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To

CHARLES WALTER DUMONT

more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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I. DEFINITIONS.

A. Suretyship — 1. IN BROAD SENSE. Suretyship, in its broadest sense, is the relation occupied by a person liable for the payment of money or for the performance of an act by another, such liability being collateral as to such person, and who is liable to suffer loss in event of the failure of such other person to pay or perform, but whose liability is terminated at once, fully and completely, if such other person does pay or perform.[1]

2. IN NARROW SENSE. Suretyship, in its narrower sense, is a legal relation, based upon contract between competent parties, in which one person undertakes, as the object of such contract, to answer to another for the debt, default, or miscarriage of a third person; the third person's liability to the second person being thus similar to that of such first person.[2]

B. Surety[3] — 1. IN GENERAL. A surety, in the broadest sense,[4] is the person collaterally liable for the payment or performance by another.[5] In the narrower

1. Childs Suretyship 1. See also Smith *v.* Shelden, 35 Mich. 42, 24 Am. Rep. 529; Wendlandt *v.* Sohre, 37 Minn. 162, 33 N. W. 700.

In its broadest sense, suretyship exists in every instance where one person is primarily liable for the payment of money or for the performance of some act, and a second person, as between himself and the one primarily liable, expects to pay or perform in event only of the failure of the other to do so. Suretyship, in its broadest sense, includes guaranties (see GUARANTY, 20 Cyc. 1392) and suretyship in its narrower or technical sense (see *infra*, I, A, 2).

Other definitions are: "A contract . . . accessary to an obligation contracted by another person, either contemporaneously, or previously, or subsequently to answer on the default of the principal." Russell *v.* Failor, 1 Ohio St. 327, 329, 59 Am. Dec. 631.

"A contract by one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person who is himself primarily responsible for the payment of such debt or the performance of the act or duty." Roberts *v.* Hawkins, 70 Mich. 566, 571, 38 N. W. 575.

"A contract that the surety will see that the principal pays or performs." American Bonding Co. *v.* Pueblo Inv. Co., 150 Fed. 17, 23, 80 C. C. A. 97, 9 L. R. A. N. S. 557.

"A contract whereby one person engages to be answerable for the debt, default, or miscarriage of another." State *v.* Parker, 72 Ala. 181, 183.

"A direct contract to pay the debt of another." McIntosh-Huntington Co. *v.* Reed, 89 Fed. 464, 466.

Pothier says a suretyship is a contract by which a person obligates himself on behalf of a debtor to a creditor for the payment of a whole or a part of what is due from such debtor, by way of accession to his obligation. Ringgold *v.* Newkirk, 3 Ark. 96, 108.

Statutory definitions of suretyship exist in many states. La. Rev. Civ. Code, art. 3035, defines "suretyship" to be "an accessory promise, by which a person binds himself, for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not." Bayne *v.* Cusimano, 50 La. Ann. 361, 363, 23 So. 361; Lachman *v.* Block, (La. 1894) 15 So. 649, 650. See also Ringgold *v.* Newkirk, 3 Ark. 96, 108; and the statutes of the several states.

In Quebec suretyship in connection with a negotiable instrument is called an "aval." Patterson *v.* Lynch, 1 L. C. Rep. 219.

Collateral to primary valid obligation.—A contract of suretyship is collateral to and predicated upon a primary obligation. In order to establish suretyship, it is first necessary to prove the existence of the primary contract. Thornburg *v.* Allman, 8 Ind. App. 531, 35 N. E. 1110. "It is of the essence of the contract, that there be a subsisting valid obligation of a principal debt. Without a principal, there can be no accessory, and by the extinction of the former, the latter becomes extinct." Russell *v.* Failor, 1 Ohio St. 327, 329, 59 Am. Dec. 631. See also Mobile, etc., R. Co. *v.* Nicholas, 98 Ala. 92, 12 So. 723; State *v.* Parker, 72 Ala. 181, 183; Bernd *v.* Lynes, 71 Conn. 733, 43 Atl. 189; Sherman *v.* Shaver, 75 Va. 1, 4; and *infra*, IV, B; VIII, E, 1.

2. Childs Suretyship 2.

3. **Surety company** defined see *infra*, X, A.

4. **Suretyship in its broad sense** see *supra*, I, A, 1.

5. Childs Suretyship 1. See also *infra*, II, D; IV, A.

In its **broadest sense** the term includes every person whose estate is obligated to

sense,[6] he is a person who undertakes, by an express contract for that very purpose, to become liable for the debt, default, or miscarriage by another, the effect of the term being that the liability of the latter is similar to that of the surety.[7]

2. Cosurety[8] — a. In General. Cosureties are those equally bound,[9] as among themselves, on a contract of suretyship, for the same debtor and for the same debt, although not necessarily in equal amounts, or on the same instrument.[10] This is

answer for the default of another. Watriss *v.* Pierce, 32 N. H. 560; Magill *v.* Brown, 20 Tex. Civ. App. 662, 50 S. W. 143, 642. He is "a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so." Smith *v.* Shedlen, 35 Mich. 42, 24 Am. Rep. 529 [*quoted* in Chattanooga Foundry, etc., Works *v.* Hembree, 117 Ala. 295, 301, 23 So. 38]; Cassan *v.* Maxwell, 39 Minn. 391, 393, 40 N. W. 357; Wendlandt *v.* Sohre, 37 Minn. 162, 163, 33 N. W. 700; Wise *v.* Miller, 45 Ohio St. 388, 399, 14 N. E. 218; Hoffman *v.* Habighorst, 38 Oreg. 261, 268, 63 Pac. 610, 53 L. R. A. 908. See also Johnson *v.* Young, 20 W. Va. 614, 655.

6. Suretyship in a narrow sense see *supra*, I, A, 2.

7. Childs Suretyship 2.

Other definitions are: "A co-obligor or co-promisor, entering into a contract, with the principal jointly, or jointly and severally, and at the same time." Read *v.* Cutts, 7 Me. 186, 189, 22 Am. Dec. 184.

"Any one who is bound on the same instrument for its payment with another, who, as between themselves, is the principal debtor, whatever may be the particular form of the undertaking." Hammel *v.* Beardsley, 31 Minn. 314, 316, 17 N. W. 858. Within the meaning of Minn. Gen. St. c. 66, § 36. *Compare* Gagan *v.* Stevens, 4 Utah 348, 9 Pac. 706, under Comp. L. (1876) p. 403. § 1240.

"A person who binds himself for the payment of a sum of money, or for the performance of something else, for another who is already bound for the same." Young *v.* McFadden, 125 Ind. 254, 255, 25 N. E. 284.

"One bound that something shall be done, not by himself in the first instance, but, by some other, and, in case of default by this prime agent, that the obligor shall perform the act, or compensate for nonperformance." Field *v.* Harrison, Wythe (Va.) 273, 281.

"One who becomes responsible for the debt, default, or miscarriage of another person." Hall *v.* Weaver, 34 Fed. 104, 106, 13 Sawy. 188.

"One who contracts for the payment of a debt in case of the failure of another person who is himself principally responsible for it, or, as it has otherwise been expressed, a surety is a person who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have paid it before the surety was himself compelled to do so. Brandt Sur. & G. § 1 [*quoted* in Deering *v.* Veal, 78 S. W. 886, 887, 25 Ky. L. Rep 1890].

"One who contracts to answer for the debt, default or miscarriage of another." Mobile, etc., R. Co. *v.* Nicholas, 98 Ala. 92, 126, 12 So. 723.

"A person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed the obligation before the surety was required to do so." Reissaus *v.* Whites, 128 Mo. App. 135, 140, 106 S. W. 603.

Webster defines the term as meaning "certainty . . . safety. Security against loss or damage — security for payment; and in law, one who enters into a bond, or recognizance, to answer for another's appearance in court; or for his payment of a debt; or for the performance of some act." Pitkins *v.* Boyd, 4 Greene (Iowa) 255, 259.

As defined by statute a surety is one who, at the request of another and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person or hypothecates property as security therefor. Sather Banking Co. *v.* Arthur R. Briggs Co., 138 Cal. 724, 729, 72 Pac. 352; Valentine *v.* Donohoe-Kelly Banking Co., 133 Cal. 191, 195, 65 Pac. 381; O'Conor *v.* Morse, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155; London, etc., Bank *v.* Smith, 101 Cal. 415, 419, 35 Pac. 1027, 1028.

In Scotch law a surety is called a "cautioner." Black Dict.

8. Rights and remedies of cosureties see *infra*, IX, C.

9. A surety not legally bound is not a surety in any real sense of the term and is therefore not a cosurety with other sureties. Stockmeyer *v.* Oertling, 35 La. Ann. 467; Landers *v.* Tuggle, 22 La. Ann. 443; Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631.

10. Waldrop *v.* Wolff, 114 Ga. 610, 40 S. E. 830 (holding that where two principals and a surety bind themselves jointly and severally in an eventual condemnation money bond, each principal is a cosurety with the surety as to the other principal); Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; Stockmeyer *v.* Oertling, 35 La. Ann. 467; Harris *v.* Ferguson, 2 Bailey (S. C.) 397. See Wanack *v.* Michels, 215 Ill. 87, 74 N. E. 84 [*affirming* 114 Ill. App. 631], holding that the Dram Shop Act (Ill. St. c. 43, § 5), providing that the owner of a building, who knowingly permits

true, although they became sureties at different times [11] without communicating with each other,[12] and each without knowledge that the others had entered into the relation.[13] While it does not follow necessarily that sureties for the same obligation are cosureties,[14] if they have executed the same instrument in the same capacity they are presumed to be cosureties.[15] On the other hand, those who sign

the occupation of his premises by a person dispensing intoxicating liquors therein, shall be jointly liable with the latter for all damages sustained in consequence of the sale of such liquor, does not constitute the owner a surety of the dram-shop keeper, and he is therefore not a cosurety with the sureties on the dram-shop keeper's bond required by the statute. See also Childs Suretyship 5.

Sureties under a bond binding them severally in penal sums aggregating that for which the principal is liable are cosureties. Toucey *v.* Schell, 15 Misc. (N. Y.) 350, 37 N. Y. Suppl. 879.

11. *Massachusetts.*— Warner *v.* Morrison, 3 Allen 566.

Michigan.— See Shufelt *v.* Moore, 93 Mich. 564, 53 N. W. 722.

New Hampshire.—See Prescott *v.* Perkins, 16 N. H. 305.

New York.— Norton *v.* Coons, 6 N. Y. 33; National Surety Co. *v.* Di Marsico, 55 Misc. 302, 105 N. Y. Suppl. 272.

North Carolina.—Atwater *v.* Farthing, 118 N. C. 388, 24 S. E. 736.

Ohio.—Boyd *v.* Robinson, 13 Ohio Cir. Ct. 211, 7 Ohio Cir. Dec. 83.

South Carolina.— Harris *v.* Ferguson, 2 Bailey 397.

Texas.— Moore *v.* Hanscom, (Civ. App. 1907) 103 S. W. 665.

Vermont.— See Flanagan *v.* Post, 45 Vt. 246.

See 40 Cent. Dig. tit. "Principal and Surety," § 585 *et seq.*

Where a renewal note, signed by the former sureties, is also signed by an additional surety, all of the sureties are cosureties. Shufelt *v.* Moore, 93 Mich. 564, 53 N. W. 722; Prescott *v.* Perkins, 16 N. H. 305; Flanagan *v.* Post, 45 Vt. 246. But *compare* Sponhaur *v.* Malloy, 21 Ind. App. 287, 52 N. E. 245, holding that where after the death of the principal on a note, the surety thereon gave a renewal note signed also by the widow of the principal, the principal having died insolvent, that the surety thereby became primarily liable, and the widow was therefore his surety.

12. Norton *v.* Coons, 6 N. Y. 33.

13. Chaffee *v.* Jones, 19 Pick. (Mass.) 260; Wells *v.* Miller, 66 N. Y. 255; National Surety Co. *v.* Di Marsico, 55 Misc. (N. Y.) 302, 105 N. Y. Suppl. 272; Moore *v.* Hanscom, (Tex. Civ. App. 1907) 103 S. W. 665; Stout *v.* Vause, 1 Rob. (Va.) 169. But *compare* Citizens' Nat. Bank *v.* Burch, 145 N. C. 316, 59 S. E. 71, holding that where one signed as surety, a note signed by two persons, without knowledge of the fact that one of the signers was a surety, he could not be held a cosurety with such signer.

14. Sweet *v.* McAllister, 4 Allen (Mass.) 353; Wells *v.* Miller, 66 N. Y. 255, holding that where one of two partners indorsed, without adding the word "surety" to his name, a note which he knew was to be used for the other partner's individual benefit, and which he knew a third person was going to indorse as surety under the misapprehension that the note was for a partnership purpose, the indorsing partner was not a cosurety with such third person.

Sureties who are not bound for the same debt or who do not occupy between each other the same relative position cannot be considered cosureties. Day *v.* McPhee, 41 Colo. 467, 93 Pac. 670.

Supplemental surety not a cosurety see *infra*, I, B, 3, a.

The relation of cosuretyship between indorsers upon a promissory note is not established by showing that the second indorser used language which led the first to believe that he intended to stand in that relation, and the first indorser was induced thereby to indorse it, if the second indorser in fact did not agree nor intend to stand in that relation. Sweet *v.* McAllister, 4 Allen (Mass.) 353.

To constitute a surety on a note a cosurety with another signing the note, there must be a mutual understanding between the parties to that effect. Citizens' Nat. Bank *v.* Burch, 145 N. C. 316, 59 S. E. 71.

Where a surety on a note is executor of the principal with sufficient property to satisfy a judgment on the note, he occupies the position of principal as to a cosurety on the note. Robinson *v.* McDowell, 130 N. C. 246, 41 S. E. 287.

15. *Indiana.*— Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

Maine.— Crosby *v.* Wyatt, 23 Me. 156.

Nebraska.— Eisley *v.* Horr, 42 Nebr. 3, 60 N. W. 365.

New Hampshire.— Prescott *v.* Perkins, 16 N. H. 305.

New York.— Coburn *v.* Wheelock, 34 N. Y. 440 [*affirming* 42 Barb. 267]; Warner *v.* Price, 3 Wend. 397.

North Carolina.— Smith *v.* Carr, 128 N. C. 150, 38 S. E. 732.

Vermont.— Flanagan *v.* Post, 45 Vt. 246.

See 40 Cent. Dig. tit. "Principal and Surety," § 578 *et seq.*

Sureties presumed to be cosureties —*Accommodation indorsers prior to the delivery of an instrument.*— Kellogg *v.* Lopez, 145 Cal. 497, 78 Pac. 1056; Weeks *v.* Parsons, 176 Mass. 570, 58 N. E. 157; Currier *v.* Fellows, 27 N. H. 366; Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 559; Caldwell *v.* Hurley, 41 Wash. 296, 83 Pac. 318 (holding that prior to the enactment of the Negotiable Instrument Act, Session Laws (1898), p. 340, c. 149, parties who indorsed a note at the time of its execution were cosureties);

in different capacities are presumed not to be cosureties.[16] Such sureties may, however, become cosureties by an express understanding to that effect.[17]

b. Sureties by Different Instruments. Sureties may be cosureties, although they have executed different instruments, provided they are liable for the same engagement,[18] but not if the obligations are different.[19] Nor are sureties by differ-

Harper *v.* Knowlson, 2 Grant Err. & App. (U. C.) 253.

Sureties who have indorsed as a part of the same transaction.— Menzies *v.* Kennedy, 23 Grant Ch. (U. C.) 360.

In Georgia, under Rev. Code, §§ 2133, 2738, 2739, accommodation indorsers of a negotiable instrument payable at a chartered bank are cosureties. Freeman *v.* Cherry, 46 Ga. 14.

16. See cases cited *infra*, this note.

Sureties presumed not to be cosureties — *Indorser and surety maker of a note.*— Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51; Chaffee *v.* Jones, 19 Pick. (Mass.) 260; Chapman *v.* Pendleton, 26 R. I. 573, 59 Atl. 928.

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Wisconsin.— Rudolf *v.* Malone, 104 Wis. 470, 80 N. W. 743.

United States.—Postmaster-Gen. *v.* Munger, 19 Fed. Cas. No. 11,309, 2 Paine 189.

England.— Whiting *v.* Burke, L. R. 6 Ch. 342 [*affirming* L. R. 10 Eq. 539]; Deering *v.* Winchelsea, 2 B. & P. 270, 1 Cox. Ch. 318, 1 Rev. Rep. 41, 29 Eng. Reprint 1184; Mayhew *v.* Cricketts, 2 Swanst. 185, 36 Eng. Reprint 585, 1 Wils. Ch. 418, 37 Eng. Reprint 178, 19 Rev. Rep. 57; Craythorne *v.* Swinburne, 14 Ves. Jr. 160, 9 Rev. Rep. 264, 33 Eng. Reprint 482.

See 40 Cent. Dig. tit. "Principal and Surety," § 581.

19. Prescott *v.* Perkins, 16 N. H. 305 (holding that where the goods of the principal on a note were attached, and a third person receipted to the sheriff for them, the sureties on the note and the receiptor were not cosureties); National Surety Co. *v.* U. S., 123 Fed. 294, 59 C. C. A. 479 (holding that a surety on a proposal bond, in regard to a mail route contract, is not a cosurety with a surety on the bond of a contractor given after the letting of the contract to secure the performance thereof). See Hutchison *v.* Roberts, 8 Houst. (Del.) 459, 17 Atl. 1061, holding that sureties on separate instruments for separate debts do not become cosureties by being coöbligees in a bond of indemnity from the debtor for the debts.

Thus sureties on the general bond of an officer are not cosureties with the sureties on a bond given by such officer for some special fund not within the operation of the general bond. Lacey *v.* Robbins, 74 Tex. 566, 12 S. W. 314, holding that sureties on the general bond of a county clerk are not cosureties with those on a bond given for the safekeeping and disbursement of a school fund. But if the general bond covers the duties for which the special bond is given, sureties on the special bond are cosureties with the sureties on the general bond. Elbert *v.* Jacoby, 8 Bush (Ky.) 542 (holding that the surety for a guardian in his general bond was cosurety with a surety in a bond executed by the guardian upon a decree for the sale of the ward's land); Burnett *v.* Millsaps, 59 Miss. 333 (holding that sureties on the general bond of a sheriff are cosureties on a bond given by him with regard to taxes); Cherry *v.* Wilson, 78 N. C. 164 (holding that the surety on a sheriff's bond for the collection of general taxes are cosureties with a surety on another bond for the collection of special taxes).

ent instruments for equal portions of one debt cosureties;[20] but sureties on one instrument are cosureties, although each has limited his liability to a portion only of the entire amount called for therein.[21] Sureties on different bonds given in successive steps in litigation are not cosureties.[22]

3. Supplemental Surety[23] — a. In General. A supplemental surety is one who, as between himself and another surety or sureties, is collaterally bound; he is a surety for a surety; and, to him, another surety occupies the position of a principal, their liabilities being successive.[24] Hence a surety for a surety, a supplemental surety and the surety are not cosureties.[25] A person can become a supplemental surety is various ways.[26] He may be a maker of a promissory note, and yet be a surety for other makers who are sureties if such was the intention;[27] but such an intention is not shown by the fact that he signed several months after the others,[28]

Sureties on successive bonds are not cosureties if the latter bond supersedes the former, and if the liability of the surety on the first bond terminates as to the future when the second is given. Tittle *v.* Bennett, 94 Ga. 405, 21 S. E. 62. But *compare* Barnes *v.* Cushing, 168 N. Y. 542 [*reversing* 43 N. Y. App. Div. 158, 59 N. Y. Suppl. 345]. And where the substitution is by statutory requirement the same rule applies. U. S. *v.* Wardwell, 28 Fed. Cas. No. 16,640, 5 Mason 82. But see Rudolf *v.* Malone, 104 Wis. 470, 80 N. W. 743, holding that a recital in a cumulative executive bond that one of the sureties in the prior bond had asked to be released therefrom, and another had removed from the county, does not show any agreement between the parties that the sureties on the second bond were to be primarily liable and the sureties on the two bonds are cosureties). And *compare* Tennessee Hospital *v.* Fuqua, 1 Lea (Tenn.) 608; Steele *v.* Reese, 6 Yerg. (Tenn.) 263.

Sureties on renewal note and on original note are not cosureties. Chapman *v.* Garber, 46 Nebr. 16, 64 N. W. 362; Hutchins *v.* McCauley, 22 N. C. 399.

20. Coope *v.* Twynam, Turn. & R. 426, 24 Rev. Rep. 89, 12 Eng. Ch. 426, 37 Eng. Reprint 1164.

21. Toucey *v.* Schell, 15 Misc. (N. Y.) 350, 37 N. Y. Suppl. 879.

22. Steele *v.* Mealing, 24 Ala. 285; Old *v.* Chambliss, 3 La. Ann. 205 (holding that where, under an execution against a principal and his surety, the former buys in the property on a twelve months' bond, the surety on the latter is not a cosurety with the other surety); Knox *v.* Vallandingham, 13 Sm. & M. (Miss.) 526; Moore *v.* Lassiter, 16 Lea (Tenn.) 630.

Sureties on different bonds held not cosureties — *Sureties on a bond to pay a judgment and sureties for the original debt.*— Hoskins *v.* Parsons, 1 Metc. (Ky.) 251; Smith *v.* Anderson, 18 Md. 520.

Special bail and sureties for the original obligation.— Smith *v.* Bing, 3 Ohio 33.

Surety for stay of execution, and sureties for the original debt.— Titzell *v.* Smeigh, 2 Leg. Chron. (Pa.) 271.

Sureties in a supersedeas bond and sureties in a replevin bond.— Kellar *v.* Williams, 10 Bush (Ky.) 216; Hartwell *v.* Smith, 15 Ohio St. 200.

Sureties on appeal-bond and sureties on judgment bond.— Cowan *v.* Duncan, Meigs (Tenn.) 470.

Surety on forthcoming bond after levy and surety for original debt.— Dunlap *v.* Foster, 7 Ala. 734; Langford *v.* Perrin, 5 Leigh (Va.) 552.

A surety for a debt and a surety on a replevin bond afterward entered into.— Yoder *v.* Briggs, 3 Bibb (Ky.) 228.

A surety on the last of two replevin bonds and a surety on the first.— Brooks *v.* Shepherd, 4 Bibb (Ky.) 572.

A stayor and a surety liable for the judgment.— Chaffin *v.* Campbell, 4 Sneed (Tenn.) 184.

Replevin bail and sureties liable for the judgment.— Taylor *v.* Russell, 75 Ind. 386.

23. **Right and remedies** of supplemental surety see *infra*, IX, C.

24. Childs Suretyship 5.

25. *Connecticut.*— Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247.

Illinois.— Robertson *v.* Deatherage, 82 Ill. 511; Myers *v.* Fry, 18 Ill. App. 74.

Missouri.— Leeper *v.* Paschal, 70 Mo. App. 117.

Tennessee.— Tennessee Hospital *v.* Fuqua, 1 Lea 608.

Texas.— Mulkey *v.* Templeton, (Civ. App. 1901) 60 S. W. 439.

Vermont.— Adams *v.* Flanagan, 36 Vt. 400.

West Virginia.— Singer Mfg. Co. *v.* Bennett, 28 W. Va. 16.

See 40 Cent. Dig. tit. "Principal and Surety," § 578 *et seq.*

26. **Accommodation accepter and guarantor.** — Schram *v.* Werner, 85 Hun (N. Y.) 293, 32 N. Y. Suppl. 995.

Additional surety signing a note given in renewal of a prior note also signed by the sureties on the former one is a supplemental surety. Hunt *v.* Chambliss, 7 Sm. & M. (Miss.) 532. See also Leeper *v.* Paschal, 70 Mo. App. 117.

Surety proper and guarantor.— Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74; Longley *v.* Griggs, 10 Pick. (Mass.) 121; Chapman *v.* Garber, 46 Nebr. 16, 64 N. W. 362.

27. Dullnig *v.* Weekes, 16 Tex. Civ. App. 1, 40 S. W. 178. See *infra*, IX, C, 1, c.

28. McNeil *v.* Sanford, 3 B. Mon. (Ky.) 11.

nor can any such intention arise when the signer is not aware of the other sureties.[29] An indorser occupies the position of a supplemental surety for prior parties;[30] and one who becomes surety with the drawer of a bill of exchange is liable to subsequent holders only, and not to the accepter.[31] As joint debtors are sureties as to each other's share of the debt,[32] a surety for joint debtors would occupy the position of a supplemental surety as to each for the other's share of the debt.[33] A person who pledges his own note to secure the payment of another person's note is a supplemental surety as to an indorser on the latter note.[34] A very common method for the relation of supplemental surety to arise is by the giving of bonds in judicial proceedings. As between successive sets of sureties, those last in time are primarily liable, and those first in time become supplemental sureties for them.[35] Where a surety signs an instrument which purports to have been signed by the prior parties as principals, he is justified in considering himself a surety as to such prior parties.[36]

b. Validity and Effect of Stipulation. Upon the question whether a subsequent surety can stipulate that he is not to be a cosurety with prior parties, the cases are not entirely in accord. Some hold that he can so stipulate where the principal falsely informs him that all prior signers are principals,[37] or where he is ignorant

29. Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74.

30. Commercial Bank *v.* Layne, 101 Tenn. 145, 46 S. W. 762.

Indorsers.— Stacy *v.* Rose, (Tenn. Ch. App. 1900) 58 S. W. 1087.

Accepter and indorser.— Robinson *v.* Kilbreth, 20 Fed. Cas. No. 11,957, 1 Bond 592.

Surety proper and indorser.— Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51; Nurre *v.* Chittenden, 56 Ind. 462; Smith *v.* Smith, 16 N. C. 173; Briggs *v.* Boyd, 37 Vt. 534.

31. Griffith *v.* Reed, 21 Wend. (N. Y.) 502, 34 Am. Dec. 267.

32. See *infra*, IV, D, 5, a.

33. Brooks *v.* Miller, 29 W. Va. 499, 2 S. E. 219. In Waldrop *v.* Wolff, 114 Ga. 610, 40 S. E. 830, a surety for joint debtors is said to be a cosurety with each as to the other's share of the debt.

34. Montgomery *v.* Sayre, 100 Cal. 182, 34 Pac. 646, 38 Am. St. Rep. 271.

35. See cases cited *infra*, this note.

Sureties on a dissolution bond are supplemental sureties as to sureties on a subsequent appeal-bond. Chrisman *v.* Jones, 34 Ark. 73.

Sureties on a claimant's bond are supplemental sureties as to a subsequent supersedeas bond. Chowning *v.* Willis, (Tex. Civ. App. 1897) 38 S. W. 1141.

In successive appeals, the first set are collaterally liable if they do not become parties to the subsequent appeals. Wronkow *v.* Oakley, 133 N. Y. 505, 31 N. E. 521, 28 Am. St. Rep. 661, 16 L. R. A. 209.

Where a new surety is substituted for another on a guardian's bond, as between the two, the latter is primarily liable. Sutton *v.* Williams, 77 Ga. 570, 1 S. E. 175; Field *v.* Pelot, McMull. Eq. (S. C.) 369.

36. Paul *v.* Berry, 78 Ill. 158 (holding that where a father executes a promissory note, signs the name of his son thereto as principal, and procures others to sign as sureties, the son afterward, with full knowledge, cannot suffer judgment by default, and claim that subsequent signers were his cosureties); Turner *v.* Overall, (Tenn. Ch. App. 1897) 39 S. W. 756 (holding that where one as surety signed a note under the belief that it was the joint and several note of the prior signers, mother and son, he is not a cosurety with the mother, although the loan was made to the son).

A person signing a note already executed by several partners, which he is justified in supposing to be a firm note, is not a cosurety with such partners as are actually sureties for the others. Bain *v.* Wilson, 10 Ohio St. 14 (holding that where a bill is signed individually by several partners of a dissolved firm, one being the principal and the others sureties, another person signing as surety will not be a cosurety with the prior sureties unless he had knowledge of the dissolution, or knew that the bill was not a firm obligation); Wharton *v.* Duncan, 83 Pa. St. 40 (holding that where a partner executed his individual mortgage to secure discounts to the partnership, and subsequently another person executed a mortgage as further security, the two mortgagors are not cosureties); Melms *v.* Werdehoff, 14 Wis. 18 (holding that where a firm-name is signed to a note which afterward is signed by a surety in the belief that the firm were the debtors, the firm is estopped to allege that the note was an accommodation note, and that all the signers were cosureties).

Whether adding the word "surety" to his signature makes the signer surety for the prior signer or a cosurety with him the cases are not agreed, some holding that he is a surety for the prior signers (Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; Sayles *v.* Sims, 73 N. Y. 551; Robison *v.* Lyle, 10 Barb. (N. Y.) 512; Harris *v.* Warner, 13 Wend. (N. Y.) 400; Thompson *v.* Sanders, 20 N. C. 539); others holding that he is not surety for the other but a cosurety (Baldwin *v.* Fleming, 90 Ind. 177; Woodworth *v.* Bowes, 5 Ind. 276; Whitehouse *v.* Hanson, 42 N. H. 9; Sisson *v.* Barrett, 6 Barb. (N. Y.) 199 [*affirmed* in 2 N. Y. 406].

37. Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; Bobbitt *v.* Shryer, 70 Ind. 513.

of the existing suretyship,[38] or even where he has knowledge of the suretyship,[39] and although the prior sureties expected that the subsequent surety would be equally liable with them;[40] and in most jurisdictions the consent of those who have signed as sureties is not necessary to enable a subsequent signer to stipulate that his liability is to be that of a supplemental surety only.[41] Other cases hold, however, that a subsequent surety cannot stipulate for secondary liability as to other sureties unless such other sureties assent thereto.[42]

C. Principal. The principal is the person primarily liable upon the contract of suretyship.[43]

D. Creditor or Obligee. The creditor or obligee is the person who can enforce payment or performance by the principal or surety.[44]

II. DISTINCTIONS.

A. Surety and Guarantor.[45] The liability of a surety in the narrow sense and of a guarantor is very similar, and the distinctions between the two are technical rather than real. While each is, as to the principal, collaterally liable, the surety is, as to the creditor or obligee, primarily liable;[46] the guarantor being recognized by the creditor as collaterally liable. The surety promises to pay[47] or perform;[48] the guarantor does not undertake directly to pay or perform, but that another — the principal, will pay or perform.[49] The guarantor is liable for damages if he

38. Sayles *v.* Sims, 73 N. Y. 551.

39. Houck *v.* Graham, 123 Ind. 277, 24 N. E. 113; Chapeze *v.* Young, 87 Ky. 476, 9 S. W. 399, 10 Ky. L. Rep. 465.

A sheriff not being satisfied with the sureties of his deputy, a second bond was given with the express stipulation that the sureties thereon should not be called upon while the sureties in the prior bond should be resident in the state and the sheriff could be indemnified for any misconduct of the deputy without recourse to the second bond. It was held that the primary liability rested on the sureties on the former bond. Harrison *v.* Lane, 5 Leigh (Va.) 414, 27 Am. Dec. 607.

40. Adams *v.* Flanagan, 36 Vt. 400. See McCollum *v.* Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 35 L. R. A. 480.

41. Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; Baldwin *v.* Fleming, 90 Ind. 177; Bowser *v.* Rendell, 31 Ind. 128; Oldham *v.* Broom, 28 Ohio St. 41; Sherman *v.* Black, 49 Vt. 198.

42. Simmons *v.* Camp, 64 Ga. 726; Whitehouse *v.* Hanson, 42 N. H. 9; Warner *v.* Price, 3 Wend. (N. Y.) 397; Crouse *v.* Wagner, 41 Ohio St. 470 (holding that where the sureties on a note refused to renew except as sureties for a new surety, and the principal then secured the signature of such new party by telling him that the note was in renewal of a note on which the former sureties were liable as such, and the former sureties signed stipulating, without the knowledge of the new party and without making any inquiry as to the circumstances under which he signed, that they were sureties for him, they all were cosureties); Harper *v.* Knowlson, 2 Grant Err. & App. (U. C.) 253. See Stovall *v.* Border Grange Bank, 78 Va. 188.

In New Hampshire a person cannot become supplemental surety without the request of the surety; and the principal is not agent of the surety for the purpose of making such request. Whitehouse *v.* Hanson, 42 N. H. 9.

43. Childs Suretyship 2. See also *infra*, IV, A.

44. Childs Suretyship 3.

45. See also GUARANTY, 20 Cyc. 1400 *et seq.*

46. Watson *v.* Beabout, 18 Ind. 281; Kirby *v.* Studebaker, 15 Ind. 45; Supplee *v.* Herrman, 16 Pa. Super. Ct. 45; Allegheny County Light Co. *v.* Reinhold, 21 Pa. Co. Ct. 118.

"Suretyship," rather than that of "guaranty," applies to the promise in which the promisor binds himself to do that which another is bound to do, if the latter does not do it himself, as it is an original undertaking. Woody *v.* Haworth, 24 Ind. App. 634, 57 N. E. 272, 273.

47. Kirby *v.* Studebaker, 15 Ind. 45; McBeth *v.* Newlin, 15 Wkly. Notes Cas. (Pa.) 129; McIntosh-Huntington Co. *v.* Reed, 89 Fed. 464.

A contract "guaranteeing" payment of a debt "when due" is a contract of suretyship. Reading Trust Co. *v.* Boyer, 15 Pa. Dist. 45.

48. Clark *v.* Turk, (Tex. Civ. App. 1899) 50 S. W. 1070.

49. Roberts *v.* Hawkins, 70 Mich. 566, 38 N. W. 575; Nichols *v.* King, 5 U. C. Q. B. 324.

The distinction is sometimes stated thus: A surety undertakes to pay if the principal does not, while a guarantor undertakes to pay if the principal cannot. McIntosh-Huntington Co. *v.* Reed, 89 Fed. 464.

A bond conditioned for the faithful performance of duties by the principal is not a guaranty; the undertaking is direct for the payment of money. Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210; Indiana, etc., Live Stock Ins. Co. *v.* Bender, 32 Ind. App. 287, 69 N. E. 691; Page *v.* White Sewing Mach. Co., 12 Tex. Civ. App. 327, 34 S. W. 988.

fails to perform his collateral contract that the principal will pay.[50] The surety is usually, although not necessarily, jointly liable with the principal;[51] while the guarantor makes a contract entirely independent from that of the principal, although frequently on the same instrument. The surety is liable at the same time as the principal on an original promise; the liability of the guarantor does not arise until default of the principal, as the guarantor does not undertake to do what the principal does.[52]

B. Surety and Indorser.[53] An indorser, like a guarantor, is not liable on the same contract with the principal, but makes an independent contract.[54] The indorser's implied contract entitles him to notice of dishonor; but the surety's contract does not.[55]

C. Surety and Insurer. The distinctions between a surety and an insurer of the fidelity of an employee cannot be sharply drawn. A surety undertakes to pay a sum of money, with a condition that, if certain acts are performed by another, the contract shall be void. An insurer, for a valuable consideration, agrees, subject to certain conditions, to indemnify the insured against loss consequent upon the dishonesty or default of a designated employee.[56]

D. Surety and Principal.[57] The one receiving the money [58] or the goods [59] is the principal, and the other is a surety;[60] but the fact that one may benefit indirectly by the transaction does not make him a principal.[61] On the other hand

50. Durand, etc., Co. *v.* Rockwell, 23 Ind. App. 11, 54 N. E. 771.

A covenant by a mortgagee to an assignee of the mortgage, to make good the mortgage after all means have been exhausted to satisfy it, is a guaranty; and action must be brought thereon. Clarke *v.* Best, 8 Grant Ch. (U. C.) 7.

51. Watson *v.* Beabout, 18 Ind. 281; Cassity *v.* Robinson, 8 B. Mon. (Ky.) 279; Hunt *v.* Adams, 7 Mass. 518, 6 Mass. 519, 5 Mass. 358, 4 Am. Dec. 68.

52. Durand, etc., Co. *v.* Rockwell, 23 Ind. App. 11, 54 N. E. 771.

Terms compared.— "Surety" is a general term, and "guaranty" is a special. In a statute where there is nothing to limit it, "surety" is taken to include "guaranty." Gagan *v.* Stevens, 4 Utah 348, 9 Pac. 706. The words "surety" and "guarantor" are often used indiscriminately as synonymous terms; but, while a surety and guarantor have in common that they are both bound for another person, yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal in the same instrument, executed at the same time, and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal. Usually he will not be protected, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its non-performance. Hall *v.* Weaver, 34 Fed. 104, 106, 13 Sawy. 188.

53. See also COMMERCIAL PAPER, 7 Cyc. 658 *et seq.*

54. Crampton *v.* Foster, 29 N. Y. App. Div. 215, 51 N. Y. Suppl. 883.

55. Nickell *v.* Citizens' Bank, 60 S. W. 925, 22 Ky. L. Rep. 1552; Kellogg *v.* Iron City Nat. Bank, (Tex. Civ. App. 1894) 26 S. W. 856.

56. Vance Ins. 595. See also FIDELITY INSURANCE, 19 Cyc. 516.

Distinguished from indemnity see INDEMNITY, 22 Cyc. 80.

57. **Other relationships distinguished** see *supra*, II, A–C.

58. Ferriday *v.* Purnell, 2 La. Ann. 334; Schlicker *v.* Gordon, 74 Mo. 534; Boulware *v.* Hartsook, 83 Va. 679, 3 S. E. 289.

59. Reigart *v.* White, 52 Pa. St. 438; Trerice *v.* Burkett, 1 Ont. 80.

60. *Indiana.*— Lackey *v.* Boruff, 152 Ind. 371, 53 N. E. 412.

Minnesota.— Seibert *v.* Quesnel, 65 Minn. 107, 67 N. W. 803, 60 Am. St. Rep. 441.

Pennsylvania.— Allison *v.* Wood, 147 Pa. St. 197, 23 Atl. 559, 30 Am. St. Rep. 726.

South Carolina.— Fraser *v.* Fishburne, 4 S. C. 314.

Texas.— Devine *v.* U. S. Mortgage Co., (Civ. App. 1898) 48 S. W. 585.

Compare Warburton *v.* Ralph, 9 Wash. 537, 38 Pac. 140, holding that the fact that one maker of a note received the consideration did not make the other a surety as to the creditor.

61. Hughes *v.* Ladd, 42 Oreg. 123, 69 Pac. 548.

For example the fact that the principal used the money to pay a debt owing by him to the surety does not make the latter any less a surety. Harvey *v.* Osborn, 55 Ind. 535; Mackreth *v.* Walmesley, 51 L. T. Rep. N. S. 19, 32 Wkly. Rep. 819; Shepley *v.* Hurd, 3

a person apparently may be undertaking to pay the debt of another, and yet the debt be his own, in which case he is none the less a principal.[62] So too, while the relation may exist between the principal and surety, the surety may have contracted as a principal with the creditor, and be held as such.[63]

III. CLASSIFICATIONS.

A. Enumerated. For convenience in designating the different ways in which the relation of suretyship may arise, two classifications are made: (1) As to the form of the contract, suretyship is voluntary or involuntary;[64] (2) as to the nature of the contract, it is personal or real.[65]

B. Voluntary Suretyship. Voluntary suretyship arises where the chief object of the contract is to become a surety.[66]

C. Involuntary Suretyship. Involuntary suretyship, or by operation of law,[67] arises where the chief object of the contract is to accomplish some other purpose than security, but its effect is to make one of the parties secondarily liable for a debt or for the performance of an act by another.

D. Personal Suretyship. Personal suretyship arises where the surety may be made to respond in damages generally for a breach of his contract.[68]

E. Real Suretyship. Real suretyship arises where certain specific property can be taken to enforce payment of another's debt, or the performance of some duty owing by another, and the owner of such property, if he would save it, must pay or perform, but he is not personally liable in damages.[69]

IV. CREATION AND EXISTENCE OF RELATION.[70]

A. In General. Generally the relation arises whenever a person becomes

Ont. App. 549. Nor will the fact that a note signed by two partners was given for goods which were turned over to the firm make both principals if the property turned over was credited to one partner. Strong *v.* Baker, 25 Minn. 442.

A wife, by signing her husband's note, does not become a principal. Sponhaur *v.* Malloy, 21 Ind. App. 287, 52 N. E. 245.

Mutual accepters are not sureties for each other. McCandless *v.* Hadden, 9 B. Mon. (Ky.) 186.

62. Gund *v.* Ballard, 73 Nebr. 547, 103 N. W. 309.

Illustrations.— Where a person at the request of another accepts a bill on the promise of the latter that he would share any loss or liability, the parties do not stand in the position of principal and surety. Way *v.* Hearn, 11 C. B. N. S. 774, 103 E. C. L. 774. Where the buyer of goods signs a note with the seller in settlement of a lien thereon, the buyer is not a mere surety. Wimberly *v.* Windham, 104 Ala. 409, 16 So. 23, 53 Am. St. Rep. 70. Where a person makes a promise to pay the debt of another, having received the money from the debtor, or makes the promise because he thinks himself in honor bound to pay the debt, he does not occupy the position of a surety. *Ex p.* Bentley, 2 Deac. & C. 578, 2 L. J. Bankr. 39.

The grantee of property in fraud of the grantor's creditors does not occupy the position of a surety for the grantor. Wilson *v.* Hinman, 99 N. Y. App. Div. 41, 90 N. Y. Suppl. 746; Rex *v.* Keating, 12 Grant Ch. (U. C.) 29.

Where each of two signers of a note is interested in the application of the proceeds, neither is surety for the other as to the entire note, although the interest of one be greater than the other. Pape *v.* Randall, 18 Ind. App. 53, 47 N. E. 530.

63. *Alabama.*— Scott *v.* Myatt, 24 Ala. 489, 60 Am. Dec. 485.

New York.— Maher *v.* Willson, 3 N. Y. Suppl. 80 [*affirmed* in 123 N. Y. 655, 25 N. E. 954]; Olney *v.* Van Heusen, 3 Thomps. & C. 313.

Oregon.— Vincent *v.* Logsdon, 17 Oreg. 284, 20 Pac. 429.

Wisconsin.— Academy of Music Co. *v.* Davidson, 85 Wis. 129, 55 N. W. 172.

Canada.— See Ogilvie *v.* McLeod, 11 U. C. C. P. 348.

See 40 Cent. Dig. tit. "Principal and Surety," § 5 *et seq.*

64. Stearns Suretyship 2. See *infra*, III, B, C.

65. Stearns Suretyship 3. See *infra*, III, D, E.

66. Duncan *v.* North Wales, etc., Bank, 6 App. Cas. 1, 50 L. J. Ch. 355, 43 L. T. Rep. N. S. 706, 29 Wkly. Rep. 763. See *infra*, IV, D, 4.

67. Wayman *v.* Jones, 58 Mo. App. 313. See *infra*, IV, D, 5.

68. Childs Suretyship 14. See *infra*, IV, D.

69. Childs Suretyship 14. See *infra*, IV, D, 5, e.

70. Agreement to become surety see *infra*, IV, D. 4, c.

Evidence: Admissibility of see *infra*, IV, D, 7. Presumption and burden of proof see

liable for another's debt or duty, in which such person has not a direct personal interest, and from which he does not receive a benefit.[71]

B. Necessity of Real Principal. It is essential that there be a principal; and if a person undertake that another will pay or perform, there not being any legal liability on the part of such other person to pay or perform, the promisor is the principal and not a surety.[72]

C. Nature and Validity of Principal's Obligation[73] **— 1. In General.** Not only must there be a real principal,[74] but the obligation of the principal, for the payment or performance of which the surety undertakes to make himself collaterally liable, must be a valid and binding obligation as between the principal and the creditor;[75] if valid, the surety will be bound as such,[76] otherwise

infra, IV, D, 7, b. Weight and sufficiency see *infra*, IV, D, 7, a.

Obligation constituting parties cosureties see *supra*, I, B, 2.

71. *California.*— Townsend *v.* Sullivan, 3 Cal. App. 115, 84 Pac. 435.

Illinois.— Home Nat. Bank *v.* Waterman, 134 Ill. 461, 29 N. E. 503 [*affirming* 30 Ill. App. 535]; Baird *v.* School Trustees, 106 Ill. 657.

Indiana.— Crumrine *v.* Crumrine, 14 Ind. App. 641, 43 N. E. 322.

Louisiana.— Robinson *v.* Freret, 9 La. Ann. 303; Adle *v.* Metoyer, 1 La. Ann. 254.

Maryland.— Savage Mfg. Co. *v.* Worthington, 1 Gill 284.

New York.— Dibble *v.* Richardson, 171 N. Y. 131, 63 N. E. 829.

Oregon.— Hughes *v.* Ladd, 42 Oreg. 123, 69 Pac. 548.

South Carolina.— State Bank *v.* Rose, 1 Strobh. Eq. 257.

South Dakota.— Bailey Loan Co. *v.* Seward, 9 S. D. 326, 69 N. W. 58.

Texas.— Tabet *v.* Powell, 39 Tex. Civ. App. 465, 88 S. W. 273; Devine *v.* U. S. Mortgage Co., (Civ. App. 1898) 48 S. W. 585.

Washington.— Washington Mill Co. *v.* Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.

England.— Imperial Bank *v.* London, etc., Docks Co., 5 Ch. D. 195, 46 L. J. Ch. 335, 36 L. T. Rep. N. S. 233; Other *v.* Iveson, 3 Drew. 177, 3 Eq. Rep. 562, 1 Jur. N. S. 568, 24 L. J. Ch. 654, 3 Wkly. Rep. 332, 61 Eng. Reprint 870; McFee *v.* Morris, 7 Jur. 387; Robinson *v.* Gee, 1 Ves. 251, 27 Eng. Reprint 1013.

Canada.— Fane *v.* Bancroft, 30 Nova Scotia 33.

See 40 Cent. Dig. tit. "Principal and Surety," § 20 *et seq.* See also HUSBAND AND WIFE, 21 Cyc. 1465.

Illustrations.—A person who pledges his property in substitution of other pledged property given to secure a debt owing by another is none the less a surety. Reed *v.* Cramb, 22 Ill. App. 34. Sureties for a town collector signing a note with him for money not collected are sureties on the note. Crandall *v.* Moston, 24 N. Y. App. Div. 547, 50 N. Y. Suppl. 145. Where a husband and wife become liable for work performed on the property of the wife, the husband is a surety. Brown *v.* Mason, 170 N. Y. 584, 63 N. E. 1115 [*affirming* 55 N. Y. App. Div. 395, 66 N. Y. Suppl. 917]. A surety is not a principal because the consideration for his becoming such was the release of a mortgage to the principal by the creditor. Allen *v.* Wilkerson, 99 Ga. 139, 25 S. E. 26. But a creditor suing on a note received from his debtor as collateral does not become a surety for the maker. Cardin *v.* Jones, 23 Ga. 175. So where notes are exchanged the makers are not sureties. Newmarket Sav. Bank *v.* Hanson, 67 N. H. 501, 32 Atl. 774.

A surety on a note is not a fiduciary to the payee, or under any obligations to disclose to such payee any facts within the knowledge of such surety as to the value of such note, or of the security thereof. Opie *v.* Pacific Inv. Co., 26 Wash. 505, 67 Pac. 231, 56 L. R. A. 778.

72. See *supra*, I, A, text and notes 1, 2.

A warranty that dividends will be earned and paid is not a contract of suretyship. Hornor *v.* McDonald, 52 La. Ann. 396, 27 So. 91; Minor *v.* Hart, 52 La. Ann. 395, 27 So. 99; Roder *v.* Hart, 52 La. Ann. 215, 27 So. 238; Green *v.* Hart, 52 La. Ann. 213, 26 So. 862.

Repudiation of the contract by one principal of several may prevent the creation of the relation as between himself and a surety upon the contract. Winham *v.* Crutcher, 3 Tenn. Ch. 666.

73. **Defenses** available to surety see *infra*, VIII.

74. See *supra*, IV, B.

75. See cases cited *infra*, notes 76, 77.

76. *Connecticut.*— Doughty *v.* Savage, 28 Conn. 146, where the surety had no knowledge of the invalidity of the contract.

Illinois.— Jones *v.* Fisher, 116 Ill. 68, 4 N. E. 255.

Iowa.— Poor *v.* Merrill, 68 Iowa 436, 27 N. W. 367.

Maryland.— Hall *v.* Belt, 8 Gill & J. 470.

Minnesota.— Renville County *v.* Gray, 61 Minn. 242, 63 N. W. 635.

Pennsylvania.— Harbison *v.* Bailey, 8 Pa. Cas. 115, 6 Atl. 724.

South Carolina.— Evans *v.* Huey, 1 Bay 13, although the surety believed the contract to be valid.

Texas.— Turner *v.* Smith, 9 Tex. 626. *Compare* Lathrop *v.* Masterson, 44 Tex. 527; Smith *v.* Basinger, 12 Tex. 227, where under

not,[77] although, as will be seen, there are circumstances under which the surety may be held liable upon an obligation which is not enforceable against the principal.[78]

2. Requirements of Statute.[79] The fact that the bond or obligation of the principal is not in the form required by law will not affect the liability of the surety or constitute a defense in an action against him for breach thereof,[80] unless such failure to comply with the statutory requirements actually invalidates the obligation of the principal.[81]

3. Duress.[82] Duress at common law, where no statute is violated,[83] is a personal defense, which can only be set up by the person subjected to the duress;[84] and duress to the principal will not avoid the obligation of a surety,[85] unless the

the circumstances it was held to be immaterial whether the bond was binding on principal or not.

See 40 Cent. Dig. tit. "Principal and Surety," § 8.

Compare Patterson *v.* Gibson, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356, where surety had no knowledge of the invalidity of the contract.

77. *Arkansas.*— Smith *v.* Carder, 33 Ark. 709.

Louisiana.— Carroll *v.* Hamilton, 30 La. Ann. 520; Levy *v.* Wise, 15 La. Ann. 38 (against public policy); Bradford *v.* Skillman, 6 Mart. N. S. 123.

Massachusetts.— Canton Sav. Inst. *v.* Murphy, 156 Mass. 305, 31 N. E. 285.

North Carolina.— Grier *v.* Hill, 51 N. C. 572.

Pennsylvania.— Cooney *v.* Biggerstaff, 4 Pa. Cas. 200, 7 Atl. 156.

Texas.— Trammell *v.* Swan, 25 Tex. 473 (fraud and want of consideration); Edwards County *v.* Jennings, (Civ. App. 1895) 33 S. W. 585.

See 40 Cent. Dig. tit. "Principal and Surety," § 3.

Knowledge of surety may estop him from denying liability upon the contract. Winn *v.* Sandford, 145 Mass. 303, 14 N. E. 119, 1 Am. St. Rep. 461.

Want of knowledge on part of obligee.— The use of demised premises by the assignee of a lease for unlawful purposes, without actual knowledge to the lessor, will not discharge one of the original lessees who is described as surety from the obligation of his contract. Way *v.* Reed, 6 Allen (Mass.) 364. See also to the same effect Arras *v.* Richardson, 5 N. Y. Suppl. 755, holding the surety liable, although the leased premises were used for illegal and immoral purposes, but where personal knowledge was not brought home to the landlord, although his agent knew of the fact, the lease showing nothing from which an illegal purpose could be implied.

Forged instrument.— When the name of one, two, or more obligors has been forged, the surety, although he signed in belief that the forged name was genuine, is nevertheless bound if the obligee accepted the instrument without notice of the forgery. Wayne Agricultural Co. *v.* Cardwell, 73 Ind. 555; Helms *v.* Wayne Agricultural Co., 73 Ind. 325, 38 Am. Rep. 147.

78. See *infra*, IV, C, 2-10.

79. **Statutory requirements** as to contract of surety see *infra*, IV, D, 11, b; IV, D, 12, b.

80. *Georgia.*— Stephens *v.* Crawford, 3 Ga. 499.

Indiana.—Scotten *v.* State, 51 Ind. 52.

Iowa.— State *v.* Wiley, 15 Iowa 155.

Nebraska.— Riggs *v.* Miller, 34 Nebr. 666, 52 N. W. 567; Kopplekom *v.* Huffman, 12 Nebr. 95, 10 N. W. 577.

New Jersey.— Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

New York.— Skellinger *v.* Yendes, 12 Wend. 306.

North Carolina.— Governor *v.* Witherspoon, 10 N. C. 42; Henderson *v.* Matlock, 9 N. C. 366.

United States.— Chadwick *v.* U. S., 3 Fed. 750.

See 40 Cent. Dig. tit. "Principal and Surety," § 9.

81. Bradford *v.* Skillman, 6 Mart. N. S. (La.) 123; Cooney *v.* Biggerstaff, 4 Pa. Cas. 200, 7 Atl. 156.

82. **Fraud, duress, or undue influence** in contract of suretyship see *infra*, IV, D, 11, d.

83. **Where a bond is extorted against the requisitions of a statute,** the defense of duress is as available to the surety as the principal. Thompson *v.* Lockwood, 15 Johns. (N. Y.) 256; U. S. *v.* Tingey, 5 Pet. (U. S.) 115, 8 L. ed. 66; Hawes *v.* Marchant, 11 Fed. Cas. No. 6,240, 1 Curt. 136.

84. Thompson *v.* Buckhannon, 2 J. J. Marsh. (Ky.) 416; Hazard *v.* Griswold, 21 Fed. 178; Huscombe *v.* Standing, Cro. Jac. 187, 79 Eng. Reprint 163.

85. *Georgia.*— Spicer *v.* State, 9 Ga. 49.

Illinois.— Peacock *v.* People, 83 Ill. 331; Huggins *v.* People, 39 Ill. 241; Plummer *v.* People, 16 Ill. 358.

Indiana.— Tucker *v.* State, 72 Ind. 242.

Kentucky.— Thompson *v.* Buckhannon, 2 J. J. Marsh. 416.

Maine.— Oak *v.* Dustin, 79 Me. 23, 7 Atl. 815, 1 Am. St. Rep. 281.

Massachusetts.— Robinson *v.* Gould, 11 Cush. 55.

North Carolina.— Simms *v.* Barefoot, 3 N. C. 402.

United States.— Hazard *v.* Griswold, 21 Fed. 178.

England.— Huscombe *v.* Standing, Cro. Jac. 187, 79 Eng. Reprint 163.

See 40 Cent. Dig. tit. "Principal and Surety," § 18.

The exception to the general rule is where the relation of father and son or husband

surety, at the time of executing the obligation, is ignorant of the circumstances which render it voidable by the principal.[86]

4. Fraud.[87] As a rule if the principal is not bound owing to fraud practised upon him by the creditor, the surety likewise is not bound,[88] and is entitled to withdraw the security deposited with the creditor, or, if the same has been converted, to recover its value.[89] But a surety cannot take advantage of fraud perpetrated on his principal, where the latter does not complain thereof.[90] Nor is a surety released from liability by the fraud of his principal in securing the execution of a contract for the performance of which the surety renders himself liable, where the creditor has no notice of such fraud, actual or constructive.[91] If a surety changes his position to that of creditor, as by executing his own note to the payee and taking up the original note, his right to defeat a recovery by setting up fraud on the principal is lost.[92]

5. Illegality[93] **— a. In General.** The agreement of a surety is not binding where the bargain between the primary parties out of which it springs is contaminated by positive illegalities.[94] A surety may set up in his defense the illegality of

and wife exists between the principal and surety. Plummer *v.* People, 16 Ill. 358; Osborn *v.* Robbins, 36 N. Y. 365; East Stroudsburg Nat. Bank *v.* Seiple, 13 Pa. Dist. 575, 29 Pa. Co. Ct. 245; Owens *v.* Mynatt, 1 Heisk. (Tenn.) 675.

86. Patterson *v.* Gibson, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356; Strong *v.* Grannis, 26 Barb. (N. Y.) 122; Griffith *v.* Sitgreaves, 90 Pa. St. 161; East Stroudsburg Nat. Bank *v.* Seiple, 13 Pa. Dist. 575, 29 Pa. Co. Ct. 245; Hazard *v.* Griswold, 21 Fed. 178.

Increase of risk.— If the surety contracts in ignorance of the duress, it materially increases the risk beyond that assumed in the usual course of business of that kind. Patterson *v.* Gibson, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356.

If the surety has full knowledge of the duress, and, notwithstanding such knowledge, voluntarily enters into the obligation, he is bound thereby. Haney *v.* People, 12 Colo. 345, 21 Pac. 39. In Osborn *v.* Robbins, 36 N. Y. 365, 2 Transcr. App. 319, 4 Abb. Pr. N. S. 15, the surety knew the facts, although the case does not indicate that he knew that the proceedings were irregular. It was held that the duress of the principal was available as a defense to the surety. In Patterson *v.* Gibson, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356, it is said that knowledge of the fact of the imprisonment of the principal does not involve necessarily knowledge of its illegality.

87. **Fraud, duress, or undue influence** in contract of suretyship see *infra*, IV, D, 11, d.

88. Bennett *v.* Carey, 72 Iowa 476, 34 N. W. 291; Hazard *v.* Irwin, 18 Pick. (Mass.) 95; Putnam *v.* Schuyler, 4 Hun (N. Y.) 166, 6 Thomps. & C. 485.

Misrepresentation made to the principal, insufficient to discharge him, will not avail the surety. Bryant *v.* Crosby, 36 Me. 562, 58 Am. Dec. 767.

Where a composition agreement contained a condition that it should not be binding unless signed by all the creditors, and notes were given under this agreement, a surety on the notes is not liable if the agreement, unknown to him, was not signed by all of the creditors. Doughty *v.* Savage, 28 Conn. 146.

89. Wile *v.* Wright, 32 Iowa 451.

90. Walker *v.* Gilbert, 7 Sm. & M. (Miss.) 456.

A surety cannot avail himself of fraud practised upon his principal (Fluker *v.* Henry, 27 Ala. 403; Brown *v.* Wright, 7 T. B. Mon. (Ky.) 396, 18 Am. Dec. 190; Walker *v.* Gilbert, 7 Sm. & M. (Miss.) 456), or upon a cosurety (Sulphur Deposit Bank *v.* Peak, 110 Ky. 579, 62 S. W. 268, 23 Ky. L. Rep. 19, 96 Am. St. Rep. 466), unless the defrauded party has rescinded the contract (Hazard *v.* Irwin, 18 Pick. (Mass.) 95; Macey, etc., Co. *v.* Heger, 195 Pa. St. 125, 45 Atl. 675).

If there are two principals, both of them must avoid the contract before the sureties can plead fraud. Kirby *v.* Spiller, 83 Ala. 481, 3 So. 700.

91. Union Bank *v.* Beatty, 10 La. Ann. 378.

92. Fluker *v.* Henry, 27 Ala. 403.

93. **Illegal consideration** see *infra*, IV, C, 10; IV, D, 11, e; IX, B, 5, f, (IV).

94. Denison *v.* Gibson, 24 Mich. 187; Hartford Tp. Bd. of Education *v.* Thompson, 33 Ohio St. 321; Woodson *v.* Barrett, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612. *Compare*, however, Comstock *v.* Gage, 91 Ill. 328, holding that the receipt by a bank on deposit of the funds of a city even through an illegal scheme by the bank, created an implied promise on the bank's part to repay the money and that an express undertaking by a third party that the bank would do so was binding upon them.

Sureties are not liable on a gambling contract (Woodson *v.* Barrett, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612), or on one made for the purpose of compounding a crime (East Stroudsburg Nat. Bank *v.* Seiple, 13 Pa. Dist. 575, 29 Pa. Co. Ct. 245), or entered into to defraud the creditors of the principal (Hook *v.* White, 201 Pa. St. 41, 50 Atl. 290; Coles *v.* Strick, 15 Q. B. 2, 69 E. C. L. 2).

A contract providing for the construction of a building in a manner prohibited by the city ordinance is not invalid if it also pro-

the contract,[95] although the principal may not be in a position to urge the same defense.[96]

b. Collateral Transaction. If the contract itself is not illegal, the sureties are not discharged because certain collateral acts of their principal,[97] or of the obligee,[98] are illegal; thus sureties for a contractor cannot set up as a defense that he employed aliens in violation of the law.[99]

c. Ultra Vires Contract. Sureties on bonds to a corporate obligee are liable, although the transaction may be *ultra vires* as to the corporation;[1] the government

vides that necessary changes may be made, and a change is made so as to avoid a violation of the ordinance. Higgins *v.* Quigley, 23 Ind. App. 348, 54 N. E. 136.

An official bond is not a wagering contract within arts. 1131, 1135, of the civil code of lower Canada. Black *v.* Reg., 29 Can. Sup. Ct. 693 [*affirming* 6 Can. Exch. 236].

Contract to repay public money.— Surety is not liable on a contract for the repayment of public money improperly loaned to a private person. Hartford Tp. Bd. of Education *v.* Thompson, 33 Ohio St. 321. However, if sureties enter into a contract for the return of public money, they are liable, although such money, originally, was received by their principal wrongfully (Comstock *v.* Gage, 91 Ill. 328; Harbison *v.* Baily, 8 Pa. Cas. 115, 6 Atl. 724), or not in the manner prescribed by law (State *v.* Farmers', etc., State Bank, 66 Minn. 301, 69 N. W. 3).

Forfeit for failure to run race.— It has been held that in the absence of fraud the surety on a note given as a forfeit for failure to run a horse-race cannot resist the collection of the note. Crump *v.* Secrest, 9 Tex. 260.

If property is leased for illegal purposes, sureties on a bond conditioned for the payment of the rent cannot be held (Mound *v.* Barker, 71 Vt. 253, 44 Atl. 346, 76 Am. St. Rep. 767), unless the lessor is without actual knowledge of such unlawful use (Way *v.* Reed, 6 Allen (Mass.) 364; Arras *v.* Richardson, 5 N. Y. Suppl. 755).

95. Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027.

96. Denison *v.* Gibson, 24 Mich. 187.

The surety's equity does not depend upon the right of the principals to demand the same relief. Denison *v.* Gibson, 24 Mich. 187.

The surety's rights are not affected because the primary parties have put themselves in a position where they could not recede or compel a revocation. Denison *v.* Gibson, 24 Mich. 187.

97. Comstock *v.* Gage, 91 Ill. 328.

Illustration.—Although a copy of the rules and regulations of the department of agriculture attached to a license to mine, provided that "in all cases where phosphate royalties are not promptly paid in the time provided by law, the license shall be suspended," and any mining done thereafter "shall be considered and treated as illegal," the liability of sureties for the payment of the royalty is not terminated by a failure of the department to suspend the license after the first default. State *v.* Scheper, 33 S. C. 562, 11 S. E. 623, 12 S. E. 564, 816.

98. Eagle Roller-Mill Co. *v.* Dillman, 67 Minn. 232, 69 N. W. 910, holding that it is not a defense to the sureties on the bond of an agent to purchase grain that the obligee furnished scales for the use of the principal which had not been tested and sealed as required by Gen. St. (1894) § 2205.

99. Philadelphia *v.* McLinden, 11 Pa. Dist. 128, 26 Pa. Co. Ct. 287.

1. American Bonding Co. *v.* Ottumwa, 137 Fed. 572, 70 C. C. A. 270. But in Edwards County *v.* Jennings, (Tex. Civ. App. 1895) 33 S. W. 585, it was held that a contract between a county and a private person by which the latter was to supply the county, and private individuals who wished, with water for a certain period, at an agreed consideration, was *ultra vires*, and a perfect defense to the sureties on the bond of the contractor.

Sureties for an agent appointed to negotiate bonds for a city are liable for money borrowed by him on the bonds which he did not pay over, although the council of the city transcended its powers in issuing the bonds. Indianapolis *v.* Skeen, 17 Ind. 628. Sureties for an agent appointed by a railway company to sell coal are liable for money collected by him, although the company did not have power to deal in coal. North Western R. Co. *v.* Whinray, 2 C. L. R. 1207, 10 Exch. 77, 23 L. J. Exch. 261, 2 Wkly. Rep. 523.

Sureties for a bank cashier are liable, although he is not a director as required by statute (Lionberger *v.* Krieger, 88 Mo. 160 [*affirming* 13 Mo. App. 313]), or for his wrongful conversion of bank stock issued to him, although he held the stock in violation of the banking act prohibiting loans on the security of shares of the capital stock of the bank (Walden Nat. Bank *v.* Snyder, 7 N. Y. Suppl. 934); and are not relieved from liability by showing that he was employed in the transaction of what was not properly banking business, the claim being for money appropriated by the principal, and not for losses occasioned by illegal transactions (Springer *v.* Canada Exch. Bank, 14 Can. Sup. Ct. 716 [*affirming* 13 Ont. App. 390 (*affirming* 7 Ont. 309)]. A provision in the charter of a banking company that its banking house shall be situated, and its banking operations shall be conducted in a certain city, is directory only; and sureties on the bond of its cashier are not discharged by a violation of such provision. Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

Sureties for a teller are liable for money raised by him by issuing due-bills under au-

or municipality only can question the validity of the transaction, or object to a non-compliance with formalities which are for its protection.[2]

d. Violation of Rights of Third Persons. Sureties are not obliged to perform their contract where performance would violate the rights of third persons.[3]

6. Incapacity or Disqualification of Principal.[4] Although the principal lacked capacity to enter into the contract made, the surety is bound nevertheless,[5] as he may be said to warrant the competency of his principal.[6] Hence a surety for an infant principal is bound,[7] unless the principal disaffirm his contract on attaining majority;[8] but even in such a case the surety remains liable if the creditor is not placed *in statu quo* by a return of the consideration.[9] So a surety is liable, although the contract is void as to a corporate principal because *ultra vires*;[10] or because the principal is a married woman,[11] or other disqualified or incapacitated person.[12]

7. Incomplete or Irregular Instrument.[13] Mere irregularities in or incomplete-

thority of the bank, although the bank did not have power to issue such bills, and was not obliged to pay them. Wayne *v.* Commercial Nat. Bank, 52 Pa. St. 343.

Sureties for a contractor cannot claim that the city did not proceed properly to let the contract. Madison *v.* American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097. Sureties on the bond of a contractor for building a school-house are liable, although the school-board made the contract without authority by reason of a failure to advertise for bids. People's Lumber Co. *v.* Gillard, 136 Cal. 55, 68 Pac. 576.

Where a surety undertakes to pay the cost of repairing streets, it is immaterial how the city has raised the money to pay for the repairs. American Bonding Co. *v.* Ottumwa, 137 Fed. 572, 70 C. C. A. 270.

2. Walden Nat. Bank *v.* Snyder, 7 N. Y. Suppl. 934; Madison *v.* American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

3. Vann *v.* Lunsford, 91 Ala. 576, 8 So. 719.

4. **Incapacity of surety** see *infra*, IV, D, 11, f; IX, D, 5, f, (II).

Estoppel of surety see *infra*, IV, D, 12; VII, B.

5. Satterfield *v.* Compton, 6 Rob. (La.) 120; Johnson *v.* Marshall, 4 Rob. (La.) 157; Fort *v.* Cortes, 14 La. 180; Baldwin *v.* Gordon, 12 Mart. (La.) 378; Hicks *v.* Randolph, 3 Baxt. (Tenn.) 352, 27 Am. Rep. 760.

6. Caldwell *v.* Ruddy, 2 Ida. (Hasb.) 1, 1 Pac. 339.

7. Goodell *v.* Bates, 14 R. I. 65 (holding that the obligors on a replevin bond cannot avoid it on the ground that one of the principals was an infant); Hicks *v.* Randolph, 3 Baxt. (Tenn.) 352, 27 Am. Rep. 760.

8. Keokuk County State Bank *v.* Hall, 106 Iowa 540, 76 N. W. 832; Baker *v.* Kennett, 54 Mo. 82.

9. Kyger *v.* Sipe, 89 Va. 507, 16 S. E. 627, holding that the fact that the principal in a bond given for the purchase-price of property was at the time of executing the same an infant, and afterward disaffirmed the contract, does not relieve the surety on the bond from liability for the deficiency if the property has been sold and the proceeds applied to the debt.

10. Maledon *v.* Leflore, 62 Ark. 387, 35 S. W. 1102.

11. *Arkansas.*— Stillwell *v.* Bertrand, 22 Ark. 375.

Indiana.— Davis *v.* Statts, 43 Ind. 103, 13 Am. Rep. 382.

Kentucky.— Warren *v.* Louisville Leaf Tobacco Exch., (1900) 55 S. W. 912.

Massachusetts.— Winn *v.* Sanford, 145 Mass. 302, 14 N. E. 119, 1 Am. St. Rep. 461.

Mississippi.— McGavock *v.* Whitfield, 45 Miss. 452; Foxworth *v.* Bullock, 44 Miss. 457; Whitworth *v.* Carter, 43 Miss. 61.

Missouri.— Weed Sewing Mach. Co. *v.* Maxwell, 63 Mo. 486.

Montana.— McCormick *v.* Hubbell, 4 Mont. 87, 5 Pac. 314.

New Jersey.—Wagoner *v.* Watts, 44 N. J. L. 126.

New York.— Kimball *v.* Newell, 7 Hill 116.

Pennsylvania.— Wiggins' Appeal, 100 Pa. St. 155.

South Carolina.— Smyley *v.* Head, 2 Rich. 590, 45 Am. Dec. 750.

Tennessee.— Willingham *v.* Leake, 7 Baxt. 453; Hicks *v.* Randolph, 3 Baxt. 352, 27 Am. Rep. 760.

Vermont.— St. Albans Bank *v.* Dillon, 30 Vt. 122, 73 Am. Dec. 295.

See 40 Cent. Dig. tit. "Principal and Surety." § 13.

12. Lionberger *v.* Krieger, 83 Mo. 160 [*affirming* 13 Mo. App. 313] (holding that the fact that a person appointed as bank cashier was not a director of the bank as the statute requires does not render invalid the obligation of the sureties on his official bond); Hicks *v.* Randolph, 3 Baxt. (Tenn.) 352, 27 Am. Rep. 760; Lyndon *v.* Miller, 36 Vt. 329 (holding that the sureties on a tax-collector's bond are bound, although the collector never took oath of office, if in fact he acted as collector). *Contra* see Levy *v.* Wise, 15 La. Ann. 38, holding that the rule that a surety cannot plead matters personal to the principal obligor cannot be applied to a case where the principal is alleged to be a slave, and consequently incapacitated from contracting, from motives of public policy.

13. **Delivery of instrument** by surety see *infra*. IV, D, 9, a.

Incomplete or irregular instrument of suretyship see *infra*, IV, D, 11, g.

ness of the instrument evidencing the obligation of the principal to the creditor or obligee do not affect the surety's liability,[14] even though the principal may not be bound by the instrument,[15] provided of course the irregularity or incompleteness is not such as to render the obligation insensible and void.[16]

8. Usury.[17] While a surety may set up the defense of usury,[18] it will not avoid a contract as to a surety beyond the extent to which it vitiates it as to the principal.[19] Therefore, where the effect of usury is not to vitiate the entire contract, but only to the extent of the usury, a surety is not discharged from liability by his principal paying or agreeing to pay usury,[20] although the payment or agreement to pay was not disclosed to the surety,[21] but he remains bound for the principal and legal interest.[22] It would be otherwise if the payment or agreement to pay usury was concealed from the surety for the purpose of inducing him to do what he would not otherwise have done, or it increased the risk taken by him in becoming surety.[23]

Indorsement of incomplete negotiable instrument see Commercial Paper, 7 Cyc. 495.

Omission of principal to sign obligation of suretyship see *infra*, IV, D, 8, b.

Reformation of instrument generally see Reformation of Instruments.

14. *Florida.*— Webster *v.* Wailes, 35 Fla. 267, 17 So. 571.

Illinois.— Affeld *v.* People, 12 Ill. App. 502.

Indiana.— Irwin *v.* Kilburn, 104 Ind. 113, 3 N. E. 650.

Ohio.— Walsh *v.* Miller, 51 Ohio St. 462, 38 N. E. 381, use of "trustee" instead of "assignee."

Pennsylvania.— Duffee *v.* Mansfield, 141 Pa. St. 507, 21 Atl. 675.

South Carolina.— Carson *v.* Hill, 1 McMull. 76.

Texas.— San Roman *v.* Watson, 54 Tex. 254.

Virginia.— Cox *v.* Thomas, 9 Gratt. 312; Luster *v.* Middlecapp, 8 Gratt. 54, 56 Am. Dec. 129.

United States.— Mutual L. Ins. Co. *v.* Wilcox, 17 Fed. Cas. No. 9,979, 8 Biss. 197, 6 Reporter 8.

See 40 Cent. Dig. tit. "Principal and Surety," § 15.

Failure to insert surety's name in the body of the instrument is immaterial (Stewart *v.* Carter, 4 Nebr. 564; San Roman *v.* Watson, 54 Tex. 254), especially where he signed and sealed the instrument (Affeld *v.* People, 12 Ill. App. 502; Luster *v.* Middlecapp, 8 Gratt. (Va.) 54, 56 Am. Dec. 129). *Compare* Cox *v.* Thomas, 9 Gratt. (Va.) 312.

Locality.— The rule has been applied with respect to a failure to shape or an incomplete or uncertain statement as to place or locality. Irwin *v.* Kilburn, 104 Ind. 113, 3 N. E. 650 (uncertainty in name of county in which contract was to be performed); Mutual L. Ins. Co. *v.* Wilcox, 17 Fed. Cas. No. 9,979, 8 Biss. 197, 6 Reporter 8 (place of agency left blank in agent's bond).

15. Webster *v.* Wailes, 35 Fla. 267, 17 So. 571.

16. Smith *v.* Carder, 33 Ark. 709; Grier *v.* Hill, 51 N. C. 592.

17. Usury as a defense see *infra*, VIII, D, 2; IX, A, 3, b.

Estoppel of grantee assuming mortgage in defenses of usury see Mortgages, 27 Cyc. 1362.

18. Stockton *v.* Coleman, 39 Ind. 106; Huntress *v.* Patten, 20 Me. 28.

A surety who takes up his principal's note and gives his own note in lieu thereof cannot plead usury, infecting the old note, in defense to an action on the new note. Boylston *v.* Bain, 90 Ill. 283.

19. Columbus First Nat. Bank *v.* Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751; Selser *v.* Brock, 3 Ohio St. 302; Middlebury Bank *v.* Bingham, 33 Vt. 621.

20. *Kentucky.*— Mount *v.* Tappey, 7 Bush 617.

Missouri.— Samuel *v.* Withers, 16 Mo. 532.

Ohio.— Columbus First Nat. Bank *v.* Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751; Selser *v.* Brock, 3 Ohio St. 302.

Pennsylvania.— Mayfield *v.* Gordon, 2 Am. L. Reg. 187.

Texas.— Payne *v.* Powell, 14 Tex. 600; Terrell *v.* Barrack, 2 Tex. App. Civ. Cas. § 667; Hoerr *v.* Coffin, 1 Tex. App. Civ. Cas. § 185.

Vermont.— Davis *v.* Converse, 35 Vt. 503.

See 40 Cent. Dig. tit. "Principal and Surety," § 17.

Where the claim of the creditor amounts to more than the note, for which the surety is bound, usury on the note cannot affect the surety. Gillen *v.* Kentucky Nat. Bank, 8 S. W. 193, 10 Ky. L. Rep. 97.

21. Mitchell *v.* Cotten, 3 Fla. 134; Mount *v.* Tappey, 7 Bush (Ky.) 617; Selser *v.* Brock, 3 Ohio St. 302; Davis *v.* Converse, 35 Vt. 503.

22. Ellis *v.* Bibb, 2 Stew. (Ala.) 63; Mitchell *v.* Cotten, 3 Fla. 134; Selser *v.* Brock, 3 Ohio St. 302; Mayfield *v.* Gordon, 2 Am. L. Reg. (Pa.) 187.

23. Mount *v.* Tappey, 7 Bush (Ky.) 617; Columbus First Nat. Bank *v.* Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751.

In Georgia concealed usury in a promissory note which contains a waiver of homestead or exemption prevents a surety signing the note with his principal from being bound by the instrument, since the secret taint in the note increases the risk of the surety. Allen *v.* Wilkerson, 99 Ga. 139, 25 S. E. 26; Vandiver *v.* Wright, 94 Ga. 698, 19 S. E. 990;

9. Want of Authority to Make Contract.[24] Want of authority of the person who executes an obligation as the agent or representative of the principal will not as a rule affect the surety's liability thereon,[25] especially in the absence of fraud,[26] and where the surety was cognizant of the want of authority,[27] even though the obligation is not binding upon the principal.[28]

10. Want or Failure of Consideration.[29] Where the obligation is invalid as between the original parties by reason of a total lack of consideration,[30] or because supported by an illegal consideration, this being regarded as no consideration at all,[31] it will not bind the surety. Likewise a party cannot be bound as surety for

Howard *v.* Johnson, 91 Ga. 319, 18 S. E. 132; Lewis *v.* Brown, 89 Ga. 115, 14 S. E. 881. The defense cannot be evaded by any arrangement between the creditor and the principal purging the note of usury, in which the surety takes no part, and to which he does not assent. Howard *v.* Johnson, *supra*.

24. Unauthorized execution of suretyship contract see *infra*, IV, D, 8, b, (II).

Omission of principal to sign obligation see *infra*, IV, D, 8, b.

25. *Arkansas.*— Maledon *v.* Leflore, 62 Ark. 387, 35 S. W. 1102.

Indiana.— Indianapolis *v.* Skeen, 17 Ind. 628.

Nebraska.— Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027.

New Hampshire.— Weare *v.* Sawyer, 44 N. H. 198.

New York.— Millius *v.* Shafer, 3 Den. 60.

North Carolina.— Holland *v.* Clark, 67 N. C. 104.

Pennsylvania.— Stewart *v.* Behm, 2 Watts 356.

South Carolina.— Pelzer *v.* Campbell, 15 S. C. 581, 40 Am. Rep. 705.

See 40 Cent. Dig. tit. "Principal and Surety," § 12.

Contra.— Edwards County *v.* Jennings, (Tex. Civ. App. 1895) 33 S. W. 585.

A surety signing a partnership note is bound, although the note had been signed by a member of the firm without authority. Stewart *v.* Behm, 2 Watts (Pa.) 356. *Compare* Pelzer *v.* Campbell, 15 S. C. 581, 40 Am. Rep. 705. But see Russell *v.* Annable, 109 Mass. 72, 12 Am. Rep. 665, a bond to dissolve an attachment of partnership property and similarly signed.

26. Weare *v.* Sawyer, 44 N. H. 198.

27. Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027.

28. Millius *v.* Shafer, 3 Den. (N. Y.) 60; Holland *v.* Clark, 67 N. C. 104.

29. Consideration for suretyship contract see *infra*, IV, D, 10.

30. *Alabama.*—Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 13 Am. St. Rep. 46, 4 L. R. A. 680.

California.— Hazeltine *v.* Larco, 7 Cal. 32.

Connecticut.— Cowles *v.* Pick, 55 Conn. 251, 10 Atl. 569, 3 Am. St. Rep. 44.

Illinois.— Parkhurst *v.* Vail, 73 Ill. 343.

Indiana.— Favorite *v.* Stidham, 84 Ind. 423.

Iowa.— Briggs *v.* Downing, 48 Iowa 550.

Kentucky.— Greer *v.* Clermont Distilling, etc., Co., 15 Ky. L. Rep. 237.

Maine.— Sawyer *v.* Fernald, 59 Me. 500.

Maryland.— Roberts *v.* Woven Wire Mattress Co., 46 Md. 374.

Massachusetts.— Green *v.* Shepherd, 5 Allen 589; Tenney *v.* Prince, 4 Pick. 385, 16 Am. Dec. 347.

Mississippi.— Clopton *v.* Hall, 51 Miss. 482.

Missouri.— Scroggin *v.* Holland, 16 Mo. 419; Peck *v.* Harris, 57 Mo. App. 467.

Nebraska.— Barnes *v.* Van Keuren, 31 Nebr. 165, 47 N. W. 848.

New York.— McNaught *v.* McClaughry, 42 N. Y. 22, 1 Am. Rep. 487; Sawyer *v.* Chambers, 43 Barb. 622.

North Carolina.— Greer *v.* Jones, 52 N. C. 581.

Pennsylvania.— Gunnis *v.* Weigley, 114 Pa. St. 191, 6 Atl. 465.

Tennessee.— Gilman *v.* Kibler, 5 Humphr. 19.

Texas.— Jones *v.* Ritter, 32 Tex. 717. *Compare* Trammell *v.* Swan, 25 Tex. 473, where the original transaction was simulated and fraudulent as between the principal and the obligee.

United States.— Good *v.* Martin, 95 U. S. 90, 24 L. ed. 341.

See 40 Cent. Dig. tit. "Principal and Surety," § 14.

A renewal is likewise void, where the original obligation was void for want of consideration. Hetherington *v.* Hixon, 46 Ala. 297.

A surety executing a sealed instrument is, however, estopped to deny the absence of the consideration. Richner *v.* Kreuter, 100 Ill. App. 548; Quimby *v.* Morrill, 47 Me. 470; Evansville Nat. Bank *v.* Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204; Davis Sewing Mach. Co. *v.* Richards, 115 U. S. 524, 6 S. Ct. 173, 29 L. ed. 480.

31. Daniels *v.* Barney, 22 Ind. 207; Levy *v.* Wise, 15 La. Ann. 38; Tandy *v.* Elmore-Cooper Live Stock Commission Co., 113 Mo. App. 409, 87 S. W. 614.

Illegality of principal's obligation see *supra*, IV, C, 5.

This rule has been applied to a promise that the principal will not be prosecuted for embezzlement (U. S. Fidelity, etc., Co. *v.* Charles, 131 Ala. 658, 31 So. 558, 57 L. R. A. 212; Rouse *v.* Mohr, 29 Ill. App. 321; Gorham *v.* Keyes, 137 Mass. 583; Hartford Tp. Bd. of Education *v.* Thompson, 33 Ohio St. 321); to a loan of public funds for private use which is illegal as contrary to public policy (Hartford Tp. Bd. of Education *v.* Thompson, *supra*); and to an obligation given

a debt which is not due, by reason of a failure of consideration against the principal.[32] Nevertheless as the obligation of a surety arises from the consideration received by his principal, he cannot avail himself of a want of consideration where the principal cannot.[33] If a contract is void by reason of being founded in whole or in part on an illegal consideration, a renewal of it is likewise void.[34]

D. Nature and Validity of Surety's Obligation[35]— **1. In General.** To enter into a valid contract creating the relation of principal and surety, as in the case of other contracts,[36] there must be competent parties,[37] an offer and acceptance,[38] and a valid consideration,[39] as well as a sufficient compliance with the formalities required by law.[40] The contract of suretyship may be either express[41] or implied;[42] and it must[43] or need not[44] be in writing, depending upon the existence or not of requirements of law to that effect.

2. Notice to and Acceptance by Principal. It seems to be necessary as between the surety and his principal,[45] but not, as between the surety and the creditor,[46] that the principal should have notice of and accept the surety's offer to assume the relation. To make one surety a principal as to another surety it must be shown that the latter became surety at his request.[47]

3. Notice to and Acceptance by Creditor[48]— **a. In General.** Subject to the exception hereinafter stated[49] notice to and acceptance by the creditor of the

for a gambling debt (Leckie *v.* Scott, 10 La. 412; Harley *v.* Stapleton, 24 Mo. 248; Woodson *v.* Barrett, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612).

32. Adams *v.* Cuny, 15 La. Ann. 485.

Partial failure of consideration.— It is for the principal and not the surety to elect whether to avoid the principal contract for a partial failure of consideration or only to claim a *pro rata* deduction. Equity Com'r *v.* Robinson, 1 Bailey (S. C.) 151.

33. Dillingham *v.* Jenkins, 7 Sm. & M. (Miss.) 479, holding that where a principal had, by promises to an assignee, induced him to purchase a note signed by him and a surety and thereby precluded himself from setting up a failure of consideration as to the payee, the surety was likewise precluded from making the same defense.

34. East Stroudsburg Nat. Bank *v.* Seiple, 13 Pa. Dist. 575, 29 Pa. Co. Ct. 245.

35. **Defenses available to surety** see *infra*, VIII.

Distinguished from other contracts see *supra*, II.

Suretyship as between husband and wife see Husband and Wife, 21 Cyc. 1211.

36. See Contracts, 9 Cyc. 213.

37. See Childs Suretyship 24; and *infra*, IV, D, 11, f.

38. See Childs Suretyship 24; and *infra*, IV, D, 2, 3.

39. See Childs Suretyship 24; and *infra*, IV, D, 10.

40. See Childs Suretyship 24; and *infra*, IV, D, 11, b.

41. See *infra*, IV, D, 4.

42. See *infra*, IV, D, 5.

43. See *infra*, IV, D, 8; Frauds, Statute of, 20 Cyc. 160 *et seq.*

44. See *infra*, IV, D, 8; Frauds, Statute of, 20 Cyc. 160 *et seq.*

45. Hughes *v.* Littlefield, 18 Me. 400; McPherson *v.* Meek, 30 Mo. 345; Talmage *v.* Burlingame, 9 Pa. St. 21; Lathrop *v.* Wilson, 30 Vt. 604; Peake *v.* Dorwin, 25 Vt. 28. See also Snell *v.* Warner, 63 Ill. 176. *Compare* Craig *v.* Vanpelt, 3 J. J. Marsh. (Ky.) 489; Powers *v.* Nash, 37 Me. 322; Whitehouse *v.* Hanson, 42 N. H. 9.

Notice and acceptance of offer generally see Contracts, 9 Cyc. 247.

Appearance on the face of the instrument of the fact of suretyship may constitute notice to principal. McPherson *v.* Meek, 30 Mo. 345.

Request of principal may be shown: By appearing and defending an action upon the obligation. Snell *v.* Warner, 63 Ill. 176. By suffering a default in an action against both principal and surety upon the obligation. Powers *v.* Nash, 37 Me. 322. By acceptance of or acquiescence in the benefits of the contract. Powers *v.* Nash, *supra*.

An offer to become a surety must be accepted before a binding contract is effected. Childs Suretyship 25.

Notice of acceptance must be given within a reasonable time. Childs Suretyship 32.

No particular form of notice is required. Childs Suretyship 32.

An offer may be revoked before it is acted upon. Childs Suretyship 33. Revocation, however, should be clear and explicit and leave no doubt as to intention. Childs Suretyship 34. See Lanusse *v.* Barker, 3 Wheat. (U. S.) 101, 4 L. ed. 343.

46. Howard *v.* Clark, 36 Iowa 114; Talmage *v.* Burlingame, 9 Pa. St. 21; Peake *v.* Dorwin, 25 Vt. 28. *Compare* Powers *v.* Nash, 37 Me. 322.

47. Whitehouse *v.* Hanson, 42 N. H. 9.

48. **Acceptance of written instrument** see *infra*, IV, C, 9, b.

Notice to and acceptance: By creditor of change in relation see *infra*, IV, D, 6, c. Of conditional execution by surety see *infra*, IV, D, 8, c, (II), (G). See also *infra*, IV, D, 9, b, (II); VI, B, 6.

49. See *infra*, IV, D, 3, b, (II).

offer of one to become a surety for a principal is an essential requisite to a valid and binding contract of suretyship.[50]

b. Suretyship Not Apparent on Face of Instrument — (i) *In General.* Where the fact of suretyship is not shown upon the face of the contract, notice thereof to the creditor must be proved in order to enable the surety to avail himself of the protection which the law affords to sureties.[51]

(ii) *Effect of Creditor's Knowledge.* On the other hand, one of several makers of an instrument, who has signed the same as surety for the other makers, may avail himself of the protection which the law affords sureties as against the creditor, where the creditor has knowledge of the relation, although the relation does not appear upon the face of the instrument.[52] Knowledge of

50. See cases cited *infra*, note 51. See also Gilman *v.* Kibler, 5 Humphr. (Tenn.) 19.

Notice and acceptance of offer generally see CONTRACTS, 9 Cyc. 247.

51. *Alabama.*— Summerhill *v.* Tapp, 52 Ala. 227.

Connecticut.— Bull *v.* Allen, 19 Conn. 101.

Georgia.— Stewart *v.* Parker, 55 Ga. 656; Higdon *v.* Bailey, 26 Ga. 426.

Illinois.— Piper *v.* Headlee, 39 Ill. App. 93. *Compare* Baird *v.* School Trustees, 106 Ill. 657.

Indiana.— Tharp *v.* Parker, 86 Ind. 102; Lanson *v.* Vevay First Nat. Bank, 82 Ind. 21; Davenport *v.* King, 63 Ind. 64.

Iowa.— Morgan *v.* Thompson, 60 Iowa 280, 14 N. W. 306; Murray *v.* Graham, 29 Iowa 520.

Kentucky.— Neel *v.* Harding, 2 Metc. 247.

Massachusetts.— Wilson *v.* Foot, 11 Metc. 285.

Michigan.— Smith *v.* Sheldon, 35 Mich. 42, 24 Am. Rep. 529.

Minnesota.— Agnew *v.* Merritt, 10 Minn. 308.

Missouri.— Patterson *v.* Brock, 14 Mo. 473.

New Hampshire.— Nichols *v.* Parsons, 6 N. H. 30, 23 Am. Dec. 706. See also Newmarket Sav. Bank *v.* Hanson, 67 N. H. 501, 32 Atl. 774.

New Jersey.— Kaighn *v.* Fuller, 14 N. J. Eq. 419.

New York.— Elwood *v.* Deifendorf, 5 Barb. 398; Neimcewicz *v.* Gahn, 3 Paige 614 [*affirmed* in 11 Wend. 312].

Ohio.— Cone *v.* Rees, 11 Ohio Cir. Ct. 632, 1 Ohio Cir. Dec. 192.

Tennessee.— Dozier *v.* Lea, 7 Humphr. 520.

Texas.— Roberts *v.* Bain, 32 Tex. 385; Bonnell *v.* Prince, 11 Tex. Civ. App. 399, 32 S. W. 855. See also Burke *v.* Cruger, 8 Tex. 66, 59 Am. Dec. 102.

Vermont.— See Harrington *v.* Wright, 48 Vt. 427.

Washington.— Culbertson *v.* Wilcox, 11 Wash. 522, 39 Pac. 954.

Wyoming.— Frank *v.* Snow, 6 Wyo. 42, 42 Pac. 484, 43 Pac. 78.

See 40 Cent. Dig. tit. "Principal and Surety," § 21.

Estoppel.— Where several persons sign an obligation jointly and severally, promising to pay and perform as principal, each is estopped to prove that he signed only as surety and that the creditor had knowledge of such fact. Heath *v.* Derry Bank, 44 N. H. 174. See also *infra*, IV, D, 12; VII, B.

Strict proof should be required of the surety. Burke *v.* Cruger, 8 Tex. 66, 59 Am. Dec. 102.

The surety has the burden not only of proving knowledge by the creditor, but that the latter consented to deal with the surety in that capacity, in those states where the creditor, having acted on the apparent character of a surety as principal, is not required to recognize the suretyship. Farmers', etc., Bank *v.* De Shorb, 137 Cal. 685, 70 Pac. 771; Casey *v.* Gibbons, 136 Cal. 368, 68 Pac. 1032.

52. *Alabama.*— Pollard *v.* Stanton, 5 Ala. 451.

Georgia.— Taylor *v.* Scott, 62 Ga. 39; Camp *v.* Howell, 37 Ga. 312.

Illinois.— Flynn *v.* Mudd, 27 Ill. 323; Reed *v.* Cramb, 22 Ill. App. 34.

Indiana.— Gipson *v.* Ogden, 100 Ind. 20; Starret *v.* Burkhalter, 86 Ind. 439.

Iowa.— Lauman *v.* Nichols, 15 Iowa 161; Kelly *v.* Gillespie, 12 Iowa 55, 79 Am. Dec. 516.

Kentucky.— Neel *v.* Harding, 2 Metc. 247.

Louisiana.— Adle *v.* Metoyer, 1 La. Ann. 254.

Maine.— Cummings *v.* Little, 45 Me. 183; Lime Rock Bank *v.* Mallett, 42 Me. 349.

Maryland.— Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283.

Massachusetts.— Guild *v.* Butler, 127 Mass. 386.

Michigan.— Walter A. Wood Mowing, etc., Mach. Co. *v.* Oliver, 103 Mich. 326, 61 N. W. 507; Stevens *v.* Oaks, 58 Mich. 343, 25 N. W. 309; Smith *v.* Shelden, 35 Mich. 42, 24 Am. Rep. 529.

Montana.— Smith *v.* Freyler, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358.

Nebraska.— Lee *v.* Brugmann, 37 Nebr. 232, 55 N. W. 1053.

New Hampshire.— Derry Bank *v.* Baldwin, 41 N. H. 434; Grafton Bank *v.* Kent, 4 N. H. 221, 17 Am. Dec. 414. See also Wheat *v.* Kendall, 6 N. H. 504.

New York.— Wing *v.* Terry, 5 Hill 160; Matter of Sanders, 4 Misc. 343, 24 N. Y. Suppl. 317 [*affirmed* in 82 Hun 62, 31 N. Y. Suppl. 65]; Suydam *v.* Westfall, 4 Hill 211 [*reversed* on other grounds in 2 Den. 205].

North Carolina.— Goodman *v.* Litaker, 84 N. C. 8, 37 Am. Rep. 602.

Ohio.— Day *v.* Ramey, 40 Ohio St. 446; McDowell *v.* Reese, 10 Ohio Dec. (Reprint)

the relation by the creditor or obligee must be proved, unless shown on the face of the instrument.[53] Knowledge that one person is the principal, and others who

303, 20 Cinc. L. Bul. 102, construing Rev. St. § 5832.

Pennsylvania.— Walter *v.* Fisher, 4 Leg. Gaz. 204.

Rhode Island.—Otis *v.* Van Storch, 15 R. I. 41, 23 Atl. 39.

Texas.—Victoria First Nat. Bank *v.* Skidmore, (Civ. App. 1895) 30 S. W. 564; Morris *v.* Booth, (App. 1892) 18 S. W. 639; Babcock *v.* Milmo Nat. Bank, 1 Tex. App. Civ. Cas. § 817. See also Gourley *v.* Taylor, (App. 1891) 15 S. W. 731.

Vermont.— Peake *v.* Dorwin, 25 Vt. 28; Claremont Bank *v.* Wood, 10 Vt. 582. See also Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095.

Washington.— Harmon *v.* Hale, 1 Wash. Terr. 422, 34 Am. Rep. 816.

Wisconsin.— Irvine *v.* Adams, 48 Wis. 468, 4 N. W. 573, 33 Am. Rep. 817; Riley *v.* Gregg, 16 Wis. 666.

Wyoming.— Frank *v.* Snow, 6 Wyo. 42, 42 Pac. 484, 43 Pac. 78.

United States.— American, etc., Mortg. Corp. *v.* Marquam, 62 Fed. 960; Scott *v.* Scruggs, 60 Fed. 721, 9 C. C. A. 246; *In re* Goodwin, 10 Fed. Cas. No. 5,549, 5 Dill. 140, 17 Nat. Bankr. Reg. 257.

See 40 Cent. Dig. tit. "Principal and Surety," § 21.

53. *Alabama.*—Summerhill *v.* Tapp, 52 Ala. 227.

Georgia.— Chamblee *v.* Davie, 88 Ga. 205, 14 S. E. 195; Stewart *v.* Parker, 55 Ga. 656; Howell *v.* Lawrenceville Mfg. Co., 31 Ga. 663; Higdon *v.* Bailey, 26 Ga. 426.

Indiana.— Tharp *v.* Parker, 86 Ind. 102; Lamson *v.* Vevay First Nat. Bank, 82 Ind. 21; Albright *v.* Griffin, 78 Ind. 182; Arms *v.* Beitman, 73 Ind. 85; Davenport *v.* King, 63 Ind. 64.

Iowa.— Morgan *v.* Thompson, 60 Iowa 280, 14 N. W. 306; Murray *v.* Graham, 29 Iowa 520.

Kansas.— Whittenhall *v.* Korber, 12 Kan. 618.

Kentucky.— Neel *v.* Harding, 2 Metc. 247.

Missouri.— Patterson *v.* Brock, 14 Mo. 473.

New Hampshire.— Nichols *v.* Parsons, 6 N. H. 30, 23 Am. Dec. 706.

New Jersey.— Kaighn *v.* Fuller, 14 N. J. Eq. 419.

New York.— Elwood *v.* Deifendorf, 5 Barb. 398; Neimcewicz *v.* Gahn, 3 Paige 614 [*affirmed* in 11 Wend. 312].

North Carolina.— Torrence *v.* Alexander, 85 N. C. 143.

Tennessee.— Dozier *v.* Lea, 7 Humphr. 520.

Texas.— Roberts *v.* Bane, 32 Tex. 385; Burke *v.* Cruger, 8 Tex. 66, 59 Am. Dec. 102; Bonnell *v.* Prince, 11 Tex. Civ. App. 399, 32 S. W. 855.

Washington.— Culbertson *v.* Wilcox, 11 Wash. 522, 39 Pac. 954.

See 40 Cent. Dig. tit. "Principal and Surety," § 21.

Compare Farmers', etc., Bank *v.* De Shorb, 137 Cal. 685, 70 Pac. 771; Casey *v.* Gibbons, 136 Cal. 368, 68 Pac. 1032.

Actual knowledge to creditor may not be necessary. Fuller *v.* Quesnel, 63 Minn. 302, 65 N. W. 634.

Bad faith of creditor in not making inquiry may not be necessary to charge him with notice. Fuller *v.* Quesnel, 63 Minn. 302, 65 N. W. 634.

Knowledge of suretyship merely, as between two signers of an instrument, has been held not to change the primary liability of the surety to the creditor. California Nat. Bank *v.* Ginty, 108 Cal. 148, 41 Pac. 38; Damon *v.* Pardow, 34 Cal. 278; Hull *v.* Peer, 27 Ill. 312.

An accommodation maker is not, as respects a holder with notice, the principal debtor. *In re* Goodwin, 10 Fed. Cas. No. 5,549, 5 Dill. 140, 17 Nat. Bankr. Reg. 257. *Compare* Murray *v.* Judah, 6 Cow. (N. Y.) 484, holding that the drawer of a check for the accommodation of the payee is not a surety, although the indorsee knows that it was an accommodation check; that the drawer is a principal as between himself, the payee, and the holder; and that the payee is a surety.

An accepter for the accommodation of the drawer of a bill of exchange is not, as between the original parties, a surety of the drawer, even though the fact that the acceptance was for the accommodation of the drawer was known to the payee at the time. Israel *v.* Ayer, 2 S. C. 344.

Wife as surety.— The fact that a husband negotiated a loan for which he and his wife executed their note as principal, and that he received the money, is not notice to third persons that the wife signed as surety. Frank *v.* Snow, 6 Wyo. 42, 42 Pac. 484, 43 Pac. 78. See also Gahn *v.* Niemcewicz, 11 Wend. (N. Y.) 312, holding that where a husband and wife join in a mortgage of her inheritance to secure the debt of the husband, notice to the creditor that the mortgaged property is the inheritance of the wife is not sufficient to charge the creditor with notice that the wife stands in the relation of surety, since the money may have been obtained for the benefit of the wife's estate, or with a view of a gift to the husband.

Where a joint maker of a note had previously stated to the payee, naming the other joint makers, that he was going to "back up" and "stand behind" them, the speaker is a surety merely. Omaha Nat. Bank *v.* Johnson, 111 Wis. 372, 87 N. W. 237. A joint maker of a note wrote to an indorsee as follows: "Your notice concerning the note of George C. Hunt to hand. Under the circumstances of the case I shall resist my liability on the note. This is to notify you that you must take all needful legal steps to fasten on me any liability. You must sue Mr. Hunt as the law requires, and sue at once." As a surety, under Code (1896), § 3884, may require the creditor to sue the

appear as such in the instrument are sureties, is not shown by the sure fact that the former paid the interest on the debt.[54]

4. Express Contract[55]— a. In General. The contract of suretyship when express[56] should comply with all the essential requisites of express contracts in general.[57]

b. Qualification of Liability.[58] It is not necessary that the obligation of the principal and surety be equal,[59] and a surety is at liberty to qualify his liability either by designating the relation which he occupies,[60] or by limiting the amount for which he can be held liable.[61]

c. Agreement to Become Surety — (i) *In General.* A contract to pay another to become surety or to lend one his credit is not unlawful,[62] is based on a sufficient consideration,[63] and is binding upon the promising surety,[64] although the obligation between the principal and the creditor does not absolutely conform to the agreement to become a surety.[65]

(ii) *Operation and Effect.* An agreement to become a surety does not make the promisor one,[66] nor will an unsuccessful attempt to do so;[67] but if one has made an agreement to become a surety, he is liable for a breach of his contract, if it has been relied on, to the same extent as if he had become surety.[68] A person

principal by giving written notice, this letter sufficiently indicated that the writer was a surety. Alabama Nat. Bank *v.* Hunt, 125 Ala. 512, 28 So. 488.

54. Coffin *v.* Loomis, (Tex. Civ. App. 1897) 41 S. W. 511.

55. Obligation constituting parties cosureties see *supra*, I, B, 2.

56. See Hood *v.* Paddock-Hawley Iron Co., 53 Ill. App. 229; Kirby *v.* Studebaker, 15 Ind. 45; Alter *v.* Zunts, 27 La. Ann. 317; Beers *v.* Wolf, 116 Mo. 179, 22 S. W. 620; Allison *v.* Wood, 147 Pa. St. 197, 23 Atl. 559, 30 Am. St. Rep. 726; Reigart *v.* White, 52 Pa. St. 438.

57. See Contracts, 9 Cyc. 213 *et seq.*

58. Affecting right of contribution between cosureties see *infra*, IX, C, 1, d.

59. Gasquet *v.* Dimitry, 9 La. 585; Citizens' Nat. Bank *v.* Burch, 145 N. C. 316, 59 S. E. 71. See *supra*, II, D.

60. Crawford *v.* Jones, 24 Tex. 382. See also Hicks *v.* Hinde, 9 Barb. (N. Y.) 528. See also *supra*, I, B, 3, b.

61. New Orleans *v.* Waggaman, 31 La. Ann. 299; Brighton Bank *v.* Smith, 12 Allen (Mass.) 243, 90 Am. Dec. 144; Toucey *v.* Schell, 15 Misc. (N. Y.) 350, 37 N. Y. Suppl. 879; Citizens' Nat. Bank *v.* Burch, 145 N. C. 316, 59 S. E. 71.

Illustrations.— Where an amount is placed opposite each signature, each surety severally is liable for that amount only, although in the body of the instrument, after the part specifying all of these amounts, occurred the words, "for the payment of which well and truly to be made we bind ourselves, our heirs, representatives, administrators, and assigns, jointly and severally, by these presents." Butte *v.* Cohen, 9 Mont. 435, 24 Pac. 206. In Dangel *v.* Levy, 1 Ida. 722, it was held that where an injunction bond for two thousand dollars appeared to have "one thousand dollars" written and erased between the signature and seal of one of the sureties, the surety could not limit his liability as expressed in the body of the bond, if the amount were written before the bond was signed.

62. Givens *v.* Gridley, 106 S. W. 1192, 32 Ky. L. Rep. 825.

Covenant to become surety instead of another may be valid. Flinn *v.* McGonigle, 9 Watts & S. (Pa.) 75.

63. Givens *v.* Gridley, 106 S. W. 1192, 32 Ky. L. Rep. 825.

64. McKerall *v.* McMillen, 9 Rob. (La.) 19, enforcement by creditor under La. Civ. Code, art. 1884.

65. Webster *v.* Smith, 4 Ind. App. 44, 30 N. E. 139; Mann *v.* McDowell, 3 Pa. St. 357, 45 Am. Dec. 649.

66. Rice *v.* Moore, 1 Harr. (Del.) 452; Canal, etc., Co. *v.* Grayson, 4 La. Ann. 511; Vogelsang *v.* Taylor, (Tex. Civ. App. 1904) 80 S. W. 637.

67. Matthews *v.* Millsaps, 58 Miss. 564.

68. Van Riper *v.* Baker, 44 Iowa 450; Sleight *v.* Watson, 53 N. C. 10; Mann *v.* McDowell, 3 Pa. St. 357, 45 Am. Dec. 649.

Breach of contract generally see Contracts, 9 Cyc. 685.

Tender for signature.—A person having agreed to become surety on a note is not released from his agreement by failure to make formal demand that he sign it. Webster *v.* Smith, 4 Ind. App. 44, 30 N. E. 139. And if a bond be tendered for signature to one who has promised to execute it, it is not any defense that a cosurety has not executed it, or that the latter was not present, or that the latter afterward died. Horne *v.* Ramsdale, 11 L. J. Exch. 100, 9 M. & W. 329.

Creditor's knowledge of agreement.— In McKerall *v.* McMillan, 9 Rob. (La.) 19, it was held that, under Civ. Code, art. 1884, and Code Pr. art. 35, the creditor could enforce the agreement of a person with the principal to become a surety, although the creditor was ignorant of it at the time it was made. But *compare* Shiff *v.* Shiff, 20 La. Ann. 269.

who actually has not become a surety cannot be made liable by the false and fraudulent representation that he has become one.[69]

5. Implied or Quasi-Contract[70]**— a. In General.** While the relation of suretyship is never implied, but must be the result of an express contract,[71] it frequently, however, happens that contracts are made whose chief object is to accomplish some purpose other than to become liable for the debt, default, or miscarriage of another, but which by operation of law incidentally have that effect.[72]

b. By Execution of Joint Obligation. If two or more persons are jointly liable for the payment of money,[73] or for the performance of some act,[74] each is a principal for his proportionate share of the debt, or so far as his own acts are concerned, and a surety as to the shares or acts of the others; but in these cases the suretyship is restricted to those so jointly liable, and never can be imposed upon the creditor or obligee without his consent, as to him each is a principal as to the whole debt or duty.[75]

A covenant to relieve one who is a surety by becoming surety in his stead is properly sued upon in the name of such surety. Flinn *v.* McGonigle, 9 Watts & S. (Pa.) 75.

69. Hayes *v.* Burkam, 94 Ind. 311.

70. Obligation constituting parties cosureties see *supra*, I, B, 2.

71. See the following cases:

California.— Solomon *v.* Reese, 34 Cal. 28.

Connecticut.— Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74.

Georgia.— Cardin *v.* Jones, 23 Ga. 175.

Kentucky.— Milliken *v.* Dinning, 6 Bush 646.

Pennsylvania.— Tracy *v.* Pomeroy, 120 Pa. St. 14, 13 Atl. 514; Monroe *v.* Wallace, 2 Penr. & W. 173; Titzell *v.* Smeigh, 2 Leg. Chron. 271.

See 40 Cent. Dig. tit. "Principal and Surety," § 28; and Childs Suretyship 14.

72. Chicago, etc., R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896; Whitman *v.* Gaddie, 7 B. Mon. (Ky.) 591. See also Childs Suretyship 15; and *infra*, IV, D, 5, b-e.

There is no distinction between the operation and effect suretyship created by consent of the creditor and that which arises by operation of law. Wayman *v.* Jones, 58 Mo. App. 313.

A stock-holder may by operation of law become a surety for the corporation. Phœnix Warehousing Co. *v.* Badger, 6 Hun (N. Y.) 293 [*affirmed* in 67 N. Y. 294]. See Corporations, 10 Cyc. 649 *et seq.*

A surety for the price of school lands is liable as principal by statute. Powell *v.* Kettelle, 6 Ill. 491.

The surety of a master of a vessel acting as agent for the owner may be considered the surety of such owner. Eckford *v.* Wood, 5 Ala. 136.

Where a building contractor abandons the work before it is completed, and absconds, the guarantor of his contract, who elects to treat the failure and flight of his principal as settled facts and to coöperate with the owner in completing the work, becomes liable as a surety. Lender *v.* Kline, 167 Pa. St. 188, 31 Atl. 550.

Where parties exchange memorandum checks for mutual accommodation they stand in the relation of principal and surety to each other so long as their checks are outstanding and unpaid. Burdsall *v.* Chrisfield, 1 Disn. (Ohio) 51, 12 Ohio Dec. (Reprint) 481.

Where two persons purchased land as joint tenants and gave their joint bond for the purchase-money, and one of them paid more than his proportionate share, he was surety for the amount so paid over his proportion of the debt. Stokes *v.* Hodges, 11 Rich. Eq. (S. C.) 135.

73. *Alabama.*— Clark *v.* Dane, 128 Ala. 122, 28 So. 960; Bragg *v.* Patterson, 85 Ala. 233, 4 So. 716; Owen *v.* McGehee, 61 Ala. 440; Martin *v.* Baldwin, 7 Ala. 923.

California.— Chipman *v.* Morrill, 20 Cal. 130.

Georgia.— Waldrop *v.* Wolff, 114 Ga. 610, 40 S. E. 830.

Kentucky.— Bridgewater *v.* England, 62 S. W. 882, 23 Ky. L. Rep. 338.

Louisiana.— Daigle's Succession, 15 La. Ann. 594.

Maine.— Goodall *v.* Wentworth, 20 Me. 322.

Missouri.— See Reissaus *v.* Whites, 128 Mo. App. 135, 106 S. W. 603.

New Hampshire.— Henderson *v.* McDuffe, 5 N. H. 38, 20 Am. Dec. 557.

New York.— Crafts *v.* Mott, 4 N. Y. 604; Van Rensselaer *v.* Akin, 22 Wend. 549.

Ohio.— Still *v.* Holland, 1 Ohio Dec. (Reprint) 584, 10 West. L. J. 481.

Pennsylvania.— Sterling *v.* Stewart, 74 Pa. St. 445, 15 Am. Rep. 559.

South Carolina.— Stokes *v.* Hodges, 11 Rich. Eq. 135.

See 40 Cent. Dig. tit. "Principal and Surety," § 32.

Where an owner and occupier of land is compelled to pay arrears of tithes, a portion of which should have been paid by another owner and occupier, he can recover from such other owner and occupier. Christie *v.* Barker, 53 L. J. Q. B. 537.

74. Cox *v.* Thomas, 9 Gratt. (Va.) 312.

Each of two trustees is responsible for a breach of trust committed by the other. Lockhart *v.* Reilly, 1 De G. & J. 464, 27 L. J. Ch. 54, 58 Eng. Ch. 360, 44 Eng. Reprint 803.

75. Fitzgerald *v.* Nolan, 102 Iowa 283, 71 N. W. 224.

c. By Endorsement of Obligation. An indorser of a negotiable instrument, except an indorser "without recourse," [76] may be liable as a surety.[77] So the drawer of a bill of exchange may become a surety after its acceptance.[78] Again, an irregular or anomalous indorser [79] is sometimes presumed to be a surety.[80] A mortgagee may become surety for the mortgagor where by indorsement upon his mortgage he subordinates the same to a subsequent lien.[81] Accommodation parties, whether indorsers [82] or makers,[83] bear the relation of sureties to the party accommodated.

d. By Assumption of Indebtedness [84]— (i) *In General.* A common instance of involuntary suretyship is where one party to a contract, as a part of the agreement, assumes an indebtedness owing by the other, the one assuming the indebtedness becoming the principal, and the former debtor a surety,[85] at least as between themselves.[86]

(ii) *Upon Conveyance of Land.* A grantee of land who assumes a mortgage thereon,[87] or takes it subject to a lien existing at the time of the convey-

One maker of a promissory note, on paying his share, cannot claim the rights of a surety against the creditor as to the unpaid balance. Fitzgerald *v.* Nolan, 102 Iowa 283, 71 N. W. 224; Jump *v.* Johnson, 13 S. W. 843, 12 Ky. L. Rep. 100.

76. See Commercial Paper, 7 Cyc. 809 *et seq.*

77. Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716; Drew *v.* Robertson, 2 La. Ann. 592; Bryant *v.* Rudisell, 4 Heisk. (Tenn.) 656; Early *v.* Chamberlain, 1 Tex. App. Civ. Cas. § 920. See also Childs Suretyship 354; Commercial Paper, 7 Cyc. 825. But see Rice *v.* Dorrian, 57 Ark. 541, 22 S. W. 213, under Mansfield Dig. pars. 6396, 6397.

78. See Childs Suretyship 354; Commercial Paper, 7 Cyc. 642 *et seq.*

79. See Commercial Paper, 7 Cyc. 664 *et seq.*

"Indorser for collection."— Sawyer *v.* Macaulay, 18 S. C. 543.

80. See Childs Suretyship 354; Commercial Paper, 7 Cyc. 668.

81. Moses *v.* Home Bldg., etc., Assoc., 100 Ala. 465, 14 So. 412.

82. Humphrey *v.* Vertner, Freem. (Miss.) 251; Baker *v.* Martin, 3 Barb. (N. Y.) 634; Bryant *v.* Rudisell, 4 Heisk. (Tenn.) 656.

83. Lacy *v.* Lofton, 26 Ind. 324; Guild *v.* Butler, 127 Mass. 386; Baker *v.* Martin, 3 Barb. (N. Y.) 634; American Nat. Bank *v.* Junk Bros. Lumber, etc., Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492. See also Childs Suretyship 364; Commercial Paper, 7 Cyc. 725.

84. As changing relation see *infra*, IV, D, 6. **By partner** on retirement of principal or dissolution see *infra*, IV, D, 5, d, (III). **Effect of collateral agreement** see *infra*, IV, D, 5, e.

85. *Iowa.*— Malanaphy *v.* Fuller, etc., Mfg. Co., 125 Iowa 719, 101 N. W. 640.

Kansas.— Union Stove, etc., Works *v.* Caswell, 48 Kan. 689, 29 Pac. 1072, 16 L. R. A. 85.

Missouri.— American Nat. Bank *v.* Klock, 58 Mo. App. 335.

New York.— Berbling *v.* Glaser, 3 Misc. 624, 23 N. Y. Suppl. 118.

Texas.— Long *v.* Patton, 43 Tex. Civ. App. 11, 93 S. W. 519.

Vermont.— Bishop *v.* Day, 13 Vt. 81, 37 Am. Dec. 582.

See 40 Cent. Dig. tit. "Principal and Surety," § 33.

Where a railroad company gave a bond of indemnity to a county which had issued and delivered its bonds to the company, the company virtually becomes the principal debtor, and the county a surety. Washington, etc., R. Co. *v.* Cazenove, 83 Va. 744, 3 S. E. 433.

Where three trustees and executors mortgaged a leasehold, and afterward a new executor and trustee was appointed who succeeded to the interest of one of the original three who was released, the retiring trustee and executor became a surety. Canada Permanent Loan, etc., Co. *v.* Ball, 30 Ont. 557.

86. Gay *v.* Blanchard, 32 La. Ann. 497. In Goodson *v.* Cooley, 19 Ga. 599, a seller of property subject to a chattel mortgage which was assumed by the buyer did not become a surety as to the creditor. See *infra*, IV, D, 6; VIII, C, 3, b.

87. *Connecticut.*— Chapman *v.* Beardsley, 31 Conn. 115.

Illinois.— Flagg *v.* Geltmacher, 98 Ill. 293.

Indiana.— Oglebay *v.* Todd, 166 Ind. 250, 76 N. E. 238; Ellis *v.* Johnson, 96 Ind. 377.

Kansas.— Union Stone, etc., Works *v.* Caswell, 48 Kan. 689, 29 Pac. 672, 16 L. R. A. 85.

Massachusetts.— Rice *v.* Sanders, 152 Mass. 108, 24 N. E. 1079, 23 Am. St. Rep. 804, 8 L. R. A. 315.

Missouri.— Regan *v.* Williams, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 558; Orrick *v.* Durham, 79 Mo. 174; Fitzgerald *v.* Barker, 70 Mo. 685; Heim *v.* Vogel, 69 Mo. 529; American Nat. Bank *v.* Klock, 58 Mo. App. 335; Wayman *v.* Jones, 58 Mo. App. 313.

New Jersey.— Huyler *v.* Atwood, 26 N. J. Eq. 504.

New York.— Wysong *v.* Meyer, 58 N. Y. App. Div. 422, 69 N. Y. Suppl. 286; Paine *v.* Jones, 76 N. Y. 274 [*affirming* 14 Hun

ance to him,[88] or, as a part of the consideration, assumes any other indebtedness of his grantor,[89] becomes a principal as to the grantor.[90] If the grantee does not assume the mortgage or lien, but the grantor remains responsible for it as between the two, the grantee occupies the position of a surety.[91]

(III) *Upon Partnership Changes.* After a dissolution of a firm or after changes in its membership, agreements frequently are made, whereby the debts of the former firm are assumed by certain ones. Those who assume the debts are, as among themselves, the principals, and the others are considered sureties.[92]

577]; Calvo *v.* Davies, 73 N. Y. 211, 29 Am. Rep. 130 [*affirming* 8 Hun 222]; Perkins *v.* Squier, 1 Thomps. & C. 620. See also Murray *v.* Marshall, 94 N. Y. 611.

Pennsylvania.— Cook *v.* Berry, 193 Pa. St. 377, 44 Atl. 471.

Vermont.— Bishop *v.* Day, 13 Vt. 81, 37 Am. Dec. 582.

West Virginia.—Curry *v.* Hale, 15 W. Va. 867.

Wisconsin.— Palmeter *v.* Carey, 63 Wis. 426, 21 N. W. 793, 23 N. W. 586.

United States.— Union Mut. L. Ins. Co. *v.* Hanford, 27 Fed. 588 [*affirmed* in 143 U. S. 187, 12 S. Ct. 437, 36 L. ed. 118].

England.— Joice *v.* Duffy, 5 Can. L. J. 141.

Canada.— Maloney *v.* Campbell, 28 Can. Sup. Ct. 228 [*affirming* 24 Ont. App. 224]; Ontario Trusts Corp. *v.* Hood, 27 Ont. 135; Campbell *v.* Robinson, 27 Grant Ch. (U. C.) 634; Irving *v.* Boyd, 15 Grant Ch. (U. C.) 157; Mathers *v.* Helliwell, 10 Grant Ch. (U. C.) 172.

See 40 Cent. Dig. tit. "Principal and Surety," § 33; and MORTGAGES, 27 Cyc. 1356.

The grantee, by assuming the payment of the mortgage, does not make it his personal debt to the extent that his heirs can compel his administrator to discharge it. *In re* Hunt, 19 R. I. 139, 32 Atl. 204, 61 Am. St. Rep. 743.

Transfer of bond for title.—A purchaser of real estate, holding a bond for title, by a transfer of the bond becomes in effect a surety for the payment of the notes given for the purchase-money. Hodges *v.* Elyton Land Co., 109 Ala. 617, 20 So. 23.

88. Monroe *v.* Wallace, 2 Penr. & W. (Pa.) 173.

89. Ellis *v.* Conrad Seipp Brewing Co., 207 Ill. 291, 69 N. E. 808; Hurd *v.* Wing, 76 N. Y. App. Div. 506, 78 N. Y. Suppl. 574; Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 110 Am. St. Rep. 946, 4 L. R. A. 666.

90. See cases cited *supra*, notes 86–88.

In some jurisdictions the mortgagee is not required to recognize the relation thus created, especially where he has no right against the grantee personally. Wilson *v.* Land Security Co. 26 Can. Sup. Ct. 149; Forster *v.* Ivey, 32 Ont. 175; Aldous *v.* Hicks, 21 Ont. 95.

91. Barnes *v.* Mott, 64 N. Y. 397, 21 Am. Rep. 625 [*affirming* 6 Daly 150]; Lowry *v.* McKinney, 68 Pa. St. 294; Magill *v.* Brown, 20 Tex. Civ. App. 662, 50 S. W. 143, 642. But see Lennig *v.* Harrisonburg Land, etc., Co., 107 Va. 458, 59 S. E. 400, holding that where defendant improvement company sold certain lots to complainant, which, with the improvement company's remaining property, were subject to a vendor's lien, such transaction did not create the relation of principal and surety between complainant and the improvement company, in so far as the lien was effective against the land so conveyed; complainant having paid no part of the lien debt, and not being personally liable therefor.

Where the property is subject to several liens, some of which are assumed by the grantee and others by the grantor, the grantor and grantee will occupy the position of surety as to the respective debts. Snyder *v.* Robinson, 35 Ind. 311, 9 Am. Rep. 338.

92. *Florida.*— West *v.* Chasten, 12 Fla. 315.

Georgia.—Preston *v.* Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124.

Illinois.— Chandler *v.* Higgins, 109 Ill. 602; Moore *v.* Topliff, 107 Ill. 241. *Compare* Buchanan *v.* Meisser, 105 Ill. 638.

Indiana.— Bays *v.* Connor, 105 Ind. 415, 5 N. E. 18; Williams *v.* Boyd, 75 Ind. 286.

Michigan.— Walter A. Wood Mowing, etc., Mach. Co. *v.* Oliver, 103 Mich. 326, 61 N. W. 507; Smith *v.* Sheldon, 35 Mich. 42, 24 Am. Rep. 529.

Minnesota.— Leithauser *v.* Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336.

Mississippi.— Graham *v.* Thornton, (1891) 9 So. 292.

Missouri.— Burnside *v.* Fetzner, 63 Mo. 107.

Nevada.— Barber *v.* Gillson, 18 Nev. 89, 1 Pac. 452.

New York.— Sizer *v.* Ray, 87 N. Y. 220; Morss *v.* Gleason, 64 N. Y. 204; Dodd *v.* Dreyfus, 17 Hun 600; Thurber *v.* Corbin, 51 Barb. 215; Waddington *v.* Vredenbergh, 2 Johns. Cas. 227.

Ohio.— Butler *v.* Birkey, 13 Ohio St. 514.

Pennsylvania.— Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033; Shamburg *v.* Abbott, 112 Pa. St. 6, 4 Atl. 518.

Tennessee.— Bryan *v.* Henderson, 88 Tenn. 23, 12 S. W. 338.

Texas.— Hall *v.* Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861; Gourley *v.* Tyler, (App. 1891) 15 S. W. 731.

Wisconsin.— Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42.

England.— Wilson *v.* Lloyd, L. R. 16 Eq. 60, 42 L. J. Ch. 559, 28 L. T. Rep. N. S. 331, 21 Wkly. Rep. 507.

Canada.— Allison *v.* McDonald, 23 Can. Sup. Ct. 635; Munroe *v.* O'Neil, 1 Manitoba 245.

So too the purchaser of a firm's business, by assuming the firm's debts, becomes the principal and the former parties are sureties therefor.[93]

e. By Mortgage[94] or Pledge.[95] One of the most common instances of real suretyship is a mortgage[96] or pledge[97] of property to secure a third person's debt. The extent of the interest of the surety in the property is immaterial.[98] A married woman mortgaging her property for her husband's debt in which she does not have a personal interest is a surety.[99] Where a prior mortgagee of land agrees to subordinate his lien to that of a subsequent mortgage, he occupies the position of a real surety as to the indebtedness secured by such subsequent mortgage.[1]

6. Changes in Relation[2] — a. In General. Subsequent dealings between the parties to a contract may cause the relation of principal and surety to arise;[3] and the respective liabilities of principal and surety may be reversed,[4] so that the principal becomes the surety,[5] and the surety the principal.[6] Subsequent arrange-

See 38 Cent. Dig. tit. "Partnership," §§ 487, 725; and Partnership, 30 Cyc. 612, 708.

Compare Wolters *v.* Henningsan, 114 Cal. 433, 46 Pac. 277.

In some jurisdictions the creditor is not obliged to respect the relation, although informed of the change. Swire *v.* Redman, 1 Q. B. D. 536, 35 L. T. Rep. N. S. 470, 24 Wkly. Rep. 1069; Jones *v.* Dunbar, 32 U. C. C. P. 136.

93. Malanaphy *v.* Fuller, etc., Mfg. Co., 125 Iowa 719, 101 N. W. 640, 106 Am. St. Rep. 332; Berbling *v.* Glaser, 3 Misc. (N. Y.) 624, 23 N. Y. Suppl. 118; Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42.

94. **Chattel mortgage** generally see Chattel Mortgages, 6 Cyc. 980.

95. **Pledge** generally see Pledges, *ante*, p. 779.

96. *California.*— Sather Banking Co. *v.* Arthur R. Briggs Co., 138 Cal. 724, 72 Pac. 352; Spear *v.* Ward, 20 Cal. 659.

Georgia.— White *v.* Ault, 19 Ga. 551.

Iowa.— Christner *v.* Brown, 16 Iowa 130.

Michigan.— Metz *v.* Todd, 36 Mich. 473.

New York.—Albion Bank *v.* Burns, 46 N. Y. 170; Averill *v.* Loucks, 6 Barb. 470; Gahn *v.* Niemcewicz, 11 Wend. 312. *Compare* Wilson *v.* Hinman, 182 N. Y. 408, 75 N. E. 236, 108 Am. St. Rep. 820, 3 L. R. A. N. S. 232 [*reversing* 99 N. Y. App. Div. 41, 90 N. Y. Suppl. 746].

North Carolina.—Weil *v.* Thomas, 114 N. C. 197, 19 S. E. 103; Hinton *v.* Greenleaf, 113 N. C. 6, 18 S. E. 56.

Texas.— Westbrook *v.* Belton Nat. Bank, 97 Tex. 246, 77 S. W. 942.

Wisconsin.— Leffingwell *v.* Freyer, 21 Wis. 392.

See 40 Cent. Dig. tit. "Principal and Surety," § 34.

A joint mortgage to secure the separate debts of the mortgagors makes each a principal as to his debt, and a surety as to the debts of the others. Van Rensselaer *v.* Akin, 22 Wend. (N. Y.) 549.

A partner who mortgages his separate property to secure a firm debt is a surety. Averill *v.* Loucks, 6 Barb. (N. Y.) 470. *Contra*, Tiffany *v.* Crawford, 14 N. J. Eq. 278.

97. Price *v.* Dime Sav. Bank, 124 Ill. 317, 15 N. E. 754, 7 Am. St. Rep. 367; Reed *v.* Cramb, 22 Ill. App. 34; Allis *v.* Ware, 28 Minn. 166, 9 N. W. 666; Boyd *v.* Robinson, 13 Ohio Cir. Ct. 211, 7 Ohio Cir. Dec. 83; Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425.

98. Townsend *v.* Sullivan, 3 Cal. App. 115, 84 Pac. 435; McBride *v.* Potter-Lovell Co., 169 Mass. 7, 47 N. E. 242, 61 Am. St. Rep. 265; Gould *v.* Central Trust Co., 6 Abb. N. Cas. (N. Y.) 381.

The limit of the liability of a real surety is the property. Van Orden *v.* Durham, 35 Cal. 136.

99. Gahn *v.* Niemcewicz, 11 Wend. (N. Y.) 312; Weil *v.* Thomas, 114 N. C. 197, 19 S. E. 103; Hinton *v.* Greenleaf, 113 N. C. 6, 18 S. E. 56; Angel *v.* Miller, 16 Tex. Civ. App. 679, 39 S. W. 1092; Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843 [*affirming* 28 Fed. 346].

1. Moses *v.* Home Bldg., etc., Assoc., 100 Ala. 465, 14 So. 412; Rowan *v.* Sharps' Rifle Mfg. Co., 33 Conn. 1.

2. **Obligation constituting parties cosureties** see *supra*, I, B, 2.

3. De Bruin *v.* Starr, 3 Ohio Dec. (Reprint) 306.

Failure of consideration of a note does not cause the maker to become a surety for the payee who has indorsed it. Shank *v.* Washington Exch. Bank, 124 Ga. 508, 52 S. E. 621.

4. Chaplin *v.* Baker, 124 Ind. 385, 24 N. E. 233; McTaggart *v.* Dolan, 86 Ind. 314; Freeland *v.* Van Campen, 2 Abb. Dec. (N. Y.) 184, 1 Keyes 39, 36 How. Pr. 29.

5. Rowan *v.* Sharps' Rifle Mfg. Co., 33 Conn. 1; Chapman *v.* Beardsley, 31 Conn. 115; Miller *v.* Stem, 12 Pa. St. 383; Downer *v.* Baxter, 30 Vt. 467; Bishop *v.* Day, 13 Vt. 81, 37 Am. Dec. 582; Vary *v.* Norton, 6 Fed. 808.

If the obligation of a principal is surrendered for another in which he is a surety merely, he is entitled to the rights of a surety. Miller *v.* Stem, 12 Pa. St. 383.

The maker of two promissory notes being about to be sued, his brother agreed with the payee to pay a fixed sum, or certain instalments so long as the said sum remained unpaid, the notes to be inoperative so long as the payments were made. Under this agreement the two notes became security for the performance of the brother's contract. Beech *v.* Ford, 7 Hare 208, 27 Eng. Ch. 208, 68 Eng. Reprint 85.

6. See *infra*, IV, D, 6, b, c.

ments may reëstablish the original relation, so that the surety will be entitled to all the rights of such position.[7]

b. From Surety to Principal.[8] A surety may become principal by some new arrangement between himself and the creditor irrespective of the principal debtor;[9] or the surety, by arrangement with the principal, may assume the indebtedness.[10] A surety does not become a principal by consenting to a change in the contract,[11] by giving a new obligation to the creditor in place of the old one,[12] by forbearance granted to him by the creditor,[13] by making a payment and agreeing to an extension,[14] by giving a mortgage to the creditor,[15] by losing security without his fault,[16] by receiving indemnity from the principal,[17] or by a gift from the principal of a part of the proceeds of the note on which he is surety.[18] Where one of two or more joint debtors undertakes to pay the entire indebtedness, he becomes the principal, and the remainder the sureties;[19] or if the surety receives part of the debt in money from the principal, they become joint debtors.[20]

c. Notice to and Acceptance by Creditor. Whether the creditor is compelled to recognize the changed relation when informed of it, there is lack of harmony in the decisions. In some jurisdictions the creditor is obliged to respect the rights of the surety;[21] in others he may ignore the relation unless he choose to accept the surety as such.[22]

7. Remsen *v.* Beekman, 25 N. Y. 552.

8. As discharging cosurety see *infra*, VIII, E, 2.

9. Reade *v.* Lowndes, 23 Beav. 361, 3 Jur. N. S. 877, 26 L. J. Ch. 793, 53 Eng. Reprint 142.

10. *Indiana.*— Crim *v.* Fleming, 123 Ind. 438, 24 N. E. 358.

Kentucky.— U. S. Bank *v.* Stewart, 4 Dana 27.

New York.— Williams *v.* Shelly, 37 N. Y. 375.

Virginia.— Rhea *v.* Preston, 75 Va. 757.

Canada.— Bailey *v.* Griffith, 40 U. C. Q. B. 418.

See 40 Cent. Dig. tit. "Principal and Surety," § 36.

Where a contractor assigns the contract to one of his sureties, the latter assumes the character and responsibilities of the principal. Gray *v.* McDonald, 19 Wis. 213.

11. Mason City Independent School Dist. *v.* Reichard, 39 Iowa 168.

12. Merriken *v.* Godwin, 2 Del. Ch. 236; Merchants' Nat. Bank *v.* Eyre, 107 Iowa 13, 77 N. W. 498; Whitaker *v.* Smith, 4 Pick. (Mass.) 83.

Under Ky. Rev. St. c. 97, § 11, a surety in a judgment debt who signs a bond by which that judgment is replevied is a principal in such bond. Milliken *v.* Dinning, 6 Bush 646.

13. Cox *v.* Jeffries, 73 Mo. App. 412.

14. Hayward *v.* Fullerton, 75 Iowa 371, 39 N. W. 651.

15. Cumming *v.* Montreal Bank, 15 Grant Ch. (U. C.) 686.

16. Citizens' Bank *v.* Barnes, 70 Iowa 412, 30 N. W. 857.

17. Kerr *v.* Hough, 51 S. W. 813, 21 Ky. L. Rep. 497; Blackstone Bank *v.* Hill, 10 Pick. (Mass.) 129.

18. Fraser *v.* McConnell, 23 Ga. 368.

19. *New Jersey.*— Shute *v.* Taylor, 61 N. J. L. 256, 39 Atl. 663.

New York.— Crafts *v.* Mott, 4 N. Y. 604.

Vermont.— Downer *v.* Baxter, 30 Vt. 467.

Virginia.— Buchanan *v.* Clark, 10 Gratt. 164.

United States.— Vary *v.* Norton, 6 Fed. 808.

England.— Rouse *v.* Bradford Banking Co., [1894] A. C. 586, 63 L. J. Ch. 890, 71 L. T. Rep. N. S. 522, 6 Reports 349, 43 Wkly. Rep. 78; Maingay *v.* Lewis, Ir. R. 5 C. L. 229.

See 40 Cent. Dig. tit. "Principal and Surety," § 36.

20. Smith *v.* Steele, 25 Vt. 427, 60 Am. Dec. 376.

Where a guardian loaned his ward's money to a firm composed of himself and one of the sureties on his bond, such surety becomes a principal as to a cosurety on the bond. Roberson *v.* Tonn, 76 Tex. 535, 13 S. W. 385.

21. *Indiana.*— McTaggart *v.* Dolan, 86 Ind. 314; Williams *v.* Boyd, 75 Ind. 286.

Michigan.— Walter A. Wood Mowing, etc., Mach. Co. *v.* Oliver, 103 Mich. 326, 61 N. W. 507; Smith *v.* Shelden, 35 Mich. 42, 24 Am. Rep. 529.

New York.— Colgrove *v.* Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Remsen *v.* Beekman, 25 N. Y. 552.

Pennsylvania.— Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033.

Wisconsin.— Gates *v.* Hughes, 44 Wis. 332.

United States.— Union Mut. L. Ins. Co. *v.* Hanford, 143 U. S. 187, 12 S. Ct. 437, 36 L. ed. 118.

England.— Rouse *v.* Bradford Banking Co., [1894] A. C. 586, 63 L. J. Ch. 890, 71 L. T. Rep. N. S. 522, 6 Reports 349, 43 Wkly. Rep. 78; Maingay *v.* Lewis, Ir. R. 5 C. L. 229. But see Swire *v.* Redman, 1 Q. B. D. 536, 35 L. T. Rep. N. S. 470, 24 Wkly. Rep. 1069.

Canada.— Bailey *v.* Griffith, 40 U. C. Q. B. 418.

See 40 Cent. Dig. tit. "Principal and Surety," § 38.

22. *Alabama.*— Hall *v.* Jones, 56 Ala. 493.

Maine.— Patch *v.* King, 29 Me. 448.

Missouri.— Skinner *v.* Hitt, 32 Mo. App. 402.

7. Evidence of Existence of Relation[23]— **a. In General.** Proof of execution is subject to the rules relating to weight and sufficiency of evidence in general.[24]

b. Presumptions.[25] Generally there is no presumption that any of two or more parties to a contract are sureties;[26] nor, if it be known that some are sureties, is there any presumption, from the order of the names, which those sureties are;[27] but the creditor may be presumed to know that one person is the principal[28] if such person has obtained all of the benefit of the contract,[29] as by receiving all of the money,[30] or if the contract was entered into on account of a debt due from one person only.[31] If the contract be joint, there is knowledge of such suretyship as arises from joint liability.[32]

Ohio.— Rawson *v.* Taylor, 30 Ohio St. 389, 27 Am. Rep. 464.

Texas.— A. F. Shapleigh Hardware Co. *v.* Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783; White *v.* Boone, 71 Tex. 712, 12 S. W. 51; Behrns *v.* Rogers, (Civ. App. 1897) 40 S. W. 419.

Virginia.— William & Mary College *v.* Powell, 12 Gratt. 372.

Washington.— Wadhams *v.* Page, 1 Wash. 420, 25 Pac. 462.

West Virginia.— Barnes *v.* Boyers, 34 W. Va. 303, 12 S. E. 708.

See 40 Cent. Dig. tit. "Principal and Surety," § 38; and *infra*, VIII, E, 2, b.

In New Jersey the creditor is not obliged to recognize the changed relation at law; the surety's remedy being in chancery. Shute *v.* Taylor, 61 N. J. L. 256, 39 Atl. 663.

23. Admissions generally see Evidence, 16 Cyc. 938.

Commercial paper generally see Commercial Paper, 8 Cyc. 262 *et seq.*

Evidence see also VII, H, 7; IX, B, 5, g; IX, C, 1, g, (VIII).

24. See Evidence, 17 Cyc. 753 *et seq.* See also Greene *v.* Anderson, 102 Ky. 216, 43 S. W. 195, 19 Ky. L. Rep. 1187; Black *v.* McCarley, 104 S. W. 987, 31 Ky. L. Rep. 1198; American Bonding Co. *v.* Loeb, 47 Wash. 447, 92 Pac. 282.

Illustrations.— In Com. *v.* Scanlon, 21 Pa. Co. Ct. 665, one whose name was signed as surety, testified that she did not sign. The principal and two others testified that she did; and a justice of the peace testified that she must have signed it or he would not have certified to an acknowledgment by her, although he did not have any recollection about the matter. It was held that the evidence was not sufficient to establish the fact that the surety did not sign. But in Reg. *v.* Chesley, 16 Can. Sup. Ct. 306, the surety swore that he signed the bond in blank, and did not make any affidavit of justification. The attesting witness and the magistrate who certified the execution of the bond swore that the surety must have executed the bond properly, or the action taken by them would not have been taken. It was held that the weight of evidence was in favor of the due execution of the bond.

Whether a married woman is surety on a note or other instrument is to be determined by the evidence, and controlled by the principles applicable to principals and sureties generally. Black *v.* McCarley, 104 S. W. 987, 31 Ky. L. Rep. 1198.

25. Presumption from: Method of execution see *infra*, IV, D, 7, b. Use of "surety" or "security" see *infra*, IV, D, 7, d, (II). See also IV, D, 9, b, (III); VIII, H, 7, a.

26. *Alabama.*— Johnson *v.* King, 20 Ala. 270.

Illinois.— Paul *v.* Berry, 78 Ill. 158.

Indiana.— Mullendore *v.* Wertz, 75 Ind. 431, 39 Am. Rep. 155; Chandler *v.* Ruddick, 1 Ind. 391.

Massachusetts.— Wilson *v.* Foot, 11 Metc. 285.

Minnesota.— Agnew *v.* Merritt, 10 Minn. 308.

New Hampshire.— Derry Bank *v.* Baldwin, 41 N. H. 434.

See 40 Cent. Dig. tit. "Principal and Surety," § 22.

That the first or any number less than all of the signers of an instrument are principals and the others sureties is not presumed. Summerhill *v.* Tapp, 52 Ala. 227. See also cases cited *supra*, this note.

27. Summerhill *v.* Tapp, 52 Ala. 227; Deering *v.* Veal, 78 S. W. 886, 25 Ky. L. Rep. 1809.

28. See cases cited *infra*, notes 29–32.

Rebuttable.— Presumption that one is a principal and not a surety may be rebutted by proper evidence. Harvey *v.* Osborn, 55 Ind. 535; Crumrine *v.* Crumrine, 14 Ind. App. 641, 43 N. E. 322; Hart *v.* Russellville Bank, 105 S. W. 934, 32 Ky. L. Rep. 338; Whitaker *v.* Smith, 4 Pick. (Mass.) 83.

Where a note remains in the hands of the payee he is presumed to know the relation of the other parties thereto. Ward *v.* Stout, 32 Ill. 399; Champion *v.* Robertson, 4 Bush (Ky.) 17.

29. Sanders' Estate, 4 Misc. (N. Y.) 343, 24 N. Y. Suppl. 317 [*affirmed* in 82 Hun 62, 31 N. Y. Suppl. 65].

30. *Illinois.*— Ward *v.* Stout, 32 Ill. 399.

Kentucky.— Champion *v.* Robertson, 4 Bush 17.

Maine.— Cummings *v.* Little, 45 Me. 183.

Vermont.— Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095.

Wisconsin.— Omaha Nat. Bank *v.* Johnson, 111 Wis. 372, 87 N. W. 237.

See 40 Cent. Dig. tit. "Principal and Surety," § 22.

31. Brannon *v.* Irons, 19 Ind. App. 305, 49 N. E. 469.

32. Jump *v.* Johnson, 13 S. W. 843, 12 Ky.

c. Burden of Proof. The burden of proof is upon one asserting the non-existence of the apparent relation of principal and surety which appears from the face of the instrument.[33]

d. Language of Contract — (I) *In General.* The relation may be shown from the language of the contract,[34] although it is not necessary that the instrument specify the relation.[35] As to whether a contract of suretyship has been entered into, the law regards the essence rather than the form of the language used,[36] and the name given to the transaction by the parties does not govern.[37] The language, however, must be sufficient to constitute such a contract.[38]

(II) *Words "Surety" and "Security."* If the word "surety" or "security" is affixed to some of the names, the presumption is that those are sureties, and the others principals;[39] although the use of the word "surety" does not indicate necessarily that the promise is collateral, or that there is another primarily liable.[40]

e. Parol Evidence.[41] In most jurisdictions the true relation between the parties may be shown by parol evidence,[42] and this even though the instrument is

L. Rep. 100; Templeton *v.* Shakley, 107 Pa. St. 370; Holt *v.* Bodey, 18 Pa. St. 207.

Where a note is presented to the payee signed by two persons, and he loans the money to them as joint makers, supposing them to be such, knowledge that one of them is a surety is not shown, although the payee never saw that person. Stovall *v.* Adair, 9 Okla. 620, 60 Pac. 282.

33. Flanagan *v.* Post, 45 Vt. 246. *Compare,* however, Farmers', etc., Bank *v.* De Shorb, 137 Cal. 685, 70 Pac. 771; Casey *v.* Gibbons, 136 Cal. 368, 68 Pac. 1032.

Burden is on the signer to show want of execution. Marshall *v.* Shelburne, 14 Can. Sup. Ct. 737, 7 Can. L. T. Occ. Notes 130.

Burden of proof see also IV, D, 9, b, (III); VII, H, 7, a; IX, B, 5, g; IX, C, 1, g, (VIII).

34. See *infra,* V, A–C.

Where two persons undertake to be responsible for the indebtedness of one of them, the undertaking of the other is one of suretyship. Bartholomay Brewery Co. *v.* Thomeier, 2 Pa. Super. Ct. 345, 38 Wkly. Notes Cas. 541.

35. Taylor *v.* Acom, 1 Indian Terr. 436, 45 S. W. 130.

Under the old common law the instrument must show the relation in the case of joint obligors, or the obligee must accept the surety as such, in order that the surety might be affected by the acts of the obligee. Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283; Willis *v.* Ives, 1 Sm. & M. (Miss.) 307; McCall *v.* Evans, 2 Brev. (S. C.) 3; Dozier *v.* Lea, 7 Humphr. (Tenn.) 520; Deberry *v.* Adams, 9 Yerg. (Tenn.) 52.

36. Gasquet *v.* Thorn, 14 La. 506; Nolte *v.* His Creditors, 7 Mart. N. S. (La.) 9; Wysong *v.* Meyer, 58 N. Y. App. Div. 422, 69 N. Y. Suppl. 286.

37. Langan *v.* Hewett, 13 Sm. & M. (Miss.) 122.

38. Allaway *v.* Duncan, 16 L. T. Rep. N. S. 264, 15 Wkly. Rep. 711.

A recommendation for the education of infants, with an assurance that the writer himself was willing to go toward its object as far as a certain sum, was a promise to pay that sum for the purpose. Dowell *v.* Wilson, Coop. t. Brough. 504, 47 Eng. Reprint 179.

Where an order was given to deliver goods to a third person, the order made the writer either the principal, or made him answerable if the third person did not pay for them, although the order did not contain any promise to pay. Langdale *v.* Parry, 2 D. & R. 337, 1 L. J. K. B. O. S. 70, 16 E. C. L. 90.

Contracts of suretyship see Hood *v.* Paddock-Hawley Iron Co., 53 Ill. App. 229; Kirby *v.* Studebaker, 15 Ind. 45; Alter *v.* Zunts, 27 La. Ann. 317; Beers *v.* Wolf, 116 Mo. 179, 22 S. W. 620; Allison *v.* Wood, 147 Pa. St. 197, 23 Atl. 559, 30 Am. St. Rep. 726; Mann *v.* McDowell, 3 Pa. St. 357, 45 Am. Dec. 649.

Contracts of primary liability see Watson *v.* Beabout, 18 Ind. 281; Cassity *v.* Robinson, 8 B. Mon. (Ky.) 279; Hunt *v.* Adams, 5 Mass. 358, 4 Am. Dec. 68; Giltinan *v.* Strong, 64 Pa. St. 242.

39. Lathrop *v.* Wilson, 30 Vt. 604; Harper *v.* McVeigh, 82 Va. 751, 1 S. E. 193.

Other presumptions see *supra,* IV, D, 7, b.

40. Giltinan *v.* Strong, 64 Pa. St. 242.

41. **Parol evidence:** Generally see Evidence, 17 Cyc. 567. To show condition upon which surety signed see Evidence, 17 Cyc. 595 note 50, 646 note 56. With respect to bill or note see Commercial Paper, 8 Cyc. 263 note 92.

42. *Alabama.*—State Branch Bank *v.* James, 9 Ala. 949.

Arkansas.— Kendall *v.* Milligan, 34 S. W. 78; Vestal *v.* Knight, 54 Ark. 97, 15 S. W. 17; State Bank *v.* Watkins, 6 Ark. 123.

Connecticut.— Orvis *v.* Newell, 17 Conn. 97.

Florida.— Bowen *v.* Darby, 14 Fla. 202.

Georgia.— Higdon *v.* Bailey, 26 Ga. 426.

Illinois.— Ward *v.* Stout, 32 Ill. 399; Kennedy *v.* Evans, 31 Ill. 258; School Trustees *v.* Southard, 31 Ill. App. 359.

Indiana.— Harvey *v.* Osborn, 55 Ind. 535.

Iowa.— Piper *v.* Newcomer, 25 Iowa 221; Corielle *v.* Allen, 13 Iowa 289; Kelly *v.* Gillespie, 12 Iowa 55, 79 Am. Dec. 516.

Kansas.— Rose *v.* Williams, 5 Kan. 483; Rose *v.* Madden, 1 Kan. 445.

under seal,[43] as this is not in contradiction of the instrument;[44] but in some jurisdictions the rule is otherwise.[45]

8. Execution of Written Instrument[46]**— a. In General.** The most frequent method of becoming a surety is by the execution of a written instrument to that effect.[47]

b. By Principal[48]**—(i)** *In General.* As to whether the principal is required to sign the instrument in order that the sureties may be held liable thereon, there is some conflict of authority. The better rule seems to be that when the failure of the principal to sign the instrument affects the surety injuriously, the surety is not bound.[49] But when the failure of the principal to sign the instrument in no way affects the rights or liability of the surety, the instrument is valid, and the surety is bound,[50] unless the surety signed upon the express condition that

Kentucky.— Emmons *v.* Overton, 18 B. Mon. 643; Farmers', etc., Bank *v.* Cosby, 4 J. J. Marsh. 366; Weller *v.* Ralston, 89 S. W. 698, 28 Ky. L. Rep. 572.

Louisiana.— Butler *v.* Ford, 9 Rob. 112; Ross *v.* Ross, 9 Rob. 173; Roberts *v.* Jenkins, 19 La. 453; Louisiana State Bank *v.* Rowell, 7 Mart. N. S. 341.

Massachusetts.— Harris *v.* Brooks, 21 Pick. 195, 32 Am. Dec. 254.

Minnesota.— Strong *v.* Baker, 25 Minn. 442.

Missouri.— Mechanics' Bank *v.* Wright, 53 Mo. 153.

New Hampshire.— Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

New York.— Hubbard *v.* Gurney, 64 N. Y. 457 [*overruling* Benjamin *v.* Arnold, 2 Hun 447, 5 Thomps. & C. 54; Campbell *v.* Tate, 7 Lans. 370]; Mohawk, etc., R. Co. *v.* Costigan, 2 Sandf. Ch. 306.

Ohio.— McDowell *v.* Reese, 10 Ohio Dec. (Reprint) 303, 20 Cinc. L. Bul. 102, construing Rev. St. § 5832; Smith *v.* Bing, 3 Ohio 33; Reddish *v.* Pentheuse, Wright 538.

Oklahoma.— Stovall *v.* Adair, 9 Okla. 620, 60 Pac. 282.

Tennessee.— Fowler *v.* Alexander, 1 Heisk. 425.

Texas.— Burke *v.* Cruger, 8 Tex. 66, 58 Am. Dec. 102; Kellogg *v.* Iron City Nat. Bank, (Civ. App. 1894) 26 S. W. 856.

Vermont.— Bradley Fertilizer Co. *v.* Caswell, 65 Vt. 231, 26 Atl. 956; Ballard *v.* Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; Harrington *v.* Wright, 48 Vt. 427; Flanagan *v.* Post, 45 Vt. 246.

Washington.— Harmon *v.* Hale, 1 Wash. Terr. 422, 34 Am. Rep. 816.

United States.— *In re* Goodwin, 10 Fed. Cas. No. 5,541, 5 Dill. 140.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 22, 61.

If one contract in terms as principal, he cannot, although actually a surety, protect himself as such against the claims of the creditor. Picot *v.* Signiago, 22 Mo. 587; Dunham *v.* Downer, 31 Vt. 249; Claremont Bank *v.* Wood, 10 Vt. 582.

In a few jurisdictions the relation may be shown in a court of equity, but not at law. Davis *v.* Mikell, Freem. (Miss.) 548; Farrington *v.* Gallaway, 10 Ohio 543; Kerr *v.* Baker, Walk. (Miss.) 140; McCall *v.* Evans, 2 Brev. (S. C.) 3; Rees *v.* Berrington, 2 Ves. Jr. 542, 30 Eng. Reprint 765.

43. Rogers *v.* Township School Trustees, 46 Ill. 428; Smith *v.* Clopton, 48 Miss. 66; Smith *v.* Doak, 3 Tex. 215. *Contra*, Green *v.* Lake, 2 Mackay (D. C.) 162; Willis *v.* Ives, 1 Sm. & M. (Miss.) 307, decided prior to the passage of the statute changing the rule as to sealed instruments.

Where parties to a sealed instrument bind themselves as principals, they are estopped to show that they were only bound as sureties. Sprigg *v.* Mt. Pleasant Bank, 10 Pet. (U. S.) 257, 9 L. ed. 416, 14 Pet. 201, 10 L. ed. 419.

At law parties to an instrument under seal cannot show that they signed as sureties and not as principals. Hubbard *v.* Gurney, 64 N. Y. 457; Dozier *v.* Lea, 7 Humphr. (Tenn.) 520; Deberry *v.* Adams, 9 Yerg. (Tenn.) 52.

44. Pridgen *v.* Buchannon, 27 Tex. 589.

45. Shriver *v.* Lovejoy, 32 Cal. 574; Bull *v.* Allen, 19 Conn. 101; Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283; Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. 534 (in the case of bonds); York City, etc., Banking Co. *v.* Bainbridge, 45 J. P. 158, 43 L. T. Rep. N. S. 732.

46. **Contract in writing** generally see Contracts, 9 Cyc. 298.

Bill or note see Commercial Paper, 7 Cyc. 658 *et seq.*, 668, 673, 710, 725.

Statute of frauds see Frauds, Statute of, 20 Cyc. 172. *Compare* Guaranty, 20 Cyc. 1419 note 28.

47. See cases cited *infra*, note 49 *et seq.*

48. **Conformity of principal's obligation to contract of suretyship** see *supra*, p. 33, text and note 65.

49. Bean *v.* Parker, 17 Mass. 591 (bail bond); St. Louis Brewing Assoc. *v.* Hayes, 97 Fed. 859, 38 C. C. A. 634. See also Clark *v.* Hennessey Bank, 14 Okla. 572, 79 Pac. 217.

Thus where no obligation attaches to the principal outside of the bond itself, the surety has no remedy over against the principal and consequently is not bound. People *v.* Hartley, 21 Cal. 585, 82 Am. Dec. 758; Sacramento *v.* Dunlap, 14 Cal. 421; Mayo *v.* Renfroe, 66 Ga. 408; Bunn *v.* Jetmore, 70 Mo. 228, 35 Am. Rep. 425. See also Deering *v.* Moore, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534.

50. *Illinois.*— School Trustees *v.* Sheik,

the principal should also sign before delivery of the instrument to the obligee,[51] or the statute absolutely requires the principal to sign.[52] Thus where the liability of the principal in a bond is fixed by contract,[53] or by operation of law,[54] his failure to sign the bond does not affect the liability of his sureties thereon. On the other hand another line of cases hold broadly that a bond purporting to be the obligation of one as principal and others as sureties, but which has been executed only by the sureties, does not upon its face show any obligation on the part of the sureties,[55] unless it appears that the sureties waived the execution of the bond by the principal, and authorized its delivery to the obligee as a valid obligation.[56]

(II) *UNAUTHORIZED EXECUTION.*[57] There is the same conflict of authority where the name of the principal has been signed without his authority. Some cases hold that in such case the sureties are liable;[58] others hold that they are not.[59] But if the sureties sign with knowledge of the fact that the principal's signature has been attached without authority,[60] or the principal is already bound independently of the bond,[61] then the sureties are liable.

(III) *DEPENDING ON FORM OF BOND.* In some jurisdictions a distinction is made between joint and joint and several bonds. Thus it is held that the failure of the principal to execute a joint and several bond does not invalidate the same as to a surety,[62] unless there was an express agreement that the bond should not

119 Ill. 579, 8 N. E. 189, 59 Am. Rep. 830 [*reversing* 16 Ill. App. 49].

Indiana.— Fassnacht *v.* Enising Gagen Co., 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 480, 63 Am. St. Rep. 322.

Montana.— McIntosh *v.* Hurst, 6 Mont. 287, 12 Pac. 647; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347.

Nebraska.— Bollmann *v.* Pasewalk, 22 Nebr. 761, 36 N. W. 134.

New York.— Williams *v.* Marshall, 42 Barb. 524; Parker *v.* Bradley, 2 Hill 584.

Ohio.— State *v.* Bowman, 10 Ohio 445.

Oklahoma.— Clark *v.* Hennessey Bank, 14 Okla, 572, 79 Pac. 217.

Texas.— San Roman *v.* Watson, 54 Tex. 254; Lindsay *v.* Price, 33 Tex. 280.

See 40 Cent. Dig. tit. "Principal and Surety," § 39.

Under the Alabama code a guardian's bond, not executed by the principal, is not a statutory bond, but is good as a common-law bond, upon which the sureties are liable. Painter *v.* Maudlin, 119 Ala. 88, 24 So. 769, 72 Am. St. Rep. 902.

51. See *infra*, IV, D, 8, c, (I), (F).

52. See Bollman *v.* Pasewalk, 22 Nebr. 761, 36 N. W. 134.

Directory statute.— If such a statute is directory merely, the failure of the principal to sign the bond will not invalidate it as to the surety. Pima County *v.* Snyder, 5 Ariz. 45, 44 Pac. 297.

53. Cockrill *v.* Davie, 14 Mont. 131, 35 Pac. 958; Eureka Sandstone Co. *v.* Long, 11 Wash. 161, 39 Pac. 446; Cooper *v.* Evans, L. R. 4 Eq. 45, 36 L. J. Ch. 431, 15 Wkly. Rep. 609.

54. *Arizona.*— Pima County *v.* Snyder, 5 Ariz. 45, 44 Pac. 297.

Florida.— Webster *v.* Wailes, 35 Fla. 267, 17 So. 571.

Maine.— Deering *v.* Moore, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534.

Montana.— Cockrill *v.* Davie, 14 Mont. 131, 35 Pac. 958.

Washington.— Eureka Sandstone Co. *v.* Long, 11 Wash. 161, 39 Pac. 446.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 39, 41.

55. Russell *v.* Annable, 109 Mass. 72, 12 Am. Rep. 665; Wood *v.* Washburn, 2 Pick. (Mass.) 24; School Dist. No. 80 *v.* Lapping, 100 Minn. 139, 110 N. W. 849; Bjoin *v.* Anglim, 97 Minn. 526, 107 N. W. 558; Martin *v.* Hornsby, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487; State *v.* Austin, 35 Minn. 51, 26 N. W. 906; North St. Louis Bldg., etc., Assoc. *v.* Obert, 169 Mo. 507, 69 S. W. 1044; Gay *v.* Murphy, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep. 496; Rapid City Bd. of Education *v.* Sweeney, 1 S. D. 642, 48 N. W. 302, 36 Am. St. Rep. 767.

56. Wild Cat Branch *v.* Ball, 45 Ind. 213; Goodyear Dental Vulcanite Co. *v.* Bacon, 148 Mass. 542, 20 N. E. 175; Safranski *v.* St. Paul, etc., R. Co., 72 Minn. 185, 75 N. W. 17; Martin *v.* Hornsby, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487.

No presumption of waiver of signature of principal by surety; positive proof is necessary. Hall *v.* Parker, 39 Mich. 287; Johnston *v.* Kimball Tp., 39 Mich. 187, 33 Am. Rep. 372.

57. Want of authority to make contract see *supra*, IV, C, 9.

58. Weare *v.* Sawyer, 44 N. H. 198; Millius *v.* Shafer, 3 Den. (N. Y.) 60; Holland *v.* Clark, 67 N. C. 104.

59. Dole Bros. Co. *v.* Cosmopolitan Preserving Co., 167 Mass. 481, 46 N. E. 105, 57 Am. St. Rep. 477; Green *v.* Kindy, 43 Mich. 279, 5 N. W. 297.

60. Klein *v.* German Nat. Bank, 69 Ark. 140, 61 S. W. 572, 86 Am. St. Rep. 183; Green *v.* Kindy, 43 Mich. 279, 5 N. W. 297; Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027.

61. Smith *v.* Basinger, 12 Tex. 227.

62. Kurtz *v.* Forquer, 94 Cal. 91, 29 Pac. 413; State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137; New York *v.* Kent, 57 N. Y. Super. Ct. 109, 5 N. Y. Suppl. 567

be valid until so executed.[63] But a bond which is the joint obligation of a principal and his sureties, and not joint and several, requires the signature of the principal to render it valid and binding upon the sureties.[64]

c. By Surety[65] — (I) *Signature*[66] — (A) *Mode of Signing.* Signature of the surety may be made by mark,[67] or a signature may be cut from one instrument and attached to another where the liability intended to be assumed is not changed.[68] A forged signature, however, does not impose any liability.[69] The addition of new names to an existing instrument does not constitute making a new instrument.[70]

(B) *Place of Signing.*[71] Where a signature is misplaced, it is for the jury to determine whether the signer intended to become a surety.[72] A witness who inadvertently places his signature under that of the obligor is not liable as a surety;[73] on the other hand, if the instrument indicates that a signer is a surety, he cannot escape liability because he signed in the place for witnesses.[74] A person may become a surety and jointly liable with the principal, by signing on the back of the instrument.[75]

(C) *Affirming Genuineness of Previous Signature.* It has been held that by signing a bond after other sureties have signed and executed the same the surety affirms a genuineness of the previous signatures,[76] even though the names of the principal and the cosureties were forged without his knowledge and without complicity of the holder of the instrument,[77] and especially if the payee or obligee has accepted the instrument without notice of the forgery.[78]

(D) *Two Signatures and One Instrument.* If the same signature appears twice, it may indicate an intention to act in two capacities.[79]

[*affirmed* in 128 N. Y. 600, 28 N. E. 252]; Loew *v.* Stocker, 68 Pa. St. 226; Douglas County *v.* Bardon, 79 Wis. 641, 48 N. W. 969. But see Martin *v.* Hornsby, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487; Gay *v.* Murphy, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep. 496.

63. Douglas County *v.* Bardon, 79 Wis. 641, 48 N. W. 969.

64. People *v.* Hartley, 21 Cal. 585, 82 Am. Dec. 758; Sacramento *v.* Dunlap, 14 Cal. 421.

65. Execution by surety company see *infra*, X, C.

66. Signing contract generally see CONTRACTS, 9 Cyc. 299.

67. Com. *v.* Campbell, 45 S. W. 89, 20 Ky. L. Rep. 54; Com. *v.* Scanlon, 21 Pa. Co. Ct. Ct. 665.

68. Lee County *v.* Welsing, 70 Iowa 198, 30 N. W. 481.

69. Colquitt *v.* Smith, 72 Ga. 515.

70. Matson *v.* Booth, 5 M. & S. 223.

71. Indorsement see *supra*, IV, C, 5, c.

72. Polacheck *v.* Moore, 114 Wis. 261, 90 N. W. 175.

73. U. S. Fidelity, etc., Co. *v.* Siegmann, 87 Minn. 175, 91 N. W. 473.

Where a person writes his initials with the word "correct" at the foot of an instrument merely to indicate the solvency of a prior party who had signed as surety, the creditor in any event does not have any recourse against him without first proceeding against the surety. Crêpeau *v.* Beauchesne, 14 Quebec Super. Ct. 495.

74. Holden *v.* Tanner, 6 La. Ann. 74; Richardson *v.* Boynton, 12 Allen (Mass.) 138, 90 Am. Dec. 141.

75. Preston *v.* Huntington, 67 Mich. 139, 34 N. W. 279.

76. Hall *v.* Smith, 14 Bush (Ky.) 604; State *v.* Baker, 64 Mo. 167, 27 Am. Rep. 214; Johnson County *v.* Chamberlain Banking House, (Nebr. 1907) 113 N. W. 1055; Lombard *v.* Mayberry, 24 Nebr. 674, 40 N. W. 271, 8 Am. St. Rep. 234 [*approving* Helms *v.* Wayne Agricultural Co., 73 Ind. 325, 38 Am. Rep. 147; Bigelow *v.* Comegys, 5 Ohio St. 256; Selser *v.* Brock, 3 Ohio St. 302].

77. Stern *v.* People, 102 Ill. 540; Lombard *v.* Mayberry, 24 Nebr. 674, 40 N. W. 271, 8 Am. St. Rep. 234; Nash *v.* Fugate, 32 Gratt. (Va.) 595, 34 Am. Rep. 780. To the same effect see Mathis *v.* Morgan, 72 Ga. 517, 53 Am. Rep. 847.

Forgery a defense see *infra*, IV, D, 11, c.

78. Helms *v.* Wayne Agricultural Co., 73 Ind. 325, 38 Am. Rep. 147; State *v.* Baker, 64 Mo. 167, 27 Am. Rep. 214. See also Stoner *v.* Millikin, 85 Ill. 218; Craig *v.* Hobbs, 44 Ind. 363; State *v.* Pepper, 31 Ind. 76; Deardorff *v.* Foresman, 24 Ind. 481; York County Mut. F. Ins. Co. *v.* Brooks, 51 Me. 506; Veazie *v.* Willis, 6 Gray (Mass.) 90.

79. Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

For example where a corporation began an attachment suit, and the bond was signed by the president in two places, the corporate seal being affixed to the first and a scroll to the second signature, it was presumed that the first signature was by the president in his official capacity, and the second by him individually as surety. Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583. But where a contract was signed, with others, by E. Capps, who was not otherwise a party to it, and below appeared the words: "I, E.

(E) *Two Instruments and One Signature.* Where two contracts appear upon one sheet, the latter only being signed by the surety, it becomes a question of intention whether he is liable on both.[80] If a surety promises to become liable for work according to specifications to be agreed on thereafter, it is not necessary that he be a party to and sign the subsequent agreement.[81]

(F) *Signing Upon Condition.*[82] The surety may sign conditionally, which may [83] or may not [84] release him from liability depending upon the circumstances of the particular case.

(G) *Revocation Before Acceptance.* A surety has the right to revoke his signature before the instrument is accepted,[85] but not afterward.[86]

(II) *CONDITIONAL EXECUTION* — (A) *In General.* As has been seen the surety may execute the contract of suretyship by signing it upon condition.[87] If a surety has agreed to be bound only upon the performance of a condition, which is known to the obligee he is not liable unless such condition has been performed.[88] But if the condition is not known to the obligee, the better rule is that a breach thereof does not relieve the surety from liability.[89] A surety for the payment of money can stipulate for the performance of certain acts before he shall become liable, such as the institution of proceedings against the principal; [90] and if he promises to pay when the principal shall receive a certain sum of money, he is not liable if such sum is not paid.[91] A surety for the loan of money can require that the indebtedness be evidenced in a certain way, as by note,[92] or draft; [93] or that

Capps, guarantee that Charles Capps complies with the above agreement. E. Capps," it was held that the first signature was as surety, and the second merely to explain the purpose of the first. Capps *v.* Watts, 43 Ill. 60.

80. Bacon *v.* Dodge, 62 Vt. 460, 20 Atl. 197 (a promissory note followed by a contract); Polacheck *v.* Lucas, 114 Wis. 261, 90 N. W. 175 (a bond and an affidavit).

81. Mann *v.* McDowell, 3 Pa. St. 357, 45 Am. Dec. 649.

Variance in dates.— Where a bond recites that it is given for the performance of a contract of a specified date to which it is annexed, and it is annexed to a contract of a different date, it must be shown that it is annexed to the latter with the authority of the sureties. Oberbeck *v.* Mayer, 59 Mo. App. 289.

82. **Conditional execution** generally see *infra*, IV, C, 8, c, (II).

83. Linn County, etc. *v.* Farris, 52 Mo. 75, 14 Am. Rep. 389; Crawford *v.* Owens, 79 S. C. 59, 60 S. E. 236.

Knowledge of obligee.— The surety on a bond, who signed it with the understanding that the principal was to sign it, is released by the obligee taking it, signed by him alone, with knowledge from the face of it and a contract he had with the principal that he was to sign it. Crawford *v.* Owens, 79 S. C. 59, 60 S. E. 236.

84. Johnson County *v.* Chamberlain Banking House, (Nebr. 1907) 113 N. W. 1055; Nash *v.* Fugate, 32 Gratt. (Va.) 595, 34 Am. Rep. 780.

Want of knowledge on part of obligee.—A surety who signs a bond upon the condition that it is to be signed by other sureties is not released from liability thereon because the others did not sign, unless notice of the condition on which his signature was obtained is brought home to the obligee. Johnson County *v.* Chamberlain Banking House, (Nebr. 1907) 113 N. W. 1055.

85. North British Mercantile Ins. Co. *v.* Kean, 16 Ont. 117. See also Lodge *v.* Boone, 3 Harr. & J. (Md.) 218.

86. Covert *v.* Shirk, 58 Ind. 264. See *infra*, VI.

87. See *supra*, IV, D, 8, c, (I), (F).

88. Rice *v.* Maryland Fidelity, etc., Co., 103 Fed. 427, 43 C. C. A. 270. See also *infra*, VIII, E, 2, g.

Notice of performance.— If the condition is the performance of some act by the principal, formal notice to the surety of such performance is unnecessary. A surety having covenanted that if his principal paid a debt by a certain day he would pay the fee of the solicitor of the creditor is liable upon payment by the principal, without notice of such payment or of the amount of the fee. Newton *v.* More, 14 Ark. 166.

Demand of performance.— If the creditor has agreed to transfer a note to the surety, his retention of the note is not a violation of the condition if the surety never made any demand for it. Chaffe *v.* Taliaferro, 58 Miss. 544.

If the surety has signed composition notes on condition that the composition agreement was to be signed by all the creditors, he is not liable unless the agreement is signed by all. Doughty *v.* Savage, 28 Cann. 146.

89. Joyce *v.* Cockrill, 92 Fed. 838, 35 C. C. A. 38. See also *infra*, VIII, E, 2, g.

90. Toles *v.* Adee, 91 N. Y. 562.

91. Hemming *v.* Trenery, 2 C. M. & R. 385, 1 Gale 206, 1 Jur. 893, 4 L. J. Exch. 245, 5 Tyrw. 887.

92. Stone *v.* Bicket, 31 Misc. (N. Y.) 683, 66 N. Y. Suppl. 79 [*affirmed* in 62 N. Y. App. Div. 617, 71 N. Y. Suppl. 1149].

93. Hood *v.* Paddock-Hawley Iron Co., 53

it can be secured by collateral given by the creditor.[94] Conditions annexed to a sale of property must be complied with, such as that it be sold at a certain place,[95] or that it be conveyed free from all encumbrances.[96]

(B) *Execution by Principal.* Where a surety signs a note or bond on condition that the principal also signs it, which condition is known to the payee or obligee, the surety is not liable thereon in case the principal fails to sign.[97] But if the obligee has no notice, actual or constructive, of the condition, the surety is bound,[98] especially if, upon learning of the non-performance of the condition he does not raise any objection.[99] So where a bond is good without the signature of the principal, and the sureties' recourse against him is in no wise impaired by his failure to sign, the fact that the sureties signed the bond on the express condition that the principal should also sign is no defense to an action thereon.[1]

(C) *Execution by Other Surety.* Where sureties sign a bond on condition that others shall also sign it before delivery by their principal to the obligee, it has been held in some cases that they are not bound where no other signatures are procured,[2] although the instrument provides that those who sign shall be liable notwithstanding such a condition.[3] In other cases it has been held, and this seems to be the better rule, that where a surety signs an obligation upon the condition that others are also to sign it, he is bound, although the instrument is delivered in violation of the agreement, if the obligee accepts it without notice of the condition, either actual or constructive,[4] or those signing it afterward waive such con-

Ill. App. 229; *Re* Coumbe, 24 Grant Ch. (U. C.) 519.

94. McCoy *v.* Wilson, 58 Ind. 447; Coyte *v.* Elphick, 22 Wkly. Rep. 541.

95. Dickson *v.* McPherson, 3 Grant Ch. (U. C.) 185.

96. Willis *v.* Willis, 14 Jur. 404, 17 Sim. 218, 42 Eng. Ch. 218, 60 Eng. Reprint 1112.

97. *Illinois.*— Knight *v.* Hurlbut, 74 Ill. 133.

Kentucky.— Williams *v.* Luther, 30 S. W. 199, 17 Ky. L. Rep. 311.

Massachusetts.— Goodyear Dental Vulcanite Co. *v.* Bacon, 151 Mass. 460, 24 N. E. 404, 8 L. R. A. 486.

Michigan.— Hall *v.* Parker, 37 Mich. 590, 26 Am. Rep. 540.

Mississippi.— Read *v.* McLemore, 34 Miss. 110.

Missouri.— Gay *v.* Murphy, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep. 496.

Montana.— Ney *v.* Orr, 2 Mont. 559.

New York.— Parker *v.* Bradley, 2 Hill 584.

See 40 Cent. Dig. tit. "Principal and Surety," § 46.

98. Richardson *v.* Rogers, 50 How. Pr. (N. Y.) 403.

99. Richardson *v.* Rogers, 50 How. Pr. (N. Y.) 403.

1. Woodman *v.* Calkins, 13 Mont. 363, 34 Pac. 187, 40 Am. St. Rep. 449.

2. White Sewing Mach. Co. *v.* Saxon, 121 Ala. 399, 25 So. 784; Smith *v.* Kirkland, 81 Ala. 345, 1 So. 276; King *v.* State, 81 Ala. 92, 8 So. 159; Guild *v.* Thomas, 54 Ala. 414, 25 Am. Rep. 703; Bibb *v.* Reid, 3 Ala. 88. See also cases cited "But see" to next note.

In Alabama, Code (1896), § 3090, provides that a surety on an official bond cannot avoid liability on the ground that he executed it on condition that others should execute it. Bromberg *v.* Maryland Fidelity, etc., Co., 139 Ala. 338, 36 So. 622.

There are two established modifications of this rule: (1) It does not apply to commercial paper which has come into the hands of a *bona fide* purchaser before maturity, who is without notice of the condition. (2) It does not apply where the surety, having knowledge or notice of the delivery of the bond, suffers the principal to act under it to the prejudice of the obligee, so as to waive the condition, and thus estop the surety from insisting on the defense. Smith *v.* Kirkland, 81 Ala. 345, 1 So. 276. See *infra*, VIII, E, 2, g.

3. White Sewing Mach. Co. *v.* Saxon, 121 Ala. 399, 25 So. 784.

4. *Arkansas.*— Tabor *v.* Merchants' Nat. Bank, 48 Ark. 454, 3 S. W. 805, 3 Am. St. Rep. 241; State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880.

California.— Tidball *v.* Halley, 48 Cal. 610.

Colorado.— Cooper *v.* De Mainville, 1 Colo. App. 16, 27 Pac. 86.

Georgia.— Clark *v.* Bryce, 64 Ga. 486; Bonner *v.* Nelson, 57 Ga. 433. But see Riley *v.* Johnson, 10 Ga. 414; Crawford *v.* Foster, 6 Ga. 202, 50 Am. Dec. 327.

Illinois.— Rhode *v.* McLean, 101 Ill. 467; Comstock *v.* Gage, 91 Ill. 328.

Indiana.— Hunt *v.* State, 53 Ind. 321; State *v.* Garton, 32 Ind. 1, 2 Am. Rep. 315; State *v.* Pepper, 31 Ind. 76; Webb *v.* Baird, 27 Ind. 368, 89 Am. Dec. 507; Blackwell *v.* State, 26 Ind. 204; Deardorff *v.* Foresman, 24 Ind. 481.

Iowa.— Taylor County *v.* King, 73 Iowa 153, 34 N. W. 774, 5 Am. St. Rep. 666; Micklewait *v.* Noel, 69 Iowa 344, 28 N. W. 630; Carroll County *v.* Ruggles, 69 Iowa 269, 28 N. W. 590, 58 Am. Rep. 223. But see Johnston *v.* Cole, 102 Iowa 109, 71 N. W.

dition;[5] but if the obligee has notice of the condition when he receives the instrument, he cannot hold the surety liable thereon.[6] If some of the sureties are discharged for

195; Daniels *v.* Gower, 54 Iowa 319, 3 N. W. 424, 6 N. W. 525.

Kentucky.— Bivins *v.* Helsley, 4 Metc. 78; Millett *v.* Parker, 2 Metc. 608; Strader *v.* Waggoner, 53 S. W. 663, 21 Ky. L. Rep. 967; Sowders *v.* Citizens' Nat. Bank, 12 Ky. L. Rep. 356.

Maine.— State *v.* Peck, 53 Me. 284; York County M. F. Ins. Co. *v.* Brooks, 51 Me. 506.

Maryland.— Harris *v.* Regester, 70 Md. 109, 16 Atl. 386.

Michigan.— Gibbs *v.* Johnson, 63 Mich. 671, 30 N. W. 343.

Minnesota.— Preston Independent School Dist. No. 45 Bd. of Education *v.* Robinson, 81 Minn. 305, 84 N. W. 105; Berkey *v.* Judd, 34 Minn. 393, 26 N. W. 5; Ward *v.* Hackett, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187.

Mississippi.— Graves *v.* Tucker, 10 Sm. & M. 9. But see Sessions *v.* Jones, 6 How. 123.

Missouri.— North Atchison Bank *v.* Gay, 114 Mo. 203, 21 S. W. 479; State *v.* Potter, 63 Mo. 212, 21 Am. Rep. 440; Ayres *v.* Milroy, 53 Mo. 516, 14 Am. Rep. 465; Lightner *v.* Gregg, 61 Mo. App. 650.

Nebraska.— Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 311; Owen *v.* Udall, 39 Nebr. 14, 57 N. W. 761; Cutler *v.* Roberts, 7 Nebr. 4, 29 Am. Rep. 371.

New Hampshire.— Hill *v.* Sweetser, 5 N. H. 168.

New York.— Russell *v.* Freer, 56 N. Y. 67; Bangs *v.* Bangs, 41 Hun 41; Singer Mfg. Co. *v.* Drummond, 40 Hun 260. But see People *v.* Bostwick, 32 N. Y. 445 [*affirming* 43 Barb. 9].

North Carolina.— Farmers' Bank *v.* Hunt, 123 N. C. 171, 32 S. E. 546; State *v.* Lewis, 73 N. C. 138, 21 Am. Rep. 461; Gwyn *v.* Patterson, 72 N. C. 189.

Ohio.— Dalton *v.* Miami Tribe No. 1, 5 Ohio Dec. Reprint 42, 2 Am. L. Rec. 329.

Pennsylvania.— Grossman's Appeal, 8 Pa. Cas. 348, 11 Atl. 725; Winters *v.* Robison, 14 Pa. Co. Ct. 264. But see Keener *v.* Crago, 81* Pa. St. 166; Warfel *v.* Frantz, 76 Pa. St. 88.

Tennessee.— Dun *v.* Garrett, 93 Tenn. 650, 27 S. W. 1011, 42 Am. St. Rep. 937; Lookout Bank *v.* Aull, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934; Jordan *v.* Jordan, 10 Lea 124, 43 Am. Rep. 294; Amis *v.* Marks, 3 Lea 568. But see Majors *v.* McNeilly, 7 Heisk. 294; Quarles *v.* Governor, 10 Humphr. 122; Perry *v.* Patterson, 5 Humphr. 133, 42 Am. Dec. 424; Byrd *v.* Shelley, 2 Tenn. Cas. 33.

Texas.— Seaton *v.* McReynolds, (Civ. App. 1903) 72 S. W. 874; Forrest *v.* White Sewing Mach. Co., (Civ. App. 1902) 67 S. W. 340; Bopp *v.* Hansford, 18 Tex. Civ. App. 340, 45 S. W. 744; Bannister *v.* Wallace, 14 Tex. Civ. App. 452, 37 S. W. 250.

Utah.— Butterfield *v.* Mountain Ice, etc., Co., 11 Utah 194, 39 Pac. 824.

Vermont.— Washington Dist. Prob. Ct. *v.* St. Clair, 52 Vt. 24.

Virginia.— Turnbull *v.* Mann, 99 Va. 41, 37 S. E. 288; Nash *v.* Fugate, 32 Gratt. 595, 34 Am. Rep. 780; Miller *v.* Fletcher, 27 Gratt. 403, 21 Am. Rep. 356; Nash *v.* Fugate, 24 Gratt. 202, 18 Am. Rep. 640.

West Virginia.— Lyttle *v.* Cozad, 21 W. Va. 183.

Wisconsin.— Belden *v.* Hurlbut, 94 Wis. 562, 69 N. W. 357, 37 L. R. A. 853; School Dist. No. 1 *v.* Dreutzer, 51 Wis. 153, 6 N. W. 610.

United States.— Dair *v.* U. S., 16 Wall. 1, 21 L. ed. 491; Garnett *v.* Mayo, 10 Fed. Cas. No. 5,245*a*, 4 Hughes 377.

Canada.— Huron County *v.* Armstrong, 27 U. C. Q. B. 533.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 47, 51, 53.

In Arkansas, Acts (1891), No. 55, § 2, provides that it shall not be a defense to a surety on any bond that he became such on condition that the cosuretyship of others should be obtained; but such act applies to such bonds only as were made after its passage. State *v.* Wallis, 57 Ark. 64, 20 S. W. 811.

If the surety has intrusted delivery to his agent for the purpose of obtaining signatures before delivering the contract to the creditor or obligee, and the agent makes delivery in violation of his instructions, the surety must suffer for the misconduct of his agent. Gibbs *v.* Johnson, 63 Mich. 671, 30 N. W. 343; Butterfield *v.* Mountain Ice, etc., Co., 11 Utah 194, 39 Pac. 824; Joyce *v.* Cockrill, 92 Fed. 838, 35 C. C. A. 38), even though that agent be the principal (Smith *v.* Peoria County, 59 Ill. 412; Benton County Sav. Bank *v.* Boddicker, 105 Iowa 548, 75 N. W. 632, 67 Am. St. Rep. 310, 45 L. R. A. 321; Carter *v.* Moulton, 51 Kan. 9, 32 Pac. 633, 37 Am. St. Rep. 259, 20 L. R. A. 309; Millett *v.* Parker, 2 Metc. (Ky.) 608; Smith *v.* Moberly, 10 B. Mon. (Ky.) 266, 52 Am. Dec. 543; Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187; King County *v.* Ferry, 5 Wash. 536, 32 Pac. 538, 34 Am. St. Rep. 880, 19 L. R. A. 500.

5. See *infra*, IV, D, 8, c, (II), (F).

6. *Illinois.*— Diefenthaler *v.* Hall, 96 Ill. App. 639.

Indiana.— Allen *v.* Marney, 65 Ind. 398, 32 Am. Rep. 73; McKinley *v.* Snyder, 65 Ind. 143; Deering Harvester Co. *v.* Peugh, 17 Ind. App. 400, 45 N. E. 808.

Kentucky.— Garvin *v.* Mobley, 1 Bush 48; Barber *v.* Ruggles, 87 S. W. 785, 27 Ky. L. Rep. 1077; Jackson *v.* Cooper, 39 S. W. 39, 19 Ky. L. Rep. 9.

Minnesota.— Preston Independent School Dist. No. 45 Bd. of Education *v.* Robinson, 81 Minn. 305, 84 N. W. 105; Clarke *v.* Williams, 61 Minn. 12, 62 N. W. 1125.

Mississippi.— Goff *v.* Bankston, 35 Miss. 518.

failure to comply with a condition to procure additional signers, all are discharged,[7] even though such condition was imposed after the instrument was executed by some of the sureties unconditionally.[8]

(D) *Nature and Form of Condition.* Generally conditions will not be implied.[9] Thus if a surety does not make the execution of the instrument by other sureties a condition precedent to the legal existence of the instrument,[10] his mere expectation or well founded belief that other parties will sign will not make delivery by him conditional on an execution by others.[11] So a mere representation,[12] or promise,[13] cotemporaneous with the delivery of the instrument, that certain other

Nebraska.— Middleboro Nat. Bank *v.* Richards, 55 Nebr. 682, 76 N. W. 528; Mullen *v.* Morris, 43 Nebr. 596, 62 N. W. 74.

South Dakota.— State *v.* Welbes, 12 S. D. 339, 81 N. W. 629.

Texas.— Wheeler, etc., Mfg. Co. *v.* Briggs, (1891) 18 S. W. 555; Gatling *v.* San Augustine County, 25 Tex. Civ. App. 283, 61 S. W. 432.

Virginia.— Ward *v.* Churn, 18 Gratt. 801, 98 Am. Dec. 749.

Washington.— Seattle *v.* L. H. Griffith Realty, etc., Co., 28 Wash. 605, 68 Pac. 1036.

See 40 Cent. Dig. tit. "Principal and Surety, § 51.

Where a promissory note is delivered in violation of a condition that another sign as cosurety, and such other person is aware of the condition, he cannot enforce the note against the surety, if he afterward procures the same by assignment. Smith *v.* Bales, 99 S. W. 672, 30 Ky. L. Rep. 779; Young *v.* Smith, 14 Wash. 565, 45 Pac. 45.

7. Tindal *v.* Bright, Minor (Ala.) 103; King *v.* Smith, 2 Leigh (Va.) 157.

For example where sureties signed a note on condition that it should not be delivered until the signature of a certain person was procured, which was not procured, another person afterward signing the note, ignorant of the condition and relying upon the sureties whose signatures preceded his, is not liable. Daniels *v.* Gower, 54 Iowa 319, 3 N. W. 424, 6 N. W. 525. Where one surety, in the presence of another, instructs the principal and the obligee that the bond is not to be delivered until a third person signs, the speaker will be deemed the spokesman of the other surety who had signed, and such other surety will not be liable if the signature of the third person is not obtained. Norris *v.* Cetti, 35 Tex. Civ. App. 28, 79 S. W. 641.

8. Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749.

9. Korty *v.* McGill, 44 Nebr. 516, 62 N. W. 1075, holding that a statement by the principal to the obligee that the former thought it would be necessary for him to pay an existing indebtedness before he could ask the surety to sign his bond, make such payment a condition precedent to the delivery of the bond. Hughes *v.* Ladd, 42 Oreg. 123, 69 Pac. 548.

A recital in a bond that a mortgage given by the principal was subject to prior mortgages for ninety-one thousand dollars is not a condition, and a surety is liable, although the prior mortgages amount to more than the sum named. Raymond *v.* Tallman, 100 N. Y. App. Div. 400, 91 N. Y. Suppl. 670.

10. Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592; Lightner *v.* Axe, 3 Lanc. L. Rev. (Pa.) 401.

Where the surety tells the obligee that others are to join, but does not make his liability conditional on such others signing, he is bound, although they do not join in the bond. Bramley *v.* Wilds, 9 Lea (Tenn.) 674.

Where the proposal for additional sureties comes from the creditor, and is not made a condition precedent by the party signing, the latter is not released from liability by the failure of such other sureties to execute. Traill *v.* Gibbons, 2 F. & F. 358.

11. *Alabama.*—McClure *v.* Colclough, 5 Ala. 65.

Georgia.— Nelson *v.* Bonner, 60 Ga. 102.

Indiana.— State *v.* Gregory, 119 Ind. 503, 22 N. E. 1.

Louisiana.— Dunbar *v.* Woods, 5 La. Ann. 135.

Maine.— Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592; Haskins *v.* Lombard, 16 Me. 140, 33 Am. Dec. 648.

New Jersey.— State *v.* Thatcher, 41 N. J. L. 403, 32 Am. Rep. 225.

North Carolina.— Webb *v.* Jones, 4 N. C. 123.

Pennsylvania.— Simpson *v.* Bovard, 74 Pa. St. 251.

South Carolina.— Martin *v.* Stribling, 1 Speers 23.

Virginia.— Turnbull *v.* Mann, 99 Va. 41, 37 S. E. 288.

See 40 Cent. Dig. tit. "Principal and Surety," § 48.

Upon the renewal of an instrument, a belief that all of the sureties on the original one would sign it does not relieve a surety who signs. Berry *v.* Com., 14 S. W. 589, 12 Ky. L. Rep. 462. See Banque Provinciale *v.* Arnoldi, 2 Ont. L. Rep. 624.

The words "express understanding" in the affidavit of a surety that his signature was obtained "on the express engagement and understanding" that others were to sign are utterly meaningless, and no attention will be paid to such a statement. Dallas *v.* Walls, 29 L. T. Rep. N. S. 599.

12. Brown *v.* Davenport, 76 Ga. 799; Lewiston *v.* Gagne, 89 Me. 395, 36 Atl. 629, 56 Am. St. Rep. 432; Reed *v.* McGregor, 62 Minn. 94, 64 N. W. 88.

13. *Illinois.*—School Trustees *v.* Sheick, 119 Ill. 579, 8 N. E. 189, 59 Am. Rep. 830 [*reversing* 16 Ill. App. 49].

persons should also execute it, is not a condition, the non-performance of which will impair the validity of the obligation delivered in reliance thereon,[14] although in such case the party signing may recover damages,[15] or set them up by way of counter-claim.[16]

(E) *Performance of Condition.* Sureties who sign on condition may demand a strict compliance therewith, and in default thereof are not bound.[17] Thus, while a condition that another sign as cosurety is sufficiently complied with if the signature of such person is affixed by an authorized agent,[18] it is otherwise if such signature is affixed by an unauthorized person, although subsequently ratified.[19] Nor is a condition that others sign as cosureties complied with by such persons signing a long time after a default by the principal;[20] nor if their signatures be obtained by fraud,[21] or be forged,[22] unless there is nothing upon the face of the instrument to put the obligee on notice, in which case the surety is estopped to deny the genuineness of such signatures.[23] Compliance with conditions will not be excused because the surety has not been injured by non-compliance, as for instance because such other person, whose signature was required, is insolvent.[24]

(F) *Waiver of Condition.* In all jurisdictions one signing a bond conditionally may afterward waive such condition and thus estop himself to deny liability on the bond.[25] But to make the principle of estoppel applicable, it must be shown that the party sought to be estopped had knowledge, actual or constructive, that his confidence had been abused.[26]

Indiana.— Mowbray *v.* State, 88 Ind. 324; Deardorff *v.* Foresman, 24 Ind. 481.

Iowa.— Micklewait *v.* Noel, 69 Iowa 344, 28 N. W. 630.

Kansas.— Risse *v.* Hopkins Planing Mill Co., 55 Kan. 518, 40 Pac. 904.

Kentucky.—Hudspeth *v.* Tyler, 108 Ky. 520, 56 S. W. 973, 22 Ky. L. Rep. 221; Gaar *v.* Louisville Banking Co., 11 Bush 180, 21 Am. Rep. 209; Murphy *v.* Hubble, 2 Duv. 247.

See 40 Cent. Dig. tit. "Principal and Surety," § 48.

14. **Such an agreement is void** because a note or bond cannot be delivered to the payee or obligee as an escrow. State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880; Hudspeth *v.* Tyler, 108 Ky. 520, 56 S. W. 973, 22 Ky. L. Rep. 221; Murphy *v.* Hubble, 2 Duv. (Ky.) 247; New Jersey *v.* Thatcher, 41 N. J. L. 403, 32 Am. Rep. 225. An agreement to obtain additional signatures made after a complete delivery of the instrument is void. McClure *v.* Smith, 56 Ga. 439.

Question for jury.— It is for the jury to decide whether an agreement was made before or after delivery of a bond. Hardwick Sav. Bank, etc., Co. *v.* Drenan, 71 Vt. 289, 44 Atl. 347.

15. Hudspeth *v.* Tyler, 108 Ky. 520, 56 S. W. 973, 22 Ky. L. Rep. 221.

16. Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209; Murphy *v.* Hubble, 2 Duv. (Ky.) 247.

17. Middleboro Nat. Bank *v.* Richards, 55 Nebr. 682, 76 N. W. 528.

18. Blankenship *v.* Ely, 98 Va. 359, 36 S. E. 484.

If the surety knew that the execution by another as surety was to be by an agent, the surety, requiring such signature, is liable if the authority of the agent prove defective. McClure *v.* Colclough, 5 Ala. 65.

19. Middleboro Nat. Bank *v.* Richards, 55 Nebr. 682, 76 N. W. 528.

20. Fletcher *v.* Austin, 11 Vt. 447, 34 Am. Dec. 698.

21. Franklin Bank *v.* Stevens, 39 Me. 532.

22. Southern Cotton-Oil Co. *v.* Bass, 126 Ala. 343, 28 So. 576; Sharp *v.* Allgood, 100 Ala. 183, 14 So. 16; Linn County *v.* Farris, 52 Mo. 75, 14 Am. Rep. 389.

23. Mathis *v.* Morgan, 72 Ga. 517, 53 Am. Rep. 847; Sullivan *v.* Williams, 43 S. C. 489, 21 S. E. 642.

24. Fitzgerald *v.* M'Cowan, [1898] 2 Ir. 1.

25. Clarke *v.* Williams, 61 Minn. 12, 62 N. W. 1125; Van Norman *v.* Barbeau, 54 Minn. 388, 55 N. W. 1112; Goff *v.* Bankston, 35 Miss. 518; Middleboro Nat. Bank *v.* Richards, 55 Nebr. 682, 76 N. W. 528; Mullen *v.* Morris, 43 Nebr. 596, 62 N. W. 74; Cutler *v.* Roberts, 7 Nebr. 4, 29 Am. Rep. 371. See also Martin *v.* Hornsby, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487; Campbell Printing-Press, etc., Co. *v.* Powell, (Tex. Civ. App. 1896) 36 S. W. 1005.

Where sureties suffer the principal to act under the bond without objection, knowing it to have been delivered in violation of the condition on which they signed, they will be deemed to have waived such condition, and are estopped to set it up to avoid liability on the bond. White Sewing-Mach. Co. *v.* Saxon, 121 Ala. 399, 25 So. 784; Smith *v.* Kirkland, 81 Ala. 345, 1 So. 276; Wright *v.* Lang, 66 Ala. 389; May *v.* Robertson, 13 Ala. 86; Robertson *v.* Coker, 11 Ala. 466.

26. Daughtry *v.* Stewart, 84 Ala. 69, 4 So. 867; Evans *v.* Daughtry, 84 Ala. 68, 4 So. 592; Wright *v.* Lang, 66 Ala. 389; Cutler *v.* Roberts, 7 Nebr. 4, 29 Am. Rep. 371.

(G) *Notice of Condition* — (1) In General. By the weight of authority it is essential, in order that non-performance of a condition may constitute a defense to a surety, that the creditor or obligee have notice thereof.[27] If the creditor or obligee was unaware that the surety had signed on condition that others should sign as sureties,[28] or that the principal should execute the contract before delivering it,[29] the liability of the surety is not affected by such conditional execution.

(2) Circumstances Putting on Inquiry — (a) In General. Notice to the creditor or obligee may be constructive. If he has knowledge of facts which would cause a reasonably prudent person to make inquiry,[30] or the conditional nature of the execution is apparent upon the face of the instrument itself,[31] it is sufficient. But in order that a defect upon the face of a bond may serve to impute notice to the obligee, it must be of such a nature as may reasonably lead to a discovery of the real defect complained of.[32] Thus the mere fact that there are more seals than signatures to a bond,[33] that the instrument contains the word "sureties,"[34] or that there are unfilled blanks[35] does not impute to the obligee notice of any conditions upon which the sureties may have signed.

(b) Failure of All Persons Named to Execute. Where a bond is delivered to the obligee without being executed by all the persons named in the body thereof as obligors, it is sufficient to put the obligee upon inquiry whether those who signed consented to its being delivered without the signature of the others;[36] and the same

27. Wilson *v.* King, 59 Ark. 32, 26 S. W. 18, 23 L. R. A. 802; Doorley *v.* Farmers', etc., Lumber Co., 4 Kan. App. 93, 46 Pac. 195; Citizens' Nat. Bank *v.* Durrill, 61 Mo. App. 543; Joyce *v.* Cockrill, 92 Fed. 838, 35 C. C. A. 38. See also *supra*, IV, D, 3; IV, D, 6, c; IV, D, 9, b, (II); VI, B, 6.

If the creditor or obligee have no notice, a surety is bound, although he signed on condition that all the creditors of the principal should sign a composition agreement (Whittemore *v.* Obear, 58 Mo. 280), that other cosureties should be unquestionably responsible (Hunt *v.* State, 53 Ind. 321; State *v.* Garton, 32 Ind. 1, 2 Am. Rep. 315; Blackwell *v.* State, 26 Ind. 204), that certain payments should be made, and the sureties released from another undertaking (Sawyers *v.* Campbell, 107 Iowa 397, 78 N. W. 56), or that a judgment should be marked "Satisfied" (Fowler *v.* Allen, 32 S. C. 229, 10 S. E. 947, 7 L. R. A. 745).

An infant obligee is not affected by notice of conditions prejudicial to him. Bangs *v.* Osborn, 2 N. Y. St. 685.

Notice of conditions to an authorized agent of the obligee or creditor affects the latter (Deering *v.* Shumpik, 67 Minn. 348, 69 N. W. 1088; Cowan *v.* Baird, 77 N. C. 201; Wheeler, etc., Mfg. Co. *v.* Briggs, (Tex. 1891) 18 S. W. 555; Carleton *v.* Cowart, (Tex. Civ. App. 1898) 45 S. W. 749), although in some cases it is held that the rule does not apply to a public agent (Lewis *v.* Gordon County, 70 Ga. 486), for the reason that he does not receive such notice in an official capacity (Preston Independent School Dist. No. 45, Bd. of Education *v.* Robinson, 81 Minn. 305, 84 N. W. 105, 83 Am. St. Rep. 374).

Evidence of conversations is admissible to show knowledge of conditions by the creditor or obligee. Benton County Sav. Bank *v.* Boddicker, 117 Iowa 407, 90 N. W. 822; People *v.* Sharp, 133 Mich. 378, 94 N. W. 1074; Miller *v.* Stem, 12 Pa. St. 383; Hardwick Sav. Bank, etc., Co. *v.* Drenan, 71 Vt. 289, 44 Atl. 347. See also North Atchison Bank *v.* Gay, 114 Mo. 203, 21 S. W. 479.

28. See *supra*, IV, D, 8, c, (II), (C).

29. See *supra*, IV, D, 8, c, (II), (B).

30. Benton County Sav. Bank *v.* Boddicker, 117 Iowa 407, 90 N. W. 822; Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

A statute requiring two sureties to certain obligations operates as notice of that fact to the obligee, and if he accepts such an obligation with only one surety, the latter is entitled to insist on his release (Cutler *v.* Roberts, 7 Nebr. 4, 29 Am. Rep. 371; Grimwood *v.* Wilson, 31 Hun (N. Y.) 215, 66 How. Pr. 283; Sharp *v.* U. S., 4 Watts (Pa.) 21, 28 Am. Dec. 676), unless it be proved that he dispensed with execution by the other (Cutler *v.* Roberts, 7 Nebr. 4, 29 Am. Rep. 371; Sharp *v.* U. S., 4 Watts (Pa.) 21, 28 Am. Dec. 676).

31. See *infra*, IV, D, 8, c, (II), (G), (2), (b). See also *supra*, IV, D, 3, b.

32. Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187.

33. Simpson *v.* Bovard, 74 Pa. St. 351; Nash *v.* Fugate, 32 Gratt. (Va.) 595, 34 Am. Rep. 780.

34. Crystal Lake Tp. *v.* Hill, 109 Mich. 246, 67 N. W. 121; Brown *v.* Probate Judge, 42 Mich. 501, 4 N. W. 195.

35. Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182, holding that where the penalty of a bond had not been inserted at the time the sureties signed, constructive notice is not given that the penal sum should not exceed a certain amount.

36. *Indiana.*— Wild Cat Branch *v.* Ball, 45 Ind. 213.

Kentucky.— Hall *v.* Smith, 14 Bush 604; Slaughter *v.* Hampton, 90 S. W. 981, 28 Ky. L. Rep. 904.

is true if a name originally in the body of the bond is erased before delivery,[37] unless the erasure cannot be detected.[38] But by the weight of authority no presumption arises that such a bond was not to be considered binding upon those signing until executed by all the obligors named in the body thereof. On the contrary its execution is deemed *prima facie* complete, and it is for those who executed it to show that they were not to be bound unless it was executed by the others.[39]

(c) DELIVERY BY STRANGER. The creditor or obligee may be held to have constructive notice if he received the instrument from a stranger, as if delivery wrongfully be made by one holding in escrow.[40]

(III) *BY AGENT*[41]— (A) *In General.* An agent can execute an instrument so

Massachusetts.—Goodyear Dental Vulcanite Co. *v.* Bacon, 151 Mass. 460, 24 N. E. 404, 8 L. R. A. 486.

Michigan.— People *v.* Sharp, 133 Mich. 378, 94 N. W. 1074; Hessell *v.* Johnson, 63 Mich. 623, 30 N. W. 209, 6 Am. St. Rep. 334; Hall *v.* Parker, 37 Mich. 590, 26 Am. Rep. 540.

Minnesota.— Martin *v.* Hornsby, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487.

Missouri.— Fales *v.* Filley, 2 Mo. App. 345.

Montana.— Butte *v.* Cook, 29 Mont. 88, 74 Pac. 67.

Nebraska.—American Radiator Co. *v.* American Bonding, etc., Co., 72 Nebr. 100, 100 N. W. 138; Middleboro Nat. Bank *v.* Richards, 55 Nebr. 682, 76 N. W. 528; Mullen *v.* Morris, 43 Nebr. 596, 62 N. W. 74; Cutler *v.* Roberts, 7 Nebr. 4, 29 Am. Rep. 371.

Ohio.— State *v.* Robinson, 6 Ohio Dec. (Reprint) 930, 8 Am. L. Rec. 723.

Oregon.— Baker County *v.* Huntington, 47 Oreg. 328, 83 Pac. 532.

Tennessee.— Sullivan County *v.* Ruth, 106 Tenn. 85, 59 S. W. 138.

Vermont.— Fletcher *v.* Austin, 11 Vt. 447, 34 Am. Dec. 698.

Virginia.—Ward *v.* Churn, 18 Gratt. 801, 98 Am. Dec. 749.

United States.— Pawling *v.* U. S., 4 Cranch 219, 2 L. ed. 601.

See 40 Cent. Dig. tit. "Principal and Surety," § 54.

The fact that a copy of a bond annexed to a declaration, by mistake, contains the name of a person who did not sign, does not show that the obligee was put on inquiry. Rhode *v.* McLean, 101 Ill. 467.

"We, the undersigned, as principal, and John Heil, Jr. and B. K. Bloch, sureties," signed by them but not by the principal, is not notice to the obligee that the sureties signed upon condition that the principal should sign before they should be bound. Butterfield *v.* Mountain Ice, etc., Co., 11 Utah 194, 39 Pac. 824.

37. Allen *v.* Marney, 65 Ind. 398, 32 Am. Rep. 73. But see Russell *v.* Freer, 56 N. Y. 67.

38. King County *v.* Ferry, 5 Wash. 536, 32 Pac. 538, 34 Am. St. Rep. 880, 19 L. R. A. 500.

39. *California.*— People *v.* Stacy, 74 Cal. 373, 16 Pac. 192; Los Angeles *v.* Mellus, 59 Cal. 444.

Georgia.— Towns *v.* Kellett, 11 Ga. 286.

Kansas.— Johnson *v.* Weatherwax, 9 Kan. 75.

Kentucky.— Stevens *v.* Wallace, 5 T. B. Mon. 404.

Massachusetts.— Cutter *v.* Whittemore, 10 Mass. 442.

Minnesota.— Reed *v.* McGregor, 62 Minn. 94, 64 N. W. 88.

Missouri.— State *v.* Sandusky, 46 Mo. 377.

Nebraska.— Mullen *v.* Morris, 43 Nebr. 596, 62 N. W. 74.

North Carolina.— Blume *v.* Bowman, 24 N. C. 338.

Pennsylvania.—Whitaker *v.* Richards, 134 Pa. St. 191, 19 Atl. 501, 19 Am. St. Rep. 684, 7 L. R. A. 749.

Virginia.—Ward *v.* Churn, 18 Gratt. 801, 98 Am. Dec. 749.

England.— Coyte *v.* Elphick, 22 Wkly. Rep. 541.

Canada.— Sedney Road Co. *v.* Holmes, 16 U. C. Q. B. 268.

See 40 Cent. Dig. tit. "Principal and Surety," § 45 *et seq.*

Contra.— Novak *v.* Pitlick, 120 Iowa 286, 94 N. W. 916, 98 Am. St. Rep. 360.

40. Ward *v.* Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749. See also Taylor County *v.* King, 73 Iowa 153, 34 N. W. 774, 5 Am. St. Rep. 666.

41. **Agency** generally see PRINCIPAL AND AGENT, *ante*, p. 1175 *et seq.*

Failure of consideration.— When a consideration entirely fails the surety is not liable. Hale *v.* Aldaffer, 5 Kan. App. 40, 47 Pac. 320, 52 Pac. 194; Tappan *v.* Van Wagenen, 3 Johns. (N. Y.) 465. As a consideration for the contract of a surety usually is that the creditor has altered his condition for the worse, the surety is not liable if the creditor does not so alter his condition (Sowles *v.* Plattsburg First Nat. Bank, 130 Fed. 1009), or make advances (Dunbar *v.* Fleisher, 137 Pa. St. 85, 20 Atl. 520; Mayhew *v.* Crickett, 2 Swanst. 185, 36 Eng. Reprint 585, 1 Wils. Ch. 418, 37 Eng. Reprint 178, 19 Rev. Rep. 57). A failure of consideration as to the principal is likewise a defense to the surety. Barbe *v.* Hansen, 40 La. Ann. 707, 4 So. 889; Adams *v.* Cuny, 15 La. Ann. 485. A depreciation in value (Pascault *v.* Cochran, 34 Fed. 358) or a total destruction (Payne *v.* Deninal, 11 Sm. & M. (Miss.) 400) of property bought by the principal is not a failure of consideration.

But if the failure be partial only, it is for the principal to elect whether he will avoid the whole contract or claim a deduction only.

as to bind his principal as surety thereon, either by express authority,[42] or where the execution of the instrument comes within the scope of his agency.[43] Where the authority is express, the surety is not bound if the agent exceeds it,[44] or unless the agent acts within a reasonable time.[45]

(B) *Ratification of Acts of Agent.* A person may be made liable as surety where his name has been signed without his knowledge, if he does not object after he has been informed thereof, as it is ratification of the use of his name.[46]

d. By Creditor or Obligee. The failure of the creditor to execute the instrument does not relieve a surety thereon, if the principal has treated it as a valid obligation.[47]

e. Acknowledgment.[48] In the absence of a statute requiring it, it is unnecessary for the signers of a bond to acknowledge it.[49]

f. Stamping.[50] Where agreements require a stamp, a contract by a surety on a separate instrument must be stamped.[51]

9. Delivery, Acceptance, Approval, and Justification — a. Delivery[52] — (I) *In General.* The obligation of a surety is not of any validity until delivered.[53]

Equity Com'r *v.* Robinson, 1 Bailey (S. C.) 151. See also Planters' State Bank *v.* Schlamp, 124 Ky. 295, 99 S. W. 216, 30 Ky. L. Rep. 473; Dillingham *v.* Jenkins, 7 Sm. & M. (Miss.) 479; Joyce *v.* Cockrill, 92 Fed. 838, 35 C. C. A. 38; Middlesex *v.* Peters, 9 U. C. C. P. 205. And if there are two sureties by separate instruments, one alone cannot avail himself of all the advantages of a partial failure of consideration. Joyce *v.* Cockrill, 92 Fed. 838, 35 C. C. A. 38.

Authority of and validity of agent's acts see *supra*, IV, C, 9; IV, D, 8, b, (II); *infra*, IV, D, 8, c, (III), (B); IV, D, 9, a, (II); IV, D, 9, b, (V); IV, D, 11, d, (IV); IV, D, 11, f, (II), (B).

42. Colquitt *v.* Smith, 76 Ga. 709.

Such authority must be in writing and signed, under Ky. Gen. St. c. 22, § 20. Dickson *v.* Luman, 93 Ky. 614, 20 S. W. 1038, 14 Ky. L. Rep. 884; Billington *v.* Com., 79 Ky. 400; English *v.* Dycus, 5 S. W. 44, 9 Ky. L. Rep. 188.

43. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550; Pacific Nat. Bank *v.* Ætna Indemnity Co., 33 Wash. 428, 74 Pac. 590.

A letter of attorney authorizing "the performance of contracts other than insurance policies" authorizes the execution of a bond guaranteeing the performance of a contract to repay money advanced to a building contractor. Pacific Nat. Bank *v.* Ætna Indemnity Co., 33 Wash. 428, 74 Pac. 590.

Limitations upon authority of agent do not affect the person dealing with the agent without knowledge of such limitations. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550.

Where an agent of the surety is himself the principal in the contract secured, the bond is not invalid because the agent occupies the two relations where the agent was induced by his superior to incur the obligation, and the signature of the agent on the bond was procured by his superior as a matter of form. Pacific Nat. Bank *v.* Ætna Indemnity Co., 33 Wash. 428, 74 Pac. 590.

44. Stovall *v.* Com., 84 Va. 246, 4 S. E. 379, holding that authority to execute a bond to the amount of twenty-five thousand dollars will not bind the surety if the amount be made forty thousand dollars by the agent.

Where sureties admit the making of the contract, they cannot derive benefit from a claim that their agent exceeded his authority. De Remer *v.* Brown, 36 N. Y. App. Div. 634, 55 N. Y. Suppl. 367.

45. Gilman *v.* Kibler, 5 Humphr. (Tenn.) 19.

46. State *v.* Hill, 50 Ark. 458, 8 S. W. 401; Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670; Hefner *v.* Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Hall *v.* State, 39 Ind. 301.

47. Duffee *v.* Mansfield, 141 Pa. St. 507, 21 Atl. 675, holding that a surety of a lessee is liable if the lessee has taken possession, although the lessor has not signed.

48. **Acknowledgment** generally see Acknowledgments, 1 Cyc. 506.

49. Washington County *v.* Dunn, 27 Gratt. (Va.) 608.

50. **Revenue stamps** generally see 9 Cyc. 302.

51. Glover *v.* Hackett, 2 H. & N. 487, 3 Jur. N. S. 1083, 26 L. J. Exch. 416, 5 Wkly. Rep. 881.

A district collector's bond is exempt from stamp duties under 55 Geo. III, c. 184, although given in a sum exceeding the exact amount of duties to be collected for the district. Collins *v.* Gwynne, 9 Bing. 544, 2 L. J. C. P. 49, 2 Moore & S. 640, 23 E. C. L. 697.

52. **Delivery** generally see Contracts, 9 Cyc. 302.

53. Benjamin *v.* Ver Nooy, 36 N. Y. App. Div. 581, 55 N. Y. Suppl. 796; and cases cited *infra*, this note.

Delivery of a copy verified by affidavit may be sufficient. Haywood *v.* Townsend, 4 N. Y. App. Div. 246, 38 N. Y. Suppl. 517.

If a surety's name be erased from a bond before delivery he is not liable. Lodge *v.* Boone, 3 Harr. & J. (Md.) 218.

Delivery sufficient.— Where an administrator's bond was placed by the principal in a desk where other probate papers were kept, such desk being in the office of the probate judge, and under his control, the delivery

(II) *By or To Agent.*[54] Delivery can be made by agent, and the principal can act as the agent of the surety for this purpose.[55] Authority to the principal may be implied from the acts and conduct of the sureties.[56] Similarly delivery can be made to an agent of the creditor.[57]

(III) *In Escrow.* If the sureties have delivered a bond in escrow, they are not bound by a delivery in violation of their instructions;[58] but the evidence of a wrongful delivery must be clear.[59] A delivery to an agent of the surety in escrow,[60] or to the creditor himself in escrow,[61] is not sufficient.[62]

b. Acceptance[63]— (I) *In General.* In order that a surety may be bound it is necessary that his contract be accepted[64] within a reasonable time;[65] but if the creditor have knowledge that one of the parties is in fact a surety, formal acceptance of the relation is not necessary.[66]

(II) *Notice of Acceptance.* Formal notice of acceptance is unnecessary,[67] unless the surety does not know whether his offer will be accepted or not.[68]

(III) *Presumption and Burden of Proof.* Acceptance will be presumed

was sufficient. Brown *v.* Weatherby, 71 Mo. 152. So where a note payable to a bank was delivered by the principal to his creditor for the purpose of having it discounted, but which was not done, and, after maturity of the note, the sureties requested the bank not to discount it, but the bank indorsed the note to the creditor, he could maintain an action on it. Cross *v.* Rowe, 22 N. H. 77.

No delivery.— Where a surety to an agreement covenanting to pay rent by the assignee of a lease refused to deliver it without the lessor's written consent to the transfer, he cannot be held liable, although the lessor afterward accepted rent from the assignee. Hoops *v.* Schmidt, 4 N. Y. Suppl. 1. Where the principal receives the note from the holder for the purpose of obtaining the signature of a surety, which is done, but refuses to redeliver the note to the holder, the surety is not liable. Chamberlain *v.* Hopps, 8 Vt. 94. Where a note was left with one of the principals to be negotiated by him to raise money to pay the debt for which they were liable, but he paid the debt with his own money, he could not recover from a surety on the note. Thomas *v.* Watkins, 16 Wis. 549.

54. **Agency** generally see PRINCIPAL AND AGENT, *ante*, p. 1175 *et seq.*

Authority of and validity of agent's acts see *supra*, IV, C, 9; IV, D, 8, b, (II); IV, D, 8, c, (III); IV, D, 8, c, (III), (B); *infra*, IV, D, 9, b, (V); IV, D, 11, d, (IV); IV, D, 11, f, (II), (B).

55. Singer Mfg. Co. *v.* Freerks, 12 N. D. 595, 98 N. W. 705; Gritman *v.* U. S. Fidelity, etc., Co., 41 Wash. 77, 83 Pac. 6.

56. Baker County *v.* Huntington, 47 Oreg. 323, 83 Pac. 532.

57. Owens *v.* Tague, 3 Ind. App. 245, 29 N. E. 784.

A bond taken by one not authorized to take it is void. Braddy *v.* Shirley, 23 N. C. 597.

58. People *v.* Bostwick, 32 N. Y. 445 [*affirming* 43 Barb. 9].

59. Amis *v.* Marks, 3 Lea (Tenn.) 568.

To avoid an official bond which has been delivered, accepted, recorded, and filed, the proof must be as satisfactory as that required to set aside a judgment for fraud. Amis *v.* Marks, 3 Lea (Tenn.) 568.

60. Taylor *v.* Craig, 2 J. J. Marsh. (Ky.) 449.

61. Hubble *v.* Murphy, 1 Duv. (Ky.) 278.

62. See ESCROW, 16 Cyc. 560 *et seq.*

63. **Acceptance** generally see CONTRACTS, 9 Cyc. 254.

Notice to and acceptance by creditor generally see *supra*, IV, C, 3.

Revocation before acceptance see *supra*, IV, D, 8, c, (I), (G).

64. Gay *v.* Blanchard, 32 La. Ann. 497.

Illustrations.—Where a note was made payable to a cashier who indorsed it but did not advance any money, the money being advanced by a third person, the sureties were not liable, as the payee never accepted it. Greenville *v.* Ormand, 51 S. C. 58, 28 S. E. 50, 64 Am. St. Rep. 663, 39 L. R. A. 847. After notice of acceptance of a bond, it is not necessary to give the surety notice of the transactions between the obligee and the principal to secure which the bond was given. Jenkins *v.* Phillips, 18 Ind. App. 562, 48 N. E. 651.

65. North British Mercantile Ins. Co. *v.* Kean, 16 Ont. 117.

66. Drescher *v.* Fulham, 10 Colo. App. 62, 52 Pac. 685. *Contra*, York City, etc., Banking Co. *v.* Bainbridge, 45 J. P. 158, 43 L. T. Rep. N. S. 732.

67. *Indiana.*— Swope *v.* Forney, 17 Ind. 385; Lane *v.* Mayer, 15 Ind. App. 382, 44 N. E. 73.

Louisiana.— Lachman *v.* Block, (1894) 15 So. 649.

Maryland.— Engler *v.* People's F. Ins. Co., 46 Md. 322.

North Dakota.— Singer Mfg. Co. *v.* Freerks, 12 N. D. 595, 98 N. W. 705.

Pennsylvania.— Reigart *v.* White, 52 Pa. St. 438; Baker *v.* Robb, 2 Del. Co. 439.

United States.—McIntosh-Huntington Co *v.* Reed, 89 Fed. 464; Hall *v.* Weaver, 34 Fed. 104, 13 Sawy. 188.

See 40 Cent. Dig. tit. "Principal and Surety," § 57.

68. Gano *v.* Farmers' Bank, 106 Ky. 508, 45 S. W. 519, 20 Ky. L. Rep. 197, 82 Am. St. Rep. 596, holding that where one offers his name as surety to whomsoever may accept it, he is entitled to notice of acceptance.

from retention of the instrument without objection; [69] and the burden of proving that it was not accepted is on the surety.[70]

(iv) *Prior Rejection.* Prior rejection does not prevent subsequent acceptance; [71] and the fact that additional signatures are required does not release those who had signed previously.[72]

(v) *Without Authority.* If acceptance be made without authority, the surety is not bound.[73]

c. Approval. The fact that a bond is not approved as required by law is no defense to the sureties thereon; [74] nor is it necessary that the approval be indorsed on the bond.[75] If the approval of a bond has become a matter of record, the evidence of the judge who made it is inadmissible to impeach it; [76] nor can the sureties question the legal qualifications of the officers who approve it.[77]

69. Boyd *v.* Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986; Gass *v.* Stinson, 10 Fed. Cas. No. 5,260, 2 Sumn. 453.

70. Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28. In Wright *v.* Schmidt, 47 Iowa 233, it is said that where one has signed a bond, and the approval of the clerk is indorsed thereon, it is conclusive of his acceptance as surety.

71. Decker *v.* Anderson, 39 Barb. (N. Y.) 346; Van Duyne *v.* Coope, 1 Hill (N. Y.) 557, holding that it is no defense to sureties that they were excepted to as being insufficient.

Illustrations.— Where an indorser of a note was informed that it would not be accepted by the creditor, but the creditor afterward accepted it without any information being given to the indorser, the indorser was liable. Early *v.* Chamberlain, 1 Tex. App. Civ. Cas. § 920. A contractor gave bond to a village, which refused to accept it, and so notified the surety company who signed it. The company requested the return of the bond, and gave notice that it did not desire to assume the suretyship; but the bond was retained by the village, and the contractor allowed to proceed with the work. The contractor having brought suit against the surety company for the recovery of the premium paid for the bond, he was not allowed to do so as the bond had performed its office so far as he was concerned. Hanley *v.* U. S. Fidelity, etc., Co., 131 Mich. 609, 92 N. W. 107.

72. Cawley *v.* People, 95 Ill. 249; Crawford *v.* Collins, 45 Barb. (N. Y.) 269; Postmaster-Gen. *v.* Norvell, 19 Fed. Cas. No. 11,310, Gilp. 106. In McIntyre *v.* Borst, 26 How. Pr. (N. Y.) 411, after a surety had been excepted to, and a new surety substituted, the prior surety was relieved, although the exception afterward was countermanded.

73. Hill *v.* Calvert, 1 Rich. Eq. (S. C.) 56, where an ordinary, without authority, erased the name of one surety from a guardian's bond, and substituted another.

Authority of and validity of agent's acts see *supra*, IV, C, 9; IV, D, 8, b, (II); IV, D, 8, c, (III); IV, D, 8, c, (III), (B); IV, D, 9, a, (II).

74. *California.*— Mendocino County *v.* Morris, 32 Cal. 145; People *v.* Evans, 29 Cal. 429; People *v.* Edwards, 9 Cal. 286.

Colorado.— Irwin *v.* Crook, 17 Colo. 16, 28 Pac 549.

Georgia.— Crawford *v.* Howard, 9 Ga. 314. *Contra*, Mayo *v.* Renfroe, 66 Ga. 408.

Illinois.— School Trustees *v.* Sheik, 119 Ill. 579, 8 N. E. 189, 59 Am. Rep. 830.

Indiana.— Peelle *v.* State, 118 Ind. 512, 21 N. E. 288; State *v.* Britton, 102 Ind. 214, 1 N. E. 617 [*affirmed* in 115 Ind. 55, 17 N. E. 254]; Pepper *v.* State, 22 Ind. 399, 85 Am. Dec. 430.

Iowa.— Held *v.* Bagwell, 58 Iowa 139, 12 N. W. 226.

Kansas.— McCracken *v.* Todd, 1 Kan. 148.

Louisiana.— State *v.* Hampton, 14 La. Ann. 725.

Maryland.— Young *v.* State, 7 Gill & J. 253.

Massachusetts.— Wendell *v.* Fleming, 8 Gray 613.

Mississippi.— Carmichael *v.* Governor, 3 How. 236.

Missouri.— Jones *v.* State, 7 Mo. 81, 37 Am. Dec. 180.

Nebraska.— Thomas *v.* Hinkley, 19 Nebr. 324, 27 N. W. 231.

New York.—Mundorff *v.* Wrangler, 44 N. Y. Super. Ct. 495; Skellinger *v.* Yendes, 12 Wend. 306.

Pennsylvania.— Musselman *v.* Com., 7 Pa. St. 240.

South Carolina.— Treasurers *v.* Stevens, 2 McCord 107.

South Dakota.— See Germantown Trust Co. *v.* Whitney, 19 S. D. 108, 102 N. W. 304.

West Virginia.— State *v.* Proudfoot, 38 W. Va. 736, 18 S. E. 949.

United States.— U. S. *v.* LeBaron, 19 How. 73, 15 L. ed. 525.

See 40 Cent. Dig. tit. "Principal and Surety," § 57.

That an official bond for the faithful performance of services has never been formally approved does not affect the liability of the surety thereon. People *v.* Huson, 78 Cal. 154, 20 Pac. 369; Heath *v.* Shrempp, 22 La. Ann. 167; Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689; and cases cited *supra*, this note.

Acceptance and retention of bond will raise the implication of its approval. Boyd *v.* Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986; Pierce *v.* Richardson, 37 N. H. 306; Postmaster-Gen. *v.* Norvell, 19 Fed. Cas. No. 11,310, Gilp. 106.

75. Gopsill *v.* Decker, 4 Hun (N. Y.) 625, 67 Barb. 211.

76. Taylor *v.* Jones, 3 La. Ann. 619.

77. Horn *v.* Whittier, 6 N. H. 88.

d. Justification of Surety.[78] Failure of a surety to justify will not release him from liability.[79]

10. Consideration [80]**— a. Necessity.** With the exception of instruments under seal,[81] a contract of suretyship, like any other contract,[82] requires a consideration; otherwise it is void.[83]

b. Sufficiency — (i) *In General.* The consideration may be either some advantage to the surety,[84] or some disadvantage to the creditor or obligee; [85] or it may be both; [86] and it is immaterial how small it is; [87] but it must be legal.[88] The most common form of consideration in contracts of suretyship is disadvantage to the creditor or obligee — the altering of his condition for the worse,[89] which

78. **Justification of surety company** see *infra*, X, D.

79. State *v.* McDonald, 4 Ida. 468, 40 Pac. 312, 95 Am. St. Rep. 137; Decker *v.* Anderson, 39 Barb. (N. Y.) 346; Barton *v.* Donnelly, 6 Misc. (N. Y.) 473, 27 N. Y. Suppl. 525; Van Duyne *v.* Coope, 1 Hill (N. Y.) 557.

80. **Consideration:** Affecting construction of contract see *infra*, V, A, D. Between principal and creditor see *supra*, IV, C, 10. For accommodation paper see Commercial Paper, 7 Cyc. 723. For bond on appeal see Appeal and Error, 2 Cyc. 924. For extension of time see *infra*, VII, E, 2, j. For new promise see *infra*, VII, E, 2, e, (II). Of contract generally see Contracts, 9 Cyc. 308.

Accounting for an enforcement of consideration see *infra*, IX, B.

81. Montgomery County *v.* Auchley, 103 Mo. 492, 15 S. W. 626; Guthrie *v.* O'Connor, 36 U. C. Q. B. 372. *Compare* Parkhurst *v.* Vail, 73 Ill. 343; Clopton *v.* Hall, 51 Miss. 482; McNaught *v.* McClaughry, 42 N. Y. 22, 1 Am. Rep. 487; Green *v.* Thornton, 49 N. C. 230.

The fact that a surety on a note receives no benefit does not affect his liability. Darby *v.* Berney Nat. Bank, 97 Ala. 643, 11 So. 881.

82. See Contracts, 9 Cyc. 308.

83. Maydole *v.* Peterson, 7 Ida. 502, 63 Pac. 1048; Planters' State Bank *v.* Schlamp, 124 Ky. 295, 99 S. W. 216, 30 Ky. L. Rep. 473; Hook *v.* White, 201 Pa. St. 41, 50 Atl. 290; Bixler *v.* Ream, 3 Penr. & W. (Pa.) 282; Barrell *v.* Trussell, 4 Taunt. 117.

84 Givens *v.* Gridley, 106 S. W. 1192, 32 Ky. L. Rep. 825.

An agreement that an attorney shall receive a fee for foreclosing a mortgage is sufficient consideration for his undertaking that the client will receive the full amount of his debt from a sale of the mortgaged property. Alter *v.* Hornor, 33 La. Ann. 243.

Security received by the surety is sufficient consideration for his contract. Judd *v.* Martin, 97 Ind. 173; Stone *v.* White, 8 Gray (Mass.) 589. And it is not necessary that the surety make the proceeds of such security available before he becomes liable. Ikin *v.* Brook, 1 B. & Ad. 124, 8 L. J. K. B. O. S. 379, 20 E. C. L. 423.

Illustrations of lack of consideration.— In the absence of proof of occupancy by a tenant, his surety is not liable, there not being any consideration for his promise if the lease is void. Andriot *v.* Lawrence, 33 Barb. (N. Y.) 142. An assignee of a lease, upon reassigning, took an agreement with a surety, for the payment of the rent. As the liability of the assignee for rent terminated with the reassignment, the second assignee did not owe him anything, and the promise of the surety was without consideration. Stoppani *v.* Richard, 1 Hilt. (N. Y.) 509. Where a debtor allowed his creditor to transfer to his account a debt due to the creditor from another person, he is not liable for the sum so transferred, as the arrangement was without consideration as to him. French *v.* French, Drinkw. 159, 5 Jur. 410, 10 L. J. C. P. 220, 2 M. & G. 644, 3 Scott N. R. 121, 40 E. C. L. 785.

85. Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226.

Where the creditor or obligee in good faith has parted with value, the surety is liable, although the premium due for entering into the obligation has not been paid. Pacific Nat. Bank *v.* Ætna Indemnity Co., 33 Wash. 428, 74 Pac. 590.

86. Surtees *v.* Lister, 7 H. & N. 1, 30 L. J. Exch. 369. In this case plaintiff and defendant were coöwners of goods which they agreed defendant should sell. The sale was on credit, defendant taking a note for less than half the price, which was turned over to plaintiff. Later plaintiff paid defendant one half of the face of the note upon the latter's agreeing to become responsible for one half of the balance due from the buyer. It was held that there was sufficient consideration for the defendant's agreement.

87. Guthrie *v.* O'Connor, 36 U. C. Q. B. 372, holding that an agreement to postpone an execution sale of debtor's property is sufficient if the agreement is carried out so far as it is possible at the time.

88. Folmar *v.* Siler, 132 Ala. 297, 31 So. 719. See also *infra*, VIII, B, 3, b.

89. Favorite *v.* Stidham, 84 Ind. 423, holding that if a surety signs at the time of the original execution of the instrument he is liable.

The rule sometimes is stated that the consideration moving to the principal is sufficient to sustain the surety's promise. Gay *v.* Mott, 43 Ga. 252; Green *v.* Shaw, 66 Ill. App. 74; Lackey *v.* Boruff, 152 Ind. 371, 53 N. E. 412; Wheeler *v.* Barr, 7 Ind. App. 381, 34 N. E. 591; Union Bank *v.* Beatty, 10 La. Ann. 378; Robertson *v.* Findley, 31 Mo. 384; Peck *v.* Harris, 57 Mo. App. 467; Savage *v.* Fox, 60 N. H. 17; McNaught *v.* McClaughry, 42 N. Y.

may be by incurring liability,[90] by the release of the principal [91] or of a former surety;[92] or the surrender of some security [93] or of a right.[94] If for any reason a surety is discharged from liability on a note, a renewal note, signed by him is without consideration.[95]

(II) *Extension of Credit to Principal.* Another method in which the creditor alters his condition for the worse, raising a sufficient consideration, is by giving credit to the principal,[96] which may be by advancing money to him,[97] demising property to him,[98] performing work for him,[99] or selling goods to him.[1] The obligee may alter his condition for the worse by giving the principal an office or employment, and trusting his affairs to him.[2]

(III) *Forbearance.* Forbearance by the creditor or obligee is a sufficient consideration for the contract of a surety,[3] although a definite time is not agreed upon;[4] and if, in reliance upon the agreement of the surety, the creditor forbears to bring suit against the principal,[5] or grants him an extension of time within

22, 1 Am. Rep. 487; Henderson *v.* Rice, 1 Coldw. (Tenn.) 223.

90. As by beginning the prosecution of an action (Dally *v.* Poolly, 6 Q. B. 494, 51 E. C. L. 494), or by entering into contracts (Farley *v.* Moran, (Cal. 1892) 31 Pac. 158; Hunt *v.* Daniel, 6 J. J. Marsh. (Ky.) 398; Smith *v.* Molleson, 74 Hun (N. Y.) 606, 26 N. Y. Suppl. 653 [*affirmed* in 148 N. Y. 241, 42 N. E. 669]).

91. Shortrede *v.* Cheek, 1 A. & E. 57, 3 L. J. K. B. 125, 3 N. & M. 366, 28 E. C. L. 51; Loftus *v.* Lee, 18 U. C. Q. B. 195; Moberly *v.* Baines, 15 U. C. Q. B. 25.

92. Jackson *v.* Cooper, 39 S. W. 39, 19 Ky. L. Rep. 9; Burrus *v.* Davis, 67 Mo. App. 210; Wash *v.* Sullivan, (Tex. Civ. App. 1904) 84 S. W. 368.

93. Zuendt *v.* Doerner, 101 Mo. App. 528, 73 S. W. 873.

The abandonment of a lien is sufficient. Davis *v.* National Surety Co., 139 Cal. 223, 72 Pac. 1001; Bowman *v.* Forney, 3 Dauph. Co. Rep. (Pa.) 68.

94. Harwood *v.* Johnson, 20 Ill. 367, holding that relinquishing a right to rescind a sale for fraud is sufficient. The creditor must prove that he possessed such a right as he claims was relinquished. Gull *v.* Lindsay, 4 Exch. 45, 18 L. J. Exch. 354.

95. Banque Provinciale *v.* Arnoldi, 2 Ont. L. Rep. 624.

96. White Sewing Mach. Co. *v.* Fowler, 28 Nev. 94, 78 Pac. 1034. "In consideration of E. R. & Co. giving credit to D. J., I hereby engage to be responsible, and to pay any sum not exceeding 120*l.*, due to the said E. R. & Co., by the said D. J.," shows a consideration, as the words "giving credit" might apply to future as well as to past credit. Edwards *v.* Jevons, 8 C. B. 436, 14 Jur. 131, 19 L. J. C. P. 50, 65 E. C. L. 436. In Hughes' Estate, 13 Pa. Super. Ct. 240, it is said that the favor the surety receives from compliance with his request for credit to the principal is the consideration for his obligation.

97. Thackwell *v.* Gardiner, 5 De G. & Sm. 58, 16 Jur. 588, 21 L. J. Ch. 777, 64 Eng. Reprint 1017.

A bond given by a bank to a state treasurer to secure deposits to be made by the latter is binding on the sureties on the bond. Kephart *v.* Buddecke, 20 Colo. App. 546, 80 Pac. 501.

98. Caballero *v.* Slater, 14 C. B. 300, 23 L. J. C. P. 67, 78 E. C. L. 300.

99. Jarvis *v.* Wilkins, 5 Jur. 9, 10 L. J. Exch. 104, 7 M. & W. 410; Loftus *v.* Lee, 18 U. C. Q. B. 195.

1. Merchants' Nat. Bank *v.* Ryan, 67 Ohio St. 448, 66 N. E. 526, holding that where the principal gives a note with a surety in order to secure the performance of a contract by the creditor, it is immaterial that the principal could have enforced performance by the creditor on giving a note without a surety, as the principal had the right to waive a strict performance of the prior contract by the creditor while it was executory, and make a new one.

2. Court Vesper No. 69 F. A. *v.* Fries, 22 Pa. Super. Ct. 250; Newberry *v.* Armstrong, 6 Bing. 201, 19 E. C. L. 98, 4 C. & P. 59, 19 E. C. L. 406, 8 L. J. C. P. O. S. 4, M. & M. 389, 3 M. & P. 509, 31 Rev. Rep. 386; Lysaght *v.* Walker, 5 Bligh N. S. 1, 5 Eng. Reprint 208.

The continuance of the principal in office after he has entered upon his duties is a sufficient consideration for the sureties on his bond. La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805; State *v.* Woods, 84 Mo. 163; State *v.* Paxton, 65 Nebr. 110, 90 N. W. 983; John Hancock Mut. L. Ins. Co. *v.* Lowenberg, 4 N. Y. St. 699.

3. New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

4. Cooper *v.* Jackson, 57 S. W. 254, 22 Ky. L. Rep. 295; Wynne *v.* Hughes, 21 Wkly. Rep. 628.

5. Turner *v.* Smith, 112 Ala. 334, 20 So. 486; Howard *v.* Lawrence, 63 S. W. 589, 23 Ky. L. Rep. 680; Jackson *v.* Cooper, 39 S. W. 39, 19 Ky. L. Rep. 9; Bowman *v.* Forney, 3 Dauph. Co. Rep. (Pa.) 68; Alhusen *v.* Prest, 6 Exch. 720, 20 L. J. Exch. 440; Jones *v.* Beach, 21 L. J. Ch. 543.

It is not necessary that the creditor have a well founded claim; or, if the surety agrees to pay a smaller sum than the creditor claims, it is not necessary that he be willing to accept it in full satisfaction of the debt owing by the principal. Tempson *v.* Knowles, 7 C. B. 651, 18 L. J. C. P. 222, 62 E. C. L. 651.

which to pay the debt,[6] or note,[7] the surety is bound. Antecedent indebtedness of the principal is a sufficient consideration for a note signed by the surety; [8] and the surrender of an old note is sufficient consideration for signing a new one,[9] whether the former note was signed by the surety [10] or not.[11]

(IV) *Past Consideration.* As a past consideration is no consideration at all,[12] a surety who executes an instrument after its delivery, is not bound;[13] but if

6. *Indiana.*— Mayer *v.* Grottendick, 68 Ind. 1.

Michigan.— Lee *v.* Wisner, 38 Mich. 82.

Minnesota.— Hooper *v.* Pike, 70 Minn. 84, 72 N. W. 829, 68 Am. St. Rep. 512.

Missouri. — Grandy *v.* Campbell, 78 Mo. App. 502.

Canada.— Moberly *v.* Baines, 15 U. C. Q. B. 25.

See 40 Cent. Dig. tit. "Principal and Surety," § 68.

7. McHard *v.* Ives, 5 Ill. App. 400; Pulliam *v.* Withers, 8 Dana (Ky.) 98, 33 Am. Dec. 479; Stone *v.* White, 8 Gray (Mass.) 589; Hall *v.* Clopton, 56 Miss. 555.

8. *Arkansas.*— Harrell *v.* Tenant, 30 Ark. 684.

Kentucky. — Dow-Hayden Grocery Co. *v.* Muncy, 73 S. W. 1030, 24 Ky. L. Rep. 2255.

Michigan.— Aultman, etc., Co. *v.* Gorham, 87 Mich. 233, 49 N. W. 486.

Minnesota.— Nichols, etc., Co. *v.* Dedrick, 61 Minn. 513, 63 N. W. 1110.

South Dakota.— Bennett *v.* Ellis, 13 S. D. 401, 83 N. W. 429.

See 40 Cent. Dig. tit. "Principal and Surety," § 68.

The fact that the creditor might proceed against the principal by attachment, under certain circumstances, before the maturity of the note, does not prevent the forbearance being a sufficient consideration. Hannay *v.* Moody, 31 Tex. Civ. App. 88, 71 S. W. 325.

Forbearance is a sufficient consideration for a mortgage given by the surety. Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226.

9. Brewster *v.* Baker, 97 Ind. 260; Coffin *v.* Asbury University, 92 Ind. 337; Towery *v.* Meeks, 30 S. W. 1014, 17 Ky. L. Rep. 248; Jaycox *v.* Trembly, 42 N. Y. App. Div. 416, 59 N. Y. Suppl. 245; Queens County Bank *v.* Leavitt, 10 N. Y. Suppl. 194.

10. *Michigan.*— Hancock First Nat. Bank *v.* Johnson, 133 Mich. 700, 95 N. W. 975, 103 Am. St. Rep. 468.

Tennessee.— Lonas *v.* Wolfe, 8 Baxt. 179.

Texas.— Bell *v.* Boyd, 76 Tex. 133, 13 S. W. 232; Boyd *v.* Bell, 69 Tex. 735, 7 S. W. 657.

Vermont.—Churchill *v.* Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563.

West Virginia.—Williamson *v.* Cline, 40 W. Va. 194, 20 S. E. 917.

Wisconsin.— Black River Falls First Nat. Bank *v.* Jones, 92 Wis. 36, 65 N. W. 861.

See 40 Cent. Dig. tit. "Principal and Surety," § 68.

11. Stroud *v.* Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111; Miller *v.* Gardner, 49 Iowa 234; Wheeler *v.* Slocumb, 16 Pick. (Mass.) 52; Jaycox *v.* Trembly, 42 N. Y. App. Div. 416, 59 N. Y. Suppl. 245.

12. Martin *v.* Stubbings, 20 Ill. App. 381.

13. *Alabama.*— Savage *v.* Rome First Nat. Bank, 112 Ala. 508, 20 So. 398; Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 13 Am. St. Rep. 46, 4 L. R. A. 680; Jackson *v.* Jackson, 7 Ala. 791.

Illinois.— Crofut *v.* Aldrich, 54 Ill. App. 541; Anderson *v.* Norvill, 10 Ill. App. 240.

Indiana.—Favorite *v.* Stidham, 84 Ind. 423; Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. 537; Brant *v.* Barnett, 10 Ind. App. 653, 38 N. E. 421; Owens *v.* Tague, 3 Ind. App. 245, 29 N. E. 784.

Iowa.— Briggs *v.* Downing, 48 Iowa 550.

Kentucky.— Jackson *v.* Cooper, 39 S. W. 39, 19 Ky. L. Rep. 9.

Massachusetts.— Pratt *v.* Hedden, 121 Mass. 116; Green *v.* Shepherd, 5 Allen 589; Stone *v.* White, 8 Gray 589.

Missouri. — Lowenstein *v.* Sorge, 75 Mo. App. 281; La Fayette Mut. Bldg. Assoc. *v.* Kleinhoffer, 40 Mo. App. 388; Hartman *v.* Redman, 21 Mo. App. 124.

Nebraska.—Barnes *v.* Van Keuren, 31 Nebr. 165, 47 N. W. 848.

New York.— McNaught *v.* McClaughry, 42 N. Y. 22, 1 Am. Rep. 487.

Texas.— Bluff Springs Mercantile Co. *v.* White, (Civ. App. 1905) 90 S. W. 710; Simmang *v.* Farnsworth, (Civ. App. 1893) 24 S. W. 541.

See 40 Cent. Dig. tit. "Principal and Surety," § 67.

Compare Jenkins *v.* Ruttan, 8 U. C. Q. B. 625, where it was held that no past consideration was imported by the following language: "Sir.— Mr. Jones informs me that you have a doubt respecting the validity of a mortgage from him to you, for your claim for the sails and rigging. I am willing to become responsible to you, that a good and valid mortgage shall be made to you in the course of this fall, provided you consent to the vessel being fitted for sea; or in default of your not receiving it, I will be responsible for the payment of your debt in twelve months."

There is no consideration for a note signed by a surety with the expectation that it would enable the principal to obtain an additional loan, but which is held by the creditor as collateral security for a note past due. Altoona Second Nat. Bank *v.* Dunn, 151 Pa. St. 228, 25 Atl. 80, 81, 82, 31 Am. St. Rep. 742.

A surety who signed an overdue note is not liable thereon, although it enabled the principal to obtain an extension of time, if the surety was not aware that the object of his becoming a party to the instrument was to obtain such extension. Pratt *v.* Hedden, 121 Mass. 116.

Where the surety's undertaking was for money "advanced or to be advanced" to the principal, and the principal was owing money

the surety becomes responsible for advancements to be made as well as for the former debt, and such future advancements are made, there is a consideration for the entire indebtedness, past and future.[14] If the surety's contract is to answer for past and future indebtedness of the principal, and the contract is not entire, the surety will be liable for the future indebtedness, although his contract as to the past indebtedness is without consideration.[15] If the surety signs after the delivery of the contract, but in accordance with a prior agreement, the surety is bound, as the consideration is that the creditor parted with value in reliance upon the signature of the surety to be obtained,[16] unless the creditor delays too long in requesting the surety's signature.[17]

11. Validity of Surety's Obligation[18]—a. In General. A surety is not liable on an unenforceable,[19] or on a void contract,[20] even though he believes it to be valid.[21] Generally, if one cosurety, for some reason, is not bound, the instrument is void as to all of the sureties,[22] even though such cosurety afterward agreed orally to consider himself bound.[23] However, he is not released from liability as surety by the fact that another surety on a separate instrument is not bound.[24]

b. Requirements of Statute[25]— (i) *Rule Stated.* It is not a defense to a surety that a bond given by him does not conform to the statute under which it

at the time the surety executed his agreement, and there is no evidence that any was advanced afterward, the surety is not liable. Bell *v.* Welch, 9 C. B. 154, 14 Jur. 432, 19 L. J. C. P. 184, 67 E. C. L. 154.

Where one surety signed a note before its delivery, and another afterward, the fact that the first surety was a rich man and the second a poor one is not admissible as evidence that the note was accepted before the second surety signed. Deposit Bank *v.* Peak, 62 S. W. 268, 23 Ky. L. Rep. 19.

14. Sherman *v.* Roberts, 1 Grant (Pa.) 261.

15. Wood *v.* Benson, 2 Cromp. & J. 95, 1 L. J. Exch. 18, 1 Price Pr. Cas. 169, 2 Tyrw. 98.

16. *Arkansas.*— Williams *v.* Perkins, 21 Ark. 18.

California.— Stroud *v.* Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111.

Illinois.— Wylie *v.* Dickenson, 50 Ill. App. 622.

Kentucky.— Sypert *v.* Harrison, 88 Ky. 461, 11 S. W. 435, 10 Ky. L. Rep. 1052; Limestone Bank *v.* Penick, 5 T. B. Mon. 25, 2 T. B. Mon. 98, 15 Am. Dec. 136; Deposit Bank *v.* Peak, 62 S. W. 268, 23 Ky. L. Rep. 19.

Minnesota.— Bowen *v.* Thwing, 56 Minn. 177, 57 N. W. 468.

Missouri.— Robertson *v.* Findley, 31 Mo. 384.

New York.— Pennsylvania Coal Co. *v.* Blake, 85 N. Y. 226.

See 40 Cent. Dig. tit. "Principal and Surety," § 67.

A surety's contract is not without consideration because the principal commenced work before giving bond, if the building contract required the execution of a bond. De Mattos *v.* Jordan, 15 Wash. 378, 46 Pac. 402.

The surety is liable if he afterward signs, although he at first declined, claiming that the amount was larger than he authorized. Dodge *v.* Pringle, 29 L. J. Exch. 115.

The presumption is that a landlord agreed to let the premises in consideration of the surety's promise; and it is immaterial that the surety's contract is dated two days before the lease. Donaldson *v.* Neidlinger, 2 N. Y. Suppl. 737.

17. Haven *v.* Chicago Sash, etc., Co., 96 Ill. App. 92 [*affirmed* in 195 Ill. 474, 63 N. E. 158]. In Sawyer *v.* Fernald, 59 Me. 500, the principal had promised to procure a surety the next day. Eighteen months afterward, he procured a surety, but the surety was ignorant of the principal's agreement. The surety was not liable. In McNaught *v.* McClaughry, 42 N. Y. 22, 1 Am. Rep. 487, the delay was some months, and in Harrington *v.* Brown, 77 N. Y. 72, two years; but the surety was held liable in each instance.

18. **Validity of principal's obligation** see *supra*, IV, C.

Want of consideration see *supra*, IV, D, 10.

What effect of usury see *supra*, IV, C, 8; *infra*, VIII, D, 2.

19. Cooney *v.* Biggerstaff, 4 Pa. Cas. 200, 7 Atl. 156.

20. De Brettes *v.* Goodman, 9 Moore P. C. 466, 14 Eng. Reprint 375, holding that a surety for the payment of purchase-money for real estate is not liable if the sale is void, owing to lack of authority of the agent who acted for the vendee.

21. Evans *v.* Huey, 1 Bay (S. C.) 13.

22. Pepper *v.* State, 22 Ind. 399, 85 Am. Dec. 430; Gross *v.* Bouton, 9 Daly (N. Y.) 25. A surety cannot object that a subsequent surety was induced, by fraud, to execute the instrument. Franklin Bank *v.* Stevens, 39 Me. 532. In Templeton *v.* Com., 3 Pa. Cas. 550, 8 Atl. 167, it is said that the absence of a seal against the signature of a surety does not affect the liability of the others.

23. Gross *v.* Bouton, 9 Daly (N. Y.) 25.

24. Gottwald *v.* Tuttle, 7 Daly (N. Y.) 105.

25. **Requirements of statute** relating to particular contracts of suretyship see Cross-References, *supra*, p. 11. Requirements of

was given,[26] or that the statute may be unconstitutional,[27] as it may be a good common-law bond, if voluntarily given, although not a statutory bond.[28]

(II) *RULE APPLIED.* Such bonds will be enforced, although a different obligee be named;[29] or if made joint only, and not joint and several;[30] or if the penalty be larger[31] or smaller[32] than the statute provides. The addition of a condition not specifically named in the statute will not invalidate the bond.[33] If a statute or by-law requires that a certain number of sureties shall sign a bond, fewer than that number will be bound.[34] So if security in addition to the sureties be required, the sureties are bound, although such security be not taken.[35] Where a statute forbids certain classes of persons from becoming sureties, they cannot plead their lack of legal qualification as a defense.[36]

c. Forgery. A contract is void as to a person whose signature as surety has been forged;[37] but it is not a defense to a surety that he was induced to sign an instrument on the supposition that a prior signature thereon was genuine.[38] He is bound, although the signature of the principal was a forgery.[39] Likewise the forgery of the signature of a cosurety will not affect the liability of a surety,[40] whether such forged signature was upon the instrument at the time he executed it,[41]

statute relating to principal's obligation see *supra*, IV, C, 2.

26. Stephens *v.* Crawford, 3 Ga. 499; Riggs *v.* Miller, 34 Nebr. 666, 52 N. W. 567; Kopplekom *v.* Huffman, 12 Nebr. 95, 10 N. W. 577; Skellinger *v.* Yendes, 12 Wend. (N. Y.) 306; Governor *v.* Witherspoon, 10 N. C. 42.

Statutory provision to this effect exists in some states. See Ala. Code (1896), § 3089.

27. Bradford *v.* Skillman, 6 Mart. N. S. (La.) 123.

28. People *v.* Pace, 57 Ill. App. 674.

29. See cases cited *infra*, this note.

A bond is properly given "to the commissioners" and need not be "to his majesty, his heirs and successors." *In re* O'Neills, Sau. & Sc. 686.

A contractor's bond running to the city instead of to the state, as required by statute, is admissible in evidence. Pacific Bridge Co. *v.* U. S. Fidelity, etc., Co., 33 Wash. 47, 73 Pac. 772.

30. Baars *v.* Gordon, 21 Fla. 25.

31. Henderson *v.* Matlock, 9 N. C. 366; Collins *v.* Gwynne, 9 Bing. 544, 2 L. J. C. P. 49, 2 Moore & S. 640, 23 E. C. L. 697.

32. Carver *v.* Carver, 77 Ind. 498.

33. Chadwick *v.* U. S., 3 Fed. 750, holding that an undertaking to be answerable for the acts of deputies as well as for the acts of the collector does not relieve the sureties.

34. Gray *v.* Norfolk School Dist., 35 Nebr. 438, 53 N. W. 377; Dalton *v.* Miami Tribe No. 1, 5 Ohio Dec. (Reprint) 42, 2 Am. L. Rec. 329; Reynolds *v.* Dechaums, 24 Tex. 174, 76 Am. Dec. 101; Peppin *v.* Cooper, 2 B. & Ald. 431.

35. Scotten *v.* State, 51 Ind. 52; State *v.* Wiley, 15 Iowa 155; Joyce *v.* Auten, 179 U. S. 591, 21 S. Ct. 227, 45 L. ed. 332 [*affirming* 92 Fed. 838, 35 C. C. A. 38].

36. Lovejoy *v.* Isbell, 70 Conn. 557, 40 Atl. 531.

Attorneys.— Cunningham *v.* Tucker, 14 Fla. 251.

Members of general assembly.— Decatur Branch Bank *v.* Douglass, 9 Ala. 853.

Non-residents.— Wallace *v.* Glover, 3 Rob. (La.) 411; State *v.* Judge New Orleans Prob. Ct., 2 Rob. (La.) 449; Gossett *v.* Cashell, 14 La. 245; Mourain *v.* Devall, 12 La. 93; Potter *v.* Richardson, 1 Mart. N. S. (La.) 276.

That a surety does not own real estate is an insufficient defense. Heater *v.* Pearce, 59 Nebr. 583, 81 N. W. 615.

In Quebec art. 1301, C. C., forbidding a wife to become surety for or with her husband, has no application to a case where husband and wife become surety for a debt for which the wife already is liable. Mullin *v.* Carey, 13 Quebec Super. Ct. 115.

37. Maxwell *v.* Wright, (Ind. App. 1902) 64 N. E. 893.

Nor is he estopped from asserting the forgery by merely withholding information in regard to it at a time when payment from the principal might have been enforced. Maxwell *v.* Wright, (Ind. App. 1902) 64 N. E. 893.

38. York County M. F. Ins. Co. *v.* Brooks, 51 Me. 506.

39. Wayne Agricultural Co. *v.* Cardwell, 73 Ind. 555; Helms *v.* Wayne Agricultural Co., 73 Ind. 325, 38 Am. Rep. 147; Chase *v.* Hathorn, 61 Me. 505; Trevathan *v.* Caldwell, 4 Heisk. (Tenn.) 535; Arthur *v.* Sherman, 11 Wash. 254, 39 Pac. 670.

40. Hall *v.* Smith, 14 Bush (Ky.) 604.

41. *District of Columbia.*— U. S. *v.* Boyd, 8 App. Cas. 440.

Illinois.— Stern *v.* People, 102 Ill. 540; Stoner *v.* Millikin, 85 Ill. 218 [*overruling* Seely *v.* People, 27 Ill. 173, 81 Am. Dec. 224]; Cornell *v.* People, 37 Ill. App. 490.

Indiana.— State *v.* Pepper, 31 Ind. 76.

Kentucky.— Wheeler *v.* Traders' Deposit Bank, 107 Ky. 653, 55 S. W. 552, 21 Ky. L. Rep. 1416, 49 L. R. A. 315; Terry *v.* Hazlewood, 1 Duv. 104.

Missouri.— State *v.* Hewitt, 72 Mo. 603; State *v.* Baker, 64 Mo. 167, 27 Am. Rep. 214.

Nebraska.— Kansas City Terra-Cotta Lumber Co. *v.* Murphy, 49 Nebr. 674, 68 N. W. 1030; Lombard *v.* Mayberry, 24 Nebr. 674, 40 N. W. 271, 8 Am. St. Rep. 234.

or afterward was placed there,[42] unless the creditor takes the instrument with notice of the facts.[43]

d. Fraud, Duress, and Concealment [44]— (i) *In General* — (a) *Rule Stated.* False or fraudulent statements made to a surety at the time of the execution of his contract, or during the negotiations leading up to it, is sufficient ground for his annulling it,[45] although it may be binding on the principal.[46] So too, if a surety acts under duress, he will not be bound on his contract.[47]

(b) *Rule Applied* — (1) What Held to Amount to Fraud. Very little said which ought not to have been said, and very little omitted which ought to have been said,[48] and except for which the relation might not have been entered into, will suffice to avoid the contract;[49] although it is not material that the surety would have executed the contract anyway if he had known the true facts;[50] nor is it material that the surety, on making inquiry of the creditor or obligee, said that a reply would be held strictly private and confidential, and as not making the creditor or obligee in any way responsible.[51] A surety is not liable if the representations made to him are untrue although honestly made.[52] It is regarded as a fraud on the surety falsely to tell him that the principal requested him to become such,[53] or to represent that the principal is not indebted,[54] or not a

Texas.— Linskie *v.* Kerr, (Civ. App. 1896) 34 S. W. 765.

See 40 Cent. Dig. tit. "Principal and Surety," § 71 *et seq.*

However, in Southern Cotton-Oil Co. *v.* Bass, 126 Ala. 343, 28 So. 576, where a person agreed to sign a bond as surety if another would sign, and thereafter a bond was exhibited to which the signature of such person was forged, the surety signing thereafter was held not to be bound, although the obligee was not aware of the forgery, and although the person whose signature was forged made a payment on the bond after default.

42. Mathis *v.* Morgan, 72 Ga. 517, 53 Am. Rep. 847; Tarbill *v.* Richmond City Mill Works, 2 Ohio Cir. Ct. 564, 1 Ohio Cir. Dec. 643; Sullivan *v.* Williams, 43 S. C. 489, 21 S. E. 642.

43. Klaman *v.* Malvin, 61 Iowa 752, 16 N. W. 356.

44. Duress generally see Contracts, 9 Cyc. 443.

Fraud generally see Contracts, 9 Cyc. 411.

Fraud, duress, or undue influence affecting principal's obligation see *supra*, IV, C, 3, 4.

Undue influence generally see Contracts, 9 Cyc. 454.

45. Benton County Sav. Bank *v.* Boddicker 105 Iowa 548, 75 N. W. 632, 67 Am. St. Rep. 310, 45 L. R. A. 321; Trammell *v.* Swan, 25 Tex. 473; Cooper *v.* Joel, 1 De G. F. & J. 240, 1 L. T. Rep. N. S. 351, 62 Eng. Ch. 184, 45 Eng. Reprint 350. But *compare* U. S. Fidelity, etc., Co. *v.* Com., 104 S. W. 1029, 31 Ky. L. Rep. 1179 (where fraudulent representation was made by one not authorized to make statements); Rothschild *v.* Frank, 14 N. Y. App. Div. 399, 43 N. Y. Suppl. 951 [*reversing* 16 Misc. 621, 39 N. Y. Suppl. 54].

An injunction having been obtained by a surety, restraining proceedings against him on the ground of fraud, and the evidence, although not conclusive, indicating that there had been fraud, the court, on motion, refused to dissolve the injunction, or to put the surety on the terms of bringing the money into court. Allan *v.* Inman, 7 Jur. 433.

46. Evans *v.* Keeland, 9 Ala. 42.

47. Wilkerson *v.* Hood, 65 Mo. App. 491.

48. Davies *v.* London, etc., Mar. Ins. Co., 8 Ch. D. 469, 47 L. J. Ch. 511, 38 L. T. Rep. N. S. 478, 26 Wkly. Rep. 794.

49. Powers Dry-Goods Co. *v.* Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460; Stone *v.* Compton, 5 Bing. N. Cas. 142, 6 Scott 846, 35 E. C. L. 85. See also Pidcock *v.* Bishop, 3 B. & C. 605, 5 D. & R. 505, 3 L. J. K. B. O. S. 109, 27 Rev. Rep. 430, 10 E. C. L. 276.

50. Learned *v.* Ryder, 5 Lans. (N. Y.) 539, 61 Barb. 552.

51. U. S. *v.* American Bonding, etc., Co., 89 Fed. 921.

52. Blaney *v.* Rogers, 174 Mass. 277, 54 N. E. 561; Isaac Harter Co. *v.* Pearson, 26 Ohio Cir. Ct. 601; Toronto Brewing, etc., Co. *v.* Hevey, 13 Ont. 64.

53. Gist *v.* Feitz, 43 Nebr. 238, 61 N. W. 621; Meck *v.* Frantz, 171 Pa. St. 632, 33 Atl. 413.

Extension desired.— A surety is not liable on a note to sign which he was entrapped by a false statement by the payee that the principal desired an extension. Hall *v.* Clopton, 56 Miss. 555.

54. *Connecticut.*— Doughty *v.* Savage, 28 Conn. 146.

Iowa.— Melick *v.* Tama City First Nat. Bank, 52 Iowa 94, 2 N. W. 1021.

Ohio.—Isaac Harter Co. *v.* Pearson, 26 Ohio Cir. Ct. 601.

United States.— U. S. *v.* American Bonding, etc., Co., 89 Fed. 921.

England.— Blest *v.* Brown, 3 Giffard 450, 8 Jur. N. S. 187, 5 L. T. Rep. N. S. 663, 66 Eng. Reprint 486 [*affirmed* in 4 De G. F. & J. 367, 8 Jur. N. S. 602, 6 L. T. Rep.

defaulter;[55] or that the creditor holds collateral of the principal;[56] or as to the time of the maturity of the liabilities of the principal.[57] If a misrepresentation is made as to the amount of the liabilities of the principal for which the surety is rendering himself liable, his contract is voidable[58] as to the excess over the amount stated to him.[59] Likewise a surety is not bound if he is deceived as to the application to be made of the proceeds of the instrument signed by him.[60] Fraudulent representations as to the contents of the contract signed by a surety will constitute a defense to him.[61] If the surety sign a note for the purchase of property, any fraudulent misstatement in regard to such property frees him from liability.[62]

(2) What Held Not to Amount to Fraud — (a) In General. A surety is liable, however, if the representation is not material;[63] or is a matter of opinion;[64] or a statement of the legal effect of his contract;[65] nor can a surety claim that he is not liable because he was told that his signature was required as a matter of form,[66] and that he did not incur any risk,[67] or that his liability would be temporary

N. S. 620, 10 Wkly. Rep. 569, 65 Eng. Ch. 284, 45 Eng. Reprint 1225].

See 40 Cent. Dig. tit. "Principal and Surety," § 78 *et seq.*

55. Drabek *v.* Grand Lodge B. S. B. C., 24 Ill. App. 82. See *infra*, IV, D, 11, d, (IV), (B).

56. Woolley *v.* Louisville Banking Co., 81 Ky. 527; Galbraith *v.* Townsend, 1 Tex. Civ. App. 447, 20 S. W. 943.

57. Stanford First Nat. Bank *v.* Mattingly, 92 Ky. 650, 18 S. W. 940, 14 Ky. L. Rep. 68.

58. Fishburn *v.* Jones, 37 Ind. 119.

59. Clopton *v.* Elkin, 49 Miss. 95; Weed *v.* Bentley, 6 Hill (N. Y.) 56. In Warren *v.* Branch, 15 W. Va. 21, it is said that if a surety is released on account of fraud, he is released as to the entire contract, and not as to part only.

60. Ham *v.* Greve, 34 Ind. 18; Haworth *v.* Crosby, 120 Iowa 612, 94 N. W. 1098; Crossley *v.* Stanley, 112 Iowa 24, 83 N. W. 806, 84 Am. St. Rep. 321.

Worthless debt.— In an action on the bond of an administrator by the widow, who was the sole distributee of the estate of her husband, it is a good defense to a surety that the administrator was insolvent at the time of his appointment, and has remained so, that the estate consisted solely of a note due from the administrator, that there were not any debts due from the estate, and that he was induced to become surety by the fraud of the widow and the administrator in order to make him liable for the worthless debt. Campbell *v.* Johnson, 41 Ohio St. 588.

61. Folmar *v.* Siler, 132 Ala. 297, 31 So. 719; Deering *v.* Shumpik, 67 Minn. 348, 69 N. W. 1088.

Renewal contract.— Where a note recited that stock was pledged to secure the note "and all other indebtedness owing by us," and a renewal note was changed by the payee so as to read, "owing by us, or either of us," the change not being noticed by the signers, it was a fraud on the signer to whom the stock belonged, and the stock could not be held to secure a debt of the other maker. Haldeman *v.* German Security Bank, 44 S. W. 383, 19 Ky. L. Rep. 1691. A surety, who cannot read or write, is not bound where the payee and a cosurety induce him to sign by mark a renewal note as a principal debtor, while the cosurety signs as surety merely. Hamilton *v.* Williams, 38 S. W. 851, 18 Ky. L. Rep. 919.

But, if no trick or artifice is used, and he signs the contract without reading it, he is liable, although he is under a misapprehension as to its terms. Metropolitan Loan Assoc. *v.* Esche, 75 Cal. 513, 17 Pac. 675; Jacobs *v.* Curtiss, 67 Conn. 497, 35 Atl. 501; McCormick *v.* Hubbell, 4 Mont. 87, 5 Pac. 314; Jaycox *v.* Trembly, 42 N. Y. App. Div. 416, 59 N. Y. Suppl. 245; Johnston *v.* Patterson, 114 Pa. St. 398, 6 Atl. 746; Milliken *v.* Callahan County, 69 Tex. 205, 6 S. W. 681.

62. Satterfield *v.* Spier, 114 Ga. 127, 39 S. E. 930 (a misstatement as to the shape and quality of land purchased, by which his risk is greater than he intended); Stanford First Nat. Bank *v.* Mattingly, 92 Ky. 650, 18 S. W. 940, 14 Ky. L. Rep. 68 (where a surety was informed that a flouring mill has earned a net profit of a certain amount during the month previous to its sale, whereas it had been operated at a loss).

63. London West *v.* London Guarantee, etc., Co., 26 Ont. 520. See Russell *v.* Trickett, 13 L. T. Rep. N. S. 280, holding that where a deed recites that a specification for work to be performed under contract has been signed by five members of the local board as required by a local act, the sureties are bound, although it never has been signed, if it has been acted upon.

A statement that a note was a renewal note, whereas it was for an overdraft, is an immaterial representation. Sulphur Deposit Bank *v.* Peak, 110 Ky. 579, 62 S. W. 268, 23 Ky. L. Rep. 19, 96 Am. St. Rep. 466.

64. Evans *v.* Keeland, 9 Ala. 42.

65. Tolerton, etc., Co. *v.* Roberts, 115 Iowa 474, 88 N. W. 966; McMinn *v.* Patton, 92 N. C. 371; Burk *v.* Galveston County, 76 Tex. 267, 13 S. W. 455.

66. Shropshire *v.* Kennedy, 84 Ind. 111; Robinson *v.* Larson, 112 Iowa 173, 83 N. W. 900; Smyley *v.* Head, 2 Rich. (S. C.) 590, 45 Am. Dec. 750; Oregon Nat. Bank *v.* Gardner, 13 Wash. 154, 42 Pac. 545.

67. Lieberman *v.* Wilmington First Nat. Bank, 2 Pennew. (Del.) 416, 45 Atl. 901,

only.[68] A certificate by an employer that an employee is not in arrears is not fraudulent, although the latter may not have remitted promptly.[69] Reports on the condition of a bank, not made for the benefit of prospective sureties for its officers, cannot constitute false representations;[70] nor is a published statement of an officer's account,[71] although erroneous, or of an auditor's report,[72] an implied representation on which subsequent sureties for such officer are justified in relying. Statements and representations made by an employer in good faith to a person about to become a surety for an employee are not warranties.[73] A holder in due course of a negotiable instrument takes it free from any defense of fraud which a surety may have.[74]

(b) STATEMENT OF CREDITOR'S INTENTION. A statement by the creditor as to his intention, to induce a surety to sign, will not affect the liability of the latter. A promise by the creditor to sell the principal more goods;[75] or to loan the principal more money;[76] or to take collateral security from the principal,[77] if broken, gives the surety, at most, but a right of action for the breach; and if the promise be for the performance of an illegal act, the surety cannot be defrauded.[78]

(3) STATEMENT SUBSTANTIALLY TRUE. If the statement of the obligee or creditor is substantially, although not strictly, correct, the surety is bound if there has not been any intent to mislead;[79] but if the creditor or obligee subsequently discovers, before the negotiations are complete, that a statement made by him was false, he is bound to correct it.[80]

(c) *Fraud Occurring After Relation Entered Into.* A surety may be discharged by fraud occurring after he has entered into the relation;[81] although the fact that the principal uses a note signed by the surety, to remove encumbrances on exempt

82 Am. St. Rep. 414, 48 L. R. A. 514; New Orleans *v.* Blache, 6 La. 500; Ford *v.* Miles, 6 Mart. N. S. (La.) 377; Hancock First Nat. Bank *v.* Johnson, 133 Mich. 700, 95 N. W. 975, 103 Am. St. Rep. 468; *In re* Mayo, 16 Fed. Cas. No. 9,353*a*, 4 Hughes 384 [*affirming* 16 Fed. Cas. No. 9,353, 4 Hughes 382].

68. Brown *v.* Davenport, 76 Ga. 799.

69. Pacific F. Ins. Co. *v.* Pacific Surety Co., 93 Cal. 7, 28 Pac. 842; Ætna L. Ins. Co. *v.* American Surety Co., 34 Fed. 291.

70. Lieberman *v.* Wilmington First Nat. Bank, 2 Pennew. (Del.) 416, 45 Atl. 901, 82 Am. St. Rep. 414, 48 L. R. A. 514, 8 Del. Ch. 519, 40 Atl. 382; Ashuelot Sav. Bank *v.* Albee, 63 N. H. 152, 56 Am. Rep. 501.

The governor being empowered to select "a solvent bank" as a state depositary, a surety on a bond given by a bank so selected cannot escape liability on the ground that the governor, by his selection, falsely represented that the bank was solvent. Mathis *v.* Morgan, 72 Ga. 517, 53 Am. Rep. 847.

71. Bower *v.* Washington County Com'rs, 25 Pa. St. 69.

72. Simcoe County *v.* Burton, 25 Ont. App. 478.

73. Guthrie Nat. Bank *v.* Maryland Fidelity, etc., Co., 14 Okla. 636, 79 Pac. 102.

74. Riley *v.* Reifert, (Tex. Civ. App. 1895) 32 S. W. 185. See COMMERCIAL PAPER, 7 Cyc. 924 *et seq.*

75. Love *v.* Steinback, 10 Lea (Tenn.) 286.

Under Ga. Code, § 2154, providing that any act of a creditor which injures the surety or increases his risk will discharge the surety, it is a good defense that the surety signed a note because the creditor represented that certain goods would be furnished the principal; that the creditor failed to furnish the goods, and the principal for that reason was unable to pay the debt. Marchman *v.* Robertson, 77 Ga. 40.

76. Stanford First Nat. Bank *v.* Mattingly, 92 Ky. 650, 18 S. W. 940, 14 Ky. L. Rep. 68.

77. Concord Bank *v.* Rogers, 16 N. H. 9.

78. Graham *v.* Marks, 98 Ga. 67, 25 S. E. 931, holding that a promise to have a person appointed to a public office is against public policy, and a surety on a note is bound, although he was induced to sign by reason of such a promise.

79. City Trust, etc., Co. *v.* Lee, 204 Ill. 69, 68 N. E. 485 [*affirming* 107 Ill. App. 263]; Getchell Lumber, etc., Co. *v.* National Surety Co., 124 Iowa 617, 100 N. W. 556; Getchell Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550.

80. Davies *v.* London, etc., Mar. Ins. Co., 8 Ch. D. 469, 47 L. J. Ch. 511, 38 L. T. Rep. N. S. 478, 26 Wkly. Rep. 794.

Matters arising after relation entered into see *infra*, VIII, E.

81. Frank Fehr Brewing Co. *v.* Mullican, 66 S. W. 627, 23 Ky. L. Rep. 2100; Powers Dry-Goods Co. *v.* Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460; Postmaster-Gen. *v.* Ustick, 19 Fed. Cas. No. 11,315, 4 Wash. 347.

An agreement between the creditor and the principal that judgment would not be entered against the latter if he would procure a surety is a fraud on the surety where the principal becomes insolvent. Hancock *v.* Wilson, 46 Iowa 352.

property of the principal, thus decreasing the property available to creditors, does not discharge a surety in the absence of any misrepresentation;[82] nor will the fact that the obligee effects a settlement with the sureties on a prior bond constitute fraud on a surety on a subsequent bond, if beneficial to the latter.[83]

(II) *Concealment* — (A) *In General.* While a contract of suretyship is not one of those designated as *uberrimæ fidei* — imposing a duty on the creditor or obligee to make an entire disclosure,[84] nevertheless material facts unknown to a person asked to become a surety, and which, if known, would influence him in regard to entering into the contract,[85] must not be concealed, although inquiry is not made in regard to them;[86] and it is immaterial that undue concealment was not wilful, or intentional, nor with a view to any advantage to the creditor or obligee;[87] nor can the creditor or obligee excuse a failure to communicate with the surety by saying that they did not see each other prior to the delivery of the contract.[88]

(B) *Material Concealment.* It has been regarded as improper concealment not to disclose the fact that the principal refused to allow application to be made for the signature of the surety,[89] or that an agent of the creditor was also a partner in the firm who were the principals.[90] When persons become sureties for an employee, they will not be liable if the employer conceals from them a prior default by such employee,[91] although not amounting to actual dishonesty,[92] and

82. Smith *v.* London First Nat. Bank, 107 Ky. 257, 53 S. W. 648, 21 Ky. L. Rep. 953.

83. Fidelity, etc., Co. *v.* O'Brien, (Tenn. Ch. App. 1896) 38 S. W. 417.

84. Davies *v.* London, etc., Mar. Ins. Co., 8 Ch. D. 469, 47 L. J. Ch. 511, 38 L. T. Rep. N. S. 478, 26 Wkly. Rep. 794; Wythes *v.* Labouchere, 3 De G. & J. 593, 5 Jur. N. S. 499, 7 Wkly. Rep. 271, 60 Eng. Ch. 459, 44 Eng. Reprint 1397; British Empire, etc., Assurance Co. *v.* Luxton, 9 Manitoba 169.

85. Powers Dry-Goods Co. *v.* Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460; Wells *v.* Walker, 9 N. M. 170, 50 Pac. 353, 923; Remington Sewing Mach. Co. *v.* Kezertee, 49 Wis. 409, 5 N. W. 809.

86. *Maine.*— Franklin Bank *v.* Cooper, 39 Me. 542.

Missouri.— Home Sav. Bank *v.* Traube, 6 Mo. App. 221.

Pennsylvania.— Goebel Brewing Co. *v.* McLean, 15 Pa. Super. Ct. 38.

West Virginia.— Warren *v.* Branch, 15 W. Va. 21.

England.— Stiff *v.* Eastbourne Local Bd., 19 L. T. Rep. N. S. 408, 17 Wkly. Rep. 68 [*affirmed* in 20 L. T. Rep. N. S. 339, 17 Wkly. Rep. 428].

Canada.— Cashin *v.* Perth, 7 Grant Ch. (U. C.) 340.

See 40 Cent. Dig. tit. "Principal and Surety," § 86 *et seq.*

The remedy of a surety when his defense is concealment of a material fact is not by injunction to restrain an action on the instrument. Stiff *v.* Eastbourne Local Bd., 20 L. T. Rep. N. S. 339, 17 Wkly. Rep. 428.

87. Railton *v.* Mathews, 10 Cl. & F. 934, 8 Eng. Reprint 993.

88. Franklin Bank *v.* Cooper, 39 Me. 542.

89. Conger *v.* Bean, 58 Iowa 321, 12 N. W. 284.

90. Jungk *v.* Holbrook, 15 Utah 198, 49 Pac. 305, 62 Am. St. Rep. 921.

91. *California.*— Guardian F., etc., Assur. Co. *v.* Thompson, 68 Cal. 208, 9 Pac. 1.

Indiana.— Wilson *v.* Monticello, 85 Ind. 10.

Kentucky.— Midway Deposit Bank *v.* Hearne, 104 Ky. 819, 48 S. W. 160, 20 Ky. L. Rep. 1019; Belleview Loan, etc., Assoc. *v.* Jeckel, 104 Ky. 159, 46 S. W. 482, 20 Ky. L. Rep. 460.

Maine.— Franklin Bank *v.* Cooper, 36 Me. 179.

Massachusetts.—Hudson *v.* Miles, 185 Mass. 582, 71 N. E. 63, 102 Am. St. Rep. 370.

Missouri.— Third Nat. Bank *v.* Owen, 101 Mo. 558, 14 S. W. 632.

New Jersey.— State *v.* Sooy, 39 N. J. L. 135.

New York.— U. S. L. Ins. Co. *v.* Salmon, 157 N. Y. 682, 51 N. E. 1094 [*affirming* 91 Hun 535, 36 N. Y. Suppl. 830].

Pennsylvania.— Lauer Brewing Co. *v.* Riley, 195 Pa. St. 449, 46 Atl. 71; Wayne *v.* Commercial Nat. Bank, 52 Pa. St. 343; Bolz *v.* Stuhl, 4 Pa. Super. Ct. 52, 40 Wkly. Notes Cas. 45.

Vermont.— Connecticut Gen. L. Ins. Co. *v.* Chase, 72 Vt. 176, 47 Atl. 825, 53 L. R. A. 510.

See 40 Cent. Dig. tit. "Principal and Surety," § 86 *et seq.*

Contra.— Lake *v.* Thomas, 84 Md. 608, 36 Atl. 437; Ætna L. Ins. Co. *v.* Mabbett, 18 Wis. 667.

If an employer has directed the arrest of the principal for felony, he should disclose to the friends of the principal, who become security for a deficiency, that the directions for the arrest have been withdrawn because he had been advised that a felony had not been committed. Davies *v.* London, etc., Mar. Ins. Co., 8 Ch. D. 469, 47 L. J. Ch. 511, 38 L. T. Rep. N. S. 478, 26 Wkly. Rep. 794.

92. Commonwealth Bldg., etc., Co. *v.* Fromlet, 6 Ohio S. & C. Pl. Dec. 184, 7 Ohio N. P.

although such default may have occurred in the service of another than the obligee.[93]

(c) *Immaterial Concealment* — (1) In General. The obligee, however, is not required to disclose matters not connected with the subject of the contract, although they might have a decided influence on the surety,[94] such as the personal habits of the principal; [95] nor is an employer obliged to mention the fact that the predecessor of the employee was a defaulter.[96] Immaterial matters which would not increase the responsibility of the surety need not be disclosed; [97] the concealment must amount to fraudulent representation.[98] The creditor or obligee is not under a duty to disclose all of his dealings with the principal,[99] nor the manner in which he will proceed to enforce the contract.[1] Arrangements for the payment of interest to or by the principal,[2] or the time of its payment,[3] need not be disclosed; nor need information be volunteered to the sureties for the cashier of a corporation, that he was also a director.[4] The creditor or obligee is not under a duty to disclose former trivial defaults of the principal,[5] such as that he had failed to account,[6] or to remit promptly,[7] or that he had intermingled his funds with those of his employer; [8] nor, in the absence of inquiry,[9] is the creditor or obligee obliged to divulge the indebtedness of the principal; [10] or that a judgment has been obtained against him; [11] or that he is insolvent.[12]

194. See Smith *v.* Josselyn, 40 Ohio St. 409, holding that if the employer neglects to inform the sureties that the principal formerly had been guilty of culpable carelessness the sureties are not bound.

93. Indiana, etc., Live Stock Ins. Co. *v.* Bender, 32 Ind. App. 287, 69 N. E. 691; Capital F. Ins. Co. *v.* Watson, 76 Minn. 387, 79 N. W. 601, 77 Am. St. Rep. 657; Ottawa Agricultural Ins. Co. *v.* Canada Guarantee Co., 30 U. C. C. P. 360.

94. Warren *v.* Branch, 15 W. Va. 21; U. S. *v.* Boyd, 5 How. (U. S.) 29, 12 L. ed. 36.

95. Ætna Indemnity Co. *v.* Schroeder, 12 N. D. 110, 95 N. W. 436.

96. Bostwick *v.* Van Voorhis, 91 N. Y. 353.

97. Comstock *v.* Gage, 91 Ill. 328.

Where a series of notes were given, a surety on one only of them is bound, although not notified of a provision in a mortgage given to secure the notes, that on default of one note all should become due, as his contract is not affected. Springfield Engine, etc., Co. *v.* Park, 3 Ind. App. 173, 29 N. E. 444.

98. Pledge *v.* Buss, Johns. 663, 6 Jur. N. S. 695, 70 Eng. Reprint 585.

99. Hamilton *v.* Watson, 12 Cl. & F. 109, 8 Eng. Reprint 1339; Espey *v.* Lake, 10 Hare 260, 16 Jur. 1106, 22 L. J. Ch. 336, 1 Wkly. Rep. 59, 44 Eng. Ch. 252, 68 Eng. Reprint 923.

1. Doane *v.* Fuller, 88 Ill. App. 515.

2. Comstock *v.* Gage, 91 Ill. 328; Coats *v.* McKee, 26 Ind. 223.

3. New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

4. Frelinghuysen *v.* Baldwin, 16 Fed. 452.

5. British Empire, etc., Assur. Co. *v.* Luxton, 9 Manitoba 169.

6. Howe Mach. Co. *v.* Farrington, 82 N. Y. 121 [*affirming* 16 Hun 591]; Wilmington, etc., R. Co. *v.* Ling, 18 S. C. 116.

7. Anaheim Union Water Co. *v.* Parker, 101 Cal. 483, 35 Pac. 1048; Home Ins. Co. *v.* Holway, 55 Iowa 571, 8 N. W. 457, 39 Am. Rep. 179; Wade *v.* Mt. Sterling, 33 S. W. 1113, 18 Ky. L. Rep. 377; Niagara Dist. Fruit Growers' Stock Co. *v.* Walker, 26 Can. Sup. Ct. 629.

8. Screwman's Ben. Assoc. *v.* Smith, 70 Tex. 168, 7 S. W. 793.

9. **In absence of inquiry** generally see *infra*, IV, D, 11, d, (II), (C), (2).

10. *Illinois.*— Booth *v.* Storrs, 75 Ill. 438.

Iowa.— Ida County Sav. Bank *v.* Seidensticker, (1902) 92 N. W. 862.

Montana.— Palatine Ins. Co. *v.* Crittenden, 18 Mont. 413, 45 Pac. 555.

United States.— Magee *v.* Manhattan L. Ins. Co., 92 U. S. 93, 23 L. ed. 699.

England.— Spencer *v.* Handley, 11 L. J. C. P. 250, 4 M. & G. 414, 43 E. C. L. 218; Stokesleigh Parish *v.* Stoddart, 2 Wkly. Rep. 14.

The omission from a statement of the indebtedness of the principal of a claim against him in tort for wrongfully obtaining possession of certain goods is not a concealment of the indebtedness. Isaac Harter Co. *v.* Pearson, 26 Ohio Cir. Ct. 601.

11. Oregon Nat. Bank *v.* Gardner, 13 Wash. 154, 42 Pac. 545.

Imminent sale under attachment.— The creditor is not required to disclose to the surety that the property of the principal is about to be sold under attachment. Smith *v.* London First Nat. Bank, 107 Ky. 257, 53 S. W. 648, 21 Ky. L. Rep. 953.

12. Roper *v.* Sangamon Lodge, No. 6, I. O. O. F., 91 Ill. 518, 33 Am. Rep. 60; Ham *v.* Greve, 34 Ind. 18; Farmers', etc., Nat. Bank *v.* Braden, 145 Pa. St. 473, 22 Atl. 1045; Farmers', etc., Nat. Bank *v.* Wood, (Pa. 1891) 22 Atl. 1045; Noble *v.* Scofield, 44 Vt. 281.

Renewal note.— The payee of a note is not required to inform a surety before signing a renewal note that one of the makers has lost his property since the making of the orig-

(2) In Absence of Inquiry on Part of Surety. In the absence of inquiry, the surety is not entitled to information which is as accessible to him as to the creditor or obligee,[13] and his ignorance will not excuse him,[14] even though the facts are not known generally, unless the creditor or obligee also knows that the surety is ignorant of them;[15] nor is there any duty imposed upon the creditor or obligee to point out the risk that the surety is incurring;[16] the very fact that security is called for should make him alert.[17]

(iii) *Knowledge by Creditor* — (a) *In General.* To enable a surety to avoid his contract by reason of fraudulent or false statements, it is essential that the creditor or obligee be connected therewith.[18]

(b) *In Case of Fraud Perpetrated by Principal.* Fraud practised by the principal alone upon the surety will not affect the liability of the latter;[19] as no duty is imposed on the obligee to seek out the sureties and ascertain whether they

inal note. Hancock First Nat. Bank *v.* Johnson, 133 Mich. 700, 95 N. W. 975, 103 Am. St. Rep. 468.

13. *Illinois.*— Roper *v.* Sangamon Lodge, No. 6, I. O. O. F., 91 Ill. 518, 33 Am. Rep. 60.

Iowa.— Sherman *v.* Harbin, 125 Iowa 174, 100 N. W. 629.

New Mexico.— Wells *v.* Walker, 9 N. M. 456, 54 Pac. 875.

Pennsylvania.— Court Vesper No. 69, F. of A. *v.* Fries, 22 Pa. Super. Ct. 250.

England.—Wason *v.* Wareing, 15 Beav. 151, 51 Eng. Reprint 494.

Canada.— Peers *v.* Oxford, 17 Grant Ch. (U. C.) 472.

See 40 Cent. Dig. tit. "Principal and Surety," § 86 *et seq.*

14. Hamilton *v.* Watson, 12 Cl. & F. 109, 8 Eng. Reprint 1339; East Zorra Tp. *v.* Douglas, 17 Grant Ch. (U. C.) 462.

That the payee of a note knows when it is made that the principal maker is insolvent and does not inform the surety thereof does not discharge the surety, since it is presumed that the surety has informed himself as to the principal's general character or reputation, or, if not, that he is willing to take the risk involved in such knowledge as he may have. Sebald *v.* Citizens' Deposit Bank, 105 S. W. 130, 31 Ky. L. Rep. 1244.

15. Monroe Bank *v.* Gifford, 72 Iowa 750, 32 N. W. 669.

16. Sherman *v.* Harbin, 125 Iowa 174, 100 N. W. 629; Wright *v.* German Brewing Co., 103 Md. 377, 63 Atl. 807.

The fact that a contractor, making a mistake in his estimates, agreed to erect a building for less than it could be built for, will not relieve a surety on the contractor's bond, although the owner knew the facts. Higgins *v.* Drucker, 22 Ohio Cir. Ct. 112, 12 Ohio Cir. Dec. 220.

17. Cunningham *v.* Buchanan, 10 Grant Ch. (U. C.) 523.

18. Burks *v.* Wonterline, 6 Bush (Ky.) 20; Reusch *v.* Keenan, 42 La. Ann. 419, 7 So. 589; New Orleans *v.* Blache, 6 La. 500; Coughran *v.* Hollister, 15 S. D. 318, 89 N. W. 647; Garner *v.* McGowen, 27 Tex. 487.

19. *Arkansas.*—Stiewel *v.* American Surety Co., 70 Ark. 512, 68 S. W. 1021.

Colorado.—A. S. Ripley Bldg. Co. *v.* Coors, 37 Colo. 78, 84 Pac. 817; Fisher *v.* Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440.

Illinois.— Davis Sewing Mach. Co. *v.* Buckles, 89 Ill. 237; Ladd *v.* Township 41, 80 Ill. 233.

Indiana.— Lucas *v.* Owens, 113 Ind. 521, 16 N. E. 196; Jones *v.* Swift, 94 Ind. 516; Craig *v.* Hobbs, 44 Ind. 363; Lepper *v.* Nuttman, 35 Ind. 384.

Iowa.— Spring Garden Ins. Co. *v.* Lemmon, 117 Iowa 691, 86 N. W. 35; Monroe Bank *v.* Gifford, 72 Iowa 750, 32 N. W. 669; Monroe Bank *v.* Anderson Bros. Min., etc., Co., 65 Iowa 692, 22 N. W. 929; Wright *v.* Flinn, 33 Iowa 159.

Kentucky.— Wheeler *v.* Traders' Deposit Bank, 107 Ky. 653, 55 S. W. 552; Sebree Deposit Bank *v.* Clark, 105 Ky. 212, 48 S. W. 1089, 20 Ky. L. Rep. 1155; Sebastian *v.* Johnson, 2 Duv. 101; Smith *v.* Moberly, 10 B. Mon. 266, 52 Am. Dec. 543.

Louisiana.— Union Bank *v.* Beatty, 10 La. Ann. 378 [*overruling* Union Bank *v.* Beatty, 10 La. Ann. 361].

Massachusetts.—Hudson *v.* Miles, 185 Mass. 582, 71 N. E. 63, 102 Am. St. Rep. 370.

Mississippi.— Robb *v.* Halsey, 11 Sm. & M. 140; Graves *v.* Tucker, 10 Sm. & M. 9.

Missouri.— Whittemore *v.* Obear, 58 Mo. 280; Linn County *v.* Farris, 52 Mo. 75, 14 Am. Rep. 389.

Montana.— McCormick *v.* Hubbell, 4 Mont. 87, 5 Pac. 314.

New York.— Coleman *v.* Bean, 1 Abb. Dec. 394, 3 Keyes 94, 32 How. Pr. 370; Rothschild *v.* Frank, 14 N. Y. App. Div. 399, 43 N. Y. Suppl. 951; Kelly *v.* Christal, 16 Hun 242 [*affirmed* in 81 N. Y. 619].

Ohio.— McGaughey *v.* Jacoby, 54 Ohio St. 487, 44 N. E. 231; Kingsland *v.* Pryor, 33 Ohio St. 19.

Pennsylvania.— Xander *v.* Com., 102 Pa. St. 434; Stewart *v.* Behm, 2 Watts 356; Dayton's Estate, 4 Kulp 451.

Vermont.— Hardwick Sav. Bank, etc., Co. *v.* Drenan, 71 Vt. 289, 44 Atl. 347; Flanagan *v.* Post, 45 Vt. 246.

Wisconsin.— Wilkinson *v.* U. S. Fidelity, etc., Co., 119 Wis. 226, 96 N. W. 560; School Dist. No. 1 *v.* Dreutzer, 51 Wis. 153, 6 N. W. 610.

United States.— Wallace *v.* Wilder, 13 Fed. 707.

have been misled.[20] However, if the creditor, standing by in silence, permits the principal, by fraud, to induce the surety to execute the contract,[21] or overhears enough of a conversation between the principal and surety to put him on inquiry,[22] or if the circumstances are such as would lead a reasonable man to believe that the principal must have used fraud, but the creditor wilfully remains ignorant,[23] the surety has a complete defense.

(c) *Where Surety Has Acquired Erroneous Impression.* A surety cannot escape liability on account of erroneous impressions which he has acquired by himself,[24] such as a belief that some other person was to be the principal;[25] that a signature of a firm-name by one member thereof bound all of the partners;[26] that a corporate principal was a partnership;[27] that prior signers would be cosureties with him;[28] or that the principal was not largely indebted.[29] However, if the creditor or obligee knows that the surety executed the contract under an erroneous belief, a duty then arises to enlighten him. If the surety thinks that a note is to secure future transactions only and not past indebtedness,[30] or that it is in renewal of a prior note instead of being for additional indebtedness,[31] or that it covers all of the indebtedness of the principal,[32] the payee, if aware of the erroneous impression, cannot hold him.

(d) *Where Creditor Himself Is Ignorant of the Facts.* Likewise the obligee or creditor cannot be said to conceal matters of which he himself is ignorant; if the principal was in default at the time the sureties executed the contract, they are bound if the creditor or obligee did not know of such default;[33] even though a failure by the latter to discover it was the result of negligence in not examining the accounts of the principal,[34] unless such negligence was gross,[35] or the obligee

20. Western New York L. Ins. Co. *v.* Clinton, 66 N. Y. 326.

21. Baltimore First Nat. Bank *v.* Terry, 135 Fed. 621.

Where the principal forged the names of other makers to a note in the presence of the payee, and afterward procured the signature of a surety relying on the genuineness of the preceding signatures, the surety is not liable, although the payee could not read and spoke English imperfectly, if he was aware of the facts. Klaman *v.* Malvin, 61 Iowa 752, 16 N. W. 356.

22. Beath *v.* Chapoton, 115 Mich. 506, 73 N. W. 806, 69 Am. St. Rep. 589.

23. Warren *v.* Branch, 15 W. Va. 21; Owen *v.* Homan, 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752. In Lee *v.* Wisner, 38 Mich. 82, an instruction that if the obligee knew of any confidential relation between the principal and the surety, he would be affected by any fraud or concealment practised by the principal upon the surety to induce the latter to sign the bond, was held to be sufficiently favorable to the surety.

24. Martin *v.* Stribling, 1 Speers (S. C.) 23.

25. Jacobs *v.* Curtiss, 67 Conn. 497, 35 Atl. 501.

It is the business of a surety to ascertain who the true principal is; and although the principal named therein be the party for whom he intended to become surety, yet if it turns out to be the bond of another party by whom it is signed, the loss must fall on the surety. Doane *v.* New Orleans, etc., Tel. Co., 11 La. Ann. 504.

26. Stewart *v.* Behm, 2 Watts (Pa.) 356.

27. Monroe Bank *v.* Gifford, 72 Iowa 750, 32 N. W. 669.

28. Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 311.

29. Hubbard *v.* Fravell, 12 Lea (Tenn.) 304.

30. Fassnacht *v.* Emsing Gagen Co., 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 480, 63 Am. St. Rep. 322; Stone *v.* Compton, 5 Bing. N. Cas. 142, 6 Scott 846, 35 E. C. L. 85. See also Pidcock *v.* Bishop, 3 B. & C. 605, 5 D. & R. 505, 3 L. J. K. B. O. S. 109, 27 Rev. Rep. 430, 10 E. C. L. 276.

31. Miller *v.* Gardner, 49 Iowa 234.

32. Powers Dry-Goods Co. *v.* Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 469.

33. *Massachusetts.*— New York L. Ins. Co. *v.* Macomber, 169 Mass. 580, 48 N. E. 776.

New York.— Hawley *v.* U. S. Fidelity, etc., Co., 100 N. Y. App. Div. 12, 90 N. Y. Suppl. 893 [*affirmed* in 184 N. Y. 549, 76 N. E. 1096].

Pennsylvania.— Wayne *v.* Commercial Nat. Bank, 52 Pa. St. 343.

United States.— Mutual L. Ins. Co. *v.* Wilcox, 17 Fed. Cas. No. 9,979, 8 Biss. 197, 6 Reporter 8.

Canada.—Simcoe County *v.* Burton, 25 Ont. App. 478; Gananoque *v.* Stunden, 1 Ont. 1. See 40 Cent. Dig. tit. "Principal and Surety," § 89.

34. McMullen *v.* Winfield Bldg., etc., Assoc., 64 Kan. 298, 67 Pac. 892, 91 Am. St. Rep. 236, 56 L. R. A. 924; Tapley *v.* Martin, 116 Mass. 275; Bowne *v.* Mt. Holly Nat. Bank, 45 N. J. L. 360; Bennett *v.* S. A. R. E. Bldg., etc., Assoc., 57 Tex. 72.

35. Graves *v.* Lebanon Nat. Bank, 10 Bush (Ky.) 23, 19 Am. Rep. 50.

wilfully abstained from an investigation after having a belief, founded on reasonable and reliable information, that the principal was a defaulter.[36]

(IV) *Concealment of Fraud by Creditor's Agent* — (A) *In General.* Fraudulent statements made by an agent of the obligee will avoid the contract,[37] if the agent had authority to make them;[38] but a surety is bound to take notice, when the principal is acting as agent for the creditor, that the authority is very limited, and the surety is liable, although he relied on fraudulent statements of the principal.[39]

(B) *Knowledge of Principal's Prior Default.* Knowledge of a prior default of the principal known to agents of the obligee at the time a surety executed a bond making himself liable therefor, will prevent an action being maintained thereon;[40] but the general rule is that knowledge by a public agent of prior defaults of a public officer will not affect the liability of sureties on the bond of such officer,[41] as a public agent has no authority to represent the state or county in such matters.[42]

(C) *One Fraudulently Acting as Agent.* If a person fraudulently acts as agent for the principal and for the creditor, the latter cannot be responsible for such fraud practised without his knowledge.[43]

(V) *Questions of Fact and Proof.* It is for the jury to determine

36. Dinsmore *v.* Tidball, 34 Ohio St. 411.

37. Franklin Bank *v.* Stevens, 39 Me. 532; Gasconade County *v.* Sanders, 49 Mo. 192.

38. See cases cited *infra*, this note.

Authority of and validity of agent's acts see *supra*, IV, C, 9; IV, D, 8, b, (II); IV, D, 8, c, (III); IV, D, 8, c, (III), (B); IV, D, 9, a, (II); IV, D, 9, b, (V); *infra*, IV, D, 11, f, (III), (B).

The secretary of a building association has authority to make repesentations to the surety. Jones *v.* National Bldg. Assoc., 94 Pa. St. 215.

A cashier of a bank has no authority to make a representation that a teller is honest, his accounts straight, that he could not take anything, and that a surety wold not run any risk in signing his bond. Lieberman *v.* Wilmington First Nat. Bank, 2 Pennew. (Del.) 416, 45 Atl. 901, 82 Am. St. Rep. 414, 48 L. R. A. 514.

That a county judge misrepresented to a surety company that the accounts of a trustee were correct, and that proper securities and funds were in his hands to balance, does not vitiate the trustee's bond to the state, upon which the company became surety on the strength of such representations, since it was not the judge's duty to make any representation to the surety, and the state, not having authorized him to act for it in the matter, is not bound by his acts. U. S. Fidelity, etc., Co., *v.* Com., 104 S. W. 1029, 31 Ky. L. Rep. 1179.

The fact that the principal employs solicitors who are the ordinary solicitors of the creditor, but who are not employed by the creditor in the transaction, does not make the solicitors the agents for the creditor so as to affect the creditor with notice of fraud or concealment, although the solicitors afterward are paid by the creditor for reporting as to the sufficiency of the surety. Wythes *v.* Labouchere, 3 De G. & J. 593, 5 Jur. N. S. 499, 7 Wkly. Rep. 271, 60 Eng. Ch. 459, 44 Eng. Reprint 1397.

39. Spalding *v.* Tucker, 51 S. W. 2, 21 Ky. L. Rep. 233.

40. Franklin Bank *v.* Cooper, 39 Me. 542.

41. *Illinois.*— Cawley *v.* People, 95 Ill. 249.

Indiana.— Hogue *v.* State, 28 Ind. App. 285, 62 N. E. 656.

Iowa.— Sioux City Independent School Dist *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am St. Rep. 271; Palmer *v.* Woods, 75 Iowa 402, 39 N. W. 668.

Kentucky.— Maryland Fidelity, etc., Co. *v.* Com., 104 Ky. 579, 47 S. W. 579, 49 S. W. 467, 20 Ky. L. Rep. 788, 1402.

Louisiana.— State *v.* Powell, 40 La. Ann. 234, 4 So. 46, 8 Am. St. Rep. 522; New Orleans *v.* Blache, 6 La. 500.

Maryland.— Frownfelter *v.* State, 66 Md. 80, 5 Atl. 410.

Minnesota.— Pine County *v.* Willard, 39 Minn. 125, 39 N. W. 71, 12 Am. St. Rep. 622, 1 L. R. A. 118.

North Carolina.— Moore County *v.* McIntosh, 31 N. C. 307.

Pennsylvania.— Bower *v.* Washington County Com'rs, 25 Pa. St. 69.

Texas.— Hallettsville *v.* Long, 11 Tex. Civ. App. 180, 32 S. W. 567.

England.— Lawder *v.* Simpson, Ir. R. 7 C. L. 57, 21 Wkly. Rep. 439.

Canada.—Simcoe County *v.* Burton, 25 Ont. App. 478.

See 40 Cent. Dig. tit. "Principal and Surety," § 88.

Inasmuch as Conn. Gen. St. (1902) § 3445, requires the treasurer of a savings bank to give a bond, which is for the benefit of the public, and the only duty imposed by statute on the directors with reference to it is to accept or reject it if not satisfactory, sureties are bound, although the directors did not inform them, when the bond was given, that the treasurer already had embezzled. Watertown Sav. Bank *v.* Mattoon, 78 Conn. 388, 62 Atl. 622.

42. McLean *v.* State, 8 Heisk. (Tenn.) 22.

43. Jungk *v.* Reed, 12 Utah 196, 42 Pac. 292.

whether a failure of the obligee to inform the sureties of a shortage of the principal indicates bad faith,[44] which may be shown by several facts and circumstances, although no one of them by itself would prove it.[45] The question whether the surety was induced to execute the contract by fraud is for the jury.[46] The fact that a surety is illiterate does not raise a presumption against the validity of the contract, but fraud must be alleged and proved;[47] and evidence as to what was said and done is admissible to show the circumstances under which the surety executed the bond.[48] The burden is on the creditor to show his lack of knowledge of fraud.[49]

e. Illegality.[50] An indemnity given for bail, whether given by the prisoner bailed or by another, has been held to be illegal.[51]

f. Incapacity of Surety.[52] Of course a surety can take advatage of his own personal incapacity to contract.[53] A surety, however, is not released by the infancy of a cosurety.[54]

g. Incomplete Instrument[55]— (i) *In General.* While an instrument may be insensible and void because of the omission of some word or words necessary to make it a complete instrument,[56] the omission of the names of sureties from the body of the bond,[57] or the failure of some name in the instrument to execute and sign the same[58] is immaterial. And generally the omission of the names of localities will not affect the surety's liability.[59] A bond is not invalid for want of a penalty.[60]

(ii) *Filling Blanks*[61]— (a) *In General.* Where an instrument containing blanks is intrusted by the surety to the principal, the latter has implied authority to fill such blanks;[62] and if the principal exceed his authority, the surety will be

44. Traders' Ins. Co. *v.* Herber, 67 Minn. 106, 69 N. W. 701.

45. Franklin Bank *v.* Cooper, 39 Me. 542.

46. Meek *v.* Frantz, 171 Pa. St. 632, 33 Atl. 413.

Testimony by the surety is admissible as to what he relied on in executing the instrument. Blaney *v.* Rogers, 174 Mass. 277, 54 N. E. 561.

47. Ellis *v.* McCormick, 1 Hilt. (N. Y.) 313.

48. Blaney *v.* Rogers, 174 Mass. 277, 54 N. E. 561.

49. Monroe Bank *v.* Anderson Bros. Min., etc., Co., 65 Iowa 692, 22 N. W. 929.

50. **Illegality of:** Contract generally see CONTRACTS, 9 Cyc. 465. Principal's obligation see *supra*, IV, C, 5, 10; *infra*, IX, B, 5, f, (IV).

51. Dunkin *v.* Hodge, 46 Ala. 523; Herman *v.* Jeuchner, 15 Q. B. D. 561 [*overruling* Wilson *v.* Strugnell, 49 J. P. 502, 54 L. J. Q. B. 340, 53 L. T. Rep. N. S. 94, 33 Wkly. Rep. 606, 7 Q. B. D. 548, 114 Cox C. C. 624, 45 J. P. 831, 50 L. J. M. C. 145, 45 L. T. Rep. N. S. 218]; Consolidated Exploration, etc., Co. *v.* Musgrave, [1900] 1 Ch. 37, 64 J. P. 89, 69 L. J. Ch. 11, 81 L. T. Rep. N. S. 747, 16 T. L. R. 13, 48 Wkly. Rep. 298. See also *infra*, IX, B, 2, b, (III), (C); IX, B, 5, f, (IV).

52. **Incapacity or disqualification of principal** see *supra*, IV, C, 6.

53. See INFANTS, 22 Cyc. 503.

54. Wills *v.* Evans, 38 S. W. 1090, 18 Ky. L. Rep. 1067.

55. **Incomplete instrument evidencing principal's obligation** see *supra*, IV, C, 7.

Signature or delivery upon condition see *supra*, IV, D, 8, c, (II).

56. Spring Garden Ins. Co. *v.* Lemmon, 117 Iowa 691, 86 N. W. 35.

Omission of the amount from a bond renders it defective. Garden Ins. Co. *v.* Lemmon, 117 Iowa 691, 86 N. W. 35. See also Copeland *v.* Cunningham, 63 Ala. 694; Church *v.* Noble, 24 Ill. 291; Case *v.* Pettee, 5 Gray (Mass.) 27; Evarts *v.* Steger, 6 Oreg. 55. But *compare* Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Selser *v.* Brock, 3 Ohio St. 302; Patterson *v.* Patterson, 2 Penr. & W. (Pa.) 200; Frazier *v.* Gains, 2 Baxt. (Tenn.) 292.

Where a blank appeared in a constable's bond so that it did not indicate who the constable was, no one could declare on it. Grier *v.* Hill, 51 N. C. 572.

57. Affeld *v.* People, 12 Ill. App. 502; Stewart *v.* Carter, 4 Nebr. 564; San Roman *v.* Watson, 54 Tex. 254; Luster *v.* Middlecoff, 8 Gratt. (Va.) 54, 56 Am. Dec. 129.

58. Cox *v.* Thomas, 9 Gratt. (Va.) 312; Sidney Road Co. *v.* Holmes, 16 U. C. Q. B. 268.

59. Mutual L. Ins. Co. *v.* Wilcox, 17 Fed. Cas. No. 9,979, 8 Biss. 197, 6 Reporter 8.

Illustration.— A contract for work on the line of a certain railway "in the county of ——, State of Indiana," is not void for uncertainty. Irwin *v.* Kilburn, 104 Ind. 113, 3 N. E. 650.

Omission of the place of the agency from an agent's bond does not invalidate it. Mutual L. Ins. Co. *v.* Wilcox, 17 Fed. Cas. No. 9,979, 8 Biss. 197, 6 Reporter 8.

60. Newburn *v.* Mackelcan, 19 Ont. App. 729.

61. **Filling blanks** generally see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 159.

62. See cases cited *infra*, this note.

bound [63] unless the creditor have knowledge thereof.[64] The creditor likewise may have authority to fill blanks and bind the surety,[65] even though the surety expected them to be filled in a different manner,[66] unless the creditor fails to act in good faith.[67] The rule is the same as to sealed instruments in most jurisdictions,[68] although in some a surety cannot be bound by anything added after he has signed.[69] A surety on a recognizance is bound if blanks are filled by the sheriff as directed by the surety.[70]

(B) *Revocation of Authority to Fill.* After a surety has authorized the principal to fill blanks, he can revoke such authority before the principal acts.[71]

h. Mistake in Drawing Instrument [72]—(I) *In General.* Where, at the time of the execution of an instrument, there was mistake as to the facts by all parties, sureties are not liable; [73] but they will not be relieved merely because they executed

Principal can insert the true date of the execution of a note (Emmons *v.* Carpenter, 55 Ind. 329; Emmons *v.* Meeker, 55 Ind. 321; Androscoggin Bank *v.* Kimball, 10 Cush. (Mass.) 373; Page *v.* Morrell, 3 Abb. Dec. (N. Y.) 433, 3 Keyes 117, 33 How. Pr. 244; Mechanics', etc., Bank *v.* Schuyler, 7 Cow. (N. Y.) 337 note; Mitchell *v.* Culver, 7 Cow. (N. Y.) 336), the amount (Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Selser *v.* Brock, 3 Ohio St. 302; Patterson *v.* Patterson, 2 Penr. & W. (Pa.) 200; Frazier *v.* Gains, 2 Baxt. (Tenn.) 92), or the place of payment (Gothrupt *v.* Williamson, 61 Ind. 599).

Principal can make the note joint.— Patterson *v.* Patterson, 2 Penr. & W. 200.

Principal can add a seal.— Patterson *v.* Patterson, 2 Penr. & W. (Pa.) 200; Frazier *v.* Gains, 2 Baxt. (Tenn.) 92.

A blank note signed by a surety can be filled up so as to bind him. Patton *v.* Shanklin, 14 B. Mon. (Ky.) 15.

Principal's ratification of insertion.—Where sureties authorize the principal to insert the name of a payee in a note, but the same is inserted by a person without authority, the sureties will be bound if the principal ratifies the act of such third person. Bremner *v.* Fields, (Tex. Civ. App. 1896) 34 S. W. 447.

Where, however, sureties signed a bond on the false representations of the principal that it was a recommendation, and the penalty afterward was filled in, they were held not liable. Spring Garden Ins. Co. *v.* Lemmon, 117 Iowa 691, 86 N. W. 35.

Effect of fraud generally see *supra*, IV, D, 11, d.

63. *Indiana.*— Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Gothrupt *v.* Williamson, 61 Ind. 599.

Kansas.— Roberson *v.* Blevins, 57 Kan. 50, 45 Pac. 63.

New York.— Nesbit *v.* Albert, 85 Hun 212, 32 N. Y. Suppl. 911.

Ohio.— Schryver *v.* Hawkes, 22 Ohio St. 308.

Pennsylvania.— Simpson *v.* Bovard, 74 Pa. St. 351; Ogle *v.* Graham, 2 Penr. & W. 132; Burns *v.* Albright, 21 Pa. Co. Ct. 426.

Tennessee.— Frazier *v.* Gains, 2 Baxt. 92; Waldron *v.* Young, 9 Heisk. 777.

See 40 Cent. Dig. tit. "Principal and Surety," § 15; and *infra*, VIII, E, 2, i.

64. Emmons *v.* Carpenter, 55 Ind. 329; Emmons *v.* Meeker, 55 Ind. 321; Gore *v.* Ross, 2 B. Mon. (Ky.) 299.

65. Carson *v.* Hill, 1 McMull. (S. C.) 76.

66. Eichelberger *v.* Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Dow-Hayden Grocery Co. *v.* Muncy, 73 S. W. 1030, 24 Ky. L. Rep. 2255.

67. Robertson *v.* Glasscock, 6 La. Ann. 124.

68. *California.*— Dolbeer *v.* Livingston, 100 Cal. 617, 35 Pac. 328.

Colorado.— Boyd *v.* Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986.

Illinois.— Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182 [*reversing* 2 Ill. App. 332]; Bartlett *v.* Freeport School Dist. Bd. Education, 59 Ill. 364. Formerly in Illinois the rule was that the sureties were not liable if the obligee knew that blanks were filled after they had signed. People *v.* Organ, 27 Ill. 27, 79 Am. Dec. 391.

Indiana.— State *v.* Pepper, 31 Ind. 76.

Iowa.— Wright *v.* Harris, 31 Iowa 272.

Minnesota.— State *v.* Young, 23 Minn. 551.

North Carolina.—Rollins *v.* Ebbs, 138 N. C. 140, 50 S. E. 577.

United States.— Moses *v.* U. S., 166 U. S. 571, 17 S. Ct. 682, 41 L. ed. 1119; U. S. *v.* Halsted, 26 Fed. Cas. No. 15,287, 6 Ben. 205.

See 40 Cent. Dig. tit. "Principal and Surety," § 72.

Although the principal disobey his instructions the surety is bound. Willis *v.* Rivers, 80 Ga. 556, 7 S. E. 90; Chalaron *v.* McFarlane, 9 La. 227; White *v.* Duggan, 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437; Mutual L. Ins. Co. *v.* Wilcox, 17 Fed. Cas. No. 9,979, 8 Biss. 197, 6 Reporter 8.

69. Hastings *v.* Clendaniel, 2 Del. Ch. 165; Rhea *v.* Gibson, 10 Gratt. (Va.) 215; U. S. *v.* Nelson, 28 Fed. Cas. No. 15,862, 2 Brock. 64; U. S. *v.* Turner, 27 Fed. Cas. No. 16,547, 2 Bond 379.

If a seal was affixed without express authority, where a surety signed a note in blank, he could not be made liable. Smith *v.* Carder, 33 Ark. 709.

70. Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867.

71. Gourdin *v.* Read, 8 Rich. (S. C.) 230.

72. **Mistake** generally see CONTRACTS, 9 Cyc. 394 *et seq.*

73. Blaney *v.* Rogers, 174 Mass. 277, 54 N. E. 561.

an instrument different from the one intended;[74] nor will a clerical error, which could not have misled, free them from liability.[75]

(II) *Equitable Relief.*[76] If a contract cannot be enforced against a surety according to its obvious intent, a court of equity will reform it,[77] although a surety will not be charged in equity further than he is answerable at law.[78]

12. Estoppel or Waiver[79]— a. In General. As a rule a surety cannot deny facts recited in his obligation,[80] unless such recital was inserted under a mistake of fact;[81] and he will not be allowed to claim that a bond was given without consideration,[82] that the judicial proceedings in which it was given were irregular,[83] or that the necessary preliminary steps were not taken.[84] If the obligation has accomplished the purpose for which it was given, the surety will not be permitted, thereafter, to free himself from its disadvantages.[85] But a surety is not estopped by the recitals of the bond, from questioning the legality of its execution.[86]

b. As to Compliance With and Validity of Statute. Sureties on a bond are estopped to set up, as a defense, that certain statutory provisions, as to its execution, were not complied with technically;[87] nor can they question the constitutionality of the statute under which the bond was given.[88]

Where a bond is given under the supposition that it is required, it does not constitute a mistake in fact. Thus where a bond is given under the mistaken impression that a former bond was no longer in force, both bonds are valid. Brooks *v.* Whitmore, 142 Mass. 399, 8 N. E. 117.

74. Brown *v.* Brown, 33 S. W. 830, 17 Ky. L. Rep. 1143; Watson *v.* Johnson, 13 Ky. L. Rep. 336; Gaines *v.* Griffith, 13 Ky. L. Rep. 263.

75. Stiewel *v.* American Surety Co., 70 Ark. 512, 68 S. W. 1021.

For example where a bond was given to secure against loss on a bond given for A and B, and a copy of the bond attached showed that it was executed by A alone by B as his attorney in fact, this mistake in the recital did not relieve the sureties. Stiewel *v.* American Surety Co., 70 Ark. 512, 68 S. W. 1021.

76. **Relief against mistake** generally see Equity, 16 Cyc. 68. See also Cancellation of Instruments, 6 Cyc. 286; Reformation of Intruments.

77. Brooks *v.* Brooke, 12 Gill & J. (Md.) 306, 38 Am. Dec. 310.

Illustration.—Where a lessor shows that the original written agreement provided for the payment of rent on the first instead of the last day of the quarter, as stated in the lease, and that he never agreed to any change from the original agreement, and that the lease has been reformed as to the lessee, he is entitled to a verdict against the surety. Stevens *v.* Pendleton, 105 Mich. 519, 63 N. W. 655, 94 Mich. 405, 53 N. W. 1108, 83 Mich. 342, 47 N. W. 1097, 85 Mich. 137, 48 N. W. 478.

78. Ratcliffe *v.* Graves, 1 Vern. Ch. 196, 23 Eng. Reprint 409.

79. **Estoppel, waiver, or ratification:** As to matters relating to discharge of surety see *infra*, VIII, E. By consent of surety as to discharge of debt between creditor and principal see *infra*, VIII, E, 2, d. Of purchaser of land to deny liability for mortgage debt assumed by him see Mortgages, 27 Cyc. 1360 *et seq.* Of unauthorized act relating to execution of principal's obligation see *supra*, IV, C.

80. Red Wing Sewer Pipe Co. *v.* Donnelly, 102 Minn. 192, 113 N. W. 1; Thompson *v.* Rush, 66 Nebr. 758, 92 N. W. 1060.

Date of contract.—Where a bond given by a city contractor recites that the contract has been executed as of one date, the sureties are estopped from asserting that the president of the board of public works actually signed the contract at another and subsequent date. Red Wing Sewer Pipe Co. *v.* Donnelly, 102 Minn. 192, 113 N. W. 1.

The surety cannot show that no liability was intended. Robinson *v.* Larson, 112 Iowa 173, 83 N. W. 900; Dixon *v.* Sims, (Tenn. Ch. App. 1901) 61 S. W. 1052. See also Rome *v.* Bowman, 183 Mass. 488, 67 N. E. 636; Chapman *v.* Pensinger, 87 Va. 581, 13 S. E. 549.

81. Blaney *v.* Rogers, 174 Mass. 277, 54 N. E. 561; Conant *v.* Newton, 126 Mass. 105.

Mistake see *supra*, IV, D, 11, h.

82. Fidelity, etc., Co. *v.* Mobile County, 124 Ala. 144, 27 So. 386; McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120.

83. Brown *v.* Hamil, 76 Ala. 506; Decker *v.* Judson, 16 N. Y. 439; Miller *v.* Youmans, 13 Misc. (N. Y.) 59, 34 N. Y. Suppl. 140 [*affirmed* in 153 N. Y. 653, 47 N. E. 1109]; State *v.* Anderson, 16 Lea (Tenn.) 321; Franklin *v.* Depriest, 13 Gratt. (Va.) 257.

84. Hauser *v.* Ryan, 73 N. J. L. 274, 63 Atl. 4.

85. Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541; Olds *v.* City Trust, etc., Co., 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356; Claggett *v.* Richards, 45 N. H. 360.

86. Williams *v.* State, 25 Fla. 734, 6 So. 831, 6 L. R. A. 821.

Tenn. Code, § 774, estopping a surety from denying the validity of a bond does not have any application to a case where the question is whether the surety has executed the bond. Byrd *v.* Shelley, 2 Tenn. Cas. 33.

87. Hartlep *v.* Cole, 120 Ind. 247, 22 N. E. 130.

88. Weaver *v.* Field, 1 Blackf. (Ind.) 324; Magruder *v.* Marshall, 1 Blackf. (Ind.) 333.

c. As to Official Bond.[89] Sureties on an official bond are estopped from denying that their principal is an officer;[90] and will not be permitted to assert that his appointment or election was illegal,[91] that he was ineligible,[92] that he never took the oath of office,[93] or that his appointment was annulled.[94]

d. By Delay. Delay by a surety may estop him from setting up defenses of want of consideration,[95] extension of time,[96] fraud,[97] or non-performance of conditions as to signatures.[98]

e. Contracting in Special Capacity. One in fact a surety may by express terms obligate himself as a principal, and thus waive the rights accruing to him as a surety.[99] If a surety has contracted in terms "as principal," he can be held as such,[1]

89. **Bond of public officer** generally see OFFICERS, 29 Cyc. 1451.

90. Gray *v.* State, 78 Ind. 68, 41 Am. Rep. 545; Trent, etc., Road Co. *v.* Marshall, 10 U. C. C. P. 329.

Appointment of principal.—Where the condition of the penalty in a bond was "that whereas the above named [obligee] hath this day admitted the above bound ———— his deputies in the office of sheriff of Grayson county for twelve months. Now if the above bound ———— shall well and truly discharge the duties of their respective offices as deputy sheriffs as aforesaid," etc., but the names of the deputies appeared in another portion of the bond, the sureties were estopped from denying their appointment. Cox *v.* Thomas, 9 Gratt. (Va.) 312.

91. *Alabama.*— Plowman *v.* Henderson, 59 Ala. 559; Sprowl *v.* Lawrence, 33 Ala. 674; McWhorter *v.* McGehee, 1 Stew. 546.

California.— People *v.* Hammond, 109 Cal. 384, 42 Pac. 36; People *v.* Huson, 78 Cal. 154, 20 Pac. 369; Mitchell *v.* Hecker, 59 Cal. 558; People *v.* Jenkins, 17 Cal. 500.

Georgia.— Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680.

Idaho.— People *v.* Slocum, 1 Ida. 62.

Indiana.— Lucas *v.* Shepherd, 16 Ind. 368.

Iowa.— Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229.

Kentucky.— Jones *v.* Gallatin County, 78 Ky. 491; Paducah *v.* Cully, 9 Bush 323; McChord *v.* Fisher, 13 B. Mon. 193; Patton *v.* Lair, 4 J. J. Marsh. 248; Duncan *v.* Pendleton County Ct., 4 Ky. L. Rep. 829.

Louisiana.— State *v.* Powell, 40 La. Ann. 234, 4 So. 46, 8 Am. St. Rep. 522; Lafayette Parish School Directors *v.* Judice, 39 La. Ann. 896, 2 So. 792; Homer *v.* Merritt, 27 La. Ann. 568.

Maryland.— Burtles *v.* State, 4 Md. 273.

Mississippi.— Taylor *v.* State, 51 Miss. 79; Byrne *v.* State, 50 Miss. 688.

Missouri.— State *v.* Horn, 94 Mo. 162, 7 S. W. 116; State *v.* Muir, 20 Mo. 303.

Nevada.— State *v.* Rhoades, 6 Nev. 352.

New Hampshire.— Horn *v.* Whittier, 5 N. H. 88.

New York.— People *v.* Norton, 9 N. Y. 176; Johnston *v.* Smith, 25 Hun 171.

North Carolina.— State *v.* Lewis, 73 N. C. 138, 21 Am. Rep. 461; Reid *v.* Humphreys, 52 N. C. 258.

Ohio.— Kelly *v.* State, 25 Ohio St. 567.

Pennsylvania.— McConomy's Estate, 170 Pa. St. 140, 32 Atl. 608; Com. *v.* Stambaugh, 164 Pa. St. 437, 30 Atl. 293; Franklin *v.* Hammond, 45 Pa. St. 507; Foster *v.* Com., 35 Pa. St. 148.

Tennessee.— State *v.* Anderson, 16 Lea 321; Waters *v.* Edmondson, 8 Heisk. 384; McLean *v.* State, 8 Heisk. 22; State *v.* Clark, 1 Head 369.

Virginia.— Pannill *v.* Calloway, 78 Va. 387; Shelton *v.* Jones, 26 Gratt. 891; Chapman *v.* Com., 25 Gratt. 721; Franklin *v.* Depriest, 13 Gratt. 257; Cecil *v.* Early, 10 Gratt. 198.

See 40 Cent. Dig. tit. "Principal and Surety," § 91½.

92. People *v.* McCumber, 27 Barb. (N. Y.) 632 [*affirmed* in 18 N. Y. 315, 72 Am. Dec. 515].

93. Lyndon *v.* Miller, 36 Vt. 329.

94. Macready *v.* Schenck, 41 La. Ann. 456, 6 So. 517.

95. Montgomery County *v.* Auchley, 103 Mo. 492, 15 S. W. 626, where a surety on a bond to secure a loan of school moneys allowed it to remain on file in the county court without objection for six years.

96. Barrett *v.* Davis, 104 Mo. 549, 16 S. W. 377. This was a suit brought to set aside a mortgage executed by a wife to secure a debt of her husband, the mortgagee having agreed to extend the time of payment of the debt if the suit should be dismissed, and the wife should consent to the extension. The attorney of the wife accordingly dismissed the suit, and proceedings to sell under the mortgage were suspended, the wife being informed that some sort of a settlement had been made. Four years afterward it was too late for the wife to say that she had not given her assent to the extension.

97. Stedman *v.* Boone, 49 Ind. 469.

98. White Sewing-Mach. Co. *v.* Saxon, 121 Ala. 399, 25 So. 784; Wright *v.* Lang, 66 Ala. 389; May *v.* Robertson, 13 Ala. 86; Robertson *v.* Coker, 11 Ala. 466; State *v.* Gregory, 119 Ind. 503, 22 N. E. 1; Wilson *v.* State, 1 Lea (Tenn.) 316.

99. Reissaus *v.* Whites, 128 Mo. App. 135, 106 S. W. 603.

1. Picot *v.* Signiago, 22 Mo. 587; Wood *v.* Motley, 83 Mo. App. 97; Visitation Convent *v.* Kleinhoffer, 76 Mo. App. 661; Benedict *v.* Cox, 52 Vt. 247; Claremont Bank *v.* Wood, 10 Vt. 582; Mt. Pleasant Bank *v.* Sprigg, 2 Fed. Cas. No. 891, 1 McLean 178 [*affirmed* in 10 Pet. 257, 9 L. ed. 416, 22 Fed. Cas. No.

even though the fact that he is a surety is known to the creditor,[2] unless he has added the word "surety" to his signature.[3] Partners who have executed a bond in the firm-name as a corporation are estopped to deny the truth as to the capacity in which they signed.[4]

f. Signing With Knowledge of Facts. A subsequent surety is bound if, at the time he signs, he has knowledge of the facts, although ignorant of their legal effect.[5] It is not a defense to a surety that the name of a prior surety was signed without authority, where the subsequent signer had the same facilities for ascertaining the authority that the creditor or obligee had.[6]

g. Treating Contract as Valid to Obtain Personal Benefit. If the surety treats the contract as valid for the purpose of obtaining a personal benefit for himself, he afterward will not be permitted to deny his liability to the creditor;[7] but he will not be estopped to deny his obligation simply because he has taken steps to protect himself in event of a failure of his defense.[8]

V. CONSTRUCTION, OPERATION, AND EFFECT OF THE CONTRACT.

A. In General. Subject to the rule of strict construction in favor of sureties,[9] contracts of suretyship are governed by the same general rules of construction as other contracts,[10] and must receive a just and reasonable interpretation, with a

13,257, 1 McLean 384, 14 Pet. 201, 10 L. ed. 419].

An agreement by a surety to be treated as a principal is not limited by another clause in which he consents to an extension of the time of payment in such a manner as to restrict the right of the creditor, as against the surety, to one extension. Merchants' Nat. Bank *v.* Murphy, 125 Iowa 607, 101 N. W. 441.

The rule is not changed by the fact that a new note is given in renewal of a prior note. Lamoille County Nat. Bank *v.* Hunt, 72 Vt. 357, 47 Atl. 1078.

2. Heath *v.* Derry Bank, 44 N. H. 174; Derry Bank *v.* Baldwin, 41 N. H. 434; Claremont Bank *v.* Wood, 10 Vt. 582.

3. People's Bank *v.* Pearsons, 30 Vt. 711.

4. Allen *v.* Hopkins, 62 Kan. 175, 61 Pac. 750.

5. People *v.* Carroll, 115 Mich. 233, 115 N. W. 42 (holding that in an action on a bond purporting on its face to be made by T. & Co. as principals and defendants as sureties, and which was executed only by defendants, a complaint in which it is not averred that the bond was delivered by the sureties with knowledge that the principals had not signed, or that they had waived such signing, but which does aver that the bond was delivered by defendants, will be good on demurrer; the delivery of the bond by defendants while unsigned by the principals being a waiver of the principals' signature); Cass County *v.* American Exchange State Bank, 11 N. D. 238, 91 N. W. 59 (holding that a surety signing a bond with knowledge of an erasure of the name of one of the previous signatures is estopped from claiming prejudice by reason of such erasure).

Presumption.— Persons who sign an existing bond are presumed to know the effect thereof, including the discharge of prior sureties, and they are bound. State *v.* Van Pelt, 1 Ind. 304; Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 311.

6. McLure *v.* Colclough, 17 Ala. 89; Schmidt *v.* Archer, 113 Ind. 365, 14 N. E. 543; Bowen *v.* Mead, 1 Mich. 432.

In Kentucky written authority is required to empower a person to sign the name of another to a bond; and if the name of a person is signed on his oral request, other sureties are not bound, although aware of the circumstances. Wilson *v.* Linville, 96 Ky. 50, 27 S. W. 857, 16 Ky. L. Rep. 340; Chamberlin *v.* Brewer, 3 Bush 561; Com. *v.* Campbell, 45 S. W. 89, 20 Ky. L. Rep. 54; Com. *v.* Magoffin, 25 S. W. 599, 15 Ky. L. Rep. 775; English *v.* Dycus, 5 S. W. 44, 9 Ky. L. Rep. 188.

7. Pacific Nat. Bank *v.* Aetna Indemnity Co., 33 Wash. 428, 74 Pac. 590; Point Pleasant *v.* Greenlee, 63 W. Va. 207, 60 S. E. 601.

If, upon a compromise of the principal with his creditors, the surety treats the amount of his obligation as an existing liability of the principal to him, the surety is estopped to deny his liability on the obligation. Irvine *v.* Adams, 48 Wis. 468, 4 N. W. 573, 33 Am. Rep. 817.

A surety who, on settlement with his principal, takes up a note of the principal by giving his own note cannot plead usury infecting the old note as a defense to an action on his new note. Boylston *v.* Bain, 90 Ill. 283.

8. See cases cited *infra*, this note.

By filing a motion to make the principal a party to an action on a bond, sureties are not precluded from denying its execution. State *v.* Chick, 146 Mo. 645, 48 S. W. 829.

By denying liability on the bond of a building contractor, the sureties are not estopped to allege non-compliance with conditions by the owner. De Mattos *v.* Jordan, 20 Wash. 315, 55 Pac. 118.

9. See *infra*, V, C.

10. New Haven County Bank *v.* Mitchell, 15 Conn. 206; Gamble *v.* Cuneo, 21 N. Y. App. Div. 413, 47 N. Y. Suppl. 548 [*affirmed* in 162 N. Y. 634, 57 N. E. 1110]; Northern

view to ascertaining the true intent of the parties as gathered from the language of the instrument in the light of surrounding facts and circumstances.[11] Words in the contract must be given their generally accepted meaning,[12] unless it is clear from the context that some other meaning was intended.[13] The general rule for the interpretation of contracts that ambiguous language will be construed most strongly against the author of it applies to contracts of suretyship.[14] The construction of the contract is a matter of law for the court;[15] if, however, the parties themselves have placed a construction on the contract by their acts, the court will adopt that construction.[16]

B. Intention as Gathered From Entire Instrument. The contract must be construed from the expressions therein contained,[17] and reference must be had to the entire instrument.[18] If the contract of suretyship makes another

Light Lodge No. 1 I. O. O. F. *v.* Kennedy, 7 N. D. 146, 73 N. W. 524.

In California, Civ. Code, § 2837, makes provision to this effect. Sather Banking Co. *v.* Arthur R. Briggs Co., 138 Cal. 724, 72 Pac. 352.

Interpretation of contract generally see CONTRACTS, 9 Cyc. 577.

11. *Illinois.*— Ewen *v.* Wilbor, 99 Ill. App. 132; McDonald *v.* Harris, 75 Ill. App. 111, holding that obligations of sureties should have a reasonable interpretation according to the intent of the parties, as disclosed by the instrument read in the light of surrounding circumstances and the purposes for which it was made.

Iowa.— Van Buren County *v.* American Surety Co., 137 Iowa 490, 115 N. W. 24.

Louisiana.— Holden *v.* Tanner, 6 La. Ann. 74, holding that, although the name of the surety was not mentioned in the body of the instrument, which, however, contemplated the giving of a surety, and those who signed as witnesses were described as such to other parties signing as principals, the remaining signer will be construed to have signed as surety.

Massachusetts.— Richardson *v.* Boynton, 12 Allen 138, 90 Am. Dec. 141, holding that where one named in the body of an instrument as surety signed it under the proper place for witnesses' attestation, but one not named in the bond signed it opposite one of the seals where the surety's name should have been, the former was liable as surety.

Missouri.— Beers *v.* Wolf, 116 Mo. 179, 22 S. W. 620; Martin *v.* Whites, 128 Mo. App. 117, 106 S. W. 608.

Nebraska.— Griswold *v.* Hazels, 62 Nebr. 888, 87 N. W. 1047.

United States.— U. S. Fidelity, etc., Co. *v* Woodson County, 145 Fed. 144, 76 C. C. A. 114.

Canada.— Fane *v.* Bancroft, 30 Nova Scotia 33.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 24, 103.

Contracts construed as suretyship agreements imposing a primary liability upon the signer. Watson *v.* Beabout, 18 Ind. 281 (where the language was "I, A. B., agree to stand as surety for C. D. in the above agreement"); Kirby *v.* Studebaker, 15 Ind. 45 (where the language was "On the part of the said A. & B., I hold myself, with them, responsible for their part of the above contract"); Cassity *v.* Robinson, 8 B. Mon. (Ky.) 279; Giltinan *v.* Strong, 64 Pa. St. 242 (where the language was "I hereby become surety for the rent . . . at $12,00 per annum, payable monthly from this date"); Reigart *v.* White, 52 Pa. St. 438 (where the language was "Will you in addition please say to [A.] to ship immediately, and I will be responsible for payment").

12. Ramsay *v.* People, 97 Ill. App. 283 [*affirmed* in 197 Ill. 572, 64 N. E. 549, 90 Am. St. Rep. 177]; Chase *v.* McDonald, 7 Harr. & J. (Md.) 160; McClusky *v.* Cromwell, 11 N. Y. 593; De Reszke *v.* Duss, 99 N. Y. App. Div. 353, 91 N. Y. Suppl. 221.

13. Taylor *v.* Smith, 116 N. C. 531, 21 S. E. 202.

14. Sather Banking Co. *v.* Arthur R. Briggs Co., 138 Cal. 724, 72 Pac. 352 (holding that an ambiguity in the terms of a mortgage securing the indebtedness of another will be construed most strongly against the mortgagor); Simpson *v.* Manley, 2 Cromp. & J. 12, 1 L. J. Exch. 3, 1 Price Pr. Cas. 130, 2 Tyrw. 86.

15. U. S. *v.* Hodge, 6 How. (U. S.) 279, 12 L. ed. 437; Bell *v.* Bruen, 1 How. (U. S.) 169, 17 Pet. 161, 11 L. ed. 89.

16. State *v.* Loeb, 21 La. Ann. 599; District of Columbia *v.* Gallaher, 124 U. S. 505, 8 S. Ct. 585, 31 L. ed. 526 (holding that the construction which the parties have put on the contract will prevail even over the literal meaning); Guthrie *v.* O'Connor, 36 U. C. Q. B. 372.

17. Griswold *v.* Hazels, 62 Nebr. 888, 87 N. W. 1047; Simpson *v.* Manley, 2 Cromp. & J. 12, 1 L. J. Exch. 3, 1 Price Pr. Cas. 130, 2 Tyrw. 86.

18. Wilson *v.* Whitmore, 92 Hun (N. Y.) 466, 36 N. Y. Suppl. 550 [*affirmed* in 157 N. Y. 693, 51 N. E. 1094]; Blades *v.* Dewey, 136 N. C. 176, 48 S. E. 627, 103 Am. St. Rep. 924; Napier *v.* Bruce, 8 Cl. & F. 470, 8 Eng. Reprint 184; Keith *v.* Fenelon Falls Union School Section, 3 Ont. 194.

If one provision is illegal and repugnant to the rest of the instrument, it will be rejected, if it can be separated from the other provisions, and the instrument treated as a valid obligation. Collins *v.* Gwynne, 7 Bing. 423, 9 L. J. C. P. O. S. 130, 5 M. & P. 276, 20 E. C. L. 192, holding that a provision in a public officer's bond for the payment of money

instrument a part thereof, the former must be construed in connection with it,[19] and when the contract is entered into pursuant to a statute or charter the statute or charter forms a part of the contract which must be construed in connection therewith.[20]

C. Strict Construction in Favor of Surety. Sureties are said to be favorites of the law,[21] and a contract of suretyship must be strictly construed to impose upon the surety only those burdens clearly within its terms, and must not be extended by implication or presumption.[22] This rule is followed both at law

to one not entitled to receive it will be rejected as surplusage.

19. Montgomery First Nat. Bank *v.* Maryland Fidelity, etc., Co., 145 Ala. 335, 40 So. 415, 117 Am. St. Rep. 45, 5 L. R. A. N. S. 418; Oberbeck *v.* Mayer, 59 Mo. App. 289 (holding, however, that when a bond recites that it is given for the performance of a contract of a stated date and that it is annexed to such contract, but it is annexed to a contract of a different date, the sureties in the bond can only be held for the performance of the latter contract upon proof that they authorized the annexation, or knew, when they signed the bond, that it related or was to be annexed to said latter contract); Higgins *v.* Drucker, 22 Ohio Cir. Ct. 112, 12 Ohio Cir. Dec. 220; Willoughby *v.* Maryland Fidelity, etc., Co., 16 Okla. 546, 85 Pac. 713, 7 L. R. A. N. S. 548.

Illustrations.— A contract of employment should be read with the bond which secures it. Jenkins *v.* Phillips, 18 Ind. App. 562, 48 N. E. 651. Where a building contract made the plans and specifications a part thereof, and the contractor's bond required the construction to be made as provided in the contract, the sureties on the bond were bound by the plans and specifications. Leavel *v.* Porter, 52 Mo. App. 632. A surety on a bond for the faithful performance of a contract to construct a "hull," according to specifications attached to the contract, is liable for the cost of equipments required by the specifications, although not strictly a part of the "hull." Heffernan *v.* U. S. Fidelity, etc., Co., 37 Wash. 477, 79 Pac. 1095.

Because the principal delivers several papers to the creditor, it does not follow that they all together constitute the contract. Weil *v.* Scott, 12 Pa. Dist. 463, holding that where a debtor gives a judgment note and, at the same time, conveys an interest in his business, and assigns life insurance policies, and a surety on the note conveys realty to the creditor, the note is the main contract, and the other papers are collateral, so that the transaction does not become usurious because the profits of the business exceed the legal rate of interest, nor does the creditor become liable as a partner.

20. U. S. Fidelity, etc., Co. *v.* Fultz, 76 Ark. 410, 89 S. W. 93; Wycough *v.* State, 50 Ark. 102, 6 S. W. 598; Olean *v.* King, 5 N. Y. St. 169 (holding that a renewal of a warrant to a town collector in accordance with power granted in the charter does not discharge his sureties, as it is the same as if the power to renew the warrant had been referred to in the collector's bond, or had been assented to specially by the sureties); Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532. See also *infra*, VIII, E, 2, j, (III), (D).

The by-laws of a private corporation form part of a contract of suretyship for an officer of the corporation. Danvers Farmers' Elevator Co. *v.* Johnson, 93 Minn. 323, 101 N. W. 492, holding that the sureties of the officer of a corporation cannot question the nature of the principal's duties as laid down in the articles and by-laws.

21. Stewart *v.* Knight, etc., Co., 166 Ind. 498, 76 N. E. 743 [*reversing* (App. 1905) 74 N. E. 1131]; Moreland School Dist. *v.* Picker, 14 Montg. Co. Rep. (Pa.) 85.

22. *California.*— Sather Banking Co. *v.* Arthur R. Briggs Co., 138 Cal. 724, 72 Pac. 352.

District of Columbia.— U. S. *v.* Maloney, 4 App. Cas. 505.

Florida.— Raney *v.* Baron, 1 Fla. 327.

Illinois.— Phœnix Mfg. Co. *v.* Bogardus, 231 Ill. 528, 83 N. E. 284; Field *v* Rawlings. 6 Ill. 581; Stevens *v.* Partridge, 109 Ill. App. 486; Ewen *v.* Wilbor, 99 Ill. App. 132; Pfirshing *v.* Peterson, 98 Ill. App. 70; Masury *v.* Westwater, 94 Ill. App. 30; Reed *v.* Cramb, 22 Ill. App. 34; Abrahams *v.* Jones, 20 Ill. App. 83.

Indiana.— Dunlap *v.* Eden, 15 Ind. App. 575, 44 N. E. 560.

Louisiana.— Parham *v.* Cobb, 9 La. Ann. 423; Cartwright *v.* McMillen, 3 La. Ann. 685; New Orleans Canal, etc., Co. *v.* Hagan, 1 La. Ann. 62.

Maryland.— State *v.* Dayton, 101 Md. 598, 61 Atl. 624; Chase *v.* McDonald, 7 Harr. & J. 160.

Missouri.— Beers *v.* Wolf, 116 Mo. 179, 22 S. W. 620; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Gray *v.* Davis, 89 Mo. App. 450; Erath *v.* Allen, 55 Mo. App. 107.

Nebraska.—Omaha First Nat. Bank *v.* Goodman, 55 Nebr. 418, 77 N. W. 756; Hopewell *v.* McGrew, 50 Nebr. 789, 70 N. W. 397.

New York.— Gamble *v.* Cuneo, 21 N. Y. App. Div. 413, 47 N. Y. Suppl. 548 [*affirmed* in 162 N. Y. 634, 57 N. E. 1110]; De Camp *v.* Bullard, 22 Misc. 441, 50 N. Y. Suppl. 807 [*affirmed* in 33 N. Y. App. Div. 627, 53 N. Y. Suppl. 1102]; Walsh *v.* Bailie, 10 Johns. 180.

Ohio.— McGovney *v.* State, 20 Ohio 93.

Pennsylvania.— Washington Bank *v.* Barrington, 2 Penr. & W. 27; Roth *v.* Miller, 15 Serg. & R. 100.

Texas.— State *v.* Evans, 32 Tex. 200.

Utah.— Coughran *v.* Bigelow, 9 Utah 260, 34 Pac. 51.

Virginia.— Kirschbaum *v.* Blair, 98 Va. 35, 34 S. E. 895.

and in equity.[23] Construction in favor of the surety should not, however, be carried to the length of giving the contract a forced and unreasonable construction with the view of relieving him.[24]

D. Conflict of Laws. The validity of the contract [25] and the liability of a surety [26] are governed by the law of the state in which the contract is entered into. The liability of a surety is determined also by the law in force at the time his contract is made.[27]

VI. Commencement, Duration, and Termination of the Relation.

A. Commencement and Continuance in General — 1. Commencement.

The surety's liability may extend to an indebtedness of the principal accruing after the execution of the bond, although the transaction out of which it arises had its inception prior to the execution.[28] But the contract of a surety is not retroactive and no liability attaches for defaults occurring before it is entered into,[29]

United States.— Leggett *v.* Humphreys, 21 How. 66, 16 L. ed. 50; U. S. Fidelity, etc., Co. *v.* Woodson County, 145 Fed. 144, 76 C. C. A. 114; U. S. *v.* De Visser, 10 Fed. 642; U. S. *v.* Cheeseman, 25 Fed. Cas. No. 14,790, 3 Sawy. 424.

England.— Napier *v.* Bruce, 8 Cl. & F. 470, 8 Eng. Reprint 184; Stoveld *v.* Upton, 6 L. J. C. P. 126.

Canada.— Weston *v.* Conron, 15 Ont. 595; Gooderham *v.* Upper Canada Bank, 9 Grant Ch. (U. C.) 39.

See 40 Cent. Dig. tit. "Principal and Surety," § 103.

The meaning of the rule as to strict construction has been held to be that the surety's obligation cannot be extended to other subjects, persons, or periods of time than those embraced or necessarily included in the contract; otherwise it is subject to the ordinary rules of construction; but the surety shall be bound to the full extent of what appears to have been his engagement, and for this purpose it is said that the words of the contract are to be taken as strongly against him as they will admit. Fisse *v.* Einstein, 5 Mo. App. 78.

23. Robinson Consol. Min. Co. *v.* Craig, 4 N. Y. St. 69; Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291.

24. Irwin *v.* Kilburn, 104 Ind. 113, 3 N. E. 650.

Inconsistent constructions.—A contract cannot be construed in one way as to the principal and in another as to the surety. Pelzer *v.* Steadman, 22 S. C. 279. And the surety is, in general, bound to the same extent as the principal is bound under the same contract. U. S. *v.* Maloney, 4 App. Cas. (D. C.) 505; Roth *v.* Miller, 15 Serg. & R. (Pa.) 100.

Courts will not relieve a surety merely because he is one unless he shows some sufficient defense. Weaver *v.* Ruhn, (Tenn. Ch. App. 1897) 47 S. W. 171.

25. Black *v.* Reg., 29 Can. Sup. Ct. 693. But see Parham *v.* Pulliam, 5 Coldw. (Tenn.) 497, holding that the contract of a surety made in one state upon an instrument payable by its terms in another state, and with reference to the law of that other state, bearing interest authorized by the law where payment is to be made, but exceeding the lawful rate of the state in which it was made, is valid and binding upon the surety and will be enforced against him by the courts of the state where the contract of suretyship was made.

Usury governed by what law see Usury.

If the contract is void where made, it cannot be enforced in another state, although it would have been valid if made there. Nichols, etc., Co. *v.* Marshall, 108 Iowa 518, 79 N. W. 282, holding that a contract of suretyship made by a married woman in Indiana, although domiciled in Iowa, cannot be enforced in the latter state, as her contract is void under the laws of Indiana. Burns Rev. St. § 6964.

26. Howard *v.* Fletcher, 59 N. H. 151.

The right of a surety to discharge his obligation by notice to the creditor to pursue the debtor must be determined by the law of the place of contract. Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532.

27. Dobyns *v.* McGovern, 15 Mo. 662.

28. Prudential Ins. Co. *v.* Berger, 16 N. Y. Suppl. 515.

Payments to be made after execution of bond.— Where the custom was not to consider premiums for insurance policies due until the first of the following month, sureties for an agent are chargeable with defaults prior to the execution of the bond if payments were not to be made until after its execution. British American Assur. Co. *v.* Neil, 76 Iowa 645, 41 N. W. 382.

29. *Arkansas.*— U. S. Fidelity, etc., Co. *v.* Fultz, 76 Ark. 410, 89 S. W. 93.

Florida.—Mutual Loan, etc., Assoc. *v.* Price, 19 Fla. 127.

Georgia.— Price *v.* Douglas County, 77 Ga. 163, 3 S. E. 240.

Illinois.— Bartlett *v.* Wheeler, 195 Ill. 445, 63 N. E. 169 [*affirming* 96 Ill. App. 342].

Indiana.— Lowry *v.* State, 64 Ind. 421.

Missouri.—Gum *v.* Swearingen, 69 Mo. 553; State *v.* Atherton, 40 Mo. 209.

Texas.— Barry *v.* Screwmen's Assoc., 67 Tex. 250, 3 S. W. 261.

Canada.— Canada West Farmers' Mut., etc., Ins. Co. *v.* Merritt, 20 U. C. Q. B. 444, holding that a bond conditioned that the principal should pay all money which he had then received, or which he should receive, does not

unless an intent to be so liable is indicated,[30] although sureties who sign an old bond are sometimes liable for breaches thereof occurring before they signed, as in the case of additional security required of particular officers by an order of court, under statute.[31]

2. CONTINUANCE. A surety bound for the fidelity and honesty of his principal, and so for an indefinite and contingent liability and not for a sum fixed and certain to become due, may revoke and end his future liability in either of two cases: (1) Where the guaranteed contract has no definite time to run; and (2) where it has such definite time, but the principal has so violated it and is so in default that the creditor may safely and lawfully terminate it on account of the breach.[32] If the facts indicate that the surety intended his obligation to be a continuing security for future credit to be extended to the principal, he is not discharged by payments made by the principal;[33] but the amount named by him in his obligation indicates the balance of the principal's account for which he may be held;[34] if the surety's liability is not continuing, he cannot be held for any credit extended to the principal after the amount designated by him has been reached, although future payments made by the principal have reduced the amount due.[35]

make the sureties liable for money received before the execution of the bond.

See 40 Cent. Dig. tit. "Principal and Surety," § 116 *et seq.*

A surety cannot be made liable for an old debt by the principal and creditor going through the form of returning an old note and making a new one. Glyn *v.* Hertel, 2 Moore C. P. 134.

30. Mahaffey *v.* Gray, 85 Ga. 460, 11 S. E. 774; Jones *v.* Hays, 38 N. C. 502, 44 Am. Dec. 78; Bell *v.* Jasper, 37 N. C. 597.

Such an intent is shown where the bond is conditioned that the principal "has faithfully discharged, and shall continue faithfully to discharge all the duties of the said office." U. S. *v.* Anderson, 24 Fed. Cas. No. 14,446, 1 Blatchf. 330.

Illustrations.— Where a bond recited that the principal had been elected for the year beginning Jan. 1, 1885, and was conditioned for the performance of the office during the said year, the surety was liable for defaults during the entire year. McMullen *v.* Winfield Bldg., etc., Assoc., 64 Kan. 298, 67 Pac. 892, 91 Am. St. Rep. 236, 56 L. R. A. 924. Where a surety undertook to become liable for all money due or to become due, he was liable for money owing by the principal at the date of the agreement, although the agreement was given at the time a new loan was made to the principal. Burgess *v.* Eve, L. R. 13 Eq. 450, 41 L. J. Ch. 515, 26 L. T. Rep. N. S. 540, 20 Wkly. Rep. 311. "I hereby undertake to pay you for all beer supplied by you to the Star brewery, 131, East street, Walworth, on the completion of the purchase, which will take place in a few days," is *prima facie* a promise to pay for goods to be supplied. Mockett *v.* Ames, 23 L. T. Rep. N. S. 729. A bond conditioned that the principal would "henceforth faithfully discharge" his duties does not impose a liability on a surety for transactions prior to the execution of the bond, although the principal had been appointed some months before. Thomson *v.* MacGregor, 81 N. Y. 592 [*reversing* 45 N. Y. Super. Ct. 197].

31. Com. *v.* Adams, 3 Bush (Ky.) 41.

New and additional bonds see for example GUARDIAN AND WARD, 21 Cyc. 231 text and notes 78, 79; OFFICERS, 29 Cyc. 1457 text and notes 7, 8.

32. Emery *v.* Baltz, 94 N. Y. 408.

Termination of employment see *infra*, VI, B, 1, 2.

33. Nottingham Hide, etc., Market *v.* Bottril, L. R. 8 C. P. 694, 42 L. J. C. P. 256, 29 L. T. Rep. N. S. 134, 21 Wkly. Rep. 739.

An assignment of an insurance policy by the surety to the creditor to secure "such interest as he may have when said policy becomes a claim" covers a bond given by the principal after the assignment. Kulp *v.* Brant, 162 Pa. St. 222, 29 Atl. 729.

34. *Louisiana.*— Isador Bush Wine, etc., Co. *v.* Wolff, 48 La. Ann. 918, 19 So. 765.

Pennsylvania.— Bentz's Estate, 14 Phila. 253.

Texas.— Lasater *v.* Purcell Mill, etc., Co., 22 Tex. Civ. App. 33, 54 S. W. 425.

England.— Tanner *v.* Moore, 9 Q. B. 1, 11 Jur. 11, 15 L. J. Q. B. 391, 58 E. C. L. 1; Henniker *v.* Wigg, 4 Q. B. 792. Dav. & M. 160, 7 Jur. 1058, 45 E. C. L. 792; Burgess *v.* Eve, L. R. 13 Eq. 450, 41 L. J. Ch. 515, 26 L. T. Rep. N. S. 540, 20 Wkly. Rep. 311; Batson *v.* Spearman, 9 A. & E. 298, 3 P. & D. 77, 36 E. C. L. 172; Williams *v.* Rawlinson, 3 Bing. 71, 3 L. J. C. P. O. S. 164; Bastow *v.* Bennett, 3 Campb. 220; Mason *v.* Pritchard, 2 Campb. 436, 12 East 227, 11 Rev. Rep. 369; Weston *v.* Empire Assur. Corp., 19 L. T. Rep. N. S. 305.

Canada.— Ross *v.* Burton, 4 U. C. Q. B. 357; Wells *v.* Ritchie, 6 U. C. Q. B. O. S. 13.

See 40 Cent. Dig. tit. "Principal and Surety," § 113.

35. Stewart *v.* Levis, 42 La. Ann. 37, 6 So. 898; Thomas *v.* Stetson, 59 Me. 229; Chalmers *v.* Victors, 18 L. T. Rep. N. S. 481, 16 Wkly. Rep. 1046; Kirby *v.* Marlborough, 2 M. & S. 18, 14 Rev. Rep. 573; Shaw *v.* Vandusen, 5 U. C. Q. B. 353.

A bond appearing to be a simple money bond for a sum certain with interest is not

A surety for the price of goods sold is discharged if the seller terminates the contract by seizing the goods,[36] unless there is a stipulation to the contrary;[37] but the liability of a surety for the accrued rent of personal property under a contract of letting, reserving to the owner the option of requiring the return of the property, is not affected by a sale of the property and termination of the letting.[38] A surety is not relieved from liability because a cosurety has removed from the state where the obligation was executed.[39]

B. Matters Affecting Duration and Termination[40] — **1. Termination of Employment — a. In General.** If an employee is appointed to hold office at the pleasure of his employer, sureties on his bond, in the absence of any reservation on their part, will be liable indefinitely;[41] but if the employment is for a fixed time, the sureties will not be liable for any default occurring after that time;[42] or if the principal has been employed to accomplish certain work, his sureties are not liable after that work has been accomplished.[43] Acceptance of another office by the principal does not necessarily terminate his former employment.[44] But the removal[45]

a continuing security in the absence of any evidence to the contrary. Walker *v.* Hardman, 11 Bligh N. S. 229, 6 Eng. Reprint 319, 4 Cl. & F. 258, 7 Eng. Reprint 99.

A surety on a note, payable at a fixed time, is not liable for a loan made to the principal after the maturity of the note. St. Albans Bank *v.* Smith, 30 Vt. 148.

36. Hewison *v.* Ricketts, 63 L. J. Q. B. 711, 71 L. T. Rep. N. S. 191, 10 Reports 558.

37. Black *v.* Stephen, 37 Can. L. J. N. S. 206.

38. Monsarratt *v.* Equitable Trust Co., 14 Pa. Super. Ct. 541.

Sale to bailee.— But a surety for the hire of personal property and for its return is discharged by a sale of the property to the bailee, although there is a provision in the contract with the buyer that the sale is to be void if a bill of exchange given by the latter is dishonored. O'Neill *v.* Carter, 9 U. C. Q. B. 470.

39. Sacramento County *v.* Bird, 31 Cal. 67.

40. **Liability on official bonds** see Officers, 29 Cyc. 1356. See also Bonds, 5 Cyc. 771 *et seq.*

41. *Alabama.*— Mobile, etc., R. Co. *v.* Brewer, 76 Ala. 135.

California.— Humboldt Sav., etc., Soc. *v.* Wennerhold, (1889) 20 Pac. 553.

Delaware.— Sparks *v.* Farmers' Bank, 3 Del. Ch. 274.

United States.—Phillips *v.* Bossard, 35 Fed. 99.

England.— Birmingham *v.* Wright, 16 Q. B. 623, 15 Jur. 749, 20 L. J. Q. B. 214, 71 E. C. L. 623.

See 40 Cent. Dig. tit. "Principal and Surety," § 116 *et seq.*

A cashier who is not reëlected formally each year, but whose salary is paid each year and who is held out as cashier by the officers of the bank, must be held, with respect to a surety on his bond, as cashier of the bank during those years. Shackamaxon Bank *v.* Yard, 143 Pa. St. 129, 22 Atl. 908, 24 Am. St. Rep. 521.

Renewal bond.— Where a surety company, before the expiration of one year, writes the obligee that if it desires to renew the bond about to expire, a new premium would be required, and, upon the premium being paid, the surety company issues a "renewal bond," an intention is shown by each of the parties that the bond was to cover the acts of the principal for the period of one year only from its date. North St. Louis Bldg., etc., Assoc. *v.* Obert, 169 Mo. 507, 69 S. W. 1044. See also *infra*, VI, B, 6.

After settlement of agency.— Sureties for an agent are not liable for indebtedness arising after he has made a full settlement of all matters pertaining to his agency. Phillips *v.* Singer Mfg. Co., 88 Ill. 305.

Bond covering new agency.— If the bond provides for liability during the continuance of the present agency or of "any future agency," sureties cannot escape liability because the principal and the obligee have entered into a new contract of agency. New York L. Ins. Co. *v.* Hamlin, 100 Wis. 17, 75 N. W. 421.

42. Gundlach *v.* Fischer, 59 Ill. 172 (holding that where the agreement between the employer and the principal was that the former was to furnish the latter such number of machines as he could sell prior to Oct. 1, 1867, sureties were not liable for the principal's failure to account for machines furnished after that date); Governor *v.* Bowman, 44 Ill. 499; Governor *v.* Lagow, 43 Ill. 134.

43. U. S. *v.* West, 8 App. Cas. (D. C.) 59.

44. Worth *v.* Newton, 2 C. L. R. 1471, 10 Exch. 247, 23 L. J. Exch. 338, 2 Wkly. Rep. 628.

45. City Ins. Co. *v.* Roberts, 6 Ohio Dec. (Reprint) 1213, 12 Am. L. Rec. 744, 11 Cinc. L. Bul. 219; Canada Agricultural Ins. Co. *v.* Watt, 30 U. C. C. P. 350.

Before notice to employee.— Upon discovery of a breach of trust by a cashier, his discharge was sent to the branch where he was employed, which was received by the president of the branch bank on Sunday morning, but was not communicated to the cashier until the afternoon of the next day. His sureties were liable for the frauds committed by the cashier on Monday. McGill *v.* U. S. Bank, 12

or resignation [46] of an employee terminates the liability of his sureties as to anything that may occur afterward, although his employment by his principals may be continued thereafter.

b. Annual or Definite Term Offices — (i) *In General.* If the principal is appointed or elected annually, his sureties will not be liable for defaults occurring after the expiration of the year in which the bond was given, although he is reappointed or reëlected,[47] and although the bond is conditioned for the performance of duties by the principal during his continuance in office.[48] The fact that the office of the principal is an annual one need not appear in the bond; [49] and if the appointment of the principal was to a certain date only, his sureties are not liable beyond that date, although they did not learn that fact until some years after, and not until a default had occurred.[50] On the other hand sureties will be liable for subsequent terms if the language of their contract indicates such an intention; [51] but it is requisite, even in such cases, that the service of the principal be

Wheat. (U. S.) 511, 6 L. ed. 711 [*affirming* 2 Fed. Cas. No. 929, 1 Paine 661].

46. Amicable Mut. L. Ins. Co. *v.* Sedgwick, 110 Mass. 163.

47. *California.*— Fresno Enterprise Co. *v.* Allen, 67 Cal. 505, 8 Pac. 59.

Iowa.— Ida County Sav. Bank *v.* Seidensticker, 128 Iowa 54, 102 N. W. 821, 111 Am. St. Rep. 189.

Missouri.— North St. Louis Bldg., etc., Assoc. *v.* Obert, 169 Mo. 507, 69 S. W. 1044.

North Carolina.— Blades *v.* Dewey, 136 N. C. 176, 48 S. E. 627, 103 Am. St. Rep. 924.

United States.— Harris *v.* Babbitt, 11 Fed. Cas. No. 6,114, 4 Dill. 185.

England.— Leadley *v.* Evans, 2 Bing. 32, 2 L. J. C. P. O. S. 108, 9 Moore C. P. 102, 9 E. C. L. 469; St. Saviour *v.* Bostock, 2 B. & P. N. R. 175; Cambridge *v.* Dennis, E. B. & E. 660, 5 Jur. N. S. 265, 27 L. J. Q. B. 474, 6 Wkly. Rep. 653, 96 E. C. L. 660.

Canada.— Waterford School Trustees *v.* Clarkson, 23 Ont. App. 213.

See 40 Cent. Dig. tit. "Principal and Surety," § 117.

Longer or shorter periods.— While, in most of these cases, the office is an annual one, the principle is the same, although the period be longer or shorter, the point being that if the term of office be a fixed period sureties are not liable for acts occurring after that period has expired. In Richardson School Fund *v.* Dean, 130 Mass. 242, the period was three years.

It makes no difference that the sureties are directors and stock-holders of the corporation employing the principal, and that it was their duty to see that a proper bond was given. Welch *v.* Seymour, 28 Conn. 387.

Bond to officer as obligee.— The rule that sureties are not liable beyond the current term of an annual office applies where the obligee and not the principal is the officer. Thus a bond given by a bank to a county treasurer to secure deposits of funds made by him covers the term which he is serving at the time the bond is given and not subsequent terms. Bonney *v.* Robertson, 6 Colo. App. 485, 41 Pac. 842.

48. Mutual Loan, etc., Assoc. *v.* Price, 16 Fla. 204, 26 Am. Rep. 703; Ulster County Sav. Inst. *v.* Ostrander, 163 N. Y. 430, 57 N. E. 627; Bamford *v.* Iles, 3 Exch. 380, 18 L. J. M. C. 49.

49. Hassell *v.* Long, 2 M. & S. 363.

Sureties may show orally that the money as to which the default occurred was received by the principal after their liability ceased. Berton *v.* Turney, 11 N. Brunsw. 202.

50. Wickens *v.* McMeekin, 15 Ont. 408.

51. Coombs *v.* Harford, 99 Me. 426, 59 Atl. 529; Mutual Bldg., etc., Assoc. *v.* Hammell, 43 N. J. L. 78; People's Bldg., etc., Assoc. *v.* Wroth, 43 N. J. L. 70.

Such an intention is indicated by the following provision: "From time to time, and at all times thereafter, during such time as he should continue in his said office, whether by virtue of his said appointment, or of any reappointment thereto, or of any such retainer or employment by or under the authority of the said trustees, or their successors, to be elected in the manner directed by the said act, he should use his best endeavours to collect the moneys received by means of the rates, in the then present or in any subsequent year," etc. Augero *v.* Keen, 2 Gale 8, 5 L. J. Exch. 233, 1 M. & W. 390, 1 Tyrw. & G. 709.

Change from annual to perpetual office.— If the provision is comprehensive enough sureties will be liable, although the office be changed from an annual one to a perpetual appointment during pleasure. Clifton Dartmouth Hardness *v.* Silly, 7 E. & B. 97, 3 Jur. N. S. 434, 26 L. J. Q. B. 90, 5 Wkly. Rep. 255, 90 E. C. L. 97; Oswald *v.* Berwick-upon-Tweed, 5 H. L. Cas. 856, 2 Jur. N. S. 743, 25 L. J. Q. B. 383, 4 Wkly. Rep. 738, 10 Eng. Reprint 1139.

Failure to reëlect.— In Lexington, etc., R. Co. *v.* Elwell, 8 Allen (Mass.) 371, where the provision was for the faithful discharge of duties by the principal "during his continuance in office, during the present year and for such further periods as he may from time to time be elected to said office," sureties were held not liable after an omission to reëlect the principal at a regular meeting, although he continued to act, and was reëlected at a subsequent regular meeting. But in Shackamaxon Bank *v.* Yard, 143 Pa. St. 129, 22 Atl. 908, 24 Am. St. Rep. 521, under

continuous.[52] An office does not become an annual one merely because the officers appointing the principal are chosen annually.[53]

(II) *Reasonable Time For Election of Successor.* The liability of the sureties is held not to terminate at the exact instant the term of office expires, but to continue for a reasonable time for the election and qualification of a successor;[54] but if a successor is not chosen, and the principal continues in office without any reappointment or reëlection, the sureties cannot be held for any default occurring after his term expired.[55]

2. Default of Principal — a. General Rule. If a master or employer continue in his employ a servant or agent after discovery of a default or dishonest conduct in the course of the agency or employment, without notice to and the assent, express or implied, of the sureties in a continuing suretyship for the faithful performance of the duties of such agent or servant, the sureties will not be liable for any loss arising from the dishonesty or defalcation of such servant or agent during his subsequent service or employment,[56] although they remain liable for all the defaults committed prior to the discovery of a default.[57] The principle is that when a

a bond "for and during the time of his employment by the said bank, whether under his present election or under any subsequent election to the said position," etc., it was held that the sureties were bound for the whole period of the principal's service, although he was not formally reëlected from year to year.

Until another is elected.— A bond stipulating for the good conduct of a treasurer until the directors "should elect another treasurer," will not remain in force after the principal's reappointment, as "another" does not mean necessarily another person. Citizens' Loan Assoc. *v.* Nugent, 40 N. J. L. 215, 29 Am. Rep. 230. See also Harris *v.* Babbitt, 11 Fed. Cas. No. 6,114, 4 Dill. 185.

52. Coombs *v.* Harford, 99 Me. 426, 59 Atl. 529.

53. Humboldt Sav., etc., Soc. *v.* Wennerhold, 81 Cal. 528, 22 Pac. 920, holding that if an officer is chosen for an indefinite time, his office is not annual because the directors who selected him are elected annually.

54. Harris *v.* Babbitt, 11 Fed. Cas. No. 6,114, 4 Dill. 185.

Illustrations.— In Black *v.* Oblender, 135 Pa. St. 526, 19 Atl. 945, sureties were liable, although the principal held over from March 26 to May 1. In Lexington, etc., R. Co. *v.* Elwell, 8 Allen (Mass.) 371, five weeks was considered not an unreasonable delay in selecting a successor to the principal. In Danvers Farmers' Elevator Co. *v.* Johnson, 93 Minn. 323, 101 N. W. 492, sureties were held liable for defaults of the principal occurring within four months after his term expired, and during which he retained office.

55. Chelmsford Co. *v.* Demarest, 7 Gray (Mass.) 1.

The presumption is that he has been reappointed, if the principal holds over. Kitson *v.* Julian, 4 E. & B. 854, 1 Jur. N. S. 754, 24 L. J. Q. B. 202, 3 Wkly. Rep. 371, 82 E. C. L. 854.

56. *Alabama.*— Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210.

California.— Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599.

Georgia.— Charlotte, etc., R. Co. *v.* Gow, 59 Ga. 685, 27 Am. Rep. 403.

Illinois.— Rapp *v.* Phœnix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427; Gradle *v.* Hoffman, 105 Ill. 147; Delbridge *v.* Lake, etc., Bldg., etc., Assoc., 98 Ill. App. 96, 82 Ill. App. 383.

Indiana.— Indiana, etc., Live Stock Ins. Co. *v.* Bender, 32 Ind. App. 287, 69 N. E. 691.

Kentucky.— Connecticut Mut. L. Ins. Co. *v.* Scott, 81 Ky. 540; Taylor *v.* Commonwealth Bank, 2 J. J. Marsh. 564.

Michigan.— Ætna Ins. Co. *v.* Fowler, 108 Mich. 557, 66 N. W. 470.

Minnesota.— Capital F. Ins. Co. *v.* Watson, 76 Minn. 387, 79 N. W. 601, 77 Am. St. Rep. 657; Manchester F. Assur. Co. *v.* Redfield, 69 Minn. 10, 71 N. W. 709; Lancashire Ins. Co. *v.* Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475.

Pennsylvania.— Murry's Estate, 3 Pa. Dist. 278, 14 Pa. Co. Ct. 590.

England.— Phillips *v.* Foxhall, L. R. 7 Q. B. 666, 41 L. J. Q. B. 293, 27 L. T. Rep. N. S. 231, 20 Wkly. Rep. 900 (the leading case on the subject); Sanderson *v.* Aston, L. R. 8 Exch. 73, 42 L. J. Exch. 64, 28 L. T. Rep. N. S. 35, 21 Wkly. Rep. 293; Enright *v.* Falvey, L. R. 4 Ir. 397.

Canada.— British Empire, etc., Assur. Co. *v.* Luxton, 9 Manitoba 169.

See 40 Cent. Dig. tit. "Principal and Surety," § 302.

The burden is on the sureties to show that the obligee retained the principal, after knowledge of his default, without notifying them. Foster *v.* Franklin L. Ins. Co., (Tex. Civ. App. 1903) 72 S. W. 91.

57. *Illinois.*— Donnell Mfg. Co. *v.* Jones, 49 Ill. App. 327.

Maryland.— Lake *v.* Thomas, 84 Md. 603, 36 Atl. 437.

New Jersey.— State Bank *v.* Chetwood, 8 N. J. L. 1.

New York.— Socialistic Co-operative Pub. Assoc. *v.* Hoffman, 12 Misc. 440, 33 N. Y. Suppl. 695.

South Carolina.—Wilmington, etc, R. Co. *v.* Ling, 18 S. C. 116.

England.— Enright *v.* Falvey, L. R. 4 Ir. 397.

person employed commits an act of dishonesty or is unfaithful to his trust, the employer may end the contract for his own protection, and what he may do and ought to do for his own sake the surety may require to be done for his;[58] and so if, after notice to or knowledge on the part of the sureties of the default on the part of the principal, they consent to the latter's continuance in the employment, their liability will remain as before.[59]

b. Application and Limitation of Rule. Generally this rule[60] is held to have no application to cases of mere breach of duty or contract obligations by the servant or agent not involving dishonesty or want of integrity on his part, or fraud or concealment on the part of the master or employer.[61] In this respect there is some difference between the cases. Thus it would seem that on one hand there is no active duty whatever on the employer either to notify the sureties or to dismiss the agent or employee for a mere default which does not in itself involve dishonesty,[62]

Canada.— Reg. *v.* Pringle, 32 U. C. Q. B. 308; McDonald *v.* May, 5 U. C. Q. B. 68. *Contra*, Snaddon *v.* London, etc., Assur. Co., 5 F. (Ct. Sess.) 182.

See 40 Cent. Dig. tit. "Principal and Surety," § 302.

58. Connecticut Mut. L. Ins. Co. *v.* Scott, 81 Ky. 540; Emery *v.* Baltz, 94 N. Y. 408; Hunt *v.* Roberts, 45 N. Y. 691.

Knowledge by officer of corporation.— The authorities are not in harmony upon the application of this rule as between a private corporation, being the creditor, and the surety of one of its officers or employees, where there is a failure on the part of one such officer to give notice to the sureties of another of his dishonesty, and the continuance of the dishonest servant in the corporate service. Some hold that the rule applies. Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210 (under the doctrine that notice to an agent within the scope of his agency is notice to his principal); Connecticut Mut. L. Ins. Co. *v.* Scott, 81 Ky. 540; Ætna Ins. Co. *v.* Fowler, 108 Mich. 557, 66 N. W. 470. Others have taken a different view. Taylor *v.* Commonwealth Bank, 2 J. J. Marsh. (Ky.) 564 (holding also that knowledge by the directors of a branch bank of the cashier's delinquency is not sufficient, as there is no legal presumption that what is known to the branches is communicated to the main bank); McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552 (knowledge of the defalcations of a cashier cannot be imputed to a corporation because known to some of its directors); Pittsburg, etc., R. Co. *v.* Shaeffer, 59 Pa. St. 350 (where it is said that corporations can only act by officers and agents and do not guaranty to the sureties of one officer the fidelity of the others).

Knowledge by commissioners chosen by the creditors of a bankrupt to act for them of the default of the trustee of the bankrupt's estate, does not discharge a surety of the trustee. McTaggart *v.* Watson, 10 Bligh N. S. 618, 6 Eng. Reprint 227, 3 Cl. & F. 525, 6 Eng. Reprint 153.

Immoral conduct on the part of an agent which does not relate to some act or acts of dishonesty or incapacity in the office or business to which the employment pertains will not authorize the obligors in a bond to demand of the obligee the discharge of such agent. La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805.

59. Emery *v.* Baltz, 94 N. Y. 408, holding that where a surety was induced to remain liable upon the assurance of the obligee that the principal should not be permitted to run further behind, such condition must be complied with. In Shepherd *v.* Beecher, 2 P. Wms. 287, 24 Eng. Reprint 733, a father gave bond for his son as apprentice, and after paying one embezzlement by his son, the father desired the master not to trust the son with any more cash, but the master did intrust the son with cash, and the son embezzled more funds, and it was held that the father was liable; that he made a request, merely; and that it was doubtful whether, under the form of the obligation, the father would have a right to make any restrictions on his liability while the apprenticeship continued.

60. See *supra*, VI, B, 2, a.

61. Manchester F. Assur. Co. *v.* Redfield, 69 Minn. 10, 71 N. W. 709; Lancashire Ins. Co. *v.* Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475; Bostwick *v.* Van Voorhis, 91 N. Y. 353; Atlantic, etc., Tel. Co. *v.* Barnes, 64 N. Y. 385, 21 Am. Rep. 621 [*affirming* 39 N. Y. Super. Ct. 40].

Notice of nature of misconduct.— It has been considered that where the employer has actual knowledge of defaults on the part of the person for whom the sureties are responsible justifying immediate dismissal, in order to hold the sureties as for a continuing liability or subsequent defaults they should be informed of all such circumstances as are material to enable them to decide whether they will require the employment to be terminated or will consent to its continuance and that for this purpose a notice in general terms of a default on the part of the agent, consistent with his being merely a debtor on foot of his accounts is not enough, but distinct information of any acts of dishonesty or acts of misconduct should be given to the sureties. Enright *v.* Falvey, L. R. 4 Ir. 397.

62. Watertown F. Ins. Co. *v.* Simmons, 131 Mass. 85, 41 Am. Rep. 196; Ætna Ins. Co. *v.* Fowler, 108 Mich. 557, 66 N. W. 470; Manchester F. Assur. Co. *v.* Redfield, 69 Minn. 10, 71 N. W. 709, where it is said that the cardinal rule of duty which the master or em-

or to give notice of a mere failure to report or account punctually or turn over or remit funds, under the terms of the contract, the performance of which is secured unless there is knowledge of an actual defalcation,[63] while at the same time it is recognized that mere incompetency or negligence on the part of a servant may be so gross or habitual that good faith to the sureties would require the master to discharge the servant or at least give notice to the sureties;[64] or, as has been also held, the rule applies to any breach of the employment, whether by dishonesty or not, which might have justified the dismissal by the employer or master,[65]

ployer owes to the sureties of his servant is entire good faith.

63. *California.*— Failure to inform sureties of a corporate officer that he had been charged with misappropriation of funds, but that an investigation indicated that he had received small amounts which he had turned over within the time allowed by the regulations of the company whereupon he was exonerated, will not release the sureties. Metropolitan Loan Assoc. *v.* Esche, 75 Cal. 513, 17 Pac. 675.

Georgia.— Charlotte, etc., R. Co. *v.* Gow, 59 Ga. 685, 27 Am. Rep. 403.

Iowa.— Phenix Ins. Co. *v.* Findley, 59 Iowa 591, 13 N. W. 738; Home Ins. Co. *v.* Holway, 55 Iowa 571, 8 N. W. 457, 39 Am. Rep. 179, where a cashier took money from the bank for his own use, without the consent of the directors, but putting in debit slips or giving his note without security, all of which was contrary to a statute, and these transactions being entered regularly on the books, came to the knowledge of the directors, but they did not take any action toward stopping them, although they continued for years it was held not to constitute a defense to the cashier's sureties. Ida County Sav. Bank *v.* Seidensticker, (1902) 92 N. W. 862.

Kansas.— Gilbert *v.* State Ins. Co., 3 Kan. App. 1, 44 Pac. 442.

Louisiana.— Natchitoches *v.* Redmond, 28 La. Ann. 274.

Michigan.— Cumberland Bldg. Loan Assoc. *v.* Gibbs, 119 Mich. 318, 78 N. W. 138; Ætna Ins. Co. *v.* Fowler, 108 Mich. 557, 66 N. W. 470.

New York.— Atlantic, etc., Tel. Co. *v.* Barnes, 64 N. Y. 385, 21 Am. Rep. 621 [*affirming* 39 N. Y. Super. Ct. 40].

Ohio.— National L. Ins. Co. *v.* Olhaber, 9 Ohio Dec. (Reprint) 842, 17 Cinc. L. Bul. 353.

South Carolina.—Wilmington, etc., R. Co. *v.* Ling, 18 S. C. 116.

See 40 Cent. Dig. tit. "Principal and Surety," § 302 *et seq.*

A good statement of this rule may be found in Charlotte, etc., R. Co. *v.* Gow, 59 Ga. 685, 694, 27 Am. Rep. 403, where it is said: "When the agent of a corporation, appointed for an indefinite time, is under bond to account and pay over daily, and he fails to perform for one day, or any number of days, whether he can be afterward trusted with additional funds at the risk of the surety upon his bond, consistently with good faith and fair dealing, without first giving notice to the surety, depends upon the apparent cause of his failure. If the corporation, or its supervising officers, have reason to believe that it results from dishonest practices or intentions, such as a conversion of the money, or a purpose to convert it, no further funds can rightfully be committed to his custody. If, on the other hand, the circumstances do not point to moral turpitude, but to lax habits of business, mere negligence, procrastination, a want of diligence or punctuality rather than a want of honesty, the corporation may continue to trust him, treating his successive failures in promptness as breaches of contract only, and relying upon the bond for protection should ultimate loss occur."

64. Manchester F. Assur. Co. *v.* Redfield, 69 Minn. 10, 71 N. W. 709. So where a contract of employment required the principal to account monthly, and refund any amount which he had overdrawn as salary in excess of one half of the profits, his sureties were held discharged by the employer's failure to require an accounting for thirteen months, and until the employment terminated. Morrison *v.* Arons, 65 Minn. 321, 68 N. W. 33.

The acts of the agent need not necessarily amount to positive dishonesty in order that the master's continuing him in service without notice to the sureties would amount to fraud or bad faith to the latter. Manchester F. Assur. Co. *v.* Redfield, 69 Minn. 10, 71 N. W. 709.

65. Sanderson *v.* Aston, L. R. 8 Exch. 73, 42 L. J. Exch. 64, 28 L. T. Rep. N. S. 35, 21 Wkly. Rep. 293, under bond conditioned for accounting and paying over to plaintiff of all moneys, etc. See also the general statement in Emery *v.* Baltz, 94 N. Y. 408. And see the following cases as apparently broader than those cited *supra*, notes 61–63: Rapp *v.* Phœnix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427 (failure to make monthly settlement); Delbridge *v.* Lake, etc., Bldg., etc., Assoc., 82 Ill. App. 388, 98 Ill. App. 96 (as to notice of the failure of the secretary of a building and loan association to turn over to the treasurer at the end of each month, as required by the by-laws, all moneys received by him during the month); Connecticut Mut. L. Ins. Co. *v.* Scott, 81 Ky. 540 (where, while there was an actual misapplication of funds, it would seem that the court recognized that any breach of duty would come within the rule, the court saying that it would be repulsive to common honesty for the employer with knowledge of an agent violating his bond and putting to hazard the rights of the sureties to allow him to proceed without notifying the sureties of the facts); Murry's Estate, 3 Pa. Dist. 278, 14 Pa. Co. Ct. 590 (failure to require an employee to make daily returns of

so that a plea showing a breach, prior to that sued for, without notice to the surety, and for which he might have required dismissal, is good.[66]

c. Failure to Examine Accounts. The fact that the default of the principal might have been prevented by an examination of his accounts by the obligee or by the obligee's agents will not relieve the sureties,[67] even though a statute [68] or a by-law [69] required an examination to be made; and the surety was induced to sign the principal's bond by his knowledge of the by-laws, and his belief that they would be enforced.[70] The duty of the surety is said to be one of good faith, not one of diligence; [71] but if an embezzlement of the principal might have been known by the use of slight care on the part of the obligee, his sureties will not be liable for any embezzlement occurring thereafter.[72]

3. By Expiration of Lease.[73] A surety of a lessee for a fixed term is not liable

all moneys received for goods sold by him as one of the conditions of his employment); British Empire, etc., Assur. Co. *v.* Luxton, 9 Manitoba 169; Confederation Life Assoc. *v.* Brown, 35 Nova Scotia 94 (where among the duties of the principal was that of making remittance, at least once a month, of all collections made on account of the employer, such remittances to be by draft, marked check, postal order, or express, and he remitted by his own personal checks on several occasions requesting to have such checks held for a few days to enable him to obtain funds to meet them, and it was held that his sureties should have received notice of his derelictions).

66. Sanderson *v.* Aston, L. R. 8 Exch. 73, 42 L. J. Exch. 64, 28 L. T. Rep. N. S. 35, 21 Wkly. Rep. 293.

67. *Delaware.*— Lieberman *v.* Wilmington First Nat. Bank, (1898) 40 Atl. 382; Sparks *v.* Farmers' Bank, 3 Del. Ch. 274.

Illinois.— Campbell *v.* People, 154 Ill. 595, 39 N. E. 578 [*affirming* 52 Ill. App. 338].

Missouri.— Chew *v.* Ellingwood, 86 Mo. 260, 56 Am. Rep. 429.

New York.— Monroe County *v.* Otis, 62 N. Y. 88.

South Carolina.— Charleston *v.* Paterson, 2 Bailey 165.

Virginia.— Crawn *v.* Com., 84 Va. 282, 4 S. E. 721, 10 Am. St. Rep. 839.

United States.— Phillips *v.* Bossard, 35 Fed. 99; Frelinghuysen *v.* Baldwin, 16 Fed. 452.

England.— Trent Nav. Co. *v.* Harley, 10 East 34, where the principal's accounts had not been examined properly for eight years.

Canada.— Reg. *v.* Chesley, 23 Nova Scotia 552; Frontenac County *v.* Breden, 17 Grant Ch. (U. C.) 645.

See 40 Cent. Dig. tit. "Principal and Surety," § 299½.

68. Mansfield Union *v.* Wright, 9 Q. B. D. 683, 47 L. T. Rep. N. S. 602, 31 Wkly. Rep. 312 [*affirming* 46 J. P. 200].

69. Mutual Loan, etc., Assoc. *v.* Price, 19 Fla. 127, 16 Fla. 204, 26 Am. Rep. 703; Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100; Albany Dutch Church *v.* Vedder, 14 Wend. (N. Y.) 165; Union Bank *v.* Forrest, 24 Fed. Cas. No. 14,356, 3 Cranch C. C. 218.

70. State *v.* Atherton, 40 Mo. 209. The fact that a bond makes the rules and regulations of a railroad company a part of the contract, and these require a periodical accounting by the principal, which he fails to make, will not relieve a surety on the bond, if there be no condition in the bond that the principal shall be dismissed immediately upon his failure to account. Pittsburg, etc., R. Co. *v.* Shaeffer, 59 Pa. St. 350.

71. Sparks *v.* Farmers' Bank, 3 Del. Ch. 274; Manchester F. Assur. Co. *v.* Redfield, 69 Minn. 10, 71 N. W. 709.

Reasonable means of knowledge on the part of the employer, it would seem, is not sufficient. Enright *v.* Falvey, L. R. 4 Ir. 397.

Ordinary care only is required of the obligee in discovering defaults by the principal in a bond requiring notice. Tarboro Bank *v.* Fidelity, etc., Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682. Where a bank teller was esteemed as capable and honest, and the usual examinations were made from time to time by the bank and by government officers, there was no bad faith on the part of the bank, although the teller skilfully concealed his defalcations, the teller's surety having never requested an examination. Lieberman *v.* Wilmington First Nat. Bank, 2 Pennew. (Del.) 416, 45 Atl. 901, 82 Am. St. Rep. 414, 48 L. R. A. 514.

Gross negligence.— To discharge a surety the negligence of the obligee must be gross, approximating wilful ignorance of the principal's defaults. Dawson *v.* Lawes, 2 Eq. Rep. 230, Kay 280, 23 L. J. Ch. 434, 2 Wkly. Rep. 213, 69 Eng. Reprint 119; Springer Exch. Bank *v.* Canada, 14 Can. Sup. Ct. 716 [*affirming* 13 Ont. App. 390 (*affirming* 7 Ont. 309)]. And facts and circumstances so cogently suggestive of the probable dishonesty of the servant may come to the master's knowledge that a failure to investigate it would be gross negligence such as would amount to bad faith or fraud toward the sureties. Manchester F. Assur. Co. *v.* Redfield, 69 Minn. 10, 71 N. W. 709. In Madden *v.* McMullen, 13 Ir. C. L. 305, 4 L. T. Rep. N. S. 180, even gross negligence is said not to discharge a surety unless accompanied by positive acts of concurrence in the defalcation of the principal.

72. Midway Deposit Bank *v.* Hearne, 104 Ky. 819, 48 S. W. 160, 20 Ky. L. Rep. 1019.

73. Destruction of leased property see *infra*, notes 84, 85.

after its expiration, although the lessee holds over,[74] and the lease gave the lessee an option for a renewal,[75] unless the language of the contract indicates the contrary.[76] A surety is discharged by a surrender of the premises accepted by the landlord,[77] remaining liable, however, for rent already due;[78] but a reletting of the premises by the lessor by the direction of the surety does not operate as a surrender.[79] A surety is not discharged by the lessee's abandonment of the premises without lawful cause, although the premises are occupied by others, the lessor not being instrumental in procuring such occupancy;[80] nor is the surety discharged because abandoned premises are not relet by the lessor when he had opportunity.[81] If the lease is from year to year, the surety has the same privilege as the lessee in regard to terminating his contract by notice.[82]

4. Destruction of Subject-Matter. Generally whether the liability of a surety ceases with the destruction of the subject-matter of the contract depends on the liability of the principal, the surety remaining liable if the principal does.[83] Destruction of a building which is the subject of a lease is not a defense to a surety for the rent,[84] unless the contract provides that the lease shall be at an end in such event.[85]

5. Changes — a. As to Principals — (i) *In General.* An assignment of a contract by the principal will discharge a surety for its performance,[86] unless the right to assign was contemplated by the contract.[87] So a surety for one person as principal is not liable for the acts of a partnership afterward formed by that person with another,[88] although the surety has knowledge of the partnership;[89]

74. Brewer *v.* Knapp, 1 Pick. (Mass.) 332, opinion of the court by Parker, C. J.

Rent payable after expiration of bond.— Where a bond to secure rent expires on a certain date, a surety on the bond is liable for rent earned on that date, although not payable until afterward. Springs *v.* Brown, 97 Fed. 405.

75. Brewer *v.* Thorp, 35 Ala. 9; Fasnacht *v.* Winkelman, 21 La. Ann. 727; Knowles *v.* Cuddeback, 19 Hun (N. Y.) 590.

76. Coe *v.* Vogdes, 71 Pa. St. 383. Where a lease to the principal and surety for three years with the privilege of five, in consideration of the payment of rent by them, provided that if the lessee continued to occupy the premises after the term, "such tenancy shall be in accordance with the terms of this lease," the surety was liable for the rent accruing after the expiration of three years. Webb *v.* Bailey, 33 S. W. 935, 17 Ky. L. Rep. 1117.

77. Koenig *v.* Miller Bros. Brewery Co., 38 Mo. App. 182; Brady *v.* Peiper, 1 Hilt. (N. Y.) 61.

A removal of a tenant by summary proceedings terminates the surety's liability as to rent thereafter accruing (Newcombe *v.* Eagleton, 16 Misc. (N. Y.) 285, 38 N. Y. Suppl. 424), unless there is a stipulation in the lease that such action shall not have that effect (Way *v.* Reed, 6 Allen (Mass.) 364). But where, after the appearance of the tenant and surety in court, a warranty of possession is stayed to enable the tenant to pay the rent, which he does with the knowledge of the surety, the latter is not released. Newcombe *v.* Eagleton, 19 Misc. (N. Y.) 603, 44 N. Y. Suppl. 401.

78. White River, etc., R. Co. *v.* Star Ranch, etc., Co., 77 Ark. 128, 91 S. W. 14; McKensie *v.* Farrell, 4 Bosw. (N. Y.) 192; *In re* Russell, 29 Ch. D. 254, 53 L. T. Rep. N. S. 365.

79. McKensie *v.* Farrell, 4 Bosw. (N. Y.) 192.

80. Ledoux *v.* Jones, 20 La. Ann. 539; Supplee *v.* Herrman, 16 Pa. Super. Ct. 45.

81. Ledoux *v.* Jones, 20 La. Ann. 539.

82. Pleasonton's Appeal, 75 Pa. St. 344; Desilver's Estate, 9 Phila. (Pa.) 302; Traeger *v.* Hartnett, 15 Wkly. Notes Cas. (Pa.) 300.

83. Carney *v.* Walden, 16 B. Mon. (Ky.) 388, holding that a surety upon an obligation containing a covenant for the return of a slave was liable for the value of the slave, death of which had been caused by the inhuman treatment of the principal.

Where a mortgage is merged by subsequent conveyances, a surety for the debt is relieved. Building Assoc. *v.* Benson, 2 Wkly. Notes Cas. (Pa.) 541.

84. Payne *v.* Devinal, 11 Sm. & M. (Miss.) 400.

85. Taylor *v.* Hortop, 22 U. C. C. P. 542.

86. Bedford *v.* Jones, 5 Leg. Gaz. (Pa.) 230; Wiley's Estate, 12 Phila. (Pa.) 152.

87. Stein *v.* Jones, 18 Ill. App. 543; Way *v.* Reed, 6 Allen (Mass.) 364; Sachs *v.* American Surety Co., 72 N. Y. App. Div. 60, 76 N. Y. Suppl. 335 [*affirmed* in 177 N. Y. 551, 69 N. E. 1130]; Damb *v.* Hoffman, 3 E. D. Smith (N. Y.) 361.

88. Connecticut Mut. L. Ins. Co. *v.* Scott, 81 Ky. 540; Parham Sewing Mach. Co. *v.* Brock, 113 Mass. 194; Bellairs *v.* Ebsworth, 3 Campb. 53, 13 Rev. Rep. 750; Montefiore *v.* Lloyd, 15 C. B. N. S. 203, 9 Jur. N. S. 1245, 33 L. J. C. P. 49, 9 L. T. Rep. N. S. 330, 12 Wkly. Rep. 83, 109 E. C. L. 203; Wright *v.* Russell, W. Bl. 934, 3 Wils. C. P. 530.

89. London Assur. Corp. *v.* Bold, 6 Q. B.

nor is a surety for a firm liable after a new member is added.[90] Conversely, a surety for joint principals is not liable for one of them acting independently,[91] or when changes are made in the membership of a firm, or by dissolution thereof,[92] notwithstanding the obligee is not aware of the dissolution.[93] If the partnership has been formed for a fixed period, the surety is not liable beyond the time when it should have been wound up under the articles.[94] However, if the surety has become liable for the performance of a particular contract by a partnership, its subsequent dissolution before the completion of the contract will not release him from liability for each of the former partners so far as that particular contract is concerned.[95] A surety is not discharged by a removal of the principal from one place to another;[96] but if a surety has become liable for the principal in a particular building, the surety is not liable for another person who succeeds to the occupancy of that building, although the creditor is not notified of the change.[97]

(II) *By Death.* Death of the principal has no effect upon the liability of his surety as to anything which occurred prior to his death;[98] and, if the obligation was for a fixed term, the surety is liable as to defaults arising after the principal's death, whether an administrator has been appointed or not.[99] If, however, the liability of the principal terminates with his death, his sureties cannot be held for anything which arises thereafter.[1] So a surety for a firm is not liable for the acts

514, 8 Jur. 1118, 14 L. J. Q. B. 50, 51 E. C. L. 514.

90. Dupee *v.* Blake, 148 Ill. 453, 35 N. E. 867. But the mere fact of the principal's associating himself with another person will not release the surety if the principal continues to act individually in the same capacity as he did before. Gilbert *v.* Des Moines State Ins. Co., 3 Kan. App. 1, 44 Pac. 442.

91. State *v.* Boon, 44 Mo. 254.

92. Mathews *v.* Garman, 110 Mich. 559, 68 N. W. 243; London, etc., F. Ins. Co. *v.* Holt, 10 S. D. 171, 72 N. W. 403; Connecticut Mut. L. Ins. Co. *v.* Bowler, 6 Fed. Cas. No. 3,106, Holmes 263. Even though the bond is conditioned for performance by three named persons as principals, "and the survivors and survivor of them, and such other person and persons as should or might act at any time or times thereafter, in partnership with them or any or either of them," etc., a surety is discharged by the retirement of one of the named persons. Cambridge University *v.* Baldwin, 5 M. & W. 580.

Death of member of firm see *infra*, text and notes 2, 3.

93. Standard Oil Co. *v.* Arnestad, 6 N. D. 255, 69 N. W. 197, 66 Am. St. Rep. 604, 34 L. R. A. 861.

94. Small *v.* Currie, 5 De G. M. & G. 141, 2 Eq. Rep. 639, 18 Jur. 731, 23 L. J. Ch. 746, 54 Eng. Ch. 114, 43 Eng. Reprint 824.

95. Abbott *v.* Morrissette, 46 Minn. 10, 48 N. W. 416; Freeman *v.* Berkey, 45 Minn. 438, 48 N. W. 194; Kaufmann *v.* Cooper, 46 Nebr. 644, 65 N. W. 796.

96. Rouss *v.* King, 74 S. C. 251, 54 S. E. 615, 69 S. C. 168, 48 S. E. 220, holding that where the contract of suretyship describes the principal as being "of" a certain place, the surety is not discharged by the removal of the principal's business to another place.

97. Manhattan Gas Light Co. *v.* Ely, 39 Barb. (N. Y.) 174, holding that a surety on an application for gas for another is not liable for gas furnished to the principal's successor, even though the principal might remain liable for lack of notice to the gas company of the change.

98. *Indiana.*— State *v.* Soale, 36 Ind. App. 73, 74 N. E. 1111.

Louisiana.—McCloskey *v.* Wingfield, 32 La. Ann. 38; Parham *v.* Cobb, 7 La. Ann. 157.

Maine.— Baker *v.* Elliot, 73 Me. 392.

Nebraska.— Bell *v.* Walker, 54 Nebr. 222, 74 N. W. 617.

Pennsylvania.—Elmendorf *v.* Whitney, 153 Pa. St. 460, 25 Atl. 607.

Texas.— Scantlin *v.* Kemp, 34 Tex. 388; Ennis *v.* Crump, 6 Tex. 85; Scott *v.* Dewees, 2 Tex. 153.

See 40 Cent. Dig. tit. "Principal and Surety," § 141.

If a suit was pending against the principal and sureties at the time of the death of the former, the cause of action survives against the sureties (Camp *v.* Watt, 14 Ala. 616; Boggs *v.* State, 46 Tex. 10), unless the suit is such as abates with the death of the principal (Melvin *v.* Evans, 48 Mo. App. 421), and the suit may proceed upon the suggestion of the principal's death (Boggs *v.* State, *supra*).

99. Supplee *v.* Herrman, 16 Pa. Super. Ct. 45 [*reversing* 9 Pa. Dist. 27], holding that a surety on a lease for years is liable for the rent for the entire term.

1. Stinson *v.* Prescott, 15 Gray (Mass.) 335, holding that sureties on a bond given by a husband for the expenses of his wife at a hospital are not liable for expenses subsequent to the husband's death.

A bond given to secure property held to abide the issue of a suit is personal merely, and sureties thereon are not bound for a breach of a third party after the death of the principal. Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*b*, Hempst. 225.

of the surviving partners after the death of one,[2] unless a contrary intention appear on the face of the obligation.[3]

b. As to Creditors or Obligees — (I) *In General — Death.* Death of the obligee is held to terminate the suretyship, although his executors continue the principal in the same capacity as before.[4] And a surety on an undertaking given to two or more joint obligees or creditors, such as partners, are not liable after any change in the number of such obligees or creditors by death,[5] or otherwise,[6] unless the intention, appearing from the instrument, is to be bound to the obligees as a class or fluctuating body.[7] Where a corporation is the obligee, its dissolution releases sureties on bonds held by it.[8]

(II) *Incorporation.* The liability of sureties on a bond given to certain persons as obligees is terminated by such obligees becoming incorporated,[9] or by the company, constituted by the obligees, being merged into an incorporated company.[10] After the consolidation of two or more corporations, sureties on bonds given to such corporations are sometimes liable to the new corporation, by virtue of the statutory provisions under which such consolidation is effected.[11]

c. Death of Surety. The death of a surety does not end the suretyship,[12] even

2. Connecticut Mut. L. Ins. Co. *v.* Bowler, 6 Fed. Cas. No. 3,106, Holmes 263; Simpson *v.* Cooke, 1 Bing. 452, 2 L. J. C. P. O. S. 74, 8 Moore 558, 8 E. C. L. 590.

3. Simpson *v.* Cooke, 1 Bing. 452, 2 L. J. C. P. O. S. 74, 8 Moore 558, 8 E. C. L. 590.

4. Barker *v.* Parker, 1 T. R. 287, 1 Rev. Rep. 201.

5. Bodenham *v.* Purchas, 2 B. & Ald. 39, 20 Rev. Rep. 342; Strange *v.* Lee, 3 East 484; Pemberton *v.* Oakes, 6 L. J. Ch. O. S. 35, 4 Russ. 154, 4 Eng. Ch. 154, 38 Eng. Reprint 763; Weston *v.* Barton, 4 Taunt. 673, 13 Rev. Rep. 726. The principle is the same where a bond is given by one partner to the others, and one of the others dies; sureties on the bond are not liable for any acts of the principal thereafter. Chapman *v.* Beckington, 3 Q. B. 703, 3 G. & D. 33, 7 Jur. 62, 12 L. J. Q. B. 61, 43 E. C. L. 934.

6. Bowers *v.* Cobb, 31 Fed. 678, holding that where, by an arrangement between two sureties on a bond, one of them is released from liability as between themselves, sureties on an indemnifying bond given to them are discharged.

7. Gargan *v.* School Dist. No. 15, 4 Colo. 53; Metcalf *v.* Bruin, 2 Campb. 422, 12 East 400, 11 Rev. Rep. 432.

8. Washington Bank *v.* Barrington, 2 Penr. & W. (Pa.) 27, where the sureties were discharged and, although the legislature afterward revived the charter "in as full force as if no forfeiture had taken place," the sureties were not liable for subsequent defaults.

9. Dance *v.* Girdler, 1 B. & P. N. R. 34, 8 Rev. Rep. 748.

10. Bensinger *v.* Wren, 100 Pa. St. 500.

11. Springfield Lighting Co. *v.* Hobart, 98 Mo. App. 227, 68 S. W. 942 (holding that under such a statute providing that on consolidation of two corporations, the new corporation shall enjoy all the rights belonging to each, a surety executing a bond to a corporation after the enactment of the statute is presumed to have the law in contemplation, and, hence is liable to the new corporation); Eastern Union R. Co. *v.* Cochrane, 2 C. L. R. 292, 9 Exch. 197, 17 Jur. 1103, 23 L. J. Exch. 61, 7 R. & Can. Cas. 792, 2 Wkly. Rep. 43.

12. *Illinois.*— Powell *v.* Kettelle, 6 Ill. 491.

Indiana.— A surety's liability is not affected by his death before the approval of an official bond which he has signed. Mowbray *v.* State, 88 Ind. 324.

Kentucky.— Moore *v.* Carpenter, 10 Ky. L. Rep. 814.

Massachusetts.— Forbes *v.* Harrington, 171 Mass. 386, 50 N. E. 641.

New York.— Smith *v.* Kibbe, 31 Hun 390. The death of a surety on a note after entry of judgment against all of the makers does not relieve his estate from the lien of the judgment. Baskin *v.* Andrews, 53 Hun 95, 6 N. Y. Suppl. 441 [*affirmed* in 130 N. Y. 313, 29 N. E. 310].

Pennsylvania.— White *v.* Com., 39 Pa. St. 167; De Morat *v.* Howard, 6 Pa. Dist. 761, 20 Pa. Co. Ct. 491. Where a bond with surety was given conditioned for payment on the principal's death, and the surety died, the obligation survived and immediately became a lien on the surety's real estate; and such lien could be preserved only by filing a statement under the provisions of the act of June 8, 1893. Stevenson *v.* Long, 23 Pa. Co. Ct. 391.

Virginia.— Coleman *v.* Stone, 85 Va. 386, 7 S. E. 241.

Washington.— Donnerberg *v.* Oppenheimer, 15 Wash. 290, 46 Pac. 254.

United States.— McClaskey *v.* Barr, 79 Fed. 408.

See 40 Cent. Dig. tit. "Principal and Surety," § 142.

Heirs of a deceased surety may be liable for assets which have come to them. Finch *v.* State, 71 Tex. 52, 9 S. W. 85. And this is especially so if the surety bound himself, his "heirs, executors, and administrators." Royal Ins. Co. *v.* Davies, 40 Iowa 469, 20 Am. Rep. 581; Shackamaxon Bank *v.* Yard, 150 Pa. St. 351, 24 Atl. 635, 30 Am. St. Rep.

though the surety was jointly liable;[13] but his estate is liable for money coming into the principal's hands thereafter,[14] and for the latter's subsequent defaults.[15] One cosurety, after the death of the other, is not freed from liability as to advances afterward made to the principal.[16]

6. By Notice. If the consideration for the contract of a surety is executory — if his liability is to arise or to be increased by future acts of the obligee or creditor, and no time has been prescribed in the contract, the surety can terminate his liability by notifying the creditor or obligee that he withdraws, remaining liable, however, for any rights the creditor or obligee previously may have acquired;[17] but, if the consideration for the surety's contract is entire, and has been executed

807; Pond *v.* U. S., 111 Fed. 989, 49 C. C. A. 582.

Statutory exemption in case of non-residence or insolvency of principal.— Under the statute in Indiana declaring that the estate of a deceased surety on a contract shall not be liable unless it is shown that the principal is a non-resident or is insolvent, provided, that although the principal be a resident, and his insolvency be not proved the claim may be allowed and a sufficient amount to satisfy it be paid into court, which the creditor may thereafter obtain on showing that he has diligently prosecuted the principal to insolvency, etc., it is held that it is sufficient to prove the insolvency of the principal at the time of trial without proof that the creditor showed due diligence to prosecute him, it not being shown that there was notice by the surety to the creditor to bring suit after maturity of the claim, under another statute. Hornbeck *v.* State, 16 Ind. App. 484, 45 N. E. 620.

Sureties on guardians' bonds see Guardian and Ward, 21 Cyc. 233.

Sureties of executors and administrators see Executors and Administrators, 18 Cyc. 1262.

13. Palmer *v.* Pollock, 26 Minn. 433, 4 N. W. 1113; Hughes' Estate, 13 Pa. Super. Ct. 240; Susong *v.* Vaiden, 10 S. C. 247, 30 Am. Rep. 50. See also as to effect upon joint action Bonds, 5 Cyc. 822.

Under the common-law rule of survivorship where the liability of the surety was joint, his estate was not liable after his death. Shropshire *v.* Reno, 5 Dana (Ky.) 583; Dixon *v.* Vandenberg, 35 N. J. Eq. 47; Dorsey *v.* Dorsey, 2 Harr. & J. (Md.) 480 note (a); Davis *v.* Van Buren, 72 N. Y. 587 [*affirming* 6 Daly 391]; Hauck *v.* Craighead, 67 N. Y. 432; Risley *v.* Brown, 67 N. Y. 160; Wood *v.* Fisk, 63 N. Y. 245, 20 Am. Rep. 528 [*reversing* 4 Hun 525]; Getty *v.* Binsse, 49 N. Y. 385, 10 Am. Rep. 379; Chard *v.* Hamilton, 56 Hun (N. Y.) 259, 9 N. Y. Suppl. 575; Carpenter *v.* Provoost, 2 Sandf. (N. Y.) 537; Weaver *v.* Shryock, 6 Serg. & R. (Pa.) 262; Harrison *v.* Field, 2 Wash. (Va.) 136; U. S. *v.* Price, 9 How. (U. S.) 83, 13 L. ed. 56; Fielden *v.* Lahens, 9 Fed. Cas. No. 4,773, 6 Blatchf. 524; Richardson *v.* Horton, 6 Beav. 185, 7 Jur. 1144, 12 L. J. Ch. 333, 49 Eng. Reprint 796.

The remedy in equity against a deceased joint debtor is limited to those cases in which he had a benefit from the consideration upon which the obligation arose. Carpenter *v.* Provoost, 2 Sandf. (N. Y.) 537. Where sureties bind themselves jointly and severally as principals in a bond, there is no difference, as to their liability in equity for the debt, between them and the principal debtor, for whom they are sureties. U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426.

But under various statutory enactments the death of a surety does not affect the liability of his estate and the common-law rule, whereby the death of a surety bound jointly with his principal discharged his estate, is changed. Redman *v.* Marvil, 73 Ind. 593; Hudelson *v.* Armstrong, 70 Ind. 99; McCoy *v.* Payne, 68 Ind. 327; Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435 [*reversing* 63 Hun 413, 18 N. Y. Suppl. 685]; Chard *v.* Hamilton, 56 Hun (N. Y.) 259, 9 N. Y. Suppl. 575 [*affirmed* in 125 N. Y. 777, 27 N. E. 409]; Keller's Estate, 1 Leg. Chron. (Pa.) 189.

14. Rapp *v.* Phœnix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427; Hecht *v.* Weaver, 34 Fed. 111, 13 Sawy. 199.

15. *Alabama.*— Moore *v.* Wallis, 18 Ala. 458.

Arkansas.— Hecht *v.* Skaggs, 53 Ark. 291, 13 S. W. 930, 22 Am. St. Rep. 192.

Indiana.— Cotton *v.* State, 64 Ind. 573.

Maine.— Green *v.* Young, 8 Me. 14, 22 Am. Dec. 218.

New Hampshire.— Carr *v.* Ladd, Smith 45.

New York.— Holthausen *v.* Kells, 18 N. Y. App. Div. 80, 45 N. Y. Suppl. 471 [*affirmed* in 154 N. Y. 776, 49 N. E. 1098].

Pennsylvania.— Jones' Appeal, 11 Wkly. Notes Cas. 554.

England.— Lloyds *v.* Harper, 16 Ch. D. 290, 50 L. J. Ch. 140, 43 L. T. Rep. N. S. 481, 29 Wkly. Rep. 452; Kipling *v.* Turner, 5 B. & Ald. 261, 7 E. C. L. 148; Bradbury *v.* Morgan, 8 Jur. N. S. 918, 31 L. J. Exch. 462, 7 L. T. Rep. N. S. 104, 1 H. & C. 249, 10 Wkly. Rep. 776.

Canada.— Canada Exch. Bank *v.* Springer, 7 Ont. 309 [*affirmed* in 13 Ont. App. 390 (*affirmed* in 14 Can. Sup. Ct. 716)]; Reg. *v.* Leeming, 7 U. C. Q. B. 306.

See 40 Cent. Dig. tit. "Principal and Surety," § 142.

16. Beckett *v.* Addyman, 9 Q. B. D. 783, 51 L. J. Q. B. 597.

17. Emery *v.* Baltz, 94 N. Y. 408. A surety can terminate his liability for future advancements or sales to be made to the prin-

fully, as in the case of a bond for the payment of a sum certain, or for the performance of services, the surety is bound indefinitely, and cannot terminate his liability by notice,[18] even though by death or insolvency of cosureties he is the only responsible party remaining;[19] and the personal representative of a surety has no greater right, in this respect, than the surety had.[20] The right to terminate his contract is sometimes given to a surety by statute;[21] and of course a surety may expressly reserve that right in his contract.[22] Where such right is reserved, notice by the surety cannot operate instantly, but the right must be exercised reasonably, so as to enable the obligee to procure new security from the principal.[23] Formal notice by the surety is not required unless stipulated for in the contract.[24] Where the contract gives the creditor or obligee the right to annul it by notice, and notice is given, the surety remains liable for all breaches prior to such notice.[25]

cipal. Jeudevine *v.* Rose, 36 Mich. 54. And notice to the agent of the obligee or creditor is sufficient. White Sewing Mach. Co. *v.* Courtney, 141 Cal. 674, 75 Pac. 296; Union Cent. L. Ins. Co. *v.* Smith, 105 Mich. 353, 63 N. W. 438.

18. *Alabama.*— Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210; McGehee *v.* Gewin, 25 Ala. 176.

Colorado.—A. S. Ripley Bldg. Co. *v.* Coors, 37 Colo. 78, 84 Pac. 817.

Maine.— Lewiston *v.* Gagne, 89 Me. 395, 36 Atl. 629, 56 Am. St. Rep. 432.

Massachusetts.— Crane *v.* Newell, 2 Pick. 612, 13 Am. Dec. 461.

Pennsylvania.— Greenawalt *v.* Kreider, 3 Pa. St. 264, 45 Am. Dec. 639.

England.— Gordon *v.* Calvert, 7 B. & C. 809, 6 L. J. K. B. O. S. 187, 1 M. & R. 497, 14 E. C. L. 361; Gordon *v.* Calvert, 4 Russ. 581, 4 Eng. Ch. 581, 38 Eng. Reprint 924 [*affirming* 2 Sim. 253, 29 Rev. Rep. 94, 2 Eng. Ch. 253, 57 Eng. Reprint 784].

Canada.— Reg. *v.* Leeming, 7 U. C. Q. B. 306. Where a surety writes to the obligee repudiating the suretyship before the principal is appointed, and, a reply not being made, the surety thinks the matter is at an end, he is not liable. North British Mercantile Ins. Co. *v.* Kean, 16 Ont. 117.

See 40 Cent. Dig. tit. "Principal and Surety," § 116 *et seq.*

19. Ridgeway *v.* Potter, 114 Ill. 457, 3 N. E. 91, 55 Am. Rep. 875. In Miller *v.* Speed, 9 Heisk. (Tenn.) 196, it was held that a surety, on the death of the principal on a private bond to secure the repayment of money, could file a bill, if he was in danger of loss, to compel a new bond, or the payment of the fund into court.

20. Calvert *v.* Gordon, 7 B. & C. 809, 7 L. J. K. B. O. S. 77, 3 M. & R. 124, 14 E. C. L. 361.

21. White Sewing Mach. Co. *v.* Courtney, 141 Cal. 674, 75 Pac. 296 (under Civ. Code, §§ 2814, 2815, 2844, a bond is in effect a continuing guaranty; and a surety has the right to terminate his contract by notice, as to transactions occurring thereafter); McKim *v.* Demmon, 130 Mass. 404 (probate bond); Kincaid *v.* Sharp, 3 Head (Tenn.) 151 (under a statute giving sureties for prosecution or defense of any suit at law or in equity the right to terminate their liability).

Because a surety has been paid for entering into the contract does not deprive him of his right to be discharged on application to the court, under N. Y. Code Civ. Proc. § 812. *In re* Thurber, 162 N. Y. 244, 56 N. E. 631, 30 N. Y. Civ. Proc. 261 [*reversing* 43 N. Y. App. Div. 528, 60 N. Y. Suppl. 198]; Matter of U. S. Fidelity, etc., Co., 50 Misc. (N. Y.) 147, 98 N. Y. Suppl. 217.

A company becoming a surety on a bond can be released from liability under N. C. Laws (1893), c. 300, § 5, on the same terms as an individual; but a surety company cannot remain on the bond and limit its liability by such unreasonable restrictions as would amount practically to a release. Tarboro Bank *v.* Maryland Fidelity, etc., Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682. See also *infra*, X, F.

22. Calvert *v.* Gordon, 7 B. & C. 809, 7 L. J. K. B. O. S. 77, 3 M. & R. 124, 14 E. C. L. 361. Where a surety had the right to discontinue his liability on giving ten days' notice "provided the accounts of the agent are then all settled . . . and the property of the State Prison delivered over to the warden or his agent," the provision is not a condition precedent as to future liability, but relates to liability for the past acts of the principal and for property in the principal's hands at the time notice is given. Gass *v.* Stinson, 10 Fed. Cas. No. 5,260, 2 Sumn. 453.

23. La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805; Reilly *v.* Dodge, 131 N. Y. 153, 29 N. E. 1011; Bostwick *v.* Van Voorhis, 91 N. Y. 353.

24. White Sewing Mach. Co. *v.* Courtney, 141 Cal. 674, 75 Pac. 296; Gass *v.* Stinson, 10 Fed. Cas. No. 5,260, 2 Sumn. 453.

25. Hurst *v.* Trow Printing, etc., Co., 2 Misc. (N. Y.) 361, 22 N. Y. Suppl. 371, 30 Abb. N. Cas. 1 [*affirmed* in 142 N. Y. 637, 37 N. E. 566], holding that where the consideration of a contract covering a certain period was a series of promissory notes, rescission of the contract by the holder of the notes, on default in the payment of some of them, does not release the indorsers of the notes maturing before the rescission.

Notice recalled.—A surety on a contractor's bond is not released because the obligee gave notice, if such notice subsequently was recalled, and the contractor allowed to proceed, although the default occurred afterward.

7. By New Obligation. While a new contract made by the creditor or obligee to take the place of a former one discharges sureties on the old contract,[26] a new bond does not take the place, necessarily, of the old one, but may be cumulative;[27] nor does the taking of bonds in judicial proceedings discharge sureties who were liable before such bonds were given,[28] unless the intention is clearly otherwise;[29] and if the relation terminates by the making of a new obligation, the sureties on the prior one are not discharged as to defaults which already have occurred.[30] In any event the release of a surety by the making of a new bond is not effected until the new bond is executed and accepted.[31]

Smith *v.* Molleson, 148 N. Y. 241, 42 N. E. 669.

Notice before default.— Where the obligee has the right to annul the contract if the contractor does not proceed diligently with the work, notice given before the contractor could be treated as in default is a matter to be considered simply in estimating damages. U. S. *v.* Maloney, 4 App. Cas. (D. C.) 505.

Provision in contract for completing work. —A contract provided that, in case of a breach, the obligee had the right to order the work under the contract discontinued, and to finish the work "by contract or otherwise," and to charge the expense to the contractors. A breach having occurred, the obligee made a new contract with one of the former contractors, who also committed a breach, and the obligee completed the work. Sureties for the original contractors were not released. Newton *v.* Devlin, 134 Mass. 490.

26. Citizens' Ins. Co. *v.* Cluxton, 13 Ont. 382.

One signing an existing note in consideration of an extension of time is bound as upon a new contract, although previous obligors are released thereby. M. Rumley Co. *v.* Wilcher, 66 S. W. 7, 23 Ky. L. Rep. 1745.

Completion of contract by surety.— Where a contractor defaulted, and his surety elected to complete the contract, such surety is not relieved from liability for mechanics' liens which accrued before default, because the obligee obtained a new contract from him, and declared the original contract "voided and forfeited." Harley *v.* Mapes Reeves Constr. Co., 33 Misc. (N. Y.) 626, 68 N. Y. Suppl. 191.

27. *California.*— Spencer *v.* Houghton, (1885) 6 Pac. 853.

Georgia.— Stewart *v.* Johnston, 87 Ga. 97, 13 S. E. 258; Sutton *v.* Williams, 77 Ga. 570, 1 S. E. 175.

Indiana.— State *v.* Mitchell, 132 Ind. 461, 32 N. E. 86; Allen *v.* State, 61 Ind. 268, 28 Am. Rep. 673.

Kentucky.—Abshire *v.* Rowe, 112 Ky. 545, 66 S. W. 394, 23 Ky. L. Rep. 1854, 99 Am. St. Rep. 302, 56 L. R. A. 936.

Massachusetts.— Brooks *v.* Whitmore, 142 Mass. 399, 8 N. E. 117, where a trustee of two estates gave a bond for each, with a different surety on each bond, and a surety on one bond, under the impression that he was liable on the other instead, petitioned for release from the latter, and was discharged therefrom, a new bond being given, and it was held that the sureties on the first bond remained liable.

New York.— People *v.* Cushing, 36 Hun 483; Gilbert *v.* Luce, 11 Barb. 91.

Oregon.— Hand Mfg. Co. *v.* Marks, 36 Oreg. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549.

Pennsylvania.— Sureties on a bond given on May 7, 1901, for the term of one year, for the support of the principal's wife and children, are not discharged by a decree directing a new bond to be given before July 1, 1901. Keefer *v.* Keefer, 28 Pa. Super. Ct. 256.

United States.—McClaskey *v.* Barr, 79 Fed. 408; *In re* Blumer, 13 Fed. 623; Postmaster-Gen. *v.* Munger, 19 Fed. Cas. No. 11,309, 2 Paine 189; Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 678.

New bonds of officers see Officers, 29 Cyc. 1461.

New bond of guardian see Guardian and Ward, 21 Cyc. 234.

New bond of executor or administrator see Executors and Administrators, 18 Cyc. 1263.

28. Whitney *v.* Stearns, 16 Me. 394; Smith *v.* Falconer, 11 Hun (N. Y.) 481 [*affirmed* in 79 N. Y. 633]; King *v.* Blackmore, 72 Pa. St. 347, 13 Am. Rep. 684; Gowan *v.* Graves, 10 Heisk. (Tenn.) 579. Tenn. Act 1842, c. 136, § 1, providing for the exoneration of a surety if judgment against the principal be stayed, does not apply where the judgment is against cosureties only, and one of them procures a stay. Sharp *v.* Embry, 1 Swan (Tenn.) 254.

29. Ramsey *v.* Coolbaugh, 13 Iowa 164 (holding that where a new delivery bond was given "in lieu of the bond" previously given, the sureties on the former bond were discharged); Oxford *v.* Gair, 15 Ont. 362.

Under a statute requiring a new bond "instead of the bond required by" a former act, sureties on the former bonds were discharged upon such new bonds being given. U. S. *v.* Wardwell, 28 Fed. Cas. No. 16,640, 5 Mason 82.

30. Tittle *v.* Bennett, 94 Ga. 405, 21 S. E. 62; Hawley *v.* U. S. Fidelity, etc., Co., 100 N. Y. App. Div. 12, 90 N. Y. Suppl. 893 [*affirmed* in 184 N. Y. 549, 76 N. E. 1096]; Sharpe *v.* Connelly, 105 N. C. 87, 11 S. E. 177; Frontenac County *v.* Breden, 17 Grant Ch. (U. C.) 645; Grand Junction R. Co. *v.* Pope, 30 U. C. C. P. 633.

31. McGehee *v.* Scott, 15 Ga. 74; Reilly *v.* Dodge, 59 N. Y. Super. Ct. 199, 14 N. Y.

8. By Recovery of Judgment. Generally the relation of principal and surety is not terminated by reason of a judgment against them having been obtained,[32] nor will the mutual rights of cosureties be affected;[33] and, while there is some difference in the authorities, generally whatever acts will discharge the surety before judgment will have a like effect thereafter.[34]

Suppl. 129 [*affirmed* in 131 N. Y. 153, 29 N. E. 1011]; Wilson *v.* Glover, 3 Pa. St. 404.

32. *Georgia.*— Curan *v.* Colbert, 3 Ga. 239, 46 Am. Dec. 427.

Illinois.— Trotter *v.* Strong, 63 Ill. 272.

Mississippi.— Davis *v.* Mikell, Freem. 548.

Missouri.— Rice *v.* Morton, 19 Mo. 263.

Nebraska.— The rendition of a judgment without judicial determination as to which defendant was principal and which surety, in accordance with Code Civ. Proc. § 511, does not extinguish the relation. Drexel *v.* Pusey, 57 Nebr. 30, 77 N. W. 351.

New York.— La Farge *v.* Herter, 11 Barb. 159 [*reversing* 3 Den. 157].

Pennsylvania.— Mortland *v.* Himes, 8 Pa. St. 265 (holding that the operation of the rule that the release of a surety does not discharge the principal is not excluded by the merger of the original contract of indebtedness in a judgment recovered); Com. *v.* Vanderslice, 8 Serg. & R. 452.

Vermont.— Dunham *v.* Downer, 31 Vt. 249.

See 40 Cent. Dig. tit. "Principal and Surety," § 99.

Discharge of surety see *infra*, VIII, E, 1, b; VIII, E, 2, j, (III), (A).

Remedies as against principal and surety see *infra*, VII.

33. Rice *v.* Morton, 19 Mo. 263.

34. *Alabama.*— Carpenter *v.* Devon, 6 Ala. 718.

Georgia.— Crawford *v.* Gaulden, 33 Ga. 173; Beall *v.* Cochran, 18 Ga. 38; Brown *v.* Riggins, 3 Ga. 405; Curan *v.* Colbert, 3 Ga. 239, 46 Am. Dec. 427; McCrary *v.* Cooley, Ga. Dec. 104.

Illinois.— Trotter *v.* Strong, 63 Ill. 272; New York Bank Note Co. *v.* Kerr, 77 Ill. App. 53.

Indiana.— Gipson *v.* Ogden, 100 Ind. 20.

Louisiana.— Allison *v.* Thomas, 29 La. Ann. 732; Gustine *v.* Union Bank, 10 Rob. 412; Calliham *v.* Tanner, 3 Rob. 299.

Mississippi.— Anthony *v.* Capel, 53 Miss. 350.

New York.— Bangs *v.* Strong, 4 N. Y. 315, 7 Hill 250, 42 Am. Dec. 64 [*affirming* 10 Paige 11]; McNulty *v.* Hurd, 18 Hun 1 [*affirmed* in 86 N. Y. 547]; Storms *v.* Thorn, 3 Barb. 314, protection of rights of surety in equity. But in Bay *v.* Tallmadge, 5 Johns. Ch. 305, it was held that after judgment and execution against bail and sureties there was an end to the relation of principal and surety and that the bail could not claim any advantage against the creditor on the ground of a want of due diligence in prosecuting the principal debtor. See also other New York cases cited *infra*, this note.

North Carolina.— Evans *v.* Raper, 74 N. C. 639.

Ohio.— Blazer *v.* Bundy, 15 Ohio St. 57; Commercial Bank *v.* Western Reserve Bank, 11 Ohio 444, 38 Am. Dec. 739.

Pennsylvania.— Manufacturers', etc., Bank *v.* Commonwealth Bank, 7 Watts & S. 335, 42 Am. Dec. 240; Com. *v.* Vanderslice, 8 Serg. & R. 452.

Texas.— Wren *v.* Peel, 64 Tex. 374; Pilgrim *v.* Dykes, 24 Tex. 383. In Ware *v.* Millican, (Civ. App. 1895) 30 S. W. 728, it was held that the release of some of the sureties on an injunction bond after judgment did not release the others.

See 40 Cent. Dig. tit. "Principal and Surety," § 99.

That the equitable rights of the surety are changed see The Colonel Howard *v.* Hayden, 6 Fed. Cas. No. 3,026 (holding that after final judgment against sureties of a claimant in an admiralty proceeding, they become principal debtors, and are not discharged by an extension of the execution against the claimant); Jenkins *v.* Robertson, 2 Drew. 351, 23 L. J. Ch. 816, 61 Eng. Reprint 755; Duff *v.* Barrett, 15 Grant Ch. (U. C.) 632 (as to extension of time to principal as not discharging surety); Hamilton *v.* Holcomb, 12 U. C. C. P. 38. In Tennessee a surety will not be discharged by an extension given to the principal after judgment against the principal and surety, since the latter is entitled to a judgment on motion against the principal. Bryant *v.* Rudisell, 4 Heisk. (Tenn.) 656; Williams *v.* Wright, 9 Humphr. (Tenn.) 493; Grimes *v.* Nolen, 3 Humphr. (Tenn.) 412; Peay *v.* Poston, 10 Yerg. (Tenn.) 111. In Lennox *v.* Prout, 3 Wheat. (U. S.) 520, 4 L. ed. 449, separate judgments had been obtained against the maker and indorser of a promissory note, and it was held that proceedings at law on the judgment against the indorser would not be restrained after the creditor had countermanded an execution against the maker, because the rules adopted for the protection of sureties were not applicable; that in such case the parties had become principal debtors. To the same effect as the last case see Hubbell *v.* Carpenter, 2 Barb. (N. Y.) 484 [*affirmed* in 5 N. Y. 171, upon the ground that the surety had voluntarily rejected the offer and abandoned the right to be substituted in the place of a creditor and of having the benefit of his remedy against the principal debtor, and the court assumed without deciding that the rights arising out of the relation of principal and surety continued to exist between the creditor and the surety after the judgment against the latter (*following* La Farge *v.* Herter, 3 Den. (N. Y.) 157, which case, however, was in effect *overruled* in La Farge *v.* Herter, 11 Barb. (N. Y.) 159)]; Findlay *v.* U. S. Bank, 9 Fed. Cas. No. 4,791, 2 McLean 44.

VII. Rights and Remedies of Creditor or Obligee.

A. In General. The liability of a surety,[35] or of a supplemental surety,[36] to the creditor or obligee is generally the same as that of the principal, even though the relationship be known.[37] The principal and sureties may be bound jointly or jointly and severally.[38] A joint and several liability is indicated where the language of the instrument is in the singular number.[39] Where the liability is joint and several, each signer can be held for the entire indebtedness, and an agreement by the creditor or obligee not to exact more than a proportionate share from each is not binding on him;[40] nor is the right of the creditor to proceed against the principal alone affected by the fact that other creditors of the principal may be unable to satisfy their claims.[41] If a surety has left the jurisdiction, his property may be attached, although the principal remains within the jurisdiction.[42] If sureties have bound themselves for specific sums, each is liable individually until that amount is exhausted.[43] Where the principal and sureties are severally bound, it is not a defense to one that the creditor or obligee has recovered a judgment against another, if that judgment has not been satisfied;[44] nor that a claim has

35. *Alabama.*— Ready *v.* Tuskaloosa, 6 Ala. 327.

California.— Casey *v.* Gibbons, 136 Cal. 368, 68 Pac. 1032; California Nat. Bank *v.* Ginty, 108 Cal. 148, 41 Pac. 38; Harlan *v.* Ely, 55 Cal. 340; Damon *v.* Pardow, 34 Cal. 278.

Connecticut.— Bull *v.* Allen, 19 Conn. 101.

District of Columbia.— U. S. *v.* Maloney, 4 App. Cas. 505.

Illinois.— Wilson *v.* Campbell, 2 Ill. 493.

Louisiana.— Gustine *v.* Union Bank, 10 Rob. 412.

Missouri.— Beers *v.* Wolf, 116 Mo. 179, 22 S. W. 620.

New Jersey.— Bullowa *v.* Orgo, 57 N. J. Eq. 428, 41 Atl. 494.

New York.— Hoyt *v.* Mead, 13 Hun 327; Berg *v.* Radcliff, 6 Johns. Ch. 302.

North Carolina.— Shaw *v.* McFarlane, 23 N. C. 216.

Pennsylvania.— White *v.* Com., 39 Pa. St. 167; Roth *v.* Miller, 15 Serg. & R. 100.

South Carolina.— Pelzer *v.* Steadman, 22 S. C. 279; Levy *v.* Hampton, 1 McCord 145; Lainhart *v.* Reilly, 3 Desauss. Eq. 590.

Tennessee.— Nelson *v.* Richardson, 4 Sneed 307.

Texas.— Stroop *v.* McKenzie, 38 Tex. 132; Ritter *v.* Hamilton, 4 Tex. 325.

Vermont.— Seaver *v.* Young, 16 Vt. 658.

West Virginia.— Merchants' Nat. Bank *v.* Good, 21 W. Va. 455.

United States.— U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426.

Canada.— Jones *v.* Dunbar, 32 U. C. C. P. 136.

See 40 Cent. Dig. tit. "Principal and Surety," § 103 *et seq.*

In Louisiana a surety, pending suit, cannot ask that proceedings against him shall be arrested until the property of the principal has been discussed. All he can ask is that the property of the principal shall be discussed under execution. Hill *v.* Bourcier, 29 La. Ann. 841. And if he fails to plead discussion, to point out the property, and to advance a sum sufficient to have the discussion effected, as required by articles 3015, 3016, Civ. Code, he becomes bound *in solido.* Elmore *v.* Robinson, 18 La. Ann. 651.

36. Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74.

37. Higerty *v.* Higerty, 1 Phila. (Pa.) 232.

38. Mariposa County *v.* Knowles, 146 Cal. 1, 79 Pac. 525; Ferriday *v.* Purnell, 2 La. Ann. 334; East Bridgewater Sav. Bank *v.* Bates, 191 Mass. 110, 77 N. E. 711; Renkert *v.* Elliott, 11 Lea (Tenn.) 235. See also *infra*, VII, H, 4.

39. Mattler *v.* Brind, 2 Colo. App. 439, 31 Pac. 348; McCormick *v.* Mitchell, 57 Ind. 248; Keller *v.* McHuffman, 15 W. Va. 64; Dart *v.* Sherwood, 7 Wis. 523, 76 Am. Dec. 228.

40. Schooley *v.* Fletcher, 45 Ind. 86; Small *v.* Older, 57 Iowa 326, 10 N. W. 734; Vaughn *v.* Haden, 37 Mo. 178; Martin *v.* Frantz, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. Rep. 589; Sterling *v.* Stewart, 74 Pa. St. 445, 15 Am. Rep. 559.

41. Baldwin *v.* Ralston, 6 Pa. Dist. 198; Rogan *v.* Williams, 63 Tex. 123.

42. Loop *v.* Summers, 3 Rand. (Va.) 511.

43. Dougherty *v.* Peters, 2 Rob. (La.) 537.

44. *Alabama.*— Firemen's Ins. Co. *v.* McMillan, 29 Ala. 147.

California.— Hunter *v.* Bryant, 98 Cal. 247, 33 Pac. 51.

Georgia.— Towns *v.* Hicks, 6 Ga. 239.

Indiana.— State *v.* Roberts, 40 Ind. 451.

Iowa.— Dubuque County *v.* Koch, 17 Iowa 229.

Pennsylvania.— Gault's Appeal, 3 Walk. 375.

South Carolina.— Noble *v.* Cothran, 18 S. C. 439; McDonald *v.* Pickett, 2 Bailey 617; State Treasurers *v.* Bates, 2 Bailey 362; State Treasurers *v.* Oswald, 2 Bailey 214.

Tennessee.— Sanders *v.* Forgasson, 3 Baxt. 249.

Vermont.— Rutland Bank *v.* Thrall, 6 Vt. 237.

been filed against the principal's estate;[45] but a judgment recovered against them jointly bars the right to proceed against them separately.[46] Where the creditor has two or more instruments available for the enforcement of his claim, he can resort to either,[47] although the parties on one may possess rights against those on another;[48] and an action on one instrument does not affect the right of the creditor or obligee to afterward bring suit on another.[49] Accommodation parties are liable in the capacity assumed by them.[50] It is not a defense to a surety that he became such at the request of the creditor;[51] nor, if the liability of the surety has arisen from the payment of money by the obligee on account of the defaults of the principal, is it any defense that such payments were made without suit.[52] The fact that the obligee does not take proper steps to make the damages as low as possible, while it may affect the measure of damages, does not discharge a surety;[53] nor does a waiver of some of the breaches of a bond preclude the obligee from enforcing the liability of sureties as to others.[54] A person having a right to proceed against

Virginia.—Ewing *v.* Ferguson, 33 Gratt. 548. See 40 Cent. Dig. tit. "Principal and Surety," § 223.

Where separate actions are brought against two sureties, the discharge of one does not operate as a discharge of the other. Burwell *v.* Edison, (M. T. 3 Vict.) 3 Ont. Case Law Dig. 5733.

Assignment of judgment against principal. — Where separate judgments against the principal and surety have been obtained, an assignment of the judgment against the principal with a reservation of the right to collect a part of the judgment against the surety does not pass the judgment against the surety as incident to the judgment against the principal. Hubbell *v.* Carpenter, 5 N. Y. 171 [*reversing* 5 Barb. 520, and *affirming* 2 Barb. 484].

Effect of recovery in tort.— In Sloan *v.* Creasor, 22 U. C. Q. B. 127, it was held that, after recovery in tort against the principal for misconduct as an officer, a suit could not be maintained against his sureties on their covenant that he would not misconduct himself.

45. Hayes *v.* Hayes, 64 Ind. 243; New Bedford Five Cents Sav. Bank *v.* Union Mill Co., 128 Mass. 27.

46. U. S. *v.* Archer, 24 Fed. Cas. No. 14,464, 1 Wall. Jr. 173 [*affirmed* in U. S. *v.* Price, 9 How. 83, 13 L. ed. 56].

47. King *v.* Blackmore, 72 Pa. St. 347, 13 Am. Rep. 684; Stafford *v.* Montgomery, 85 Tenn. 329, 3 S. W. 438. The obligee is not required to resort to an appeal-bond, but can hold the sureties on the original obligation liable. Smith *v.* Falconer, 11 Hun (N. Y.) 481 [*affirmed* in 79 N. Y. 633]. And a resort can be had to the property of the judgment surety without proceeding on a delivery bond given by the judgment principal. Brown *v.* Brown, 17 Ind. 475.

Bonds of officer and of deputy.—A person injured by the acts of a deputy inspector can hold the sureties of the chief inspector, although there is a remedy on the deputy inspector's bond. Verratt *v.* McAulay, 5 Ont. 313.

48. Sutton *v.* Williams, 77 Ga. 570, 1 S. E. 175; Tennessee Hospital *v.* Fuqua, 1 Lea (Tenn.) 608.

49. *Idaho.*— Hailey First Nat. Bank *v.* Watt, 7 Ida. 510, 64 Pac. 223.

Maine.— Whitney *v.* Stearns, 16 Me. 394.

Massachusetts.— Dalton *v.* Woburn Agricultural, etc., Assoc., 24 Pick. 257.

Pennsylvania.— Scott *v.* Swain, (1887) 8 Atl. 24.

Tennessee.— Gowan *v.* Graves, 10 Heisk. 579.

United States.— National Surety Co. *v.* U. S., 123 Fed. 294, 59 C. C. A. 479; U. S. *v.* Hoyt, 26 Fed. Cas. No. 15,409, 1 Blatchf. 326.

England.— Jackson *v.* Digby, 2 Wkly. Rep. 540.

Canada.— Banque Provinciale *v.* Arnoldi, 2 Ont. L. Rep. 624.

A pending action of replevin brought by a tenant to recover goods which had been taken in distress is not a bar to an action by the landlord against a surety for the rent. King *v.* Blackmore, 72 Pa. St. 347, 13 Am. Rep. 684.

The discharge of bail after arrest will not prevent resort to notes taken as collateral security. Hartshorne *v.* McIver, 11 Fed. Cas. No. 6,171, 1 Cranch C. C. 421.

The government having recovered judgment against a mail contractor and his sureties cannot recover on the contractor's bond. U. S. *v.* Oliver, 36 Fed. 758.

50. Wright *v.* Garlinghouse, 26 N. Y. 539 [*reversing* 27 Barb. 474]; Murray *v.* Judah, 6 Cow. (N. Y.) 484; Israle *v.* Ayer, 2 S. C. 344.

51. Scott *v.* State, 2 Md. 284.

52. Henricus *v.* Englert, 137 N. Y. 488, 33 N. E. 550 [*reversing* 17 N. Y. Suppl. 235, 237] (holding that a surety for a contractor is not discharged because the obligee paid the money directly to material-men in discharge of their liens); American Cent. Ins. Co. *v.* Burkert, 11 Pa. Super. Ct. 427 (holding that where an insurance agent disobediently failed to cancel a policy, it was not a defense to his surety that the company compromised a claim under such policy).

53. Sullivan *v.* Cluggage, 21 Ind. App. 667, 52 N. E. 110; Michigan Steamship Co. *v.* American Bonding Co., 104 N. Y. App. Div. 347, 93 N. Y. Suppl. 805.

54. Sacramento *v.* Kirk, 7 Cal. 419.

a surety for the indebtedness of the principal can avail himself of the same cause of action by way of set-off.[55]

B. Estoppel. The creditor or obligee is not estopped by giving an erroneous certificate favorable to the principal, in the absence of bad faith;[56] nor by a mere expression of opinion that the sureties have been discharged.[57] If the surety is in the employ of the obligee, a continuance of the payment of his salary is not a relinquishment of a claim against him.[58]

C. Effect of Obtaining Additional Security. A surety is not discharged by the creditor or obligee taking additional security;[59] nor by receiving possession of property of the principal, although sufficient to pay the debt.[60] The addition of a guaranty to a note will not release a maker thereof who is a surety.[61]

D. Effect of Delay. Generally, mere passiveness by the creditor or obligee, after default by the principal, in proceeding against a surety,[62] or against cosureties,[63] is not a defense, unless the delay is such as to amount to laches.[64]

E. Recourse Against Principal or Exhaustion of Other Remedies — 1. In General. Ordinarily, in the absence of a statute, the creditor or obligee

55. Domestic Sewing Mach. Co. *v.* Saylor, 86 Pa. St. 287.

56. Union Bank *v.* Forstall, 11 La. 211; Farmington *v.* Stanley, 60 Me. 472.

57. Royston *v.* Howie, 15 Ala. 309; Singer Mfg. Co. *v.* Hester, 6 Fed. 804, 2 McCrary 417.

58. U. S. *v.* Beattie, 24 Fed. Cas. No. 14,554, Gilp. 92.

59. *Illinois.*— Oxley *v.* Storer, 54 Ill. 159.

Iowa.— Citizens' Bank *v.* Whinery, 110 Iowa 390, 81 N. W. 694.

Kentucky.— Johnson *v.* Howe, 21 S. W. 239, 14 Ky. L. Rep. 897.

Massachusetts.— Dalton *v.* Woburn Agricultural, etc., Assoc., 24 Pick. 257; Lincoln *v.* Bassett, 23 Pick. 154.

Mississippi.— Smith *v.* Clopton, 48 Miss. 66.

Missouri.— Headlee *v.* Jones, 43 Mo. 235; Morgan *v.* Martien, 32 Mo. 438.

Nebraska.— Greenwood First Nat. Bank *v.* Wilbern, 65 Nebr. 242, 90 N. W. 1126, 93 N. W. 1002, 95 N. W. 12.

New York.— Van Etten *v.* Troudden, 67 Barb. 342; Williams *v.* Townsend, 1 Bosw. 411.

North Carolina.—Stallings *v.* Lane, 88 N. C. 214.

Rhode Island.— Thurston *v.* James, 6 R. I. 103.

South Carolina.—Witte *v.* Wolfe, 16 S. C. 256; Green *v.* Warrington, 1 Desauss. Eq. 430; Shubrick *v.* Warrington, 1 Desauss. Eq. 315.

Tennessee.— Miller *v.* Knight, 7 Baxt. 127, 6 Baxt. 503; Sanland *v.* Settle, Meigs 169.

Texas.— Cruger *v.* Burke, 11 Tex. 694; Burke *v.* Cruger, 8 Tex. 66, 59 Am. Dec. 102.

West Virginia.— Sayre *v.* King, 17 W. Va. 562.

United States.— The Maggie Jones, 16 Fed. Cas. No. 8,947, 1 Flipp. 635.

England. — Overend *v.* Oriental Financial Corp., L. R. 7 H. L. 348, 31 L. T. Rep. N. S. 322; Clarke *v.* Birley, 41 Ch. D. 422, 58 L. J. Ch. 616, 60 L. T. Rep. N. S. 948, 37 Wkly. Rep. 746; Eyre *v.* Everett, 2 Russ. 381, 3 Eng. Ch. 381, 38 Eng. Reprint 379.

Canada.— Currie *v.* Hodgins, 42 U. C. Q. B. 601; Kerr *v.* Hereford, 17 U. C. Q. B. 158. And see St. Stephens Bank *v.* Bonness, 32 N. Brunsw. 486 [*reversed* on the facts in 24 Can. Sup. Ct. 710].

See 40 Cent. Dig. tit. "Principal and Surety," § 219 *et seq.*

A cognovit by the principal without notice to the bail does not discharge the latter. Hodgson *v.* Nugent, 5 T. R. 277.

The acceptance of a common appearance from the principal is not a release of his surety. Berks County *v.* Ross, 3 Binn. (Pa.) 520, 5 Am. Dec. 383.

60. Greenwood First Nat. Bank *v.* Wilbern, 65 Nebr. 242, 90 N. W. 1126, 93 N. W. 1002, 95 N. W. 12. And see U. S. *v.* Stansbury, 1 Pet. (U. S.) 573, 7 L. ed. 267.

61. Anderson *v.* Hall, 4 Nebr. (Unoff.) 494, 94 N. W. 981.

62. Dreeben *v.* McKinney First Nat. Bank, (Tex. Civ. App. 1906) 93 S. W. 510. In Coleman *v.* Stone, 85 Va. 386, 7 S. E. 241, the delay was twenty-five years; and in Gaussen *v.* U. S., 97 U. S. 584, 24 L. ed. 1009, thirty years.

A surety on a check is not discharged by delay in presenting it for payment if no time has been fixed. Newman *v.* Kaufman, 28 La. Ann. 865, 26 Am. Rep. 114.

63. Clark *v.* Douglas, 58 Nebr. 571, 79 N. W. 158, holding that neglect in prosecuting a claim against a deceased cosurety's estate does not affect a surety. See also Greenawalt *v.* Kreider, 3 Pa. St. 264, 45 Am. Dec. 639.

64. People *v.* Donohue, 70 Hun (N. Y.) 317, 24 N. Y. Suppl. 437; *In re* Niewind, 23 Pittsb. Leg. J. N. S. (Pa.) 385. Where, after sufficient funds had been collected before the war by proceedings in a chancery court to pay all claims against a deceased debtor, the holder of a note did not demand payment, but, after the war, sued a surety thereon, he was not allowed to recover. Gillespie *v.* Darwin, 6 Heisk. (Tenn.) 21.

Laches cannot be asserted as a defense if the delay by the obligee was occasioned by his prosecution of the principal and another surety, and such prosecution resulted in a

cannot be required to resort to the principal before proceeding against the surety,[65] as where both principal and surety are equally bound or the surety's liability is upon a contract and absolute promise, depending upon no such condition expressed in the contract or implied by law,[66] and the creditor cannot be compelled in such cases to resort to other remedies before coming on the surety,[67] or, in the absence of statute, to attempt by execution to exhaust his remedy against the principal before proceeding against the surety.[68] The surety's remedy is to pay the debt

material reduction of the claim. Turk *v.* Ritchie, 104 Va. 587, 52 S. E. 339.

65. *Arkansas.*— Hunt *v.* Burton, 18 Ark. 188.

California.— London, etc., Bank *v.* Smith, 101 Cal. 415, 35 Pac. 1027; Nickerson *v.* Chatterton, 7 Cal. 568.

Colorado.— Day *v.* McPhee, 41 Colo. 467, 93 Pac. 670.

Kentucky.— Governor *v.* Perkins, 2 Bibb 395.

Louisiana.— Cougot *v.* Fournier, 4 Rob. 420; Griffing *v.* Caldwell, 1 Rob. 15; Bonny *v.* Brashear, 19 La. 383; Boutee *v.* Martin, 16 La. 133; Bryan *v.* Cox, 3 Mart. N. S. 574; Wood *v.* Fritz, 10 Mart. 196.

Minnesota.— Huey *v.* Pinney, 5 Minn. 310.

New York.— Levy *v.* Cohen, 103 N. Y. App. Div. 195, 92 N. Y. Suppl. 1074 [*reversing* 45 Misc. 95, 91 N. Y. Suppl. 594].

North Carolina.— Cowan *v.* Roberts, 134 N. C. 415, 46 S. E. 979, 101 Am. St. Rep. 845, 65 L. R. A. 729.

Pennsylvania.— Campbell *v.* Sherman, 151 Pa. St. 70, 25 Atl. 35, 31 Am. St. Rep. 735; Roberts *v.* Riddle, 79 Pa. St. 468; Reigart *v.* White, 52 Pa. St. 438; Geddis *v.* Hawk, 1 Watts 280.

South Carolina.— Shubrick *v.* Russell, 1 Desauss. Eq. 315.

Wisconsin.— Day *v.* Elmore, 4 Wis. 190.

See 40 Cent. Dig. tit. "Principal and Surety," § 468 *et seq.* And see *infra*, VII, E, 3.

Right of creditors of surety to compel resort to principal's property see MARSHALING ASSETS AND SECURITIES, 26 Cyc. 936.

66. *Maryland.*— Garey *v.* Hignutt, 32 Md. 552.

Michigan.— People *v.* Butler, 74 Mich. 643, 42 N. W. 273.

Missouri.— Carr *v.* Card, 34 Mo. 513.

New York.— Johnson *v.* Ackerman, 3 Daly 430.

Pennsylvania.— Ashton *v.* Bayard, 71 Pa. St. 139.

South Carolina.— Miller *v.* White, 25 S. C. 235.

Texas.— Ritter *v.* Hamilton, 4 Tex. 325.

Wisconsin.— Stein *v.* Benedict, 83 Wis. 603, 53 N. W. 891.

See 40 Cent. Dig. tit. "Principal and Surety," § 468 *et seq.*

Under an agreement by a surety to pay rent to a landlord in the case of the tenant's default, the landlord is not bound to attempt to collect from the tenant before resorting to the surety. Ducker *v.* Rapp, 41 N. Y. Super. Ct. 235 [*reversed* on other grounds in 67 N. Y. 464]; Turnure *v.* Hohenthal, 36 N. Y. Super. Ct. 79.

67. Brooks *v.* Carter, 36 Ala. 682. So where a bank became a party to a suit of assignment made by the principal for the benefit of creditors at the request of defendant and under a stipulation that the bank should not be held thereby to release any rights as against the defendants, the latter agreeing at the same time to pay the balance on the notes over and above the amount of dividends received under the assignments, etc., it was held that the notes were not discharged as against the sureties and that suits thereon might be maintained against them without waiting for the adjustment of the assignor's accounts. Biddeford First Nat. Bank *v.* McKenney, 67 Me. 272.

68. Macready *v.* Schenck, 41 La. Ann. 456, 6 So. 517; Conery *v.* Cannon, 26 La. Ann. 123; New Orleans Canal, etc., Co. *v.* Escoffie, 2 La. Ann. 830.

Under various statutory provisions, however, the rule is otherwise and in such instances, where it appears that the party to the judgment is the surety, the property of the principal debtor must first be levied on or exhausted. Knode *v.* Baldridge, 73 Ind. 54; Johnson *v.* Harris, 69 Ind. 305; Brown *v.* Brown, 17 Ind. 475 (holding that it is only by force of such statute that the surety is entitled to this favor); Folger *v.* Palmer, 35 La. Ann. 814; Lee *v.* Griffin, 31 Miss. 632; Eckert *v.* Myers, 45 Ohio St. 525, 15 N. E. 862.

A return showing that the officer could not find the principal or any property of his after diligent search and inquiry and that plaintiff's counsel was called on and could give no information on either subject was held to justify recourse on the surety. McCloskey *v.* Wingfield, 32 La. Ann. 38. But where, in order to authorize an action against an indorser, the execution against the maker or obligor in a note or bond must show that no property of the maker could be found on the execution against him, the return "*nulla bona*" is not sufficient, since these terms import merely a want of "goods." Woodward *v.* Harbin, 1 Ala. 104. And see, generally, EXECUTIONS, 17 Cyc. 878.

Where the contract requires all necessary steps for collection from the maker, etc., before resorting to the assignor of a note who, upon such condition, bound himself for the amount thereof, it was held that a capias ad satisfaciendum, being an available remedy, was a necessary step after judgment against the maker upon which a fieri facias issued and was returned *nulla bona*. Flower *v.* McMicken, 2 Mart. N. S. (La.) 132.

Surety cannot control execution.—A surety has no right, after a judgment has been re-

and pursue the principal for reimbursement,[69] or to proceed under the statute to bring such action against the debtor as may be provided thereby for his protection.[70] It follows that, in the absence of a statute, forbearance to proceed against the principal will not affect the right of the creditor to pursue the surety,[71] whatever may

covered against him and his principal, to have an execution issued and levied upon the property of the principal without the consent of plaintiff; and the latter has the right to discharge the levy and withdraw the execution. Forbes *v.* Smith, 40 N. C. 369.

69. Stein *v.* Benedict, 83 Wis. 603, 53 N. W. 891. See also *infra*, IX, B, 4.

70. See Cougot *v.* Fournier, 4 Rob. (La.) 420.

71. *Alabama.*— Dampskibsaktieselskabet Habil *v.* U. S. Fidelity, etc., Co., 142 Ala. 363, 39 So. 54; Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210; Abercrombie *v.* Knox, 3 Ala. 728, 37 Am. Dec. 721.

Arkansas.— Dawson *v.* Real Estate Bank, 5 Ark. 283.

California.— Humphreys *v.* Crane, 5 Cal. 173.

Colorado.— Byers *v.* Hussey, 4 Colo. 515.

District of Columbia.— Clark *v.* Gerstley, 26 App. Cas. 205 [*affirmed* in 204 U. S. 504, 27 S. Ct. 337, 51 L. ed. 589].

Florida.— Pfeiffer *v.* Knapp, 17 Fla. 144; Dorman *v.* Bigelow, 1 Fla. 281.

Georgia.— Harvey *v.* Atkinson, 100 Ga. 178, 28 S. E. 31; Crawford *v.* Gaulden, 33 Ga. 173.

Illinois.— Pearl *v.* Wellman, 11 Ill. 352; Grabfelder *v.* Willis, 10 Ill. App. 330.

Indiana.— Barnes *v.* Mowry, 129 Ind. 568, 28 N. E. 535; Cochran *v.* Orr, 94 Ind. 433; Owen *v.* State, 25 Ind. 107; Kirby *v.* Studebaker, 15 Ind. 45; Naylor *v.* Moody, 3 Blackf. 92.

Kansas.— Hall *v.* Hays City First Nat. Bank, 5 Kan. App. 493, 47 Pac. 566.

Kentucky.—Nichols *v.* McDowell, 14 B. Mon. 6; Grayham *v.* Washington County Ct., 9 Dana 182; McHaney *v.* Crabtree, 6 T. B. Mon. 104.

Louisiana.—Forstall *v.* Fussell, 50 La. Ann. 249, 23 So. 273; Purdy *v.* Forstall, 45 La. Ann. 814, 13 So. 95; State *v.* Guilbeau, 37 La. Ann. 718; Howard *v.* Finney, 32 La. Ann. 1305; Pharr *v.* McHugh, 32 La. Ann. 1280; Hill *v.* Bourcier, 29 La. Ann. 841; Elmore *v.* Robinson, 18 La. Ann. 651; Gillet *v.* Rachal, 9 Rob. 276; Warfield *v.* Ludewig, 9 Rob. 240; Frazier *v.* Dick, 5 Rob. 249; Cougot *v.* Fournier, 4 Rob. 420; Griffing *v.* Caldwell, 1 Rob. 15; Bonny *v.* Brashear, 19 La. 383; Fortineau *v.* Boissiere, 18 La. 470; Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214; Boutte *v.* Martin, 16 La. 133; Moore *v.* Broussard, 8 Mart. N. S. 277; Bryan *v.* Cox, 3 Mart. N. S. 574; Wood *v.* Fitz, 10 Mart. 196; Cooley *v.* Lawrence, 4 Mart. 639.

Maine.— Freeman's Bank *v.* Rollins, 13 Me. 202.

Maryland.— Taylor *v.* State, 73 Md. 208, 20 Atl. 914, 11 L. R. A. 852; Hayes *v.* Wells, 34 Md. 512; Garey *v.* Hignutt, 32 Md. 552; Sasscer *v.* Young, 6 Gill & J. 243; Jordan *v.* Trumbo, 6 Gill & J. 103; Buchanan *v.* Bordley, 4 Harr. & M. 41, 1 Am. Dec. 38.

Massachusetts.— Allen *v.* Brown, 124 Mass. 77; Hunt *v.* Bridgham, 2 Pick. 581, 13 Am. Dec. 458.

Michigan.— People *v.* Butler, 74 Mich. 643, 42 N. W. 273.

Minnesota.— Berryhill *v.* Peabody, 77 Minn. 59, 79 N. W. 651; Huey *v.* Pinney, 5 Minn. 310.

Mississippi.—Wright *v.* Watt, 52 Miss. 634; Clopton *v.* Spratt, 52 Miss. 251; Hunt *v.* Knox, 34 Miss. 655; Johnson *v.* Planters' Bank, 4 Sm. & M. 165, 43 Am. Dec. 480; Montgomery *v.* Dillingham, 3 Sm. & M. 647.

Missouri.— McCune *v.* Belt, 38 Mo. 281; Rucker *v.* Robinson, 38 Mo. 154, 90 Am. Dec. 412; Cain *v.* Bates, 35 Mo. 427; Carr *v.* Card, 34 Mo. 513; Hawkins *v.* Ridenhour, 13 Mo. 125; Hartman *v.* Redman, 21 Mo. App. 124.

Nebraska.— Kroncke *v.* Madsen, 56 Nebr. 609, 77 N. W. 202; Maywood Bank *v.* McAllister, 56 Nebr. 188, 76 N. W. 552; Smith *v.* Mason, 44 Nebr. 610, 63 N. W. 41; Sheldon *v.* Williams, 11 Nebr. 272, 9 N. W. 86.

Nevada.— Quillen *v.* Quigley, 14 Nev. 215.

New Jersey.—Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100; Grier *v.* Flitcraft, 57 N. J. Eq. 556, 41 Atl. 425; Haskell *v.* Burdette, 32 N. J. Eq. 422.

New York.— Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; Clark *v.* Sickler, 64 N. Y. 231, 21 Am. Rep. 606; McKecknie *v.* Ward, 58 N. Y. 541, 17 Am. Rep. 281; Singer *v.* Troutman, 49 Barb. 182; Thompson *v.* Hall, 45 Barb. 214; Turnure *v.* Hohenthal, 36 N. Y. Super. Ct. 79; Williams *v.* Townsend, 1 Bosw. 411; Mutual L. Ins. Co. *v.* Davies, 56 How. Pr. 440. But *compare* Ducker *v.* Rapp, 67 N. Y. 464 [*reversing* 41 N. Y. Super. Ct. 235].

North Carolina.— Neal *v.* Freeman, 85 N. C. 441; Carter *v.* Jones, 40 N. C. 196, 49 Am. Dec. 425.

Pennsylvania.— Ashton *v.* Bayard, 71 Pa. St. 139; Pittsburg, etc., R. Co. *v.* Shaeffer, 59 Pa. St. 350; Reigart *v.* White, 52 Pa. St. 438; Richards *v.* Com., 40 Pa. St. 146; Brubaker *v.* Okeson, 36 Pa. St. 519; Marberger *v.* Pott, 16 Pa. St. 9, 55 Am. Dec. 479; Guldin *v.* Faber, 1 Walk. 435; Thursby *v.* Gray, 4 Yeates 518; Neel's Appeal, 9 Pa. Cas. 76, 11 Atl. 636; Cook *v.* Com., 8 Pa. Cas. 413, 11 Atl. 574; Chester City Presby. Church *v.* Conlin, 11 Pa. Super. Ct. 413, 7 Del. Co. 437; Coatesville *v.* Kauffman, 1 Chest. Co. Rep. 57; Lightner *v.* Axe, 3 Lanc. L. Rev. 401; Keller's Estate, 1 Leg. Chron. 189; Higerty *v.* Higerty, 1 Phila. 232.

South Carolina.—Watson *v.* Barr, 37 S. C. 463, 16 S. E. 188; Edwards *v.* Dargan, 30 S. C. 177, 8 S. E. 858; Miller *v.* White, 25 S. C. 235; State *v.* Williams, 19 S. C. 62; Jackson *v.* Patrick, 10 S. C. 197; Shubrick *v.* Russell, 1 Desauss. Eq. 315.

be the consequences of the delay,[72] such as the subsequent insolvency of the principal,[73] or the fact that the remedy against the principal may be lost by lapse of time.[74] This is especially so if the surety contributes to the delay.[75] Delay in enforcing

South Dakota.— Bennett *v.* Ellis, 13 S. D. 401, 83 N. W. 429.

Tennessee.— Deberry *v.* Adams, 9 Yerg. 52; Johnston *v.* Searcy, 4 Yerg. 182.

Texas.— Burke *v.* Cruger, 8 Tex. 66, 59 Am. Dec. 102; Terrel *v.* Townsend, 6 Tex. 149; Rice *v.* Farmers', etc., Nat. Bank, (Civ. App. 1897) 42 S. W. 1023; Behrns *v.* Rogers, (Civ. App. 1897) 40 S. W. 419.

Virginia.—Wells *v.* Hughes, 89 Va. 543, 16 S. E. 689; Coleman *v.* Stone, 85 Va. 386, 7 S. E. 241; Crawn *v.* Com., 84 Va. 282, 4 S. E. 721, 10 Am. St. Rep. 839; Updike *v.* Lane, 78 Va. 132.

West Virginia.— Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924; Cumberland First Nat. Bank *v.* Parsons, 45 W. Va. 688, 32 S. E. 271; Knight *v.* Charter, 22 W. Va. 422.

Wisconsin.— Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 110 Am. St. Rep. 946, 4 L. R. A. N. S. 666; Stein *v.* Benedict, 83 Wis. 603, 53 N. W. 891.

United States.— American Surety Co. *v.* Lawrenceville Cement Co., 96 Fed. 25; Greenway *v.* William D. Orthwein Grain Co., 85 Fed. 536, 29 C. C. A. 330; Nelson *v.* Killingsley First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425; Hagood *v.* Blythe, 37 Fed. 249; Hunt *v.* U. S., 12 Fed. Cas. No. 6,900, 1 Gall. 32; Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 678; U. S. *v.* Wright, 28 Fed. Cas. No. 16,776.

England.— *Ex p.* Usher, 1 Ball & B. 197; Strong *v.* Foster, 17 C. B. 201, 25 L. J. C. P. 106, 4 Wkly. Rep. 151, 84 E. C. L. 201; London Assur. Co. *v.* Buckle, 4 Moore C. P. 153, 16 E. C. L. 368; Eyre *v.* Everett, 2 Russ. 381, 3 Eng. Ch. 381, 38 Eng. Reprint 379. See also Hearn *v.* Cole, 3 Dow. 459, 3 Eng. Reprint 763.

Canada.— Reg. *v.* Hammond, 12 N. Brunsw. 33; Federal Bank *v.* Harrison, 10 Ont. Pr. 271.

See 40 Cent. Dig. tit. "Principal and Surety," § 312 *et seq.*

This is especially so if the principal was insolvent when the debt was due (Field *v.* Cutler, 4 Lans. (N. Y.) 195; Barnard *v.* Martin, 112 N. C. 754, 17 S. E. 536), or if the principal resides in another state (Davie *v.* Hatcher, 7 Fed. Cas. No. 3,610, 1 Woods 456).

The condition in an injunction bond to pay such damages "as the defendant may recover against them" applies to the surety the same as to the principal; and recovery against the principal is not a prerequisite to an action against the surety. Parham *v.* Cobb, 7 La. Ann. 157.

An undertaking, on the removal of an action from one court to another, "to pay any amount that may be awarded" by the latter court does not require the judgment creditor to exhaust his remedies against the principal before proceeding upon the undertaking. Johnson *v.* Ackerson, 3 Daly (N. Y.) 430.

An attachment bond providing for payment to the obligee of all the damages which should be recovered in any suit against the principal for wrongfully suing out the attachment does not compel the obligee to prosecute a separate action against the principal before suing the surety. Jennings *v.* Joiner, 1 Coldw. (Tenn.) 645.

72. Schroeppell *v.* Shaw, 3 N. Y. 446 [*affirming* 5 Barb. 580].

73. *Arkansas.*— King *v.* State Bank, 9 Ark. 185, 47 Am. Dec. 739.

Illinois.— Lyle *v.* Morse, 24 Ill. 95.

Indiana.— May *v.* Reed, 125 Ind. 199, 25 N. E. 216.

Kentucky.— Stout *v.* Ashton, 5 T. B. Mon. 251; Harrison *v.* Lane, 4 Bibb 466.

Maine.— Stowell *v.* Goodenow, 31 Me. 538.

Missouri.— Burge *v.* Duden, 105 Mo. App. 8, 78 S. W. 653.

Montana.— Hefferlin *v.* Krieger, 19 Mont. 123, 47 Pac. 638.

New York.— People *v.* White, 28 Hun 289; People *v.* Russell, 4 Wend. 570.

Pennsylvania.— Shaffstall *v.* McDaniel, 152 Pa. St. 598, 25 Atl. 576; Johnston *v.* Thompson, 4 Watts 446.

Virginia.— Alexander *v.* Byrd, 85 Va. 690, 8 S. E. 577. Failure for twenty-eight years to proceed against the principal, who was, during the most of that time, a man of means, did not relieve a surety, who was a poor man. Updike *v.* Lane, 78 Va. 132.

United States.— Smith *v.* U. S., 5 Pet. 292, 8 L. ed. 130.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 316, 317.

Appointment of receiver.— It is not a defense to a surety that, at the time he executed a note, the principal, a corporation, had personal property subject to execution in excess of the amount of the note, and that the holder of the note agreed to the appointment of a receiver for the corporation. Durbin *v.* Northwestern Scraper Co., 36 Ind. App. 123, 73 N. E. 297.

74. Cooley *v.* Lawrence, 4 Mart. (La.) 639; Eickhoff *v.* Eikenbary, 52 Nebr. 332, 72 N. W. 308; Townsend *v.* Riddle, 2 N. H. 448; Looney *v.* Hughes, 26 N. Y. 514 [*affirming* 30 Barb. 605].

Letting in junior judgments.—A surety is not discharged by delay in proceeding against the principal, although such neglect lets in junior judgments which take all of the principal's property. McGee *v.* Metcalf, 12 Sm. & M. (Miss.) 535, 51 Am. Dec. 122.

75. Shaeffer *v.* McKinstry, 8 Watts (Pa.) 258, holding that where the surety, an administrator, delayed in selling property, and the share which would have gone to the principal to be applied on the indebtedness went to the principal's children instead, the surety had not right to complain of the delay.

Injunction.—A surety cannot take advantage of a delay caused by his obtaining an injunction against the obligee from proceed-

the claim against the principal will not release a surety, although it occurs after suit has been instituted.[76] Delay in issuing execution after judgment has been obtained,[77] or a stay of execution,[78] does not discharge a surety, even if the principal disposes of his property meanwhile,[79] or it is destroyed,[80] or is discharged from the lien of the judgment.[81] Delay after a levy on the principal's property is not a defense to his surety,[82] although the principal avails himself of an adjournment of an execution sale to procure a release of his property as exempt.[83] Statutes, however, sometimes require the creditor or obligee to pursue the principal first; [84] but

ing against him. Commonwealth Bank *v.* Patterson, 4 B. Mon. (Ky.) 382.

Request of indorser for delay.— A delay for more than a year in suit against the maker has been held to be excused by the indorser's request and promise to "stand good for the amount." Davis *v.* Leitzman, 70 Ind. 275.

76. Butler *v.* Gambs, 1 Mo. App. 466.

Surety resisting prosecution.— Where the surety unites with the principal in resisting recovery, he cannot complain because the proceeding is not prosecuted more diligently against the principal. Kirtz *v.* Spaugh, Wils. (Ind.) 267; Creath *v.* Sims, 5 How. (U. S.) 192, 12 L. ed. 110.

A refusal of the creditor to proceed with an attachment against the principal, after a request by the surety unaccompanied by an offer of indemnity against costs and charges, is not a defense to the latter, although the principal afterward becomes insolvent. Bellows *v.* Lovell, 5 Pick. (Mass.) 307.

Where the judge refused to allow the action to be tried until later, a surety cannot set up the delay as a defense. Jones *v.* Allen, 85 Fed. 523, 29 C. C. A. 318.

77. *Alabama.*— Buckalew *v.* Smith, 44 Ala. 638; Sawyer *v.* Patterson, 11 Ala. 523.

Arkansas.—Wright *v.* Yell, 13 Ark. 503, 58 Am. Dec. 336.

Illinois.— Duer *v.* Morrill, 20 Ill. App. 355.

Missouri.— Patton *v.* Cooper, 84 Mo. App. 427.

North Carolina.— Charlotte First Nat. Bank *v.* Homesley, 99 N. C. 531, 6 S. E. 797.

Pennsylvania.—Mundorff *v.* Singer, 5 Watts 172.

Tennessee.— Grimes *v.* Nolen, 3 Humphr. 412.

See 40 Cent. Dig. tit. "Principal and Surety," § 324.

78. *Alabama.*—Summerhill *v.* Tapp, 52 Ala. 227; Hetherington *v.* Mobile Branch Bank, 14 Ala. 68.

Delaware.— Houston *v* Hurley, 2 Del. Ch. 247.

Georgia.— Lumsden *v.* Leonard, 55 Ga. 374.

Kentucky.— Stringfellow *v.* Williams, 6 Dana 236; Finn *v.* Stratton, 5 J. J. Marsh. 364.

Mississippi.— McMullen *v.* Hinkle, 39 Miss. 142; Union Bank *v.* Govan, 10 Sm. & M. 333.

Missouri.— Moss *v.* Craft, 10 Mo. 720.

New Hampshire.— Morrison *v.* Citizens' Nat. Bank, 65 N. H. 253, 20 Atl. 300, 23 Am. St. Rep. 39, 9 L. R. A. 282.

Pennsylvania.— Morrison *v.* Hartman, 14 Pa. St. 55; Griesmere *v.* Thorn, 32 Pa. Super. Ct. 13.

Tennessee.— McNeilly *v.* Cooksey, 2 Lea 39; Miller *v.* Porter, 5 Humphr. 294.

Texas.— Brown *v.* Chambers, 63 Tex. 131.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 261, 324.

A mere suspension of execution for several years without any binding agreement for doing so, and until the principal and all the sureties but one in the forthcoming bond become insolvent, does not discharge the solvent surety in equity. Alcock *v.* Hill, 4 Leigh (Va.) 622.

Abstaining from seizing the interest of the principal in a partnership does not furnish a ground for suspending execution against a surety until the value of such interest can be ascertained. Cunningham *v.* Buchanan, 10 Grant Ch. (U. C.) 523.

79. Jerauld *v.* Trippet, 62 Ind. 122; Koch *v.* Cornwell, (Tex. Civ. App. 1897) 40 S. W. 144; McKenny *v.* Waller, 1 Leigh (Va.) 434.

80. Thompson *v.* Robinson, 34 Ark. 44.

81. Lumsden *v.* Leonard, 55 Ga. 374.

82. State Bank *v.* Golden, 15 Ala. 616.

83. Lilly *v.* Roberts, 58 Ga. 363.

84. See the statutes of the several states.

In Georgia under Code, § 2154, delay in entering judgment against a principal until he becomes insolvent discharges his surety. Hayes *v.* Little, 52 Ga. 555.

In Indiana, under Rev. St. (1894) § 2468, the estate of a deceased surety is exempt from liability unless the principal is insolvent or a non-resident; but the claim may be allowed, notwithstanding insolvency be not proved, and the amount be paid into court, which the creditor afterward may obtain by proving insolvency. Tremain *v.* Severin, 16 Ind. App. 447, 45 N. E. 620.

In Kentucky St. § 4669, providing that a surety is discharged if execution against the principal be not taken out within one year, applies to the master commissioner; and execution against a surety can be enjoined if the master commissioner did not take out execution within one year on a sale bond if he had authority to take out execution (Bridgewater *v.* England, 62 S. W. 882, 23 Ky. L. Rep. 338); but a surety is not discharged if the master commissioner did not have authority to collect the bond without an order of court (Turner *v.* Eastin, 51 S. W. 567, 21 Ky. L. Rep. 380). Section 4568, requiring a creditor to issue execution against the principal upon notice by a surety, does not apply if one execution already has been issued. National Surety Co. *v.* Arterburn, 110 Ky. 832, 62 S. W. 862, 23 Ky. L. Rep. 281. Under 2 Rev. St. c. 97, § 11, a surety on a bond having the force of a judgment was released in

a general provision of law, or of a by-law, that a defaulting officer must be proceeded against, will not release his sureties, although such provision be ignored.[85] In equity, in some cases, the creditor may be required to exhaust his remedies against the principal first.[86] If the principal is dead, the creditor is not under any obligation to present his claim against his estate,[87] in the absence of a statute on this point;[88] but may allow the estate to be distributed among the principal's heirs without affecting the surety's liability.[89] The rule is the same in regard to the estate of an insolvent principal; the creditor is not obliged to have his claim

case plaintiff failed to issue execution within one year; but this did not apply to judicial bonds, the collection of which is controlled by the court. Rankin *v.* White, 3 Bush 545; Barbee *v.* Pitman, 3 Bush 259. But a surety on a bond executed to the clerk of the court for money in litigation loaned under order of court was discharged if the party to whom the fund was adjudged failed to issue execution within one year after judgment. Wintersmith *v.* Tabor, 5 Bush 105. The statute applied as well to the issuing of a second execution after one had already been sued on a replevin bond, as to the first. Commonwealth Bank *v.* Patterson, 2 B. Mon. 378. Where an execution against a principal was not levied, or a levy was postponed, without the consent of the surety, the latter was discharged unless he had property of the principal in his hands. Glass *v.* Thompson, 9 B. Mon. 235. Under the statute of 1838 a surety was discharged if execution was not taken out for seven years. "Sureties on judgments" means sureties on the securities on which the judgments were recovered. Bray *v.* Howard, 7 B. Mon. 467. And if seven years elapsed after an execution was taken out a surety was discharged. Craig *v.* Gresham, 12 B. Mon. 401; Daviess *v.* Womack, 8 B. Mon. 383; Bray *v.* Howard, *supra*.

In Louisiana, Rev. Civ. Code, art. 3066, provides that suit shall not be instituted against a surety on an appeal-bond, or on the bond of an administrator, tutor, curator, executor, or syndic, until steps have been taken to enforce payment against the principal; but the sureties for a surviving partner as liquidator may be sued without execution having been issued against the principal. Macready *v.* Schenck, 41 La. Ann. 456, 6 So. 517.

In Texas, Rev. St. (1895) art. 1204, provides that a surety may be sued without suing the principal, if the latter be a non-resident or is dead. Art. 3814 provides that when the principal and surety are sued together, the surety may have the property of the principal first sold; but if sureties have given a trust deed with the principal, and the latter is dead, the trust deed can be foreclosed against the sureties without postponement to foreclosure of a trust deed given by the principal alone. Planters', etc., Nat. Bank *v.* Robertson, (Civ. App. 1905) 86 S. W. 643. Under Rev. St. (1895) arts. 1256, 1257, where suit is discontinued against a principal obligor for want of service of process, judgment cannot be rendered against a surety unless the principal is insolvent; judgment against a surety without service on the principal, and without proof of his insolvency as alleged cannot be sustained. Welch *v.* Phelps, etc., Windmill Co., (Civ. App. 1896) 37 S. W. 175. To entitle a surety to the privilege given by statute of not being sued first, he must have contracted as such. Ennis *v.* Crump, 6 Tex. 85.

85. Nashville *v.* Knight, 12 Lea (Tenn.) 700; Wilks *v.* Heeley, 1 Cromp. & M. 249, 2 L. J. Exch. 51, 3 Tyrw. 291. Where the by-laws of a bank require the treasurer to notify the principal and sureties concerning dues unattended to, and to enforce prompt payment, the sureties on a note due to the bank are not discharged by neglect to take these steps. New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187.

86. See *infra*, IX, A, 2.

87. *Alabama.*—Darby *v.* Berney Nat. Bank, 97 Ala. 643, 11 So. 881; Minter *v.* Mobile Branch Bank, 23 Ala. 762, 58 Am. Dec. 315; Hooks *v.* Mobile Branch Bank, 8 Ala. 580; McBroom *v.* Governor, 6 Port. 32.

Iowa.— Jackson *v.* Benson, 54 Iowa 654, 7 N. W. 97.

Mississippi.— Johnson *v.* Planters' Bank, 4 Sm. & M. 165, 43 Am. Dec. 480.

New Hampshire.—Stevens *v.* Hood, 70 N. H. 177, 46 Atl. 29.

Pennsylvania.— Baker *v.* Small, 17 Pa. Super. Ct. 423.

Texas.— Willis *v.* Chowning, (1897) 40 S. W. 395; Merriwether *v.* Lewis, 2 Tex. 340; Planters', etc., Nat. Bank *v.* Robertson, (Civ. App. 1905) 86 S. W. 643.

See 40 Cent. Dig. tit. "Principal and Surety," § 326.

This is especially so if the surety admits that there are no funds in the hands of the principal's executor. Trimble *v.* Brichta, 11 La. Ann. 271.

A surety cannot require the creditor to wait until the principal's estate is settled. Morris *v.* McAnally, 3 Coldw. (Tenn.) 304.

88. In Illinois, under the act of March 4, 1869, a surety on a note, bond, or bill is discharged if it is not presented against the maker's estate within two years from granting letters of administration; and it is immaterial that the estate is insolvent. Tipton *v.* Carrigan, 10 Ill. App. 318. Unless it is impossible to realize anything. Watts *v.* Bolin, 86 Ill. App. 474. If a judgment of a county court against the estate of a deceased maker of a note shows that the claim was presented within two years, sureties who were not parties to the judgment may show that the claim was not so presented. Curry *v.* Mack, 90 Ill. 606.

89. Phœnix Mut. L. Ins. Co. *v.* Landis, 50 Mo. App. 116.

allowed, and to receive dividends,[90] although the assets might be sufficient to pay all claims in full.[91] If the surety's contract stipulates that the creditor shall proceed against the principal without delay, the surety is not liable unless such stipulation is complied with;[92] but an oral agreement cannot be shown to vary an absolute undertaking by the surety as shown in his written contract;[93] and an agreement by the creditor, without consideration, to proceed against the principal, is void.[94] A statute providing that no person shall be sued as surety unless suit shall have been or is simultaneously commenced against the principal, etc., has been confined by interpretation to a suit brought against a surety in his character as such, where his engagement defined his position to be that of a surety and is held not to extend to a case where the party has made himself principal by a joint and several obligation,[95] and the privilege of the surety is not matter in bar but in abatement only.[96]

2. Resort to Other Securities. The rule is that a surety is not released by delay on the part of the creditor in enforcing collateral security for the debt;[97] and the creditor or obligee is not required,[98] nor can he be compelled to resort to such

90. *Illinois.*— Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591.

Minnesota.— St. Louis County *v.* Duluth Security Bank, 75 Minn. 174, 77 N. W. 815.

Mississippi.— Clopton *v.* Spratt, 52 Miss. 251.

Ohio.— Dye *v.* Dye, 21 Ohio St. 86, 8 Am. Rep. 40.

Texas.— Levy *v.* Wagner, 29 Tex. Civ. App. 98, 69 S. W. 112.

See 40 Cent. Dig. tit. "Principal and Surety," § 327.

If a dividend has been paid, the balance may be collected from the sureties, although there is reasonable probability of another dividend. National Lead Co. *v.* Montpelier Hardware Co., 73 Vt. 119, 50 Atl. 809.

91. Krupp *v.* St. Martinus Ritter-Verein, 53 S. W. 648, 21 Ky. L. Rep. 938.

92. A surety is discharged by delay if the contract expressly stipulates that on the principal's default the creditor "may and shall proceed" against the principal. Walker *v.* Goldsmith, 7 Oreg. 161.

93. Hanchet *v.* Birge, 12 Metc. (Mass.) 545.

94. Pearson *v.* Gayle, 11 Ala. 278; Brown *v.* Flanders, 80 Ga. 209, 5 S. E. 92; Mendel *v.* Cairnes, 84 Ind. 141; Adams Bank *v.* Anthony, 18 Pick. (Mass.) 238.

95. Ennis *v.* Crump, 6 Tex. 85; Ritter *v.* Hamilton, 4 Tex. 325. See also Terrel *v.* Townsend, 6 Tex. 149.

96. Ritter *v.* Hamilton, 4 Tex. 325. See also Terrel *v.* Townsend, 6 Tex. 149.

97. Thorn *v.* Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; Clopton *v.* Spratt, 52 Miss. 251; Coe *v.* Cassidy, 72 N. Y. 133; Scott *v.* Stockwell, 65 How. Pr. (N. Y.) 249.

98. *Arkansas.*— Maledon *v.* Leflore, 62 Ark. 387, 35 S. W. 1102.

Colorado.— Day *v.* McPhee, 41 Colo. 467, 93 Pac. 670.

Idaho.— Lewiston First Nat. Bank *v.* Williams, 2 Ida. (Hasb.) 670, 23 Pac. 552.

Illinois.— Penny *v.* Crane Bros. Mfg. Co., 80 Ill. 244.

Indiana.— Presbyterian Bd. of Publication, etc., *v.* Gilliford, 139 Ind. 524, 38 N. E. 404; Brown *v.* Brown, 17 Ind. 475; Jones *v.* Tincher, 15 Ind. 308, 77 Am. Dec. 92.

Kentucky.— Cromwell *v.* Rankin, 97 S. W. 415, 30 Ky. L. Rep. 123.

Maryland.—Warner *v.* Williams, 93 Md. 517, 49 Atl. 559; Brengle *v.* Bushey, 40 Md. 141, 17 Am. Rep. 586.

Massachusetts.— Olds *v.* City Trust, etc., Co., 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356; Allen *v.* Woodard, 125 Mass. 400, 28 Am. Rep. 250; Sigourney *v.* Wetherell, 6 Metc. 553.

Michigan.—Webber *v.* Webber, 109 Mich. 147, 66 N. W. 960.

Mississippi.— Wade *v.* Staunton, 5 How. 631.

Missouri.— Roberts *v.* Jeffries, 80 Mo. 115; Aultman, etc., Co. *v.* Smith, 52 Mo. App. 351; English *v.* Seibert, 49 Mo. App. 563; Callaway County Sav. Bank *v.* Terry, 13 Mo. App. 99.

Nebraska.— See Haas *v.* Bank of Commerce, 41 Nebr. 754, 60 N. W. 85.

New Jersey.— Freehold Nat. Banking Co. *v.* Brick, 37 N. J. L. 307.

New York.— Buffalo First Nat. Bank *v.* Wood, 71 N. Y. 405, 27 Am. Rep. 66; Queens County Bank *v.* Leavitt, 10 N. Y. Suppl. 194; Warner *v.* Beardsley, 3 Wend. 194; Leonard *v.* Giddings, 9 Johns. 355; Campbell *v.* Macomb, 4 Johns. Ch. 534.

Ohio.— Stone *v.* Rockefeller, 29 Ohio St. 625.

Pennsylvania.— Ege *v.* Barnitz, 8 Pa. St. 304; Geddis *v.* Hawk, 1 Watts 280.

Rhode Island.— Thurston *v.* James, 6 R. I. 103.

South Dakota.— Bennett *v.* Ellis, 13 S. D. 401, 83 N. W. 429.

Tennessee.— Cherry *v.* Miller, 7 Lea 305; Miller *v.* Knight, 7 Baxt. 127.

Texas.— Walker *v.* Collins, 22 Tex. 189; Cruger *v.* Burke, 11 Tex. 694; Maryland Fidelity, etc., Co. *v.* Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871.

Vermont.— Austin *v.* Curtis, 31 Vt. 64; Rutland Bank *v.* Thrall, 6 Vt. 237.

West Virginia.— Armstrong *v.* Poole, 30 W. Va. 666, 5 S. E. 257, where it is held that the only exception to the rule that the creditor cannot be required to first resort to

security,[99] or to any other means in his power to enforce the payment of his claim,[1] even though the principal become insolvent,[2] or the security eventually is lost.[3]

other securities is where a resort to equity is necessary to obtain payment of a debt, and both principal and surety are parties to the suit, and then the court will compel the creditor to pursue the principal debtor first, and exhaust his estate before selling the property of the surety, unless to do so will, in the opinion of the court, unduly delay the creditor in the collection of his debt.

United States.— Osborne *v.* Smith, 18 Fed. 126, 5 McCrary 487.

England.— Morley *v.* Inglis, 6 Dowl. P. C. 202, 3 Hodges 270, 4 Bing. N. Cas. 58, 5 Scott 314, 33 E. C. L. 595.

See 40 Cent. Dig. tit. "Principal and Surety," § 475.

If the creditor be willing to make substitution, the mere fact of his holding other securities against the principal is not a cause for delaying the collection of the debt from the surety. Warner *v.* Beardsley, 8 Wend. (N. Y.) 194.

A surety who undertakes to pay rent unqualifiedly upon the tenant's default, etc., cannot require the landlord to distrain. Brooks *v.* Carter, 36 Ala. 682; Hall *v.* Hoxsey, 84 Ill. 616; Ledoux *v.* Jones, 20 La. Ann. 539; Ruggles *v.* Holden, 3 Wend. (N. Y.) 216 [*distinguishing* King *v.* Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; Pain *v.* Packard, 13 Johns. (N. Y.) 174, 7 Am. Dec. 392]. So under such a promise by a surety it is held that the landlord's right to seize a crop for the enforcement of a statutory lien is not compulsory. Miller *v.* White, 25 S. C. 235.

99. *Alabama.*— Haden *v.* Brown, 18 Ala. 641; Montgomery Branch Bank *v.* Perdue, 3 Ala. 409.

Florida.— Bradford *v.* Marvin, 2 Fla. 463.

Indiana.— Brown *v.* Brown, 17 Ind. 475; Jones *v.* Tincher, 15 Ind. 308, 77 Am. Dec. 92.

Louisiana.— New Orleans Canal, etc., Co. *v.* Escoffie, 2 La. Ann. 830.

Maryland.— Freaner *v.* Yingling, 37 Md. 491.

Massachusetts.— Allen *v.* Woodard, 125 Mass. 400, 28 Am. Rep. 250.

Missouri.— Roberts *v.* Jeffries, 80 Mo. 115; Aultman, etc., Co. *v.* Smith, 52 Mo. App. 351; Callaway County Sav. Bank *v.* Terry, 13 Mo. App. 99.

Nebraska.— Myers *v.* Farmers' State Bank, 53 Nebr. 824, 74 N. W. 252.

New Jersey.— Freehold Nat. Banking Co. *v.* Brick, 37 N. J. L. 307.

New York.— Black River Bank *v.* Page, 44 N. Y. 453; Queens County Bank *v.* Leavitt, 10 N. Y. Suppl. 194.

Oregon.— Rockwell *v.* Portland Sav. Bank, 39 Oreg. 241, 64 Pac. 388.

Pennsylvania.— Geddis *v.* Hawk, 1 Watts 280 [*overruling* Hawk *v.* Geddis, 16 Serg. & R. 23]; American Mechanics' Bldg., etc., Assoc. *v.* Dunlap, 20 Lanc. L. Rev. 59.

Vermont.— Rutland Bank *v.* Thrall, 6 Vt. 237.

Canada.— Montreal Bank *v.* Davy, 21 U. C. C. P. 179.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 320, 330.

Security as counter-claim.— In an action on an appeal-bond, a pledge given to secure the debt for which the judgment appealed from was rendered is not available to the sureties as a counter-claim. Sterne *v.* Talbott, 89 Hun (N. Y.) 368, 35 N. Y. Suppl. 412.

Where other parties claim securities held by the creditor, and such other parties are not in court, the securities cannot be applied to the payment of the indebtedness. Klopp *v.* Lebanon Valley Bank, 39 Pa. St. 489.

1. Brooks *v.* Carter, 36 Ala. 682; Sheldon *v.* Williams, 11 Nebr. 272, 9 N. W. 86; Leonard *v.* Giddings, 9 Johns. (N. Y.) 355; Miller *v.* White, 25 S. C. 235.

Illustrations.— Thus a lessor is not required to enforce his lien (Ledoux *v.* Jones, 20 La. Ann. 539; Parker *v.* Alexander, 2 La. Ann. 188), nor to distrain (Brooks *v.* Carter, 36 Ala. 682; Hall *v.* Hoxsey, 84 Ill. 616; Ruggles *v.* Holden, 3 Wend. (N. Y.) 216). A landlord is not compelled to seize his tenant's crops. Miller *v.* White, 25 S. C. 235. The federal government is not required to distrain on goods and so collect the tax due from a tobacco manufacturer. U. S. *v.* Barrowcliff, 24 Fed. Cas. No. 14,528, 3 Ben. 519. An unpaid seller is not required to retake possession of the goods before resorting to the surety for the price. Webster *v.* Smith, 4 Ind. App. 44, 30 N. E. 139; Sheldon *v.* Williams, 11 Nebr. 272, 9 N. W. 86. A surety cannot compel the creditor or obligee to attach the property of the principal before proceeding against the surety (Hickok *v.* Farmers', etc., Bank, 35 Vt. 476; Davis *v.* Patrick, 57 Fed. 909, 6 C. C. A. 632), especially if legal grounds for attachment are not shown (Thompson *v.* Robinson, 34 Ark. 44). It is not a defense to a surety that plaintiff has a remedy against other persons for his claim. Leonard *v.* Giddings, 9 Johns. (N. Y.) 355. A materialman can recover from the sureties of a contractor for materials furnished for a public school, although the school board has funds on hand to pay for them. People's Lumber Co. *v.* Gillard, 136 Cal. 55, 68 Pac. 576. Sureties of a United States marshal cannot urge, when sued by the district attorney for his compensation, that the latter's claim against the United States is unimpaired. Dick *v.* Reynolds, 4 Mart. N. S. (La.) 525.

2. Miller *v.* Knight, 7 Baxt. (Tenn.) 127.

3. Souter *v.* Southwestern Georgia Bank, 94 Ga. 713, 20 S. E. 111; Lumsden *v.* Leonard, 55 Ga. 374; Ledoux *v.* Jones, 20 La. Ann. 539; Bardwell *v.* Witt, 42 Minn. 468, 44 N. W. 983; Schroeppell *v.* Shaw, 3 N. Y. 446 [*affirming* 5 Barb. 580]. *Compare* Russell *v.* Weinberg, 2 Abb. N. Cas. (N. Y.) 422 [*affirmed* in 4 Abb. N. Cas. 139], holding that if the surety requests the creditor to enforce the security, and it is sufficient, the surety is discharged if it afterward depreciates.

The surety, however, will not be liable until security has been exhausted if he has made that an express term in his contract;[4] or if there is a statutory requirement to that effect.[5] If the creditor has two or more securities, he is at liberty to resort to either,[6] and cannot be required to realize on any particular security first;[7] nor can he be required to take and apply security held by the surety,[8] or to wait until the surety realizes on it.[9] A court of equity, however, will in some cases require the creditor to resort to security given to him by the principal.[10]

3. Notice to Sue — a. In General. In most jurisdictions, under the common law, a surety cannot, by notice, impose any burden upon the creditor to proceed against the principal, nor will the surety be discharged by the creditor's failure to do so,[11] even, in some jurisdictions, although the principal afterward became

4. Dussol *v.* Bruguiere, 50 Cal. 456; Packard *v.* Herrington, 41 Kan. 469, 21 Pac. 621 (holding that if a surety sign a note under an agreement with the creditor that the former is not, in any event, to be liable for more than the difference between the note and the value of security held by the latter, such difference is the limit of his liability); Musket *v.* Rogers, 5 Bing. N. Cas. 728, 8 L. J. C. P. 354, 8 Scott 51, 35 E. C. L. 388 (holding, however, that where the creditor is under a contractual duty to enforce security before proceeding against a surety, he is not required to attempt to enforce payment of a bill by a party who is totally insolvent). In Monsell *v.* Mitchell, 23 U. C. Q. B. 116, where it was agreed between the creditor and the surety that mortgaged lands of the principal should be sold before the surety should be called upon, it was held that the surety was entitled, at the most, to a temporary injunction until a sale of the premises. A promise by the principal to his surety that payment would be made out of the proceeds of certain property does not affect the creditor if the latter was not a party to the agreement. Sigler *v.* Booze, 65 Mo. App. 555.

Liability limited to deficiency after foreclosure.— Where by the terms of a bond the limit of the surety's liability was the deficiency after foreclosure and sale of mortgaged premises under a second sale, it was held that such foreclosure sale was a condition precedent to the right to recover against the surety, although the property had been sold under a prior mortgage for its full value. Beebe *v.* Canney, 52 Minn. 491, 55 N. W. 61.

5. See the statutes of the various states.

In Idaho, under Rev. St. § 4520, "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage," and in such action the proceeds of the property are to be applied on the debt, and judgment given for the balance, if any. If the principal has given a mortgage to secure his indebtedness, an action cannot be maintained against the principal and surety, ignoring the mortgage. Lewiston First Nat. Bank *v.* Williams, 2 Ida. (Hasb.) 670, 22 Pac. 552.

In England, under 43 Geo. III, c. 99, § 9, the seizure and sale of land and goods owned by a collector was a condition precedent to a suit against his sureties, provided the obligees had knowledge thereof. Gwynne *v.* Burnell, 6 Bing. N. Cas. 453, 37 E. C. L. 713, 7 Cl. & F. 572, 7 Eng. Reprint 1188, 1 Scott N. R. 711, West 342, 9 Eng. Reprint 522. And the sureties must show that there was property of the principal which could have been seized. Wilks *v.* Heeley, 1 Cromp. & M. 249, 2 L. J. Exch. 51, 3 Tyrw. 291.

6. Sather Banking Co. *v.* Arthur R. Briggs Co., 138 Cal. 724, 72 Pac. 352.

7. Haas *v.* Bank of Commerce, 41 Nebr. 754, 60 N. W. 85. Where a note is pledged by the payee as collateral security, the maker, on the insolvency of the payee, cannot compel the pledgee to realize on other securities first, so that the maker may avail himself of a set-off against the payee, even though the maker is a surety for the pledgee's claim. Dallemand *v.* Nova Scotia Bank, 54 Ill. App. 600.

8. Stone *v.* Hammell, (Cal. 1889) 22 Pac. 203; Glasscock *v.* Hamilton, 62 Tex. 143; McLaughlin *v.* Potomac Bank, 7 How. (U. S.) 220, 12 L. ed. 675; Curry *v.* McCauley, 11 Fed. 365.

9. Rutledge *v.* Greenwood, 2 Desauss. Eq. (S. C.) 389.

10. See *infra*, IX, A, 2.

11. *California.*— Dane *v.* Corduan, 24 Cal. 157, 85 Am. Dec. 53; Hartman *v.* Burlingame, 9 Cal. 557.

Delaware.—Wilds *v.* Attix, 4 Del. Ch. 253.

Illinois.— Taylor *v.* Beck, 13 Ill. 376.

Indiana.— Halstead *v.* Brown, 17 Ind. 202.

Maine.— Eaton *v.* Waite, 66 Me. 221; Leavitt *v.* Savage, 16 Me. 72.

Maryland.— Freaner *v.* Yingling, 37 Md. 491.

Massachusetts.— Adams Bank *v.* Anthony, 18 Pick. 238; Bellows *v.* Lovell, 5 Pick. 307; Frye *v.* Barker, 4 Pick. 382.

Minnesota.— Benedict *v.* Olson, 37 Minn. 431, 35 N. W. 10.

Mississippi.— Kerr *v.* Baker, Walk. 140.

Missouri.— State *v.* Reynolds, 3 Mo. 95.

Nebraska.— Maywood Bank *v.* McAllister, 56 Nebr. 188, 76 N. W. 552.

New Hampshire.— Davis *v.* Huggins, 3 N. H. 231.

New Jersey.— Pintard *v.* Davis, 21 N. J. L. 632, 47 Am. Dec. 172 [*affirming* 20 N. J. L. 205].

New York.— Wells *v.* Mann, 45 N. Y. 327, 6 Am. Rep. 93 [*reversing* 52 Barb. 263]; Huffman *v.* Hulbert, 13 Wend. 377; Row *v.* Pulver, 1 Cow. 246; Valentine *v.* Farrington, 2 Edw. 53. *Compare* King *v.* Baldwin, 2

insolvent;[12] but statutes have been enacted in most of the states, giving the surety the right to require the creditor to bring suit against the principal, and releasing the surety upon the creditor's failure to comply with such notice,[13] unless the

Johns. Ch. 554 [*reversed* in 17 Johns. 384, 8 Am. Dec. 415].

Ohio.— Washburn *v.* Holmes, Wright 67.

Oregon.— White *v.* Savage, 48 Oreg. 604, 87 Pac. 1040; Findley *v.* Hill, 8 Oreg. 247, 34 Am. Rep. 578.

Pennsylvania.— Dehuff *v.* Turbett, 3 Yeates 157; American Mechanics Bldg., etc., Assoc. *v.* Dunlap, 20 Lanc. L. Rev. 59.

South Carolina.— Pickett *v.* Land, 2 Bailey 608; Caston *v.* Dunlap, Rich. Eq. Cas. 77, 23 Am. Dec. 194; Rutledge *v.* Greenwood, 2 Desauss. Eq. 389.

Vermont.— Hickok *v.* Farmers', etc., Bank, 35 Vt. 476; Hogaboom *v.* Herrick, 4 Vt. 131.

Virginia.— Croughton *v.* Duval, 3 Call 69.

Wisconsin.— Harris *v.* Newell, 42 Wis. 687.

United States.— Dennis *v.* Rider, 7 Fed. Cas. No. 3,797, 2 McLean 451.

See 40 Cent. Dig. tit. "Principal and Surety," § 329 *et seq.*

Discontinuance of a suit commenced against the principal after notice to the creditor from the surety does not discharge the latter. Manning *v.* Shotwell, 5 N. J. L. 584, 8 Am. Dec. 622.

A refusal by a landlord, at the demand of a surety in June, to dispossess a tenant who was not in default nor insolvent, although the surety offers to pay the costs and an increased rental, will not discharge the surety from liability for the November and December rent. Raved *v.* Kibbe, 102 N. Y. Suppl. 490.

Under Minn. Comp. St. c. 72, § 35, providing that an action may be brought by one against two or more persons for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as surety, does not give a surety any right to require the creditor to enforce the debt against the principal, but merely gives the surety himself the right to bring suit to compel the principal to pay the creditor. Huey *v.* Pinney, 5 Minn. 310.

12. Smith *v.* Fryler, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358; Morrison *v.* Equitable Nat. Bank, 9 Ohio S. & C. Pl. Dec. 31, 6 Ohio N. P. 7.

Contra.— In other states a surety is discharged if the creditor fails to sue the principal after a request to do so, and the principal afterward becomes insolvent. Dampskibsaktieselksbet Habil *v.* U. S. Fidelity, etc., Co., 142 Ala. 363, 39 So. 54; Pickens *v.* Yarborough, 26 Ala. 417, 62 Am. Dec. 728; Goodman *v.* Griffin, 3 Stew. (Ala. 160; Herbert *v.* Hobbs, 3 Stew. (Ala.) 9; Bruce *v.* Edwards, 1 Stew. (Ala.) 11, 18 Am. Dec. 33; Kendall *v.* Milligan, (Ark. 1896) 34 S. W. 78; Martin *v.* Skehan, 2 Colo. 614; Colgrove *v.* Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Herrick *v.* Borst, 4 Hill (N. Y.) 650; Albany Dutch Church *v.* Vedder, 14 Wend. (N. Y.) 165; Manchester Iron Mfg. Co. *v.* Sweeting, 10 Wend. (N. Y.) 162; Fulton *v.* Matthews, 15 Johns. (N. Y.) 433, 8 Am. Dec. 261; Pain *v.* Packard, 13 Johns. (N. Y.) 174, 7 Am. Dec. 369; Gardner *v.* Ferree, 15 Serg. & R. (Pa.) 28, 16 Am. Dec. 513; Cope *v.* Smith, 8 Serg. & R. (Pa.) 110, 11 Am. Dec. 582; Kemmerer *v.* Yoder, 1 Woodw. (Pa.) 41; Hopkins *v.* Spurlock, 2 Heisk. (Tenn.) 152. But the surety is not discharged if the principal was insolvent at the time of giving notice; and the surety must show that the principal was solvent. Hunt *v.* Purdy, 82 N. Y. 486, 37 Am. Rep. 587; Marsh *v.* Dunckel, 25 Hun (N. Y.) 167; Thompson *v.* Hall, 45 Barb. (N. Y.) 214; Merritt *v.* Lincoln, 21 Barb. (N. Y.) 249; Herrick *v.* Borst, *supra*; Warner *v.* Beardsley, 8 Wend. (N. Y.) 194. It is not sufficient that this particular debt might have been collected. Herrick *v.* Borst, *supra*. If, in addition, the creditor offers to allow the surety to proceed against the principal by attachment, the surety has no ground for discharge. Warner *v.* Beardsley, *supra*. The surety, in giving notice to the creditor, is not required to inform him of facts suggesting the probability that delay would be injurious to the surety. Remsen *v.* Beekman, 25 N. Y. 552; King *v.* Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415. Oral notice is sufficient. Strader *v.* Houghton, 9 Port. (Ala.) 334; Bruce *v.* Edwards, 1 Stew. (Ala.) 11, 18 Am. Dec. 33. In some states the notice must be accompanied by an offer to indemnify the creditor. Huey *v.* Pinney, 5 Minn. 310. But a tender of expenses is not requisite unless the creditor expressly puts his refusal to sue the principal on the ground of the trouble and expense. Wetzel *v.* Sponsler, 18 Pa. St. 460. Evidence of giving notice to the creditor must be clear. Conrad *v.* Foy, 68 Pa. St. 381; Wolleshlare *v.* Searles, 45 Pa. St. 45. The creditor is not obliged to proceed against the principal if the latter is beyond the jurisdiction. Warner *v.* Beardsley, 8 Wend. (N. Y.) 194; Boyd *v.* Com., 36 Pa. St. 355. The words "*nulla bona*" are not a sufficient return to a writ of execution to authorize proceedings against a surety, since such words signify merely want of goods whereon the officer could levy; while to authorize proceedings against a surety, the return should be of "no property found." Woodward *v.* Harbin, 1 Ala. 104.

13. See the statutes of the several states.

In Arkansas, by statute, unless the holder of a bond brought suit within thirty days after notice, a surety thereon could plead his exoneration at law, or he might obtain relief in equity. Hempstead *v.* Watkins, 6 Ark. 317, 42 Am. Dec. 696; State Bank *v.* Watkins, 6 Ark. 123.

In Indiana a surety on a promissory note that is due, apprehending the insolvency or removal of the principal, could require the holder to sue. Reid *v.* Cox, 5 Blackf. 312; Varnum *v.* Milford, 28 Fed. Cas. No. 16,890,

principal was insolvent at the time notice was given,[14] or becomes insolvent before the creditor can collect by process;[15] and the burden is on the creditor to show that action would have been unavailing.[16] The creditor is excused likewise if the principal be a non-resident,[17] even though the latter have property in the state which might be subjected to the payment of the debt;[18] and the burden is on the surety to prove that the principal is within the jurisdiction.[19] If the creditor, being ignorant of the principal's residence, shows that he has exercised reasonable diligence to ascertain it, but without effect, the surety remains liable.[20] Death of the principal is considered a removal from the jurisdiction of the court, and the creditor is not required, under the statute, to present his claim against the deceased principal's estate.[21]

b. Persons Entitled to Give. As the right of a surety in any state to compel suit against his principal is generally controlled by the statute of that state, it follows that the extent of such right, in a particular state, must be ascertained by reference to the statute; and it varies in different states. However, there is considerable similarity in the statutes, and certain general principles run through all

2 McLean 74. And see Overturf *v.* Martin, 2 Ind. 507.

In Iowa, under Code (1873), §§ 2108, 2109, a surety is discharged if the creditor refuses to bring suit on a matured claim, or to permit the surety to do so, for ten days after request from the surety. Dorothy *v.* Hicks, 63 Iowa 240, 18 N. W. 909. And it is immaterial whether the surety has been injured. Shenandoah Nat. Bank *v.* Ayres, 87 Iowa 526, 54 N. W. 367. The Revision (1860), §§ 1819, 1820, contained a similar provision. Piper *v.* Newcomer, 25 Iowa 221; Newton First Nat. Bank *v.* Smith, 25 Iowa 210.

In Kansas the surety is not discharged unless the creditor refuses to allow the former to bring suit in the latter's name. Ingels *v.* Sutliff, 36 Kan. 444, 13 Pac. 828; Turner *v.* Hale, 8 Kan. 38.

In Mississippi, under Code (1857), pp. 362, 363, the defense was as effectual at law as in equity. Smith *v.* Clopton, 48 Miss. 66.

In West Virginia, a plea under Code, c. 101, was a sufficient defense. Gillilan *v.* Ludington, 6 W. Va. 128.

Failure to arrest principal.—A refusal of the obligee to arrest the principal for embezzlement, when so instructed by a surety, would not discharge the latter under Act March 28, 1840, No. 117. Cougot *v.* Fournier, 4 Rob. (La.) 420.

The statute is cumulative in those states where the right of the surety to require the creditor to proceed against the principal was recognized prior to the enactment of the statute, and does not abrogate the common-law rule, or the remedy in equity. Howle *v.* Edwards, 97 Ala. 649, 11 So. 748; Goodman *v.* Griffin, 3 Stew. (Ala.) 160; Herbert *v.* Hobbs, 3 Stew. (Ala.) 9; Bruce *v.* Edwards, 1 Stew. (Ala.) 11, 18 Am. Dec. 33; Hancock *v.* Bryant, 2 Yerg. (Tenn.) 476; Denny *v.* Sayward, 10 Wash. 422, 39 Pac. 119.

An assignor cannot be held liable by his assignee after the latter has released a surety by failure to sue. Hurst *v.* Chambers, 12 Bush (Ky.) 155.

Waiver of the surety's statutory right does not result from a provision in a note that an extension of time of payment, with or without the knowledge of the sureties, should not release them. School Trustees *v.* Southard, 31 Ill. App. 359.

Supplemental surety not discharged if no request.—A surety on a collateral note given to indemnify a surety on another note is not discharged because the latter did not give the statutory notice to his creditor, there not having been any request from the former surety to do so. Dennis *v.* Piper, 21 Ill. App. 169.

14. Pittman *v.* Chisolm, 43 Ga. 442; Graham *v.* Rush, 73 Iowa 451, 35 N. W. 518; Bizzell *v.* Smith, 17 N. C. 27; Robertson *v.* Angle, (Tex. Civ. App. 1903) 76 S. W. 317. *Contra,* Overturf *v.* Martin, 2 Ind. 507; Reid *v.* Cox, 5 Blackf. (Ind.) 312; Meriden Silver Plate Co. *v.* Flory, 44 Ohio St. 430, 7 N. E. 753.

15. Weiler *v.* Hoch, 25 Pa. St. 525.

16. Strickler *v.* Burkholder, 47 Pa. St. 476.

17. Rowe *v.* Buchtel, 13 Ind. 381; Phillips *v.* Riley, 27 Mo. 386; Bostwick *v.* Norwalk Nat. Bank, 13 Ohio Cir. Ct. 675, 6 Ohio Cir. Dec. 682; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156. *Contra,* Hayward *v.* Fullerton, 75 Iowa 371, 39 N. W. 651; Meriden Silver Plate Co. *v.* Flory, 44 Ohio St. 430, 7 N. E. 753. Where two makers of a note live in different counties so that they cannot be joined in an action before a justice of the peace, and one of them is a surety, the payee is not compelled to sue on notice from the surety. Hughes *v.* Gordon, 7 Mo. 297.

18. Hightower *v.* Ogletree, 114 Ala. 94, 21 Co. 934; Conklin *v.* Conklin, 54 Ind. 289. *Contra,* Hancock *v.* Bryant, 2 Yerg. (Tenn.) 476.

19. Hightower *v.* Ogletree, 114 Ala. 94, 21 So. 934; Petty *v.* Cleveland, 2 Tex. 404.

20. Cox *v.* Jeffries, 73 Mo. App. 412.

21. Hickam *v.* Hollingsworth, 17 Mo. 475; Davis *v.* Gillilan, 71 Mo. App. 498; Scott *v.* Dewees, 2 Tex. 153.

In Indiana, the estate of the deceased principal being sufficient to pay his debts, the

of them.[22] The statutory notice, as well as the notice allowed in some states in the absence of a statute, must be given by the surety himself,[23] or by one with authority,[24] such as an agent,[25] or the personal representative of a deceased surety.[26] It is not requisite that the relation shall appear from the instrument,[27] or even that the creditor shall have had knowledge of the relation at the time the liability was created.[28] The statute in most states restricts the privilege of giving notice to sureties on certain designated contracts.[29] It does not extend to involuntary sureties,[30] and the relation must have existed at the inception of the contract.[31] Generally an indorser cannot claim the privilege,[32] unless the indorsement was for the purpose of security merely;[33] but it has been held that an accommodation accepter can avail himself of it.[34] An indemnified surety is denied the privilege, as he has no equities;[35] but a surety's right is not taken away by the fact of his having had dealings with the creditor.[36]

c. To Whom Notice May Be Given. If there are two creditors, notice must be given to both.[37] Notice served on the person having the legal title is sufficient without seeking an equitable owner;[38] and generally notice may be addressed to the holder of the instrument whether he holds it for collection[39] or as collateral security.[40] Notice to an agent or attorney will not suffice if the authority of such agent or attorney to receive it does not appear,[41] even though the notice is in fact

surety is discharged if the creditor, after notice, fails to present his claim. Daily *v.* Robinson, 86 Ind. 382. And the surety must show that the principal left an estate in the state, and that administration has been had. Whittlesey *v.* Heberer, 48 Ind. 260.

22. See the statutes of the several states.

23. Geddis *v.* Hawk, 10 Serg. & R. (Pa.) 33, holding that notice to an administrator of an obligee by the guardian of one of his heirs is insufficient.

24. Conrad *v.* Foy, 68 Pa. St. 381.

If a female surety afterward marries, notice given by her husband is sufficient. Medley *v.* Tandy, 85 Ky. 566, 4 S. W. 308, 9 Ky. L. Rep. 168.

25. Wetzel *v.* Sponsler, 18 Pa. St. 460, holding that a general agent who transacts all the business of a surety can give notice without special instructions to that effect.

26. O'Howell *v.* Kirk, 41 Mo. App. 523.

27. Ward *v.* Stout, 32 Ill. 399; Hamrick *v.* Barnett, 1 Ind. App. 1, 27 N. E. 106; Meriden Silver Plate Co. *v.* Flory, 44 Ohio St. 430, 7 N. E. 753. *Contra,* Terrel *v.* Townsend, 6 Tex. 149; *In re* Babcock, 2 Fed. Cas. No. 696, 3 Story 393.

28. O'Howell *v.* Kirk, 41 Mo. App. 523.

29. Thus in Alabama, Laws (1821), c. 26, § 5, did not include the parties in a joint and several sealed bill. Ellis *v.* Jones, 1 How. (U. S.) 197, 11 L. ed. 100. In Arkansas a bond given to a municipal corporation to secure money to be paid by a public weigher is within Mansfield Dig. §§ 6398-6400. Monticello *v.* Cohn, 48 Ark. 254, 3 S. W. 30. In Illinois and Missouri, the application of the statute is restricted to bonds, bills, and notes for the payment of money or for the delivery of property. Taylor *v.* Beck, 13 Ill. 376; Ætna Ins. Co. *v.* Monaghan, 38 Mo. 432. In Missouri Wagner's St. p. 1302, §§ 1, 2, has no reference to obligations given for public uses, where the duty to bring suit devolves upon state or county officers. Johnson County *v.* Gilkeson, 70 Mo. 645; Jasper County *v.* Shanks, 61 Mo. 332; Cedar County *v.* Johnson, 50 Mo. 225.

30. Fish *v.* Glover, 154 Ill. 86, 39 N. E. 1081 [*affirming* 51 Ill. App. 566].

31. Fensler *v.* Prather, 43 Ind. 119.

32. Boatmen's Sav. Bank *v.* Johnson, 24 Mo. App. 316.

33. Bailey Loan Co. *v.* Seward, 9 S. D. 326, 69 N. W. 58; Williams *v.* Ogg, etc., Lumber Co., 94 S. W. 420, 42 Tex. Civ. App. 558.

34. Van Alstyne *v.* Sorley, 32 Tex. 518.

35. Wilson *v.* Tebbetts, 29 Ark. 579, 21 Am. Rep. 165; Bailey *v.* New, 29 Ga. 214.

36. Hayward *v.* Fullerton, 75 Iowa 371, 39 N. W. 651 (holding that the right of a surety on a note to require the holder to bring suit against the principal is not lost because the surety made a payment, and indorsed, on the note, an extension of time for the payment of the balance); Newton First Nat. Bank *v.* Smith, 25 Iowa 210 (holding that a surety's right is not affected because he is a director in the bank which is the creditor).

37. Kelly *v.* Matthews, 5 Ark. 223.

38. Gillilan *v.* Ludington, 6 W. Va. 128.

39. If the creditor has left the neighborhood, placing the obligation in the hands of an agent or attorney for collection, the request may be addressed to such agent or attorney. Wetzel *v.* Sponsler, 18 Pa. St. 460. If a creditor receives notes under a special agreement by which he is not to sue, but to collect in any other mode, notice may be given to him by one ignorant of the limitation of his powers. Pickens *v.* Yarborough, 26 Ala. 417, 62 Am. Dec. 728.

40. McCrary *v.* King, 27 Ga. 26.

41. Cummins *v.* Garretson, 15 Ark. 132; Driskill *v.* Washington County, 53 Ind. 532; Sapington *v.* Jeffries, 15 Mo. 628.

Notice to the counsel of an absent or nonresident plaintiff in a judgment is sufficient. Thomas *v.* Mann, 28 Pa. St. 520.

Notice to spouse.—Notice to a husband or

communicated to the creditor;[42] and generally notice to a public officer will not release a surety.[43]

d. Time For Giving. Notice cannot be given before a cause of action accrues to the creditor;[44] nor before the amount due has been ascertained;[45] nor can the creditor, after recovering judgment against all on whom he could get service of process, be required to bring another suit.[46]

e. Sufficiency in General. As the statute is in derogation of common law, it must be complied with strictly; and if it prescribes the manner in which notice shall be given, it must be followed to effect the surety's release;[47] but if the creditor, knowing that the surety is about to give him notice, by his conduct prevents its being given, the surety is discharged if the principal afterward becomes insolvent.[48]

f. Form. The statutes generally call for a written notice, and in such case an oral one will not operate as a release of the surety;[49] but as the requirement as to writing is a personal privilege of the creditor, it may be waived by him,[50] which waiver may be either in express terms,[51] or implied, as where the creditor accepts oral notice and promises compliance therewith.[52] Written notice is not waived

wife of the creditor is not sufficient. Shimer *v.* Jones, 47 Pa. St. 268; Hellen *v.* Bryson, 40 Pa. St. 472. But in McCoy *v.* Lockwood, 71 Ind. 319, where the surety, in addition to leaving notice with the wife of the creditor, with a request to deliver it to her husband, afterward informed the creditor of the leaving of the notice, and of its contents, the service was held to be sufficient.

42. Adams *v.* Roane, 7 Ark. 360; Bartlett *v.* Cunningham, 85 Ill. 22; Shimer *v.* Jones, 47 Pa. St. 268.

43. School Trustees *v.* Southard, 31 Ill. App. 359 (holding that notice to the treasurer of the board of trustees for a school fund is not notice to the board); Davis *v.* Snead, 33 Gratt. (Va.) 705 (holding that a person appointed as commissioner to sell lands under a decree of court and to take bonds for the purchase-money is not a "creditor" within the meaning of Code (1873), c. 143, §§ 4, 5.

Notice to levying officer.— After judgment has been obtained against the surety and principal jointly, a direction to the officer to proceed to collect the debt as soon as possible, and a request to tell the creditor to proceed, does not constitute a ground for the surety's relief, as the officer is not the creditor's agent to receive notice of the surety's wishes. McNeilly *v.* Cooksey, 2 Lea (Tenn.) 39.

44. Scales *v.* Cox, 106 Ind. 261, 6 N. E. 622; Conrad *v.* Foy, 68 Pa. St. 381; Hellen *v.* Crawford, 44 Pa. St. 105, 84 Am. Dec. 421; Donough *v.* Boger, 10 Phila. (Pa.) 616.

An allegation that notice was given "at or about" the time of maturity is insufficient. Donough *v.* Roger, 10 Phila. (Pa.) 616.

45. Kauffman *v.* Com., 5 Pa. Cas. 385, 8 Atl. 600, holding that if the amount due on an administration bond is unliquidated, a surety thereon cannot compel collection before it has been fixed by a decree of the orphans' court.

46. Irwin *v.* Helgenberg, 21 Ind. 106.

47. Simpson *v.* State, 6 Baxt. (Tenn.) 440. Thus under Tenn. Acts (1801), c. 18, it was necessary that service be proved by two witnesses. Miller *v.* Childress, 2 Humphr. (Tenn.) 320. Under Mo. Rev. St. § 3898, service by mail is not sufficient, although receipt of the notice is proved. Conway *v.* Campbell, 38 Mo. App. 473. But where the notice is in duplicate, service of either is sufficient, although the statute directs the service of a "copy." Sparks *v.* Munson, 76 Mo. App. 83.

48. Triplet *v.* Randolph, 46 Mo. App. 569.

49. *Alabama.*— Darby *v.* Berney Nat. Bank, 97 Ala. 643, 11 So. 881.

Illinois.— Ward *v.* Stout, 32 Ill. 399; Imming *v.* Fiedler, 8 Ill. App. 256.

Indiana.— Miller *v.* Arnold, 65 Ind. 488; Kaufman *v.* Wilson, 29 Ind. 504; Colerick *v.* McCleas, 9 Ind. 245; Carr *v.* Howard, 8 Blackf. 190.

Iowa.— Stevens *v.* Campbell, 6 Iowa 538.

Kentucky.— Nichols *v.* McDowell, 14 B. Mon. 6.

Mississippi.— Bridges *v.* Winters, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598.

Missouri.— Petty *v.* Douglass, 76 Mo. 70; Langdon *v.* Markle, 48 Mo. 357; Freligh *v.* Ames, 31 Mo. 253.

North Carolina.— Charlotte First Nat. Bank *v.* Homesley, 99 N. C. 531, 6 S. E. 797.

Ohio.— Jenkins *v.* Clarkson, 7 Ohio 72.

Pennsylvania.— Hickernell's Appeal, 90 Pa. St. 328.

Tennessee.— Miller *v.* Childress, 2 Humphr. 320.

Texas.— Leazar *v.* Menefee, (Civ. App. 1901) 61 S. W. 438.

See 40 Cent. Dig. tit. "Principal and Surety," § 344.

A telegram is not "notice in writing" within 2 Gavin & H. St. §§ 672, 673, and will not discharge a surety. Kaufman *v.* Wilson, 29 Ind. 504.

50. Pickens *v.* Yarborough, 26 Ala. 417, 62 Am. Dec. 728; Clark *v.* Osborn, 41 Ohio St. 28.

51. Hamblin *v.* McCallister, 4 Bush (Ky.) 418.

52. Smith *v.* Clopton, 48 Miss. 66; Taylor *v.* Davis, 38 Miss. 493. *Contra*, Chrisman *v.* Tuttle, 59 Ind. 155.

Where a surety was liable on two notes,

by a failure to object to the introduction of evidence showing an oral request,[53] nor by bringing suit long afterward,[54] nor from a conversation which led the surety to presume that he was released.[55] Notice must be clear and explicit,[56] and not ambiguous;[57] and the burden is on the surety to show its nature and terms.[58] If the statute indicates the terms to be used in the notice, a substantial compliance therewith is essential.[59] The notice must amount to a command;[60] it is not sufficient to express a hope,[61] a wish,[62] or a desire;[63] nor will it be a suffic ent compliance for the surety to give a hint;[64] to make a request;[65] to urge;[66] to

and written notice was given as to one only, but the creditor accepted it as applicable to both, promising to sue, this was held equivalent to formal notice. Clark *v.* Osborn, 41 Ohio St. 28.

Written notice is not waived by the creditor answering that he cannot sue until court meets. Keirn *v.* Andrews, 59 Miss. 39.

In Kentucky under Gen. St. c. 104, § 11, it is provided that notice in writing shall not be waived unless such waiver is in writing; hence, the dismissal of a suit begun by the obligee after an oral promise to sue is not a defense to another action against the surety. Hibler *v.* Shipp, 78 Ky. 64.

53. Davis *v.* Payne, 45 Iowa 194.

54. Kittridge *v.* Stegmier, 11 Wash. 3, 39 Pac. 242, where the delay was ten months.

55. Beasley *v.* Boothe, 3 Tex. Civ. App. 98, 22 S. W. 255, where the creditor, on receiving oral notice to sue, refused because of an agreement to extend, whereupon the surety claimed and the creditor admitted that he was released; but, as the surety did not claim that such admission by the creditor induced him to forbear giving written notice, the creditor was held not to be estopped from enforcing the claim against the surety.

56. Denick *v.* Hubbard, 27 Hun (N. Y.) 347.

The notice is not clear unless its meaning can be apprehended at once without explanation or argument. Shimer *v.* Jones, 47 Pa. St. 268. Where an order of court directed the payment of a sum of money on pain of attachment, and an indorser of a note given as collateral security for the payment of this sum gave notice to the holder that he would require him to exhaust the remedy by attachment previous to proceeding against him, the notice was held not sufficiently explicit. Warner *v.* Beardsley, 8 Wend. (N. Y.) 194.

57. Greenawalt *v.* Kreider, 3 Pa. St. 264, 45 Am. Dec. 639.

58. King *v.* Haynes, 35 Ark. 463. A surety must prove notice in the very mode required by the statute. Simpson *v.* State, 6 Baxt. (Tenn.) 440.

59. Simpson *v.* State, 6 Baxt. (Tenn.) 440. Under Burns Rev. St. Ind. §§ 1224, 1225 (Horner Rev. St. (1897) §§ 1210, 1211) the notice must require the obligee "forthwith" to institute an action. McMillin *v.* Deardorff, 18 Ind. App. 428, 48 N. E. 233. Under the Iowa statute the notice should require the creditor to elect whether to sue or to permit the surety to sue in the creditor's name. Hill *v.* Sherman, 15 Iowa 365. In some states the notice must declare also that the surety will consider himself discharged if the creditor does not proceed. Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667; Erie Bank *v.* Gibson, 1 Watts (Pa.) 143; Cope *v.* Smith, 8 Serg. & R. (Pa.) 110, 11 Am. Dec. 582; Kemmerer *v.* Yoder, 1 Woodw. (Pa.) 41; Jackson *v.* Huey, 10 Lea (Tenn.) 184, 42 Am. Rep. 301. Notice to sue "for the collection of the amount due" instead of specifically describing the contract is insufficient under Iowa Code (1873), § 2108. Moore *v.* Peterson, 64 Iowa 423, 20 N. W. 744. But in Routon *v.* Lacy, 17 Mo. 399, notice was said to be sufficient if its object could not be misunderstood, although it does not contain a description of the note. A notice to collect all moneys for which he stood as surety for the state, without designating the principal or the obligation, was of no effect under Clay Dig. Ala. p. 532, § 6. Shehan *v.* Hampton, 8 Ala. 942. Notice must demand suit against all parties, and not simply against the principal. Harriman *v.* Egbert, 36 Iowa 270. The notice need not follow the precise words of the statute, and require suit to be brought against "the principal debtor and other parties liable," but it is sufficient if they are mentioned by name. Christy *v.* Horne, 24 Mo. 242. Although the statute provides for notice if the surety apprehends that the principal is about to become insolvent, or is about to leave the state without paying the debt, it is not necessary that the surety's apprehension of these facts be set out in the notice. Shehan *v.* Hampton, 8 Ala. 942.

60. Denick *v.* Hubbard, 27 Hun (N. Y.) 347; Porter *v.* First Nat. Bank, 54 Ohio St. 155, 43 N. E. 165. "We notify you to commence an action" is sufficient. Meriden Silver Plate Co. *v.* Flory, 44 Ohio St. 430, 7 N. E. 753. If it is doubtful whether the surety intended to request suit as a matter of favor, or to require it as a matter of right, the jury should find, from the facts, how the parties understood the matter. Bethune *v.* Dozier, 10 Ga. 235.

61. Bates *v.* State Bank, 7 Ark. 394, 46 Am. Dec. 293.

62. Baker *v.* Kellogg, 29 Ohio St. 663; Parrish *v.* Gray, 1 Humphr. (Tenn.) 88.

63. Savage *v.* Carleton, 33 Ala. 443. Notice that the surety wanted the note settled is not enough. Bowling *v.* Chambers, 20 Colo. App. 113, 77 Pac. 16.

64. Greenawalt *v.* Kreider, 3 Pa. St. 264, 45 Am. Dec. 639.

65. Darby *v.* Berney Nat. Bank, 97 Ala. 643, 11 So. 881; Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667.

66. Coykendall *v.* Constable, 48 Hun (N. Y.)

suggest;[67] to advise;[68] or to state that the surety refuses to remain liable,[69] or that he will not pay except under compulsion.[70] The notice must be in effect a demand to sue,[71] and be more than instructions to dun the principal.[72]

g. Compliance. Upon receipt of notice to sue, the creditor must bring suit within the time prescribed by statute, or the surety will be discharged,[73] although

360, 1 N. Y. Suppl. 9 [*affirmed* in 117 N. Y. 627, 22 N. E. 1128].

67. Keirn *v.* Andrews, 59 Miss. 39.

68. Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667.

69. Lockridge *v.* Upton, 24 Mo. 184, holding that the words, "I will not stand good as security any longer," is not a requisition to sue. Nor is a notice sufficient which says that the principal's property would pay, and that the surety would pay nothing. Wilson *v.* Glover, 3 Pa. St. 404.

70. Williams *v.* Ogg, etc., Lumber Co., 42 Tex. Civ. App. 558, 94 S. W. 420, holding that the words, "We do not intend to pay any more of the notes until we are forced to do so," were not sufficient as a notice under Tex. Rev. St. (1895) art. 3811, tit. 84.

71. The following expressions are not sufficient: "To get it settled." Bowling *v.* Chambers, 20 Colo. App. 113, 77 Pac. 16. "To go and get his money." Maier *v.* Canavan, 57 How. Pr. (N. Y.) 504. "Make Daniel come to time." Lawson *v.* Buckley, 49 Hun (N. Y.) 329, 2 N. Y. Suppl. 178. Notice to collect may be sufficient if the language used indicates that the collection must be made by suit if necessary. The following expressions have been held to be sufficient: "To proceed at once to collect." Franklin *v.* Franklin, 71 Ind. 573; Iliff *v.* Weymouth, 40 Ohio St. 101. "To collect it, as he would not stand bail any longer." Strickler *v.* Burkholder, 47 Pa. St. 476. "To use every effort to collect." Sullivan *v.* Dwyer, (Tex. Civ. App. 1897) 42 S. W. 355. In the following cases the accompanying language was not deemed equivalent to instructions to sue: Darby *v.* Berney Nat. Bank, 97 Ala. 643, 11 So. 881; Coykendall *v.* Constable, 48 Hun (N. Y.) 360, 1 N. Y. Suppl. 9 [*affirmed* in 117 N. Y. 627, 22 N. E. 1128]; Parrish *v.* Gray, 1 Humphr. (Tenn.) 88. "Put in a train of collection, as he had reason to believe the principal would avoid payment if possible" was held insufficient. Bates *v.* State Bank, 7 Ark. 394, 46 Am. Dec. 293.

72. Wilson *v.* Glover, 3 Pa. St. 404, holding that notice "to push" the principal is not sufficient.

73. German-American Bank *v.* Denmire, 58 Iowa 137, 12 N. W. 237.

Reasonable time.— In some states action must be commenced within a reasonable time. This was the requirement in Alabama under the statute of 1821. Scott *v.* Bradford, 5 Port. (Ala.) 443. Where notice was received by a creditor on October 17, and action was not commenced until January 25, it was not instituted within a reasonable time as required by Ohio Rev. St. § 5833. Meriden Silver Plate Co. *v.* Flory, 44 Ohio St. 430, 7 N. E. 753. A delay of three months in bringing suit after notice has been held not sufficient to discharge the surety. Ingals *v.* Sutliff, 36 Kan. 444, 13 Pac. 828.

To first term of court.— In some states suit must be brought to the first term of court having jurisdiction, after notice is received by the creditor, if there is sufficient time to do so. Alabama Nat. Bank *v.* Hunt, 125 Ala. 512, 28 So. 488; Craft *v.* Dodd, 15 Ind. 380; Donough *v.* Boger, 10 Phila. (Pa.) 616. And suit is brought to the first court when the summons is made returnable to the next term, and served on defendant at least three days before the first day of such term, and duly returned on or before such day. Guttery *v.* Pickett, 125 Ala. 434, 27 So. 840. If the creditor might have brought suit in a court in session at the time notice is received, but he waits until a subsequent term, the surety is discharged. Hamrick *v.* Barnett, 1 Ind. App. 1, 27 N. E. 106; Wetzel *v.* Sponsler, 18 Pa. St. 460. Where the payee of a note, on receipt of notice, immediately endeavored to employ attorneys at the place of her residence, but was unable to do so, the attorneys being adversely interested, and on her first opportunity went to an adjoining town, twenty-six miles distant, and there employed attorneys who brought suit at the first term of the district court, there not being sufficient time before the return-day of the next term of the county court, the facts sufficiently showed diligence. Robertson *v.* Angle, (Tex. Civ. App. 1903) 76 S. W. 317.

Within certain number of days.— In some states the statute specifies a certain number of days within which suit must be instituted. In Miller *v.* Gray, 31 Ill. App. 453, a delay of thirty-six days was too long. Where, by an alteration of the date, without the surety's consent, a note was made to fall due one year later than as originally drawn, but the surety demanded suit on the note according to its original tenor, a judgment subsequently entered on a cognovit without notice to the surety should be opened, and the surety be allowed to show whether he had been discharged by the payee's failure to bring suit promptly. Wyman *v.* Yeomans, 84 Ill. 403. In Missouri suit must be brought within thirty days in some court where service can be obtained on the principal as well as on the surety. Cox *v.* Jeffries, 73 Mo. App. 412. The disturbed condition arising from the Civil war was considered an insufficient excuse for non-compliance with the statute, if the courts were open. Cockrill *v.* McCurdy, 33 Mo. 365. Where suit was instituted, before a justice, two days after notice, but the summons was made returnable more than thirty days after, the surety was not released in the absence of evidence that the return-day had been set longer than necessary, two

the latter does not sustain any actual injury from the delay.[74] If the statute will be complied with by bringing suit in any one of two or more courts, the creditor has the privilege of selecting either, although the matter might be expedited if another were chosen.[75] The statute sometimes provides who shall be made parties defendant.[76] If the suit fails through improper pleading, the creditor is in the same position as if he had never brought suit at all; [77] but the creditor is not compelled to resort to additional remedies, such as attachment, to enforce the collection of his claim.[78] The statute is not complied with by merely instituting suit, but it also includes the duty of prosecuting it with due diligence.[79]

h. Withdrawal. The surety may withdraw his notice by requesting the creditor not to sue,[80] or by acquiescing in the dismissal of a suit brought in compliance with his notice,[81] in which case the surety's liability continues; but the surety is no longer liable if he requests indulgence for himself alone, and not for the principal, and the creditor does not bring suit against the principal.[82]

F. Demand and Notice of Default. To hold a surety it is not necessary to make a demand on the principal for payment,[83] or for the performance of the

of defendants living in different townships. Patton *v.* Cooper, 84 Mo. App. 427.

What statute governs.— Where the creditor commences action after the passage of one act, and prior to the enactment of another shortening the time in which suit must be brought, he is entitled to the time provided in the former statute. Nichols *v.* McDowell, 14 B. Mon. (Ky.) 6.

It is a question of law whether a creditor has been duly diligent in proceeding against the principal. Neal *v.* Freeman, 85 N. C. 441.

Evidence of a cosurety's responsibility is admissible, on behalf of a surety, as showing the probability of a delay by the creditor in bringing suit. Vancil *v.* Hagler, 27 Kan. 407.

74. Sullivan *v.* Dwyer, (Tex. Civ. App. 1897) 42 S. W. 355.

75. Collum *v.* Fahrner, 83 Mo. App. 110; Robertson *v.* Angle, (Tex. Civ. App. 1903) 76 S. W. 317. But where, by bringing suit in the circuit court, the creditor could sue both principal and surety jointly, he does not comply with the notice if he brings suit in a justice's court which has jurisdiction of one only of the defendants. Sisk *v.* Rosenberger, 82 Mo. 46; Hardy *v.* Worthen, 53 Mo. App. 580.

76. In Missouri, under Rev. St. (1889) § 8344, suit must be brought against the principal and surety; and the surety can show that the principal was living at the time of the institution of the suit, although since deceased. Davis *v.* Gillilan, 71 Mo. App. 498. Under a former act the creditor was not required to join the sureties as defendants. Perry *v.* Barret, 18 Mo. 140. In Alabama, under the statute of 1821, suit might be brought against the principal or surety or both. Scott *v.* Bradford, 5 Port. (Ala.) 443. In Rowe *v.* Buchtel, 13 Ind. 381, the creditor was not required to sue the surety. The creditor may sue the principal alone, or the principal and surety, but not the surety alone. Starling *v.* Buttles, 2 Ohio 303.

77. Hempstead *v.* Watkins, 6 Ark. 317, 42 Am. Dec. 696.

78. Robertson *v.* Angle, (Tex. Civ. App. 1903) 76 S. W. 317.

79. Sisk *v.* Rosenberger, 82 Mo. 46.

It is the duty of the creditor to use all means of saving the surety which the law puts in his power, which a prudent man would adopt to save himself. Wetzel *v.* Sponsler, 18 Pa. St. 460.

If a suit be dismissed, although promptly instituted, diligence is not shown. Overturf *v.* Martin, 2 Ind. 507.

If the creditor fails to obtain service at the first term, he should take out an alias summons to the next term. Peters *v.* Linenschmidt, 58 Mo. 464.

Execution.— Delay to take out execution for fifty-two days after judgment will discharge a surety. Martin *v.* Orr, 96 Ind. 491. But where the statute requires plaintiff to use due diligence in prosecuting the suit "to judgment," he is not required to sue out execution. Harrison *v.* Price, 25 Gratt. (Va.) 553.

80. Rotting *v.* Cleman, 20 Wash. 116, 54 Pac. 935; Gillilan *v.* Ludington, 6 W. Va. 128. Where, at the time of giving notice, the surety requests the creditor to see the debtor before suing, to induce him to make payment, and, after the expiration of the time for bringing suit, gives the creditor another notice requesting the latter not to sue, the surety is not released. Simpson *v.* Blunt, 42 Mo. 542.

81. Kittridge *v.* Stegmier, 11 Wash. 3, 39 Pac. 242.

82. Bailey *v.* New, 29 Ga. 214.

83. *California.*—Treweek *v.* Howard, 105 Cal. 434, 39 Pac. 20; Chafoin *v.* Rich, 77 Cal. 476, 19 Pac. 882.

Missouri.— Carr *v.* Card, 34 Mo. 513.

New York.— Eccleston *v.* Sands, 108 N. Y. App. Div. 147, 95 N. Y. Suppl. 1107; Donaldson *v.* Neidlinger, 2 N. Y. Suppl. 737; Turnure *v.* Hohenthal, 36 N. Y. Super. Ct. 79; McKensie *v.* Farrell, 4 Bosw. 192; People *v.* Berner, 13 Johns. 383; Rushmore *v.* Gracie, 4 Edw. 84. *Compare* Ducker *v.* Rapp, 41 N. Y. Super. Ct. 235 [*reversed* in 67 N. Y. 464].

Pennsylvania.— Haynes *v.* Synnott, 160

contract,[84] even though there is a strong probability that the principal would have paid or performed if demand had been made;[85] nor is it requisite, before proceeding against sureties, that the principal be called upon to account.[86] Nor is demand on the sureties necessary before bringing suit against them.[87] Sureties who have entered into an absolute undertaking are not entitled to notice of their principal's default,[88] even though the rules and by-laws of the obligee require such informa-

Pa. St. 180, 28 Atl. 832; Richards *v.* Com., 40 Pa. St. 146; McKelvy *v.* Berry, 21 Pa. Super. Ct. 276.

Utah.— Wallace *v.* Richards, 16 Utah 52, 50 Pac. 804.

Canada.— Essex *v.* Park, 11 U. C. C. P. 473.

See 40 Cent. Dig. tit. "Principal and Surety," § 388.

Principal out of state.— Especially is this so if the principal is out of the state. State Treasurers *v.* Gibson, 3 Hill (S. C.) 339.

Knowledge by an employer that his agent was improperly retaining a sum of money for commissions, without insisting on payment, but carrying the amount as a balance, does not discharge the agent's sureties. John Hancock Mut. L. Ins. Co. *v.* Lowenberg, 4 N. Y. St. 699.

84. New Haven *v.* Eastern Paving Brick Co., 78 Conn. 689, 63 Atl. 517 (holding that sureties for a contractor are liable for his default in furnishing imperfect and defective brick for paving, although he has not been notified that repairs were required); Mahaffey *v.* Gray, 85 Ga. 460, 11 S. E. 774 (holding that where a surety on a forthcoming bond knew that certain cotton had not been produced according to the conditions of the bond, he was liable without a demand being made for the cotton); White *v.* Swift, 29 Fed. Cas. No. 17,557, 1 Cranch C. C. 442 (holding that, in an action against a surety for the performance of a decree, it is not necessary that notice of the decree shall have been given to the principal).

85. Weaver *v.* Ruhm, (Tenn. Ch. App. 1897) 47 S. W. 171; Wilson *v.* Brown, 6 Ont. App. 87.

86. *Arkansas.*— German Ins. Co. *v.* Smead, (1890) 13 S. W. 332.

California.— People *v.* Jenkins, 17 Cal. 500.

New York.— Eccleston *v.* Sands, 108 N. Y. App. Div. 147, 95 N. Y. Suppl. 1107.

United States.— Smith *v.* U. S., 5 Pet. 292, 8 L. ed. 130.

England.— Black *v.* Ottoman Bank, 8 Jur. N. S. 801, 6 L. T. Rep. N. S. 763, 15 Moore P. C. 472, 10 Wkly. Rep. 871, 15 Eng. Reprint 573.

87. *Arkansas.*— Newton *v.* More, 14 Ark. 166.

California.— Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. 1072.

Massachusetts.— Wood *v.* Barstow, 10 Pick. 368.

Minnesota.— Danvers Farmers' El. Co. *v.* Johnson, 93 Minn. 323, 101 N. W. 492.

New York.— Wilson *v.* Field, 27 Hun 46.

See 40 Cent. Dig. tit. "Principal and Surety," § 388.

88. *California.*— Treweek *v.* Howard, 105 Cal. 434, 39 Pac. 20; Southern California Nat. Bank *v.* Wyatt, 87 Cal. 616, 25 Pac. 918; Chafoin *v.* Rich, 77 Cal. 476, 19 Pac. 882; Damon *v.* Pardow, 34 Cal. 278; Shriver *v.* Lovejoy, 32 Cal. 574; Dane *v.* Corduan, 24 Cal. 157, 85 Am. Dec. 53; And *v.* Magruder, 10 Cal. 282; Hartman *v.* Burlingame, 9 Cal. 557.

Colorado.— Boyd *v.* Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986.

Connecticut.— Phœnix Mut. L. Ins. Co. *v.* Holloway, 51 Conn. 310, 50 Am. Rep. 21.

District of Columbia.— Clark *v.* Gerstley, 26 App. Cas. 205 [*affirmed* in 204 U. S. 504, 27 S. Ct. 337, 51 L. ed. 589].

Georgia.— Hunnicutt *v.* Perot, 100 Ga. 312, 27 S. E. 787. Where an agent deposited money with his employer in lieu of a bond, obtaining the money on a note with surety, and when the employment ceased, the agent withdrew the deposit, but did not pay the note, it was held that the surety was not discharged because the holder of the note failed to inform him of these facts. Lumpkin *v.* Calloway, 101 Ga. 226, 28 S. E. 622.

Indiana.— Fitch *v.* Citizens' Nat. Bank, 97 Ind. 211; Weik *v.* Pugh, 92 Ind. 382; Scott *v.* Shirk, 60 Ind. 160; McMillan *v.* Bull's Head Bank, 32 Ind. 11, 2 Am. Rep. 323; Sullivan *v.* Cluggage, 21 Ind. App. 667, 52 N. E. 110.

Iowa.— Phenix Ins. Co. *v.* Findley, 59 Iowa 591, 13 N. W. 738; Home Ins. Co. *v.* Holway, 55 Iowa 571, 8 N. W. 457, 39 Am. Rep. 179; Jackson *v.* Benson, 54 Iowa 654, 7 N. W. 97.

Louisiana.— Dougherty *v.* Peters, 2 Rob. 534.

Maine.— Wright *v.* Andrews, 70 Me. 86, 35 Am. Rep. 308.

Maryland.— Lake *v.* Thomas, 84 Md. 608, 36 Atl. 437.

Massachusetts.— Hudson *v.* Miles, 185 Mass. 582, 71 N. E. 63, 102 Am. St. Rep. 370. Where an insurance agent began to remit irregularly, increasing his indebtedness for more than a year until it exceeded the penalty of his bond, at which time his sureties were informed for the first time, they were not discharged. Watertown F. Ins. Co. *v.* Simmons, 131 Mass. 85, 41 Am. Rep. 196.

Mississippi.— Mathews *v.* Chrisman, 12 Sm. & M. 595, 51 Am. Dec. 124.

Missouri.— Buchner *v.* Liebig, 38 Mo. 188. Where a contractor obligated himself by bond to build a bridge which should stand and remain for four years, and, in less than two years the bridge gave way and became unfit for use, his sureties were held responsible without notice. Buchanan County *v.* Kirtley, 42 Mo. 534.

New Jersey.— Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

tion to be given to them,[89] or the sureties are injured by lack of it,[90] as it is their duty to make inquiry and ascertain whether the principal is discharging the obligation resting upon him.[91] An agreement by the obligee with the principal not to inform his sureties of his default will not release them if they do not make any

New York.— Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280; Cass *v.* Shewman, 61 Hun 472, 16 N. Y. Suppl. 236; Rushmore *v.* Gracie, 4 Edw. 84. *Compare* Ducker *v.* Rapp, 41 N. Y. Super. Ct. 235 [*reversed* in 67 N. Y. 464].

North Carolina.— Neal *v.* Freeman, 85 N. C. 441.

Ohio.— Bush *v.* Critchfield, 4 Ohio 103.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Shaeffer, 59 Pa. St. 350; Marberger *v.* Pott, 16 Pa. St. 9, 55 Am. Dec. 479; *In re* Mason, 5 Lack. Jur. 331; Lightner *v.* Axe, 3 Lanc. L. Rev. 401.

Rhode Island.— Mathewson *v.* Sprague, 1 R. I. 8.

Texas.— Officer *v.* Marshall, 9 Tex. Civ. App. 428, 29 S. W. 246; Garrett *v.* Mobile L. Ins. Co., 1 Tex. App. Civ. Cas. § 937.

Virginia.— Richmond, etc., R. Co. *v.* Kasey, 30 Gratt. 218.

United States.— George A. Fuller Co. *v.* Doyle, 87 Fed. 687; Postmaster-Gen. *v.* Reeder, 19 Fed. Cas. No. 11,311, 4 Wash. 678.

England.— Nares *v.* Rowles, 14 East 510; Orme *v.* Young, Holt N. P. 84, 17 Rev. Rep. 611, 3 E. C. L. 43; Brown *v.* Langley, 12 L. J. C. P. 62, 4 M. & G. 466, 5 Scott N. R. 249, 43 E. C. L. 244.

Canada.— Reg. *v.* Hammond, 12 N. Brunsw. 33.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 304 *et seq.*, 388.

Obligee without knowledge of breach.— This is especially so if the obligee has no knowledge of the breach. Accident Ins. Co. of North America *v.* Baker, 34 W. Va. 667, 12 S. E. 834.

A delay for three years in notifying sureties does not affect their liability. Wilkerson *v.* Crescent Ins. Co., 64 Ark. 80, 40 S. W. 465, 62 Am. St. Rep. 152; Watson *v.* Barr, 37 S. C. 463, 16 S. E. 188; Peel *v.* Tatlock, 1 B. & P. 419.

Surety in bond for title.— Where a grantor of land executed a bond conditioned to make title, and the grantee brought trespass against an adverse claimant, and failed in the suit, it was held that a surety on the bond was not relieved from liability because he had not received notice of the suit. Smith *v.* Martin, 4 Desauss. Eq. (S. C.) 148.

Where a building contractor's bond makes provision for delay beyond the time stipulated for the completion of the work, his surety cannot claim to be discharged because the owner of the building did not notify him promptly of the contractor's failure to perform the contract within the time specified. National Surety Co. *v.* Long, 79 Ark. 523, 96 S. W. 745.

If a lessee abandons the premises, the lessor is not under a duty to notify the lessee's surety. Ledoux *v.* Jones, 20 La. Ann. 539.

A written clause in a lease requiring the lessor, in case the rent should not be paid, to give notice to the sureties of the lessee, who were then to have the right, upon payment of the rent, to take possession of the premises, is not inconsistent with a printed clause in which the sureties agree to pay rent upon default of the lessee, without demand or notice. The lessor is not relieved from his obligation to give notice, but the obligation of the sureties does not depend upon its being given; and the giving of notice is not a condition precedent to the recovery of the rent. Barhydt *v.* Ellis, 45 N. Y. 107.

Before the estate of a deceased principal is settled, the holder of a note is not obliged to inform a surety thereon of its non-payment. Jackson *v.* Benson, 54 Iowa 654, 7 N. W. 97.

The pledgee of collateral may sell it at private sale for less than its face value, without notice to the surety, if he acts in good faith, and was given the right to sell at private or public sale without demand or notice. Iron City Nat. Bank *v.* Rafferty, 207 Pa. St. 238, 56 Atl. 445.

Foreign bill of exchange.— Under Ky. St. § 483, a note held by an incorporated bank named as payee is not placed on the footing of a foreign bill of exchange, never having been indorsed to or discounted by an incorporated bank as required by statute, so as to entitle surety makers to notice of non-payment. Nickell *v.* Citizens' Bank, 60 S. W. 925, 22 Ky. L. Rep. 1552.

89. New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187; Price *v.* Kirkham, 3 H. & C. 437, 34 L. J. Exch. 35, 11 L. T. Rep. N. S. 314.

90. *Massachusetts.*— Commercial Bank *v.* French, 21 Pick. 486, 32 Am. Dec. 280.

Pennsylvania.— Coatesville *v.* Hope, 1 Chest. Co. Rep. 57.

Texas.— Dallas Homestead, etc., Assoc. *v.* Thomas, 36 Tex. Civ. App. 268, 81 S. W. 1041.

United States.— Smith *v.* U. S., 5 Pet. 292, 8 L. ed. 130.

Canada.— Wilson *v.* Brown, 6 Ont. App. 87.

Delay by the obligee to obtain actual knowledge of a default by the principal does not discharge a surety, although the bond required immediate notice of default, and the obligee obtained all the security the principal could give, which the surety might have obtained by earlier notice. A surety has no right to reimbursement which is superior to that of the obligee. Tarboro Bank *v.* Maryland Fidelity, etc., Co., 128 N. C. 366, 38 S. E. 908.

91. Forrester *v.* State, 46 Md. 154; Harris *v.* Newell, 42 Wis. 687. A surety is not entitled to notice if the breaches lie as much in his knowledge as in that of the creditor. People *v.* Edwards, 9 Cal. 286.

inquiries.[92] If, however, the obligation of the sureties is a continuing one, and the extent of the liability of the principal rests entirely within the knowledge of the obligee, notice of the principal's default must be given to the sureties within a reasonable time, or they will be discharged.[93]

G. Extent of Liability and Amount Recoverable — 1. In General. The extent of a surety's liability is strictly limited [94] to that assumed by the terms of his contract.[95] If he has become responsible for one person only, he cannot be

92. Grover *v.* Hoppock, 26 N. J. L. 191; Wilmington, etc., R. Co. *v.* Ling, 18 S. C. 116.

93. Thus where goods are sold from time to time, it is the duty of the seller to give notice to the buyer's surety of the amount, and of default in payment, within a reasonable time; and what constitutes a reasonable time depends upon the circumstances of each case; but the surety is not discharged by failure to receive notice, except to the extent that loss has resulted from lack thereof. McKecknie *v.* Ward, 58 N. Y. 541, 17 Am. Rep. 281.

94. Strict construction of contract see *supra*, V, C.

95. *Illinois.*— People *v.* Tompkins, 74 Ill. 482 (holding that sureties who have undertaken to be responsible for the performance of duties by their principal are not responsible for his failure to pay over money where the collection of money was not necessarily a part of his duties, and was not recited in the contract); Crego *v.* People, 36 Ill. App. 407 (holding that a surety who has undertaken that dividends shall be paid promptly to farmers selling milk on the dividend plan is not liable to a farmer who has sold milk at a fixed price).

Iowa.— Heaton *v.* Ainley, (1898) 74 N. W. 766 (holding that where a note was executed with an indorsement thereon that it was given to secure the payee against losses by signing paper for the maker, and the wife of the maker signed a note with a similar indorsement, except that it contained in addition the letters, "acct.," the wife was not liable for the unpaid balance of an open running account between the husband and the creditor, that not having been included in the instruments executed by the husband, but the notes of the husband and wife were intended as indemnity to the creditor as surety only); British American Assur. Co. *v.* Neil, 76 Iowa 645, 41 N. W. 382 (holding that where an agent took a warrant in payment which his employer refused to accept, and which he was not bound to accept, and afterward, the agent having pledged the warrant, the employer redeemed it, crediting the agent with the balance realized, and recognizing the transaction in which the agent took the warrant, the sureties for the agent were liable for the amount paid to redeem the warrant).

Kentucky.— Cromwell *v.* Rankin, 97 S. W. 415, 30 Ky. L. Rep. 123, holding that where a note is secured by stock held as collateral, nothing having been said about dividends, any error in holding that dividends received by the principal should be counted as a credit to the surety, and that any future dividends received up to the same amount should be received by the payee, is in favor of the surety.

Louisiana.— Horne *v.* Belcher, 11 La. Ann. 321 (holding that sureties on a sequestration bond are liable for the amount of the note sequestered where the creditor could not sue the principal pending the litigation, and the latter has become insolvent); Holden *v.* Tanner, 6 La. Ann. 74 (holding that a surety on a lease is liable for rent, and not only that the lessee will take possession and return the property in good order).

Massachusetts.— Canton Sav. Inst. *v.* Murphy, 156 Mass. 305, 31 N. E. 285.

Minnesota.— Bell *v.* Forrestal, 55 Minn. 431, 57 N. W. 55, 223.

New York.— Westcott *v.* Maryland Fidelity, etc., Co., 87 N. Y. App. Div. 497, 84 N. Y. Suppl. 731 (holding that where money is advanced to enable a person to erect a building, the loan being secured by a building-loan mortgage on the premises and by a bond given by the mortgagor for the performance of his contract to erect the building, the creditor, upon foreclosing the mortgage, is entitled to recover from a surety on the bond the amount of a deficiency judgment only); Moore *v.* Cockcroft, 4 Duer 133 (holding that a surety for the performance of an award is not liable for an agreement which the arbitrator advised the parties to make but which was not a part of the award).

Pennsylvania.— Building Assoc. *v.* Benson, 2 Wkly. Notes Cas. 541, holding that a bond to indemnify against loss under a mortgage will not cover a loss from a sale of the premises.

United States.— Lake Drummond Canal, etc., Co. *v.* West End Trust, etc., Co., 131 Fed. 147 (holding that an agreement to indemnify against claims of third persons arising out of work performed by a contractor does not cover injuries occurring after the contractor has left the work; and evidence will not be admitted against his surety which covers all claims without specifying which resulted from the work of the contractor.

Canada.— Montreal *v.* Ste. Cunégonde, 32 Can. Sup. Ct. 135 (holding that the surety in an undertaking to be liable for all "damages which might result whether from the connection of said sewers or works necessary" in connection therewith, was liable not only for all damages resulting from the act of making the actual connection of the sewers, but also for damages that might be occasioned subsequently on account of the user of them); Stevenson *v.* McLean, 11 U. C. C. P. 208.

held for the defaults of a firm of which such person is a member.[96] If a subordinate of the principal is employed by the obligee, and the control of the principal over such subordinate is limited, the sureties of the principal are not liable for the acts of such subordinate; [97] and if a surety has signed a note as security for one purpose, it cannot be used to secure some other debt.[98] Sureties who have undertaken to be responsible for the principal within certain territory are not responsible for his acts elsewhere,[99] although a transfer from place to place in the territory named will not affect their liability.[1] If the surety has indicated the manner in which the indebtedness for which he has undertaken to become liable shall be incurred, he is not liable for indebtedness incurred in another way.[2] An undertaking that the principal will pay does not cover a note given for the debt; [3] nor does an undertaking that the principal will pay for goods to be furnished cover goods already

If an employer adopts an unauthorized act of his agent, the money received by the agent through such act is received in the scope of his duties, and his sureties are liable therefor. Indianapolis *v.* Skeen, 17 Ind. 628.

96. Crescent Brewing Co. *v.* Handley, 90 Ala. 486, 7 So. 912; Mallory *v.* Brent, 75 Mo. App. 473; Shaw *v.* Vandusen, 5 U. C. Q. B. 353. But see Burton *v.* Blin, 23 Vt. 151.

The mere fact that the principal has a partner will not be a defense to the surety, if the creditor deals with the principal individually. Braun *v.* Woolacott, 129 Cal. 107, 61 Pac. 801.

97. Equitable L. Assur. Soc. *v.* Coats, 44 Mich. 260, 6 N. W. 648, holding that the sureties for an insurance agent are not liable for a deficiency occurring after the insurance company has appointed a cashier at such agency, who is paid by the company, and who has a certain general charge and control of the funds, as it becomes possible for the cashier to receive and appropriate money without the knowledge of the agent.

98. Fritz *v.* Moyer, 18 Montg. Co. Rep. (Pa.) 77, 15 York Leg. Rec. 198, holding that if a note is given for the price of land, a surety thereon is not liable for a failure of the grantee to perform conditions, the vendor thereupon rescinding the sale.

99. *Illinois.*— Welke *v.* Pabst Brewing Co., 74 Ill. App. 152, holding that sureties under a contract to sell and deliver goods to a person at a named place are not liable for the purchase-price of goods delivered to him at another place.

Kansas.— Singer Mfg. Co. *v.* Armstrong, 7 Kan. App. 314, 54 Pac. 571.

Michigan.— White Sewing-Mach. Co. *v.* Mullins, 41 Mich. 339, 2 N. W. 196.

New York.— Kellogg *v.* Farquhar, 5 Silv. Sup. 373, 8 N. Y. Suppl. 208, holding, however, that the fact that the principal is given exclusive rights in certain territory does not indicate that his acts are restricted to such territory.

Ohio.—Iliff *v.* Western-Southern L. Ins. Co., 11 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 429, holding also that a provision in the bond of an agent that the liability of his sureties should continue "during his employment in whatever capacity he may be engaged, the duties and emoluments of which may be changed without notice to the sureties" is not sufficient to make the sureties liable for his acts after he is transferred to another state.

United States.—Miller *v.* Stewart, 9 Wheat. 680, 6 L. ed. 189.

1. Portsea Island Union *v.* Whillier, 2 E. & E. 755, 6 Jur. N. S. 887, 29 L. J. Q. B. 150, 2 L. T. Rep. N. S. 211, 8 Wkly. Rep. 493, 105 E. C. L. 745 (holding that sureties for a collector appointed for a parish are liable for his acts in any part of the parish, although the parish is divided into districts for the purpose of making the collections, and the collector, after serving in one district, is transferred to another); Reg. *v.* Miller, 20 U. C. Q. B. 485 (holding that sureties for a person appointed "a collector of Her Majesty's customs in the Province of Canada" are liable for his defaults in any port of Canada to which he may be transferred).

2. *Illinois.*— Barclay *v.* Warne, 143 Ill. 19, 32 N. E. 175 [*reversing* 39 Ill. App. 279], holding that sureties for the payment of dividends declared by the principals and "shown by their books" are not liable for dividends not based on profits.

Indiana.— Webster *v.* Smith, 4 Ind. App. 44, 30 N. E. 139, holding that a person agreeing to become surety on a note to be given for the purchase-price of goods, but not specifying the form of the note, is not released from his agreement by the fact that title to the goods was retained by the seller until paid.

Kentucky.— Thompson *v.* Fruit Growers' Co., 50 S. W. 1094, 21 Ky. L. Rep. 119.

Massachusetts.— Boston Hat Manufactory *v.* Messenger, 2 Pick. 223.

Ohio.— Jones, etc., Co. *v.* McQueety, 4 Ohio S. & C. Pl. Dec. 417, 3 Ohio N. P. 218.

Tennessee.— Martin *v.* Ridley, 1 Tenn. Ch. App. 78, holding that sureties on a bond to secure existing debts of a dissolved partnership "as well as debts hereafter made in the name of said firm" are not liable for a debt renewed by the principal long after he had ceased to transact business under the firm-name.

United States.— Gass *v.* Stinson, 10 Fed. Cas. No. 5,260, 2 Tumn. 453.

3. Barr *v.* Ward, 36 Nebr. 905, 55 N. W. 282; American Buttonhole, etc., Mach. Co. *v.* Gurnee, 44 Wis. 49.

Sureties for the performance of an award are liable on a note for which the arbitrators determine the property of the principal is

on hand;[4] and if the contract is in regard to furnishing goods in certain quantities it will not cover smaller quantities;[5] but the mere fact that goods are delivered to and accepted by the principal after the time for delivery is past does not free the surety from liability.[6] If the surety has undertaken to be liable for embezzlement or larceny, or for the fraud or dishonesty, of the principal, he is not liable for acts to which these terms cannot be applied;[7] nor for losses resulting from disobedience of the principal;[8] nor for such as are regarded as debts by the principal to the obligee.[9] If a surety becomes responsible for a judgment to be obtained, he can show that the judgment for which he is sought to be held is not the one for which he became liable,[10] or that the judgment obtained is void;[11] and if a surety undertakes that property shall be delivered free from liens, he is liable for enforceable liens only;[12] but a surety may become responsible for disputed as well as for valid

liable. Hardesty *v.* Cox, 53 Kan. 618, 36 Pac. 985.

4. Weir Plow Co. *v.* Walmsley, 110 Ind. 242, 11 N. E. 232. A bond conditioned that the principal shall conduct a business in the name of the obligee, and shall purchase and pay for all stock necessary therefor, does not make a surety thereon liable for stock purchased by the principal at the time the bond was executed, but it applies only to stock thereafter purchased. Wussow *v.* Hase, 108 Wis. 382, 84 N. W. 433.

5. Grasser, etc., Brewing Co. *v.* Rogers, 112 Mich. 112, 70 N. W. 445, 67 Am. St. Rep. 389.

6. Oastler *v.* Pound, 7 L. T. Rep. N. S. 852, 11 Wkly. Rep. 518.

7. U. S. Fidelity, etc., Co. *v.* Overstreet, 84 S. W. 764, 27 Ky. L. Rep. 248; U. S. Fidelity, etc., Co. *v.* Merkley, 65 S. W. 614, 23 Ky. L. Rep. 1570; Rankin *v.* Bush, 182 N. Y. 524, 74 N. E. 1125 [*affirming* 102 N. Y. App. Div. 510, 92 N. Y. Suppl. 866]; Livingston *v.* Fidelity, etc., Co., 27 Ohio Cir. Ct. 662. In Postmaster-Gen. *v.* McColl, 31 U. C. C. P. 364, sureties for a postmaster undertook that he would not commit larceny of any money, or of any letter containing the same which might come into his custody. He opened letters; and, having taken therefrom some checks, forged the payees' names thereto, warranted the genuineness of the indorsements, and cashed the checks at a bank. The checks were not paid, and the drawers issued duplicates, so that the bank lost the money. It was held that the sureties were not liable, as the forgery and warranty, not the larceny, were the proximate causes of the loss, the contents of the letters not belonging to the bank. But in City Trust, etc., Co. *v.* Lee, 204 Ill. 69, 68 N. E. 485 [*affirming* 107 Ill. App. 263], it was held that a bond securing an employer against "loss by reason of the dishonesty or fraud, amounting to larceny or embezzlement," of an employee, is a guaranty against fraud or dishonesty of the employee, whether such as would render him liable to an indictment for larceny or embezzlement or not. And in N. K. Fairbank Co. *v.* American Bonding, etc., Co., 97 Mo. App. 205, 70 S. W. 1096, where a bond was on condition that it was to be of full force if the principal "shall in any manner or by any means, misuse, misappropriate, or misapply said paper or plates, or in any manner dispose of the same, or convert them to their own use, amounting to larceny or embezzlement of paper or plates," it was held that the sureties were liable for a misappropriation of paper, although it might not be embezzlement, as the provision as to embezzlement applied to the last clause only in regard to conversion.

8. Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 100 Fed. 559, 40 C. C. A. 542 [*reversed* on other grounds in 183 U. S. 402, 46 L. ed. 753].

9. Milwaukee Theater Co. *v.* Fidelity, etc., Co., 92 Wis. 412, 66 N. W. 360, holding that sureties are not liable for money intrusted to the principal, and for which he fails to account, if he is charged interest thereon while in his hands.

10. Caponigri *v.* Cooper, 34 Misc. (N. Y.) 649, 70 N. Y. Suppl. 587. Where an insured, about to sue several insurance companies, entered into a contract with another insurer to repay to the latter a proportionate part of the loss advanced by such insurer, in event of any of the suits being determined adversely to the insured, a surety for the performance of the contract is not estopped to show that a judgment adverse to the insured was in consequence of a defense not available to such insurer. Parrish *v.* Rosebud Min., etc., Co., 140 Cal. 635, 74 Pac. 312. A judgment by default against several defendants having been set aside upon a bond being given conditioned to pay any judgment plaintiff might recover, a surety on the bond is liable not only for a judgment against all of the defendants, but also for a larger judgment against one. Luce *v.* Alexander, 49 N. Y. Super. Ct. 202 [*affirmed* in 100 N. Y. 613]. In Scott *v.* Duncombe, 49 Barb. (N. Y.) 73, a surety on a bond given to secure such sums as finally might be directed to be paid by a judgment against a defendant was held liable not only for the amount adjudged to be due in the suit pending at the time the bond was given, but also for sums claimed in two other suits after the execution of the bond.

11. McCloskey *v.* Wingfield, 29 La. Ann. 141.

12. Alcatraz Masonic Hall Assoc. *v.* U. S. Fidelity, etc., Co., 3 Cal. App. 338, 85 Pac. 156; Chester City Presby. Church *v.* Conlin, 8 Del. Co. (Pa.) 135. A surety undertaking to pay all charges running in favor of persons who might become entitled to liens on

claims if such was the intention.[13] A failure of the principal to pay his note,[14] or to pay over money,[15] or any part of it,[16] or to account for it,[17] constitutes a breach of the contract of his surety; but a surety cannot be held liable before the money is due; [18] nor if the money was not to be paid except upon the happening of a contingency which has not occurred.[19] If the contract of the surety was to reimburse the obligee for money which the latter might be called upon to pay by reason of acts of the principal, the surety is liable upon payment by the obligee, although without compulsion, if there was legal liability on his part.[20] A surety on the bond of a deputy is liable for his failure to pay over money to the obligee, although the obligee in turn may not have made payment of such amount.[21] If payment by the principal was to be made out of certain funds, the surety is not in default if such funds were not received by the principal,[22] unless the undertaking included the

a building being constructed for a state agricultural college is not liable if, under the statute, liens could not attach to the building. Smith *v.* Bowman, 32 Utah 33, 88 Pac. 687, 9 L. R. A. N. S. 889.

13. St. Paul Title, etc., Co. *v.* Sabin, 112 Wis. 105, 87 N. W. 1109.

14. Wilson *v.* Old Town Bank, (Md. 1887) 11 Atl. 759; Street *v.* Old Town Bank, 67 Md. 421, 10 Atl. 319; Grimison *v.* Russell, 20 Nebr. 337, 30 N. W. 249; Black *v.* Stephen, 37 Can. L. J. N. S. 206. A person holding a note signed by a surety as indemnity against liability for the payment of money can enforce the note against the surety if he pays the money, although raised by a note signed by himself and the principal, he afterward having paid the latter note. Pinckney *v.* Pomeroy, 62 Barb. (N. Y.) 460.

15. Goodhue Farmers' Warehouse Co. *v.* Davis, 81 Minn. 210, 83 N. W. 531; Steele *v.* Hoe, 14 Q. B. 431, 14 Jur. 147, 19 L. J. Q. B. 89, 68 E. C. L. 431; Pattison *v.* Belford Union, 1 H. & N. 523, 3 Jur. N. S. 1116, 26 L. J. Exch. 115, 5 Wkly. Rep. 121. Sureties on a bond conditioned for the payment "when and as required" of all commissions of an agent in excess of a certain sum to be applied on a loan to the agent, are liable, although the obligee did not require the application of such excess to the discharge of the debt. Harper *v.* National L. Ins. Co., 56 Fed. 281, 5 C. C. A. 505. Where the contract of a surety is for the repayment of money advanced for manufacturing purposes if "for the reasons incorporated in said agreement, it should not be carried out," he is liable if the enterprise fails by reason of the manufactured article not selling. Angus *v.* Union Gas, etc., Stove Co., 24 Can. Sup. Ct. 104.

A surety for a guardian is liable for money paid by him to the guardian as the purchase-price of land of the ward sold by the guardian under a decree, and purchased by the surety. Winlock *v.* Winlock, 1 Dana (Ky.) 382.

In an action on the bond of a tax collector, it is not necessary to prove exactly what money he received; for if it is proved that he was to collect a certain sum, and that he paid over a smaller sum, and did not take proper steps to exonerate himself from the residue, plaintiff will be entitled to recover. Loveland *v.* Knight, 3 C. & P. 106, 4 M. & R. 597, 14 E. C. L. 474.

16. Gwynne *v.* Burnell, 6 Bing. N. Cas. 853, 37 E. C. L. 713, 7 Cl. & F. 572, 7 Eng. Reprint 1188, 1 Scott N. R. 711, West 342, 9 Eng. Reprint 522.

17. Mathis *v.* Morgan, 72 Ga. 517, 53 Am. Rep. 847; Howe Sewing Mach. Co. *v.* Layman, 88 Ill. 39; Danvers Farmers' Elevator Co. *v.* Johnson, 93 Minn. 323, 101 N. W. 492.

18. State Nat. Bank *v.* New Orleans Brewing Assoc., 49 La. Ann. 934, 22 So. 934; Sauer *v.* Griffin, 67 Mo. 654; Robertson *v.* Davis, 27 Can. Sup. Ct. 571; Learn *v.* Bagnall, 1 Ont. L. Rep. 472.

19. Crick *v.* Warren, 2 F. & F. 348, holding that if a surety becomes responsible for the costs of a suit already incurred by the defendant if the plaintiff will consent to forego further proceedings, he is not liable if the plaintiff moves for a new trial.

20. Rudd *v.* Hanna, 4 T. B. Mon. (Ky.) 528; U. S. Fidelity, etc., Co. *v.* Probst, 97 S. W. 405, 30 Ky. L. Rep. 63; Casey *v.* Gunn, 29 Mo. App. 14.

21. Baby *v.* Baby, 8 U. C. Q. B. 76.

22. A surety who has undertaken that a contractor will make a payment out of a certain instalment received on the contract is not liable if the contractor abandons the contract, and the surety completes it, the amount received by the surety for his work not being enough to reimburse him. Folz *v.* Amweg, 191 Pa. St. 157, 43 Atl. 204. A surety who undertakes payment out of the estate of the principal after his death is not liable if there is no estate; the word "estate" in such case not applying to a life-estate in land owned by the principal which the surety takes in remainder after the death of the principal. Brown *v.* Fletcher, 35 L. T. Rep. N. S. 165. But if the principal has agreed to account for money "received on account of the rents and profits of the real estate," his surety is liable for the proceeds of an insurance policy taken by the receiver in his own name, the premiums having been paid out of the rents and profits; and for income from an investment of the proceeds of a sale of real estate; and for money paid him to be applied on repairs. *In re* Graham, (1895) 1 Ch. 66, 64 L. J. Ch. 98, 71 L. T. Rep. N. S. 623, 13 Reports 81, 43 Wkly. Rep. 103.

collection also of such funds;[23] but if the funds are received by the principal, the surety becomes liable, although they are insufficient to pay all demands on the principal.[24] It is the duty of an officer to pay over funds at the expiration of his term,[25] and it is not an excuse for a public officer that such funds have been lost through fire[26] or robbery;[27] but it is an excuse for a private officer,[28] unless he has been negligent.[29] Where there are successive bonds, with different sets of sureties on each, it is the time of an actual defalcation and not the technical breach which determines which set is liable.[30] If the principal uses money collected during one term to make good the defaults of a prior term, the sureties on the last bond given are liable.[31] Persons who have become security for the performance of duties by the principal must see that he performs them;[32] but if the sureties have undertaken that the principal will render honest and faithful service, they are not liable for unintentional clerical errors, the principal not profiting thereby.[33] If a surety has undertaken that the principal will perform certain acts, a failure to perform them will constitute a breach of the contract.[34] A surety for a building con-

23. If a military officer covenants to collect a soldier's wages and pay over the price of a horse at a certain time, the officer is bound whether the wages are earned and collected or not. Thompson *v.* Coppage, 2 Bush (Ky.) 318.

24. Where insolvent debtors compounded with their creditors, agreeing to pay them a certain percentage of their claims, and conveyed their property in trust for that purpose, and the trustees became sureties for advances made by a bank, agreeing that such advances should "in the first instance be paid to you out of the net proceeds of the trust estate so far as the same will extend to pay," the trustees are liable for the advances to the full amount of the proceeds of the trust property, and not only to the extent, if any, which might be left after the payment of the percentage to the creditors. Wilson *v.* Craven, 10 L. J. Exch. 448, 8 M. & W. 584. A person undertaking to pay rent out of the proceeds from a sale of certain effects is liable for the entire amount of the rent if the goods produce that much, although there are prior claims. Stephens *v.* Pell, 2 Cromp. & M. 710, 3 L. J. Exch. 214, 4 Tyrw. 267.

25. The sureties of an officer are liable if, after his resignation, he refuses to deliver moneys to his successor. Stemmermann *v.* Lilienthal, 54 S. C. 440, 32 S. E. 535. See, generally, OFFICERS.

26. Monticello *v.* Lowell, 70 Me. 437.

27. Hornsby *v.* Slack, 1 Ir. C. L. 126.

28. Chicago, etc., R. Co. *v.* Bartlett, 120 Ill. 603, 11 N. E. 867 [*affirming* 20 Ill. App. 96].

29. A surety for an express messenger is liable for a theft of funds occurring while the messenger was absent from the car, although there was a possibility of a duplicate key to the safe, in which the money had been placed, having been made, and the company did not make any provision for watching the safe, the surety being aware of the circumstances. Frink *v.* Southern Express Co., 82 Ga. 33, 8 S. E. 862, 3 L. R. A. 482.

30. Gonser *v.* State, 30 Ind. App. 508, 65 N. E. 764; State *v.* O'Neill, (Mo. App. 1905) 90 S. W. 413; State *v.* O'Neill, 114 Mo. App. 611, 90 S. W. 410. *Compare* Barnes *v.* Cushing, 168 N. Y. 542, 61 N. E. 902 [*reversing* 43 N. Y. App. Div. 158, 59 N. Y. Suppl. 345]. The sureties on the bond of a clerk of court in force when all the proceedings in the administration of an estate were had, and the decree was made directing him to make payment of the proceeds, are the ones liable for his default, and not those on his bond for the succeeding term. Johnson *v.* Bobbitt, 81 Miss. 339, 33 So. 73.

31. Detroit *v.* Weber, 29 Mich. 24; Gwynne *v.* Burnell, 6 Bing. N. Cas. 853, 37 E. C. L. 713, 7 Cl. & F. 572, 7 Eng. Reprint 1188, 1 Scott N. R. 711, West 342, 9 Eng. Reprint 522.

32. Hill's Appeal, 31 Pittsb. Leg. J. N. S. (Pa.) 375. Sureties for a bank clerk who is sent eleven miles for the purpose of receiving a large sum of money from a customer for deposit are liable for its loss, such loss being *prima facie* evidence of gross negligence. Melville *v.* Doidge, 6 C. B. 450, 12 Jur. 922, 18 L. J. C. P. 7, 60 E. C. L. 450. An allegation that an inspector wrongfully branded pork of inferior quality as prime mess pork is sufficient without alleging that he acted knowingly, wilfully, or designedly, or that he did not use the best of his skill, judgment, and ability. Reg. *v.* Mowat, 3 U. C. C. P. 228.

33. Jephson *v.* Howkins, 2 M. & G. 366, 2 Scott N. R. 605, 40 E. C. L. 644.

34. Morton *v.* Benjamin, 8 U. C. Q. B. 594. Sureties who have bound themselves to pay all loss or damage which a stock-yards company should sustain from any act of negligence on the part of a cattle-dealing firm are liable for a loss resulting from a delivery of cattle to the firm in reliance on a false order presented by the firm, and fraudulently represented to be genuine. Union Stock Yards Co. *v.* Westcott, 47 Nebr. 300, 66 N. W. 419. If a surety obligates himself to become liable for rents, mesne profits, and costs, in event that a sheriff's grantee establishes a superior title to that of the principal, he is not liable where such grantee recovers possession in ejectment from the actual occupant, if in a second ejectment against the principal the grantee suffers a

tractor is liable if the principal does not perform his contract [35] in time,[36] or if he does not furnish [37] or pay for [38] labor and materials; if improper material [39] and poor workmanship is used; [40] and if adjoining property is damaged.[41] If the condition of a bond is to save the obligee harmless, the bond is broken if a judgment be obtained against the obligee,[42] although unpaid; [43] but the bringing of an action alone is not a breach of the bond.[44] It is not a defense to a surety that the obligee has not lost anything as a result of the breach of the bond.[45] If money was to be paid on a certain day, payment the following day will not suffice; [46] or if an employee has refused to account, evidence is inadmissible that afterward he offered to do so.[47] A surety, if his contract is so worded, may be liable before the principal is.[48]

2. Default Occasioned or Acquiesced in by Creditor or Obligee. The surety cannot be held liable for non-performance of his contract resulting from some act or omission on the part of the creditor or obligee.[49] A surety on the recognizance

voluntary nonsuit; as by suffering such nonsuit he acknowledges that his title is not superior. Graham *v.* James, 27 Pa. Super. Ct. 211.

A bond "faithfully to collect" and to act to the best of the collector's skill is broken by an omission to make timely application for debts, and to bring suits for their recovery. Hawkins *v.* Berkley, 1 Wash. (Va.) 204.

A prison bounds bond is broken on the departure of the prisoner from the limits. Rudd *v.* Hanna, 4 T. B. Mon. (Ky.) 528.

35. Mayes *v.* Lane, 116 Ky. 566, 76 S. W. 399, 25 Ky. L. Rep. 824.

36. Adams *v.* Haigler, 123 Ga. 659, 51 S. E. 638; Leppert *v.* Flaggs, 101 Md. 71, 60 Atl. 450.

37. Adams *v.* Haigler, 123 Ga. 659, 51 S. E. 638. After a contractor abandons his contract, and a suit is instituted against his sureties, testimony by a witness as to the amount of the items paid out to complete the building, corroborated by testimony of the architect that these items were necessary, is sufficient to entitle plaintiff to a verdict, such testimony being undisputed. Dallas Homestead, etc., Assoc. *v.* Thomas, 36 Tex. Civ. App. 268, 81 S. W. 1041.

38. A. S. Ripley Bldg. Co. *v.* Coors, 37 Colo. 78, 84 Pac. 817; Mayes *v.* Lane, 116 Ky. 566, 76 S. W. 399, 25 Ky. L. Rep. 824; U. S. Fidelity, etc., Co. *v.* Probst, 97 S. W. 405, 30 Ky. L. Rep. 63; Casey *v.* Gunn, 29 Mo. App. 14.

A judgment establishing a mechanic's lien is conclusive against a surety on a bond conditioned against such liens. Ruggles *v.* Bernstein, 188 Mass. 232, 74 N. E. 366; Oberbeck *v.* Mayer, 59 Mo. App. 289; McFall *v.* Dempsey, 43 Mo. App. 369.

39. Leppert *v.* Flaggs, 101 Md. 71, 60 Atl. 450.

40. A judgment against the obligee is not evidence in a suit on a bond to indemnify the obligee against negligence of a contractor, where notice by the obligee to the surety thereon was not given in time to make a defense. *In re* Byers, 205 Pa. St. 66, 54 Atl. 492.

La. Civ. Code, arts. 2765, 3545, providing that the architect and contractor of a building shall be liable if the building fall to ruin either in whole or in part on account of the badness of the workmanship, will be construed strictly against a surety on the bond of the builder. Vernon Parish Police Jury *v.* Johnson, 111 La. 279, 35 So. 550.

41. Leppert *v.* Flaggs, 101 Md. 71, 60 Atl. 450.

42. Lake Drummond Canal, etc., Co. *v.* West End Trust, etc., Co., 131 Fed. 147; Gray *v.* Lewis, L. R. 8 Ch. 1035, 43 L. J. Ch. 281, 29 L. T. Rep. N. S. 199, 21 Wkly. Rep. 923, 928; Boyd *v.* Robinson, 20 Ont. 404.

A bond of a building contractor conditioned to save the owner harmless is broken if liens for material are established on the property, which the owner is obliged to pay in excess of the contract price. A. S. Ripley Bldg. Co. *v.* Coors, 37 Colo. 78, 84 Pac. 817.

43. Mewburn *v.* Mackelcan, 19 Ont. App. 729.

44. Sutherland *v.* Webster, 21 Ont. App. 228.

45. Grand Junction R. Co. *v.* Pope, 30 U. C. C. P. 633. Nominal damages would be recoverable in any event. Royal Canadian Bank *v.* Goodman, 29 U. C. Q. B. 574.

46. London, etc., R. Co. *v.* Goodwin, 3 Exch. 736, 18 L. J. Exch. 337.

47. Dr. Blair Medical Co. *v.* U. S. Fidelity, etc., Co., (Iowa 1902) 89 N. W. 20.

48. If a surety has undertaken to pay on completion of a building, he becomes liable at that time, although the owner cannot be called upon to pay until a certificate of a surveyor is given. The promise of the surety to pay is not merely an undertaking that he will pay when the owner becomes liable. Lewis *v.* Hoare, 44 L. T. Rep. N. S. 66, 29 Wkly. Rep. 357.

49. *Alabama.*— Maryland Fidelity, etc., Co. *v.* Robertson, 136 Ala. 379, 34 So. 933.

Illinois.— Chicago, etc., R. Co. *v.* Bartlett, 120 Ill. 603, 11 N. E. 867 [*affirming* 20 Ill. App. 96], holding that if the obligee has been negligent in not repairing a door, a surety of a paymaster cannot be held for a loss of funds stolen by a thief who entered through such door, the paymaster not having been negligent.

Iowa.— Stillman *v.* Wickham, 106 Iowa 597, 76 N. W. 1008, holding that where the owner of a building took the erection thereof from the control of the contractor, directed the workmen, rejected material duly furnished by the contractor, and bought other

of a debtor is discharged if the creditor enjoins further proceedings;[50] and a surety on a forthcoming bond is released if the creditor seizes and sells the property for which the bond was given.[51] Likewise a surety is not liable if an agent of the obligee interferes with the performance of the contract,[52] unless the agent was without authority.[53] If the creditor or obligee has consented to the acts of the principal which have resulted in a loss, he cannot hold the sureties therefor.[54] To discharge a surety by some act of the creditor or obligee, the act must be such as necessarily prevents a performance, or it must be wrongful. A surety is not discharged by the lawful act of the creditor or obligee which, although it results in inability to perform, does not have such an effect necessarily;[55] or if the act of the creditor

without consulting him, a surety for the contractor was discharged.

Maryland.— Leppert *v.* Flaggs, 101 Md. 71, 60 Atl. 450, holding, however, that it is not a defense to a surety on the bond of a building contractor, when sued by the owner for damages for injury to adjoining property which the latter has paid, that the contractor and the owner were joint tort-feasors, and that there could not be any recovery in such cases.

Ohio.— Section 16 *v.* Miller, 3 Ohio 261, holding that a surety for making improvements on land is not bound where the obligee, by his own act, prevents them from being made.

United States.— Maryland Fidelity, etc., Co. *v.* U. S., 137 Fed. 866, 70 C. C. A. 204 (holding that a surety for a contractor who has agreed to remove stone from leased land for the lessee by a certain time is not liable if the lessee does not keep the lease in force during that time, resulting in the landowner taking steps to dispossess the contractor); American Surety Co. *v.* Choctaw Constr. Co., 135 Fed. 487, 68 C. C. A. 199 (holding that the surety for a contractor is not liable for his failure to furnish railroad ties if the obligee has violated his part of the contract in regard to furnishing motive power for transportation); U. S. *v.* Tillotson, 28 Fed. Cas. No. 16,524, 1 Paine 305 (holding that sureties on the bond of a contractor to construct a fort are discharged by the refusal of the war department to permit the administrator of the contractor to complete the work).

England.— Blest *v.* Brown, 4 De G. F. & J. 367, 8 Jur. N. S. 602, 6 L. T. Rep. N. S. 620, 10 Wkly. Rep. 569, 65 Eng. Ch. 284, 45 Eng. Reprint 1225 (holding that where flour was sold to a baker on credit to enable him to fulfil a contract to supply the army with bread, the sellers could not hold his surety liable for the price if the flour furnished was not of the quality specified, on account of which the government vacated the contract); Burke *v.* Rogerson, 12 Jur. N. S. 635, 14 L. T. Rep. N. S. 780 (holding that where the seller of a ship had liberty to freight it, and he, without the knowledge of the buyer or of the surety of the latter, loaded it with munitions of war for the Circassians, who were at war with Russia, and despatched it to Constantinople, the surety was released by such exposure to extraordinary risk).

Acts or omission not releasing surety.—An employer, however, is not required to use all means in his power to guard against the consequences of the dishonesty of an employee. Black *v.* Ottoman Bank, 8 Jur. N. S. 801, 6 L. T. Rep. N. S. 763, 15 Moore P. C. 472, 10 Wkly. Rep. 871, 15 Eng. Reprint 573. And sureties for a township treasurer are not discharged because the township council tacitly permitted him to mix the township money with his own. East Zorra Tp. *v.* Douglas, 17 Grant Ch. (U. C.) 462.

50. Palmer *v.* Everett, 7 Allen (Mass.) 358.

51. Jacobson *v.* Sevill, 6 La. Ann. 277.

52. Huntington *v.* Williams, 3 Conn. 427, holding that a sheriff cannot recover on a bond given him that a prisoner should keep the limits if the escape was with the consent and approbation of the jailer.

53. Thus sureties for a bookkeeper of a bank are not relieved because he took money with the consent of the cashier. Chew *v.* Ellingwood, 86 Mo. 260, 56 Am. Rep. 429. And sureties of a teller are not released from liability for a loss caused by overdrafts by reason of the fact that the directors of the bank knew and sanctioned them, as they have no power to sanction overdrafts. Market St. Bank *v.* Stumpe, 2 Mo. App. 545. The sureties of a treasurer of a corporation are not relieved from liability for a breach of his bond in regard to the disposition of funds, although by order of the directors, if in direct violation of the by-laws. Spring Hill Min. Co. *v.* Sharp, 16 N. Brunsw. 603. And a surety of a guardian is not released by an order of court authorizing the guardian to retain and use the money of the ward, especially if a cosurety has consented to it, and it is fair to suppose that the funds were used before the consent and order. Berton *v.* Anderson, 56 Ark. 470, 20 S. W. 250.

54. Stevens *v.* Partridge, 109 Ill. App. 486. Sureties for a deputy collector of internal revenue are discharged if the public funds are used in his private business with the consent of the collector. Pickering *v.* Day, 2 Del. Ch. 333.

55. Rupp *v.* Over, 3 Brewst. (Pa.) 133. Where the obligee, as attorney for other creditors of the principal, prevents a lien of his judgment from attaching to property of the principal, the surety is not discharged, as there is nothing unlawful in his proceedings. Thornton *v.* Thornton, 63 N. C. 211. And where the holder of a note levied upon goods mortgaged to a surety on the note by the

has been caused by prior conduct of the surety.[56] A failure by the creditor to take steps to mitigate damages is at most a partial defense.[57]

3. Amount Recoverable. The amount recoverable from a surety is governed by the general rule; he is liable for such damages as directly result from a breach of his contract,[58] nominal damages being recoverable, although the failure to keep his agreement was unattended with any loss.[59] Generally the liability of a surety equals that of the principal; [60] and the liability of sureties on a note is *prima facie* the amount due; [61] but under some circumstances the principal and sureties may

principal to secure the surety against liability, the holder claiming that the goods were the property of a third person and levying upon them as such, the surety was not discharged. Sheehan *v.* Taft, 110 Mass. 331. Advice and permission by the payee of a note to the principal that the latter carry his property out of the state, sell it, and, with the proceeds, pay his debts, will not discharge sureties on the note. Hawkins *v.* Ridenhour, 13 Mo. 125.

A surety on the bond of a subcontractor cannot defend because he was not given an opportunity to complete the work on default of the subcontractor, if the bond, by its terms, gives the contractor the right to complete the work in such event. McNally *v.* Mercantile Trust Co., 204 Pa. St. 596, 54 Atl. 360.

56. Jones *v.* Hawkins, 60 Ga. 52, holding that a surety cannot complain of acts of the creditor which grew directly out of litigation conducted by the surety as counsel for the principal, obstructing the collection of the debt out of the property of the principal.

57. Michigan Steamship Co. *v.* American Bonding Co., 104 N. Y. App. Div. 347, 93 N. Y. Suppl. 805.

A surety for a building contractor is not relieved from liability by delay of the owner in selecting material, except as to the stipulation providing for a forfeiture if the building is not completed within a specified time. Bagwell *v.* American Surety Co., 102 Mo. App. 707, 77 S. W. 327.

58. New Haven *v.* Eastern Paving Brick Co., 78 Conn. 689, 63 Atl. 517.

Illustrations.— Where one of two contractors for carrying the mail assigned his interest in the contract to the other, part of the consideration to be paid from funds to be received from the government, and the assignee furnishing sureties for the faithful performance of his duty, and the assignee was dismissed by the government for failure to perform his duty, his sureties were held liable to the assignor for the balance of the consideration, such loss being the proximate consequence of the assignee's failure to perform his duty. Chaffin *v.* Gullet, 2 Sneed (Tenn.) 275. Where a judgment creditor forbore issuing execution on the promise of a third person to erect a house and grant a lease thereof to the creditor, such lease to satisfy the judgment, it was held, in an action for not erecting the house, that the measure of damages was the value of the lease, and not the difference between the amount of the judgment and the value of the lease. Strutt *v.* Farlar, 16 L. J. Exch. 84, 16 M. & W. 249. And where a municipality was given the privilege of connecting its sewers with those of a city, so as to drain the waters from that and two other municipalities through the city sewers, and the municipality became responsible to the city for all "damages which might result whether from the connection of said sewers or works necessary," to the city as well as to other persons or corporations, and bound itself to reimburse the city for all sums that the latter might be "called upon and condemned to pay on account of such damages and the costs resulting therefrom," it was held that the municipality was liable not only for all damages resulting from making the actual connection, but also for damages subsequently occasioned from time to time by user; and that the municipalities were bound to pay damages in proportion to the areas drained by them into the city sewers. Montreal *v.* Ste. Cunégonde, 32 Can. Sup. Ct. 135.

59. Royal Canadian Bank *v.* Goodman, 29 U. C. Q. B. 574, holding that where sureties undertake that the principal shall obey the lawful commands of his employer, they are liable for nominal damages if the principal discounts drafts contrary to orders, although the employer in fact gains by the transaction.

60. Stull *v.* Lee, 70 Iowa 31, 30 N. W. 6; Gustine *v.* Union Bank, 10 Rob. (La.) 412; Horton *v.* Dow, 10 N. Y. St. 139; Dawson *v.* Raynes, 2 Russ. 466, 26 Rev. Rep. 9, 3 Eng. Ch. 466, 38 Eng. Reprint 411.

Where a note payable to a firm was signed by one of the partners, it was held that, as the partner was entitled to his proportionate amount of the note as payee, the sureties on the note were not liable for that amount, but for the balance only. McMicken *v.* Webb, 6 How. (U. S.) 292, 12 L. ed. 443.

Where the principal was a buyer of goods to fill a government contract, which were to be supplied by the seller to the buyer, and by the buyer to the government within a given period, and the goods were not supplied by the seller within that time, but the government waived the delay and paid the contract price to the principal, and the principal did not pay the seller, who brought suit against the surety for the price, and the surety sought to reduce the amount by showing that the contract price was higher than the market price owing to the limited time allowed for delivery under the contract, it was held that he was liable for the contract price. Castler *v* Pound, 7 L. T. Rep. N. S. 852, 11 Wkly. Rep. 518.

61. Agricultural Ins. Co. *v.* Sargeant, 26

be answerable for different amounts.[62] The surety is entitled to credit for any payments by the principal,[63] or for any proceeds from security received by the creditor; [64] and part payment by the surety will discharge the principal to the extent of the amount paid.[65] If the principal is bankrupt, and the creditor receives dividends from his estate, the surety is entitled to credit therefor; [66] and if the creditor has other claims against the principal, such dividends must be apportioned.[67]

Can. Sup. Ct. 29. A surety on notes given for the price of property transferred in fraud of the seller's creditors is not liable for the value of the property in excess of the amount of the note. Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553. The liability of sureties on a note given during the Civil war for land was for the value of Confederate money at that time; but they could show that it was given for land, and the amount recoverable would be the value of the land. Bryan *v.* Harrison, 71 N. C. 478.

62. Horne *v.* Young, 40 Ga. 193, holding that where the sureties on a note made in 1860 requested the making of a new note to take up the old one, which was done, the latter being payable in Confederate money, the jury might look into the original consideration, the value of the old note at the time of the new contract, and the different relations of the principal and sureties to that consideration; and, under the Georgia ordinance of 1865, might find a verdict for one amount against the principal and another against the sureties.

Sureties upon a bond are only liable for defalcations made with respect to funds in the hands of the principal at the time of the execution of the bond, and with respect to funds which subsequently came into the hands of such principal. Citizens' Sav., etc., Assoc. *v.* Weaver, 127 Ill. App. 252.

By reason of accumulated interest, a judgment against a surety may be for a greater amount than that of a previous judgment against the principal. Noble *v.* Cothran, 18 S. C. 439.

A surety for alimony at the rate of nine dollars a week is not liable for an increased amount ordered by court. Manning *v.* Sweeting, 4 N. Y. St. 842.

63. Temple St. Cable R. Co. *v.* Hellman, 103 Cal. 634, 37 Pac. 530; Brander *v.* Garrett, 19 La. 455; *In re* Pulsifer, 14 Fed. 247, 9 Biss. 487.

Where the principal is entitled to a deduction, from the sum due, of three times the amount of extra interest paid, a surety is discharged *pro tanto.* Wright *v.* Bartlett, 43 N. H. 548.

If an extension of a note is invalid because obtained by a false representation that the surety authorized it, the surety is entitled to have a bonus paid by the principal for the extension, applied as a partial payment. McDougall *v.* Walling, 15 Wash. 78, 45 Pac. 668, 55 Am. St. Rep. 871.

Liability reduced by discharge of judgment. —Where a note was given for the purchase-price of land, which was subject to the lien of a judgment, which the owner of the note authorized the principal to discharge, promising to allow it as a credit on the note, it was held that as soon as the principal discharged the judgment, the liability of a surety on the note was extinguished to that extent. Cole *v.* Justice, 8 Ala. 793.

Where a grantee of land gave bond for the purchase-money, and the grantor gave bond of indemnity against an annuity which was charged upon the land, and the annuity, being in arrear, was paid by a purchaser from the grantee, and the grantor reimbursed him, the surety for the purchase-price was liable for the full amount due without deduction of the amount paid by the grantor. Burn *v.* Poaug, 3 Desauss. Eq. (S. C.) 596.

64. McConnell *v.* Beattie, 34 Ark. 113; Field *v.* Pelot, 1 McMull. Eq. (S. C.) 369.

Stay of proceedings against surety.—A surety is entitled to have proceedings stayed until the balance of the proceeds from security can be ascertained. McConnell *v.* Beattie, 34 Ark. 113.

65. Emery *v.* Richardson, 61 Me. 99. After the recovery of separate judgments against two partners for a joint trespass, and also judgments against them and their sureties on their respective appeal-bonds, a payment, by one surety, of a part of the judgment against him will discharge the others to the extent of the amount paid, although the surety assigned all his claims against his principal and cosurety to the creditor. Lord *v.* Tiffany, 98 N. Y. 412, 50 Am. Rep. 689.

66. Charlotte First Nat. Bank *v.* Alexander, 85 N. C. 352.

67. Richardson *v.* Kidder, 3 Dem. Surr. (N. Y.) 255; Gray *v.* Seckham, L. R. 7 Ch. 680, 42 L. J. Ch. 127, 27 L. T. Rep. N. S. 290, 20 Wkly. Rep. 920.

If a surety is liable for a part only of the debt, a dividend for the whole debt should be apportioned. Ellis *v.* Wilmot, L. R. 10 Exch. 10, 44 L. J. Exch. 10, 31 L. T. Rep. N. S. 574, 23 Wkly. Rep. 214; *Ex p.* Wood, Bridgman Index Eq. Cas.; Gee *v.* Pack, 33 L. J. Q. B. 49, 9 L. T. Rep. N. S. 290. In Ellis *v.* Emmanuel, 1 Ex. D. 157, 46 L. J. Exch. 25, 34 L. T. Rep. N. S. 553, 24 Wkly. Rep. 832, it is said that a surety for the whole debt, with a limitation on the amount which he can be called upon to pay, is liable for any balance remaining, not exceeding the sum named; but a surety for a part only of the debt is entitled to a deduction of dividends *pro rata.*

If a debt be payable in instalments, a surety for an instalment due cannot have a dividend for the whole debt applied entirely to that instalment; but the dividend must be applied ratably in part payment of each instalment as it becomes due. London Assur. Co. *v.* Buckle, 4 Moore C. P. 153, 16 E. C. L. 368; Martin *v.* Brecknell, 2 M. & S. 39, 2 Rose 156, 14 Rev. Rep. 579.

A surety cannot be held for penalties,[68] unless by virtue of a statute;[69] but he is liable for liquidated damages.[70] Sureties on official bonds should be credited with the amount due the principal for his services,[71] and with disbursements properly made by him;[72] and sureties for building contractors are entitled to have deducted from the amount chargeable against them the unpaid balance of the contract price remaining in the owner's hands.[73] A surety for a materialman is liable, on default of the principal, for the difference between the contract price and the market price paid for materials.[74] If the agreement of the surety was to be responsible for a certain amount, he cannot be held for amounts in excess of it.[75] Sureties for an amount owing by the principal are liable for what is actually due, and not for the amount recited in the instrument as being due,[76] nor for amounts subsequently due.[77] Usually an undertaking as to future indebtedness does not cover indebtedness already existing.[78] An undertaking that an agent will

68. *Indiana.*— Dill *v.* Lawrence, 109 Ind. 564, 10 N. E. 573.

Louisiana.— Reynolds *v.* Yarborough, 7 La. 188.

Pennsylvania.— Siedel *v.* Shelly, 7 Lack. Leg. N. 286.

England.— Anonymous, Cary 12, 21 Eng. Reprint 7.

Canada.— McLean *v.* Tinsley, 7 U. C. Q. B. 40.

69. McIntosh *v.* Likens, 25 Iowa 555, holding that under a statute (Revision (1860), § 1791), which provided that if usurious interest should be contracted for, it should work a forfeiture of ten per cent on the amount of the contract to the school fund, the state was entitled to a judgment against a surety on a usurious note for the amount of interest forfeited.

70. Thus a surety on the bond of a contractor is liable for liquidated damages for delay in completing the work. Mercantile Trust Co. *v.* Hensey, 27 App. Cas. (D. C.) 210 [*affirmed* in 205 U. S. 298, 27 S. Ct. 535, 51 L. ed. 811]; Leavel *v.* Porter, 52 Mo. App. 632.

71. Gray *v.* Davis, 89 Mo. App. 450; U. S. *v.* Corwin, 25 Fed. Cas. No. 14,870, 1 Bond 149.

72. Maryland Fidelity, etc., Co. *v.* Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871.

Where an officer, with the taxes collected by him, takes up county orders, his sureties are entitled to have the amounts so expended applied to their relief, although the officer does not take credit therefor, and secretly sells the orders to others. Maxwell *v.* Miller, 38 W. Va. 261, 18 S. E. 449.

73. Higgins *v.* Drucker, 22 Ohio Cir. Ct. 112, 12 Ohio Cir. Dec. 220. Between the contractor and the sureties of an assignee of the contract the rule is the same. American Surety Co. *v.* Lucas, (Tex. Civ. App. 1900) 57 S. W. 969.

74. Bateman *v.* Mapel, 145 Cal. 241, 78 Pac. 734; Degnon-McLean Constr. Co. *v.* City Trust, etc., Co., 40 Misc. (N. Y.) 530, 82 N. Y. Suppl. 944 [*affirmed* in 99 N. Y. App. Div. 195, 90 N. Y. Suppl. 1029].

Subcontractor.— One manufacturing for a contractor for a specified sum the interior work for a public building according to plans and specifications, subject to the power of the supervising architect to reject the materials and work, is a subcontractor; and the cost of the work is not included in the contractor's bond conditioned on his paying for the material and labor entering into the work. People *v.* Banhagel, 151 Mich. 40, 114 N. W. 669.

75. *Georgia.*— Westbrook *v.* Moore, 59 Ga. 204.

New Jersey.— Tunison *v.* Cramer, 5 N. J. L. 498.

New York.— Agawam Bank *v.* Strever, 16 Barb. 82; Rayner *v.* Clark, 7 Barb. 581; Fairlie *v.* Lawson, 5 Cow. 424; Clark *v.* Bush, 3 Cow. 151. A surety for the payment of a certain amount of alimony is not liable for the expense of burying a child of the parties to the divorce. Manning *v.* Sweeting, 4 N. Y. St. 842. A bond to pay the obligee for "disbursements" and expenses by him will not cover payments made by an assignee of the bond to the obligee to reimburse the latter for such disbursements and expenses. Dunham *v.* McCann, 110 N. Y. App. Div. 157, 97 N. Y. Suppl. 212.

North Carolina.—Donlan *v.* American Bonding, etc., Co., 139 N. C. 212, 51 S. E. 924.

Pennsylvania.— Com. *v.* Forney, 3 Watts & S. 353.

West Virginia.— Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553.

Wisconsin.— Zinns Mfg. Co. *v.* Mendelson, 89 Wis. 133, 61 N. W. 302, holding that a surety for the faithful performance of a contract to sell is not liable for sums paid for decorating and painting a booth where the sales were made.

United States.— U. S. *v.* Tillotson, 28 Fed. Cas. No. 16,524, 1 Paine 305.

England.— Smith *v.* Brandram, 9 Dowl. P. C. 430, 5 Jur. 173, 2 M. & G. 244, 2 Scott N. R. 539, 40 E. C. L. 583.

76. Robinson Consol. Min. Co. *v.* Craig, 4 N. Y. St. 69.

77. De Camps *v.* Carpin, 19 S. C. 121 (holding that a surety for the debts of one person to another cannot be held for an existing liability of the creditor as surety for the debtor which has not been paid); Ward *v.* Henley, 1 Y. & J. 285, 30 Rev. Rep. 781 (holding that the liability of sureties in a replevin bond is limited to the amount of the rent in arrear at the time of the distress and costs, and are not liable for subsequent rent).

78. Hirsch *v.* Meldrim, 124 Ga. 717, 52 S. E.

pay over all money coming into his hands does not cover advances made to the agent by the obligee,[79] unless there is an agreement to that effect.[80] If the obligation is that the principal will pay over all moneys in his possession,[81] or which he has collected,[82] the surety is not liable for money not collected, although the principal has assumed the indebtedness; [83] but a surety is liable for money with which the principal has charged himself and credited others in his dealings with them.[84]

4. Interest. Generally sureties are liable for interest [85] on the amount due,[86] as damages for its detention,[87] even though such amount is unliquidated [88] or the amount itself is interest.[89] Interest begins to run from the time the sureties became liable,[90] which may not be from the same time that the principal is liable for interest.[91] If no time is specified for payment of the amount due, interest

813 (holding that a surety who undertakes to repay an advance to be made to his principal is not liable if the party who is to make the advance releases a lien which he has on the property of the principal, enabling the latter to sell it for a sum in excess of a preëxisting debt owing him, and from the proceeds paying a part of such debt, retaining the balance as the advance which the surety authorized); Hamilton *v.* Watson, 12 Cl. & F. 109, 8 Eng. Reprint 1339 (holding, however, that an obligation to be responsible for a cash credit is not avoided by the fact that the cash credit is employed to pay an old debt due the creditor).

79. Burlington Ins. Co. *v.* Johnson, 120 Ill. 622, 12 N. E. 205 [*affirming* 24 Ill. App. 565]; Charles Brown Grocery Co. *v.* Wasson, 113 Ky. 414, 68 S. W. 404, 24 Ky. L. Rep. 307; John Hancock Mut. L. Ins. Co. *v.* Lowenberg, 120 N. Y. 44, 23 N. E. 978; North Western Mut. L. Ins. Co. *v.* Mooney, 108 N. Y. 118, 15 N. E. 303.

Money withheld, without authority, by an agent as commissions cannot be regarded as advancements, and his sureties are liable therefor. John Hancock Mut. L. Ins. Co. *v.* Lowenberg, 4 N. Y. St. 699.

80. Union Cent. L. Ins. Co. *v.* Smith, 105 Mich. 353, 63 N. W. 438; Chamberlain *v.* Hodgetts, (Tex. Civ. App. 1906) 99 S. W. 161. Where the agreement of the sureties was to be liable for such advancements as the obligees deemed "warranted by accepted sales," the sureties are liable for advancements made before there were any "accepted sales." Kirschbaum *v.* Blair, 98 Va. 35, 34 S. E. 895.

81. Byrne *v.* Ætna Ins. Co., 56 Ill. 321.

An undertaking that the principal will indorse and turn over all notes received does not make the surety liable for the payment of such notes. Victor Sewing Mach. Co. *v.* Crockwell, 2 Utah 557.

82. Delo *v.* Banks, 101 Pa. St. 458.

83. Ball *v.* Watertown F. Ins. Co., 44 Mich. 137, 6 N. W. 232.

84. Pattison *v.* Belford Union, 1 H. & N. 523, 3 Jur. N. S. 116, 26 L. J. Exch. 115, 5 Wkly. Rep. 121, holding that where the treasurer of a poor-law union was also a corn-dealer, and, upon receiving corn from farmers from whom rates were due, was in the habit of debiting himself with the amount due for the corn, and crediting them with the amount due for rates, his surety was liable for the amounts so credited and not paid over, as, in effect, the money had passed.

If promises to pay instead of cash are taken by a treasurer from members of a building and loan association, and credit given, his sureties are liable for such amounts. People's Bldg., etc., Assoc. *v.* Wroth, 43 N. J. L. 70.

85. Degnon-McLean Constr. Co. *v.* City Trust, etc., Co., 40 Misc. (N. Y.) 530, 82 N. Y. Suppl. 944 [*affirmed* in 99 N. Y. App. Div. 195, 90 N. Y. Suppl. 1029]; Montreal *v.* Ste. Cunégonde, 32 Can. Sup. Ct. 135. But interest cannot be recovered on the amount of damages and costs for which a judgment has been obtained on a replevin bond, unless the bond so provides. Berry *v.* Keatan, Ky. Dec. 70. And where the obligee of a bond receives the whole principal after it is payable, he cannot recover interest in an action on the bond. Dixon *v.* Parkes, 1 Esp. 110.

86. Where a surety bound himself to pay all and every such sum or sums of money as should become due to the obligee for money advanced to the principal, and to pay interest for such sum or sums of money, with a provision that the principal sum recoverable was limited to a named amount, interest could not be recovered on any amounts advanced in excess of the sum named. Meek *v.* Wallis, 27 L. T. Rep. N. S. 650.

87. Goff *v.* U. S., 22 App. Cas. (D. C.) 512; Brighton Bank *v.* Smith, 12 Allen (Mass.) 243, 90 Am. Dec. 144.

88. State *v.* Wayman, 2 Gill & J. (Md.) 254; Degnon-McLean Constr. Co. *v.* City Trust, etc., Co., 99 N. Y. App. Div. 195, 90 N. Y. Suppl. 1029 [*affirmed* in 184 N. Y. 544, 76 N. E. 1093, and *affirming* 40 Misc. 530, 82 N. Y. Suppl. 944].

89. Fergus *v.* Gore, 1 Sch. & Lef. 107.

90. McMullen *v.* Winfield Bldg., etc., Assoc., 64 Kan. 298, 67 Pac. 892, 91 Am. St. Rep. 236, 56 L. R. A. 924; Holmes *v.* Frost, 125 Pa. St. 328, 17 Atl. 424; London *v.* Citizens' Ins. Co., 13 Ont. 713.

Substitution of demand note.— Where a collateral note is taken up before it is due, and a demand note, bearing the same date, is substituted therefor, a surety on the latter note is liable for interest only from the time the demand note was given. Proctor *v.* Whitcomb, 137 Mass. 303.

91. Dorsett *v.* Lambeth, 6 La. Ann. 51; Dawson *v.* Raynes, 2 Russ. 466, 26 Rev. Rep. 9, 3 Eng. Ch. 466, 38 Eng. Reprint 411.

begins to run thereon from the date of demand,[92] and such demand may be the commencement of an action.[93] Interest is computed to the time of recovering judgment,[94] and at the legal rate, if no rate is specified.[95]

5. Costs. Sureties are not liable for costs and expenses incurred by the creditor or obligee in an endeavor to enforce the liability of the principal,[96] unless they have undertaken to be answerable therefor,[97] or a suit is necessary to disclose the principal's liability.[98] The sureties are liable for the costs of the proceeding against them;[99] but an apportionment of the costs among the plaintiffs and sureties will be made, if it seems just.[1] A surety, however, will not be relieved in equity until he has paid costs which he, by his pleadings, has caused plaintiff to incur unnecessarily.[2] If a surety has entered into a contract to indemnify a person, such indemnity extends to lawful claims only, and will not cover costs incurred in the defense of an improper action,[3] nor the costs of defending a suit where the liability is clear.[4]

6. Attorney's Fees. Sureties are not liable for the attorney's fees of the creditor or obligee,[5] unless there is an express provision in the contract to that

Where a surety signed a note which bore interest from its date, but under an agreement that he should "not be bound for interest, but for the principal alone," he was not relieved from liability for interest after maturity. McDonald *v.* Huestis, 1 Ind. App. 275, 27 N. E. 509.

92. Heath *v.* Gay, 10 Mass. 371; Degnon-McLean Constr. Co. *v.* City Trust, etc., Co., 99 N. Y. App. Div. 195, 90 N. Y. Suppl. 1029 [*affirmed* in 184 N. Y. 544, 76 N. E. 1093, and *affirming* 40 Misc. 530, 82 N. Y. Suppl. 944]; Folz *v.* Tradesmen's Trust, etc., Co., 201 Pa. St. 583, 51 Atl. 379; Pennsylvania Ins., etc., Co. *v.* Swain, 7 Pa. Dist. 406; U. S. *v.* Quinn, 122 Fed. 65, 58 C. C. A. 401.

A surety on a penal bond is liable for interest from the time he has notice that he has become liable. Brighton Bank *v.* Smith, 12 Allen (Mass.) 243, 90 Am. Dec. 144. And this is especially so if he does not set aside and cause to remain idle any fund to meet the decree or judgment. Tarr *v.* Rosenstein, 53 Fed. 112, 3 C. C. A. 466 [*affirming* 51 Fed. 368].

93. U. S. *v.* Curtis, 100 U. S. 119, 25 L. ed. 571; U. S. *v.* Hills, 26 Fed. Cas. No. 15,369, 4 Cliff. 618, 6 Reporter 771.

94. Faber *v.* Lathom, 77 L. T. Rep. N. S. 168.

95. Allen *v.* Jones, 8 Minn. 202, holding that an unsigned indorsement of a rate of interest on the back of a note is regarded as an oral agreement, and not within the statute allowing the parties to fix their own rate in writing.

96. *Arkansas.*— Batesville Bank *v.* Maxey, 76 Ark. 472, 88 S. W. 968.

Massachusetts.— Copp *v.* McDugall, 9 Mass. 1.

South Carolina.— Leslie *v.* Taggart, 2 McMull. 71. Sureties on a prison bounds bond are not liable for the costs incurred in defeating the discharge of the principal. Baker *v.* Bushnell, 2 McMull. 21.

Wisconsin.— Brinker *v.* Meyer, 81 Wis. 33, 50 N. W. 782.

England.— Colvin *v.* Buckle, 11 L. J. Exch. 33, 8 M. & W. 680. *Compare In re* Lockey, 14 L. J. Ch. 164, 1 Phil. 509, 19 Eng. Ch. 509, 41 Eng. Reprint 726, where sureties in the recognizance of the committee of a lunatic were held liable for the costs of proceedings taken to enforce payment by their principal.

See 40 Cent. Dig. tit. "Principal and Surety," § 455.

97. Spark *v.* Heslop, 1 E. & E. 563, 5 Jur. N. S. 730, 28 L. J. Q. B. 197, 7 Wkly. Rep. 312, 102 E. C. L. 563. Sureties for the payment of a judgment are liable for damages by way of costs awarded as a part of the judgment, although such damages were authorized by a statute passed after the sureties entered into their contract, but before the judgment was entered. Horner *v.* Lyman, 2 Abb. Dec. (N. Y.) 399, 4 Keyes 237.

98. Sureties are liable for costs of a suit to compel the principal to account, it being a condition of the bond that he shall render an account. Scully *v.* Hawkins, 14 La. Ann. 183; Maunsell *v.* Egan, 9 Ir. Eq. 283, 3 J. & L. 251.

99. Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. 833; People *v.* Love, 25 Cal. 520; Scully *v.* Hawkins, 14 La. Ann. 183.

1. Essex County *v.* Wright, 13 Ont. Pr. 474.

2. Watson *v.* Allcock, 4 De G. M. & G. 242, 1 Eq. Rep. 231, 17 Jur. 568, 22 L. J. Ch. 858, 1 Wkly. Rep. 399, 53 Eng. Ch. 188, 43 Eng. Reprint 499.

3. Lewis *v.* Smith, 9 C. B. 610, 19 L. J. C. P. 278, 67 E. C. L. 610.

4. Berwick-upon-Tweed *v.* Murray, 7 De G. M. & G. 497, 3 Jur. N. S. 1, 847, 26 L. J. Ch. 201, 5 Wkly. Rep. 208, 56 Eng. Ch. 386, 44 Eng. Reprint 194; Gillett *v.* Rippon, M. & M. 406, 22 E. C. L. 551.

A surety for a building contractor will be liable for the costs of a suit to establish a mechanic's lien, but not for costs incurred in selling the property under the lien, it being the duty of the owner to pay the debt, and avoid increasing the expenses. La Fayette Mut. Bldg. Assoc. *v.* Kleinhoffer, 40 Mo. App. 388.

5. Donlan *v.* American Bonding, etc., Co., 139 N. C. 212, 51 S. E. 924. Where a creditor, being permitted by the court to participate in a fund on condition of payment of part of

effect,[6] or the sureties have agreed to be answerable for all expenses.[7] And the sureties will not be liable for attorney's fees, even though there be an express stipulation therefor, if their liability is sought to be enforced in some other way than on the contract in which such stipulation appears.[8]

7. As Limited by Penalty. A surety on a bond is not liable beyond the penalty named therein;[9] and, after a surety on a bond to indemnify a surety, has paid the full amount of the penalty of such bond, he, as creditor, can recover from the latter surety a claim for which such surety was liable.[10] It is not a defense to a surety that judgments have been recovered to the amount of the bond, if the judgments have not been satisfied;[11] nor will a court enjoin proceedings against a surety because the aggregate amounts sought to be recovered exceed the penalty.[12] If the amount of the penalty is insufficient to satisfy all claims, it should be apportioned.[13] If sureties bind themselves severally for certain amounts, each is liable up to that amount,[14] but not beyond it.[15] Sureties, although not liable beyond the penalty as to some persons, may be liable beyond it as to others, if the bond so provides.[16] A surety is entitled to have the proceeds of security given him by

counsel fees incurred in its recovery, took the amount due him less the fees and receipted, having participated in the recovery, he could not afterward come upon his debtor's surety for the amount of such fees. Gurnee *v.* Bausemer, 80 Va. 867.

6. Ft. Dodge First Nat. Bank *v.* Breese, 39 Iowa 640.

A surety on a note providing for the payment of attorney's fees is not relieved therefrom by reason of another provision that he should "not be bound for interest, but for the principal alone." McDonald *v.* Huestis, 1 Ind. App. 275, 27 N. E. 509. Where the holder of a note providing for attorney's fees personally filed it against the principal's estate, and received part payment, and afterward employed an attorney, who commenced suit against the sureties, he was held entitled to attorney's fees, although the balance of the note was paid by the principal's estate pending the suit. Shoup *v.* Snepp, 22 Ind. App. 30, 53 N. E. 189.

7. Spark *v.* Heslop, 1 E. & E. 563, 5 Jur. N. S. 730, 28 L. J. Q. B. 197, 7 Wkly. Rep. 312, 10 E. C. L. 563.

8. Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541, holding that a surety on a replevin bond given after a distress is not liable for attorney's fees, although embraced in a note given for the rent.

9. *Georgia.*— Westbrook *v.* Moore, 59 Ga. 204; Bothwell *v.* Sheffield, 8 Ga. 569.

New Jersey.— Tunison *v.* Cramer, 5 N. J. L. 498.

New York.— Rayner *v.* Clark, 7 Barb. 581; Fairlie *v.* Lawson, 5 Cow. 424; Clark *v.* Bush, 3 Cow. 151.

North Carolina.— Bernhardt *v.* Dutton, 146 N. C. 206, 59 S. E. 651; New Home Sewing Mach. Co. *v.* Seago, 128 N. C. 158, 38 S. E. 805.

Pennsylvania.— Com. *v.* Forney, 3 Watts & S. 353.

United States.— American Surety Co. *v.* U. S., 123 Fed. 287, 59 C. C. A. 256, holding that where, after verdict had been returned against a surety, he paid a decree, which left a balance of the penalty smaller than the verdict, on motion by the surety, judgment should be entered for the amount of the balance only of the penalty.

England.— *Ex p.* Wood, Bridgman Index Eq. Cas.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 111, 115.

Successive bonds.— Where a bond is given in renewal of a prior one, recovery cannot be had on the second bond after the penalty of the first has been exhausted. North St. Louis Bldg., etc., Assoc. *v.* Obert, 169 Mo. 507, 69 S. W. 1044.

10. Clark *v.* Bush, 3 Cow. (N. Y.) 151.

11. Moore *v.* Worsham, 5 Ala. 645.

12. Craig *v.* Milne, 25 Grant Ch. (U. C.) 259.

13. Claims held by a person who has contracted to indemnify the surety should be considered with the others, in computing the *pro rata*. Thomas Laughlin Co. *v.* American Surety Co., 114 Fed. 627, 51 C. C. A. 247; American Surety Co. *v.* Lawrenceville Cement Co., 110 Fed. 717.

14. New Orleans *v.* Waggaman, 31 La. Ann. 299; Dougherty *v.* Peters, 2 Rob. (La.) 537; Brighton Bank *v.* Smith, 12 Allen (Mass.) 243, 90 Am. Dec. 144; Toucey *v.* Schell, 15 Misc. (N. Y.) 350, 37 N. Y. Suppl. 879. Where several sureties were bound "in the sum of fifty pounds each, to be paid" to the obligee, "to which payment, well and truly to be made, we hereby bind us, and each of us, our and each of our heirs, executors and administrators, and every of them, by these presents," it was not a defense to one surety, that another had paid £50. Armstrong *v.* Cahill, L. R. 6 Ir. 440.

15. Marcy *v.* Praeger, 34 La. Ann. 54, sureties of a sheriff.

16. Thus, under Act Cong. Aug. 13, 1894, by which contractors for government work are required to give bonds conditioned to indemnify the government, and, in addition, to secure laborers and materialmen, the penalty in the bond limits the liability of the sureties to the government; but the provision for the protection of the laborers and materialmen is distinct, and the amount of liability thereunder is indefinite. Griffith *v.* Rundle, 23 Wash. 453, 63 Pac. 199, 55 L. R. A. 381;

the principal, and which he turns over to the creditor, applied on the penalty,[17] although he cannot claim any deduction on account of payments made by the principal;[18] but the surety's liability is not restored by reason of his subsequent reimbursement by the principal.[19] It is generally held that interest is recoverable on the amount due, although the addition of interest makes the total amount exceed the penalty;[20] and the rule seems to be the same as to costs.[21]

H. Actions — 1. In General. On default of the principal, his sureties become liable to a suit,[22] although the amount of the principal's liability has not been established,[23] unless the sureties have expressly stipulated otherwise.[24] Action must be brought on the instrument to which the sureties are parties, and not on the transaction which it secures.[25] An action at law is the proper means of enforcing a claim against sureties;[26] but a court of equity will give relief upon a proper case being made out,[27] or as an incident to its equity jurisdiction in matters of

U. S. *v.* Rundle, 100 Fed. 400, 40 C. C. A. 450.

17. Field *v.* Pelot, 1 McMull. Eq. (S. C.) 369.

18. Com. *v.* Montgomery, 31 Pa. St. 519; McKenna *v.* Secrest, 4 Strobh. Eq. (S. C.) 160; *In re* O'Callaghan, 1 Ir. Eq. 448a, 450n.

A surety for a defaulting contractor, after the owner has completed the house, is not entitled to have the balance of the contract price credited on the penalty named in the bond. Higgins *v.* Drucker, 22 Ohio Cir. Ct. 112, 12 Ohio Cir. Dec. 220.

19. American Surety Co. *v.* Lawrenceville Cement Co., 110 Fed. 717.

20. *Connecticut.*— New Haven *v.* Eastern Paving Brick Co., 78 Conn. 689, 63 Atl. 517.

District of Columbia.— Goff *v.* U. S., 22 App. Cas. 512.

Georgia.— Westbrook *v.* Moore, 59 Ga. 204.

Kansas.— McMullen *v.* Winfield Bldg., etc., Assoc., 64 Kan. 298, 67 Pac. 892.

Massachusetts.— Brighton Bank *v.* Smith, 12 Allen 243, 90 Am. Dec. 144.

Missouri.— St. Louis Domicile, etc., Assoc. *v.* Augustin, 2 Mo. App. 123.

Pennsylvania.— Pennsylvania Ins., etc., Co. *v.* Swain, 7 Pa. Dist. 406.

South Carolina.— State *v.* Wylie, 2 Strobh. 113.

Virginia.— Tazewell *v.* Saunders, 13 Gratt. 354.

Wisconsin.— Clark *v.* Wilkinson, 59 Wis. 543, 18 N. W. 481.

See 40 Cent. Dig. tit. "Principal and Surety," § 115.

Contra.— Ansley *v.* Mock, 8 Ala. 444; Westcott *v.* Maryland Fidelity, etc., Co., 87 N. Y. App. Div. 497, 84 N. Y. Suppl. 731; Fairlie *v.* Lawson, 5 Cow. (N. Y.) 424; New Home Sewing Mach. Co. *v.* Seago, 128 N. C. 158, 38 S. E. 805; Springer *v.* Canada Exch. Bank, 14 Can. Sup. Ct. 716 [*affirming* 13 Ont. App. 390 (*affirming* 7 Ont. 309)]. In Thomas Laughlin Co. *v.* American Surety Co., 114 Fed. 627, 51 C. C. A. 247, it is said that a surety's liability ordinarily does not extend beyond the penal sum, for costs and interest, unless he has resisted or obstructed the recovery of the claim.

21. Held *v.* Burke, 83 N. Y. App. Div. 509, 82 N. Y. Suppl. 426. *Contra*, State *v.* Wylie, 2 Strobh. (S. C.) 113. See also Thomas Laughlin Co. *v.* American Surety Co., 114 Fed. 627, 51 C. C. A. 247.

22. Keene *v.* Newark Watch Case Material Co., 81 N. Y. App. Div. 48, 80 N. Y. Suppl. 859; Pennsylvania Ins., etc., Co. *v.* Swain, 7 Pa. Dist. 406; Maryland Fidelity, etc., Co. *v.* Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871; Black *v.* Stephen, 37 Can. L. J. N. S. 206. Where the surety wrote, "I consider myself jointly liable for the amount of $200, payable in six months;" and about a month later the principal gave his note for goods bought, payable in six months from its date, the surety was held liable immediately on the default of the principal at the expiration of his six months' credit. Boyle *v.* Bradley, 26 U. C. C. P. 373.

23. Biddeford First Nat. Bank *v.* McKenney, 67 Me. 272; Williams *v.* McNair, 98 N. C. 332, 4 S. E. 131, 133; Montreal *v.* Ste. Cunegonde, 32 Can. Sup. Ct. 135.

Where a contractor abandons his contract, it is not necessary for the obligee to contract with another before suing the sureties. Sullivan *v.* Cluggage, 21 Ind. App. 667, 52 N. E. 110.

24. Where a surety had become a party to a note as security for advances for the publication of certain books, under an agreement that payment was not to be required while the books remained in the possession of the holder of the note, the latter, so long as he was in possession of some of the books, could not recover from the surety. Robertson *v.* Davis, 27 Can. Sup. Ct. 571.

25. Willamouicz *v.* Strong, 8 Ark. 467.

26. Ditto *v.* Young, 3 J. J. Marsh. (Ky.) 187. By Ga. Act (1826), a resort to equity was unnecessary to adjust the rights of sureties on a trustee's bond, as they were allowed to make special defenses, and have their respective responsibilities ascertained. Osborn *v.* Harris County, 17 Ga. 123, 63 Am. Dec. 230.

27. Ogden *v.* Waller, 24 Miss. 190. Tenn. Acts (1835), c. 20, gave jurisdiction to the chancery court against sureties for the performance of covenants and collateral conditions, where it had jurisdiction against the principal; but they might demur if they could not be embraced in the decree for re-

trust and account.[28] The contract may require that suit against the surety shall be brought within a certain time after the principal's default.[29]

2. Venue. If the contract specifies a place of payment, sureties may be sued in that place;[30] but sureties cannot be sued at the place of performance if they are not residents of that place, if a place of payment is not specified.[31] The fact that the principal submits to the jurisdiction does not deprive the sureties of their privilege as to the place of being sued.[32] If the principal and surety are jointly liable, and are residents of different counties, suit may be brought in either county.[33]

3. Who Can Enforce Surety's Liability. The obligee of a bond is the only one who can enforce the liability of sureties thereon,[34] unless by virtue of a statute,[35] or of an express provision in the instrument.[36] A bond to one partner as obligee

lief. Hay *v.* Marshall, 3 Humphr. (Tenn.) 623.

Lost instrument.— Under the old common law, a resort to equity was necessary in case of the loss of the instrument by which the surety was bound. Graves *v.* McCaul, 1 Call (Va.) 414; Sheffield *v.* Castleton, 1 Eq. Cas. Abr. 93, 21 Eng. Reprint 904.

Effect of remedy at law.— It is not an objection to a bill in chancery against the principal that there is a remedy at law against the surety. Middletown Bank *v.* Russ, 3 Conn. 135, 8 Am. Dec. 164.

28. Moore *v.* Waller, 1 A. K. Marsh. (Ky.) 488; Gorsuch *v.* Briscoe, 56 Md. 573; Lord *v.* Tiffany, 98 N. Y. 412, 50 Am. Rep. 689.

A bill for an account against the principal and surety may be sustained, although the account has been stated as to the principal. Ludlow *v.* Simond, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291.

29. Under a bond securing the faithful performance of a building contract to be completed on or before September 15, providing that no action should be brought against the surety unless the same was brought and process served within six months from the time for completion of the contract, an action commenced on March 12, by service of summons and complaint on the surety, was in time. Monro *v.* National Surety Co., 47 Wash. 488, 92 Pac. 280.

30. Taylor *v.* Gribble, (Tex. Civ. App. 1896) 33 S. W. 765.

31. Lindheim *v.* Muschamp, 72 Tex. 33, 12 S. W. 125.

32. Chamberlain *v.* Carroll, (Tex. Civ. App. 1900) 59 S. W. 624.

33. Heard *v.* Tappan, 116 Ga. 930, 43 S. E. 375; White *v.* Hart, 35 Ga. 269; Lyons *v.* Daugherty, (Tex. Civ. App. 1894) 26 S. W. 146.

In Georgia, under Civ. Code (1895), § 2145, the principals in an administrator's bond on which a non-resident fidelity insurance company is surety may be joined with the surety in suit brought in any county wherein jurisdiction over the surety may be obtained. Morris *v.* George, 3 Ga. App. 413, 59 S. E. 1116.

34. American Surety Co. *v.* Boyle, 65 Ohio St. 486, 63 N. E. 73; Guthrie *v.* O'Connor, 36 U. C. Q. B. 372.

A building contractor's bond cannot be enforced by materialmen. Wolf *v.* Sterling, 61 Ill. App. 515 [*affirmed* in 163 Ill. 467, 45 N. E. 218]; Greenfield Lumber, etc., Co. *v.* Parker, 159 Ind. 571, 65 N. E. 747.

Where a contractor for carrying the mail agreed to carry on each wagon a postal employee, and a subcontractor agreed with the contractor to carry the mail only, and was to be liable in damages "to the original contractor" for failure therein, it was held that the subcontractor's sureties were not liable to a postal employee for injuries received while riding in the wagon. Lawton *v.* Waite, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616.

Although the Canadian Post Office Act (C. S. C. c. 31, § 64, subs. 2) enacts that debts due to the post-office, whether by bond or otherwise, shall be instituted in the name of the postmaster-general, the crown is not deprived of the right to proceed on a bond taken in the name of the queen. Reg. *v.* McPherson, 15 U. C. C. P. 17.

Where a county treasurer fails to deliver the public moneys to his successor, the county auditor, on request of the county board, should sue on the treasurer's official bond as relator, and may compromise such suit. Cabel *v.* McCafferty, 53 Ind. 75.

35. Under the General Inspection Act of 1874, 37 Vict. c. 45 (D), § 6, bonds given to the crown by inspectors, can be enforced by "persons aggrieved." Verratt *v.* McAulay, 5 Ont. 313. The British parliament has the power, on the consolidation of two corporations, to provide that all bonds held by either of the old companies, and all rights and remedies for enforcing the same, shall remain valid and effectual in favor of the new corporation. London, etc., R. Co. *v.* Goodwin, 3 Exch. 320, 18 L. J. Exch. 174, 6 R. & Can. Cas. 177.

36. Materialmen can enforce a building contractor's bond if it so provides. Brown *v.* Markland, 22 Ind. App. 652, 53 N. E. 295; Philadelphia *v.* Harry C. Nichols Co., 214 Pa. St. 265, 63 Atl. 886. And this is so, although the provision was inserted under the requirement of a void statute. People's Lumber Co. *v.* Gillard, 136 Cal. 55, 68 Pac. 576. Where, upon abandoning his work, a contractor assigned his contract to his sureties with the understanding that they should finish it, and, with the money received, pay for

is properly enforced by him alone;[37] and a bond to one person cannot be enforced by that person and a partner whom he afterward associates with him.[38] Where a bond is given to the obligees as a house rather than to them as a collection of individuals, the sureties remain liable after changes in the membership;[39] and where those to whom an obligation is given constitute a committee representing a body, they and their successors can enforce it for such persons as are entitled to its benefit.[40] Although a covenant may be made with two or more jointly, yet the cause of action of the covenantees may be several, and each of them may bring an action for his own particular damage;[41] but an obligation to the inhabitants of a town cannot be enforced.[42] There is no privity of contract between the creditor and one promising the debtor to provide for the payment of the debt.[43] Where the instrument is a promissory note, it cannot be enforced by one not the payee named therein, who advanced money thereon,[44] even in the name of the payee with his consent,[45] unless the sureties consented to such advancement;[46] but a negotiable instrument is enforceable by a holder for value without notice.[47] A right to sue sureties cannot be affected by subsequent changes,[48] and a claim against them can be assigned,[49] although the contract does not contain the words "successors and assigns;"[50] but the claim against a surety cannot be transferred

the "materials and labor furnished," it was held that the latter clause meant such as should be furnished to the sureties, and did not give a prior claim to those who had furnished material prior to the assignment. Tuttle *v.* Harlan Independent School Dist., 62 Iowa 422, 17 N. W. 603. Where a surety agrees to be liable for rent to the obligee and to his "successors and assigns," the surety is not discharged by a sale of the property. Monsarratt *v.* Equitable Trust Co., 14 Pa. Super. Ct. 541.

37. Agacio *v.* Forbes, 4 L. T. Rep. N. S. 155, 14 Moore P. C. 160, 9 Wkly. Rep. 503, 15 Eng. Reprint 267.

38. Barnett *v.* Smith, 17 Ill. 565.

39. Bakers' Union *v.* Streuve, 3 Ohio Dec. (Reprint) 110, 3 Wkly. L. Gaz. 253; Barclay *v.* Lucas, 3 Dougl. 321, 1 T. R. 292 note, 1 Rev. Rep. 202 note, 26 E. C. L. 214. In Moller *v.* Lambert, 2 Campb. 548, 11 Rev. Rep. 795, it is said that an action can be maintained upon a bond expressed to be payable to a mercantile firm, by the persons who actually constituted the firm when the bond was executed.

40. Lloyd's *v.* Harper, 16 Ch. D. 290, 50 L. J. Ch. 140, 43 L. T. Rep. N. S. 481, 29 Wkly. Rep. 452.

41. Palmer *v.* Sparshott, 11 L. J. C. P. 204, 4 M. & G. 137, 4 Scott N. R. 743, 43 E. C. L. 79.

42. The following: "I do hereby authorize G. B. to assure the inhabitants of Pembroke and its vicinity, that I do hereby undertake to be accountable for the payment of the notes issued by the Milford Bank, as far as the sum of 30,000 pounds will extend to pay," cannot be enforced by an individual holder of notes. Phillips *v.* Bateman, 16 East 356.

43. Atty.-Gen. *v.* Trimleston, 5 Ir. Eq. 511; Helliwell *v.* Dickson, 9 Grant Ch. (U. C.) 414.

The liability of garnishees under a bond given to the judgment debtors, conditioned that an employee should pay over all moneys received, cannot be attached. Griswold *v.* Buffalo, etc., R. Co., 2 Ont. Pr. 178.

An agreement by one person to answer the draft of another will not give any right to the one in whose favor a draft is drawn to proceed against the person on whom it is drawn. Rattenbury *v.* Fenton, 3 L. J. Ch. 203, 3 Myl. & K. 505, 10 Eng. Ch. 505, 40 Eng. Reprint 192.

44. Howe *v.* Selby, 53 Iowa 670, 6 N. W. 39.

45. Manufacturers' Bank *v.* Cole, 39 Me. 188; Dewey *v.* Cochran, 49 N. C. 184; Clinton Bank *v.* Ayres, 16 Ohio 282. *Contra*, Planters', etc., Bank *v.* Blair, 4 Ala. 613; Utica Bank *v.* Ganson, 10 Wend. (N. Y.) 314; Montpelier Bank *v.* Joyner, 33 Vt. 481.

46. Starrett *v.* Barber, 20 Me. 457.

47. Smith *v.* Moberly, 10 B. Mon. (Ky.) 266, 52 Am. Dec. 543; Greer *v.* Bush, 57 Miss. 575. Where a promissory note is made payable to a person named "or bearer," a stranger can maintain an action in his own name, as bearer, against a surety thereon. Thrall *v.* Benedict, 13 Vt. 248.

48. Monsarratt *v.* Equitable Trust Co., 30 Pittsb. Leg. J. N. S. (Pa.) 305 [*affirmed* in 14 Pa. Super. Ct. 541].

49. U. S. *v.* Rundle, 100 Fed. 400, 40 C. C. A. 450.

Sureties on a contractor's bond are not liable to a bank which pays time checks given laborers and materialmen under an arrangement between the contractor and the bank, the checks being indorsed as evidence of payment, and no assignment of the claims having been made. U. S. *v.* Rundle, 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505.

The assignee of a debt and mortgage can enforce a bond which had been given to the assignor as security for the debt. Longfellow *v.* McGregor, 61 Minn. 494, 63 N. W. 1032.

50. Citizens' Trust, etc., Co. *v.* Howell, 19 Pa. Super. Ct. 255.

separately from that against the principal, as whoever has the latter is entitled to the former.[51]

4. Parties Defendant. If the principal and sureties are bound jointly, they should be joined as defendants;[52] and the fact that the word "surety" is added after some of the signatures does not alter the rule.[53] In event of the death of one, a surviving surety can be held liable.[54] If the principal and sureties are bound jointly and severally,[55] the creditor or obligee can proceed against one surety without joining the others;[56] or he can enforce his claim against the property

51. Andrus *v.* Chretien, 3 La. 48.

52. *Georgia.*—Scarratt *v.* F. W. Cook Brewing Co., 117 Ga. 181, 43 S. E. 413.

Indiana.— South Side Planing Mill Assoc. *v.* Cutler, etc., Lumber Co., 64 Ind. 560; Wheeler *v.* Rohrer, 21 Ind. App. 477, 52 N. E. 780.

Louisiana.— Pecquet *v.* Pecquet, 17 La. Ann. 204; Smith *v.* Scott, 3 Rob. 258; New Orleans *v.* Ripley, 5 La. 120, 35 Am. Dec. 175; Thibodeau *v.* Patin, 1 Mart. N. S. 478; Etzberger *v.* Menard, 11 Mart. 434; Morgan *v.* Young, 5 Mart. 364; Aston *v.* Morgan, 2 Mart. 336, 5 Am. Dec. 733.

Montana.— Cole Mfg. Co. *v.* Morton, 24 Mont. 58, 60 Pac. 587.

Pennsylvania.— Philadelphia *v.* Reeves, 48 Pa. St. 472.

Tennessee.— Kendrick *v.* Moss, 104 Tenn. 376, 58 S. W. 127, holding that separate actions cannot be maintained against the principal and surety.

United States.— Pickersgill *v.* Lahens, 15 Wall. 140, 21 L. ed. 119.

England.— Strong *v.* Foster, 17 C. B. 201, 25 L. J. C. P. 106, 4 Wkly. Rep. 151, 84 E. C. L. 201. A promise by a surety, who is jointly bound on a promissory note with the principal, made after the debt is due, that he will pay it, does not render him severally liable. Jones *v.* Beach, 2 De G. M. & G. 886, 22 L. J. Ch. 425, 51 Eng. Ch. 693, 42 Eng. Reprint 1119.

Canada.— Thompson *v.* Cummings, (Mich. T. 4 Vict.) 2 Ont. Case Law Dig. 4027, 3 Ont. Case Law Dig. 5692.

53. *California.*— Southern California Nat. Bank *v.* Wyatt, 87 Cal. 616, 25 Pac. 918; Aud *v.* Magruder, 10 Cal. 282.

Connecticut.— Bond *v.* Storrs, 13 Conn. 412.

Indiana.— Wittmer Lumber Co. *v.* Rice, 23 Ind. App. 586, 55 N. E. 868.

Kansas.— Rose *v.* Madden, 1 Kan. 445.

Maine.— Rice *v.* Cook, 71 Me. 559.

Massachusetts.— Moies *v.* Bird, 11 Mass. 436, 6 Am. Dec. 179; Hunt *v.* Adams, 5 Mass. 358, 4 Am. Dec. 68, 6 Mass. 519, 7 Mass. 518. In Little *v.* Weston, 1 Mass. 156, it is held that where a note beginning, "I promise," etc., is signed by the principal, and by one who adds "surety" to his signature, the signers are not jointly liable.

Michigan.— Inkster *v.* Marshall First Nat. Bank, 30 Mich. 143.

New York.— Hoyt *v.* Mead, 13 Hun 327; Decker *v.* Gaylord, 8 Hun 110; Perkins *v.* Goodman, 21 Barb. 218; Beaman *v.* Lyon, 27 N. Y. Wkly. Dig. 168; Thomas *v.* Gumaer, 7 Wend. 43.

Oregon.— Bowen *v.* Clarke, 25 Oreg. 592, 37 Pac. 74.

Pennsylvania.— Kleckner *v.* Klapp, 2 Watts & S. 44; Philadelphia *v.* Reeves, 5 Phila. 357.

West Virginia.— Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366.

54. Comins *v.* Pottle, 22 Hun (N. Y.) 287.

55. See *supra*, VII, A.

56. *Georgia.*— Cincinnati Fourth Nat. Bank *v.* Mayer, 100 Ga. 87, 26 S. E. 83.

Indiana.— Foster *v.* Honan, 22 Ind. App. 252, 53 N. E. 667.

Iowa.— Pierce *v.* Durham, (1898) 73 N. W. 862.

Louisiana.— Rogay *v.* Juillard, 25 La. Ann. 305; State *v.* McDonnel, 12 La. Ann. 741; Griffing *v.* Caldwell, 1 Rob. 15; Bonny *v.* Brashear, 19 La. 383; Ballew *v.* Andrus, 10 La. 216; Wood *v.* Fitz, 10 Mart. 196; Bernard *v.* Curtis, 4 Mart. 214.

Michigan.— People *v.* Butler, 74 Mich. 643, 42 N. W. 273.

Mississippi.—Davis *v.* Hoopes, 33 Miss. 173.

New York.—American Surety Co. *v.* Thurber, 56 N. Y. Super. Ct. 338, 4 N. Y. Suppl. 191 [*affirmed* in 121 N. Y. 655, 23 N. E. 1129].

North Carolina.— McNeill *v.* McBryde, 112 N. C. 408, 16 S. E. 841; Brown *v.* McKee, 108 N. C. 387, 13 S. E. 8; Davis *v.* Sanderlin, 23 N. C. 389.

Ohio.— Walsh *v.* Miller, 51 Ohio St. 462, 38 N. E. 381.

Pennsylvania.— Domestic Sewing Mach. Co. *v.* Saylor, 86 Pa. St. 287; Lishy *v.* O'Brian, 4 Watts 141; Geddis *v.* Hawk, 1 Watts 280; Supplee *v.* Herrman, 16 Pa. Super. Ct. 45; Com. *v.* Steigerwalt, 18 Lanc. L. Rev. 301.

South Carolina.— State *v.* Williams, 19 S. C. 62; Lowndes *v.* Pinckney, 2 Strobh. Eq. 44; Lainhart *v.* Reilly, 3 Desauss. Eq. 590.

Tennessee.— Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340; Whiteside *v.* Latham, 2 Coldw. 91.

Texas.— Houghton *v.* Ledbetter, 37 Tex. 161; Lewis *v.* Riggs, 9 Tex. 164.

Virginia.— Dabney *v.* Smith, 5 Leigh 13.

Washington.— Pacific Bridge Co. *v.* U. S. Fidelity, etc., Co., 33 Wash. 47, 73 Pac. 772.

United States.— U. S. *v.* Hodge, 6 How. 279, 12 L. ed. 437.

England.— Berwick-upon-Tweed *v.* Murray, 7 De G. M. & G. 497, 3 Jur. N. S. 1, 847, 26 L. J. Ch. 201, 5 Wkly. Rep. 208, 56 Eng. Ch. 386, 44 Eng. Reprint 194. The non-execution of a contract by the principal does not require the obligee to sue the surety, as the

of a deceased surety.[57] If the sureties are parties to separate contracts, although for the same principal and for the same demand, they cannot be properly joined,[58] although a misjoinder is not necessarily fatal.[59] In chancery the principal and all of the sureties should be made parties defendant; [60] and if one be dead, his personal representatives should be substituted,[61] unless it be shown that the estate is insolvent.[62] If the bill is filed for the purpose of reaching property of the principal

principal may be sued on an implied contract. White *v.* Cuyler, 1 Esp. 200, 6 T. R. 176, 3 Rev. Rep. 147.

See 40 Cent. Dig. tit. "Principal and Surety," § 415 *et seq.*

In an action on a contractor's bond in favor of a school-board, for the payment of claims for material, the school-board is not a necessary party. American Surety Co. *v.* Lauber, 22 Ind. App. 326, 53 N. E. 793.

Effect of statute.— Comp. Laws, c. 80, § 470, providing that the property of the principal must be taken in execution before that of the surety, does not prevent suit against a surety alone. Kirkpatrick *v.* Gray, 43 Kan. 434, 23 Pac. 633.

Under Tex. Rev. St. (1895) art. 1204, the surety may be sued alone if the principal be dead (Muenster *v.* Tremont Nat. Bank, (Civ. App. 1898) 46 S. W. 277), or if he is a fugitive from justice (Bopp *v.* Hansford, 18 Tex. Civ. App. 340, 45 S. W. 744). But the statute has no application to the foreclosure of a deed of trust by a surety. Duncan *v.* Hand, (Civ. App. 1905) 87 S. W. 233. Where the principal dies after an attempt to appeal from a judgment, and his administrator sues out a writ of error, the creditor need not see that the appeal or writ of error is prosecuted to effect before enforcing his remedy against the sureties. Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842.

Under La. Civ. Code, arts. 3049, 3050, sureties are liable *in solido*, but have the right to demand that the creditor reduce his claim to the portion of each, unless some are insolvent. Parker *v.* Guillot, 118 La. 223, 42 So. 782. The principal and surety should be sued in the same action, when practicable. Stafford *v.* Harper, 32 La. Ann. 1076. A surety is liable for the whole debt if he fail to claim the benefit of division. Brander *v.* Garrett, 19 La. 455; U. S. *v.* Hawkins, 4 Mart. N. S. 317. Cosureties, unless they bind themselves *in solido*, or renounce the benefit of division, are bound for their virile portions only. Filhiol *v.* Jones, 8 Mart. 635. Judicial sureties are not entitled to discussion nor division. Dancy *v.* Delahoussaye, 9 Rob. 45; Woodburn *v.* Friend, 19 La. 496; Penniman *v.* Barrymore, 6 Mart. N. S. 494; Bryan *v.* Cox, 3 Mart. N. S. 574; Dennis *v.* Veazey, 12 Mart. 79.

In Ontario a court, on motion of the creditor, will not appoint a personal representative for a deceased surety against the objection of the next of kin, without suit being brought against the principal, as Gen. Ord. 62 does not authorize suing a surety without the principal. *Re* Colton, 8 Ont. Pr. 542.

Exhaustion of remedy against surety.— It is not necessary that a creditor should exhaust his remedy at law against the surety before proceeding in equity against the principal. Speiglemeyer *v.* Crawford, 6 Paige (N. Y.) 254; Alexander *v.* Taylor, 62 N. C. 36.

57. Horne *v.* Tartt, 76 Miss. 304, 24 So. 971.

58. Tourtelott *v.* Junkin, 4 Blackf. (Ind.) 483; Phalen *v.* Dingee, 4 E. D. Smith (N. Y.) 379. Where the principal signed the following: "I agree . . . to collect . . . and bind myself by my securities," etc.; and immediately underneath, his sureties added: "We hereby agree to become security for the due fulfilment of the above contract," it was held that the sureties were not jointly liable with the principal. York Tp. School Section No. 6 *v.* Hunter, 10 U. C. C. P. 359.

Sureties liable on separate demands.— Where a contract provides that each of two tenants is to pay one half of the rent, and that each of two sureties is to be liable for only one tenant's portion of the rent, an action cannot be maintained against the sureties jointly under Code Civ. Proc. § 454, as they are not liable for the same demand. Southmayd *v.* Jackson, 15 Misc. (N. Y.) 476, 37 N. Y. Suppl. 201. But a principal and surety can be joined. Carman *v.* Plass, 23 N. Y. 286.

Where an administrator gives two bonds, the sureties on each may be made joint defendants. Powell *v.* Powell, 48 Cal. 234; Keowne *v.* Love, 65 Tex. 152.

59. Finley *v.* Harrison, 5 J. J. Marsh. (Ky.) 154.

60. *Kentucky.*— Payne *v.* Hays, 4 J. J. Marsh. 176; Sneed *v.* White, 3 J. J. Marsh. 525, 20 Am. Dec. 175; Tobin *v.* Wilson, 3 J. J. Marsh. 63.

Maryland.— Carroll *v.* Waring, 3 Gill & J. 491.

North Carolina.— Hart *v.* Coffee, 57 N. C. 321.

Virginia.— Loop *v.* Summers, 3 Rand. 511.

England.— Brooks *v.* Stuart, 1 Beav. 512, 8 L. J. Ch. 279, 17 Eng. Ch. 512, 48 Eng. Reprint 1039; Cockburn *v.* Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005.

Canada.— Canada Exchange Bank *v.* Springer, 29 Grant Ch. (U. C.) 270.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 417, 418.

61. Roane *v.* Pickett, 7 Ark. 510; Wytheville Crystal Ice, etc., Co. *v.* Frick Co., 96 Va. 141, 30 S. E. 491; Berwick-upon-Tweed *v.* Murray, 7 De G. M. & G. 497, 3 Jur. N. S. 1, 847, 26 L. J. Ch. 201, 5 Wkly. Rep. 208, 56 Eng. Ch. 386, 44 Eng. Reprint 194.

62. Hooks *v.* Bramlette, 1 Tex. App. Civ. Cas. § 863; Madox *v.* Jackson, 3 Atk. 406, 26 Eng. Reprint 1034.

only, the surety is not a necessary,[63] although a proper, party,[64] nor is a surety a necessary party where the object of the suit is an accounting by the principal.[65]

5. Service of Process. In order to obtain a valid judgment against a surety, it is essential that he be served with process,[66] unless there is a statute to the contrary which enters into and forms a part of the contract.[67] Service on the principal is not requisite in order to obtain a valid judgment against the surety,[68] unless the principal and surety are joined in one action and a joint judgment is rendered against them.[69]

6. Pleadings — a. Form of Action. The form of action against a surety will depend very largely upon the contract entered into by him. The fact that the word "surety" is appended to his signature does not prevent recovery on the common counts in assumpsit.[70] If recovery cannot be had in general assumpsit under the money counts, he must be declared against specially.[71]

b. Declaration, Complaint, or Petition. In determining whether a complaint states a cause of action the whole must be considered together.[72] The contract of the principal should be set out.[73] As a rule it is not necessary to say that the surety's contract was in writing; [74] but a consideration between the principal and the obligee must be shown.[75] An allegation of indebtedness is sufficient without averring a promise to pay it.[76] If a contract authorizes alterations therein, and alterations have been made, they should be set out; [77] but if the contract provides

Where a general account is necessary, an insolvent surety should be made a party. Garrow *v.* McDonald, 20 Grant Ch. (U. C.) 122.

63. Cooper *v.* Cooper, 5 N. J. Eq. 498; Dias *v.* Bouchaud, 10 Paige (N. Y.) 445 [*reversed* on other grounds in 1 N. Y. 201]; Adams *v.* Thompson, 6 L. J. Ch. 109.

Where a bill is brought to enforce the lien of a judgment on the land of a surety, a co-surety must be made a party. Findley *v.* Smith, 42 W. Va. 299, 26 S. E. 370.

64. Tedder *v.* Steele, 70 Ala. 347; Rutherford *v.* Alyea, 53 N. J. Eq. 580, 32 Atl. 70 [*reversed* on other grounds in 54 N. J. Eq. 411, 34 Atl. 1078].

65. Newton *v.* Egmont, 4 Sim. 574, 6 Eng. Ch. 574, 58 Eng. Reprint 215.

Where several yearly bonds were given by a collector, it was held that the sureties thereon could not be joined in an action for an accounting by the principal without an allegation that default was made during the period for which each bond ran. Rutherford *v.* Alyea, 53 N. J. Eq. 580, 32 Atl. 70 [*reversed* in 54 N. J. Eq. 411, 34 Atl. 1083].

66. Diamond *v.* Petit, 3 La. Ann. 37. See, generally, Process.

67. Johnson *v.* Chicago, etc., El. Co., 105 Ill. 462, holding that where a bond is given under a particular statute, the statute will enter into the bond and form a part of its obligation, and where the statute provides that in case of a recovery in the suit in which it is given, as in the case of a bond given to procure the discharge of an attachment, judgment shall be entered for the sum found due against the principal and surety in the bond, judgment may be so entered without the service of process on the surety or his appearance in the case, the execution by him of such a bond being a virtual consent that judgment may go against him.

68. Baldwin *v.* Webster, 68 Ind. 133; Hayden *v.* Kale, 7 Ky. L. Rep. 375; Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181; Chapman *v.* Brite, 4 Tex. Civ. App. 506, 23 S. W. 514.

69. Howse *v.* Reeves, etc., Co., 76 S. W. 513, 25 Ky. L. Rep. 949; Pearson *v.* Ruttan, 15 U. C. C. P. 79.

70. Vaughn *v.* Rugg, 52 Vt. 235.

71. Butler *v.* Rawson, 1 Den. (N. Y.) 105; Tomlinson *v.* Willey, 1 How. Pr. (N. Y.) 247; Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095.

72. Calvo *v.* Davies, 73 N. Y. 211, 29 Am. Rep. 130.

73. Cooney *v.* Winants, 19 Wend. (N. Y.) 504. Where a bond is given to secure persons furnishing labor or materials to be used under a certain contract, and a declaration in an action on the bond alleges the execution of the contract and bond at the same time, and that the bond was given to secure the performance of the contract, a demurrer on the ground that no contract was specified or set forth in the bond is properly overruled. People *v.* Carroll, (Mich. 1908) 115 N. W. 42.

An averment that plaintiff "did then" employ the principal is sufficient, although the principal was already in the employ of the plaintiff, if the averment is not traversed. Norton *v.* Powell, 11 L. J. C. P. 202, 4 M. & G. 42, 43 E. C. L. 31.

74. Lilley *v.* Hewitt, 11 Price 494. See Frauds, Statute of, 20 Cyc. 308.

75. Bixler *v.* Ream, 3 Penr. & W. (Pa.) 282.

76. Albany Furniture Co. *v.* Merchants' Nat. Bank, 17 Ind. App. 93, 46 N. E. 479.

An allegation of recovery of a judgment against the principal is a sufficient allegation of indebtedness. Pierpont *v.* McGuire, 13 Misc. (N. Y.) 70, 34 N. Y. Suppl. 150.

77. People's Lumber Co. *v.* Gillard, 136 Cal. 55, 68 Pac. 576.

that an extension of time shall not release a surety, an extension, if made, need not be alleged.[78] If the contract is conditional, the conditions should be set out, and performance thereof must be averred,[79] or that compliance therewith was excused.[80] Execution of the contract by the sureties must be alleged,[81] but the suretyship need not be noticed.[82] If the complaint shows that the principal never executed the contract, it should also set out that the sureties waived its execution by him.[83] Breach of the contract by the principal must be stated,[84] which is done sufficiently by a statement that the principal received money of the plaintiff for which he failed to account; [85] or that a contractor failed to furnish proper material,[86] or that it was his duty to pay for material, which he did not do, and the plaintiff was compelled to pay therefor.[87] If the action is to recover money expended by plaintiff, a general statement that such expenditures were necessary and proper suffices.[88] The insolvency of the principal need not be alleged; [89] or, if alleged, the facts indicating it need not be pleaded.[90] An averment of a breach by the surety is unnecessary.[91] Damage must be alleged,[92] but actual damage need not be shown,[93] nor the items constituting such damage.[94] Misjoinder of counts,[95] or inconsistent counts,[96] will not prejudice plaintiff, as he is allowed to

78. Mankedick *v.* Consolidated Coal, etc., Co., 25 Ind. App. 135, 57 N. E. 256.

79. Higgins *v.* Dixon, 3 D. & L. 124, 10 Jur. 376, 14 L. J. Q. B. 329.

Where a building contract provides that expenses incurred by the owner should be audited and certified by the architect, plaintiff should allege that the architect had given a certificate. Moreland School Dist. *v.* Picker, 14 Montg. Co. Rep. (Pa.) 85.

80. Manufacturers, etc., Mut. F. Ins. Co. *v.* Canada Guarantee Co., 43 U. C. Q. B. 247; Royal Canadian Bank *v.* European Assurance Soc., 29 U. C. Q. B. 579.

81. Church *v.* Campbell, 7 Wash. 547, 35 Pac. 381, holding that a complaint which alleges that the principals "gave" a bond with their co-defendants as sureties is fatally defective as to the sureties.

82. Riley *v.* Jarvis, 43 W. Va. 43, 26 S. E. 366.

83. Bjoin *v.* Anglim, 97 Minn. 526, 107 N. W. 558.

84. Cooney *v.* Winants, 19 Wend. (N. Y.) 504. Where the agreement was that the principal should be forthcoming to satisfy the amount of a judgment to be entered upon a warrant of attorney, an allegation that he was not forthcoming to satisfy the judgment so to be entered up, without averring that judgment was entered upon the warrant of attorney, is sufficient on motion in arrest of judgment. Page *v.* Jarvis, 5 Jur. 412, 10 L. J. Exch. 239, 8 M. & W. 136.

85. State *v.* Ridgway, 12 Ill. 14; Merkley *v.* U. S. Fidelity, etc., Co., 73 S. W. 1126, 24 Ky. L. Rep. 2308; Danvers Farmers' Elevator Co. *v.* Johnson, 93 Minn. 323, 101 N. W. 492; Keene *v.* Newark Watch Case Material Co., 39 Misc. (N. Y.) 6, 78 N. Y. Suppl. 753 [*affirmed* in 81 N. Y. App. Div. 48, 80 N. Y. Suppl. 859]. Where the complaint alleged that the total sales by the principal amounted to eight hundred and thirty-four dollars, and that he collected the same and paid over to the plaintiff one thousand and eighty-nine dollars, the averments showed that the principal was not in default. Cummings *v.* Tell City Brewing Co., 26 Ind. App. 541, 60 N. E. 359.

86. New Haven *v.* Eastern Paving Brick Co., 78 Conn. 689, 63 Atl. 517.

87. Pacific Bridge Co. *v.* U. S. Fidelity, etc., Co., 33 Wash. 47, 73 Pac. 772.

Allegation of payment or lien.— Plaintiff alleged that she was the owner of described land and contracted with one of the defendants to erect a building thereon, and that he gave a bond with the other defendant as surety for the carrying out of the contract; that plaintiff had complied with the contract, and a third party had filed a lien on the building for materials furnished, and had sued to foreclose the same; that the sureties on the bond had been notified of the claim, and had refused to pay the expenses and attorney's fees in defending the same, and prayed for judgment for the amount of the lien and costs and attorney's fees. It was held that to charge the sureties on account of the materialman's claim, it must appear that she had paid the claim, and that it was, under the law, a valid lien on the property, and where there was no allegation of payment or that the lien was valid, the petition was demurrable. McGarry *v.* Seiz, 129 Ga. 296, 58 S. E. 856.

88. McKenzie *v.* Barrett, 43 Tex. Civ. App. 451, 98 S. W. 229.

89. Walter A. Wood Mowing, etc., Co. *v.* Farnham, 1 Okla. 375, 33 Pac. 867.

90. It is not necessary to allege the recovery of a judgment against the principal, and that execution has been issued and returned *nulla bona*. Binford *v.* Willson, 65 Ind. 70.

91. Farley *v.* Moran, (Cal. 1892) 31 Pac. 158.

92. Cooney *v.* Winants, 19 Wend. (N. Y.) 504.

93. Johnson *v.* Cook, 24 Wash. 474, 64 Pac. 729.

94. Adams *v.* Haigler, 123 Ga. 659, 51 S. E. 638.

95. Houston *v.* Delahay, 14 Kan. 125.

96. Rohde *v.* Biggs, 108 Mich. 446, 66 N. W. 331.

amend; [97] but the allowance of an amendment is not an adjudication as to the materiality or effect of evidence in support of the amendment.[98]

c. Plea or Answer — (i) *In General.* Where separate actions are instituted on the same instrument, a plea filed in one cannot be extended to the others, but a plea must be filed in each suit.[99] A plea filed in a suit against the principal and surety jointly should answer the action as to both.[1] A misjoinder of defenses will not prevent the surety from offering evidence thereunder.[2] The objection that the principal,[3] or a cosurety,[4] has not been made a party defendant, must be taken advantage of by a plea in abatement; if the sureties unite with the principal in a plea to the merits, they admit the suretyship.[5] A plea which traverses the facts alleged in the declaration amounts to the general issue [6] and is sufficient.[7] If defendant wishes to take advantage of a discrepancy between the covenant actually made and the one recited in the declaration, he should plead "*non est factum*" ; [8] and under this plea it may be shown that a deed was executed conditionally only, and as an escrow.[9] To obtain any benefit arising out of the relation, the surety must set up the fact of suretyship, and demand his privileges; [10] if his plea is inconsistent, he may lose them.[11] An answer setting up the suretyship merely is not a bar to the action unless connected with other facts.[12] A plea of a statutory defense is sufficient if it substantially adopts the language of the statute.[13] Certain defenses should be pleaded specially, such as delivery of the instrument without authority,[14] fraud,[15] and non-performance of conditions by plaintiff; [16] or that the liability of the surety has been terminated by a new obligation.[17] Likewise if the surety wishes to avail himself of his statutory exemption from suit until the principal has been sued,[18] or desires to prove error in a decree against the principal,[19] he must do so by a special plea. As a rule the objection that there is no writing as required by the statute of frauds need not be pleaded specially.[20] An answer which avers that the signature of the surety was obtained by false representations should add that he was uninformed as to the subject misrepresented.[21] If fraud on the principal is pleaded, the rescission of the contract

97. Michigan Steamship Co. *v.* American Bonding Co., 109 N. Y. App. Div. 55, 95 N. Y. Suppl. 1034; Crenshaw *v.* Varley, (Tex. Civ. App. 1896) 34 S. W. 1005; Pacific Bridge Co. *v.* U. S. Fidelity, etc., Co., 33 Wash. 47, 73 Pac. 772; Dimmock *v.* Sturla, 15 L. J. Exch. 65, 14 M. & W. 758.

98. Michigan Steamship Co. *v.* American Bonding Co., 109 N. Y. App. Div. 55, 95 N. Y. Suppl. 1034.

99. Wall *v.* Wall, 2 Harr. & G. (Md.) 79.

1. Slipher *v.* Fisher, 11 Ohio 299.

2. Eppinger *v.* Kendrick, (Cal. 1896) 44 Pac. 234.

3. Ritter *v.* Hamilton, 4 Tex. 325; Sherwood *v.* Jordan, 2 Tex. Unrep. Cas. 610.

4. Lainhart *v.* Reilly, 3 Desauss. Eq. (S. C.) 590.

5. Welch *v.* Fourier, 6 Ala. 516.

6. Lyall *v.* Higgins, 4 Q. B. 528, 3 G. & D. 585, 7 Jur. 644, 12 L. J. Q. B. 241, 45 E. C. L. 526.

7. Groom *v.* Bluck, 10 L. J. C. P. 105, 2 M. & G. 567, 2 Scott N. R. 89, 40 E. C. L. 746.

8. Wadsworth *v.* Townley, 10 U. C. Q. B. 579.

9. Huron County *v.* Armstrong, 27 U. C. Q. B. 533.

10. Kilgore *v.* Tippit, 26 La. Ann. 624; Pecquet *v.* Pecquet, 17 La. Ann. 204; Pyron *v.* Grinder, 25 Tex. Suppl. 159.

In an action on a promissory note, signed by two, pleadings or other formalities are not required by the code, to bring before the court the question whether one is principal and the other surety. Kupfer *v.* Sponhorst, 1 Kan. 75.

11. Kilgore *v.* Tippit, 26 La. Ann. 624.

12. Moorman *v.* Barton, 16 Ind. 206.

13. McAllister *v.* Ely, 18 Ill. 249.

14. Baker County *v.* Huntington, 46 Oreg. 275, 79 Pac. 187, holding, however, that where a bond is so defective on its face that the obligee would have constructive notice of lack of authority by the principal to deliver it, it is not necessary that such notice should be pleaded by the sureties thereon.

15. Fishburn *v.* Jones, 37 Ind. 119; Ellis *v.* McCormick, 1 Hilt. (N. Y.) 313.

16. Bonner *v.* Nelson, 57 Ga. 433; George A. Fuller Co. *v.* Doyle, 87 Fed. 687; White *v.* Ansdell, 5 L. J. Exch. 180, 1 M. & W. 348, 1 Tyrw. & G. 785.

17. Hill *v.* Fitzpatrick, 6 Ala. 314.

18. Petty *v.* Cleveland, 2 Tex. 404.

19. Davant *v.* Webb, 2 Rich. (S. C.) 379.

20. Eastwood *v.* Kenyon, 9 L. J. Q. B. 409, 11 A. & E. 438, 3 P. & D. 276, 4 Jur. 1081, 39 E. C. L. 245. See FRAUDS, STATUTE OF, 20 Cyc. 311.

21. Stanford First Nat. Bank *v.* Mattingly, 92 Ky. 650, 18 S. W. 940, 14 Ky. L. Rep. 68. And see Monroe Bank *v.* Anderson Bros. Min., etc., Co., 65 Iowa 692, 22 N. W. 929.

by the principal on account thereof is averred sufficiently by a statement that the principal refused to perform it.[22] A plea of duress of the principal by imprisonment should allege that the imprisonment was illegal, or used for an illegal purpose, and that the surety was ignorant of its real character.[23] A defense that conditions have not been performed by plaintiff should be accompanied by an allegation that he had notice of them.[24] The defense of want of consideration need not be pleaded specially.[25] A plea that the surety did not receive any consideration is bad.[26] A plea that the liability of the surety had terminated prior to the default of the principal, without stating any facts in support, is a mere conclusion, and insufficient.[27] Under a plea of the general issue, a surety may show that plaintiff has enough money of the principal to satisfy the demand.[28]

(II) *Release and Discharge in General.* As a general rule, the surety must specially plead that he has been discharged by an alteration of the instrument or contract;[29] an extension of time to the principal;[30] the relinquishment or loss of securities by plaintiff,[31] or that the principal has been discharged,[32] or released by plaintiff;[33] or by plaintiff's non-compliance with the statutory notice to sue.[34] If the surety sets up a discharge by reason of some act of plaintiff which injured him, he must allege the facts which caused such injury,[35] and show the consequent damage.[36] An averment that the surety has been "lulled into security by the surrender" of a note to the principal by plaintiff sufficiently indicates knowledge of the surrender by the surety and prejudice.[37] An answer that the surety has been discharged by failure of plaintiff to bring suit after notice to do so should aver that suit could have been brought at the time notice was given.[38] If an extension of time to the principal is claimed as a defense, the plea should aver that plaintiff had knowledge of the suretyship,[39] that it was given without the surety's consent,[40] that there was a consideration therefor,[41] and of what the consideration consisted;[42] but the consideration pleaded may be described in general

22. Hazard *v.* Irwin, 18 Pick. (Mass.) 95.

23. Graham *v.* Marks, 98 Ga. 67, 25 S. E. 931.

24. Farrell *v.* Fabel, 47 Minn. 11, 49 N. W. 303.

25. Gein *v.* Little, 43 Misc. (N. Y.) 421, 89 N. Y. Suppl. 488 [*affirmed* in 102 N. Y. App. Div. 614, 92 N. Y. Suppl. 1125].

26. Brokaw *v.* Kelsey, 20 Ill. 303.

27. North St. Louis Bldg., etc., Assoc. *v.* Obert, 169 Mo. 507, 69 S. W. 1044.

28. Marquette Opera House Bldg. Co. *v.* Wilson, 109 Mich. 223, 67 N. W. 123. *Compare*, however, Whittlesey *v.* Heberer, 48 Ind. 260.

29. See *infra*, VII, G, 6, c, (III).

30. Rawlings *v.* Cole, 67 Mich. 431, 35 N. W. 66; Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924.

In Illinois the defense of extension of time to the principal is admissible on behalf of a surety, under the general issue. Warner *v.* Crane, 20 Ill. 148; Wiley *v.* Temple, 85 Ill. App. 69.

31. Hoffman *v.* Atkins, 11 La. Ann. 172; Barnes *v.* Crandell, 11 La. Ann. 119; Hayden *v.* Cook, 34 Nebr. 670, 52 N. W. 165.

32. Cutter *v.* Evans, 115 Mass. 27.

33. Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Shelton *v.* Hurd, 7 R. I. 403, 84 Am. Dec. 564.

34. Shehan *v.* Hampton, 8 Ala. 942; Headington *v.* Neff, 7 Ohio 229.

35. Carlile *v.* People, 27 Colo. 116, 59 Pac. 48; Stewart *v.* Barrow, 55 Ga. 664.

Amendment of plea.— Where defendant, sued as a principal on a note, filed a plea that he was surety only, it was error to refuse to permit him thereafter to file a properly verified amendment alleging that, by reason of usury exacted without his knowledge by plaintiff from the principal, a waiver of homestead in the notes had been avoided, which had increased defendant's liability as surety. Whilden *v.* Milledgeville Banking Co., 3 Ga. App. 69, 59 S. E. 336.

36. Smith *v.* Kugler, 14 Montg. Co. Rep. (Pa.) 83. An allegation by a surety in his answer that he requested the sheriff to levy on certain personal property of the principal, but that the execution was held until the principal died insolvent, is insufficient without an averment that such property was subject to execution, and was sufficient to satisfy it. Scott *v.* Shirk, 60 Ind. 160.

37. Kirby *v.* Landis, 54 Iowa 150, 6 N. W. 173.

38. Field *v.* Burton, 71 Ind. 380.

39. McCloskey *v.* Indianapolis Manufacturers' etc., Union, 67 Ind. 86, 33 Am. Rep. 76.

40. Stone *v.* State Bank, 8 Ark. 141; Patnode *v.* Deschenes, 15 N. D. 100, 106 N. W. 573; Maingay *v.* Lewis, Ir. R. 5 C. L. 229.

41. Lehnert *v.* Lewey, 142 Ala. 149, 37 So. 921. *Contra*, St. Paul Trust Co. *v.* St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408.

42. Brooks *v.* Allen, 62 Ind. 401; Smith *v.* Freyler, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358; National Citizens' Bank *v.* Toplitz, 178

terms.[43] The time for which the extension was granted should be named,[44] although it need not be with strict accuracy.[45] Facts which prove the extension need not be pleaded.[46] A plea that the principal had executed a promissory note to plaintiff does not indicate an extension.[47] A plea of a release on condition must allege performance of the condition by defendant;[48] and a plea that the principal has been released must be certain and definite.[49] A plea of relinquishment of security by plaintiff must show the value of such security;[50] and such defense cannot be made by alleging a change made in the contract.[51] An allegation that plaintiff, a bank, had not applied money of the principal "on deposit, and payable to his order," sufficiently shows that the deposit was a general one, and liable to appropriation on the debt.[52] A plea that plaintiff did not proceed against the principal on receipt of notice to sue from the surety should state with certainty all the material facts,[53] alleging that the notice was in writing, when this is required by the statute,[54] and that the principal was solvent at the time notice was given;[55] but defendant need not state that he apprehended that the principal was about to become insolvent or remove from the state;[56] nor that plaintiff had notice of defendant's character as surety.[57] It is not necessary that the notice be set out; and, if set out, an error is not fatal.[58] The failure of plaintiff to sue can be stated in general terms; and the exact time of delay need not be named.[59]

(III) *Alteration of Instrument or Contract.*[60] As already stated,[61] the surety must, as a rule, specially plead that he has been discharged by an alteration of the instrument or contract;[62] and the changes made should be set out;[63] but in some jurisdictions, under a general denial of execution, or the general issue, a surety may show that, after he signed the bond, and without his knowledge, it was altered, as by the erasure of a signature of a cosurety and addition of another.[64]

(IV) *Payment or Performance.*[65] A plea of payment by the principal

N. Y. 464, 71 N. E. 1 [*affirming* 81 N. Y. App. Div. 593, 81 N. Y. Suppl. 422]; Marshall *v.* Aiken, 25 Vt. 327. *Contra*, Huey *v.* Pinney, 5 Minn. 310. An answer stating that the plaintiff agreed with the principal to extend the time of payment if the principal would pay interest in advance, and that the interest was paid accordingly, sufficiently shows that the interest was paid in advance. Hamilton *v.* Winterrowd, 43 Ind. 401.

43. Holland *v.* Johnson, 51 Ind. 346; Shaw *v.* Binkard, 10 Ind. 227; Roberts *v.* Stewart, 31 Miss. 664.

44. Brooks *v.* Allen, 62 Ind. 401; Huey *v.* Pinney, 5 Minn. 310; Smith *v.* Freyler, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358.

45. Lehnert *v.* Lewey, 142 Ala. 149, 37 So. 921; Starret *v.* Burkhalter, 86 Ind. 439; Hamilton *v.* Winterrowd, 43 Ind. 393.

46. St. Paul Trust Co. *v.* St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408.

47. Lindeman *v.* Rosenfield, 67 Ind. 246, 33 Am. Rep. 79.

48. Lyle *v.* Morse, 24 Ill. 95, holding that a plea setting up a promise to release a surety, upon receipt by the creditor of mortgage security, is defective unless it alleges the execution and delivery of the mortgage.

49. Mitchell *v.* Williamson, 6 Md. 210.

50. Hailey First Nat. Bank *v.* Watt, 7 Ida. 510, 64 Pac. 223.

51. Howard County *v.* Baker, 119 Mo. 397, 24 S. W. 200.

52. Dawson *v.* Real Estate Bank, 5 Ark. 283.

53. Donough *v.* Boger, 10 Phila. (Pa.) 616.

54. Ward *v.* Stout, 32 Ill. 399; Mendel *v.* Cairnes, 84 Ind. 141. *Compare* Coats *v.* Swindle, 55 Mo. 31.

55. Darby *v.* Berney Nat. Bank, 97 Ala. 643, 11 So. 881.

56. Shehan *v.* Hampton, 8 Ala. 942; Newton First Nat. Bank *v.* Smith, 25 Iowa 210.

57. Payne *v.* Webster, 19 Ill. 103.

58. Waterford *v.* Hensley, Mart. & Y. (Tenn.) 275.

59. A recital that plaintiff had failed for a long space of time, to wit —— years, to bring suit, is sufficient, without alleging against whom he failed to bring suit. Gillilan *v.* Ludington, 6 W. Va. 128.

60. See, generally, Alterations of Instruments, 1 Cyc. 227.

61 See *supra*, VII, G, 6, c, (II).

62. Sachs *v.* American Surety Co., 72 N. Y. App. Div. 60, 76 N. Y. Suppl. 335 [*affirmed* in 177 N. Y. 551, 69 N. E. 1130]; Kunzweiler *v.* Lehman, 34 Misc. (N. Y.) 466, 70 N. Y. Suppl. 290; Connor *v.* Thornton, (Tex. Civ. App. 1899) 51 S. W. 354.

63. Leppert *v.* Flaggs, 101 Md. 71, 60 Atl. 450; Randle *v.* Barnard, 99 Fed. 348.

64. Fairhaven *v.* Cowgill, 8 Wash. 686, 36 Pac. 1093.

In Pennsylvania, under Proc. Act, May 25, 1887, the defense of material alteration in the contract may be made under the plea of the general issue, and without previous notice. Mundy *v.* Stevens, 61 Fed. 77, 9 C. C. A. 366.

65. See also Payment, 30 Cyc. 1253.

must aver acceptance by plaintiff.[66] On the other hand, a statement that "to the best of the information and belief" of defendant plaintiff gave the principal a receipt does not indicate payment.[67] Where the declaration claims a certain sum due, omitting interest, a plea that defendant paid that sum, with interest, is bad;[68] and a plea that the principal executed a promissory note to plaintiff is not a plea of payment;[69] nor will an equitable discharge of a surety support a plea of payment.[70] The defense of payment may be shown under a general denial.[71] A plea of performance admits the execution of the instrument.[72]

d. Replication or Reply. Where the answer of defendant is in effect a denial of liability, a reply is not required.[73] If defendant pleads a defense which covers a part only of the claim of plaintiff, and plaintiff, in his replication, simply denies the truth of this defense, such defense being sustained by the evidence, plaintiff cannot recover that part of the claim concerning which a defense was not made.[74] A replication, although unnecessarily long, and being substantially a new assignment, is good if it expressly deny the material part of the defense.[7] Where the plea of defendant is that he became surety for the principal for one year, and no longer, a replication denying that defendant became surety for the period in the plea mentioned, or for any other specified time, is sufficient.[76] To the answer of a surety that the name of a new surety was added to a note without his consent, a reply that defendant, with full knowledge of the facts, fully ratified the note, and agreed to pay, sufficiently alleges a ratification;[77] but, to an answer alleging that the note was signed after delivery without consideration, a reply that defendant agreed to pay one half of the note if another surety would pay one half, which the latter had agreed to do, is insufficient in not showing with whom the agreement was made, or the performance of the condition.[78] Where the plea is that defendant was discharged by failure of plaintiff to sue after defendant had notified him to do so, plaintiff cannot recover without pleading that defendant has not sustained any injury.[79] If defendant pleads that plaintiff obtained, in a prior suit, a verdict on a counter-claim for the identical damages claimed in the present action, a replication merely alleging that the recoupment, in the former suit, was directed to special counts only, which were not submitted to the jury, without showing that the plea of recoupment was withdrawn or disallowed, or that the finding did not extinguish all of his claim against the surety, is demurrable.[80]

7. Evidence — a. Presumptions and Burden of Proof. The burden is on the creditor to show performance on his part,[81] and liability on the part of the surety, including all facts necessary to establish such liability,[82] and that the matter con-

66. Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

67. Cook *v.* Com., 8 Pa. Cas. 413, 11 Atl. 574.

68. Bishton *v.* Evans, 2 C. M. & R. 12, 3 Dowl. P. C. 735, 1 Gale 76, 4 L. J. Exch. 142, 5 Tyrw. 639.

69. Lindeman *v.* Rosenfield, 67 Ind. 246, 33 Am. Rep. 79.

70. Shelton *v.* Hurd, 7 R. I. 403, 84 Am. Dec. 564.

71. Riner *v.* New Hampshire F. Ins. Co., 9 Wyo. 446, 64 Pac. 1062, 9 Wyo. 81, 60 Pac. 262.

72. Burtles *v.* State, 4 Md. 273.

73. Cooke *v.* Williamson, 11 Ind. 242.

74. Ross *v.* Burton, 4 U. C. Q. B. 357.

75. Moore *v.* Andrew, 23 U. C. Q. B. 367.

76. Wilkes *v.* Clement, 9 U. C. Q. B. 339.

77. Owens *v.* Tague, 3 Ind. App. 245, 29 N. E. 784.

78. Owens *v.* Tague, 3 Ind. App. 245, 29 N. E. 784.

79. Gillilan *v.* Ludington, 6 W. Va. 128.

80. Maryland Fidelity, etc., Co. *v.* Robertson, 136 Ala. 379, 34 So. 933.

81. Stendal *v.* Ackerman, 43 Misc. (N. Y.) 54, 86 N. Y. Suppl. 468; Koppitz-Melchers Brewing Co. *v.* Schultz, 68 Ohio St. 407, 67 N. E. 719.

82. *Florida.*— Mutual Loan, etc., Assoc. *v.* Price, 19 Fla. 127.

Iowa.— Okey *v.* Sigler, 82 Iowa 94, 47 N. W. 911.

Louisiana.— Erwin *v.* Greene, 5 Rob. 70; Hazard *v.* Lambeth, 3 Rob. 378; Old *v.* Fee, 8 Mart. 14.

Maine.— Stowell *v.* Goodenow, 31 Me. 538.

New Hampshire.— Tenney *v.* Knowlton, 60 N. H. 572.

New York.— Menke *v.* Gerbracht, 75 Hun 181, 26 N. Y. Suppl. 1097.

Texas.— Maryland Fidelity, etc., Co. *v.* Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871.

See 40 Cent. Dig. tit. "Principal and Surety," § 428 *et seq.*

Fraud.— Where a creditor seeks to enforce

cerning which recovery is sought was covered by the surety's contract; [83] but he need not show that all matters preliminary to the giving of an official bond were complied with.[84] As a rule the burden is on the surety to show the relation sustained by him, if such relation is not shown on the face of the instrument; [85] that the instrument, which he admits having signed, was not accepted by the payee; [86] that the principal was within the jurisdiction of the court, so that he might be first proceeded against, as required by statute; [87] that the debt might be collected from the principal or his estate; [88] or that he has been discharged by some act of plaintiff,[89] or by failure of the creditor to sue the principal debtor after

payment of a note against the surety whose signature was obtained by the fraud of the principal debtor, he has the burden of proving that he took the note without knowledge of the fraud. Monroe Bank *v.* Anderson Bros. Min., etc., Co., 65 Iowa 692, 22 N. W. 929.

Signature of other sureties as condition precedent to liability.— Where the names of two as sureties appear in the body of a bond, and one of them signs the same in the presence of the obligee and leaves it in his possession, without saying anything restricting his liability, no presumption arises that such bond was not to be considered binding upon him until the signature of the other surety should be obtained. Johnson *v.* Weatherwax, 9 Kan. 75.

83. Southern Express Co. *v.* Moeller, 85 Mo. 208 (holding that where a surety is sought to be held liable for the failure of an express agent to account for a package, the burden is on the obligee to show that the package was received by the principal as agent); Morris *v.* Easby, 2 Phila. (Pa.) 301 (holding that where the contract was to answer for debts made in the ordinary course of business as they should then appear on the books of the firm, it was incumbent on plaintiff to show that the debt for which he sought to hold defendant was not only made in the ordinary business of the firm, but also appeared on the books at the time of the contract).

84. Thus in an action on the bond of a county depositary, plaintiff need not show that the board of auditors advertised for proposals for the county deposits, that the proposal made by the depositary was in the form required by law, that the depositary possessed the requisite qualifications, nor that the bond was deposited with the county treasurer. Renville County *v.* Gray, 61 Minn. 242, 63 N. W. 635.

85. *California.*— Farmers', etc., Bank *v.* De Shorb, 137 Cal. 685, 70 Pac. 771; Casey *v.* Gibbons, 136 Cal. 368, 68 Pac. 1032.

Minnesota.— Washington Slate Co. *v.* Burdick, 60 Minn. 270, 62 N. W. 285.

New York.— Brink *v.* Stratton, 64 N. Y. App. Div. 331, 72 N. Y. Suppl. 87 [*reversed* on other grounds in 176 N. Y. 150, 86 N. E. 148, 63 L. R. A. 182].

South Carolina.— Kennedy *v.* Gibbes, 2 Desauss. Eq. 380.

West Virginia.— Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924.

United States.— Shepherd *v.* May, 115 U. S. 505, 6 S. Ct. 119, 29 L. ed. 456.

See also *supra*, IV, D, 7.

Relation of joint makers of contract.— It will not be presumed that a creditor has knowledge that one of several joint makers of a contract stands in the relation of surety to the other makers, where that fact does not appear from the face of the instrument. Wilson *v.* Foot, 11 Metc. (Mass.) 285; Agnew *v.* Merritt, 10 Minn. 308.

86. Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28.

87. Petty *v.* Cleveland, 2 Tex. 404.

88. Whittlesey *v.* Heberer, 48 Ind. 260, holding that it will not be presumed that a deceased principal debtor left property sufficient to pay his debts, that his estate is situated within the state, or that administration has been had upon his estate.

89. *Illinois.*— Truesdell *v.* Hunter, 28 Ill. App. 292.

Indiana.— Barclay *v.* Miers, 70 Ind. 346.

Louisiana.— Bayley *v.* Jeneven, 24 La. Ann. 288.

Maine.— Eaton *v.* Waite, 66 Me. 221.

Minnesota.— Guderian *v.* Leland, 61 Minn. 67, 63 N. W. 175; Washington Slate Co. *v.* Burdick, 60 Minn. 270, 62 N. W. 285.

New York.— Socialistic Co-operative Pub. Assoc. *v.* Hoffmann, 12 Misc. 440, 33 N. Y. Suppl. 695.

Ohio.— Bramble *v.* Ward, 40 Ohio St. 267.

United States.— Shepherd *v.* May, 115 U. S. 505, 6 S. Ct. 119, 29 L. ed. 456; Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28.

See 40 Cent. Dig. tit. "Principal and Surety," § 431 *et seq.*

Alteration of contract.— Stevens *v.* Pendleton, 94 Mich. 405, 53 N. W. 1108.

Change of breach of duty by employee into simple debt.— Socialistic Co-operative Pub. Assoc. *v.* Hoffmann, 12 Misc. (N. Y.) 440, 33 N. Y. Suppl. 695.

Refusal of lessor to deliver premises to lessee.— Bayley *v.* Jeneven, 24 La. Ann. 288.

Extension of time.— In an action against a surety he has the burden of proof of an extension of time to the principal sufficient to discharge him (Truesdell *v.* Hunter, 28 Ill. App. 292; Columbia Finance, etc., Co. *v.* Mitchell, 72 S. W. 350, 24 Ky. L. Rep. 1844; Eaton *v.* Waite, 66 Me. 221; Bramble *v.* Ward, 40 Ohio St. 267); and the burden is not sustained where his testimony fails to fix any time to which extension was made (Truesdell *v.* Hunter, *supra*).

Knowledge of the fact that other persons were sureties when time was given the principal debtor is not presumed in favor of the sureties. but must be proved. Mullendore *v.* Wertz, 75 Ind. 431, 39 Am. Rep. 155.

notice,[90] or by performance.[91] But, by the weight of authority, the burden is on the creditor to show that the surety consented to an alteration of the contract,[92] or to an extension of time of payment or performance; [93] that the surety, after a discharge by an extension of time or otherwise, made a new promise; [94] that a note after the extension of the time of payment is a valid and existing obligation; [95] or that the surety was not injured by the relinquishment of a levy or other lien on the principal's property,[96] or by failure of the creditor to sue the principal debtor when notice to sue was given.[97] The amount acknowledged by a public officer to be due by him to the state, in his return to the auditor, is *prima facie* evidence of the amount due, not only against himself, but also against his sureties.[98]

b. Admissibility — (i) *In General.* Where sureties on two bonds unite in a plea, each bond is admissible in evidence.[99] Oral evidence is not admissible to vary the terms of the instrument upon which suit is brought,[1] nor to show agreements and dealings between the principal and surety with which the creditor or obligee is not connected,[2] nor in reference to irrelevant matters and undisputed points.[3] Where the sureties have alleged one defense, evidence of a different defense is inadmissible; [4] nor can the surety show an opinion expressed by the

Presumption from taking order on third person and rebuttal.— Where a creditor takes from his debtor an order on a third person, payable generally and absolutely, and at a time certain, there is a presumption that it was taken in payment, and extended the time of payment, of the original debt, but such presumption may be repelled by proof that it was taken as collateral security. Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42. And see, generally, PAYMENT.

When proof of loss by surety not necessary. — Under Civ. Code (1895), § 2972, providing that any act of a creditor which injures the surety or increases his risk or exposes him to greater liability will discharge him, it is only where the discharge of a surety is claimed on the ground that the creditor's act has injured him that proof of loss by the surety is required, and such proof is not required where his discharge is dependent on an act which has increased his risk or exposed him to greater liability. Cloud *v.* Scarborough, 3 Ga. App. 7, 59 S. E. 202.

90. King *v.* Haynes, 35 Ark. 463 (holding that a surety claiming a discharge from a failure of the creditor to sue the principal debtor after notice to him to sue must clearly show the nature and terms of the notice); Conrad *v.* Foy, 68 Pa. St. 381 (holding that a surety can be discharged by nothing less than clear and positive proof of notice given to the creditor to proceed against the principal).

91. Workingmen's Bldg., etc., Assoc. *v.* Stuart, 1 Lack. Leg. Rec. 399.

92. Mundy *v.* Stevens, 61 Fed. 77, 9 C. C. A. 366, holding that a surety who defends on the ground of an alteration in the contract operating to release him has not the burden of showing that such alteration was without his consent, when plaintiff himself sets out the alteration in his statement of claim, and introduces it in evidence.

93. Barclay *v.* Miers, 70 Ind. 346; Okey *v.* Sigler, 82 Iowa 94, 47 N. W. 911; Stowell *v.* Goodenow, 31 Me. 538; McNulty *v.* Hurd, 86 N. Y. 547; Menke *v.* Gerbracht, 75 Hun (N. Y.) 181, 26 N. Y. Suppl. 1097. *Contra*, Guderian *v.* Leland, 61 Minn. 67, 63 N. W. 175; Washington Slate Co. *v.* Burdick, 60 Minn. 270, 62 N. W. 285; Shepherd *v.* May, 115 U. S. 505, 6 S. Ct. 119, 29 L. ed. 456.

94. Bramble *v.* Ward, 40 Ohio St. 267.

95. Tenney *v.* Knowlton, 60 N. H. 572.

96. Rawson *v.* Gregory, 59 Ga. 733; Allen *v.* O'Donald, 23 Fed. 573.

97. Strickler *v.* Burkholder, 47 Pa. St. 476, holding that in an action against a surety on a note by the holder the burden of proof is on plaintiff to show that the money could not have been collected, if suit had been brought when notice to sue was given.

98. Rodes *v.* Com., 6 B. Mon. (Ky.) 359.

99. Mathis *v.* Carpenter, 95 Ala. 156, 10 So. 341, 36 Am. St. Rep. 187.

1. Crescent Brewing Co. *v.* Handley, 90 Ala. 486, 7 So. 912; Trentman *v.* Fletcher, 100 Ind. 105; Ceresco State Bank *v.* Belk, 56 Nebr. 710, 77 N. W. 58; Hoyt *v.* French, 24 N. H. 198; Concord Bank *v.* Rogers, 16 N. H. 9. See EVIDENCE, 17 Cyc. 605. The testimony of C, the obligee in a bond, signed only by O as surety, to secure the performance of the contract of H, to build for C, that he had no notice that O signed with the understanding that he was to sign with H as his surety, is immaterial, in view of the stipulation of the building contract, drawn by him, providing for a bond by H, with surety, and the form of the bond indicating that it was to be signed by another. Crawford *v.* Owens, 79 S. C. 59, 60 S. E. 236.

2. Ham *v.* Greve, 34 Ind. 18; Monroe Bank *v.* Gifford, 72 Iowa 750, 32 N. W. 669; Holmes *v.* Frost, 125 Pa. St. 328, 17 Atl. 424.

3. Thus where the breach assigned is the failure of the principal to account for the proceeds of goods disposed of by him, and the manner of the disposal is not complained of, it is not error to refuse to allow defendant to show directions by plaintiff to the principal concerning such disposal. Dr. Blair Medical Co. *v.* U. S. Fidelity, etc., Co., (Iowa 1902) 89 N. W. 20.

4. Stepp *v.* Hatcher, 67 S. W. 819, 23 Ky. L. Rep. 2441.

obligee as to the legal liability of the surety;[5] but matters subsequent to the contract can be shown by the surety in his exoneration,[6] such as an extension of time to the principal,[7] or an alteration of the contract.[8] Conversations and correspondence between the principal and creditor can be offered in evidence by the surety to show the circumstances under which the contract was made,[9] and the creditor can show a conversation between himself and the principal indicating that the creditor was induced to grant an extension upon a representation by the principal that the surety agreed thereto.[10] The principal personally can testify as to transactions between himself and the obligee;[11] and, if the surety is sued alone, the husband of the principal is a competent witness either against or in favor of the surety.[12] The right of the obligee to recover is not taken away by a loss of written instruments;[13] but their contents may be shown in other ways.[14]

(II) *Judgment or Award Against Principal.* There is considerable conflict as to whether a judgment or award recovered against the principal is admissible in evidence against his surety, and if so as to its effect. In some states, such judgment,[15] or an award,[16] is inadmissible, especially if the surety had

5. National Surety Co. *v.* U. S., 123 Fed. 294, 59 C. C. A. 479, holding that in an action on a bond given to secure the performance of a mail route contract, a letter from the auditor for the post-office department in regard to the liability of defendant on a similar contract was irrelevant.

6. Allison *v.* Thomas, 29 La. Ann. 732.

7. Horne *v.* Bodwell, 5 Gray (Mass.) 457. See *infra*, VIII, E, 2, j.

8. Mennet *v.* Grisard, 79 Ind. 222; Norwegian Evangelical Lutheran Bethlehem Cong. *v.* U. S. Fidelity etc., Co., 81 Minn. 32, 83 N. W. 487. See *infra*, VIII, E, 2, i.

9. Jackson *v.* Jackson, 7 Ala. 791; Hunter *v.* Porter, 133 Iowa 391, 109 N. W. 283; Blaney *v.* Rogers, 174 Mass. 277, 54 N. E. 561.

10. White *v.* Middlesworth, 42 Mo. App. 368.

11. Lasater *v.* Purcell Mill, etc., Co., 22 Tex. Civ. App. 33, 54 S. W. 425; Riner *v.* New Hampshire F. Ins. Co., 9 Wyo. 446, 64 Pac. 1062.

12. Deck *v.* Johnson, 30 Barb. (N. Y.) 283 [*affirmed* in 1 Abb. Dec. 497, 2 Keyes 348].

13. McLennan *v.* Wellington, 48 Kan. 756, 30 Pac. 183.

14. Timberlake *v.* Jennings, (Va. 1891) 13 S. E. 28, holding that the entry in a "fiduciary book" which the code requires the clerk of court to keep, of personal representatives and their sureties, was sufficient to show the fact of suretyship of the persons named therein, where the bond was lost during the war.

15. *Alabama.*— Maryland Fidelity, etc., Co. *v.* Robertson, 136 Ala. 379, 34 So. 933; Fireman's Ins. Co. *v.* McMillan, 29 Ala. 147. A judgment in an action by a contractor against the owner in which the latter set up a counter-claim is not *res judicata* of the owner's right of action against a surety who was not a party to the former action. Maryland Fidelity, etc., Co. *v.* Robertson, *supra*.

Maine.— Foxcroft *v.* Nevens, 4 Me. 72.

Maryland.— Roberts *v.* Woven Wire Mattress Co., 46 Md. 374; Beall *v.* Beck, 3 Harr. & M. 242.

Minnesota.— American Bldg., etc., Assoc. *v.* Stoneman, 53 Minn. 212, 54 N. W. 1115.

New Jersey.— De Greiff *v.* Wilson, 30 N. J. Eq. 435.

New York.— Thomas *v.* Hubbell, 15 N. Y. 405, 69 Am. Dec. 619 [*reversing* 18 Barb. 9]; Clark *v.* Montgomery, 23 Barb. 464; V. Loewer's Gambrinus Brewery Co. *v.* Lithauer, 43 Misc. 683, 88 N. Y. Suppl. 372; Thomson *v.* MacGregor, 9 Abb. N. Cas. 138.

Pennsylvania.— Bradford *v.* Frederick, 101 Pa. St. 445; Giltinan *v.* Strong, 64 Pa. St. 242 [*reversing* 7 Phila. 176]. A judgment in favor of a city against a building contractor does not prevent an action by a subcontractor against a surety, although one of the issues in the former suit was whether the work of the subcontractor had been performed properly. Philadelphia *v.* Stewart, 10 Pa. Dist. 395.

Tennessee.— Barksdale *v.* Butler, 6 Lea 450; Muhling *v.* Ganeman, 4 Baxt. 88; Gambil *v.* Campbell, 12 Heisk. 737.

Texas.— Glasscock *v.* Hamilton, 62 Tex. 143.

England.— *Ex p.* Young, 17 Ch. D. 668, 50 L. J. Ch. 824, 45 L. T. Rep. N. S. 90.

See 40 Cent. Dig. tit. "Principal and Surety," § 397 *et seq.*

Judgment in foreclosure suit.—Where sureties are not parties to a foreclosure suit, they are not precluded from setting up an extension of time to the principal as a defense, although it was alleged and adjudged in the foreclosure suit that there was no agreement to extend. Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874.

Questions determined by an adjudication of the bankruptcy of the maker of a note are not admissible in evidence in a subsequent action by the payee against a surety. Kennedy *v.* Moore, 17 S. C. 464.

Surety not estopped by penal proceedings.— Sureties on a liquor dealer's bond are not estopped, in an action thereon, from showing that their principal had not violated the law, even though in penal proceedings against him he confessed his guilt, or was convicted of the offense. Paducah *v.* Jones, 31 Ky. L. Rep. 1203, 104 S. W. 971.

16. Simonton *v.* Boucher, 22 Fed. Cas. No. 12,877, 2 Wash. 473.

no notice of the action against the principal;[17] and recovery by one person on a bond is not evidence in an action by another person on the same bond.[18] In other states a judgment against the principal is admissible, in some jurisdictions being *prima facie* evidence against the surety,[19] and in others conclusive.[20] Much, however, depends upon the nature of the contract of the surety. Generally, a judgment or decree against an executor, administrator, guardian, or assignee, finding an amount due, is admissible in a proceeding against the surety, in some states being *prima facie* evidence,[21] in others conclusive,[22] on the liability of the surety. Likewise, if a surety has undertaken to perform a decree, judgment,[23] or

17. Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647; Ranson *v.* Keyes, 9 Cow. (N. Y.) 128.

18. People *v.* McHenry, 19 Wend. (N. Y.) 482.

19. *Illinois.*— Henry *v.* Heldmaier, 226 Ill. 152, 80 N. E. 705 [*affirming* 129 Ill. App. 86].

Iowa.— McConnell *v.* Poor, 113 Iowa 133, 84 N. W. 968, 52 L. R. A. 312; Charles *v.* Hoskins, 14 Iowa 471, 83 Am. Dec. 378.

Kentucky.— Com. *v.* Bracken, 32 S. W. 609, 17 Ky. L. Rep. 785.

Michigan.— People *v.* Mersereau, 74 Mich. 687, 42 N. W. 153.

Virginia.— Hobson *v.* Yancey, 2 Gratt. 73; Munford *v.* Nottoway Overseers of Poor, 2 Rand. 313.

Wisconsin.— Grafton *v.* Hinkley, 111 Wis. 46, 86 N. W. 859.

United States.— U. S. *v.* Rundle, 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505; Dexter, etc., Co. *v.* Sayward, 66 Fed. 265; U. S. *v.* Ingate, 48 Fed. 251; Berger *v.* Williams, 3 Fed. Cas. No. 1,341, 4 McLean 577.

See 40 Cent. Dig. tit. "Principal and Surety," § 397 *et seq.*

A surety is not estopped from pleading and proving a defense unsuccessfully urged by the principal in a prior action against him, although the surety appeared as attorney for the principal in the former suit. Park *v.* Ensign, 66 Kan. 50, 71 Pac. 230, 97 Am. St. Rep. 352. But where, in an action by the principal maker of a note to recover possession thereof, on the ground that it had been paid, a surety on the note was a witness, and judgment was rendered in favor of the defendant, and afterward an action on the note was brought by the defendant against the principal and surety, the latter was held estopped by the judgment in the former suit, to rely on the transaction claimed by him to be payment. Beh *v.* Bay, 127 Iowa 246, 103 N. W. 119, 109 Am. St. Rep. 385.

20. *Georgia.*— Price *v.* Carlton, 121 Ga. 12, 48 S. E. 721; Waldrop *v.* Wolff, 114 Ga. 610, 40 S. E. 830; Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541; Mitchell *v.* Toole, 63 Ga. 93.

Illinois.— Meyer *v.* Purcell, 114 Ill. App. 472 [*affirmed* in 214 Ill. 62, 73 N. E. 392].

Indiana.— Fuller *v.* Wright, 59 Ind. 333.

Louisiana.— Fusz *v.* Trager, 39 La. Ann. 292, 1 So. 535; Corning *v.* Elliott, 10 La. Ann. 753; Herrick *v.* Conant, 4 La. Ann. 276; Brashear *v.* Carlin, 19 La. 395.

Massachusetts.— Cutter *v.* Evans, 115 Mass. 27; Way *v.* Lewis, 115 Mass. 26.

Mississippi.— Higdon *v.* Vaughn, 58 Miss. 572.

Nevada.— Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

North Carolina.— Nimocks *v.* Pope, 117 N. C. 315, 23 S. E. 269; McDonald *v.* McBryde, 117 N. C. 125, 23 S. E. 103; Robbins *v.* Killebrew, 95 N. C. 19; Council *v.* Averett, 90 N. C. 168; Brown *v.* Pike, 74 N. C. 531; Harker *v.* Arendell, 74 N. C. 85.

Ohio.— Jaynes *v.* Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810.

Vermont.— Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94.

Washington.— Henry *v.* Ætna Indemnity Co., 36 Wash. 553, 79 Pac. 42; Friend *v.* Ralston, 35 Wash. 422, 77 Pac. 794; Ihrig *v.* Scott, 13 Wash. 559, 43 Pac. 633.

See 40 Cent. Dig. tit. "Principal and Surety," § 397 *et seq.*

A judgment against the principal in a sequestration bond is not conclusive as to ownership against the surety. Carroll *v.* Hamilton, 30 La. Ann. 520; Clarke *v.* Scott, 2 La. Ann. 907.

In North Carolina, under Code, § 1345, a judgment against the principal is presumptive evidence against a surety on an official bond. Martin *v.* Buffaloe, 128 N. C. 305, 38 S. E. 902; McNeill *v.* Currie, 117 N. C. 341, 23 S. E. 216; Moore *v.* Alexander, 96 N. C. 34, 1 S. E. 536.

21. Bennett *v.* Graham, 71 Ga. 211; Bradwell *v.* Spencer, 16 Ga. 578; Macready *v.* Schenck, 41 La. Ann. 456, 6 So. 517; Furguson *v.* Glaze, 12 La. Ann. 667; Jenkins *v.* State, 76 Md. 255, 23 Atl. 608, 790; Parr *v.* State, 71 Md. 220, 17 Atl. 1020; O'Conner *v.* State, 18 Ohio 225.

22. *California.*— Treweek *v.* Howard, 105 Cal. 434, 39 Pac. 20.

Kentucky.— McCalla *v.* Patterson, 18 B. Mon. 201; Hobbs *v.* Middleton, 1 J. J. Marsh. 176; Hindman *v.* Lewman, 61 S. W. 470, 63 S. W. 478, 23 Ky. L. Rep. 179; Com. *v.* Bracken, 32 S. W. 609, 17 Ky. L. Rep. 785.

New York.— Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; Gerould *v.* Wilson, 16 Hun 530 [*affirmed* in 81 N. Y. 573].

Pennsylvania.—Neel *v.* Com., (1886) 7 Atl. 74; Com. *v.* Gracey, 96 Pa. St. 70.

Virginia.— Ross *v.* McLauchlan, 7 Gratt. 86.

See 40 Cent. Dig. tit. "Principal and Surety," § 397 *et seq.*

23. Riddle *v.* Baker, 13 Cal. 295; Harrell *v.* Sanders, 26 La. Ann. 691; People *v.* Lan-

award,[24] or to pay any balance that shall appear to be due by the principal to the obligee,[25] he is bound by any decree, judgment, or award rendered. A surety on an appeal-bond cannot attack the judgment appealed from;[26] and a decree that an injunction was sued out wrongfully by the principal is conclusive against a surety on the injunction bond who has undertaken that the principal will pay all damages which may be adjudged.[27] If there has been fraud or collusion in obtaining a judgment against the principal, such fact may be shown by the surety.[28] Where the surety has had an opportunity to contest the claim of the creditor or obligee, he cannot afterward contest it;[29] nor can he enjoin a judgment recovered against him.[30] A judgment in favor of the principal is admissible on behalf of the surety, in connection with proof that it is for the same demand, and that it has been satisfied.[31]

(III) *Admissions of Principal.*[32] Admissions by the principal cannot be offered in evidence against his surety,[33] especially if they make separate defenses,[34] unless such admissions are connected with the act or transaction to which the contract of the surety relates, and are within the scope of the duties connected with the joint liability, in which case they are admissible.[35] Accounts, entries, and written statements by the principal are *prima facie* evidence against his sureties,[36] in some states being conclusive.[37] But the principal cannot collude with the

ing, 73 Mich. 284, 41 N. W. 424; Griswold *v.* Hazard, 28 Fed. 597.

Where a liquor dealer's bond was conditioned that the sureties should be liable for the result of a suit against their principal, such sureties were conclusively bound by the judgment in the suit, although they were not parties thereto, and had no notice thereof. Point Pleasant *v.* Greenlee, 60 S. E. 601.

If a surety apprehends any fraudulent collusion between the obligee and the principal as to the decree, his remedy is in chancery for relief against the bond. Lothrop *v.* Southworth, 5 Mich. 436.

24. Binsse *v.* Wood, 37 N. Y. 526 [*affirming* 47 Barb. 624].

25. Holmes *v.* Frost, 125 Pa. St. 328, 17 Atl. 424.

Mechanics' liens.— Where a bond was given by a contractor conditioned that buildings should be turned over free from encumbrance, records showing the filing of claims for mechanics' liens, and a decree establishing the same, are admissible as proof of the existence of liens against the property, although the surety was not made a party to the proceedings. Comstock *v.* Cameron, 41 Nebr. 814, 60 N. W. 105.

26. Barber *v.* Rutherford, 12 Misc. (N. Y.) 33, 33 N. Y. Suppl. 89 [*affirming* 10 Misc. 784, 30 N. Y. Suppl. 1129].

27. Shenandoah Nat. Bank *v.* Read, 86 Iowa 136, 53 N. W. 96.

28. *Illinois.*— Elder *v.* Prussing, 101 Ill. App. 655.

Iowa.— Charles *v.* Hoskins, 14 Iowa 471, 83 Am. Dec. 378.

Louisiana.— Carroll *v.* Hamilton, 30 La. Ann. 520; Allison *v.* Thomas, 29 La. Ann. 732; Herrick *v.* Conant, 4 La. Ann. 276.

Maine.— Dane *v.* Gilmore, 51 Me. 544.

New Hampshire.— Great Falls Mfg. Co. *v.* Worster, 45 N. H. 110.

North Carolina.— Parker *v.* Woodside, 29 N. C. 296.

South Carolina.— State Treasurers *v.* Bates, 2 Bailey 362.

See 40 Cent. Dig. tit. "Principal and Surety," § 399.

29. Fulton *v.* Sollibellos, 4 La. 526; Stoops *v.* Wittler, 1 Mo. App. 420; Kenner *v.* Caldwell, Bailey Eq. (S. C.) 149, 21 Am. Dec. 538; Trinity Parish *v.* Ætna Indemnity Co., 37 Wash. 515, 79 Pac. 1097.

30. McBroom *v.* Sommerville, 2 Stew. (Ala.) 515; Ross *v.* Woodville, 4 Munf. (Va.) 324.

31. Fireman's Ins. Co. *v.* McMillan, 29 Ala. 147.

32. See also Evidence, 16 Cyc. 1034.

33. Harty *v.* Smith, 74 Ill. App. 194; Rae *v.* Beach, 76 N. Y. 164; Aeschlimann *v.* Presbyterian Hospital, 29 N. Y. App. Div. 630, 53 N. Y. Suppl. 998 [*affirmed* in 165 N. Y. 296, 59 N. E. 148, 80 Am. St. Rep. 725]; McDowell *v.* Burwell, 4 Rand. (Va.) 317; Pendleton *v.* U. S., 19 Fed. Cas. No. 10,924, 2 Brock. 75.

34. Craw *v.* Abrams, 68 Nebr. 546, 94 N. W. 639, 97 N. W. 296.

35. U. S. *v.* Cutter, 25 Fed. Cas. No. 14,911, 2 Curt. 617. See Evidence, 16 Cyc. 1034.

The returns made by a person as administrator are not admissible against the sureties of that person as guardian of the same estate. Johnson *v.* McCullough, 59 Ga. 212.

36. *Kentucky.*— Rodes *v.* Com., 6 B. Mon. 359.

South Carolina.—State Treasurers *v.* Bates, 2 Bailey 362.

United States.— U. S. *v.* Boyd, 5 How. 29, 12 L. ed. 36; Supreme Council C. K. A. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96; Simonton *v.* Boucher, 22 Fed. Cas. No. 12,877, 2 Wash. 473.

England.— Abbeyleix *v.* Sutcliffe, L. R. 26 Ir. 332; Lysaght *v.* Walker, 5 Bligh N. S. 1, 5 Eng. Reprint 208.

Canada.— Victoria Mut. F. Ins. Co. *v.* Davidson, 3 Ont. 378; Murray *v.* Gibson, 28 Grant Ch. (U. C.) 12; Middlefield *v.* Gould, 10 U. C. C. P. 9; Ferrie *v.* Jones, 8 U. C. Q. B. 192.

See Evidence, 16 Cyc. 1034.

37. Gibson *v.* Hawkins, 69 Ga. 354, 47 Am.

creditor to fix liability on the surety, and if there be fraud between the creditor and the principal in this respect the surety can obtain relief from it.[38]

c. Sufficiency. Uncontradicted evidence of an admission, by one of the defendants, that a debt is his own, supports a finding that he is the principal;[39] but the relation of principal and surety is not shown by the fact that a judgment has been obtained against one only of two makers of a note;[40] nor by a statement by one of the signers of a note that it was genuine and given for value, and that there was no defense thereto.[41] Where the liability of sureties on a bond is alleged, and a breach of the contract of the principal is proved, a judgment against the sureties is supported by the proof.[42] The same facts which establish the non-payment of a debt on a bond against the principal affect the sureties.[43] If the bond of suretyship provides that a written statement by an employer, based on the accounts of the principal, "shall be *prima facie* evidence" of a loss sustained by the wrongful act of the principal, the employer makes out a *prima facie* case by offering such a statement in evidence.[44] But where a building contractor and his surety agree to secure the owner against all liens, and liens are filed, a judgment by default against the owner is not conclusive on the surety;[45] nor is a breach of a guardian's bond shown by proof that his ward did not receive the proceeds of a sale of real estate, as the guardian may have expended it properly.[46] Where the burden of proof is on the creditor, it is not sustained by contradictory evidence.[47] The jury are not obliged to believe any witness, and are not bound to find that certain defendants are sureties when the instrument is silent as to that point.[48] A variance between the evidence offered by a surety, and the allegations in his answer, will not be fatal if the evidence sustains the gist of his defense.[49] If the evidence is conflicting, the court will not disturb a finding by the jury that representations made to a surety were fraudulent;[50] that conditions annexed by him have not been complied with;[51] that his contract has been altered;[52] or that an extension of time was granted to the principal without the consent of the surety,[53] or with his consent.[54]

8. Trial — a. In General. The surety cannot complain of irregularity in the proceeding which does not affect him;[55] and he is bound by the agreement of the principal with plaintiff for a judgment and stay of execution, although entered into without his knowledge and consent.[56] The action of the creditor against the surety cannot be delayed by a cross action of the surety against the principal;[57] nor is a surety on the bond of a contractor, when sued for damages, which the obligee has been compelled to pay on account of the negligence of the contractor, entitled

Rep. 757; Lewison *v.* Hoffman, 8 Misc. (N. Y.) 583, 29 N. Y. Suppl. 1119; Metropolitan L. Ins. Co. *v.* Callen, 4 N. Y. Suppl. 833; State *v.* Teague, 9 S. C. 149. Where A covenanted to deliver certain goods to B, the value thereof to be determined by the prices placed on similar articles sold by X during the preceding six months, and a bill of such articles was made out by X, and exhibited to B, who admitted its correctness, this admission was held available against both B and his surety. Davis *v.* Kingsley, 13 Conn. 285.

38. Evans *v.* Keeland, 9 Ala. 42.

39. Saunders *v.* Pruntey, (Va. 1897) 26 S. E. 584.

40. Fritch *v.* Citizens' Bank, 191 Pa. St. 283, 43 Atl. 394.

41. Elliott *v.* Moreland, 69 N. J. L. 216, 54 Atl. 224.

42. Robinson *v.* Chamberlain, 29 Tex. Civ. App. 170, 68 S. W. 209.

43. Guldin *v.* Faber, 1 Walk. (Pa.) 435, evidence of payment of interest as repelling presumtion of payment of debt.

44. American Surety Co. *v.* Pauly, 72 Fed. 484, 18 C. C. A. 657.

45. Picot *v.* Signiago, 27 Mo. 125.

46. Maryland Fidelity, etc., Co. *v.* Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871.

47. Ross *v.* Hughes, (Va. 1897) 26 S. E. 825.

48. Brink *v.* Stratton, 64 N. Y. App. Div. 331, 72 N. Y. Suppl. 87 [*reversed* on other grounds in 176 N. Y. 150, 68 N. E. 148, 63 L. R. A. 182].

49. Lazelle *v.* Miller, 40 Oreg. 549, 67 Pac. 307.

50. Melick *v.* Tama City First Nat. Bank, 52 Iowa 94, 2 N. W. 1021.

51. Benton County Sav. Bank *v.* Boddicker, 117 Iowa 407, 90 N. W. 822; Caudle *v.* Ford, 72 S. W. 270, 24 Ky. L. Rep. 1764.

52. Dorsey *v.* McGee, 30 Nebr. 657, 46 N. W. 1018.

53. Clark *v.* House, 16 N. Y. Suppl. 777.

54. Jordan *v.* D'Heur, 71 Ind. 199.

55. Hennen *v.* Wood, 16 La. Ann. 263.

56. Carraway *v.* Odeneal, 56 Miss. 223.

57. Chrisman *v.* Perrin, 67 Ind. 586.

to a continuance in order to prepare for trial, because the obligee, on account of sickness, obtained a continuance in the former action against the obligee.[58] If the matter in controversy is referred to a commissioner, he should state fully the accounts of the principal,[59] and show priority of debts.[60]

b. Questions of Law and Fact. As in other cases,[61] questions of law are for the court,[62] while questions of fact are for the jury.[63] It is for the jury to decide whether a surety lacked capacity at the time he executed the contract;[64] and, where it is doubtful from the testimony what relation the defendant assumed, that point should be left with the jury.[65] The jury should decide also whether a contract set out in the declaration was the one for the performance of which defendant gave bond;[66] and whether plaintiff has exercised due diligence in giving notice of acts of the principal,[67] or in enforcing a lien.[68] The jury likewise should pass upon the point of acceptance of work by the obligee as performance of the contract,[69] or whether alleged transactions between the obligee and principal have taken place.[70]

c. Instructions. In an action against a surety the court should properly instruct the jury as to all the issues raised by the pleadings and evidence;[71] but

58. Spokane *v.* Costello, 42 Wash. 182, 84 Pac. 652.

59. Choate *v.* Arrington, 116 Mass. 552.

60. Dillard *v.* Krise, 86 Va. 410, 10 S. E. 430.

61. See, generally, TRIAL.

62. Gates *v.* Morton Hardware Co., (Ala. 1906) 40 So. 509 (whether the relation of principal and surety has been created); Neal *v.* Freeman, 85 N. C. 441 (diligence of creditor in proceeding against principal after default); Barclay *v.* Deekerhoof, 151 Pa. St. 374, 24 Atl. 1067 (construction of agreement for additional work for additional compensation indorsed on a building contract, and determination whether it was such an alteration of the contract as released sureties); U. S. *v.* Hodge, 6 How. (U. S.) 279, 12 L. ed. 437 (construction of instruments).

63. *Georgia.*— Wyley *v.* Stanford, 22 Ga. 385; Bethune *v.* Dozier, 10 Ga. 235, whether the surety intends to request the creditor to sue the principal as a matter of favor or to require it as a matter of right under the statute.

Iowa.— Mingus *v.* Daugherty, 87 Iowa 56, 54 N. W. 66, 43 Am. St. Rep. 354.

Kansas.— Roberson *v.* Blevins, 57 Kan. 50, 45 Pac. 63, whether there was an agreement for extension of the time of payment.

Mississippi.— Moore *v.* Redding, 69 Miss. 841, 13 So. 849, extension of time for payment of note.

New York.—Detroit Water Com'rs *v.* Burr, 2 Sweeny 25.

Pennsylvania.—Meek *v.* Frantz, 171 Pa. St. 632, 33 Atl. 413 (whether a lessor made a false representation, which induced defendant to become surety on the lease); American Tel. Co. *v.* Lennig, 139 Pa. St. 594, 21 Atl. 162 (whether an embezzlement was committed by the principal as bookkeeper or subsequently as cashier).

Texas.—Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 205, 31 S. W. 285, 33 L. R. A. 359, whether it was negligence for a bank, as between it and the surety of a borrower, to return to the borrower for collection notes which had been deposited as collateral, so that the collateral became impaired.

See 40 Cent. Dig. tit. "Principal and Surety," § 443.

Consignment or sale.— It is for the jury to decide whether a transaction between the creditor and the principal is a consignment or a sale. Wilson *v.* Edwards, 61 N. Y. 659.

64. Harty *v.* Smith, 74 Ill. App. 194, holding that the question whether a surety was so intoxicated at the time he signed a note as to be incapable of knowing what he was doing is one of fact for the determination of the jury.

65. Wyley *v.* Stanford, 22 Ga. 385; Shaffstall *v.* McDaniel, 152 Pa. St. 598, 25 Atl. 576; Moyer *v.* Richardson, 1 Lack. Leg. N. (Pa.) 263.

66. U. S. Fidelity, etc., Co. *v.* Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344.

67. Roberts *v.* Woven Wire Mattress Co., 46 Md. 374; American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644.

68. Mingus *v.* Daugherty, 87 Iowa 56, 54 N. W. 66, 43 Am. St. Rep. 354.

69. Detroit Water Com'rs *v.* Burr, 2 Sweeny (N. Y.) 25.

70. W. C. No. 73, P. O. S. of A. *v.* Thomas, 13 Pa. Super. Ct. 453, holding that where the sureties for a treasurer set up as a defense a loan to the treasurer by the obligee, who denied it, and there was no written evidence of any such arrangement, the question was exclusively for the jury.

71. See, generally, TRIAL. In a suit on a note by the indorsee bank against the maker, in which the maker alleged that the note was made for the accommodation of the payee investment company, a charge that if defendant signed the note as accommodation maker, and plaintiff had notice thereof, and if, at the time of making the same, it was agreed by plaintiff that it would hold certain stock as security for the same, and afterward the investment company agreed with plaintiff that its cashier could realize on the stock, and pay *pro rata* on certain of the investment company's notes, held by

should not instruct as to issues not so raised.[72] An instruction submitting an issue not raised by the evidence, such as premature payment,[73] or ratification of an alteration,[74] is erroneous; but an instruction that an agreement for an extension need not be in express terms is harmless where the agreement, if it existed at all, was express.[75] An instruction that the defenses of the principal and surety depend upon the establishment of the fact that an extension has been granted is not erroneous, where the principal claims that the action has been prematurely brought because the extended time has not expired, and the surety claims a discharge because of such extension.[76] Where the defense of a surety is that the creditor surrendered certain bonds held as collateral security for the debt, an instruction that plaintiff "controlled" the bonds implies that there had been a delivery and acceptance of the bonds by him.[77] When the court has substantially given the charge asked by a surety upon his defense, the refusal to repeat the charge is no ground of complaint.[78]

d. Verdict and Findings.[79] A verdict is not objectionable by reason of words which are mere surplusage.[80] If the contract stipulates that an extension shall not release the surety thereon, there need not be a finding that there was an extension.[81]

9. Judgment[82] **— a. In General.** A surety cannot be made liable by a judgment entered without any proceeding against him;[83] nor can a judgment against a surety be based on a verdict against the principal alone;[84] and, in an action against a sheriff, if the record fails to show that proof was made as to who were the sureties on his bond, the judgment can be considered as against him only.[85] If suit be brought against the principal and surety jointly on the same instrument, the judgment must be against all or none,[86] and rendered against all at the same time.[87] If judgment be obtained against the principal alone, the sureties are

plaintiff without the knowledge and consent of defendant, they should find for defendant, was as favorable to defendant as the facts warranted. Smith *v.* Traders' Nat. Bank, 82 Tex. 368, 17 S. W. 779. A ruling that a surety in an agreement to pay such sums of money as arbitrators should award is discharged if, by consent of the parties, matters are embraced in the award which were not included in the submission referred to in the agreement, and that, as to everything not appearing upon the face of the award, the jury may determine whether matters were embraced in the award which were not submitted, furnishes to the surety no ground of exception in an action against him upon his agreement. Hubbell *v.* Bissell, 2 Allen (Mass.) 196.

Instruction construed.— A surety claimed a release because his principal had given a mortgage to secure both the surety and other debts. The court charged that "plaintiff could not release any of the mortgaged property or appropriate it to any purpose other than the payment of the mortgage debt," without releasing the surety to the extent of the value of the property otherwise appropriated. It was held that this did not charge that the mortgaged property must be first appropriated to pay the surety debt. De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787.

72. Kilkelly *v.* Martin, 34 Wis. 525. And see, generally, Trial.

73. Essex *v.* Murray, 29 Tex. Civ. App. 368, 68 S. W. 736.

74. Kilkelly *v.* Martin, 34 Wis. 525.

75. Kerns *v.* Ryan, 26 Ill. App. 177.

76. Abel *v.* Jarratt, 100 Ga. 732, 28 S. E. 453.

77. Monroe Bank *v.* Gifford, 79 Iowa 300, 44 N. W. 558.

78. Smith *v.* Traders' Nat. Bank, 82 Tex. 368, 17 S. W. 779. See, generally, Trial.

79. See, generally, Trial.

80. Guthrie *v.* Carpenter, 162 Ind. 417, 70 N. E. 486, holding that a verdict, "We, the jury, find for the defendant S., release from bond," is not objectionable by reason of the last three words, as they are surplusage.

81. Mankedick *v.* Consolidated Coal, etc., Co., 25 Ind. App. 135, 57 N. E. 256.

82. See, generally, Judgments.

83. Earle *v.* Cureton, 13 S. C. 19.

84. Cobb *v.* Wise, 71 Ga. 103.

85. Dane *v.* McArthur, 57 Ala. 448.

86. Kingsland *v.* Koeppe, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; Rutherford *v.* Moore, 24 Ind. 311.

Amendment.— Where judgment was entered on a verdict against the principal and surety, neither of the defendants being named, but the judgment was against "the defendant," it is amendable by adding the letter "s." Saffold *v.* Wade, 56 Ga. 174.

Burden of proof as to residence.— When a surety claims the benefit of Rev. Code, p. 380, art. 30, providing that final judgment shall not be rendered against a surety if the principal be a resident of the state, the surety has the burden of proving that the principal is a resident if process has been returned "not found." Thrasher *v.* Buckingham, 40 Miss. 67.

87. Griffing *v.* Caldwell, 16 La. 294; Shively *v.* U. S., 5 Watts (Pa.) 332.

discharged;[88] but judgment may be rendered against the surety alone if the principal become insolvent pending the suit,[89] or if the contract be several as well as joint.[90] Separate judgments, however, may be rendered in favor of a principal and sureties jointly sued.[91] At common law, a judgment need not designate that one or more of the defendants are sureties;[92] but in many states by statute such designation is requisite.[93] The statute, however, does not apply where the principal is not before the court,[94] nor where judgment is by default,[95] nor if evidence is not introduced to show the relation;[96] nor if all the defendants are principals, although sustaining the relation of sureties among themselves.[97] Judgment must be for the same amount against all the defendants,[98] unless sureties on a bond are bound in different amounts, in which case a separate judgment should be rendered against each for the full amount for which he is bound, although more than the amount due from the principal cannot be collected.[99] If suit be brought on several bonds against a person who is surety on each, separate judgments should be entered on each bond, and not one judgment for the gross penalties.[1] In some states, by statute, a judgment should direct that the sheriff levy upon the property of the principal first.[2] A decree in equity should provide for first exhausting the estate of the principal,[3] unless he is utterly insolvent;[4] and may

88. McKinney *v.* Green, 52 Miss. 70.

89. Kuhn *v.* Abat, 2 Mart. N. S. (La.) 168.

90. Rehm *v.* Halverson, 197 Ill. 378, 64 N. E. 388 [*affirming* 94 Ill. App. 627].

91. Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438.

92. Keaton *v.* Cox, 26 Ga. 162.

93. Failure of the clerk, in recording a judgment, to certify that some of the defendants are sureties, in accordance with Code Civ. Proc. § 511, is reversible error. Escritt *v.* Michaelson, 73 Nebr. 634, 103 N. W. 300, 106 N. W. 1016; Trester *v.* Pike, 60 Nebr. 510, 83 N. W. 676; Blaco *v.* State, 58 Nebr. 557, 78 N. W. 1056; Maxwell *v.* Home F. Ins. Co., 57 Nebr. 207, 77 N. W. 681. The requirement in Code, § 449, for the judgment to certify which of defendants is principal and which surety, applies where they are sued jointly only. Wilkins *v.* Ohio Nat. Bank, 31 Ohio St. 565.

Procedure under statutes.— Under Ind. Civ. Code (1881), §§ 738, 739, a surety may have the relation established by proceedings subsequent to the judgment rendered; and such proceedings are independent of the principal action, and not affected by its fate. Montgomery *v.* Vickery, 110 Ind. 211, 11 N. E. 38; Williams *v.* Fleenor, 77 Ind. 36. In an action to which the sureties of an assignee are parties, notice and motion are sufficient to authorize a personal judgment against them for the unpaid balance of a judgment against the assignee. Hindman *v.* Lewman, 61 S. W. 470, 63 S. W. 478, 23 Ky. L. Rep. 179. One or more defendants may be certified as sureties as provided in Ohio Civ. Code, § 449, without evidence, if the parties consent in open court at the time judgment is rendered. Peters *v.* McWilliams, 36 Ohio St. 155.

Record.— It is not a ground for reversal that the record does not show that the clerk certified which of defendants was principal and which was surety, under Mich. Rev. St. (1838) p. 451, authorizing a party to show that one of several defendants is a mere surety, and upon such showing requiring the entry of that fact to be made. Prentiss *v.* Spalding, 2 Dougl. (Mich.) 84.

94. Watson *v.* Beabout, 18 Ind. 281; Brownlee *v.* Young, 25 Mont. 38, 63 Pac. 798; Kirkland Land, etc., Co. *v.* Jones, 18 Wash. 407, 51 Pac. 1043.

95. Morehead Banking Co. *v.* Duke, 121 N. C. 110, 28 S. E. 191.

96. Gatewood *v.* Burns, 99 N. C. 357, 6 S. E. 635.

97. Brownlee *v.* Young, 25 Mont. 38, 63 Pac. 798.

98. Clark *v.* Blalock, 114 Ga. 309, 40 S. E. 228; Jones *v.* Lewis, 87 Ga. 446, 13 S. E. 578; Robinson *v.* Chamberlain, 29 Tex. Civ. App. 170, 68 S. W. 209.

99. Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. 833; People *v.* Love, 25 Cal. 520; State *v.* Hampton, 14 La. Ann. 679.

In Louisiana, under Rev. Civ. Code, arts. 3049, 3050, sureties liable *in solido* for the same debt are entitled to the benefit of a division when they have asked for it specially in their answer, and judgment against each must be for his virile portion, except in event of insolvency of the cosureties. Metropolitan Bank *v.* Muller, 50 La. Ann. 1278, 24 So. 295, 69 Am. St. Rep. 475; Holmes *v.* The Belle Air, 5 La. Ann. 523; McCausland *v.* Lyons, 4 La. Ann. 273; McGuire *v.* Bry, 3 Rob. 196; Atchafalaya Bank *v.* Dawson, 13 La. 497. But the sureties of a sheriff bound severally for particular sums are not entitled to the right of division. New Orleans *v.* Waggaman, 31 La. Ann. 299.

1. Cassady *v.* Board of Trustees, 93 Ill. 394.

2. Rooker *v.* Wise, 14 Ind. 276; Dignowity *v.* Staacke, (Tex. Civ. App. 1894) 25 S. W. 824; Montrose *v.* Fannin County Bank, (Tex. Civ. App. 1893) 23 S. W. 709.

3. Patton *v.* Patton, 3 B. Mon. (Ky.) 160; Pace *v.* Plumlee, 2 Tenn. Cas. 55; Beckham *v.* Duncan, (Va. 1889) 9 S. E. 1002.

4. May *v.* May, 19 Fla. 373.

adjust the rights of the surety as to the creditor.[5] If the statute allows, a judgment may provide also for the enforcement of the rights of the sureties against the principal,[6] when sued jointly, and against each other.[7] If, after the death of the principal, judgment be entered against him and his sureties, it will be stricken off as against him, but not against his sureties; [8] but if the principal die after judgment is rendered, and before satisfaction, a scire facias may go against his administrators.[9] A judgment entered on an altered bond will be opened, even as to the one who made the alteration;[10] and if a judgment against a principal and surety is void as to the former, it is void as to the latter also.[11]

b. Summary Judgment. In some states, by statute, judgment against a surety is authorized upon judgment against the principal; [12] but the remedy is allowed only in the cases expressly named in the statute.[13]

10. Execution. If a joint judgment has been rendered against a principal and surety, the execution must issue against both, although the surety has been discharged by facts occurring after the judgment, unless the surety has taken some legal steps to have the fieri facias declared invalid.[14] If the principal prosecutes a writ of error, execution should not issue against the surety pending the proceedings in error.[15] It is unnecessary, before execution issues against a surety, that a rule to show cause why execution should not issue be served upon him.[16] Execution cannot issue for a greater sum than the judgment against the surety, although the judgment against the principal is for a larger sum, and the surety has promised to

5. Shubrick *v.* Russell, 1 Desauss. Eq. (S. C.) 315, where the creditor had extended the time of payment of a bond taken as collateral security for a debt, and a surety for the debt was given the bond, and, under the decree, the time of payment of the debt was extended to the time when the extension on the collateral security expired.

6. Labbe *v.* Corbett, 69 Tex. 503, 6 S. W. 808, holding, however, that where a judgment is recovered against a principal and surety, judgment should not be rendered against the principal in favor of the surety without reference to whether the surety should satisfy the first judgment.

7. Young *v.* Clark, 2 Ala. 264.

8. Com. *v.* Joyce, 18 Pa. Co. Ct. 193. Judgment cannot be entered against a surety on a claimant's bond if, owing to the death of the principal, judgment has not been entered against him, as the property is in possession of the heirs of the principal, and the surety would not have any rights against the heirs. Muenster *v.* Tremont Nat. Bank, 92 Tex. 422, 49 S. W. 362 [*reversing* (Tex. Civ. App. 1898) 46 S. W. 277].

9. Swan *v.* Hazen, 6 Humphr. (Tenn.) 46.

10. Com. *v.* Carl, 12 Pa. Dist. 759, 6 Dauph. Co. Rep. 166.

11. Douthit *v.* Martin, 15 Tex. Civ. App. 559, 39 S. W. 944; Woldert *v.* Durst, 15 Tex. Civ. App. 81, 38 S. W. 215.

A judgment against the principal individually, and not as administrator, will not discharge a surety, if the judgment is amended afterward, unless the surety shows that the administrator had assets sufficient to pay at the time of the entry of the judgment. Collier *v.* Leonard, 69 Ga. 311.

If judgment for costs is rendered against a married woman, her husband and their sureties, it is not void as to the sureties even though erroneous in so far as it adjudges costs against the married woman. Greene County *v.* Wilhite, 35 Mo. App. 39.

12. *Alabama.*— Johnston *v.* Atwood, 2 Stew. 225.

California.— Ladd *v.* Parnell, 57 Cal. 232.

Connecticut.— Welch *v.* McKane, 55 Conn. 25, 10 Atl. 168.

Illinois.— Johnson *v.* Chicago, etc., Elevator Co., 105 Ill. 462; Rietzell *v.* People, 72 Ill. 416; Hennies *v.* People, 70 Ill. 100.

Michigan.— Lang *v.* People, 14 Mich. 439; Chappee *v.* Thomas, 5 Mich. 53.

Minnesota.— Stapp *v.* The Steam-Boat Clyde, 44 Minn. 510, 47 N. W. 160; Libby *v.* Husby, 28 Minn. 40, 8 N. W. 903; Davidson *v.* Farrell, 8 Minn. 258.

Mississippi.— Peck *v.* Critchlow, 7 How. 243.

Tennessee.— Pickett *v.* Boyd, 11 Lea 498.

United States.— Beall *v.* New Mexico, 16 Wall. 535, 21 L. ed. 292.

Canada.— Where a proceeding is against both the principal and surety, the creditor is entitled, by summary application under Gen. Ord. Chy. 638, to administration of the estate of the surety. *Re* Allan, 9 Ont. Pr. 277.

Constitutionality.— In Hughes *v.* Hughes, 4 T. B. Mon. (Ky.) 42, the act of 1800 (2 Dig. L. K. 671) authorizing judgment against sureties on an injunction bond on dissolution of the injunction, was held unconstitutional.

13. Garrott *v.* Fuller, 36 Ala. 179; Campbell *v.* May, 31 Ala. 567; Creanor *v.* Creanor, 36 Ark. 91; Walker *v.* Walker, 42 Ga. 141.

14. Gunn *v.* Slaughter, 83 Ga. 124, 9 S. E. 772; Brinton *v.* Gerry, 7 Ill. App. 238; Goodman *v.* Allen, 6 La. Ann. 371. *Contra*, Mortland *v.* Himes, 8 Pa. St. 265.

15. Wren *v.* Peel, 64 Tex. 374.

16. Stuckey *v.* Crosswell, 12 Rich. (S. C.) 273.

pay the larger sum.[17] Generally there is no requirement that any particular property shall be levied upon first.[18] In the absence of proof to the contrary, an execution will be presumed to have been returned for sufficient reasons.[19] At common law, the judgment creditor is at liberty to levy first upon the property of the surety if he choose to do so,[20] even though the principal is concealing his property in the mean time,[21] or becomes insolvent pending the delay;[22] but in chancery the decree usually provides that the property of the principal shall be subjected first to the discharge of the obligation;[23] or, in event of the death of the principal, his heirs or devisees or legatees who have received assets by descent or will are made liable before resort can be had to the sureties.[24] So too at common law, where there are two or more sureties, the judgment creditor is at liberty to levy execution on the property of any one of them.[25] However, in many states, by statute, the common-law rule has been changed, so that a surety is entitled to have the property of the principal, both real and personal,[26] exhausted before a levy can be made upon the property of the surety,[27] provided, in some states, the

17. Evans *v.* Pugh, 2 Dowl. P. C. 360, holding that execution cannot be taken against a surety on a judgment against him alone, for costs in a suit against the principal alone, although the surety has promised to pay such costs if the creditor would proceed against the principal, such an agreement being a collateral one upon which suit must be brought.

18. There is no cause for complaint that the property of a surety, which has not been attached, has been sold before other property which has been attached, belonging to cosureties. Dollarhide *v.* Parks, 92 Mo. 178, 5 S. W. 3. The principal cannot insist that the execution shall be levied on the personal property of the surety before levying on the land of the principal. Kendrick *v.* Rice, 16 Tex. 254. Where a surety for the purchase-price of a printing-plant stipulated in his contract that his liability should not be enforced out of his personal property, and the principal executed a chattel mortgage of the plant to the surety to indemnify him, and afterward conveyed the plant to the surety, the liability of the surety could be enforced against the plant. Streeter *v.* Seigman, (N. J. Ch. 1901) 48 Atl. 907.

19. Manice *v.* Duncan, 12 La. Ann. 715.

20. *Georgia.*— Battle *v.* Stephens, 32 Ga. 25; Keaton *v.* Cox, 26 Ga. 162.

Maine.— Fuller *v.* Loring, 42 Me. 481.

North Carolina.— Eason *v.* Petway, 18 N. C. 44.

Ohio.— Stanley *v.* Lucas, Wright 34.

Texas.— Turner *v.* Smith, 9 Tex. 626.

Vermont.— Crane *v.* Stickles, 15 Vt. 252.

See 40 Cent. Dig. tit. "Principal and Surety," § 458.

21. Walker *v.* Tyson, 52 Ala. 593.

22. Fox *v.* Hudson, 20 Kan. 246.

23. Hill *v.* Mellon, (Ark. 1892) 18 S. W. 540; Bridgewater *v.* England, 62 S. W. 882, 23 Ky. L. Rep. 338; Boughton *v.* New Orleans Bank, 2 Barb. Ch. (N. Y.) 458.

24. Thomas *v.* Adams, 30 Ill. 37.

25. Minick *v.* Brock, 41 Nebr. 512, 59 N. W. 782.

A statute (Ind. Code, §§ 674, 675), authorizing the court to order the property of the principal sold first, does not authorize an order requiring one of two cosureties to turn over property to satisfy one half of the debt. Schooley *v.* Fletcher, 45 Ind. 86.

26. Morris *v.* McAnally, 3 Coldw. (Tenn.) 304.

27. *Indiana.*— McTaggart *v.* Dolan, 86 Ind. 314; Lacy *v.* Lofton, 26 Ind. 324; Rogers *v.* Voss, Wils. 376.

Louisiana.— New Orleans *v.* Waggaman, 31 La. Ann. 299; Stinson *v.* Hill, 21 La. Ann. 560; Bernard *v.* Curtis, 4 Mart. 214.

Mississippi.— Smith *v.* Clopton, 48 Miss. 66; Walker *v.* Gilbert, 13 Sm. & M. 693; Moss *v.* Agricultural Bank, 4 Sm. & M. 726.

Pennsylvania.— Kirkpatrick *v.* White, 29 Pa. St. 176.

Tennessee.— Sellars *v.* Fite, 3 Baxt. 120, 131; Bryant *v.* Rudisell, 4 Heisk. 656.

Texas.— Hollimon *v.* Karger, 30 Tex. Civ. App. 258, 71 S. W. 299.

Virginia.—Wytheville Crystal Ice, etc., Co. *v.* Frick Co., 96 Va. 141, 30 S. E. 491; Womack *v.* Paxton, 84 Va. 9, 5 S. E. 550; Stovall *v.* Border Grange Bank, 78 Va. 188; Grove *v.* Little, 11 Leigh 180.

See 40 Cent. Dig. tit. "Principal and Surety," § 458.

In Louisiana the surety must make an actual tender of a specific sum to pay the costs of a discussion of the property of the principal. Schmidt *v.* City of New Orleans, 33 La. Ann. 17; Adams *v.* Gordon, 22 La. Ann. 41; Griffing *v.* Caldwell, 1 Rob. 15; Allen *v.* Petrovic, 14 La. 165; Banks *v.* Brander, 13 La. 274; Robechot *v.* Folse, 11 La. 133; Thibodeau *v.* Patin, 1 Mart. N. S. 478; Baldwin *v.* Gordon, 12 Mart. 378; Herries *v.* Canfield, 9 Mart. 385; Delazerry *v.* Blanque's Syndics, 6 Mart. 560; Curtis *v.* Martin, 5 Mart. 674; Morgan *v.* Young, 5 Mart. 364. But judicial sureties are not entitled to discussion. Dancy *v.* Delahoussaye, 9 Rob. 45; Woodburn *v.* Friend, 19 La. 496; Penniman *v.* Barrymore, 6 Mart. N. S. 494; Bryan *v.* Cox, 3 Mart. N. S. 574; Denis *v.* Veazey, 12 Mart. 79.

In Kentucky, under Code, § 661, giving a surety the right to compel the principal to discharge the debt, the heirs of a surety can require the land of the principal to be sold first. Meador *v.* Meador, 88 Ky. 217, 10 S. W. 651, 10 Ky. L. Rep. 783.

surety can point out property which belongs to the principal.[28] It is insufficient that the surety believes there is sufficient property of the principal to satisfy the execution.[29] The statute does not apply where the principal is not sued;[30] nor if he is insolvent;[31] nor where his property is not readily available,[32] as by being in litigation,[33] and in the custody of the court by its receiver,[34] or has passed from the possession of the principal;[35] or where to reach the property of the principal would involve great delay.[36] If the property of the principal cannot be sold for want of bidders, the execution may then be levied upon the property of the surety.[37] The statute does not apply where both defendants are principals, although, as between them, the relation of principal and surety exists;[38] nor where the judgment does not indicate that any of the defendants are sureties.[39] Failure of an execution to designate that some of the debtors are sureties will not avail the principal;[40] nor can a stranger, whose interests are adverse to the surety, claim the benefit of the statute for the latter;[41] nor does the statute apply as between a surety and a supplemental surety.[42] If the officer disregards his instructions, the execution sale is nevertheless valid, but he is liable in damages to the surety.[43]

28. Schmidt *v.* New Orleans, 33 La. Ann. 17; Griffing *v.* Caldwell, 1 Rob. (La.) 15; Allen *v.* Petrovic, 14 La. 165; Banks *v.* Brander, 13 La. 274; Thibodeau *v.* Patin, 1 Mart. N. S. (La.) 478; Baldwin *v.* Gordon, 12 Mart. (La.) 378; Herries *v.* Canfield, 9 Mart. (La.) 385; Delazerry *v.* Blanque's Syndics, 6 Mart. (La.) 560; Curtis *v.* Martin, 5 Mart. (La.) 674; Morgan *v.* Young, 5 Mart. (La.) 364; Gibson *v.* Hughes, 6 How. (Miss.) 315.

29. Bowen *v.* Groover, 77 Ga. 126.

30. Stafford *v.* Harper, 32 La. Ann. 1076; Davis *v.* Sanderlin, 23 N. C. 389.

Death of principal.— In Eckert *v.* Myers, 45 Ohio St. 525, 15 N. E. 862, it is held that a surety, under the statute, can require the estate of a deceased co-principal to be exhausted first, although the default arose after his death; but in Planters', etc., Nat. Bank *v.* Robertson, (Tex. Civ. App. 1905) 86 S. W. 643, it is said that Rev. St. (1895) art 3814, cannot be enforced when the principal is dead, since the principal debtor must be proceeded against in the probate court.

31. *Indiana.*— Watson *v.* Beabout, 18 Ind. 281.

Louisiana.— Morgan *v.* His Creditors, 4 La. 5; Delazerry *v.* Blanque's Syndics, 6 Mart. 560.

Mississippi.— Caruthers *v.* Dean, 11 Sm. & M. 178.

Missouri.— Phillips *v.* Robbins, 59 Mo. 107.

Pennsylvania.— Kirkpatrick *v.* White, 29 Pa. St. 176.

Pleading.— Where plaintiff alleges the hopeless insolvency of the principal, the sureties, by pleading an exception that admits the truth of such averment, will not deprive themselves of the right of discussion under Rev. St. § 354. State *v.* Cousin, 31 La. Ann. 297.

An affidavit that the principal has no property, left with the sheriff until after an execution sale of the property of an indorser, instead of being filed, is a substantial compliance with the statute. Huntington *v.* Pritchard, 11 Sm. & M. (Miss.) 327.

32. Lepretre *v.* Barthet, 25 La. Ann. 124.

33. Dejean's Syndics *v.* Martin, 7 Mart. N. S. (La.) 194, holding that a surety cannot compel the creditor to discuss property the sale of which has been enjoined by one claiming it, as such property is in litigation within the intendment of Civ. Code, art. 3016.

34. Knode *v.* Baldridge, 73 Ind. 54.

35. Womack *v.* Fluker, 13 La. Ann. 196. Where the buyer of goods conveyed all of his property in trust, subject to his then existing debts, and afterward gave a bond, with surety, for the price of the goods, the trust property was liable for the price of the goods. Meade *v.* Grigsby, 26 Gratt. (Va.) 612.

36. Hill *v.* Miller, 7 La. Ann. 621; Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554.

37. Moss *v.* Craft, 10 Mo. 720.

38. Brownlee *v.* Young, 25 Mont. 38, 63 Pac. 798.

39. *Indiana.*— Douch *v.* Bliss, 80 Ind. 316.

Iowa.— State *v.* McGlothlin, 61 Iowa 312, 16 N. W. 137.

Mississippi.— Work *v.* Harper, 31 Miss. 107, 66 Am. Dec. 549.

North Carolina.— Stewart *v.* Ray, 26 N. C. 269.

Ohio.— Elliott *v.* Elmore, 16 Ohio 27.

Tennessee.— Grissom *v.* Moore, 1 Sneed 361.

40. Walker *v.* Columbus State Bank, 64 Kan. 884, 67 Pac. 552.

41. Hyman *v.* Seaman, 33 Miss. 185.

42. Hamblin *v.* Foster, 4 Sm. & M. (Miss.) 139, holding that the act of May 13, 1837 (Howard & H. St. p. 595), requiring an affidavit of want of property in the maker of a note before the property of an indorser could be taken, did not require such affidavit of the insolvency of a first indorser before the property of a second indorser could be proceeded against.

43. Sellars *v.* Fite, 3 Baxt. (Tenn.) 131; Atkinson *v.* Rhea, 7 Humphr. (Tenn.) 59; Brackenridge *v.* Cobb, 85 Tex. 448, 21 S. W. 1034. In Johnson *v.* Harris, 69 Ind. 305, it was held that under Code, §§ 416, 674, 675, a levy upon the property of the surety before

11. Appeal and Error. When judgment is rendered improperly against the principal and his sureties, the judgment may be reversed as to the sureties, and affirmed as to the principal alone,[44] or it may be reversed as to the representatives of a deceased surety;[45] but if a joint judgment against the principal and surety is erroneous as to the principal, although not complained of by him, and beneficial to the sureties,[46] or is erroneous as to the sureties, it must be reversed as to all.[47] Where a verdict is found upon a plea of *non assumpsit*, and the jury do not pass upon a plea by the surety that he was discharged because plaintiff gave the principal time for payment without the consent of the surety, the judgment will not be reversed.[48] Judgment against two cosureties can be affirmed as to one and reversed as to the other, although it might result that the right of contribution would be lost to the former if the latter succeeded on the new trial.[49] If the principal has set up a counter-claim, and a judgment for the excess is rendered inadvertently for both the principal and surety, it will be reversed merely so far as it grants affirmative relief to the surety and affirmed as to the principal.[50]

I. Recourse to Indemnity or Security to Surety. If a surety receives security as indemnity from his principal, the creditor is entitled to the benefit thereof,[51] as, in equity, it is regarded as a trust for the better security of the debt.[52] This security is available to the creditor, although he was ignorant of it at the time it was given;[53] and it is immaterial whether the surety received it at the time he incurred liability, or at a later date[54] This right of subrogation is not defeated by the fact that the personal liability of the surety can no longer be enforced by

exhausting the property of the principal is irregular, and cannot be upheld. And in Miller *v.* Hudson, 114 Ind. 550, 17 N. E. 122, it was held that if a joint execution issues against the principal and surety, and before exhausting the effects of the principal, the officer levies upon property of the surety subject to execution, replevin is not the proper remedy of the surety.

44. Evans *v.* Bell, 20 Ala. 509; Pillow *v.* Thompson, 20 Tex. 206.

45. Park *v.* Walker, 2 Sneed (Tenn.) 503.

46. Carr *v.* Bob, 7 Dana (Ky.) 417.

47. Draper *v.* State, 1 Head (Tenn.) 262; Mumford *v.* Nottoway Overseers of Poor, 2 Rand. (Va.) 313.

48. Daniels *v.* Hallenbeck, 19 Wend. (N. Y.) 408.

49. Morgan *v.* Smith, 70 N. Y. 537.

50. Picard *v.* Lang, 3 N. Y. App. Div. 51, 38 N. Y. Suppl. 229.

51. *Alabama.*— Smith *v.* Gillam, 80 Ala. 296; Alabama Gold L. Ins. Co. *v.* Anderson, 67 Ala. 425; Mobile Branch Bank *v.* Robertson, 19 Ala. 798.

Indiana.— Griffis *v.* Connersville First Nat. Bank, (App. 1906) 79 N. E. 230.

Kentucky.— Moore *v.* Moberly, 7 B. Mon. 299.

Maine.— *In re* Fickett, 72 Me. 266.

Maryland.— Owens *v.* Miller, 29 Md. 144.

Missouri.— Thornton *v.* National Exch. Bank, 71 Mo. 221; Haven *v.* Foley, 18 Mo. 136; American Nat. Bank *v.* Klock, 58 Mo. App. 335.

Nebraska.— Richards *v.* Yoder, 10 Nebr. 429, 6 N. W. 629. Although a county cannot demand of its treasurer other security than the bond required by law, it is not prevented from taking advantage of securities given by the treasurer to his sureties for their indemnity. Harlan County *v.* Whitney, 65 Nebr. 105, 90 N. W. 993, 101 Am. St. Rep. 610.

New Hampshire.— Barton *v.* Croydon, 63 N. H. 417.

New Jersey.— Heid *v.* Vreeland, 30 N. J. Eq. 591. *Compare* Price *v.* Trusdell, 29 N. J. Eq. 620 [*reversing* 28 N. J. Eq. 200].

North Carolina.— Matthews *v.* Joyce, 85 N. C. 258, holding that, although a surety substitutes his own note for that of his principal upon the conveyance of land by the latter to the surety to indemnify him against contingent liabilities, the creditor is entitled to avail himself of the security whether the surety is damnified or not.

Ohio.— Green *v.* Dodge, 6 Ohio 80, 25 Am. Dec. 736.

United States.— Branch *v.* Macon, etc., R. Co., 4 Fed. Cas. No. 1,808, 2 Woods 385; Burroughs *v.* U. S., 4 Fed. Cas. No. 2,202, 2 Paine 569.

See 40 Cent. Dig. tit. "Principal and Surety," § 402.

52. *Alabama.*— Ohio L. Ins., etc., Co. *v.* Ledyard, 8 Ala. 866.

Massachusetts.— Eastman *v.* Foster, 8 Metc. 19.

Nebraska.— Harlan County *v.* Whitney, 65 Nebr. 105, 90 N. W. 993, 101 Am. St. Rep. 610; Meeker *v.* Waldron, 62 Nebr. 689, 87 N. W. 539.

New York.— Vail *v.* Foster, 4 N. Y. 312; Clark *v.* Ely, 2 Sandf. Ch. 166.

Virginia.— Roberts *v.* Colvin, 3 Gratt. 358.

See 40 Cent. Dig. tit. "Principal and Surety," § 402.

53. Baltimore, etc., R. Co. *v.* Trimble, 51 Md. 99; Osborn *v.* Noble, 46 Miss. 449; Carpenter *v.* Bowen, 42 Miss. 28; Curtis *v.* Tyler, 9 Paige (N. Y.) 432; Rice's Appeal, 79 Pa. St. 168.

54. Osborn *v.* Noble, 46 Miss. 449.

the creditor; the right to the benefit of the security continues, although the claim of the creditor is barred by the statute of limitations; [55] or the surety has become insolvent,[56] and has been discharged in bankruptcy; [57] or, the debt being a joint one, on the death of the surety his estate cannot be held; [58] or although, by some act of the creditor, such as an extension of time,[59] or a release of the principal,[60] the liability of the surety has been terminated. To avail himself of the right of subrogation, it is not necessary that the creditor take any steps to enforce the debt,[61] either against the principal [62] or against the surety.[63] The right inures to any one entitled to enforce the contract made by the surety, such as the holder of a negotiable instrument; [64] or one having valid claims arising by reason of the default of a public officer.[65] The right extends to any property,[66] of the principal which is in the hands of the surety to secure the debt, whether real [67] or personal,[68] such as money,[69] deeds of trust [70] and mortgages of land [71] or of chattels; [72] and to the

55. Eastman *v.* Foster, 8 Metc. (Mass.) 19; Holt *v.* Penacook Sav. Bank, 62 N. H. 551; Ijames *v.* Gaither, 93 N. C. 358. The action to enforce subrogation must be taken within the statutory period. Darnold *v.* Simpson, 114 Fed. 368.

56. Rice *v.* Dewey, 13 Gray (Mass.) 47; Dick *v.* Truly, Sm. & M. Ch. (Miss.) 557; Keene Five Cents Sav. Bank *v.* Herrick, 62 N. H. 174; Ijames *v.* Gaither, 93 N. C. 358.

57. Magoffin *v.* Boyle Nat. Bank, 69 S. W. 702, 24 Ky. L. Rep. 585.

58. Crosby *v.* Crafts, 5 Hun (N. Y.) 327 [*affirmed* in 69 N. Y. 607].

59. Helm *v.* Young, 9 B. Mon. (Ky.) 394; Newsam *v.* Finch, 25 Barb. (N. Y.) 175.

60. Jones *v.* Ward, 71 Wis. 152, 36 N. W. 711. The right of subrogation is not lost by failure of the creditor to present his claim against the estate of the principal within the time limited. Smith *v.* Gillam, 80 Ala. 296 [*overruling* Watson *v.* Rose, 51 Ala. 292].

61. Union Nat. Bank *v.* Rich, 106 Mich. 319, 64 N. W. 339.

62. Ray *v.* Proffet, 15 Lea (Tenn.) 517.

63. Breedlove *v.* Stump, 3 Yerg. (Tenn.) 257.

64. McCracken *v.* German F. Ins. Co., 43 Md. 471; Boyd *v.* Parker, 43 Md. 182.

65. Jennings *v.* Taylor, 102 Va. 191, 45 S. E. 913.

66. Glass *v.* Thompson, 9 B. Mon. (Ky.) 235; U. S. Bank *v.* Stewart, 4 Dana (Ky.) 27; Cooper *v.* Middleton, 94 N. C. 86; Jennings *v.* Taylor, 102 Va. 191, 45 S. E. 913.

67. Carpenter *v.* Bowen, 42 Miss. 28; Matthews *v.* Joyce, 85 N. C. 258.

68. Belcher *v.* Hartford Bank, 15 Conn. 381; Hilleary *v.* Hurdle, 6 Gill (Md.) 105. The right of the creditor is not affected by the fact that the pledge given by the principal to his surety has become absolute by foreclosure. Eastman *v.* Foster, 8 Metc. (Mass.) 19.

69. Crim *v.* Fleming, 101 Ind. 154; Nourse *v.* Weitz, 120 Iowa 708, 95 N. W. 251; Lindsay *v.* Morse, 129 Mich. 350, 88 N. W. 881.

70. Blanton *v.* Bostic, 126 N. C. 418, 35 S. E. 1035. Where a county issued and delivered its bonds to a railroad company upon conditions, for the performance of which the company gave a bond of indemnity secured by a deed of trust, it was held that, as by the contract of indemnity the company virtually became the principal debtor, a holder of coupons of the bonds had the right of substitution to the benefit of the security given by the company. Washington, etc., R. Co. *v.* Cazenove, 83 Va. 744, 3 S. E. 433.

71. *Alabama.*— Daniel *v.* Hunt, 77 Ala. 567; Cullum *v.* Mobile Branch Bank, 23 Ala. 797.

Illinois.— Chambers *v.* Prewitt, 71 Ill. App. 119.

Indiana.— Loehr *v.* Colborn, 92 Ind. 24.

Kentucky.— Helm *v.* Young, 9 B. Mon. 394; Magoffin *v.* Boyle Nat. Bank, 69 S. W. 702, 24 Ky. L. Rep. 585.

Maryland.— McCracken *v.* German F. Ins. Co., 43 Md. 471; Boyd *v.* Parker, 43 Md. 182.

Massachusetts.— Rice *v.* Dewey, 13 Gray 47.

Michigan.— Albion State Bank *v.* Knickerbocker, 125 Mich. 311, 84 N. W. 311.

Mississippi.— Dick *v.* Truly, Sm. & M. Ch. 557.

Nebraska.— Oak Creek Valley Bank *v.* Helmer, 59 Nebr. 176, 80 N. W. 891; South Omaha Nat. Bank *v.* Wright, 45 Nebr. 23, 63 N. W. 126.

New Hampshire.— Holt *v.* Penacook Sav. Bank, 62 N. H. 551; Keene Five Cents Sav. Bank *v.* Herrick, 62 N. H. 174.

New York.— Vail *v.* Foster, 4 N. Y. 312.

North Carolina.— Hooker *v.* Yellowley, 128 N. C. 297, 38 S. E. 889; Ijames *v.* Gaither, 93 N. C. 358.

Texas.— Magill *v.* Brown, 20 Tex. Civ. App. 62, 50 S. W. 143, 642, holding that where a grantee of lands took a mortgage from his grantor on other lands to secure the payment of a mortgage on the lands purchased, the holder of the mortgage on the lands purchased can enforce the mortgage given as security for its payment.

Vermont.— Morrill *v.* Morrill, 53 Vt. 74, 38 Am. Rep. 659.

United States.— McLean *v.* La Fayette Bank, 16 Fed. Cas. No. 8,888, 3 McLean 587.

See 40 Cent. Dig. tit. "Principal and Surety," § 402 *et seq.*

72. Plaut *v.* Storey, 131 Ind. 46, 30 N. E. 886; Newsam *v.* Finch, 25 Barb. (N. Y.)

priority which such mortgage may have over claims held by other creditors of the principal; [73] nor is the right lost by the fact that the surety has foreclosed a mortgage held by him.[74] Liens,[75] bonds,[76] promissory notes,[77] and other choses in action [78] placed by the principal in the hands of the surety, or a judgment confessed by the principal as indemnity to the surety,[79] can be reached by the creditor. If the security is to protect sureties liable for different debts, the security should be apportioned among the several creditors.[80] Some conflict exists as to the rights of the creditor where the property is given by the principal to secure a debt due by the principal to the surety as well as to indemnify the surety for the debt due the creditor. Some courts hold that the creditor is entitled to all of the security if necessary to satisfy his claim,[81] while other courts hold that the surety is entitled to indemnify himself in full as to his individual claims before the creditor is entitled to anything; [82] but if the creditor pays the individual claims of the surety, he is then entitled to all of the security.[83] In cases of real suretyship, the surety is entitled to indemnify himself before the creditor can demand the property of the principal in his hands.[84] On subrogation of the creditor to security held by the surety, the latter is entitled to be released to that extent, from his liability to the creditor,[85] unless the property delivered by the principal to his surety, and by the latter to the creditor, is in effect the property of the creditor which the principal has taken wrongfully.[86] The creditor cannot enforce directly for his benefit a

175; Wheeler *v.* Bellville First Nat. Bank, (Tex. Civ. App. 1897) 41 S. W. 376.

73. Swift *v.* Kortrecht, 112 Fed. 709, 50 C. C. A. 429; Beckett *v.* Booth, 2 Eq. Cas. Abr. 595, 22 Eng. Reprint 500.

74. Eastman *v.* Foster, 8 Metc. (Mass.) 19; State *v.* Bergfeld, 108 Mo. App. 630, 84 S. W. 177; Holt *v.* Penacook Sav. Bank, 62 N. H. 551.

75. Forrest *v.* Luddington, 68 Ala. 1.

76. Baltimore, etc., R. Co. *v.* Trimble, 51 Md. 99. When and how far equity will regard a bond of indemnity to the surety as a fund for the benefit of the creditor, between whom and the surety there is no privity, depends on the condition of the bond, and whether it has been forfeited before relief is sought in equity. King *v.* Harman, 6 La. 607, 26 Am. Dec. 485.

77. Clark *v.* Ely, 2 Sandf. Ch. (N. Y.) 166; Breedlove *v.* Stump, 3 Yerg. (Tenn.) 257.

78. Curtis *v.* Tyler, 9 Paige (N. Y.) 432.

79. Crosby *v.* Crafts, 5 Hun (N. Y.) 327 [*affirmed* in 69 N. Y. 607]; Hincken *v.* McGlathery, 8 Pa. Co. Ct. 267. If the surety has had execution issued on the judgment, and property has been sold thereunder, the surety taking notes of the purchaser in payment holds such notes in trust for the creditor. Clark *v.* Ely, 2 Sandf. Ch. (N. Y.) 166.

80. Holt *v.* Penacook Sav. Bank, 62 N. H. 551; Wheeler *v.* Bellville First Nat. Bank, (Tex. Civ. App. 1897) 41 S. W. 376; Courrier-Journal Job-Printing Co. *v.* Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183.

81. South Omaha Nat. Bank *v.* Wright, 45 Nebr. 23, 63 N. W. 126; Ten Eyck *v.* Holmes, 3 Sandf. Ch. (N. Y.) 428.

82. Eastman *v.* Foster, 2 Metc. (Mass.) 19; Becket First Cong. Soc. *v.* Snow, 1 Cush. (Mass.) 510. Where a surety on notes and a bond paid the notes, and compromised an action against him on the bond by paying some cash, transferring the notes, and assigning his interest in a mortgage given as security, such mortgage, at the time, being supposed to be a junior one, and subsequently, a mortgage supposed to be senior to the one transferred, was declared void, causing the assigned mortgage to become sufficient to satisfy all the debts in full, it was held that after satisfying the unpaid portion of the bond the surety was entitled to the balance of the proceeds of the mortgage. Jennings *v.* Palmer, 8 Gratt. (Va.) 70.

83. McQuestin *v.* Winter, 10 Grant Ch. (U. C.) 464. If a judgment creditor seeking to redeem property from a mortgage given by the judgment debtor to secure a surety for another debt of the debtor pays the amount due under the mortgage, and indemnifies the mortgagee in respect of his liability as surety, the judgment creditor is entitled to all collateral security held by such surety, including a policy of insurance on the life of the debtor, as well as the mortgage. Gilmour *v.* Cameron, 6 Grant Ch. (U. C.) 290.

84. Van Orden *v.* Durham, 35 Cal. 136.

85. Cheatham *v.* Seawright, 30 S. C. 101, 8 S. E. 526; Field *v.* Pelot, McMull. Eq. (S. C.) 369. Where the security is not sufficient to cover the entire debt for which the sureties are liable, and the sureties have paid part of the debt, the security should be applied to the balance due before the sureties will be entitled to anything. Kelly *v.* Herrick, 131 Mass. 373.

86. Berwick-upon-Tweed *v.* Murray, 7 De G. M. & G. 497, 3 Jur. N. S. 1,847, 26 L. J. Ch. 201, 5 Wly. Rep. 208, 56 Eng. Ch. 386, 44 Eng. Reprint 194, holding that where the sureties of a defaulting treasurer took from him a note given by a bank for a deposit

trust created for the benefit of the surety; [87] but the proper procedure is to file a bill asking for subrogation; and, as a part of the relief granted, the property can then be applied in payment of the debt.[88] Should the creditor, for any reason, fail in establishing his rights to subrogation, he is not deprived from afterward attaching any property of the principal in the hands of the surety; [89] and where the creditor has the right of subrogation, a resort to equitable proceedings is not necessary. If the surety is willing, he may at any time assign to the creditor any property of the principal in his hands,[90] provided he holds it as indemnity for the debt owing to such creditor.[91] The effect is the same as if a decree in chancery had been made directing such assignment.[92] The substitution of the creditor in place of the surety as to property in the hands of the latter does not give the creditor any rights greater than the surety had.[93] If the surety could not have enforced the security except on the happening of a contingency, the creditor cannot enforce it unless the contingency arises; [94] and if the principal has given the surety property to indemnify him in event of a judgment being obtained against him, such security is not available to the surety, and consequently not to the creditor, until the surety has been harmed [95] and if the property was to reimburse the surety in event of payment by him, the creditor cannot be subrogated thereto if the surety has not made payment.[96] If the surety has foreclosed a mortgage given him, the creditor is not entitled to vacate the sale.[97] As the right of subrogation is an equitable one, growing out of the relation arising through contract, it does not exist where the contract was not executed by the principal,[98] nor by one who intended to become surety.[99] The creditor has no right to security given for indemnity to the surety by a third person,[1] although such third person is a partner of the principal,[2] nor to security given by cosureties to each other; [3] or by a surety to a supplemental surety.[4]

J. Disposition of Security. The rights of the creditor in security given by the principal to his surety are superior to claims of others against the surety; [5] and

made a month previously by the treasurer in the name of his daughter, the circumstances under which the deposit note was received by the sureties were such as should have induced inquiry, and that the sureties should restore the amount with interest to the obligee, without being entitled to credit therefor on the amount due on their bond.

87. Union Nat. Bank *v.* Rich, 106 Mich. 319, 64 N. W. 339.

88. U. S. Bank *v.* Stewart, 4 Dana (Ky.) 27.

89. Jaseph *v.* People's Sav. Bank, 132 Ind. 39, 31 N. E. 524.

90. *Georgia.*— Simmons *v.* Goodrich, 68 Ga. 750.

Louisiana.— King *v.* Harmon, 6 La. 607, 26 Am. Dec. 485.

Nebraska.— Harlan County *v.* Whitney, 65 Nebr. 105, 90 N. W. 993, 101 Am. St. Rep. 610.

New York.— Merchants', etc., Nat. Bank *v.* Cumings, 149 N. Y. 360, 44 N. E. 173 [*affirming* 79 Hun 397, 29 N. Y. Suppl. 782].

Canada.— Paton *v.* Wilkes, 8 Grant Ch. (U. C.) 252.

See 40 Cent. Dig. tit. "Principal and Surety," § 402.

91. Anderson *v.* Sims, (Tex. 1887) 4 S. W. 471.

92. Paris *v.* Hulett, 26 Vt. 308.

93. Bibb *v.* Martin, 14 Sm. & M. (Miss.) 87; Anderson *v.* Sims, (Tex. 1887) 4 S. W. 471.

94. Thompson *v.* White, 48 Conn. 509; Fartig *v.* Henne, 197 Pa. St. 560, 47 Atl. 840.

95. Importers', etc., Nat. Bank *v.* McGhees, 88 Ga. 702, 16 S. E. 27; Tilford *v.* James, 7 B. Mon. (Ky.) 336; Pool *v.* Doster, 59 Miss. 258; Ohio L. Ins., etc., Co. *v.* Reeder, 18 Ohio 35.

96. Pool *v.* Doster, 59 Miss. 258; Henderson-Achert Lithographic Co. *v.* John Shillito Co., 64 Ohio St. 236, 60 N. E. 295, 83 Am. St. Rep. 745 [*affirming* 9 Ohio S. & C. Pl. Dec. 7, 6 Ohio N. P. 25].

97. Miller *v.* Carnall, 22 Ark. 274.

98. Bibb *v.* Martin, 14 Sm. & M. (Miss.) 87.

99. Fagan *v.* Thompson, 38 Fed. 467.

1. Macklin *v.* Northern Bank, 83 Ky. 314; O'Neill *v.* State Sav. Bank, 34 Mont. 521, 87 Pac. 970. If a mortgage executed by the wife of the principal does not recite that it is to indemnify the surety, but that it is intended to secure the debt, the creditor is entitled to be substituted to it. Magoffin *v.* Boyle Nat. Bank, 69 S. W. 702, 24 Ky. L. Rep. 585.

2. American Surety Co. *v.* Lawrenceville Cement Co., 110 Fed. 717.

3. Hampton *v.* Phipps, 108 U. S. 260, 2 S. Ct. 622, 27 L. ed. 719.

4. Shackleford *v.* Stockton, 6 B. Mon. (Ky.) 390.

5. Vail *v.* Foster, 4 N. Y. 312. See also *infra*, IX, B, 2, a *et seq.*

cannot be impaired by the latter [6] diverting it to other purposes.[7] The equitable lien of the creditor attaches as against an assignee,[8] or a pledgee [9] of such security. If, however, before the creditor has taken steps to subject the security to his claim, the surety, in good faith, releases it to the principal, the creditor cannot complain,[10] unless the principal [11] or the surety [12] be insolvent. If the surety unjustly releases the security, the right of the creditor therein is not defeated,[13] unless the rights of third persons have intervened,[14] and the surety is liable to the extent of the value of the security wrongfully released.[15]

VIII. DISCHARGE AND OTHER DEFENSES OF SURETY.

A. In General. Generally the same defenses can be made in an action at law as can be made in a court of equity;[16] but they must be pleaded,[17] and sustained with sufficient evidence.[18]

B. Matters Personal to Principal or Cosurety. Defenses do not operate in favor of a surety which are personal to the principal,[19] or to a cosurety.[20]

C. Matters Personal to Surety. Matters personal to a surety may be set up by him in his defense,[21] although they are not available to the principal;[22] and the surety may intervene to set up such a defense if the principal is insolvent and does not defend, and the rights of the surety are endangered.[23] But a surety cannot complain of any act committed or omitted not affecting his rights.[24]

D. Matters Existing at Time of Entering Into Relation — 1. In General. Practically all such defenses available to a surety, as such, have already been considered;[25] such as incapacity of the parties;[26] invalidity of the contract,[27]

6. First Nat. Bank *v.* Davis, 87 Mo. App. 242.

7. Haggarty *v.* Pittman, 1 Paige (N. Y.) 298, 19 Am. Dec. 434.

8. Eastman *v.* Foster, 8 Metc. (Mass.) 19; Holt *v.* Penacook Sav. Bank, 62 N. H. 551.

9. McRady *v.* Thomas, 16 Lea (Tenn.) 173.

10. Tilford *v.* James, 7 B. Mon. (Ky.) 336; Logan *v.* Mitchell, 67 Mo. 524. Where the principal intrusted money to his surety to pay the note on which they were liable, but the surety failed to do so, the creditor has no claim on the money which will prevent the principal recovering it from the surety by suit. Spaulding *v.* Henshaw, 80 Ky. 55, 44 Am. Rep. 461.

A release by a state of railroad bonds held by the state as security against liability on account of having indorsed other bonds of the company does not work any injustice to the holders of the indorsed bonds. Charlotte First Nat. Bank *v.* Jenkins, 64 N. C. 719.

11. Dyer *v.* Jacoway, 76 Ark. 171, 88 S. W. 901; Jones *v.* Quinnipiack Bank, 29 Conn. 25; Oak Creek Valley Bank *v.* Helmer, 59 Nebr. 176, 80 N. W. 891.

12. Charlotte First Nat. Bank *v.* Jenkins, 64 N. C. 719; Commercial Bank *v.* Poore, 6 Grant Ch. (U. C.) 514.

13. McCracken *v.* German F. Ins. Co., 43 Md. 471; Boyd *v.* Parker, 43 Md. 182; Blanton *v.* Bostic, 126 N. C. 418, 35 S. E. 1035.

14. Miller *v.* Wack, 1 N. J. Eq. 204.

15. Clements *v.* Ramsey, 7 Ky. L. Rep. 445.

16. *Illinois.*— McChesney *v.* Bell, 59 Ill. App. 84.

Kentucky.—Taylor *v.* Commonwealth Bank, 2 J. J. Marsh. 564.

Mississippi.— Smith *v.* Clopton, 48 Miss. 66.

New Hampshire.— Heath *v.* Derry Bank, 44 N. H. 174.

New York.— Schroeppell *v.* Shaw, 3 N. Y. 446.

South Carolina.— Wayne *v.* Kirby, 2 Bailey 551.

Wisconsin.— Leffingwell *v.* Freyer, 21 Wis. 392.

See 40 Cent. Dig. tit. "Principal and Surety," § 390.

17. U. S. Fidelity, etc., Co. *v.* Probst, 97 S. W. 405, 30 Ky. L. Rep. 63; Sachs *v.* American Surety Co., 72 N. Y. App. Div. 60, 76 N. Y. Suppl. 335 [*affirmed* in 177 N. Y. 551, 69 N. E. 1130]; Hutton *v.* Federal Bank, 9 Ont. Pr. 568.

18. Fordsville Banking Co. *v.* Thompson, 82 S. W. 251, 26 Ky. L. Rep. 534.

19. Van Kirk *v.* Adler, 111 Ala. 104, 20 So. 336; McCabe *v.* Raney, 32 Ind. 309; Boone County *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, 37 Am. Rep. 229; McCormick *v.* Hubbell, 4 Mont. 87, 5 Pac. 314.

Change in building contract see *infra*, VIII, E, 2, i, (VIII).

20. McChesney *v.* Bell, 59 Ill. App. 84.

21. Campbell *v.* Gates, 17 Ind. 126.

22. Marshall *v.* Sloan, 26 Ark. 513.

23. Price *v.* Carlton, 121 Ga. 12, 48 S. E. 721.

24. Lafayette Parish School Directors *v.* Judice, 39 La. Ann. 896, 2 So. 792.

25. See *supra*, IV, C, D.

26. Of principal see *supra*, IV, C, 6.

Of surety see *supra*, IV, D, 11, f.

In action by surety against principal see *infra*, IX, B, 5, f, (II).

27. Of principal see *supra*, IV, C.

including concealment, duress, fraud, and undue influence,[28] forgery,[29] illegality of the obligation,[30] incomplete or irregular instrument,[31] non-acceptance of instrument,[32] non-compliance with statutory requirements,[33] non-delivery of instrument,[34] and non-execution of instrument by principal [35] or by surety;[36] or revocation of execution;[37] mistake in drawing instrument;[38] non-performance of condition precedent;[39] want of notice to or acceptance by principal [40] or by creditor;[41] want or failure of consideration;[42] as well as estoppel to deny liability and waiver of matters of defense.[43] Generally a surety cannot set up the defense that the contract is invalid if the principal could not,[44] although a surety is not estopped to assert the invalidity on the contract merely because the principal has made a payment thereon.[45]

2. Usury [46]— a. In General. Generally the defense of usury is available to a surety to the same extent that it is to the principal,[47] although the failure of the principal to take advantage of such defense will not interfere with the right of the surety to do so.[48] As usury is a wrong created purely by statute, the right of a surety to take advantage of it varies in the different states. In some a surety is not discharged by an agreement to pay usurious interest;[49] in others, while a surety may set up usury as a defense,[50] the extent to which it is available is not the same. The surety may be bound for the principal debt, although discharged as to the interest;[51] or his entire contract may be void.[52] If the contract was

Of surety see *supra*, IV, D, 11.

28. **Perpetrated upon principal** see *supra*, IV, C. 3, 4.

Perpetrated upon surety see *supra*, IV, D, 11, d.

29. See *supra*, IV, D, 11, c.

30. **Of principal** see *supra*, IV, C, 5.

Of surety see *supra*, IV, D, 11, e.

31. **Evidencing obligation of principal** see *supra*, IV, C, 7.

Evidencing obligation of surety see *supra*, IV, D, 11, g.

32. See *supra*, IV, D, 9, b.

Failure to justify see *supra*, IV, D, 9, d.

Non-approval of instrument see *supra*, IV, D, 9, c.

33. **In principal's obligation** see *supra*, IV, C, 2.

In surety's obligation see *supra*, IV, D, 11, b.

Failure to acknowledge see *supra*, IV, D, 8, e.

Failure to stamp see *supra*, IV, D, 8, f.

34. See *supra*, IV, D, 9, a.

35. See *supra*, IV, C, 9; IV, D, 8, b.

36. See *supra*, IV, D, 8, c.

Unauthorized execution by agent see *supra*, IV, C, 9; IV, D, 8, c, (III).

37. See *supra*, IV, D, 8, c, (I), (G).

38. See *supra*, IV, D, 11, h.

39. See *supra*, IV, D, 8, c, (II).

40. See *supra*, IV, D, 2.

41. See *supra*, IV, D, 3.

42. **For principal's obligation** see *supra*, IV, C, 10.

For surety's obligation see *supra*, IV, D, 10.

43. See *supra*, IV, D, 12.

44. Villiere *v.* Armstrong, 4 Mart. N. S. (La.) 21; State *v.* Seabrook, 42 S. C. 74, 20 S. E. 58.

Illustrations.— A surety on a promissory note given for the price of land sold at an administration sale cannot set up the invalidity of the sale as a defense. Lathrop *v.* Masterson, 44 Tex. 527. A certificate of membership in the board of trade of Chicago is property; and sureties on a bond conditioned for its assignment will be liable in case of a breach. Jones *v.* Fisher, 116 Ill. 68, 4 N. E. 255. A bond payable in "current money of the United States" is valid, and a judgment thereon will not be arrested on the ground that such currency is not known to the laws. Hall *v.* Belt, 8 Gill & J. (Md.) 470.

45. State *v.* Bright, 14 S. C. 7.

46. See also *supra*, IV, C, 8.

47. Middlebury Bank *v.* Bingham, 33 Vt. 621; Pugh *v.* Cameron, 11 W. Va. 523.

48. Harrington *v.* Findley, 89 Ga. 385, 15 S. E. 483.

49. Samuel *v.* Withers, 16 Mo. 532; Columbus First Nat. Bank *v.* Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751; Hoerr *v.* Coffin, 1 Tex. App. Civ. Cas. § 185.

50. Stockton *v.* Coleman, 39 Ind. 106; Huntress *v.* Patten, 20 Me. 28.

51. Mitchell *v.* Cotten, 3 Fla. 134; Mayfield *v.* Gordon, 2 Am. L. Reg. (Pa.) 187; Middlebury Bank *v.* Bingham, 33 Vt. 621.

For example sureties on a bond for the payment of money, wishing to foreclose a deed of trust given to them by their principal, gave the creditor their note in place of the bond, so that they could use the bond in payment at the foreclosure sale. Afterward, when suit was brought on their note, it was held, by a divided court, that the note was not payment of the bond, and that they were entitled, under Code, c. 96, § 6, to have credit for usurious interest which had been paid on the bond. Moore *v.* Johnson, 34 W. Va. 672, 12 S. E. 918.

Where the principal is entitled to a deduction, from the debt, of three times the amount of the extra interest paid by him, his surety is discharged to the same extent. Wright *v.* Bartlett, 43 N. H. 548.

52. Labaree *v.* Klosterman, 33 Nebr. 150, 49 N. W. 1102.

void originally, a subsequent arrangement between the creditor and the principal, purging it of usury, without the assent of the surety, cannot make the latter liable.[53] A surety is not discharged if the usury does not increase his risk,[54] as where the claim of the creditor amounts to more than that for which the surety is bound;[55] nor will a collateral agreement between the principal and the creditor for the payment of an illegal rate avoid the contract of the surety,[56] even though the principal pay the usury.[57] Equity, in relieving a surety from usury, will require him to pay legal interest.[58]

b. Conflict of Laws.[59] If the contract is made payable in another state where the rate of interest provided for is lawful, it will be enforced against the surety in the state where the contract was made, although the interest exceeds the legal rate allowed in the state where made, unless there was an intention to evade the usury laws;[60] and if a note is executed by the principal in one state, and by a surety in another, the surety will be liable if the note is valid in the state where the principal is, although usurious by the law of the state in which the surety executed it.[61]

E. Matters Arising After Entering Into Relation — 1. Discharge of Principal — a. In General. As a general rule the liability of a surety ends with the extinguishment of the obligation of the principal.[62] Returning an official bond to the principal for the purpose of obtaining an additional surety does not

In Georgia a waiver of homestead in a note affected by usury is void; and if a surety sign such a note in ignorance of the usury, he is not bound, as his risk is increased. Prather *v.* Smith, 101 Ga. 283, 28 S. E. 857; Allen *v.* Wilkerson, 99 Ga. 139, 25 S. E. 26; Vandiver *v.* Wright, 94 Ga. 698, 19 S. E. 990; Harrington *v.* Findley, 89 Ga. 385, 15 S. E. 483; Lewis *v.* Brown, 89 Ga. 115, 14 S. E. 881. It is incumbent on the creditor to prove that the surety had knowledge of the usury. Denton *v.* Butler, 99 Ga. 264, 25 S. E. 624. As the state remedy does not apply to national banks, a waiver in a note payable to a national bank is valid, and a surety thereon is bound, as his risk is not increased. Dalton First Nat. Bank *v.* McEntire, 112 Ga. 232, 37 S. E. 381.

53. Howard *v.* Johnson, 91 Ga. 319, 18 S. E. 132.

54. Mount *v.* Tappey, 7 Bush (Ky.) 617.

55. Gillen *v.* Kentucky Nat. Bank, 8 S. W. 193, 10 Ky. L. Rep. 97.

56. Terrell *v.* Barrack, 2 Tex. App. Civ. Cas. § 667.

57. Davis *v.* Converse, 35 Vt. 503.

58. Ellis *v.* Bibb, 2 Stew. (Ala.) 63; Jones *v.* Kilgore, 2 Rich. Eq. (S. C.) 63.

59. Conflict of laws generally see *supra*, V, D.

60. Parham *v.* Pulliam, 5 Coldw. (Tenn.) 497.

61. Pugh *v.* Cameron, 11 W. Va. 523.

62. *Alabama.*— McBroom *v.* Governor, 6 Port. 32.

Georgia.— Brown *v.* Ayer, 24 Ga. 288.

Illinois.— Dupee *v.* Blake, 148 Ill. 453, 35 N. E. 867 [*reversing* 50 Ill. App. 155]; Himrod *v.* Baugh, 85 Ill. 435.

Indiana.— Bridges *v.* Blake, 106 Ind. 332, 6 N. E. 833.

Kentucky.— Gray *v.* Merrill, 11 Bush 633; Havens *v.* Foudry, 4 Metc. 247.

Louisiana.— Stewart *v.* Levis, 42 La. Ann. 37, 6 So. 898; Brink *v.* Bartlett, 105 La. 336, 29 So. 958; Leckie *v.* Scott, 10 La. 412.

Maine.— State *v.* Dow, 53 Me. 305.

Maryland.— Blackburn *v.* Beall, 21 Md. 208.

Minnesota.— Hastings First Nat. Bank *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239.

Mississippi.— Anthony *v.* Capel, 53 Miss. 350.

Missouri.— Scroggin *v.* Holland, 16 Mo. 419.

New York.— Aeschlimann *v.* Presbyterian Hospital, 29 N. Y. App. Div. 630, 53 N. Y. Suppl. 998 [*affirmed* in 165 N. Y. 296, 59 N. E. 148, 80 Am. St. Rep. 723]; Brady *v.* Peiper, 1 Hilt. 61; Schuyler *v.* Englert, 62 How. Pr. 479 [*affirmed* in 10 Daly 463].

Pennsylvania.— Metropolitan Nat. Bank *v.* Merchants, etc., Bank, 155 Pa. St. 20, 25 Atl. 764; *In re* Wiley, 12 Phila. 152, holding that as an assignee of a lease is discharged from liability when he parts with his interest, a surety for the rent is discharged also.

Tennessee.— Brown *v.* McDonald, 8 Yerg. 158, 29 Am. Dec. 112.

Vermont.— Flagg *v.* Locke, 74 Vt. 320, 52 Atl. 424 (where the rule is also declared by statute); Paddleford *v.* Thacher, 48 Vt. 574.

United States.— U. S. *v.* Alexander, 110 U. S. 325, 4 S. Ct. 99, 28 L. ed. 166.

See 40 Cent. Dig. tit. "Principal and Surety," § 286 *et seq.*

The maxim "Sublato fundamento, cadit opus" applies. Municipality No. 2 *v.* Groning, 15 La. 166.

If the principal has given bail in order to secure his release from imprisonment, anything which terminates the right to deprive him any longer of his liberty will relieve a surety on his bail bond. McClary Mfg. Co. *v.* Morin, 14 Quebec Super. Ct. 423.

Recovery of payments made after discharge see *infra*, IX, A, 3.

amount to extinguishment of the obligation,[63] nor is a conditional agreement to cancel of any effect until there is performance or an offer to perform the condition.[64] Whenever a note or bond comes into the hands of the principal, with a right to enforce it a surety thereon is discharged.[65] Similarly, if a mortgagee purchase the mortgaged land,[66] or if a purchaser of land takes an assignment of a judgment which is a lien on the land,[67] a surety for the indebtedness is discharged by the merger of the right and liability in one person. So, if a landlord takes an assignment of a lease, a surety for the rent is no longer liable.[68]

b. Judgment in Favor of Principal. A surety can set up, as a defense, that a judgment has been rendered in favor of the principal in an action for the same alleged default,[69] even though the surety was not a party to the action in which judgment was rendered,[70] and although judgment has been obtained against the sureties, if judgment afterward is rendered in favor of the principal, the sureties are released.[71] If the principal succeeds only in reducing the amount of the claim against him, the sureties are released to the same extent.[72] A surety cannot be held under a judgment void as to his principal.[73]

2. Act of Parties — a. In General. Generally a surety is discharged if the creditor deprives him of any right he would have against the principal, even though

63. Postmaster-Gen. *v.* Norvell, 19 Fed. Cas. No. 11,310, Gilp. 106, return of bond by postmaster-general affording no evidence of non-acceptance and as not amounting to cancellation or surrender.

64. Kempshall *v.* East, 127 Ind. 320, 26 N. E. 836.

65. Johnson *v.* Hicks, 97 Ky. 116, 30 S. W. 3, 16 Ky. L. Rep. 827; Ashoff *v.* Van Brunt, 84 Mich. 575, 48 N. W. 151; Com. *v.* Royer, 161 Pa. St. 351, 29 Atl. 36; *In re* McIntosh, 158 Pa. St. 525, 27 Atl. 1042; Donnan *v.* Watts, 22 S. C. 430; Galphin *v.* McKinney, 1 McCord Eq. (S. C.) 280.

66. Building Assoc. *v.* Benson, 2 Wkly. Notes Cas. (Pa.) 541.

67. Wright *v.* Knepper, 1 Pa. St. 361; Johnson *v.* Young, 20 W. Va. 614.

The assignment of a judgment to the wife of the judgment debtor will not discharge a surety. Hall *v.* Bardwell, 1 C. Pl. (Pa.) 22.

68. Smith *v.* Thurston, 19 Mo. App. 48.

69. *District of Columbia.*— U. S. *v.* Mattoon, 5 Mackey 565, holding that where in an action against the principal and his sureties on an official bond the principal failed to defend but no judgment was taken against him and on the trial, the evidence being held insufficient against the sureties and the court being about to direct a verdict in their favor, plaintiff consented that the principal should be included therein, the verdict in favor of the principal worked the discharge of the sureties even though the court was in error in its rulings as to the sufficiency of the evidence against them.

Iowa.— Stevens *v.* Carroll, 131 Iowa 170, 105 N. W. 653; Ames *v.* Maclay, 14 Iowa 281.

Missouri.— State *v.* Coste, 36 Mo. 437, 88 Am. Dec. 148.

Tennessee.— Bank of Commerce *v.* Porter, 1 Baxt. 447.

Texas.— Sonnentheil *v.* Texas Guarantee, etc., Co., 23 Tex. Civ. App. 436, 56 S. W. 143.

See 40 Cent. Dig. tit. "Principal and Surety," § 290.

Errors affecting the liability of the surety only are immaterial if the judgment in favor of the principal is correct. Thompson *v.* Chaffee, 39 Tex. Civ. App. 567, 89 S. W. 285.

Where the creditor relied on the surety to prosecute the action against the principal, and it appears that the judgment for the principal was only a dismissal of the action for want of prosecution, the judgment did not release the surety. Hardin *v.* Johnston, 58 Ga. 522.

Where some of the principals were relieved from a judgment at law by an injunction, issued upon execution of the required statutory bond and the injunction was perpetuated as to a part of the principals only and dissolved as to the others, it was held that the sureties could not be subjected to the statutory judgment. Hill *v.* McKenzie, 39 Ala. 314.

70. State *v.* Parker, 72 Ala. 181; Brown *v.* Bradford, 30 Ga. 927; Dickason *v.* Bell, 13 La. Ann. 249. But see State Bank *v.* Robinson, 13 Ark. 214.

The doctrine of res inter alios acta does not apply. Gill *v.* Morris, 11 Heisk. (Tenn.) 614, 27 Am. Rep. 744.

71. Michener *v.* Springfield Engine, etc., Co., 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59; Thomas *v.* Wilson, 6 Blackf. (Ind.) 203; Ames *v.* Maclay, 14 Iowa 281; Dickason *v.* Bell, 13 La. Ann. 249.

72. Jones *v.* Kilgore, 2 Rich. Eq. (S. C.) 63, holding that where, after a judgment against sureties, suit was brought against the administrator of the principal, who succeeded in reducing the claim of the creditor to the principal sum only, owing to having found evidence of usury among the papers of the principal, the sureties will be relieved, in equity, upon payment of the principal sum and legal interest.

73. McCloskey *v.* Wingfield, 29 La. Ann. 141.

he is benefited,[74] whether such injury arises from some positive act or omitting to do something which it was the duty of the creditor to perform;[75] and matters which would discharge a surety before maturity of a debt will have a like effect if arising after maturity.[76] If for any reason the creditor forfeits his right to participate in the estate of an insolvent principal, he has no right to enforce his claim against a surety.[77]

b. Release[78]—(i) *Consideration.* A release without consideration,[79] such as a receipt in full given to a guardian,[80] is insufficient as a defense, although if there is a consideration, the release being in writing, it need not be recited.[81] A payment by the principal[82] or by the surety[83] will not constitute a consideration for a release if such payment is to be applied on the indebtedness; but a payment by the surety which is not to be credited on the indebtedness,[84] or a note of the principal for an additional sum,[85] is a sufficient consideration. Likewise a consideration exists if, by agreement of all the parties, the creditor, having property of the principal to apply to the secured debt, is to apply it in extinguishment of another debt of the principal for which the surety is not liable;[86] or if the surety has performed,[87] or agrees to perform services.[88] A refusal of a judgment creditor to levy upon the property of the principal at the instance of the surety,[89] the acceptance of another surety[90] or of a mortgage,[91] or the agreement of the surety to refrain from taking indemnity from the principal,[92] each constitutes a consideration; but if the release is upon condition that a mortgage shall be given,[93] or upon some other condition,

74. Polak *v.* Everett, 1 Q. B. D. 669, 46 L. J. Q. B. 218, 35 L. T. Rep. N. S. 350, 24 Wkly. Rep. 689.

75. Watts *v.* Shuttleworth, 5 H. & N. 235, 29 L. J. Exch. 229 [*affirmed* in 7 H. & N. 353, 7 Jur. N. S. 945, 5 L. T. Rep. N. S. 58, 10 Wkly. Rep. 132].

Conflict of laws.— When an action is brought in one state on a contract made in another state, the question whether a surety has been discharged by any act of the creditor is to be determined by the laws of the state where the action is brought. Tomer *v.* Dickerson, 37 Ga. 428.

76. Stowell *v.* Goodenow, 31 Me. 538.

77. Garey *v.* Hignutt, 32 Md. 552, holding that if a trustee in insolvency purchases a judgment against his insolvent, and, by refusing to disclose the amount paid, forfeits all claim to distribution from the estate of the insolvent, he has no right to enforce the judgment against a surety.

78. **Of guarantor** generally see Guaranty, 20 Cyc. 1478.

79. *Louisiana.*— Walmsley *v.* Resweber, 105 La. 522, 30 So. 5.

Maine.— Dunn *v.* Collins, 70 Me. 230.

South Carolina.— Alsobrook *v.* Alsobrook, 14 S. C. 170.

Vermont.— Hogaboom *v.* Herrick, 4 Vt. 131.

Canada.— Donaldson *v.* Wherry, 29 Ont. 552.

A promise by a vendee of land to a surety on the title bond of the vendor that he himself would procure a surrender of an outstanding legal title or withhold the purchase-money is without consideration and not available to the surety as a defense. Greene *v.* Allen, 32 Ala. 215.

80. People *v.* Borders, 31 Ill. App. 426; Meier *v.* Herancourt, 6 Ohio Dec. (Reprint) 1164, 8 Cinc. L. Bul. 29.

81. Burrill *v.* Saunders, 36 Me. 409.

82. Muse *v.* Fraley, 50 S. W. 534, 20 Ky. L. Rep. 1936.

83. Sulphur Deposit Bank *v.* Peak, 110 Ky. 579, 62 S. W. 268, 23 Ky. L. Rep. 19, 96 Am. St. Rep. 466; Martin *v.* Frantz, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. Rep. 589.

Payment of additional loan.— If the creditor loans an additional sum to the principal under an agreement that when the second loan is paid, and the original loan is reduced to a certain amount with interest, the liability of the sureties therefor should cease, the sureties are discharged by the performance of such agreement. Mockett *v.* Boston Imp. Co., 2 Nebr. (Unoff.) 500, 89 N. W. 283.

84. McIlhenny Co. *v.* Blum, 68 Tex. 197, 4 S. W. 367.

85. Taylor *v.* Meek, 4 Blackf. (Ind.) 388.

86. Austin *v.* Belknap, 54 Vt. 495.

87. Hope *v.* Eddington, Lalor (N. Y.) 43.

88. Gilbert *v.* State Ins. Co., 3 Kan. App. 1, 44 Pac. 442.

89. Westmoreland Bank *v.* Klingensmith, 7 Watts (Pa.) 523.

90. Reid *v.* Nunnelly, 24 Ark. 356.

Substitution of another surety of officer.— In Wilson *v.* Glover, 3 Pa. St. 404, it was held that whether or not a verbal discharge of a surety of a tax collector and agreement to accept another in his place, of which a minute was not made, would be effectual as a discharge in any event, it could not be effectual until actually executed.

91. Clodfelter *v.* Hulett, 72 Ind. 137.

92. Heitsch *v.* Cole, 47 Minn. 320, 50 N. W. 235.

93. Imming *v.* Fiedler, 8 Ill. App. 256.

Creditor need not prepare mortgage.— Where it is agreed that a surety shall be discharged upon the execution by the principal of a mortgage, it is not the duty of the creditor to prepare and tender the mortgage for

such as that all creditors of the principal shall assent to an assignment by the latter, it is not effective unless the condition is performed.[94]

(II) *Effect* — (A) *In General.* A release of one employee will not release the sureties of another, although the two have aided each other in committing the default;[95] but a release of third persons from liability to the obligee will discharge the sureties of an officer if it interferes with their rights and causes them injury.[96] If a release be procured by the fraud of the principal, the surety is not discharged,[97] unless the surety is injured by the passiveness of the obligee after discovery of the fraud.[98] A surety who has been discharged by a release can enjoin the creditor from proceeding against him;[99] but if the surety only is discharged, it is improper for him to make the principal a complainant in the bill.[1]

(B) *Of Release of Principal* — (1) In General. The general rule is that the release of the principal debtor, without the consent of the surety, releases the surety,[2] as where the release arises out of a composition agreement,[3] or a covenant not to

execution; and consequently the surety is not discharged until the mortgage has been executed and delivered. Lyle *v.* Morse, 24 Ill. 95.

94. Mueller *v.* Dobschuetz, 89 Ill. 176.

95. Union Nat. Bank *v.* Legendre, 35 La. Ann. 787; McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552.

96. Foss *v.* Chicago, 34 Ill. 488, holding that where public funds kept in a bank were obtained fraudulently by a public officer upon checks not drawn in conformity to the law, and the obligee made a settlement with the bank, releasing it from all liability, the sureties on the bond of the officer were discharged thereby.

97. Carter *v.* Tice, 120 Ill. 277, 11 N. E. 529; Parr *v.* State, 71 Md. 220, 17 Atl. 1020; Scholefield *v.* Templer, 4 De G. & J. 429, 7 Wkly. Rep. 635, 61 Eng. Ch. 338, 45 Eng. Reprint 166.

98. Gordon *v.* McCarty, 3 Whart. (Pa.) 407. See also Waldrop *v.* Leaman, 30 S. C. 428, 9 S. E. 466.

99. Trabing *v.* Albany County, 1 Wyo. 301; Walker *v.* Brooks, 4 Wkly. Rep. 347.

1. Hawkins *v.* Hall, 38 N. C. 280.

2. *California.*— Bull *v.* Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235.

Georgia.— Stallings *v.* Americus Bank, 59 Ga. 701; Brown *v.* Ayer, 24 Ga. 288.

Indiana.— Cartmel *v.* Newton, 79 Ind. 1.

Mississippi.—Anthony *v.* Capel, 53 Miss. 350.

New York.— Van Rensselaer *v.* Akin, 22 Wend. 549; Kirby *v.* Taylor, 6 Johns. Ch. 242.

Pennsylvania.— Metropolitan Nat. Bank *v.* Merchants', etc., Nat. Bank, 155 Pa. St. 20, 25 Atl. 764.

Texas.— Roberson *v.* Tonn, 76 Tex. 535, 13 S. W. 385; Long *v.* Patton, 43 Tex. Civ. App. 11, 93 S. W. 519.

Vermont.— Paddleford *v.* Thacher, 48 Vt. 574.

England.— Commercial Bank *v.* Jones, [1893] A. C. 313, 57 J. P. 644, 62 L. J. P. C. 104, 68 L. T. Rep. N. S. 776, 1 Reports 367, 42 Wkly. Rep. 256; Lowes *v.* Maughan, Cab. & E. 340.

Canada.—Holliday *v.* Jackson, 22 Can. Sup. Ct. 479 [*affirming* 20 Ont. App. 298 (*reversing* 22 Ont. 235)]; Cumming *v.* Montreal Bank, 15 Grant Ch. (U. C.) 686, as to release of indorsers.

See 40 Cent. Dig. tit. "Principal and Surety," § 286.

An indemnified surety is held not to be discharged by a release of the principal. Jones *v.* Ward, 71 Wis. 152, 36 N. W. 711.

A surety on an undertaking given upon an order of arrest in a civil action is released if the order of arrest is set aside under a stipulation not to sue for malicious prosecution or for false imprisonment. Schuyler *v.* Englert, 10 Daly (N. Y.) 463 [*affirming* 62 How. Pr. 479].

The repeal of an act which rendered a collector liable for embezzlement on refusing to pay over money without sufficient excuse does not discharge his sureties as to his future defaults. State *v.* Smith, 16 Fla. 175.

New contract by surety.— If the surety, after maturity of the debt, enters into a new contract with the creditor looking to a settlement of liability, a release of the principal thereafter does not discharge the surety. Hall *v.* Hutchons, 3 L. J. Ch. 45, 3 Myl. & K. 426, 10 Eng. Ch. 426, 40 Eng. Reprint 162; Defries *v.* Smith, 10 Wkly. Rep. 189.

Release before decree of breach in nonperformance of decree.—A release by the receiver of a corporation, appointed in Pennsylvania, is not a good ground for defense in an action brought for a breach, which consisted in the non-performance of a decree afterward passed by the supreme court of Rhode Island. The release, if it had any legal effect, could only be availed of by pleading it in that court before the decree. Hazard *v.* Griswold, 21 Fed. 178.

After the creditor has assigned his claim, his acts are ineffective to divest his assignee of any rights acquired by the transfer. Morristown Stove Works *v.* Jones, (Tenn. Ch. App. 1899) 53 S. W. 217.

Consent see *infra*, VIII, E, 2, d.

3. *Kentucky.*— Schuff *v.* Germania Safety Vault, etc., Co., 43 S. W. 229, 19 Ky. L. Rep. 1457.

New Jersey.— Ordinary *v.* Dean, 44 N. J. L. 64.

Vermont.— Paddleford *v.* Thacher, 48 Vt. 574.

Virginia.— Daniel *v.* Wharton, 90 Va. 584, 19 S. E. 170.

sue,[4] unless the right to go against the surety is reserved in the instrument of release,[5] or it appears from the whole transaction that it was intended that the surety should remain bound.[6] But the rule at common law that the release of a debtor whose person was in execution upon a capias ad satisfaciendum extinguished the judgment itself,[7] does not apply to a commitment in contempt proceedings so as to release the sureties of the contemner,[8] or to a discharge from imprisonment under a capias ad satisfaciendum, where the statutes preserve the judgment.[9] As a surety occupies the position of principal to a supplemental surety, a release of the surety will discharge the supplemental surety.[10] A release of the principal also will release sureties liable on collateral security for the debt,[11] and property pledged [12] or mortgaged to secure the debt.[13] The liability of a surety once released cannot be revived without his consent; [14] and if the surety, in ignorance of the release of the principal, has made payment, he can recover the amount paid.[15]

(2) Of One of Several Principals. The general rule is that a release of one of several persons jointly bound as principals releases the surety on their bond.[16]

England.— Cragoe *v.* Jones, L. R. 8 Exch. 81, 42 L. J. Exch. 68, 28 L. T. Rep. N. S. 36, 21 Wkly. Rep. 408; Hall *v.* Wilcox, 1 M. & Rob. 58; Walker *v.* Brooks, 4 Wkly. Rep. 347.

See 40 Cent. Dig. tit. "Principal and Surety," § 286.

Statute preserving liability.—Where a statute provides that releases shall be filed upon a claim made under an assignment for the benefit of creditors, and that it shall not operate to discharge any surety, the surety is not released. Fertig *v.* Bartles, 78 Fed. 866.

An executor has power to give a release. Daniel *v.* Wharton, 90 Va. 584, 19 S. E. 170.

4. Farnsworth *v.* Coots, 46 Mich. 117, 8 N. W. 705.

5. Brown *v.* Ayer, 24 Ga. 288; Price *v.* Barker, 3 C. L. R. 927, 4 E. & B. 760, 1 Jur. N. S. 775, 24 L. J. Q. B. 130, 8 E. C. L. 760. This rule is confined to cases in which the principal and the surety or coöbligor against whom the remedy of the creditor is reserved are parties to or signers of the same obligation. Dupee *v.* Blake, 148 Ill. 453, 35 N. E. 867. See also *infra*, VIII, E, 2, f.

6. Hall *v.* Hutchons, 3 L. J. Ch. 45, 3 M. & K. 426, 10 Eng. Ch. 426, 40 Eng. Reprint 162. See also Cumming *v.* Montreal Bank, 15 Grant Ch. (U. C.) 686.

7. Hawkins *v.* Mims, 36 Ark. 145, 38 Am. Rep. 30; U. S. *v.* Stansbury, 1 Pet. (U. S.) 573, 7 L. ed. 267. But see Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214, where it appears the common-law rule is not recognized.

Where a guarantor consents to the discharge his liability is not affected. Terrell *v.* Smith, 8 Conn. 426.

8. Hawkins *v.* Mims, 36 Ark. 145, 38 Am. Rep. 30, as to sureties of receiver who has failed to turn over funds in obedience to an order of court, it being held that contempt proceedings do not interfere with the prosecution of any other remedy to which the creditor may be entitled, etc.

9. Lawson *v.* Snyder, 1 Md. 71; Treasurers *v.* Johnson, 4 McCord (S. C.) 458 (which cases are under statutes permitting the discharge with the debtor's consent); U. S. *v.* Stansbury, 1 Pet. (U. S.) 573, 7 L. ed. 267; U. S. *v.* Sturges, 27 Fed. Cas. No. 16,414, 1 Paine 525.

10. Brown *v.* Chicago, etc., R. Co., 76 Nebr. 792, 107 N. W. 1024.

Sureties on different bonds.— If, after a judgment against the principal has been affirmed, he obtains an injunction restraining further proceedings, a release of a surety on the injunction bond releases a surety on the supersedeas bond, at least to the extent of the property owned by the former. Lewis *v.* Armstrong, 80 Ga. 402, 7 S. E. 114.

11. Dupee *v.* Blake, 148 Ill. 453, 35 N. E. 867 [*reversing* 50 Ill. App. 155]. The release of an indorser on a note releases a surety on a collateral note. Montgomery *v.* Sayre, 100 Cal. 182, 34 Pac. 646, 38 Am. St. Rep. 271.

12. O'Mara *v.* Nugent, 37 N. J. Eq. 326 (holding that one who has pledged property to secure the debt of another is entitled to a retransfer of the property, after a release of the debtor by the creditor); Denny *v.* Lyon, 38 Pa. St. 98, 80 Am. Dec. 463.

13. Dibble *v.* Richardson, 171 N. Y. 131, 63 N. E. 829 [*reversing* 64 N. Y. App. Div. 520, 72 N. Y. Suppl. 304], holding that if the creditor, by will, cancels the indebtedness, a mortgage given by a third person to secure it is released likewise, except so far as it may be necessary to enforce the mortgage to meet any deficiency in the assets of the estate.

Effect of extension of time see *infra*, VIII, E, 2, j, (I), (B).

14. Calloway *v.* Snapp, 78 Ky. 561; Greenlee *v.* Lowing, 35 Mich. 63.

15. Hirsh *v.* Munger, 3 Thomps. & C. (N. Y.) 290. See also *infra*, IX, A, 3.

16. *Iowa.*— Malanaphy *v.* Fuller, etc., Mfg. Co., 125 Iowa 719, 101 N. W. 640, 106 Am. St. Rep. 332.

Missouri.— Prior *v.* Kiso, 81 Mo. 241.

Tennessee.— Harris *v.* Taylor, 3 Sneed 536, 67 Am. Dec. 576.

Texas.— Crook *v.* Lipscomb, 30 Tex. Civ. App. 567, 70 S. W. 993.

Washington.— Friendly *v.* National Surety Co., 46 Wash. 71, 89 Pac. 177, 10 L. R. A. N. S. 1160.

But this rule has been held not to apply to cases of joint trusts where the party released was not in default.[17]

(c) *Of Release of Surety.* While a release is a good defense for a surety,[18] an understanding that he is not to be liable will not be;[19] nor would steps taken by the obligee merely looking to a release be sufficient.[20] An agreement between the principal and the creditor for the release of the surety is a defense to the latter;[21] but an arrangement between two joint debtors that one alone is to make payment will not release the other, although made in the presence of the creditor;[22] nor is a retiring partner released as surety because the creditor has all of his dealings with the continuing partners.[23] A release of the surety does not affect the liability of the principal.[24]

(d) *Of Release of Cosurety.* Under the common-law rule, where cosureties were bound jointly, a release of one discharged all;[25] but in equity the cosureties

See 40 Cent. Dig. tit. "Principal and Surety," § 287.

Where it does not appear on the face of a joint bond that two of the obligors are sureties, it is no defense to them that, after the death of the other obligor, his executor had been released. Ashbee *v.* Pidduck, 2 Gale 116, 5 L. J. Exch. 251, 1 M. & W. 564, 1 Tyrw. & G. 1016.

Principals in different capacities.— Where a bond was conditioned for the payment of any ultimate recovery in a suit against partners, and a judgment was obtained against them as partners, and against one individually, the liability of the surety for the latter is not affected by a release of his partner for a partnership liability. Everett *v.* Mitchell, 23 N. Y. App. Div. 332, 48 N. Y. Suppl. 303.

17. Kirby *v.* Turner, Hopk. (N. Y.) 309; Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242 (in which cases one of several guardians was released, all claim against the other being reserved, and it was held that the surety was discharged from liability as to the guardian released, but no further); Hocker *v.* Woods, 33 Pa. St. 466.

18. See the cases cited *supra*, note 84 *et seq.*

If the creditor has a life-interest only in the debt, his release of the payment of interest thereon will not extend beyond his life. Coates *v.* Coates, 10 Jur. N. S. 532, 33 L. J. Ch. 448, 9 L. T. Rep. N. S. 795, 3 New Rep. 355, 12 Wkly. Rep. 634.

Question for jury.— Whether the release of a surety was intended is a question for the jury. Rouss *v.* Krauss, 126 N. C. 667, 36 S. E. 146.

Subsequent claims against principal.— If the surety is released from liability, he cannot assert any rights, as against third persons, for subsequent claims of the surety against the principal. Legriel *v* Barker, 2 Vern. Ch. 39, 23 Eng. Reprint 636.

19. Dendy *v.* Gamble, 59 Ga. 434.

20. Whittemore *v.* Ridout, 2 Grant Ch. (U. C.) 525, holding that where the minutes of a meeting of the board of directors of a building society showed that a surety "had requested that his security for the secretary might be cancelled," and suggested that his name be erased from the bond of the secretary by wish of the board, and be relieved as security, and that the secretary was requested to submit other names as securities in place thereof, does not afford any ground for the relief of the surety.

21. Maydole *v.* Peterson, 7 Ida. 502, 63 Pac. 1048; Clodfelter *v.* Hulett, 72 Ind. 137.

22. Donaldson *v.* Wherry, 29 Ont. 552.

23. Campbell *v.* Floyd, (Pa. 1893) 25 Atl. 1038; Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033.

24. Union Nat. Bank *v.* Legendre, 35 La. Ann. 787; Mortland *v.* Himes, 8 Pa. St. 265; Wolf *v.* Fink, 1 Pa. St. 435, 44 Am. Dec. 141; Baldwin *v.* Ralston, 6 Pa. Dist. 198; Ragsdale *v.* Gossett, 2 Lea (Tenn.) 729; McIlhenny Co. *v.* Blum, 68 Tex. 197, 4 S. W. 367; Bridges *v.* Phillips, 17 Tex. 128.

Under the strict rule of the common law, if the principal and surety were bound jointly, a release of the surety would release the principal also. Blow *v.* Maynard, 2 Leigh (Va.) 29; Nicholson *v.* Revil, 4 A. & E. 675, 1 Harr. & W. 756, 5 L. J. K. B. 129, 6 N. & M. 192, 31 E. C. L. 300.

As between two sets of sureties on successive bonds of a guardian, a release by the ward of the set secondarily liable will not affect the liability of the others. Field *v.* Pelot, McMull. Eq. (S. C.) 369.

25. Spencer *v.* Houghton, 68 Cal. 82, 8 Pac. 679, (1885) 6 Pac. 853; People *v.* Buster, 11 Cal. 215; State *v.* Van Pelt, 1 Ind. 304; Trabing *v.* Albany County, 1 Wyo. 301. See also Evans *v.* Bremridge, 2 Jur. N. S. 134, 2 Kay & J. 174, 25 L. J. Ch. 102, 4 Wkly. Rep. 161 [*affirmed* in 8 De G. M. & G. 100, 2 Jur. N. S. 311, 25 L. J. Ch. 334, 4 Wkly. Rep. 350, 57 Eng. Ch. 78, 44 Wkly. Rep. 327].

New bond under order of court.—A probate decree, under statute discharging a surety on a bond of a trustee from further liability, and the giving of a new bond by the principal, approved by the court, operates as a discharge of a cosurety for acts of the principal committed thereafter, notwithstanding a recital in the new bond that it is in addition to the one discharged. McKim *v.* Demmon, 130 Mass. 404. See also *supra*, VI, A, 1 *et seq.* and cross-references. And see *infra*, note 29 *et seq.*

Alteration see *infra*, VIII, E, 2, i.

remained liable for their proportionate shares,[26] and, under the modern law, a covenant not to sue,[27] or a release of one cosurety, does not discharge the others,[28] but he remains liable for his proportionate share of the indebtedness,[29] especially if the surety released has paid his own proportionate part.[30] A release, without authority, is a nullity, and will not affect the liability of cosureties.[31] If the sureties are not bound by the same but by separate instruments, a release of one will not release the others;[32] although, if cosureties, the latter would be liable for their proportion only.[33] If a surety, by subsequent acts, has become a co-principal,

26. Smith *v.* State, 46 Md. 617; State *v.* Matson, 44 Mo. 305; Routon *v.* Lacy, 17 Mo. 399.

27. State Bank *v.* Bozeman, 13 Ark. 631; Benedict *v.* Rea, 35 Hun (N. Y.) 34.

28. Teutonia Nat. Bank *v.* Wagner, 33 La. Ann. 732; Walsh *v.* Miller, 51 Ohio St. 462, 38 N. E. 381; Ward *v.* New Zealand Nat. Bank, 8 App. Cas. 755, 52 L. J. P. C. 65, 49 L. T. Rep. N. S. 315; *Ex p.* Gifford, 6 Ves. Jr. 805, 6 Rev. Rep. 53, 31 Eng. Reprint 1318.

Discharge of a surety by failure of the creditor to bring suit after notice to do so does not affect the liability of the others. Wilson *v.* Tebbetts, 29 Ark. 579, 21 Am. Rep. 165; School Trustees *v.* Southard, 31 Ill. App. 359; Martin *v.* Orr, 96 Ind. 491; Cochran *v.* Orr, 94 Ind. 433; Ramey *v.* Purvis, 38 Miss. 499; Routon *v.* Lacy, 17 Mo. 399.

29. *Alabama.*— Jemison *v.* Governor, 47 Ala. 390.

Arkansas.— Gordon *v.* Moore, 44 Ark. 349, 51 Am. Rep. 606.

Illinois.— Thomason *v.* Clark, 31 Ill. App. 404.

Maryland.— Garey *v.* Hignutt, 32 Md. 552.

Minnesota.— State *v.* Bongard, 89 Minn. 426, 94 N. W. 1093.

Mississippi.— Thompson *v.* Adams, Freem. 225.

Missouri.— Dodd *v.* Winn, 27 Mo. 501.

New York.— Morgan *v.* Smith, 70 N. Y. 537.

Virginia.— Hewitt *v.* Adams, 1 Patt. & H. 34.

England.— *Re* Wolmershausen, 62 L. T. Rep. N. S. 541, 38 Wkly. Rep. 537.

See 40 Cent. Dig. tit. "Principal and Surety," § 269.

In an action against sureties of an administrator, it is not a defense that plaintiff, who was also administrator of the estate of a cosurety, had paid out the assets of the latter estate to the heirs, as such act, if a discharge at all, was so *pro tanto* only. Poullain *v.* Brown, 80 Ga. 27, 5 S. E. 107.

Statutory regulation — *In general.*— This frequently is a matter of statutory regulation. See Jemison *v.* Governor, 47 Ala. 390; Wristen *v.* Curtiss, 76 Cal. 6, 18 Pac. 81; Lay *v.* Nixon, 14 Mont. 64, 35 Pac. 458; Alford *v.* Baxter, 36 Vt. 158.

Official bonds.— Thus under a statute authorizing the release of sureties on official bonds, the discharge of a surety on such bond does not release the other sureties. People *v.* Otto, 77 Cal. 45, 18 Pac. 869.

Guardian bond — state not obligee.— In Frederick *v.* Moore, 13 B. Mon. (Ky.) 470, it was held that the rule that the release of one surety will discharge cosureties does not apply to the release of a surety in a guardian bond under the statute authorizing any surety of a guardian, etc., to apply for his release; that while the bond was executed to the commonwealth, whose agent it may be said the county court was in releasing the surety, the commonwealth was merely nominal obligee having no beneficial interest in the bond.

30. *Kentucky.*— Sulphur Deposit Bank *v.* Peak, 110 Ky. 579, 62 S. W. 268, 23 Ky. L. Rep. 19.

Missouri.— State *v.* Atherton, 40 Mo. 209.

New York.— Hood *v.* Hayward, 48 Hun 330, 1 N. Y. Suppl. 566.

Pennsylvania.— Klingensmith *v.* Klingensmith, 31 Pa. St. 460; Schock *v.* Miller, 10 Pa. St. 401.

Texas.— Ulrich *v.* Hoefling, 23 Tex. Civ. App. 289, 56 S. W. 199.

See 40 Cent. Dig. tit. "Principal and Surety," § 269.

The discharge of one surety on an official bond, on part payment of the liability, will not release the others. Deering *v.* Moore, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534.

31. Wynne *v.* Edwards, 7 Humphr. (Tenn.) 418, where a release of a surety on the bond of a constable by a mere order of a county court was a nullity.

Dismissal of suit as to deceased cosurety.— In Mills *v.* Hackett, 65 Tex. 580, it was held that the court has no authority to dismiss a deceased surety on a replevin bond from the bond; that an order to this effect was intended merely as a dismissal of the suit as to the surety and did not operate as a release, the motion being to dismiss him from the suit because he was dead, and his estate was not released from responsibility.

32. Poor *v.* Merrill, 68 Iowa 436, 27 N. W. 367; McCloskey *v.* Wingfield, 32 La. Ann. 38; Jamison *v.* Cosby, 11 Humphr. (Tenn.) 273. Where the record of the order of acceptance and approval of the bond of a sheriff, at the time a person signed a supplemental bond for additional security, disclosed nothing to indicate that those whom he believed to be jointly bound with him were not, he cannot be held after their release. Com. *v.* Berry, 95 Ky. 443, 26 S. W. 7, 15 Ky. L. Rep. 833.

33. Wanamaker *v.* Powers, 186 N. Y. 562, 79 N. E. 1118 [*affirming* 102 N. Y. App. Div. 485, 93 N. Y. Suppl. 19]; London *v.* Citizens' Ins. Co., 13 Ont. 713.

as between himself and his cosurety his release will release his former cosurety entirely.[34-77]

c. Necessity of Knowledge of Relation. In order that a surety, as such, may be discharged by acts of the creditor or obligee, the latter must have knowledge of the existence of the relation;[78] and if the creditor or obligee have knowledge, it is not necessary that the relation be shown on the face of the instrument;[79] but he is not obliged to make inquiry,[80] although he may be held to have notice if negligently although not wilfully ignorant.[81] Although the creditor or obligee did not possess such knowledge originally, or if the relation arose from transactions occurring after the contract was entered into, he must respect the rights of the surety when informed that the relation exists.[82]

34-77. Roberson *v.* Tonn, 76 Tex. 535, 13 S. W. 385.

78. *Alabama.*— Cullum *v.* Emanuel, 1 Ala. 23, 34 Am. Dec. 757.

California.— Harrier *v.* Bassford, 145 Cal. 529, 78 Pac. 1038.

Colorado.— Tootle *v.* Cook, 4 Colo. App. 111, 35 Pac. 193.

Indiana.—McCloskey *v.* Indianapolis Manufacturers', etc., Union, 67 Ind. 86, 33 Am. Rep. 76; Weaver *v.* Prebster, 37 Ind. App. 582, 77 N. E. 674; Durbin *v.* Northwestern Scraper Co., 36 Ind. App. 123, 73 N. E. 297; Voris *v.* Shotts, 20 Ind. App. 220, 50 N. E. 484.

Kentucky.— Turner *v.* Farmers' Bank, 58 S. W. 695, 22 Ky. L. Rep. 787.

Michigan.— Smith *v.* Shelden, 35 Mich. 42, 24 Am. Rep. 529.

New Jersey.— Young *v.* Bell, (Ch. 1898) 41 Atl. 226.

New York.— Gahn *v.* Niemcewicz, 11 Wend. 312.

Ohio.— Cone *v.* Rees, 11 Ohio Cir. Ct. 632, 5 Ohio Cir. Dec. 192; Mack *v.* Keatzel, 2 Ohio Dec. (Reprint) 313, 2 West. L. Month. 412.

Pennsylvania.—Henke's Appeal, 10 Pa. Cas. 295, 14 Atl. 45.

Vermont.— Paddleford *v.* Thacher, 48 Vt. 574.

West Virginia.— Parsons *v.* Harrold, 46 W. Va. 122, 32 S. E. 1002.

Wyoming.— Frank *v.* Snow, 6 Wyo. 42, 42 Pac. 484, 43 Pac. 78.

Canada.— Blackley *v.* Kenney, 18 Ont. App. 135 [*reversing* 19 Ont. 169].

See 40 Cent. Dig. tit. "Principal and Surety," § 195 *et seq.*

A mortgage by a wife does not indicate that she is a surety if the creditor does not know that the money was not for her use (Gahn *v.* Niemcewicz, 11 Wend. (N. Y.) 312); nor does the fact that a wife joined in the covenant of seizin in a mortgage indicate that she had an interest in the property mortgaged, and, hence was a surety (Von Hemert *v.* Taylor, 76 Minn. 386, 76 N. W. 42).

79. *Florida.*— Bowen *v.* Darby, 14 Fla. 202.

Georgia.— Taylor *v.* Scott, 62 Ga. 39; Camp *v.* Howell, 37 Ga. 312; St. Mary Bank *v.* Mumford, 6 Ga. 44.

Illinois.— Flynn *v.* Mudd, 27 Ill. 323.

Indiana.— Gipson *v.* Ogden, 100 Ind. 20; Starrett *v.* Burkhalter, 86 Ind. 439.

Iowa.— Lauman *v.* Nichols, 15 Iowa 161; Kelly *v.* Gillespie, 12 Iowa 55, 79 Am. Dec. 516.

Louisiana.— Adle *v.* Metoyer, 1 La. Ann. 254.

Maine.— Lime Rock Bank *v.* Mallett, 42 Me. 349; Mariner's Bank *v.* Abbott, 28 Me. 280.

Maryland.— Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283.

Massachusetts.— Guild *v.* Butler, 127 Mass. 386.

Michigan.— Walter A. Wood Mowing, etc., Mach. Co. *v.* Oliver, 103 Mich. 326, 61 N. W. 507; Stevens *v.* Oaks, 58 Mich. 343, 25 N. W. 309.

Montana.— Smith *v.* Freyler, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358.

Nebraska.— Lee *v.* Brugmann, 37 Nebr. 232, 55 N. W. 1053.

New Hampshire.— Derry Bank *v.* Baldwin, 41 N. H. 434; Grafton Bank *v.* Kent, 4 N. H. 221, 17 Am. Dec. 414.

North Carolina.— Goodman *v.* Litaker, 84 N. C. 8, 37 Am. Rep. 602.

Ohio.— McDowell *v.* Reese, 10 Ohio Dec. (Reprint) 303, 20 Cinc. L. Bul. 102, under statute.

Pennsylvania.— Walter *v.* Fisher, 4 Leg. Gaz. 204.

Rhode Island.— Otis *v.* Von Storch, 15 R. I. 41, 23 Atl. 39.

Texas.— Victoria First Nat. Bank *v.* Skidmore, (Civ. App. 1895) 30 S. W. 564; Morris *v.* Booth, (App. 1892) 18 S. W. 639; Babcock *v.* Milmo Nat. Bank, 1 Tex. App. Civ. Cas. § 817.

Vermont.— Peake *v.* Dorwin, 25 Vt. 28; Claremont Bank *v.* Wood, 10 Vt. 582.

Washington.— Harmon *v.* Hale, 1 Wash. Terr. 422, 34 Am. Rep. 816.

Wisconsin.— Irvine *v.* Adams, 48 Wis. 468, 4 N. W. 573, 33 Am. Rep. 817; Riley *v.* Gregg, 16 Wis. 666.

United States.—American, etc., Mortg., etc., Corp. *v.* Marquam, 62 Fed. 960; Scott *v.* Scruggs, 60 Fed. 721, 9 C. C. A. 246.

England.— Wythes *v.* Labouchere, 3 De G. & J. 593, 5 Jur. N. S. 499, 7 Wkly. Rep. 271, 60 Eng. Ch. 459, 44 Eng. Reprint 1397.

See 40 Cent. Dig. tit. "Principal and Surety," § 195 *et seq.*

80. Benedict *v.* Olson, 37 Minn. 431, 35 N. W. 10.

81. Enix *v.* Hays, 48 Iowa 86; Fuller *v.* Quesnel, 63 Minn. 302, 65 N. W. 634.

82. *Georgia.*— Preston *v.* Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124.

d. Effect of Consent of Surety — (i) *In General.* A surety is not discharged by any act of the creditor or obligee to which he consents,[83] such as relinquishment of security held by the creditor or obligee,[84] or acts which result in a loss of such security,[85] or an alteration,[86] or the release of the principal,[87] or of a cosurety,[88] or non-performance of conditions,[89] or an extension of the time of performance or payment.[90] Consent to an extension means, as a general rule, one extension

Illinois.— Reed *v.* Cramb, 22 Ill. App. 34.
Iowa.— McCramer *v.* Thompson, 21 Iowa 244.
Kentucky.— Harris-Seller Banking Co. *v.* Bond, 47 S. W. 764, 20 Ky. L. Rep. 897.
Massachusetts.— Guild *v.* Butler, 127 Mass. 386.
New Hampshire.— Wheat *v.* Kendall, 6 N. H. 504.
New York.— Niemcewicz *v.* Gahn, 3 Paige 614 [*affirmed* in 11 Wend. 312].
North Carolina.— Coffey *v.* Reinhardt, 114 N. C. 509, 19 S. E. 370.
Texas.— Zapalac *v.* Zapp, 22 Tex. Civ. App. 375, 54 S. W. 938; Hall *v.* Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861.
United States.— Scott *v.* Scruggs, 60 Fed. 721, 9 C. C. A. 246; Vary *v.* Norton, 6 Fed. 808.
England.— Overend *v.* Oriental Financial Corp., L. R. 7 H. L. 348, 31 L. T. Rep. N. S. 322 [*affirming* L. R. 7 Ch. 142, 41 L. J. Ch. 332, 25 L. T. Rep. N. S. 813, 20 Wkly. Rep. 253, and *overruling* Strong *v.* Foster, 17 C. B. 201, 25 L. J. C. P. 106, 4 Wkly. Rep. 151, 84 E. C. L. 201].
Canada.— Bailey *v.* Griffith, 40 U. C. Q. B. 418 [*overruling* Jones *v.* Dunbar, 32 U. C. C. P. 136].
See 40 Cent. Dig. tit. "Principal and Surety," § 195 *et seq.*

The notice must be clear.— Palmer *v.* Purdy, 83 N. Y. 144.

83. *Georgia.*— Jones *v.* Hawkins, 60 Ga. 52, holding that if a surety assents to the application of funds from a sale of the property of the principal to the junior liens and receives part of the money himself, he is not discharged by such application.
Maine.— Osgood *v.* Miller, 67 Me. 174.
Minnesota.— Pence *v.* Cale, 20 Minn. 257.
Nebraska.— State *v.* Paxton, 65 Nebr. 110, 90 N. W. 983, holding also that if consent be given for the addition of names of cosureties after the delivery of an official bond, in order to procure its approval and prevent a forfeiture of the office by the principal, there is a sufficient consideration therefor.
New York.— Hellman *v.* City Trust, etc., Co., 111 N. Y. App. Div. 879, 98 N. Y. Suppl. 51, holding also that assent may be oral.
See 40 Cent. Dig. tit. "Principal and Surety," § 356 *et seq.*

A surety mentally incapable of assenting is released as if an agreement had not been made. Gaar *v.* Hulse, 90 Ill. App. 548.

If the surety be dead, assent must be given by his personal representatives, assent by an heir being insufficient. U. S. *v.* Cushman, 25 Fed. Cas. No. 14,907, 2 Sumn. 310.

84. Pence *v.* Gale, 20 Minn. 257; New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187; New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

85. Farmers' Bank *v.* Arthur, 75 Iowa 129, 39 N. W. 228; New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187; Lancaster *v.* Harrison, 6 Bing. 726, 8 L. J. C. P. O. S. 288, 4 M. & P. 561, 19 E. C. L. 325.

86. Janes *v.* Ferd Heim Brewing Co., (Tex. Civ. App. 1897) 44 S. W. 896; Mundy *v.* Stephens, 61 Fed. 77, 9 C. C. A. 366.

The burden is on the creditor or obligee to show consent by the surety to an alteration. Com. *v.* Carl, 12 Pa. Dist. 759, 6 Dauph. Co. Rep. 166; U. S. *v.* McIntyre, 111 Fed. 590; Mundy *v.* Stevens, 61 Fed. 77, 9 C. C. A. 366.

87. Osgood *v.* Miller, 67 Me. 174; Poole *v.* Willats, L. R. 4 Q. B. 630, 9 B. & S. 957, 38 L. J. Q. B. 255, 20 L. T. Rep. N. S. 1006, 17 Wkly. Rep. 1009; Union Bank *v.* Beech, 3 H. & C. 672, 34 L. J. Exch. 133, 12 L. T. Rep. N. S. 499, 13 Wkly. Rep. 922; Cowper *v.* Smith, 4 M. & W. 519.

88. Richardson *v.* Overleese, 17 Tex. Civ. App. 376, 44 S. W. 308.

89. Robertson *v.* Meredith, 45 S. W. 103, 20 Ky. L. Rep. 70 (holding that a surety who signed a bond on condition that a deed be made to him is not released if he consents to the delivery of the deed to the principal); Hamilton *v.* Woodworth, 17 Mont. 327, 42 Pac. 849 (holding that where a building contract provided that the owner should pay the workmen having a time-check signed by the contractor, and the surety of the contractor, upon being informed that the contract price was exhausted, consented to further payment of the workmen by the owner, he is liable although the agreement as to signing time-checks is not observed); Page *v.* White Sewing Mach. Co., 12 Tex. Civ. App. 327, 34 S. W. 988; Murphy *v.* Victor Sewing Mach. Co., 112 U. S. 688, 5 S. Ct. 324, 28 L. ed. 856 (holding that a surety can consent to the non-performance of implied conditions as to notice).

90. *Connecticut.*—Adams *v.* Way, 32 Conn. 160.
Georgia.— Johnson *v.* Prater, 84 Ga. 141, 10 S. E. 589.
Illinois.— Johnston *v.* Paltzer, 100 Ill. App. 171, holding that where a grantee of mortgaged premises has assumed the mortgage debt, the mortgagor is not discharged by an extension of the time of payment of the debt given to the grantee by the mortgagee, to which the mortgagor assents.
Kentucky.— Crutcher *v.* Trabue, 5 Dana 80.
Louisiana.—Deuil *v.* Martel, 10 La. Ann. 643 (holding, however, that the consent of a surety to an extension of the time of payment will

only;[91] but if the language so indicates, consent may be held to include further extensions.[92] On the question whether the burden is on the creditor to prove that the surety assented to an extension of time or upon the surety to prove that he did not consent the authorities are not in accord, some holding that the burden is on the creditor,[93] while others hold that the burden is on the surety.[94] Consent may be given in advance at the time the contract of suretyship is entered into.[95]

not be inferred from his declaration that he would agree to any arrangement made for him by the principal, in the absence of proof that the principal professed to act also as agent for the surety in making the new terms); Andrus *v.* State Treasurer, 4 La. 403.

Maine.— Treat *v.* Smith, 54 Me. 112.

Mississippi.— Thornton *v.* Dabney, 23 Miss. 559; Green *v.* Brandon, Walk. 372.

Missouri.— Bruegge *v.* Bedard, 89 Mo. App. 543, holding that a wife who has mortgaged her land to secure a note of her husband is not discharged by an extension of time given to her husband to which she assents.

Nebraska.— Sherman County *v.* Nichols, 65 Nebr. 250, 91 N. W. 198.

New Hampshire.— Hutchinson *v.* Wright, 61 N. H. 108; Crosby *v.* Wyatt, 10 N. H. 318.

New Jersey.— Gregory *v.* Solomon, 19 N. J. L. 112; A. *v.* B., 1 N. J. L. J. 22.

New York.— Wright *v.* Storrs, 32 N. Y. 691 [*affirming* 6 Bosw. 600]; Rice *v.* Isham, 4 Abb. Dec. 37, 1 Keyes 44; Klein *v.* Long, 27 N. Y. App. Div. 158, 50 N. Y. Suppl. 419 [*reversing* 16 N. Y. App. Div. 301, 44 N. Y. Suppl. 613]; La Farge *v.* Herter, 11 Barb. 159 [*affirmed* in 9 N. Y. 242].

Ohio.— Reddish *v.* Watson, 6 Ohio 510, holding also that a surety who has consented to the extension of time is not entitled to notice thereof.

Pennsylvania.— Van Horne *v.* Dick, 151 Pa. St. 341, 24 Atl. 1078; Wolf *v.* Fink, 1 Pa. St. 435, 44 Am. Dec. 141.

Tennessee.— Bowling *v.* Flood, 1 Lea 678.

Washington.— Merchants' Bank *v.* Bussell, 16 Wash. 546, 48 Pac. 242.

West Virginia.— Parsons *v.* Harrold, 46 W. Va. 122, 32 S. E. 1002; Knight *v.* Charter, 22 W. Va. 422.

United States.— Suydam *v.* Vance, 23 Fed. Cas. No. 13,657, 2 McLean 99.

England.— Torrance *v.* Bank of British North America, L. R. 5 P. C. 246, 29 L. T. Rep. N. S. 109, 21 Wkly. Rep. 329; Vyner *v.* Hopkins, 6 Jur. 889; Tyson *v.* Cox, Turn. & R. 395, 24 Rep. 79, 12 Eng. Ch. 395, 37 Eng. Reprint 1153.

See 40 Cent. Dig. tit. "Principal and Surety," § 359 *et seq.*

A mere inquiry made by a surety when signing a note, as to whether the payee will extend it when due, in case of request to do so, is not consent to an extension. Clark *v.* House, 16 N. Y. Suppl. 777.

An extension for a longer time than assented to by the surety will discharge him. McGavock *v.* Omaha Nat. Bank, 64 Nebr. 440, 90 N. W. 230. And see McCauley *v.* Offutt, 12 B. Mon. (Ky.) 386, holding that where sureties in a replevin bond agreed that the execution might be stayed any length of time which plaintiff might direct, and no time was fixed by plaintiff, the sureties were released after a lapse of thirteen years without plaintiff suing out execution.

91. *Alabama.*— Gray *v.* Brown, 22 Ala. 262.

Indiana.— Oyler *v.* McMurray, 7 Ind. App. 645, 34 N. E. 1004.

Maine.— Lime Rock Bank *v.* Mallett, 34 Me. 547, 56 Am. Dec. 673.

New Hampshire.— Conway Sav. Bank *v.* Dow, 69 N. H. 228, 39 Atl. 975; Rochester Sav. Bank *v.* Chick, 64 N. H. 410, 13 Atl. 872; Merrimack County Bank *v.* Brown, 12 N. H. 320.

Ohio.— McDowell *v.* Reese, 10 Ohio Dec. (Reprint) 303, 20 Cinc. L. Bul. 102.

See 40 Cent. Dig. tit. "Principal and Surety," § 359.

Consent to a renewal does not authorize an extension without a renewal. Smith *v.* Townsend, 25 N. Y. 479.

92. Winnebago County State Bank *v.* Hustel, 119 Iowa 115, 93 N. W. 70 (holding that a stipulation in a note that all defense on the ground of any extension of time for payment was waived indicates, from the use of the word "any," that an indefinite number of extensions was contemplated); Furber *v.* Bassett, 2 Duv. (Ky.) 433 (holding that written consent by a surety to a stay of execution until a fixed time, and longer if the principal asks it, is substantially a power of attorney to the principal to make a subsequent postponement); Madison *v.* American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097 (holding that where a contract with a city provided that the time could "be extended only by the previous written consent of the mayor and city engineer for good cause shown," it did not limit the liability of the sureties to one extension).

93. Tuohy *v.* Woods, 112 Cal. 665, 55 Pac. 683; Okey *v.* Sigler, 82 Iowa 94, 47 N. W. 911; Stowell *v.* Goodenow, 31 Me. 538; Menke *v.* Gerbracht, 75 Hun (N. Y.) 181, 26 N. Y. Suppl. 1097.

94. Guderian *v.* Leland, 61 Minn. 67, 63 N. W. 175; Washington Slate Co. *v.* Burdick, 60 Minn. 270, 62 N. W. 285; State *v.* Mannig, 55 Mo. 142; Shepherd *v.* May, 115 U. S. 505, 6 S. Ct. 119, 29 L. ed. 456.

A presumption that the surety did not consent arises where it appears that he was not present at the time the agreement extending the time was consummated. McNulty *v.* Hurd, 86 N. Y. 547.

95. Howe Sewing Mach. Co. *v.* Layman, 88 Ill. 39; Starret *v.* Burkhalter, 70 Ind. 285;

Thus a surety may give his consent in the contract of suretyship that payments may be made by the obligee at other times and in a different manner than stipulated in the original contract;[96] that the principal may be released without discharging the surety;[97] that the duties of employees for whom the surety is bound may be changed,[98] or their compensation altered;[99] or that the time of payment or performance may be extended.[1] If assent is conditional, the conditions must be performed in order that the surety's liability may continue.[2] Where there are two or more sureties, assent by fewer than all does not prevent the discharge of the others.[3]

(II) *Implied Consent.* Consent may be implied from conduct of the surety,[4] such as advice or a request to perform the acts relied on as a discharge,[5] or from a course of business or usage known to the surety.[6] Thus consent may be implied

Domestic Sewing Mach. Co. *v.* Webster, 47 Iowa 357; Smith *v.* Molleson, 148 N. Y. 241, 42 N. E. 669.

96. Enterprise Hotel Co. *v.* Book, 48 Oreg. 58, 85 Pac. 333; Brown Iron Co. *v.* Templeman, 30 Tex. Civ. App. 50, 69 S. W. 249.

97. Union Bank *v.* Beech, 3 H. & C. 672, 34 L. J. Exch. 133, 12 L. T. Rep. N. S. 499, 13 Wkly. Rep. 922 (holding that where the contract of the surety allows the creditor to compound with the principal, a release of the principal under a composition deed entered into with him does not affect the liability of the surety); Cowper *v.* Smith, 4 M. & W. 519.

98. Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. 438, 60 Am. St. Rep. 417; Collier *v.* Southern Express Co., 32 Gratt. (Va.) 718; Royal Canadian Bank *v.* Yates, 19 U. C. C. P. 439.

99. Travelers' Ins. Co. *v.* Stiles, 82 N. Y. App. Div. 441, 81 N. Y. Suppl. 664.

1. *Indiana.*— Oyler *v.* McMurray, 7 Ind. App. 645, 34 N. E. 1004; Hodge *v.* Farmers' Bank, 7 Ind. App. 94, 34 N. E. 123.

Missouri.— Milan First Nat. Bank *v.* Wells, 98 Mo. App. 573, 73 S. W. 293.

Ohio.— Miller *v.* Spain, 41 Ohio St. 376; Reddish *v.* Watson, 6 Ohio 510.

United States.— Smith *v.* Addison, 22 Fed. Cas. No. 12,998, 5 Cranch C. C. 623.

England.— Greenwood *v.* Francis, [1899] 1 Q. B. 312, 68 L. J. Q. B. 228, 79 L. T. Rep. N. S. 624, 15 T. L. R. 125, 47 Wkly. Rep. 230; Yates *v.* Evans, 56 J. P. 565, 61 L. J. Q. B. 446, 66 L. T. Rep. N. S. 532.

Canada.— Agricultural Ins. Co. *v.* Sargeant, 26 Can. Sup. Ct. 29; McLaughlin Carriage Co. *v.* Oland, 34 Nova Scotia 193.

See 40 Cent. Dig. tit. "Principal and Surety," § 360.

2. Norwegian Evangelical Lutheran Bethlehem Cong. *v.* U. S. Fidelity, etc., Co., 81 Minn. 32, 83 N. W. 487; Rockwell *v.* Portland Sav. Bank, 39 Oreg. 241, 64 Pac. 388; Lond *v.* Patton, 43 Tex. Civ. App. 11, 93 S. W. 519, holding that a surety agreeing to an extension of the time of payment of a note on the express condition that cattle should be returned to the principal is not bound if such condition is not complied with.

3. Crosby *v.* Wyatt, 10 N. H. 318; Westbrook *v.* Belton Nat. Bank, 97 Tex. 246, 77 S. W. 942; Mundy *v.* Stevens, 61 Fed. 77, 9 C. C. A. 366; Vyner *v.* Hopkins, 6 Jur. 889. But see State L. & T. Co. *v.* Cochran, 130 Cal. 245, 62 Pac. 466, 600, holding that where a bank having assets of a defaulting officer did not proceed, in every instance, in the regular and legal way, but in the manner an ordinary business man would in an effort to convert assets of doubtful value into money, if either of the sureties consented to the several arrangements made by the bank, such consent was binding on all.

Consent by sureties designated as a class will not include those not of the character described. Winnebago County State Bank *v.* Hustel, 119 Iowa 115, 93 N. W. 70.

Consent to recall execution.—An agreement between a judgment creditor and one cosurety for the recall of an execution which was about to be levied upon the property of the latter relieves the other cosurety from such part of the judgment as the former cosurety was bound to pay. Ide *v.* Churchill, 14 Ohio St. 372.

4. Johnston *v.* Paltzer, 100 Ill. App. 171; Williams *v.* Gooch, 73 Ill. App. 557; Cox *v.* Dowd, 133 N. C. 537, 45 S. E. 846; Adams *v.* Clark, Brayt. (Vt.) 196; Tucker *v.* Laing, 2 Kay & J. 745, 69 Eng. Reprint 982.

5. *Iowa.*— Jordan *v.* Walters, (1899) 80 N. W. 530.

Kentucky.— Spilman *v.* Smith, 15 B. Mon. 123.

Louisiana.— Andrus *v.* State Treasurer, 4 La. 403.

New York.— Lenane *v.* Mayer, 18 Misc. 454, 41 N. Y. Suppl. 960.

Ohio.— Baldwin *v.* Western Reserve Bank, 5 Ohio 273.

Pennsylvania.— National Bldg., etc., Assoc. No. 2 *v.* Fink, 182 Pa. St. 52, 37 Atl. 1009; Slicker *v.* Schuchert, 179 Pa. St. 401, 36 Atl. 205.

Tennessee.— Bell *v.* Trimby, (Ch. App. 1896) 38 S. W. 100.

Texas.— Henderson *v.* Brooks, (Civ. App. 1899) 54 S. W. 305.

Washington.— McDougall *v.* Walling, 15 Wash. 78, 45 Pac. 668, 55 Am. St. Rep. 871.

See 40 Cent. Dig. tit. "Principal and Surety," § 356 *et seq.*

6. Chase *v.* Hathorn, 61 Me. 505; Strafford Bank *v.* Crosby, 8 Me. 191; Swire *v.* Redman, 1 Q. B. D. 536, 35 L. T. Rep. N. S. 470, 24 Wkly. Rep. 1069.

Any deviation from such usage will dis-

to an alteration,[7] diversion,[8] extension of the time of payment,[9] relinquishment of security,[10] or to acts which result in a loss thereof.[11] Where consent is to be implied the facts from which it is to be implied must very clearly warrant the implication.[12] Mere knowledge of acts done by the creditor or obligee subsequent to the making of the contract of suretyship without objection on the part of the surety is not consent by the latter.[13] But knowledge at the time of entering into the contract of suretyship of acts done prior thereto without notice of dissent will estop the surety from claiming the advantage thereof.[14]

e. Waiver of Defenses — (i) *In General.* A surety may waive his defenses,[15] such as that a condition imposed by him that others would sign as

charge the surety. Crosby *v.* Wyatt, 10 N. H. 318.

7. *Illinois.*— Johnston *v.* Paltzer, 100 Ill. App. 171.

Iowa.— Jordan *v.* Walters, (1899) 80 N. W. 530.

Minnesota.— Renville County *v.* Gray, 61 Minn. 242, 63 N. W. 635.

New York.— Lenane *v.* Mayer, 18 Misc. 454, 41 N. Y. Suppl. 960.

Ohio.— Tiernan *v.* Fenimore, 17 Ohio 545.

See 40 Cent. Dig. tit. "Principal and Surety," § 358 *et seq.*

Where the surety participates in the alteration complained of, consent is conclusively presumed. Wheeler *v.* Everett Land Co., 14 Wash. 630, 45 Pac. 316; Mundy *v.* Stevens, 61 Fed. 77, 9 C. C. A. 366; Woodcock *v.* Oxford, etc., R. Co., 1 Drew. 521, 61 Eng. Reprint 551, where the sureties were attorneys and drew up the papers altering the contract.

Alteration of the date of the instrument is not authorized by consent to an extension of the time of payment. Brennum Lumber Co. *v.* Pickard, 33 Ind. App. 484, 71 N. E. 676.

8. Chase *v.* Hathorn, 61 Me. 505.

9. *Georgia.*— Carson *v.* McDaniel, 79 Ga. 561, 5 S. E. 137.

Illinois.— Williams *v.* Gooch, 73 Ill. App. 557.

Louisiana.— Adle *v.* Metoyer, 1 La. Ann. 254; Frazier *v.* Dick, 5 Rob. 249; Andrus *v.* State Treasurer, 4 La. 403.

New Hampshire.— Crosby *v.* Wyatt, 10 N. H. 318.

New Jersey.— A. *v.* B., 1 N. J. L. J. 22.

New York.— Moyer *v.* Urtel, 9 N. Y. St. 667.

Ohio.— Baldwin *v.* Western Reserve Bank, 5 Ohio 273.

Virginia.— Ward *v.* Vass, 7 Leigh 135.

Washington.— McDougall *v.* Walling, 15 Wash. 78, 45 Pac. 668, 55 Am. St. Rep. 871.

England.— Tucker *v.* Laing, 2 Kay & J. 745, 69 Eng. Reprint 982.

See 40 Cent. Dig. tit. "Principal and Surety," § 359 *et seq.*

10. National Bldg., etc., Assoc. No. 2 *v.* Fink, 182 Pa. St. 52, 37 Atl. 1009; Slicker *v.* Schuchert, 179 Pa. St. 401, 36 Atl. 205; Bell *v.* Trimby, (Tex. Ch. App. 1896) 38 S. W. 100.

11. Doane *v.* New Orleans, etc., Tel. Co., 11 La. Ann. 504.

12. Frank Fehr Brewing Co. *v.* Mullican, 66 S. W. 627, 23 Ky. L. Rep. 2100; Adle *v.* Metoyer, 1 La. Ann. 254; Frazier *v.* Dick, 5 Rob. (La.) 249; New Hampshire Sav. Bank *v.* Ela, 11 N. H. 335.

13. *Connecticut.*— Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397.

Georgia.— Riggins *v.* Brown, 12 Ga. 271.

Iowa.—Okey *v.* Sigler, 82 Iowa 94, 47 N. W. 911 (holding that where, in an action against a principal and surety, judgment by default is rendered against the surety, and afterward the principal allows judgment to go against him on condition that execution be stayed for a certain time, the surety will not be presumed to have consented to the stipulation because he did not object to the stay, under Code (1873), § 3068, providing that execution shall not be stayed if the surety object, since, after the default judgment against him, he was no longer in court, and was not bound by subsequent proceedings and agreements to which he was not a party); Lambert *v.* Shetler, 71 Iowa 463, 32 N. W. 424; Roberts *v.* Richardson, 39 Iowa 290.

Kentucky.— Edwards *v.* Coleman, 6 T. B. Mon. 567.

New York.— Middletown *v.* Ætna Indemnity Co., 97 N. Y. App. Div. 344, 90 N. Y. Suppl. 16.

England.— Polak *v.* Everett, 1 Q. B. D. 669, 46 L. J. Q. B. 218, 35 L. T. Rep. N. S. 350, 24 Wkly. Rep. 689.

See 40 Cent. Dig. tit. "Principal and Surety," § 356 *et seq.*

But see Womack *v.* Paxton, 84 Va. 9, 5 S. E. 550, holding that a surety on a bond secured by a trust deed is not discharged by a sale of the trust property under a decree of court on terms more advantageous to him than those prescribed in the deed, where he is made defendant to the sale, and does not make any objections at the time to such change.

14. See *supra*, IV, D, 12.

15. Brockman *v.* Sieverling, 6 Ill. App. 512; Lafayette Second Nat. Bank *v.* Hill, 76 Ind. 223, 40 Am. Rep. 239; Hooper *v.* Pike, 70 Minn. 84, 72 N. W. 829, 68 Am. Rep. 512; Van Norman *v.* Barbeau, 54 Minn. 388, 55 N. W. 1112; Mayhew *v.* Crickett, 2 Swanst. 185, 36 Eng. Reprint 585, 1 Wils. Ch. 418, 37 Eng. Reprint 178, 19 Rev. Rep. 57.

A waiver by the principal is not a waiver by the surety. Maryland Fidelity, etc., Co. *v.* U. S., 137 Fed. 866, 70 C. C. A. 204, holding that where a principal and surety were discharged by the government materially short-

cosureties, has not been performed;[16] or that there has been an alteration or change in the contract,[17] or that an extension of time has been given to the principal;[18] and a request by a surety for an extension of time for payment, after an alteration of his contract,[19] or after an extension of time to the principal,[20] is a waiver of the defense. But it is essential that he have knowledge of the facts which would justify his considering himself discharged or not bound,[21] although it is not necessary that he be aware of their legal effect.[22] The burden is on the creditor to prove such waiver or ratification.[23] A surety cannot waive his defense to the detriment of his own creditors.[24]

(II) *By New Promise.* If a surety makes a new promise, express or implied to pay the debt or unqualifiedly acknowledges its continued existence, he thereby waives any defense he may have, such as that he had been discharged by an extension of time granted by the creditor to the principal without the surety's consent,[25]

ening the time for the performance of a contract, a waiver by the principal resuming work is ineffectual as against the surety.

A waiver of protest is not a waiver of discharge. Burke *v.* Ward, (Tex. Civ. App. 1895) 32 S. W. 1047.

16. Van Norman *v.* Barbeau, 54 Minn. 388, 55 N. W. 1112; Henderson *v.* Vermilyea, 27 U. C. Q. B. 544.

17. Owens *v.* Tague, 3 Ind. App. 245, 29 N. E. 784; Pelton *v.* Prescott, 13 Iowa 567; State *v.* Harney, 57 Miss. 863; State *v.* Paxton, 65 Nebr. 110, 90 N. W. 983.

18. *Alabama.*— Decatur Bank *v.* Johnson, 9 Ala. 622.

Michigan.— Porter *v.* Hodenpuyl, 9 Mich. 11.

New Hampshire.— Fowler *v.* Brooks, 13 N. H. 240.

Ohio.— Bramble *v.* Ward, 40 Ohio St. 267.

England.— Smith *v.* Winter, 8 L. J. Exch. 34, 4 M. & W. 454.

See 40 Cent. Dig. tit. "Principal and Surety," § 368 *et seq.*

If the surety give the creditor written notice to sue he waives a defense of extension of time. Brink *v.* Reid, 122 Ind. 257, 23 N. E. 770.

19. Bell *v.* Mahin, 69 Iowa 408, 29 N. W. 331.

20. New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

21. *Alabama.*— White Sewing Mach. Co. *v.* Saxon, 121 Ala. 399, 25 So. 784 (holding also that knowledge that the principal is proceeding with the business which the bond was intended to secure is not notice that the bond was delivered in violation of conditions imposed on him); Daughtry *v.* Stewart, 84 Ala. 69, 4 So. 867; Evans *v.* Daughtry, 84 Ala. 68, 4 So. 592.

Connecticut.— Welch *v.* Seymour, 28 Conn. 387.

Illinois.— Tipton *v.* Carrigan, 10 Ill. App. 318.

Indiana.—Montgomery *v.* Hamilton, 43 Ind. 451; Owens *v.* Tague, 3 Ind. App. 245, 29 N. E. 784.

Iowa.— Stillman *v.* Wickham, 106 Iowa 597, 76 N. W. 1008.

Kentucky.— Young *v.* New Farmers' Bank, 102 Ky. 257, 43 S. W. 473, 19 Ky. L. Rep. 1309; Robinson *v.* Offutt, 7 T. B. Mon. 540.

Missouri.— State *v.* McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L. R. A. 735; McGonigle *v.* State, (1890) 13 S. W. 761.

Nebraska.— Henry, etc., Co. *v.* Fisherdick, 37 Nebr. 207, 55 N. W. 643.

New Hampshire.— Rochester Sav. Bank *v.* Chick, 64 N. H. 410, 13 Atl. 872; Merrimack County Bank *v.* Brown, 12 N. H. 320.

New York.— Platauer *v.* American Bonding Co., 92 N. Y. Suppl. 238.

West Virginia.— Glenn *v.* Morgan, 23 W. Va. 467.

Canada.— Wickens *v.* McMeekin, 15 Ont. 408 (holding that where a surety, not being aware that his liability had terminated by reason of the expiration of the appointment of the principal, wrote a letter to the obligee giving notice that he withdrew from the suretyship, he will not be estopped from denying his liability as to defaults occurring after his liability had terminated, and prior to his notice); Keith *v.* Fenelon Falls Union School Section, 3 Ont. 194; Kerr *v.* Cameron, 19 U. C. Q. B. 366.

See 40 Cent. Dig. tit. "Principal and Surety," § 373 *et seq.*

A surety whose ignorance results from his own negligence will be conclusively presumed to have knowledge. State *v.* Harney, 57 Miss. 863, holding that sureties who sign an affidavit of solvency attached to the bond of a tax-collector, in which they are described as "sureties on the within bond," are estopped to claim that they are not bound by reason of their ignorance of an existing alteration at the time.

22. Rindskopf *v.* Doman, 28 Ohio St. 516; Churchill *v.* Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563.

23. Bramble *v.* Ward, 40 Ohio St. 267.

24. Campion *v.* Whitney, 30 Minn. 177, 14 N. W. 806, holding that the discharge is available not only to the surety but to the surety's judgment creditor, whose judgment is a lien on the mortgaged premises given as security, and after the lien has attached it is not affected by the surety's waiver.

25. *Alabama.*— Ellis *v.* Bibb, 2 Stew. 63, holding, however, that the surety will be bound by the new promise to the extent only of the legal liability of the principal, and

diversion of instrument,[26] relinquishment of means of enforcement of payment from the principal,[27] alteration of the contract,[28] or non-performance of a condition that another should sign as cosurety.[29] A new consideration is not as a general rule necessary to hold the surety;[30] but where the surety has been discharged by an alteration of the contract, it is held that a new consideration is necessary in order to revive the obligation.[31] The payment of interest by a surety, after his release, will not alone operate as a new promise.[32] Nor will payment with the money of the principal, although the surety does not state that he acts as agent of the principal;[33] nor will declarations that he may have to pay or expects to pay,[34] or negotiations looking to a settlement.[35] As a general rule it is for the jury to determine whether acts and statements amount to a new promise.[36]

(III) *By Taking Indemnity After Default.* Upon the question whether a surety waives a defense by taking indemnity from the principal after knowledge of the facts, the cases are not in entire accord, it having been held that this is not a waiver,[37] while other cases are to the contrary.[38] And if a surety erroneously supposing himself liable takes security, he may be liable to the extent thereof.[39] But a surety does not waive a defense if he did not in fact accept the

will be relieved in equity if the new obligation is for a greater amount.

Illinois.— Monmouth First Nat. Bank *v.* Whitman, 66 Ill. 331; Hinds *v.* Ingham, 31 Ill. 400.

Indiana.— Williams *v.* Boyd, 75 Ind. 286.

Kansas.— Elder *v.* Dyer, 26 Kan. 604, 40 Am. Rep. 320.

Michigan.—Porter *v.* Hodenpuyl, 9 Mich. 11.

Minnesota.— Hooper *v.* Pike, 70 Minn. 84, 72 N. W. 829, 68 Am. St. Rep. 512.

New Hampshire.— New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685; Fowler *v.* Brooks, 13 N. H. 240.

Ohio.— Bramble *v.* Ward, 40 Ohio St. 267; Rindskopf *v.* Doman, 28 Ohio St. 516.

Texas.— Stanley *v.* Evans, 33 Tex. Civ. App. 535, 77 S. W. 17.

Vermont.— Churchill *v.* Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563.

West Virginia.— Parsons *v.* Harrold, 46 W. Va. 122, 32 S. E. 1002.

Wisconsin.— Black River Falls First Nat. Bank *v.* Jones, 92 Wis. 36, 65 N. W. 861.

See 40 Cent. Dig. tit. "Principal and Surety," § 373 *et seq.*

26. Mastin Bank *v.* Hammerslough, 72 Mo. 274.

27. Mayhew *v.* Crickett, 2 Swanst. 185, 36 Eng. Reprint 585, 1 Wils. Ch. 418, 37 Eng. Reprint 178, 19 Rev. Rep. 57.

28. Mulkey *v.* Long, 5 Ida. 213, 47 Pac. 949; Warren *v.* Fant, 79 Ky. 1.

29. Loving *v.* Dixon, 56 Tex. 75.

30. *Alabama.*— Decatur Bank *v.* Johnson, 9 Ala. 622.

Indiana.—Owens *v.* Tague, 3 Ind. App. 245, 29 N. E. 784.

Iowa.— Pelton *v.* Prescott, 13 Iowa 567.

Michigan.— Porter *v.* Hodenpuyl, 9 Mich. 11.

New Hampshire.— Fowler *v.* Brooks, 13 N. H. 240.

Ohio.— Bramble *v.* Ward, 40 Ohio St. 267.

England.— Mayhew *v.* Cricketts, 2 Swanst. 185, 36 Eng. Reprint 585, 1 Wils. Ch. 418, 37 Eng. Reprint 178, 19 Rev. Rep. 57.

See 40 Cent. Dig. tit. "Principal and Surety," § 367 *et seq.*

31. Mulkey *v.* Long, 5 Ida. 213, 47 Pac. 949; Warren *v.* Fant, 79 Ky. 1; Emmons *v.* Overton, 18 B. Mon. (Ky.) 643. And see Blakey *v.* Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254.

Alteration of check.— After an indorser of a check has been discharged by its certification, an instrument executed by him reciting that he consented to an extension of the time of payment of the check is without consideration, and the indorser does not incur any liability thereon. Detroit First Nat. Bank *v.* Currie, 147 Mich. 72, 110 N. W. 499.

32. Brockman *v.* Sieverling, 6 Ill. App. 512.

33. Lime Rock Bank *v.* Mallett, 42 Me. 349.

34. Fowler *v.* Brooks, 13 N. H. 240.

35. Slaughter *v.* Hampton, 90 S. W. 981, 28 Ky. L. Rep. 904 (holding that a surety who was not bound because of the absence of the signatures of cosureties to a bond does not make himself liable by trying to borrow money to pay it); Crandall *v.* Mosten, 24 N. Y. App. Div. 547, 50 N. Y. Suppl. 145.

36. Fowler *v.* Brooks, 13 N. H. 240.

37. Fowler *v.* Brooks, 13 N. H. 240; Rounsavell *v.* Wolf, 47 Wis. 353, 2 N. W. 545, where, however, it does not appear that the surety had knowledge of facts constituting the defense at the time he took the security.

38. Hagler *v.* State, 31 Nebr. 144, 47 N. W. 692, 28 Am. St. Rep. 514 (holding that if sureties after knowledge of an alteration in a bond signed by them accept indemnity from their principal, they thereby adopt and ratify the bond and are liable); Campbell Printing Press Mfg. Co. *v.* Powell, (Tex. Civ. App. 1893) 24 S. W. 965 (where sureties on a note given for the purchase-price of chattels, with knowledge of its delivery by the principal to the payee in violation of its condition, accepted a mortgage on the chattels to indemnify them against loss, took possession under the mortgage, and placed the property in a position where the payee could not enforce against it the purchase-money debt).

39. Hoss *v.* Crouch, (Tenn. Ch. App. 1898) 48 S. W. 724.

security,[40] if he accepted security which appears not to be of any value,[41] or if he accepted the security without the knowledge of the creditor and subsequently surrendered it to the principal.[42]

f. Reservation of Rights Against Surety. A transaction between the principal and the creditor or obligee, which otherwise would operate to discharge a surety, will not as a general rule have that effect if the creditor or obligee reserve all rights against the surety,[43] or reserves the right to sue the principal, at the request of the surety,[44] the effect of such reservation being to make the agreement with the principal conditional upon the consent of the surety.[45] Thus where rights are reserved a surety is not discharged by an extension of time to the principal,[46] or a release [47] or a covenant not to sue the principal,[48] or an agreement not to enforce a judgment

40. Campbell Printing-Press Mfg. Co. *v.* Powell, (Tex. Civ. App. 1896) 36 S. W. 1005.

41. Phelps *v.* Walkey, 84 Iowa 120, 50 N. W. 560; Fay *v.* Tower, 58 Wis. 286, 16 N. W. 558.

42. Rittenhouse *v.* Kemp, 37 Ind. 258.

43. Morgan *v.* Smith, 70 N. Y. 537; Wagman *v.* Hoag, 14 Barb. (N. Y.) 232; Wyke *v.* Rogers, 1 De G. M. & G. 408, 21 L. J. Ch. 611, 50 Eng. Ch. 312, 42 Eng. Reprint 609.

An agreement subsequent to the transaction which discharged the surety cannot reserve rights against him. Elyton Co. *v.* Hood, 121 Ala. 373, 25 So. 745.

44. Prout *v.* Decatur Branch Bank, 6 Ala. 309; Exchange Bldg., etc., Co. *v.* Bayless, 91 Va. 134, 21 S. E. 279.

45. Hunt *v.* Knox, 34 Miss. 655; Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51; Calvo *v.* Davies, 73 N. Y. 211, 29 Am. Rep. 130.

46. *Alabama.*— Prout *v.* Decatur Branch Bank, 6 Ala. 309.

Kansas.— Dean *v.* Rice, 63 Kan. 691, 66 Pac. 992.

Maryland.— Clagett *v.* Salmon, 5 Gill & J. 314; Salmon *v.* Clagett, 3 Bland 125.

Michigan.— Bailey *v.* Gould, Walk. 478.

Mississippi.— Hunt *v.* Knox, 34 Miss. 655.

New York.— Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51; Calvo *v.* Davies, 73 N. Y. 211, 29 Am. Rep. 130. And see Morgan *v.* Smith, 70 N. Y. 537.

Oklahoma.— Kuhlman *v.* Leavens, 5 Okla. 562, 50 Pac. 171.

Pennsylvania.— Kaufmann *v.* Rowan, 189 Pa. St. 121, 42 Atl. 25.

Vermont.— Viele *v.* Hoag, 24 Vt. 46.

Virginia.— Exchange Bldg., etc., Co. *v.* Bayless, 91 Va. 134, 21 S. E. 279.

Washington.— Boston Nat. Bank *v.* Jose, 10 Wash. 185, 38 Pac. 1026.

England.— Boaler *v.* Mayor, 19 C. B. N. S. 76, 11 Jur. N. S. 565, 34 L. J. C. P. 230, 12 L. T. Rep. N. S. 457, 13 Wkly. Rep. 775, 115 E. C. L. 75; Owen *v.* Homan, 4 H. L. Cas. 997, 7 Eq. Rep. 370, 17 Jur. 861, 10 Eng. Reprint 752; Webb *v.* Hewitt, 3 Kay & J. 438, 69 Eng. Reprint 1181.

Canada.— Trust, etc., Co. *v.* McKenzie, 23 Ont. App. 167; Upper Canada Bank *v.* Jardine, 9 U. C. C. P. 332.

See 40 Cent. Dig. tit. "Principal and Surety," § 352 *et seq.*

47. *Colorado.*— McAllister *v.* People, 28 Colo. 156, 63 Pac. 308.

Illinois.— Mueller *v.* Dobschuetz, 89 Ill. 176.

Maryland.— Clagett *v.* Salmon, 5 Gill & J. 314.

Massachusetts.— Potter *v.* Green, 6 Allen 442.

Missouri.— Boatmen's Sav. Bank *v.* Johnson, 24 Mo. App. 316.

North Carolina.— Stirewalt *v.* Martin, 84 N. C. 4.

Texas.— Weddington *v.* Jones, 41 Tex. Civ. App. 463, 91 S. W. 818.

England.— Maltby *v.* Carstairs, 7 B. & C. 735, 6 L. J. K. B. O. S. 196, 1 M. & R. 549, 14 E. C. L. 330; Norman *v.* Bolt, Cab. & E. 77; Boultbee *v.* Stubbs, 18 Ves. Jr. 20, 11 Rev. Rep. 141, 34 Eng. Reprint 225.

Canada.— Donaldson *v.* Wherry, 29 Ont. 552; Bell *v.* Manning, 11 Grant Ch. (U. C.) 142.

See 40 Cent. Dig. tit. "Principal and Surety," § 352 *et seq.*

Releasing the principal from prison limits, and allowing him to leave the state on an agreement "that it should in no way prejudice the holder's rights, which he has or may hereafter have for his debt," does not discharge a surety. Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214.

Composition agreements signed by the creditors of an insolvent, providing for his release, but with a stipulation that rights against sureties should not be prejudiced thereby do not release the sureties. North *v.* Wakefield, 13 Q. B. 536, 13 Jur. 731, 18 L. J. Q. B. 214, 66 E. C. L. 536; Green *v.* Wynn, L. R. 7 Eq. 28, 38 L. J. Ch. 76, 19 L. T. Rep. N. S. 553, 17 Wkly. Rep. 72 [*affirmed* in L. R. 4 Ch. 204, 38 L. J. Ch. 220, 20 L. T. Rep. N. S. 131, 17 Wkly. Rep. 385]; Bateson *v.* Gosling, L. R. 7 C. P. 9, 41 L. J. C. P. 63, 25 L. T. Rep. N. S. 570, 20 Wkly. Rep. 98; *Ex p.* Carstairs, Buck 560; *Ex p.* Glendinning, Buck 517; Davidson *v.* McGregor, 11 L. J. Exch. 164, 8 M. & W. 755; Wood *v.* Brett, 9 Grant Ch. (U. C.) 452; Hall *v.* Thompson, 9 U. C. C. P. 257.

If, by mistake, an absolute release is executed, it can be reformed in equity. Montreal Bank *v.* McFaul, 17 Grant Ch. (U. C.) 234.

48. Price *v.* Barker, 3 C. L. R. 927, 4 E. & B. 760, 1 Jur. N. S. 775, 24 L. J. Q. B. 130, 82 E. C. L. 760.

against him,[49] or by a renewal, provided the original instrument is retained with the right of immediate action thereon;[50] although it is otherwise if the creditor bind himself not to proceed on the original note unless the renewal note is not paid at maturity;[51] nor will a release of a surety with a reservation of rights against the other cosureties affect the right of the creditor or obligee to recover from such other cosureties.[52] A reservation cannot be implied, but must be express,[53] and clear,[54] although not necessarily formal,[55] and it may be oral.[56] But if the transaction between the creditor and the principal is evidenced in writing, and the effect of admitting an oral reservation would be to vary the written one, evidence of the oral reservation is inadmissible.[57] Notice to the surety of the reservation is not necessary.[58] If the negotiations between the principal and the creditor have resulted in an absolute discharge or abandonment of the contract, a reservation against a surety would be unavailing, as there would be no rights to reserve,[59] as would be the case where the original contract is discharged by novation,[60] by a material alteration of the contract itself,[61] or by an absolute release of the principal extinguishing the debt.[62]

g. Performance — (i) *In General.* A surety can defend successfully by showing that the obligations for which he was bound have been performed,[63] and

49. Hubbell *v.* Carpenter, 5 N. Y. 171 [*reversing* 5 Barb. 520, and *affirming* 2 Barb. 484].

50. Jones *v.* Sarchett, 61 Iowa 520, 16 N. W. 589; Nichols *v.* Norris, 3 B. & Ad. 41, 23 E. C. L. 28; Wyke *v.* Rogers, 1 De G. M. & G. 408, 21 L. J. Ch. 611, 50 Eng. Ch. 312, 42 Eng. Reprint 609; Lindsay *v.* Downes, 2 Ir. Eq. 307; Melvill *v.* Glendining, 7 Taunt. 126, 2 E. C. L. 290; Currie *v.* Hodgins, 42 U. C. Q. B. 601.

51. Templeman *v.* Texas Brewing Co., (Tex. Civ. App. 1896) 35 S. W. 935; Shepley *v.* Hurd, 3 Ont. App. 549.

52. *Illinois.*—Clark *v.* Mallory, 83 Ill. App. 488 [*affirmed* in 185 Ill. 227, 56 N. E. 1099].

New York.— Hood *v.* Hayward, 124 N. Y. 1, 26 N. E. 331 [*affirming* and *modifying* 48 Hun 330, 1 N. Y. Suppl. 566].

South Carolina.— Massey *v.* Brown, 4 S. C. 85.

Virginia.— Hewitt *v.* Adams, 1 Patt. & H. 34.

England.— Maltby *v.* Carstairs, 7 B. & C. 735, 6 L. J. K. B. O. S. 196, 1 M. & R. 549, 14 E. C. L. 330; Thompson *v.* Lack, 3 C. B. 540, 16 L. J. C. P. 75, 54 E. C. L. 540.

Canada.— Macdonald *v.* Whitfield, 27 Can. Sup. Ct. 94.

See 40 Cent. Dig. tit. "Principal and Surety," § 352 *et seq.*

But see Jemison *v.* Governor, 47 Ala. 390.

Where a bond is joint only, and not joint and several, so that a release of one obligor releases all, a reservation against the others cannot be made. Tyner *v.* Hamilton, 51 Ind. 259.

53. Stein *v.* Steindler, 1 Misc. (N. Y.) 414, 20 N. Y. Suppl. 839; Overend *v.* Oriental Financial Corp., L. R. 7 H. L. 348, 31 L. T. Rep. N. S. 322 [*affirming* L. R. 7 Ch. 142, 41 L. J. Ch. 332, 25 L. T. Rep. N. S. 813, 20 Wkly. Rep. 253].

54. Calvo *v.* Davies, 73 N. Y. 211, 29 Am. Rep. 130 (holding that extending the time of payment of a debt "with the express understanding that the bond and mortgage should remain in every other respect unaffected by the agreement," is not with a reservation of the right to proceed against a surety); Boultbee *v.* Stubbs, 18 Ves. Jr. 20, 11 Rev. Rep. 141, 34 Eng. Reprint 225; Baby *v.* Kent, 5 Grant Ch. (U. C.) 232; Gorman *v.* Dixon, 26 Can. Sup. Ct. 87.

55. Gorman *v.* Dixon, 26 Can. Sup. Ct. 87.

56. Norman *v.* Bolt, Cab. & E. 77; Wyke *v.* Rogers, 1 De G. M. & G. 408, 21 L. J. Ch. 611, 50 Eng. Ch. 312, 42 Eng. Reprint 609; Gorman *v.* Dixon, 26 Can. Sup. Ct. 87; Ontario Trusts Corp. *v.* Hood, 27 Ont. 135; Currie *v.* Hodgins, 42 U. C. Q. B. 601.

57. Mercantile Bank *v.* Taylor, [1893] A. C. 317, 57 J. P. 741, 1 Reports 371; *Ex p.* Carstairs, Buck 560 [*reversing* 1 Rose 130]; *Ex p.* Glendinning, Buck 517; Wyke *v.* Rogers, 1 De G. M. & G. 408, 21 L. J. Ch. 611, 50 Eng. Ch. 312, 42 Eng. Reprint 609; McClure *v.* Fraser, 9 L. J. Q. B. 60; Cumming *v.* Montreal Bank, 15 Grant Ch. (U. C.) 686.

58. Morgan *v.* Smith, 70 N. Y. 537; Kuhlman *v.* Leavens, 5 Okla. 562, 50 Pac. 171; Boston Nat. Bank *v.* Jose, 10 Wash. 185, 38 Pac. 1026; Webb *v.* Hewitt, 3 Kay & J. 438, 69 Eng. Reprint 1181.

59. Webb *v.* Hewitt, 3 Kay & J. 438, 69 Eng. Reprint 1181; Port Whitby, etc., R. Co. *v.* Dumble, 32 U. C. Q. B. 36.

60. Robinson *v.* Offutt, 7 T. B. Mon. (Ky.) 540; Gustine *v.* Union Bank, 10 Rob. (La.) 412; Holliday *v.* Jackson, 22 Can. Sup. Ct. 479 [*affirming* 20 Ont. App. 298, and *reversing* 22 Ont. 235].

61. Bristol, etc., Land, etc., Co. *v.* Taylor, 24 Ont. 286.

62. Commercial Bank *v.* Jones, [1893] A. C. 313, 57 J. P. 644, 62 L. J. P. C. 104, 68 L. T. Rep. N. S. 776, 1 Reports 367, 42 Wkly. Rep. 256.

63. Millikin *v.* Starr, 79 Ill. App. 443; Barnes *v.* Cushing, 43 N. Y. App. Div. 158, 59 N. Y. Suppl. 345 [*reversed* on other grounds in 168 N. Y. 542, 61 N. E. 902].

Performance of sealed contract.— Where an oral agreement is substituted for a sealed

if he has undertaken to perform one of two or more acts in the alternative, the performance of any one will discharge him.[64] Performance by a stranger will not be compliance with the contract.[65] A surety is discharged where the law prevents performance of his contract.[66] Acceptance of work performed by a contractor will not relieve his sureties, unless the obligee have knowledge of the defects therein,[67] or there has been unreasonable delay in their discovery.[68]

(II) *PAYMENT* — (A) *By Principal.* Payment of the debt by the principal discharges the surety,[69] and the indebtedness cannot be kept alive against the latter,[70] even though payment was made with money borrowed by the principal, for the purpose of paying the debt and under an understanding with the lender that the debt should be kept alive against the surety.[71] As a surety occupies the relation of principal to a supplemental surety,[72] payment by the surety will discharge the supplemental surety.[73]

contract, it is not a defense to a surety that the oral agreement has been performed. Wilson *v.* Spencer, 11 Leigh (Va.) 261.

64. English *v.* State Bank, 76 Ga. 537 (holding that where the contract of a surety was that the principal would turn over the proceeds of goods, or return the goods themselves, and the goods were returned a few days afterward, and the principal was not allowed to have them again without further security, the sureties were discharged by such return of the goods); American Bonding Co. *v.* State University, 11 Ida. 163, 81 Pac. 604 (holding that if the bond so provides, sureties for a building contractor, after a default by the principal, either can complete the work, or sublet it); Dumont *v.* U. S., 98 U. S. 142, 25 L. ed. 65.

65. U. S. *v.* South Branch Distilling Co., 27 Fed. Cas. No. 16,359, 8 Biss. 162, holding that the fact that the purchaser of goods sold for violation of the internal revenue law paid the tax does not release the sureties on the warehouse bond.

66. Bunting *v.* Wright, 61 N. C. 295 (holding that sureties who have undertaken to surrender a debtor for imprisonment are discharged by the enactment of a statute abolishing imprisonment for debt); Livingston *v.* The Jewess, 15 Fed. Cas. No. 8,412, 1 Ben. 19 note.

67. Newark *v.* New Jersey Asphalt Co., 68 N. J. L. 458, 53 Atl. 294; Leonard *v.* Jackson County Ct., 25 W. Va. 45.

68. St. Louis Bd. of Education *v.* National Surety Co., 183 Mo. 166, 82 S. W. 70.

69. *Alabama.*— Firemen's Ins. Co. *v.* McMillan, 29 Ala. 147.

Colorado.— Rockford Ins. Co. *v.* Rogers, 15 Colo. App. 23, 60 Pac. 956.

Indiana.— Bridges *v.* Blake, 106 Ind. 332, 6 N. E. 833; Musgrave *v.* Glasgow, 3 Ind. 31.

Iowa.— Charles *v.* Hoskins, 14 Iowa 471, 83 Am. Dec. 378.

Louisiana.— Stewart *v.* Levis, 42 La. Ann. 37, 6 So. 898; Municipality No. 2 *v.* Groning, 15 La. 166.

Maine.— Thomas *v.* Stetson, 59 Me. 229; Dane *v.* Gilmore, 51 Me. 544.

Massachusetts.— Chapman *v.* Collins, 12 Cush. 163; Paine *v.* Drury, 19 Pick. 400; Merrimack Bank *v.* Parker, 7 Pick. 88.

Michigan.— Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. 534.

Missouri.—Marquardt Sav. Bank *v.* Freund, 80 Mo. App. 657.

New York.— Barnes *v.* Cushing, 43 N. Y. App. Div. 158, 59 N. Y. Suppl. 345 [*reversed* on other grounds in 168 N. Y. 542, 61 N. E. 902].

North Carolina.— Parker *v.* Woodside, 29 N. C. 296; Woodman *v.* Mooring, 14 N. C. 237.

Pennsylvania.— Guldin *v.* Faber, 1 Walk. 435, holding also that the same facts which establish non-payment in a case of the principal will establish it as to the surety.

South Carolina.— State Treasurers *v.* Bates, 2 Bailey 362.

United States.— Berger *v.* Williams, 3 Fed. Cas. No. 1,341, 4 McLean 577.

England.— Reg. *v.* O'Callaghan, 1 Ir. Eq. 439, J. & C. 154; Pemberton *v.* Oakes, 6 L. J. Ch. O. S. 35, 4 Russ. 154, 4 Eng. Ch. 154, 38 Eng. Reprint 763; Ward *v.* Henley, 1 Y. & J. 285, 30 Rev. Rep. 781.

Canada.— Rawdon Tp. *v.* Ward, 27 U. C. Q. B. 609.

See 40 Cent. Dig. tit. "Principal and Surety," § 226 *et seq.*

Where the principal repudiates a payment made by his agent, and receives back the means of payment, the surety is not discharged. Furbush *v.* Lee County, 37 Ark. 87.

Payment by one of several principals discharges the surety. Wolff *v.* Stover, 107 Pa. St. 206.

70. Chapman *v.* Collins, 12 Cush. (Mass.) 163; Gibson *v.* Rix, 32 Vt. 824; Seattle First Nat. Bank *v.* Harris, 7 Wash. 139, 34 Pac. 466.

71. Day *v.* Humphrey, 79 Ill. 452; Burnet *v.* Courts, 5 Harr. & J. (Md.) 78; Buffington *v.* Bernard, 90 Pa. St. 63; Greening *v.* Patten, 51 Wis. 146, 8 N. W. 107.

The law will not imply authority from sureties to the principal to borrow money on the joint credit of the principal and sureties, to be applied in payment of the debt nor a promise from the sureties to the lender to repay the money so borrowed. Rolfe *v.* Lamb, 16 Vt. 514.

72. See *supra*, I, B, 3.

73. Shackleford *v.* Stockton, 6 B. Mon. (Ky.) 390; Wronkow *v.* Oakley, 133 N. Y. 505, 31 N. E. 521, 28 Am. St. Rep. 661, 16 L. R. A. 209 (holding also that the liability

(B) *By Surety.* Payment by the surety is a complete defense to an action for the debt brought against him by the creditor or obligee;[74] but payment by a cosurety of his proportionate share does not release him as to the remainder.[75]

(C) *By Third Person.* As a surety is discharged by payment of the debt, it is immaterial by whom payment is made;[76] and payment by a third person at the request of the principal is as effectual as if made by the principal;[77] but if a third person pay money for the purpose of having the instrument assigned to him, such transaction does not amount to payment, and the instrument is not extinguished.[78] To operate as an assignment, however, it is necessary that the creditor receive the money with knowledge that it is not payment.[79] If the object be assignment and not payment, the person furnishing the money can allow the principal to act for him in procuring such assignment.[80]

(D) *Form and Sufficiency* — (1) IN GENERAL. It is not requisite that payment, in order to discharge a surety, should be in cash; any arrangement, in good faith, between the principal and the obligee, whereby the obligation is considered paid, is sufficient.[81] A receipt in full, signed by the obligee, without actual payment, will not suffice;[82] nor will unexecuted negotiations looking to a settlement.[83] A seizure or levy upon property of the principal, sufficient to pay the debt, is a satisfaction of it, and a surety is released;[84] but a sale, under execution, of property which was supposed by the creditor to belong to the principal, but which

of the supplemental surety cannot be continued by the surety taking an assignment of the debt); Singer Mfg. Co. *v.* Bennett, 28 W. Va. 16.

74. Bothwell *v.* Sheffield, 8 Ga. 569; Creager *v.* Brengle, 5 Harr. & J. (Md.) 234, 9 Am. Dec. 516; Mann *v.* Stennet, 8 Beav. 189, 9 Jur. 98, 50 Eng. Reprint 75; Armstrong *v.* Forster, 6 Ont. 129.

Payment in a particular place is not required of a surety, if his contract does not call for it, although the principal by a separate contract has bound himself to do so. Chamberlain *v.* Fox, (Tex. Civ. App. 1899) 54 S. W. 297.

A surety who loans money to the obligee under an agreement that the latter is to apply it as instalments become due on the bond for which the surety is liable, is discharged from liability on the bond to the extent of the sum loaned. Sturdy *v.* Arnaud, 3 T. R. 599.

A presumption of payment by the surety is raised after ten years, which is strengthened by the fact that the principal paid the money to the surety. Pearsall *v.* Houston, 48 N. C. 346.

75. Schooley *v.* Fletcher, 45 Ind. 86; Vaughn *v.* Haden, 37 Mo. 178; Martin *v.* Frantz, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. Rep. 859.

76. Blackburn *v.* Beall, 21 Md. 208.

77. Elmendorph *v.* Tappen, 5 Johns. (N. Y.) 176; Dreher *v.* Sick, 7 Ohio Dec. (Reprint) 579, 4 Cinc. L. Bul. 23.

78. Wright *v.* Yell, 13 Ark. 503, 58 Am. Dec. 336. And see Chappell *v.* McKeough, 21 Colo. 275, 40 Pac. 769.

79. Cason *v.* Heath, 86 Ga. 438, 12 S. E. 678 (holding that if the principal receives money from another with which to purchase the note, but the principal does not tell the holder of his object in paying the money, and the holder does not have any intention of assigning it, a surety on the note is discharged); Riddle *v.* Russell, 108 Iowa 591, 79 N. W. 363 (holding that if a person pays the amount of a note to a bank, nothing being said about purchasing it, and he accepts it after it is marked "paid," he cannot recover from a surety thereon); U. S. *v.* Rundle, 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505 (holding that sureties on the bond of a contractor are not liable to a bank which, under an arrangement with the contractor, pays checks given to laborers and materialmen, although the checks are indorsed, and the sureties are liable for the payment of persons supplying labor and materials, the indorsement, in these cases, being merely evidence of payment without any intention to assign claims).

80. Du Bois *v.* Stoner, 11 Ill. App. 403.

81. Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. 534; Gibson *v.* Rix, 32 Vt. 824.

Satisfaction by imprisonment.— The liability of sureties for a judgment against the principal is suspended if his body has been taken under execution, such imprisonment, so long as it continues, being a satisfaction of the judgment. Koenig *v.* Steckel, 36 N. Y. Super. Ct. 167 [*affirmed* in 58 N. Y. 475].

82. Cook *v.* Com., 8 Pa. Cas. 413, 11 Atl. 574.

83. Stern *v.* People, 102 Ill. 540 (holding that where an arrangement was made between a bank and a county treasurer by which the latter was to deposit revenue with the bank, and the bank was to be credited with county orders held by it against the deposit, such orders, although in the bank, cannot be treated as paid until actually credited on the deposit); North Bridgewater Sav. Bank *v.* Soule, 129 Mass. 528.

84. Thomas *v.* Wason, 8 Colo. App. 452, 46 Pac. 1079; Hoffman *v.* Fleming, 43 W. Va. 762, 28 S. E. 790.

The seizure and sale of bonded spirits forfeited by the fraudulent acts of the distiller, and the payment of the taxes out of the pro-

does not, will not discharge a surety who has not been misled to his prejudice;[85] nor will an attachment against the property of the principal discharge a surety, until applied in payment.[86] Payment is sufficient if made to one of two or more obligees;[87] or to an agent of the obligee, if authorized,[88] or to an unauthorized agent, if such payment is ratified by the creditor.[89]

(2) Payment With Property. Payment made by the principal in property, personal,[90] or real,[91] will discharge the surety if accepted in extinguishment of the debt. If the principal and obligee in good faith have placed a value on the property such value will govern.[92] If, however, the obligee is not authorized to receive anything but money, payment in property will not discharge the surety;[93] and if property received in settlement is taken from the creditor owing to the superior rights of third persons, the sureties are not released.[94]

(3) Payment With Commercial Paper. In the absence of agreement, a note given for a debt by the principal,[95] or by a surety,[96] does not as a general rule constitute payment of such debt. If, however, the note is accepted as payment, the surety is discharged,[97] and if the obligee accept a note of the principal in payment of a loss, a surety is discharged, although the obligee was ignorant of his right

ceeds, discharge the sureties. U. S. *v.* Sutton, 111 U. S. 42, 4 S. Ct. 291, 28 L. ed. 346; U. S. *v.* Ulrici, 111 U. S. 38, 4 S. Ct. 288, 28 L. ed. 344.

85. Chambers *v.* Cochran, 18 Iowa 159.

86. Amoskeag Bank *v.* Robinson, 44 N. H. 503.

87. Husband *v.* Davis, 10 C. B. 645, 20 L. J. C. P. 118, 70 E. C. L. 645.

88. Law *v.* East-India Co., 4 Ves. Jr. 824, 31 Eng. Reprint 427.

89. People *v.* Frost, 46 Ill. App. 197, holding that, although a judgment creditor has directed the sheriff to pay the moneys collected on the judgment to her, and not to her attorneys, payment to the attorneys is ratified by her subsequently drawing an order on the attorneys for a part of the money, and by her acquiescence for over five years before proceeding against the sureties of the sheriff.

90. *Kentucky.*— Ruble *v.* Norman, 7 Bush 582.

Maryland.— Baugher *v.* Duphorn, 9 Gill 314.

North Carolina.— Woodman *v.* Mooring, 14 N. C. 237.

Vermont.— Ellis *v.* Allen, 48 Vt. 545.

West Virginia.— Sayre *v.* King, 17 W. Va. 562.

United States.— U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426.

See 40 Cent. Dig. tit. "Principal and Surety," § 226 *et seq.*

91. Loomer *v.* Wheelwright, 3 Sandf. Ch. (N. Y.) 135; Daniel *v.* Wharton, 90 Va. 584, 19 S. E. 170.

92. Union Stove, etc., Works *v.* Breidenstein, 50 Kan. 53, 31 Pac. 703.

Where property taken by the creditor is encumbered with liens the surety nevertheless is discharged if the property was accepted in settlement. Citizens' Nat. Bank *v.* Manoni, 76 Va. 802; U. S. *v.* Triplett, 28 Fed. Cas. No. 16,539.

93. Martin *v.* U. S., 4 T. B. Mon. (Ky.) 487, holding that delivery of goods is not a good defense to an action on a revenue bond, as collectors must obtain money.

94. Benneson *v.* Savage, 130 Ill. 352, 22 N. E. 838.

95. *Kansas.*— Hall *v.* Hays City First Nat. Bank, 5 Kan. App. 493, 47 Pac. 566.

Kentucky.— Nickell *v.* Citizens' Bank, 60 S. W. 925, 22 Ky. L. Rep. 1552.

New York.— Woodbridge *v.* Richardson, 2 Thomps. & C. 418, holding that where the terms of a lease provided for the payment of rent by a note falling due and to be paid at a specified time, a surety for the lessee remains liable until the note is paid.

Pennsylvania.— Greenawalt *v.* McDowell, 65 Pa. St. 464 (holding that a surety on a note is not relieved from liability by the payee taking a note of the principal, negotiating it, and indorsing the amount of the proceeds on the original note as a partial payment. The last note being unpaid, there was no payment on the first note); Hummelstown Brownstone Co. *v.* Knerr, 25 Pa. Super. Ct. 465.

Wisconsin.— Paine *v.* Voorhees, 26 Wis. 522.

Canada.— Hooker *v.* Gamble, 13 U. C. C. P. 462.

See 40 Cent. Dig. tit. "Principal and Surety," § 229 *et seq.*

96. Emery *v.* Richardson, 61 Me. 99; Moore *v.* Johnson, 34 W. Va. 672, 12 S. E. 918.

If there is an express stipulation that the note of a surety is not to operate as satisfaction of the original obligation unless followed by payment, a cosurety is not discharged unless prejudiced. American Surety Co. *v.* Crow, 22 Misc. (N. Y.) 573, 49 N. Y. Suppl. 946.

97. *Florida.*— Hart *v.* Stribling, 25 Fla. 433, 6 So. 455.

Indiana.— Price *v.* Barnes, (App. 1892) 31 N. E. 809.

Mississippi.— Newman *v.* Kling, 73 Miss. 312, 18 So. 685.

New Jersey.— Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

Ohio.— Goodin *v.* State, 18 Ohio 6.

Vermont.— Austin *v.* Curtis, 31 Vt. 64.

Wisconsin.— Jaffray *v.* Crane, 50 Wis. 349,

to proceed against the surety.[98] A surety will be discharged if the creditor or obligee accept a bond,[99] or a draft,[1] as payment; but it is otherwise if the draft is not considered payment unless it in turn is paid.[2] If the creditor take a check of the principal, which would have been paid if presented promptly, but which is retained by the creditor until there are not sufficient funds in the bank to meet it, a surety for the debt for which the check was given is discharged;[3] but by taking a worthless check the creditor does not release a surety if the latter is notified of its dishonor in time to protect himself.[4] A non-negotiable draft or note of the principal is not payment,[5] nor is a note which is not enforceable.[6] Payment by the note of a third person will discharge a surety;[7] but not if the obligee is induced by fraud to take one which is worthless, and he repudiates the transaction,[8] or the note is a forgery.[9]

(4) Illegal Payments. A surety is not as a general rule released by payment which is illegal by reason of its being a preference in violation of the bankruptcy act, and which the creditor is obliged to refund;[10] but if the creditor is aware of the illegal preference at the time he receives payment the surety is discharged.[11]

(E) *Application of Payments*[12] — (1) By Principal or Surety. Where a surety is liable for a part only of the entire indebtedness of the principal to the creditor, and the principal makes a payment on account of his indebtedness, he is entitled to designate to which particular part of the indebtedness it shall be applied, regardless of the wishes of the creditor,[13] or of the surety;[14] and, after application

7 N. W. 300; American Button-Hole, etc., Mach. Co. *v.* Gurnee, 44 Wis. 49.

England.— Skip *v.* Huey, 3 Atk. 91, 26 Eng. Reprint 855, 9 Mod. 438, 88 Eng. Reprint 559; Lichfield Union *v.* Greene, 1 H. & N. 884, 3 Jur. N. S. 247, 26 L. J. Exch. 140, 5 Wkly. Rep. 370.

See 40 Cent. Dig. tit. "Principal and Surety," § 229 *et seq.*

A supplemental surety will be discharged if the note of a surety be taken in payment. Singer Mfg. Co. *v.* Bennett, 28 W. Va. 16.

It is for the jury to determine whether a note is taken as payment. Adams *v.* De Frehn, 27 Pa. Super. Ct. 184; Philadelphia *v.* Howell, 19 Pa. Super. Ct. 76.

98. Bowers *v.* Cobb, 31 Fed. 678.

99. La Farge *v.* Herter, 11 Barb. (N. Y.) 159 [*affirmed* in 9 N. Y. 241]; Ledford *v.* Vandyke, 44 N. C. 480; Clark *v.* Cordon, 30 N. C. 179.

1. Morgan *v.* Coffman, 8 La. Ann. 56; Albany City F. Ins. Co. *v.* Devendorf, 43 Barb. (N. Y.) 444; Lichfield Union *v.* Greene, 1 H. & N. 884, 3 Jur. N. S. 247, 26 L. J. Exch. 140, 5 Wkly. Rep. 370.

2. Burnham *v.* Hubbard, 36 Conn. 539; Ford *v.* Stewart, 4 B. Mon. (Ky.) 326; Weller *v.* Ranson, 34 Mo. 362.

3. Fegley *v.* McDonald, 89 Pa. St. 128.

4. Hogan *v.* Kaiser, 113 Mo. App. 711, 88 S. W. 1128.

5. Lindeman *v.* Rosenfield, 67 Ind. 246, 33 Am. Rep. 79; Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42.

6. Kelley *v.* Post, 37 Ill. App. 396, holding that a corporate note given by the president of the corporation, for his individual debt, cannot be construed as payment.

7. Smith *v.* McKee, 67 Iowa 161, 25 N. W. 103; Stringfield *v.* Graff, 22 Iowa 438; Dryden *v.* Stephens, 19 W. Va. 1.

8. Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435 [*affirming* 63 Hun 413, 18 N. Y. Suppl. 685].

Acceptance by a ward, after reaching majority, of promissory notes which the guardian had not collected, and was therefore liable to pay, is not a defense to a surety for the guardian unless the notes are collected. Com. *v.* Miller, 5 T. B. Mon. (Ky.) 205.

9. Offutt *v.* Commonwealth Bank, 1 Bush (Ky.) 166.

10. *Iowa.*— Watson *v.* Poague, 42 Iowa 582.

Kentucky.— Northern Bank *v.* Farmers' Nat. Bank, 111 Ky. 350, 63 S. W. 604, 23 Ky. L. Rep. 696.

Texas.— Hooker *v.* Blount, 44 Tex. Civ. App. 162, 97 S. W. 1083.

United States.—Swarts *v.* St. Louis Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387.

England.— Petty *v.* Cooke, L. R. 6 Q. B. 790, 40 L. J. Q. B. 281, 25 L. T. Rep. N. S. 90, 19 Wkly. Rep. 1112.

See 40 Cent. Dig. tit. "Principal and Surety," § 232 *et seq.*

11. Northern Bank *v.* Cooke, 13 Bush (Ky.) 340.

12. **Application of payment** generally see Payment, 30 Cyc. 1227 *et seq.*

13. Lyman *v.* Miller, 12 U. C. Q. B. 215.

Principal paying through surety.— If the principal places money in the hands of his sureties to be applied by them on the indebtedness for which they are liable, the creditor cannot apply it otherwise. Buffalo County *v.* Van Sickle, 16 Nebr. 363, 20 N. W. 261; U. S. *v.* Cochran, 25 Fed. Cas. No. 14,821, 2 Brock. 274.

14. Grant County Bldg., etc., Assoc. *v.* Lemmon, 78 S. W. 874, 25 Ky. L. Rep. 1725; Bishop *v.* Smith, (N. J. Sup. 1904) 57 Atl. 874; Wright *v.* Hickling, L. R. 2 C. P. 199, 36 L. J. C. P. 40, 15 L. T. Rep. N. S. 245; Plomer *v.* Long, 1 Stark. 153, 2 E. C. L. 66.

has been made to a debt for which the surety was liable, it cannot be changed, although both the principal and the creditor wish it.[15] Similarly a surety, making payment, has the right to designate upon what part of the indebtedness it shall be applied.[16]

(2) By Creditor. If the principal, when making a payment, omits to designate how he wishes the money applied, the creditor may apply it to any part of the indebtedness of the principal, a surety not having any right to insist upon the application to the debt for which he is liable,[17] nor does it make any difference that the surety was not aware of the existence of any other indebtedness of the principal than that for which the surety became liable;[18] but application once made by the creditor to a debt for which the surety was liable cannot subsequently be changed even with the consent of the principal.[19] Such application can be made by the creditor at any time before trial.[20] If the indebtedness of the principal is a running account, for some of the items of which a surety is liable, the creditor is not under obligation to apply payments to the oldest items;[21] but if the creditor has made an agreement with the surety to apply certain future payments by the principal to the indebtedness for which the surety is liable, the creditor has no right to make any other application, even with the consent of the principal.[22] Where a surety has become responsible for the payment of money by the principal, and the latter receives money under his contract, which he pays over, the creditor or obligee has no right to apply such payments in any other way than to the relief of the surety.[23] Likewise payments by an officer of moneys received during his term of office must be credited so as to discharge his sureties for that term.[24] If the creditor or obligee

Statements of account between the creditor and the principal are admissible in evidence to show the application of payments. White Sewing-Mach. Co. *v.* Fargo, 3 N. Y. Suppl. 494.

15. Baugher *v.* Duphorn, 9 Gill (Md.) 314; Ellis *v.* Allen, 48 Vt. 545; Gibson *v.* Rix, 32 Vt. 824.

16. Waugh *v.* Wren, 9 Jur. N. S. 365, 7 L. T. Rep. N. S. 612, 1 New Rep. 142, 11 Wkly. Rep. 244.

17. Tolerton, etc., Co. *v.* Roberts, 115 Iowa 474, 88 N. W. 966, 91 Am. St. Rep. 171 (holding also that a representation by a chattel mortgagee that the notes first maturing will be paid from the first part of the mortgaged property is not sufficient to show a contract that the proceeds will be applied in that manner, although made to the surety to induce him to sign the first notes, if such representation be merely the speaker's interpretation of the law); Eccleston *v.* Sands, 108 N. Y. App. Div. 147, 95 N. Y. Suppl. 1107; Alexander *v.* U. S., 57 Fed. 828, 6 C. C. A. 602; Cunningham *v.* Buchannan, 10 Grant Ch. (U. C.) 523.

Application on building contracts.— The owner of a building is not required to apply the contract price for the benefit of a surety of the contractor, but may withhold it for damages due him for delay in the erection of the building. Getchell, etc., Lumber, etc., Co. *v.* National Surety Co., (Iowa 1904) 100 N. W. 1123; Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550.

18. Arbuckles *v.* Chadwick, 146 Pa. St. 393, 23 Atl. 346.

19. Mitchell *v.* Wheeler, 131 Iowa 434, 103 N. W. 1030; Mitchell *v.* Wheeler, 122 Iowa 368, 98 N. W. 152.

20. Black *v.* Stephen, 37 Can. L. J. N. S. 206.

21. Simson *v.* Ingham, 2 B. & C. 65, 3 D. & R. 249, 1 L. J. K. B. O. S. 234, 26 Rev. Rep. 273, 9 E. C. L. 37 (holding that where sureties are liable for advances made to a firm, with a provision rendering them liable for advances made after a change in the firm, the creditor is entitled to apply payments made after the death of a partner, to advances made to the new firm); Agricultural Ins. Co. *v.* Sargeant, 26 Can. Sup. Ct. 29.

22. Petefish *v.* Watkins, 124 Ill. 384, 16 N. E. 248 (holding that where a surety signs a note under an agreement with the payee to accept in payment another note, and afterward at the instance of the payee, and to enable the principal to take up the note, the surety signs a second note, the payee cannot apply it to the individual indebtedness of the principal, even with the consent of the latter); Mellendy *v.* Austin, 69 Ill. 15 (holding that where the seller of goods agrees with a surety on a note given for the price, that the proceeds of sales by the buyer shall be received in payment of the note, the payee cannot apply the same on other an indebtedness of the buyer).

An oral agreement, made at the same time as a note, that the creditor should apply thereon the first money paid by the principal, cannot be shown, as it varies the terms of the contract. Hoyt *v.* French, 24 N. H. 198.

23. Crane Co. *v.* Pacific Heat, etc., Co., 36 Wash. 95, 78 Pac. 460; U. S. *v.* American Bonding, etc., Co., 89 Fed. 925, 32 C. C. A. 420. But see People *v.* Powers, 108 Mich. 339, 66 N. W. 215.

24. Porter *v.* Stanley, 47 Me. 515, 74 Am. Dec. 501; McMillan *v.* Boyd, 40 Ohio St. 35;

has received collateral security from the principal, without any stipulation that it is to be held for any particular debt,[25] or holds any property of the principal,[26] the creditor or obligee can apply it to debts for which the surety is not liable.

(3) By Court. If neither the creditor nor the principal has made any application of a payment made by the latter, and their transactions afterward become a matter of judicial adjustment, the court will apply the payment as equity seems to require, usually to the oldest item,[27] unless the conduct of the parties indicates that payments by the principal were to be credited to later items.[28] In some cases application will be made ratably among different debts.[29]

(III) *Tender.* A tender of money in full performance of the secured contract,[30]

Riner *v.* New Hampshire F. Ins. Co., 9 Wyo. 446, 64 Pac. 1062, 9 Wyo. 18, 60 Pac. 262.

The burden is on the surety to show that such moneys were received during the term for which he was surety. Thompson *v.* Commercial Union Assur. Co., 20 Colo. App. 331, 78 Pac. 1073; Grafton *v.* Reed, 34 W. Va. 172, 12 S. E. 767; Hecox *v.* Citizens' Ins. Co., 2 Fed. 535, 9 Biss. 421, holding that the surety should show also that the obligee had knowledge of the fact that the moneys remitted by the principal were from current business.

25. *California.*— California Nat. Bank *v.* Ginty, 108 Cal. 148, 41 Pac. 38.

Connecticut.— Stamford Bank *v.* Benedict, 15 Conn. 437.

Illinois.— Jackson *v.* May, 28 Ill. App. 305.

Massachusetts.— Cogswell *v.* Eames, 14 Allen 48; Wilcox *v.* Fairhaven Bank, 7 Allen 270.

Michigan.— Noble *v.* Murphy, 91 Mich. 653, 52 N. W. 148, 30 Am. St. Rep. 507.

Missouri.— Mathews *v.* Switzler, 46 Mo. 301.

Vermont.— Fair Haven First Nat. Bank *v.* Johnson, 65 Vt. 382, 26 Atl. 634.

Virginia.— Pope *v.* Transparent Ice Co., 91 Va. 79, 20 S. E. 940.

Canada.— London *v.* Citizens' Ins. Co., 13 Ont. 713; Commercial Bank *v.* Muirhead, 4 U. C. C. P. 434.

See 40 Cent. Dig. tit. "Principal and Surety," § 326 *et seq.*

But see Holliday *v.* Brown, 33 Nebr. 657, 50 N. W. 1042.

Where several debts are secured by mortgage for some of which debts there are sureties, the mortgagor being the principal, on a sale of the mortgaged property that portion of the proceeds applicable to the debt on which the sureties are bound will be credited as a payment *pro tanto* on the debt and the sureties to that amount discharged. Fielder *v.* Varner, 45 Ala. 429.

Where the creditor is given the right to elect as to the application of the proceeds of security the surety is not entitled to have such proceeds applied to that part of the debt for which he is liable, as against the wishes of the creditor. Advance Thresher Co. *v.* Hogan, 74 Ohio St. 307, 78 N. E. 436.

26. Lowe *v.* Guthrie, 4 Okla. 287, 44 Pac. 198 (holding that sureties for a defaulting city clerk are not entitled to credit on their bond, of unpaid salary due the clerk, if a part of his indebtedness to the city is unsecured); Lowe *v.* Reddan, 123 Wis. 90, 100 N. W. 1038 (holding that a bank deposit by the principal can be applied by the bank on two notes held by the bank, one half to each note, as against a surety on one of the notes).

27. *Georgia.*— Simmons *v.* Cates, 56 Ga. 609.

Iowa.— Ida County Sav. Bank *v.* Seidensticker, 128 Iowa 54, 102 N. W. 821, 111 Am. St. Rep. 189.

Massachusetts.— Boston Hat Manufactory *v.* Messinger, 2 Pick. 223.

New York.— Barnes *v.* Cushing, 71 N. Y. App. Div. 366, 75 N. Y. Suppl. 953.

Pennsylvania.— McKee *v.* Com., 2 Grant 23.

Wisconsin.— Zinns Mfg. Co. *v.* Mendelson, 89 Wis. 133, 61 N. W. 302.

England.— Kinnaird *v.* Webster, 10 Ch. D. 139, 48 L. J. Ch. 348, 39 L. T. Rep. N. S. 494, 27 Wkly. Rep. 212; Royal Bank *v.* Christie, 8 Cl. & F. 214, 8 Eng. Reprint 84.

Canada.— Royal Canadian Bank *v.* Payne, 19 Grant Ch. (U. C.) 180.

See 40 Cent. Dig. tit. "Principal and Surety," § 236 *et seq.*

28. Agricultural Ins. Co. *v.* Sargeant, 26 Can. Sup. Ct. 29, holding that where notes of the principal, signed by a surety, are carried by the creditor to the debit side of a running account with the principal, and the principal is charged with current business, credits also will be applied to current business, especially if renewal notes are given by the surety from time to time.

29. State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880 (where a state treasurer misappropriated bonds during two terms of office, and, during his second term, transferred a sum generally to the bond account, and the court applied such sum ratably between the terms); Lexington, etc., R. Co. *v.* Elwell, 8 Allen (Mass.) 371 (holding that where a corporate treasurer was entitled to a set-off to his account, and there was no evidence to show when such credit accrued, it would be applied to his general account, and not exclusively to that part on which his sureties were liable).

30. *California.*— Daneri *v.* Gazzola, 139 Cal. 416, 73 Pac. 179; O'Conor *v.* Morse, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155; Randol *v.* Tatum, 98 Cal. 390, 33 Pac. 433, the last two cases holding that a surety is discharged by tender, although not made pursuant to the statute providing that an obligation for the payment of money is ex-

or of property,[31] by the principal, will discharge his sureties from all liability. Such also will be the effect of a tender by the surety himself.[32] The tender must, however, be substantial, complete, and legally sufficient,[33] and if suit has been brought the tender must include the costs of the action.[34] Tender alone is sufficient, although it is not kept good,[35] unless the principal be a public officer, and his sureties have undertaken to be liable for his unfaithfulness or dishonesty.[36]

(iv) *Compromise and Settlement; Accord and Satisfaction.* A compromise or settlement between the creditor or obligee and the principal, by which the latter is discharged from liability, discharges his surety,[37] even though

tinguished by a due offer of payment, if the amount is deposited in the name of the creditor with some bank of deposit and notice thereof is given to the creditor.

Indiana.— Spurgeon *v.* Smitha, 114 Ind. 453, 17 N. E. 105; Musgrave *v.* Glasgow, 3 Ind. 31.

Kansas.— Fisher *v.* Stockebrand, 26 Kan. 565.

Tennessee.— Johnson *v.* Ivey, 4 Coldw. 608, 94 Am. Dec. 206.

Canada.— Western Assur. Co. *v.* McLean, 29 U. C. Q. B. 57.

See 40 Cent. Dig. tit. "Principal and Surety," § 228.

Loss of lien by refusal of tender.— If a tender by the principal be refused by the creditor, his lien on property of a third person, pledged for the debt, is gone. Mitchell *v.* Roberts, 17 Fed. 776, 5 McCrary 425.

31. Hansford *v.* Perrin, 6 B. Mon. (Ky.) 595.

32. O'Conor *v.* Morse, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155 (holding that where one cosurety pays his proportionate part, offering to pay the balance, which is refused by the obligee, he is discharged from all liability); Hayes *v.* Josephi, 26 Cal. 535.

Tender must be in good faith.— Lee *v.* Lee, 67 Ala. 406, holding that a tender by sureties to a guardian which he, under a previous agreement with them, refuses to accept, will not discharge them.

33. Hiller *v.* Howell, 74 Ga. 174 (holding that a surety is not discharged because an incomplete tender made by the principal was rejected by the creditor); Bonner *v.* Nelson, 57 Ga. 433 (holding a tender in depreciated currency insufficient); Clark *v.* Sickler, 64 N. Y. 231, 21 Am. Rep. 606; Cunningham *v.* Morrow, 24 Pa. Co. Ct. 348.

A tender of property which the surety agrees "to deliver" to the creditor must be delivered at the residence of the creditor, if portable. Ponderous articles must be delivered where the creditor directs, and the surety must ascertain such place from the creditor before the time for delivery. La Farge *v.* Rickert, 5 Wend. (N. Y.) 187, 21 Am. Dec. 209.

An informal tender by the principal while insolvent, if not accepted by the creditor, discharges the surety. Life Assoc. of America *v.* Neville, 72 Ala. 517.

34. Whipple *v.* Newton, 17 Pick. (Mass.) 168; Hampshire Manufacturers' Bank *v.* Billings, 17 Pick. (Mass.) 87.

35. Curiac *v.* Packard, 29 Cal. 194; Smith *v.* Old Dominion Bldg., etc., Assoc., 119 N. C. 257, 26 S. E. 40.

36. State *v.* Alden, 12 Ohio 59, holding that sureties of a sheriff are not discharged by his tender of money collected on an execution, as his duty is a continuing one, and the rules applicable between creditor and principal do not apply, and if the sheriff absconds with the money his sureties remain liable.

37. *Illinois.*— Foss *v.* Chicago, 34 Ill. 488.

Indiana.— Dick *v.* Dumbauld, 10 Ind. App. 508, 38 N. E. 78, holding that a claim allowed against the estate of a deceased surety is discharged by the subsequent satisfaction of a judgment in favor of the claimant against the principal, although the latter judgment was for a less amount than the allowed claim.

Iowa.— Heitz *v.* Atlee, 67 Iowa 483, 25 N. W. 742.

Massachusetts.— Chellis *v.* Leavitt, 124 Mass. 359, holding that a surety is discharged by the payment of a smaller amount by the principal, if such smaller amount is accepted by the creditor in full settlement in consideration of the principal waiving his right to take the poor debtor's oath.

New Jersey.—Elizabeth State Bank *v.* Chetwood, 8 N. J. L. 1.

West Virginia.— Chalfants *v.* Martin, 25 W. Va. 394 (holding that a part payment to the attorney of the creditor, under a fraudulent agreement whereby the attorney gives a receipt in full without the knowledge of the creditor, cannot inure to the benefit of a surety); Renick *v.* Ludington, 14 W. Va. 367.

United States.— U. S. *v.* Chouteau, 102 U. S. 603, 26 L. ed. 246, holding that sureties on a distillery bond cannot be subjected to the penalty attached to the removal of spirits without payment of the tax, after the principal has effected a full and complete compromise with the government of prosecutions based on the same offense and designed to secure the same penalty.

England.— Webb *v.* Hewitt, 3 Kay & J. 438, 69 Eng. Reprint 1181.

See 40 Cent. Dig. tit. "Principal and Surety," § 231.

A settlement between a ward and his guardian, while the former was under age, does not prevent a right of action against a surety on the bond of the guardian. Magruder *v.* Goodwyn, 2 Patt. & H. (Va.) 561.

A mere agreement to compromise is not sufficient, it not being shown that the compromise was actually consummated. Tuckerman *v.* Newhall, 17 Mass. 581.

the discharge was the result of new security given by the principal to the creditor which has proved worthless;[38] but a payment on an unliquidated claim, which is not stated to be in full settlement, does not affect the liability of a surety for the balance.[39] Accord and satisfaction between the surety himself and the creditor, resulting from a transfer from the former to the latter, of collateral security obtained from the principal, is a good defense to the surety;[40] but acceptance, by the creditor, from one cosurety of his proportionate part of the debt, does not amount to accord and satisfaction.[41] A surety is discharged by failure of the creditor to rescind promptly after knowledge that a settlement with the principal was procured through fraud by the latter,[42] or through mistake.[43]

h. Non-Performance of Conditions — (i) *In General.* If a surety has annexed conditions, to be performed by the creditor or obligee after the contract has been entered into, a failure to perform them releases the surety from liability,[44] and the principal cannot waive performance.[45] Thus if the surety has entered into his contract under an agreement providing for security for himself,[46] or for an examination of the accounts of the principal,[47] or has stipulated that the principal shall

38. Newman *v.* Hazelrigg, 1 Bush (Ky.) 412.

39. Field *v.* Robins, 8 A. & E. 90, 2 Jur. 855, 7 L. J. Q. B. 153, 2 N. & P. 226, 1 W. W. & H. 145, 35 E. C. L. 495.

40. Hunter *v.* Porter, 133 Iowa 391, 109 N. W. 283.

41. Martin *v.* Frantz, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. Rep. 589.

42. Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; Goodin *v.* State, 18 Ohio 6.

43. Brown *v.* Haggerty, 26 Ill. 469 (holding that where the principal was liable on two notes of like tenor, except one was due a week or so later than the other, and was signed by a surety, and the principal called at the bank to pay the note which was due, but, by mistake, the bank gave up the note signed by the surety, on which, five months later, suit was brought by the owner against the surety, the surety was discharged by the laches, the principal in the meantime having become insolvent); Law *v.* East-India Co., 4 Ves. Jr. 824, 31 Eng. Reprint 427.

44. *Indiana.*— Campbell *v.* Gates, 17 Ind. 126.

Michigan.— Fay *v.* Jenks, 93 Mich. 130, 53 N. W. 163, where the condition was that the principal should have the exclusive sale of certain goods.

Missouri.— Eldridge *v.* Fuhr, 59 Mo. App. 44.

North Carolina.— Hull *v.* Carter, 83 N. C. 249.

Ohio.— Koppitz-Melchers Brewing Co. *v.* Schultz, 68 Ohio St. 407, 67 N. E. 719, holding that where the contract provided that the principal should have credit not to exceed two car loads at any one time, and that, on ordering the third car load, he should pay for the first car load, failure to require payment for the first car load before shipping the third, released the surety.

Texas.— Durrell *v.* Farwell, 88 Tex. 98, 30 S. W. 539, 31 S. W. 185.

United States.— Coughran *v.* Bigelow, 164 U. S. 301, 17 S. Ct. 117, 41 L. ed. 442 [*affirming* 9 Utah 260, 24 Pac. 51] (holding that where a deed was to be delivered to vendees after they had performed their part of the contract of sale, and, by this contract, the first payment was to be made by them on October first, their failure to make this payment on October first, released the sureties on the bond for delivery of the deed); Lombard Inv. Co. *v.* American Surety Co., 65 Fed. 476.

Canada.— Robertson *v.* Davis, 27 Can. Sup. Ct. 571; Paris Bd. of Education *v.* Citizens' Ins., etc., Co., 30 U. C. C. P. 132; Steen *v.* Swalwell, 25 U. C. C. P. 356, holding that a surety who becomes such under an agreement that the obligee is to abstain from doing anything which would prevent the principal from obtaining a patent to land, is discharged if the obligee opposes the issuance of the patent.

45. Griffith *v.* Newell, 69 S. C. 300, 48 S. E. 259; Charley *v.* Potthoff, 118 Wis. 258, 95 N. W. 124.

46. Jones *v.* Keer, 30 Ga. 93 (holding that a surety is not liable if the creditor fails to assign to him an execution against the principal in accordance with the contract); Jeffries *v.* Lamb, 73 Ind. 202 (holding that a payee of a note having induced the surety to sign by agreeing that he would deliver a former note and mortgage to the principal so that the surety might secure himself by obtaining a first mortgage thereon, cannot hold the surety upon refusal to comply with such agreement); Hill *v.* Nuttall, 17 C. B. N. S. 262, 33 L. J. C. P. 303, 112 E. C. L. 262 (holding that where a contractor was unable to obtain material for his contract because he then was owing the materialman, and the person for whom the work was to be performed became surety for such debt of the contractor, to be paid in six months "providing he has work done as security for the same," the surety is not liable unless such work is done, although it is not necessary for the materialman to show that the material furnished was used in the work done by the contractor).

47. Montreal Harbour Com'rs *v.* Guarantee Co. of North America, 22 Can. Sup. Ct. 542;

be prosecuted criminally,[48] or that the surety shall be liable for a deficiency only after the application, upon the indebtedness, of security held by the creditor,[49] he cannot be held liable if the conditions have not been fulfilled. To relieve the surety, however, the creditor or obligee must have notice of the conditions,[50] and the surety is not relieved by non-performance of an agreement made with him by the principal, with which the creditor or obligee is not connected,[51] nor by the breach of an independent agreement between the creditor and the principal.[52] A substantial compliance with conditions is sufficient, if they are performed as fully as the circumstances will allow.[53] Where the liability of the surety is made conditional upon the creditor abstaining from certain acts, the surety is not discharged if these acts are done by third persons.[54] Failure to observe provisions in statutes, which are directory merely, will not discharge a surety,[55] nor will failure by a creditor or obligee to observe provisions in the contract which were inserted for the benefit of the latter;[56] or which were inserted for the benefit of the principal;[57] or if they

Paris Bd. of Education *v.* Citizens' Inv., etc., Co., 30 U. C. C. P. 132.

48. People *v.* Jansen, 7 Johns. (N. Y.) 332, 5 Am. Dec. 275; London Guarantie Co. *v.* Fearnley, 5 App. Cas. 911, 45 J. P. 4, 43 L. T. Rep. N. S. 390, 28 Wkly. Rep. 893.

49. Tracy *v.* Pomeroy, 120 Pa. St. 14, 13 Atl. 514; Durrell *v.* Farwell, 88 Tex. 98, 30 S. W. 539, 31 S. W. 185; Robertson *v.* Davis, 27 Can. Sup. Ct. 571, holding that a surety on notes to secure advances for the publication of books under an agreement that the proceeds of sales were to be applied on such advances cannot be held for the full amount of the notes, a statement of the financial situation never having been rendered him.

50. Haines *v.* Gibson, 115 Mich. 131, 73 N. W. 126; Dwelling-House Ins. Co. *v.* Johnston, 90 Mich. 170, 51 N. W. 200 (holding that where sureties wrote the employer of the principal that they would not be responsible for any further defaults unless monthly settlements were made with the principal, the sureties remain liable if the employer did not receive the letter); Woog *v.* People's Bank, 4 Ohio S. & C. Pl. Dec. 51, 2 Ohio N. P. 394 (holding that where a surety in replevin stipulated that the sheriff was to return the property to defendant if plaintiff failed to furnish the surety with indemnity, the surety is liable, although he does not receive indemnity, and the property is not returned, defendant not having any notice of the condition); Joyce *v.* Cockrill, 92 Fed. 838, 35 C. C. A. 38.

51. Conrey *v.* Brandegee, 2 La. Ann. 132; Mathews *v.* Meek, 23 Ohio St. 272; Carpenter *v.* Kee, 5 Humphr. (Tenn.) 585, holding that where the surety signed under an agreement with the principal that the latter would confess judgment and have it stayed by some responsible person, the refusal of the principal to perform his agreement does not constitute a ground for relief to the surety.

52. Ellis *v.* McCormick, 1 Hilt. (N. Y.) 313, where it was held that a breach of an agreement by the landlord to make certain improvements, indorsed on the lease, does not discharge a surety for the rent.

53. Robinson *v.* Epping, 24 Fla. 237, 4 So. 812; Allen County *v.* U. S. Fidelity, etc., Co., 93 S. W. 44, 29 Ky. L. Rep. 356; Barbe *v.* Hansen, 40 La. Ann. 707, 4 So. 889 (holding that sureties on a note given for the purchase-price of land to be procured by the vendor from the government at one dollar and twenty-five cents per acre are not discharged because the vendor did not pay that amount, if it was sold to the principal for that amount, and there is no proof that the land was worth less); Guthrie *v.* O'Connor, 36 U. C. Q. B. 372.

54. Glegg *v.* Gilbey, 2 Q. B. D. 209, 46 L. J. Q. B. 325, 35 L. T. Rep. N. S. 927, 25 Wkly. Rep. 311; Musket *v.* Rogers, 5 Bing. N. Cas. 728, 8 L. J. C. P. 354, 8 Scott 51, 35 E. C. L. 388. See also *supra*, IV, D, 8, c, (II), (E), (F).

55. Moreland *v.* State Bank, 1 Ill. 263 (holding that the omission of directors of a bank to protest notes as provided by statute does not release the sureties on a note given to the bank); Todd *v.* Perry, 20 U. C. Q. B. 649 (holding that the fact that a public collector does not receive the tax roll until six days after the date designated for him to receive it will not discharge his sureties).

56. Getchell, etc., Lumber, etc., Co. *v.* National Surety Co., 124 Iowa 617, 100 N. W. 556, 1123 (holding that where the owner had the right to terminate a building contract on certification, by the architects, that the contractors refused, neglected, or failed to perform their agreement, the owner can give the notice, on learning of the abandonment of the contract, without a certificate of the architects, and hold the sureties on the bond of the contractors); Smith *v.* Molleson, 148 N. Y. 241, 42 N. E. 669; Enterprise Hotel Co. *v.* Book, 48 Oreg. 58, 85 Pac. 333; Madison *v.* American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097 (holding that a surety for a contractor is liable, although payments were made under the certificate of but one city engineer instead of two).

57. Enterprise Hotel Co. *v.* Book, 48 Oreg. 58, 85 Pac. 333, holding that where a building contract provided that if the owner should request, in writing, any alterations, the same should be made, sureties are not released because the contractor consented to alterations without first requiring the request therefor to be in writing. See also *supra*, IV, C, 5, c, note 2.

consist of restrictions so unreasonable as practically to amount to a release by tending to defeat recovery.[58]

(II) *As to Notice and Demand.* If the contract of suretyship stipulates that notice shall be given to the surety of the principal's default, failure to comply with the condition,[59] or to give notice within the time specified,[60] or to give notice promptly if the contract provides for immediate notice,[61] will prevent recovery from the surety. Similarly non-compliance with a condition that demand be made on the principal [62] or on the surety,[63] or that demand be made at a particular place,[64] will defeat an action against the surety on the contract.

(III) *Building Contracts.* The general rule as to the effect of non-performance of conditions [65] applies to sureties for building contracts, and to hold the surety conditions imposed by him must be complied with, such as notice of the commencement of the work,[66] the amounts to be paid during the progress of the

58. Tarboro Bank *v.* Fidelity, etc., Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682.

59. Scarratt *v.* F. W. Cook Brewing Co., 117 Ga. 181, 43 S. E. 413; Hurley *v.* Fidelity, etc., Co., 95 Mo. App. 88, 68 S. W. 958; Novelty Mill Co. *v.* Heinzerling, 39 Wash. 244, 81 Pac. 742; Heffernan *v.* U. S. Fidelity, etc., Co., 37 Wash. 477, 79 Pac. 1095; National Surety Co. *v.* Long, 125 Fed. 887, 60 C. C. A. 623.

Failure to give notice on suspicion of a default is not a breach of the condition. Tarboro Bank *v.* Fidelity, etc., Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682.

Breach of condition caused by surety.— If the surety prevents performance of the condition as to the giving of notice he is not discharged by breach of the condition. Royal Canadian Bank *v.* European Assur. Soc., 29 U. C. Q. B. 579.

Service of notice must be proved if denied. Singer *v.* Pollock, 91 N. Y. Suppl. 755. But if the declaration avers notice in writing, and defendant suffers judgment by default, evidence of the notice is not necessary. Barwise *v.* Russell, 3 C. & P. 608, 14 E. C. L. 741.

60. Union Surety, etc., Co. *v.* Stevenson, 27 Pa. Super. Ct. 324; U. S. Fidelity, etc., Co. *v.* Rice, 148 Fed. 206, 78 C. C. A. 164.

If no time is specified within which notice must be given failure to give notice within a reasonable time discharges the surety. Chatham *v.* McCrea, 12 U. C. C. P. 352, holding that where a surety for the payment of rent was not given notice of the default of the tenant until some months after it occurred, the notice was not given within a reasonable time.

61. Fidelity, etc., Co. *v.* Robertson, 136 Ala. 379, 34 So. 933; Trinity Parish *v.* Ætna Indemnity Co., 37 Wash. 515, 79 Pac. 1097; Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331] (holding that the requirement that immediate notice must be given is fulfilled by giving it as soon as it is reasonably practicable; but notice within from ten to seventeen days cannot be said, as a matter of law, to have been given as soon as reasonably practicable); National Surety Co. *v.* Long, 125 Fed. 887, 60 C. C. A. 623 (holding that mailing a notice to a surety eleven days after a known default of the principal is not sufficient compliance with a condition of immediate notice); Montreal Harbour Com'rs *v.* Guarantee Co. of North America, 22 Can. Sup. Ct. 542 (holding that failure to notify a surety of a defalcation of the principal until a week after his employer had full knowledge thereof, and he had left the country, prevents recovery from the surety, the contract calling for immediate notice).

62. Folsom *v.* Squire, 72 N. J. L. 430, 60 Atl. 1102; Nelson *v.* Bostwick, 5 Hill (N. Y.) 37, 40 Am. Dec. 310; Lawrence *v.* Walmsley, 31 L. J. C. P. 143, 5 L. T. Rep. N. S. 798, 10 Wkly. Rep. 344; Port Elgin Public School Bd. *v.* Eby, 26 Ont. 73 (holding that if a surety has undertaken to be liable for a failure of the principal to deliver moneys on demand the death of the principal will not excuse the performance of the condition; demand on the personal representatives of the principal is insufficient); Bruce County *v.* Cromar, 22 U. C. Q. B. 321 (holding also that where the condition of a bond was that a treasurer, on request made, would give a just account of all moneys received, and would pay over and deliver all balances due, the words "upon request to him or them made" apply both to the giving an account and to the paying over); O'Neill *v.* Carter, 9 U. C. Q. B. 254 (holding that if a surety has stipulated for the return of goods on request such request is not excused because the principal is out of the province).

63. Morgan *v.* Menzies, 65 Cal. 243, 3 Pac. 807; Douglass *v.* Rathbone, 5 Hill (N. Y.) 143; Batson *v.* Spearman, 9 A. & E. 298, 3 P. & D. 77, 36 E. C. L. 172, holding that where sureties are to pay "after receiving notice to pay," notice that a certain amount is due, without notice to pay, is insufficient.

Demand by agent.— An oral demand by the husband of the obligee is sufficient, where his authority was not questioned at the time, and the facts indicated that it was assumed to have been made in her name. Lee *v.* Briggs, 39 Mich. 592.

64. Hamer *v.* Johnson, 15 La. 242; Fort *v.* Cortes, 14 La. 180.

65. See *supra*, VIII, E, 2, h, (I).

66. Orleans, etc., R. Co. *v.* International Constr. Co., 113 La. 409, 37 So. 10.

work,[67] that payments are to be made on certificates or estimates only,[68] that liens must be released,[69] the manner in which changes shall be made,[70] that insurance shall be procured,[71] and for giving additional bonds.[72]

i. Alteration and Change in Contract or Obligation[73] — (i) *In General* — (a) *Rule Stated.* A surety is discharged by a material alteration or change, without his consent, in the contract entered into by him or in the contract the performance of which is secured;[74] but if the performance of two or more con-

67. Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397.

68. *Alabama.*—Montgomery First Nat. Bank *v.* Maryland Fidelity, etc., Co., 145 Ala. 335, 40 So. 415, 117 Am. St. Rep. 45, 5 L. R. A. N. S. 418, holding also that money paid in violation of a provision in the contract that payments are to be made on architect's certificates and estimates only cannot be regarded as a loan to the contractor.

Connecticut.— Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397, holding that where a construction contract called for payments on approximate estimates by an engineer, a letter from him stating that the contractor had requested an estimate, and apparently was entitled to one, and recommending payment of a certain sum, as in his opinion the work performed was worth that amount, was not sufficient compliance.

Florida.— Gato *v.* Warrington, 37 Fla. 542, 19 So. 883, holding that if the contract provides for payment upon receipted weekly pay rolls, the sureties are discharged by advancements to the contractor without reference to any receipted pay rolls.

Iowa.— Getchell Lumber, etc., Co. *v.* National Surety Co., 124 Iowa 617, 100 N. W. 556, 1123, holding, however, that the requirement that an architect certify to the owner before the latter can act does not constitute a written certificate.

Nebraska.—Brennan *v.* Clark, 29 Nebr. 385, 45 N. W. 472.

The certificate of the architect is conclusive upon the sureties in the absence of any claim of bad faith or fraud in the conduct of such architect. Dallas Homestead, etc., Assoc. *v.* Thomas, 36 Tex. Civ. App. 268, 81 S. W. 1041.

69. Shelton *v.* American Surety Co., 131 Fed. 210, 66 C. C. A. 94 [*affirming* 127 Fed. 736].

70. McConnell *v.* Poor, 113 Iowa 133, 84 N. W. 968, 52 L. R. A. 312; Stillman *v.* Wickham, 106 Iowa 597, 76 N. W. 1008 (holding that where the owner changes the plans and has extra work done without a special agreement minuted on the original contract as therein required, the surety for the contractor is discharged); Killoren *v.* Meehan, 55 Mo. App. 427 (holding that where the contract provides that, upon changes being made, the difference in the contract price is to be agreed on in writing, a surety is discharged if a material change is agreed on orally); Truckee Lodge No. 14 I. O. O. F. *v.* Wood, 14 Nev. 293 (holding that where the contract provides for changes in plans either to be agreed upon mutually, or to be referred to arbitrators before the changes are made, sureties for the contractor are released if the owner orders changes, refusing to have the price fixed).

71. Gallagher *v.* St. Patrick's Church, 45 Nebr. 535, 63 N. W. 864 (holding that where the contract required the owner to procure insurance to a certain amount, his failure to do so discharged the sureties of the contractor, although the owner was unable to obtain insurance to that amount from any responsible insurance company, and the fire was occasioned by the negligence of the contractor); Watts *v.* Shuttleworth, 5 H. & N. 235, 29 L. J. Exch. 229 [*affirmed* in 7 H. & N. 353, 7 Jur. N. S. 945, 5 L. T. Rep. N. S. 58, 10 Wkly. Rep. 132] (holding that sureties are discharged entirely, by a failure of the owner to insure, and not merely to the extent of the benefit they would have derived from the insurance if effected). But see Hohn *v.* Shideler, 164 Ind. 242, 72 N. E. 575; Schreiber *v.* Worm, 164 Ind. 7, 72 N. E. 852, both holding that sureties are not discharged by a failure of the owner to insure as agreed, if there is no loss which such insurance would have covered.

72. Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397.

73. Alteration of contract by act of law see *infra*, VIII, E, 3, a.

Alterations of instruments generally see Alteration of Instruments, 2 Cyc. 216.

74. *Arkansas.*— O'Neal *v.* Kelley, 65 Ark. 550, 47 S. W. 409.

California.— Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599.

Connecticut.—Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397; Rowan *v.* Sharp's Rifle Mfg. Co., 33 Conn. 1.

District of Columbia.— Clark *v.* Gerstley, 26 App. Cas. 205 [*affirmed* in 204 U. S. 504, 27 S. Ct. 337, 51 L. ed. 589].

Georgia.— Worthan *v.* Brewster, 30 Ga. 112; Bethune *v.* Dozier, 10 Ga. 235.

Idaho.— Mulkey *v.* Long, 5 Ida. 213, 47 Pac. 949.

Illinois.— McCartney *v.* Ridgway, 160 Ill. 129, 43 N. E. 826, 32 L. R. A. 555.

Indiana.— Bailey *v.* Boyd, 75 Ind. 125.

Iowa.— Stillman *v.* Wickham, 106 Iowa 597, 76 N. W. 1008; Steele *v.* Mills, 68 Iowa 406, 27 N. W. 294.

Kentucky.— Hall *v.* Smith, 14 Bush 604; Craig *v.* Cox, 2 Bibb 309, 5 Am. Dec. 609.

Louisiana.— Orleans, etc., R. Co. *v.* International Constr. Co., 113 La. 409, 37 So. 10; McGuire *v.* Wooldridge, 6 Rob. 47.

Maryland.— Mayhew *v.* Boyd, 5 Md. 102, 59 Am. Dec. 101; Sasscer *v.* Young, 6 Gill & J. 243.

Massachusetts.— Brigham *v.* Wentworth, 11 Cush. 123.

tracts is secured by the contract of the surety, a change as to one will not affect his liability as to the other;[75] and where the contract of a surety can be enforced by two or more parties, an alteration made by one of them may discharge the liability of the surety to that one, leaving the surety liable to the others who are innocent.[76] It is immaterial that the alteration was made without fraudulent intent,[77] or that it is not prejudicial;[78] or even that it is for the surety's benefit.[79]

Michigan.— Canadian Bank of Commerce *v.* Coumbe, 47 Mich. 358, 11 N. W. 196.

Missouri.— Schuster *v.* Weiss, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182; State *v.* McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L. R. A. 735; Mallory, etc., Co. *v.* Brent, 75 Mo. App. 473; Handley *v.* Barrows, 68 Mo. App. 623.

New Hampshire.— Watriss *v.* Pierce, 32 N. H. 560.

New York.— Vose *v.* Florida R. Co., 50 N. Y. 369; Grant *v.* Smith, 46 N. Y. 93; Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201 (holding that a surety on the bond of a building contractor is not discharged by changes made by the architect in violation of the terms of the contract); Wright Steam Engine Works *v.* McAdam, 113 N. Y. App. Div. 872, 99 N. Y. Suppl. 577 [*affirmed* in 190 N. Y. 550, 83 N. E. 1135]; American Casualty Ins. Co. *v.* Green, 70 N. Y. App. Div. 267, 75 N. Y. Suppl. 407 [*affirmed* in 178 N. Y. 580, 70 N. E. 1094]; Hyde *v.* Miller, 45 N. Y. App. Div. 396, 60 N. Y. Suppl. 974 [*affirmed* in 168 N. Y. 590, 60 N. E. 1113]; Livingston *v.* Moore, 15 N. Y. App. Div. 15, 44 N. Y. Suppl. 125; Bagley *v.* Clarke, 7 Bosw. 94; Cornell *v.* Eagan, 13 Daly 505, 1 N. Y. St. 265, 5 N. Y. St. 1; Bangs *v.* Strong, 7 Hill 250, 42 Am. Dec. 64.

Pennsylvania.— Berks County *v.* Ross, 3 Binn. 520; St. Peter's, etc., Church *v.* Bohinski, 11 Kulp 164; Nesbitt *v.* Turner, 7 Kulp 41.

South Carolina.— Greenville *v.* Armand, 51 S. C. 121, 28 S. E. 147.

Texas.— Clark *v.* Cummings, 84 Tex. 610, 19 S. W. 798; Cudahy Packing Co. *v.* Shepard, 37 Tex. Civ. App. 1, 82 S. W. 786.

Washington.— Walla Walla County *v.* Ping, 1 Wash. Terr. 339.

United States.— American Bonding Co. *v.* Pueblo Inv. Co., 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. N. S. 557; Zeigler *v.* Hollahan, 131 Fed. 205, 66 C. C. A. 1 [*affirming* 126 Fed. 788]; U. S. *v.* McIntyre, 111 Fed. 590; U. S. Glass Co. *v.* West Virginia Flint-Bottle Co., 81 Fed. 993; Mundy *v.* Stevens, 61 Fed. 77, 9 C. C. A. 366; U. S. *v.* O'Neill, 19 Fed. 567; U. S. *v.* De Visser, 10 Fed. 642; Miller *v.* Stewart, 17 Fed. Cas. No. 9,591, 4 Wash. 26; U. S. *v.* Case, 25 Fed. Cas. No. 14,743.

England.— Holme *v.* Brunskill, 3 Q. B. D. 495, 47 L. J. Q. B. 610, 38 L. T. Rep. N. S. 838; Bolton *v.* Salmon, [1891] 2 Ch. 48, 60 L. J. Ch. 239, 64 L. T. Rep. N. S. 222, 39 Wkly. Rep. 589; Whitcher *v.* Hall, 5 B. & C. 269, 8 D. & R. 22, 4 L. J. K. B. O. S. 167, 29 Rev. Rep. 244, 11 E. C. L. 458; Lowes *v.* Maughan, Cab. & E. 340; Bonar *v.* Macdonald, 3 H. L. Cas. 226, 14 Jur. 1077, 10 Eng. Reprint 87.

Canada.— Union Bank *v.* O'Gara, 22 Can. Sup. Ct. 404; Driscoll *v.* Barker, 18 N. Brunsw. 407; Reg. *v.* Mowatt, 1 Northwest Terr. 146; Farmers Loan, etc., Co. *v.* Patchett, 6 Ont. L. Rep. 255, 2 Ont. Wkly. Rep. 702; Citizens' Ins. Co. *v.* Cluxton, 13 Ont. 382; Grand Junction R. Co. *v.* Pope, 30 U. C. C. P. 633; Titus *v.* Durkee, 12 U. C. C. P. 367; Canniff *v.* Bogert, 6 U. C. C. P. 474.

See 40 Cent. Dig. tit. "Principal and Surety," § 146 *et seq.*

A surety for the performance of an award is discharged by a substitution of arbitrators (Mackay *v.* Dodge, 5 Ala. 388); or by including matters in the award not embraced in the submission (Hubbell *v.* Bissell, 2 Allen (Mass.) 196); or if the arbitrators alter the contract of the surety (Titus *v.* Durkee, 12 U. C. C. P. 367, holding that where, by the original covenant, the principal was to have insured the subject-matter, the surety is released from liability if, by the arbitration, the insurance is done away with).

75. Parke, etc., Co. *v.* White River Lumber Co., 110 Cal. 658, 43 Pac. 202; Guilford Granite Co. *v.* Harrison Granite Co., 23 App. Cas. (D. C.) 1; National Inv. Co. *v.* Schickling, 56 Minn. 283, 57 N. W. 663; Harrison *v.* Seymour, L. R. 1 C. P. 518, 12 Jur. N. S. 924, 35 L. J. C. P. 264; Skillett *v.* Fletcher, L. R. 1 C. P. 217, Harr. & R. 197, 12 Jur. N. S. 295, 35 L. J. C. P. 154, 13 L. T. Rep. N. S. 61, 14 Wkly. Rep. 435 [*affirmed* in L. R. 2 C. P. 469, 36 L. J. C. P. 206, 16 L. T. Rep. N. S. 426, 15 Wkly. Rep. 876].

76. Conn *v.* State, 125 Ind. 510, 25 N. E. 443; Kansas City School District *v.* Livers, 147 Mo. 580, 49 S. W. 507; U. S. Fidelity, etc., Co. *v.* Omaha Bldg., etc., Co., 116 Fed. 145, 53 C. C. A. 465; U. S. *v.* National Surety Co., 92 Fed. 549, 34 C. C. A. 526. See Steele *v.* Mills, 68 Iowa 406, 27 S. W. 294.

77. Harsh *v.* Klepper, 28 Ohio St. 200.

78. *Louisiana.*— McGuire *v.* Wooldridge, 6 Rob. 47.

New York.— Cornell *v.* Eagan, 13 Daly 505, 1 N. Y. St. 265, 5 N. Y. St. 1; Miller *v.* Herlich, 5 N. Y. St. 909; Bangs *v.* Strong, 7 Hill 250, 42 Am. Dec. 64.

Pennsylvania.— Berks County *v.* Ross, 3 Binn. 520, 5 Am. Dec. 383.

United States.— Clark *v.* Gerstley, 204 U. S. 504, 27 S. Ct. 337, 51 L. ed. 589; U. S. *v.* Case, 25 Fed. Cas. No. 14,743; U. S. *v.* Tillotson, 28 Fed. Cas. No. 16,524, 1 Paine 305 [*reversed* on other grounds in 12 Wheat. 180, 6 L. ed. 594].

Canada.— Canniff *v.* Bogart, 6 U. C. C. P. 474.

See 40 Cent. Dig. tit. "Principal and Surety," § 147 *et seq.*

79. *Connecticut.*— Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397.

Nor is it necessary that the alteration affect the validity of the contract; for although the surety is discharged, the principal,[80] and cosureties, who have consented to the alteration, will remain bound.[81] Inasmuch as a contract under seal cannot be varied by parol evidence, it has been held that an oral agreement between the obligee and the principal, changing the terms of a bond, will not discharge a surety thereon.[82] A waiver of some provision which is solely for the benefit of the principal or of the creditor is not such alteration as will discharge the surety.[83] The liability of the surety will not be revived by a restoration of the instrument to its original form,[84] nor by the fact that the principal attempts to perform the original agreement.[85] Alterations made without the knowledge or consent of the creditor or obligee do not affect the liability of a surety,[86] unless the creditor or obligee is put

Georgia.— Taylor *v.* Johnson, 17 Ga. 521, holding that the test in case a bond executed by a surety has been altered is whether the identity of the instrument has been destroyed so that a plea of *non est factum* would be sustained on demurrer.

Indiana.— Weir Plow Co. *v.* Walmsley, 110 Ind. 242, 11 N. E. 232.

Iowa.— Stillman *v.* Wickham, 106 Iowa 597, 76 N. W. 1008.

New York.— Ludlow *v.* Simond, 2 Cai. Cas. 1, 2 Am. Dec. 291.

Pennsylvania.— Berks County *v.* Ross, 3 Binn. 520, 5 Am. Dec. 383; Bauschard Co. *v.* New York Fidelity, etc., Co., 21 Pa. Super. Ct. 370.

South Carolina.— Greenville *v.* Ormand, 51 S. C. 121, 28 S. E. 147.

United States.—Miller *v.* Stewart, 9 Wheat. 680, 6 L. ed. 189; Zeigler *v.* Hallahan, 131 Fed. 205 [*affirming* 126 Fed. 788].

Canada.— Titus *v.* Durkee, 12 U. C. C. P. 367.

See 40 Cent. Dig. tit. "Principal and Surety," § 178.

80. Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373; Howe *v.* Peabody, 2 Gray (Mass.) 556.

81. Mundy *v.* Stevens, 61 Fed. 77, 9 C. C. A. 366.

An agreement which is void, as being without consideration (Hemery *v.* Marksberry, 57 Mo. 399; Sanford *v.* Story, 15 Misc. (N. Y.) 536, 38 N. Y. Suppl. 104), or illegal has been held not to discharge the surety (see *infra*, VIII, E, 2, i, (VI) note 45 *et seq.*).

82. *Illinois.*— Chapman *v.* McGrew, 20 Ill. 101.

New York.— Shufeldt *v.* Gustin, 2 E. D. Smith 57, holding that sureties are not relieved from liability for rent on a lease under seal because, by parol, a part of the premises was exchanged for other premises of the lessor.

Ohio.— Caldwell Furnace Foundry Co. *v.* Peck-Williamson Heating, etc., Co., 27 Ohio Cir. Ct. 665.

Texas.— Milliken *v.* Callahan County, 69 Tex. 205, 6 S. W. 681.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185.

England.— See Parker *v.* Watson, 8 Exch. 404, 22 L. J. Exch. 167.

Canada.— Peters *v.* Bryson, 11 N. Brunsw. 489.

Evidence of relation see *supra*, IV, D, 7, e.

83. Clark *v.* Jones, 1 Den. (N. Y.) 516, 43 Am. Dec. 706; Rouss *v.* Krauss, 126 N. C. 667, 36 S. E. 146; Ross *v.* Woodville, 4 Munf. (Va.) 324 (holding that if a purchaser of land cannot get such title as he bargained for, he may waive it, and his surety for the purchase-money remains bound); Reg. *v.* Mowat, 1 Northwest Terr. 146 (holding that failure of the government to inspect hay does not discharge a surety for the person furnishing it).

84. People *v.* Kneeland, 31 Cal. 288; Com. *v.* Carl, 12 Pa. Dist. 759, 6 Dauph. Co. Rep. 166; Banque Provinciale *v.* Arnoldi, 2 Ont. L. Rep. 624, holding that the liability of the surety is not revived, although he did not learn of the alteration until after the restoration. But see McAlpin *v.* Clark, 11 Ohio Cir. Ct. 524, 5 Ohio Cir. Dec. 364, holding that where the principal in a note added "with interest at 7 per cent.," according to the previous understanding between the parties, but the payee, without fraudulent intent, erased the words, and brought suit on the note as it was originally, a surety thereon was not discharged.

A motion at the trial to strike out "interest payable semi-annually," inserted by direction of the principal after the note was signed by the sureties, is refused properly. Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172.

Resigning of a note by one whose signature was erased before delivery will not prevent the sureties being released by the erasure. Connor *v.* Thornton, (Tex. Civ. App. 1899) 51 S. W. 354.

As a recognizance need not be in writing, it is not a defense to a surety that the amount was changed from one thousand dollars to two thousand dollars. A judgment can be had for the original amount. Com. *v.* McHenry, 13 Phila. (Pa.) 451.

85. O'Neal *v.* Kelley, 65 Ark. 550, 47 S. W. 409; American Casualty Ins. Co. *v.* Green, 70 N. Y. App. Div. 267, 75 N. Y. Suppl. 407 [*affirmed* in 178 N. Y. 580, 70 N. E. 1094]; Bonar *v.* Macdonald, 3 H. L. Cas. 226, 14 Jur. 1077, 10 Eng. Reprint 87.

86. *Florida.*— Williams *v.* Moseley, 2 Fla. 304.

Indiana.— Bucklen *v.* Huff, 53 Ind. 474, holding that an alteration of a note by the principal, unknown to the payee because the latter was unable to read or write, is a mere spoliation, and the right of the payee to re-

on inquiry,[87] as by an apparent erasure; [88] nor will an accidental erasure discharge a surety.[89] However, if the surety, by his negligence in leaving spaces in the instrument, has enabled the alteration to be made, an innocent creditor can hold him.[90] An alteration by an authorized agent of the creditor or of which the agent has knowledge will discharge the surety,[91] although it is otherwise if the agent making the alteration does not have any authority to make it.[92]

(B) *Material Changes.* Applying the general rule as to the effect of material alterations, alterations as to the place,[93] or time of performance or payment,[94]

cover on the note as it existed before the alteration is not affected.

Michigan.— Haines *v.* Gibson, 115 Mich. 131, 73 N. W. 126; Goldner *v.* Finn, 67 Mich. 340, 34 N. W. 590.

Nebraska.— Bingham *v.* Shadle, 45 Nebr. 82, 63 N. W. 143 (holding that where some of the sureties on an appeal-bond, after approval, erased their names therefrom without the knowledge of the obligee, cosureties are not released); Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104 (holding that an alteration of a building contract without the knowledge of the owner does not discharge the sureties on the bond of the contractor).

New York.—Henricus *v.* Englert, 137 N. Y. 488, 33 N. E. 550, holding that sureties on the bond of a subcontractor given to the original contractor are not released by reason of changes in the plans and specifications made by the subcontractor under an agreement with the owner, the original contractor being ignorant thereof.

Tennessee.— Harrison *v.* Turbeville, 2 Humphr. 242.

Vermont.— Hardwick Sav. Bank, etc., Co. *v.* Drenan, 72 Vt. 438, 48 Atl. 645.

Canada.— Reg. *v.* Mowat, 1 Northwest Terr. 146.

See 40 Cent. Dig. tit. "Principal and Surety," § 169.

But see Hindustan, etc., Bank *v.* Smith, 36 L. J. C. P. 241, 16 L. T. Rep. N. S. 518, holding that a note signed by directors of a bank, payable to the bank, is in the custody of the bank; and if the secretary strike out some of the names, the others are discharged.

87. French *v.* Graves, 50 N. Y. App. Div. 522, 64 N. Y. Suppl. 74, holding that if a bond refers to an agreement and the obligee knows that the agreement received is not the same as that referred to in the bond, he cannot claim that the surety is bound under the rule that where one of two innocent parties must suffer, he who has put it into the power of a third person to perpetrate a fraud must bear the loss.

88. Bracken County Sinking Fund Com'rs *v.* Daum, 80 Ky. 388; State *v.* Allen, 69 Miss. 508, 10 So. 473, 30 Am. St. Rep. 563; Cass County *v.* American Exch. State Bank, 11 N. D. 238, 91 N. W. 59. But see McCramer *v.* Thompson, 21 Iowa 244, holding that where a surety had his name erased with the consent of the principal before delivery, the payee could hold the cosureties for their proportion, although the erasure was apparent, and the payee had knowledge of the true relation, as he could treat them all as principals.

The burden is on a surety claiming release because of an erasure of the name of a prior surety and the substitution of another, to show the alteration, that he did not consent thereto, and that the obligee knew thereof or had notice of facts which should have put him on inquiry. Illinois University *v.* Hayes, 114 Iowa 690, 87 N. W. 664.

89. Rhoads *v.* Federick, 8 Watts (Pa.) 448.

90. Blakey *v.* Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254.

Filling blanks generally see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 159 *et seq.*; COMMERCIAL PAPER, 7 Cyc. 619 *et seq.*

91. Eckert *v.* Louis, 84 Ind. 99; Owens *v.* Tague, 3 Ind. App. 245, 29 N. E. 784; Reg. *v.* Mowat, 1 Northwest Terr. 146.

92. Charlotte, etc., R. Co. *v.* Gow, 59 Ga. 685, 27 Am. Rep. 403; Allen County *v.* U. S. Fidelity, etc., Co., 93 S. W. 44, 29 Ky. L. Rep. 356 (holding that a surety on the bond of a contractor for the construction of a courthouse is not discharged by changes made by the building committee appointed by an order providing that it should not have the power to make any changes).

93. *Arkansas.*— White River, etc., R. Co. *v.* Star Ranch, etc., Co., 77 Ark. 128, 91 S. W. 14.

California.— Pelton *v.* San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12, holding that as a note which does not designate a place of payment is payable at the place of date, the addition of a place of payment in another state discharges a surety thereon.

Indiana.— Good Roads Mach. Co. *v.* Moore, 25 Ind. App. 479, 58 N. E. 540.

Michigan.— Haines *v.* Gibson, 115 Mich. 131, 73 N. W. 126, holding, however, that where a contract provides that logs shall be put into a lake near the premises, but the route for getting them to the lake is not designated, there is no alteration of the contract if the logs are put into another lake and floated into the lake designated.

Missouri.— Singer Mfg. Co. *v.* Hibbs, 21 Mo. App. 574.

New York.— Ludlow *v.* Simond, 2 Cai. Cas. 1, 2 Am. Dec. 291, holding that a surety having agreed to make good a deficiency in the sale of property at a particular place is not liable if the sale takes place elsewhere.

See 40 Cent. Dig. tit. "Principal and Surety," § 175.

94. *Connecticut.*— Rowan *v.* Sharp's Rifle Mfg. Co., 33 Conn. 1.

Indiana.— Stayner *v.* Joice, 82 Ind. 35, holding that changing the time of payment from one day to one year discharges a surety.

or as to the amount of the obligation,[95] or date of the contract,[96] or changing the medium of payment,[97] inserting or striking out a material clause,[98] or making a joint note joint and several,[99] affixing,[1] or removing a seal,[2] or erasing the word "surety" after a signature [3] are material changes which discharge the surety.

(c) *Immaterial Changes.* Generally an alteration will be held immaterial which does not change the legal effect of the instrument,[4] or place the surety in a

Kansas.— Peru Plow, etc., Co. *v.* Ward, 1 Kan. App. 6, 41 Pac. 64, holding that a surety for the payment of three notes due at intervals of one year is discharged by an agreement that, on failure to pay any one of them, all should become due, an action being brought within two years on all the notes.

Pennsylvania.— Com. *v.* Carl, 12 Pa. Dist. 759, 6 Dauph. Co. Rep. 166.

Texas.— Clark *v.* Cummings, 84 Tex. 610, 19 S. W. 798; Butler *v.* State, 31 Tex. Cr. 63, 19 S. W. 676.

United States.— U. S. Glass Co. *v.* West Virginia Flint-Bottle Co., 81 Fed. 993.

Canada.— Citizens' Ins. Co. *v.* Cluxton, 13 Ont. 382.

See 40 Cent. Dig. tit. "Principal and Surety," § 175.

95. *Alabama.*— Moses *v.* Home Bldg., etc., Assoc., 100 Ala. 465, 14 So. 412.

Connecticut.— Rowan *v.* Sharp's Rifle Mfg. Co., 33 Conn. 1, holding that a change in a contract providing that four dollars might be retained from the price of each rifle for the payment of advances then made, so that an increased deduction was allowed for additional advances, discharges a surety.

Maine.— Dover *v.* Robinson, 64 Me. 183.

Massachusetts.— Agawam Bank *v.* Sears, 4 Gray 95; Howe *v.* Peabody, 2 Gray 556.

Michigan.— People *v.* Brown, 2 Dougl. 9.

Minnesota.— Renville County Com'rs *v.* Gray, 61 Minn. 242, 63 N. W. 635.

Missouri.— State *v.* Chick, 146 Mo. 645, 48 S. W. 829; Warden *v.* Ryan, 37 Mo. App. 466.

Nebraska.— Schlageck *v.* Widholm, (1900) 81 N. W. 448.

New York.— New York *v.* Clark, 84 N. Y. App. Div. 383, 82 N. Y. Suppl. 855; French *v.* Graves, 50 N. Y. App. Div. 522, 64 N. Y. Suppl. 74; Monroe County *v.* Clarke, 25 Hun 282 [*affirmed* in 91 N. Y. 391]; Manning *v.* Sweeting, 4 N. Y. St. 842.

Wisconsin.— Sage *v.* Strong, 40 Wis. 575.

England.—Ellesmere Brewery Co. *v.* Cooper, [1896] 1 Q. B. 75, 65 L. J. Q. B. 173, 73 L. T. Rep. N. S. 567, 44 Wkly. Rep. 254.

Canada.— Victoria Mut. F. Ins. Co. *v.* Davidson, 3 Ont. 378.

See 40 Cent. Dig. tit. "Principal and Surety," § 174.

Indorsement on the instrument of a partial payment has been held to be such an alteration as will discharge the surety. Johnston *v.* May, 76 Ind. 293; Hawkins *v.* Humble, 5 Coldw. (Tenn.) 531. But see State Solicitors' Co. *v.* Savage, 39 Fla. 703, 23 So. 413.

Inserting a provision for payment of attorney's fees is such an alteration as to amount as will discharge a surety. Kerr *v.* Iddings, 6 Ohio Cir. Ct. 604, 3 Ohio Cir. Dec. 607.

96. Brannum Lumber Co. *v.* Pickard, 33 Ind. App. 484, 71 N. E. 676; Britton *v.* Dierker, 46 Mo. 591, 2 Am. Rep. 553; Brown *v.* Straw, 6 Nebr. 536, 29 Am. Rep. 369.

97. Hanson *v.* Crawley, 41 Ga. 303; Bangs *v.* Strong, 7 Hill (N. Y.) 250, 42 Am. Dec. 64; Darwin *v.* Rippey, 63 N. C. 318; Bogarth *v.* Breedlove, 39 Tex. 561. See also Church *v.* Howard, 17 Hun (N. Y.) 5 [*reversed* on other grounds in 79 N. Y. 415].

98. Weir Plow Co. *v.* Walmsley, 110 Ind. 242, 11 N. E. 232 (holding that the addition of the clause, "all goods specified in this contract, and in the price-list attached, have been delivered to the" principal, is a material alteration); Anselm *v.* Groby, 62 Mo. App. 421; Paine *v.* Jones, 14 Hun (N. Y.) 577 [*affirmed* in 76 N. Y. 274] (holding that abrogating a clause in a mortgage providing for the release of a portion of the premises on part payment discharges a surety on a bond secured by the mortgage); Eyre *v.* Bartrop, 3 Madd. 221, 18 Rev. Rep. 216, 56 Eng. Reprint 491.

99. Eckert *v.* Louis, 84 Ind. 99; Banque Provinciale *v.* Arnoldi, 2 Ont. L. Rep. 624.

1. State *v.* Smith, 9 Houst. (Del.) 143, 31 Atl. 516; Fred Heim Brewing Co. *v.* Hazen, 55 Mo. App. 277.

2. Organ *v.* Allison, 9 Baxt. (Tenn.) 459.

3. Laub *v.* Paine, 46 Iowa 550, 26 Am. Rep. 163; Rogers *v.* Tapp, 1 Tex. App. Civ. Cas. § 1308.

4. *Illinois.*— Longan *v.* Taylor, 130 Ill. 412, 22 N. E. 745, holding that the insertion, in an official bond, of the words "from the date of this bond," does not affect the liability of the sureties.

Indiana.— State *v.* Berg, 50 Ind. 496, holding that where the bond of a township trustee provided that he should account in 1868, the insertion of "1869 and 1870" after "1868" did not discharge his sureties, as he might be compelled to account in those years even if the insertion had not been made.

Iowa.— Sawyers *v.* Campbell, 107 Iowa 397, 78 N. W. 56; Jackson *v.* Boyles, 64 Iowa 428, 20 N. W. 746, holding that where a note is payable on conditions, an indorsement thereon that the conditions have been performed is not an alteration which will discharge a surety.

Rhode Island.— Arnold *v.* Jones, 2 R. I. 345, holding that a surety on a note payable to a partnership is not discharged because it is altered so as to be payable to the same partnership by a different name.

South Carolina.—Burn *v.* Poaug, 3 Desauss. Eq. 596.

See 40 Cent. Dig. tit. "Principal and Surety," § 170 *et seq.*

different position.[5] Changes to make the instrument conform to the intention of all the parties will not release the surety, although made without his knowledge,[6] nor is a surety discharged by a subsequent collateral or auxiliary agreement between the principal and the creditor or obligee which does not vary the terms of the contract,[7] as where the principal executes a mortgage to secure the note upon which the surety is bound.[8] The addition of words more accurately describing property mentioned in the contract,[9] and procuring attesting witnesses,[10] are immaterial alterations, and do not affect the liability of the surety.

(II) *AS TO COMPENSATION.* A surety is not, as a general rule, discharged by a change in the compensation of his principal,[11] by a change in the rate of commissions allowed,[12] by a change from commissions to a salary,[13] as to the mode of payment,[14] or because a guaranty of the payment of his commissions is withdrawn.[15] If, however, the compensation was an express term in the contract of the surety, so that a change therein amounts to a new agreement between the employer and the principal, a change in the amount of compensation,[16] or a change

5. Creede First Nat. Bank *v.* Miner, 9 Colo. App. 361, 48 Pac. 837 (holding that an alteration of a trust deed reciting that a surety had agreed to become surety on a renewal note also is immaterial if the surety had signed the renewal note before the alteration was made); Roach *v.* Summers, 20 Wall. (U. S.) 165, 22 L. ed. 252.

6. Busjahn *v.* McLean, 3 Ind. App. 281, 29 N. E. 494 (holding that raising the amount of a note will not release a surety in a court having both law and equity powers, where the note, as corrected, conforms to the intent of all the parties); Mattingly *v.* Riley, 49 S. W. 799, 20 Ky. L. Rep. 1621; Standard Underground Cable Co. *v.* Stone, 35 N. Y. App. Div. 62, 54 N. Y. Suppl. 383 (holding that where a corporation agreed to give a bond with its president, treasurer, and another person as sureties, but the bond, as drawn, named the latter two only, the signature of the president after the other two had signed, was not a material alteration); McAlpin *v.* Clark, 11 Ohio Cir. Ct. 524, 5 Ohio Cir. Dec. 364 (holding that where the rate of interest originally agreed upon is inserted by the maker after a note has been signed by a surety, and the payee thereafter strikes out the alteration, the surety is not discharged).

7. *Kentucky.*— Heddrick *v.* Huffaker, 80 S. W. 1130, 26 Ky. L. Rep. 201, enlarging territory for sale of goods.

Maryland.— American Bonding Co. *v.* Progressive Permanent Bldg. Loan, etc., Assoc., 101 Md. 323, 61 Atl. 199.

Missouri.— St. Louis Bd. of Education *v.* National Surety Co., 183 Mo. 166, 82 S. W. 70; N. K. Fairbank Co. *v.* American Bonding, etc., Co., 97 Mo. App. 205, 70 S. W. 1096, holding that where the contract secured was the printing of certain wrappers with paper to be furnished by the obligee, an agreement by the printing company, as each lot of paper was delivered, acknowledging receipt of the paper as bailee, and agreeing to print and return the identical paper as wrappers, does not affect the liability of a surety on a bond indemnifying the obligee against misappropriation of the paper.

Nebraska.—Anderson *v.* Hall, 4 Nebr. (Unoff.) 494, 94 N. W. 981.

New York.— Ellis *v.* McCormick, 1 Hilt. 313.

Ohio.— Stuts *v.* Strayer, 60 Ohio St. 384, 54 N. E. 368, 71 Am. St. Rep. 723.

Tennessee.— Bryan *v.* Henderson, 88 Tenn. 23, 12 S. W. 338.

Washington.— Kittridge *v.* Stegmier, 11 Wash. 3, 39 Pac. 242.

United States.— McGuire *v.* Gerstley, 204 U. S. 489, 27 S. Ct. 332, 51 L. ed. 581; U. S. Glass Co. *v.* Mathews, 89 Fed. 828, 32 C. C. A. 364; St. Louis Brewing Assoc. *v.* Hayes, 71 Fed. 110, 17 C. C. A. 634; Pascault *v.* Cochran, 34 Fed. 358.

8. Springfield Engine, etc., Co. *v.* Park, 3 Ind. App. 173, 29 N. E. 444; Headlee *v.* Jones, 43 Mo. 235; Morgan *v.* Martin, 32 Mo. 438; Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843.

Effect of obtaining additional security see *supra*, VII, C.

9. Starr *v.* Blatner, 76 Iowa 356, 41 N. W. 41; Rowley *v.* Jewett, 56 Iowa 492, 9 N. W. 353.

10. Heard *v.* Tappan, 121 Ga. 437, 49 S. E. 292.

11. Wallace *v.* Spencer Exch. Bank, 126 Ind. 265, 26 N. E. 175; Domestic Sewing Mach. Co. *v.* Webster, 47 Iowa 357; Loving *v.* Auditor Public Accounts, 76 Va. 942; Frank *v.* Edwards, 8 Exch. 214, 22 L. J. Exch. 42. But see Bagley *v.* Clarke, 7 Bosw. (N. Y.) 94.

12. Amicable Mut. L. Ins. Co. *v.* Sedgwick, 110 Mass. 163; Taylor *v.* Standard L., etc., Ins. Co., 47 Nebr. 673, 66 N. W. 647; Harper *v.* National L. Ins. Co., 56 Fed. 281, 5 C. C. A. 505; Smith *v.* Addison, 22 Fed. Cas. No. 12,998, 5 Cranch C. C. 623.

13. Socialistic Co-operative Pub. Assoc. *v.* Hoffmann, 12 Misc. (N. Y.) 440, 33 N. Y. Suppl. 695; Toronto Bank *v.* Wilmot, 19 U. C. Q. B. 73.

14. Phœnix Mut. L. Ins. Co. *v.* Holloway, 51 Conn. 310, 50 Am. Rep. 21.

15. Amicable Mut. L. Ins. Co. *v.* Sedgwick, 110 Mass. 163; Travelers' Ins. Co. *v.* Stiles, 82 N. Y. App. Div. 441, 81 N. Y. Suppl. 664.

16. American Casualty Co. *v.* Green, 178 N. Y. 580, 70 N. E. 1094 [*affirming* 70 N. Y. App. Div. 267, 75 N. Y. Suppl. 407]; Bagley

from a salary to a commission,[17] is held to be such a material alteration as will discharge the surety.

(III) *As to Duties.* As a general rule a surety is discharged by a material change or enlargement of the duties of his principal,[18] or in the place of employment,[19] but not by a mere change in the designation of the office of the principal, without a material change in his duties.[20] If the nature of the duties of the office are not recited in the contract, they are those which plainly and commonly belong to the class of employment by which the principal is designated.[21] Imposing additional duties on the principal, not materially changing or incompatible with his former ones, will not discharge the surety, the default not being connected with the added duties,[22] although it is otherwise if the added duties have enlarged the responsibility of the principal enabling him to commit the default.[23] If the principal already holds another office at the time the surety enters into his contract, the surety cannot urge the other duties as a defense;[24] but if the principal occupies two offices, and his surety became liable for the duties of the two offices combined,

v. Clarke, 7 Bosw. (N. Y.) 94; Rex *v.* Herron, [1903] 2 Ir. 474; Holland *v.* Lea, 2 C. L. R. 532, 9 Exch. 430, 23 L. J. Exch. 122; Bonar *v.* Macdonald, 3 H. L. Cas. 226, 14 Jur. 1077, 10 Eng. Reprint 87.

17. Germania F. Ins. Co. *v.* Lange, 193 Mass. 67, 78 N. E. 746; Victor Sewing-Mach. Co. *v.* Langham, 28 Fed. Cas. No. 16,935, 9 Biss. 183; North Western, etc., R. Co. *v.* Whinray, 2 C. L. R. 1207, 10 Exch. 77, 23 L. J. Exch. 261, 2 Wkly. Rep. 523; Canada Agricultural Ins. Co. *v.* Watt, 30 U. C. C. P. 350.

18. *Alabama.*— Rapier *v.* Louisiana Equitable L. Ins. Co., 57 Ala. 100, holding that sureties for a special agent are not liable after he is made a general agent.

Arkansas.— Singer Mfg. Co. *v.* Buyette, 74 Ark. 600, 86 S. W. 673, 109 Am. St. Rep. 104.

California.— Victor Sewing Mach. Co. *v.* Scheffler, 61 Cal. 530.

Illinois.— Stevens *v.* Partridge, 109 Ill. App. 486.

Massachusetts.—Grocers' Bank *v.* Kingman, 16 Gray 473; Boston Hat Manufactory *v.* Messinger, 2 Pick. 223.

Minnesota.— Fidelity Mut. L. Assoc. *v.* Dewey, 83 Minn. 389, 86 N. W. 423, 54 L. R. A. 945.

Missouri.— Singer Mfg. Co. *v.* Hibbs, 21 Mo. App. 574.

New York.— Tradesmen's Nat. Bank *v.* National Surety Co., 169 N. Y. 563, 62 N. E. 670 [*affirming* 66 N. Y. Suppl. 1146] (holding that sureties for an agent who is to make sales only are not liable after authority is given to the agent to make collection of the proceeds of such sales); Monroe County *v.* Clarke, 25 Hun 282 [*affirmed* in 92 N. Y. 391].

Canada.— Van Allan *v.* Wigle, 7 U. C. C. P. 459

See 40 Cent. Dig. tit. "Principal and Surety," § 146 *et seq.*

If such change be temporary only, the surety may not be discharged. Weston *v.* Conron, 15 Ont. 595.

19. Good Roads Mach. Co. *v.* Moore, 25 Ind. App. 479, 58 N. E. 540; Singer Mfg. Co. *v.* Hibbs, 21 Mo. App. 574.

20. Walsh *v.* Miller, 51 Ohio St. 462, 38 N. E. 381; Murray *v.* Gibson, 28 Grant Ch. (U. C.) 12.

21. Lieberman *v.* Wilmington First Nat. Bank, (Del. 1898) 40 Atl. 382; Salem *v.* McClintock, 16 Ind. App. 656, 46 N. E. 39, 59 Am. St. Rep. 330.

Oral evidence may be introduced to show the terms of the employment of the principal. Southern Cotton Oil Co. *v.* Bass, 113 Ala. 603, 21 So. 227.

22. *Alabama.*— Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210.

Indiana.— Wallace *v.* Exchange Bank, 126 Ind. 265, 26 N. E. 175.

Massachusetts.— Rollstone Nat. Bank *v.* Carleton, 136 Mass. 226.

Missouri.— St. Louis Third Nat. Bank *v.* Owen, 101 Mo. 558, 14 S. W. 632; Home Sav. Bank *v.* Traube, 75 Mo. 199, 42 Am. Rep. 402 [*reversing* 6 Mo. App. 221]; Hibernia Sav. Bank *v.* McGinnis, 9 Mo. App. 578; Home L. Ins. Co. *v.* Potter, 4 Mo. App. 595.

New York.— New York *v.* Kelly, 98 N. Y. 467, 50 Am. Rep. 699; Monroe County *v.* Clarke, 25 Hun 282 [*affirmed* in 92 N. Y. 391].

Pennsylvania.— Harrisburg Sav., etc., Assoc. *v.* U. S. Fidelity, etc., Co., 197 Pa. St. 177, 46 Atl. 910; Shackamaxon Bank *v.* Yard, 150 Pa. St. 351, 24 Atl. 635, 30 Am. St. Rep. 807.

England.— Skillett *v.* Fletcher, L. R. 2 C. P. 469, 36 L. J. C. P. 206, 16 L. T. Rep. N. S. 426, 15 Wkly. Rep. 876.

Canada.— Trent, etc., Road Co. *v.* Marshall, 10 U. C. C. P. 329.

See 40 Cent. Dig. tit. "Principal and Surety," § 156.

23. State *v.* Holman, 96 Mo. App. 193, 68 S. W. 965; Kellogg *v.* American Ins. Co., 62 N. J. Eq. 811, 48 Atl. 1117 [*affirming* 58 N. J. Eq. 344, 44 Atl. 190]; Mumford *v.* Memphis, etc., R. Co., 2 Lea (Tenn.) 393, 31 Am. Rep. 616; Pybus *v.* Gibb, 6 E. & B. 902, 3 Jur. N. S. 315, 26 L. J. Q. B. 41, 5 Wkly. Rep. 44, 88 E. C. L. 902.

24. Boyd *v.* Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986.

a removal of the principal from one has been held to discharge the surety.[25] Sureties are not discharged because the duties of the principal are increased by the natural growth of the business in which he is engaged;[26] nor does an increase in the capital of the obligee discharge the sureties of a cashier.[27] If the sureties have undertaken to become liable for all of the duties to which the principal may be assigned a change therein will not affect their liability.[28] While the resignation of a treasurer necessarily makes him a custodian of money in an individual rather than in an official capacity, his surety will not be discharged.[29] Whether a change in regard to making remittances will discharge a surety depends, as is usual in these cases, on whether the making of remittances was a term in the contract for which the surety expressly or impliedly agreed to become liable, if not a term in the contract, a surety will not be discharged, in the absence of injury occasioned thereby,[30] nor will a surety for an agent be discharged by a change in the rules governing his conduct, allowing him to give credit instead of requiring payment in cash.[31]

(IV) *AS TO PARTIES TO THE CONTRACT.* A surety is discharged by the erasure of the name of the principal,[32] or of a cosurety;[33] or by a substitution of principals,[34] or of cosureties;[35] or by a change in the name of the payee of a

25. Rex *v.* Herron, [1903] 2 Ir. 474.

26. Coombs *v.* Harford, 99 Me. 426, 59 Atl. 529 (holding that sureties for a trustee of a lodge are not discharged by a change or an increase in the membership); Strawbridge *v.* Baltimore, etc., R. Co., 14 Md. 360, 74 Am. Dec. 541 (holding that where a person was appointed ticket and freight agent at a second class station, his sureties are not discharged because it is made a first class station, the only difference being that a greater amount of freight is paid at a first class station); Lexington, etc., R. Co. *v.* Elwell, 8 Allen (Mass.) 371 (holding that sureties for the treasurer of a railway company are not discharged by the corporation assuming the entire management of the road after having leased it).

27. Lionberger *v.* Krieger, 88 Mo. 160 [*affirming* 13 Mo. App. 313]; McAuley *v.* Cooley, 47 Nebr. 165, 66 N. W. 304; Morris Canal, etc., Co. *v.* Van Vorst, 21 N. J. L. 100.

28. New York Fourth Nat. Bank *v.* Spinney, 47 Hun (N. Y.) 293 [*affirmed* in 120 N. Y. 560, 24 N. E. 816]; Lane's Appeal, 112 Pa. St. 499, 5 Atl. 776.

Where the right to change duties is reserved in the contract of suretyship the surety is not discharged by a change within the limits of the reservation. Prudential Ins. Co. *v.* Berger, 16 N. Y. Suppl. 515.

29. Stemmermann *v.* Lilienthal, 54 S. C. 440, 32 S. E. 535.

30. Lake *v.* Thomas, 84 Md. 608, 36 Atl. 437.

31. Richmond, etc., R. Co. *v.* Kasey, 30 Gratt. (Va.) 218.

32. Martin *v.* Thomas, 24 How. (U. S.) 315, 16 L. ed. 689.

33. *Iowa.*— State *v.* Craig, 58 Iowa 238, 12 N. W. 301; McCramer *v.* Thompson, 21 Iowa 244; Hall *v.* McHenry, 19 Iowa 521, 87 Am. Dec. 451.

Kentucky.— Bracken County Sinking Fund Com'rs *v.* Daum, 80 Ky. 388.

Louisiana.—Pratt's Succession, 16 La. Ann. 357; Bradley *v.* Trousdale, 15 La. Ann. 206.

Mississippi.— State *v.* Allen, 69 Miss. 508, 10 So. 473, 30 Am. St. Rep. 563.

Missouri.— Briggs *v.* Glenn, 7 Mo. 572.

Nebraska.— Hagler *v.* State, 31 Nebr. 144, 47 N. W. 692, 28 Am. St. Rep. 514.

New York.— Burns *v.* Robbins, 1 Code Rep. 62.

North Dakota.— Cass County *v.* American Exch. State Bank, 11 N. D. 238, 91 N. W. 59.

Tennessee.— Mitchell *v.* Burton, 2 Head 613.

Texas.— Connor *v.* Thornton, (Civ. App. 1899) 51 S. W. 354; Davis *v.* State, 5 Tex. App. 48; Wilbarger County *v.* Bean, 3 Tex. App. Civ. Cas. § 16.

Virginia.— Blanton *v.* Com., 91 Va. 1, 20 S. E. 884.

United States.— Smith *v.* U. S., 2 Wall. 219, 17 L. ed. 788.

England.— Hindustan, etc., Bank *v.* Smith, 36 L. J. C. P. 241, 16 L. T. Rep. N. S. 518.

See 40 Cent. Dig. tit. "Principal and Surety," § 274.

But see Landis *v.* Keller, 13 Phila. (Pa.) 501, holding that a surety on a note cannot defend an action on the ground that the name of a cosurety was cut off, such cosurety having paid his share, and there not being any improper intent in the mutilation.

34. Vincent *v.* People, 25 Ill. 500; Georgetown First Nat. Bank *v.* Gatewood, 39 S. W. 509, 19 Ky. L. Rep. 225.

35. *Indiana.*— State *v.* Polke, 7 Blackf. 27.

Missouri.— State *v.* McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L. R. A. 735.

New York.— Cobb *v.* Lackey, 6 Duer 649.

North Carolina.— Davis *v.* Coleman, 29 N. C. 424.

Washington.— Fairhaven *v.* Cowgill, 8 Wash. 686, 36 Pac. 1093.

See 40 Cent. Dig. tit. "Principal and Surety," § 183.

Novation of the contract discharges a surety thereon. Gower *v.* Halloway, 13 Iowa 154.

note;[36] or in the capacity in which he acts;[37] or by the addition of cosureties;[38] but the addition of supplemental sureties will not affect the liability of the surety.[39]

(v) *As to Extension of Credit.* If the surety has stipulated that his liability shall not exceed a certain amount, an extension of credit to the principal for a larger amount is not an alteration which discharges the surety;[40] but if the agreement between the creditor and the principal provided that the latter should not receive credit beyond that amount an extension of credit beyond the amount specified discharges the surety.[41]

(vi) *As to Interest.* Adding a clause to a note, calling for the payment of interest,[42] or changing the time when interest is to begin,[43] the time payable,[44] or the rate,[45] discharges the surety; but a collateral agreement for a changed

36. Bell *v.* Mahin, 69 Iowa 408, 29 N. W. 331; Robinson *v.* Berryman, 22 Mo. App. 509.

37. Hodge *v.* Farmers' Bank, 7 Ind. App. 94, 34 N. E. 123 (holding that writing "cashier" after the name of the payee is a material alteration, as the note thus becomes payable to a bank); Jackson *v.* Cooper, 39 S. W. 39, 19 Ky. L. Rep. 9 (holding that inserting "guardian" after the name of the payee discharges a surety).

38. *Indiana.*— Crandall *v.* Auburn First Nat. Bank, 61 Ind. 349; Owens *v.* Tague, 3 Ind. App. 245, 29 N. E. 784.

Iowa.— Berryman *v.* Manker, 56 Iowa 150, 9 N. W. 103; Hall *v.* McHenry, 19 Iowa 521, 87 Am. Dec. 451.

Kentucky.— M. Rumley Co. *v.* Wilcher, 66 S. W. 7, 23 Ky. L. Rep. 1745.

Massachusetts.— Howe *v.* Peabody, 2 Gray 556.

Nebraska.— State *v.* Paxton, 65 Nebr. 110, 90 N. W. 983.

New Hampshire.— See New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

New York.— McVean *v.* Scott, 46 Barb. 379.

United States.— Long *v.* Oneale, 15 Fed. Cas. No. 8,481, 1 Cranch C. C. 233.

England.— Gardner *v.* Walsh, 5 E. & B. 83, 1 Jur. N. S. 828, 24 L. J. Q. B. 285, 3 Wkly. Rep. 460, 85 E. C. L. 82.

See 40 Cent. Dig. tit. "Principal and Surety," § 183.

Compare Taylor *v.* Johnson, 17 Ga. 521.

Forged names of cosureties, added by the principal, do not release prior sureties. Tarbill *v.* Richmond City Mills Works, 2 Ohio Cir. Ct. 564, 1 Ohio Cir. Dec. 643.

39. Bowser *v.* Rendell, 31 Ind. 128; Commercial Bank *v.* Layne, 101 Tenn. 45, 46 S. W. 762.

A guaranty added to a note does not release a surety thereon. Anderson *v.* Hall, 4 Nebr. (Unoff.) 494, 94 N. W. 981.

40. *California.*— Bateman Bros. *v.* Mapel, 145 Cal. 241, 78 Pac. 734.

Maryland.— Clagett *v.* Salmon, 5 Gill & J. 314.

North Carolina.— Rouss *v.* Krauss, 126 N. C. 667, 36 S. E. 146.

Pennsylvania.— Bentz's Estate, 14 Phila. 258; Crompton's Estate, 9 Pa. Co. Ct. 134.

South Carolina.— Rouss *v.* King, 69 S. C. 168, 48 S. E. 220.

Texas.— Fuqua *v.* Pabst Brewing Co., (Civ. App. 1896) 36 S. W. 479.

United States.— Fertig *v.* Bartles, 78 Fed. 866.

England.— Gordon *v.* Rae, 8 E. & B. 1065, 4 Jur. N. S. 530, 27 L. J. Q. B. 185, 92 E. C. L. 1065; Seller *v.* Jones, 16 L. J. Exch. 20, 16 M. & W. 112.

41. Köppitz-Melchers Brewing Co. *v.* Schultz, 68 Ohio St. 407, 67 N. E. 719; Gerke *v.* Wiedemann Brewing Co., 20 Ohio Cir. Ct. 174, 11 Ohio Cir. Dec. 206.

42. *Alabama.*— Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272.

Indiana.— Hart *v.* Clouser, 30 Ind. 210; Kountz *v.* Hart, 17 Ind. 329; Moore *v.* Hinshaw, 23 Ind. App. 267, 55 N. E. 236, 77 Am. St. Rep. 434, holding that a surety is released by the subsequent insertion of the rate, although the agreement was that the note should bear such rate.

Kentucky.— Locknane *v.* Emmerson, 11 Bush 69.

Ohio.— Jones *v.* Bangs, 40 Ohio St. 139, 48 Am. Rep. 664.

South Carolina.— Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743.

See 40 Cent. Dig. tit. "Principal and Surety," § 176.

43. Benedict *v.* Miner, 58 Ill. 19; Franklin L. Ins. Co. *v.* Courtney, 60 Ind. 134, holding that interlining the words "after maturity" after the provision for the payment of interest, discharges a surety, although the amount of the note had been left blank to be filled up.

44. Marsh *v.* Griffin, 42 Iowa 403; Patterson *v.* McNeeley, 16 Ohio St. 348 (holding that where the word "paid" is inserted before "annually" in the clause: "The above to be at ten per cent. interest annually," a surety is released from all liability on the note); Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172; Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555.

45. *Minnesota.*— Fillmore County *v.* Greenleaf, 80 Minn. 242, 83 N. W. 157, where the rate was reduced.

Ohio.— Thompson *v.* Massie, 41 Ohio St. 307; Harsh *v.* Klepper, 28 Ohio St. 200; McDowell *v.* Reese, 10 Ohio Dec. (Reprint) 303, 20 Cinc. L. Bul. 102.

South Carolina.— Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770, 32 S. C. 238, 10 S. E. 943, 7 L. R. A. 743.

Texas.— Casey-Swasey Co. *v.* Anderson, 37 Tex. Civ. App. 223, 83 S. W. 840.

rate,[46] or that the interest is to cease after a certain time,[47] has been held not to affect the liability of the surety, even though such independent agreement is indorsed on the note itself.[48]

(VII) *DIVERSION OF INSTRUMENT.* If one becomes a surety on a note or other instrument for a specified purpose, according to the agreement of the parties, he is not liable if it is used for a different purpose without his consent,[49] to any one having notice or knowledge of such purpose and the diversion of the instrument;[50] but one who takes the instrument without notice or knowledge of the diversion from the use for which the surety executed it may hold the surety,[51]

Canada.— Bristol, etc., Land Co. *v.* Taylor, 24 Ont. 286.

See 40 Cent. Dig. tit. "Principal and Surety," § 176.

Usurious rate.—An alteration of a note to make it bear eight instead of six per cent interest will not release a surety thereon, the undertaking to pay more than six per cent being void. Keene *v.* Miller, 103 Ky. 628, 45 S. W. 1041, 20 Ky. L. Rep. 279.

46. *Indiana.*— Bucklen *v.* Huff, 53 Ind. 474; Huff *v.* Cole, 45 Ind. 300.

Massachusetts.— Cambridge Sav. Bank *v.* Hyde, 131 Mass. 77, 41 Am. Rep. 193.

Missouri.— Hemery *v.* Marksberry, 57 Mo. 399.

New York.— Sanford *v.* Story, 15 Misc. 536, 38 N. Y. Suppl. 104.

Texas.— Claiborne *v.* Birge, 42 Tex. 98. A collateral agreement between the principal and the payee of a note to pay usurious interest will not avoid the note as to the sureties thereon, as the collateral agreement is void. Terrell *v.* Barrack, 2 Tex. App. Civ. Cas. § 667.

Vermont.— Richmond *v.* Standclift, 14 Vt. 258.

See 40 Cent. Dig. tit. "Principal and Surety," § 176.

47. Wheeler *v.* Washburn, 24 Vt. 293.

48. Bucklen *v.* Huff, 53 Ind. 474; Cambridge Sav. Bank *v.* Hyde, 131 Mass. 77, 41 Am. Rep. 193; Sanford *v.* Story, 15 Misc. (N. Y.) 536, 38 N. Y. Suppl. 104. But see Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743.

49. Johnston *v.* May, 76 Ind. 293; Bonser *v.* Cox, 6 Beav. 110, 8 Jur. 387, 13 L. J. Ch. 260, 49 Eng. Reprint 767, holding that a surety on a note, the consideration of which was expressed to be a draft at three months' date, cannot be enforced by the payee if the latter immediately, without discount, advances the money to the principal.

Cosurety without knowledge of representations.— If a principal procure one to sign a note with him as surety upon the representation that the money raised thereon shall be paid upon debts on which the surety is already bound for him, a cosurety is not affected by such representation, when the money thus raised is paid on a debt for which he is sole surety for the principal, unless he had knowledge of such representation. Flanagan *v.* Post, 45 Vt. 246.

50. *Indiana.*— Ham *v.* Greve, 34 Ind. 18.

Kentucky.— Russell *v.* Ballard, 16 B. Mon. 201, 63 Am. Dec. 526.

Mississippi.— Chaffe *v.* Taliaferro, 58 Miss. 544 (where a trust deed securing the note showed the purpose of the transaction); Herring *v.* Winans, Sm. & M. Ch. 466.

New York.— Benjamin *v.* Rogers, 126 N. Y. 60, 26 N. E. 970 [*reversing* 57 Hun 588, 10 N. Y. Suppl. 777]; Lee *v.* Highland Bank, 2 Sandf. Ch. 311.

Tennessee.— Hickerson *v.* Raiguel, 2 Heisk. 329.

Vermont.— Harrington *v.* Wright, 48 Vt. 427.

Wisconsin.— Moulton *v.* Posten, 52 Wis. 169, 8 N. W. 621.

See 40 Cent. Dig. tit. "Principal and Surety," § 144.

Diversions discharging sureties.—A note given for the purpose of being used as collateral security for an existing debt, and used to obtain additional credit. Archer *v.* Hudson, 7 Beav. 551, 8 Jur. 761, 13 L. J. Ch. 380, 29 Eng. Ch. 551, 49 Eng. Reprint 1180 [*affirmed* in 15 L. J. Ch. 211]. A note intended as a renewal of an existing note, and used to obtain an additional loan. Harrington *v.* Wright, 48 Vt. 427. A note executed to enable the principal to obtain future credit, and applied on (Ham *v.* Greve, 34 Ind. 18; Haworth *v.* Crosby, 120 Iowa 612, 94 N. W. 1098; Crossley *v.* Stanley, 112 Iowa 24, 83 N. W. 806, 84 Am. St. Rep. 321; Planters' State Bank *v.* Schlamp, 99 S. W. 216, 30 Ky. L. Rep. 473; Chaffe *v.* Taliaferro, 58 Miss. 544; Benjamin *v.* Rogers, 126 N. Y. 60, 26 N. E. 970 [*reversing* 10 N. Y. Suppl. 777]), or retained as security for an existing debt (Bushey *v.* Reynolds, 31 Ark. 657).

It is immaterial that there was no fraud on the part of the creditor, and that the surety was not injured by the particular diversion. Gano *v.* Farmers' Bank, 103 Ky. 508, 45 S. W. 519, 20 Ky. L. Rep. 197, 82 Am. St. Rep. 596.

Diversion of proceeds.—In an action against sureties on a note it is no defense that the money raised on the note was, by the principal maker, diverted from the use intended, and in consideration of which the sureties signed, and that plaintiff had knowledge of the diversion. Hefferlin *v.* Krieger, 19 Mont. 123, 47 Pac. 638.

51. Chalaron *v.* McFarlane, 9 La. 227; Citizens' Nat. Bank *v.* Durrill, 61 Mo. App. 543 (restrictions imposed before negotiation); McWilliams *v.* Mason, 31 N. Y. 294 [*reversing* 6 Duer 276].

Filling blanks see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 159 *et seq*; COMMERCIAL PAPER, 7 Cyc. 619 *et seq.*

and a surety cannot complain that a note was used for a purpose different from the one he supposed it would be.[52] In some cases the rule is, that where a note is signed by a surety for the purpose of obtaining a discount, it is immaterial by whom the money is advanced, provided the purpose has been accomplished, and although the note may be sold to another than the payee,[53] or, such is the result if the party who takes such note has no knowledge of any limitation upon the purpose of the instrument imposed by the surety, the fact that it is made to a particular payee being considered insufficient to give such notice,[54] or where there is a general intention to become surety to raise money without regard to whom the note should be passed.[55] In other cases, however, it is held that if a note is not delivered to the payee but is sold to a third person without the consent of the sureties thereon it cannot be enforced against them.[56]

52. Davis *v.* Atlanta Nat. Bank, 66 Ga. 651 (holding that a note payable to a particular person or bearer is negotiable, and if two sign it as sureties, and intrust it to the principal debtor or maker, who places it in the hands of bearer as collateral to secure another note given by the maker, the sureties are not discharged from paying it, although they expected it to be used only to borrow money for the principal from the payee in the note); Farmers' Bank *v.* Burchard, 33 Vt. 346.

53. *Alabama.*— Planters', etc., Bank *v.* Blair, 4 Ala. 613.

Kentucky.— Ward *v.* Northern Bank, 14 B. Mon. 351 [*overruling* in effect Conway *v.* U. S. Bank, 6 J. J. Marsh. 128]; Smith *v.* Moberly, 10 B. Mon. 266, 52 Am. Dec. 543; Browning *v.* Fountain, 1 Duv. 13.

Mississippi.— Commercial Bank *v.* Claiborne, 5 How. 301.

Montana.— See Hefferlin *v.* Krieger, 19 Mont. 123, 47 Pac. 638.

New Hampshire.— Hunt *v.* Aldrich, 27 N. H. 31.

Vermont.— Middlebury Bank *v.* Bingham, 33 Vt. 621; Montpelier Bank *v.* Joyner, 33 Vt. 481. So where several as sureties execute a note to raise money to pay any note on which one of such sureties is sole surety and to whom the new note is delivered to get it discounted, and before the latter note is discounted and on the faith of it, such sole surety pays the note on which he is surety out of his own funds he is not bound to surender the new note to his cosureties. Flanagan *v.* Post, 45 Vt. 246.

See 40 Cent. Dig. tit. "Principal and Surety," § 144. And as to right so to dispose of notes generally drawn for discount see COMMERCIAL PAPER, 7 Cyc. 688 note 80.

Suing in name of payee see COMMERCIAL PAPER, 8 Cyc. 66 *et seq.*

54. Utica Bank *v.* Ganson, 10 Wend. (N. Y.) 314, as to the construction of which see Benjamin *v.* Rogers, 126 N. Y. 60, 26 N. E. 970, where, however, the party taking the note had knowledge and the sureties were discharged.

55. Perkins *v.* Ament, 2 Head (Tenn.) 110, holding, however, that if the surety became such with the intention that it should be passed to the payee only, the surety would not be bound if the note was never passed to the payee.

56. *Iowa.*— Howe *v.* Selby, 53 Iowa 670, 6 N. W. 39.

Maine.— Chase *v.* Hathorn, 61 Me. 505 (holding that the surety's consent may be implied from the conduct of the parties, or that he may ratify the act of the principal); Granite Bank *v.* Ellis, 43 Me. 367.

Massachusetts.— Prescott *v.* Prinsley, 6 Cush. 233.

North Carolina.— Parker *v.* McDowell, 95 N. C. 219, 59 Am. Rep. 235 (holding that where a note for discount is made payable to the cashier of a bank and discount is refused, it cannot be enforced against sureties if it is then sold to a stranger, but that where the note is made payable to the accommodation indorser and is indorsed by him to be discounted at a particular bank, the indorsers are liable, although it was sold to another); Southerland *v.* Whitaker, 50 N. C. 5; Dewey *v.* Cochran, 49 N. C. 184 (in both of which cases the notes were payable to the cashier of a bank).

Ohio.— Clinton Bank *v.* Ayres, 16 Ohio 282.

Pennsylvania.— Janes *v.* Benson, 155 Pa. St. 489, 26 Atl. 752, 35 Am. St. Rep. 899.

South Carolina.— Greenville *v.* Ormand, 51 S. C. 58, 28 S. E. 50, 64 Am. St. Rep. 663, 39 L. R. A. 847, note payable to the cashier of a bank.

Texas.— Eck *v.* Schuermeyer, (Civ. App. 1895) 29 S. W. 241.

See 40 Cent. Dig. tit. "Principal and Surety," § 144.

Delay in delivery to bank.— Where a note made payable to plaintiff bank was handed by the maker to the president thereof, who received it individually, and not as president, and advanced the amount of the note, but did not discount the note with the bank until two years afterward, having forgotten to do so in the meantime, there was a sufficient delivery of the same to the bank to bind the sureties thereon. Farmers' Bank *v.* Couch, 118 N. C. 436, 24 S. E. 737.

Note held by creditor upon refusal of bank to discount.— Where a note with sureties was intended to be discounted by a bank, and the proceeds applied in paying a note held by the bank, and the balance to be applied in payment of debts due by the principal to a third person, and such third person was given the note to be presented to the bank, but the latter refused to dis-

(VIII) *BUILDING CONTRACTS.* Material changes in building contracts discharge sureties on bonds given to secure their performance,[57] but immaterial changes involving neither extra expense nor time do not.[58] Thus material changes in the plans or specifications,[59] such as increasing the dimensions,[60] or the amount to be paid the contractor,[61] will discharge the sureties; but an immaterial change in location will not.[62] The fact that the owner permitted the principal to complete the work after the contract time,[63] or that the obligee, in completing the

count it, and such third person obtained judgment on the note in the name of the payee, claiming that, after refusal of the bank to discount it, he was authorized to retain it as security, it was held that the judgment should be held first for the person paying the debt to the bank, and, second, for the satisfaction of the claims of the third person. Tysor *v.* Lutterloh, 57 N. C. 247.

57. *Arkansas.*— O'Neal *v.* Kelley, 65 Ark. 550, 47 S. W. 409, holding also that it does not make any difference that the change was made upon the assurance to the owner by the contractor that the liability of the sureties would not be affected thereby.

Connecticut.— Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397.

Indiana.— Guthrie *v.* Carpenter, 162 Ind. 417, 70 N. E. 486.

Iowa.— McConnell *v.* Poor, 113 Iowa 133, 84 N. W. 968, 52 L. R. A. 312.

Missouri.— Kane *v.* Thuener, 62 Mo. App. 69; Eldridge *v.* Fuhr, 59 Mo. App. 44.

Tennessee.— Southern Bridge Co. *v.* Bogenshot, (Ch. App. 1897) 48 S. W. 97.

Texas.— Thompson *v.* Chaffee, 39 Tex. Civ. App. 567, 89 S. W. 285.

See 40 Cent. Dig. tit. "Principal and Surety," § 162 *et seq.*

If alterations are expressly provided for in the contract a surety is not discharged by their being made. Burnes *v.* Fidelity, etc., Co., 96 Mo. App. 467, 70 S. W. 518. And see Drumheller *v.* American Surety Co., 30 Wash. 530, 71 Pac. 25.

Novation.— Where two contractors agree to erect a house, and the work is begun by one, but he abandons it, an undertaking by the other to complete the work is not a novation, but in pursuance of the original contract. Adams *v.* Haigler, 123 Ga. 659, 51 S. E. 638.

58. St. Louis Bd. of Education *v.* National Surety Co., 183 Mo. 166, 82 S. W. 70; Kunzweiler *v.* Lehman, 34 Misc. (N. Y.) 466, 70 N. Y. Suppl. 290; Henricus *v.* Englert, 17 N. Y. Suppl. 235.

Failure of the owner to insure the building as agreed is immaterial, there not having been a fire. Schreiber *v.* Worm, 164 Ind. 7, 72 N. E. 852.

59. *California.*—Alcatraz Masonic Hall Assoc. *v.* U. S. Fidelity, etc., Co., 3 Cal. App. 338, 85 Pac. 156.

Iowa.— Stillman *v.* Wickham, 106 Iowa 597, 76 N. W. 1008.

Kansas.— Morgan County *v.* McRae, 53 Kan. 358, 36 Pac. 717.

Missouri.— Evans *v.* Graden, 125 Mo. 72, 28 S. W. 439; Beers *v.* Wolf, 116 Mo. 179, 22 S. W. 620; Burnes *v.* Fidelity, etc., Co., 96 Mo. App. 467, 70 S. W. 518; Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201, where the foundation was deepened.

New York.— Livingston *v.* Moore, 15 N. Y. App. Div. 15, 44 N. Y. Suppl. 125, where the time for completion was changed.

Pennsylvania.— Lancaster *v.* Barrett, 1 Pa. Super. Ct. 9, 37 Wkly. Notes Cas. 251.

Texas.— Randall *v.* Smith, 2 Tex. Unrep. Cas. 397; Thompson *v.* Chaffee, 39 Tex. Civ. App. 567, 89 S. W. 285.

See 40 Cent. Dig. tit. "Principal and Surety," § 163 *et seq.*

Adding a story to a building is such change as will discharge a surety. Judah *v.* Zimmerman, 22 Ind. 388, 13 Ind. 286.

60. O'Neal *v.* Kelley, 65 Ark. 550, 47 S. W. 409; Middletown *v.* Ætna Indemnity Co., 97 N. Y. App. Div. 344, 90 N. Y. Suppl. 16; Livingston *v.* Moore, 15 N. Y. App. Div. 15, 44 N. Y. Suppl. 125; U. S. *v.* Corwine, 25 Fed. Cas. No. 14,871, 1 Bond 339.

61. Alcatraz Masonic Hall Assoc. *v.* U. S. Fidelity, etc., Co., 3 Cal. App. 338, 85 Pac. 156; Guthrie *v.* Carpenter, 162 Ind. 417, 70 N. E. 486; Beers *v.* Wolf, 116 Mo. 179, 22 S. W. 620; Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201; Kane *v.* Thuener, 62 Mo. App. 69; Warden *v.* Ryan, 37 Mo. App. 466; Southern Bridge Co. *v.* Bogenshot, (Tenn. Ch. App. 1897) 48 S. W. 97.

A change by oral agreement discharges the surety, where the contract provides for a variation in the price, if agreed on in writing. Killoren *v.* Meehan, 55 Mo. App. 427.

Extra allowance for work included in specifications does not discharge a surety, although the contractor failed to include the amount in estimating his bid. Moore *v.* Fountain, (Miss. 1891) 8 So. 509.

62. Segari *v.* Mazzei, 116 La. 1026, 41 So. 245 (where the site of a dwelling-house was changed from one place to another in the same square for the accommodation of the owner and without causing additional expense to the contractor); Dorsey *v.* McGee, 30 Nebr. 657, 46 N. W. 1018 (where the site of a building was changed from the northeast to the southwest corner of the same lot). And see American Surety Co. *v.* Choctaw Constr. Co., 135 Fed. 487, 68 C. C. A. 199, holding that where a contract for materials for the construction of a railroad did not refer to any survey, plat, map, or route, the selection of one route instead of another will not release a surety for the materialman.

63. U. S. *v.* Stratford, 53 N. Y. App. Div. 410, 65 N. Y. Suppl. 1051.

work after abandonment by the principal, made some changes from the plan and specifications, due allowance being made for the difference in price,[64] will not discharge the sureties. Material changes as to payments,[65] such as making them prematurely, discharges the surety.[66] Retention, by the owner, of money owing the contractor, to pay debts of the latter does not discharge the sureties,[67] nor are the sureties discharged because payment was made by the owner to the principal while there were claims unpaid, in the absence of any term in the contract forbidding it.[68] Sureties are not discharged by a change in the work made necessary by the negligence of the principal;[69] nor by an independent collateral agreement between the owner and the principal,[70] nor are sureties discharged because the principal performs additional work not demanded by the owner.[71] Provisions in the contract for the benefit of the obligee alone may be waived without affecting the liability of the surety, such as an option to retain a portion of the contract price;[72] and it has been held that the principal can waive a provision

64. U. S. *v.* Maloney, 4 App. Cas. (D. C.) 505; George A. Fuller Co. *v.* Doyle, 87 Fed. 687.

65. Montgomery First Nat. Bank *v.* Fidelity, etc., Co., 145 Ala. 335, 40 So. 415, 117 Am. St. Rep. 45, 5 L. R. A. 418 (making payment without certificate of the architect); Gato *v.* Warrington, 37 Fla. 542, 19 So. 883 (when payments were made without reference to receipted weekly pay-rolls, as provided in the contract); Bowman *v.* Globe Steam Heating Co., 80 Mo. App. 628 (where payment was made to depend on future tests instead of on the connection of radiators).

Mere failure to pay promptly is not such change as will discharge sureties. Bagwell *v.* American Surety Co., 102 Mo. App. 707, 77 S. W. 327.

A contractor may waive payment in money if not prohibited from so doing by the contract. Foster *v.* Gaston, 123 Ind. 96, 23 N. E. 1092.

66. Glenn County *v.* Jones, 146 Cal. 518, 80 Pac. 695; Kane *v.* Thuener, 62 Mo. App. 69; Greenville *v.* Ormand, 51 S. C. 121, 28 S. E. 147; Cowdery *v.* Hahn, 105 Wis. 455, 81 N. W. 882, 76 Am. St. Rep. 923. But see Degnon-McLean Constr. Co. *v.* Philadelphia City Trust, etc., Co., 184 N. Y. 544, 76 N. E. 1093 [*affirming* 99 N. Y. App. Div. 195, 90 N. Y. Suppl. 1029].

A loan of small sums by the owner to the contractor on due-bills to be repaid out of the next instalment of the contract price is not an alteration of the contract. Stephens *v.* Elver, 101 Wis. 392, 77 N. W. 737.

Paying one day before due will be regarded as an immaterial change. Marree *v.* Ingle, 69 Ark. 126, 61 S. W. 369; Stephens *v.* Elner, 101 Wis. 392, 77 N. W. 737.

Anticipating payments to contractors see *infra*, VIII, E, 2, m, (VII).

67. Degnon-McLean Constr. Co. *v.* City Trust, etc., Co., 99 N. Y. App. Div. 195, 90 N. Y. Suppl. 1029 [*affirming* 40 Misc. 530, 82 N. Y. Suppl. 944]; Hand Mfg. Co. *v.* Marks, 36 Oreg. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549; De Mattos *v.* Jordan, 15 Wash. 378, 46 Pac. 402.

68. Marree *v.* Ingle, 69 Ark. 126, 61 S. W. 369; Northern Light Lodge No. 1 I. O. O. F. *v.* Kennedy, 7 N. D. 146, 73 N. W. 524; Meyers *v.* Wood, 26 Tex. Civ. App. 591, 65 S. W. 671; Spokane *v.* Costello, 42 Wash. 182, 84 Pac. 652.

69. Killoren *v.* Meehan, 55 Mo. App. 427.

70. Moore *v.* Fountain, (Miss. 1891) 8 So. 509; St. Louis Bd. of Education *v.* National Surety Co., 183 Mo. 166, 82 S. W. 70; Fullerton Lumber Co. *v.* Gates, 89 Mo. App. 201; Killoren *v.* Meehan, 55 Mo. App. 427; Henricus *v.* Englert, 17 N. Y. Suppl. 235; Barclay *v.* Deckerhoof, 151 Pa. St. 374, 24 Atl. 1067; Fitzpatrick *v.* McAndrews, 2 Pa. Dist. 713, 12 Pa. Co. Ct. 353.

Sureties on the bond of a subcontractor are not released by the contractor executing to the subcontractor an irrevocable power of attorney to transact all of the business pertaining to the subcontract. Evans *v.* Watson, 8 Kan. App. 144, 55 Pac. 17.

It is for the court to determine whether an agreement is an alteration of the original contract or an independent collateral contract. Barclay *v.* Deckerhoof, 151 Pa. St. 374, 24 Atl. 1067.

71. Norwegian Evangelical Lutheran Bethlehem Cong. *v.* U. S. Fidelity, etc., Co., 83 Minn. 269, 86 N. W. 330 (holding also that, although the additional work was demanded the sureties are not discharged, if it was provided for in the original contract); Snoqualmi Realty Co. *v.* Moynihan, 179 Mo. 629, 78 S. W. 1014.

72. *Arkansas.*— Marree *v.* Ingle, 69 Ark. 126, 61 S. W. 369.

Indiana.— Hohn *v.* Shideler, 164 Ind. 242, 72 N. E. 575.

Nebraska.— Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104.

New York.— Smith *v.* Molleson, 148 N. Y. 241, 42 N. E. 669.

North Dakota.— Northern Light Lodge No. 1 I. O. O. F. *v.* Kennedy, 7 N. D. 146, 73 N. W. 524.

Texas.— American Surety Co. *v.* San Antonio L. & T. Co., (Civ. App. 1906) 98 S. W. 387; Meyers *v.* Wood, 26 Tex. Civ. App. 591, 65 S. W. 671.

Washington.— Spokane *v.* Costello, 42 Wash. 182, 84 Pac. 652.

See 40 Cent. Dig. tit. "Principal and Surety," § 162 *et seq.*

intended solely for his own benefit, which requires notices from the owner to the surety to be in writing.[73]

(IX) *LEASES.* A surety for a lessee cannot be held for rent after a change in the terms of the lease,[74] or in the terms of the surety's contract by the provisions of the lease,[75] and will be discharged by the substitution of a new contract between the lessor and the lessee without the surety's consent.[76] Subletting will not discharge the surety;[77] and the fact that the lessor occupied part of the premises for a portion of the term with the consent of the tenant, no change having been made in the contract, does not release the surety.[78]

(X) *CHANGES AND AMENDMENTS IN JUDICIAL PROCEEDINGS.*[79] A surety on an undertaking given during judicial proceedings is released by a change in the return-day,[80] or in the parties to the proceedings,[81] or if one of the parties defendant is dismissed;[82] but if a bill is filed by a creditor in behalf of himself and others who might come in, an intention is shown to allow such changes and sureties are not discharged.[83] In admiralty, so long as the cause of action remains practically the same, sureties will not be discharged by change as to parties.[84] Generally a surety is not released by amendments to the pleadings,[85] although

73. Enterprise Hotel Co. *v.* Book, 48 Oreg. 58, 85 Pac. 333; Cowles *v.* U. S. Fidelity, etc., Co., 32 Wash. 120, 72 Pac. 1032, 98 Am. St. Rep. 838; Grafton *v.* Hinkley, 111 Wis. 46, 86 N. W. 859.

Matters personal to principal or cosurety generally see *supra*, VIII, B.

74. Green *v.* Boyd, 13 Pa. Super. Ct. 651.

75. Stevens *v.* Pendleton, 83 Mich. 342, 47 N. W. 1097, holding that such change must be intentional, and that the evidence showed such intention.

76. See the cases cited *infra*, this note.

Changes discharging surety.— Enlarging premises and increasing rent and burdens of lessee. New York *v.* Clark, 84 N. Y. App. Div. 383, 82 N. Y. Suppl. 855. Inserting provision for surrender in the event of total or partial destruction by fire or other casualty rendering premises untenantable. Zeigler *v.* Hallahan, 131 Fed. 205, 66 C. C. A. 1 [*affirming* 126 Fed. 788]. Diminishing, or surrendering part of, premises. Denouvion *v.* Hodgson, 23 La. Ann. 438; Penn *v.* Collins, 5 Rob. (La.) 213; Prior *v.* Kiso, 81 Mo. 241; Nichols *v.* Palmer, 48 Wis. 110, 4 N. W. 137 (where, during the life of a lease for three years, an agreement was entered into by lessor and lessee, by which the latter was to surrender the premises at the end of the second year, and pay certain sums, etc., in full of all rent due under the lease); Holme *v.* Brunskill, 3 Q. B. D. 495, 47 L. J. Q. B. 610, 38 L. T. Rep. N. S. 838. But an agreement by the lessor with the lessee to rent the premises for the latter and at his risk and give him the benefit of all the rent received, qualified by the stipulation that the agreement should not be construed as impairing or altering the lease, etc., makes no change in the terms of the lease or the obligations of the tenants. Morgan *v.* Smith, 7 Hun (N. Y.) 244 [*affirmed* in 70 N. Y. 537].

77. Conklin *v.* Cooper, 12 N. Y. St. 632.

78. Medary *v.* Cathers, 161 Pa. St. 87, 28 Atl. 1012; Sutherland *v.* Shelton, 12 Heisk. (Tenn.) 374, holding that, although the lessor may have occupied or used some part of the land not included in the reservation to her by the lease, the sureties contracted only for the performance of the contract of their principal, which was for the payment of the rent and the performance of the other duties agreed upon, and this was not made dependent upon the performance by the lessor of her agreement as to the occupation; that if the lessor occupied or used more of the land or houses than she had reserved, she did so as the tenant of the lessee for which she might be bound to him for rent or for use and occupation, but such conduct on her part, assented to by the lessee, could not release the sureties.

79. **Surety for performance of award** see *supra*, VIII, E, 2, i, (I), (A) note 74.

80. Wilson *v.* Fisk, 22 R. I. 100, 46 Atl. 272.

81. Morse *v.* Goetz, 51 Ill. App. 485 (holding that the rule applies, although a substituted party plaintiff is for the use of the former one); Miller *v.* Herlich, 5 N. Y. St. 909; Smith *v.* Roby, 6 Heisk. (Tenn.) 546; Phillips *v.* Wells, 2 Sneed (Tenn.) 154. But see Elder *v.* Fielder, 9 Baxt. (Tenn.) 272.

The insertion of the christian name of plaintiff in a warrant after an appeal discharges the surety in the appeal. Irwin *v.* Sanders, 5 Yerg. (Tenn.) 287.

82. Tyler *v.* Davis, 63 Miss. 345; Com. *v.* Clay, 9 Phila. (Pa.) 121.

83. Levy *v.* Taylor, 24 Md. 282.

The substitution of "heirs at law" for "executors" as plaintiffs does not release a surety on a property bond in replevin. Jamieson *v.* Capron, 95 Pa. St. 15.

84. The Beaconsfield, 158 U. S. 303, 15 S. Ct. 860, 39 L. ed. 993 (where other libellants were substituted); Newell *v.* Norton, 3 Wall. (U. S.) 257, 18 L. ed. 271; Boden *v.* Demwolf, 56 Fed. 846 (where a party respondent was added); The Maggie Jones, 16 Fed. Cas. No. 8,947, 1 Flipp. 635 (where a co-libellant was added).

85. Lanahan *v.* Porter, 148 Mass. 596, 20 N. E. 460 (holding that where, in an action on a note, notice to an indorser was not averred; and, after a judgment against de-

they change the form of action,[86] or increase the damages claimed.[87] The liability of sureties is not affected by immaterial variations in the proceedings not increasing their liability.[88] Sureties are not released because a judgment has been entered by consent of the parties;[89] nor because a stipulation is entered into to waive the right to a deficiency judgment in an action to foreclose a mortgage.[90]

j. Extension of Time — (I) *Effect* — (A) *General Rules.* The rule is well settled that if a creditor or obligee, by a valid and binding agreement, without the assent of a surety, gives further time for payment or performance to the principal debtor, the surety will be discharged.[91] And where two persons are bound

fendants, it was set aside on their motion upon giving a bond with sureties, the amendment of the declaration by the addition of an allegation of notice to the indorser will not release the sureties); Newell *v.* Norton, 3 Wall. (U. S.) 257, 18 L. ed. 271.

Bond for compliance with any judgment.— The amendment of a complaint so as to demand a money judgment instead of specific performance does not release a surety on a bond conditioned for compliance with any judgment to be rendered. Doon *v.* American Surety Co., 110 N. Y. App. Div. 215, 97 N. Y. Suppl. 270 [*affirmed* in 186 N. Y. 598, 79 N. E. 1103].

86. Block *v.* Blum, 33 Ill. App. 643 (where on appeal from a judgment in trover the form of action was changed to assumpsit); Rothwell *v.* Paine, 9 N. Y. Civ. Proc. 128 (holding that where, in an action for fraud, money received in a fiduciary capacity, and an accounting, defendant was released on an arrest bond, the elimination of the cause for fraud does not relieve sureties on the bond).

87. Townsend Nat. Bank *v.* Jones, 151 Mass. 454, 24 N. E. 593 (holding that where an attachment suit is brought on one note, an amendment so as to declare on four notes does not discharge a surety); Hare *v.* Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141. But see Prince *v.* Clark, 127 Mass. 599.

88. Triest *v.* Enslen, 106 Ala. 180, 17 So. 356 (holding that sureties on a claim bond are not released because another claim suit is tried with that of the claimants, who are principals in the bond, no prejudice to the sureties having resulted); Brackenbush *v.* Dorsett, 138 Ill. 167, 27 N. E. 934 [*affirming* 37 Ill. App. 581] (holding that sureties on an injunction bond are not released because the injunction is modified by an order entered by consent, so as to make it less comprehensive); Boynton *v.* Phelps, 52 Ill. 210 (holding that sureties on an injunction bond in a suit to enjoin the collection of a judgment are not discharged by an agreement that a decree might be rendered such as would protect the rights of an assignee of the judgment, enabling him to collect it with interest and costs, but stipulating that all claims for damages in consequence of the issuance of the injunction should be waived); Patten *v.* Bullard, 3 N. Y. St. 735 (where the court vacated a reference ordered to ascertain the liability of the parties).

89. Jaffray *v.* Smith, 106 Ala. 112, 17 So. 218 (holding that where an assignee of an insolvent debtor obtains possession of attached property, the sureties on claim bonds given are not released by an agreement between the assignee and the attaching creditors that one of the claims should be tried, and the verdict rendered therein made conclusive as to all of the others); Preston *v.* Hood, 64 Cal. 405, 1 Pac. 487 (holding that sureties on a bond given to prevent a levy of an attachment are not released by reason of a judgment entered by consent, and execution stayed for sixty days by stipulation).

A surety on a capias bond is discharged if, by agreement, a judgment is entered against one only of defendants, and the damages so assessed as to convert the judgment into a contract to deliver stock. Com. *v.* Clay, 9 Phila. (Pa.) 121.

90. Mack *v.* Anderson, 33 N. Y. Suppl. 208.

91. *Alabama.*— Moses *v.* Home Bldg., etc., Assoc., 100 Ala. 465, 14 So. 412; Cox *v.* Mobile, etc., R. Co., 44 Ala. 611; Gray *v.* Brown, 22 Ala. 262; Haden *v.* Brown, 18 Ala. 641; Inge *v.* Mobile Branch Bank, 8 Port. 108; Everett *v.* U. S., 6 Port. 166, 30 Am. Dec. 584; Comegys *v.* Booth, 3 Stew. 14; Ellis *v.* Bibb, 2 Stew. 63.

Arkansas.— Ferguson *v.* State Bank, 8 Ark. 416.

California.— Daneri *v.* Gazzola, 139 Cal. 416, 73 Pac. 179; Tuohy *v.* Woods, 122 Cal. 665, 55 Pac. 683.

Connecticut.— Deming *v.* Norton, Kirby 397.

District of Columbia.— Clark *v.* Gerstley, 26 App. Cas. 205 [*affirmed* in 204 U. S. 504, 27 S. Ct. 337, 51 L. ed. 589]; Walker *v.* Washington Title Ins. Co., 19 App. Cas. 575.

Florida.— Bowen *v.* Darby, 14 Fla. 202.

Georgia.— McCrary *v.* Coley, Ga. Dec. 104.

Idaho.— Maydole *v.* Peterson, 7 Ida. 502, 63 Pac. 1048.

Illinois.— Skinner *v.* Sullivan, 227 Ill. 93, 81 N. E. 11 [*affirming* 127 Ill. App. 657]; Home Nat. Bank *v.* Waterman, 134 Ill. 461, 29 N. E. 503 [*affirming* 30 Ill. App. 535]; Bradshaw *v.* Combs, 102 Ill. 428; Myers *v.* Fairbury First Nat. Bank, 78 Ill. 257; Ward *v.* Stout, 32 Ill. 399; Kennedy *v.* Evans, 31 Ill. 258; Montague *v.* Mitchell, 28 Ill. 481; Flynn *v.* Mudd, 27 Ill. 323; Cunningham *v.* Wrenn, 23 Ill. 64; Wyatt *v.* Dufrene, 106 Ill. App. 214; Gaar *v.* Hulse, 90 Ill. App. 548; Peterson *v.* Stege, 67 Ill. App. 147; Barnard *v.* Reynolds, 49 Ill. App. 596; Reed *v.* Cramb, 22 Ill. App. 34; Henderson *v.* Dodgson, 9 Ill. App. 80.

Indiana.— Spurgeon *v.* Smitha, 114 Ind. 453, 17 N. E. 105; Gipson *v.* Ogden, 100 Ind.

for the same debt, and there is an obligation on the part of one to exonerate the other, in the event of payment being enforced against such other, and this is

20; Williams *v.* Scott, 83 Ind. 405; Jarvis *v.* Hyatt, 43 Ind. 163; Calvin *v.* Wiggam, 27 Ind. 489; Redman *v.* Deputy, 26 Ind. 338; Musgrave *v.* Glasgow, 3 Ind. 31; Bugh *v.* Crum, 26 Ind. App. 465, 59 N. E. 1076, 84 Am. St. Rep. 307; Oyler *v.* McMurray, 7 Ind. App. 645, 34 N. E. 1004.

Iowa.— Cambria Sav. Bank *v.* La Nier, 135 Iowa 280, 112 N. W. 774; Lambert *v.* Shetler, 71 Iowa 463, 32 N. W. 424, 62 Iowa 72, 17 N. W. 187; Citizens' Bank *v.* Barnes, 70 Iowa 412, 30 N. W. 857; Roberts *v.* Richardson, 39 Iowa 290; Bonney *v.* Bonney, 29 Iowa 448; Lauman *v.* Nichols, 15 Iowa 161; Corielle *v.* Allen, 13 Iowa 289; Kelly *v.* Gillespie, 12 Iowa 55, 79 Am. Dec. 516.

Kansas.— Diehl *v.* Davis, 75 Kan. 38, 88 Pac. 532; Horton Bank *v.* Brooks, 64 Kan. 285, 67 Pac. 860; Roberson *v.* Blevins, 57 Kan. 50, 45 Pac. 63; Rose *v.* Williams, 5 Kan. 483.

Kentucky.—Champion *v.* Robertson, 4 Bush 17; Helm *v.* Young, 9 B. Mon. 394; Reid *v.* Watts, 4 J. J. Marsh. 440; Farmers', etc., Bank *v.* Cosby, 4 J. J. Marsh. 366; Clark *v.* Patton, 4 J. J. Marsh. 33, 20 Am. Dec. 203; Harris-Seller Banking Co. *v.* Bond, 47 S. W. 764, 20 Ky. L. Rep. 897; Dohn *v.* Bronger, 47 S. W. 619, 20 Ky. L. Rep. 823.

Louisiana.— Alter *v.* Zunts, 27 La. Ann. 317; Deuil *v.* Martel, 10 La. Ann. 643; Calliham *v.* Tanner, 3 Rob. 299; Nolte *v.* His Creditors, 7 Mart. N. S. 9; Millaudon *v.* Arnous, 3 Mart. N. S. 596.

Maine.— Dunn *v.* Spalding, 43 Me. 336; Lime Rock Bank *v.* Mallett, 42 Me. 349, 34 Me. 547, 56 Am. Dec. 673; Chute *v.* Pattee, 37 Me. 102; Thomas *v.* Dow, 33 Me. 390; Mariner's Bank *v.* Abbott, 28 Me. 280; Hutchinson *v.* Moody, 18 Me. 393; Leavitt *v.* Savage, 16 Me. 72; Kennebec Bank *v.* Tuckerman, 5 Me. 130, 17 Am. Dec. 209.

Maryland.— Clagett *v.* Salmon, 5 Gill & J. 314.

Massachusetts.— Gifford *v.* Allen, 3 Metc. 255; Greely *v.* Dow, 2 Metc. 176.

Michigan.— Walter A. Wood Mowing, etc., Co. *v.* Oliver, 103 Mich. 326, 61 N. W. 507; Stevens *v.* Oaks, 58 Mich. 343, 25 N. W. 309; Metz *v.* Todd, 36 Mich. 473.

Minnesota.— Allis *v.* Ware, 28 Minn. 166, 9 N. W. 666; Wheaton *v.* Wheeler, 27 Minn. 464, 8 N. W. 599; Huey *v.* Pinney, 5 Minn. 310.

Missouri.— Stillwell *v.* Aaron, 69 Mo. 539, 33 Am. Rep. 517; German Sav. Assoc. *v.* Helmrick, 57 Mo. 100; Westbay *v.* Stone, 112 Mo. App. 411, 87 S. W. 34.

Nebraska.— Shuler *v.* Hummel, 1 Nebr. (Unoff.) 204, 95 N. W. 350.

New Hampshire.— Wright *v.* Bartlett, 43 N. H. 548; Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

New York.—Ducker *v.* Rapp, 67 N. Y. 464; Lowman *v.* Yates, 37 N. Y. 601; Froude *v.* Bishop, 25 N. Y. App. Div. 514, 49 N. Y. Suppl. 955; Wilson *v.* Edwards, 6 Lans. 134 [*reversed* in 61 N. Y. 659, because the evidence did not justify a nonsuit]; Dunham *v.* Countryman, 66 Barb. 268; Newsam *v.* Finch, 25 Barb. 175; Blackwell *v.* Bainbridge, 19 N. Y. Suppl. 681; Miller *v.* McCan, 7 Paige 451; Sailly *v.* Elmore, 2 Paige 497; King *v.* Baldwin, 2 Johns. Ch. 554 [*reversed* upon other grounds in 17 Johns. 384]; Delaplaine *v.* Hitchcock, 4 Edw. 321.

North Carolina.— Salisbury First Nat. Bank *v.* Swink, 129 N. C. 255, 39 S. E. 962; Charlotte First Nat. Bank *v.* Lineberger, 83 N. C. 454, 35 Am. Rep. 582.

North Dakota.— McCormick Harvesting Mach. Co. *v.* Rae, 9 N. D. 482, 84 N. W. 346.

Ohio.— Fawcett *v.* Freshwater, 31 Ohio St. 637; Ide *v.* Churchill, 14 Ohio St. 372; Steubenville Bank *v.* Hoge, 6 Ohio 17; Jones *v.* Turner, 6 Cinc. L. Bul. 231, 6 Ohio Dec. (Reprint) 1059, 10 Am. L. Rec. 31. Where an employee was in default, and his employer, upon receiving notice from his surety that the latter would be bound no longer, suspended him, but afterward continued the employment, permitting him to retain the money in his hands, there was such an extension of time of payment as discharged the surety. City Ins. Co. *v.* Roberts, 6 Ohio Dec. (Reprint) 1213, 12 Am. L. Rec. 744, 11 Cinc. L. Bul. 219.

Oregon.— Lazelle *v.* Miller, 40 Oreg. 549, 67 Pac. 307.

Pennsylvania.— Henderson *v.* Ardery, 36 Pa. St. 449; Uhler *v.* Applegate, 26 Pa. St. 140; Miller *v.* Stem, 12 Pa. St. 383; Follmer *v.* Dale, 9 Pa. St. 83; Clippinger *v.* Creps, 2 Watts 45; Bauschard Co. *v.* New York Fidelity, etc., Co., 21 Pa. Super. Ct. 370; Smith *v.* Shidler, 3 Pittsb. 550.

Porto Rico.— Porto Rico Bank *v.* Argueso, 1 Porto Rico 49.

South Carolina.— Sloan *v.* Latimer, 41 S. C. 217, 19 S. E. 491, 691; Maxwell *v.* Connor, 1 Hill Eq. 14; Smith *v.* Tunno, 1 McCord Eq. 443, 16 Am. Dec. 617; Kennedy *v.* Gibbes, 2 Desauss. Eq. 380.

South Dakota.— Bunker *v.* Taylor, 10 S. D. 526, 74 N. W. 450; Bank of Commerce *v.* Humphrey, 6 S. D. 415, 61 N. W. 444.

Tennessee.— Foy *v.* Sinclair, 93 Tenn. 296, 30 S. W. 28; Apperson *v.* Cross, 5 Heisk. 481; Washington *v.* Tait, 3 Humphr. 543.

Texas.— Wylie *v.* Hightower, 74 Tex. 306, 11 S. W. 1118; Long *v.* Patton, 43 Tex. Civ. App. 11, 93 S. W. 519; Marshall Nat. Bank *v.* Smith, 33 Tex. Civ. App. 555, 77 S. W. 237; Robson *v.* Brown, (Civ. App. 1900) 57 S. W. 83, 686; Zapalac *v.* Zapp, 22 Tex. Civ. App. 375, 54 S. W. 938; Angel *v.* Miller, (Civ. App. 1897) 39 S. W. 1092; Templeman *v.* Texas Brewing Co., (Civ. App. 1896) 35 S. W. 935; Victoria First Nat. Bank *v.* Skidmore, (Civ. App. 1895) 30 S. W. 564; Morris *v.* Booth, (App. 1892) 18 S. W. 639; Babcock *v.* Milmo Nat. Bank, 1 Tex. App. Civ. Cas. § 817; Hoerr *v.* Coffin, 1 Tex. App. Civ. Cas. § 185.

known to the creditor, then the creditor cannot extend the time of payment to the party ultimately liable without discharging the other debtor, even though

Vermont.— Newbury Bank *v.* Richards, 35 Vt. 281; People's Bank *v.* Pearsons, 30 Vt. 711; Peake *v.* Dorwin, 25 Vt. 28; Turrill *v.* Boynton, 23 Vt. 142.

Virginia.— Steele *v.* Boyd, 6 Leigh 547, 29 Am. Dec. 218; Hill *v.* Bull, Gilm. 149.

West Virginia.— Glenn *v.* Morgan, 23 W. Va. 467.

Wisconsin.— Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 110 Am. St. Rep. 946, 1 L. R. A. N. S. 891; American Button Hole, etc., Mach. Co. *v.* Gurnee, 44 Wis. 49.

Wyoming.— Lawrence *v.* Thom, 9 Wyo. 414, 64 Pac. 339.

United States.— Clark *v.* Gerstley, 204 U. S. 504, 27 S. Ct. 337, 51 L. ed. 589 [*affirming* 26 App. Cas. (D. C.) 205]; Uniontown Bank *v.* Mackey, 140 U. S. 220, 11 S. Ct. 844, 35 L. ed. 485; American, etc., Mortg., etc., Corp. *v.* Marquam, 62 Fed. 960; Scott *v.* Scruggs, 60 Fed. 721, 9 C. C. A. 246; Sprigg *v.* Mount Pleasant Bank, 22 Fed. Cas. No. 13,257, 1 McLean 384 [*affirmed* in 14 Pet. 201, 10 L. ed. 419]; U. S. *v.* Hillegas, 26 Fed. Cas. No. 15,366, 3 Wash. 70; Varnum *v.* Milford, 28 Fed. Cas. No. 16,890, 2 McLean 74.

England.— Overend *v.* Oriental Financial Corp., L. R. 7 H. L. 348, 31 L. T. Rep. N. S. 322 [*affirming* L. R. 7 Ch. 142, 41 L. J. Ch. 332, 25 L. T. Rep. N. S. 813, 20 Wkly. Rep. 253]; Stevenson *v.* Roche, 9 B. & C. 707, 7 L. J. K. B. O. S. 304, 4 M. & R. 561, 17 E. C. L. 316; Combe *v.* Woolf, 8 Bing. 156, 1 L. J. C. P. 51, 1 Moore & S. 241, 21 E. C. L. 486; Nisbet *v.* Smith, 2 Bro. Ch. 579, 29 Eng. Reprint 317; Pooley *v.* Harradine, 7 E. & B. 431, 90 E. C. L. 431; Greenough *v.* McCleland, 2 E. & E. 424, 6 Jur. N. S. 772, 30 L. J. Q. B. 15, 2 L. T. Rep. N. S. 571, 8 Wkly. Rep. 612, 105 E. C. L. 424; Taylor *v.* Burgess, 5 H. & N. 1, 5 Jur. N. S. 1317, 29 L. J. Exch. 7, 1 L. T. Rep. N. S. 12, 8 Wkly. Rep. 27; Clarke *v.* Henty, 2 Jur. 918, 3 Y. & C. Exch. 187; *Ex p.* Wilson, 11 Ves. Jr. 410, 8 Rev. Rep. 194, 32 Eng. Reprint 1145. In Hannington *v.* Beare, 4 Dowl. P. C. 256, it is held that bail are discharged by time being given to their principal without their consent, although they may not have been damnified. But see Woosman *v.* Price, 1 Cromp. & M. 352, 2 L. J. Exch. 115, 3 Tyrw. 375.

Canada.— Le Jeune *v.* Sparrow, 1 Northwest Terr. 384; Howee *v.* Mills, 10 U. C. C. P. 194; Hooker *v.* Gamble, 9 U. C. C. P. 434; Mulholland *v.* Broomfield, 32 U. C. Q. B. 369; Darling *v.* McLean, 20 U. C. Q. B. 372.

See 40 Cent. Dig. tit. "Principal and Surety," § 186.

The reason of the rule that an extension of time to the principal discharges a surety is that it is an alteration of the contract of the latter, and the obligation is discharged (Haden *v.* Brown, 18 Ala. 641; Daneri *v.* Gazzola, 139 Cal. 416, 73 Pac. 179; Tuohy *v.* Woods, 122 Cal. 665, 55 Pac. 683; Skinner *v* Sullivan, 127 Ill. App. 657 [*affirmed* in 227 Ill. 93, 81 N. E. 11]; Wylie *v.* Hightower, 74 Tex. 306, 11 S. W. 1118; Blest *v.* Brown, 3 Giffard 450, 8 Jur. N. S. 187, 5 L. T. Rep. N. S. 663, 66 Eng. Reprint 486 [*affirmed* in 4 De G. F. & J. 367, 8 Jur. N. S. 602, 6 L. T. Rep. N. S. 620, 10 Wkly. Rep. 569, 65 Eng. Ch. 284, 45 Eng. Reprint 1225), or interferes with his right of subrogation (Skinner *v.* Sullivan, *supra*; Gay *v.* Blanchard, 32 La. Ann. 497; Pipkin *v.* Bond, 40 N. C. 91). The transaction operates as a new loan to the principal. Spurgeon *v.* Smitha, 114 Ind. 453, 17 N. E. 105; Musgrave *v.* Glasgow, 3 Ind. 31.

Extension of time for — *Payment of judgment.*— Carpenter *v.* Devon, 6 Ala. 718; Allison *v.* Thomas, 29 La. Ann. 732; Gustine *v.* Union Bank, 10 Rob. (La.) 412; Calliham *v.* Tanner, 3 Rob. (La.) 299; McNulty *v.* Hurd, 86 N. Y. 547; Storms *v.* Thorne, 3 Barb. (N. Y.) 314; Bangs *v.* Strong, 7 Hill (N. Y.) 250, 42 Am. Dec. 64 [*affirming* 10 Paige 11]; Blazer *v.* Bundy, 15 Ohio St. 57; Pilgrim *v.* Dykes, 24 Tex. 383. But see Bryant *v.* Rudisell, 4 Heisk. (Tenn.) 656; Williams *v.* Wright, 9 Humphr. (Tenn.) 493; Grimes *v.* Nolen, 3 Humphr. (Tenn.) 412; Peay *v.* Poston, 10 Yerg. (Tenn.) 111; Deberry *v.* Adams, 9 Yerg. (Tenn.) 52 (upon scire facias to revive judgment); The Colonel Howard *v.* Hayden, 6 Fed. Cas. No. 3,026; Jenkins *v.* Robertson, 2 Drew. 351, 23 L. J. Ch. 816, 61 Eng. Reprint 755; Duff *v.* Barrett, 15 Grant Ch. (U. C.) 632. See also *supra*, VI, B, 8.

Performance of contract.— Worthan *v.* Brewster, 30 Ga. 112; Judah *v.* Zimmerman, 22 Ind. 388; Todd *v.* Greenwood Tp. School Dist. No. 1, 40 Mich. 294; Watriss *v.* Pierce, 32 N. H. 560; Michigan Steamship Co. *v.* American Bonding Co., 104 N. Y. App. Div. 347, 93 N. Y. Suppl. 805; Kugler *v.* Wiseman, 20 Ohio 361; State Bank *v.* Kerr, 1 McMull. (S. C.) 139; Carson *v.* Hill, 1 McMull. (S. C.) 76; Lane *v.* Scott, 57 Tex. 367; Earnshaw *v.* Boyer, 60 Fed. 528; Bowmaker *v.* Moore, 3 Price 214, 7 Price 223, 21 Rev. Rep. 758. Where the award of arbitrators is not made within the time limited in the arbitration bond, a surety on such bond is discharged from liability. Brookins *v.* Shumway, 18 Wis. 98. But where, in an action on an instrument guaranteeing the collection of accounts if not collected "within a reasonable time," it was stipulated that a reasonable time had elapsed when the trial of the cause was had, the sureties could not claim prejudice by an extension, without their consent, of the time for the collection of the accounts. C. Shenkberg Co. *v.* Porter, 137 Iowa 245, 114 N. W. 890.

Compensated surety.—An extension of time to a contractor will not release a compensated surety unless damage result. Henry *v.* Ætna Indemnity Co., 36 Wash. 553, 79 Pac. 42.

The surety in a debtor's relief bond is discharged if the time for the principal to

such debtor occupies the position of a principal debtor to the creditor,[92] as where debtors become sureties by another assuming the indebtedness.[93] In some cases it is held that where the parties are jointly bound the defense of an extension of time granted to the principal cannot be taken advantage of by the surety.[94] The defense is personal to the surety and cannot be set up for him by another creditor of the principal.[95] An extension of time granted to the surety does not affect the liability of the principal;[96] nor does an agreement by the creditor with the principal not to sue the surety until after a certain time discharge the latter.[97] An extension of time to an ostensible principal, who is really a surety, does not discharge a surety who is really a cosurety.[98] The right of a surety to consider

make his disclosure is extended by the obligee beyond the six months prescribed in the bond. Phillips *v.* Rounds, 33 Me. 357.

A surety for an administrator is not discharged by an extension of a debt due by the estate, as they do not undertake to pay the debts, but that the administrator will administer faithfully and honestly. Gillet *v.* Rachel, 9 Rob. (La.) 276.

Consent of surety see *supra*, VIII, E, 2, d.

Knowledge of relation see *supra*, VIII, E, 2, c.

92. Home Nat. Bank *v.* Waterman, 134 Ill. 461, 25 N. E. 648, 29 N. E. 503; Gay *v.* Blanchard, 32 La. Ann. 497; Walton *v.* Beauregard, 1 Rob. (La.) 301; Millerd *v.* Thorn, 56 N. Y. 402. Under La. Code, art. 3032, a surety was discharged by an extension, although bound *in solido*. Jones *v.* Fleming, 15 La. Ann. 522 [*distinguished* in Moriarty *v.* Bagnetto, 110 La. 598, 34 So. 701, in that the surety in the latter case bound himself as a party to the contract sued on and expressly waived the rights to which, as surety, he might have been entitled].

As between grantor and grantee of mortgaged premises see MORTGAGES, 27 Cyc. 1357.

93. *California.*— Tuohy *v.* Woods, 122 Cal. 665, 55 Pac. 683.

Kansas.— Union Stove, etc., Works *v.* Caswell, 48 Kan. 689, 29 Pac. 1072, 16 L. R. A. 85.

Missouri.— Steele *v.* Johnson, 96 Mo. App. 147, 69 S. W. 1065; Wayman *v.* Jones, 58 Mo. App. 313.

New York.— Calvo *v.* Davies, 73 N. Y. 211, 29 Am. Rep. 130 [*affirming* 8 Hun 222].

Texas.— Long *v.* Patton, 43 Tex. Civ. App. 11, 93 S. W. 519.

See 40 Cent. Dig. tit. "Principal and Surety," § 186.

The principle is applied to former partners, some of whom have assumed to pay firm debts (Preston *v.* Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124; Walter A. Wood Mowing, etc., Mach. Co. *v.* Oliver, 103 Mich. 326, 61 N. W. 507; Leithauser *v.* Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336; Lazelle *v.* Miller, 40 Oreg. 549, 67 Pac. 307; Hall *v.* Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861; Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42; Pasheller *v.* Hammett, 1 L. J. Ch. 204 [*affirmed* in 10 Bligh N. S. 548, 6 Eng. Reprint 202, 4 Cl. & F. 207, 7 Eng. Reprint 80]), and to accommodation accepters (Bailey *v.* Edwards, 4 B. & S. 761, 11 Jur. N. S. 134, 34 L. J. Q. B. 41, 9 L. T. Rep. N. S. 646, 116 E. C. L. 761; Davies *v.* Stainbank, 6 De G. M. & G. 679, 55 Eng. Ch. 528, 43 Eng. Reprint 1397; Ewin *v.* Lancaster, 12 L. T. Rep. N. S. 632, 13 Wkly. Rep. 857), or makers (Leet *v.* Blumenthal, 13 Quebec Super. Ct. 250) of bills and notes.

94. Moriarty *v.* Bagnetto, 110 La. 598, 34 So. 701 [*distinguishing* Jones *v.* Fleming, 15 La. Ann. 522], holding that if the surety is jointly bound, and the instrument does not express the relation, and there is no proof of the relation, he is not discharged.

Sureties jointly and severally bound with the principal are not discharged by an extension of time given to the principal. Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283; Davis *v.* Mikell, Freem. (Miss.) 548; Farrington *v.* Gallaway, 10 Ohio 543; Claremont Bank *v.* Wood, 10 Vt. 582.

A surety on a bond is not discharged by an extension of time given to the principal. Lewis *v.* Harbin, 5 B. Mon. (Ky.) 564; Shaw *v.* McFarlane, 23 N. C. 216; Deberry *v.* Adams, 9 Yerg. (Tenn.) 52; Devers *v.* Ross, 10 Gratt. (Va.) 252, 60 Am. Dec. 331; U. S. *v.* Howell, 26 Fed. Cas. No. 15,405, 4 Wash. 620.

95. Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924.

96. Perkins *v.* Squier, 1 Thomps. & C. (N. Y.) 620; Fraser *v.* Fishburne, 4 S. C. 314.

97. Armstead *v.* Thomas, 9 Ala. 586.

98. Koehler *v.* Hussey, 57 S. W. 241, 22 Ky. L. Rep. 317.

Supplemental surety.—An extension of time to the principal will not release a supplemental surety if the supplemental surety is not a surety for the principal, as in the case of the maker of a note given to a surety to secure the latter only. Delaware County Trust, etc., Co. *v.* Haser, 8 Del. Co. 125 [*affirmed* in 199 Pa. St. 17, 48 Atl. 694, 85 Am. St. Rep. 763].

Giving time to one of two sureties on a promissory note does not discharge the other, although the first signed on the front and the other on the back. Draper *v.* Weld, 13 Gray (Mass.) 580.

Pro tanto discharge.— If a surety is released by an extension of time granted without his consent, it relieves his cosurety from liability for one half of the debt. Hallock *v.* Yankey, 102 Wis. 41, 78 N. W. 156, 72 Am. St. Rep. 861.

himself discharged by an extension of time to the principal is not affected by the fact that the surety executed the note without the knowledge of the principal,[99] or that the principal was insolvent,[1] or a discharged bankrupt;[2] nor that the extension benefited or did not injure the surety, his contract being changed.[3] A surety who has been discharged by an extension of time to the principal need not wait until he is proceeded against, to take advantage of his defense; but he is entitled to relief in equity,[4] and can obtain an injunction restraining proceedings against him,[5] or against execution on a judgment obtained before he had notice of the extension of time.[6]

(B) *As to Mortgage or Pledge to Secure Another's Debt.* One who pledges his goods or mortgages his land as security for the debt of another occupies the position of a surety and an extension of time which would discharge a surety from personal liability will discharge the pledge or mortgage.[7] And so it is held that

99. Howard *v.* Clark, 36 Iowa 114.

1. Calliham *v.* Tanner, 3 Rob. (La.) 299.

2. Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677.

3. *Alabama.*—Haden *v.* Brown, 18 Ala. 641.
Iowa.— Roberts *v.* Richardson, 39 Iowa 290.
Louisiana.— Peacock *v.* Chapman, 8 La. Ann. 87.
New York.— Gahn *v.* Niemcewicz, 11 Wend. 312.
North Carolina.— Pipkin *v.* Bond, 40 N. C. 91.
Ohio.— Jones *v.* Turner, 6 Cinc. L. Bul. 231, 6 Ohio Dec. (Reprint) 1059, 10 Am. L. Rec. 31.
Pennsylvania.— Follmer *v.* Dale, 9 Pa. St. 83.
South Carolina.— Sloan *v.* Latimer, 41 S. C. 217, 19 S. E. 491, 691.
United States.— U. S. *v.* Hillegas, 26 Fed. Cas. No. 15,366, 3 Wash. 70.
England.— Samuell *v.* Howarth, 3 Meriv. 272, 17 Rev. Rep. 81, 36 Eng. Reprint 105.
See 40 Cent. Dig. tit. "Principal and Surety," § 199.

But under subs. 14, § 39, The King's Bench Acts, 58 & 59 Vict. c. 6, a surety relying on the giving of time to the principal as a defense must show that he has suffered pecuniary loss or damage as the reasonably direct and natural result thereof. Blackwood *v.* Percival, 14 Manitoba 216.

4. McCrary *v.* Coley, Ga. Dec. 104; Pipkin *v.* Bond, 40 N. C. 91.

5. Rathbone *v.* Warren, 10 Johns. (N. Y.) 587; Wright *v.* Sandars, 3 Jur. N. S. 504, 5 Wkly. Rep. 644; Blake *v.* White, 4 L. J. Exch. 48, 1 Y. & C. Exch. 420; Bowmaker *v.* Moore, 3 Price 214, 7 Price 223, 21 Rev. Rep. 758; Boultbee *v.* Stubbs, 18 Ves. Jr. 20, 11 Rev. Rep. 141, 34 Eng. Reprint 225. But see Mackintosh *v.* Wyatt, 3 Hare 562, 25 Eng. Ch. 562, 67 Eng. Reprint 504.

Before a justice of the peace.— In Howerton *v.* Sprague, 64 N. C. 451, it is held that where a surety is discharged by a binding contract for further time given to the principal, the discharge cannot be enforced by a justice of the peace, and therefore if the creditor has taken out process against the principal and surety before a justice of the peace and obtained judgment and levied an execution upon the goods of the principal which he afterward instructs the officer to deliver up upon a binding contract to give the principal further time, the surety is discharged by matter *in pais*, there being no satisfaction of the execution, and the surety may resort to an injunction to enforce his discharge.

6. Farmers', etc., Bank *v.* Cosby, 4 J. J. Marsh. (Ky.) 366; Howerton *v.* Sprague, 64 N. C. 451; Armistead *v.* Ward, 2 Patt. & H. (Va.) 504.

7. *Alabama.*— Moses *v.* Home Bldg., etc., Assoc., 100 Ala. 465, 14 So. 412.
Illinois.— Reed *v.* Cramb, 22 Ill. App. 34.
Iowa.— Christner *v.* Brown, 16 Iowa 130.
Kansas.— Diehl *v.* Davis, 75 Kan. 38, 88 Pac. 532.
Michigan.— Metz *v.* Todd, 36 Mich. 473.
Minnesota.— Allis *v.* Ware, 28 Minn. 166, 9 N. W. 666.
New York.— Albion Bank *v.* Burns, 46 N. Y. 170; Smith *v.* Townsend, 25 N. Y. 479; Neimcewicz *v.* Gahn, 3 Paige 614 [*affirmed* in 11 Wend. 312].
North Carolina.— Hinton *v.* Greenleaf, 113 N. C. 6, 18 S. E. 56.
Ohio.— People's Ins. Co. *v.* McDonnell, 8 Ohio Dec. (Reprint) 302, 7 Cinc. L. Bul. 53; Jones *v.* Turner, 6 Ohio Dec. (Reprint) 1059, 10 Am. L. Rec. 31, 6 Cinc. L. Bul. 231.
Pennsylvania.— Ayres *v.* Wattson, 57 Pa. St. 360.
Tennessee.— Foy *v.* Sinclair, 93 Tenn. 296, 30 S. W. 28.
Texas.— Westbrook *v.* Belton Nat. Bank, 97 Tex. 246, 77 S. W. 942; Angel *v.* Miller, 16 Tex. Civ. App. 679, 39 S. W. 1092.
See 40 Cent. Dig. tit. "Principal and Surety," § 187.

Although the mortgage is to indemnify sureties, where that protection is to be given not by reimbursement of sums which the sureties might have to pay, but by sale of the property to pay the debt in the first instance, it follows that the property becomes directly responsible for the original debt and therefore surety for it, and the mortgage will be discharged by an extension which would discharge a surety from personal liability. Westbrook *v.* Belton Nat. Bank, 97 Tex. 246, 77 S. W. 942.

Sureties on collateral note.— Where the payee of a note held another note of the same makers with sureties as collateral, an

the pledge cannot be retained as security for a renewal except with the consent of the owner.[8]

(c) *As to One or More Instalments.* If a surety is liable for different payments,[9] such as instalments of rent, an extension of time as to one or more will not affect the liability of the surety for the others;[10] nor will an extension of time granted to the principal for a portion of his indebtedness discharge a surety as to the balance.[11]

(d) *As to Surety Having Indemnity.* A surety by taking security from his principal against liability by reason of the suretyship in effect appropriates that portion of the property or effects of the principal to the payment of the debt and will not be permitted to urge a discharge by reason of an extension of time by the creditor.[12] If, however, security taken from the principal by a surety to indemnify him against loss proves to be worthless,[13] or is lost without the fault of the surety,[14] he will be discharged by an extension of the time of payment; likewise, if security taken by him be returned to the principal before the extension is granted, the creditor not being aware of the indemnity at the time the extension is granted.[15]

(ii) *Binding Agreement Required* — (a) *General Rule.* The general rule is that an agreement between the creditor and the principal for delay merely,[16] which does not prevent the surety from making payment at any time,[17] will not

extension of the note secured to a time subsequent to the maturity of the collateral note discharged the sureties. Slagle *v.* Pow, 41 Ohio St. 603. *Compare* Delaware County Trust, etc., Co. *v.* Haser, 8 Del. Co. (Pa.) 125 [*affirmed* in 199 Pa. St. 17, 48 Atl. 694, 85 Am. St. Rep. 763].

8. Burnap *v.* Potsdam Nat. Bank, 96 N. Y. 125.

9. Croydon Commercial Gas Co. *v.* Dickinson, 2 C. P. D. 46, 46 L. J. C. P. 157, 36 L. T. Rep. N. S. 135, 25 Wkly. Rep. 157; Provincial Bank *v.* Cussen, L. R. 18 Ir. 382; Davies *v.* Stainbank, 6 De G. M. & G. 679, 55 Eng. Ch. 528, 43 Eng. Reprint 1397.

10. Coe *v.* Cassidy, 72 N. Y. 133; Ducker *v.* Rapp, 67 N. Y. 464; Cassidy *v.* Schedel, 9 Hun (N. Y.) 340 [*affirmed* in 71 N. Y. 603].

11. Klein *v.* Long, 27 N. Y. App. Div. 158, 50 N. Y. Suppl. 419 [*reversing* 16 N. Y. App. Div. 301, 44 N. Y. Suppl. 613]; Hopkirk *v.* McConico, 12 Fed. Cas. No. 6,696, 1 Brock. 220; Bingham *v.* Corbitt, 34 L. J. Q. B. 37, 12 Wkly. Rep. 1030; McLaughlin Carriage Co. *v.* Oland, 37 Can. L. J. 365, 34 Nova Scotia 193; Commercial Bank *v.* Muirhead, 12 U. C. Q. B. 39.

Taking note for interest on bond see Gahn *v.* Niemcewicz, 11 Wend. (N. Y.) 312.

12. *Alabama.*— Chilton *v.* Robbins, 4 Ala. 223, 37 Am. Dec. 741.

Indiana.— Bohring *v.* Root, Wils. 29.

Louisiana.— Hardesty *v.* Sturges, 12 La. Ann. 231.

Missouri.— First Nat. Bank *v.* Davis, 87 Mo. App. 242; Hardester *v.* Tate, 85 Mo. App. 624.

Ohio.— Kleinhaus *v.* Generous, 25 Ohio St. 667.

Vermont.— Wilson *v.* Wheeler, 29 Vt. 484; Smith *v.* Steele, 25 Vt. 427, 60 Am. Dec. 376.

Washington.— McDougall *v.* Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849.

West Virginia.— Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924.

See 40 Cent. Dig. tit. "Principal and Surety," § 193.

Contra, see Helm *v.* Young, 9 B. Mon. (Ky.) 394; Newsam *v.* Finch, 25 Barb. (N. Y.) 175.

13. Fay *v.* Tower, 58 Wis. 286, 16 N. W. 558.

14. Citizens' Bank *v.* Barnes, 70 Iowa 412, 30 N. W. 857, holding that if the surety agrees that a chattel mortgage, given him by his principal, shall not be recorded, and the mortgaged property is appropriated to satisfy a prior lien, he will be discharged by an extension of time granted to his principal by the creditor.

15. Rittenhouse *v.* Kemp, 37 Ind. 258.

16. *Illinois.*— English *v.* Landon, 181 Ill. 614, 54 N. E. 911 [*reversing* 75 Ill. App. 483]; King *v.* Griggs, 116 Ill. App. 132.

Iowa.— Jones *v.* Cottrell, (1906) 109 N. W. 793.

Kentucky.—Nichols *v.* McDowell, 14 B. Mon. 6; Barber *v.* Ruggles, 87 S. W. 785, 27 Ky. L. Rep. 1077.

Louisiana.— Howard *v.* Finney, 32 La. Ann. 1305; Natchitoches *v.* Redmond, 28 La. Ann. 274; Clements *v.* Biossat, 26 La. Ann. 243; Warfield *v.* Ludewig, 9 Rob. 240; Frazier *v.* Dick, 5 Rob. 249; Fortineau *v.* Boissiere, 18 La. 470; Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214; Cooley *v.* Lawrence, 4 Mart. 639.

Mississippi.—Wright *v.* Watt, 52 Miss. 634; Montgomery *v.* Dillingham, 3 Sm. & M. 647.

New Hampshire.— Fowler *v.* Brooks, 13 N. H. 240.

Pennsylvania.— Haynes *v.* Synnott, 160 Pa. St. 180, 28 Atl. 832.

Texas.— Hunter *v.* Clark, 28 Tex. 159; Titterington *v.* Murrell, (Civ. App. 1905) 90 S. W. 510.

England.— Creighton *v.* Rankin, 7 Cl. & F. 325, 7 Eng. Reprint 1092; Heath *v.* Key, 1 Y. & J. 434.

See 40 Cent. Dig. tit. "Principal and Surety," § 201.

Mere delay or forbearance see *supra,* VII, D.

17. Légér *v.* Arcenaux, 5 Rob. (La.) 513; Woodburn *v.* Friend, 19 La. 496; Brink *v.* Stratton, 64 N. Y. App. Div. 331, 72 N. Y.

discharge the surety unless such agreement amounts to a binding contract.[18] The contract must be complete, and a mere unaccepted offer, or an agreement to be consummated upon the performance of conditions, will not be sufficient.[19] It

Suppl. 87 [*reversed* in 176 N. Y. 150, 68 N. E. 148, 63 L. R. A. 182, for error in ruling as to the competency and admissibility of evidence].

18. *Arkansas.*— Vaughan *v.* Vernon, 82 Ark. 28, 100 S. W. 92, holding that a remark by the principal to the payee at the delivery of a note that probably he would want to be carried over another year, and the reply of the payee that interest was what was wanted, and giving the principal to understand that, if the interest was paid promptly, he would be carried over, is not a binding agreement to extend the time of payment, although the note was allowed to run for several years.

California.— Williams *v.* Covillaud, 10 Cal. 419.

District of Columbia.— Green *v.* Lake, 2 Mackey 162.

Illinois.— English *v.* Landon, 181 Ill. 614, 54 N. E. 911 [*reversing* 75 Ill. App. 483]; Heenan *v.* Howard, 81 Ill. App. 629, holding that where the principal does not say he will keep the money another year, or promise to pay interest for another year, there is nothing binding on him to keep it, although he requests to be allowed to have it for another year.

Indiana.— Weaver *v.* Prebster, 37 Ind. App. 582, 77 N. E. 674, agreement must be mutual.

Kentucky.— Anderson *v.* Mannon, 7 B. Mon. 217; Krupp *v.* St. Martinus Ritter-Verein, 53 S. W. 648, 21 Ky. L. Rep. 938.

Maryland.— Lake *v.* Thomas, 84 Md. 608, 36 Atl. 437; Oberndorff *v.* Union Bank, 31 Md. 126, 1 Am. Rep. 31.

Mississippi.— Roberts *v.* Stewart, 31 Miss. 664; Freeland *v.* Compton, 30 Miss. 424; Haynes *v.* Covington, 9 Sm. & M. 470.

New York.— Thayer *v.* King, 31 Hun 437.

Ohio.— Jones *v.* Brown, 11 Ohio St. 601; De Bruin *v.* Starr, 3 Ohio Dec. (Reprint) 306; Thompson *v.* Marshall, 2 Ohio Dec. (Reprint) 506, 3 West. L. Month. 386.

Tennessee.— White *v.* Summers, 1 Baxt. 154; Thompson *v.* Watson, 10 Yerg. 362.

Texas.— Frois *v.* Mayfield, 33 Tex. 801; Burke *v.* Cruger, 8 Tex. 66, 59 Am. Dec. 102.

Washington.— A surety on a note is not prejudiced because, after its execution, there was indorsed thereon, "With privilege of three months' extension, if security remains satisfactory," such indorsement in no sense changing the rights and obligations of the parties. Kittridge *v.* Stegmier, 11 Wash. 3, 39 Pac. 242.

West Virginia.— Cumberland First Nat. Bank *v.* Parsons, 45 W. Va. 688, 32 S. E. 271.

Wisconsin.— Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 110 Am. St. Rep. 946, 4 L. R. A. N. S. 666; Irvine *v.* Adams, 48 Wis. 468, 4 N. W. 573, 33 Am. Rep. 817.

United States.—Uniontown Bank *v.* Mackey, 140 U. S. 220, 11 S. Ct. 844, 35 L. ed. 485.

England.— Ladbrook *v.* Hewett, 1 Dowl. P. C. 488. Agreement between a bank and one of its customers that the latter may overdraw his account further during a specified period does not discharge a surety from liability to the bank if such agreement may be terminated upon notice before the expiration of the specified period. Rouse *v.* Bradford Banking Co., [1894] A. C. 586, 63 L. J. Ch. 890, 71 L. T. Rep. N. S. 522, 6 Reports 349, 43 Wkly. Rep. 78.

See 40 Cent. Dig. tit. "Principal and Surety," § 201.

Void and voidable agreements not discharging sureties see Carter *v.* Columbia Bank, 16 S. W. 79, 12 Ky. L. Rep. 968; Frederick-Town Sav. Inst. *v.* Michael, 81 Md. 487, 32 Atl. 189, 340, 33 L. R. A. 628 (agreement amounting to an unlawful preference under the Bankruptcy Act); Bowers *v.* State, 7 Harr. & J. (Md.) 32; Durfee *v.* Abbott, 50 Mich. 479, 15 N. W. 559 (the last two cases being voidable agreements of infant obligees); Williams *v.* Gilchrist, 11 N. H. 535 (holding that where a partner affixed the firm signature without authority to a note in payment of his own note, the new note being void against the partners, did not operate to discharge a surety on the individual note of the partner); Thompson *v.* Marshall, 2 Ohio Dec. (Reprint) 506, 3 West. L. Month. 386 (holding, however, that the surety will be released if the defense of the principal can be waived, as in the case of an extension based on excessive interest).

Illegal amendment of corporate constitution.— Where a building and loan association sought to amend its constitution in regard to the time of making payments, but the records failed to show that the amendment was made legally, a surety is not released by the principal acting on the amendment. Byers *v.* Hussey, 4 Colo. 515.

Various transactions as effecting extension and discharge see *infra*, VIII, E, 2, j, (III).

19. Huntsville Branch Bank *v.* Robinson, 5 Ala. 623 (where the principal made a proposition to the creditor to discharge his indebtedness in stock at a future time, and the creditor agreed to the proposition if modified in a manner stated, but the principal never gave notice of the acceptance of the terms, and it was held that there was no binding agreement between the parties, and the sureties were not released); Ferguson *v.* State Bank, 8 Ark. 416 (holding that while to debt on a note it is a good plea at law, by the surety, that the creditor took a mortgage security from the principal and gave him day of payment, without the consent of the surety, under issue to such a plea defendant must prove that the board of directors of the bank accepted the mortgage security); Morehead Bank *v.* Elam, 74 S. W. 209, 24 Ky. L. Rep. 2425; Miller *v.* Hatch, 72 Me. 481, 39 Am. Rep. 346.

must be one that the principal can enforce at law,[20] and that ties the creditor's hands and precludes him from bringing suit,[21] or if not actually depriving the creditor of the power to bring suit, fetters him,[22] as by giving the principal a right of action if the agreement for an extension be violated.[23]

(B) *Form.* The form of the contract is immaterial if binding,[24] nor need it be express;[25] but may be inferred from acts, declarations, facts, and circumstances.[26] But if the agreement for an extension be oral, and is one required by statute to be in writing,[27] or if to admit it in evidence would have the effect of varying a written instrument,[28] or a contract under seal,[29] evidence thereof would not be allowed at law and the surety would not be discharged, although even in such case the surety might be discharged in equity.[30]

(C) *Parties to Extension*[31] — (1) IN GENERAL. A contract between the cred-

20. Clippinger *v.* Creps, 2 Watts (Pa.) 45; Clarke *v.* Birley, 41 Ch. D. 422, 58 L. J. Ch. 616, 60 L. T. Rep. N. S. 948, 37 Wkly. Rep. 746.

21. *Alabama.*— Agee *v.* Steele, 8 Ala. 948.

California.— Pimental *v.* Marques, 109 Cal. 406, 42 Pac. 159.

Illinois.— English *v.* Landon, 181 Ill. 614, 54 N. E. 911 [*reversing* 75 Ill. App. 483]; Higgins *v.* McPherson, 118 Ill. App. 464.

Kentucky.— Peck *v.* Durrett, 9 Dana 486; Nickell *v.* Citizens' Bank, 60 S. W. 925, 22 Ky. L. Rep. 1552; Jett *v.* Jett, 32 S. W. 293, 17 Ky. L. Rep. 690.

Louisiana.— Adle *v.* Metoyer, 1 La. Ann. 254; Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214.

Massachusetts.— Blackstone Bank *v.* Hill, 10 Pick. 129.

Missouri.— Aultman, etc., Co. *v.* Smith, 52 Mo. App. 351.

New York.— Lowman *v.* Yates, 37 N. Y. 601; Draper *v.* Romeyn, 18 Barb. 166.

North Carolina.— Asheville Nat. Bank *v.* Sumner, 119 N. C. 591, 26 S. E. 129.

Pennsylvania.— Bauschard Co. *v.* New York Fidelity, etc., Co., 21 Pa. Super. Ct. 370.

Virginia.—Coffman *v.* Moore, 29 Gratt. 244.

England.— Bank of Ireland *v.* Beresford, 6 Dow 238, 19 Rev. Rep. 50, 3 Eng. Reprint 1456; Cross *v.* Sprigg, 2 Hall & T. 233, 47 Eng. Reprint 1669, 14 Jur. 634, 19 L. J. Ch. 528, 2 Macn. & G. 113, 48 Eng. Ch. 88, 42 Eng. Reprint 44; Orme *v.* Young, Holt N. P. 84, 17 Rev. Rep. 611, 3 E. C. L. 43; Bell *v.* Banks, 3 M. & G. 258, 3 Scott N. R. 497, 42 E. C. L. 141. See also Archer *v.* Hale, 4 Bing. 464, 6 L. J. C. P. O. S. 79, 1 M. & P. 286, 13 E. C. L. 590.

See 40 Cent. Dig. tit. "Principal and Surety," § 201 *et seq.*

Agreement for stay before judgment.— Where, before judgment was rendered, it was agreed between the creditor and the principal that execution should be stayed for sixty days, but the agreement was not incorporated in the judgment, nor entered upon the record and there was nothing to prevent the creditor from issuing execution at any time, the surety was not discharged. Woolworth *v.* Brinker, 11 Ohio St. 593.

Time given to redeem property applied toward payment.— Where certain property was received in part payment of a secured note, a stipulation that the principal might redeem it within a given time by payment of the whole debt is not a contract for an extension of time. Marshall *v.* Dixon, 82 Ga. 435, 9 S. E. 167.

22. Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373.

23. Austin *v.* Dorwin, 21 Vt. 38.

24. Jones *v.* Fleming, 15 La. Ann. 522.

25. Revell *v.* Thrash, 132 N. C. 803, 44 S. E. 596.

26. Brooks *v.* Wright, 13 Allen (Mass.) 72; Bangs *v.* Strong, 10 Paige (N. Y.) 11 [*affirmed* in 7 Hill 250, 42 Am. Dec. 64].

27. Turner *v.* Williams, 73 Me. 466; Berry *v.* Pullen, 69 Me. 101, 31 Am. Rep. 248, which cases are as to an agreement to pay a higher rate of interest than the legal rate. But in Thompson *v.* Marshall, 2 Ohio Dec. (Reprint) 506, 3 West. L. Month. 386, it is held that an agreement to pay ten per cent interest releases a surety, as the principal can waive his defense, and the creditor would be bound.

28. Jones *v.* Brown, 11 Ohio St. 601. An oral extension of a note is insufficient, as the note remains as it was; and the oral agreement is in effect a covenant not to sue for a specified time. Mullendore *v.* Wertz, 75 Ind. 431, 39 Am. Rep. 155.

29. *Illinois.*— Wittmer *v.* Ellison, 72 Ill. 301.

Indiana.— Carr *v.* Howard, 8 Blackf. 190; Tate *v.* Wymond, 7 Blackf. 240.

Kentucky.— Brinagar *v.* Phillips, 1 B. Mon. 283, 36 Am. Dec. 575.

Virginia.— Steptoe *v.* Harvey, 7 Leigh 501.

England.— Davey *v.* Prendergrass, 5 B. & Ald. 187, 7 E. C. L. 110, 2 Chit. 336, 18 E. C. L. 665.

Canada.— Fair *v.* Pengelly, 34 U. C. Q. B. 611; Corrigal *v.* Boulton, 17 U. C. Q. B. 131.

See 40 Cent. Dig. tit. "Principal and Surety," § 201.

30. Carter *v.* Duncan, 84 N. C. 676; Dunham *v.* Downer, 31 Vt. 249; Sayre *v.* King, 17 W. Va. 562. A surety on a bond is not released at law by an extension of time to the principal. Devers *v.* Ross, 10 Gratt. (Va.) 252, 60 Am. Dec. 331; Parsons *v.* Harrold, 46 W. Va. 122, 32 S. E. 1002; Glenn *v.* Morgan, 23 W. Va. 467. See also cases cited *supra*, VIII, E, 2, j, (I), (A), note 91 *et seq.*

31. As between state and individual see *infra*, VIII, E, 2, j, (III), (E).

By authority of law see *infra*, VIII, E, 2, j, (III), (D), (E).

itor and a stranger to give time to the principal does not discharge the surety;[32] and to constitute a valid agreement it is essential that any one acting on behalf of the creditor or obligee have authority to grant an extension.[33] However, if the creditor, on learning that some one assuming to act for him has granted an extension of time, does not insist upon his objection thereto, a ratification thereof may be indicated.[34] An administrator[35] or an executor of a creditor has power to grant an extension of time to the principal which will discharge the surety.[36]

(2) By One of Several Creditors or Obligees. An extension of the time of payment,[37] or a stay of execution,[38] granted to the principal by one of two joint creditors, will release the surety as to both; but where a contractor gives a bond to secure laborers and materialmen, as well as to secure the performance of his contract, an extension of time for completing the work will not affect the liability of the sureties on the bond, for labor and material furnished.[39]

(3) To One of Several Principals. An extension of the time of payment to one joint maker of a note releases the sureties.[40]

(d) *Consideration* — (1) In General. To effect the discharge of a surety by an extension of time the agreement for a stay of execution[41] or for the extension must be supported by a sufficient consideration,[42] pursuant to the general rule

32. Fraser *v.* Jordan, 8 E. & B. 303, 3 Jur. N. S. 1054, 26 L. J. Q. B. 288, 5 Wkly. Rep. 819, 92 E. C. L. 303.

Extension not to principal.— The liability of sureties on a bond of an abstracter of titles to a purchaser of land for the omission from the abstract of an outstanding mortgage on the land are not discharged by an extension of time granted by the vendee to the vendor to make good his covenants of warranty against encumbrancers, the extension being to the vendor alone and of his liability alone, and the security accepted is collateral to that liability only and not to the liability of the abstract company. Allen *v.* Hopkins, 62 Kan. 175, 61 Pac. 750.

Assignees of a note after maturity cannot hold sureties thereon if the payee had granted an extension of time to the principal. Hoffman *v.* Habighorst, 49 Oreg. 379, 89 Pac. 952, 91 Pac. 20.

33. Jackson *v.* Michie, 33 La. Ann. 723.

Agent confined to authority given.— If the agent be given authority to grant an extension on condition that the surety consent, he cannot grant an extension without such consent. Farwell *v.* Meyer, 35 Ill. 40.

An agent to collect has no authority to extend the time of payment. Caston *v.* Dunlap, Rich. Eq. Cas. (S. C.) 77, 23 Am. Dec. 194.

A cashier being without authority to accept a renewal of a note held by the bank, or to release a surety thereon, an entry by the cashier on the credit side of the account of the principal of the receipt of interest on the overdue note, did not release the sureties. Gray *v.* Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518.

An attorney for the creditor has no authority to have an entry made upon the records, postponing the enforcement of a judgment. Jones *v.* Goodin, 46 S. W. 690, 20 Ky. L. Rep. 659.

Officer acting without authority.— The sureties of an auctioneer are not discharged because the state treasurer took notes for a sum due the state for taxes on sales, as the treasurer has no authority to receive anything but money, or to extend the time of payment. State *v.* Beard, 11 Rob. (La.) 243.

34. Woodbury *v.* Larned, 5 Minn. 339, holding that if the payee, after expressing his dissatisfaction that the person assuming to act for him had taken renewal notes from the principal, and, with knowledge that the surety considered himself released thereby, accepts such notes, a ratification is shown sufficiently.

35. West *v.* Brison, 99 Mo. 684, 13 S. W. 95. But see Jackson *v.* Michie, 33 La. Ann. 723.

36. Underwood *v.* Sample, 70 Ind. 446.

But where the principal became administrator of the estate of a surety, and after maturity the principal individually gave his note for the amount of the bond, it was held that the estate was discharged from liability. Callaway *v.* Price, 32 Gratt. (Va.) 1.

37. Clark *v.* Patton, 4 J. J. Marsh. (Ky.) 33, 20 Am. Dec. 203.

38. Givens *v.* Briscoe, 3 J. J. Marsh. (Ky.) 529; Bangs *v.* Strong, 10 Paige (N. Y.) 11 [*affirmed* in 7 Hill 250, 42 Am. Dec. 64].

39. Steffes *v.* Lemke, 40 Minn. 27, 41 N. W. 302; Kansas City *v.* McGovern, 78 Mo. App. 513; Doll *v.* Crume, 41 Nebr. 655, 59 N. W. 806.

40. Warburton *v.* Ralph, 9 Wash. 537, 38 Pac. 140.

41. Royston *v.* Howie, 15 Ala. 309; Wilson *v.* Orleans Bank, 9 Ala. 847; Sawyer *v.* Bradford, 6 Ala. 572.

42. *Alabama.*— Howle *v.* Edwards, 97 Ala. 649, 11 So. 748; Saint *v.* Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. Rep. 210; Buckalew *v.* Smith, 44 Ala. 638; Agee *v.* Steele, 8 Ala. 948.

Colorado.— Winne *v.* Colorado Springs Co., 3 Colo. 155; Bowling *v.* Chambers, 20 Colo. App. 113, 77 Pac. 16.

District of Columbia.— Clark *v.* Gerstley, 26 App. Cas. 205 [*affirmed* in 204 U. S. 504, 27 S. Ct. 337, 51 L. ed. 589]; Green *v.* Lake, 2 Mackey 162.

which requires a binding agreement between the principal and the creditor which

Georgia.— Tatum *v.* Morgan, 108 Ga. 336, 33 S. E. 940; Vason *v.* Beall, 58 Ga. 500; Bonner *v.* Nelson, 57 Ga. 433; Crawford *v.* Gaulden, 33 Ga. 173; Goodwyn *v.* Hightower, 30 Ga. 249.

Illinois.— English *v.* Landon, 181 Ill. 614, 54 N. E. 911; Glickauf *v.* Hirschorn, 73 Ill. 574; Galbraith *v.* Fullerton, 53 Ill. 126; Woolford *v.* Dow, 34 Ill. 424; Gardner *v.* Watson, 13 Ill. 347; People *v.* McHatton, 7 Ill. 638; Waters *v.* Simpson, 7 Ill. 570; Church *v.* John E. Burns Lumber Co., 127 Ill. App. 451; Kriz *v.* Rad Pokrok, No. 65 C. S. P. S., 46 Ill. App. 418.

Indiana.— Lindeman *v.* Rosenfield, 67 Ind. 246, 33 Am. Rep. 79; Hogshead *v.* Williams, 55 Ind. 145; Halstead *v.* Brown, 17 Ind. 202; Shook *v.* Ripley County, 6 Ind. 461; Shook *v.* State, 6 Ind. 113; Carr *v.* Howard, 8 Blackf. 190; Harter *v.* Moore, 5 Blackf. 367; Coman *v.* State, 4 Blackf. 241; Weaver *v.* Prebster, 37 Ind. App. 582, 77 N. E. 674; Olson *v.* Chism, 21 Ind. App. 40, 51 N. E. 373; Voris *v.* Shotts, 20 Ind. App. 220, 50 N. E. 484; Bohring *v.* Root, Wils. 29.

Iowa.— Byers *v.* Harris, 67 Iowa 685, 25 N. W. 879; Wendling *v.* Taylor, 57 Iowa 354, 10 N. W. 675; Roberts *v.* Richardson, 39 Iowa 290; Davis *v.* Graham, 29 Iowa 514; Hunt *v.* Postlewait, 28 Iowa 427.

Kansas.— Eaton *v.* Whitmore, 3 Kan. App. 760, 45 Pac. 450.

Kentucky.— Brinagar *v.* Phillips, 1 B. Mon. 283, 36 Am. Dec. 575; U. S. Fidelity, etc., Co. *v.* Boyd, 94 S. W. 35, 29 Ky. L. Rep. 598.

Louisiana.— Parker *v.* Guillot, 118 La. 223, 42 So. 782; Frazier *v.* Dick, 5 Rob. 249; Huie *v.* Bailey, 16 La. 213, 35 Am. Dec. 214.

Maine.— Leavitt *v.* Savage, 16 Me. 72.

Maryland.— Hoye *v.* Penn, 1 Bland 28.

Mississippi.— Keirn *v.* Andrews, 59 Miss. 39; Roberts *v.* Stewart, 31 Miss. 664; Freeland *v.* Compton, 30 Miss. 424; Clarke County Police *v.* Covington, 26 Miss. 470; Govan *v.* Binford, 25 Miss. 151 (holding that an agreement by the principal to pay the debt at a future day, or, in default thereof, to deliver a specific article in payment, is not such a consideration for forbearance as will prevent the creditor from holding the surety); Thornton *v.* Dabney, 23 Miss. 559; Wadlington *v.* Gary, 7 Sm. & M. 522; Payne *v.* Commercial Bank, 6 Sm. & M. 24; Newell *v.* Hamer, 4 How. 684, 35 Am. Dec. 415.

Missouri.— Regan *v.* Williams, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 600; Harburg *v.* Kumpf, 151 Mo. 16, 52 S. W. 19; West *v.* Brison, 99 Mo. 684, 13 S. W. 95; Ford *v.* Beard, 31 Mo. 459; Marks *v.* State Bank, 8 Mo. 316; Nichols *v.* Douglass, 8 Mo. 49; Donovan Real-Estate Co. *v.* Clark, 84 Mo. App. 163; Burrus *v.* Davis, 67 Mo. App. 210; Aultman, etc., Co. *v.* Smith, 52 Mo. App. 351; Brown *v.* Kirk, 20 Mo. App. 524; Newcomb *v.* Blakely, 1 Mo. App. 289.

Nebraska.— Smith *v.* Mason, 44 Nebr. 610, 63 N. W. 41; Watts *v.* Gantt, 42 Nebr. 869, 61 N. W. 104.

New Hampshire.— Hoyt *v.* French, 24 N. H. 198; New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187; Bailey *v.* Adams, 10 N. H. 162.

New Jersey.— Grover *v.* Hoppock, 26 N. J. L. 191.

New York.— Olmstead *v.* Latimer, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685 [*modifying* 9 N. Y. App. Div. 163, 41 N. Y. Suppl. 44]; Wilson *v.* Webber, 157 N. Y. 693, 51 N. E. 1094 [*affirming* 92 Hun 466, 36 N. Y. Suppl. 550]; Draper *v.* Romeyn, 18 Barb. 166; Mutual L. Ins. Co. *v.* Davies, 44 N. Y. Super. Ct. 172; Gahn *v.* Niemcewicz, 11 Wend. 312; Reynolds *v.* Ward, 5 Wend. 501; Bangs *v.* Strong, 10 Paige 11 [*affirmed* in 7 Hill 250, 42 Am. Dec. 64]; Sailly *v.* Elmore, 2 Paige 497. Where plaintiff consented, without consideration, that the constable who had collected the money on execution might retain it for a short time for a temporary purpose, the surety of the constable was not discharged. Boice *v.* Main, 4 Den. 55.

Ohio.— Farmers' Bank *v.* Raynolds, 13 Ohio 84; Hill *v.* Calloway, 1 Ohio Dec. (Reprint) 59, 1 West. L. J. 398.

Pennsylvania.— Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033; Zane *v.* Kennedy, 73 Pa. St. 182; Ashton *v.* Sproule, 35 Pa. St. 492; Snively *v.* Fisher, 21 Pa. Super. Ct. 56.

South Carolina.— Parnell *v.* Price, 3 Rich. 121; Burn *v.* Poaug, 3 Desauss. Eq. 596.

Tennessee.— Lane *v.* Howell, 1 Lea 275; Deberry *v.* Adams, 9 Yerg. 52.

Texas.— Wylie *v.* Hightower, 74 Tex. 306, 11 S. W. 1118; Houston *v.* Braden, (Civ. App. 1896) 37 S. W. 467; Bonnell *v.* Prince, 11 Tex. Civ. App. 399, 32 S. W. 855; Benson *v.* Phipps, (Civ. App. 1894) 28 S. W. 359; Hall *v.* Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861; Beasley *v.* Boothe, 3 Tex. Civ. App. 98, 22 S. W. 255.

Utah.— Wallace *v.* Richards, 16 Utah 52, 50 Pac. 804.

Vermont.— Joslyn *v.* Smith, 13 Vt. 353.

Virginia.— Hunter *v.* Jett, 4 Rand. 104; Norris *v.* Crummey, 2 Rand. 323.

Wisconsin.— Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42.

United States.— Clark *v.* Gerstley, 204 U. S. 504, 27 S. Ct. 337, 51 L. ed. 589 [*affirming* 26 App. Cas. (D. C.) 205].

See 40 Cent. Dig. tit. "Principal and Surety," §§ 213, 214. See also cases cited *supra*, VIII, E, 2, j, (I), (A) note 91; VIII, E, 2, j, (II), (A), note 16 *et seq.*

Pleading.—A plea by a surety setting up an extension of time to the principal as a defense must show a consideration for the agreement between the obligee and the principal. Palmer *v.* White, 65 N. J. L. 69, 46 Atl. 706.

Executed and unexecuted illegal contracts. — If the parties enter into an illegal and unexecuted contract to extend the time the surety will not be released. Parlin, etc., Co. *v.* Hutson, 198 Ill. 389, 65 N. E. 93 [*citing* Silmeyer *v.* Schaffer, 60 Ill. 479; Galbraith *v.* Fullerton, 53 Ill. 126]. But where the

will tie the hands of the latter. Under this rule the payment of a sum of money,[43] although not made until several days afterward, and the creditor begins suit on that day,[44] or giving a note for an additional sum,[45] is a sufficient consideration; but a promise to pay the debt at a future time,[46] or out of the proceeds of some particular property, is not.[47] A confession of judgment by the principal in favor of his creditor is sufficient; [48] so is a purchase of property by the principal from the creditor at the request of the latter.[49] One promise is a sufficient consideration for another, and an actual money consideration is not required to effect an extension of time.[50]

(2) PAYMENTS.[51] Part payment of the amount due is not a sufficient consideration for an extension of the time of payment of the balance,[52] nor would the payment of another matured debt owing by the principal to the creditor; [53] but part payment, before maturity, of the debt for which the surety is liable,[54]

contract, although illegal, has been executed, the surety is discharged. Parlin, etc., Co. *v.* Hutson, *supra*.

Payment of usury see *infra*, VIII, E, 2, j, (III), (B), (2).

Mere delay or forbearance see *supra*, VII, D.

43. Rathbone *v.* Warren, 10 Johns. (N. Y.) 587; McComb *v.* Kittridge, 14 Ohio 348; Farmers', etc., Bank *v.* Bayless, 1 Tex. App. Civ. Cas. § 1245. But where a note was in the possession of a bank for collection, the payment by the principal to the bank of one dollar for its trouble in extending the time of payment of the balance due was held insufficient to discharge a surety on the note. Prather *v.* Gammon, 25 Kan. 379.

44. Forbes *v.* Sheppard, 98 N. C. 111, 3 S. E. 817.

45. Hutchinson *v.* Moody, 18 Me. 393; McNulty *v.* Hurd, 86 N. Y. 547; Washington *v.* Tait, 3 Humphr. (Tenn.) 543.

Agreement to pay.— Where the principal agrees to pay fifty dollars in addition to the amount due at the end of the extended time, and in the meantime the creditor is to have the use of a horse of the principal, the surety is discharged. Riley *v.* Gregg, 16 Wis. 666.

46. Hume *v.* Mazelin, 84 Ind. 574.

47. Wadlington *v.* Gary, 7 Sm. & M. (Miss.) 522.

48. Riddle *v.* Thompson, 104 Pa. St. 330; Blank *v.* Weber, 2 Walk. (Pa.) 205; Croft *v.* Johnson, 1 Marsh. 59, 5 Taunt. 319, 1 E. C. L. 169; Blowsfield *v.* Tower, 4 Taunt. 456.

49. Dunham *v.* Downer, 31 Vt. 249.

50. English *v.* Landon, 181 Ill. 614, 54 N. E. 911.

An agreement between creditor and principal to exchange releases of mutual claims is a sufficient consideration for an extension of time to the principal. Blackwell *v.* Bainbridge, 19 N. Y. Suppl. 681.

51. Payment of interest see *infra*, VIII, E, 2, j, (III), (B), (1).

52. *Alabama.*— Hughes *v.* Southern Warehouse Co., 94 Ala. 613, 10 So. 133.

Arkansas.— Caldwell *v.* McVicar, 9 Ark. 418; King *v.* State Bank, 9 Ark. 185, 46 Am. Dec. 739.

Illinois.— Edmonds *v.* Thomas, 41 Ill. App. 505.

Indiana.— Davis *v.* Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565.

Kansas.— Ingels *v.* Sutliff, 36 Kan. 444, 13 Pac. 828.

Kentucky.— Evans *v.* Partin, 56 S. W. 648, 22 Ky. L. Rep. 20.

Mississippi.— Roberts *v.* Stewart, 31 Miss. 664.

Missouri.— Petty *v.* Douglass, 76 Mo. 70.

Nebraska.— Sherman County *v.* Nichols, 65 Nebr. 250, 91 N. W. 198.

New Hampshire.— Mathewson *v.* Strafford Bank, 45 N. H. 104. Where the principal requested the creditor to receive part payment, which was declined, but the creditor said he would take it in about six months, at which time he would need it, and, at the end of six months, the creditor received a less sum in part payment, the transaction did not amount to an agreement to give time. McCann *v.* Dennett, 13 N. H. 528.

New York.— Halliday *v.* Hart, 30 N. Y. 474.

Ohio.— Jenkins *v.* Clarkson, 7 Ohio 72.

Pennsylvania.— Hall *v.* Bardwell, 1 C. Pl. 22.

Texas.— Andrews *v.* Hagadon, 54 Tex. 571; Yeary *v.* Smith, 45 Tex. 56.

Virginia.— Wells *v.* Hughes, 89 Va. 543, 16 S. E. 689.

See 40 Cent. Dig. tit. "Principal and Surety," § 217.

But in Freeman *v.* Profilet, 11 Rob. (La.) 33, part payment of a substantial sum was held to be sufficient consideration for an extension of time for payment of the balance, where the principal was a non-resident, financially involved, and where collection by judicial proceeding would have been attended with a delay of a number of years.

53. Beasley *v.* Boothe, 3 Tex. Civ. App. 98, 22 S. W. 255.

The fact that the principal is insolvent at the time he pays a matured debt will not make such payment a consideration for an extension of a debt for which a surety is liable. Bunker *v.* Taylor, 10 S. D. 526, 74 N. W. 450.

54. Vestal *v.* Knight, 54 Ark. 97, 15 S. W. 17; Whittle *v.* Skinner, 23 Vt. 531; Austin *v.* Dorwin, 21 Vt. 38.

Part of bonds not due.— Where the obligee on several bonds executed by the same person agreed that, in consideration of the immediate payment of a certain sum on each bond, some of which were not due, and of

or the promise to pay, before maturity, another debt of the principal is a sufficient consideration.[55]

(3) Obtaining Security. If the principal, as consideration for an extension of time, gives his creditor additional security, it is sufficient,[56] although inadequate.[57] A transfer of property by the principal,[58] or an order upon a third person for property,[59] an assignment of the interest of the principal in a partnership,[60] giving a mortgage on real [61] or on personal property,[62] or giving another mortgage,[63] or giving another note as collateral security, is a sufficient consideration for an extension of time to discharge the surety.[64]

(E) *Duration of Extension.* As an agreement, to result in a binding contract, must be certain as to its terms, an extension to the principal, in order to release his surety, must be for a definite period.[65] It is not sufficient that the creditor actually

the consolidation of the interest with the principal, he would give further time for the payment of the residue, the surety is discharged, although the whole amount paid does not equal the amount due. Smith *v.* Tunno, 1 McCord Eq. (S. C.) 443, 16 Am. Dec. 617.

Mere remittance before maturity.— Where the principal makes a remittance with the intention of making part payment at maturity, the fact that it reaches the creditor the day before maturity, and he is given credit therefor, does not constitute a consideration for an agreement to extend the balance. Sully *v.* Childress, 106 Tenn. 109, 60 S. W. 499, 82 Am. St. Rep. 875.

55. Buck *v.* Smiley, 64 Ind. 431.

56. Hall *v.* Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861; Merchants' Bank *v.* Bussell, 16 Wash. 546, 48 Pac. 242 (taking additional surety on a note); Overend *v.* Oriental Financial Corp., L. R. 7 H. L. 348, 31 L. T. Rep. N. S. 322 [*affirming* L. R. 7 Ch. 142, 41 L. J. Ch. 332, 25 L. T. Rep. N. S. 813, 20 Wkly. Rep. 253].

Agreement under seal to convey land.— Where the creditor agreed, under seal, that a simple contract debt should be paid by conveying land to the creditor within fifteen days, the surety is discharged. Wagman *v.* Hoag, 14 Barb. (N. Y.) 232.

Notes by judgment debtor.— The giving of notes by a judgment debtor and one of his sureties, under an agreement that the time of payment of the judgment be extended until maturity of the notes, is a valid consideration for the extension of time, and therefore a cosurety against whom judgment was also recovered is released thereby. McNulty *v.* Hurd, 86 N. Y. 547.

57. Underwood *v.* Sample, 70 Ind. 446.

Where a wife signed a note as additional surety in consideration of an extension of time granted to her husband as principal, the former surety was released by the extension, although the wife was not bound, she not having any separate estate. Williams *v.* Jensen, 75 Mo. 681.

58. Mobile State Branch Bank *v.* James, 9 Ala. 949; Carter-Battle Grocer Co. *v.* Clarke, (Tex. Civ. App. 1905) 91 S. W. 880.

59. Robinson *v.* Dale, 38 Wis. 330.

60. Whittle *v.* Skinner, 23 Vt. 531.

61. *Arkansas.*— Ferguson *v.* State Bank, 8 Ark. 416.

Kentucky.— Sparks *v.* Hall, 4 J. J. Marsh. 35.

Missouri.— Semple *v.* Atkinson, 64 Mo. 504.

Texas.— Moroney *v.* Coombes, (Civ. App. 1905) 88 S. W. 430.

United States.— Hopkirk *v.* McConico, 11 Fed. Cas. No. 6,696, 1 Brock. 220.

England.— Bolton *v.* Buckenham, [1891] 1 Q. B. 278, 60 L. J. Q. B. 261, 64 L. T. Rep. N. S. 278, 39 Wkly. Rep. 293; Boultbee *v.* Stubbs, 18 Ves. Jr. 20, 11 Rev. Rep. 141, 34 Eng. Reprint 225.

Canada.— Todd *v.* City Bank, 7 Can. L. J. 123.

See 40 Cent. Dig. tit. "Principal and Surety," § 218.

62. Smith *v.* Clopton, 48 Miss. 66; Lee *v.* Brugmann, 37 Nebr. 232, 55 N. W. 1053; Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874.

63. Wylie *v.* Hightower, 74 Tex. 306, 11 S. W. 1118.

64. Anonymous, 1 N. J. L. J. 22. Taking the individual note of one partner is consideration for an agreement to extend the time of payment, for it may be higher than the partnership note. The holder of a partnership note must exhaust the partnership assets; and it might not be as substantial and safe as the note of one partner only. Clark *v.* House, 16 N. Y. Suppl. 777.

65. *Arkansas.*—Kendall *v.* Milligan, (1896) 34 S. W. 78; King *v.* Haynes, 35 Ark. 463; Thompson *v.* Robinson, 34 Ark. 44.

Colorado.— Winne *v.* Colorado Springs Co., 3 Colo. 155.

Delaware.— McCreary *v.* Nivin, (Ch. 1907) 67 Atl. 452.

Georgia.— Bunn *v.* Commercial Bank, 98 Ga. 647, 26 S. E. 63.

Illinois.— English *v.* Landon, 181 Ill. 614, 54 N. E. 911; Field *v.* Brokaw, 148 Ill. 654, 37 N. E. 80; Glickauf *v.* Hirschhorn, 73 Ill. 574; Gardner *v.* Watson, 13 Ill. 347; People *v.* McHatton, 7 Ill. 638; Waters *v.* Simpson, 7 Ill. 570; Church *v.* John E. Burns Lumber Co., 127 Ill. App. 451.

Indiana.— Beach *v.* Zimmerman, 106 Ind. 495, 7 N. E. 237; Cates *v.* Thayer, 93 Ind. 156; Chrisman *v.* Perrin, 67 Ind. 586; Prather *v.* Young, 67 Ind. 480; Miller *v.* Arnold, 65 Ind. 488; Tracy *v.* Quillen, 65 Ind. 249; Jarvis *v.* Hyatt, 43 Ind. 163; Weaver *v.* Prebster, 37 Ind. App. 582, 77 N. E. 674; Durbin *v.* Northwestern Scraper Co., 36 Ind.

does wait a long time after an agreement for delay; [66] but if the period be definite, it is immaterial how short it is,[67] even a day being sufficient to release the surety.[68] In some cases it has been held that where there is an agreement, on sufficient consideration, postponing the day of payment, although it may not be shown how long or to what particular time the payment is agreed to be postponed, the rule that an extension of time discharges the surety applies.[69]

(F) *Fraud.* It has been held that an agreement for an extension obtained by fraud practised upon the creditor, being voidable, will not discharge the surety;[70] but if the creditor, on learning of the fraud practised upon him by the principal, does not act promptly, the surety will be discharged unless it clearly appears

App. 123, 73 N. E. 297; Olson *v.* Chism, 21 Ind. App. 40, 51 N. E. 373; Voris *v.* Shotts, 20 Ind. App. 220, 50 N. E. 484.

Iowa.—Morgan *v.* Thompson, 60 Iowa 280, 14 N. W. 306.

Mississippi.— Freeland *v.* Compton, 30 Miss. 424; Clarke County Police *v.* Covington, 26 Miss. 470; Thornton *v.* Dabney, 23 Miss. 559; Wadlington *v.* Gary, 7 Sm. & M. 522.

Missouri.— West *v.* Brison, 99 Mo. 684, 13 S. W. 95; Burrus *v.* Davis, 67 Mo. App. 210; Aultman, etc., Co. *v.* Smith, 52 Mo. App. 351.

Nebraska.— Watts *v.* Gantt, 42 Nebr. 869, 61 N. W. 104.

North Carolina.— Revell *v.* Thrash, 132 N. C. 803, 44 S. E. 596; Benedict *v.* Jones, 129 N. C. 475, 40 S. E. 223.

South Carolina.— Parnell *v.* Price, 3 Rich. 121.

Texas.— Webb *v.* Pahde, (Civ. App. 1897) 43 S. W. 19; Houston *v.* Braden, (Civ. App. 1896) 37 S. W. 467.

Utah.— Wallace *v.* Richards, 16 Utah 52, 50 Pac. 804.

See 40 Cent. Dig. tit. "Principal and Surety," § 211.

An agreement to dismiss a suit without specifying any day to which indulgence is to be given will not discharge a surety. David *v.* Malone, 48 Ala. 428; Tracy *v.* Quillen, 65 Ind. 249.

Nor will stay or withdrawal of execution without any definite extension discharge the surety. McGee *v.* Metcalf, 12 Sm. & M. (Miss.) 535, 51 Am. Dec. 122; Knight *v.* Charter, 22 W. Va. 422. But see Chichester *v.* Mason, 7 Leigh (Va.) 244.

A surety must allege and prove that the time was extended for a definite period. Clark *v.* Gerstley, 26 App. Cas. (D. C.) 205 [*affirmed* in 204 U. S. 504, 27 S. Ct. 337, 51 L. ed. 589]; Truesdell *v.* Hunter, 28 Ill. App. 292; McCormick Harvesting Mach. Co. *v.* Rae, 9 N. D. 482, 84 N. W. 346.

The fact that a depositor leaves his deposit in a bank after the retirement of a partner does not release the retiring partner from his liability as surety, there not being any extension for a definite time. Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033.

"Until after the harvest."—An agreement to wait "until after the harvest" has been held to be too indefinite. Findley *v.* Hill, 8 Oreg. 247, 34 Am. Rep. 578.

"Until after threshing."— But an agreement, made in the summer time, to extend the time of payment of a note "until after threshing," has been held to be sufficiently definite. Moulton *v.* Posten, 52 Wis. 169, 8 N. W. 621.

Agreement to pay semiannual interest.— An agreement between the payee of a note and the principal, allowing the latter to retain the money upon his paying the interest semiannually, is an extension for six months at least, and is sufficiently definite to relieve the surety. Scott *v.* Fisher, 110 N. C. 311, 14 S. E. 799, 28 Am. St. Rep. 688.

66. Bucklen *v.* Huff, 53 Ind. 474.

67. Comegys *v.* Booth, 3 Stew. (Ala.) 14; Menifee *v.* Clark, 35 Ind. 304; Revell *v.* Thrash, 132 N. C. 803, 44 S. E. 596; Bank of British Columbia *v.* Jeffs, 15 Wash. 230, 46 Pac. 247.

A demand note taken by the creditor discharges the surety, as the note is not due until demand. Johnson *v.* Franklin Bank, 173 Mo. 171, 73 S. W. 191. See, however, Deal *v.* Cochran, 66 N. C. 269.

68. Johnson *v.* Planters' Bank, 4 Sm. & M. (Miss.) 165, 43 Am. Dec. 480; Fellows *v.* Prentiss, 3 Den. (N. Y.) 512, 45 Am. Dec. 484; Bangs *v.* Strong, 7 Hill (N. Y.) 250, 42 Am. Dec. 64. But see Cooper *v.* Fisher, 7 J. J. Marsh. (Ky.) 396.

69. Cox *v.* Mobile, etc., R. Co., 37 Ala. 320 (where it is said that the rule that the extension must be for a definite and precise period means that a mere indulgence determinable at the will of the creditor will not discharge the surety); Haden *v.* Brown, 18 Ala. 641. *Compare* David *v.* Malone, 48 Ala. 428.

70. Mack *v.* Kaetzel, 2 Ohio Dec. (Reprint) 313, 2 West. L. Month. 412.

Evidence not showing fraud.— Where the principal on a bond made an agreement with the holder for an extension of the time for payment in consideration of twenty-five dollars to be paid, it is not fraudulent or a trick to take the holder by surprise, for the principal a few days later to drive up to the store of the holder, hand him twenty-five dollars, and drive off at once after saying, "Here is that money I promised you." Forbes *v.* Sheppard, 98 N. C. 111, 3 S. E. 817.

Executed contract.— Where the payee of a note accepted a new note of the principal secured by a mortgage on land which the principal did not own, but to which he appeared to have title by a forged deed, the

that he has not been prejudiced.[71] The rule is applied where the creditor has granted an extension of time because of a representation by the principal that the surety has consented thereto,[72] because he fraudulently has been induced to accept a worthless note,[73] or where the creditor gave time to the principal on condition that a new bond [74] or note be executed, and the principal forged the signatures of the sureties to the new instrument.[75] But where the signature of a surety to a renewal note was obtained by a false representation of the principal to which the creditor was not a party, extension was held valid and the surety on the original note released.[76]

(G) *Performance of Conditions.* Not only must the agreement for an extension be complete;[77] but if the creditor has annexed conditions to his agreement for an extension of time, the agreement is not binding if the conditions are not performed, and the surety is not discharged.[78]

(III) *Various Transactions as Effecting Extension and Discharge* — (A) *In General.* Any contract upon sufficient consideration which, in its consequences, may have the effect of giving an extension of time discharges the surety.[79] An agreement that the indebtedness may be paid in instalments,[80] an agreement not to sue, the continuance of an action or the proceedings therein,[81]

surety on the original note was released after the contract for the extension became executed by the expiration of the time given. Parlin, etc., Co. *v.* Hutson, 198 Ill. 389, 65 N. E. 93.

71. Morley *v.* Dickinson, 12 Cal. 561 (holding that the contract was good until rescinded); Burnap *v.* Robertson, 75 Ga. 689; Struss *v.* Masonic Sav. Bank, 89 Ky. 61, 11 S. W. 769, 12 S. W. 266, 11 Ky. L. Rep. 333; Sandy River Nat. Bank *v.* Miller, 82 Me. 137, 19 Atl. 109.

72. Dwinnell *v.* McKibben, 93 Iowa 331, 61 N. W. 985; White *v.* Middlesworth, 42 Mo. App. 368; Bebout *v.* Bodle, 38 Ohio St. 500; McDougall *v.* Walling, 15 Wash. 78, 45 Pac. 668, 55 Am. St. Rep. 871.

73. Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435 [*affirming* 63 Hun 413, 18 N. Y. Suppl. 685].

74. Lyttle *v.* Cozad, 21 W. Va. 183.

75. *Indiana.*— Lovinger *v.* Madison First Nat. Bank, 81 Ind. 354; Albright *v.* Griffin, 78 Ind. 182.

Iowa.— Hubbard *v.* Hart, 71 Iowa 668, 33 N. W. 233.

Kentucky.— Bowman *v.* Humphrey, 37 S. W. 150, 18 Ky. L. Rep. 511.

Missouri.— Kincaid *v.* Yates, 63 Mo. 45; Central Sav. Bank *v.* Danckmeyer, 70 Mo. App. 168.

Tennessee.— Athens First Nat. Bank *v.* Buchanan, 87 Tenn. 32, 9 S. W. 202, 10 Am. St. Rep. 617, 1 L. R. A. 199.

Texas.— Jameson *v.* Officer, 15 Tex. Civ. App. 212, 39 S. W. 190 [*affirming* 9 Tex. Civ. App. 428, 29 S. W. 246].

Vermont.— Lyndonville Nat. Bank *v.* Fletcher, 68 Vt. 81, 34 Atl. 38, 54 Am. St. Rep. 874, holding that a bank owes a surety on a note discounted by it no duty as to discovering the forgeries of signatures upon renewals beyond good faith, and its negligence in this respect must amount to bad faith; that the fact that it stamped the original note "paid" upon taking a renewal, which original the principal showed to the surety, will not estop the bank from suing on the original.

See 40 Cent. Dig. tit. "Principal and Surety." § 207.

76. Farmers', etc., Bank *v.* Lucas, 26 Ohio St. 385.

77. See *supra*, VIII, E, 2, j, (II), (A).

78. Thorn *v.* Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; Harnsberger *v.* Geiger, 3 Gratt. (Va.) 144.

Consent of surety.— If the creditor agrees to an extension upon condition that the surety consents, the surety is not discharged. Kuhlman *v.* Leavens, 5 Okla. 562, 50 Pac. 171; Duff *v.* Barrett, 17 Grant Ch. (U. C.) 187. But see Brown *v.* Fountain, 3 Tex. Civ. App. 227, 22 S. W. 129.

79. Govan *v.* Binford, 25 Miss. 151.

If an award extends the time of payment of a debt, the surety is discharged. Coleman *v.* Wade, 6 N. Y. 44. So where an action in replevin, by agreement, is referred to arbitration, and time for award is enlarged, the surety becomes discharged. Bowmaker *v.* Moore, 7 Price 223, 21 Rev. Rep. 758.

80. Fordyce *v.* Ellis, 29 Cal. 96; Gifford *v.* Allen, 3 Metc. (Mass.) 255; Steele *v.* Boyd, 6 Leigh (Va.) 547, 29 Am. Dec. 218; Jenkins *v.* Robertson, 2 Drew. 351, 23 L. J. Ch. 816, 61 Eng. Reprint 755; Tatum *v.* Evans, 54 L. T. Rep. N. S. 336; Croft *v.* Johnson, 1 Marsh. 59, 5 Taunt. 319, 1 E. C. L. 169; Bowsfield *v.* Tower, 4 Taunt. 456; Boultbee *v.* Stubbs, 18 Ves. Jr. 20, 11 Rev. Rep. 141, 34 Eng. Reprint 225.

81. Harbert *v.* Dumont, 3 Ind. 346; Moore *v.* Broussard, 8 Mart. N. S. (La.) 277. But see Ward *v.* Johnson, 6 Munf. (Va.) 6, 8 Am. Dec. 729.

When suit could not be brought.—An agreement not to bring suit against the estate of a deceased principal for a time not exceeding that within which such suit is prohibited by law will not discharge the surety. Gardner *v.* Van Norstrand, 13 Wis. 543; Walker *v.* Archer, 128 Mich. 603, 87 N. W. 754 (holding that where, after an appeal, the case was

or a stay of proceedings on a judgment or of execution will discharge the surety.[82] If the principal confess judgment under an agreement with the creditor for a stay of execution, it is held that the surety is not discharged if the creditor could not have obtained judgment, in the ordinary course, any sooner than the postponed time;[83] but if the extension is longer than the time which would be required to obtain judgment and execution in a suit not defended, the surety is discharged, although the principal might have obtained as great delay by defending the suit.[84] An agreement to dismiss a suit will not discharge a surety if the creditor is not prevented from bringing a new suit immediately.[85] If the creditor agrees to receive payment of the debt in property, instead of money, at a distant day after maturity,[86] or if the principal turns over property for the purpose of having it converted into money, and payment made from the proceeds, and the creditor consents to a sale

postponed several times, the sureties on the appeal-bond were released from liability); Ducker *v.* Rapp, 67 N. Y. 464 (where it is further indicated, however, that an ordinary stipulation during a litigation, to extend the time to answer, would not affect the surety); Wybrants *v.* Lutch, 24 Tex. 309.

Undertaking in the proceeding.—A mere stipulation in a litigation for the postponement of one of the ordinary proceedings therein and in which an undertaking has been given will not discharge the sureties in the undertaking. Steinbock *v.* Evans, 122 N. Y. 551, 25 N. E. 929; Hall, etc., Furniture Co. *v.* Schmidt, 7 Wash. 606, 35 Pac. 424. See Blackwell *v.* Bainbridge, 19 N. Y. Suppl. 681, where the agreement was upon sufficient consideration and the sureties were held to be discharged.

82. *Iowa.*— Okey *v.* Sigler, 82 Iowa 94, 47 N. W. 911.

Kentucky.— Reid *v.* Watts, 4 J. J. Marsh. 440.

Louisiana.— State Bank *v.* Smith, 4 Rob. 276. But a declaration by a creditor that he would not execute his judgment until the return of a certain person from Europe is not an extension, but at most an expression of intention merely. Purdy *v.* Forstall, 45 La. Ann. 814, 13 So. 95.

Maryland.— State *v.* Hammond, 6 Gill & J. 157.

New York.— Ducker *v.* Rapp, 67 N. Y. 464; Boughton *v.* Orleans Bank, 2 Barb. Ch. 458.

North Carolina.— Salisbury First Nat. Bank *v.* Swink, 129 N. C. 255, 39 S. E. 962; Evans *v.* Raper, 74 N. C. 639.

Ohio.— Ide *v.* Churchill, 14 Ohio St. 372; Steubenville Bank *v.* Leavitt, 5 Ohio 207.

Pennsylvania.— Sawyers *v.* Hicks, 6 Watts 76; Mowery *v.* Brumbaugh, 14 Pa. Co. Ct. 257.

Virginia.— Chichester *v.* Mason, 7 Leigh 244; Ward *v.* Johnson, 6 Munf. 6, 8 Am. Dec. 729; Ward *v.* Johnston, 1 Munf. 45.

West Virginia.— Knight *v.* Charter, 22 W. Va. 422.

England.— Rees *v.* Berrington, 2 Ves. Jr. 540, 30 Eng. Reprint 765.

See 40 Cent. Dig. tit. "Principal and Surety," § 198½.

A surety can show by extrinsic evidence that an execution was stayed at the instance of the principal without his consent. Higgs *v.* Landrum, 1 Coldw. (Tenn.) 81.

Suffering an execution sale to be postponed will not release a surety when the sale takes place sooner than it could have been forced in the usual course of legal proceedings. Manice *v.* Duncan, 12 La. Ann. 715.

A stipulation that execution against the person of defendant should not be issued until after the argument of a motion to open a judgment by default will not release his sureties if execution against the property had not been stayed, as execution against the person could not issue until return of that against the property. Cooper *v.* Wandel, 9 N. Y. St. 9.

83. *Alabama.*— Fletcher *v.* Gamble, 3 Ala. 335.

Indiana.— Barker *v.* McClure, 2 Blackf. 14.

Ohio.— Upington *v.* May, 40 Ohio St. 247.

Texas.— Guerguin *v.* Boone, 33 Tex. Civ. App. 622, 77 S. W. 630.

United States.— Suydam *v.* Vance, 23 Fed. Cas. No. 13,657, 2 McLean 99.

England.— Price *v.* Edmunds, 10 B. & C. 578, 8 L. J. K. B. O. S. 119, 5 M. & R. 287, 21 E. C. L. 246; Ladbrook *v.* Hewett, 1 Dowl. P. C. 488; Hulme *v.* Coles, 2 Sim. 12, 29 Rev. Rep. 52, 2 Eng. Ch. 12, 57 Eng. Reprint 695.

84. Bower *v.* Tiermann, 3 Den. (N. Y.) 378.

In Pennsylvania the statute provided that for cognizance by a justice of the peace of certain matters if the parties voluntarily appeared before him, etc., and that no execution should issue before the expiration of one year from the date of judgment if defendant were a freeholder, etc., and it was held that where the debtor's land was encumbered he did not have the privilege of the stay of execution and that in such case the acceptance by the creditor of a judgment before a justice of the peace against the principal in a note with a stipulation that defendant should be entitled to a stay of execution is a release of the surety on the note. Clippinger *v.* Creps, 2 Watts 45.

85. Tracy *v.* Quillen, 65 Ind. 249. See also *supra*, VIII, E, 2, j, (II), (E).

86. Millaudon *v.* Arnous, 3 Mart. N. S. (La.) 596; Wagman *v.* Hoag, 14 Barb. (N. Y.) 232; Davies *v.* Stainbank, 6 De G. M. & G. 679, 55 Eng. Ch. 528, 43 Eng. Reprint 1397.

thereof on credit, it will constitute such an extension as to discharge a surety.[87] Consent by the creditor to wait until the principal can go to a certain place to get funds will not discharge the surety.[88] It is not necessarily an extension of time to permit a contractor to complete his work after the time specified in the contract;[89] and notice to the principal that he will be sued if he do not pay before a certain time,[90] or the signification of a willingness to extend credit, are not agreements for an extension.[91] Where the surety has become liable for all debts of the principal to become due, extensions granted to the principal will not discharge the surety if the debt as extended answers to the description of those intended to be secured; [92] or if the surety has agreed to become responsible for all debts owing by the principal at a certain future time, any extensions granted to the principal which do not expire later than such time will not affect the liability of the surety.[93]

87. Lambert *v.* Shitler, 62 Iowa 72, 17 N. W. 187; Brown *v.* Roberts, 14 La. Ann. 259; Carter-Battle Grocer Co. *v.* Clarke, (Tex. Civ. App. 1905) 91 S. W. 880. Where the holder of a note appears at the concurso of the creditors of the principal, and votes that property which is mortgaged to secure the payment of the note shall be sold on time, an indorser is discharged. Lobdell *v.* Niphler, 4 La. 294.

Postponement of sale.— Where it appeared that the maker of a secured note, before its maturity, transferred his property to a stranger to sell, and out of the proceeds pay the note; that after maturity all the parties agreed to a sale of the property on fifteen days' notice of sale; that, a sale on the date fixed being impracticable, plaintiff consented to a postponement; that there was no evidence that the surety did not consent thereto, or that the payee agreed to look wholly to the sale for payment of the debt or to release the surety, it was held that the surety was not released. Pimental *v.* Marques, 109 Cal. 406, 42 Pac. 159.

88. Boutte *v.* Martin, 16 La. 133.

89. Gallagher *v.* St. Patrick's Church, 45 Nebr. 535, 63 N. W. 864 (where the contract provided for completion of the building at the contractor's expense); U. S. *v.* Stratford, 53 N. Y. App. Div. 410, 65 N. Y. Suppl. 1051.

90. McGuire *v.* Bry, 3 Rob. (La.) 196.

91. Purdy *v.* Forstall, 45 La. Ann. 814, 13 So. 95.

Where a note or contract is to be signed or renewed by a surety, this is not binding as an extension. Barber *v.* Burrows, 51 Cal. 404, 473; Miller *v.* McCallen, 69 Iowa 681, 29 N. W. 942; Williams *v.* Martin, 2 Duv. (Ky.) 491; Uniontown Bank *v.* Mackey, 140 U. S. 220, 11 S. Ct. 844, 35 L. ed. 485. See also *supra*, VIII, E, 2, j, (II), (A).

92. Sather Banking Co. *v.* Arthur R. Briggs Co., 138 Cal. 724, 72 Pac. 352; Hawkins *v.* Gibson, 74 Ga. 405; U. S. Fidelity, etc., Co. *v.* U. S., 191 U. S. 416, 24 S. Ct. 142, 48 L. ed. 242; York City, etc., Banking Co. *v.* Bainbridge, 45 J. P. 158, 43 L. T. Rep. N. S. 732.

Extending usual credit.— Under a bond executed to a brewing company by a liquor dealer to secure payment for liquors to be delivered in future, which provided that the principal should pay the accounts for liquor "as often as the same shall fall due, or when thereunto legally required" and no contract was made as to the time within which payments were to be made, and purchases were made every few days and payments made from time to time, it was held that it would be presumed, in the absence of any stipulation on the subject that it was contemplated by all the parties that there would be an allowance of the usual credits; that under the terms of the bond in this case, however, it was not necessary to resort to presumptions, since under the bond there could be no default except by a failure by the principal to pay when due according to express or an implied agreement, and that the allowance of credits usual under the custom of business on purchases made did not vary the contract. Phœnix Brewing Co. *v.* Rumbarger, 181 Pa. St. 251, 37 Atl. 340, 59 Am. St. Rep. 647.

93. *Missouri.*— Johnson *v.* Franklin Bank, 173 Mo. 171, 73 S. W. 191.

Pennsylvania.— Kulp *v.* Brant, 162 Pa. St. 222, 29 Atl. 729.

United States.— Nash *v.* Heilman, 14 Fed. 88, 9 Biss. 358.

England.— Prendergast *v.* Devey, 6 Madd. 124, 22 Rev. Rep. 254, 56 Eng. Reprint 1039.

Canada.— McLaughlin Carriage Co. *v.* Oland, 37 Can. L. J. N. S. 365, 34 Nova Scotia 193.

Running of time from date of credit.— In Boyle *v.* Bradley, 26 U. C. C. P. 373, it was held that where a surety becomes liable for goods to be purchased to "the amount of $200, payable in six months," the six months begins to run from the time credit is extended to the principal, and not from the date of the surety's contract, nor from the default of the principal; and the principal having given his note on the day of the last shipment to him, payable in six months, the surety became liable immediately on default of the principal at the expiration of the six months' credit.

Days of grace.— Where the contract of the surety was for the payment of all claims within three months from the delivery of goods, taking a note from the principal payable three months from the time of delivery, but which, on account of days of grace, was due three days later, is an extension of time which discharges the surety. Appleton *v.* Parker, 15 Gray (Mass.) 173.

(B) *Payment of Interest* — (1) IN GENERAL. A promise to pay,[94] giving a note [95] for, or the payment of accrued interest is not a consideration for an extension of time; [96] nor does the payment of interest as it becomes due after an extension,[97] although at a greater rate,[98] constitute a consideration, even though, because of such payments, the creditor continues indulgence to the principal.[99] But the payment of interest in advance,[1] or giving a note therefor, is a sufficient consideration to support a contract for an extension of time to the principal so as to discharge the surety.[2] The mere fact of the acceptance of interest in advance,[3]

94. Kerns *v.* Ryan, 26 Ill. App. 177; Dennis *v.* Piper, 21 Ill. App. 169; Halstead *v.* Brown, 17 Ind. 202.

95. Gahn *v.* Niemcewicz, 11 Wend. (N. Y.) 312. The giving of a note for interest less than that which would have accrued, is a partial payment only, not involving a definite extension of time which would release the sureties. La Belle Sav. Bank *v.* Taylor, 69 Mo. App. 99.

96. *California.*— Stroud *v.* Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111.

Illinois.— Higgins *v.* McPherson, 118 Ill. App. 464; Edmonds *v.* Thomas, 41 Ill. App. 505.

Indiana.— Dare *v.* Hall, 70 Ind. 545; Weaver *v.* Prebster, 37 Ind. App. 582, 77 N. E. 674.

Missouri.— Wayman *v.* Jones, 58 Mo. App. 313.

England.— Tucker *v.* Laing, 2 Kay & J. 745, 69 Eng. Reprint 982.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 190, 215.

Mistake in note.— Where, by mistake, a note provided for the payment of interest "after maturity," instead of from date as agreed by the payee and the principal, the payment of interest at maturity is not payment in advance, but a payment of interest accrued; and a surety on the note is not discharged by an agreement to extend the time of payment. Levy *v.* Roth, 103 S. W. 292, 31 Ky. L. Rep. 704.

97. *Iowa.*— Dyar *v.* Shenkberg, 93 Iowa 154, 61 N. W. 403.

Kentucky.— Alley *v.* Hopkins, 98 Ky. 668, 34 S. W. 13, 17 Ky. L. Rep. 1227, 56 Am. St. Rep. 382; Offutt *v.* Glass, 4 Bush 486.

Maine.— Freeman's Bank *v.* Rollins, 13 Me. 202. But an indorsement on a note of interest received, with the words "for a renewal," "to renew the balance," "balance renewed," etc., is sufficient to authorize a jury to find an agreement to give further credit to the principal. Mariner's Bank *v.* Abbott, 28 Me. 280.

Ohio.— Fischer *v.* Penterman, 8 Ohio Dec. (Reprint) 540, 8 Cinc. L. Bul. 306; Penterman *v.* Dorman, 8 Ohio Dec. (Reprint) 391, 7 Cinc. L. Bul. 281.

Pennsylvania.— Campbell *v.* Floyd, (1893) 25 Atl. 1038; Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033; Bitler's Estate, 30 Pa. Super. Ct. 84.

England.— Tucker *v.* Laing, 2 Kay & J. 745, 69 Eng. Reprint 982.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 190, 215.

98. Stearns *v.* Sweet, 78 Ill. 446.

99. Brown *v.* Prophit, 53 Miss. 649.

1. *Alabama.*— Scott *v.* Scruggs, 95 Ala. 383, 11 So. 215.

Illinois.— Flynn *v.* Mudd, 27 Ill. 323; Higgins *v.* McPherson, 118 Ill. App. 464.

Indiana.— Kaler *v.* Hise, 79 Ind. 301; Redman *v.* Deputy, 26 Ind. 338; Schieber *v.* Traudt, 19 Ind. App. 349, 49 N. E. 605.

Iowa.— Christner *v.* Brown, 16 Iowa 130.

Kansas.— Schnitzler *v.* Wichita Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

Kentucky.— Cromwell *v.* Rankin, 97 S. W. 415, 30 Ky. L. Rep. 123.

Maine.— Lime Rock Bank *v.* Mallett, 42 Me. 349.

Michigan.— Hitchcock *v.* Frackelton, 116 Mich. 487, 74 N. W. 720.

Mississippi.— Dubuisson *v.* Folkes, 30 Miss. 432.

Missouri.— Merchants' Ins. Co. *v.* Hauck, 83 Mo. 21; St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 465; Stillwell *v.* Aaron, 69 Mo. 539, 33 Am. Rep. 517; Springfield First Nat. Bank *v.* Leavitt, 65 Mo. 562; Owen *v.* Bray, 80 Mo. App. 526.

New Hampshire.— New Hampshire Sav. Bank *v.* Ela, 11 N. H. 335.

North Carolina.— Revell *v.* Thrash, 132 N. C. 803, 44 S. E. 596.

Pennsylvania.— Calvert *v.* Good, 95 Pa. St. 65.

South Dakota.— Windhorst *v.* Bergandahl, (1907) 111 N. W. 544.

Tennessee.— Stone's River Nat. Bank *v.* Walter, 104 Tenn. 11, 55 S. W. 301.

Texas.— De Barrera *v.* Frost, 39 Tex. Civ. App. 544, 88 S. W. 476; State Nat. Bank *v.* Stratton-White Co., (Civ. App. 1899) 50 S. W. 631; Farmers', etc., Bank *v.* Bayless, 1 Tex. App. Civ. Cas. § 1245.

Vermont.— Dunham *v.* Downer, 31 Vt. 249; People's Bank *v.* Pearsons, 30 Vt. 711.

Washington.— Bank of British Columbia *v.* Jeffs, 15 Wash. 230, 46 Pac. 247; Binnian *v.* Jennings, 14 Wash. 677, 45 Pac. 302.

West Virginia.— Glenn *v.* Morgan, 23 W. Va. 467.

Wisconsin.— Hallock *v.* Yankey, 102 Wis. 41, 78 N. W. 156, 72 Am. St. Rep. 861.

England.— Blake *v.* White, 4 L. J. Exch. 48, 1 Y. & C. Exch. 420.

See 40 Cent. Dig. tit. "Principal and Surety," § 215.

2. Robinson *v.* Miller, 2 Bush (Ky.) 179; Steele *v.* Johnson, 96 Mo. App. 147, 69 S. W. 1065.

3. *Arizona.*— McGlassen *v.* Tyrrell, 5 Ariz. 51, 44 Pac. 1088.

Illinois.— English *v.* Landon, 181 Ill. 614, 54 N. E. 911 [*reversing* 75 Ill. App. 483].

although at a greater rate,[4] without an agreement to extend the time of payment, will not discharge a surety, although it may be *prima facie* evidence of a contract to extend.[5]

(2) RATE — USURY. An agreement to pay an increased rate of interest,[6] or

Indiana.— Bucklen *v.* Huff, 53 Ind. 474; Cheek *v.* Glass, 3 Ind. 286.

Maryland.— Gray *v.* Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518.

Massachusetts.— Haydenville Sav. Bank *v.* Parsons, 138 Mass. 53; Agricultural Bank *v.* Bishop, 6 Gray 317; Oxford Bank *v.* Lewis, 8 Pick. 458.

Missouri.— Coster *v.* Mesner, 58 Mo. 549; Hosea *v.* Rowley, 57 Mo. 357; American Nat. Bank *v.* Love, 62 Mo. App. 378; Nevada First Nat. Bank *v.* Gardner, 57 Mo. App. 268; Citizens' Bank *v.* Moorman, 38 Mo. App. 484.

New Hampshire.— New Hampshire Sav. Bank *v.* Gill, 16 N. H. 578.

Ohio.— Gard *v.* Neff, 39 Ohio St. 607; Penterman *v.* Dorman, 8 Ohio Dec. (Reprint) 391, 7 Cinc. L. Bul. 281.

England.— Rayner *v.* Fussey, 28 L. J. Exch. 132.

See 40 Cent. Dig. tit. "Principal and Surety," § 190.

Mere remittance in advance insufficient.— Previous to the maturity of a promissory note, the principal sent the holder a draft, saying that he hoped to be able to pay the note soon, in which case the draft was to be applied as part payment; but that, if he could not do so, the holder should take the sum as interest in advance for three months. The holder did not reply, but cashed the draft, holding the proceeds without making any application thereof until the expiration of three months, when he indorsed it as three months' interest on the note, and it was held that these facts did not import a binding contract to delay the payment of the note, and that a surety thereon was not discharged thereby. Middlebury Bank *v.* Bingham, 33 Vt. 621.

4. Eaton *v.* Waite, 66 Me. 221.

5. *Georgia.*— Scott *v.* Saffold, 37 Ga. 384.

Indiana.— Starret *v.* Burkhalter, 86 Ind. 439; Woodburn *v.* Carter, 50 Ind. 376; Abel *v.* Alexander, 45 Ind. 523, 15 Am. Rep. 270; Hamilton *v.* Winterrowd, 43 Ind. 393; Jarvis *v.* Hyatt, 43 Ind. 163; Schieber *v.* Traudt, 19 Ind. App. 349, 49 N. E. 605.

New Hampshire.— New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685. Where the by-laws of a savings bank required the payment of interest in advance on all notes every four months, the receipt of such interest is *prima facie* evidence of a contract by the bank to delay the payment for four months, and therefore a surety on a note would be discharged. New Hampshire Sav. Bank *v.* Ela, 11 N. H. 335.

North Carolina.— Revell *v.* Thrash, 132 N. C. 803, 44 S. E. 596; Hollingsworth *v.* Tomlinson, 108 N. C. 245, 12 S. E. 989.

Ohio.— Fischer *v.* Penterman, 8 Ohio Dec. (Reprint) 540, 8 Cinc. L. Bul. 306; Penterman *v.* Dorman, 8 Ohio Dec. (Reprint) 391, 7 Cinc. L. Bul. 281.

South Carolina.— Gardner *v.* Gardner, 23 S. C. 588.

Texas.—Maddox *v.* Lewis, 12 Tex. Civ. App. 424, 34 S. W. 647.

Wisconsin.—Welch *v.* Kukuk, 128 Wis. 419, 107 N. W. 301, holding that the extension must be based on the payment as the consideration.

Wyoming.— Lawrence *v.* Thom, 9 Wyo. 414, 64 Pac. 339.

See 40 Cent. Dig. tit. "Principal and Surety," § 190.

Presumption of fact.— The presumption of an agreement to extend the time of payment, arising from the payment of interest in advance, is one of fact and not of law. Guerguin *v.* Boone, 33 Tex. Civ. App. 622, 77 S. W. 630.

The voluntary payment of interest by the principal about the time it is due (English *v.* Landon, 181 Ill. 614, 54 N. E. 911 [*reversing* 75 Ill. App. 483]), or shortly before it is due is held not to discharge the surety (Weaver *v.* Prebster, 37 Ind. App. 582, 77 N. E. 674).

A mere indorsement on a note that the time of payment is extended to a given day, up to which time interest at the rate named in the note has been paid, does not discharge a surety, there being nothing to show that the payment was in advance or that the principal bound himself to keep the money, etc. Crossman *v.* Wohlleben, 90 Ill. 537. And an indorsement on an overdue note of a payment of more than enough to pay the accrued interest does not imply necessarily an agreement for an extension of time. Vore *v.* Woodford, 29 Ohio St. 245. But in Dubuisson *v.* Folkes, 30 Miss. 432, it was held that an indorsement: "Six months further time is given on the within note, and the interest paid to January 2d, 1853," and signed, accompanied by prepayment of interest, is sufficient evidence of a contract to extend the time of payment, so as to discharge a surety.

Indorsements alleged to have been by mistake.— Where as against a surety plaintiff claimed that credits of interest were indorsed on a note by mistake and that no interest was in fact paid and it appeared that the account of the principal with plaintiff bank had been charged with interest and that the bank credited its interest account by such amount as collected, and that there had been deposits made after the charge, it was held that in the absence of evidence that the subsequent deposits were insufficient to cover the balance due when the charge was made it would not be presumed that it was not so covered; that it was incumbent on the bank to prove that the subsequent deposits were insufficient to cover such balance due on the account when the charge was made. Columbia Finance, etc., Co. *v.* Mitchell, 72 S. W. 350, 24 Ky. L. Rep. 1844.

6. White *v.* Whitney, 51 Ind. 124; Huff *v.* Cole, 45 Ind. 300; Shaver *v.* Allison, 11 Grant Ch. (U. C.) 355; Mathers *v.* Helliwell, 10 Grant Ch. (U. C.) 172.

interest on interest,[7] is a sufficient consideration for an extension of time. In some states a promise to pay interest at the rate specified in the original contract,[8] or at the rate which the principal is bound, by law, to pay,[9] or a reduced rate,[10] is regarded as not constituting any consideration for an extension of time; in other states the contrary is the rule.[11] Whether an executory agreement to pay usury will constitute a sufficient consideration for an extension of time to the principal depends largely upon the effect of usury upon the contract under the statutes of the different states. If such agreement is made illegal, the agreement for an extension is not binding, and hence the surety not discharged,[12] although the delay is actually given in pursuance of the agreement,[13] and the usury subsequently is paid;[14] in other states the surety is discharged.[15] If usury has been paid for

Where a note does not bear interest, an agreement to pay interest during the time payment is extended cannot be implied in the absence of a stipulation therefor; and hence, there not being any consideration for such extension, a surety on the note is not relieved. Hensler *v.* Watts, 113 Iowa 741, 84 N. W. 666.

7. Scott *v.* Fisher, 110 N. C. 311, 14 S. E. 799, 28 Am. St. Rep. 688.

8. *Georgia.*— Tatum *v.* Morgan, 108 Ga. 336, 33 S. E. 940.

Indiana.— Hume *v.* Mazelin, 84 Ind. 574; Dare *v.* Hall, 70 Ind. 545; Chrisman *v.* Tuttle, 59 Ind. 155; Abel *v.* Alexander, 45 Ind. 523, 15 Am. Rep. 270.

Massachusetts.— Wilson *v.* Powers, 130 Mass. 127.

Michigan.— Shayler *v.* Giddens, 122 Mich. 659, 81 N. W. 552.

Missouri.— Harburg *v.* Kumpf, 151 Mo. 16, 52 S. W. 19.

New York.— Reynolds *v.* Ward, 5 Wend. 501.

Wisconsin.— Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 110 Am. St. Rep. 946, 4 L. R. A. N. S. 666.

See 40 Cent. Dig. tit. "Principal and Surety," § 215.

9. Green *v.* Lake, 2 Mackey (D. C.) 162; Douglass *v.* State, 44 Ind. 67; Durbin *v.* Northwestern Scraper Co., 36 Ind. App. 123, 73 N. E. 297.

10. Dare *v.* Hall, 70 Ind. 545.

11. *Illinois.*— Dodgson *v.* Henderson, 113 Ill. 360; Beuter *v.* Dillon, 63 Ill. App. 517; Reynolds *v.* Barnard, 36 Ill. App. 218.

Mississippi.— Keirn *v.* Andrews, 59 Miss. 39.

Nebraska.— Shuler *v.* Hummel, 1 Nebr. (Unoff.) 204, 95 N. W. 350.

New Hampshire.— Fowler *v.* Brooks, 13 N. H. 240.

Ohio.— Thompson *v.* Marshall, 2 Ohio Dec. (Reprint) 506, 3 West. L. Month. 386.

Texas.— Benson *v.* Phipps, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128; Woodall *v.* Streeter, (Civ. App. 1897) 39 S. W. 169.

Washington.— Nelson *v.* Flagg, 18 Wash. 39, 50 Pac. 571.

See 40 Cent. Dig. tit. "Principal and Surety," § 215.

Binding agreement necessary.— Reducing the rate of interest, and allowing it to run along after maturity on payment of interest, without any binding contract for a definite time, does not release a surety for the debt. Field *v.* Brokaw, 148 Ill. 654, 37 N. E. 80.

12. *Alabama.*— Cox *v.* Mobile, etc., R. Co., 37 Ala. 320.

District of Columbia.— Green *v.* Lake, 2 Mackey 162; May *v.* Shepherd, 1 Mackey 430.

Illinois.— Galbraith *v.* Fullerton, 53 Ill. 126.

Indiana.— Williams *v.* Boyd, 75 Ind. 286; Halstead *v.* Brown, 17 Ind. 202; Brown *v.* Harness, 16 Ind. 248; Goodhue *v.* Palmer, 13 Ind. 457; Shaw *v.* Binkard, 10 Ind. 227.

Kentucky.— Patton *v.* Shanklin, 14 B. Mon. 15; Duncan *v.* Reed, 8 B. Mon. 382; Pyke *v.* Clark, 3 B. Mon. 262; Tudor *v.* Goodloe, 1 B. Mon. 322.

New York.— Vilas *v.* Jones, 1 N. Y. 274 [*affirming* 10 Paige 76]; Denick *v.* Hubbard, 27 Hun 347. But see Draper *v.* Trescott, 29 Barb. 401.

North Carolina.—Charlotte First Nat. Bank *v.* Lineberger, 83 N. C. 454, 35 Am. Rep. 582. But see Scott *v.* Harris, 76 N. C. 205.

Pennsylvania.— Neel *v.* Com., 4 Pa. Cas. 95, 7 Atl. 74.

South Carolina.—Cornwell *v.* Holly, 5 Rich. 47.

Tennessee.— McKamy *v.* McNabb, 97 Tenn. 236, 36 S. W. 1091; Howell *v.* Sevier, 1 Lea 360, 27 Am. Rep. 771; Wilson *v.* Langford, 5 Humphr. 320.

Texas.— Payne *v.* Powell, 14 Tex. 600; Brown *v.* Fountain, 3 Tex. Civ. App. 227, 22 S. W. 129.

Vermont.—Smith *v.* Hyde, 36 Vt. 303; Burgess *v.* Dewey, 33 Vt. 618.

West Virginia.— Parsons *v.* Harrold, 46 W. Va. 122, 32 S. E. 1002.

Wisconsin.— Irvine *v.* Adams, 48 Wis. 468, 4 N. W. 573, 33 Am. Rep. 817; St. Maries *v.* Polleys, 47 Wis. 67, 1 N. W. 389.

See 40 Cent. Dig. tit. "Principal and Surety," § 205.

13. Gilder *v.* Jeter, 11 Ala. 256.

14. Green *v.* Lake, 2 Mackey (D. C.) 162; Smith *v.* Hyde, 36 Vt. 303; Burgess *v.* Dewey, 33 Vt. 618.

15. *Georgia.*— Camp *v.* Howell, 37 Ga. 312; Stallings *v.* Johnson, 27 Ga. 564.

Iowa.— Corielle *v.* Allen, 13 Iowa 289.

Mississippi.— Brown *v.* Prophit, 53 Miss. 649.

New Hampshire.— Wheat *v.* Kendall, 6 N. H. 504; Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

Ohio.— Wood *v.* Newkirk, 15 Ohio St. 295;

an extension of time, in most states the surety is discharged; for, while an agreement to pay usury might not be enforceable, the creditor is bound after it has been paid, and the principal alone can take advantage of it.[16]

(c) *Taking Notes, Bonds, or Other Security.* A surety may be discharged by an extension, whether such extension be by a continuation of the indebtedness in its original form, or by changing the evidence thereof, as by taking, from the principal, a note,[17] bond,[18] or draft, payable at a future day,[19] for the debt; or taking a bond extending a mortgage;[20] or a note in renewal of a former note,[21]

Blazer *v.* Bundy, 15 Ohio St. 57; McComb *v.* Kittridge, 14 Ohio 348; McDowell *v.* Reese, 10 Ohio Dec. (Reprint) 303, 20 Cinc. L. Bul. 102. But see Hill *v.* Calloway, 1 Ohio Dec. (Reprint) 59, 1 West. L. J. 398.

Virginia.— See Armistead *v.* Ward, 2 Patt. & H. 504.

See 40 Cent. Dig. tit. "Principal and Surety," § 205.

Payment with usurious note.—A surety on a note is discharged if the holder extends the time of payment in consideration of the execution of a second note by the principal, although the second note calls for usurious interest and never has been paid (Moulton *v.* Posten, 52 Wis. 169, 8 N. W. 621), or afterward is paid (Fay *v.* Tower, 58 Wis. 286, 16 N. W. 558).

16. *Alabama.*— Kyle *v.* Bostick, 10 Ala. 589.

Georgia.— Knight *v.* Hawkins, 93 Ga. 709, 20 S. E. 266; Scott *v.* Saffold, 37 Ga. 384.

Illinois.— Danforth *v.* Semple, 73 Ill. 170; Wittmer *v.* Ellison, 72 Ill. 301.

Indiana.— Lemmon *v.* Whitman, 75 Ind. 318, 39 Am. Rep. 150.

Kentucky.— Duncan *v.* Reed, 8 B. Mon. 382; Kenningham *v.* Bedford, 1 B. Mon. 325.

Missouri.— Wild *v.* Howe, 74 Mo. 551; Stillwell *v.* Aaron, 69 Mo. 539 [*overruling* in effect Farmers', etc., Bank *v.* Harrison, 57 Mo. 503; Ritenour *v.* Harrison, 57 Mo. 502; Wiley *v.* Hight, 39 Mo. 130; Marks *v.* State Bank, 8 Mo. 316].

New York.— Froude *v.* Bishop, 25 N. Y. App. Div. 514, 49 N. Y. Suppl. 955; Draper *v.* Trescott, 29 Barb. 401.

Ohio.— Osborn *v.* Low, 40 Ohio St. 347.

South Dakota.— Niblack *v.* Champeny, 10 S. D. 165, 72 N. W. 402.

Tennessee.— Stone's River Nat. Bank *v.* Walter, 104 Tenn. 11, 55 S. W. 301.

Texas.— Mann *v.* Brown, 71 Tex. 241, 9 S. W. 111; Brown *v.* Fountain, 3 Tex. Civ. App. 227, 22 S. W. 129; Farmers', etc., Bank *v.* Bayless, 1 Tex. App. Civ. Cas. § 1245.

Vermont.— Turrill *v.* Boynton, 23 Vt. 142; Austin *v.* Dorwin, 21 Vt. 38.

Virginia.—Armistead *v.* Ward, 2 Patt. & H. 504.

West Virginia.— Parsons *v.* Harrold, 46 W. Va. 122, 32 S. E. 1002; Glenn *v.* Morgan, 23 W. Va. 467.

United States.— Vary *v.* Norton, 6 Fed. 808.

See 40 Cent. Dig. tit. "Principal and Surety," § 205.

In Pennsylvania under the law of 1858, a surety may deduct the usurious excess from the debt; and an extension granted by the creditor to the principal, the consideration of which is a payment of usury, will not discharge the surety. Hartman *v.* Danner, 74 Pa. St. 36.

17. *Louisiana.*— Lee *v.* Sewall, 2 La. Ann. 940; Mouton *v.* Noble, 1 La. Ann. 192.

Massachusetts.—Appleton *v.* Parker, 15 Gray 173.

Michigan.— People *v.* Grant, 138 Mich. 60, 100 N. W. 1006; Durfee *v.* Abbott, 50 Mich. 479, 15 N. W. 559.

Minnesota.— Leithauser *v.* Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336.

Missouri.— Johnson *v.* Franklin Bank, 173 Mo. 171, 73 S. W. 191.

New York.— Brown *v.* Mason, 170 N. Y. 584, 63 N. E. 1115 [*affirming* 55 N. Y. App. Div. 395, 66 N. Y. Suppl. 917]; Dodd *v.* Dreyfus, 17 Hun 600, 57 How. Pr. 319; Thurber *v.* Corbin, 51 Barb. 215. Evidence on the part of the creditor is inadmissible to show that a note received for the debt was intended as a memorandum merely. Fellows *v.* Prentiss, 3 Den. 512, 45 Am. Dec. 484.

Texas.— Templeman *v.* Texas Brewing Co., (Civ. App. 1896) 35 S. W. 935.

Wisconsin.— Weed Sewing Mach. Co. *v.* Oberreich, 38 Wis. 325.

Wyoming.— Riner *v.* New Hampshire F. Ins. Co., 9 Wyo. 446, 64 Pac. 1062, 9 Wyo. 81, 60 Pac. 262.

United States.— U. S. *v.* American Bonding, etc., Co., 89 Fed. 921.

England.— Croydon Commercial Gas Co. *v.* Dickinson, 2 C. P. D. 46, 46 L. J. C. P. 157, 36 L. T. Rep. N. S. 135, 25 Wkly. Rep. 157.

Canada.— Austin *v.* Gibson, 4 Ont. App. 316; Ross *v.* Burton, 4 U. C. Q. B. 357; Reg. *v.* Bonter, 6 U. C. Q. B. O. S. 551.

See 40 Cent. Dig. tit. "Principal and Surety," § 191.

18. Munster, etc., Bank *v.* France, L. R. 24 Ir. 82; Clarke *v.* Henty, 2 Jur. 918, 3 Y. & C. Exch. 187.

19. Albany City F. Ins. Co. *v.* Devendorf, 43 Barb. (N. Y.) 444; Bangs *v.* Mosher, 23 Barb. (N. Y.) 478; Howell *v.* Jones, 1 C. M. & R. 97, 3 L. J. Exch. 255, 4 Tyrw. 548; Maingay *v.* Lewis, Ir. R. 5 C. L. 229; Samuell *v.* Howarth, 3 Meriv. 272, 17 Rev. Rep. 81, 36 Eng. Reprint 105.

20. Canada Permanent Loan, etc., Co. *v.* Ball, 30 Ont. 557.

21. *Alabama.*— Elyton Co. *v.* Hood, 121 Ala. 373, 25 So. 745.

Georgia.— Simmons *v.* Guise, 46 Ga. 473.

Illinois.— Price *v.* Dime Sav. Bank, 124

bond,[22] or judgment.[23] But taking a check with the understanding that the drawer did not have any money in the bank, but would deposit some within two or three days, is not an extension,[24] nor is a surety discharged because the creditor takes a note of the principal for an indebtedness for which the surety is not liable,[25] or if the original note is retained as collateral security for the new notes.[26] Time is not given to the principal merely by the creditor taking new security maturing after the debt becomes due,[27] such as a mortgage,[28] a guaranty,[29] a warrant of attorney to confess judgment,[30] or an order on a third person;[31] nor is an extension effected by taking a bond [32] or note of the principal as collateral security;[33] or a

Ill. 317, 15 N. E. 754, 7 Am. St. Rep. 367; Reed *v.* Cramb, 22 Ill. App. 34.

Iowa.— Chickasaw County *v.* Pitcher, 36 Iowa 593.

Kansas.— Schnitzler *v.* Wichita Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

Louisiana.— Exchange, etc., Co. *v.* Walden, 15 La. 431; Morgan *v.* Their Creditors, 1 La. 527, 20 Am. Dec. 285.

Missouri.— Springfield First Nat. Bank *v.* Leavitt, 65 Mo. 562.

New York.— Burnap *v.* Potsdam Nat. Bank, 96 N. Y. 125; Delaware, etc., R. Co. *v.* Burkhard, 36 Hun 57; Phœnix Warehousing Co. *v.* Badger, 6 Hun 293 [*affirmed* in 67 N. Y. 294]; Maier *v.* Canavan, 57 How. Pr. 504; Wilde *v.* Jenkins, 4 Paige 481.

North Carolina.— Canton Chemical Co. *v.* Pegram, 112 N. C. 614, 17 S. E. 298.

Ohio.— People's Ins. Co. *v.* McDonnell, 8 Ohio Dec. (Reprint) 302, 7 Cinc. L. Bul. 53.

Pennsylvania.— Ayres *v.* Wattson, 57 Pa. St. 360.

South Dakota.— Windhorst *v.* Bergendahl, (1907) 111 N. W. 544.

Tennessee.— Foy *v.* Sinclair, 93 Tenn. 296, 30 S. W. 28.

Texas.— Westbrook *v.* Belton Nat. Bank, 97 Tex. 246, 77 S. W. 942.

Washington.— Seattle First Nat. Bank *v.* Harris, 7 Wash. 139, 34 Pac. 466.

Wisconsin.— Omaha Nat. Bank *v.* Johnson, 111 Wis. 372, 87 N. W. 237.

Canada.— Banque Provinciale *v.* Arnoldi, 2 Ont. L. Rep. 624.

See 40 Cent. Dig. tit. "Principal and Surety," § 191.

Mere retention of note.— Where, on maturity of a note, the principal sent the creditor a note with his signature for renewal, requesting the creditor to ask the sureties to renew, but the creditor notified the principal that his offer was not accepted, and insisted on payment, although the new note was not returned, the sureties on the original note were not discharged. Nickell *v.* Citizens' Bank, 109 Ky. 641, 60 S. W. 925, 22 Ky. L. Rep. 1552.

22. Fordyce *v.* Ford, 2 Ves. Jr. 536, 30 Eng. Reprint 763; Hooker *v.* Gamble, 12 U. C. C. P. 512.

23. Morley *v.* Dickinson, 12 Cal. 561; McNulty *v.* Hurd, 18 Hun (N. Y.) 1 [*affirmed* in 86 N. Y. 547].

24. Bordelon *v.* Weymouth, 14 La. Ann. 93.

25. Fitts *v.* A. F. Messick Grocery Co., 144 N. C. 463, 57 S. E. 164; Agricultural Ins. Co. *v.* Sargeant, 26 Can. Sup. Ct. 29.

26. Andrews *v.* Marrett, 58 Me. 539.

27. *Kansas.*— Roberson *v.* Blevins, 57 Kan. 50, 45 Pac. 63.

Louisiana.— Buckner *v.* Watt, 19 La. 211.

Maryland.— Hayes *v.* Wells, 34 Md. 512.

New York.— Elwood *v.* Deifendorf, 5 Barb. 398.

England.— Overend *v.* Oriental Financial Corp., L. R. 7 H. L. 348, 31 L. T. Rep. N. S. 322 [*affirming* L. R. 7 Ch. 142, 41 L. J. Ch. 332, 25 L. T. Rep. N. S. 813, 20 Wkly. Rep. 253].

See 40 Cent. Dig. tit. "Principal and Surety," § 192.

28. *Alabama.*—Mobile, etc., R. Co. *v.* Brewer, 76 Ala. 135.

Connecticut.— Continental L. Ins. Co. *v.* Barber, 50 Conn. 567.

Illinois.— German Ins., etc., Inst. *v.* Vahle, 28 Ill. App. 557.

Missouri.— Noll *v.* Oberhellmann, 20 Mo. App. 336.

New York.— Mack *v.* Anderson, 33 N. Y. Suppl. 208. The giving of a chattel mortgage to secure an overdue note which, by the terms of the mortgage, is extended for thirty days, the mortgage to remain as additional security for the payment of several demand notes, is not an extension of the time of payment of the demand notes so as to discharge the sureties on such demand notes. Fallkill Nat. Bank *v.* Sleight, 1 N. Y. App. Div. 189, 37 N. Y. Suppl. 155.

Tennessee.— Watauga Bank *v.* Matson, 99 Tenn. 390, 41 S. W. 1062.

Texas.—Burke *v.* Cruger, 8 Tex. 66, 59 Am. Dec. 102.

United States.— U. S. *v.* Hodge, 6 How. 279, 12 L. ed. 437; Allen *v.* O'Donald, 28 Fed. 346; The Maggie Jones, 16 Fed. Cas. No. 8,947, 1 Flipp. 635.

Canada.— Ontario Trusts Corp. *v.* Hood, 23 Ont. App. 589.

See 40 Cent. Dig. tit. "Principal and Surety," § 192.

Sufficient consideration for extension see *supra*, VIII, E, 2, j, (II), (D).

29. Williams *v.* Covillaud, 10 Cal. 419.

30. Merriman *v.* Barker, 121 Ind. 74, 22 N. E. 992; Bell *v.* Shuttleworth, 10 L. J. C. P. 239; Bell *v.* Banks, 3 M. & G. 258, 3 Scott N. R. 497, 42 E. C. L. 141.

31. Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42.

32. Firemen's Ins. Co. *v.* Wilkinson, 35 N. J. Eq. 160; Remsen *v.* Graves, 41 N. Y. 471.

33. Parham Sewing Mach. Co. *v.* Brock, 113 Mass. 194; Kingman St. Louis Imple-

note [34] or bill of exchange of the principal for the purpose of having the proceeds thereof, when obtained, applied on the original indebtedness,[35] although such action has been taken by the principal with the expectation that the creditor will refrain from pressing for immediate payment.[36] If a note of the principal is not taken as payment of the original debt, or if it does not suspend the creditor's right of action, the surety is not discharged.[37]

(D) *Stay or Extension by Authority of Law.* A stay under a statutory provision will not discharge a surety.[38] The state, in the collection of penalties, is held not to occupy the position of an ordinary creditor, and the respite of a replevied fine by the governor will not release the sureties on the replevy bond.[39] A court having no authority to enter an order giving a collector of taxes an extension of time for their collection does not, by such an order, discharge sureties;[40] and an extension of time for the filing of the final account of an administrator, whether the order be valid or not, is held not to affect the liability of his sureties for a dividend which, by the decree, he is ordered to pay.[41]

(E) *As to Duties of Office or Employment.* Where no particular time of settlement is provided for under a bond securing the faithful performance of the duties of an agent in paying over money, but it is left to the discretion of the obligee, it is not a good plea on behalf of the surety that the obligee changed the time and manner of settlement;[42] but if the contract of employment required remittances at stated periods, a surety will be discharged by authority given to the principal

ment Co. *v.* McMaster, 118 Mo. App. 209, 94 S. W. 819; Van Etten *v.* Troudden, 67 Barb. (N. Y.) 342; Williams *v.* Townsend, 1 Bosw. (N. Y.) 411; Austin *v.* Curtis, 31 Vt. 64. The giving of a note by a contractor for government work for the amount of an account rendered for materials furnished does not release the surety on his bond given pursuant to the act of Aug. 13, 1894, 28 U. S. St. at L. 278, c. 280, § 1 [U. S. Comp. St. (1901) p. 2523], from liability for such material, the action on the bond being based on the account and not on the note. U. S. *v.* Axman, 153 Fed. 982.

The mere taking of the note of the principal does not establish an agreement to give further time, but it is presumed to have been taken as collateral security (Hutchinson *v.* Woodwell, 107 Pa. St. 509; Philadelphia *v.* Howell, 19 Pa. Super. Ct. 76; U. S. *v.* American Surety Co., 32 Pittsb. Leg. J. N. S. (Pa.) 372); and it must be shown to have been substituted for the previous liability of the principal (Lutterloh *v.* McIlhenny Co., 74 Tex. 73, 11 S. W. 1063).

But taking a renewal note, although the original note is not marked "paid," is held not the taking of collateral security, but an extension of time of payment of the original note, discharging a surety thereon. Schnitzler *v.* Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

34. Schlager *v.* Teal, 185 Pa. St. 322, 39 Atl. 963.

35. Wade *v.* Staunton, 5 How. (Miss.) 631.

36. Dodson *v.* Taylor, 56 N. J. L. 11, 28 Atl. 316; Austin *v.* Curtis, 31 Vt. 64.

37. Fox *v.* Parker, 44 Barb. (N. Y.) 541; Hummelstown Brownstone Co. *v.* Knerr, 25 Pa. Super. Ct. 465; Paine *v.* Voorhees, 26 Wis. 522. See also *supra*, VIII, E, 2, j, (II), (A).

Agreement not to proceed on original debt. — But if the agreement between the principal and the creditor is that the latter will not proceed on the original debt if the subsequent note is paid (Brannon *v.* Irons, 19 Ind. App. 305, 49 N. E. 469; Norton *v.* Roberts, 4 T. B. Mon. (Ky.) 491; Marquardt Sav. Bank *v.* Freund, 80 Mo. App. 657; Smith *v.* Crease, 22 Fed. Cas. No. 13,031, 2 Cranch C. C. 481; Shepley *v.* Hurd, 3 Ont. App. 549), or if he realizes from the collateral security it has been held to constitute an extension discharging the surety (Smarr *v.* Schmitter, 38 Mo. 478; Lea *v.* Dozier, 10 Humphr. (Tenn.) 447).

38. Houston *v.* Hurley, 2 Del. Ch. 247, holding that stay of execution on a judgment, if required by statute, does not release the surety on the debt for which the judgment is given, although entered as by consent of plaintiffs.

Stay by one of two sureties.— If a judgment against two cosureties be stayed at the instance of one, the other will not be discharged. Sharp *v.* Embry, 1 Swan (Tenn.) 254.

As to duties of office see *infra*, VIII, E, 2, j, (III), (E).

Consent see *supra*, VIII, E, 2, d.

39. Nall *v.* Springfield, 9 Bush (Ky.) 673.

40. Lane *v.* Howell, 1 Lea (Tenn.) 275, where the law fixed the time for the rendering of accounts by such officer.

Order revocable.— In Helm *v.* Com., 79 Ky. 67, it was held that an order of a county court, extending the time within which the sheriff should pay a balance due the county, being without consideration, was revocable and did not release his sureties.

41. Lanier *v.* Irvine, 24 Minn. 116.

42. Lake *v.* Thomas, 84 Md. 608, 36 Atl. 437. See also *supra*, VI, B, 2, a, *et seq.*

to retain the money a longer time.[43] The allowance of delay by municipal authorities to a tax collector for the making of his settlement will not discharge his sureties.[44] Where by express statutory provisions the time for the settlement of an officer's accounts, as in the case of a tax collector, may be extended, such an extension will not discharge his sureties,[45] and in a number of decisions a statute extending the time for the settlement of such officer, although enacted after the execution of the bond, is not permitted to discharge the sureties who are held to have bound themselves subject to the right of the state to make such provision.[46] Upon this last point, however, the authorities are not uniform, and it is elsewhere held that the general rule under which sureties are discharged by an extension of time [47] applies between the state and an individual,[48] and that such a statute will discharge the sureties.[49] And where the time for the discharge of the duties of an assignee is fixed by statute, an extension of the time by statute, after the execution of a bond for the performance of such duties, is held to discharge the sureties as to acts of the principal done after the expiration of the original period.[50]

(IV) *Evidence and Burden of Proof.* The burden of proof to show an extension of time is on the surety.[51] Any evidence, otherwise competent, tending

43. Burley *v.* Hitt, 54 Mo. App. 272.

An order from the post-office department directing postmasters to retain balances due until drawn for by the general office is not an extension of time to a postmaster whose duty to account is fixed by statute, and does not discharge the surety on his bond, and any contract by the postmaster-general for an extension of time would be void. Locke *v.* Postmaster-Gen., 15 Fed. Cas. No. 8,441, 3 Mason 446.

44. Natchitoches *v.* Redmond, 28 La. Ann. 274. See also Clements *v.* Biossat, 26 La. Ann. 243.

Transaction not an extension but a loan.— In Johnson *v.* Mills, 10 Cush. (Mass.) 503, sureties of a tax collector offered to pay moneys collected to the town treasurer to whom he had given bond, but the treasurer agreed that the collector might keep the money for a time and pay his own debts with it, which the collector did, and it was held that the sureties on the collector's bond were discharged, not because there was an extension of time but because the transaction amounted to a loan, for which the sureties on the collector's bond were not liable, and the rule that an extension of time must be supported by a consideration did not apply.

45. Whitby *v.* Flint, 9 U. C. C. P. 449; Whitby *v.* Harrison, 18 U. C. Q. B. 606. See also Todd *v.* Perry, 20 U. C. Q. B. 649.

Where by the provision of a town charter the trustees are empowered to renew the warrant issued to a town collector for the collection of taxes, such renewal will not discharge the sureties on the collector's bond, since the case is the same in legal effect as if the power to renew the warrant had been referred to by a recital in the bond and especially assented to by the sureties. Olean *v.* King, 5 N. Y. St. 169.

46. State *v.* Carleton, 1 Gill (Md.) 249 (under a bond conditioned to pay over the sums collected "at such time as the law shall direct"); State *v.* Swinney, 60 Miss. 39, 45 Am. Rep. 405; Worth *v.* Cox, 89 N. C. 44; Prairie *v.* Worth, 78 N. C. 169; Smith *v.* Com., 25 Gratt. (Va.) 780; Com. *v.* Holmes, 25 Gratt. (Va.) 771. But see the intimation in Prairie *v.* Jenkins, 75 N. C. 545.

47. See *supra*, VIII, E, 2, j, (I), (A).

48. State *v.* Roberts, 68 Mo. 234, 30 Am. Rep. 788.

49. People *v.* McHatton, 7 Ill. 638; Davis *v.* People, 6 Ill. 409; State *v.* Roberts, 68 Mo. 234, 30 Am. Rep. 788; Johnson *v.* Hacker, 8 Heisk. (Tenn.) 388.

Statutes construed not to extend time.— In McLean *v.* State, 8 Heisk. (Tenn.) 22, a statute directing the county clerk to deliver the tax books for a particular year before the first day of January of the succeeding year was held not to extend the time. And in Allison *v.* State, 8 Heisk. (Tenn.) 312, an act providing for an extension of time and that nothing therein contained should operate or be held to release the present sureties of the revenue officers who may claim the benefit of the act, provided the sureties should consent to such further time, was held to mean that in order to prevent the release of such sureties the act should not take effect in favor of any collector unless his sureties should agree to the extension of time.

50. State *v.* Bowman, 44 Ill. 499; State *v.* Lagow, 43 Ill. 134, holding, however, that the sureties were liable for moneys received by the principal, and not paid over as required by law, during the original period.

51. *Arkansas.*— Ferguson *v.* State Bank, 8 Ark. 416.

District of Columbia.— Green *v.* Lake, 2 Mackey 162, to show a valid, binding contract.

Indiana.— Barclay *v.* Miers, 70 Ind. 346.

Maine.— Eaton *v.* Waite, 66 Me. 221.

Maryland.— Gott *v.* State, 44 Md. 319, evidence held too vague and indefinite to show an extension.

Ohio.— Bramble *v.* Ward, 40 Ohio St. 267.

Texas.— Guerguin *v.* Boone, 33 Tex. Civ. App. 622, 77 S. W. 630; Hall *v.* Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861, necessity to prove some sufficient consideration.

to show the contract, is admissible;[52] but a writing which apparently amounts to an extension may be explained.[53]

(v) *Questions of Law and Fact.* The question whether an agreement for an extension of time has been made,[54] and, if made, what are its terms, are questions properly to be submitted to the jury;[55] its effect if proved is for the announcement of the court.[56]

k. Inducing the Surety to Refrain From Protecting Himself. A surety is discharged by a concealment of material facts by the creditor, when inquiry is made by the former,[57] or by any act of the creditor which causes the surety to forego taking steps to protect himself.[58] Thus informing a surety that the debt is paid or settled, thereby lulling him into security and preventing him from taking steps to protect himself, will estop the creditor from thereafter proceeding against the surety.[59] In like manner a statement by the creditor to the surety that the creditor will look to and enforce the obligation only against the principal, in

Canada.— Kerr *v.* Boulton, 25 U. C. Q. B. 282.

See 40 Cent. Dig. tit. "Principal and Surety," § 433.

Consent see *supra*, VIII, E, 2, d.

Burden does not shift.— On the other hand it is held that where an unauthorized extension is set up by a surety in the defense of an action on a note, the substance of the issue between the parties is whether plaintiff at the date of his writ had an actionable contract against defendants in the form of a promissory note; that when plaintiff produces and proves the note he makes out his *prima facie* case to avoid the effect of which it is incumbent upon defendant to offer some evidence, but the burden of proof is not thereby shifted, but remains on plaintiff throughout the trial; that while the proof of the extension of time of payment necessarily commences on the part of defendant after production and proof of the note, it is not because the burden of proof has shifted but because plaintiff has offered proof sufficient to establish the validity of the contract and its breach unless rebutted by proof of equal or greater weight. Tenney *v.* Knowlton, 60 N. H. 572.

The open and close is with plaintiff. Stepp *v.* Hatcher, 67 S. W. 819, 23 Ky. L. Rep. 2441.

52. Mennet *v.* Grisard, 79 Ind. 222, holding that evidence is admissible on behalf of the surety that an indorsement on a note, "Received October 15th, 1878, forty dollars on the within, interest to February 23d, 1879," has been altered by striking out "interest."

A letter from the principal making a proposition for an extension, although the details suggested were not complied with, the proposition itself having been accepted and the extension granted, is admissible in a suit in an action against the surety and is not hearsay. Lawrence *v.* Thom, 9 Wyo. 414, 64 Pac. 339.

Entries on the books of a creditor bank tending to show that the note in question was regarded as paid when new notes were issued are competent, relevant, and material evidence in an action on the original note against a surety. Citizens' Nat. Bank *v.* Wilson, 121 Iowa 156, 96 N. W. 727.

53. Wing *v.* Beach, 31 Ill. App. 78.

54. *Kansas.*— Roberson *v.* Blevins, 57 Kan. 50, 45 Pac. 63.

Mississippi.— Moore *v.* Redding, 69 Miss. 841, 13 So. 849.

North Carolina.— Revell *v.* Thrash, 132 N. C. 803, 44 S. E. 596.

Pennsylvania.— U. S. *v.* Hegeman, 204, Pa. St. 438, 54 Atl. 438; Adams *v.* De Frehn, 27 Pa. Super. Ct. 184.

Texas.— Robson *v.* Brown, (Civ. App. 1900) 57 S. W. 83, 686.

See 40 Cent. Dig. tit. "Principal and Surety, § 443.

55. Brooks *v.* Wright, 13 Allen (Mass.) 72.

56. Moore *v.* Redding, 69 Miss. 841, 13 So. 849.

57. Taylor *v.* Lohman, 74 Ind. 418 (holding that the surety is discharged, although there was no intention to defraud him); Frank Fehr Brewing Co. *v.* Mullican, 66 S. W. 627, 23 Ky. L. Rep. 2100.

58. White *v.* Walker, 31 Ill. 422; Taylorsville Bank *v.* Hardesty, 91 S. W. 729, 28 Ky. L. Rep. 1285 (holding that where the administratrix of a surety inquired of the cashier of a bank whether the name of the deceased appeared on any note payable to the bank, and was informed that it did not, and the principals on notes payable to the bank upon which deceased was surety were solvent at the maturity of such notes, but afterward became insolvent, the bank was estopped to enforce the notes against the estate of the surety); West *v.* Brison, 99 Mo. 684, 13 S. W. 95; Ft. Scott First Nat. Bank *v.* Lillard, 55 Mo. App. 675; St. Louis Brewing Assoc. *v.* Hayes, 107 Fed. 395, 46 C. C. A. 370. And see Case Wagon Co. *v.* Wolfenden, 67 Wis. 293, 30 N. W. 518, 63 Wis. 185, 23 N. W. 485, holding that where a surety, on the faith of a bond whereby certain persons agreed to pay the notes on which he is bound, is induced to refrain from securing and protecting himself, the obligors of such bond, after purchasing the notes, cannot maintain an action against the surety.

59. *Alabama.*— Waters *v.* Creagh, 4 Stew. & P. 410.

Georgia.— Whitaker *v.* Kirby, 54 Ga. 277.

Illinois.— Brown *v.* Haggerty, 26 Ill. 469.

Iowa.— Sessions *v.* Rice, 70 Iowa 306, 30

reliance upon which the surety refrains from securing himself will prevent recovery from the surety;[60] but it must appear that in consequence of such statement the surety did in fact alter his line of conduct to his injury.[61] A mere statement that the principal is good for the amount,[62] that the creditor will not look to him,[63] that security held by the creditor will be sufficient,[64] that he does not want the surety any longer,[65] that he does not consider him bound,[66] or that he need not trouble himself [67] is not sufficient to estop the creditor from proceeding against the surety unless in consequence of such statement the latter has changed his situation to his injury.[68] While a surety is justified in relying upon statements made by an authorized agent of the creditor,[69] it is not a defense that he relied upon information from the principal,[70] although fraudulent,[71] unless the creditor was a party to the fraud.[72]

l. Inducing Surety to Relinquish Security. If the surety, relying upon notice from the creditor that the debt has been paid, releases security given to him,[73] or if he is induced to give up such security by any arrangement between the prin-

N. W. 735. But in Sioux Valley State Bank *v.* Kellogg, 81 Iowa 124, 46 N. W. 859, it is held that the fact that a surety has been informed by the creditor that the principal has paid the debt and that relying on that statement the surety does not attempt to make the principal secure him is no defense to an action against the surety where there is no evidence that he could have secured anything from his principal had he attempted to do so.

Kentucky.— Struss *v.* Masonic Sav. Bank, 89 Ky. 61, 11 S. W. 769, 12 S. W. 266, 11 Ky. L. Rep. 333; Brooking *v.* Farmers' Bank, 83 Ky. 431.

Massachusetts.— Baker *v.* Briggs, 8 Pick. 122, 19 Am. Dec. 311.

Mississippi.— Foster *v.* Walker, 34 Miss. 365.

Missouri.— Triplet *v.* Randolph, 46 Mo. App. 569.

New Hampshire.— Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116, 12 Am. Rep. 68.

Pennsylvania.— Bissell *v.* Franklin First Nat. Bank, 69 Pa. St. 415.

Vermont.— Vermont State Bank *v.* Stoddard, 1 D. Chipm. 157.

Canada.— Canadian Bank *v.* Green, 45 U. C. Q. B. 81.

See 40 Cent. Dig. tit. "Principal and Surety," § 136 *et seq.*

The surrender of a note is equivalent to a declaration that it had been paid or satisfied in some way. Kirby *v.* Landis, 54 Iowa 150, 6 N. W. 173.

60. *Georgia.*— Bullard *v.* Ledbetter, 59 Ga. 109.

Iowa.— Wolf *v.* Madden, 82 Iowa 114, 47 N. W. 981; Auchampaugh *v.* Schmidt, 80 Iowa 186, 45 N. W. 567.

Massachusetts.— Harris *v.* Brooks, 21 Pick. 195, 32 Am. Dec. 254.

Missouri.— Biggerstaff *v.* Hoyt, 62 Mo. 481.

Vermont.— Hickok *v.* Farmers', etc., Bank, 35 Vt. 476.

See 40 Cent. Dig. tit. "Principal and Surety," § 136 *et seq.*

61. Wilds *v.* Attix, 4 Del. Ch. 253.

62. Howe Mach. Co. *v.* Farrington, 82 N. Y. 121; Wheeler *v.* Benedict, 36 Hun (N. Y.) 478; Brubaker *v.* Okeson, 36 Pa. St. 519.

63. Huntington First Nat. Bank *v.* Williams, 126 Ind. 423, 26 N. E. 75; Smith *v.* McCall, 63 Mo. App. 631; Mahurin *v.* Pearson, 8 N. H. 539.

64. Gillen *v.* Kentucky Nat. Bank, 8 S. W. 193, 10 Ky. L. Rep. 97; Bruce *v.* Laing, (Tex. Civ. App. 1901) 64 S. W. 1019.

65. Brubaker *v.* Okeson, 36 Pa. St. 519.

66. Wheeler *v.* Benedict, 36 Hun (N. Y.) 478.

Acknowledgment of payment.— The declaration of the creditor to the surety that he was indebted to the principal on open account, and that there was to be a settlement between them, and that he would not therefore hold the surety further bound to pay the debt, although not good as a release, is *prima facie* an acknowledgment of payment, and will defeat a recovery against the surety, unless plaintiff show affirmatively that the claim of the principal against him is insufficient to satisfy the debt. Foster *v.* Walker, 34 Miss. 365.

67. Auchampaugh *v.* Schmidt, 77 Iowa 13, 41 N. W. 472; Evans *v.* Mengel, 1 Pa. St. 68; Miller *v.* Knght, 6 Baxt. (Tenn.) 503.

68. Taylor *v.* Lohman, 74 Ind. 418; Heitsch *v.* Cole, 47 Minn. 320, 50 N. W. 235 (holding that if a surety, in reliance on a promise by the creditor to release him if he would refrain from taking security from the principal, does refrain from taking security, he will not be liable); Driskell *v.* Mateer, 31 Mo. 325, 80 Am. Dec. 105. See also Hogaboom *v.* Herrick, 4 Vt. 131.

69. St. Louis Brewing Assoc. *v.* Hayes, 107 Fed. 395, 46 C. C. A. 370.

70. Sullivan *v.* Cluggage, 21 Ind. App. 667, 52 N. E. 110; Burge *v.* Duden, 105 Mo. App. 8, 78 S. W. 653; Blackwood *v.* Percival, 14 Manitoba 216.

71. Bond *v.* Ray, 5 Humphr. (Tenn.) 492.

72. Sailly *v.* Elmore, 2 Paige (N. Y.) 497; Wilson *v.* Green, 25 Vt. 450, 60 Am. Dec. 279.

73. Rowley *v.* Jewett, 56 Iowa 492, 9 N. W. 353; Carpenter *v.* King, 9 Metc. (Mass.) 511, 43 Am. Dec. 405; Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116, 12 Am. Rep. 68; Bissell *v.* Franklin First Nat. Bank, 69 Pa. St. 415.

cipal and the creditor,[74] he will be discharged to the extent of the value of the security released. But the surety is not discharged by releasing security if he relies on statements made by one without authority to bind the creditor,[75] or if the security is released through the fraud of the principal in which the creditor did not participate.[76]

m. Relinquishment or Loss of Security by Creditor or Obligee — (i) *In General.* Whenever the creditor, having in his hands any securities or means of satisfying the debt, relinquishes [77] or loses it by his wilful acts,[78] or through his negligence the surety will be discharged,[79] being released by any act of the creditor

74. Mathews *v.* Everett, 84 Ga. 472, 11 S. E. 135; Craig *v.* Cox, 2 Bibb (Ky.) 309, 5 Am. Dec. 609; Schuff *v.* Germania Safety Vault, etc., Co., 43 S. W. 229, 19 Ky. L. Rep. 1457.

75. Butler *v.* Hamilton, 2 Desauss. Eq. (S. C.) 226, 2 Am. Dec. 692; Beckham *v.* Shackelford, 8 Tex. Civ. App. 660, 29 S. W. 200.

76. Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; Washington Dist. Prob. Ct. *v.* St. Clair, 52 Vt. 24.

77. *Illinois.*— Rogers *v.* Township 23 School Trustees, 46 Ill. 428.

Pennsylvania.— Clow *v.* Derby Coal Co., 98 Pa. St. 432; Richards *v.* Com., 40 Pa. St. 146; Com. *v.* Vanderslice, 8 Serg. & R. 452; Griesmere *v.* Thorn, 32 Pa. Super. Ct. 13.

Rhode Island.— Otis *v.* Von Storch, 15 R. I. 41, 23 Atl. 39.

West Virginia.— Parsons *v.* Harrold, 46 W. Va. 122, 32 S. E. 1002; Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554.

England.— Merchants' Bank *v.* Maud, 18 Wkly. Rep. 312 [*reversed* upon other grounds in 19 Wkly. Rep. 657].

See 40 Cent. Dig. tit. "Principal and Surety," § 244 *et seq.*

Relinquishment need not be collusive in order to discharge the surety. Scott *v.* Llano County Bank, 99 Tex. 221, 89 S. W. 749 [*reversing* (Civ. App. 1905) 85 S. W. 301].

Where both the principal and surety gave security the creditor cannot retain security of the surety after having relinquished the security of the principal. Hill *v.* Horskins, 150 Fed. 236.

A material alteration of security with the consent of the creditor to the prejudice of a surety discharges the latter. Monroe *v.* De Forest, 53 N. J. Eq. 264, 31 Atl. 773.

If security is relinquished by mistake to the knowledge of the surety and he delays for an unreasonable time in protecting himself, he cannot avail himself of the defense. Gaar *v.* Taylor, 128 Iowa 636, 105 N. W. 125.

Where the debt is under seal, the relinquishment is available only in a court of equity. Parsons *v.* Harrold, 46 W. Va. 122, 32 S. E. 1002; Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554.

A surety can enjoin the creditor from releasing security (Smith *v.* Smith, 40 N. C. 34), and if security has been relinquished the surety can enjoin proceedings against him by the creditor (Miller *v.* Dyer, 1 Duv. (Ky.) 263; Dobson *v.* Prather, 41 N. C. 31).

Relinquishment should be pleaded specially. — Holt *v.* Bodey, 18 Pa. St. 207.

Recovery of payments made after relinquishment see *infra*, IX, A, 3.

78. Griffeth *v.* Moss, 94 Ga. 199, 21 S. E. 463; Small *v.* Hicks, 81 Ga. 691, 8 S. E. 628; Murrell *v.* Scott, 51 Tex. 520; Allen *v.* O'Donald, 23 Fed. 573; Harberton *v.* Bennett, Beatty 386.

A right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the prevailing statute, hence he is not discharged by an act of the creditor by which the right of distress is lost. *In re* Russell, 29 Ch. D. 254, 53 L. T. Rep. N. S. 365.

Release from arrest in an action by the principal against the debtor does not discharge the surety. Emery *v.* Baltz, 94 N. Y. 408 (where the debtor was released upon giving an offer of judgment for plaintiff's demand and it was held that plaintiff in that action was not bound to sue or arrest and imprison the debtor; that his omission to do so evaded no right of the sureties; that the order of arrest laid the foundation for an execution against the person and that the right to that execution all the time remained, since the release from jail did not operate to vacate the order of arrest or affect the right to body execution); Berks County *v.* Ross, 3 Binn. (Pa.) 520, 5 Am. Dec. 383 (where the creditor accepted the debtor's appearance without bail, in consideration of which the former obtained an assignment of all the latter's property).

79. *Illinois.*— Pfirshing *v.* Peterson, 98 Ill. App. 70.

Indiana.— Crim *v.* Fleming, 101 Ind. 154; Smith *v.* McKean, 99 Ind. 101.

Iowa.— Magney *v.* Roberts, 129 Iowa 218, 105 N. W. 430; Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853; Mingus *v.* Daugherty, 87 Iowa 56, 54 N. W. 66, 45 Am. St. Rep. 354; Middleton *v.* Marshalltown First Nat. Bank, 40 Iowa 29.

Maryland.— Simmons *v.* Tongue, 3 Bland 341.

Pennsylvania.— Fast *v.* Wilson, 2 Am. L. J. 260.

Texas.— Harrison Mach. Works *v.* Templeton, 82 Tex. 443, 18 S. W. 601.

United States.— Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28.

England.— Wulff *v.* Jay, L. R. 7 Q. B. 756, 41 L. J. Q. B. 322, 27 L. T. Rep. N. S. 118, 20 Wkly. Rep. 1030; Strange *v.* Fooks, 4 Giffard 408, 9 Jur. N. S. 943, 8 L. T. Rep. N. S. 789, 2 New Rep. 507, 11 Wkly.

which deprives the surety of the right of subrogation;[80] but if relinquishment of security be by a part only of those entitled to enforce the liability of a surety, the rights of the others to hold the surety are not affected.[81] It is immaterial when the creditor received the security held by him;[82] or whether the surety has knowledge thereof;[83] or whether the principal lacked capacity to enter into the contract;[84] and if the surety has paid the debt before he is aware of any relinquishment or loss of security by the creditor, he is entitled to recover from the creditor the amount so paid.[85] But a surety is not discharged by a release of security to which the principal does not have any title,[86] or by the release of security where prior, valid liens would exhaust it entirely;[87] or if the creditor took the security under a binding agreement with the principal to return it,[88] or if money is paid the principal as compensation for services arising from some independent transaction,[89] nor is a surety discharged by a relinquishment of security given for some independent matter.[90] Sureties are not discharged if the loss of security does not result from

Rep. 983, 66 Eng. Reprint 765; Capel *v.* Butler, 4 L. J. Ch. O. S. 69, 2 Sim. & St. 457, 1 Eng. Ch. 457, 57 Eng. Reprint 421.

See 40 Cent. Dig. tit. "Principal and Surety," § 244 *et seq.*

80. *Indiana.*— Crim *v.* Fleming, 101 Ind. 154.

Louisiana.— Gay *v.* Blanchard, 32 La. Ann. 497; Kennedy *v.* Bossiere, 16 La. Ann. 445; Pratt's Succession, 16 La. Ann. 357; Daigle's Succession, 15 La. Ann. 594; Coons *v.* Graham, 12 Rob. 206; McGuire *v.* Wooldridge, 6 Rob. 47; Merchants' Bank *v.* Cordeviolle, 4 Rob. 506; Comstock *v.* Créon, 1 Rob. 528; Hereford *v.* Chase, 1 Rob. 212; Offutt *v.* Hendsley, 9 La. 1; New Orleans *v.* Blache, 6 La. 500; Abat *v.* Holmes, 3 La. 351.

Mississippi.— Payne *v.* Commercial Bank, 6 Sm. & M. 24.

New York.— La Farge *v.* Herter, 11 Barb. 159 [*affirmed* in 9 N. Y. 241]; Boyd *v.* McDonough, 39 How. Pr. 389.

Oregon.— Keel *v.* Levy, 19 Oreg. 450, 24 Pac. 253.

Pennsylvania.— Boschert *v.* Brown, 72 Pa. St. 372.

Tennessee.— Allen *v.* Henley, 2 Lea 141; Scanland *v.* Settle, Meigs 169.

Vermont.— Smith *v.* Day, 23 Vt. 656; Manchester Bank *v.* Bartlett, 13 Vt. 315, 37 Am. Dec. 594.

England.— Harberton *v.* Bennett, Beatty 386.

See 40 Cent. Dig. tit. "Principal and Surety." § 248.

81. Duluth *v.* Heney, 43 Minn. 155, 45 N. W. 7; King *v.* Murphy, 49 Nebr. 670, 68 N. W. 1029; Doll *v.* Crume. 41 Nebr. 655, 59 N. W. 806; U. S. Fidelity, etc., Co. *v.* Omaha Bldg., etc., Co., 116 Fed. 145, 53 C. C. A. 465.

82. Holland *v.* Johnson, 51 Ind. 346; Freaner *v.* Yingling, 37 Md. 491; Pledge *v.* Buss, Johns. 663, 6 Jur. N. S. 695, 70 Eng. Reprint 585; Campbell *v.* Rothwell, 47 L. J. Q. B. 144, 38 L. T. Rep. N. S. 33.

83. Freaner *v.* Yingling, 37 Md. 491.

84. Sample *v.* Cochran, 82 Ind. 260, principal a married woman.

85. Chester *v.* Kingston Bank, 17 Barb. (N. Y.) 271; Cooper *v.* Wilcox, 22 N. C. 90, 32 Am. Dec. 695; Dixon *v.* Ewing, 3 Ohio 280, 17 Am. Dec. 590.

86. Sheehan *v.* Taft, 110 Mass. 331; Blydenburgh *v.* Bingham, 38 N. Y. 371, 98 Am. Dec. 49; Morristown Stove Works *v.* Jones, (Tenn. Ch. App. 1899) 53 S. W. 217; Cumberland First Nat. Bank *v.* Parsons, 45 W. Va. 688, 32 S. E. 271.

Release of security through doubt as to ownership will discharge the surety if the property in fact belonged to the principals. Brinton *v.* Gerry, 7 Ill. App. 238.

87. Jones *v.* Hawkins, 60 Ga. 52; Moss *v.* Pettingill, 3 Minn. 217.

88. Pearl St. Cong. Soc. *v.* Imlay, 23 Conn. 10; Pearl *v.* Cortright, 81 Miss. 300, 33 So. 72; Fair Haven First Nat. Bank *v.* Johnson, 65 Vt. 382, 26 Atl. 634; Adams *v.* Dutton, 57 Vt. 515.

Returning security to principal upon payment by surety.—Where a surety became such on condition that the principal would deposit with the creditor collateral security as protection for his indorsement; but the principal took an agreement from the creditor that the latter would return the collateral on payment of the debt, the creditor is liable to the surety for the value of the collateral if the creditor returns it to the principal upon payment of the debt by the surety, the creditor being aware of the condition upon which the surety signed. Morton *v.* Dillon, 90 Va. 592, 19 S. E. 654.

89. Howe Mach. Co. *v.* Woolly, 50 Iowa 549; McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552. And see U. S. *v.* Potter, 27 Fed. Cas. No. 16,076, holding that U. S. Rev. St. (1878) § 1766 [U. S. Comp. St. (1901) p. 1208], authorizing the withholding of the salary of an officer in arrears does not form any part of the contract with the sureties upon the bond of such officer, but is to secure and protect the government, and to insure punctuality on the part of public officers, and if an unauthorized payment is made by the proper officer whose duty it is to pass upon and allow salaries, the government is not responsible for his conduct, and the sureties are not discharged thereby.

90. American Bonding Co. *v.* Progressive Permanent Bldg., Loan, etc., Assoc., 101 Md. 323, 61 Atl. 199; Kohler *v.* Matlage, 72

the fault of the creditor.[91] Thus sureties for an employee are not discharged if a return of property deposited by him to secure money wrongfully taken is procured by means of fraud of the principal,[92] and relinquishment of security by a cosurety,[93] or a loss caused by the surety himself,[94] or by a third person, such as by one holding security in trust,[95] or a loss resulting from an order of court,[96] or a surrender of security which is not enforceable,[97] does not prejudice the creditor; nor will a relinquishment of security by the surety discharge the principal.[98] The creditor is responsible to the surety for ordinary care and prudence regarding collateral securities, [99] and is entitled to charge a reasonable amount for the expense of taking care of any property held by him as security.[1]

(II) *Particular Kinds of Security*. If the creditor has any funds,[2] or property belonging to the principal which may be rightfully retained,[3] or

N. Y. 259; Mutual L. Ins. Co. *v.* Wilcox, 17 Fed. Cas. No. 9,979, 8 Biss. 197, 6 Reporter 8.

91. New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187; Sternback *v.* Friedman, 23 Misc. (N. Y.) 173, 50 N. Y. Suppl. 1025; Hardwick *v.* Wright, 35 Beav. 133, 55 Eng. Reprint 845. And see Kaufman *v.* Loomis, 110 Ill. 617 [*reversing* 13 Ill. App. 124], holding that where the creditor, in opposition to the wishes of the surety, refused to assent to a settlement of a claim against a railroad company for an alleged infringement of a patent, assigned by the principal to a trustee as security, the surety is not released, although shortly thereafter the patent was declared invalid thus making the claim valueless. It was the duty of the trustee to get as much as possible; and the creditor cannot be prejudiced by a mistake made in good faith.

92. McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552; Hamlin *v.* Klein, 8 N. Y. App. Div. 413, 40 N. Y. Suppl. 833.

But where the principal was negligent in permitting the perpetration of the fraud, the surety is discharged. Merchants' Bank *v.* McKay, 12 Ont. 498 [*affirmed* in 15 Can. Sup. Ct. 672].

93. Whitehill *v.* Wilson, 3 Penr. & W. (Pa.) 405, 24 Am. Dec. 326.

580; Barton's Estate, 3 Del. Co. (Pa.)

94. Schroeppel *v.* Shaw, 5 Barb. (N. Y.) 338.

95. Murrell *v.* Scott, 51 Tex. 520; Hardwick Sav. Bank, etc., Co. *v.* Drenan, 71 Vt. 289, 44 Atl. 347.

96. Galphin *v.* McKinney, 1 McCord Eq. (S. C.) 280; Hardwick Sav. Bank, etc., Co. *v.* Drenan, 71 Vt. 289, 44 Atl. 347. But see Henderson *v.* Terry, 62 Tex. 281, holding that a surety on a note against whom judgment is rendered, providing that the principal's land shall be first subjected to its payment, is discharged from liability to the extent of the value of the land, where in a subsequent suit by the principal to which the surety was not a party, a decree vacating the former judgment so far as it forecloses the lien on the land is entered by the consent of the principal and the judgment creditor.

97. Kelley *v.* Post, 37 Ill. App. 396; Bedwell *v.* Gephart, 67 Iowa 44, 24 N. W. 585; Loomis *v.* Fay, 24 Vt. 240.

98. Wysong *v.* Meyer, 58 N. Y. App. Div. 422, 69 N. Y. Suppl. 286; Walker *v.* Com., 18 Gratt. (Va.) 13, 98 Am. Dec. 631.

99. City Bank *v.* Young, 43 N. H. 457; Scott *v.* Llano County Bank, 99 Tex. 221, 89 S. W. 749 [*reversing* (Civ. App. 1905) 85 S. W. 301].

It is for the jury to determine whether the creditor exercised proper care. Magney *v.* Roberts, 129 Iowa 218, 105 N. W. 430; Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359.

Evidence that the principal refused to insure or to cancel doubtful policies is competent as tending to prove lack of diligence charged on the part of the creditor in failing to keep up insurance. Rouss *v.* King, 74 S. C. 251, 54 S. E. 615.

1. Coe *v.* Cassidy, 72 N. Y. 133.

2. *Alabama.*—White *v.* Life Assoc. of America, 63 Ala. 419, 35 Am. Rep. 45; Perrine *v.* Firemen's Ins. Co., 22 Ala. 575; Allen *v.* Greene, 19 Ala. 34.

Georgia.— Walsh *v.* Colquitt, 64 Ga. 740.

Missouri.— Taylor *v.* Jeter, 23 Mo. 244.

Nebraska.— Pierce *v.* Atwood, 64 Nebr. 92, 89 N. W. 669.

England.— General Steam Nav. Co. *v.* Rolt, 6 C. B. N. S. 550, 6 Jur. N. S. 801, 8 Wkly. Rep. 223, 95 E. C. L. 550.

See 40 Cent. Dig. tit. "Principal and Surety," § 252 *et seq.*

The creditor must have the right to apply the money to the secured debt before he can be charged with releasing the surety by not applying such funds. Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575 [*affirming* 99 Ill. App. 132].

3. *Illinois.*— Kirkpatrick *v.* Howk, 80 Ill. 122; Phares *v.* Barbour, 49 Ill. 370.

Indiana.— Sample *v.* Cochran, 82 Ind. 260; Stewart *v.* Davis, 18 Ind. 74.

Iowa.— Monroe Bank *v.* Gifford, 79 Iowa 300, 44 N. W. 558.

Kentucky.— Ruble *v.* Norman, 7 Bush 582.

Maine.— Springer *v.* Toothaker, 43 Me. 381, 69 Am. Dec. 66.

Massachusetts.— Fitchburg Sav. Bank *v.* Torrey, 134 Mass. 239; Baker *v.* Briggs, 8 Pick. 122, 19 Am. Dec. 311.

New York.— Chester *v.* Kingston Bank, 17 Barb. 271.

Pennsylvania.— Hutchinson *v.* Woodwell, 107 Pa. St. 509.

Texas.— Harrison Mach. Works *v.* Templeton, 82 Tex. 443, 18 S. W. 601; Kiam *v.*

claims of the principal against third persons,[4] or a mortgage,[5] or other lien upon property of the principal,[6] such as a judgment lien,[7] or execution lien,[8] a relinquishment or loss thereof will prevent a recovery against the surety

Cummings, 13 Tex. Civ. App. 198, 36 S. W. 770.

Vermont.— Strong *v.* Wooster, 6 Vt. 536.

United States.— Wood *v.* Brown, 104 Fed. 203, 43 C. C. A. 474.

England.— Wulff *v.* Jay, L. R. 7 Q. B. 756, 41 L. J. Q. B. 322, 27 L. T. Rep. N. S. 118, 20 Wkly. Rep. 1030.

See 40 Cent. Dig. tit. "Principal and Surety," § 252 *et seq.*

4. Foss *v.* Chicago, 34 Ill. 488; Crim *v.* Fleming, 101 Ind. 154 (holding that where the creditor, having received an assignment of fees due the principal as clerk of court, allows the principal to collect and appropriate the proceeds, the surety is released); Bixby *v.* Barklie, 26 Hun (N. Y.) 275 (holding that where the principal executed a power of attorney to a person authorizing him to receive a certain annual income of the principal, and apply it on the debts of the principal, a revocation of such power of attorney with the consent of the person to whom it is given will release sureties on a bond of the principal held by such person).

5. *Georgia.*— Kyle *v.* Chattahoochee Nat. Bank, 96 Ga. 693, 24 S. E. 149; Griffeth *v.* Moss, 94 Ga. 199, 21 S. E. 463.

Iowa.— De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787; Heitz *v.* Atlee, 67 Iowa 483, 25 N. W. 742; Port *v.* Robbins, 35 Iowa 208.

Louisiana.—Armor *v.* Amis, 4 La. Ann. 192; Coons *v.* Graham, 12 Rob. 206.

Minnesota.— Gotzian *v.* Heine, 87 Minn. 429, 92 N. W. 398.

Mississippi.— Chism *v.* Thomson, 73 Miss. 410, 19 So. 210; Chaffe *v.* Taliaferro, 58 Miss. 544.

New York.— Malone Third Nat. Bank *v.* Shields, 55 Hun 274, 8 N. Y. Suppl. 298; Hayes *v.* Ward, 4 Johns. Ch. 123, 8 Am. Dec. 554.

Oregon.— Keel *v.* Levy, 19 Oreg. 450, 24 Pac. 253; Brown *v.* Rathburn, 10 Oreg. 158.

Pennsylvania.— Wharton *v.* Duncan, 83 Pa. St. 40.

Tennessee.— Renegar *v.* Thompson, 1 Lea 457.

Texas.— Scott *v.* Llano County, 99 Tex. 221, 89 S. W. 749 [*reversing* (Civ. App. 1905) 85 S. W. 301]; Murrell *v.* Scott, 51 Tex. 520; Galbraith *v.* Townsend, 1 Tex. Civ. App. 447, 20 S. W. 943.

Virginia.—Ashby *v.* Smith, 9 Leigh 164.

England.— Pledge *v.* Buss, Johns. 663, 6 Jur. N. S. 695, 70 Eng. Reprint 585; Pearl *v.* Deacon, 1 De G. & J. 461, 3 Jur. N. S. 1187, 26 L. J. Ch. 761, 5 Wkly. Rep. 793, 58 Eng. Ch. 358, 24 Eng. Reprint 802.

Canada.— Allison *v.* McDonald, 23 Can. Sup. Ct. 635 [*affirming* 20 Ont. App. 695]; Farmer's Loan, etc., Co. *v.* Patchett, 6 Ont. L. Rep. 255, 2 Ont. Wkly. Rep. 702.

See 40 Cent. Dig. tit. "Principal and Surety," § 244 *et seq.*

6. *Alabama.*— Denson *v.* Gray, 113 Ala. 608, 21 So. 925. But see Woodward *v.* Clegge, 8 Ala. 317.

Arkansas.— Hubbard *v.* Pace, 34 Ark. 80.

Iowa.— Heitz *v.* Atlee, 67 Iowa 483, 25 N. W. 742.

Louisiana.— Penn *v.* Collins, 5 Rob. 213; Hereford *v.* Chase, 1 Rob. 212.

Missouri.— Ferguson *v.* Turner, 7 Mo. 497.

New York.— Mutual L. Ins. Co. *v.* Davies, 56 How. Pr. 440.

North Carolina.— Bell *v.* Howerton, 111 N. C. 69, 15 S. E. 891.

Pennsylvania.— Holt *v.* Bodey, 18 Pa. St. 207; Ramsey *v.* Westmoreland Bank, 2 Penr. & W. 203.

Tennessee.— Hoss *v.* Crouch, (Ch. App. 1898) 48 S. W. 724.

West Virginia.— Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554.

United States.— Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28; Allen *v.* O'Donald, 23 Fed. 573.

See 40 Cent. Dig. tit. "Principal and Surety," § 244 *et seq.*

But see Coombs *v.* Parker, 17 Ohio 289, 49 Am. Dec. 459.

If a corporation does not fix its lien upon the stock of a stock-holder who is its debtor, by refusing to permit its transfer, and his surety does not request that a transfer be refused, a transfer may be made by the company without losing any of its rights against the surety. Perrine *v.* Fireman's Ins. Co., 22 Ala. 575.

7. *Georgia.*— Jones *v.* Hawkins, 60 Ga. 52.

Minnesota.— Finnegan *v.* Janeway, 85 Minn. 384, 89 N. W. 4.

Mississippi.— McMullen *v.* Hinkle, 39 Miss. 142.

Missouri.— Rice *v.* Morton, 19 Mo. 263; Green *v.* Dougherty, 55 Mo. App. 217.

New York.— See Wells *v.* Kelsey, 16 Abb. Pr. 221 note, 25 How. Pr. 384.

Texas.— Henderson *v.* Terry, 62 Tex. 281.

Canada.— Mellish *v.* Green, 5 Grant Ch. (U. C.) 655.

See 40 Cent. Dig. tit. "Principal and Surety," § 260.

But *compare* Perry *v.* Saunders, 36 Iowa 427, holding that a surety is not discharged because action is brought on a judgment and a new judgment obtained, although the lien of the first judgment is lost by the rendition of the second.

A creditor by losing priority of a judgment possessed by him over other creditors discharges the surety. Findlay *v.* U. S. Bank, 10 Ohio 59.

8. Smith *v.* McKean, 99 Ind. 101; Robeson *v.* Roberts, 20 Ind. 155, 83 Am. Dec. 308; Brown *v.* Early, 2 Duv. (Ky.) 369; Watson *v.* Reed, 4 Baxt. (Tenn.) 49.

Discontinuing proceedings under a defective levy does not discharge the surety. Somersworth Sav. Bank *v.* Worcester, 76 Me. 327.

to the extent of the value of the security relinquished or lost. So if the creditor having levied an execution on the property of the principal afterward releases the levy he thereby deprives himself of recourse against the surety,[9] and release of a levy of the property of a cosurety releases the other cosureties to the extent of the proportion of the debt equitably due from the cosurety upon whose property the levy was made and released.[10] But a surety is not discharged because the creditor discontinues proceedings which have been begun;[11] nor by the return, at the request of the creditor, of an execution against property of the principal before a levy;[12] and if a judgment is a lien upon real property whether levied upon or not, a dismissal of a levy upon the real property will not discharge the surety.[13] So it has been held that the surety is not discharged by the release of an attachment against the property of the principal,[14] unless the suit and attachment were at the request

9. *Alabama.*— Winston *v.* Yeargin, 50 Ala. 340; State Bank *v.* Edwards, 20 Ala. 512.

California.— Morley *v.* Dickinson, 12 Cal. 561.

Colorado.— Thomas *v.* Wason, 8 Colo. App. 452, 46 Pac. 1079, although the surety was indemnified.

Delaware.—Hazel *v.* Sinex, 6 Del. Ch. 19, 6 Atl. 625; Houston *v.* Hurley, 2 Del. Ch. 247.

Georgia.— Brown *v.* Riggins, 3 Ga. 405; Curan *v.* Colbert, 3 Ga. 239, 46 Am. Dec. 427. But *compare* Manry *v.* Shepperd, 57 Ga. 68.

Indiana.— Sterne *v.* McKinney, 79 Ind. 578; Sterne *v.* Vincennes First Nat. Bank, 79 Ind. 560; Sterne *v.* Vincennes Bank, 79 Ind. 549.

Iowa.—Maquoketa *v.* Willey, 35 Iowa 323; Sherraden *v.* Parker, 24 Iowa 28.

Kentucky.— Mt. Sterling Imp. Co. *v.* Cockrell, 70 S. W. 842, 24 Ky. L. Rep. 1151.

Minnesota.— Moss *v.* Pettingill, 3 Minn. 217.

North Carolina.— Howerton *v.* Sprague, 64 N. C. 451; Dobson *v.* Prather, 41 N. C. 31; Nelson *v.* Williams, 22 N. C. 118; Cooper *v.* Wilcox, 22 N. C. 90, 32 Am. Dec. 695. But *compare* Forbes *v.* Smith, 40 N. C. 369, holding that where, after a judgment against the principal and surety, the latter, without the consent of the creditor, had an execution issued and levied upon the property of the principal, the creditor has a right to discharge the levy and withdraw the execution without making himself liable to the surety.

Ohio.— Day *v.* Ramey, 40 Ohio St. 446; Dixon *v.* Ewing, 3 Ohio 280, 17 Am. Dec. 590.

Pennsylvania.— Stephens *v.* Monongahela Nat. Bank, 88 Pa. St. 157, 32 Am. Rep. 438; Kreiter *v.* Grosh, 3 Leg. Op. 241.

Tennessee.— Hutton *v.* Campbell, 10 Lea 170; Holt *v.* Manier, 1 Lea 488; Lee *v.* Shanks, (Ch. App. 1898) 52 S. W. 1091; Watson *v.* Read, 1 Tenn. Ch. 196.

Texas.— Jenkins *v.* McNeese, 34 Tex. 189; Chowning *v.* Willis, (Civ. App. 1897) 38 S. W. 1141.

West Virginia.— McKenzie *v.* Wiley, 27 W. Va. 658.

Wisconsin.— Hyde *v.* Rogers, 59 Wis. 154, 17 N. W. 127.

England.— Mayhew *v.* Cricket, 2 Swanst. 185, 36 Eng. Reprint 585, 1 Wils. Ch. 418, 37 Eng. Reprint 178, 19 Rev. Rep. 57.

See 40 Cent. Dig. tit. "Principal and Surety," § 261.

But *compare* Boynton *v.* Phelps, 52 Ill. 210, holding that where after an execution was levied on person property sufficient to satisfy the judgment, a forthcoming bond was given to the officer, and then the debtor, giving an injunction bond, obtained an injunction restraining the collection of the judgment, but the bill was dismissed pending the injunction suit, the creditor could elect either to sue on the injunction bond or to obtain satisfaction under the levy; and, in choosing the former remedy, omitting to avail himself of the levy, the sureties on the injunction bond were not released.

10. Martin *v.* Taylor, 8 Bush (Ky.) 384; Lower *v.* Buchanan Bank, 78 Mo. 67; Rice *v.* Morton, 19 Mo. 263; Dobson *v.* Prather, 41 N. C. 31. But see Alexander *v.* Byrd, 85 Va. 690, 8 S. E. 577.

Where the signature of a cosurety was forged, release of a levy against his property does not affect the right of the creditor against his cosureties. Stoner *v.* Millikin, 85 Ill. 218.

11. *District of Columbia.*— Starr *v.* U. S., 8 App. Cas. 552.

Indiana.— Owen *v.* State, 25 Ind. 371.

Maryland.— Lawson *v.* Snyder, 1 Md. 71; Somerville *v.* Marbury, 7 Gill & J. 275.

New Hampshire.— Barney *v.* Clark, 46 N. H. 514; Concord Bank *v.* Rogers, 16 N. H. 9.

New York.— Mutual L. Ins. Co. *v.* Davies, 56 How. Pr. 440; Fulton *v.* Matthews, 15 Johns. 433, 8 Am. Dec. 261.

Pennsylvania.— Wayne *v.* Commercial Nat. Bank, 52 Pa. St. 343.

Vermont.— Baker *v.* Marshall, 16 Vt. 522, 42 Am. Dec. 528; Montpelier Bank *v.* Dixon, 4 Vt. 587, 24 Am. Dec. 640.

12. Blandford *v.* Barger, 9 Dana (Ky.) 22, 33 Am. Dec. 519; McNeilly *v.* Cooksey, 2 Lea (Tenn.) 39; Humphrey *v.* Hitt, 6 Gratt. (Va.) 509, 52 Am. Dec. 133; Knight *v.* Charter, 22 W. Vt. 422; Ambler *v.* Leach, 15 W. Va. 677.

Withdrawal of an execution which is void does not prejudice the creditor. Wilson *v.* White, 82 Ark. 407, 102 S. W. 201.

13. Wyley *v.* Stanford, 22 Ga. 385; Sasscer *v.* Young, 6 Gill & J. (Md.) 243; Wood *v.* Brown, 104 Fed. 203, 43 C. C. A. 474.

14. Curtice *v.* Bothamly, 8 Allen (Mass.)

of the surety, in which event it has been considered that the surety will be discharged.[15]

(III) *MISAPPLICATION OF SECURITY.*[16] The creditor, having received property of the principal, must account for it,[17] it being his duty to appropriate such property[18] and any profits therefrom[19] to the debt for which the security was given. If the creditor fraudulently encumbers or conceals the property of an insolvent principal,[20] or having received security for the debt for which the surety is bound applies it to a purpose other than the satisfaction of that debt[21] the surety is discharged to the extent of the value of the security misapplied. But the fact that proceeds of the property of the principal were distributed improperly by an erroneous judgment of a court does not discharge the surety,[22] and if the creditor applies security given by one cosurety to the share of that cosurety, the liability of the other cosurety for his share is not affected;[23] nor can the right of the creditor to proceed against a surety be prejudiced by the misappropriation of property of the principal by a cosurety.[24]

(IV) *SUBSTITUTION OF SECURITY.* A surety is not discharged merely because the creditor exchanges security for other security of the same kind, without loss to the surety;[25] but if injury results the surety will be released *pro tanto*.[26]

336; Bellows *v.* Lovell, 4 Pick. (Mass.) 153; Herrick *v.* Orange County Bank, 27 Vt. 584; Baker *v.* Marshall, 16 Vt. 522, 42 Am. Dec. 528; Montpelier Bank *v.* Dixon, 4 Vt. 587, 24 Am. Dec. 640.

15. State Bank *v.* Matson, 24 Mo. 333; Ashby *v.* Smith, 9 Leigh (Va.) 164.

16. As to application of funds or security see *supra*, VII, J; VIII, E, 2, g, (II), (E); and *infra*, IX, A, 2; IX, B, 2.

Recovery of payments made after misapplication see *infra*, IX, A, 3.

17. Spalding *v.* Susquehanna County Bank, 9 Pa. St. 28.

18. *Iowa.*— Iowa Nat. Bank *v.* Cooper, 131 Iowa 556, 107 N. W. 625.

Kansas.— Packard *v.* Herrington, 41 Kan. 469, 21 Pac. 621.

New Hampshire.— New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

Texas.— Embree *v.* Strickland, 1 Tex. App. Civ. Cas. § 1299.

United States.— Brown *v.* Newton First Nat. Bank, 112 Fed. 901, 50 C. C. A. 602, 56 L. R. A. 876.

See 40 Cent. Dig. tit. "Principal and Surety," § 240 *et seq.*

19. McKee *v.* Buford, 3 B. Mon. (Ky.) 432; Cornell *v.* Eagan, 5 N. Y. St. 1.

20. Robeson *v.* Roberts, 20 Ind. 155, 83 Am. Dec. 308; McMullen *v.* Hinkle, 39 Miss. 142; Greenwood First Nat. Bank *v.* Wilbern, 65 Nebr. 242, 90 N. W. 1126, 93 N. W. 1002, 95 N. W. 12.

21. *California.*— Eppinger *v.* Kendrick, 114 Cal. 620, 46 Pac. 613.

Georgia.— Barrett *v.* Bass, 105 Ga. 421, 31 S. E. 435; Montgomery *v.* Martin, 94 Ga. 219, 21 S. E. 513.

Iowa.— De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787.

Missouri.— Tolle *v.* Boeckeler, 12 Mo. App. 54.

New York.— Sternbach *v.* Friedman, 34 N. Y. App. Div. 534, 54 N. Y. Suppl. 608.

Oregon.— Keel *v.* Levy, 19 Oreg. 450, 24 Pac. 253.

Pennsylvania.— Hutchinson *v.* Woodwell, 107 Pa. St. 509; Kuhns *v.* Westmoreland Bank, 2 Watts 136; Lichtenthaler *v.* Thompson, 13 Serg. & R. 157, 15 Am. Dec. 581.

South Carolina.— Rosborough *v.* McAliley, 10 S. C. 235.

Texas.— Morris *v.* Booth, (App. 1892) 18 S. W. 639.

Vermont.— Hurd *v.* Spencer, 40 Vt. 581.

Virginia.— Donally *v.* Wilson, 5 Leigh 329.

England.— Dixon *v.* Steel, [1901] 2 Ch. 602, 70 L. J. Ch. 794, 85 L. T. Rep. N. S. 404, 50 Wkly. Rep. 132; Pearl *v.* Deacon, 1 De G. & J. 461, 3 Jur. N. S. 1187, 26 L. J. Ch. 761, 5 Wkly. Rep. 793, 58 Eng. Ch. 358, 44 Eng. Reprint 802.

See 40 Cent. Dig. tit. "Principal and Surety," § 240 *et seq.*

22. McCalla *v.* Knox, 84 Ga. 291, 10 S. E. 624.

23. Margrett *v.* Gregory, 6 L. T. Rep. N. S. 543, 10 Wkly. Rep. 630.

24. State Bank *v.* Bozeman, 13 Ark. 631; Prather *v.* Young, 67 Ind. 480.

25. *Massachusetts.*— North Ave. Sav. Bank *v.* Hayes, 188 Mass. 135, 74 N. E. 311, where a surety took a renewal note in place of one held as collateral security.

Missouri.— Young *v.* Cleveland, 33 Mo. 126, 82 Am. Dec. 155.

New York.— Keeler *v.* Hollweg, 36 N. Y. App. Div. 490, 55 N. Y. Suppl. 821 [*affirming* 23 Misc. 415, 51 N. Y. Suppl. 259], where a new mortgage was taken in place of another on the same property.

Texas.— Smith *v.* Traders' Nat. Bank, 82 Tex. 368, 17 S. W. 779, where certificates of stock were surrendered and other certificates issued in their place.

Canada.— Winslow *v.* Verner, 30 N. Brunsw. 150, where the security was changed from a mortgage of the property to the property itself.

See 40 Cent. Dig. tit. "Principal and Surety," § 244 *et seq.*

26. Monroe *v.* De Forest, 53 N. J. Eq. 264, 31 Atl. 773. See also Ashby *v.* Smith, 9

Substitution of security of a different kind has been held to discharge the surety, although the security substituted was as good as the security surrendered.[27]

(v) *Disposition of Security For Less Than Value.* If property of the principal is sold irregularly, or negligently by the creditors so that it brings less than its value the surety is discharged *pro tanto*.[28] But the mere fact that property is sold for less than its face value will not release a surety, if the sale was made in good faith;[29] and if the property was sold for its full market value the surety remains liable, although it might be worth more to him.[30]

(vi) *Failure to Register or Record Instrument.* While it has been held, particularly in earlier decisions, that a surety is not discharged by failure of the creditor to record the instrument evidencing the obligation, such as a mortgage in consequence of which the security is lost,[31] especially if the surety did not request the creditor to record the instrument,[32] there are later cases to the contrary.[33] Thus it has been held that a surety is discharged by omission of the creditor to file a warrant of attorney,[34] or a bill of sale,[35] whereby the benefit of the security is lost to the surety. If the creditor has agreed to record a mortgage he must do so within a reasonable time.[36]

Leigh (Va.) 164, as to effecting a complete discharge by taking inferior security.

The burden is on the surety to show that he has been injured. North Ave. Sav. Bank *v.* Hayes, 188 Mass. 135, 74 N. E. 311; Lock Haven State Bank *v.* Smith, 155 N. Y. 185, 49 N. E. 680 [*affirming* 85 Hun 200, 32 N. Y. Suppl. 999].

27. New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685; Albright *v.* Allday, (Tex. Civ. App. 1896) 37 S. W. 646, holding that a surety is discharged if the creditor allows the principal to sell mortgaged land, and to substitute for the mortgage held as security the vendor's lien or other notes taken for the land sold.

28. *Alabama.*— Denson *v.* Gray, 113 Ala. 608, 21 So. 925, where the creditor bid in the property at a nominal sum.

California.— Montgomery *v.* Sayre, 100 Cal. 182, 34 Pac. 646, 38 Am. St. Rep. 271, where the property was sold at private sale for less than its value.

Georgia.— Ward *v.* McLamb, 118 Ga. 811, 45 S. E. 688.

Indiana.— Nichols *v.* Burch, 128 Ind. 324, 27 N. E. 737, where the creditor prevented others from bidding at a sale.

England.— Mutual Loan Fund Assoc. *v.* Sudlow, 5 C. B. N. S. 449, 28 L. J. C. P. 108, 5 Jur. N. S. 338, 94 E. C. L. 449, where an agent of the creditor conducted the sale negligently.

Canada.— Martin *v.* Hall, 25 Grant Ch. (U. C.) 471, where the sale was without notice to the surety.

See 40 Cent. Dig. tit. "Principal and Surety," § 256.

Sale of security to surety.— A surety cannot complain of a sale of property to him at a private sale for less than its value. Coe *v.* Cassidy, 72 N. Y. 133.

29. Denniston *v.* Hill, 173 Pa. St. 633, 34 Atl. 452.

30. Gillen *v.* Kentucky Nat. Bank, 8 S. W. 193, 10 Ky. L. Rep. 97. And see Denny *v.* Seeley, 34 Oreg. 364, 55 Pac. 976, holding that where the value of stock sold at its market value has declined since its sale, the surety cannot object that the sale was without his consent.

31. Philbrooks *v.* McEwen, 29 Ind. 347; New York Nat. Exch. Bank *v.* Jones, 9 Daly (N. Y.) 248 (holding that a surety is not discharged by omission of the creditor to refile a mortgage to continue the lien); Lang *v.* Brevard, 3 Strobh. Eq. (S. C.) 59; Hampton *v.* Levy, 1 McCord Eq. (S. C.) 107.

The neglect of the obligee in a forthcoming bond to have the same enrolled, by which all lien on the property of the principal is lost, will not discharge a surety on the bond from liability. Pickens *v.* Finney, 12 Sm. & M. (Miss.) 468.

Neglect to enroll a tenant's recognizance when the lease was executed does not discharge the surety. Jephson *v.* Maunsell, 10 Ir. Eq. 38, 132.

32. Philbroks *v.* McEwen, 29 Ind. 347; Lang *v.* Brevard, 3 Strobh. Eq. (S. C.) 59.

33. Sullivan *v.* State, 59 Ark. 47, 26 S. W. 194; Tramwell *v.* Swift Fertilizer Works, 121 Ga. 778, 49 S. E. 739 (where the instrument was a note with a mortgage clause in it); Toomer *v.* Dickerson, 37 Ga. 428 (holding that where the creditor had a chattel mortgage duly recorded when received, but neglected to have the mortgage recorded in another state after a removal of the property to the latter state, the surety is discharged without regard to the question whether or not he has been injured); Cloud *v.* Scarborough, 3 Ga. App. 7, 59 S. E. 202; Burr *v.* Boyer, 2 Nebr. 265; Bennett *v.* Taylor, 43 Tex. Civ. App. 30, 93 S. W. 704; Galbraith *v.* Townsend, 1 Tex. Civ. App. 447, 20 S. W. 943. See Schroeppell *v.* Shaw, 3 N. Y. 446; Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28.

34. Watson *v.* Allcock, 4 De G. M. & G. 242, 1 Eq. Rep. 231, 17 Jur. 568, 22 L. J. Ch. 858, 1 Wkly. Rep. 399, 43 Eng. Reprint 499.

35. Wulff *v.* Jay, L. R. 7 Q. B. 756, 41 L. J. Q. B. 322, 27 L. T. Rep. N. S. 118, 20 Wkly. Rep. 1030.

36. Redlon *v.* Heath, 59 Kan. 255, 52 Pac. 862.

(VII) *ANTICIPATING PAYMENTS TO CONTRACTORS.* As the money to be paid to a contractor by the obligee in a bond given by the contractor to secure the performance of the work operates as security and is a material incentive for the prompt and proper execution of the contract, a premature payment to the contractor will release the sureties upon his bond;[37] but provisions as to the time of payment intended solely for the benefit of the obligee may be waived by him without affecting the liability of the surety,[38] and if a payment by the owner does

37. *Arkansas.*— National Surety Co. *v.* Long, 79 Ark. 523, 96 S. W. 745 (holding also that the rule is not changed by the fact that the surety has received a consideration for executing the bond); Lawhon *v.* Toors, 73 Ark. 473, 84 S. W. 636.

California.— Kiessig *v.* Allspaugh, 91 Cal. 231, 27 Pac. 655, 13 L. R. A. 418; Bragg *v.* Shain, 49 Cal. 131. And see Alcatraz Masonic Hall Assoc. *v.* U. S. Fidelity, etc., Co., 3 Cal. App. 338, 85 Pac. 156, holding that where a building contract required the owner to retain four thousand and seventy-five dollars for thirty-five days after the acceptance of the work, and the bond executed by the surety was conditioned on the contractor delivering the building free from liens, the surety is not liable unless the owner is compelled to pay a greater sum than four thousand and seventy-five dollars to free the building from valid liens, as the right exists to have this amount applied toward the satisfaction of claims.

Connecticut.—Chester *v.* Leonard, 68 Conn. 495, 37 Atl. 397.

Iowa.— Lucas County *v.* Roberts, 49 Iowa 159.

Kentucky.—St. Mary's College *v.* Meagher, 11 S. W. 608, 11 Ky. L. Rep. 112.

Michigan.— Backus *v.* Archer, 109 Mich. 666, 67 N. W. 913.

Minnesota.— Simonson *v.* Grant, 36 Minn. 439, 31 N. W. 861, holding also that where sureties are discharged by premature payments, they are not estopped from enforcing their claims for liens for materials furnished by them to the contractor and used in the building.

Mississippi.— Picard *v.* Shantz, 70 Miss. 381, 12 So. 544.

Missouri.— Evans *v.* Graden, 125 Mo. 72, 28 S. W. 439; Kane *v.* Thuener, 62 Mo. App. 69.

Nebraska.— Gray *v.* Norfolk School Dist., 35 Nebr. 438, 53 N. W. 377; Bell *v.* Paul, 35 Nebr. 240, 52 N. W. 1110.

New Jersey.— Welch *v.* Hubschmitt Bldg., etc., Co., 61 N. J. L. 57, 38 Atl. 824.

New York.— Henricus *v.* Englert, 17 N. Y. Suppl. 235.

Oregon.— Enterprise Hotel Co. *v.* Book, 48 Oreg. 58, 85 Pac. 333; Wehrung *v.* Denham, 42 Oreg. 386, 71 Pac. 133.

Pennsylvania.— McNally *v.* Mercantile Trust Co., 204 Pa. St. 596, 54 Atl. 360; Fitzpatrick *v.* McAndrews, 2 Pa. Dist. 713.

South Carolina.— Greenville *v.* Ormand, 51 S. C. 121, 28 S. E. 147.

Tennessee.— Bell *v.* Trimby, (Ch. App. 1896) 38 S. W. 100.

Texas.— Ryan *v.* Morton, 65 Tex. 258; Sanders *v.* Hambrick, 16 Tex. Civ. App. 459, 41 S. W. 883. *Compare* McKenzie *v.* Barrett, 43 Tex. Civ. App. 451, 98 S. W. 229, holding that where the bond provided for the release of the surety if the owner, when making fortnightly payments, did not retain twenty per cent of the value of the work done as shown by the certificate of the architect, the surety is not released by the owner failing unconsciously to retain that amount.

Washington.— Peters *v.* Mackay, 20 Wash. 172, 54 Pac. 1122; De Mattos *v.* Jordan, 15 Wash. 378, 46 Pac. 402, holding, however, that payment by the owner for material needed, the amount being deducted from the next instalment, was not such anticipation as would discharge the surety.

United States.— Fidelity, etc., Co. *v.* Agnew, 152 Fed. 955, 82 C. C. A. 103; Shelton *v.* American Surety Co., 127 Fed. 736 [*affirmed* in 131 Fed. 210, 66 C. C. A. 94]; Morgan County *v.* Branham, 57 Fed. 179.

England.— Calvert *v.* London Dock Co., 2 Jur. 62, 2 Keen 638, 7 L. J. Ch. 90, 15 Eng. Ch. 638, 48 Eng. Reprint 774.

See 40 Cent. Dig. tit. "Principal and Surety," § 284 *et seq.*

If, after notice of liens of workmen, payment is made to the contractor, recovery cannot be had from his surety, as the latter is entitled to the benefit of the security of the price. Taylor *v.* Jeter, 23 Mo. 244.

Immaterial anticipation.— The mere fact that the owner advanced wages on an estimate then due, and which was in fact made the following day, will not avoid the obligation of the surety. Stephens *v.* Elver, 101 Wis. 392, 77 N. W. 737.

Basis of computation.— Where a contract provided for payments not to exceed eighty per cent of the estimated value of "the work performed on the building," the payments should be based not only on the stone put in the building but also on that prepared for the building. Smith *v.* Molleson, 74 Hun (N. Y.) 606, 26 N. Y. Suppl. 653 [*affirmed* in 148 N. Y. 241, 42 N. E. 669].

38. *Alabama.*— Maryland Fidelity, etc., Co. *v.* Robertson, 136 Ala. 379, 34 So. 933.

Missouri.— Casey *v.* Gunn, 29 Mo. App. 14.

New York.— New York *v.* Brady, 70 Hun 250, 24 N. Y. Suppl. 296.

Pennsylvania.— Haine *v.* Dambach, 4 Pa. Co. Ct. 633.

Wisconsin.— Eastern R. Co. *v.* Tuteur, 127 Wis. 382, 105 N. W. 1067.

See 40 Cent. Dig. tit. "Principal and Surety," § 284 *et seq.*

not impair any security to the benefit of which the surety is entitled, the latter is not discharged.[39] If payments are made according to the provisions of the contract the sureties are not released merely because such payments were made before the expiration of the time allowed by statute for filing liens,[40] and if the contract provides for extra payments when needed for additional labor, an extra payment in good faith will not release the sureties, although not actually necessary.[41] A loan by the owner to the contractor, to be repaid out of the next instalment of the contract price,[42] or the acceptance of an order drawn by the contractor in favor of a person furnishing materials, and which is paid from a subsequent instalment,[43] will not avoid the obligation of the surety; and a surety cannot complain if premature payments have been induced by his own representations as to the integrity of the contractor;[44] nor are sureties for a subcontractor discharged because premature payments may have been made to the contractor.[45]

(VIII) *Allowing Principal to Check Out Deposit in Bank.* Upon the question whether, when a bank is the holder of a note, the sureties thereon are discharged because the bank allows the principal to check out his deposit therein the authorities differ, some holding that the sureties are not discharged,[46] while others hold that it is the duty of the bank to apply such deposit on the debt, and that sureties are discharged if this is not done.[47]

(IX) *Failure to Obtain or to Preserve Security.* Whatever may be the duty of the creditor not to part with security once received by him, he does not owe any duty to the surety to obtain security.[48] He even can waive security if

39. Hand Mfg. Co. *v.* Marks, 36 Oreg. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549.

40. Hayden *v.* Cook, 34 Nebr. 670, 52 N. W. 165.

41. Moore *v.* Fountain, (Miss. 1891) 8 So. 509.

The owner is not acting in good faith when the circumstances ought to indicate to him that payments, to which the contractor is not entitled, are being requested. Fidelity, etc., Co. *v.* Agnew, 152 Fed. 955, 82 C. C. A. 103, holding that if, to his certain knowledge, the only basis for the approval of the architect is the invoices on which material is shipped and the representations of the builder, the owner being advised as to how such approvals are obtained, they are available to him only for what they stand.

42. Baubien *v.* Stoney, Speers Eq. (S. C.) 508; Stephens *v.* Elver, 101 Wis. 392, 77 N. W. 737.

Facts held not to constitute loan.— Where early in the performance of the agreement when but little material had been delivered, the materialmen needing money applied to the owner for an advance to be repaid by the shipment of material but the owner not being able to accommodate them, it was arranged that they execute a note which he indorsed and had discounted, the understanding being that it should be met by the shipment of material and no payment was made thereafter, but the value of the material shipped by the materialmen was credited by the bank, the transaction could not be treated merely as an accommodation loan, but was an advance payment which released the surety. Fidelity, etc., Co. *v.* Agnew, 152 Fed. 955, 82 C. C. A. 103.

43. De Mattos *v.* Jordan, 15 Wash. 378, 46 Pac. 402.

44. Slicker *v.* Schuckert, 17 Pa. Co. Ct. 497.

45. Smith *v.* Molleson, 74 Hun (N. Y.) 606, 26 N. Y. Suppl. 653 [*affirmed* in 148 N. Y. 241, 42 N. E. 669].

46. *Georgia.*— Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977, 115 Am. St. Rep. 68, 8 L. R. A. N. S. 944.

Kansas.— Citizens' Bank *v.* Elliott, 9 Kan. App. 797, 59 Pac. 1102.

Missouri.— Citizens' Bank *v.* Booze, 75 Mo. App. 189.

Texas.— Houston *v.* Braden, (Civ. App. 1896) 37 S. W. 467.

Washington.— Kirkland Land, etc., Co. *v.* Jones, 18 Wash. 407, 51 Pac. 1043; British Columbia Bank *v.* Jeffs, 15 Wash. 230, 46 Pac. 247.

England.— Strong *v.* Foster, 17 C. B. 201, 25 L. J. C. P. 106, 4 Wkly. Rep. 151, 84 E. C. L. 201.

And see Wilson *v.* Old Town Bank, (Md. 1887) 11 Atl. 759; Street *v.* Old Town Bank, 67 Md. 421, 10 Atl. 319.

Where the principal owes the bank.— A surety on a note held by a bank cannot be discharged by non-application of the deposit of the principal on the debt, if an overdraft of the principal existed in the bank all the time the note was in existence. Lee *v.* Grant County Deposit Bank, 77 S. W. 374, 25 Ky. L. Rep. 1208.

47. Dawson *v.* Real Estate Bank, 5 Ark. 283; Pursifull *v.* Pineville Banking Co., 97 Ky. 154, 30 S. W. 203, 17 Ky. L. Rep. 38, 53 Am. St. Rep. 409; Burgess *v.* Sadieville Deposit Bank, 97 S. W. 761, 30 Ky. L. Rep. 177; Taylorsville Bank *v.* Hardesty, 91 S. W. 729, 28 Ky. L. Rep. 1285; Newbold *v.* Boon, 6 Pa. Super. Ct. 511, 41 Wkly. Notes Cas. 559. But see Bank of Commerce *v.* Humphrey, 6 S. D. 415, 61 N. W. 444.

48. Rouss *v.* King, 69 S. C. 168, 48 S. E. 220.

it is offered,[49] and can take security for other claims for which the surety is not liable.[50] The creditor is not bound to revive judgment,[51] or to prevent the principal from removing property not in the possession of the creditor,[52] it being the duty of the surety and not that of the creditor to invoke the law in such cases.[53] Nor is the creditor under any duty to take active steps to preserve security,[54] as to insure,[55] pay taxes,[56] or make repairs;[57] nor is he under any duty to administer on the estate of a deceased principal in order to protect the surety if the latter has an equal opportunity of doing so.[58] Likewise the owner of a building in progress of erection is not under any obligation to see that the contractor applies the payments made to him, in discharge of claims for material and labor;[59] and a surety is not discharged although, by delay of the creditor, property in the possession of the latter has depreciated in value,[60] or has been injured by fire.[61] The creditor is not proscribed from buying property from the principal merely because it deprives him of the right to attach it.[62]

(x) *Extent of Discharge.* A relinquishment, loss, or misapplication of security by the creditor does not discharge the surety entirely,[63] but to the extent only to which he has been injured thereby;[64] which is the value of the security so misapplied, lost, or relinquished,[65] and such value is *prima facie* the face value at

49. Rouss *v.* King, 69 S. C. 168, 48 S. E. 220; Folk *v.* Cruikshanks, 4 Rich. (S. C.) 243.

50. Stokes *v.* Gillis, 81 Ga. 187, 6 S. E. 841; Lock Haven State Bank *v.* Smith, 85 Hun (N. Y.) 200, 32 N. Y. Suppl. 999 [*affirmed* in 155 N. Y. 185, 49 N. E. 680]. And see Hildebrand *v.* Deardorf, 15 Serg. & R. (Pa.) 23.

51. Campbell *v.* Sherman, 151 Pa. St. 70, 25 Atl. 35, 31 Am. St. Rep. 735; Kindt's Appeal, 102 Pa. St. 441.

52. Lumsden *v.* Leonard, 55 Ga. 374; Ledoux *v.* Jones, 20 La. Ann. 539; Taft *v.* Gifford, 13 Metc. (Mass.) 187.

53. Goodacre *v.* Skinner, 47 Kan. 575, 28 Pac. 705; Crane *v.* Stickles, 15 Vt. 252.

54. Vance *v.* English, 78 Ind. 80.

55. Rouss *v.* King, 74 S. C. 251, 54 S. E. 615.

56. Wasson *v.* Hodshire, 108 Ind. 26, 8 N. E. 621.

57. Grisard *v.* Hinson, 50 Ark. 229, 6 S. W. 906.

58. Grindol *v.* Ruby, 14 Ill. App. 439.

59. Mayes *v.* Lane, 116 Ky. 566, 76 S. W. 399, 25 Ky. L. Rep. 824.

60. Gray *v.* Brown, 22 Ala. 262; Gray *v.* Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518.

61. Cromwell *v.* Rankin, 97 S. W. 415, 30 Ky. L. Rep. 123; Bardwell *v.* Witt, 42 Minn. 468, 44 N. W. 983.

62. Echols *v.* Head, 68 Ga. 152.

63. Ward *v.* McLamb, 118 Ga. 811, 45 S. E. 688.

64. Lafayette County *v.* Hixon, 69 Mo. 581; Saline County *v.* Buie, 65 Mo. 63.

65. *Alabama.*— Henderson *v.* Huey, 45 Ala. 275; Allen *v.* Greene, 19 Ala. 34; Cullum *v.* Emanuel, 1 Ala. 23, 34 Am. Dec. 757.

Arkansas.— Dawson *v.* Real Estate Bank, 5 Ark. 283.

Colorado.— Day *v.* McPhee, 41 Colo. 467, 93 Pac. 670.

Delaware.— Hazel *v.* Sinex, 6 Del. Ch. 19, 6 Atl. 625; Houston *v.* Hurley, 2 Del. Ch. 247.

Georgia.— Ward *v.* McLamb, 118 Ga. 811, 45 S. E. 688; Kyle *v.* Chattahoochee Nat. Bank, 96 Ga. 693, 24 S. E. 149; Montgomery *v.* Martin, 94 Ga. 219, 21 S. E. 513; Griffeth *v.* Moss, 94 Ga. 199, 21 S. E. 463.

Idaho.— Hailey First Nat. Bank *v.* Watt, 7 Ida. 510, 64 Pac. 223.

Illinois.— Kirkpatrick *v.* Howk, 80 Ill. 122; Pfirshing *v.* Peterson, 98 Ill. App. 70.

Indiana.— Crim *v.* Fleming, 101 Ind. 154; Weik *v.* Pugh, 92 Ind. 382; Sample *v.* Cochran, 84 Ind. 594; Sterne *v.* McKinney, 79 Ind. 578; Sterne *v.* Vincennes First Nat. Bank, 79 Ind. 560; Sterne *v.* Vincennes Bank, 79 Ind. 549; Holland *v.* Johnson, 51 Ind. 346; Stewart *v.* Davis, 18 Ind. 74.

Iowa.— Magney *v.* Roberts, 129 Iowa 218, 105 N. W. 430; National Surety Co. *v.* Walker, 127 Iowa 518, 101 N. W. 780, 103 N. W. 492; De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787; Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853; Mingus *v.* Daugherty, 87 Iowa 56, 54 N. W. 66, 43 Am. St. Rep. 354; May *v.* White, 40 Iowa 246; Maquoketa *v.* Willey, 35 Iowa 323.

Louisiana.— Barrow *v.* Shields, 13 La. Ann. 57.

Maine.— Cummings *v.* Little, 45 Me. 183; Springer *v.* Toothaker, 43 Me. 381, 69 Am. Dec. 66.

Maryland.— Freaner *v.* Yingling, 37 Md. 491.

Massachusetts.— Boston Penny Sav. Bank *v.* Bradford, 181 Mass. 199, 63 N. E. 427; Fitchburg Sav. Bank *v.* Torrey, 134 Mass. 239; Guild *v.* Butler, 127 Mass. 386; Baker *v.* Briggs, 8 Pick. 122, 19 Am. Dec. 311.

Minnesota.— Nelson *v.* Munch, 28 Minn. 314, 9 N. W. 863.

Mississippi.— Picard *v.* Shantz, 70 Miss. 381, 12 So. 544; Barkwell *v.* Swan, 69 Miss. 907, 13 So. 809; Chaffe *v.* Taliaferro, 58 Miss. 544.

Missouri.— Green *v.* Dougherty, 55 Mo. App. 217.

Nebraska.— Stewart *v.* American Exch. Nat. Bank, 54 Nebr. 461, 74 N. W. 865; Bronson *v.* McCormick Harvester Mach. Co.,

the place where the security is enforceable.[66] The liability of the surety is not affected if he has not suffered any injury by the act of the creditor,[67] but the burden is on the creditor to show that the surety has not been injured.[68] If the contract provides for a surrender of a part of the security upon payment of a portion of the indebtedness, and a surrender is made without the payment of interest in arrears, the surety is released as to such interest.[69] In ascertaining the value of goods released from a levy, the expenses of a sheriff's sale should be deducted.[70]

3. Operation of Law — a. In General. The general rule that a surety is discharged when the liability of his principal is extinguished[71] does not apply when the extinction is caused by operation of law, and not by the act of the creditor,[72] and the defense is personal to the principal,[73] but the surety remains liable.[74] If the contract of the principal is changed or enlarged by legislative enactment,[75] or by order of court,[76] the surety is nevertheless discharged.

52 Nebr. 342, 72 N. W. 312; Gray *v.* Norfolk School Dist., 35 Nebr. 438, 52 N. W. 377.

New Hampshire.— New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

New York.— Malone Third Nat. Bank *v.* Shields, 55 Hun 274, 8 N. Y. Suppl. 298; Underhill *v.* Palmer, 10 Daly 478; Griswold *v.* Jackson, 2 Edw. 461 [*affirmed* in 4 Hill 522].

North Carolina.— Smith *v.* McLeod, 38 N. C. 390; Nelson *v.* Williams, 22 N. C. 118.

Ohio.— Day *v.* Ramey, 40 Ohio St. 446.

Oregon.— Enterprise Hotel Co. *v.* Book, 48 Oreg. 58, 85 Pac. 333; Cochran *v.* Baker, 34 Oreg. 555, 52 Pac. 520, 56 Pac. 641.

Pennsylvania.— Stephens *v.* Monongahela Nat. Bank, 88 Pa. St. 157, 32 Am. Rep. 438; Wharton *v.* Duncan, 83 Pa. St. 40; Everly *v.* Rice, 20 Pa. St. 297; Holt *v.* Bodey, 18 Pa. St. 207; Gettysburg Bank *v.* Thompson, 3 Grant 114; Neff's Appeal, 9 Watts & S. 36; Molaka *v.* American F. Ins. Co., 29 Pa. Super. Ct. 149; Coatesville *v.* Hope, 1 Chest. Co. Rep. 57.

Tennessee.— Hutton *v.* Campbell, 10 Lea 170; Watson *v.* Read, 1 Tenn. Ch. 196.

Texas.— Henderson *v.* Terry, 62 Tex. 281; Murrell *v.* Scott, 51 Tex. 520; Burns *v.* Staacke, (Civ. App. 1899) 53 S. W. 354; Durrell *v.* Farwell, (Civ. App. 1894) 27 S. W. 795.

Vermont.— Hurd *v.* Spencer, 40 Vt. 581.

Virginia.— Loop *v.* Summers, 3 Rand. 511.

West Virginia.— Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554.

Wisconsin.— Lowe *v.* Reddan, 123 Wis. 90, 100 N. W. 1038.

United States.—American Bonding Co. *v.* Pueblo Inv. Co., 150 Fed. 17; Brown *v.* Newton First Nat. Bank, 132 Fed. 450, 66 C. C. A. 293; Wood *v.* Brown, 104 Fed. 203, 43 C. C. A. 474; Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28.

England.— Rainbow *v.* Juggins, 5 Q. B. D. 138, 49 L. J. Q. B. 353, 28 Wkly. Rep. 428 [*affirmed* in 5 Q. B. D. 422, 44 J. P. 829, 49 L. J. Q. B. 718, 42 L. T. Rep. N. S. 346, 29 Wkly. Rep. 130]; Strange *v.* Fooks, 4 Giffard 408, 9 Jur. N. S. 943, 8 L. T. Rep. N. S. 789, 2 New Rep. 507, 11 Wkly. Rep. 983, 66 Eng. Reprint 765; Capel *v.* Butler, 4 L. J. Ch. O. S. 69, 2 Sim. & St. 457, 1 Eng. Ch. 457, 57 Eng. Reprint 421; Campbell *v.* Rothwell, 47 L. J. Q. B. 144, 38 L. T. Rep. N. S. 33.

See 40 Cent. Dig. tit. "Principal and Surety," § 267.

66. Monroe Bank *v.* Gifford, 79 Iowa 300, 44 N. W. 558; Merchants' Bank *v.* McKay, 12 Ont. 498 [*affirmed* in 15 Can. Sup. Ct. 672].

67. Wyley *v.* Stanford, 22 Ga. 385; Gaar *v.* Taylor, 128 Iowa 636, 105 N. W. 125; Patton *v.* Cooper, 84 Mo. App. 427. But see Toomer *v.* Dickerson, 37 Ga. 428.

68. Rawson *v.* Gregory, 59 Ga. 733; Cummings *v.* Little, 45 Me. 183; Guild *v.* Butler, 127 Mass. 386; Allen *v.* O'Donald, 23 Fed. 573.

69. Land Security Co. *v.* Wilson, 22 Ont. App. 151 [*affirmed* in 26 Can. Sup. Ct. 149].

70. Com. *v.* Haas, 16 Serg. & R. (Pa.) 252.

71. See *supra*, VIII, E, 1 *et seq.*

72. Phillips *v.* Wade, 66 Ala. 53; Rice *v.* Brantley, 5 Ala. 184; McBroom *v.* Governor, 6 Port. (Ala.) 32; Phillips *v.* Solomon, 42 Ga. 192.

A marriage between the principal and the creditor, however, by taking away the right of the creditor to sue the principal discharges the sureties. Govan *v.* Moore, 30 Ark. 667, English, C. J., dissenting.

73. Rice *v.* Brantley, 5 Ala. 184. See also Bankruptcy, 5 Cyc. 405.

Where the right of action against a personal representative of the principal is suspended for six months, the surety is not discharged. Rice *v.* Brantley, 5 Ala. 184.

74. Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Ray *v.* Brenner, 12 Kan. 105; Whereatt *v.* Ellis, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865.

75. Schuster *v.* Weiss, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182; State *v.* Holman, 96 Mo. App. 193, 68 S. W. 965; Pybus *v.* Gibb, 6 E. & B. 902, 3 Jur. N. S. 315, 26 L. J. Q. B. 41, 5 Wkly. Rep. 44, 88 E. C. L. 902. See also *supra*, VIII, E, 2, j, (III), (D), (E).

Discharge of sureties on official bonds by statutory change of duties see Officers, 29 Cyc. 1460.

76. Shearer's Appeal, 96 Pa. St. 61, holding that a court cannot reform a recognizance

b. Bankruptcy or Insolvency — (I) *Of Principal.* A discharge of the principal in bankruptcy [77] or in insolvency [78] will not discharge his sureties, especially if the debt for which they are liable is exempted from the operation of the bankruptcy law,[79] or they are fully indemnified,[80] or if their liability arose after the bankruptcy; [81] and it does not make any difference that the creditor assented to such bankruptcy or assignment,[82] accepted the benefits thereof,[83] and gave the requisite releases,[84] or that the sureties protested against the discharge of the principal.[85] Accommodation parties [86] and makers of collateral notes [87] are not affected by the bankruptcy of the principal.

(II) *Of Cosurety.* A surety is not discharged because his cosurety is insolvent.[88]

by decreeing that the surety enter into a new one enlarging his liability to his prejudice. But see Sipe *v.* Taylor, 106 Va. 231, 55 S. E. 542. And see *supra*, VIII, E, 2, j, (III), (D), (E).

A surety for alimony cannot be made liable for an increased amount by order of court. Manning *v.* Sweeting, 4 N. Y. St. 842; Sage *v.* Strong, 40 Wis. 575.

77. *Georgia.*— Burns *v.* Parks, 53 Ga. 61.

Indiana.— Post *v.* Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677.

Kansas.— Ray *v.* Brenner, 12 Kan. 105.

Kentucky.— Moore *v.* Waller, 1 A. K. Marsh. 488. *Compare* Calloway *v.* Snapp, 78 Ky. 561.

North Carolina.— See Thornton *v.* Thornton, 63 N. C. 211.

Virginia.— See Ewing *v.* Ferguson, 33 Gratt. 548.

England.— Harding *v.* Preece, 9 Q. B. D. 281, 46 J. P. 646, 51 L. J. Q. B. 515, 47 L. T. Rep. N. S. 100, 31 Wkly. Rep. 42; Glegg *v.* Gilbey, 2 Q. B. D. 209, 46 L. J. Q. B. 325, 35 L. T. Rep. N. S. 927, 25 Wkly. Rep. 311.

See 40 Cent. Dig. tit. "Principal and Surety," § 294.

Conflict of laws.— In determining the effect of the discharge in bankruptcy of the principal on the obligation of the surety, the state law, and not the bankruptcy law, governs. Serra é Hijo *v.* Hoffman, 30 La. Ann. 67.

78. Ames *v.* Wilkinson, 47 Minn. 148, 49 N. W. 696; Jackson *v.* Patrick, 10 S. C. 197; Varnum *v.* Evans, 2 McMull. (S. C.) 409. See Insolvency, 22 Cyc. 1347. But *compare* Bail, 5 Cyc. 32, 115.

In an action against the surety in a prison-bounds bond defendant will not be permitted to adduce evidence that the principal was insolvent, and therefore the creditor did not sustain any damage. Smoot *v.* Lee, 22 Fed. Cas. No. 13,133, 2 Cranch C. C. 459.

The principal under an order of bastardy took the benefit of the Insolvency Act and died. The surety on his recognizance, having been arrested for the amount of the recognizance, applied for a discharge. It was held that, although the surety did not have any property, as the parish had been charged for many years with the burden cast upon them by the principal, the application of the surety could not be granted without the consent of the parish officers; nor would a rule be granted to compel the parish officers to show cause why they should not give their consent. Matter of Smith, 13 Price 3.

79. Jones *v.* Russell, 44 Ga. 460.

80. Moore *v.* Paine, 12 Wend. (N. Y.) 123.

81. Duncan *v.* Sutton, 1 Bing. N. Cas. 431, 4 L. J. C. P. 164, 1 Scott 338, 27 E. C. L. 707.

82. Paul *v.* Logansport Nat. Bank, 60 Ind. 199; *Ex p.* Jacobs, L. R. 10 Ch. 211, 44 L. J. Bankr. 34, 31 L. T. Rep. N. S. 745, 23 Wkly. Rep. 251.

The consent of the creditor to a discharge of the principal in bankruptcy without payment of the amount required by the bankruptcy law, discharges the surety. Calloway *v.* Snapp, 78 Ky. 561.

83. *In re* Burchell, 4 Fed. 406. But *compare* Charlotte First Nat. Bank *v.* Alexander, 85 N. C. 352 [*distinguishing* Brown *v.* Merchants', etc., Nat. Bank, 79 N. C. 244].

The discharge of a debtor by the acceptance of a composition under the Bankruptcy Act (1869), § 126, is a discharge in bankruptcy, and releases the debtor himself only, but does not release any person jointly bound with him. *Ex p.* Jacobs, L. R. 10 Ch. 211, 44 L. J. Bankr. 34, 31 L. T. Rep. N. S. 745, 23 Wkly. Rep. 251.

84. Ames *v.* Wilkinson, 47 Minn. 148, 49 N. W. 696; Varnum *v.* Evans, 2 McMull. (S. C.) 409; *Ex p.* Jacobs, L. R. 10 Ch. 211, 44 L. J. Bankr. 34, 31 L. T. Rep. N. S. 745, 23 Wkly. Rep. 251.

Thus where the creditor sues the surety and proves the debt against the principal who has become bankrupt, and the surety notifies the creditor that if he signs the certificate the surety will hold himself discharged, and, after issue is joined, but before trial, the creditor signs the certificate, which, without such signature, the bankrupt could not obtain, the surety is not discharged. Browne *v.* Carr, 7 Bing. 508, 20 E. C. L. 229, 9 L. J. C. P. O. S. 144, 5 M. & P. 497, 2 Russ. 600, 3 Eng. Ch. 600, 38 Eng. Reprint 461.

85. *Ex p.* Jacobs, L. R. 10 Ch. 211, 44 L. J. Bankr. 34, 31 L. T. Rep. N. S. 745, 23 Wkly. Rep. 251; Glegg *v.* Gilbey, 2 Q. B. D. 209, 46 L. J. Q. B. 325, 35 L. T. Rep. N. S. 927, 25 Wkly. Rep. 311; Ellis *v.* Wilmot, L. R. 10 Exch. 10, 44 L. J. Exch. 10, 31 L. T. Rep. N. S. 574, 23 Wkly. Rep. 214.

86. Springfield Third Nat. Bank *v.* Hastings, 58 Hun (N. Y.) 531, 12 N. Y. Suppl. 401 [*affirmed* in 134 N. Y. 501, 32 N. E. 71].

87. Lewis *v.* Penn Tp. Bank, 3 Whart. (Pa.) 531.

88. Sacramento County *v.* Bird, 31 Cal. 67.

(III) *OF SURETY.* While a discharge in bankruptcy [89] or insolvency [90] of the surety himself may be an available defense, a surety is not released as to indebtedness maturing after his own discharge in bankruptcy.[91]

c. Statute of Limitations and Laches [92]— (I) *DEBT BARRED AS TO SURETY.* The right to recover from a surety may be barred by the statute of limitations; [93] and, regardless of the statute, laches on the part of the creditor in delaying action, may defeat his right.[94] The statute in effect at the time of the breach governs, and not that in force at the time of the execution of the contract; [95] and if the statute provides the time within which suit must be brought against a surety, suit cannot be brought thereafter, although the obligee was ignorant of the suretyship.[96] While the surety may be discharged by lapse of the period of limitation specially applicable to sureties, a mortgage given by him will not be barred until the debt itself is barred.[97]

(II) *DEBT BARRED AS TO PRINCIPAL.* A surety is not discharged merely because the cause of action against the principal is barred.[98]

(III) *FAILURE TO PRESENT CLAIM AGAINST PRINCIPAL'S ESTATE.* Failure of the creditor or obligee to present his claim against the estate of a deceased principal in time to have it allowed does not discharge the surety; [99] and it is

89. See BANKRUPTCY, 5 Cyc. 398.

90. See INSOLVENCY, 22 Cyc. 1343 note 90.

91. Johnson *v.* Compton, 4 Sim. 37, 6 Eng. Ch. 37, 58 Eng. Reprint 15.

92. See, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 963 *et seq.*; EQUITY, 16 Cyc. 150 *et seq.* See also *infra*, IX, B, 4, c, (II), (D).

93. German-American Bank *v.* Denmire, 58 Iowa 137, 12 N. W. 237.

In Connecticut Gen. St. tit. 19, c. 18, § 11, providing that suit shall not be brought against a surety on a bond unless within one year after final judgment in the action in which the bond was given, is superseded by Gen. St. tit. 18, c. 11, § 4, limiting the time in which claims shall be presented against the estate of a decedent; and where a surety on a bond for costs died within one year after final judgment, and before suit on the bond, the claimant could present his claim against the estate of the deceased surety within the time allowed any creditor. Bradley *v.* Vail, 48 Conn. 375.

In Kentucky under Act 1838 (3 St. L. p. 558) sureties on all writings, sealed or not, were released where there was a failure to sue within seven years. Commonwealth Bank *v.* Blanton, 8 B. Mon. 44.

In North Carolina a bond for the payment of money, executed in May, 1860, by a principal and his sureties, is exempted by Code Civ. Proc. § 16, from the operation of the statute of limitations as contained in Code Civ. Proc. §§ 31, 34. Knight *v.* Braswell, 70 N. C. 709.

94. Darnold *v.* Simpson, 114 Fed. 368.

Effect of delay see *supra*, VII, D.

95. King *v.* Nichols, 2 Ohio Dec. (Reprint) 564, 4 West. L. Month. 25.

96. Day *v.* Billingsley, 3 Bush (Ky.) 157; Weller *v.* Ralston, 89 S. W. 698, 28 Ky. L. Rep. 572.

97. Craddock *v.* Lee, 61 S. W. 22, 22 Ky. L. Rep. 1651.

98. Charbonneau *v.* Bouvet, (Tex. 1904) 82 S. W. 460; Daniel *v.* Harvin, 10 Tex. Civ. App. 439, 31 S. W. 421; Nelson *v.* Killingley First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425. *Contra*, Auchampaugh *v.* Schmidt, 70 Iowa 642, 27 N. W. 805, 59 Am. Rep. 459, Reed, J., dissenting. See also *infra*, IX, B, 4, c, (II), (D).

99. *Alabama.*— Darby *v.* Berney Nat. Bank, 97 Ala. 643, 11 So. 881; Minter *v.* Mobile Branch Bank, 23 Ala. 762, 58 Am. Dec. 315; McBroom *v.* Governor, 6 Port. 32.

Arkansas.— Smith *v.* Smithson, 48 Ark. 261, 3 S. W. 49; Ashby *v.* Johnston, 23 Ark. 163, 79 Am. Dec. 102.

California.—Los Angeles County *v.* Lankershim, 100 Cal. 525, 35 Pac. 153.

Iowa.— Jackson *v.* Benson, 54 Iowa 654, 7 N. W. 97. Unless it be shown that it could have been paid when presented. Pottawattamie County *v.* Taylor, 47 Iowa 520; Vredenburgh *v.* Snyder, 6 Iowa 39.

Maryland.— Banks *v.* State, 62 Md. 88.

Mississippi.— Cohea *v.* Sinking Fund Com'rs, 7 Sm. & M. 437; Johnson *v.* Planters' Bank, 4 Sm. & M. 165, 43 Am. Dec. 480; Kerr *v.* Brandon, 2 How. 910.

New Hampshire.— Sibley *v.* McAllaster, 8 N. H. 389.

Ohio.— Moore *v.* Gray, 26 Ohio St. 525.

Pennsylvania.— Cope *v.* Smith, 8 Serg. & R. 110, 11 Am. Dec. 582.

Tennessee.— Reeves *v.* Pulliam, 7 Baxt. 119.

Texas.— Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842 [*modifying* (Civ. App. 1897) 38 S. W. 1141].

See 40 Cent. Dig. tit. "Principal and Surety," § 326, and EXECUTORS AND ADMINISTRATORS, 18 Cyc. 417.

In Illinois, prior to the acts of 1869, page 305, the common-law rule prevailed. Villars *v.* Palmer, 67 Ill. 204; People *v.* White, 11 Ill. 341. But this has been changed by Rev. St. c. 132, § 3. Waughop *v.* Bartlett, 165 Ill. 124, 129, 46 N. E. 197; Brockman *v.* Sieverling, 6 Ill. App. 512. The act of 1869 was not a mere statute of limitations, but was a part of the contract upon which the sureties

competent for the surety to pay the amount due, and prefer his claim against the estate.[1]

(IV) *Debt Barred as to Cosurety.* A surety is not discharged because the statute of limitations has run in favor of a cosurety;[2] but he remains liable for the whole debt.[3]

(V) *When Statute Begins to Run* — (A) *In General.* The statute of limitations begins to run against a surety on a note from its maturity and not from its execution;[4] it begins to run at once on a demand[5] or on an overdue[6] note, unless there has been an extension, in which case the statute begins to run from the expiration of the extension.[7] On a breach of a fidelity bond the statute begins to run at once, and not from the end of the term for which the principal was elected.[8] The contingent liability of a surety is not such a claim against his estate as must be presented and probated within the statutory time.[9]

(B) *Waiver of Breach or Default.* There may be successive breaches of a bond, in which case the obligee may waive the first, and the statute of limitations will not begin to run until later.[10] So the owner of a building in course of erection can waive the default of the contractor in failing to complete the same within the time prescribed,[11] or he can waive the apparent breach caused by the mere filing of a materialman's lien, and wait until the rendition of a judgment thereon, and the statute will begin to run from such latter breach.[12]

(VI) *Suspension of Running of Statute* — (A) *In General.* A delay does not prevent the statute of limitations running in favor of a surety;[13] nor can the principal waive the benefit of the statute for his surety.[14] The fact that the surety has undertaken to be liable for a note "until paid" does not continue his obligation beyond the statutory time.[15]

(B) *By Part Payment.* If the statute prescribes a period within which action

had a right to rely. House *v.* School Trustees Tp. 35, 83 Ill. 368. The provision "that this act shall not be construed so as to release any surety from the payment of the whole or any part of such debt that may remain unpaid after the estate of the decedent is fully administered" applies only to notes presented for allowance; and the holder could not recover such balance as would have remained unpaid if the note had been presented. Huddleston *v.* Francis, 124 Ill. 195, 16 N. E. 243 [*affirming* 26 Ill. App. 224]. And it was immaterial whether the estate was solvent or not. A note made and matured between the passage of the act of March 4, 1869, and that of July 1, 1874, would be governed by the prior statute. Under the latter statute, failure of the creditor to present a note to the estate of a deceased principal discharges the surety to the extent only that it might have been collected from the estate if presented within the proper time after the granting of letters of administration. Tipton *v.* Carrigan, 10 Ill. App. 318.

In Minnesota in Siebert *v.* Quesnel, 65 Minn. 107, 67 N. W. 803, 60 Am. St. Rep. 441, it is held that a surety is discharged if the claim is not presented against the estate of a deceased principal if sufficient to discharge all claims against it.

1. Mitchell *v.* Williamson, 6 Md. 210.

2. Davis *v.* Auxier, 41 S. W. 767, 19 Ky. L. Rep. 719; Staples *v.* Gokey, 34 Hun (N. Y.) 289; McVean *v.* Scott, 46 Barb. (N. Y.) 379; Martin *v.* Frantz, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. Rep. 859.

3. Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

4. Dohn *v.* Bronger, 47 S. W. 619, 20 Ky. L. Rep. 823.

5. Newell *v.* Clark, 73 N. H. 289, 61 Atl. 555.

6. Howard *v.* Lawrence, 63 S. W. 589, 23 Ky. L. Rep. 680.

7. Cook *v.* Landrum, 82 S. W. 585, 26 Ky. L. Rep. 813.

8. Grant County Bldg., etc., Assoc. *v.* Lemmon, 78 S. W. 874, 25 Ky. L. Rep. 1725.

9. McWilliams *v.* Norfleet, 60 Miss. 987; Gordon *v.* Gibbs, 3 Sm. & M. (Miss.) 473.

10. McKim *v.* Williams, 134 Mass. 136.

Thus the sureties for a guardian would be liable for his failure to return an inventory and to render an account; but failure to bring an action for such breach within the time prescribed by the statute of limitations would not discharge them for his subsequent failure to pay over the estate to his successor. McKim *v.* Williams, 134 Mass. 136.

11. Beebe *v.* Redward, 35 Wash. 615, 77 Pac. 1052.

12. Washington Securities Inv. Co. *v.* Flynn, 38 Wash. 701, 80 Pac. 544; Denny *v.* Spurr, 38 Wash. 347, 80 Pac. 541; Beebe *v.* Redward, 35 Wash. 615, 77 Pac. 1052.

13. Kennedy *v.* Foster, 14 Bush (Ky.) 479.

14. Dawes *v.* Shed, 15 Mass. 6, 8 Am. Dec. 80.

15. Bernd *v.* Lynes, 71 Conn. 733, 43 Atl. 189.

must be brought against a surety, a payment, whether made by himself or by the principal, will not extend that period.[16]

(c) *By Fraud of Principal.* If the running of the statute has been suspended as to the principal on account of concealed fraud, it is suspended likewise as to his surety, although the latter is innocent.[17]

(vii) *By Special Limitation in Contract.* A provision in a contract of suretyship that any action thereon must be brought within six months is reasonable, and will be upheld;[18] and, in order to hold the surety, suit must be brought within six months after the obligee had knowledge[19] of a breach; but the principal cannot take advantage of such a provision in his bond if he is sued on the contract to secure the performance of which the bond was given.[20]

(viii) *By New Promise.* A new promise by the surety will suspend the running of the statute as to him, although the cause of action becomes barred as to the principal.[21]

d. Declaration of War. The fact that the principal becomes an alien enemy is not available as a defense to his sureties.[22]

F. Counter-Claim and Set-Off[23] — **1. Of Surety's Claim.** Sureties, when sued, can set off their claims against plaintiff.[24]

2. Of Cosurety's Claim. One surety cannot, however, set off a claim of his cosurety.[25]

16. Lilly *v.* Farmers' Nat. Bank, 56 S. W. 722, 22 Ky. L. Rep. 148.

17. Eising *v.* Andrews, 66 Conn. 58, 33 Atl. 585, 50 Am. St. Rep. 75; Lieberman *v.* Wilmington First Nat. Bank, (Del. 1900) 45 Atl. 901; McMullen *v.* Winfield Bldg., etc., Assoc., 64 Kan. 298, 67 Pac. 892, 91 Am. St. Rep. 236, 56 L. R. A. 924.

For example a surety on a note procured his insolvent principal to deposit money in the bank which held the note, and the bank appropriated the deposit in payment. Subsequently this was adjudged to constitute a fraudulent preference, and the bank was compelled to repay the money. Ky. St. § 2552, provides that if a surety shall obstruct or hinder his being sued, the time of such obstruction shall not be computed as part of the time of limitation. It was held that the period intervening between the appropriation of the deposit and the termination of the suit to have such deposit declared an illegal preference should be deducted from the period of limitation running in favor of the surety. Exchange Bank *v.* Thomas, 115 Ky. 832, 74 S. W. 1086, 75 S. W. 283, 25 Ky. L. Rep. 228.

18. Granite Bldg. Co. *v.* Saville, 101 Va. 217, 43 S. E. 351; Marshalltown Stone Co. *v.* Louis Drach Constr. Co., 123 Fed. 746.

19. Novelty Mill Co. *v.* Heinzerling, 39 Wash. 244, 81 Pac. 742; Henry *v.* Ætna Indemnity Co., 36 Wash. 553, 79 Pac. 42.

20. Marshalltown Stone Co. *v.* Louis Drach Constr. Co., 123 Fed. 746.

21. Daniel *v.* Harvin, 10 Tex. Civ. App. 439, 31 S. W. 421.

22. Bean *v.* Chapman, 62 Ala. 58; Paul *v.* Christie, 4 Harr. & M. (Md.) 161.

23. See, generally, Recoupment, Set-Off, and Counter-Claim.

24. See cases cited *infra*, this note.

Surety can counter-claim by setting up damages for breach of promise where one became surety on the promise of the payee to procure other sureties, which promise the payee did not fulfil. Gaar *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 21 Am. Rep. 209; Murphy *v.* Hubble, 2 Duv. (Ky.) 247. Sureties on the bond of a contractor can set off their claim as lien-holders. German Lutheran Evangelical St. Matthew's Cong. Church *v.* Heise, 44 Md. 453. Where a note arose out of a contract, and is executed in pursuance of its stipulations, questions of recoupment between the creditor and a surety on the note should be treated as though the suit had been on the original contract itself. Langdon *v.* Markle, 48 Mo. 357. Where a bank is the payee of a note, and the bank and the principal become insolvent, one of several indorsers is entitled to set off his deposit in the bank as against his contributive share of the note; and the receiver must adjust such share according to the solvency of the other indorsers. Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

Surety cannot set off the bond of a third person, upon which plaintiff is liable as surety, unless there has been a previous adjustment of accounts between the principal obligor and defendants, and a balance ascertained to be due to defendants. Sailer *v.* Domestic Sewing Mach. Co., 34 Leg. Int. (Pa.) 115. The sureties upon the bond of an insolvent defaulting sheriff cannot set off against his indebtedness to a municipality the amount of a judgment held by them against the municipality. Schmidt *v.* New Orleans, 33 La. Ann. 17. One surety can set off against the creditor his claim for contribution against the estate of a cosurety, if the creditor would be liable to refund such amount to such estate. Fisher *v.* Cassidy, 49 Ohio St. 421, 34 N. E. 696.

25. Bowyear *v.* Pawson, 6 Q. B. D. 540, 50 L. J. Q. B. 495, 29 Wkly. Rep. 664.

3. Of Principal's Claim — a. In Joint Action Against Principal and Surety. Generally, when the principal and surety are sued jointly, a claim in favor of the principal can be set off against the demand of the creditor or obligee,[26] against a relator,[27] or against an assignee unless the instrument be negotiable and the latter is a holder in due course.[28]

b. In Suit Against Surety Alone. If the surety is sued alone he cannot avail himself of a claim of the principal against plaintiff,[29] unless the principal consents

26. *Illinois.*— Hayes *v.* Cooper, 14 Ill. App. 490; Meyer *v.* Stookey, 3 Ill. App. 336.

Indiana.— Slayback *v.* Jones, 9 Ind. 470; Crist *v.* Jacoby, 10 Ind. App. 688, 38 N. E. 543; Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328, 36 N. E. 716.

Kansas.— Park *v.* Ensign, 66 Kan. 50, 71 Pac. 230, 97 Am. St. Rep. 352.

Kentucky.— Crutcher *v.* Trabue, 5 Dana 80; Rumley Co. *v.* Wilcher, 66 S. W. 7, 23 Ky. L. Rep. 1745.

Louisiana.— Brander *v.* Garrett, 19 La. 455.

Minnesota.—Becker *v.* Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543.

Missouri.— Rubey *v.* Watson, 22 Mo. App. 428.

Nebraska.—Van Etten *v.* Kosters, 48 Nebr. 152, 66 N. W. 1106; Raymond *v.* Greene, 12 Nebr. 215, 10 N. W. 709, 41 Am. Rep. 763.

New Hampshire.— Savage *v.* Fox, 60 N. H. 17; Cole *v.* Hills, 44 N. H. 227; Mahurin *v.* Pearson, 8 N. H. 539.

New York.— Springer *v.* Dwyer, 50 N. Y. 19; Loring *v.* Morrison, 15 N. Y. App. Div. 498, 44 N. Y. Suppl. 526; Newell *v.* Salmons, 22 Barb. 647.

North Carolina.— Brinson *v.* Sanders, 54 N. C. 210.

Oklahoma.— Willoughby *v.* Ball, 18 Okla. 535, 90 Pac. 1017.

Tennessee.— Guggenheim *v.* Rosenfeld, 9 Baxt. 533.

Vermont.— Brunbridge *v.* Whitecomb, 1 D. Chipm. 180.

Virginia.— Robertson *v.* Trigg, 32 Gratt. 76.

West Virginia.— Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

See 40 Cent. Dig. tit. "Principal and Surety," § 393 *et seq.*

Contra.— Noble *v.* Anniston Nat. Bank, (Ala. 1906) 41 So. 136; McCreary *v.* Jones, 96 Ala. 592, 11 So. 600; Woodruff *v.* State, 7 Ark. 333; Warren *v.* Wells, 1 Metc. (Mass.) 80; Dart *v.* Sherwood, 7 Wis. 523, 76 Am. Dec. 228; Great Western Ins. Co. *v.* Pierce, 1 Wyo. 45; Joyce *v.* Cockrill, 92 Fed. 838, 35 C. C. A. 38.

Although another action is pending against him alone, a claim may be set off by the principal in a suit against him and his surety. Concord *v.* Pillsbury, 33 N. H. 310.

Where a surety confessed judgment to the commonwealth for a default of his principal, and afterward the commonwealth became indebted to the principal and another, and retained a certificate for a part of the fund, to be applied to the default of the principal, the other person interested in the certificate, disclaiming all interest therein, it was held that the amount of the certificate was deducted properly from the judgment. *In re* Hewitt, 5 Pa. St. 267.

A surety can set off but not recoup a claim of the principal. Marcy *v.* Whallon, 115 Ill. App. 435; Kingman *v.* Decker, 43 Ill. App. 303; Gilliam *v.* Coon, 10 Ill. App. 43.

Va. Code, § 3299, allowing pleas of set off, does not authorize sureties jointly sued with the principal on a bond for the purchase-price of land to plead as set-off damages suffered by the principal by reason of a breach of warranty of title, as the sureties do not have any interest in such cause of action. Kinzie *v.* Rieley, 100 Va. 709, 42 S. E. 872.

27. Myers *v.* State, 45 Ind. 160.

28. Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466 [*affirming* 10 Ohio Dec. (Reprint) 434, 21 Cinc. L. Bul. 136]; Armstrong *v.* Law, 11 Ohio Dec. (Reprint) 461, 27 Cinc. L. Bul. 100.

29. *Alabama.*— Fluker *v.* Henry, 27 Ala. 403.

Colorado.— Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779.

Georgia.— Mordecai *v.* Stewart, 37 Ga. 364.

Louisiana.—Purdy *v.* Forstall, 45 La. Ann. 814, 13 So. 95.

Maryland.— Gantt *v.* Bowie, 2 Harr. & J. 374.

New York.— Lasher *v.* Williamson, 55 N. Y. 619; Springer *v.* Dwyer, 50 N. Y. 19; Henry *v.* Daley, 17 Hun 210; Morgan *v.* Smith, 7 Hun 244 [*affirmed* in 70 N. Y. 537]; New York *v.* Parker Vein Steamship Co., 8 Bosw. 300; McKensie *v.* Farrell, 4 Bosw. 192; La Farge *v.* Halsey, 1 Bosw. 171, 4 Abb. Pr. 397.

Oklahoma.— Willoughby *v.* Ball, 18 Okla. 535, 90 Pac. 1017.

South Carolina.— Cantey *v.* Blair, 2 Rich. Eq. 46.

Tennessee.— Phœnix Iron Works Co. *v.* Rhea, 98 Tenn. 461, 40 S. W. 482 [*affirming* (Ch. App. 1896) 38 S. W. 1079].

Vermont.— Lamoille County Nat. Bank *v.* Bingham, 50 Vt. 105, 28 Am. Rep. 490; Ward *v.* Whitney, 32 Vt. 89.

West Virginia.— Baltimore, etc., R. Co. *v.* Bitner, 15 W. Va. 455, 36 Am. Rep. 820.

United States.— U. S. *v.* Buchanan, 8 How. 83, 12 L. ed. 997.

England.— Harrison *v.* Nettleship, 3 L. J. Ch. 86, 2 Myl. & K. 423, 7 Eng. Ch. 423, 39 Eng. Reprint 1005.

Canada.— Gray *v.* Smith, 6 U. C. Q. B. 62.

See 40 Cent. Dig. tit. "Principal and Surety," § 393 *et seq.*

thereto,[30] and it has been assigned to the surety [31] before the suit is brought; [32] and the principal can intervene for the purpose of setting off a claim against the creditor.[33] Sureties cannot set off a demand which their principal would not be entitled to set off; [34] the claim of the principal must be due [35] and be a liquidated demand.[36] In equity set-off will be allowed if the creditor [37] or the principal [38] is insolvent.

c. Statutory Provisions. In some states this matter is regulated by statute.[39]

d. Suit Upon Several Distinct Claims. If suit is brought on several distinct claims, to which a set-off is allowed, it should be applied ratably; and a surety for a part of the claims has no right to have it applied first to those debts for which he is liable.[40]

After the principal has been adjudged a bankrupt, the surety cannot set off usury paid by the principal on transactions other than the one sued on, as, under the act of 1867, "all debts due the bankrupt . . . shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee." Woolfolk *v.* Plant, 46 Ga. 422.

It is competent, by way of equitable defense for the surety, to plead a set-off due from the creditor to the principal arising out of the same transaction out of which the liability of the surety arose. Bechervaise *v.* Lewis, L. R. 7 C. P. 372, 41 L. J. C. P. 161, 26 L. T. Rep. N. S. 848, 20 Wkly. Rep. 726.

30. *Alabama.*— Lynch *v.* Bragg, 13 Ala. 773.

Illinois.— Wieland *v.* Oberne, 20 Ill. App. 118; Graff *v.* Kahn, 18 Ill. App. 485.

Iowa.— Reeves *v.* Chambers, 67 Iowa 81, 24 N. W. 602.

Pennsylvania.— Balsley *v.* Hoffman, 13 Pa. St. 603.

Tennessee.— Phœnix Iron Works Co. *v.* Rhea, 98 Tenn. 461, 40 S. W. 482 [*affirming* (Ch. App. 1896) 38 S. W. 1079].

See 40 Cent. Dig. tit. "Principal and Surety," § 394.

31. Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779; Wieland *v.* Oberne, 20 Ill. App. 118; Graff *v.* Kahn, 18 Ill. App. 485; Snyder *v.* Frankenfield, 4 Pa. Dist. 767.

32. Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575 [*affirming* 99 Ill. App. 132].

33. Burton *v.* Decker, 54 Kan. 608, 38 Pac. 783; Becker *v.* Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543.

34. Gentry *v.* Jones, 6 J. J. Marsh. (Ky.) 148.

35. Marquette Opera House Bldg. Co. *v.* Wilson, 109 Mich. 223, 67 N. W. 123, holding that the amount due the principal for extra work cannot be applied on the claim, where the obligation to pay for such extras did not arise till the architect had given an estimate therefor, and this is not shown to have been done.

36. Kinzie *v.* Rieley, 100 Va. 709, 42 S. E. 872.

37. Davidson *v.* Alfaro, 80 N. Y. 660; Coffin *v.* McLean, 80 N. Y. 560; Jarratt *v.* Martin, 70 N. C. 459; Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466 [*affirming* 10 Ohio Dec. (Reprint) 434, 21 Cinc. L. Bul. 136]; Armstrong *v.* Law, 11 Ohio Dec. (Reprint) 461, 27 Cinc. L. Bul. 100; Smith *v.* Wainwright, 24 Vt. 97.

38. *Alabama.*— Scholze *v.* Steiner, 100 Ala. 148, 14 So. 552.

Minnesota.—Becker *v.* Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543.

New York.— Morgan *v.* Smith, 7 Hun 244 [*affirmed* in 70 N. Y. 537]; Wright *v.* Austin, 56 Barb. 13.

Ohio.— Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466 [*affirming* 10 Ohio Dec. (Reprint) 434, 21 Cinc. L. Bul. 136]; Armstrong *v.* Law, 11 Ohio Dec. (Reprint) 461, 27 Cinc. L. Bul. 100.

Oklahoma.— Willoughby *v.* Ball, 18 Okla. 535, 90 Pac. 1017.

See 40 Cent. Dig. tit. "Principal and Surety," § 395.

39. See cases cited *infra,* this note; and the statutory provisions of the several states.

In Indiana under Rev. St. (1881) § 349, a surety on a note given for the purchase of an engine may plead a breach of warranty of the engine as a defense, notwithstanding the principal, when sued thereon, failed to avail himself of it. Springfield Engine, etc., Co. *v.* Park, 3 Ind. App. 173, 29 N. E. 444. Under 2 Rev. St. p. 40, § 58, an accommodation indorser and the drawer of a bill of exchange drawn on a firm for its use are entitled, in an action against them and the firm by the discounting bank, to set off an indebtedness due the firm from the bank. Larrimore *v.* Heron, 16 Ind. 350.

In Missouri under Rev. St. (1889) § 2050, giving defendant "in an action arising on contract" the right to counter-claim "any other cause of action arising also on contract, and existing at the commencement of the action," the principal and sureties on an appeal-bond may plead a judgment obtained by the principal against the obligee upon a debt existing at the time the judgment appealed from was rendered. Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839.

In Ohio, under Code Pr. § 93, allowing such "grounds of defense, counter-claim, and set-off . . . as have been heretofore denominated legal or equitable," in an action on a joint debt against principal and surety, a demand due to the principal may be set off. Wagner *v.* Stocking, 22 Ohio St. 297.

In Virginia, under Code, c. 168, § 4, a claim of the principal may be set off by him and his sureties. Edmunds *v.* Harper, 31 Gratt. 637.

40. Franklin Bank *v.* Cooper, 36 Me. 221.

e. Interest. Interest should be allowed on an amount due from the creditor to the principal when such amount is applied by way of set-off.[41]

IX. Rights and Remedies of Surety.

A. As to Creditor or Obligee [1]— **1. In General.** A surety for a contractor has no right to require payment of the contract price to himself.[2] The surety may have such right, however, where the agreement of the parties provides therefor,[3] and he may acquire it by completing the work on default of the principal,[4] in which case he is entitled to recover the contract price, less any amounts paid to the principal prior to his abandonment of the contract,[5] and less deductions for defects in the work and material furnished by the principal.[6] If the surety's contract was induced by fraud, he may have it canceled so far as he is concerned,[7] and the

41. Bronaugh *v.* Neal, 1 Rob. (La.) 23.

1. Necessity of resort by creditor to principal, etc., see *supra*, VII, E.

2. Philadelphia *v.* McLinden, 11 Pa. Dist. 128, 26 Pa. Co. Ct. 287.

Work performed by surety for principal.— It has been held that the right of action is not in the surety even though he performed the work and took an assignment of the proceeds of the contract. Ferris *v.* Kingston Tp., 12 U. C. Q. B. 436, holding that after one man takes a job of work, putting forth another person as his surety for the due performance of it, the surety cannot, by arrangement between the two, be intruded upon the other party to the contract as the principal; that if the surety does the work it is for the person who undertook to do it and not for the other party to the contract.

3. Howard *v.* Holland Public Schools, 50 Mich. 94, 14 N. W. 712.

4. St. Peter's Catholic Church *v.* Vannote, 66 N. J. Eq. 78, 56 Atl. 1037 (where a building contract gave the owner the right to complete the work on abandonment by the contractors, and upon such abandonment the work was completed by the sureties of the contractor under agreement with the owners, and on bill of interpleader filed by the owners, it was held that such completion was neither for the owners nor the contractors but to relieve the sureties from their obligation as such; that an unpaid portion of the contract price being in the hands of the owners and retained by them under the terms of the original contract as an indemnity and for their security if they should be required to complete the contract, the sureties could have compelled the owners to devote all or a part of such fund to complete the contract before resorting to their bond, and that therefore they were entitled to the security held by the owner for the performance of the contract as far as it was necessary to reimburse them for their necessary outlay); McChesney *v.* Syracuse, 75 Hun (N. Y.) 503, 27 N. Y. Suppl. 508 (where upon abandonment of the contract by the principal the surety was employed to complete the building and was held entitled to the remainder of the fund unpaid under the original contract); Hitchcock *v.* U. S., 27 Ct. Cl. 185.

Bond and contract construed together.— In Madison First Nat. Bank *v.* School District No. 1, 77 Nebr. 570, 110 N. W. 349, it was held that where a contractor's bond provides that in case of his default in performance the surety may take possession of the building and complete the work, and that in such event the reserve in the hands of the owner of the building together with any other moneys due or to become due shall be paid to the surety, the building contract and the bond being interdependent and taken over at the same instant should be construed together as constituting a trilateral contract between the parties and that upon default by the contractor and completion of the building according to the contract by the surety the latter does not stand in the position of assignee with respect to the "reserve" in the hands of the owner and the "other moneys due or to become due" but as an original party to the trilateral contract. To the same effect see American Bonding Co. *v.* State University, 11 Ida. 163, 81 Pac. 604.

Completion creating no liability to surety. — But in Hall *v.* Gilmour, 9 U. C. Q. B. 492, where a contract was entered into to build certain cottages, the contractor to receive £800 during the progress of the work, and, on its completion, £1,000 by the conveyance of certain premises, and after failure to perform his contract, and after he had received the £800, he assigned the contract to his sureties, and they entered into an agreement with the owner which, after reciting the previous contract, the liability of the sureties thereunder, the non-performance of the contract by the principal, and his assignment thereof to the sureties, provided for giving further time, the sureties covenanting to finish the work according to the first agreement, and the parties mutually binding themselves in £1,000 for the performance of this last agreement, it was held that there was no covenant, expressed or implied, on the part of the owner to convey to the sureties, or to pay them the £1,000.

5. Waterford Bd. of Education *v.* Richfield Springs First Nat. Bank, 70 Hun (N. Y.) 520, 24 N. Y. Suppl. 392.

6. American Bonding Co. *v.* State University, 11 Ida. 163, 81 Pac. 604.

7. Blest *v.* Brown, 3 Giffard 450, 8 Jur. N. S. 187, 5 L. T. Rep. N. S. 663, 66 Eng. Reprint 486 [*affirmed* in 4 De G. F. & J.

principal,[8] and cosureties,[9] if any, are necessary parties to a suit brought for the purpose of obtaining relief against the obligation.

2. Exoneration in Equity — a. In General. Before the surety has paid the debt, a court of equity, for good cause shown, may, for the surety's protection, require the creditor or obligee to proceed against the principal,[10] or against his estate, if he is deceased,[11] bankrupt,[12] or insolvent.[13] And so in equity the creditor or obligee may be required to resort to the property of the principal,[14] or to any

367, 8 Jur. N. S. 602, 6 L. T. Rep. N. S. 620, 10 Wkly. Rep. 569, 65 Eng. Ch. 284, 45 Eng. Reprint 1225]. See also *supra*, IV, D, 11, d.

8. Miles *v.* Rankin, 6 T. B. Mon. (Ky.) 78.

9. Allan *v.* Houlden, 6 Beav. 148, 12 L. J. Ch. 181, 49 Eng. Reprint 782.

10. *Delaware.*— Miller *v.* Stout, 5 Del. Ch. 259.

Florida.— Hayden *v.* Thrasher, 18 Fla. 795.

Hawaii.— Macfie *v.* Kilauea Sugar Co., 6 Hawaii 440.

Illinois.— Street *v.* Chicago Wharfing, etc., Co., 157 Ill. 605, 41 N. E. 1108; Wise *v.* Shepherd, 13 Ill. 41; Keach *v.* Hamilton, 84 Ill. App. 413.

Indiana.— Hoppes *v.* Hoppes, 123 Ind. 397, 24 N. E. 139.

Iowa.— Keokuk *v.* Love, 31 Iowa 119.

Kentucky.— Meador *v.* Meador, 88 Ky. 217, 10 S. W. 651, 10 Ky. L. Rep. 783.

Maryland.— Sasscer *v.* Young, 6 Gill & J. 243.

Minnesota.— Huey *v.* Pinney, 5 Minn. 310.

Missouri.— Wilcox *v.* Todd, 64 Mo. 388.

New Jersey.— Philadelphia, etc., R. Co. *v.* Little, 41 N. J. Eq. 519, 7 Atl. 356.

New York.— King *v.* Baldwin, 17 Johns. 384, 8 Am. Dec. 415 [*reversing* 2 Johns. Ch. 555, upon other grounds]; Marsh *v.* Pike, 10 Paige 595; Hayes *v.* Ward, 4 Johns. Ch. 123, 8 Am. Dec. 554.

North Carolina.— Thigpen *v.* Price, 62 N. C. 146.

Ohio.— Hale *v.* Wetmore, 4 Ohio St. 600; McConnell *v.* Scott, 15 Ohio 401, 45 Am. Dec. 583.

Pennsylvania.— Beaver *v.* Beaver, 23 Pa. St. 167.

South Carolina.— Norton *v.* Reid, 11 S. C. 593.

Vermont.— Bishop *v.* Day, 13 Vt. 81, 37 Am. Dec. 582.

Virginia.— Southall *v.* Farish, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641, doubting, however, whether a creditor having money or its equivalent in his hands belonging to the surety can be compelled to exhaust his remedies against the principal instead of being permitted to apply the money in his hands, leaving the surety to proceed against the principal.

Wisconsin.— Dobie *v.* Fidelity, etc., Co., 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135.

England.— Wooldridge *v.* Norris, L. R. 6 Eq. 410, 37 L. J. Ch. 640, 19 L. T. Rep. N. S. 144, 16 Wkly. Rep. 965.

Canada.— Campbell *v.* Robinson, 27 Grant Ch. (U. C.) 634.

See 40 Cent. Dig. tit. "Principal and Surety," § 468 *et seq.*

Peculiar circumstances rendering such interference necessary must exist in order to entitle a surety to invoke the aid of a court of equity to compel a creditor to exhaust his remedy against the principal debtor before resorting to the surety. Abercrombie *v.* Knox, 3 Ala. 728, 37 Am. Dec. 721; Stein *v.* Benedict, 83 Wis. 603, 53 N. W. 891. See also Shubrick *v.* Russell, 1 Desauss. Eq. (S. C.) 315. And it has been held that the cases in which the surety may thus require the creditor to proceed against the principal are confined ordinarily to where the character of the surety stands confessed upon the face of the instrument itself. *In re* Babcock, 2 Fed. Cas. No. 696, 3 Story 393.

Effect of delay in suing see *supra*, VII, D.

11. Pride *v.* Boyce, Rice Eq. (S. C.) 275, 33 Am. Dec. 78; Paxton *v.* Rich, 85 Va. 378, 7 S. E. 531, 1 L. R. A. 639. In equity the obligee must resort to personal property left by the principal, to lands devised, and to the wife's paraphernalia before coming on the surety. Tynt *v.* Tynt, 2 P. Wms. 542, 24 Eng. Reprint 853.

12. Wright *v.* Simpson, 6 Ves. Jr. 714, 31 Eng. Reprint 1272.

13. Neglect of the creditor to proceed against the estate of an insolvent principal when requested by the surety will discharge the latter in equity. McCollum *v.* Hinckley, 9 Vt. 143.

14. *Indiana.*— Moffitt *v.* Roche, 77 Ind. 48; Nunemacher *v.* Ingle, 20 Ind. 135.

New Jersey.— Delaware, etc., R. Co. *v.* Oxford Iron Co., 38 N. J. Eq. 151; Irick *v.* Black, 17 N. J. Eq. 189.

Virginia.— Beckham *v.* Duncan, (1889) 9 S. E. 1002; West *v.* Belches, 5 Munf. 187.

West Virginia.— Wilson *v.* Carrico, 50 W. Va. 336, 40 S. E. 439; Neal *v.* Buffington, 42 W. Va. 327, 26 S. E. 172.

England.— Bechervaise *v.* Lewis, L. R. 7 C. P. 372, 41 L. J. C. P. 161, 26 L. T. Rep. N. S. 848, 20 Wkly. Rep 726.

See 40 Cent. Dig. tit. "Principal and Surety," § 474 *et seq.*

Application of distributive share in estate. — Where one of the next of kin of an intestate is indebted to the estate in a bond secured by a surety, the latter has a right, in equity, to compel the administrator to apply the distributive share of his principal toward the satisfaction of the bond. Allen *v.* Smitherman, 41 N. C. 341.

In behalf of surety's vendee.— Where a judgment was recovered against the administrator of an estate and a surety on the bond of such administrator, and the surety has received nothing either from the assets of the estate or from the administrator as

security [15] in the hands of the creditor or obligee, before resorting to the surety, or to any security furnished by the latter,[16] provided the security furnished by the principal is as available as that furnished by the surety,[17] and it does not cause any injury to the rights of third persons.[18] The surety likewise is entitled to an accounting of security received by the creditor or obligee.[19] The creditor is not

such, and is insolvent, and the administrator has converted the interest of the judgment creditor in the estate, and is solvent, the judgment creditor will be restrained from selling lands purchased by plaintiffs of the insolvent surety until the property of the administrator has been subjected to the payment of the judgment. Hill *v.* Crowley, 55 Ark. 450, 18 S. W. 540.

15. *Iowa.*— Richards *v.* Osceola Bank, 79 Iowa 707, 45 N. W. 294.

New York.— Wright *v.* Austin, 56 Barb. 13.

North Carolina.— Egerton *v.* Alley, 41 N. C. 188.

South Carolina.— State Bank *v.* Campbell, 2 Rich. Eq. 179.

West Virginia.— Neal *v.* Buffington, 42 W. Va. 327, 26 S. E. 172.

United States.—U. S. *v.* Cushman, 25 Fed. Cas. No. 14,908, 2 Sumn. 426.

Canada.— Teeter *v.* St. John, 10 Grant Ch. (U. C.) 85.

See 40 Cent. Dig. tit. "Principal and Surety," § 474 *et seq.*

In Prout *v.* Lomer, 79 Ill. 331, it is said that the equitable principle that when a party has a lien upon or interest in two funds out of either of which his debt can be paid, another party, having a lien upon or interest in one only of such funds for his debt, has the right in equity to compel the former to resort in the first instance to the other fund for satisfaction, is applicable to sureties in the narrow sense only, and not in favor of an accommodation maker of a note.

Part of contract price retained.—Where the bond of a contractor provided for the retention of a part of the price for thirty days after the completion of the work, his sureties are entitled to have such reservation applied in part liquidation of the cost of completing the work after he discontinued it; a provision in the bond that it should not be rendered void by any payment in advance does not prevent the sureties from having the benefit of the entire amount of the reservation, although a part of it has been paid to the principal. Guttenberg *v.* Vassel, 74 N. J. L. 553, 65 Atl. 994.

After judgment against surety.— Where a vendor's lien is retained to secure a bond for purchase-money, and a judgment is obtained by the assignee of the bond against the principal and surety, the surety in equity cannot compel such assignee to exhaust his lien before enforcing his judgment against the surety, although the principal is insolvent. Armstrong *v.* Poole, 30 W. Va. 666, 5 S. E. 257.

16. *Alabama.*— Gresham *v.* Ware, 79 Ala. 192.

Arkansas.— Kempner *v.* Dooley, 60 Ark. 526, 31 S. W. 145.

Indiana.— Hoppes *v.* Hoppes, 123 Ind. 397, 24 N. E. 139; Wright *v.* Crump, 25 Ind. 339. Under U. S. Rev. St. (1878) § 1212 [U. S. Comp. St. (1901) p. 853], which permitted a defendant in a suit on a contract to have the question of suretyship determined, in an action on a note and to foreclose a mortgage securing it, one defendant, by cross complaint, may show that he is a surety, and ask that the interest of the principal in the land covered by the mortgage be sold before the property of the cross complainant is resorted to. Chaplin *v.* Baker, 124 Ind. 385, 24 N. E. 233.

Michigan.— Grand Rapids Sav. Bank *v.* Denison, 92 Mich. 418, 52 N. W. 733.

Missouri.— Wilcox *v.* Todd, 64 Mo. 388.

New Jersey.— St. Peter's Catholic Church *v.* Vannote, 66 N. J. Eq. 78, 56 Atl. 1037; Kidd *v.* Hurley, 54 N. J. Eq. 177, 33 Atl. 1057; Philadelphia, etc., R. Co. *v.* Little, 41 N. J. Eq. 519, 7 Atl. 356; Tiffiany *v.* Crawford, 14 N. J. Eq. 278.

New York.— Vartie *v.* Underwood, 18 Barb. 561; Sheppard *v.* Conley, 9 N. Y. Suppl. 777; Neimcewicz *v.* Gahn, 3 Paige 614; Wheelright *v.* Loomer, 4 Edw. 232.

North Carolina.— Weil *v.* Thomas. 114 N. C. 197, 19 S. E. 103.

Tennessee.— Kirkman *v.* Bank of America, 2 Coldw. 397.

Texas.— Lazarus *v.* Henrietta Nat. Bank, 72 Tex. 354, 10 S. W. 252.

See 40 Cent. Dig. tit. "Principal and Surety," § 474 *et seq.*

Partition.— Where a mortgage is given by joint owners of land to secure the debt of one, the court, in a suit to foreclose, first will direct partition so that the share of the principal shall be applied on the debt first. Wheat *v.* McBrayer, 26 S. W. 809, 16 Ky. L. Rep. 195.

17. Gary *v.* Cannon, 38 N. C. 64.

18. Orvis *v.* Newell, 17 Conn. 97, holding that one of two joint makers of a note, secured by a mortgage of each, cannot compel the collection of the entire debt from the property mortgaged by the other, to the prejudice of the holder of a second mortgage thereon who took it without notice of the suretyship.

19. *Arkansas.*— McConnell *v.* Beattie, 34 Ark. 113.

Iowa.— Stringfield *v.* Graff, 22 Iowa 438, holding that an attorney having received from the principal collateral notes in satisfaction of a judgment against the principal and his surety, the latter can maintain a bill for an accounting without joining the principal as plaintiff.

Kansas.— Packard *v.* Herrington, 41 Kan. 469, 21 Pac. 621.

New York.— Alston *v.* Conger, 66 Barb. 272.

required to resort to proceedings which would be useless;[20] nor to property which is not of any value by reason of prior liens.[21] The surety does not lose his rights, in this respect, merely because the property has been sold,[22] or levied upon;[23] or because the surety has consented to an exchange of securities.[24] If proceedings already have been begun by the creditor or obligee, the surety is entitled to have them stayed[25] until an accounting can be had, or securities can be enforced.

b. Indemnity to Creditor Against Expense. Before the surety will be entitled to the assistance of a court of equity, he should offer to indemnify the creditor against all expenses,[26] and to pay any deficiency that may result.[27]

3. Recovery of Payments — a. In General. If, after the surety has paid the debt, a recovery is had by the creditor from the principal, the surety is entitled to recover from the creditor the amount obtained from the principal;[28] but the principal is not entitled to an overpayment by the sureties.[29] If security, given by a surety, having been converted into money, brings more than the amount for which he is liable, he can recover the excess.[30] If a surety, through ignorance

North Carolina.— Womble *v.* Fraps, 77 N. C. 198.

South Carolina.— Field *v.* Pelot, McMull. Eq. 369.

Texas.— Fidelity, etc., Co. *v.* Schelper, 37 Tex. Civ. App. 393, 83 S. W. 871; Robertson *v.* Angle, (Civ. App. 1903) 76 S. W. 317.

Canada.— Robertson *v.* Davis, 27 Can. Sup. Ct. 571; Lee *v.* Ellis, 27 Ont. 608; Molson's Bank *v.* Heilig, 26 Ont. 276. In taking an account after a sale of mortgaged property, the creditor is entitled to credit for sums paid in discharging prior encumbrances. Teeter *v.* St. John, 10 Grant Ch. (U. C.) 85.

See 40 Cent. Dig. tit. "Principal and Surety," § 474 *et seq.*

Where a judgment creditor buys and forecloses a mortgage constituting a lien prior to his judgment, and bids in the land at the sale, the amount realized therefor at the sale is conclusive as to its value as between him and the sureties. Moorman *v.* Hudson, 125 Ind. 504, 25 N. E. 593.

20. Newman *v.* Mills, 1 Hog. 291.

21. Northwestern Mut. L. Ins. Co. *v.* Allis, 23 Minn. 337.

22. Polk *v.* Gallant, 22 N. C. 395, 34 Am. Dec. 410.

Property collusively disposed of.— But the court will not entertain a bill by a surety to compel the sale first of land sold by the principal pending a levy thereon to a third person, where there was collusion between the principal and surety in causing such sale to be made. Stratton *v.* Thomas, 133 Mich. 281, 94 N. W. 1053.

23. McMullen *v.* Ritchie, 64 Fed. 253.

24. Solomon *v.* Meridian First Nat. Bank, 72 Miss. 854, 17 So. 383.

25. McConnell *v.* Beattie, 34 Ark. 113; Kidd *v.* Hurley, 54 N. J. Eq. 177, 33 Atl. 1057; Sheppard *v.* Conley, 9 N. Y. Suppl. 777.

26. *California.*— Dane *v.* Corduan, 24 Cal. 157, 85 Am. Dec. 53.

Maryland.— Whitridge *v.* Durkee, 2 Md. Ch. 442.

Minnesota.— Huey *v.* Pinney, 5 Minn. 310.

United States.— *In re* Babcock, 2 Fed. Cas. No. 696, 3 Story 393.

England.— Wright *v.* Simpson, 6 Ves. Jr. 714, 31 Eng. Reprint 1272.

See 40 Cent. Dig. tit. "Principal and Surety," § 472.

27. *In re* Babcock, 2 Fed. Cas. No. 696, 3 Story 393; Wright *v.* Simpson, 6 Ves. Jr. 714, 31 Eng. Reprint 1272.

Payment of deficiency into court.— If a surety, before suit is brought against him, applies to a court of equity to be released, and it appears that the estate of the principal would not have paid the whole debt, the court will require the surety to pay the deficiency into court for the creditor, but permit him to deduct his costs. McCollum *v.* Hinckley, 9 Vt. 143.

28. Gray *v.* Seckham, L. R. 7 Ch. 680, 42 L. J. Ch. 127, 27 L. T. Rep. N. S. 290, 20 Wkly. Rep. 920, holding that where the creditor, after payment by one surety of the amount for which the sureties were liable, recovered a dividend from the insolvent principal on the whole amount originally due from the principal, the surety who made payment is entitled to recover a share of such dividend bearing the same proportion to the whole dividend as the sum paid by the surety bore to the sum proved for by the creditor.

Amount paid for release.— The surety cannot recover an amount paid by him to the creditor for his release, although the principal afterward pays the debt in full. Wilson *v.* Whitmore, 140 Mass. 469, 5 N. E. 304.

Subsequent payment of proportionate share by cosurety.— If, after full payment by one surety, a cosurety pays his proportionate part to the creditor, such cosurety cannot recover his payment, it being the duty of the creditor, in such case, to account with the surety who paid in excess of his share. Wash *v.* Sullivan, (Tex. Civ. App. 1904) 84 S. W. 368.

Requiring creditor to prove against bankrupt.— After payment by the surety, he can compel the creditor, as his trustee, to prove against the estate of a bankrupt principal. *Ex p.* Wood, Bridgman Index Eq. Cas.

29. Pope *v.* U. S., 14 Ct. Cl. 446.

30. Manning *v.* Sweeting, 4 N. Y St. 842.

of facts, has paid money by mistake, he can recover it;[31] so of payments made for defaults of the principal occurring before the sureties became liable.[32] Sureties can recover payments made after they have been discharged by acts of the creditor[33] without their knowledge, as by the relinquishment,[34] or by the misapplication[35] of security; or by a release of the principal[36] or of the surety;[37] or if the surety has paid under harsh circumstances,[38] amounting to duress,[39] or through fraud,[40] or on failure of consideration.[41] A surety who has paid a judgment or decree against him can recover the amount so paid after a reversal thereof.[42] If, after an agreement for a settlement is made between the surety and the creditor, the latter violates it, the surety can recover the money paid thereunder;[43] but

31. Mills *v.* Alderbury Union, 3 Exch. 590, 18 L. J. Exch. 252.

If such mistake was the result of failure to exercise ordinary prudence, and the defense of the surety was one which could be waived, he cannot recover the payment. Anderson *v.* Western Union Tel. Co., 77 Miss. 851, 27 So. 838.

32. Cox *v.* Hill, 5 Lea (Tenn.) 146. But payments made for defaults for which they were not liable cannot be recovered if the entire amount paid does not exceed the amount for which they knew they actually were liable at the time of such payment, although the defaults were unknown to the obligee. Pass *v.* Grenada County, 71 Miss. 426, 14 So. 447.

33. Riggins *v.* Brown, 12 Ga. 271.

Discharge generally see *supra*, VIII, E, 1 *et seq.*

34. Chester *v.* Kingston Bank, 17 Barb. (N. Y.) 271; Cooper *v.* Wilcox, 22 N. C. 90, 32 Am. Dec. 695; Dixon *v.* Ewing, 3 Ohio 280, 17 Am. Dec. 590.

Payment with full knowledge of all the facts cannot be recovered back. Geary *v.* Gore Bank, 5 Grant Ch. (U. C.) 536.

Relinquishment or loss of securities see *supra*, VIII, E, 2, m.

35. Where property pledged by the surety is taken to pay the debt after the creditor has diverted property pledged by the principal, the right of the surety to recover is not lost because he alleges his interest in the property to be greater than shown by the evidence. Bruce *v.* Laing, (Tex. Civ. App. 1901) 64 S. W. 1019.

Misapplication of security see *supra*, VIII, E, 2, m, (III).

36. Hirsh *v.* Munger, 3 Thomps. & C. (N. Y.) 290; Fox *v.* Litwiler, 12 Pa. Dist. 337.

37. Lodge *v.* Boone, 3 Harr. & J. (Md.) 218.

38. Law *v.* East India Co., 4 Ves. Jr. 824, 31 Eng. Reprint 427, in equity.

39. Kalmbach *v.* Foote, 79 Mich. 236, 44 N. W. 603; Hirsh *v.* Munger, 3 Thomps. & C. (N. Y.) 290; Boling *v.* Young, 38 Ohio St. 135.

Payment applied to actual liability.— A surety making payment to avoid suit cannot recover the amount paid, although for defaults of the principal for which he was not liable, if, at the time of such payment, he knew that the defaults of the principal for which he was liable exceeded the amount paid, although the obligee was ignorant thereof. Pass *v.* Grenada County, 71 Miss. 426, 14 So. 447.

40. Chester *v.* Kingston Bank, 16 N. Y. 336 [*affirming* 17 Barb. 271].

41. Gerard *v.* Knapp, 26 Ill. App. 307, holding that where the payee of a note given as the consideration for a sale which never was consummated wrongfully negotiated it, a surety thereon, being compelled to pay it to the holder, can recover the amount so paid from the payee.

Negotiation of security after payment of debt secured.— Likewise, where a bill was deposited as security for goods which afterward were paid for by the buyer, and the seller indorsed the bill to one who sued and recovered thereon against an accommodation accepter of the bill, the latter can recover from the seller the amount of the bill, but not the costs of the action by the holder against the accepter. Bleaden *v.* Charles, 7 Bing. 246, 9 L. J. C. P. O. S. 82, 5 M. & P. 14, 20 E. C. L. 116.

Moral obligation.— In Marigny *v.* Union Bank, 12 Rob. (La.) 283, it is held that the obligation of a bank cashier to repair any loss from his neglect is a natural if not a legal one; and a surety on a note given by such cashier to replace money lost through his laches, having paid the note, cannot reclaim it.

Want or failure of consideration for principal's obligation see *supra*, IV, C, 10.

Consideration for surety's obligation see *supra*, IV, D, 11.

42. Williams *v.* Simmons, 22 Ala. 425; Kalmbach *v.* Foote, 79 Mich. 236, 44 N. W. 603.

But a surety on a bond paying a judgment against his principal which afterward was reversed on appeal cannot recover from the judgment creditor, there not being any legal privity existing between them, and the remedy of the surety being against the principal. Garr *v.* Martin, 20 N. Y. 306.

43. Nabors *v.* Camp, 14 Ala. 460 (where a surety on a replevin bond agreed with the attaching creditor to pay the latter a certain sum if a discharge was given from the debt and damages, but the surety refused to pay the costs, and the proposition being accepted and the money paid, it was held that the surety could recover the money paid on the compromise if the contract was violated by the creditor coercing costs from him); Warfield *v.* Watkins, 30 Barb. (N. Y.) 395 (holding that where the holder of a note, after

the surety cannot recover on a contract made between the creditor and the principal,[44] in regard to which there is no privity between the surety and the creditor. Where the surety is allowed to recover payments made by him, he usually is entitled to interest thereon;[45] but if the surety would not be entitled to interest on security given by him to the creditor, he is not entitled to interest on the proceeds thereof.[46]

b Usury. The surety can recover usury paid by him.[47] As to payments made by the principal, however, the rule is not uniform. It has been held that a surety in a bond may claim credits for sums exacted from his principal as usurious interest,[48] while on the other hand the recovery of such voluntary payments is held to be a personal privilege of the principal which does not inure to the benefit of the surety[49] A surety having paid nothing for his principal cannot recover back usurious interest paid by the principal on other instruments or in other transactions in which the surety was not bound as such.[50]

B. As to Principal — 1. Rights as to Consideration For Undertaking. If a surety has received something as a consideration, he is entitled to retain it without accounting for it;[51] and if he has incurred liability on the promise of consideration,

bringing suit thereon, has received from a surety part payment of the debt and costs, and has agreed to use diligence to collect the debt from the principal and to pay the surety one half of the amount he might be able so to collect, the holder is bound to resort to legal proceedings, if necessary, and will be liable for a breach of the agreement; he cannot set up that the principal could successfully defend the action by reason of the payment by the surety).

44. Winters' Appeal, 61 Pa. St. 307, where a judgment creditor contracted with the principal to bid in certain land of the principal at sheriff's sale, and release the judgment, but he assigned the judgment to another who compelled a surety for the judgment to pay it, and it was held that the latter could not recover on the contract.

45. Riggins *v.* Brown, 12 Ga. 271; Law *v.* East-India Co., 4 Ves. Jr. 824, 31 Eng. Reprint 427.

46. Manning *v.* Sweeting, 4 N. Y. St. 842.

47. Whitehead *v.* Peck, 1 Ga. 140; Kirkpatrick *v.* Wherritt, 7 B. Mon. (Ky.) 388 (unless he has been repaid the amount by the principal); Hahn *v.* Walker, 3 Dana (Ky.) 183; Moore *v.* Johnson, 34 W. Va. 672, 12 S. E. 918. But see Hutton *v.* Federal Bank, 9 Ont. Pr. 568.

Tender of debt.— In a court of equity a party seeking to avoid the payment of a usurious debt must tender in his bill the amount really and truly due. But a surety for such usurious debt, if he be not a party to the usury, and be ignorant of all knowledge in respect to it, is not bound to make such tender. Hazel *v.* Sinex, 6 Del. Ch. 19, 6 Atl. 625.

Subsequent contract by surety.— Where the real estate of a bankrupt is sold under a judgment, and is bid in by his assignee, and the latter sells it to a surety liable for such judgment, under an agreement by which the surety is to pay the indebtedness to the judgment creditor, and the surety pays the assignee, who pays the creditor, the court will not look behind the contract of the assignee with the surety, and the latter cannot recover usury included in the amount paid. Guilinger *v.* Zahniser, 3 Pa. Cas. 555, 6 Atl. 705. *Compare* Moore *v.* Johnson, 34 W. Va. 672, 12 S. E. 918.

In action against principal see *infra*, IX, B, 5, f, (IV).

Retaining security see *infra*, IX, B, 4, a, (V).

48. Crutcher *v.* Trabue, 5 Dana (Ky.) 80, in equity. Under a statute requiring a trustee of a county fund to keep an account of the interest and annually pay to the trustees of common schools in each district the proportion of interest due it, it was held, in an action on the bond of a trustee who misappropriated the fund, that if any usury has been paid to any district, the cause of action to recover it lies against the district, but that the principal of the fund cannot be diminished through such usurious payment, and defendant surety cannot claim credit on that account. U. S. Fidelity, etc., Co. *v.* Com., 104 S. W. 1029, 31 Ky. L. Rep. 1179.

49. Savage *v.* Fox, 60 N. H. 17 (where such interest was paid in advance on a note); Lamoille County Nat. Bank *v.* Bingham, 50 Vt. 105, 28 Am. Rep. 490; Cady *v.* Goodnow, 49 Vt. 400; Ward *v.* Whitney, 32 Vt. 89. But see Cole *v.* Hills, 44 N. H. 227.

Statute applying such payments to principal debt.— Kock *v.* Block, 29 Ohio St. 565, holding that but for the statute which provided that all payments in excess of the rate allowed by law at the time of the making of the contract were to be deemed payments on account of the principal, the rule of the text would apply as against a surety, but that under such statute where the payee of a note had transferred it to a holder in due course and payment by the sureties compelled by the holder, the sureties could recover from the original payee any excess over the amount the latter could have enforced.

50. Mordecai *v.* Stewart, 37 Ga. 364; Cantey *v.* Blair, 2 Rich. Eq. (S. C.) 46. And the surety cannot have the benefit of such payment after the principal has been adjudged a bankrupt. Woolfolk *v.* Plant, 46 Ga. 422.

51. Nashville Bank *v.* Grundy, Meigs (Tenn.) 256.

Creditor cannot reach funds placed in the hands of the surety as consideration and not

he can bring suit to recover it, although his undertaking has not resulted in the benefit expected from it by his principal,[52] or the instrument never is used, the surety not being the cause of the non-use.[53]

2. Security or Indemnity — a. In General. The principal lawfully may give security to his surety; and agreements in regard thereto are valid,[54] although the liability of the surety is contingent and remote,[55] and for various obligations,[56] and it is uncertain which obligation covers, and which set of sureties is liable for, the principal's default.[57] Money,[58] notes,[59] mortgages,[60] a right of action,[61] or

as collateral security. Nashville Bank *v.* Grundy, Meigs (Tenn.) 256.

Where a third person has agreed to indemnify a surety, such third person is not entitled to deduct from the amount due the consideration received by the surety for entering into his contract. McQuesten *v.* Bowman, 17 N. H. 24.

52. Blount *v.* Bowne, 82 Ga. 346, 9 S. E. 164; Culbertson *v.* Stillinger, 6 Fed. Cas. No. 3,463, Taney 75.

One who has become surety for an executor in consideration of one half of the commissions is entitled to the compensation agreed upon, although the executor pays another as additional surety; but the executor is entitled to deduct one half of the amount paid as counsel fees to establish the amount of his fees as executor. Culbertson *v.* Stillinger, 6 Fed. Cas. No. 3,463, Taney 75.

One who becomes surety on a bond given to procure the release of goods from seizure is entitled to his compensation, although the goods are seized again under other process. Blount *v.* Bowne, 82 Ga. 346, 9 S. E. 164.

53. McDonald *v.* Manning, 19 Can. Sup. Ct. 112. Where a part of the consideration for the contract of the sureties was that they should be the consignees of the principal for a designated time, they are entitled to the benefit of this agreement. Bunbury *v.* Winter, 1 Jac. & W. 255, 21 Rev. Rep. 159, 37 Eng. Reprint 372.

54. Maryland Fidelity, etc., Co. *v.* Johnston, 117 La. 880, 42 So. 357 (where it appears that the giving of a pledge for holding a surety harmless is expressly authorized by the code); Stevens *v.* Bell, 6 Mass. 339; Essex *v.* Lindsley, 41 N. J. Eq. 189, 3 Atl. 391.

When the principal is in failing circumstances, a transfer by him in good faith to his sureties for the sole purpose of securing them for their liabilities for him, does not fall within the statute prohibiting conveyances to trustees to prefer one or more creditors to the exclusion of others. Atkinson *v.* Tomlinson, 1 Ohio St. 237.

The lien of a factor on the goods of the principal covers the amount for which the former is liable as surety. Drinkwater *v.* Goodwin, Cowp. 251.

Indemnity to secure bail see *infra*, IX, B, 2, b, (III), (c); and IX, B, 5, f, (IV).

55. Fling *v.* Goodall, 40 N. H. 208.

56. Simmons Hardware Co. *v.* Thomas, 147 Ind. 313, 46 N. E. 645; Fling *v.* Goodall, 40 N. H. 208.

Construction and sufficiency.—Where a chose in action was assigned to secure the repayment of a certain advancement "and also of all other sums which might thereafter become due from" the assignor to the assignee "whether in respect of principal, interest, discount, commissions, or otherwise howsoever," it covers money subsequently paid by the assignee as surety for the assignor. Dumbell *v.* Isle of Man R. Co., 42 L. T. Rep. N. S. 745. So where a mortgage was executed by the principal to his surety to indemnify the latter against notes, which the latter agreed to sign, payable at some bank in a designated place to an amount not exceeding a specified amount, "and against all other notes which the said" surety may sign as such, it was held that the mortgage was security for two classes of notes, one comprehending those payable at some bank in the place designated, and the other including notes payable elsewhere, or not mentioning any place of payment, the latter not being restricted as to amount. Babcock *v.* Bridge, 29 Barb. (N. Y.) 427.

57. State *v.* Hemingway, 69 Miss. 491, 10 So. 575.

58. Woodbury *v.* Bowman, 14 Me. 154, 31 Am. Dec. 40; McNish *v.* Pope, 7 Rich. Eq. (S. C.) 186.

Money of ward.—But an agreement between a guardian and his surety that the latter, for his indemnity, shall hold the moneys of which the guardian is the legal custodian, is subversive of the objects of the appointment, and therefore void. Poultney *v.* Randall, 9 Bosw. (N. Y.) 232. But in Rogers *v.* Hopkins, 70 Ga. 454, it was held that it is not illegal for a guardian to deliver to his surety for the protection of the latter property of the ward, if there was no intention for the surety to use the property, and the guardian does not lose proper control over it.

59. Woodbury *v.* Bowman, 14 Me. 154, 31 Am. Dec. 40.

60. Gladwin *v.* Gladwin, 13 Cal. 330 [*citing* Dana *v.* Stanford, 10 Cal. 269]; State Bank *v.* Davis, 4 Ind. 653; McLaughlin *v.* Carter, 13 Tex. Civ. App. 694, 37 S. W. 666. Where, upon purchase of leasehold, the buyer assumed debts and gave the sureties for such debts a mortgage to secure them, the sureties are entitled to the benefit of such mortgage, although the leasehold subsequently is extinguished by the foreclosure of a prior mortgage on the property. Thornton *v.* National Exch. Bank, 71 Mo. 221.

61. Lawyers' Surety Co. *v.* Reinach, 25 Misc. (N. Y.) 150, 54 N. Y. Suppl. 205 [*affirming* 23 Misc. 242, 51 N. Y. Suppl. 162].

other property may be placed in the hands of the surety for his protection,[62] and the principal may confess judgment in favor of the surety for that purpose.[63] If the surety has entered into his contract,[64] or into a renewal thereof, in reliance on security to be given him, there is a sufficient consideration;[65] and, after he has entered into the relation, and before a breach, his liability to pay the principal's debt constitutes a sufficient consideration.[66] If the title to the security is transferred to the surety, immediate delivery thereof may not be necessary;[67] but if the security is of the character which requires registration, and registration is not had, the surety cannot hold it as against subsequent *bona fide* purchasers.[68]

62. Stevens *v.* Bell, 6 Mass. 339.

Statute of frauds.—Where the obligee of a bond for title delivers it to his surety in a replevin bond, as indemnity, the latter does not acquire any lien on the land thereby. He may retain the bond until he is indemnified, but he can acquire a lien on the land only by a contract or agreement for that purpose which must be evidenced by writing. Porter *v.* Howard, 1 A. K. Marsh. (Ky.) 358.

Subrogation to right on original debt see SUBROGATION.

63. Pringle *v.* Sizer, 2 S. C. 59. See also Farmers', etc., Bank *v.* Spear, 49 Ill. App. 509 [*affirmed* in 156 Ill. 555, 41 N. E. 164]; Monell *v.* Smith, 5 Cow. (N. Y.) 441; Borland's Appeal, 66 Pa. St. 470.

Assignment of judgment of third person.—Where a third person executed a judgment note upon which judgment was entered, to secure one as indorser on the note of another, such indorser cannot assign the judgment to a stranger who raises the money and pays the indorsed note, the judgment being security for the indorsement and not indemnity against the debt of the maker of the indorsed note. Heist *v.* Tobias, 182 Pa. St. 442, 38 Atl. 579.

64. Barker *v.* Boyd, 71 S. W. 528, 24 Ky. L. Rep. 1389; Thompson *v.* Stevens, 10 Me. 27.

65. Mayer *v.* Grottendrick, 68 Ind. 1. But see Ceas *v.* Bramley, 18 Hun (N. Y.) 187.

66. *Indiana.*— Simmons Hardware Co. *v.* Thomas, 147 Ind. 313, 46 N. E. 645.

Massachusetts.—Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

Michigan.— Mandigo *v.* Mandigo, 26 Mich. 349.

Nebraska.— Harlan County *v.* Whitney, 65 Nebr. 105, 90 N. W. 993, 101 Am. St. Rep. 610.

North Carolina.—Wiswell *v.* Potts, 58 N. C. 184.

Pennsylvania.—Keller *v.* Rhoads, 39 Pa. St. 513, 80 Am. Dec. 539.

United States.— *In re* Reynolds, 20 Fed. Cas. No. 11,724, 16 Nat. Bankr. Reg. 158.

See 40 Cent. Dig. tit. "Principal and Surety," § 505.

A promise by a surety to his principal to pay the outstanding debt is a good consideration for an express promise by the principal to pay the surety a like sum on demand. Gladwin *v.* Gladwin, 13 Cal. 330; Little *v.* Little, 13 Pick. (Mass.) 426; Cushing *v.* Gore, 15 Mass. 69; Osgood *v.* Osgood, 39 N. H. 209; Haseltine *v.* Guild, 11 N. H. 390. See also *infra*, IX, B, 3, c.

67. Bates *v.* Wiggin, 37 Kan. 44, 14 Pac. 442, 1 Am. St. Rep. 234. So where the surety signed a note for the price of a yoke of oxen under an oral agreement that the principal should take possession, but that the oxen should be the property of the surety until the principal paid the note, the surety can maintain his title as against everyone. Ferguson *v.* Union Furnace Co., 9 Wend. (N. Y.) 345; Burke *v.* Harrison, 5 Sneed (Tenn.) 237. See also Bates *v.* Wiggin, 37 Kan. 44, 14 Pac. 442, 1 Am. St. Rep. 234. But in Ceas *v.* Bramley, 18 Hun (N. Y.) 187, it was held that where a surety on a note agreed to remain surety for an extended time and the principal agreed to turn over to him a horse as security for his liability upon the terms that in case the surety had to pay the note the horse was to be his property and he was to have the right to take possession of him, the transaction was not a pledge because there was no delivery of the property; that it was not a chattel mortgage because there was no absolute sale defeasible on condition, nor was there any delivery of the property by way of transfer of title as security for the debt; that if the transaction were treated as a sale, it was void by the statute of frauds, and was without consideration, not being in writing and signed by the parties and there being no delivery and no money paid; and that if the transaction could be considered a parol chattel mortgage it was void as to the creditors of the principal, and the property having been taken after his death his administrator, representing his creditors, could recover it.

Possession by trustee.—A trust deed by a principal to secure his sureties is not invalid because the trustee failed to take immediate possession of the property. State *v.* Hemingway, 69 Miss. 491, 10 So. 575.

Equity in stock.—A surety becoming such on an agreement of the principal to transfer to him a certificate of stock as collateral security has an equity in the stock enforceable against all persons having notice. Dueber Watch Case Mfg. Co. *v.* Daugherty, 62 Ohio St. 589, 57 N. E. 455.

68. Smith *v.* Washington, 16 N. C. 318.

Where title passes to surety.—Where, at the time of the sale of a chattel, it was agreed orally by all of the parties that the chattel should belong to the sureties on the note given for the price, until the note was paid, the title passed from the seller to the sureties, and the agreement was not in effect a mortgage from the principal to the sureties

b. Rights Under and Enforcement of Security — (I) *In General.* The right of the surety to such security is superior to secret equities of third persons;[69] to subsequent liens;[70] and to the rights of subsequent purchasers,[71] mortgagees,[72] assignees in insolvency,[73] receivers,[74] and of other creditors.[75] But the sureties cannot retain security as against prior liens unless the holders thereof delay the enforcement of their claims;[76] nor against prior attaching creditors;[77] nor against those acquiring rights under a prior contract with the principal.[78] If the security be notes, the sureties can bring suit thereon.[79] The death of the principal does not affect the right of the sureties.[80] And as sureties may have a right to two

requiring registration. Worthy *v.* Cole, 69 N. C. 157.

After giving new bond.—Where the treasurer of a county gave his sureties a mortgage which was left with the clerk of the council for safe-keeping, and subsequently upon the treasurer giving a new bond, his old bond and the mortgage were returned to him by the clerk, and destroyed by him, it was held that the former sureties were entitled to a first charge on the property for their indemnification in respect of a defalcation discovered of a debt before these transactions, although the mortgage had not been registered. Frontenac County *v.* Breden, 17 Grant Ch. (U. C.) 645.

69. Phipps *v.* Mansfield, 62 Ga. 209.

70. A deed by a defaulting state treasurer of all of his property in trust to indemnify his sureties takes precedence of any lien the state subsequently may acquire by judgment against him. State *v.* Hemingway, 69 Mass. 491, 10 So. 575.

71. State Bank *v.* Davis, 4 Ind. 653.

A surety on the notes of an infant for the price of chattels, having paid a judgment on the notes, and having received from the infant a note for the amounts so paid, secured by a mortgage on the same chattels, is entitled to hold the property as against a subsequent purchaser from the infant with knowledge of the mortgage. Knaggs *v.* Green, 48 Wis. 601, 4 N. W. 760, 33 Am. Rep. 838.

72. Markell *v.* Eichelberger, 12 Md. 78; Fowler *v.* Rice, 17 Pick. (Mass.) 100; Haven *v.* Foley, 18 Mo. 136. Where a usurious note, secured by mortgage, is, at the request of the principal, paid by the surety by the giving of his own note, which he afterward pays, the surety, in an action to foreclose the mortgage, cannot be made responsible by junior mortgagees for the amount of the usury. Foard *v.* Grinter, (Ky. 1892) 18 S. W. 1034.

73. Merwin *v.* Austin, 58 Conn. 22, 18 Atl. 1029, 7 L. R. A. 84; Barker *v.* Buel, 5 Cush. (Mass.) 519; Glenn *v.* Doyle, 3 Tenn. Ch. 324.

74. A surety can bring replevin at once if a receiver of the principal in another action takes possession of property to which the surety is entitled under an oral mortgage. Bates *v.* Wiggin, 37 Kan. 44, 14 Pac. 442, 1 Am. St. Rep. 234.

75. *Louisiana.*— St. John *v.* Sanderson, 15 La. 346.

Tennessee.— Burke *v.* Harrison, 5 Sneed 237, holding that another creditor of the principal cannot reach security held by the surety without payment or a tender of the amount for which the principal is liable to the surety.

Texas.— McLaughlin *v.* Carter, 13 Tex. Civ. App. 694, 37 S. W. 666.

Virginia.—Coffman *v.* Niswander, 26 Gratt. 737.

United States. — American Surety Co. *v.* Lawrenceville Cement Co., 110 Fed. 717; *In re* Reynolds, 20 Fed. Cas. No. 11,724, 16 Nat. Bankr. Rg. 158.

England.— Dumbell *v.* Isle of Man R. Co., 42 L. T. Rep. N. S. 745.

See 40 Cent. Dig. tit. "Principal and Surety," § 508.

But in Ingalls *v.* Dennett, 6 Me. 79, it was held that where a surety on an overdue note, having effects of the principal in his hands, was summoned as his trustee in a foreign attachment, and then was compelled to pay the note, the effects still were bound by the attachment, and he could not retain them by way of indemnity, because until he had paid the debt or procured the discharge of the principal by assuming the payment, he had no right of action against the principal.

Effect of release of surety from liability see *supra*, VIII, E, 2, b, (II), (C).

76. Ellis *v.* Temple, 4 Coldw. (Tenn.) 315, 94 Am. Dec. 200.

77. If the principal did not have any title to property at the time of a supposed conveyance thereof to his sureties for indemnity, they will not have priority over an attaching creditor. Frankle *v.* Douglas, 1 Lea (Tenn.) 476.

78. Greenless *v.* Shinnick, 7 Ohio Dec. (Reprint) 385, 2 Cinc. L. Bul. 282.

79. Klein *v.* Funk, 82 Minn. 3, 84 N. W. 460; Bolln *v.* Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898. So where a trustee to whom the principal had transferred control of his cotton crop for indemnity of his surety, drew on a consignee of the cotton in favor of the surety, but the drawee refused to pay the bill, the payee could not recover from the drawer, since the trustee drew on the consignee merely to carry out the agreement between the principal and his surety, and was not obliged to coerce payment by the drawee. Smith *v.* Houston, 8 Ala. 736.

Before payment of debt see *infra*, IX, B, 3, c.

80. Wilding *v.* Richards, 1 Coll. 655, 14 L. J. Ch. 211, 28 Eng. Ch. 655, 63 Eng. Reprint 584. But see Ceas *v.* Brawley, 18 Hun (N. Y.) 187, where the debtor agreed to turn over to the surety a horse which the surety

securities, it is held that they will not lose any security they have by acquiring additional security.[81]

(II) *Retention of Security.* The principal cannot recover security from the surety so long as the surety is liable to the obligee,[82] but it is otherwise when the surety's liability ceases.[83] If the sureties have agreed to surrender security on being indemnified, such condition must be performed before the surety can be compelled to part with his security;[84] but if the sureties, having agreed to surrender security and take a bond instead, break their agreement, they are liable for the expenses necessarily incurred in procuring and offering the bond.[85]

(III) *Application of and Accounting For Security* — (A) *In General.* A surety holding security is entitled to have it applied in satisfaction of the debt[86] for the amount for which he is actually liable;[87] and he is entitled to retain the profits also of any such security as incident to it,[88] until he is discharged from liability. And if the surety has applied his security judiciously in discharge of the liability of the principal, the latter has no ground for complaint.[89]

(B) *Application to Particular Debts or Liabilities — Renewal or New Obligation.* A surety cannot appropriate security to his own debts,[90] and should apply it in extinguishing his claims for payments in the order in which they were made.[91]

was to have the right to take and keep as his own in the event he had to pay the debt.

81. Brandon *v.* Brandon, 3 De G. & J. 524, 5 Jur. N. S. 256, 28 L. J. Ch. 147, 7 Wkly. Rep. 250, 60 Eng. Ch. 407, 44 Eng. Reprint 1371. And the right of the sureties to enforce security for any indebtedness it was intended to secure is not affected by the fact that they were offered additional security for a part of the indebtedness. Dumbell *v.* Isle of Man R. Co., 42 L. T. Rep. N. S. 745.

82. Mandigo *v.* Mandigo, 26 Mich. 349; Smith *v.* Wigler, (N. J. Ch. 1907) 65 Atl. 900; Cook *v.* Casler, 76 N. Y. App. Div. 279, 78 N. Y. Suppl. 661; Shea *v.* Fidelity, etc., Co., 39 Misc. (N. Y.) 107, 78 N. Y. Suppl. 892, right of surety on bond given under liquor tax law to retain security until liability on the bond is barred by limitation). See also McNish *v.* Pope, 7 Rich. Eq. (S. C.) 186, holding that where the money received by a trustee from a sale of land was turned over to the surety on his trust bond to be applied thereon, the surety undertaking with the purchaser of the land to procure a relinquishment of dower from the wife of the trustee, the surety might retain the money for a reasonable time to meet her claim, before paying the money to the *cestuis que trustent.*

Void agreement.—Where the agreement between the principal and his surety in regard to security is void, the principal can recover it. Poultney *v.* Randall, 9 Bosw. (N. Y.) 232.

83. See *infra*, IX, B, 2, b, (III), (C).

84. Fowler *v.* Rice, 17 Pick. (Mass.) 100.

If the surety surrenders security upon a false representation that the debt is paid, his lien thereon is not lost. Tyson *v.* Cox, Turn. & R. 395, 24 Rev. Rep. 79, 12 Eng. Ch. 395, 37 Eng. Reprint 1153.

If the security be given to two or more co-sureties, it cannot be surrendered by one so as to affect the rights of the others. Hayes *v.* Davis, 18 N. H. 600.

85. Cook *v.* Casler, 76 N. Y. App. Div. 279, 78 N. Y. Suppl. 661.

Surrender and accounting see *infra*, IX, B, 2, b, (III), (C).

86. Constant *v.* Matteson, 22 Ill. 546; Courtney *v.* Scott, Litt. Sel. Cas. (Ky.) 457; Commercial Bank *v.* Shuart, 46 Barb. (N. Y.) 371; McKnight *v.* Bradley, 10 Rich. Eq. (S. C.) 557.

Application by surety.— The mere fact of the surety applying funds to the payment of the debt instead of handing them to the principal for that purpose according to a stipulation in their agreement will not entitle the principal to claim the full amount from the surety, but credit must be given for the application made. Williams *v.* Howard, 58 N. C. 38.

87. Orr *v.* Hancock, 1 Root (Conn.) 265; Hellams *v.* Abercrombie, 15 S. C. 110, 40 Am. Rep. 684, holding that a surety can foreclose a mortgage, held by him, for the full amount thereof, although the creditor has obtained judgment for less.

Voluntary payment see *infra*, IX, B, 4, c, (II), (A) *et seq.*

88. Sellick *v.* Munson, 2 Aik. (Vt.) 150, 16 Am. Dec. 689.

89. Smith *v.* Kiser, 98 N. C. 379, 4 S. E. 204. So where the principal gives his sureties a mortgage to secure the payment of a note executed by them, and the property is sold and the proceeds applied on the note, the principal cannot dispute the satisfaction of such mortgage in an action against him by a surety who has paid part of the note. Stone *v.* Hammell, (Cal. 1889) 22 Pac. 203.

90. Ware *v.* Otis, 8 Me. 387.

Applicability to particular liability.— In resisting surrender of security, the burden is on the surety to show that a mortgage was intended to secure him not only on a bail bond executed when the mortgage was assigned to him, but on others that it might be necessary to give in the proceedings. Smith *v.* Wigler, (N. J. Ch. 1907) 65 Atl. 900.

91. Whipple *v.* Briggs, 30 Vt. 111.

Security given to sureties covers renewals [92] of the debts by them, and new notes given by them to raise money with which to pay the original indebtedness.[93] Likewise security to indemnify sureties on a bond applies to a new bond given by the principal; [94] and security against liability on a note to be discounted at a particular bank is enforceable, although the note be discounted at a different bank.[95]

(c) *Surrender and Accounting.* If the principal has placed security in the hands of his surety, and the principal himself pays the debt, or the surety has sufficient money in his hands with which to pay the debt,[96] or the surety is released or discharged for any cause, the principal is entitled to a return of the security, and can compel an accounting by the surety,[97] or by third persons wrongfully in possession thereof,[98] or can bring an action in tort for its conversion; [99] and where the proceeds under a contract are to be paid to the surety on a bond given for its performance, the proceeds remaining due after the performance of the contract and

92. Bray *v.* First Ave. Coal Min. Co., 148 Ind. 599, 47 N. E. 1073; Moore *v.* Thompson, 100 Ky. 231, 37 S. W. 1042, 18 Ky. L. Rep. 681 (renewal of note by accommodation indorser); Drake *v.* Ellman, 80 Ky. 434; Blanton *v.* Bostic, 126 N. C. 418, 35 S. E. 1035; Wise *v.* Willard, 41 Ohio St. 679.

But where the indemnity is executed by a third person it has been held that the security does not cover a renewal as between the original parties. Westbrook *v.* Belton Nat. Bank, (Tex. Civ. App. 1903) 75 S. W. 842, distinguishing the cases where the indemnity is given by the principal himself. On the other hand no such distinction has been observed where the indemnitor executed a note as surety to the original surety and gave a mortgage to secure such note, the latter note not being extended or renewed. Mayer *v.* Grottendick, 68 Ind. 1; Wise *v.* Willard, 41 Ohio St. 679.

New notes indorsed by surviving members of firm.— In Power *v.* Alger, 13 Abb. Pr. (N. Y.) 284, it was held that security given to a firm could not be enforced by the surviving partners after the death of one, as covering new notes given by the principal and indorsed by such survivors individually, the security not having been given or intended for their individual benefit.

93. Jarboe *v.* Shiveley, 109 Ky. 402, 59 S. W. 328, 22 Ky. L. Rep. 968, 95 Am. St. Rep. 384 (holding that when a surety, in order to enable the principal to raise the money to pay the debt for which he is bound, becomes surety to a new creditor, he is entitled, notwithstanding the change in the creditor, to retain any indemnity in his possession or under his control); Roberts *v.* Bruce, 91 Ky. 379, 15 S. W. 872, 12 Ky. L. Rep. 932; Markell *v.* Eichelberger, 12 Md. 78; Chase *v.* McDonald, 7 Harr. & J. (Md.) 160; Nesbit *v.* Worts, 37 Ohio St. 378.

94. Bobbitt *v.* Flowers, 1 Swan (Tenn.) 511.

95. Patterson *v.* Johnston, 7 Ohio 225.

96. Walker *v.* Palmer, 24 Ala. 358, holding that if the surety has moneys of his principal in his hands, his lien on the property of the principal is diminished to that extent.

After the income or proceeds equal the debt for which the surety is bound he cannot retain the security. Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921; Ruble *v.* Coulter, 63 Ill. App. 484.

Possession must be for security.— If the surety has money of the principal in his hands, the principal must show that the surety has a right to use such money for his reimbursement. Burhans *v.* Squires, 75 Iowa 59, 39 N. W. 181.

97. Montgomery *v.* Russell, 7 Mart. N. S. (La.) 288; Smith *v.* Wigler, (N. J. Ch. 1907) 65 Atl. 900; Horn *v.* Pattison, 1 Grant (Pa.) 304. Thus in Chaffe *v.* Lisso, 33 La. Ann. 206, the principal in an attachment bond placed property in the hands of his surety for security, and the person against whom the attachment was sued out made a *cessio bonorum*, and a syndic was appointed; the principal having proceeded by rule against the syndic for the cancellation of the bond, and against the surety for the return of the property pledged, it was held that as the syndic was the only party who could claim damages by reason of the attachment, and as he consented to the rule, the surety did not have any right to retain possession of the property.

Demand or notice that the suretyship has ceased is required. Dewart *v.* Masser, 40 Pa. St. 302.

Money deposited with surety on bail-bond. — Indemnity given to bail, whether by the prisoner bailed or another, is held to be illegal (Consolidated Exploration, etc., Co. *v.* Musgrave, [1900] 1 Ch. 37, 64 J. P. 89, 69 L. J. Ch. 11, 81 L. T. Rep. N. S. 747, 16 T. L. R. 13, 48 Wkly Rep. 298), and cannot be recovered back (Dunkin *v.* Hodge, 46 Ala. 523; Herman *v.* Jeuchner, 15 Q. B. D. 561, 49 J. P. 502, 54 L. J. Q. B. 340 53 L. T. Rep. N. S. 94, 33 Wkly. Rep. 606 [*overruling* Wilson *v.* Strugnell, 7 Q. B. D. 548, 14 Cox C. C. 624, 45 J. P. 831, 50 L. J. M. C. 145, 45 L. T. Rep. N. S. 218]).

Variance.— If the complaint of the principal states that property was conveyed to secure the surety after he became such, there is not a fatal variance because the evidence shows that it was before he became surety. Warden *v.* Nolan, 10 Ind. App. 334, 37 N. E. 821.

98. Buford *v.* Neely, 17 N. C. 481.

99. Ayres *v.* French, 41 Conn. 142.

discharge of the surety cannot be recovered by him or his assignee having knowledge of the facts.[1] The surety must account for the proceeds of security, although he has taken an assignment of prior liens thereon discharged by him.[2] In accounting for property placed in the possession of the surety, its value at the time it was transferred to him will be taken;[3] and the surety has been held responsible for its profits, and for all losses which, with due care, could have been prevented.[4]

(D) *Application of Excess.* If the surety has paid the debt, he must account for any excess of the security over the amount paid,[5] and other creditors of the principal are entitled to the benefit of any excess of security over the debt of the principal for which the surety is liable,[6] unless the principal has instructed the surety to pay such excess to others.[7]

3. Before Payment or Satisfaction — a. In General. Whether a surety is deemed to be a creditor of his principal from the date of his suretyship or from the date of his payment of the debt depends upon the character of the proceeding which raises the question.[8] While many of the rights of a surety depend upon payment by him, he possesses many before payment; and such rights have their inception as soon as he executes the instrument,[9] and are fixed by the law in force at that time;[10] but usually the surety, before payment, cannot interfere with the right of the principal to deal with his property as he pleases.[11] Ordinarily, and

1. Lee Sam *v.* Hume Packing Co., 123 Cal. 283, 55 Pac. 895.

2. Riddle *v.* Bowman, 27 N. H. 236.

3. Montgomery *v.* Russell, 10 La. 330; Crane *v.* Thayer, 18 Vt. 162, 46 Am. Dec. 142. See also Kerr *v.* Hough, 61 S. W. 262, 22 Ky. L. Rep. 1693, holding that where the estate of a surety was insolvent, and the debt was not paid, the principal was entitled to recover the value of property delivered by him to the principal devisees of the surety in anticipation of a probable loss by the estate by reason of the suretyship.

Interest.—The surety is liable for interest on money realized on security (Riddle *v.* Bowman, 27 N. H. 236; Crane *v.* Thayer, 18 Vt. 166, 46 Am. Dec. 142), and will be allowed interest on money paid by him in discharge of encumbrances on the property (Riddle *v.* Bowman, *supra*).

4. Steele *v.* Brown, 18 Ala. 700.

Suit against insolvent makers of note.— But the surety is not obliged to sue the insolvent makers of notes placed in his hands. Thomas *v.* Breedlove, 6 La. 573.

5. Miller *v.* Caldwell, 4 Pa. St. 160; Fletcher *v.* Edson, 8 Vt. 294, 30 Am. Dec. 470. Where a purchaser of land surrendered it, by agreement, to his surety in the purchase-money notes, "to sell and pay off said notes," and directs the vendor to make title as the surety may direct, the agreement is not inconsistent with the claim of the principal that the surety was to refund to him the amount previously paid on the price, if the land should bring more than the amount of the notes. Ferrell *v.* McCoy, 53 S. W. 23, 21 Ky. L. Rep. 787.

Liability to guarantor. — Where a surety failed to give his principal credit for a sum of money received, and after paying the bond of the principal on which he was liable, claimed and received from a guarantor of such bond, the full amount paid, it was held that the principal could not recover, the surety being liable to the guarantor for such sum. Campbell *v.* Boyce, 4 Rich. (S. C.) 391.

6. Hopkins *v.* Hemm, 159 Ill. 416, 42 N. E. 848 [*affirming* 56 Ill. App. 480]; Williams *v.* Gallick, 11 Oreg. 337, 3 Pac. 469.

Other liabilities not secured.—Where a confession of judgment is given to indemnify the sureties against their liability on certain determinate and specified securities, plaintiffs can hold the judgment as indemnity against their liability on those securities only. If there should be a surplus after satisfying those securities, they will not be allowed, as against junior judgment creditors, to apply such surplus to other securities on which they were liable at the time as sureties, but which were not mentioned as among those to secure which the judgment was given. Pringle *v.* Sizer, 2 S. C. 59.

7. O'Reilly *v.* Hendricks, 2 Sm. & M. (Miss.) 388.

8. Loughridge *v.* Bowland, 52 Miss. 546.

9. Wiggin *v.* Flower, 5 Rob. (La.) 406; *In re* Stout, 109 Fed. 794. In Nally *v.* Long, 56 Md. 567, it is held that the equitable obligation arises at once upon the creation of the relation, but is not consummated until payment.

10. Washburn *v.* Blundell, 75 Miss. 266, 22 So. 946.

11. Jennings *v.* Shropshire, 9 B. Mon. (Ky.) 431; Johnson *v.* Morrison, 5 B. Mon. (Ky.) 106; Buford *v.* Francisco, 3 Dana (Ky.) 68; Webster *v.* Brown, 2 S. C. 428.

So a surety for an administrator cannot prevent payment of money to him by alleging that the latter probably had administered the estate so as to render the surety liable. Brown *v.* Kerrigan, 4 Redf. Surr. (N. Y.) 146. But where an administrator was insolvent it was held that where he had had land sold by him bought in for his own benefit and a judgment was recovered against a

this is the common-law rule,[12] where one is surety for another for the payment of a debt, the right of action by the surety against the principal,[13] or against his estate,[14] accrues at the time of the payment by the former; and the payment must be made before the action for reimbursement is brought.[15] In some jurisdictions this rule has been changed or modified by statute [16] or the equitable remedy for exoneration has been supplemented.[17]

b. As to Debts Due Principal From Surety. When the surety is sued by the principal on a claim held by the latter against the former, the mere fact of the suretyship will not be a defense to the surety if no action has been taken against

surety for the purchase-price, the surety was entitled to an order restraining the administrator from using or assigning the commissions due him from the estate until the determination of an action begun by the surety against him. Stenhouse *v.* Davis, 82 N. C. 432

12. Litler *v.* Horsey, 2 Ohio 209. See also the cases cited *infra*, note 13.

13. *Alabama.*—Winston *v.* Farrow, (1905) 40 So. 53; Landrum *v.* Brookshire, 1 Stew. 252.

Delaware.— Jefferson *v.* Tunnell, 2 Del. Ch. 135.

Illinois.— Shepard *v.* Ogden, 3 Ill. 257.

Indiana.— Stearns *v.* Irwin, 62 Ind. 558; Christian *v.* Highlands, 32 Ind. App. 104, 69 N. E. 266.

Iowa.— Dennison *v.* Soper, 33 Iowa 183.

Kentucky.— Bowman *v.* Wright, 7 Bush 375; Wood *v.* Berthoud, 4 J. J. Marsh. 303.

Louisiana.—Bannon *v.* Barnett, 7 La. Ann. 105; Forest *v.* Shores, 11 La. 416.

Maine.— Longfellow *v.* Andrews, 45 Me. 75; Ingalls *v.* Dennett, 6 Me. 79.

Massachusetts.—Swift *v.* Crocker, 21 Pick. 241 (liability on note not due); Gardner *v.* Cleveland, 9 Pick. 334.

Mississippi.— Weir-Booger Dry Goods Co. *v.* Kelly, 80 Miss. 64, 31 So. 808.

Missouri.— Hearne *v.* Keath, 63 Mo. 84, payment or its equivalent.

Nebraska.— Minick *v.* Huff, 41 Nebr. 516, 59 N. W. 795.

New Hampshire.—Conn *v.* Coburn, 7 N. H. 368, 26 Am. Dec. 746.

New York.—Hannay *v.* Pell, 3 E. D. Smith 432; Powell *v.* Smith, 8 Johns. 249, imprisonment of surety on a capias ad satisfactiendum is not satisfaction to the creditor.

North Carolina.— Ponder *v.* Carter, 34 N. C. 242; Green *v.* Williams, 33 N. C. 139; Reynolds *v.* Magness, 24 N. C. 26; Hodges *v.* Armstrong, 14 N. C. 253.

Pennsylvania.— Miller *v.* Howry, 3 Penr. & W. 374, 24 Am. Dec. 320; Morrison *v.* Berkey, 7 Serg. & R. 238; McConaghy's Estate, 13 Phila. 399.

South Carolina.—Hellams *v.* Abercrombie, 15 S. C. 110, 40 Am. Rep. 684.

Vermont.— Bullard *v.* Brown, 74 Vt. 120, 52 Atl. 422.

Wisconsin.— Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100.

Wyoming.— Newell *v.* Morrow, 9 Wyo. 1, 59 Pac. 429.

See 40 Cent. Dig. tit. "Principal and Surety," § 510.

When parties exchange their memorandum checks for mutual accommodation, a right of action in behalf of one against the other does not accrue until plaintiff has paid the check given by him. Burdsall *v.* Chrisfield, 1 Disn. (Ohio) 51, 12 Ohio Dec. (Reprint) 481.

That the surety became such through misrepresentations made to him will not entitle him to recover from the principal before payment. Citizens' Bank *v.* Burrus, 178 Mo. 716, 77 S. W. 748.

Time of payment see *infra*, IX, B, 4, c, (I).

14. Hill's Estate, 67 Cal. 238, 7 Pac. 664 (holding that when the demand does not accrue until after the death of the principal, a judgment against the surety must be paid before the surety can go against the estate); Covey *v.* Neff, 63 Ind. 391. But see Walker *v.* Drew, 20 Fla. 908, holding that the claim of a surety for a matured debt of a decedent is provable against his estate.

The surety for a bankrupt has been held not entitled to prove for purpose of voting at first meeting unless he has paid the debt. *Re* Parrott, 63 L. T. Rep. N. S. 777, 8 Morr. Bankr. Cas. 49, 39 Wkly. Rep. 400. But see *Ex p.* Delmar, 7 Morr. Bankr. Cas. 129, 190, 38 Wkly. Rep. 752.

15. See *infra*, IX, B, 4, c, (I) *et seq.*

16. Walton *v.* Williams, 5 Okla. 642, 49 Pac. 1022. See also *infra*, IX, B, 5, b.

17. Rice *v.* Dorrian, 57 Ark. 541, 22 S. W. 213; Uptmoor *v.* Young, 57 Ark. 528, 22 S. W. 169. See also Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5. And see *infra*, IX, B, 3, d.

In Louisiana, under Code Civ. Proc. art. 3026, a surety was given the right to sue the principal for indemnification: (1) When a suit for payment exists against him; (2) when the principal has become bankrupt; (3) when the principal was bound to discharge him within a given time; (4) when the debt has become due by the expiration of the time for which it was contracted. The party suing must bring himself within the statute. Edwards *v.* Prather, 22 La. Ann. 334. See also Iberia Cypress Co. *v.* Christen, 112 La. 448, 36 So. 490; Mudd *v.* Rogers, 10 La. Ann. 648; Gillet *v.* Rachal, 9 Rob. (La.) 276; Thompson *v.* Wilson, 13 La. 138; Dickey *v.* Rogers, 7 Mart. N. S. (La.) 588. Such provisions give a remedy which the surety of an administrator exercises in his name personally and in no wise for or on account of creditors of the estate nor by virtue of any right of action borrowed by

him on the debt for which he is surety;[18] nor will it be a defense against the personal representative of the principal,[19] and it is held that he cannot refuse to pay claims which have been assigned to the principal, if the surety has not paid anything on the debt for which he is liable, although judgment has been obtained against him.[20] The principal has the right to assign to the creditor, as security, a debt due from the surety to the principal.[21] And a surety who has been fully indemnified by the principal cannot object to paying a debt owing by him to the principal.[22] If, however, the principal,[23] or his estate,[24] is insolvent, equity recognizes the right of the surety to retain any funds of the principal in his hands,[25] even as against an assignee of the principal;[26] and the principal will not be allowed to recover from his surety without first indemnifying the latter.[27]

c. Enforcement of Security or Indemnity. The surety cannot apply security

anticipation from the creditor. Derouen *v.* Norres, 49 La. Ann. 1131, 22 So. 669.

18. *Kentucky.*—Walker *v.* McKay, 2 Metc. 294.

Louisiana.— McDowell *v.* Crook, 10 La. Ann. 31.

Maine.— Robinson *v.* Safford, 57 Me. 163; Perkins *v.* Hitchcock, 49 Me. 468.

Missouri.—Hopkins *v.* Fechter, 47 Mo. 331.

New York.— McCormick *v.* Sullivan, 71 Hun 333, 24 N. Y. Suppl. 1117. But in Hannay *v.* Pell, 3 E. D. Smith 432, it was held that under the code provisions allowing equitable defenses and counter-claims and permitting the court to grant him any affirmative relief to which he may be entitled, where judgment has been recovered against the surety, relief may be granted to the surety in an action against him by his principal on a money demand by requiring plaintiff to pay the judgment after deducting the amount of the claim sued on and due from defendant and by providing that payment by defendant of such amount on the judgment shall discharge him from plaintiff's claim.

Wisconsin.— Kinsey *v.* Ring, 83 Wis. 536, 53 N. W. 842.

See 40 Cent. Dig. tit. "Principal and Surety," § 502.

Signing a note to satisfy a judgment against him, which the surety has not paid, is not sufficient to entitle him to set off the judgment against a debt due to his principal. Jones *v.* Wolcott, 15 Gray (Mass.) 541.

Stay of proceedings.— If the surety, when sued by his principal, does not object that suit has been begun against him on the debt for which he is liable as surety, it is discretionary with the trial court afterward to allow a stay of proceedings. Richardson *v.* Merritt, (Minn. 1898) 77 N. W. 234.

As against another surety.— One surety of a non-resident debtor cannot, by bill or attachment in chancery, draw from another, who is surety for such debtor in a distinct demand, any funds which he may owe the non-resident, to the prejudice of such surety. Sims *v.* Wallace, 6 B. Mon. (Ky.) 410.

Payment by cosurety see *infra*, text and note 55.

19. Tyree *v.* Parham, 66 Ala. 424.

20. Root *v.* Moriarty, 39 Ind. 85.

21. Miller *v.* Cherry, 57 N. C. 197. But an oral agreement between the principal and the surety that a debt of the latter to the former shall go in satisfaction of the liability about to be assumed by the surety will not prevail over an oral assignment of the debt by the principal to a third person before the surety became bound. Newby *v.* Hill, 2 Metc. (Ky.) 530.

22. Holden *v.* Gilbert, 7 Paige (N. Y.) 208.

23. Abbey *v.* Van Campen, Freem. (Miss.) 273; Mattingly *v.* Sutton, 19 W. Va. 19.

24. **In bankruptcy or winding-up proceedings.**— In Barrett's Case, 4 De G. J. & S. 756, 34 L. J. Bankr. 41, 12 L. T. Rep. N. S. 193, 756, 13 Wkly. Rep. 559, 69 Eng. Ch. 579, 46 Eng. Reprint 1116, it was held that while ordinarily the debtor of a bankrupt's estate or an estate being wound up cannot buy up counter-claims subsequent to the bankruptcy or the winding-up order for the purpose of making a set-off, it is otherwise where there is an actual ownership of a counter-claim arising in consequence of some anterior matter; that where a company upon failure to make payment under a mortgage gave the mortgagee a promissory note, and subsequently a winding-up order was made and the surety of the mortgagor procured the mortgage debt to be paid and a transfer of the securities, including said promissory note, which was dishonored when it fell due, and then obtained a transfer of the note to himself, he should be allowed to set off his claim on the promissory note against the sum due him for calls.

25. Scott *v.* Timberlake, 83 N. C. 382; Beaver *v.* Beaver, 23 Pa. St. 167; Barnes *v.* Barnes, 106 Va. 319, 56 S. E. 172.

26. Scott *v.* Timberlake, 83 N. C. 382; Walker *v.* Dicks, 80 N. C. 263; Battle *v.* Hart, 17 N. C. 31; Craighead *v.* Swartz, 219 Pa. St. 149, 67 Atl. 1003 (set-off allowed as an equitable one where equity is administered in common-law proceedings); *In re* Reynolds, 20 Fed. Cas. No. 11,724, 16 Nat. Bankr. Reg. 158. But see Kinsey *v.* Ring, 83 Wis. 536, 53 N. W. 842.

27. Abbey *v.* Van Campen, Freem. (Miss.) 273; Mattingly *v.* Sutton, 19 W. Va. 19.

In administration of decedent's estate.— A devisee, who is the executor, and who becomes surety for a creditor of the estate, can apply the debt due by the testator toward the discharge of the sum for which he has become surety. Goldsmith *v.* Goldsmith, 17 Grant Ch. (U. C.) 213.

before maturity of the debt,[28] nor before he has become liable therefor;[29] and previous to that time he has no interest which he can assign.[30] If the surety is indemnified against loss or damage, ordinarily he must suffer such loss before he can recover on the indemnity;[31] but if the indemnity is against liability no damage need be sustained and the indemnity may be enforced before payment.[32] So the payee of a promissory note given by the principal to secure the former as surety cannot sue thereon if it is a mere indemnity against loss;[33] but a promissory note in ordinary form given to the payee by his principal as collateral security may be sued on when it matures notwithstanding the debt for which the payee is surety for the maker has not been paid;[34] and the liability of a surety for a debt not due may furnish a good consideration for a promissory note, upon a promise, either express, or implied by law, on the part of the surety, that he will pay and discharge

28. Burns *v.* True, 5 Tex. Civ. App. 74, 24 S. W. 338.

If he has given a renewal, he must wait until the extended time has expired. Burt *v.* Gamble, 98 Mich. 402, 57 N. W. 261.

Right to sell to meet maturing obligations. — But under an agreement that the surety should have a lien on all of certain commodities for the price of which the surety was liable, and the surety was to have a right, at all times, to control and direct the sale of the commodity and to apply the avails to his liabilities from time to time as they should fall due and payable, he was empowered to keep himself in cash funds, by sales, ready to meet his responsibilities as they should mature, and was not restricted in the sales to the amount of the liabilities only which had matured. Calkins *v.* Lockwood, 17 Conn. 154, 42 Am. Dec. 729.

29. *Alabama.*— Cochran *v.* Miller, 74 Ala. 50.

Connecticut.— Filly *v.* Brace, 1 Root 507.

Illinois.— Constant *v.* Matteson, 22 Ill. 546.

Indiana.— Wells *v.* Merritt, 17 Ind. 255; Ellis *v.* Martin, 7 Ind. 652.

Iowa.— Nourse *v.* Weitz, 120 Iowa 708, 95 N. W. 251.

Louisiana.— Montgomery's Succession, 2 La. Ann. 469.

New York.— Campbell *v.* Macomb, 4 Johns. Ch. 534.

South Carolina.— McDaniel *v.* Austin, 32 S. C. 601, 11 S. E. 350.

Tennessee.— Nashville Bank *v.* Grundy, Meigs 256.

See 40 Cent. Dig. tit. "Principal and Surety," § 520 *et seq.*

If a supplemental bill shows payment of a judgment by the sureties, it is no objection to the maintenance of the original bill to enforce a lien that the sureties had not paid the judgment before bringing suit. Crawford *v.* Richeson, 101 Ill. 351.

Against estate of surety.—In Montgomery's Succession, 2 La. Ann. 469, it is held that property of the principal, who is dead and on whose property a surety has a lien for his indemnity, may be withheld from distribution for a reasonable time until it can be ascertained whether the surety will be liable.

30. Hall *v.* Cushman, 16 N. H. 462, 43 Am. Dec. 562.

31. Brentnal *v.* Holmes, 1 Root (Conn.) 291, 1 Am. Dec. 44 (holding that before payment the surety cannot recover from the principal on a general agreement of indemnity by the latter); Crippen *v.* Thompson, 6 Barb. (N. Y.) 532; Pond *v.* Warner, 2 Vt. 532 (holding that the allowance of a demand against the estate of a surety is a damnification which will entitle the administrator to sue the indemnity).

The recovery of a judgment against a surety is sufficient evidence of damage to entitle him to enforce indemnity. Marshall *v.* Cobleigh, 18 N. H. 485; Carman *v.* Noble, 9 Pa. St. 366.

Indemnity generally see INDEMNITY, 22 Cyc. 90.

Indemnity mortgages see MORTGAGES, 27 Cyc. 1065 *et seq.*

32. Jarvis *v.* Sewall, 40 Barb. (N. Y.) 449 (holding that in an action on a bond to indemnify sureties on appeal against costs which they might "incur and become bound to pay," it is not necessary to prove that any costs actually were paid); Wooldridge *v.* Norris, L. R. 6 Eq. 410, 37 L. J. Ch. 640, 19 L. T. Rep. N. S. 144, 16 Wkly. Rep. 965; Newburn *v.* Mackelcan, 19 Ont. App. 729; Boyd *v.* Robinson, 20 Ont. 404 [*citing* Smith *v.* Teer, 21 U. C. Q. B. 412].

33. Borum *v.* Reed, 73 Mo. 461, 462, holding that a note in the following form: "Six months after date we, or either of us, promise to pay S. P. Borum, or order, the sum of one thousand one hundred and fifty-three dollars and ten cents, with interest at eight per cent from date, value received. This note for purpose of paying John Bonecuta, the sum of $87; paying J. R. Amos $953 10–100; paying Dickson $8; and all other debts which S. P. Borum is security for," was a mere indemnity. *Compare* Filly *v.* Brace, 1 Root (Conn.) 507, *infra*, note 34.

34. Russell *v.* La Roque, 11 Ala. 352; Hapgood *v.* Wellington, 136 Mass. 217. But see Woodbridge *v.* Scott, 3 Brev. (S. C.) 193. In Filly *v.* Brace, 1 Root (Conn.) 507, it was held that where C trusts B and takes his notes payable at a certain time, and B gives A his note for the same sum, payable one month after B's note is payable to C conditioned that, if he holds A harmless from said debt to C then said note to be void, if B fails to pay said debt to C before his note is payable to A he will be liable upon it.

the debt of his principal;[35] such a note may be the foundation of an action and a valid attachment, before payment of the secured debt, at least to the extent of the actual payment made by the surety before taking judgment in his action.[36] The right of the surety in these respects will be controlled by the terms of the agreement between the parties, as where it is stipulated that the surety may enforce his security upon default of the principal,[37] or the contract is otherwise of such a nature as to give the surety the right to enforce his security before payment.[38] If the principal, to secure his surety, has given the latter a warrant for a judgment, the surety can enter judgment as soon as the debt is due and before payment, for the entire amount authorized by the warrant.[39]

d. Exoneration in Equity. After maturity of the debt, although the surety has not been troubled by the creditor, he has the right, before payment, to go into a court of equity, at any time, to compel payment of the debt by the principal,[40] or

35. Swift *v.* Crocker, 21 Pick. (Mass.) 241.

36. Swift *v.* Crocker, 21 Pick. (Mass.) 241; Osgood *v.* Osgood, 39 N. H. 209. And for time of payment in action for reimbursement on the implied promise see *infra*, IX, B, 4, c, (I) *et seq.*

Recovery may be had in such cases to the extent of payments made before the judgment, although nothing was paid before the suit was brought, but the recovery is confined to the amount of such subsequent payments. Swift *v.* Crocker, 21 Pick. (Mass.) 241; Little *v.* Little, 13 Pick. (Mass.) 426; Cushing *v.* Gore, 15 Mass. 69 (where the recovery was for the amount, which appeared to have been paid before judgment); Osgood *v.* Osgood, 39 N. H. 209 (holding that if no payments have been made nominal damages may be recovered); Haseltine *v.* Guild, 11 N. H. 390 (holding that beyond the sum paid before judgment the consideration must be deemed to have failed). *Compare* Gladwin *v.* Gladwin, 13 Cal. 330; Hapgood *v.* Wellington, 136 Mass. 217.

A note executed after the action is commenced will not support it. Swift *v.* Crocker, 21 Pick. (Mass.) 241.

If the principal has agreed with the surety to pay the demand, upon a breach of such agreement, the surety has a right of action against the principal. Hall *v.* Nash, 10 Mich. 303; Loosemore *v.* Radford, 1 Dowl. P. C. N. S. 881, 11 L. J. Exch. 284, 9 M. & W. 657.

37. Iberia Cypress Co. *v.* Christen, 112 La. 448, 36 So. 490. Where a bond provided that if the principal should not satisfy the debt secured at maturity, land conveyed by him in trust should be sold, etc., the land may be sold before payment of the security. Morton *v.* Lowell, 56 Tex. 643.

38. Daniel *v.* Joyner, 38 N. C. 513 (holding that where the principal in a bond gave a trust deed providing that the trustee should save his surety in the bond harmless and that the trustee should proceed to sell sufficient property to answer the ends of the trust whenever required by the principal's creditors or any surety who might be threatened with loss by reason of his suretyship, the trustee was not bound to wait until the surety was actually damnified by having been compelled to pay the money); Bird *v.* Benton, 13 N. C. 179 (where it was held that a verbal pledge to a surety wherein he was given the power to sell the property and repay himself and return the balance to the pawnor, authorized the surety to sell whenever he was in danger of being forced to pay the debt for which he was bound and before the actual payment by him); Fletcher *v.* Edson, 8 Vt. 294, 30 Am. Dec. 470 (holding that where the agreement was that a note on demand given by the principal to his surety to indemnify the latter was not to be demanded unless the surety had reasonable doubt of the ability of the principal to pay, the note is suable on proof of the principal's failing circumstances).

Under an express agreement for the surety to collect a note transferred to him as collateral security and to apply the proceeds on the debt, he may sue upon it, although he has not been compelled to pay anything. Klein *v.* Funk, 82 Minn. 3, 84 N. W. 460.

In equity.—Where a surety on a bond is secured by an indemnity bond of a third person, and has been called upon to pay within the condition of the indemnity bond, he may file a bill against the executors of his indemnitor for administration, payment of the debt, and indemnity, and it is unnecessary for the bill to be filed on behalf of all of the creditors. Wooldridge *v.* Norris, L. R. 6 Eq. 410, 37 L. J. Ch. 640, 19 L. T. Rep. N. S. 144, 16 Wkly. Rep. 965.

39. Monell *v.* Smith, 5 Cow. (N. Y.) 441.

Enforcement confined to indemnity.—But the surety cannot enforce the judgment by execution for any more than is necessary for his indemnity. Borland's Appeal, 66 Pa. St. 470.

The surety can assign a confessed judgment to the creditor. Harrisburg Bank *v.* Douglass, 4 Watts (Pa.) 95, 28 Am. Dec. 689.

40. *Arkansas.*— Rice *v.* Dorrian, 57 Ark. 541, 22 S. W. 213; Uptmoor *v.* Young, 57 Ark. 528, 22 S. W. 169, in which cases the equitable right is recognized but the statute supplements the surety's remedy, providing that a surety may maintain an action against his principal to obtain indemnity against the liability for which he is bound before it is due, whenever any grounds for attachment exist, and, in such actions, obtain orders of attachment.

Delaware.— Miller *v.* Stout, 5 Del. Ch. 259.

from the estate [41] of the principal, or to be secured against loss.[42] The doctrine in such cases rests upon the simple right, as between the principal and surety, that

Georgia.— Sanford *v.* U. S. Fidelity, etc., Co., 116 Ga. 689, 43 S. E. 61.

Hawaii.— Macfie *v.* Kilauea Sugar Co., 6 Hawaii 440.

Illinois.— Roberts *v.* American Bonding, etc., Co., 83 Ill. App. 463.

Indiana.— Ritenour *v.* Mathews, 42 Ind. 7.

Kentucky.— Huss *v.* Rice, 92 Ky. 362, 17 S. W. 869, 13 Ky. L. Rep. 624.

Maryland.— Whitridge *v.* Durkee, 2 Md. Ch. 442.

Mississippi.— Graham *v.* Thornton, (1891) 9 So. 292.

New Jersey.— Holcomb *v.* Fetter, 70 N. J. Eq. 300, 67 Atl. 1078 [*citing* Herron *v.* Mullen, 56 N. J. Eq. 839, 42 Atl. 1016; Philadelphia, etc., R. Co. *v.* Little, 41 N. J. Eq. 519, 7 Atl. 356; Delaware, etc., R. Co. *v.* Oxford Iron Co., 38 N. J. Eq. 151]; Irick *v.* Black, 17 N. J. Eq. 189.

New York.— Hannay *v.* Pell, 3 E. D. Smith 432.

North Carolina.— Taylor *v.* Miller, 62 N. C. 365; Thigpen *v.* Price, 62 N. C. 146.

Ohio.— Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5 (where it appears also that there is a statutory provision in that state that a surety may maintain an action to compel his principal to discharge the debt, etc.); Stump *v.* Rogers, 1 Ohio 533; Still *v.* Holland, 1 Ohio Dec. (Reprint) 584, 10 West. L. J. 481.

Pennsylvania.— Craighead *v.* Swartz, 219 Pa. St. 149, 67 Atl. 1003; Smith *v.* Harry, 91 Pa. St. 119; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

South Carolina.— Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634; Hellams *v.* Abercrombie, 15 S. C. 110, 40 Am. Rep. 684; Norton *v.* Reid, 11 S. C. 593; Taylor *v.* Heriot, 4 Desauss. Eq. 227.

Tennessee.— Saylors *v.* Saylors, 3 Heisk. 525; Greene *v.* Starnes, 1 Heisk. 582; Croone *v.* Bivens, 2 Head 339; Gilliam *v.* Esselman, 5 Sneed 86; Washington *v.* Tait, 3 Humphr. 543.

Vermont.— Bishop *v.* Day, 13 Vt. 81, 37 Am. Dec. 582.

Virginia.— Rhea *v.* Preston, 75 Va. 757.

Wisconsin.— Dobie *v.* Fidelity, etc., Co., 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135.

United States.— A surety on a bond given to protect from sale the mortgaged property of a railroad, in a foreclosure suit directing all claims to be presented, need not pay the judgment recovered against him on the bond before presenting it as a claim. Union Trust Co. *v.* Morrison, 125 U. S. 591, 8 S. Ct. 1004, 31 L. ed. 825.

England.— Wooldridge *v.* Norris, L. R. 6 Eq. 410, 37 L. J. Ch. 640, 19 L. T. Rep. N. S. 144, 16 Wkly. Rep. 965; Padwick *v.* Stanley, 9 Hare 627, 16 Jur. 586, 41 Eng. Ch. 627, 68 Eng. Reprint 664; Antrobus *v.* Davidson, 3 Meriv. 569, 17 Rev. Rep. 130, 36 Eng. Reprint 219; Ranelaugh *v.* Hayes, 1 Vern. Ch. 189, 23 Eng. Reprint 405.

Canada.— Joice *v.* Duffy, 5 Can. L. J. 141; Burnham *v.* Peterboro, 8 Grant Ch. (U. C.) 366.

See 40 Cent. Dig. tit. "Principal and Surety," § 512.

But a surety who has received an agreed security for his assuming the position has been denied the right to proceed in equity before payment to compel the principal to give him any further security. Nash *v.* Burchard, 87 Mich. 85, 49 N. W. 492.

41. Stump *v.* Rogers, 1 Ohio 533; Dobie *v.* Fidelity, etc., Co., 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135. In an action by the widow and heirs of a deceased judgment debtor to have the judgment declared not a lien on the estate of the decedent, a judgment defendant, who is a surety for the deceased co-defendant, has such an interest in the subject-matter that he may show that property of the latter is primarily liable for the debt. Delavan *v.* Pratt, 19 Iowa 429.

42. Macfie *v.* Kilauea Sugar Co., 6 Hawaii 440; Howell *v.* Cobb, 2 Coldw. (Tenn.) 104, 88 Am. Dec. 591; Glossop *v.* Harrison, Coop. 61, 10 Eng. Ch. 61, 35 Eng. Reprint 478, 3 Ves. & B. 134, 35 Eng. Reprint 429; Lee *v.* Rook, Mosely 318, 25 Eng. Reprint 415; Ranelaugh *v.* Hayes, 1 Vern. Ch. 189, 23 Eng. Reprint 405; Dick *v.* Gordon, 6 Grant Ch. (U. C.) 394.

Protection of surety's estate.— Where an executor sued to pay debts out of the real estate of his testator, and the estate was indebted largely for suretyship for which there were judgment liens against the principal, and in the suit the lien creditors of the principal had been convened, it was held that the principal was not entitled to claim the benefit of a statutory provision that a sale shall not be made of his realty unless the rents and profits of the real estate will not satisfy the liens in five years, but that his land first should be subjected to the exoneration of the lands of the surety. Alderson *v.* Alderson, 53 W. Va. 388, 44 S. E. 313.

Receiver.— A surety cannot maintain a proceeding in equity to compel his principal to convey his property to a receiver, to secure him before he has paid the debt, and before recovering judgment and exhausting his remedies at law. Nash *v.* Burchard, 87 Mich. 85, 49 N. W. 492, where the surety was denied the right to proceed in equity before payment, having been secured by the principal and the court refusing to change the contract of the parties by requiring further security. On the other hand, where the court otherwise has jurisdiction in the particular proceeding before it to protect the surety, it may appoint a receiver upon facts justifying such appointment. Sanford *v.* U. S. Fidelity, etc., Co., 116 Ga. 689, 43 S. E. 61; Roberts *v.* American Bonding, etc., Co., 83 Ill. App. 463; Stenhouse *v.* Davis, 82 N. C. 432; Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5; Walton *v.* Williams, 5 Okla. 642, 49 Pac. 1022.

the surety has to be protected by the principal.[43] The form in which that protection may be secured is not material where the right to it exists and can be had without prejudice to the creditor.[44] The creditor entitled to the debt for which the surety is liable should be made a party defendant in order to receive payment from the principal,[45] and the bill should allege that the surety is still liable for the debt.[46]

4. After Payment or Satisfaction — a. Reimbursement or Indemnity in General — (i) *Rules Stated.* There is always at the least an implied contract between the parties which obliges a principal to reimburse his surety when the latter has paid the debt;[47] he then becomes a creditor of the principal,[48] and, the debt having matured and being due,[49] is entitled to recover from the latter the amount so paid,[50] even though the creditor was not bound to respect the suretyship;[51] nor are the rights of sureties against their principal affected by any private arrangement among themselves for the distribution of the liability,[52] or by the particular manner in which the relation arose.[53] But a surety has no claim by reason of his suretyship after payment of the debt by a principal,[54] nor does one

43. Roberts *v.* American Bonding, etc., Co., 83 Ill. App. 463; Holcombe *v.* Fetter, 70 N. J. Eq. 300, 67 Atl. 1078, holding that the defense that the creditor may by reason of his laches lose his right of action against the surety is not available.

Irreparable injury.— It is not essential that the claim of the surety for relief should depend upon the fact that he will incur irreparable injury. Holcombe *v.* Fetter, 70 N. J. Eq. 300, 67 Atl. 1078 (remedy available, although principal not insolvent or in danger of becoming so); Irick *v.* Black, 17 N. J. Eq. 189.

The insolvency of the surety will not preclude him from maintaining the bill. Ferrer *v.* Barrett, 57 N. C. 455.

44. Roberts *v.* American Bonding, etc., Co., 83 Ill. App. 463.

45. See *infra*, IX, B, 5, d.

46. Jones *v.* Perkins, 8 Tex. 337.

47. Babcock *v.* Hubbard, 2 Conn. 536; Winslow *v.* Otis, 5 Gray (Mass.) 360; Konitzky *v.* Meyer, 49 N. Y. 571; Southall *v.* Farish, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641 [*citing* Kendrick *v.* Forney, 22 Gratt. (Va.) 748]. See also *infra*, IX, B, 5, a.

48. Morrison *v.* Cassell, 25 Ill. 368; Winslow *v.* Otis, 5 Gray (Mass.) 360; Pullan *v.* De Camp, 9 Ohio Dec. (Reprint) 344, 12 Cinc. L. Bul. 199; Boyd *v.* Brooks, 34 L. J. Ch. 605, 12 L. T. Rep. N. S. 38, 13 Wkly. Rep. 419.

Bail see *infra*, IX, B, 5, f, (IV), note 90.

49. See *infra*, IX, B, 4, c, (II), (A).

50. *Alabama.*— Bragg *v.* Patterson, 85 Ala. 233, 4 So. 716; Dubberly *v.* Black, 38 Ala. 193.

California.— Williams *v.* Riehl, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60; Hill's Estate, 67 Cal. 238, 7 Pac. 664; Townsend *v.* Sullivan, 3 Cal. App. 115, 84 Pac. 435.

Colorado.— Fitch *v.* Hammer, 17 Colo. 591, 31 Pac. 336.

Kentucky.— Thomas *v.* Beckman, 1 B. Mon. 29.

Maryland.— Nally *v.* Long, 56 Md. 567.

Massachusetts.— Coburn *v.* Parker, 11 Gray 335; Winslow *v.* Otis, 5 Gray 360.

Michigan.— Lange *v.* Perley, 47 Mich. 352, 11 N. W. 193, holding that the fact that the surety made payment to secure his individual release does not affect his right of recovery; the surety can only relieve himself from liability by relieving the principal from such liability.

Minnesota.— Wendlandt *v.* Sohre, 37 Minn. 162, 33 N. W. 700; Kimmel *v.* Lowe, 28 Minn. 265, 9 N. W. 764.

New York.— Lyth *v.* Green, 21 N. Y. App. Div. 300, 47 N. Y. Suppl. 478; Ransom *v.* Keyes, 9 Cow. 128.

South Carolina.— Stokes *v.* Hodges, 11 Rich. Eq. 135.

Texas.— Saunders *v.* Ireland, 87 Tex. 316, 28 S. W. 271.

Wisconsin.— Gray *v.* McDonald, 19 Wis. 213.

England.— Stirling *v.* Forrester, 3 Bligh 575, 22 Rev. Rep. 69, 4 Eng. Reprint 712; Layer *v.* Nelson, 1 Vern. Ch. 456, 23 Eng. Reprint 582, by the custom of London.

See 40 Cent. Dig. tit. "Principal and Surety," § 524.

But a surety for an executor or administrator must exhaust his remedies against such executor or administrator individually before resorting to the assets of the estate. Maybury *v.* Grady, 67 Ala. 147; Vanderveer *v.* Ware, 65 Ala. 606 (which cases are as to liability of surety on supersedeas bond given by executor); Hazen *v.* Durling, 2 N. J. Eq. 133 (surety on the administration bond, who has paid an execution against the estate). See also Subrogation.

Extent of recovery see *infra*, IX, B, 5, h, (II).

51. Bonny *v.* Brashear, 19 La. 383; Irick *v.* Black, 17 N. J. Eq. 189; Peters *v.* Barnhill, 1 Hill (S. C.) 234; Lockhardt *v.* Gibbs, 2 Tex. Unrep. Cas. 293.

52. Water Power Co. *v.* Brown, 23 Kan. 676.

53. King *v.* McGhee, 99 Ga. 621, 25 S. E. 849; Jones *v.* Whitaker, 57 L. T. Rep. N. S. 216.

54. Putney *v.* McDow, 52 S. C. 540, 30 S. E. 605. See also *infra*, IX, B, 5, f, (V).

surety have any right against the principal where payment of the debt was made by his cosurety,[55] and the payment of a note by the surety therein cannot be regarded as a payment by him of an original debt of the principal which was discharged by the proceeds of the secured note, so as to deprive the principal of a right which depended upon his having paid such original debt.[56]

(II) *Against Estate of Principal.* If the principal is dead, the surety can prove his claim against the estate of the principal;[57] and if a surety becomes administrator or executor of his principal, he need not bring a formal action to recover indemnity, but, from the assets in his hands, may retain the amount paid.[58]

(III) *Effect of Taking Security.* The rights of a surety are not affected by taking security,[59] from his principal or from a third person,[60] unless there was an agreement that the surety should look to such security only,[61] even though there are other creditors of the principal who are seeking to satisfy their claims out of his property.[62]

(IV) *With Respect to Particular Parties and Relations* — (A) *In General.* Any of several sureties who makes payments is entitled to recover the amounts so paid by him.[63] But a surety has no claim against a person merely

55. Bannon *v.* Barnett, 7 La. Ann. 105; Jackson *v.* Murray, 77 Tex. 644, 14 S. W. 235.

56. Gerdone *v.* Gerdone, 70 Ind. 62, in which case a father who owned a lot agreed with his son that the latter might enter thereon and make improvements, and that when he had paid for one half of the cost of the improvements he should be entitled to one half interest in the property. When the improvements were completed the amount due represented the amount which would make the son's payments one half of the cost of the improvements. In order to pay this amount his son took up a note held by a third person against the party to whom the amount was due, by giving to such third person his own note with his father as surety thereon, and in order to meet the last note proceeds were raised by another note also executed by the son and father as principal and surety respectively. The last note was paid by the surety, and it was held that the payment could not be considered as a payment of the original debt due on the cost of the improvements; that such payment was made by the son, although the father might be entitled to reimbursement.

57. *Florida.*—Walker *v.* Drew, 20 Fla. 908.
Kentucky.— Conley *v.* Boyle, 6 T. B. Mon. 637.
New York.— Thomson *v.* Taylor, 11 Hun 274 [*affirmed* in 72 N. Y. 32].
Ohio.— Eckert *v.* Myers, 45 Ohio St. 525, 15 N. E. 862; Barnes *v.* Shinneberger, Tapp. 214.
South Carolina.— Thomson *v.* Palmer, 3 Rich. Eq. 139.
Tennessee.— Reeves *v.* Pulliam, 7 Baxt. 119.
Vermont.— West *v.* Rutland Bank, 19 Vt. 403.
Virginia.— Tinsley *v.* Oliver, 5 Munf. 419.
Wisconsin.— Webster *v.* Lawson, 73 Wis. 561, 41 N. W. 710.
England.— Ingram *v.* Thorp, 7 Hare 67, 27 Eng. Ch. 67, 68 Eng. Reprint 27.
See 40 Cent. Dig. tit. "Principal and Surety," § 530.

58. Powell *v.* White, 11 Leigh (Va.) 309; Boyd *v.* Brooks, 34 L. J. Ch. 605, 12 L. T. Rep. N. S. 38, 13 Wkly. Rep. 419; Goldsmith *v.* Goldsmith, 17 Grant Ch. (U. C.) 213.
Surety of administrator succeeding him see *infra*, IX, B, 4, c, (I), note 96.

59. Coburn *v.* Parker, 11 Gray (Mass.) 335; First Nat. Bank *v.* Davis, 87 Mo. App. 242; Mosely *v.* Fullerton, 59 Mo. App. 143; West *v.* Rutland Bank, 19 Vt. 403.

60. Hancock *v.* Holbrook, 40 La. Ann. 53, 3 So. 351; Wesley Church *v.* Moore, 10 Pa. St. 273.

61. Cornwall *v.* Gould, 4 Pick. (Mass.) 444.

62. Joseph *v.* Heaton, 5 Grant Ch. (U. C.) 636; Topping *v.* Joseph, 1 Grant Err. & App. (U. C.) 292.

63. Hall *v.* Smith, 5 How. (U. S.) 96, 12 L. ed. 66, holding further that the principal is liable on an implied promise to a surety for a surety, upon payment by the former.
A surety, after contributing to a cosurety who has paid the creditor, has a right to be reimbursed by the principal. Goodall *v.* Wentworth, 20 Me. 322; Ilsley *v.* Jewett, 2 Metc. (Mass.) 168. So where an administrator sold property to one of his sureties for which payment never was made, and another surety was compelled to pay a judgment recovered upon the administration bond, the latter surety is entitled to have the shares of the administrator and of the purchaser as distributees of the estate refunded to him. Norfleet *v.* Cotton, 16 N. C. 334.
Part of claim discharged as to one surety.— If after contribution by a surety by paying one half of the debt to a cosurety who had paid the whole and recovered a judgment therefor against the principal, the cosurety assigns the judgment, the assignee takes no greater right than the assignor had and could not enforce satisfaction for more than one half of the judgment; and where the judgment debtor becomes the owner of the judgment under a bequest from the assignee, it cannot be held that the whole debt is

because the latter has received money [64] or property from the principal.[65] The principal cannot recover from his surety,[66] even though the former appears to be the surety; [67] but, after a change in the relation, a former principal who has become surety can recover from the former surety who has become principal,[68] unless there was some express agreement in regard to the matter; [69] and defendant can show that the relation has changed.[70]

(B) *Where Principal Was Agent For Another.* If the principal acted as the agent of another person, and the surety pays money in a matter within the scope of such agency, the surety can recover from such third person,[71] although the existence of the agency was unknown to the surety at the time of payment.[72]

(C) *Surety For One of Several Debtors.* If a person becomes surety for one only of two joint debtors, he cannot recover from the other; [73] but where a surety for one

merged and discharged. Ilsley *v.* Jewett, 2 Metc. (Mass.) 168.

Parties plaintiff see *infra*, IX, B, 5, d, (I).

64. A surety for a tax collector cannot recover from a person who borrowed money from the collector, not knowing that it was tax money, and who, in good faith, delivered goods in repayment of the loan. Brown *v.* Houck, 41 Hun (N. Y.) 16.

65. A surety for the purchase-money of property bought by a woman cannot recover from the husband after her marriage, although by the marriage the property becomes his. Cureton *v.* Moore, 55 N. C. 204.

Want of privity between surety and assignee or vendee of principal.— So where a contract for the sale of land, the purchase-price of which was evidenced by notes executed with a surety, was assigned under an agreement with the assignor and assignee, and in part consideration for the assignment, that the assignee should pay the original notes, it was held that although the agreement of the assignee to pay such notes was valid, there was no privity between him and the surety on the notes which would sustain an action by the surety against the assignee for reimbursement after payment of the notes by the surety. Hoffman *v.* Schwaebe, 33 Barb. (N. Y.) 194. And where a mortgagee, in a mortgage in which a surety on a joint bond for the payment of an advancement joined a surety, afterward by indenture to which such surety was not a party sold the estate to another, who engaged to pay the mortagee the sum first advanced, and covenanted to indemnify the mortgagor and his surety, and the latter afterward advanced the money to pay said debt, it was held that he was not entitled to recover from the vendee of the mortgagor in an action for money paid; that the surety's remedy was against his principal, or an action against the vendee on the covenant to indemnify, in the name of his principal. Crafts *v.* Tritton, 2 Moore C. P. 411. But as to the right of sureties to set up in equity a condition by parol under which a mortgagee of the principal agreed to pay the secured debt out of the land see Rodes *v.* Crockett, 2 Yerg. (Tenn.) 346, 24 Am. Dec. 489, *infra*, note 85.

Fraudulent conveyances see FRAUDULENT CONVEYANCES, 20 Cyc. 432.

66. Where an executor, supposing the estate to be solvent, pays a debt, he afterward cannot recover anything from a surety for such debt upon discovering that the estate is insolvent, although if he had not paid the debt the surety would have been compelled to do so and could not have recovered from the estate. Paine *v.* Drury, 19 Pick. (Mass.) 400. See also Proudfoot *v.* Clevenger, 33 W. Va. 267, 10 S. E. 394.

67. Boulware *v.* Hartsook, 83 Va. 679, 3 S. E. 289. See also *infra*, IX, C.

68. Gee *v.* Nicholson, 2 Stew. (Ala.) 512; Davis *v.* Heimbach, 75 Cal. 261, 17 Pac. 199; Lewis *v.* Lewis, 92 Ill. 237; Downer *v.* Baxter, 30 Vt. 467.

69. Newton *v.* More, 14 Ark. 166.

70. Mohawk, etc., R. Co. *v.* Costigan, 2 Sandf. Ch. (N. Y.) 306; Robinson *v.* McDowell, 130 N. C. 246, 41 S. E. 287.

71. *Alabama.*— Eckford *v.* Wood, 5 Ala. 136.

Maine.— Smith *v.* Sayward, 5 Me. 504.

Missouri— Higgins *v.* Dellinger, 22 Mo. 397.

New York.— City Trust, etc., Co. *v.* American Brewing Co., 174 N. Y. 486, 67 N. E. 62 [*affirming* 70 N. Y. App. Div. 511, 75 N. Y. Suppl. 140].

Texas.— McGregor *v.* Hudson, (Civ. App. 1895) 30 S. W. 489.

United States.— Tiernan *v.* Andrews, 23 Fed. Cas. Nos. 14,025, 14,026, 4 Wash. 474, 564.

England.— Benson *v.* Duncan, 3 Exch. 644, 18 L. J. Exch. 169, 14 Jur. 218.

See 40 Cent. Dig. tit. "Principal and Surety," § 524.

Surety on consignee's bond for duties.— But it has been held that a surety who pays a bond given by a consignee for duties cannot look to the consignor or real owner, as the true owner does not contract any debt with the government when the consignee enters the goods. Hewes *v.* Pierce, 1 Mart. N. S. (La.) 357.

Surety for one member of firm see *infra*, IX, B, 4, a, (IV), (D).

72. Higgins *v.* Dellinger, 22 Mo. 397; City Trust, etc., Co. *v.* American Brewing Co., 174 N. Y. 486, 67 N. E. 62 [*affirming* 70 N. Y. App. Div. 511, 75 N. Y. Suppl. 140].

73. Osborn *v.* Cunningham, 20 N. C. 559, holding that if two joint obligors be sued

partner is obliged to make payment of what is actually a firm debt, he can recover from the other partners.[74]

(D) *Where There Are Two or More Principals.* Coöbligors who are principals are jointly liable to their surety.[75] But a surety can recover the full amount from either of his several principals,[76] although the default was committed by one

and one of them give bail, such bail cannot, upon being compelled to pay the debt by proceedings against him as such, sustain an action against the other obligor for money paid to his use, there being no privity between the bail of one obligor and his coobligor. To the same effect see Bowman *v.* Blodgett, 2 Metc. (Mass.) 308, where, after dissolution of a partnership, a suit was brought against both of the former partners for a partnership debt, and one of them was held to bail, and the bail was compelled to pay the amount of a judgment against both.

74. *Kentucky.*— Burns *v.* Parish, 3 B. Mon. 8, where a note was signed by one partner for the hire of a slave, with the knowledge and consent of both members of the firm and the entire proceeds went to the benefit of the firm, and it was held that the surety on the note after payment might recover against the firm. So in Hikes *v.* Crawford, 4 Bush 19, a similar rule was announced where the note was given for a firm debt, although it was signed by one partner only, but in so far as this case held that a note so signed made the firm as such liable thereon it was overruled in Macklin *v.* Crutcher, 6 Bush 401, 99 Am. Dec. 680.

Louisiana.— See Stewart *v.* Caldwell, 9 La. Ann. 419, as to liability of member of firm which is not a commercial partnership, for one half of the claim.

New York.— Donegan *v.* Moran, 53 Hun 21, 5 N. Y. Suppl. 575, where property attached at the suit of a partnership was claimed by a third person and in order to retain it one of the partners executed an indemnity bond in his own name.

North Carolina.— Wharton *v.* Woodburn, 20 N. C. 647.

Tennessee.— Lowry *v.* Hardwick, 4 Humphr. 188, where two members of a firm who were sued stayed execution and the surety on the stay, who was afterward obliged to pay, was held entitled to recover against a third member of the firm.

Canada.— Purdom *v.* Nichol, 15 Can. Sup. Ct. 610 [*reversing* 15 Ont. App. 244, and *affirming* 16 Ont. 699].

See 40 Cent. Dig. tit. "Principal and Surety," § 527.

Contra.—As opposed to the cases above cited in this note see Asbury *v.* Flesher, 11 Mo. 610. Other cases which hold that a recovery cannot be had against another member of a firm upon an obligation signed by an individual member have been distinguished from those above cited in this note. In Tom *v.* Goodrich, 2 Johns. (N. Y.) 213; Krafts *v.* Creighton, 3 Rich. (S. C.) 273; and U. S. *v.* Astley, 24 Fed. Cas. No. 14,472, 3 Wash. 508, it is held that where bonds had been executed by one member of a firm, to secure duties to the United States government upon property imported into the United States, the other copartner was not liable to refund to the surety. These decisions have been said to have proceeded upon the circumstance that the bond in such a case excluded all liability of the party proceeded against for the payment of the duties and that for this reason he could not be called upon to refund the amount paid out by the surety in the bond, and in this respect are distinguishable from the authorities first above cited in this note. Donegan *v.* Moran, 53 Hun (N. Y.) 21, 5 N. Y. Suppl. 575.

Sealed instrument.—Although one partner may not have authority to bind the other members of the firm by the execution of a sealed instrument, yet if the matter is a partnership transaction and a surety thereon has paid the debt either voluntarily (Wharton *v.* Woodburn, 20 N. C. 647), or after recovery against the party who signed the note secured (Purviance *v.* Sutherland, 2 Ohio St. 478) he may recover against another member of the firm.

Administrator as member of firm.— Where a surety signed an administration bond under a representation from a firm of which the administrator was a member, that they intended to take possession of all of the assets of the estate and make the administration a matter of partnership business, sharing the gains and losses resulting therefrom, so that the surety would become a surety for the firm, he cannot recover from the firm, as it is against the policy of the law for an administrator to allow others to control the property of the estate or share in its administration. Forsyth *v.* Woods, 11 Wall. (U. S.) 484, 20 L. ed. 207.

75. Babcock *v.* Hubbard, 2 Conn. 536; Eckert *v.* Myers, 45 Ohio St. 525, 15 N. E. 862.

76. *Louisiana.*— Dickey *v.* Rogers, 7 Mart. N. S. 588.

New Hampshire.— Riddle *v.* Bowman, 27 N. H. 236; Jones *v.* Fitz, 5 N. H. 444.

New Jersey.— Apgar *v.* Hiler, 24 N. J. L. 812.

New York.— Westcott *v.* King, 14 Barb. 32.

Vermont.— Clay *v.* Severance, 55 Vt. 300; West *v.* Rutland Bank, 19 Vt. 403.

Virginia.— Baxter *v.* Moore, 5 Leigh 219.

See 40 Cent. Dig. tit. "Principal and Surety," § 527.

Renewal fraudulently procured.—Where the surety on a note, with knowledge that one of the principals thereon has absconded and concealing the fact, procures the other principal to execute a renewal which the latter does with the understanding that it is to be executed by the other principal, but the

only,[77] unless such default was committed with the connivance of the surety,[78] or there was an express agreement that the principals were to be liable in certain proportions.[79] It does not make any difference that judgment has been rendered against some of them only; [80] or that the surety executed the instrument before some of the principals had signed it.[81]

(E) *One Who Assumes Liability Without Principal's Request.* A surety who executed the contract without the knowledge of the principal cannot recover from the latter; [82] there cannot be an implied promise on the part of the principal to pay the surety if there was no request to incur the liability; [83] but it is held that a request from the principal may be implied from his accepting the benefit of the surety's contract.[84]

(V) *Enforcement of Security.* After payment by the surety, there is no longer any obstacle in the way of his enforcing any security he may hold,[85]

surety, who also executes the renewal, takes up the original note with the renewal without its being signed by the absconding principal and subsequently pays the renewal note, he is entitled to recover the amount from the principal on the renewal note, the payment being referred to the original debt. Warner *v.* Hall, 5 Vt. 156.

77. Babcock *v.* Hubbard, 2 Conn. 536; Albro *v.* Robinson, 93 Ky. 195, 19 S. W. 587, 14 Ky. L. Rep. 124; Overton *v.* Woodson, 17 Mo. 453; Dobyns *v.* McGovern, 15 Mo. 662; McCoun *v.* Sperb, 53 Hun (N. Y.) 165, 6 N. Y. Suppl. 106.

Default of surviving administrator.—A surviving administrator and the representatives of a deceased administrator are held to be jointly liable to indemnify the surety if he has been subjected to liability for defaults of the surviving administrator committed after the death of his associate. Dobyns *v.* McGovern, 15 Mo. 662; Eckert *v.* Myers, 45 Ohio St. 525, 15 N. E. 862. *Contra*, Towne *v.* Ammidown, 20 Pick. (Mass.) 535. See also, generally, Executors and Administrators, 18 Cyc. 1.

78. Tighe *v.* Morrison, 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617.

79. Duncan *v.* Keiffer, 3 Binn. (Pa.) 126.

80. Purviance *v.* Sutherland, 2 Ohio St. 478; Imbusch *v.* Farwell, 1 Black (U. S.) 566, 17 L. ed. 188; Badeley *v.* Consolidated Bank, 34 Ch. D. 536, 55 L. T. Rep. N. S. 635, 35 Wkly. Rep. 136.

81. Babcock *v.* Hubbard, 2 Conn. 536.

After election to pursue real principal.— In Pickering *v.* Marsh, 7 N. H. 192, plaintiff, at the request of the real principals in a note, signed it as surety upon their promise to indemnify him, they executing the note as sureties and another signing it as principal, the note being in fact for the benefit of the parties who signed as sureties. Plaintiff having paid the note and resorted to the parties at whose request he signed, as his principals, by claiming under an assignment by them for the exclusive benefit of their indorser, etc., it was held that if he had an election in the first instance to treat the party who signed as maker as his principal, by reason of the description of the parties in the instrument, such election no longer existed after plaintiff, with knowledge as to who were the actual principals, resorted to them as such and gave them a discharge.

82. *Illinois.*— Ricketson *v.* Giles, 91 Ill. 154.

Indiana.— Windle *v.* Williams, 18 Ind. App. 158, 47 N. E. 680.

Missouri.— McPherson *v.* Meek, 30 Mo. 345.

North Carolina.— Carter *v.* Black, 20 N. C. 425.

Pennsylvania.— Talmage *v.* Burlingame, 9 Pa. St. 21.

Vermont.— Lathrop *v.* Wilson, 30 Vt. 604.

See 40 Cent. Dig. tit. "Principal and Surety," § 524 *et seq.*

But see Hecker *v.* Mahler, 64 Ohio St. 398, 60 N. E. 555, where, however, the agent of the principals procured the surety to sign.

Where two or more are jointly liable, a request by one of them will be regarded as a request by all, and a surety can recover from any of them. Hamilton *v.* Johnston, 82 Ill. 39.

Surety for more than one see *supra*, IX, B, 4, a, (IV), (C), (D).

83. Whitehouse *v.* Hanson, 42 N. H. 9; Wright *v.* Garlinghouse, 26 N. Y. 539 [*reversing* 27 Barb. 474]; Lathrop *v.* Wilson, 30 Vt. 604.

84. Powers *v.* Nash, 37 Me. 322; Hall *v.* Smith, 5 How. (U. S.) 96, 12 L. ed. 66.

His appearance in court and defending a suit will justify the inference that an appeal-bond was signed by the surety at the principal's request. Snell *v.* Warner, 63 Ill. 176.

Knowledge that surety is required.—Where the principal in a lease knew that the landlord would not accept it without security, his assent to its execution by a surety must be inferred. Whiteside *v.* Connolly, 21 Misc. (N. Y.) 19, 46 N. Y. Suppl. 940 [*affirming* 20 Misc. 711, 44 N. Y. Suppl. 1134].

85. *Alabama.*— Graham *v.* King, 15 Ala. 563.

Georgia.— Flannagan *v.* Forrest, 94 Ga. 685, 21 S. E. 712.

Illinois.— Stevens *v.* Hay, 61 Ill. 399.

Indiana.— Howe *v.* White, 162 Ind. 74, 69 N. E. 684; Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131.

Kentucky.— Cook *v.* Landrum, 82 S. W. 585, 26 Ky. L. Rep. 813.

without any previous suit against the principal to determine the liability of the latter;[86] but if the surety has not been given any security, he does not acquire a lien on the property of his principal by the mere fact of having made payment.[87] The surety will not be restrained from enforcing security because he entered into a compromise with the creditor, if made in good faith and manifestly to the advantage of the principal;[88] nor will the fact that the debt of the principal was usurious prevent the surety from retaining his security.[89]

(VI) *Notice and Demand.* In order to recover from the principal, the surety is not required to give him notice that payment has been made,[90] or to make a demand on him,[91] and security may be enforced without any previous notice to the person having given such security, that steps have been taken to hold the surety liable.[92]

b. As to Debt Due Principal From Surety. After the surety has satisfied the debt for which he was liable, he may, as against the principal or his assignee, set off the amount against a debt to the principal.[93] On the other hand, in an action by

Louisiana.— Conery *v.* Cannon, 26 La. Ann. 123.

Mississippi.— Rucks *v.* Taylor, 49 Miss. 552.

Nebraska.— Grimison *v.* Russell, 20 Nebr. 337, 30 N. W. 249.

New Hampshire.— Riddle *v.* Bowman, 27 N. H. 236.

New York.— Milk *v.* Waite, 18 Abb. N. Cas. 236.

North Carolina.— Knight *v.* Rountree, 99 N. C. 389, 6 S. E. 762.

Ohio.— Tidd *v.* Bloch, 26 Ohio Cir. Ct. 113.

Pennsylvania.— Smith *v.* Harry, 91 Pa. St. 119.

England.— Cooper *v.* Jenkins, 32 Beav. 337, 1 New Rep. 383, 55 Eng. Reprint 132; Petre *v.* Duncombe, 15 Jur. 86, 20 L. J. Q. B. 242, 2 L. M. & P. 107.

See 40 Cent. Dig. tit. "Principal and Surety," § 533.

After proof of claim against insolvent.— Where a deed of assignment by the principal contained a clause that creditors should be entitled to receive dividends upon the excess only of their claims over security held by them unless they consented to abandon such security, a surety proving his claim for the full amount will not be deemed to have abandoned a policy of insurance on the life of the principal, as such policy did not possess any value in the lifetime of the principal. Parker *v.* Anglesea, 25 L. T. Rep. N. S. 482, 20 Wkly. Rep. 162.

Confessed judgment secures only actual liability and not the payments actually made. Hartley *v.* Kirlin, 45 Pa. St. 49.

Enforcement of parol condition against subsequent mortgagee.— Upon the principle that a fund set apart by the principal debtor for the payment of his debt may be reached in equity by his sureties who have paid the debt, if a debtor mortgage his land on condition that the mortgagee pay out of the land another debt for which sureties of the mortgagor are liable they may set up that condition by parol in equity and enforce it upon the property in the hands of the mortgagee. Rodes *v.* Crockett, 2 Yerg. (Tenn.) 346, 24 Am. Dec. 489.

86. Pope *v.* Davidson, 5 J. J. Marsh. (Ky.) 400, action on covenant to save a surety harmless from liability.

87. Foster *v.* Athenæum, 3 Ala. 302; Wood *v.* Wood, 124 Ind. 545, 24 N. E. 751, 9 L. R. A. 173; Johnson *v.* Morrison, 5 B. Mon. (Ky.) 106.

88. Destrehan *v.* Scudder, 11 Mo. 484.

Abandonment of an indemnity agreement made by the principal will not be implied in the absence of a contract discharging it. Chadwick *v.* Manning, [1896] A. C. 231, 65 L. J. P. C. 42.

89. Polhill *v.* Broen, 84 Ga. 338, 10 S. E. 921; Irwin *v.* McKnight, 76 Ga. 669.

90. Sikes *v.* Quick, 52 N. C. 19.

Indemnitor having notice of action.—Where a bond given to indemnify a surety was subject to a condition for repayment "at or before the expiration of six months' notice [to be given] to pay the same," notice to the obligor of an action being commenced against the surety is sufficient. Jones *v.* Williams, 9 Dowl. P. C. 252, 10 L. J. Exch. 120, 7 M. & W. 493.

91. Collins *v.* Boyd, 14 Ala. 505; Clanton *v.* Coward, 67 Cal. 373, 7 Pac. 787; Rodenbarger *v.* Bramblett, 78 Ind. 213. See also, generally, Money Paid, 27 Cyc. 839.

Enforcement of mortgage.— In Cook *v.* Landrum, 82 S. W. 585, 26 Ky. L. Rep. 813, it is held that a statute providing that an action shall not be brought until demand of payment has been made of the personal representative of the debtor does not apply to a suit by a surety who has paid a debt of his principal for the purpose of enforcing a mortgage given to secure the debt and to protect the surety.

92. Fisk *v.* Comstock, 2 Rob. (La.) 25.

93. Kershaw *v.* Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70 (levy on surety's property before notice of assignment); Mosteller *v.* Bost, 42 N. C. 39; Barney *v.* Grover, 28 Vt. 391.

After insolvency of principal see Tuscumbia etc., R. Co. *v.* Rhodes, 8 Ala. 206; Merwin *v.* Austin, 58 Conn. 22, 18 Atl. 1029, 7 L. R. A. 84; Cosgrove *v.* McKasy, 65 Minn. 426, 68 N. W. 76; Williams *v.* Helme, 16 N. C. 151, 18 Am. Dec. 580; Jones *v.* Mossop, 3 Hare

the surety against the principal, after payment by the former, the principal can set off against the demand of his surety a claim which he holds against the latter.[94]

c. Payment or Satisfaction Sufficient to Create Liability[95] — (I) *Time and Manner of Payment in General.* It is immaterial to the surety's right to reimbursement how he extinguished the secured debt or paid the sum he seeks to recover,[96] but payment must be made before the action is brought.[97]

(II) *Voluntary Payment* — (A) *In General — Present Legal Obligation.* Whatever present liability on the part of a surety exists or has become fixed by judicial determination may be paid off and satisfied voluntarily by him without waiting to be coerced by process, and such payment will entitle him to reimbursement.[98] Nor is the right of the surety to such reimbursement affected by a com-

568, 8 Jur. 1064, 13 L. J. Ch. 470, 25 Eng. Ch. 568, 67 Eng. Reprint 506.

Liability as surety.— In Cosgrove *v.* McKasy, 65 Minn. 426, 68 N. W. 76, it is held that the doctrine of equitable set-off cannot be extended so far as to allow a surety for a debt due to an assignee in insolvency to offset, as against it, the amount of an obligation which he has been obliged to pay as a surety for the assignor. The latter is, in every respect, a debt due to the surety from the estate; but the former is not, strictly speaking, or for the purpose of invoking the equitable powers of the court, a debt due from the surety.

As between several sureties.— Where two of five sureties upon a joint and several bond to a county, who were also indebted to their principal by a promissory note, one as principal and the other as surety, paid the county a certain amount as sureties on such bond after an assignment of the principal in the bond for the benefit of his creditors, the principal debtor in the note was not entitled to have more than one fifth of the amount due to the county on the bond offset as against the sum due on the note, upon the principle that when two or more sureties stand in the same relation to a principal they must bear the burdens of their position equally. Cosgrove *v.* McKasy, 65 Minn. 426, 68 N. W. 76.

94. Crampton *v.* Walker, 3 E. & E. 321, 7 Jur. N. S. 43, 30 L. J. Q. B. 19, 9 Wkly. Rep. 98, 107 E. C. L. 321.

95. **Extent of recovery** see *infra*, IX, B, 5, h, (II), (B).

96. Burns *v.* Parish, 3 B. Mon. (Ky.) 8; Lord *v.* Staples, 23 N. H. 448; Pearson *v.* Parker, 3 N. H. 366; Hulett *v.* Soullard, 26 Vt. 295.

Where a surety of an administrator succeeds him, owing to a breach of the bond, and indorses upon the bond a receipt of the money due thereon as money received from himself as surety, and has charged himself with the same in his inventory, he can maintain an action against the administrator for money paid for the use of the latter. Hazelton *v.* Valentine, 113 Mass. 472.

Payment by third person.—A surety may recover from his principals, for a payment upon their obligation made in the first instance by an outside party, and repaid to the latter by the surety (Harper *v.* McVeigh, 82 Va. 751, 1 S. E. 193), if the surety procured payment to be made by the third person, and it may be presumed that a consideration passed from the surety to such third person, it not appearing otherwise (Presly *v.* Donaldson, 33 Miss. 92).

Replevy bond.—A surety replevying the debt of his principal by a valid replevy bond extinguishes the judgment, and can proceed against the principal as if actual payment in money had been made. Lucas *v.* Chamberlain, 8 B. Mon. (Ky.) 276; Burns *v.* Parish, 3 B. Mon. (Ky.) 8.

Surety as administrator of principal's estate see *supra*, IX, B, 4, a, (II).

97. *Iowa.*— Dennison *v.* Soper, 33 Iowa 183.

Missouri.— Hearne *v.* Keath, 63 Mo. 84.

New Hampshire.— Child *v.* Eureka Powder Works, 44 N. H. 354.

South Carolina.— Woodbridge *v.* Scott, 3 Brev. 193.

United States.— Pigou *v.* French, 19 Fed. Cas. No. 11,161, 1 Wash. 278; Whetmore *v.* Murdock, 29 Fed. Cas. No. 17,510, 3 Woodb. & M. 390.

See 40 Cent. Dig. tit. "Principal and Surety," § 510.

Evidence of payment see *infra*, IX, B, 5, g.

98. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575; Goodall *v.* Wentworth, 20 Me. 322; Smith *v.* Harry, 91 Pa. St. 119.

A payment cannot be said to be voluntary, so long as the obligation is enforceable. Randolph *v.* Randolph, 3 Rand. (Va.) 490.

Payments which support surety's right — *Without demand or suit.*— Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131; May *v.* Ball, 108 Ky. 180, 56 S. W. 7, 21 Ky. L. Rep. 1673; Rudd *v.* Hanna, 4 T. B. Mon. (Ky.) 528; Gates *v.* Renfroe, 7 La. Ann. 569; Hichborn *v.* Fletcher, 66 Me. 209, 22 Am. Rep. 562; Hazelton *v.* Valentine, 113 Mass. 472; Rawson *v.* Rawson, 105 Mass. 214; Odlin *v.* Greenleaf, 3 N. H. 270; Hazen *v.* Darling, 2 N. J. Eq. 133 (holding that after the return of *nulla bona* upon an execution against administrators, the administration bond is forfeited, and the surety has a right to satisfy the execution with or without suit upon the bond); Wharton *v.* Woodburn, 20 N. C. 647; Linn *v.* McClelland, 20 N. C. 596; Williams *v.* Williams, 5 Ohio 444; Winchester *v.* Beardin, 10 Humphr. (Tenn.) 247, 51 Am. Dec. 702; Pitt *v.* Pursord, 5 Jur. 611, 10 L. J. Exch. 475, 8 M. & W. 538.

Before judgment rendered.—Howe *v.* White,

promise with the creditor which does not injure the rights of the principal,[99] or because payment was made without request [1] or permission [2] from the principal to pay, or although the surety does not notify the principal of his intention to pay.[3]

(B) *As Affected by Character of Instrument.* The right of the surety to reimbursement is not affected by the fact that the bond on which payment was made could not have been exacted of the principal by the obligee [4] or by objections to the sufficiency of the instrument which the principal is estopped to set up.[5]

(C) *Where There Was no Legal Obligation to Pay.* A surety cannot recover from his principal for a payment made, if the surety was not under any legal obligation to make it,[6] or if he or the principal had been discharged or released

162 Ind. 74, 69 N. E. 684; Butler *v.* Haynes, 3 N. H. 21.

Before execution issues.— Stallworth *v.* Preslar, 34 Ala. 505.

To avoid seizure and arrest see Montgomery *v.* Russell, 10 La. 330; Anonymous, Cary 19, 21 Eng. Reprint 10.

Before maturity of debt.— Graham *v.* King, 15 Ala. 563; Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; Barber *v.* Gillson, 18 Nev. 89, 1 Pac. 452. See also Wiggin *v.* Flower, 5 Rob. (La.) 406, under statute. But he cannot recover from the principal until the debt becomes due. White *v.* Miller, 47 Ind. 385; Schick *v.* Ott, 27 Ohio Cir. Ct. 697.

Where bail make payment after a judgment in their favor has been reversed on appeal and the cause remanded, they can recover from their principal. Stevens *v.* Hay, 61 Ill. 399. But see in this connection *infra*, IX, B, 5, f, (IV).

That the principal had a demand against the creditor, of which the surety did not take advantage, is no ground of objection to the surety's right to recover reimbursement of the principal. Rawson *v.* Rawson, 105 Mass. 214, holding that evidence of such demand is immaterial because if the surety had been sued separately he could not set off a demand due the principal, and if the principal and surety had been sued jointly the demand in favor of one of them could not be set off.

99. Martin *v.* Ellerbe, 70 Ala. 326. Evidence that their principal refused to have anything to do with getting his account closed; that he said if the bondsmen wanted to make a settlement they could do as they pleased, and that he would not have anything to do with it; that the sureties made settlement, and that objections to the account were withdrawn, was held admissible, and the principal was held bound by the settlement. Bleakley *v.* Adelman, 27 Pa. Super. Ct. 21.

1. Clanton *v.* Coward, 67 Cal. 373, 7 Pac. 787 (distinguishing cases of payment at request and without legal obligation); White *v.* Miller, 47 Ind. 385.

2. Hazelton *v.* Valentine, 113 Mass. 472.

3. Gates *v.* Renfroe, 7 La. Ann. 569; Moncure *v.* Dermott, 13 Pet. (U. S.) 345, 10 L. ed. 193 [*reversing* 17 Fed. Cas. No. 9,707, 5 Cranch. C. C. 445].

4. Frith *v.* Sprague, 14 Mass. 455.

That a bond is not a good statutory bond will not defeat liability if it is a valid and binding common-law obligation. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575.

5. Bates *v.* Merrick, 2 Hun (N. Y.) 568, holding that where an insufficient undertaking given upon an appeal has been accepted and received as proper and lawful, and the proceedings stayed by virtue of it, the principal is estopped from questioning its validity in an action by the sureties.

6. Smith *v.* Staples, 49 Conn. 87; Hollinsbee *v.* Ritchey, 49 Ind. 261; Sponhaur *v.* Malloy, 21 Ind. App. 287, 52 N. E. 245; Gray *v.* Bowls, 18 N. C. 437, holding that as the obligation of a forthcoming bond is only that the property shall be delivered to the officer, and not that the execution shall be satisfied, a surety on such bond who pays the execution without request of the principal cannot recover the money from the latter.

Before accounting.— Before legal liability arises the surety cannot voluntarily pay moneys which may never be due from him or his principal, as where an accounting by the principal in a trust capacity may be necessary to fix liability. See Richardson *v.* Day, 20 S. C. 412. And as to condition precedent to action on bonds see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1280; GUARDIAN AND WARD, 21 Cyc. 240. But the parties interested may occupy such relations as to estop themselves to object that the payment was made before such accounting. Richardson *v.* Day, 20 S. C. 412, holding that where an intestate's wards, who were also her heirs at law, asserted a liability against a surety on the guardianship bond and accepted a settlement from such surety, in an action afterward brought by the surety to subject the lands of the deceased guardian to the repayment of the amounts so paid by him, these wards and heirs at law are estopped from objecting that the surety was not liable until after an accounting by the guardian.

Payment to improper person.—A surety cannot recover from the principal for a payment made to an improper person as to a guardian of a different fund. Strickler's Estate, 11 Lanc. Bar (Pa.) 107.

Rights to security.— If the surety is not liable for the debt, he cannot acquire any rights to security, by making payment. Smith *v.* McGehee, 14 Ala. 404 (where principal had paid and surety had been notified not to pay); Roe *v.* Kiser, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288; Howe *v.* White, 162 Ind. 74, 69 N. E. 684.

Ignorance of facts.—A payment will not be merely voluntary if the surety was ignorant

from liability,[7] and the payment was made with knowledge of the facts.[8] And while the principal must have been bound legally for the debt,[9] it is held that if the creditor can hold the surety, it will not necessarily be a defense to the principal that the latter could not be compelled by the creditor to pay the debt,[10] and where the creditors, in a composition deed, have released the principal, but stipulate for a reserve of remedies against sureties, the latter, having been compelled to pay the debt, can recover from the principal.[11] A part only of the payment by the surety may be voluntary, within the inhibition against payment where there is no legal liability in which case he can recover for the part only which was not voluntary.[12]

(D) *Waiver of Objection or Defense by Surety.* The surety is not compelled to take

of the facts constituting a defense (Turman *v.* Looper, 42 Ark. 500; Gasquet *v.* Oakey, 19 La. 76; Thompson *v.* Wilson, 13 La. 138; Stinson *v.* Brennan, Cheves (S. C.) 15), and could not have discovered them with due diligence (Hichborn *v.* Fletcher, 66 Me. 209, 22 Am. Rep. 562; Hyde *v.* Miller, 168 N. Y. 590, 60 N. E. 1113 [*affirming* 45 N. Y. App. Div. 396, 60 N. Y. Suppl. 974]).

Debt barred by limitation see *infra*, IX, B, 4, c, (II), (D).

Payment by principal see *infra*, IX, B, 5, f, (V).

7. Spilman *v.* Smith, 15 B. Mon. (Ky.) 123; Kimble *v.* Cummins, 3 Metc. (Ky.) 327; Hatchett *v.* Pegram, 21 La. Ann. 722; Randolph *v.* Randolph, 3 Rand. (Va.) 490.

Where the principal has been discharged by an alteration without his consent, such alteration being the addition of the signature of the surety, the latter cannot recover from the estate of the principal, as payment by the surety was not of any benefit to the estate. Windle *v.* Williams, 18 Ind. App. 158, 47 N. E. 680.

Dismissal of suit as to others than principals.— Where a transfer of goods was attacked as in fraud of creditors, and the goods were attached, and the buyer gave a replevin bond for the release of the goods, on which complainants were sureties, the fact that the attachment was dismissed as to the alleged fraudulent transferrer but continued as to others did not require a dismissal of a suit by such sureties, who afterward had been compelled to pay a liability under the replevin bond, as against their principal, since the transferee was the principal in the attachment litigation, so far as the sureties were concerned, and dismissal as to the transferrer was immaterial. Shapira *v.* Paletz, (Tenn. Ch. App. 1900) 59 S. W. 774.

Time to sue and limitation see *infra*, IX, B, 5, c.

8. *Arkansas.*— Roe *v.* Kiser, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288.

Georgia.— Jones *v.* Joyner, 8 Ga. 562; Hargraves *v.* Lewis, 3 Ga. 162.

Indiana.— Sponhaur *v.* Malloy, 21 Ind. App. 287, 52 N. E. 245.

Massachusetts.— Bancroft *v.* Abbott, 3 Allen 524, holding that a payment by a surety, made with knowledge of the facts, although under the mistaken belief that he was bound to make it, is voluntary, and the surety cannot recover it back.

Missouri.— Noble *v.* Blount, 77 Mo. 235.

Ohio.— Davis *v.* Kelley, 5 Ohio Dec. (Reprint) 30, 1 Am. L. Rec. 479; Riddle *v.* Canby, 2 Ohio Dec. (Reprint) 586, 4 West. L. Month. 124.

See 40 Cent. Dig. tit. "Principal and Surety," § 524 *et seq.*

9. Hollinsbee *v.* Ritchey, 49 Ind. 261.

Obligation terminated by death.—As a bond given by a husband for the board and expenses of his wife is terminated by his death, a surety on such bond cannot recover from his estate for payments made thereafter. Stinson *v.* Prescott, 15 Gray (Mass.) 335.

Failure of principal to defend.— If, when the surety is sued alone, he notifies the principal to defend, and, the latter failing to defend, a judgment is recovered against the surety which he pays, he can recover from the principal whether the latter was actually liable or not. Dampskibsaktieselskabet Habil *v.* U. S. Fidelity, etc., Co., 142 Ala. 663, 39 So. 54.

10. Lane *v.* Moon, (Tex. Civ. App. 1907) 103 S. W. 211.

Thus as against the estate of a principal, where the creditor does not present his claim within the time designated by statute, a surety, paying the debt, may recover indemnity from the estate. Hooks *v.* Mobile Branch Bank, 8 Ala. 580; Miller *v.* Woodward, 8 Mo. 169; Sibley *v.* McAllaster, 8 N. H. 389; Reeves *v.* Pulliam, 9 Baxt. (Tenn.) 153; Marshall *v.* Hudson, 9 Yerg. (Tenn.) 57; Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842 [*modifying* (Civ. App. 1897) 38 S. W. 1141].

Discharge of principal see *supra*, VIII.

11. Kearsley *v.* Cole, 16 L. J. Exch. 115, 16 M. & W. 128.

12. Lucking *v.* Gegg, 12 Bush (Ky.) 298; Tennell *v.* Dozier, Hard. (Ky.) 47.

Interest for which he and the principal were not liable is not recoverable. Jones *v.* Joyner, 8 Ga. 562 (as payment of usury where the creditor could not have recovered the usury); Minus *v.* McDowell, 4 Ga. 182; Lucking *v.* Gegg, 12 Bush (Ky.) 298; Davis *v.* Kelley, 5 Ohio Dec. (Reprint) 30, 1 Am. L. Rec. 479; Butcher *v.* Churchill, 14 Ves. Jr. 567, 33 Eng. Reprint 638.

When deductions should have been made, but the surety pays the full amount, he cannot recover from the principal for the amount in excess of that properly due. Washburn *v.* Pond, 2 Allen (Mass.) 474.

advantage of every technical objection.[13] And he can waive a personal defense,[14] such as incapacity from coverture,[15] or a change in the contract between the creditor and the principal.[16] If the surety pays after the debt is barred both as to him and to his principal, he cannot recover;[17] but if the debt is not barred as to the principal, the surety can waive the statute of limitations for himself, and payment under such circumstances will not be voluntary.[18] So the rule permitting the surety to waive defenses is applied to the defense of the statute of frauds; he may pay the debt, although his promise was not in writing, and recover the amount from the principal.[19]

(III) *By Note, Draft, or Other Obligation.* Payment may be sufficient by the passing of negotiable security,[20] and payment will be deemed to have been made by the surety if he gives his own note,[21] although before payment of this latter note,[22] or draft,[23] to the creditor,[24] unless something remains to be done to carry his engagement into effect.[25]

(IV) *Satisfaction in or by Levy on Property.* So it is held sufficient

13. Reynolds *v.* Harral, 2 Strobh. (S. C.) 87.

14. Parker *v.* Rochester, 4 Johns. Ch. (N. Y.) 329, holding that a surety on notes which were discounted by an insurance company not having any authority to discount them, and which, by statute, were void in the hands of such company, was not bound to take advantage of the defense given by statute, and was therefore entitled to any security given him by his principal.

15. Ricketson *v.* Giles, 91 Ill. 154.

16. Simmons *v.* Goodrich, 68 Ga. 750.

17. Stone *v.* Hammell, 83 Cal. 547, 23 Pac. 703, 17 Am. St. Rep. 272, 8 L. R. A. 425; May *v.* Ball, 108 Ky. 180, 56 S. W. 7, 21 Ky. L. Rep. 1673; Hatchett *v.* Pegram, 21 La. Ann. 722; Randolph *v.* Randolph, 3 Rand. (Va.) 490.

18. Shaw *v.* Loud, 12 Mass. 447; McClatchie *v.* Durham, 44 Mich. 435, 7 N. W. 76, when principal keeps the debt alive as to himself.

19. Godden *v.* Pierson, 42 Ala. 370; Beal *v.* Brown, 13 Allen (Mass.) 114; Cahill *v.* Bigelow, 18 Pick. (Mass.) 369; Lee *v.* Stowe, 57 Tex. 444.

20. Lucas *v.* Chamberlain, 8 B. Mon. (Ky.) 276.

21. *Arkansas.*— Neale *v.* Newland, 4 Ark. 506, 38 Am. Dec. 42.

California.— Stone *v.* Hammell, (1889) 22 Pac. 203, holding further that a surety contributing to his cosurety by giving his own note is entitled to reimbursement from the principal.

Georgia.— Flannagan *v.* Forrest, 94 Ga. 685, 21 S. E. 712; Mims *v.* McDowell, 4 Ga. 182.

Massachusetts.— Day *v.* Stickney, 14 Allen 255.

New Hampshire.— Pearson *v.* Parker, 3 N. H. 366.

New York.— Howe *v.* Buffalo, etc., R. Co., 37 N. Y. 297 [*affirming* 38 Barb. 124]; Elwood *v.* Deifendorf, 5 Barb. 398; Auerbach *v.* Rogin, 40 Misc. 695, 83 N. Y. Suppl. 154; Witherby *v.* Mann, 11 Johns. 518.

North Carolina.— Brooks *v.* King, 46 N. C. 45.

Texas.— Boulware *v.* Robinson, 8 Tex. 327, 58 Am. Dec. 117.

Vermont.— Prescott *v.* Newell, 39 Vt. 82; Whipple *v.* Briggs, 28 Vt. 65.

See 40 Cent. Dig. tit. "Principal and Surety," § 546.

A non-negotiable note, however, will not be regarded as payment. Romine *v.* Romine, 59 Ind. 346; Bennett *v.* Buchanan, 3 Ind. 47; Pitzer *v.* Harmon, 8 Blackf. (Ind.) 112, 44 Am. Dec. 738; Boulware *v.* Robinson, 8 Tex. 327, 58 Am. Dec. 117.

Acceptance as payment.— But it has been held that it must also be shown that the creditor accepted such note as payment in discharge of the original debt. White *v.* Miller, 47 Ind. 385; Leutell *v.* Getchell, 59 Me. 135.

Note uncollectable.— It is not a matter to be raised by the principal that the surety's note, which was accepted as a payment by the creditor, is uncollectable either by reason of some inherent defect, as that it was not properly stamped, or because of the surety's insolvency. Hardin *v.* Branner, 25 Iowa 364.

Sufficiency of payment generally in this respect see PAYMENT, 30 Cyc. 1194.

22. Auerbach *v.* Rozin, 40 Misc. (N. Y.) 695, 83 N. Y. Suppl. 154; Boulware *v.* Robinson, 8 Tex. 327, 58 Am. Dec. 117. See also the cases cited *supra*, note 21.

23. Sapp *v.* Aiken, 68 Iowa 699, 28 N. W. 24, holding that a surety on a bond for costs is entitled to sue the principal when he has delivered a draft on the principal, signed by himself, which was accepted by the clerk as payment, and the bond is discharged, although the draft afterward is dishonored.

24. **Joining in new bond with principal.**— But a surety in a bond for bankrupts after they obtain their certificate, joining with them in a new bond to the representatives of the creditor, and the old bond being delivered up to the surety, is not equivalent to payment by him so as to enable him to prove under the commission. *Ex p.* Sergeant, 1 Glyn & J. 183 [*affirmed* in 2 Glyn & J. 23].

25. Hearne *v.* Keath, 63 Mo. 84, as where

to entitle the surety to recover from the principal that he has satisfied the debt in property, such as land,[26] or by a mortgage,[27] or that it has been satisfied by levy upon his property,[28] or by a judicial sale under a decree enforcing a judgment for the secured debt.[29]

(v) *Part Payments.* A surety who has paid any part of the indebtedness can maintain an action for the amount paid.[30] The right is not affected by the intent with which such partial payment was made,[31] nor by the fact that the principal paid a part of the indebtedness, and that, on payment of the balance by the surety, he took an assignment of the claim against the principal.[32]

d. Purchase of Property at Execution Sale. If property of the surety is sold on execution for the debt of the principal, the latter, by buying it, cannot acquire title thereto,[33] unless the surety permits such purchase in fraud of his own creditors;[34] and if there are two or more principals, a purchase by one of them inures

by the agreement between the creditor and surety the latter is to pay accrued interest.

26. Lord *v.* Staples, 23 N. H. 448; Bonney *v.* Seely, 2 Wend. (N. Y.) 481; Ainslie *v.* Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532.

Action for money paid see Money Paid, 27 Cyc. 832.

Extent of recovery see *infra*, IX, B, 5, h, (II), (B).

27. Fahey *v.* Frawley, L. R. 26 Ir. 78; McVicar *v.* Royce, 17 U. C. Q. B. 529 (before the mortgage falls due); Trites *v.* Kelly, Trin. T. 1833. *Contra*, Bennett *v.* Buchanan, 3 Ind. 47.

28. Kershaw *v.* New York Merchants' Bank, 7 How. (Miss.) 386, 40 Am. Dec. 70 (levy on the property of surety on forfeited forthcoming bond, *prima facie* satisfaction of the judgment); Lord *v.* Staples, 23 N. H. 448 (holding that where land of the surety was levied on, although at his request, he can recover from his principal after they have given a new note for the debt, if the title remains in the creditor); Hulett *v.* Soullard, 26 Vt. 295.

Goods which surety had sold.— Where a surety sues for money paid by a sale of his goods on execution, the principal can show that the surety, before such sale, had sold the goods to another who recovered them from the buyer at the sheriff's sale. Head *v.* McDonald, 7 T. B. Mon. (Ky.) 203.

Loss of benefit of payment.— Where a surety whose land had been sold on execution for the debt of his principal, and who had a right to redeem, mortgaged it without referring to the execution, and upon a bill by the mortgagee, which was silent as to the execution sale and to which the surety and the execution purchaser were parties, but never answered, the land was sold to satisfy the mortgage, it was held that the sale was for the debt of the mortgagor and that the benefit of the execution sale was withdrawn and lost to the principal and the claim of the surety on his principal was extinguished. Jarvis *v.* Whitman, 12 B. Mon. (Ky.) 97.

29. Harper *v.* McVeigh, 82 Va. 751, 1 S. E 193.

Land fraudulently conveyed by surety.— The surety's right to enforce a mortgage upon real estate given to him by his principal by way of indemnity is not affected by the fact that the land subjected to the payment of the judgment against the principal and the surety had been fraudulently conveyed by the surety and had been reached by a suit in equity in which the conveyance was declared void. State Bank *v.* Davis, 4 Ind. 653.

30. *Alabama.*— Carroll *v.* Corbitt, 57 Ala. 579.

Indiana.— Stearns *v.* Irwin, 62 Ind. 558; Ritenour *v.* Mathews, 42 Ind. 7.

Iowa.— Wilson *v.* Crawford, 47 Iowa 469.

Louisiana.— Pickett *v.* Bates, 3 La. Ann. 627; Newman *v.* Goza, 2 La. Ann. 642.

Maryland.— Bullock *v.* Campbell, 9 Gill 182, where it is said upon the authority of Pownal *v.* Ferrand, 6 B. & C. 439, 9 D. & R. 603, 5 L. J. K. B. O. S. 176, 30 Rev. Rep. 394, 13 E. C. L. 203, that several suits may be brought if the surety is obliged to make several payments.

Nebraska.— Minick *v.* Huff, 41 Nebr. 516, 59 N. W. 795.

Texas.— Boulware *v.* Robinson, 8 Tex. 327, 58 Am. Dec. 117.

England.— Pownal *v.* Ferrand, 6 B. & C. 439, 9 D. & R. 603, 5 L. J. K. B. 176, 30 Rev. Rep. 394, 13 E. C. L. 203; Briant *v.* Pilcher, 16 C. B. 354, 1 Jur. N. S. 1020, 3 Wkly. Rep. 483, 81 E. C. L. 354; Davis *v.* Humphreys, 9 L. J. Exch. 153, 6 M. & W. 153.

See 40 Cent. Dig. tit. "Principal and Surety," § 548.

Control of judgment against principal.—A surety paying part only of the debt is not entitled to control it as against the principal. Bridges *v.* Nicholson, 20 Ga. 90.

Proof of claim in bankruptcy see Bankruptcy, 5 Cyc. 227.

31. Hall *v.* Hall, 10 Humphr. (Tenn.) 352, holding that the surety can recover for the part paid, although his object in making a partial payment was to reduce the amount so as to bring it within the jurisdiction of a justice.

32. Cook *v.* Landrum, 82 S. W. 585, 26 Ky. L. Rep. 813.

33. Madgett *v.* Fleenor, 90 Ind. 517; Perry *v.* Yarbrough, 56 N. C. 66; Dougall *v.* Dougall, 26 Grant Ch. (U. C.) 401.

34. Pond *v.* Wadsworth, 24 Ala. 531.

to the benefit of the surety.[35] It is competent, however, for a surety to purchase the property of his principal at an execution sale, although the execution is against them jointly.[36]

5. Actions and Proceedings — a. Nature and Form of Action in General. The action by the surety against his principal for indemnity is brought on the contract implied by law,[37] and this is true notwithstanding the fact that a formal assignment of the claim has been made by the creditor either to the surety[38] or to a third person.[39] The form of the action is assumpsit[40] for money paid,[41]

35. McCollum *v.* Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480.

36. Carlos *v.* Ansley, 8 Ala. 900.

37. *Arkansas.*— Hill *v.* Wright, 23 Ark. 530.

Indiana.— Hopewell *v.* Kerr, 9 Ind. App. 11, 36 N. E. 48.

Indian Territory.— Sparks *v.* Childers, 2 Indian Terr. 187, 47 S. W. 316.

Massachusetts.— Appleton *v.* Bascom, 3 Metc. 169; Cornwall *v.* Gould, 4 Pick. 444.

Missouri.— Blake *v.* Downey, 51 Mo. 437.

New York.— Holmes *v.* Weed, 19 Barb. 128.

England.— Dugdale *v.* Lovering, L. R. 10 C. P. 196, 44 L. J. C. P. 197, 32 L. T. Rep. N. S. 155, 23 Wkly. Rep. 391; *Ex p.* Ford, 16 Q. B. D. 305, 55 L. J. Q. B. 406; Badeley *v.* Consolidated Bank, 34 Ch. D. 536, 55 L. T. Rep. N. S. 635, 35 Wkly. Rep. 136; The Orchis, 15 P. D. 38, 6 Aspin. 501, 59 L. J. P. D. & Adm. 31, 62 L. T. Rep. N. S. 407, 38 Wkly. Rep. 472; Reynolds *v.* Doyle, Drinkw. 1, 1 M. & G. 753, 2 Scott N. R. 45, 39 E. C. L. 1009; Woods *v.* Thiedemann, 1 H. & C. 478, 10 Wkly. Rep. 846; Bridgeman *v.* Daw, 40 Wkly. Rep. 253.

Canada.— Canada Exch. Bank *v.* Springer, 29 Grant Ch. (U. C.) 270.

See 40 Cent. Dig. tit. "Principal and Surety," § 568. And see *supra*, IX, B, 4, a, (I); IX, B, 4, c.

The jurisdiction of the particular court is to be determined as of the time when the surety paid. Smith *v.* Moore, 63 N. C. 138, holding that where a surety paid in 1866 a note executed in 1861, his claim against the principal is not within the ordinance of June, 1866, conferring exclusive jurisdiction on the superior courts of all contracts made prior to May 1, 1865.

Retention of funds by executor or administrator see *supra*, IX, B, 4, a, (II).

38. Katz *v.* Moessinger, 110 Ill. 372; Boyd *v.* Beville, 91 Tex. 439, 44 S. W. 287; McDaniel *v.* Riggs, 16 Fed. Cas. No. 8,745, 3 Cranch C. C. 167.

Action not on original claim or evidence of debt.— The action is on the implied contract and not on the original claim or evidence of indebtedness. Fitch *v.* Hammer, 17 Colo. 591, 31 Pac. 336; Cameron *v.* Warbritton, 9 Ind. 351; Goodwin *v.* Davis, 15 Ind. App. 120, 43 N. E. 881; Harrah *v.* Jacobs, 75 Iowa 72, 39 N. W. 187, 1 L. R. A. 152; Nutall *v.* Brannin, 5 Bush (Ky.) 11 (holding that where the action is brought against a personal representative, the affidavits required by law in such cases should be made to the account, as the action is not on the original note secured); Crisfield *v.* State, 55 Md. 182; Hollingsworth *v.* Floyd, 2 Harr. & G. (Md.) 87; Frevert *v.* Henry, 14 Nev. 191; Boyd *v.* Beville, 91 Tex. 439, 44 S. W. 287; Holliman *v.* Rogers, 6 Tex. 91; Miller *v.* Zeigler, 3 Utah 17, 23, 5 Pac. 518, 521; Blow *v.* Maynard, 2 Leigh (Va.) 29 (where, however, there was also a release); Armitage *v.* Baldwin, 5 Beav. 278, 49 Eng. Reprint 585; Copis *v.* Middleton, 2 L. J. Ch. O. S. 82, Turn. & R. 224, 12 Eng. Ch. 224, 37 Eng. Reprint 1083; Simpkins *v.* Poulett, 2 L. J. Ch. O. S. 81; Jones *v.* Davids, 4 Russ. 277, 4 Eng. Ch. 277, 38 Eng. Reprint 810. See also, generally, Subrogation.

39. Archer *v.* Laidlaw, 135 Mich. 88, 97 N. W. 159.

40. *California.*— Chipman *v.* Morrill, 20 Cal. 130.

Connecticut.— Bunce *v.* Bunce, Kirby 137.

Maryland.— Crisfield *v.* State, 55 Md. 192.

Nevada.— Frevert *v.* Henry, 14 Nev. 191.

Texas.— Holliman *v.* Rogers, 6 Tex. 91.

United States.— Hall *v.* Smith, 5 How. 96, 12 L. ed. 66.

England.— Woffington *v.* Sparks, 2 Ves. 569, 28 Eng. Reprint 363.

See 40 Cent. Dig. tit. "Principal and Surety," § 568.

41. *Alabama.*— Martin *v.* Ellerbe, 70 Ala. 326.

Arkansas.— Neale *v.* Newland, 4 Ark. 506, 38 Am. Dec. 42.

Connecticut.— Ward *v.* Henry, 5 Conn. 595, 13 Am. Dec. 119; Bunce *v.* Bunce, Kirby 137. When the surety has been compelled to pay the judgment recovered against him and the principals for their default he has an option either to bring his action on the implied promise to indemnify, and show the payment of the judgment, as a breach of promise; or to bring his action for the money paid on the execution, as money paid at their request. Babcock *v.* Hubbard, 2 536.

Indiana.— Collins *v.* Paris, 57 Ind. 151.

Kentucky.— Nutall *v.* Brannin, 5 Bush 11; Lansdale *v.* Cox, 7 T. B. Mon. 401.

Maine.— Smith *v.* Sayward, 5 Me. 504.

Massachusetts.— Gibbs *v.* Bryant, 1 Pick. 118; Randall *v.* Rich, 11 Mass. 494; Ford *v.* Keith, 1 Mass. 139, 2 Am. Dec. 4.

New Hampshire.— Lord *v.* Staples, 23 N. H. 448; Pearson *v.* Parker, 3 N. H. 366.

New York.— Howe *v.* Buffalo, etc., R. Co. 37 N. Y. 297 [*affirming* 38 Barb. 124]; Bonney *v.* Seely, 2 Wend. 481; Ainslee *v.* Wil-

or a special action on the case,[42] the claim for reimbursement being a purely legal one, enforceable only by action, in the absence of special circumstances.[43] An express contract of indemnity between the surety and the principal does not preclude a suit on the implied contract.[44]

b. Statutory Remedies — (i) *In General.* Statutory enactments are not uncommon which give the surety more convenient remedies for enforcing his rights,[45] as found in provisions permitting him to have the suretyship established in the action against the principal, and upon payment of the judgment to file a complaint and obtain an execution against the principal;[46] or giving the surety the right to have the judgment against him and his principal stand and be enforced by execution against the principal;[47] or authorizing recovery by a surety against

son, 7 Cow. 662, 17 Am. Dec. 532; Witherby *v.* Mann, 11 Johns. 518; Powell *v.* Smith, 8 Johns. 249.

North Carolina.— Gray *v.* Bowls, 18 N. C. 437.

Pennsylvania.— Hill *v.* Voorhies, 22 Pa. St. 68; Hassinger *v.* Solms, 5 Serg. & R. 4.

Tennessee.— Lane *v.* Keith, 2 Baxt. 189.

Utah.— Miller *v.* Ziegler, 3 Utah 17, 23, 5 Pac. 518, 521.

Vermont.— Hulett *v.* Soullard, 26 Vt. 295.

See 40 Cent. Dig. tit. "Principal and Surety," § 568.

An action for money had and received will not lie. Ford *v.* Keith, 1 Mass. 139, 2 Am. Dec. 4. *Contra*, McDaniel *v.* Riggs, 16 Fed. Cas. No. 8,745, 3 Cranch C. C. 167.

A surety cannot declare in tort for the purpose of evading the bankruptcy laws. Ledbetter *v.* Torney, 33 N. C. 294.

Where an obligee gave the bond to the surety thereon, such surety could not support assumpsit against the principal for money paid, laid out, and expended by him for the use of the latter, or any of the common money counts. Butterworth *v.* Ellis, 6 Leigh (Va.) 106.

Manner of payment to support action see *supra*, IX, B, 4, c, (I) *et seq.* And see, generally, Money Paid, 27 Cyc. 832.

42. Woffington *v.* Sparks, 2 Ves. 569, 28 Eng. Reprint 363.

43. Martin *v.* Ellerbe, 70 Ala. 326. But see Hite *v.* Campbell, 10 B. Mon. (Ky.) 80.

Deceased principal on joint obligation.— The remedy may be by bill in equity where the surety on a joint obligation seeks to recover from the estate of a deceased principal. Barnes *v.* Shinneberger, Tapp. (Ohio) 214; Mountjoy *v.* Bank, 6 Munf. (Va.) 387.

44. Gibbs *v.* Bryant, 1 Pick. (Mass.) 118, holding that suit may be upon the implied or upon the written promise, and that if the written promise contradicts the implication of law, defendant might show it.

Suit in equity.— Where a devisee of the principal debtor gave bond to indemnify the estate of the surety, in which bond one of the executors of the surety became surety in his individual character, and the creditor recovered judgment in the federal court against the executors of the surety, and he who had become surety of the devisee paid it, and the bond of the devisee was in the hands of one of the obligees therein, who was out of the state, and refused to give it up to the executors, it was held that a bill against the devisee by the surety to recover the money so paid was within the jurisdiction of a court of chancery. Cabell *v.* Megginson, 6 Munf. (Va.) 202.

45. See the statutes of the various states.

Accommodation indorsers of a promissory note governed by the law merchant have been held not to be sureties within a statute relating to "remedies of sureties against their principals." Gordon *v.* Southern Bank, 19 Ind. 192.

46. Zimmerman *v.* Ganmer, 152 Ind. 552, 53 N. E. 829; Smith *v.* Harbin, 124 Ind. 434, 24 N. E. 1051; Stout *v.* Duncan, 87 Ind. 383; Scherer *v.* Schutz, 83 Ind. 543; Boys *v.* Simmons, 72 Ind. 593; Dodge *v.* Dunham, 41 Ind. 186; Laval *v.* Rowley, 17 Ind. 36.

If sureties pay a judgment before the question of suretyship is determined, such question may be tried and determined by the court in which the original judgment was rendered, in a proper proceeding, after such payment. Oglebay *v.* Todd, 166 Ind. 250, 76 N. E. 238; Montgomery *v.* Vickery, 110 Ind. 211, 11 N. E. 38; Stout *v.* Duncan, 87 Ind. 383; Richardson *v.* Howk, 45 Ind. 451; McClure *v.* Lucas, 2 Ind. App. 32, 28 N. E. 153.

Before payment see *supra*, IX, B, 3, a.

47. *Georgia.*— Ezzard *v.* Bell, 100 Ga. 150, 28 S. E. 28; Davenport *v.* Hardeman, 5 Ga. 580. But the judgment should show the relation. Patterson *v.* Clark, 101 Ga. 214, 28 S. E. 623.

Kentucky.— Duke *v.* Pigman, 110 Ky. 756, 62 S. W. 867, 23 Ky. L. Rep. 209; Alexander *v.* Lewis, 1 Metc. 407.

Mississippi.— Dibrell *v.* Dandridge, 51 Miss. 55.

Nebraska.— Drexel *v.* Pusey, 57 Nebr. 30, 77 N. W. 351.

Ohio.— Hill *v.* King, 48 Ohio St. 75, 26 N. E. 988; Peters *v.* McWilliams, 36 Ohio St. 155.

Texas.— Hall *v.* Taylor, (Civ. App. 1906) 95 S. W. 755; Tarlton *v.* Orr, 40 Tex. Civ. App. 410, 90 S. W. 534, holding that the question of suretyship must be settled in that action.

Canada.— Potts *v.* Leask, 36 U. C. Q. B. 476, holding that under the statute controlling a defendant could not issue an execution in the name of plaintiff against the other defendant for one half of the amount paid, without applying to plaintiff or tender-

his principal, whenever judgment is rendered against the surety, even though such judgment remains unpaid.[48] So a summary remedy is provided sometimes,[49] by motion for judgment against the principal and in favor of the surety who has been charged,[50] upon notice to the principal,[51] and, as in other instances of summary remedies, such statutes are construed strictly, and the requirements thereof must be strictly pursued.[52]

(II) *ATTACHMENT.*[53] Since upon payment by the surety he becomes a creditor of the principal,[54] he is not entitled to an attachment against his principal's property before that time.[55] After payment of the debt by the surety he may have

ing him any indemnity; and an execution so issued will be set aside.

See 40 Cent. Dig. tit. "Principal and Surety," § 577 *et seq.*

The remedy given accepters, indorsers, or guarantors is held not to extend to a surety maker of a note. Harris *v.* Harris, 92 Ill. App. 455.

Partial payment.— So much of the judgment as remains unsatisfied may be prosecuted to execution for the benefit of a surety who has made any payment which is applied on the judgment. Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780.

Such a statute extends to the legal representatives of deceased sureties. Harris *v.* Wynne, 4 Ga. 521.

48. Purviance *v.* Sutherland, 2 Ohio St. 478.

49. See the statutes of the various states.

Jurisdiction.— In Elliott *v.* Clements, 5 Ala. 470, under a statute providing for judgment in favor of the surety when he is sued, upon notice to the principal, it is held that the motion must be made in the court where the original judgment was recovered. But in Hall *v.* Tompkins, 9 Humphr. (Tenn.) 592, the statute in that state was held to give the right to the surety to move in the circuit court of any county other than that in which the judgment against the surety was rendered.

50. Grimes *v.* Nolen, 3 Humphr. (Tenn.) 412. Newnan *v.* Campbell, Mart. & Y. (Tenn.) 63.

Where a surety has paid several sums, he may maintain as many motions and recover several judgments against his principal. Ayres *v.* Lewellin, 3 Leigh (Va.) 609. See also *infra*, IX, B, 5, h.

On confessed judgment.—A surety is entitled to the summary remedy, although he confessed judgment without service of process. Roberts *v.* Rose, 2 Humphr. (Tenn.) 145; Newnan *v.* Campbell, Mart. & Y. (Tenn.) 63. But see Riley *v.* Stallworth, 56 Ala. 481.

Judgment against the principal's estate may be entered on such motion where the administrator is a party to the action. Whiteside *v.* Latham, 2 Coldw. (Tenn.) 91.

51. Brown *v.* Wheeler, 3 Ala. 287 (holding that notice should be given to the principal of proceedings against the surety although not provided for by the statute); Scott *v.* Bradford, 5 Port. (Ala.) 443 (notice to principal when the surety is sued alone).

Notice not required.— In Tennessee the statute giving a summary remedy against the principal by judgment over in favor of the surety, not having provided for notice to the principal it was held that no notice was necessary. Newman *v.* Campbell, Mart. & Y. (Tenn.) 63; Williams *v.* Greer, 4 Hayw. (Tenn.) 235. But such statute is held to be operative only within the state where passed, and not to empower citizens of such state to obtain judgments against non-residents without notice. McNairy *v.* Bell, 5 Rob. (La.) 418.

Service.— Notice may be served on the principal in another county. Herndon *v.* Mason, 4 J. J. Marsh. (Ky.) 575.

Sufficiency.— A notice is sufficient if it is certain to a common intent (Pait *v.* Pait, 19 Ala. 713; Dorsey *v.* Beall, Hard. (Ky.) 564), is in substantial compliance with the statute (Bragg *v.* Cason, 4 Ind. 632), and apprises the principal of the ground of the motion (Graves *v.* Webb, 1 Call (Va.) 443).

52. Vanderveer *v.* Ware, 65 Ala. 606; Elliott *v.* Clements, 5 Ala. 470; Brown *v.* Wheeler, 3 Ala. 287; Dibrell *v.* Dandridge, 51 Miss. 55; Voorhies *v.* Dickson, 1 Sneed (Tenn.) 348; Frost *v.* Rucker, 4 Humphr. (Tenn.) 57; McNairy *v.* Eastland, 10 Yerg. (Tenn.) 310; Bacchus *v.* Gee, 2 Leigh (Va.) 68, denying right under the particular statute to proceed by motion for judgment against devisees.

The remedy of a surety on a bond, bill, or note "for the payment of money or delivery of property" is held not to extend to sureties on bonds given to secure the performance of private official trusts. State *v.* Darby, 11 Mo. App. 528.

Bail was held not to be security under a statute giving a summary remedy to a surety against whom judgment has been rendered, who has paid the debt of the principal. Worley *v.* Taylor, Ky. Dec. 344. But it was held otherwise under the statute in Tennessee. Scott *v.* Lanhan, 8 Yerg. (Tenn.) 420.

A surety for the stay of execution is held not to be a surety within the summary remedy statute in Tennessee. Judgment against the stayor is not a judgment on the original cause of action against the principal or on any preëxisting liability. Frost *v.* Rucker, 4 Humphr. (Tenn.) 57.

Record must show relation.— In Brown *v.* Oldham, Walk. (Miss.) 493, it was held that under the statute controlling, to entitle a surety to recover on motion, the record should show facts indicating the relation.

53. See, generally, ATTACHMENT, 4 Cyc. 368.

54. See *supra*, IX, B, 3, a; IX, B, 4, a.

55. Bannon *v.* Barnett, 7 La. Ann. 105

an attachment.[56] And under various statutes the surety is given the remedy by attachment before payment, or even before the debt is due, as a means of enforcing indemnity against loss by reason of his suretyship.[57]

(III) *Statutes Not Exclusive.* Statutory remedies of the surety are held to be cumulative and they do not exclude such common-law remedy as might have been available to the surety before the statute.[58]

c. Time to Sue and Limitations. As the surety cannot bring an action against his principal on the implied promise for reimbursement until payment by the former,[59] the statute of limitations begins to run from that time.[60] So if the

(holding that the curator of a surety on a bond cannot maintain an attachment against the principal thereon, unless the surety has made a payment; payments by a cosurety are immaterial); Hearne *v.* Keath, 63 Mo. 84 (holding that the statute authorizing an attachment in some instances, where the debt is not due, contemplates that to warrant the proceeding, there must be an actual subsisting debt, which will become due by the efflux of time, and does not give a surety on a note the right to an attachment); Newell *v.* Morrow, 9 Wyo. 1, 59 Pac. 429.

56. Scott *v.* Doneghy, 17 B. Mon. (Ky.) 321.

Note indorsed to surety.— Where the payee of a note indorses the same before maturity to a surety thereon, the surety is entitled to an attachment if the payee could have obtained one. Danker *v.* Jacobs, 79 Nebr. 435, 112 N. W. 579. But see otherwise in Fitch *v.* Hammer, 17 Colo. 591, 31 Pac. 336, where the note was indorsed to the surety after maturity.

Attachment of guardian.— A remedy by attachment of a delinquent guardian to enforce the delivery of the estate by him to his successor does not extend to justify such attachment in favor of a surety who has made good the deficiencies of a removed guardian, the claim of such surety not differing from any original debt for which no arrest can be made. Noll's Estate, 5 Pa. Dist. 716.

57. *Arkansas.*— Rice *v.* Dorrian, 57 Ark. 541, 22 S. W. 213 (holding that an indorser is not a surety under such statute); Uptmoor *v.* Young, 57 Ark. 528, 22 S. W. 169 (which cases are under the statute giving the surety the right to sue for indemnity before the obligation is due, and without having paid the same, whenever any grounds exist upon which an attachment may issue, and which statute was held to create no new right but to secure and make more effectual the equitable right to exoneration).

Kentucky.— Patterson *v.* Caldwell, 1 Metc. 489 (holding that the remedy is available only in cases provided for by statute and the mere fact that the surety is without indemnity furnishes no ground for attachment); Rice *v.* Downing, 12 B. Mon. 44 (holding that the surety must be confined to the grounds provided for by the statute and is not a creditor); Meyer *v.* Ruff, 16 S. W. 84, 13 Ky. L. Rep. 254 (confining the right to the statutory grounds).

Ohio.— Brannin *v.* Smith, 2 Disn. 436, holding that while the surety may sustain an attachment on behalf of the creditor against the principal for a debt past due on the ground of non-residence, where the debt is not due the surety, like the creditor, is restricted to the particular ground of attachment prescribed for such cases.

Oklahoma.— Walton *v.* Williams, 5 Okla. 642, 49 Pac. 1022, where it was held that the statute changed the common-law rule under which a surety cannot sue before the debt was due.

Tennessee.— Thurman *v.* Jenkins, 2 Baxt. 426.

See 40 Cent. Dig. tit. "Principal and Surety," § 577.

A surety having mortgage security cannot sue out an attachment without alleging the insufficiency of the mortgage, but if the principal induces the surety to take out attachments, the former cannot be heard to object that there was no cause therefor. Jarboe *v.* Colvin, 4 Bush (Ky.) 70.

The affidavit must show a case provided for by the statute. Meyer *v.* Ruff, 16 S. W. 84, 13 Ky. L. Rep. 254. See also Shockley *v.* Bulloch, 18 Ga. 283, holding an affidavit sufficient.

58. *Alabama.*— Riley *v.* Stallworth, 56 Ala. 481.

Indiana.— Harker *v.* Glidewell, 23 Ind. 219.

Minnesota.— Kimmel *v.* Lowe, 28 Minn. 265, 9 N. W. 764.

Missouri.— Harper *v.* Rosenberger, 56 Mo. App. 388.

Nebraska.— Drexel *v.* Pusey, 57 Nebr. 30, 77 N. W. 351.

Ohio.— Hill *v.* King, 48 Ohio St. 75, 26 N. E. 988; Day *v.* Ramey, 40 Ohio St. 446; Peters *v.* McWilliams, 36 Ohio St. 155.

Virginia.— Tinsley *v.* Oliver, 5 Munf. 419. See also Cabell *v.* Megginson, 6 Munf. 202.

Washington.— Denny *v.* Sayward, 10 Wash. 422, 39 Pac. 119.

See 40 Cent. Dig. tit. "Principal and Surety," § 559 *et seq.*

59. See *supra*, IX, B, 3; IX, B, 4; IX, B, 5, a.

60. See Limitations of Actions, 25 Cyc. 1113.

What statute applies.— The statute which fixes the limitation of actions on simple contracts (Buckner *v.* Morris, 2 J. J. Marsh. (Ky.) 121), or contracts not in writing (Dewitt *v.* Boring, 123 Ind. 4, 23 N. E. 1085 [*following* Kreider *v.* Isenbice, 123 Ind. 10, 23 N. E. 786]; Sherrod *v.* Woodard, 15 N. C. 360, 25 Am. Dec. 714; Poe *v.* Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713) applies.

surety is compelled to pay the debt, the fact that the creditor could not have enforced it against the principal on account of the statute of limitations is not a defense when the surety sues for reimbursement.[61]

d. Parties — (I) *PLAINTIFF.* Cosureties who have not paid anything have no interest in the suit to recover back the amount paid by plaintiff.[62] The action is properly brought by the surety who makes the payment,[63] and at law sureties who have paid the debt cannot join as plaintiffs but must sue separately,[64] unless they are permitted to do so by statute,[65] or have made payment jointly.[66] So it is held that if a suit is necessary to enforce securities, cosureties are not necessary parties thereto.[67]

(II) *DEFENDANT.* Coöbligors who are principals are jointly liable to their surety,[68] but if the original liabilities of several principals are in distinct propor-

Claiming under right of creditor see SUBROGATION.

Waiver of defense see *supra*, IX, B, 4, c, (II), (D).

61. *Georgia.*— Reid *v.* Flippen, 47 Ga. 273.

Kansas.— Reed *v.* Humphrey, 69 Kan. 155, 76 Pac. 390.

Michigan.— McClatchie *v.* Durham, 44 Mich. 435, 7 N. W. 76.

Tennessee.— Marshall *v.* Hudson, 9 Yerg. 57.

Texas.— Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528.

Vermont.— Norton *v.* Hall, 41 Vt. 471, where the surety, in good faith, kept the liability alive.

See 40 Cent. Dig. tit. "Principal and Surety," § 572.

Contra.—Auchanpaugh *v.* Schmidt, 70 Iowa 642, 27 N. W. 805, 59 Am. Rep. 459.

62. Jackson *v.* Murray, 77 Tex. 644, 14 S. W. 235.

63. See cases cited *infra*, note 64 *et seq.*

An administrator of a surety, paying the debt, can maintain an action in his own name against the principal. Mowry *v.* Adams, 14 Mass. 327. And the estate of a surety is not a necessary party to an action by the administratrix of a cosurety to recover from the principal. Townsend *v.* Sullivan, 3 Cal. App. 115, 84 Pac. 435.

An action for damages for disposing of security brought by a surety who had paid the claim against one with whom the security had been placed for the indemnity of plaintiff and cosureties is well brought by plaintiff without joining cosureties. Bush *v.* Haeussler, 26 Mo. App. 265.

Payments by more than one surety see *supra*, IX, B, 4, a, (IV), (A).

64. *Missouri.*— Sevier *v.* Roddie, 51 Mo. 580.

New Hampshire.— Peabody *v.* Chapman, 20 N. H. 418.

New York.— Gould *v.* Gould, 8 Cow. 168 [*affirmed* in 6 Wend. 263].

Pennsylvania.— Boggs *v.* Curtin, 10 Serg. & R. 211.

Tennessee.— Newnan *v.* Campbell, Mart. & Y. 63; Graham *v.* Green, 4 Hayw. 187; Williams *v.* Alley, Cooke 257.

See 40 Cent. Dig. tit. "Principal and Surety," § 573.

65. Skiff *v.* Cross, 21 Iowa 459, joinder proper under a statute providing that all persons having an interest in the subject of the action or in obtaining the relief demanded may be joined as plaintiffs, etc.

In summary proceedings.— Under a statute giving a surety a summary remedy by judgment over against the principal as soon as the creditor shall have obtained judgment against the surety, the foundation of the summary judgment is the judgment against the surety and not the amount paid by him, and therefore several sureties cannot each have a separate judgment for the whole amount of the judgment against them, and must join in the proceedings. Litler *v.* Horsey, 2 Ohio 209; McNairy *v.* Eastland, 10 Yerg. (Tenn.) 310. See also in this connection *infra*, IX, B, 5, h.

66. Parker *v.* Leek, 1 Stew. (Ala.) 523; Rizer *v.* Callen, 27 Kan. 339; Bates *v.* Merrick, 2 Hun (N. Y.) 568.

The presumption is that they have paid their proportions individually. Lombard *v.* Cobb, 14 Me. 222.

Permissible joinder — *Payment from joint fund.*— Whitbeck *v.* Ramsay, 74 Ill. App. 524; Stewart *v.* Vaughan, Rice (S. C.) 33; Thomas *v.* Carter, 63 Vt. 609, 22 Atl. 720, 14 L. R. A. 82, where the sureties contribute their respective proportions to a joint deposit for the purpose of payment.

Payment by sureties of their joint note.— Ross *v.* Allen, 67 Ill. 317; Appelton *v.* Bascom, 3 Metc. (Mass.) 169; Doolittle *v.* Dwight, 2 Metc. (Mass.) 561; Prescott *v.* Newell, 39 Vt. 82; Whipple *v.* Briggs, 28 Vt. 65. So sureties can maintain a joint action if the money was raised upon a note made by one surety to the order of the other and discounted for their joint benefit. Enos *v.* Leach, 18 Hun (N. Y.) 139.

Payment by heirs of joint judgment against them.— Snider *v.* Greathouse, 16 Ark. 72, 63 Am. Dec. 54.

67. Morgan *v.* Street, 28 Ind. App. 131, 62 N. E. 99, foreclosure of mortgage.

Exoneration.— But it is held that the creditor and surety properly are made parties plaintiff in a bill by a surety against the principal and counter sureties to enforce the exoneration of the surety. Ferrer *v.* Barrett, 57 N. C. 455.

68. See *supra*, IX, B, 4, a, (IV), (D).

tions, a separate action must be brought against each one.[69] A surety who has paid a note and received contribution from a cosurety is not a necessary party to a suit by the latter against the principal for the amount contributed,[70] and so where the surety has paid the debt, he may proceed against the principal or may subject a fund without making the creditor a party.[71] When the surety proceeds in equity [72] all interested parties who are not complainants should be made defendants,[73] and where the debt is unpaid and the surety seeks exoneration or indemnity by such suit the creditor must be a party, for the ultimate relief is not to have the amount paid to the surety but to the creditor.[74]

e. Pleading.[75] The surety cannot obtain specific relief except such as is consistent with the allegations and prayer in his complaint;[76] but a declaration or complaint which alleges the original liability of plaintiff and defendant to the creditor that plaintiff was surety for defendant, payment by the surety, and that defendant has not made payment,[77] although requested,[78] and asking for judgment is sufficient, and is founded on the implied contract of indemnity, notwithstanding the original claim was based on a note which is shown to have been satisfied,[79]

69. Chipman *v.* Morrill, 20 Cal. 130, where four persons bought separate and distinct interests in real estate, but gave their joint note for the whole purchase-price, which one of them paid.

70. Stone *v.* Hammell, (Cal. 1889) 22 Pac. 203.

Joining principal and cosurety see *infra*, IX, C, 1, g, (VI), (B).

71. Murphy *v.* Jackson, 58 N. C. 11.

72. See, generally, EQUITY, 16 Cyc. 1.

73. Hite *v.* Campbell, 10 B. Mon. (Ky.) 80 (holding that a surety on a note, who has paid it, is an indispensable party to a suit against the principal by the equitable assignee of his claim); Scribner *v.* Adams, 73 Me. 541.

Surety for indemnity.— Where an administratrix of the principal gave a memorandum to his surety to indemnify the latter, such memorandum being signed by a surety also, the surety on the memorandum properly was made a party to a bill filed for indemnity against the administratrix, although the demand against him might be of a legal nature, being surety in respect of a demand which as against his principal was the proper subject of a suit in equity. Atkins *v.* Revell, 1 De G. F. & J. 360, 62 Eng. Ch. 276, 45 Eng. Reprint 398.

74. *Kentucky.*— Bamberger *v.* Moayon, 91 Ky. 517, 16 S. W. 276, 13 Ky. L. Rep. 102, under express provision of statute giving remedy by attachment.

North Carolina.— Murphy *v.* Jackson, 58 N. C. 11.

Ohio.— Still *v.* Holland, 1 Ohio Dec. (Reprint) 584, 10 West. L. J. 481.

Tennessee.— Oneal *v.* Smith, 10 Lea 340; Gilliam *v.* Esselman, 5 Sneed 86.

Virginia.— Call *v.* Scott, 4 Call 402.

See 40 Cent. Dig. tit. "Principal and Surety." § 573.

Creditor proper party.— Where a mortgage is given to indemnify the mortgagor's sureties on his note payable to a third person, and also to secure another note executed by the mortgagor to one of the sureties, and the other sureties release their interests in the mortgage to the one holding the note payable to himself, the surety holding such note, in enforcing the mortgage to satisfy his own debt, may also include a foreclosure for the benefit of himself and his cosureties on the other note, although the payee and holder of that note is not made a party to the action. The payee, although a proper party, is not a necessary one. McDaniel *v.* Austin, 32 S. C. 601, 11 S. E. 350.

75. See, generally, PLEADING, 31 Cyc. 1.

In actions for money paid see MONEY PAID, 27 Cyc. 832.

76. Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21, holding that where the surety seeks to have corporate stock pledged by him as collateral, restored to him, and to have a receiver appointed, without alleging that the debt is due, his action cannot be sustained on the ground that it is a suit to compel the principal to pay, or to require the pledgee to proceed against the property of the principal, if he has not asked for the latter relief.

77. Kreider *v.* Isenbice, 123 Ind. 10, 23 N. E. 786; Dewitt *v.* Boring, 123 Ind. 4, 23 N. E. 1085. See also Rawson *v.* Rawson, 105 Mass. 214, holding a declaration good as for money paid to defendant's use, after verdict.

Payment to successor.— Where the sureties of a county treasurer sue their principal to recover money paid for him to his successor, they need not allege that such payment was made to the sucessor of the treasurer. Cabel *v.* McCafferty, 53 Ind. 75.

Allegation of request.— Where the surety's legal obligation to pay appears from the facts alleged in his pleading in an action for reimbursement, he need not allege that the payment was made at defendant's request. Clanton *v.* Coward, 67 Cal. 373, 7 Pac. 787, distinguishing the cases in which the payments were not made under legal obligation by the payer.

78. Windle *v.* Williams, 18 Ind. App. 158, 47 N. E. 680.

79. Goodwin *v.* Davis, 15 Ind. App. 120, 43 N. E. 881.

After judgment and payment.— If the indebtedness paid by the surety was evidenced by a judgment, it is not necessary to set

and although it is alleged that the surety procured a transfer of the claim by the creditor to himself.[80]

f. Defenses [81]— (I) *In General.* When sued by a surety, defendant may show that he is a cosurety with plaintiff, and not a principal,[82] although plaintiff actually supposed that defendant was a principal,[83] and in a suit for reimbursement by the assignee of a surety who had paid the debt, the principal may rely upon any defense he may have had against the surety.[84]

(II) *Incapacity of Principal.* If the original contract secured may be avoided upon the ground of incapacity of the principal, he may defeat an action by the surety founded on an implied contract for reimbursement.[85]

(III) *Non-Execution of Contract by Principal.* A surety cannot recover from the principal if the latter did not execute the contract, as where the name of the latter was signed without authority; [86] unless the principal is liable without having executed the contract.[87]

forth a copy of the judgment, the action being upon the implied contract (Scherer *v.* Schutz, 83 Ind. 543; Harker *v.* Glidewell, 23 Ind. 219), nor to allege that the court rendering it was within the state, and had jurisdiction (Hopewell *v.* Kerr, 9 Ind. App. 11, 36 N. E. 48). In Kimmel *v.* Lowe, 28 Minn. 265, 9 N. W. 764, it was held that a complaint alleging that plaintiff, defendant, and another executed a note, the entire consideration of which was received by defendant, and that the others were sureties; that, default having been made in the payment of the note, the holder thereof recovered a judgment thereon against defendant and such sureties in a court in Maryland having jurisdiction; that plaintiff has paid the judgment, and has taken and filed in the office of the clerk of said court an assignment thereof in writing; that a statute of Maryland provides that "when any person shall recover a judgment against the principal debtor and surety, and the judgment shall be satisfied by the surety, the creditor shall assign the same to the surety; and such assignment being recorded in the court where the judgment was rendered, the assignee shall be entitled to execution in his own name against the principal," states a good cause of action whether the action be regarded as founded on the judgment or on the implied liability for money paid.

Variance as to a note cannot arise in an action by a surety on the note for money paid to the use of the principal; the note itself is not declared on. Cameron *v.* Warbritton, 9 Ind. 351.

80. Boyd *v.* Beville, 91 Tex. 439, 44 S. W. 287.

Subrogation to rights of creditor see Subrogation.

81. Effect of judgment in favor of obligee or creditor see *infra*, IX, B, 5, g, (II).

Non-payment see *supra*, IX, B, 3, a.

Setting up claim due to principal see *supra*, IX, B, 4, b.

Surety without request see *supra*, IX, B, 4, a, (IV), (E).

Voluntary payment see *supra*, IX, B, 4, c, (II).

Waiver of defenses see *supra*, IX, B, 4, c, (II), (D).

82. Mackreth *v.* Walmesley, 51 L. T. Rep. N. S. 19, 32 Wkly. Rep. 819.

83. Whitehouse *v.* Hanson, 42 N. H. 9.

84. Hite *v.* Campbell, 10 B. Mon. (Ky.) 80.

In summary proceedings by the surety the principal may avail himself of any equitable circumstances to show that he was not bound to pay the entire demand. Tennell *v.* Dozier, Hard. (Ky.) 47, holding that the proper action at law was assumpsit; that under the plea of *non assumpsit* defendant might avail himself of any equitable circumstances to show that in equity and good conscience he was not bound to pay the demand, and that such proceedings should be permitted under the act as would place the parties as near as possible in the same situation as they would stand in a trial at common law.

85. Ayers *v.* Burns, 87 Ind. 245, 44 Am. Rep. 759, where it was held that the surety of an infant on a promissory note could not recover for reimbursement against the infant; that if payment by the surety raised an implied contract, it was not binding on the infant, and indicating further that infants may be bound only on implied contracts for necessaries, and not on express contracts, as by bond or note, even if they are given for necessaries.

Where an infant is bound for the original debt his surety may recover for reimbursement. Conn *v.* Coburn, 7 N. H. 368, 26 Am. Dec. 746, where plaintiff was surety on an infant's note given for the purchase of necessaries. So in Fagin *v.* Goggin, 12 R. I. 398, it was held that an infant was bound on a recognizance and was liable to reimburse his surety to the amount of the judgment recovered by the state upon the recognizance and paid by the surety, because the law required the infant to enter into the recognizance with surety.

Liability of infants generally see Infants, 22 Cyc. 503.

86. Oppman *v.* Steinbrenner, 17 Mont. 369, 42 Pac. 1015; Winham *v.* Crutcher, 3 Tenn. Ch. 666; Murray *v.* Winham, 3 Tenn. Ch. 336. See also *supra*, IX, C; IX, B, 4, a, (IV).

87. Woodman *v.* Calkins, 13 Mont. 363, 34 Pac. 187, 40 Am. St. Rep. 449.

(IV) *ILLEGALITY.* Where a surety pays, knowing of facts which render the transaction illegal, such payment is a voluntary one, and no recovery can be had from the principal.[88] So sureties cannot recover from their principal if their agreement is illegal, although the contract between the principal and the creditor is perfectly legal and valid,[89] or upon an implied contract against public policy.[90] But the fact that the transaction which necessitated the giving of the contract of suretyship was illegal will not make the contract itself illegal.[91] A surety on a usurious contract, which is not enforceable against the principal, voluntarily paying the same with knowledge that it was usurious, cannot compel the principal to reimburse him or enforce security given to indemnify him; [92] but on the other

88. Harley *v.* Stapleton, 24 Mo. 248 (although the principal was compelled to pay in another jurisdiction); Davis *v.* Stokes County, 74 N. C. 374.

Recovery back from creditor see *supra*, IX, A, 3, b.

89. Ramsay *v.* Whitbeck, 183 Ill. 550, 56 N. E. 322 [*reversing* 81 Ill. App. 210], holding that, where one of the considerations for a contract of suretyship is an illegal agreement that the officer shall deposit public funds in the banks of the sureties on interest for his and their benefit, they cannot recover for losses incurred by them.

90. See the cases cited *infra*, this note.

Reimbursement of bail — *In general.*— There is some conflict of authority as to the right of bail in a criminal case to recover reimbursement. The better opinion is against the right to recover the amount forfeited by reason of the non-appearance of the accused upon the ground that such a recovery would be contrary to public policy. U. S. *v.* Ryder, 110 U. S. 729, 4 S. Ct. 196, 28 L. ed. 308, holding that the act of congress declaring that sureties on bonds given to the United States shall have the same right of priority which the United States have by law does not embrace recognizances in criminal cases. It appears also in this case as well as others that there may be an express contract to indemnify bail in a criminal case. Cripps *v.* Hartnoll, 4 B. & S. 414, 10 Jur. N. S. 200, 32 L. J. Q. B. 381, 8 L. T. Rep. N. S. 765, 11 Wkly. Rep. 953, 116 E. C. L. 414 (holding that such contract of indemnity cannot be implied by law, and upon this point *reversing* 2 B. & S. 697, 8 Jur. N. S. 1010, 31 L. J. Q. B. 150, 6 L. T. Rep. N. S. 605, 110 E. C. L. 697, and showing that Green *v.* Creswell, 10 A. & E. 453, 4 Jur. 169, 9 L. J. Q. B. 63, 2 P. & D. 430, 37 E. C. L. 250, upon the authority of which the lower court based its opinion, was a case of bail in a civil proceeding and therefore not authority in a case of criminal bail); Simpson *v.* Robert, 35 Ga. 180 (where a mortgage executed by the principal to the bail to induce him to enter into a recognizance was sustained, which ruling is held in U. S. *v.* Ryder, *supra*, to be in entire accord with that in Cripps *v.* Hartnoll, *supra*). *Contra*, Fagin *v.* Goggin, 12 R. I. 398; Reynolds *v.* Harral, 2 Strobh. (S. C.) 87, which relied upon the statement in Petersdorff on Bail, to which the only authority cited is Fisher *v.* Fallows, 5 Esp. 171, 8 Rev. Rep. 843. But the last case was at *nisi prius*, and was a case of bail in a civil proceeding and consequently not authority in the case of criminal bail, as shown in Cripps *v.* Hartnoll, *supra*. See also Stevens *v.* Hay, 61 Ill. 399, where, however, the bail was in fact enforcing a mortgage security.

But costs may be recovered, as where the recognizance is estreated only because of failure to pay costs. Jones *v.* Orchard, 16 C. B. 614, 1 Jur. N. S. 936, 24 L. J. C. P. 229, 81 E. C. L. 614.

If bail put up a cash deposit for their principal, which the principal forfeits, the bail can recover from the principal, unless it was understood, at the time of deposit, that the money should be forfeited by non-appearance. Hutchinson *v.* Brassfield, 86 Mo. App. 40.

Retention of indemnity see *supra*, IX, B, 2, b, (II).

91. Green *v.* Peter Schoenhofen Brewing Co., 103 Iowa 252, 72 N. W. 655, holding that the fact that the sale of beer at retail by an agent to whom it was sent for sale violated the law, and caused the seizure that necessitated the giving of a replevin bond by his employer, on which he became surety, does not avoid the implied contract of the principal to repay the surety.

Bond in groundless and malicious suit.— It is not a defense to the principal in a replevin bond that the surety knew, when he signed the bond, that the replevin suit was groundless and malicious; the surety's suit is not brought upon any illegal contract. Smith *v.* Rines, 32 Me. 177.

On replevin bond for property fraudulently conveyed.— In an action by a surety on a replevin bond given in an attachment suit to save property conveyed in fraud of creditors, where it appeared that the surety had full knowledge of the fraud when he became such, such fact did not preclude him from maintaining a creditor's suit to subject property held by the principal's wife in fraud of creditors to the payment of the amount complainant was compelled to pay by reason of his liability on the bond, on the ground that complainant did not come into equity with clean hands. Shapira *v.* Paletz, (Tenn. Ch. App. 1900) 59 S. W. 774.

92. Roe *v.* Kiser, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288; Jones *v.* Joyner, 8 Ga. 562; Hargraves *v.* Lewis, 3 Ga. 162; Davis *v.* Kelley, 5 Ohio Dec. (Reprint) 30, 1 Am. L. Rec. 479; Riddle *v.* Canby, 2 Ohio Dec. (Reprint) 586, 6 West. L. Month. 124.

hand, it is held that where usury does not render the contract void, and the principal may waive it as a defense if he desires to do so, a surety can recover from the principal, unless the latter notifies him not to pay.[93]

(v) *Payment, Satisfaction, and Release.* The principal can show in his defense that he already has reimbursed his surety,[94] or facts which show a good defense by way of accord and satisfaction or as an executed compromise,[95] and release [96] and a supplemental surety cannot recover from a surety if the former made payment with money of the principal.[97] But when one cosurety has paid the creditor, the principal cannot escape liability to him by showing payment to another cosurety.[98]

g. Evidence and Burden of Proof — (i) *In General.* The burden is upon the surety to show the relation, in an action in which his right to a particular recovery depends upon his relation as surety to another as principal,[99] and if the surety has paid voluntarily he must show that the debt was in fact recoverable.[1]

93. Ford *v.* Keith, 1 Mass. 139, 2 Am. Dec. 4; Jackson *v.* Jackson, 51 Vt. 253, 31 Am. Rep. 688; Moncure *v.* Dermott, 13 Pet. (U. S.) 345, 10 L. ed. 193 [*reversing* 17 Fed. Cas. No. 9,707, 5 Cranch C. C. 445]. So where the principal procured the grantee in a prior deed from him in a usurious transaction, to convey the land to another to secure him as surety for money borrowed, the last transaction is not tainted with the usury in the first, and the surety, upon paying the debt, may enforce his security. Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921.

Effect of judgment in favor of creditor or obligee see *infra*, IX, B, 5, g, (II).

Usury and voluntary payments generally see *supra*, IX, B, 4, c, (II).

94. New York State Bank *v.* Fletcher, 5 Wend. (N. Y.) 85 (holding that a surety of a surety is not entitled to recover from the principal if the latter has paid his immediate surety); Will *v.* Witt, 5 Hayw. (Tenn.) 276 (holding that where a surety recovered judgment in the county court against his principal by motion without notice to the principal, the latter was entitled to trial in the circuit court on certiorari on showing that he had paid to the surety an indemnification before judgment).

Payment of money borrowed by surety.— If the surety borrows money to pay the secured debt, and the principal pays the surety's creditor and discharges the surety from liability for the amount so borrowed, the surety has no claim against the principal. Morrison *v.* Cassell, 25 Ill. 368.

Worthless notes.— In Taylor *v.* Cox, 32 W. Va. 148, 9 S. E. 70, it was held that if the principal has transferred notes to his surety in payment, and the notes prove worthless, such payment is not a bar to an action by the surety.

Right to security.— Smith *v.* McGehee, 14 Ala. 404, holding that one who is indemnified by another to be surety of a third person cannot recover from his indemnitor, if there is nothing due at the time he pays because the principal had paid and the surety had been notified not to pay.

95. Lange *v.* Perley, 47 Mich. 352, 11 N. W. 193; Cartwright *v.* Cooke, 3 B. & Ad. 701, 1 L. J. K. B. 261, 23 E. C. L. 308.

Taking principal's property under agreement to pay debt see Lewis *v.* Lewis, 92 Ill. 237; Lange *v.* Perley, 47 Mich. 352, 11 N. W. 193; Tarlton *v.* Orr, 40 Tex. Civ. App. 410, 90 S. W. 534, facts showing that the surety had taken land in satisfaction, although the land had been forfeited to the state for nonpayment of the purchase-price.

Agreement not executed.— An agreement by the principal to convey to the surety a certain lot of land is not a defense if the agreement has not been complied with. Fraser *v.* Goode, 3 Rich. (S. C.) 199.

96. Rawson *v.* Stuart, 22 Oreg. 256, 29 Pac. 792.

Release with consent of surety.— If the principal has been released by the creditor with the consent of the surety, the latter cannot claim reimbursement from the principal. Moore *v.* Isley, 22 N. C. 372.

Consideration.—An agreement by one of two makers of a note to pay the whole is not a consideration for the release of the other maker by the surety, as the former already was liable for the whole. Cameron *v.* Warbritton, 9 Ind. 351.

Release of cosurety.— The liability of the principal is not affected because the surety bringing suit and who paid a debt has released a cosurety. Crowdus *v.* Shelby, 6 J. J. Marsh. (Ky.) 61.

Payment by surety after principal discharged see *supra*, IX, B, 4, c, (II).

97. Craig *v.* Vanpelt, 3 J. J. Marsh. (Ky.) 489.

98. Lowry *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 210.

99. Kearney *v.* Harrell, 58 N. C. 199.

To have benefit of statutory remedy.— Before an indorser can avail himself of the statutory provision that the payment of a judgment by a surety shall operate *per se* as a transfer of the judgment, he must show that he is an accommodation indorser. Dibrell *v.* Dandridge, 51 Miss. 55.

Upon change of relation.— But it is upon a former principal to show that the relation has been changed by the former surety assuming the debt. Stratton *v.* Heuser, 42 S. W. 1133, 19 Ky. L. Rep. 1019.

1. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575. See also *supra*, IX, B, 4, c, (II).

To show the relation, he should prove the original agreement by proof of the bond or other contract, and if the fact do not appear on the face of the instrument he should show it by other means.[2] Evidence is always admissible to show the equitable rights of the principal and surety toward each other,[3] and which is material to the right to recover the amount alleged to have been paid by plaintiff as surety,[4] and, as between the immediate parties, to show their true relation in fact, although different from that indicated by the instrument or their relative positions thereon.[5] Slight proof of payment may be sufficient to support a recovery in favor of the surety against his principal.[6] The note upon which the payment was made is admissible in evidence,[7] and the possession of the note by the surety is *prima facie* evidence of payment by him.[8] If it does not appear when the surety made payment, it will be presumed that it was at maturity of the debt,[9] and before suit was brought by the surety.[10]

(II) *Judgment by Creditor or Obligee.* A judgment against the surety, with proof of payment by him, is competent *prima facie* evidence in an action to recover the amount from the principal.[11] But a judgment against a

2. Edge *v.* Keith, 13 Sm. & M. (Miss.) 295. The cause of action by a surety against his principal is not founded upon an "account" within the meaning of the statute, which may be established by *ex parte* affidavit. McCamant *v.* Batsell, 59 Tex. 363.

Request of principal.— The surety must show that he became such at the principal's request. Edge *v.* Keith, 13 Sm. & M. (Miss.) 295; McPherson *v.* Meek, 30 Mo. 345. See also *supra*, IX, B, 4, a, (IV), (E).

Immaterial variance — *In general.*— Where sureties, having been compelled to pay a judgment against them, alleged in a bill to recover from their principals that they were sureties on replevin bonds given in attachment, and sought to recover the amount paid by them as such, the fact that the executions introduced in evidence showed that complainants' debt arose from a liability on an appeal-bond did not necessitate a dismissal of the bill for variance between the allegations and the proof, where parol evidence, unobjected to, also was introduced to the effect that they were sureties on the replevin bond, as alleged, and that the judgment paid was taken against them as such. Shapira *v.* Paletz, (Tenn. Ch. App. 1900) 59 S. W. 774.

As to note paid by surety see Cameron *v.* Warbritton, 9 Ind. 351, *infra*, note 7.

In suit by principal for account of security see Warden *v.* Nolan, 10 Ind. App. 334, 37 N. E. 821, *supra*, IX, B, 2, b, (III), (C), note 97.

3. *In re* May, 16 Fed. Cas. No. 9,327, 17 Nat. Bankr. Reg. 192.

4. Stone *v.* Hammell, (Cal. 1889) 22 Pac. 203, holding that the records of a probate court, showing the insolvency of a deceased cosurety on a note who had not contributed to its payment, are admissible in evidence in an action against the principal by the cosurety who made payment.

5. Ragland *v.* Milam, 10 Ala. 618; Hull *v.* Peer, 27 Ill. 312; Apgar *v.* Hiler, 24 N. J. L. 812 (an apparent cosurety may be shown to be a joint principal); Smith *v.* Bing, 3 Ohio 33.

Relation of parties to commercial paper see Commercial Paper, 8 Cyc. 262.

6. Price *v.* Burva, 6 Wkly. Rep. 40, holding that evidence that a surety in a bond sent a check to his principal in order that the latter might satisfy a compromise of a suit brought against them, and subsequently stated to the principal that he had paid the debt, to which the principal made no reply, and eight or nine years had elapsed, was sufficient evidence that the debt had been satisfied by the surety, to support a verdict upon that theory.

Insufficient evidence of agreement for delay. — The evidence was held sufficient to support a judgment for the surety where the principal testified that the surety had agreed to give him indulgence in the payment of the amount due, but the surety denied this, and it was shown that he had made repeated efforts to collect his claim, and that the principal did not make any attempt to set up the alleged agreement. Doll *v.* Reed, 13 S. W. 1081, 12 Ky. L. Rep. 300.

7. Cameron *v.* Warbritton, 9 Ind. 351 (holding that the action is not on the note and no question of variance can arise); Hill *v.* Voorhies, 22 Pa. St. 68.

If the surety was compelled to pay by execution a copy of the judgment and writ should be produced. Edge *v.* Keith, 13 Sm. & M. (Miss.) 295.

8. Landrum *v.* Brookshire, 1 Stew. (Ala.) 252; Heaton *v.* Ainley, (Iowa 1898) 74 N. W. 766; Reynolds *v.* Skelton, 2 Tex. 516.

Possession of a bond and a receipt for payment by the surety constitute sufficient evidence of payment. Sluby *v.* Champlin, 4 Johns. (N. Y.) 461.

9. Heaton *v.* Ainley, (Iowa 1898) 74 N. W. 766.

10. Presly *v.* Donaldson, 33 Miss. 92.

Where a surety pays a judgment and receives an assignment thereof, it will be presumed that such payment was made on the date of the assignment. Searing *v.* Berry, 58 Iowa 20, 11 N. W. 708.

11. Chipman *v.* Fambro, 16 Ark. 291; Bone *v.* Torry, 16 Ark. 83; Snider *v.* Greathouse, 16 Ark. 72, 63 Am. Dec. 54; Murphy *v.* Jones, 4 Pa. Cas. 52, 6 Atl. 726; Denny *v.* Sayward, 10 Wash. 422, 39 Pac. 119.

surety is not binding on the principal who was not a party to the suit,[12] although it is otherwise where the principal has notice of the suit,[13] unless there was collusion between the creditor and the surety, or negligence by the latter.[14] On the other hand, where the judgment has been rendered against the principal as well as the surety, the former is concluded [15] as to all matters actually determined against or waived by him.[16] But the mere fact that the judgment is against the surety alone in an action against him and the principal has been held not to preclude the surety, afterward in an action against the principal, from showing that the debt was that of the principal.[17]

h. Judgment [18] — (i) *In General.* In a summary proceeding for judgment against the principal [19] the judgment must show the necessary jurisdictional facts; [20]

Suretyship and claim — *In general.*— It has been held that such a judgment is *prima facie* evidence of the amount of the surety's claim and the measure of recovery to which he is entitled as against the principal. Lyon *v.* Northrup, 17 Iowa 314, Murphy *v.* Jones, 4 Pa. Cas. 52, 6 Atl. 726. On the other hand it is held that a judgment against the surety is evidence only of the identity of the claim but not of the amount thereof or of the original contract of suretyship. Austin *v.* Dorwin, 21 Vt. 38. And so the record of a judgment in an action on a bond is held to be admissible to prove that plaintiff had been sued and had paid the money on the execution, but the question of his suretyship is not determined in such an action and therefore the record therein does not prove it. Edge *v.* Keith, 13 Sm. & M. (Miss.) 295.

In a summary proceeding under the statute it is necessary for the surety to connect the instrument on which he was bound with the judgment paid. Brown *v.* Wheeler, 3 Ala. 287.

12. Benjamin *v.* Ver Nooy, 36 N. Y. App. Div. 581, 55 N. Y. Suppl. 796.

13. Konitzky *v.* Meyer, 49 N. Y. 571; Hare *v.* Grant, 77 N. C. 203, holding that in such case the judgment against the surety furnishes the measure of his recovery against the principal.

14. Hare *v.* Grant, 77 N. C. 203, where it is said that the rule that the principal is bound if the surety notifies him of the suit so as to enable him to defend would not apply where there was fraud or collusion between the surety and creditor, and probably would not apply where there had been negligence on the part of the surety in using the defenses within his power, or which were furnished him by the principal.

Judgment by confession or default.— Although a surety is prohibited by a statutory provision from suffering judgment to go against him by confession or default when the principal debtor is willing to defend, yet, if he does suffer such judgment to be rendered, he can maintain an action to recover the money from the principal; but in such case he occupies the position of the creditor suing on the original debt, and must establish its validity and repel all defenses against it. Riley *v.* Stallworth, 56 Ala. 481. See also *supra*, IX, B, 5, b, (I), note 50.

15. **Conclusive of judgment** generally see JUDGMENTS, 23 Cyc. 623.

Summary remedy see *supra*, IX, B, 5, b, (I).

16. Reed *v.* Humphrey, 69 Kan. 155, 76 Pac. 390 (holding that the principal cannot deny liability on the original demand of the judgment creditor); Oppman *v.* Steinbrenner, 17 Mont. 369, 42 Pac. 1015 (holding an answer bad which denies the execution of the note upon which judgment had been recovered in another state, but which does not dispute the judgment).

Infancy cannot be pleaded by the principal after such judgment. Dewitt *v.* Boring, 123 Ind. 4, 23 N. E. 1085.

Want of consideration or illegality cannot be pleaded by the principal after such judgment. Maples *v.* Cox, 74 Ga. 701 (usury); Pitts *v.* Fugate, 41 Mo. 405; Wade *v.* Green, 3 Humphr. (Tenn.) 547 (usury). In such a case it does not matter that the surety had knowledge of the usury. Thurston *v.* Prentiss, Walk. 529 [*affirmed* in 1 Mich. 193].

Attacking jurisdiction of person.— Where a complaint alleges a foreign judgment, and also a judgment of revivor, an answer alleging absence from the state where the judgment was rendered, and that a fraudulent appearance was entered, is defective if it is doubtful to which of the judgments it refers. Oppman *v.* Steinbrenner, 17 Mont. 369, 42 Pac. 1015.

Equity will not restrain the security on appeal, to whom the judgment was transferred, from collecting the condemnation money out of his principal, because the attorneys of the principal neglected their duty to attend to the principal's case, although the principal was sick at the time. Odell *v.* Mundy, 59 Ga. 641.

17. Peters *v.* Barnhill, 1 Hill (S. C.) 234, where the verdict failed as against the principal in the action by the creditor against the surety and principal, because of failure to prove execution of the instrument by the principal.

18. See, generally, JUDGMENTS, 23 Cyc. 623.

19. See *supra*, IX, B, 5, b, (I).

20. Brown *v.* Wheeler, 3 Ala. 287; Jones *v.* Read, 1 Humphr. (Tenn.) 335, holding that the summary judgment must recite the judgment against the surety.

Summary proceedings generally see SUMMARY PROCEEDINGS.

if there are several principals the judgment against them should be joint,[21] and if there are several sureties the judgment for them, before payment, must be joint.[22] In a suit by the surety for indemnity before payment, under the statute giving such remedy,[23] the judgment against the principal should be for a particular sum to be realized on execution, and not merely that the principal indemnify the surety.[24]

(II) *EXTENT OF RECOVERY*[25]— (A) *In General. Prima facie* the amount due from the principal to the surety is the face value of the claim of the creditor;[26] but the surety is not allowed to speculate on his principal, and cannot collect any more than the amount actually paid by him,[27] although he may have taken an assignment of the claim.[28] The same rule governs between a supplemental surety and a surety.[29] The surety cannot recover for remote and indirect losses suffered by him which could have been avoided by payment of the debt.[30]

21. Voorhies *v.* Dickson, 1 Sneed (Tenn.) 348. But if a judgment is rendered against a part of the principals, it is not absolutely void, and is a protection to purchasers at an execution sale under such judgment. Hall *v.* Tompkins, 9 Humphr. (Tenn.) 592.

22. McNairy *v.* Eastland, 10 Yerg. (Tenn.) 310; Newnan *v.* Campbell, Mart. & Y. (Tenn.) 63; Graham *v.* Green, 4 Hayw. (Tenn.) 187, in which cases it appears, however, that after payment the judgment must be separate in favor of those paying. See also Little *v.* Horsey, 2 Ohio 209.

23. See *supra*, IX, B, 3, a; IX, B, 3, c.

24. Mudd *v.* Rogers, 10 La. Ann. 648.

Judgment to be discharged in particular certificates.—In Graves *v.* Webb, 1 Call (Va.) 443, it was held, where the obligee in a bond had obtained a judgment against a surety to be discharged in particular certificates, that the surety was entitled to a judgment against the principal for the same specific thing which he himself had been adjudged to pay. It appeared, however, that such judgment was in pursuance of and consistent with the original contract.

25. **In actions for money paid** generally see MONEY PAID, 27 Cyc. 845.

Note given by principal to surety see *supra*, IX, B, 3, c, note 36.

26. Collins *v.* Boyd, 14 Ala. 505; Bone *v.* Torry, 16 Ark. 83; Searing *v.* Berry, 58 Iowa 20, 11 N. W. 708.

27. *Alabama.*— Graham *v.* King, 15 Ala. 563; Gee *v.* Nicholson, 2 Stew. 512.

Georgia.— Where an execution has been paid partly by the principal, the surety cannot recover the whole amount thereof, the statute providing that the surety shall be reimbursed only. Stanford *v.* Connery, 84 Ga. 731, 11 S. E. 507.

Indiana.— Gieseke *v.* Johnson, 115 Ind. 308, 17 N. E. 573.

Iowa.— Where a surety, having paid the debt, joined with the principal in making a new note to another person for the money with which payment was made, and at its maturity took up the latter note, he should be allowed the amount paid on the debt, but not, in addition, the amount of the second note. Heaton *v.* Ainley, (1898) 74 N. W. 766.

Kentucky.— Hickman *v.* McCurdy, 7 J. J. Marsh. 555.

Maryland.— Martindale *v.* Brock, 41 Md. 571.

Missouri.— Hearne *v.* Keath, 63 Mo. 84.

Nebraska.— Eaton *v.* Lambert, 1 Nebr. 339.

New Hampshire.— Osgood *v.* Osgood, 39 N. H. 209.

New Jersey.— Delaware, etc., R. Co. *v.* Oxford Iron Co., 38 N. J. Eq. 151.

Pennsylvania.— Vail *v.* Hartman, 1 C. Pl. 132.

Virginia.— Southall *v.* Farish, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641; Kendrick *v.* Forney, 22 Gratt. 748.

See 40 Cent. Dig. tit. "Principal and Surety," § 535.

Compromise.— The principal is entitled to the benefit of any compromise made with the creditor. Simmons *v.* Goodrich, 68 Ga. 750; Coggeshall *v.* Ruggles, 62 Ill. 401; Wiggin *v.* Flower, 5 Rob. (La.) 406; Dorsey *v.* His Creditors, 7 Mart. N. S. (La.) 498; Nolte *v.* His Creditors, 7 Mart. N. S. (La.) 9; Bonney *v.* Seely, 2 Wend. (N. Y.) 481; Price *v.* Horton, 4 Tex. Civ. App. 526, 23 S. W. 501; Matthews *v.* Hall, 21 W. Va. 510; Reed *v.* Norris, 1 Jur. 233, 6 L. J. Ch. 197, 2 Myl. & C. 36, 14 Eng. Ch. 361, 40 Eng. Reprint 678.

Recovery back of excess.— If the principal, through false representations, has paid the surety more than the latter has paid, he can recover the excess. Price *v.* Horton, 4 Tex. Civ. App. 526, 23 S. W. 501.

28. Blow *v.* Maynard, 2 Leigh (Va.) 29 (where, however, there was a general release of all liability on the bond, which was held to release the principal, so that the surety's assignment could not avail); Reed *v.* Norris, 1 Jur. 233, 6 L. J. Ch. 197, 2 Myl. & C. 361, 14 Eng. Ch. 361, 40 Eng. Reprint 678.

But where a surety has the right to purchase the negotiable paper upon which he is liable with another, and he does so for less than its face value, he might recover the face value from the principal. Fowler *v.* Strickland, 107 Mass. 552.

29. Parsons *v.* Briddock, 2 Vern. Ch. 608, 23 Eng. Reprint 997.

30. Hayden *v.* Cabot, 17 Mass. 169; Thurston *v.* Prentiss, 1 Mich. 193; Wynn *v.* Brooke, 5 Rawle (Pa.) 106; Vance *v.* Lancaster, 3 Hayw. (Tenn.) 130, such as a sale

(B) *As Affected by Medium of Payment.* A surety who makes a payment in property, as in land,[31] or with a mortgage, may recover to the extent of the value thereof.[32] So where the surety pays in depreciated paper,[33] he cannot recover more than the value thereof. But the promise implied upon payment by a surety is a promise to pay the debt not the value of the property;[34] therefore if the property is of greater value than the amount of the debt the surety cannot recover the excess from the principal,[35] and if the debt is satisfied by execution sale of the surety's property his recovery is measured by the judgment satisfied and not merely by the value of the property.[36] The value of the property is its market value[37] at the time[38] of payment; but if the principal and surety agree upon the value of such property, other creditors of the principal do not have any right to object.[39]

(C) *Interest.* The surety is entitled to recover against the principal reimbursement for interest paid by the former to the creditor;[40] and is entitled to recover interest also on the amount which he has been required to pay to the creditor,[41]

of his property on execution for less than its value.

A contract of general indemnity against loss arising from the suretyship should be construed to embrace all losses arising directly or by immediate consequence from the failure of the principal to pay the secured debt, but not remote or unexpected consequences, such as the effect of the suretyship on the surety's mercantile credit, his personal inconvenience, or his loss of office owing to the embarrassment of his mind. Robertson *v.* Lippincott, 1 Phila. (Pa.) 308.

31. Lord *v.* Staples, 23 N. H. 448, appraised value of land levied on.

Manner of payment generally see *supra*, IX, B, 4, c, (III) *et seq.*

32. Fahey *v.* Frawley, L. R. 26 Ir. 78.

33. *Arkansas.*— Jordan *v.* Adams, 7 Ark. 348.

Kentucky.— Crozier *v.* Grayson, 4 J. J. Marsh. 514; Owings *v.* Owings, 3 J. J. Marsh. 590.

Louisiana.— Dinkgrave's Succession, 31 La. Ann. 703.

Maryland.— Hall *v.* Creswell, 12 Gill & J. 36.

Virginia.— Kendrick *v.* Forney, 22 Gratt. 748.

West Virginia.— Feamster *v.* Withrow, 12 W. Va. 611, 9 W. Va. 296; Butler *v.* Butler, 8 W. Va. 674.

See 40 Cent. Dig. tit. "Principal and Surety," § 535.

Worth of property to parties.— The rule of the text must yield to particular circumstances, however. Thus in Southall *v.* Farish, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641, a surety on a note held by a bank which had become insolvent, against whom, together with the principal on the note, judgment had been obtained, had funds deposited with the creditor bank, and upon the insolvency of the bank a stranger had agreed with such surety to take his deposits at their face value, but the bank refused to transfer the fund except upon payment of a security debt. The principal agreed with the surety that if he would satisfy the debt out of his deposits he, the principal, would make reimbursement at the face value of the deposits. The secured debt was paid by charging the judgment against the deposits. It was held that the worth of the deposits to the parties at the time the judgment was so discharged determined the amount which the surety paid and which he was entitled to recover back, although the assets of the insolvent bank ultimately realized only sixty cents on the dollar.

34. Hickman *v.* McCurdy, 7 J. J. Marsh. (Ky.) 555. See also *supra*, IX, B, 4, a, (I).

35. Hickman *v.* McCurdy, 7 J. J. Marsh. (Ky.) 555.

36. Coleman *v.* Riggs, 61 Iowa 543, 16 N. W. 583.

37. Feamster *v.* Withrow, 12 W. Va. 611, 9 W. Va. 296; Butler *v.* Butler, 8 W. Va. 674.

38. Jordan *v.* Adams, 7 Ark. 348; Hall *v.* Creswell, 12 Gill & J. (Md) 36; Feamster *v.* Withrow, 12 W. Va. 611, 9 W. Va. 296; Butler *v.* Butler, 8 W. Va. 674.

39. Southall *v.* Farish, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641, *supra*, note 33.

40. Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921; Knight *v.* Mantz, Ga. Dec. 22; Bushong *v.* Taylor, 82 Mo. 660 (interest paid on judgment up to the time of payment and six per cent thereafter); Newman *v.* Newman, 29 Mo. App. 649; Robinson *v.* Sherman, 2 Gratt. (Va.) 178, 44 Am. Dec. 381; Rigby *v.* MacNamara, 2 Cox Ch. 415, 2 Rev. Rep. 92, 30 Eng. Reprint 192; Goddard *v.* Whyte, 2 Giffard 449, 6 Jur. N. S. 1364, 3 L. T. Rep. N. S. 313, 66 Eng. Reprint 188; Willes *v.* Greenhill, 30 L. J. Ch. 808, 9 Wkly. Rep. 217.

If a surety pays usurious interest to obtain time to pay the debt, he cannot recover it of the principal. Lucking *v.* Gegg, 12 Bush (Ky.) 298; Thurston *v.* Prentiss, 1 Mich. 193.

41. *California.*— Smith *v.* Johnson, 23 Cal. 63; Townsend *v.* Sullivan, 3 Cal. App. 115, 84 Pac. 435.

Indiana.— Gieseke *v.* Johnson, 115 Ind. 308, 17 N. E. 573.

Maryland.— Winder *v.* Diffenderffer, 2 Bland 166.

Missouri.— Bushong *v.* Taylor, 82 Mo. 660; Newman *v.* Newman, 29 Mo. App. 649.

such interest, under the rules governing the accrual of interest, being held to run from the date of payment by the surety.[42]

(D) *Costs and Expenses* — (1) IN GENERAL. A surety can recover from his principal all reasonable expenses and necessary costs that he has incurred on account of the relation;[43] and if the principal and surety are sued together, the surety is justified in expecting that the principal will satisfy the claim, and can

Nebraska.— Eaton *v.* Lambert, 1 Nebr. 339.

Pennsylvania.— Vail *v.* Hartman, 1 C. Pl. 132.

West Virginia.—Cranmer *v.* McSwords, 26 W. Va. 412.

England.— Hodgson *v.* Hodgson, 2 Keen 704, 7 L. J. Ch. 5, 15 Eng. Ch. 704, 48 Eng. Reprint 800; Petre *v.* Duncombe, 15 Jur. 86, 20 L. J. Q. B. 242, 2 L. M. & P. 107 (where the principal covenanted with his surety to pay the secured debt); Parsons *v.* Briddock, 2 Vern. Ch. 608, 23 Eng. Reprint 997. In Rigby *v.* Macnamara, 2 Cox Ch. 415, 2 Rev. Rep. 92, 30 Eng. Reprint 192, it was held that interest could not be allowed on interest paid by the surety to the creditor. And under 6 Geo. IV, c. 16, § 52, it was held that a surety cannot prove against a bankrupt principal for interest due and paid subsequent to the date of the commission. *Ex p.* Wilson, 1 Rose 137; Francis *v.* Rucker, Ambl. 672, 27 Eng. Reprint 436. Two persons, having jointly and severally granted an annuity, and mutually covenanted that each should pay one moiety, and indemnify the other against all "actions, suits, costs, charges, damages, demands, sums of money, and expenses," which might be incurred by reason of the non-payment thereof, one who, on the insolvency of the other, had made payments on account of his moiety, is not entitled to interest on such payments. Bell *v.* Free, 1 Swanst. 90, 36 Eng. Reprint 310, 1 Wils. Ch. 51, 37 Eng. Reprint 24, 18 Rev. Rep. 153.

See 40 Cent. Dig. tit. "Principal and Surety," § 536.

In a summary process under a statute providing for judgment against the principal for the sum paid by the surety, it was held that interest on such sum could not be awarded. Dorsey *v.* Beall, Hard. (Ky.) 564; Reading *v.* Holton, Hard. (Ky.) 63. In Alabama it was held that if the surety recovered interest the record must show when he paid the debt, if the liability was not fixed by verdict. Brown *v.* Wheeler, 3 Ala. 287.

Express statutory provisions sometimes control the subject. Thus under Ind. Rev. St. (1881) § 1219, a surety paying a note is entitled to recover from his principal the rate of interest specified in the note. Goodwin *v.* Davis, 15 Ind. App. 120, 43 N. E. 881. In Arkansas the provision that a surety on a bond, note, etc., for the payment of money, etc., be entitled to recover ten per cent interest on the amount paid by him from the time of payment, does not embrace joint vendees of land who have given their joint note for the purchase-price, the provision being held to refer to sureties in the common or technical sense. McGee *v.* Russell, 49 Ark. 104, 4 S. W. 284.

On new note of surety.—In White *v.* Miller, 47 Ind. 385, it is held that if the surety has given his note in lieu of the note of his principal, he can recover the rate of interest mentioned in the original note up to the time when he paid his own note.

42. *Iowa.*— Heaton *v.* Ainley, (1898) 74 N. W. 766.

Kentucky.— Owings *v.* Owings, 3 J. J. Marsh. 590.

New Hampshire.— Child *v.* Eureka Powder Works, 44 N. H. 354.

Virginia.— Kendrick *v.* Forney, 22 Gratt. 748; Robinson *v.* Sherman, 2 Gratt. 178, 44 Am. Dec. 381.

West Virginia.— Feamster *v.* Withrow, 12 W. Va. 611; Butler *v.* Butler, 8 W. Va. 674.

See 40 Cent. Dig. tit. "Principal and Surety," § 536. And see INTEREST, 22 Cyc. 1459.

In suit for proceeds of converted securities. — Where one cosurety of a trustee, without the knowledge of the other, and with a view to conceal a misappropriation of stock by the trustee, paid the dividends thereon up to a certain time, and the other cosurety thereafter was compelled to pay the value of the stock with interest from the expiration of such time, the latter cosurety could not recover from the persons who converted the stock, interest on the amount paid for the years during which the first-named surety voluntarily paid the dividends. Blake *v.* Traders' Nat. Bank, 149 Mass. 250, 21 N. E. 381, 3 L. R. A. 746.

43. *Illinois.*— Stevens *v.* Hay, 61 Ill. 399.

Massachusetts.— Hayden *v.* Cabot, 17 Mass. 169.

Mississippi.—Whitworth *v.* Tilman, 40 Miss. 76.

New York.— Thompson *v.* Taylor, 72 N. Y. 32 (holding that the right of the surety to recover costs was not abrogated by **Laws (1858)**, c. 314, § 3, as to indorsers' costs); Elwood *v.* Deifendorf, 5 Barb. 398. An accommodation party can charge the accommodated party with costs of a suit for the collection of the note which he has been compelled to pay. Baker *v.* Martin, 3 Barb. 634.

Pennsylvania.—Wynn *v.* Brooke, 5 Rawle 106; Vail *v.* Hartman, 1 C. Pl. 132.

Texas.— Bennett *v.* Dowling, 22 Tex. 660.

Vermont.— Downer *v.* Baxter, 30 Vt. 467; Hulett *v.* Soullard, 26 Vt. 295.

Virginia.— Robinson *v.* Sherman, 2 Gratt. 178, 44 Am. Dec. 381, holding that a surety in a forthcoming bond which has been forfeited is entitled on paying the judgment against his principal to recover the costs of the original judgment, but not the costs incurred by the execution and forfeiture of the bond.

recover the costs of the suit which he is compelled to pay.[44] But the principal is not liable for costs and expenses unnecessarily incurred by the surety in litigation carried on by him in order to get rid of his liability,[45] or to defeat the efforts of a party seeking to enforce it,[46] unless the principal requested the surety to defend,[47] or there was an express agreement for indemnity as to costs.[48] And it is incumbent on a surety seeking to recover from his principal costs and expenses incurred in litigation to show that the litigation was entered into in good faith and upon reasonable grounds, and was a measure of defense necessary to the interests of both parties, and was calculated so to result.[49] Of course the surety is entitled to recover the costs of proceedings against his principal to enforce the liability of the latter to him.[50]

(2) Attorney's Fees. The surety can recover for attorney's fees paid by him in defending a suit if such defense was made with the consent of the principal,[51]

West Virginia.— Feamster *v.* Withrow, 12 W. Va. 611; Butler *v.* Butler, 8 W. Va. 674.

England.— Goddard *v.* Whyte, 2 Giffard 449, 6 Jur. N. S. 1364, 3 L. T. Rep. N. S. 313, 66 Eng. Reprint 188; Pierce *v.* Williams, 23 L. J. Exch. 322; Caldbeck *v.* Boon, Ir. R. 7 C. L. 32.

Canada.— Trites *v.* Kelly, Trin. T. 1833. Where a grantee of land has assumed a mortgage thereon, and the grantor is sued by the mortgagee, the grantor can recover the costs from the grantee. Joice *v.* Duffy, 5 Can. L. J. 141.

See 40 Cent. Dig. tit. "Principal and Surety," § 537.

Forfeited recognizance and arrest.— Sureties can recover the expenses necessarily incurred in procuring the rearrest of the principal (Milk *v.* Waite, 18 Abb. N. Cas. (N. Y.) 236), and for trouble in regard to a forfeited recognizance (Miller *v.* Caldwell, 4 Pa. St. 160).

If the surety pays and takes an assignment of a judgment against his principal, including costs, the costs can be enforced against the principal. Parsons *v.* Briddock, 2 Vern. Ch. 608, 23 Eng. Reprint 997; Harper *v.* Culbert, 5 Ont. 152; Victoria Mut. F. Ins. Co. *v.* Freel, 10 Ont. Pr. 45.

If the surety lives in another state, he is entitled to recover whatever he has been compelled to pay under the laws of such state. Thomas *v.* Beckman, 1 B. Mon. (Ky.) 29.

44. Apgar *v.* Hiler, 24 N. J. L. 812.

If the principal and surety institute a suit which is unsuccessful, and the surety pays the costs, he can recover them. Whitworth *v.* Tilman, 40 Miss. 76.

45. Sheehan *v.* Carroll, 124 Mass. 67; Whitworth *v.* Tilman, 40 Miss. 76.

46. *Connecticut.*— Beckley *v.* Munson, 22 Conn. 299.

Maine.— Emery *v.* Vinall, 26 Me. 295.

Massachusetts.— Heyden *v.* Cabot, 17 Mass. 169.

New York.— Thompson *v.* Taylor, 72 N. Y. 32. In Holmes *v.* Weed, 24 Barb. 546, it is held that where a surety knowing the claim against his principal to be just litigates it, he can recover only the costs of a judgment by default.

Pennsylvania.—Wynn *v.* Brooke, 5 Rawle 106.

West Virginia.— Cranmer *v.* McSwords, 26 W. Va. 412.

Canada.—See Whitehouse *v.* Glass, 7 Grant Ch. (U. C.) 45.

See 40 Cent. Dig. tit. "Principal and Surety," § 537.

Costs of appeal by surety.— After a judgment is obtained against the principal and surety, and the former has made an unsuccessful appeal, the surety cannot recover the costs of an appeal which he himself takes. City Trust, etc., Co. *v.* American Brewing Co., 88 N. Y. App. Div. 383, 84 N. Y. Suppl. 771.

Costs of execution against surety.—If judgment is obtained against a surety, and enforced by execution upon his property, the costs of the execution cannot be recovered from the principal. Such costs are not necessary expenses, since the surety should have paid the judgment and avoided the necessity of levying an execution. Pierce *v.* Williams, 23 L. J. Exch. 322.

47. Howes *v.* Martin, 1 Esp. 162.

48. Emery *v.* Vinall, 26 Me. 295; Albany *v.* Andrews, 29 N. Y. App. Div. 20, 52 N. Y. Suppl. 1129; Bonney *v.* Seely, 2 Wend. (N. Y.) 481.

49. Whitworth *v.* Tilman, 40 Miss. 76; Cranmer *v.* McSwords, 26 W. Va. 412.

As a means of showing good faith, it is often proper, and sometimes necessary, in the commencement of a suit against the surety, that he shall give notice to his principal, in order to enable him to pursue the course that he thinks best for his own safety with reference to the claim against the surety, and to the consequences of that action to himself. Whitworth *v.* Tilman, 40 Miss. 76.

50. Ayres *v.* Lewellin, 3 Leigh (Va.) 609, holding that where a surety has paid five several sums of money for his principal, he is entitled to reimbursement for the cost of five several motions against the principal.

Costs generally see Costs, 11 Cyc. 1.

51. Bancroft *v.* Pearce, 27 Vt. 668. On satisfaction of a forfeited recognizance, a surety can retain his counsel fees from money collected on a judgment assigned to him. Miller *v.* Caldwell, 4 Pa. St. 160.

If the principal has entered into an express agreement to indemnify his surety against all loss, counsel fees, and expenses incurred for any cause, he is liable, in the absence of

or if the litigation was advantageous to the latter, as by procuring the remission of a forfeiture of a bail-bond.[52] If the surety was liable on a note with an attorney's fee clause, and is compelled to pay such fee, it being reasonable, he can recover it from the principal.[53]

C. As to Cosureties — 1. Contribution [54]— a. Nature and Origin of Right. The right of contribution among cosureties is not founded on contract, but results from the application of the general principle of equity which equalizes burdens which two or more may be called upon to bear.[55] This equitable obligation springs up at the time the relation is entered into, and the surety is an existing creditor of a cosurety from the date of the execution of his contract, although the right is not consummated until payment of the debt.[56] The doctrine originated in equity, although the common law at a later period adopted the equitable principle.[57] The right to contribution is not affected by the fact that the surety has received security on account of his liability.[58]

bad faith, although he employed competent counsel for both, and gave the surety notice thereof. U. S. Fidelity, etc., Co. *v.* Hittle, 121 Iowa 352, 96 N. W. 782. But under a contract between a principal and surety, providing that, in the event of the principal's requesting the surety to defend in any proceeding, the principal would place the surety in possession of funds sufficient to defray all costs and expenses, where the surety employed an attorney to defend an action against the principal without the consent of the principal, the principal was not liable for the attorney's compensation. American Surety Co. *v.* Lehr, (Tex. Civ. App. 1906) 93 S. W. 681.

52. Ellis *v.* Norman, 44 S. W. 429, 19 Ky. L. Rep. 1798; Abeles *v.* Mitchell, 13 Phila. (Pa.) 81.

53. Ellis *v.* Conrad Seipp Brewing Co., 207 Ill. 291, 69 N. E. 808 [*affirming* 107 Ill. App. 139]; Coffeen Coal, etc., Co. *v.* Kaubrick, 56 Ill. App. 591; Coffeen Coal, etc., Co. *v.* Barry, 56 Ill. App. 587.

If he does not pay such fees, although they are provided for in the note, he cannot recover them. Gieseke *v.* Johnson, 115 Ind. 308, 17 N. E. 573. But where the surety is subrogated to all the rights of the creditor on the original contract, it is held that a surety on a note providing for attorney's fees, etc., who pays the note without suit and takes an assignment thereof, is entitled, in an action against the maker, to recover such attorney's fees. Beville *v.* Boyd, 16 Tex. Civ. App. 491, 41 S. W. 670, 42 S. W. 318.

54. **Contribution** generally see Contribution, 9 Cyc. 794.

55. *Alabama.*—Tyus *v.* De Jarnette, 26 Ala. 280.

Maryland.—Smith *v.* Anderson, 18 Md. 520.

New York.— Tobias *v.* Rogers, 2 Edm. Sel. Cas. 168.

Ohio.— Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631; Boyd *v.* Robinson, 13 Ohio Cir. Ct. 211, 7 Ohio Cir. Dec. 83.

England.— Deering *v.* Winchelsea, 2 B. & P. 270, 1 Cox Ch. 318, 1 Rev. Rep. 41, 29 Eng. Reprint 1184.

See 40 Cent. Dig. tit. "Principal and Surety," § 605 *et seq.*

56. Washington *v.* Norwood, 128 Ala. 383, 30 So. 405; Nally *v.* Long, 56 Md. 567. See also Shoemake *v.* Stimson, 16 Wash. 1, 47 Pac. 218. And see cases cited *infra,* IX, C, 1, c, (I).

57. See *infra,* IX, C, 1, g, (I).

58. *Arkansas.*—Anthony *v.* Percifull, 8 Ark. 494.

California. — Williams *v.* Riehl, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60.

Georgia.— Manning *v.* Weyman, 99 Ga. 57, 26 S. E. 58.

Louisiana.— Lloyd *v.* Martin, 7 Mart. 444.

Massachusetts. — Bachelder *v.* Fiske, 17 Mass. 464.

Michigan. — Roeder *v.* Niedermeier, 112 Mich. 608, 71 N. W. 154.

Missouri. — Mosely *v.* Fullerton, 59 Mo. App. 143.

New Jersey.— Paulin *v.* Kaighn, 29 N. J. L. 480.

Texas.—Glasscock *v.* Hamilton, 62 Tex. 143.

England.— Done *v.* Whalley, 2 Exch. 198, 12 Jur. 338, 17 L. J. Exch. 225.

Canada.— Moorehouse *v.* Kidd, 28 Ont. 35 [*affirmed* in 25 Ont. App. 221]; Cameron *v.* Boulton, 12 U. C. C. P. 570.

See 40 Cent. Dig. tit. "Principal and Surety," § 611.

An indemnified surety assuming the debt cannot have contribution. Silvey *v.* Dowell, 53 Ill. 260. But the transaction was held not to be an assumption of the debt, but a mere taking of security accruing to the benefit of all the sureties, where a surety took from his principal, after default, a transfer of property, absolute in form, giving in return an agreement to sell same and pay the principal the balance over such sum as the surety might be obliged to pay, and a sale could not be made, and the surety retained the land, which was worth little more than the amount of his liability, which he paid subsequently. Roeder *v.* Niedermeier, 112 Mich. 608, 71 N. W. 154.

Where the security proves worthless or unavailable, the rule applies with greater force. Norwood *v.* Washington, 136 Ala. 657, 33 So. 869 (holding that where a mortgage executed by the principles in favor of their sureties, named as one of the mortgagees a deceased surety, it was ineffective as to him to convey title, and the power conferred thereby could

b. Who Entitled and Subject to Contribution — (I) *COSURETIES.*[59] Cosureties are entitled and subject to contribution among themselves.[60] Conversely, the right or liability to contribution does not attach to one who is not a cosurety with a surety.[61] Thus a person who, although appearing to be a surety on an instrument, is in fact the principal, having received part or all of the sum borrowed,[62] or who has subsequently become the principal by assuming the indebtedness cannot have contribution from a surety for the debt.[63]

not be exercised by his administrator, and that the latter therefore is not required to resort to the mortgage before proceeding against the cosureties for contribution); Johnson *v.* Vaughn, 65 Ill. 425; Atkinson *v.* Stewart, 2 B. Mon. (Ky.) 348; Mason *v.* McKnight, 76 S. W. 509, 25 Ky. L. Rep. 903.

59. As to who are cosureties see *supra*, I, B, 2; IX, B, 3.

60. *California.*— Dussal *v.* Bruquiere, 50 Cal. 456; Powell *v.* Powell, 48 Cal. 234.

Georgia.— Waldrop *v.* Wolff, 114 Ga. 610, 40 S. E. 830; Snow *v.* Brown, 100 Ga. 117, 28 S. E. 77; Freeman *v.* Cherry, 46 Ga. 14.

Illinois.— Paul *v.* Berry, 78 Ill. 158; Burgett *v.* Stream, 85 Ill. App. 72.

Indiana.—Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 127; Stevens *v.* Tucker, 87 Ind. 109; Whiteman *v.* Harriman, 85 Ind. 49; Nurre *v.* Chittenden, 56 Ind. 462.

Kentucky.— Davezac *v.* Seiler, 93 Ky. 418, 20 S. W. 375, 14 Ky. L. Rep. 497; Elbert *v.* Jacoby, 8 Bush 542; Crow *v.* Murphy, 12 B. Mon. 444; Cobb *v.* Haynes, 8 B. Mon. 137; Bosley *v.* Taylor, 5 Dana 157, 30 Am. Dec. 677; Breckinridge *v.* Taylor, 5 Dana 110.

Louisiana.— Stockmeyer *v.* Oertling, 35 La. Ann. 467.

Maryland.— Nally *v.* Long, 56 Md. 567.

Massachusetts. — Warner *v.* Morrison, 3 Allen 566; Chaffee *v.* Jones, 19 Pick. 260; Taylor *v.* Savage, 12 Mass. 98.

Mississippi.— Burnett *v.* Millsaps, 59 Miss. 333.

Missouri.— Labeaume *v.* Sweeney, 17 Mo. 153.

New Hampshire.— Prescott *v.* Perkins, 16 N. H. 305.

New Jersey.—Bishop *v.* Smith, (Sup. 1904) 57 Atl. 874; Paulin *v.* Kaighn, 29 N. J. L. 480; Wyckoff *v.* Gardner, (Ch. 1886) 5 Atl. 801.

New York.— Decker *v.* Judson, 16 N. Y. 439; Norton *v.* Coons, 6 N. Y. 33; National Surety Co. *v.* Di Marsico, 55 Misc. 302, 105 N. Y. Suppl. 272; Toucey *v.* Schell, 15 Misc. 350, 37 N. Y. Suppl. 879.

North Carolina.—Atwater *v.* Farthing, 118 N. C. 388, 24 S. E. 736; Jones *v.* Blanton, 41 N. C. 115, 51 Am. Dec. 415.

Ohio.— Robinson *v.* Boyd, 60 Ohio St. 57, 53 N. E. 494; Daum *v.* Kehnast, 18 Ohio Cir. Ct. 1, 9 Ohio Cir. Dec. 867; Boyd *v.* Robinson, 13 Ohio Cir. Ct. 211, 7 Ohio Cir. Dec. 83.

Oklahoma.— Strickler *v.* Gitchel, 14 Okla. 523, 78 Pac. 94.

South Carolina.— Harris *v.* Ferguson, 2 Bailey 397.

Texas.— Moore *v.* Hanscom, (Civ. App. 1907) 103 S. W. 665; Farmers', etc., Bank *v.* Bayless, 1 Tex. App. Civ. Cas. § 1245.

Virginia.— Stovall *v.* Border Grange Bank, 78 Va. 188; Perrin *v.* Ragland, 5 Leigh. 552.

Washington.—Caldwell *v.* Hurley, 41 Wash. 296, 83 Pac. 318.

Wisconsin.— Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 110 Am. St. Rep. 946, 4 L. R. A. N. S. 666.

England.— Whiting *v.* Burke, L. R. 6 Ch. 342 [*affirming* L. R. 10 Eq. 539]; Deering *v.* Winchelsea, 2 B. & P. 270, 1 Cox Ch. 318, 1 Rev. Rep. 41, 29 Eng. Reprint 1184; Woods *v.* Creaghe, 2 Hog. 50; Mayhew *v.* Crickett, 2 Swanst. 185, 36 Eng. Reprint 585, 1 Wils. Ch. 418, 37 Eng. Reprint 178, 19 Rev. Rep. 57; Layer *v.* Nelson, 1 Vern. Ch. 456, 23 Eng. Reprint 582; Craythorne *v.* Swinburne, 14 Ves. Jr. 160, 9 Rev. Rep. 264, 33 Eng. Reprint 482.

Canada.— Murray *v.* Gibson, 28 Grant Ch. 12.

See 40 Cent. Dig. tit. "Principal and Surety," § 605 *et seq.*

By statute.— In some states the right of cosureties to contribution has been made statutory. See the statutes of the several states and see the following cases: Kellogg *v.* Lopez, 145 Cal. 497, 78 Pac. 1056; Bigby *v.* Douglas, 123 Ga. 635, 51 S. E. 606; Stockmeyer *v.* Doertling, 35 La. Ann. 467; Ferriday *v.* Purnell, 2 La. Ann. 334; Belond *v.* Guy, 20 Wash. 160, 54 Pac. 995; Knight *v.* Weeks, 115 Fed. 970, 53 C. C. A. 366, under a Florida statute.

61. *Illinois.*— Wanack *v.* Michels, 215 Ill. 87, 74 N. E. 84 [*affirming* 114 Ill. App. 631].

Indiana.— Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51.

Massachusetts.— Chaffee *v.* Jones, 19 Pick. 260.

Missouri.— Citizens' Ins. Co. *v.* Broyles, 78 Mo. App. 364.

New Hampshire.— Prescott *v.* Perkins, 16 N. H. 305.

Rhode Island.— Chapman *v.* Pendleton, 26 R. I. 573, 59 Atl. 928.

Texas.— Lacy *v.* Rollins, 74 Tex. 566, 12 S. W. 314.

Virginia.— Rosenbaum *v.* Goodman, 78 Va. 121.

United States.— National Surety Co. *v.* U. S., 123 Fed. 294, 59 C. C. A. 479.

See 40 Cent. Dig. tit. "Principal and Surety," § 605 *et seq.*

62. McPherson *v.* Talbott, 10 Gill & J. (Md.) 499, 32 Am. Dec. 191; Zimmerman *v.* Bridges, 8 Pa. Cas. 45, 4 Atl. 181; Boulware *v.* Hartsook, 83 Va. 679, 3 S. E. 289.

63. Davis *v.* Heimbach, 75 Cal. 261, 17 Pac. 199. See also Silvey *v.* Dowell, 53 Ill. 260.

(II) *Supplemental and Successive Sureties.*[64] A surety is not entitled to contribution from a supplemental surety,[65] nor is a surety entitled to contribution from another surety where their liability arose on successive bonds given in the course of judicial proceeding, the liability of the latter being secondary to that of the former.[66]

(III) *Surety Who Signs At Request of Cosurety.* In some jurisdictions it is held that if a surety requests another person to become a surety with him, he is not entitled to contribution from the latter;[67] but in other jurisdictions the right to contribution is held to exist in the absence of a contract of indemnity.[68]

(IV) *Contribution From Estate of Cosurety.* Contribution can be compelled from the estate of a bankrupt,[69] insane,[70] or deceased cosurety,[71] and

64. As to who are supplemental sureties see *supra*, I, B, 3.

Rights of supplemental and successive sureties see *infra*, IX, D.

65. *Connecticut.*— Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; Monson *v.* Drakeley, 40 Conn. 552, 16 Am. Rep. 74.

Illinois.— Robertson *v.* Deatherage, 82 Ill. 511; Paul *v.* Berry, 78 Ill. 158; Myers *v.* Fry, 18 Ill. App. 74.

Indiana.— Houck *v.* Graham, 123 Ind. 277, 24 N. E. 113; Bobbitt *v.* Shryer, 70 Ind. 513.

Kentucky.— Chapeze *v.* Young, 87 Ky. 476, 9 S. W. 399, 10 Ky. L. Rep. 465; Daniel *v.* Ballard, 2 Dana 296.

Maryland.— Lusby *v.* Carr, 60 Md. 192; Byers *v.* McClanahan, 6 Gill & J. 250.

Massachusetts.— Longley *v.* Griggs, 10 Pick. 121; Taylor *v.* Savage, 12 Mass. 98.

Michigan.— Goetchius *v.* Calkins, 46 Mich. 328, 9 N. W. 436.

Mississippi.— Hunt *v.* Chambliss, 7 Sm. & M. 532.

Missouri.— Leeper *v.* Paschal, 70 Mo. App. 117.

Nebraska.— Chapman *v.* Garber, 46 Nebr. 16, 64 N. W. 362.

New Hampshire.— Cutter *v.* Emery, 37 N. H. 567.

New York.— Sayles *v.* Sims, 73 N. Y. 551; Barry *v.* Ransom, 12 N. Y. 462; Schram *v.* Werner, 85 Hun 293, 32 N. Y. Suppl. 995; Harris *v.* Warner, 13 Wend. 400.

North Carolina.— Thompson *v.* Sanders, 20 N. C. 539; Smith *v.* Smith, 16 N. C. 173.

Ohio.— Bain *v.* Wilson, 10 Ohio St. 14.

Tennessee.— Stacy *v.* Rose, (Ch. App. 1900) 58 S. W. 1087; Turner *v.* Overall, (Ch. App. 1897) 39 S. W. 756.

Texas.— Mulkey *v.* Templeton, (Civ. App. 1901) 60 S. W. 439.

Vermont.—Adams *v.* Flanagan, 36 Vt. 400; Keith *v.* Goodwin, 31 Vt. 268, 73 Am. Dec. 345.

Virginia.— Harrison *v.* Lane, 5 Leigh 414, 27 Am. Dec. 607.

West Virginia.— Singer Mfg. Co. *v.* Bennett, 28 W. Va. 16.

United States.— Robinson *v.* Kilbreth, 20 Fed. Cas. No. 11,957, 1 Bond 592.

England.— Turner *v.* Davies, 2 Esp. 478.

See 40 Cent. Dig. tit. "Principal and Surety," § 578 *et seq.*

66. *Alabama.*— Dunlap *v.* Foster, 7 Ala. 734.

Indiana.— Taylor *v.* Russell, 75 Ind. 386.

Kentucky.— Hughes *v.* Hardesty, 13 Bush 364; Kellar *v.* Williams, 10 Bush 216; Hammock *v.* Baker, 3 Bush 208; Hoskins *v.* Parsons, 1 Metc. 251; Brooks *v.* Shepherd, 4 Bibb 572; Yoder *v.* Briggs, 3 Bibb 228.

Louisiana.— Old *v.* Chambliss, 3 La. Ann. 205.

Maryland.— Smith *v.* Anderson, 18 Md. 520.

Mississippi.— Knox *v.* Vallandingham, 13 Sm. & M. 526.

Ohio.— Hartwell *v.* Smith, 15 Ohio St. 200; Smith *v.* Bing, 3 Ohio 33.

Pennsylvania.— Titzel *v.* Smeigh, 2 Leg. Chron. 271.

Tennessee.— Moore *v.* Lassiter, 16 Lea 630; Chaffin *v.* Campbell, 4 Sneed 184; Cowan *v.* Duncan, Meigs 470; Brown *v.* McDonald, 8 Yerg. 158, 29 Am. Dec. 112.

Virginia.— Langford *v.* Perrin, 5 Leigh 552.

See 40 Cent. Dig. tit. "Principal and Surety," § 583.

67. *Kentucky.*— Daniel *v.* Ballard, 2 Dana 296.

Maryland.— Byers *v.* McClanahan, 6 Gill & J. 250.

Massachusetts.—Taylor *v.* Savage, 12 Mass. 98.

New Hampshire.— Cutter *v.* Emery, 37 N. H. 567.

England.— Jones *v.* Williams, 9 Dowl. P. C. 252, 10 L. J. Exch. 120, 7 M. & R. 493 (holding that where a surety, urging others to become sureties, wrote: "I should consider it a matter of favour to myself if your brothers will join, and I will see that they come to no harm," the primary liability, as among the sureties, fell upon the writer); Turner *v.* Davies, 2 Esp. 478.

See 40 Cent. Dig. tit. "Principal and Surety," § 588.

68. Bagott *v.* Mullen, 32 Ind. 332, 2 Am. Rep. 351; Burnett *v.* Millsaps, 59 Miss. 333; Bishop *v.* Smith, (N. J. Sup. 1904) 57 Atl. 874.

69. *In re* Parker, [1894] 3 Ch. 400, 64 L. J. Ch. 6, 71 L. T. Rep. N. S. 557, 7 Reports 590, 43 Wkly. Rep. 1. But see *Ex p.* Porter, 4 Deac. & C. 774, 4 L. J. Bankr. 86, 2 Mont. & A. 281.

70. Pickering *v.* Leiberman, 41 Fed. 376.

71. *Alabama.*— Handley *v.* Heflin, 84 Ala. 600, 4 So. 725.

Illinois.— Conover *v.* Hill, 76 Ill. 342.

where the administration has been closed or the personal assets exhausted, the heirs of a deceased cosurety may be held liable to the extent of realty they have received.[72] If a surety becomes executor for his cosurety, he can retain, out of the estate, the amount due.[73]

c. Payment — (I) *As Condition to Consummation of Right.*[74] A surety, as a general rule, is not entitled to contribution from a cosurety until he has paid more than his proportionate share of the debt.[75] But if the surety pays less than the whole debt, or less than his proportionate share, he will be entitled to contribution if such payment discharges the whole debt as to himself and his cosureties.[76]

(II) *What Constitutes Payment* — (A) *In General.* Usually anything will be considered payment which discharges the liability of the cosurety,[77] as

Massachusetts.— Bachelder *v.* Fiske, 17 Mass. 464.

Mississippi.—Apperson *v.* Wilbourn, 58 Miss. 439.

New Jersey.— Stothoff *v.* Dunham, 19 N. J. L. 181.

New York.— Johnson *v.* Harvey, 84 N. Y. 363, 38 Am. Rep. 515; Egbert *v.* Hanson, 34 Misc. 596, 70 N. Y. Suppl. 383; Bradley *v.* Burwell, 3 Den. 61.

Pennsylvania.— Wetmore *v.* Dobbins, 2 Pa. Super. Ct. 110, 38 Wkly. Notes Cas. 540.

South Carolina.— McKenna *v.* George, 2 Rich. Eq. 15.

Virginia.— Pace *v.* Pace, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459.

England.— Ramskill *v.* Edwards, 31 Ch. D. 100, 55 L. J. Ch. 81, 33 L. T. Rep. N. S. 949, 34 Wkly. Rep. 96.

See 40 Cent. Dig. tit. "Principal and Surety," § 612.

Whether the cosurety died before or after the default contribution can be had from his estate. Wyckoff *v.* Gardner, (N. J. Ch. 1886) 5 Atl. 801. But see Waters *v.* Riley, 2 Harr. & G. (Md.) 305, 18 Am. Dec. 302, holding that where one of two sureties on a joint bond is compelled, by reason of the insolvency of the principal, to pay the debt after the death of a cosurety, he does not have any remedy in equity against the representatives of the deceased.

Statutory provisions exist in some states to the same general effect as the rule stated in the text. See Beach *v.* Bell, 139 Ind. 167, 38 N. E. 819 (holding that under the prevailing statutes the lien created in favor of cosureties by their payment of a judgment rendered against them and deceased, where the sums paid by them are entered as credits upon the docket, continues against the realty of deceased until discharged by decree or payment); Reeves *v.* Pulliam, 7 Baxt. (Tenn.) 119 (holding that under Tenn. Code, §§ 3625, 3626, contribution can be had from the administrator of a deceased cosurety).

72. Wood *v.* Leland, 22 Pick. (Mass.) 503 (under statute); Stephens *v.* Meek, 6 Lea (Tenn.) 226; Glasscock *v.* Hamilton, 62 Tex. 143; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98. And see Stevens *v.* Tucker, 87 Ind. 109, holding that a surety can have contribution against the heirs of a deceased surety after a final settlement of his estate, when the liability to pay because of the insolvency of the principal could not be ascertained until then.

73. Bathurst *v.* De la Zouch, Dick. 460, 21 Eng. Reprint 348.

74. Exoneration in equity see *infra*, IX, C, 2.

75. *Alabama.*— Washington *v.* Norwood, 128 Ala. 383, 30 So. 405; Pegram *v.* Riley, 88 Ala. 399, 6 So. 753; Taylor *v.* Means, 73 Ala. 468.

Florida.— May *v.* Vann, 15 Fla. 553.

Iowa.— Craig *v.* West, 61 Iowa 758, 17 N. W. 108.

Maryland.— Nally *v.* Long, 56 Md. 567; Smith *v.* State, 46 Md. 617.

Michigan.— Backus *v.* Coyne, 45 Mich. 584, 8 N. W. 694.

Mississippi.— Stone *v.* Buckner, 12 Sm. & M. 73.

Missouri.— Magruder *v.* Admire, 4 Mo. App. 133.

New York.— Tobias *v.* Rogers, 2 Edm. Sel. Cas. 168; People *v.* Duncan, 1 Johns. 311.

Ohio.— Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

Oregon.— Ladd *v.* Portland Chamber of Commerce, 37 Oreg. 544, 60 Pac. 713, 61 Pac. 1127, 62 Pac. 208.

South Carolina.— Gourdin *v.* Trenholm, 25 S. C. 362.

England.— Wolmershausen *v.* Gullick, [1893] 2 Ch. 514, 62 L. J. Ch. 773, 68 L. T. Rep. N. S. 753, 3 Reports 610; *Ex p.* Snowdon, 17 Ch. D. 44, 50 L. J. Ch. 540, 44 L. T. Rep. N. S. 830, 29 Wkly. Rep. 654; *Ex p.* Porter, 4 Deac. & C. 774, 4 L. J. Bankr. 86, 2 Mont. & A. 281; Davies *v.* Humphreys, 4 Jur. 250, 9 L. J. Exch. 263, 6 M. & W. 153.

See 40 Cent. Dig. tit. "Principal and Surety," § 619 *et seq.*

76. Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729. And see cases cited *infra*, IX, C, 1, e, (VI), (A), note 38.

77. Edmonds *v.* Sheahan, 47 Tex. 443, holding that payment in Confederate money was sufficient if it discharged the debt.

Payment in the form of a purchase of the debt is sufficient. Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 110 Am. St. Rep. 938, 4 L. R. A. N. S. 666.

A payment otherwise sufficient is not vitiated because a surety, through a bequest,

where a surety individually has assumed the debt,[78] or where he has given security for its payment.[79]

(B) *Payment With Real Property.* Payment may be made in land,[80] or by a mortgage thereon.[81]

(C) *Payment With Commercial Paper.* Payment is sufficient to give a right to contribution, if made by commercial paper, received by the creditor as payment,[82] even though such commercial paper has not been paid by the surety giving it.[83] But a new note signed by the principal and one of the sureties merely changing the form of the original contract is not payment by the signing surety.[84] If, however, such new note is given as collateral security only, the right of contribution on ultimate payment of the original note is not affected.[85]

(III) *Payment Not Within Scope of Sureties' Undertaking.* The mere fact that one cosurety has made payment to the creditor is not of itself sufficient to give him the right of contribution, if such payment was outside the contract on which the sureties were liable.[86] Thus, where a surety makes a pay-

afterward comes into possession of property which was sold under an execution against him to satisfy the debt (Caldwell *v.* Roberts, 1 Dana (Ky.) 355); nor because the creditor, through fraud of the surety, may have accepted in settlement a less sum than was due (Shepard *v.* Pebbles, 38 Wis. 373).

Facts held insufficient to constitute payment.— A surety on an official bond cannot claim to have made payment thereon because the principal, through default of duty, is liable to him in damages (Mitchell *v.* Turner, 37 Ala. 660; Rutland *v.* Paige, 24 Vt. 181); nor can a surety claim contribution where the payment made by him was on a bond given for the price of property which he acquired by the formation of a mere paper corporation in which he held the great majority of stock for which he did not pay anything (Moore *v.* Drew, 51 La. Ann. 740, 25 So. 402).

78. See cases cited *infra*, this note.

A surety replevying the debt by a valid replevy bond extinguishes the judgment thereby, and may proceed against his cosureties as if he had made payment in money. Lucas *v.* Chamberlain, 8 B. Mon. (Ky.) 276; Burns *v.* Parish, 3 B. Mon. (Ky.) 8.

Surety of guardian succeeding him.— A surety of a guardian having been appointed successor on the death of the latter, and having charged himself with the balance due from his predecessor, is entitled to contribution. Flickinger *v.* Hull, 5 Gill (Md.) 60.

79. Lytle *v.* Pope, 11 B. Mon. (Ky.) 297.

80. Frost *v.* Tracy, 52 Mo. App. 308, holding that where executions being levied on the land of a surety, he conveyed it to his cosurety in consideration of the latter satisfying the executions, which was done, the land having paid the judgments, the grantor was entitled to contribution from the grantee, as the deed and agreement were not a final settlement, or a new contract superseding their prior relations.

81. Bishop *v.* Smith, (N. J. Sup. 1904) 57 Atl. 874; Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 559.

It is immaterial that the mortgage is not paid until after suit for contribution has been brought (Patterson *v.* Patterson, 23 Pa. St. 464), or that it is not paid at all (Robertson *v.* Maxcey, 6 Dana (Ky.) 101).

82. Meeske *v.* Pfenning, 120 Mich. 474, 79 N. W. 795, holding that payment of a judgment on a bond by the check of a company not a party to the suit, of which a surety on the bond was a member, the check being charged to such surety on the books of the company, was payment by the surety, entitling him to contribution from his cosurety.

Payment may be made by negotiable note. — Pinkston *v.* Taliaferro, 9 Ala. 547; Anthony *v.* Percifull, 8 Ark. 494; Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408, 78 Am. St. Rep. 559 (holding also that a note which includes other indebtedness than that on which the maker is liable as surety is payment of the debt for which the maker was liable as surety); Prescott *v.* Newell, 39 Vt. 82. But see Brisendine *v.* Martin, 23 N. C. 286, holding that where a surety brings an action of assumpsit, for money paid for the use and at the request of defendant, against his cosurety, to obtain contribution, it is not sufficient for him to show that he has given his note for the debt due by the principal, and that the same has been accepted by the creditor as a payment and discharge of the debt, and that to entitle him to recover in this action, there must be an actual payment in money, or in money's worth, such as bank-notes, the note of a third person, or a horse or the like, which is valuable in itself to the surety who parts with it.

Payment may be made by bond.— Robertson *v.* Maxcey, 6 Dana (Ky.) 101.

83. Owen *v.* McGehee, 61 Ala. 440; White *v.* Carlton, 52 Ind. 371; Stubbins *v.* Mitchell, 82 Ky. 535; Atkinson *v.* Stewart, 2 B. Mon. (Ky.) 348; Smith *v.* Mason, 44 Nebr. 610, 63 N. W. 41.

84. Ryan *v.* Krusor, 76 Mo. App. 496; Bell *v.* Boyd, 76 Tex. 133, 13 S. W. 232.

85. Adams *v.* De Frehn, 27 Pa. Super. Ct. 184.

86. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575 (holding that where an injunction was granted against levy on individual property of members of a firm under a judgment

ment to prevent the very default on the occurrence of which the sureties were to be liable, it has been held that a right of contribution does not exist, as the default for which the sureties had undertaken never occurred.[87]

(IV) *VOLUNTARY PAYMENT* — (A) *In General.* A surety who voluntarily pays the debt when he is not under legal liability to do so is not generally entitled to contribution; [88] but where a legal liability exists payment may be made as soon as the principal is in default,[89] and payment is not voluntary because a surety

against the firm, and the injunction bond provided for payment of the judgment "herein enjoined," a surety on such bond who, after dissolution of the injunction, paid the amount of the judgment cannot enforce contribution, as the injunction was not directed against the judgment, and the bond did not create any liability for its payment); Novak *v.* Dupont, 112 Iowa 334, 83 N. W. 1062 (holding that if one cosurety on a bond conditioned that the principal would "pay or cause to be paid" all notes executed to a bank, becomes surety on a note by the principal to such bank, which such surety pays, he is not entitled to contribution from his cosurety on the bond, as the principal had caused such note to be paid); Henkle *v.* Allstadt, 4 Gratt. (Va.) 284.

87. Ladd *v.* Portland Chamber of Commerce, 37 Oreg. 49, 60 Pac. 713, 61 Pac. 1127, 62 Pac. 208, holding that where a part of the sureties borrow money on their personal credit to prevent the default of the principal they cannot compel a surety who has taken no part in such transaction to contribute thereto as a surety has no right to obligate his cosurety to prevent a default of the principal. But see Bottoms *v.* Leonards, 53 S. W. 273, 21 Ky. L. Rep. 862, holding that where sureties guaranteed that a turnpike-road company should complete its road "free from debt" by a certain time, and some of them advanced money to enable the company to complete the road free from debt within the required time, the others, under the statute regulating contribution between cosureties, may be required to contribute.

88. *Alabama.*— Halsey *v.* Murray, 112 Ala. 185, 20 So. 575.

California.— Curtis *v.* Parks, 55 Cal. 106, holding that if, after a default by their principal, the sureties expressly agree among themselves to make payment in certain definite proportions, one of them paying the whole amount cannot recover anything, as, under their agreement, the payment in excess of his share was voluntary as to them.

Massachusetts.— Skillin *v.* Merrill, 16 Mass. 40.

Missouri.—Skrainka *v.* Rohan, 18 Mo. App. 340.

Ohio.— Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631.

South Carolina.— Lowndes *v.* Pinckney, 1 Rich. Eq. 155.

Wisconsin.— Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 110 Am. St. Rep. 946, 4 L. R. A. N. S. 666.

See 40 Cent. Dig. tit. "Principal and Surety," § 615.

When payment is voluntary in part the surety cannot have contribution as to the part that was voluntary. Briggs *v.* Hinton, 14 Lea (Tenn.) 233, holding that where the amount against the principal was swelled owing to an appeal by him alone, a surety paying the excess over the amount of the original judgment could not have contribution as to such excess.

89. Dussol *v.* Bruguiere, 50 Cal. 456 (holding that, although an executor of a surety makes payment without having the claim allowed in the probate court, he is entitled to contribution); Hoyt *v.* Tuthill, 33 Hun (N. Y.) 196 (holding that payment may be made, although the cosureties have not requested it); Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 110 Am. St. Rep. 946, 4 L. R. A. N. S. 666; Pitt *v.* Pursord, 5 Jur. 611, 10 L. J. Exch. 475, 8 M. & W. 538 (holding also that the rule stated in the text applies, although no demand has been made by the creditor).

If a surety is compelled to pay a note, it is not competent for his cosurety to show that the note, as between the principal and the payee, was without consideration. Cave *v.* Burns, 6 Ala. 780.

Payments held compulsory so as to give right of contribution — *Before suit begun.*— Goodall *v.* Wentworth, 20 Me. 322; Linn *v.* McClelland, 20 N. C. 596; Pitt *v.* Pursord, 5 Jur. 611, 10 L. J. Exch. 475, 8 M. & W. 538.

After suit brought and before judgment.— Bright *v.* Lennon, 83 N. C. 183.

Before execution issues on the judgment.— Buckner *v.* Stewart, 34 Ala. 429; Briggs *v.* Hinton, 14 Lea (Tenn.) 233; Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921.

Superseding judgment.— A surety against whom a judgment is rendered does not lose his right to have contribution by suing out a writ of error and superseding the judgment. John *v.* Jones, 16 Ala. 454.

In Louisiana.— Civ. Code, art. 3058 (3027), providing that, "when several persons have been sureties for the same debtor and for the same debt, the surety who has satisfied the debt, has his remedy against the other sureties in proportion to the share of each; but this remedy takes place only, when such person has paid in consequence of a lawsuit instituted against him," is held to be mandatory; and to entitle a surety to contribution, payment of the debt must have been enforced by suit at law against him. Stockmeyer *v.* Oertling, 35 La. Ann. 467; Monson's Succession, McGloin (La.) 368. But see Bond *v.* Bishop, 18 La. Ann. 549; Ferriday *v.* Purnell, 2 La. Ann. 334.

does not interpose, against the creditor, a technical or unmeritorious defense,[90] nor when he pays in ignorance of a good defense,[91] or waives a defense personal to himself.[92]

(B) *Payment After Debt Barred by Statute of Limitations.* Payment by one of the cosureties after the claim against them has been barred by the statute of limitations is voluntary and does not entitle him to contribution from the other cosureties.[93] But it is no defense to a cosurety, from whom contribution is sought that the creditor could not have enforced payment from him because the statute had run, if the cosurety making payment could not have set up that defense against the creditor.[94]

(V) *PAYMENT BY PRINCIPAL OR WITH PRINCIPAL'S FUNDS.* A surety has no right to contribution unless he has made payment with his own money. If payment has been made by the principal,[95] or by the surety with money or property

90. Harts *v.* Latham, 84 Ill. App. 483. In Deakyne *v.* Buchanan, 3 Houst. (Del.) 124, it was held that a surety in an executor's bond could compel his cosurety to contribute where a judgment had been obtained by default against him severally by a judgment creditor of the testator, although such creditor had not been required to prove a sufficiency of assets, and that the debt should have been paid by the executor.

91. Hichborn *v.* Fletcher, 66 Me. 209, 22 Am. Rep. 562; Warner *v.* Morrison, 3 Allen (Mass.) 566.

92. Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727 (holding that, although a surety might have resisted successfully the payment of a note upon the ground that it had been altered without his consent by the addition of other signatures after his, he is entitled to contribution if he pays it); Craven *v.* Freeman, 82 N. C. 361.

Statute of limitation see *infra*, IX, C, 1, c, (IV), (B).

93. *California.*— Machado *v.* Fernandez, 74 Cal. 362, 16 Pac. 19.

Kentucky.— Cochran *v.* Walker, 82 Ky. 220, 56 Am. Rep. 891 (holding that a surety against whom a judgment has been recovered, and who has paid the debt, cannot recover as for contribution against his cosurety, as to whom the cause of action was barred at the date of the judgment); Shelton *v.* Farmer, 9 Bush 314; Letcher *v.* Yantis, 3 Dana 160 (holding that the statute of 1828 exonerating a surety from the claim of the creditor who omits to sue him within a certain time, exonerates him from the claim of a cosurety for contribution also).

Louisiana.— Hatchett *v.* Pegram, 21 La. Ann. 722.

Maine.— Godfrey *v.* Rice, 59 Me. 308.

Maryland.— Hooper *v.* Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496.

Missouri.— Singleton *v.* Townsend, 45 Mo. 379.

New York.—Green *v.* Milbank, 56 How. Pr. 382.

Pennsylvania.— Wheatfield Tp. *v.* Brush Valley Tp., 25 Pa. St. 112.

Tennessee.— Cocke *v.* Hoffman, 5 Lea 105, 40 Am. Rep. 23.

Virginia.— Turner *v.* Thom, 89 Va. 745, 17 S. E. 323.

See 40 Cent. Dig. tit. "Principal and Surety," § 616½.

But see Bright *v.* Lennon, 83 N. C. 183, and Jones *v.* Blanton, 41 N. C. 115, 51 Am. Dec. 415, holding that a surety on a guardian's bond can have contribution, although he waives the statute of limitations in an action against him by the ward.

When a surety goes into another state where the statute of limitations is not a defense, after the claim is barred as to all parties in one state, and is compelled to pay the debt he is entitled to contribution. Aldrich *v.* Aldrich, 56 Vt. 324, 48 Am. Rep. 791.

Limitations of actions for contribution see *infra*, IX, C, 1, g, (V).

94. *Alabama.*— Cawthorne *v.* Weisinger, 6 Ala. 714.

Arkansas.— Williams *v.* Ewing, 31 Ark. 229.

Colorado.— Buell *v.* Burlingame, 11 Colo. 164, 17 Pac. 509.

Indiana.— Sexton *v.* Sexton, 35 Ind. 88.

Maine.— Crosby *v.* Wyatt, 23 Me. 156.

Maryland.— Hooper *v.* Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496.

New Hampshire.— Crosby *v.* Wyatt, 10 N. H. 318.

North Carolina.— Leak *v.* Covington, 99 N. C. 559, 6 S. E. 241.

Ohio.— Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

Oregon.— Durbin *v.* Kuney, 19 Oreg. 71, 23 Pac. 661.

Pennsylvania.— Martin *v.* Frantz, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. Rep. 859.

Texas.— Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528.

Vermont.— Aldrich *v.* Aldrich, 56 Vt. 324, 48 Am. Rep. 791.

England.— Wolmershausen *v.* Gullick, [1893] 2 Ch. 514, 62 L. J. Ch. 773, 68 L. T. Rep. N. S. 753, 3 Reports 610.

See 40 Cent. Dig. tit. "Principal and Surety," § 616½.

95. Crawford *v.* Glass, 33 N. C. 118.

Partial payment by the principal can be shown in reduction of a surety's claim for contribution. Gilmore *v.* Gilmore, (Kan. App. 1897) 50 Pac. 99, 104; Paulin *v.* Kaighn, 29 N. J. L. 480; Livingston *v.* Van Rensselaer, 6 Wend. (N. Y.) 63; Boughner *v.* Hall, 24 W. Va. 249.

of the principal in his hands, he cannot have contribution;[96] nor is he entitled to contribution if he has been reimbursed by the principal, or from the principal's estate.[97] If, however, apparent means of payment given to him by his principal prove worthless,[98] or through subsequent claims of other persons have to be applied in some other manner, his right to contribution revives.[99] A surety holding funds of the principal which he should have applied to the debt and which he misapplied cannot have contribution.[1]

d. Loss or Modification of Right — (i) *By Agreement Between Cosureties.* Sureties, who otherwise would be cosureties, and subject and entitled to contribution, may regulate the order of their liability and the rights of contribution among themselves by contract,[2] and such a contract supersedes the contract

96. *District of Columbia.*— Gibson *v.* Shehan, 5 App. Cas. 391, 28 L. R. A. 400, holding that a surety applying to the discharge of the debt, an indemnity bond given him by the principal, does not acquire any right of contribution.

Georgia.— Linder *v.* Snow, 119 Ga. 41, 45 S. E. 732.

Illinois.— Silvey *v.* Dowell, 53 Ill. 260.

Massachusetts.— Mason *v.* Lord, 20 Pick. 447.

New Jersey.— Paulin *v.* Kaighn, 29 N. J. L. 480.

New York.— Davis *v.* Toulmin, 77 N. Y. 280.

England.— Gopeel *v.* Swindon, 1 D. & L. 888, 8 Jur. 340, 13 L. J. Q. B. 113.

See 40 Cent. Dig. tit. "Principal and Surety," § 621 *et seq.*

97. *Indiana.*— Keiser *v.* Beam, 117 Ind. 31, 19 N. E. 534.

Maine.— Gould *v.* Fuller, 18 Me. 364.

Maryland.— McPherson *v.* Talbott, 10 Gill & J. 499, 32 Am. Dec. 191.

Massachusetts.— Mason *v.* Lord, 20 Pick. 447, holding that where a surety pays as administrator of the principal, and the sum paid is allowed him in the settlement of his accounts, he does not have any claim upon the other sureties for contribution as to such amount. And see Cockayne *v.* Sumner, 22 Pick. 117.

Virginia.— Boulware *v.* Hartsook, 83 Va. 679, 3 S. E. 289.

See 40 Cent. Dig. tit. "Principal and Surety," § 593 *et seq.*

Facts held insufficient to constitute reimbursement see Northwestern Nat. Bank *v.* Great Falls Opera-House Co., 23 Mont. 1, 57 Pac. 440.

98. Snyder *v.* Clark, 100 Cal. 414, 34 Pac. 1034; Zimmerman *v.* Neuer, 1 Pearson (Pa.) 110, where the surety failed to make his money by execution on a judgment given by the principal.

99. Wilson *v.* Stewart, 24 Ohio St. 504; Prindle *v.* Page, 21 Vt. 94, holding that where a surety, obtaining from the principal a lease of certain premises in consideration of his agreement to pay the note of the principal on which he was liable as surety, was compelled to give up such premises because they were subject to a prior mortgage which was foreclosed immediately afterward, and a judgment was obtained by the mortgagee against the surety for the rents and profits during the time he had retained possession he was entitled to contribution. See also Baye *v.* Van der Horck, 57 Minn. 497, 59 N. W. 630.

1. John *v.* Jones, 16 Ala. 454; Simmons *v.* Camp, 71 Ga. 54; Torrance *v.* Cook, 63 Ga. 598, holding that where three sureties induced their principal to furnish Confederate money with which to pay their obligee, but such payment being refused the note of one of the sureties with the others as sureties was given instead, the surety who signed as principal maker using the Confederate money in his business, he was not entitled to contribution, although he subsequently had paid the note in good money. And see *In re* Skiles, 211 Pa. St. 631, 61 Atl. 245.

2. *Florida.*— Hayden *v.* Thrasher, 18 Fla. 795.

Illinois.— Robertson *v.* Deatherage, 82 Ill. 511; Paul *v.* Berry, 78 Ill. 158.

Maryland.— Lusby *v.* Carr, 60 Md. 192, holding that where two of five sureties on a note gave mortgages on their real estate to secure the loan, and agreed with the other three that the real estate should constitute the primary security, the other three became secondarily liable so far as the mortgagors were concerned.

Michigan.— Bronson *v.* Marsh, 130 Mich. 35, 90 N. W. 686.

New Jersey.— Apgar *v.* Hiler, 24 N. J. L. 812.

New York.— Barry *v.* Ransom, 12 N. Y. 462.

Oregon.—Rose *v.* Wollenberg, 36 Oreg. 154, 59 Pac. 190, holding, however, that the facts in this case were not sufficient to raise an implied agreement varying the ordinary rule of contribution.

Pennsylvania.— Zimmerman *v.* Bridges, (1886) 4 Atl. 181; Mickley *v.* Stocksleger, 10 Pa. Co. Ct. 345.

Texas.— Hall *v.* Taylor, (Civ. App. 1906) 95 S. W. 755.

Vermont.— Keith *v.* Goodwin, 31 Vt. 268, 73 Am. Dec. 345.

England.— Thomas *v.* Cook, 8 B. & C. 728, 7 L. J. K. B. O. S. 49, 3 M. & R. 444, 15 E. C. L. 358.

Canada.— Thomas *v.* Nunns, 12 Quebec Super. Ct. 52, holding that where directors passed a resolution agreeing to be cosureties on a note to be discounted by a bank to raise funds for their company, but one of them refused to sign until he received a

implied by law.[3] A conditional agreement regulating the right of contribution cannot be enforced if the condition has not been complied with,[4] but a condition imposed on the principal by the surety, the non-performance of which would not be a defense as to the creditor, will not affect the liability of such surety to contribute.[5]

(II) *RELEASE OR DISCHARGE* — (A) *Of Surety.*[6] Release by a surety of his cosurety terminates the liability of the latter for contribution,[7] and is equivalent to payment by such cosurety, so far as other cosureties are concerned, and the latter cannot be held liable for any portion of the share of such released cosurety;[8] but a discharge of one cosurety by the creditor will not affect the right of the others to contribution from the surety released,[9] unless they have consented to the release,[10] or have paid with knowledge of the facts.[11]

(B) *Of Principal.* A release of the principal by a surety will prevent such surety from obtaining contribution from his cosureties,[12] and likewise a dis-

letter signed by the others agreeing to hold him harmless in respect to his indorsement such director became secondarily liable as among themselves.

See 40 Cent. Dig. tit. "Principal and Surety," § 608.

3. Kellogg *v.* Lopez, 145 Cal. 497, 78 Pac. 1056; Patterson *v.* Patterson, 23 Pa. St. 464.

As to the contract implied by law see *supra*, IX, C, 1, a.

4. Davezac *v.* Seiler, 93 Ky. 418, 20 S. W. 375, 14 Ky. L. Rep. 497 (holding that where the agreement by one surety to exonerate the other from liability was based on a promise by the latter to become a surety on another bond, failure to perform such promise constitutes a failure of consideration releasing the former from liability on his agreement); Ladd *v.* Portland Chamber of Commerce, 37 Oreg. 49, 60 Pac. 713, 61 Pac. 1127, 62 Pac. 208 (holding that where a surety agrees to assume his proportion of personal obligations entered into by his cosureties to prevent a default by the principal, on condition that he receives his share of interest on claim against the principal, he is not bound to contribute his share if the condition was not complied with).

5. Briggs *v.* Boyd, 37 Vt. 534, holding that a surety cannot resist contribution because the principal did not get the note discounted at a certain bank as he directed.

6. **By discharge in bankruptcy** see BANKRUPTCY, 5 Cyc. 398.

By creditor see *supra*, VIII, E, 2, b.

7. Warren *v.* Whitesides, 34 Miss. 171 (holding also that the procurement by a surety, at the request of a cosurety, of the payment of a stipulated sum by an insolvent principal is a sufficient consideration for a release); Peyton *v.* Stuart, 88 Va. 50, 13 S. E. 408, 16 S. E. 160.

8. Currier *v.* Baker, 51 N. H. 613. See Prescott *v.* Newell, 39 Vt. 82, holding that where two sureties gave a note in discharge of the obligation upon which they were bound, the fact that one of their cosureties became a surety on such note does not constitute or show of itself an agreement to delay enforcing contribution against him, so as to discharge other cosureties from their obligation to contribute. See also *supra*, VIII, E, 2, j.

9. *Maine.*— Hill *v.* Morse, 61 Me. 541.

Massachusetts.— Clapp *v.* Rice, 15 Gray 557, 77 Am. Dec. 387.

New Hampshire.— Boardman *v.* Paige, 11 N. H. 431.

Texas.— Lane *v.* Moon, (Civ. App. 1907) 103 S. W. 211.

Canada.— Macdonald *v.* Whitfield, 27 Can. Sup. Ct. 94.

See 40 Cent. Dig. tit. "Principal and Surety," § 608.

Discharge by statute.— It is held that a surety, having obtained his discharge by giving the statutory notice to the creditor, is not liable for contribution. Letcher *v.* Yantis, 3 Dana (Ky.) 160, holding, however, that if the contract of suretyship was made prior to the enactment of the statute providing for the release of a surety by giving notice to sue, the right of a cosurety to contribution is not affected by such release. But see Reiter *v.* Cumback, 1 Ind. App. 41, 27 N. E. 443, holding that the statute providing for notice by a surety to the creditor or obligee has no bearing upon the rights of cosureties as against each other.

10. Bouchaud *v.* Dias, 3 Den. (N. Y.) 238 (holding that where a surety on a custom-house bond is released by the secretary of the treasury pursuant to an act of congress, with the consent of another surety, the latter cannot maintain an action for contribution, but that such release is inoperative unless it be shown that all requirements of the act of congress have been complied with); Moore *v.* Isley, 22 N. C. 372.

11. Craven *v.* Freeman, 82 N. C. 361.

12. John *v.* Jones, 16 Ala. 454; Pickering *v.* Marsh, 7 N. H. 192; Draughan *v.* Bunting, 31 N. C. 10; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98, holding that this result is not affected by the fact that the release was executed upon a nominal consideration, nor by the fact that the surety did not have in mind the operation of the release as to his cosureties.

Where the will of a surety extinguishes the debt of the principal, contribution cannot be had. Hobart *v.* Stone, 10 Pick. (Mass.) 215.

Facts held not to constitute a release.— Where a surety filed his claim against the estate of a deceased principal, and contracted with an heir of the principal whereby the claim was withdrawn without participation

charge of the principal by the creditor or obligee releases all the sureties from liability for contribution.[13]

(c) *Extension of Time to Principal or to Surety.*[14] An extension of time to the principal by a surety,[15] or by the creditor with the consent of a surety,[16] takes away the right of such surety to enforce contribution. But an extension of time by the creditor to a surety will not affect the latter's right to contribution from a cosurety.[17]

(d) *Effect of Causing or Participating in Default of Principal.* A surety cannot have contribution if the default resulted from his wrongful act,[18] or if he participated in the wrongful act of a principal,[19] unless all of the sureties were equally at fault or acquiesced.[20]

e. Measure of Contribution — (i) *In General.* Where one of two or more cosureties has paid the debt for which they were all bound his cosureties are liable to him for their proportionate shares.[21] If partners have become sureties in the

in dividends, receiving certain property in full satisfaction, the transaction was only a payment by the estate to reduce the liability, and not a release of the principal so as to release cosureties from liability. Bull *v.* Rich, 92 Minn. 475, 100 N. W. 212, 101 N. W. 489. A surety who pays less than the amount of a judgment under a compromise with the creditor, by which it is agreed that the principal only is to remain bound to the creditor for the balance, and to the sureties for the amount so paid, can compel contribution from his cosureties, although he stipulated not to use the judgment against the principal, since the principal may afterward be made to respond to the sureties in an action at law for money paid. Cummings *v.* May, 91 Ala. 233, 8 So. 790.

Where the release results from mistake in the execution of an instrument the right to contribution is not affected. Vorley *v.* Barrett, 1 C. B. N. S. 225, 26 L. J. C. P. 1, 5 Wkly. Rep. 137, 87 E. C. L. 225. But a mistake of law as to the effect on contribution of a release given to the principal will not prevent such release discharging the cosureties. Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

13. Hamilton *v.* Glasscock, (Tex. 1888) 9 S. W. 207. If after the recovery of a judgment against the principal and his two sureties, the creditor releases the principal and one surety, but does not enter the release on the record of the judgment, and subsequently issues execution against the other surety which is paid, the latter should recover his property. Fox *v.* Litwiler, 12 Pa. Dist. 337.

14. **Extension of time to principal as discharging surety** see *supra*, VIII, E, 2, j.

15. Clark *v.* Dane, 128 Ala. 122, 28 So. 960 (holding that the rule applies, although the principal be insolvent and the cosureties are not injured by the extension); Dunn *v.* Slee, Holt N. P. 399, 3 E. C. L. 160, 1 Moore C. P. 2, 4 E. C. L. 505, 17 Rev. Rep. 651; Cameron *v.* Boulton, 9 U. C. C. P. 537. But see Greenwood *v.* Francis, [1899] 1 Q. B. 312, 68 L. J. Q. B. 228, 79 L. T. Rep. N. S. 624, 15 T. L. R. 125, 47 Wkly. Rep. 230, holding that if the sureties, in their original contract with the obligee, have agreed to be treated as principals and not to be released by reason of time being given to the principal, and one surety, on making payment, takes an assignment of the bond from the obligee, such paying surety stands in the place of the obligee, and an agreement between the surety and the principal not to enforce the liability of the latter for a certain time will not defeat the right to contribution.

16. Boughton *v.* Orleans Bank, 2 Barb. Ch. (N. Y.) 458; Worthington *v.* Peck, 24 Ont. 535.

17. Dunn *v.* Slee, Holt N. P. 399, 3 E. C. L. 160, 1 Moore C. P. 2, 4 E. C. L. 505, 17 Rev. Rep. 651.

18. *Missouri.*— Block *v.* Estes, 92 Mo. 318, 4 S. W. 731.

New York.—Crisfield *v.* Murdock, 127 N. Y. 315, 27 N. E. 1046, holding that a surety cannot have contribution for money which he refused to pay to the person entitled to receive it, and which subsequently was lost through a bank failure.

Ohio.— McCrory *v.* Parks, 18 Ohio St. 1, where the default resulted from the fraud of the surety seeking contribution.

Pennsylvania.— Eshleman *v.* Bolenius, 144 Pa. St. 269, 22 Atl. 758, holding that a surety on an administrator's bond, who has collected money belonging to the estate, and wrongfully loaned it to a third person, cannot have contribution for any amount he is compelled to pay to the estate owing to the insolvency of the borrower.

England.— Blyth *v.* Fladgate, [1891] 1 Ch. 337, 60 L. J. Ch. 66, 63 L. T. Rep. N. S. 546, 39 Wkly. Rep. 422.

See 40 Cent. Dig. tit. "Principal and Surety," § 606 *et seq.*

Measure of liability of surety who causes default see *infra*, IX, C, 1, e, (v).

19. Healey *v.* Scofield, 60 Ga. 450; Scofield *v.* Gaskill, 60 Ga. 277; Pile *v.* McCoy, 99 Tenn. 367, 41 S. W. 1052, where the suretv for a guardian took the ward's money in payment of a debt due to the surety from the guardian individually.

20. Pomeroy *v.* Sterrett, 183 Pa. St. 17, 38 Atl. 476; Pile *v.* McCoy, 99 Tenn. 367, 41 S. W. 1052; Briggs *v.* Boyd, 37 Vt. 534.

21. *Alabama.*— Owen *v.* McGehee, 61 Ala. 440.

firm-name, they are regarded, for the purpose of contribution, as one surety;[22] and the heirs of a cosurety are liable in such equal sums as amount in the aggregate to the proportionate share of their ancestor.[23]

(II) *Effect of Cosureties' Insolvency or Absence From Jurisdiction.* It is generally held that if contribution be sought at law, each surety is liable for no more than his exact aliquot proportion, ascertained by dividing the amount for which all the sureties were liable, by their entire number, without respect to the solvency of any of them.[24] In equity, if some of the sureties are insolvent,[25] or out of the jurisdiction, the amount for which cosureties are liable in contribution is apportioned among the solvent sureties within the jurisdiction.[26]

California.— Williams *v.* Riehl, 127 Cal. 365, 59 Pac. 763, 78 Am. St. Rep. 60.

Colorado.— McAllister *v.* Irwin, 31 Colo. 254, 73 Pac. 47.

Delaware.— Deakyne *v.* Buchanan, 3 Houst. 124.

Indiana.— Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

Kansas.— Gilmore *v.* Gilmore, (App. 1897) 50 Pac. 99, 104.

Kentucky.— Hudson *v.* Combs, 110 Ky. 762, 62 S. W. 709, 23 Ky. L. Rep. 231; Lee *v.* Forman, 3 Metc. 114; Crowdus *v.* Shelby, 6 J. J. Marsh. 61; Mitchell *v.* Sproul, 5 J. J. Marsh. 264.

Louisiana.— Lloyd *v.* Martin, 7 Mart. 444.

Maine.— Titcomb *v.* McAllister, 81 Me. 399, 17 Atl. 315.

Massachusetts.— Kelly *v.* Page, 7 Gray 213; Bachelder *v.* Fiske, 17 Mass. 464; Johnson *v.* Johnson, 11 Mass. 359.

Mississippi.— Stone *v.* Buckner, 12 Sm. & M. 73.

New Jersey.— Bishop *v.* Smith, (Sup. 1904) 57 Atl. 874; Wyckoff *v.* Vliet, (1887) 9 Atl. 680.

New York.— Norton *v.* Coons, 6 N. Y. 33; Lyth *v.* Green, 21 N. Y. App. Div. 300, 47 N. Y. Suppl. 478; Bradley *v.* Burwell, 3 Den. 61; Beaman *v.* Blanchard, 4 Wend. 432.

North Carolina.— Smith *v.* Carr, 128 N. C. 150, 38 S. E. 732; Hughes *v.* Boone, 81 N. C. 204; Cherry *v.* Wilson, 78 N. C. 164, 166.

Ohio.— Wilson *v.* Stewart, 24 Ohio St. 504.

Oregon.— Van Winkle *v.* Johnson, 11 Oreg. 469, 5 Pac. 922, 50 Am. Rep. 495.

Pennsylvania.— Cooper's Estate, 4 Pa. Super. Ct. 615, 40 Wkly. Notes Cas. 254.

Texas.—Acers *v.* Curtis, 68 Tex. 423, 4 S. W. 551; Smart *v.* Panther, 42 Tex. Civ. App. 262, 95 S. W. 679; Mulkey *v.* Templeton, (Civ. App. 1901) 60 S. W. 439.

Vermont.— Flanagan *v.* Post, 45 Vt. 246; Prindle *v.* Page, 21 Vt. 94; Foster *v.* Johnson, 5 Vt. 60.

Wisconsin.— Boutin *v.* Etsell, 110 Wis. 276, 85 N. W. 964; Rudolf *v.* Malone, 104 Wis. 470, 80 N. W. 743; German-American Sav. Bank *v.* Fritz, 68 Wis. 390, 32 N. W. 123.

United States.— McDonald *v.* Magruder, 3 Pet. 470, 7 L. ed. 744; Lidderdale *v.* Robinson, 12 Wheat. 594, 6 L. ed. 740 [*affirming* 15 Fed. Cas. No. 8,337, 2 Brock. 159].

England.— Cowell *v.* Edwards, 2 B. & P. 268; *In re* Swan, Ir. R. 4 Eq. 208; Kemp *v.* Finden, 8 Jur. 65, 13 L. J. Exch. 137, 12 M. & W. 421; Pitt *v.* Pursord, 5 Jur. 611, 10 L. J. Exch. 475, 8 M. & W. 538.

Canada.— Harper *v.* Knowlson, 2 Grant Err. & App. (U. C.) 253.

See 40 Cent. Dig. tit. "Principal and Surety," § 627.

22. Ferriday *v.* Purnell, 2 La. Ann. 334; Chaffee *v.* Jones, 19 Pick. (Mass.) 260.

23. Wood *v.* Leland, 1 Metc. (Mass.) 387.

24. *Illinois.*— Moore *v.* Bruner, 31 Ill. App. 400.

Indiana.— Newton *v.* Pence, 10 Ind. App. 672, 38 N. E. 484.

New Jersey.— Stothoff *v.* Dunham, 19 N. J. L. 181.

North Carolina.— Adams *v.* Hayes, 120 N. C. 383, 27 S. E. 47; Samuel *v.* Zachery, 26 N. C. 377.

Oregon.— Fischer *v.* Gaither, 32 Oreg. 161, 51 Pac. 736.

South Carolina.—Aiken *v.* Peay, 5 Strobh. 15, 53 Am. Dec. 684.

Tennessee.— Riley *v.* Rhea, 5 Lea 115.

England.— Browne *v.* Lee, 6 B. & C. 689, 9 D. & R. 700, 5 L. J. K. B. O. S. 276, 13 E. C. L. 310.

See 40 Cent. Dig. tit. "Principal and Surety," § 628.

25. *Kentucky.*— Cobb *v.* Haynes, 8 B. Mon. 137; Bosley *v.* Taylor, 5 Dana 157, 30 Am. Dec. 677; Breckinridge *v.* Taylor, 5 Dana 110.

Michigan.— Stewart *v.* Goulden, 52 Mich. 143, 17 N. W. 731.

Missouri.— Dodd *v.* Winn, 27 Mo. 501.

North Carolina.— Hughes *v.* Boone, 81 N. C. 204.

South Carolina.— Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 543; Harris *v.* Ferguson, 2 Bailey 397.

Tennessee.— Gross *v.* Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635.

Virginia.— Beckham *v.* Duncan, (1889) 9 S. E. 1002; Robertson *v.* Trigg, 32 Gratt. 76.

England.— Hitchman *v.* Stewart, 3 Drew. 271, 3 Eq. Rep. 838, 1 Jur. N. S. 839, 24 L. J. Ch. 690, 3 Wkly. Rep. 464, 61 Eng. Reprint 271; Dallas *v.* Walls, 29 L. T. Rep. N. S. 599.

See 40 Cent. Dig. tit. "Principal and Surety," § 628.

26. *Kentucky.*— Bosley *v.* Taylor, 5 Dana 157, 30 Am. Dec. 677.

Michigan.— Stewart *v.* Goulden, 52 Mich. 143, 17 N. W. 731.

North Carolina.— Jones *v.* Blanton, 41 N. C. 115, 51 Am. Dec. 415.

The equitable doctrine is sometimes followed at law.[27] But the death or insolvency of some of the cosureties does not affect the liability of the others on an express agreement made by all.[28]

(III) *Effect of Relinquishment or Loss of Security.* If before the liability of his cosureties is terminated a surety voluntarily relinquish,[29] or lose security held by him, a cosurety can resist contribution to the extent of the value of the security so lost or relinquished,[30] and a surety who induces cosureties to

South Carolina.— McKenna *v.* George, 2 Rich. Eq. 15.

Tennessee.— Gross *v.* Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635.

See 40 Cent. Dig. tit. "Principal and Surety," § 628.

27. Weed *v.* Calkins, 24 Hun (N. Y.) 582 (where the controversy was submitted without process under code, § 1279, and the court held that, although to authorize the equitable apportionment the suit should be in equity, in submitting the controversy the parties waived the technicalities of an action and the equitable doctrine was followed); Mills *v.* Hyde, 19 Vt. 59, 46 Am. Dec. 177 (holding that there is no logical foundation for the distinction between the legal and equitable doctrine).

Adoption by statute.— The equitable doctrine is sometimes adopted by statute. Couch *v.* Terry, 12 Ala. 225; Bottoms *v.* Leonard, 53 S. W. 273, 21 Ky. L. Rep. 862.

In Missouri the statute providing that sureties are liable to each other for their "due proportion" of the amount paid in settlement of the debt is construed in the light of the equitable doctrine to apportion the debt among the solvent sureties only, both at law and in equity. Dodd *v.* Winn, 27 Mo. 501.

In jurisdictions where there are no separate courts of chancery contribution is enforced according to the equitable doctrine. Smith *v.* Mason, 44 Nebr. 610, 63 N. W. 41; Boardman *v.* Paige, 11 N. H. 431; Henderson *v.* McDuffee, 5 N. H. 38, 20 Am. Dec. 557; Liddell *v.* Wiswell, 59 Vt. 365, 8 Atl. 680; Faurot *v.* Gates, 86 Wis. 569, 57 N. W. 294, under statute abolishing the distinction between actions at law and in equity.

28. Dennis *v.* Sanger, 15 Tex. Civ. App. 411, 39 S. W. 997.

29. *Alabama.*— Taylor *v.* Morrison, 26 Ala. 728, 62 Am. Dec. 747.

Kentucky.— Roberts *v.* Sayre, 6 T. B. Mon. 188.

Maryland.— Hilleary *v.* Hurdle, 6 Gill 105.

Missouri.—Chilton *v.* Chapman, 13 Mo. 470.

New York.— Ramsey *v.* Lewis, 30 Barb. 403; Fielding *v.* Waterhouse, 40 N. Y. Super. Ct. 424; Boyer *v.* Marshall, 8 N. Y. St. 233.

West Virginia.— Neely *v.* Bee, 32 W. Va. 519, 9 S. E. 898.

See 40 Cent. Dig. tit. "Principal and Surety," § 600.

The relinquishment must amount to a fraud on the cosurety in order to take away the right to contribution. Paulin *v.* Kaighn, 27 N. J. L. 503. In Brandon *v.* Medley, 54 N. C. 313, it was held that where cosureties on an administration bond compromise a suit against them, under the advice of counsel and from an honest belief that both were liable to the larger sum, on account of the devastavit and insolvency of their principal and it was afterward discovered that one of them who had administered on the estate of the principal had erroneously given up assets of the principal to another, acting under legal advice and by a misapprehension of law, but in good faith, which assets, if they had been held, would have saved both sureties from loss by reason of their suretyship, the whole burden could not be thrown on the surety who had thus given up the assets, it not appearing that he had concealed the facts from his cosurety and there being no allegation of fraud or imposition.

Whether the relinquishment is before or after payment of the debt is immaterial. Paulin *v.* Kaighn, 29 N. J. L. 480.

If the surety was compelled to surrender the security to third persons, provided he shows that the claim of such third persons was a superior one, he does not lose his right to contribution. Cornett *v.* Holcomb, 62 S. W. 477, 23 Ky. L. Rep. 34.

An exchange of security, in good faith, which does not occasion any loss, will not affect the right to contribution, although such change is made without the knowledge of the cosurety. Carpenter *v.* Kelly, 9 Ohio 106.

A surety can be restrained from relinquishing security by a bill in equity. Sheehan *v.* Taft, 110 Mass. 331.

30. *Alabama.*— Steele *v.* Mealing, 24 Ala. 285.

Georgia.— Simmons *v.* Camp, 71 Ga. 54.

Illinois.— Frink *v.* Peabody, 26 Ill. App. 390.

Indiana.— Pollard *v.* Pittman, 37 Ind. App. 475, 77 N. E. 293.

Kentucky.— Teeter *v.* Pierce, 11 B. Mon. 399; Goodloe *v.* Clay, 6 B. Mon. 236.

Louisiana.— Moore *v.* Drew, 51 La. Ann. 740, 25 So. 402.

Minnesota.— Schmidt *v.* Coulter, 6 Minn. 492.

Missouri.— Chilton *v.* Chapman, 13 Mo. 470.

New York.— Crisfield *v.* Murdock, 127 N. Y. 315, 27 N. E. 1046.

North Carolina.— Kerns *v.* Chambers, 38 N. C. 576.

Pennsylvania.— Eshleman *v.* Bolenius, 144 Pa. St. 269, 22 Atl. 758.

Tennessee.— Brown *v.* McDonald, 8 Yerg. 158, 29 Am. Dec. 112.

See 40 Cent. Dig. tit. "Principal and Surety," § 599.

Security available to cosurety.— But in

surrender collateral security held by them for their protection, will be estopped from enforcing a claim for contribution to the extent of the collateral surrendered.[31] But a surety is not obliged to accept security; and his refusal to do so will not defeat his right to contribution.[32]

(iv) *Cosureties Bound For Different Amounts.* Cosureties who have executed separate instruments for different amounts are liable for contribution in proportion to the amounts named in the respective instruments;[33] and where sureties on the same instrument are liable for different amounts, each must contribute the proportion that the amount for which he is liable bears to the aggregate sum.[34]

(v) *When Full Amount Paid Is Recoverable.* In some cases a surety

Moorhouse *v.* Kidd, 25 Ont. App. 221, it is held that where a surety had security equally available to his cosureties and which they could have enforced, he is not deprived of his right to contribution by reason of the fact that he did not enforce it and depreciation resulted.

The value is presumed to be the full value unless the delinquent proves otherwise. Paulin *v.* Kaighn, 29 N. J. L. 480; Fielding *v.* Waterhouse, 40 N. Y. Super. Ct. 424. But see Teeter *v.* Pierce, 11 B. Mon. (Ky.) 399, holding that a surety who loses the benefit of a mortgage is chargeable with the fair vendible value of the mortgaged property at a coercive sale.

Loss or relinquishment of various classes of security — *Funds.*— Crisfield *v.* Murdock, 127 N. Y. 315, 27 N. E. 1046 (holding that where a surety on the bond of a collector takes the management of the funds, depositing them in a bank of which he is president and chief manager, and refuses to pay them to the treasurer when directed to do so by the collector, he is, as between himself and a cosurety, primarily liable for the funds if they are lost by a failure of the bank); Eshleman *v.* Bolenius, 144 Pa. St. 269, 22 Atl. 758; Neely *v.* Bee, 32 W. Va. 519, 9 S. E. 898.

Mortgage.— Taylor *v.* Morrison, 26 Ala. 728, 62 Am. Dec. 747 (holding that a surety is not excused for abandoning mortgaged property merely because the mortgagor objects to giving it up); Steele *v.* Mealing, 24 Ala. 285 (holding that a surety cannot have contribution if he permits property mortgaged to him to be levied upon and sold); Frink *v.* Peabody, 26 Ill. App. 390; Teeter *v.* Pierce, 11 B. Mon. (Ky.) 399; Goodloe *v.* Clay, 6 B. Mon. (Ky.) 236; Roberts *v.* Sayre, 6 T. B. Mon. (Ky.) 188; Ramsey *v.* Lewis, 30 Barb. (N. Y.) 403.

Deed of trust.— Chilton *v.* Chapman, 13 Mo. 490.

Lien.— Moore *v.* Drew, 51 La. Ann. 740, 25 So. 402, holding that where a surety has a right to enforce a vendor's privilege, but allows a company, in which he is a stockholder, to obtain judgment against the property without making any claim to the property or to its proceeds, he cannot recover from his cosurety.

Judgment against the principal.—Fielding *v.* Waterhouse, 40 N. Y. Super. Ct. 424. But see Cummings *v.* May, 91 Ala. 233, 8 So. 790, holding that a surety who has stipulated not to use a judgment obtained by the creditor against the principal can have contribution if the principal afterward can be made to respond to the cosureties in an action at law for money paid.

Judgment against third person.— Schmidt *v.* Coulter, 6 Minn. 492, where the surety after obtaining a judgment against a garnishee of his principal lost his remedy by neglect.

Levy on property of principal.— Brown *v.* McDonald, 8 Yerg. (Tenn.) 158, 29 Am. Dec. 112, holding that where an execution issued on a judgment against a principal and two sureties is levied on property of the principal sufficient to satisfy it, but one surety executes a delivery bond with the principal for the property, such surety cannot have contribution to the amount of the debt paid by him after forfeiture of the bond. But see Chipman *v.* Todd, 60 Me. 282.

31. Ayer *v.* Tilton, 42 N. H. 407.

32. Smith *v.* Mason, 44 Nebr. 610, 63 N. W. 41.

Agreement not to record mortgage.— If a surety has received security from the principal with the understanding that it is not to be recorded, he can have contribution, although the benefit of the security is lost by reason of its not being recorded. White *v.* Carlton, 52 Ind. 371; Pool *v.* Williams, 30 N. C. 286, where the agreement was that the security was not to be registered "unless it becomes necessary to do so."

33. *Massachusetts.*— Loring *v.* Bacon, 3 Cush. 465.

New York.— Armitage *v.* Pulver, 37 N. Y. 494.

North Carolina.— Moore *v.* Boudinot, 64 N. C. 190; Jones *v.* Blanton, 41 N. C. 115, 51 Am. Dec. 415; Jones *v.* Hays, 38 N. C. 502, 44 Am. Dec. 78; Bell *v.* Jasper, 37 N. C. 597.

Tennessee.— Odom *v.* Owen, 2 Baxt. 446.

England.— Deering *v.* Winchelsea, 2 B. & P. 270, 1 Cox Ch. 318, 1 Rev. Rep. 41, 29 Eng. Reprint 1184.

See 40 Cent. Dig. tit. "Principal and Surety," § 629.

But see Burnett *v.* Millsaps, 59 Miss. 333.

34. Moore *v.* Hanscom, (Tex. Civ. App. 1907) 103 S. W. 665; *In re* MacDonaghs, Ir. R. 10 Eq. 269; Arcedeckne *v.* Howard, 45 L. J. Ch. 622 [*affirming* 27 L. T. Rep. N. S. 194, 20 Wkly. Rep. 879].

can recover the entire amount paid by him from another surety, as where the latter by his wrongful act caused the default of the principal;[35] or where the amount sought to be recovered is interest charged to the principal on money borrowed by the surety from whom contribution is sought.[36] If one of two or more sureties has agreed to be primarily liable as between himself and the others, the entire amount can be collected from him.[37]

(VI) *Basis of Apportionment* — (A) *In General.* Contribution is based upon the exact amount paid to satisfy the liability of the sureties, whether the payment is in full or by way of compromise of the whole debt.[38] But a surety cannot recover contribution for an amount paid by him in excess of the original debt.[39] Any payments procured from the principal must be deducted from the original amount, the remainder being the liability of the sureties, and their proportions are based thereon.[40] Nor can a surety recover any more by having his payment take the form of an assignment of the claim of the creditor; he is still entitled to contribution only on the basis of the actual settlement.[41]

(B) *Payments and Proceeds of Security From Principal.* In ascertaining the amount which forms the basis of contribution, there must be deducted from the entire amount any payments made by the principal to the surety seeking contribution,[42] and any funds or proceeds of security held by the latter belonging to the

35. Swoope *v.* Trotter, 4 Port. (Ala.) 27 (holding that where a surety on the bond of a guardian receives funds of the ward in payment of a debt due from the guardian in his individual capacity, a cosurety, having been called upon to pay an amount due on the bond, can recover from the first surety the amount so received); Daniel *v.* Joyner, 38 N. C. 513; Norfleet *v.* Cotton, 16 N. C. 334; Pile *v.* McCoy, 99 Tenn. 367, 41 S. W. 1052.

36. Thompson *v.* Dekum, 32 Oreg. 179, 52 Pac. 517, 755.

37. Cox *v.* Waggoner, 5 Sneed (Tenn.) 542; Thomas *v.* Cook, 8 B. & C. 728, 7 L. J. K. B. O. S. 49, 3 M. & R. 444, 15 E. C. L. 358; Arcedeckne *v.* Howard, 45 L. J. Ch. 622 [*affirming* 27 L. T. Rep. N. S. 194, 20 Wkly. Rep. 879], holding, however, that an agreement among cosureties in regard to advancing money to pay the creditor cannot be construed as an agreement fixing the amount of their liability as to each other.

38. *Alabama.*— Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729; Pegram *v.* Riley, 88 Ala. 399, 6 So. 753; Stallworth *v.* Preslar, 34 Ala. 505.

Kentucky.— Hudson *v.* Combs, 110 Ky. 762, 62 S. W. 709, 23 Ky. L. Rep. 231; Breckenridge *v.* Taylor, 5 Dana 110, holding also that where a surety takes a receipt for more than the amount of a judgment against him "paid on a compromise, in full satisfaction of the judgment," it will be presumed that he made full payment in the absence of proof that less than the whole amount had been received, or that payment had been in property at a conventional price.

Texas.— Mulkey *v.* Templeton, (Civ. App. 1901) 60 S. W. 439; Scott *v.* Rowland, 14 Tex. Civ. App. 370, 37 S. W. 380.

West Virginia.— Weimer *v.* Talbot, 56 W. Va. 257, 49 S. E. 372.

Wisconsin.— Boutin *v.* Etsell, 110 Wis. 276, 85 N. W. 964.

See 40 Cent. Dig. tit. "Principal and Surety," § 628 *et seq.*

If payment be made in property, real or personal, its value at the time of payment, without reference to its cost, will fix the basis of contribution. Jones *v.* Bradford, 25 Ind. 305 (payment in land); Hickman *v.* McCurdy, 7 J. J. Marsh. (Ky.) 555 (payment by a house and lot); Edmonds *v.* Sheahan, 47 Tex. 443 (payment in Confederate money).

39. Hickman *v.* McCurdy, 7 J. J. Marsh. (Ky.) 555.

40. Gilmore *v.* Gilmore, (Kan. App. 1897) 50 Pac. 99, 104; McClelland *v.* Davis, 4 Lea (Tenn.) 97; Boughner *v.* Hall, 24 W. Va. 249. But see White *v.* Banks, 21 Ala. 705, 56 Am. Dec. 283, holding that where one cosurety refuses to accept the conditions imposed by the principal for obtaining the proceeds of security — that a release should be executed — and thereby fails to obtain means to pay the debt, he cannot have contribution from another cosurety who has performed the conditions, and applied such proceeds on his share of the debt.

Where the paying surety acquires land of the principal, its value at the time he acquires it fixes the amount which is to be deducted from the indebtedness paid. Livingston *v.* Van Rensselaer, 6 Wend. (N. Y.) 63.

41. Kellogg *v.* Lopez, 145 Cal. 497, 78 Pac. 1056; Williams *v.* Riehl, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60; Sinclair *v.* Redington, 56 N. H. 146; Tarr *v.* Ravenscroft, 12 Gratt. (Va.) 642. But see Boutin *v.* Etsell, 110 Wis. 276, 85 N. W. 964, holding that the fact that the sureties on the bond of a defaulting county treasurer took an assignment instead of a satisfaction of a judgment on the bond, in settling with the county, did not prejudice a cosurety sued for contribution, there not being any attempt to enforce the face of the judgment.

42. Wyckoff *v.* Gardner, (N. J. Ch. 1886) 5 Atl. 801; Davis *v.* Toulmin, 77 N. Y. 280;

principal.[43] The surety seeking contribution must, however, be allowed credit for any expenses reasonably incurred by him in protecting or realizing on such security,[44] or in acquiring it, or keeping it alive,[45] or in making it available.[46]

(c) *Interest.* In determining the amount upon which contribution is based interest paid by the surety to the creditor must be included,[47] and a surety may recover interest on the proportionate share of his cosurety from the date of payment to the creditor,[48] at the legal rate,[49] even though the instrument held by the creditor provided for a higher rate.[50] The cosurety may, however, by bringing into court the amount of his share of the sum due, be released as to any further interest.[51]

(d) *Costs and Attorney's Fees.* If a judgment be obtained by the creditor against all of the sureties, contribution can be had to the costs of the suit by the surety against whom the judgment was enforced.[52] Contribution can be had to costs incurred in a suit by the creditor against one surety alone which are paid by him, if defense of the suit was reasonably prudent and justifiable,[53] or resulted in a

Boughner *v.* Hall, 24 W. Va. 249; Bushnell *v.* Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411.

43. *Alabama.*— John *v.* Jones, 16 Ala. 454.
Iowa.— Doud *v.* Waller, 48 Iowa 634.
Kansas.— Gilmore *v.* Gilmore, (App. 1897) 50 Pac. 99, 104.
Kentucky.— Moore *v.* Moberly, 7 B. Mon. 299.
Massachusetts.— Bachelder *v.* Fiske, 17 Mass. 464.
New Hampshire.— Currier *v.* Fellows, 27 N. H. 366.
New Jersey.— Wolcott *v.* Hagerman, 50 N. J. L. 289, 13 Atl. 605.
North Carolina.— Carr *v.* Smith, 129 N. C. 232, 39 S. E. 831; Fagan *v.* Jacocks, 15 N. C. 263.
England.— *In re* Arcedeckne, 24 Ch. D. 709, 53 L. J. Ch. 102, 48 L. T. Rep. N. S. 725.
See 40 Cent. Dig. tit. "Principal and Surety," § 596 *et seq.* And see cases cited *infra*, IX, C, 1, f, (I), (A), (1).
Funds due to the principal and another jointly do not come within the operation of the rule in the text. Cook *v.* Davis, 22 Cal. 157.
If the principal is deceased the fact that the surety seeking contribution holds funds belonging to the principal will not affect the basis of apportionment, as he is liable to account for such funds to the administrator so that they can be administered according to law. Sharp *v.* Caldwell, 7 Humphr. (Tenn.) 415.

44. Livingston *v.* Van Rensselaer, 6 Wend. (N. Y.) 63 (holding that the surety seeking contribution must be allowed to deduct from the proceeds of a mortgage the expenses of foreclosure and sale); Derosset *v.* Bradley, 63 N. C. 17 (holding that where two sureties on a note agreed to employ a broker to purchase bills of a bank, to which the note was payable, to a sufficient amount to pay the debt, contribution can be had for the percentage charged by the broker); *In re* Arcedeckne, 24 Ch. D. 709, 53 L. J. Ch. 102, 48 L. T. Rep. N. S. 725 (holding that the surety seeking contribution must be credited with premiums paid on a policy of insurance on the life of the principal if he is required to account for the proceeds of such policy).

45. White *v.* Banks, 21 Ala. 705, 56 Am. Dec. 283; *In re* Arcedeckne, 24 Ch. D. 709, 53 L. J. Ch. 102, 48 L. T. Rep. N. S. 725, where the surety paid premiums on a policy of insurance on the life of the principal.

46. Hoover *v.* Mowrer, 84 Iowa 43, 50 N. W. 62, 35 Am. St. Rep. 293; Aldrich *v.* Hapgood, 39 Vt. 617. But see Comegys *v.* State Bank, 6 Ind. 357.

47. Weimer *v.* Talbot, 56 W. Va. 257, 49 S. E. 372.

48. *Illinois.*— Moore *v.* Bruner, 31 Ill. App. 400.
Kentucky.— Breckinridge *v.* Taylor, 5 Dana 110.
Maine.— Titcomb *v.* McAllister, 81 Me. 399, 17 Atl. 315.
Nebraska.— Smith *v.* Mason, 44 Nebr. 610, 63 N. W. 41.
South Carolina.— Aikin *v.* Peay, 5 Strobh. 15, 53 Am. Dec. 684.
Tennessee.— Gross *v.* Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635.
Texas.— Edmonds *v.* Sheahan, 47 Tex. 443; Farmers', etc., Bank *v.* Bayless, 1 Tex. App. Civ. Cas. § 1245.
West Virginia.— Weimer *v.* Talbot, 56 W. Va. 257, 49 S. E. 372.
Wisconsin.— Bushnell *v.* Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411.
England.— Hitchman *v.* Stewart, 3 Drew. 271, 3 Eq. Rep. 838, 1 Jur. N. S. 839, 24 L. J. Ch. 690, 3 Wkly. Rep. 464, 61 Eng. Reprint 907; *In re* Swan, Ir. R. 4 Eq. 208.
See 40 Cent. Dig. tit. "Principal and Surety," § 630.

49. Toole *v.* Durand, 7 Rob. (La.) 363; Rothschild *v.* Bowers, 2 Rob. (La.) 380.

50. Scott *v.* Rowland, 14 Tex. Civ. App. 370, 37 S. W. 380; Bushnell *v.* Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411.

51. Smith *v.* Anderson, 18 Md. 520.

52. Robertson *v.* Maxcey, 6 Dana (Ky.) 101 (under statute); Davis *v.* Emerson, 17 Me. 64; Kemp *v.* Finden, 8 Jur. 65, 13 L. J. Exch. 137, 12 M. & W. 421.

53. Wagenseller *v.* Prettyman, 7 Ill. App. 192; Bosley *v.* Taylor, 5 Dana (Ky.) 157, 30 Am. Dec. 677; Breckinridge *v.* Taylor, 5 Dana (Ky.) 110; Bright *v.* Lennon, 83 N. C. 183; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

reduction of the demand of the creditor;[54] and contribution for attorney's fees paid in resisting the claim of the creditors is allowed under the same conditions.[55] A surety, who having paid his proportionate share of the debt to the creditor is sued for and compelled to pay the balance of the debt can recover from his cosurety the necessary costs of the creditor's action against him,[56] and mere willingness, unaccompanied by an offer to pay his share of the original debt before action brought for the recovery thereof, will not relieve a surety from liability to contribution for costs,[57] nor will payment of his share after suit begun;[58] and it will not avail a surety to show that he was not served with process in the original action by the creditor.[59] A surety can recover costs incurred in the suit against his cosurety who has failed to make contribution after demand.[60]

f. Security or Indemnity — (I) *From Principal* — (A) *Before Mutual Rights of Cosureties Are Adjusted* — (1) Right of Sureties to Participation. Cosureties are in general entitled to participate equally in all benefits received by any one of their number from the principal, such as payments made by the latter,[61] or collected from him by suit,[62] and to the benefit of any security which has been received by a cosurety from the principal,[63] or of the proceeds of any such

54. Carter *v.* Maryland Fidelity, etc., Co., 134 Ala. 369, 32 So. 632, 92 Am. St. Rep. 41; McKenna *v.* George, 2 Rich. Eq. (S. C.) 15.

55. Wagenseller *v.* Prettyman, 7 Ill. App. 192; Backus *v.* Coyne, 45 Mich. 584, 8 N. W. 694 (holding that the right of contribution for attorney's fees does not depend upon the surety's success in the defense, and that it is sufficient if he acted as a prudent man would in the light of facts and circumstances showing a probability of success in whole or in part sufficient to justify the expense likely to be incurred); Gross *v.* Davis, 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635; Boutin *v.* Etsell, 110 Wis. 276, 85 N. W. 964 (where the defense resulted in a reduction of the amount claimed).

56. McKee *v.* Campbell, 27 Mich. 497.

57. Van Winkle *v.* Johnson, 11 Oreg. 469, 5 Pac. 922, 50 Am. Rep. 495.

58. Smith *v.* Anderson, 18 Md. 520 (holding, however, that by paying his share into court after commencement of suit a surety can relieve himself from responsibility for costs accruing thereafter); Van Winkle *v.* Johnson, 11 Oreg. 469, 5 Pac. 922, 50 Am. Rep. 495.

59. Van Winkle *v.* Johnson, 11 Oreg. 469, 5 Pac. 922, 50 Am. Rep. 495.

60. Sherrod *v.* Woodard, 15 N. C. 360, 25 Am. Dec. 714.

61. *Georgia.*—McLewis *v.* Furgerson, 59 Ga. 644, holding that where a tax collector divided the profits of his office with one of the sureties on his bond, in pursuance of an agreement between them, and the collector afterward defaults, and the amount of profits realized by such surety was enough to indemnify all the sureties, the cosureties may recover from the surety first mentioned the amount they have been obliged to pay by reason of the default.

Massachusetts.— Labbe *v.* Bernard, 196 Mass. 551, 82 N. E. 688, surety on bond of building contractor.

New York.— Davis *v.* Toulmin, 77 N. Y. 280.

North Carolina.—Hall *v.* Robinson, 30 N. C. 56.

Pennsylvania.—McMullin *v.* Penn Tp. Bank, 2 Pa. St. 343; Agnew *v.* Bell, 4 Watts 31.

Canada.— Macdonald *v.* Whitfield, 27 Can. Sup. Ct. 94.

See 40 Cent. Dig. tit. "Principal and Surety," § 596.

62. Robinson *v.* Brooks, 32 Ala. 222; Pinkston *v.* Taliaferro, 9 Ala. 547 (holding that a surety who has paid the debt of a deceased, insolvent principal, and laid his claim before the orphans' court at the same time that he is suing his cosurety for contribution, is liable to his cosurety for one half of the amount recovered); Doolittle *v.* Dwight, 2 Metc. (Mass.) 561; Harrison *v.* Phillips, 46 Mo. 520 (holding that an amount recovered by garnishment against a bank where a fund has been deposited by the principal must be regarded as for the use of all of the sureties); Miller *v.* Sawyer, 30 Vt. 412.

63. *Indiana.*— Whiteman *v.* Harriman, 85 Ind. 49.

Iowa.— Hoover *v.* Mowrer, 84 Iowa 43, 50 N. W. 62, 35 Am. St. Rep. 293; Reinhart *v.* Johnson, 62 Iowa 155, 17 N. W. 452.

Louisiana.— Smith *v.* Conrad, 15 La. Ann. 579.

Maine.— Scribner *v.* Adams, 73 Me. 541.

Massachusetts.— Bachelder *v.* Fiske, 17 Mass. 464.

Minnesota.— Schmidt *v.* Coulter, 6 Minn. 492.

Missouri.— McCune *v.* Belt, 45 Mo. 174.

New Hampshire.— Lowe *v.* Smart, 5 N. H. 353.

New Jersey.— Paulin *v.* Kaighn, 29 N. J. L. 480.

New York.— Davis *v.* Toulmin, 77 N. Y. 280; Boyer *v.* Marshall, 8 N. Y. St. 233.

North Carolina.— Parham *v.* Green, 64 N. C. 436; Leary *v.* Cheshire, 56 N. C. 170; Gregory *v.* Murrell, 37 N. C. 233; Fagan *v.* Jacocks, 15 N. C. 263.

Ohio.— Butler *v.* Birkey, 13 Ohio St. 514; Niece *v.* Rogers, 14 Ohio Cir. Ct. 646, 7 Ohio Cir. Dec. 671.

security.[64] If they have paid unequal amounts, they are entitled to participate in proportion to the amounts they have paid.[65] The cosurety receiving the security is regarded as occupying the position of a trustee for the others,[66] and it does not make any difference that it was given to him without the knowledge of the others.[67] But a purchase of the principal's land by a surety, if made in good faith and for a reasonable consideration, will not give his cosureties any rights therein.[68] A surety has no right to participate in security given to a supplemental surety,[69] and payment or security given for the benefit of sureties liable for a particular debt or obligation is not available to sureties who are liable for a distinct debt or obligation, although for the same principal.[70]

(2) Application to Separate Debt of Principal to Cosurety. If security has been given to a surety for the benefit of all the sureties for a particular debt, he cannot apply it to another debt of the principal to him,[71] but a surety holding

Pennsylvania.— Shaeffer *v.* Clendenin, 100 Pa. St. 565.

Texas.— Glasscock *v.* Hamilton, 62 Tex. 143.

Vermont.— Flanagan *v.* Post, 45 Vt. 246; Aldrich *v.* Hapgood, 39 Vt. 617; Miller *v.* Sawyer, 30 Vt. 412; Whipple *v.* Briggs, 28 Vt. 65.

Virginia.— McMahon *v.* Fawcett, 2 Rand. 514, 14 Am. Dec. 796.

Canada.— Trerice *v.* Burkett, 1 Ont. 80.

See 40 Cent. Dig. tit. "Principal and Surety," § 596.

Particular forms of security — *Commercial paper.*— Munden *v.* Bailey, 70 Ala. 63 (promissory note); Hartwell *v.* Whitman, 36 Ala. 712 (draft); Adams *v.* De Frehn, 27 Pa. Super. Ct. 184.

Deed of trust.— Bell *v.* Lamkin, 1 Stew. & P. (Ala.) 460.

Land.— Roeder *v.* Niedermeier, 112 Mich. 608, 71 N. W. 154; Urbahn *v.* Martin, 19 Tex. Civ. App. 93, 46 S. W. 291.

Mortgage.—Steele *v.* Mealing, 24 Ala. 285; Whitehead *v.* Pitcher, 13 Ind. 141; Barker *v.* Boyd, 71 S. W. 528, 24 Ky. L. Rep. 1389; Hilleary *v.* Hurdle, 6 Gill (Md.) 105; Sheldon *v.* Welles, 4 Pick. (Mass.) 60; Stanwood *v.* Clampitt, 23 Miss. 372; Farmers' Nat. Bank *v.* Teeters, 31 Ohio St. 36; Farmers' etc., Nat. Bank *v.* Snodgrass, 29 Oreg. 395, 45 Pac. 758, 54 Am. St. Rep. 797; Bobbitt *v.* Flowers, 1 Swan (Tenn.) 511; Moorhouse *v.* Kidd, 25 Ont. App. 221 [*affirming* 28 Ont. 35].

Policy of insurance.— Scribner *v.* Adams, 73 Me. 541; Berridge *v.* Berridge, 44 Ch. D. 168, 59 L. J. Ch. 533, 63 L. T. Rep. N. S. 101, 38 Wkly. Rep. 599.

64. *California.*—Williams *v.* Riehl, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60.

Indiana.— Kelso *v.* Kelso, 16 Ind. App. 615, 44 N. E. 1013, 45 N. E. 1065.

Maine.— Titcomb *v.* McAllister, 81 Me. 399, 17 Atl. 315.

Missouri.— Mosely *v.* Fullerton, 59 Mo. App. 143.

New Jersey.— Wolcott *v.* Hagerman, 50 N. J. L. 289, 13 Atl. 605; Paulin *v.* Kaighn, 29 N. J. L. 480.

Vermont.— Miller *v.* Sawyer, 30 Vt. 412.

England.— *In re* Arcedeckne, 24 Ch. D. 709, 53 L. J. Ch. 102, 48 L. T. Rep. N. S. 725.

See 40 Cent. Dig. tit. "Principal and Surety," § 596.

65. Whitehead *v.* Pitcher, 13 Ind. 141; Brooks *v.* Fowle, 14 N. H. 248; Bolln *v.* Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898; Berridge *v.* Berridge, 44 Ch. D. 168, 59 L. J. Ch. 533, 63 L. T. Rep. N. S. 101, 38 Wkly. Rep. 599. And see Donnels *v.* Edwards, 2 Pick. (Mass.) 617.

66. *Alabama.*— Taylor *v.* Morrison, 26 Ala. 728, 62 Am. Dec. 747; Pinkston *v.* Taliaferro, 9 Ala. 547.

Missouri.— Harrison *v.* Phillips, 46 Mo. 520.

North Carolina.— Hall *v.* Robinson, 30 N. C. 56.

Ohio.— Carpenter *v.* Kelly, 9 Ohio 106.

Texas.— Urbahn *v.* Martin, 19 Tex. Civ. App. 93, 46 S. W. 291.

See 40 Cent. Dig. tit. "Principal and Surety," § 596 *et seq.*

67. Cannon *v.* Connaway, 5 Del. Ch. 559; Hoover *v.* Mowrer, 84 Iowa 43, 50 N. W. 62, 35 Am. St. Rep. 293; Steel *v.* Dixon, 17 Ch. D. 825, 50 L. J. Ch. 591, 45 L. T. Rep. N. S. 142, 29 Wkly. Rep. 735.

68. Crompton *v.* Vasser, 19 Ala. 259 (where the purchase was at a sale upon execution); Keiser *v.* Beam, 117 Ind. 31, 19 N. E. 534 (holding that a surety does not lose his rights by buying the land of his principal at private sale if a reasonable price is paid, although the land might be of greater value); Elrod *v.* Gastineau, 124 Ky. 609, 99 S. W. 903, 30 Ky. L. Rep. 803. *Compare* Sanders *v.* Weelburg, 107 Ind. 266, 7 N. E. 573, holding that where a surety pays a judgment against his principal, and, upon execution sale procured by himself, purchases the principal's property at a comparatively nominal price, his cosurety may show, in bar of an action for contribution, that such property at its fair value was more than sufficient to satisfy the judgment.

69. Nash *v.* Burchard, 87 Mich. 85, 49 N. W. 492.

70. Hutchison *v.* Roberts, 8 Houst. (Del.) 459, 17 Atl. 1061; Lacy *v.* Rollins, 74 Tex. 566, 12 S. W. 314; Somers *v.* Johnson, 57 Vt. 274; Conrad *v.* Smith, 91 Va. 292, 21 S. E. 501.

71. Steele *v.* Mealing, 24 Ala. 285; Hoover *v.* Mowrer, 84 Iowa 43, 50 N. W. 62, 35 Am.

an individual claim against the principal, and being given security which he is not instructed to hold for the benefit of his cosureties, is not under any duty to share it with them if it is not sufficient to indemnify him as to the individual debt.[72] Where the surety holds security to indemnify him as surety on several debts, on some or all of which there are cosureties, and such security is insufficient to satisfy all of the debts, it should be applied on all of them in the proportion that each bears to the aggregate sum.[73]

(3) Security Given For Benefit of One Surety. A surety may at the time of entering into the relation stipulate for security for his exclusive benefit and security thus obtained inures to the benefit of his cosureties only to the extent of the surplus after his exoneration.[74] But security given to a surety after entering into the relation inures equally to the benefit of all, even though intended for the sole benefit of the one to whom it was given,[75] unless the other sureties consent to the arrangement, in which case they waive their right of participation.[76]

(4) Rights as to Third Persons. The right of a surety to security given to a cosurety is superior to the rights of subsequent judgment creditors of the principal [77] or the cosurety.[78] As against the creditors of the principal, a surety is entitled to security held by a supplemental surety.[79] Security given to a surety

St. Rep. 293; Sherman *v.* Foster, 158 N. Y. 587, 53 N. E. 504; Whipple *v.* Briggs, 30 Vt. 111; Hinsdill *v.* Murray, 6 Vt. 136, holding that if a principal be in failing circumstances, and one surety receive property from him which such surety gives a cosurety to understand is for their joint liability, and the latter relies upon the assurance, the former surety is not at liberty to apply such property to a separate liability, even with the consent of the principal. And see cases cited *infra*, IX, C, 1, f, (I), (A), (3).

72. *Illinois.*— Jester *v.* Carse, 71 Ill. 23.
Maine.— Titcomb *v.* McAllister, 81 Me. 399, 17 Atl. 315.
Missouri.— McCune *v.* Belt, 45 Mo. 174.
New Hampshire.— Brown *v.* Ray, 18 N. H. 102, 45 Am. Dec. 361, holding, however, that the surety cannot apply the security to demands against the principal subsequently purchased.
Texas.— Urbahn *v.* Martin, 19 Tex. Civ. App. 93, 46 S. W. 291. See also Sanders *v.* Wettermark, 20 Tex. Civ. App. 175, 49 S. W. 900.
England.— Mackreth *v.* Walmesley, 51 L. T. Rep. N. S. 19, 32 Wkly. Rep. 819.
See 40 Cent. Dig. tit. "Principal and Surety," § 601 *et seq.*

73. *Kentucky.*—Moore *v.* Moberly, 7 B. Mon. 299; Goodloe *v.* Clay, 6 B. Mon. 236.
Minnesota.— Mueller *v.* Barge, 54 Minn. 314, 56 N. W. 36.
Missouri.— Hayden *v.* Cornelius, 12 Mo. 321.
New Hampshire.— Brown *v.* Ray, 18 N. H. 102, 45 Am. Dec. 361.
New York.— Rathbone *v.* Stocking, 2 Barb. 135, holding also that there is in the absence of evidence to the contrary a presumption that the liabilities are equal.
Ohio.— Wilson *v.* Stewart, 24 Ohio St. 504.
See 40 Cent. Dig. tit. "Principal and Surety," § 601 *et seq.*
But see Whipple *v.* Briggs, 30 Vt. 111, holding that where a person was sole surety for some of the debts of the principal, and a cosurety as to others, the proceeds of security held by him must be applied in the order in which the debts were paid.

74. Scribner *v.* Adams, 73 Me. 541; McDowell County *v.* Nichols, 131 N. C. 501, 42 S. E. 938; Long *v.* Barrett, 38 N. C. 631; Moore *v.* Moore, 11 N. C. 358, 15 Am. Dec. 523. But see Niece *v.* Rogers, 14 Ohio Cir. Ct. 646, 7 Ohio Cir. Dec. 671 (holding that where a surety signed with the understanding that the principal should obtain another surety thereon, and a second surety, with the knowledge that the first had signed with such an understanding, afterward signed the note as surety, but before signing and as a condition precedent thereto and without the knowledge of the first surety required the principal to give him indemnity, such indemnity inured equally to the benefit of both sureties, and the first surety, after satisfying the debt, could recover from his cosurety a proportionate share of such indemnity); Steel *v.* Dixon, 17 Ch. D. 825, 50 L. J. Ch. 591, 45 L. T. Rep. N. S. 142, 29 Wkly. Rep. 735 (where the court says by way of *dictum* that it is immaterial that the security was taken by virtue of a bargain entered into between the cosurety and the debtor at the time of entering into the relation, and that such security inures equally to the benefit of all).

75. Hoover *v.* Mowrer, 84 Iowa 43, 50 N. W. 62, 35 Am. St. Rep. 293; Siebert *v.* Thompson, 8 Kan. 65; Scribner *v.* Adams, 73 Me. 541. *Compare* Thompson *v.* Adams, Freem. (Miss.) 225.
Application of security to separate debt of principal to cosurety see *supra*, IX, C, 1, f, (I), (A), (2).

76. Tyus *v.* De Jarnette, 26 Ala. 280.

77. Bobbitt *v.* Flowers, 1 Swan (Tenn.) 511; Leonard *v.* Black, 4 Can. L. J. 260.

78. Trerice *v.* Burkett, 1 Ont. 80. But see Jewett *v.* Bailey, 5 Me. 87.

79. Butler *v.* Birkey, 13 Ohio St. 514.

can be followed by his cosureties into the hands of third persons, if it can be done without injury to the latter,[80] or if they have acquired their interests with notice.[81]

(B) *After Mutual Rights of Cosureties Are Adjusted.* After the creditor has been paid, and the cosureties have adjusted their rights and liabilities as to each other, the equities between them cease, each becoming an independent creditor of the principal for the amount paid by such surety, so that any security[82] or funds[83] thereafter received by one of them from the principal does not inure to the benefit of the others.

(II) *FROM THIRD PERSONS.* The rule that any security given to one cosurety inures to the benefit of all has been held to apply only to security given by the principal, and does not apply to security given by a third person.[84]

g. Actions and Proceedings — (I) *REMEDY AT LAW OR IN EQUITY.* Although the doctrine of contribution originated in equity, the common law, at a later period, adopted the equitable principle by implying a promise from each cosurety to reimburse each of the others for any payment in excess of his proportion of the debt.[85] Courts of equity, however, retain jurisdiction in such cases,[86] so that frequently there is a remedy either at law or in equity.[87] But where the machinery of the law is manifestly insufficient, the only adequate remedy may be in equity,[88] and in many cases it is held that in order to proceed against his cosurety

80. Hinsdill *v.* Murray, 6 Vt. 136.

81. Kerr *v.* Cowen, 17 N. C. 356; Menzies *v.* Kennedy, 23 Grant Ch. (U. C.) 360.

82. Campau *v.* Detroit Driving Club, 135 Mich. 575, 98 N. W. 267; Hall *v.* Cushman, 16 N. H. 462, 43 Am. Dec. 562; Urbahn *v.* Martin, 19 Tex. Civ. App. 93, 46 S. W. 291; Tabor *v.* Cockrell, (Tex. App. 1890) 16 S. W. 786; Cramer *v.* Redman, 10 Wyo. 328, 68 Pac. 1003.

83. Gould *v.* Fuller, 18 Me. 364; Messer *v.* Swan, 4 N. H. 481. But see Harrison *v.* Phillips, 46 Mo. 520, holding that the moment funds come into the hands of a state tax collector they become the property of the state, and the state may follow them anywhere, and if paid by the collector to one of his sureties, even after their rights are adjusted as among themselves, the others can require such funds to be applied in reduction of the amounts paid by them.

84. Hutchison *v.* Roberts, 8 Houst. (Del.) 459, 17 Atl. 1061 [*affirming* 6 Del. Ch. 112, 11 Atl. 48]; Leggett *v.* McClelland, 39 Ohio St. 624. And see American Surety Co. *v.* Boyle, 65 Ohio St. 486, 63 N. E. 73.

85. Baldwin *v.* Fleming, 90 Ind. 177; Goodall *v.* Wentworth, 20 Me. 322; Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631.

Insolvency of principal.—A surety who has paid the debt can immediately proceed against his cosurety for contribution at law and need not show the insolvency of the principal as a condition precedent. Buckner *v.* Stewart, 34 Ala. 529; Sloo *v.* Pool, 15 Ill. 47; Croy *v.* Clark, 74 Ind. 597; Rankin *v.* Collins, 50 Ind. 158; Judah *v.* Mieure, 5 Blackf. (Ind.) 171; Caldwell *v.* Roberts, 1 Dana (Ky.) 355; Goodall *v.* Wentworth, 20 Me. 322; Mosely *v.* Fullerton, 59 Mo. App. 143; Smith *v.* Mason, 44 Nebr. 610, 63 N. W. 41; Odlin *v.* Greenleaf, 3 N. H. 270; Boyer *v.* Marshall, 8 N. Y. St. 233; Lucas *v.* Curry, 2 Bailey (S. C.) 403; Boutin *v.* Etsell, 110 Wis. 276, 85 N. W. 964; Cowell *v.* Edwards, 2 B. & P. 268.

86. *Alabama.*— Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729; Broughton *v.* Wimberly, 65 Ala. 549.

California.— Chipman *v.* Morrill, 20 Cal. 130.

Kentucky.— Mitchell *v.* Sproul, 5 J. J. Marsh. 264.

Massachusetts.— Wood *v.* Leland, 22 Pick. 503.

Michigan.— Smith *v.* Rumsey, 33 Mich. 183.

New Hampshire.— Weston *v.* Elliott, 72 N. H. 433, 57 Atl. 336.

New Jersey.— Neilson *v.* Williams, 42 N. J. Eq. 291, 11 Atl. 257.

North Carolina.— Shepherd *v.* Monroe, 4 N. C. 427; Carrington *v.* Carson, 1 N. C. 323.

See 40 Cent. Dig. tit. "Principal and Surety," § 641. See also CONTRIBUTION, 9 Cyc. 792.

87. Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729; Broughton *v.* Wimberly, 65 Ala. 549; Craig *v.* Ankeney, 4 Gill (Md.) 225; Smith *v.* Rumsey, 33 Mich. 183. To secure the benefit of a judgment lien against a cosurety, the one paying the amount of the judgment ordinarily should proceed in equity; but where a court of law has acquired jurisdiction over the subject-matter, and an appeal has not been taken from any of its orders, it will do full justice between the parties by enforcing contribution according to their equitable rights. German-American Savings Bank *v.* Fritz, 68 Wis. 390, 32 N. W. 123.

88. Choate *v.* Arrington, 116 Mass. 552 (holding that where a surety upon the second bond of an executor is adjudged liable for the full value of the estate not accounted for, under statute, whatever adjustment, if any, should be made between him and the

in equity for contribution a surety must either show that he has proceeded against the principal with due diligence but unsuccessfully, or that the latter is insolvent and that therefore an action against him would be fruitless.[89]

(II) *Nature and Form of Action* — (A) *In General.* The action at law for contribution is generally brought, not on the original debt,[90] but on the contract which the law implies in the absence of express agreement,[91] and is enforced in an action of assumpsit under the common counts for money paid.[92] If, however, the sureties have entered into an express contract as to contribution the action must be brought on such contract.[93] Actions between cosureties for contribution are sometimes regulated by statute,[94] and are governed, as to procedure, by

surety upon the first bond can be determined only by a suit in equity); Cuyler *v.* Ensworth, 6 Paige (N. Y.) 32 (holding that after an execution is returned unsatisfied, a surety can file a creditor's bill against his cosurety to reach equitable property which could not be reached by the execution).

To subject indemnity to the claim of cosureties the proper procedure is by bill in equity where there is a multiplicity of parties having distinct and independent claims. Scribner *v.* Adams, 73 Me. 541. Where, however, one of two cosureties who have paid the debt, in equal proportions, receives from the principal a sum of money for the benefit of both, the other surety has an adequate remedy at law and should not go into equity. Allen *v.* Wood, 38 N. C. 386.

89. *Kentucky.*— Bolling *v.* Doneghy, 1 Duv. 220; Lee *v.* Forman, 3 Metc. 114; Daniel *v.* Ballard, 2 Dana 296; Poignard *v.* Vernon, 1 T. B. Mon. 45; Pearson *v.* Duckham, 3 Litt. 385.

Mississippi.—Stone *v.* Buckner, 12 Sm. & M. 73.

North Carolina.— Allen *v.* Wood, 38 N. C. 386; Linn *v.* McClelland, 20 N. C. 596. See Adams *v.* Hayes, 120 N. C. 383, 27 S. E. 47, holding that where a complaint for contribution joined the principals as parties, and asked judgment *in solido*, but did not allege the insolvency of the principals, except by an averment that the complainant "was compelled to pay," the cause of action is construed on demurrer as equitable rather than legal, in order to sustain the jurisdiction below, although the proper relief was not asked, and the insolvency of the principals was alleged imperfectly.

Oregon.— Fischer *v.* Gaither, 32 Oreg. 161, 51 Pac. 736.

Texas.— Tabor *v.* Cockrell, (App. 1890) 16 S. W. 786.

Virginia.— McCormack *v.* Obhannon, 3 Munf. 484, 5 Am. Dec. 509.

West Virginia.— Hawker *v.* Moore, 40 W. Va. 49, 20 S. E. 848.

England.— Lawson *v.* Wright, 1 Cox Ch. 275, 29 Eng. Reprint 1164, holding that on a bill for contribution it is not necessary to prove the insolvency of the principal if he be a party to the suit; otherwise if he be not a party.

See 40 Cent. Dig. tit. "Principal and Surety," §§ 619–620.

But see Wyckoff *v.* Gardner, (N. J. Ch. 1886) 5 Atl. 801, where upon a bill for contribution the court held that it was not necessary for a surety to realize upon an execution which he had obtained against the principal, before filing the bill.

90. Mitchell *v.* Turner, 37 Ala. 660 (holding that one of the sureties on a sheriff's bond cannot maintain an action at law on such bond against his cosureties for the default of their principal); Jackson *v.* Murray, 77 Tex. 644, 14 S. W. 235; Tarlton *v.* Orr, 40 Tex. Civ. App. 410, 90 S. W. 534; Wash *v.* Sullivan, (Tex. Civ. App. 1904) 84 S. W. 368; U. S. *v.* Preston, 27 Fed. Cas. No. 16,087, 4 Wash. 446, (holding that where a surety pays a duty bond to the United States, he cannot maintain an action on it in the name of the obligee against his coöbligors).

91. See *supra*, IX, C, 1, a.

92. *Florida.*— Love *v.* Gibson, 2 Fla. 598.

Illinois.— Porter *v.* Horton, 80 Ill. App. 333.

Massachusetts.— Bachelder *v.* Fiske, 17 Mass. 464.

Missouri.— Jeffries *v.* Ferguson, 87 Mo. 244.

Ohio.— Russell *v.* Failor, 1 Ohio St. 327, 59 Am. Dec. 631.

Texas.— Tarlton *v.* Orr, 40 Tex. Civ. App. 410, 90 S. W. 534.

Vermont.— Prindle *v.* Page, 21 Vt. 94.

England.— Kemp *v.* Finden, 8 Jur. 65, 13 L. J. Exch. 137, 12 M. & W. 421; Pitt *v.* Pursord, 5 Jur. 61, 10 L. J. Exch. 475, 8 M. & W. 538.

Canada.— McLean *v.* Jones, 2 Can. L. J. N. S. 206.

See 40 Cent. Dig. tit. "Principal and Surety," § 641. See also Money Paid, 27 Cyc. 832.

Case is the proper form of action by a surety against his cosurety where the loss paid by the former was occasioned by the fault of the latter. Long *v.* Kent, 6 Ala. 100.

93. Kellogg *v.* Lopez, 145 Cal. 497, 78 Pac. 1056; Patterson *v.* Patterson, 23 Pa. St. 464; Pendlebury *v.* Walker, 4 Y. & C. Exch. 424.

94. See the statutes of the several states. And see Couch *v.* Terry, 12 Ala. 225; Cooper *v.* Chamblee, 114 Ga. 116, 39 S. E. 917; Osborn *v.* Harris County, 17 Ga. 123, 63 Am. Dec. 230; Wood *v.* Leland, 22 Pick. (Mass.) 503; Dysart *v.* Crow, 170 Mo. 275, 70 S. W. 689.

the laws in force at the time they are brought, although enacted after the contract was entered into.[95]

(B) *Proceeding on Original Debt or Judgment.* A surety can enforce contribution from his cosureties by proceeding on the original contract, where, by subrogation,[96] he acquires the rights of the original creditor,[97] or where he can acquire the rights of the creditor by assignment.[98] But in some jurisdictions after a judgment against cosureties is paid by one of them, it is held to be satisfied so that contribution cannot be enforced by means thereof.[99] In some states there are statutory provisions allowing contribution to be enforced by means of the judgment.[1]

(C) *Summary Remedies.* In many states statutes prescribe a summary remedy for the enforcement of contribution by sureties against their cosureties.[2] These statutes must be strictly construed to embrace cases only therein provided for,[3] and

Statutory remedies are cumulative, not excluding the common-law remedy, and plaintiff has the right to elect whether he will pursue the one or the other. Riley *v.* Stallworth, 56 Ala. 481.

In Kentucky attachment will lie against a cosurety on the ground that he is removing his property from the state fraudulently to avoid payment. Hanley *v.* Wallace, 3 B. Mon. 184.

95. Young *v.* Clark, 2 Ala. 264; Derosset *v.* Bradley, 63 N. C. 17.

96. See, generally, SUBROGATION.

97. *Georgia.*— Bigby *v.* Douglas, 123 Ga. 635, 51 S. E. 606.

North Carolina.—Howell *v.* Reams, 73 N. C. 391.

Ohio.— Neilson *v.* Fry, 16 Ohio St. 552, 91 Am. Dec. 110.

Pennsylvania.— Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783; *In re* Cooper, 4 Pa. Super. Ct. 615, 40 Wkly. Notes Cas. 254.

South Carolina.— Burrows *v.* McWhann, 1 Desauss. Eq. 409, 1 Am. Dec. 677. But a surety of a custom-house bond was held not entitled, under the acts of congress of 1797 and 1799, to the rights of the United States as against his cosurety. State Bank *v.* Adger, 2 Hill Eq. 262.

England.— Latouche *v.* Pallas, Hayes 450; *In re* Swan, Ir. R. 4 Eq. 208.

See 40 Cent. Dig. tit. "Principal and Surety," § 633 *et seq.*

98. *California.*— March *v.* Barnet, 121 Cal. 419, 53 Pac. 933, 66 Am. St. Rep. 44, holding that where an attachment suit was against two defendants, and an undertaking was executed to release the property seized, upon judgment on the note sued on being recovered and paid by one of the sureties on the judgment bond, the statute gives him the right to enforce the judgment on assignment, against both defendants in the attachment suit notwithstanding the property of one only was attached.

Georgia.— Burke *v.* Lee, 59 Ga. 165, as to control of execution.

Maryland.—Wilson *v.* Ridgely, 46 Md. 235; Carroll *v.* Bowie, 7 Gill 34.

Montana.— Northwestern Nat. Bank *v.* Great Falls Opera House Co., 23 Mont. 1, 57 Pac. 440, 45 L. R. A. 285.

New Jersey.— Bishop *v.* Smith, (Sup. 1904) 57 Atl. 874, holding that under 2 Gen. St. p. 1845, § 31, a judgment creditor receiving satisfaction from less than the whole number of defendants may enter satisfaction as to them, which entry shall not release the others, but the judgment as to the others may be assigned to those who have made satisfaction, and they may have execution against the others.

See 40 Cent. Dig. tit. "Principal and Surety," § 633 *et seq.*

99. Morrison *v.* Marvin, 6 Ala. 797; Hull *v.* Sherwood, 59 Mo. 172; Tarlton *v.* Orr, 40 Tex. Civ. App. 410, 90 S. W. 534; Reg. *v.* Land, 3 U. C. Q. B. 277. But see McGinnis *v.* Loring, 126 Mo. 404, 28 S. W. 750.

1. See the statutes of the several states. And see Davis *v.* Heimbach, 75 Cal. 261, 17 Pac. 199 (holding that under Cal. Code Civ. Proc. § 709, in an action against a principal and sureties, a surety is entitled to the benefit of the judgment to compel contribution, provided he file with the clerk notice of his payment and claim for contribution; but an execution obtained by a surety against his cosureties without serving notice on them will be quashed); Knight *v.* Weeks, 115 Fed. 970, 53 C. C. A. 366 (holding that under a statutory provision in Florida that a surety paying money shall have control of the judgment, a surety who has paid after execution issued has the right to have such execution levied on property of a cosurety; and the court cannot arrest the execution on a petition of such cosurety setting up prior equities between the parties, which it is the sole province of a court of equity to determine).

2. See the statutes of the several states; and cases cited *infra*, this section.

3. Nation *v.* Roberts, 20 Ala. 544; Lansdale *v.* Cox, 7 T. B. Mon. (Ky.) 401 (holding that the statute of 1796, giving a remedy by motion to one surety for contribution against a cosurety "and his legal representatives" applies to executors and administrators only and does not include heirs); Wilkerson *v.* Sampson, 56 Mo. App. 276; Hickerson *v.* Price, 7 Coldw. (Tenn.) 151 (holding that under Code, § 3625, providing that a cosurety against whom a judgment has been rendered for the whole debt or who has paid more than a ratable share of such judgment may have judgment on motion against all the other parties to the instrument not included

are not exclusive of other proceedings for the enforcement of contribution.[4] Under these statutes a surety against whom a judgment has been rendered for the debt may upon motion obtain a summary judgment against a cosurety for his proportionate share,[5] in the court in which the original judgment was rendered,[6] upon notice to his cosurety,[7] and upon showing the insolvency of the principal.[8] The record must show the facts necessary to sustain the jurisdiction of the court.[9]

(III) *Notice and Demand.* The general rule is that notice of payment of the debt need not be given to the cosurety nor need demand for contribution be made, before commencing suit against him.[10]

in the judgment, a surety who has paid the entire debt has no right of motion, against a cosurety who is included in the original judgment); Owen *v.* Owen, 3 Humphr. (Tenn.) 325.

4. Roberts *v.* Adams, 6 Port. (Ala.) 361, 31 Am. Dec. 694.

5. *Alabama.*— Irwin *v.* Scruggs, 32 Ala. 516 (holding that the judgment to which a surety is entitled against his cosureties, under Code, § 2645, may be rendered summarily by the court where no appearance has been made by defendant); Broughton *v.* Robinson, 11 Ala. 922 (holding that the judgment should be rendered without condition). See also Nation *v.* Roberts, 20 Ala. 544.

Indiana.— Cating *v.* Stewart, 6 Blackf. 372.

Kentucky.— Lansdale *v.* Cox, 7 T. B. Mon. 401; Robertson *v.* Maxcey, 6 Dana 101; Lampton *v.* Bruner, 2 Litt. 141.

Missouri.— Wilkerson *v.* Sampson, 56 Mo. App. 276, holding that under Rev. St. §§ 8349, 8351, 8352, to entitle a surety to a summary judgment on motion against his cosurety for an excess paid by him he must have had judgment rendered against him, and on such motion he can recover only an excess paid on such judgment and any amounts paid before judgment will not be considered.

Tennessee.— Bittick *v.* McEwen, 7 Heisk. 1; Hickerson *v.* Price, 7 Coldw. 151; Kincaid *v.* Sharp, 3 Head 151, holding that Code, §§ 3665, 3666, providing for a summary judgment against a cosurety was designed to apply in favor of sureties in all cases, irrespective of the attitude of the parties as plaintiff or defendant.

Virginia.— Strother *v.* Mitchell, 80 Va. 149, holding that a judgment rendered in a collateral action in which one of two sureties was a party but in which a personal judgment was not rendered against the surety, although a determination of the amount due from him was made for the purpose of adjusting the rights of the parties to the action, in no manner incident to compelling such surety to pay the amount due, was not such a judgment as would permit him to recover a summary judgment against his cosurety.

United States.— White *v.* Perrin, 29 Fed. Cas. No. 17,555, 1 Cranch C. C. 50, under a Virginia statute.

See 40 Cent. Dig. tit. "Principal and Surety," § 636.

6. Nation *v.* Roberts, 20 Ala. 544; Young *v.* Clark, 2 Ala. 264 (holding also that the motion may be made either at the term when judgment is rendered or at any subsequent term); Anderson *v.* Binford, 2 Baxt. (Tenn.) 310 (holding that under Tenn. Code, §§ 3589, 3632, the jurisdiction to take judgment by motion in favor of a surety is local and confined to the court of the county rendering the judgment against the principal or of the county in which a defendant resides); Dade *v.* Mandeville, 6 Fed. Cas. No. 3,533, 1 Cranch C. C. 92 (holding that the summary remedy given in Virginia is confined to the court which rendered the original judgment).

7. Irwin *v.* Scruggs, 32 Ala. 516; Broughton *v.* Robinson, 11 Ala. 922; Cating *v.* Stewart, 6 Blackf. (Ind.) 372 (holding also that the ten days' notice of motion provided for may be served on the cosurety in any county in the state); Batson *v.* Lasselle, 1 Blackf. (Ind.) 119; Lampton *v.* Bruner, 2 Litt. (Ky.) 141 (holding also that under the prevailing statute the notice and motion might be joint against several cosureties).

8. Nation *v.* Roberts, 20 Ala. 544; Roberts *v.* Adams, 6 Port. (Ala.) 361, 31 Am. Dec. 694; Batson *v.* Lasselle, 1 Blackf. (Ind.) 119; Lampton *v.* Bruner, 2 Litt. (Ky.) 141; White *v.* Perrin, 29 Fed. Cas. No. 17,555, 1 Cranch C. C. 50. But see Robertson *v.* Maxcey, 6 Dana (Ky.) 101.

9. Weeks *v.* Yeend, 104 Ala. 564, 16 So. 421 (reversing a summary judgment taken by default, where the record contained no evidence that the relation of sureties existed between plaintiff and defendant, or of a common liability, or, if such liability existed, of its satisfaction by plaintiff); Rutherford *v.* Smith, 27 Ala. 417; Broughton *v.* Robinson, 11 Ala. 922; Batson *v.* Lasselle, 1 Blackf. (Ind.) 119, insolvency of principal.

10. *California.*—Taylor *v.* Reynolds, 53 Cal. 686.

Iowa.— Wood *v.* Perry, 9 Iowa 479.

Massachusetts.— Chaffee *v.* Jones, 19 Pick. 260.

New Jersey.— Wyckoff *v.* Gardner, (Ch. 1886) 5 Atl. 801.

North Carolina.— Bright *v.* Lennon, 83 N. C. 183; Parham *v.* Green, 64 N. C. 436, both these cases, however, recognizing Sherrod *v.* Woodard, 15 N. C. 360, 25 Am. Dec. 714, as authority for the proposition that demand may, under certain conditions, be a condition precedent to the bringing of an action for contribution.

South Carolina.— Lucas *v.* Guy, 2 Bailey 403.

Tennessee.— Cage *v.* Foster, 5 Yerg. 261, 26 Am. Dec. 265.

Vermont.— Foster *v.* Johnson, 5 Vt. 60, holding that this rule applies with greater

(IV) *DEFENSES* — (A) *In General.* The cosurety, when sued for contribution, can generally set up any legal or equitable defense.[11] Thus he may defend on the ground that he did not execute the contract of suretyship,[12] that it was defectively executed,[13] that there was no consideration,[14] or that it was executed as part of an unlawful transaction.[15] Subsequent insanity of the surety from whose estate contribution is sought is not a defense.[16]

(B) *Judgment in Favor of Defendant Cosurety.* Where, in an action by the creditor against cosureties, judgment is taken against one surety only,[17] or one only is found to be liable, such surety cannot compel contribution from the one against whom judgment was not rendered.[18] If judgment is rendered in favor of both sureties, but the creditor, on appeal as to one only, obtains judgment, the other is not liable to contribution.[19]

(C) *Payment by Defendant.* As a surety is equitably liable for his proportionate share only,[20] it is a good defense, to an action for contribution, that he has paid such proportion to the creditor,[21] or to the plaintiff cosurety;[22] but if after cosureties have adjusted their accounts, and supposed they had settled them, one of them is forced to make further payment, he can have contribution as to such additional sum.[23]

force where the cosurety's property has been levied on at the instance of the other surety.

Wisconsin.— Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921.

See 40 Cent. Dig. tit. "Principal and Surety," § 642 *et seq.*

Contra.— Carpenter *v.* Kelly, 9 Ohio 106.

Notice of suit against the surety suing for contribution need not have been given by him to his cosurety. Malin *v.* Bull, 13 Serg. & R. (Pa.) 441.

11. Dennis *v.* Gillespie, 24 Miss. 581; Hall *v.* Robinson, 30 N. C. 56 (holding that the act of 1807 did not enlarge the rights of the surety who paid the debt, nor deprive the cosurety of any just ground of defense which would have been available to him in equity); Briggs *v.* Boyd, 37 Vt. 534.

Effect of judgment in prior action see *infra*, IX, C, 1, g, (VIII).

12. Hall *v.* Woodward, 30 S. C. 564, 9 S. E. 684, where it was held that omission to set up the defense at the first trial did not preclude his making it at the second, after reversal of a judgment in favor of the cosurety defendant upon another defense. See also Ramskill *v.* Edwards, 31 Ch. D. 100, 55 L. J. Ch. 81, 53 L. T. Rep. N. S. 949, 34 Wkly. Rep. 96.

13. Price *v.* Edwards, 11 Mo. 524 (holding that where the name of a cosurety was erased from a bond before delivery while it was in the possession of a surety, the latter is not entitled to contribution from the former in the absence of any explanation of the cause of erasure); Cross *v.* Scarboro, 6 Baxt. (Tenn.) 134. But see Nashville *v.* Edwards, 16 Lea (Tenn.) 203, holding that, although a surety may not be liable on a bond because not executed properly, he is liable to contribute to one who was induced to remain on the bond by his agreement to sign it.

14. Pratt *v.* Hedden, 121 Mass. 116, as to surety on note signing after delivery.

15. Power *v.* Hoey, 19 Wkly. Rep. 916. See also Belond *v.* Guy, 20 Wash. 160, 54 Pac. 995.

16. Pickering *v.* Leiberman, 41 Fed. 376, *infra*, note 30.

17. Waggoner *v.* Walrath, 24 Hun (N. Y.) 443 [*affirmed* in 92 N. Y. 639], holding that the reason for the rule is that the fact that plaintiff does not proceed to judgment against the cosurety raises a presumption that he intended to release him from liability, and that the surety against whom judgment was rendered could be compelled to pay only his proportionate share.

18. Ruff *v.* Montgomery, 83 Miss. 185, 36 So. 67; Hood *v.* Morgan, 47 W. Va. 817, 35 S. E. 911, where the surety against whom judgment was taken acted as an adversary to the surety against whom judgment was refused. *Compare* Comstock *v.* Keating, 115 Mo. App. 372, 91 S. W. 416, holding that where the cosureties were not adversaries in the action a judgment against one did not release the other from contribution.

19. Ledoux *v.* Durrive, 10 La. Ann. 7.

20. See *supra*, IX, C, 1, e.

21. *Alabama.*— White *v.* Banks, 21 Ala. 705, 56 Am. Dec. 283. But see Steele *v.* Mealing, 24 Ala. 285, holding that payment by a surety for a debt, of a replevy bond executed by him also as surety, and given to release property of the principal mortgaged to him as security for the debt, will not avail him in an action against him for contribution toward payment of the debt secured by the mortgage, although such property was applied on the debt.

Illinois.— Barbee *v.* Le Crone, 63 Ill. App. 199.

Indiana.— Mires *v.* Alley, 51 Ind. 507.

Iowa.— Craig *v.* West, 61 Iowa 758, 17 N. W. 108.

New York.— Sisson *v.* Barrett, 2 N. Y. 406 [*affirming* 6 Barb. 199].

Canada.— Harper *v.* Knowlson, 2 Grant Err. & App. (U. C.) 253.

See 40 Cent. Dig. tit. "Principal and Surety," § 623 *et seq.*

22. Chandler *v.* Furbish, 8 Me. 408.

23. Barge *v.* Van der Horck, 57 Minn. 497,

(D) *Set-Off.* A surety, in an action against him for contribution, can set off a debt due to him from the cosurety seeking contribution.[24] Conversely, a surety in an action against him for a debt owing his cosurety can set off a claim against the latter for contribution.[25] But in an action for contribution defendant cannot set up a defense that plaintiff was indebted to the principal in a greater sum than he has paid as surety,[26] nor can defendant set off debts due to him individually from the principal.[27]

(V) *Limitations.*[28] Provisions in statutes of limitations in regard to implied contracts in general [29] apply to actions between cosureties for contribution.[30]

(VI) *PARTIES* — (A) *Plaintiff.* Sureties who have made payment jointly may unite in an action against cosureties for contribution,[31] but sureties who have made payments separately cannot so unite at law.[32] In equity two or more sureties may unite whether or not they paid jointly.[33]

(B) *Defendant.* At law an action for contribution must be brought against each cosurety separately,[34] and a surety and the principal cannot be joined as defendants.[35] But in equity all the cosureties and the principal should be joined to prevent a multiplicity of suits.[36] Persons, however, from whom nothing can

59 N. W. 630, holding that where two cosureties on a note divided the proceeds of collaterals assigned to them by the principal, supposing they had exclusive right to them, but one of the sureties being a cosurety with a third person on another note of the same principal, was compelled afterward to account to such third person for a proportionate share of the collateral, the surety so being compelled to pay his cosurety on the second note, can have contribution, as to such subsequent payment, from his cosurety on the first note. See also Wilson *v.* Stewart, 24 Ohio St. 504.

24. Munden *v.* Bailey, 70 Ala. 63; Long *v.* Barnett, 38 N. C. 631. But see Preston *v.* Campbell, 3 Hayw. (Tenn.) 20.

25. Wayland *v.* Tucker, 4 Gratt. (Va.) 267, 50 Am. Dec. 76.

26. Davis *v.* Toulmin, 77 N. Y. 280; Boyer *v.* Marshall, 8 N. Y. St. 233. But see Bezzell *v.* White, 13 Ala. 422.

Proportionate shares as against principal see *supra*, IX, B, 4, b.

27. Hoover *v.* Mowrer, 84 Iowa 43, 50 N. W. 62, 35 Am. St. Rep. 293.

28. From time of payment see LIMITATIONS OF ACTIONS, 25 Cyc. 1115.

29. See LIMITATIONS OF ACTIONS, 25 Cyc. 1043.

30. Novak *v.* Dupont, 112 Iowa 334, 83 N. W. 1062; Harris *v.* Thomas, (Tenn. Ch. App. 1899) 52 S. W. 706; Tate *v.* Winfree, 99 Va. 255, 37 S. E. 956.

Mere passiveness in asserting his rights will not prejudice a surety's claim for contribution, unless the lapse of time works a bar. Owen *v.* McGehee, 61 Ala. 440.

Laches in seeking contribution by subrogation.—In Pickering *v.* Lieberman, 41 Fed. 376, it was held that one of two or more sureties, who had paid the debt and who was entitled to contribution and by statute to be subrogated by an assignment on the record to his use of a judgment for the debt, must proceed with diligence and a delay of nearly eighteen years is such laches as to move a court of equity to refuse relief, and the fact that one of the other sureties had been adjudged insane at a time subsequent to the judgment affords no excuse for the delay, since his trustee stood in his place and ready to answer all such claims.

31. Dussol *v.* Bruguiere, 50 Cal. 456 (holding also that where one of several sureties jointly paying dies, his executor may be joined with a part of the sureties in an action against cosureties for contribution); Adams *v.* De Frehn, 27 Pa. Super. Ct. 184; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

Payment by joint note is joint payment such as will allow sureties to join in an action for contribution. Prescott *v.* Newell, 39 Vt. 82.

32. Bunker *v.* Tufts, 55 Me. 180 (holding also that if there is no evidence of joint payment there is a legal presumption that each paid separately); Lombard *v.* Cobb, 14 Me. 222; Prescott *v.* Newell, 39 Vt. 82; Kelby *v.* Steel, 5 Esp. 194.

33. Young *v.* Lyons, 8 Gill (Md.) 162; Smith *v.* Rumsey, 33 Mich. 183; Hughes *v.* Boone, 81 N. C. 204; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

34. Adams *v.* Hayes, 120 N. C. 383, 27 S. E. 47; Powell *v.* Matthis, 26 N. C. 83, 40 Am. Dec. 427; Thompson *v.* Hibbs, 45 Oreg. 141, 76 Pac. 778; Burnham *v.* Choat, 5 U. C. Q. B. O. S. 736.

35. Burnham *v.* Choat, 5 U. C. Q. B. O. S. 736. But see Cunent *v.* Thompson, 2 Cinc. Super. Ct. 54, where the statute provided that persons severally liable upon the same obligation might be joined in the same action.

36. Daum *v.* Kehnast, 18 Ohio Cir. Ct. 1, 9 Ohio Cir. Dec. 867; Johnson *v.* Vaughn, 65 Ill. 425; Trescot *v.* Smyth, 1 McCord Eq. (S. C.) 301 (holding also that the principal cannot object that as to him the surety seeking contribution has an adequate remedy at law); Rush *v.* Bishop, 60 Tex. 177; Jalufka *v.* Matejek, 22 Tex. Civ. App. 384, 55 S. W. 395.

The principal must be made a party, or his insolvency shown.— Chrisman *v.* Jones, 34

be collected are not necessary parties.[37] In a suit in equity brought by a surety before payment of the debt to compel a cosurety to contribute his share, the creditor should be made a party, as otherwise he could not be compelled to accept payment;[38] but the creditor is not a necessary party to a bill in equity to subject indemnity to the claims of cosureties.[39]

(VII) *PLEADINGS.* Although a surety can recover from his cosureties under the common counts,[40] he may also plead specially.[41] A complaint in an action for contribution is sufficient which alleges the execution of the contract by the principal and sureties, their relation, the liability of the sureties thereon, payment by plaintiff, and failure of defendant,[42] or of the personal representative of a deceased cosurety, to contribute, and which prays that he do so.[43] It is not necessary to allege that the default of the principal occurred after the defendant executed the contract,[44] or notice to defendant of suit against plaintiff.[45]

(VIII) *EVIDENCE AND BURDEN OF PROOF* — (A) *In General.* In an action for contribution the burden is, as a general rule, on plaintiff to prove that defendant was a cosurety,[46] as well as to show the damages to which he is entitled.[47] If, how-

Ark. 73; Rainey *v.* Yarborough, 37 N. C. 249, 38 Am. Dec. 681. But see Couch *v.* Terry, 12 Ala. 225.

37. See cases cited *infra*, this note.

The following were held not to be necessary parties: *An insolvent principal.*— Johnson *v.* Vaughn, 65 Ill. 425; Byers *v.* McClanahan, 6 Gill & J. (Md.) 250.

Insolvent cosureties.— Couch *v.* Terry, 12 Ala. 225; Johnson *v.* Vaughn, 65 Ill. 425; Bosley *v.* Taylor, 5 Dana (Ky.) 157, 30 Am. Dec. 677; Byers *v.* McClanahan, 6 Gill & J. (Md.) 250.

Personal representatives of a deceased insolvent cosurety.— Young *v.* Lyons, 8 Gill (Md.) 162. But see Hole *v.* Harrison, Rep. t. Finch 15, 23 Eng. Reprint 9.

Cosureties not within the jurisdiction.— Voss *v.* Lewis, 126 Ind. 155, 25 N. E. 892; Bosley *v.* Taylor, 5 Dana (Ky.) 157, 30 Am. Dec. 677; Jones *v.* Blanton, 41 N. C. 115, 51 Am. Dec. 415.

Supplemental sureties.— Hilton *v.* Crist, 5 Dana (Ky.) 384.

Cosureties who have paid their proportionate shares.—Dysart *v.* Crow, 170 Mo. 275, 70 S. W. 689. And if, after suit is brought against cosureties, one of them pays his contributive share, the others cannot object to a dismissal as to him if their liability is not increased thereby. Carter *v.* Fidelity, etc., Co., 134 Ala. 369, 32 So. 632, 92 Am. St. Rep. 41.

38. Wolmershausen *v.* Gullick, [1893] 2 Ch. 514, 62 L. J. Ch. 773, 68 L. T. Rep. N. S. 753, 3 Reports 610.

39. Rosenthal *v.* Sutton, 31 Ohio St. 406.

40. See *supra*, IX, C, 1, g, (I), (A).

41. Bachelder *v.* Fiske, 17 Mass. 464. See Porter *v.* Horton, 80 Ill. App. 333, holding that where a surety sued on an express agreement to indemnify, and also filed the common counts, and the bill of particulars filed recited that the claim was for a payment on a bond, on a certain date, of a specified amount, under the circumstances alleged in the declaration, and interest thereon, amounting to a certain named sum, the bill of particulars did not limit plaintiff's right of action by its specifications, so as to preclude the right to recover under the common counts, although the express agreement was not proved.

If the default is committed after the death of the cosurety, the declaration, in an action against the representative of the deceased, must be special, and not general. Bradley *v.* Burwell, 3 Den. (N. Y.) 61.

42. Dodge *v.* Kimple, 121 Cal. 580, 54 Pac. 94; Harshman *v.* Armstrong, 43 Ind. 126; Hardell *v.* Carroll, 90 Wis. 350, 63 N. W. 275.

Amendment of defective complaint.—Where a complaint by a surety on a note is defective in failing to allege the name of the party for whose benefit the note was made, or that plaintiff and defendants were sureties thereon, if it alleges the making of a joint and several note by plaintiff and defendants, payment by plaintiff, the liability of defendants to plaintiff, and that they have not paid, there are sufficient allegations to justify an amendment supplying the necessary allegations which are lacking. Thompson *v.* Hibbs, 45 Oreg. 141, 76 Pac. 778.

43. Windle *v.* Williams, 18 Ind. App. 158, 47 N. E. 680; Van Demark *v.* Van Demark, 13 How. Pr. (N. Y.) 372.

In an action against the heirs and devisees of three of plaintiff's cosureties, the other sureties being insolvent or having died not leaving any estate, a petition alleging that fact, and that each set of sureties sued has received, by way of descent or devise, more than is required to pay the amount for which they are liable, *prima facie* states a cause of action. Swift *v.* Donahue, 104 Ky. 137, 46 S. W. 683, 20 Ky. L. Rep. 446.

44. Carter *v.* Fidelity, etc., Co., 134 Ala. 369, 32 So. 632, 92 Am. St. Rep. 4, holding that if it occurred before, it would be a matter of defense only.

45. Malin *v.* Bull, 13 Serg. & R. (Pa.) 441.

46. Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51; Nurre *v.* Chittenden, 56 Ind. 462; Sweet *v.* McAllister, 4 Allen (Mass.) 353; Leeper *v.* Paschal, 70 Mo. App. 117.

47. Fielding *v.* Waterhouse, 40 N. Y. Super. Ct. 424, holding that if a surety releases a judgment against the principal, the burden of proof, in an action by him for contribution

ever, by the instrument, the parties apparently are cosureties, the burden is on defendant to prove that he is a supplemental surety.[48] Where the relation of the parties is not plainly established by the writing, parol evidence is admissible to show their real relation, as that they were cosureties,[49] or that they were supplemental sureties.[50] An express agreement between the parties regulating contribution also can be shown orally.[51] If contribution is claimed as to an amount paid for an administrator, the inventory and account of the latter are admissible for plaintiff.[52]

(B) *Judgment by Creditor or Obligee.*[53] In an action for contribution, a judgment obtained against the sureties by the creditor or obligee is admissible in evidence,[54] and is conclusive as to all questions of liability within the issues determined in that action.[55] But a judgment or decree is not conclusive on a surety

from a cosurety, is on the releasing surety to show the value of the judgment.

48. Simmons *v.* Camp, 64 Ga. 726; Carr *v.* Smith, 129 N. C. 232, 39 S. E. 831; Smith *v.* Carr, 128 N. C. 150, 38 S. E. 732.

49. Drummond *v.* Yager, 10 Ill. App. 380; Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51; Zimerman *v.* Bridges, 8 Pa. Cas. 45, 4 Atl. 181. And see *In re* Boutin, 12 Quebec Super. Ct. 186.

50. *Illinois.*— Myers *v.* Fry, 18 Ill. App. 74.

Indiana.—Houck *v.* Graham, 123 Ind. 277, 24 N. E. 113; Baldwin *v.* Fleming, 90 Ind. 177.

Massachusetts.— Hendrick *v.* Whittemore, 105 Mass. 23, holding that parol evidence is admissible to show at whose request a surety signed so as to establish whether he is a cosurety or a supplemental surety.

Missouri.— Leeper *v.* Paschal, 70 Mo. App. 117.

New York.— Robison *v.* Lyle, 10 Barb. 512.

Vermont.— Adams *v.* Flanagan, 36 Vt. 400.

See 40 Cent. Dig. tit. "Principal and Surety," § 647.

51. Houck *v.* Graham, 123 Ind. 277, 24 N. E. 113; Barry *v.* Ransom, 12 N. Y. 462; Thomas *v.* Cook, 8 B. & C. 728, 7 L. J. K. B. O. S. 49, 3 M. & R. 444, 15 E. C. L. 358.

52. Taylor *v.* Means, 73 Ala. 468.

53. **Judgment in favor of cosurety against creditor** see *supra*, IX, C, 1, g, (IV), (B).

54. Rochelle *v.* Bowers, 9 La. 528 (as to judgment of federal court); Haygood *v.* McKoon, 49 Mo. 77 (holding also that a judgment against sureties on the bond of a guardian is not rendered inadmissible merely because it contains a copy of the bond, since it is not a part of the record and should be treated as surplusage); Lucas *v.* Guy, 2 Bailey (S. C.) 403 (holding that the decree of the ordinary against an administrator is evidence to charge the sureties in an action for contribution).

Decree not competent or admissible.— A decree in chancery against one of the sureties on a bond of a deceased administrator, in favor of a successor, founded on the default of the deceased, is not competent or admissible against a cosurety not a party to the suit, to show the common liability of the sureties. Means *v.* Hicks, 65 Ala. 241.

55. Waller *v.* Campbell, 25 Ala. 544 (holding that sureties on a guardian's bond against whom judgment has been rendered cannot go behind the judgment to show that the guardian's default for which such judgment was rendered was not covered by a bond in that suit but by a prior bond); Rochelle *v.* Bowers, 9 La. 528 (over a defense pleaded that the cosureties sued for contribution, had never signed the bond upon which judgment was rendered in the action by the obligee thereon).

The judgment is conclusive as to the amount if it was rendered against all the sureties, and defendants in contribution allowed a default by reason of negligence or confidence in their cosurety. Sutliff *v.* Brown, 65 Iowa 42, 21 N. W. 164.

As to suretyship.— Where the issue of suretyship is not raised by the pleadings in an action by a creditor against several debtors, the judgment cannot conclude the parties in a subsequent action by one of the defendants against another for contribution. Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51 (holding that, although the liability of one who writes his name on the back of a promissory note is *prima facie* that of an accommodation indorser, yet a complaint by the creditor showing the indorsement will not confer jurisdiction to render judgment that the indorser was a surety for those whose names appear as makers); Leaman *v.* Sample, 91 Ind. 236 (holding that in an action against the principal and sureties on a promissory note, where the answer of one of the defendants sets up liability only as surety, the judgment against the parties in said relation and that the property of the principal be first exhausted does not conclude the other surety so as to bar his right to contribution); Githens *v.* Kimmer, 68 Ind. 362. And in Points *v.* Jacobia, 12 Kan. 50, it was held that where a judgment was rendered against one of the defendants as principal and against another as surety in the absence of the supposed principal and without any notice to him, such judgment is not a final adjudication as between him and the other defendant as to who is principal and who is surety, under the statutory provisions that where it is made to appear that one or more persons jointly or severally bound who signed as surety, etc., it shall be the duty of the clerk to certify which are sureties and that the property of the principal debtor shall be exhausted before that of the surety, etc., but

who was not a party to the suit in which it was rendered,[56] unless he has notice of the suit and an opportunity to defend, in which event it has been held that he will be concluded as to such matters as he might have interposed in that suit.[57] A judgment is admissible by way of inducement to evidence to show its payment by plaintiff,[58] and the amount.[59]

(IX) *JUDGMENT OR DECREE.* Judgment should be rendered against each defendant separately.[60] If a bill in equity prays for repayment of the entire amount by defendant on the theory that he is primarily liable to the complainant, the decree may provide for equal contribution, such relief being within the general scope of the bill.[61] If the bill prays for contribution from cosureties on an official bond, a confirmation of a master's report fixing the amount due to creditors in accordance with an order of court is a sufficient decree upon which execution may issue.[62]

2. EXONERATION IN EQUITY. It has been held that a surety, before he has paid the debt, may file a bill in equity to compel his cosureties to contribute,[63] or to compel a cosurety to pay to the creditor any money of the principal in his hands which should be applied on the debt,[64] or to restrain the collection from him of the share of another surety in whose hands the principal placed funds to satisfy the debt,[65] and a judgment against a cosurety may be enjoined for equitable reasons involving new issues and new parties which were not before the court in the action at law.[66] Where a solvent surety is indebted to an insolvent cosurety, equity will interfere to prevent the collection of such debt, although the creditor surety has not paid the debt of his principal.[67]

D. As to Supplemental and Successive Sureties.[68] A supplemental surety can recover from the surety, as to whom he was supplemental, the entire amount which he has been compelled to pay,[69] and in the case of successive bonds

such a judgment is only a direction to the officers that the property of the person certified as principal shall be taken first in execution.

56. Thompson *v.* Young, 2 Ohio 334; Lowndes *v.* Pinckney, 1 Rich. Eq. (S. C.) 155; Glasscock *v.* Hamilton, 62 Tex. 143; Briggs *v.* Boyd, 37 Vt. 534; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

57. Broughton *v.* Robinson, 11 Ala. 922 (holding that under the prevailing statute, when notice is given by a surety sued to another not sued, the judgment of the common creditor, in the absence of fraud or collusion, is conclusive of the liability); Love *v.* Gibson, 2 Fla. 598; Malin *v.* Bull, 13 Serg. & R. (Pa.) 441.

58. Babcock *v.* Carter, 117 Ala. 575, 23 So. 487, 67 Am. St. Rep. 193 (judgment on supersedeas bond rendered against plaintiff surety alone); Preslar *v.* Stallworth, 37 Ala. 402; Clark *v.* Norman, 68 Hun (N. Y.) 372, 22 N. Y. Suppl. 849.

59. Broughton *v.* Robinson, 11 Ala. 922; Leak *v.* Covington, 99 N. C. 559, 6 S. E. 241; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

60. Acers *v.* Curtis, 68 Tex. 423, 4 S. W. 551; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

61. Livingston *v.* Van Rensselaer, 6 Wend. (N. Y.) 63.

62. Lowndes *v.* Pinckney, 2 Strobh. Eq. (S. C.) 44.

63. Broughton *v.* Robinson, 11 Ala. 922 (under statute); Ferrer *v.* Barrett, 57 N. C. 455; McKenna *v.* George, 2 Rich. Eq. (S. C.) 15; Wolmershausen *v.* Gullick, [1893] 2 Ch. 514, 62 L. J. Ch. 773, 68 L. T. Rep. N. S. 753, 3 Reports 610.

64. Wolmershausen *v.* Gullick, [1893] 2 Ch. 514, 62 L. J. Ch. 773, 68 L. T. Rep. N. S. 753, 3 Reports 610; MacDonald *v.* Whitfield, 27 Can. Sup. Ct. 94.

Creditor necessary party see *supra*, text and note 38.

65. Silvey *v.* Dowell, 53 Ill. 260. But see Pinkston *v.* Taliaferro, 9 Ala. 547, holding that a surety who has paid the debt of a dead insolvent principal, and laid his claim against the orphans' court, cannot be restrained from proceeding in equity against a cosurety for contribution until the final settlement and order for distribution, although he is the administrator of the principal debtor.

66. Simmons *v.* Camp, 65 Ga. 673.

67. Keach *v.* Hamilton, 84 Ill. App. 413.

68. **Definition** see *supra*, I, B, 3.

Contribution see *supra*, IX, C, 1, b, (II).

Security held by supplemental surety see *supra*, IX, C, 1, f, (I), (A), (4).

69. *Florida.*— Hayden *v.* Thrasher, 18 Fla. 795.

Indiana.— Nesbit *v.* Knowlton, 51 Ind. 352; Bowser *v.* Rendell, 31 Ind. 128.

New Hampshire.— Cutter *v.* Emery, 37 N. H. 567.

New Jersey.— Apgar *v.* Hiler, 24 N. J. L. 812; Darrah *v.* Osborne, 7 N. J. L. 71.

Tennessee.— Cox *v.* Waggoner, 5 Sneed 542.

Vermont.— Warner *v.* Hall, 5 Vt. 156.

England.— Thomas *v.* Cook, 8 B. & C. 728, 7 L. J. K. B. O. S. 49, 3 M. & R. 444, 15 E. C. L. 358.

A surety for a lessee can recover from a

given in the course of judicial proceedings, the sureties among themselves are liable in the inverse order of their undertakings.[70] A surety for the original debt, against whom and his principal a judgment has been obtained, can recover from a surety on a bond given by the principal alone to stay the judgment.[71]

X. SURETY COMPANIES.[72]

A. Definition. A surety company is a corporation incorporated for the purpose of making, guaranteeing, or becoming a surety upon bonds or undertakings required or authorized by law.[73]

B. Creation and Powers — 1. IN GENERAL. Statutes may permit the organization of corporations for the purpose of becoming sureties and may be constitutionally authorized to execute as sureties bonds required by law.[74] A statute may

surety of an assignee of the lease. Bender *v.* George, 92 Pa. St. 36.

70. Chrisman *v.* Jones, 34 Ark. 73; Day *v.* McPhee, 41 Colo. 467, 93 Pac. 670 (holding that if one surety is primarily liable, the right of the surety secondarily liable, who has discharged the liability, to compel the one primarily liable to repay the sum disbursed, attaches immediately upon payment, and is not affected by a subsequent attempt of the obligee to discharge the surety primarily liable); Titzel *v.* Smeigh, 2 Leg. Chron. (Pa.) 271.

71. Winchester *v.* Beardin, 10 Humphr. (Tenn.) 247, 51 Am. Dec. 702.

72. As surety on: Appeal-bond see APPEAL AND ERROR, 2 Cyc. 829. Attachment bond see ATTACHMENT, 4 Cyc. 535. Bail-bond see BAIL, 5 Cyc. 22, 108. Bond of executor or administrator see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 133. Referee's bond see BANKRUPTCY, 5 Cyc. 273 note 1.

73. See Cal. Code Civ. Proc. § 1056. See also Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836; Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176; State *v.* Hennepin County Dist. Ct., 58 Minn. 351, 59 N. W. 1055; Stepacher *v.* McClure, 75 Mo. App. 135; Earle *v.* Earle, 49 N. Y. Super. Ct. 57; Lawyers' Surety Co. *v.* Reinach, 25 Misc. (N. Y.) 150, 54 N. Y. Suppl. 205 [*affirming* 23 Misc. 242, 51 N. Y. Suppl. 162]; Hurd *v.* Hannibal, etc., R. Co., 6 N. Y. Civ. Proc. 386; McGean *v.* MacKellar, 6 N. Y. Civ. Proc. 169, 67 How. Pr. 273; Aldrich *v.* Columbia R. Co., 39 Oreg. 263, 64 Pac. 455.

"Common surety."—A surety company permitted by law to act as sole surety for trustees, guardians, administrators, and other fiduciaries may be called a "common surety," not exactly in the nature of a common carrier, like railroads and telegraph companies, but still one of those public agencies to which are given unusual powers, and who have assumed the most sacred responsibilities. Tarboro Bank *v.* Maryland Fidelity, etc., Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682.

Insurance company.—A surety company is an insurance company, within the general insurance law of New York (Laws (1892), c. 690), prohibiting an insurance company to expose itself on any one risk to a loss exceeding ten per cent of its capital and surplus, and classifying as insurance companies those guaranteeing bonds in actions, or required by law. Industrial, etc., Trust *v.* Tod, 56 N. Y. App. Div. 39, 67 N. Y. Suppl. 362. And see *infra*, X, E.

74. *California.*— Cramer *v.* Tittle, 72 Cal. 12, 12 Pac. 869.

Louisiana.— Holmes *v.* Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 So. 403.

Maryland.— Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176; Gans *v.* Carter, 77 Md. 1, 25 Atl. 663; Herzberg *v.* Warfield, 76 Md. 446, 25 Atl. 664.

Michigan.— Steel *v.* Auditor-Gen., 111 Mich. 381, 69 N. W. 738.

Montana.— King *v.* Pony Gold Min. Co., 24 Mont. 470, 62 Pac. 783.

New York.— Travis *v.* Travis, 48 Hun 343, 1 N. Y. Suppl. 357; Hurd *v.* Hannibal, etc., R. Co., 33 Hun 109.

Pennsylvania.— *In re* Clark, 195 Pa. St. 520, 46 Atl. 127, 48 L. R. A. 587; Com. *v.* Miller, 195 Pa. St. 230, 45 Atl. 921.

Rhode Island.— Leiter *v.* Lyons, 24 R. I. 42, 52 Atl. 78.

Texas.— Clopton *v.* Goodbar, (Civ. App. 1900) 55 S. W. 972.

United States.— *In re* Kalter, 2 Am. Bankr. Rep. 590.

England.— *In re* Hunt, [1896] P. 288, 66 L. J. P. D. & Adm. 8, 45 Wkly. Rep. 236.

Right to incorporate see People *v.* Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124.

Allowance for compensation paid surety company.— The Pennsylvania act of June 24, 1895, which authorizes persons who act in a trust capacity and are required by law to give bonds, to include as part of the expenses of the administration of the trust, the compensation paid to a surety company for going upon their bond does not contravene Const. art. 3, § 7, which prohibits the legislature from passing any local or special law "granting to any corporation . . . any special or exclusive privilege or immunity." *In re* Clark, 195 Pa. St. 520, 46 Atl. 127, 48 L. R. A. 587.

The federal act in relation to corporate sureties applies to the Indian Territory, although there is no United States district court there, and the act provides that a power of attorney of the resident agent of the corporation must be filed with the clerk of the district court for the district, as the

permit such a company to become sole surety where by law two sureties are required.[75]

2. Foreign Companies. In the absence of constitutional or statutory prohibition,[76] a surety company created in one state may make valid contracts of suretyship in another and may be authorized to execute as surety bonds required by law,[77] on compliance with the laws of the latter state.[78] And when such com-

act provides for service in cases where there is no resident agent. Ranney-Alton Mercantile Co. *v.* Mineral Belt Constr. Co., 2 Indian Terr. 134, 48 S. W. 1028.

Estoppel of company to deny power.— Under Act Cong. Aug. 13, 1894, § 7, a surety company is estopped to deny its power to execute a supersedeas bond. Ranney-Alton Mercantile Co. *v.* Mineral Belt Constr. Co., 2 Indian Terr. 134, 48 S. W. 1028.

Authority of an agent of a surety company to execute a contract of suretyship can be shown by the charter of the company. Pacific Nat. Bank *v.* Ætna Indemnity Co., 33 Wash. 428, 74 Pac. 590.

75. *California.*— Cramer *v.* Tittle, 72 Cal. 12, 12 Pac. 869.

Maryland.— Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176; Gans *v.* Carter, 77 Md. 1, 25 Atl. 663.

Minnesota.— State *v.* Hennepin County Dist. Ct., 58 Minn. 351, 59 N. W. 1055.

Montana.— King *v.* Pony Gold Min. Co., 24 Mont. 470, 62 Pac. 783.

New York.— Travis *v.* Travis, 48 Hun 343, 1 N. Y. Suppl. 357; Hurd *v.* Hannibal, etc., R. Co., 33 Hun 109; Matter of Filer, 11 Abb. N. Cas. 107. *Compare* Nichols *v.* MacLean, 98 N. Y. 458, holding that Code Civ. Proc. § 1334, requiring two sureties to an undertaking on appeal to the court of appeals, was not repealed or affected by the act of 1881, c. 486, "to facilitate the giving of bonds required by law," which applies only to bonds or undertakings which are to be accepted or approved by a head of department, surrogate, judge, sheriff, district attorney, or other officer, and which merely authorizes any officer who is required to approve any such bond or undertaking to accept and approve the same, in his discretion, when its conditions are guaranteed by a duly incorporated guaranty company.

Pennsylvania.— Com. *v.* Miller, 195 Pa. St. 230, 45 Atl. 921.

Rhode Island.— Leiter *v.* Lyons, 24 R. I. 42, 52 Atl. 78.

Texas.— Clopton *v.* Goodbar, (Civ. App. 1900) 55 S. W. 972.

Judicial notice of statute.—A statute empowering a corporation to become sole surety upon judicial bonds and authorizing clerks of courts to accept the corporation as such surety is so far a public statute that the courts will take judicial notice of it. Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176.

76. Altoona, etc., Terminal R. Co.'s Bond, 24 Pa. Co. Ct. 561 (holding that a foreign surety company would not be accepted as surety for a railroad company on a land-damage bond); Less *v.* Ghio, (Tex. Civ. App. 1899) 49 S. W. 635 (holding that a foreign company could not become surety on a guardian's bond).

77. *California.*— Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836; Cramer *v.* Tittle, 72 Cal. 12, 12 Pac. 869.

Connecticut.— Lovejoy *v.* Isbell, 70 Conn. 557, 40 Atl. 531.

Indiana.— Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316.

Louisiana.— Holmes *v.* Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 So. 403; Standard Cotton Seed Oil Co. *v.* Matheson, 48 La. Ann. 1321, 20 So. 713.

Texas.—Less *v.* Ghio, 92 Tex. 651, 51 S. W. 502; Clopton *v.* Goodbar, (Civ. App. 1900) 55 S. W. 972.

Tex. Act, June 10, 1897, authorized a foreign corporation on complying with its requirements to become surety upon the character of bonds therein mentioned, and was not restricted in its operation by the act of March 23, 1897, giving such right to domestic corporations only. The laws were not in conflict, and the later was cumulative of the earlier. Less *v.* Ghio, 92 Tex. 651, 51 S. W. 502.

78. Ansley *v.* Stuart, 121 La. 629, 46 So. 675. See Foreign Corporations, 19 Cyc. 1263.

Filing designation of agent.— Turner *v.* Franklin, (Ariz. 1906) 85 Pac. 1070. Failure of an agent of a foreign surety company to deposit in the clerk's office of the county the power of attorney under which he acts, as required by Burns Rev. St. (1901) § 3453, does not render a bond given by him invalid. Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316. It is sufficient if a designation of an agent for the service of process be filed with the insurance commissioner without filing it with the secretary of state. Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836.

Presumption of compliance.—A certificate of the insurance commissioner that a surety company is entitled to transact business in the state raises the presumption that it has complied with the requirements of the statute. Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836. In some states it is held that, in the absence of proof to the contrary, compliance with the laws of the state will be presumed under the maxim "*Omnia rite acta præsumuntur.*" New York Fidelity, etc., Co. *v.* Eickhoff, 63 Minn. 170, 65 N. W. 351, 56 Am. St. Rep. 464, 30 L. R. A. 586. See Foreign Corporations, 19 Cyc. 1322.

Service of process on agent as giving jurisdiction of surety company see Turner *v.* Franklin, (Ariz. 1906) 85 Pac. 1070. And see, generally, Process.

Penalties denounced against surety companies transacting business without comply-

panies are governed by special regulations, the general law pertaining to foreign corporations is not applicable to them.[79]

C. Mode of Executing Contract.[80] A surety company must sign and execute the instrument in the manner required by law for signing and executing such instruments.[81] If a foreign company has complied with the requirements of the law, it is not necessary to state in a bond which it signs, that it is authorized to transact business in the state.[82]

D. Justification. While surety companies are sometimes permitted to become sureties on bonds and undertakings without justifying,[83] it is usually provided that

ing with statutory provisions can be recovered by a suit in the name of the state only; and penalties against the corporation have no application to an agent of the company. Davis *v.* Pullman Co., 34 Tex. Civ. App. 621, 79 S. W. 635, holding that a palace car company which does not solicit business for a surety company and which never transmitted applications other than for itself is not an agent of the surety company within §§ 8–10, c. 165, p. 247, Acts 1897; and is not liable for the penalties prescribed.

Where a foreign surety company has ceased to do business in the state, after signing an injunction bond, by reason of failure to comply with the statute requiring bonds to be deposited in the office of the secretary of state, defendant has a right to call for other security, and the fact that the company is settling its unfinished business in the state and has property left there, the value of which does not appear, does not afford sufficient security to enable plaintiff to sustain the validity of the bond furnished. Ansley *v.* Stewart, 121 La. 629, 46 So. 675, where, under such circumstances, time was granted within which to furnish a new bond.

79. Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836; Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316; Moffet *v.* Koch, 106 La. 371, 31 So. 40.

The act defining the qualification of personal sureties does not govern surety companies. Moffet *v.* Koch, 106 La. 371, 31 So. 40.

80. **Execution by surety** generally see *supra*, IV, D, 8, c.

81. See CORPORATIONS, 10 Cyc. 1000 *et seq.*

A foreign surety company may sign by the second vice-president and the assistant secretary, with the corporate seal affixed. Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836. See CORPORATIONS, 10 Cyc. 1000 *et seq.*

82. Clopton *v.* Goodbar, (Tex. Civ. App. 1900) 55 S. W. 972.

83. State *v.* Hennepin County Inv. Co., 58 Minn. 351, 59 N. W. 1055, holding, however, that such a statute is only permissive, and does not make it compulsory on the court to accept a surety company as surety without justification. See also *In re* Philadelphia, etc., R. Co., 28 Wkly. Notes Cas. (Pa.) 117.

Mich. Pub. Acts (1895), No. 266, declaring that any bond required by law to be given with surety or sureties may be executed by a surety company, and that such execution shall be in all respects a full and complete compliance with every requirement as to the execution of such bond by sureties, and that in those cases where, by the laws of the state, more than one surety is required, it shall be lawful to approve and accept a bond with but one surety, provided the surety is a corporation duly qualified, and that the certificate of the insurance commissioner shall be conclusive proof of the solvency and credit of such company for all purposes, and of its right to be accepted as sole surety, and of its sufficiency as such, does not operate to compel those charged with the duty of accepting and approving bonds of saloon keepers under Act No. 313, Pub. Acts (1887), to accept a bond with a foreign corporation as sole surety, where their refusal is based on an honest doubt as to the sufficiency of the surety proposed. Schmitt *v.* Clinton, 111 Mich. 99, 69 N. W. 153.

Constitutionality.—A statute may constitutionally authorize a surety company to become sole surety on bonds required by law without an affidavit showing qualifications, although such an affidavit is required for other sureties. King *v.* Pony Gold Min. Co., 24 Mont. 470, 62 Pac. 783.

Constitutionality of statute controlling discretion of court.— In Pennsylvania it has been held that the power of courts of record to require security from persons subject to their order where there are interests demanding its protection is an inherent one, essential to the due administration of right and justice which the constitution has placed beyond the possibility of legislative interference, especially in the case of the orphans' court; and that, under the constitutional distribution of governmental powers, the legislature, in authorizing surety companies to become surety on bonds required by law, like guardianship bonds, cannot dictate to the courts how they shall decide as to the sufficiency of the security, or compel the courts to accept as good and sufficient security which is insufficient, or compel the courts to accept the decision of an officer having no judicial recognition under the constitution as to matters affecting their own procedure and the performance of their own judicial functions, or confer upon such officer the right to decide questions of law, such as the due incorporation of a foreign surety company, the extent of its corporate powers, and whether or not it has brought itself within the terms of the statute authorizing it to act as surety; and therefore, that Pa. Act, June 26, 1895 (Pamphl. Laws 343), as to the acceptance as surety or guarantor of com-

such a company, if excepted to, shall be required to justify.[84] Unless otherwise provided, justification by a surety company is made in the same manner as by any other surety.[85] It should appear on such justification that the surplus assets of the company are equal to the amount of its undertaking.[86] Such a showing does not, however, absolutely require approval and acceptance;[87] but sufficient facts must be presented by the objections to overcome the presumption of solvency before a refusal to approve can be justified.[88]

E. Construction and Operation of Contract.[89] Generally speaking, a contract of suretyship by a surety company is governed by the same rules as the contracts of other sureties,[90] but some distinctions are made by the courts in construing such contracts. The doctrine that a surety is a favorite of the law, and that a

panies qualified to act as such, is unconstitutional in so far as it purports to control the discretion of the orphans' court in accepting any given company as such surety. *In re* American Banking, etc., Co., 4 Pa. Dist. 757, 17 Pa. Co. Ct. 274.

84. See Fox *v.* Hale, etc., Silver Min. Co., 97 Cal. 353, 32 Pac. 446; Haines *v.* Hein, 67 N. Y. App. Div. 389, 73 N. Y. Suppl. 293; Earle *v.* Earle, 49 N. Y. Super. Ct. 57; Rosenwald *v.* Phenix Ins. Co., 9 N. Y. Civ. Proc. 444; McGean *v.* MacKeller, 6 N. Y. Civ. Proc. 169, 67 How. Pr. 273. See also White *v.* Rintoul, 51 N. Y. Super. Ct. 512.

85. Earle *v.* Earle, 49 N. Y. Super. Ct. 57.

Prescribed mode not exclusive.—A mode of justification prescribed by statute is not necessarily exclusive. Haines *v.* Hein, 67 N. Y. App. Div. 389, 73 N. Y. Suppl. 293, holding that testimony of an officer of a surety company, having knowledge of its financial condition, is sufficient as to its standing; but that a certified copy of the annual report of a surety company filed in the office of the state superintendent of insurance is an insufficient justification under Code Civ. Proc. § 811, and Laws (1893), c. 720, § 4, amended by Laws (1895), c. 178.

86. Fox *v.* Hale, etc., Silver Min. Co., 97 Cal. 353, 32 Pac. 446.

Certificate of authority.— Under some statutes the certificate of authority of a surety company is evidence of the solvency of such company (Romine *v.* Howard, (Tex. Civ. App. 1906) 93 S. W. 690); and is sufficient to justify the approval of a bond or undertaking (Germantown Trust Co. *v.* Whitney, 19 S. D. 108, 102 N. W. 304).

The certificate of approval need not show the authority of the corporation to execute the bond. Germantown Trust Co. *v.* Whitney, 19 S. D. 108, 102 N. W. 304.

87. Earle *v.* Earle, 49 N. Y. Super. Ct. 57, holding that a judge must exercise his discretion in each particular case as to whether the actual statement of the company's business justifies an approval.

88. Matter of Keogh, 22 Misc. (N. Y.) 747, 50 N. Y. Suppl. 998.

89. Validity of agreement between principal and surety.— In Maryland Fidelity, etc., Co. *v.* Butler, 130 Ga. 225, 60 S. E. 851, 16 L. R. A. N. S. 994, it was agreed between a guardian and a surety company that, if the latter would become surety on the bond of the former, he would deposit the wards' funds in some bank in the city of the guardian's residence, to be approved by the surety, and that no part of this money should be withdrawn without the joint check of the guardian and the surety, through its local representative. The arrangement was stated to the bank's officers. Deposits were made, and afterward an interest-bearing certificate of deposit was issued to carry into effect the agreement of the parties. It certified that the guardian had deposited a named sum payable to the order of the surety. This was received by the guardian and retained, with the understanding between him and the surety that no part of the fund should be withdrawn from the bank without the joint check of the guardian and the surety, and that, if the whole should be withdrawn at once, the certificate of deposit should be indorsed jointly by them. It was held that such an arrangement had the effect to surrender in part the custody and control of the ward's funds to another than the guardian appointed by law, and to put it beyond the power of the guardian to withdraw the fund in case of an emergency, and that it was contrary to public policy. See also *supra*, IX, B, 2.

90. *Missouri.*— North St. Louis Bldg., etc., Assoc. *v.* Obert, 169 Mo. 507, 69 S. W. 1044.

Pennsylvania.— Bauschard Co. *v.* New York Fidelity, etc., Co., 21 Pa. Super. Ct. 370.

Texas.— American Surety Co. *v.* Koen, (Civ. App. 1908) 107 S. W. 938.

Wisconsin.— Electric Appliance Co. *v.* U. S. Fidelity, etc., Co., 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609.

United States.— American Bonding Co. *v.* Pueblo Inv. Co., 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. N. S. 557; U. S. *v.* American Bonding, etc., Co., 89 Fed. 921.

Discharge.—A surety company, like any other surety, has a right to require a strict compliance with the terms of the contract; and it will be discharged by any material alteration of the contract between the principal and the obligee without its consent, by an agreement on the part of the obligee not to sue the principal, by an extension of the time of payment, and in like cases, to the same extent as other sureties. Bauschard Co. *v.* New York Fidelity, etc., Co., 21 Pa. Super. Ct. 370; U. S. *v.* American Bonding, etc., Co., 89 Fed. 921. See also *supra*, VI, B, 6, note 21; VIII, E, 2, a *et seq.*

claim against him is *strictissimi juris*,[91] does not apply where the bond or undertaking is executed upon a consideration by a corporation organized to make such bonds or undertakings for profit.[92] While such corporations may call themselves "surety companies," their business is in all essential particulars that of insurers.[93] Their contracts are usually in the terms prescribed by themselves, and should be construed most strongly in favor of the obligee.[94] Limitations on the powers of an agent of a surety company do not affect persons dealing with the agent without knowledge thereof.[95] A surety company is estoped by the material recitals in a bond which it has executed.[96]

F. Relief From Further Liability.[97] A statute providing for relief of "sureties" generally from further liability on a bond or for petition for such relief applies to surety companies which, by an amendment of the statute, have been authorized to become sureties on bonds or undertakings required by law, where there is nothing in the original statute or the amendment excepting them.[98]

PRINCIPAL CHALLENGE. See JURIES, 24 Cyc. 310 *et seq.*

PRINCIPIA PROBANT, NON PROBANTUR. A maxim meaning "Principles prove, they can not themselves be proved." [1]

PRINCIPIIS OBSTA. A maxim meaning "Withstand beginnings." [2]

PRINCIPIORUM NON EST RATIO. A maxim meaning "There is no reasoning of principles." [3]

91. See *supra*, V, C.

92. New Haven *v.* Eastern Paving Brick Co., 78 Conn. 689, 63 Atl. 517; Walker *v.* Holtzclaw, 57 S. C. 459, 35 S. E. 754; Pacific Bridge Co. *v.* U. S. Fidelity, etc., Co., 33 Wash. 47, 73 Pac. 772; Cowles *v.* U. S. Fidelity, etc., Co., 32 Wash. 120, 72 Pac. 1032, 98 Am. St. Rep. 838; Tebbets *v.* Mercantile Credit Guarantee Co., 73 Fed. 95, 19 C. C. A. 281; Supreme Council C. K. A. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96. But *compare* American Surety Co. *v.* Koen, (Tex. Civ. App. 1908) 107 S. W. 938.

93. *Illinois.*— People *v.* Rose, 174 Ill. 310; 51 N. E. 246, 44 L. R. A. 124.

Iowa.— Van Buren County *v.* American Surety Co., (1908) 115 N. W. 24.

Kentucky.— Champion Ice Mfg., etc., Co. *v.* American Bonding, etc., Co., 115 Ky. 863, 75 S. W. 197, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 356.

Missouri.— See North St. Louis Bldg., etc., Assoc. *v.* Obert, 169 Mo. 507, 69 S. W. 1044.

North Carolina.— Tarboro Bank *v.* Maryland Fidelity, etc., Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682.

Texas.— American Surety Co. *v.* San Antonio L. & T. Co., (Civ. App. 1906) 98 S. W. 387.

Washington.— Pacific Bridge Co. *v.* U. S. Fidelity, etc., Co., 33 Wash. 47, 73 Pac. 772; Cowles *v.* U. S. Fidelity, etc., Co., 32 Wash. 120, 72 Pac. 1032, 98 Am. St. Rep. 838; Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 67 Pac. 989.

United States.— American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977; Tebbets *v.* Mercantile Credit Guarantee Co., 73 Fed. 95, 19 C. C. A. 281; Supreme Council C. K. A. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96.

94. Champion Ice Mfg., etc., Co. *v.* American Bonding, etc., Co., 115 Ky. 863, 75 S. W. 197, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 356; American Surety Co. *v.* San Antonio L. & T. Co., (Tex. Civ. App. 1906) 98 S. W. 387; Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 67 Pac. 989; American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977; Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 80 Fed. 766, 26 C. C. A. 146 [*reversed* on other grounds in 173 U. S. 582, 19 S. Ct. 551, 43 L. ed. 818]; Tebbets *v.* Mercantile Credit Guarantee Co., 73 Fed. 95, 19 C. C. A. 281; Supreme Council C. K. A. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96. See also Fenton *v.* New York Fidelity, etc., Co., 36 Oreg. 283, 56 Pac. 1096, 76 Am. St. Rep. 792, 48 L. R. A. 770.

Construction against forfeiture.—A bond of a surety company in form and essence resembling an insurance contract, and differing materially from the ordinary forms, will be construed most strongly against a forfeiture of the indemnity for which it was given. Tarboro Bank *v.* Maryland Fidelity, etc., Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682.

95. Getchell, etc., Lumber, etc., Co. *v.* Peterson, 124 Iowa 599, 100 N. W. 550; Anderson *v.* National Surety Co., 196 Pa. St. 288, 46 Atl. 306.

96. St. Louis County *v.* American L., etc., Co., 75 Minn. 489, 78 N. W. 113, holding that a surety company on a bond given by a company as the depositary of county funds was estopped to deny that such company had been designated as a depositary. And see ESTOPPEL, 16 Cyc. 702.

97. See also *supra*, VI, B, 6, note 21.

98. *In re* Thurber, 162 N. Y. 244, 56 N. E. 631, 30 N. Y. Civ. Proc. 261 [*reversing* 43 N. Y. App. Div. 528, 60 N. Y. Suppl. 198].

1. Morgan Leg. Max.

2. Peloubet Leg. Max. [*citing* Branch Pr.].

3. Peloubet Leg. Max. [*citing* Price *v.* Mas-

PRINCIPIUM EST POTISSIMA PARS CUJUSQUE REI. A maxim meaning "The beginning is the most powerful part of a thing." [4]

PRINCIPLE. A fundamental truth; an original cause; a motive; [5] the cause, source, or origin of anything; that from which a thing proceeds, as the principle of motion, the principles of action, ground, foundation, that which supports an assertion, an action, or a series of actions, or of reasoning; a general truth; a law comprehending many subordinate truths; as the principles of morality, of law, of government, etc.[6] (Principle: Of Invention, see PATENTS, 30 Cyc. 821.)

PRINT. As a noun, a mark, form, character; a figure made by impression; [7] a mark made by impression; a line, character, figures, or indentation made by the pressure of one body or thing upon another; a printed cloth; a fabric figured by stamping; [8] a mark or form made by impression or printed; anything printed; that which, being impressed, leaves its form, as a cut in wood or metal, to be impressed on paper; the impression made; a picture; a stamp; the letters in a printed book; an impression from an engraved plate; a picture impressed upon an engraved surface, etc.; [9] a picture; something complete in itself similar in kind to an engraving, cut, or photograph.[10] As a verb, to impress letters, figures, and characters, by types and ink of various forms and colors, upon paper of various kinds, or some such yielding surface; [11] to take an impression of;

coll, 2 Bulstr. 238, 239, 80 Eng. Reprint 1089].

4. Bouvier L. Dict. [*citing* Lampet's Case, 10 Coke 46*b*, 49*a*, 77 Eng. Reprint 994].

5. Singer *v.* Walmsley, 22 Fed. Cas. No. 12,900, 1 Fish. Pat. Cas. 558.

6. Webster Dict. [*quoted* in People *v.* Stewart, 7 Cal. 140, 143].

The term may mean a mere elementary truth, but it may also mean constituent parts. Hornblower *v.* Boulton, 8 T. R. 95, 106, 3 Rev. Rep. 439.

As used in a specification of error that commissioners in condemnation proceedings adopted an erroneous principle in assessing damages, the term is inapplicable to a mistake of fact. "We speak of a principle of law, or a principle of ethics, as meaning a 'tenet' of the science; but we never speak of a 'principle' of fact." New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25, 66.

7. Worcester Dict. [*quoted* in Arthur *v.* Moller, 97 U. S. 365, 368, 24 L. ed. 1046].

8. Webster Dict. [*quoted* in Arthur *v.* Moller, 97 U. S. 365, 368, 24 L. ed. 1046].

In its broader sense it may be an impression of either figures, characters, or letters. In the more common sense it is used as applicable to letters. U. S. *v.* Harman, 38 Fed. 827, 829.

"Print" and "engraving" as synonymous see Wood *v.* Abbott, 30 Fed. Cas. No. 17,938, 5 Blatchf. 325, 328.

The term may include: Impressions on paper, or engravings on copper, steel, wood, or stone, representing some particular subject or composition, and which may be either colored or uncolored. McElrath Com. Dict. [*quoted* in Arthur *v.* Moller, 97 U. S. 365, 368, 24 L. ed. 1046]. Impressions on paper or some substance, of engravings on copper, steel, wood, stone, etc., representing some particular subject or composition. Homan Encycl. Com. [*quoted* in Arthur *v.* Moller, *supra*]. See also McCulloch Dist. Com.

Printed "circular" and "handbill" in their usual acceptation in common language are synonymous. People *v.* McLaughlin, 33 Misc. (N. Y.) 691, 693, 68 N. Y. Suppl. 1108.

Printed copy.— The federal statute requiring the filing, with the librarian of congress under the copyright laws, of a printed copy of the title of a map is complied with by the filing of a copy traced from the printed copy through a transparent medium. Chapman *v.* Ferry, 18 Fed. 539, 540, 9 Sawy. 395.

"Printed matter," in its ordinary meaning, is a paper, or some other like substance, commonly used for the purpose, printed in the ordinary or usual way. Forbes Lithograph Mfg. Co. *v.* Worthington, 25 Fed. 899, 900. A federal statute imposing duty "on all books, periodicals and pamphlets, and all printed matter and illustrated books and papers." The term "printed matter" refers only to articles *ejusdem generis* with books and pamphlets, and does not include iron showcards. Forbes Lith. Mfg. Co. *v.* Worthington, 132 U. S. 655, 660, 661, 10 S. Ct. 180, 33 L. ed. 453 [*affirming* 25 Fed. 899].

"Printed publication" is anything which is printed, and, without any injunction of secrecy, is distributed to any part of the public in any country. Cottier *v.* Stimson, 20 Fed. 906, 910.

9. Webster Dict.; Worcester Dict. [both *quoted* in Yuengling *v.* Schile, 12 Fed. 97, 107, 20 Blatchf. 452].

10. Yuengling *v.* Schile, 12 Fed. 97, 107, 20 Blatchf. 452; Rosenbach *v.* Dreyfuss, 2 Fed. 217, 221.

11. Forbes Lith. Mfg. Co. *v.* Worthington, 25 Fed. 899, 900, where it is said: "The word 'print' has a wide range of signification."

Typewriting not printing see Sunday *v.* Hagenbach, 18 Pa. Co. Ct. 540, 541. But where a statute provided that, where no newspaper was published, printed notice to the electors of the proposed organization of a city should be posted, typewritten notices were held to be printed within the meaning of the statute. State *v.* Oakland, 69 Kan. 784, 785, 77 Pac. 694.

to copy or take off the impress of; to stamp;[12] to publish.[13] (Prints: Copyright of, see COPYRIGHT, 9 Cyc. 905. Libelous, see LIBEL AND SLANDER, 25 Cyc. 370. Obscene, see OBSCENITY, 29 Cyc. 1318. See also PRINTER; PRINTING.)

PRINTER. The person whose mechanical skill has, by means of the type, and printing press, etc., stamped upon the paper the words, sentences, and ideas of the author.[14] (See PRINT; PRINTING.)

PRINTING. The act, art, or practice of impressing letters, characters, or figures on paper, cloth, or other materials;[15] the art of impressing letters; the art of making books or papers by impressing legible characters;[16] the process of multiplying the copies, by sheets.[17] (Printing: Appointment or Designation of Official Newspaper, see NEWSPAPERS, 29 Cyc. 695. Briefs and Papers on Appeal in — Civil Action, see APPEAL AND ERROR, 3 Cyc. 111; Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 859. Construction of Printed Matter in Written Instrument, see CONTRACTS, 9 Cyc. 584; DEEDS, 13 Cyc. 605; FIRE INSURANCE, 19 Cyc. 658. Contract For Public Printing, see COUNTIES, 11 Cyc. 470; MUNICIPAL CORPORATIONS, 28 Cyc. 642; NEWSPAPERS, 29 Cyc. 701. Customs Duties on Printed Matter, see CUSTOMS DUTIES, 12 Cyc. 1125. Disbursements Taxable as Costs, see COSTS, 11 Cyc. 131. Exemption of Printing Press and Material, see EXEMPTIONS, 18 Cyc. 1417. Forgery by Use of Printed Instrument — In General, see FORGERY, 19 Cyc. 1380; Setting Out or Describing Instrument in Indictment, see FORGERY, 19 Cyc. 1397; INDICTMENTS AND INFORMATIONS, 22 Cyc. 354. Freedom of Press, see CONSTITUTIONAL LAW, 8 Cyc. 892. Obscene Publication, see OBSCENITY, 29 Cyc. 1318. Signature to Summons, see PROCESS. See also PRINT; PRINTER.)

PRIOR. Preceding, as in the order of time, of thought, of origin, of dignity, or of importance.[18] (See PRIORITY.)

12. Webster Unabr. Dict. [*quoted* in Arthur *v.* Moller, 97 U. S. 365, 367, 24 L. ed. 1046], where it is added: "Hence, specifically, to strike off an impression or impressions of, from types, stereotype or engraved plates, or the like, by means of a press; to multiply by the press; as, to 'print' newspapers, handbills, books, pictures, and the like. To mark by pressure; to form an impression upon; to cover with figures by a press or something analogous to it; as, to 'print' calico, &c."

13. "Print" is familiarly used in the sense of "publish," and in that sense the word receives recognition in many if not all of the dictionaries. State *v.* Cronin, 75 Nebr. 738, 742, 106 N. W. 986; Nebraska Land, etc., Co. *v.* McKinley-Lanning L. & T. Co., 52 Nebr. 410, 414, 72 N. W. 357.

In the sense of "publish."— Where a statute requires the publication of a notice of foreclosure in a paper "printed" in the county, a compliance with the law is not shown by the certificate that such notice was published in a newspaper published in the county. A newspaper may be published in a county, and yet not printed there. A strict compliance with the statute must be shown. Bragdon *v.* Hatch, 77 Me. 433, 434, 1 Atl. 140; Blake *v.* Dennett, 49 Me. 102, 104. But under a similar statute it is held that a notice of judicial sale is not invalid because the newspaper in which it was inserted though published in the proper county was partly printed outside of such county. Ætna L. Ins. Co. *v.* Wortaszewski, 63 Nebr. 636, 637, 88 N. W. 855. This doctrine has been upheld in the case of notices in actions against non-residents. Palmer *v.* McCormick, 30 Fed. 82, 83. And so under a statute requiring the proceedings of a city council to be published in a newspaper printed and published in such city where the contract for publishing such proceedings was awarded to a newspaper, the matter for which was composed, set up, and placed in form in such city, and then sent to another place where the press work was done, the papers being then sent back to such city from whence they are issued to subscribers, it was held that this was a compliance with the statute. Bayer *v.* Hoboken, 44 N. J. L. 131, 133.

14. Brown *v.* Woods, 6 J. J. Marsh. (Ky.) 11, 19.

As including: "Proprietor" see Woodward *v.* Brown, 119 Cal. 283, 301, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Quivey *v.* Porter, 37 Cal. 458, 464. "Publisher" see Sharp *v.* Daugney, 33 Cal. 505, 512; Bunce *v.* Reed, 16 Barb. (N. Y.) 347, 350; Pennoyer *v.* Neff, 95 U. S. 714, 721, 25 L. ed. 565.

Not embracing "editor" see Brown *v.* Woods, 6 J. J. Marsh. (Ky.) 11, 19.

15. *In re* American Bank-Note Co., 27 Misc. (N. Y.) 572, 574, 58 N. Y. Suppl. 275.

16. Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369, 377.

17. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, 4 Phila. 157.

"Printing is an art — it is more than a mere mechanical pursuit." Campbell *v.* Sumner County, 64 Kan. 376, 378, 67 Pac. 866.

"Printing" and "engraving" are not identical. *In re* American Bank-Note Co., 27 Misc. (N. Y.) 572, 575, 58 N. Y. Suppl. 275.

18. Century Dict.

PRIORITY. A legal preference or precedence.[19] (Priority: Agreement as to, see MORTGAGES, 27 Cyc. 1169. In Application of — Municipal Appropriations and Funds, see MUNICIPAL CORPORATIONS, 28 Cyc. 1572; Partnership and Individual Assets and Liabilities, see PARTNERSHIP, 30 Cyc. 603; Payments in General, see PAYMENT, 30 Cyc. 1243. In Disposition of Proceeds of — Insurance, see FIRE INSURANCE, 19 Cyc. 883; Judicial Sale in General, see JUDICIAL SALES, 24 Cyc. 74; Partition Sale, see PARTITION, 30 Cyc. 291; Sale in Admiralty, see ADMIRALTY, 1 Cyc. 897; Sale Under Execution, see EXECUTIONS, 17 Cyc. 1351; Sale Under Foreclosure, see MECHANICS' LIENS, 27 Cyc. 451; MORTGAGES, 27 Cyc. 1761; Sale Under Judgment in Creditor's Suit, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 267; CREDITORS' SUITS, 12 Cyc. 59; FRAUDULENT CONVEYANCES, 20 Cyc. 824. Of Actions For Same Cause, see ABATEMENT AND REVIVAL, 1 Cyc. 23. Of Agricultural Liens, see AGRICULTURE, 2 Cyc. 64. Of Allowances From Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 387. Of Assignments — In General, see ASSIGNMENTS, 4 Cyc. 75; For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 267; Of Bills of Lading, see CARRIERS, 6 Cyc. 424; Of Judgments, see JUDGMENTS, 23 Cyc. 1419; Of Mortgages or Debts Secured Thereby, see MORTGAGES, 27 Cyc. 1300. Of Attachments — In General, see ATTACHMENT, 4 Cyc. 632; In Proceedings in Justices' Courts, see JUSTICES OF THE PEACE, 24 Cyc. 539; In Suits Against Firms or Partners, see PARTNERSHIP, 30 Cyc. 577. Of Claims Against Estate — Assigned, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 266; Of Bankrupt, see BANKRUPTCY, 5 Cyc. 384; Of Decedent, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 541; Of Insolvent, see INSOLVENCY, 22 Cyc. 1319. Of Claims Against Insolvent Bank, see BANKS AND BANKING, 5 Cyc. 571. Of Claims Against Insolvent or Dissolved Insurance Company, see INSURANCE, 22 Cyc. 1408. Of Conveyances and Contracts For Sale, see VENDOR AND PURCHASER. Of Costs, see ADMIRALTY, 1 Cyc. 897; EXECUTIONS, 17 Cyc. 1353. Of Dower, see DOWER, 14 Cyc. 915. Of Executions, see EXECUTIONS, 17 Cyc. 1054. Of Garnishments, see GARNISHMENT, 20 Cyc. 1061. Of Grants, Surveys, and Patents For Public Lands, see BOUNDARIES, 5 Cyc. 914; MINES AND MINERALS, 27 Cyc. 578; PUBLIC LANDS. Of Inventions and Patents Therefor, see PATENTS, 30 Cyc. 827. Of Liens — In General, see LIENS, 25 Cyc. 678; Attorneys' Liens, see ATTORNEY AND CLIENT, 4 Cyc. 1017; Carriers' Liens, see CARRIERS, 6 Cyc. 436; Factors' Liens, see FACTORS AND BROKERS, 19 Cyc. 162; Judgment Liens, see JUDGMENTS, 23 Cyc. 1377; MUNICIPAL CORPORATIONS, 28 Cyc. 1772; Landlords' Liens, see LANDLORD AND TENANT, 24 Cyc. 1259; Maritime Liens, see MARITIME

Used in connection with other words.— "Prior claims" see Stansberry *v.* Pope, 6 J. J. Marsh. (Ky.) 189, 192. "Prior discovery" see Bay *v.* Oklahoma Southern Gas, etc., Co., 13 Okla. 425, 437, 17 Pac. 936. "Prior lien" see Miner's Bank *v.* Heilner, 47 Pa. St. 452, 459; Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 81 Fed. 439, 447. "Prior mortgage" see Cook *v.* Belshaw, 23 Ont. 545, 549 "Prior negligence" see Holwerson *v.* St. Louis, etc., R. Co., 157 Mo. 216, 234. 57 S. W. 770, 50 L. R. A. 850. "Prior notice" see L'Union St. Joseph de Montreal *v.* Lapierre, 4 Can. Sup. Ct. 164, 180. "Prior pavement" see Matter of Brady, 85 N. Y. 268, 270. "Prior reasonable notice" see Chadwick *v.* Starrett, 27 Me. 138, 143. "Prior to" see State *v.* Bullitt, 60 N. J. L. 119, 123, 36 Atl. 881. "Prior to the passage" see Charless *v.* Lamberson, 1 Iowa 435, 443, 63 Am. Dec. 457. "Prior to shipment" see Fire Ins. Assoc. of England *v.* Merchants', etc., Transp. Co., 66 Md. 339, 352, 7 Atl. 905, 59 Am. Rep. 162.

"At least ten days prior thereto" see Coe *v.* Caledonia, etc., R. Co., 27 Minn. 197, 202, 6 N. W. 621.

When employed to describe a judgment the term signifies nothing except priority in point of time, because judgment cannot be prior in any other respect. Matter of Townsend, 83 Hun (N. Y.) 200, 202, 31 N. Y. Suppl. 409.

19. Black L. Dict. See also Matter of Smith, 36 Misc. (N. Y.) 292, 294, 73 N. Y. Suppl. 463.

A relative or comparative term.— Sterling Irr. Co. *v.* Downer, 19 Colo. 595, 599, 36 Pac. 787.

"Prior and subsequent are opposite terms, and although the word priority is sometimes used in the sense of pre-eminence and preference, yet it is generally used to signify antecedence and precedence, and when we speak of prior claims we intend to denote claims which have antecedence." Matter of Townsend, 83 Hun (N. Y.) 200, 201, 31 N. Y. Suppl. 409.

Liens, 26 Cyc. 802; Mechanics' Liens, see Mechanics' Liens, 27 Cyc. 230; Of Assessments For Benefit From Public Improvements, see Municipal Corporations, 28 Cyc. 1202; Of Chattel Mortgages, see Chattel Mortgages, 7 Cyc. 46; Of Corporations on Corporate Stock, see Corporations, 10 Cyc. 584; Of Employees For Wages, see Master and Servant, 26 Cyc. 1072; Mines and Minerals, 27 Cyc. 778; Of Mortgages and Debts or Obligations Secured Thereby, see Mortgages, 27 Cyc. 1166; Of Taxes, see Taxation; Of Wards on Property of Guardians, see Guardian and Ward, 21 Cyc. 110; On Logs, Lumber or Mills, see Logging, 28 Cyc. 1589; On Property of Deceased as Affecting Liability of, as Devisees and Legatees, see Descent and Distribution, 14 Cyc. 204; On Separate Estate of Wife, see Husband and Wife, 21 Cyc. 1495; Vendors' Liens, see Vendor and Purchaser. Of Patents — For Inventions, see Patents, 30 Cyc. 835; For Public Lands, see Mines and Minerals, 27 Cyc. 605; Public Lands. Of Pledges, see Pledges, 31 Cyc. 779. Of Titles to Common Lands, see Common Lands, 8 Cyc. 358. Of Water Rights by Appropriation, see Waters. Proceedings For Determination of, see Attachment, 4 Cyc. 649; Executions, 17 Cyc. 1067; Mechanics' Liens, 27 Cyc. 438; Mortgages, 27 Cyc. 1228. See also Prior.)

PRIOR POSSESSIO CUM TITULO POSTERIORE MELIOR EST PRIORE TITULO SINE POSSESSIONE. A maxim meaning "Prior possession, with subsequent title, is better than prior title without possession." [20]

PRIOR TEMPORE, POTIOR JURE. A maxim meaning "He who is first in time is preferred in right." [21]

PRISE. In French law, "prize"; captured property.[22] (See Prize.)

PRISON BOUNDS. See Prisons.

PRISON BREACH. See Prisons.

PRISONER. See Prisons.

20. Peloubet Leg. Max. [*citing* Traynor Leg. Max.].

21. Bouvier L. Dict. [*citing* Broom Leg. Max.; Coke Litt. 14*a*].

The maxim is applied in: Curtiss *v.* Smith, 35 Conn. 156, 160; Williams *v.* Elting-Woolen Co., 33 Conn. 353, 356; Shallcross *v.* Deats, 43 N. J. L. 177, 181; Toronto Tel. Mfg. Co. *v.* Bell Tel. Co., 2 Can. Exch. 524, 533.

Other forms of maxim.—*Prior est in tempore, potior est in jure* see Sullivan *v.* Clifton, 55 N. J. L. 324, 326, 26 Atl. 964, 39 Am. St. Rep. 652, 20 L. R. A. 719; Hendrickson *v.* Brown, 39 N. J. L. 239, 243; Wheeler *v.* Kirtland, 24 N. J. Eq. 552, 555. *Prior in tempore, potior est in jure* see *In re* Phillips, 205 Pa. St. 515, 518, 55 Atl. 213, 97 Am. St. Rep. 746, 66 L. R. A. 760; Kunes *v.* McClosky, 115 Pa. St. 461, 466, 9 Atl. 83; Fritz *v.* Brandon, 2 Wkly. Notes Cas. (Pa.) 164, 170; Coon *v.* Reed, 2 Wkly. Notes Cas. (Pa.) 159; Stevens *v.* The Sandwich, 23 Fed. Cas. No. 13,409, 1 Pet. Adm. 233. *Prior in tempore, potior in jure* see Hubbard *v.* Little, 9 Cush. (Mass.) 475, 477; Knowles Loom Works *v.* Vacher, 57 N. J. L. 490, 498, 31 Atl. 306, 33 L. R. A. 305; Postens *v.* Postens, 3 Watts & S. (Pa.) 182, 184, 38 Am. Dec. 752; Miller *v.* Jacobs, 3 Watts (Pa.) 477, 488; Kuhns *v.* Westmoreland Bank, 2 Watts (Pa.) 136, 138; Malvin *v.* Sweitzer, 1 Kulp (Pa.) 5; Hammett *v.* Harrison, 1 Phila. (Pa.) 349, 351; Gordon *v.* Fitzhugh, 27 Gratt. (Va.) 835, 839; McClaskey *v.* O'Brien, 16 W. Va. 791, 839; Street *v.* Commercial Bank, 1 Grant Ch. (U. C.) 169, 188.

22. Black L. Dict.

The term does not merely signify a forcible taking by a belligerent power or by the authority and act of governments, but it is also appropriately used to designate any unlawful taking; as well that which is the act of pirates as that which is committed by other persons not duly commissioned by any recognized authority or government. Dole *v.* New England Mut. Mar. Ins. Co., 88 Mass. 373, 389.

PRISONS

By Walter Myers

CROSS-REFERENCES

For Matters Relating to:

Arrest, see ARREST, 3 Cyc. 867.

Bail, see BAIL, 5 Cyc. 63.

Burning of Prison, see ARSON, 3 Cyc. 989.

Commitment For Extradition, see EXTRADITION (INTERNATIONAL), 19 Cyc. 64; EXTRADITION (INTERSTATE), 19 Cyc. 95.

Compensation of De Facto Jailer, see OFFICERS, 29 Cyc. 1430.

Convict, see CONVICTS, 9 Cyc. 869.

Convict Labor, see CONVICTS, 9 Cyc. 878.

Custody of Prisoner Arrested Under Execution Against the Person, see EXECUTIONS, 17 Cyc. 1513.

Discharge From:

Arrest, see BAIL, 5 Cyc. 10, 63.

Imprisonment of Judgment Debtor Confined For Contempt in Supplementary Proceedings, see EXECUTIONS, 17 Cyc. 1480.

Disposition of Prisoner Arrested Under Execution Against the Person, see EXECUTIONS, 17 Cyc. 1513.

Effect of Discharge of Prisoner in Insolvency Proceeding, see INSOLVENCY, 22 Cyc. 1335.

Escape of Convict Laborer, see CONVICTS, 9 Cyc. 881.

Execution Against the Person, see EXECUTIONS, 17 Cyc. 1490.

False Imprisonment, see FALSE IMPRISONMENT, 19 Cyc. 316.

Garnishment of Property Taken by Officer From Person of Prisoner, see GARNISHMENT, 20 Cyc. 1025.

Imprisonment:

As Affecting Limitations, see LIMITATIONS OF ACTIONS, 25 Cyc. 1264.

As Punishment, see CRIMINAL LAW, 12 Cyc. 954, 959, 969.

For Non-Payment of Fine, see CRIMINAL LAW, 12 Cyc. 960; FINES, 19 Cyc. 551.

Interruption of Residence by Confinement in Prison as Affecting Settlement, see PAUPERS, 30 Cyc. 1094.

Jail Breaking as Criminal Offense, see ESCAPE, 16 Cyc. 537.

For Matters Relating to — (*continued*)
Judicial Power to Regulate Fees For Board in Prison, see CONSTITUTIONAL LAW, 8 Cyc. 850 n. 33.
Liability of:
County For Default in Establishing and Maintaining Penitentiary, see COUNTIES, 11 Cyc. 497.
Master For Injury in Case of Employment of Convict Labor, see CONVICTS, 9 Cyc. 877.
Officer For Escape Before Commitment, see SHERIFFS AND CONSTABLES.
Prison and Jail Charges, see COUNTIES, 11 Cyc. 494.
Prison Breach as Criminal Offense, see ESCAPE, 16 Cyc. 537.
Reformatory, see REFORMATORIES.
Regulation of Convicts, see CONVICTS, 9 Cyc. 876.
Rescue of Prisoner, see RESCUE.
Satisfaction of Judgment by Arrest and Imprisonment Under Execution, see JUDGMENTS, 23 Cyc. 1492.
Seizure of Prisoner's Correspondence, see SEARCHES AND SEIZURES.
Support of Pauper in Prison, see PAUPERS, 30 Cyc. 1149.
Wages of Officials Charged With Custody of Prisoners, see COUNTIES, 11 Cyc. 495.

I. TERMINOLOGY.

A. Prison. A prison is a place of confinement for the safe custody of persons, in order to their answering in any action, civil or criminal.[1] In its general sense it may be said to include the various buildings, whether designated as prisons, jails, penitentiaries, houses of correction, or otherwise, which are used for the confinement of persons in judicial custody, in civil or criminal proceedings, either as punishment by imprisonment or to insure their production in further proceedings as parties or witnesses.[2]

B. State Prison. In a general sense the term means a place of confinement for state prisoners; that is, for persons charged with political offenses, and confined for reasons of state.[3]

1. Jacob L. Dict. [*quoted* in Scarborough *v.* Thornton, 9 Pa. St. 451, 454].

As including: Any place designated by law for the keeping of persons held in custody under process of law or under lawful arrest see N. Y. Pen. Code (1903), § 92. The penitentiary, county jails, and every place designated by law for the keeping of persons held in custody under process of law or under lawful arrest see N. D. Rev. Code (1899), § 6956; S. D. Pen. Code (1903), § 152. Territorial prisons, county jails, and every place designated by law for keeping persons held in custody under process of law or under lawful arrest see Okla. Rev. St. (1903) § 2068.

Used in the phrase "committed to prison." — The term "prison" as used in Mass. St. (1887) c. 435, was held not to be limited to state's prisons, but to include all places of imprisonment or confinement. Sturtevant *v.* Com., 158 Mass. 598, 33 N. E. 648.

2. Anderson L. Dict.; Bouvier L. Dict.; Jacob L. Dict. See also *dictum* in Schenck *v.* New York, 67 N. Y. 44 [*affirming* 40 N. Y. Super. Ct. 165]; Hobart *v.* Strode, Cro. Car. 309.

"Jail" defined see 23 Cyc. 372.

"Jail yard" defined see 23 Cyc. 373.

Jail or prison fees see COUNTIES, 11 Cyc. 494; EXECUTIONS, 17 Cyc. 1514. Held not to include the sheriff's fees on execution rendered against plaintiff and in favor of defendant, or the officer's fees for committing the original plaintiff to prison, such expenses not being incurred in jail or in prison. How *v.* Codman, 4 Me. 79, 82, construing St. (1821) c. 59, § 8.

"Prison precinct" is a term which has been held to embrace not only the prison building but also the grounds connected therewith. Hix *v.* Sumner, 50 Me. 290, 291.

3. Martin *v.* Martin, 47 N. H. 52, 53.

As used in U. S. Comp. St. (1901) p. 3721 see *In re* Mills, 135 U. S. 263, 10 S. Ct. 762, 34 L. ed. 107.

County jail, penitentiary, or house of correction. — "State prison" distinguished from state penitentiary (see Beard *v.* Boston, 151 Mass. 96, 23 N. E. 826); from county jail or other house of correction (see Martin *v.* Martin, 47 N. H. 52, 53). The term "state prison" has been held to apply equally to either the penitentiary or the county jail. Sedberry *v.* Carver, 77 N. C. 319, 321, construing Code Civ. Proc. § 161. That "state prison" is equivalent to state penitentiary, that being the only state prison known to the law see Harris *v.* State, 8 Tex. App. 90; McCoy *v.* State, 7 Tex. App. 379).

Prison in another state. — The term "state prison" has been held to be limited in its

C. Prisoner. A prisoner is a person deprived of his liberty by virtue of a judicial or other lawful process;[4] a person committed to prison;[5] a captive detained in some place of confinement;[6] one that is confined in prison on an action or upon commandment.[7]

D. Prison Bounds. Prison bounds are the limits of the territory surrounding a prison, within which an imprisoned debtor, who is out on bonds, may go at will.[8]

E. Prison Breach. Prison breach is the forcible breaking out of the place.[9]

II. STATUS AND SUPERVISION.

A. Establishment, Maintenance, and Use — 1. IN GENERAL. The establishment and maintenance of prisons is provided for and regulated by constitutions or statutes,[10] the provisions of which must be substantially complied with,[11]

meaning to the prison established and maintained in the state in which the statute was passed, and not to include a prison in another state, although the latter was there called a "state prison." Martin *v.* Martin, 47 N. H. 52, 53.

Reformatory.—"State prison" as not including the state reformatory within Minn. Gen. St. (1894) § 4790 see Dion *v.* Dion, 92 Minn. 278, 100 N. W. 4, 5, 1101. But see Walton *v.* State, 88 Ind. 9, 13, where it is held that, under Rev. St. (1881) §§ 6162, 6202, the penal department of the Indiana reformatory institution is a "state prison."

4. Royce *v.* Salt Lake City, 15 Utah 401, 409, 49 Pac. 290.

5. Mullins *v.* Surrey County Treasurer, 5 Q. B. D. 170, 173.

6. Mews *v.* Reg., 8 App. Cas. 339, 352, 15 Cox C. C. 185, 52 L. J. M. C. 57, 48 L. T. Rep. N. S. 1, 31 Wkly. Rep. 385.

7. Jacob L. Dict. [*quoted* in Scarborough *v.* Thornton, 9 Pa. St. 451, 454].

As defined by statute a prisoner is any person held in custody under process of law, or under lawful arrest (N. Y. Pen. Code (1903), § 93); every person held in custody under process of law issued from a court of competent jurisdiction, whether civil or criminal, or under any lawful arrest (N. D. Rev. Codes (1899), § 6957; S. D. Pen. Code (1903), § 153).

A prisoner committed on mesne process is not a prisoner committed for debt within the meaning of a statute making the sheriff liable to the creditor or person to whose use any forfeiture was adjudged, or any debt, damages, or costs awarded against such prisoner, for the full amount of such debt, damages, and costs, for the escape of such prisoner, through the insufficiency of the jail or prison in any county. Lovell *v.* Bellows, 7 N. H. 375, 389.

"A prisoner who gives security for the prison bounds, is from thenceforward no otherwise in the custody of the Sheriff, than as may be sufficient to protect the Sheriff against any suit which the creditor may bring against him for not confining the debtor within the walls of the prison. He is in the eye and contemplation of the law, a true prisoner; being . . . in the custody of the law: but the Sheriff hath no longer any power over him, either to restrain him, or to discharge him, if he reside not within the prison." Meredith *v.* Duval, 1 Munf. (Va.) 76, 80.

A prisoner, while within the prison bounds established by the court of common pleas in pursuance of the statute, which ought to be considered as an extension of the four walls of the prison, is to every legal intent a prisoner, and as such, entitled to claim the support given for the relief of an insolvent debtor. Buttles *v.* Carlton, 1 Ohio 32, 33.

A verdict finding the "prisoner" guilty of the offense charged in the indictment is sufficient without giving the name of the accused. By the use of the word "prisoner" it identifies the person named in the indictment, in custody, and on trial, as the person guilty of the offense. Hairston *v.* Com., 97 Va. 754, 756, 32 S. E. 797.

8. Black L. Dict. See also EXECUTIONS, 17 Cyc. 1531; and *infra*, V, C.

"Jail liberties" or "limits" defined see 23 Cyc. 373.

9. Wharton Cr. L. [*quoted* in Randall *v.* State, 53 N. J. L. 488, 490, 22 Atl. 46]. See also ESCAPE, 16 Cyc. 538.

10. See Stuart *v.* La Salle County, 83 Ill. 341, 25 Am. Rep. 397; Burroughs *v.* Lowder, 8 Mass. 373; Com. *v.* Heiffer, 2 Woodw. (Pa.) 311; Campbell *v.* Franklin County, 27 Vt. 178.

In England prisons or jails cannot be erected by any less authority than by act of parliament. 4 Bacon Abr. tit. "Gaol and Gaolers."

11. Stuart *v.* La Salle County, 83 Ill. 341, 25 Am. Rep. 397; Kokomo *v.* Harness, 35 Ind. App. 384, 74 N. E. 270.

A jail is not "in good and sufficient condition and repair" as required by Ill. Rev. St. c. 75, § 1, when it is impossible to separate male and female prisoners, or minors from old and hardened offenders, or those charged with or convicted of misdemeanors from those charged with or convicted of felonies, except by placing them in cells. Stuart *v.* La Salle County, 83 Ill. 341, 25 Am. Rep. 397.

Under the Indiana metropolitan police law [Acts (1897), p. 93, c. 59, as amended by Acts (1901), p. 24, c. 18] it is mandatory, and not merely optional, with the city, to provide a station house, and to provide food for any person detained therein when deemed necessary by the officer in charge. Kokomo *v.* Harness, 35 Ind. App. 384, 74 N. E. 270.

although a literal compliance with the letter of the law is not always necessary.[12] In some states the authority to construct and maintain prisons is conferred on a county board or on the county court,[13] which is the sole judge as to size, cost, quality of material,[14] and location.[15] The records should always show what buildings or apartments are intended for the use of prisoners, and such records cannot be contradicted by parol evidence or proof of usage,[16] although when the records cannot be found ancient usage is sufficient evidence that apartments have been appropriated for a prison.[17]

2. Use by United States of State Prison or County Jail.[18] The various states have made it the duty of their officers to receive and keep in the state or county prisons any prisoners committed thereto by process or order issued under the authority of the United States, as if they had been committed under the authority of the state, provision having been made by the United States for the support of such prisoners,[19] and for certain purposes and to certain intents a state jail lawfully used by the United States may be deemed to be the jail of the United States, and the jailer or keeper to be a United States official.[20]

B. Status as City, County, or State Institution. There is a recognized distinction between state prisons and those of cities and counties;[21] but unless restricted by law, the prisons of a county, city, or town, all become the public prisons of the state.[22] A city is, as a general rule, allowed to use the county jail,[23]

12. Ely *v.* Parsons, 2 Conn. 382; Allen *v.* Smith, 12 N. J. L. 159.

13. People *v.* La Salle County, 84 Ill. 303, 25 Am. Rep. 461; Baxter *v.* Taber, 4 Mass. 361; Campbell *v.* Franklin County, 27 Vt. 178.

14. People *v.* La Salle County, 84 Ill. 303, 25 Am. Rep. 461.

15. Allen *v.* Smith, 12 N. J. L. 159. *Compare* Ely *v.* Parsons, 2 Conn. 382.

There is no authority to take land not belonging to the county.— Walter *v.* Bacon, 8 Mass. 468; Baxter *v.* Taber, 4 Mass. 361.

In England land purchased for prison purposes vests in the prison commissioners under the prison acts of 1877. Prison Com'rs *v.* Middlesex, 9 Q. B. D. 506, 46 J. P. 740, 51 L. J. Q. B. 433, 46 L. T. Rep. N. S. 864, 30 Wkly. Rep. 881. As to necessary notice of enlargement see Reg. *v.* Westmoreland, L. R. 3 Q. B. 457, 9 B. & S. 288, 37 L. J. M. C. 115, 18 L. T. Rep. N. S. 326, 16 Wkly. Rep. 753.

16. Burroughs *v.* Lowder, 8 Mass. 373.

Where the records of the session show an appropriation of certain apartments in a house for prisoners, the jailer may not admit them to any other part of the house, unless it belongs to the prison. Clap *v.* Cofran, 10 Mass. 373; Burroughs *v.* Lowder, 8 Mass. 373.

17. Clap *v.* Cofran, 7 Mass. 98.

18. **Applicability of state commutation systems to United States prisoners** see *infra*, V, G, 2.

19. See Lewis, etc., County *v.* U. S., 77 Fed. 732 (construing Mont. Comp. St. § 1275); *In re* Kays, 35 Fed. 288 (construing Cal. Pen. Code, §§ 1601, 1602). See also Clinton *v.* Nelson, 2 Utah 284.

A jailer is bound to receive persons committed by authority of the United States and keep them safely confined until such time as they are discharged by due course of the laws of the United States. Johnson *v.* Lewis, 1 Dana (Ky.) 182.

The United States is not bound by a state statute authorizing the use of county jails for the confinement of United States prisoners, the keeping and subsistence of such prisoners being made by statute a matter of contract. Lewis, etc., County *v.* U. S., 77 Fed. 732.

The county supervisors and sheriffs are the proper parties with whom to contract for the care of United States prisoners imprisoned in a county jail. Avery *v.* Pima County, 7 Ariz. 26, 60 Pac. 702.

20. Randolph *v.* Donaldson, 9 Cranch (U. S.) 76, 3 L. ed. 662; *In re* Birdsong, 39 Fed. 599, 4 L. R. A. 628.

21. Walton *v.* State, 88 Ind. 9; Bronk *v.* Riley, 2 N. Y. Suppl. 266 [*affirmed* in 50 Hun 489, 3 N. Y. Suppl. 446], holding that a prison erected by a county, paid for out of the county treasury and managed by local and county officers, is not a state prison, although prisoners from other counties are confined in it under contract between the county or penitentiary officers and the county sending the prisoners. But *compare* Sedberry *v.* Carver, 77 N. C. 319, 321, where it is said: "The term 'state prison,' as used in the statute, may equally apply, and was probably intended to apply, to either the Penitentiary or the County jail."

22. Felts *v.* Memphis, 2 Head (Tenn.) 650.

A state prisoner committed to the city jail is in the custody of the city jailer, and the county jailer has no control over him. Horsfall *v.* Com., 1 Bush (Ky.) 103.

23. Lexington *v.* Gentry, 76 S. W. 404, 25 Ky. L. Rep. 738 (holding that a county jailer cannot refuse to receive prisoners committed to his custody by the judgment of the police court of a city, where the court had jurisdiction to try the offense); Mason

and, conversely, a county has the right to use the jail of a city within its limits for the confinement of its prisoners.[24]

C. Regulation and Supervision. The regulation and supervision of prisons is vested in officers designated by statute,[25] who are authorized to adopt rules and regulations for the government of the prison or prisons under their control,[26] but who have such supervision only over matters connected with the prisons as may be provided by law.[27] Where a measure of discretion was left to the prison inspectors in the execution of a statute, the courts have refused to control that discretion.[28]

III. OFFICERS.[29]

A. Appointment,[30] Tenure, and Removal — 1. IN GENERAL. Sometimes the power of appointing deputies and the lower officials is vested in the sheriff,[31] or the jailer,[32] or the board of prison directors.[33] Where the statute provides that subordinate officials are to be appointed by the jailer with the advice and consent of the inspectors, and if the jailer neglects to fill a vacancy within a specified time the inspectors are to fill it, the rejection by the inspectors of an appointment does not

County *v.* Maysville, 40 S. W. 691, 19 Ky. L. Rep. 400 (holding that this was true even prior to the enactment of St. § 2228, giving such right). See also Tippecanoe County *v.* Lafayette, 7 Ind. 614.

A contract by a city to pay a county for the use of its jail is without consideration and void. Mason County *v.* Maysville, 40 S. W. 691, 19 Ky. L. Rep. 400. *Contra*, Brady *v.* Joiner, 101 Ga. 190, 28 S. E. 679.

24. Alexandria *v.* Madison County, 23 Ind. App. 110, 55 N. E. 31 (holding that under Burns Rev. St. (1894) § 3541, subd. 44, which imposes upon cities the obligation of allowing prisoners to be confined in a city jail until they can be transported to the county jail, the city must bear the expense of caring for such prisoners until they are delivered to the sheriff of the county); Wesley *v.* People, 37 Mich. 384 [*following* Elliott *v.* People, 13 Mich. 365] (holding that as to the county of Wayne, the Detroit House of Correction is made the place of imprisonment for county jail offenses and must be treated to that extent as if it were the county jail).

25. See State *v.* Union County, 50 N. J. L. 9, 11 Atl. 143 (holding that the special provisions of the act of Feb. 27, 1857, giving the custody of the jails and prisoners in the counties of Essex and Hudson to the board of chosen freeholders, were not made applicable to Union county by the act of March 19, 1857); Hays *v.* Allegheny County Prison Inspectors, 209 Pa. St. 342, 58 Atl. 684 (holding since the passage of the Pennsylvania act of April 23, 1903 (Pamphl. Laws 284), the mayor of Pittsburg is a member of the board of inspectors of Allegheny prison).

The court of common pleas in New Hampshire has no power to instruct the jailer of the county to receive or not to receive any person into his custody. *In re* De Courcey, 22 N. H. 368.

Mich. Act No. 118, Laws (1893), superseded all acts previously in force covering the entire management, control, and discipline of all the penal institutions in the state. Rich *v.* Chamberlain, 107 Mich. 381, 65 N. W. 235; Atty.-Gen. *v.* Parsell, 100 Mich. 170, 58 N. W. 839.

26. See Hulin *v.* People, 31 Mich. 323.

Record of rules.— Where a clerk is a mere amanuensis to a board of inspectors, and his attendance is not requisite to make valid the acts of the board, the record of the inspectors' rules, signed by them, is sufficient without the signature of the clerk. Hulin *v.* People, 31 Mich. 323.

27. State *v.* Hobart, 13 Nev. 419.

28. Com. *v.* Halloway, 42 Pa. St. 446, 82 Am. Dec. 526.

29. See, generally, OFFICERS, 29 Cyc. 1356.

30. **Time of appointment.**— Where an act of the legislature provided "that for the purpose of making a settlement with the present keeper of the Penitentiary, up to . . . when the term for which he was appointed expires, the raw materials, stock, and manufactured articles on hand, shall be valued by two disinterested persons, to be selected by the Commissioners of the Sinking Fund at the expiration of the present keeper's term of office," the fact that the appraisers were appointed about four weeks before the keeper's term expired did not affect the validity of their appointment. Com *v.* Theobald, 11 B. Mon. (Ky.) 223.

31. See State *v.* McIntyre, 25 Minn. 383 (appointment by sheriff subject to approval of judge of district court); Gage County *v.* Kyd, 38 Nebr. 164, 56 N. W. 964 [*followed* in Dakota County *v.* Eastcott, 4 Nebr. (Unoff.) 151, 93 N. W. 679] (holding that the sheriff has power to employ the necessary guards).

32. State *v.* Hobart, 13 Nev. 419, holding that a statute giving the warden power to appoint and remove "all necessary help" at the prison empowers him to appoint a prison physician.

33. Yerger *v.* State, 91 Miss. 802, 45 So. 849 (holding that the managing body of a prison may elect the successor of a prison official before his term expires, where such term will expire while they remain in office); Denver *v.* Hobart, 10 Nev. 28.

entitle them to act independently until the jailer has had a reasonable time after such rejection to make another appointment.[34] A court subject to whose approval the appointment of certain prison officials is required to be made is bound to make every intendment in favor of the appointment as a discreet exercise of the power, and cannot review such an appointment in pursuance of views, preferences, and opinions of any section of the community.[35]

2. ELIGIBILITY. Under some statutes a person holding a judicial or lucrative office is not eligible to appointment as a prison director.[36]

3. TERM OF OFFICE. The term of office of the higher prison officials is usually fixed by statute,[37] but where the law does not fix a term, the office is held during the pleasure of the appointing power.[38] The term begins at the date of the appointment where the statute creating the office fixes no definite time for its commencement.[39]

4. REMOVAL. A prison official has no property or vested right in his office;[40] but he is entitled to exercise the functions and receive the prescribed compensation thereof until the end of his term, unless his incumbency is sooner terminated by resignation, or forfeiture of or removal from the office in the manner provided by law.[41] Where there is no term or tenure fixed by constitution or statute, or where the office is to be held during the pleasure of the appointing power, the power of removal is discretionary and without control;[42] but where such an officer is chosen for a definite term, and provision is made for his removal for cause, the causes of removal must be alleged, the party notified, and a hearing had.[43] Where the statute gives power of removal for cause, without specifying the causes, the power is necessarily of a discretionary nature, and the removing authority is the exclusive judge of the cause and the sufficiency thereof;[44] but where the statute specifies

34. Jones *v.* Graham, 24 Ala. 450.

35. Dunkelberger's Case, 14 Pa. Co. Ct. 641; Martin's Case, 11 Pa. Co. Ct. 279; *In re* Ganser, 1 Woodw. (Pa.) 258.

36. See Howard *v.* Shoemaker, 35 Ind. 111, holding that under the statutes of Indiana the office of mayor of a city is both judicial and lucrative.

37. See Manson *v.* State, 66 Ind. 78; Baker *v.* Kirk, 33 Ind. 517.

Election to fill vacancy.— Where the statute provided that the superintendent of the penitentiary should hold office for two years from the time of his election, a person elected at a called session of the legislature to fill a vacancy caused by resignation is entitled to hold the office for the full term of two years from his election. McAffee *v.* Russell, 29 Miss. 84.

38. State *v.* Mayne, 68 Ind. 285.

39. Yerger *v.* State, 91 Miss. 802, 45 So. 849.

40. Lynch *v.* Chase, 55 Kan. 367, 40 Pac. 666.

A veteran of the Civil war who is employed as a keeper or guard has not a vested right in the office but may be removed for the good of the service. People *v.* Lathrop, 71 Hun (N. Y.) 202, 24 N. Y. Suppl. 754 [*affirmed* in 142 N. Y. 113, 36 N. E. 805]; People *v.* Durston, 3 N. Y. Suppl. 522.

41. Baker *v.* Kirk, 33 Ind. 517; Lynch *v.* Chase, 55 Kan. 367, 40 Pac. 666.

42. State *v.* Mayne, 68 Ind. 285; State *v.* McIntyre, 25 Minn. 383; People *v.* Durston, 3 N. Y. Suppl. 522.

43. State *v.* Mayne, 68 Ind. 285; Wood *v.* Selby, 24 Ind. 183; Lynch *v.* Chase, 55 Kan. 367, 40 Pac. 666; Gorham *v.* Luckett, 6 B. Mon. (Ky.) 146; Evening Post Co. *v.* Caufield, 66 S. W. 502, 23 Ky. L. Rep. 2088; Yerger *v.* State, 91 Miss. 802, 45 So. 849.

What is sufficient cause.— The cause must be one amounting to malfeasance in office, or showing that the incumbent has not, in some particular, faithfully and impartially discharged his duties. State *v.* Mayne, 68 Ind. 285. A charge against a prison warden of depriving a prisoner of food for two days is not sufficient where the only direct evidence is that of a subordinate employee who for months previous had been watching the warden in order to prefer charges against him, and the warden testifies otherwise. People *v.* Wright, 7 N. Y. App. Div. 185, 40 N. Y. Suppl. 285.

Power of removal cannot be exercised for political, personal, or other arbitrary reasons. — People *v.* Lathrop, 71 Hun (N. Y.) 202, 24 N. Y. Suppl. 754 [*affirmed* in 142 N. Y. 113, 36 N. E. 805].

The warden of the city prison of New York is not a state officer, but a "person holding a position by appointment in any city or county" within Laws (1892), c. 577, prohibiting removal, without a hearing, of a veteran holding such an office. People *v.* Wright, 150 N. Y. 444, 44 N. E. 1036.

44. South *v.* Sinking Fund Com'rs, 86 Ky. 186, 5 S. W. 567, 9 Ky. L. Rep. 478; Brower *v.* Kantner, 190 Pa. St. 182, 43 Atl. 7.

Where the reasons assigned for removal are sufficient on their face to warrant a removal, the court cannot go beyond that and determine whether the reasons had existence as a matter of fact, and cannot consider the ex-

the causes for removal, and prescribes the procedure, removals cannot be made for other causes,[45] or in any other method than that prescribed.[46] Where the incumbent of one office holds another office *ex officio* his removal from the principal office removes him from the other office also.[47]

B. Sheriff as Jailer Ex Officio. The sheriff is jailer *ex officio*, and has a common-law right to the custody and control of the public prisons, and of the prisoners confined therein.[48] Some cases hold that where the statutes are silent on the subject of the rights of the sheriff, but the constitution recognizes the common-law rights attached to the office of sheriff from time immemorial, they cannot be detached by statute;[49] but other cases hold that the office of sheriff is a purely ministerial office, the functions and province of which is to execute duties prescribed by law, and which may be contracted, enlarged, or transferred at the will of the legislature.[50]

C. Bond.[51] The statutes very generally require the warden or jailer to give a bond for the faithful discharge of his duties [52] and authorize the taking of such a bond from subordinate prison officials.[53] But it has been held that, in the absence of any statutory requirement to that effect, the warden of a penitentiary cannot be required to give a bond.[54] A statutory requirement that the bond of the warden

planation given by the person removed, and say that it was sufficient and ought to have been accepted. People *v.* Harvey, 127 N. Y. App. Div. 211, 111 N. Y. Suppl. 167.

The only means of compelling a reinstatement lies with the legislature. South *v.* Sinking Fund Com'rs, 86 Ky. 186, 5 S. W. 567, 9 Ky. L. Rep. 478.

45. Gorham *v.* Luckett, 6 B. Mon. (Ky.) 146; People *v.* Wright, 7 N. Y. App. Div. 185, 40 N. Y. Suppl. 285.

Cruel and inhuman treatment of a prisoner is a sufficient cause for removal of a prisoner under a statute authorizing removal "only for incompetency and conduct inconsistent with the position held." People *v.* Wright, 7 N. Y. App. Div. 185, 40 N. Y. Suppl. 285, holding, however, that temporarily depriving a prisoner of food was not necessarily cruel or inhuman.

46. See Lynch *v.* Chase, 55 Kan. 367, 40 Pac. 666.

When the constitution directs the mode of removal, a statute prescribing a different mode is unconstitutional. Lowe *v.* Com., 3 Metc. (Ky.) 237.

47. Burr *v.* Norton, 25 Conn. 103.

48. State *v.* Buckley, (N. J. Sup. 1902) 52 Atl. 692; Virtue *v.* Essex County, 67 N. J. L. 139, 50 Atl. 360; Felts *v.* Memphis, 2 Head (Tenn.) 650; State *v.* Brunst, 26 Wis. 412, 7 Am. Rep. 84.

The sheriff may keep the prison in person or he may employ as many deputy keepers as he thinks fit. Becker *v.* Ten Eyck, 6 Paige (N. Y.) 68.

The deputy sheriff, by virtue of such office, is not authorized to act as deputy jailer. Skinner *v.* White, 9 N. H. 204. But *compare* Burr *v.* Norton, 25 Conn. 103, holding that where the county jail is also the county workhouse, it is implied that the deputy jailer shall be keeper of the workhouse, and consequently under the control of the sheriff.

In Montana it has been held that if the sheriff is not absent or disabled he has no authority to put the jail and prisoners into the custody of the jailer. Platner *v.* Madison County, 5 Mont. 458, 6 Pac. 365.

The sheriff of Philadelphia city and county has the custody of the debtors' and witnesses' apartment of the Philadelphia prison, and the appointment of its keeper. Com. *v.* Christopher, 3 Grant (Pa.) 375.

The United States marshal in Utah territory had the sole and entire control and management of the territorial penitentiary, subject to the general rules and regulations made by the attorney-general of the United States. Clinton *v.* Nelson, 2 Utah 284.

49. Virtue *v.* Essex County, 67 N. J. L. 139, 50 Atl. 360; People *v.* Keeler, 29 Hun (N. Y.) 175, 64 How. Pr. 478; State *v.* Cummins, 99 Tenn. 667, 42 S. W. 880; State *v.* Brunst, 26 Wis. 412, 7 Am. Rep. 84. But see Felts *v.* Memphis, 2 Head (Tenn.) 650.

50. State *v.* Dews, R. M. Charlt. (Ga.) 397; Baltimore *v.* State, 15 Md. 376, 74 Am. Dec. 572, where the constitution provides that the sheriff "shall exercise such powers and perform such duties as now or may hereafter be fixed by law," the legislature is authorized to change his rights and duties. Beasly *v.* Ridout, 94 Md. 641, 52 Atl. 61. Where the right of the sheriff to the charge and care of the county jail and to the custody of the prisoners confined therein is statutory there is no question as to the power of the legislature in the premises. McDaniel *v.* Armstrong, 5 Pennew. (Del.) 240, 59 Atl. 865.

51. See, generally, OFFICERS, 29 Cyc. 1356.

52. See Ramsey *v.* People, 197 Ill. 572, 64 N. E. 549 [*affirming* 97 Ill. App. 283].

53. See Goree *v.* Ramey, 78 Tex. 176, 14 S. W. 553, holding that the penitentiary board may require the assistant superintendent to give bond to keep a correct account of all moneys received for any state convict and pay it over as required by law.

54. State *v.* Heisey, 56 Iowa 404, 9 N. W. 327, holding that no bond could be required of a warden of a new penitentiary whose duties and powers were declared by law to be the

of a penitentiary shall be approved by the governor and the penitentiary commissioners is for the security and benefit of the public only, and the fact that a warden's bond is not approved by the governor does not affect its validity as against the warden or his bondsmen;[55] but where the statute requires the keeper of the penitentiary to execute a bond to the state, a bond executed to the governor and his successors in office is not a valid statutory bond and cannot be sued upon in the name of the governor.[56]

D. Compensation.[57] The care of the jail and the prisoners therein, being a part of the sheriff's official duty, is paid for by his established fees or salary, and he cannot recover any additional pay therefor from the county or state,[58] whether the actual services are performed by himself or by a subordinate appointed by him,[59] in the absence of any statute providing for compensation for such services in addition to his established fees or salary;[60] nor can deputies or subordinates appointed by him to perform a part of his duties with regard to jails recover from the county or state pay for their services,[61] unless, of course, provision has been made by statute for the payment of such officials by the county or state.[62] As a general rule, however, the statutes provide for compensation to prison officials for their services,[63]

same as prescribed by law for the warden of an existing penitentiary who was required to give bond before entering upon the discharge of his duties, and that a bond given by the warden of the new penitentiary, not having been required by statute, could not be enforced as a statutory bond. *Contra*, Willett *v.* Kipp, 12 Hun (N. Y.) 474, holding that a sheriff may secure the performance of the duties of the jailer by requiring the latter to give him a bond of indemnity with satisfactory sureties.

55. Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549 [*affirming* 97 Ill. App. 283].

56. Tucker *v.* Hart, 23 Miss. 548.

57. See also *infra*, VII.

58. *Alabama.*— State *v.* Brewer, 59 Ala. 130.

California.— Stockton *v.* Shasta County, 11 Cal. 113.

Colorado.— Larimer County *v.* Branson, 4 Colo. App. 274, 35 Pac. 750.

Illinois.— Seibert *v.* Logan County, 63 Ill. 155; Goff *v.* Douglas County, 32 Ill. App. 145 [*affirmed* in 132 Ill. 323, 24 N. E. 60].

Indiana.— Benton County *v.* Harmon, 101 Ind. 551; Carroll County *v.* Gresham, 101 Ind. 53; Bynum *v.* Greene County, 100 Ind. 90.

Iowa.— McDonald *v.* Woodbury County, 48 Iowa 404.

New Jersey.— Hudson County *v.* Kaiser, (Sup. 1908) 69 Atl. 25; Morris County *v.* Freeman, 44 N. J. L. 631.

Wisconsin.— Parsons *v.* Waukesha County, 83 Wis. 288, 53 N. W. 507.

See 40 Cent. Dig. tit. "Prisons," § 10.

The surplus of moneys furnished a sheriff for feeding prisoners or policing the jail belongs to the county. Hudson County *v.* Kaiser, (N. J. Sup. 1908) 69 Atl. 25.

Sheriff not entitled to fee for discharge of prisoner.— McNees *v.* Armstrong County, 20 Pa. Co. Ct. 105; Becker *v.* Lawrence County, 42 Wkly. Notes Cas. (Pa.) 464.

59. Larimer County *v.* Branson, 4 Colo. App. 274, 35 Pac. 750; Goff *v.* Douglas County, 132 Ill. 323, 24 N. E. 60 [*affirming* 32 Ill. App. 145]. See also Peck *v.* Kent, 47 Mich. 477, 11 N. W. 279, where an allowance for the board of a jail watchman was refused.

Where a sheriff employs a guard without the approval of the commissioners' court or county judge as provided by statute he cannot recover from the county the amount paid for the services of the guard. McDade *v.* Waller County, 3 Tex. App. Civ. Cas. § 110.

60. Larimer County *v.* Branson, 4 Colo. App. 274, 35 Pac. 750; Lloyd *v.* Silver Bow County, 15 Mont. 433, 39 Pac. 457, holding that under the Montana statute the sheriff has authority to employ, at the county's expense, the necessary guards to insure the safety and safe-keeping of his prisoners.

61. Hare *v.* Sebastian County, 35 Ark. 90; Union County *v.* Patton, 63 Ill. 458; Seibert *v.* Logan County, 63 Ill. 155 [*approved* in People *v.* Foster, 133 Ill. 496, 23 N. E. 615]; Scott County *v.* Drake, 71 Ill. App. 280.

Where the county voluntarily pays such assistant no recovery therefor can be had from the sheriff by the county. People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

62. See People *v.* Foster, 133 Ill. 496, 23 N. E. 615; Hamil *v.* Carroll County, 102 Iowa 71, 69 N. W. 1122, 71 N. W. 425; Stone *v.* Pflanz, 99 Ky. 647, 36 S. W. 1128, 18 Ky. L. Rep. 489.

Ratification of employment by sheriff.— Where the statute gave to the county commissioners the power to employ and pay guards, and the sheriff employed a guard to perform necessary services, which he did perform with the knowledge of the county commissioners, who subsequently at a regular session fixed the compensation of guards, there was a sufficient ratification of the sheriff's action to entitle the guard employed by him to recover from the county for his services. Mitchell *v.* Leavenworth County, 18 Kan. 188.

63. See the following cases:

Kansas.— Mitchell *v.* Leavenworth County, 18 Kan. 188.

Massachusetts.— Adams *v.* Hampden County, 13 Gray 439.

and an allowance for the maintenance of prisoners,[64] and for expenses incurred by officials in the discharge of their duties.[65] The amount of such compensation and allowance is fixed by statute,[66] or the power to fix the same vested in some particular court or board,[67] who must, in so doing, act within their statutory powers,[68] and are not authorized to make an order, the effect of which

Michigan.— Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024.

Nebraska.— Gage County *v.* Kyd, 38 Nebr. 164, 56 N. W. 564 [*followed* in Dakota County *v.* Eastcott, 4 Nebr. (Unoff.) 151, 93 N. W. 679], holding that under Comp. St. c. 28, § 5, when extra guards are actually necessary the county must pay two dollars a day for them.

Nevada.— Crosman *v.* Nightingill, 1 Nev. 323, holding that where the lieutenant-governor of a state receives no salary and no compensation except a *per diem* allowance for services actually rendered as president of the senate, a statute making him *ex officio* warden of the state prison and allowing him a salary as such is not in violation of a constitutional prohibition against increasing the compensation of officers during their terms of office.

See 40 Cent. Dig. tit. "Prisons," § 10.

A statute allowing the sheriff fees for "waiting on and washing for prisoners" includes mending their clothes and washing their bedding. Hamil *v.* Carroll County, 102 Iowa 523, 69 N. W. 1122, 71 N. W. 425, construing McClain's Code, § 5067. Grubb *v.* Louisa County, 40 Iowa 314, holding that a sheriff was entitled to no compensation outside of his fees and salary for waiting on prisoners, was decided before the adoption of the statute referred to.

"Attendance" on the sessions of a prison board within a statute allowing a *per diem* for time spent in such attendance includes the time actually spent in traveling, by the usual and direct route between the residence of the member and the place where the sessions are held. State *v.* Briggs, 5 N. D. 69, 63 N. W. 206.

Payment and recovery by sheriff.— Where the sheriff is authorized to employ guards at the county's expense, and the county refuses to compensate such guards for their services, the sheriff may pay them himself and recover from the county the amount so paid. Lloyd *v.* Silver Bow County Com'rs, 15 Mont. 433, 39 Pac. 457.

64. See McNees *v.* Armstrong County, 20 Pa. Co. Ct. 105.

65. People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

66. Gage County *v.* Kyd, 38 Nebr. 164, 56 N. W. 964 [*followed* in Dakota County *v.* Eastman, 4 Nebr. (Unoff.) 151, 93 N. W. 679] (holding that under Comp. St. c. 28, § 5, a jail guard, when actually necessary for guarding prisoners, is entitled to two dollars per day); Boland *v.* Luzerne County, 10 Kulp (Pa.) 10 (holding that the Pennsylvania acts of March 31, 1876, and July 2, 1895, in relation to the salaries of county officers, repealed that portion of the act of April 13, 1868, which authorized the board of prison commissioners to pay the keeper of the prison such salary as they should fix.

Cal. Act April 15, 1880, as amended by the act of March, 1881, allowing to state prison directors ten cents per mile for traveling expenses, and one hundred dollars per month for other expenses is in conflict with Const. art. 10, § 4, providing that members of the prison board "shall receive no compensation, other than reasonable traveling and other expenses incurred while engaged in the performance of official duties, to be audited as the Legislature may direct." People *v.* Chapman, 61 Cal. 262.

67. See Truman *v.* Pinal County, 6 Ariz. 191, 57 Pac. 65; State *v.* McIntyre, 25 Minn. 383; Butcher *v.* Philadelphia, 7 Pa. Dist. 593, 21 Pa. Co. Ct. 459, holding that the Pennsylvania act of April 14, 1835, providing that the inspectors of the Philadelphia county prison should fix the salary of the prison physician, was not repealed by the Pennsylvania act of May 21, 1879.

Under Howell Annot. St. Mich. § 9055, providing that the sheriff shall receive certain fees for every person committed or discharged or taken before a court for examination or to jail, and that "for other services not herein specially provided," he shall receive "such sums as may be allowed by the board of supervisors," the board is not authorized to vote a sheriff a lump salary "as jailer," without in any wise restricting his usual fees, but only, if he performs services not specially provided for, to allow him such compensation, as they may deem proper, after the services are rendered. Plummer *v.* Edwards, 87 Mich. 621, 49 N. W. 876.

Court cannot allow more than maximum prescribed by statute.— McNees *v.* Armstrong County, 20 Pa. Co. Ct. 105.

In Massachusetts the salaries of jail officials are fixed by the county commissioners, subject to revision by the superior court, but as an order of court fixing the salary of a certain official is not for any definite period in the future, the commissioners may subsequently reduce the salary (subject again to revision by the court) if they deem that a change in the circumstances and conditions renders the reduction just. Vose *v.* Essex County, 145 Mass. 500, 14 N. E. 515.

68. Randall *v.* Lyon County, 20 Nev. 35, 14 Pac. 583, holding that under Gen. St. § 2139, authorizing the sheriff to employ a jailer and making it the duty of the county commissioners to allow "a fair and adequate monthly compensation," the commissioners had no authority to fix the compensation on a *per diem* basis, and to confine it to such times as prisoners were detained in the county jail.

is to entirely deprive such an official of compensation.[69] A jailer may be entitled to pay for attendance on court as a witness,[70] and guards engaged on a monthly compensation are not subject to a deduction of salary while taking a convict before the court under a subpœna.[71] In Louisiana it is held that deputies of the sheriff designated for duty at a prison are not employees of the prison within a statute requiring a city to pay the salaries of such employees.[72] A jailer who continues the performance of the duties of his office for several months after the rate of compensation has been reduced impliedly accepts the lower rate and cannot subsequently question its reasonableness.[73] Where a city jailer receives and keeps county, state, and United States prisoners, the city cannot compel him to account to it for the fees received for such services,[74] except to the extent that the salary paid by the city to the jailer exceeds the minimum salary which under the law it is obliged to pay.[75] It has been held that a sheriff may receive a share of the fees and emoluments of his deputies, if the parties so agree; [76] but where the appointment of a jailer and the amount of his salary is prescribed by law, the sheriff, receiving such salary to the use of the jailer, cannot refuse to pay it over, even on the ground of the illegality of the appointment.[77] A *de facto* jail officer is entitled to the emoluments of the office of which he is actually incumbent; [78] but a mere intruder has no right to fees or salary for services rendered during such usurpation.[79] Where a duly appointed officer is unlawfully prevented from performing his duties he is entitled to recover as if he had performed them.[80] The statutes sometimes require jailers to make periodical reports of the fees received by or due to them.[81]

E. Powers and Duties. A jailer or the warden of a state penitentiary is merely the keeper,[82] with powers and duties defined and limited by statute,[83] and usually subject to the control of a state prison board.[84] A majority of the officers

69. State *v.* McIntyre, 25 Minn. 383.

70. Ellison *v.* Stevenson, 6 T. B. Mon. (Ky.) 271.

71. State *v.* Coffin, 56 Ohio St. 240, 46 N. E. 819.

72. State *v.* New Orleans, 35 La. Ann. 532.

73. Truman *v.* Pinal County, 6 Ariz. 191, 57 Pac. 65, construing Sess. Laws (1893), art. No. 87, authorizing the county supervisors to fix the compensation.

74. Newport *v.* Ebert, 111 S. W. 330, 33 Ky. L. Rep. 820.

75. Newport *v.* Ebert, 111 S. W. 330, 33 Ky. L. Rep. 820.

76. Austin *v.* Moore, 7 Metc. (Mass.) 116.

77. McLenore *v.* Lancaster, 57 S. C. 382, 35 S. E. 743.

78. Behan *v.* Davis, 3 Ariz. 399, 31 Pac. 521; *In re* McHenry, 6 Pa. Dist. 784.

79. Meehan *v.* Hudson County, 46 N. J. L. 276, 50 Am. Rep. 421.

80. Jones *v.* Graham, 21 Ala. 654.

81. See Stone *v.* Pflanz, 99 Ky. 647, 36 S. W. 1128, 18 Ky. L. Rep. 489, construing St. §§ 356, 1730, 1773, 1774, as to the items to be included in such report and the warrant to be drawn by the auditor on receipt thereof.

82. State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873.

83. State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873.

Allowance and certification of cost bill.— Under Ohio Rev. St. § 7336, it is the duty of the warden of the penitentiary, when a convict and a bill of costs in the case is delivered to him, to inspect the bill and determine that it contains only such items as were certified by the court and such further items as are the proper expenses of transporting the convict to the penitentiary, and to allow and certify the bill if it contains only such items; but he is without authority to review the action of the court as to the items of costs accruing during the trial. State *v.* Coffin, 56 Ohio St. 240, 46 N. E. 819.

Determination of trades to be taught.— Where the constitution or the statute confides to the discretion of the jailer the determination of what trades shall be taught to prisoners, a court will not interefere with such discretion by mandamus. People *v.* State Prison Inspectors, 4 Mich. 187.

Superintendent of penitentiary is under duty to receive moneys arising from hire of convicts.— State *v.* Neal, 59 S. C. 259, 37 S. E. 826 [*followed* in Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865].

County jailer has no right of visitorial access to or supervision over city jail.— Horsfall *v.* Com., 1 Bush (Ky.) 103.

84. State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873.

Transfer of statutory powers of jailer.— Where the statutes expressly vest certain powers in and confer certain duties upon the jailer, the prison inspectors cannot transfer any of such powers and duties to a clerk. Hulin *v.* People, 31 Mich. 323, holding that under the Michigan statute, if the prison agent — who is the jailer — allows the clerk to receive and pay out the prison funds out of his presence and personal control, these

constituting a state board of prison commissioners may lawfully hold a meeting and transact such business as the board is authorized to transact.[85] It is sometimes made the duty of the jailer to receive and care for any property which a convict has on his person when he enters the prison;[86] but a statute so providing does not authorize the jailer to receive payment of a certificate of deposit belonging to a convict.[87] A jailer need not receive a debtor without sufficient written evidence of authority to receive and hold him,[88] but if he sees fit he may waive this without rendering himself or the sheriff liable for any consequences which may follow.[89] The superintendent of a workhouse cannot lawfully receive an inmate's child into that institution or permit it to remain therein even on payment of its board.[90] A statute providing that eight hours shall constitute a day's work for state employees is not applicable to penitentiary employees who are paid annual salaries under a statute passed after the eight-hour law.[91] A contract by a jailer to lease that part of the jail set apart for his own use is void;[92] but the sheriff is not chargeable with rent for the part of the jail building occupied by him as a residence.[93]

F. Liabilities[94]— **1. In General — a. Civil Liabilities.** When the exigencies of a case require an officer of a prison to exercise judgment, his determination thereon is in the nature of a judicial, and not of a ministerial, act, for which, in the absence of malice or fraud, no personal liability is incurred.[95] The warden of a jail is not bound to pay into the county treasury money received by him for keeping prisoners from another county.[96] If a jailer takes a note for a fine and costs, it is equivalent to the receipt of so much money and renders the jailer liable for the amount.[97] The liabilities of a jailer do not attach to one who in case of emergency looks after the discipline of the convicts and the protection of the property of the state until further notice at the request of a superior official.[98]

b. Criminal Responsibility. Under the statutes of some states a sheriff or jailer is indictable for misfeasance and malfeasance in office, or wilful neglect in the discharge of his official duties.[99]

acts are done as the agent's own servant and not officially as clerk.

85. Ackley *v.* Perrin, 10 Ida. 531, 79 Pac. 192, holding that a meeting may be lawfully held by a majority of the board without giving notice to a member who at the time of calling and holding the meeting is beyond the jurisdiction of the state.

86. Thompson *v.* Niles, 115 Iowa 67, 87 N. W. 732.

87. Thompson *v.* Niles, 115 Iowa 67, 87 N. W. 732, holding that payment to the jailer is at the bank's risk.

88. Jordan *v.* McAllister, 91 Me. 481, 40 Atl. 324, holding that he may properly require a certified copy of the execution and the officer's return thereon, or of the bond.

89. Jordan *v.* McAllister, 91 Me. 481, 40 Atl. 324.

90. Peters *v.* White, 103 Tenn. 390, 53 S. W. 726.

91. State *v.* Martindale, 47 Kan. 147, 27 Pac. 852, where it further appeared that if the eight hour law were applied to penitentiary employees the appropriation for that institution would be insufficient.

92. Thompson *v.* Probert, 2 Bush (Ky.) 144; Miller *v.* Porter, 8 B. Mon. (Ky.) 282.

93. Benton County *v.* Harman, 101 Ind. 551.

94. Liability for escape see *infra*, VI, D.

95. Porter *v.* Haight, 45 Cal. 631; Schoettgen *v.* Wilson, 48 Mo. 253.

96. Sacramento *v.* Hardy, 18 Cal. 412.

97. St. Albans Bank *v.* Dillon, 30 Vt. 122, 73 Am. Dec. 295.

98. South *v.* Julian, 5 Ky. L. Rep. 425.

99. See Lynch *v.* Com., 115 Ky. 309, 73 S. W. 745, 24 Ky. L. Rep. 2180; *In re* Bucks County Prison, 15 Pa. Co. Ct. 569; State *v.* Sellers, 7 Rich. (S. C.) 368, holding that a jailer appointed under the Sheriff's Act of 1839 (11 St. at L. 33) is an officer within the meaning of the act of 1829 (6 St. at L. 390), providing "for the punishment of the official misconduct of district officers."

Where a jailer permits a prisoner to do work other than that provided by statute, it is not a misfeasance for which he is indictable (Const. art. 4, § 36); but he is liable for the fine prescribed by Ky. Gen. St. c. 29, p. 465. Lovell *v.* Com., 93 Ky. 507, 20 S. W. 540, 14 Ky. L. Rep. 496.

Failure to turn over money.— The superintendent of the penitentiary is criminally liable for a failure to turn over to his successor moneys coming into his hands from the hire of convicts. State *v.* Neal, 59 S. C. 259, 37 S. E. 826 [*followed* in Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865].

Furnishing prisoners with liquor is official misconduct. *In re* Bucks County Prison, 15 Pa. Co. Ct. 569; State *v.* Sellers, 7 Rich. (S. C.) 368.

Permitting a jail to become so filthy as to

2. For Injuries to Prisoners. Where punishment inflicted upon a prisoner is proper and authorized, and not cruel or excessive, and is not inflicted with malice or intent to injure, the officer is not liable for an injury resulting therefrom.[1] And *a fortiori* a prison official is not liable for an injury to a prisoner of which his act or neglect was not the proximate cause,[2] nor is he liable for failing to furnish attendance and care to a prisoner injured by a fellow prisoner when it does not appear that he knew or should have known of the injury.[3] Neither is a city marshal responsible for injuries caused by the unhealthy condition of a cell when it does not appear that he knew of such condition and had control of the cells.[4] But a sheriff who knowingly permits one prisoner to assault another, and uses no reasonable means to prevent it, is liable to the assaulted prisoner.[5]

3. Liability on Bond. Where a prison official is required to give a bond conditioned for the faithful performance of the duties of his office, such officer and his sureties are liable for the faithful performance of all the duties imposed, whether by statute or by the rules and regulations of the prison directors;[6] but the sureties are not liable with respect to matters not coming within a fair construction of the statutes or rules.[7] The liability of the sureties on such a bond is a joint one with the officer, and they may be sued, together with the officer, directly upon the bond, for his nonfeasance or misfeasance in office, and they will be liable together with him thereon.[8]

endanger the comfort, health, and lives of prisoners renders the jailer subject to indictment. McBride *v.* Com., 4 Bush (Ky.) 331 [*overruling* Com. *v.* Mitchell, 3 Bush (Ky.) 39].

An intent on the part of the officer to do wrong is essential. Lynch *v.* Com., 115 Ky. 309, 73 S. W. 745, 24 Ky. L. Rep. 2180.

1. People *v.* Wright, 7 N. Y. App. Div. 185, 40 N. Y. Suppl. 285 [*affirmed* in 150 N. Y. 444, 44 N. E. 1036]; Rose *v.* Toledo, 24 Ohio Cir. Ct. 540, 1 Ohio Cir. Ct. N. S. 321.

A complaint in an action for cruel and unusual punishment is defective where it fails to allege that the acts complained of were not in accordance with the regulations of the prison or of law, or that they were not necessary for the proper punishment of plaintiff, or to secure submission and obedience on his part. Wightman *v.* Brush, 10 N. Y. Suppl. 76.

2. Gunther *v.* Johnson, 36 N. Y. App. Div. 437, 55 N. Y. Suppl. 869, holding that where a prisoner confined to await action by the grand jury was improperly placed in the same room with one committed as a vagrant, no keeper being present, and an altercation arose, in the course of which the prisoner first referred to assaulted the vagrant who thereupon stabbed and killed him, the sheriff was not liable for the killing as the assault of the deceased upon the vagrant was the proximate cause thereof.

3. Moxley *v.* Roberts, 43 S. W. 482, 19 Ky. L. Rep. 1328.

4. Bishop *v.* Lucy, 21 Tex. Civ. App. 326, 50 S. W. 1029.

5. Hixon *v.* Cupp, 5 Okla. 545, 49 Pac. 927.

6. Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549, 90 Am. St. Rep. 177 [*affirming* 97 Ill. App. 283]; Hulin *v.* People, 31 Mich. 323; Hixon *v.* Cupp, 5 Okla. 545, 49 Pac. 927; Scarborough *v.* Thornton, 9 Pa. St. 451.

Suffering a prisoner to escape is a breach of the condition of a sheriff's bond (Smith *v.* Com., 59 Pa. St. 320; Scarborough *v.* Thornton, 9 Pa. St. 451); and the sureties are liable without first fixing the liability of the principal (Smith *v.* Com., *supra*). See also *infra*, VI, D.

Failure of a sheriff to protect the prisoners in his charge from assault by others confined in the jail is a failure to "faithfully perform" the duty of sheriff. Hixon *v.* Cupp, 5 Okla. 545, 49 Pac. 927.

Improper discharge of prisoner.—A sheriff is liable on his bond for discharging a prisoner in custody by virtue of process from the United States circuit court, unless such discharge is sanctioned by an act of congress, or the mode thereof adopted as a rule by the circuit court. McNutt *v.* Bland, 2 How. (U. S.) 9, 11 L. ed. 159.

Failure to pay over money.—Money received by a sheriff for keeping and guarding prisoners in a county other than that in which he holds his office is received by him officially, and if he fails to pay it over to the person rendering the services, the sureties on his official bond are liable to such person. Martin *v.* Seeley, 15 Nebr. 136, 17 N. W. 346.

A suit on the sheriff's bond for the misconduct of a jailer was not authorized by the Georgia act of 1799. Howard *v.* Crawford, 15 Ga. 423.

Where a warden is made the custodian of all funds belonging to a penitentiary, he is not a mere bailee as to such funds, but is an insurer thereof, and liable for their loss, although he is without fault. Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549, 90 Am. St. Rep. 177 [*affirming* 97 Ill. App. 283].

7. Hulin *v.* People, 31 Mich. 323.

Money collected by an officer while acting beyond the scope of his official duty is not chargeable to his sureties. Loving *v.* Auditor of Public Accounts, 76 Va. 942.

8. Hixon *v.* Cupp, 5 Okla. 545, 49 Pac. 927.

G. Actions[9] By or Against Officers. The superintendent of a county penitentiary is an officer within the meaning of a statute providing that an action against a public officer for an act done by him in virtue of his office must be tried in the county where the cause of action or some part thereof arose.[10] Under a statute providing that all suits necessary to protect the rights of the state connected with the penitentiary shall be prosecuted in the name of the board of directors, a suit against a warden to secure funds of the state unlawfully converted by him is properly prosecuted in the name of the board.[11] In an action against a retired sheriff for failure to deliver to his successor a prisoner on civil process admitted to the jail limits, evidence of his reason for such failure is admissible,[12] and an omission of plaintiff to cause the prisoner to be retaken by issuing a second execution to the new sheriff may be considered in mitigation of damages.[13]

IV. Fiscal and Business Management.

A. Property and Funds. Where the statute provides that the warden of a state prison shall have the custody of all the property pertaining to the prison, that he shall be treasurer of the prison, that all contracts of the prison shall be made by him, and that he may sue and be sued thereon, money deposited in a bank by such warden in his official capacity cannot be regarded as the property of the state or held in trust for it by the bank.[14] Prison inspectors, while at the prison in the discharge of their official duties, have a right to be furnished with meals at the expense of the prison funds,[15] and such funds are also chargeable with the expenses of a journey made by the inspectors and the warden to inspect and become familiar with the use of a machine which the inspectors were authorized to buy to enable the warden to make a registry of all convicts under his care.[16] Under the English Prisons Act the legal estate in all prisons and prison property is vested in the prison commissioners.[17]

B. Contracts. The general rules as to the requisites of a valid contract[18] are applicable to contracts by prison officials relating to the care, custody, and maintenance of prisoners or prison property.[19] It is sometimes required by statute that all contracts on account of the prison shall be made by the warden in writing,[20] and approved by the prison inspectors in writing.[21] A contract made by prison

The sureties are not liable for exemplary damages.— The measure of damages, as against them is, in the absence of any provision of the statute, just compensation for actual injury. Hixon *v.* Cupp, 5 Okla. 545, 49 Pac. 927.

9. See, generally, Actions, 1 Cyc. 634.

10. Porter *v.* Pillsbury, 11 How. Pr. (N. Y.) 240, applying Code Proc. (1852) § 124 (Code Civ. Proc. (1908) § 983).

11. Nye *v.* Kelly, 19 Wash. 73, 52 Pac. 528.

12. French *v.* Willet, 10 Bosw. (N. Y.) 566.

13. French *v.* Willet, 10 Bosw. (N. Y.) 566.

14. Com. *v.* Phœnix Bank, 11 Metc. (Mass.) 129.

15. Mogel *v.* Berks County, 154 Pa. St. 14, 26 Atl. 227.

16. Mogel *v.* Berks County, 154 Pa. St. 14, 26 Atl. 227.

17. Prison Com'rs *v.* Middlesex, 9 Q. B. D. 506, 46 J. P. 740, 51 L. J. Q. B. 433, 46 L. T. Rep. N. S. 864, 30 Wkly. Rep. 881, holding that the prison commissioners have title to lands and houses purchased for the purpose of rendering a prison more safe or commodious, although never used as part of the prison.

18. See Contracts, 9 Cyc. 213.

19. State *v.* State Prison Com'rs, (Mont. 1908) 96 Pac. 736 (holding that the circumstances in the case at bar did not show an unconditional offer and acceptance); State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873.

20. Whitmore *v.* Munn, 11 Cush. (Mass.) 510.

Under Mass. St. (1827) c. 118, the contract was not required to be in writing. Whitmore *v.* Munn, 11 Cush. (Mass.) 510; Austin *v.* Foster, 9 Pick. (Mass.) 341.

21. Whitmore *v.* Munn, 11 Cush. (Mass.) 510, holding that Rev. St. c. 144, so providing, meant to exclude any inference from the acts and conduct of the inspectors and to require that the contract should be directly submitted to them for their approval in writing, and that until such written approval was given the contract should not be binding.

An approval of an assignment by the warden of all the interest he might have in a contract is not an approval of the contract. Whitmore *v.* Munn, 11 Cush. (Mass.) 510.

When approval too late.— An express approval of a contract by the prison inspectors after the prison has parted with all interest in the contract and after a suit thereon has been commenced is too late to make the con-

inspectors is not abrogated by a subsequent statute superseding all prior laws relating to the management of penal institutions but expressly saving existing rights.[22]

C. Leases.[23] The prison authorities are sometimes given power to lease convict labor, and the penitentiary grounds, shops, machinery therein, and other property of the prison,[24] and it is within the powers of the board having supervision of prisons to provide by contract for the feeding and clothing of convicts in the penitentiary as one of the considerations for the leasing of their labor.[25] But a statute authorizing the prison authorities to lease the prison shops and such vacant grounds as they deem proper authorizes them to lease only the shops, buildings, and grounds owned by the state at the time of the execution of the lease or during its continuance, and does not authorize them to bind the state by a covenant to supply other or additional shops or grounds.[26] The liability of the lessee of the penitentiary to pay rent depends upon the compliance by the state with its undertaking to permit him to enjoy uninterrupted possession of the premises, machinery, fixtures, etc., and to employ the convicts at such labor as will be most profitable;[27] and while the state has the right, notwithstanding the lease, to make necessary and proper improvements to the prison,[28] the lessee has the right to set off against the rent such damages as he has sustained by reason of the interference with his use of the premises and of the convicts occasioned by the improvement.[29] Where a lease provides that the annual rent shall be a certain amount "net," this means that the state shall receive the amount stipulated and that the lessee shall pay the expenses of administration.[30] Where a lease provides for payment by the state to the lessee of a certain amount each month, the measure of damages for a breach of the contract is the amount so named.[31] A statute authorizing the superintendent, with the governor's approval, to make such improvements in the penitentiary as he deems advisable, not to exceed the sum to be paid by the lessees, and providing that amounts due the state from the lessees shall not be expended or appropriated for any other purpose, appropriates for improvements only such amounts as, in the judgment of the superintendent and the governor, are needed, and does not create a contract with the lessees that all the rent shall be expended for improvements.[32] Where an act of the legislature to aid in the construction of a railroad authorized the lessees of

tract binding in law. Whitmore *v.* Munn, 11 Cush. (Mass.) 510.

Under Mass. St. (1827) c. 118, an approval by the inspectors was not required to be in writing (Whitmore *v.* Munn, 11 Cush. (Mass.) 510; Austin *v.* Foster, 9 Pick. (Mass.) 341), but might be implied from their acts (Austin *v.* Foster, *supra*).

22. Rich *v.* Chamberlain, 107 Mich. 381, 65 N. W. 235; so holding as to a contract for the keeping of female prisoners in a house of correction.

23. Leases generally see LANDLORD AND TENANT, 24 Cyc. 845.

24. See the following cases:

California.— People *v.* Brooks, 16 Cal. 11.

Indiana.— Patterson *v.* Crawford, 12 Ind. 241.

Kentucky.— Com. *v.* Todd, 9 Bush 708.

Louisiana.— State *v.* James, 47 La. Ann. 173, 16 So. 751.

Minnesota.— Reed *v.* Seymour, 24 Minn. 273.

Mississippi.— Hamilton *v.* State, (1891) 8 So. 761.

Nebraska.— State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873.

See 40 Cent. Dig. tit. "Prisons," § 17.

25. State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873.

26. Reed *v.* Seymour, 24 Minn. 273, holding that such covenant is *ultra vires* and void.

Such a covenant may be made binding upon the state by ratification by the legislature, but the intention to ratify must be clear and unmistakable. Reed *v.* Seymour, 24 Minn. 273.

27. Com. *v.* Todd, 9 Bush (Ky.) 708.

28. Com. *v.* Todd, 9 Bush (Ky.) 708.

29. Com. *v.* Todd, 9 Bush (Ky.) 708, holding that the lessee is not precluded from asserting the right to set off such damages by reason of the fact that he became the contractor to erect the improvements.

30. State *v.* James, 47 La. Ann. 173, 16 So. 751.

31. People *v.* Brooks, 16 Cal. 11, holding that where the lessee is forcibly and unlawfully kept from the possession of the prison during a part of the term he is entitled to the stipulated monthly payments in full during such period.

32. Hamilton *v.* State, (Miss. 1891) 8 So. 761.

the penitentiary to transfer such lease of it and of the convicts "for the unexpired term thereof" to the railroad, and provided that on execution of the transfer the lessees should be released from any further liability to the state, a transfer not made until nineteen months after the passage of the act was not a compliance therewith and did not release the lessees or the sureties on their bond from liability under the lease up to the time of the transfer.[33] The lessee of a state penitentiary is liable in assumpsit for work performed by one who was illegally imprisoned.[34]

D. Purchase of Supplies. In purchasing or providing supplies for the prison the officials must be governed by the statutory regulations on the subject,[35] and a prison official may be compelled by mandate to fulfil the duties imposed upon him by statute in reference to the purchase of and payment for supplies.[36] Where the statute requires the sheriff to furnish necessary articles for prisoners and provides that all charges for keeping and maintaining prisoners shall be paid from the county treasury, the sheriff may procure necessary articles on the credit of the county and the person from whom they were purchased may maintain an action directly against the county for the purchase-price.[37] Where the statute requires the various counties to maintain jails at their expense, the county supervisors have, without any express provision to that effect, authority to purchase on behalf of the county the necessary furnishings for the jail.[38] In Nebraska it is held that independent of statute an action may be maintained on the relation of the warden of the penitentiary against the board of purchase and supplies to require them to provide the necessaries for the support of the penitentiary.[39]

E. Enforcement of Claims Against Prisons. A general statute providing that when any controversy arises or any suit is pending respecting any contract or claim on account of the state prison the warden may submit the same to the determination of arbitrators or referees to be approved by the inspectors is not *pro tanto* repealed by a resolution of the legislature authorizing certain officers to adjudicate upon and settle certain claims,[40] and after an award under such a submission the claimants cannot be deprived of their rights by subsequent legislation.[41]

33. Hamilton *v.* State, (Miss. 1891) 8 So. 761. A subsequent act of the legislature validating the transfer could not affect the lessees' liability unless the conditions thereof were complied with. Hamilton *v.* State, (Miss. 1891) 8 So. 761, holding that an act of the legislature providing that the transfer should be valid if the transferee should give bond could not affect the lessees' liability if the bond was not given.

34. Patterson *v.* Crawford, 12 Ind. 241.

35. See Cook County *v.* Gilbert, 146 Ill. 268, 33 N. E. 761 [*affirming* 44 Ill. App. 69] (holding that under Rev. St. (1891) c. 34, § 62, the commissioners of Cook county had no right to require the sheriff to apply to the superintendent for supplies for dieting prisoners, since that was a matter "otherwise expressly provided for" by Ill. Rev. St. (1891) c. 75, § 16, requiring the sheriff to feed prisoners); State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873 (holding that except where supplies are furnished by the contractor pursuant to an agreement with the state, the method prescribed by Nebr. Act Feb. 15, 1877 (Sess. Laws (1877), p. 199) for procuring supplies for the support of the penitentiary is exclusive, and the board of public lands and buildings cannot delegate to an agent of their own selection the disbursement of money appropriated for that purpose).

36. Patton *v.* State, 117 Ind. 585, 19 N. E. 303, holding that under Rev. St. (1881) §§ 6140, 6141, it is the imperative duty of the warden of the penitentiary to draw a warrant for fuel sold and delivered to him or his predecessor for use in the institution, where no fraud or mistake in regard to the claim is alleged, and he cannot excuse himself from so doing by alleging merely that the directors rejected the account because of fraud or mistake, they having no authority to reject it.

37. Feldenheimer *v.* Woodbury County, 56 Iowa 379, 9 N. W. 315, holding that a person furnishing clothing must take notice and determine at his peril whether it was suitable, and, possibly, whether it was necessary; but that he was not bound to inquire whether the sheriff had failed in his duty by purchasing new clothing instead of having old clothing properly washed.

38. Schenck *v.* New York, 67 N. Y. 44 [*affirming* 40 N. Y. Super. Ct. 165], holding that this is true, although the jail in question can be used only for the confinement of persons committed on civil process, who must, under the statute, be kept at their own expense.

39. State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873.

40. Allen *v.* Tinker, 52 Me. 278, holding that the claimants are under no legal obligation to submit to the jurisdiction of such officers.

41. Allen *v.* Tinker, 52 Me. 278.

V. CUSTODY, CONTROL, AND DISCHARGE OF PRISONERS.

A. In General. The original process for the commitment of a convict to jail, and not a mere copy thereof, should be left with the jailer as evidence of his authority to hold the prisoner.[42] It is the duty of the sheriff upon the election and qualification of his successor to turn over to the latter the jail and the prisoners therein;[43] and the new sheriff has no control over or power to hold prisoners who are not so assigned.[44] On the conviction of crime of a mother, her young children will not be permitted to accompany her to the penitentiary.[45] In the absence of any statutory restriction, express or implied, it is within the power of the board having charge of prisons to appoint an agent on behalf of the state to lease or manage the convict labor as well as the shops and machinery within the penitentiary.[46] A statute prohibiting the use of motive power machinery for manufacturing purposes "in any of the penal institutions of the state," and the employment of the convicts therein at certain labor, applies only to the state prisons and such other prisons and reformatories as are conducted by the state and at its expense.[47] In England it is held that a person committed to prison for acting as a solicitor, although not duly qualified, is a "criminal prisoner," [48] as is also a person committed to prison in default by distress for non-payment of a sum of money adjudged to be paid by a court of summary jurisdiction.[49]

B. Discipline[50] and Restraint. A jailer is vested with a certain amount of discretion with regard to the safe-keeping and security of his prisoners,[51] and the courts will not interfere with him unless it appears that he has misused his power for purposes of oppression.[52] A jailer is justified in punishing a prisoner who calls him foul names and uses abusive expressions toward him.[53]

C. Privilege of Prison Bounds. The tendency of modern legislation on the subject of imprisonment for debt is to render it as little irksome as possible — scarcely a privation of liberty,[54] by the establishment of what are termed prison bounds or jail liberties, which are designated areas, usually of considerable extent, within which the prisoner is permitted to go at liberty upon giving bond that he

42. Townsend *v.* Babbitt, 11 Gray (Mass.) 468.

43. French *v.* Willet, 4 Bosw. (N. Y.) 649, 10 Abb. Pr. 99; Hinds *v.* Doubleday, 21 Wend. (N. Y.) 223. See also Meredith *v.* Duval, 1 Munf. (Va.) 76.

Sufficiency of complaint for failure to assign prisoners.—A complaint which, after stating the due commitment of a prisoner by defendant as sheriff to the county jail, then proceeds to state the expiration of the term of defendant's office, the election of a new sheriff, the due qualification of the latter, and the service upon defendant of the certificate of the county clerk that such new sheriff had qualified and given the security required by law, and avers that defendant did not within ten days after such service deliver to the said new sheriff the prisoner then in defendant's custody on an execution and confined within the jail liberties, shows a clear and explicit neglect of duty and violation of the statute for which defendant is liable, and is enough to put defendant to his defense. French *v.* Willet, 4 Bosw. (N. Y.) 649, 10 Abb. Pr. 99.

44. Hinds *v.* Doubleday, 21 Wend. (N. Y.) 223; Partridge *v.* Westervelt, 13 Wend. (N. Y.) 500.

45. People *v.* Clark, 1 Wheel. Cr. (N. Y.) 288.

46. State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873.

47. Bronk *v.* Riley, 2 N. Y. Suppl. 266 [*affirmed* in 50 Hun 489, 3 N. Y. Suppl. 446].

48. Osborne *v.* Milman, 18 Q. B. D. 471, 51 J. P. 437, 56 L. J. Q. B. 263, 56 L. T. Rep. N. S. 808, 35 Wkly. Rep. 397 [*reversing* 17 Q. B. D. 514, 16 Cox C. C. 138, 55 L. T. Rep. N. S. 463].

49. Kennard *v.* Simmons, 15 Cox C. C. 397, 48 J. P. 551, 50 L. T. Rep. N. S. 28.

50. See also CONVICTS, 9 Cyc. 877.

51. People *v.* Wright, 7 N. Y. App. Div. 185, 40 N. Y. Suppl. 285; *Ex p.* Taws, 23 Fed. Cas. No. 13,768, 2 Wash. 353.

52. *Ex p.* Taws, 23 Fed. Cas. No. 13,768, 2 Wash. 353.

Acts warranting interference of court.— It is cruel and unusual as disciplinary punishment, and unwarranted by law, to chain a prisoner by the neck with a trace chain and padlock so that he can neither lie down nor sit down, and leave him so chained in darkness alone for several hours of the night; and it is the duty of the court by appropriate action to protect prisoners from such arbitrary oppression. *In re* Birdsong, 39 Fed. 599, 4 L. R. A. 628.

53. People *v.* Wright, 7 N. Y. App. Div. 185, 40 N. Y. Suppl. 285, confinement in dark cell.

54. Codman *v.* Lowell, 3 Me. 52.

will not go beyond the prescribed limits.[55] Jail liberties are sometimes allowed also to persons committed to jail for lack of bail on criminal charges;[56] but one who has been convicted of crime and sentenced to imprisonment is not entitled to jail liberties.[57]

D. Visitors. The jailer may require persons seeking admission to the jail as visitors to submit their persons to a proper and orderly examination or search,[58] or permit visitors to enter without being searched if, in his opinion, they are proper persons to be relieved of that formality.[59] If visitors to the jail do not consent to be searched they may be refused admittance, required to depart, or ejected;[60] but the jailer has no authority to search them by force or without their consent.[61] In England, where a material witness for a person accused of crime was confined in prison, it was held that the jailer should allow the attorney for the accused to see the witness in his presence, but properly refused to allow the attorney to see the witness apart.[62]

E. Place of Confinement[63] and Transfer of Prisoners. The state may provide in which one of its penitentiaries convicts or classes of convicts shall be confined,[64] and it has been held that a prisoner may be removed from one jail to another by authority of a parol order.[65] Although the legislature has conferred upon the inspectors of a state prison power to contract with a city for the confinement and maintenance of a certain class of convicted persons in the city house of correction, there is no authority for sentencing such convicts to be confined in the house of correction until the power granted the inspectors has been exercised by them and a contract entered into.[66] A sheriff would be liable to punishment if, without strong circumstances of excuse, he should put a debtor in a cell set apart for felons;[67] and *a fortiori* he will not be punished for refraining from placing a

55. See Codman *v.* Lowell, 3 Me. 52; and, generally, EXECUTIONS, 17 Cyc. 1531–1541.

Sheriff has no control over body of debtor after bond for jail liberties given.— Codman *v.* Lowell, 3 Me. 52; Kruse *v.* Kingsbury, 102 Mich. 100, 60 N. W. 443; Lyle *v.* Stephenson, 6 Call (Va.) 54. But see Meredith *v.* Duval, 1 Munf. (Va.) 76, holding that a debtor within the prison rules is still a true prisoner in the eye of the law and as such should be transferred by the sheriff to his successor in office.

56. See State *v.* Pearson, 100 N. C. 414, 6 S. E. 387.

57. State *v.* Pearson, 100 N. C. 414, 6 S. E. 387 (construing Code, § 3466); *Ex p.* Bradley, 26 N. C. 543 (in the absence of any express order or rule of the court which sentenced him).

58. Shields *v.* State, 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17.

59. People *v.* Wright, 7 N. Y. App. Div. 185, 40 N. Y. Suppl. 285 [*affirmed* in 150 N. Y. 444, 44 N. E. 1036].

60. Shields *v.* State, 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17.

61. Shields *v.* State, 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17.

62. Rex *v.* Simmonds, 7 C. & P. 176, 32 E. C. L. 559.

63. Imprisonment of: City prisoners in county jails and *vice versa* see *supra*, II, B. United States prisoners in state or county prison, see *supra*, II, A, 2.

64. O'Brien *v.* Barr, 83 Iowa 51, 49 N. W. 68; Conlon's Case, 148 Mass. 168, 19 N. E. 164 (construing St. (1884) c. 255, §§ 3, 14); McDonald *v.* Vermilye, 39 N. J. L. 282.

A statute authorizing the executive council of the state to designate what convicts shall be confined in a particular prison is not in conflict with a constitutional provision vesting the judicial power of the state in the courts. O'Brien *v.* Barr, 83 Iowa 51, 49 N. W. 68.

Mode of designation.— Under such a statute the executive council may designate in whatever way will clearly point out the individual convicts or class of convicts who are to be confined in such prison, and may order the removal of a class of convicts, leaving it to the judgment of the prison warden which convicts come within the class designated. O'Brien *v.* Barr, 83 Iowa 51, 49 N. W. 68, holding that an order for the removal of twenty convicts "whose removal will in the judgment of the state warden be most consistent with the interests of the state and the proper treatment of its convicts, and with a due regard for the existing contracts for the employment of convict labor," was proper.

Construction of statute.— A statute providing that when there is no sufficient prison in a county the court may order "any person charged with a criminal offense, and ordered to be committed to prison" to be sent to the jail of another county, applies only to persons charged with crime and awaiting trial, and does not authorize the removal to another county of a person sentenced to imprisonment in the county jail as the punishment for a crime. Huber *v.* Robinson, 23 Ind. 137.

65. Rex *v.* Grant, Quincy (Mass.) 326.

66. Humphrey *v.* People, 39 Mich. 207; Dorsey *v.* People, 37 Mich. 382.

67. Farrar *v.* Barnes, 12 Rich. (S. C.) 224.

debtor in such a cell without some strong reason for so doing.[68] Where a jailer discovers that one of the prisoners is suffering from a contagious disease, he should remove him to a suitable place and keep him there until he has served his sentence.[69] If a sheriff is to be imprisoned he cannot be confined in the county jail, but the coroner is left to the common-law rule by which he may make his own home or any other place a prison.[70]

F. Discharge of Prisoners. The statutes sometimes allow a discharge, at the discretion of the inspectors, of a convict who has served out the term of his imprisonment, without making payment of costs or fines and without making restitution.[71] County commissioners have no authority to make an order for the discharge of one who is in jail in execution of a criminal sentence.[72] A statute authorizing workhouse commissioners to discharge a prisoner under certain circumstances, even if constitutional, does not authorize them to discharge a person sentenced to a term in the workhouse where such sentence has been suspended and the person has never been sent to the workhouse.[73] A statute providing that a prisoner who is arrested charged with a misdemeanor and held to answer the same, or who is arrested by virtue of a capias or an indictment for a misdemeanor, shall be discharged by the committing magistrate or officer making the arrest under a capias on his own recognizance without security, does not authorize a sheriff to discharge a person not arrested by him or his deputy.[74] Under the Ohio statute the directors of a workhouse cannot discharge a person committed thereto, unless the order therefor be made at a meeting of the board at which a majority is present, uniting in its action.[75] When a pardon is granted [76] the jailer must liberate the prisoner.[77] After a prisoner has been admitted to the liberty of the jail limits on giving a bond, the sheriff has no longer any power to discharge him.[78]

G. Commutation of Sentence For Good Conduct — 1. In General. In a number of states the statutes provide for a reduction of the term of imprisonment to which a prisoner has been sentenced as a reward for good conduct during his confinement,[79] and a prisoner is entitled to his discharge at the expiration of the

68. Farrar *v.* Barnes, 12 Rich. (S. C.) 224.

69. Matter of Boyce, 43 Misc. (N. Y.) 297, 300, 88 N. Y. Suppl. 841, 844, where it is said: "From necessity and the duty of prompt action the sheriff has the right to remove a smallpox prisoner to a suitable place and charge the county with the expense thereof. . . . The county, under the law and by necessity, must support and maintain the prisoners sentenced to its jail. Such support must include medical treatment as well as provisions and lodging, and if the patient has a contagious disease, and the expense of his support, maintenance and medical treatment is greater than otherwise would be, it may be unfortunate for the county, but it does not relieve it from its obligation nor authorize it to turn its prisoners loose upon the county town, or shirk its responsibility upon the local board of health."

70. Day *v.* Brett, 6 Johns. (N. Y.) 22.

71. Beidelman *v.* Northampton County, 4 Leg. Gaz. (Pa.) 212, holding that the Pennsylvania act of May 10, 1871, so providing, applied to the Northampton county jail in which the penitentiary system was established.

72. Com. *v.* Sheriff, 1 Grant (Pa.) 187.

73. Rogers *v.* State, 101 Tenn. 427, 47 S. W. 697, so holding on the ground that they acquired no jurisdiction of such person, and their act was an unwarranted interference with the judgment of the court while that court still had control of the prisoner and of the judgment.

74. Smith *v.* Strobach, 50 Ala. 462.

75. *Ex p.* Walker, 8 Ohio Dec. (Reprint) 480, 8 Cinc. L. Bul. 898.

76. See Pardons, 29 Cyc. 1558.

77. *In re* Biegle, 5 Ohio S. & C. Pl. Dec. 583, 7 Ohio N. P. 561, holding that a workhouse board cannot refuse to liberate a pardoned prisoner because of the fact that one of the signatures to the pardon was attached under a false impression.

78. Kruse *v.* Kingsbury, 102 Mich. 100, 60 N. W. 443.

79. See the following cases:

California.— *Ex p.* Clifton, 145 Cal. 186, 78 Pac. 655; *Ex p.* Dalton, 49 Cal. 463.

Indiana.— Woodward *v.* Murdock, 124 Ind. 439, 24 N. E. 1047.

Iowa.— State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361.

Kansas.— *In re* Kness, 58 Kan. 705, 50 Pac. 939.

Massachusetts.— *In re* Conlon, 148 Mass. 168, 19 N. E. 164.

Michigan.— *In re* Harney, 134 Mich. 527, 96 N. W. 795; *In re* Canfield, 98 Mich. 644, 57 N. W. 807; *In re* Walsh, 87 Mich. 466, 49 N. W. 606.

Missouri.— *Ex p.* Collins, 94 Mo. 22, 6 S. W. 345.

time for which his sentence runs less the time for which he is entitled to credit as good time earned.[80] The right to credit for good time is purely statutory,[81] and can only be acquired in the manner and under the circumstances pointed out by the statute.[82] The statutory provisions as to diminution of imprisonment for good time do not confer upon the prisoner any legal or vested right,[83] and so the right to a reduction of the sentence may be lost by misconduct.[84] But such statutes do confer a privilege of which the prisoner may avail himself,[85] and of which he cannot be deprived by legislation subsequent to his incarceration.[86] Neither has the governor any power at his discretion to deprive a prisoner of the benefit of such diminution.[87] The statutes usually make it the duty of the jailer to keep a correct register of each

Nebraska.— *In re* Fuller, 34 Nebr. 581, 52 N. W. 577; *In re* Hall, 34 Nebr. 206, 51 N. W. 750.

New Jersey.— State *v.* Patterson, (Sup. 1891) 22 Atl. 802.

New York.— *In re* Walters, 128 Fed. 791.

Pennsylvania.— *In re* Raymond, 110 Fed. 155.

Tennessee.—State *v.* Dalton, 109 Tenn. 544, 72 S. W. 456; State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233.

Utah.— *Ex p.* Nokes, 6 Utah 106, 21 Pac. 458; *In re* Clawson, 5 Utah 358, 15 Pac. 328.

Vermont.— *Ex p.* McKenna, 79 Vt. 34, 64 Atl. 77.

See 40 Cent. Dig. tit. "Prisons," § 26.

80. Woodward *v.* Murdock, 124 Ind. 439, 24 N. E. 1047.

Absence on parole.— The rule stated in the text applies although for a part of the time covered by the sentence the prisoner was absent on parole, the conditions of which he violated. Woodward *v.* Murdock, 124 Ind. 439, 24 N. E. 1047.

If no forfeiture has been declared until the prisoner has served for such length of time that with the diminution of sentence provided for he is entitled to his discharge, and can secure the same in a legal proceeding. State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361.

81. Woodward *v.* Murdock, 124 Ind. 439, 24 N. E. 1047.

A prisoner whose sentence is not such as is within the statute providing for deduction for good behavior is entitled to no deduction whatever. *Ex p.* Nokes, 6 Utah 106, 21 Pac. 458, holding that under Comp. Laws (1888), §§ 5268, 5270, a prisoner sentenced for less than three months is entitled to no deduction.

82. Woodward *v.* Murdock, 124 Ind. 439, 24 N. E. 1047; State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361; Vanvabry *v.* Staton, 88 Tenn. 334, 12 S. W. 786, holding that neither the county court nor the workhouse commissioners have authority to make a rule or regulation by which a convict held in the workhouse under sentence of a court to work out fine and costs shall receive credit for labor voluntarily performed by him before conviction and while in prison awaiting trial.

83. State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361; *In re* Conlon, 148 Mass. 168, 19 N. E. 164.

84. Baker *v.* State, 88 Wis. 140, 59 N. W. 570; *In re* Terrill, 144 Fed. 616, 75 C. C. A. 418.

The rules in reference to the forfeiture of good time must be plain, certain, and specific, and must be adopted by the board of prison inspectors and be made known to the inmates of the prison and be of record. *In re* Walsh, 87 Mich. 466, 49 N. W. 606.

The forfeitures provided by statute may be imposed by the jailer without a judicial determination as to the facts constituting a violation of the rules, regulations, or laws of the prison. State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361.

Conclusiveness of determination.— Where under the rules of a prison the prison board has authority to determine how much good time should be allowed to prisoners, and after such time has been allowed to take it from them for insubordination or for other causes specified in the rules, the determination of the board withdrawing the good time allowed to the prisoners is conclusive on the courts. *In re* Terrill, 144 Fed. 616, 75 C. C. A. 418.

Breach of conditional pardon.— The deduction allowed for good behavior previous to a conditional pardon is not forfeited by a breach of the conditions of the pardon, but stands to the credit of the prisoner in final commutation of his sentence. *Ex p.* McKenna, 79 Vt. 34, 64 Atl. 77.

85. State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361.

86. *In re* Canfield, 98 Mich. 644, 57 N. W. 807 [*following In re* Opinion of Justices, 13 Gray (Mass.) 618; Matter of Walsh, 87 Mich. 466, 49 N. W. 606], holding that the effect of a new statute by which credits are to be estimated upon a less favorable schedule than that in force when a convict was sentenced, is to that extent, and as to him, *ex post facto*, and hence has no application to him, but he is entitled to have his credits computed according to the schedule in force at the time of his incarceration.

87. State *v.* Hunter, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361, holding that the governor cannot, in granting a suspension of sentence upon a prisoner, lawfully impose as a condition to be accepted by him the requirement that in the event of the revocation of the suspension by the governor, in his discretion, the prisoner may be reimprisoned with the penalty of a forfeiture of the diminution of his sentence for good conduct, which he would have enjoyed had he not accepted the benefit of the suspension.

Commutation of life sentence to definite term without diminution see *infra*, note 3.

convict, showing the good time with which he is entitled to be credited.[88] If such a record is not kept by the jailer it cannot be supplied by parol evidence;[89] but in such case it is conclusively presumed that the prisoner's conduct was unexceptionable, and he is entitled to the full benefit of the good time credits which he would have earned by such conduct.[90] If the record is properly kept it may be sustained and corroborated by parol evidence;[91] and on behalf of the convict, it may be contradicted by such evidence if it is untrue.[92] Under some of the statutes convicts are entitled to be informed from time to time as to their records and of good time earned,[93] and of loss of good time and for what reason it is lost,[94] and a convict who is reported for an infraction of the rules involving a loss of good time should be given, if he so desires, an opportunity to be heard upon such reports.[95] Under some of the statutes the right to commutation for good conduct is dependent upon a report on that subject by the board of prison officials to the governor, and action thereon by the latter with the approval of designated state officers may be had.[96] The language of the statute must govern in determining how the term of the sentence and the deduction for good time is to be computed.[97] A prisoner is not entitled to credit for good time during his absence from the prison on parol, in addition to that earned while an inmate of the prison.[98] Under some of the statutes convicts who have served previous terms are not allowed good time, or are allowed less good time than convicts serving a first term,[99] or are required to serve out the time deducted from their previous terms in addition to their subsequent terms.[1]

88. *In re* Canfield, 98 Mich. 644, 57 N. W. 807; State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233.

89. State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233.

90. State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233, holding that where such a record is kept the prisoner is entitled to full credit for good time from the date of the last entry showing misconduct.

91. State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233.

92. State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233.

93. *In re* Canfield, 98 Mich. 644, 58 N. W. 807; *In re* Walsh, 87 Mich. 466, 49 N. W. 606.

94. *In re* Walsh, 87 Mich. 466, 49 N. W. 606.

95. *In re* Walsh, 87 Mich. 466, 49 N. W. 606.

96. *In re* Raymond, 110 Fed. 155.

97. See *In re* Kness, 58 Kan. 705, 50 Pac. 939 (holding that under Laws (1891), c. 152, § 24, the good time earned by convicts in the state penitentiary is computed for and at the end of each calendar month, and when the time of actual service together with the good time earned equals the time of the sentence the convict is entitled to a discharge); *In re* Fuller, 34 Nebr. 581, 52 N. W. 577 (holding that under Code Cr. Proc. § 569, allowing a deduction of two months for the first and second year, and *pro rata* for any part of a year, where the sentence is for more or less than a year, where the sentence does not exceed two years and no charges are registered against a prisoner, he is entitled to a deduction of one sixth of the term of imprisonment).

Cumulative sentences.— Where the statute provided that a deduction for good behavior "shall be allowed from his term" a prisoner was entitled to have his good time computed upon each term separately. *Ex p.* Clifton, 145 Cal. 186, 78 Pac. 655 [*distinguishing Ex p.* Dalton, *infra*]. But where the statute provided for credits to "be deducted from the entire term of penal servitude to which such convict shall have been sentenced," the deduction should be made from the total time of all the sentences as a single term of imprisonment. *Ex p.* Dalton, 49 Cal. 463 [*approved* but *distinguished* in *Ex p.* Clifton, *supra*].

98. Woodward *v.* Murdock, 124 Ind. 439, 24 N. E. 1047.

99. See *In re* Harney, 134 Mich. 527, 96 N. W. 795; *In re* Canfield, 98 Mich. 644, 58 N. W. 807.

The prison authorities must determine which term a convict is serving, subject to his right to attack the correctness of the conclusion reached on habeas corpus. *In re* Canfield, 98 Mich. 644, 58 N. W. 807.

Unlawful sentence.— Where the sentence under which a previous term was served was unlawfully imposed, the convict cannot be deprived of his good time because of such previous term. *In re* Harney, 134 Mich. 527, 96 N. W. 795.

1. See State *v.* Patterson, (N. J. Sup. 1891) 22 Atl. 802; *In re* Walters, 128 Fed. 791, decided under law of New York.

A federal prisoner who had a commutation under the state laws must, on a subsequent conviction before the date of the expiration of his full original term, serve out the amount of the commutation, although the later conviction was not for an offense against the United States. *In re* Willis, 83 Fed. 148, decided under N. Y. Laws (1886), c. 21.

One who is sentenced to a second term before the first term has expired and the remission as to such term made, cannot be

A person sentenced to imprisonment for life is not entitled to the benefits of a statute providing for a deduction from the term of the sentence for good behavior;[2] and where a sentence of life imprisonment is commuted by the governor to a certain number of "years of actual time in the penitentiary," and the commutation provides that when the convict shall have served that number of "years of actual time" he shall be entitled to a discharge, the prisoner is not entitled to the benefit of the good time law for the purpose of reducing his term to less than the number of years specified in the commutation.[3] A statute allowing a diminution of sentences for good time does not apply to convicts whose sentences are in force at the time of the passage of the act.[4] Where the statute empowers the board of workhouse commissioners to discharge convicts for good conduct, after conviction and final sentence to confinement in the workhouse, from which there is no proceeding in error, the court has no power at a subsequent term to remit the remainder of the imprisonment during the good behavior of the prisoner.[5]

2. UNITED STATES PRISONERS.[6] The United States statutes formerly provided that prisoners confined in jails or penitentiaries of any state for offenses against the United States should be entitled to the same rule of credits for good behavior as other prisoners in the same jail or penitentiary,[7] and provided for certain deductions from the terms of prisoners confined in a state prison or penitentiary, where there was no system of commutation.[8] These early acts have, however, been repealed, and the statute now in force provides a uniform system of commutation for good conduct for United States prisoners, no matter where they are confined,[9] which is applicable to all sentences imposed subsequent to its taking effect,[10] but not to sentences imposed prior to that time.[11]

required to serve out, in addition to the second term, the time remitted from the first term, under a statute providing that if a person who has received a diminution of sentence for good conduct "shall be again convicted and sentenced to imprisonment" he shall be required in addition to such sentence to serve out the number of days remitted to him on the previous term. State *v.* Patterson, (N. J. Sup. 1891) 22 Atl. 802.

2. *Ex p.* Collins, 94 Mo. 22, 6 S. W. 345.

3. *In re* Hall, 34 Nebr. 206, 51 N. W. 750.

4. To the extent to which such a statute should apply to sentences then in force, it would be unconstitutional as an attempted exercise by the legislature of the pardoning power which is vested in the governor. State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233; *In re* Clawson, 5 Utah 358, 15 Pac. 328.

5. State *v.* Dalton, 109 Tenn. 544, 72 S. W. 456.

6. Use by United States of state prison or county jail see *supra*, II, A, 2.

7. U. S. Rev. St. (1878) § 5544 [U. S. Comp. St. (1901) p. 3721]. See *In re* Naples, 142 Fed. 781; *In re* Walters, 128 Fed. 791; *In re* Raymond, 110 Fed. 155; *In re* Willis, 83 Fed. 148; *In re* Terry, 37 Fed. 649, 13 Sawy. 598.

8. U. S. Rev. St. (1878) § 5543 [U. S. Comp. St. (1901) p. 3721]; 18 U. S. St. at L. 479, c. 145 [U. S. Comp. St. (1901) p. 3722].

Prisons or jails to which statutes applicable.— U. S. Rev. St. (1878) § 5543 [U. S. Comp. St. (1901) p. 3721], referred to jails and penitentiaries within a state, regardless of whether they were state, city, or county institutions (U. S. *v.* Schroeder, 27 Fed. Cas. No. 16,233, 14 Blatchf. 344), but the act of 1875 referred merely to state prisons or penitentiaries, and did not include county jails or places employed for temporary confinement or confinement for short periods (*In re* Deering, 60 Fed. 265; *In re* Corcoran, 47 Fed. 211). It has been held that U. S. Rev. St. (1878) § 5543 [U. S. Comp. St. (1901) p. 3721], applied to a person confined in a county jail or prison in which no credits were provided, although the state had a commutation system applicable to other prisons, and that as regards prisoners in such jails this statute was not repealed by the act of 1875 (*In re* Deering, 60 Fed. 265); but other cases, without mentioning or considering U. S. Rev. St. (1878) § 5543 [U. S. Comp. St. (1901) p. 3721], have held that the act of 1875 did not apply to a prisoner in a state having a commutation system of its own, although such system did not apply to the jail in which he was confined (U. S. *v.* Goujon, 39 Fed. 773; *In re* Terry, 37 Fed. 649, 13 Sawy. 598; U. S. *v.* Schroeder, 27 Fed. Cas. No. 16,233, 14 Blatchf. 344).

9. 32 U. S. St. at L. 397, c. 1140 [U. S. Comp. St. (1901) p. 1095]. See U. S. *v.* Jackson, 143 Fed. 783, 75 C. C. A. 41 [*reversing* 140 Fed. 266].

10. 32 U. S. St. at L. 397, c. 1140 [U. S. Comp. St. (1901) p. 1095]. See U. S. *v.* Jackson, 143 Fed. 783, 75 C. C. A. 41 [*reversing* 140 Fed. 266], where it is said that this statute was probably intended to be applicable to the cases of prisoners convicted before it became operative, but not sentenced until afterward.

11. 32 U. S. St. at L. 397, c. 1140 [U. S.

VI. ESCAPE OF PRISONERS.[12]

A. Necessity of Valid Judgment, Arrest, and Commitment. Before a prisoner can make an escape he must have been legally taken into custody, and this requires that the proceedings, such as the judgment, arrest, and commitment by which the prisoner was taken, must have been valid and sufficient.[13] If the court rendering judgment against a prisoner had no jurisdiction, the sheriff is not liable for an escape.[14] But if the judgment is not void, the fact that it may have been erroneous is immaterial, since a judgment cannot be attacked collaterally.[15] So whenever the process by which one is arrested is void,[16] or appears to be void,[17] no action lies for his escape; but advantage cannot be taken of a mere error or irregularity in the process.[18] It is well settled also that if a creditor gives a debtor in execution permission to go at large beyond the jail liberties, an action for escape cannot be maintained.[19]

B. Kinds of Escapes — 1. In General. There are, at common law, two kinds of escapes: The one, wilful or voluntary; the other, negligent.[20] A third kind of escape due to act of God or the public enemies is also recognized in the cases.[21]

Comp. St. (1901) p. 1095]. See Woodward *v.* Bridges, 144 Fed. 156; U. S. *v.* Jackson, 143 Fed. 783, 75 C. C. A. 41 [*reversing* 140 Fed. 266]; U. S. *v.* Farrar, 139 Fed. 260, 71 C. C. A. 386 [*reversing* 133 Fed. 254]; *In re* Walters, 128 Fed. 791.

12. Criminal liability for escape see ESCAPE, 16 Cyc. 537.

13. See cases cited *infra*, this note.

A commitment for legal cause by order of a competent court of record is a legal commitment, and the sheriff is bound to obey the order. The prisoner knows for what cause and by whom he was committed, and may at any time have a copy of the record. Randall *v.* Bridge, 2 Mass. 549.

Although no execution had issued against him, where a defendant was surrendered by his special bail in open court, and prayed in custody of the jailer by plaintiff's attorney, the jailer was liable to plaintiff in case of his escape. Com. *v.* Dulen, 4 Bibb (Ky.) 316.

Where the execution was not placed in an officer's hands within fifteen days after the rendition of judgment, no action can be maintained against the sheriff for the escape of a debtor committed to jail on mesne process, notwithstanding the debtor may have actually escaped from the jail and gone to parts unknown previous to the rendition of the judgments. Weeks *v.* Martin, 16 Vt. 237.

The officer's return of the commitment of the prisoner is conclusive evidence on this point, and can only be contradicted in a suit for a false return. Atherton *v.* Gilmore, 9 N. H. 185.

There must be at least a delivery of the prisoner, at the jail, to the sheriff, or deputy jailer, or someone authorized to confine in the jail in order to constitute a lawful commitment on execution. Skinner *v.* White, 9 N. H. 204.

14. Austin *v.* Fitch, 1 Root (Conn.) 288.

15. Wesson *v.* Chamberlain, 3 N. Y. 331.

16. Howard *v.* Crawford, 15 Ga. 423; Hutchins *v.* Edson, 1 N. H. 139; Goodwin *v.* Griffis, 88 N. Y. 629; Carpentier *v.* Willett, 31 N. Y. 90, 1 Abb. Dec. 312, 1 Keyes 510, 28 How. Pr. 225; Carpentier *v.* Willet, 6 Bosw. (N. Y.) 25, 18 How. Pr. 400 [*affirmed* in 31 N. Y. 90, 1 Abb. Dec. 312, 1 Keyes 510, 28 How. Pr. 225]; Ellis *v.* Gee, 5 N. C. 445.

17. Kidder *v.* Barker, 18 Vt. 454, holding that a jailer is not bound to look beyond his copy of the process.

18. Howard *v.* Crawford, 15 Ga. 423; Dunford *v.* Weaver, 84 N. Y. 445 [*affirming* 21 Hun 349]; Renick *v.* Orser, 4 Bosw. (N. Y.) 384; Ginochio *v.* Orser, 1 Abb. Pr. (N. Y.) 433; Ontario Bank *v.* Hallett, 8 Cow. (N. Y.) 192; Hinman *v.* Brees, 13 Johns. (N. Y.) 529; Scott *v.* Shaw, 13 Johns. (N. Y.) 378; *Ex p.* Tracy, 25 Vt. 93.

Where the process is regular on its face a sheriff cannot allege error in the judgment or process as an excuse for an escape. Bensel *v.* Lynch, 2 Rob. (N. Y.) 448 [*affirmed* in 44 N. Y. 162].

That the papers were voidable is not a good defense. Jones *v.* Cook, 1 Cow. (N. Y.) 309; Cable *v.* Cooper, 15 Johns. (N. Y.) 152.

Amendable defects.— It is not a good defense in an action for an escape that a capias ad satisfaciendum was wrongfully attested as to the name of the chief justice, for such a defect is amendable. Ross *v.* Luther, 4 Cow. (N. Y.) 158, 15 Am. Dec. 341.

A defendant can move to set aside the order of arrest, after the entry of judgment, on showing to the court that the judgment was recovered on a cause of action for which he was not liable to arrest, and hence that he cannot be legally imprisoned on a capias ad satisfaciendum issued on such judgment; but if he suffers the order of arrest to remain in force it must be held to be regular, for the purposes of an action for an escape from imprisonment on the capias ad satisfaciendum. Smith *v.* Knapp, 30 N. Y. 581.

19. Poucher *v.* Holley, 3 Wend. (N. Y.) 184; Powers *v.* Wilson, 7 Cow. (N. Y.) 274.

20. Adams *v.* Turrentine, 30 N. C. 147.

21. Mabry *v.* Turrentine, 30 N. C. 201; Adams *v.* Turrentine, 30 N. C. 147.

2. Voluntary Escape. Every going out of prison, with the knowledge or consent of the sheriff or keeper, is a voluntary escape. A voluntary escape occurs when a prisoner is allowed to go at large by permission or wilful default of the officer in whose custody he is.[22] It is of no consequence that the sheriff relied on the prisoner's honor and promise to return.[23]

3. Negligent Escape. There is a negligent escape when a prisoner has gone out of the sight and control of the officer in whose custody he was, without the knowledge or consent of such officer, but by reason of his careless or negligent conduct.[24]

C. Acts Constituting an Escape — 1. In General. An escape occurs when acts are done which are incompatible with custody, or when a relaxation of confinement is permitted so that the prisoner is not at all times in the control of the sheriff or keeper.[25] But although a sheriff may not, as an indulgence or privilege, allow a prisoner to go outside the jail,[26] there are some emergencies which have been declared a sufficient excuse for a prisoner's temporary liberty.[27]

2. Admitting Prisoners to Jail Liberties — a. In General. Ever since the establishment of prison liberties in England, they have been held by the courts of that country as in effect an extension of the walls of the jail,[28] and the same doctrine prevails in many of the United States.[29] It consequently follows that the departure from the walls of the jail of a prisoner entited to the liberties is not an escape so long as he keeps within the liberties,[30] but to admit a prisoner to the liberties, except in the cases provided by law, renders the jailer liable for an escape.[31]

22. *Connecticut.*— Bowen *v.* Huntington, 3 Conn. 423.

Indiana.— Hoagland *v.* State, 22 Ind. App. 204, 40 N. E. 931, 72 Am. St. Rep. 298.

New Hampshire.— Sherburn *v.* Beattie, 16 N. H. 437.

New York.— Tillman *v.* Lansing, 4 Johns. 45.

North Carolina.— Adams *v.* Turrentine, 30 N. C. 147.

Pennsylvania.— Hopkinson *v.* Leeds, 78 Pa. St. 396.

England.— Bonafous *v.* Walker, 2 T. R. 126.

Where a sheriff appointed the dwelling-house of a debtor as his prison, and the debtor was there confined, and such house was no part of the public prison and not within the bounds of the jail, and such debtor escaped, the escape was voluntary. Jones *v.* State, 3 Harr. & J. (Md.) 559.

23. Hoagland *v.* State, 22 Ind. App. 204, 40 N. E. 931, 72 Am. St. Rep. 298.

24. Adams *v.* Turrentine, 30 N. C. 147; Bonafous *v.* Walker, 2 T. R. 126.

The escape of a prisoner who has liberty of the yard on bonds is a negligent escape. Carrington *v.* Parsons, 4 Day (Conn.) 45; Abel *v.* Bennet, 1 Root (Conn.) 127; Jones *v.* Abbee, 1 Root (Conn.) 106.

Where a prisoner, being sick, was by the advice of a physician admitted to the dwelling-house part of the jail, and from there, without the knowledge or consent of the jailer, walked out of the doors a few rods and returned, it was held a negligent escape. Sanderson *v.* Rutland, 43 Vt. 385.

25. Comer *v.* Huston, 55 Ill. App. 153; Colby *v.* Sampson, 5 Mass. 310; Moredell *v.* Marshal, 1 Mod. 116.

Every liberty given to a prisoner, not authorized by law, is an escape. Colby *v.* Sampson, 5 Mass. 310.

No matter how short the time a prisoner is at large it constitutes an escape. Hopkinson *v.* Leeds, 78 Pa. St. 396.

26. Comer *v.* Huston, 55 Ill. App. 153.

27. See cases cited *infra*, this note.

Illustrations.— Where heating apparatus was being put in a jail it was justifiable to confine the prisoner in the sheriff's kitchen. Comer *v.* Huston, 55 Ill. App. 153. And during the plague it was held that the sheriff might keep his prisoners *sub salva et arcta custodia* anywhere out of the prison. Hobart's Case, Cro. Car. 209, 79 Eng. Reprint 784.

28. Bonafous *v.* Walker, 2 T. R. 126.

29. Bolton *v.* Cummings, 25 Conn. 410; Seymour *v.* Harvey, 8 Conn. 63; Steinman *v.* Tabb, 3 Bibb (Ky.) 202; Walter *v.* Bacon, 8 Mass. 468; Brown *v.* Tracy, 9 How. Pr. (N. Y.) 93; Peters *v.* Henry, 6 Johns. (N. Y.) 121, 5 Am. Dec. 196.

30. Bolton *v.* Cummings, 25 Conn. 410; Seymour *v.* Harvey, 8 Conn. 63; Steinman *v.* Tabb, 3 Bibb (Ky.) 202; Green *v.* Hern, 2 Penr. & W. (Pa.) 167.

Time of enjoying liberties.— In Massachusetts it has been held that if a prisoner for debt, having given a bond for the liberties, is found in the night-time voluntarily without the prison and in the yard appurtenant to the jail, it is an escape within the condition of the bond. Freeman *v.* Davis, 7 Mass. 200; Clap *v.* Cofran, 7 Mass. 98; Bartlett *v.* Willis, 3 Mass. 86. But the liberty of the yard during the daytime includes any part of the day when a man's form and features can be distinguished. Trull *v.* Wilson, 9 Mass. 154. And it is no escape to go into a private house within the limits in the daytime. Patterson *v.* Philbrook, 9 Mass. 151.

31. Leonard *v.* Hoit, Brayt. (Vt.) 73; Lowrey *v.* Barney, 2 D. Chipm. (Vt.) 11.

The jailer is not bound to allow a prisoner the privilege of the prison liberties, unless the prisoner gives bond and security not to depart therefrom,[32] and it is held in some jurisdictions that as the bond is intended as a security to the jailer against the abuse of the privilege by the prisoner, he may waive such security, and grant the liberties without a bond.[33] In other jurisdictions, however, a sheriff is liable for an escape if he admits a prisoner to the liberties without giving a bond.[34] It is a common condition of a prison limits bond that the prisoner, if not legally discharged within a certain time from the day of his commitment, shall surrender himself to be held in close confinement.[35]

b. On Irregular or Insufficient Bond. The sheriff is liable for an escape if he admits the prisoner to the liberty of the yard on a bond, not in conformity with the statute,[36] unless the creditor has waived the irregularity and accepted the bond.[37] If the bail is sufficient when given, the fact that it afterward fails will not render the sheriff liable.[38]

3. Going Beyond Jail Liberties. Where a prisoner goes or is at large beyond the liberties of the jail, without the assent of the party at whose instance he is in custody, it is an escape.[39] In some cases a distinction seems to be drawn between a voluntary and an involuntary or inadvertent escape. Thus it has been held that if a prisoner admitted to the liberties of the jail knowingly and voluntarily goes beyond the limits, it is an escape for which the sheriff is liable.[40] But for a merely involuntary escape, as by accidentally or inadvertently going beyond the liberties which are bounded by an imaginary line, and returning immediately before action brought, the sheriff is not liable.[41] A bond for the liberties restrains the prisoner within the liberties established by law for the time being.[42] This contemplates the

32. Steinman *v.* Tabb, 3 Bibb (Ky.) 202; Brown *v.* Tracy, 9 How. Pr. (N. Y.) 93.

33. Steinman *v.* Tabb, 3 Bibb (Ky.) 202; Brown *v.* Tracy, 9 How. Pr. (N. Y.) 93; Peters *v.* Henry, 6 Johns. (N. Y.) 121, 5 Am. Dec. 196; Holmes *v.* Lansing, 3 Johns. Cas. (N. Y.) 73; Bonafous *v.* Walker, 2 T. R. 26.

34. Com. *v.* Gower, 4 Litt. (Ky.) 279; Hotchkiss *v.* Whitten, 71 Me. 577; Clap *v.* Cofran, 7 Mass. 98.

35. See cases cited *infra*, this note.

The day of commitment is to be excluded in computing the period. Wiggin *v.* Peters, 1 Metc. (Mass.) 127. The consent of the judgment creditor that the examination of the debtor, upon his application to be admitted to take the poor debtor's oath after he has given bond for the liberty of the jail, may be adjourned to a time after the expiration of ninety days from the date of the bond, is no waiver of the condition of the bond requiring the surrender of the debtor to the jailer at the expiration of ninety days. Burnett *v.* Small, 7 Gray (Mass.) 548. But the condition of the bond is satisfied if the debtor is admitted to take the poor debtor's oath on the ninety-first day from the date of the bond without any surrender to the jailer, either on or before that day. Plummer *v.* Odiorne, 8 Gray (Mass.) 246.

In Alabama under a statute providing that no person in custody shall have the liberty of the prison bounds who shall neglect or refuse for sixty days to take the benefit of the Insolvent Debtors' Act, it is an escape to remain without the prison walls after the expiration of sixty days. McMichael *v.* Rapelye, 4 Ala. 383.

36. Com. *v.* Gower, 4 Litt. (Ky.) 279; Clapp *v.* Hayward, 15 Mass. 276; Hooe *v.* Tebbs, 1 Munf. (Va.) 501.

Where the signatures on a bail-bond were forgeries, although the sheriff was ignorant thereof, a discharge thereunder was an escape. Conyers *v.* Rhame, 11 Rich. (S. C.) 60.

Requirement as to approval of sureties.— When a debtor is permitted to have the liberty of the jail yard on giving a bond with sureties not approved in conformity with the statutory requirement, the jailer is liable for an escape. Whitehead *v.* Varnum, 14 Pick. (Mass.) 523. But in Tappan *v.* Bellows, 1 N. H. 100, it was held that it was no escape if the sureties given were in fact sufficient, although they had not been approved as required by law.

37. Coffin *v.* Herrick, 10 Me. 121; Morton *v.* Campbell, 37 Barb. (N. Y.) 179.

38. Northum *v.* Phelps, 1 Root (Conn.) 54.

39. Dunford *v.* Weaver, 84 N. Y. 445.

However short the time or distance the prisoner is off the jail limits, it constitutes an escape which renders the officer in charge liable. Jones *v.* State, 3 Harr. & J. (Md.) 559; Dunford *v.* Weaver, 84 N. Y. 445.

40. Bissell *v.* Kip, 5 Johns. (N. Y.) 89.

41. Kip *v.* Babcock, 7 Johns. (N. Y.) 178; Ballou *v.* Kip, 7 Johns. (N. Y.) 175. *Compare* Bissell *v.* Kip, 5 Johns. (N. Y.) 89.

42. Reed *v.* Fullum, 2 Pick. (Mass.) 158; Willard *v.* Hathaway, Brayt. (Vt.) 75.

In Massachusetts under Rev. St. c. 14, § 13, the jail limits to which a debtor arrested on an implied contract of indemnity is entitled do not extend beyond the boundaries of the town in which the jail is situated, and going beyond such limits is an escape. Appleton *v.* Bascom, 3 Metc. 169.

right of the legislature to alter the prison limits, and such alteration does not impair the obligation of a bond previously given.[43]

4. Removal of Prisoner From Prison by Legal Process. The removal of a prisoner from the prison or the jail liberties by virtue of a valid legal process which affords justification to the officer taking him is not an escape.[44] Thus it is not an escape to take a prisoner who is imprisoned on execution in a civil suit away from the jail liberties on a habeas corpus.[45] But if the sheriff suffers his prisoner to get out of his custody, except in obedience to the requirements of the writ, or goes with him out of the way, for the accommodation of the prisoner, it will be an escape.[46]

5. Discharge of Prisoner — a. In General. A sheriff has no power to discharge a debtor from prison of his own will; but such a discharge is an escape.[47] To relieve a sheriff from liability the discharge must be made either with the consent of the creditor,[48] by valid order of court,[49] by act of the legislature,[50] or under circumstances authorized by statute.[51]

b. By Order of Court. In an action against a sheriff for an escape it is a defense for him that a valid order for the discharge of the prisoner has been made,[52] although it has never been formally served on him.[53] If the court making the order had jurisdiction, the sheriff is justified in obeying it, although it may have been for an insufficient cause, or founded on an irregular proceeding.[54] But if the court had not jurisdiction, the order of discharge is void, and the sheriff is liable for his act in discharging the prisoner.[55] Hence to protect the sheriff either the order of discharge must show the facts giving the court jurisdiction,[56] or it must

Evidence of a custom of prisoners to go to a certain place as being within the limits is incompetent to control the construction of the statute establishing the limits. Trull *v.* Wheeler, 19 Pick. (Mass.) 240.

43. See cases cited *infra*, this note.

A bond for the jail liberties, given before the passage of a statute narrowing the limits, is broken by going without the limits as defined in that act. Reed *v.* Fullum, 2 Pick. (Mass.) 158. *Compare* Farley *v.* Randall, 22 Pick. (Mass.) 146, holding that a statute extending the prison limits for debtors imprisoned on execution to the boundaries of the county does not extend the limits as to a debtor imprisoned for a debt contracted prior to its passage.

44. Wilckens *v.* Willet, 4 Abb. Dec. (N. Y.) 596, 1 Keyes 521. *Compare* Brown *v.* Tracy, 9 How. Pr. (N. Y.) 93.

45. Martin *v.* Wood, 7 Wend. (N. Y.) 132; Wattles *v.* Marsh, 5 Cow. (N. Y.) 176; Hassam *v.* Griffin, 18 Johns. (N. Y.) 48, 9 Am. Dec. 184; Noble *v.* Smith, 5 Johns. (N. Y.) 357.

46. People *v.* Stone, 10 Paige (N. Y.) 606; Memorandum, Cro. Car. 1, case 4, p. 14.

47. Wright *v.* Roberts, 28 N. C. 119.

Payment to a sheriff upon a capias ad satisfaciendum is not good, and a discharge upon such a payment is an escape. Anonymous, 12 Mod. 230, 385, 88 Eng. Reprint 1282, 1397; Compton *v.* Ireland, 1 Mod. 194, 86 Eng. Reprint 823.

48. Kellogg *v.* Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335, holding, however, that plaintiff's attorney has no authority to order the discharge of a defendant from custody on execution without the consent of plaintiff or a previous satisfaction of the debt.

49. See *infra*, VI, C, 5, b.

50. Fitch *v.* Badger, 1 Root (Conn.) 72.

51. See the statutes of the several states, and cases cited *infra*, this note.

Failure of creditor to provide for support of debtor.— Statutes in some states permit a jailer to discharge a prisoner unless the creditor gives a bond for the payment of the prison charges. Richards *v.* Crane, 7 Pick. (Mass.) 216; Blood *v.* Austin, 3 Pick. (Mass.) 259; Buck *v.* Meserve, 16 N. H. 422. But in the absence of such a statute a discharge under such circumstances is unauthorized and therefore an escape. Buck *v.* Meserve, 16 N. H. 422.

In New Jersey the act of 1823 abolishing imprisonment for debt in certain cases does not authorize a sheriff to take the bond mentioned in the first section of the act, and to discharge a defendant after he has been confined in jail upon an execution. Such bond and such discharge are admissible only after an arrest, and prior to confinement in jail. Eayre *v.* Earl, 8 N. J. L. 359.

52. Richmond *v.* Praim, 24 Hun (N. Y.) 578; Stevenson *v.* Carothers, 3 Yeates (Pa.) 180.

53. Richmond *v.* Praim, 24 Hun (N. Y. 578.

54. Cable *v.* Cooper, 15 Johns. (N. Y.) 152; Wattles *v.* Marsh, 5 Cow. (N. Y.) 176; Hathaway *v.* Holmes, 1 Vt. 405; Brown *v.* Compton, 8 T. R. 424.

A discharge on a habeas corpus by a judge having jurisdiction is a conclusive defense for a sheriff in an action for an escape, although the discharge be for an insufficient cause, or founded on an irregular proceeding. Chamblee *v.* Holcomb, 7 Ga. 419; Wiles *v.* Brown, 3 Barb. (N. Y.) 37; Hathaway *v.* Holmes, 1 Vt. 405.

55. Cable *v.* Cooper, 15 Johns. (N. Y.) 152; Brown *v.* Compton, 8 T. R. 424.

56. Schaffer *v.* Riseley, 114 N. Y. 23, 20 N. E. 630 [*reversing* 44 Hun 6]; Develin *v.* Cooper, 84 N. Y. 410 [*affirming* 20 Hun 188];

be made to appear by proof *aliunde* that the court had jurisdiction to make the order.[57]

6. Constructive Escape. The whole doctrine of escapes rests upon the notion that there should be an imprisonment of the party within the proper limits,[58] and the fact that a person is at liberty to go where he pleases without any restraint, acting or ready to act upon him, either physically or morally, seems to exclude the notion of imprisonment.[59] The law has therefore adjudged that where a party imprisoned is allowed any liberty or authority incompatible with the notion of custody, not merely *salva et arcta custodia*, but of any custody at all, it shall be deemed an escape.[60] Thus at common law, if the sheriff be arrested and committed to the county jail, it is an escape, for he cannot be imprisoned in a jail, of which he has the custody.[61] On the same principle, if a jailer is committed to his own jail and no new keeper is appointed, it is an escape of the jailer for which the sheriff is liable; [62] but it is not an escape of the other prisoners, if they are in fact kept in custody.[63] So it is asserted to be an escape, if the sheriff make a prisoner of the jailer, and give him the keys.[64] And if a sheriff intrust a prisoner with the keys to the prison, it is an escape, for no man can be his own jailer.[65] But the correctness of the doctrine of constructive escapes has been denied, as being inapplicable to cases arising under a statute giving prisoners the benefit of the prison bounds.[66]

D. Liability — 1. Of Sheriff or Jailer to Creditor — a. In General. It is the keeper of the jail who is liable for an escape; where a sheriff is held liable, he is held *qua* jailer and not *qua* sheriff.[67] Therefore, where the sheriff is not the keeper or jailer, and has no control over the jail, he is not liable for an escape.[68] It has been held that a sheriff is not liable for the negligent escape of a debtor committed from another county.[69] The responsibilities of a sheriff are the same whether a prisoner is arrested under federal or state process after the prisoner has been committed.[70]

b. After Taking Bond For Liberties. A bond given to entitle a prisoner to the liberties of the prison yard is in effect a substitute for the custody of the sheriff, and, if regularly taken and allowed, it discharges the sheriff from any further

Bullymore *v.* Cooper, 46 N. Y. 236; Bush *v.* Pettibone, 5 Barb. (N. Y.) 273 [*affirmed* in 4 N. Y. 300].

57. Schaffer *v.* Riseley, 114 N. Y. 23, 20 N. E. 630 [*reversing* 44 Hun 6]; Develin *v.* Cooper, 84 N. Y. 410 [*affirming* 20 Hun 188].

58. Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486.

59. Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486.

60. Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486.

Where a woman warden of the Fleet married a person imprisoned in the Fleet, it was an escape, for the prisoner could not be imprisoned without a keeper, and he could not be in the custody of his wife. Platt *v.* London Sheriffs, Plowd. 35, 75 Eng. Reprint 57

61. Day *v.* Brett, 6 Johns. (N. Y.) 22; Bendison *v.* Lenthall, 1 Keb. 202, 83 Eng. Reprint 899; Somes *v.* Lenthall, Style 465, 82 Eng. Reprint 866. See also Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486.

62. Gage *v.* Graffam, 11 Mass. 181; Colby *v.* Sampson, 5 Mass. 310; Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486.

63. Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 485.

64. Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486.

65. Wilkes *v.* Slaughter, 10 N. C. 211; Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486; Wilkinson *v.* Satter, Lee t. Hardw. 310.

Where a prisoner is intrusted with the keys under supervision of the jailer, it is no escape. Bolton *v.* Cummings, 25 Conn. 410.

66. Currie *v.* Worthy, 47 N. C. 104 [*disapproving* Wilkes *v.* Slaughter, 10 N. C. 211], and holding that it is no escape if the door of a prison has remained open, when no prisoners left the prison.

67. Keim *v.* Saunders, 120 Pa. St. 121, 13 Atl. 710.

68. Keim *v.* Saunders, 120 Pa. St. 121, 13 Atl. 710.

The board of inspectors of the Philadelphia county prison are not responsible, as jailers, for the escape of a prisoner. Saunders *v.* Smith, 132 Pa. St. 180, 19 Atl. 54 [*reversing* 6 Pa. Co. Ct. 257].

69. Chipman *v.* Sawyer, 1 Tyler (Vt.) 83, 2 Tyler 61.

70. Spafford *v.* Goodell, 22 Fed. Cas. No. 13,197, 3 McLean 97.

That a prisoner is marshal of the United States for the district, and that by virtue of his office he has equal control with the sheriff over the jail, is no defense to an action against the sheriff for his escape. Parsons *v.* Stanton, 2 Day (Conn.) 300.

responsibility for the prisoner's remaining in his custody.[71] Such a bond is assignable;[72] and if the sheriff refuse to assign it to the creditor, on request, after breach of condition, an action on the case will lie against him.[73]

c. For Escape of Prisoner Received From Predecessor. The sheriff who receives the public jail from his predecessor, although without a deed of assignment, is responsible from that period for the safe-keeping of prisoners there, as if they had been originally committed to his custody.[74] And if a new sheriff receives a prisoner from his predecessor he is answerable for his escape, although a voluntary escape may have existed in the time of his predecessor.[75]

2. Of Jailer to Sheriff. A sheriff has a right to take a bond from the jailer to indemnify him for all losses to which he may be subjected by the escape of a prisoner, while in the custody of the jailer;[76] but without a bond of indemnity the jailer is liable to the sheriff only for want of fidelity or due care in the discharge of his duty.[77]

E. Defenses — 1. In General. It may be deduced as the rule from the earlier cases on the subject that nothing but the act of God or the public enemy will relieve a sheriff from liability for the escape from jail of an execution debtor.[78] But under the new and enlightened systems prevailing at the present day most of this law is practically obsolete.[79] A sheriff is not to be held conclusively liable as for an escape upon proof that he had taken or allowed the debtor to be out of jail, but he may show the circumstances which induced him so to act, and from such circumstances it may be determined whether the absence of the prisoner from the jail was but temporary and for justifiable and good cause, or was a mere indulgence or privilege granted the prisoner.[80] It has been held not a good defense that no prison fees were paid, even where it appeared that the prisoner was not able to pay such fees,[81] that the liberties were undefined by visible boundaries and monuments,[82] that the prisoner had license to go at large from plaintiff[83]

71. *Georgia.*— Gunn *v.* Davis, 26 Ga. 169.
Maine.— Palmer *v.* Sawtell, 3 Me. 447; Codman *v.* Lowell, 3 Me. 52.
Massachusetts.— Cargil *v.* Taylor, 10 Mass. 206.
Virginia.— Vanmeter *v.* Giles, 1 Rob. 328; Lyle *v.* Stevenson, 6 Call. 54.
United States.— U. S. *v.* Noah, 27 Fed. Cas. No. 15,894, 1 Paine 368.
See 40 Cent. Dig. tit. "Prisons," § 35.
Contra.— Yates *v.* Yeaden, 4 McCord (S. C.) 18.

72. Powers *v.* Segur, 2 Bailey (S. C.) 419; Vilas *v.* Barker, 20 Vt. 603. But see Peck *v.* Glover, 1 Nott & M. (S. C.) 582.
In England a bail-bond taken by the sheriff for the appearance of defendant was made assignable by St. 4 Anne, c. 16, § 20.
The assignment of a void bond by the jailer to the creditor is not a waiver of the creditor's cause of action against the jailer. Com. *v.* Gower, 4 Litt. (Ky.) 279.
When the United States is plaintiff, an assignment to it of a bond for the limits is valid, and its acceptance by the secretary of the treasury, will be presumed to have been authorized. U. S. *v.* Noah, 27 Fed. Cas. No. 15,894, 1 Paine 368.

73. Vilas *v.* Barker, 20 Vt. 603, holding further that it is no excuse, for refusing to assign, that during the pendency of the suit, plaintiff caused his declaration to be amended by leave of court, by adding an additional count for a new and distinct cause of action, and that judgment was rendered for a sum in damages founded on claims embraced in both counts.

74. Slemaker *v.* Marriott, 5 Gill & J. (Md.) 406.

75. Stickle *v.* Reed, 23 Hun (N. Y.) 417; Rawson *v.* Turner, 4 Johns. (N. Y.) 469; James *v.* Peirce, 2 Lev. 132, 83 Eng. Reprint 484, 1 Vent. 269, 86 Eng. Reprint 180; Lenthal *v.* Lenthal, 2 Lev. 109, 83 Eng. Reprint 473; Grant *v.* Southers, 6 Mod. 183, 87 Eng. Reprint 938. But see Mynouss *v.* Turke, Dyer 66-a, 73 Eng. Reprint 139; Balden *v.* Temple, Hob. 202, 80 Eng. Reprint 348.

76. Turrentine *v.* Faucett, 33 N. C. 652; Scarborough *v.* Thornton, 9 Pa. St. 451.

77. Turrentine *v.* Faucett, 33 N. C. 652.

78. *New Jersey.*— Patten *v.* Halsted, 1 N. J. L. 277.
New York.— Fairchild *v.* Case, 24 Wend. 381.
North Carolina.— Rainey *v.* Dunning, 6 N. C. 386.
Pennsylvania.— Wheeler *v.* Hambright, 9 Serg. & R. 390, 396.
South Carolina.— State *v.* Halford, 6 Rich. 58; Saxon *v.* Boyce, 1 Bailey 66.
England.— Alsept *v.* Eyles, 2 H. Bl. 108; O'Niel *v.* Marson, 5 Burr. 2812; Smith *v.* Hillier, Cro. Eliz. 167, 78 Eng. Reprint 425; 6 Bac. tit. Sheriff Lib. H. 5.
See 40 Cent. Dig. tit. "Prisons," § 31.

79. See Comer *v.* Huston, 55 Ill. App. 153.

80. Comer *v.* Huston, 55 Ill. App. 153.

81. Com. *v.* Dulen, 4 Bibb (Ky.) 316; McClain *v.* Hayne, 1 Treadw. (S. C.) 212.

82. Bissel *v.* Kip, 5 Johns. (N. Y.) 89.

83. Sweet *v.* Palmer, 16 Johns. (N. Y.) 181.

or his attorney,[84] that the prisoner forcibly broke jail,[85] that a satisfaction piece turned out to be a forgery,[86] that the pleadings were amended to enhance damages,[87] that plaintiff declared generally as in custody instead of declaring specially that he was in close custody,[88] that the order for bail was rescinded after it had been delivered to the sheriff and executed by him,[89] that after being apprised of the escape plaintiff delayed unreasonably to call for an assignment of the bond,[90] or that the prisoner was by law privileged from arrest.[91] But it is a good defense that an officer acted under an order of the court enlarging the limits, and that the prisoner was within those limits,[92] that one of two joint debtors was released because the other was discharged by the execution plaintiff,[93] or that the escape has been procured by fraud.[94]

2. Recapture, Return, or Death of Prisoner — a. On Escape From Mesne Process. At common law the sheriff might, if he pleased, suffer a prisoner in his custody upon mesne process to go at large without sureties, but it was at his own peril; when, however, he had suffered such prisoner to go at large, he might retake him at any time before return of the writ. And if he had the body in court upon the return of the writ, it was a good defense to an action for an escape.[95] But where a debtor arrested on mesne process, escaped after judgment, hisreturn before the issue of execution was no defense.[96]

b. On Escape From Final Process. If an officer suffer a debtor to escape after an arrest on a capias ad satisfaciendum, he is liable even though he have him in court on return-day.[97] In criminal cases there is no distinction between

That a husband was permitted to escape at the request of the wife is no defense to an action brought by a wife against the sheriff for the permissive escape of the husband who had been committed by attachment for not performing a decree of alimony. Prather *v.* Clarke, 3 Brev. (S. C.) 393.

Contract of release.— The court says in Van Wormer *v.* Van Voast, 10 Wend. (N. Y.) 356: "An assent or agreement on the part of a plaintiff, subsequent to an escape, that the debtor may remain out of the limits without a new consideration, will not discharge the judgment or the sheriff; for the right of action having once accrued, nothing but a release or an agreement for a valuable consideration can defeat the action. Sweet *v.* Palmer, 16 Johns. (N. Y.) 181; Scott *v.* Peacock, 1 Salk. 271, 91 Eng. Reprint 237." But where there is a good consideration for the subsequent agreement, the sheriff will be discharged. Powers *v.* Wilson, 7 Cow. (N. Y.) 274.

Where a party was committed to jail on a capias ad satisfaciendum, which showed on its face that the judgment was for costs alone, this was notice to the sheriff of that fact, and that such judgment equitably belonged to the attorney, he being entitled to the costs, so that a permission, given by the party in whose favor the judgment was recovered, to the prisoner to go at large beyond the jail liberties, was no defense to an action by the attorney against the sheriff for an escape. Wilkins *v.* Batterman, 4 Barb. (N. Y.) 47.

84. Lovell *v.* Orser, 1 Bosw. (N. Y.) 349.
85. Stone *v.* Woods, 5 Johns. (N. Y.) 182.
86. Lownds *v.* Remsen, 7 Wend. (N. Y.) 35.
87. Vilas *v.* Barker, 20 Vt. 603.
88. Fairfield *v.* Case, 24 Wend. (N. Y.) 381.
89. Brissac *v.* Moorer, Dudley (S. C.) 228.
90. Wheeler *v.* Pettes, 21 Vt. 398. See also Spear *v.* Holmer, 24 Vt. 547, holding that where a debtor gave a jail bond, suit could not be maintained for an escape until there was a demand made for the bond, and a refusal by the sheriff to assign it, and the fact that the bond was found in possession of a former jailer, in another state, after a delay of several years, afforded no necessary presumption that a demand would not have been available.

If a creditor might have collected the amount of a jail bond but directed the sheriff not to attach property, such creditor is chargeable with want of due diligence and has no action. Weed *v.* Preston, 54 Vt. 648.

91. Gill *v.* Miner, 13 Ohio St. 182, holding that such privilege is personal to the party to whom it appertains.
92. Lampson *v.* Landon, 5 Day (Conn.) 506.
93. Ransom *v.* Keyes, 9 Cow. (N. Y.) 128.
94. Dexter *v.* Adams, 2 Den. (N. Y.) 646 (as by inducing the prisoner to step outside the limits of the liberties of the jail); Van Wormer *v.* Van Voast, 10 Wend. (N. Y.) 356.

Return of prisoner fraudulently prevented. — That a creditor arrested a debtor after escape by writ of attachment for the purpose of preventing his return until he could bring an action against the sheriff is a good defense for the sheriff in an action for escape. Drake *v.* Chester, 2 Conn. 473.

95. Langdon *v.* Hathaway, 1 N. H. 367; Cady *v.* Huntington, 1 N. H. 138; Stone *v.* Woods, 5 Johns. (N. Y.) 182; Allington *v.* Flower, 2 B. & P. 246; Pariente *v.* Plumbtree, 2 B. & P. 35. See Jones *v.* Pope, 1 Saund. 35 note, 85 Eng. Reprint 45.
96. Stone *v.* Woods, 5 Johns. (N. Y.) 182.
97. U. S. *v.* Brent, 24 Fed. Cas. No. 14,639, 1 Cranch C. C. 525.

escape from mesne and final process. The sheriff is answerable to the state, and the rights of the people demand a recapture.[98]

c. When Escape Is Voluntary. The general rule is that after a voluntary escape from custody and final process, the sheriff cannot retake the prisoner or receive him back without plaintiff's consent.[99] Nor will the voluntary return of the prisoner prevent the liability of the sheriff for the escape.[1] If a sheriff discharges a prisoner on the promise of another to pay his fine, and the fine is not paid, he cannot rearrest the prisoner, but is liable for the fine.[2]

d. When Escape Is Negligent. In case of a negligent escape, the jailer has a right to retake the prisoner on fresh pursuit, and return him to his former custody,[3] even where the negligence is occasioned by a misunderstanding of law;[4] and if he does so before action brought by the creditor for the escape, he is excused.[5] So the voluntary return of the prisoner after such escape and before action brought is equivalent to a retaking on fresh pursuit.[6] But the recapture on fresh pursuit, or the voluntary return, should be made before suit is brought for the escape.[7]

e. Under Statutes Granting Liberties on Bond. The statutes relative to jail liberties have not altered the common law as to the liability of sheriffs for escapes, or taken away their common-law rights as to fresh pursuit and recapture; and if a prisoner, who has given to the sheriff a bond for the liberties, voluntarily goes

98. Dickinson *v.* Brown, 1 Esp. 218, 1 Peake N. P. 234; Butt *v.* Jones, Gow. 99, 5 E. C. L. 881, 2 Hawk. P. C. 131. See also State *v.* Caldwell, 115 Ind. 6, 17 N. E. 185; State *v.* Newcomer, 109 Ind. 243, 8 N. E. 920.

99. Hoagland *v.* State, 22 Ind. App. 204, 40 N. E. 931, 72 Am. St. Rep. 298; Riley *v.* Whittiker, 49 N. H. 145, 6 Am. Rep. 474; Butler *v.* Washburn, 25 N. H. 251; Stickle *v.* Reed, 23 Hun (N. Y.) 417; Clark *v.* Cleveland, 6 Hill (N. Y.) 344; Tillman *v.* Lansing, 4 Johns. (N. Y.) 45; Lash *v.* Ziglar, 27 N. C. 702; Smith *v.* Com., 59 Pa. St. 320; Wilkinson *v.* Jacques, 3 T. R. 392; Ravenscroft *v.* Eyles, 2 Wils. C. P. 294.

That a prisoner was arrested on a second capias ad satisfaciendum issued by plaintiff after a voluntary escape is not a good plea. Catherwood *v.* Fitler, 2 Pa. L. J. 296.

In New York the duties of sheriffs as to escapes, and their defense of recapture and voluntary return before suit brought, remain the same as before the statute relative to jail liberties and that of 1810. See Jansen *v.* Hilton, 10 Johns. 549.

1. Stickle *v.* Reed, 23 Hun (N. Y.) 417; Hopkinson *v.* Leeds, 78 Pa. St. 396; Mosedell's Case, 1 Mod. 116, 86 Eng. Reprint 775.

2. Williams *v.* Mize, 72 Ga. 129.

3. Butler *v.* Washburn, 25 N. H. 251; Tillman *v.* Lansing, 4 Johns. (N. Y.) 45; Smith *v.* Com., 59 Pa. St. 320; Sanderson *v.* Rutland, 43 Vt. 385.

4. Rogers *v.* May, 25 Ga. 463; Colley *v.* Morgan, 5 Ga. 178.

5. Sanderson *v.* Rutland, 43 Vt. 385.

An actual recapture is necessary; fresh pursuit alone is no defense, although the prisoner dies before the sheriff is able, by reasonable diligence, to retake him. Whicker *v.* Roberts, 32 N. C. 485. See also Chambers *v.* Jones, 11 East 406. *Compare*, Meriton *v.* Briggs, Ld. Raym. 39, 91 Eng. Reprint 922.

6. Tillman *v.* Lansing, 4 Johns. (N. Y.) 45; Sanderson *v.* Rutland, 43 Vt. 385.

Presumption on voluntary return.— Where the prisoner voluntarily returns before action is brought against the sheriff, it will be presumed that the officer consented to receive the prisoner, until the contrary is shown. Drake *v.* Chester, 2 Conn. 473.

A return within the limits is the same as a return within the jail. Jansen *v.* Hilton, 10 Johns. (N. Y.) 549; Peters *v.* Henry, 6 Johns. (N. Y. 121, 5 Am. Dec. 196.

7. Jansen *v.* Hilton, 10 Johns. (N. Y.) 549; Ridgeway's Case, 3 Coke 52, 76 Eng. Reprint 753. See also Whiting *v.* Reynel, Cro. Jac. 657, 79 Eng. Reprint 568.

Where the sheriff retook the prisoner before issue joined, it was held that such retaking would not excuse him. Parsons *v.* Lee, Jeff. (Va.) 49.

What is a commencement of suit.— Where a prisoner on execution, admitted to the liberties of the jail, went beyond them on a Sunday, and plaintiff, before he returned, on the same day, sued out a capias against the sheriff for the escape and delivered it to the coroner, it was not such a commencement of a suit against the sheriff as would prevent his pleading a voluntary return before suit brought. Van Vechten *v.* Paddock, 12 Johns. (N. Y.) 178, 7 Am. Dec. 303. A suit is not commenced unless the writ is served on the sheriff while the prisoner was actually off the limits. Carruth *v.* Church, 6 Barb. (N. Y.) 504. But where a capais ad respondendum against a sheriff was delivered to the wife of the coroner at his house, the coroner being then absent, while the prisoner was actually off the limits, although he immediately thereafter returned, it was a sufficient commencement of the action to make the sheriff liable for the escape. Visscher *v.* Gansevoort, 18 Johns. (N. Y.) 496; Bronson *v.* Earl, 17 Johns. (N. Y.) 63.

beyond the limits, his bond is forfeited and the sheriff may retake him on fresh pursuit, and recommit him to custody, or bring an action on the bond.[8]

3. Defects in Jail. While it has been held that no action will lie against a prison keeper for the escape of a prisoner through the insufficiency of the jail and without negligence on the keeper's part,[9] the general rule is that a defect in the jail will not constitute a good defense.[10] And the sheriff has been held for an escape, although there was no jail at all in the county.[11]

4. Insolvency of Prisoner. The insolvency of the prisoner is no defense to an action against a sheriff for an escape.[12] If available at all, it is only by way of evidence in mitigation of damages,[13] and this has been denied.[14]

F. Actions — 1. Right of Action — a. In General. By the common law, arrest under a capias ad satisfaciendum is satisfaction, and if there is an escape, plaintiff has no remedy but to sue the sheriff.[15] To redress this hardship the statute of 8 & 9 Wm. III[16] which is of force in many of the United States was passed, under which the creditor, in case of an escape, might either retake defendant on a new capias ad satisfaciendum, or sue out a fieri facias.[17] Under the statutes allowing a prisoner in execution the benefit of the prison bounds on giving security, plaintiff may either retake him, or proceed against his security; or, in case the security shall prove deficient, against the sheriff, who is ultimately liable for an escape.[18] Under the act of Wm. III[19] plaintiff may have a capias ad satisfaciendum or a fieri facias. If he elects the first the second is relinquished.[20] So under the Prison Bounds Act, if plaintiff resorts to the bond, he cannot have the fieri facias,[21] and if he retakes and imprisons defendant, the bond is discharged.[22]

b. Waiver of Right of Action. What will amount to a waiver of the right to sue the officer depends on circumstances. For a creditor's attorney to appear and protest against a discharge,[23] or to resist an application for the benefit of the insolvent laws,[24] have been held not to amount to a waiver. Where a defendant detained under mesne process escapes and the sheriff obtains leave to appear and defend the original suit, and judgment is recovered on a declaration against the original defendant, plaintiff does not thereby elect to consider defendant in custody, or to discharge the sheriff, for the proceeding only determines the extent of the sheriff's liability.[25]

2. Form of Action — a. By Creditor Against Sheriff. Where the statute has not provided a different form of remedy, case is the only form of action which can be brought against a sheriff for the escape of a party committed to his custody.[26]

8. Barry *v.* Mandell, 10 Johns. (N. Y.) 563; Jansen *v.* Hilton, 10 Johns. (N. Y.) 549. But see Peters *v.* Henry, 6 Johns. (N. Y.) 121, 5 Am. Dec. 196; Tillman *v.* Lansing, 4 Johns. (N. Y.) 45.

9. Brainard *v.* Head, 15 La. Ann. 489; Stiles *v.* Dearborn, 6 N. H. 145.

10. Slemaker *v.* Marriott, 5 Gill & J. (Md.) 406; Patten *v.* Halsted, 1 N. J. L. 277; Mabry *v.* Turrentine, 30 N. C. 201; Adams *v.* Turrentine, 30 N. C. 147; Kepler *v.* Barker, 13 Ohio St. 177; Richardson *v.* Spencer, 6 Ohio 13; Brown County Com'rs *v.* Butt, 2 Ohio 348.

The doctrine has been carried to the extent of excluding the insecure state of the jail as evidence, even in mitigation of damages. Smith *v.* Hart, 1 Brev. (S. C.) 146.

11. Gwinn *v.* Hubbard, 3 Blackf. (Ind.) 14; Smith *v.* Hart, 2 Bay (S. C.) 395; Stone *v.* Wilson, 10 Gratt. (Va.) 529.

12. Dunford *v.* Weaver, 84 N. Y. 445; Barnes *v.* Willett, 35 Barb. (N. Y.) 514; Smith *v.* Com., 59 Pa. St. 320; Karch *v.* Com., 3 Pa. St. 269; Wolverton *v.* Com., 7 Serg. & R. (Pa.) 273, holding that evidence to that effect is inadmissible.

13. Barnes *v.* Willett, 35 Barb. (N. Y.) 514.

14. Patterson *v.* Westervelt, 17 Wend. (N. Y.) 543.

15. Berry *v.* Hoke, 1 Rich. (S. C.) 76.

16. St. 8 & 9 Wm. III, c. 27.

17. Berry *v.* Hoke, 1 Rich. (S. C.) 76.

18. Berry *v.* Hoke, 1 Rich. (S. C.) 76.

19. St. 8 & 9 Wm. III, c. 27.

20. Berry *v.* Hoke, 1 Rich. (S. C.) 76.

21. Berry *v.* Hoke, 1 Rich. (S. C.) 76.

22. Osborne *v.* Bowman, 2 Bay (S. C.) 208.

23. Hotchkiss *v.* Whitten, 71 Me. 577, although he may examine the debtor.

24. Browning *v.* Rittenhouse, 38 N. J. L. 279; Currie *v.* Worthy, 48 N. C. 315.

25. Scarborough *v.* Thornton, 9 Pa. St. 451.

26. *Indiana.*— State *v.* Hamilton, 33 Ind. 502.

New Hampshire.— Lovell *v.* Bellows, 7 N. H. 375.

New York.— Loosey *v.* Orser, 4 Bosw. 391.

The statutes, however, frequently authorize an action of debt for the escape of a party committed upon an execution from a court of record.[27] In some states a sheriff is liable to an attachment where by his negligence and carelessness he suffers a prisoner to escape, and the injured party need not be driven to his action for an escape.[28] The action of debt given by the statute does not take away the common-law right of suing in case, but is a cumulative remedy.[29]

b. By Sheriff Against Jailer. Where a deputy sheriff or jailer permits an escape, the usual course for the sheriff is to resort to his bond;[30] and if he has omitted to take one the jailer is only answerable in assumpsit on his implied undertaking to serve the sheriff with diligence and fidelity.[31]

3. Persons Entitled to Sue. Unless plaintiff could have maintained the original action against the prisoner, no action can be maintained for an escape on mesne process.[32] Furthermore the only party entitled to sue is the one at whose suit the prisoner escaping is shown to have been arrested or charged in execution.[33]

4. Venue.[34] An action for an escape from prison in one county will lie in such county, although the judgment on which the suit against the prisoner was founded is of record in another county.[35]

5. Pleading[36] **— a. Complaint or Declaration.** In an action for escape, the complaint or declaration should contain substantive allegations showing that the prisoner escaped,[37] with the permission,[38] or through the negligence,[39] of the sheriff. An escape from the custody of the deputy sheriff may be declared on as

North Carolina.— Willey *v.* Eure, 53 N. C. 320.

England.— Bonafous *v.* Walker, 2 T. R. 126.

See 40 Cent. Dig. tit. "Prisons," § 40.

Action on the case generally see Case, Action on, 6 Cyc. 681.

Where a creditor is unable to obtain judgment upon a jail bond by reason of any neglect or default of the sheriff in taking it, or where the debt cannot be collected upon it on account of the poverty of the signers, case lies against the sheriff as for an escape. Wheeler *v.* Pettes, 21 Vt. 398.

27. See the statutes of the several states. And see State *v.* Hamilton, 33 Ind. 502; Fullerton *v.* Harris, 8 Me. 393; Willey *v.* Eure, 53 N. C. 320; Planck *v.* Anderson, 5 T. R. 37; Bonafous *v.* Walker, 2 T. R. 126.

Action of debt generally see Debt, Action of, 13 Cyc. 402.

N. Y. Code Civ. Proc. § 69, abolishing the form of an action of debt, did not repeal 2 Rev. St. p. 437, § 63, giving an action of debt against a sheriff for an escape from final process, and he is liable for such escape in a similar way under the code. Barnes *v.* Willett, 11 Abb. Pr. 225, 19 How. Pr. 564 [*affirmed* in 12 Abb. Pr. 448]. See also McCreery *v.* Willett, 4 Bosw. 643 [*affirmed* in 9 Bosw. 600]; Renick *v.* Orser, 4 Bosw. 384.

For the escape of one committed under an execution from a justice's court an action of debt will not lie, such court not being a court of record. Brown *v.* Genung, 1 Wend. (N. Y.) 115.

28. Craig *v.* Maltbie, 1 Ga. 544.

Attachment generally see Attachment, 4 Cyc. 368.

29. Lovell *v.* Bellows, 7 N. H. 375; Willey *v.* Eure, 53 N. C. 320; Bonafous *v.* Walker, 2 T. R. 126.

30. Kain *v.* Ostrander, 8 Johns. (N. Y.) 207.

31. Kain *v.* Ostrander, 8 Johns. (N. Y.) 207; Atterton *v.* Harward, Cro. Eliz. 349, 1 Rolle Abr. 98, 78 Eng. Reprint 597, assumpsit.

32. Riggs *v.* Thatcher, 1 Me. 68.

33. Folsom *v.* Gregory, 12 N. C. 233.

34. **Venue** generally see Venue.

35. Bogert *v.* Hildreth, 1 Cai. (N. Y.) 1.

36. **Pleading** generally see Pleading, 31 Cyc. 1.

37. Barns *v.* Williams, 2 Bibb (Ky.) 562, holding that an allegation that the prisoner has departed "contrary to the conditions of the bond" is insufficient as being only a legal conclusion.

Under the New York code a complaint is sufficient which states all the facts essential to the common-law action of debt and prays judgment for the amount of the judgment on which the prisoner was committed. McCreery *v.* Willett, 4 Bosw. 643 [*affirmed* in 9 Bosw. 600]; Renick *v.* Orser, 4 Bosw. 384. And a complaint which alleges that the sheriff "suffered and permitted such person to escape and go at large," states a voluntary, and not a negligent, escape. Loosey *v.* Orser, 4 Bosw. 391.

In Vermont Comp. St. p. 240, § 1, provides that debtors shall be discharged on oath, unless the court, on rendering judgment, decides that the cause of action accrued from the wilful and malicious act of the debtor, and that a minute of such decision be inserted in the execution. Hence a declaration must allege that there was such a minute, and pleading over will not cure the omission. Barber *v.* Chase, 3 Vt. 340.

38. Loosey *v.* Orser, 4 Bosw. (N. Y.) 391.

39. See Skinner *v.* White, 9 N. H. 204; Smith *v.* Hart, 1 Brev. (S. C.) 146.

an escape from the sheriff.[40] Where a commitment has been alleged, such allegation will be considered as including all facts necessary to a legal commitment.[41]

b. Plea or Answer. The allegation that the sheriff permitted the escape should be denied either generally or specifically,[42] or by the insertion of an averment in the answer which, if true, would be inconsistent, or in conflict, with such allegation.[43] Each defense in an answer which, by its terms, is declared to be "a further and distinct defense" must be complete in itself, and cannot be aided by a resort to other parts of the answer to which it contains no reference in terms or by necessary implication.[44] A plea of recaption or return should show a detention down to the commencement of the action, or a legal discharge from such detention.[45] In case discharge is pleaded, it must be shown how the discharge was made.[46]

c. Demurrer. An objection which goes merely to the form and not to the substance of a pleading must be raised by special demurrer and cannot be taken advantage of on general demurrer.[47]

6. Variance. In an action against a sheriff for an escape a variance as to the amount of debt alleged to be due by the prisoner is not material, and will not defeat the action.[48]

7. Evidence[49] — a. In General. An actual escape must be proved by plaintiff;[50] and it is competent for the sheriff to prove that there was no negligence on his part, that he used due means to retake the prisoner,[51] or that the prisoner voluntarily returned before suit brought.[52] In proving the insufficiency of bail, it is not necessary for plaintiff to show that he proceeded to judgment against the bail without success.[53] Evidence on the part of the plaintiff that the prisoner was seen at large walking in the street is *prima facie* sufficient to entitle him to recover.[54]

b. Admissibility Under Pleadings. A voluntary return cannot be shown under the general issue,[55] but a defense of fresh pursuit may be.[56] Likewise it may be shown on the general issue, in mitigation of damages, that the debtor had no property.[57] Where there is a plea of voluntary return to a single count for escape, plaintiff may, without a new assignment, prove a single escape on any day before suit brought, and defendant may then show a return into custody before suit, and apply his plea to such return;[58] but if plaintiff has not newly assigned, defendant cannot show a previous escape and return as a defense.[59]

8. Damages[60] — a. In General — (i) *In Action by Creditor Against Sheriff.* Where the escape is out of execution and the action is in debt against

40. Skinner *v.* White, 9 N. H. 204.
41. Atherton *v.* Gilmore, 9 N. H. 185.
42. Loosey *v.* Orser, 4 Bosw. (N. Y.) 391.
43. Loosey *v.* Orser, 4 Bosw. (N. Y.) 391.
In New York the statute requires an averment, whatever may be its words, which amounts in substance, to a clear and distinct allegation that the escape stated in the complaint "was made without the consent of the defendant." Loosey *v.* Orser, 4 Bosw. 391.
44. Loosey *v.* Orser, 4 Bosw. (N. Y.) 391.
45. Chambers *v.* Jones, 11 East 406; Meriton *v.* Briggs, 1 Ld. Raym. 39, 91 Eng. Reprint 922.
46. Catherwood *v.* Fitler, 2 Pa. L. J. 296, holding that where the sheriff pleaded that he had arrested defendant under a second writ and held him until discharged by due course of law, if defendant submitted to the second arrest and was discharged under the insolvent law, that fact would be a conclusive defense, but that if he did not submit to the second arrest, a mere discharge would not be a defense; and hence a plea not showing how defendant was discharged is defective.
47. State Treasurer *v.* Weeks, 4 Vt. 215; Burley *v.* Griffith, 8 Leigh (Va.) 442.
48. Smith *v.* Hart, 1 Beav. (S. C.) 146.
49. **Evidence** generally see Evidence, 16 Cyc. 821.
50. Johnston *v.* Macon, 4 Call (Va.) 367.
A letter written by the prisoner after escape, showing that he was beyond the reach of legal process, is admissible. Patterson *v.* Westervelt, 17 Wend. (N. Y.) 543.
51. Johnston *v.* Macon, 4 Call (Va.) 367.
Evidence held sufficient to show escape without consent of sheriff.— Didsbury *v.* Van Tassell, 12 N. Y. Suppl. 30.
52. Didsbury *v.* Van Tassell, 12 N. Y. Suppl. 30.
53. Young *v.* Hosmer, 11 Mass. 89.
54. Steward *v.* Kip, 7 Johns. (N. Y.) 165.
55. Howland *v.* Squier, 9 Cow. (N. Y.) 91.
56. Whicker *v.* Roberts, 32 N. C. 485.
57. Richardson *v.* Spencer, 6 Ohio 13.
58. Howland *v.* Squier, 9 Cow. (N. Y.) 91.
59. Howland *v.* Squier, 9 Cow. (N. Y.) 91.
60. **Damages** generally see Damages, 13 Cyc. 1.

the sheriff on his liability independently of his bond, plaintiff, on proving the escape, is entitled to recover the whole amount of the debt and costs,[61] and interest.[62] But where the action is case, only the special damages occasioned by the escape can be recovered.[63] The sheriff's sureties are liable only for the damages actually sustained.[64] Where a state statute makes a sheriff civilly liable for the safe-keeping of prisoners, and any party aggrieved may sue on his bond in the name of the state, the United States may recover expenses of the arrest and keeping of the prisoner, and money expended in recapturing him.[65]

(II) *In Action by Creditor Against County.* In an action on the case against a county for the escape of an execution debtor by reason of defects in the jail, the special damage which plaintiff has sustained by his escape is the amount to be recovered;[66] and such damage may amount to the whole debt with interest and costs.[67]

(III) *In Action by Sheriff Against County.* The damages recovered against a sheriff for an escape in consequence of there being no jail is the measure of damages in an action by the sheriff against the county commissioners for not providing a jail.[68]

b. Mitigation of Damages. In an action on the case for an escape the defendant may show, in mitigation of damages, that the prisoner was insolvent or wholly destitute of property;[69] and this whether the escape was voluntary or negligent,[70] although general reputation of insolvency is not admissible.[71] But where the action is debt, or in the nature of debt, the defendant cannot show the insolvency of the debtor in mitigation of damages.[72]

61. *Indiana.*— State *v.* Hamilton, 33 Ind. 502.

Kentucky.— Johnson *v.* Lewis, 1 Dana 182.

Maine.— Fullerton *v.* Harris, 8 Me. 393.

Massachusetts.— Whitehead *v.* Varnum, 14 Pick. 523.

North Carolina.— Lash *v.* Ziglar, 27 N. C. 702.

Pennsylvania.— Saunders *v.* Smith, 6 Pa. Co. Ct. 257.

England.—Robertson *v.* Taylor, 2 Chit. 454, 18 E. C. L. 733.

See 40 Cent. Dig. tit. "Prisons," § 44.

62. Whitehead *v.* Varnum, 14 Pick. (Mass.) 523 (holding that interest runs only from the date of the writ, and not from the time of the escape); Lash *v.* Ziglar, 27 N. C. 702; Brown *v.* Littlefield, 1 Wend. (N. Y.) 398; Rawson *v.* Dole, 2 Johns. (N. Y.) 454; Saunders *v.* Smith, 6 Pa. Co. Ct. 257.

Where an action for an escape is stayed to allow the sheriff time to bring his action on the bond given for the jail liberties, interest is not recoverable of the sheriff for the time of such stay. McIntyre *v.* Woods, 5 Johns. (N. Y.) 357.

63. Hotchkiss *v.* Whitten, 71 Me. 577; Lovell *v.* Bellows, 7 N. H. 375; Spafford *v.* Goodell, 22 Fed. Cas. No. 13,197, 3 McLean 97, holding that this injury is measured by the amount of property possessed by the prisoner, not exceeding the sum named in the execution.

The jury have a discretion in assessing the damages which plaintiff has sustained, and are not bound to find the whole debt. Chase *v.* Keyes, 2 Gray (Mass.) 214; Burrell *v.* Lithgow, 2 Mass. 526; Russell *v.* Turner, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254; Rawson *v.* Dole, 2 Johns. (N. Y.) 454; Bonafous *v.* Walker, 2 T. R. 126. But see Seymour *v.* Harvey, 8 Conn. 63; Bowen *v.* Huntington, 3 Conn. 423, in both of which cases it is held that the whole amount of the debt and costs may be recovered, although plaintiff declares in case and not in debt.

64. State *v.* Johnson, 1 Ind. 158; Willey *v.* Eure, 53 N. C. 320; Governor *v.* Matlock, 8 N. C. 425.

65. State *v.* Hill, 60 Fed. 1005, 9 C. C. A. 326, 24 L. R. A. 170.

66. Williams *v.* New Haven County, 2 Root (Conn.) 23; Dutton *v.* Litchfield County, 1 Root (Conn.) 505; Murray *v.* Bishop, 1 Root (Conn.) 357; Dennie *v.* Middlesex County, 1 Root (Conn.) 278; Hawley *v.* Litchfield County, 1 Root (Conn.) 155; Staphorse *v.* New Haven County, 1 Root (Conn.) 126.

67. Hubbard *v.* Shaler, 2 Day (Conn.) 195.

68. Brown County Com'rs *v.* Butt, 2 Ohio 348. *Compare* Campbell *v.* Hampson, 1 Ohio 119.

69. Nye *v.* Smith, 11 Mass. 188; Smith *v.* Knapp, 30 N. Y. 581; Loosey *v.* Orser, 4 Bosw. (N. Y.) 391; Russell *v.* Turner 7 Johns. (N. Y.) 189, 5 Am. Dec. 254; Patterson *v.* Westervelt, 17 Wend. (N. Y.) 543; Hootman *v.* Shriner, 15 Ohio St. 43; Richardson *v.* Spencer, 6 Ohio 13; Shuler *v.* Garrison, 5 Watts & S. (Pa.) 455; Smith *v.* Hart, 1 Brev. (S. C.) 146.

70. Brooks *v.* Hoyt, 6 Pick. (Mass.) 468; Hootman *v.* Shriner, 15 Ohio St. 43.

71. Fairchild *v.* Case, 24 Wend. (N. Y.) 381.

72. State *v.* Hamilton, 33 Ind. 502; Hoagland *v.* State, 22 Ind. App. 204, 40 N. E. 931,

9. Trial.[73] The general rules relating to the trial of civil actions generally are applicable to actions for escape.[74]

10. Judgment[75] **and Enforcement Thereof.**[76] So far as the judgment and its enforcement is concerned, the general rules on the subject apply.[77] Since a sheriff is answerable only for the original judgment, for the non-payment of which the prisoner was committed, he should have the benefit of any conditions upon which such judgment was payable, and the judgment against him in such a case should not be for a sum payable absolutely.[78] Nor can the sheriff be committed to jail for failure to pay the judgment rendered against him.[79] The court will stay execution on the judgment to allow the sheriff time to bring his action on the bond taken for the jail liberties.[80]

VII. Compensation and Reimbursement For Maintenance and Care of Prisoners.[81]

A. Right to Compensation and Reimbursement — 1. In General. Express provision is made by statute for the maintenance and care of prisoners in England,[82] in Canada,[83] and in the United States;[84] and these statutes must be looked to primarily to determine the right of the sheriff or other officers to particular compensation for such maintenance and care and the amount thereof, and for expenses incurred therein,[85] and the liability of the state, county, or a

72 Am. St. Rep. 298; McCreery *v.* Willet, 9 Bosw. (N. Y.) 600, 23 How. Pr. 129.

73. Trial generally see Trial.

74. See cases cited *infra*, this note.

Findings.— The jury need not specially find that an escape was with the consent or through the negligence of the sheriff. Burley *v.* Griffith, 8 Leigh (Va.) 442; Long *v.* Palmer, 16 Pet. (U. S.) 65, 10 L. ed. 888.

Instructions.— In an action against a jail keeper for an escape by refusing to receive a person whose discharge had been refused by a judge, but who was accompanied by an officer, and had no writ showing that he was an insolvent debtor, an instruction that the surrender was not valid is not reversible error. Saunders *v.* Perkins, 140 Pa. St. 102, 21 Atl. 257. In an action for the escape of a prisoner arrested under a void process, the court should instruct the jury that it is void, or should exclude it from the jury altogether. Gorton *v.* Frizzell, 20 Ill. 291.

75. Judgment generally see Judgments, 23 Cyc. 623.

76. Execution generally see Executions, 17 Cyc. 878.

77. See Judgments, 23 Cyc. 623.

78. Hoagland *v.* State, 22 Ind. App. 204, 40 N. E. 931, 72 Am. St. Rep. 298.

79. Hoagland *v.* State, 22 Ind. App. 204, 40 N. E. 931, 72 Am. St. Rep. 298.

80. McIntyre *v.* Woods, 5 Johns. (N. Y.) 357.

81. Compensation of prison officers generally see *supra*, III, D.

Compensation of sheriffs generally see Sheriffs and Constables.

82. See Mews *v.* Reg., 8 App. Cas. 339, 15 Cox C. C. 185, 47 J. P. 310, 52 L. J. M. C. 57, 48 L. T. Rep. N. S. 1, 31 Wkly. Rep. 385; Mullins *v.* Surrey County Treasurer, 7 App. Cas. 1, 15 Cox C. C. 9, 46 J. P. 276, 51 L. J. Q. B. 145, 45 L. T. Rep. N. S. 625, 30 Wkly. Rep. 157; Prison Com'rs *v.* Liverpool, 5 Q. B. D. 332, 44 J. P. 616, 49 L. J. Q. B. 431, 42 L. T. Rep. N. S. 838, 29 Wkly. Rep. 6.

83. See Wentworth County *v.* Hamilton, 34 U. C. Q. B. 585.

84. See the statutes of the several states and the cases cited in the notes following.

85. *Arizona.*— Avery *v.* Pima County, 7 Ariz. 26, 60 Pac. 702.

Indiana.— Carroll County *v.* Gresham, 101 Ind. 53.

Michigan.— Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024.

Missouri.— State *v.* Wofford, 116 Mo. 220, 22 S. W. 486.

Ohio.— Matter of Lease, 4 Ohio Cir. Ct. 3, 2 Ohio Cir. Dec. 386.

Virginia.— Price *v.* Smith, 93 Va. 14, 24 S. E. 474.

Construction of particular statutes see Field *v.* Putman, 22 Ga. 93; La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346]; State *v.* Clark, 170 Mo. 67, 70 S. W. 489; Kyd *v.* Gage County, 38 Nebr. 131, 56 N. W. 799; Locke *v.* Belknap County, 71 N. H. 208, 51 Atl. 914; Morris County *v.* Freeman, 44 N. J. L. 631; People *v.* Livingston County, 89 N. Y. App. Div. 152, 85 N. Y. Suppl. 284; Kelly *v.* Multnomah County, 18 Oreg. 356, 22 Pac. 1110; Godshalk *v.* Northampton County, 71 Pa. St. 324 (holding that the act of 1865, authorizing sheriffs, etc., to collect "20 per cent in addition to the fees allowed by law," did not authorize such addition to the amount allowed for boarding prisoners. See *infra*, VII, A, 2, c. Knox County *v.* Fox, 107 Tenn. 724, 65 S. W. 404; Price *v.* Smith, 93 Va. 14, 24 S. E. 474; Doty *v.* Sauk County, 93 Wis. 102, 67 N. W. 10.

Custody and care pending preliminary examination.— Under Mo. Laws (1891), p. 146, § 11, providing that the sheriff, marshal, or other officer who shall have in custody or under his charge any person "undergoing

municipality therefor.[86] The statutes sometimes themselves fix the compensation and allow for expenses,[87] and sometimes they leave it to be fixed by the county board, county court, or some other authority.[88] In determining the right to compensation and reimbursement, and the liability of the county or other body therefor, the general rule is that the sheriff takes the office with all its burdens, and subject to the power of the legislature to add new duties, and he can recover no other compensation than that which the law allows;[89] and the same is true of the warden of the penitentiary.[90] A court has no authority to direct a jailer not to receive a prisoner convicted of crime, except upon condition of bond being given for the prison charges; nor can the jailer require bond for their payment, except in civil cases.[91] Where the sheriff has contracted with the county to keep all the prisoners for a gross sum payable monthly, relinquishing to the county all fees allowed by law for such services, he cannot repudiate the contract, after it has been observed by the parties for several years, and recover the excess of the fees over the stipulated compensation, on the ground that the parties, in making the contract, acted under a mistake as to the constitutionality of the statute.[92]

2. Particular Services and Expenses[93]— a. In General. Where the statute merely allows a certain sum for the boarding of each prisoner, or allows the actual cost of boarding, the sheriff is not entitled to any additional compensation for services in keeping the jail or looking after the prisoners, as this is a part of his general duty.[94] He is entitled, however, to compensation or reimbursement for

examination preparatory to commitment" shall, for transporting, safe-keeping, and maintaining such person, receive a certain amount for every day he may have such person under his charge, a county marshal is not entitled to such fee where a prisoner is in his custody as jailer, committed under authority of Rev. St. (1889) §§ 4028, 4030, pending a continuance of his examination. State *v.* Wofford, 116 Mo. 220, 22 S. W. 486.

Maintenance and care of United States prisoners in county jails see Avery *v.* Pima County, 7 Ariz. 26, 60 Pac. 702; *In re* Kays, 35 Fed. 288. And see *supra*, II, A, 2.

Repeal of statutes see Fayette County *v.* Faires, 44 Tex. 514. And see, generally, Statutes.

86. See *infra*, VII, B, 1.

87. See Kyd *v.* Gage County, 38 Nebr. 131, 56 N. W. 799; and other cases cited in the notes following.

88. See La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346]; Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024; Fayette County *v.* Faires, 44 Tex. 514. See also *infra*, VII, C.

89. *Alabama.*— State *v.* Brewer, 59 Ala. 130.

Arkansas.— Hare *v.* Sebastian County, 35 Ark. 90.

California.— Stockton *v.* Shasta County, 11 Cal. 113.

Colorado.— Larimer County *v.* Bransom, 4 Colo. App. 274, 35 Pac. 750.

Illinois.— People *v.* Foster, 133 Ill. 496, 23 N. E. 615; Goff *v.* Douglas County, 132 Ill. 323, 24 N. E. 60 [*affirming* 32 Ill. App. 145].

Indiana.— Carroll County *v.* Gresham, 101 Ind. 53; Bynum *v.* Greene County, 100 Ind. 90.

Kentucky.— Lexington *v.* Gentry, 116 Ky. 528, 76 S. W. 404, 25 Ky. L. Rep. 738; McCracken County *v.* Edwards, 7 Ky. L. Rep. 511.

Michigan.— Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024.

Ohio.— Matter of Lease, 4 Ohio Cir. Ct. 3, 2 Ohio Cir. Dec. 386.

Wisconsin.— Parsons *v.* Waukesha County, 83 Wis. 288, 53 N. W. 507; Hartwell *v.* Waukesha County Sup'rs, 43 Wis. 311.

Wyoming.— Sweetwater County *v.* Johnson, 2 Wyo. 259.

See 40 Cent. Dig. tit. "Prisons," § 47 *et seq.*

90. State *v.* Wallichs, 15 Nebr. 457, 19 N. W. 641, holding that under Comp. St. c. 86, § 12, fixing the salary of the warden of the state penitentiary at fifteen hundred dollars, and Cr. Code, § 514, making it his duty to return convicts for retrial, neither he nor any of his subordinates in the employment of the state at a fixed salary will be entitled to any more than reimbursement for actual expenses in making such return.

91. *In re* De Comcey, 22 N. H. 368.

92. Collier *v.* Montgomery County, 103 Tenn. 705, 54 S. W. 989.

93. Conveying prisoner to and from court see Sheriffs and Constables.

Fees for commitment and discharge see Sheriffs and Constables.

94. *Indiana.*— Bynum *v.* Greene County, 100 Ind. 90 [*following* Sexson *v.* Greene County, 101 Ind. 600; Alexander *v.* Monroe County, 101 Ind. 599; Benton County *v.* Harman, 101 Ind. 551].

Iowa.— McDonald *v.* Woodbury County, 48 Iowa 404; Grubb *v.* Louisa County, 40 Iowa 314.

Kansas.—Republic County Com'rs *v.* Kindt, 16 Kan. 157; Atchison County Com'rs *v.* Tomlinson, 9 Kan. 167.

Ohio.— Matter of Lease, 4 Ohio Cir. Ct. 3, 2 Ohio Cir. Dec. 386.

Wisconsin.— Doty *v.* Sauk County, 93 Wis.

property purchased for the county and necessary for use in the jail,[95] and, as a general rule, for fuel,[96] for necessary special expenses in heating the jail,[97] for necessary clothing furnished prisoners and repair thereof,[98] for washing for them,[99] and for taking convicts to the penitentiary.[1] As a rule the county is liable under the statutes, and the sheriff is entitled to reimbursement, for the necessary expenses of medical and nurse attendance on sick prisoners.[2] And where it is necessary to remove a dead body to prevent infection, the charge for such service must be paid by the county.[3] If a prisoner escapes, the sheriff is not entitled as a matter

102, 67 N. W. 10; Bell *v.* Fon du Lac County, 53 Wis. 433, 10 N. W. 522.

See 40 Cent. Dig. tit. "Prisons," § 47 *et seq.*

95. Bynum *v.* Greene County, 100 Ind. 90 (holding, however, that this does not include things necessarily used and consumed in boarding prisoners, as these things are to be deemed included in, and paid for, by the *per diem* allowed for boarding); Marion County *v.* Reissner, 66 Ind. 568; Kelly *v.* Multnomah County, 18 Oreg. 356, 22 Pac. 1110.

Illustrations.— Thus it has been held that he is entitled to recover for the price of brooms, mops, and candles (Marion County *v.* Reissner, 66 Ind. 568; Marion County *v.* Reissner, 58 Ind. 260); and for necessary bedding (La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346]; Hendricks *v.* Chautauqua County, 35 Kan. 483, 11 Pac. 450; Kelly *v.* Multnomah County, 18 Oreg. 356, 22 Pac. 1110).

96. *Illinois.*— La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346].

Indiana.— Marion County Com'rs *v.* Reissner, 58 Ind. 260, holding that fuel furnished by him is not part of the board of prisoners.

Kansas.—Hendricks *v.* Chautauqua County, 35 Kan. 483, 11 Pac. 450.

Oregon.— Kelly *v.* Multnomah County, 18 Oreg. 356, 22 Pac. 1110.

Pennsylvania.— Richardson *v.* Clarion County, 14 Pa. St. 198.

See 40 Cent. Dig. tit. "Prisons," § 47 *et seq.*

Contra.— McCracken County *v.* Edwards, 7 Ky. L. Rep. 511 (where the statute allowed fifty cents per day for "keeping, dieting and providing for each prisoner"); Price *v.* Smith, 93 Va. 14, 24 S. E. 474 (holding that fuel was included in the allowance for boarding).

97. Vigo County *v.* Weeks, 130 Ind. 162, 29 N. E. 776, holding that, under Rev. St. § 6015, which provides that "there shall be established and kept in every county by authority of the board of county commissioners, and at the expense of the county, a prison for the safe keeping of prisoners lawfully committed," where the county board placed in the jail a steam-heating apparatus, which for its operation required a skilled engineer, such engineer, although employed by the sheriff, must be paid by the county outside of the sheriff's compensation.

98. La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346].

99. La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346], amount actually paid out for such washing. *Contra,* Connelly *v.* Dakota County, 35 Minn. 365, 29 N. W. 1, holding that an allowance of four dollars per week for "boarding prisoners" was intended to cover washing for them.

1. People *v.* Foster, 133 Ill. 496, 23 N. E. 615; Taylor *v.* Adams, 66 N. C. 338. See, generally, SHERIFFS AND CONSTABLES.

2. *Alabama.*— Malone *v.* Escambia County, 116 Ala. 214, 22 So. 503, by statute. *Contra,* where there was no statute. Mitchell *v.* Tallapoosa County, 30 Ala. 130.

Arkansas.— Hart *v.* Howard County, 44 Ark. 560.

Illinois.— La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346].

Indiana.— Lamar *v.* Pike County, 4 Ind. App. 191, 30 N. E. 912.

Kansas.—Hendricks *v.* Chautauqua County, 35 Kan. 483, 11 Pac. 450; Roberts *v.* Pottawatomie County Com'rs, 10 Kan. 29.

New Hampshire.— Perkins *v.* Grafton County, 67 N. H. 282, 29 Atl. 541, by statute.

See 40 Cent. Dig. tit. "Prisons," § 47 *et seq.*

Contra.— Connell *v.* Davidson County, 2 Head (Tenn.) 188, holding also that the power conferred on jail inspectors, "to make rules and regulations for the preservation of health and decorum of prisoners," did not authorize them to charge the county with physicians' bills for medical attendance to the prisoners.

For the sheriff's own personal attendance on sick prisoners he is not entitled to compensation. La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346].

Miss. Code (1892), § 4139, which provides that the sheriffs, with the concurrence of the circuit judge or a justice of the peace, may procure medical aid for a prisoner confined in jail, the cost to be paid by the county if the prisoner be unable to pay, has no application where a prisoner, shot by a deputy sheriff while attempting to escape, is carried to his mother's house, and there treated by a physician procured by the sheriff at the suggestion of the circuit judge. Gray *v.* Coahoma County, 72 Miss. 303, 16 So. 903.

Removal and care of prisoner having contagious disease see Matter of Boyce, 43 Misc. (N. Y.) 297, 88 N. Y. Suppl. 841.

3. Slotts *v.* Rockingham County, 53 N. H. 598.

of right, to demand reimbursement for expenses incurred in recapturing him, or compensation for services performed in effecting the recapture.[4]

b. Jailer, Turnkeys, and Guards. In the absence of statutory provision to the contrary, the sheriff's salary and fees cover his services as jailer, and he is not entitled to recover additional compensation therefor.[5] If he employs a jailer or turnkey, the expense of his services and board must be borne by him and not by the county,[6] unless a statute provides otherwise.[7] There are cases, however, in which the county has been held liable, even in the absence of a statute, for the expense of extra guards necessary to keep a prisoner safely;[8] and such expense is often allowed by statute.[9] The jailer cannot himself be appointed or act as guard and claim compensation therefor.[10]

c. Board of Prisoners.[11] For the boarding of prisoners the statutes allow either a certain sum per day or week for each prisoner, or the actual cost of their board, or leave it to the board of commissioners or some court to fix the amount

4. Martin County *v.* Pipher, 98 Ind. 124.

5. Larimer County *v.* Bransom, 4 Colo. App. 274, 35 Pac. 750; McDonald *v.* Woodbury County, 48 Iowa 404.

6. *Arkansas.*— Hare *v.* Sebastian County, 35 Ark. 90. See also Jefferson County *v.* Hudson, 22 Ark. 595.

Colorado.— Larimer County *v.* Bransom, 4 Colo. App. 274, 35 Pac. 750.

Illinois.— Goff *v.* Douglas County, 132 Ill. 323, 24 N. E. 60 [*affirming* 32 Ill. App. 145]; Union County *v.* Patton, 63 Ill. 458; Seibert *v.* Logan County, 63 Ill. 155.

Iowa.— McDonald *v.* Woodbury County, 48 Iowa 404.

Oregon.— Crossen *v.* Wasco County, 6 Oreg. 215.

Wisconsin.— Hartwell *v.* Waukesha County Sup'rs, 43 Wis. 311.

Wyoming.— Sweetwater County *v.* Johnson, 2 Wyo. 259.

Compare State *v.* Brewer, 59 Ala. 130.

See 40 Cent. Dig. tit. "Prisons," § 47 *et seq.*

7. *Illinois.*— People *v.* Foster, 133 Ill. 496, 23 N. E. 615.

Louisiana.— Parker *v.* New Orleans, 15 La. Ann. 43.

Montana.— Lloyd *v.* Silver Bow County, 15 Mont. 433, 39 Pac. 457; Platner *v.* Madison County, 5 Mont. 458, 6 Pac. 365.

Nebraska.— Gage County *v.* Kyd, 38 Nebr. 164, 56 N. W. 964; Kyd *v.* Gage County, 38 Nebr. 131, 56 N. W. 799.

Nevada.— Randall *v.* Lyon County, 20 Nev. 35, 14 Pac. 583.

South Dakota.— Plunkett *v.* Lawrence County, 18 S. D. 450, 101 N. W. 35.

See 40 Cent. Dig. tit. "Prisons," § 47 *et seq.*

Compensation not allowed.— It has been held, however, that a statute authorizing the sheriff to appoint a jailer, for whose acts he shall be responsible, does not entitle the sheriff to recover compensation for the jailer's services (Crossen *v.* Wasco County, 6 Oreg. 215); and that a statute providing that "for any service rendered by an officer wherein no fees are allowed by this act, nor any other act or provision by law, such officer shall be allowed a reasonable compensation therefor," does not apply to payment for services of a jailer hired by the sheriff (Sweetwater County *v.* Johnson, 2 Wyo. 259).

Necessity.— Under a statute providing that the sheriff shall have a jailer and as many guards as the county commissioners may deem necessary, who shall receive such compensation as the county commissioners may allow, the sheriff, to entitle him to an allowance for *per diem* paid by him for the services of a jailer, without previous authority for employing him, must show that the services of the jailer were necessary for the care and custody of the jail or of prisoners therein. Platner *v.* Madison County, 5 Mont. 458, 6 Pac. 665.

8. Baltimore *v.* Howard County Com'rs, 61 Md. 326, holding that if the circumstances of the case are such as to call for extra care in guarding a prisoner and keeping him safely to answer the charge against him, and in the opinion of the sheriff the unguarded jail is not sufficient for that purpose, it is his duty to guard it, and the expense of such guard must be borne, not by the sheriff personally, but by the community for whose protection the prisoner is confined. See also La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346]; Hart *v.* Vigo County, 1 Ind. 309.

9. Jefferson County *v.* Hudson, 22 Ark. 595; Lloyd *v.* Silver Bow County, 15 Mont. 433, 39 Pac. 457; Dakota County *v.* Borowsky, 67 Nebr. 317, 93 N. W. 686; James *v.* Lincoln County Com'rs, 5 Nebr. 38.

Where the sheriff has the custody of two prisoners from different counties, for safekeeping, the compensation is no greater than if they came from the same county. James *v.* Lincoln County Com'rs, 5 Nebr. 38.

10. Vinsant *v.* Auditor, 1 Bush (Ky.) 72, holding that it is the official duty of a jailer to keep prisoners safely without a guard, that if the jailer be directed by order of the court to summon a guard to assist him, it is his official duty to superintend the guard so summoned, and that he cannot summon himself, or be legally appointed by the court, to act as guard, and that if he does so act, he is not entitled to compensation for his services.

11. **Right of de facto jailer to compensation** see *infra*, VII, A, 3, b.

to be allowed.[12] Where the statute makes the county liable for the maintenance of prisoners and requires the sheriff to board them, without fixing the compensation, he is entitled to recover the actual cost of boarding them,[13] but not for his personal services or for profits in his favor.[14] An act increasing the "fees" of county officers a certain per cent does not increase the compensation allowed the sheriff for boarding prisoners.[15] Where the statute fixes the amount to be allowed for boarding prisoners it cannot be changed, nor the sheriff deprived thereof, by the county commissioners.[16] If the circumstances are such that a prisoner in the custody of a sheriff cannot be confined in the jail, the county is liable for necessaries furnished him elsewhere.[17]

d. Insane Prisoners.[18] Since a court has no authority to commit insane prisoners as such to a jail, the presumption is that they were committed as prisoners for some offense, and therefore the sheriff is entitled to no extra compensation for their care.[19]

e. Change of Compensation. The state constitutions often prohibit an increase or diminution of the salary of a public officer during his term of office;[20] but it has been held that an increase or reduction in the allowance for boarding of prisoners does not come within such a provision,[21] unless the constitution uses a broader

12. *Arkansas.*— Jefferson County *v.* Hudson, 22 Ark. 595.

Idaho.— Mombert *v.* Bannock County, 9 Ida. 470, 75 Pac. 239.

Louisiana.— Parker *v.* New Orleans, 15 La. Ann. 43.

Minnesota.— Connelly *v.* Dakota County, 35 Minn. 365, 29 N. W. 1.

Montana.— Lloyd *v.* Silver Bow County, 7 Mont. 562, 19 Pac. 217, holding that under Comp. St. § 1075, providing that the fees allowed the sheriff for the board of prisoners shall be, for five or under, one dollar per day for each prisoner, and for over five, eighty cents per day each, the sheriff is entitled, when the number exceeds five, to receive for the five prisoners one dollar a day each, and for the excess eighty cents each.

Nebraska.— Lancaster County *v.* Hoagland, 8 Nebr. 36.

New Hampshire.— Locke *v.* Belknap County, 71 N. H. 208, 51 Atl. 914.

New York.— People *v.* Livingston County, 89 N. Y. App. Div. 152, 85 N. Y. Suppl. 284; People *v.* Saratoga County, 45 N. Y. App. Div. 42, 60 N. Y. Suppl. 1122.

Pennsylvania.— McCormick *v.* Fayette County, 150 Pa. St. 190, 24 Atl. 667 (holding that the act of Feb. 14, 1867 (Pamphl. Laws 199), providing that sheriffs in certain counties shall be entitled to a sum not exceeding fifty cents per day for boarding each and every prisoner confined in the jail of said county, is *in pari materia* with the act of April 11, 1856 (Pamphl. Laws 314), providing that sheriffs shall receive such allowance for boarding prisoners as may be fixed by court, not exceeding twenty-five cents per day for each prisoner, and is to be construed with it as granting to the sheriffs such sums not exceeding fifty cents as may be allowed by the court); Strine *v.* Northumberland County, 2 Walk. 198; McNees *v.* Armstrong County, 20 Pa. Co. Ct. 105.

South Carolina.— Gilreath *v.* Greenville County, 63 S. C. 75, 40 S. E. 1028; Williams *v.* Kershaw County, 56 S. C. 400, 34 S. E. 694.

Tennessee.—Knox County *v.* Fox, 107 Tenn. 724, 65 S. W. 404.

Wisconsin.— Deissner *v.* Waukesha County, 95 Wis. 588, 70 N. W. 668; Bell *v.* Fond du Lac County, 53 Wis. 433, 10 N. W. 522.

Wyoming.—Albany County *v.* Boswell, 1 Wyo. 292.

See 40 Cent. Dig. tit. "Prisons," § 47.

Constitutionality.— A law limiting the sum allowed a sheriff for boarding prisoners is not unconstitutional. Strine *v.* Northumberland County, 2 Walk. (Pa.) 198.

Fraction of day.— Notwithstanding the fiction that the law knows no fraction of a day, it has been held that where the lawful charge for board is sixty cents a day, only twenty cents can be recovered for one third of a day's board. Pressley *v.* Marion County, 80 Ind. 45. In an earlier case the opinion was expressed that two days' board could not be charged for a prisoner who was placed in jail a short time before midnight and discharged a short time after that hour. Indianapolis *v.* Parker, 31 Ind. 230.

13. Bell *v.* Fond du Lac County, 53 Wis. 433, 10 N. W. 522, holding also that the county board cannot bind the sheriff by a resolution fixing beforehand the cost of such board.

14. Doty *v.* Sauk County, 93 Wis. 102, 67 S. W. 10; Bell *v.* Fond du Lac County, 53 Wis. 433, 10 N. W. 522.

15. Feagin *v.* Comptroller, 42 Ala. 516. See also Godshalk *v.* Northampton County, 71 Pa. St. 324.

16. Albany County *v.* Boswell, 1 Wyo. 292.

17. Miller *v.* Dickinson County, 68 Iowa 102, 26 N. W. 31, where a prisoner had been shot while resisting the officer arresting him, and his condition did not permit his confinement in jail.

18. See, generally, INSANE PERSONS, 22 Cyc. 1104.

19. Carroll County *v.* Gresham, 101 Ind. 53.

20. See OFFICERS, 29 Cyc. 1427.

21. Dane *v.* Smith, 54 Ala. 47.

term than "salary." [22] A constitutional prohibition of any law increasing or diminishing the salary or emoluments of a public officer during his term is a limitation on the power of the legislature alone, and does not prevent the court from making changes in the emoluments of the sheriff as authorized by the statute in force at the time of his election.[23] Under a statute reducing the compensation of sheriffs for boarding prisoners in jail but declaring that it shall not apply to any sheriff in office at the time of the adoption of the constitution then in force, but shall be in operation after the expiration of the terms of such sheriffs, a sheriff who has been appointed since the passage of the act, to fill the unexpired term of one who was in office at the time of its passage, cannot claim the benefit of the proviso.[24]

3. Persons Entitled — a. In General. The sheriff, and not his deputy or jailer, is entitled to receive and collect the fees and other compensation for services as jailer, and for boarding and guarding prisoners in the jail,[25] unless the statute provides otherwise.[26] Where, by law, an allowance is made to a sheriff for the maintenance and care of prisoners, an individual who furnishes such care and maintenance must look to the sheriff for his pay, and not to the county.[27]

b. De Facto Jailer. It has been held that one who acts as jailer under color of title is entitled to the amount allowed him by the court for boarding prisoners, although he might not be entitled to fees for committing and releasing prisoners.[28]

4. Forfeiture of Compensation. Where, through negligence or misconduct, persons employed to guard prisoners have allowed them to escape, they are not entitled to full compensation,[29] and it has also been held that a jailer who allows prisoners to escape forfeits his fees for keeping them.[30]

B. Who Liable [31] **— 1. State, County, City, or Town.** In England, by an early statute, the expense of supporting prisoners in the common jails was made a charge upon the respective shires.[32] At present, under the Prison Act of 1877, the expenses incurred in respect of the prisons, to which the act applies, and of the prisoners therein, are no longer chargeable to the county, but are to be defrayed out of moneys provided for that purpose by parliament.[33] In the United States the statutes of the various states upon the subject impose the liability for the maintenance and care of prisons, according to the circumstances, upon the state,[34] the county,[35]

22. See Officers, 29 Cyc. 1428, text and note 72. *Compare* McDaniel *v.* Armstrong, 5 Pennew. (Del.) 240, 59 Atl. 865, holding, under the circumstances, that there was no violation of the provision.

23. McCormick *v.* Fayette County, 150 Pa. St. 190, 24 Atl. 667.

24. *Ex p.* Mason, 55 Ala. 262, construing Sess. Acts (1876–1877), p. 65.

25. Atchison County *v.* Tomlinson, 9 Kan. 167; Dakota County *v.* Borowsky, 67 Nebr. 317, 93 N. W. 686. The mere keeper of a jail cannot recover of the county the fees of the sheriff for keeping, dieting, and discharging prisoners. Union County *v.* Patton, 63 Ill. 458. *Compare* Lloyd *v.* Silver Bow County, 15 Mont. 433, 39 Pac. 457.

26. Moutier *v.* Stumpe, 39 Mo. App. 161; Locke *v.* Belknap, 71 N. H. 208, 51 Atl. 914.

27. Mombert *v.* Bannock County, 9 Ida. 470, 75 Pac. 239; Hendricks *v.* Chautauqua County, 35 Kan. 483, 11 Pac. 450.

28. Atchison *v.* Lucas, 83 Ky. 451. *Compare*, however, Officers, 29 Cyc. 1393.

29. Judge Hickman County Ct. *v.* Moore, 2 Bush (Ky.) 108.

30. Saxon *v.* Boyce, 1 Bailey (S. C.) 66; McCracken *v.* State, 8 Yerg. (Tenn.) 171.

31. On imprisonment for debt see Executions, 17 Cyc. 1514.

32. See St. 14 Eliz. c. 5.

33. See Middlesex County *v.* Reg., 9 App. Cas. 757, 15 Cox C. C. 542, 48 J. P. 104, 53 L. J. Q. B. 505, 51 L. T. Rep. N. S. 513, 33 Wkly. Rep. 49; Mews *v.* Reg., 8 App. Cas. 339, 15 Cox C. C. 185, 47 J. P. 310, 52 L. J. M. C. 57, 48 L. T. Rep. N. S. 1, 31 Wkly. Rep. 385; Mullins *v.* Surrey County Treasurer, 7 App. Cas. 1, 15 Cox C. C. 9, 46 J. P. 276, 51 L. J. Q. B. 145, 45 L. T. Rep. N. S. 625, 30 Wkly. Rep. 157; Prison Com'rs *v.* Liverpool, 5 Q. B. D. 332, 44 J. P. 616, 49 L. J. Q. B. 431, 42 L. T. Rep. N. S. 838, 29 Wkly. Rep. 6.

34. See Orleans County *v.* State Auditor, 65 Vt. 492, 27 Atl. 197.

35. See Ransom *v.* Gentry County, 48 Mo. 341. And cases cited *infra*, this section.

In Louisiana a parish has no right to charge for the mere use of its jail to incarcerate prisoners sent from an adjacent parish under an order of the district judge, issued under Rev. St. § 2839, where it has, through its authorized agent, given consent to the use, and has acquiesced by that consent in the execution of the order. Caddo Parish *v.* Bossier Parish, 42 La. Ann. 939, 8 So. 533.

In Tennessee, since Shannon Code, § 7370, requires the sheriff, as custodian of the jail, to receive all prisoners committed by authority of law, he is entitled to compensation from the county for the board of prisoners

or city, town, or other municipality.[36] In no case can the state be made liable for expenses connected with jails merely by implication.[37] The county is generally liable for the care and maintenance of its own prisons and of prisoners confined therein for offenses committed within the county.[38] The county is also liable, as a rule, to the sheriff for the board of prisoners committed under authority of a statute, in pursuance of a city, village, or town ordinance, although it may be entitled to reimbursement from the city, village, or town.[39] If a city or town has no jail of its own, it is generally liable for the expense of keeping its prisoners in the county jail.[40] If a county refuses to pay for the necessary guard-

sentenced by a justice to labor in the workhouse during the time they are kept in the jail from the time of their sentence until removed to the workhouse by the superintendent, commitments having been issued by the justice to the sheriff to take charge of the prisoners during such time, the justice not being required to take them to the workhouse. Knox County *v.* Fox, 107 Tenn. 72, 65 S. W. 404.

36. See Kokomo *v.* Harness, 35 Ind. App. 384, 74 N. E. 270; Adams *v.* Hampden County, 13 Gray (Mass.) 439; Watson *v.* Cambridge, 18 Pick. (Mass.) 470; and cases cited *infra*, this section.

In Kentucky, under St. (1899) § 1730, fixing the liability of a city for the keep of prisoners confined for a breach of its by-laws or ordinances, and for the violation of a statute where the city gets the benefit of a fine, and section 3155, providing that all fines and penalties collected in a police court shall be for the benefit of the city, a city is liable for the keep of all prisoners convicted in the police court where a fine is imposed and the prisoners are sent to the county jail, although section 3151 forbids prisoners, for whose maintenance the city would be liable, from being confined except in the city workhouse. A county jailer cannot refuse to receive prisoners committed to his custody by a judgment of the police court of a city, where the court had jurisdiction to try the offense of the person charged therewith, although the commitment should have been to the city workhouse. Lexington *v.* Gentry, 116 Ky. 528, 76 S. W. 404, 25 Ky. L. Rep. 738. Under section 1730 a city is not liable to the sheriff of the county for the keep of prisoners committed to his care either for appearance or under sentence, where a fine constitutes no part of the punishment. Lexington *v.* Gentry, *supra*.

In Virginia, Code, § 3532, fixing the fees a jailer is entitled to for receiving and supporting prisoners, applies only to payments out of the state treasury for receiving and supporting prisoners charged with crime, and not to payments out of a city's treasury to the keeper of the city jail for receiving and supporting prisoners charged with violation of its ordinances. Richmond *v.* Epps, 98 Va. 233, 35 S. E. 723.

37. See Orleans County *v.* State Auditor, 65 Vt. 492, 27 Atl. 197, holding that the provision of Acts (1882), No. 100, that "all other expenses connected with the courts" should be paid by the state, did not apply to expenses connected with jails.

38. *Illinois.*— La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346].

Indiana.— McKee *v.* Tippecanoe County, 6 Ind. App. 700, 33 N. E. 251; Hawthorn *v.* Randolph County, 5 Ind. App. 280, 30 N. E. 16, 31 N. E. 1124.

Kansas.—Hendricks *v.* Chautauqua County, 35 Kan. 483, 11 Pac. 450.

Missouri.— Ransom *v.* Gentry County, 48 Mo. 341.

Nebraska.— Gage County *v.* Kyd, 38 Nebr. 164, 56 N. W. 964.

Utah.— Taylor *v.* Salt Lake County Ct., 2 Utah 405.

See 40 Cent. Dig. tit. "Prisons," § 52; and cases cited *supra*, VII, A.

Prisoners in house of correction.— In Michigan Wayne county is liable for the support of its prisoners sentenced to the Detroit house of correction, as required by statute, although no contract has been made for their support, since the statute does not require such contract. Detroit *v.* Wayne County, 43 Mich. 169, 5 N. W. 77.

39. Nickell *v.* Waukesha County, 62 Wis. 469, 22 N. W. 737. See also People *v.* Columbia County, 67 N. Y. 330 [*reversing* 8 Hun 275]; People *v.* Livingston County 89 N. Y. App. Div. 152, 85 N. Y. Suppl. 284.

In Nebraska the sheriff may recover from the county for boarding prisoners committed to the county jail under city ordinances as well as those committed under state laws. Douglas County *v.* Coburn, 34 Nebr. 351, 51 N. W. 965.

In Pennsylvania the county of Erie is bound to pay the sheriff for the board of prisoners committed to the county jail by the mayor and aldermen of the city of Erie for violation of city ordinances. Burton *v.* Erie County, 206 Pa. St. 570, 56 Atl. 40.

40. *Connecticut.*—Norwich *v.* Hyde, 7 Conn. 529.

Indiana.— Tippecanoe County *v.* Chissom, 7 Ind. 688.

Nebraska.— Douglas County *v.* Coburn, 34 Nebr. 351, 51 N. W. 965.

Wisconsin.— Nickell *v.* Waukesha County, 62 Wis. 469, 22 N. W. 737.

Canada.— Wentworth County *v.* Hamilton, 34 U. C. Q. B. 585.

See 40 Cent. Dig. tit. "Prisons," § 52.

In California, under Pen. Code, § 1611, providing that the sheriff must receive all persons committed to jail by competent authority, it is immaterial, to the liability of the city to the county for board of prisoners, that

ing of prisoners, the sheriff may pay therefor and recover as for money paid for the benefit of the county.[41] The cost of special guards for prisoners coming from different counties should be shared by the several counties.[42]

2. As Between Counties or Towns. If by reason of a change of venue, or because of the want of a jail or its insufficiency, a prisoner from one county is confined in the jail of another county, the former county is either directly liable to the sheriff for his board and other expenses of his keep and for guarding him, or else the latter county is so liable with the right to recover therefor from the former.[43] The liability as between towns depends upon the statutes in the par-

the city recorder had no authority to commit prisoners convicted by him to the county jail, if he had jurisdiction to convict them. Sonoma County *v.* Santa Rosa, 102 Cal. 426, 36 Pac. 810.

In Indiana, under the metropolitan police law (Acts (1897), p. 93, c. 59, as amended by Acts (1901), p. 24, c. 18), requiring the council in certain cities to provide, at the expense of the city, necessary accommodations for police station houses, and to provide food for any persons detained in any such station houses when such food is deemed necessary by the officer in charge, it is mandatory, and not merely optional, with a city, to provide a station house, and to provide food for any person detained therein when deemed necessary by the officer in charge. Where a city operating under such law had no station house itself, and committed all prisoners arrested for the violation of city ordinances and penal statutes of the state to the county jail and the care and custody of the sheriff, who furnished them with board and other accommodations during the period intervening between their incarceration and trial, or discharge upon abandonment of the prosecution, it was liable to such sheriff for the board so furnished. Kokomo *v.* Harness, 35 Ind. App. 384, 74 N. E. 270.

Demand.— Since the metropolitan police law (Acts (1897), p. 93, c. 59, as amended by Acts (1901), p. 23, c. 18), requiring cities to provide food for persons detained in a station house when the same is deemed necessary by the officer in charge, creates an implied contract on the part of the city to reimburse a sheriff who boards prisoners committed by the city to the county jail to await trial, and makes it the legal duty of the city to pay for such board, no demand is necessary on the part of the sheriff as a condition precedent to suing the city for the value of the board furnished by him. Kokomo *v.* Harness, 35 Ind. App. 384, 74 N. E. 270.

41. Lloyd *v.* Silver Bow County Com'rs, 15 Mont. 433, 39 Pac. 457.

42. James *v.* Lincoln County Com'rs, 5 Nebr. 38, holding also that in a suit by the sheriff against one of the counties to recover for such services, he is entitled to one half of the whole amount only.

Jail fees pending appeal from conviction.— In case of an appeal *in forma pauperis* by defendant sentenced to life imprisonment, where no bond is given for maintenance in jail on procuring a stay, as required by Code (1880), § 2335, the sheriff, after refusal to deliver the prisoner to the penitentiary authorities for incarceration, cannot recover from the county the jail fees accruing after such refusal and pending the appeal. Warren County *v.* Worrell, 67 Miss. 154, 6 So. 629.

43. *Arkansas.*—Hart *v.* Howard County, 44 Ark. 560, holding that Mansfield Dig. art. 3890, authorizing a sheriff to commit a prisoner in his custody to the jail of some other county in the same circuit when the jail of his county is unsafe, is directory; and if committed to a jail in another circuit the county from which he is carried is liable for his expenses there, including necessary medical attention, to the same extent as if committed to a jail in the same circuit.

Colorado.— Montezuma County *v.* San Miguel County, 3 Colo. App. 137, 32 Pac. 346.

Indiana.— Hart *v.* Vigo County, 1 Ind. 309.

Iowa.— Wapello County *v.* Monroe County, 39 Iowa 349.

Maryland.— Baltimore *v.* Howard County Com'rs, 61 Md. 326.

Missouri.— See Ransom *v.* Gentry County, 48 Mo. 341 (holding that where a prisoner indicted for a felony in one county is removed by change of venue to another, not provided with a sufficient jail, the former county is not liable for the expenses of guarding the prisoner in the latter, when the cost arose from a failure of the county to provide such jail; and that the county failing to provide the jail must bear the expense); Perry County *v.* Logan, 4 Mo. 434.

New Hampshire.— Perkins *v.* Grafton County, 67 N. H. 282, 29 Atl. 541.

Texas.— White *v.* Mason County, 7 Tex. Civ. App. 441, 26 S. W. 1007, under Code Cr. Proc. art. 1062.

Wisconsin.— Portage County *v.* Waupaca County, 15 Wis. 361.

See 40 Cent. Dig. tit. "Prisons," § 52.

Where prisoners were sent by military officers under the Reconstruction Laws from one county to be confined in the jail of another, the jailer having custody could recover for their support from the county from which they were sent, the same as he could have done had the commitment been under civil authority. Gates *v.* Johnson County, 36 Tex. 144.

Medical attendance on prisoners from another county.— The county from which a prisoner is carried has been held liable for necessary medical attention. Hart *v.* Howard County, 44 Ark. 560. In Kansas, however, under the criminal code giving discretionary

ticular state, the town in which the jail is located being generally liable to the keeper, with the right to recover from the town from which the prisoner was sent, or in which he had his settlement or domicile.[44]

3. Liability of Prisoner.[45] An action cannot be maintained against a prisoner to recover the price of his board, although the prisoner requested it to be furnished, for it is the duty of the prison authorities to furnish such food.[46] So also the expenses of a guard must be paid by the county and not by the prisoners who were guarded.[47]

4. In Bastardy Proceedings. Where defendant in a prosecution or proceeding for bastardy is imprisoned, the expense of keeping him falls upon the county or other municipality, and not upon the complainant or prosecutrix nor upon defendant.[48]

C. Allowance and Payment.[49] The statutes sometimes expressly provide for the allowance of the expense of the care and maintenance of prisons and prisoners by the county board, county court, or some other tribunal, and such provisions must be complied with.[50] Under some statutes the allowance by the board is conclusive.[51] When an allowance has once been made by a duly organized board,

power to allow compensation for medical attendance furnished its prisoners, a county in whose jail prisoners of another county are confined is not entitled to recover of the latter county for attention to such prisoners. Smith County *v.* Osborne County, 29 Kan. 72. In New Hampshire, under Gen. Laws, c. 285, §§ 4, 11, when a prisoner is removed from one county to another, a physician who attended a prisoner at the request of the jailer of the county to which he was removed has a cause of action therefor against the county from which he was removed. Perkins *v.* Grafton County, 67 N. H. 282, 29 Atl. 541.

Amount of recovery.— Only the amount fixed by law can be recovered from the county liable. Therefore, when the county of W received into its jail for safe-keeping certain prisoners of the county of M, paying its sheriff more than the statutory compensation for dieting, it was held, in an action by the former to recover of the latter the amount so paid, that the recovery should be limited to the amount fixed by law. Wapello County *v.* Monroe County, 39 Iowa 349.

44. Sayward *v.* Alfred, 5 Mass. 244; Doggett *v.* Dedham, 2 Mass. 564. *Compare*, however, Tyler *v.* Brooklyn, 5 Conn. 185.

45. **Prisoners for debt** see Executions, 17 Cyc. 1514.

46. Washburn *v.* Belknap, 3 Conn. 502.

47. Peters *v.* State, 9 Ga. 109.

48. *Indiana.*— Louthain *v.* Lusher, 52 Ind. 330; *Ex p.* Haase, 50 Ind. 149.

Massachusetts.— Sayward *v.* Alfred, 5 Mass. 244.

Michigan.—Waite *v.* Washington, 44 Mich. 388, 6 N. W. 874.

New Hampshire.—Harris *v.* Sullivan County, 15 N. H. 81.

Ohio.—Hootman *v.* Shriner, 15 Ohio St. 43. See 6 Cent. Dig. tit. "Bastards," § 245.

49. See, generally, Sheriffs and Constables.

50. **In Idaho,** under Sess. Laws (1899), pp. 405, 406, providing that county officers shall at the end of each quarter file with the clerk of the county commissioners a sworn statement, with proper vouchers of all expenses incurred and fees received to be audited by the board, a sheriff must file such vouchers before his claim for the board and support of prisoners can be allowed. Mombert *v.* Bannock County, 9 Ida. 470, 75 Pac. 239.

In Kansas, under section 331 of the criminal code, the board of county commissioners may allow a moderate compensation for medical service, fuel, bedding, and menial attendance furnished for prisoners committed to the county jail, which shall be paid out of the county treasury; but the allowance of such claims is wholly discretionary with the county board, and the liability of the county for the same can only arise upon an order made by the county commissioners when duly convened and acting as a board. Hendricks *v.* Chautauqua County, 35 Kan. 483, 11 Pac. 450. And see Roberts *v.* Pottawatomie County Com'rs, 10 Kan. 29.

The Wisconsin statutes relating to the compensation of sheriffs for the maintenance of persons confined in jail (Rev. St. §§ 4947, 4950), clearly contemplate that a sheriff shall keep accurate accounts of all charges and expenses therefor and present them to the county board to be audited, and if he fails to do so he can recover from the county only such expenses as he is able to show by clear and satisfactory evidence that he actually incurred, and only such as are reasonable. Deissner *v.* Waukesha County, 95 Wis. 588, 70 N. W. 668.

The keeping of a prison book, as required by Mass. St. (1848) c. 276, § 2, was not a condition precedent to an allowance by the county commissioners of additional compensation beyond the sum fixed by section 1 as the price of board. Adams *v.* Hampden County, 13 Gray (Mass.) 439.

51. Cicotte *v.* Wayne County, 59 Mich. 509, 26 N. W. 686, holding that under Const. art. 10, § 10, and Howell Annot. St. § 9055, the board of supervisors in other counties, and the board of auditors in Wayne county, had exclusive power to fix the amount pyable for

it must be taken as a true statement of the facts in the case, and cannot be disturbed arbitrarily.[52] Under other statutes the allowance is to be fixed, and may be changed, by the county court or some other court,[53] and its allowance is generally conclusive.[54] Before compensation or reimbursement can be allowed a sheriff for maintenance and care of prisoners, for articles purchased by him, or for the services of a jailer or guard, the items must be affirmatively shown to be within the terms of the statute.[55] Where there is no statute on the subject reasonable charges may be allowed if it has been an established custom, and such charges will continue to be allowed until the sheriff has notice.[56] By its acts a board may ratify the doings of a sheriff in good faith and become bound to pay therefor, as where the board for a time pays for the guard of prisoners,[57] and it is no reason for disallowing the costs of the guards that the jail was sufficient of itself.[58] Where a sheriff presents bills for boarding prisoners and they are allowed at the precise sum at which he renders them, and are paid, he is estopped from making any other claim, unless he acted under duress; and the fact that he fixed the amount under protest, and accepted the allowances because he was in need of money, does not amount to duress.[59] Ordinarily the sheriff has no preference over other creditors of the county in the payment of claims for boarding prisoners and transporting them to the penitentiary.[60]

D. Actions.[61] A sheriff who is dissatisfied with the amount allowed him for maintaining prisoners may sue the county for what he claims to be a reasonable amount.[62] Where the statute gives the jailer a special action for his fees it must

furnishing food to the prisoners in jails; and hence an action could not be maintained to recover more than they had allowed.

In California Penal Code, section 1611, which provides that the sheriff, for maintaining prisoners, shall be allowed a reasonable compensation "to be determined by the board of supervisors," does not make the board's determination conclusive; and, if the sheriff is dissatisfied, he may sue the county for what he claims to be a reasonable amount. Fulkerth *v.* Stanislaus County, 67 Cal. 334, 7 Pac. 754.

52. People *v.* Clinton County, 19 N. Y. Suppl. 642.

53. **In Pennsylvania,** the act of Feb. 14, 1867 (Pamphl. Laws, p. 199), which provides that the sheriffs of certain counties named therein shall receive a sum "not exceeding fifty cents a day" for boarding prisoners, does not repeal the act of March 31, 1864, by which the court of quarter sessions was given authority to determine the compensation to be paid therefor. Levan *v.* Carbon County, 11 Pa. Co. Ct. 315. And the power of the courts to change the sheriff's allowance for boarding prisoners was not taken away by Const. (1873) art. 3, § 13, which declares that "no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment," since that section applies only to the legislature. McCormick *v.* Fayette County, 150 Pa. St. 190, 24 Atl. 667. But the court of quarter sessions cannot increase the compensation of the sheriff for his services. Strock *v.* Cumberland County, 176 Pa. St. 59, 34 Atl. 352.

Guarding prisons.— It is for the courts to say whether or not extra services were necessary to guard prisoners. Dakota County *v.* Borowsky, 67 Nebr. 317, 93 N. W. 686. See further Baltimore *v.* Howard County Com'rs, 61 Md. 326.

Fees taxed by court and paid by state treasurer.— State *v.* Shropshire, 4 Yerg. (Tenn.) 52.

54. Fayette County *v.* Faires, 44 Tex. 514.

55. Jefferson County *v.* Hudson, 22 Ark. 595.

56. State *v.* Ogle, 2 Houst. (Del.) 371.

57. La Salle County *v.* Milligan, 143 Ill. 321, 32 N. E. 196 [*affirming* 34 Ill. App. 346], holding that where a county board, having knowledge of the insecurity of the county jail, audits and allows, from time to time, bills of the sheriff for money paid for guarding the same, without objection, and it appears that there was no concealment or fraud on the part of the sheriff, but that he acted in the utmost good faith and in the honest belief in his right to employ the guards, such county board will thereby ratify the act of the sheriff in the performance of the duty resting upon the county, and cannot recover back from the sheriff the moneys so paid to him; and holding also that where the county board, with full knowledge of the facts, allows and pays the sheriff from time to time sums of money paid by him as salary for the jailer, instead of an allowance for a guard of the jail, and there is no concealment or fraud in procuring such allowances, the county cannot recover back the several sums so allowed and paid.

58. Berry *v.* St. Francois County, 9 Mo. 360.

59. Cicotte *v.* Wayne County, 59 Mich. 509, 26 N. W. 686.

60. Hunter *v.* Mobley, 26 S. C. 192, 1 S. E. 670.

61. See, generally, ACTIONS, 1 Cyc. 634.

62. Fulkerth *v.* Stanislaus County, 67 Cal. 334, 7 Pac. 754.

be strictly pursued.[63] An action by a sheriff against the county to recover for the maintenance of prisoners is properly dismissed when the complaint fails to set out the actual expenses incurred by plaintiff.[64] In an action for maintaining a prisoner the jailer's books of entry are not evidence of the commitment of the prisoner and the length of his confinement.[65]

PRIUS VITIIS LABORAVIMUS, NUNC LEGIBUS. A maxim meaning "We labored first with vices, now with laws."[1]

PRIVACY. See RIGHT OF PRIVACY.[2]

PRIVATE. Personal, separate, sequestered from company or observation, secret, secluded, lonely, solitary.[3] (Private: Act, see STATUTES. Agent, see

63. Love *v.* Lowry, 1 McCord (S. C.) 181.

64. Doty *v.* Sauk County, 93 Wis. 102, 67 N. W. 10.

65. Walker *v.* McMahan, 1 Treadw. (S. C.) 129.

1. Morgan Leg. Max. [*citing* 4 Inst. 76].

2. **Protection of right of privacy** see INJUNCTIONS, 22 Cyc. 899.

3. Timber *v.* Desparois, 18 S. D. 587, 593, 101 N. W. 879.

Distinguished from "public" see Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783; Chamberlain *v.* Burlington, 19 Iowa 395, 402; Cayuga County *v.* State, 153 N. Y. 279, 288, 47 N. E. 288.

In connection with other words.— "Private concern" see People *v.* Nichols, 52 N. Y. 478, 481, 11 Am. Rep. 734. "Private conversation" see Jacobs *v.* Hesler, 113 Mass. 157, 160. "Private expenses" see Stoughton *v.* Lynch, 1 Johns. Ch. (N. Y.) 467, 469. "Private gain" see Com. *v.* Hamilton College, 101 S. W. 405, 406, 30 Ky. L. Rep. 1338. "Private party" see Com. *v.* Mathues, 210 Pa. St. 372, 376, 59 Atl. 961; Jones *v.* Hoover, 144 Fed. 217, 220. "Private pond" see Benscoter *v.* Long, 157 Pa. St. 208, 213, 27 Atl. 674; Reynolds *v.* Com., 93 Pa. St. 458, 461; Peters *v.* State, 96 Tenn. 682, 684, 36 S. W. 399, 33 L. R. A. 114. "Private purpose" see People *v.* Allen, 1 Lans. (N. Y.) 248, 256. "Private residence" see Hipp *v.* State, 45 Tex. Cr. 200, 201, 75 S. W. 28, 67 L. R. A. 973; Hodges *v.* State, 44 Tex. Cr. 444, 445, 72 S. W. 179.

Used in the sense of "concealed" or "secret" see Spain *v.* Howe, 25 Wis. 625, 630.

Used to mark a certain square upon a plat of land the word "private" means that the square was donated for the use of individuals that might thereafter become lot owners of lots abutting on the square and not to the general public. Smith *v.* Heath, 102 Ill. 130, 140.

"Private action" is an action which may be maintained for the enforcement or protection of a private or individual right, or the redress or prevention of wrong done or threatened to a person in his individual character. Ketchum *v.* Buffalo, 14 N. Y. 356, 370, 371, where it is said: "To maintain it, it must appear that some personal right has been or is about to be invaded, or that the party is entitled have such right enforced or protected in a court of justice. The suitor must make title in a private capacity to the relief demanded."

"Private attorney" is an attorney employed by, and in the interest of, private persons, and not paid out of public funds. He is one who has a special interest in the securing of a conviction, being employed by private persons to prosecute. State *v.* Whitworth, 26 Mont. 107, 117, 66 Pac. 748.

"Private claim" is a term which includes claims made against the state in behalf of a private interest, as distinguished from claims of a public character. Cayuga County *v.* State, 153 N. Y. 279, 288, 47 N. E. 288.

"Private confession."— In the Lutheran church, confession made as a condition precedent to the participation by members in "the sacrament of the Lord's supper" is private when made by each individual privately to the pastor. Schradi *v.* Dornfeld, 52 Minn. 465, 469, 55 N. W. 49.

"Private contract" is a contract between individuals only and affecting only private rights. People *v.* Palmer, 14 Misc. (N. Y.) 41, 45, 35 N. Y. Suppl. 222.

"Private crossing," in reference to a railroad company, a crossing neither required nor used for any public purpose. Wabash R. Co. *v.* Williamson, 104 Ind. 154, 156, 3 N. E. 814.

"Private domain" is a term used to designate unfenced or unoccupied lands belonging to some private person or corporation. State *v.* Cunningham, 35 Mont. 547, 550, 90 Pac. 755.

"Private dwelling" is a house designed for the accommodation of an individual and his household. Skillman *v.* Smatheurst, 57 N. J. Eq. 1, 5, 40 Atl. 855, where it is said: "Not only does the term 'a private dwelling' by force of the word 'dwelling' restrict the character of building by eliminating all buildings for business purposes, such as stores, livery stables, factories and the like, but it also, by force of the word 'private' excludes buildings for residential purposes of public character, such as hotels or general public boarding or community houses." See also Levy *v.* Schreyer, 27 N. Y. App. Div. 282, 284, 50 N. Y. Suppl. 584; Wickenden *v.* Webster, 6 E. & B. 387, 391, 2 Jur. N. S. 590, 25 L. J. Q. B. 264, 4 Wkly. Rep. 562. "'Strictly as a private dwelling,' and not for any 'public or objectionable purpose'" see Gannett *v.* Albree, 103 Mass. 372, 374.

"Private institution" is a term employed to designate those institutions which are

PRINCIPAL AND AGENT. Asylum, see ASYLUMS, 4 Cyc. 362. Banking, see BANKS AND BANKING, 5 Cyc. 433.[4] Bridge, see BRIDGES, 5 Cyc. 1069. Carrier, see CARRIERS, 6 Cyc. 364. Charity, see CHARITIES, 6 Cyc. 902. Conveyance, see CONVEYANCE, 9 Cyc. 863 note 34. Corporation, see CORPORATIONS, 10 Cyc. 1. Detective, see DETECTIVES, 14 Cyc. 234. Easement, see EASEMENTS, 14 Cyc. 1142. Examination of Married Woman, see ACKNOWLEDGMENTS, 1 Cyc. 521. Ferry, see FERRIES, 19 Cyc. 493. Hospital, see HOSPITALS, 21 Cyc. 1110. House, see INNKEEPERS, 22 Cyc. 1072. International Law, see PRIVATE INTERNATIONAL LAW. Law, see STATUTES. Nuisance, see NUISANCES, 29 Cyc. 1152. Path, see PRIVATE PATH. Property, see PROPERTY. Prosecutor, see PRIVATE PROSECUTOR, *post*, p. 361. River, see PRIVATE RIVER. Road, see PRIVATE ROADS. Sale, see PRIVATE SALE. School, see SCHOOLS AND SCHOOL-DISTRICTS. Statute, see STATUTES. Use, see EMINENT DOMAIN, 15 Cyc. 543. War, see WAR. Way, see EASEMENTS, 14 Cyc. 1154. Waters, see NAVIGABLE WATERS, 29 Cyc. 285; WATERS. Wharf, see WHARVES. Wrong, see TORTS.)

PRIVATE ACT. See STATUTES.

PRIVATE AGENT. See PRINCIPAL AND AGENT.

PRIVATE ASYLUM. See ASYLUMS, 4 Cyc. 362.

PRIVATE BANKING.[5] See BANKS AND BANKING, 5 Cyc. 433.

PRIVATE BRIDGE. See BRIDGES, 5 Cyc. 1069.

PRIVATE CARRIER. See CARRIERS, 6 Cyc. 364.

PRIVATE CHARITY. See CHARITIES, 6 Cyc. 902.

PRIVATE CONVEYANCE. See CONVEYANCE, 9 Cyc. 863 note 34.

PRIVATE CORPORATION. See CORPORATIONS, 10 Cyc. 1.

PRIVATE DETECTIVE. See DETECTIVES, 14 Cyc. 234.

PRIVATE EASEMENT. See EASEMENTS, 14 Cyc. 1142.

created or established by private individuals for their own private purposes. Toledo Bank *v.* Bond, 1 Ohio St. 622, 643, distinguishing the term "public institution." See also INSTITUTION, 22 Cyc. 1373.

"Private leak" in navigation is a slight defect in one of the outer planks of the ship. The Pharos, 9 Fed. 912, 914.

"Private notes" is a term used to designate notes of individuals or companies whether incorporated or not. Young *v.* Adams, 6 Mass. 182, 186.

"Private persons" as used in an act providing that no bridge shall thereafter be built in any county by or at the expense of any individual or private person, body politic or corporate, shall be deemed a county bridge, unless erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, etc., are used in opposition to the words "body politic or corporate." Trustees appointed by a local turnpike act are individuals within the meaning of this statute. Rex *v.* Derby, 3 B. & Ad. 147, 150, 1 L. J. M. C. 15, 23 E. C. L. 73. Under statute providing that "if any clerk or servant of any private person or of any copartnership (except apprentices and persons within the age of eighteen years), or of any officer, agent, clerk or servant of any incorporated company, shall embezzle, or convert to his own use, or take, make away with, or secrete, with intent to embezzle, &c." The keeper of the county poorhouse employed by the superintendent of the county is not a servant of a private person. Coats *v.* People, 22 N. Y. 245, 246.

"Private preserve," under the Vermont statute, is a natural pond, of not more than twenty acres, belonging to a common owner, or any artificial pond made solely for the purpose of fish culture. State *v.* Theriault, 70 Vt. 617, 619, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L. R. A. 290.

"The words 'private rights' may properly be confined to such rights, when applied to property, as persons may possess unconnected with, and not essentially affecting, the public interest, or growing out of a public institution of society." Rugh *v.* Ottenheimer, 6 Oreg. 231, 237, 25 Am. Rep. 513.

4. "Private banker" see *post*, this page, note 5.

5. "Private banker" is a term which includes persons or firms engaged in banking without having any special privileges or authority from the state (Perkins *v.* Smith, 116 N. Y. 441, 448, 23 N. E. 21; Hall *v.* Baker, 66 N. Y. App. Div. 131, 136, 72 N. Y. Suppl. 965; Sexton *v.* Home F. Ins. Co., 35 N. Y. App. Div. 170, 172, 54 N. Y. Suppl. 862); a person or firm, not a corporation, engaged in banking without having special privileges or authority from the state (*In re* Surety Guarantee, etc., Co., 121 Fed. 73, 74, 56 C. C. A. 654). Defined by statute see Mo. Rev. St. (1899) § 1289; Utah Rev. St. (1898) § 384. Distinguished from "individual banker" see Perkins *v.* Smith, 116 N. Y. 441, 448, 23 N. E. 21; People *v.* Doty, 80 N. Y. 225, 228. The term "private banker" has definite signification, and is applied only to individuals or to a firm, and does not comprehend corporations. *In re*

PRIVATEER. In international law, a private armed vessel, duly commissioned by government to cruise during war against the commerce of the enemy.[6] (Privateer: Admiralty Jurisdiction, see ADMIRALTY, 1 Cyc. 822. Taking of Prize, see WAR.)

PRIVATE EXAMINATION. See ACKNOWLEDGMENTS, 1 Cyc. 521.

PRIVATE FERRY. See FERRIES, 19 Cyc. 493.

PRIVATE HOSPITAL. See HOSPITALS, 21 Cyc. 1110.

PRIVATE HOUSE. See INNKEEPERS, 22 Cyc. 1072.[7]

PRIVATE INTERNATIONAL LAW. That branch of the law of a country which relates to cases more or less subject to the law of other countries.[8] (Private International Law: As to Acknowledgment, see ACKNOWLEDGMENTS, 1 Cyc. 535. As to Action — For Death, see DEATH, 13 Cyc. 313, 334, 340, 365, 380, 382; Of Covenant, see COVENANT, ACTION OF, 11 Cyc. 1028; Upon Covenant, see COVENANTS, 11 Cyc. 1132, 1161. As to Administration of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 847. As to Admiralty Jurisdiction, see ADMIRALTY, 1 Cyc. 809, 821, 846. As to Adoption, see ADOPTION OF CHILDREN, 1 Cyc. 933. As to Adverse Possession, see DETINUE, 14 Cyc. 255. As to Agency, see CONTRACTS, 9 Cyc. 664 *et seq.*, 670. As to Amount of Recovery, see COMMERCIAL PAPER, 8 Cyc. 330; DEATH, 13 Cyc. 380. As to Appeal, see APPEAL AND ERROR, 2 Cyc. 671. As to Appeal to United States Supreme Court, see APPEAL AND ERROR, 2 Cyc. 553. As to Assignment, see ASSIGNMENTS, 4 Cyc. 63. As to Assignment For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 113, 193. As to Assumpsit, see ASSUMPSIT, ACTION of, 4 Cyc. 324. As to Attorney's Fees, see ATTORNEY AND CLIENT, 4 Cyc. 996 note 56; COMMERCIAL PAPER, 7 Cyc. 586 note 25; 8 Cyc. 322. As to Attorney's Lien, see ATTORNEY AND CLIENT, 4 Cyc. 1010. As to Bill of Lading, see CARRIERS, 6 Cyc. 352, 410. As to Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 495, 586 note 25, 631, 657, 664, 679, 682, 693, 751, 782, 836, 839, 866, 959, 1051, 1061, 1089, 1111; 8 Cyc. 24, 25, 310, 322, 330. As to Bond, see BONDS, 5 Cyc. 721, 730, 752, 777. As to Boundary, see BOUNDARIES, 5 Cyc. 891. As to Building Contract, see BUILDERS AND ARCHITECTS, 6 Cyc. 18. As to Carrier's Contract, see CARRIERS, 6 Cyc. 398, 430, 480, 580. As to Champerty and Maintenance, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 847, 883. As to Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1060. As to Compensation of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1142. As to Conduct of Sale Under Execution, see EXECUTIONS, 17 Cyc. 1236. As to

Surety Guarantee, etc., Co., 121 Fed. 73, 74, 56 C. C. A. 654.

6. Burrill L. Dict.

7. See also 14 Cyc. 1126; 21 Cyc. 1112.

8. Wharton Confl. L. § 1.

Private international law embraces those universal principles of right and justice which govern the courts of one state having before them cases involving the operation and effect of the laws of another state or country. Minor Confl. L. § 3. The principles of private international law are now generally grouped under three heads, distinct but at the same time interdependent, (a) rules of nationality, (b) rights and duties of aliens, (c) the choice of the proper law to apply to questions that admit of the application of two or more national laws. Burge Col. & For. L. Introd. p. 2.

Part of our law.— International law in its widest and most comprehensive sense — including not only questions of rights between nations, governed by what has been properly called the law of nations (see INTERNATIONAL LAW, 22 Cyc. 1699); but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts private or public, done within the dominions of another nation — is part of our law and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man duly submitted to their dominion. Hilton *v.* Guyot, 159 U. S. 113, 163, 16 S. Ct. 139, 40 L. ed. 95. The principles of private international law are a part of the private law of the District of Columbia. Snashall *v.* Metropolitan R. Co., 19 D. C. 399, 408, 10 L. R. A. 746.

"The phrase 'private international law' is liable to be misunderstood.—It is a convenient expression for such rules as, in the jurisprudence of most civilised nations, are applied, *ex comitate*, to the solution of questions depending upon foreign *status*, foreign laws, or foreign contracts." Ewing *v.* Ewing, 10 App. Cas. 453, 513.

Construction of Covenant, see COVENANTS, 11 Cyc. 1052, 1085. As to Contract — Generally, see CONTRACTS, 9 Cyc. 213, 308, 575, 664, 690; For Building, see BUILDERS AND ARCHITECTS, 6 Cyc. 18; Of Apprenticeship, see APPRENTICES, 3 Cyc. 549; Of Carriage, see CARRIERS, 6 Cyc. 398, 430, 480, 580; Of Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1311, 1323 note 96; To Arbitrate, see ARBITRATION AND AWARD, 3 Cyc. 602. As to Costs, see COSTS, 11 Cyc. 25, 123. As to Covenant, see COVENANTS, 11 Cyc. 1035, 1132. As to Crime and Criminal Procedure, see CRIMINAL LAW, 205, 222. As to Custom or Usage, see CUSTOMS AND USAGES, 12 Cyc. 1056. As to Damages, see COMMERCIAL PAPER, 8 Cyc. 330. As to Death, see DEATH, 13 Cyc. 290, 313. As to Deed, see DEEDS, 13 Cyc. 526, 600. As to Deposition, see COSTS, 11 Cyc. 123. As to Descent and Distribution, see DESCENT AND DISTRIBUTION, 14 Cyc. 20, 188. As to Devise to Corporation, see CORPORATIONS, 10 Cyc. 1127. As to Disabilities and Privileges of Coverture, see HUSBAND AND WIFE, 21 Cyc. 1119, 1258, 1634. As to Distribution of Amount Recovered, see DEATH, 13 Cyc. 382. As to Divorce, see DIVORCE, 14 Cyc. 556, 581. As to Dower, see DOWER, 14 Cyc. 871, 890. As to Execution, see EXECUTIONS, 17 Cyc. 951, 1236. As to Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 58 note 14, 74, 319, 339 note 61, 374, 542, 847, 1142. As to Exemption, see EXEMPTIONS, 18 Cyc. 1369, 1376. As to Fire Insurance, see FIRE INSURANCE, 19 Cyc. 624 note 90, 775 note 90, 844 note 28, 858 note 6, 972 note 70. As to Foreign Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1195 *et seq.* As to Form of Remedy, see ACTIONS, 1 Cyc. 706. As to Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 417, 579. As to Gambling Transaction, see GAMING, 20 Cyc. 923. As to Garnishment, see GARNISHMENT, 20 Cyc. 1003. As to Gift, see GIFTS, 20 Cyc. 1193, 1243. As to Guaranty, see GUARANTY, 20 Cyc. 1392, 1442. As to Homestead, see HOMESTEADS, 21 Cyc. 448, 463. As to Husband and Wife, see HUSBAND AND WIFE, 21 Cyc. 1145, 1258, 1274, 1634. As to Infant, see GUARDIAN AND WARD, 21 Cyc. 190 note 76; INFANTS, 22 Cyc. 512. As to Inheritance — Generally, see DESCENT AND DISTRIBUTION, 14 Cyc. 20; By Bastard, see BASTARDS, 5 Cyc. 642. As to Innkeeper, see INNKEEPERS, 22 Cyc. 1095. As to Insolvency, see INSOLVENCY, 22 Cyc. 1285. As to Interest, see COMMERCIAL PAPER, 8 Cyc. 310; DEATH, 13 Cyc. 365; INTEREST, 22 Cyc. 1459, 1476. As to Interpretation and Operation of Conveyance, see DEEDS, 13 Cyc. 600. As to Intestacy, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 58 note 14; WILLS. As to Judgment, see JUDGMENTS, 23 Cyc. 623, 674, 811 note 15, 1476 note 4, 1558 note 18, 1564, 1576 note 45. As to Jurisdiction, see COURTS, 11 Cyc. 633, 661. As to Landlord and Tenant, see LANDLORD AND TENANT, 24 Cyc. 915, 1164 note 77, 1172, 1208 note 60. As to Lease, see LANDLORD AND TENANT, 24 Cyc. 915. As to Liability of Shareholder, see CORPORATIONS, 10 Cyc. 670, 672. As to Libel and Slander, see LIBEL AND SLANDER, 25 Cyc. 276. As to Life Insurance, see LIFE INSURANCE, 25 Cyc. 746, 747, 749, 780, 789, 856. As to Limited Partnership, see PARTNERSHIP, 30 Cyc. 753. As to Lottery, see LOTTERIES, 25 Cyc. 1654. As to Malicious Prosecution, see MALICIOUS PROSECUTION, 26 Cyc. 24. As to Marine Insurance, see MARINE INSURANCE, 26 Cyc. 583. As to Marriage, see DOWER, 14 Cyc. 890; HUSBAND AND WIFE, 21 Cyc. 1258, 1274; MARRIAGE, 26 Cyc. 829. As to Marriage Agreement, see HUSBAND AND WIFE, 21 Cyc. 1258, 1274. As to Master and Servant, see MASTER AND SERVANT, 26 Cyc. 1079, 1229, 1291, 1384, 1493. As to Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 19. As to Minority, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 339 note 61; GUARDIAN AND WARD, 21 Cyc. 190 note 76; INFANTS, 22 Cyc. 512. As to Mortgage, see MORTGAGES, 27 Cyc. 975, 1128 note 10, 1133, 1282, 1801. As to Mutual Benefit Insurance, see MUTUAL BENEFIT INSURANCE, 29 Cyc. 86. As to Negligence, see NEGLIGENCE, 29 Cyc. 564. As to Negotiable Instrument, see COMMERCIAL PAPER, 7 Cyc. 586 note 25, 631, 657, 664, 679, 682, 693, 751, 782, 836, 839, 866, 959, 1051, 1061, 1089, 1111; 8 Cyc. 24, 25, 310, 322, 330. As to Partition, see PARTITION, 30 Cyc. 172. As to Partnership, see PARTNERSHIP, 30 Cyc. 401, 753. As to Patent, see PATENTS, 30 Cyc. 819. As to Payment, see PAYMENT, 30 Cyc. 1182. As to

Penalty, see PENALTIES, 30 Cyc. 1347. As to Perpetuity, see PERPETUITIES, 30 Cyc. 1501. As to Pilot, see PILOTS, 30 Cyc. 1609, 1610. As to Pleading, see PLEADING, 31 Cyc. 45. As to Power of Appointment, see POWERS, 31 Cyc. 1056. As to Priority of Debts, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 542. As to Procedure, see PLEADING, 31 Cyc. 45. As to Property in General, see PROPERTY. As to Right to Sue For Personal Injury, see HUSBAND AND WIFE, 21 Cyc. 1685 note 70. As to Sale, see SALES; VENDOR AND PURCHASER. As to Separate Estate of Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1434, 1499. As to Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 279. As to Statute of Limitations, see DEATH, 13 Cyc. 340; LIMITATIONS OF ACTIONS, 25 Cyc. 1018. As to Subscription, see CORPORATIONS, 10 Cyc. 404. As to Suit by Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1527 note 23. As to Survival of Action, see ABATEMENT AND REVIVAL, 1 Cyc. 48. As to Taking Deposition, see DEPOSITIONS, 13 Cyc. 881 note 42, 908 note 4, 944 note 70. As to Tort Generally, see TORTS. As to Trust, see TRUSTS. As to Usury, see USURY. As to Widow's Allowance, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 374. As to Will, see WILLS. As to Wrongful Attachment, see ATTACHMENT, 4 Cyc. 834 note 21. Domicile Generally, see DOMICILE, 14 Cyc. 831 *et seq.* Judicial Cognizance of Foreign or Interstate Law, see EVIDENCE, 17 Cyc. 884. Opinion Evidence as to Foreign or Interstate Law, see EVIDENCE, 17 Cyc. 67. Proof of Foreign or Interstate Law, see EVIDENCE, 17 Cyc. 67. Treaty, see TREATIES. See also CONFLICT OF LAWS, 8 Cyc. 567, and Cross-References Thereunder.)

PRIVATE LAND GRANT. See PUBLIC LANDS.

PRIVATE LAW. See STATUTES.

PRIVATE NUISANCE. See NUISANCES, 29 Cyc. 1152.

PRIVATE PATH. A neighborhood road running from one public road to another; from a public place to another public place;[9] a neighborhood road.[10] (See EASEMENTS, 14 Cyc. 1154, 1172; PENT ROADS, 30 Cyc. 1379; PRIVATE ROADS, *post*, p. 363.)

PRIVATE PROPERTY. See PROPERTY.

PRIVATE PROSECUTOR. One who prefers an accusation against a party whom he suspects to be guilty.[11] (See COSTS, 11 Cyc. 270; CRIMINAL LAW, 12 Cyc. 292; INDICTMENTS AND INFORMATIONS, 22 Cyc. 198.)

9. Kirby *v.* Southern R. Co., 63 S. C. 494, 502, 41 S. E. 765.

10. Earle *v.* Poat, 63 S. C. 439, 453, 41 S. E. 525; State *v.* Floyd, 39 S. C. 23, 25, 17 S. E. 505.

Distinguished from "private way" see Earle *v.* Post, 63 S. C. 439, 453, 41 S. E. 525; State *v.* Floyd, 39 S. C. 23, 25, 17 S. E. 505.

Under a statute empowering certain commissioners to make, alter, and keep in repair "public" and "private" paths, the term "private paths" is held to mean "roads free and common to all who might choose to make use of them; that is to say, public ways diverging from and running across the main or principal roads or highways, commonly called 'great roads,' and not private paths exclusively appropriated for private purposes. It would be preposterous to suppose the legislature intended to vest important powers in public commissioners, to open, improve, and keep in repair, private passages or easements for the particular and exclusive benefit of one or a few individuals." Nash *v.* Peden, 1 Speers (S. C.) 17, 21; State *v.* Mobley, 1 McMull. (S. C.) 44, 48; Withers *v.* Claremont County, 3 Brev. (S. C.) 83, 86. The term, as used in a statute authorizing the commissioners of roads to lay out, make, and keep in repair, all such high roads, private paths, bridges, etc., as have been or shall be established by law, or as they shall judge necessary in their several parishes and districts, is synonymous with "private road." Singleton *v.* Road Com'rs, 2 Nott & M. (S. C.) 526, 527.

11. Bouvier L. Dict. [*quoted* in State *v.* Millain, 3 Nev. 409, 425 (where it is said: "This is a very correct definition, and certainly is not broad enough to include a mere witness in the case, who is not shown to have taken any part in setting a prosecution on foot. A party who voluntarily makes an affidavit to procure the issuance of a warrant to arrest a party whom he accuses of crime is properly a prosecutor. So, too, a party who voluntarily procures permission to be sworn and go before a grand jury to testify as to any alleged crime, may be held to be a prosecutor. But a party who merely appears in response to a subpœna issued at the instance of the grand jury or the prosecuting attorney, cannot be held or treated as a prosecutor. He is merely a witness, and nothing more"); Heacock *v.* State, 13 Tex. App. 97, 129].

Such a person, if challenged for this cause, would not be allowed, under the Texas code,

PRIVATE RIGHT OF WAY. That private right which one man has of going over another's land.[12] (See EASEMENTS, 14 Cyc. 1154, 1172, 1176.)

PRIVATE RIVER. At common law, the term applies to a river where the tide does not ebb and flow.[13] (See NAVIGABLE WATERS, 29 Cyc. 289.)

to try the case as a juror. Heacock *v.* State, 13 Tex. App. 97, 129.

12. Tomlinson *v.* Trenton, etc., St. R. Co., 15 Pa. Dist. 480, 484, 31 Pa. Co. Ct. 81.

It is that right which one has of going over another's land, and is confined either to the inhabitants of a particular district, or to those occupying or owning certain estates, or it extends to one or more individuals in certain. Chicago *v.* Borden, 190 Ill. 430, 440, 60 N. E. 915; Garrison *v.* Rudd, 19 Ill. 558, 563.

"**To every private way** there are two essential requisites, first, the *terminus a quo*, or the point or place from which the grantee is to set out in order to use the way, and the *terminus ad quem*, the place where the way is to end; and second, that the grantor has the right, not the mere revocable permission, of setting out from the *terminus a quo*, and proceeding to and entering the *terminus ad quem*. It is one of the most important of incorporeal hereditaments, in which one man has an interest and a right, though another man is the owner of the soil over which it is claimed. It is simply an easement or a privilege, conferring no interest in the land." Garrison *v.* Rudd, 19 Ill. 558, 563.

13. Adams *v.* Pease, 2 Conn. 481, 484.

Rivers in which the tide ebbs and flows are, at common law, classed as navigable, while those in which the tide does not ebb and flow are classed as non-navigable. Adams *v.* Pease, 2 Conn. 481, 484.

PRIVATE ROADS

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CROSS-REFERENCES

For Matters Relating to:

Easement Taken For Public Use, see EMINENT DOMAIN, 15 Cyc. 586, 607, 640 note 57, 646.

License to Pass Over Land, see LICENSES, 25 Cyc. 640.

Pent Road, see PENT ROADS, 30 Cyc. 1379.

Private Road:

As Boundary, see BOUNDARIES, 5 Cyc. 905, 909.

As Breach of Covenant, see COVENANTS, 11 Cyc. 1115, 1124.

For Logging Purposes, see LOGGING, 25 Cyc. 1547.

Public Road, see STREETS AND HIGHWAYS.

Right of Way Over Land of Another, see EASEMENTS, 14 Cyc. 1134.

I. DEFINITION AND ORIGIN OF TERM.

A private road may be defined as a road established by public authority chiefly for the accommodation of an individual or individuals, and at his or their instance and expense.[1] In accurate legal contemplation, the term involves a contradic-

1. Clark *v.* Boston, etc., R. Co., 24 N. H. 114, 118. See also Metcalf *v.* Bingham, 3 N. H. 459.

Private roads are neighborhood ways not commonly used by other than the people of the neighborhood where they are, although they may be used by any one who may have occasion to do so. State *v.* Mobley, 1 McMull. (S. C.) 44, 46; *Ex p.* Withers, 3 Brev. (S. C.) 83, 85.

A road from a private house as one terminus to a public road is a private road and not a public highway, although used as a convenience by others than the owner of the house at the terminus. Smith *v.* Kinard, 2 Hill (S. C.) 642.

A neighborhood road is a public highway and not a private road. Kissinger *v.* Hanselman, 33 Ind. 80.

Private roads become such by being laid out under an order of court, as public roads are. Johnson *v.* Stayton, 5 Harr. (Del.) 448.

Term as used in statute construed.— The

tion. It is unknown to the common law, having its origin in American legislation, and cannot be regarded as having been employed as a substitute for the word "way" at common law.[2]

II. NATURE.

A. In General. As to the real nature of a private road there is a conflict of authority, one class of cases holding that such a road is in reality what its name implies, a "private road," [3] and another class holding that a private road is but a public road by another name, and is a term invented merely for the purposes of classification.[4]

B. Distinguished From Private Way. A private way is an incorporeal hereditament which may be created or extinguished by the acts of the owners of the servient and dominant tenements as private individuals, while the public authorities alone have the power to create or extinguish a private road.[5]

term "private road," as used in Oreg. Laws, c. 50, §§ 16 and 17, authorizing the establishment of private roads over the land of an individual, without his consent, for the private use of another, means such a road as is used for private individuals only, and is not wanted for the public generally. Witham *v.* Osburn, 4 Oreg. 318, 321, 18 Am. Rep. 287.

2. Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577, *per* Sanderson, J.

3. *Alabama.*— Sadler *v.* Langham, 34 Ala. 311.

Illinois.— Crear *v.* Crossly, 40 Ill. 175; Nesbitt *v.* Trumbo, 39 Ill. 110, 89 Am. Dec. 290.

Indiana.— Stewart *v.* Hartman, 46 Ind. 331; Wild *v.* Deig, 43 Ind. 455, 13 Am. Rep. 399. See also Blackman *v.* Halves, 72 Ind. 515.

Iowa.— Bankhead *v.* Brown, 25 Iowa 540.

Maryland.— See State *v.* Price, 21 Md. 448, holding that a road to which the public can have no access by a highway cannot, in the nature of things, be public, and at most would serve only the purposes of private convenience.

Missouri.— Dickey *v.* Tennison, 27 Mo. 373.

New York.— Taylor *v.* Porter, 4 Hill 140, 40 Am. Dec. 274.

Oregon.— Witham *v.* Osburn, 4 Oreg. 318, 18 Am. Rep. 287.

Tennessee.— Clack *v.* White, 2 Swan 540.

West Virginia.— Varner *v.* Martin, 21 W. Va. 534.

Wisconsin.— Osborn *v.* Hart, 24 Wis. 89, 1 Am. Rep. 161.

See 40 Cent. Dig. tit. "Private Roads," § 1 *et seq.*

4. *California.*— Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915; Monterey County *v.* Cushing, 83 Cal. 507, 23 Pac. 700; Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577, where it is said that, in accurate legal contemplation, the term "private road," which was unknown to the common law, and has its origin in American legislation, involves a contradiction, and that it was invented to distinguish a class of public roads benefiting private individuals who, instead of the public at large, should bear the expense of their establishment and maintenance.

Delaware.— *In re* Hickman, 4 Harr. 580, where the court takes the view that a private road, although laid out on a private petition at private cost, is merely a branch of the system of public roads.

Massachusetts.—Denham *v.* Bristol County Com'rs, 108 Mass. 202.

New Hampshire.— Proctor *v.* Andover, 42 N. H. 348; Metcalf *v.* Bingham, 3 N. H. 459.

New Jersey.— Allen *v.* Stevens, 29 N. J. L. 509; Perrine *v.* Farr, 22 N. J. L. 356.

Pennsylvania.— Waddell's Appeal, 84 Pa. St. 90; *In re* Killbuck Private Road, 77 Pa. St. 39; *In re* Pocopson Road, 16 Pa. St. 15.

South Carolina.— Singleton *v.* Road Com'rs, 2 Nott & M. 526.

See 40 Cent. Dig. tit. "Private Roads," § 1 *et seq.*

Quasi-public.— In Cook *v.* Vickers, 141 N. C. 101, 53 S. E. 740, it is said that while it is true that private roads or cartways are laid out on the application of a particular individual and paid for by him, yet, since they are intended also for the use of the public generally, they are properly regarded as quasi-public and as part of the public road system.

The fact that private roads are open to the use of the public makes them public roads, and their character as public roads is unaffected by the circumstance that, in view of their situation, they are but little used, and are mainly convenient for the use of a few individuals, and such as may have occasion to visit them socially or on matters of business, nor by the circumstance that in view of such conditions the legislature may deem it just to open and maintain them at the cost of those most immediately concerned instead of the public at large. Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577.

The name given the way does not determine its character, for if the road be called a private road or a neighborhood road, but is in fact so laid out as to give the public a right to freely use it, upon terms common to all, notwithstanding its name, it is a public one. Cozard *v.* Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932, 1 L. R. A. N. S. 969, 111 Am. St. Rep. 779.

5. Allen *v.* Stevens, 29 N. J. L. 509.

C. Distinguished From Public Road or Highway. A private road is distinguished from a public highway, in that the expense of laying it out is not borne by the public at large, but by the individual or individuals for whose accommodation chiefly it is laid out,[6] and in that the latter is a way through the state, or from town to town, while the former is a way from public road to public road, or from a public road over a neck of land toward its extremity.[7]

III. What May Be Termini.

When the statute authorizing private roads fixes what may be termini, a road cannot be laid out except between such termini.[8] Generally the terminus *a quo*, as fixed by the statute, is a dwelling,[9] or farm or plantation,[10] and the other terminus is a highway [11] or some private way leading to a highway.[12]

IV. Establishment.

A. Power to Establish — 1. In General. The power to grant a private road, being an exercise of the right of eminent domain,[13] is entirely dependent upon the local statute governing the subject,[14] and can be exercised only when

Private roads are not to be understood as being synonymous with ways at common law, but as indicating a particular class of highways or public ways over which any one may pass without committing trespass. Hartley *v.* Vermillion, 141 Cal. 339, 348, 74 Pac. 987; Sherman *v.* Buick, 32 Cal. 241, 252, 91 Am. Dec. 577.

"Private right of way" defined see *ante*, p. 362.

6. Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577; Clark *v.* Boston, etc., R. Co., 24 N. H. 114. See also Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

7. Singleton *v.* Road Com'rs, 2 Nott & M. (S. C.) 526, 527.

8. State *v.* Guilbaud, 47 N. J. L. 277 (holding that under the road act empowering the highway surveyors to lay out a private road from one's land to a mill, market, public landing, or public road, no authority exists to lay out such a road for the sole purpose of communication between two lots of the applicant); *In re* Sandy Lick Creek Road, 51 Pa. St. 94 (holding further that there is no authority under the statute for a private road starting with a turnpike and ending at a creek).

9. Lesley *v.* Klamath County, 44 Oreg. 491, 75 Pac. 709; *In re* Killbuck Private Road, 77 Pa. St. 39; *In re* Sandy Lick Creek Road, 51 Pa. St. 94; *In re* Calhoon's Road, 8 Pa. Co. Ct. 222.

It is not necessary that the road begin precisely at the dwelling of the petitioner, but it is sufficient if it gives convenient entrance to his premises in proximity to his dwelling so that the public may have excess. Lesley *v.* Klamath County, 44 Oreg. 491, 75 Pac. 709. See also Proctor *v.* Andover, 42 N. H. 348.

10. Owings *v.* Worthington, 10 Gill & J. (Md.) 283; Greenwood *v.* Stoner, 3 Harr. & J. (Md.) 435; *In re* Killbuck Private Road, 77 Pa. St. 39; *In re* Sandy Lick Creek Road, 51 Pa. St. 94; *In re* Calhoon's Road, 8 Pa. Co. Ct. 222.

11. State *v.* Guilbaud, 47 N. J. L. 277; *In re* Keeling's Road, 59 Pa. St. 358; *In re* Sandy Lick Creek Road, 51 Pa. St. 94.

Not necessary to connect with highway.— Under the Connecticut statute to authorize the laying out of a private road it is not necessary that it should be connected with a highway, so as to accommodate the public as well as the petitioner, but it may be laid out where its only use is to give the petitioner access to one parcel of his land by connecting it with another. Reynolds *v.* Reynolds, 15 Conn. 83.

Passing over one highway to another.— Under a statute authorizing the establishment of private roads from plantations to public highways, such a road cannot be granted to pass over one public highway to another. Owings *v.* Worthington, 10 Gill & J. (Md.) 283.

Private road into another county.— The levy court or commissioners of one county cannot grant a private road into another county, under Acts (1824), c. 253, authorizing the granting of private roads from plantation to highways, churches, mills, etc. Owings *v.* Worthington, 10 Gill & J. (Md.) 283.

12. *In re* Keeling's Road, 59 Pa. St. 358; *In re* Sandy Lick Creek Road, 51 Pa. St. 94.

Private highway.— The courts have expressed doubt as to whether, under a statute authorizing a private way leading to a highway, a private road can be laid out to a private railway, although such railway leads to a highway. *In re* Keeling's Road, 59 Pa. St. 358.

13. Bibb County *v.* Harris, 71 Ga. 250.

Taking lands for private road, under the right of Eminent domain, see Eminent Domain, 15 Cyc. 586.

14. *California.*— Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

Iowa.— Carter *v.* Barkley, 137 Iowa 510, 115 N. W. 21.

Massachusetts.— Holcomb *v.* Moore, 4 Allen 529.

Missouri.— Chandler *v.* Reading, 129 Mo. App. 63, 107 S. W. 1036; Coberly *v.* Butler, 63 Mo. App. 556.

it has been clearly conferred by legislative enactment and under the conditions prescribed.[15]

2. Mode of Exercise. The power to establish a private road can be exercised only in the mode prescribed by the statute.[16]

3. Dependent Upon Necessity. It is generally provided by statute [17] or constitution [18] that land can be taken for a private road only in cases of necessity; and the word "necessity," when so used in constitution or statute, is given the most restricted meaning,[19] so that a private road may be granted only where it is absolutely indispensable to the applicant as a means of reaching his land.[20] If there is

South Carolina.—Singleton *v.* Road Com'rs, 2 Nott & M. 526.

See 40 Cent. Dig. tit. "Private Roads," § 1 *et seq.*

The same tribunal having power to establish public highways is vested by statute with the power to grant private roads. McCauley *v.* Dunlap, 4 B. Mon. (Ky.) 57; Miller's Case, 9 Serg. & R. (Pa.) 35.

The county judge of Richmond county, under the act of 1871, creating county courts in several counties, including Richmond, and declaring that the judges thereof shall discharge the duties formerly devolving on the justices of the inferior courts as to county business, has jurisdiction to grant private roads. Summerville Macadamized, etc., Road Co. *v.* Dutscher-Schuetzen Club, 62 Ga. 318.

Refusal of other authorities to lay out road condition precedent to exercise of power.— Under St. (1839) c. 367, depriving the county commissioners of power to lay out roads except where a town shall have refused to lay out a private road, in order to give the county commissioners jurisdiction in the matter of laying out such road, it must appear that the town, as well as the selectmen, has refused to lay out the road. Pettengill *v.* Kennebec County Com'rs, 21 Me. 377.

Power to open road heretofore used by public.— Under the act of 1818, authorizing three freeholders to open a private road, when it appears that the way was "heretofore" used by the public and had been recently closed, they cannot determine that there is a private road, but only order it to be opened. Perrine *v.* Farr, 22 N. J. L. 356.

For private act providing for the establishment of a cartway see Cook *v.* Vickers, 144 N. C. 312, 57 S. E. 1.

15 Bibb County *v.* Harris, 71 Ga. 250.

16 Barnard *v.* Howarth, 9 Ind. 103; Owings *v.* Worthington, 10 Gill & J. (Md.) 283. See also Berridge *v.* Shults, 32 Misc. (N. Y.) 444, 66 N. Y. Suppl. 204; Matter of Lawton, 22 Misc. (N. Y.) 426, 50 N. Y. Suppl. 408.

The jury provided by the highway law relating to the laying out of a private road is not such a jury as is contemplated by the constitution. People *v.* Haverstraw, 151 N. Y. 75, 45 N. E. 384 [*affirming* 80 Hun 385, 30 N. Y. Suppl. 325].

17. Piffin *v.* May, 78 Ark. 18, 93 S. W. 64; Vice *v.* Eden, 113 Ky. 255, 68 S. W. 125, 24 Ky. L. Rep. 132; McCauley *v.* Dunlap, 4 B. Mon. (Ky.) 57; Burgwyn *v.* Lockhardt, 60 N. C. 264; Plimmons *v.* Frisby, 60 N. C. 200; Lea *v.* Johnston, 31 N. C. 15.

Upon "sufficient reason" shown may be the language of the statute see Cook *v.* Vickers, 144 N. C. 312, 57 S. E. 1. The question of "sufficient reason" for the establishment of a cartway is a question for the jury to determine under proper instructions from the court. Cook *v.* Vickers, *supra*, construing a private act providing for the establishment of a cartway upon "sufficient reason" shown.

18. *Georgia.*— Chattanooga, etc., R. Co. *v.* Philpot, 112 Ga. 153, 37 S. E. 181; Normandale Lumber Co. *v.* Knight, 89 Ga. 111, 14 S. E. 882; Bibb County *v.* Harris, 71 Ga. 250.

Michigan.— People *v.* Richards, 38 Mich. 214.

Missouri.— Colville *v.* Judy, 73 Mo. 651; Coberly *v.* Butler, 63 Mo. App. 556; Barr *v.* Flynn, 20 Mo. App. 383; Cox *v.* Tipton, 18 Mo. App. 450. See also Chandler *v.* Reading, 129 Mo. App. 63, 107 S. W. 1039.

New York.— Berridge *v.* Shultz, 32 Misc. 444, 66 N. Y. Suppl. 204.

South Carolina.— Singleton *v.* Road Com'rs, 2 Nott & M. 526.

See 40 Cent. Dig. tit. "Private Roads," § 3.

Such a provision of the constitution is of controlling force, and, being the supreme law of the state, it must prevail over any conflicting legislative act. Barr *v.* Flynn, 20 Mo. App. 383.

19. Chattanooga, etc., R. Co. *v.* Philpot, 112 Ga. 153, 37 S. E. 181.

20. *Georgia.*— Chattanooga, etc., R. Co. *v.* Philpot, 112 Ga. 153, 37 S. E. 181.

Kentucky.—McCauley *v.* Dunlap, 4 B. Mon. 57.

Michigan.— People *v.* Richards, 38 Mich. 214.

Missouri.— Cox *v.* Tipton, 18 Mo. App. 450.

New Hampshire.— Brown *v.* Brown, 50 N. H. 538; Dudley *v.* Cilley, 5 N. H. 558.

North Carolina.— Lea *v.* Johnston, 31 N. C. 15.

Pennsylvania.— *In re* Redstone Tp. Road, 112 Pa. St. 183, 5 Atl. 383; *In re* Plumcreek Tp. Road, 110 Pa. St. 544, 1 Atl. 431; *In re* Harbaugh's Road, 8 Pa. Co. Ct. 671.

South Carolina.—Singleton *v.* Road Com'rs, 2 Nott & M. 526.

Tennessee.— Clack *v.* White, 2 Swan 540.

See 40 Cent. Dig. tit. "Private Roads," § 1½.

in existence a practicable way to and from the land[21] whether private[22] or public,[23] a case of necessity does not arise, even though such way may be less convenient than the one proposed.[24] But a statute providing that any person owning any land not having a public or private way thereto may have a private road over the land of another does not contemplate that the owner who claims to have no way to his land shall be compelled, before inviting the aid of the statute, to institute suits to determine whether he has such way,[25] but should be construed to mean that, unless a party has a way, either public or private, which is unobstructed and unquestioned, he may institute proceedings under the statute;[26] and the fact that there is an apprehension that the owners of the land over which the private way in use by the applicant is laid out may abolish the same does not change the rule.[27] The court must affirmatively find that the road proposed is a way of necessity.[28]

Compare Reynolds *v.* Reynolds, 15 Conn. 83, holding that if it appears from the record that a private road laid out by public authority is necessary, a decree establishing such road will not be deemed erroneous because it also appears that such road is not strictly and absolutely necessary, but convenient only, in order to enable the petitioner to have access to his land.

Under the Missouri statute it is held that no necessity for a private road exists, except where the land is inaccessible. Coberly *v.* Butler, 63 Mo. App. 556.

Practical necessity.— The necessity contemplated by the statute is a practical necessity, and if the applicant's outlet to the highway on his own ground or the way he now has does not afford him practical access to the highway and cannot be made to do so at a reasonable expense, then he is entitled to the establishment of the road as a necessity. Vice *v.* Eden, 113 Ky. 255, 68 S. W. 125, 24 Ky. L. Rep. 132. See also Carter *v.* Barkley, 137 Iowa 510, 115 N. W. 21.

21. *Georgia.*— Chattanooga, etc., R. Co. *v.* Philpot, 112 Ga. 153, 37 S. E. 181.

Iowa.— Richards *v.* Wolf, 82 Iowa 358, 47 N. W. 1044, 31 Am. St. Rep. 501.

Missouri.— Cox *v.* Tipton, 18 Mo. App. 450.

North Carolina.— Burgwyn *v.* Lockhart, 60 N. C. 264; Plimmons *v.* Frisby, 60 N. C. 200; Lea *v.* Johnston, 31 N. C. 15.

Pennsylvania.— *In re* Plum Tp. Road, 31 Pittsb. Leg. J. N. S. 171.

See 40 Cent. Dig. tit. "Private Roads," § 1½.

The Iowa statute expressly provides that any person not having a public or private way thereto may have a private way under the statute and it is held that if one has either a public or private way he cannot maintain the statutory proceeding for a private road. Carter *v.* Barkley, 137 Iowa 510, 115 N. W. 21.

Existing way held not practicable.— Where the existing way to and from the land of the petitioner is specially difficult and burdensome, it is not to be deemed practicable. Mayo *v.* Thigpen, 107 N. C. 63, 11 S. E. 1052; *In re* Brecknock Tp. Road, 2 Woodw. (Pa.) 437. Likewise where the only existing route is over a strip of land continually subject to overflow and inundation, such route must be deemed impracticable. Mayo *v.* Thigpen, *supra*.

22. Chattanooga, etc., R. Co. *v.* Philpot, 112 Ga. 153, 37 S. E. 181; Cox *v.* Tipton, 18 Mo. App. 450; Burgwyn *v.* Lockhart, 60 N. C. 264; Plimmons *v.* Frisby, 60 N. C. 200; *In re* Plum Tp. Road, 31 Pittsb. Leg. J. N. S. (Pa.) 171.

23. Richards *v.* Wolf, 82 Iowa 358, 47 N. W. 1044, 31 Am. St. Rep. 501; Cox *v.* Tipton, 18 Mo. App. 450; Lea *v.* Johnston, 31 N. C. 15.

Only where no public road passes through or touches the land and the land is inaccessible does the necessity for a private road exist. Coberly *v.* Butler, 63 Mo. App. 556.

24. *Georgia.*— Chattanooga, etc., R. Co. *v.* Philpot, 112 Ga. 153, 37 S. E. 181.

Kentucky.— Vice *v.* Eden, 113 Ky. 255, 68 S. W. 125, 24 Ky. L. Rep. 132.

Michigan.— People *v.* Richards, 38 Mich. 214.

Missouri.— Cox *v.* Tipton, 18 Mo. App. 450.

North Carolina.— Lea *v.* Johnston, 31 N. C. 15.

South Carolina.— Singleton *v.* Road Com'rs, 2 Nott & M. 526.

See 40 Cent. Dig. tit. "Private Roads," § 1½.

Common convenience.— It is not necessary that the common convenience should be promoted in order to authorize the establishment of private roads. Pettengill *v.* Kennebec County Com'rs, 21 Me. 377.

25. Carter *v.* Barkley, 137 Iowa 510, 115 N. W. 21.

26. Carter *v.* Barkley, 137 Iowa 510, 115 N. W. 21.

27. Chattanooga, etc., R. Co. *v.* Philpot, 112 Ga. 153, 37 S. E. 181.

Until the way is actually abolished, so that it cannot be used by an applicant as a means of access to his land, there is no such necessity as would authorize the public authorities to appropriate the private property of another to his use. Chattanooga, etc., R. Co. *v.* Philpot, 112 Ga. 153, 37 S. E. 181.

28. Chandler *v.* Reading, 129 Mo. App. 63, 107 S. W. 1039.

It is immaterial at what stage of the proceedings the court finds that the road pro-

4. CONSTRUCTION OF STATUTES CONFERRING POWER. Acts conferring the power to grant private roads are in derogation of the common law and common right, and must be strictly construed.[29]

B. Proceedings Therefor — 1. NATURE. The statutory proceeding for the establishment of a private road is one having for its object the taking of the property of one person, on the ground of necessity, for the private use of another, and is therefore *in invitum* in derogation of the common law and of the common right.[30] It is in the nature of a civil action strictly between the petitioner and the owner or owners through whose land the road is to pass, the public at large having no interest therein.[31]

2. RIGHT TO INSTITUTE — a. In General. The statute authorizing the road determines who may institute proceedings therefor.[32] Some statutes provide that the petitioner must live [33] or be settled [34] on the land over which the private road is desired; while others provide that the petitioner must be either a resident who occupies, or a non-resident who owns, cultivated land which such road will connect with the public highway.[35]

b. Estoppel. The fact that a landowner has already instituted, but abandoned, a proceeding for a road which would have given him the desired access to a parcel of land does not estop him to institute a proceeding for a different road to such parcel, if on the first application no road was actually established.[36] Where one opens a road over his own land to a highway and afterward by deeds, without reservation of the road, conveys the lots nearest the highway to others who close the road, he is not estopped from instituting a statutory proceeding to lay such road out as a private road.[37]

3. TIME FOR INSTITUTING. A party desiring to lay out a private road to his lands, and having already a right of way to the same, is not bound to wait until his right of way expires before bringing proceeding to lay out a private way, but he may move a reasonable time in advance of the expiration of the existing easement.[38]

4. PARTIES. Where a private road is sought to be established over lands parallel to a division fence, which becomes the boundary of the road on one side, the adjoining owner is not a necessary party to the proceedings and cannot be heard to object where no part of his land or interest in the division fence is taken or damaged.[39]

5. PETITION AND BOND — a. Petition — (I) *IN GENERAL.* The statutes generally provide that the proceeding shall be founded on a written petition.[40]

posed is a way of necessity. Chandler *v.* Reading, 129 Mo. App. 63, 107 S. W. 1039. And it is held that it is enough if it appears that the court found the fact of necessity affirmatively at some stage of the proceeding, as where the finding of such fact is recited in the final judgment. Chandler *v.* Reading, *supra.*

29. Colville *v.* Judy, 73 Mo. 651; Chandler *v.* Reading, 129 Mo. App. 63, 107 S. W. 1039; Coberly *v.* Butler, 63 Mo. App. 556; Barr *v.* Flynn, 20 Mo. App. 383; Cox *v.* Tipton, 18 Mo. App. 450.

30. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

31. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

32. Pettengill *v.* Kennebec County Com'rs, 21 Me. 377.

33. Pettengill *v.* Kennebec County Com'rs, 21 Me. 377.

34. Cozard *v.* Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932, 111 Am. St. Rep. 779, 1 L. R. A. N. S. 969; Caroon *v.* Doxey, 48 N. C. 23, holding that the owner of a tract of land on which he does not reside and no part of which he has either fenced, cultivated, or improved, having only, in common with others, used it as a range for cattle, is not entitled to a petition for a private road over adjoining lands, under a statute authorizing the establishment of such road where the petitioner therefor is "settled upon his land."

35. Hall *v.* Lincoln County Com'rs, 62 Me. 325; Orrington *v.* Penobscot County Com'rs, 51 Me. 570.

36. Reynolds *v.* Reynolds, 15 Conn. 83.

37. State *v.* Stackhouse, 14 S. C. 417.

38. Palmer *v.* Clement, 49 Mich. 45, 12 N. W. 903.

39. Wells *v.* Harris, 137 Mo. 512, 38 S. W. 1101.

40. See the statutes of the several states. And see the following cases:

Connecticut.— Perkins *v.* Colebrook, 68 Conn. 113, 35 Atl. 772.

Georgia.— Neal *v.* Neal, 122 Ga. 804, 50 S. E. 929; Green *v.* Reeves, 80 Ga. 805, 6 S. E. 865.

(II) *Notice of Presentation of.* Where the statute requires a copy of the petition and a written notice of the time and place of its presentation to be served on the landowner, without prescribing the method of service, personal service thereof is indispensable,[41] and service made in any other manner will not constitute legal service,[42] although in fact it accomplishes the purpose of notifying the landowner.[43] It is held, however, that the giving of the notice is not an act relating to the subject-matter of the proceeding,[44] and that the landowner by a general appearance subjects himself to the jurisdiction of the tribunal to which the petition is presented.[45]

(III) *Requisites* — (A) *In General.* The petition which is the foundation of the proceeding must of course contain all the necessary statutory averments to entitle the petitioner to the relief prayed for;[46] but the petition is not required to be so formal and precise as ordinary pleadings, and will be upheld if it contains enough to show with reasonable certainty the jurisdictional facts.[47]

(B) *Averring Necessity.* If the statute or constitution requires that the proposed road must be a way of necessity, that fact must of course be alleged in the petition;[48] but the petition is sufficient in this regard if it either follows the language of the statute or constitution, as the case may be,[49] or alleges facts which show the necessity of the proposed road with reasonable certainty.[50]

Illinois.— Cass Highway Com'rs *v.* Mallory, 21 Ill. App. 184.

Maine.— Fernald *v.* Palmer, 83 Me. 244, 22 Atl. 467.

Maryland.— Owings *v.* Worthington, 10 Gill & J. 283.

Michigan.— Hall *v.* Pettit, 88 Mich. 158, 50 N. W. 117; Palmer *v.* Clement, 49 Mich. 45, 12 N. W. 903.

Missouri.— Belk *v.* Hamilton, 130 Mo. 292, 32 S. W. 656; Colville *v.* Judy, 73 Mo. 651; Chandler *v.* Reading, 129 Mo. App. 63, 107 S. W. 1039; Barr *v.* Flynn, 20 Mo. App. 383.

New Jersey.—Parmley *v.* White, 35 N. J. L. 203.

New York.— Satterly *v.* Winne, 101 N. Y. 218, 4 N. E. 185.

North Carolina.— Warlick *v.* Lowman, 103 N. C. 122, 9 S. E. 458.

Pennsylvania.— *In re* Keeling's Road, 59 Pa. St. 358; Miller's Case, 9 Serg. & R. 35; *In re* Kyle's Road, 4 Yeates 514.

See 40 Cent. Dig. tit. "Private Roads," § 6.

Sufficient petition see Cook *v.* Vickers, 144 N. C. 312, 57 S. E. 1.

41. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665. And see Chandler *v.* Reading, 129 Mo. App. 63, 107 S. W. 1039.

42. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

Service of the notice on the landowner's wife at his usual place of abode is insufficient. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

43. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

44. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

The only office of the notice is to bring the person of the landowner within the jurisdiction of the tribunal authorized by the statute to establish private roads. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

45. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

Acts constituting general appearance.— Where, after his plea to the jurisdiction is overruled, the landowner contests the merits of the application, agrees to a continuance, and, when finally defeated, appeals from the judgment establishing the road, these acts constitute a general appearance which dispenses with the service of legal notice. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

46. Chandler *v.* Reading, 129 Mo. App. 63, 107 S. W. 1039.

47. Warlick *v.* Lowman, 103 N. C. 122, 9 S. E. 458.

48. Colville *v.* Judy, 73 Mo. 651; Barr *v.* Flynn, 20 Mo. App. 383. See also Neal *v.* Neal, 122 Ga. 804, 50 S. E. 929; Hall *v.* Pettit, 88 Mich. 158, 50 N. W. 117.

A petition is demurrable, which fails to allege that the proposed road is a way of necessity. Neal *v.* Neal, 122 Ga. 804, 50 S. E. 929.

49. Barr *v.* Flynn, 20 Mo. App. 383.

50. Green *v.* Reeves, 80 Ga. 805, 6 S. E. 865; Warlick *v.* Lowman, 103 N. C. 122, 9 S. E. 458.

Although the petition does not say, in so many words, that the road is a way of necessity, yet it is sufficient if it declares that no public road passes through or touches the petitioner's land, there being an obvious inference of necessity for a road in such circumstances. Belk *v.* Hamilton, 130 Mo. 292, 32 S. W. 656.

Petition held good against collateral attack. — Mo. Const. (1875) art. 2, § 20, prohibits the taking of private land for a private way without consent of the owner except for "private ways of necessity." Rev. St. (1889) § 8559, authorizes the taking of private land for a private road on a petition asking for a "private way" over the land to the public road, and showing that "no public road passes through or touches" the land. It was held that an allegation that no "public road passes through or touches" the land will render a petition under the

(c) *Naming Person to Be Benefited.* The petition should state, in terms and truly, the person for whose benefit the projected road is to be.[51]

(d) *Designating Route.* The petition must state such a road or way as the tribunal to which it is presented has authority to establish,[52] describing with reasonable certainty the precise route desired.[53]

(iv) *Waiver of Objections.* Defects in the petition consisting merely of informalities of statement must be deemed waived, when raised for the first time after the jury has been impaneled.[54] So too an objection that the petition was not sworn to is waived by proceeding to trial without objection.[55]

b. Bond. If a bond required by the statute to invest a tribunal with jurisdiction to act on a petition to establish a private road does not substantially comply with such statute, no jurisdiction of the proceedings is acquired.[56] And the defect in the bond cannot, at a late stage in the proceeding, be cured by filing an amended bond.[57] But the validity of the bond is not affected by inaccurate recitals as to the petition, if the petition is sufficiently identified,[58] nor can the validity of the bond be attacked collaterally.[59]

6. Commissioners, Viewers, Jurors, Surveyors, and Like Officers — a. Who May Act — (i) *In General.* Under a statute providing that one of the viewers appointed shall be a surveyor, it is not necessary that the court should appoint a county surveyor.[60]

(ii) *Disqualification* — (a) *In General.* Where the statute provides that a member of a tribunal laying out a private road shall be disinterested, sons or nephews of the petitioner are disqualified to act.[61] But a person is not disqualified to act as juror by having served in previous ineffectual proceedings taken by the same person to obtain another right of way to the same land.[62]

statute good against collateral attack for failure to allege that the way asked was one of necessity. Belk *v.* Hamilton, 130 Mo. 292, 32 S. W. 656.

Allegations of petition held to allege sufficient to show sufficient reason for road.— Acts (1901), p. 950, c. 729, § 13, provides that any party, desiring a cartway from his premises over the lands of his neighbor to the public road, may file his petition, etc., and if sufficient reason be shown the same will be laid out. Plaintiffs alleged that the way out from their premises was very rough, and increased the distance of travel by about three miles. It was held that the allegations of the petition were sufficient as against a demurrer. Cook *v.* Vickers, 144 N. C. 312, 57 S. E. 1.

51. Fernald *v.* Palmer, 83 Me. 244, 22 Atl. 467.

52. Owings *v.* Worthington, 10 Gill & J. (Md.) 283.

53. Perkins *v.* Colebrook, 68 Conn. 113, 35 Atl. 772.

A description by reference to a preëxisting private way by permission, well marked by user and known as a road, although never legally laid out, is a sufficiently certain description of a projected private road. Satterly *v.* Winne, 101 N. Y. 218, 4 N. E. 185.

As to the termini of the route, it is sufficient if they are designated in the petition with reasonable accuracy. Parmley *v.* White, 35 N. J. L. 203; Miller's Case, 9 Serg. & R. (Pa.) 35. See also *In re* Kyle's Road, 4 Yeates (Pa.) 514, holding that, although no general rule can be laid down as to the definiteness with which the termini must be designated, yet where there is a terminus *a quo* and a terminus *ad quem*, both well known, and the distance between them is not much more than a mile, the maxim "that is regarded as certain which can be made certain" is applicable.

An omission to so designate is fatal to the proceedings. Cass Highway Com'rs *v.* Mallory, 21 Ill. App. 184; *In re* Keeling's Road, 59 Pa. St. 358.

54. Warlick *v.* Lowman, 103 N. C. 122, 9 S. E. 458.

55. Palmer *v.* Clement, 49 Mich. 45, 12 N. W. 903.

56. Geary *v.* San Diego County, 107 Cal. 530, 40 Pac. 800.

57. Geary *v.* San Diego County, 107 Cal. 530, 40 Pac. 800.

Bond not signed by petitioner.— Under Pol. Code, § 3683, providing that a bond must accompany the petition for the opening of a private road, a bond reciting that whereas W and others had petitioned for the laying out of the road, when in fact the petition is not signed by W, is fatally defective, and therefore the board of supervisors acquired no jurisdiction of the proceeding. Geary *v.* San Diego County, 107 Cal. 530, 40 Pac. 800.

58. Mariposa County *v.* Knowles, 146 Cal. 1, 79 Pac. 525.

59. Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915.

60. Latah County *v.* Hasfurther, 12 Ida. 797, 88 Pac. 433.

61. Lyon *v.* Hamor, 73 Me. 56.

62. Palmer *v.* Clement, 49 Mich. 45, 12 N. W. 903.

(B) *Waiver of.* Where the owner of land over which a private road is granted is present when the application is made to the commissioner's court, and a jury to assess damages is appointed at his request and without objection to the persons selected, it will be presumed, although not shown by the record, that they were competent jurors.[63]

b. Appointment — (I) *In General.* It is no objection to the appointment of a committee to lay out a private road that a committee has been previously appointed on the same petition, and has made a report which had been set aside.[64]

(II) *Notice of Application* — (A) *Necessity.* It is generally provided by statute or court rule that notice shall be given to the owner of the land over which the proposed road is to be laid out of the time and place when the application for appointment of viewers will be made.[65]

(B) *Waiver Regarding.* One who participates in the selection of viewers,[66] or delays in making the objection until the report of the viewers is filed,[67] waives any want of notice of the intended application.

(III) *Order of Appointment.* The order appointing viewers of a proposed private road must recite the jurisdictional facts,[68] and whenever it fails so to do the proceeding should be dismissed without prejudice.[69]

c. Hearing Before Viewers as to Necessity For Road — (I) *Notice of.* Personal notice must be given to the owner or owners of the land, over which the proposed road is to pass, of the time and place of the meeting of the viewers, or other like officers, to determine the question as to the necessity of such road.[70] But one who, although not legally notified, appeared at the hearing and contested on the merits, will be deemed to have waived the objection of want of sufficient notice.[71]

(II) *Issues.* The question involved on the hearing is the necessity of the proposed road.[72]

(III) *Evidence* [73] — (A) *As to Another Existing Way.* The fact that the petitioner has secured another way for his own use is relevant on the question of the necessity of a proposed private road; [74] and, like other facts, may be established by testimony as to what the applicant himself has said on the subject.[75]

63. Long *v.* Butler County Com'rs' Ct., 18 Ala. 482. See also People *v.* Taylor, 34 Barb. (N. Y.) 481.

64. Reynolds *v.* Reynolds, 15 Conn. 83.

65. Rout *v.* Mountjoy, 3 B. Mon. (Ky.) 300; Matter of Dennison Tp. Private Road, 13 Pa. Super. Ct. 227.

66. Green *v.* Reeves, 80 Ga. 805, 6 S. E. 865.

67. Matter *v.* Dennison Tp. Private Road, 13 Pa. Super. Ct. 227.

68. Karnes *v.* Drake, 103 Ky. 134, 44 S. W. 444, 19 Ky. L. Rep. 1794; Abney *v.* Barnett, 1 Bibb (Ky.) 557.

Directing kind of notice of hearing.— The order appointing the viewers should not mislead them by directing them to give the notice of hearing suitable to the case of a public road. *In re* Union Tp. Private Road, 14 Pa. Co. Ct. 436.

69. Karnes *v.* Drake, 103 Ky. 134, 44 S. W. 444, 19 Ky. L. Rep. 1794.

Omissions held fatal.—An order appointing viewers is defective where it does not state any of the causes and conveniences of travel, which, by the statute, are pointed out as sufficient inducements for the jurisdiction of the court to attach. Karnes *v.* Drake, 103 Ky. 134, 44 S. W. 444, 19 Ky. L. Rep. 1794; Abney *v.* Barnett, 1 Bibb (Ky.) 557.

70. Elliott's Appeal, 154 Pa. St. 541, 25 Atl. 814; *In re* Redstone Tp. Road, 112 Pa. St. 183, 5 Atl. 383; *In re* Plumcreek Tp. Road, 110 Pa. St. 544, 1 Atl. 431; *In re* Boyer's Road, 37 Pa. St. 257; *In re* Neeld's Road, 1 Pa. St. 353; *Re* Shawhan, 4 Pa. Cas. 181, 7 Atl. 97; *In re* Harbaugh's Road, 8 Pa. Co. Ct. 671; *In re* Union Tp. Private Road, 7 Kulp (Pa.) 245.

71. Mohawk, etc., R. Co. *v.* Artcher, 6 Paige (N. Y.) 83.

72. Reynolds *v.* Reynolds, 15 Conn. 83.

The question as to who is to use the proposed road is not involved in a proceeding for its establishment. Summerville Macadamized, etc., Road Co. *v.* Deutscher Schuetzen Club, 62 Ga. 318.

73. **Evidence** generally see Evidence, 16 Cyc. 821 *et seq.*

74. McCauley *v.* Dunlap, 4 B. Mon. (Ky.) 57.

75. McCauley *v.* Dunlap, 4 B. Mon. (Ky.) 57.

Evidence that road prayed for would be shorter.— If the petitioner already has another outlet from his lands to the public highway, evidence tending to show that the road prayed for would be shorter is immaterial. Warlick *v.* Lowman, 103 N. C. 122, 9 S. E. 458. But where it is alleged that the petitioner has no other outlet, so that the jury may find that the road prayed for

(B) *Expert.* As to whether expert testimony is admissible on the question of the necessity of a proposed private road, there is a conflict of authority, it being held in one jurisdiction that such testimony is admissible,[76] and in another jurisdiction that as the subject is not one involving a peculiar language, the opinions of witnesses are inadmissible.[77]

d. Report or Return of Viewers — (I) *Where to Be Made.* The viewers must report to the next term of court after they are appointed to allow time for filing exceptions to the report, if necessary.[78]

(II) *Essentials* — (A) *In General.* The report of viewers must substantially conform with the petition and order.[79]

(B) *As to Road* — (1) Necessity. A statutory requirement that viewers of a private road shall report whether the same is necessary cannot be dispensed with, and their report is fatally defective if it fails to set forth that the road is necessary.[80] But a return for private use,[81] or that there is occasion for the road,[82] is a sufficient compliance with the law as to the necessity of the road.

(2) Location. To lay out a private road partly on a public road is fatal to the report of viewers,[83] although the records of the court do not show that a formal order had issued to open the public road.[84]

(3) Width. The report of viewers or other like officers must show the width of the road which they adopted as a basis for the computation of damages,[85] unless the statute under which the proceeding was instituted itself provides that the road shall be of a given width, and does not expressly require it to be specified in the report.[86]

(4) Termini — (a) In General. The terminal points of the road as contained in the report of viewers must correspond with those stated in the petition and order;[87] but it is sufficient if there be substantial conformity in this particular.[88]

(b) Certainty Regarding. The report of viewers or like officers will be sustained, against the objection that it fails to fix the termini of the road, if the report[89] or a draft which by the statute is made an essential part of the report,[90] locates the termini with reasonable certainty, mathematical precision not being required.

(5) Directing Kind of Fences to Be Erected. It is not necessary for the committee laying out a private road to direct in their report the particular kind

is a necessity, then evidence as to the length and nature of the proposed route, as compared with one laid out in a different direction, becomes competent as tending to show that the demand is reasonable and just. Warlick *v.* Lowman, *supra.*

76. Vice *v.* Eden, 113 Ky. 255, 68 S. W. 125, 24 Ky. L. Rep. 132, holding, however, that while it is proper to permit witnesses acquainted with the locality to give their opinions as to the necessity of the road, it is error to refuse to allow them to state the facts on which their opinions are based.

77. Burwell *v.* Sneed, 104 N. C. 118, 10 S. E. 152.

78. *In re* Boyer's Road, 37 Pa. St. 257, holding further that it was erroneous for viewers to assemble on the ground, assess the damages and make their report to the court on the same day they were appointed, and for the court on the next day to confirm the report absolutely.

79. *In re* Roche's Private Road, 10 Pa. Super. Ct. 87, 44 Wkly. Notes Cas. 166. See also *In re* Springfield Road, 73 Pa. St. 127; *In re* Cassville Borough Road, 4 Pa. Super. Ct. 511.

80. *In re* Sandy Lick Creek Road, 51 Pa. St. 94.

81. *In re* Reserve Tp., 2 Grant (Pa.) 204.

82. *In re* Pocopson Road, 16 Pa. St. 15.

83. *In re* Boyer's Road, 37 Pa. St. 257; *In re* Neeld's Road, 1 Pa. St. 353.

84. *In re* Neeld's Road, 1 Pa. St. 353.

85. *In re* Plumcreek Tp. Road, 110 Pa. St. 544, 1 Atl. 431.

86. *In re* Rickards, 5 Pennew. (Del.) 17, 58 Atl. 945.

87. *In re* Boyer's Road, 37 Pa. St. 257.

88. *In re* South Abington Tp. Road, 109 Pa. St. 118; *In re* Springfield Road, 73 Pa. St. 127; *In re* Cassville Borough Road, 4 Pa. Super. Ct. 511.

89. Reynolds *v.* Reynolds, 15 Conn. 83; State *v.* White, 35 N. J. L. 203; *In re* Springfield Road, 73 Pa. St. 127; *In re* Rearick's Private Road, 7 Pa. Super. Ct. 548; *In re* Cassville Borough Road, 4 Pa. Super. Ct. 511.

90. *In re* South Abington Tp. Road, 109 Pa. St. 118; *In re* Bean's Road, 35 Pa. St. 280; *In re* Roche's Private Road, 10 Pa. Super. Ct. 87.

of fences the petitioners shall build in the places designated for that purpose, where the law furnishes a sufficient guide on the subject.[91]

(6) Limiting Duration of Road. A declaration in the return, in direct contravention of the statute, that the private road shall remain such so long as the petitioner shall keep it in repair, and no longer, invalidates the whole proceeding.[92]

(c) *Showing Notice of View to Landowner.* A report of viewers must show personal notice to the owner of the land, over which it is proposed to lay out a road, of the time and place of view.[93]

(d) *Certifying Regard Had to Public Convenience.* The return of surveyors appointed to lay out a private road must certify that regard was had to the public convenience.[94]

(iii) *Waiver of Defects.* A petitioner for a private way cannot object to the report of the committee appointed to hear the application on the ground that such report contains irrelevant findings of fact, if he made no objection at the hearing to the admission of the evidence on which such findings are based.[95]

(iv) *Amendment* — (a) *What Is Amendable.* A mere clerical error in the report of viewers is always amendable.[96]

(b) *Manner of Amending.* The court itself has no power to alter the report of viewers,[97] but the proper remedy is an application for the recommitment of the report to the viewers for correction.[98] It has been held, however, that the action of the court in accepting an amended report may be regarded as an equivalent of its having been recommitted to the viewers for correction.[99]

(v) *Confirmation* — (a) *Necessity.* It is indispensable that the report of viewers laying out a private road be confirmed by the court.[1]

(b) *Order of Confirmation* — (1) Sufficiency — (a) In General. Where the width of a private road is fixed during the same term at which the decree of confirmation *nisi* of a report of viewers laying out a private road is made, it is sufficient, although omitted in the decree itself.[2]

(b) Waiver Regarding. Any defects in the order or confirmation are, so far as the landowner is concerned, waived by his proceeding by petition to recover the damages assessed in the proceeding.[3]

(2) Effect. A confirmation of report is in effect an order that the road be opened;[4] but confirmation of a report *nunc pro tunc*, followed by a simultaneous final confirmation and issue of the order to open the road, does not cure previous informal and unauthorized proceedings.[5]

91. Reynolds *v.* Reynolds, 15 Conn. 83.

92. *In re* Brown, 51 N. H. 367, holding further that the fact that the selectmen did not intend to annex such a condition, having taken the clause containing it from a book of forms, does not justify the court in permitting them to amend their return by striking out the clause so as to validate their proceedings.

93. Roberts *v.* Williams, 15 Ark. 43; *In re* Redstone Tp. Road, 112 Pa. St. 183, 5 Atl. 383; *In re* Plumcreek Tp. Road, 110 Pa. St. 544, 1 Atl. 431; *In re* Boyer's Road, 37 Pa. St. 257; *In re* Neeld's Road, 1 Pa. St. 353.

94. Parmley *v.* White, 35 N. J. L. 203.

95. Perkins *v.* Colebrook, 68 Conn. 113, 35 Atl. 772.

96. Elliott's Appeal, 154 Pa. St. 541, 25 Atl. 814; *In re* Beigh's Road, 23 Pa. St. 302.

97. *In re* Beigh's Road, 23 Pa. St. 302, holding further that the power of the court is limited to a rejection or confirmation of the report.

98. *In re* Boyer's Road, 37 Pa. St. 257; *In re* Beigh's Road, 23 Pa. St. 302.

99. Elliott's Appeal, 154 Pa. St. 541, 25 Atl. 814.

1. Miller's Case, 9 Serg. & R. (Pa.) 35.

No confirmation nisi is necessary, where, at a term to which the report is made, viewers were appointed. *In re* Beigh's Road, 23 Pa. St. 302.

2. *In re* Hunter's Private Road, 46 Pa. St. 250, holding further that in such case, if more than one term passes before final confirmation, and another term thereafter elapses before any exceptions are filed, the road is duly granted, and it is error in the court to vacate the decree of confirmation and set aside the proceedings. See also *In re* Weaver's Road, 45 Pa. St. 405.

3. *In re* Weaver's Road, 45 Pa. St. 405, order not fixing width.

4. *In re* Beigh's Road, 23 Pa. St. 302.

5. *In re* Reserve Tp. Road, 2 Grant (Pa.) 204.

7. Order or Decree Laying Out or Opening Road — a. Conditions Precedent. In one jurisdiction at least the order for the opening of a private road cannot issue until the damages are paid, or tendered and brought into court.[6]

b. Negativing Existence of Facts Showing Lack of Jurisdiction. The order or decree of a court establishing a private road need not negative the existence of every fact which would show that the court could not properly exercise its power in the given case.[7]

c. Fixing Matters Pertaining to Road — (I) *Location* — (A) *In General.* That the description of the location of the road contained in the order laying out the road does not follow the language of the application is not fatal to the proceeding, provided the description in the application is incorporated in the order by reference and the two descriptions are not irreconcilably repugnant.[8]

(B) *Termini.* In ordering the laying out of a private road it is the duty of the court, in its judgment, to fix both termini of such way.[9]

(II) *Width.* Where the statute requires that the order of the court establishing the road shall define and specify its width, an omission so to do is fatal to the proceeding;[10] but the court may, at a subsequent term, correct a mere mistake in fixing the width,[11] allowing another term to pass before confirming the report absolutely.[12]

(III) *Opening of* — (A) *Time.* If the statute provides that the court shall direct when the roads shall be laid out and when the damages shall be paid, the court must so direct in the decree establishing the road.[13]

(B) *Manner.* The order of confirmation need not specify how the road shall be opened, if the law authorizing the proceeding specifies the manner of opening the road in plain and direct terms.[14]

(IV) *Manner of Keeping in Repair.* It is not necessary for the court, in the order of confirmation, to specify how the road shall be kept in repair when the statute authorizing the proceeding provides that it shall be kept in repair by the persons applying for and using it.[15]

(V) *Limiting Duration.* Unless the statute expressly so provides a tribunal establishing a private road has no authority to limit in its decree the time for the

6. *In re* Clowes' Road, 31 Pa. St. 12. See also Belk *v.* Hamilton, 130 Mo. 292, 32 S. W. 656, holding that an order of a county board in a proceeding to establish a private way, reciting the deposit by the petitioner of the damages awarded and directing defendants to vacate the road and the road overseers to open it, as in the order described, over defendant's land, sufficiently complies with Rev. St. (1889) § 8562, requiring the county board, at a proper stage of such a proceeding, to order the way established and render judgment against the petitioner for damages allowed each defendant.

7. Long *v.* Butler County Com'rs' Ct., 18 Ala. 482, holding further that under a statute conferring a power on a court of roads and revenue of each county to establish private roads, but providing that no such road shall pass through any person's plantation, it is not necessary, in an order of the court laying out a road, to direct that it shall be so laid out as not to pass through the plantation of any person, and that the appellate court will not presume that it does so pass, for the purpose of invalidating the proceeding.

8. Satterly *v.* Winne, 101 N. Y. 218, 4 N. E. 185.

9. Burden *v.* Harman, 52 N. C. 354.

10. Barnhard *v.* Haworth, 9 Ind. 103.

11. *In re* Weaver's Road, 45 Pa. St. 405. *Compare In re* Clowes' Road, 31 Pa. St. 12, holding that the order confirming the report in favor of a private road is fatally defective, if it fixes the width of the road in excess of that for which the report estimates damages.

12. *In re* Union Tp. Private Road, 7 Kulp (Pa.) 245; *In re* Kingston Tp. Private Road, 5 Kulp (Pa.) 235.

13. Reynolds *v.* Reynolds, 15 Conn. 83, where it is said that the provision alluded to in the text is wise and salutary; that when it is left wholly uncertain, and depending on the option of the party who instituted the proceedings whether the road shall be opened at all, the owner of the land over which the road is laid out can, in such a state of uncertainty, neither cutivate nor alienate it, without embarrassment and hazard.

14. *In re* Kyle's Road, 4 Yeates (Pa.) 514.

15. *In re* Kyle's Road, 4 Yeates (Pa.) 514. **In authorizing a private road partly over a private bridge of another man,** it is the duty of the court to add to the confirmation of such order relative to the maintenance and repair of the bridge by the applicant as the case may require. *In re* Clowe's Road, 31 Pa. St. 12.

use of the road to a given period of the year,[16] or to limit its duration to the necessity which required it.[17]

8. Laying Out Road. A road does not become a legal private road until the public functionaries whose ministerial duty it is so to do have actually laid it out.[18] The public functionaries whose ministerial duty it becomes to lay out a private road have no discretion to change its location,[19] but must lay it out so as to cover ground substantially the same as that described in the application [20] and the order of the court.[21]

9. Expenses and Costs. Statutes authorizing the establishment of private roads generally require that the expenses and costs of proceeding therefor shall be paid by the applicant.[22] But the applicant is not liable for such expenses and costs in case a private road is laid out on a petition for a public road, where the statute requires that the expenses and costs of a proceeding to establish a public road shall be paid by the public.[23]

10. Operation and Effect. If a road is petitioned for and damages assessed as for a private road and the order of the board of commissioners made for a private road, it cannot be sustained on the ground that it is a public highway.[24]

11. Estoppel to Question Validity. If the tribunal had jurisdiction, the one at whose instance and for whose benefit the road was established by it, is, by accepting and using the road, estopped from questioning the validity of the proceedings.[25]

12. Review — a. By Certiorari [26] — (I) *In General.* Certiorari will not lie to review proceedings to establish a private road where an adequate remedy by appeal exists; [27] nor will it lie to review a determination adverse to the establishment of the road, made by a tribunal in the exercise of its discretionary powers.[28]

(II) *Discretion to Grant.* It is discretionary with the court, to which application is made, to refuse the writ, where no transcript of the record is presented therewith, so as to enable the court to judge of the propriety of issuing the writ.[29]

(III) *Proceedings Therefor* — (A) *Who May Institute.* One who becomes the owner of the land subsequent to the time of the view, but before issue of the final order, and presents a sufficient objection to the establishment of the road, is entitled, on a showing that he has lost his right of appeal, without fault or negligence on his part, to a writ of certiorari to review the proceedings.[30]

(B) *Estoppel to Institute.* After a private road has been laid out and opened and the party through whose land it runs has proceeded by petition to recover

16. Holcomb *v.* Moore, 4 Allen (Mass.) 529.

17. Reynolds *v.* Reynolds, 15 Conn. 83, holding further that the discontinuance of a private way, as such, must depend on circumstances over which the court has no control, and that it is neither necessary or proper for the court to provide against them.

18. Satterly *v.* Winne, 101 N. Y. 218, 4 N. E. 185.

No discretion to refuse to lay out road.— It seems that where the statute imposes on public functionaries the ministerial duty of laying out a private road, when the road has been certified by the jury, they have no discretion to refuse to lay it out. Satterly *v.* Winne, 101 N. Y. 218, 4 N. E. 185.

19. Satterly *v.* Winne, 101 N. Y. 218, 4 N. E. 185.

20. Powell *v.* Hitchner, 32 N. J. L. 211; Satterly *v.* Winne, 101 N. Y. 218, 4 N. E. 185.

21. Powell *v.* Hitchner, 32 N. J. L. 211.

22. Doniphan County *v.* Albright, 8 Kan. App. 238, 55 Pac. 495; Belk *v.* Hamilton, 130 Mo. 292, 32 S. W. 656; Ernst *v.* Baker, 1 Browne (Pa.) 326.

23. Ernst *v.* Baker, 1 Browne (Pa.) 326.

Contract affecting liability for expenses.— A contract made under the authority of the police jury of a parish to construct a private road across a tract of land in the parish belonging to an absentee, which stipulates that the land shall pay the cost of the construction, cannot be enforced against the parish for a deficiency between the price which the land brought and the cost of making the road. Young *v.* Iberville Parish, 22 La. Ann. 87.

24. Stewart *v.* Hartman, 46 Ind. 331.

25. Fernald *v.* Palmer, 83 Me. 244, 22 Atl. 467.

26. Certiorari generally see Certiorari, 6 Cyc. 730 *et seq.*

27. Moore *v.* Bailey, 8 Mo. App. 156.

28. Brooks *v.* Kirby, 19 Ala. 72.

29. Roberts *v.* Williams, 13 Ark. 355.

30. Roberts *v.* Williams, 15 Ark. 43.

damages therefor, he cannot, after an adverse award of viewers, sue out a certiorari to reverse the order of confirmation for any defect therein.[31]

(c) *Form of Application* — (1) ENTITLING. A writ of certiorari in the matter of a private road should be entitled as between the applicant therefor, as plaintiff in certiorari, and the applicant for the road, as defendant.[32]

(2) EXHIBITS. To obtain certiorari, the party aggrieved by the establishment of a private road should present, with his application, a duly certified transcript of the record sought to be reviewed.[33]

(D) *Quashing Writ.* The writ will be dismissed because improvidently granted, as where it appears that an adequate remedy by appeal exists.[34]

(E) *Hearing and Determination* — (1) HEARING. On the hearing of the writ nothing is reviewable except the regularity of the proceedings.[35]

(2) DETERMINATION — (a) QUASHING PROCEEDINGS. The entire proceeding will be quashed in certiorari, where the petition failed to allege that the petitioner had no access to his land other than by the proposed road,[36] or where it appears that there was no service of notice, as required by statute, on the owner [37] or occupant [38] of the land, or where the applicant for the road paid the surveyors more than their legal fees.[39]

(b) REMITTING PROCEEDINGS. In one jurisdiction the court may, where it appears that the return of the surveyors exceeds the width of road prescribed by statute, order the proceedings to be remitted, unless an amendment thereof be ordered on motion of the applicant for the road, as authorized by statute.[40]

b. By Appeal — (I) *IN GENERAL.* Since the right of appeal, in the absence of some constitutional authorization, is purely of statutory origin,[41] unless the statute so provides [42] an appeal does not lie in proceedings to establish a private road.[43] But the right of appeal will not be denied if by fair and reasonable inter-

31. *In re* Weaver's Road, 45 Pa. St. 405.

32. Griscom *v.* Gilmore, 15 N. J. L. 475.

33. Roberts *v.* Williams, 13 Ark. 355.

34. Moore *v.* Bailey, 8 Mo. App. 156.

35. *In re* Keller's Private Road, 154 Pa. St. 547, 25 Atl. 814.

36. Hall *v.* Pettit, 88 Mich. 158, 50 N. W. 117.

37. Hall *v.* Pettit, 88 Mich. 158, 50 N. W. 117; *Re* Shawhan, 4 Pa. Cas. 181, 7 Atl. 97.

38. Hall *v.* Pettit, 88 Mich. 158, 50 N. W. 117.

39. Parmley *v.* White, 35 N. J. L. 203.

40. Gruner *v.* Hartman, 66 N. J. L. 189, 48 Atl. 522.

41. See APPEAL AND ERROR, 2 Cyc. 519 *et seq.*

42. *Idaho.*— Latah County *v.* Hasfurther, 12 Ida. 797, 88 Pac. 433.

Iowa.— Bankhead *v.* Brown, 25 Iowa 540.

Kentucky.—Freeman *v.* Cook, 113 Ky. 461, 68 S. W. 410, 24 Ky. L. Rep. 319; Rout *v.* Mountjoy, 3 B. Mon. 300.

Maryland.— Arnsperger *v.* Crawford, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497.

Missouri.— Moore *v.* Bailey, 8 Mo. App. 156.

North Carolina.— Burden *v.* Harman, 52 N. C. 354; Ladd *v.* Hairston, 12 N. C. 368.

Pennsylvania.— *In re* Rearick's Private Road, 7 Pa. Super. Ct. 548.

See 40 Cent. Dig. tit "Private Roads," § 18.

From order denying road.— Under Gen. St. c. 94, art. 1, § 43, providing for appeal from decisions of county courts in regard to the establishment of private roads, an appeal lies from an order denying an application, under section 45, to establish a road, although that section follows the section giving the right of appeal. Karnes *v.* Drake, 103 Ky. 134, 44 S. W. 444, 19 Ky. L. Rep. 1794.

Appeal and trial de novo.— In some jurisdictions it is provided by statute that an appeal and trial *de novo* may be had in proceedings for the establishment of a private road. Latah County *v.* Hasfurther, 12 Ida. 797, 88 Pac. 433; Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665; Moore *v.* Bailey, 8 Mo. App. 156; Cook *v.* Vickers, 141 N. C. 101, 53 S. E. 740.

Further appeal to court of appeals.— Code Pub. Gen. Laws, art. 25, § 121, authorizing an appeal to the circuit court from an order granting a private road and making an award to the owners of land taken therefor, and providing that the judgment shall be final between the parties, does not authorize a further appeal to the court of appeals from the judgment of the circuit court on appeal. Arnsperger *v.* Crawford, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497.

Only final order appealable.—An order setting aside a report of viewers because of information improperly given them is not a final order from which an appeal lies. *In re* Perry Tp. Road, 36 Pa. Super. Ct. 131.

43. People *v.* Robinson, 29 Barb. (N. Y.) 77, 17 How. Pr. 534; Wood *v.* Wood, 4 N. C. 126.

pretation of the law it can be allowed, and the courts will give a liberal construction to the statute in favor of the right.[44]

(II) *Persons Entitled.* One who does not appear to be affected by the establishment of a private road, and is no party to the proceeding, cannot sustain a writ of error.[45]

(III) *Presenting and Reserving Ground of Review.* Questions not raised in the court below will not be noticed on appeal, as where the jury to assess the damages was not sworn.[46]

(IV) *Hearing and Determination* — (A) *Hearing.* If the tribunal establishing the road and the proceedings are regular on their face, the appellate court can consider nothing beyond the record proper,[47] in which neither the testimony [48] nor the recital of facts in the opinion filed by the court[49] below is a part. And where the language of the statute is that the landowner, if dissatisfied with the assessment made by the viewer, may appeal from the judgment of the tribunal confirming the same, the questions whether there was a necessity for the road and whether the report of the viewers should be set aside are not matters to be reviewed by the appellate tribunal,[50] the sole matter reviewable being the amount of damages to which the landowner may be entitled for that part of his land proposed to be taken.[51]

(B) *Determination* — (1) Reversal. The proceedings will be reversed where the petition on which it is founded fails to show, either directly or by necessary implication, that the proposed road is a way of necessity; [52] or where the petition [53] or report of the viewers [54] fails to set forth with reasonable certainty the termini of the road; or where the lower tribunal, on confirming the report of the viewers, fails to observe the statutory requirement to fix the width of the road;[55] or where the record shows that the order for the opening of the road was issued before payment or tender into court of the damages assessed,[56] or that the road was laid out on the bridge of another, without making a special order relative to the maintenance and repair of the bridge.[57] So too the proceedings will be reversed on appeal if the act under which they were had is unconstitutional.[58]

(2) Requisites of Judgment of Tribunal For Trial De Novo. If the appeal transfers the entire proceeding to the appellate court for trial *de novo*, its judgment must fix and determine all the rights of the parties.[59] Accordingly it is held to be essential for the appellate tribunal to provide in its judgment for the establish-

44. Cook *v.* Vickers, 141 N. C. 101, 53 S. E. 740.

45. Rout *v.* Mountjoy, 3 B. Mon. (Ky.) 300.

46. Long *v.* Butler County Com'rs' Ct., 18 Ala. 482.

47. *In re* Roche's Private Road, 10 Pa. Super. Ct. 87, 44 Wkly. Notes Cas. 166; *In re* Rearick's Private Road, 7 Pa. Super. Ct. 548. See also Rout *v.* Mountjoy, 3 B. Mon. (Ky.) 300.

Exceptions which raise only questions of fact cannot be considered by the appellate court. *In re* Rearick's Private Road, 7 Pa. Super. Ct. 548.

The action of the lower court in setting aside a report of viewers because they had been informed of the amount of a previous award set aside will not be reviewed by the appellate court. *In re* Perry Tp. Road, 36 Pa. Super. Ct. 131.

Presumption on appeal.— It must be taken for granted that every objection made to the report and overruled by the court below, which is in its nature capable of being proved, is untrue in point of fact unless the contrary appears from the record. *In re* Roche's Private Road, 10 Pa. Super. Ct. 87, 44 Wkly. Notes Cas. 166. See also *In re* Keller's Private Road, 154 Pa. St. 547, 25 Atl. 814; Sadsbury Tp. Roads, 147 Pa. St. 471, 23 Atl. 772; *In re* Duff's Private Road, 66 Pa. St. 459; *In re* New Hanover Tp. Road, 18 Pa. St. 220; *In re* Schuylkill Falls Road, 2 Binn. (Pa.) 250.

48. *In re* Roche's Private Road, 10 Pa. Super. Ct. 87, 44 Wkly. Notes Cas. 166.

49. *In re* Roche's Private Road, 10 Pa. Super. Ct. 87, 44 Wkly. Notes Cas. 166.

50. Cleckler *v.* Morrow, 150 Ala. 524, 43 So. 784.

51. Cleckler *v.* Morrow, 150 Ala. 524, 43 So. 784.

52. Colville *v.* Judy, 73 Mo. 651.

53. *In re* Keeling's Road, 59 Pa. St. 358.

54. *In re* Keeling's Road, 59 Pa. St. 358.

55. *In re* Boyer's Road, 37 Pa. St. 257.

56. *In re* Clowes' Road, 31 Pa. St. 12.

57. *In re* Clowes' Road, 31 Pa. St. 12.

58. Bankhead *v.* Brown, 25 Iowa 540.

59. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

ment of the road,[60] a judgment merely awarding damages and remanding the same to the lower tribunal for further proceedings being insufficient.[61]

c. Collaterally. Except for jurisdictional reasons, rendering void the proceedings to establish a private road,[62] they are not subject to collateral attack.[63] And in reviewing such proceedings collaterally, the records of the tribunal establishing the road should receive a fair and reasonable interpretation,[64] it being enough if such record clearly shows the purport of its judicial acts.[65]

C. Damages to Landowners — 1. Who Must Pay. It is generally provided by the statutes authorizing private roads that the person or persons for whose benefit they are opened shall pay the damages awarded to the landowners.[66] And where the statute plainly provides that the fact of the benefit determines who shall pay the damages, the petitioner for the road is not relieved from liability by alleging in his petition that the road is to be for the benefit of the public, or by failing to allege that it is to be for his own benefit.[67] Nor can he escape liability on the ground that the notice required by statute to be given by the municipal officers, on the filing of the petition for a private road, was defective, if he was not injured thereby.[68]

2. When Payable. Some of the statutes authorizing private roads make the payment of the damages awarded to landholders a condition precedent to the opening thereof,[69] while others provide that damages, when estimated, shall not be paid until the land has been entered upon and possession taken for the purpose of constructing the road.[70]

3. Assessment — a. Mode. In some jurisdictions the inquisition under a writ of ad quod damnum is the proper mode of ascertaining the amount of the damages,[71]

60. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

61. Allen *v.* Welch, 125 Mo. App. 278, 102 S. W. 665.

62. Proctor *v.* Andover, 42 N. H. 348; Berridge *v.* Shults, 32 Misc. (N. Y.) 444, 66 N. Y. Suppl. 204.

63. Brown *v.* Brown, 50 N. H. 538.

64. Belk *v.* Hamilton, 130 Mo. 292, 32 S. W. 656.

65. Belk *v.* Hamilton, 130 Mo. 292, 32 S. W. 656.

66. See the statutes of the several states. And see the following cases:

Alabama.— Cleckler *v.* Morrow, 150 Ala. 524, 43 So. 784.

Idaho.— Latah County *v.* Hasfurther, 12 Ida. 797, 88 Pac. 433.

Kansas.— Doniphan County *v.* Albright, 8 Kan. App. 238, 65 Pac. 495.

Maine.— Fernald *v.* Palmer, 83 Me. 214, 22 Atl. 467.

New York.— Craig *v.* Orange County, 10 Wend. 585.

See 40 Cent. Dig. tit. "Private Roads," § 12.

67. Fernald *v.* Palmer, 83 Me. 244, 22 Atl. 467.

68. Fernald *v.* Palmer, 83 Me. 244, 22 Atl. 467.

69. Green *v.* Reeves, 80 Ga. 805, 6 S. E. 865; Doniphan County *v.* Albright, 8 Kan. App. 238, 55 Pac. 495; *In re* Clowes' Road, 31 Pa. St. 12; *In re* York Water Co. Road, 24 Pa. St. 397. See also Mohawk, etc., R. Co. *v.* Artcher, 6 Paige (N. Y.) 83.

When question of compensation can be raised.— In proceedings, under such a statute, the question of compensation cannot be raised before the commissioners are appointed and the way laid out; it is only necessary that the damages shall be paid before the road is opened. Green *v.* Reeves, 80 Ga. 805, 6 S. E. 865.

Effect of failure to pay.— Where the statute provides that the applicant for the road shall pay the damages assessed within ten days after the determination of the supervisors to lay it out, in order to obtain the filing and recording of the order for the establishment of the road, a delay in paying the assessment for three months is fatal to the validity of the proceedings. State *v.* Union, 68 Wis. 158, 31 N. W. 482.

70. Kidder *v.* Oxford, 116 Mass. 165.

Sufficient opening of road.— Where a person for whose benefit a private road has been laid out and who, under the award, is liable for the damages assessed therefor, to be paid when the way is opened, uses the road for three years, it is sufficiently opened to render the damages due. Fernald *v.* Palmer, 83 Me. 244, 22 Atl. 467.

71. McCauley *v.* Dunlap, 4 B. Mon. (Ky.) 57; Jones *v.* Barclay, 2 J. J. Marsh. (Ky.) 73.

The order awarding a writ of ad quo damnum upon an application to establish a private road must name the day on which the inquest is to be held, which must also be inserted in the writ, and the omission so to do is fatal. Troutman *v.* Barnes, 4 Metc. (Ky.) 337.

Evidence.— It is error not to permit plaintiff in writ of ad quo damnum to show the nature and character of his title to the land affected. Jones *v.* Barclay, 2 J. J. Marsh. (Ky.) 73.

while in others that is the proper mode if the landowners cannot agree with the selectmen of the town upon compensation, or upon a committee to estimate the damages.[72]

b. Who May Apply Therefor. Where the statute authorizing a private road provides no mode for assessing damages, except by referring to the manner provided in cases of public highways, in which case the landowner applies for the assessment after the road is opened, while in private road cases the road cannot be opened until damages are paid, the petitioner for a private road may apply for the appointment of viewers to assess damages.[73]

c. Notice of. Personal notice of the time and place when the jury [74] or viewers [75] will meet for the assessment of damages must be given to the person or persons over whose land the road is to be opened.

d. Elements to Be Considered in Estimating Damage — (I) *Benefits Accruing to Landowner.* When the statute providing for the assessment of damages for the laying out of both public and private roads declares, as to the latter class of roads, that such assessment shall be deemed the just compensation to be made for the private property taken for public use, and omits the direction contained in the statute as to public roads, that the damages shall be diminished as to the extent of the resulting benefits, this evidences an intention that in assessing the damages for lands taken for private roads, benefits and advantages to the owner are not to be considered.[76]

(II) *Additional Fencing.* Under some statutes the additional fencing that may become necessary, as well as the use of the land, may, in assessing damages, be taken into consideration.[77]

(III) *Existing Right of Way.* The fact that the land is also subject to an easement of a private right of way is an element to be considered by the jury in estimating the damages.[78]

(IV) *Allowance For Interest.* Under a statute providing that the damages, when estimated, shall not be paid until the land has been entered upon and possession taken for the purpose of constructing a road, the jury may, in estimating damages, include an allowance for interest from the time when the land was taken.[79]

e. Competency of Witness on Question of Damages. The fact that one having no vested interest in the land or the damage to be assessed was served with notice of the original application does not of itself make him a party to the subsequent proceedings, so as to render him incompetent as a witness on the question of damages.[80]

f. Report of Viewers. The report of viewers appointed to assess damages must show that the landowner or landowners had notice of the time and place fixed for such assessment,[81] and it is not sufficient to state that application was made to

72. Craigie *v.* Mellen, 6 Mass. 7.

73. *In re* York Water Co. Road, 24 Pa. St. 397.

74. Jones *v.* Barclay, 2 J. J. Marsh. (Ky.) 73.

75. Elliott's Appeal, 154 Pa. St. 541, 25 Atl. 814; *In re* Redstone Tp. Road, 112 Pa. St. 183, 5 Atl. 383; *In re* Plumcreek Tp. Road, 110 Pa. St. 544, 1 Atl. 431; *In re* Boyer's Road, 37 Pa. St. 257; Neeld's Road Case, 1 Pa. St. 353; *Re* Shawhan, 4 Pa. Cas. 181, 7 Atl. 97; *In re* Harbaugh's Road, 8 Pa. Co. Ct. 671; *In re* Union Tp. Private Road, 7 Kulp (Pa.) 245.

76. Crater *v.* Fritts, 44 N. J. L. 374.

77. McCauley *v.* Dunlap, 4 B. Mon. (Ky.) 57; Jones *v.* Barclay, 2 J. J. Marsh. (Ky.) 73.

Charge to jury as to additional fencing.— If it does not appear that a jury, in a proceeding to establish a private road, was properly charged by the sheriff, when executing a writ of ad quo damnum, to take into consideration the additional fencing, it is error. Jones *v.* Barclay, 2 J. J. Marsh. (Ky.) 73.

78. *In re* Private Road, 1 Ashm. (Pa.) 417.

79. Kidder *v.* Oxford, 116 Mass. 165.

80. McCauley *v.* Dunlap, 4 B. Mon. (Ky.) 57.

81. *In re* Redstone Tp. Road, 112 Pa. St. 183, 5 Atl. 383; *In re* Plumcreek Tp. Road, 110 Pa. St. 544, 1 Atl. 431; *In re* Boyer's Road, 37 Pa. St. 257; *In re* Neeld's Road, 1 Pa. St. 353; *In re* Harbaugh's Road, 8 Pa.

them or him for a release thereof.[82] But the report is not erroneous because he does not designate who shall pay the damages assessed, where the law fixes the obligation upon the persons at whose instance the road is laid out.[83]

4. Reassessment — a. In General. Some of the statutes authorizing private roads expressly provide that any person deeming himself aggrieved by the award of damages, made by the viewers or like officers, may maintain a proceeding for a reassessment of the damages,[84] or may apply for a jury to reassess the same.[85]

b. Proceedings Therefor — (i) *Who May Institute.* A statutory provision that any person aggrieved by the selectmen's estimate of damages may apply for a jury to reassess damages does not include a person for whose benefit the road is laid out.[86]

(ii) *Petition.* Notice of the petition for a reassessment of damages, filed by the owner of the lands over which the road is opened or is to be opened, must if the statute provides that the damages are to be paid by the person or persons petitioning for the road, be given to such person or persons.[87]

5. Actions Therefor — a. In General. An award or assessment of a sum to be paid by one to another made in statutory proceedings to establish a private road forms the subject of an action in assumpsit.[88]

b. Defenses. Where damages have been awarded to the owner of land for the opening of a private road, the person for whose benefit it was opened, and who is liable for the damages, cannot defend an action by the owner therefor on the ground that the latter has assigned his claim, particularly where the action is for the benefit of the assignee.[89]

V. Pleading and Evidence of Existence.

A private road laid out by public authority should be pleaded as a highway.[90] If the particular mode in which a private road was laid out is pleaded, it must be proved as pleaded.[91]

VI. Maintenance and Repair.

A. In General. Statutes authorizing private roads generally provide that the person or persons for whose benefit such a road is opened shall keep it in repair.[92] But it has been held that a person at whose instance a road has been opened under such a statute is not bound to keep in repair that part of the road

Co. Ct. 671; *In re* Union Tp. Private Road, 7 Kulp (Pa.) 245.

82. *In re* Harbaugh's Road, 8 Pa. Co. Ct. 671; *In re* Union Tp. Private Road, 7 Kulp (Pa.) 245.

83. *In re* Private Road, 1 Ashm. (Pa.) 417.

84. See the statutes of the several states. And see Jewell *v.* Holderness, 41 N. H. 161.

Revision by board of supervisors.— Unless the statute so directs, an assessment of damages, on the laying out of a private road, is subject to the revision or correction by the board of supervisors. Craig *v.* Orange County, 10 Wend. (N. Y.) 585.

85. See the statutes of the various states. And see Goodwin *v.* Merrill, 48 Me. 282.

86. Goodwin *v.* Merrill, 48 Me. 282.

The town is not a proper party to a petition for an increase of damages for the establishment of a private road. Jewell *v.* Holderness, 41 N. H. 161, for the reason that the damages are by statute imposed upon the party for whose accommodation the road is laid out.

87. Jewell *v.* Holderness, 41 N. H. 161, holding further that the town is not interested, and in no event liable, and, if notified, the proceeding as to it will be dismissed.

88. Baker *v.* Braman, 6 Hill (N. Y.) 47, 40 Am. Dec. 387, holding further that it is no objection to the maintenance of the action that the statute under which the road was established is unconstitutional, since, by bringing the action for damages awarded him, the landowner adopts the statute and removes all obstacles to its operation.

Assumpsit generally see Assumpsit, Action of, 4 Cyc. 317 *et seq.*

89. Fernald *v.* Palmer, 83 Me. 244, 22 Atl. 467.

90. Perrine *v.* Farr, 22 N. J. L. 356.

91. Perrine *v.* Farr, 22 N. J. L. 356.

92. See the statutes of the several states. And see Cleckler *v.* Morrow, 150 Ala. 524, 43 So. 784; Latah County *v.* Hasfurther, 12 Ida. 797, 88 Pac. 433; Singleton *v.* Road Com'rs, 2 Nott & M. (S. C.) 526.

Private road laid out on bridge.— The order establishing a private road on the bridge of another person should provide that the applicant shall maintain and keep the bridge in repair so long as he alone uses it,

which runs through his own land, for the benefit of those who may have acquired a prescriptive right to use it.[93] Sometimes statutes authorizing private roads provide that they shall not become public highways in the sense that they must be kept in repair at the expense of the public,[94] but even where the statute is silent on the subject no obligation rests on the public to keep the road in repair.[95] It has been held, however, that where the statute under which a private road is laid out speaks of it as a public highway, the duty is cast upon the public to keep it in a suitable state of repair.[96]

B. Gates. Statutes authorizing private roads, subject to gates, generally impose the duty of the erection and maintenance of such gates on the person at whose instance and for whose benefit the road is established.[97]

C. Fences. Unless the cost of fencing has been assessed as damages, the duty to fence a private road devolves upon the person for whose accommodation it was laid out.[98]

VII. Obstructions and Use For Travel.

A. Obstructions[99] **— 1. In General.** If a private road of a given width is ordered to be laid out, the building of his fences, by the owner of the land, so as not to leave the road of the specified width in the clear, constitutes an obstruction.[1] Where a private road leading to defendant's home had been used as such for from eighteen to twenty-one years, the landowners could not close it by the construction of a water trough over it.[2]

2. Right to Remove. An obstruction placed in a private road by the owner of the land over which the road is laid cannot be removed by one having no right to use the road.[3]

3. Actions — a. Right to Maintain. An abutter has a right to reasonably convenient points of connection with a private road, and it is actionable for another abutter to impede his use of such points.[4]

b. Form — (i) *Actions at Law.* For an encroachment of a private road an action at law is maintainable by the person at whose instance and for whose benefit such road was established.[5]

(ii) *In Equity.* Whenever an adequate remedy cannot be afforded by an action at law for damages, one whose right to use a private road is impeded by the wrongful acts of another is entitled to injunction to restrain further obstruction.[6] But to authorize injunctive relief, in such case, it must appear that in locating the road the least possible injury, consistent with the end to be attained, was done to the owner of the land.[7]

and if used by the owner and the applicant in common, to be maintained and kept in repair at the common expense. *In re* Clowes' Road, 31 Pa. St. 12.

93. Puryear *v.* Clements, 53 Ga. 232.

94. Latah County *v.* Hasfurther, 12 Ida. 797, 88 Pac. 433.

95. Baker *v.* Dedham, 16 Gray (Mass.) 393.

96. Brown *v.* Brown, 50 N. H. 538; Proctor *v.* Andover, 42 N. H. 348; Metcalf *v.* Bingham, 3 N. H. 459.

97. Proctor *v.* Andover, 42 N. H. 362. See also Pent Roads, 30 Cyc. 1381.

98. Fleming *v.* Ramsey, 46 Pa. St. 252.

99. **Road across one's own land.**— The term "private way," in Gen. St. c. 63, § 28, requiring application to be made within a year for damages for the obstruction of a private way by a railroad corporation, does not apply to a road across one's own land. Presbrey *v.* Old Colony, etc., R. Co., 103 Mass. 1, 4.

1. Herrick *v.* Stover, 5 Wend. (N. Y.) 580, holding further that the landowner cannot build what is known as a Virginia fence, placing the center on the exterior lines of the road with the angles projecting into the road.

2. McClurg *v.* State, 2 Ga. App. 624, 58 S. E. 1064.

3. Drake *v.* Rogers, 3 Hill (N. Y.) 604.

4. Downing *v.* Corcoran, 112 Mo. App. 645, 87 S. W. 114.

5. Herrick *v.* Stover, 5 Wend. (N. Y.) 580, action for damages.

6. Downing *v.* Corcoran, 112 Mo. App. 645, 87 S. W. 114, holding further that if successive efforts of plaintiff to obtain access to the road have been obstructed by defendant, the fact that the obstructions have actually been erected does not render it improper to enjoin a defendant from obstructing the road so as to interfere with plaintiff's access thereto.

Injunction generally see Injunctions, 22 Cyc. 724 *et seq.*

7. Clack *v.* White, 2 Swan (Tenn.) 540.

c. Defenses. It is no defense to an action for a substantial encroachment on a private road that plaintiff was not thereby interrupted in the use of the road;[8] but it is a good defense that defendant yielded his assent, expressly or impliedly, to the encroachment.[9]

B. Use For Travel. The public have the right to use a private road for travel,[10] and it is immaterial that the road is subject to gates and bars,[11] or that it is merely a *cul de sac*.[12]

VIII. INJURIES FROM DEFECTS.

A. Liability. A town is liable for any special damage that may be caused by its failure to perform the duty cast upon it by statute to keep a private road in suitable repair.[13] Nor is there any such distinction between private roads with gates or bars, and those without, as to justify a different rule as to the liability for want of repair, where, in both cases, they are termed highways in the statute.[14]

B. Actions. The objection that a portion of a private road was laid out at a greater width than that prayed for in the petition cannot be urged by the town in a suit for injuries caused by its failure to keep the road in repair.[15]

IX. ALTERATION, VACATION, AND EXTINGUISHMENT.

A. Alteration. Under a statute authorizing an application by a person interested to alter a private road, the owner of the land over which the road passes is clearly entitled to petition for such alteration.[16] If the statute authorizing the proceeding requires the petitioner therein to put the new road in as good condition as the old, such provision does not apply where the road, as first located, has never been opened.[17]

B. Vacation — 1. Power to Vacate. The power of the legislature to establish private roads, if the same be necessary, carries with it, as a necessary incident, the power to provide for the vacation of such roads, when they shall have become no longer necessary;[18] and when such legislative provision had been made the road laid out by public authority may be discontinued by it without the consent or against the will of the person upon whose petition it was originally established.[19]

8. Herrick *v.* Stover, 5 Wend. N. Y.) 580.

9. Herrick *v.* Stover, 5 Wend. (N. Y.) 580.

10. *Delaware.*— *In re* Hickman, 4 Harr. 580.

Massachusetts.—Davis *v.* Smith, 130 Mass. 113; Denham *v.* Bristol County Com'rs, 108 Mass. 202; Danforth *v.* Durell, 8 Allen 242; Flagg *v.* Flagg, 16 Gray 175.

Missouri.— Belk *v.* Hamilton, 130 Mo. 292, 32 S. W. 656.

New Hampshire.— Brown *v.* Brown, 50 N. H. 538; Proctor *v.* Andover, 42 N. H. 348; Clark *v.* Boston, etc., R. Co., 24 N. H. 114; Metcalf *v.* Bingham, 3 N. H. 459.

New Jersey.— Perrine *v.* Farr, 22 N. J. L. 356, where the court says that, although private roads must be laid out on the application of an individual for the more immediate benefit of his property, they are, like public roads, open to the public use, the right to use both having as its foundation the law of the legislature and the action of public functionaries in laying them out.

North Carolina.— Cook *v.* Vickers, 141 N. C. 101, 53 S. E. 740. See also Cozard *v.* Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932, 111 Am. St. Rep. 779, 1 L. R. A. N. S. 969.

Oregon.— Lesley *v.* Klamath County, 44 Oreg. 491, 75 Pac. 709.

South Carolina.— *Ex p.* Withers, 3 Brev. 83.

See 40 Cent. Dig. tit. "Private Roads," § 38.

Special mode of use.— In the location of a private road laid out by public authority and accepted by the town a description of it as a "bridle way" does not confine the right of way to a special mode of use or to a particular class of animals. Flagg *v.* Flagg, 16 Gray (Mass.) 175.

11. Brown *v.* Brown, 50 N. H. 538; Proctor *v.* Andover, 42 N. H. 348. See also Pent Roads, 30 Cyc. 1381.

12. Danforth *v.* Durell, 8 Allen (Mass.) 242.

13. Brown *v.* Brown, 50 N. H. 538; Proctor *v.* Andover, 42 N. H. 348; Metcalf *v.* Bingham, 3 N. H. 459.

14. Proctor *v.* Andover, 42 N. H. 348.

15. Proctor *v.* Andover, 42 N. H. 348.

16. Ryker *v.* McElroy, 28 Ind. 179.

17. Ryker *v.* McElroy, 28 Ind. 179.

18. *In re* Stuber's Road, 28 Pa. St. 199.

19. Denham *v.* Bristol County Com'rs, 108 Mass. 202; Flagg *v.* Flagg, 16 Gray (Mass.) 175.

2. Manner of. A private road established by public authority can be vacated only in the manner provided by statute.[20]

3. Proceedings Therefor — a. Grounds. It is good ground for the vacation of a private road, on the petition of the owner of the land over which it passes, that the person at whose instance it was laid out has another convenient way over the land of a third person.[21]

b. Advertisement. The township in which the road proposed to be vacated lies must be named in the advertisement required by statute, that all concerned may know with certainty the location of the road.[22]

c. Petition. In one jurisdiction the statute provides that the petition to vacate a private road must set forth in a clear and distinct manner the situation and circumstances of such road, or of the part thereof, which the applicants may desire to have vacated.[23] But a petition for the vacation of the entire road, presented under such a statute, need not specify the portions of the road to be vacated, nor the particular reasons why the vacation of such portions is desired.[24]

d. Return of Surveyors. An omission of the surveyors to state in their return that the township in which the road proposed to be vacated lies is fatal, where the township controls the appointment of the surveyors.[25]

e. Review. In reviewing by appeal proceedings for the vacation of a private road only the regularity of the proceedings can be considered,[26] but the proceeding will be vacated if it appears that the requirements of the statute necessary to give jurisdiction have not been strictly followed.[27]

C. Extinguishment. There is a conflict of authority as to whether unity in title and possession of all the land occupied by a private road, which was laid out by public authority, operates to discontinue it, the courts of one jurisdiction holding that where petitioner who has procured a private road to be laid out over the lands of another has acquired title to the servient tenement, the right to the road is extinguished not only as to him, but as to all other persons,[28] while in another jurisdiction the view obtains that the right to use the road can be extinguished only by the action of the proper public authority.[29]

X. PENALTIES.[30]

A. In General. In one jurisdiction the person using a private road is subject to a statutory penalty for leaving open a swinging gate placed across it by the owner of the land.[31]

20. *In re* Hunter's Private Road, 46 Pa. St. 250.

Although bars have been kept up in the place of swinging gates across a private road, for thirty or forty years, by the owner of the land through which the road passes, without complaint on the part of those using the road, no presumption will be thereby created that the right of use of the road has ceased. Van Blarcom *v.* Frike, 29 N. J. L. 516.

21. Plimmons *v.* Frisby, 60 N. C. 200.

In Pennsylvania the statutory ground for the vacation of a private road is that it is "useless, inconvenient and burdensome." *In re* Glenfield Borough Road, 5 Pa. Super. Ct. 222.

22. State *v.* Allen, 11 N. J. L. 103.

23. *In re* Glenfield Borough Road, 5 Pa. Super. Ct. 222.

24. *In re* Glenfield Borough Road, 5 Pa. Super. Ct. 222.

25. State *v.* Allen, 11 N. J. L. 103.

26. *In re* Glenfield Borough Road, 5 Pa. Super. Ct. 222.

Sufficiency of petition.— On appeal to proceedings affecting a private road the court can only consider the sufficiency of the petition. *In re* Glenfield Borough Road, 5 Pa. Super. Ct. 222.

27. State *v.* Allen, 11 N. J. L. 113, where the proceedings were set aside because neither the advertisement required by the statute nor the return of the surveyors stated the township in which the road proposed to be vacated lies.

Entertainment of viewers.— If a court rule provides that no viewer shall be entertained by or at the expense of any person interested, a proceeding for the vacation of a private road will be set aside where the viewers are entertained by a party of record, although his interest in the vacation or continuance of the road is doubtful. *In re* Heidelberg Tp., 1 Pa. Co. Ct. 7.

28. Jacocks *v.* Newby, 49 N. C. 266.

29. Flagg *v.* Flagg, 16 Gray (Mass.) 175.

30. **Penalty** generally see Penalties, 30 Cyc. 1331 *et seq.*

31. Allen *v.* Stevens, 29 N. J. L. 509.

B. Actions Therefor — 1. Burden of Proof. To maintain an action for a penalty for leaving open a swinging gate across a private road, plaintiff must prove that the way in question is a private road, laid out or made such in the manner prescribed by statute.[32]

2. Defenses. It is no defense to an action for the statutory penalty that defendant had a private way where the private road in question was laid out.[33]

XI. Criminal Offenses.[34]

A. In General. It has been held that the obstruction of a private road cannot be a public nuisance, and hence is not indictable as such.[35]

B. Indictment[36] **— 1. Maliciously Injuring Road.** Where the statute makes it a criminal offense to maliciously injure a private road laid out by authority of law, an indictment which fails to allege facts showing that such road was so laid out, and which does not even contain a direct allegation to that effect, is fatally defective.[37]

2. Breaking Down Gate on Road. An indictment for breaking down a gate across a private road established according to law is sufficient if it is in the words of the statute.[38]

C. Defenses. Where the crime charged is the breaking down of a gate across a private road located according to law, it is a matter of defense that the road was not located according to law, and is therefore not a private road in law.[39]

PRIVATE SALE. A sale without advertisement and public outcry.[1] (See, generally, Sales.)

PRIVATE SCHOOL. See Schools and School-Districts.

PRIVATE SEWER. As defined by a city charter, one built with or without permits, and paid for by the parties, persons, associations, or corporations constructing the same.[2] (See Drains, 14 Cyc. 1018; Municipal Corporations, 28 Cyc. 917.)

PRIVATE STATUTE. See Statutes.

PRIVATE USE. See Eminent Domain, 15 Cyc. 543.

PRIVATE WAR. A war carried on by individuals, without the authority or sanction of the state of which they are subjects.[3] (See, generally, War.)

PRIVATE WATERS.[4] See Navigable Waters, 29 Cyc. 285; Waters.

PRIVATE WAY. See Easements, 14 Cyc. 1134; Private Roads, *ante*, p. 363.

32. Allen *v.* Stevens, 29 N. J. L. 509.

33. Allen *v.* Stevens, 29 N. J. L. 509.

34. Criminal law and criminal procedure generally see Criminal Law, 12 Cyc. 70 *et seq.*

35. State *v.* Randall, 1 Strobh. (S. C.) 110, 47 Am. Dec. 548.

As a private nuisance see Nuisances, 30 Cyc. 1177.

Obstruction of private highways.—Cr. Code, par. 221, subd. 5, making it a public nuisance to obstruct or encroach on public highways, private ways, etc., does not apply to the obstruction of private highways, a private highway being unknown to the law of this state. Gilbert *v.* People, 121 Ill. App. 423.

36. Indictment generally see Indictments and Informations, 22 Cyc. 157 *et seq.*

37. Territory *v.* Richardson, 8 Ariz. 336, 76 Pac. 456.

38. State *v.* Combs, 120 N. C. 607, 27 S. E. 30.

Such an indictment sufficiently locates the road by a description of it as "running through the land of H., beginning near the house of" defendant, "in B. township and running in an eastern direction through the lands of said H. for the distance of about one-half mile," although it does not state its eastern terminus or whether it runs through a public road. State *v.* Combs, 120 N. C. 607, 27 S. E. 30.

39. State *v.* Combs, 120 N. C. 607, 27 S. E. 30.

1. Barcello *v.* Hapgood, 118 N. C. 712, 725, 24 S. E. 124.

2. Prior *v.* Buehler, etc., Constr. Co., 170 Mo. 439, 444, 71 S. W. 205.

3. Century Dict.

Private war is unknown in civil society, except where it is lawfully exerted by way of defense between private persons. People *v.* McLeod, 25 Wend. (N. Y.) 483, 576, 37 Am. Dec. 328.

4. "The division of waters into navigable and nonnavigable is but a way of dividing them into public and private waters." Lamprey *v.* State, 52 Minn. 181, 199, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670.

PRIVATE WHARF. See Wharves.

PRIVATE WRONG. See Torts.

PRIVATIO PRÆSUPPONIT HABITUM. A maxim meaning "A deprivation presupposes a possession."[5]

PRIVATIS PACTIONIBUS NON DUBIUM EST NON LÆDI JUS CÆTERORUM. A maxim meaning "There is no doubt that the rights of others cannot be prejudiced by private agreement." [6]

PRIVATORUM CONVENTIO JURI PUBLICO NON DEROGAT. A maxim meaning "The agreement of private individuals does not derogate from the public right, [law.]"[7]

PRIVATUM COMMODUM PUBLICO CEDIT. A maxim meaning "Private goods yield to public." [8]

PRIVATUM INCOMMODUM PUBLICO BONO PENSATUR. A maxim meaning "Private inconvenience is made up for by public benefit." [9]

PRIVIES. All who have mutual or successive relationship to the same rights;[10] persons connected together, or having a mutual interest in the same action or thing, by some relation other than that of actual contract between them;[11] persons who are parties to, or have an interest in, any action or thing, or any relation to another;[12] persons whose interest in an estate is derived from the contract or conveyance of others;[13] those who are partakers or have an interest in any action[14] or thing, or any relation to another;[15] those who are so connected with the parties in estate as to be identified with them at interest, and consequently to be affected by them in the litigation;[16] those who have mutual or successive relationship to the same right of property or subject-matter;[17] those whose relationship to the same right of property is mutual or successive.[18] (See Privity, and Cross-References Thereunder; Privy.)

PRIVILEGE.[19] As used in its broad and commonly accepted sense an advan-

5. Bouvier L. Dict. [*citing* 2 Rolle 419].

6. Peloubet Leg. Max. [*citing* Dig. 2, 15, 3].

7. Black L. Dict. [*citing* Dig. 50, 17, 45, 1; 9 Coke 141; Broom Leg. Max.].

8. Morgan Leg. Max. [*citing* Jenkins Cent.].

9. Burrill L. Dict. [*citing* Jenkins Cent. 85, case 65; Broom Leg. Max.].

10. Hayward *v.* Bath, 38 N. H. 179, 183; Chamberlain *v.* Carlisle, 26 N. H. 540, 551.

Classes.— There are several kinds — privies in blood, as heir and ancestor; privies in representation, as the executor or administrator to the deceased; privies in estate, as relation between donor and donee, lessor and lessee; privies in respect to contract; and privies on account of estate and contract together. Tinkham *v.* Borst, 24 How. Pr. (N. Y.) 246, 247; Gouraud *v.* Gouraud, 3 Redf. Surr. (N. Y.) 262, 267. There are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor, and coparceners; privies in representation, as testator and executor, administrator and intestate; privies in law, as where the law without privity of blood or estate casts land upon another, as by escheat. Ahlers *v.* Thomas, 24 Nev. 407, 408, 56 Pac. 93, 77 Am. St. Rep. 820; Coan *v.* Osgood, 15 Barb. (N. Y.) 583, 588. There are privies in estate, privies in blood, and privies in law. Johnston *v.* Duncan, 67 Ga. 61, 70; Hart *v.* Bates, 17 S. C. 35, 41.

11. Black L. Dict. [*quoted* in Woodward *v.* Jackson, 85 Iowa 432, 436, 52 N. W. 358; Western Loan, etc., Co. *v.* Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774, 775, 107 Am. St. Rep. 435].

12. Bouvier L. Dict. [*quoted* in Gouraud *v.* Gouraud, 3 Redf. Surr. (N. Y.) 262, 267].

13. Black L. Dict. [*quoted* in Woodward *v.* Jackson, 85 Iowa 432, 436, 52 N. W. 358].

14. Hart *v.* Bates, 17 S. C. 35, 41.

15. Bouvier L. Dict. [*quoted* in Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292]; Jacob L. Dict. [*quoted* in Marr *v.* Hanna, 7 J. J. Marsh. (Ky.) 642, 643, 23 Am. Dec. 449; Harrington *v.* Harrington, 2 How. (Miss.) 701, 717].

For example personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors or purchasers from them with notice of the fact. State *v.* St. Louis, 145 Mo. 551, 567, 46 S. W. 981, 42 L. R. A. 113; Henry *v.* Woods, 77 Mo. 277, 281; Withers *v.* Wabash R. Co., 122 Mo. App. 282, 292, 99 S. W. 34.

16. Hartford F. Ins. Co. *v.* King, 31 Tex. Civ. App. 636, 640, 73 S. W. 71.

17. State *v.* St. Louis, 145 Mo. 551, 567, 46 S. W. 981, 42 L. R. A. 113; Henry *v.* Woods, 77 Mo. 277, 281; Withers *v.* Wabash R. Co., 122 Mo. App. 282, 292, 99 S. W. 34.

18. Strayer *v.* Johnson, 110 Pa. St. 21, 24, 1 Atl. 222.

19. As granting an easement or fee.— In a lease providing that the tenant of the leased premises should have "the privilege of using the well. . . on the lot next south so long as they remain," there is no necessary implication that they should remain. Basserman *v.* Trinity Church Soc., 39 Conn. 137, 138. In an agreement of partition providing that one

tage;[20] a peculiar advantage;[21] a personal benefit or favor;[22] a private or personal favor enjoyed.[23] It means also, in connection with the context, a particular and peculiar benefit or advantage,[24] enjoyed by a person, company, or class, beyond the common advantage of other citizens;[25] some peculiar right or favor granted by law contrary to the general rule;[26] the enjoyment of some desirable right;[27] special enjoyment of a good;[28] an exemption from some general burden, obligation, or duty;[29] an exemption from some evil or burden;[30] an exemption from some duty, burden, or attendance[31] with which certain persons are indulged,[32] from a supposition of the law that their public duties or services, or the offices in which they are engaged, are such as require all their time and care, and that, therefore, without this indulgence, those duties could not be performed to that advantage which the public good demands;[33] an exemption of a person or class of persons from the operation of any law;[34] an exemption of a private man or a particular corporation from the rigor of the common law;[35] a peculiar exemption,[36] franchise, right, claim, liberty;[37] an

of the parties thereto should have "the 'privilege' of a road" through the premises of the other party, to enable him to reach a certain road, it was held that the use of the word "privilege" in connection with the word "him" did not establish a personal privilege merely, but was an easement connected with the land. Karmuller *v.* Krotz, 18 Iowa 352, 358. In a deed conveying a parcel of land bounded upon one side by the shore of the sea at high water mark, and containing an additional clause, "including all the privilege of the shore to low water mark," it was held that the fee in the land between high and low water mark passes to the grantee. Dillingham *v.* Roberts, 75 Me. 469, 471, 46 Am. Rep. 419. A deed conveying a certain piece of land on which a saw-mill now stands, together with the mill thereon situate, with the privilege of occupying land in front of said mill and below the same, sufficient for a timber yard adjacent to said saw-mill, by the use of the words "privilege of occupying" merely grant an easement in the land in front of the mill, and does not convey the fee. Cross *v.* Pike, 59 Vt. 324, 326, 10 Atl. 526.

20. Moore *v.* Fletcher, 16 Me. 63, 65, 33 Am. Dec. 633; Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 649.

21. Van Valkenburg *v.* Brown, 43 Cal. 43, 49, 13 Am. Rep. 136; Douglass *v.* Stephens, 1 Del. Ch. 465, 476; North River Steam Boat Co. *v.* Livingston, Hopk. (N. Y.) 170, 232; Imperial Dict. [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91]; Webster Dict. [*quoted* in Territory *v.* Stokes, 2 N. M. 161, 170].

22. Burrill L. Dict. [*quoted* in *Ex p.* Levy, 43 Ark. 42, 54, 51 Am. Rep. 550].

23. Imperial Dict. [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91].

24. Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 649.

25. State *v.* Cantwell, 142 N. C. 604, 614, 55 S. E. 820, 8 L. R. A. N. S. 498; Black L. Dict. [*quoted* in Guthrie Daily Leader *v.* Cameron, 3 Okla. 677, 689, 41 Pac. 635].

26. Burrill L. Dict. [*quoted* in *Ex p.* Levy, 43 Ark. 42, 54, 51 Am. Rep. 550].

27. Imperial Dict. [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91].

28. Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 649; Webster Dict. [*quoted* in Territory *v.* Stokes, 2 N. M. 161, 170].

29. Lonas *v.* State, 3 Heisk. (Tenn.) 287, 306; Burrill L. Dict. [*quoted* in *Ex p.* Levy, 43 Ark. 42, 54, 51 Am. Rep. 550].

30. Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 649; Imperial Dict. [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91]; Webster Dict. [*quoted* in Territory *v.* Stokes, 2 N. M. 161, 170; Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 278, 2 Flipp. 621].

31. Jacob L. Dict. [*quoted* in Territory *v.* Stokes, 2 N. M. 161, 164].

32. Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91 [*quoting* Bacon Abr.].

"Includes in its ordinary definition an exemption from such burthens as others are subjected to, as the privilege of being exempt from arrest, or from taxation." State *v.* Betts, 24 N. J. L. 555, 557.

Where an exemption from taxation in a railroad charter is made as a privilege only, it may be revoked at any time. Com. *v.* Chesapeake, etc., R. Co., 27 Gratt. (Va.) 344, 346.

33. Black L. Dict. [*quoted* in State *v.* Cantwell, 142 N. C. 604, 614, 55 S. E. 820, 823, 8 L. R. A. N. S. 498].

34. Century Dict. [*quoted* in Com. *v.* Henderson, 172 Pa. St. 135, 138, 33 Atl. 368].

Thus the right of a debtor or widow to exemption is a personal privilege. Com. *v.* Henderson, 172 Pa. St. 135, 138, 33 Atl. 368.

35. Jacob L. Dict. [*quoted* in Territory *v.* Stokes, 2 N. M. 161, 169].

36. Van Valkenburg *v.* Brown, 43 Cal. 43, 49, 13 Am. Rep. 136; Douglass *v.* Stephens, 1 Del. Ch. 465, 476.

It is an exceptional or extraordinary exemption. State *v.* Cantwell, 142 N. C. 604, 614, 55 S. E. 820, 8 L. R. A. N. S. 498.

37. Webster Dict. [*quoted* in Territory *v.* Stokes, 2 N. M. 161, 170].

Franchise.—"A privilege, as distinguished from a mere power, is a right peculiar to the person or class of persons on whom it is conferred, and not possessed by others. As applied to a corporation, it is ordinarily used as synonymous with 'franchise,' and means a special privilege conferred by the state, which

immunity;[38] an immunity held beyond the course of the law;[39] a peculiar immunity;[40] legal power, authority, immunity granted by authority;[41] a right, an immunity, benefit, or advantage enjoyed by a person or body of persons beyond the common advantages of other individuals;[42] a right or immunity by way of exemption from the general law;[43] a right or immunity granted to a person either against or beyond the course of the common or general law;[44] a right or immunity not enjoyed by others or by all;[45] a right peculiar to an individual or body;[46] a right peculiar to the person on whom conferred, not to be exercised by another or others;[47] an investiture with special or peculiar rights;[48] special rights belonging to the individual or class, and not to the mass;[49] a law made in favor of an individual;[50] a particular law or a particular disposition of the law, which grants certain special prerogatives to some persons, contrary to the common right;[51] a license or permission upon specified terms, to do that which is in general prohibited;[52] the exercise of an occupation, of business which requires a license from some proper authority, designated by

does not belong to citizens generally of common right, and which cannot be enjoyed or exercised without legislative authority." International Trust Co. *v.* American L. & T. Co., 62 Minn. 501, 503, 65 N. W. 78, 632.

38. Moore *v.* Fletcher, 16 Me. 63, 65, 33 Am. Dec. 633; North River Steam Boat Co. *v.* Livingstone, Hopk. (N. Y.) 170, 232; Webster Dict. [*quoted* in Territory *v.* Stokes, 2 N. M. 161, 170].

"Privilege" and "immunity" are synonymous or nearly so. Van Valkenburg *v.* Brown, 43 Cal. 43, 49, 13 Am. Rep. 136. The words "privileges" and "rights" when used in statutes are sometimes synonymous. People *v.* Hayden, 133 N. Y. 198, 201, 30 N. E. 970. In a deed containing the clause "excepting and reserving to the said party of the first part and to his heirs and assigns forever, the right and privilege of taking water from the ditch or raceway," etc., the right and privilege mentioned as reserved are used as synonymous terms. Smith *v.* Cornell University, 21 Misc. (N. Y.) 220, 221, 225, 45 N. Y. Suppl. 640.

39. State *v.* Cantwell, 142 N. C. 604, 614, 55 S. E. 820, 8 L. R. A. N. S. 498.

40. Van Valkenburg *v.* Brown, 43 Cal. 43, 49, 13 Am. Rep. 136; Douglass *v.* Stevens, 1 Del. Ch. 465, 476.

41. U. S. *v.* Patrick, 54 Fed. 338, 348.

As authority or right.—As used in a statute providing "that the county judges of the several counties of this State, with like privileges as the judges of the circuit courts of this State, may interchange with each other, hold court for each other, and perform each other's duties, when they find it necessary or convenient," the term means official right or authority. Pike *v.* Chicago, 155 Ill. 656, 667, 40 N. E. 567.

42. Imperial Dict. [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91].

43. Abbott L. Dict. [*quoted* in Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 278, 2 Flipp. 621].

44. Dike *v.* State, 38 Minn. 366, 368, 38 N. W. 95.

45. Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 649; Webster Dict. [*quoted* in Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 278, 2 Flipp. 621; Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91].

46. Ripley *v.* Knight, 123 Mass. 515, 519; Lonas *v.* State, 3 Heisk. (Tenn.) 287, 306; Burrill L. Dict. [*quoted* in *Ex p.* Levy, 43 Ark. 42, 54, 51 Am. Rep. 550].

47. Brenham *v.* Water Co., 67 Tex. 542, 552, 4 S. W. 143.

Such was held to be the meaning of the term as used in a city ordinance granting to a water company the privilege of supplying the city and the inhabitants thereof with water for a period of twenty-five years. It was not used in the technical sense in which it is used in the civil law, or even under the common law, where used in the sense of priority. Brenham *v.* Water Co., 67 Tex. 542, 552, 4 S. W. 143.

48. U. S. *v.* Patrick, 54 Fed. 338, 348.

49. Lonas *v.* State, 3 Heisk. (Tenn.) 287, 306.

Public privileges.—In a constitution providing that "all freemen when they form a social compact are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public service," the word "privileges" means a public privilege and not the exercise or enjoyment of a special privilege. Com. *v.* Whipps, 80 Ky. 269, 274.

50. Crabbe Syn. [*quoted* in Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 278, 2 Flipp. 621].

51. Bacon Abr. [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91]; Bouvier L. Dict. [*quoted* in Territory *v.* Stokes, 2 N. M. 161, 169; Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 649].

In its passive sense it is the same prerogative granted by the same particular law. Bouvier L. Dict. [*quoted* in Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 649].

52. Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 656 (construing a statute imposing a privilege tax on lawyers); Harrison *v.* Willis, 7 Heisk. (Tenn.) 35, 44, 19 Am. Rep. 604.

Under the Arkansas constitution containing a similar provision, the privileges there contemplated are such as cannot be exercised or enjoyed by any citizen, or other integral part of the whole community, without the intervention of some statutory provision granting to, or conferring upon, one or more individuals, the right of doing some particular

a general law, and not open to all, or any, without such license; [53] a prerogative; [54] a power granted to an individual or corporation to do something, or enjoy some advantage which is not of common right.[55] In Roman law, a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors; [56] something conferred upon an individual by a private law, and hence some peculiar benefit or advantage, some right or immunity not enjoyed by the world at large.[57] In the law of Louisiana, a right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors.[58] (Privilege: In General, see EXEMPTIONS, 16 Cyc. 1374; FRANCHISES, 19 Cyc. 1451. Abatement of Action and Objection on Ground of Privilege of Defendant, see APPEARANCES, 3 Cyc. 515; PARTIES, 30 Cyc. 104; PLEADING, 31 Cyc. 166, 169, *et seq.*; PROCESS; VENUE. At Agricultural Fair, see AGRICULTURE, 2 Cyc. 74. Constitutional Guarantee Against Class Legislation as Applied to Privilege Tax, see CONSTITUTIONAL LAW, 8 Cyc. 1052. Corporate, see CORPORATIONS, 10 Cyc. 1085. Effect on Limitation, see LIMITATIONS OF ACTIONS, 25 Cyc. 1226. Exclusive or Special — In General, see MONOPOLIES, 27 Cyc. 890; Constitutional Prohibition, see CONSTITUTIONAL LAW, 8 Cyc. 1036; Grant as Subject of Protection and Relief by Injunction, see INJUNCTIONS, 22 Cyc. 847; Liability Under Contract Conferring, see CONTRACTS, 9 Cyc. 523. From Appearance as Witness, see WITNESSES. From Arrest, see ARREST, 3 Cyc. 874, 917; FALSE IMPRISONMENT, 19 Cyc. 337. From Jury Duty, see GRAND JURIES, 20 Cyc. 1304; JURIES, 24 Cyc. 206. From Military Service, see ARMY AND NAVY, 3 Cyc. 839. From Service of Process, see PROCESS; From Taxation, see TAXATION. From Tolls, see BRIDGES, 5 Cyc. 1072; TOLL-ROADS. From Work on Highway, see STREETS AND HIGHWAYS. Grants of by Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 874. In Market and Market Place, see MUNICIPAL CORPORATIONS, 28 Cyc. 930. Licenses For — In General, see LICENSES, 25 Cyc. 957; Statutes Requiring Not Within Constitutional Guarantee Against Abridgment of Privileges of Citizens, see CONSTITUTIONAL LAW, 8 Cyc. 1047. Master's Liability For Work Done by Contractor in Exercise of, see MASTER AND SERVANT, 26 Cyc. 1564. Of Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 918. Of Bridge Tax, see BRIDGES, 5 Cyc. 1074. Of Coverture, see HUSBAND AND WIFE, 21 Cyc. 1304. Of Ferry Keeper, see FERRIES, 19 Cyc. 493. Of Infant as to. Prosecutions For Crime, see

thing. Stevens *v.* State, 2 Ark. 291, 305, 35 Am. Dec. 72.

Under the Tennessee constitution providing that "the Legislature shall have power to tax merchants, peddlers, and 'privileges' in such manner as they may from time to time direct," a privilege is whatever the legislature choose to declare to be a privilege and to tax as such. Trentham *v.* Moore, 111 Tenn. 346, 351, 76 S. W. 904; Nashville, etc., Tp. Co. *v.* White, 92 Tenn. 370, 372, 22 S. W. 75; Kurth *v.* State, 86 Tenn. 134, 136, 5 S. W. 593. See also Jacksonville *v.* Ledwith, 26 Fla. 163, 203, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69. A positive prohibition to exercise occupation without a license is not essential to make it a privilege, the requirement of a license carrying with it a prohibition to act without it. Dun *v.* Cullen, 13 Lea (Tenn.) 202, 204.

Under the Tennessee statute the test of a privilege is whether a thing can be lawfully done without obtaining a license to authorize it. Where it is a right not open to all, but only to such as are empowered by license from the proper authority, it is a privilege. Robertson *v.* Heneger, 5 Sneed (Tenn.) 257, 258.

53. Blaufield *v.* State, 103 Tenn. 593, 597, 53 S. W. 1090; Dun *v.* Cullen, 13 Lea (Tenn.) 202, 204; Jenkins *v.* Ewin, 8 Heisk. (Tenn.) 456, 475; Columbia *v.* Guest, 3 Head (Tenn.) 413, 414; Phillips *v.* Lewis, 3 Tenn. Cas. 230, 242; Pullman Southern Car Co. *v.* Nolan, 22 Fed. 276, 279.

The essential element of the definition is occupation and business, not the ownership simply of property, or its possession or keeping. Phillips *v.* Lewis, 3 Tenn. Cas. 230, 242.

54. Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 649.

55. Harrison *v.* Willis, 7 Heisk. (Tenn.) 35, 44, 19 Am. Rep. 604.

Distinguished from "corporate right." Detroit St. R. Co. *v.* Guthard, 51 Mich. 180, 183, 16 N. W. 328.

56. The Nestor, 18 Fed. Cas. No. 10,126, 1 Sumn. 73.

57. Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, 649.

58. Butchers' Union Slaughter-House, etc., Co. *v.* Crescent City Live-Stock Landing, etc., Co., 41 La. Ann. 355, 360, 6 So. 508.

Under the Louisiana law, the term "privileges" has a well defined meaning, different and distinct from the term "mortgage." Benjamin's Succession, 39 La. Ann. 612, 613, 2 So. 187.

"Privilege" and "pledge" are totally different things. Carroll *v.* Bancker, 43 La. Ann. 1078, 1194, 10 So. 187.

INFANTS, 22 Cyc. 626. Of Judge, see JUDGES, 23 Cyc. 524. Of Juror on *Voir Dire* Examination, see JURIES, 24 Cyc. 339. Of Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 416. Of Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1304. Of Party to Action—As to Incriminating Answer to Libel, see ADMIRALTY, 1 Cyc. 856; As to Place of Bringing Suit, see VENUE. Of Public Mill and Manufacturing Corporation, see MILLS, 27 Cyc. 510. Of Toll-Road Company, see TOLL-ROADS. Of Witnesses — In General, see DISCOVERY, 14 Cyc. 362; WITNESSES; As Entitling Pleader to Omit Verification, see PLEADING, 31 Cyc. 536. Protection by Injunction, see INJUNCTIONS, 22 Cyc. 839. Regulation of Corporate Privilege, see MUNICIPAL CORPORATIONS, 28 Cyc. 726. Sufficiency of Consideration of Note Given For Worthless Privilege, see COMMERCIAL PAPER, 7 Cyc. 708. See Cross-References under PREFERENCE, 31 Cyc. 1159, and PRIORITY, *ante*, p. 310.)

PRIVILEGED COMMUNICATION. A statement or charge, defamatory of the character of another, but made under such circumstances as to rebut the legal inference of malice;[59] a communication communicated in confidence, privately endorsed, secret, in reliance on secrecy.[60] (Privileged Communication: Admissibility as Admission, see CRIMINAL LAW, 12 Cyc. 423. Defamatory Communication, see LIBEL AND SLANDER, 25 Cyc. 375. Disclosure by Witness, see WITNESSES. Of Writings, see DISCOVERY, 14 Cyc. 362.)

PRIVITY. In a general sense, private knowledge; joint knowledge with another of a private concern,[61] which is often supposed to imply consent or concurrence;[62] cognizance implying consent or concurrence.[63] In law, a derivative kind of interest, founded upon or growing out of the contract of another, as that which subsists between an heir and his ancestor, between executor and testator, and between lessor and lessee and his assignee;[64] a relation which creates obligation.[65] (Privity: Admission by as Evidence, see EVIDENCE, 16 Cyc. 985. Effect—

59. Hemmens *v.* Nelson, 138 N. Y. 517, 529, 34 N. E. 342, 20 L. R. A. 440.

60. Webster Dict. [*quoted* in State *v.* Kidd, 89 Iowa 54, 62, 56 N. W. 263].

61. Webster Dict. [*quoted* in Quinlan *v.* Pew, 56 Fed. 111, 117, 5 C. C. A. 438; Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292].

62. Century Dict. [*quoted* in Quinlan *v.* Pew, 56 Fed. 111, 117, 5 C. C. A. 438].

63. Webster Dict. [*quoted* in Quinlan *v.* Pew, 56 Fed. 111, 117, 5 C. C. A. 438; Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292].

The basis of this word is said to be the French "Privaute," which Webster's International Dictionary makes the equivalent of extreme familiarity. Quinlan *v.* Pew, 56 Fed. 111, 117, 5 C. C. A. 438.

As they were used in a statute limiting the liability of an owner of a vessel in certain cases, for any embezzlement, loss or destruction of goods shipped upon the vessel happening without the privity or knowledge of such owners, the meaning of the words "privity or knowledge" was held to be "a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it." Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292.

64. Burrill L. Dict. [*quoted* in Coan *v.* Osgood, 15 Barb. (N. Y.) 583, 588].

For other definitions of the term see ADVERSE POSSESSION, 1 Cyc. 1002; ESTOPPEL, 16 Cyc. 716; EVIDENCE, 16 Cyc. 985 note 76; JUDGMENTS, 23 Cyc. 1253.

There are three kinds of privity, namely: (1) Privity in case of estate only; (2) privity in respect to contract only; (3) privity in respect to estate and contract together. Mygatt *v.* Coe, 124 N. Y. 212, 219, 26 N. E. 611, 11 L. R. A. 646.

Implies succession.— He who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his title, and thus takes it charged with the burden attending it. Boughton *v.* Harder, 46 N. Y. App. Div. 352, 355, 61 N. Y. Suppl. 574. Privity exists between two successive holders when the later takes under the earlier, as by descent (for instance, a widow under her husband, or a child under its parent), or by will or grant, or by a voluntary transfer of possession. Sherin *v.* Brackett, 36 Minn. 152, 154, 30 N. W. 551. Privity only exists because of the relationship between the parties, or because of the derivative character of their title. Hummel *v.* Central City First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72, 76.

Privity of estate is that which exists between lessor and lessee, tenant for life or remainderman or reversioner, etc., and their respective assignees, and between joint tenants and copartners. Hartley *v.* Phillips, 198 Pa. St. 9, 13, 47 Atl. 929.

The ground of privity is property and not personal relation. Bailey *v.* Sundberg, 49 Fed. 583, 586, 1 C. C. A. 387.

65. Hathaway *v.* Cincinnatus, 62 N. Y. 434, 447.

As to Purchasers *Pendente Lite*, see LIS PENDENS, 25 Cyc. 1478; As to Rights and Liabilities Under Contract of Persons Not Parties Thereto, see CONTRACTS, 9 Cyc. 377, 387; On Right to Tack Successive Adverse Possessions, see ADVERSE POSSESSION, 1 Cyc. 1001. Element of — Bar by Former Adjudication, see JUDGMENTS, 23 Cyc. 1111; Estoppel, see ESTOPPEL, 16 Cyc. 715. Element of Right of Action For — Accounting, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 403; Fraud and False Representations, see FRAUD, 20 Cyc. 84; Money Had and Received, see MONEY RECEIVED, 27 Cyc. 857. Element of Right to — Attack Judgment Collaterally, see JUDGMENTS, 23 Cyc. 1067; Enforce Personal Liability in Suit to Establish Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 88; Relief by Interpleader, see INTERPLEADER, 23 Cyc. 11. Right of to Take Appeal or Sue Out Writ of Error, see APPEAL AND ERROR, 2 Cyc. 626. See PRIVIES; PRIVY.)

PRIVY. As an adjective, admitted to the participation of knowledge with another of a secret transaction;[66] secretly cognizant; privately known.[67] As a noun, one who is a partner,[68] or has any part or interest, in any action, matter or thing.[69] In law, one whose right to the thing in question may be benefited or injured, according as the matter in controversy may happen to be determined.[70] (See PRIVIES; PRIVITY.)

PRIVY TOKEN. A term used to denote a false mark or sign, forged object, counterfeited letter, key, ring, etc., used to deceive persons and thereby fraudulently get possession of property.[71] (See, generally, COUNTERFEITING, 11 Cyc. 1; FALSE PRETENSES, 19 Cyc. 384; FORGERY, 19 Cyc. 1367.)

PRIVY VERDICT.[72] A verdict when the judge hath left or adjourned the court, and the jury being agreed, in order to be delivered from their confinement obtain leave to give their verdict privily to the judge out of court;[73] that which, for the sake of being released from confinement, is given by a jury out of court to a judge;[74] one given out of court, before any of the judges of the court;[75] a verdict given before one of the judges of the court, after the court have risen.[76]

66. Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292; Webster Dict. [*quoted* in Edgell *v.* Lowell, 4 Vt. 405, 413].

67. Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292.

68. Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292.

69. Bouvier L. Dict. [*quoted* in Quinlan *v.* Pew, 56 Fed. 111, 117, 5 C. C. A. 438].

70. Edwards *v.* McConnel, Cooke (Tenn.) 305.

A privy in estate is a successor to the same estate, and not to a different estate in the same property. Pool *v.* Morris, 29 Ga. 374, 382, 74 Am. Dec. 68. He is any person who must necessarily derive his title to the property in question from a party bound by the judgment, return, etc., subsequently to such judgment, return, etc. Hunt *v.* Haven, 52 N. H. 162, 170; Dickinson *v.* Lovell, 35 N. H. 9, 16; Coleman *v.* Davis, (Tex. Civ. App. 1896) 36 S. W. 103; Allan *v.* Hoffman, 83 Va. 129, 138, 2 S. E. 602. To constitute one person, a privy in estate to another, such other must be predecessor in respect to the property in question, from whom the privy derives his right or title — in mutual or successive relationship. Patton *v.* Pitts, 80 Ala. 373, 376.

A privy in blood or estate is one who derives his title to the property by descent or purchase. Orthwein *v.* Thomas, 127 Ill. 554, 571, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434.

71. Black L. Dict. [*quoted* in State *v.* Renick, 33 Oreg. 584, 590, 56 Pac. 275, 72 Am. St. Rep. 758, 44 L. R. A. 266].

72. **A verdict** is either privy or public. Young *v.* Seymour, 4 Nebr. 86, 89.

73. Young *v.* Seymour, 4 Nebr. 86, 89; Kramer *v.* Kister, 187 Pa. St. 227, 235, 40 Atl. 1008, 44 L. R. A. 432; Willard *v.* Shaffer, 6 Phila. (Pa.) 520; Peart *v.* Chicago, etc., R. Co., 5 S. D. 337, 341, 58 N. W. 806; Campbell *v.* Linton, 27 U. C. Q. B. 563, 566.

So called, because it ought to be kept secret from each of the parties before it be affirmed by the court. Barrett *v.* State, 1 Wis. 175, 180.

But if the court be adjourned to the judge's chamber (Dornick *v.* Reichenback, 10 Serg. & R. (Pa.) 84, 90), or if the judge adjourn the court to his lodgings, and the jury there deliver their verdict (Campbell *v.* Linton, 27 U. C. Q. B. 563, 566), it is not privy but public.

74. Dornick *v.* Reichenback, 10 Serg. & R. (Pa.)) 84, 94.

75. Barrett *v.* State, 1 Wis. 175, 180.

76. Campbell *v.* Linton, 27 U. C. Q. B. 563, 566.

Such verdict is of no force unless afterward affirmed by a public verdict, given openly in court, wherein the jury may, if they please, vary the privy verdict; so that a privy verdict is indeed a mere nullity. Young *v.* Seymour, 4 Nebr. 86, 89; Kramer *v.* Kister, 187 Pa. St. 227, 235, 40 Atl. 1008, 44 L. R. A. 432; Willard *v.* Shaffer, 6 Phila. (Pa.) 520; Peart *v.* Chicago, etc., R. Co., 5 S. D. 337, 341, 58 N. W. 806; Campbell *v.* Linton, 27 U. C. Q. B. 563, 566.

PRIZE. Anything carried off as the result or reward of a contest;[77] anything offered to be competed for, or as the inducement to or reward of effort;[78] anything to be striven for;[79] anything offered as an inducement to participate in a scheme of chance;[80] a reward gained by contest or competition.[81] A thing striven for;[82] some valuable thing, offered by a person for the doing of something by others, into the strife for which he does not enter;[83] that which is obtained against the competition of others;[84] that which is won in a lottery,[85] or in any similar way.[86] In admiralty law, the term used to signify any goods, the subject of marine capture;[87] property taken at sea from an enemy, *jure belli*;[88] maritime captures only — ships, and cargoes taken by ships.[89] (Prize: Admiralty Jurisdiction, see ADMIRALTY, 1 Cyc. 838. Capture and Recapture of or by Insured Vessel, see MARINE INSURANCE, 26 Cyc. 634, 657. Enemies and Other Property, Vessels, and Cargoes Subject to Capture, see WAR. Prize Money, see WAR. Public Offer of—In General, see CONTRACTS, 9 Cyc. 255; In Horse-Race, see AGRICULTURE, 2 Cyc. 74; In Lottery, see LOTTERIES, 25 Cyc. 1634. See also PRIZE-FIGHTING.)

77. Webster Dict. [*quoted* in Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 613, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93; Sullivan *v.* State, 67 Miss. 346, 352, 7 So. 275].

78. Webster Dict. [*quoted* in Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 613, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93].

79. Standard Dict. [*quoted* in Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 613, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93].

80. Standard Dict. [*quoted* in Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 613, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93].

81. Worcester Dict. [*quoted* in Sullivan *v.* State, 67 Miss. 346, 352, 7 So. 275].

82. Webster Dict. [*quoted* in Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 613, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93].

83. Morrison *v.* Bennett, 20 Mont. 560, 569, 52 Pac. 553, 40 L. R. A. 158.

84. Webster Dict. [*quoted* in Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 613, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93; Sullivan *v.* State, 67 Miss. 346, 352, 7 So. 275].

85. Century Dict. [*quoted* in Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 613, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93]; Webster Dict. [*quoted* in Equitable Loan, etc., Co. *v.* Waring, *supra*].

86. Century Dict. [*quoted* in Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 613, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93].

Used in connection with anti-lottery laws, the word "prize" comprehends anything of value gained (or correspondingly lost) by the operation of chance, or any inequality in amount of value in a scheme of payment of money or other thing of value as a result of the use of chance. Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 613, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93.

Under a statute entitled "An act to prevent the sale or exchange of property under the inducement that a gift or prize is to be part of the transaction," the giving of a photograph to each purchaser of a certain brand of tobacco is not a violation thereof. The sale prohibited is a sale upon any representation "that anything other than what is specifically stated to be the subject of the sale" is to be delivered. Com. *v.* Emerson, 165 Mass. 146, 42 N. E. 559.

87. Groning *v.* Union Ins. Co., 1 Nott & M. (S. C.) 537, 539.

88. Bas *v.* Tingy, 4 Dall. (U. S.) 37, 41, 1 L. ed. 731.

89. U. S. *v.* Athens Armory, 24 Fed. Cas. No. 14,473, 2 Abb. 129, 35 Ga. 344.

As soon as war is declared, all the property of the enemy, or his subjects, wherever found, whether on land or water, is lawful prize. Johnson *v.* Twenty-One Bales, etc., 13 Fed. Cas. No. 7,417, 2 Paine 601; Van Ness Prize Cas. 5, 3 Wheel. Cr. (N. Y.) 433.

Prize only relates to or is connected with a state or condition of war. A vessel captured for engaging in piratical aggression becomes a prize on account of the state of universal war presumed to have been declared by a pirate against commerce and human kind at large, which requires no reciprocal declaration from any nation. The City of Mexico, 28 Fed. 148, 150.

"Good and lawful prize" does not necessarily imply that the goods were enemies' property. Groning *v.* Union Ins. Co., 1 Nott & M. (S. C.) 537, 540.

The question of prize or no prize is essentially a question of title. Enemy property, or property found so engaged in an unfinished voyage of illicit traffic with the enemy as to be quasi hostile, is liable to condemnation; property not in that predicament is not. *In re* Seventy-Eight Bales of Cotton, 21 Fed. Cas. No. 12,679, 1 Lowell 11.

"Capture" and "prize" are not convertible terms, and that for the subject of capture to be made prize for the benefit of the captors the taking must meet the conditions imposed by the statutes. U. S. *v.* Dewey, 188 U. S. 254, 259, 23 S. Ct. 415, 47 L. ed. 463. In ordinary use the words "prizes and capture" refer, doubtless, to captures on water as maritime prize; but under the statute "to confiscate property used for insurrectionary purposes" they refer to property taken on land as well as on water. Union Ins. Co. *v.* U. S., 6 Wall. (U. S.) 759, 763, 18 L. ed. 879; U. S. *v.* Athens Armory, 24 Fed. Cas. No. 14,473, 2 Abb. 129, 35 Ga. 344.

PRIZE-FIGHTING

By Edward W. Tuttle

CROSS-REFERENCES

For Matters Relating to:

Affray, see Affray, 2 Cyc. 40.
Assault, see Assault and Battery, 3 Cyc. 1014.
Breach of the Peace, see Breach of the Peace, 5 Cyc. 1023.
Conspiracy, see Conspiracy, 8 Cyc. 615.
Criminal Law and Procedure in General, see Criminal Law, 12 Cyc. 1.
Dueling, see Dueling, 14 Cyc. 1111.
Homicide, see Homicide, 21 Cyc. 646.
Riot, see Riot.
Unlawful Assembly, see Unlawful Assembly.

I. DEFINITION.

While the term "prize-fight" has no technical legal meaning at common-law,[1] a prize[2] fight[3] is defined as a contest in which the combatants fight for a reward or wager.[4]

1. Seville *v.* State, 49 Ohio St. 117, 131, 30 N. E. 621, 15 L. R. A. 516. See also *infra*, II, A.

According to the lexicographers it would seem to be left doubtful whether to constitute a prize-fight there must be fighting in public. Sullivan *v.* State, 67 Miss. 346, 7 So. 275. See *infra*, III, C.

"Prize-fight" is a phrase of common use, and its employment indicates what is clearly and distinctly meant, as other English terms. State *v.* Patton, 159 Ind. 248, 251, 64 N. E. 850.

"What is commonly called a prize-fight" see State *v.* Olympic Club, 46 La. Ann. 935, 15 So. 190, 24 L. R. A. 452.

2. **"Prize"** defined see *ante*, p. 394.

3. **"Fight"** defined see 19 Cyc. 527.

4. Webster Dict. [*quoted* in State *v.* Purtell, 56 Kan. 479, 481, 43 Pac. 782; Sullivan *v.* State, 67 Miss. 346, 352, 7 So. 275]. See also *infra*, III, B.

Other lexicographers who define it give it substantially the same definition. Seville *v.* State, 49 Ohio St. 117, 131, 30 N. E. 621, 15 L. R. A. 516.

Other definitions are: "A pugilistic encounter, or a boxing match for a prize or wager." Century Dict. [*quoted* in State *v.* Patton, 159 Ind. 248, 251, 64 N. E. 850; Seville *v.* State, 49 Ohio St. 117, 131, 30 N. E. 621, 15 L. R. A. 516].

"An exhibition contest, especially one of pugilists, for a stake or wager." Webster Dict. [*quoted* in State *v.* Patton, 159 Ind. 248, 251, 64 N. E. 850].

In the Ohio statute the term has been held to be used in its ordinary signification of a fight for a prize or reward, and includes all fights of that character however conducted or

II. NATURE OF OFFENSE.

A. At Common Law. The specific offense of prize-fighting was unknown at common law,[5] the participants being punishable for assault and battery,[6] breach of the peace,[7] or riot,[8] according to the circumstances surrounding the particular case.

B. Under Statute. Prize-fighting is prohibited in many of the states by statutes penalizing the offense.[9]

C. Distinguished From Boxing or Sparring Matches. A mere boxing or sparring match was not illegal at common law,[10] unless carried to such length as to cause serious injury to one of the participants,[11] or so conducted as to amount to a breach of the peace,[12] and statutes prohibiting prize-fighting sometimes except from their provisions a glove contest or sparring exhibition in an athletic club or gymnasium.[13] An exception of this kind in a statute does not legalize prize-fighting,

witnessed. Seville *v.* State, 49 Ohio St. 117, 131, 30 N. E. 621, 15 L. R. A. 516. See *infra*, III, C, E.

A prize-fighter is "one who fights or boxes publicly for a reward" (Worcester Dict. [*quoted* in Sullivan *v.* State, 67 Miss. 346, 352, 7 So. 275]); "one who fights publicly for a reward" (Webster Dict. [*quoted* in Sullivan *v.* State, *supra*].

Priz--fighting is "the act or practice of fighting for a prize" (Worcester Dict. [*quoted* in Sullivan *v.* State, 67 Miss. 346, 352, 7 So. 275]); "fighting, especially boxing, in public, for a reward or wager" (Webster Dict. [*quoted* in Sullivan *v.* State, *supra*]).

5. Sullivan *v.* State, 67 Miss. 346, 7 So. 275.

6. Com. *v.* Collberg, 119 Mass. 350, 20 Am. Rep. 328; Reg. *v.* Coney, 8 Q. B. D. 534, 15 Cox C. C. 46, 46 J. P. 404, 51 L. J. M. C. 66, 46 L. T. Rep. N. S. 307, 30 Wkly. Rep. 678; Reg. *v.* Hunt, 1 Cox C. C. 177; Rex *v.* Perkins, 4 C. & P. 537, 19 E. C. L. 638.

7. Reg. *v.* Young, 10 Cox C. C. 371.

8. Reg. *v.* Brown, C. & M. 314, 41 E. C. L. 175; Reg. *v.* Billingham, 2 C. & P. 234, 31 Rev. Rep. 665, 12 E. C. L. 545.

Where a crowd looks on quietly a prize-fight does not constitute a riot or affray. Reg. *v.* Hunt, 1 Cox C. C. 177.

9. See the statutes of the several states; and the following cases:

Indiana.— State *v.* Patton, 159 Ind. 248, 64 N. E. 850.

Kansas.— State *v.* Purtell, 56 Kan. 479, 43 Pac. 782.

Kentucky.—Com. *v.* McGovern, 116 Ky. 212, 75 S. W. 261, 25 Ky. L. Rep. 411, 66 L. R. A. 280.

Louisiana.— State *v.* Olympic Club, 46 La. Ann. 935, 15 So. 190, 24 L. R. A. 452.

Massachusetts.— Com. *v.* Mack, 187 Mass. 441, 73 N. E. 534; Com. *v.* Welsh, 7 Gray 324.

Michigan.— People *v.* Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287, holding that the statute prohibiting prize-fights "or any other fight in the nature of a prize-fight" defines but one offense, where there is nothing in the statute to show what constitutes such other fight.

Mississippi.— Sullivan *v.* State, 67 Miss. 346, 7 So. 275.

New York.— People *v.* Finucan, 80 N. Y. App. Div. 407, 80 N. Y. Suppl. 929, 17 N. Y. Cr. 254; People *v.* Johnson, 22 Misc. 150, 49 N. Y. Suppl. 382, 12 N. Y. Cr. 546.

Ohio.— Seville *v.* State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516; State *v.* Hobart, 11 Ohio S. & C. Pl. Dec. 166, 8 Ohio N. P. 246.

See 40 Cent. Dig. tit. "Prize-Fighting," § 1 *et seq.*

Repeal of law licensing prize-fighting.—A law licensing prize-fighting by imposing an occupation tax thereon is repealed by a subsequent act prohibiting such contests, and a conviction under the former law of engaging in a prize-fight without a license is unwarranted. Sullivan *v.* State, 32 Tex. Cr. 50, 22 S. W. 44.

An agreement to engage in a prize-fight is a conspiracy to engage in a crime. Seville *v.* State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516.

10. State *v.* Burnham, 56 Vt. 445, 48 Am. Rep. 801; Reg. *v.* Coney, 8 Q. B. D. 534, 15 Cox C. C. 46, 46 J. P. 404, 51 L. J. M. C. 66, 46 L. T. Rep. N. S. 307, 30 Wkly. Rep. 678; Reg. *v.* Orton, 14 Cox C. C. 226, 39 L. T. Rep. N. S. 292.

11. Reg. *v.* Orton, 14 Cox C. C. 226, 39 L. T. Rep. N. S. 292 (holding that if the contestants met intending to fight till one gave in from exhaustion or injury received, it was not a sparring match but a prize-fight); Reg. *v.* Young, 10 Cox C. C. 371.

12. State *v.* Burnham, 56 Vt. 445, 48 Am. Rep. 801.

13. See the statutes of the several states; and see State *v.* Olympic Club, 46 La. Ann. 935, 15 So. 190, 24 L. R. A. 452 (holding that mere boxing as ordinarily understood is not unlawful, and an interference with it by the legislative power would be a great stretch of authority, bordering upon an infringement of personal liberty, and even boxing without gloves, for a display of skill and for pastime, when there is no breach of the peace, and no intentional injury to the person, cannot be considered as embraced within the statute); People *v.* Johnson, 22 Misc. (N. Y.) 150, 49 N. Y. Suppl. 382, 12 N. Y. Cr. 546 (holding that the Horton law, prohibiting sparring exhibitions where an admission fee is received except where held by a domestic

but merely sanctions legitimate exhibitions of skill in sparring, and a contest which because of the prize offered or the intent of the contestants to injure each other is in fact a prize-fight is unlawful even under such a statute.[14]

III. Elements of Offense.

A. Intent. An intention on the part of the participants to do physical violence to each other is an essential element of a prize-fight.[15] But the mere fact that it is a so-called friendly bout and for scientific points does not change the character of a contest which is in other respects a prize-fight.[16]

B. Prize or Reward. The contest must have been engaged in with an expectation of a prize or reward either to be won from the contestant or otherwise awarded,[17] which may consist of money paid or contributed by the spectators;[18] and it is immaterial that the defeated as well as the successful contestant is rewarded,[19] or that the reward is divided equally between them,[20] or even that the prize was not actually awarded.[21] Under a statute directed merely at fighting, however, a reward is unnecessary.[22]

incorporated athletic association, does not allow a charge of admission fees to sparring exhibitions conducted by associations incorporated under the membership corporation law); *In re* Athletic Clubs, 5 Ohio S. & C. Pl. Dec. 696, 7 Ohio N. P. 457 (holding that contestants who fight on wager or for a prize or reward, such as gate money, or with the accompaniment of backers, referees, and umpires, do not come within the permissive provisions of such a statute, and that any combat which is essentially a prize-fight, no matter by what name called or under what rules of gymnasium or club conducted or by whatsoever permission, is a violation of the statute prohibiting prize-fighting); State *v.* Burnham, 56 Vt. 445, 48 Am. Rep. 801 (holding that the mere fact that slight injuries were inflicted upon the contestants is not determinative of the character of the contest).

14. State *v.* Purtell, 56 Kan. 479, 43 Pac. 782; State *v.* Olympic Club, 47 La. Ann. 1095, 17 So. 599 (holding that the glove contests permitted by such a statute are for recreation, exercise, and instruction and not for the purpose of introducing and exhibiting for a prize, trained and professional prize-fighters, nor for the purpose of making money from such exhibitions or contests by charging an admission fee); Sullivan *v.* State, 67 Miss. 346, 7 So. 275; State *v.* Hobart, 11 Ohio S. & C. Pl. Dec. 166, 8 Ohio N. P. 246 (holding that every boxing match or sparring exhibition for a prize being a prize-fight, and a crime, no public gymnasium or athletic club, whether it has been organized *bona fide* or is a sham, can exhibit a boxing match or sparring contest for a prize under any circumstances whatever, notwithstanding the exception).

15. State *v.* Purtell, 56 Kan. 479, 43 Pac. 782; State *v.* Olympic Club, 47 La. Ann. 1095, 17 So. 599; People *v.* Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287; Reg. *v.* Orton, 14 Cox C. C. 226, 39 L. T. Rep. N. S. 292; Reg. *v.* Young, 10 Cox C. C. 371.

16. State *v.* Olympic Club, 47 La. Ann. 1095, 17 So. 599; Com. *v.* Collberg, 119 Mass. 350, 20 Am. Rep. 328 (holding that anger and mutual ill-will are not elements of the offense); Com. *v.* Sullivan, 16 Wkly. Notes Cas. (Pa.) 14 (holding that a claim that a contest is simply for scientific points, and that it is friendly, will not avail to prevent binding the parties over to keep the peace, as against a charge that it is to be a prize-fight or pugilistic contest, where it is to be for four rounds of three minutes each, with intermissions of one minute each, and to be conducted under the "Marquis of Queensbury rules," one of which is that a man knocked down must rise within ten seconds and continue to the end of the round or be declared the loser).

17. *Indiana.*— State *v.* Patton, 159 Ind. 248, 64 N. E. 850.

Kansas.— State *v.* Purtell, 56 Kan. 479, 43 Pac. 782, holding, however, that it is not necessary to show that the prize or reward was to be gained by one from the other.

Louisiana.— State *v.* Olympic Club, 47 La. Ann. 1095, 17 So. 599.

Michigan.— People *v.* Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287.

New York.— People *v.* Floss, 7 N. Y. Suppl. 504, holding that a conviction is unwarranted when the contest was intended only as an advertisement for one of the participants, to secure notoriety and thus a better salary as an exhibition boxer, and no prize was to be gained by the successful person.

See 40 Cent. Dig. tit. "Prize-Fighting," § 1 *et seq.*

18. People *v.* Finucan, 80 N. Y. App. Div. 407, 80 N. Y. Suppl. 929.

19. State *v.* Purtell, 56 Kan. 479, 43 Pac. 782.

20. Com. *v.* McGovern, 116 Ky. 212, 75 S. W. 261, 25 Ky. L. Rep. 411, 66 L. R. A. 280.

21. State *v.* Moore, 5 Ohio S. & C. Pl. Dec. 689, 4 Ohio N. P. 81.

22. Com. *v.* Welsh, 7 Gray (Mass.) 324, holding that under the statute providing that every person who shall, by previous appointment or arrangement, meet another person and engage in a fight, shall be punished, it is not necessary to prove that the fight was for a prize or reward.

C. Publicity. Where the statute is aimed at public fighting, the contess must have been a public one to constitute the offense;[23] otherwise this feature it not essential to the commission of the crime.[24]

D. Previous Appointment. Statutes penalizing prize-fighting sometimes provide that to constitute the offense the fight must be by previous appointment or agreement.[25]

E. Manner of Conducting Contest Immaterial. The manner in which the contest is conducted,[26] whether with or without gloves,[27] or ring,[28] whether before few or many spectators,[29] the clothing worn by the contestants,[30] and the rules observed,[31] are not material if the contest embraces the essential elements of a prize-fight. But all these elements may be considered by the jury in determining the nature of the fight.[32]

IV. Principals and Acessaries; Liability of Spectators.

Aiders and abetters[33] in a prize-fight which is an unlawful assembly as distinguished from a lawful sparring exhibition[34] are punishable,[35] but the mere pres-

23. Com. *v.* Mack, 187 Mass. 441, 73 N. E. 534; Sullivan *v.* State, 67 Miss. 346, 7 So. 275, holding that a private contest between individuals, whether amateurs or professional fighters or boxers, although it be for a prize or wager, would not be a prize-fight within the meaning of the prevailing statute.

24. Seville *v.* State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516; State *v.* Hobart, 11 Ohio S. & C. Pl. Dec. 166, 8 Ohio N. P. 246.

25. See the statutes of the several states; and see Com. *v.* Welsh, 7 Gray (Mass.) 324 (holding that on the trial of an indictment under such a statute, the previous appointment or arrangement may be inferred from the conduct of the parties and other circumstances, and need not be proved to have been made within the commonwealth, nor at a distinct time and place other than when and where the fight took place); State *v.* Moore, 5 Ohio S. & C. Pl. Dec. 689, 4 Ohio N. P. 81 (holding, however, that it is not necessary that the agreement to enter into the contest should have been made for any particular length of time previous to the actual contest, nor is it necessary that such agreement be made in any form of words or writing, and that if the agreement to enter the contest is made by seconds or other parties on behalf of the principal, the participants are liable under the statute. But the agreement must have been known by the contestants before the contest began).

26. State *v.* Burnham, 56 Vt. 445, 48 Am. Rep. 801, holding that the circumstances of an agreement to engage in the match, giving notice, having seconds, a referee, rules, a ring, and that slight injuries were received, are consistent both with a lawful and unlawful contest.

27. *Kansas.*— State *v.* Purtell, 56 Kan. 479, 43 Pac. 782.

Kentucky.— Com. *v.* McGovern, 116 Ky. 212, 75 S. W. 261, 25 Ky. L. Rep. 411, 66 L. R. A. 280.

Louisiana.— State *v.* Olympic Club, 46 La. Ann. 935, 15 So. 190, 24 L. R. A. 452, 47 La. Ann. 1095, 17 So. 599.

Ohio.— State *v.* Hobart, 11 Ohio S. & C. Pl. Dec. 166, 8 Ohio N. P. 246; State *v.* Moore, 5 Ohio S. & C. Pl. Dec. 689, 4 Ohio N. P. 81.

Vermont.— State *v.* Burnham, 56 Vt. 445, 48 Am. Rep. 801, holding that it was not error to refuse to allow the jury to examine the gloves with which the contest was fought.

England.— Reg. *v.* Orton, 14 Cox C. C. 226, 39 L. T. Rep. N. S. 292.

28. People *v.* Finucan, 80 N. Y. App. Div. 407, 80 N. Y. Suppl. 929, 17 N. Y. Cr. 254, holding that the rule applies even where the statute prohibits fights "commonly called a ring or prize fight."

29. Seville *v.* State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516.

30. State *v.* Olympic Club, 46 La. Ann. 935, 15 So. 190, 24 L. R. A. 452.

31. State *v.* Olympic Club, 46 La. Ann. 935, 15 So. 190, 24 L. R. A. 452; People *v.* Finucan, 80 N. Y. App. Div. 407, 80 N. Y. Suppl. 929, 17 N. Y. Cr. 254.

Marquis of Queensbury Rules.—A contest which is conducted under and governed by the Marquis of Queensbury rules is manifestly a prize-fight. Com. *v.* McGovern, 116 Ky. 212, 75 S. W. 261, 25 Ky. L. Rep. 411, 66 L. R. A. 280. See also State *v.* Hobart, 11 Ohio S. & C. Pl. Dec. 166, 8 Ohio N. P. 246; Com. *v.* Sullivan, 16 Wkly. Notes Cas. (Pa.) 14.

32. State *v.* Moore, 5 Ohio S. & C. Pl. Dec. 689, 4 Ohio N. P. 81 (holding that the fact that the contest was had with gloved hands, as also the kind, size, weight, and other characteristics of the gloves so used, may be looked to in connection with the other evidence in the case); State *v.* Burnham, 56 Vt. 445, 48 Am. Rep. 801; Reg. *v.* Orton, 14 Cox C. C. 226, 39 L. T. Rep. N. S. 292. And see cases cited *supra*, this section.

33. See, generally, Criminal Law, 12 Cyc. 183 *et seq.*

34. See Reg. *v.* Orton, 14 Cox C. C. 226, 39 L. T. Rep. N. S. 292. And see *supra*, II, C.

35. See the cases cited *infra*, this note.

ence of one as a spectator at a prize-fight, who does and says nothing to encourage the fight and takes no actual part in the management thereof, does not subject him to conviction as a principal as a matter of law.[36] Sometimes the statute against prize-fighting as a substantive offense provides for punishment of persons who aid, advise, encourage, or promote, the fight,[37] or who aid or abet therein.[38]

V. INDICTMENT OR INFORMATION.[39]

An indictment for engaging in[40] or aiding or abetting a fight need not set out the particular acts, but may follow the language of the statute when by the use of such language the act in which the offense consists is fully, directly, and expressly alleged without uncertainty or ambiguity.[41] It is not necessary, however, to follow the language of the statute if the acts constituting the offense are clearly described in the indictment.[42] The necessity for an averment that the fight took place in public depends upon whether publicity is an essential element of the crime.[43] Where the offense consists of engaging in a prize-fight, the indictment or information must show that both parties fought;[44] but it is sufficient to allege

Assault.— All persons aiding and abetting a prize-fight are guilty of an assault. Reg. *v.* Coney, 8 Q. B. D. 534, 15 Cox C. C. 46, 46 J. P. 404, 51 L. J. M. C. 66, 46 L. T. Rep. N. S. 307, 30 Wkly. Rep. 678, holding that consent of the parties actually engaged in fighting to interchange blows does not afford any answer to the criminal charge of assault.

Prosecution for unlawful assembly see Reg. *v.* Orton, 14 Cox C. C. 226, 39 L. T. Rep. N. S. 292.

Where one combatant is killed persons present at and sanctioning the prize-fight are said to be guilty of manslaughter as principals in the second degree. Rex *v.* Hargrave, 5 C. & P. 170, 24 E. C. L. 509.

36. Reg. *v.* Coney, 8 Q. B. D. 534, 15 Cox C. C. 46, 46 J P. 404, 51 L. J. M. C. 66, 46 L. T. Rep. N. S. 307, 30 Wkly. Rep. 678 [*disapproving* Rex *v.* Murphy, 6 C. & P. 103, 25 E. C. L. 343; Rex *v.* Billingham, 2 C. & P. 234, 31 Rev. Rep. 665, 12 E. C. L. 545], where it seems that such facts unexplained may afford some evidence to the jury.

Corroboration as witnesses.— The spectators of a sparring match are not *participes criminis* so that their evidence, touching what occurred at the match, requires corroboration. Reg. *v.* Young, 10 Cox C. C. 371. And although all persons present at and sanctioning a prize-fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree, yet they are not such accomplices as require their evidence to be confirmed, if they are called as witnesses against other parties charged with manslaughter. Rex *v.* Hargrave, 5 C. & P. 170, 24 E. C. L. 509.

37. See Com. *v.* Welsh, 7 Gray (Mass.) 324, where the statute included those who were present as an aid, second, or surgeon.

38. See People *v.* Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287; People *v.* Floss, 7 N. Y. Suppl. 504, *supra*, note 17.

39. **Indictment or information** generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157 *et seq.*

40. Com. *v.* Barrett, 108 Mass. 302 (holding that an indictment averring in the words of the statute that certain inhabitants of the state, by a previous appointment made in the state, left the state and on the same day fought with each other without its limits, sufficiently charges that both the leaving the state and the fighting were in pursuance of one appointment made in the state); Com. *v.* Welsh, 7 Gray (Mass.) 324 (holding that an indictment alleging that defendant at a time and place named, by and in pursuance of a previous appointment and arrangement, met and engaged in a fight with one J S is sufficient without further charging what previous appointment or arrangement was made, or when, or where, or by whom, or further setting out defendant's acts); People *v.* Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287.

41. Com. *v.* Welsh, 7 Gray (Mass.) 324.

But if the statute does not define the offense or declare what acts shall be a violation of its provisions, as a statute which makes it unlawful "for any person to engage in prize-fighting," etc., without more, it is not sufficient to charge the offense in the language of the statute but the facts should be set out which show an unlawful act. Sullivan *v.* State, 67 Miss. 346, 7 So. 275. But see People *v.* Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287.

Charging in language of statute generally, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 339.

42. State *v.* Patton, 159 Ind. 248, 64 N. E. 850.

43. Sullivan *v.* State, 67 Miss. 346, 7 So. 275 (holding the averment necessary, the prevailing statute prohibiting public fighting only); Seville *v.* State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516 (holding the averment unnecessary under the prevailing statute prohibiting both public and private fights).

Publicity as an element of the offense see *supra*, III, C.

44. Sullivan *v.* State, 67 Miss. 346, 7 So. 275, holding that an indictment charging that S did unlawfully engage in a prize-fight with

that the accused engaged with another in a fight.[45] It is unnecessary to negative the existence of facts bringing the case within exceptions contained in the statute.[46]

VI. EVIDENCE.[47]

On a prosecution for prize-fighting it is not competent to show that such contests are common and harmless amusements in colleges,[48] nor is the opinion of an expert as to whether the contest in question was a glove contest or a prize-fight admissible.[49]

VII. TRIAL.[50]

Whether a contest was a prize-fight or a lawful glove contest,[51] and whether an alleged club was only a sham and pretense,[52] are questions of fact for the jury under proper instructions.

PRIZE GOODS. Goods taken on the high seas, *jure belli*, out of the hands of the enemy.[1] (See, generally, WAR.)

PRIZE LAW. A law of war, of might, and of force, which is to be exercised at the order and behest of the executive, and not upon the principles of policy or equity.[2] (See, generally, WAR.)

PRIZE LOGS. All logs, masts, spars, and other timber, the marks of which have been so defaced as not to be known; [3] logs not having thereon some mark for the purpose of designating the owner or owners.[4]

PRIZE MONEY. A dividend from the proceeds of a captured vessel, etc., paid to the captors.[5] (See, generally, WAR.)

PRIZE TICKETS. In a lottery, tickets on which the holder would be entitled to demand and receive the prizes drawn to their respective numbers.[6] (See generally, LOTTERIES, 25 Cyc. 1631 *et seq.*)

K, "to wit; did then and there enter a ring commonly called a prize-ring, and did then and there in the said ring, beat, strike, and bruise the said K," is defective as the *videlicet* excludes the conclusion that K fought.

45. State *v.* Patton, 159 Ind. 248, 64 N. E. 850; Com. *v.* Welsh, 7 Gray (Mass.) 324; Seville *v.* State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516.

46. Seville *v.* State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516, holding that it is unnecessary to negative the existence of the matters mentioned in a proviso excepting exercises in any public gymnasium or athletic club if written permission therefor shall have been obtained from the sheriff or mayor.

47. Evidence generally see CRIMINAL LAW, 12 Cyc. 379 *et seq.*; EVIDENCE, 16 Cyc. 821 *et seq.*

48. State *v.* Burnham, 56 Vt. 445, 48 Am. Rep. 801.

49. State *v.* Olympic Club, 46 La. Ann. 935, 15 So. 190, 24 L. R. A. 452; Seville *v.* State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516.

50. Trial generally see CRIMINAL LAW, 12 Cyc. 504 *et seq.*

51. State *v.* Purtell, 56 Kan. 479, 43 Pac. 782; State *v.* Olympic Club, 46 La. Ann. 935, 15 So. 190, 24 L. R. A. 452; State *v.* Burnham, 56 Vt. 445, 48 Am. Rep. 801; Reg. *v.* Coney, 8 Q. B. D. 534, 15 Cox C. C. 46, 46 J. P. 404, 51 L. J. M. C. 66, 46 L. T. Rep. N. S. 307, 30 Wkly. Rep. 678; Reg. *v.* Orton, 14 Cox C. C. 226, 39 L. T. Rep. N. S. 292, holding that where the contestants, although wearing gloves, fought with great ferocity and each was severely injured, the question whether the contest was a prize-fight or a mere sparring match was held properly submitted to the jury.

What constitutes prize-fighting is a question of law; but it is a term in common use, and the very employment of the word indicates what is meant. People *v.* Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287.

52. Com. *v.* Mack, 187 Mass. 441, 73 N. E. 534.

1. The Adeline, 9 Cranch (U. S.) 244, 284, 3 L. ed. 719; The Two Friends, 1 C. Rob. 271, 283.

2. The Buena Ventura, 87 Fed. 927, 929.

3. Kennebec Log Driving Co. *v.* Burrill, 18 Me. 314, 317.

4. Kennebec Log Driving Co. *v.* Burrill, 18 Me. 314, 317.

Such is the meaning of the term as used in a statute providing that such logs shall be the property of log driving companies. Kennebec Log Driving Co. *v.* Burrill, 18 Me. 314, 317.

5. Black L. Dict.

It is, strictly speaking, a matter of bounty and not of right, and no one has any absolute title to it before adjudication. U. S. *v.* Steever, 113 U. S. 747, 753, 5 S. Ct. 765, 28 L. ed. 1133.

6. Baltimore Bank *v.* Smith, 3 Gill & J. (Md.) 265, 275.

PRO. A Latin preposition meaning for, in respect of; on account of; in behalf of.[7]

PRO AND CON. For and against.[8]

PROBABILITY. The state of being probable;[9] likelihood; appearance of truth; that state of a case or question of fact which results from superior evidence or preponderation of argument on one side, inclining the mind to receive it as the truth, but leaving some room for doubt;[10] likelihood of the occurrence of an event in the doctrine of chances, or the quotient obtained by dividing the number of favorable chances by the whole number of chances;[11] likelihood or appearance — that is, resemblance of truth.[12] The term is sometimes employed as meaning the same thing as presumption.[13] (See PROBABLE.)

PROBABLE. Having more evidence for than against;[14] having more evidence for than the contrary;[15] supported by evidence which inclines the mind to belief, but leaves some room for doubt;[16] likely.[17] (See PROBABILITY;

None other would be a prize ticket within the meaning of a contract to pay a note in cash or prize tickets of a certain lottery fifty days after the drawing should be concluded. Baltimore Bank *v.* Smith, 3 Gill & J. (Md.) 265, 275.

7. Black L. Dict., where it is said to be the introductory word of many Latin phrases.

Used in a note signed "A pro B" indicates that A is not the promisor in the note and that he signed the note in behalf of B. Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160.

8. Black L. Dict.

It is a phrase descriptive of the presentation of arguments or evidence on both sides of a disputed question. Black L. Dict.

9. Mims *v.* State, 141 Ala. 93, 96, 37 So. 354; Williams *v.* State, 98 Ala. 22, 12 So. 808; Webster Dict.; Worcester Dict. [both *quoted* in Howard *v.* State, 108 Ala. 571, 18 So. 813, 816; Bain *v.* State, 74 Ala. 38, 39].

10. Webster Dict. [*quoted* in Brown *v.* Atlanta, etc., R. Co., 19 S. C. 39, 59].

11. Worcester Dict. [*quoted* in Brown *v.* Atlanta, etc., R. Co., 19 S. C. 39, 59].

12. Webster Dict. [*quoted* in People *v.* O'Brien, 130 Cal. 1, 8, 62 Pac. 297].

In ordinary language the term implies doubt. People *v.* O'Brien, 130 Cal. 1, 8, 62 Pac. 297. A probability of the defendant's innocence is at least equivalent to a reasonable doubt of his guilt. Shaw *v.* State, 125 Ala. 80, 82, 28 So. 390; Henderson *v.* State, 120 Ala. 360, 363, 25 So. 236; Winslow *v.* State, 76 Ala. 42, 48. A probability of the existence of a thing or condition means that there is more evidence in favor of such existence than against. The term implies consideration of probative facts. Gilmore *v.* State, 99 Ala. 154, 159, 13 So. 536.

There is a difference between probability and proof.—The object of both words is to express a particular effect of evidence, but "proof" is the stronger expression. Brown *v.* Atlanta, etc., R. Co., 19 S. C. 39, 59.

"To say that a state of facts have a probable existence, *ex vi termini*, implies that there is reason for the belief that they exist. If there is no reason for such belief there is no 'probability' of their existence. In order to find that there is a probability of the existence of a fact, a reason for believing in the existence of such fact must be entertained." Mims *v.* State, 141 Ala. 93, 96, 37 So. 354.

"It . . . falls short of moral certainty, but produces what is called opinion. Demonstration produces certain knowledge, proof produces belief, and probability opinion." Brown *v.* Atlanta, etc., R. Co., 19 S. C. 39, 59.

The party upon whom burden of proof rests creates a probability by introducing more evidence than the other party. State *v.* Jones, 64 Iowa 349, 362, 17 N. W. 911, 20 N. W. 370.

13. Fay *v.* Reynolds, 60 Conn. 217, 220, 21 Atl. 418.

14. Webster Dict. [*quoted* in Bain *v.* State, 74 Ala. 38, 39; Bailey *v.* Centerville, 108 Iowa 20, 27, 78 N. W. 831]; State *v.* Jones, 64 Iowa 349, 356, 17 N. W. 911, 20 N. W. 470; Worcester Dict. [*quoted* in Bain *v.* State, *supra*].

15. Worcester Dict. [*quoted* in Bailey *v.* Centerville, 108 Iowa 20, 27, 78 N. W. 831; State *v.* Jones, 64 Iowa 349, 356, 17 N. W. 911, 20 N. W. 470].

On a plea of insanity in a homicide case, it is error to instruct the jury that defendant is not entitled to an acquittal if the evidence proved him probably insane. "By saying insanity is probable is meant, as understood in common parlance and from the definition of lexicographers, that there is more evidence of insanity than against it, or better reason to believe the defendant insane than to suppose him sane." State *v.* Thiele, 119 Iowa 659, 662, 94 N. W. 256.

16. Webster Dict. [*quoted* in Bain *v.* State, 74 Ala. 38, 39; Kelch *v.* State, 55 Ohio St. 146, 153, 45 N. E. 6, 60 Am. St. Rep. 680, 39 L. R. A. 737]; Worcester Dict. [*quoted* in Bain *v.* State, *supra*].

It clearly involves the idea of a preponderance of evidence, as used in connection with testimony. Bain *v.* State, 74 Ala. 38, 39. In legal effect, if a claim is made probable by the evidence, it is for the reason that the preponderance of the evidence is in favor of the claim. State *v.* Trout, 74 Iowa 545, 546, 38 N. W. 405, 7 Am. St. Rep. 499. See also Kelch *v.* State, 55 Ohio St. 146, 152, 45 N. E. 6, 60 Am. St. Rep. 680, 39 L. R. A. 737.

17. O'Brien *v.* New York, etc., R. Co., 13 N. Y. Suppl. 305.

PROBABLE CAUSE; PROBABLE CONSEQUENCE; PROBABLE EVIDENCE; PROBABLE EXPECTANCY.)

PROBABLE CAUSE. Belief founded on reasonable grounds;[18] that apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged; and in a civil case that a cause of action existed.[19] (Probable Cause: Certificate on Seizure — By Customs Officer, see CUSTOMS DUTIES, 12 Cyc. 1138; By Internal Revenue Officer, see INTERNAL REVENUE, 22 Cyc. 1663. Defense in Action — For False Imprisonment, see FALSE IMPRISONMENT, 19 Cyc. 351, 360, 366; On Bond to Procure Attachment, or For Wrongful Attachment, see ATTACHMENT, 4 Cyc. 863. Effect as to Liability of Prosecuting Witness For Costs, see COSTS, 11 Cyc. 273. For Issuing Warrant — In Civil Proceeding, see MALICIOUS PROSECUTION, 26 Cyc. 43; In Criminal Case, see CRIMINAL LAW, 12 Cyc. 299; MALICIOUS PROSECUTION, 26 Cyc. 24. Showing — In Bail-Bond, see BAIL, 5 Cyc. 102; In Information, Complaint, or Warrant For Search, Seizure and Forfeiture Under Liquor Laws, see INTOXICATING LIQUORS, 23 Cyc. 294, 296. Want of as Element of Cause of Action For — False Imprisonment, see FALSE IMPRISONMENT, 19 Cyc. 319; Malicious Prosecution, see MALICIOUS PROSECUTION, 26 Cyc. 8; Wrongful Attachment, see ATTACHMENT, 4 Cyc. 854. Want of as Element of Criminal Offense of Malicious Prosecution, see MALICIOUS PROSECUTION, 26 Cyc. 20. Want of — Averment in Pleading, see ATTACHMENT, 4 Cyc. 854; FALSE IMPRISONMENT, 19 Cyc. 359; LIBEL AND SLANDER, 25 Cyc. 444; MALICIOUS PROSECUTION, 26 Cyc. 74; Evidence, see ATTACHMENT, 4 Cyc. 871; FALSE IMPRISONMENT, 19 Cyc. 364; MALICIOUS PROSECUTION, 26 Cyc. 91; Inference of Malice, see ATTACHMENT, 4 Cyc. 871; MALICIOUS PROSECUTION, 26 Cyc. 51; Instructions to Jury, see FALSE IMPRISONMENT, 19 Cyc. 374; MALICIOUS PROSECUTION, 26 Cyc. 117; Question For Jury, see FALSE IMPRISONMENT, 19 Cyc. 374; MALICIOUS PROSECUTION, 26 Cyc. 105; Scope of Inquiry and Powers of Court in Determining Issues or Questions in Habeas Corpus Proceedings, see HABEAS CORPUS, 21 Cyc. 324.)

PROBABLE CONSEQUENCE. Of the use of given names, the consequence which is more likely to follow from their use than it is to fail to follow.[20] (See CRIMINAL LAW, 12 Cyc. 153; HOMICIDE, 21 Cyc. 712; NEGLIGENCE, 29 Cyc. 400; TORTS.)

PROBABLE EVIDENCE. Presumptive evidence is so called, from its foundation in probability.[21] (See EVIDENCE, 16 Cyc. 821; PRESUMPTION, 31 Cyc. 1169, and Cross-References Thereunder.)

PROBABLE EXPECTANCY. The right which every man has to earn his living, or to pursue his trade or business, without undue interference; the right which every man has, whether employer or employee, of absolute freedom to employ or

Distinguished from "possible." Scott *v.* Alleghany Valley R. Co., 172 Pa. St. 646, 652, 33 Atl. 712; South-Side Pass. R. Co. *v.* Trich, 117 Pa. St. 390, 399, 11 Atl. 627, 2 Am. St. Rep. 672.

18. Freymark *v.* McKinney Bread Co., 55 Mo. App. 435, 437.

Has reference to the common standard of human judgment and conduct. Griswold *v.* Griswold, 143 Cal. 617, 620, 77 Pac. 672.

Does not mean actual and positive cause. State *v.* Davie, 62 Wis. 305, 308, 22 N. W. 411.

"Good reason to believe" is not a probable cause within the meaning of a statute providing for the issuance of a warrant for arrest for trespass upon the showing of probable cause under oath. Meddaugh *v.* Williams, 48 Mich. 172, 174, 12 N. W. 34.

"Probable cause for the appeal" as the equivalent of "probable ground for reversal of the judgment" see *In re* Adams, 81 Cal. 163, 166, 22 Pac. 547, as such terms are used in a statute.

19. Hutchinson *v.* Weuzel, 155 Ind. 49, 54, 56 N. E. 845; Lacy *v.* Mitchell, 23 Ind. 67; Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. 179, 181.

20. Western Commercial Travelers' Assoc. *v.* Smith, 85 Fed. 401, 405, 29 C. C. A. 223, 40 L. R. A. 653.

21. Black L. Dict.

"Probable evidence is essentially distinguished from demonstrative by this, that it admits of degrees, and of all variety of them, from the highest moral certainty to the very lowest presumption." Butler Analogy [*quoted* in Com. *v.* Costley, 118 Mass. 1, 24].

be employed.[22] (See CONSTITUTIONAL LAW, 8 Cyc. 695; EXPECTANCY, 18 Cyc. 1501.)

PROBABLE VALUE. See MECHANICS' LIENS, 27 Cyc. 121 note 36.

PROBANDI NECESSITAS INCUMBIT ILLI QUI AGIT. A maxim meaning "The necessity of proving lies with him who sues." [23]

PROBATE. As applied to a will, a proceeding to establish its validity; [24] the proof before an officer authorized by law that an instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be.[25] (Probate: In General, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 55. Appeal and Proceedings For Review in Probate Proceedings, see APPEAL AND ERROR, 2 Cyc. 474 *et seq.*, 514, 547. Court, Jurisdiction and Powers in General, see COURTS, 11 Cyc. 791. Injunction Against, see INJUNCTIONS, 22 Cyc. 812. Judgment in, Conclusiveness, see JUDGMENTS, 23 Cyc. 1323. Mandamus Relating to, see MANDAMUS, 26 Cyc. 195. Of Instrument, see ACKNOWLEDGMENTS, 1 Cyc. 512; MORTGAGES, 27 Cyc. 1113. Of Will, see WILLS. Perjury in, see PERJURY, 30 Cyc. 1406. Records as Evidence, see EVIDENCE, 17 Cyc. 300, 501. Right to Jury Trial in, see JURIES, 24 Cyc. 104. See also PROBATE BOND; PROBATE CODE; PROBATE COURT; PROBATE DUTY; PROBATE FEE; PROBATE HOMESTEAD.)

PROBATE BOND. A bond which must, by law, be given to the judge of probate.[26] (See PROBATE, and Cross-References Thereunder.)

PROBATE CODE. The body or system of law relating to the estates of deceased persons and of persons under guardianship.[27] (See PROBATE, and Cross-References Thereunder.)

PROBATE COURT. A distinct tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills.[28] (Probate

22. Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 765, 53 Atl. 230.

23. Bouvier L. Dict. [*citing* Inst. 2, 20, 4].

Applied in Frechette *v.* Goulet, 8 Can. Sup. Ct. 169, 180.

24. McCay *v.* Clayton, 119 Pa. St. 133, 138, 12 Atl. 860.

25. Bouvier L. Dict. [*quoted* in Pettit *v.* Black, 13 Nebr. 142, 151, 12 N. W. 841].

"Is a civil proceeding as contradistinguished from criminal proceedings. *In re* Spiegelhalter, 1 Pennew. (Del.) 5, 7, 39 Atl. 465.

Not synonymous with "execution."— *In re* Lamb, 122 Mich. 239, 241, 80 N. W. 1081.

To probate involves only a determination that the will was duly signed and published, and that the testator was competent to make it. It simply establishes the validity of the will. *In re* Lamb, 122 Mich. 239, 241, 80 N. W. 1081.

The term when strictly used relates to the proof of a will before an officer or tribunal having jurisdiction to determine the question of its validity. In common usage, however, it is often used with reference to the proceedings incident to the administration and settlement of the estates of decedents, and it is sometimes used in this sense in the statutes. Reno *v.* McCully, 65 Iowa 629, 632, 22 N. W. 902.

While the term originally meant merely "relating to proof," and afterward "relating to the proof of wills," yet in the American law it is not a general name or term used to include all matters of which probate courts have jurisdiction. Johnson *v.* Harrison, 47 Minn. 575, 578, 50 N. W. 923, 28 Am. St. Rep. 382.

The phrases "probate of the will" and "grant of administration" as equivalent see Dawley *v.* New Shoreham Prob. Ct., 16 R. I. 694, 696, 19 Atl. 248, construing a statutory provision.

"Jurisdiction of all probate and testamentary matters" given by the constitution of Ohio to the court of common pleas may be completely exercised without possessing the power to order the sale of lands of an intestate. Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 524, 7 L. ed. 496.

26. Thomas *v.* White, 12 Mass. 367, 369.

Such as bonds given by executors or administrators, and some others, which are provided for by several statutes. The bond given to the judge of probate, by one to whom the whole of the real estate of his ancestor had been assigned, conditioned to pay to the other heirs their respective proportions of such estate, is extra-official, and not a probate bond such as must be given to the judge of probate. Thomas *v.* White, 12 Mass. 367, 369.

Under a statute providing that all bonds relating to probate matters shall be filed in the office of the clerk of the circuit court, the bonds meant are those of executors and administrators, and a guardian's bond is not embraced by the statute. Reno *v.* McCully, 65 Iowa 629, 632, 22 N. W. 902.

27. Johnson *v.* Harrison, 47 Minn. 575, 579, 50 N. W. 923, 28 Am. St. Rep. 382.

28. Robinson *v.* Fair, 128 U. S. 53, 86, 9 S. Ct. 30, 32 L. ed. 415.

Such tribunals are variously called prerogative courts, probate courts, surrogate courts, orphans' courts, etc. Robinson *v.* Fair, 128 U. S. 53, 86, 9 S. Ct. 30, 32 L. ed. 415.

Court: Creation of, see COURTS, 11 Cyc. 710. Jurisdiction—Nature of, see COURTS, 11 Cyc. 791; Necessity of Appearing of Record, see COURTS, 11 Cyc. 697; Presumption as to, see COURTS, 11 Cyc. 694; Scope and Extent of, see COURTS, 11 Cyc. 679. Perjury Proceedings in, see PERJURY, 30 Cyc. 1406. Records as Evidence, see EVIDENCE, 17 Cyc. 300. Records or Proceedings, Parol Evidence, see EVIDENCE, 17 Cyc. 572.)

PROBATE DUTY. In England, and other European countries, a tax graded in accordance with the valuation of the estate to be probated.[29] (See TAXATION.)

PROBATE FEE. A reward or compensation to a county judge or judge or register of probate, for services rendered or to be rendered.[30]

PROBATE HOMESTEAD. As defined by statute, a homestead set apart by the court for the use of the surviving husband or wife, and the minor children out of the common property, or if there be no common property, then out of the real estate belonging to the deceased.[31] (See HOMESTEADS, 21 Cyc. 562 *et seq.*)

"**Under our constitutional** system, that court itself is, for most purposes, at least, a prerogative, and not a judicial, court, and has no jurisdiction over persons or property, except in such proceedings as relate to the estates of deceased persons, or those under disability and liable to wardship." Grand Rapids, etc., R. Co. *v.* Chesebro, 74 Mich. 466, 472, 42 N. W. 66.

"**The origin of our Probate Courts** is traced to the Ecclesiastical Courts of England, the jurisdiction of which was practically limited to the probate of wills, the granting of administrations and the suing for legacies. 3 Black 95–98. In every other respect the control of estates, executors and administrators was exclusively in the Common Law and Chancery Courts. As Judge Woerner puts it in his invaluable treatise (The American Law of Administration): 'It should, therefore, be remembered that there is a very great difference between the totality of the powers exercised by the English courts in connection with the administration of estates of deceased persons, sometimes called testamentary or probate jurisdiction, and the testamentary or probate jurisdiction of Ecclesiastical Courts — a distinction which is of the utmost importance in ascertaining the conclusiveness of the judgments and decrees of the several classes of courts in collateral proceedings.' . . . In this country Probate Courts, since their first establishment in Massachusetts in 1784 (R. S. 1784, Chap. 46; Wales *v.* Willard, 2 Mass. 120), were patterned after the English models. But in the great majority of instances they have outgrown their limited and inferior jurisdiction as mere statutory courts deriving their sole authority from legislative enactment and have developed into courts of record with increased powers (proceeding according to the course of common law) and 'within the field of their jurisdiction they are as much a branch of the judiciary of the State as any court of general or plenary powers. . . . Their orders, judgments and decrees are, therefore, as conclusive upon the parties to the record, until reversed or annulled on appeal, writ of error or direct proceeding in chancery for fraud, as decrees in chancery or judgments at law.' Woerner, § 145 (2d ed.)." Plant *v.* Harrison, 36 Misc. (N. Y.) 649, 688, 74 N. Y. Suppl. 411.

In designating the character of probate courts under the constitution and laws of Minnesota, it is said, they are, in fact, courts of superior jurisdiction. The constitution and the laws commit to them general, original, and probably exclusive original jurisdiction over "the estates of deceased persons and persons under guardianship."—(article 6. § 7)—a jurisdiction second to none in practical importance. Though limited to certain specified subjects (and this is the case with all courts), their jurisdiction in respect to the same is general and not inferior. To be sure, they are to some extent under the control of the district and supreme courts, but only in the exercise of an appellate and remedial jurisdiction. As respects the subjects committed to them in the exercise of an original jurisdiction, they have all the power which any court has; consequently they are not inferior to any other court in the exercise of that jurisdiction, and, as they are not inferior courts, they are superior courts. Davis *v.* Hudson, 29 Minn. 27, 34, 11 N. W. 136.

Under a statute providing for the examination of a judgment debtor before the "probate judge" where the order issued by such judge for the examination of the debtor recites therein "probate court" instead of "probate judge" the order is not fatally defective. The words "probate court" are nearly synonymous with "probate judge." White Sewing Mach. Co. *v.* Wait, 24 Kan. 136, 139.

"**The probate court having jurisdiction,**" as used in a statute declaring that the executor, administrator, or guardian shall be licensed to make a sale of real estate by such court, means "'the probate court whose jurisdiction it is proper to invoke in the case in hand,'—in other words, the probate court in whose jurisdiction the guardianship is pending." Rumrill *v.* St. Albans First Nat. Bank, 28 Minn. 202, 204, 9 N. W. 731.

29. State *v.* Bazille, 97 Minn. 11, 18, 106 N. W. 93, 6 L. R. A. N. S. 732.

30. State *v.* Mann, 76 Wis. 469, 473, 45 N. W. 526, 46 N. W. 51.

31. Noah's Estate, 73 Cal. 590, 591, 15 Pac. 290, 2 Am. St. Rep. 834.

PROBATIONARY TERM. A term implying definite or stated length of duration, especially so when such term or period is to be provided in advance.[32]

PROBATIONES DEBENT ESSE EVIDENTES, ID EST, PERSPICUÆ ET FACILES INTELLIGI. A maxim meaning "Proofs ought to be evident, that is, clear and easily understood." [33]

PROBATIS EXTREMIS, PRÆSUMITUR MEDIA. A maxim meaning "The extremes being proved, the intermediate proceedings are presumed." [34]

PROBATIVE. In the law of evidence, having the effect of proof; tending to prove, or actually proving.[35] (See, generally, EVIDENCE, 16 Cyc. 821 *et seq.*)

PROBATOR. In old English law, strictly, an accomplice in felony who to save himself confessed the fact, and charged or accused any other as principal or accessary, against whom he was bound to make good his charge. It also signified an approver, or one who undertakes to prove a crime charged upon another.[36] (See CRIMINAL LAW, 12 Cyc. 445.)

PROCEDENDO. A writ commanding an inferior court to proceed to judgment.[37] (Procedendo: On Decision of Cause in Appellate Court — In Civil Action, see APPEAL AND ERROR, 3 Cyc. 478; In Criminal Prosecutions, see CRIMINAL LAW, 12 Cyc. 944. See also JUSTICES OF THE PEACE, 24 Cyc. 784.)

PROCEDURE. A general term including pleading, process, evidence, and practice — in fact, every step that may be taken from the beginning to the end of a case.[38] (See PRACTICE, 31 Cyc. 1153, and Cross-References Thereunder; PROCEEDING and Cross-References Thereunder.)

32. People *v.* Kearny, 164 N. Y. 64, 66, 58 N. E. 14.

Under the New York civil service laws giving power to the civil service commission to fix the probationary term of service for those employed under the classified service, the term does not mean "any time" within a fixed length of duration, unmeasured by the rules, and measurable by the pleasure or will of the appointing power. "Probation or probationary implies the purpose of the term or period, but not its length; the rules could fix its length, for so the statute provides, but could not make its length provisional in point of time, for that would be to unfix it or annex an unauthorized item." People *v.* Kearny, 164 N. Y. 64, 66, 58 N. E. 14.

33. Peloubet Leg. Max. [*citing* Coke Litt. 283*a*].

34. Bouvier L. Dict. [*citing* 1 Greenleaf Ev. § 20].

Applied in Greenfield *v.* Camden, 74 Me. 56, 66; St. Louis *v.* Lang, 131 Mo. 412, 421, 33 S. W. 54.

35. Black L. Dict.

"Probative fact" in the law of evidence is a fact which actually has the effect of proving a fact sought; an evidentiary fact. Black L. Dict. [*citing* 1 Bentham Ev. 18].

"Probative force" is a force serving for proof. Sturdevant's Appeal, 71 Conn. 392, 399, 42 Atl. 70.

36. Black L. Dict. [*citing* Jacob L. Dict.].

"The course in pursuing this old form was for the culprit, indicted for treason or felony, to confess the truth of the charge, and, upon being sworn, to reveal all the treasons and felonies within his knowledge, and to enter before a coroner his appeal against all his partners in crime who were within the realm." State *v.* Graham, 41 N. J. L. 15, 16, 32 Am. Rep. 174.

37. Yates *v.* People, 6 Johns. (N. Y.) 337, 463.

Distinguished from "prohibition." Yates *v.* People, 6 Johns. (N. Y.) 337, 463.

The function of the writ is to remit a cause to an inferior, from a superior court, to which it has been removed by writ, either granted on a suggestion, or of course. It directs the inferior court to proceed, either because the suggestion has not been sustained or because the party who procured the removal has not conformed to the rules prescribed by the superior court in such cases. It is intended to restore the *statu quo.* Yates *v.* People, 6 Johns. (N. Y.) 337, 446.

It gives no decision, but directs one. Yates *v.* People, 6 Johns. (N. Y.) 337, 463.

38. Kirksville *v.* Munyon, 114 Mo. App. 567, 570, 91 S. W. 57.

"The term . . . is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence, and Practice." Kansas City *v.* O'Connor, 36 Mo. App. 594, 598; Angevine *v.* Fleischmann, 55 N. Y. App. Div. 106, 109, 67 N. Y. Suppl. 182; Kring *v.* Missouri, 107 U. S. 221, 231, 2 S. Ct. 443, 27 L. ed. 506 [*quoting* Bishop Cr. Proc. § 2].

"Procedure . . . is mere machinery for carrying on the suit, whether in the Court appealed from or the Court appealed to, and for removing the cause from the Court appealed from to the Court appealed to but not affecting the respective jurisdictions of either Courts." Taylor *v.* Reg., 1 Can. Sup. Ct. 65, 92.

Used in the section of a city charter creating a court of record and providing that "the forms of process, pleading and proceedings and the manner of pleading and procedure prescribed by the Code of Civil Procedure for actions, proceedings, and remedies in courts

PROCEED. To commence and carry on a legal process;[39] to conduct, to begin and carry on an action or proceeding.[40] (See PROCEEDING, and Cross-References Thereunder.)

PROCEEDING.[41] In its general acceptation, an act which is done by the authority or direction of the court, express or implied;[42] an act necessary to be done in order to attain a given end; a prescribed mode of action for carrying into effect a legal right; performance of an act, wholly distinct from any consideration of an abstract right;[43] the form and manner of conducting judicial business before a court or judicial officer; regular and orderly progress in form of law; including all possible steps in an action, from its commencement to the execution of judgment;[44] the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and executing them;[45] especially a measure or step taken;[46] all the steps or measures, adopted in the prosecution or defense of an action.[47] In a more particular sense, any application, however made, to a court of justice for the purpose of having a matter in dispute judicially determined;[48] any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object.[49] (Proceeding: In Aid of Execution, see

of record, shall be used in said city court, as near as may be, except as otherwise provided by this act." The term is broad enough to cover the question of whether the giving of an undertaking on appeal from said court will in itself stay an execution of the judgment appealed from. Angevine *v.* Fleischmann, 55 N. Y. App. Div. 106, 108, 67 N. Y. Suppl. 182.

Used in the general rule, that in matters of procedure the *lex fori* controls, the term applies to the nature of the action; as, whether it shall be covenant, assumpsit, debt, etc., to the rules of pleading and evidence, the order and manner of trial, and the nature and effect of process, and perhaps to all other matters of remedy only, which are incorporated into the contract as affecting its nature and obligatory character. Cochran *v.* Ward, 5 Ind. App. 89, 29 N. E. 795, 797, 51 Am. St. Rep. 229.

39. Iliff *v.* Weymouth, 40 Ohio St. 101, 103.

40. Century Dict.; Webster Dict. [both *quoted* in People *v.* McCarthy, 168 N. Y. 549, 554, 61 N. E. 899].

A stipulation not to proceed against a party, as an agreement not to sue. Planters' Bank *v.* Houser, 57 Ga. 140.

Under New York city charter giving to the courts of special session exclusive jurisdiction of all misdemeanors committed out of the city of New York except charges of libel, but providing that such courts shall be divested of jurisdiction "to proceed" with the hearing and the determination of any charge of misdemeanor in either of certain cases, the words "to proceed" are used in a broader sense than continuing a proceeding already begun. People *v.* McCarthy, 168 N. Y. 549, 553, 61 N. E. 899.

41. **Special proceeding** see ACTIONS, 1 Cyc. 720.

42. Burns *v.* San Francisco Super. Ct. 140 Cal. 1, 6, 73 Pac. 597; Bulkeley *v.* Keteltas, 3 Sandf. (N. Y.) 740, 741; Anderson L. Dict. [*quoted* in Burns *v.* San Francisco Super. Ct., *supra*].

Such, for instance, as the issuing of an execution, or the delivery by the clerk of a transcript of the judgment to the plaintiff. But when a transcript is once given to the plaintiff, the right to file it results from the law, and the filing of it cannot be considered as a "proceeding in court," or as a thing done by the authority of the court. Bulkeley *v.* Keteltas, 3 Sandf. (N. Y.) 740, 741.

43. Fielden *v.* Lahens, 9 Bosw. (N. Y.) 436, 444; Rich *v.* Husson, 1 Duer (N. Y.) 617, 620, 11 N. Y. Leg. Obs. 119; Matter of Mace, 4 Redf. Surr. (N. Y.) 325, 327; *Ex p.* McGee, 33 Oreg. 165, 169, 54 Pac. 1091.

44. Black L. Dict. [*quoted* in *Ex p.* McGee, 33 Oreg. 165, 168, 54 Pac. 1091].

45. *Ex p.* McGee, 33 Oreg. 165, 168, 54 Pac. 1091; Erwin *v.* U. S., 37 Fed. 470, 488, 2 L. R. A. 229; Bouvier L. Dict. [*quoted* in Gordon *v.* State, 4 Kan. 489, 501].

46. Century Dict. [*quoted* in Neil *v.* Almond, 29 Ont. 63, 69].

47. Hopewell *v.* State, 22 Ind. App. 489, 54 N. E. 127, 129; Gordon *v.* State, 4 Kan. 489, 501; Uhe *v.* Chicago, etc., R. Co., 3 S. D. 563, 567, 54 N. W. 601; Webster Dict. [*quoted* in Morewood *v.* Hollister, 6 N. Y. 309, 320].

"It may mean more than the record history of the case. . . . It is, undoubtedly, sometimes used in this restrictive sense. In its ordinary acceptation, the word, when unqualified except by the subject to which it is applied, includes the whole of the subject. Thus the proceedings of a suit embraces all matters that occur in its progress judicially. Proceedings upon a trial, all that occurs in that part of the litigation." Morewood *v.* Hossliter, 6 N. Y. 309, 320; Uhe *v.* Chicago, etc., R. Co., 3 S. D. 563, 567, 54 N. W. 601.

48. State *v.* Gordon, 8 Wash. 488, 489, 36 Pac. 498.

49. Black L. Dict. [*quoted* in *Ex p.* McGee, 33 Oreg. 165, 168, 54 Pac. 1091].

Synonyms.— The terms "suit" and "action" and "proceeding at law" are substantially synonymous under a statute providing that "no person shall be disqualified as a witness in any civil suit or proceeding at law, or in equity, by reason of his interest in

EXECUTIONS, 17 Cyc. 1402. In Personam — Equity Jurisdiction of the Person, see EQUITY, 16 Cyc. 1; Maxims in Equity, see EQUITY, 16 Cyc. 134; Pendency of as Ground For Abatement, see ABATEMENT AND REVIVAL, 1 Cyc. 41; Remedies in Admiralty, see ADMIRALTY, 1 Cyc. 809. In Rem — Divorce Proceeding, see DIVORCE, 14 Cyc. 580; Equity Jurisdiction of Property or Other Subject-Matter,

the event of the same as party or otherwise" (Calderwood *v.* Calderwood, 38 Vt. 171, 173); but the term is held not to be a synonym of "civil action" under a statute providing that "a party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agents of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony" (Strom *v.* Montana Cent. R. Co., 81 Minn. 346, 348, 84 N. W. 46).

It is more comprehensive than "action" (*In re* McFarland, 10 Mont. 445, 454, 26 Pac. 185; Mars *v.* Oro Fin. Min. Co., 7 S. D. 605, 617, 65 N. W. 19); or "judgment," frequently including the latter (Uhe *v.* Chicago, etc., R. Co., 3 S. D. 563, 567, 54 N. W. 601); or "suit" or "implead" and must include an action to vacate letters patent (People *v.* Clarke, 9 N. Y. 349, 369). In its most comprehensive sense the term includes every step taken in a civil action except the pleadings. Strom *v.* Montana Cent. R. Co., 81 Minn. 346, 348, 84 N. W. 46. See also Hopewell *v.* State, 22 Ind. App. 489, 54 N. E. 127, 129; Wilson *v.* Macklin, 7 Nebr. 50, 52; O'Dea *v.* Washington County, 3 Nebr. 118, 121; Johnson *v.* Jones, 2 Nebr. 126, 137; Wilson *v.* Allen, 3 How. Pr. (N. Y.) 369, 371. But see Martin Cantine Co. *v.* Warshauer, 7 Misc. (N. Y.) 412, 413, 28 N. Y. Suppl. 139, holding that a pleading is a proceeding of the court.

The term is a technical one, and has acquired a peculiar and appropriate meaning in law. Hopewell *v.* State, 22 Ind. App. 489, 54 N. E. 127, 129; Gordon *v.* State, 4 Kan. 489, 501.

"Both in its popular use and in its technical application, [it] has a definite meaning which we cannot alter or enlarge. It means, in all cases, the performance of an act, and is wholly distinct from any consideration of an abstract right." Fargo *v.* Helmer, 43 Hun (N. Y.) 17, 19; Rich *v.* Husson, 1 Duer (N. Y.) 617, 620, 11 N. Y. Leg. Obs. 119; Matter of Mace, 4 Redf. Surr. (N. Y.) 325, 327; *Ex p.* McGee, 33 Oreg. 165, 168, 54 Pac. 1091.

As ordinarily used, it is generic in meaning, and broad enough to include all methods of invoking the action of courts, whether controversies properly termed "actions" or "special proceedings," as distinguished from them. State *v.* Lewis County, etc., Dist. Ct., 33 Mont. 138, 142, 82 Pac. 789.

An act, however tortious, of an executive officer of a court, done under the color of its process is to be regarded as a proceeding of that court within the statute inhibiting injunctions by federal courts to stay proceedings in state courts, except in certain cases. American Assoc. *v.* Hurst, 59 Fed. 1, 5, 7 C. C. A. 598.

Has reference to something done or to be done in a court of justice. Hopewell *v.* State, 22 Ind. App. 489, 54 N. E. 127, 129.

In the probate code of Montana the term is used as a general designation of the action and procedure whereby the law is administered upon the various subjects within the probate jurisdiction. *In re* McFarlane, 10 Mont. 444, 454, 26 Pac. 185.

Ordinary proceedings intend the regular and usual mode of carrying on a suit by due course at common law. Bouvier L. Dict. [*quoted* in Erwin *v.* U. S., 37 Fed. 470, 488, 2 L. R. A. 229].

The proceedings in a suit embrace all matters that occur in its progress judicially. Anderson L. Dict. [*quoted* in Uhe *v.* Chicago, etc., R. Co., 3 S. D. 563, 567, 54 N. W. 601].

The phrase "proceedings and practice" as used in a state constitution providing that all laws relating to courts shall be general and of uniform operation; and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments, and decrees of such courts, severally, shall be uniform, is construed to mean the form in which actions are brought and the manner of conducting and carrying on suits. People *v.* Raymond, 186 Ill. 407, 414, 57 N. E. 1066.

The phrase "proceedings thereupon" in the federal statute enacting that "writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, as are now used in the courts of such state," etc., is construed to include all the laws, which regulate the rights, duties, and conduct of officers, in the service of such process, according to the exigency, upon the person or property of the execution-debtor; and also, all the exemptions from arrest or imprisonment under such process, created by those laws. U. S. *v.* Knight, 14 Pet. (U. S.) 301, 314, 316, 10 L. ed. 465; Beers *v.* Haughton, 9 Pet. (U. S.) 362, 9 L. ed. 145. To the same effect see Amis *v.* Smith, 16 Pet. (U. S.) 303, 313, 10 L. ed. 973.

Under a statute authorizing the transfer of any civil suit or proceeding pending in any circuit court to another, when certain special causes exist, the term includes all matters

see EQUITY, 16 Cyc. 118; For Enforcement of Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 322; In Admiralty, see ADMIRALTY, 1 Cyc. 809; Judgment in, see JUDGMENTS, 23 Cyc. 1406; Maxims in Equity, see EQUITY, 16 Cyc. 134; Pendency of as Ground For Abatement, see ABATEMENT AND REVIVAL, 1 Cyc. 41. See also PRACTICE, 31 Cyc. 1153, and Cross-References Thereunder; PROCEDURE, and Cross-References Thereunder.)

connected with or attending the exercise of the power conferred upon circuit courts in chancery which are necessary to enable the court to exercise its superintending control and authority conferred by statute. Kittridge *v.* Kinne, 80 Mich. 200, 204, 44 N. W. 1051.

Under a statute providing that a person interested, who was not a party to the proceeding to probate a will, may, within five years after sentence or order, proceed by bill in equity to impeach or establish the will, on which bill a jury trial shall be ordered, the term "proceeding" refers to the entire proceeding, including the order admitting the will to probate or rejecting it. Dillard *v.* Dillard, 78 Va. 208, 210.

Used in the recital of the case-made, that it contains all the proceedings, the term includes the evidence. Deere Plow Co. *v.* Jones, (Kan. 1904) 75 Pac. 1039, 1040, 68 Kan. 650, 76 Pac. 750.

Used in a code providing that all proceedings prescribed for the circuit court shall be pursued in justices' courts, the term does not confer power; it relates to the manner of the exercise of power. The term does not relate to matters pertaining to the powers of the court, but to the form and manner of the exercise of the power. St. Joseph Mfg. Co. *v.* Harrington, 53 Iowa 380, 382, 5 N. W. 568.

Used in a statute prescribing the manner of petitioning for and holding elections by cities to determine the question of issuing bonds for the purchase of public utilities, and providing that "the passage of this act shall in no way affect any bonds heretofore issued, contract entered into for any public building, pavement, or sewer, tax or special assessment levied, action now pending, or proceeding of any kind commenced and not completed, by or on behalf of any city," the term does not mean a judicial proceeding. State *v.* Topeka, 68 Kan. 177, 186, 74 Pac. 647.

Used in a statute providing that whenever in a criminal action or proceeding any attorney shall defend the accused by order of the court on the ground that the accused is destitute, the county in which such criminal action or proceeding shall arise shall be liable to pay such attorney such sum as the court may certify to be reasonable, and which shall in no case exceed fifteen dollars per day for each day actually occupied in such trial or proceeding, the word "proceeding" indicates something in the nature of a criminal action, distinguishable therefrom. Green Lake Co. *v.* Waupaca Co., 113 Wis. 425, 435, 89 N. W. 549.

"**Proceedings in error** are in the nature of a new action, and are brought by the person against whom final judgment has been rendered, in the court below, whether plaintiff or defendant." Glasser *v.* Hackett, 37 Fla. 358, 362, 20 So. 532.

Examples.— *The following have been held to be proceedings* in a legal or judicial sense: "Advertisement for sale of lands" where a statute to prevent unnecessary and vexatious costs provided that where, pursuant to any condition or proviso contained in a mortgage, there has been a demand or notice given requiring payment, or declaring an intention to proceed under a power of sale therein contained, no other proceeding, and no action to enforce such a mortgage shall be taken within a certain time (Smith *v.* Brown, 20 Ont. 165, 166); an "answer" in a suit (Wilcox, etc., Guano Co. *v.* Phœnix Ins. Co., 60 Fed. 929, 933); ordering, drawing, summoning, and impaneling of a grand jury (*In re* Tillery, 43 Kan. 188, 193, 23 Pac. 162); filing an affidavit in an action of replevin (Wilson *v.* Macklin, 7 Nebr. 50, 52); application for a writ of "mandate" or writ of "ne exeat" (State *v.* Gordon, 8 Wash. 488, 490, 36 Pac. 498); the findings of fact in a case under a statute providing that "the court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party" (Thompson *v.* Connecticut Mut. L. Ins. Co., 139 Ind. 325, 354, 38 N. E. 796); a hearing before a county board under a statute giving an attorney a lien upon the amount recovered in an action or proceeding (Maloney *v.* Douglass County, 2 Nebr. (Unoff.) 396, 89 N. W. 248, 249); instructions given to the jury (Atchison, etc., R. Co. *v.* Brassfield, 51 Kan. 167, 174, 32 Pac. 814); levy and sale under an execution within the meaning of the federal statute providing that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy" (Mills *v.* Provident Life, etc., Co., 100 Fed. 344, 346, 40 C. C. A. 394); a peremptory writ of mandamus under a statute providing for a stay of proceedings on filing a recognizance on appeal (State *v.* Lewis, 76 Mo. 370, 378); the minutes of a case required to be made by a justice of the peace, under a statute requiring him to keep a book, styled a "docket" in which he shall enter all proceedings before him in any case (Hughston *v.* Cornish, 59 Miss. 372, 374); notice by counsel for plaintiff in a case that he should make a motion to have the judgment therein vacated where a statute provided that where the supreme court orders a new trial or further proceedings, the record shall be transmitted to the court below, "and proceedings shall be had thereon within one year from the time of entering in the supreme court such an order

PROCEEDS.[50] That which arises from a thing; [51] that which arises from anything,[52] sold, bartered or exchanged, or anything proceeding from or produced by another thing; [53] the amount proceeding or accruing from some possession or transaction, especially the sum derived from the sale of goods; [54] issue, rent, pro-

for a new trial or further proceedings," or in default thereof, such cause shall be considered and treated as discontinued and dismissed, unless the court, for good cause shown, shall order otherwise (Bonesteel *v.* Orvis, 31 Wis. 117, 119); petition for mechanic's lien under a statute allowing amendments of pleadings or proceedings (Sherry *v.* Schraage, 48 Wis. 93, 96, 4 N. W. 117; Witte *v.* Meyer, 11 Wis. 296); certified copies of pleadings under a statute requiring appellant to file with his petition in error a transcript of the proceedings in the lower court (Adams County School Dist. No. 49 *v.* Cooper, 44 Nebr. 714, 716, 62 N. W. 1084); a preliminary examination of one charged with crime, under a statute providing for the transfer by a justice of the peace, before whom an action or proceeding is pending, to another justice (State *v.* Bergaman, 37 Minn. 407, 408, 34 N. W. 737); the settlement of a statement of a case on appeal (Banta *v.* Siller, 121 Cal. 414, 416, 53 Pac. 935); a "stay bond" under a statute providing that whenever any proceeding is taken it fails to conform to the provisions of the code it may be amended (State *v.* Russell, 17 Nebr. 201, 204, 22 N. W. 455); steps taken by which the judgment of a court is vacated, and the case taken to, and the appearance of possession effected in another tribunal (O'Dea *v.* Washington County, 3 Nebr. 118, 121); swearing to a petition in pleading and attaching the jurat to the affidavit (Johnson *v.* Jones, 2 Nebr. 126, 137); taking the deposition of a witness before a notary public to be used in a pending case (Burns *v.* San Francisco Super. Ct., 140 Cal. 1, 9, 73 Pac. 597); a writ of assistance, under a statute providing that "no process shall be issued or other proceedings had on any final decree or order until the same shall have been signed and recorded" (Wilmott *v.* Equitable Bldg., etc., Assoc., 44 Fla. 815, 817, 33 So. 447); a statutory action for the trial of right to property, under a statute providing that the appellate court shall have jurisdiction of all matters of appeal or writs of error from the final judgments of the county courts "in any suit or proceeding at law, or in chancery, other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute" (Sellers *v.* Thomas, 185 Ill. 384, 386, 57 N. E. 10).

The following have been held not to be proceedings: Application for costs (Matter of Mace, 4 Redf. Surr. (N. Y.) 325, 327); arbitration upon voluntary submission (Caughell *v.* Brower, 17 Ont. Pr. 438, 439); bail-bond given to the sheriff for the appearance of the defendant at the return of a writ of replevin (Meloche *v.* Reaume, 34 U. C. Q. B. 606, 608); holding of an election for permanently locating a county site, under a statute providing that the repeal of a statute does not affect any proceeding (Gordon *v.* State, 4 Kan. 489, 501); motion for a new trial (Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 301, 23 L. ed. 898); receiving and examining into complaints against policemen by the mayor of a city under a statute giving him such power as "head of the police" (Payne *v.* San Francisco, 3 Cal. 122, 127); statutory proceedings to foreclose a mortgage (Dwight *v.* Phillips, 48 Barb. (N. Y.) 116, 119); taking and certifying an acknowledgment to a deed by a notary public (Helena First Nat. Bank *v.* Roberts, 9 Mont. 323, 340, 23 Pac. 718).

50. Distinguished from "invoice." Tradesmen's Nat. Bank *v.* National Surety Co., 169 N. Y. 563, 568, 62 N. E. 670.

51. Rees Dict. [*quoted* in Dow *v.* Whetten, 8 Wend. (N. Y.) 160, 170].

52. Crabb Syn. [*quoted* in Dow *v.* Whetten, 8 Wend. (N. Y.) 160, 170].

53. Dow *v.* Whetten, 8 Wend. (N. Y.) 160, 172.

"When a sale proper is effected, the money, or thing received in exchange for the specific article sold, constitutes the proceeds of the sale. Such a use of the term 'proceeds' is appropriate and familiar." Where a trust deed conveyed to the trustees a certain certificate of stock and other property real and personal, and directed them immediately after the death of the grantor "to transfer and deliver to" A the certificate of stock, "and convey for the best prices that can be obtained" the other property, real and personal, and, after retaining as compensation for their trouble five per cent. on the proceeds of all such sales, as well as all costs and charges, to distribute the net proceeds between certain persons named, it was held that the trustees were not entitled to commissions on the certificate of stock transferred and delivered by them to A. It was a mere donation, a gratuity, from which no proceeds were received by the trustees. Charleston College *v.* Willingham, 13 Rich. Eq. (S. C.) 195, 207.

When used in connection with sale, the term means a sum of money derived from the sale of property. Hunt *v.* Williams, 126 Ind. 493, 494, 26 N. E. 177; Wheeler, etc., Mfg. Co. *v.* Winnett, 3 Nebr. (Unoff.) 22, 91 N. W. 514, 515; Andrews *v.* Johns, 59 Ohio St. 65, 71, 51 N. E. 880; Finney's Appeal, 113 Pa. St. 11, 18, 4 Atl. 60.

"When we speak of the proceeds of a sale, we mean the sum that is paid for the things sold. When we speak of the proceeds of a note, we ordinarily mean the amount due or collected upon it." Wheeler, etc., Mfg. Co. *v.* Winnett, 3 Nebr. (Unoff.) 22, 91 N. W. 514, 515.

"Taking the words in their ordinary sense, a general power to dispose of land or real estate and to take in return therefor such proceeds as one thinks best, will include the power of disposing of them in exchange for other lands." Phelps *v.* Harris, 101 U. S. 370, 380, 25 L. ed. 855.

54. Century Dict. [*quoted* in Matter of

duce, as the proceeds of an estate; the amount or value of goods sold and converted into money;[55] money or other articles of value obtained from the sale of property;[56] the money which arises from the conversion of land or other property;[57] the produce or profits of anything;[58] the sum, amount, value of goods or things sold and converted into money;[59] the sum, amount; money arising from the sale; the purchase price; the bid;[60] the useful or material results of an action or course.[61] It is a word of loose and varying significance[62] and one of equivocal import and of great generality.[63] The word is sometimes construed as meaning "harvest" or "product,"[64] or "produce" or "income,"[65] and as employed in and in connection with the context and subject-matter of various contracts,[66]

Gates, 51 N. Y. App. Div. 350, 352, 64 N. Y. Suppl. 1050].

55. Webster Dict. [*quoted* in Dow *v.* Whetten, 8 Wend. (N. Y.) 160, 170].

56. Tradesmen's Nat. Bank *v.* National Surety Co., 169 N. Y. 563, 568, 62 N. E. 670; Webster Dict. [*quoted* in Birmingham *v.* Lesan, 77 Me. 494, 497, 1 Atl. 151].

It does not necessarily mean money; its meaning in each case depending very much upon the connection in which it was employed, and the subject-matter to which it is applied. Hunt *v.* Williams, 126 Ind. 493, 494, 26 N. E. 177; Thomson's Appeal, 89 Pa. St. 36, 46; Phelps *v.* Harris, 101 U. S. 370, 380, 25 L. ed. 855.

57. Charteris *v.* Charteris, 10 Ont. 738, 743.

58. Brennan *v.* Munro, 6 U. C. Q. B. O. S. 92, 93.

59. Hunt *v.* Williams, 126 Ind. 493, 494, 26 N. E. 177; Webster Dict. [*quoted* in Dow *v.* Whetten, 8 Wend. (N. Y.) 160, 161].

60. Merrimack River Sav. Bank *v.* Curry, 4 Kan. App. 125, 46 Pac. 204, 205.

61. Standard Dict. [*quoted* in Matter of Gates, 51 N. Y. App. Div. 350, 352, 64 N. Y. Suppl. 1050].

62. Kidwell *v.* Ketler, 146 Cal. 12, 21, 79 Pac. 514.

63. Hunt *v.* Williams, 126 Ind. 493, 494, 26 N. E. 177; Matter of Gates, 51 N. Y. App. Div. 350, 352, 64 N. Y. Suppl. 1050; Thomson's Appeal, 89 Pa. St. 36, 46; Phelps *v.* Harris, 101 U. S. 370, 380, 25 L. ed. 855.

"The word . . . is of such general signification that resort must usually be made to the context, and to the subject matter to which it relates, in order to ascertain its meaning;" and where a stock of goods was transferred to mortgagees at an inventory price, which was credited on the mortgage, and the mortgagees, on the transfer being set aside, were ordered to account "for the proceeds of the property transferred to them" the word included the price agreed to be paid for the goods, and did not refer only to the amounts realized from sales of the property by the mortgagee. Armour Packing Co. *v.* London, 53 S. C. 539, 543, 31 S. E. 500.

64. Matter of Gates, 51 N. Y. App. Div. 350, 352, 64 N. Y. Suppl. 1050.

65. Birmingham *v.* Lesan, 77 Me. 494, 497, 1 Atl. 151.

In the ordinary acceptation of the term, it conveys the same idea as produce. It is something proceeding from or produced by another. Dow *v.* Whetten, 8 Wend. (N. Y.) 160, 161.

Strictly speaking, it implies something that arises or leads out of, or from, another thing, and in its ordinary acceptation, when applied to the income to be derived from real estate, it embraces the idea of issues, rents and profits, or produce. Hunt *v.* Williams, 126 Ind. 493, 494, 26 N. E. 177.

66. See cases cited *infra*, this note.

As used in an agreement of an assignee and judgment creditors with the sheriff, that the proceeds of a sale of stock of goods were to be paid to the sheriff in satisfaction of an execution held by him, the term meant the amount of money produced, less the cost of sale. Dickson's Estate, 166 Pa. St. 134, 143, 30 Atl. 1032. See also Matter of Mitchell, 61 Hun (N. Y.) 372, 384, 16 N. Y. Suppl. 180.

As used in an agreement with a judgment creditor that certain acts of forbearance on his part "shall not prejudice the lien of his judgment, or his right to payment 'out of the future proceeds of the property,'" the term means the amount of money that would in the future be obtained for the property upon a disposition of it by sale. Belmont *v.* Ponvert, 35 N. Y. Super. Ct. 208, 212.

As used in a bond given by a mortgagor to a junior mortgagee who had brought suit to foreclose his mortgage, the condition of the bond being that the mortgagor would, within a fixed time after the sale of the premises under foreclosure, pay to such mortgagee the balance due upon the judgment to be rendered in favor of said mortgagee, after applying the proceeds arising from the sale of the mortgaged premises to the payment of the mortgage indebtedness, according to the priorities established by the court, the term means "the sum, amount, money arising from the sale; the purchase price; the bid." Merrimack River Sav. Bank *v.* Curry, 4 Kan. App. 125, 46 Pac. 204, 205.

In a contract for the sale of goods providing that all of said goods as also all proceeds therefrom are to be held in trust by the purchaser for the payment of his obligations to the buyer, the term is comprehensive enough to include notes taken by such purchaser for the goods sold by him. Mordecai *v.* Steignious, 53 S. C. 95, 105, 30 S. E. 717.

As used in a contract providing for the payment for certain repairs upon buildings, out of the proceeds of the business conducted at the said premises, the term is equivalent to "receipts" or "gross proceeds." Smith *v.* Hubert, 83 Hun (N. Y.) 503, 508, 31 N. Y. Suppl. 1076.

As used in a contract whereby plaintiff was to receive all the proceeds of logs delivered

statutes,[67] or wills [68] has been frequently before the courts for interpretation. The word has been considered by lexicographers as a mercantile term, and they accordingly distinguish it from the same word, when used in another sense, as to proceed on a journey, or in any other undertaking.[69] (Proceeds: Of Firm Property, as Partnership Assets, see PARTNERSHIP, 30 Cyc. 424. Of Insurance of Property and Right Thereto, see FIRE INSURANCE, 19 Cyc. 883. Of Judicial Sale, see JUDICIAL SALES, 24 Cyc. 73. Of Partition Sale, Disposition of, see PARTITION, 30 Cyc. 291. Of Sales — In Admiralty, see ADMIRALTY, 1 Cyc. 895; Of Homestead, see HOMESTEADS, 21 Cyc. 497; Of Property Subject to Landlord's Lien, see LANDLORD AND TENANT, 24 Cyc. 1280; Under Execution, see EXECUTIONS, 17 Cyc. 1351; Under Foreclosure, see MORTGAGES, 27 Cyc. 1496; CHATTEL MORTGAGES, 7 Cyc. 115; MECHANICS' LIENS, 27 Cyc. 451; Under Judgment in Creditor's Suits or Similar Proceedings, see CREDITORS' SUITS, 12 Cyc. 59; FRAUDULENT CONVEYANCES, 20 Cyc. 824.)

by one defendant to another, after deducting the advances made by the other, the term means net proceeds after all charges for delivery, including raftage and boomage, have been paid. Moss Point Lumber Co. *v.* Thompson, 83 Miss. 499, 504, 35 So. 828.

The phrase "proceeds of the wood and timber" in a contract that defendants might cut, carry away and dispose of all the wood and timber on a certain lot of land, provided they paid over to plaintiff the proceeds of the same as fast as sold and paid for, with plaintiff's approval, is broad enough to include the gross amount of the sales. McMurphy *v.* Garland, 47 N. H. 316, 319.

Where insurance was effected upon goods to a foreign port, and "upon the 'proceeds' thereof home: the goods valued at the sum insured out; the policy to be 'open' on the proceeds home," and the identical goods shipped to the foreign port were returned in the same vessel to the home port, and damaged upon their return voyage, it was held that they were not protected by the policy during the voyage homeward. "The grammatical sense of the term is the substituted cargo, or property, whatever it may be, which results from, or is acquired, by means of the specified goods. It imports a sale, barter, or other disposition of the outward cargo, or some operation therewith, by which, or by the future investment of the moneys or funds derived therefrom, other goods or insurable property are obtained, on which the policy is to attach for the return voyage. It does not necessarily follow, that the operation is to be effected by a sale or absolute disposition of the goods; the term, by a just and liberal construction, will fairly embrace any insurable interest, which the outward cargo, by any arrangement, enables the assured to procure for the return voyage." Dow *v.* Hope Ins. Co., 1 Hall (N. Y.) 185, 191. See also Haven *v.* Gray, 12 Mass. 71.

67. See cases cited *infra*, this note.

As used in a statute making it an offense punishable by fine to take part in any sport, game, play or public diversion on Sunday, except a sacred concert, music or an entertainment given by a religious or charitable society, the proceeds of which, if any, are to be devoted exclusively to a charitable or religious purpose, the term means, that which finally results or proceeds from the entertainment, taking into account not only that which is received, but that which is incidentally and properly paid out. Com. *v.* Alexander, 185 Mass. 551, 553, 70 N. E. 1017.

Under a statute providing that the proceeds of all lands that have been or may hereafter be granted to this state, where by the terms and conditions of such grant the same are not otherwise appropriated, are declared to be perpetual funds for common school purposes, the term implies a sale and conversion of the lands into money. McMurtry *v.* Engelhardt, 5 Nebr. (Unoff.) 271, 98 N. W. 40, 41.

68. See cases cited *infra*, this note.

As applied to the disposition of property the term must be construed to mean money or other property. Sprecht *v.* Parsons, 7 Utah 107, 108, 25 Pac. 730.

As used in a will directing executors to pay certain sums out of the proceeds of the estate, the term does not mean income. Allen *v.* Barnes, 5 Utah 100, 106, 12 Pac. 912. As used in a will bequeathing certain property to trustees, the income to be by them devoted to certain purposes and empowering them to sell the property and reinvest the proceeds, and directing that so much of the proceeds of the property should be paid to a certain person as she may deem necessary for the maintenance of herself and another, the term is used to denote income. Thomson's Appeal, 89 Pa. St. 36, 46. Where a testator devises his farm to his wife for life, said real estate to go to A at her death, if any remains, providing that said A maintains and provides for her decently from the proceeds of the farm or otherwise, the term meant money or other thing of value obtained from the sale of the property. Birmingham *v.* Lesan, 77 Me. 494, 497, 1 Atl. 151. As used in a will directing the transfer of the property of the testator to certain persons on their attaining the age of twenty-one years, and in the meantime "the interest, dividends, and proceeds of such estate and effects" as shall be necessary for the purpose to be applied toward the maintenance of J., the word includes real and personal property. Stokes *v.* Salomons, 9 Hare 75, 80, 15 Jur. 483, 20 L. J. Ch. 343, 41 Eng. Ch. 75, 68 Eng. Reprint 421, 4 Eng. L. & Eq. 133.

69. Dow *v.* Whetten, 8 Wend. (N. Y.) 160, 170.

PROCESS

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CROSS-REFERENCES

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For Condemnation, see Eminent Domain, 15 Cyc. 841.
For Damages From Collision, see Collision, 7 Cyc. 374.
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For Penalty For Insertion of False Notice of Copyright, see Copyright, 9 Cyc. 926.
For Penalty For Violation of Liquor Law, see Intoxicating Liquors, 23 Cyc. 170.
For Possession by Execution Purchaser, see Executions, 17 Cyc. 1317.
For Recovery of Dower, see Dower, 14 Cyc. 978.
For Removal of Guardian and Appointment of Successor, see Guardian and Ward, 21 Cyc. 56.
For Sale by Guardian, see Guardian and Ward, 21 Cyc. 83.
For Sale of Decedent's Estate, see Executors and Administrators, 18 Cyc. 724.
For Separate Maintenance, see Husband and Wife, 21 Cyc. 1604.
For Slander, see Libel and Slander, 25 Cyc. 433.
For Specific Performance, see Specific Performance.
For Trespass, see Trespass.
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In Equity, see Equity, 16 Cyc. 209.
In Involuntary Bankruptcy, see Bankruptcy, 5 Cyc. 309.
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On Bail-Bond, see Bail, 5 Cyc. 139.
On Inquisition of Insanity, see Insane Persons, 22 Cyc. 1124.
On Insurance Policy, see Accident Insurance, 1 Cyc. 284; Fire Insurance, 19 Cyc. 916; Life Insurance, 25 Cyc. 915; Marine Insurance, 26 Cyc. 714; Mutual Benefit Insurance, 29 Cyc. 220.
Relating to:
Boundaries, see Boundaries, 5 Cyc. 946.
Community Property, see Husband and Wife, 21 Cyc. 1689.
Highway, see Streets and Highways.
Support of Pauper, see Paupers, 30 Cyc. 1125.
To Appoint Guardian Ad Litem For Infant, see Infants, 22 Cyc. 653.
To Assert Claim to Property Taken Under Execution, see Executions, 17 Cyc. 1201.
To Commit Insane Person, see Insane Persons, 22 Cyc. 1159.
To Compel:
Accounting by Executor or Administrator, see Executors and Administrators, 18 Cyc. 1127.
Satisfaction of Judgment or Vacation Thereof, see Judgments, 23 Cyc. 1499.
To Contest Election, see Elections, 15 Cyc. 398.
To Enforce:
Agricultural Lien, see Agriculture, 2 Cyc. 69.
Forfeiture Under Revenue Law, see Internal Revenue, 22 Cyc. 1683.
Log or Lumber Lien, see Logging, 25 Cyc. 1593.
Maritime Lien, see Maritime Liens, 26 Cyc. 813.
Mechanic's Lien, see Mechanics' Liens, 27 Cyc. 362.
Militia Penalties and Fines, see Militia, 27 Cyc. 499 note 66.
To Enjoin Judgment, see Judgments, 23 Cyc. 1036.
To Escheat Property, see Escheat, 16 Cyc. 554.
To Foreclose Mortgage, see Mortgages, 27 Cyc. 1584.
To Obtain Possession of Demised Premises, see Landlord and Tenant, 24 Cyc. 1402.
To Open or Vacate:
Executor's or Administrator's Settlement, see Executors and Administrators, 18 Cyc. 1202 note 13.
Judgment, see Judgments, 23 Cyc. 952.
To Quiet Title, see Quieting Title.
To Sell Infant's Property, see Infants, 22 Cyc. 570.
Upon Scire Facias Against Bail, see Bail, 5 Cyc. 55.
Upon Writ of Audita Querela, see Audita Querela, 4 Cyc. 1068.
Particular Form or Class of Action, see Assault and Battery, 3 Cyc. 1080; Attachment, 4 Cyc. 540; Creditors' Suits, 12 Cyc. 34; Debt, Action of, 13 Cyc. 413; Detinue, 14 Cyc. 264; Divorce, 14 Cyc. 655; Ejectment, 15 Cyc. 88; Eminent Domain, 15 Cyc. 841; Forcible Entry and Detainer, 19 Cyc. 1149; Garnishment, 20 Cyc. 1044; Injunctions, 22 Cyc. 917; Interpleader, 23 Cyc. 36; Libel and Slander, 25 Cyc. 433; Mechanics' Liens, 27 Cyc. 362; Mortgages, 27 Cyc. 1562; Partition, 30 Cyc. 221; Quieting Title; Real Actions; Specific Performance; Trespass.

For Matters Relating to — (*continued*)

Particular Writ or Process, see ARREST, 3 Cyc. 955; ATTACHMENT, 4 Cyc. 540; CERTIORARI, 6 Cyc. 795; DISCOVERY, 14 Cyc. 350; ENTRY, WRIT OF, 15 Cyc. 1075; EXECUTIONS, 17 Cyc. 1001; GARNISHMENT, 20 Cyc. 1044; HABEAS CORPUS, 21 Cyc. 314; INJUNCTIONS, 22 Cyc. 957; MANDAMUS, 26 Cyc. 470; NE EXEAT, 29 Cyc. 394; POSSESSORY WARRANT, 31 Cyc. 954; PROHIBITION; QUO WARRANTO; REPLEVIN; SCIRE FACIAS; SEARCHES AND SEIZURES; SEQUESTRATION.

Pendency of Action, see ABATEMENT AND REVIVAL, 1 Cyc. 23.

Power of Legislature With Regard to Process, see CONSTITUTIONAL LAW, 8 Cyc. 821.

Prayer For Process in Proceeding For Injunction, see INJUNCTIONS, 22 Cyc. 930.

Proceeding Against Which Homestead Exemption May Be Allowed, see HOMESTEADS, 21 Cyc. 622.

Process as Essential to Confession of Judgment, see JUDGMENTS, 23 Cyc. 712.

Question as to Process on Review, see APPEAL AND ERROR, 3 Cyc. 157.

Resistance to or Obstruction of Process, see OBSTRUCTING JUSTICE, 29 Cyc. 1327.

Restoration of Lost Process as Part of Lost Record, see RECORDS.

Right of Person Not Served With Process to Appeal, see APPEAL AND ERROR, 2 Cyc. 633.

Sufficiency of Process to Sustain Judgment, see JUDGMENTS, 23 Cyc. 684.

Summons in Proceeding For Trial De Novo on Appeal From Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 723.

Summons or Citation to Show Cause Against Issuance of Execution Against the Person, see EXECUTIONS, 17 Cyc. 1505.

Time For Filing or Service of Pleading, see PLEADING, 31 Cyc. 597.

Tolling Statute of Limitations by Evasion or Obstruction of Process, see LIMITATIONS OF ACTIONS, 25 Cyc. 1223.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

A. Definition. Process, in the sense in which it is employed in the present title, means the writ, notice, or other formal writing, issued by authority of law, for the purpose of bringing defendant into a court of law to answer plaintiff's demands in a civil action,[1] although in a more technical and limited sense the

1. *Georgia.*— Savage *v.* Oliver, 110 Ga. 636, 639. See also Neal-Millard Co. *v.* Owens, 115 Ga. 959, 961, 42 S. E. 266.

Iowa.— Gollobitsch *v.* Rainbow, 84 Iowa 567, 570, 51 N. W. 48.

Michigan.— Tweed *v.* Metcalf, 4 Mich. 578, 588.

Minnesota.— Hinkly *v.* St. Anthony Falls Water Power Co., 9 Minn. 55.

Missouri.— Wilson *v.* St. Louis, etc., R. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624; Horton *v.* Kansas City, etc., R. Co., 26 Mo. App. 349, 355.

New York.— Utica City Bank *v.* Buell, 9 Abb. Pr. 385, 390, 17 How. Pr. 498.

Pennsylvania.— Philadelphia *v.* Campbell, 11 Phila. 163, 164.

Wisconsin.— Carey *v.* German American Ins. Co., 84 Wis. 80, 84, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267.

United States.— U. S. *v.* Murphy, 82 Fed. 893, 899.

Other definitions are: The means used to acquire jurisdiction of defendants in an action, whether by writ or notice, may properly be designated a process. Wilson *v.* St. Louis, etc., R. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624. See also Neal-Millard Co. *v.* Owens, 115 Ga. 959, 42 S. E. 266.

A writ, warrant, subpœna, or other formal writing issued by authority of law. Savage *v.* Oliver, 110 Ga. 636, 36 S. E. 54.

In its application to the commencement of the proceedings the word "process" is used to designate the writ or other judicial means by which a defendant is brought into court to answer a charge, although there may be afterward issued in the progress of the case interlocutory and final processes. Philadelphia *v.* Campbell, 11 Phila. (Pa.) 163.

Synonymous with writ.—Process is synonymous with writ — all writs being called process. Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267. The common-law definition of process is a writ issued by some

term is frequently applied only to those writs or writings which issue out of a

court or officer exercising judicial power. Tweed *v.* Metcalf, 4 Mich. 578. The word "process," as used in a constitutional provision relating to the style of all processes, means all such writs, whether original, mesne, or final, by which the authority of the state is exerted in obtaining jurisdiction over the person or property of the citizen, and which requires the exercise of a sovereign power for their enforcement. Hinkly *v.* St. Anthony Falls Water Power Co., 9 Minn. 55.

Statutory definitions.— The word "process" shall include any writ, declaration, summons, or order whereby any action, writ, or proceeding shall be commenced, or which shall be issued in or upon any action, suit, or proceeding authorized by law in this state. Minn. Gen. St. (1894) §§ 2865, 3190; Oreg. Annot. Codes & St. (1901) § 5169; Ballinger Annot Codes & St. Wash. (1897) § 4405.

The word "process" signifies a writ or summons issued in the course of judicial proceedings. Ariz. Pen. Code (1901), par. 7, subd. 15; Sandel & H. Dig. Ark. (1893) § 7220; Cal. Code Civ. Proc. (1903) § 17, subd. 6; Cal. Pen. Code (1903), § 7, subd. 15; Cal. Pol. Code (1903), § 17, subd. 6; Ky. Civ. Code, § 732, subd. 26; Mont. Pol. Code (1895), § 16, subd. 6; Mont. Code Civ. Proc. (1895) § 3463, subd. 5; Mont. Pen. Code (1895), § 7, subd. 15; N. D. Rev. Codes (1899), § 5152; S. D. Code Civ. Proc. (1903) § 8; Utah Rev. St. (1898) § 2498; Epperson *v.* Graves, 3 Ky. L. Rep. 527, 528.

"Process," as used in the article relating to the sheriff, includes all writs, warrants, summons, and orders of courts of justices or judicial officers. Cal. Pol. Code (1903), § 4175; Ida. Pol. Code (1901), § 1644; Mont. Pol. Code (1895), § 4380; Utah Rev. St. (1898) § 5574.

Process of law, as defined by Lord Coke, is twofold, viz., by the king's writ or by due proceeding and warrant, either in deed or in law, without writ. 2 Coke Inst. 51, 52 [*quoted* in People *v.* Nevins, 1 Hill (N. Y.) 154; State *v.* Shaw, 73 Vt. 149, 50 Atl. 863]. See, generally, CONSTITUTIONAL LAW, 8 Cyc. 1089 *et seq.*

Classification as mesne and final.—Although literally perhaps process can only be strictly characterized as the initial steps in a case, it is come to be indicated by the two terms "mesne" and "final" which are used to designate the two stages in the progress of a cause in which it is employed. Utica City Bank *v.* Buel, 9 Abb. Pr. (N. Y.) 385, 17 How. Pr. 498.

Civil process.— The term "civil process" as employed in a statute providing that no civil process shall issue against a person in the military service of the state or of the United States includes a writ of scire facias upon a mortgage, unless expressly prohibited by the act of the contracting parties. Coxe *v.* Martin, 44 Pa. St. 322.

Compulsory process.— The term "compulsory process" as used with reference to the securing of attendance of witnesses includes not only the ordinary subpœna but a warrant of arrest or attachment for such witnesses as fail to obey or avoid service of the first subpœna or recognizance. Powers *v.* Com., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494, 24 Ky. L. Rep. 1007. "Compulsory process for obtaining witnesses" means the right to invoke the aid of the law to compel the personal attendance of witnesses at the trial when they are within the jurisdiction of the court. Graham *v.* State, 50 Ark. 161, 6 S. W. 721. See, generally, WITNESSES.

Criminal process see, generally, CRIMINAL LAW, 12 Cyc. 297 *et seq.*

Final process is usually used as equivalent to a process of execution (see, generally, EXECUTIONS, 17 Cyc. 921), as distinguished from mesne process which must issue before final judgment (see Arnold *v.* Chapman, 13 R. I. 586). For example, where a statute provides that if there shall be no master in chancery or commissioner to execute a decree, the same may be carried into effect by execution or other final process, such process must be understood to be such as is the practice of the court of chancery to issue, which are, besides executions, writs of attachment and sequestration and writs of assistance. Armsby *v.* People, 20 Ill. 155. "Final process" as used in particular statutes has been held to comprise writs of execution. Amis *v.* Smith, 16 Pet. (U. S.) 303, 313, 10 L. ed. 973. And as a part of the proceedings upon final process a forthcoming bond executed after levy of an execution is included. Amis *v.* Smith, *supra.* A motion by a judgment debtor to allow a judgment against the judgment creditor to be created against the other judgment has been held a final process. Curlee *v.* Thomas, 74 N. C. 51 [*cited* in Atkinson *v.* Pittman, 47 Ark. 464, 2 S. W. 114].

Irregular process.— Irregular process has been defined to mean process absolutely void and not merely erroneous and voidable; but usually the term has been applied to all processes not issued in strict conformity with the law, whether the defects appear upon the face of the process or by reference to extrinsic facts, and whether such defects render the process absolutely void or only voidable. Doe *v.* Harter, 2 Ind. 252, 253. Irregular process is such as a court has general jurisdiction to issue, but which is authorized in the particular case by reason of the existence or non-existence of facts or circumstances rendering it improper in such a case. Bryan *v.* Congdon, 86 Fed. 221, 223, 29 C. C. A. 670. There is a great difference between erroneous process and irregular (that is void) process. The first stands valid and good until it be reversed; the latter is an absolute nullity from the beginning. Paine *v.* Ely, N. Chipm. (Vt.) 14, 24.

Mesne process.— In its strict significance mesne process is used to embrace all writs and orders of the court necessary for the carrying on of the suit after its institution,

court.[2] It is so denominated because it proceeds or issues forth in order to compel the appearance of defendant.[3] In a more enlarged signification process includes all the proceedings of any court.[4] As employed in statutes the legal

from and after the summons which is the original process up to, but not including those writs which are necessary to secure the benefits of the suit to the successful party and which are final process. Birmingham Dry-Goods Co. *v.* Bledsoe, 113 Ala. 418, 21 So. 403. However, in some jurisdictions and under particular statutes the term "mesne process" is used to describe any and all writs except final process, or to embrace all writs preceding execution. Birmingham Dry-Goods Co. *v.* Bledsoe, *supra*; Place *v.* Washburn, 163 Mass. 530, 40 N. E. 853; State *v.* Ferguson, 31 N. J. L. 289; Arnold *v.* Chapman, 13 R. I. 586. Where used in contradistinction to final process or process to execution mesne process signifies all such process as intervenes between the commencement and end of the suit. Pennington *v.* Lowenstein, 19 Fed. Cas. No. 10,938. In the use of the phrase "mesne process" in contradiction of "final process," it has been held to include the process by which defendant is brought into court (Hirshiser *v.* Tinsley, 9 Mo. App. 339), a subpœna for a witness (Birmingham Dry-Goods Co. *v.* Bledsoe, 113 Ala. 418, 21 So. 403), a counter affidavit interposed to an execution issued upon foreclosure of a laborer's lien (Cosgrave *v.* Mitchell, 74 Ga. 824), and a writ of attachment (Place *v.* Washburn, 163 Mass. 530, 40 N. E. 853; Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133). In speaking of arrest upon mesne process the court said: "The object of mesne process is essentially different from that of final process or execution; one is to compel the appearance of the party in court; the other to satisfy the demand of the plaintiff. In one the command is to take the body 'and him safely keep so that you have him to appear' on the return day of the writ; in the other it is to take the body of the debtor, and him commit to the keeper of the jail, etc., and the keeper is commanded to him safely keep until he pays, etc." Aldrich *v.* Weeks, 62 Vt. 89, 90, 19 Atl. 115.

Original process.— Original process is the process which originates a cause (Oglesby *v.* Attrill, 12 Fed. 227), as distinguished from that which prolongs an action already begun (Oglesby *v.* Attrill, *supra*), or which is appellate in its nature (Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 586, 10 L. ed. 579, 618). It has been held, under particular statutes, to apply to the petition and citation taken together (Hotchkiss' Appeal, 32 Conn. 353, 355), but not to apply to a writ of habeas corpus (Holmes *v.* Jennison, *supra*), nor to process served by way of notice to plaintiff of a bill for new trial (Oglesby *v.* Attrill, *supra*), or to a subpœna or notice issued on the filing of a bill in equity to enjoin an action at law (Cortes Co. *v.* Thannhauser, 9 Fed. 226, 228, 20 Blatchf. 59).

Original writ.— By original writ is usually meant the first process or initiatory step in prosecuting a suit. Walsh *v.* Haswell, 11 Vt. 85. At common law it is to be distinguished from a judicial writ. Walsh *v.* Haswell, *supra*; Converse *v.* Damariscotta Bank, 15 Me. 431; Pullman Palace-Car Co. *v.* Washburn, 66 Fed. 790. The English practice was that the original writ issued from chancery and was witnessed in the name of the sovereign, but judicial writs issued from the court where the proceedings were of record, such a process being from the court and grounded on proceedings before them. Walsh *v.* Haswell, *supra*; Pullman Palace-Car Co. *v.* Washburn, *supra*. Under the practice of the United States there is no such thing as an original writ as it was known to the English common-law practice. Pressey *v.* Snow, 81 Me. 288, 17 Atl. 71. See also Clark *v.* Paine, 11 Pick. (Mass.) 66, wherein it is said that a writ of scire facias, according to the English practice, would not be considered as an original writ, but that such a designation had in England a technical meaning which it would not be safe to adopt in giving construction to a Massachusetts statute. In the United States the term "original writ" has been held to include a writ of summons and attachment. Pressey *v.* Snow, *supra*.

Returnable process.— The term "returnable process" is used to designate process upon which the officer receiving it is bound to certify his doings. Utica City Bank *v.* Buel, 9 Abb. Pr. (N. Y.) 385, 17 How. Pr. 498.

Summary process.— "Summary," as applied to process, means immediate, instantaneous, in contradistinction from the ordinary course by emanating and taking effect without intermediate applications or delays. Gaines *v.* Travis, 8 N. Y. Leg. Obs. 45.

Trustee process see GARNISHMENT, 20 Cyc. 978.

Void process.— Void process is defined to be such as was issued without power in the court to award it, or which a court has not acquired jurisdiction to issue in the particular case, or which fails in some material respect to comply with the requisite form of legal process. Bryan *v.* Congdon, 86 Fed. 221, 29 C. C. A. 670.

2. *Colorado.*— Comet Consol. Min. Co. *v.* Frost, 15 Colo. 310, 25 Pac. 506.

Florida.— Gilmer *v.* Bird, 15 Fla. 410.

Iowa.— Nichols *v.* Burlington, etc., Plank-road Co., 4 Greene 42.

Minnesota.— Hanna *v.* Russell, 12 Minn. 80.

Oregon.— Bailey *v.* Williams, 6 Oreg. 71.

Wisconsin.— Porter *v.* Vandercook, 11 Wis. 70.

3. Davenport *v.* Bird, 34 Iowa 524; Fitzpatrick *v.* New Orleans, 27 La. Ann. 457; State *v.* McCann, 67 Me. 372.

4. *Connecticut.*— Palmer *v.* Allen, 5 Day 193.

meaning of the word "process" varies according to the context, subject-matter, and spirit of the statute in which it occurs.[5]

Florida.— Gilmer *v.* Bird, 15 Fla. 410, 421, where it is said: "Says Baron Comyn, 'Process, in a large acceptance, comprehends the whole proceeding after the original and before judgment; but generally, it imports the writs which issue out of any court to bring the party to answer, or for doing execution and all process out of the King's Courts, ought to be in the name of the King.'"

Iowa.— See Gollobitsch *v.* Rainbow, 84 Iowa 567, 570, 51 N. W. 48, where it is said: "It is true that the word 'process,' as generally used, is understood to mean a writ, warrant, subpœna or other formal writing issued by authority of law, but it also refers to the means of accomplishing an end, including judicial proceedings."

Minnesota.— Wolf *v.* McKinley, 65 Minn. 156, 68 N. W. 2; Hanna *v.* Russell, 12 Minn. 80.

New Mexico.— Tipton *v.* Cordova, 1 N. M. 383.

New York.— Perry *v.* Lorillard F. Ins. Co., 6 Lans. 201 [*affirmed* in 61 N. Y. 214, 19 Am. Rep. 272]; Taylor *v.* Porter, 4 Hill 140, 40 Am. Dec. 274.

Vermont.— Rich *v.* Trimble, 2 Tyler 349.

United States.— U. S. *v.* Murphy, 82 Fed. 893; Marvin *v.* U. S., 44 Fed. 405; McBratney *v.* Usher, 15 Fed. Cas. No. 8,661, 1 Dill. 367.

Modes of process as employed in statutes may be considered as equivalent to modes or manner of proceeding. Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 27, 6 L. ed. 253; U. S. *v.* Martin, 17 Fed. 150, 9 Sawy. 90.

5. U. S. *v.* Murphy, 82 Fed. 893.

It has been held to include: A summons. Sherman *v.* Gundlach, 37 Minn. 118, 33 N. W. 549; McLaughlin *v.* Wheeler, 2 S. D. 379, 50 N. W. 834. *Contra*, Comet Consol Min. Co. *v.* Frost, 15 Colo. 310, 25 Pac. 506; Johnson *v.* Hamburger, 13 Wis. 175; Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305. See also Gilmer *v.* Bird, 15 Fla. 410; Hanna *v.* Russell, 12 Minn. 80; Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Bailey *v.* Williams, 6 Oreg. 71; Porter *v.* Vandercook, 11 Wis. 70. A summons from a justice's court. Hyfield *v.* Sims, 90 Ga. 808, 16 S. E. 990. A summons in garnishment. Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581; Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646; German American Ins. Co. *v.* Chippewa Cir. Judge, 105 Mich. 566, 63 N. W. 531; Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55; Franklyn *v.* Taylor Hydraulic Air Compressing Co., 68 N. J. L. 113, 52 Atl. 714; Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252. But see Wile *v.* Cohn, 63 Fed. 759. An original notice from a city court. Tully *v.* Beaubien, 10 Iowa 187. A writ of attachment. Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267. A scire facias. Epperson *v.* Graves, 3 Ky. L. Rep. 527. A scire facias ad audiendum errores. Weiskoph *v.* Dibble, 18 Fla. 22. A scire facias upon a mortgage. Drexel *v.* Miller, 49 Pa. St. 246. A notice of motion. Field *v.* Park, 20 Johns. (N. Y.) 140. A guardian's notice of application to sell his ward's land. Nichols *v.* Mitchell, 70 Ill. 258. A rule *nisi* in an action to foreclose a mortgage. Falvey *v.* Jones, 80 Ga. 130, 4 S. E. 264. An order of sale in foreclosure. National Black River Bank *v.* Wall, 3 Nebr. (Unoff.) 316, 91 N. W. 525. An execution. Savage *v.* Oliver, 110 Ga. 636, 36 S. E. 54; Johnson *v.* Elkins, 90 Ky. 163, 13 S. W. 448, 11 Ky. L. Rep. 967, 8 L. R. A. 552; Gowdy *v.* Sanders, 88 Ky. 346, 11 S. W. 82, 10 Ky. L. Rep. 912; Lewis *v.* Morton, 159 Mass. 432, 34 N. E. 544; National F. Ins. Co. *v.* Chambers, 53 N. J. Eq. 468, 32 Atl. 663; Harman *v.* Childress, 3 Yerg. (Tenn.) 327; U. S. *v.* Noah, 27 Fed. Cas. No. 15,894, 1 Paine 368. An attachment execution. Kennedy *v.* Agricultural Ins. Co., 165 Pa. St. 179, 30 Atl. 724. A fee bill. Reddick *v.* Cloud, 7 Ill. 670. A writ of assistance on a fieri facias for costs. Clark *v.* Martin, 3 Grant (Pa.) 393. Any writ issued by the commissioner for service, including the warrant, the subpœna and the mittimus writs, temporary and final, and the recognizance or bonds of defendant and witnesses in the case. Taylor *v.* U. S., 45 Fed. 531. A recognizance taken by United States commissioners for appearance and an answer in a criminal case. U. S. *v.* Murphy, 82 Fed. 893. A list of grand jurors and alternates, and petit jurors and alternates selected by the county commissioners and furnished the sheriff. Williams *v.* Hempstead County, 39 Ark. 176. A rule or order to commit in contempt proceedings. People *v.* Nevins, 1 Hill (N. Y.) 154. A warrant for arrest. Gorr *v.* Port Jervis, 57 N. Y. App. Div. 122, 68 N. Y. Suppl. 15; Philadelphia *v.* Campbell, 11 Phila. (Pa.) 163. See also Davenport *v.* Bird, 34 Iowa 524. A declaration in actions commenced without writ, but by filing and service of a declaration, is in the nature of process. Menominee *v.* Menominee County Cir. Judge, 81 Mich. 577, 46 N. W. 23; Ellis *v.* Fletcher, 40 Mich. 321; Begole *v.* Stimson, 39 Mich. 288; Thayer *v.* Lewis, 4 Den. (N. Y.) 269; Roth *v.* Way, 2 Hill (N. Y.) 385. But strictly speaking and for all purposes it is not process. Thayer *v.* Lewis, *supra*; Corlies *v.* Holmes, 20 Wend. (N. Y.) 681.

It has been held not to include: A petition. Sowell *v.* Sowell, 40 Ala. 243; Neal-Millard Co. *v.* Owens, 115 Ga. 959, 42 S. E. 266. An original notice. Nichols *v.* Burlington, etc., Plank Road Co., 4 Greene (Iowa) 42. A notice between private parties which simply goes to create a right of action. Healey *v.* Geo. F. Blake Mfg. Co., 180 Mass. 270, 62 N. E. 270. A notice given under a statutory provision authorizing a judgment on a contract to be obtained on motion after fifteen days' notice to defendant. Leas *v.*

B. Necessity For — 1. To Commence Action. Except in case of service by publication, an action can be commenced in most jurisdictions only by the issuance of a summons or other writ of process; in no other way can the court obtain jurisdiction of the case.[6] If expressly required, by the statute, as commencement of suit, its issuance cannot be waived;[7] but otherwise a defendant who is *sui juris* may waive issuance of process.[8]

2. Upon Defendant's Cross Demand, or Claim Against Co-Defendant. In cross actions by a defendant against a plaintiff, no additional process is necessary,[9] unless specially required by statute,[10] although the contrary is the rule of the chancery practice.[11] Nor is service of additional process necessary to confer jurisdiction to determine the relations of the co-defendants incidental to the subject-matter of plaintiff's complaint.[12] When a cross complaint is filed by a defendant raising new questions against a co-defendant, it is the doctrine of some

Merriman, 132 Fed. 510. A registry of a judgment. Fluester *v.* McClellan, 8 C. B. N. S. 357, 98 E. C. L. 357. A declaration in ejectment. Knapp *v.* Pults, 3 How. Pr. (N. Y.) 53. A rule to show cause. Taylor *v.* Henry, 2 Pick. (Mass.) 397. A motion by the attorney-general. Fitzpatrick *v.* New Orleans, 27 La. Ann. 457. An order for the holding of a local option election. Gilbert *v.* State, 32 Tex. Cr. 596, 25 S. W. 632. An order for the appearance of an absent defendant. Forsyth *v.* Pierson, 9 Fed. 801, 11 Biss. 133. A commission to examine witnesses. Duncan *v.* Hill, 19 N. C. 291. Extraordinary remedies. Territory *v.* Ashenfelter, 4 N. M. 85, 12 Pac. 879, such as habeas corpus, quo warranto, mandamus, etc. A bond in replevin. Simpson *v.* Wilcox, 18 R. I. 40, 25 Atl. 391. Affidavits, recognizances, or justices' returns. Dorman *v.* Bayley, 10 Minn. 383. An appeal-bond on appeal from justice's judgment. Smith *v.* Waters, 25 Ind. 397. An affidavit and recognizance given by appellant as a condition for an allowance of an appeal from a justice and the return of the appeal papers by the justice. Dorman *v.* Bayley, *supra*. A decree of sale. Parks *v.* Bryant, 132 Ala. 224, 31 So. 593; Sauer *v.* Steinbauer, 14 Wis. 70. A precept under which a sale of land for non-payment of taxes is made. Scarritt *v.* Chapman, 11 Ill. 443; Curry *v.* Hinman, 11 Ill. 420. A warrant to collect taxes. Haley *v.* Elliott, 16 Colo. 159, 26 Pac. 559; Tweed *v.* Metcalf, 4 Mich. 578; Sprague *v.* Birchard, 1 Wis. 457, 60 Am. Dec. 393. But see Missouri *v.* Spiva, 42 Fed. 435, holding that the term "process" includes a tax book authenticated by the seal of the court under which a tax collector is authorized by statute to seize and sell property to enforce a collection of taxes. A copy of an indictment. Fitzpatrick *v.* New Orleans, 27 La. Ann. 457. An information from a police magistrate. Davenport *v.* Bird, 34 Iowa 524. A warrant of commitment by which criminals are transported from the court to the place of commitment. U. S. *v.* Tanner, 147 U. S. 661, 13 S. Ct. 436, 37 L. ed. 321. A writ of inquiry. Cook *v.* Tuttle, 2 Wend. (N. Y.) 289.

6. *Missouri.*— State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146; Orchard *v.* National Exch. Bank, 121 Mo. App. 338, 98 S. W. 824.

North Carolina.— Peters Grocery Co. *v.* Collins Bag Co., 142 N. C. 174, 55 S. E. 90.

Ohio.— Smith *v.* Baltimore, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 542, 7 Ohio N. P. 145.

South Dakota.— Ramsdell *v.* Duxberry, 14 S. D. 222, 85 N. W. 221.

West Virginia.— Moore *v.* Holt, 55 W. Va. 507, 47 S. E. 251.

Essentiality to jurisdiction of service of process and notice in general see Courts, 11 Cyc. 671.

As precedent to appointment of guardian ad litem see Infants, 22 Cyc. 653.

One summons cannot be issued for several suits.— Williamson *v.* Wardlaw, 40 Ga. 702.

7. Ramsdell *v.* Duxberry, 14 S. D. 222, 85 N. W. 221.

8. Carter *v.* Penn, 79 Ga. 747, 4 S. E. 896; Brady *v.* Hardeman, 17 Ga. 67. In which event the case will stand in court as if it had been commenced by a summons issued on complaint and the supplemental complaint was acknowledged and the summons waived. Tuskaloosa Wharf Co. *v.* Tuskaloosa, 38 Ala. 514.

Such waiver does not affect the question of jurisdiction, but simply supersedes the necessity for the process (Washington *v.* Barnes, 41 Ga. 307), and defendant's right to defend is not impaired by such a waiver (Ochus *v.* Sheldon, 12 Fla. 138).

Waiver may be dated before filing of petition. Battle *v.* Eddy, 31 Tex. 368.

Appearance as waiver of want of process see Appearances, 3 Cyc. 517.

In action by or against infants see Infants, 22 Cyc. 681.

Stipulation waiving process as equivalent to appearance see Appearances, 3 Cyc. 510.

9. Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783; Bevier *v.* Kahn, 111 Ind. 200, 12 N. E. 169; Eisman *v.* Whalen, 39 Ind. App. 350, 79 N. E. 514, 1072.

10. Griffith *v.* Bluegrass Bldg., etc., Assoc., 108 Ky. 713, 57 S. W. 486, 22 Ky. L. Rep. 391; Mitchell *v.* Fidelity Trust, etc., Co., 47 S. W. 446, 20 Ky. L. Rep. 713.

11. Thomason *v.* Neeley, 50 Miss. 310; Harris *v.* Schlinke, 95 Tex. 88, 65 S. W. 172.

Necessity for process upon cross bill in equity see Equity, 16 Cyc. 211.

12. Rodgers *v.* Parker, 136 Cal. 313, 68 Pac. 975; Fentriss *v.* State, 44 Ind. 271;

courts that process is necessary to give jurisdiction, by analogy to the chancery practice,[13] but other courts hold that no process need issue.[14] Such process is expressly required by statute in some states.[15] In other states service of the cross complaint is by statute required to give the court jurisdiction over the subject-matter of the cross complaint, and this is a substitute for, and the equivalent of, process.[16] A defendant who has not appeared and has not been served with process cannot be compelled to litigate a question with a co-defendant by the mere service upon him of an answer setting up a cross demand.[17]

3. Upon Supplemental Petitions. No new summons is needed for a supplemental petition.[18] But when a petition is filed in a pending proceeding which has no relation whatever to the subject-matter of the proceeding, defendants named in the petition must be served with a summons.[19] So where a petition substituting an entirely different plaintiff is filed, no judgment may be rendered thereon unless there has been service upon defendant or he has appeared thereto.[20]

4. Upon Bringing in New Parties. Where plaintiff is granted leave to add a new defendant, the person so added must be served with process in the same manner as for the commencement of an original suit.[21] A provision to this effect is ordinarily made by statute,[22] which applies also to persons brought in by order of court, not upon their own application, as necessary to the complete determination of the cause.[23] But where upon the decease of an original defendant his infant heirs are made parties, it has been held that service of the order making them parties is sufficient without a new summons.[24] And where the name of one of plaintiff firm has been omitted from the petition he may be made a party by amendment without further service on defendant.[25]

5. New Process After Amendment of Cause of Action. An amended statement of the same cause of action does not necessitate the issuance of further, or new, process;[26] but if a new cause of action is set up by amendment new process must

Eisman *v.* Whalen, 39 Ind. App. 350, 79 N. E. 514, 1072.

13. Joyce *v.* Whitney, 57 Ind. 550; Fletcher *v.* Holmes, 25 Ind. 458; Amburgy *v.* Burt, etc., Lumber Co., 121 Ky. 580, 89 S. W. 680, 28 Ky. L. Rep. 551; Southward *v.* Jamison, 66 Ohio St. 290, 64 N. E. 135. And see Clay *v.* Hildebrand, 44 Kan. 481, 24 Pac. 962; Arnold *v.* Badger Lumber Co., 36 Nebr. 841, 55 N. W. 269; Crain *v.* Wright, 60 Tex. 515. But *compare* Hapgood *v.* Ellis, 11 Nebr. 131, 7 N. W. 845.

14. Tucker *v.* St. Louis L. Ins. Co., 63 Mo. 588.

15. Luttrell *v.* Reynolds, 63 Ark. 254, 37 S. W. 1051; Ringo *v.* Woodruff, 43 Ark. 469; Thode *v.* Spofford, 65 Iowa 294, 17 N. W. 561, 21 N. W. 647.

16. White *v.* Patton, 87 Cal. 151, 25 Pac. 270; Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

17. Joy *v.* White, 6 N. Y. Suppl. 571; Parker *v.* Commercial Tel. Co., 3 N. Y. St. 174.

18. Moshell *v.* Reed, 97 S. W. 372, 30 Ky. L. Rep. 10.

19. La Forge *v.* Binns, 125 Ill. App. 527.

20. Armstrong *v.* Bean, 59 Tex. 492.

21. Jones *v.* Cloud, 4 Coldw. (Tenn.) 236.

22. See the statutes of the several states. And see the cases cited in the following note.

23. Meeks *v.* Meeks, 87 N. Y. App. Div. 99, 84 N. Y. Suppl. 67 (holding under Code Civ. Proc. § 453, requiring that a supplemental summons must be issued directed to the new defendant in the same form as the original, except that in the body it must require defendant to answer the original or amended complaint and the supplemental complaint, or either of them, as the case requires, that where, prior to the bringing in of an additional defendant the complaint had been amended, an order for the publication of summons directing service of the amended and supplemental summons and of the amended complaint on such defendant was proper); Romanoski *v.* Union R. Co., 30 Misc. (N. Y.) 830, 61 N. Y. Suppl. 1097 [*reversed* on other grounds in 31 Misc. 762, 64 N. Y. Suppl. 1147]; Moore *v.* Donahew, 3 Okla. 396, 41 Pac. 579.

24. Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418.

Subscription of parties upon decease of original party generally see Abatement and Revival, 1 Cyc. 109.

25. Roberson *v.* McIlhenny, 59 Tex. 615.

26. *Kentucky.*— Griffith *v.* Bluegrass Bldg., etc., Assoc., 108 Ky. 713, 57 S. W. 486, 22 Ky. L. Rep. 391.

Nebraska.— Schuyler Nat. Bank *v.* Bollong, 28 Nebr. 684, 45 N. W. 164; Healey *v.* Aultman, 6 Nebr. 349.

New Mexico.— U. S. *v.* Rio Grande Dam, etc., Co., (1906) 85 Pac. 393.

Texas.— Rabb *v.* Rogers, 67 Tex. 335, 3 S. W. 303; Chandler *v.* Scherer, 32 Tex. 573; Turner *v.* Brown, 7 Tex. 489; Wisley *v.* Houston Nat. Bank, 28 Tex. Civ. App. 268, 67 S. W. 195.

issue.[27] And, in particular, when service is had by publication and there is no appearance of defendant, no such amendment will be allowed.[28] When a demurrer to the petition is sustained the court on allowing an amendment may order defendants to answer without further process.[29]

C. Issuance — 1. In General. Process is deemed issued when it is prepared and placed in the hands of one authorized to serve it with the intention of having it served.[30] Process is not irregular if delivered by the clerk, signed and sealed in blank, to plaintiff's attorney.[31] In those states where the statute requires a complaint to be filed upon which the summons subsequently issues, the summons can be issued only upon the filing of a complete pleading,[32] and against those persons who are made parties in it.[33]

2. Time For Issuance.[34] Under some statutes process cannot issue before the filing of plaintiff's pleading.[35] And where the statutes so provide it must be issued

Virginia.— Norfolk, etc., R. Co. *v.* Sutherland, 105 Va. 545, 54 S. E. 465.

West Virginia.—Phelps *v.* Smith, 16 W. Va. 522.

Canada.— Hamilton *v.* Bovril Co., 15 Quebec Super. Ct. 62.

See 40 Cent. Dig. tit. "Process," § 5.

A correction of the boundary of the premises described in the original petition was allowed without service of new process in Moore *v.* Robinson, 91 S. W. 659, 29 Ky. L. Rep. 43.

27. Cecil *v.* Sowards, 10 Bush (Ky.) 96; Rutlidge *v.* Vanmeter, 8 Bush (Ky.) 354; Three Forks City Co. *v.* Com., 45 S. W. 353, 20 Ky. L. Rep. 149; Kentucky Eclectic Inst. *v.* Gaines, 1 S. W. 444. See also Schuttler *v.* King, 12 Mont. 149, 30 Pac. 25.

Striking out a party defendant, improperly joined, does not require the issuance of new process against those defendants already before the court after personal service or appearance. Three Forks City Co. *v.* Com., 45 S. W. 353. 20 Ky. L. Rep. 149.

28. Wood *v.* Nicolson, 43 Kan. 461, 23 Pac. 587; Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295; Perry Rice Grocery Co. *v.* W. E. Craddock Grocery Co., 34 Tex. Civ. App. 442, 78 S. W. 966.

But a mere amendment in form, such as the adding of a caption to the complaint, is allowable. White *v.* Hinton, 3 Wyo. 30 Pac. 953, 17 L. R. A. 66.

Permitting other claimants to intervene and file answers does not constitute an amendment of the complaint. Goodale *v.* Coffee, 24 Oreg. 346, 33 Pac. 990.

29. Keary *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 359.

30. *Illinois.*— Pease *v.* Ritchie, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566.

Iowa.— Oskaloosa Cigar Co. *v.* Iowa Cent. R. Co., (1902) 89 N. W. 1065.

Missouri.— Burton *v.* Deleplain, 25 Mo. App. 376.

New Hampshire.—See Society *v.* Whitcomb, 2 N. H. 227.

New York.— Mills *v.* Corbett, 8 How. Pr. 500; Jackson *v.* Brooks, 14 Wend. 649.

North Carolina.—Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699; Webster *v.* Sharpe, 116 N. C. 466, 21 S. E. 912.

Oregon.— White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

Pennsylvania.— Person's Appeal, 78 Pa. St. 145.

Delivery of the process by the clerk to plaintiff, or attorney, followed by its delivery to an officer for service, is in fact a delivery by the clerk to the officer. Medlin *v.* Seideman, 39 Tex. Civ. App. 553, 88 S. W. 250.

Where a copy of the complaint certified by the clerk is required by the statute to be served with the summons, issuance of the process is not complete until such copy has been prepared and certified. Reynolds *v.* Page, 35 Cal. 296.

31. *Alabama.*— Slater *v.* Canter, 35 Ala. 679.

Michigan.— Potter *v.* John Hutchinson Mfg. Co., 87 Mich. 59, 49 N. W. 517.

North Carolina.— Croom *v.* Morrisey, 63 N. C. 591.

South Carolina.—Miller *v.* Hall, 1 Speers l.

United States.— Jewett *v.* Garrett, 47 Fed. 625.

Such a blank summons need not be delivered for use in any particular suit, but for any suit that the attorney may thereafter have occasion to bring. Sweet *v.* Newaygo County Cir. Judge, 95 Mich. 449, 54 N. W. 951.

Use in different court.—A writ returnable to the superior court, made on a blank issued by the clerk of the court of common pleas and intended to be used for a writ to be issued by that court, is irregular. Dearborn *v.* Twist, 6 N. H. 44.

32. See *infra*, I, C, 2.

33. Nutting *v.* Losance, 27 Ind. 37.

34. **Issuance upon holiday** see Holidays, 21 Cyc. 443.

Issuance upon Sunday see Sunday.

Process for summoning of jurors see Juries, 24 Cyc. 223.

35. See the statutes of the several states. And see Jones *v.* Porter, 23 Ind. 66, holding that where a complaint was filed to foreclose a mortgage and process was issued and served, and afterward process was issued against a person who was not named in the record and plaintiff amended making such person a party, the process was bad as to such person.

within a limited time after the complaint is filed.[36] In any event it is within the discretion of the court to allow or refuse the issuance of summons after a long delay.[37]

3. Conditions Precedent. If the statute fixes a condition precedent to the issuance of process a failure to comply with the condition invalidates the process.[38]

4. Præcipe. A præcipe is a written order to the clerk of a court to issue a writ.[39] Many statutes require plaintiff to file a præcipe with the clerk before the summons issues; but the clerk may waive the præcipe without affecting the validity of the process,[40] and inaccuracies in the præcipe do not invalidate the process.[41]

5. Who May Issue. Process is usually issued by the clerk of the court,[42] without any order from the court;[43] but under some statutes it is issued by the plaintiff or his attorney.[44] When a summons may be issued by plaintiff or his attorney, it may be considered issued when it has been duly drawn and signed, with intent

Filing an unsigned declaration will not permit of issuance of process. Carrington *v.* Hamilton, 3 Ark. 416.

A prayer for a citation is not necessary. Bauduc *v.* Domingon, 8 Mart. N. S. (La.) 434; Sompeyrac *v.* Estrada, 8 Mart. (La.) 722.

36. Linden Gravel Min. Co. *v.* Sheplar, 53 Cal. 245; Coombs *v.* Parrish, 6 Colo. 296.

37. Steves *v.* Carson, 21 Colo. 280, 40 Pac. 569 (after lapse of time allowed by statute); Reese *v.* Kirby, 68 Ga. 825 (delay of ten years in applying).

Dismissal for delay in issuance of process see Dismissal and Nonsuit, 14 Cyc. 436.

38. Carrington *v.* Hamilton, 3 Ark. 416 (pleading filed without having been signed); Morse *v.* Rankin, 51 Conn. 326 (failure to file bond for costs); Lord *v.* F. M. Dowling Co., 52 Fla. 313, 42 So. 585 (failure to file affidavit); Stevens *v.* White, 2 Ohio Dec. (Reprint) 107, 1 West. L. Month. 394; White *v.* Freese, 2 Cinc. Super. Ct. 30 (want of an affidavit of verification).

Cost bond.— Where the clerk was required by statute to pass upon the bond for costs before issuing the process, a failure so to do renders the process void. Redmond *v.* Mullenax, 113 N. C. 505, 18 S. E. 708.

Penalty for issuance without security see Clerks of Court, 7 Cyc. 244 note 5].

39. Black L. Dict.; Bouvier L. Dict.

The word "præcipe" is also used as meaning an original writ drawn up in the alternative to command defendant to do the thing required or to show the reason why he has not done it. Black L. Dict. [*citing* 3 Blackstone Comm. 274].

40. Johnson *v.* Murray, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174; Goff *v.* Russell, 3 Kan. 212; Manspeaker *v.* Topeka Bank, 4 Kan. App. 768, 46 Pac. 1012.

41. See the cases cited *infra*, this note.

The following inaccuracies were held insufficient to affect the process: Præcipe signed "attorneys" and not "attorneys for plaintiff." Robinson *v.* Brown, 74 Ind. 365. Return-day specified only by request to "fix in" summons a specified date. Johnson *v.* Lynch, 87 Ind. 326. See also Moore *v.* Glover, 115 Ind. 367, 16 N. E. 163. Requiring the process to be made returnable in less than the required number of days. Davis *v.* Brode, 13 Pa. Co. Ct. 631. Use of word "process" instead of "summons." Kennedy *v.* Beck, 15 Kan. 555. Signature of præcipe by the legal plaintiff. Good *v.* Bair, 8 Lanc. Bar (Pa.) 185.

42. Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108; McNevins *v.* McNevins, 28 Colo. 245, 64 Pac. 199; Tucker *v.* Eden, 68 Vt. 168, 34 Atl. 698; *In re* Durant, 60 Vt. 176, 12 Atl. 650.

A deputy clerk may issue process. Yonge *v.* Broxson, 23 Ala. 684; Goodwyn *v.* Goodwyn, 11 Ga. 178; Jacobs *v.* Measures, 13 Gray (Mass.) 74; Pendleton *v.* Smith, 1 W. Va. 16.

On behalf of clerk.— The clerk may issue process in a proceeding in his own behalf. Evans *v.* Etheridge, 96 N. C. 42, 1 S. E. 633; Kerns *v.* Huntzinger, 2 Leg. Rec. (Pa.) 79; Vermont Mut. F. Ins. Co. *v.* Cummings, 11 Vt. 503. *Contra*, Doolittle *v.* Clark, 47 Conn. 316.

Clerk de facto.— Process is valid when issued by one who is clerk *de facto*. State *v.* Webster Parish Police Jury, 120 La. 163, 45 So. 47, 14 L. R. A. N. S. 794; Calvert, etc., R. Co. *v.* Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997.

Judicial character of act.— Issuing a summons is not a judicial act. Clarke *v.* Bradlaugh, 8 Q. B. D. 63, 46 J. P. 278, 51 L. J. Q. B. 1, 46 L. T. Rep. N. S. 49, 30 Wkly. Rep. 53.

Where a woman acting as deputy clerk signs a writ, it is not absolutely void, although voidable, and is not subject to collateral attack. State *v.* Webster Parish Police Jury, 120 La. 163, 45 So. 47, 14 L. R. A. N. S. 794.

Mandamus to compel issuance see Mandamus, 26 Cyc. 204.

43. Abney *v.* Ohio Lumber, etc., Co., 45 W. Va. 446, 32 S. E. 256.

But an order may be necessary after the time allowed by statute has expired. Steves *v.* Carson, 21 Colo. 280, 40 Pac. 569.

44. See the statutes of the several states. And see Rand *v.* Pantagraph Co., 1 Colo. App. 270, 28 Pac. 661; Gilmer *v.* Bird, 15 Fla. 410; White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

to deliver it to the process server, although it may not have been actually delivered.[45]

6. Counties to Which Process May Issue.[46] In the absence of statutory authority a court has no power to issue process to be executed beyond the limits of its territorial jurisdiction.[47] But by statute the issuance of process into counties other than that in which the action is brought is frequently authorized.[48] Thus, where two or more persons who reside in different counties may be named jointly as defendants, either county may usually be selected, and the court may send its process to the other counties;[49] but this is not true where the resident defendant is merely nominal and the real defendant is the one sought in another county.[50] The case must be rightly brought in the county from which the summons issues,[51] and the parties must be rightly joined.[52] In some jurisdictions if the action is local,

45. Mills *v.* Corbett, 8 How. Pr. (N. Y.) 500; Smith *v.* Nicholson, 5 N. D. 426, 67 N. W. 296.

46. Issuance of final process beyond limits of original jurisdiction of court see Courts, 11 Cyc. 690.

Service of process outside of jurisdiction see *infra*, II, B, 8.

47. *Arkansas.*—Auditor *v.* Davies, 2 Ark. 494.

Illinois.—Wirtz *v.* Henry, 59 Ill. 109 (holding that there was no statutory authority for issuing process to another county in an action on the case brought to recover damages for alleged fraud and deceit practised by defendant in making a contract); Aspern *v.* Lamar Ins. Co., 6 Ill. App. 235.

Indiana.— Ham *v.* Rogers, 6 Blackf. 559.

Louisiana.— Evans *v.* Saul, 8 Mart. N. S. 247.

Nebraska.— Walker *v.* Stevens, 52 Nebr. 653, 72 N. W. 1038.

North Carolina.— See Moore *v.* North Carolina R. Co., 67 N. C. 209; Howerton *v.* Tate, 66 N. C. 431.

Ohio.— Knight *v.* Buser, 6 Ohio Dec. (Reprint) 772, 8 Am. L. Rec. 28.

Tennessee.— See Slatton *v.* Jonson, 4 Hayw. 197.

See 40 Cent. Dig. tit. "Process," § 15.

Compare Cicero *v.* Bates, 1 Mich. N. P. 25, holding that a command in a writ to "summon defendant if to be found in this state" would not vitiate the writ after the writ was served within the proper county.

48. See the statutes of the several states. And see the following cases:

Arkansas.— Elliott *v.* State Bank, 4 Ark. 437.

Illinois.— Linton *v.* Anglin, 12 Ill. 284; Haddock *v.* Waterman, 11 Ill. 474.

Louisiana.— Berry *v.* Gaudy, 15 La. Ann. 533.

Missouri.— Christian *v.* Williams, 111 Mo. 429, 20 S. W. 96, holding that under a statute providing that where there are several defendants residing in different counties plaintiff may have a summons directed to any county in which one or more defendants may be found, the process cannot issue to another county where a defendant is found and served with process in the county where plaintiff resides.

Ohio.— Smith *v.* Johnson, 57 Ohio St. 486, 49 N. E. 693; Steel *v.* Burgert, 4 Ohio Dec. (Reprint) 557, 2 Clev. L. Rep. 377; Campbell *v.* Woodsdale Island Park Co., 4 Ohio S. & C. Pl. Dec. 152, 3 Ohio N. P. 159.

Texas.— Ward *v.* Lattimer, 2 Tex. 245, holding that while a branch writ was authorized when defendants resided in different counties, no provision existed for sending a summons out of the county when defendants all resided in the county where the suit was instituted.

See 40 Cent. Dig. tit. "Process," § 15.

What law governs.— The right to issue process to another county is governed by the statute in force at the time the action is begun. Funk *v.* Ironmonger, 76 Ill. 506.

49. *Indiana.*— Chicago, etc., R. Co. *v.* Marshall, 38 Ind. App. 217, 75 N. E. 973.

Kansas.— Hendrix *v.* Fuller, 7 Kan. 331.

Kentucky.— Ford *v.* Logan, 2 A. K. Marsh. 324.

Nebraska.— Hobson *v.* Cummins, 57 Nebr. 611, 78 N. W. 295; Belcher *v.* Palmer, 35 Nebr. 449, 53 N. W. 380; Bair *v.* Peoples' Bank, 27 Nebr. 577, 43 N. W. 347.

Tennessee.— Nashville *v.* Webb, 114 Tenn. 432, 85 S. W. 404.

See 40 Cent. Dig. tit. "Process," § 15.

The statute expression "joint defendants" in this connection embraces all persons who may be properly joined in the one action. People *v.* Wayne Cir. Ct. Judge, 22 Mich. 493.

A misjoinder of causes of action defeats the right to summon a non-resident defendant. Stewart *v.* Rosengren, 66 Nebr. 445, 92 N. W. 586.

50. New Blue Springs Milling Co. *v.* De Witt, 65 Kan. 665, 70 Pac. 647; Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15; Brenner *v.* Egly, 23 Kan. 123; Seiver *v.* Union Pac. R. Co., 68 Nebr. 91, 93 N. W. 943, 110 Am. St. Rep. 393, 61 L. R. A. 319; Goldstein *v.* Fred Krug Brewing Co., 62 Nebr. 728, 87 N. W. 958; Hobson *v.* Cummins, 57 Nebr. 611, 78 N. W. 295; Hanna *v.* Emerson, 45 Nebr. 708, 64 N. W. 229; Cobbey *v.* Wright, 23 Nebr. 250, 36 N. W. 505; Dunn *v.* Haines, 17 Nebr. 560, 23 N. W. 501.

51. Marshall *v.* Saline River Land, etc., Co., 75 Kan. 445, 89 Pac. 905; New Blue Springs Milling Co. *v.* De Witt, 65 Kan. 665, 70 Pac. 647; Adair County Bank *v.* Forrey, 74 Nebr. 811, 105 N. W. 714; Fostoria *v.* Fox, 60 Ohio St. 340, 54 N. E. 370.

52. Marshall *v.* Saline River Land, etc., Co., 75 Kan. 445, 89 Pac. 905.

the summons may be issued to another county even though there is but a single defendant.[53] The writ sent to the other county should be an exact counterpart of the one which is to be executed within the county,[54] except that it should be directed to another sheriff [55] and only the party to be served need be named.[56] Under the practice in England [57] and in Canada [58] service of process without the jurisdiction may be allowed in actions founded upon a breach within the jurisdiction of any contract wherever made, which is to be performed within the jurisdiction. And in certain of the provinces of Canada service of process without the jurisdiction may be allowed against a foreign defendant when the action is founded upon a tort committed within the jurisdiction.[59]

D. Requisites and Validity — 1. In General. The requisites of process are largely matters of statutory regulation, and it is necessary that the writ contain whatever the statute prescribes, whether deemed important or not.[60] But irregularities in form, such as adding a required statement by way of a memorandum upon the summons instead of inserting it in the body thereof, will not vitiate the process.[61] And the citation need not contain matters which are not required by a statute enumerating the essentials of a process.[62] A general statute enacted for the purpose of securing uniformity with regard to process in courts of a particular

Some cases hold that there must be an actual joint liability disclosed, and proof of a several liability will not authorize a judgment against a defendant served in another county. McKibben *v.* Day, 71 Nebr. 280, 98 N. W. 845; Stull Bros. *v.* Powell, 70 Nebr. 152, 97 N. W. 249; Penney *v.* Bryant, 70 Nebr. 127, 96 N. W. 1033. See also Hosie *v.* Harrington, 2 Mich. N. P. 77. The court is without jurisdiction of the non-resident defendant if plaintiff fails to establish the joint liability charged, even though the non-resident defendant does not take the objection. McDonald *v.* Boardman, 17 Ohio Cir. Ct. 209, 9 Ohio Cir. Dec. 533.

53. Nebraska Mut. Hail Ins. Co. *v.* Meyers, 66 Nebr. 657, 92 N. W. 572. This case rested upon the construction of a common-law form of statute which provided that "where the action is rightly brought in any county, according to the provisions of title four, a summons shall be issued to any other county, against any one or more of defendants, at plaintiff's request." The court held that this statute was not confined in its operation to transitory actions in which at least one defendant had been served with process in the county of venue, but to all actions rightly brought. "If, for instance, the action affects the title or right of possession of real property, it is rightly brought in the county in which the land is situated, and the summons may be issued to, and served in, any other county, although there be but a single defendant."

54. Mayo *v.* Stoneum, 2 Ala. 390.

55. Womsley *v.* Cummins, 1 Ark. 125.

56. See *infra*, I, D, 7.

57. Comber *v.* Leyland, [1898] A. C. 524, 67 L. J. Q. B. 884, 79 L. T. Rep. N. S. 180. See also Thompson *v.* Palmer, [1893] 2 Q. B. 80, 62 L. J. Q. B. 502, 69 L. T. Rep. N. S. 366, 4 Reports 422, 42 Wkly. Rep. 22; Bell *v.* Antwerp, etc., Line, [1891] 1 Q. B. 103, 7 Aspin. 154, 60 L. J. Q. B. 270, 64 L. T. Rep. N. S. 276, 39 Wkly. Rep. 89; Robey *v.* Snafell Min. Co., 20 Q. B. D. 152, 57 L. J. Q. B. 134, 36 Wkly. Rep. 224; Green *v.* Browning, 34 L. T. Rep. N. S. 760; Golden *v.* Darlow, 8 T. L. R. 57; Hassall *v.* Lawrence, 4 T. L. R. 23.

58. Dickson *v.* McInnes, 3 West. L. Rep. 60; Bishop *v.* Scott, 6 Northwest Terr. 54; Blackley *v.* Elite Costume Co., 9 Ont. L. Rep. 382, 5 Ont. Wkly. Rep. 57.

59. Anderson *v.* Nobels Explosive Co., 12 Ont. L. Rep. 644, 8 Ont. Wkly. Rep. 439, 558, 644, holding that an order permitting service upon defendants abroad was properly set aside where the cause of action alleged against defendants engaged in the manufacture of explosives in Scotland was that they were negligent in allowing a fuse, which had injured a plaintiff at a place within the province, to be manufactured and sold in a defective condition, since the manufacture and sale must be deemed to have taken place in Scotland, in the absence of any contrary allegation, and although the invasion of plaintiff's right of personal security occurred in Ontario the tort comprised also the wrongful act or omission of the alleged tort-feasor.

60. Ward *v.* Ward, 59 Cal. 139; Smith *v.* Aurich, 6 Colo. 388; Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759. See also Caldwell *v.* Glenn, 6 Rob. (La.) 9; Falkner *v.* Guild, 10 Wis. 563, specification of a day of term when a hearing will be asked.

The object of process is to give the party reasonable notice of the time and place at which he is to appear and to apprise him of the cause of action and to whom he is bound to answer. Phillips *v.* Lemoyne, 4 Ark. 144.

Where the petition is the leading process, all that is required as to the citation, if the petition is correct, is substantial conformity to the petition, and the same strictness is not demanded as in the case of the writ at common law which was the leading process in the suit. Dikes *v.* Monroe, 15 Tex. 236.

61. Star *v.* Mahan, 4 Dak. 213, 30 N. W. 169; Cook *v.* Kelsey, 19 N. Y. 412.

62. Hemken *v.* Farmer, 3 Rob. (La.) 155.

grade will apply to courts created by a prior special act,[63] the acts being repugnant to each other in respect of such provisions.

2. Style or Title. The style or title of a writ is the formal designation of the authority under which it issues. A writ is properly said to run in the name of the person or government from whom the command on the face of the writ appears to emanate.[64] While the place for the style is properly at the head of the writ, it may nevertheless appear elsewhere without rendering the summons invalid.[65] Constitutional provisions are usually made as to the style in which process shall run.[66] In case the provision is that process shall run in the name of the state it may be styled simply "the state of," etc.,[67] or "state of," [68] The statement of the state and county in the margin of process, as ordinarily employed to show the venue, is not sufficient to cause the process to be regarded as running in the name of the state.[69] Unless process runs under the style so prescribed, it is void according to the rule of some courts; [70] but other cases hold that it is thus rendered voidable only, and is subject to amendment.[71] A summons or notice issued by a party or his

63. Starbird *v.* Brown, 84 Me. 238, 24 Atl. 824.

64. Johnson *v.* Provincial Ins. Co., 12 Mich. 216, 86 Am. Dec. 49.

65. Harris *v.* Jenks, 3 Ill. 475; Cleland *v.* Tavernier, 11 Minn. 194; White *v.* Com., 6 Binn. (Pa.) 179, 6 Am. Dec. 443.

66. See the constitutions of the several states. And see cases cited *infra*, this note.

For example the constitution of the state of Colorado, art. 6, § 30, provides that process shall run in the name of "the people of the state of Colorado"; that of Ohio in the name of "the state of Ohio" (Const. art. 12, § 20); that of Kentucky in the name of "the commonwealth of Kentucky" (Const. § 123).

A citation is not within the provision of the constitution of Louisiana requiring the style of all process to be "The state of Louisiana." Bludworth *v.* Sompeyrac, 3 Mart. (La.) 719; Kimball *v.* Taylor, 14 Fed. Cas. No. 7,775, 2 Woods 37.

After the adoption of a state constitution a writ issued in the name of the united States of America, within the jurisdiction of a state, is void. Gilbreath *v.* Kuykendall, 1 Ark. 50.

To what process applicable.—A constitutional provision as to the style of process of all writs and other proceedings has been held to apply only to such process as was under the English law required to run in the name of the king. Curry *v.* Hinman, 11 Ill. 420; Lennig *v.* Newkirk, 7 N. J. L. J. 87. And under such a provision where a statute invests courts with a novel jurisdiction and lays down an original mode of proceeding, such proceeding need not run in the name of the people unless the statute expressly provides therefor. Curry *v.* Hinman, *supra*. Wis. Const. art. 6, § 17, providing as to the style of process, relates only to such process as emanates from a court of justice. Sprague *v.* Birchard, 1 Wis. 457, 60 Am. Dec. 393.

67. Branch *v.* Branch, 6 Fla. 314, holding "the state of Florida" a sufficient style of process.

The people.—A constitutional requirement that the style of the process shall be "In the name of the People of the State of . . . " is satisfied by the caption "The People of the State of. . . . " Knott *v.* Pepperdine, 63 Ill. 219. But a writ styled "State of Michigan. The Circuit Court for the County of Newaygo, in Chancery," does not run in the name of the people of the state of Michigan. Forbes *v.* Darling, 94 Mich. 621, 54 N. W. 385.

68. Weber *v.* Frost, 22 La. Ann. 348; Mabbett *v.* Vick, 53 Wis. 158, 10 N. W. 84.

69. Little *v.* Little, 5 Mo. 227, 32 Am. Dec. 317; Fowler *v.* Watson, 4 Mo. 27; Beach *v.* O'Riley, 14 W. Va. 55.

If the style is stated in the constitution in quotation marks, a literal use of the entire expression so stated is required. Johnson *v.* Provincial Ins. Co., 12 Mich. 216, 86 N. W. 49; Lemons *v.* State, 4 W. Va. 755, 6 Am. Rep. 293.

70. *Illinois.*— Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; Sidwell *v.* Schumacher, 99 Ill. 426; McFadden *v.* Fortier, 20 Ill. 509.

Kentucky.— Yeager *v.* Groves, 78 Ky. 278.

Michigan.— Forbes *v.* Darling, 94 Mich. 621, 54 N. W. 385.

West Virginia.— Beach *v.* O'Riley, 14 W. Va. 55; Sims *v.* Charleston Bank, 3 W. Va. 415.

United States.— Manville *v.* Battle Mountain Smelting Co., 17 Fed. 126, 5 McCrary 328.

See 40 Cent. Dig. tit. "Process," § 22.

71. *Arkansas.*— Kahn *v.* Kuhn, 44 Ark. 404.

Minnesota.— Hanna *v.* Russell, 12 Minn. 80.

Missouri.— Doan *v.* Boley, 38 Mo. 449; Hansford *v.* Hansford, 34 Mo. App. 262. But *compare* Little *v.* Little, 5 Mo. 227, 32 Am. Dec. 317.

Nebraska.— Moore *v.* Fedawa, 13 Nebr. 379, 14 N. W. 170.

Texas.— Portis *v.* Parker, 8 Tex. 23, 58 Am. Dec. 95.

Wisconsin.— Ilsley *v.* Harris, 10 Wis. 95.

attorney under statutory authority is not deemed such process as comes within these constitutional provisions.[72]

3. DIRECTION. Process should ordinarily be directed to the officer who is to serve it,[73] although under some statutes the summons is to be directed to defendant.[74] Under these statutes such a direction need be only to the particular defendant intended to be served therewith.[75] In case the officer who ordinarily serves writs is disqualified, the statute usually provides that some other designated officer shall serve it, in which case it should be directed to such officer.[76] A statutory condition precedent to such direction must have been fulfilled.[77] And under some statutes the facts giving the substitute authority to serve the writ should appear upon the face thereof.[78] Under other statutes provision has been made for the direction of the writ to an indifferent person.[79] Whether the want of a proper direction is a fatal defect in a writ is a question upon which there is a difference of judicial opinion; some cases hold that the defect is fatal to the validity of the writ,[80] while the better view appears to be that it is not fatal but may be cured by amendment.[81] The absence of a proper direction is a mere informality in case of a statutory summons which does not issue out of the court, provided the instrument discloses for whom it is intended.[82]

72. *Colorado.*— Comet Consol. Min. Co. *v.* Frost, 15 Colo. 310, 25 Pac. 506.

Florida.— Gilmer *v.* Bird, 15 Fla. 410.

Iowa.— See Nichols *v.* Burlington, etc., Plank Road Co., 4 Greene 42, holding that the original notice provided for by the code need not be in the style of "the state of Iowa."

Minnesota.— Hanna *v.* Russell, 12 Minn. 80.

Oregon.— Bailey *v.* Williams, 6 Oreg. 71.

Wisconsin.— Porter *v.* Vandercook, 11 Wis. 70.

73. *Arkansas.*— Rudd *v.* Thompson, 22 Ark. 363.

Georgia.— Cheney *v.* Beall, 69 Ga. 533.

Massachusetts.— Hearsey *v.* Bradbury, 9 Mass. 95.

Pennsylvania.— Paul *v.* Vankirk, 6 Binn. 123.

Texas.— Carroll *v.* Peck, 31 Tex. 649.

West Virginia.— Hansford *v.* Tate, 61 W. Va. 207, 56 S. E. 372.

See 40 Cent. Dig. tit. "Process," § 23.

Process directed to a sheriff who is disqualified to serve it is defective. Hansford *v.* Tate, 61 W. Va. 207, 56 S. E. 372.

Direction to an officer de facto is good. Gunby *v.* Welcher, 20 Ga. 336.

74. Plano Mfg. Co. *v.* Kaufert, 86 Minn. 13, 89 N. W. 1124. See also Glenn *v.* Augusta Drug Co., 127 Ga. 5, 55 S. E. 1032, holding that a summons was not invalid because directed to defendant who was named in the caption but not in the body of the summons.

In Louisiana a citation must be addressed to defendant. Belard *v.* Gebelin, 47 La. Ann. 162, 16 So. 739 (holding that defendants could not be held bound by a citation which was not addressed to them or their curator *ad hoc*); Jacobs *v.* Frere, 28 La. Ann. 625; Waddill *v.* Payne, 23 La. Ann. 773; Bertoulin *v.* Bourgoin, 19 La. Ann. 360; Aldige *v.* Knox, 16 La. Ann. 180.

Non-resident.— The requirement of Tex. Rev. St. art. 1230, that citation for a non-resident defendant be addressed to him is not satisfied by its being addressed to the sheriff and served by him. Porter *v.* Hill County, (Tex. Civ. App. 1895) 33 S. W. 383.

75. Traill *v.* Porter, L. R. 1 Ir. 60.

76. Minott *v.* Vineyard, 11 Iowa 90; Gallegos *v.* Pino, 1 N. M. 410; State *v.* Baird, 118 N. C. 854, 24 S. E. 668. *Compare* Tesh *v.* Com., 4 Dana (Ky.) 522.

77. Chord *v.* McCoy, Morr. (Iowa) 311, holding that an affidavit of the interest of the person to whom the writ should afterward be directed must first have been filed.

78. McPherson *v.* State Bank, 4 Ark. 558; Carlisle *v.* Weston, 21 Pick. (Mass.) 535.

79. See the statutes of the several states. And see Augur *v.* Augur, 14 Conn. 82; Case *v.* Humphrey, 6 Conn. 130; Eno *v.* Frisbie, 5 Day (Conn.) 122; Johnson *v.* Hills, 1 Root (Conn.) 504; Thatcher *v.* Heacock, 1 Root (Conn.) 284; Lawrence *v.* Kingman, Kirby (Conn.) 6; Culver *v.* Balch, 23 Vt. 618; Ingraham *v.* Leland, 19 Vt. 304; Miller *v.* Hayes, Brayt. (Vt.) 21.

80. Vaughn *v.* Brown, 9 Ark. 20, 47 Am. Dec. 730; Anthony *v.* Beebe, 7 Ark. 447; Hickey *v.* Forristal, 49 Ill. 255; Bertoulin *v.* Bourgoin, 19 La. Ann. 360.

81. *Alabama.*— Herring *v.* Kelly, 96 Ala. 559, 11 So. 600. See Nabors *v.* Thomason, 1 Ala. 590; Ware *v.* Todd, 1 Ala. 199.

Georgia.— Telford *v.* Coggins, 76 Ga. 683; Buchanan *v.* Sterling, 63 Ga. 227.

Indiana.— Simcoke *v.* Frederick, 1 Ind. 54.

Maine.— Barker *v.* Norton, 17 Me. 416.

Massachusetts.— Wood *v.* Ross, 11 Mass. 271.

New Hampshire.— Parker *v.* Barker, 43 N. H. 35, 80 Am. Dec. 130.

Vermont.— Chadwick *v.* Divol, 12 Vt. 499.

82. Plano Mfg. Co. *v.* Kaufert, 86 Minn. 13, 89 N. W. 1124.

4. Designation of Court. The court in which the action is brought must be designated,[83] but an inaccuracy which does not mislead or prejudice will be disregarded.[84]

5. Place of Holding Court. If the process requires defendant's appearance before the court, the place must be named with reasonable certainty,[85] unless fixed by law.[86]

6. Appearance and Return — a. Distinction Between Return-Day and Appearance Day. The day for defendant's appearance is usually the return-day of the writ,[87] so that the term "return-day" is commonly employed to mean appearance day, and, in the absence of any statutory provision on the subject, the appearance day is the return-day of the writ if an appearance can be entered on that day [88] But as the return-day, strictly speaking, is merely the day appointed by law when writs are to be returned and filed,[89] there is no necessary connection between it and the day upon which defendant is bound to appear, and in some states the two days are by statute allowed to fall upon different dates.[90]

b. Necessity of Fixing Return or Appearance Day. The process must specify

83. Waddill *v.* John, 48 Ala. 232; Beall *v.* Siverts, 1 A. K. Marsh. (Ky.) 154; Dix *v.* Palmer, 5 How. Pr. (N. Y.) 233; Anonymous, 2 Code Rep. (N. Y.) 75. See also Orendorff *v.* Stanberry, 20 Ill. 89 (holding that where the venue of a writ is "State of Illinois, Tazewell county," and the writ is directed to "The sheriff of Logan county," commanding him to summon defendants "to appear before the circuit court of said county," the uncertainty as to which of the counties defendants are to appear in renders the summons void); Tallman *v.* Hinman, 10 How. Pr. (N. Y.) 89.

Designating a court other than the one in which the action is pending renders the process a nullity. Eggleston *v.* Wattawa, 117 Iowa 676, 91 N. W. 1044; Rutta *v.* Laffera, 1 Tex. App. Civ. Cas. § 822.

84. *California.*— Crane *v.* Brannan, 3 Cal. 192, holding that a memorandum "district court" at the head of a writ, which appears in the body to have come from the county court, is not part of the writ.

Georgia.— Georgia Southern, etc., R. Co., *v.* Pritchard, 123 Ga. 320, 51 S. E. 424.

Illinois.— Carter *v.* Rodewald, 108 Ill. 351.

Iowa.— See Nichols *v.* Burlington, etc., Plank Road Co., 4 Greene 42, holding a notice informing defendant that the petition is to be filed in the office of the clerk of the district court of Des Moines county sufficient.

Louisiana.— Driggs *v.* Morgan, 10 Rob. 119.

Minnesota.— Hanna *v.* Russell, 12 Minn. 80.

Missouri.— Payne *v.* Collier, 6 Mo. 321.

Washington.— Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760.

See 40 Cent. Dig. tit. "Process," § 20.

A statement of the name in the margin, required by statute, will govern a different venue stated in the body of the summons. Relfe *v.* Valentine, 45 Ala. 286.

Inaccuracy is cured if the complaint, served at the same time, correctly names the court. Yates *v.* Blodgett, 8 How. Pr. (N. Y.) 278.

85. Womsley *v.* Cummins, 1 Ark. 125. See also Warner *v.* Kenny, 3 How. Pr. (N. Y.) 323, 1 Code Rep. 96; Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759.

Specific as is usual in ordinary correspondence.— Van Wyck *v.* Hardy, 4 Abb. Dec. (N. Y.) 496, 39 How. Pr. 392.

At the court-house in a specified county is sufficiently definite. Tucker *v.* Real Estate Bank, 4 Ark. 429.

Omission to specify county as well as place in the body of the writ will not vitiate if it does not mislead. Gardner *v.* Witbord, 59 Ill. 145; Hall *v.* Davis, 44 Ill. 494; Northwestern Benev., etc., Assoc. *v.* Woods, 21 Ill. App. 372. But an actual error, such as naming the wrong county, will vitiate. Gill *v.* Hoblit, 23 Ill. 473; Cator *v.* Cockfield, 1 Brev. (S. C.) 91.

The name of the state in which the cause is to be tried need not be given where the notice follows the language of the statute. Lyon *v.* Byington, 10 Iowa 124.

86. Yonge *v.* Broxson, 23 Ala. 684; Stout *v.* Wertsner, 15 Montg. Co. Rep. (Pa.) 48.

The city or town in which the court sits need not be stated. Bond *v.* Epley, 48 Iowa 600.

Specification of place of trial in caption.— Where plaintiff is required to designate the county in which he desires the trial, the specification of a county in the caption is sufficient. Ward *v.* Sands, 10 Abb. N. Cas. (N. Y.) 60.

87. Hunsaker *v.* Coffin, 2 Oreg. 107.

A direction to defendant to appear and answer "forthwith" is not in compliance with a requirement of statute that appearance be made on the return-day. Hunsaker *v.* Coffin, 2 Oreg. 107.

88. Branch *v.* Webb, 7 Leigh (Va.) 371.

89. Bankers' Iowa State Bank *v.* Jordan, 111 Iowa 324, 82 N. W. 779.

90. See the statutes of the several states. And see Clough *v.* McDonald, 18 Kan. 114, where it is said under the Kansas statute that defendant has twenty days after the return-day in which to appear.

the time when defendant is to appear and answer,[91] or defend.[92] If the return-day of the process is fixed by statute it need not be designated,[93] although the better practice is to do so, and if wrongly designated the summons is not thereby rendered invalid.[94]

c. Day to Which Writ May Be Made Returnable. In case process is made returnable to a day which is not a legal return-day it is bad,[95] as where it is made returnable at a wrong term [96] or a time when no term is to be held,[97] or at a day out of term.[98] In like manner where the date fixed for return is an impossible one,[99] or is a day past,[1] the process is void. Under some statutes a writ is properly made returnable to the next succeeding term, although less than the statutory period for notice has intervened between the issuance of the summons and the first day of the term, and although a continuance may be made necessary for lack of proper service.[2] Under other statutes, when the necessary period does not intervene, the summons should be made returnable to the term following the next succeeding term,[3] or to the next rule day in vacation.[4]

d. Period Between Issuance and Return. The common-law rule required fifteen days between the teste and the return of the original writ, that being the

91. Winters *v.* Hughes, 3 Utah 443, 24 Pac. 759. See Comet Consol. Min. Co. *v.* Frost, 15 Colo. 310, 25 Pac. 506 (holding that a summons which requires defendant to answer the complaint which "will be filed in the clerk's office on the second Monday after service" thereof fixes that day as the time when defendant must answer, and not as the time when the complaint will be filed); Kendrick *v.* Kendrick, 19 La. 36; West *v.* Wilson, 4 La. 219 (holding that a statutory provision requiring a citation to express the number of days given defendant to answer was inapplicable when he resided outside of the state).

92. Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673, holding that an original notice requiring defendant to appear and answer, instead of to defend, was not fatal as depriving him of the right to demur or plead otherwise than by answer.

93. Davis *v.* McCary, 100 Ala. 545, 13 So. 665; Yonge *v.* Broxson, 23 Ala. 684; Butcher *v.* Brand, 6 Iowa 235; Hare *v.* Niblo, 4 Leigh (Va.) 359; Cunningham *v.* Sayre, 21 W. Va. 440.

94. Morgan *v.* Woods, 33 Ind. 23; Worster *v.* Oliver, 4 Iowa 345; Merrill *v.* Barnard, 61 N. C. 569; Porter *v.* Vandercook, 11 Wis. 70. But *compare* Crowell *v.* Galloway, 3 Nebr. 215.

95. *Arkansas.*— Thompson *v.* McHenry, 18 Ark. 537, so holding, although the law making a change in the time of returning such process had not been published when the writ issued.

Michigan.— People *v.* Kent County Cir. Judge, 38 Mich. 308.

Pennsylvania.— Thompson *v.* Patterson, 2 Miles 146.

Texas.— Neill *v.* Brown, 11 Tex. 17.

Virginia.— Kyles *v.* Ford, 2 Rand. 1.

Compare Woodley *v.* Gilliam, 64 N. C. 649; Tate *v.* Powe, 64 N. C. 644.

Naming a legal holiday as the return-day of the process will not invalidate it, but the process is returnable the next legal day. Ostertag *v.* Galbraith, 23 Nebr. 730, 37 N. W. 637.

96. *Alabama.*— Brown *v.* Simpson, 3 Stew. 331.

Illinois.— Miller *v.* Handy, 40 Ill. 448; Elee *v.* Wait, 28 Ill. 70; Hildreth *v.* Hough, 20 Ill. 331.

Indiana.— Briggs *v.* Snegham, 45 Ind. 14; Carey *v.* Butler, 11 Ind. 391; Shirley *v.* Hagar, 3 Blackf. 225.

Maine.— Blake *v.* Wing, 77 Me. 170.

New York.— Ryan *v.* McConnell, 1 Sandf. 709, 1 Code Rep. 93; Bunn *v.* Thomas, 2 Johns. 190.

Compare Herberton *v.* Stockton, 2 Miles (Pa.) 164; Fisher *v.* Potter, 2 Miles (Pa.) 147.

Voidable.— Such a writ is frequently held voidable merely. McAlpine *v.* Smith, 68 Me. 423; Kelly *v.* Gilman, 29 N. H. 385, 61 Am. Dec. 648, where it is said an exception exists in the case of mesne process running against the body of defendant and made returnable after an intervening lien); Jackson *v.* Crane, 1 Cow. (N. Y.) 38; Shirley *v.* Wright, 2 Ld. Raym. 775, 92 Eng. Reprint 17.

97. Brown *v.* Simpson, 3 Stew. (Ala.) 331.

98. Wood *v.* Hill, 5 N. H. 229; Tobler *v.* Stubble, 32 Tex. 188. See also Cramer *v.* Van Alstyne, 9 Johns. (N. Y.) 386.

99. Covington *v.* Burleson, 28 Tex. 368 (where defendant was cited to appear "the second Monday after the tenth Monday in March, A. D. 1861"); McNeil *v.* Ballinger, 1 Tex. App. Civ. Cas. § 841; Scott *v.* Watts, 1 Tex. App. Civ. Cas. § 88 (where defendant was cited to appear in the year 187).

1. Hendricks *v.* Pugh, 57 Miss. 157; Violand *v.* Saxel, 31 Tex. 283; Spence *v.* Morris, (Tex. Civ. App. 1894) 28 S. W. 405; Binyard *v.* McCombs, 1 Tex. App. Civ. Cas. § 520; James *v.* Proper, 1 Tex. App. Civ. Cas. § 83.

2. Mechanics' Sav. Inst. *v.* Givens, 82 Ill. 157.

3. Hurst *v.* Strong, 1 How. (Miss.) 123. See also Blacklock *v.* Gairdner, 1 Brev. (S. C.) 249; Blacklock *v.* Gairdner, 2 Bay (S. C.) 507.

4. Walker *v.* Joyner, 52 Miss. 789.

time deemed necessary between service and return.[5] If the statute provides that a certain number of days must intervene between the return-day and the date of issuance of the writ, the specification of a less number of days makes the summons void.[6] And similarly, if the statute requires the return within a specified time, greater time will invalidate the summons.[7] Unless such procedure is authorized by statute, a summons cannot be issued upon a return-day and made returnable upon the same day.[8] A provision that process shall be returnable upon the second Monday after its date, but that when issued to another county it may be returnable at the option of the party having it issued on a third or fourth Monday, does not prevent a summons which is issued to another county from being made returnable on the second Monday after its date.[9] Under the provisions of some statutes the requirement as to appearance is made to depend upon the amount in controversy.[10]

e. Sufficiency of Provision. If the time for appearance is identified in the statute by reference to terms of court, the process should ordinarily specify, with reasonable certainty, the term,[11] and the day of the term when appearance is required;[12] but it has been held sufficient to specify the term merely, where the law determines the day of the term upon which appearance must be made.[13] The hour at which appearance should be made is frequently required to be stated.[14] The

5. Logan *v.* Lawshe, 62 N. J. L. 567, 41 Atl. 751.

6. *Delaware.*— Warrington *v.* Tull, 5 Harr. 107.

Illinois.— Matthews *v.* Huff, 113 Ill. 90.

Missouri.— Sanders *v.* Rains, 10 Mo. 770.

Nebraska.— Crowell *v.* Galloway, 3 Nebr. 215.

Pennsylvania.— Misho *v.* McClelland, 20 Pa. Co. Ct. 302.

But when the return-day and appearance day are not the same, a direction that the sheriff serve and return the process within a shorter period than the law allows him does not affect the validity of the process, or prejudice defendant. Clough *v.* McDonald, 18 Kan. 114. And an obvious clerical error in the direction to the sheriff as to date for the return of the process may be disregarded. Alford *v.* Hoag, 8 Kan. App. 141, 54 Pac. 1105.

A statutory provision that the summons must be dated fifteen days before trial is construed to mean not less than fifteen days. Wolff *v.* Marietta Paper Mfg. Co., 61 Ga. 463.

7. Culver *v.* Phelps, 130 Ill. 217, 22 N. E. 809; Newcombe *v.* Cohn, 33 Misc. (N. Y.) 602, 67 N. Y. Suppl. 930. But *compare* Wolff *v.* Marietta, etc., Mfg. Co., 61 Ga. 463.

8. Dyott *v.* Pennock, 2 Miles (Pa.) 213.

A summons made returnable "instanter" is void. Joinar *v.* Delta Bank, 71 Miss. 382, 14 So. 464.

Under a statute providing that process shall be returnable within a specified number of days after its date, it may be issued, executed, and returned on the return-day. Spragins *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 139, 13 S. E. 45.

9. State *v.* Republican Valley, etc., R. Co., 27 Nebr. 852, 44 N. W. 51; De Vol *v.* Culver, 2 Ohio Dec. (Reprint) 154, 1 West. L. Month. 588.

10. Brauer *v.* Luntzer, 12 Nebr. 473, 11 N. W. 730, so holding where a particular court retained the practice and jurisdiction of a justice's court, although an increased jurisdiction had also been conferred upon it.

11. *Arkansas.*— Anderson *v.* Pearce, 36 Ark. 293, 38 Am. Rep. 39.

Illinois.— Williams *v.* Williams, 221 Ill. 541, 77 N. E. 928.

Iowa.— Knapp *v.* Haight, 23 Iowa 75. But stating that defendant is required to appear at the "next term" is not sufficient under a statute providing that the term shall be named. Decatur County *v.* Clements, 18 Iowa 536; Des Moines Branch State Bank *v.* Van, 12 Iowa 523. See also De Tar *v.* Boone County, 34 Iowa 488, holding the process sufficient to support a judgment by default.

New Mexico.— Holzman *v.* Martinez, 2 N. M. 271.

Texas.— Cave *v.* Houston, 65 Tex. 619; Kirk *v.* Hampton, 2 Tex. App. Civ. Cas. § 719, holding that the summons must require appearance at the next regular term.

If an impossible term is specified, the process is a nullity. Lowrey *v.* Richmond, etc., R. Co., 83 Ga. 504, 10 S. E. 123; Holzman *v.* Martinez, 2 N. M. 271.

12. Rattan *v.* Stone, 4 Ill. 540 (holding that a summons which names the wrong day of the term is absolutely void); Boals *v.* Shules, 29 Iowa 507 (holding that if the day of the term is designated, but the time is also otherwise specified so that two different days are named, the process is a nullity).

But if the process reads in the alternative, one of the days specified being the proper one and the other being the day prior thereto, this is a mere informality. Lemonds *v.* French, 4 Greene (Iowa) 123.

Statement of calendar day.— A statutory requirement that the day of the court term be named is satisfied by a designation of the calendar day and *vice versa*. Dunkle *v.* Elston, 71 Ind. 585; McDowell *v.* Nicholson, 2 Tex. App. Civ. Cas. § 268.

13. Merrill *v.* Barnard, 61 N. C. 569.

14. Hodges *v.* Brett, 4 Greene (Iowa) 345,

date may be fixed with reference to a term of court where the time of holding such term is prescribed by law.[15] But where it is provided that the day shall be plainly expressed, a faulty reference to the day is not aided by the fact that defendant is also required to appear at the "term next to be holden," the date of which is fixed by general law.[16] An error in stating the time at which process is returnable,[17] or a failure to follow the statutory language for the time for appearance,[18] is not fatal where defendant is neither deceived nor misled. Surplusage in regard to the time for appearance will not affect the writ.[19] But a want of proper certainty in point of time cannot be supplied by construction or intendment.[20] The return-day may be expressed in figures.[21] Where the writ is made returnable upon a certain day of a certain month "next," it has been construed to be returnable in the ensuing year in case the same month has already been expressed in stating the date of the writ.[22]

f. To Whom Returnable. In case by statute provision is made for a return of process to a particular officer, it should not be made returnable otherwise.[23]

g. Direction to Return. Where the law requires the officer to return process, a direction to him to do so need not be inserted.[24]

7. Designation of Parties. The process should state the names of the parties, plaintiff and defendant, and this requirement is frequently found expressly set out in the statute.[25] The full christian name and surname of each party required to be

where a designation "11 o'clock M.," was regarded as a fatal defect.

Naming an earlier hour, or naming the forenoon where by law defendant has the entire day, is alike immaterial. Armstrong *v.* Middlestadt, 22 Nebr. 711, 36 N. W. 151; Titus *v.* Whitney, 16 N. J. L. 85, 31 Am. Dec. 228.

15. Phillips *v.* Lemoyne, 4 Ark. 144; Rogers *v.* Miller, 5 Ill. 333.

16. Bell *v.* Austin, 13 Pick. (Mass.) 90.

17. Condon *v.* Barr, 47 N. J. L. 113, 54 Am. Rep. 121.

18. McKnight *v.* Grant, 13 Ida. 629, 92 Pac. 989, 121 Am. St. Rep. 287; Ralph *v.* Lomer, 3 Wash. 401, 28 Pac. 760.

The statutory language need not be used if other words of equivalent import are employed. Hurford *v.* Baker, 17 Nebr. 443, 23 N. W. 339.

An obvious clerical error in stating the time will not render the summons open to attack otherwise than on direct appeal from the judgment. Kelly *v.* Harrison, 69 Miss. 856, 12 So. 261.

19. Lawyer Land Co. *v.* Steel, 41 Wash. 411, 83 Pac. 896, where a summons, served by publication upon a defendant outside the state, contained the clause requiring defendant to appear in twenty days after service if service should be made within the state, and it was held that this clause was mere surplusage and did not affect the summons.

20. Wright *v.* Wilmot, 22 Tex. 398; Davidson *v.* Heidenheimer, 2 Tex. Unrep. Cas. 490.

21. Maires *v.* Smith, 16 N. J. L. 360.

22. Hochlander *v.* Hochlander, 73 Ill. 618; Miller *v.* Handy, 40 Ill. 448; Elee *v.* Wait, 28 Ill. 70; Hildreth *v.* Hough, 20 Ill. 331; Calhoun *v.* Webster, 3 Ill. 221. *Contra*, Posey *v.* Branch, 2 McMull. (S. C.) 338 (holding that where a writ was tested March 4, 1842, and was made returnable to the third Monday in March next, the return-day might be taken to indicate the third Monday of the test of March 4, 1842, or the third Monday next after the fourth of March, 1842); Point Pleasant *v.* Greenlee, 63 W. Va. 207, 60 S. E. 601 (holding that a writ tested on the first day of August and made returnable on "the first Monday in August next" was not absolutely void under the statute requiring all writs to be returnable within ninety days, as the error was self-correcting, and the writ should be construed to mean the first Monday of the month therein mentioned).

23. See the cases cited *infra*, this note.

Where summons is to be made returnable before the clerk of court, it is error to make it returnable to the judge. Piercy *v.* Watson, 118 N. C. 976, 24 S. E. 659 (holding that such a summons was irregular but not void); Johnson *v.* Judd, 63 N. C. 498; Swepson *v.* Harvey, 63 N. C. 106; Smith *v.* McIlwaine, 63 N. C. 95.

24. Smith *v.* Bradley, 1 Root (Conn.) 148.

25. See the statutes of the several states. And see the following cases:

California.— Lyman *v.* Milton, 44 Cal. 630.

Illinois.— Great Northern Hotel Co. *v.* Farrand, etc., Organ Co., 90 Ill. App. 419.

Kentucky.— Bryant *v.* Mack, 41 S. W. 774, 19 Ky. L. Rep. 744. But *compare* Stern *v.* Sedden, 4 Bibb 178.

Maine.— Jones *v.* Sutherland, 73 Me. 157.

Texas.— Heath *v.* Fraley, 50 Tex. 209; Portwood *v.* Wilburn, 33 Tex. 713; Rodgers *v.* Green, 33 Tex. 661; Little *v.* Marler, 8 Tex. 107. See Hunt *v.* Wiley, 1 Tex. App. Civ. Cas. § 1214.

The abbreviation, "etc.," employed after the name of plaintiff, does not import that there are other plaintiffs. Brubaker *v.* Poage, 1 T. B. Mon. (Ky.) 123.

The omission of defendant's name in one part of the writ is cured by its presence in another part. Guinan *v.* Waco, 22 Tex. Civ. App. 445, 54 S. W. 611.

Process issued to another county, against a non-resident defendant, need not name the

named should be given.[26] If a middle initial is used it should be correct, but the insertion of a wrong initial letter between the christian and surname of a party plaintiff will not render the judgment void, but it is at most reversible only on direct appeal.[27] A mere inaccuracy in the spelling of a party's name will not vitiate the process beyond the power of amendment, where it does not appear to have actually misled,[28] unless the error is so great that an entirely different person may be said to be named.[29] A variance in the name of a party to a writ where it is

other defendants. McCormick Harvesting Mach. Co. *v.* Cummins, 59 Nebr. 330, 80 N. W. 1049; Hobson *v.* Cummins, 57 Nebr. 611, 78 N. W. 295. And see Hartley *v.* Tunstall, 3 Ark. 119, holding that the writ to each county must contain the names of no defendants other than those who reside in that county.

Where there are several defendants the names of all must be stated in the citation issued to each. Bendy *v.* Boyce, 37 Tex. 443; Crosby *v.* Lum, 35 Tex. 41; Burleson *v.* Henderson, 4 Tex. 49; Wadley *v.* Johnson, 2 Tex. Unrep. Cas. 739; Owsley *v.* Paris Exch. Bank, 1 Tex. Unrep. Cas. 93.

Substitution.— Where the action is commenced by the filing of the complaint, a substitution because of the original plaintiff's death may properly be stated in the summons. Bunker *v.* Taylor, 13 S. D. 433, 83 N. W. 555.

Person deceased.— Process addressed to a person as if living cannot be served upon his personal representatives. Matter of Georgi, 35 Misc. (N. Y.) 685, 72 N. Y. Suppl. 431.

Defendant may be described under an alias. — Duncan *v.* McAffee, 3 Ill. 559.

Summons to answer plaintiff "or his attorney" has been held sufficient on the ground that the last-mentioned words might be rejected as surplusage. Brewer *v.* Sibley, 13 Metc. (Mass.) 175.

An entire omission of defendant's name in the process is at most an amendable defect, where the declaration or complaint is annexed, as required by statute, and correctly names defendant. Smith *v.* Morris, 29 Ga. 339.

26. See cases cited *infra*, this note.

Description by initial of christian name is a misnomer. Rush *v.* Kennedy, 7 Dowl. P. C. 199, 3 Jur. 198, 8 L. J. Exch. 85, 4 M. & W. 586. In Herf *v.* Shulze, 10 Ohio 263, the use of merely the initials of plaintiff in the writ was held to be ground for abatement. But *compare* Milburn *v.* Smith, 11 Tex. Civ. App. 678, 33 S. W. 910, holding a citation served by publication in attachment sufficient, although it designated defendant by his initials. The full name should be given, even though the party may have been described by the initial of his christian name in the transaction. Stoll *v.* Griffith, 41 Wash. 37, 82 Pac. 1025. If the party's full name be once given, the process is not defective if in a subsequent place the full name is not stated. Missouri, etc., R. Co. *v.* Bodie, 32 Tex. Civ. App. 168, 74 S. W. 100. The use of "Sam." for "Samuel" will not vitiate the summons under a statute declaring that service of summons shall not be set aside for defects not affecting defendant's substantial rights. Rich *v.* Collins, 12 Colo. App. 511, 56 Pac. 207.

The reason for insisting strongly upon correctness in the names of parties is that otherwise there would be considerable difficulty in establishing a plea of former recovery. Morgan *v.* Woods, 33 Ind. 23.

Blank as to christian name.— The officer serving may be given the process, with defendant's christian name blank, and authorized to ascertain and insert it. Osgood *v.* Norris, 21 N. H. 435. An omission of any christian name, with no amendment at any stage, was considered a fatal defect in Houser *v.* Jones, 1 Phila. (Pa.) 394.

When a wife is a party plaintiff with her husband her name must be stated, and it is not sufficient that the citation recite that a person named "*et uxor* are plaintiffs." Higgins *v.* Shepard, (Tex. Civ. App. 1908) 107 S. W. 79.

In Louisiana the code of practice does not require defendant's name and surname to appear at full length in the citation. Lallande *v.* Terrill, 12 La. 7.

Addition or description.— A writ naming defendant a blacksmith was held sufficient, although he claimed he was a nailer and not a blacksmith. Blower *v.* Campbell, Quincy (Mass.) 8.

27. Morgan *v.* Woods, 33 Ind. 23. In Bowen *v.* Mulford, 10 N. J. L. 230, Chief Justice Ewing said: "The introduction of a letter or name between the christian and surname is very common, for the purpose of distinction; and in the use and understanding of the people at large, and therefore in presumption of fact, John Mulford and John S. Mulford, are not the same but different persons. Hence the variance was material. To sanction it, might open the door to serious mischief."

28. Morgan *v.* Woods, 33 Ind. 23; Gulf, etc., R. Co. *v.* James, 48 Fed. 148, 1 C. C. A. 53.

An abbreviation of defendant's surname, which the court considered could not have misled, was held immaterial in Cooke *v.* Shoemaker, 8 Kulp (Pa.) 212.

An error in plaintiff's christian name is cured under the Illinois statute when rightfully stated in the declaration. Sidway *v.* Marshall, 83 Ill. 438.

29. Neal-Millard Co. *v.* Owens, 115 Ga. 959, 42 S. E. 266; People *v.* Dunn, 27 Misc. (N. Y.) 71, 58 N. Y. Suppl. 147; McGill *v.* Weil, 10 N. Y. Suppl. 246; Southern Pac. R. Co. *v.* Block, 84 Tex. 21, 19 S. W. 300. See also Miller *v.* Flewelling, 17 Can. L. T. Occ. Notes 265.

idem sonans with the real name is not material.[30] If the name of a defendant is unknown, a fictitious name may be given in the process, adding a statement that it is fictitious, where such a proceeding is permitted by statute,[31] and in some jurisdictions a description should be added tending to identify the person intended.[32] An error in the name of a co-defendant offers no ground of objection to a defendant rightly named and served.[33] In any case, if the party plaintiff or defendant be actually before the court, as by plaintiff bringing suit or by defendant being actually served, the name by which he sues or is sued is wholly immaterial, unless a mistake therein be used as a ground for a plea in abatement.[34] The fact that defendants are named in the alternative is fatal.[35]

8. Statement of Nature of Action. Whether or not a summons should contain a statement indicating the nature of the cause of action is a matter depending upon the provisions of the statute; some statutes make no such requirement,[36] others

A writ was upheld which entirely omitted defendant's surname, but stated his christian name, which was an unusual one, where the full name appeared in the petition served. Crain *v.* Griffis, 14 Tex. 358.

30. People *v.* Hilderbrand, 71 Mich. 313, 38 N. W. 919; Tibbets *v.* Kiah, 2 N. H. 557; Petrie *v.* Woodworth, 3 Cai. (N. Y.) 219; Webb *v.* Lawrence, 1 Cromp. & M. 806, 2 Dowl. P. C. 81, 3 Tyrw. 906.

Especially when the summons is accompanied by other papers in the action in which defendant's name is correctly spelled. Baldwin *v.* McMichael, 68 Ga. 628; Sidway *v.* Marshall, 83 Ill. 438; Holman *v.* Goslin, 63 N. Y. App. Div. 204, 71 N. Y. Suppl. 197.

31. Enewold *v.* Olsen, 39 Nebr. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573; Lenehan *v.* St. Francis Xavier College, 30 Misc. (N. Y.) 378, 63 N. Y. Suppl. 1033 [*affirmed* in 51 N. Y. App. Div. 535, 64 N. Y. Suppl. 868]; People *v.* Dunn, 27 Misc. (N. Y.) 71, 58 N. Y. Suppl. 147; Waterbury *v.* Mather, 16 Wend. (N. Y.) 611.

Sufficiency.— A writ directing an officer "to summon the unknown children" of certain persons is not a valid summons, under Ky. Civ. Code, § 66, which requires that the writ "shall command the officer to whom it is directed to summon the defendant named therein." Kellar *v.* Stanley, 86 Ky. 240, 5 S. W. 477, 9 Ky. L. Rep. 388. Where the process sought to include as defendants the unknown heirs of a deceased owner, the addition of the words "if any" to their designation does not invalidate the process. Abbott *v.* Curran, 98 N. Y. 665.

A citation to the unknown heirs of a decedent does not include his wife. Heidenheimer *v.* Loring, 6 Tex. Civ. App. 560, 26 S. W. 99.

32. Hilton *v.* Sinsheimer, 5 N. Y. Civ. Proc. 355, holding that this description need not be added when defendant is personally served.

33. Gunter *v.* McEntire, (Tex. Civ. App. 1893) 24 S. W. 590.

34. *California.*— Welsh *v.* Kirkpatrick, 30 Cal. 202, 89 Am. Dec. 85.

Illinois.— Hammond *v.* People, 32 Ill. 446, 83 Am. Dec. 286; Guinard *v.* Heysinger, 15 Ill. 288.

Maryland.— Baltimore First Nat. Bank *v.* Jaggers, 31 Md. 38, 100 Am. Dec. 53.

Massachusetts.— Langmaid *v.* Puffer, 7 Gray 378.

Missouri.— Parry *v.* Woodson, 33 Mo. 347, 84 Am. Dec. 51.

New York.— Stuyvesant *v.* Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562.

Oregon.— Foshier *v.* Narver, 24 Oreg. 441, 34 Pac. 21, 41 Am. St. Rep. 874.

South Carolina.— Genobles *v.* West, 23 S. C. 154.

Vermont.— *Ex p.* Kellogg, 6 Vt. 509.

Canada.— Protestant Bd. of School Com'rs *v.* Cook, 2 Quebec Pr. 226.

Statement of rule.— No better statement of this principle can be found than the following, by Justice Cowen, in Waterbury *v.* Mather, 16 Wend. (N. Y.) 611, 613: "If the parties are in truth before the court, whether plaintiff or defendant, plaintiffs or defendants, if all or any of them be misnamed, whether they be corporate or natural persons, the only way to make the objection good is by a plea in abatement. The persons being actually before the court, by their own consent or otherwise, no matter by what name they choose to call themselves, the name, as well as everything else, becomes *rem judicatam*. The court have possession of the persons and the thing, and by whatever names the former may be called, it is enough if they can be intelligibly connected by evidence as parties in interest and participators in the litigation. They are then tied up and concluded, and in all future litigation may be connected with the subject matter by proper averments. In the immediate suit, and on the immediate trial, all the court and jury have to do, is to see that in truth the real parties are before them. It may sometimes be a troublesome question of identity; still it is, in general, a mere formal dispute of no real consequence; and an abatement is allowed for no reason but to avoid circuity in setting up the suit as a future bar."

35. Alexander *v.* Leland, 1 Ida. 425.

36. Stanquist *v.* Hebbard, 122 Cal. 268, 54 Pac. 841; Eddy *v.* Lafayette, 163 U. S. 456, 16 S. Ct. 1082, 41 L. ed. 225 (construing Arkansas statute); Gulf, etc., R. Co. *v.* James, 48 Fed. 148, 1 C. C. A. 53. See Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,675, 10 Blatchf. 524, holding that a writ which requires defendant to answer to plaintiff in a plea of trespass, and also to a certain bill of plaintiff against defendant,

do.[37] If the statute requires such a statement it is mandatory.[38] A brief and general characterization, avoiding detail, is usually held a sufficient compliance with the statute.[39]

for damages, in a sum named, for deceit and breach of promise of marriage, sets forth, in the action for deceit, an action in trespass on the case, and the rest of the *ac etiam* clause may be regarded as explanatory of the subject-matter to which the deceit was applied, or may be rejected as surplusage; and therefore the writ is not incongruous.

Under former statutes in California the summons was required to state the cause and general nature of the action. Bewick *v.* Muir, 83 Cal. 368, 33 Pac. 389; People *v.* Greene, 52 Cal. 577; King *v.* Blood, 41 Cal. 314.

37. Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512; Moody *v.* Taylor, 12 Iowa 71; Colby *v.* Dow, 18 N. H. 557; Stoddard *v.* Cockran, 6 N. H. 160; Ross *v.* Ward, 16 N. J. L. 23; Silkman *v.* Boiger, 4 E. D. Smith (N. Y.) 236; Bray *v.* Andreas, 1 E. D. Smith (N. Y.) 387; Cooper *v.* Chamberlain, 2 Code Rep. (N. Y.) 142.

Where the complaint is served with the summons it is sometimes provided that the summons need not contain a statement of the cause of action. Swem *v.* Newell, 19 Colo. 397, 35 Pac. 734.

38. Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512; Sawyer *v.* Robertson, 11 Mont. 416, 28 Pac. 456; Boyle *v.* Victoria Yukon Trading Co., 8 Brit. Col. 352.

39. *California.*— A statement "of the nature of the action in general terms" is sufficiently made by reciting that the action is brought to recover money and to foreclose liens. Bewick *v.* Muir, 83 Cal. 368, 23 Pac. 389.

Colorado.— "The cause and general nature of the action" is sufficiently shown by declaring that it is brought to recover a sum stated, evidenced by the promissory note more fully set forth in the complaint. Barndollar *v.* Patton, 5 Colo. 46. So, stating the amount sued for and that it was due on an insurance policy described in the complaint. Tabor *v.* Goss, etc., Mfg. Co., 11 Colo. 419, 18 Pac. 537. But a summons in an action for negligence, causing personal injuries, is fatally defective when it merely states that the action is brought to recover a stated amount, due from defendant to plaintiff on certain damages claimed to have been incurred by plaintiff by reason of the negligent operating of defendant railroad, and judgment by default is void. Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512.

Indiana.— A summons need not fully inform defendant of the nature or character of the action; a statement that the action is brought "to set aside satisfaction of judgment" is sufficient to uphold a judgment on default which also directs a sale under the previous judgment. Freeman *v.* Paul, 105 Ind. 451, 5 N. E. 754.

Iowa.— Stating that a specified sum is due on a promissory note is sufficient to apprise indorsers of the nature of the claim. Davis *v.* Burt, 7 Iowa 56. Notice of a claim on contract against two is sufficient to sustain a judgment against one. Padden *v.* Clark, 124 Iowa 94, 99 N. W. 152. The original notice is not to set forth the cause of action in detail, but it is sufficient if it informs defendant with reasonable certainty of the remedy that plaintiff seeks. Harkins *v.* Edwards, 1 Iowa 296. See also Hickman *v.* Chambers, 10 Iowa 301, holding that where a petition claimed judgment against defendants for the foreclosure of a mortgage, and against one of them on a note executed by him, and the original notice claimed judgment against them on a note and a foreclosure of a mortgage to secure payment of the same, the variance was not sufficient to quash the notice.

Maryland.— The "purpose" for which defendant is summoned is sufficiently stated in a summons requiring him to "answer to an action at the suit of" plaintiff. Ritter *v.* Offutt, 40 Md. 207.

Montana.— The "cause and general nature of the action" sufficiently appears by a statement that it is brought to recover a stated sum, the value of stated personal property belonging to plaintiff and taken possession and disposed of by defendant. Sawyer *v.* Robertson, 11 Mont. 416, 28 Pac. 456.

Nebraska.— Defendant is sufficiently apprised of the "nature of the claim against him" by being summoned to answer plaintiff's bill of particulars, wherein they claim a stated sum as due on a promissory note. McPherson *v.* Beatrice First Nat. Bank, 12 Nebr. 202, 10 N. W. 707.

Rhode Island.— Describing the action as "of the case, for trover and conversion of certain personal property" is sufficient. Slocomb *v.* Powers, 10 R. I. 255.

Texas.— Old Alcalde Oil Co. *v.* Ludgate, (Civ. App. 1905) 85 S. W. 453. The statute does not design that the statement in the summons supply the place of the statement in the pleading. Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808. Nevertheless a requirement that the complaint be served with the summons does not override a requirement that the summons shall state the nature of the demand. Delaware Western Constr. Co. *v.* Farmers, etc., Nat. Bank, 33 Tex. Civ. App. 658, 77 S. W. 628. The nature of plaintiff's demand is sufficiently shown by a recital that it is a note, of specified date and amount, and on which defendant is liable. McAnally *v.* Vickry, (Tex. Civ. App. 1904) 79 S. W. 857; Houston, etc., R. Co. *v.* Erving, 2 Tex. App. Civ. Cas. § 122; Hunt *v.* Wiley, 1 Tex. App. Civ. Cas. § 1214. A statement that it is on a note, and for foreclosure of a mortgage, is sufficient. Loungeway *v.* Hale, 73 Tex. 495, 11 S. W. 537. If notes are stated to have been made and delivered by defendants to plaintiffs, it is not necessary to also state that plaintiffs are the holders

9. STATEMENT OF THE RELIEF SOUGHT. Process is usually required to apprise defendant of the result consequent on his default,[40] as, in actions on contract for the recovery of money only, that if defendant fail to appear, judgment will be taken against him for a specified sum,[41] or, in other actions, that in such case plaintiff will apply to the court for the relief demanded in the complaint,[42] or that in such case default will be entered against him.[43] A substantial compliance with the statutory requirement is always sufficient.[44] It is sometimes required merely that the summons state the sum of money or other relief demanded,[45] or that there

of the notes, or that they ask for a money judgment. Hinzie *v.* Kempner, 82 Tex. 617, 18 S. W. 659. A statement that the action was "trespass to try title and remove cloud from title, cancel deed, and for damages" is insufficient. Ford *v.* Baker, (Civ. App. 1896) 33 S. W. 1036. A statement that the action was for taxes does not support a default judgment foreclosing a tax lien. Netzorg *v.* Green, 26 Tex. Civ. App. 119, 62 S. W. 789.

Washington.— A statement that the action is brought to recover money due on a note particularly described, and to foreclose a mortgage given to secure it, is a sufficient statement of the nature of the action. De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

See 40 Cent. Dig. tit. "Process," § 28.

40. See the statutes of the several states. And see the cases cited *infra*, this and following notes.

The omission to state the penalty of default as required by statute was held a mere irregularity in Indian Territory, by the United States circuit court of appeals. Ammons *v.* Brunswick-Balke-Colender Co., 141 Fed. 570, 72 C. C. A. 614.

41. Gundry *v.* Whittlesey, 19 Wis. 211; Chamberlain *v.* Mensing, 47 Fed. 202.

Effect of omission.— A total omission to state any amount where the statute requires it may be a fatal defect. Farris *v.* Walter, 2 Colo. App. 450, 31 Pac. 231; Gundry *v.* Whittlesey, 19 Wis. 211. An omission to state the amount will not invalidate the summons if the complaint is referred to therein and served at the same time. Burkhardt *v.* Haycox, 19 Colo. 339, 35 Pac. 730; Prezeau *v.* Spooner, 22 Nev. 88, 35 Pac. 514; Higley *v.* Pollock, 21 Nev. 198, 27 Pac. 895.

Failure to insert ad damnum clause in a writ in action of covenant broken, with counts for money paid, etc., is fatal. Deveau *v.* Skidmore, 47 Conn. 19.

In New York under Code Proc. § 129, subd. 1, it was provided that in actions arising on contract for the recovery of money only, plaintiff should insert in the summons a notice that he would take judgment for a sum specified therein if defendant failed to answer the complaint. For cases decided under this provision see Mason *v.* Hand, 1 Lans. 66; West *v.* Brewster, 1 Duer 647; New York *v.* Lyons, 1 Daly 296; Montegriffo *v.* Musti, 1 Daly 77; Luling *v.* Stanton, 2 Hilt. 538; Salters *v.* Ralph, 15 Abb. Pr. 273; Levy *v.* Nicholas, 15 Abb. Pr. 63 note; Hartshorn *v.* Newman, 15 Abb. Pr. 63; Norton *v.* Cary, 14 Abb. Pr. 364, 23 How. Pr. 469; Dunn *v.* Bloomingdale, 6 Abb. Pr. 340 note; Johnson *v.* Paul, 6 Abb. Pr. 335 note, 14 How. Pr. 454; Tuttle *v.* Smith, 6 Abb. Pr. 329, 14 How. Pr. 395; Davis *v.* Bates, 6 Abb. Pr. 15; People *v.* Bennett, 5 Abb. Pr. 384 [*affirmed* in 6 Abb. Pr. 343]; McDonald *v.* Walsh, 5 Abb. Pr. 68; Champlin *v.* Deitz, 37 How. Pr. 214; Cobb *v.* Dunkin, 19 How. Pr. 164 [*reversing* 17 How. Pr. 97]; Albany County Excise Com'rs *v.* Classon, 17 How. Pr. 193; Kelsey *v.* Covert, 15 How. Pr. 92; Dunn *v.* Bloomingdale, 14 How. Pr. 474; McNeff *v.* Short, 14 How. Pr. 463; Ridder *v.* Whitlock, 12 How. Pr. 208; Baxter *v.* Arnold, 9 How. Pr. 445; Hyde Park Cemetery Bd. *v.* Teller, 8 How. Pr. 504; Hewitt *v.* Howell, 8 How. Pr. 346; Travis *v.* Tobias, 7 How. Pr. 90; Field *v.* Morse, 7 How. Pr. 12; Flynn *v.* Hudson River R. Co., 6 How. Pr. 308; Trapp *v.* New York, etc., R. Co., 6 How. Pr. 237, 1 Code Rep. N. S. 384; Clor *v.* Mallory, 1 Code Rep. 126; Leopold *v.* Poppenheimer, 1 Code Rep. 39; Diblee *v.* Mason, 1 Code Rep. 37, 2 Edm. Sel. Cas. 20.

42. Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 188, 6 Pac. 512; U. S. *v.* Turner, 50 Fed. 734; Chamberlain *v.* Mensing, 47 Fed. 202.

43. McKee *v.* Harris, 1 Iowa 364.

44. Burkhardt *v.* Haycox, 19 Colo. 339, 35 Pac. 730; Kimball *v.* Castagnio, 8 Colo. 525, 9 Pac. 488; White *v.* Iltis, 24 Minn. 43; Hotchkiss *v.* Cutting, 14 Minn. 537; Schuttler *v.* King, 12 Mont. 149, 30 Pac. 25; Miller *v.* Zeigler, 3 Utah 17, 5 Pac. 518. See Leman *v.* Saunders, 72 Ga. 202; Kleckley *v.* Leyden, 63 Ga. 215.

Illustrations.— If the statute requires that the summons shall notify defendant that plaintiff will take judgment for any money or damages demanded in the complaint, or will apply to the court for any other relief demanded, the summons may follow the statute and state the two alternatives or may demand only damages, or only equitable relief. Granger *v.* Sherriff, 133 Cal. 416, 65 Pac. 873; Stanquist *v.* Hebbard, 122 Cal. 268, 54 Pac. 841. A notice in the summons that in case defendant fails to appear plaintiff "will take judgment against you for the relief demanded in his complaint" is a substantial compliance with the statute requiring a notice that plaintiff "will apply to the court for the relief demanded in the complaint." Clark *v.* Palmer, 90 Cal. 504, 27 Pac. 375. See also Behlow *v.* Shorb, 91 Cal. 141, 27 Pac. 546.

45. Farris *v.* Walter, 2 Colo. App. 450, 31 Pac. 231; Freeman *v.* Paul, 105 Ind. 451, 5 N. E. 754. See Moody *v.* Taylor, 12 Iowa 71. If the relief sought consists of two diverse matters, both must be stated. Miles *v.* Kinney, (Tex. 1888) 8 S. W. 542.

be indorsed upon the summons the amount sued for.[46] The petition or statement of plaintiff's claim is sometimes required to be annexed to the process, in which case a mere folding inside of the writ is not sufficient.[47]

10. TESTE. The teste of process is the concluding clause commencing: "Witness the Honorable A. B., judge of said Circuit Court, etc.," or as the case may be.[48] It is generally considered a mere matter of form,[49] although it is frequently provided for in the state constitutions,[50] its only purpose being to give character and dignity to the process.[51] The teste is by some statutes required to be in the name of the judge,[52] by others in the name of the clerk.[53] Where it is provided that the summons may be subscribed by plaintiff to his attorney, and it is not required to issue from court, it need not be tested in the name of the presiding judge.[54] A writ must be tested in term-time.[55] A process cannot bear teste of a term after it issues, although it is returnable at a subsequent term.[56] Where a writ is sued out in vacation it must be tested as of the previous term.[57] The teste of a writ is not conclusive as to the time of its issuance.[58]

11. DATE. The date of the writ is not a material part of it,[59] and it may be entirely omitted without invalidating the writ.[60] A statutory requirement as to the date of process is directory merely.[61] While the writ is presumed to have been issued upon the day of its date,[62] the presumption is not a conclusive one, and the issuance at another time may be established by parol evidence,[63] even though such

In the absence of statutory requirement, the amount need not be stated. Marstellar *v.* Marstellar, 93 Pa. St. 350.

46. See *infra*, I, D, 14.

47. Ballard *v.* Bancroft, 31 Ga. 503; Saco *v.* Hopkinton, 29 Me. 268.

48. Bouvier L. Dict.

49. *Georgia.*— Jordan *v.* Porterfield, 19 Ga. 139, 63 Am. Dec. 301.

Illinois.— Norton *v.* Dow, 10 Ill. 459.

Maine.— Converse *v.* Damariscotta Bank, 15 Me. 431.

Massachusetts.— Hawkes *v.* Kennebeck, 7 Mass. 461.

New Hampshire.— Reynolds *v.* Damrell, 19 N. H. 394.

New York.— Brink *v.* Fulton, 1 Cow. 41.

South Carolina.— Charleston *v.* Schmidt, 11 Rich. 343, 345, where it is said: "The test is regarded as mere matter of form and the commencement of the suit is dated from the lodgment of the process."

England.— McNay *v.* Alt, 66 L. T. Rep. N. S. 832.

But *compare* Riggs *v.* Bagley, 2 Greene (Iowa) 383; Buchannan *v.* Kennon, 1 N. C. 530; Wimbish *v.* Wofford, 33 Tex. 109, where the writ was held void because tested in the name of the deputy instead of the chief clerk.

50. Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352. See also Ripley *v.* Warren, 2 Pick. (Mass.) 592, 594, where it was said: "Now nothing can be more precisely mere matter of form than the teste of a writ, although by some unaccountable means it was thought important enough to be provided for in the constitution of the State."

51. Reynolds *v.* Damrell, 19 N. H. 394.

52. Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352; U. S. *v.* Turner, 50 Fed. 734. See also Sapp *v.* Parrish, 3 Ga. App. 234, 59 S. E. 821 (holding that process bearing teste in the name of the judge is not void, although his official title is not also given); Howerter *v.* Kelly, 23 Mich. 337 (holding that where a vacancy has occurred in the office of circuit judge, and the governor has designated another to hold the term, process should be tested in the name of the latter, although his acceptance has not been signified to the clerk).

53. Norton *v.* Dow, 10 Ill. 459; Buchannan *v.* Kennon, 1 N. C. 530; Pendleton *v.* Smith, 1 W. Va. 16. See East *v.* Parks, 4 Greene (Iowa) 80.

54. Johnson *v.* Hamburger, 13 Wis. 175; Porter *v.* Vandercook, 11 Wis. 70.

55. Potter *v.* White, 3 Harr. (Del.) 329.

56. Hurst *v.* Strong, 1 How. (Miss.) 123.

57. Potter *v.* White, 3 Harr. (Del.) 329.

58. Allen *v.* Smith, 12 N. J. L. 159.

59. Kelley *v.* Mason, 4 Ind. 618.

60. Rogers *v.* Farnham, 25 N. H. 511; Lyle *v.* Longley, 6 Baxt. (Tenn.) 286; Andrews *v.* Ennis, 16 Tex. 45; Ambler *v.* Leach, 15 W. Va. 677.

61. Mitchell *v.* Morris Canal, etc., Co., 31 N. J. L. 99; Swan *v.* Roberts, 2 Coldw. (Tenn.) 153. See also Simmerman *v.* Clevenger, 9 N. J. L. J. 213.

62. *Arkansas.*—Jackson *v.* Bowling, 10 Ark. 578; McLarren *v.* Thurman, 8 Ark. 313.

Illinois.— Rural Press Co. *v.* Chicago Electrotype, etc., Co., 107 Ill. App. 501.

Maine.— Bragg *v.* Greenleaf, 14 Me. 395.

New Hampshire.— Society for Propagating Gospel *v.* Whitcomb, 2 N. H. 227.

North Carolina.— Currie *v.* Hawkins, 118 N. C. 593, 24 S. E. 476.

Vermont.— Chapman *v.* Goodrich, 55 Vt. 354.

A writ dated on Sunday is presumptively void. Hanson *v.* Shackelton, 4 Dowl. P. C. 48, 1 Harr. & W. 342.

The indorsement by the sheriff of the time of its receipt does not rebut this presumption. Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

63. *California.*— Hibernia Sav., etc., Soc. *v.*

evidence may be in contradiction of the date which appears on the face of the writ as the date thereof.[64]

12. Signature. Unless the statute authorizes plaintiff or his attorney to issue process,[65] process by which suit is instituted must bear the official signature of some officer authorized to issue the same,[66] usually the clerk of the court;[67] but the clerk may authorize his signature to be made by another, or adopt it as his own after it has been made,[68] or he may adopt a printed signature.[69] It is sufficient if the clerk sign with the initials only of his christian name.[70] Where the teste contained the signature of the clerk, this was held a sufficient signing of the writ.[71] Signature by a deputy should be in the name of the clerk.[72] When plaintiff, or his attorney, may sign the summons, a printed subscription is held sufficient.[73] There is a difference of opinion among courts as to the effect of a want of proper signature,

Churchill, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73.

Maine.— Trafton *v.* Rogers, 13 Me. 315.

New Hampshire.— Robinson *v.* Burleigh, 5 N. H. 225.

New Jersey.— Allen *v.* Smith, 12 N. J. L. 159.

New York.— Porter *v.* Kimball, 3 Lans. 330.

A further reference in the writ to the year of the independence of the United States may be considered in establishing the true date (Gilbert *v.* South Carolina Interstate, etc., Exposition Co., 113 Fed. 523), or a like reference to the existence of the state may be so considered (Bridges *v.* Ridgley, 2 Litt. (Ky.) 395).

A post-dated writ is not void for that reason. Mitchell *v.* Morris Canal, etc., Co., 31 N. J. L. 99.

64. Trafton *v.* Rogers, 13 Me. 315; Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661; Robinson *v.* Burleigh, 5 N. H. 225.

65. Rand *v.* Pantagraph Stationery Co., 1 Colo. App. 270, 28 Pac. 661; Johnson *v.* Hamburger, 13 Wis. 175. See also *supra*, I, C, 5.

66. Andrus *v.* Carroll, 35 Vt. 102, holding that the signature of the authority issuing a writ merely to the minute of recognizance at the foot of the writ is not a sufficient signature of the writ.

67. *Arkansas.*— Powers *v.* Swigart, 8 Ark. 363.

Connecticut.— See Tracy *v.* Post, 1 Root 191 (holding that an alderman has no right to sign any writs but such as are returnable before the city court, the mayor, or an alderman); Windham *v.* Hampton, 1 Root 175 (holding that in an action by a town the writ of summons may be signed by a justice of the peace who is a resident of the town and also one of the plaintiffs).

Kansas.— Lindsay *v.* Kearny County, 56 Kan. 630, 44 Pac. 603.

Montana.— Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

South Carolina.— Smith *v.* Affanassieffe, 2 Rich. 334.

Texas.— Caufield *v.* Jones, 18 Tex. Civ. App. 721, 45 S. W. 741.

United States.— Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252; Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305; Peaslee *v.* Haberstro, 19 Fed. Cas. No. 10,884, 15 Blatchf. 472, 8 Reporter 486.

See 40 Cent. Dig. tit. "Process," § 34.

A magistrate cannot sign process in his own case, although he is authorized to sign and issue writs. Doolittle *v.* Clark, 47 Conn. 316.

68. Louisville, etc., R. Co. *v.* Banks, 33 S. W. 627, 17 Ky. L. Rep. 1065; Richardson *v.* Bachelder, 19 Me. 82; Stevens *v.* Ewer, 2 Metc. (Mass.) 74; Gamble *v.* Trahen, 3 How. (Miss.) 32.

General authority given by the clerk to an attorney to sign writs is ineffective, and a writ signed by the attorney is a nullity, which cannot be validated by the clerk's subsequent ratification. Gardner *v.* Lane, 14 N. C. 53.

69. Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777; Littleton *v.* Marshall, 8 Ohio S. & C. Pl. Dec. 672, 6 Ohio N. P. 509.

70. Bishop Hill Colony *v.* Edgerton, 26 Ill. 54.

71. Wibright *v.* Wise, 4 Blackf. (Ind.) 137; Botts *v.* Williams, 5 J. J. Marsh. (Ky.) 62. *Contra*, see Smith *v.* Hackley, 44 Mo. App. 614.

72. Felder *v.* Meredith, Walk. (Miss.) 447; Wimbish *v.* Wofford, 33 Tex. 109; Pendleton *v.* Smith, 1 W. Va. 16.

Signature by the deputy clerk, as such, is not invalid. Calender *v.* Olcott, 1 Mich. 344; Walke *v.* Circleville Bank, 15 Ohio 288; Johnson *v.* Nash, 20 Vt. 40.

73. Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841 [*overruling* Ames *v.* Schurmeier, 9 Minn. 221]; Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62; New York *v.* Eisler, 2 N. Y. Civ. Proc. 125; Mutual L. Ins. Co. *v.* Ross, 10 Abb. Pr. (N. Y.) 260 note; Mezchen *v.* More, 54 Wis. 214, 11 N. W. 534.

Signature by agent.— Plaintiff may authorize the signature by an attorney in fact. Tatum *v.* Allison, 31 Ga. 337; Hotchkiss *v.* Cutting, 14 Minn. 537. Signature by the agent, as such, is an irregularity, but the process is sufficient to confer jurisdiction and may be amended. Weare *v.* Slocum, 1 Code Rep. (N. Y.) 105.

One attorney, or firm, must sign for all the plaintiffs. Jones *v.* Conlon, 48 Misc. (N. Y.) 172, 95 N. Y. Suppl. 255.

some holding that it renders the process absolutely void;[74] but the better rule seems to be that the process is thereby rendered voidable only.[75]

13. Seal. Process which issues out of a court is almost invariably required by statute to be under the seal of that court.[76] Whether an omission of the seal in such case invalidates the writ is a question upon which there is a conflict of authority, some cases holding that it renders the writ void,[77] others that it merely renders it voidable.[78] If there is no official court seal, the clerk may affix any seal as that of the court.[79] Where process issues from the party or his attorney it need not be under the seal of the court.[80]

74. *Illinois.*— Hernandez *v.* Drake, 81 Ill. 34.

Kansas.— Lindsay *v.* Kearny County, 56 Kan. 630, 44 Pac. 603.

Montana.— Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

New Hampshire.—Reynolds *v.* Damrell, 19 N. H. 394.

Texas.— Caufield *v.* Jones, 18 Tex. Civ. App. 721, 45 S. W. 741.

United States.— Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305; Peaslee *v.* Haberstro, 19 Fed. Cas. No. 10,884, 15 Blatchf. 472, 8 Reporter 486.

See 40 Cent. Dig. tit. "Process," § 34.

75. *Arkansas.*— Jett *v.* Shinn, 47 Ark. 373, 1 S. W. 693; Whiting *v.* Beebe, 12 Ark. 421.

Georgia.— Tatum *v.* Allison, 31 Ga. 337.

Indiana.— Wibright *v.* Wise, 4 Blackf. 137.

Kentucky.— Botts *v.* Williams, 5 J. J. Marsh. 62.

Massachusetts.— Austin *v.* Lamar F. Ins. Co., 108 Mass. 338.

Minnesota.— Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841.

New York.—Hill *v.* Haynes, 54 N. Y. 153; Barnard *v.* Heydrick, 49 Barb. 62.

North Carolina.— Henderson *v.* Graham, 84 N. C. 496.

Pennsylvania.— McCormick *v.* Meason, 1 Serg. & R. 92.

West Virginia.— Ambler *v.* Leach, 15 W. Va. 677.

76. *Arkansas.*— Reeder *v.* Murray, 3 Ark. 450; Woolford *v.* Dugan, 2 Ark. 131, 35 Am. Dec. 52.

Illinois.— Garland *v.* Britton, 12 Ill. 232, 52 Am. Dec. 487. See also Morrison *v.* Silverburgh, 13 Ill. 551, holding that the clerk is not required to state on the face of the process that it is issued under seal.

Massachusetts.— Hall *v.* Jones, 9 Pick. 446.

Mississippi.—Pharis *v.* Conner, 3 Sm. & M. 87.

New Hampshire.— Reynolds *v.* Damrell, 19 N. H. 394.

New York.— Churchill *v.* Marsh, 4 E. D. Smith 369.

North Carolina.— Shackelford *v.* McRae, 10 N. C. 226, holding a seal necessary when process issued to another county, although the use of the seal as to writs within the territorial jurisdiction was obviated.

Ohio.— Doe *v.* Pendleton, 15 Ohio 735; Boal *v.* King, 6 Ohio 11.

South Carolina.— Smith *v.* Affanassieffe, 2 Rich. 334.

Texas.— Chambers *v.* Chapman, 32 Tex. 569; Frosch *v.* Schlumpf, 2 Tex. 422, 47 Am. Dec. 655; Hale *v.* Gee, (Civ. App. 1895) 29 S. W. 44; Wells *v.* Ames Iron Works, 3 Tex. App. Civ. Cas. § 296; Block *v.* Weiller, 2 Tex. App. Civ. Cas. § 503; Leal *v.* Woodhouse, 2 Tex. App. Civ. Cas. § 101.

United States.— Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252; Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305; Peaslee *v.* Haberstro, 19 Fed. Cas. No. 10,884, 15 Blatchf. 472, 8 Reporter 486.

See 40 Cent Dig. tit. "Process," § 35.

Seal of a court, other than that in which process issues, invalidates the process. Hall *v.* Jones, 9 Pick. (Mass.) 446; Dominick *v.* Eacker, 3 Barb. (N. Y. 17; Imlay *v.* Brewster, 3 Tex. Civ. App. 103, 22 S. W. 226.

The seal must be referred to in the attestation. Riggs *v.* Bagley, 2 Greene (Iowa) 383.

Where no seal has been provided for the court it has been held that process may issue without seal. Goff *v.* Russell, 3 Kan. 212.

Second use of seal.— Where a seal of the court has been once used by having been affixed to a process which has been filled up, such seal cannot be detached and affixed to another writ. Filkins *v.* Brockway, 19 Johns. (N. Y.) 170.

The fact that the impression of the seal is not discernible is not material. Smith *v.* Alston, 1 Mill (S. C.) 104.

Summary process should be sealed as a writ. Hughes *v.* Phelps, 1 Brev. (S. C.) 81.

77. Kelso *v.* Norton, 74 Kan. 442, 87 Pac. 184; Choate *v.* Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424; Lower Towamensing Tp. Road, 10 Pa. Dist. 581; Carson Bros. *v.* McCord-Collins Co., 37 Tex. Civ. App. 540, 84 S. W. 391; Caufield *v.* Jones, 18 Tex. Civ. App. 721, 45 S. W. 741.

78. Rudd *v.* Thompson, 22 Ark. 363; Boyd *v.* Fitch, 71 Ind. 306; Sawyer *v.* Baker, 3 Me. 29; Foot *v.* Knowles, 4 Metc. (Mass.) 386. See also Jump *v.* McClurg, 35 Mo. 193, 86 Am. Dec. 146. But see Stayton *v.* Newcomer, 6 Ark. 451, 44 Am. Dec. 524, holding that where a writ was not sealed, it was a nullity.

79. Beaubein *v.* Sabine, 3 Ill. 457; Stevens *v.* Ewer, 2 Metc. (Mass.) 74; Swink *v.* Thompson, 31 Mo. 336.

80. Rand *v.* Pantagraph Stationery Co., 1 Colo. App. 270, 28 Pac. 661. *Compare* Talcott *v.* Rozenberg, 3 Daly (N. Y.) 203, holding a statute dispensing with the necessity

14. INDORSEMENTS. The statutes frequently provide that process shall bear certain indorsements,[81] such as the amount claimed by plaintiff, where the action is brought for the recovery of money only,[82] or the residence of plaintiff,[83] or defendant,[84] or the name of the attorney,[85] or of the time when the writ was signed,[86] or of the officer serving the writ,[87] or of an affidavit authorizing service by an indifferent person,[88] or of the authority to serve the summons.[89] Under some statutes where plaintiff lives outside of the state, the writ is required to be indorsed by a sufficient person who is an inhabitant of the state,[90] or it may be provided that the

of a seal on process of a court of record. where it shall be subscribed by the party or his attorney, not to apply to the marine court of the city of New York.

81. See the statutes of the several states. And see cases cited *infra*, this and following notes.

The cause of action is, under some statutes, required to be indorsed upon the writ. Howell *v.* Hallett, Minor (Ala.) 102.

Name and residence of assignee.— Rev. St. c. 84, § 144, providing that the name and place of residence of an assignee, if known, shall at any time during the pendency of the suit be indorsed by the request of defendant on a writ or process, or further proceedings thereon shall be stayed, is mandatory. Liberty *v.* Haines, 101 Me. 402, 64 Atl. 665.

In an action for a penalty, if a copy of the complaint is not served with the summons, a general reference to the statute under which suit is brought must be indorsed on the summons. Layton *v.* McConnell, 61 N. Y. App. Div. 447, 70 N. Y. Suppl. 679.

In an action on a bond the name of the real party in interest must be indorsed on the summons. Hopkinton Prob. Ct. *v.* Lamphear, 14 R. I. 291.

Indorsement by the sheriff of the day of receipt is not necessary. Chickering *v.* Failes, 26 Ill. 507; Cobb *v.* Newcomb, 7 Iowa 43; Nance *v.* Webb, 42 Miss. 268. But if made by him is conclusive of that fact until impeached or set aside. White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

Process issued to another county.— Under some statutes where a process is issued to be served in another county, or, as it is sometimes termed, a branch summons, the branch summons must be indorsed so as to show that all the summonses are for one suit and one and the same cause of action. Drennen *v.* Jasper Inv. Co., (Ala. 1907) 45 So. 157.

82. See the statutes of the several states. And see Weaver *v.* Gardner, 14 Kan. 347; George *v.* Hatton, 2 Kan. 333 (holding an indorsement unnecessary where an action was brought for the recovery of money and to subject real estate to the payment thereof); Dusenberry *v.* Bennett, 7 Kan. App. 123, 53 Pac. 82; Watson *v.* McCartney, 1 Nebr. 131; Hamilton *v.* Miller, 31 Ohio St. 87; Gillett *v.* Miller, 12 Ohio Cir. Ct. 209, 5 Ohio Cir. Dec. 588; Kious *v.* Kious, 2 Ohio Dec. (Reprint) 318, 2 West. L. Month. 418 (holding that an action upon a note and mortgage is not within the statute); Vancouver Agency *v.* Quigley, 37 Can. L. J. N. S. 826; Union Bank *v.* Wurzburg, 9 Brit. Col. 160; British Columbia Land, etc., Agency *v.* Cum Yow, 8 Brit. Col. 2; Rogers *v.* Reed, 7 Brit. Col. 139. *Compare* Foster *v.* Collins, 5 Sm. & M. (Miss.) 259.

Sufficiency.— A statute requiring an "indorsement" on the summons of the amount sued for is sufficiently complied with by such a statement on the face of the summons. Thompson *v.* Pfeiffer, 60 Kan. 409, 56 Pac. 763.

Issuance of second summons.— Where the original summons was issued without a proper indorsement of the amount for which judgment would be taken, another summons with proper indorsement may be thereafter issued and served. Simpson *v.* Rice, etc., Co., 43 Kan. 22, 22 Pac. 1019.

83. Dundas *v.* McKenzie, 10 Brit. Col. 174; Sherwood *v.* Goldman, 11 Ont. Pr. 433; Taylor *v.* Lewis, 14 Quebec Super. Ct. 431.

84. State Sav. Bank *v.* Columbia Iron Works, 6 Ont. L. Rep. 358, 2 Ont. Wkly. Rep. 733.

85. Shinn *v.* Cummins, 65 Cal. 97, 3 Pac. 133.

Name and place of abode of attorney.— The Common Law Procedure Act of 1852, 15 & 16 Vict. c. 56, § 6, providing that the summons shall be indorsed with the name and place of abode of the attorney is satisfied by naming the place of business of the attorney, although it is not the place where he sleeps. Ablett *v.* Basham, 5 E. & B. 1019, 2 Jur. N. S. 285, 25 L. J. Q. B. 239, 85 E. C. L. 1019.

86. Pollard *v.* Wilder, 17 Vt. 48.

87. Stone *v.* Sprague, 24 N. H. 309.

Indorsement with lead pencil is not sufficient. Stone *v.* Sprague, 24 N. H. 309; Meserve *v.* Hicks, 24 N. H. 295.

88. Eno *v.* Frisbie, 5 Day (Conn.) 122.

89. See New York *v.* Millen, 13 Daly (N. Y.) 458, holding that Laws (1886), c. 758, § 1, did not require that the authority to serve a summons in an action for a penalty brought in a district court in the name of the mayor, aldermen, and commonalty of the city of New York, should be indorsed upon the summons.

90. See the statutes of the several states. And see cases cited *infra*, this note.

The indorsement of the attorney, who is a sufficient person, is sufficient under such a statute, although over the attorney's name appear the words "from the office of." Bennett *v.* Holmes, 79 Me. 51, 7 Atl. 902; Stone *v.* McLanathan, 39 Me. 131; Seagrave *v.* Erickson, 11 Cush. (Mass.) 89; Slate *v.* Ackley, 8 Cush. (Mass.) 62. And see

original writ shall be indorsed with his christian and surname if he is an inhabitant of the state.[91] Where an indorsement of the christian and surname is required, initials of the christian name may be employed.[92] The omission of a required indorsement renders the writ voidable only.[93] An unnecessary indorsement of the amount and nature of the claim will not affect the writ if those facts are truly stated.[94] The name of a plaintiff may be indorsed by his attorney, where the action is ratified by him.[95] In case of a suit by next friend the next friend may indorse the writ.[96] The indorsement need not be signed or sealed by the clerk.[97] The change of an indorser of a writ before service does not affect its character as a legal writ from the time of its date.[98] Under a statute requiring indorsement upon an original writ at the time when it is signed, such indorsement must be made at the time of signing.[99]

15. Various Other Requisites. Under some statutes the process must state the time [1] and place [2] of filing of plaintiff's complaint or petition, or must designate the place where service of the answer must be made,[3] or require the answer to be filed at a particular place.[4] So likewise it may be required that the summons shall state the title of the cause,[5] shall state the file number of the suit,[6] shall

Brackett *v.* Bartlett, 19 N. H. 129; Pettingill *v.* McGregor, 12 N. H. 179.

91. See the statutes of the several states. And see Feneley *v.* Mahoney, 21 Pick. (Mass.) 212; Haywood *v.* Main, 18 Pick. (Mass.) 226; Robbins *v.* Hill, 12 Pick. (Mass.) 569 (holding a writ indorsed "A. B. by attorney," insufficient); Clark *v.* Paine, 11 Pick. (Mass.) 66 (holding that any mode of signing which would bind the party to a bond or note was a sufficient indorsement); Hartwell *v.* Hemmenway, 7 Pick. (Mass.) 117.

The original indorser cannot be discharged and another substituted in his place, without the consent of defendant. Caldwell *v.* Lovett, 13 Mass. 422; Ely *v.* Forward, 7 Mass. 25.

A new indorser may be ordered where plaintiff having indorsed the original writ afterward absconded and left the state. Oysted *v.* Shed, 8 Mass. 272.

Action by corporation.— An original writ prescribed by a corporation, which is indorsed in the name of the corporation by an individual, is sufficient since defendant will be entitled to the same remedy against him as if he had written his name only. Middlesex Turnpike Corp. *v.* Tufts, 8 Mass. 266.

92. Stratton *v.* Foster, 11 Me. 467; Clark *v.* Paine, 11 Pick. (Mass.) 66.

93. Gillett *v.* Miller, 12 Ohio Cir. Ct. 209, 5 Ohio Cir. Dec. 588. But *compare* Hopkinton Prob. Ct. *v.* Lamphear, 14 R. I. 291.

Where the writ is not indorsed at the time of its service, the court has no power to permit it to be indorsed at a subsequent period without the assent of defendant. Pettingill *v.* McGregor, 12 N. H. 179.

94. Weaver *v.* Gardner, 14 Kan. 347; Boulware *v.* Otoe County, 16 Nebr. 26, 19 N. W. 454; Larimer *v.* Clemmer, 31 Ohio St. 499.

95. Stevens *v.* Getchell, 11 Me. 443.

96. Crossen *v.* Dryer, 17 Mass. 222, so holding under a statute requiring original writs to be indorsed by plaintiff or his agent or attorney.

97. Abbey *v.* W. B. Grimes Dry Goods Co., 44 Kan. 415, 24 Pac. 426.

98. Steward *v.* Riggs, 9 Me. 51.

99. Wheelock *v.* Sears, 19 Vt. 559.

1. See the statutes of the several states. And see Star *v.* Mahan, 4 Dak. 213, 30 N. W. 169; Cook *v.* Kelsey, 19 N. Y. 412 [*affirming* 8 Abb. Pr. 170, 17 How. Pr. 134]; Pignolet *v.* Daveaux, 2 Hilt. (N. Y.) 584; Houston, etc., R. Co. *v.* Erving, 2 Tex. App. Civ. Cas. § 122.

Sufficiency.— While an error of one day has been held not material (Jacquerson *v.* Van Erben, 2 Abb. Pr. (N. Y.) 315), an error of three days in stating the date has been held a fatal one (Leal *v.* Woodhouse, 2 Tex. App. Civ. Cas. § 101). A requirement that the summons state the date of the filing of the complaint is not satisfied by a statement of the date of filing of a copy of the complaint. Merrill *v.* George, 23 How. Pr. (N. Y.) 331.

2. Star *v.* Mahan, 4 Dak. 213, 30 N. W. 169 (holding that the statement is insufficient if at the foot and not in the body of the summons); Cook *v.* Kelsey, 19 N. Y. 412 (holding that the name of the state need not be given in a summons directed against a non-resident); Pignolet *v.* Daveaux, 2 Hilt. (N. Y.) 584.

3. See the statutes of the several states. And see Hotchkiss *v.* Cutting, 14 Minn. 537 (holding sufficient a requirement to serve a copy of the answer "upon the subscriber at his office in the city of Rochester, Minnesota"); Weare *v.* Slocum, 1 Code Rep. (N. Y.) 105 (holding that a summons directing service to be made upon one not an attorney, who signed the complaint and summons as agent of plaintiff, is bad).

4. See Medley *v.* Voris, 2 La. Ann. 140, holding a citation to contain a sufficient description of the location of the office of the clerk where the answer was required to be filed.

5. Louisiana Bank *v.* Elam, 10 Rob. (La.) 26; Caldwell *v.* Glenn, 6 Rob. (La.) 9.

6. Durham *v.* Betterton, 79 Tex. 223, 14 S. W. 1060; Houston, etc., R. Co. *v.* Erving, 2 Tex. App. Civ. Cas. § 122.

give the office address of plaintiff's attorney,[7] or shall have affixed thereto a revenue stamp.[8]

E. Alteration of Process. Process may be altered without application to the court, before it has been served, either as to the return-day or place of trial.[9] But it has been held that a process server cannot strike the names of defendants from a process and insert others in their stead.[10]

F. Alias and Pluries Writs. An alias writ is a writ issued when one of the same kind has been issued before in the same cause.[11] A second writ, issued when the first has failed of its purpose.[12] It presupposes the existence of an original

7. See Sullivan *v.* Harney, 53 Misc. (N. Y.) 249, 103 N. Y. Suppl. 177, holding that the failure of a summons to give the street number of plaintiff's attorney, as required by Code Civ. Proc. § 417, was a mere irregularity and not a jurisdictional defect, so that defendant having known such office address and retained the summons could not have the service set aside and the judgment entered in the case vacated.

8. Aldrich *v.* Nest Egg Co., 6 Brit. Col. 53.

9. *Maine.*— Gardiner *v.* Gardiner, 71 Me. 266.

Massachusetts.— Gardner *v.* Webber, 16 Pick. 251.

New Jersey.— Stellmacher *v.* Kloepping, 36 N. J. L. 176.

New York.— Sullivan *v.* Alexander, 18 Johns. 3; Sloan *v.* Wattles, 13 Johns. 158. But *compare* People *v.* Singer, 1 Cow. 41.

Pennsylvania.— Com. *v.* Warfel, 157 Pa. St. 444, 27 Atl. 763. *Compare* Elwood Paper Co. *v.* Radziewicz, 16 Pa. Co. Ct. 81, holding that where a summons is so altered that defendant is unable to determine therefrom the day set for hearing it is defective.

Vermont.— Hunt *v.* Viall, 20 Vt. 291, holding that a statute forbidding officers from "making writs" does not prohibit such an alteration.

England.— Crowther *v.* Wheat, 8 Mod. 243, 88 Eng. Reprint 174, where it was held that immaterial alterations might be made even after the sealing of the writ and that material alterations might be made before the writ was sealed.

See 40 Cent. Dig. tit. "Process," § 38.

Contra.— Denison *v.* Crafts, 74 Conn. 38, 49 Atl. 851; St. Mary's Bank *v.* Mumford, 6 Ga. 44. *Compare* Parsons *v.* Ely, 2 Conn. 377, holding that a material alteration in plaintiff's writ, as in the date or return, after it has been signed and issued, and after security to prosecute has been given, will render it abatable, if such security is necessary; *aliter* if not necessary.

Change of attorney.— J, an attorney, sued out a writ for plaintiff, an infant. Next day it was agreed that B should be substituted as attorney, and plaintiff's agent, with J and B, went to the crown office, where, with the permission of the clerk, J's name was struck out and B's name inserted in the præcipe. The same change was made in the writ and copy before service. It was held that the alteration was unauthorized, and that the copy and service must be set aside, since the statute required the writ to be indorsed with the name and place of business of the attorney actually suing out the same. O'Reilly *v.* Vanevery, 2 Ont. Pr. 184.

After service made, a writ may not be altered without leave of court. Childs *v.* Ham, 23 Me. 74. See also *infra*, IV, B.

10. Charities Com'rs *v.* Litzen, 1 N. Y. City Ct. 374.

11. Bouvier L. Dict.

12. Century Dict.

Issuance to another county.— In Texas it is provided by statute that where any process has not been returned or returned without service, or has been improperly served, the clerk shall upon application issue other process to the same or any other county as the party applying may direct, under this provision an alias process may be issued to a county other than that named as the residence of defendant in the petition and before amendment of the petition (Lauderdale *v.* R. & T. A. Ennis Staticnery Co., 80 Tex. 496, 16 S. W. 308 [*distinguishing* Ward *v.* Lattimer, 2 Tex. 245]; Baber *v.* Brown, 54 Tex. 99. See also Crawford *v.* Wilcox, 68 Tex. 109, 3 S. W. 695. But *compare* Duer *v.* Endres, 1 Tex. App. Civ. Cas. § 322; Bean *v.* McQuiddy, 1 Tex. App. Civ. Cas. § 51), and leave of court is not required (Gillmour *v.* Ford, (Tex. 1892) 19 S. W. 442), nor need a copy of the application be served with the citation (Gillmour *v.* Ford, *supra*).

In England and Canada.—Under the English Common Law Procedure Act of 1852, 15 & 16 Vict. c. 76, and under the modern rules of the supreme court, order VIII, writs not served within the time allowed may be renewed. Hewett *v.* Barr, [1891] 1 Q. B. 98, 60 L. J. Q. B. 268, 39 Wkly. Rep. 294; Hume *v.* Somerton, 25 Q. B. D. 239, 55 J. P. 38, 59 L. J. Q. B. 420, 62 L. T. Rep. N. S. 828, 38 Wkly Rep. 748; Doyle *v.* Kaufman, 3 Q. B. D. 7, 47 L. J. Q. B. 26, 26 Wkly. Rep. 98 [*affirmed* in 3 Q. B. D. 340]; Davies *v.* Garland, 1 Q. B. D. 250, 45 L. J. Q. B. 137, 33 L. T. Rep. N. S. 727, 24 Wkly. Rep. 252; Manby *v.* Manby, 3 Ch. D. 101, 35 L. T. Rep. N. S. 307, 24 Wkly. Rep. 699; Nazer *v.* Wade, 1 B. & S. 728, 8 Jur. N. S. 134, 31 L. J. Q. B. 5, 5 L. T. Rep. N. S. 604, 101 E. C. L. 728; Anonymous, 1 H. & C. 664, 32 L. J. Exch. 88, 7 L. T. Rep. N. S. 718, 11 Wkly. Rep. 293. Similar practice obtains in Canada. Laird *v.* King, 19 Ont. Pr. 307; Mair *v.* Cameron, 18 Ont. Pr. 484; Gilmour *v.* Magee, 14 Ont. Pr. 120; St. Louis *v.* O'Callaghan, 13 Ont. Pr. 322; Mackelcan *v.* Becket, 9 Ont. Pr. 289. Concurrent writs may be issued under the English practice, bearing teste the same day as the original and remaining in force

summons, and hence cannot be issued after the suit has been dismissed.[13] If the alias writ also proves ineffectual, other similiar writs may issue which are designated pluries writs.[14] Such a writ is but a continuance of the original process,[15] and every alias or pluries writ must be dated on the day of the return of the preceding process.[16] If the party permit a chasm in the proceedings to occur, by failing to continue the process regularly from term to term until service is had, it operates as a discontinuance of the action.[17] This rule is not, however, rigidly followed in some jurisdictions, but it is held that the issuance of alias and pluries writs is merely a matter of due diligence, and unless so much time is suffered to elapse as will amount to laches, there is no discontinuance of the suit.[18] Nor does the rule seem to be applicable in those jurisdictions where the action is commenced by the filing of plaintiff's complaint.[19] Service of the alias cannot relate back to the time of the issuing of the original, so as to validate any proceedings had meantime, the regularity of which depended upon defendant being before the court.[20] A return should regularly be made on the original writ, in order to show the necessity and propriety of an alias or pluries,[21] but a writ which has no proper basis as an alias

as long as the original. Collins *v.* North British, etc., Ins. Co., [1894] 3 Ch. 228, 63 L. J. Ch. 709, 71 L. T. Rep. N. S. 58, 8 Reports 470, 43 Wkly. Rep. 106; Traill *v.* Porter, L. R. 1 Ir. 60; Coles *v.* Sherard, 11 Exch. 482, 25 L. J. Exch. 59; Rules of Supreme Court, Order VI.

13. Park Land, etc., Co. *v.* Lane, 106 Va. 304, 55 S. E. 690.

After vacation of dismissal.— The intervention of a judgment of dismissal, pending the issuance of an alias summons, will not affect the validity of the alias if the judgment is subsequently vacated as unauthorized. Everett *v.* Niagara Ins. Co., 142 Pa. St. 322, 21 Atl. 817.

14. U. S. Oil, etc., Supply Co. *v.* Gartlan, 58 W. Va. 267, 52 S. E. 524.

Alternative remedies.— A statutory provision that after the return of an alias without service, plaintiff may take out an attachment against defendant's property is merely permissive as an alternative remedy, and plaintiff may secure successive summonses instead. Howell *v.* Shepard, 48 Mich. 472, 12 N. W. 661.

15. U. S. Oil, etc., Supply Co. *v.* Gartlan, 58 W. Va. 267, 52 S. E. 524.

No new petition need be filed, nor need the original petition be refiled. Hanna *v.* Emerson, 45 Nebr. 708, 64 N. W. 229.

Who may issue.— An alias can be issued only from the office of the officer to which the original is returnable. Boggs *v.* Symmes, 8 Rich. (S. C.) 443.

16. Slatton *v.* Jonson, 4 Hayw. (Tenn.) 197.

Where a summons is returned "not found" at any time after the lapse of the time in which it may be lawfully served, plaintiff is entitled to an alias summons without waiting until the return-day named in the summons. People *v.* Leask, 1 Abb. N. Cas. (N. Y.) 299.

17. *Maryland.*— Hazlehurst *v.* Morris, 28 Md. 67.

Michigan.— Johnson *v.* Mead, 58 Mich. 67, 24 N. W. 665.

New York.— Soulden *v.* Van Rensselaer, 3 Wend. 472.

North Carolina.— Penniman *v.* Daniel, 91 N. C. 431; Etheridge *v.* Wordley, 83 N. C. 11.

South Carolina.— State Bank *v.* Baker, 3 McCord 281 (holding that a second writ cannot be considered as an alias if it be issued more than a year and a day after the first, and all the intermediate writs must be regularly lodged with the sheriff and cannot at a subsequent period be made out so as to fill up the intermediate numbers to prevent the statute of limitations); Parker *v.* Grayson, 1 Nott & M. 171.

Tennessee.—Armstrong *v.* Harrison, 1 Head 379.

See 40 Cent. Dig. tit. "Process," § 42.

The rule is otherwise where the alias is issued against an added party defendant. State *v.* Baird, 118 N. C. 854, 24 S. E. 668.

The direction to the clerk to issue the alias will be presumed to have been properly given. Lauderdale *v.* R. & T. A. Ennis Stationery Co., 80 Tex. 496, 16 S. W. 308.

18. Parsons *v.* Hill, 15 App. Cas. (D. C.) 532; *In re* Crucier, 28 Pa. St. 261; McClurg *v.* Fryer, 15 Pa. St. 293; O'Neill's Estate, 29 Pa. Super. Ct. 415.

19. Dunker *v.* Lutz, 48 Cal. 464.

20. Tyrone First Nat. Bank *v.* Cooke, 3 Pa. Super. Ct. 278.

21. Parker *v.* Grayson, 1 Nott & M. (S. C.) 171.

Effect of premature issuance.— But the issuance of an alias before such return does not affect a substantial right of the defendant. Ensign *v.* Roggencamp, 13 Nebr. 30, 12 N. W. 811.

Service.— The original process must have been returned without service (Whitman *v.* Sheets, 20 Ohio Cir. Ct. 1, 11 Ohio Cir. Dec. 179; Gorman *v.* Steed, 1 W. Va. 1), or the service made must have been irregular (Danville, etc., R. Co. *v.* Brown, 90 Va. 340, 18 S. E. 278; Wynn *v.* Wyatt, 11 Leigh (Va.) 584).

If the first summons was void, another summons may issue without order of court or return of the void summons. Walker *v.* Stevens, 52 Nebr. 653, 72 N. W. 1038; Williams *v.* Welton, 28 Ohio St. 451. It should

may nevertheless be treated as a new writ for a new suit.[22] The court has inherent power to award such further process;[23] but the clerk has no such authority to issue it without an order from the court, in the absence of statute.[24] In order that an alias summons may be issued under statutory authority it must be shown that the conditions imposed by statute exist.[25] It should be a substantial duplicate of the original process,[26] although all parties defendant need not be named;[27] but new parties defendant cannot be substituted in an alias writ.[28] The fact that a person has secured the issuance of an alias writ, which is irregular and void, does not prevent the party from availing himself of any remedy which he might have had if the writ had not been issued;[29] and where a plaintiff has discontinued as to a

not, however, be an alias summons. Folk *v.* Howard, 72 N. C. 527.

An officer will not be required to make a false return upon a writ in order that it may serve as a foundation of an alias writ. Low *v.* Little, 17 Johns. (N. Y.) 346, holding that where in a *qui tam* action the writ which had been sued out in due time and sent by mail to the sheriff of the county had been lost or miscarried, and plaintiff supposing it to have been served and returned proceeded to file his declaration, an amendment by permitting an alias capias to issue, as grounded upon a return of *non est inventus* to the former writ, was properly refused.

22. Rattan *v.* Stone, 4 Ill. 540 (holding that the words "as you have been before commanded" appearing in the alias summons might be considered as surplusage and the summons amended by striking them out); Frantz *v.* Detroit United R. Co., 147 Mich. 199, 110 N. W. 531; Axtell *v.* Gibbs, 52 Mich. 639, 640, 18 N. W. 395, 396.

23. U. S. Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342.

24. State Medical College *v.* Rushing, 124 Ga. 239, 52 S. E. 333; Rowland *v.* Towns, 120 Ga. 74, 47 S. E. 581; Peck *v.* La Roche, 86 Ga. 314, 12 S. E. 638.

If the original summons is being attacked as defective, the clerk cannot award an alias curing the defects unless so directed by the court. Farris *v.* Walter, 2 Colo. App. 450, 31 Pac. 231.

Under statutory authority to issue alias process, the clerk may do so without direction of the court. Cherry *v.* Mississippi Valley Ins. Co., 16 Lea (Tenn.) 292.

Reissuance of same process.— Although it is erroneous, after a summons has been served upon a portion of the defendants named and returned, to place such summons in the hands of an officer for further service upon the defendants not served, without an order of court directing such action, the irregularity will not render the service of the summons void. Hancock *v.* Preuss, 40 Cal. 572.

25. Briggs *v.* Davis, 34 Me. 158, holding that Me. Rev. St. c. 114, § 48, authorizing a new summons to be issued and served in certain case, did not extend to a case in which no summons had been delivered to defendant or left at any place or with any person for him.

Election.— A statute authorizing plaintiff, in an action against several defendants, to dismiss as to those not served, or to continue the cause to perfect service, will not permit plaintiff to take judgment against those who have been served and at the same time have an alias writ for those not served. Doggett *v.* Jordan, 3 Fla. 215. An alias may issue in order that personal service may be made upon a non-resident, although proceedings in the action by attachment and publication have been commenced. Lebensberger *v.* Scofield, 139 Fed. 380, 71 C. C. A. 476.

26. Hill *v.* Morgan, 9 Ida. 718, 76 Pac. 323; Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361.

These writs are in the usual form of the original, excepting the alias writ is designated by the additional words "'as we have formerly commanded you,' being inserted after the usual commencement, 'We command you.' The distinguishing feature on the face of the pluries writ is the phrase, 'as we have often commanded you,' which follows the usual commencement of process." Alderson Jud. Writs & Process 154.

A change in its form, in order to conform to a new statutory requirement, is proper. State *v.* Logan, 33 Md. 1.

The damages claimed should correspond in amount with the original (Boggs *v.* Symmes, 8 Rich. (S. C.) 443), but a variance in amount is an irregularity merely (Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361).

A duplicate indorsement of the character of the action is not essential, when the alias is served with the original summons, and the latter bears the indorsement. State Board of Pharmacy *v.* Jacob, 46 Misc. (N. Y.) 607, 92 N. Y. Suppl. 836.

Should show that it is in the same suit.— Where a writ against two persons is served upon one, and not found as to the other, and another writ issues to be served upon the person not found, the second writ should show that it is in the same suit with the first. Dunn *v.* Hall, 8 Blackf. (Ind.) 32.

27. Lewis *v.* Grace, 44 Ala. 307; Reed *v.* Boyd, 84 Ill. 66. *Contra*, Morgan *v.* Morgan, 2 Bibb (Ky.) 388.

28. Elias *v.* Hayes, 24 Misc. (N. Y.) 754, 53 N. Y. Suppl. 858.

Where new parties are added to the original writ by amendment, an alias summons may be issued and served upon them. Pittsburgh *v.* Eyth, 201 Pa. St. 341, 50 Atl. 769.

29. Grover *v.* Sims, 5 Blackf. (Ind.) 498.

defendant not served, and issues a new summons as against such defendant, the fact that the new summons contains recitals as to the issuance and failure to serve the former process will not render it void.[30] The fact that an alias writ is returned "not found" as to a defendant who was served upon the original will not have the effect of vitiating such service.[31]

G. Supplying Lost Process. A copy of a writ which has been lost or destroyed may be supplied by evidence of its contents,[32] and may be ordered filed in lieu of the original, upon notice.[33] In some jurisdictions where a writ is lost plaintiff may in a proper case have leave to file a new writ.[34]

II. SERVICE.

A. In General.[35] Service of process is the giving of such actual or constructive notice thereof to defendant as makes him a party to the proceedings and compels him to appear or suffer judgment by default.[36] It is by service of process that the court obtains jurisdiction to adjudicate upon the rights of defendant as involved in the action brought.[37] The directions of the statute as to service must be obeyed, or no jurisdiction is acquired over the person named in the writ.[38] There are two general methods of making service, actual and constructive. Personal service is actual service; service by publication is constructive service; substituted service, by leaving a copy of the writ at defendant's usual place of abode, should probably be called actual service.[39] To obtain jurisdiction, service must be had, in some way, upon the very person against whom judgment is sought.[40]

30. Smith *v.* Blakeney, 8 Port. (Ala.) 128.

31. McBeath *v.* Spann, 7 Ala. 201.

32. Fowler *v.* More, 4 Ark. 570.

The copy offered must be shown to be a true copy of the lost original. Whitcher *v.* Whitcher, 10 N. H. 440.

A mere certificate by the clerk that there had been a summons, which was lost, or a recital in the notice of publication that a summons had been issued, does not afford proof. Smith *v.* Trimble, 27 Ill. 152.

33. Long *v.* Sutter, 67 Ill. 185; Gentry *v.* Hutchcraft, 7 T. B. Mon. (Ky.) 241, 18 Am. Dec. 172. The affidavit proving the contents of the writ and its loss is not to be received in lieu of the process. Littell *v.* Cassady, Hard. (Ky.) 227.

Loss in the mail of process sent to the sheriff for service does not give plaintiff any standing to have a copy filed with a return of "not found" in order to save the action from the bar of the statute of limitations. Low *v.* Little, 17 Johns. (N. Y.) 346.

34. Taylor *v.* Cobleigh, 16 N. H. 105 (holding that where a writ has been lost without fault of plaintiff and there is in existence a certified copy thereof, leave to file another writ will be granted); Whitcher *v.* Whitcher, 10 N. H. 440 (holding that where the court on permitting a copy of the original writ to be filed may in its discretion require a new indorser); Mattocks *v.* Bishop, 4 N. H. 439 (holding that leave to file a new writ could not be granted without defendant's consent in case the original writ had not been filed with the clerk of court).

35. **Costs allowable** see COSTS, 11 Cyc. 100.

In proceedings before justice of the peace see JUSTICES OF THE PEACE, 24 Cyc. 521.

Insufficient service of process as ground for continuance see CONTINUANCES IN CIVIL CASES, 9 Cyc. 84.

Under Municipal Court Act see COURTS, 11 Cyc. 787 note 28.

Writ or process on summoning jurors see JURIES, 24 Cyc. 228.

36. Sanford *v.* Dick, 17 Conn. 213.

The object of service of process for the commencement of a suit is to give notice to the party proceeded against, and any statutory service which reasonably accomplishes that end answers the requirements of justice. State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146.

37. Com. *v.* Bangs, 22 Pa. Super. Ct. 403; Wren *v.* Johnson, 62 S. C. 533, 40 S. E. 937.

38. Wright *v.* Douglass, 3 Barb. (N. Y.) 554 [*reversed* on other grounds in 2 N. Y. 373]; Stamey *v.* Barkley, 211 Pa. St. 313, 60 Atl. 991.

39. See Dunkle *v.* Elston, 71 Ind. 585, where it was held that service by leaving a copy at defendant's residence was "personal service," this term being employed in contradistinction to service by publication.

"Whether actual service shall be made by reading the summons, or notice to the defendant, or leaving a copy with him personally or at his usual place of residence, is for the Legislature to prescribe." Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

40. Adams *v.* Town, 3 Cal. 247; Jones *v.* Jones, 23 La. Ann. 304; Booth *v.* Holmes, 2 Tex. Unrep. Cas. 232; Elliott *v.* Holmes, 8 Fed. Cas. No. 4,392, 1 McLean 466.

Service upon wrong defendant.— Where an action was brought against two persons as makers and one as an indorser of a note, and the citation which was issued for one of the makers was served on the other, such service was insufficient, being a departure from the command contained in the citation. Barnett *v.* Tayler, 30 Tex. 453.

B. Personal Service — 1. In General. Personal service ordinarily means service upon defendant personally, and does not include service by leaving a copy at defendant's usual place of abode.[41] But where the statute provides for service upon a corporation or individual by actually making service upon an officer or agent, such service is personal service upon such corporation or individual.[42] Personal service is the ordinary method of obtaining jurisdiction over the person of defendant,[43] and in the absence of a statute authorizing a substitute method, service must be personal.[44]

2. Amended and Alias Process. After service of process, a formal amendment does not require service of the amended process.[45] But if the original process is defective, and has been set aside or adjudged invalid, the amended process must be served.[46] The original summons need not be served with the alias.[47]

3. Procured by Fraud or Duress. Personal service obtained by inveigling or enticing a person or an officer of a corporation, into the territorial jurisdiction of the court, by means of fraudulent representations,[48] or by trick or device,[49] is

41. *Iowa.*— McKenna *v.* State Ins. Co., 73 Iowa 453, 35 N. W. 519.

New York.—Bogart *v.* Swezey, 26 Hun 463.

North Carolina.— Charlotte First Nat. Bank *v.* Wilson, 80 N. C. 200, holding under a statute, requiring personal service of the summons, or defendant's written admission thereof, that leaving a copy with his wife is not a legal service, notwithstanding proof of delivery to him by her and his verbal assent thereto.

North Dakota.— Casselton First Nat. Bank *v.* Holmes, 12 N. D. 38, 94 N. W. 764.

Wisconsin.—Minard *v.* Burtis, 83 Wis. 267, 53 N. W. 509; Moyer *v.* Cook, 12 Wis. 335.

United States.— *In re* Risteen, 122 Fed. 732.

42. Green *v.* Snyder, 114 Tenn. 100, 84 S. W. 808.

Service upon corporation see *infra*, VI.

Substituted service see *infra*, II, C.

43. *Arkansas.*— Coffee *v.* Gates, 28 Ark. 43.

Kansas.— Newton First Nat. Bank *v.* Wm. B. Grimes Dry-Goods Co., 45 Kan. 510, 26 Pac. 56.

New Hampshire.— Downer *v.* Shaw, 22 N. H. 277.

Texas.— Scott *v.* Streepy, 73 Tex. 547, 11 S. W. 532.

Utah.— Greiner *v.* Ogden St. R. Co., 21 Utah 158, 60 Pac. 548.

44. Bennett *v.* Howard, 2 Day (Conn.) 416; Water Lot Co. *v.* Brunswick Bank, 30 Ga. 685; Romaine *v.* Muscatine County, Morr. (Iowa) 357; Sainsbury *v.* Thorp, 9 Dowl. P. C. 183.

Attempts to evade service do not dispense with the necessity for personal service. Van Rensselaer *v.* Palmatier, 2 How. Pr. (N. Y.) 24.

45. Simmons *v.* Varnum, 36 Ala. 92; Jarrett *v.* City Electric R. Co., 120 Ga. 472, 47 S. E. 927; Bray *v.* Creekmore, 109 N. C. 49, 13 S. E. 723; Stone *v.* Cordell, 1 Ohio Dec. (Reprint) 166, 3 West. L. J. 79.

Amendment before service.— If the original process is ordered amended before it has been served, service of the amended process is properly ordered. Lassiter *v.* Carroll, 87 Ga. 731, 13 S. E. 825.

46. Prentice *v.* Stefan, 72 Wis. 151, 39 N. W. 364. See also Stewart *v.* Canadian Pac. R. Co., 35 N. Brunsw. 115.

47. Lawrence *v.* Bernstein, 46 Misc. (N. Y.) 608, 92 N. Y. Suppl. 817.

48. *Iowa.*— Toof *v.* Foley, 87 Iowa 8, 54 N. W. 59.

Missouri.— Diffenderffer *v.* Rowden, 83 Mo. App. 268.

Nebraska.— Jaster *v.* Currie, 69 Nebr. 4, 94 N. W. 995.

New York.— Metcalf *v.* Clark, 41 Barb. 45; Carpenter *v.* Spooner, 2 Sandf. 717; Higgins *v.* Dewey, 14 N. Y. Suppl. 894; Allen *v.* Wharton, 13 N. Y. Suppl. 38; Dunham *v.* Cressy, 4 N. Y. Suppl. 13.

Pennsylvania.—Trattner *v.* Forman, 10 Pa. Dist. 566.

United States.— Cavanaugh *v.* Manhattan Transit Co., 133 Fed. 818; Union Sugar Refinery *v.* Mathiesson, 24 Fed. Cas. No. 14,397, 2 Cliff. 146.

See 40 Cent. Dig. tit. "Process," § 51.

Where a person has voluntarily come within the jurisdiction, the fact that service is thereafter obtained upon him by fraud is not ground for setting it aside. Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. Co., 46 N. Y. Super. Ct. 377; Case *v.* Smith, 152 Fed. 730.

Pretense of settlement.— Securing presence within the jurisdiction for the ostensible purpose of arranging a settlement of existing controversy, but with the actual and undisclosed intent of serving process if the debtor does not settle, taints the service with fraud. Olean St. R. Co. *v.* Fairmount Constr. Co., 55 N. Y. App. Div. 292, 67 N. Y. Suppl. 165; Baker *v.* Wales, 35 N. Y. Super. Ct. 403.

Requesting defendant's presence to defend an attachment suit is not in itself a fraud, although personal service upon him is thereby obtained. Duringer *v.* Moschino, 93 Ind. 495.

Possibility of escape.— The fact that defendant might have escaped from the jurisdiction after the fraud was discovered will not defeat the application of the rule. Jaster *v.* Currie, 69 Nebr. 4, 94 N. W. 995.

49. Wyckoff *v.* Packard, 20 Abb. N. Cas.

void, and will be set aside. So also it is void if obtained by securing defendant's presence within the jurisdiction by means of criminal process,[50] or by the use of force.[51] The relief granted should be the setting aside of the service, not the dismissal of the action.[52]

4. Double Service. A second service of process does not waive the first service.[53] Nor can a second service within the county effect a shortening of time allowed a defendant because the first service was without the county.[54]

5. Service of Pleading With Process.[55] Statutes sometimes require a copy of plaintiff's complaint to be served with the writ, and such statutes are usually deemed mandatory, no jurisdiction being acquired in default of the service of such pleading.[56] But unless required by statute a copy of the complaint need not be served.[57]

(N. Y.) 420; Pilcher *v.* Graham, 18 Ohio Cir. Ct. 5, 9 Ohio Cir. Dec. 825; Miami Powder Co. *v.* Griswold, 5 Ohio Dec. (Reprint) 532, 6 Am. L. Rec. 464; Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259.

For example if plaintiff by an agreement to try the case upon a certain day has secured service upon defendant, plaintiff's subsequent refusal to carry out the agreement entitles defendant to have the service set aside. Graves *v.* Graham, 19 Misc. (N. Y.) 618, 44 N. Y. Suppl. 415. Where an inventor who had assigned his invention to certain third parties invited defendant, an infringer, into the jurisdiction where the assignees resided for the avowed purpose of settling the controversy but without the knowledge of such assignees, and procured an interview between the parties, at the close of which defendant was served with process in consequence of such infringement, it was held that there was not sufficient evidence of deceptive contrivances to obtain service on defendant, and that a motion to dismiss the action on that account must be overruled. Union Sugar Refinery *v.* Mathiesson, 24 Fed. Cas. No. 14, 397, 2 Cliff. 304. A defendant who, knowing that a possible cause of action exists against him in a certain jurisdiction, voluntarily goes into such jurisdiction on business with third parties, takes the risk of being there discovered and served with process; and such service is not invalidated because plaintiff had knowledge that defendant would come within the jurisdiction and arranged to be notified when defendant should come, where no trick or device was resorted to for the purpose of inducing his coming. Case *v.* Smith, 152 Fed. 730.

50. McNab *v.* Bennett, 66 Ill. 157; Byler *v.* Jones, 79 Mo. 261; Addicks *v.* Bush, 1 Phila. (Pa.) 19.

51. Ziporkes *v.* Chmelniker, 15 N. Y. St. 215.

52. Beacon *v.* Rogers, 79 Hun (N. Y.) 220, 29 N. Y. Suppl. 507; Metcalf *v.* Clark, 41 Barb. (N. Y.) 45.

53. Dresser *v.* Wood, 15 Kan. 344; Russell *v.* Millett, 20 Wash. 212, 55 Pac. 44.

54. Mayenbaum *v.* Murphy, 5 Nev. 383.

55. Service of pleadings generally see Pleading, 31 Cyc. 591.

56. See the statutes of the several states. And see Sacramento Sav. Bank *v.* Spencer, 53 Cal. 737; Harris *v.* Alexander, 1 Rob. (La.) 30; Slocomb *v.* Bowie, 13 La. 10; Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747; Hickman *v.* Barnes, 1 Mo. 156; Crawford *v.* Wilcox, 68 Tex. 109, 3 S. W. 695; Thomas *v.* Womack, 13 Tex. 580; James *v.* Watson, 2 Tex. Unrep. Cas. 741 (holding a citation sent to another county not good unless accompanied by a copy of the petition); Brummer *v.* Moran, (Tex. Civ. App. 1907) 102 S. W. 474; Lazarus *v.* Barrett, 5 Tex. Civ. App. 5, 23 S. W. 822; Taylor *v.* Pridgen, 3 Tex. App. Civ. Cas. § 89.

Contra, in Alabama, where failure to serve the complaint was held to be a mere irregularity, not preventing the acquiring of jurisdiction. Dew *v.* Cunningham, 28 Ala. 466, 65 Am. Dec. 362. *Compare* Wharton *v.* Franks, 9 Port. (Ala.) 232, holding that a statute requiring an indorsement of the cause of action on the writ dispensed with the necessity of service of a copy of the declaration.

Previous service of pleading.— A summons which requires defendant to answer the complaint "a copy of which . . . is herewith served on you," and which is served without the complaint, is a nullity, and the fact that a copy of a complaint has been previously served is immaterial. Tuller *v.* Caldwell, 3 Minn. 117.

57. See Collier *v.* Catherine Lead Co., 208 Mo. 246, 106 S. W. 971 (holding that a statute providing that the service of summons on several defendants by delivering to the one first summoned a copy of the petition and writ, and to those subsequently served a copy of the writ, etc., did not require a copy of the petition to be delivered to the first defendant served in each county where the defendants are in several counties); Payne *v.* McCarthy, 1 Hun (N. Y.) 78, 3 Thomps. & C. 755; Brummer *v.* Moran, (Tex. Civ. App. 1907) 102 S. W. 474 (holding that under statutes providing that where the petition shall be filed with the clerk he shall issue a citation, and a statute providing that if the citation is served without the county in which the suit is pending the officer shall deliver to defendant a certified copy of the petition to accompany the citation, there was no necessity for serving a copy of the peti-

6. Acceptance or Acknowledgment of Service. An acknowledgment or acceptance of service is the full equivalent of actual personal service [58] and renders such service unnecessary.[59] When made by a non-resident it seems to have the effect merely of personal service without the state,[60] although it has been said to be equivalent to personal service within the state; [61] and the acknowledgment may, by its terms, amount to a waiver of the want of jurisdiction in such case.[62] Defendant, by such acknowledgment, waives no right of defense.[63] The acknowledgment of service should be in writing and signed,[64] and while it is always good practice for the acknowledgment to show the time and place of service, the necessity of such showing depends upon the statute authorizing acknowledgment of service.[65] An attorney at law who acknowledges service on behalf of a defendant is presumed to have authority so to do,[66] but the authority of an agent or attorney in fact to make such an acknowledgment must be specially conferred and must be shown.[67] An acknowledgment of "due service" includes an acknowledgment both of a proper manner and a proper time of service.[68] An acknowl-

tion on defendants who were residents of the county in which the suit was brought).

58. Cheney *v.* Harding, 21 Nebr. 65, 32 N. W. 255; Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008. See also Boughton *v.* Spear, 4 Ala. 257; Earbee *v.* Ware, 9 Port. (Ala.) 291; Lewis *v.* State Bank, 4 Ark. 443; Banks *v.* Banks, 31 Ill. 162; Herrington *v.* Williams, 31 Tex. 448; Barton *v.* Nix, 20 Tex. 39.

An acknowledgment made after judgment entered has been held insufficient. State *v.* Cohen, 13 S. C. 198.

59. Washington *v.* Barnes, 41 Ga. 307; Johnson *v.* Monell, 13 Iowa 300; Donlevy *v.* Cooper, 2 Nott & M. (S. C.) 548; Franklin *v.* Conrad-Stanford Co., 137 Fed. 737, 70 C. C. A. 171.

A statutory provision that the acknowledgment cannot be made until after petition filed nullifies an acknowledgment previously made. McAnelly *v.* Ward, 72 Tex. 342, 12 S. W. 206.

60. *Michigan.*—Allured *v.* Voller, 107 Mich. 476, 65 N. W. 285.

New York.— Litchfield *v.* Burwell, 5 How. Pr. 341.

South Carolina.— Riker *v.* Vaughan, 23 S. C. 187.

Virginia.— Smith *v.* Chilton, 77 Va. 535.

Wisconsin.— Weatherbee *v.* Weatherbee, 20 Wis. 499.

See 40 Cent. Dig. tit. "Process," § 54.

Compare Chickering *v.* Failes, 26 Ill. 507.

61. Johnson *v.* Monell, 13 Iowa 300; Cheney *v.* Harding, 21 Nebr. 65, 31 N. W. 255; Vermont Farm Mach. Co. *v.* Marble, 20 Fed. 117.

62. See the cases cited *infra*, this note.

A consent incorporated in the acknowledgment of service that defendant will allow plaintiff "to proceed with the case the same as though service had been made as commanded in said summons" gives the court full jurisdiction. Allured *v.* Voller, 107 Mich. 476, 65 N. W. 285. So of an indorsement acknowledging service and waiving the benefit of the state statutes respecting absent defendants. Richardson *v.* Smith, 11 Allen (Mass.) 134. And it has been held that an admission of service if accompanied by an agreement to enter an appearance is sufficient to confer jurisdiction, even though made beyond the territorial jurisdiction of the court. Shaw *v.* Mt. Pleasant Nat. State Bank, 49 Iowa 179; Allured *v.* Voller, 107 Mich. 476, 65 N. W. 285; Keeler *v.* Keeler, 24 Wis. 522.

63. Ochus *v.* Sheldon, 12 Fla. 138.

64. Montgomery *v.* Tutt, 11 Cal. 307; Godwin *v.* Monds, 106 N. C. 448, 10 S. E. 1044. See also Doerfler *v.* Schmidt, 64 Cal. 265, 30 Pac. 816; Vanmeter *v.* Durham, 31 Ill. 237; Maher *v.* Bull, 26 Ill. 348, both holding a return of the sheriff that "defendant waived reading and accepted service" insufficient.

But it does not have to be written on the day on which service is acknowledged (Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324) and defendant's admission in court that he signed it dispenses with the statutory requirement that it be attested (Phillips *v.* Corey, 1 Indian Terr. 567, 45 S. W. 119).

Proof.— The service is sufficiently shown by proving that the signature of defendant to an acknowledgment thereupon indorsed is in his own handwriting. Norwood *v.* Riddle, 1 Ala. 195.

65. Alderson *v.* Bell, 9 Cal. 315; Maples *v.* Mackey, 15 Hun (N. Y.) 533; Nicholson *v.* Cox, 83 N. C. 44, 35 Am. Rep. 556; Stoddard Mfg. Co. *v.* Mattice, 10 S. D. 253, 72 N. W. 891. See Crane *v.* Brannan, 3 Cal. 102.

66. See Attorney and Client, 4 Cyc. 935.

67. Kuhnen *v.* Burt, 108 Ga. 471, 34 S. E. 125; Lamb *v.* Gaston, etc., Gold, etc., Min. Co., 1 Mont. 64; Lower *v.* Wilson, 9 S. D. 252, 68 N. W. 545, 62 Am. St. Rep. 865; Finney *v.* Clark, 86 Va. 354, 10 S. E. 569. See Leblanc *v.* Perroux, 21 La. Ann. 26.

Confession of judgment by the principal is a ratification of the act of the agent. Rogers *v.* Bowen, 19 Ga. 596.

68. Woolsey *v.* Abbett, 65 N. J. L. 253, 48 Atl. 949. The objection that the service was made on a legal holiday is waived by such an acknowledgment. McClellan *v.* Gaston, 18 Wash. 472, 51 Pac. 1062. Stating that the service was of a copy of the summons is

edgment of service does not constitute an appearance,[69] nor does it waive the issuance of process.[70]

7. Authority or Capacity to Serve — a. In General. Statutes almost universally designate what persons shall have authority to serve process,[71] and it is necessary that the statute be observed in order that jurisdiction may be acquired;[72] but the writ itself is not invalidated by unauthorized service.[73] It has been held that at common law service outside of the state may be made by a private individual.[74] Under some statutes process may be served by the officer to whom it is directed or by any officer to whom it might have been directed.[75] But it would seem that where an officer can serve process only under particular circumstances he has no power to serve process not directed to him,[76] and it has been held that the circumstances rendering such service proper should appear from the record.[77]

immaterial. Maples *v.* Mackey, 15 Hun (N. Y.) 533.

69. Donlevy *v.* Cooper, 2 Nott & M. (S. C.) 548.

Stipulation waiving process and reciting appearance as amounting to appearance see Appearances, 3 Cyc. 510.

70. Seisel *v.* Wells, 99 Ga. 159, 25 S. E. 266.

71. See the statutes of the several states.

72. *Arkansas.*— Rudd *v.* Thompson, 22 Ark. 363; Hughes *v.* Martin, 1 Ark. 386.

Colorado.— Wellington *v.* Beck, 29 Colo. 73, 66 Pac. 881.

Georgia.— McCalla *v.* Verdell, 122 Ga. 801, 50 S. E. 943; Callaway *v.* Harrold, 61 Ga. 111. See also Falvey *v.* Jones, 80 Ga. 130, 4 S. E. 264.

Illinois.— Hickey *v.* Forristal, 49 Ill. 255.

Indiana.— Kyle *v.* Kyle, 55 Ind. 387.

Kansas.— Flint *v.* Noyes, 27 Kan. 351.

Kentucky.— Long *v.* Gaines, 4 Bush 353.

Maine.— See Brown *v.* Gordon, 1 Me. 165, holding that one deputy sheriff could not serve a writ upon another deputy who was also coroner.

Mississippi.— Arnold *v.* Wynn, 26 Miss. 338.

Nebraska.— Cresswell *v.* McCaig, 11 Nebr. 222, 9 N. W. 52, holding that a bailiff unless specially appointed for that purpose has no authority as bailiff to serve process issued out of the district court.

New Mexico.— Gallegos *v.* Pino, 1 N. M. 410.

New York.— Lazzarone *v.* Oishei, 2 Misc. 200, 21 N. Y. Suppl. 267.

Ohio.— Collins *v.* Baltimore, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 445, 7 Ohio N. P. 270.

South Carolina.— See Stewart *v.* Childs, 1 Bay 362.

Texas.— Witt *v.* Kaufman, 25 Tex. Suppl. 384; Wadley *v.* Johnson, 2 Tex. Unrep. Cas. 739; Douthit *v.* Martin, 15 Tex. Civ. App. 559, 39 S. W. 944; Scott *v.* Watts, 1 Tex. App. Civ. Cas. § 88. See Robinson *v.* Schmidt, 48 Tex. 13; Boyden *v.* McClane, 42 Tex. 183.

Wisconsin.— Grantier *v.* Rosecrance, 27 Wis. 488.

United States.— Gaillard *v.* Cantini, 76 Fed. 699, 22 C. C. A. 493.

The service must be made in the particular official capacity named in the process. Graves *v.* Smart, 75 Me. 295.

An officer de facto may make service. Gunby *v.* Welcher, 20 Ga. 336; Gradnigo *v.* Moore, 10 La. Ann. 670; Fowler *v.* Bebee, 9 Mass. 231, 6 Am. Dec. 62. See also Flournoy *v.* Clements, 7 Ala. 535 (holding service of a writ by a sheriff *de facto* good when made so soon after his successor was qualified that it could not have been generally known that he was superseded); Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159. Powers of officers *de facto* generally see Officers, 29 Cyc. 1393.

The legislature may confer upon particular persons the right to serve process without infringing a constitutional provision for the election of sheriffs by the people. Andress *v.* Roberts, 18 Ala. 387.

Prison officers.— Where by statute the warden and deputy warden of the state prison may serve legal process within the "precincts" of the prison they may serve process not only in the prison building but in the grounds connected therewith. Hix *v.* Sumner, 50 Me. 290.

73. Hughes *v.* Martin, 1 Ark. 386.

74. Stone *v.* Anderson, 25 N. H. 221.

75. Boaz *v.* Nail, 2 Metc. (Ky.) 245.

An officer who is fully empowered to make service may serve a process, although it is not directed to him. Morrell *v.* Cook, 35 Me. 207, service by constable. See also Hearsey *v.* Bradbury, 9 Mass. 95. But see People *v.* Moore, 2 Dougl. (Mich.) 1, holding that a constable did not acquire authority to serve writs directed to the sheriff by virtue of attendance upon a session of the circuit court under a statute requiring such attendance.

Where the process was directed to a nonexisting officer, another officer having by statute the same power may serve the writ. Lowe *v.* Harris, 121 N. C. 287, 28 S. E. 535. And where the sheriff's office is vacant, the coroner or his deputy may execute process addressed to the sheriff. Reed *v.* Reber, 62 Ill. 240; Greenup *v.* Stoker, 12 Ill. 24, 52 Am. Dec. 474.

Process issuing out of the federal courts and directed to a marshal cannot be served by a private person, notwithstanding process from the state courts may be so served. Schwabacker *v.* Reilly, 21 Fed. Cas. No. 12,501, 2 Dill. 127.

76. Arnold *v.* Wynn, 26 Miss. 338. See also Hickey *v.* Forristal, 49 Ill. 255; Andrews *v.* Fitzpatrick, 89 Va. 438, 16 S. E. 278.

77. Beard *v.* Smith, 9 Iowa 50.

b. Sheriff. As a general rule the sheriff is the officer primarily intrusted by statute with the duty of serving process.[78] But where he is a party, he is disqualified from serving process in the action,[79] and procession certain kinds of actions is sometimes required by statute to be served by other officers.[80] By statute the sheriff is sometimes permitted to serve process beyond the limits of his bailiwick.[81] A provision for service of process upon the sheriff by the coroner or the sheriff of the adjoining county does not prevent service on him of process from the justice's court by the constable.[82]

c. Deputies. Unless prohibited by statute, service may be made by an officer's deputy with the same effect as by the officer himself.[83] The personal disqualification of the principal to make service of process results in a similar disqualification of the deputy.[84] When the deputy is a party, service may be made upon him by

78. See the statutes of the several states.

A writ directed to all and singular the sheriffs of the state must be served by the sheriff for the district in which defendant lives or is found. Wood *v.* Crosby, 2 Hill (S. C.) 520.

Service by city sheriff.— See Dow *v.* Kelly, 1 Root (Conn.) 552.

79. *Iowa.*— Minott *v.* Vineyard, 11 Iowa 90.

Kentucky.— Knott *v.* Jarboe, 1 Metc. 504.

Louisiana.— Jacobs *v.* Ducros, 7 Rob. 115, holding that the coroner should serve the process in such a case.

Michigan.— Hubel *v.* Rorison, 81 Mich. 41, 45 N. W. 590, holding that the right of a coroner to serve process under Howell St. § 606, is confined to cases where the sheriff is himself a party or is directly interested in the suit.

Mississippi.— Dyson *v.* Baker, 54 Miss. 24.

Nebraska.— See Barlass *v.* May, 16 Nebr. 647, 21 N. W. 436.

New Mexico.— Gallegos *v.* Pino, 1 N. M. 410.

North Carolina.— State *v.* Baird, 118 N. C. 854, 24 S. E. 668.

South Carolina.— See Miller *v.* Yeadon, 3 McCord 11.

Texas.— Goodin *v.* State, 14 Tex. App. 443. See Robinson *v.* Schmidt, 48 Tex. 13.

A merely nominal interest will not create such disqualification. Webster *v.* Smith, 78 Mo. 163; Avery *v.* Warren, 12 Heisk (Tenn.) 559.

Relationship to a party, it has been held, will not disqualify in the absence of pecuniary interest. Dawson *v.* Duplantier, 15 La. 289.

Action against former sheriff.— The present sheriff is neither a party to nor interested in an action against a former sheriff. Barker *v.* Remick, 43 N. H. 235.

Action against town.— Under some statutes it has been held that a sheriff is incompetent to serve process in an action against a town of which he is an inhabitant and taxpayer. State *v.* Walpole, 15 N. H. 26; Lyman *v.* Burlington, 22 Vt. 131; Evarts *v.* Georgia, 18 Vt. 15; Essex *v.* Prentiss, 6 Vt. 47. But *compare* Windsor *v.* Jacob, 1 Tyler (Vt.) 241. Under other statutes such disability is removed. Bristol *v.* Marblehead, 1 Me. 82.

A constable may serve process where the sheriff or his deputy is a party and the process is such as would otherwise be within his authority to serve. Briggs *v.* Strange, 17 Mass. 405.

80. See the statutes of the several states.

The marshal shall serve summons in certain actions to recover penalty. Seydel *v.* Corporation Liquidating Co., 88 N. Y. Suppl. 1004.

81. Gaynor *v.* Wilde, 38 Pa. St. 300, holding that the power of sheriffs to serve process in cases of trespass on real estate and nuisance by non-residents was limited to the county immediately adjoining the one in which the injury was committed.

82. Hayden *v.* Atlanta Sav. Bank, 66 Ga. 150; Cron *v.* Krones, 17 Wis. 401.

83. Clark *v.* Bray, Kirby (Conn.) 237; Dungan *v.* Hall, 64 Ill. 254; Henry *v.* Halsey, 5 Sm. & M. (Miss.) 573; Yeargin *v.* Siler, 83 N. C. 348. See also Christie *v.* Loomis, 32 Fla. 401, 13 So. 891.

Service outside of county or state.— A writ directed to the sheriff of one county cannot be served by the deputy sheriff of another county to which it has been sent. Branner *v.* Chapman, 11 Kan. 118. Under a Kansas statute, permitting the sheriff to make service outside of the state upon a nonresident, the deputy is not authorized to make the service. Kincaid *v.* Frog, 49 Kan. 766, 31 Pac. 704; Flint *v.* Noyes, 27 Kan. 351.

The return of service should be in the name of the sheriff. Harriman *v.* State, 1 Mo. 504; Dennison *v.* Story, 1 Oreg. 272.

84. *Georgia.*— Hillyer *v.* Pearson, 118 Ga. 815, 45 S. E. 701.

Iowa.— Minott *v.* Vineyard, 11 Iowa 90.

New Hampshire.— Ingraham *v.* Olcock, 14 N. H. 243. See also Barker *v.* Remick, 43 N. H. 235, holding that in an action against a former sheriff for the default of his deputy who was the present sheriff, process might be served by a deputy of the present sheriff.

South Carolina.— May *v.* Walters, 2 McCord 470.

Tennessee.— Stewart *v.* Magness, 2 Coldw. 310, 88 Am. Dec. 598.

Vermont.— Fairfield *v.* Hall, 8 Vt. 68.

But *compare* Hix *v.* Sumner, 50 Me. 290.

Character of disqualification.— In Minott *v.* Vineyard, 11 Iowa 90, 93, the court said: "Cases may arise where the sheriff is disqualified, when the deputy could act. Thus,

his principal, or by another deputy;[85] but it is improper for a deputy who is a party to the action, to himself serve the process.[86] A deputy may serve process already in his hands, although his principal has been removed.[87]

d. Persons Specially Deputized or Authorized. A person who is not an officer cannot ordinarily serve process unless specially authorized or deputized.[88] In many states, however, it is provided in general terms by statute that private persons may serve process.[89] A sheriff may appoint a special deputy to execute a particular process,[90] without any express authority derived from statute or otherwise.[91] Such appointment should properly be in writing indorsed upon the writ, but may be by verbal command if accompanied by delivery of the writ.[92] The authority conferred may be limited in its exercise to a particular locality.[93] Statutes commonly provide for service by properly deputized private persons in case the officers who would normally serve the process are not available.[94] The court

if the sheriff should be sick, absent from the county, or the like, and should have a deputy, it would be improper to direct the writ to the coroner. . . . But such deputy cannot act where the disqualification applies to the sheriff personally, as that he is interested, prejudiced, or the like."

Estoppel.— "If the plaintiff is willing that the process should go into the hands of the defendant, and the defendant is willing to receive it and accept service, the latter cannot afterward be heard to make any objection on the ground of irregularity. And so if the defendant's deputy receive the process and serve it upon the principal, and the latter does not make the objection *in limine*, he should not be permitted afterward to say that his deputy had done an illegal act." Turnbull *v.* Thompson, 27 Gratt. (Va.) 306, 309.

85. *Iowa.*— Minnott *v.* Vineyard, 11 Iowa 90.

Maine.— Adams *v.* Wiscasset Bank, 1 Mo. 361, 10 Am. Dec. 88.

Massachusetts.— Gage *v.* Graffam, 11 Mass. 181. See also Colby *v.* Dillingham, 7 Mass. 475.

Michigan.— Hubel *v.* Rorison, 81 Mich. 41, 45 N. W. 590.

Rhode Island.— Slocomb *v.* Powers, 10 R. I. 255.

86. Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48; Holbrook *v.* Brennan, 6 Daly (N. Y.) 46. *Compare* Walker *v.* Hill, 21 Me. 481.

87. Stewart *v.* Hamilton, 23 Fed. Cas. No. 13,429, 4 McLean 534, deputy United States marshal.

88. Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885; Republican Valley R. Co. *v.* Sayre, 13 Nebr. 280, 13 N. W. 404; Ross *v.* Fuller, 12 Vt. 265, 36 Am. Dec. 342.

89. See the statutes of the several states. And see the following cases:

Iowa.— Conway *v.* McGregor, etc., R. Co., 43 Iowa 32.

Minnesota.— Whitewater First Nat. Bank *v.* Estenson, 68 Minn. 28, 70 N. W. 775; Miller *v.* Miller, 39 Minn. 376, 40 N. W. 261.

New York.— Hunter *v.* Lester, 18 How. Pr. 347.

South Dakota.— Plano Mfg. Co. *v.* Murphy, 16 S. D. 380, 92 N. W. 1072, 102 Am. St. Rep. 692.

Washington.— Washington Mill Co. *v.* Marks, 27 Wash. 170, 67 Pac. 565.

In England.— Private persons were authorized by the English Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76), to serve process. Curlewis *v.* Broad, 1 H. & C. 322, 31 L. J. Exch. 473, 10 Wkly. Rep. 797.

A minor may not serve process. Gilson *v.* Kuenert, 15 S. D. 291, 89 N. W. 472.

90. *Florida.*— Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885.

Georgia.— Twiggs *v.* Hardwick, 61 Ga. 272, holding that the sheriff might specially deputize a constable.

Illinois.— Dungan *v.* Hall, 64 Ill. 254. See Guyman *v.* Burlingame, 36 Ill. 201.

Iowa.— Wilford *v.* Miller, Morr. 405.

Kentucky.— Court of Appeals Sergeant *v.* George, 5 Litt. 198.

New Jersey.— Allen *v.* Smith, 12 N. J. L. 159.

England.— Parker *v.* Kett, 1 Ld. Raym. 658, 91 Eng. Reprint 1338.

In Vermont, before the rule was changed by statute, the appointment of a special officer to serve process was held to be a judicial act, which could only be exercised by the authority issuing the process (Dolbear *v.* Hancock, 19 Vt. 388; Ross *v.* Fuller, 12 Vt. 265, 36 Am. Dec. 342; Bebee *v.* Steel, 2 Vt. 314), and could not be delegated (Kelly *v.* Paris, 10 Vt. 261, 33 Am. Dec. 199). And it follows from this that such an appointment upon a blank writ is void, since the judicial officer making the appointment must consider not only the person, but the occasion and the particular case. Kelly *v.* Paris, *supra*.

If the appointment is made by a deputy sheriff, it will be taken as the act of the sheriff. Thrift *v.* Frittz, 7 Ill. App. 55.

91. Jewett *v.* Garrett, 47 Fed. 625.

92. Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885; Meyer *v.* Bishop, 27 N. J. Eq. 141 [*affirmed* in 28 N. J. Eq. 239]. But *compare* Thompson *v.* Moore, 91 Ky. 80, 15 S. W. 6, 358, 12 Ky. L. Rep. 664.

93. Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885.

94. See the statutes of the several states. And see the following cases:

Connecticut.— Lawrence *v.* Kingman, Kirby 6.

Illinois.— See Reed *v.* Moffatt, 62 Ill. 300.

has inherent power to appoint a special officer to execute its process.[95] It is always proper, and sometimes required, that the special authority be indorsed upon the process.[96] The authority to serve an original will not extend to the service of an alias.[97] The circumstances which render the special appointment proper need not be recited in the appointment,[98] and it will be presumed that the person making service was properly authorized so to do until the contrary appears.[99]

e. Party, or Person Interested. Process cannot be executed by any person in his own favor,[1] nor by an attorney;[2] and this rule applies to officers as well as to other persons.[3] If, however, service be made by plaintiff, it is a mere irregularity, rendering the service voidable but not void.[4] Only an indifferent person may properly be authorized to serve process.[5] If by statute any person not a party may serve the summons,[6] plaintiff's attorney is competent.[7] So is plaintiff's

Iowa.— Currens *v.* Ratcliffe, 9 Iowa 309.

Kansas.— Dolan *v.* Topping, 51 Kan. 321, 32 Pac. 1120.

North Carolina.— Witkousky *v.* Wasson, 69 N. C. 38.

Vermont.— Culver *v.* Balch, 23 Vt. 618.

See 40 Cent. Dig. tit. "Process," § 64.

Compare McClane *v.* Rogers, 42 Tex. 214, holding that there was no authority to appoint a "special sheriff" for the service of all necessary process.

Powers.— A person deputed to serve a writ has all the powers which may be exercised by a sheriff in executing any process, except that he is not to be recognized and obeyed as a sheriff or known officer but must show his authority and make known his business if required by the party who is to obey the same. Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

A special bailiff appointed under Ky. Civ. Code, § 668, must reside in the county where defendant is to be served. Lillard *v.* Brannin, 91 Ky. 511, 16 S. W. 349, 13 Ky. L. Rep. 74.

Disinterested person.— Under some statutes provision is made for the service of process by disinterested persons. Walworth *v.* Farwell, 41 Vt. 212. See also *supra*, II, B, 7, a. A person signing a petition for the appointment of a guardian of the person and estate of one who is wasting his property cannot make service of the petition as a disinterested person. Baker *v.* Searle, 2 R. I. 115.

95. Wilson *v.* Roach, 4 Cal. 362.

A county judge in Nebraska may appoint any person specially to serve process issued by him. Gilbert *v.* Brown, 9 Nebr. 90, 2 N. W. 376.

96. Miller *v.* McMillan, 4 Ala. 527; Fullerton *v.* Briggs, 20 Vt. 542; The E. W. Gorgas, 8 Fed. Cas. No. 4,585, 10 Ben. 460, 13 Fed. Cas. No. 7,248, 4 Ben. 109. See Washburn *v.* Hammond, 25 Vt. 648, holding the justice form of authorizing one to serve a writ does not confer sufficient authority to serve a county court writ.

The statutory requirement of an indorsement is complied with, although the authority is written upon a separate piece of paper and attached to the back of the process. Cowdery *v.* Johnson, 60 Vt. 595, 15 Atl. 188. *Contra*, Gordon *v.* Knapp, 2 Ill. 488; Larkin *v.* Pew, 9 Del. Co. (Pa.) 292. But an omission to either fill in the name of the appointee, or to sign the appointment, invalidates the service. Davis *v.* Hamilton, 53 Ill. App. 94. An omission to date the indorsement will not vitiate the authority, although required by statute to be dated and signed. Forbes *v.* Bringe, 32 Nebr. 757, 49 N. W. 720.

97. Thompson *v.* Moore, 91 Ky. 80, 15 S. W. 6, 358, 12 Ky. L. Rep. 664.

98. Culver *v.* Balch, 23 Vt. 618.

99. Mooney *v.* McGuirk, 31 Misc. (N. Y.) 744, 64 N. Y. Suppl. 41.

If the appointee must be sworn, his oath need not be annexed, but the fact that he was sworn should be stated, and is sufficient. Minott *v.* Vineyard, 11 Iowa 90.

1. *Alabama.*— Mitchell *v.* Allen, 2 Stew. & P. 247. See also Boykin *v.* Edwards, 21 Ala. 261.

Colorado.— Toenniges *v.* Drake, 7 Colo. 471, 4 Pac. 790.

Georgia.— Johnson *v.* Shurley, 58 Ga. 417.

Illinois.— Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551.

Michigan.— Bush *v.* Meacham, 53 Mich. 574, 19 N. W. 192; Morton *v.* Crane, 39 Mich. 526.

Mississippi.— Dyson *v.* Baker, 54 Miss. 24; McLeod *v.* Harper, 43 Miss. 42.

See 40 Cent. Dig. tit. "Process," § 66.

In Michigan the copy of the declaration with rule to plead indorsed by which action is begun may be served by plaintiff. Penfold *v.* Slyfield, 110 Mich. 343, 68 N. W. 226.

An inhabitant of a town which is plaintiff may serve process. Windham *v.* Hampton, 1 Root (Conn.) 175.

2. Rutherford *v.* Moody, 59 Ark. 328, 27 S. W. 230.

3. See *supra*, II, B, 7, b.

4. Lillard *v.* Lillard, 5 B. Mon. (Ky.) 340; Wood *v.* Carpenter, 9 N. H. 153; Losey *v.* Stanley, 83 Hun (N. Y.) 420, 31 N. Y. Suppl. 950 [*reversed* in 147 N. Y. 560, 42 N. E. 8]; Hunter *v.* Lester, 10 Abb. Pr. (N. Y.) 260.

5. Augur *v.* Augur, 14 Conn. 82; Kellogg *v.* Wadhams, 9 Conn. 201; Culver *v.* Balch, 23 Vt. 618; Kelly *v.* Paris, 10 Vt. 261, 33 Am. Dec. 199.

6. See the statutes of the several states. And see Gilson *v.* Kuenert, 15 S. D. 291, 89 N. W. 472. See also *supra*, II, B, 7, d.

7. Whitewater First Nat. Bank *v.* Estenson, 68 Minn. 28, 70 N. W. 775.

Special deputization.— Plaintiff's attorney

agent,[8] or a stock-holder in plaintiff corporation.[9] One who makes service of the writ will be presumed to be a proper person in the absence of any showing to the contrary.[10]

8. Place of Service. The general rule is that valid service of process cannot be made upon a defendant outside the territorial jurisdiction of the court, so as to confer jurisdiction over the person.[11] But many modifications of the rule have been introduced by statute.[12] Thus, service in another county within the state is sometimes declared valid when defendant has removed from the county where the action was commenced after such commencement;[13] it is usually valid in the case of an action against joint defendants where one of them has been properly served in the county of venue;[14] it is sometimes declared valid, within the limits of the state, when defendant has no permanent residence in any particular county;[15] and it is sometimes valid when the cause of action accrued within the county of venue.[16] While statutes frequently provide for the service of process outside the state, such service cannot give the court jurisdiction to render a personal judgment.[17] If a non-resident is found within the territorial jurisdiction of the court, personal service may be made upon him with the same effect as though he were a resident, unless his presence is under circumstances which render him privileged.[18]

may also be specially deputized. Wilford *v.* Miller, Morr. (Iowa) 405.

8. Whitewater First Nat. Bank *v.* Estenson, 68 Minn. 28, 70 N. W. 775; Loucks *v.* Hallenbeck, 48 N. Y. App. Div. 426, 63 N. Y. Suppl. 1; Plano Mfg. Co. *v.* Murphy, 16 S. D. 380, 92 N. W. 1072, 102 Am. St. Rep. 692; King *v.* Davis, 137 Fed. 198.

9. Adams *v.* Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88; Merchants' Bank *v.* Cook, 4 Pick. (Mass.) 405; Hardwick *v.* Jones, 65 Mo. 54.

10. Buel *v.* Duke, 38 Mich. 167; Rowen *v.* Shapard, 2 Tex. App. Civ. Cas. § 295; Cowdery *v.* Johnson, 60 Vt. 595, 15 Atl. 188.

But it is held in California that it should appear in the affidavit of service by an unofficial person that he is more than eighteen years of age. Maynard *v.* MacCrellish, 57 Cal. 355.

11. *Arkansas.*— Ford *v.* Adams, 54 Ark. 137, 15 S. W. 186.

Iowa.— Weil *v.* Lowenthal, 10 Iowa 575.

Kansas.— Kerany County *v.* Rush, 44 Kan. 231, 24 Pac. 484.

Kentucky.— Dyas *v.* Lindsey, 4 Bush 349; Ruby *v.* Grace, 2 Duv. 540.

Missouri.— Roberts *v.* Stone, 99 Mo. App. 425, 73 S. W. 388.

New York.— Litchfield *v.* Burwell, 5 How. Pr. 341; Goldman *v.* Monds, 1 N. Y. City Ct. 97; Green *v.* Oneida Ct. C. Pl., 10 Wend. 592.

United States.— Jennings *v.* Johnson, 148 Fed. 337, 78 C. C. A. 329.

See 40 Cent. Dig. tit. "Process," § 69.

A summons served on board a British ship lying at a dock within the territorial jurisdiction of the court is properly served. Peabody *v.* Hamilton, 106 Mass. 217.

12. See the statutes of the several states.

13. Dyas *v.* Lindsey, 5 Bush (Ky.) 506; Raymon *v.* Reed, 16 B. Mon. (Ky.) 345.

14. *Indiana.*— Chicago, etc., R. Co. *v.* Marshall, 38 Ind. App. 217, 75 N. E. 973.

Kentucky.— Anderson *v.* Smith, 3 Metc. 491.

Michigan.— Clark *v.* Lichtenberg, 33 Mich. 307.

Nebraska.— Adair County Bank *v.* Forrey, 74 Nebr. 811, 105 N. W. 714, a non-resident is as liable to service as a resident.

Ohio.— Allen *v.* Miller, 11 Ohio St. 374; McGill *v.* Smith, 2 Cinc. Super. Ct. 215.

Texas.— Sanders *v.* City Nat. Bank, (1889) 12 S. W. 110.

See 40 Cent. Dig. tit. "Process," § 69.

Whether the liability of defendants is joint, so as to permit service on one of them outside the jurisdiction, is a question of law. Harrison *v.* Monmouth Nat. Bank, 207 Ill. 630, 69 N. E. 871.

The filing of proof of service on one defendant within the county is a condition precedent to valid service on another defendant in another county. Allison *v.* Kinne, 104 Mich. 141, 62 N. W. 152. But see Lamar *v.* Cottle, 27 Ga. 263.

15. Reed *v.* Browning, 130 Ind. 575, 30 N. E. 704.

16. Linton *v.* Anglin, 12 Ill. 284; Haddock *v.* Waterman, 11 Ill. 474.

17. Stamey *v.* Barkley, 211 Pa. St. 313, 60 Atl. 991; Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Foote *v.* Sewall, 81 Tex. 659, 17 S. W. 373; Franz Falk Brewing Co. *v.* Hirsch, 78 Tex. 192, 14 S. W. 450; York *v.* State, 73 Tex. 651, 11 S. W. 869; Stein *v.* Mentz, 42 Tex. Civ. App. 38, 94 S. W. 447.

Constitutionality of statutory provision.— A statute which permits service outside of the state is unconstitutional so far as it attempts to authorize proceedings *in personam* to be founded upon such service. Wallace *v.* United Electric Co., 211 Pa. St. 473, 60 Atl. 1046.

18. *Alabama.*— Lee *v.* Baird, 139 Ala. 526, 36 So. 720.

Illinois.— Willard *v.* Zehr, 215 Ill. 148, 74 N. E. 107.

9. Time of Service[19] — a. In General. The last day upon which process may be executed is the return-day thereof;[20] and service is in time if made any time on that day.[21] This rule is subject, however, to statutory modifications in many states.[22] For example under some statutes process is required to be served not less than six days before the return-day,[23] in or at any time before the return-day,[24] or ten days before the first day of the term,[25] or within three years after issuance.[26] If process is returnable within a given number of days from its date, it may be served and returned on the days of its issuance.[27] Service before the suit is legally

Maine.— Alley *v.* Caspari, 80 Me. 234, 14 Atl. 12, 6 Am. St. Rep. 178.

Massachusetts.— Thompson *v.* Cowell, 148 Mass. 552, 20 N. E. 170; Peabody *v.* Hamilton, 106 Mass. 217.

New York.— Matter of Washburn, 12 Misc. 242, 34 N. Y. Suppl. 44.

South Carolina.— Ford *v.* Calhoun, 53 S. C. 106, 30 S. E. 830.

Vermont.— Wilkins *v.* Brock, 79 Vt. 57, 64 Atl. 232.

United States.— Lebensberger *v.* Scofield, 139 Fed. 380, 71 C. C. A. 476; Mason *v.* Connors, 129 Fed. 831; Jewett *v.* Garrett, 47 Fed. 625.

See 40 Cent. Dig. tit. "Process," § 70.

Privileges and exemptions from service see *infra*, II, E.

Cross action against non-resident.— A defendant sued by a non-resident plaintiff may be authorized by statute to serve the attorney of plaintiff with a writ in a cross action and a personal judgment may be rendered on such service. Arkwright Mills *v.* Aultman, etc., Mach. Co., 128 Fed. 195.

19. Service upon holiday see Holidays, 21 Cyc. 443.

Service upon Sunday see Sunday.

20. *Delaware.*— Lofland *v.* Jefferson, 4 Harr. 303.

Georgia.— Peck *v.* La Roche, 86 Ga. 314, 12 S. E. 638.

Illinois.— Draper *v.* Draper, 59 Ill. 119; Hitchcock *v.* Haight, 7 Ill. 603.

New Jersey.— State *v.* Kennedy, 18 N. J. L. 22; Matthews *v.* Warne, 11 N. J. L. 295.

South Carolina.— Butler *v.* Corbitt, 2 Strobh. 1.

Texas.— Harrington *v.* Harrington, (App. 1890) 16 S. W. 538; Cobb *v.* Brown, 3 Tex. App. Civ. Cas. § 314.

Vermont.— Blodgett *v.* Brattleboro, 28 Vt. 695.

Virginia.— Crews *v.* Garland, 2 Munf. 491; Dunbar *v.* Long, 4 Hen. & M. 212.

See 40 Cent. Dig. tit. "Process," § 71.

21. Baxley *v.* Bennett, 33 Ga. 146; Heberton *v.* Stockton, 2 Miles (Pa.) 164; Cashee *v.* Wisner, 2 Browne (Pa.) 245; Boyd *v.* Serrill, 4 Pa. L. J. 114. See also Aumock *v.* Jamison, 1 Nebr. 432.

22. See the statutes of the several states. And see the following cases:

California.— Linden Gravel Min. Co. *v.* Sheplar, 53 Cal. 245.

Georgia.— Reese *v.* Shepherd, 27 Ga. 226.

Kentucky.— Stoll *v.* Knight, 3 B. Mon. 123.

Massachusetts.— Butler *v.* Fessenden, 12 Cush. 78.

New Jersey.— Raub *v.* Phillipsburg, 37 N. J. L. 48.

New York.— Nichols *v.* Fanning, 20 Misc. 73, 45 N. Y. Suppl. 409; Hovey *v.* McCrea, 4 How. Pr. 31.

Ohio.— Meisse *v.* McCoy, 17 Ohio St. 225.

South Carolina.— Buist *v.* Mitchell, 3 Brev. 485.

Utah.— Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008, holding service was not required to be within a year but that it was sufficient if summons issued within a year from the filing of the complaint.

Virginia.— Raub *v.* Otterback, 89 Va. 645, 16 S. E. 933; Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832, 14 S. E. 754.

Canada.— Troup *v.* Kilbourne, 5 Brit. Col. 547.

See 40 Cent. Dig. tit. "Process," § 72.

Short summons.— Under some statutes it is provided that where all the plaintiffs or all the defendants are non-residents a summons fixing the time for answer at a shorter period than otherwise required may be issued. See Nichols *v.* Tracy, 1 Sandf. (N. Y.) 278; Lewis *v.* Davis, 8 Daly (N. Y.) 185 (holding that a person permanently employed and regularly in attendance at a store in the city of New York would be regarded as having a place of business in that city and might be sued by long summons); Mead *v.* Hartwell, 10 Misc. (N. Y.) 662, 31 N. Y. Suppl. 674, 24 N. Y. Civ. Proc. 217; Bell *v.* Good, 19 N. Y. Suppl. 693 [*reversing* 22 N. Y. Civ. Proc. 317]; Milligan *v.* Fles, 4 N. Y. Suppl. 338, 21 Abb. N. Cas. 93 (holding that the fact that plaintiff has a place of business in New York city does not preclude him from the right to have a short summons).

23. Mathewson *v.* Ham, 21 R. I. 203, 42 Atl. 871, holding that a writ issued from the district court must be served not less than six days before the return-day.

24. Claypoole *v.* Houston, 12 Kan. 324; Armstrong *v.* Grant, 7 Kan. 285.

25. French *v.* Regan, 58 Ill. App. 261; Axtell *v.* Workman, 17 Ind. App. 152, 46 N. E. 472; Broghill *v.* Lash, 3 Greene (Iowa) 357.

26. Hibernia Sav., etc., Soc. *v.* Cochran, 141 Cal. 653, 75 Pac. 315.

27. Spragins *v.* West Virginia Cent., etc., R. Co., 35 W. Va. 139, 13 S. E. 45, holding that the provision of W. Va. Code, c. 124, that any process shall be returnable within ninety days from its date, and that the time within which any act is to be done shall be computed by excluding the first day and including the last does not preclude the execution of a writ on the day of its issuance.

commenced is a nullity.[28] Service should not be made on Sunday [29] or on a day expressly excepted by statute.[30] Statutes sometimes make special provision for service in designated cases of emergency, when defendant is about to remove out of the state.[31] Under some statutes the filing of the complaint must precede the service of summons, but under others this is not required.[32]

b. Computing Time.[33] The rules of computing time are not quite uniform in the different states. It is commonly said that in computing time, when service is required to be made a certain number of days before the return-day, the day of service should be excluded and the day of the return should be included.[34] It is also said that either the return-day or the day of service is to be excluded, which amounts to the same thing.[35] If the day of service be included and the return-day excluded, as held by some courts, the result is likewise the same.[36] Under some statutes, however, both the day of service and the return-day are to be excluded.[37]

c. Extending Time. The court has power, unless limited by statute, to extend the time for making service of process, on good cause shown.[38]

10. Manner of Service — a. In General. To constitute a good personal service of any kind, defendant must, in some substantial form, be apprised of the fact that service is intended to be made.[39] Personal service cannot be made by

28. Texas State Fair, etc. *v.* Lyon, 5 Tex. Civ. App. 382, 24 S. W. 328.

In Michigan service of a declaration as a substitute for process cannot properly be made until after the declaration is filed, for until that time the action is not commenced. South Bend Chilled Plow Co. *v.* Manahan, 62 Mich. 143, 28 N. W. 768; Ellis *v.* Fletcher, 40 Mich. 321.

29. See Sunday.

30. Swinney *v.* Johnson, 18 Ark. 534.

Holiday see Holidays, 21 Cyc. 443.

Day kept holy by party.— Under N. Y. Pen. Code, § 271, providing that "whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time . . . or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party, to be adjourned to that day for trial," is guilty of a misdemeanor, a plaintiff who procures process against such person to be returned on Saturday through inadvertence, and without intent to fix the return on a day kept holy by defendant is not criminally liable, and hence such process is not void. Martin *v.* Goldstein, 20 N. Y. App. Div. 203, 46 N. Y. Suppl. 961 [*reversing* 39 N. Y. Suppl. 254].

31. Swinney *v.* Johnson, 18 Ark. 534 (holding that service may be made on Sunday or on the fourth of July in such cases); Josey *v.* Dixon, 12 Rich. (S. C.) 378 (holding that service may be made before the debt has accrued).

32. See the statutes of the several states. And see Keith *v.* Quinney, 1 Oreg. 364.

33. **Computation of time** generally see Time.

34. *Indiana.*— Reigelsberger *v.* Stapp, 91 Ind. 311; Monroe *v.* Paddock, 75 Ind. 422; Moffitt *v.* Bininger, 17 Ind. 195; Kortepeter *v.* Wright, 15 Ind. 456; Martin *v.* Reed, 9 Ind. 180; Womack *v.* McAhren, 9 Ind. 6.

Michigan.— Chaddock *v.* Barry, 93 Mich. 542, 53 N. W. 785.

Minnesota.— Smith *v.* Force, 31 Minn. 119, 16 N. W. 704.

New York.— Matter of Carhart, 67 How. Pr. 216.

South Carolina.— Buist *v.* Mitchell, 3 Brev. 485.

Wisconsin.— Young *v.* Krueger, 92 Wis. 361, 66 N. W. 355.

See 40 Cent. Dig. tit. "Process," § 74.

The law does not regard fractions of a day in computing the time for service of process. Ball *v.* Mander, 19 How. Pr. (N. Y.) 468.

35. Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264.

36. Dilts *v.* Zeigler, 1 Greene (Iowa) 164, 48 Am. Dec. 370; Buist *v.* Mitchell, 2 Treadw. (S. C.) 631; Dickinson *v.* Lee, 2 Coldw. (Tenn.) 615.

Last day falling on Sunday.— If the sheriff is allowed a certain number of days after a given day in which to serve process, and the last date falls on Sunday it is not to be counted. Baxley *v.* Bennett, 33 Ga. 146.

37. Sallee *v.* Ireland, 9 Mich. 154; Dousman *v.* O'Malley, 1 Dougl. (Mich.) 450; Snell *v.* Scott, 2 Mich. N. P. 108; Fitzhugh *v.* Hall, 28 Tex. 558; O'Connor *v.* Towns, 1 Tex. 107.

The expression "clear days," when applied to the time for a notice, is very well understood. It means the days included between the day of service and the day for the performance of the act, or the happening of the event, to which the notice relates — in common terms, the first and last days are both excluded. This is the meaning of the term "clear days," and it is the only meaning. Nordheimer *v.* Shaw, 8 Can. L. J. N. S. 283.

38. Peck *v.* La Roche, 86 Ga. 314, 12 S. E. 638; Allen *v.* Mutual Loan, etc., Co., 86 Ga. 74, 12 S. E. 265; Lamar *v.* Cottle, 27 Ga. 263; Bentley *v.* Reid, 133 Fed. 698, 66 C. C. A. 528.

39. Hiller *v.* Burlington, etc., R. Co., 70 N. Y. 223; Anderson *v.* Abeel, 96 N. Y. App. Div. 370, 89 N. Y. Suppl. 254. See also

mail.[40] In the absence of statutory direction as to the method of making personal service of process, such service should be by reading the original to defendant.[41] But statutes almost universally regulate the mode of service.[42] The usual methods prescribed are reading the writ to defendant,[43] or delivering to him a copy,[44] or by both methods,[45] or by either;[46] although other things are frequently required, such as producing the original and making known to defendant the contents of the writ,[47] reading the petition as well as the writ to defendant,[48] etc.[49] The statute must in all cases be strictly followed in order that the court may acquire

Woodley *v.* Jordan, 112 Ga. 151, 37 S. E. 178.

For example.— Under a statute providing for service of summons by delivery of a copy of the summons and complaint, service was insufficient where defendants voluntarily handed them back, and the person making the service did not acquaint defendants that they were entitled to retain the copies served. Beekman *v.* Cutler, 2 Code Rep. (N. Y.) 51. See also Niles *v.* Vanderzee, 14 How. Pr. (N. Y.) 547. Service of process by merely laying it on the body of a man too sick to understand it is invalid. People *v.* Judge Super. Ct., 38 Mich. 310. It is not a good service of a summons to deposit it on a chair in a room in which defendant was, without asking for defendant by name, or stating the nature of the paper and without offering to deliver it into defendant's hands. Correll *v.* Granget, 12 Misc. (N. Y.) 209, 34 N. Y. Suppl. 25.

40. *Minnesota.*— St. Paul Sav. Bank *v.* Authier, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498.

Rhode Island.— Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341.

Washington.— Bennett *v.* Supreme Tent K. M. W., 40 Wash. 431, 82 Pac. 744, 2 L. R. A. N. S. 389.

Wisconsin.— Adams *v.* Wright, 14 Wis. 408.

United States.— Levinson *v.* Oceanic Steam Nav. Co., 15 Fed. Cas. No. 8,292.

41. Law *v.* Grommes, 158 Ill. 492, 41 N. E. 1080; Ball *v.* Shattuck, 16 Ill. 299.

Production of original.— When a person serving a writ of summons does not, when requested, produce the original, the proceedings taken under the writ are void, and not merely irregular. Hawthorn *v.* Harris, 23 Wkly. Rep. 214.

42. See the statutes of the several states.

43. Casteel *v.* Hiday, 13 Ind. 536; Matthews *v.* Blossom, 15 Me. 400; Kleckner *v.* Lehigh County, 6 Whart. (Pa.) 66.

Sufficiency of reading.— To constitute good service of a process by reading it, the whole of it must be read. Stating the material parts is not enough. Crary *v.* Barber, 1 Colo. 172. Service by reading "in presence and hearing of" defendant is insufficient. The reading must be to defendant. Hynek *v.* Englest, 11 Iowa 210. On the other hand it has been held that where a summons is read in the hearing of defendant, although the officer addressed himself to his clerk, defendant being aware of the officer's mistake, the service is sufficient, as what is read in the presence of several persons is read to all, although the officer addresses only one specially. Metzger *v.* Huntington, 51 Ill. App. 377.

What law governs.— The statute in force at the time of the service, and not that in force at the time of the issuance, controls. Rose *v.* Ford, 2 Ark. 26.

44. *California.*— Brown *v.* Lawson, 51 Cal. 615.

Georgia.— Ballard *v.* Bancroft, 31 Ga. 503.

Kentucky.— Case *v.* Colston, 1 Metc. 145.

Mississippi.— Carter *v.* Daizy, 42 Miss. 501.

Nebraska.— Newlove *v.* Woodward, 9 Nebr. 502, 4 N. W. 237.

Ohio.— Robbins *v.* Clemmens, 41 Ohio St. 285.

Pennsylvania.— Boyle *v.* Lansford School Dist., 7 Pa. Dist. 709, 7 Del. Co. 314; Kolb *v.* Heist, 29 Pa. Co. Ct. 111, 20 Montg. Co. Rep. 23.

South Carolina.— Wallace *v.* Prince, 3 Rich. 177.

Texas.— McCoy *v.* Crawford, 9 Tex. 353.

Wisconsin.— Wilkinson *v.* Bayley, 71 Wis. 131, 36 N. W. 836; Moyer *v.* Cook, 12 Wis. 335.

Copy and translation.— Under 2 Mart. Dig. La. p. 150, providing that the citation shall "together with the petition" be delivered to the sheriff of the county where defendant resides and shall be served by delivering a copy of the petition and citation in the French and English languages, it is not necessary that the papers should be in both languages, but it is sufficient if the sheriff deliver a copy of these papers in both languages. Fleming *v.* Conrad, 11 Mart. (La.) 301.

Each defendant should be served with a copy. Covington *v.* Burleson, 28 Tex. 368.

45. Noleman *v.* Weil, 72 Ill. 502; *Ex p.* Tindall, 6 De G. M. & G. 741, 55 Eng. Ch. 575, 43 Eng. Reprint 1421. Personal service of a petition and writ may be made either by reading both to defendant or delivering a copy of both to him; but service by delivering a copy of the petition and reading the writ is not good. Waddingham *v.* St. Louis, 14 Mo. 190.

46. Rose *v.* Ford, 2 Ark. 26.

47. Skilton *v.* Mason, 24 Leg. Int. (Pa.) 228; Buchanan *v.* Specht, 1 Phila. (Pa.) 252; Thomas *v.* Pearce, 2 B. & C. 761, 4 D. & R. 317, 2 L. J. K. B. O. S. 153, 26 Rev. Rep. 543, 9 E. C. L. 330; Phillipson *v.* Emanuel, 56 L. T. Rep. N. S. 858.

48. Hickman *v.* Barnes, 1 Mo. 156.

49. Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747, where the various statutory provisions as to personal service are set out.

jurisdiction over defendant,[50] although it has been held that statutory requisites may be waived by defendant.[51] And if all that the law requires is done, the doing of additional superfluous acts will not vitiate the service.[52]

b. In Case of Several Defendants. Where there are several defendants the service must be complete and entire as to each;[53] but in case of joint debtors or partners, if process is issued against all and is served on one or more, but others cannot be found, the statutes usually provide that plaintiff may proceed against those served, and, if successful, have judgment against all.[54] Such a judgment will be enforced as to the joint property of all and the separate property of those served, but will not bind personally those not served.[55]

c. The Copy Delivered. The copy should be substantially correct, but is not to be construed with the same strictness as the original.[56] The copy need not contain any indorsement by the sheriff, but is sufficient if it contains all that was put on the summons by the clerk.[57] Clerical errors in the copy delivered will not affect the jurisdiction of the court, where defendant has not been misled thereby.[58] Thus, designating the wrong month for the term when the mistake is an obvious one,[59] giving a wrong day of the month as the return-day, when same is fixed by law,[60] the omission of words of surplusage,[61] giving the wrong year when same is obviously an impossible date,[62] the lack of the file number of the case,[63] the

50. *Arkansas.*— Fulcher *v.* Lyon, 4 Ark. 449.

California.— People *v.* Bernal, 43 Cal. 385.

Illinois.— Maher *v.* Bull, 26 Ill. 348.

Minnesota.— St. Paul Sav. Bank *v.* Authier, 52 Minn. 98, 53 N. W. 812, 18 L. R. A. 498.

Montana.— Sanford *v.* Edwards, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482.

Nebraska.— Newlove *v.* Woodward, 9 Nebr. 502, 4 N. W. 237.

New Hampshire.— Blake *v.* Smith, 67 N. H. 182, 38 Atl. 16.

New York.— Eisenhofer *v.* New Yorker Zeitung Pub., etc., Co., 91 N. Y. App. Div. 94, 86 N. Y. Suppl. 438.

Ohio.— Robbins *v.* Clemmens, 41 Ohio St. 285.

Pennsylvania.— Boyle *v.* Lansford School Dist., 7 Pa. Dist. 709, 7 Del. Co. 314.

Texas.— McCoy *v.* Crawford, 9 Tex. 353.

See 40 Cent. Dig. tit. "Process," § 76.

51. Casteel *v.* Hiday, 13 Ind. 536; Chapman *v.* Allen, Morr. (Iowa) 23 (delivery of copy); Williamson *v.* Cocke, 124 N. C. 585, 32 S. E. 963.

52. Bozarth *v.* Largent, 128 Ill. 95, 21 N. E. 218.

53. *Illinois.*— Colwell *v.* Culbertson, 126 Ill. App. 294.

Iowa.— Jamison *v.* Weaver, 84 Iowa 611.

New Hampshire.— Bugbee *v.* Thompson, 41 N. H. 183.

South Carolina.— Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913.

Texas.— Anderson *v.* Brown, 16 Tex. 554. Under Paschal Dig. art. 1430, requiring that every defendant must be served personally with a copy of the petition and of the citation, where a husband and wife are defendants, each must be served personally with a copy of the petition and of the citation. Covington *v.* Burleson, 28 Tex. 368.

See 40 Cent. Dig. tit. "Process," § 79.

54. Bishop *v.* Vose, 27 Conn. 1; Southmayd *v.* Backus, 3 Conn. 474; Bishop *v.* Bull, 1 Day (Conn.) 141; Mills *v.* Bishop, Kirby (Conn.) 4; Parker *v.* Danforth, 16 Mass. 299; Tappan *v.* Bruen, 5 Mass. 193; People *v.* New York Super. Ct., 19 Wend. (N. Y.) 119. *Compare* Bartlett *v.* Campbell, 1 Wend. (N. Y.) 50.

This is a statutory proceeding in substitution for outlawry.—At the common law plaintiff in such a case was required to proceed to outlawry against those joint debtors who could not be found, and he then declared separately against those served with process and obtained a separate judgment against them, but no judgment except that of outlawry against those not found. Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271.

55. Yerkes *v.* McFadden, 141 N. Y. 136, 36 N. E. 7; Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913; Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271.

56. Biles *v.* Basler, 24 Pa. Co. Ct. 3. See Jensen *v.* Hays, 2 Tex. App. Civ. Cas. § 566. In Jones *v.* Marshall, 3 Kan. App. 529, 43 Pac. 840, 841, the court said: "It may be that the sheriff could leave out some of the things which the summons must contain to be a legal command to him, and yet the copy served give the court jurisdiction over the person of the defendant, and the judgment be only voidable; but surely he cannot leave out of the copy the vital things of which he is commanded to give the defendant notice, without rendering the judgment void."

57. Dresser *v.* Wood, 15 Kan. 344; White *v.* Taylor, 48 N. H. 284; Peters *v.* Crittenden, 8 Tex. 131.

58. See the cases cited in the following notes.

59. Williams *v.* Buchanan, 75 Ga. 789.

60. Irions *v.* Keystone Mfg. Co., 61 Iowa 406, 16 N. W. 349.

61. Herman *v.* Sprigg, 3 Mart. N. S. (La.) 190.

62. Union Furnace Co. *v.* Shepherd, 2 Hill (N. Y.) 413.

63. Peters *v.* Crittenden, 8 Tex. 131.

want of the signature of the officer who issued it,[64] and the omission of the date of the summons [65] are at most mere irregularities. The seal of the court upon the original need not be copied upon the copy of the summons.[66] A revenue stamp on the original is no essential part of the writ, and its presence need not be indicated on the copy.[67] If by mistake the original instead of a copy be delivered to or left for defendant this will not affect the service.[68] If a single defendant is sued in more than one capacity, he need not be served with more than one copy of the writ.[69]

d. Refusal to Receive Service. Where a defendant upon whom service of process by copy is sought to be made refuses to receive the copy offered, the person or officer making the service should inform him of the nature of the paper and of his purpose to make service thereof, and deposit it in some appropriate place in his presence or where it will be most likely to come into his possession.[70] If service is sought to be made by reading and defendant refuses to hear it read, the offer to read it is sufficient to constitute a good service.[71] But the officer has no right to use force in serving civil process.[72]

64. Collins *v.* Merriam, 31 Vt. 622.

65. Mayerson *v.* Cohen, 123 N. Y. App. Div. 646, 108 N. Y. Suppl. 59.

66. Sietman *v.* Goeckner, 127 Ill. App. 67; Hughes *v.* Osborn, 42 Ind. 450; Kelley *v.* Mason, 4 Ind. 618; Peters *v.* Crittenden, 8 Tex. 131.

67. Tucker *v.* Potter, 35 Conn. 43; Watson *v.* Morton, 18 Abb. Pr. (N. Y.) 138.

68. Adams *v.* Adams, 64 N. H. 224, 9 Atl. 100; Gould *v.* Rose, 17 Ohio Cir. Ct. 181, 9 Ohio Cir. Dec. 619.

69. Owsley *v.* Paris Exch. Bank, 1 Tex. Unrep. Cas. 93.

70. *New York.*— Davison *v.* Baker, 24 How. Pr. 39.

Wisconsin.— Borden *v.* Borden, 63 Wis. 374, 23 N. W. 573.

United States.— Norton *v.* Meader, 18 Fed. Cas. No. 10,351, 4 Sawy. 603.

England.— Fry *v.* Crosbie, 1 Hog. 289.

Canada.— Ritz *v.* Schmidt, 12 Manitoba 138.

For example the sheriff found defendant in front of his house, and defendant ran away, the sheriff calling out to him, when very near him, that he had two declarations to serve, naming plaintiffs, and then left the declarations in the house, and it was held not sufficient. The declarations should have been delivered or offered to defendant within his reach or laid down within his reach. Van Rensselaer *v.* Petrie, 2 How. Pr. (N. Y.) 94. When a party seeking to serve a writ was standing in defendant's yard, close to the street door of his house, and saw him at a window within the dwelling-house, and informed him in a loud voice that he had a writ against him, and held the copy out and threw it on the ground in his presence, and left it there, it was held not to amount to a personal service of the writ. Heath *v.* White, 2 D. & L. 40, 8 Jur. 575, 13 L. J. Q. B. 218. See Goggs *v.* Huntingtower, 1 D. & L. 599, 8 Jur. 66, 13 L. J. Exch. 352, 12 M. & W. 503. When a defendant was followed upstairs by a party who was endeavoring to serve him, and having run into a room and closed the door after him, the copy of the writ was put into the room through a crevice in the wall, and he was told what it was, it was held that the service was not sufficient. Christmas *v.* Eicke, 6 D. & L. 156, 2 Saund. & C. 292. And see Arrowsmith *v.* Ingle, 3 Taunt. 234. It was held in an English case that if a person who has corresponded on the subject of the action, and to whom process is sent, inclosed in a letter by the post, wilfully refuses to receive the letter, it will be deemed good service on him, although he never read it. Aldred *v.* Hicks, 1 Marsh. 8, 5 Taunt. 186, 1 E. C. L. 102. Where a director of a corporation knew of the institution of a suit against it and of the sheriff's desire to summon it by serving process on him as a director, and that a deputy was about to make that service, he could not defeat service by running out of the room and slamming a door in the officer's face. Boggs *v.* Inter-American Min., etc., Co., 105 Md. 371, 66 Atl. 259.

71. Slaght *v.* Robbins, 13 N. J. L. 340. See also Story *v.* Ware, 35 Miss. 399, 72 Am. Dec. 125.

72. State *v.* Claudius, 1 Mo. App. 551; Davison *v.* Baker, 24 How. Pr. (N. Y.) 39.

Where a process server gained access forcibly to the room where defendant was, after having obtained an entrance into the house under pretext that he wanted to see a servant named, the service was illegal, and will be set aside. Olson *v.* McConihe, 54 Misc. (N. Y.) 48, 105 N. Y. Suppl. 386.

Duty to leave premises.— The sheriff went to plaintiff's house with process which he was authorized to serve. The person on whom he was to make the service was in the house. The door was open, and he entered peaceably. When in, the wife of plaintiff ordered him out and it was held that, being legally in the house, he was not bound to leave it when ordered, and was justified in using sufficient force against the wife to enable him to serve the process. Hager *v.* Danforth, 20 Barb. (N. Y.) 16 [*reversing* 8 How. Pr. 435].

Where a person, to avoid service of summons and other papers on him, shelters himself in his wife's petticoats, and refuses to receive the papers in his hands, the laying of

C. Substituted Service — 1. In General. By substituted service is meant service by leaving a copy of the process at the residence or abode or place of business of defendant. Such service, when made upon residents, should probably be deemed actual service, and has frequently been called personal service or the equivalent of personal service,[73] although it has also been designated constructive service.[74] Service upon the agent or attorney of defendant, and service by mail, are also regarded as substituted service, although they are usually authorized under more restricted conditions. Such service is usually considered the equivalent of personal service and gives the court jurisdiction over the person of defendant.[75] In England the courts have been given large discretion in authorizing substituted service in such manner as they may deem fit,[76] but as a condition to the exercise of such discretion it must first be shown by affidavit that every means of effecting personal service has been exhausted,[77] and if the party is not subject to personal service, substituted service cannot be permitted.[78] Similar rules as to

the papers on his shoulder will be a sufficient service, and does not constitute an assault on such person. Martin *v.* Raffin, 21 N. Y. Suppl. 1043.

73. *Connecticut.*— Hurlburt *v.* Thomas, 55 Conn. 181, 10 Atl. 556, 3 Am. St. Rep. 43.

Georgia.— Lucas *v.* Wilson, 67 Ga. 356, gives court jurisdiction over the person.

Indiana.— Dunkle *v.* Elston, 71 Ind. 585 (is personal service); Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440.

Kansas.— Atchison County *v.* Challis, 65 Kan. 179, 69 Pac. 173.

Massachusetts.— Fitzgerald *v.* Salentine, 10 Metc. 436.

New York.— Ferris *v.* Plummer, 46 Hun 515; Johnston *v.* Robins, 3 Johns. 440.

Actual service.— In Bernhardt *v.* Brown, 118 N. C. 700, 705, 24 S. E. 527, 715, 36 L. R. A. 402, the court said: "Whether actual service shall be made by reading the summons, or notice to the defendant, or leaving a copy with him personally or at his usual place of residence, is for the Legislature to prescribe."

Leaving a copy is not personal service. Currier *v.* Gilman, 55 N. H. 364; Charlotte First Nat. Bank *v.* Wilson, 80 N. C. 200.

74. Carter *v.* Daizy, 42 Miss. 501.

75. Atchison County *v.* Challis, 65 Kan. 179, 69 Pac. 173; Abbott *v.* Abbott, 101 Me. 343, 64 Atl. 615; Johnston *v.* Robins, 3 Johns. (N. Y.) 440; Park Land, etc., Co. *v.* Lane, 106 Va. 304, 55 S. E. 690.

76. Jay *v.* Budd, [1898] 1 Q. B. 12, 66 L. J. Q. B. 863, 77 L. T. Rep. N. S. 335, 14 T. L. R. 1, 46 Wkly. Rep. 34; Tomlinson *v.* Goatley, L. R. 1 C. P. 230, 12 Jur. N. S. 431, 35 L. J. C. P. 183; Lewis *v.* Herbert, L. R. 16 Ir. 340; Bates *v.* Bates, 9 C. B. N. S. 561, 7 Jur. N. S. 728, 30 L. J. C. P. 191, 3 L. T. Rep. N. S. 670, 9 Wkly. Rep. 255, 99 E. C. L. 561; Davies *v.* Westmacott, 7 C. B. N. S. 829, 6 Jur. N. S. 636, 29 L. J. C. P. 150, 1 L. T. Rep. N. S. 297, 97 E. C. L. 829; Kitchin *v.* Wilson, 4 C. B. N. S. 483, 4 Jur. N. S. 539, 27 L. J. C. P. 253, 93 E. C. L. 483; Barringer *v.* Handley, 16 Jur. 1023, 12 C. B. 720, 22 L. J. C. P. 6, 74 E. C. L. 720; *In re* Boger, 3 Jur. N. S. 930; Wolverhampton, etc., Banking Co. *v.* Bond, 43 L. T. Rep. N. S. 721, 29 Wkly. Rep. 599; Hart *v.* Herwig, 28 L. T. Rep. N. S. 329, 21 Wkly. Rep. 538 [*affirmed* in L. R. 8 Ch. 860, 42 L. J. Ch. 457, 29 L. T. Rep. N. S. 47, 21 Wkly. Rep. 663]; Baillie *v.* Blanchet, 10 L. T. Rep. N. S. 365, 4 New Rep. 48; Furber *v.* King, 29 Wkly. Rep. 535; Capes *v.* Brewer, 24 Wkly. Rep. 40; Cox *v.* Bannister, 8 Wkly. Rep. 206.

Order IX of the Rules of the Supreme Court provides: "If it be made to appear to the Court or to a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution of service of notice, by advertisement or otherwise as may be just."

The principle on which substituted service is ordered is that there is reasonable ground to suppose that the service will come to the knowledge of defendant. Hope *v.* Hope, 4 De G. M. & G. 328, 2 Eq. Rep. 1047, 23 L. J. Ch. 682, 2 Wkly. Rep. 545, 698, 53 Eng. Ch. 256, 43 Eng. Reprint 534; *Re* Slade, 45 L. T. Rep. N. S. 276, 30 Wkly. Rep. 28.

The method should be fixed by the order. Jones *v.* Brandon, 2 Jur. N. S. 437.

Advertisement.— The courts frequently order service by advertisement in some designated newspaper in place of or in addition to leaving the writ where defendant might be expected to find it. Crane *v.* Jullion, 2 Ch. D. 220, 24 Wkly. Rep. 691; Cook *v.* Dey, 2 Ch. D. 218, 45 L. J. Ch. 611, 24 Wkly. Rep. 362; Hartley *v.* Dilke, 35 L. T. Rep. N. S. 706; Whitley *v.* Honeywell, 35 L. T. Rep. N. S. 517; Rafael *v.* Ongley, 34 L. T. Rep. N. S. 124; Coulburn *v.* Carshaw, 32 Wkly. Rep. 33; Mellows *v.* Bannister, 31 Wkly. Rep. 238.

77. Davies *v.* Westmacott, 7 C. B. N. S. 829, 6 Jur. N. S. 636, 29 L. J. C. P. 150, 1 L. T. Rep. N. S. 297, 97 E. C. L. 829; Firth *v.* Bush, 9 Jur. N. S. 431, 11 Wkly. Rep. 611.

Registered letter.— Where a plaintiff has exhausted all means to personally serve a writ of summons out of the jurisdiction, the court will allow substituted service by registered letter. Seaton *v.* Clarke, L. R. 26 Ir. 297.

78. Wilding *v.* Bean, [1891] 1 Q. B. 100, 60 L. J. Q. B. 10, 64 L. T. Rep. N. S. 41,

substituted service have been adopted in Canada.[79] Statutes authorizing substituted service are to be strictly construed.[80]

2. Service by Leaving Copy at Defendant's Residence — a. In General. Service by the leaving of a copy of the process at defendant's residence or place of abode is exclusively a statutory proceeding, and is almost universally provided for as a method to be used in certain cases.[81] If all that the statute requires is done, it is immaterial that defendant in fact receives no actual notice thereof;[82] and conversely, if the statute is not complied with it is of no avail that defendant does in fact receive actual notice of the action.[83]

b. When Authorized. Substituted service is to be used only when defendant cannot be found personally.[84] It is frequently provided for in cases where defendant seeks to evade personal service.[85] It cannot be employed against non-residents,[86] although some statutes have even declared the method proper where defendant once was a resident but had ceased to be such at the time of the service.[87]

39 Wkly. Rep. 40; Fry *v.* Moore, 23 Q. B. D. 395, 58 L. J. Q. B. 382, 61 L. T. Rep. N. S. 545, 37 Wkly. Rep. 565; Sloman *v.* New Zealand, 1 C. P. D. 563, 46 L. J. C. P. 185, 35 L. T. Rep. N. S. 454, 25 Wkly. Rep. 86; Field *v.* Bennett, 56 L. J. Q. B. 89; Hillyard *v.* Smyth, 36 Wkly. Rep. 7.

79. Young *v.* Dominion Constr. Co., 19 Ont. Pr. 139; Robertson *v.* Mero, 9 Ont. Pr. 510.

80. Gage *v.* Riverside Trust Co., 156 Fed. 1002.

81. See the statutes of the several states. And see the following cases:

Georgia.— Rogers *v.* Craig, 68 Ga. 286; Water Lot Co. *v.* Brunswick Bank, 30 Ga. 685, holding that under the statute "notorious place of residence" and "notorious place of abode" were legal synonyms.

Indiana.— Conwell *v.* Atwood, 2 Ind. 280.

Iowa.— Macklot *v.* Hart, 12 Iowa 428.

Kentucky.—Biesenthall *v.* Williams, 1 Duv. 329, 85 Am. Dec. 629.

Louisiana.— Rowland *v.* Pascal, 10 La. 598.

Maine.— Matthews *v.* Blossom, 15 Me. 400.

Minnesota.— Missouri, etc., Trust Co. *v.* Norris, 61 Minn. 256, 63 N. W. 634.

Montana.— Sanford *v.* Edwards, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482.

Nebraska.— Walker *v.* Stevens, 52 Nebr. 653, 72 N. W. 1038; Newlove *v.* Woodward, 9 Nebr. 502, 4 N. W. 237.

New Hampshire.— Blake *v.* Smith, 67 N. H. 182, 38 Atl. 16.

New Jersey.— Rogers *v.* Jermen, 3 N. J. L. 527. See also Harrison *v.* Farrington, 35 N. J. Eq. 4; Wagner *v.* Blanchet, 27 N. J. Eq. 356.

New York.— McCarthy *v.* McCarthy, 13 Hun 579; Casey *v.* White, 48 Misc. 659, 96 N. Y. Suppl. 190.

Ohio.— Robbins *v.* Clemmens, 41 Ohio St. 285; Walke *v.* Circleville Bank, 15 Ohio 288.

Pennsylvania.— Bujac *v.* Morgan, 3 Yeates 258; Dyre's Case, 1 Browne 299; Nester *v.* Root, 19 Montg. Co. Rep. 213.

South Carolina.— Hunter *v.* Hunter, 1 Bailey 646; Bowers *v.* Alston, 1 Nott & M. 458.

Washington.— Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Washington Mill Co. *v.* Marks, 27 Wash. 170, 67 Pac. 565.

See 40 Cent. Dig. tit. "Process," § 90.

82. Conwell *v.* Atwood, 2 Ind. 289; Kennedy *v.* Harris, 3 Indian Terr. 487, 58 S. W. 567.

83. Park Land, etc., Co. *v.* Lane, 106 Va. 304, 55 S. E. 690.

84. *Louisiana.*— Kendrick *v.* Kendrick, 19 La. 36.

New York.— Bishop *v.* Hughes, 117 N. Y. App. Div. 425, 102 N. Y. Suppl. 595.

Pennsylvania.— Wagenhorst *v.* Smith, 1 Woodw. 421.

Texas.— McLamore *v.* Heffner, 31 Tex. 189.

United States.— Settlemier *v.* Sullivan, 97 U. S. 444, 24 L. ed. 1110.

See 40 Cent. Dig. tit. "Process," § 87.

85. Steinhardt *v.* Baker, 20 Misc. (N. Y.) 470, 46 N. Y. Suppl. 707 [*affirmed* in 25 N. Y. App. Div. 197, 49 N. Y. Suppl. 357]. See Bishop *v.* Hughes, 117 N. Y. App. Div. 425, 102 N. Y. Suppl. 595 (holding a showing sufficient to authorize an order for substituted service); Nichols *v.* Emmett, 56 Misc. (N. Y.) 321, 107 N. Y. Suppl. 663 (where evidence was held insufficient to show that defendant had avoided service).

86. *Indiana.*— Sturgis *v.* Fay, 16 Ind. 429, 79 Am. Dec. 440.

Iowa.— Schlawig *v.* De Peyster, 83 Iowa 323, 49 N. W. 843, 32 Am. St. Rep. 308, 13 L. R. A. 785.

Kansas.— Amsbaugh *v.* Exchange Bank, 33 Kan. 100, 5 Pac. 384.

Maine.— Thomas *v.* Thomas, 96 Me. 223, 52 Atl. 642, 90 Am. St. Rep. 342.

Nebraska.— Wood *v.* Roeder, 45 Nebr. 311, 63 N. W. 853.

New York.— Lynch *v.* Eustis, 85 N. Y. Suppl. 1063.

North Dakota.— Casselton First Nat. Bank *v.* Holmes, 12 N. D. 38, 94 N. W. 764.

Pennsylvania.— Bumpus *v.* Hardenburg, 3 Pa. Dist. 27.

South Carolina.— Armstrong *v.* Brant, 44 S. C. 177, 21 S. E. 634.

Wyoming.— Honeycutt *v.* Nyquist, 12 Wyo. 183, 74 Pac. 90, 109 Am. St. Rep. 975.

87. Johnson *v.* Thaxter, 12 Gray (Mass.) 198; Orcutt *v.* Ranney, 10 Cush. (Mass.) 183;

If such service is to be deemed valid against a non-resident, it is only as the equivalent of constructive service by publication and operates only so far as the proceeding is *in rem.*[88] Some statutes require that an order for substituted service be obtained from the court, upon showing by affidavit that personal service cannot be made.[89] If the statute provides for such service only in case the place of defendant's sojourn cannot be ascertained, the service is invalid if his location can in fact be readily discovered.[90]

c. Place Where Copy May Be Left. The precise method authorized by the statute must be employed.[91] Thus, where the statute required that the copy be left at defendant's residence or usual place of abode,[92] leaving it at his place of busi-

Tilden *v.* Johnson, 6 Cush. (Mass.) 354; Wright *v.* Oakley, 5 Metc. (Mass.) 400.

Where defendant is actually in the commonwealth at the time of service of process, although his permanent residence is elsewhere, service by leaving a summons at his last and usual place of abode is sufficient and he is not entitled to the further notice under Gen. St. c. 126, § 6. Reeder *v.* Holcomb, 105 Mass. 93.

88. Eliot *v.* McCormick, 144 Mass. 10, 12, 10 N. E. 705 (where it was said that Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565, and Freeman *v.* Alderson, 119 U. S. 185, 7 S. Ct. 165, 30 L. ed. 372, "modify the application and effect of our statutes, and overrule the adjudications of this court, so far as they hold that a judgment *in personam* can be rendered against a non-resident defendant without any other service than attaching his property, or leaving a summons at his last and usual place of abode within the State, followed by such publication of notice as is ordered by the court"); Bumpus *v.* Hardenburg, 3 Pa. Dist. 27. See also Eastern Texas R. Co. *v.* Davis, 37 Tex. Civ. App. 342, 83 S. W. 883; Adams *v.* Heckscher, 80 Fed. 742.

89. McCarthy *v.* McCarthy, 13 Hun (N. Y.) 579; Simpson *v.* Burch, 4 Hun (N. Y.) 315; Carter *v.* Youngs, 42 N. Y. Super. Ct. 169; Nichols *v.* Emmett, 56 Misc. (N. Y.) 321, 107 N. Y. Suppl. 663; Lawrence *v.* Bernstein, 46 Misc. (N. Y.) 608, 92 N. Y. Suppl. 817; Molloy *v.* Lennon, 22 Misc. (N. Y.) 542, 49 N. Y. Suppl. 1004; Phillips *v.* Winne, 20 N. Y. Suppl. 49; Smith *v.* Fogarty, 6 N. Y. Civ. Proc. 366; Nagle *v.* Taggart, 4 Abb. N. Cas. (N. Y.) 144; Foot *v.* Harris, 2 Abb. Pr. (N. Y.) 454; Jones *v.* Derby, 1 Abb. Pr. (N. Y.) 458; McCarthy *v.* Kimball, 55 How. Pr. (N. Y.) 418; Collins *v.* Campfield, 9 How. Pr. (N. Y.) 519.

An affidavit on knowledge and belief that defendant was within the state and avoiding service made by plaintiff's attorney is insufficient when the sources of such knowledge and belief were not stated. Nichols *v.* Emmett, 56 Misc. (N. Y.) 321, 107 N. Y. Suppl. 663.

Sufficiency of showing.—Averments in an affidavit to the effect that the affiant had at specified times called at the residence of defendant, and, on stating that he had a paper for her, was informed at such times by servants and others, that she was in, but was told by her father that he, affiant, could not see her, authorize an order directing a substituted service of the summons and complaint, under N. Y. Code Civ. Proc. § 435. McCarthy *v.* McCarthy, 16 Hun (N. Y.) 546 [*affirmed* in 84 N. Y. 671].

The order must designate a method of service authorized by the statute. Jones *v.* Derby, 1 Abb. Pr. (N. Y.) 458; Collins *v.* Campfield, 9 How. Pr. (N. Y.) 519.

Variance between order and summons.—A substituted service of a summons under N. Y. Code Civ. Proc. §§ 435, 436, by mailing and posting on the door of defendant's residence, is substantially irregular where plaintiff is truly named as "Gilson F. Farrington" in the affidavit and order for substituted service, and "George F. Farrington" in the summons. Farrington *v.* Muchmore, 52 N. Y. App. Div. 247, 65 N. Y. Suppl. 432 [*reversing* 30 Misc. 218, 62 N. Y. Suppl. 165], holding, however, that an error in the given name of the plaintiff in the copy of a summons annexed to an order for substituted service may be corrected on motion; it does not require that the summons and the order for the substituted service thereof and such service be set aside. The reason for the distinction made between the correction of the name of plaintiff and of the name of a defendant under such circumstances, considered.

90. Ottman *v.* Daly, 7 N. Y. Suppl. 897.

91. Romaine *v.* Muscatine County, Morr. (Iowa) 357; Zecharie *v.* Bowers, 1 Sm. & M. (Miss.) 584, 40 Am. Dec. 111; Jones *v.* Derby, 1 Abb. Pr. (N. Y.) 458; Collins *v.* Campfield, 9 How. Pr. (N. Y.) 519.

92. See the statutes of the several states.

"Place of abode" does not necessarily mean where defendant sleeps but rather where he is usually to be found. Blackwell *v.* England, 8 E. & B. 541, 3 Jur. N. S. 1302, 27 L. J. Q. B. 124, 6 Wkly. Rep. 59, 92 E. C. L. 541; Haslope *v.* Thorne, 1 M. & S. 103. "Place of residence" is substantially the same as "place of abode." State *v.* Toland, 36 S. C. 515, 15 S. E. 599. And see Water Lot Co. *v.* Brunswick Bank, 30 Ga. 685.

Usual place of abode means the place of abode at the time of the service of the writ. Sparks *v.* Weatherby, 16 La. 594; Mygatt *v.* Coe, 63 N. J. L. 510, 44 Atl. 198; Johnson *v.* Gadsden, 1 Nott & M. (S. C.) 89; Capehart *v.* Cunningham, 12 W. Va. 750.

The term "house of his usual abode" means a person's customary dwelling-place or resi-

ness,[93] or at the dwelling-house of another person,[94] or at a house or hotel where he was temporarily stopping,[95] or at his former dwelling-house after his removal therefrom,[96] or in defendant's berth in a steamer upon which he has taken passage,[97] or in a part of the house which he does not inhabit or frequent,[98] or at any other place,[99] is insufficient. Some statutes further provide for the leaving of the writ at some public place at defendant's dwelling,[1] or at some obvious part of the house,[2] or that a copy of the writ may be posted upon the front door of his usual place of abode.[3] If the statute authorizes posting upon "the front door," a return showing posting upon "the door" does not show a valid service.[4] The question whether a defendant resides at a certain place is a question of fact, and he is shown to have once resided there, such residence will be presumed to have continued, in the absence of any showing to the contrary.[5]

dence. Missouri, etc., Trust Co. *v.* Norris, 61 Minn. 256, 63 N. W. 634.

The "dwelling-house" of the statute is the house in which defendant has his legal residence, and in which he permanently resides. Massillon Engine, etc., Co. *v.* Hubbard, 11 S. D. 325, 77 N. W. 588.

In the case of a married man, the house of his usual abode for the purpose of the service of summons is the house wherein his wife and family reside. Northwestern, etc., Hypotheek Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

Where a person has several residences, which he permanently maintains, occupying one at one period of the year and another at another period, a summons must be served on him at the dwelling-house in which he is living at the time of the service. Camden Safe Deposit, etc., Co. *v.* Barbour, 66 N. J. L. 103, 48 Atl. 1008.

Where plaintiff lives in premises formerly occupied by defendant temporarily absent from the province, service of process in Quebec must be made personally except upon leave granted by the judge or prothonotary. Normandin *v.* Renaud, 7 Quebec Pr. 421.

House upon plantation.— Under a statute providing that citation may be served by leaving the same at the domicile of a defendant, it is sufficient, where defendant resides on a plantation, if service is made on a person of proper age who resides in any house upon the plantation, even though it is not the residence of defendant. Rousseau *v.* Gayarre, 24 La. Ann. 355; McCalop's Succession, 10 La. Ann. 224; Maxwell *v.* Collier, 6 Rob. (La.) 86.

93. *Delaware.*—Hitch *v.* Gray, 1 Marv. 400, 41 Atl. 91; Gibbons *v.* Mason, 1 Harr. 452.

Georgia.— Smith *v.* Bryan, 60 Ga. 628.

Indiana.— Stout *v.* Harlem, 20 Ind. App. 200, 50 N. E. 492.

Iowa.— Winchester *v.* Cox, 3 Greene 575.

Nebraska.— Wittstruck *v.* Temple, 58 Nebr 16, 78 N. W. 456.

Ohio.— Lambert *v.* Sample, 25 Ohio St. 336; Hayes *v.* U. S. Bank, Wright 563.

Pennsylvania.— See Dyre's Case, 1 Browne 299.

Wisconsin.— Mayer *v.* Griffin, 7 Wis. 82.

United States.— Halsey *v.* Hurd, 11 Fed. Cas. No. 5,966, 6 McLean 14.

See 40 Cent. Dig. tit. "Process," § 90.

But *compare* Smith *v.* Parke, 2 Paige (N. Y.) 298.

94. Boyland *v.* Boyland, 18 Ill. 551.

95. White *v.* Primm, 36 Ill. 416; Hennings *v.* Cunningham, (N. J. Sup. 1904) 59 Atl. 12.

But a hotel may be his usual place of residence, if he has no other place to live. McFaddin *v.* Garrett, 49 La. Ann. 1319, 22 So. 358.

96. Kline *v.* Kline, 104 Ill. App. 274 (even though it is immediately forwarded to him); Matter of Norton, 32 Misc. (N. Y.) 224, 66 N. Y. Suppl. 317.

97. Craig *v.* Gisborne, 13 Gray (Mass.) 270.

98. Perry *v.* Perry, 103 Ga. 706, 30 S. E. 663; Fitzgerald *v.* Salentine, 10 Metc. (Mass.) 436; Heinemann *v.* Pier, 110 Wis. 185, 85 N. W. 646.

99. Ames *v.* Winsor, 19 Pick. (Mass.) 247; Rogers *v.* Jermen, 3 N. J. L. 527; Fisk *v.* Bennett, 69 Hun (N. Y.) 272, 23 N. Y. Suppl. 471; Phelps *v.* McCollam, 10 N. D. 536, 88 N. W. 292.

Leaving process in yard.— Leaving a process with a member of defendant's family, at a distance of one hundred and twenty feet from his dwelling, but in the yard of the dwelling, was not a sufficient service under a statute prescribing that, in the absence of a defendant, the process should be left with some member of his family "at the dwelling-house of such defendant." Kibbe *v.* Benson, 17 Wall. (U. S.) 624, 21 L. ed. 741.

1. Tomlinson *v.* Hoyt, 1 Sm. & M. (Miss.) 515.

2. Bowers *v.* Alston, 1 Nott & M. (S. C.) 458.

3. Farrington *v.* Muchmore, 30 Misc. (N. Y.) 218, 62 N. Y. Suppl. 165 [*reversed* on other grounds in 52 N. Y. App. Div. 247, 65 N. Y. Suppl. 432]; Earle *v.* McVeigh, 91 U. S. 503, 23 L. ed. 398.

4. King *v.* Davis, 137 Fed. 198 [*affirmed* in 157 Fed. 676, 85 C. C. A. 348].

5. *Georgia.*— Collins *v.* Camp, 94 Ga. 460, 20 S. E. 356; Rogers *v.* Craig, 68 Ga. 286; Barrett *v.* Black, 25 Ga. 151.

Indiana.— Pendleton *v.* Vanausdal, 2 Ind. 54.

Louisiana.— Zacharie *v.* Richards, 6 Mart. N. S. 467.

Pennsylvania.— Altoona Second Nat. Bank *v.* Gardner, 171 Pa. St. 267, 33 Atl. 188.

d. With Whom Copy May Be Left. It is usually provided that the copy may be left only with certain designated persons, as a member of defendant's family, or a person over a certain age living at the house, or a person of suitable age and discretion, resident therein, etc., and these provisions must be strictly observed.[6] Even though the statute is silent as to the age of the person with whom the copy shall be left, it must be construed to mean a person of such age as would understand what was intended to be done with the summons.[7] If the statute requires the writ to be left with a member of defendant's family, it is sufficient to leave it with a member of the family in which he resides, where he has no family of his own.[8] Unless the statute provides otherwise, it is sufficient to leave the copy at defendant's residence while he and his family are absent from the county.[9]

e. Informing Recipient as to Contents. A provision of the statute that the person with whom the writ is left shall be informed of its contents is mandatory.[10]

f. Publication. Under some statutes a resident defendant who is, at the time of such service, out of the state, is entitled to further notice by publication;[11] but under other statutes no further notice is necessary.[12]

Washington.— Northwestern, etc., Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

Where a person disappears from home, without any expression of an intention not to return, process left with his wife, nine days after his disappearance, at his usual place of abode, is a sufficient service to give the court jurisdiction. Botna Valley State Bank *v.* Silver City Bank, 87 Iowa 479, 54 N. W. 472; Hershey *v.* Botna Valley State Bank, 89 Iowa 740, 55 N. W. 342.

6. See the statutes of the several states. And see the following cases:

Arkansas.— Du Val *v.* Johnson, 39 Ark. 182.

Georgia.— Perry *v.* Perry, 103 Ga. 706, 30 S. E. 663.

Illinois.— Boyland *v.* Boyland, 18 Ill. 551.

Iowa.— Spencer *v.* Berns, 114 Iowa 126, 86 N. W. 209; Diltz *v.* Chambers, 2 Greene 479.

Louisiana.— Sparks *v.* Weatherby, 16 La. 594.

Minnesota.— Brigham *v.* Connecticut Mut. L. Ins. Co., 79 Minn. 350, 82 N. W. 668; Temple *v.* Norris, 53 Minn. 286, 55 N. W. 133, 20 L. R. A. 159; Heffner *v.* Gunz, 29 Minn. 108, 12 N. W. 342.

Mississippi.— Tomlinson *v.* Hoyt, 1 Sm. & M. 515.

Missouri.— Stewart *v.* Stringer, 41 Mo. 400, 97 Am. Dec. 278; Dobbins *v.* Thompson, 4 Mo. 118.

Pennsylvania.— Biles *v.* Basler, 24 Pa. Co. Ct. 3.

Canada.— *In re* Barron, 33 Can. L. J. N. S. 297.

See 40 Cent. Dig. tit. "Process," § 91.

The term "family," as used in the act, regulating the service of process, is not confined to persons under defendant's control or in his employ; thus, a widowed mother, who resides with her son, is a member of his family, within the meaning of the statute. Ellington *v.* Moore, 17 Mo. 424. Under the code of procedure, service of process may be made upon two minor defendants by leaving a copy with their mother as a member of the family of each. Weber *v.* Weber, 49 Mo. 45. Va. Code (1887), § 3207 (Va. Code (1904), p. 1684), authorizes substituted service by delivering a copy at defendant's usual place of abode, and giving information of its purport to his wife or any person found there, "who is a member of his family," and above the age of sixteen years. It was held that such section should be construed as requiring that the wife should be a member of defendant's family in order to be entitled to receive the process, so that a return showing service by leaving a copy with defendant's wife, but not stating that she was a member of defendant's family, is insufficient. King *v.* Davis, 137 Fed. 198 [*affirmed* in 157 Fed. 676, 85 C. C. A. 348].

Person living in the house.—Under La. Code Pr. art. 189, authorizing constructive service of process upon defendant by leaving it at his domicile, with a person of suitable age, "living in the house," a citation served upon a person other than defendant, who is only transiently at defendant's domicile, and does not reside there, is fatally defective. Lewis *v.* Smith, 24 La. Ann. 617.

Leaving with plaintiff.— Service of a summons, made by leaving a copy of the original at defendant's dwelling-house with an adult member of his family, is void, if such adult member is plaintiff in the action. Rowan *v.* Ryan, 5 Lack. Leg. N. (Pa.) 321.

7. Kimbel *v.* Villella, 20 Pa. Co. Ct. 18.

It need not be an adult person.— Conrad *v.* Johnson, 25 Ind. 487 (sixteen years of age is sufficient); Biles *v.* Basler, 24 Pa. Co. Ct. 3.

A person fourteen years old is *prima facie* of "suitable age and discretion" under the statute. Temple *v.* Norris, 53 Minn. 286, 55 N. W. 133, 20 L. R. A. 159.

8. Pyles *v.* Beall, 37 Fla. 557, 20 So. 778.

9. Burbage *v.* American Nat. Bank, 95 Ga. 503, 20 S. E. 240. *Compare* People *v.* Craft, 7 Paige (N. Y.) 325.

10. Barwick *v.* Rouse, 53 Fla. 643, 43 So. 753.

11. Currier *v.* Gilman, 55 N. H. 364.

12. Du Val *v.* Johnson, 39 Ark. 182; Barrett *v.* Black, 25 Ga. 151; Abbee *v.* Higgins, 2 Greene (Iowa) 535; South Carolina Bank

g. In Case of Several Defendants. The statutory service must be complete as to each one of several defendants.[13]

3. Service by Leaving Copy With Agent or Attorney. Statutes sometimes provide for service upon resident agents of non-resident parties, particularly when the latter are engaged in business within the court's jurisdiction,[14] or upon the attorney of defendant,[15] or upon the resident agents of certain classes of principals,[16] or upon the resident agents of absentee defendants;[17] but such methods of service are invalid without statutory authority.[18] Statutes also sometimes permit individuals to designate persons upon whom service of process may be

v. Simpson, 2 McMull. (S. C.) 352; Cruikshanks *v.* Frean, 3 McCord (S. C.) 84.

13. Stewart *v.* Stringer, 41 Mo. 400, 97 Am. Dec. 278.

A copy must be left for each even though they all live together. Rogers *v.* Buchanan, 58 N. H. 47. See also Hutchens *v.* Latimer, 5 Ind. 67. Where substituted service is attempted in an action on a joint contract, copies of the summons must be left at the usual place of abode of each of defendants, whether they reside at the same house or live separately. Butts *v.* Francis, 4 Conn. 424.

14. See the statutes of the several states. And see the following cases:

Georgia.— Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426, attorney at law or in fact. Service of process cannot be perfected by service on one described as the attorney of defendant in lieu of serving defendant himself, it appearing that he has a legal residence in the state where service can be perfected on him, nor can the presiding judge by order authorize service on his attorney and by sending a copy by registered mail to defendant, although he may be absent from the state on business for an indefinite period. Stallings *v.* Stallings, 127 Ga. 464, 56 S. E. 469.

Indiana.— Behn *v.* Whitney, 125 Ind. 599, 25 N. E. 187; Rauber *v.* Whitney, 125 Ind. 216, 25 N. E. 186.

Iowa.— Barnabee *v.* Holmes, 115 Iowa 581, 88 N. W. 1098.

Kentucky.— Guenther *v.* American Steel Hoop Co., 116 Ky. 580, 76 S. W. 419, 25 Ky. L. Rep. 795.

Massachusetts.— Fall River *v.* Riley, 140 Mass. 488, 5 N. E. 481; Gardner *v.* Barker, 12 Mass. 36.

Pennsylvania.— Bumpus *v.* Hardenburg, 3 Pa. Dist. 27; Vankirk *v.* Wetherill, 1 Leg. Gaz. 131; Tyack *v.* Grove, 1 Woodw. 99.

Vermont.— Folsom *v.* Conner, 49 Vt. 4.

Wisconsin.— Frink *v.* Sly, 4 Wis. 310.

United States.— Alaska Commercial Co. *v.* Debney, 144 Fed. 1, 74 C. C. A. 374, 75 C. C. A. 131 [*reversing* 2 Alaska 303].

England.— La Compagnie Gen. Transatlantic *v.* Law, [1899] A. C. 451, 8 Aspin. 550, 68 L. J. P. 104, 80 L. T. Rep. N. S. 845.

See 40 Cent. Dig. tit. "Process," § 92.

Deceased defendant.— Ky. Civ. Code Pr. § 51, subd. 6, providing for the service of process on the resident agent of a non-resident, does not authorize a judgment against a non-resident defendant who was dead when suit was instituted, although process was served on a resident agent in charge of his business. Soper *v.* Clay City Lumber Co., 53 S. W. 267, 21 Ky. L. Rep. 933.

15. Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426 (in case of non-resident defendant); Kimball *v.* Sweet, 170 Mass. 538, 51 N. E. 116 (in case of a cross action against plaintiff in the original action); Thomas *v.* Curtis, 20 Wend. (N. Y.) 675; Levinson *v.* Oceanic Steam Nav. Co., 15 Fed. Cas. No. 8,292, 17 Alb. L. J. 285. See Muir *v.* Guinane, 9 Ont. L. Rep. 324, 5 Ont. Wkly. Rep. 324.

Attorney in another suit.— A non-resident defendant cannot be brought under the jurisdiction of the court by service upon a resident attorney at law merely employed to represent defendant in another suit. Shainwald *v.* Davids, 69 Fed. 701. *Contra*, see Chalmers *v.* Hack, 19 Me. 124.

Where two attorneys are in partnership doing business in the name of one whose name appears as attorney of record for defendants, service on the other is sufficient. Lansing *v.* McKillup, 7 Cow. (N. Y.) 416.

16. Maysville, etc., R. Co. *v.* Ball, 108 Ky. 241, 56 S. W. 188, 21 Ky. L. Rep. 1693 (common carrier); Adams Express Co. *v.* Crenshaw, 78 Ky. 136 (common carrier); Lhoneux *v.* Hong Kong, etc., Banking Corp., 33 Ch. D. 446, 55 L. J. Ch. 758, 54 L. T. Rep. N. S. 863, 34 Wkly. Rep. 753; O'Neil *v.* Clason, 46 L. J. Q. B. 191.

Service upon agent of corporation, foreign or domestic see *infra*, VI, A, 6, d; VI, B, 5, b.

17. Farmer *v.* Hafley, 38 La. Ann. 232; New Orleans First Municipality *v.* Christ Church, 3 La. Ann. 453; Cazeau *v.* Lesparre, 17 La. 498; Pilie *v.* Kenner, 16 La. 570; Nelson *v.* Omaley, 6 Me. 218. See, generally, Absentees, 1 Cyc. 208.

18. *Connecticut.*—Bennet *v.* Howard, 2 Day 416.

Georgia.—Jones *v.* Georgia Southern R. Co., 66 Ga. 558.

Iowa.— Brown *v.* Newman, 13 Iowa 546.

Louisiana.— Fuselier *v.* Robin, 4 La. Ann. 61; Jacobs *v.* Ducros, 7 Rob. 115; Holliday *v.* McCulloch, 3 Mart. N. S. 176.

Maine.— Holmes *v.* Fox, 19 Me. 107.

Montana.— Davidson *v.* Clark, 7 Mont. 100, 14 Pac. 663.

Texas.— Gamble *v.* Dalrymple, 28 Tex. 593.

United States.—Mason *v.* Connors, 129 Fed. 831.

Canada.— Kerr *v.* Miller, 8 Dowl. P. C. 322; Parmeter *v.* Reed, 7 Dowl. P. C. 545.

See 40 Cent. Dig. tit. "Process," § 92.

made in their behalf during their absence from the state.[19] Under the civil law the codes sometimes allow the service of citation upon an officer known as a curator *ad hoc* appointed to represent an absentee defendant in suits concerning interests in property.[20] But the process must in all these cases run against the principal as defendant, and not against the agent or attorney.[21]

4. Service by Mail. Service by mail is provided for in some statutes, and, as in other forms of statutory service, a strict compliance with the terms of the statute is necessary.[22]

5. The Copy Served. Inasmuch as there appears to be no substantial difference in the rules as to the sufficiency of copies of process delivered and those left at the residence, this subject has been treated in full in connection with personal service.[23]

D. Service by Publication — 1. In General. Statutes everywhere exist authorizing constructive service of process by publication in certain cases where personal service cannot be had.[24] These statutes are in derogation of the common law and hence are to be strictly construed and literally observed.[25]

2. Actions in Which Such Service May Be Employed. The statutes usually provide in substance that such service may be made by publication in all actions which have for their immediate object the enforcement or establishment of claims to or rights in specific real or personal property which is subject to the jurisdiction of the court, although they are frequently much more detailed and cover specific-

19. Lyster *v.* Pearson, 6 Misc. (N. Y.) 618, 26 N. Y. Suppl. 77 [*reversed* on other grounds in 7 Misc. 98, 27 N. Y. Suppl. 399].

Agreement of parties.— Parties may agree that service upon designated agents shall be good service upon themselves as principals. Montgomery *v.* Liebenthal, [1898] 1 Q. B. 487, 67 L. J. Q. B. 313, 78 L. T. Rep. N. S. 211, 14 T. L. R. 201, 46 Wkly. Rep. 292; Tharsis Sulphur, etc., Co. *v.* Societe des Metaux, 58 L. J. Q. B. 435, 60 L. T. Rep. N. S. 924, 38 Wkly. Rep. 78.

20. McDonald *v.* Vaughan, 13 La. Ann. 405. See Grassmeyer *v.* Beeson, 13 Tex. 524.

Service upon absentees generally see Absentees, 1 Cyc. 208.

21. Jacobs *v.* Frere, 28 La. Ann. 625; Waddill *v.* Payne, 23 La. Ann. 773.

22. Smith *v.* Smith, 4 Greene (Iowa) 266; Mullen *v.* Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106; Fisk *v.* Hunt, 33 Oreg. 424, 54 Pac. 660.

In Kentucky the statute provides that a warning order attorney shall be appointed who shall make diligent efforts to inform a defendant by mail. Ball *v.* Poor, 4 Ky. L. Rep. 746.

Registered mail.— Service may be made upon a non-resident defendant by registered mail. Brennen *v.* Redfern, 11 Pa. Dist. 248.

23. See *supra*, II, B, 10, c.

If the statute requires a certified copy of the complaint to be left with the summons, no jurisdiction is acquired where the copy of the complaint is not certified. Heatherly *v.* Hadley, 2 Oreg. 269.

24. See the statutes of the several states. And see the following cases:

Arkansas.— Parsons *v.* Paine, 26 Ark. 124.

Iowa.— Robertson *v.* Young, 10 Iowa 291.

Mississippi.— Griffith *v.* Vertner, 5 How. 736.

Texas.— Byrnes *v.* Sampson, 74 Tex. 79, 11 S. W. 1073.

United States.— Morris *v.* Graham, 51 Fed. 53; American Freehold Land-Mortg. Co. *v.* Benson, 33 Fed. 456; Salisbury *v.* Sands, 21 Fed. Cas. No. 12,251, 2 Dill. 270.

Curator ad hoc.— Under the civil law absentee defendants in actions substantially *in rem* are brought in by the appointment of and service upon a *curator ad hoc*, notice of which appointment is given by publication. Robbins *v.* Martin, 43 La. Ann. 488, 9 So. 108; Mason *v.* Benedict, 43 La. Ann. 397, 8 So. 930; Young *v.* Upshur, 42 La. Ann. 362, 7 So. 557, 21 Am. St. Rep. 381; Duruty *v.* Musacchia, 42 La. Ann. 357, 7 So. 555; Wunstel *v.* Landry, 39 La. Ann. 312, 1 So. 393. See also Absentees, 1 Cyc. 208.

25. *Alabama.*— Sayre *v.* Elyton Land Co., 73 Ala. 85.

California.— Cohn *v.* Kember, 47 Cal. 144; Jordan *v.* Giblin, 12 Cal. 100.

Colorado.— Beckett *v.* Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. Rep. 399; Clayton *v.* Clayton, 4 Colo. 410.

Idaho.— Mills *v.* Smiley, 9 Ida. 325, 76 Pac. 783.

Iowa.— Lot Two *v.* Swetland, 4 Greene 465.

Michigan.— Granger *v.* Judge Super. Ct., 44 Mich. 384, 6 N. W. 848.

Minnesota.—Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 9 Am. St. Rep. 376; Ware *v.* Easton, 46 Minn. 180, 48 N. W. 775.

Mississippi.— Foster *v.* Simmons, 40 Miss. 585.

Missouri.— Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971.

Nebraska.— Stull *v.* Masilonka, 74 Nebr. 309, 104 N. W. 188, 108 N. W. 166.

New York.— Fink *v.* Wallach, 47 Misc. 247, 95 N. Y. Suppl. 872 [*reversed* on other grounds in 109 N. Y. App. Div. 718, 96 N. Y. Suppl. 543]; Wilson *v.* Lange, 40 Misc. 676,

ally almost every form of action which is substantially *in rem*;[26] but the property to be affected must be within the territorial jurisdiction of the court if service by publication is to be effectual.[27] Such statutes are within the legislative powers of the several states.[28] Among those actions in the nature of proceedings *in rem*, in which service by publication has been held proper, are an action to fix a trust in lands,[29] an action against a simple contract debtor to subject realty to payment of debts,[30] a suit for the recovery of a fund in the possession of a resident party, although claimed by a non-resident assignee,[31] an action to set aside a judgment annulling a marriage on the ground of fraud,[32] an action by a state to recover money deposited by a prisoner with a sheriff in lieu of bail,[33] an action to quiet,[34] or remove a cloud from,[35] title to real property, a suit for divorce and alimony, where it is sought to make the decree a charge upon property lying within the

83 N. Y. Suppl. 180; Haight *v.* Husted, 4 Abb. Pr. 348.

North Carolina.— Wheeler *v.* Cobb, 75 N. C. 21.

Texas.— Stephenson *v.* Texas, etc., R. Co., 42 Tex. 162.

Washington.— Paxton *v.* Daniell, 1 Wash. 19, 23 Pac. 441; Garrison *v.* Cheeney, 1 Wash. Terr. 489.

Wisconsin.— Hafern *v.* Davis, 10 Wis. 501.

United States.— Cohen *v.* Portland Lodge, No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483 [*affirming* 144 Fed. 266]; Batt *v.* Procter, 45 Fed. 515.

26. See the statutes of the several states. And see the following cases:

Colorado.— Hanscom *v.* Hanscom, 6 Colo. App. 97, 39 Pac. 885.

District of Columbia.— Jones *v.* Rutherford, 26 App. Cas. 114, a check drawn by the treasurer of the United States in settlement of a claim against the government is personal property within such a statute.

Iowa.— Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941; Robertson *v.* Young, 10 Iowa 291.

Michigan.— Williams *v.* Flint, etc., R. Co., 116 Mich. 392, 74 N. W. 641.

Minnesota.— Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4.

Missouri.— Morrison *v.* Turnbaugh, 192 Mo. 427, 91 S. W. 152; Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74; Clark *v.* Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412.

Nebraska.— Cheney *v.* Harding, 21 Nebr. 68, 32 N. W. 64.

New York.— Miller *v.* Jones, 67 Hun 281, 22 N. Y. Suppl. 86; Von Hesse *v.* Mackaye, 55 Hun 365, 8 N. Y. Suppl. 894 [*affirmed* in 121 N. Y. 694, 24 N. E. 1099].

Ohio.— Hinch *v.* D'Utassy, 1 Ohio S. & C. Pl. Dec. 372.

Texas.— Veeder *v.* Gilmer, (Civ. App. 1907) 105 S. W. 331, holding that personal service is not necessary in an action to correct an acknowledgment of a deed upon which the title to land depends.

Virginia.— Clem *v.* Given, 106 Va. 145, 55 S. E. 567, holding that under the Virginia statutes proceedings quasi *in rem* were included, and that in an action for specific performance of a contract of sale of real estate brought against a non-resident executor of the widow and children of the vendor, it was proper to proceed against the executor by publication.

Wisconsin.—Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

United States.—Evans *v.* Scribner, 58 Fed. 303 (holding that service might be had upon an absent defendant when the suit was brought to cancel for fraud a deed of land situated within the district, but that such service could not be had when the suit was for the purpose of setting aside alleged fraudulent transfers of life insurance policies issued by a foreign company, and which were not within the district, although the company in compliance with the state statute had deposited bonds with the controller-general of the state, especially when the company acknowledged its liability on the policy and offered to pay the amount thereof into court); Non-Magnetic Watch Co. *v.* Horlogere Suisse Assoc., 44 Fed. 6.

See 40 Cent. Dig. tit. "Process," § 100.

27. Bryan *v.* University Pub. Co., 112 N. Y. 382, 19 N. E. 825, 2 L. R. A. 638; Moyer *v.* Koontz, 103 Wis. 22, 79 N. W. 50, 74 Am. St. Rep. 837; Evans *v.* Scribners, 58 Fed. 303.

28. Roller *v.* Holly, 176 U. S. 398, 20 S. Ct. 410, 44 L. ed. 520; Arndt *v.* Griggs, 134 U. S. 316, 10 S. Ct. 557, 33 L. ed. 918; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Connor *v.* Tennessee Cent. R. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687.

29. Chicago, etc., Bridge Co. *v.* Anglo-American, etc., Co., 46 Fed. 584.

30. Plumb *v.* Bateman, 2 App. Cas. (D. C.) 156; Hencke *v.* Twomey, 58 Minn. 550, 60 N. W. 667.

31. Taylor *v.* Security Mut. L. Ins. Co., 38 Misc. (N. Y.) 575, 77 N. Y. Suppl. 1012.

32. Everett *v.* Everett, 22 N. Y. App. Div. 473, 47 N. Y. Suppl. 994, holding that the judgment is to be deemed a *res* remaining within the jurisdiction of the court.

33. State *v.* Scanlon, 2 Ind. App. 320, 28 N. E. 426.

34. Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941; Miller *v.* Davison, 31 Iowa 435; Dillon *v.* Heller, 39 Kan. 599, 18 Pac. 693; Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867.

35. Mitchener *v.* Holmes, 117 Mo. 185, 22 S. W. 1070; Morris *v.* Graham, 51 Fed. 53.

court's jurisdiction,[36] a suit to foreclose a mortgage[37] or to enforce a lien,[38] an action to trace trust funds into specific property,[39] an action to reform the description of land in a deed,[40] a suit for an accounting in respect to an estate within the jurisdiction of the court,[41] an action to construe a will,[42] an action to set aside a conveyance of realty,[43] an action to cancel a deed of real and personal property,[44] an action to set aside an assignment of a patent,[45] an action to enforce a transfer of shares of stock,[46] and an action for specific performance.[47] But if claims merely personal in their nature are joined with claims involving real estate, service cannot be had by publication so as to authorize judgment upon such personal claims,[48] although the mere fact that a party asks a greater measure of relief than can be given without personal service does not deprive the court of jurisdiction to grant such relief as is proper under service by publication.[49]

36. Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626; Hanscom *v.* Hanscom, 6 Colo. App. 97, 39 Pac. 885; Twing *v.* O'Meara, 59 Iowa 326, 13 N. W. 321; Harshberger *v.* Harshberger, 26 Iowa 503; Wesner *v.* O'Brien, 56 Kan. 724, 44 Pac. 1090, 54 Am. St. Rep. 604, 32 L. R. A. 289. *Contra*, Mussey *v.* Stimmel, 15 Ohio Cir. Ct. 439, 8 Ohio Cir. Dec. 237; Bunnell *v.* Bunnell, 25 Fed. 214.

37. Robertson *v.* Young, 10 Iowa 291; Mack *v.* Austin, 67 Kan. 36, 72 Pac. 551; Martin *v.* Pond, 30 Fed. 15.

A personal judgment cannot be rendered. Wood *v.* Stanberry, 21 Ohio St. 142.

38. Hoye Coal Co. *v.* Colvin, 83 Ark. 528, 104 S. W. 207; Morgan *v.* Mutual Ben. L. Ins. Co., 189 N. Y. 477, 82 N. E. 438 [*affirming* 119 N. Y. App. Div. 645, 104 N. Y. Suppl. 185] (holding that where a foreign insurance company doing business in the state under the laws thereof issued a policy to a resident who with the company's consent assigned it to another resident as collateral security for advanced premiums, and the assignee died a resident of the state and his trustees held the policy as an asset of his estate, the subject-matter of an action by the trustees against the company and the beneficiaries to recover the amount of premiums advanced was personal property within the state, within N. Y. Code Civ. Proc. § 438, subd. 5, authorizing the service of summons on a non-resident defendant by publication, where the complaint demands judgment that defendant be excluded from an interest in personal property within the state, and the non-resident beneficiaries may be served by publication); Chesley *v.* Morton, 9 N. Y. App. Div. 461, 41 N. Y. Suppl. 463.

39. Reeves *v.* Pierce, 64 Kan. 502, 67 Pac. 1108.

40. Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134.

41. Devlin *v.* Roussel, 36 N. Y. App. Div. 87, 55 N. Y. Suppl. 386.

42. Dillavou *v.* Dillavou, 130 Iowa 405, 106 N. W. 949.

43. Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4; Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74.

44. Robinson *v.* Kind, 23 Nev. 330, 47 Pac. 1, 977.

45. Miller *v.* Jones, 67 Hun (N. Y.) 281, 22 N. Y. Suppl. 86. But see Non-Magnetic Watch Co. *v.* Horlogere Suisse Assoc., 44 Fed. 6, where a patent right was held to be property not capable of being considered within the territorial jurisdiction of a court.

46. Sohege *v.* Singer Mfg. Co., (N. J. Ch. 1907) 68 Atl. 64 (so holding where the court had enjoined transfer of the shares and appointed receivers of them); Lockwood *v.* Brantly, 31 Hun (N. Y.) 155; Ryan *v.* Seaboard, etc., R. Co., 83 Fed. 889. But in a suit to establish their rightful title and ownership by persons claiming equitable title to stock of a Michigan corporation a federal court of that district cannot, by publication of notice, acquire jurisdiction of non-resident holders of the legal title to such stock. Jellenik *v.* Huron Copper-Min. Co., 82 Fed. 778.

47. *California.*— Seculovich *v.* Morton, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106.

District of Columbia.— Simmons *v.* Fry, 19 D. C. 472.

Kansas.— Horner *v.* Ellis, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446, holding, however, that prior to the adoption of Laws (1903), c. 384, an action to compel specific performance of an agreement to convey land, where defendant's obligation was in contract merely, was *in personam* and not *in rem*, and that jurisdiction could not be acquired by publication.

Montana.— Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 76 Pac. 967, 67 L. R. A. 940.

Virginia.— Clem *v.* Givens, 106 Va. 145, 55 S. E. 567.

United States.— Boswell *v.* Otis, 9 How. 336, 13 L. ed. 164; Porter Land, etc., Co. *v.* Baskin, 43 Fed. 323.

"If the defendant appears, the cause becomes mainly a suit *in personam*. But if there is no appearance of defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*." Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 495, 78 Pac. 967, 67 L. R. A. 940 [*quoting* Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931].

48. Zimmerman *v.* Barnes, 56 Kan. 419, 43 Pac. 764.

49. Reeves *v.* Pierce, 64 Kan. 502, 67 Pac. 1108; Chesley *v.* Morton, 9 N. Y. App. Div. 461, 41 N. Y. Suppl. 463; Porter Land, etc., Co. *v.* Baskin, 43 Fed. 323. Publication is

3. Persons Upon Whom Service May Be Made. Ordinarily statutes authorizing service by publication provide that such service may be made upon a non-resident,[50] or upon a resident who has left the state with intent to defraud his creditors or to avoid service, or is concealed in the state for that purpose,[51] or upon one who cannot after due diligence be found within the state.[52] One who is but temporarily absent from the state cannot be proceeded against as a non-resident,[53] nor can one be served as a non-resident merely because it cannot be ascertained where his residence is.[54] It is also sometimes provided that such service may be resorted to when defendant's last place of residence is in the state, but his residence, at the time, cannot be ascertained.[55] And inasmuch as no personal judgment can be rendered on mere constructive service of non-resident defendants, it is frequently provided that the non-resident served in this way must have property or debts owing to him within the state.[56] But a defendant does not have property within the state within the meaning of the statutes when it is merely brought temporarily

not allowable in the case of an action to enforce the performance of a contract for the sale of land where the complainant prays as condition precedent to the conveyance of the land that defendant be required to furnish him an abstract as agreed and to pay damages for delay in performance. Adams *v.* Heckscher, 83 Fed. 281.

50. *California.*— Parson *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

Georgia.— Stallings *v.* Stallings, 127 Ga. 464, 56 S. E. 469.

Indiana.— Johnson *v.* Patterson, 12 Ind. 471.

Nebraska.—Topliff *v.* Richardson, 76 Nebr. 114, 107 N. W. 114; Wood Harvester Co. *v.* Dobry, 59 Nebr. 590, 81 N. W. 611.

New Hampshire.— Martin *v.* Wiggin, 67 N. H. 196, 29 Atl. 450.

New York.— Bixby *v.* Smith, 3 Hun 60.

Texas.—Kitchen *v.* Crawford, 13 Tex. 516; Kilmer *v.* Brown, 28 Tex. Civ. App. 420, 67 S. W. 1090.

Wisconsin.—Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

United States.— Foster *v.* Givens, 67 Fed. 684, 14 C. C. A. 625; Palmer *v.* McCormick, 30 Fed. 82; Hartley *v.* Boynton, 17 Fed. 873, 5 McCrary 453; Collinson *v.* Teal, 6 Fed. Cas. No. 3,020, 4 Sawy. 241.

See 40 Cent. Dig. tit. "Process," § 101.

Resident synonymous with inhabitant.— In the law of process and service thereof, the term "resident" is generally synonymous with "inhabitant." Atkinson *v.* Washington, etc., College, 54 W. Va. 32, 46 S. E. 253.

51. *California.*— Kahn *v.* Matthai, 115 Cal. 689, 47 Pac. 698.

Iowa.— Lyon *v.* Comstock, 9 Iowa 306.

Kansas.— Cole *v.* Hoeburg, 36 Kan. 263, 13 Pac. 275.

Nebraska.—Walter A. Wood Harvester Co. *v.* Dobry, 59 Nebr. 590, 81 N. W. 611.

New York.— Towsley *v.* McDonald, 32 Barb. 604.

See 40 Cent. Dig. tit. "Process," § 101.

A township which fails to elect, or permit or allow its trustee, clerk or treasurer to qualify or designate, some person on whom service can be made, does not "conceal" itself, within the meaning of Kan. Code, §§ 429, 440, so as to permit service by publication. Brockway *v.* Oswego Tp., 32 Kan. 221, 4 Pac. 79.

Refusal of admission.— The mere failure by two different persons, on the same day, to obtain admittance to the apartments occupied by persons on whom summons is sought to be served is not sufficient to show an intent to avoid service. Foster *v.* Moore, 68 Hun (N. Y.) 526, 22 N. Y. Suppl. 1089.

Openly avoiding service of a summons by eluding the approach of the officer is not keeping concealed, within a provision authorizing a service by publication on defendant, being a resident of the state and keeping himself concealed with intent to avoid the service of the summons. Van Rensselaer *v.* Dunbar, 4 How. Pr. (N. Y.) 151.

To establish the intent to defraud, it must appear that defendant had some property which could be reached by suit. Towsley *v.* McDonald, 32 Barb. (N. Y.) 604.

52. Braly *v.* Seaman, 30 Cal. 610; Bixby *v.* Smith, 3 Hun (N. Y.) 60; Peck *v.* Cook, 41 Barb. (N. Y.) 549.

Sufficiency of showing.— Where the sheriff was unable to find defendant at his home, and was told there in June that he was out of the state and in July plaintiff was informed that defendant could probably be found at a certain place, and plaintiff unsuccessfully tried to find him there, and defendant's relatives could not tell where he could be found, an order for service by publication was justified. Hatfield *v.* Malcolm, 71 Hun (N. Y.) 51, 24 N. Y. Suppl. 596.

The judge and not the affiant must be satisfied that defendant is not a non-resident and that personal service cannot be made. Evans *v.* Weinstein, 124 N. Y. App. Div. 316, 108 N. Y. Suppl. 753.

53. McKim *v.* Odom, 3 Bland (Md.) 407.

54. Close *v.* Van Husen, 6 How. Pr. (N. Y.) 157.

In Texas it is sufficient if defendant's residence is unknown. Kilmer *v.* Brown, 28 Tex. Civ. App. 420, 67 S. W. 1090.

55. Close *v.* Van Husen, 6 How. Pr. (N. Y.) 157.

56. *New York.*—Fiske *v.* Anderson, 33 Barb. 71; Fiske *v.* Anderson, 12 Abb. Pr. 8; Lefferts *v.* Harris, 10 Abb. Pr. N. S. 2 note.

within the state.[57] The person sought to be served by publication must be a necessary or proper party.[58] Unknown defendants are summoned by publication under separate statutes authorizing such proceedings.[59]

4. Character of the Jurisdiction Acquired. It may be said as a general rule that where suit is brought to determine a non-resident defendant's personal rights and obligations, that is, where it is purely *in personam*, service by publication is ineffectual for any purpose, since no personal judgment can be rendered in such case;[60] but such service, when authorized by statute, is effectual so far as the proceeding is *in rem*, or quasi *in rem*, and gives the court jurisdiction over property within its territorial jurisdiction.[61] In proceedings quasi *in rem* the court usually acquires jurisdiction by attaching the property of defendant, whereas in proceedings strictly *in rem* no seizure of the property is necessary for jurisdictional pur-

North Carolina.— Winfree *v.* Bagley, 102 N. C. 515, 9 S. E. 198.

Ohio.— Williams *v.* Welton, 28 Ohio St. 451.

South Carolina.— Lesterjette *v.* Ford, 1 McMull. 89 note.

South Dakota.—Bunker *v.* Taylor, 13 S. D. 433.

Wisconsin.— Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

See 40 Cent. Dig. tit. "Process," § 101.

Contra.— Anderson *v.* Goff, 72 Cal. 65, 69, 13 Pac. 73, 1 Am. St. Rep. 34, where it is said: "Our statute gives the right to service of summons upon defendants in all cases where they are non-residents of the state, without reference to the fact of their having or not having property here. The effect of a judgment thus obtained is quite another thing."

57. Galusha *v.* Flour City Nat. Bank, 4 Thomps. & C. (N. Y.) 68; Haight *v.* Husted, 4 Abb. Pr. (N. Y.) 348.

58. *California.*—Ligare *v.* California South. R. Co., 76 Cal. 610, 18 Pac. 777.

Colorado.— Frybarger *v.* McMillan, 15 Colo. 349, 25 Pac. 713.

Indiana.— Dowell *v.* Lahr, 97 Ind. 146; Hamilton *v.* Barricklow, 96 Ind. 398.

Kansas.— Mack *v.* Austin, 67 Kan. 36, 72 Pac. 551.

Minnesota.— Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

South Carolina.— Commercial Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

59. See the statutes of the several states. And see the following cases:

Alabama.— Birmingham Realty Co. *v.* Barron, 150 Ala. 232, 43 So. 346, holding that under Code (1896), § 690, providing that where it is necessary to make persons whose names are unknown defendants to a bill the register must make publication as in case of non-residents, describing such unknown parties as near as may be by the character in which they are sued, and with reference to their title or interest in the subject-matter, an order of publication is sufficient to give jurisdiction, although containing no reference to the subject-matter of the suit and the title and interest of such defendants therein.

Arkansas.— Allen *v.* Smith, 25 Ark. 495.

California.— Moss *v.* Mayo, 23 Cal. 421.

District of Columbia.— Simmons *v.* Fry, 19 D. C. 472.

Iowa.— Guise *v.* Early, 72 Iowa 283, 33 N. W. 683.

Minnesota.—Inglee *v.* Welles, 53 Minn. 197, 55 N. W. 117; Ware *v.* Easton, 46 Minn. 180, 48 N. W. 775; Shepherd *v.* Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212.

Mississippi.— Kirkland *v.* Texas Express Co., 57 Miss. 316; Reed *v.* Gregory, 46 Miss. 740.

Missouri.— State *v.* Staley, 76 Mo. 158. See also Davis *v.* Montgomery, 205 Mo. 271, 103 S. W. 979, holding a petition and order for publication in an action to enforce a lien for taxes insufficient.

Nebraska.— Stull *v.* Masilonka, 74 Nebr. 309, 104 N. W. 188, 108 N. W. 166.

New York.— Piser *v.* Lockwood, 30 Hun 6.

60. *Iowa.*— Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Smith *v.* Griffin, 59 Iowa 409, 13 N. W. 423.

New Jersey.—Lanning *v.* Twining, 71 N. J. Eq. 573, 64 Atl. 466.

North Carolina.— Winfree *v.* Bagley, 102 N. C. 515, 9 S. E. 198.

Tennessee.—Farmers', etc., Bank *v.* Carter, 88 Tenn. 279, 12 S. W. 545.

Washington.— Paxton *v.* Daniell, 1 Wash. 19, 23 Pac. 441.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

The garnishment of the maker of a negotiable note, at the suit of creditors of the payee, because he has fraudulently conveyed his property, cannot give the state court jurisdiction to bring in the alleged fraudulent holder by publication only. Hauf *v.* Wilson, 31 Fed. 384.

61. *Kansas.*— Zimmerman *v.* Barnes, 56 Kan. 419, 43 Pac. 764.

Minnesota.— Lydiard *v.* Chute, 45 Minn. 277, 47 N. W. 967.

North Dakota.— Hartzell *v.* Viger, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 457.

Virginia.— Clem *v.* Given, 106 Va. 145, 55 S. E. 567.

Wisconsin.— Jarvis *v.* Barrett, 14 Wis. 591.

United States.— Arndt *v.* Griggs, 134 U. S. 316, 10 S. Ct. 557, 33 L. ed. 918; Morris *v.* Graham, 51 Fed. 53; Chicago, etc., Bridge Co. *v.* Anglo-American Packing, etc., Co., 46

poses.[62] Some statutes do not limit the use of service by publication against non-residents to actions in the nature of proceedings *in rem*, but while such service may be employed as provided by statute in proceedings *in personam*, it will not result in giving the court jurisdiction if defendant does not appear.[63] Service by publication may be sufficient to give jurisdiction over the person of a resident defendant,[64] although it has been held that such a proceeding does not constitute due process of law where defendant can be found within the state.[65]

5. Prerequisites to Service by Publication — a. In General. The existence of facts disclosing the right, under the statute, to make service by publication, should appear on the files and records of the court, and the form in which this showing is to be made, like the substance of the showing itself, is a matter regulated by statute. There is a good deal of variety in this respect among the statutes of various jurisdictions.[66]

b. Return of Not Found. Under some statutes a summons must be issued and returned "not found" before publication may be resorted to,[67] while under other statutes this is not necessary.[68] Again, such service and return, under other statutes, is necessary only when defendant is or is supposed to be a resident.[69] Some statutes require such return in the case of joint defendants, some of whom are within and some without the jurisdiction, in order to authorize service by publication.[70] A return of not found in order to form the foundation for publication must not be made until the time has expired within which personal service might be had;[71] but publication need not take place at once thereafter, and an interim of several months between the return and the publication has been held

Fed. 584; Bennett *v.* Fenton, 41 Fed. 283, 10 L. R. A. 500; Palmer *v.* McCormick, 28 Fed. 541.

62. Graham *v.* O'Bryan, 120 N. C. 463, 27 S. E. 122; Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

Attachment not indispensable.— "A writ of attachment is the usual and familiar method of conferring jurisdiction in such cases, but is not the only one. There is no magic about the writ which should make it the exclusive remedy. The same legislative power which provided it, can devise some other, and declare that it shall have the same force and effect. . . . The legislature could, therefore, substitute the service of summons by publication founded on affidavit that the defendant had property subject to the process of the court, for the writ of attachment, and give the court power to pronounce a judgment which should be effectual against such property." Jarvis *v.* Barrett, 14 Wis. 591, 595. See also Irion *v.* Bexar County, 26 Tex. Civ. App. 527, 63 S. W. 550.

63. Kirkpatrick *v.* Post, 53 N. J. Eq. 591, 32 Atl. 267 [*affirmed* in 53 N. J. Eq. 641, 33 Atl. 1059]; Clarke *v.* Boreel, 21 Hun (N. Y.) 594. *Compare* McMullen *v.* Guest, 6 Tex. 275, where in a purely personal action commenced by publication against a non-resident the court said: "The non-residence of the defendant constitutes no objection to the jurisdiction, however the judgment might be regarded if sought to be enforced in a foreign State."

64. Beard *v.* Beard, 21 Ind. 321; Fernandez *v.* Casey, 77 Tex. 452, 14 S. W. 149; Knowles *v.* Logansport Gas Light, etc., Co., 19 Wall. (U. S.) 58, 22 L. ed. 70.

65 Bear Lake County *v.* Budge, 9 Ida. 708, 75 Pac. 614, 108 Am. St. Rep. 179; Bardwell *v.* Collins, 44 Minn. 97, 46 N. W. 315, 20 Am. St. Rep. 547, 9 L. R. A. 152; Brown *v.* Levee Com'rs, 50 Miss. 468.

66. See the statutes of the several states. And see the cases cited *infra*, II, D, 5, b *et seq.*

67. *Arkansas.*— Turnage *v.* Fisk, 22 Ark. 286.

Illinois.— Smith *v.* Trimble, 27 Ill. 152.

Iowa.— Trask *v.* Key, 4 Greene 372; Pinkney *v.* Pinkney, 4 Greene 324.

Kentucky.— Greenup *v.* Bacon, 1 T. B. Mon. 108.

Michigan.— Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109.

Missouri.— Pitkin *v.* Flagg, 198 Mo. 646, 97 S. W. 162; Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158; Tooker *v.* Leake, 146 Mo. 419, 48 S. W. 638; Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971; State *v.* Finn, 87 Mo. 310.

New Hampshire.— Burney *v.* Hodgdon, 66 N. H. 338, 29 Atl. 493.

See 40 Cent. Dig. tit. "Process," § 103.

68. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Easton *v.* Childs, 67 Minn. 242, 69 N. W. 903 [*overruling* Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134]; Best *v.* British, etc., Mortg. Co., 128 N. C. 351, 38 S. E. 923; Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

69. Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158; Tooker *v.* Leake, 146 Mo. 419, 48 S. W. 638; Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971; Smith *v.* Whittlesey, 19 Ohio Cir. Ct. 412, 10 Ohio Cir. Dec. 377.

70. Smith *v.* Whittlesey, 19 Ohio Cir. Ct. 412, 10 Ohio Cir. Dec. 377.

71. Clayton *v.* Clayton, 4 Colo. 410; Palmer *v.* Cowdrey, 2 Colo. 1; Pinkney *v.* Pinkney, 4

not to affect the validity of the latter,[72] although an unreasonable and unexplained delay may destroy the right to resort to publication.[73]

c. Filing Petition or Declaration. It is sometimes provided that a declaration or complaint must be filed before publication can be made, or an order therefor be given;[74] and this pleading is under some statutes required or permitted to contain a showing of facts disclosing the right to constructive service.[75] But unless required by statute such filing is not necessary as a prerequisite to service by publication.[76] If the petition must first be filed, it is in some states essential that it shall disclose a cause of action of which the court has jurisdiction.[77] Under some statutes it may appear either by affidavit or by a verified complaint or file that a cause of action exists,[78] or that defendant is a non-resident.[79] In some jurisdictions the petition on which service by publication is ordered must be sworn to.[80]

d. Affidavit For Order of Publication — (i) *Necessity.* It is almost universally provided that, as a prerequisite to service by publication, an affidavit shall be made and filed, showing the existence of facts authorizing recourse to that statutory substitute for personal service.[81] An affidavit may be sufficient even if made

Greene (Iowa) 324; Sweet *v.* Gibson, 123 Mich. 699, 83 N. W. 407; Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158.

72. Richardson *v.* Wortman, 34 Colo. 374, 83 Pac. 381; Eagle Gold Min. Co. *v.* Bryarly, 28 Colo. 262, 65 Pac. 52.

73. Brunswick Hardware Co. *v.* Bingham, 110 Ga. 526, 35 S. E. 772, a delay of seven terms of court.

74. Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198; Cummings *v.* Tabor, 61 Wis. 185, 21 N. W. 72; Anderson *v.* Coburn, 27 Wis. 558.

Failure to file is not a jurisdictional defect and can be cured by a *nunc pro tunc* order. Fink *v.* Wallach, 109 N. Y. App. Div. 718, 96 N. Y. Suppl. 543 [*reversing* 47 Misc. (N. Y.) 247, 95 N. Y. Suppl. 872].

75. McMahan *v.* Smith, 69 Ark. 591, 65 S. W. 459; Yolo County *v.* Knight, 70 Cal. 431, 11 Pac. 662; Morrison *v.* Turnbaugh, 192 Mo. 427, 91 S. W. 152; Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158; State *v.* Staley, 76 Mo. 158; U. S. *v.* American Lumber Co., 80 Fed. 309.

76. Foster *v.* Henderson, 54 Iowa 220, 6 N. W. 186 [*overruling* Foster *v.* Henderson, (Iowa 1879) 1 N. W. 596; Billings *v.* Kothe, 49 Iowa 34].

When notice published fixes date of filing of the petition, such filing must be made as stated; but if the petition is in fact on file at the time of the first publication, even if filed after the date fixed in the notice, jurisdiction is acquired. Oliver *v.* Davis, 81 Iowa 287, 46 N. W. 1000.

77. Paget *v.* Stevens, 143 N. Y. 172, 38 N. E. 273; Montgomery *v.* Boyd, 60 N. Y. App. Div. 133, 70 N. Y. Suppl. 139; Haight *v.* Le Foncier de France, 84 N. Y. Suppl. 135.

78. Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777.

79. Wright *v.* Hink, 193 Mo. 130, 91 S. W. 933; Harbert *v.* Durden, 116 Mo. App. 512, 92 S. W. 746.

80. Charles *v.* Morrow, 99 Mo. 638, 12 S. W. 903; Brandow *v.* Vroman, 22 Misc. (N. Y.) 370, 50 N. Y. Suppl. 323 [*reversed* on other grounds in 29 N. Y. App. Div. 597, 51 N. Y. Suppl. 943]; McCully *v.* Heller, 66 How. Pr. (N. Y.) 468.

81. See the statutes of the several states. And see the following cases:

Arkansas.— Allen *v.* Smith, 25 Ark. 495; Coons *v.* Throckmorton, 25 Ark. 60.

California.— Weis *v.* Cain, (1903) 73 Pac. 980; People *v.* Pearson, 76 Cal. 400, 18 Pac. 424; People *v.* Mullan, 65 Cal. 396, 4 Pac. 348.

Illinois.— Millett *v.* Pease, 31 Ill. 377.

Indiana.—Redman *v.* Burgess, 20 Ind. App. 371, 50 N. E. 825.

Iowa.— Guinn *v.* Elliott, 123 Iowa 179, 98 N. W. 625; Priestman *v.* Priestman, 103 Iowa 320, 72 N. W. 535; Bardsley *v.* Hines, 33 Iowa 157.

Kansas.— Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487.

Minnesota.— Easton *v.* Childs, 67 Minn. 242, 69 N. W. 903; Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Brown *v.* St. Paul, etc., R. Co., 38 Minn. 506, 38 N. W. 698; Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836.

Missouri.— Pitkin *v.* Flagg, 198 Mo. 646, 97 S. W. 162 (holding that Rev. St. (1899) § 577, providing that where the sheriff makes a return of *non est*, the court on being satisfied that process cannot be served shall make an order of publication, does not require the court to examine the files and make orders of publication without suggestions from plaintiff's attorney); Morrison *v.* Turnbaugh, 192 Mo. 427, 91 S. W. 152; Murdock *v.* Hillyer, 45 Mo. App. 287.

Nebraska.— Murphy *v.* Lyons, 19 Nebr. 689, 28 N. W. 328.

New York.— Easterbrook *v.* Easterbrook, 64 Barb. 421; Waffle *v.* Goble, 53 Barb. 517.

North Carolina.— Peters Grocery Co. *v.* Collins Bag Co., 142 N. C. 174, 55 S. E. 90.

North Dakota.—Pillsbury *v.* J. B. Streeter, Jr., Co., 15 N. D. 174, 107 N. W. 40.

Oklahoma.— Cordray *v.* Cordray, (1907) 91 Pac. 781, holding that where publication is relied on to confer jurisdiction the affi-

in another action.[82] It must be sufficient as to each one of the defendants sought to be served.[83] No presumptions can be indulged to sustain it when directly attacked.[84]

(II) *Who May Make.* The statute frequently provides by whom the affidavit shall be made, whether by the party or his attorney or other person, and when there is such specific provision an affidavit is invalid if made by any one not so authorized.[85] If the statute makes no provision in regard to the matter, an affidavit by plaintiff,[86] or his attorney,[87] is sufficient, and it is not necessary in the latter case that the means of knowledge of the affiant should be stated.[88]

(III) *Form of Affidavit.* The affidavit must be properly sworn to,[89] and contain a proper jurat,[90] and it may ordinarily be made anywhere, within or without the state.[91] The want of a venue will not vitiate it if it clearly appears in what court, state, and county the case is pending,[92] although it has been held, on

davit as well as the publication notice are jurisdictional matters and both must comply with the statute.

Texas.— Kilmer *v.* Brown, 28 Tex. Civ. App. 420, 67 S. W. 1090.

United States.— Johnson *v.* Hunter, 147 Fed. 133, 77 C. C. A. 359; Bronson *v.* Keokuk, 4 Fed. Cas. No. 1,928, 2 Dill. 498.

See 40 Cent. Dig. tit. "Process," § 108 *et seq.*

Filing.—An affidavit for publication of summons is properly filed, where it is deposited with the proper officer. Bogart *v.* Kiene, 85 Minn. 261, 88 N. W. 748.

Evidence of filing.— The presumption that an affidavit of non-residence was never filed, arising from the clerk's failure to make a memorandum of such filing in the appearance docket, and the absence of such affidavit from the other papers in the case, is rebutted by positive testimony that such affidavit was made, that the clerk's office was carelessly conducted, and a recital in the decree that service had been duly made by publication. Simmons *v.* Simmons, 91 Iowa 408, 59 N. W. 272. The recital in an order for publication of process, that an affidavit of non-residence had been presented, is not sufficient evidence of that fact. Platt *v.* Stewart, 10 Mich. 260.

82. Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62.

83. Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

84. Bothell *v.* Hoellwarth, 10 S. D. 491, 74 N. W. 231.

It is to be deemed sufficient evidence to support the jurisdiction unless it is controverted by defendant's affidavit. Railey *v.* Railey, 66 S. W. 414, 23 Ky. L. Rep. 1891.

85. Everett *v.* Connecticut Mut. L. Ins. Co., 4 Colo. App. 509, 36 Pac. 616; Sayre-Newton Lumber Co. *v.* Park, 4 Colo. App. 482, 36 Pac. 445; Sylph Min., etc., Co. *v.* Williams, 4 Colo. App. 345, 36 Pac. 80; Davis *v.* John Mouat Lumber Co., 2 Colo. App. 381, 31 Pac. 187; Taylor *v.* Watkins, 4 B. Mon. (Ky.) 561; Gilkeson *v.* Knight, 71 Mo. 403; Swanson *v.* Hoyle, 32 Wash. 169, 72 Pac. 1011.

A recital of agency in an affidavit made by one for another, for the purpose of an order for service by publication, is a sufficient showing of authority. Birmingham Realty Co. *v.* Barron, 150 Ala. 232, 43 So. 346.

86. Waffle *v.* Goble, 53 Barb. (N. Y.) 517.

Under Va. Code, § 3230, providing that where there are or may be persons interested in the subject to be disposed of whose names are unknown, and makes such persons parties by the general description of "parties unknown" on affidavit of the fact that said parties are unknown an order of publication may be entered against such unknown parties an affidavit reciting that the parties are unknown "to affiant" is sufficient and need not state that they are unknown to all. Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016.

87. *California.*— Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

Iowa.— Banta *v.* Wood, 32 Iowa 469.

New York.— Salisbury *v.* Cooper, 33 Misc. 558, 68 N. Y. Suppl. 876.

Virginia.— Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016.

Wisconsin.— Young *v.* Schenck, 22 Wis. 556.

United States.— Palmer *v.* McCormick, 30 Fed. 82.

See 40 Cent. Dig. tit. "Process," § 110.

88. Gilkeson *v.* Knight, 71 Mo. 403. But *compare* Eldridge *v.* The William Campbell, 27 Mo. 595, where in analogy to the admiralty practice the rule was said to be otherwise under a statute relating to proceedings against vessels.

89. Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

90. Rumeli *v.* Tampa, 48 Fla. 112, 37 So. 563.

91. Johnson *v.* Gibson, 116 Ill. 294, 6 N. E. 205.

Certification.— Where an affidavit on which an order for publication is granted is sworn to without the state, without being certified in the manner required to entitle a deed so acknowledged to be recorded in the state, the order for publication and the proceedings thereunder are without authority, as the papers are to be regarded as unverified. Phelps *v.* Phelps, 6 N. Y. Civ. Proc. 117.

92. Clemson Agricultural College *v.* Pickens, 42 S. C. 511, 20 S. E. 401; Palmer *v.* McCormick, 30 Fed. 82.

the contrary, that a venue is absolutely essential to a valid affidavit;[93] and an affidavit wrongly entitled in the cause has been declared fatally defective.[94] A verified complaint is an affidavit, and if it contains the necessary facts, will sustain an order for publication under a statute requiring an affidavit,[95] and a verified complaint referred to in an affidavit may be looked to as part of the affidavit;[96] but a complaint not so referred to is valueless for the purpose of supplying material facts omitted from the affidavit.[97] Mere clerical errors will not vitiate the affidavit.[98]

(iv) *What Facts Must Appear in Affidavit.* Every fact should be shown which is necessary under the statute to give the right to an order for service by publication,[99] although it may be supported and aided by a sheriff's return of not found;[1] but it need show no facts other than those required by the statute.[2] The particular facts which must appear in the affidavit are always prescribed by statute, and vary in the different states, but they commonly include such facts as non-residence of defendant,[3] that defendant's residence is unknown or cannot

93. Albers *v.* Kozeluh, 68 Nebr. 522, 94 N. W. 521, 97 N. W. 646.

94. Castle *v.* Matthews, Lalor (N. Y.) 438. But *compare* Becker *v.* Linton, (Nebr. 1908) 114 N. W. 928, holding that an affidavit for service by publication was not invalid because it had a caption showing that it was made for a pending case, whereas no case was pending, or because persons named in the affidavit against whom the petition was filed were referred to as defendants.

95. Ballard *v.* Hunter, 74 Ark. 174, 85 S. W. 252; Woods *v.* Pollard, 14 S. D. 44, 84 N. W. 214; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274 [*affirmed* in 95 U. S. 714, 24 L. ed. 565].

96. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777; Wiley *v.* Carson, 15 S. D. 298, 89 N. W. 475; Coughran *v.* Markley, 15 S. D. 37, 87 N. W. 2; Woods *v.* Pollard, 14 S. D. 44, 84 N. W. 214; Davis *v.* Cook, 9 S. D. 319, 69 N. W. 18.

Unverified complaint.— It was held in Clemson Agricultural College *v.* Pickens, 42 S. C. 511, 20 S. E. 401, that a reference to a complaint which apparently was unverified might aid an affidavit.

97. Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376.

98. Pierpont *v.* Pierpont, 19 Tex. 227.

An affidavit of non-residence, reciting that the attorney for the complainant states on oath that defendant is not a resident of the state, and that he has made diligent inquiry to learn his place of residence, and has been "enabled" to ascertain the same, is insufficient to support a service by publication, as "enabled" cannot be construed as *idem sonans* with "unable." Tobin *v.* Brooks, 113 Ill. App. 79.

Use of county instead of state.— Under a statute requiring that notice of publication be on affidavit that service cannot be had on defendant "in the state," a published notice based on an affidavit that service cannot be had on defendant "in the county" is void. Stillman *v.* Rosenberg, 111 Iowa 369, 82 N. W. 768.

99. *California.*— Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732.

Idaho.— Strode *v.* Strode, 6 Ida. 67, 52 Pac. 161, 96 Am. St. Rep. 249.

Illinois.— Hannas *v.* Hannas, 110 Ill. 53; Hartung *v.* Hartung, 8 Ill. App. 156.

Indiana.— Fontaine *v.* Houston, 58 Ind. 316.

Iowa.— Stillman *v.* Rosenberg, 111 Iowa 369, 82 N. W. 768; Chase *v.* Kaynor, 78 Iowa 449, 43 N. W. 269; Fuller *v.* Riggs, 66 Iowa 328, 23 N. W. 730.

Kansas.— Grouch *v.* Martin, 47 Kan. 313, 27 Pac. 985; Carey *v.* Reeves, 46 Kan. 571, 26 Pac. 951.

Michigan.—Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520.

Nebraska.—Atkins *v.* Atkins, 9 Nebr. 191, 2 N. W. 466.

New York.— Carleton *v.* Carleton, 85 N. Y. 313; Empire City Sav. Bank *v.* Silleck, 98 N. Y. App. Div. 139, 90 N. Y. Suppl. 561 [*affirmed* in 180 N. Y. 541, 73 N. E. 1123]; Bixby *v.* Smith, 3 Hun 60; Towsley *v.* McDonald, 32 Barb. 604.

North Carolina.— Wheeler *v.* Cobb, 75 N. C. 21.

Wisconsin.— Manning *v.* Heady, 64 Wis. 630, 25 N. W. 1.

United States.— Johnson *v.* Hunter, 147 Fed. 133, 77 C. C. A. 359 [*reversing* 127 Fed. 219].

See 40 Cent. Dig. tit. "Process," § 114.

A showing substantially and by plain inference in accordance with the statute is sufficient on collateral attack. Allen *v.* Chicago, 176 Ill. 113, 52 N. E. 33.

Affidavit need not show all facts under some statutes.— In Wisconsin it is only necessary that the affidavit and complaint together shall show the requisite facts. Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124; Bragg *v.* Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161.

1. Seaver *v.* Fitzgerald, 23 Cal. 85; Howe Mach. Co. *v.* Pettibone, 74 N. Y. 68; Marx *v.* Ebner, 180 U. S. 314, 21 S. Ct. 376, 45 L. ed. 547. *Contra*, Waffle *v.* Goble, 53 Barb. (N. Y.) 517.

2. Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777; Warner *v.* Miner, 41 Wash. 98, 82 Pac. 1033.

3. *California.*— Parsons *v.* Weis. 144 Cal. 410, 77 Pac. 1007; Furnish *v.* Mullan, 76 Cal. 646, 18 Pac. 854.

upon diligent inquiry be ascertained,[4] that personal service of summons cannot be made within the state,[5] that he is absent from the state and cannot be served personally,[6] that defendant has left the state with the intent to defraud his creditors,[7] that defendant cannot be found within the state after due diligence,[8] that

Idaho.— Mills *v.* Smiley, 9 Ida. 325, 76 Pac. 783.

Indiana.— Hamilton *v.* Barricklow, 96 Ind. 398; Davidson *v.* State, 62 Ind. 276.

Mississippi.— McKiernan *v.* Massingill, 6 Sm. & M. 375, citizenship in another state not equivalent of non-residence.

Missouri.— Wright *v.* Hink, 193 Mo. 130, 91 S. W. 933, the fact may be shown either by affidavit or in the petition.

Nebraska.— McGavock *v.* Pollack, 13 Nebr. 535, 14 N. W. 659.

New York.— Young *v.* Fowler, 73 Hun 179, 25 N. Y. Suppl. 875; Jerome *v.* Flagg, 48 Hun 351, 1 N. Y. Suppl. 101.

Washington.— Bardon *v.* Hughes, 45 Wash. 627, 88 Pac. 1040 (holding that a particular affidavit was not subject to the objection that it did not state that the place of residence was unknown); De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

United States.— Cohen *v.* Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483; Johnson *v.* Hunter, 147 Fed. 133, 77 C. C. A. 359 [*reversing* 127 Fed. 219].

See 40 Cent. Dig. tit. "Process," § 118.

Contra.— Taylor *v.* Ormsby, 66 Iowa 109, 23 N. W. 288.

Conclusions of law.— The allegation in an affidavit for publication of summons that defendants, and each of them, are non-residents of the state, and that service of summons cannot be made within the state upon said defendants or any of them, is not open to an objection that it alleges a mere conclusion of law. Becker *v.* Linton, (Nebr. 1908) 114 N. W. 928.

4. *Illinois.*— Anderson *v.* Anderson, 229 Ill. 538, 82 N. E. 311; Hannas *v.* Hannas, 110 Ill. 53; Spalding *v.* Fahrney, 108 Ill. App. 602; Malaer *v.* Damron, 31 Ill. App. 572.

Mississippi.— Foster *v.* Simmons, 40 Miss. 585.

New York.— Denman *v.* McGuire, 101 N. Y. 161, 4 N. E. 278; Cook *v.* Farnam, 21 How. Pr. 286; Hyatt *v.* Wagenright, 18 How. Pr. 248.

Washington.— Bardon *v.* Hughes, 45 Wash. 627, 88 Pac. 1040.

United States.— Cohen *v.* Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483, holding an affidavit sufficient to show diligence on the part of affiant.

5. Priestman *v.* Priestman, 103 Iowa 320, 72 N. W. 535; Snell *v.* Meservy, 91 Iowa 322, 59 N. W. 32; Grouch *v.* Martin, 47 Kan. 313, 27 Pac. 985; Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495; McCormick *v.* Paddock, 20 Nebr. 486, 30 N. W. 602; McGavock *v.* Pollack, 13 Nebr. 535, 14 N. W. 659.

The words "in this state" must appear in the affidavit. Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495.

6. People *v.* Booth, 121 Mich. 131, 79 N. W. 1100; Torrans *v.* Hicks, 32 Mich. 307; Taylor *v.* Coots, 32 Nebr. 30, 48 N. W. 964, 29 Am. St. Rep. 426; Fouts *v.* Mann, 15 Nebr. 172, 18 N. W. 64; De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072; State *v.* Pierce County Super. Ct., 6 Wash. 352, 33 Pac. 827; Cohen *v.* Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483, holding the allegations of an affidavit without a copy of the return of the sheriff on the summons sought to be served to constitute *prima facie* evidence of defendant's absence from the state.

7. Young *v.* Fowler, 73 Hun (N. Y.) 179, 25 N. Y. Suppl. 875; Stow *v.* Stacy, 14 N. Y. Civ. Proc. 45; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

8. *California.*— Chapman *v.* Moore, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130 (holding that an affidavit was sufficient to show the exercise of diligence, although it failed to state expressly the result of affiant's inquiries); Forbes *v.* Hyde, 31 Cal. 342.

Idaho.— McKnight *v.* Grant, 13 Ida. 629, 92 Pac. 989, 121 Am. St. Rep. 287.

Kansas.— Washburn *v.* Buchanan, 52 Kan. 417, 34 Pac. 1049.

Minnesota.— Harrington *v.* Loomis, 10 Minn. 366.

Montana.— Palmer *v.* McMaster, 13 Mont. 184, 33 Pac. 132, 40 Am. St. Rep. 634.

New York.— Kennedy *v.* Lamb, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800; McCracken *v.* Flanagan, 127 N. Y. 493, 28 N. E. 385, 24 Am. St. Rep. 481; Carleton *v.* Carleton, 85 N. Y. 313; McLaughlin *v.* McCann, 123 N. Y. App. Div. 67, 107 N. Y. Suppl. 762 (holding that an order for service of a summons by publication was authorized, upon an affidavit of plaintiff showing that the last she knew of defendant she resided in the state of Washington, since the presumption of the continuance of residence obtained and the great distance of that state warranted the finding that defendant could not be served in New York with due diligence); Sinnott *v.* Ennis, 120 N. Y. App. Div. 874, 105 N. Y. Suppl. 218 (holding that an affidavit that defendants are non-residents of the state and reside in and are subjects of Great Britain and Ireland, and have always been residents thereof, and that plaintiff is unable to make personal service of the summons, is sufficient to justify a finding that such defendants cannot with due diligence be found within the state); Bixby *v.* Smith, 3 Hun 60; Waffle *v.* Goble, 53 Barb. 517; Peck *v.* Cook, 41 Barb. 549; Fetes *v.* Volmer, 5 Silv. Sup. 408, 8 N. Y. Suppl. 294; Wichman *v.* Aschpurwis, 55 N. Y. Super. Ct. 218; Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1; Orr *v.* Currie, 14 Misc. 74, 35 N. Y. Suppl. 198.

North Carolina.— Peters Grocery Co. *v.* Collins Bag Co., 142 N. C. 174, 55 S. E. 90.

defendant is concealing himself in order to avoid service,[9] that plaintiff has mailed a copy of the summons to defendant at his place of residence,[10] that the names or residences of the unknown defendants could not be ascertained by diligent exertion,[11] that the party to be served is a foreign corporation,[12] that plaintiff has a good cause of action against such defendant,[13] that defendant sought to be served by publication is a necessary or proper party to the action,[14] that the cause of action is one of those enumerated in the statute,[15] that the court has jurisdiction of the subject of the action,[16] and that defendant has property within the state.[17] Of those facts which are stated in the statute in the disjunctive, any one is enough to be shown in the affidavit,[18] or the affidavit may state two or more of such statutory grounds for publication in the disjunctive;[19] but those facts which are enumerated in the statute in the conjunctive must all be shown in the affidavit.[20] In some jurisdictions the affidavit must disclose the facts which constitute plaintiff's cause of action;[21] in others it is sufficient if the nature of the cause of action is stated;[22] while in others the affidavit is required only to state that plaintiff

North Dakota.— Simensen *v.* Simensen, 13 N. D. 305, 100 N. W. 708.

South Carolina.—Augusta Sav. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

United States.— Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274.

See 40 Cent. Dig. tit. "Process," § 118.

9. Bradford *v.* McAvoy, 99 Cal. 324, 33 Pac. 1091.

10. Martin *v.* Pond, 30 Fed. 15, holding that under Minn. Laws (1869), c. 73, § 49, allowing service by publication upon affidavit stating among other things that plaintiff has mailed a copy of the summons to defendant at his place of residence, "unless it is stated in the affidavit that his residence is not known to affiant," the fact that the address to which the copy of summons was mailed, as stated in the affidavit, was not in fact the residence of defendant, does not affect the jurisdiction; the plaintiff having acted in good faith, upon the best information obtainable, the affidavit being in proper form, the publication being properly made, and the judgment reciting due service by publication.

11. Kirkland *v.* Texas Express Co., 57 Miss. 316; Piser *v.* Lockwood, 30 Hun (N. Y.) 6.

12. De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072. See *infra*, VI, B, 8.

13. *California.*—Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777.

Colorado.— Beckett *v.* Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. Rep. 399.

Indiana.— Hamilton *v.* Barricklow, 96 Ind. 398; Davidson *v.* State, 62 Ind. 276.

New York.— Rawdon *v.* Corbin, 3 How. Pr. 416.

South Carolina.—Augusta Sav. Bank *v.* Stellings, 31 S. C. 360, 9 S. E. 1028.

See 40 Cent. Dig. tit. "Process," § 117.

14. Frybarger *v.* McMillen, 15 Colo. 349, 25 Pac. 713; Dowell *v.* Lahr, 97 Ind. 146; Hamilton *v.* Barricklow, 96 Ind. 398; Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823; Augusta Sav. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

15. Grouch *v.* Martin, 47 Kan. 313, 27 Pac. 985; Harris *v.* Claflin, 36 Kan. 543, 13 Pac. 830; Fulton *v.* Levy, 21 Nebr. 478, 32 N. W. 307; Fouts *v.* Mann, 15 Nebr. 172, 18 N. W. 64; Atkins *v.* Atkins, 9 Nebr. 191, 2 N. W. 466; Whitehead *v.* Post, 2 Ohio Dec. (Reprint) 468, 3 West. L. Month. 195.

Averment of conclusion.— An affidavit for constructive service, made under a statute requiring that it be shown that the case is one mentioned in "section 72," stating merely that "this case is one of those mentioned in section 72," while defective, does not make the service thereunder void. Douglass *v.* Lieberman, 9 Kan. App. 45, 57 Pac. 254.

16. Hartzell *v.* Vigen, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451.

17. *Minnesota.*— Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376.

New York.— Handley *v.* Quick, 47 How. Pr. 233; Rawdon *v.* Corbin, 3 How. Pr. 416.

North Carolina.— Spiers *v.* Halstead, 71 N. C. 209.

Oregon.— Colburn *v.* Barrett, 21 Oreg. 27, 26 Pac. 1008; Pike *v.* Kennedy, 15 Oreg. 420, 15 Pac. 637.

South Carolina.—Augusta Sav. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

18. Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; Ervin *v.* Milne, 17 Mont. 494, 43 Pac. 706; De Corvet *v.* Dolan, 7 Wash. 365, 35 Pac. 72, 1072.

19. Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782.

20. Cook *v.* Farmer, 11 Abb. Pr. (N. Y.) 40 [*affirmed* in 34 Barb. 95, 12 Abb. Pr. 359, 21 How. Pr. 286].

21. *Nevada.*— Victor Mill, etc., Co. *v.* Esmeralda County Justice Ct., 18 Nev. 21, 1 Pac. 831.

North Carolina.— Lemly *v.* Ellis, 143 N. C. 200, 55 S. E. 629; Bacon *v.* Johnson, 110 N. C. 114, 14 S. E. 508.

South Dakota.— Coughran *v.* Markley, 15 S. D. 37, 87 N. W. 2.

Wisconsin.— Rankin *v.* Adams, 18 Wis. 292; Slocum *v.* Slocum, 17 Wis. 150.

United States.— Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274.

See 40 Cent. Dig. tit. "Process," § 117.

22. *Indiana.*— Pitts *v.* Jackson, 135 Ind. 211, 35 N. E. 10; Field *v.* Malone, 102 Ind. 251, 1 N. E. 507.

has a good cause of action against defendant named.[23] A substantial difference between the cause of action described in the affidavit and that disclosed in the complaint will render the publication ineffectual to confer jurisdiction.[24] If the residence of defendant is stated as accurately as it is known, that is sufficient;[25] if the town is given the street and number need not be added.[26] Some cases have held that a showing of facts as to residence and actual abode from which it is clear that nothing would have resulted from a diligent effort to obtain personal service within the state will take the place of the showing which the statute requires that defendant, after due diligence, cannot be found within the state.[27] It is sometimes held unnecessary for the affidavit to show defendant has property in the state, although such fact must always exist in order that a judgment may be valid and effectual;[28] where it is necessary to show that defendants have property in the state, the affidavit should specify the property.[29] Defendant sought to be served by publication must be properly named in the affidavit.[30]

(v) *How Facts Should Be Stated.* When the requirement of the statute is in the form of a conclusion, such as that defendant cannot after due diligence be found, or that he is a necessary party to the action, etc., the affidavit should not merely use the words of the statute, but should set up the evidence which tends to show the existence of what the statute requires;[31] but some cases hold

Kansas.— Grouch *v.* Martin, 47 Kan. 313, 27 Pac. 985; Harris *v.* Claflin, 36 Kan. 543, 13 Pac. 830; Gillespie *v.* Thomas, 23 Kan. 138; Claypoole *v.* Houston, 12 Kan. 324. See, however, Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346, where it is held that under Code Civ. Proc. § 72, enumerating the cases in which service may be had by publication, and section 73, requiring an affidavit for such service to show "that the case is one of those mentioned" by section 72, an affidavit stating that the action is one "to quiet title to real estate as provided by section 72," does not sufficiently show that the case is "one of those mentioned."

Minnesota.—Gilmore *v.* Lampman, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376; Inglee *v.* Welles, 53 Minn. 197, 55 N. W. 117.

Nebraska.— Leigh *v.* Green, 62 Nebr. 344, 86 N. W. 1093, 89 Am. St. Rep. 751; Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867; Majors *v.* Edwards, 36 Nebr. 56, 53 N. W. 1041; Shedenhelm *v.* Shedenhelm, 21 Nebr. 387, 32 N. W. 170; Holmes *v.* Holmes, 15 Nebr. 615, 19 N. W. 600.

United States.— Ormsby *v.* Ottman, 85 Fed. 492, 29 C. C. A. 295.

23. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043; Frybarger *v.* McMillen, 15 Colo. 349, 25 Pac. 713.

24. Vermont L. & T. Co. *v.* McGregor, 5 Ida. 510, 51 Pac. 104.

25. Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164.

26. Burke *v.* Donnovan, 60 Ill. App. 241.

27. *Iowa.*— Byrne *v.* Roberts, 31 Iowa 319.

Kansas.— Washburn *v.* Buchanan, 52 Kan. 417, 34 Pac. 1049.

Missouri.— Harbert *v.* Durden, 116 Mo. App. 512, 92 S. W. 746 [*overruling* Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495].

New York.— Kennedy *v.* New York L. Ins., etc., Co., 101 N. Y. 487, 5 N. E. 774; Union Trust Co. *v.* Driggs, 62 N. Y. App. Div. 213, 70 N. Y. Suppl. 947; Jerome *v.* Flagg, 48 Hun 351, 1 N. Y. Suppl. 101; Hudson *v.* Kowing, 4 N. Y. St. 866.

Oregon.— Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664; Pike *v.* Kennedy, 15 Oreg. 420, 15 Pac. 637.

South Dakota.— Cochran *v.* Germain, 15 S. D. 77, 87 N. W. 527.

United States.— Marx *v.* Ebner, 180 U. S. 314, 21 S. Ct. 376, 45 L. ed. 547; McDonald *v.* Cooper, 32 Fed. 745, 13 Sawy. 86.

But an affidavit of non-residence merely is not equivalent to an affidavit that personal service cannot be made on defendant within the state. Carnes *v.* Mitchell, 82 Iowa 601, 48 N. W. 941.

28. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

29. Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346; Winner *v.* Fitzgerald, 19 Wis. 393; McDonald *v.* Cooper, 32 Fed. 745, 13 Sawy. 86.

30. Rawson *v.* Sherwood, (Kan. 1898) 53 Pac. 69.

31. *California.*— People *v.* Wrin, 143 Cal. 11, 76 Pac. 646; Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; Kahn *v.* Matthai, 115 Cal. 689, 47 Pac. 698; Furnish *v.* Mullan, 76 Cal. 646, 18 Pac. 854; Ligare *v.* California Southern R. Co., 76 Cal. 610, 18 Pac. 777; Yolo County *v.* Knight, 70 Cal. 430, 11 Pac. 662; Braly *v.* Seaman, 30 Cal. 610; Ricketson *v.* Richardson, 26 Cal. 149; Seaver *v.* Fitzgerald, 23 Cal. 85; Swain *v.* Chase, 12 Cal. 283.

Dakota.— Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701.

Idaho.— Mills *v.* Smiley, 9 Ida. 325, 76 Pac. 783. But *compare* McKnight *v.* Grant, 13 Ida. 629, 92 Pac. 989, 121 Am. St. Rep. 287.

Michigan.— Thompson *v.* Shiawassee Cir. Judge, 54 Mich. 236, 19 N. W. 967.

Minnesota.— Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134; Harrington *v.* Loomis, 10 Minn. 366; Mackubin *v.* Smith, 5 Minn. 367.

that this is unnecessary,[32] particularly when no judicial action upon the showing made in the affidavit is required,[33] even though it may be advisable.[34] Even slight evidence is sufficient to sustain the jurisdiction.[35] A return of "not found"

Montana.— Alderson *v.* Marshall, 7 Mont. 288, 16 Pac. 576, under an old statute.

Nevada.— Victor Mill, etc., Co. *v.* Esmeralda County Justice Ct., 18 Nev. 21, 1 Pac. 831.

New York.— Kennedy *v.* Lamb, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800; McCracken *v.* Flanagan, 127 N. Y. 493, 28 N. E. 385, 24 Am. St. Rep. 481; Belmont *v.* Cornen, 82 N. Y. 256; McLaughlin *v.* McCann, 123 N. Y. App. Div. 67, 107 N. Y. Suppl. 762; Kennedy *v.* New York L. Ins., etc., Co., 32 Hun 35 [*reversed* on the facts in 101 N. Y. 487, 5 N. E. 774]; Towsley *v.* McDonald, 32 Barb. 604; Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1; McLeod *v.* Moore, 15 N. Y. Civ. Proc. 77; Greenbaum *v.* Dwyer, 66 How. Pr. 266; Handley *v.* Quick, 47 How. Pr. 233.

North Carolina.— Bacon *v.* Johnson, 110 N. C. 114, 14 S. E. 508.

North Dakota.— Pillsbury *v.* J. B. Streeter, Jr., Co., 15 N. D. 174, 107 N. W. 40; Simensen *v.* Simensen, 13 N. D. 305, 100 N. W. 708.

South Dakota.— Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075; Woods *v.* Pollard, 14 S. D. 44, 84 N. W. 214; Plummer *v.* Bair, 12 S. D. 23, 80 N. W. 139; Bothell *v.* Hoellwarth, 10 S. D. 491, 74 N. W. 231; Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453.

United States.— Cohen *v.* Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483; Batt *v.* Procter, 45 Fed. 515; McDonald *v.* Cooper, 32 Fed. 745, 13 Sawy. 86; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,083, 3 Sawy. 274.

"To illustrate: It is not sufficient to state generally, that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the Court or Judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way the existence of jurisdictional facts — a practice too dangerous to the rights of defendants to admit of judicial toleration." Ricketson *v.* Richardson, 26 Cal. 149, 154. An affidavit for publication of a summons against non-residents recited that they had been sought for to obtain service, but after diligent search and inquiry could not be found within the state. It then proceeded to show the kind of search and inquiry that had been made; that the affiant had made inquiry of all persons from whom he could expect to obtain information as to the residence of defendants, together with the names of the persons of whom he made inquiries, and why he expected them to know of defendant's whereabouts, and it was held that the affidavit constituted a substantial compliance with Code Civ. Proc. § 412, authorizing service by publication where the person sought to be served "cannot, after due diligence, be found within the state," although the affidavit failed to expressly state the result of the affiant's inquiries. Chapman *v.* Moore, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130. An affidavit by a plaintiff in partition, which alleges that defendants named are non-residents of the state, and reside in and are subjects of Great Britain and Ireland, and have always been residents thereof, and that plaintiff is unable to make personal service of the summons on such defendants, justifies a finding that such defendants cannot, with due diligence, be found within the state, and process may be served on them by publication, and, when so served, the court acquires jurisdiction of the person of such defendants. Sinnott *v.* Ennis, 120 N. Y. App. Div. 874, 105 N. Y. Suppl. 218.

32. *Illinois.*— Hartung *v.* Hartung, 8 Ill. App. 156.

Minnesota.— Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823, that defendant is a proper party to the action.

Montana.— Ervin *v.* Milne, 17 Mont. 494, 43 Pac. 706.

New York.— Salisbury *v.* McGibbon, 58 N. Y. App. Div. 524, 69 N. Y. Suppl. 258; Smith *v.* Mahon, 27 Hun 40.

South Carolina.— National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028; Yates *v.* Gridley, 16 S. C. 496.

Wisconsin.— Sueterlee *v.* Sir, 25 Wis. 357; Young *v.* Schenck, 22 Wis. 556; Farmers', etc., Bank *v.* Eldred, 20 Wis. 196.

33. Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043; Ervin *v.* Milne, 17 Mont. 494, 43 Pac. 706; Goore *v.* Goore, 24 Wash. 139, 63 Pac. 1092.

34. Little *v.* Chambers, 27 Iowa 522.

35. Harris *v.* Claflin, 36 Kan. 543, 13 Pac. 830; Crouter *v.* Crouter, 133 N. Y. 55, 30 N. E. 726; Brenen *v.* North, 7 N. Y. App. Div. 79, 39 N. Y. Suppl. 975; Stow *v.* Stacy, 14 N. Y. Civ. Proc. 45; Coughran *v.* Markley, 15 S. D. 37, 87 N. W. 2.

Distinction between absence and insufficiency of evidence.— "There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and inconclusive testimony; but there being some appreciable evidence of a legal character, which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it, and his action is simply erroneous. . . . If, how-

by the sheriff may be sufficient evidence of due diligence,[36] or that defendant cannot be found,[37] to satisfy the court, but if the statute requires the showing to be made by affidavit, the return must be incorporated or referred to in the affidavit.[38] Affidavits upon information and belief are frequently declared to be insufficient,[39] although many cases permit their use, on the ground that they nevertheless constitute some evidence upon which the court may base its jurisdiction to order a publication.[40] If facts are stated upon information and belief, the sources of information or grounds of belief should be given.[41] Affidavits as to non-residence and due diligence in attempting to find defendant may consist of hearsay evidence;[42] but this is not allowable in affidavits purporting to show that plaintiff has a good cause of action.[43]

e. Order For Publication. The order directs what shall be done pursuant to obtaining service by publication, and the requisites of such order are prescribed by statute and should be substantially observed.[44] Under some statutes the court

ever, there is a total want of evidence on any point necessary to be determined . . . then there is nothing upon which he is authorized to act; the evidence, which is the very basis of his jurisdiction, and upon which it depends, is wanting, and his action is without authority. . . . In one case there is a defect of jurisdiction; in the other there is only an error of judgment." Forbes *v.* Hyde, 31 Cal. 342, 349. See also Staples *v.* Fairchild, 3 N. Y. 41.

36. Seaver *v.* Fitzgerald, 23 Cal. 85; Marx *v.* Ebner, 180 U. S. 314, 21 S. Ct. 376, 45 L. ed. 547.

37. Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134.

38. Empire City Sav. Bank *v.* Silleck, 180 N. Y. 541, 73 N. W. 1123 [*affirming* 98 N. Y. App. Div. 139, 90 N. Y. Suppl. 561]; Doheny *v.* Worden, 75 N. Y. App. Div. 47, 77 N. Y. Suppl. 959.

39. *Arkansas.*— Waggoner *v.* Fogleman, 53 Ark. 181, 13 S. W. 729; Turnage *v.* Fisk, 22 Ark. 286.

Indiana.— Fontaine *v.* Houston, 58 Ind. 306.

Minnesota.—Corson *v.* Shoemaker, 55 Minn. 386, 57 N. W. 134; Feikert *v.* Wilson, 38 Minn. 341, 37 N. W. 585.

New York.— Carleton *v.* Carleton, 85 N. Y. 313; Andrews *v.* Borland, 10 N. Y. St. 396; Greenbaum *v.* Dwyer, 66 How. Pr. 266; Lyon *v.* Baxter, 64 How. Pr. 426; Evertson *v.* Thomas, 5 How. Pr. 45.

Oklahoma.— Romig *v.* Gillett, 10 Okla. 186, 62 Pac. 805.

Wisconsin.— Hafern *v.* Davis, 10 Wis. 501.

See 40 Cent. Dig. tit. "Process," § 116.

Presumption of knowledge.— Where affiant, in an affidavit of an agent for complainant, swears positively that he knows the names of the heirs of a certain person are known to complainant, it will be presumed that the facts were within the knowledge of affiant. Birmingham Realty Co. *v.* Barron, 150 Ala. 232, 43 So. 346.

40. *California.*— Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240.

Illinois.— Malaer *v.* Damron, 31 Ill. App. 572.

Michigan.— Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520.

Nebraska.— Leigh *v.* Green, 62 Nebr. 344, 86 N. W. 1093, 89 Am. St. Rep. 751.

New York.— Howe Mach. Co. *v.* Pettibone, 74 N. Y. 68; Seiler *v.* Wilson, 43 Hun 629; Chase *v.* Lawson, 36 Hun 221; Walter *v.* De Graaf, 19 Abb. N. Cas. 406; Steinle *v.* Bell, 12 Abb. Pr. N. S. 171; Van Wycke *v.* Hardy, 20 How. Pr. 222 [*affirmed* in 4 Abb. Dec. 496, 39 How. Pr. 392].

See 40 Cent. Dig. tit. "Process," § 116.

41. Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520 (stating that this should be done not for the purpose of adding any weight to the affidavit as evidence, but as a safeguard against reckless swearing); Belmont *v.* Cornen, 82 N. Y. 256; Davis *v.* Cook, 9 S. D. 319, 69 N. W. 18; Hafern *v.* Davis, 10 Wis. 501.

Names and residences.— An affidavit for publication, merely stating that deponent believes that defendant resides in the state, and that the process could not be served on him by reason of his concealment, or of his continued absence from the place of his residence, but not giving the names and residences of the persons from whom the information of such absence was derived, was insufficient. Evarts *v.* Becker, 8 Paige (N. Y.) 506.

42. Rue *v.* Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; Cohen *v.* Portland Lodge No. 142 B. P. O. E., 144 Fed. 266 [*affirmed* in 152 Fed. 357, 81 C. C. A. 483].

43. Columbia Screw Co. *v.* Warner Lock Co., 138 Cal. 445, 71 Pac. 498.

44. *California.*—People *v.* McFadden, (1904) 77 Pac. 999; Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

Florida.— Laflin *v.* Gato, 50 Fla. 558, 39 So. 59.

Missouri.— Kelly *v.* Murdagh, 184 Mo. 377, 83 S. W. 437.

New York.— Eleventh Ward Bank *v.* Powers, 43 N. Y. App. Div. 178, 59 N. Y. Suppl. 314; Kennedy *v.* Arthur, 11 N. Y. Suppl. 661; Brookes *v.* Taylor, 9 N. Y. St. 68.

Utah.— Park *v.* Higbee, 6 Utah 414, 24 Pac. 524.

Wisconsin.— O'Malley *v.* Fricke, 104 Wis. 280, 80 N. W. 436.

United States.— Adams *v.* Heckscher, 83 Fed. 281.

See 40 Cent. Dig. tit. "Process," § 121 *et seq.*

makes no order, and the mere filing of the affidavit at once gives the right to publish;[45] but an order of the court for publication of summons is usually required before such publication can lawfully be made.[46] Occasionally the statute authorizes the clerk of the court[47] or the judge out of court[48] to make the order. Authority to issue the order rests upon a proper affidavit or other record showing the existence of the facts required by statute.[49] If the facts required by the statute are properly stated in the affidavit, the right to an order for publication is absolute, and it is immaterial whether or not such statements are true,[50] and similarly, if the affidavit is not sufficient, other affidavits tending to show the existence of the requisite facts are ineffectual to support the jurisdiction.[51] The statute very commonly provides that the requisite facts shall be shown by affidavit to the satisfaction of the court.[52] The order must be in conformity to the affidavit,[53] and it must purport to be based upon some ground set forth therein.[54] But the

Effect of prior order.— The validity of an order of publication is not destroyed by the existence of a prior order of publication, where, on a motion to vacate it for insufficiency of the affidavits, plaintiff, out of caution, procured such second order. Littlejohn *v.* Leffingwell, 34 N. Y. App. Div. 185, 54 N. Y. Suppl. 536.

Warning order.— An order directing the publication of a warning order, in a suit by the state for the recovery of a balance due on land sold by it, must contain all the recitals required by the statute providing that the order shall contain the title of the suit, the date and amount of the note or bond proceeded upon, and a description of the land upon which the lien is sought to be enforced, and warning defendant to appear and make defense on the first day of the term of court that commences more than sixty days from the date of such order. Lawrence *v.* State, 30 Ark. 719.

45. Vanpelt *v.* Hutchinson, 114 Ill. 435, 2 N. E. 491; Crabb *v.* Atwood, 10 Ind. 331 (no order necessary in vacation); McClymond *v.* Noble, 84 Minn. 329, 87 N. W. 833, 87 Am. St. Rep. 354; Easton *v.* Childs, 67 Minn. 242, 69 N. W. 903; Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

46. See the statutes of the several states. And see the following cases:

California.— People *v.* Pearson, 76 Cal. 400, 18 Pac. 424; Seaver *v.* Fitzgerald, 23 Cal. 85.

Colorado.— Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043.

Iowa.— Guise *v.* Early, 72 Iowa 283, 33 N. W. 683; Miller *v.* Corbin, 46 Iowa 150.

Kentucky.— Blight *v.* Bank, 6 T. B. Mon. 192, 17 Am. Dec. 136.

Minnesota.— Smith *v.* Valentine, 19 Minn. 452.

Missouri.— Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158.

New York.— Von Rhade *v.* Von Rhade, 2 Thomps. & C. 491.

Oregon.— McFarlane *v.* Cornelius, 43 Oreg. 513, 73 Pac. 325, 74 Pac. 468; Goodale *v.* Coffee, 24 Oreg. 346, 33 Pac. 990.

What court to make order.— Under N. Y. Code, § 440, requiring an order for the service of summons by publication to be made by the judge of the court or the county judge of the county where the action is triable, the supreme court at special term has no power to make an order, although signed by a judge thereof, for service by publication. Crosby *v.* Thedford, 7 N. Y. Civ. Proc. 245.

47. McBride *v.* Hartwell, 2 Kan. 410; Charley *v.* Kelley, 120 Mo. 134, 25 S. W. 571; Otis *v.* Epperson, 88 Mo. 131; Clemson Agricultural College *v.* Pickens, 42 S. C. 511, 20 S. E. 401; Wyser *v.* Calhoun, 11 Tex. 323.

48. Lowerre *v.* Owens, 14 N. Y. App. Div. 215, 43 N. Y. Suppl. 467; Phinney *v.* Broschell, 19 Hun (N. Y.) 116 [*affirmed* in 80 N. Y. 544].

49. Johnson *v.* Miner, 144 Cal. 785, 78 Pac. 240; People *v.* Booth, 121 Mich. 131, 79 N. W. 1100; Crossland *v.* Admire, 149 Mo. 650, 51 S. W. 463; State *v.* Horine, 63 Mo. App. 1; Smith *v.* Matson, 47 How. Pr. (N. Y.) 118.

50. Tooker *v.* Leake, 146 Mo. 419, 48 S. W. 638; Gallum *v.* Weil, 116 Wis. 236, 92 N. W. 1091. See, however, Kitchen *v.* Crawford, 13 Tex. 516, where the truth of the facts and not the statement in the affidavit was held to form the basis of the service by publication.

51. Wortman *v.* Wortman, 17 Abb. Pr. (N. Y.) 66.

52. See the statutes of the several states. And see the following cases:

California.— Bradford *v.* McAvoy, 99 Cal. 324, 33 Pac. 1091; Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

Dakota.— Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701.

Idaho.— Mills *v.* Smiley, 9 Ida. 325, 76 Pac. 783.

New York.— Belmont *v.* Cornen, 82 N. Y. 256.

South Carolina.— Gibson *v.* Everett, 41 S. C. 22, 19 S. E. 286.

South Dakota.— Cochran *v.* Germain, 15 S. D. 77, 87 N. W. 527; Davis *v.* Cook, 9 S. D. 319, 69 N. W. 18.

United States.— McDonald *v.* Cooper, 32 Fed. 745, 13 Sawy. 86.

53. Fetes *v.* Volmer, 5 Silv. Sup. (N. Y.) 408, 8 N. Y. Suppl. 294. An order of publication in a suit to set aside a deed, which misdescribes the land, is fatally defective. Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399.

54. Parker *v.* Burton, 172 Mo. 85, 72 S. W. 663.

order need not recite a finding of the jurisdictional facts which are required to appear in the affidavit.[55] If the statute contemplates the issuance of the summons before the order for publication is made, an order is void which is made prior thereto.[56] The order must be based on facts existing at the time it is made,[57] or so near such time that it may reasonably be presumed that no change has meanwhile taken place.[58] The order should ordinarily direct that the service of summons be made by publication in a newspaper for a designated period within a specified time;[59] it should designate the paper in which publication is to be made,[60] and should state that such paper is a newspaper;[61] if there is no such requirement in the statute, such designation will nevertheless not vitiate the order,[62] and generally speaking redundant recitals will not affect the validity of the order.[63] It is frequently provided that the order shall direct a copy of the summons to be deposited in the post-office addressed to defendant at his last place of residence unless it shall appear that such residence is unknown and cannot, with reasonable diligence, be ascertained.[64] If more than one method is allowed by statute, at

55. Goodale *v.* Coffee, 24 Oreg. 348, 33 Pac. 990.

56. People *v.* Huber, 20 Cal. 81.

57. Roosevelt *v.* Land Imp. Co., 108 Wis. 653, 84 N. W. 157.

For example an order of publication against non-residents, made on the twentieth of the month, on an affidavit made on the fifteenth, is defective, since the order must be based on facts existing at the time it is made. New York Baptist Union for Ministerial Education *v.* Atwell, 95 Mich. 239, 54 N. W. 760. A warning order against a defendant on the ground that he is a non-resident of Kentucky and believed to be absent therefrom cannot be made on an affidavit of such facts filed by plaintiff four months previously. Spreen *v.* Delsignore, 94 Fed. 71.

58. People *v.* Booth, 121 Mich. 131, 79 N. W. 1100.

Presumption as to change.—Where an order of publication is obtained early on Monday on an affidavit made at a late hour on Saturday, alleging that defendant is a resident of the state of Washington, there is sufficient diligence, as there is little probability of a residence in Washington being lost, and one in Michigan gained, in the meantime. Adams *v.* Hosmer, 98 Mich. 51, 56 N. W. 1051. Where service is had by publication, jurisdiction attaches, although the affidavit for service was sworn to two days before filing the petition, as the interval between the two acts was so brief that no presumption can fairly arise of a change in the jurisdictional facts set forth in the affidavit. Leigh *v.* Green, 62 Nebr. 344, 86 N. W. 1093, 89 Am. St. Rep. 751.

An affidavit made in the present tense is to be construed as covering the entire period during which personal service might be made under the forms prescribed by law. Snell *v.* Meservy, 91 Iowa 322, 59 N. W. 32. See also Bogle *v.* Gordon, 39 Kan. 31, 17 Pac. 857.

59. Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124.

60. Guise *v.* Early, 72 Iowa 283, 33 N. W. 683; Otis *v.* Epperson, 88 Mo. 131. *Contra*, Green *v.* Squires, 20 Hun (N. Y.) 15.

Designation by plaintiff's counsel.— Under the Missouri statute plaintiff's counsel is required to designate the newspaper in which publication shall be made. Hansford *v.* Hansford, 34 Mo. App. 262.

Newspaper most likely to afford notice.— If the statute provides that publication shall be in a newspaper most likely to give notice to defendant, the order need not so describe the designated paper. Seaver *v.* Fitzgerald, 23 Cal. 85; Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043.

61. Oswald *v.* Kampmann, 28 Fed. 36.

62. Wyser *v.* Calhoun, 11 Tex. 323.

63. Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399; Von Rhade *v.* Von Rhade, 2 Thomps. & C. (N. Y.) 491.

64. *California.*— Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007; Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

Colorado.—Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043.

Idaho.— Mills *v.* Smiley, 9 Ida. 325, 76 Pac. 783.

New York.— Littlejohn *v.* Leffingwell, 34 N. Y. App. Div. 185, 54 N. Y. Suppl. 536; Ritten *v.* Griffith, 16 Hun 454; Towsley *v.* McDonald, 32 Barb. 604; Spaus *v.* Schaffner, 2 N. Y. Suppl. 189; Cook *v.* Farnum, 34 Barb. 95, 12 Abb. Pr. 359, 21 How. Pr. 286.

Oregon.— Goodale *v.* Coffee, 24 Oreg. 346, 33 Pac. 990.

Wisconsin.— Rockman *v.* Ackerman, 109 Wis. 639, 85 N. W. 491; Roosevelt *v.* Ulmer, 98 Wis. 356, 74 N. W. 124.

Direction as to mailing.— Under N. Y. Code, § 135, subd. 5, requiring that the order for the publication of a summons must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served at his residence, an order merely directing that a copy of the summons and complaint be deposited in the post-office, addressed to defendant, is insufficient. Hyatt *v.* Wagenright, 18 How. Pr. (N. Y.) 248. But *compare* Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664. An order for the service of summons on a non-resident by publication, which fails to designate the post-office in which copies of the summons, complaint, and order shall be deposited for transmission to defendant, as required by N. Y. Code Civ.

the option of plaintiff, the order is sufficient if it directs any one.[65] The name of defendant must correctly appear in the order,[66] but a new defendant may be added without obtaining a new order.[67] When an entry of the order upon the court records is required, such entry in due form is not jurisdictional,[68] although a provision that the order must be filed on or before the first day of publication must be complied with to confer jurisdiction.[69] No entry is necessary unless the statute provides that it shall be made.[70] An inadvertent failure to sign the order is a mere irregularity.[71] Judicial discretion in granting an order for publication cannot be questioned on appeal where a sufficient showing of facts has been made to call into exercise the judicial mind.[72] An order for service by publication cannot be impeached collaterally if the judge making the order has jurisdiction to make it.[73]

6. Mode and Sufficiency of Service by Publication — a. In General. The means and methods provided by statute for obtaining service by publication must be strictly followed, since the whole proceeding is in derogation of the common law.[74]

Proc. § 440, is insufficient. Walter *v.* De Graaf, 19 Abb. N. Cas. (N. Y.) 406. Under a statute requiring that an order of publication must contain a direction that on or before the date of the first publication plaintiff deposit in a specified post-office one or more sets of copies of the summons, complaint, and order, an order directing that the summons be served by publication, and by mailing copies of said "summons and complaint," addressed to defendant at his last place of residence, West Eighty-Third street, said publication and mailing to be commenced within three months from the date, was void, because it did not require a copy of the order, as well as of the summons and complaint, to be served, and did not specify the post-office in which they were to be deposited, and did not require them to be mailed on or before the first day of the first publication. McCool *v.* Boller, 14 Hun (N. Y.) 73.

Defect cured.— A defect in the order of the judge, in failing to direct a copy of the petition as well as of the notice to be mailed to defendant, was held to be cured by plaintiff's mailing a copy of the petition. Lyon *v.* Comstock, 9 Iowa 306. But an order directing copies to be mailed to an incorrect address is not cured by personal service upon defendant outside of the jurisdiction. Beaupre *v.* Brigham, 79 Wis. 436, 48 N. W. 596.

65. *In re* Field, 131 N. Y. 184, 30 N. E. 48; O'Neil *v.* Bender, 30 Hun (N. Y.) 204.

66. Newman *v.* Bowers, 72 Iowa 465, 34 N. W. 212; Skelton *v.* Sackett, 91 Mo. 377, 3 S. W. 874.

For example "The Washington Trust Co." for "The Washington Trust Company of the City of New York" has been held insufficient. Detroit *v.* Detroit City R. Co., 54 Fed. 1. In a suit against several defendants, publication was ordered against two of them on proper affidavit of non-residence and the publication actually made was against all of defendants, but it was held that it was ineffective as against defendants not specified in the order. Pomeroy *v.* Betts, 31 Mo. 419. But "Mary E. Byers" for "Mary Ann Byers" has been held sufficient after appearance. Beckner *v.* McLinn, 107 Mo. 277, 17 S. W. 819. In an order for publication, a clerical mistake in naming one of the defendants as "Albert," instead of "Alfred," is not sufficient to vitiate the service, where the affidavit and copies of the order, and the summons and notice served on defendant, contained the correct name. McCully *v.* Heller, 66 How. Pr. (N. Y.) 468.

67. Childers *v.* Schantz, 120 Mo. 305, 25 S. W. 209.

68. *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Horn *v.* Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676; Smith *v.* Valentine, 19 Minn. 452.

69. Whiton *v.* Morning Journal Assoc., 23 Misc. (N. Y.) 299, 50 N. Y. Suppl. 899. *Compare* Fink *v.* Wallach, 109 N. Y. App. Div. 718, 96 N. Y. Suppl. 543 [*reversing* 47 Misc. 247, 95 N. Y. Suppl. 899], holding that after proper delivery to the clerk, his retention thereof and failure to actually file the papers did not amount to a jurisdictional defect.

70. Fink *v.* Wallach, 109 N. Y. App. Div. 718, 96 N. Y. Suppl. 543.

71. McDermott *v.* Gray, 198 Mo. 266, 95 S. W. 431.

72. Coughran *v.* Markley, 15 S. D. 37, 87 N. W. 2.

73. Evans *v.* Weinstein, 124 N. Y. App. Div. 316, 108 N. Y. Suppl. 753.

74. *California.*— McCauley *v.* Fulton, 44 Cal. 355; McMinn *v.* Whelan, 27 Cal. 300; People *v.* Huber, 20 Cal. 81.

Colorado.— Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221; Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438.

District of Columbia.— Morse *v.* U. S., 29 App. Cas. 433.

Iowa.— Shaller *v.* Marker, 136 Iowa 575, 114 N. W. 43; Bradley *v.* Jamison, 46 Iowa 68; Tunis *v.* Withrow, 10 Iowa 305, 77 Am. Dec. 117.

Mississippi.— Foster *v.* Simmons, 40 Miss. 585.

Missouri.— Otis *v.* Epperson, 88 Mo. 131.

Nebraska.— Calkins *v.* Miller, 55 Nebr. 601, 75 N. W. 1108.

Nevada.— Coffin *v.* Bell, 22 Nev. 169, 37

b. The Notice Published. The matter to be published varies in the different jurisdictions, the statute in each state providing exactly of what it shall consist.[75] In some states the summons is required to be published,[76] in others the clerk is required to prepare a warning order which is published,[77] in others there is published merely a designated notice.[78] In determining the sufficiency of the summons, order, or notice published, the substantial rather than technical and literal requirements of the statute are to be observed.[79] The published notice must give defend-

Pac. 240, 58 Am. St. Rep. 738; Victor Mill, etc., Co. *v.* Esmeralda County Justice Ct., 18 Nev. 21, 1 Pac. 831.

New York.— Kendall *v.* Washburn, 14 How. Pr. 380; Anonymous, 3 How. Pr. 293.

Oregon.— Odell *v.* Campbell, 9 Oreg. 298; Northcut *v.* Lemery, 8 Oreg. 316.

Texas.— Stephenson *v.* Texas, etc., R. Co., 42 Tex. 162.

Washington.—Garrison *v.* Cheeney, 1 Wash. Terr. 489.

Wisconsin.— Likens *v.* McCormick, 39 Wis. 313; Hafern *v.* Davis, 10 Wis. 501.

United States.— Pennoyer *v.* Neff, 95 U. S. 723, 24 L. ed. 565; Cooper *v.* Reynolds, 10 Wall. 319, 19 L. ed. 931; Cohen *v.* Portland Lodge No. 142 B. P. O. E., 152 Fed. 357, 81 C. C. A. 483; Hartley *v.* Boynton, 17 Fed. 873, 5 McCrary 453; Galpin *v.* Page, 9 Fed. Cas. No. 5,206, 3 Sawy. 93; Gray *v.* Larrimore, 10 Fed. Cas. No. 5,721, 2 Abb. 542, 4 Sawy. 638. The mode provided by congress (Suppl. Rev. St. (1874–1891), p. 84 (U. S. Comp. St. (1901) p. 513) for giving the federal courts jurisdiction over an absent defendant by publication is exclusive of any other mode; and, where such requirements are not complied with, the court acquires no jurisdiction, although publication was made in the mode provided by the statutes of the state in which such court sits. Bracken *v.* Union Pac. R. Co., 56 Fed. 447, 5 C. C. A. 548.

See 40 Cent. Dig. tit. "Process," § 129.

An insufficient effort to obtain service by publication will not affect a subsequent personal service within the jurisdiction. McKibbin *v.* McKibbin, 139 Cal. 448, 73 Pac. 143.

Defective order.— The service is good if the statute is observed, even though the order inadvertently departs from the statute. Mishkind-Feinberg Realty Co. *v.* Sidorsky, 111 N. Y. App. Div. 578, 98 N. Y. Suppl. 496.

75. See the statutes of the several states.

76. *California.*— San Diego Sav. Bank *v.* Goodsell 137 Cal. 420, 70 Pac. 299; Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; McCauley *v.* Fulton, 44 Cal. 355.

Colorado.— Donald *v.* Bradt, 15 Colo. App. 414, 62 Pac. 580.

Iowa.— Fanning *v.* Krapfl, 68 Iowa 244, 26 N. W. 133.

New York.— Van Wyck *v.* Hardy, 11 Abb. Pr. 473.

Oregon.— George *v.* Nowlan, 38 Oreg. 537, 64 Pac. 1; Willamette Real Est. Co. *v.* Hendrix, 28 Oreg. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Jones *v.* Everett Land Co., 61 Fed. 529, 9 C. C. A. 602; Palmer *v.* McCormick, 30 Fed. 82.

See 40 Cent. Dig. tit. "Process," § 130.

A published summons, not signed by attorney, and not stating when the complaint is or will be filed, is insufficient. Hays *v.* Lewis, 21 Wis. 663.

77. Beidler *v.* Beidler, 71 Ark. 318, 74 S. W. 13; McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597; McLaughlin *v.* McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56; Cross *v.* Wilson, 52 Ark. 312, 12 S. W. 576; Thomas *v.* Mahone, 9 Bush (Ky.) 111; Kelly *v.* Murdagh, 184 Mo. 377, 83 S. W. 437; Mosely *v.* Reily, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721; Skelton *v.* Sackett, 91 Mo. 377, 3 S. W. 874; Otis *v.* Epperson, 88 Mo. 131; Bobb *v.* Woodward, 42 Mo. 482. See Stuart *v.* Cole, 42 Tex. Civ. App. 478, 92 S. W. 1040, in which the nature of a warning order under the Arkansas statute is considered.

Sufficiency.— A warning order against nonresident defendants, husband and wife, which recites "the defendant," followed by the husband's name, followed by the abbreviation, "etc.," without mentioning the name of the wife, "warned to appear," etc., is void as to the wife and she is not brought into court thereby. Clark *v.* Raison, 104 S. W. 342, 31 Ky. L. Rep. 905.

78. Hannas *v.* Hannas, 110 Ill. 53; Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13; Morgan *v.* Woods, 33 Ind. 23; Green *v.* Green, 7 Ind. 113; Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911; Core *v.* Oil, etc., Co., 40 Ohio St. 636; Gary *v.* May, 16 Ohio 66.

79. *California.*— People *v.* Davis, 143 Cal. 673, 77 Pac. 651. Under Code Civ. Proc. § 407, subd. 5, before its amendment in 1897, providing that the name of plaintiff's attorney must be indorsed on the summons, the attorney's name did not thereby become a part of the summons, so as to render void a summons by publication, a copy of which was published without the attorney's name; the record showing that the name of the attorney was indorsed on the summons. People *v.* McAllister, (Cal. 1904) 76 Pac. 1127; People *v.* Wrin, 143 Cal. 11, 76 Pac. 646.

Idaho.— McKnight *v.* Grant, 13 Ida. 629, 92 Pac. 989, 121 Am. St. Rep. 287, holding that where in a publication of a summons the word "filed" was omitted from the order to appear and answer plaintiff "of the complaint filed herein," the error was not such a variance as to be fatal to the jurisdiction where the copy of the summons and complaint mailed to defendant were correct.

Indiana.— Jones *v.* Kohler, 137 Ind. 528, 37 N. E. 399, 45 Am. St. Rep. 215.

ant the length of time allowed by the statute to make his appearance.[80] The parties defendant who are sought to be served by publication must be properly designated by christian and surname in the summons, order, or notice,[81] but other defendants need not be mentioned.[82] Unknown heirs may be designated merely

Kansas.— Townsend *v.* Burr, 9 Kan. App. 810, 60 Pac. 477. A publication notice which advises defendant of the nature of the action and of his interest therein is sufficient. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911.

Missouri.— Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74.

New York.— Cook *v.* Kelsey, 19 N. Y. 412; Brenen *v.* North, 7 N. Y. App. Div. 79, 39 N. Y. Suppl. 975; Van Wyck *v.* Hardy, 11 Abb. Pr. 473.

North Carolina.— Lemly *v.* Ellis, 143 N. C. 200, 55 S. E. 629, holding a notice to contain a sufficient statement of the eviction of a plaintiff under a paramount title in violation of a covenant in a deed to show a cause of action.

Oregon.— George *v.* Nowlan, 38 Oreg. 537, 64 Pac. 1.

Washington.— Warner *v.* Miner, 41 Wash. 98, 82 Pac. 1033.

United States.— Ranch *v.* Werley, 152 Fed. 509, holding a summons to sufficiently state the date on which defendant is required to answer.

Omissions.— An order for publication of summons is satisfied by the publication of a copy substantially correct. An omission of unnecessary words cannot vitiate. Van Wyck *v.* Hardy, 4 Abb. Dec. (N. Y.) 496, 39 How. Pr. 392 [*affirming* 11 Abb. Pr. 473].

Statement of cause of action.— Under a statute requiring a "brief statement of the cause of action" to be made, when service is had by publication, a detailed and specific statement is not required, and a misdescription of a date, not likely to mislead, is not a fatal defect. Pipkin *v.* Kaufman, 62 Tex. 545.

80. McGowan *v.* Mobile Branch Bank, 7 Ala. 823 (holding that a discrepancy between the time at which complainant prays that defendant may answer the bill and that named in the order of notice is not fatal); Bell *v.* Good, 19 N. Y. Suppl. 693, 22 N. Y. Civ. Proc. 356. Service by publication should be quashed on motion when the published notice requires the party to answer on or before the second, instead of the third, Monday after the fourth publication of the notice. Calkins *v.* Miller, 55 Nebr. 601, 75 N. W. 1108.

Statement of time of filing complaint.— Where defendant, a non-resident, is served by publication, it is unnecessary to comply with the requirement of S. C. Code, § 156, that the summons, as published, shall state the time and place of filing the complaint, if defendant is furnished with a copy of the complaint, as well as the summons. Clemson Agricultural College *v.* Pickens, 42 S. C. 511, 20 S. E. 401.

81. *Indiana.*— Thompson *v.* McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334.

Iowa.— Schaller *v.* Marker, 136 Iowa 575, 114 N. W. 43 (holding that the publication of an original notice designating defendant as "Chase" instead of "Chan" constituted a fatal misnomer); Fanning *v.* Krapfl, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293.

Kansas.— Whitney *v.* Masemore, 75 Kan. 522, 89 Pac. 914, 121 Am. St. Rep. 442; Morris *v.* Tracy, 58 Kan. 137, 48 Pac. 571.

Maryland.— Hardester *v.* Sharretts, 84 Md. 146, 34 Atl. 1122.

Mississippi.— Magoffin *v.* Mandaville, 28 Miss. 354.

Missouri.— Corrigan *v.* Schmidt, 126 Mo. 304, 28 S. W. 874; Hirsh *v.* Weisberger, 44 Mo. App. 506.

Texas.— Boynton *v.* Chamberlain, 38 Tex. 604.

See 40 Cent. Dig. tit. "Process," § 131.

Description held sufficient: "Frank Strimple" for "Benjamin F. Strimple." Steinmann *v.* Strimple, 29 Mo. App. 478. "Berlah M. Plimpton" for "Beulah M. Plimpton." Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4.

Descriptions held insufficient: "Keesel" for "Keisel." Hubner *v.* Reickhoff, 103 Iowa 368, 72 N. W. 540, 64 Am. St. Rep. 191. "P. T. B. Hopkins" for "T. P. B. Hopkins." Fanning *v.* Krapfl, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293. "Q. R. Noland" for "Quinces R. Noland." Skelton *v.* Sackett, 91 Mo. 377, 3 S. W. 874. Notice by publication to "—— Clark" of the pendency of proceedings is not binding on "Helen I. Clark." Clark *v.* Hillis, 134 Ind. 421, 34 N. E. 13.

The omission of the middle initial is not a misnomer. Corrigan *v.* Schmidt, 126 Mo. 304, 28 S. W. 874.

Where defendant's name is stated correctly in the copy of the summons and complaint mailed to him, a mistake in the summons as published is not fatal. McKnight *v.* Grant, 13 Ida. 629, 92 Pac. 989, 121 Am. St. Rep. 287.

Service on a married woman, who had borne the name of "Durham" for nearly twenty years, by her maiden name of "Morris," was invalid. Morris *v.* Tracy, 58 Kan. 137, 48 Pac. 571.

The description of the residence of a defendant as St. Louis, Mo., is sufficient, in a notice for constructive service by publication, without the addition of street address, it not appearing that plaintiff has more definite knowledge of defendant's residence, and defendant's name in the notice being one so uncommon that it may reasonably be assumed that post-office officials in the city named can readily find such defendant, and deliver the newspaper containing such notice, when sent pursuant to the statute. Waterhouse *v.* Waterhouse, 8 Ohio S. & C. Pl. Dec. 73, 6 Ohio N. P. 106.

82. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911; Brenen *v.* North, 7 N. Y. App. Div. 79, 39 N. Y. Suppl. 975.

as the heirs of a named deceased person.[83] Parties may be estopped to contend that they were not properly named, as when the grantee in a deed allows his name to be erroneously written therein and the deed so made to be recorded,[84] or where a woman having property rights in the state absents herself for a long period and marries without the knowledge of her kin and home acquaintances.[85] The property respecting which the action is brought must be properly described.[86] Surplusage will not vitiate the notice even if erroneous.[87]

c. Time of Publication. The statutes further provide when, for what period and how often publication shall be made, and the statutes must be strictly followed in this regard.[88] If the statute requires publication once a week, it is not necessary that each publication should be on the same day of the week,[89] nor is it necessary

83. Tygart *v.* Peeples, 9 Rich. Eq. (S. C.) 46.

84. Blinn *v.* Chessman, 49 Minn. 140, 51 N. W. 666, 32 Am. St. Rep. 536.

85. Jones *v.* Kohler, 137 Ind. 528, 37 N. E. 399, 45 Am. St. Rep. 215.

86. Caldwell *v.* Bigger, 76 Kan. 49, 90 Pac. 1095.

Notice by publication to non-resident heirs, if so specific as to advise the heirs of the nature of their interest to be affected with the proceeding, is sufficient. Gary *v.* May, 16 Ohio 66. But the property to be affected must be described. Lawler *v.* Whetts, 1 Handy 39, 12 Ohio Dec. (Reprint) 17.

87. Waterhouse *v.* Waterhouse, 8 Ohio S. & C. Pl. Dec. 73, 6 Ohio N. P. 106.

An unnecessary explanation as to the time for appearance will not affect the notice. Stoll *v.* Griffith, 41 Wash. 37, 82 Pac. 1025.

88. *California.*—People *v.* McFadden, (1904) 77 Pac. 999; Savings, etc., Soc. *v.* Thompson, 32 Cal. 347; Jordan *v.* Giblin, 12 Cal. 100.

Colorado.— Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221.

District of Columbia.— Leach *v.* Burr, 17 App. Cas. 128.

Georgia.— Smith *v.* Thompson, 3 Ga. 23.

Illinois.— Ricketts *v.* Hyde Park, 85 Ill. 110.

Indiana.— Horn *v.* Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676; Hartford Security Co. *v.* Arbuckle, 123 Ind. 518, 24 N. E. 329.

Iowa.— Gaar *v.* Taylor, 128 Iowa 636, 105 N. W. 125.

Kentucky.— Mercantile Trust Co. *v.* South Park Residence Co., 94 Ky. 271, 22 S. W. 314, 15 Ky. L. Rep. 70; Robinson *v.* Richardson, 4 J. J. Marsh. 574; Barclay *v.* Hendricks, 4 T. B. Mon. 251; Lawlin *v.* Clay, 4 Litt. 283; Pyle *v.* Cravens, 4 Litt. 17; Cravens *v.* Dyer, 1 Litt. 153; Payne *v.* Wallace, 2 A. K. Marsh. 244.

Missouri.— Burnes *v.* Burnes, 61 Mo. App. 612.

New Hampshire.— McTye *v.* McTye, 67 N. H. 590, 36 Atl. 605.

New York.— Market Nat. Bank *v.* Pacific Nat. Bank, 89 N. Y. 397; Soule *v.* Chase, 1 Rob. 222 [*reversed* on other grounds in 39 N. Y. 342]; Matter of Denton, 40 Misc. 326, 81 N. Y. Suppl. 1031.

North Carolina.— State *v.* Georgia Co., 109 N. C. 310, 13 S. E. 861.

Ohio.— Bacher *v.* Shawhan, 41 Ohio St. 271.

South Dakota.— Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453.

Texas.— Stephenson *v.* Texas, etc., R. Co., 42 Tex. 162; Irion *v.* Bexar County, 26 Tex. Civ. App. 527, 63 S. W. 550; Patterson *v.* Seeton, 19 Tex. Civ. App. 430, 47 S. W. 732; Blackman *v.* Harry, (Civ. App. 1896) 35 S. W. 290; Wilson *v.* Green, 1 Tex. App. Civ. Cas. § 98.

Utah.— Wells *v.* Kelly, 11 Utah 421, 40 Pac. 705.

Washington.—Fuhrman *v.* Power, 43 Wash. 533, 86 Pac. 940; Deming Inv. Co. *v.* Ely, 21 Wash. 102, 57 Pac. 353; State *v.* Pierce County Super. Ct., 6 Wash. 352, 33 Pac. 827.

United States.— Hunt *v.* Wickliffe, 2 Pet. 201, 7 L. ed. 397; Ranch *v.* Werley, 152 Fed. 509; McDonald *v.* Cooper, 32 Fed. 745, 13 Sawy. 86.

See 40 Cent. Dig. tit. "Process," § 133.

Where time is not fixed.— If the time for commencing service by publication is not fixed by statute, it must be done within a reasonable time. Johnston *v.* Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

Sufficiency of publication.— "Publication for three successive weeks in a weekly newspaper," means three successive publications in a weekly newspaper, and not publication for twenty-one days. Southern Indiana R. Co. *v.* Indianapolis, etc., R. Co., 168 Ind. 360, 81 N. E. 65; Swett *v.* Sprague, 55 Me. 190; Alexander *v.* Alexander, 26 Nebr. 68, 41 N. W. 1065. Under Cal. Pr. Act, § 31, requiring summons to be published once a week for three months, if the last day of the publication is in the same week in which the three months expires, it is sufficient, although this day is less than three months from the first day of publication. Savings, etc., Soc. *v.* Thompson, 32 Cal. 347.

Where service by publication is not made sufficient time before the return-term of the writ, such service is good for the succeeding term. In principle the case does not differ from the case of personal service less than five days before the return-term. Hill *v.* Baylor, 23 Tex. 261.

The failure of the clerk to make publication pursuant to the order will not work a discontinuance, but the judge has power to allow the publication to be made, returnable to a future term of the court. Penniman *v.* Daniel, 93 N. C. 332.

89. Raunn *v.* Leach, 53 Minn. 84, 54 N. W. 1058.

that a given number of weeks shall intervene between the first and last publication where the statute provides for publication once a week for that number of weeks,[90] but publication must be made once in each of the weeks provided by the statute.[91] The word "month" will be taken to mean calendar month in the absence of a legislative definition.[92] Publication for a longer period than that prescribed will not impair the validity of the service.[93] It is of no consequence that one of the publications is made on a legal holiday.[94] Publication must be made for the required number of times in the same paper.[95]

d. Place of Publication. The statutes of the different states designate in various ways what newspapers may be employed as mediums of publication. Thus it is frequently provided that publication shall be made in a newspaper designated by the court as most likely to give notice to the person served,[96] in a newspaper published and having a *bona fide* circulation in the county in which the proceedings are had,[97] in a secular newspaper of general circulation published in the city, town, or county,[98] in a newspaper designated by plaintiff, printed or published in the county where the petition is filed,[99] in a newspaper of general circulation printed in the English language and published in the county,[1] in a newspaper selected by the governor,[2] etc.[3] Service is void if publication is made in any other paper than

90. Savings, etc., Soc. *v.* Thompson, 32 Cal. 347; Knowles *v.* Summey, 52 Miss. 377; Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349, 7 L. ed. 882. But see Morse *v.* U. S., 29 App. Cas. (D. C.) 433, holding that where publication against non-resident defendants is required to be made once a week for three successive weeks, three weekly publications extending over a period of fifteen days are insufficient.

"The month mentioned in said statutes is a calendar month, and not a lunar month. Under the contention of the appellant the publication of the summons in said paper was made for twenty-nine days only — less than a month. This presupposes that the last issue of the paper, unlike the preceding four issues, answered for only one day. That contention is incorrect." Forsman *v.* Bright, 8 Ida. 467, 470, 69 Pac. 473.

91. Doheny *v.* Worden, 75 N. Y. App. Div. 47, 77 N. Y. Suppl. 959.

Two publications in each of four consecutive periods of seven days from the date of an order of publication satisfies the requirement of Act Cong. June 8, 1898 (30 U. S. St. at L. 434, c. 394), § 6, requiring such publication in the District of Columbia at least "twice a week for a period of not less than four weeks," although there was but one publication in the last calendar week of such period. Leach *v.* Burr, 188 U. S. 510, 23 S. Ct. 393, 47 L. ed. 567 [*affirming* 17 App. Cas. (D. C.) 128].

92. Guaranty Trust, etc., Co. *v.* Green Cove Springs, etc., R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. ed. 116.

93. Fouts *v.* Mann, 15 Nebr. 172, 18 N. W. 64. But see Laflin *v.* Gato, 52 Fla. 529, 42 So. 387, holding that an order for constructive service by publication, fixing the appearance day fifty-two days from the date of the order, was void, the statute providing that the date should be fixed at not less than thirty, nor more than fifty days.

An order requiring a longer period of publication than the statute calls for is ineffectual as to the time in excess of the statutory limit. People *v.* McFadden, (Cal. 1904) 77 Pac. 999.

94. Malmgren *v.* Phinney, 50 Minn. 457, 52 N. W. 131, 36 Am. St. Rep. 753.

95. Scammon *v.* Chicago, 40 Ill. 146.

96. Seaver *v.* Fitzgerald, 23 Cal. 85; Otis *v.* Epperson, 88 Mo. 131; Wakeley *v.* Nicholas, 16 Wis. 588.

Definition and designation of newspaper see NEWSPAPERS, 29 Cyc. 692.

97. Gallagher *v.* Johnson, 65 Ark. 90, 44 S. W. 1041; Thompson *v.* Scanlan, (Ark. 1891) 16 S. W. 197.

98. Railton *v.* Lauder, 126 Ill. 219, 18 N. E. 555; Kerr *v.* Hitt, 75 Ill. 51.

99. Herriman *v.* Moore, 49 Iowa 171; Cooke *v.* Tallman, 40 Iowa 133; Flint *v.* Gurrell, 12 Nebr. 341, 11 N. W. 431.

1. Lynn *v.* Allen, 145 Ind. 584, 44 N. E. 646, 57 Am. St. Rep. 223, 33 L. R. A. 779.

2. Taliaferro *v.* Butler, 77 Tex. 578, 14 S. W. 191; Davis *v.* Harnbell, (Tex. Civ. App. 1899) 24 S. W. 972.

3. Donald *v.* Bradt, 15 Colo. App. 414, 62 Pac. 580; Grove's Estate, 2 Woodw. (Pa.) 182. Mo. St. (1899) § 581, declares that service on a non-resident by publication may be had by publishing the notice in some newspaper published in the county where suit is instituted, if there be a paper published there, and if not, then in some paper published in the state. The act of the general assembly, approved April 28, 1877 (Laws (1877), p. 215), and the act amendatory thereof approved April 22, 1879 (Laws 1879), p. 84), gave the circuit court sitting at the city of P exclusive jurisdiction in all suits arising in a certain part of M county, and it was held that the circuit court at P could not obtain jurisdiction by publication in a newspaper issued in that part of the county other than that in which such court held jurisdiction under the act of 1877, as amended by the act of 1879, where there was a newspaper published in that part of the county in which it did have jurisdiction. Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186.

one designated by or pursuant to the statute.[4] If no newspaper is printed or published in the county, publication may under some statutes be made in a newspaper published in an adjoining county,[5] or in any newspaper published in the state.[6] A newspaper is deemed to be "printed" within the county where it is issued, notwithstanding that a portion of it is in fact printed in another state.[7] If the statute requires the paper to be published in the county it is immaterial where it is printed.[8] Where a notice is published in the paper intended by the order it is sufficient, although there has been an error in the designation of the paper in the order.[9]

e. Concurrent Requirements. Statutes frequently provide for other methods of reaching the attention of defendant to be used in addition to and concurrent with the publication. Thus a notice is sometimes required to be posted on the court-house door,[10] and it is very commonly required that when the residence of defendant is known, a copy of the notice, order, or summons, and sometimes of plaintiff's first pleading, shall be sent to him at such address by mail.[11] If an order of the court is necessary directing such mailing, a notice mailed before the making of the order is ineffectual.[12] The proper address must be used,[13] and the notice must be mailed from the post-office designated in the order.[14] Any one may deposit the notice in the post-office.[15] If required to be deposited in the post-office "forthwith," it is sufficient if done within a reasonable time.[16] If there are two or

4. Donald *v.* Bradt, 15 Colo. App. 414, 62 Pac. 580; Otis *v.* Epperson, 88 Mo. 131; Brisbane *v.* Peabody, 3 How. Pr. (N. Y.) 109; Taliaferro *v.* Butler, 77 Tex. 578, 14 S. W. 191.

5. Cooke *v.* Tallman, 40 Iowa 133.

6. Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186, paper designated by plaintiff or attorney with approval of the judge or clerk.

7. Palmer *v.* McCormick, 30 Fed. 82.

8. Ricketts *v.* Hyde Park, 85 Ill. 110.

9. Sheraden Borough, 34 Pa. Super. Ct. 639, holding that where an order directed that notice should be given in the "Pittsburg Gazette," and it appeared that the notice was published in the "Pittsburg Gazette Times," and that there was no other paper known as the "Pittsburg Gazette" published in the county at the time, the publication was a substantial compliance with the order of the court. It cannot, on appeal, be said that the court erred in construing its order for publication of summons in the "San Diego Union" as referring to the "San Diego Union and Daily Bee," in which it was published. People *v.* McFadden, (Cal. 1904) 77 Pac. 999.

10. Batre *v.* Anze, 5 Ala. 173; Laflin *v.* Gato, 50 Fla. 558, 39 So. 59; McKey *v.* Cobb, 33 Miss. 533; Zecharie *v.* Bowers, 3 Sm. & M. (Miss.) 641.

11. *Alabama.*— Cullum *v.* Mobile Branch Bank, 23 Ala. 797.

California.— San Diego Sav. Bank *v.* Goodsell, 137 Cal. 420, 70 Pac. 299; Schart *v.* Schart, 116 Cal. 91, 47 Pac. 927; Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

Colorado.— O'Rear *v.* Lazarus, 8 Colo. 608, 9 Pac. 621.

Idaho.— Strode *v.* Strode, 6 Ida. 67, 52 Pac. 161, 96 Am. St. Rep. 249.

Iowa.— Bristow *v.* Guess, 12 Iowa 404; Foley *v.* Connelly, 9 Iowa 240; Taylor *v.* Brobst, 4 Greene 534.

Nevada.— Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370.

New York.— Union Trust Co. *v.* Driggs, 62 N. Y. App. Div. 213, 70 N. Y. Suppl. 947; Von Rhade *v.* Von Rhade, 2 Thomps. & C. 491; Barnard *v.* Heydrick, 2 Abb. Pr. N. S. 47.

Oregon.— Knapp *v.* Wallace, (1907) 92 Pac. 1054.

Washington.— Kahn *v.* Thorpe, 43 Wash. 463, 86 Pac. 855; State *v.* Pierce County Super. Ct., 6 Wash. 352, 33 Pac. 827.

United States.— Ranch *v.* Werley, 152 Fed. 509.

See 40 Cent. Dig. tit. "Process," § 135.

12. Rockman *v.* Ackerman, 109 Wis. 639, 85 N. W. 491.

13. Paulling *v.* Creagh, 63 Ala. 398; Anderson *v.* Anderson, 229 Ill. 538, 82 N. E. 311.

14. Smith *v.* Wells, 69 N. Y. 600.

It is not improper to deposit a summons and complaint, in an action against a nonresident, in the post-office of the city where plaintiff's attorney resides, instead of the city where the order of publication was made. Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

15. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; Sharp *v.* Daugney, 33 Cal. 505.

16. Lyon *v.* Comstock, 9 Iowa 306 (on the second day after the order was made); Cleland *v.* Tavernier, 11 Minn. 194 (before the first legal publication); Van Wyck *v.* Hardy, 4 Abb. Dec. (N. Y.) 496, 39 How. Pr. 392 (within four days); Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

Where an order of publication required a copy of the summons and complaint to be deposited in the post-office "forthwith," a finding of the trial court that a delay of ten days was not unreasonable will not be disturbed. Star *v.* Mahan, 4 Dak. 213, 30 N. W. 169.

more defendants, a separate notice must be mailed to each of the defendants sought to be served.[17]

f. Personal Service Outside State. Personal service outside the state is frequently provided for by statute as a substitute for and an equivalent to service by publication,[18] but no jurisdiction over the person of defendant is acquired thereby unless defendant actually appears.[19] The procedure is wholly statutory,[20] and the provisions of the statute must be observed as carefully as in case of service by publication.[21] Only the summons need be served, where the statute does not also require service of the affidavit, order, or complaint.[22] It is usually held that all necessary steps to secure the right to service by publication must be taken, and such service duly ordered, before personal service without the state may be resorted to,[23] and the summons served must be the same summons ordered to be published.[24] But it is unnecessary also to mail a copy of the summons where such personal service is had.[25] If the order provides in the alternative for both publication and personal service without the state, a defect in the former part of the order will not affect the validity of service had under the latter part.[26]

17. Wylly *v.* Sanford L. & T. Co., 44 Fla. 118, 33 So. 453; Dennison *v.* Blumenthal, 37 Ill. App. 385.

18. *Kansas.*— Adams *v.* Baldwin, 49 Kan. 781, 31 Pac. 681.

Nebraska.—Anheuser-Busch Brewing Assoc. *v.* Peterson, 41 Nebr. 897, 60 N. W. 373.

New York.— Jenkins *v.* Fahey, 73 N. Y. 355; Lockwood *v.* Brantly, 31 Hun 155; Matthews *v.* Gilleran, 12 N. Y. Suppl. 74; Abrahams *v.* Mitchell, 8 Abb. Pr. 123.

North Carolina.— Long *v.* Home Ins. Co., 114 N. C. 465, 19 S. E. 347.

Ohio.—Williams *v.* Welton, 28 Ohio St. 451.

Washington.— Hunter *v.* Wenatchee Land Co., 36 Wash. 541, 79 Pac. 40.

Wisconsin.— Wilmot *v.* Smith, 86 Wis. 299, 56 N. W. 873; Pier *v.* Amory, 40 Wis. 571.

United States.—Adams *v.* Heckscher, 80 Fed. 742; Salisbury *v.* Sands, 21 Fed. Cas. No. 12,251, 2 Dill. 270.

See 40 Cent. Dig. tit. "Process," § 136.

19. *California.*— Riverside First Nat. Bank *v.* Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95; *In re* Culp, 2 Cal. App. 70, 83 Pac. 89.

Iowa.— Clark *v.* Tull, 113 Iowa 143, 84 N. W. 1030; Kelly *v.* Norwich F. Ins. Co., 82 Iowa 137, 47 N. W. 986.

Kansas.—Adams *v.* Baldwin, 49 Kan. 781, 31 Pac. 681.

Nebraska.—Anheuser- Busch Brewing Assoc. *v.* Peterson, 41 Nebr. 897, 60 N. W. 373.

New York.— Mahr *v.* Norwich Union F. Ins. Soc., 127 N. Y. 452, 28 N. E. 391.

North Carolina.— Long *v.* Home Ins. Co., 114 N. C. 465, 19 S. E. 347.

Ohio.— Williams *v.* Welton, 28 Ohio St. 451.

South Carolina.— National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

Texas.— Donovan *v.* Hinzie, (Civ. App. 1901) 60 S. W. 994; Roller *v.* Holley, 13 Tex. Civ. App. 636, 35 S. W. 1074.

United States.— Dull *v.* Blackman, 169 U. S. 243, 18 S. Ct. 333, 42 L. ed. 733.

See 40 Cent. Dig. tit. "Process," § 136.

20. Jennings *v.* Johnson, 148 Fed. 337, 78 C. C. A. 329; *In re* Cliff, [1895] 2 Ch. 21, 64 L. J. Ch. 423, 72 L. T. Rep. N. S. 440, 13 Reports 425, 43 Wkly. Rep. 436.

21. Hedrix *v.* Hedrix, 103 Mo. App. 40, 77 S. W. 495.

22. Ludden *v.* Degener, 14 N. Y. App. Div. 397, 43 N. Y. Suppl. 908; Allen *v.* Richardson, 16 S. D. 390, 92 N. W. 1075.

23. Adams *v.* Baldwin, 49 Kan. 781, 31 Pac. 681; Brooklyn Trust Co. *v.* Bulmer, 49 N. Y. 84; Peck *v.* Cook, 41 Barb. (N. Y.) 549; Fiske *v.* Anderson, 12 Abb. Pr. (N. Y.) 8; Manning *v.* Heady, 64 Wis. 630, 25 N. W. 1.

Contrary view.— "The learned counsel for appellant . . . contend that, before service can be made without the State, an affidavit must be filed that personal service cannot be made within the State, as provided by section 2832, when service is to be made by publication; and this, because actual personal service without the State only supersedes the necessity of publication. The whole argument, however, is answered by the single statement that the true construction of section 2835 is that personal service without the State supersedes the necessity of service by publication. In other words, that the word 'publication' as used in that section means not only or merely the act of publishing the notice for four weeks in the paper, but also the other acts, both preceding and following that, which the statute requires in order to make a completed service by publication. So that when personal service is made without the State, it is not necessary either to file the affidavit that service cannot be made within the State nor to procure the designation in writing by the clerk, nor to file the affidavit, etc., with the clerk." Miller *v.* Davison, 31 Iowa 435, 439. And see Jennings *v.* Rocky Bar Gold Min. Co., 29 Wash. 726, 70 Pac. 136.

24. Coffin *v.* Bell, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

25. McCully *v.* Heller, 66 How. Pr. (N. Y.) 468.

26. Sabin *v.* Kendrick, 2 N. Y. App. Div. 96, 37 N. Y. Suppl. 524.

England and Canada.— In England the entire subject of service outside the jurisdiction

7. Time When Service Is Complete. The service is in some states complete as soon as the paper containing the last publication is issued,[27] but in others the full statutory number of days or weeks must expire before service is deemed complete.[28] When personal service outside the state is resorted to as a substitute for publication, the service is in some states held not complete until the expiration of the time provided for publication,[29] although other courts hold that such service is complete as soon as personal service is in fact made.[30]

E. Privileges and Exemptions[31]— **1. Persons in Presence of the Court.** It is a well-settled rule of the common law that service of a summons upon any person interested in a cause in the presence of the court in which it is being tried

is covered by Order XI of the Rules of the Supreme Court. Such service is allowed in case: (1) The subject-matter of the action is land situated within the jurisdiction; (2) the action relates to any act, deed, contract or liability affecting such land; (3) relief is sought against any person domiciled within the jurisdiction; (4) the action is brought for the administration of the personal estate of one who at the time of his death was domiciled in the jurisdiction; (5) the action is for breach within the jurisdiction of a contract to be performed within the jurisdiction; (6) an injunction is sought as to anything to be done within the jurisdiction or a nuisance is sought to be prevented within the jurisdiction; and (7) any person out of the jurisdiction is a necessary or proper party to an action brought against parties served within the jurisdiction. Comber *v.* Leyland, [1898] A. C. 524, 67 L. J. Q. B. 884, 79 L. T. Rep. N. S. 180; Thompson *v.* Palmer, [1893] 2 Q. B. 80, 62 L. J. Q. B. 502, 69 L. T. Rep. N. S. 366, 4 Reports 422, 42 Wkly. Rep. 22; Witted *v.* Galbraith, [1893] 1 Q. B. 577, 62 L. J. Q. B. 248, 68 L. T. Rep. N. S. 421, 4 Reports 362, 41 Wkly. Rep. 395; Seagrove *v.* Parks, [1891] 1 Q. B. 551, 60 L. J. Q. B. 355; Bell *v.* Antwerp, etc., Line, [1891] 1 Q. B. 103, 7 Aspin. 154, 60 L. J. Q. B. 270, 64 L. T. Rep. N. S. 276, 39 Wkly. Rep. 84; Massey *v.* Heynes, 21 Q. B. D. 330, 57 L. J. Q. B. 521, 36 Wkly. Rep. 834; Hewitson *v.* Fabre, 21 Q. B. D. 6, 57 L. J. Q. B. 449, 58 L. T. Rep. N. S. 856, 36 Wkly. Rep. 717; Kaye *v.* Sutherland, 20 Q. B. D. 147, 57 L. J. Q. B. 68, 58 L. T. Rep. N. S. 56, 36 Wkly. Rep. 508; Thomas *v.* Hamilton, 17 Q. B. D. 592, 55 L. J. Q. B. 555, 55 L. T. Rep. N. S. 385, 35 Wkly. Rep. 22; Deutsche Nat. Bank *v.* Paul, [1898] 1 Ch. 283, 67 L. J. Ch. 156, 78 L. T. Rep. N. S. 35, 14 T. L. R. 193, 46 Wkly. Rep. 243; Winter *v.* Winter, [1894] 1 Ch. 421, 63 L. J. Ch. 165, 69 L. T. Rep. N. S. 759, 8 Reports 614; Societe Generale de Paris *v.* Dreyfus, 37 Ch. D. 215, 57 L. J. Ch. 276, 58 L. T. Rep. N. S. 573, 36 Wkly. Rep. 609; Reynolds *v.* Coleman, 36 Ch. D. 453, 56 L. J. Ch. 903, 57 L. T. Rep. N. S. 588, 35 Wkly. Rep. 813; *In re* Eager, 22 Ch. D. 86, 52 L. J. Ch. 56, 47 L. T. Rep. N. S. 685, 31 Wkly. Rep. 33; Fowler *v.* Barstow, 20 Ch. D. 240, 51 L. J. Ch. 103, 45 L. T. Rep. N. S. 603, 30 Wkly. Rep. 113; Young *v.* Brassey, 1 Ch. D. 277, 45 L. J. Ch. 142, 24 Wkly. Rep. 110; Westman *v.* Aktiebolaget Ekman's Mekaneska Snickarefabrik, 1 Ex. D. 237, 45 L. J. Exch. 327, 24 Wkly. Rep. 405; James *v.* Despott, L. R. 14 Ir. 71; Peru Republic *v.* Dreyfus, 55 L. T. Rep. N. S. 802; Lisbon-Berlyn Gold Fields *v.* Heddle, 52 L. T. Rep. N. S. 796; Potters *v.* Miller, 31 Wkly. Rep. 858. The question of the service of a writ out of the jurisdiction is finally determined when leave to serve it is given under Order XI, subject to any application by defendant to rescind the leave and to the right of appeal and cannot be raised in the defense. Preston *v.* Lamont, 1 Ex. D. 361, 45 L. J. Exch. 797, 35 L. T. Rep. N. S. 341, 24 Wkly. Rep. 928. Similar rules have been adopted in some of the provinces of Canada. Young *v.* Dominion Constr. Co., 19 Ont. Pr. 139; Franchot *v.* General Securities Corp., 18 Ont. Pr. 291; Empire Oil Co. *v.* Vallerand, 17 Ont. Pr. 27; Clarkson *v.* Duprê, 16 Ont. Pr. 521; Oligny *v.* Beauchemin, 16 Ont. Pr. 508; Bell *v.* Villeneuve, 16 Ont. Pr. 413; Sears *v.* Meyers, 15 Ont. Pr. 381; Livingstone *v.* Sibbald, 15 Ont. Pr. 315; Fisher *v.* Cassady, 14 Ont. Pr. 577; Simpson *v.* Hall, 14 Ont. Pr. 310; Purves *v.* Slater, 11 Ont. Pr. 507; Martin *v.* Lafferty, 9 Ont. Pr. 300.

27. Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043; Banta *v.* Wood, 32 Iowa 469; Davis *v.* Huston, 15 Nebr. 28, 16 N. W. 820.

28. Foster *v.* Vehmeyer, 133 Cal. 459, 65 Pac. 974; Grewell *v.* Henderson, 5 Cal. 465; Market Nat. Bank *v.* Pacific Nat. Bank, 89 N. Y. 397; Waters *v.* Waters, 7 Misc. (N. Y.) 519, 27 N. Y. Suppl. 1004; Brod *v.* Heymann, 3 Abb. Pr. N. S. (N. Y.) 396; Richardson *v.* Bates, 23 How. Pr. (N. Y.) 516; Moore *v.* Thayer, 6 How. Pr. (N. Y.) 47; Harmon *v.* Whittemore, 7 Ohio Dec. (Reprint) 92, 1 Cinc. L. Bul. 109; Gilfillin *v.* Koke, 2 Ohio Dec. (Reprint) 172, 1 West. L. Month. 705; Cox *v.* North Wisconsin Lumber Co., 82 Wis. 141, 51 N. W. 1130. See also Ranch *v.* Werley, 152 Fed. 509, construing Oregon statutes.

29. Bowen *v.* Harper, 6 Ida. 654, 59 Pac. 179; Brooklyn Trust Co. *v.* Bulmer, 49 N. Y. 84; Crouter *v.* Crouter, 17 N. Y. Suppl. 758 [*affirmed* in 133 N. Y. 55, 30 N. E. 726]; Abrahams *v.* Mitchell, 8 Abb. Pr. (N. Y.) 123. But *compare In re* Macauley, 94 N. Y. 574.

30. H. L. Spencer Co. *v.* Koell, 91 Minn. 226, 97 N. W. 974.

31. **Exemptions and privileges of ambassador or consul** see Ambassadors and Consuls, 2 Cyc. 265 *et seq.*

Indictment for service on minister see Ambassadors and Consuls, 2 Cyc. 269 note 53.

is a contempt, but the privilege is one of the court rather than of the person.[32] In all other cases of exemption from service of summons, the privilege is deemed personal only.[33]

2. Members of Legislative Bodies. At common law members of parliament enjoyed no privilege from suit at any time,[34] and although there is a conflict of authority the better established opinion is that no common-law rule of exemption for legislators is to be recognized in the United States;[35] but in many American jurisdictions statutes or constitutional provisions provide for such immunity for members of legislative assemblies while engaged in the discharge of their duties.[36] Immunity from arrest is sometimes held to include exemption from service of summons,[37] but the better rule is to the contrary.[38]

3. Service on Judges. Judges are exempt from service of summons while holding court and for a reasonable time in going to and from the place of the session.[39]

4. Service on Jurors. Under a statute providing against the service of any writ or other process on the body of a juror, jurors are not exempt from the service of civil process without arrest during the time they are attending court.[40]

5. Service on Attorneys at Law. Resident attorneys at law have no privilege of exemption during the trial of causes in which they are engaged, except when in the actual presence of the court;[41] and the rule has been applied to non-resident attorneys,[42] although other cases announce a contrary doctrine.[43] The immunity

32. Clark *v.* Grant, 2 Wend. (N. Y.) 257; Sandford *v.* Chase, 3 Cow. (N. Y.) 381; U. S. *v.* Edme, 9 Serg. & R. (Pa.) 147; Huddeson *v.* Prizer, 9 Phila. (Pa.) 65.

33. Sebring *v.* Stryker, 10 Misc. (N. Y.) 289, 30 N. Y. Suppl. 1053.

34. Stockdale *v.* Hansard, 9 A. & E. 1, 3 Jur. 905, 8 L. J. Q. B. 294, 2 P. & D. 1, 36 E. C. L. 27.

35. Berlet *v.* Weary, 67 Nebr. 75, 93 N. W. 238, 108 Am. St. Rep. 616, 60 L. R. A. 609. And see cases cited *infra*, note 38. *Contra*, Geyer *v.* Irwin, 4 Dall. (Pa.) 107, 1 L. ed. 762; Bolton *v.* Martin, 1 Dall. (Pa.) 296, 1 L. ed. 144.

36. *Connecticut.*— King *v.* Coit, 4 Day 129.

Kansas.— Cook *v.* Senior, 3 Kan. App. 278, 45 Pac. 126.

South Carolina.— Tillinghast *v.* Carr, 4 McCord 152.

Virginia.— McPherson *v.* Nesmith, 3 Gratt. 237.

Wisconsin.—Anderson *v.* Rountree, 1 Pinn. 115.

United States.—Miner *v.* Markham, 28 Fed. 387.

See 40 Cent. Dig. tit. "Process," § 144.

37. Anderson *v.* Rountree, 1 Pinn. (Wis.) 115; Miner *v.* Markham, 28 Fed. 387.

38. *District of Columbia.*— Merrick *v.* Giddings, MacArthur & M. 55.

Kentucky.— Johnson *v.* Offutt, 4 Metc. 19; Catlett *v.* Morton, 4 Litt. 122.

Minnesota.— Rhodes *v.* Walsh, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632.

Nebraska.— Berlet *v.* Weary, 67 Nebr. 75, 93 N. W. 155, 108 Am. St. Rep. 616, 60 L. R. A. 609, containing a very exhaustive discussion of the question.

New Hampshire.— Bartlett *v.* Blair, 68 N. H. 232, 38 Atl. 1004.

South Carolina.— Worth *v.* Norton, 56 S. C. 56, 33 S. E. 792, 76 Am. St. Rep. 524, 45 L. R. A. 563, an exhaustive case on the question, with dissenting opinion by Pope, J.

Texas.— Gentry *v.* Griffith, 27 Tex. 461.

Virginia.— McPherson *v.* Nesmith, 3 Gratt. 237.

United States.— Kimberly *v.* Butler, 14 Fed. Cas. No. 7,777.

See 40 Cent. Dig. tit. "Process," § 144.

Members of congress, while in attendance upon its sessions, are not privileged from being sued in this district. Howard *v.* Citizens' Bank, etc., Co., 12 App. Cas. (D. C.) 222.

39. See Judges, 23 Cyc. 524.

40. Grove *v.* Campbell, 9 Yerg. (Tenn.) 7.

41. National Press Intelligence Co. *v.* Brooke, 18 Misc. (N. Y.) 373, 41 N. Y. Suppl. 658 (service made in open court held good); Parker Sav. Bank *v.* McCandlass, 6 Pa. Co. Ct. 327. But *compare* Gilbert *v.* Vanderpool, 15 Johns. (N. Y.) 242.

42. Greenleaf *v.* Peoples' Bank, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L. R. A. 499 (this case contains a thorough discussion of the question in a concurring opinion by Clark, C. J.); Robbins *v.* Lincoln, 27 Fed. 342.

An attorney at law who travels from one county to another in the practice of his profession is not exempt from service of process while returning from court, although he was sworn as a witness in a cause in which he was engaged. Tyrone Bank *v.* Doty, 2 Pa. Dist. 558, 12 Pa. Co. Ct. 287.

43. *Pennsylvania.*— Huddeson *v.* Prizer, 9 Phila. 65.

South Carolina.— Vincent *v.* Watson, 1 Rich. 194; Hunter *v.* Cleveland, 1 Brev. 167.

Virginia.— Com. *v.* Ronald, 4 Call 97.

United States.— Norris *v.* Hassler, 23 Fed. 581; Blight *v.* Fisher, 3 Fed. Cas. No. 1,542, Pet. C. C. 41.

England.— Cole *v.* Hawkins, 2 Str. 1094.

extends not only to those who are in the immediate presence of the judges of courts of record, but to those also who are in attendance upon the subordinate tribunals and officers appointed by those courts to assist them in the discharge of their duties.[44]

6. Service on Suitors and Witnesses. Suitors and witnesses coming from foreign jurisdictions for the sole purpose of attending court, whether under summons or subpœna or not, are usually held immune from service of civil process while engaged in such attendance and for a reasonable time in coming and going.[45] The

See Poole *v.* Gould, 1 H. & N. 99, 25 L. J. Exch. 250, where the court refused to set aside service made in court upon a witness present in obedience to a writ of summons.

44. Hoffman *v.* Bay Cir. Judge, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L. R. A. 663 (holding that an attorney at law is privileged from service of summons while attending upon the supreme court and while going to the court and returning to the county of his residence); Whitman *v.* Sheets, 20 Ohio Cir. Ct. 1, 11 Ohio Cir. Dec. 179 (holding that the privilege exists in favor of an attorney who goes into another county in the same state in order to attend court).

45. *Arkansas.*— Martin *v.* Bacon, 76 Ark. 158, 88 S. W. 863, 113 Am. St. Rep. 81.

California.— Fox *v.* Hale, etc., Min. Co., 108 Cal. 369, 41 Pac. 308.

Georgia.— Fidelity, etc., Co. *v.* Everett, 97 Ga. 787, 25 S. E. 734.

Indiana.— Wilson *v.* Donaldson, 117 Ind. 356, 20 N. E. 250, 10 Am. St. Rep. 48, 3 L. R. A. 266.

Iowa.— Murray *v.* Wilcox, 122 Iowa 188, 97 N. W. 1087, 101 Am. St. Rep. 263, 64 L. R. A. 534.

Kansas.— Bolz *v.* Crone, 64 Kan. 570, 67 Pac. 1108; Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15.

Maryland.— Bolgiano *v.* Gilbert Lock Co., 73 Md. 132, 20 Atl. 788, 25 Am. St. Rep. 582.

Michigan.— Letherby *v.* Shaver, 73 Mich. 500, 41 N. W. 677; Mitchell *v.* Huron Cir. Judge, 53 Mich. 541, 19 N. W. 176.

Minnesota.— St. Paul First Nat. Bank *v.* Ames, 39 Minn. 179, 39 N. W. 308; Sherman *v.* Gundlach, 37 Minn. 118, 33 N. W. 549.

Nebraska.— Linton *v.* Cooper, 54 Nebr. 438, 74 N. W. 842, 69 Am. St. Rep. 727.

New Hampshire.— Ela *v.* Ela, 68 N. H. 312, 36 Atl. 15.

New Jersey.— Richardson *v.* Smith, 74 N. J. L. 111, 65 Atl. 162; Mulhearn *v.* Press Pub. Co., 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101; Massey *v.* Colville, 45 N. J. L. 119, 46 Am. Rep. 754; Miller *v.* Dungan, 37 N. J. L. 182; Halsey *v.* Stewart, 4 N. J. L. 366.

New York.— Matthews *v.* Tufts, 87 N. Y. 568; Person *v.* Grier, 66 N. Y. 124, 23 Am. Rep. 35; Goldsmith *v.* Haskell, 120 N. Y. App. Div. 403, 105 N. Y. Suppl. 327 (holding the facts sufficient to show that a traveling salesman had obtained residence outside of the state); Lamkin *v.* Starkey, 7 Hun 479; Grafton *v.* Weeks, 7 Daly 523; Kinsey *v.* American Hardwood Mfg. Co., 94 N. Y. Suppl. 455; Hollender *v.* Hall, 13 N. Y. Suppl. 758 [*affirmed* in 11 N. Y. Suppl. 521, 19 N. Y. Civ. Proc. 292]; Finch *v.* Galigher, 12 N. Y. Suppl. 487, 25 Abb. N. Cas. 404; Pritsch *v.* Schlicht, 5 N. Y. St. 871; Sheehan *v.* Bradford, etc., R. Co., 15 N. Y. Civ. Proc. 429; Brett *v.* Brown, 13 Abb. Pr. N. S. 295; Merrill *v.* George, 23 How. Pr. 331; Coburn *v.* Hopkins, 1 Wend. 292.

North Carolina.— Cooper *v.* Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731.

Ohio.— Barber *v.* Knowles, 77 Ohio St. 81, 82 N. E. 1065; Andrews *v.* Lembeck, 46 Ohio St. 38, 18 N. E. 483, 15 Am. St. Rep. 547; Bassett *v.* Gunsolus, 6 Ohio Dec. (Reprint) 1228, 13 Am. L. Rec. 487.

Pennsylvania.— Hayes *v.* Shields, 2 Yeates 222; Western New York, etc., R. Co. *v.* Clermont, etc., R. Co., 9 Pa. Dist. 299; Ferree *v.* Pierce, 25 Pa. Co. Ct. 112; Yeakel *v.* Brand, 7 North. Co. Rep. 31; Holmes *v.* Nelson, 1 Phila. 217; Carstairs *v.* Knapp, 35 Wkly. Notes Cas. 292.

South Dakota.— Malloy *v.* Brewer, 7 S. D. 587, 64 N. W. 1120, 58 Am. St. Rep. 856; Comp. Laws, § 5274, providing that a witness shall not be liable to be sued in a county in which he does not reside by being served with a summons in such county while going, returning, or attending in obedience to a subpœna, covers only the subject of the immunity of witnesses and does not assume to regulate the exemption of suitors. Fisk *v.* Westover, 4 S. D. 233, 55 N. W. 961, 46 Am. St. Rep. 780.

Tennessee.— Sewanee Coal, etc., Co. *v.* Williams, (1908) 107 S. W. 968, holding that the exemption applied to witnesses summoned before federal courts as well as before the state courts.

Texas.— Feibleman *v.* Edmonds, 69 Tex. 334, 6 S. W. 417.

Wisconsin.— Cameron *v.* Roberts, 87 Wis. 291, 58 N. W. 376, 41 Am. St. Rep. 43.

United States.—Skinner, etc., Co. *v.* Waite, 155 Fed. 828 (holding that a person going into another state as a witness or as a party defendant in a suit therein, either nominally or as a defendant in interest, is exempt from process in such state while he is necessarily attending there in respect to such trial, at least in the absence of a state statute unequivocally abrogating such exemption); American Wooden-Ware Co. *v.* Stern, 63 Fed. 676; Kauffman *v.* Kennedy, 25 Fed. 785; Small *v.* Montgomery, 23 Fed. 707; Wilson Sewing-Mach. Co. *v.* Wilson, 22 Fed. 803, 23 Blatchf. 51; Nichols *v.* Horton, 14

rule is broad enough to include witnesses before a legislative committee,[46] witnesses present before a commission of the supreme court,[47] a suitor attending a hearing before a referee in bankruptcy,[48] persons attendant upon summary proceedings for dispossession under a landlord and tenant statute,[49] suitors or witnesses present in the state for the purpose of taking depositions,[50] and a suitor coming into the jurisdiction in order to confer with counsel during the argument of a demurrer.[51] The rule is by most courts held to apply equally well to suitors and witnesses attending court in the state but not in the county of their residence,[52]

Fed. 327, 4 McCrary 567; Atchison *v.* Morris, 11 Fed. 582, 11 Biss. 191; Brooks *v.* Farwell, 4 Fed. 166, 2 McCrary 220; Juneau Bank *v.* McSpedan, 14 Fed. Cas. No. 7,582, 5 Biss. 64; Parker *v.* Hotchkiss, 18 Fed. Cas. No. 10,739, 1 Wall. Jr. 269. *Contra*, Blight *v.* Fisher, 3 Fed. Cas. No. 1,542, Pet. C. C. 41.

See 40 Cent. Dig. tit. "Process," §§ 148, 150.

Contra.— Bishop *v.* Voss, 27 Conn. 1; Lewis *v.* Miller, 115 Ky. 623, 74 S. W. 691, 24 Ky. L. Rep. 2533.

"This immunity is one of the necessities of the administration of justice." Person *v.* Grier, 66 N. Y. 124, 23 Am. Rep. 22.

Exemption limited to jurisdiction where hearing is had.— The policy of the law exempting from service of process parties and witnesses going to and from court extends only to the jurisdiction in which attendance at court is required, and does not render invalid a service of process from a Massachusetts court upon a citizen of Vermont while traveling through Massachusetts to attend court in Connecticut as a witness. Holyoke, etc., Ice Co. *v.* Ambden, 55 Fed. 593, 21 L. R. A. 319. The contrary, however, was held in Tyrone Bank *v.* Doty, 2 Pa. Dist. 558, 12 Pa. Co. Ct. 287, in which it was held that where a witness, on the day after the trial, departs for his home in a distant county by the most direct route, he is exempt from service of process while passing through an intermediate county.

Resident coming from outside state.— A resident who had been sojourning out of the state to avoid service of process, and voluntarily came within the state to testify in a legal proceeding, and attend as a party, could not be served with process while coming, attending court or returning, provided he returned with reasonable despatch. Cake *v.* Haight, 30 Misc. (N. Y.) 386, 63 N. Y. Suppl. 1043.

Witness exempt only in personal capacity.— It was held in Linn *v.* Hagan, 121 Ky. 627, 87 S. W. 1101, 27 Ky. L. Rep. 1113, that the execution exemption of the witness, when allowed, is a personal one and that a witness who has come from a foreign jurisdiction to testify in a pending case may nevertheless be served in a representative capacity, as administratrix. But see Sewanee Coal, etc., Co. *v.* Williams, (Tenn. 1908) 107 S. W. 968, holding that a resident of another state or county, who has in good faith come to testify as a witness, is exempt from service of process for the commencement of a civil action, either against him in his individual capacity, or against a corporation of which he is an officer or agent.

Effect of statute.— N. C. Code, §§ 1367, 1735, prohibiting arrest in civil actions of parties attending court as witness or as jurors, do not by implication repeal the common-law exemption of non-residents from service of process while in the state in attendance in court either as witnesses or as suitors. Cooper *v.* Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731.

Final process.— The protection to suitors and witnesses attending court from service of civil process does not extend to final process, and service of an attachment execution upon a non-resident defendant and garnishee attending court as plaintiff in another suit will not be set aside. Schroeder *v.* Reynolds, 17 Lanc. L. Rev. (Pa.) 300.

46. Thorp *v.* Adams, 11 N. Y. Suppl. 479, 19 N. Y. Civ. Proc. 351.

47. Mulhearn *v.* Press Pub. Co., 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101.

48. Morrow *v.* Dudley, 144 Fed. 441.

49. Richardson *v.* Smith, 74 N. J. L. 111, 65 Atl. 162.

50. Parker *v.* Marco, 136 N. Y. 585, 32 N. E. 989, 32 Am. St. Rep. 770, 20 L. R. A. 45; Langdon *v.* Baker, 7 Ohio S. & C. Pl. Dec. 423, 5 Ohio N. P. 118; Partridge *v.* Powell, 180 Pa. St. 22, 36 Atl. 419; Plimpton *v.* Winslow, 9 Fed. 365, 20 Blatchf. 82. See Bank *v.* Messenger, 1 Northumb. Co. Leg. N. (Pa.) 173.

51. Kinne *v.* Lant, 68 Fed. 436.

Selling property pursuant to decree.— A managing officer of a foreign corporation who is in the state to attend a sale of land under a decree of the federal court in an action in which the foreign corporation was a party is not in attendance on a judicial proceeding so as to exempt him from service of a summons in an action against the corporation. Greenleaf *v.* People's Bank, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L. R. A. 499.

52. *Illinois.*— Gregg *v.* Sumner, 21 Ill. App. 110.

Indiana.— Wilson *v.* Donaldson, 117 Ind. 356, 20 N. E. 250, 10 Am. St. Rep. 48, 3 L. R. A. 266.

Kansas.— Underwood *v.* Fosha, 73 Kan. 408, 85 Pac. 564.

Michigan.— Mitchell *v.* Huron Cir. Judge, 53 Mich. 541, 19 N. W. 176.

Nebraska.— Mayer *v.* Nelson, 54 Nebr. 434, 74 N. W. 841.

New Jersey.— Massey *v.* Colville, 45 N. J. L. 119, 46 Am. Rep. 754.

New York.— Person *v.* Grier, 66 N. Y. 124,

where the process of such court could not reach them in the county of their residence.[53] But the privilege does not attach when the person is attending court merely as a spectator.[54] Some cases limit the privilege to witnesses alone, and do not accord it to suitors.[55] Resident witnesses and suitors, attending court in the county of their residence, have no such privilege.[56]

7. Service on Electors. In some jurisdictions statutes forbid the service of civil process on an elector during the time appointed for an election.[57]

8. Service on Persons Charged With Crime. When a non-resident defendant in a criminal prosecution comes into the jurisdiction involuntarily for the purpose of appearing, pleading, or being tried, he will be held immune from the service of summons in a civil suit, until after a reasonable time has elapsed to enable him to return to his home;[58] but a voluntary appearance of a person for whom requisition has been

23 Am. Rep. 35; People *v.* Inman, 74 Hun 130, 26 N. Y. Suppl. 329; Thorp *v.* Adams, 11 N. Y. Suppl. 479, 19 N. Y. Civ. Proc. 351.

North Dakota.— Hicks *v.* Besuchet, 7 N. D. 429, 75 N. W. 793, 66 Am. St. Rep. 665.

Ohio.— Barber *v.* Knowles, 77 Ohio St. 81, 82 N. E. 1065; Andrews *v.* Lembeck, 46 Ohio St. 38, 18 N. E. 483, 15 Am. St. Rep. 547.

Pennsylvania.— Miles *v.* McCullough, 1 Binn. 77; Wetherell *v.* Seitzinger, 1 Miles 237.

See 40 Cent. Dig. tit. "Process," §§ 148, 150.

Contra.— Legrand *v.* Bedinger, 4 T. B. Mon. (Ky.) 539; Christian *v.* Williams, 111 Mo. 429, 20 S. W. 96. See also Sadler *v.* Ray, 5 Rich. (S. C.) 523.

Who deemed a party.— The cashier of a national bank, sent by the bank to attend the taking of depositions in another city, but without formal power of attorney from the bank to represent it in a case in which the bank was a plaintiff, is not such a party to the case as to be exempt from the service of a summons on him as cashier of the bank, in a suit against the bank. White *v.* Merchants', etc., Nat. Bank, 12 Pa. Co. Ct. 254.

Taking depositions.— The same exemption exists while a party is in another county in attendance on the taking of depositions in a pending action. Powers *v.* Arkadelphia Lumber Co., 61 Ark. 504, 33 S. W. 842, 54 Am. St. Rep. 276; Wetherill *v.* Seitzinger, 1 Miles (Pa.) 237.

Change of venue.— It was held in Massey *v.* Colville, 45 N. J. L. 119, 46 Am. Rep. 754, that the remedy upon service in such a case was not by setting aside the service but by a change of venue if an unfair advantage had been taken of defendant. And this is the construction given by the courts of Kentucky to the statute of that state. Linn *v.* Hagan, 121 Ky. 627, 87 S. W. 1101, 27 Ky. L. Rep. 1113.

Necessity of subpœna.— In Kentucky a witness is not protected from service in another county unless he is attending court there pursuant to the command of a subpœna. Currie Fertilizer Co. *v.* Krish, 74 S. W. 268, 24 Ky. L. Rep. 2471.

53. Sebring *v.* Stryker, 10 Misc. (N. Y.) 289, 30 N. Y. Suppl. 1053; Schroeder *v.* Reynolds, 17 Lanc. L. Rev. (Pa.) 300.

54. McIntire *v.* McIntire, 5 Mackey (D. C.) 344; Michaels *v.* Hain, 78 Hun (N. Y.) 500, 29 N. Y. Suppl. 567.

55. *Connecticut.*— Bishop *v.* Vose, 27 Conn. 1.

Idaho.— Guynn *v.* McDaneld, 4 Ida. 605, 43 Pac. 74, 95 Am. St. Rep. 158, where the court concedes that the majority of decisions are opposed to this limitation which it nevertheless adopts.

Illinois.— Cassem *v.* Galvin, 158 Ill. 30, 41 N. E. 1087; Greer *v.* Young, 120 Ill. 184, 11 N. E. 167; Gregg *v.* Sumner, 21 Ill. App. 110.

Missouri.— Baisley *v.* Baisley, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726.

Rhode Island.— Capwell *v.* Sipe, 17 R. I. 475, 23 Atl. 14, 33 Am. St. Rep. 890; Baldwin *v.* Emerson, 16 R. I. 304, 15 Atl. 83, 27 Am. St. Rep. 741.

Nature of the action may determine privilege.— In Mullen *v.* Sanborn, 79 Md. 364, 366, 29 Atl. 522, 47 Am. St. Rep. 421, 25 L. R. A. 721, the court said: "As to what the better rule may be, both as to plaintiffs and defendants, there is some conflict of authority; but we are all of opinion that this right of exemption should not be extended to one who, like the appellee, comes here and avails himself of the right given him by our statute to issue an attachment for fraud . . . The appellee having failed to prosecute his attachment with success, and the appellant having sued him in the court where the bond was filed to ascertain the damages, so that he could avail himself of a suit on the bond to make himself whole, we think the appellee should be held to have waived his right, if he had any, to exemption from summons."

56. Case *v.* Rorabacher, 15 Mich. 537; Frisbie *v.* Young, 11 Hun (N. Y.) 474; Pollard *v.* Union Pac. R. Co., 7 Abb. Pr. N. S. (N. Y.) 70. See also Hunter *v.* Cleveland, 1 Brev. (S. C.) 167; Huntington *v.* Shultz, Harp. (S. C.) 452, 18 Am. Dec. 660, holding that a statute conferring an exemption from arrest did not prohibit service of a capias ad respondendum.

57. See the statutes of the several states. And see Corlies *v.* Holmes, 20 Wend. (N. Y.) 681.

58. *Idaho.*— Guynn *v.* McDaneld, 4 Ida. 605, 43 Pac. 74, 95 Am. St. Rep. 158.

Illinois.— Cassem *v.* Galvin, 158 Ill. 30, 41 N. E. 1087; Greer *v.* Young, 120 Ill. 184, 11 N. E. 167; Gregg *v.* Sumner, 21 Ill. App. 110.

made in another state will not operate to create such privilege.[59] In some states defendants in criminal cases do not enjoy the same privilege as parties in civil cases, and may be served with writs of summons when on trial in jurisdictions other than where they reside,[60] unless the criminal charge is a contrivance of plaintiff in the civil suit to bring defendant within the jurisdiction.[61] Residents confined in jail or prison on criminal charges are subject to service of civil process.[62]

9. Service on Persons Engaged in Military Service. Statutes frequently exempt persons from the service of civil process while actually engaged in the military service of the state or of the United States,[63] and even in the absence of such a statute it has been held that public policy demands the recognition of such exemption.[64]

10. Waiver and Loss of Privilege. Service of civil process upon a privileged person is not void,[65] and the privilege must be asserted at the first opportunity or it is waived.[66] The privilege is waived by retaining an attorney who afterward

Michigan.— Jacobson *v.* Wayne Cir. Judge, 76 Mich. 234, 42 N. W. 1110, where relator was arrested on a criminal charge in a county where he did not reside and went to another county other than that of his residence to consult an attorney whom he regularly employed and while in this attorney's office he was served with a summons, and it was held that this was a breach of privilege and the service was set aside.

Nebraska.— Palmer *v.* Rowan, 21 Nebr. 452, 32 N. W. 210, 59 Am. St. Rep. 844, in another county in the same state.

New York.— Sander *v.* Harris, 14 N. Y. Suppl. 37; Day *v.* Harris, 14 N. Y. Suppl. 3; Murphy *v.* Sweezy, 2 N. Y. Suppl. 241.

United States.— U. S. *v.* Bridgman, 24 Fed. Cas. No. 14,645, 9 Biss. 221, 9 Reporter 74.

See 40 Cent. Dig. tit. "Process," § 149.

When appearance deemed compulsory.— "The real question is, Was the defendant's presence within this jurisdiction in fact compulsory? I am of opinion that it should be so considered. . . . The defendant came from a foreign jurisdiction where he resided, into this district, for the sole purpose of pleading to the indictment and giving bail. His attendance was really compulsory, because he knew that if he did not come without arrest he would be brought here upon a warrant. Bail could not be taken in Massachusetts, and with knowledge of this fact he was of necessity advised that he must personally attend this court, either under or without arrest; and he chose to avail himself of the opportunity extended to him for a limited time, to come without arrest. But in fact he was here none the less under compulsion . . . he was, while necessarily within this jurisdiction for that purpose, exempt from liability to the service of process upon him in the present action." U. S. *v.* Bridgman, 24 Fed. Cas. No. 14,645, 9 Biss. 221, 223, 9 Reporter 74.

59. King *v.* Phillips, 70 Ga. 409.

60. Nichols *v.* Goodheart, 5 Ill. App. 574; Metropolis Bank *v.* White, 26 Misc. (N. Y.) 504, 57 N. Y. Suppl. 460; Williams *v.* Bacon, 10 Wend. (N. Y.) 636; Moyer *v.* Place, 13 Pa. Co. Ct. 163; Treichler *v.* Hauck, 2 Woodw. (Pa.) 19.

61. Nichols *v.* Goodheart, 5 Ill. App. 574; Metropolis Bank *v.* White, 26 Misc. (N. Y.) 504, 57 N. Y. Suppl. 460; Garr *v.* Kessler, 18 Pa. Co. Ct. 216; Com. *v.* Huntzinger, 2 Leg. Rec. (Pa.) 80.

62. Davis *v.* Duffie, 1 Abb. Dec. (N. Y.) 486, 3 Keyes 606, 3 Transcr. App. 54, 4 Abb. Pr. N. S. 478; Phelps *v.* Phelps, 7 Paige (N. Y.) 150; White *v.* Underwood, 125 N. C. 25, 34 S. E. 104, 74 Am. St. Rep. 630, 46 L. R. A. 706.

63. See the statutes of the several states. And see Davidson *v.* Barclay, 63 Pa. St. 406; Drexel *v.* Miller, 49 Pa. St. 246; Coxe *v.* Martin, 44 Pa. St. 322; Rank *v.* Wenger, 1 Pearson (Pa.) 532; Heck *v.* Fink, 1 Woodw. (Pa.) 102; Gregg *v.* Summers, 1 McCord (S. C.) 461. See also Greening *v.* Sheffield, Minor (Ala.) 276; Hart *v.* Flynn, 8 Dana (Ky.) 190 (in which the exemption was said to be repealed by a law conferring exemption from arrest only); Hunter *v.* Weidner, 1 Woodw. (Pa.) 6; Hickman *v.* Armstrong, 2 Brev. (S. C.) 176.

A paymaster appointed by the president of the United States was held not to come within the Pennsylvania statute exempting from service of summons. Mechanics' Sav. Bank *v.* Sallade, 1 Woodw. (Pa.) 23.

Active service.— A militiaman who is returning from an annual encampment is doing military duty but is not in active service so as to be exempt from the service of summons. Land Title, etc., Co. *v.* Crump, 16 Pa. Co. Ct. 593. There is no exemption where one serves in the militia merely on the occasion of a public reception. Kirkpatrick *v.* Irby, 3 McCord (S. C.) 205.

64. Land Title, etc., Co. *v.* Rambo, 174 Pa. St. 566, 34 Atl. 207.

65. Peters *v.* League, 13 Md. 58, 71 Am. Dec. 622.

66. Weston *v.* Citizens' Nat. Bank, 64 N. Y. App. Div. 145, 71 N. Y. Suppl. 827; Sizer *v.* Hampton, etc., R., etc., Co., 57 N. Y. App. Div. 390, 68 N. Y. Suppl. 232; Sebring *v.* Stryker, 10 Misc. (N. Y.) 289, 30 N. Y. Suppl. 1053; Watsontown Nat. Bank *v.* Messinger, 6 Pa. Co. Ct. 609; Hendrick *v.* Gates, 3 C. Pl. (Pa.) 160; Meng *v.* Houser, 13 Rich. Eq. (S. C.) 210; Matthews *v.* Puffer, 10 Fed. 606, 20 Blatchf. 233.

acknowledges service of the declaration,[67] or by entering appearance and filing a motion for bail,[68] or taking substantial steps in the cause.[69] But there is no waiver by filing a petition and bond for removal to the federal court.[70] Any act of the person exempt from service, committed while such exemption is in force, which itself gives cause for the institution of civil proceedings against him, will be deemed a waiver of the privilege so far as service in such proceedings is concerned.[71] A suitor or witness will lose his privilege by unreasonable delay within the jurisdiction after he is through with his attendance at court,[72] or by unnecessarily remaining in the jurisdiction to attend to private business during a considerable interval while waiting for the case to be taken up.[73] The privilege is allowed with a reasonable latitude, and a party going to or returning from court need not take the most direct route; reasonable deviations or delays will be allowed, provided they do not arise in carrying out a purpose entirely distinct from the purpose of going to, attending, or returning from court.[74] Deciding not to have a deposition taken after going into the jurisdiction with the *bona fide* intention of taking it will not operate as a waiver.[75]

III. RETURN AND PROOF OF SERVICE.

A. In General[76] — 1. The Officer's Return. In order for a court to obtain jurisdiction of defendant he must not only have been served in the manner pointed

Illustrations. — A delay of three weeks in applying to have set aside service of summons made on one while going to the train after attending a judicial hearing did not operate as a waiver. Morrow *v.* Dudley, 144 Fed. 441. A sojourner in Jersey City, who came to New York city to attend a trial, and, when the case was not called, remained till half-past seven in the evening, was not exempt from service of process, since he did not return with reasonable despatch. Cake *v.* Haight, 30 Misc. (N. Y.) 386, 63 N. Y. Suppl. 1043.

67. Anonymous, 9 N. J. L. J. 166.

68. White *v.* Marshall, 23 Ohio Cir. Ct. 376.

69. Sheehan, etc., Transp. Co. *v.* Sims, 36 Mo. App. 224, holding that a plea of privilege was waived where defendant appeared by counsel, filed a demurrer to the petition on grounds other than jurisdictional, entered into a stipulation concerning substantial steps in the cause, appealed from a judgment against him, and secured a reversal and then gave notice to take depositions.

70. Atchison *v.* Morris, 11 Fed. 582, 11 Biss. 191.

71. Iron Dyke Copper Min. Co. *v.* Iron Dyke R. Co., 132 Fed. 208; Nichols *v.* Horton, 14 Fed. 327, 4 McCrary 567.

72. Marks *v.* La Societe Anonyme, 19 N. Y. Suppl. 470 [*affirmed* in 139 N. Y. 630, 35 N. E. 206]; Finch *v.* Galigher, 12 N. Y. Suppl. 487, 25 Abb. N. Cas. 404.

What constitutes a reasonable time for a party or witness to take his departure is a question of fact to be determined from the evidence adduced in each particular case. Linton *v.* Cooper, 54 Nebr. 438, 74 N. W. 842, 69 Am. St. Rep. 727. Where defendant came into the state to testify in two cases that were on the day calendars in two separate courts and on the call of the calendars both cases were set for other days, but it did not appear that the witnesses were notified of that fact, it was held that by remaining in the state during that day's session of court defendant did not forfeit his privilege from service of process. Pope *v.* Negus, 3 N. Y. Suppl. 796, 14 N. Y. Civ. Proc. 406.

73. Woodruff *v.* Austin, 15 Misc. (N. Y.) 450, 37 N. Y. Suppl. 22, holding that, where the cause in which defendant was a witness appeared on the day calendar on November 7, and was passed for the day, and did not come up again until November 18, although it was marked "Ready," and liable to be called at any time, and on November 14, defendant was informed that his attendance as a witness was not required on that day, and that he might go home and return on November 18, but he remained until the afternoon, attending to private business, when he was served with summons, he had forfeited his right of exemption from service.

74. Barber *v.* Knowles, 77 Ohio St. 81, 82 N. E. 1065.

75. Wetherill *v.* Seitzinger, 1 Miles (Pa.) 237.

76. **Entry on justice's docket** see JUSTICES OF THE PEACE, 24 Cyc. 635.

In deportation proceedings see ALIENS, 2 Cyc. 128 note 92.

Necessity that process or notice appear from record on appeal see APPEAL AND ERROR, 2 Cyc. 1028.

Process as part of contents of record proper in appellate court see APPEAL AND ERROR, 2 Cyc. 1055.

Proof of service of notice of appeal see APPEAL AND ERROR, 2 Cyc. 872.

Recital of record as to process in lower court see APPEAL AND ERROR, 2 Cyc. 1034.

Return of not found as ground for attachment see ATTACHMENT, 4 Cyc. 438.

Return of writ as essential to pendency of

out by law,[77] but there must be a legal return of such service.[78] The return of a writ is a statement in writing indorsed thereon by the officer to whom it is directed, certifying to the court what he has done pursuant to the command of the writ.[79] It is simply evidence of service.[80] The term also has the more literal meaning of bringing the writ back to the court from which it issues and filing it with the clerk of that court.[81] Both these acts are necessary to constitute the due return of process.[82] The day upon which a writ is to be returned is usually fixed or ascertainable by law,[83] and that day is called the return-day.[84] It is the duty of the sheriff to return process to the proper court whether executed or not,[85] in default of which he is liable to an action for damages.[86] By leave of court a writ may be returned after the lawful return-day;[87] but without such leave a return after the return-day, while otherwise a good return,[88] is not sufficient to protect the officer from liability for any damages suffered by reason of the delay.[89] It may be

prior action see ABATEMENT AND REVIVAL, 1 Cyc. 24.

Statement of inability to serve process as ground for attachment see ATTACHMENT, 4 Cyc. 512.

77. See *supra*, II.

78. Albright-Pryor Co. *v.* Pacific Selling Co., 126 Ga. 498, 55 S. E. 251, 115 Am. St. Rep. 108.

79. *Arkansas.*— Jones *v.* Goodbar, 60 Ark. 182, 29 S. W. 462; Phillips County *v.* Pillow, 47 Ark. 404, 1 S. W. 686.

California.— Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116.

Connecticut.— State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657.

Iowa.— Aultman *v.* McGrady, 58 Iowa 118, 12 N. W. 233; Kingsbury *v.* Buchanan, 11 Iowa 387.

Louisiana.— Wooldridge *v.* Monteuse, 27 La. Ann. 79.

Missouri.— State *v.* Melton, 8 Mo. 417; Horton *v.* Kansas City, etc., R. Co., 26 Mo. App. 349.

New York.— Iselin *v.* Henlein, 16 Abb. N. Cas. 73.

North Carolina.— Smith *v.* Kelly, 7 N. C. 507.

Tennessee.— Hutton *v.* Campbell, 10 Lea 170.

Where a suit is commenced by declaration, the certificate of service may be made on the back of the original declaration, or on a copy of it. Larned *v.* Wilcox, 4 Mich. 333.

80. Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

81. Casky *v.* Haviland, 13 Ala. 314; Easton *v.* Childs, 67 Minn. 242, 69 N. W. 903; State *v.* Melton, 8 Mo. 417; U. S. *v.* Landrum, 6 Fed. Cas. No. 3,393.

In North Carolina it may be returnable before the judge in term-time or before the clerk at any time, according to the nature of the proceedings. Sumner *v.* Miller, 64 N. C. 688; Tate *v.* Powe, 64 N. C. 644.

Return to wrong officer.—The statutory provision as to where process shall be returned is directory, and does not render process void if returned to a wrong officer. Ontario Bank *v.* Garlock, 1 Wend. (N. Y.) 288.

Due return of process means the bringing of the process into court with such indorsements on it as the law requires the officer to make. Harman *v.* Childress, 3 Yerg. (Tenn.) 327.

82. Wilson *v.* Young, 58 Ark. 593, 25 S. W. 870; Atkinson *v.* Heer, 44 Ark. 174; Nelson *v.* Cook, 19 Ill. 440; Beall *v.* Shattuck, 53 Miss. 358; Graves *v.* Macfarland, 58 Nebr. 802, 79 N. W. 707.

83. *Alabama.*— Garner *v.* Johnson, 22 Ala. 494; Caskey *v.* Nitcher, 8 Ala. 622.

Connecticut.— Hill *v.* Buechler, 73 Conn. 227, 47 Atl. 123.

Mississippi.— Story *v.* Ware, 35 Miss. 399, 72 Am. Dec. 125.

Pennsylvania.— Snyder *v.* Finn, 6 Pa. Dist. 191, 18 Pa. Co. Ct. 594; Price *v.* Scott, 21 Pa. Co. Ct. 608.

Tennessee.— Padgett *v.* Duckton Sulphur, etc., Co., 97 Tenn. 690, 37 S. W. 698.

Texas.— Maddox *v.* Rockport, (Civ. App. 1896) 38 S. W. 397.

Provision in process as to return see *supra*, I, D, 6, b *et seq.*

84. Bankers' Iowa State Bank *v.* Jordan, 111 Iowa 324, 82 N. W. 779.

The date of the return of a writ is the date when it is placed by the sheriff in the office from which it was issued. Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232.

85. Brown *v.* Baker, 9 Port. (Ala.) 503; Beall *v.* Shattuck, 53 Miss. 358.

86. Herr *v.* Atkinson, 40 Ark. 377; People *v.* Johnson, 4 Ill. App. 346; Crooker *v.* Melick, 18 Nebr. 227, 24 N. W. 689; Webster *v.* Quimby, 8 N. H. 382.

No one but plaintiff in the suit can raise the question of the sheriff's failure to make due return. Beebe *v.* George H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

87. Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720. But *compare* Bowden *v.* T. A. Gillispie Co., (N. J. Sup. 1907) 68 Atl. 238.

88. Miller *v.* Forbes, 6 Kan. App. 617, 49 Pac. 705; Graves *v.* Macfarland, 58 Nebr. 802, 79 N. W. 707; West *v.* Nixon, 3 Grant (Pa.) 236.

89. People *v.* Wheeler, 7 Paige (N. Y.) 433; Hyatte *v.* Allison, 48 N. C. 533.

returned before the return-day if served, but should not be returned until the return-day if no service has been had.[90] If returnable only in term, the return of the writ will be set aside if made in vacation.[91] The return-day is usually stated in the body of the writ,[92] and in case of indefinite or ambiguous designation the language of the writ will be construed so as to support it and render it operative if such construction is reasonable.[93] Thus if made returnable in a named month, without any indication of the year, it will be held returnable in the month named in the current year if possible,[94] and if made returnable on a legal holiday, it will be deemed returnable on the first judicial day thereafter.[95] Insensible words used in connection with the designation of the return-day will be rejected as surplusage.[96] The return need not be verified,[97] for it is made by a sworn officer and its truth is guaranteed by the sanctions of his official oath.[98]

2. ACKNOWLEDGMENT OF SERVICE. An acknowledgment of service indorsed upon the writ and subscribed by defendant is in many states sufficient under the statute to show service,[99] but it must usually be supported by proof of the genuineness of the signature.[1] Such proof may be made by the officer who makes service so stating in his return.[2]

B. Form, Requisites, and Sufficiency of Return — 1. IN GENERAL. The return should show on its face that everything necessary to constitute a good service has been done;[3] but no nice criticisms will be indulged in regard to the words used, and if it can be fairly inferred from the language employed that the officer has met the requirements of the law, the return will be deemed sufficient.[4]

90. Glover *v.* Rawson, 3 Pinn. (Wis.) 226, 3 Chandl. 249, the effect of premature return is to subject the officer to an action for damages.

91. Johnson *v.* Wilmington, etc., Electric R. Co., 1 Pennew. (Del.) 87, 39 Atl. 777.

92. See *supra*, I, D, 6, b.

93. Findley *v.* Ritchie, 8 Port. (Ala.) 452; Smith *v.* Winthrop, Minor (Ala.) 378; Gibson *v.* Laughlin, Minor (Ala.) 182; Winston *v.* Miller, 12 Sm. & M. (Miss.) 550.

94. Vinton *v.* Mead, 17 Mich. 388; Nash *v.* Mallory, 17 Mich. 232.

95. Ostertag *v.* Galbraith, 23 Nebr. 730, 37 N. W. 637.

96. Lore *v.* McRae, 12 Ala. 444, holding that a writ made returnable at "our next circuit court" to be held in a month named, will be returnable at the next term of court as ascertained by law, without reference to the month stated in the writ.

97. Wolf *v.* Moyer, 21 Pa. Co. Ct. 624.

98. Dunklin *v.* Wilson, 64 Ala. 162.

99. Metz *v.* Bremond, 13 Tex. 394. A certificate of acknowledgment of service of a citation by the clerk of a court is not sufficient. Cox *v.* Wadlington, 3 How. (Miss.) 57.

Acknowledgment of service generally see *supra*, II, B, 6.

1. *Alabama.*— Norwood *v.* Riddle, 1 Ala. 195; Welch *v.* Walker, 4 Port. 120.

Kentucky.— Lyne *v.* Commonwealth Bank, 5 J. J. Marsh. 545; Kendrick *v.* Kendrick, 4 J. J. Marsh. 241; Jackson *v.* Speed, 3 J. J. Marsh. 56; South *v.* Carr, 7 T. B. Mon. 419; Gatewood *v.* Rucker, 1 T. B. Mon. 21.

Minnesota.— Masterson *v.* Le Claire, 4 Minn. 163.

Mississippi.— Bacon *v.* Bevan, 44 Miss. 293; Davis *v.* Jordan, 5 How. 295; Harvie *v.* Bostic, 1 How. 106.

New York.— Litchfield *v.* Burwell, 5 How. Pr. 341.

See 40 Cent. Dig. tit. "Process," § 161.

But *compare* Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008.

2. Norwood *v.* Riddle, 9 Port. (Ala.) 425; Rowan *v.* Wallace, 7 Port. (Ala.) 171.

3. *Arkansas.*— *Ex p.* Cross, 7 Ark. 44.

California.— Linott *v.* Rowland, 119 Cal. 452, 51 Pac. 687; People *v.* Bernal, 43 Cal. 385.

Iowa.— Watts *v.* White, 12 Iowa 330.

Missouri.— Williams *v.* Monroe, 125 Mo. 574, 28 S. W. 853; Madison County Bank *v.* Suman, 79 Mo. 527.

New York.— Cameron *v.* United Traction Co., 67 N. Y. App. Div. 557, 73 N. Y. Suppl. 981; Vitola *v.* Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Suppl. 273.

Ohio.— Brotton *v.* Allston, 2 Ohio Dec. (Reprint) 393, 2 West. L. Month. 588.

Pennsylvania.—Stark *v.* Lehigh Coal, etc., Co., 9 Kulp 467; Gilbough *v.* Keller, 11 Phila. 364.

Texas.— Graves *v.* Robertson, 22 Tex. 130; Thompson *v.* Griffis, 19 Tex. 115.

Wisconsin.— Hall *v.* Graham, 49 Wis. 553, 5 N. W. 943.

See 40 Cent. Dig. tit. "Process," § 164.

For example, "Executed Oct. 18th, 1832, as commanded within" is not a sufficient return of a summons. Ogle *v.* Coffey, 2 Ill. 239. An affidavit by a sheriff made long after the alleged service that, to the best of his belief, he made service on defendant, will not give the court jurisdiction. Pearson *v.* Pierce, 40 Ohio St. 231.

4. *Illinois.*— Farnsworth *v.* Strasler, 12 Ill. 482.

It must appear that the summons served was the summons in the action.[5] In case two returns are indorsed upon a writ, both will be construed together.[6] If it is necessary that other papers or indorsements be served on defendant with the summons, the return should show that it has been done.[7] Since the sheriff can act only within his county, a return showing service by him outside his county is bad as proof,[8] but he need not name in his return the county of which he is sheriff,[9] nor need he designate himself as sheriff, since the court is presumed to know its own officers.[10] A return that defendant waived service is illegal, since the sheriff has no power to certify a waiver.[11] The return need show nothing which already

Louisiana.— Collins *v.* Walling, 6 La. Ann. 702.

Michigan.— Fleugel *v.* Lards, 108 Mich. 632, 66 N. W. 585; Elliott *v.* Preston, 44 Mich. 189, 6 N. W. 238.

Mississippi.— Bacon *v.* Bevan, 44 Miss. 293.

Missouri.— Jones *v.* Relfe, 3 Mo. 388; Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

Nebraska.— Wells *v.* Turner, 14 Nebr. 445, 16 N. W. 484.

Washington.— Northwestern, etc., Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

Wisconsin.— Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

See 40 Cent. Dig. tit. "Process," § 164.

Illustrations.— A return that a writ was served by reading it in presence and hearing of defendant is tantamount to stating that it was read to him. McPherson *v.* State Bank, 4 Ark. 558. The sheriff's return that he served a "copy" of the summons is equivalent to a return that he served a copy certified by the clerk. Brown *v.* Lawson, 51 Cal. 615. A statement that a copy of the writ was left with defendant is equivalent to a statement that it was served by delivering a copy to him. Buck *v.* Buck, 60 Ill. 105. To serve defendant with a true copy is "to deliver to him a true copy." Hedges *v.* Mace, 72 Ill. 472. A return, "Served by reading," implies "to the defendant." Chandler *v.* Miller, 11 Ind. 382; Holsinger *v.* Dunham, 11 Ind. 346. As the statute requires the officer to state whether a copy of the petition was demanded, a return, "No copy demanded," will be presumed to refer to a copy of the petition, and not to a copy concerning which no duty is laid on the officer. Cobb *v.* Newcomb, 7 Iowa 43. The date attached to an officer's return is not to be taken as evidence that the notice was given on the day of the date, where that would be inconsistent with the return itself. Thayer *v.* Stearns, 1 Pick. (Mass.) 109. "Not to be found in my county" implies that defendant is a resident of such county. Carlisle *v.* Cowan, 85 Tenn. 165, 2 S. W. 26. A return of a citation, "Executed . . . by a certified of this writ and copy of petition," by a fair construction would mean that a copy was served on defendant, notwithstanding the omission, and the return was sufficient. Bartlett *v.* Winkler, 15 Tex. 515. Under a statute providing that "a copy of the complaint must be served with the summons unless two or more defendants reside in the same county, in which case a copy of the complaint need only be served on one of such defendants," where several defendants reside in the same county, and a copy of the complaint is served on one of them with the summons, a return of service need not show that defendants all reside in the county. Mantle *v.* Casey, 31 Mont. 408, 78 Pac. 591. Where an affidavit states that the summons was served by leaving a copy "at the last and usual place of abode of said defendant in said Clark county," the obvious meaning is that the service was made at the last and usual abode of defendant, and that such place of abode was then in Clark county. Healey *v.* Butler, 66 Wis. 9, 27 N. W. 822.

Referring to annexed summons.— It is not necessary that an affidavit of service of process, although referring to an "annexed summons," should in fact be annexed to the summons, but it is sufficient if the court can find as a fact, from the contents of the affidavit, or from the proceedings for the appointment of a guardian *ad litem* or otherwise, that the summons was in fact served. Steinhardt *v.* Baker, 20 Misc. (N. Y.) 470, 46 N. Y. Suppl. 707 [*affirmed* in 25 N. Y. App. Div. 197, 49 N. Y. Suppl. 357].

Strict construction.— The return of a sheriff or other officer, showing or attempting to show constructive service of a summons, is to be strictly construed, and everything may be inferred against the return which its departure from the description of the statute will warrant. Holtschneider *v.* Chicago, etc., R. Co., 107 Mo. App. 381, 81 S. W. 489.

5. Litchfield *v.* Burwell, 5 How. Pr. (N. Y.) 341.

6. Pillow *v.* Sentelle, 39 Ark. 61.

7. Melvin *v.* Clark, 45 Ala. 285; Farris *v.* Powell, 10 Iowa 553; Benedict *v.* Warriner, 14 How. Pr. (N. Y.) 568; Brotton *v.* Allston, 2 Ohio Dec. (Reprint) 393, 2 West. L. Month. 588.

A true copy means a copy with all indorsements upon it. Goodrich *v.* Hamer, 8 Ohio Dec. (Reprint) 441, 8 Cinc. L. Bul. 11.

8. Farmers' L. & T. Co. *v.* Dickson, 17 How. Pr. (N. Y.) 477.

9. Thomas *v.* Colorado Nat. Bank, 11 Colo. 511, 19 Pac. 501; Whiting *v.* Hagerty, 5 La. Ann. 686; Kendrick *v.* Kendrick, 19 La. 36; Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042.

10. Thompson *v.* Haskell, 21 Ill. 215, 74 Am. Dec. 98.

11. Shannon *v.* Goffe, 15 La. Ann. 86.

appears elsewhere of record.[12] Redundancy will not vitiate the return,[13] nor is the return any evidence of non-essential matters stated therein.[14]

2. In Whose Name Return Should Be Made. The return should be made and signed by the officer who in fact served or attempted to serve it.[15] But a deputy sheriff, not being known to the court, and being deemed to act not for himself but for the sheriff, should sign a return in the name of the sheriff by himself as deputy, or should designate the sheriff for whom he purported to act,[16] although under some statutes the deputy may make the return in his own name.[17]

3. Time and Place of Service. The return should show with reasonable certainty the time of service.[18] When a single date appears in the return, without

12. Mills *v.* Howard, 12 Tex. 9.

13. Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880. A sheriff's return of a summons, "executed by serving a copy on the within named defendant, except as stated below," and dated and signed by the sheriff, where nothing is stated below, is sufficient proof of service to support a judgment by default. Colley *v.* Spivey, 127 Ala. 109, 28 So. 574.

14. Sheldon *v.* Comstock, 3 R. I. 84.

15. Sheppard *v.* Hill, 5 Ark. 308; McKnight *v.* Connell, 14 La. Ann. 396; Bennett *v.* Vinyard, 34 Mo. 216; Thomas *v.* Goodman, 25 Tex. Suppl. 446.

It is competent for a sheriff and his deputies to agree upon a particular mode of making returns to writs which would bind the parties to the contracts, but not third persons. Naylor *v.* Simmes, 4 Gill & J. (Md.) 273.

If a deputy dies after executing a writ, but without making a return, the sheriff may certify the doings of the deputy on the writ, and return it to the clerk's office. Ingersoll *v.* Sawyer, 2 Pick. (Mass.) 276. Where a deputy sheriff died before making return of a summons served by him, and affidavits were made showing statements made by him during his sickness as to the time and place, and defendants and others corroborated the statements so made, a motion to substitute proof of service was properly granted, and the sheriff instructed to make proof of service, under his certificate, according to the affidavits. Barber *v.* Goodell, 56 How. Pr. (N. Y.) 364.

16. *Alabama.*— Briggs *v.* Greenlee, Minor 123; Land *v.* Patteson, Minor 14.

California.— Reinhart *v.* Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52; Joyce *v.* Joyce, 5 Cal. 449.

Illinois.— Ditch *v.* Edwards, 2 Ill. 127, 26 Am. Dec. 414.

Iowa.— Gray *v.* Wolf, 77 Iowa 630, 42 N. W. 504.

Mississippi.— Kelly *v.* Harrison, 69 Miss. 856, 12 So. 261.

Missouri.— Harriman *v.* State, 1 Mo. 504.

Pennsylvania.— Bennethum *v.* Bowers, 133 Pa. St. 332, 19 Atl. 361; Bolard *v.* Mason, 66 Pa. St. 138.

Texas.— Arnold *v.* Scott, 39 Tex. 378.

Wisconsin.— U. S. *v.* Lockwood, 1 Pinn. 386.

See 40 Cent. Dig. tit. "Process," § 165.

The full name of the deputy need not be signed. Thus, "W. Y. Robinson, Sheriff of S. J. County, Texas, by C., deputy," is sufficient. Hays *v.* Byrd, 14 Tex. Civ. App. 24, 36 S. W. 777.

When served by special deputy.— If a summons is served by a regular deputy of a sheriff, the return must be in the name of the latter; but where it is served by a special deputy by appointment indorsed thereon, the statute does not require the return, which is to be made under oath, to be in the name of the sheriff. Glencoe *v.* People, 78 Ill. 382. But see Bolard *v.* Mason, 66 Pa. St. 138.

Where sheriff's name to be written.— It is immaterial that the name of the sheriff is written in the return of service of summons below, instead of above, that of the deputy by whom the summons was served. Zepp *v.* Hager, 70 Ill. 223.

A return of service, made and signed by a sheriff, when actually made by his deputy, is irregular, but not invalid. Orchard *v.* Peake, 69 Kan. 510, 77 Pac. 281.

17. Bean *v.* Haffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138, 8 Ky. L. Rep. 739; Stoll *v.* Padley, 98 Mich. 13, 56 N. W. 1042; Calender *v.* Olcott, 1 Mich. 344; Towns *v.* Harris, 13 Tex. 507; Miller *v.* Alexander, 13 Tex. 497. A return of process signed by a deputy sheriff without reference to the sheriff is sufficient to uphold a default, where the court finds that it was duly served, for if the sheriff was dead the deputy had authority under the statute to serve the summons, but if he was not dead the person on whom process was served should have shown that fact. Timmerman *v.* Phelps, 27 Ill. 496.

18. *Arkansas.*— Thompson *v.* State Bank, 5 Ark. 245; Gilbreath *v.* Kuykendall, 1 Ark. 50.

Connecticut.— Select *v.* Olmstead, 1 Root 497.

Illinois.— Dick *v.* Moore, 85 Ill. 66; Harding *v.* Larkin, 41 Ill. 413; Bletch *v.* Johnson, 35 Ill. 542; Chickering *v.* Failes, 26 Ill. 507; Ball *v.* Shattuck, 16 Ill. 299; Garrett *v.* Phelps, 2 Ill. 331; Clemson *v.* Hamm, 2 Ill. 176; Wilson *v.* Greathouse, 2 Ill. 174.

Iowa.— Hakes *v.* Shupe, 27 Iowa 465; Wilson *v.* King, Morr. 106.

Louisiana.— O'Hara *v.* Independence Lumber, etc., Co., 42 La. Ann. 226, 7 So. 533.

any designation to the contrary, it will be held to refer to the time of service and not to the time of return.[19] It is sometimes said that both time and place should be shown in the return,[20] but many cases hold that the place need not be shown.[21] The venue given at the head of the return will be taken as indicative of the place of service when no other place is mentioned in the return.[22] If, however, a place is named outside the county in which the sheriff is authorized to serve process, it will render the return bad.[23]

4. Name of Defendant Served. The return should give the name of the party served or should designate him with such reasonable certainty as to leave no substantial doubt as to his identity.[24] Particular care should be exercised in the case

Mississippi.— Calhoun *v.* Matlock, 3 How. 70.

New Jersey.— Stediford *v.* Ferris, 4 N. J. L. 108; Morford *v.* Perine, 3 N. J. L. 474.

Texas.— Sloan *v.* Batte, 46 Tex. 215; Clark *v.* Wilcox, 31 Tex. 322; Whitaker *v.* Fitch, 25 Tex. Suppl. 308; Llano Imp. Co. *v.* Watkins, 4 Tex. Civ. App. 428, 23 S. W. 612.

Wisconsin.— Wendel *v.* Durbin, 26 Wis. 390.

See 40 Cent. Dig. tit. "Process," § 166.

In England it is required by Order IX, Rule 15, that the day of the month and week on which service is made shall be indorsed upon the writ within three days after service. This order is substantially a re-enactment of section 15 of the Common Law Procedure Act of 1852, 15 & 16 Vict. c. 76. Dymond *v.* Croft, 3 Ch. D. 512, 45 L. J. Ch. 604, 34 L. T. Rep. N. S. 786, 24 Wkly. Rep. 824; Sproat *v.* Peckett, 48 L. T. Rep. N. S. 755; *Re* Livesey, 47 L. T. Rep. N. S. 328, 31 Wkly. Rep. 87.

19. Marlow *v.* Kuhlenbeck, 2 Colo. 602; Harmon *v.* Campbell, 30 Ill. 25; Cariker *v.* Anderson, 27 Ill. 358; Orendorff *v.* Stanberry, 20 Ill. 89. *Contra*, Bancroft *v.* Speer, 24 Ill. 227.

20. Gilbreath *v.* Kuykendall, 1 Ark. 50; Clemson *v.* Hamm, 2 Ill. 176; Wilson *v.* Greathouse, 2 Ill. 174; Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829, required by statute, the court holding further that where the return shows service on defendant "at her residence," it will be presumed that it was within the county.

Where process is served by a private individual under W. Va. Code (1899), c. 124, § 2 [Code (1906), § 3798], his return in addition to showing the manner and time must also show the place of service. Lynch *v.* West, 63 W. Va. 571, 60 S. E. 606.

21. Henry *v.* Ward, 4 Ark. 150; Williams *v.* Sill, 12 Iowa 511; Hays *v.* Byrd, 14 Tex. Civ. App. 24, 36 S. W. 777; Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.

State.— Where the return shows service of summons in a certain county, it is sufficient, although it does not state that such service was made in the state. The court will take judicial notice that the county is in the state. Zwickey *v.* Haney, 63 Wis. 464, 23 N. W. 577.

The presumption is that the officer served the writ within the county where he had a right to serve it. Mahan *v.* McManus, (Tex. Civ. App. 1907) 102 S. W. 789.

22. Davis *v.* Richmond, 35 Vt. 419.

23. Northwood *v.* Barrington, 9 N. H. 369.

24. *Arkansas.*— Rose *v.* Ford, 2 Ark. 26; Gilbreath *v.* Kuykendall, 1 Ark. 50.

Illinois.— Richardson *v.* Thompson, 41 Ill. 202; Underhill *v.* Kirkpatrick, 26 Ill. 84; Pardon *v.* Dwire. 23 Ill. 572; Wanamaker *v.* Poorbaugh, 91 Ill. App. 560.

Indiana.— Brooks *v.* Allen, 62 Ind. 401; Johnson *v.* Patterson, 59 Ind. 237.

Iowa.— Boker *v.* Chapline, 12 Iowa 204; Longacre *v.* Simpson, Morr. 495.

Kentucky.— Grider *v.* Payne, 9 Dana 188.

Mississippi.—Woodliffe *v.* Connor, 45 Miss. 552.

Missouri.— Spencer *v.* Medder, 5 Mo. 458.

Nebraska.— Johnson *v.* Jones, 2 Nebr. 126.

Nevada.— Allen *v.* Mayberry, 14 Nev. 115.

Texas.— Underhill *v.* Lockett, 20 Tex. 130; Hough *v.* Coates, (Civ. App. 1894) 25 S. W. 995.

See 40 Cent. Dig. tit. "Process," § 167.

Returns held sufficient.—Return that sheriff served the summons upon "James Mayberry" and "delivered to the said Jame May a certified copy of the complaint." Allen *v.* Mayberry, 14 Nev. 115. Summons issued against Harrison Johnson; return — Duly served "on the within named H. Johnson." Johnson *v.* Jones, 2 Nebr. 126. Summons against "A. B. Sr.," return of service "on the within named A. B. Jr." Dawson *v.* State Bank, 3 Ark. 505. Writ against "Alfred Snelgrove," return of service upon "Snelgrove." Snelgrove *v.* Mobile Branch Bank, 5 Ala. 295. Writ against "A. B. junior," return of service upon "A. B." Sanders *v.* Dowell, 7 Sm. & M. (Miss.) 206. Writ against "Luther Burt," return of service upon "L. Burt." Davis *v.* Burt, 7 Iowa 56. Summons against "Schlacks," return of service upon "Schlack." Schlacks *v.* Johnson, 13 Colo. App. 130, 56 Pac. 673. Citation for "J. A. Townsend," return of service upon "J. A. Townsen." Townsend *v.* Ratcliff, 50 Tex. 148. Citation against "E. T. Stevens," return of personal service upon "E. T. Stephen." Dunn *v.* Hughes, (Tex. Civ. App. 1896) 36 S. W. 1084. Service upon a corporation through its agent "H. L. Bode," in the absence of a showing that H. L. Bode was not in fact the full name of the agent served. German Ins. Co. *v.* Frederick, 57 Nebr. 538, 77 N. W. 1106. Summons to J. C., return of service upon "C, one of the defendants herein." Gate City Abstract Co. *v.* Post, 55

of service upon joint defendants, for the return should show clearly upon which ones service was made and when and how it was made upon each.[25] It the return

Nebr. 742, 76 N. W. 471. Summons against "A. J. Veasey," return of service upon "Jack Veasey." Veasey *v.* Brigman, 93 Ala. 548, 9 So. 728, 13 L. R. A. 541. An insertion in the return of a superfluous initial letter will not invalidate it (Phillips *v.* Evans, 64 Mo. 17); nor will the addition of a superfluous terminal letter to the party's surname, where the return also recites that defendant was duly served (Alexander *v.* McDow, 108 Cal. 25, 41 Pac. 24); nor the omission of mere words of description (Schmidt *v.* Stolowski, 126 Wis. 55, 105 N. W. 44); nor will the use of a wrong christian name in the return invalidate the judgment (Sandwich Mfg. Co. *v.* Earl, 56 Minn. 390, 57 N. W. 938).

Returns held insufficient.— Citation against "Atanacio Vidauri," return of service upon "Rafael Vidauri." Vidauri *v.* State, 22 Tex. App. 676, 3 S. W. 347. Process against "Jacob Kraig," return of service upon "Jacob Krug." McClaskey *v.* Barr, 45 Fed. 151. William T. C. was the party sought to be served, affidavit of service upon W. F. C. Houghton *v.* Tibbets, 126 Cal. 57, 58 Pac. 318. Summons against Samuel B. Bancroft, return of service upon "S. B. Bancroft." Bancroft *v.* Speer, 24 Ill. 227. Summons against "Sylvanus H. Butterfield," return of service on "S. H. Butterfield." Butterfield *v.* Johnson, 46 Ill. 68. Citation to "Mrs. Parmelia Brown," return of service upon "Mrs. Brown." Brown *v.* Robertson, 28 Tex. 555. Citation issued to "J. W. H.," return of service upon "J. N. H." Hendon *v.* Pugh, 46 Tex. 211. Citation directed to J. W. Booth, return "Executed . . . by delivering a true copy of the within process to the within named defendant, W. Booth." Booth *v.* Holmes, 2 Tex. Unrep. Cas. 232.

25. Colerick *v.* Hooper, 3 Ind. 316, 56 Am. Dec. 505; Call *v.* Hagger, 8 Mass. 423; Stults *v.* Outcalt, 6 N. J. L. 130; Willis *v.* Bryan, 33 Tex. 429; Thompson *v.* Griffis, 19 Tex. 115; Swilley *v.* Reliance Lumber Co., (Tex. Civ. App. 1898) 46 S. W. 387; Rush *v.* Davenport, (Tex. Civ. App. 1896) 34 S. W. 380; Randolph *v.* Schwingle, (Tex. Civ. App. 1894) 27 S. W. 955; Chowning *v.* Chowning, 3 Tex. App. Civ. Cas. § 150; McDowell *v.* Nicholson, 2 Tex. App. Civ. Cas. § 268; Stephenson *v.* Kellogg, 1 Tex. App. Civ. Cas. § 542.

Sufficiency of return.— Process directed to all the defendants by name, and returned by the sheriff "Executed on the parties, this October 1st, 1870, with copy," shows a sufficient service. Florence *v.* Paschal, 50 Ala. 28. Where a writ against several defendants is returned "Executed," the court will intend that it was executed on all the defendants. Cantley *v.* Moody, 7 Port. (Ala.) 443. Where a sheriff's return recites the service of the writ upon "the within-named" persons, naming three defendants, and charges fees for service of three copies, it sufficiently appears that each of the defendants was served with a copy of the writ. Martin *v.* Hargardine, 46 Ill. 322. Returns on a summons against several defendants as follows: "Served the within named, by leaving a true copy of the same with the within named," giving the names of the several defendants, are sufficient to show that a copy was served on each defendant. Greenman *v.* Harvey, 53 Ill. 386. See also Turner *v.* Jenkins, 79 Ill. 228. A return to a summons addressed to two defendants, that the defendants, naming them conjunctively, could not be found, will be construed as meaning that neither of the defendants could be found, and not that both of them could not be found. Blinn *v.* Chessman, 49 Minn. 140, 51 N. W. 666, 32 Am. St. Rep. 536. Where process was returned "Executed on all in my bailiwick but Richard Stratton," it was held insufficient, it not appearing how many resided in the bailiwick. Hackwith *v.* Damron, 1 T. B. Mon. (Ky.) 235. A sheriff's return of service of summons on two defendants certified that "I served the within summons on Charles Blanchard . . . by then and there delivering him a true copy of the original summons; and I further certify that I served the within summons on Mrs. Louise D. Bernard . . . on the twenty-seventh day of March, 1891, by then and there delivering to Charles Blanchard a true and certified copy of said original," and was held to sufficiently show that both services took place at the same time, and not to be defective for failure to show when service on C was made. Senescal *v.* Bolton, 7 N. M. 351, 34 Pac. 446. A return of a citation to several defendants showing that it was executed "by delivering to the within-named defendants, in person, a true copy of this writ," is fatally defective, since it fails to show a delivery to "each" of defendants of a copy of the writ. Chamblee *v.* Hufsmith, (Tex. Civ. App. 1898) 44 S. W. 616. Where the statute requires the delivery of a copy of a citation to each of the defendants, a return which fails to show a delivery to each is defective. Schramm *v.* Gentry, 64 Tex. 143; Vaughan *v.* State, 29 Tex. 273. Where the return on a citation fails to show that a copy was served on each defendant, but shows a joint service only, it is defective. Rutherford *v.* Davenport, (Tex. App. 1891) 16 S. W. 110; Fulton *v.* State, 14 Tex. App. 32. A sheriff's return of service on an application for mandamus, which recites that he served it on "the within named defendants, William Bishop, Sr., and W. A. Andrews . . . by delivering a true copy thereof, with a copy of the affidavit . . . to the above named, the said defendants, personally," is not void for uncertainty, as indicating but a single service on one defendant, and a motion to dismiss the proceedings is properly overruled. State Sav. Bank *v.* Davis, 22 Wash. 406, 61 Pac. 43. A return that summons was served upon James D. Myers on May 1, 1893, and upon

shows service on one but is silent as to the other, it will be presumed that no service was had as to that other.[26]

5. Manner of Service. The return should show clearly and fully the manner in which service was made, so that it may appear of record whether the statutory requirements as to manner of service have been substantially complied with.[27]

James Myers on May 2, 1893, by delivering to and leaving with them a certified copy thereof fairly imports that a copy was delivered to each. Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

26. Granberry *v.* Wellborn, 4 Ala. 118.

27. *Arkansas.*— Gatton *v.* Walker, 9 Ark. 199; Rose *v.* Ford, 2 Ark. 26; Gilbreath *v.* Kuykendall, 1 Ark. 50.

Florida.— Standley *v.* Arnow, 13 Fla. 361.

Illinois.— Botsford *v.* O'Conner, 57 Ill. 72; Vanmeter *v.* Durham, 31 Ill. 237; Ball *v.* Shattuck, 16 Ill. 299; Ogle *v.* Coffey, 2 Ill. 239.

Iowa.— Grosvenor *v.* Henry, 27 Iowa 269; Farris *v.* Powell, 10 Iowa 553; Park *v.* Long, 7 Iowa 434; Hodges *v.* Hodges, 6 Iowa 78, 71 Am. Dec. 388; Neally *v.* Redman, 5 Iowa 387.

Maine.— Blanchard *v.* Day, 31 Me. 494.

Massachusetts.— Graves *v.* Cushman, 131 Mass. 359.

Mississippi.— French *v.* State, 53 Miss. 651; Hargus *v.* Bowen, 46 Miss. 72; Moore *v.* Coats, 43 Miss. 225; Rankin *v.* Dulaney, 43 Miss. 197; York *v.* Crawford, 42 Miss. 508; Wolley *v.* Bowie, 41 Miss. 553; Robertson *v.* Johnson, 40 Miss. 500; Merritt *v.* White, 37 Miss. 438.

Missouri.— Charless *v.* Marney, 1 Mo. 537; Knoll *v.* Woelken, 13 Mo. App. 275.

Nebraska.—Forbes *v.* Bringe, 32 Nebr. 757, 49 N. W. 720; Betts *v.* Boyd, 31 Nebr. 815, 48 N. W. 889; Brown *v.* Brown, 10 Nebr. 349, 6 N. W. 397.

New Hampshire.— Pendexter *v.* Cole, 66 N. H. 270, 20 Atl. 331.

New Jersey.— Crisman *v.* Swisher, 28 N. J. L. 149; Moore *v.* Miller, 16 N. J. L. 233; Ross *v.* Ward, 16 N. J. L. 23; Stedifford *v.* Ferris, 4 N. J. L. 108; Morford *v.* Perine, 3 N. J. L. 474; Shin *v.* Earnest, 2 N. J. L. 155; Baylon *v.* Hooper, 2 N. J. L. 95; Hedden *v.* Van Ness, 2 N. J. L. 84; Layton *v.* Cooper, 2 N. J. L. 62.

New York.— Hughes *v.* Mulvey, 1 Sandf. 92.

Pennsylvania.— Filson *v.* Hayes, 18 Pa. St. 354; Roushey *v.* Feist, 10 Kulp 79; Philadelphia *v.* Cathcart, 10 Phila. 103; Lenore *v.* Ingram, 1 Phila. 519; Buchanan *v.* Specht, 1 Phila. 252; Beyerly *v.* Hunger, 1 Woodw. 354; Leis *v.* Yost, 1 Woodw. 15.

Rhode Island.— Sheldon *v.* Comstock, 3 R. I. 84.

South Carolina.— Prince *v.* Dickson, 39 S. C. 477, 18 S. E. 33.

Texas.— Lauderdale *v.* R. & T. A. Ennis Stationery Co., 80 Tex. 496, 16 S. W. 308; Graves *v.* Drane, 66 Tex. 658, 1 S. W. 905; Sanders *v.* City Nat. Bank, (1889) 12 S. W. 110; Holliday *v.* Steele, 65 Tex. 388; Continental Ins. Co. *v.* Milliken, 64 Tex. 412; Johnson *v.* Barthold, 43 Tex. 556; King *v.* Goodson, 42 Tex. 152; Hill *v.* Grant, 33 Tex. 132; Chandler *v.* Scherer, 32 Tex. 573; Clark *v.* Wilcox, 31 Tex. 322; Ryan *v.* Martin, 29 Tex. 412; Fitzhugh *v.* Hall, 28 Tex. 558; Thomason *v.* Bishop, 24 Tex. 302; Graves *v.* Robertson, 22 Tex. 130; Hart *v.* Clifton, 19 Tex. 56; Stevens *v.* Price, 16 Tex. 572; Middleton *v.* State, 11 Tex. 255; Brooks *v.* Powell, (Civ. App. 1895) 29 S. W. 809; Randolph *v.* Schwingle, (Civ. App. 1894) 27 S. W. 955; Taylor *v.* Pridgen, 3 Tex. App. Civ. Cas. § 89; Graves *v.* Le Geirse, 1 Tex. App. Civ. Cas. § 812; Kleaden *v.* Reynolds, 1 Tex. App. Civ. Cas. § 773; Bean *v.* McQuiddy, 1 Tex. App. Civ. Cas. § 51.

See 40 Cent. Dig. tit. "Process," § 169.

Illustrations.— The following return of service, by a sheriff, upon a writ, was held sufficient: "I executed the within by reading to the within named Augustin Gatton, at his residence, in White county, on the 17th day of March, 1847. C. D., Sh'ff." Gatton *v.* Walker, 9 Ark. 199. An entry by the sheriff that he had served defendants, naming them, "each with a copy of this within writ and process," does not sufficiently show that the service was personal, within the meaning of Ga. Code, § 3457. Crapp *v.* Dodd, 92 Ga. 405, 17 S. E. 666. A return on a summons, "Served by reading and delivering a true copy to Wm. R. Morrison, a director of the defendant," is not insufficient as failing to show what was served and what was delivered. Cairo, etc., R. Co. *v.* Holbrook, 92 Ill. 297. A return to a summons which recites, "Executed this writ, by reading it to the within named James Funk, May 8th, 1861," is sufficient. Funk *v.* Hough, 29 Ill. 145. A sheriff's return that on, etc., he served, a summons on, etc., "who attempted to avoid service by concealing himself, and running from me at the time I read this process to him at the place I last saw him," is legally sufficient. Orendorff *v.* Stanberry, 20 Ill. 89. A sheriff's return in this form, "I. R. Simms, summoned by reading," and signed by the sheriff, and dated, is sufficient. Simms *v.* Klein, 1 Ill. 371. Under Ky. Civ. Code Pr. § 49, a return by a special bailiff that he served a summons "by delivering to him a copy of the within summons," with the date of service, is sufficient. Barbour *v.* Newkirk, 83 Ky. 529. A return by a sheriff indorsed on a summons, as follows: "Executed on the within-named J. J. Milam (the person named in the summons), this Oct. 12, 1870, by personal service, copy waived," signed by the sheriff, is sufficient within Miss. Rev. Code, p. 489, art. 63, requiring the sheriff to return process "with a written statement of his proceedings thereon." Milam *v.* Strickland, 45 Miss. 721. A return upon a summons, "Executed personally, with original and copy, defendant claiming such," is in conformity with the requirements of the statute.

When a copy of the complaint is required to be left with defendant, the return must show that it was done.[28] When the statute provides for substituted service by leaving a copy of the writ at the residence or last place of residence of defendant, or other place, or with certain designated persons, as the case may be, a return purporting to show such service must show that everything required by the statute was strictly performed in exactly the manner required by the statute.[29] In some

Presley *v.* Anderson, 42 Miss. 274. A return of service of summons showing service on minors by delivering to each of them a true and correct copy thereof was insufficient under Hill Annot. Laws Oreg. § 55, subd. 3, requiring summons to be served by delivering a copy thereof to minors personally, since such return did not show personal delivery; hence the court acquired no jurisdiction of the persons of such minors by such service. Harris *v.* Sargeant, 37 Oreg. 41, 60 Pac. 608. Under an act providing that summons may be served by producing the original summons to defendant and informing him of the contents, or by leaving a copy at his dwelling-house, in the presence of one or more of his family, a return of the copy, "Served personally on defendant." did not comply with the act. Lenore *v.* Ingram, 1 Phila. (Pa.) 519. A return, "Executed by serving the defendant with a true copy," is bad, under the statute, as not showing the manner of service, and not showing that it was delivered to him in person. Graves *v.* Robertson, 22 Tex. 130. Under a rule of court requiring a summons to be served on a defendant by "giving him notice of its contents," a return of service of a writ by "making known the contents" to defendant is sufficient. Trimble *v.* Erie Electric Motor Co., 89 Fed. 51.

Reasons for the rule.— "There are sound reasons why the mode of executing a writ of summons should be distinctly stated. In default of an appearance, the court may be called upon by the plaintiff to allow a judgment against the defendant: and before thus visiting a party with the penalty of a default, common and equal justice may demand that it should be unequivocally exhibited to the court by the record that the writ was served on a proper day and in a legal manner; while strict attention to the form of the return will do much to prevent remissness or negligence on the part of the officer charged with the important duty of executing the writ." Weaver *v.* Springer, 2 Miles (Pa.) 42, 44.

28. *Alabama.*— Melvin *v.* Clark, 45 Ala. 285.

California.— Linott *v.* Rowland, 119 Cal. 452, 51 Pac. 687.

Iowa.— Farris *v.* Powell, 10 Iowa 553.

New York.— Benedict *v.* Warriner, 14 How. Pr. 568.

Ohio.— Brotton *v.* Allston, 2 Ohio Dec. (Reprint) 393, 2 West. L. Month. 588.

Texas.—Sanders *v.* City Nat. Bank, (1889) 12 S. W. 110. The return of a sheriff that he executed process "by delivering to the within named A. B., in person, a certified copy of this writ, and a copy of petition," without stating what petition, is not sufficient. Tullis *v.* Scott, 38 Tex. 537. A sheriff's return upon a citation, "Executed thirty-first March, 1859, by delivering to the defendant a true copy of this writ, together with the accompanying certified copy of petition," is sufficient. Hill *v.* Grant, 33 Tex. 132.

See 40 Cent. Dig. tit. "Process," § 169.

Co-defendants.— If service of a copy of the complaint upon only one of several defendants is sufficient provided all reside in the county, the return need not show that all the defendants do reside in the county, for if served therein they will be presumed to be residents. Pellier *v.* Gillespie, 67 Cal. 582, 8 Pac. 185; Calderwood *v.* Brooks, 28 Cal. 151.

29. *Arkansas.*— Barnett *v.* State, 35 Ark. 501; Bruce *v.* Arrington, 22 Ark. 362; Parks *v.* Weems, 9 Ark. 439; Vaughn *v.* Brown, 9 Ark. 20, 47 Am. Dec. 730; Patrick *v.* Johnson, 6 Ark. 380; Boyer *v.* Robinson, 6 Ark. 552; Ringgold *v.* Randolph, 4 Ark. 428; Johnson *v.* State Bank, 3 Ark. 522; Dawson *v.* State Bank, 3 Ark. 505.

Georgia.— Jones *v.* Tarver, 19 Ga. 279.

Illinois.— Bletch *v.* Johnson, 35 Ill. 542; Townsend *v.* Griggs, 3 Ill. 365; Hessler *v.* Wright, 8 Ill. App. 229.

Indiana.— Pigg *v.* Pigg, 43 Ind. 117; Bryant *v.* State, 5 Ind. 245.

Iowa.— Farris *v.* Ingraham, 34 Iowa 231; Harris *v.* Wells, 10 Iowa 587; Tavenor *v.* Reed, 10 Iowa 416; Davis *v.* Burt, 7 Iowa 56; Harmon *v.* Lee, 6 Iowa 171; Neally *v.* Redman, 5 Iowa 387; Converse *v.* Warren, 4 Iowa 158; Pilkey *v.* Gleason, 1 Iowa 85.

Kansas.— Sexton *v.* Rock Island Lumber, etc., Co., 49 Kan. 153, 30 Pac. 164; Nipp *v.* Bower, 9 Kan. App. 854, 61 Pac. 448.

Louisiana.— Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504; Adams *v.* Basile, 35 La. Ann. 101; Arnault *v.* St. Julien, 21 La. Ann. 630; Cole *v.* Hocha, 21 La. Ann. 613; McCracken *v.* Simms, 19 La. Ann. 33; Feazel *v.* Cooper, 15 La. Ann. 462; Flynn *v.* Rhodes, 12 La. Ann. 239; Lancaster *v.* Carriel, 5 La. Ann. 147; Thibodaux *v.* Wright, 3 La. Ann. 130; Griffing *v.* Caldwell, 1 Rob. 15; Sparks *v.* Weatherby, 16 La. 594; Pilié *v.* Kenner, 16 La. 570; Ballard *v.* Lee, 14 La. 211; Ireland *v.* Bryan, 3 Mart. N. S. 515; Baldwin *v.* Martin, 1 Mart. N. S. 519.

Maine.— Abbott *v.* Abbott, 101 Me. 343, 64 Atl. 615; Sanborn *v.* Stickney, 69 Me. 343.

Massachusetts.— Graves *v.* Cushman, 131 Mass. 359.

Minnesota.— Goener *v.* Woll, 26 Minn. 154, 2 N. W. 163.

Mississippi.— Robison *v.* Miller, 57 Miss. 237; Hendricks *v.* Pugh, 57 Miss. 157; Bustamente *v.* Bescher, 43 Miss. 172; Glenn *v.* Wragg, 41 Miss. 654; Ford *v.* Coleman, 41 Miss. 651; Fatheree *v.* Long, 5 How. 661.

jurisdictions, when service is made pursuant to statute by leaving the writ with a member of defendant's family, the name of such member must be stated in the

Missouri.— Laney *v.* Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391; Allen *v.* Singer Mfg. Co., 72 Mo. 326; Brown *v.* Langlois, 70 Mo. 226; Phillips *v.* Evans, 64 Mo. 17; Hewitt *v.* Weatherby, 57 Mo. 276; Smith *v.* Rollins, 25 Mo. 408; Blanton *v.* Jamison, 3 Mo. 52.

New Hampshire.— Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

New Jersey.— Derrickson *v.* White, 32 N. J. L. 137; Polhemus *v.* Perkins, 15 N. J. L. 435; Ballinger *v.* Sherron, 14 N. J. L. 144; Despreaux *v.* Barber, 3 N. J. L. 1041.

New York.— Proctor *v.* Witcher, 15 N. Y. App. Div. 227, 44 N. Y. Suppl. 190; People *v.* Matthews, 43 Barb. 168 [*affirmed* in 38 N. Y. 451]; Anonymous, 25 Wend. 677.

Ohio.— Gamble *v.* Warner, 16 Ohio 371.

Pennsylvania.— O'Brien *v.* Bartlett, 12 Pa. Dist. 746; Weaver *v.* Springer, 2 Miles 42; Hoffa *v.* Weidenhamer, 22 Pa. Co. Ct. 528; Miller *v.* Swayne, 2 Leg. Rec. 236; Stout *v.* Wertsner, 15 Montg. Co. Rep. 48; Bar *v.* Purcil, 2 Phila. 259; Johnson *v.* Aylesworth, 3 Pittsb. 237; Hiester *v.* Muhlenberg, 2 Woodw. 1; Sheaffer *v.* Dillsburg Kaolin Co., 18 York Leg. Rec. 7.

Texas.— Roberts *v.* Stockslager, 4 Tex. 307.

Virginia.— Wynn *v.* Wyatt, 11 Leigh 584.

Washington.— Mitchell, etc., Co. *v.* O'Neil, 16 Wash. 108, 47 Pac. 235.

West Virginia.— Midkiff *v.* Lusher, 27 W. Va. 439; Capehart *v.* Cunningham, 12 W. Va. 750; Lewis *v.* Botkin, 4 W. Va. 533; Vandiver *v.* Roberts, 4 W. Va. 493.

Wisconsin.— McConkey *v.* McCraney, 71 Wis. 576, 37 N. W. 822; Pollard *v.* Wegener, 13 Wis. 569; Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

See 40 Cent. Dig. tit. "Process," § 170.

Description of person with whom process was left.— Where the statute requires that service of a writ may be made by leaving a copy with a white member of defendant's family, a return by the officer that he left a copy with "A. B., a member of" defendant's family, is not sufficient to give jurisdiction over the person of defendant. *Ex p.* Cross, 7 Ark. 44. A return that a copy was left at his place of residence with "a" person over fifteen years of age is insufficient in not stating the person to be a member of his family. Dawson *v.* State Bank, 3 Ark. 505. A return of an original notice, "Served by leaving a copy of this notice with Mrs. Ann Thompson, the mother of J. W. Thompson, at his usual place of abode . . . said J. W. Thompson not being found in my county," was held deficient in not showing that Ann Thompson was a member of the family of J. W. Thompson, or of the family where he had his residence. Lyon *v.* Thompson, 12 Iowa 183. A return of process, "Served by certified copy left with Joseph Kerr's [defendant's] wife, at his usual residence," was insufficient, as not showing that the person with whom it was left was more than fourteen years old. Davis *v.* Burt, 7 Iowa 56. Under La. Code Pr. art. 189, authorizing the service of citation to be made at the usual domicile or the residence of defendant, if he be absent, on a free person above the age of fourteen, and living there, the sheriff's return of service of citation should state expressly that he left the process at the usual domicile or residence, with a free person, above fourteen years of age, living there, defendant being absent. Kendrick *v.* Kendrick, 19 La. 36.

Posting of copy.— A return that the summons was served on a person unknown by posting one "copy on the courthouse," and a copy on two public places in the township, not reciting the length of time they were so posted, was insufficient, the statute requiring posting for three weeks. Pioneer Land Co. *v.* Maddux, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67.

Explaining contents of writ.— Where service of process was made by leaving a copy with a member of the family of defendant (Underwood St. p. 186, c. 22, § 11), a return which failed to show that the officer explained to such person the contents of the writ and that it was left at the usual place of abode of defendant was fatally defective. Hessler *v.* Wright, 8 Ill. App. 229.

Place of leaving copy.— A return of service of petition and citation on defendant by leaving copies at "his residence" was sufficient, without showing that it was at his "usual residence," in the absence of evidence that defendant had more than one domicile. Griffing *v.* Caldwell, 1 Rob. (La.) 15. Where defendant was described in a writ as of L, in P county, a return by the officer that he left a summons for him at his "last and usual place of abode in Kennebec county" was indefinite and insufficient, since his last and usual place of abode in K county would not necessarily be his "place of last and usual abode within the state." Sanborn *v.* Stickney, 69 Me. 343. Under a statute permitting substituted service where defendant cannot be found, and there is no free white person over the age of sixteen years who is a member of the family of defendant, by leaving a copy of the writ "at some public place at the dwelling house of the defendant," a return "Executed [on defendant] by leaving a copy at her residence," etc., is insufficient, as failing to show that it was left as some public place at the residence (Eskridge *v.* Jones, 1 Sm. & M. (Miss.) 595), and under such provision the service of a writ by leaving a return upon a writ "Executed by leaving a copy at the boarding house of the defendant," was held insufficient (Smith *v.* Cohea, 3 How. (Miss.) 35). Under a statute permitting service at the "usual place of abode," a return of service at the "last usual place of abode" was held not to show valid service. Madison County Bank *v.* Suman, 79 Mo. 527. An officer's return that he left at "the dwelling house" of a trustee a true and attested

return,[30] but in others this is not held to be necessary.[31] Where service is made upon a person as agent of defendant, the return ought to show that he is such agent;[32] and when the statute designates certain agents as competent to accept service for the principal, the return should so characterize the agent served as to show that he was one of those agents designated by the statute.[33] If the method adopted is permitted by the statute only in certain cases, the return must show facts disclosing that the case was one within the authorization of the statute, as where substituted service is authorized only when defendant cannot be found,[34] or where service upon a resident agent is permissible when defendant is a non-resident.[35]

6. Alteration of Return. Erasures or interlineations subsequently found in a return will not nullify a judgment based upon it which recites that the summons was served on defendant.[36]

7. Process Not Served. If service cannot be made upon any defendant for the

copy of the writ is a sufficient return that he left such copy at "the last and usual place of abode" of the trustee. Bruce *v.* Cloutman, 45 N. H. 37, 84 Am. Dec. 111. Under Pa. Act, March 20, 1810, permitting summons to be served on defendant by leaving a copy at his "dwelling house," a return of service as served on defendant by copy left at his "residence" was sufficient. Achy *v.* Kline, 1 Woodw. (Pa.) 162. Under Tex. Rev. St. art. 1220, providing that, when a citation is served without the county in which the suit is brought, the officer shall deliver to each of defendants "the certified copy of the petition accompanying the citation," the return must show that the copy delivered to defendants was certified, and it is not sufficient to state that "a copy of the petition" was delivered to defendant, although the citation recites that a certified copy accompanies the citation, and is to be served with it. Lauderdale *v.* R. & T. A. Ennis Stationery Co., 80 Tex. 496, 16 S. W. 308. Under a statute authorizing service of summons by leaving a copy at the place of defendant's "abode," a return that the same was left at a house or usual place of "residence" was sufficient, the expressions being substantially synonymous. State *v.* Toland, 36 S. C. 515, 15 S. E. 599, 600.

30. Montgomery *v.* Brown, 7 Ill. 581; Hass *v.* Leverton, 128 Iowa 79, 102 N. W. 811 (sufficient to state that it was left with defendant's wife); Wilson *v.* Call, 49 Iowa 463; Clark *v.* Little, 41 Iowa 497; Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504; O'Hara *v.* Independence Lumber, etc., Co., 42 La. Ann. 226, 7 So. 533; Lewis *v.* Hartel, 24 Wis. 504.

31. Box *v.* Equitable Securities Co., 71 Ark. 286, 73 S. W. 100; Vaule *v.* Miller, 64 Minn. 485, 67 N. W. 540; Robison *v.* Miller, 57 Miss. 237; Morehead *v.* Chaffe, 52 Miss. 161; Goldman *v.* Teitlebaum, 10 Pa. Dist. 53; Shea *v.* Plains Tp., 7 Kulp (Pa.) 554. But *compare* Earle *v.* Howarth, 7 Del. Co. (Pa.) 388.

32. Planters', etc., Bank *v.* Walker, Minor (Ala.) 391; Jacobs *v.* Sartorius, 3 La. Ann. 9.

33. Great Western Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Lake Shore, etc., R. Co. *v.* Hunt, 39 Mich. 469.

34. *Iowa.*— Bonsall *v.* Isett, 14 Iowa 309; Grant *v.* Harlow, 11 Iowa 429; Sidles *v.* Reed, 10 Iowa 589; Eikenburg *v.* Barnett, 10 Iowa 593; Chittenden *v.* Hobbs, 9 Iowa 417; Nosler *v.* Githens, 9 Iowa 295; Davis *v.* Burt, 7 Iowa 56.

Louisiana.—Corcoran *v.* Riddell, 7 La. Ann. 268; Oakey *v.* Drummond, 4 La. Ann. 363.

Mississippi.— Mullins *v.* Sparks, 43 Miss. 129.

New Jersey.— Cooper *v.* Roberts, 16 N. J. L. 353; Polhemus *v.* Perkins, 15 N. J. L. 435.

New York.— Shapiro *v.* Goldberg, 31 Misc. 755, 64 N. Y. Suppl. 88.

Washington.— Mitchell, etc., Co. *v.* O'Neil, 16 Wash. 108, 47 Pac. 235.

West Virginia.— Johnson *v.* Ludwick, 58 W. Va. 464, 52 S. E. 489.

Wisconsin.— Matteson *v.* Smith, 37 Wis. 333; Lewis *v.* Hartel, 24 Wis. 504; Knox *v.* Miller, 18 Wis. 397.

United States.— Settlemier *v.* Sullivan, 97 U. S. 444, 24 L. ed. 1110; Harris *v.* Hardeman, 14 How. 334, 14 L. ed. 444.

See 40 Cent. Dig. tit. "Process," §§ 170, 171.

Sufficiency.—A return on a summons that service was made by leaving a copy for defendant, who being sick the officer "could not see her," gave the court no jurisdiction; the only statutory provision for service by leaving a copy with a member of the family being where a party is "not found within the county of his residence." Le Grand *v.* Fairall, 86 Iowa 211, 53 N. W. 115. The return of an officer on a writ, stating that he executed it by leaving a copy with a member of the family of defendant, the latter "being absent," is insufficient under a provision of the statute allowing such service if defendant "could not be found." Hammond *v.* Olive, 44 Miss. 543.

35. Taylor *v.* Brown, 13 Pa. Co. Ct. 655; Boyle *v.* Whitney, 8 Pa. Co. Ct. 501; Miller *v.* Swayne, 2 Leg. Rec. (Pa.) 236.

36. Gregory *v.* Ford, 14 Cal. 138, 73 Am. Dec. 639.

reason that such defendant cannot be found in the county,[37] that defendant refused to receive the writ when offered,[38] that defendant is dead,[39] that the officer was kept off by force of arms,[40] that defendant is exempt from service by reason of certain circumstances,[41] or that service cannot be made for any other reason,[42] the facts should be set up in the return. No writ should be returned not found until the time within which service could lawfully be made has expired.[43]

8. Affidavit of Service. Service of process may frequently be made by persons other than officers,[44] but in such cases the statement of the person serving as to the fact and manner of service must be made under oath or supported by his affidavit.[45]

37. Neally *v.* Redman, 5 Iowa 387; Ford *v.* Munson, 4 N. J. L. 93; Sherer *v.* Easton Bank, 33 Pa. St. 134; Brown *v.* Belches, 1 Wash. (Va.) 9.

Sufficiency of return.— "Although *non est inventus* is the more frequent return in such a case, yet it is by no means as full an answer to the command of the writ, as is the return of *nihil.* That amounts to an averment that the defendant has nothing in the bailiwick, no dwelling-house, no family, no residence. and no personal presence to enable the officer to make the service required by the Act of Assembly." Sherer *v.* Easton Bank, 33 Pa. St. 134, 139. Where substituted service is provided for by law, the return should be that defendant could not be found in the county so as to be served with process, *non est inventus* alone not being sufficient. Moore *v.* Miller, 16 N. J. L. 233. A statement in the return that the sheriff did not go to the house of one of defendants destroys the return of not found as to such defendant. Lodge *v.* State Bank, 6 Blackf. (Ind.) 557. Under some statutes a mere return of "not found" is insufficient. Morris *v.* Knight, 1 Blackf. (Ind.) 106; Doggett *v.* Jordan, 3 Fla. 215. On a return "Not found," made by the sheriff on an original notice, it will be presumed that defendant could not be found in the county of the officer making the return. Macklot *v.* Hart, 12 Iowa 428. A sheriff is not authorized to return a defendant "No inhabitant of the State," as he cannot officially know the inhabitants of the state, although it may be good for as much territory as he can officially notice. Greenup *v.* Bacon, 1 T. B. Mon. (Ky.) 108. Since the whole county is not necessarily the bailiwick of a deputy sheriff, a return by him that defendant is "no inhabitant of my bailiwick" is not equivalent to a return that he is no inhabitant of the county. Gully *v.* Sanders, Litt. Sel. Cas. (Ky.) 424. A sheriff cannot make a return of *non est inventus,* if defendant is a known inhabitant of another state or county. Kibbe *v.* Deering, 1 Litt. (Ky.) 244. In an action against several joint contractors, where the writ described one of defendants on whom no service was made as of a certain county, the return of the proper officer that he had no last or usual place of abode within such county is sufficient. Call *v.* Hagger, 8 Mass. 423. Where there is more than one defendant, the sheriff's return that he cannot find defendants is equivalent to saying that neither can be found. Hitchcock *v.* Hahn, 60 Mich. 459, 27 N. W. 600. Return on a writ must purport something capable of being understood without evidence *aliunde.* The letters "N. E. I." cannot be taken to mean *non est inventus.* Parker *v.* Grayson, 1 Nott & M. (S. C.) 171.

38. Fuller *v.* Kenney, 32 Me. 334, holding that if a defendant refuses to receive a summons offered him by the officer having the writ for service, the officer may return that he delivered the summons, or he may return the facts specifically, and they will be held to be a delivery.

39. Burr *v.* Dougherty, 14 Phila. (Pa.) 6, holding that the proper return to a writ of summons, when the sheriff knows defendant is dead, is *mortuus est* and not *nihil habet.*

40. Crumpler *v.* Glisson, 4 N. C. 516.

41. Hunter *v.* Weidner, 1 Woodw. (Pa.) 6, holding that a return of a summons, stating that one of defendants had gone to the war, without stating in what capacity he had gone, was insufficient as it did not prove defendant within the protection of the act of April 2, 1822, section 70, relating to those in military service.

42. Hooper *v.* McDade, 1 Cal. App. 733, 82 Pac. 1116.

43. Combs *v.* Warner, 8 Dana (Ky.) 87.

44. See *supra,* II, B, 7, d.

45. *Arkansas.*— Coffee *v.* Gates, 28 Ark. 43.

California.— Hibernia Sav., etc., Soc. *v.* Clarke, 110 Cal. 27, 42 Pac. 425; Yolo County *v.* Knight, 70 Cal. 430, 11 Pac. 662.

Iowa.— Blair *v.* Hemphill, 111 Iowa 226, 82 N. W. 501; Romaine *v.* Muscatine County, Morr. 357.

Missouri.— Murdock *v.* Hillyer, 45 Mo. App. 287.

New York.— Vitolo *v.* Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Suppl. 273.

South Carolina.— Barron *v.* Dent, 17 S. C. 75.

See 40 Cent. Dig. tit. "Process," § 177.

All the necessary facts may be shown in one affidavit or in two or more separate affidavits. State *v.* Whatcom County Super. Ct., 42 Wash. 521, 85 Pac. 256. Where the only proof that a summons alleged to have been lost or destroyed was served on defendant, who is in default, consists of an affidavit made by plaintiff, in which he states that said summons was served on defendant personally by a certain person more than seven and one-half years prior to making such affidavit, and there is nothing in

This rule has been applied to special deputies,[46] to constables,[47] and to a city marshal.[48] If the statute prescribes the officer before whom the affidavit shall be made, it is insufficient if made before another;[49] but if no officer is designated, it may be made before any officer authorized to administer oaths.[50] While the general rules applicable to a sheriff's return usually apply equally to such an affidavit of service, certain additional requirements are frequently imposed by statute. Thus the affidavit is often required to show that the person serving the writ has the qualifications required by the statute, as that he is of the proper age,[51] or not interested in the matter in controversy,[52] or is competent to testify as a witness at the trial of the cause.[53] Some statutes require such affidavit also to contain an averment that the person served is, or that affiant knows him to be, the identical person named in the summons.[54] It is sometimes provided that the affidavit must

the affidavit nor record showing affiant's means of knowledge, or relating to the particulars of the loss or destruction of the summons, or excusing the delay in making a return thereon, or explaining why said proof of service was not originally made by the affidavit of the party who served the summons, the proof of service is insufficient to show jurisdiction of defendant. Brettell *v.* Deffebach, 6 S. D. 21, 60 N. W. 167.

46. Edwards *v.* McKay, 73 Ill. 570; Simms *v.* Simms, 88 Ky. 642, 11 S. W. 665, 11 Ky L. Rep. 131; Doty *v.* Berea College, 15 S. W. 1063, 16 S. W. 268, 12 Ky. L. Rep. 964.

47. Berentz *v.* Belmont Oil Min. Co., 148 Cal. 577, 84 N. W. 47, 113 Am. St. Rep. 308; Moss *v.* Blinn, 7 Iowa 261.

48. Brauchle *v.* Nothhelfer, 107 Wis. 457, 83 N. W. 653.

49. Adams *v.* Heckscher, 80 Fed. 742.

50. Marine Wharf, etc., Co. *v.* Parsons, 49 S. C. 136, 26 S. E. 956.

51. Williamson *v.* Cummings Rock Drill Co., 95 Cal. 652, 30 Pac. 762; Horton *v.* Gallardo, 88 Cal. 581, 26 Pac. 375; Barney *v.* Vigoureaux, 75 Cal. 376, 17 Pac. 433; Lyons *v.* Cunningham, 66 Cal. 42, 4 Pac. 938; Doerfler *v.* Schmidt, 64 Cal. 265; Weil *v.* Bent, 60 Cal. 603; Howard *v.* Galloway, 60 Cal. 10; Maynard *v.* MacCrellish, 57 Cal. 355. Under 2 Ballinger Annot. Codes & St. Wash. § 4874, providing that, where summons is not served by an officer, it may be served by any person over twenty-one years of age, proof of service reciting that the one who served the summons "is more than 21 years of age," is insufficient for failing to show that he was over such age when service was made. French *v.* Ajax Oil, etc., Co., 44 Wash. 305, 697, 87 Pac. 359, 360. Where an affidavit of service of summons is made by plaintiff's attorney, who states that he is such attorney, and made the service, and appends to the summons his office and post-office address, the absence of a statement of the age and the residence of the affiant may be supplied by the court's knowledge that its officer is over twenty-one years of age, and by the statement of his office address. Booth *v.* Kingsland Ave. Bldg. Assoc., 18 N. Y. App. Div. 407, 46 N. Y. Suppl. 457.

An affidavit stating that the affiant is a male citizen of the United States, over eighteen years of age, was not sufficient to show that he was over eighteen years of age at the time of the service of the summons, on the contention that the words "male citizen of the United States" indicated that he was an elector, and therefore twenty-one years of age or over, since while it is true that a citizen, in the full acceptation of that term, is a member of the civil state, entitled to all its privileges, the possession of all political rights is not essential to citizenship, which term is a comprehensive one, and includes citizens of the state and citizens of the United States, and these include political as well as civil citizens, electors and non-electors. And hence a person may be a citizen of the United States, although under age and not entitled to vote. Lyons *v.* Cunningham, 66 Cal. 42, 4 Pac. 938.

52. Raub *v.* Otterbach, 89 Va. 645, 16 S. E. 933.

53. Dimick *v.* Campbell, 31 Cal. 238; McMillan *v.* Reynolds, 11 Cal. 372.

54. O'Connell *v.* Gallagher, 104 N. Y. App. Div. 492, 93 N. Y. Suppl. 643; Schmidt *v.* Stolowski, 126 Wis. 55, 105 N. W. 44; Porath *v.* Reigh, etc., Co., 112 Wis. 433, 88 N. W. 315; German Mut. Farmer F. Ins. Co. *v.* Decker, 74 Wis. 556, 43 N. W. 500; Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326; Sayles *v.* Davis, 20 Wis. 302. Sanborn & B. Annot. St. Wis. § 2642, providing, if service of summons is made by one other than the sheriff, proof thereof shall be by affidavit of such person, showing that "he knew the person served to be the defendant mentioned in the summons," is not satisfied by a statement that affiant knew that the person with whom he left a copy of the summons and complaint was the general manager of defendant. Kernan *v.* Northern Pac. R. Co., 103 Wis. 356, 79 N. W. 403. In Young *v.* Young, 18 Minn. 90, a court rule making this requirement was held invalid as inconsistent with the statute. And it was held in Cunningham *v.* Water-Power Sandstone Co., 74 Minn. 282, 77 N. W. 137, that such a showing was unnecessary.

When a summons has been personally served out of the state, it must be shown by affidavit that the person served is the identical person named in the action or proceeding. It is not sufficient to show by affidavit that the person served acknowledged

show the place where service was made, the presumption which obtains in the case of service by the sheriff not being recognized.[55] If personal service is made outside the state as a substitute for service by publication, the affidavit should show the place of service.[56]

C. Proof of Service by Publication — 1. Who May Make Proof. The statute usually provides that proof of service by publication shall be by affidavit or certificate of some one of a number of designated persons, such as the proprietor, editor, printer, or chief clerk of the newspaper in which publication is made, and the statute must be observed.[57] A printed copy of the summons published is sometimes required to be returned with the affidavit.[58] If the statute does not restrict the proof, any other competent evidence of the service may be shown to establish the fact,[59] and even where the statute provided that proof "shall" be made in a designated mode, other competent evidence was held admissible to prove the fact.[60] The affidavit must positively show that the affiant is one of the persons designated by the statute,[61] and it is not enough for him to merely describe himself as such person.[62] The affiant need not describe himself by the term

himself to be such identical person. Cole *v.* Allen, 51 Ind. 122.

55. Weis *v.* Schoerner, 53 Wis. 72, 9 N. W. 794; Lewis *v.* Hartel, 24 Wis. 504, sufficient to state the county.

56. Fisher *v.* Fredericks, 33 Mo. 612.

57. See the statutes of the several states. And see the following cases:

Arkansas.—Pillow *v.* Sentelle, 39 Ark. 61; Lawrence *v.* State, 30 Ark. 719.

California.—Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Seaver *v.* Fitzgerald, 23 Cal. 85; Gray *v.* Palmer, 9 Cal. 616.

Illinois.— Riely *v.* Barton, 32 Ill. App. 524.

Kentucky.— Bainbridge *v.* Owen, 2 J. J. Marsh. 463; Freeman *v.* Brown, 7 T. B. Mon. 263; Wilkinson *v.* Perrin, 7 T. B. Mon. 214; Miller *v.* Hall, 3 T. B. Mon. 242.

Nebraska.— Taylor *v.* Coots, 32 Nebr. 30, 48 N. W. 964, 29 Am. St. Rep. 426; Wescott *v.* Archer, 12 Nebr. 345, 11 N. W. 491, 577.

New York.— Waters *v.* Waters, 7 Misc. 519, 27 N. Y. Suppl. 1004.

Illustrations.—An affidavit of publication made by a "publisher and proprietor" is a substantial compliance with the rule requiring it to be made by the "printer, foreman, or principal clerk." Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; People *v.* Thomas, 101 Cal. 571, 36 Pac. 9; Quivey *v.* Porter, 37 Cal. 458; Sharp *v.* Daugney, 33 Cal. 505. The editor of the paper is competent to make an affidavit under a statute requiring it to be made by "the printer, or his foreman or principal clerk." Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565. *Contra,* Hay *v.* McKinney, 7 J. J. Marsh. (Ky.) 441; Butler *v.* Cooper, 6 J. J. Marsh. (Ky.) 29. The proprietor or manager is the publisher within the meaning of the statute. Stuart *v.* Cole, 42 Tex. Civ. App. 478, 92 S. W. 1040. A certificate cannot be made by proxy. Nicholas *v.* Gratz, 2 J. J. Marsh. (Ky.) 486; Miller *v.* Hall, 3 T. B. Mon. (Ky.) 242. An entry by the clerk of the court is sometimes provided for, where that officer performs the act of which proof is to be made. English *v.* Monypeny, 6 Ohio Cir. Ct. 554, 3 Ohio Cir. Dec. 582.

An unsigned certificate is ineffectual. Star Brewery *v.* Otto, 63 Ill. App. 40.

In Texas the sheriff's return must disclose all the facts constituting legal service. O'Leary *v.* Durant, 70 Tex. 409, 11 S. W. 116; Lyon *v.* Paschal, 45 Tex. 435; Thomas *v.* Goodman, 25 Tex. Suppl. 446; Edrington *v.* Allsbrooks, 21 Tex. 186; Wilson *v.* Palmer, 18 Tex. 592; Blossom *v.* Letchford, 17 Tex. 647; Goodlove *v.* Gray, 7 Tex. 483; Chaffee *v.* Bryan, 1 Tex. App. Civ. Cas. § 770; Burns *v.* Batey, 1 Tex. App. Civ. Cas. § 419.

58 Maury *v.* Keller, (Tex. Civ. App. 1898) 53 S. W. 59; State *v.* Pierce County Super. Ct., 6 Wash. 352, 33 Pac. 827.

59. Colton *v.* Rupert, 60 Mich. 318, 27 N. W. 520; English *v.* Monypeny, 6 Ohio Cir. Ct. 554, 3 Ohio Cir. Dec. 582; Claybrook *v.* Wade, 7 Coldw. (Tenn.) 555.

60. Robinson *v.* Hall, 33 Kan. 139, 5 Pac. 763.

61. Cross *v.* Wilson, 52 Ark. 312, 12 S. W. 576; Haywood *v.* Collins, 60 Ill. 328; Riely *v.* Barton, 32 Ill. App. 524; Brown *v.* Wood, 6 J. J. Marsh. (Ky.) 11; Brown *v.* Mahan, 4 J. J. Marsh. (Ky.) 59; Miller *v.* Hall, 3 T. B. Mon. (Ky.) 242.

Who may make.—A judgment rendered on such service has been held not to be void because the person making the affidavit is not shown by the affidavit to come within the terms of the statute. Hardin *v.* Strader, 1 B. Mon. (Ky.) 286.

Oral testimony may be received. Riely *v.* Barton, 32 Ill. App. 524.

62. Steinbach *v.* Leese, 27 Cal. 295. *Contra,* Farmer's Nat. Bank *v.* Fonda, 65 Mich. 533, 32 N. W. 664, where in an affidavit of publication the affiant described himself as "printer and publisher of the Three Rivers Herald, a public newspaper, printed, published, and circulating in the county of St. Joseph," etc., but there was no direct averment that he was such printer, or that the paper was so published, and it was held that the recital was sufficient.

employed in the statute if he states facts which disclose that he comes within its purview.[63]

2. Requisites and Sufficiency of Affidavit. The affidavit or certificate of the publication of the summons or notice must show that just such publication as the law requires has been made in precisely the manner provided by law.[64] But it is the service and not the proof thereof which gives the court jurisdiction, and a judgment will not be set aside merely because the proof is not made as provided for by statute, where it appears that service was in fact properly had,[65] although there are cases which hold that a want of the proof provided for by law is fatal to the jurisdiction.[66] It has been held that no presumption will ordinarily aid the record of a service by publication, since that is a strictly statutory proceeding in derogation of the common law.[67] It should appear that publication was made in a newspaper,[68] of the kind specified by the statute,[69] which should be named,[70] and it should appear to be the same newspaper in which publication was ordered.[71] It should also clearly appear from the affidavit that the summons, order, or notice was published at the proper time, for the requisite number of times, at the proper intervals and for the required period, as provided for by the statute.[72] It is in

63. Gray *v.* Palmer, 9 Cal. 616; Pettiford *v.* Zoellner, 45 Mich. 358, 8 N. W. 57; Waters *v.* Waters, 7 Misc. (N. Y.) 519, 27 N. Y. Suppl. 1004.

64. Haywood *v.* Collins, 60 Ill. 328; Hemingway *v.* Chicago, 60 Ill. 324.

A newspaper clipping of the notice published, attached to the affidavit and referred to therein, will be looked to in aid of a defective statement in the affidavit itself. Inglee *v.* Welles, 53 Minn. 197, 55 N. W. 117.

Where a judgment, silent as to notice, is offered in evidence on an issue in another cause, evidence of application for, and issuance of, citation to be served by publication on a non-resident of the state does not constitute such proof as is required to show that the judgment was rendered on notice by publication alone, in the absence of the sheriff's return on such citation, or of any evidence as to what else the record may show respecting service thereof. McCarthy *v.* Burtis, 3 Tex. Civ. App. 439, 22 S. W. 422.

65. Pierce *v.* Butters, 21 Kan. 124.

"Jurisdiction begins on granting the order before the publication is made. The statute merely directs proof to be made before inquiring into the merits." Soule *v.* Chase, 1 Rob. (N. Y.) 222, 233 [*reversed* on other grounds in 39 N. Y. 342].

66. O'Rear *v.* Lazarus, 8 Colo. 608, 9 Pac. 621.

67. Godfrey *v.* Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. St. Rep. 657; Hartley *v.* Boynton, 17 Fed. 873, 5 McCrary 453.

68. Claybrook *v.* Wade, 7 Coldw. (Tenn.) 555.

69. Gallagher *v.* Johnson, 65 Ark. 90, 44 S. W. 1041; Spalding *v.* Fahrney, 108 Ill. App. 602; Warner *v.* Miner, 41 Wash. 98, 82 Pac. 1033.

70. Hopkins *v.* Claybrook, 5 J. J. Marsh. (Ky.) 234.

71. Waters *v.* Waters, 7 Misc. (N. Y.) 519, 27 N. Y. Suppl. 1004; Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

72. *Arkansas.*— Pillow *v.* Sentelle, 39 Ark. 61; Lawrence *v.* State, 30 Ark. 719.

California.—Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

Illinois.— Tobin *v.* Brooks, 113 Ill. App. 79.

Indiana.— Curry *v.* State, 131 Ind. 439, 31 N. E. 86.

Kentucky.— Hopkins *v.* Claybrook, 5 J. J. Marsh. 234; Banks *v.* Johnson, 4 J. J. Marsh. 649; Passmore *v.* Moore, 1 J. J. Marsh. 591; Tevis *v.* Richardson, 7 T. B. Mon. 654; Milam *v.* Thomasson, 7 T. B. Mon. 324; Lawlins *v.* Lackey, 6 T. B. Mon. 70; Miller *v.* Hall, 3 T. B. Mon. 242.

Michigan.—Wilkinson *v.* Conaty, 65 Mich. 614, 32 N. W. 841; Snyder *v.* Hemmingway, 47 Mich. 549, 11 N. W. 381.

Minnesota.— Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4; Godfrey *v.* Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. St. Rep. 657.

Missouri.— Cruzen *v.* Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549; Haywood *v.* Russell, 44 Mo. 252.

New York.— Hallett *v.* Righters, 13 How. Pr. 43.

South Dakota.— Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453.

Texas.— Chaffee *v.* Bryan, 1 Tex. App. Civ. Cas. § 770.

Wisconsin.— Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

United States.— Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402.

Proof that a summons was published for six successive weeks in a weekly newspaper sufficiently shows publication once a week for six successive weeks (McHenry *v.* Bracken, 93 Minn. 510, 101 N. W. 960), although such an affidavit would not be sufficient where publication was made for six successive weeks in a daily newspaper (Godfrey *v.* Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. St. Rep. 657).

Insensible statements in a certificate or affidavit will be regarded as surplusage. Michael *v.* Mace, 137 Ill. 485, 27 N. E. 694;

some states necessary to show the dates of the issues of the paper in which the notice was published.[73] If the affidavit states that the notice was properly published but the dates given in the affidavit show that the statement is not true, the showing made by the dates will control,[74] unless it is stated merely under a *vidilicet*,[75] or unless there is an obvious clerical error in the dates.[76] But an omission of a date may be supplied by a second affidavit.[77] If the mailing of a copy of the summons or complaint is also required, an affidavit of some competent witness or certificate of an authorized officer must be made to prove the fact.[78] If plaintiff's attorney does the mailing he may make the affidavit.[79] The affidavit should show such facts as to the address and time of mailing as are necessary under the statute.[80] Misstatements in the affidavit as to immaterial facts will not render it void.[81] Statutes providing when such affidavit shall be made are directory only.[82] The giving of the required affidavit may be compelled in case of refusal.[83]

D. Operation and Effect — 1. Effect on Summons. After being returned the summons is *functus officio*, and no subsequent service of the same writ will be effectual for any purpose;[84] but the return itself may be used again when judgment founded upon it has been vacated.[85]

2. Presumption in Aid of Return[86] — a. In General. There is a general presumption, applicable to a variety of cases, that a sworn officer who has acted in a matter has done his duty in the premises, and this presumption has been resorted to in various ways to support sheriff's returns indorsed upon process, where such returns are ambiguous or silent as to certain requisites provided for by law.[87]

Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164; Swayze *v.* Doe, 13 Sm. & M. (Miss.) 317.

73. Lawrence *v.* State, 30 Ark. 719; Maury *v.* Keller, (Tex. Civ. App. 1898) 53 S. W. 59.

74. Pierce *v.* Butters, 21 Kan. 124.

75. Howard *v.* McChesney, 103 Cal. 536, 37 Pac. 523.

76. Michael *v.* Mace, 137 Ill. 485, 27 N. E. 694; Schaefer *v.* Kienzel, 123 Ill. 430, 15 N. E. 164.

77. Howard *v.* McChesney, 103 Cal. 536, 37 Pac. 523.

78. Seaver *v.* Fitzgerald, 23 Cal. 85; O'Rear *v.* Lazarus, 8 Colo. 608; 9 Pac. 621; Roberts *v.* Roberts, 3 Colo. App. 6, 31 Pac. 941; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370; Hallett *v.* Righters, 13 How. Pr. (N. Y.) 43.

Any one but the party himself may make the affidavit. Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

79. Anderson *v.* Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

80. Foley *v.* Connelly, 9 Iowa 240; Pinkney *v.* Pinkney, 4 Greene (Iowa) 324; Steinle *v.* Bell, 12 Abb. Pr. N. S. (N. Y.) 171.

For example, where an order for publication of summons required a mailing of copies to each of the defendants, an affidavit setting forth that "a copy of said summons attached to a copy of the complaint, directed to" numerous defendants, was deposited in the post-office, does not show complete service on any of the defendants, mailing being as much a part of the service as publication; and there was no abuse of the court's discretion in setting aside a default based thereon. Harris *v.* Morris, 3 Cal. App. 151, 84 Pac. 678.

81. Warner *v.* Miner, 41 Wash. 98, 82 Pac. 1033.

82. McFarlane *v.* Cornelius, 43 Oreg. 513, 73 Pac. 325, 74 Pac. 468.

83. Eberle *v.* Krebs, 50 N. Y. App. Div. 450, 64 N. Y. Suppl. 246.

84. Fanning *v.* Foley, 99 Cal. 336, 33 Pac. 1098; Eaton *v.* Fullett, 11 Ill. 491; Garner *v.* Willis, 1 Ill. 368; Carnahan *v.* People, 2 Ill. App. 630; Cook *v.* Wood, 16 N. J. L. 254.

A summons may be withdrawn after return by order of the court for future service. Hancock *v.* Preuss, 40 Cal. 572.

Quashing return and continuance for service.— And where the return of a special deputy on a summons in a case at law shows service only by reading, if no copy was actually delivered to defendant, so that an amendment would not be permissible, the return should be quashed, and the case continued for the purpose of getting service, and the defective service is not cause for dismissing the suit. Noleman *v.* Weil, 72 Ill. 502.

85. Brien *v.* Casey, 2 Abb. Pr. (N. Y.) 416.

86. On appeal from judgment of justice see Justices of the Peace, 24 Cyc. 745.

On collateral attack of judgment see Judgments, 23 Cyc. 1079.

87. *Alabama.*— McKeagg *v.* Collehan, 13 Ala. 828.

Connecticut.—Whittlesey *v.* Starr, 8 Conn. 134.

Indiana.— Union Traction Co. *v.* Barnett, 31 Ind. App. 467, 67 N. E. 205.

New York.— Van Kirk *v.* Wilds, 11 Barb. 520.

Texas.— Calvert, etc., R. Co. *v.* Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997.

b. Fact of Service. The fact of service must always appear in some form in the return, and when a return alleges service upon part of the defendants and is silent as to others, no presumption of service will be indulged.[88]

c. Person Serving Writ. It will be presumed that the person making service of process was competent to do so.[89] Thus one who purports to serve process as an officer will be presumed to be a duly qualified officer authorized to serve the writ in question;[90] one who purports to serve process as a deputy will be presumed to have been duly authorized as such;[91] when a coroner serves process it will be presumed that the conditions existed which made such service proper;[92] and when a previous grant of authority is necessary in order that one other than an officer may serve process, such grant will be presumed in order to support such service.[93]

d. Diligence Employed. Where an officer makes a return of not found or of substituted service, no showing of diligence is necessary, since he is presumed to have used the necessary diligence.[94]

e. Person Served. A return of service upon an agent, under a statute authorizing such service, which omits to set forth the character of the agent, is presumptive evidence that the party served was in fact an agent qualified to receive service for his principal.[95]

f. Manner of Service. Facts as to the manner of service should ordinarily be stated, and it has been held that no presumptions will supply an omission to allege the doing of that which the statute declares shall be done;[96] but where the statute

United States.—Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801; New River Mineral Co. *v.* Roanoke Coal, etc., Co., 110 Fed. 343, 49 C. C. A. 78.

Where a deputy sheriff is shown to have been at least a *de facto* officer at the time he served and returned a summons, the presumption of regularity attaches with reference to his acts, without proof of his appointment by official record. Mosher *v.* McDonald, 128 Iowa 68, 102 N. W. 837.

Where a return was lost, but there was an entry in the appearance docket that the writ was returned "served," the presumption is that the return was regular. Stunkle *v.* Holland, 4 Kan. App. 478, 46 Pac. 416. But it is held that this presumption may be rebutted. Shehan *v.* Stuart, 117 Iowa 207, 90 N. W. 614.

88. Dickison *v.* Dickison, 124 Ill. 483, 16 N. E. 861.

89. Rucker *v.* Tabor, 126 Ga. 132, 54 S. E. 959; Eversole *v.* Eastern Kentucky Insane Asylum, 100 S. W. 300, 30 Ky. L. Rep. 989; Blain *v.* McManus, 2 Tex. Unrep. Cas. 314; Sun Mut. Ins. Co. *v.* Holland, 2 Tex. App. Civ. Cas. § 443.

Presumption overcome.— Where it appeared that the writ was served by a person not an officer, deputized by the sheriff, and bearing the same name as that of one of plaintiffs, and nothing appeared to the contrary, it was held that it must be presumed, from the identity of names, that the person serving the writ was a plaintiff, and that the service was not good. Filkins *v.* O'Sullivan, 79 Ill. 524. Where the statute limits the right to serve process to persons having certain qualifications, the affidavit of service must affirmatively disclose the competency of the person making service. See *supra*, III, B, 8.

90. Whiting *v.* Hagerty, 5 La. Ann. 686; Kendrick *v.* Kendrick, 19 La. 36.

91. Gilbert *v.* Brown, 9 Nebr. 90, 2 N. W. 376.

92. Russell *v.* Durham, 29 S. W. 16, 16 Ky. L. Rep. 516; Rodolph *v.* Mayer, 1 Wash. Terr. 133.

93. Hess *v.* Smith, 16 Misc. (N. Y.) 55, 37 N. Y. Suppl. 635.

94. *Illinois.*— Chickering *v.* Failes, 26 Ill. 507, in a suit in equity for relief from a judgment.

Iowa.—Neally *v.* Redman, 5 Iowa 387, appeal from judgment by default.

Missouri.— State *v.* Finn, 87 Mo. 310, in an action against a sheriff for false return.

North Carolina.— Tomlinson *v.* Long, 53 N. C. 469, in an action against the sheriff for a false return.

Texas.— Livar *v.* State, 26 Tex. App. 115, 9 S. W. 552, return upon attachment issued against veniremen, on appeal in criminal prosecution.

95. Fulton *v.* Commercial Travelers' Mut. Acc. Assoc., 172 Pa. St. 117, 33 Atl. 324.

96. Rose *v.* Ford, 2 Ark. 26; Philadelphia *v.* Cathcart, 10 Phila. (Pa.) 103. There are a few cases which hold that the officer need only return that he executed the writ, and it will be presumed that he did it as provided by law. Mayfield *v.* Allen, Minor (Ala.) 274; Bridges *v.* Ridgley, 2 Litt. (Ky.) 395; Norton *v.* Berlin Iron Bridge Co., 51 N. J. L. 442, 17 Atl. 1079; Strayhorn *v.* Blalock, 92 N. C. 292. But in Mississinpi where the statute provides that original process shall be served "upon the defendant personally, if to be found in the county, by handing him a true copy of the process," a return, "Executed this writ by personal service on" defendant,

provides what the return shall show, it will be presumed, as to all facts not required to appear in the return, that the officer did his duty according to law.[97]

g. Place of Service. If the return states that the sheriff served defendant, without stating where such service was made, it will be presumed that it was made within the county over which the officer's authority extended.[98] If substituted service, by leaving a copy of the writ at a designated place, is provided for by statute, the writ will be presumed to have been left at the place designated by the statute even though it is loosely described in non-statutory terms.[99] But the presumption in favor of an officer will not be indulged when process is served by a private individual.[1]

h. Time of Service. Where a return is without date, or with an imperfect or uncertain date, it will be presumed that the writ was served within the time prescribed by law.[2] Where the affidavit of an unofficial person constitutes the proof of service, and it is silent as to the time of service, the date of the jurat will be presumed to be the date of the service.[3]

i. Residence. If the service can be deemed valid only in case defendant resides in the county where service is made, a presumption to that effect will be entertained to support the service.[4]

j. Copy Served. Where the return states that the sheriff served defendant with a certified copy, it will be presumed that the certification was by the clerk, he being the only one allowed to certify such copies.[5]

k. Truth of the Return. Every legal presumption is in favor of the truth of the sheriff's return.[6]

3. Evidence Affecting The Return — a. Evidence to Aid or Explain Return. If the return is lost, parol evidence of the execution is admissible.[7] No defects

is insufficient for failing to state the facts on which the officer bases his conclusion that the service was personal, although the statute also provides that a general return of "Executed" is sufficient. Dogan *v.* Barnes, 76 Miss. 566, 24 So. 965. See also Heirmann *v.* Stricklin, 60 Miss. 234; Smith *v.* Bradley, 6 Sm. & M. (Miss.) 485; Keithley *v.* Borum, 2 How. (Miss.) 683. Where writs are issued in duplicate, running to different counties, the general return, "Executed," applies only to such of defendants as reside within the county to which the writ issued. Bozman *v.* Brower, 6 How. (Miss.) 43.

97. Webber *v.* Webber, 1 Metc. (Ky.) 18. See also Collier *v.* Catherine Lead Co., 208 Mo. 246, 106 S. W. 971.

Language employed.— Where, to constitute legal service, the citation and petition must be served in both English and French, the sheriff's return that he "served the petition and citation" implies that service was made in both languages. Cox *v.* Wells, 3 Mart. N. S. (La.) 158; Fleming *v.* Conrad, 11 Mart. (La.) 301.

98. *Arkansas.*— Henry *v.* Ward, 4 Ark. 150.

California.—Crane *v.* Brannan, 3 Cal. 192.

Indiana.—Baltimore, etc., R. Co. *v.* Brant, 132 Ind. 37, 31 N. E. 464; Ohio, etc., R. Co. *v.* Quier, 16 Ind. 440.

Kansas.— Ingraham *v.* McGraw, 3 Kan. 521.

Massachusetts.— Richardson *v.* Smith, 1 Allen 541.

Missouri.— Crowley *v.* Wallace, 12 Mo. 143.

Nebraska.— Gilbert *v.* Brown, 9 Nebr. 90, 2 N. W. 376.

United States.— Knowles *v.* Logansport Gas Light, etc., Co., 19 Wall. 58, 22 L. ed. 70.

See 40 Cent. Dig. tit. "Process," § 195.

In a suit on a foreign judgment, the record being silent as to whether service was had in the jurisdiction in which the judgment was rendered, no presumption that it was had within that jurisdiction was indulged. Rand *v.* Hanson, 154 Mass. 87, 28 N. E. 6, 26 Am. St. Rep. 210, 12 L. R. A. 574.

Service by constable.— In the absence of a showing to the contrary, it will not be presumed that a constable made service of process outside of his county. Mahan *v.* McManus, (Civ. App. 1907) 102 S. W. 789.

99. Jones *v.* Tarver, 19 Ga. 279; Smithson *v.* Briggs, 33 Gratt. (Va.) 180.

1. Lynch *v.* West, 63 W. Va. 571, 60 S. E. 606.

2. Reid *v.* Jordan, 56 Ga. 282; Cosby *v.* Bustard, Litt. Sel. Cas. (Ky.) 137; Stanton-Belment Co. *v.* Case, 47 W. Va. 779, 35 S. E. 851.

3. Reed *v.* Catlin, 49 Wis. 686, 6 N. W. 326.

4. Pellier *v.* Gillespie, 67 Cal. 582, 8 Pac. 185; Calderwood *v.* Brooks, 28 Cal. 151.

5. Curtis *v.* Herrick, 14 Cal. 117, 73 Am. Dec. 632.

6. Ingraham *v.* McGraw, 3 Kan. 521.

Conclusiveness of presumption see *infra*, III, D, 3, b.

7. Newhouse *v.* Martin, 68 Ind. 224.

The presumption is that a lost return was regular. Stunkle *v.* Holland, 4 Kan. App. 478, 46 Pac. 416.

or omissions in respect to the return can be corrected or supplied by extrinsic evidence,[8] and this is equally true after the death of the officer making it;[9] but if the return is not defective, but for any reason it becomes material to learn more about the service than is shown in the return, extrinsic evidence may be introduced.[10] A more liberal rule, however, permits omissions in a return to be supplied and ambiguities to be explained by parol evidence if that becomes necessary to prevent a failure of justice.[11] If the jurat is wanting in an affidavit of service, it may be shown by parol evidence that the affidavit was in fact sworn to,[12] and omissions in the affidavit may be supplied by parol evidence.[13]

b. Evidence to Impeach Return — (i) *Conclusiveness of Return as to Parties and Privies.* The question of the conclusiveness of the return is one upon which there is an utterly irreconcilable conflict in authority. The English common-law rule,[14] which is also the rule in many American states, is that, as between parties and privies, the return of an officer is to be taken as true, as to all matters which are properly the subject of a return by the officer, and it can be controverted only in an action against the officer for a false return,[15] unless it

8. Harris *v.* Alexander, 1 Rob. (La.) 30; Madison County Bank *v.* Suman, 79 Mo. 527; Samuels *v.* Shelton, 48 Mo. 444.

9. Wilson *v.* Greathouse, 2 Ill. 174.

10. Wardwell *v.* Etter, 143 Mass. 19, 8 N. E. 420; Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584.

Identification of person.— Where a writ of summons is directed against a person by a certain name, and two individuals are known in the community by that name, the officer serving the writ may point out in court, in giving testimony, the person he served; and such testimony does not contradict his return. Reid *v.* Mercurio, 91 Mo. App. 673. Where process is returned served on "R. E. Morgan," a defendant whose name of "Robert E. Morgan" is not precluded, as contradicting the return, from showing by parol that the process was served on a "Rufus E. Morgan" residing in the same county as himself, since such evidence merely shows to what person the return applies. Slingluff *v.* Gainer, 49 W. Va. 7, 37 S. E. 771.

11. Kipp *v.* Fullerton, 4 Minn. 473; Vigars *v.* Mooney, 3 N. J. L. 909; Jackson *v.* Tenney, 17 Okla. 495, 87 Pac. 867; Leonard *v.* O'Neal, 16 Lea (Tenn.) 158.

12. Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728.

13. Northwestern, etc., Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 59.

14. Goubot *v.* De Crouy, 1 Cromp. & M. 772, 2 Dowl. P. C. 86, 2 L. J. Exch. 267, 3 Tyrw. 906. See Tillman *v.* Davis, 28 Ga. 494, 497, 73 Am. Dec. 786, where Lumpkin, J., said: "I have investigated carefully in Brooke and Viner's Abridgements, and traced the question to its fountain head, and find it well settled that by the common law no averments will lie against the sheriff's return."

15. *Arkansas.*— *Ex p.* St. Louis, etc., R. Co., 40 Ark. 141.

Georgia.— Brown *v.* Way, 28 Ga. 531 (decided before the statute was passed); Tillman *v.* Davis, 28 Ga. 494, 73 Am. Dec. 786.

Indiana.— Nichols *v.* Nichols, 96 Ind. 433; Johnston Harvester Co. *v.* Bartley, 81 Ind. 406; Birch *v.* Frantz, 77 Ind. 199; Johnson *v.* Patterson, 59 Ind. 237.

Kansas.— Orchard *v.* Peake, 69 Kan. 510, 77 Pac. 281; Warren *v.* Wilner, 61 Kan. 719, 60 Pac. 745; Goddard *v.* Harbour, 56 Kan. 744, 44 Pac. 1055, 54 Am. St. Rep. 608 [*overruling* Jones *v.* Marshall, 3 Kan. App. 529, 43 Pac. 840]. See, however, Starkweather *v.* Morgan, 15 Kan. 274, where Justice Brewer considers the question one merely of weight of evidence.

Louisiana.— Leverich *v.* Adams, 15 La. Ann. 310; State Bank *v.* Elam, 10 Rob. 26; Skilliman *v.* Jones, 3 Mart. N. S. 686.

Maine.— Stinson *v.* Snow, 10 Me. 263, 25 Am. Dec. 238.

Massachusetts.— Taylor *v.* Clark, 121 Mass. 319; Tilden *v.* Johnson, 6 Cush. 354; Slayton *v.* Chester, 4 Mass. 478. See, however, Brewer *v.* Holmes, 1 Metc. 288, where Shaw, C. J., permitted a return to be contradicted.

Missouri.— Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Stewart *v.* Stinger, 41 Mo. 400, 97 Am. Dec. 278; McDonald *v.* Leewright, 31 Mo. 29, 77 Am. Dec. 631; Delinger *v.* Higgins, 26 Mo. 180; Hallowell *v.* Page, 24 Mo. 590; Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 86 S. W. 62. See also Cornwall *v.* Star Bottling Co., 128 Mo. App. 163, 106 S. W. 591; Strobel *v.* Clark, 128 Mo. App. 48, 106 S. W. 585.

New Hampshire.— Bolles *v.* Bowen, 45 N. H. 124. See, however, Clough *v.* Moore, 63 N. H. 111, where the return was shown to be false.

Pennsylvania.— Bennethum *v.* Bowers, 133 Pa. St. 332, 19 Atl. 361; Paxon's Appeal, 49 Pa. St. 195; Sample *v.* Coulson, 9 Watts & S. 62; Zion Church *v.* St. Peter's Church, 5 Watts & S. 215; Mentz *v.* Hamman, 5 Whart. 150, 34 Am. Dec. 546; Knowles *v.* Lord, 4 Whart. 500, 34 Am. Dec. 525; Ben Franklin Coal Co. *v.* Pennsylvania Water Co., 25 Pa. Super. Ct. 629; Philadelphia Demokrat Pub. Co. *v.* Edwards Sad Iron Co., 9 Pa. Dist. 56; Virtue *v.* Ioka Tribe, 5 Pa. Dist. 634; Hess *v.* Weingartner, 5 Pa. Dist. 451; Goodwin *v.* Wherry Co., 26 Pa. Co. Ct.

is contradicted by other matters appearing of record in the case,[16] or unless the false return was procured or induced by plaintiff, or resulted from the mistake of the officer,[17] except where the return forms the basis for a foreign judgment, in which case it is *prima facie* evidence only.[18] But the return is not evidence, under this rule, as to matters which are not properly the subject of such return, nor is it conclusive as to matters which are not supposed to be within the officer's own knowledge,[19] although as to the latter class of facts it is *prima facie* evi-

570; Sheetz *v.* Chesapeake, etc., R. Co., 25 Pa. Co. Ct. 25; Young *v.* Trunkley, 22 Pa. Co. Ct. 127; Walker *v.* Walker Automatic Steam Coupler Co., 8 Lack. Leg. N. 125; O'Neill *v.* Philadelphia Rapid Transit Co., 19 Montg. Co. Rep. 180; Moore *v.* Fidelity Ins., etc., Co., 16 Montg. Co. Rep. 90. Where the sheriff returns that he served a summons on "the person for the time being in charge" of the business of defendant in accordance with the act of July 9, 1901, such return is conclusive. Penn Valley Creamery Co. *v.* Martin, 2 Blair Co. Rep. 364. The return of a sheriff, made two years after the proper time, is not conclusive. Weidman *v.* Weitzel, 13 Serg. & R. 96.

Rhode Island.— Sheldon *v.* Comstock, 3 R. I. 84.

Tennessee.— Home Ins. Co. *v.* Webb, 106 Tenn. 191, 61 S. W. 79.

Vermont.— McDaniels *v.* De Groot, 77 Vt. 160, 59 Atl. 166; Witherell *v.* Goss, 26 Vt. 748; Downer *v.* Back, 25 Vt. 259; Barrett *v.* Copeland, 18 Vt. 67. 44 Am. Dec. 362; Hawks *v.* Baldwin, Brayt. 85.

West Virginia.— Talbott *v.* Southern Oil Co., 60 W. Va. 427, 55 S. E. 1009; Rader *v.* Adamson, 37 W. Va. 582, 16 S. E. 808; Bowyer *v.* Knapp, 15 W. Va. 277.

United States.— Trimble *v.* Erie Electric Motor Co., 89 Fed. 51; U. S. *v.* Gayle, 45 Fed. 107; Von Roy *v.* Blackman, 28 Fed. Cas. No. 16,997, 3 Woods 98. But see Forest *v.* Union Pac. R. Co., 47 Fed. 1.

Return by person specially authorized.— The rule is the same in the case of a return by a person specially authorized. Downer *v.* Back, 25 Vt. 259.

Wrong date.— Evidence to show that the return bears a wrong date does not contradict the return. Welch *v.* Butler, 24 Ga. 445. *Contra,* White River Bank *v.* Downer, 29 Vt. 332.

Test of privity.— "It is said in some of the elementary treatises, that parties and privies are concluded by such return; but a careful consideration of the cases as well as the reason of the rule, will confine it to those whose privity is such as entitle them to have the return set aside, to maintain an action against the officer for a false return." Phillips *v.* Elwell, 14 Ohio St. 240, 244, 84 Am. Dec. 373.

16. Hunter *v.* Stoneburner, 92 Ill. 75.

Where process bears date after the sheriff's return of service, the return is no evidence of service, and defendant may show that he was never served. Keaton *v.* Moore, 59 Ga. 553.

Contradictory returns.— There was on file in a foreclosure proceeding the affidavit of one other than the sheriff that he had served the summons by leaving a copy thereof and a copy of the complaint at defendant's "usual abode in the city of Spokane" (Spokane being within the county where action was brought), as provided in Ballinger Annot. Codes & St. Wash. § 4875. There was also on file, under section 4877 (making a return of the sheriff that defendant cannot be found within the county *prima facie* evidence on which to base service by publication on the ground that he cannot be found within the state), a return of the sheriff that he was unable to make personal service, because defendant could not be found within the county, and that on information he believed him to be residing in New York, and it was held that, since the presumption of nonresidence raised by the return of the sheriff was not conclusive, the affidavit of service would not be overthrown thereby, and hence a decree and sale based on such verified service would not, under a direct attack, be disturbed on account of the return. Northwestern, etc., Hypotheek Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

17. Doty *v.* Deposit Bldg., etc., Assoc., 103 Ky. 710, 46 S. W. 219, 47 S. W. 433, 20 Ky. L. Rep. 625, 43 L. R. A. 551, 554; Ramsburg *v.* Kline, 96 Va. 465, 31 S. E. 608; Preston *v.* Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777; McClung *v.* McWhorter, 47 W. Va. 150, 34 S. E. 740, 81 Am. St. Rep. 785.

18. *Illinois.*— Bimeler *v.* Dawson, 5 Ill. 536, 39 Am. Dec. 430; Newman *v.* Greeley State Bank, 92 Ill. App. 638.

Iowa.— Webster *v.* Hunter, 50 Iowa 215.

Kansas.— Thorn *v.* Salmonson, 37 Kan. 441, 15 Pac. 588.

Massachusetts.— Trager *v.* Webster, 174 Mass. 580, 55 N. E. 506; Carleton *v.* Bickford, 13 Gray 591, 74 Am. Dec. 652.

Pennsylvania.— Price *v.* Schaeffer, 161 Pa. St. 530, 29 Atl. 279, 25 L. R. A. 699; Splane *v.* Splane, 29 Pa. Super. Ct. 185.

A judgment of a federal court is to be treated in the state courts as a domestic judgment; and the return of the marshal of personal service of a subpœna in chancery in the action in which the judgment is rendered is conclusive on the parties to the same extent as the return of a sheriff on a summons issued from a state court. Thomas *v.* Owen, 58 Kan. 73, 49 Pac. 73.

19. *Kansas.*— Schnack *v.* Boyd, 59 Kan. 275, 52 Pac. 874; Chambers *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 270; Bond *v.* Wilson, 8 Kan. 228, 12 Am. Rep. 466; Eastwood *v.* Carter, 9 Kan. App. 471, 61 Pac. 510.

dence.[20] In proper cases, however, it is perhaps true generally that relief may be had in equity upon a showing there made that the return is false;[21] but some fact other than the mere falsity of the return, such as fraud or mistake, must usually be shown in order that equity may assume jurisdiction.[22] The rule forbidding the contradiction of a sheriff's return does not apply to an affidavit of service made by a private person, and such affidavit is always open to attack,[23] but a judgment founded thereon should not be set aside without clear and convincing proof.[24] It may always be shown that a return which purports to be the sheriff's return is not his in fact.[25] Opposed to the common-law rule is the more liberal rule which permits the return to be impeached by affidavit or otherwise in a direct proceeding brought for that purpose, such as a motion to dismiss the action or to set aside the return or to vacate a judgment by default based thereon,[26] but the proof

Louisiana.— Baham *v.* Stewart, 109 La. 999, 34 So. 54.

Massachusetts.— Baker *v.* Baker, 125 Mass. 7.

Michigan.— Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833.

Missouri.— Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

Nebraska.— Walker *v.* Lutz, 14 Nebr. 274, 15 N. W. 352.

Pennsylvania.—Daly *v.* Iselin, 10 Pa. Dist. 193; McFeely *v.* Hohein, 25 Pa. Co. Ct. 497; Stouffer *v.* Beetem, 18 Pa. Co. Ct. 605.

Rhode Island.— Sheldon *v.* Comstock, 3 R. I. 84.

Vermont.— Johnson *v.* Murphy, 42 Vt. 645.

Washington.— Krutz *v.* Isaacs, 25 Wash. 566, 66 Pac. 141.

United States.— L. E. Waterman Co. *v.* Parker Pen Co., 100 Fed. 544; Johnson *v.* Richmond Beach Imp. Co., 63 Fed. 493.

See 40 Cent. Dig. tit. "Process," § 189.

Waiver of reading.—Where defendant waives the reading of an original notice, the sheriff's return will be sufficient evidence of such waiver. Gregory *v.* Harmon, 10 Iowa 445.

Statements as to residence or abode.— An officer's return that defendant has no residence or last or usual place of abode in the state must be taken to mean only that no such residence or last or usual place of abode is known to the officer and is conclusive only to that extent. Tilden *v.* Johnson, 6 Cush. (Mass.) 354. A recital in a sheriff's return of service as to the usual place of abode of defendant is not conclusive. Wendell *v.* Mugridge, 19 N. H. 109; Galusha *v.* Cobleigh, 13 N. H. 79; Johnson *v.* Richmond Beach Imp. Co., 63 Fed. 493.

20. Walker *v.* Stevens, 52 Nebr. 653, 72 N. W. 1038; Hagerman *v.* Empire Slate Co., 97 Pa. St. 534; Bragdon *v.* Perkins-Campbell Co., 19 Pa. Co. Ct. 305.

In an action against a company, the return of a sheriff on the summons that he had served it on one P, one of the partners and associates of the company, is *prima facie* evidence that P was such partner and associate. Wilson *v.* Spring Hill Quartz Min. Co., 10 Cal. 445.

21. Dunklin *v.* Wilson, 64 Ala. 162; Crafts *v.* Dexter, 8 Ala. 767, 42 Am. Dec. 666; Kochman *v.* O'Neill, 202 Ill. 110, 66 N. E. 1047; Owens *v.* Ranstead, 22 Ill. 161; Harper *v.* Mangel, 98 Ill. App. 526; Smooth *v.* Judd, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738; Patterson *v.* Yancey, 97 Mo. App. 681, 71 S. W. 845; Home Ins. Co. *v.* Webb, 106 Tenn. 191, 61 S. W. 79. See, generally, JUDGMENTS, 23 Cyc. 996.

22. Meyer *v.* Wilson, 166 Ind. 651, 76 N. E. 748; Doty *v.* Deposit Bldg., etc., Assoc., 103 Ky. 710, 46 S. W. 219, 47 S. W. 433, 20 Ky. L. Rep. 625, 43 L. R. A. 551, 554; Thomas *v.* Ireland, 88 Ky. 581, 11 S. W. 653, 11 Ky. L. Rep. 103; Knox County *v.* Harshman, 133 U. S. 152, 10 S. Ct. 257, 33 L. ed. 586; Walker *v.* Robbins, 14 How. (U. S.) 584, 14 L. ed. 552.

Collusion must be shown between plaintiff and officer in some states, whether relief is sought at law or in equity. Ramsburg *v.* Kline, 96 Va. 465, 31 S. E. 608; Preston *v.* Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777; McClung *v.* McWhorter, 47 W. Va. 150, 34 S. E. 740, 81 Am. St. Rep. 785.

23. Campbell *v.* Donovan, 111 Mich. 247, 69 N. W. 514; Detroit Free Press Co. *v.* Bagg, 78 Mich. 650, 44 N. W. 149; O'Connor *v.* Felix, 147 N. Y. 614, 42 N. E. 269; Peck *v.* Chambers, 44 W. Va. 270, 28 S. E. 706.

24. Smith *v.* Hickey, 25 N. Y. App. Div. 105, 49 N. Y. Suppl. 198; Dutton *v.* Smith, 23 N. Y. App. Div. 188, 50 N. Y. Suppl. 784; Marin *v.* Potter, 15 N. D. 284, 107 N. W. 970; Northwestern, etc., Hypotheek Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

25. McComb *v.* Council Bluffs Ins. Co., 83 Iowa 247, 48 N. W. 1038.

26. *Alabama.*— Paul *v.* Malone, 87 Ala. 544, 6 So. 351; Dunklin *v.* Wilson, 64 Ala. 162. But see Brown *v.* Turner, 11 Ala. 752; Crafts *v.* Dexter, 8 Ala. 767, 42 Am. Dec. 666.

Arizona.— National Metal Co. *v.* Greene Consol. Copper Co., 9 Ariz. 192, 80 Pac. 397, (1907) 89 Pac. 535, 9 L. R. A. N. S. 1062.

Colorado.— Great West. Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Du Bois *v.* Clark, 12 Colo. App. 220, 55 Pac. 750.

Connecticut.— Butts *v.* Francis, 4 Conn. 424.

Illinois.—Allegretti *v.* Stubbert, 126 Ill. App. 171. The strict rule of the common law as to the conclusiveness of the return of service on a summons or other process has been somewhat relaxed in this state, so that now

necessary to overthrow the return must be clear and unequivocal.[27] In Georgia the statute allows the return to be traversed and the truth of it tried in the court having jurisdiction of the cause, if the sheriff is made a party to the traverse.[28]

such a return may be contradicted, not for the purpose of defeating the jurisdiction, but in order to excuse a default. Cooke *v.* Haungs, 113 Ill. App. 501. See also Callender *v.* Gates, 45 Ill. App. 374. The strict common-law rule is asserted in Hunter *v.* Stoneburner, 92 Ill. 75; Fitzgerald *v.* Kimball, 86 Ill. 396; McAnaney *v.* Quigley, 105 Ill. App. 611.

Iowa.— Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340.

Kentucky.— Barbour *v.* Newkirk, 83 Ky. 529. Under the statute a showing of fraud or mistake must be made in order to question the truth of the return. Utter *v.* Smith, 80 S. W. 447, 25 Ky. L. Rep. 2272. See also Claryville, etc., Turnpike Co. *v.* Com., 107 S. W. 327, 32 Ky. L. Rep. 861, 1157.

Maryland.— Stigers *v.* Brent, 50 Md. 214, 33 Am. Dec. 317; Windwart *v.* Allen, 13 Md. 196.

Michigan.— Lane *v.* Jones, 94 Mich. 540, 54 N. W. 283; Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833.

Minnesota.— Osman *v.* Wisted, 78 Minn. 295, 80 N. W. 1127; Crosby *v.* Farmer, 39 Minn. 305, 40 N. W. 71, distinguishing and overruling previous cases.

Nebraska.— Goble *v.* Brenneman, 75 Nebr. 309, 106 N. W. 440, 121 Am. St. Rep. 813; Graves *v.* Macfarland, 58 Nebr. 802, 79 N. W. 707; Campbell Printing Press, etc., Co. *v.* Marder, 50 Nebr. 283, 69 N. W. 774, 61 Am. St. Rep. 573; Baldwin *v.* Burt, 2 Nebr. (Unoff.) 377, 383, 96 N. W. 401.

New Jersey.— Chapman *v.* Cumming, 17 N. J. L. 11.

New York.— Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Buswell *v.* Lincks, 8 Daly 518; Pfotenhauer *v.* Brooker, 52 Misc. 649, 101 N. Y. Suppl. 762; Boynton *v.* Keeseville Electric Light, etc., Co., 5 Misc. 118, 25 N. Y. Suppl. 741 [*affirmed* in 78 Hun 609, 28 N. Y. Suppl. 1117]; Van Rensselaer *v.* Chadwick, 7 How. Pr. 297. An officer's return of service of summons is conclusive, unless traversed. Mayerson *v.* Cohen, 123 N. Y. App. Div. 646, 108 N. Y. Suppl. 59.

North Carolina.— Godwin *v.* Monds, 106 N. C. 448, 10 S. E. 1044.

Ohio.— Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768; Parker *v.* Van Dorn Iron Works, 23 Ohio Cir. Ct. 444.

South Carolina.— Genobles *v.* West, 23 S. C. 154.

Texas.— Kempner *v.* Jordan, 7 Tex. Civ. App. 275, 26 S. W. 870.

Washington.— Northwestern, etc., Hypotheek Bank *v.* Ridpath, 29 Wash. 687, 70 Pac. 139.

Wisconsin.— Carr *v.* Commercial Bank, 16 Wis. 50.

Where process is returned as served on two defendants, evidence that it was never served on one of defendants is admissible to show the falsity of the return as a whole. Buck *v.* Hawley, 129 Iowa 406, 105 N. W. 688.

27. *Illinois.*—Allegretti *v.* Stubbert, 126 Ill. App. 171; Callender *v.* Gates, 45 Ill. App. 374.

Maryland.— Taylor *v.* Welslager, 90 Md. 409, 45 Atl. 476; Abell *v.* Simon, 49 Md. 318.

Minnesota.— Osman *v.* Wisted, 78 Minn. 295, 80 N. W. 1127; Vaule *v.* Miller, 69 Minn. 440, 72 N. W. 452; Jensen *v.* Crevier, 33 Minn. 372, 23 N. W. 541.

Nebraska.— Connell *v.* Galligher, 36 Nebr. 749, 55 N. W. 229; Wilson *v.* Shipman, 34 Nebr. 573, 52 N. W. 576, 33 Am. St. Rep. 660. There is a strong presumption that the return of an officer to a writ served by him is true, but the same may be impeached in a collateral proceeding by convincing evidence. Unangst *v.* Southwick, (1907) 113 N. W. 989.

New York.— Mace *v.* Mace, 24 N. Y. App. Div. 291, 48 N. Y. Suppl. 831; Jacobs *v.* Zeltner, 9 Misc. 455, 30 N. Y. Suppl. 238. See also Pfotenhauer *v.* Brooker, 52 Misc. 649, 101 N. Y. Suppl. 762; Mann *v.* Meryash, 107 N. Y. Suppl. 599; Halpern *v.* Sherman, 107 N. Y. Suppl. 20; Sills *v.* Machson, 104 N. Y. Suppl. 770; Hogan *v.* Gault, 104 N. Y. Suppl. 410; Reich *v.* Cochran, 102 N. Y. Suppl. 827.

Texas.— Wood *v.* Galveston, 76 Tex. 126, 13 S. W. 227; Gatlin *v.* Dibrell, 74 Tex. 36, 11 S. W. 908; Harrell *v.* Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863.

Wisconsin.— Illinois Steel Co. *v.* Dettlaff, 116 Wis. 319, 93 N. W. 14.

See 40 Cent. Dig. tit. "Process," § 204.

For example the return of an officer that he served the notice of action on a married woman by leaving a copy at the residence of and with her husband, that being her usual place of residence, is not overcome by the testimony of a witness, given seventeen years thereafter, on his unaided recollection, that her husband was not then at the place where he and his family usually resided, but at the house of a neighbor. Galvin *v* Dailey, 109 Iowa 332, 80 N. W. 420. When service is made by a deputy sheriff and return signed by the sheriff, affidavit of defendant that the paper delivered to him as a copy of the original notice was the one made an exhibit, which did not show that the original notice was signed by plaintiff or his attorney, as it was in fact, is sufficient to overcome a recital in the return that a true copy of the original notice was delivered to defendant. Hoitt *v.* Skinner, 99 Iowa 360, 68 N. W. 788.

28. Parker *v.* Medlock, 117 Ga. 813, 45 S. E. 61; Kahn *v.* Southern Bldg., etc., Assoc., 115 Ga. 459, 41 S. E. 648; Southern R. Co. *v.* Cook, 106 Ga. 450, 32 S. E. 585; Evans *v.* Smith, 101 Ga. 86, 28 S. E. 617; Sanford *v.* Bates, 99 Ga. 145, 25 S. E. 35; Parker *v.* Rosenheim, 97 Ga. 769, 25 S. E. 763; Cheshire *v.* Milburn Wagon Co., 89

On collateral attack, however, the rule is general that, in the absence of fraud, the return cannot be impeached, since it is part of the record and as such imports absolute verity until set aside.[29]

(II) *Conclusiveness of Return as to Officer Making It.* The return is conclusive against the officer making it, when questioned collaterally,[30] at least when the party against whom it is sought to be impeached derives some interest from or under it,[31] but it is not conclusive in the officer's favor.[32] The officer may, however, show by parol evidence facts in regard to the execution of the writ which are not inconsistent therewith.[33]

(III) *Conclusiveness of Return as to Strangers to the Record.* Strangers to the record are not concluded by the sheriff's return, and as against them statements therein are *prima facie* evidence only, subject to be disproved by any competent evidence.[34]

IV. Defects, Objections, and Amendments.

A. Defects and Objections — 1. In General.[35] As to what defects are fatal and what are mere irregularities, no general rule can be stated. It is said

Ga. 249, 15 S. E. 311; Stone *v.* Richardson, 76 Ga. 97; Elder *v.* Cozart, 59 Ga. 199; Robertson *v.* Pharr, 58 Ga. 605; Davant *v.* Carlton, 57 Ga. 489; Lamb *v.* Dozier, 55 Ga. 677; Maund *v.* Keating, 55 Ga. 396; Griffith *v.* Shipp, 49 Ga. 231; Dasher *v.* Dasher, 47 Ga. 320. There is no error in striking a traverse of an officer's return of service, where the officer is neither made a party nor given notice of the filing of the traverse. O'Connell *v.* Friedman, 118 Ga. 831, 45 S. E. 668. Where a summons of garnishment was issued against a corporation, and the officer made two returns of service, and these returns showed service on a different corporation, and the officer was allowed to amend one of the returns so as to make it show service on the corporation intended to be served, and the return, as amended, was traversed, the original returns were admissible in evidence, and it was error to exclude them from the jury. News Printing Co. *v.* Brunswick Pub. Co., 113 Ga. 233, 38 S. E. 853. Return of service by a United States marshal should be treated, in the state courts, as being equally conclusive with a return by a sheriff. Sindall *v.* Thacker, 56 Ga. 51.

The evidence offered to contradict the return must be clear and satisfactory. Davant *v.* Carlton, 53 Ga. 491; Dozier *v.* Lamb, 52 Ga. 646.

Where an affidavit of illegality was filed, the mere filing of the traverse to the entry of service by the sheriff, and service of a copy of the same on the sheriff by a private individual, did not make the sheriff a party thereto. Parker *v.* Medlock, 117 Ga. 813, 45 S. E. 61.

29. *Arkansas.*— Rose *v.* Ford, 2 Ark. 26.
California.— Egery *v.* Buchanan, 5 Cal. 53.
Illinois.— Rivard *v.* Gardner, 39 Ill. 125; Harrison *v.* Hart, 21 Ill. App. 348.
Indiana.— Johnson *v.* Patterson, 59 Ind. 237; Gillespie *v.* Splahn, Wils. 228; Tyler *v.* Davis, 37 Ind. App. 557, 75 N. E. 3.
Kentucky.— Thomas *v.* Ireland, 88 Ky. 581, 11 S. W. 653, 21 Am. St. Rep. 356.
Michigan.— Johnson *v.* Mead, 73 Mich. 326, 41 N. W. 487; Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833.
Missouri.— Decker *v.* Armstrong, 87 Mo. 316; Reeves *v.* Reeves, 33 Mo. 28.
New Jersey.— Castner *v.* Styer, 23 N. J. L. 236.
New York.— Sargeant *v.* Mead, 1 N. Y. Suppl. 589; Black *v.* Black, 4 Bradf. Surr. 174.
North Carolina.— Edwards *v.* Tipton, 77 N. C. 222.
Ohio.— Mueller *v.* Bates, 2 Disn. 318; Thompson *v.* C., etc., R. Co., 9 Ohio Dec. (Reprint) 209, 11 Cinc. L. Bul. 211.
Rhode Island.— Estes *v.* Cooke, 12 R. I. 6; Angell *v.* Bowler, 3 R. I. 77.
United States.— Rickards *v.* Ladd, 20 Fed. Cas. No. 11,804, 6 Sawy. 40, 8 Reporter 518, 20 Alb. L. J. 335.
See 40 Cent. Dig. tit. "Process," § 193.

30. Simmons *v.* Bradford, 15 Mass. 82; Duncan *v.* Gerdine, 59 Miss. 550; Barrett *v.* Copeland, 18 Vt. 67, 44 Am. Dec. 362; Henry *v.* Stone, 2 Rand. (Va.) 455.

31. Baker *v.* McDuffie, 23 Wend. (N. Y.) 289.

32. McGough *v.* Wellington, 6 Allen (Mass.) 505; Duckworth *v.* Millsaps, 7 Sm. & M. (Miss.) 308; Barrett *v.* Copeland, 18 Vt. 67, 44 Am. Dec. 362.

33. Evans *v.* Davis, 3 B. Mon. (Ky.) 344.

34. *Maine.*— Kendall *v.* White, 13 Me. 245.
Ohio.— Phillips *v.* Elwell, 14 Ohio St. 240, 84 Am. Dec. 373.
Vermont.— Witherell *v.* Goss, 26 Vt. 748.
West Virginia.— Bowyer *v.* Knapp, 15 W. Va. 277.
United States.— Rigney *v.* De Graw, 100 Fed. 213.
See 40 Cent. Dig. tit. "Process," § 192.

35. **Action for wrongful attachment** as affected by irregular or void process see Attachment, 4 Cyc. 831.
Incorporation of return in record as essential to review see Appeal and Error, 3 Cyc. 157.
Presenting objections on appeal for first time see Appeal and Error, 2 Cyc. 688.

that only those which affect the jurisdiction will render the writ void;[36] but this determines little, for the question still arises, what defects affect the jurisdiction. The matter seems to be largely one of precedent rather than principle. But this particular inquiry belongs rather to the subject of judgments, and will be found treated at large under that title.[37] Defects in an original but unexecuted summons are not available against an alias.[38] Where process is returned not served as to one of several defendants, the action abates as to him.[39]

2. Persons Entitled to Object. As a general rule a defendant is not entitled to urge defects in the service upon his co-defendants.[40] A party may be permitted to quash his own writ and thereby work a discontinuance of the action.[41] At common-law, however, one defendant in an action upon a joint contract might plead in abatement a want of service upon a co-defendant,[42] but this rule does not apply where by statute plaintiff is permitted to proceed against defendants who have been served,[43] or judgment is authorized to be entered against all.[44] Where two or more persons are sued on a joint contract they may plead in abatement a defect of service as to one only.[45]

3. Grounds For Quashing or Abating Writ. The grounds upon which writs may be quashed or abated are numerous, and include most defects and irregularities in the writ or service which are not so trivial that they will be disregarded,[46]

Urging defects on trial de novo on appeal from justice of the peace see Justices of the Peace, 24 Cyc. 726.

Vacating judgment because of mistake as to process see Judgments, 23 Cyc. 933.

Waiver of defects by appeal see Justices of the Peace, 24 Cyc. 694.

Waiver of defects in process of justice of the peace see Justices of the Peace, 24 Cyc. 531.

36. See Judgments, 23 Cyc. 914.

37. **Collateral attack on judgment** see Judgments, 23 Cyc. 1075.

Equitable relief against judgment see Judgments, 23 Cyc. 994.

Vacating judgment see Judgments, 23 Cyc. 914.

38. Goodlett *v.* Hansell, 56 Ala. 346.

Where a correct alias capias has been served, an error in the original writ which was not served is not a ground for abatement. Scull *v.* Kuykendall, 21 Fed. Cas. No. 12,570b, Hempst. 9.

39. Hall *v.* State, 39 Ind. 301; Glidewell *v.* McGaughey, 2 Blackf. (Ind.) 359.

40. *California.*— Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712.

Illinois.— Gottschalk *v.* Noyes, 225 Ill. 94, 80 N. E. 72. But see Colwell *v.* Culbertson, 126 Ill. App. 294, holding that one who has a direct interest in land sought to be foreclosed might attack a service had upon minor co-defendants.

Indiana.— See Hiatt *v.* Darlington, 152 Ind. 570, 53 N. E. 825.

Maine.— Bonzey *v.* Redman, 40 Me. 336.

Massachusetts.— Thayer *v.* Ray, 17 Pick. 166.

New Hampshire.— Ingraham *v.* Olcock, 14 N. H. 243.

Tennessee.— Campbell *v.* Hampton, 11 Lea 440; State Bank *v.* Anderson, 3 Sneed 669.

Vermont.— Comins *v.* Jones, 54 Vt. 560.

Right to assert error as to co-party not served with process see Appeal and Error, 3 Cyc. 240 note 25.

41. Womsley *v.* Cummins, 1 Ark. 125.

42. Draper *v.* Moriarty, 45 Conn. 476; Curtis *v.* Baldwin, 42 N. H. 398.

43. Boots *v.* Boots, 84 Ind. 171. See also Richards *v.* McNemee, 87 Mo. App. 396.

44. Harker *v.* Brink, 24 N. J. L. 333.

45. Butts *v.* Francis, 4 Conn. 424.

46. Renner *v.* Reed, 3 Ark. 339; Wood *v.* Ross, 11 Mass. 271; Cooke *v.* Gibbs, 3 Mass. 193; Tilton *v.* Parker, 4 N. H. 142 (holding that the court may quash a writ on motion for defective service, or put defendant to plead the matter in abatement); Crawford *v.* Stewart, 38 Pa. St. 34. See Carlisle *v.* Cowan, 85 Tenn. 165, 2 S. W. 26, holding that where an attachment has been sued out on a false return implying that defendant was a resident of the county, under Tenn. Code, § 2812, providing that, "if action be brought in the wrong county, it may be prosecuted to a termination, unless abated by plea of the defendant," a plea in abatement is the proper method to secure the quashing of the writ.

A mere irregularity in the service, respecting a matter which is not necessary to confer jurisdiction, is not a ground for abatement. Jones *v.* Nelson, 51 Ala. 471; Cotton *v.* Huey, 4 Ala. 56; Maverick *v.* Duffee, 1 Ala. 433.

In Florida it is held that the writ will not be quashed because of defective service; the proper motion is to set aside or quash the service or return. Silver Springs, etc., R. Co. *v.* Van Ness, 45 Fla. 559, 34 So. 884; Tidwell *v.* Witherspoon, 18 Fla. 282.

Former adjudication.— It is no ground for quashing a writ or setting aside service thereof that there has been a former adjudication of the same cause of action. Bruner *v.* Finley, 211 Pa. St. 74, 60 Atl. 488; Ford *v.* Calhoun, 53 S. C. 106, 30 S. E. 830.

Objections to the merits of plaintiff's cause of action cannot be considered in support of a motion to quash the summons and the serv-

although defects in the return which do not show insufficient service but merely fail to state enough facts to show a good service will not affect the summons itself.[47] Thus it is ground for abating or quashing a writ that it was not served the number of days before the return-day required by law;[48] that it issued in the wrong county;[49] that the writ issued prematurely;[50] that the writ issued without affidavits required by statute;[51] that the return-day was altered without authority after issuance;[52] that service was obtained by fraud;[53] that the writ issued without a proper seal;[54] that it was not signed by the clerk of the court from which it issued;[55] that it does not show the day, month, and year when the same was signed;[56] that defendant is not designated with sufficient accuracy;[57] that the writ contains no return-day;[58] that it is returnable on a day or to a court not authorized by law;[59] that it is directed to an officer who is disqualified from serving it;[60] that it was served by a disqualified or unauthorized person;[61] the want of a suitable indorsement on a writ, under

ice thereof. Embree *v.* McLennan, 18 Wash. 651, 52 Pac. 241.

A question of jurisdiction of the subject of the suit cannot be raised on a motion to set aside the service of summons, but it should be raised by demurrer or answer. Mabon *v.* Ongley Electric Co., 24 N. Y. App. Div. 50, 48 N. Y. Suppl. 973.

More appropriate remedy.— A rule of court authorizing only certain persons to use blank writs will not make abatable a writ filled up by an unauthorized person, where plaintiff is not at fault, the rule being more appropriately enforceable against the person who violates it. Kinne *v.* Hinman, 58 N. H. 363.

Quashing writ of account render see ACCOUNTS AND ACCOUNTING, 1 Cyc. 405 note 61.

47. Hopkins *v.* Baltimore, etc., R. Co., 42 W. Va. 535, 26 S. E. 187.

In Florida it has been held that no defect either in the return or the service is ground for quashing the writ. Engelke, etc., Milling Co. *v.* Grunthal, 46 Fla. 349, 35 So. 17.

48. *Connecticut.*— Payne *v.* Bacon, 1 Root 109.

Georgia.— Hood *v.* Powers, 57 Ga. 244.

Massachusetts.— Bullard *v.* Nantucket Bank, 5 Mass. 99.

Nebraska.— Ley *v.* Pilger, 59 Nebr. 561, 81 N. W. 507.

New Jersey.— Paul *v.* Bird, 25 N. J. L. 559; Pedreck *v.* Shaw, 2 N. J. L. 57.

Vermont.— Butler *v.* Lowry, 3 Vt. 14; Guilford Overseers of Poor *v.* Jamaica Overseers of Poor, 2 D. Chipm. 104.

49. McCulloch *v.* Ellis, 28 Ill. App. 439; Hawkes *v.* Kennebeck County, 7 Mass. 461.

50. Hust *v.* Conn, 12 Ind. 257; Gearhart *v.* Olmstead, 7 Dana (Ky.) 441.

51. Posey *v.* McCubbins, 5 Yerg. (Tenn.) 235.

52. Denison *v.* Crafts, 74 Conn. 38, 49 Atl. 851.

53. Van Horn *v.* Great Western Mfg. Co., 37 Kan. 523, 15 Pac. 562.

54. *Georgia.*— Lowe *v.* Morris, 13 Ga. 147.

Illinois.— Anglin *v.* Nott, 2 Ill. 395; Easton *v.* Altum, 2 Ill. 250; Hannum *v.* Thompson, 2 Ill. 238.

Maine.— Tibbetts *v.* Shaw, 19 Me. 204; Bailey *v.* Smith, 12 Me. 196.

Massachusetts.— Hall *v.* Jones, 9 Pick. 446.

Mississippi.— Pharis *v.* Conner, 3 Sm. & M. 87.

Ohio.— Boal *v.* King, 6 Ohio 11.

55. Powers *v.* Swigart, 8 Ark. 363.

56. Pollard *v.* Wilder, 17 Vt. 48.

57. Zuill *v.* Bradley, Quincy (Mass.) 6.

58. Pattee *v.* Lowe, 35 Me. 121.

A writ purporting to bear date Oct. 23, 1863, returnable in July next, issued between June 20 and 25, 1863, is likely to delude defendant by the confusion of dates and should therefore be quashed. Gorman *v.* Steed, 1 W. Va. 1.

59. Rattan *v.* Stone, 4 Ill. 540; Hooper *v.* Jellison, 22 Pick. (Mass.) 250; Dearborn *v.* Twist, 6 N. H. 44; Williamson *v.* McCormick, 126 Pa. St. 274, 17 Atl. 591. Where a writ was made returnable to the next term generally, instead of the first day of the term, as the statute required, but was nevertheless executed before the term, and returned the first day, a motion to quash the writ was properly denied. Hare *v.* Niblo, 4 Leigh (Va.) 359.

60. Hansford *v.* Tate, 61 W. Va. 207, 56 S. E. 372.

If a writ be directed to an officer who may and does serve it, it is no cause of abatement that it was not directed to another officer who might have served it, although the direction be not strictly conformable to the statutory provisions. Cooper *v.* Ingalls, 5 Vt. 508.

61. *Iowa.*— Beard *v.* Smith, 9 Iowa 50.

Kansas.— Pelham *v.* Edwards, 45 Kan. 547, 26 Pac. 41.

Massachusetts.— Brewer *v.* New Gloucester, 14 Mass. 216.

New York.— Winterroth *v.* Umschlag, 68 N. Y. App. Div. 324, 74 N. Y. Suppl. 124.

Vermont.— Howard *v.* Walker, 39 Vt. 163; Bliss *v.* Connecticut, etc., R. Co., 24 Vt. 428; Dolbear *v.* Hancock, 19 Vt. 388; Dunmore Mfg. Co. *v.* Rockwell, Brayt. 18.

A writ will not abate because the service was made by the son-in-law of plaintiff, under a special direction given him by the authority issuing the writ. Miller *v.* Hayes, Brayt. (Vt.) 21. Where no possible injury can be shown from the fact that service of process was made by a deputized person, the authority to whom omitted to mention particularly all such known officers as might

the requirement of a statute; [62] that no authority is indorsed on the writ for the indifferent person who made service to serve the same; [63] that the writ contains no declaration when such pleading is a necessary part of it; [64] that names are inserted in the writ which are not authorized by the statute; [65] that the writ has no teste,[66] or bears teste on Sunday,[67] or bears the teste of an unauthorized person; [68] that it fails to state the amount of damages demanded; [69] that the writ was filled out on a blank previously used and entered in another action,[70] or was altered after having been filled out for use in another action; [71] that it was served upon a defendant while privileged from service; [72] that it does not have the style required by law; [73] that there is a misnomer of plaintiff [74] or defendant; [75] that it does not designate with certainty the day upon which defendant is commanded to appear; [76] that the summons was issued upon a petition not verified as required by statute; [77] that the place of holding court is not designated; [78] that a supplemental summons was served without leave of court; [79] that in case of an alias writ there had been a discontinuance prior to its issuance; [80] that the cause of action is not indorsed upon the writ; [81] or that there is a variance between the declaration and the writ.[82] But there are some defects in the writ which do not invalidate the process but produce other incidental results. Thus if the sheriff is not bound to serve a writ for a non-resident plaintiff unless security for costs is indorsed upon it, service made without such indorsement is nevertheless good.[83] A mere technical variance

legally serve it, the court would not quash it. Bell *v.* Chipman, 2 Tyler (Vt.) 423.

62. Haverhill Ins. Co. *v.* Prescott, 38 N. H. 398.

63. Washburn *v.* Hammond, 25 Vt. 648.

64. Rathbone *v.* Rathbone, 5 Pick. (Mass.) 221; Brigham *v.* Este, 2 Pick. (Mass.) 420. The writ and process, to which alone the power of quashing is applicable, may be quashed for defects therein, but not for defects in the declaration. Bean *v.* Green, 4 Cush. (Mass.) 279.

65. Hartley *v.* Tunstall, 3 Ark. 119.

66. Ripley *v.* Warren, 2 Pick. (Mass.) 592; Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352.

67. Haines *v.* McCormick, 5 Ark. 663.

68. Reynolds *v.* Damrell, 19 N. H. 394; Buchannan *v.* Kennon, 1 N. C. 530.

69. Putney *v.* Cram, 5 N. H. 174.

70. Lyford *v.* Bryant, 38 N. H. 88.

71. Eastman *v.* Morrison, 46 N. H. 136.

72. King *v.* Coit, 4 Day (Conn.) 129; Halsey *v.* Stewart, 4 N. J. L. 366. *Compare* Greer *v.* Young, 120 Ill. 184, 11 N. E. 167; Lewis *v.* Schwinn, 71 Ill. App. 265. *Contra,* Wilkins *v.* Brock, 79 Vt. 57, 64 Atl. 232; Booraem *v.* Wheeler, 12 Vt. 311.

73. Hoy *v.* Brown, 16 N. J. L. 157. Where the constitution provides that "writs shall run in the name of the state of West Virginia," a writ running in the name of the commonwealth of West Virginia should be quashed. Gorman *v.* Stead, 1 W. Va. 1.

74. Bull *v.* Traynham, 3 Rich. (S. C.) 433. But *compare* Kincaid *v.* Howe, 10 Mass. 203, holding that an objection to written evidence of a debt due to plaintiff in his proper name is the only proper remedy.

75. Skelton *v.* Sackett, 91 Mo. 377, 3 S. W. 874. See Miller *v.* Stettiner, 7 Bosw. (N. Y.) 692, holding that a plea in abatement and not a motion was the proper practice in such a case. But see Lederer Amusement Co. *v.* Pollard, 71 N. Y. App. Div. 35, 36, 75 N. Y. Suppl. 619, where it is said: "If, upon a motion to set aside the service on the ground that a mistake has been made, the plaintiff by opposing it claims that the person served was the one desired in the action, then, whether the service was under the wrong name or not, it is the duty of the court as was here done, to deny the motion."

Names unknown.— The fact that defendants are designated in the summons by supposed names, their real names being unknown, affords no ground for quashing the writ. Davis *v.* Jennings, 78 Nebr. 462, 111 N. W. 128.

76. Wright *v.* Wilmot, 22 Tex. 398.

77. Kerns *v.* Roberts, 2 Ohio Dec. (Reprint) 537, 3 West. L. Month. 604.

78. Wragg *v.* Mobile Branch Bank, 8 Port. (Ala.) 195.

A summons failing to name the county in which plaintiff desires trial need not be absolutely set aside. Wallace *v.* Dimmick, 24 Hun (N. Y.) 635.

79. Boyle, etc., Co. *v.* Fox, 72 N. Y. App. Div. 617, 76 N. Y. Suppl. 102.

80. Parsons *v.* Hill, 25 App. Cas. (D. C.) 532.

81. Johnson *v.* Perry, 4 Stew. & P. (Ala.) 45.

82. Roberts *v.* Beeson, 4 Port. (Ala.) 164; Schenck *v.* Schenck, 10 N. J. L. 274. But see Stapp *v.* Thomason, 2 Litt. (Ky.) 214, holding that a variance between the original petition and the copy served is not a ground for a plea in abatement, but should be urged by motion to quash the return.

Variance as to amount of damages.— A motion to quash will not be sustained where the only defect complained of is a variance between the amount of damages stated in the summons and that stated in the complaint. Rich *v.* Collins, 12 Colo. App. 511, 56 Pac. 207.

83. Johnson *v.* Ralph, Tapp. (Ohio) 133.

between the summons and the pleading as to the title of the court will not be sufficient to set aside the summons.[84] If the only defect in the writ is that it commands appearance, in a less time than is allowed by law, the writ will not be held bad, but defendant will be granted such an extension of time as he is entitled to.[85] And an obvious clerical error as to the date of filing the petition will not be ground for setting aside the summons.[86] If a capias issues in a case where only a summons is authorized, the writ is not to be dismissed, but defendant is entitled to be discharged from custody without giving bail;[87] and a writ improperly issued as an attachment against the body of the defendant, but which is not served by attaching his body, is not abatable.[88] There are statutes in many states declaring that all defects and errors in the process or proceedings shall be disregarded unless they affect the substantial rights of the parties.[89] And some statutes provide that no summons or the service thereof shall be set aside where there is sufficient substance about either to inform defendant that there is an action brought against him in court.[90] Under some statutes insufficiency of service of process upon a part of defendants is not ground for abatement, but the cause will be continued for proper service.[91]

4. Grounds For Quashing or Setting Aside Service or Return. The grounds upon which a motion to quash or set aside the service or return is proper are much the same as for a motion to quash the writ. Thus the motion may be made on the ground that service was fraudulently procured;[92] that defendant was brought into the jurisdiction on criminal process;[93] that service was made upon a person privileged from service,[94] or upon a non-resident;[95] that service has been made upon the wrong person;[96] that there was a failure to serve a copy of the complaint

84. Hughes *v.* Osborn, 42 Ind. 450.

85. Guion *v.* Melvin, 69 N. C. 242; Jones *v.* Stokes, 3 N. C. 25; Anonymous, 2 N. C. 286; Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361. See, however, Foster *v.* Markland, 37 Kan. 32, 14 Pac. 452, where it is held that service may be set aside.

86. Western Union Tel. Co. *v.* Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367.

87. Rittenour *v.* McCausland, 5 Blackf. (Ind.) 540. *Contra*, Barnard *v.* Field, 1 Dall. (Pa.) 348, 1 L. ed. 170.

88. Bowman *v.* Stowell, 21 Vt. 309.

89. Loring *v.* Binney, 38 Hun (N. Y.) 152; Higley *v.* Pollock, 21 Nev. 198, 27 Pac. 895.

90. Ross *v.* Glass, 70 Ind. 391.

91. Indiana Nitroglycerin, etc., Co. *v.* Lippincott Glass Co., (Ind. App. 1904) 72 N. E. 183, holding that it is not ground for abatement of an action against a corporation that it is brought in a county where the corporation has no office or agent, and that it was not bound by the service made therein on an alleged agent where it is sued jointly with a co-defendant properly suable in such county, the insufficiency of the service being ground only for continuance for proper service.

92. Van Horn *v.* Great Western Mfg. Co., 37 Kan. 523, 15 Pac. 562; Allen *v.* Wharton, 13 N. Y. Suppl. 38; Mason *v.* Libbey, 1 Abb. N. Cas. (N. Y.) 354; Harbison-Walker Refractories Co. *v.* Fredericks, 28 Pa. Co. Ct. 95; Addicks *v.* Bush, 1 Phila. (Pa.) 19; Saveland *v.* Connors, 121 Wis. 28, 98 N. W. 933; Gilbert *v.* Burg, 91 Wis. 358, 64 N. W. 996.

93. Byler *v.* Jones, 79 Mo. 261.

94. *New York.*—Seaver *v.* Robinson, 3 Duer 622.

Ohio.— Whitman *v.* Sheets, 20 Ohio Cir. Ct. 1, 11 Ohio Cir. Dec. 179.

Pennsylvania.— Melaney *v.* Atkins, 4 Pa. Dist. 644; Partridge *v.* Powell, 4 Pa. Dist. 119; Sener *v.* McCormick, 13 Pa. Co. Ct. 352.

Tennessee.— Baker *v.* Compton, 2 Head 471.

United States.— Hale *v.* Wharton, 73 Fed. 739; Matthews *v.* Puffer, 10 Fed. 606, 20 Blatchf. 233.

Service of process on a non-resident who is exempt from service by reason of being in the state for the purpose of attending a litigation is not void, but voidable, and his remedy is by special appearance and motion to set aside the return of service, and not by motion to dismiss the action. Cooper *v.* Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731.

Witness.— Where service is made on a resident of the state while voluntarily attending as a witness, the court may set it aside or grant other appropriate relief, although such service is not a nullity. Massey *v.* Colville, 45 N. J. L. 119, 46 Am. Rep. 754.

Who may assert privilege.— A claim for exemption from service of civil process by reason of being engaged as a militiaman could only be made by the person so served, and the return of service would not be stricken off, on application by the sheriff, on the ground of privilege. Land Title, etc., Co. *v.* Crump, 16 Pa. Co. Ct. 593.

95. National Typographic Co. *v.* New York Typographic Co., 44 Fed. 711.

96. See cases cited *infra*, this note.

with the summons; [97] that the copy of the summons was left at the wrong place; [98] that service was made by an unauthorized officer; [99] that service was made in the wrong county; [1] that the name of plaintiff's attorney was not indorsed on the summons; [2] that a return of not found is false; [3] that the summons requires defendant to answer a complaint "which has been filed in the office of the clerk," when none has in fact been filed; [4] that the copy served was not attested; [5] that defendant was dead at the time of the alleged service; [6] that the return is ambiguous; [7] that the person upon whom service was made was not an agent of defendant corporation; [8] or that the summons was not served in time.[9] After a defective writ has been amended by leave of court, the original service cannot be set aside because the copy served did not conform to the writ as amended.[10] When the entry of a writ is required to be made in the sheriff's book, failure to make it is no ground for setting aside the service, as such entry is merely evidence of the delivery of the process to the sheriff.[11] The lack of an indorsement of the cause of action on a summons which is required, not by statute, but only by rule of court, is not ground for setting aside the service; [12] and a mere irregularity consisting of the failure of the summons to state the street number of plaintiff's attorney is not ground for setting aside the service.[13] Service will not be set aside because of a mistake in returning the writ to the wrong clerk's office.[14] Some cases hold that, in order to successfully object on the ground of the insufficiency of personal service, defendant must show that the writ did not in fact come into his possession and was not brought to his knowledge.[15] A motion to set aside the service of process is not

A defendant is not obliged to seek relief by motion where process is improperly served on him, although he may do so, as he is entitled to set up by answer that he is not indebted to plaintiff; not being the person against whom plaintiff's alleged claim exists. Barney *v.* Northern Pac. R. Co., 56 How. Pr. (N. Y.) 23. See also Hinton *v.* Stevens, 1 Harr. & W. 521. In Griffin *v.* Gray, 5 Dowl. P. C. 331, 2 Gale 201, it was held that where a summons issued against Thomas Gray was served upon William Gray, the latter must show at the trial that he is not the party sought to be served.

In England.— Where a writ has been served on the wrong person, and service is possible on the right person, leave will not be given under Order LXX, rule 1, to amend the irregularity, but the faulty service will be discharged with costs upon the application of the person intended to be served. Nelson *v.* Pastorino, 49 L. T. Rep. N. S. 564.

97. Houlton *v.* Gallow, 55 Minn. 443, 57 N. W. 141.

Showing.—Where defendant moved to quash return on the summons, presenting an affidavit stating that no copy of the complaint had been served with it, and the sheriff's return stated that he had served a certified copy with the summons, and it appeared that what purported to be a copy of the complaint was served with the summons, and defendant refused to present the same to the court as directed by it, it was held that the court properly refused to quash the return of the summons. Forsman *v.* Bright, 8 Ida. 467, 69 Pac. 473.

98. Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768.

99. Oliphant *v.* Dallas, 15 Tex. 138, 65 Am. Dec. 146.

1. McCullock *v.* Ellis, 28 Ill. App. 439.

2. Hutchens *v.* Latimer, 5 Ind. 67; Lee *v.* Clark, 53 Minn. 315, 55 N. W. 127, no such indorsement on copy of summons.

3. Thompson *v.* Morris, 2 B. Mon. (Ky.) 35. Where a sheriff returns the writ not found as to one of two defendants, who was a non-resident of the state, before the return-day, and afterward such defendant, two days before the return-day, presents himself to the sheriff and demands service on himself, the court, on motion of such defendant, will not quash the return of not found, but may permit the sheriff to return the fact that defendant was not an inhabitant of his county. Smith *v.* Alexander, 6 B. Mon. (Ky.) 584.

4. Millette *v.* Melmke, 26 Minn. 306, 3 N. W. 700.

5. Bank *v.* Perdriaux, Brightly (Pa.) 67.

6. Hunt *v.* Economical Mut. Ben. Assoc., 17 Wkly. Notes Cas. (Pa.) 423.

7. Regent Realty Co. *v.* Armour Packing Co., 112 Mo. App. 271, 86 S. W. 880.

8. Cincinnati Times-Star Co. *v.* France, 61 S. W. 18, 22 Ky. L. Rep. 1666.

9. Foster *v.* Markland, 37 Kan. 32, 14 Pac. 452.

In England, although a writ of summons expires by rules of the supreme court in one year from its date, a defendant served with a writ after it has expired should move to set it aside, and not treat it as a nullity. Hamp *v.* Warren, 2 Dowl. P. C. N. S. 758, 7 Jur. 156, 12 L. J. Exch. 215, 10 M. & W. 103.

10. Chamberlain *v.* Bittersohn, 48 Fed. 40.

11. Miller *v.* Hall, 1 Speers (S. C.) 1.

12. Wilson *v.* Pyles, 1 Strobh. (S. C.) 357.

13. Sullivan *v.* Harney, 53 Misc. (N. Y.) 249, 103 N. Y. Suppl. 177.

14. Cutler *v.* Rathbone, 1 Hill (N. Y.) 204.

15. Rhodes *v.* Innes, 7 Bing. 329, 1 Dowl. P. C. 215, 9 L. J. C. P. O. S. 116, 5 M. & P.

a proper method of contesting the jurisdiction of the court over the subject-matter of the cause.[16]

5. Grounds For Setting Aside Service by Publication. Service by publication may be set aside on motion where insufficient, as when based upon insufficient affidavits;[17] where the order of publication does not have the requisites provided for by the statute;[18] or where there is no property within the state to give the court jurisdiction,[19] where claims are improperly united, some being personal and beyond the jurisdiction of the court;[20] or where there is a misnomer of plaintiff in the summons.[21] But the mere failure of the clerk to file an order for service by publication will not deprive the court of jurisdiction,[22] nor is the date of the summons so important that service will be set aside because of a variance in this respect between the original and copy.[23]

6. Procedure — a. In General. If the service or return is defective, a motion may be made to set aside or quash the service or return.[24] Acknowledgments of

153, 20 E. C. L. 151; Phillips *v.* Ensell, 1 C. M. & R. 374, 2 Dowl. P. C. 684, 3 L. J. Exch. 338, 4 Tyrw. 814; Emerson *v.* Brown, 7 M. & G. 476, 8 Scott N. R. 219, 49 E. C. L. 476.

16. Manning *v.* Canadian Locomotive Co., 120 N. Y. App. Div. 735, 105 N. Y. Suppl. 662.

17. *California.*— Braly *v.* Seaman, 30 Cal. 610.

Indiana.— Mehrhoff *v.* Diffenbacker, 4 Ind. App. 447, 31 N. E. 41.

Kansas.— Ogden *v.* Walters, 12 Kan. 282.

Kentucky.—Arthurs *v.* Harlan, 78 Ky. 138.

New York.— Vernam *v.* Holbrook, 5 How. Pr. 3; Everts *v.* Thomas, 3 Code Rep. 74. Where the affidavits on which an order is made for publication of summons in case of a non-resident defendant are defective, and it appears there was another sufficient affidavit used before the judge on procuring the order which had not been filed, a motion to set aside the order, on the ground that it had been allowed on insufficient affidavits, will be denied, as the code does not expressly require that the affidavits shall be filed, nor does it provide what shall be done with them. Vernam *v.* Holbrook, *supra.*

The question of whether or not a complaint states a cause of action should not be determined on a motion to vacate an order for service by publication, but must be raised by demurrer or answer, unless the complaint is clearly frivolous. Montgomery *v.* Boyd, 65 N. Y. App. Div. 128, 72 N. Y. Suppl. 611.

Persons who may object.— In an action to determine rights in a life insurance policy assigned to plaintiff's testator as collateral security for premiums paid to establish an equitable lien for the amount so paid, and to collect the amount of the policy, the beneficiaries are proper and necessary parties, and defendant insurer may therefore move to vacate an order for service upon them by publication. Morgan *v.* Mutual Ben. L. Ins. Co., 189 N. Y. 447, 82 N. E. 438 [*affirming* 119 N. Y. App. Div. 645, 104 N. Y. Suppl. 185].

18. Berford *v.* New York Iron Mine, 55 N. Y. Super. Ct. 516, 2 N. Y. Suppl. 516 [*affirmed* in 119 N. Y. 638, 23 N. E. 1148].

19. Bryan *v.* University Pub. Co., 112 N. Y. 382, 19 N. E. 825, 2 L. R. A. 638; Von Hesse *v.* Mackaye, 55 Hun (N. Y.) 365, 8 N. Y. Suppl. 894 [*affirmed* in 121 N. Y. 694, 24 N. E. 1099].

Bill must show right to relief.— On motion to vacate an order for substituted service made in a suit purporting to have been brought under Federal Judiciary Act, March 3, 1875, 18 U. S. St. at L. 472, c. 137, § 8 [U. S. Comp. St. (1901) p. 513), which authorizes such service in local actions relating to property within the district, the court must examine the bill, and the order should be set aside unless the bill affirmatively shows sufficient grounds for relief under such statute and complainants' right to maintain the suit. Gage *v.* Riverside Trust Co., 156 Fed. 1002.

20. Zimmerman *v.* Barnes, 56 Kan. 419, 43 Pac. 764.

21. Farrington *v.* Muchmore, 30 Misc. (N. Y.) 218, 62 N. Y. Suppl. 165 [*reversed* in 52 N. Y. App. Div. 247, 65 N. Y. Suppl. 432, holding that such error may be corrected on motion].

22. Fink *v.* Wallach, 109 N. Y. App. Div. 718, 96 N. Y. Suppl. 543.

23. George *v.* Fitzpatrick, 41 N. Y. Suppl. 211, 25 N. Y. Civ. Proc. 383.

24. Supreme Council C. B. L. *v.* Boyle, 10 Ind. App. 301, 37 N. E. 1105; Winrow *v.* Raymond, 4 Pa. St. 501; National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

It is the practice of the federal courts to dispose of objections to the sufficiency of the service summarily on a motion to quash the return, rather than by a jury trial on a plea in abatement, regardless of the state practice. Benton *v.* McIntosh, 96 Fed. 132.

Prejudice.— Unless the case is one in which prejudice to defendant is presumed, such prejudice must be shown in order to have service set aside. Lark *v.* Chappell, 1 McCord (S. C.) 566.

Distinction between motion to quash service and to set aside return.— In Goodrich *v.* Hamer, 8 Ohio Dec. (Reprint) 441, 8 Cinc. L. Bul. 11, the court distinguished between a motion to set aside a return and a motion to quash service as follows: the former at-

service may also be set aside in proper cases.[25] A defect in the writ itself is available by plea in abatement,[26] and the same is true of a defective service.[27] A plea in abatement should be used when the defect is not apparent upon the face of the record,[28] a motion to quash being available only as to patent defects;[29] although in many jurisdictions a motion to quash supported by affidavits is considered proper practice where the defect is not apparent on the face of the record.[30] Under the codes in some states the failure to obtain jurisdiction of defendant by proper

tacks the truth of the facts stated, not their sufficiency, the latter attacks the sufficiency of the return, not its truth. The cases do not seem to observe this distinction. Thus in Scott *v.* Stockholders' Oil Co., 122 Fed. 835, it was held that the question of the legal sufficiency of the service may be raised by a motion to set aside the return.

25. Fail *v.* Presley, 50 Ala. 342.

26. Powers *v.* Swigart, 8 Ark. 363; Zuill *v.* Bradley, Quincy (Mass.) 6.

27. *Connecticut.*— Cady *v.* Gay, 31 Conn. 395; Gould *v.* Smith, 30 Conn. 88; Colburn *v.* Tolles, 13 Conn. 524; Parsons *v.* Ely, 2 Conn. 377.

Illinois.— Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124; Lanza *v.* McNulta, 46 Ill. App. 69.

Maine.— Tweed *v.* Libbey, 37 Me. 49; Adams *v.* Hodsdon, 33 Me. 225; Patten *v.* Starrett, 20 Me. 145; Brown *v.* Gordon, 1 Me. 165.

North Carolina.— Laverty *v.* Turner, 15 N. C. 275.

Pennsylvania.— Northern Liberties Nat. Bank *v.* American Ship-Bldg. Co., 1 Pa. Cas. 380, 2 Atl. 511.

Tennessee.— Nelson *v.* Cummins, 1 Overt. 436.

Vermont.— Pearson *v.* French, 9 Vt. 349.

Wisconsin.— Rowen *v.* Taylor, 1 Pinn. 235.

28. *Florida.*— Putnam Lumber Co. *v.* Ellis-Young Co., 50 Fla. 251, 39 So. 193; Campbell *v.* Chaffee, 6 Fla. 724.

Illinois.— Willard *v.* Zehr, 215 Ill. 148, 74 N. E. 107; Greer *v.* Young, 120 Ill. 184, 11 N. E. 167; Montana Columbian Club *v.* Ketcham, 54 Ill. App. 334.

Kentucky.— Owings *v.* Beall, 3 Litt. 103.

Maine.— Mahan *v.* Sutherland, 73 Me. 158; Chamberlain *v.* Lake, 36 Me. 388; Cook *v.* Lothrop, 18 Me. 260.

Massachusetts.— Haynes *v.* Saunders, 11 Cush. 537; Stevens *v.* Ewer, 2 Metc. 74; Prescott *v.* Tufts, 7 Mass. 209.

Mississippi.— Lamb *v.* Russell, 81 Miss. 382, 32 So. 916; Mayfield *v.* Barnard, 43 Miss. 270.

New Hampshire.— Haverhill Ins. Co. *v.* Prescott, 38 N. H. 398; Scruton *v.* Deming, 36 N. H. 432.

United States.— Electric Vehicle Co. *v.* Craig Toledo Motor Co., 157 Fed. 316; U. S. *v.* American Bell Tel. Co., 29 Fed. 17, which cases hold that where the invalidity, irregularity, or defect in the service of the writ appears upon the face of the return, a motion to quash the service or abate the writ is the proper mode of bringing the matter to the attention of the court; but where the objection does not appear upon the face of the papers, the better rule of practice, where it is sought to question or dispute the facts stated therein, is to do so by plea in abatement, on which an issue may be regularly taken and tried.

Branch summons.— The party served with a "branch summons" can only take advantage of a variance between it and the other summons by plea in abatement, and a motion to strike it from the files is not a proper remedy. Drennen *v.* Jasper Inv. Co., (Ala. 1907) 45 So. 157.

Traverse of return.— In some jurisdictions the return must be traversed in connection with the plea, and where a return of service is made by a deputy sheriff, both he and the sheriff are necessary parties to a traverse of the return. Bell *v.* New Orleans, etc., R. Co., 2 Ga. App. 812, 59 S. E. 102.

29. *Connecticut.*—Bishop *v.* Vose, 27 Conn. 1.

Maine.— Sawtelle *v.* Jewell, 34 Me. 543 (holding that for want of sufficient service on one of two or more defendants as joint promisors, the writ must be abated as to all); Cook *v.* Lothrop, 18 Me. 260.

New Hampshire.— Hibbard *v.* Clark, 54 N. H. 521; Crawford *v.* Crawford, 44 N. H. 428; Merrill *v.* Palmer, 13 N. H. 184.

New York.— Nellis *v.* Rowles, 41 Misc. 313, 84 N. Y. Suppl. 753.

Tennessee.— Padgett *v.* Ducktown Sulphur, etc., Co., 97 Tenn. 690, 37 S. W. 698.

Vermont.— Culver *v.* Balch, 23 Vt. 618.

United States.— U. S. *v.* Banister, 70 Fed. 44.

Demurrer.— The question cannot be raised by a general demurrer. Marcus *v.* Rovinsky, 95 Me. 106, 49 Atl. 420.

Permitting an amendment so as to avoid the objection raised is virtually to overrule the motion. Shepard *v.* Ogden, 3 Ill. 257.

Summons in another action.— A motion cannot be made in one action to set aside the summons in another. Toma *v.* Foundation Co., 119 N. Y. App. Div. 151, 104 N. Y. Suppl. 263.

30. Delisser *v.* New York, etc., R. Co., 59 N. Y. Super. Ct. 233, 14 N. Y. Suppl. 382; Grady *v.* Gosline, 48 Ohio St. 665, 29 N. E. 768; Wall *v.* Chesapeake, etc., R. Co., 95 Fed. 398, 37 C. C. A. 129. See also Crowley *v.* Royal Exch. Shipping Co., 10 Daly (N. Y.) 409 [*affirmed* in 89 N. Y. 607], holding that where the facts are undisputed and the law certain, the defective service of summons and complaint may be set aside on motion.

The motion should ordinarily be decided by the court and not sent to a referee. Buchholtz *v.* Florida East Coast R. Co., 59 N. Y. App. Div. 566, 69 N. Y. Suppl. 682.

service of process may be asserted as a defense.[31] After the question has been raised and determined on motion to quash it cannot be again raised by answer.[32] After judgment, the remedy is not by motion to quash but by direct attack on the judgment.[33]

b. Requisites of Plea or Motion. The motion to quash should point out clearly the defect complained of and specify the grounds upon which it is based,[34] and nothing beyond the scope of the motion will be considered.[35] All grounds of objection not set up are deemed waived or abandoned.[36] Where the denial of the return of an officer upon a summons is purely argumentative, the return will stand.[37] A plea in abatement may be directed both to the writ and the declaration, if abatement is sought as to only a part of the writ and some of the counts in the declaration.[38] A plea in abatement upon the ground that summons was illegally issued and sent to a county other than that in which the action is brought is not defective for failure to show where the cause of action arose.[39]

c. Matters Considered. In those jurisdictions where the sheriff's return is conclusive between the parties,[40] the court will look only to the face of the return on a motion to set aside the return or the service,[41] except as to those matters respecting which the return is not conclusive.[42] In other jurisdictions, however, the plea may contradict the sheriff's return.[43] Parol evidence is admissible to show that the writ, at the time of service, was void.[44] The court, in deciding upon a demurrer to a plea in abatement for want of proper service of the writ, will not look beyond the plea to ascertain whether the service was sufficient, unless the return is referred to and made a part of the case.[45]

31. Stelling *v.* Peddicord, 78 Nebr. 779, 111 N. W. 793 (holding that, where a defendant is privileged from suit in the county at the time he is sued, he may set up want of jurisdiction of his person to answer along with other defenses he may have, without first making special appearance or preliminary objections); Anheuser-Busch Brewing Assoc. *v.* Peterson, 41 Nebr. 897, 60 N. W. 373. But see Nones *v.* Hope Mut. L. Ins. Co., 8 Barb. (N. Y.) 541, holding that the meaning of the section of the code allowing it to be set up as a defense that the court has no jurisdiction of the person is that the person is not subject to the jurisdiction of the court, not that the suit has been irregularly commenced, and to relieve himself from an irregular service of a summons defendant must move the court to set aside the proceedings. *Compare* Cole *v.* Cliver, 43 N. J. L. 182.

32. Foye *v.* Guardian Printing, etc., Co., 109 Fed. 368.

33. Baldwin *v.* Burt, 54 Nebr. 287, 74 N. W. 594.

34. Cheney *v.* Chicago City Nat. Bank, 77 Ill. 562; Smith *v.* Delane, 74 Nebr. 594, 104 N. W. 1054; Bucklin *v.* Strickler, 32 Nebr. 602, 49 N. W. 371; Brown *v.* Goodyear, 29 Nebr. 376, 45 N. W. 618; Freeman *v.* Burks, 16 Nebr. 328, 20 N. W. 207; Smelt *v.* Knapp, 16 Nebr. 53, 20 N. W. 20; Perkins *v.* Mead, 22 How. Pr. (N. Y.) 476; Thibault *v.* Connecticut Valley Lumber Co., 80 Vt. 333, 67 Atl. 819; Barrows *v.* McGowan, 39 Vt. 238.

For example an objection "that no certified copy of the summons therein has been served on the defendant as required by law" is too general to be available. Brown *v.* Goodyear, 29 Nebr. 376, 45 N. W. 618. A motion on the grounds: "First, that no service of summons has been made upon the defendant as required by law; second, that no return of summons has been made as required by law," is too general to be considered. Forbes *v.* McHaffie, 32 Nebr. 742, 49 N. W. 721.

35. Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. Co., 87 N. Y. 355.

36. Feibleman *v.* Edmonds, 69 Tex. 334, 6 S. W. 417.

37. Allegretti *v.* Stubbert, 126 Ill. App. 171.

38. Southard *v.* Hill, 44 Me. 92, 69 Am. Dec. 85.

39. Warren *v.* Saunders, 27 Gratt. (Va.) 259.

40. See *supra*, III, D, 3, b, (I).

41. Kennard *v.* New Jersey R., etc., Co., 1 Phila. (Pa.) 41.

42. Fulton *v.* Commercial Travelers' Mut. Acc. Assoc., 172 Pa. St. 117, 33 Atl. 324. See also Forrest *v.* Union Pac. R. Co., 47 Fed. 1, holding that the certificate of a sheriff that service was made upon a person named as agent of defendant is not conclusive that such person was an agent, and the same may be determined, as any other question of fact, upon an issue raised by special plea to the jurisdiction.

43. Chicago Sectional Electric Underground Co. *v.* Congdon Brake Shoe Mfg. Co., 111 Ill. 309; Union Nat. Bank *v.* Centreville First Nat. Bank, 90 Ill. 56; Sibert *v.* Thorp, 77 Ill. 43.

44. Pope *v.* Anthony, 5 Blackf. (Ind.) 212; Siggers *v.* Sansom, 3 Moore & S. 194, 30 E. C. L. 504.

45. Hill *v.* Powers, 16 Vt. 516. See also Morse *v.* Nash, 30 Vt. 76, holding that in a plea in abatement to the service of a writ, in which material facts are averred, without any statement of the time or place when and where they occurred, this omission is not

d. Operation and Effect of Ruling.[46] Upon the writ being quashed the case stands as if no writ had been issued.[47] Where one of two defendants pleads the general issue, but the other pleads in abatement because of defects in the writ, on sustaining the plea in abatement the suit should be abated as to one and retained as to the other.[48] Under some statutes it is provided that where an action abates by reason of an insufficient service or return due to the default or neglect of the officer, a new action may be begun at any time within a specified period.[49]

7. Time For Objections, Waiver, and Cure — a. In General. It is frequently held, often in conformity with a statute or court rule, that objections must be taken not later than the first term or a designated day thereof,[50] and in any case, unnecessary or unexcused delay or laches will deprive defendant of the right to urge formal objections to process, service, or return;[51] but such restrictions do not apply to substantial defects which render the writ or the service void.[52] Inasmuch as a general appearance waives all defects and irregularities in the process, service, or return, a party who wishes to raise any question as to these matters must do so at a preliminary stage, before taking any steps relating to the merits of the case.[53] A motion to quash a writ for a cause which may be taken advantage of

supplied by referring to the writ and return in the plea, and making them a part thereof, although they contain a statement of such a time and place; and by reason of such omission the plea is defective.

46. Appealability of order quashing or refusing to quash process see Appeal and Error, 2 Cyc. 609.

47. Bird *v.* Mathis, 6 Ark. 379; Minott *v.* Vineyard, 11 Iowa 90; Beard *v.* Smith, 9 Iowa 50.

48. Foster *v.* Collins, 5 Sm. & M. (Miss.) 259.

49. Ricaby *v.* Gentle, 122 Mich. 336, 80 N. W. 1093, holding that failure of an officer to make return of a summons on the return day is negligence, within 3 Comp. Laws, Mich. (1897), § 9738.

50. *Alabama.*— Tankersley *v.* Richardson, 2 Stew. 130.

Georgia.— Reynolds *v.* Atlanta Nat. Bldg., etc., Assoc., 104 Ga. 703, 30 S. E. 942; Peck *v.* La Roche, 86 Ga. 314, 12 S. E. 638; Dozier *v.* Lamb, 59 Ga. 461; Pittman *v.* Jones, 53 Ga. 134.

Illinois.— Grand Lodge B. L. F. *v.* Cramer, 60 Ill. App. 212.

Maine.— Bray *v.* Libby, 71 Me. 276; White *v.* Wall, 40 Me. 574; Stevens *v.* Getchell, 11 Me. 443; Rule XVIII, 1 Me. 416.

Maryland.— Ritter *v.* Offutt, 40 Md. 207.

Massachusetts.— Joyner *v.* Egremont School Dist. No. 3, 3 Cush. 567; Brewer *v.* Sibley, 13 Metc. 175; Carpenter *v.* Aldrich, 3 Metc. 58; Gilbert *v.* Nantucket Bank, 5 Mass. 97.

Ohio.— Kious *v.* Kious, 2 Ohio Dec. (Reprint) 318, 2 West. L. Month. 419.

South Carolina.— Hanks *v.* Ingram, 2 Bailey 440.

Vermont.— Hill *v.* Morey, 26 Vt. 178; Wheelock *v.* Sears, 19 Vt. 559.

51. Beutell *v.* Oliver, 89 Ga. 246, 15 S. E. 307 (at the trial); Dobbins *v.* Jenkins, 51 Ga. 203 (after a delay of two years); State *v.* Webster Parish Police Jury, 120 La. 163, 45 So. 47, 14 L. R. A. N. S. 794; McLeod *v.* Harper, 43 Miss. 42 (after judgment); Wooten *v.* Wingate, 6 Sm. & M. (Miss.) 271 (after several pleas filed, two verdicts and new trials); Pollard *v.* Union Pac. R. Co., 7 Abb. Pr. N. S. (N. Y.) 70; Myers *v.* Overton, 2 Abb. Pr. (N. Y.) 344 (after judgment); Hunter *v.* Lester, 18 How. Pr. (N. Y.) 347 (after judgment). It was said in Richardson *v.* Rich, 66 Me. 249, that "if the time allowed for filing the motion is permitted to pass without doing so, it is as much a waiver, as though the appearance had been general." The motion is in time if made before the time to answer has expired. Lederer *v.* Adams, 19 N. Y. Civ. Proc. 294, 11 N. Y. Suppl. 481.

52. *Georgia.*— Brady *v.* Hardeman, 17 Ga. 67.

Maine.— Tibbetts *v.* Shaw, 19 Me. 204; Bailey *v.* Smith, 12 Me. 196.

Michigan.— Turrill *v.* Walker, 4 Mich. 177.

Mississippi.— McLeod *v.* Harper, 43 Miss. 42.

South Carolina.— Wood *v.* Crosby, 2 Hill 520.

53. *Alabama.*— Stanley *v.* Mobile Bank, 23 Ala. 652; Sawyer *v.* Price, 6 Ala. 285; Jordan *v.* Bell, 8 Port. 53; Roberts *v.* Beeson, 4 Port. 164; Hamner *v.* Eddins, 3 Stew. 192.

Arkansas.— Grider *v.* Apperson, 38 Ark. 388.

California.— Hayes *v.* Shattuck, 21 Cal. 51.

Connecticut.— Denison *v.* Crafts, 74 Conn. 38, 49 Atl. 851; Parrott *v.* Housatonic R. Co., 47 Conn. 575.

District of Columbia.— Hutchins *v.* Munn, 28 App. Cas. 271.

Florida.— Benedict *v.* W. T. Hadlow Co., 52 Fla. 188, 42 So. 239; Branch *v.* Branch, 6 Fla. 314.

Georgia.— Stallings *v.* Stallings, 127 Ga. 464, 56 S. E. 469; Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660.

Illinois.— Tewalt *v.* Irwin, 164 Ill. 592, 46 N. E. 13; Edens *v.* Williams, 36 Ill. 252; Miles *v.* Goodwin, 35 Ill. 53; Lahner *v.* Hertzog, 23 Ill. App. 308.

Indiana.— Hays *v.* McKee, 2 Blackf. 11.

by a plea in abatement must in general be made within the time limited for filing a plea in abatement.[54] A failure to assert a defect or irregularity by a plea in

Iowa.— Baker *v.* Kerr, 13 Iowa 384; Turner *v.* Kelley, 10 Iowa 573.

Kentucky.— Frankfort Bank *v.* Anderson, 3 A. K. Marsh. 1; Withers *v.* Reed, 4 Bibb 258.

Louisiana.— Dunbar *v.* Murphy, 11 La. Ann. 713.

Maine.— Pattee *v.* Lowe, 35 Me. 121; Moran *v.* Portland Steam Packet Co., 35 Me. 55; Clapp *v.* Balch, 3 Me. 216.

Massachusetts.— Simonds *v.* Parker, 1 Metc. 508; Carlisle *v.* Weston, 21 Pick. 535; Brigham *v.* Clark, 20 Pick. 43; Ripley *v.* Warren, 2 Pick. 592.

Michigan.— Improved Match Co. *v.* Michigan Mut. F. Ins. Co., 122 Mich. 256, 80 N. W. 1088; Wiest *v.* Luyendyk, 73 Mich. 661, 41 N. W. 839; Lane *v.* Leech, 44 Mich. 163, 6 N. W. 228.

Missouri.— Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Meyer *v.* Broadwell, 83 Mo. 571.

Montana.— Butte Butchering Co. *v.* Clarke, 19 Mont. 306, 48 Pac. 303.

Nevada.— Iowa Min. Co. *v.* Bonanza Min. Co., 16 Nev. 64.

New Hampshire.— Bowman *v.* Brown, 51 N. H. 549; Lovell *v.* Sabin, 15 N. H. 29.

New Jersey.— Cook *v.* Hendrickson, 2 N. J. L. 343.

New York.— Willett *v.* Stewart, 43 Barb. 98; Bedell *v.* Sturta, 1 Bosw. 634; Gossling *v.* Broach, 1 Hilt. 49; Avogadro *v.* Bull, 4 E. D. Smith 384; Dempsey *v.* Paige, 4 E. D. Smith 218; Steinhaus *v.* Enterprise Vending Mach. Co., 39 Misc. 797, 81 N. Y. Suppl. 282; Goldstein *v.* Goldsmith, 28 Misc. 569, 59 N. Y. Suppl. 677; Seydel *v.* Corporation Liquidating Co., 88 N. Y. Suppl. 1004; Ahner *v.* New York, etc., R. Co., 14 N. Y. Suppl. 365.

North Carolina.— Jones *v.* Madison County Com'rs, 135 N. C. 218, 47 S. E. 753; McBride *v.* Welborn, 119 N. C. 508, 26 S. E. 125; Butts *v.* Screws, 95 N. C. 215; Moore *v.* North Carolina R. Co., 67 N. C. 209; Mills *v.* Carpenter, 32 N. C. 298; Jones *v.* Penland, 19 N. C. 358; Worthington *v.* Arnold, 13 N. C. 363; Dudley *v.* Carmolt, 5 N. C. 339; McCrea *v.* Starr, 5 N. C. 252.

Pennsylvania.— Porter *v.* Cresson, 10 Serg. & R. 257; Com. *v.* Smith, 2 Serg. & R. 300; Downing *v.* Baldwin, 1 Serg. & R. 298; Harpe *v.* Standard Sewing Mach. Co., 13 Pa. Dist. 44; Lane *v.* American Relief Assoc., 25 Pa. Co. Ct. 129; Gable *v.* Sechrist, 17 York Leg. Rec. 152.

South Carolina.— Williams *v.* Garvin, 51 S. C. 399, 29 S. E. 1; Orangeburgh Dist. Ordinary *v.* Lovick, 1 Brev. 459.

South Dakota.—Gilson *v.* Kuenert, 15 S. D. 291, 89 N. W. 472.

Texas.— Wilson *v.* Zeigler, 44 Tex. 657.

Vermont.— Huntley *v.* Henry, 37 Vt. 165; Blodgett *v.* Brattleboro, 28 Vt. 695.

Virginia.— Lane *v.* Bauserman, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872; Payne *v.* Grim, 2 Munf. 297.

Wisconsin.— O'Dell *v.* Rogers, 44 Wis. 136.

United States.— Leach *v.* Burr, 188 U. S. 510, 23 S. Ct. 393, 47 L. ed. 567; Shields *v.* Thomas, 18 How. 253, 15 L. ed. 368; Barnes *v.* Western Union Tel. Co., 120 Fed. 550; Scull *v.* Briddle, 21 Fed. Cas. No. 12,570, 2 Wash. 200. See also Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608.

England.— Fry *v.* Moore, 23 Q. B. D. 395, 58 L. J. Q. B. 382, 61 L. T. Rep. N. S. 545, 37 Wkly. Rep. 565; Field *v.* Bennett, 56 L. J. Q. B. 89.

Canada.—Butler *v.* McMicken, 32 Ont. 422; Howland *v.* Insurance Co. of North America, 16 Ont. Pr. 514; Sears *v.* Meyers, 15 Ont. Pr. 381; McNab *v.* Macdonnell, 15 Ont. Pr. 14.

Appearance as waiver of defects in service see APPEARANCES, 3 Cyc. 517.

A code provision that the objection that the court has no jurisdiction of the person of defendant may be raised by answer when it does not appear on the face of the pleadings, means that when the person is not subject to the jurisdiction of the court the objection can be so raised, not that an answer is available for raising the question whether defendant has been properly served. Nones *v.* Hope Mut. L. Ins. Co., 8 Barb. (N. Y.) 541.

An application made by defendants for security for costs constitutes a waiver of any objection as to service. Lhoneux *v.* Hong Kong, etc., Banking Corp., 33 Ch. D. 446, 55 L. J. Ch. 758, 54 L. T. Rep. N. S. 863, 34 Wkly. Rep. 753.

Merely obtaining an extension of time to answer will not constitute a waiver of a defect in the summons. Bell *v.* Good, 19 N. Y. Suppl. 693.

Other instances of waiver.— Defendant, by answering to the merits of the case before the court rules on its motion to quash the return of the officer on the summons, waives the motion, although he state in his answer that the motion is not waived. Newport News, etc., R. Co. *v.* Thomas, 96 Ky. 613, 29 S. W. 437, 16 Ky. L. Rep. 706. A mere entry in the record that a cause was "continued by consent of parties," where one of several defendants had been duly served, does not constitute a waiver of service, and confer jurisdiction, as to defendants who were not served. Snow *v.* Grace, 25 Ark. 570. Waiver of notice and service by a non-resident defendant in trespass to try title is not shown by a record which discloses that at one term the cause was continued for want of service, and that eighteen months afterward an order, upon motion then made, was entered, correcting, *nunc pro tunc*, the minutes of the term held two years previously, so as to show that at such previous term defendant's attorney appeared in a motion to quash service, securing a continuance, but discloses no service upon defendant of the motion for the order *nunc pro tunc*. Hopkins *v.* State, (Tex. Civ. App. 1894) 28 S. W. 225.

54. Nickerson *v.* Nickerson, 36 Me. 417; Shorey *v.* Hussey, 32 Me. 579; Trafton *v.*

abatement or by motion is usually regarded as a waiver.[55] And it is held that defects which are grounds for plea in abatement cannot be afterward asserted if not so urged.[56] In some statutes it is provided that no summons or service shall be set aside where there is sufficient substance about either to inform the party on whom service is made that there is an action instituted against him of the name of plaintiff therein, and of the court and time where and when he is to appear.[57] In those jurisdictions where defenses in abatement may be united with defenses in bar, a plea of the latter sort does not of course waive a contemporaneous plea in abatement founded upon an improper service or return.[58] Taking depositions to be used in the cause, while a motion to quash the writ is pending, is not a proceeding touching the merits of the case which will waive the motion.[59]

b. Laches. Where formally defective process is personally served, or where personal service is improperly made, and defendant makes no appearance and enters no objection to it but lets the cause proceed, he will not be permitted to object at a subsequent term, but will be deemed to have waived the defect by his silence.[60]

c. After Objection Overruled. Failure to except to an order overruling an objection to a defective summons, service, or return is a waiver of such objection.[61]

Rogers, 13 Me. 315; Simonds *v.* Parker, 1 Metc. (Mass.) 508; Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352.

55. *Maine.*— Cook *v.* Lothrop, 18 Me. 260.

Massachusetts.— Ripley *v.* Warren, 2 Pick. 592; Hawkes *v.* Kennebec County, 7 Mass. 461; Prescott *v.* Tufts, 7 Mass. 209.

New Hampshire.— Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352.

Pennsylvania.— West *v.* Nixon, 3 Grant 236.

United States.— Miller *v.* Gages, 17 Fed. Cas. No. 9,571, 4 McLean 436.

56. Johnson *v.* King, 20 Ala. 270 (failure of separate writs, served upon separate defendants in different counties, to bear an indorsement showing that they were for one and the same cause of action); Hall *v.* Gilmore, 40 Me. 578. And see cases cited *infra*, this note. But see Tilden *v.* Johnson, 6 Cush. (Mass.) 354 (holding that if the service of a writ on an absent defendant who has a last and usual place of abode within the commonwealth is not made by leaving summons or copy as required by statute at such place of abode, defendant may take advantage of the defect of service, either by a plea in abatement or by a writ of error); Parker *v.* Porter, 4 Yerg. (Tenn.) 81 (holding that where a court has no jurisdiction of the person of defendant because process was executed on him in another county, and the facts appear on the face of the bill, the court will dismiss the bill without requiring a plea in abatement).

Illustrations of matters waived by failure to plead in abatement: Wrong description of defendant's domicile. Smith *v.* Bowker, 1 Mass. 76. That writ bears teste of a justice of the common pleas who is also plaintiff. Prescott *v.* Tufts, 7 Mass. 209. That the signature of the clerk and the seal of the court on a writ of scire facias had been detached from another writ and affixed by means of wafers. Stevens *v.* Ewer, 2 Metc. (Mass.) 74. That plaintiff's residence was misdescribed. Day *v.* Floyd, 130 Mass. 488. Variance between original and alias summons as to claim of damages. Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361. That writ is returnable to wrong place. State University *v.* Joslyn, 21 Vt. 52. That service was defective. Bulkley *v.* Starr, 2 Day (Conn.) 552; Curtis *v.* Baldwin, 42 N. H. 398; Morse *v.* Calley, 5 N. H. 222. That service was not timely. Thornton *v.* Fitzhugh, 10 Sm. & M. (Miss.) 438; Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 434. That there is an erroneous direction of the writ. Peebles *v.* Weir, 60 Ala. 413; Yonge *v.* Broxson, 23 Ala. 684; Sawyer *v.* Price, 6 Ala. 285; Adamson *v.* Parker, 3 Ala. 727. But *compare* Case *v.* Humphrey, 6 Conn. 130, holding that where a direction of a writ is unlawful for failure to comply with statutory prerequisites, the court may dismiss it *ex officio*. That there has been a lack of authority in the person serving the writ. Smith *v.* Dexter, 121 Mass. 597; Shaw *v.* Baldwin, 33 Vt. 447. That there has been a defective return. Jordan *v.* Bell, 8 Port. (Ala.) 53; Bell *v.* New Orleans, etc., R. Co., 2 Ga. App. 812, 59 S. E. 102; Barksdale *v.* Neal, 16 Gratt. (Va.) 314; Hinton *v.* Ballard, 3 W. Va. 582.

57. See the statutes of the various states. And see Southern Indiana R. Co. *v.* Indianapolis, etc., R. Co., 168 Ind. 360, 81 N. E. 65, holding that such a statute did not cure the fact that the return showed that there was no service whatever upon the person authorized by the statute to accept service.

58. Stallings *v.* Stallings, 127 Ga. 464, 56 S. E. 469; Thomasson *v.* Mercantile Town Mut. Ins. Co., (Mo. App. 1904) 81 S. W. 911; Jordan *v.* Chicago, etc., R. Co., 105 Mo. App. 446, 79 S. W. 1155; Stelling *v.* Peddicord, 78 Nebr. 779, 111 N. W. 793; Pyron *v.* Graef, (Tex. Civ. App. 1903) 72 S. W. 101.

59. Briggs *v.* Davis, 34 Me. 158.

60. Peck *v.* Strauss, 33 Cal. 678; Benedict *v.* W. T. Hadlow Co., 52 Fla. 188, 42 So. 239; Belkin *v.* Rhodes, 76 Mo. 643.

61. Williams *v.* Browning, 45 Mo. 475.

There is some conflict in the cases as to the effect of answering to the merits after a preliminary objection to the summons, service, or return has been improperly overruled, most authorities holding that the point is not waived, at least if an exception is taken,[62] but some holding that the objection is always waived by so answering.[63]

d. Estoppel. If the sheriff, at defendant's request, serves the writ in a manner not authorized by law, defendant will be estopped to object thereafter that due service was not made.[64]

e. Other Cases of Waiver. Defective service may be waived by giving a stipulation to answer judgment,[65] by an express agreement to consider it good service,[66] or by an agreement to submit the case to referees,[67] and a confession of judgment is a waiver of a defective writ.[68] An acceptance or acknowledgment of service precludes the party from taking advantage of any defects or irregularities in the service,[69] but it is not a waiver of any defects in the summons itself.[70]

62. *Connecticut.*— Morse *v.* Rankin, 51 Conn. 326.

Iowa.— Converse *v.* Warren, 4 Iowa 158.

Kentucky.— Chesapeake, etc., R. Co. *v.* Heath, 87 Ky. 651, 9 S. W. 832, 10 Ky. L. Rep. 646.

Massachusetts.— Ames *v.* Winsor, 19 Pick. 247.

New York.— Dewey *v.* Greene, 4 Den. 93. Justice Cowen said, in Avery *v.* Slack, 17 Wend. 85, 87: "But it is said the defendant waived the objection by pleading over. Not so. He made a specific objection in due season, and that being overruled, he was compelled to plead or give up all he had to say on the merits. Resistance, to the extent of a man's power, is certainly a new kind of waiver."

North Carolina.— Mullen *v.* Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106.

Oklahoma.— Bes Line Constr. Co. *v.* Schmidt, 16 Okla. 429, 481, 85 Pac. 711, 713.

West Virginia.— Fisher *v.* Crowley, 57 W. Va. 312, 50 S. E. 422; Quesenberry *v.* People's Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73.

United States.— Harkness *v.* Hyde, 98 U. S. 476, 25 L. ed. 237; Central Grain, etc., Exch. *v.* Chicago Bd. of Trade, 125 Fed. 463, 60 C. C. A. 299.

Consent to continuance.— Where, after defendant's motion to quash a summons had been overruled, he appeared and agreed to a continuance by a stipulation in which all irregularities in the original process were waived, he was estopped thereafter to contend that the service was void on the ground that the summons did not contain a statutory clause that in the absence of appearance the complaint would be taken for confessed. Ammons *v.* Brunswick-Balke-Collender Co., 5 Indian Terr. 636, 82 S. W. 937.

63. Sears *v.* Starbird, 78 Cal. 225, 20 Pac. 547; Desmond *v.* San Francisco Super. Ct., 59 Cal. 274; Improved-Match Co. *v.* Mich. Mut. F. Ins. Co., 122 Mich. 256, 80 N. W. 1088; Webster *v.* Wheeler, 119 Mich. 601, 78 N. W. 657.

64. Anderson *v.* Kerr, 10 Iowa 233. Where a sheriff by mistake left the copy of a writ against J at the house of J's brother, but met and told J of the fact on the same evening, J replying he would get the copy and accept the service, whereupon the sheriff returned the writ, "Served the within, by personal service," held, that J was estopped from denying the service. Johnson *v.* Johnson, 52 Ga. 449. If a summons be left agreeably to defendant's directions, he cannot take advantage of its not being left at the place of his usual abode. Taylor *v.* Cook, 1 N. J. L. 54. Where summons was served by leaving a copy, at request of defendant, at his office, in the presence of one or more of his family, defendant was estopped from objecting that the copy ought to have been left at his dwelling-house. Hodgins *v.* O'Malley, 4 Kulp (Pa.) 206. When a copy of a writ was delivered to the clerk of defendant, with orders to deliver it to his master, which he promised to do, and defendant afterward called on plaintiff's attorney with the writ in his hand, and wrote a letter, stating that he had received it on such a day, it was held a sufficient personal service. Aston *v.* Greathead, 2 Dowl. P. C. N. S. 547, 6 Jur. 1000.

Silence.— A defendant is not bound to give notice of a defective service of process, and his silence does not estop him from objecting to the want of jurisdiction. Williams *v.* Van Valkenburg, 16 How. Pr. (N. Y.) 144.

65. The Acadia, 1 Fed. Cas. No. 24, Brown Adm. 73.

66. Coates *v.* Sandy, 9 Dowl. P. C. 381, 2 Scott N. R. 535.

67. Hix *v.* Sumner, 50 Me. 290.

68. Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660.

69. Rodahan *v.* Goggins, 26 Ga. 408; State *v.* Baird, 118 N. C. 854, 24 S. E. 668.

Effect on third parties.— Such a waiver cannot bind third parties. American Grocery Co. *v.* Kennedy, 100 Ga. 462, 28 S. E. 241.

Failure to file affidavit of non-residence.— Where it clearly appears from the record that defendant resided in another state, the failure to file an affidavit of non-residence required for service by publication under section 78 of the Nebraska code does not affect the jurisdiction, if defendant has acknowledged service by indorsement on the summons. Cheney *v.* Harding, 21 Nebr. 68, 32 N. W. 64.

70. Sexton *v.* Brooks, 12 La. 596; Falkner *v.* Guild, 10 Wis. 563. In Ayres *v.* Hill, 82

If a judgment is void no act of ratification can impart vitality to it.[71] Statutes sometimes provide that errors and defects in process are cured after verdict.[72]

B. Amendment of Process[73] — **1. In General.** Voidable process is amendable, but void process is not.[74] In other words, an amendment may be made only if there is something to amend by.[75] Or, as it is said in other cases, matters of form may be remedied by amendment, but not defects of substance.[76] Although courts have inherent discretionary power to amend their process,[77] this power is usually declared, defined, and limited by statutes,[78] which vary greatly in their terms, but ordinarily repose large discretionary powers in the court. It is usually provided that the court may, in furtherance of justice, at any stage of the proceedings, amend any process by correcting mistakes therein, upon such terms as it deems just.[79] An amendment may be allowed to cure a defect arising from the non-observance of a constitutional direction as well as of a statutory one.[80] No amendment will ordinarily be permitted when third persons have acquired rights which would be injuriously affected thereby.[81] But the hardships incident

Ala. 401, 2 So. 892, an acknowledgment of service was held to be a waiver of the objection that the summons was directed to the sheriff instead of to the coroner.

Process may be waived entirely.— Penn Tobacco Co. *v.* Lemon, 109 Ga. 428, 34 S. E. 679.

71. Staunton Perpetual Bldg., etc., Co. *v.* Haden, 92 Va. 201, 23 S. E. 285.

Where judgment has been rendered upon a fatally defective return, excepting to the judgment and giving notice of appeal is not a waiver of the defect. Llano Imp. Co. *v.* Watkins, 4 Tex. Civ. App. 428, 23 S. W. 612.

72. Worthington *v.* Arnold, 13 N. C. 363.

73. **Correction of judgment** with respect to recital see JUDGMENTS, 23 Cyc. 872.

On appeal see APPEAL AND ERROR, 2 Cyc. 977; JUSTICES OF THE PEACE, 24 Cyc. 734.

74. *Arkansas.*— Mitchell *v.* Conley, 13 Ark. 414.

California.— Braun *v.* Blum, 138 Cal. 644, 72 Pac. 168.

Connecticut.— Eno *v.* Frisbie, 5 Day 122.

Georgia.— Neal-Millard Co. *v.* Owens, 118 Ga. 670, 45 S. E. 508; Lowery *v.* Richmond, etc., R. Co., 83 Ga. 504, 10 S. E. 123; Scarborough *v.* Hall, 67 Ga. 576.

Iowa.— Barber *v.* Swan, 4 Greene 352, 61 Am. Dec. 124.

Mississippi.— Joiner *v.* Delta Bank, 71 Miss. 382, 14 So. 464.

New Jersey.— Denn *v.* Lecouy, 1 N. J. L. 111.

New York.— Bartholomew *v.* Chautauque County Bank, 19 Wend. 99; Burk *v.* Barnard, 4 Johns. 309; Bunn *v.* Thomas, 2 Johns. 190.

United States.— Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252.

See 40 Cent. Dig. tit. "Process," § 224.

75. *Georgia.*— Fitzgerald *v.* Garvin, T. U. P. Charlt. 281.

Kentucky.—Johnson *v.* Commonwealth Bank, 5 T. B. Mon. 119.

Maine.— Porter *v.* Haskell, 11 Me. 177.

Montana.— Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

New York.— Dwight *v.* Merritt, 59 How. Pr. 320.

Vermont.— Dean *v.* Swift, 11 Vt. 331.

United States.— Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305.

See 40 Cent. Dig. tit. "Process," § 224.

A memorandum or præcipe filed with the clerk, from which he prepares the writ, may be sufficient to amend by. Furniss *v.* Ellis, 10 Fed. Cas. No. 5,162, 2 Brock. 14.

76. Harvey *v.* Cutts, 51 Me. 604; Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518; Kentzler *v.* Chicago, etc., R. Co., 47 Wis. 641, 3 N. W. 369.

77. King *v.* State Bank, 9 Ark. 185, 47 Am. Dec. 739; Gribbon *v.* Freel, 93 N. Y. 93; Christal *v.* Kelly, 88 N. Y. 285; Deimel *v.* Scheveland, 16 Daly (N. Y.) 34, 9 N. Y. Suppl. 482, 955; McDonald *v.* Walsh, 5 Abb. Pr. (N. Y.) 68.

No general rule can be stated.— "It is the infirmity of this branch of the law, that no general rules can be safely laid down to govern amendments in practice. All that ought to be said is, that they are allowed for the furtherance of justice; that they ought to be so allowed as not to operate as a surprise, either in matter of law or fact, and always upon notice to the party to be affected by them; that they ought to rest in the discretion of the court allowing or refusing them, and that this discretion, if reviewed at all by the appellate court, ought rather to be revised where the amendment is wrongfully refused, than where it is erroneously allowed." Mitchell *v.* Conley, 13 Ark. 414, 420. "Though by the common law, some writs were amendable, the power of amendment only existed as to slight and formal defects." Fisher *v.* Crowley, 57 W. Va. 312, 316, 50 S. E. 422.

78. See the statutes of the several states.

79. Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; Nash *v.* Brophy, 13 Metc. (Mass.) 476; Gribbon *v.* Freel, 93 N. Y. 93; Chamberlain *v.* Bittersohn, 48 Fed. 42.

After judgment.— An amendment may be made even after judgment. Scudder *v.* Massengill, 88 Ga. 245, 14 S. E. 571; Kirkwood *v.* Reedy, 10 Kan. 453.

After case is out of court.— An amendment may be allowed only while the case is in court. Van Ness *v.* Harrison, 3 N. J. L. 632; Burk *v.* Barnard, 4 Johns. (N. Y.) 309.

80. Ilsley *v.* Harris, 10 Wis. 95.

81. *California.*— Newmark *v.* Chapman, 53 Cal. 557.

to allowance of amendments may frequently be obviated by the imposition of terms suited to the exigencies of the case, and large discretionary powers are exercised by the courts in imposing terms which will make proper the allowance of amendments otherwise prejudicial.[82] The power of amendment granted by acts of congress to the federal courts may be enlarged but cannot be diminished by the practice of the state courts.[83]

2. Amendable Defects — a. Names of Parties. An amendment may be allowed in order to correct the name of a party plaintiff or defendant,[84] or to specify or alter the capacity in which plaintiff sues,[85] or the capacity in which defendant

Georgia.— Saunders *v.* Smith, 3 Ga. 121.
North Carolina.— Jackson *v.* McLean, 90 N. C. 64; Phillips *v.* Holland, 78 N. C. 31.
Pennsylvania.— Leeds *v.* Lockwood, 84 Pa. St. 70.
Tennessee.— Flatley *v.* Memphis, etc., R. Co., 9 Heisk. 230.

82. McElwain *v.* Corning, 12 Abb. Pr. (N. Y.) 16.

83. Norton *v.* Dover, 14 Fed. 106.

84. *Alabama.*—*Ex p.* Howard-Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.
Arkansas.— Martin *v.* Godwin, 34 Ark. 682.
Colorado.— Erdman *v.* Hardesty, 14 Colo. App. 395, 60 Pac. 360.
Georgia.— Rome R. Co. *v.* Sullivan, 14 Ga. 277.
Indiana.— Chicago, etc., Air Line R. Co. *v.* Johnston, 89 Ind. 88; Shackman *v.* Little, 87 Ind. 181.
Maine.— Griffin *v.* Pinkham, 60 Me. 123.
Massachusetts.—Langmaid *v.* Puffer, 7 Gray 378; Crafts *v.* Sikes, 4 Gray 194, 64 Am. Dec. 62; Kincaid *v.* Howe, 10 Mass. 203.
Michigan.— Final *v.* Backus, 18 Mich. 218.
Missouri.— Stone *v.* Travelers' Ins. Co., 78 Mo. 655.
New Hampshire.—Belknap County *v.* Clark, 58 N. H. 150; Lebanon *v.* Griffin, 45 N. H. 558.
New York.— Stuyvesant *v.* Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562; Stanton *v.* Leland, 4 E. D. Smith 88; Hirsch *v.* Camman, 56 Misc. 349, 106 N. Y. Suppl. 814; Matter of Georgi, 35 Misc. 685, 72 N. Y. Suppl. 431; Mack *v.* American Express Co., 20 Misc. 215, 45 N. Y. Suppl. 362; McKane *v.* Adams, 1 N. Y. Suppl. 580; Skoog *v.* New York Novelty Co., 4 N. Y. Civ. Proc. 144; Butler Hard Rubber Co. *v.* Solomon Toube Co., 2 N. Y. City Ct. 41.
North Carolina.— Forte *v.* Boone, 114 N. C. 176, 19 S. E. 632; Lane *v.* Seaboard, etc., R. Co., 50 N. C. 25.
Pennsylvania.— Downey *v.* Garard, 24 Pa. St. 52; Dresher *v.* Williams, 4 Pa. Co. Ct. 4.
Tennessee.— Jones *v.* Miller, 1 Swan 319.
Texas.— Texas, etc., R. Co. *v.* Truesdell, 21 Tex. Civ. App. 125, 51 S. W. 272.
Vermont.— Hathaway *v.* Sabin, 61 Vt. 608, 18 Atl. 188.
United States.— Gulf, etc., R. Co. *v.* James, 48 Fed. 148, 1 C. C. A. 53; Elliott *v.* Holmes, 8 Fed. Cas. No. 4,392, 1 McLean 466.
Canada.— Stewart *v.* Canadian Pac. R. Co., 35 N. Brunsw. 115.
See 40 Cent. Dig. tit. "Process," § 234.
Matter of description.— The writ may be amended by adding matter of description of defendant. Craft *v.* Rolland, 37 Conn. 491.
Names of partners.— A summons in an action against a firm, in which defendants are designated only by their firm-name, is not absolutely void, and may be amended in the trial court so as to show the names of the partners. Gans *v.* Beasley, 4 N. D. 140, 59 N. W. 714.
Changing plaintiff.— Leave will not be granted to amend the writ, before the appearance of defendant or the service of the writ and the filing of pleadings in the cause, by inserting the name of a third person as plaintiff suing for the use of the persons originally named as plaintiffs, where such third person is not before the court nor within the jurisdiction, and cannot be served with notice of the application, even though it is proposed to reserve to him the right to object to the order, such an order being, in form at least, an adjudication of the right to so use his name. Frank *v.* Union Cent. L. Ins. Co., 130 Fed. 224. Where in replevin defendant was summoned to answer to C, treasurer of city of R, for said city, and the principal in the replevin bond was described as C, treasurer of the city of R, the writ cannot be amended by making the city of R plaintiff in name. Clark *v.* Anderson, 103 Me. 134, 68 Atl. 633.

85. Anderson *v.* Brock, 3 Me. 243; Drew *v.* Farnsworth, 186 Mass. 365, 71 N. E. 783; Martin *v.* Johnson, 8 Daly (N. Y.) 541; British Columbia Furniture Co. *v.* Tugwell, 7 Brit. Col. 361.
Change to representative capacity.— Where a summons showed plaintiff suing individually and alone, but the complaint showed him suing for himself and other stock-holders of defendant corporation, under N. Y. Code Civ. Proc. § 723, providing for the amendment of any process in furtherance of justice, on a motion to strike the complaint, decision would be reserved for five days from publication of the memorandum decision to enable plaintiff to amend the summons to conform to the complaint, in default of which the motion would be granted. Wohlfarth *v.* National Export Assoc., 57 Misc. (N. Y.) 137, 107 N. Y. Suppl. 540.
Where action would be changed from civil to penal.— A writ could not be amended by inserting, immediately after the name of plaintiff, the words, "who sues for the county as well as for himself," as the amendment would convert the writ in a civil case to a penal action, and the court will not aid a prosecutor on a penal act. Walton *v.* Kirby, 3 N. C. 174.

is sued.[86] If the mistake is made by the clerk in taking the name from a memorandum or præcipe filed with him, the writ may be amended from such memorandum or præcipe.[87] But if the action is brought against one defendant, the name of another different defendant cannot be substituted by amendment without such party's consent.[88] Under liberal statutes the name of a party entirely omitted from the summons may be supplied,[89] and the names of additional defendants may be added.[90]

b. Direction to Officer. When the writ is not directed to any officer,[91] or is directed improperly or to the wrong officer,[92] it may be amended. If the sheriff cannot serve the writ and for that reason it is directed to another officer, a failure to recite the facts making such direction necessary may be cured by amendment.[93]

c. Directions For Return. There is a conflict in authority as to whether a writ made returnable at a time not authorized by law is amendable. Many early cases hold that such a writ is void,[94] but the more recent decisions hold that it is merely voidable and may be amended.[95] If the return-day is properly given, an amendment may be allowed changing it to the next term, when the amendment would

86. Southack *v.* Gleason, 49 Misc. (N. Y.) 445, 98 N. Y. Suppl. 859.

A writ issued against two persons as copartners, on the ground that they were stockholders in a corporation (Mass. St. (1851) c. 315), and were therefore liable for the corporate debts on the insolvency of the company, may be amended by charging them individually. Johnson *v.* Somerville Dyeing, etc., Co., 15 Gray (Mass.) 216.

87. Nimmon *v.* Worthington, 1 Ind. 376; Beck *v.* Williams, 5 Blackf. (Ind.) 374; Furniss *v.* Ellis, 9 Fed. Cas. No. 5,162, 2 Brock. 14.

88. *Colorado.*— Union Pac., etc., R. Co. *v.* Perkins, 7 Colo. App. 184, 42 Pac. 1047.

Georgia.— Neal-Millard Co. *v.* Owens, 115 Ga. 959, 42 S. E. 266.

New Jersey.— Maitland *v.* Henry R. Worthington, 59 N. J. L. 114, 35 Atl. 759.

New York.— Elias *v.* Hayes, 24 Misc. 754, 53 N. Y. Suppl. 858.

United States.— Comegyss *v.* Robb, 6 Fed. Cas. No. 3,049, 2 Cranch C. C. 141.

See 40 Cent. Dig. tit. "Process," § 234.

89. Van Wyck *v.* Hardy, 39 How. Pr. (N. Y.) 392.

Adding plaintiffs.— Where a warrant was issued in the name of one only of plaintiffs, and a motion to quash the writ for irregularity in issuing was made, it was held that the writ might be amended. Jarbee *v.* The Daniel Hillman, 19 Mo. 141.

A writ which has not the name of any plaintiff is not amendable. Jones *v.* Sutherland, 73 Me. 157.

90. Steinhardt *v.* Baker, 20 Misc. (N. Y.) 470, 46 N. Y. Suppl. 707 [*affirmed* in 25 N. Y. App. Div. 197, 49 N. Y. Suppl. 357]; Pittsburg *v.* Eyth, 201 Pa. St. 341, 50 Atl. 769.

An amendment at the trial adding the name of an additional joint defendant is not allowable. Holmes *v.* Daniels, 86 N. Y. Suppl. 19.

91. Mitchell *v.* Long, 74 Ga. 94.

92. *Georgia.*— Smets *v.* Weathersbee, R. M. Charlt. 537.

Massachusetts.— Wood *v.* Ross, 11 Mass. 271; Hearsey *v.* Bradbury, 9 Mass. 95.

New Hampshire.— Parker *v.* Barker, 43 N. H. 35, 80 Am. Dec. 130.

New York.— Bronson *v.* Earl, 17 Johns. 63.

Vermont.— Chadwick *v.* Divol, 12 Vt. 499.

Canada.— Houle *v.* Paquet, 20 Quebec Super. Ct. 297.

Where writ is properly served.— If a writ is directed to the wrong officer but is properly served by the right one, the defect is cured. Askew *v.* Stevenson, 61 N. C. 288.

93. Thompson *v.* Bremage, 14 Ark. 59; Moss *v.* Thompson, 17 Mo. 405.

94. *Kentucky.*— Hawkins *v.* Com., 1 T. B. Mon. 144.

Massachusetts.— Bell *v.* Austin, 13 Pick. 90.

New Hampshire.— Wood *v.* Hill, 5 N. H. 229.

New Jersey.— Van Ness *v.* Harrison, 3 N. J. L. 632.

New York.— Cramer *v.* Van Alstyne, 9 Johns. 386.

Rhode Island.— Brainard *v.* Mitchell, 5 R. I. 111.

Virginia.— Kyles *v.* Ford, 2 Rand. 1.

See 40 Cent. Dig. tit. "Process," § 236.

95. *Arkansas.*— Fisher *v.* Collins, 25 Ark. 97.

Georgia.— White *v.* Hart, 35 Ga. 269; Townsend *v.* Stoddard, 26 Ga. 430.

Indiana.— Kaufman *v.* Sampson, 9 Ind. 520.

Iowa.— Graves *v.* Cole, 2 Greene 467.

Maine.— Lawrence *v.* Chase, 54 Me. 196.

Massachusetts.—Hamilton *v.* Ingraham, 121 Mass. 562; McIniffe *v.* Wheelock, 1 Gray 600.

Mississippi.—Harrison *v.* Agricultural Bank, 2 Sm. & M. 307.

Nebraska.— Barker Co. *v.* Central West Inv. Co., 75 Nebr. 43, 105 N. W. 985.

New Jersey.— Lawrence Harbor Colony *v.* American Surety Co., 70 N. J. L. 589, 57 Atl. 390; McEvoy *v.* Hudson County School Dist. No. 8, 38 N. J. Eq. 420.

North Carolina.— Simmons *v.* Norfolk, etc., Steamboat Co., 113 N. C. 147, 18 S. E. 117, 37 Am. St. Rep. 614, 22 L. R. A. 677; Thomas *v.* Womack, 64 N. C. 657; Merrill *v.* Barnard, 61 N. C. 569.

See 40 Cent. Dig. tit. "Process," § 236.

be in furtherance of justice.[96] And an indefinite designation of the return-day may be made definite by amendment.[97] If made returnable at the wrong place it is amendable, when it appears that defendant has not been prejudiced.[98]

d. Damages and Form or Cause of Action. The writ may be amended by stating, reducing, or increasing the amount of damages asked for,[99] by stating the nature of the relief demanded [1] or the nature of the cause of action,[2] or by designating the form of action; [3] but a change in the form or cause of action cannot be made where it would prejudice defendant,[4] without consent of parties.[5]

e. Miscellaneous Defects. A summons may be amended to conform to the declaration or complaint,[6] it may be amended when the seal of the court is omitted,[7] when there is an omission of or defect in the signature or teste,[8] when the date of

96. Lassiter *v.* Carroll, 87 Ga. 731, 13 S. E. 825.

97. Ames *v.* Weston, 16 Me. 266.

98. Kelly *v.* Fudge, 2 Ga. App. 759, 59 S. E. 19; Kimball *v.* Wilkins, 2 Cush. (Mass.) 555; Inman *v.* Griswold, 1 Cow. (N. Y.) 199.

A writ returnable "before us, at," instead of "before our justices of our Supreme Court of Judicature, at," may be amended. Morrell *v.* Waggonner, 5 Johns. (N. Y.) 233.

99. *Connecticut.*— Sanford *v.* Bacon, 75 Conn. 541, 54 Atl. 204.

Maine.— Hare *v.* Dean, 90 Me. 308, 38 Atl. 227; Merrill *v.* Curtis, 57 Me. 152 (where the declaration showed that plaintiff claimed a larger amount); Converse *v.* Damariscotta Bank, 15 Me. 431; McLellan *v.* Crofton, 6 Me. 307.

Massachusetts.— Graves *v.* New York, etc., R. Co., 160 Mass. 402, 35 N. E. 851; Cragin *v.* Warfield, 13 Metc. 215; Danielson *v.* Andrews, 1 Pick. 156.

Mississippi.— Foster *v.* Collins, 5 Sm. & M. 259.

New York.— Deane *v.* O'Brien, 13 Abb. Pr. 11.

North Carolina.— McBride *v.* Welborn, 119 N. C. 508, 26 S. E. 125; Clayton *v.* Liverman, 29 N. C. 92.

Ohio.— Stone *v.* Cordell, 1 Ohio Dec. (Reprint) 166, 3 West. L. J. 79.

Pennsylvania.—Clark *v.* Herring, 5 Binn. 33.

Canada.— Guess *v.* Perry, 12 Ont. Pr. 460.

See 40 Cent. Dig. tit. "Process," § 235.

Contra.— Hoit *v.* Molony, 2 N. H. 322.

Where the amount of damages sued for is stated in the præcipe, but omitted in the summons, the court will grant leave to amend. Campbell *v.* Chaffee, 6 Fla. 724; Thompson *v.* Turner, 22 Ill. 389; State *v.* Hood, 6 Blackf. (Ind.) 260.

1. Chamberlain *v.* Bittersohn, 48 Fed. 42.

2. Polock *v.* Hunt, 2 Cal. 193; Chester, etc., Coal, etc., Co. *v.* Lickiss, 72 Ill. 521; Baltimore F. Ins. Co. *v.* McGowan, 16 Md. 47; Wilson *v.* Pyles, 1 Strobh. (S. C.) 357.

The clerk having omitted to state in a capias ad respondendum the nature of the action or the amount claimed, it was held that the mistake might be amended by the præcipe. State *v.* Hood, 6 Blackf. (Ind.) 260.

3. Chester, etc., Coal, etc., Co. *v.* Lickiss, 72 Ill. 521.

4. Watson *v.* McCartney, 1 Nebr. 131; Wilbanks *v.* Willis, 2 Rich. (S. C.) 108.

Where plaintiffs have begun their action as on contract purposely and deliberately, in order that they may obtain an attachment against defendant as a non-resident and also procure an order for publication against him, and they by those means procure his appearance, they will not be permitted to amend the summons, by making it state an action of tort for converting plaintiffs' goods. Lane *v.* Beam, 19 Barb. (N. Y.) 51.

5. Anonymous, 2 N. C. 401.

6. *Illinois.*— Wilday *v.* Wight, 71 Ill. 374.

Indiana.— Riley *v.* Murray, 8 Ind. 354; State *v.* Bryant, 5 Ind. 192.

Iowa.— Culver *v.* Whipple, 2 Greene 365; Jackson *v.* Fletcher, Morr. 230.

Missouri.— Jones *v.* Cox, 7 Mo. 173.

New York.— Norton *v.* Cary, 14 Abb. Pr. 364.

Texas.— Kavanaugh *v.* Brown, 1 Tex. 481.

See 40 Cent. Dig. tit. "Process," § 230.

7. *Florida.*— Benedict *v.* W. T. Hadlow Co., 52 Fla. 188, 42 So. 239.

Indiana.— State *v.* Davis, 73 Ind. 359.

Missouri.— Jump *v.* McClurg, 35 Mo. 193, 86 Am. Dec. 146.

New York.— Dominick *v.* Eacker, 3 Barb. 17. But *compare* Dwight *v.* Merritt, 59 How. Pr. 320.

North Carolina.— Clark *v.* Hellen, 23 N. C. 421.

Rhode Island.— Potter *v.* Smith, 7 R. I. 55.

Texas.— Cartwright *v.* Chabert, 3 Tex. 261, 49 Am. Dec. 742; Winn *v.* Sloan, 1 Tex. App. Civ. Cas. § 1103.

Wisconsin.— Strong *v.* Catlin, 3 Pinn. 121, 3 Chandl. 130.

United States.— Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305; Peaslee *v.* Haberstro, 19 Fed. Cas. No. 10,884, 15 Blatchf. 472, 8 Reporter 486.

See 40 Cent. Dig. tit. "Process," § 232.

Contra.— Foss *v.* Isett, 4 Greene (Iowa) 76, 61 Am. Dec. 117; Witherel *v.* Randall, 30 Me. 168; Tibbetts *v.* Shaw, 19 Me. 204; Bailey *v.* Smith, 12 Me. 196; Hall *v.* Jones, 9 Pick. (Mass.) 446.

If both the seal and the clerk's signature be omitted, the writ is absolutely void. Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305.

8. *Florida.*— Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885.

Georgia.— Myers *v.* Griner, 120 Ga. 723, 48 S. E. 113; Tatum *v.* Allison, 31 Ga. 337.

Illinois.— Norton *v.* Dow, 10 Ill. 459.

its issuance is omitted or wrongly given,[9] when it fails to state when and where the complaint will be filed [10] or to name the county in which plaintiff desires trial,[11] when it does not have the style required by law,[12] or when it fails to give the address of plaintiff's attorney.[13] An amendment may be allowed so as to correct a variance between an original and branch summons,[14] to state the residence of defendant,[15] to insert the name of the state in which the writ is issued,[16] to correct or supply a date in the writ, or in the indorsement thereon,[17] to add the name of the court in which the action was brought,[18] or so as to show the authority for serving the attorney of the party instead of the party himself [19] or to strike out surplusage.[20] The writ may be amended by changing the indorsement thereon so as to add other counts to the declaration,[21] by substituting a successor in office as indorser on the writ,[22] by adding an indorsement of the name of the person for whose use the action was brought,[23] or by substituting the indorsement of the name of an attorney of the court for that of one not admitted to practice in the court.[24] The writ may be changed from a capias to a summons,[25] or from a summons into a writ of attachment.[26] A writ has been held not amendable which omits to state the place of appearance.[27]

Kansas.— Aultman, etc., Mach. Co. *v.* Wier, 67 Kan. 674, 74 Pac. 227.

Maine.—Converse *v.* Damariscotta Bank, 15 Me. 431.

Massachusetts.— Austin *v.* Lamar F. Ins. Co., 108 Mass. 338.

New Hampshire.— Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352; Reynolds *v.* Damrell, 19 N. H. 394.

New Jersey.— Den *v.* Lecony, 1 N. J. L. 111.

New York.— People *v.* New York Super. Ct., 18 Wend. 675; Jenkins *v.* Pepoon, 2 Johns. Cas. 312. Where the summons is required to be subscribed by the attorney representing plaintiff, and one is signed by several attorneys each representing different plaintiffs, it may be amended so that all the plaintiffs may be represented by the same attorneys. Jones *v.* Conlon, 48 Misc. 172, 95 N. Y. Suppl. 255.

Texas.— Andrews *v.* Ennis, 16 Tex. 45; Austin *v.* Jordan, 5 Tex. 130.

Vermont.—Johnson *v.* Nash, 20 Vt. 40, holding that where the clerk of the county court by mistake signed a writ returnable to that court as "deputy clerk," he would be allowed to amend by annexing to his signature the word "clerk."

Wisconsin.—Prentice *v.* Stefan, 72 Wis. 151, 39 N. W. 364.

United States.— U. S. *v.* Turner, 50 Fed. 734.

See 40 Cent. Dig. tit. "Process," § 232.

Contra.— Mont. Code Civ. Proc. § 774, providing that pleadings may be amended, before trial, to supply an omission, does not authorize the amendment of a summons which is void because not signed by the clerk, as required by section 632. Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

9. Jackson *v.* Bowling, 10 Ark. 578; McLarren *v.* Thurman, 8 Ark. 313; Haines *v.* McCormick, 5 Ark. 663; Gardiner *v.* Gardiner, 71 Me. 266; Mathews *v.* Bowman, 25 Me. 157; Bragg *v.* Greenleaf, 14 Me. 395; Gilbert *v.* South Carolina Interstate, etc., Exposition Co., 113 Fed. 523. *Contra*, Pollard *v.* Wilder, 17 Vt. 48.

10. Foster *v.* Wood, 1 Abb. Pr. N. S. (N. Y.) 150; Keeler *v.* Betts, 3 Code Rep. (N. Y.) 183.

11. Wallace *v.* Dimmick, 24 Hun (N. Y.) 635, holding that a motion to set aside the service of such a summons might be denied on condition that a proper summons should within five days after the entry of the order be served upon defendant.

12. Guarantee Trust, etc., Co. *v.* Buddington, 23 Fla. 514, 2 So. 885; State Bank *v.* Buckmaster, 1 Ill. 176; Ilsley *v.* Harris, 10 Wis. 95.

13. Wiggins *v.* Richmond, 58 How. Pr. (N. Y.) 376.

14. Boardman *v.* Parrish, 56 Ala. 54.

15. White *v.* Hart, 35 Ga. 269; Raney *v.* McRae, 14 Ga. 589, 60 Am. Dec. 660; Patten *v.* Starrett, 20 Me. 145; Gooch *v.* Bryant, 13 Me. 386.

16. Harris *v.* Jenks, 3 Ill. 475.

17. Driscoll *v.* Stanford, 74 Me. 103; Kennedy *v.* Holden, 3 Strobh. (S. C.) 175.

18. Walker *v.* Hubbard, 4 How. Pr. (N. Y.) 154.

19. Aldrich *v.* Blatchford, 175 Mass. 369, 56 N. E. 700.

20. Lowenstein *v.* Gaines, 64 Ark. 499, 43 S. W. 762, holding that when a summons commanding defendant to answer on the first day of the next spring term of court, correct in other respects, contained the unnecessary clause, "which will be on March 25, 1895," when the term commenced on the first day of April, it was error, and an abuse of discretion, to refuse to allow the summons to be amended by striking out said clause, and to dismiss the action.

21. Moore *v.* Smith, 19 Ala. 774.

22. Paine *v.* Gill, 2 Mass. 136.

23. Paterson Tp. *v.* Munn, 18 N. J. L. 440.

24. Jewett *v.* Garrett, 47 Fed. 625.

25. Ennis *v.* Ennis, 5 Harr. (Del.) 390; Harvey *v.* Cutts, 51 Me. 604.

26. Carter *v.* Thompson, 15 Me. 464.

27. Anonymous, 6 N. J. L. 166.

3. AFFIDAVITS, ORDERS, ETC., FOR PUBLICATION. Affidavits or orders for publication may be amended when defective merely,[28] and a defective summons, voidable only, may be amended during the course of the publication.[29] But when an order is based upon an insufficient showing made in the complaint or affidavit, a subsequent amendment of such complaint or affidavit cannot give life to the order, since the defect is jurisdictional.[30]

4. PROCEDURE. Leave of court must be obtained unless the statute gives the right to amend of course,[31] and notice of the application should usually be given to the other party;[32] but no notice is necessary unless required by statute, where the rights of the parties and the issues to be tried are not affected,[33] and amendments may be allowed without notice when the other party is in court attacking the sufficiency of the process.[34] Leave to amend a return does not authorize an amendment of the writ.[35] The motion to amend should be made in the court from which the writ issues,[36] although the appellate court, after taking jurisdiction of a cause, will sometimes amend the process.[37] The amendment may be made *nunc pro tunc* at a term subsequent to that at which the order allowing it is made.[38] The amendment need not always be actually made, for if the defect is amendable the

28. Weaver *v.* Lockwood, 2 Kan. App. 62, 43 Pac. 311; Equitable L. Assur. Soc. *v.* Laird, 24 N. J. Eq. 319 (error in name of newspaper in which publication was directed); Mojarrieta *v.* Saenz, 80 N. Y. 553 (error in caption); Mishkind-Feinberg Realty Co. *v.* Sidorsky, 111 N. Y. App. Div. 578, 98 N. Y. Suppl. 496; Reister *v.* Land, 14 Okla. 34, 76 Pac. 156.

29. Deimel *v.* Scheveland, 16 Daly (N. Y.) 34, 9 N. Y. Suppl. 482, 955, holding where after a summons had been published for four weeks it was discovered that it was a six-day and not a ten-day summons, as required by Code Civ. Proc. § 3165, subd. 2, that an amendment of the summons, and the continuation of its publication in its amended form for the residue of the six weeks, required by law, was sufficient compliance with Code Civ. Proc. § 638, requiring that service by publication of "the summons" be commenced within thirty days after the granting of the warrant.

30. Foster *v.* Electric Heat Regulator Co., 16 Misc. (N. Y.) 147, 37 N. Y. Suppl. 1063.

After judgment founded on service by publication, an order that the complaint be filed *nunc pro tunc*, to cure the omission of plaintiff to file it at the commencement of the action, is unavailing to give vitality to the judgment. Kendall *v.* Washburn, 14 How. Pr. (N. Y.) 380.

31. *Connecticut.*— Sanford *v.* Bacon, 75 Conn. 541, 54 Atl. 204.

Indiana.— Kaufman *v.* Sampson, 9 Ind. 520.

Maine.— Bray *v.* Libby, 71 Me. 276.

New Hampshire.— Lebanon *v.* Griffin, 45 N. H. 558.

New York.— Walkenshaw *v.* Perzel, 7 Rob. 606, 32 How. Pr. 310; Diblee *v.* Mason, 1 Code Rep. 37, 2 Edm. Sel. Cas. 20.

32. Hewitt *v.* Howell, 8 How. Pr. (N. Y.) 346; Thomas *v.* Womack, 64 N. C. 657.

Confirmation of irregular order.— An order which is irregular, as allowing an amendment of the summons without notice to defendant, cannot be confirmed *nunc pro tunc*. Luckey *v.* Mockridge, 112 N. Y. App. Div. 199, 98 N. Y. Suppl. 335.

Misnomer of defendant, because of the use of the wrong christian name, may be corrected by amendment on an *ex parte* application, if the court finds that defendant was in fact apprised of the action brought against her. Stuyvesant *v.* Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562.

33. Sidway *v.* Marshall, 83 Ill. 438.

Substituted service — Distinction between misnomer of plaintiff and defendant.— "Where reliance is placed upon substituted service to acquire jurisdiction, there can be no presumption that a defendant who is misnamed in the summons will have taken any cognizance of the fact that it was designed to affect him in any way. . . . The name not being his own he may safely and properly disregard the process, for the name is presumably that of another. Hence, there is good reason for holding that the misnomer of a defendant in the summons cannot be corrected *ex parte* by amendment in the event of the defendant's failure to put in an appearance in the action. . . . An entirely different condition of affairs is presented, however, when the misnomer in the summons relates to the plaintiff, as in the case at bar. . . . No harm is done to the correctly-named defendant by the error in the name of the plaintiff. . . . Being put upon inquiry as to the claim, there is no reason why an amendment may not be allowed *ex parte* to correct the name of the plaintiff, if the defendant chooses not to appear in the action and allows judgment to go by default." Farrington *v.* Muchmore, 52 N. Y. App. Div. 247, 248, 65 N. Y. Suppl. 432.

34. Inman *v.* Griswold, 1 Cow. (N. Y.) 199.

35. White *v.* Sydenstricker, 6 W. Va. 46.

36. Sidway *v.* Marshall, 83 Ill. 438; Hildreth *v.* Hough, 19 Ill. 403; Dennison *v.* Willson, 16 N. H. 496.

37. McLean *v.* Breece, 113 N. C. 390, 18 S. E. 694; Capps *v.* Capps, 85 N. C. 408.

38. Myers *v.* Griner, 120 Ga. 723, 48 S. E. 113.

writ may be deemed amended whenever the objection is taken;[39] and this rule is frequently resorted to on appeal.[40] When a summons is amended by making a new party, the better practice is that the amendment should be inserted in the original summons; but there is a substantial amendment where an additional summons incorporating the amendment is issued.[41]

5. Operation and Effect. An amendment will ordinarily be deemed to relate back to the time of the commencement of the suit.[42] As often as a writ is amended it is open to attack for defects and errors, but not as to prior defects which have been corrected.[43] If a mistake in the name of a plaintiff be corrected by amendment, the process need not be again served upon defendant who has answered.[44]

C. Amendment of Return[45]— **1. In General.** The sheriff is allowed, with great liberality, to amend his return so as to remedy defects therein or make it conform to the truth of the case,[46] providing rights of third parties which have

39. Denn *v.* Lecony, 1 N. J. L. 131.

40. Kaufman *v.* Sampson, 9 Ind. 520. But see Chicago, etc., R. Co. *v.* Suta, 123 Ill. App. 125, where it is said that if no amendment is actually made pursuant to a leave granted to amend the return of a summons, the return remains unaffected.

41. Arthur *v.* Allen, 22 S. C. 432.

42. Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912; Heath *v.* Whidden, 29 Me. 108.

Where rights would be affected.—In amending a summons, the doctrine of relation will not be applied, so as to affect the rights of other parties, or defeat the defense of the statute of limitations, when complete. Flatley *v.* Memphis, etc., R. Co., 9 Heisk. (Tenn.) 230.

43. Mills *v.* Bishop, Kirby (Conn.) 4; Nashville, etc., R. Co. *v.* Wade, 2 Baxt. (Tenn.) 444.

44. Jarrett *v.* City Electric R. Co., 120 Ga. 472, 47 S. E. 927, holding that if in consequence of the amendment defendant was unprepared for trial he could have been allowed time.

45. On appeal see Appeal and Error, 2 Cyc. 977.

46. *Alabama.*—Daniels *v.* Hamilton, 52 Ala. 105; Hefflin *v.* McMinn, 2 Stew. 492, 20 Am. Dec. 58.

Arkansas.—St. Louis, etc., R. Co. *v.* Yocum, 34 Ark. 493; Brinkley *v.* Mooney, 9 Ark. 445.

California.— Gavitt *v.* Doub, 23 Cal. 78.

Connecticut.— Palmer *v.* Thayer, 28 Conn. 237.

Georgia.— Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25; Fitzgerald *v.* Garvin, T. U. P. Charlt. 281.

Illinois.— Waite *v.* Green River Special Drainage Dist., 226 Ill. 207, 80 N. E. 725; Barlow *v.* Stanford, 82 Ill. 298; Toledo, etc., R. Co. *v.* Butler, 53 Ill. 323; Montgomery *v.* Brown, 7 Ill. 581. A court of chancery has power, even after the rendition of a decree, to permit the sheriff to amend the return made on the summons by signing his name thereto, a sufficient showing having been made. Lies *v.* Klaner, 121 Ill. App. 332.

Indiana.—Walker *v.* Shelbyville, etc., Turnpike Co., 80 Ind. 452; Jackson *v.* Ohio, etc., R. Co., 15 Ind. 192.

Iowa.— Patterson *v.* Indiana, 2 Greene 492.

Kansas.— Jordan *v.* Johnson, 1 Kan. App. 656, 42 Pac. 415.

Kentucky.— Combs *v.* Warner, 8 Dana 87; Scanlon *v.* Torstadt, 37 S. W. 681, 18 Ky. L. Rep. 821.

Louisiana.— State Bank *v.* Elam, 10 Rob. 26; Skilliman *v.* Jones, 3 Mart. N. S. 686.

Maryland.— O'Connell *v.* Ackerman, 62 Md. 337; Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646.

Massachusetts.— Johnson *v.* Stewart, 11 Gray 181.

Missouri.— Webster *v.* Blount, 39 Mo. 500; Judd *v.* Smoot, 93 Mo. App. 289.

Nebraska.— Phœnix Ins. Co. *v.* King, 52 Nebr. 562, 72 N. W. 855.

North Carolina.— Stealman *v.* Greenwood, 113 N. C. 355, 18 S. E. 503.

Oregon.— Weaver *v.* Southern Oregon Co., 30 Oreg. 348, 48 Pac. 171.

Pennsylvania.— Burr *v.* Dougherty, 14 Phila. 6.

Rhode Island.— Sheldon *v.* Comstock, 3 R. I. 84.

South Carolina.— Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5.

Virginia.— Shenandoah Valley R. Co. *v.* Ashby, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

West Virginia.— Hoopes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251; Hopkins *v.* Baltimore, etc., R. Co., 42 W. Va. 535, 26 S. E. 187; State *v.* Martin, 38 W. Va. 568, 18 S. E. 748; Capehart *v.* Cunningham, 12 W. Va. 750.

United States.— Phœnix Ins. Co. *v.* Wulf, 1 Fed. 775, 6 Biss. 285; Cushing *v.* Laird, 6 Fed. Cas. No. 3,508, 4 Ben. 70.

See 40 Cent. Dig. tit. "Process," § 239.

Inquiry as to truth.— In the absence of any suspicious circumstance, the court will not inquire as to the truth of an amendment made by a sheriff to his return. World's Columbian Exposition *v.* Scala, 55 Ill. App. 207.

Service by private person.— Amendments of affidavits of service made by private persons may be made under the same rules that are applicable to amendments of sheriff's returns. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Wausau First Nat. Bank *v.* Kromer, 126 Wis. 436, 105 N. W. 823; King *v.* Davis, 137 Fed. 198.

meanwhile accrued will not become adversely affected thereby;[47] but the matter is discretionary with the court,[48] and leave must always be first obtained.[49] This is a common-law right, in no way dependent upon statute;[50] but the right is frequently expressly declared by statute.[51] Only the court to which the return is made has jurisdiction to authorize an amendment of the same.[52] No other officer

Officer's affidavit— A return which does not show a good service cannot be cured by affidavit showing a good service. Gardner *v.* Small, 17 N. J. L. 162.

Proof of publication.— The rule allowing the amendment of a sheriff's return applies equally to the proof of service by publication. Ranch *v.* Werley, 152 Fed. 509.

Acknowledgment of service.— Under the Georgia statute authorizing an acknowledgment of service of declaration and waiver of process, an acknowledgment may be amended so as to include a waiver if defendant intended, but inadvertently failed, to include it. Scudder *v.* Massengill, 88 Ga. 245, 14 S. E. 571; Ross *v.* Jones, 52 Ga. 22; Ingram *v.* Little, 21 Ga. 420; Little *v.* Ingram, 16 Ga. 194.

47. *California.*— Newhall *v.* Provost, 6 Cal. 85.

Delaware.— Johnson *v.* Wilmington, etc., R. Co., 1 Pennew. 87, 39 Atl. 777.

Illinois.— Tewalt *v.* Irwin, 164 Ill. 592, 46 N. E. 13.

Kansas.— Smith *v.* Martin, 20 Kan. 572.

Maine.— Glidden *v.* Philbrick, 56 Me. 222; Fairfield *v.* Paine, 23 Me. 498.

North Carolina.— Davidson *v.* Cowan, 12 N. C. 304.

Ohio.— *In re* Worstall, 8 Ohio S. & C. Pl. Dec. 264, 6 Ohio N. P. 525.

United States.— King *v.* Davis, 137 Fed. 222 [*affirmed* in 157 Fed. 676]; Phœnix Ins. Co. *v.* Wulf, 1 Fed. 775, 9 Biss. 285; Rickards *v.* Ladd, 20 Fed. Cas. No. 11,804, 6 Sawy. 40.

See 40 Cent. Dig. tit. "Process," § 239.

48. *Kentucky.*— Miller *v.* Shackleford, 4 Dana 264.

Massachusetts.— Johnson *v.* Day, 17 Pick. 106.

Mississippi.— Howard *v.* Priestly, 58 Miss. 21.

Missouri.— Little Rock Trust Co. *v.* Southern Missouri, etc., R. Co., 195 Mo. 669, 93 S. W. 944; Feurt *v.* Caster, 174 Mo. 289, 73 S. W. 576; Scruggs *v.* Scruggs, 46 Mo. 271; State *v.* Rayburn, 31 Mo. App. 385.

Nebraska.—Wittstruck *v.* Temple, 58 Nebr. 16, 78 N. W. 456.

North Carolina.— Campbell *v.* Smith, 115 N. C. 498, 20 S. E. 723; Luttrell *v.* Martin, 112 N. C. 593, 17 S. E. 573.

Texas.— Messner *v.* Lewis, 20 Tex. 221.

See 40 Cent. Dig. tit. "Process," § 242.

A referee to whom a case has been referred has the power to permit an amendment of the sheriff's return. Camp *v.* Ocala First Nat. Bank, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173.

49. *Alabama.*— Wilson *v.* Strobach, 59 Ala. 488.

Delaware.— Johnson *v.* Wilmington, etc., R. Co., 1 Pennew. 87, 39 Atl. 777.

Georgia.— Beutell *v.* Oliver, 89 Ga. 246, 15 S. E. 307.

Indiana.— Walker *v.* Shelbyville, etc., Turnpike Co., 80 Ind. 452.

Iowa.— Patterson *v.* Indiana, 2 Greene 492.

Kentucky.— Miller *v.* Shackleford, 4 Dana 264.

Massachusetts.— Thatcher *v.* Miller, 11 Mass. 413.

North Carolina.— Campbell *v.* Smith, 115 N. C. 498, 20 S. E. 723.

Oregon.— See Knapp *v.* Wallace, (1907) 92 Pac. 1054, holding that where plaintiff, four months after the entry of the decree, filed, as an amended return, an affidavit of the person making the original affidavit to the effect that the mailing was done on June 25, 1904, but it did not appear that leave of court was obtained to amend the return, nor that there was any showing made by affidavit on which to base the order, the amendment is ineffectual to aid the jurisdiction of the court.

Pennsylvania.— Deacle *v.* Deacle, 160 Pa. St. 206, 28 Atl. 839, 40 Am. St. Rep. 719; Whitman *v.* Higby, 24 Pa. Co. Ct. 236.

Texas.— Thomas *v.* Goodman, 25 Tex. Suppl. 446.

Virginia.— Park Land, etc., Co. *v.* Lane, 106 Va. 304, 55 S. E. 690; Bullitt *v.* Winston, 1 Munf. 269.

See 40 Cent. Dig. tit. "Process," § 241.

Motion may be informal.— A motion to permit an amendment of a sheriff's return requires no formal proceedings, such as an issue, trial, etc., but leave may be granted informally in a proper case. Wilcox *v.* Moudy, 89 Ind. 232.

Showing.— Leave will not be granted where there is no showing that an amendment could be made (Youngstown Bridge Co. *v.* White, 105 Ky. 273, 49 S. W. 36, 20 Ky. L. Rep. 1175), or where the evidence offered is conflicting and unsatisfactory) Park Land, etc., Co. *v.* Lane, 106 Va. 304, 55 S. E. 690.

After submission on appeal.— The return to a summons cannot be amended after submission of the case on appeal, and without leave granted or notice to the opposite party. Wealaka Mercantile, etc., Co. *v.* Lumber Mut. F. Ins. Co., (Mo. App. 1907) 106 S. W. 575; Wealaka Mercantile, etc., Co. *v.* Lumbermen's Mut. Ins. Co., 128 Mo. App. 129, 106 S. W. 573.

50. Main *v.* Lynch, 54 Md. 658; Rickards *v.* Ladd, 20 Fed. Cas. No. 11,804, 6 Sawy. 40.

51. See the statutes of the several states.

52. Barndollar *v.* Patton, 4 Colo. 474 (cannot be done in the supreme court); Ledford *v.* Weber, 7 Ill. App. 87; Pilkey *v.* Gleason, 1 Iowa 85 (cannot be done in supreme court).

After a cause has been removed to a federal court, the sheriff cannot amend his return on

than the one to whom the writ is committed can amend it,[53] and such officer is a necessary party to any proceedings had for the purpose of effecting an amendment.[54] If the return is defective the sheriff may be compelled to correct it; but if it is complete and perfect on its face the only remedy for its falsity, if the sheriff refused to amend, is an action against the officer.[55] It is usually held that notice must be given to the adverse party before an amendment will be allowed, particularly where an extrinsic showing is necessary;[56] but some cases hold that no notice need be given.[57] When the sheriff seeks to amend for his own protection, the court will not grant leave on doubtful and unsatisfactory evidence.[58]

2. Time For Making Amendment. There is no specific limitation upon the time within which the right of amendment must be exercised, and an amendment may be allowed at any time, and at any stage of the proceedings, in the court's discretion, even after the lapse of several years,[59] and after the sheriff has gone out of office.[60] Some cases hold that the right of amendment cannot be exercised after suit brought or motion made against the officer for official default,[61] but

the summons. Hawkins *v.* Peirce, 79 Fed. 452; Tallman *v.* Baltimore, etc., R. Co., 45 Fed. 156.

Where judgment is rendered upon a record which does not show legal service, the error is jurisdictional, and no amendment of the return so as to show due service can be made in the supreme court on appeal. Hall *v.* Graham, 49 Wis. 553, 5 N. W. 943.

Amendment of process on appeal: Generally see Appeal and Error, 2 Cyc. 977; On appeal from justice see Justices of the Peace, 24 Cyc. 734.

53. Holmes *v.* Hill, 19 Mo. 159; Carroll County Bank *v.* Goodell, 41 N. H. 81.

An ex-sheriff cannot amend a return of a service made by his deputy during his term of office. Knapp *v.* Wallace, (Oreg. 1907) 92 Pac. 1054.

54. Jefferson County Sav. Bank *v.* McDermott, 99 Ala. 79, 10 So. 154.

55. Sawyer *v.* Curtis, 2 Ashm. (Pa.) 127; Washington Mill Co. *v.* Kinnear, 1 Wash. Terr. 99.

56. *Illinois.*— Chicago Planing Mill Co. *v.* Merchant's Nat. Bank, 86 Ill. 587; Linder *v.* Crawford, 95 Ill. App. 183.

Michigan.— Haynes *v.* Knowles, 36 Mich. 407; Montgomery *v.* Merrill, 36 Mich. 97.

Missouri.— Little Rock Trust Co. *v.* Southern Missouri, etc., Co., 195 Mo. 669, 93 S. W. 944.

Nebraska.—Wittstruck *v.* Temple, 58 Nebr. 16, 78 N. W. 456; Shufeldt *v.* Barlass, 33 Nebr. 785, 51 N. W. 134.

Wisconsin.— Wausau First Nat. Bank *v.* Kromer, 126 Wis. 436, 105 N. W. 823.

United States.— King *v.* Davis, 137 Fed. 222 [*affirmed* in 157 Fed. 676].

57. Lungren *v.* Harris, 6 Ark. 474; Brown *v.* Hill, 5 Ark. 78; El Paso, etc., R. Co. *v.* Kelley, 99 Tex. 87, 87 S. W. 660. "The true rule of practice, upon much and mature reflection, we think, should only permit such amendments as a matter of course, and without notice, during the term at which the cause is determined." O'Conner *v.* Wilson, 57 Ill. 226, 230.

58. Smith *v.* Moore, 17 N. H. 380.

59. *Alabama.*— Hefflin *v.* McMinn, 2 Stew. 492, 20 Am. Dec. 58; Moreland *v.* Ruffin, Minor 18.

Florida.— Butler *v.* Thompson, 2 Fla. 9.

Illinois.— Spellmeyer *v.* Gaff, 112 Ill. 29, 1 N. E. 170; Deutsch Roemisch Katholischer Central Verein *v.* Lartz, 94 Ill. App. 255 [*affirmed* in 192 Ill. 485, 61 N. E. 487].

Kansas.—Kirkwood *v.* Reedy, 10 Kan. 453.

Louisiana.— Nichol *v.* De Ende, 3 Mart. N. S. 310.

Massachusetts.— Johnson *v.* Day, 17 Pick. 106; Thatcher *v.* Miller, 11 Mass. 413.

Missouri.— Feurt *v.* Caster, 174 Mo. 289, 73 S. W. 576; Judd *v.* Smoot, 93 Mo. App. 289; State *v.* Staed, 64 Mo. App. 28.

Nebraska.— Shufeldt *v.* Barlass, 33 Nebr. 785, 51 N. W. 134.

North Carolina.— Davidson *v.* Cowan, 12 N. C. 304.

Tennessee.— Atkinson *v.* Rhea, 7 Humphr. 59.

Texas.— Thomason *v.* Bishop, 24 Tex. 302; Porter *v.* Miller, 7 Tex. 468.

Wisconsin.— Schmidt *v.* Stolowski, 126 Wis. 55, 105 N. W. 44.

See 40 Cent. Dig. tit. "Process," § 244.

The sheriff cannot amend after judgment where the effect would be to render the judgment erroneous. McGehee *v.* McGehee, 8 Ala. 86; Watkins *v.* Gayle, 4 Ala. 153.

Parol evidence is admissible to show the propriety of allowing a sheriff's return to be amended several years after service of summons. Spellmyer *v.* Gaff, 112 Ill. 29.

60. Alford *v.* Hoag, 8 Kan. App. 141, 54 Pac. 1105; Louisville, etc., R. Co. *v.* Com., 104 Ky. 35, 46 S. W. 207, 20 Ky. L. Rep. 371; Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481; Holmes *v.* Hill, 19 Mo. 159; Shenandoah Valley R. Co. *v.* Ashby, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

The old sheriff or his deputy must make the amendment. Holmes *v.* Hill, 19 Mo. 159.

61. Brinkley *v.* Mooney, 9 Ark. 445; State *v.* Case, 77 Mo. 247; Howard *v.* Union Bank, 7 Humphr. (Tenn.) 26; Mullins *v.* Johnson, 3 Humphr. (Tenn.) 396; King *v.* Breeden, 2 Coldw. (Tenn.) 455; Carr *v.* Meade, 77 Va. 142.

After notice of motion.— The sheriff may be permitted to amend his return upon a sum-

others hold that the officer may, by leave of court, amend his return during the pendency of such suit or motion.[62]

3. Amendable Defects. Amendments in endless variety have been permitted under the general rules stated. Thus returns have been amended by adding the signature of the officer,[63] by alleging that other acts required by the statute were done in making service,[64] by adding further specifications as to the copy delivered,[65] by correcting the name of defendant,[66] by stating additional facts as to the person with whom or the place at which a summons was left,[67] by showing that one of defendants, stated to have been served, was not found,[68] by designating or correcting the date of service,[69] by stating facts as to the non-residence of one of defendants,[70] by adding specifications of details required by the statute,[71] by correcting the date of the receipt of the summons,[72] by showing that the deputy who made the service had been duly appointed by the sheriff,[73] or by showing that affiant who made the service was over eighteen years of age.[74] The proof of service by publication may be amended so as to correct defects and show the actual facts, in the same manner and to the same extent as the sheriff's return.[75] The court will never permit an untruth to be stated by way of amendment,[76] and defendant may contest the truth of the facts sought to be so introduced into the return.[77] And jurisdictional defects cannot be cured by amendment, as where it is sought

mons at any time before a motion is made against him for a false return, even after service of the notice that it will be made. Hill *v.* Hinton, 2 Head (Tenn.) 124.

62. Wilson *v.* Strobach, 59 Ala. 488; People *v.* Ames, 35 N. Y. 482, 91 Am. Dec. 64; Swain *v.* Burden, 124 N. C. 16, 32 S. E. 319; Stealman *v.* Greenwood, 113 N. C. 355, 18 S. E. 503; Whitman *v.* Higby, 24 Pa. Co. Ct. 236.

63. *Ex p.* State Bank, 7 Ark. 9; Lies *v.* Klaner, 121 Ill. App. 332; Calendar *v.* Olcott, 1 Mich. 344; Dewar *v.* Spence, 2 Whart. (Pa.) 211, 30 Am. Dec. 241.

Necessity of actual amendment.— The failure of the coroner to sign the return to a summons officially, his individual name being merely affixed, is cured by a motion in court to permit the coroner, who is present, to amend his return, although the amendment is not in fact made. Russell *v.* Durham, 29 S. W. 16, 16 Ky. L. Rep. 516.

64. Golden Paper Co. *v.* Clark, 3 Colo. 321; Noleman *v.* Weil, 72 Ill. 502; Muldrow *v.* Bates, 5 Mo. 214; Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

65. Prescotts *v.* Reed, 2 Ohio Dec. (Reprint) 478, 3 West. L. Month. 258.

Amended petition.— In an action against a husband, where the petition is amended so as to make the wife a party, and she is served with the amended petition, the return of process by the sheriff, showing that the original petition was served on the wife, may be amended so as to show that the amended petition was served. Canadian, etc., Mortg., etc., Co. *v.* Kyser, 7 Tex. Civ. App. 475, 27 S. W. 280.

66. Alford *v.* Hoag, 8 Kan. App. 141, 54 Pac. 1105; Phillips *v.* Evans, 64 Mo. 17; Grady *v.* Richmond, etc., R. Co., 116 N. C. 952, 21 S. E. 304; Lyons *v.* Donges, 1 Disn. (Ohio) 142, 12 Ohio Dec. (Reprint) 537.

67. O'Hara *v.* Independence Lumber, etc., Co., 42 La. Ann. 226, 7 So. 533; Abbott *v.* Abbott, 101 Me. 343, 64 Atl. 615; Phillips *v.* Evans, 64 Mo. 17; King *v.* Davis, 137 Fed. 198 [*affirmed* in 157 Fed. 676].

68. Watkins *v.* Gayle, 4 Ala. 153.

69. Linder *v.* Crawford, 95 Ill. App. 183; O'Hara *v.* Independence Lumber, etc., Co., 42 La. Ann. 226, 7 So. 533; Hawkins *v.* Boyden, 25 R. I. 181, 55 Atl. 324; Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5.

70. Boyce *v.* Watson, 3 J. J. Marsh. (Ky.) 498.

71. King *v.* Davis, 137 Fed. 198 [*affirmed* in 157 Fed. 676].

72. White *v.* Ladd, 34 Oreg. 422, 56 Pac. 515.

73. Manning *v.* Roanoke, etc., R. Co., 122 N. C. 824, 28 S. E. 963.

74. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

75. *Indiana.*— Barkley *v.* Tapp, 87 Ind. 25.

Kansas.— Hackett *v.* Lathrop, 36 Kan. 661, 14 Pac. 220.

Minnesota.— Burr *v.* Seymour, 43 Minn. 401, 45 N. W. 715, 19 Am. St. Rep. 245.

North Carolina.— Weaver *v.* Roberts, 84 N. C. 493.

West Virginia.— Foley *v.* Ruley, 43 W. Va. 513, 27 S. E. 268.

Wisconsin.— Frisk *v.* Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

See 40 Cent. Dig. tit. "Process," § 249.

76. Slatton *v.* Jonson, 4 Hayw. (Tenn.) 197.

77. Jones *v.* Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

Propriety of affidavits.— Where the question was whether an officer should be allowed to amend his return, opposing affidavits showing that the residence of the party sought to be served was not that stated in the return were properly considered as controverting the officer's ability to truthfully certify a competent service by amendment. Fisk *v.* Hunt, 33 Oreg. 424, 54 Pac. 660.

to add an indorsement on the writ authorizing a previously unauthorized person to serve it,[78] where service is made by an unauthorized person and an amendment is asked for showing service by such person as deputy sheriff,[79] or where a declaration as substitute for process is served before being filed.[80]

4. Operation and Effect. When a return has been amended it has relation to the time of the original return and the amended return takes the place of the original.[81]

V. Abuse of Process.

A. In General.[82] Courts will never permit the wrongful use of their process, and in case such use is attempted the party will not be permitted to gain an advantage by reason of such wrongful act.[83] But the law goes farther, and gives the person aggrieved by the wrongful act a cause of action against the offending party.[84] This action for the abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue.[85]

B. Elements. It has been said that two elements are necessary, an unlawful and ulterior purpose and also an act done in the use of the process not proper in the regular prosecution of the proceeding.[86] But it seems doubtful whether both of these elements must always be present.[87] It has been held that "a malicious abuse of legal process consists in the malicious misuse or misapplication of that

78. Thompson *v.* Moore, 91 Ky. 80, 15 S. W. 6, 358, 12 Ky. L. Rep. 664.

79. Jenssen *v.* Walther, 26 Fla. 448, 7 So. 854.

80. Ellis *v.* Fletcher, 40 Mich. 321.

81. *Alabama.*—Daniels *v.* Hamilton, 52 Ala. 105; Smith *v.* Leavitts, 10 Ala. 92.

Illinois.— Barlow *v.* Stanford, 82 Ill. 298.

Indiana.— Heaton *v.* Peterson, 6 Ind. App. 1, 31 N. E. 1133.

Maine.— Wilton Mfg. Co. *v.* Butler, 34 Me. 431.

Massachusetts.— Welsh *v.* Joy, 13 Pick. 477.

Missouri.— Smoot *v.* Judd, 184 Mo. 508, 83 S. W. 481; Webster *v.* Blount, 39 Mo. 500.

Texas.— El Paso, etc., R. Co. *v.* Kelley, 99 Tex. 87, 87 S. W. 660; Hill *v.* Cunningham, 25 Tex. 25.

Virginia.— Shenandoah Valley R. Co. *v.* Ashby, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

West Virginia.— Hoppes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251; Capehart *v.* Cunningham, 12 W. Va. 750.

See 40 Cent. Dig. tit. "Process," § 248.

Permission to amend is not equivalent to an actual amendment. Wittstruck *v.* Temple, 58 Nebr. 16, 78 N. W. 456. Where no amendment is actually made pursuant to a leave granted to amend the return of a summons, the return remains unaffected. Chicago, etc., R. Co. *v.* Suta, 123 Ill. App. 125. Where the return to a writ is defective, and it is returned to the lower court for correction, if it is amended to show that the summons and copy were in fact left at defendant's last and usual place of abode, a motion to dismiss must be overruled, but, if the return is not amended, the motion to dismiss must be sustained, unless further service of the writ shall be ordered. Abbott *v.* Abbott, 101 Me. 343, 64 Atl. 615.

82. **Damage without wrong** in abuse of legal process see Actions, 1 Cyc. 648.

Injunction against abuse of process see Injunctions, 22 Cyc. 789.

Larceny by taking under process see Larceny, 25 Cyc. 22.

Liability of clerk for wrongful issuance of process see Clerks of Court, 7 Cyc. 230.

Malicious prosecution see Malicious Prosecution, 26 Cyc. 1.

Wrongful use of particular writs see Attachment, 4 Cyc. 831; Garnishment, 20 Cyc. 1152; Injunctions, 22 Cyc. 1061; Sequestration.

83. Wanzer *v.* Bright, 52 Ill. 35; Stein *v.* Valkenhuysen, E. B. & E. 65, 96 E. C. L. 65.

84. Wanzer *v.* Bright, 52 Ill. 35; Page *v.* Cushing, 38 Me. 523; Wood *v.* Graves, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; Ancliff *v.* June, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621.

85. *Illinois.*— Bonney *v.* King, 201 Ill. 47, 66 N. E. 377; Phœnix Mut. L. Ins. Co. *v.* Arbuckle, 52 Ill. App. 33.

Massachusetts.— Wood *v.* Graves, 144 Mass. 365, 11 N. E. 567, 59 Am. St. Rep. 95.

New York.— McClerg *v.* Vielee, 116 N. Y. App. Div. 731, 102 N. Y. Suppl. 45; Foy *v.* Barry, 87 N. Y. App. Div. 291, 84 N. Y. Suppl. 335.

South Dakota.— Ingalls *v.* Christopherson, (1906) 114 N. W. 704.

England.— Grainger *v.* Hill, 4 Bing. N. Cas. 212, 7 L. J. C. P. 85, 5 Scott 561, 33 E. C. L. 675.

86. Bonney *v.* King, 201 Ill. 47, 66 N. E. 377; Jeffery *v.* Robbins, 73 Ill. App. 353; Pittsburg, etc., R. Co. *v.* Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422.

87. Nix *v.* Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434; Antcliff *v.* June, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621; Foy *v.* Barry, 87 N. Y. App. Div. 291, 84 N. Y. Suppl. 335; Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207.

process to accomplish some purpose not warranted or commanded by the writ." [88] And it has also been said that "whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is answerable to an action for damages for an abuse of the process of the court." [89] Similar expressions occur in many cases.[90] None of these statements include the second element above set forth. On the other hand, the second element alone has been held sufficient to impose liability, as where a writ is executed against property in an unreasonable and oppressive manner; [91] where, after arrest upon civil or criminal process, the party arrested is subjected to unwarrantable insult or indignities, is treated with cruelty, is deprived of proper food or shelter, or is otherwise treated with oppression and undue hardships; [92] or where a summons is served in an unreasonable, cruel, and oppressive manner.[93]

C. Malice. Although some cases hold that malice is a fact necessary to be shown in an action for abuse of process,[94] and while the action is often denominated one for the "malicious abuse of process," [95] it is probable that malice is not an essential element of the cause of action,[96] and becomes important only when exemplary damages are sought.[97] The act constituting the abuse must, however, be shown to have been wilful.[98] Under no circumstances will malice alone give a right of action.[99] Nor will the action lie against one who in good faith has sought to properly enforce a supposed right.[1]

D. Distinguished From Malicious Prosecution and False Imprisonment. The action is distinguished from one for malicious prosecution in that it is

88. Bartlett *v.* Christhilf, 69 Md. 219, 14 Atl. 518.

89. Nix *v.* Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434 [*quoting* 2 Addison Torts, § 868].

90. Hendricks *v.* W. J. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835; White *v.* Apsley Rubber Co., 181 Mass. 339, 63 N. E. 885; Johnson *v.* Reed, 136 Mass. 421; McClerg *v.* Vielee, 116 N. Y. App. Div. 731, 102 N. Y. Suppl. 45; Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207.

Illustrations of such abuses.—There is abuse of process where a subpœna is issued, not for the purpose of procuring attendance, but to force defendant to settle a claim rather than submit to the expense and inconvenience of attending court at a great distance from his home. Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207. A party who procures an execution to issue upon a vacated judgment is liable for abuse of process. Farmer *v.* Crosby, 43 Minn. 459, 45 N. W. 866. So it is held that an action lies where a party is fraudulently induced to come within the jurisdiction of the court so as to render him or his property subject to its process. Wanzer *v.* Bright, 52 Ill. 35.

91. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Rogers *v.* Brewster, 5 Johns. (N. Y.) 125; Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405.

92. Bradshaw *v.* Frazier, 113 Iowa 579, 85 N. W. 752, 86 Am. St. Rep. 394, 55 L. R. A. 258; Wood *v.* Graves, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; Smith *v.* Jones, 16 S. D. 337, 92 N. W. 1084; Smith *v.* Weeks, 60 Wis. 94, 18 N. W. 778.

93. Foley *v.* Martin, (Cal. 1903) 71 Pac. 165, holding it an abuse of process for the officer to break into defendant's house and serve him while he was lying in bed sick with paralysis.

94. Mullins *v.* Matthews, 122 Ga. 286, 50 S. E. 101; Nix *v.* Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434.

95. Bartlett *v.* Christhilf, 69 Md. 219, 14 Atl. 518; Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

96. Page *v.* Cushing, 38 Me. 523; Paul *v.* Fargo, 84 N. Y. App. Div. 9, 82 N. Y. Suppl. 369; Petry *v.* Childs, 43 Misc. (N. Y.) 108, 88 N. Y. Suppl. 286; Pittsburg, etc., R. Co. *v.* Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571, 143 N. C. 54, 55 S. E. 422.

97. Paul *v.* Fargo, 84 N. Y. App. Div. 9, 82 N. Y. Suppl. 369; Pittsburg, etc., R. Co. *v.* Wakefield Hardware Co., 138 N. C. 174, 50 S. E. 571.

98. Weeks *v.* Van Ness, 104 N. Y. App. Div. 7, 93 N. Y. Suppl. 337; Paul *v.* Fargo, 84 N. Y. App. Div. 9, 82 N. Y. Suppl. 369; Petry *v.* Childs, 43 Misc. (N. Y.) 108, 88 N. Y. Suppl. 286; Brown *v.* Feeter, 7 Wend. (N. Y.) 301.

99. Whitesell *v.* Study, 37 Ind. App. 429, 76 N. E. 1010; Kramer *v.* Stock, 10 Watts (Pa.) 115.

1. Mathews *v.* Baldwin, 101 Ga. 318, 28 S. E. 1015.

Where defendant honestly believed that plaintiff owed him an account, and assigned the account to another for the purpose of sending the same to another state for collection by garnishment in order to evade the exemption laws of Wisconsin, before the passage of Laws (1893), c. 57, prohibiting such transfers, and such garnishment was thereafter unsuccessfully attempted, such facts did not constitute actionable abuse of process. Leeman *v.* McGrath, 116 Wis. 49, 92 N. W. 425.

founded upon the use, not the issuance of the process;[2] it need not appear that the action was instituted without probable cause,[3] and it need not appear that the action has terminated,[4] but these distinctions are not always observed.[5] It differs from false imprisonment in that, among other things, a warrant valid on its face is no defense to the action.[6]

E. Parties Liable. All the persons who knowingly participate in the abuse of process are liable as joint tort-feasors,[7] and if a party directs or consents to the unlawful acts of an officer or subsequently adopts them, he becomes liable.[8] But a plaintiff who does not direct or participate in abuse of process by the officer, and does not ratify his acts, is not liable.[9] An officer who uses process placed in

2. Bonney *v.* King, 201 Ill. 47, 66 N. E. 377; Wood *v.* Graves, 144 Mass. 365, 368, 11 N. E. 567, 59 Am. Rep. 95 (where the court said: "In examining the instructions of the learned judge to the jury in the present case, no error is found. He made a careful discrimination between the remedy for a malicious prosecution and that for a malicious abuse of process in the manner of executing it. He instructed them explicitly that no damages should be given for anything which occurred before the process was used at all by the officer, but only for what occurred after it began to be used upon plaintiff, and after it began to be wrongfully used for the purpose of collecting defendants' debt"); Herman *v.* Brookerhoff, 8 Watts (Pa.) 240.

The distinction stated.— There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object not the purpose for which it was intended by the law to effect, in other words a perversion of it. On the other hand legal process, civil or criminal, may be maliciously used so as to give rights to a cause of action where no object is contemplated to be gained by it other than its proper effect and execution. Kline *v.* Hibbard, 80 Hun (N. Y.) 50, 29 N. Y. Suppl. 807 [*affirmed* in 155 N. Y. 679, 49 N. E. 1099]; Humphreys *v.* Sutcliffe, 192 Pa. St. 336, 43 Atl. 954, 73 Am. St. Rep. 819; Mayer *v.* Walter, 64 Pa. St. 283; King *v.* Johnston, 81 Wis. 578, 51 N. W. 1011; Whitten *v.* Bennett, 86 Fed. 405, 30 C. C. A. 140. See also Kramer *v.* Stock, 10 Watts (Pa.) 115. Or it may be otherwise stated that a malicious abuse of legal process exists in the malicious misuse or misapplication of process to accomplish a purpose not warranted or commanded by the writ. The malicious perversion of a regularly issued process whereby a result not lawfully or properly obtained on a writ is secured. Hence it does not include a case where the process was procured maliciously but in which there was no abuse or misuse after its issuance. Bartlett *v.* Christhill, 69 Md. 219, 14 Atl. 518 [*citing* Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19]; Grainger *v.* Hill, 4 Bing. N. Cas. 212, 7 L. J. C. P. 85, 5 Scott 561, 33 E. C. L. 675. *Compare* Reams *v.* Pancoast, 111 Pa. St. 42, 2 Atl. 205. See also MALICIOUS PROSECUTION, 26 Cyc. 6 note 3.

3. Page *v.* Cushing, 38 Me. 523; Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207; Pittsburg, etc., R. Co. *v.* Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422 (*correcting* an inadvertent statement to the contrary in 138 N. C. 174, 50 S. E. 571); Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015; Herman *v.* Brookerhoff, 8 Watts (Pa.) 240.

4. *Maine.*— Page *v.* Cushing, 38 Me. 523.

Massachusetts.— White *v.* Apsley Rubber Co., 181 Mass. 339, 63 N. E. 885.

New York.— Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207; Bebinger *v.* Sweet, 6 Hun 478.

North Carolina.—Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015; Sneeden *v.* Harris, 109 N. C. 349, 13 S. E. 920, 14 L. R. A. 389.

Pennsylvania.— Prough *v.* Entriken, 11 Pa. St. 81.

5. See Hendricks *v.* W. G. Middlebrooks Co., 118 Ga. 131, 140, 44 S. E. 835 (where the court said: "The malicious use of legal process may give rise to an action, where no object is contemplated to be gained by it other than its proper effect and execution. In such a case it is necessary to show malice and want of probable cause"); Georgia L. & T. Co. *v.* Johnston, 116 Ga. 628, 43 S. E. 27 (where it was said that both malice and want of probable cause must be shown to sustain an action for the malicious abuse of process); Nix *v.* Goodhill, 95 Iowa 282, 285, 63 N. W. 701, 58 Am. St. Rep. 434 (where it was said: "The authorities are strong, if not quite uniform, that the unlawful use of process must be malicious, and without probable cause; the rule being akin, in that respect, to actions for malicious prosecution. In fact, the two actions are of the same general character, the one being the malicious prosecution of a suit and the other the malicious use of process issued in aid of a proceeding, either pending or determined").

6. Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 51 S. E. 1015.

7. Bradshaw *v.* Frazier, 113 Iowa 579, 85 N. W. 752; Murray *v.* Mace, 41 Nebr. 60, 59 N. W. 387, 43 Am. St. Rep. 664.

But one who participates without any knowledge of the wrongful purpose is not liable. Foy *v.* Barry, 87 N. Y. App. Div. 291, 84 N. Y. Suppl. 335.

8. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Jenner *v.* Joliffe, 9 Johns. (N. Y.) 381; Hyde *v.* Cooper, 26 Vt. 552. See also McLaughry *v.* Porter, 86 Hun (N. Y.) 316, 33 N. Y. Suppl. 464.

9. People's Bldg., etc., Assoc. *v.* McElroy,

his hands for service as a cover for illegal conduct becomes a trespasser *ab initio*.[10]

F. Actions. The action is either trespass or case, depending upon the means used.[11] Inasmuch as it need not be shown that the suit has terminated, the cause of action is complete as soon as the acts complained of are committed, and the statute of limitations begins to run from that time.[12]

VI. PROCESS AGAINST CORPORATIONS.[13]

A. Domestic Corporations — 1. In General. Where a court has jurisdiction of an action against a corporation, it has, in the absence of statutory provision, by necessary implication, the right to cause its process to be served on the proper officer of the corporation in person if resident in the state, or by publication if non-resident.[14] Where the corporate charter has been surrendered and the surrender has been accepted by the state, process can no longer be served upon the corporation.[15]

2. Waiver of Process. An attorney in fact of a corporation, unless he is a general managing agent thereof, has no power to waive service of summons.[16] Nor can stock-holders waive process upon the corporation by appearance as individuals.[17]

3. Statutory Provisions. The legislature has power to prescribe the method of service of process upon corporations doing business within the state,[18] subject only to the rule that the method provided must be one that with reasonable certainty will result in the actual reception by the corporation of the notice served.[19] Such statutes may be made to apply to existing corporations [20] and may operate as a repeal of provisions in existing special charters,[21] and subject to the rules governing statutes generally [22] may either expressly or by implication repeal existing statutes relating to the same subject.[23] Where a statute has been extended to

79 Ill. App. 266; Wurmser *v.* Stone, 1 Kan. App. 131, 40 Pac. 993; Bartlett *v.* Hawley, 38 Minn. 308, 37 N. W. 580; Teel *v.* Miles, 51 Nebr. 542, 71 N. W. 296.

10. Wurmser *v.* Stone, 1 Kan. App. 131, 40 Pac. 993.

11. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Marlatte *v.* Weickgenant, 147 Mich. 266, 110 N. W. 1061; Rogers *v.* Brewster, 5 Johns. (N. Y.) 125.

Sufficiency of pleading.— "In the action for abuse of process the gravamen of the complaint is the using of the process for a purpose not justified by law, and to effect an object not within its proper scope; and in such action the facts may appear from which is fairly deducible the inference of wrongful and malicious use, and the pleading is sufficient if it aver facts out of which the inference arises." Foy *v.* Barry, 87 N. Y. App. Div. 291, 294, 84 N. Y. Suppl. 335.

Right to maintain action on the case see Case, Action on, 6 Cyc. 687.

12. Montague *v.* Cummings, 119 Ga. 139, 45 S. E. 979.

13. **In actions upon insurance contracts** see Accident Insurance, 1 Cyc. 284; Fire Insurance, 19 Cyc. 916; Life Insurance, 25 Cyc. 915; Mutual Benefit Insurance, 29 Cyc. 220.

Necessity of process upon corporation in proceeding to enforce shareholder's remedy see Corporations, 10 Cyc. 997.

14. Mitchell *v.* Southwestern R. Co., 75 Ga. 398.

15. Combes *v.* Keyes, 89 Wis. 297, 62 N. W. 89, 46 Am. St. Rep. 839, 27 L. R. A. 369.

16. Lamb *v.* Gaston, etc., Gold, etc., Min. Co., 1 Mont. 64.

17. Moore *v.* Schoppert, 22 W. Va. 282.

18. State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146.

19. State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146, holding that a provision for service upon the person having charge of a business office of a railroad company was reasonable.

20. Bay State Gas Co. *v.* State, 4 Pennew. (Del.) 238, 56 Atl. 1114.

21. Cairo, etc., R. Co. *v.* Hecht, 29 Ark. 661.

22. See Statutes.

23. *Colorado.*— Little Bobtail Gold Min. Co. *v.* Lightbourne, 10 Colo. 429, 15 Pac. 785, holding that the act of March 17, 1877, section 37, repealed by implication the act of March 14, 1877, section 30.

Indiana.— Toledo, etc., R. Co. *v.* Shively, 26 Ind. 181 (holding that Acts Special Sessions (1861), p. 78, was repealed by Acts (1863), p. 25); New Albany, etc., R. Co. *v.* Haskell, 11 Ind. 301 (holding that 2 Rev. St. p. 34, § 30, did not conflict with 2 Rev. St. p. 222, § 796).

Michigan.— Turner *v.* St. Claire Tunnel Co., 102 Mich. 574, 61 N. W. 72 (holding that 3 Howell Annot. St. § 8147, was not repealed by 3 Howell Annot. St. § 8137); Fowler *v.* Detroit, etc., R. Co., 7 Mich. 79 (holding the act of March 28, 1849, was not

cover service in equity as well as law actions, an amendment to such statute is equally so applicable.[24] A general statute has been held to apply to actions before justices of the peace.[25] But where there is a special statute particularly applicable to such proceedings it will prevail.[26]

4. County to Which Process May Issue. Process in an action against a corporation may issue to another county in accordance with statutes permitting such issuance in actions generally.[27] And it is specifically provided by statute in some states that, where a corporation is rightfully sued in one county, process may issue to any other county in the state,[28] or that, when the person designated by statute as the proper person to be served cannot be found within the county, process may be sent to any other county in the state where he may be found.[29] Under some statutes, however, no provision is made for the issuance of process to any county other than that in which the action is brought.[30]

5. Form and Requisites — a. In General. The form and requisites of process against a domestic corporation are, unless otherwise prescribed by statute,[31] substantially the same as of process against a private individual.[32]

repealed by the act of Feb. 15, 1855, section 47).

Mississippi.— Vicksburg, etc., R. Co. *v.* McCutcheon, 52 Miss. 645, holding that Code (1871), § 703, was not repealed by the act of March 28, 1872.

Montana.—Congdon *v.* Butte Consol. R. Co., 17 Mont. 481, 43 Pac. 629, holding that Comp. St. (1887) div. 1, § 75, did not repeal section 72.

Nevada.— Gillig *v.* Independent Gold, etc., Min. Co., 1 Nev. 247, holding that Pr. Act (1861), § 29, was not repealed by the law of 1862, directing the mode of service upon certain companies.

Ohio.— Fee *v.* Big Sand Iron Co., 13 Ohio St. 563, holding that Code Civ. Proc. § 66, in effect June 1, 1853, superseded the act of March 1, 1852, section 97.

Texas.— Houston, etc., R. Co. *v.* Willie, 53 Tex. 318, 37 Am. Rep. 756, holding that the act of March 21, 1874, section 2, and the act of April 17, 1874, did not repeal by implication, but were cumulative to the act of Feb. 7, 1854.

24. Bailey *v.* Mahleur, etc., Irr. Co., 36 Oreg. 54, 57 Pac. 910.

25. Katzenstein *v.* Raleigh, etc., R. Co., 78 N. C. 286.

26. Farmers' Loan, etc., Co. *v.* Warring, 20 Wis. 290. See also North *v.* Cleveland, etc., R. Co., 10 Ohio St. 548, holding that railroad companies sued before a justice must be summoned according to the provisions of Kirwin St. § 1858, and in accordance with section 2055 relating to service upon other corporations.

27. Cobbey *v.* State Journal Co., 77 Nebr. 619, 110 N. W. 643; Baltimore, etc., R. Co. *v.* McPeek, 16 Ohio Cir. Ct. 87, 8 Ohio Cir. Dec. 742; Stanton *v.* Enquirer Co., 9 Ohio S. & C. Pl. Dec. 801, 7 Ohio N. P. 589; Baldwin *v.* Lorain Co., 9 Ohio S. & C. Pl. 620, 7 Ohio N. P. 506. See Campbell *v.* Woodsdale Island Park Co., 4 Ohio S. & C. Pl. Dec. 152, 3 Ohio N. P. 159.

Issuance of process to other counties generally see *supra*. I, C, 6.

28. See the statutes of the several states. And see Newberry *v.* Arkansas, etc., R. Co., 52 Kan. 613, 35 Pac. 210.

29. See the statutes of the several states. And see Peoria Ins. Co. *v.* Warner, 28 Ill. 429; Eminence Land, etc., Co. *v.* Current River Land, etc., Co., 187 Mo. 420, 86 S. W. 145; Bente *v.* Remington Typewriter Co., 116 Mo. App. 77, 91 S. W. 397; Story *v.* American Cent. Ins. Co., 61 Mo. App. 534.

Presumption.— It will be presumed that where summons is issued to the sheriff of another county it was done in accordance with the statute, unless a showing to the contrary is made. Rochester, etc., R. Co. *v.* Miller, 107 Ind. 598, 82 N. E. 217; Rochester, etc., R. Co. *v.* Jewell, 107 Ind. 332, 82 N. E. 215.

30. Winnesheik Ins. Co. *v.* Holzgrafe, 46 Ill. 422; Stephenson Ins. Co. *v.* Dunn, 45 Ill. 211 (both holding that under the Illinois act of 1853, providing that in a suit against a corporation process should be served on the president if a resident of the county where suit was brought, and if he was absent or a non-resident then on other officers or agents indicated residing in the county, a summons issued in one county and served on a corporation in another county was invalid whether the suit was in law or equity); Dewey *v.* Central Car, etc., Co., 42 Mich. 399, 4 N. W. 179 (holding that service of process should be made only within the county where the business office of the corporation was fixed).

31. See the statutes of the several states.

32. See *supra*, I, D.

An action of assumpsit against a corporation should be commenced by summons and not by attachment. New Brunswick State Bank *v.* Van Horne, 4 N. J. L. 382; Lynch *v.* Mechanics' Bank, 13 Johns. (N. Y.) 127.

A summons was the proper form of process under the earlier statutes. See Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Johnson *v.* Cayuga, etc., R. Co., 11 Barb. (N. Y.) 621; Wilde *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 302; Whitaker *v.* Buffalo Cotton Mfg. Co., 2 How. Pr. (N. Y.)

b. To Whom Process Should Issue and Direction. Jurisdiction of a corporation cannot be obtained by service upon its officers or members as individuals;[33] hence a process is insufficient which, instead of directing the officer to summon defendant corporation, merely requires its agent to be summoned,[34] although in some jurisdictions it has been held that process directed to the officers of the corporation may be sustained as against the corporation, in case the complaint is annexed to the summons and is regular, and the persons served have knowledge that the action is against the corporation.[35] Conversely, service of a summons upon a corporation will not authorize the members of the corporation being held as partners[36] or as individuals;[37] nor can jurisdiction be obtained of individuals under a statute governing the service of process upon corporations.[38] So where by amendment a corporation is made a party, it must be served with process, although its officers are already before the court as individuals.[39] It is not necessary that the process state the name of the agent upon whom service is to be made.[40] Notice to a corporation may be regarded as notice to its directors, but it will not operate as notice to stockholders who are not directors.[41]

c. Description of Corporation. It is usually held sufficient that process issue against a corporation in its corporate name without other facts showing that it is a corporation.[42] Where the method of service to be employed is the same whether defendant is a corporation or a voluntary association, service properly made of the summons describing defendant as an unincorporated organization is good, although

97; Brown *v.* Syracuse, etc., R. Co., 5 Hill (N. Y.) 554; Rowley *v.* Chautauqua County Bank, 19 Wend. (N. Y.) 26.

Indorsement of writ.— In a suit by a corporation a writ indorsed "The . . . corporation by Royal Makepeace" was held sufficient under a statute requiring an indorsement by agent or attorney in his christian and surname. Middlesex Turnpike Corp. *v.* Tufts, 8 Mass. 266.

33. *Connecticut.*— Rand *v.* Proprietors Connecticut River Upper Locks, etc., 3 Day 441.

Indiana.— Kirkpatrick Constr. Co. *v.* Central Electric Co., 159 Ind. 639, 65 N. E. 913.

Maryland.— Binney's Case, 2 Bland 99.

Missouri.— Blodgett *v.* Schaffer, 94 Mo. 652, 7 S. W. 436.

New York.— Ziegler *v.* George Schleicher Co., 56 Misc. 582, 107 N. Y. Suppl. 85.

Virginia.— Virginia Bank *v.* Craig, 8 Leigh 399.

34. Gulf, etc., R. Co. *v.* Rawlins, 80 Tex. 579, 16 S. W. 430; Sun Mut. Ins. Co. *v.* Seeligson, 59 Tex. 3; New York Mut. L. Ins. Co. *v.* Uecker, (Tex. Civ. App. 1907) 101 S. W. 872; Butler *v.* Holmes, 29 Tex. Civ. App. 48, 68 S. W. 52; Texas-Mexican R. Co. *v.* Wright, (Tex. Civ. App. 1895) 29 S. W. 1134; Phœnix F. Ins. Co. *v.* Cain, (Tex. Civ. App. 1893) 21 S. W. 709; Texas, etc., R. Co. *v.* Florence, (Tex. App. 1889) 14 S. W. 1070; International, etc., R. Co. *v.* Sauls, 2 Tex. App. Civ. Cas. § 242. But see Galveston, etc., R. Co. *v.* Shepherd, 21 Tex. 274, holding that where a note is executed by "Paul Bremond, president of the Galveston Red River Railroad Co.," process may be issued against "Paul Bremond, president," etc., and served on him, in a suit on the note, and such service will authorize a judgment against the company.

A citation must be addressed to the corporation, and not to its president. State *v.* Voorhies, 50 La. Ann. 671, 23 So. 871; State *v.* Montegudo, 48 La. Ann. 1417, 20 So. 911.

35. Western, etc., R. Co. *v.* Kirkpatrick, 66 Ga. 86; Clark *v.* Southern Porcelain Mfg. Co., 8 S. C. 22. See also Grant *v.* Clinton Cotton Mills, 56 S. C. 554, 35 S. E. 193, holding that service of a magistrate's summons directed to "B, president," followed by the name of the corporation of which he was president, was sufficient to give the court jurisdiction of the corporation.

Members.— It has been held not a fatal objection to a writ that it is directed to the members of a corporation instead of to the corporation by its corporate name. Fuller *v.* Plainfield Academic School, 6 Conn. 532.

36. Bartram *v.* Collins Mfg. Co., 69 Ga. 751.

37. Macbean *v.* Irvine, 4 Bibb (Ky.) 17.

38. Wright *v.* Gossett, 15 Ind. 119, holding that service of process on the conductor of a train of cars, in an action for the killing of stock, would not authorize a judgment against individuals, although they might represent themselves to be the lessees of the railroad and to have charge of its rolling stock.

39. McRae *v.* Guion, 58 N. C. 129.

40. El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660]; Illinois Steel Co. *v.* San Antonio, etc., R. Co., 67 Fed. 561.

41. Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525.

42. Winner *v.* Weems, 77 Miss. 662, 27 So. 618; Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667; Snyder *v.* Philadelphia Co., 54 W. Va. 149, 46 S. E. 366, 102 Am. St. Rep. 941, 63 L. R. A. 896.

the organization is in fact incorporated.[43] Trivial errors may be disregarded.[44] As a general rule a misnomer of the corporation is regarded as an amendable defect,[45] unless the misnomer has been such that there has been in fact no citation.[46] But where defendants are sued as a partnership there must be a new service or a voluntary appearance by the corporation in order to charge them as a corporation.[47]

6. Service — a. Mode in General. Where no express provision is made for the service of process upon corporations, it has been held that a statutory provision for service upon persons generally may warrant such service upon a corporation as would be tantamount to personal service on an individual.[48] In the absence of statute substituted service cannot be had upon a corporation.[49] Where the statute points out a particular method of serving process upon corporations such method must be followed,[50] the general rule being especially exacting with reference to corporations.[51] Hence a statutory requirement as to the leaving of a copy must be followed.[52] Under some statutes service may be made by delivery of a copy without reading the original.[53] Under some statutes service may be made by the leaving of a copy

43. Saunders *v.* Adams Express Co., 71 N. J. L. 270, 57 Atl. 899 [*affirmed* in 71 N. J. L. 520, 58 Atl. 1101].

44. Great Northern Hotel Co. *v.* Farrand, etc., Organ Co., 90 Ill. App. 419, where the abbreviation "Co." was written "Cy."

The use of "railway" for "railroad" has been held immaterial. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457; Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162.

45. Johnson *v.* Central R. Co., 74 Ga. 397; Sherman *v.* Connecticut River Bridge Co., 11 Mass. 338; Bullard *v.* Nantucket Bank, 5 Mass. 99; Burnham *v.* Stratford County Sav. Bank, 5 N. H. 573; Lane *v.* Seaboard, etc., R. Co., 50 N. C. 25.

Plaintiff.— The court may permit the amendment of a corporation plaintiff in case of mistake. Union Car Spring Co. *v.* Lebanon Mfg. Co., 2 Chest. Co. Rep. (Pa.) 331.

46. Southern Pac. R. Co. *v.* Block, 84 Tex. 21, 19 S. W. 300.

Service on common agent.— Issuance of a summons against one corporation does not begin a suit against another, although served on a person who was a common agent of both. Pennsylvania Co. *v.* Sloan, 1 Ill. App. 364.

47. Thompson *v.* Allen, 86 Mo. 85.

48. Martin *v.* Atlas Estate Co., (N. J. 1907) 65 Atl. 881.

49. Bernhart *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

A corporation cannot conceal itself to avoid the service of process in the sense that such concealment will authorize an application for a substituted service of summons. Hahn *v.* Anchor Steamship Co., 2 N. Y. City Ct. 25.

50. *Indiana.*— Eel River R. Co. *v.* State, 143 Ind. 231, 42 N. E. 617.

Louisiana.— New Orleans First Municipality *v.* Christ Charter, 3 La. Ann. 453.

Missouri.— Cosgrove *v.* Tebo, etc., R. Co., 54 Mo. 495. Rev. St. (1889) § 2527, providing that when a corporation has no office in the county, or no person can be found in charge thereof, and the president or chief officer cannot be found in the county, a summons "shall" be issued, directed to the sheriff of any county in the state where such office or officer may be, prescribes the only mode of service of process on corporations in such cases; and a service in a forcible entry and detainer suit by posting notices as provided by section 5094, which is not applicable to corporations, gives no jurisdiction over defendant company. Missouri, etc., R. Co. *v.* Hoereth, 144 Mo. 136, 45 S. W. 1085.

New Hampshire.— Sleeper *v.* Free Baptist Assoc., 58 N. H. 27.

New Jersey.— Delaware, etc., R. Co. *v.* Ditton, 36 N. J. L. 361.

New York.— Kieley *v.* Central Complete Combustion Mfg. Co., 147 N. Y. 620, 42 N. E. 260 [*reversing* 13 Misc. 85, 34 N. Y. Suppl. 106].

Ohio.— State *v.* King Bridge Co., 28 Ohio Cir. Ct. 147; Parker *v.* Van Dorn Iron Works, 23 Ohio Cir. Ct. 444.

Oregon.— Willamette Falls Canal, etc., Co. *v.* Williams, 1 Oreg. 112.

Texas.— Waco Lodge No. 70 I. O. O. F. *v.* Wheeler, 59 Tex. 554.

Wisconsin.— Kernan *v.* Northern Pac. R. Co., 103 Wis. 356, 79 N. W. 403.

Service of process in federal courts should be made under a federal statute applicable thereto, and not under the state statute. Hume *v.* Pittsburgh, etc., R. Co., 12 Fed. Cas. No. 6,865, 6 Biss. 31.

Corporation falling within two branches of statute.— The fact that an insurance company is engaged in banking does not require it to be served in the manner prescribed for serving process on banks. Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77.

Where of two statutes relating to the service of process upon corporation, the later is merely cumulative, service in compliance with the earlier statute may be perfected in accordance with the later statute and the cause retained to allow plaintiff to do so. Connor *v.* Southern Express Co., 37 Ga. 397.

51. Kernan *v.* Northern Pac. R. Co., 103 Wis. 356, 79 N. W. 403.

52. Jordan *v.* Missouri, etc., R. Co., 61 Mo. 52; Aaron *v.* Pioneer Lumber Co., 112 N. C. 189, 16 S. E. 1010. See also Iron Clad Mfg. Co. *v.* Smith, 28 Misc. (N. Y.) 172, 59 N. Y. Suppl. 332.

53. Gillig *v.* Independent Gold, etc., Min. Co., 1 Nev. 247.

with a member of the family of the proper officer at his dwelling-house,[54] or by leaving a copy at the most notorious place of abode of such an officer.[55] In case several methods of service are provided by statute the officer on finding that he cannot serve it in one of such methods need not postpone service in case he is able to serve it in another method.[56] So any or all of the methods prescribed by statute may be adopted and service sustained if any of the methods are performed in compliance with the statute.[57]

b. Time. Process against a corporation, in the absence of statutory provision, may be served in the time prescribed for service upon other defendants.[58] By statute, however, special provision is made in some instances as to the service of process upon corporations, and in such case the provisions of the particular statute must be followed.[59] Where the statutes require that service shall be made during office hours, a service during business hours is sufficient.[60]

c. Place. The place at which service may be made upon a defendant corporation is usually specifically provided for by the statutes of the several states, which are widely variant.[61] Where it is provided that service shall be upon officers in the

54. Johnson *v.* American Bill Posting Co., 13 Pa. Co. Ct. 96.

55. Water Lot Co. *v.* Brunswick Bank, 30 Ga. 685.

56. Cornwall *v.* Starr Bottling Co., 128 Mo. App. 163, 106 S. W. 591.

57. El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660].

58. See *supra*, II, B, 9. See also Cavendish *v.* Weathersfield Turnpike Co., 2 Vt. 531, holding that citation could not be served after sunset on Saturday evening.

59. See the statutes of the several states. And see State *v.* Bay State Gas Co., (Del. 1901) 57 Atl. 291; Ohio, etc., R. Co. *v.* Quier, 16 Ind. 440; Ohio, etc., R. Co. *v.* Boyd, 16 Ind. 438 (holding, however, that where service was made within the statutory period, before the term of court to which the process was returnable, the service was good, but that the case must be continued); Bullard *v.* Nantucket Bank, 5 Mass. 99; Staunton Perpetual Bldg., etc., Co. *v.* Haden, 92 Va. 201, 23 S. E. 285.

60. El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660].

61. See the statutes of the several states. And see the following cases:

Georgia.— Stuart Lumber Co. *v.* Perry, 117 Ga. 888, 45 S. E. 251.

Indiana.— Eel River, etc., R. Co. *v.* State, 155 Ind. 433, 57 N. E. 388, holding that where a railroad company had no officer or agent in the state, except one appointed to receive service of process, service might be made on him in the county other than that in which the action was brought.

Kentucky.— Cincinnati, etc., Packet Co. *v.* Thomas, 92 S. W. 306, 29 Ky. L. Rep. 44, holding that, under provisions that in an action against a private corporation the summons may be served in any county on the defendant's chief officer or agent who may be found within the state, or that it may be served in the county wherein the action is brought on the defendant's chief officer or agent who may be found therein, and that in every action against a common carrier the summons may be served in any county on the defendant's chief officer or agent, or that it may be served in the county wherein the action is brought on the defendant's chief officer or agent who resides therein, a summons in an action against a common carrier operating a line of steamboats could not be served on defendant's chief officer or agent in a county other than that in which the action was brought, but must be served on defendant's chief officer or agent who may be found in the state, or upon such officer or agent found in the county where the action was instituted.

Michigan.— Potter *v.* Hutcheson Mfg. Co., 79 Mich. 207, 44 N. W. 595, holding that service might be made upon the officer of the corporation in the county where plaintiff resides, although the office of the corporation was not there located. *Compare* People *v.* Saginaw Cir. Judge, 23 Mich. 492.

Missouri.— Little Rock Trust Co. *v.* Southern Missouri, etc., R. Co., 195 Mo. 669, 93 S. W. 944 (holding that the return must specify that service was had on the agent at the business office of the corporation); Dixon *v.* Hannibal, etc., R. Co., 31 Mo. 409 (holding that process might be served on a railroad company in any county where there is any office or place of business of the company); State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146 (holding that a switchman's shanty was not a "business office" of the corporation).

Oregon.— Bailey *v.* Malheur, etc., Irr. Co., 36 Oreg. 54, 57 Pac. 910, holding that service might be made in a county other than that in which the action was brought, on the president of the corporation.

Pennsylvania.— Hawn *v.* Pennsylvania Canal Co., 154 Pa. St. 455, 26 Atl. 544; Brobst *v.* Pennsylvania Bank, 5 Watts & S. 379; Zablocki *v.* Delaware, etc., R. Co., 10 Pa. Dist. 54; Samuel *v.* American Iron, etc., Mfg. Co., 10 Pa. Dist. 43; Com. *v.* New York, etc., R. Co., 7 Pa. Co. Ct. 407; Clever *v.* Carlisle Mfg. Co., 2 Dauph. Co. Rep. 399; Moore *v.* Fidelity Ins., etc., Co., 16 Montg.

county where they usually reside, service may be made either in the county of the officer's domicile or in the county in which he has his official residence and carries on the corporate business.[62] Where process may be served in the county where property of the corporation is located, the property may be either real or personal.[63] A requirement that service shall be made upon the registered agent of a domestic corporation does not require that it shall be made at the registered office.[64] It is held under some statutes that service of process upon a person appointed to receive service must be made in the county in which he resides.[65]

d. Persons Upon Whom Service May Be Made — (i) *In General.* By statute provision is usually made as to the persons upon whom service may be had,[66] and process must be served upon some one of the persons so designated.[67] The provision is usually for service upon certain general officers of the corporation, and in case such officers cannot be found within the jurisdiction then upon specified inferior officers or agents or employees.[68] In order to justify service upon

Co. Rep. 90. Under the act of June 13, 1836, service of summons upon the secretary of defendant corporation while temporarily in the county wherein the contract upon which the action is based was made and performed is valid. Dick *v.* Meadville St. R. Co., 7 Pa. Dist. 350.

Tennessee.— Mark Twain Lumber Co. *v.* Lieberman, 106 Tenn. 153, 61 S. W. 70.

Virginia.—Dillard *v.* Central Virginia Iron Co., 82 Va. 734, 1 S. E. 124, holding that the corporation must be served at its domicile.

Wyoming.— Harrison *v.* Carbon Timber Co., 14 Wyo. 246, 83 Pac. 215, holding that the corporation must be served in the county of its residence, unless service is made upon an agent appointed to receive service of the process.

England.— Garton *v.* Great Western R. Co., E. B. & E. 837, 4 Jur. N. S. 1036, 27 L. J. Q. B. 375, 6 Wkly. Rep. 677, 96 E. C. L. 837, holding that service must be made at the principal office.

62. Governor *v.* Raleigh, etc., R. Co., 38 N. C. 471.

63. Grubb *v.* Lancaster Mfg. Co., 10 Phila. (Pa.) 316, holding, however, that personal property must be permanently placed or fixed.

64. Philadelphia, etc., Ferry Co. *v.* Intercity Link R. Co., 73 N. J. L. 86, 62 Atl. 184 [*affirmed* in 74 N. J. L. 594, 65 Atl. 1118].

65. Frazier *v.* Kanawha, etc., R. Co., 40 W. Va. 224, 21 S. E. 723.

66. See the statutes of the several states. And see Hinckley *v.* Bluehill Granite Co., 16 Me. 370.

67. *California.*—Aiken *v.* Quartz-Rock Mariposa Gold Min. Co., 6 Cal. 186.

Illinois.— Illinois Cent. R. Co. *v.* Pairpoint Mfg. Co., 55 Ill. App. 231.

Louisiana.— Collier *v.* Morgan's L., etc., Co., 41 La. Ann. 37, 5 So. 537.

Michigan.— Toledo Ice Co. *v.* Munger, 124 Mich. 4, 82 N. W. 663.

New Jerscy.— State *v.* Bennett, 47 N. J. L. 275.

Pennsylvania.— Stark *v.* Lehigh Coal, etc., Co., 8 Pa. Dist. 720, 9 Kulp 467.

Texas.— Waco Lodge No. 70 I. O. O. F. *v.* Wheeler, 59 Tex. 554; El Paso, etc., R. Co. *v.* Kelly, (Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660]; Hamburg-Bremen F. Ins. Co. *v.* Moses, 2 Tex. Unrep. Cas. 438.

Transmission of copy to proper person.— Where in an action against a domestic corporation process was not served on a proper person service is not made valid by the fact that copies of the summons and petition served were promptly transmitted to the person on whom service should have been made. State *v.* Myers, 126 Mo. App. 544, 104 S. W. 1146. See also Kieley *v.* Central Complete Combustion Mfg. Co., 147 N. Y. 620, 42 N. E. 260 [*reversing* 13 Misc. 85, 34 N. Y. Suppl. 106]. Service of summons on one as the agent of a corporation, when in fact he is not an agent, is not service on the corporation; and the fact that the alleged agent sends a copy of the summons to the corporation, and that plaintiff's attorney writes to the corporation that suit has been commenced against it, does not require the corporation to appear, and a judgment obtained on such service is a nullity. Kingman *v.* Mann, 36 Ill. App. 338.

Persons not connected with corporation.— Where attempt is made to serve a summons upon a corporation, and the persons served are not at the time officers of or connected with the corporation, a judgment founded thereon is void. Campbell Printing Press, etc., Co. *v.* Marder, 50 Nebr. 283, 69 N. W. 774, 61 Am. St. Rep. 573.

68. See the statutes of the several states. And see the following cases:

Colorado.— Golden Paper Co. *v.* Clark, 3 Colo. 321.

Florida.— Florida Cent., etc., R. Co. *v.* Luffman, 45 Fla. 282, 33 So. 710.

Illinois.— Peoria Ins. Co. *v.* Warner, 28 Ill. 429; Illinois, etc., Tel. Co. *v.* Kennedy, 24 Ill. 319; Crowley *v.* Sumner, 97 Ill. App. 301.

New York.— Tom *v.* Riga M. E. Church, 19 Wend. 25.

Ohio.— Campbell *v.* Woodsdale Island Park Co., 4 Ohio S. & C. Pl. Dec. 152, 3 Ohio N. P. 159.

Pennsylvania.— Grubb *v.* Lancaster Mfg. Co., 10 Phila. 316, 1 Wkly. Notes Cas. 201.

The temporary absence of the president of a domestic corporation will not warrant serv-

members of the inferior class it must be shown that service upon members of the superior class cannot be had.[69] Where there is no statutory provision as to the person upon whom service of process against a corporation is to be made service may be made upon any officer or agent of the corporation whose duty it is to communicate the fact of service to the governing body of the corporation.[70] Where a railroad has passed into the control and management of its bondholders, they and their agents represent the railroad company for the purpose of being served with notices directed by law to be served on the railroad company.[71] It would seem that service upon one who is merely a stock-holder is not sufficient.[72] A statute requiring a public record of an agent on whom process against the corporation may be served does not provide an exclusive method of acquiring jurisdiction but merely creates an additional agent upon whom service may be had.[73] In case service has been made upon the officer or agent designated by statute, it is immaterial that he does not communicate the fact of service to the corporation or its other officers [74] where no fraud or collusion is shown.[75] When service is made according to statute it is good, although the officers served appear and disclaim the right to answer officially.[76]

(II) *General Officers.* As a general rule under the statutory provisions service of process may be made upon the president,[77] vice-president,[78] secretary,[79]

ice on a subordinate officer or agent. Steiner *v.* Central R. Co., 60 Ga. 552.

Officer present but not found.— Under Rev. St. c. 110, § 5, which provides that a corporation may be served with process by leaving a copy with its president if he can be found in the county, otherwise on certain other officers, service on such other officers is binding on the corporation, if the president cannot be found in the county, even though he is at the time actually in the county. Chicago Sectional Electric Underground Co. *v.* Congdon Brake Shoe-Mfg. Co., 111 Ill. 309.

Where name of president is not posted.— Ga. Code, § 3412, provides that when the president of an express company resides in the state, his name shall be posted in each office, and for service of summons on him; otherwise, service shall be made on any agent thereof, and under this provision it was held that, after judgment on a summons on garnishment, the service was sufficient when made on an agent, where it did not affirmatively appear that the president of the company resided in the state, although his name was posted in each office of the company. Southern Express Co. *v.* Skipper, 85 Ga. 565, 11 S. E. 871.

Necessity that cause of action arise in district.— In an action against a corporation in a federal circuit court in Oregon, where process is served pursuant to Oreg. Code Civ. Proc. § 54, subd. 1, as amended by Sess. Laws (1876), p. 37, requiring the summons to be served on the president, secretary, cashier, or managing agent, or, if none of these persons reside or have an office in the district where the cause of action arose, then that service may be made on any agent or clerk of the corporation residing or found there, if the service is on any other than the principal officers of the company, it must appear that the cause of action arose in that district. Lung Chung *v.* Northern Pac. R. Co., 19 Fed. 254, 10 Sawy. 17.

69. Drew Lumber Co. *v.* Walter, 45 Fla. 252, 34 So. 244; St. Louis, etc., R. Co. *v.* Dawson, 3 Ill. App. 118; Beattyville Coal Co. *v.* Bamberger, 53 S. W. 31, 21 Ky. L. Rep. 830; Merrill *v.* Montgomery, 25 Mich. 73.

70. Martin *v.* Atlas Estate Co., (N. J. 1907) 65 Atl. 881; Dock *v.* Elizabethtown Steam Mfg. Co., 34 N. J. L. 312. See also Heltzel *v.* Kansas City, etc., R. Co., 77 Mo. 482, holding that a notice is not sufficiently served on a corporation, when it is served on one who merely had desk room in the business office of the corporation, but who had no connection with its affairs.

71. Woodhouse *v.* Rio Grande R. Co., 67 Tex. 416, 3 S. W. 323.

72. De Wolf *v.* Mallett, 3 Dana (Ky.) 214.

73. Martin *v.* Atlas Estate Co., (N. J. 1907) 65 Atl. 881.

74. Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195, 79 Am. Dec. 646; Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316.

75. Danville, etc., R. Co. *v.* Brown, 90 Va. 340, 18 S. E. 278.

76. Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866.

77. Branham *v.* Ft. Wayne, etc., R. Co., 7 Ind. 524; Chamberlin *v.* Mammoth Min. Co., 20 Mo. 96; Pipkin *v.* National Loan, etc., Assoc., 80 Mo. App. 1.

78. *Colorado.*— Comet Consol. Min. Co. *v.* Frost, 15 Colo. 310, 25 Pac. 506.

Illinois.— Cook *v.* Imperial Bldg. Co., 152 Ill. 638, 38 N. E. 914, holding the vice-president an "agent."

Kansas.— Pond *v.* National Mortg., etc., Co., 6 Kan. App. 718, 50 Pac. 973.

New Jersey.— Martin *v.* Atlas Estate Co., (1907) 65 Atl. 881.

Virginia.— Norfolk, etc., R. Co. *v.* Cottrell, 83 Va. 512, 3 S. E. 123.

United States.—Ball *v.* Warrington, 87 Fed. 695.

79. *Alabama.*— Talladega Ins. Co. *v.* Woodward, 44 Ala. 287.

treasurer,[80] or cashier.[81] Under some statutes service upon the directors may be permitted.[82]

(III) *MANAGING AGENT.* In some statutes the provision is for service upon a managing agent.[83] The term "managing agent" has no strict legal definition, and it is not easy to form a general rule that will govern all cases.[84] The term is

Connecticut.— McCall *v.* Byram Mfg. Co., 6 Conn. 428.

Kansas.— Chambers *v.* King Wrought-Iron Bridge Manufactory, 16 Kan. 270.

Missouri.— Heltzell *v.* Chicago, etc., R. Co., 77 Mo. 315.

Pennsylvania.— Whalen *v.* Aid Soc., 2 Leg. Rep. 370, holding that the secretary was to be regarded as a chief officer.

Where the statute requires personal service, service on the secretary of a corporate defendant is insufficient. Laufman *v.* Hope Mfg. Co., 54 N. J. L. 70, 23 Atl. 305.

Assistant secretary.— Personal service may be made on an "assistant secretary" of a domestic corporation, under Kan. Code Civ. Proc. § 65, enumerating the secretary as one of the officers of a domestic corporation on whom service may be made. Colorado Debenture Corp. *v.* Lombard Inv. Co., 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373; Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346.

80. Facts Pub. Co. *v.* Felton, 52 N. J. L. 161, 19 Atl. 123.

81. Eisenhofer *v.* New Yorker Zeitung Pub., etc., Co., 91 N. Y. App. Div. 94, 86 N. Y. Suppl. 438 (holding that N. Y. Code Civ. Proc. § 431, authorizing service of summons on a domestic corporation by delivering a copy to the cashier, does not authorize such service by delivering a copy to one who has no interest in the corporation, except that he receives the price of papers sold by him in one of its departments); Whitman *v.* Citizens' Bank, 110 Fed. 503, 49 C. C. A. 122.

A mere employee in the office of a local agent of an express company is not a cashier of the company, within the meaning of a statute authorizing service to be made on the "cashier or treasurer" of a corporation. Fearing *v.* Glenn, 73 Fed. 116, 19 C. C. A. 388.

82. Silsbee *v.* Quincy Hotel Co., 30 Ill. App. 204 (holding that under Ill. Pr. Act, § 4, providing that service of process may be had on a corporation by leaving a copy with any director found in the county, service on a corporation cannot be had by service on one of the directors who is in the county where the suit is brought on his own private business, and not on that of the corporation); Webb *v.* Cape Fear Bank, 50 N. C. 288; Com. *v.* Wilmington, etc., R. Co., 2 Pearson (Pa.) 408; Grubb *v.* Lancaster Mfg. Co., 10 Phila. (Pa.) 316.

83. Coast Land Co. *v.* Oregon Colonization Co., 44 Oreg. 483, 73 Pac. 884.

84. Foster *v.* Charles Betcher Lumber Co., 5 S. D. 57, 58 N. W. 9, 49 Am. St. Rep. 859, 23 L. R. A. 490.

The term has been held to include.—A local superintendent of a life insurance company who has "general supervision of the business" of his district (Stubing *v.* Metropolitan L. Ins. Co., 78 Hun (N. Y.) 610, 28 N. Y. Suppl. 960; Mullins *v.* Metropolitan L. Ins. Co., 78 Hun (N. Y.) 297, 28 N. Y. Suppl. 959 [*affirmed* in 143 N. Y. 681, 39 N. E. 494]), an agent of an insurance company who has the entire superintendence of all the company's business within a certain district (Ives *v.* Metropolitan L. Ins. Co., 78 Hun (N. Y.) 32, 28 N. Y. Suppl. 1030), an agent of an insurance company who has full power to receive premiums and issue policies, and the entire management of the business of the company in a city other than the city of the home office (Bain *v.* Globe Ins. Co., 9 How. Pr. (N. Y.) 448), the superintendent of a division of a railroad (Brayton *v.* New York, etc., R. Co., 72 Hun (N. Y.) 602, 25 N. Y. Suppl. 264; Rochester, etc., R. Co. *v.* New York, etc., R. Co., 48 Hun (N. Y.) 190), a general superintendent of a telegraph and telephone company (Barrett *v.* American Tel., etc., Co., 138 N. Y. 491, 34 N. E. 289 [*affirming* 56 Hun 430, 10 N. Y. Suppl. 138, 18 N. Y. Civ. Proc. 363]), a person served, in an action against a bank (which was no longer doing a banking business, but was engaged in closing up its affairs), who was in the habit of making its semiannual reports to the bank controller, employed attorneys to attend to its business, and was the only person exercising a general supervision over its affairs (Carr *v.* Commercial Bank, 19 Wis. 272), one who is introduced by a director of a corporation as the superintendent of the corporate business, and is given charge thereof, without any apparent limitation of authority (Behan *v.* Phelps, 27 Misc. (N. Y.) 718, 59 N. Y. Suppl. 713), a station agent for a railroad company, authorized to sell and collect for passenger tickets, and to receive and deliver freight, and collect for freight shipments (Brown *v.* Chicago, etc., R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564).

The term has been held not to include a director (Alabama, etc., R. Co. *v.* Burns, 43 Ala. 169), business manager (Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370), a baggage-master (Flynn *v.* Hudson River R. Co., 6 How. Pr. (N. Y.) 308), a person employed to superintend the running of horse cars on a portion of the road of a railroad company (Emerson *v.* Auburn, etc., R. Co., 13 Hun (N. Y.) 150), an assistant treasurer (Winslow *v.* Staten Island Rapid Transit R. Co., 51 Hun (N. Y.) 298, 4 N. Y. Suppl. 169), a telegraph operator (Jepson *v.* Postal Tel. Cable Co., 20 N. Y. Suppl. 300, 22 N. Y. Civ. Proc. 434), an agent of an insurance company, whose duties are confined to superintending certain soliciting agents, whom he has no authority either to employ or discharge (Schryver *v.* Metropolitan L. Ins. Co.,

evidently intended to include only such an agent as has charge and management of the ordinary business of the corporation within the particular locality, and who is vested with general powers involving the exercise of judgment and discretion in the management of the ordinary business transacted, at least within that locality.[85] In order that a person shall be a managing agent within such provision it is not necessary that he shall have entire control or charge of defendant's business,[86] but he must be intrusted with the carrying on of the corporate business or some substantial part thereof.[87]

(iv) *Agent or Employee.* Service upon a mere agent of the corporation is not sufficient unless specifically permitted by statute.[88] But in many jurisdictions, in default of the presence of a member of a superior class of officers as already noted,[89] it is expressly provided that service may be had upon an agent.[90] Under

29 N. Y. Suppl. 1092), an attorney in fact for a private corporation, authorized to apply for a patent to mining ground claimed by the corporation, and to execute such papers as might be necessary for that purpose (Mars *v.* Oro Fino Min. Co., 7 S. D. 605, 65 N. W. 19), an agent in charge of a branch store belonging to a corporation (Osborne *v.* Columbia County Farmers' Alliance Corp., 9 Wash. 666, 38 Pac. 160), the teller of a bank (Kennedy *v.* Hibernia Sav., etc., Soc., 38 Cal. 151), a director of a railroad company (Alabama, etc., R. Co. *v.* Burns, 43 Ala. 169), an employee of a domestic corporation who attends to the publication of a periodical issued by it, and to its printing, binding, and mailing, under instructions received immediately from the officers of the company (Ruland *v.* Canfield Pub. Co., 10 N. Y. Suppl. 913, 18 N. Y. Civ. Proc. 282), the recording agent of an insurance company, whose business is merely to write policies and look after the interests of the company in connection with property insured by him (State Ins. Co. *v.* Waterhouse, 78 Iowa 674, 43 N. W. 611), a person appointed by a corporation to sell its goods at fixed prices, receiving a fixed commission, and having no authority outside of such sales (Atlas Glass Co. *v.* Ball Bros. Glass Mfg. Co., 87 Fed. 418).

The word "manager" in the Pennsylvania act of March 17, 1856, relating to service of process upon corporations, is equivalent to "director." Service upon an employee, acting as superintendent of the corporation and styled "manager," is insufficient. Johnson *v.* Carbon County Electric R. Co., 18 Pa. Co. Ct. 479.

85. Mars *v.* Oro Fino Min. Co., 7 S. D. 605, 65 N. W. 19.

86. Taylor *v.* Granite State Provident Assoc., 20 N. Y. Suppl. 135.

Presumption from fact of sole agency.— Where a domestic corporation has only one agent residing in this state, he will be presumed to be its "managing agent," within Rev. St. § 2637, subd. 10, providing that in an action against a domestic corporation the summons may be served on its managing agent. Wickham *v.* South Shore Lumber Co., 89 Wis. 23, 61 N. W. 287.

87. U. S. *v.* American Bell Tel. Co., 29 Fed. 17. See also Brun *v.* Northwestern Realty Co., 52 Misc. (N. Y.) 528, 102 N. Y. Suppl. 473; Boynton *v.* Keeseville Electric Light, etc., Co., 5 Misc. (N. Y.) 118, 25 N. Y. Suppl. 741 [*affirmed* in 78 Hun 609, 28 N. Y. Suppl. 1117]; Bucket Pump Co. *v.* Eagle Iron, etc., Co., 21 Ohio Cir. Ct. 229, 11 Ohio Cir. Dec. 418.

88. Union Pac. R. Co. *v.* Pillsbury, 29 Kan. 652; Southern Express Co. *v.* Craft, 43 Miss. 508; Cochran *v.* Library Co., 6 Phila. (Pa.) 492.

Special agent.— Service on an agent employed for a special purpose is insufficient. Parke *v.* Commonwealth Ins. Co., 44 Pa. St. 422; Means *v.* Lycoming Ins. Co., 1 C. Pl. (Pa.) 6.

89. See *supra*, VI, A, 6, d, (i).

90. Gilchrist Transp. Co. *v.* Northern Grain Co., 204 Ill. 510, 68 N. E. 558 [*affirming* 107 Ill. App. 531]; Tennent-Stribbling Shoe Co. *v.* Hargardine-McKittrick Dry Goods Co., 58 Ill. App. 368 (holding that an assistant manager of a corporation is an agent); Combs *v.* Hamlin Wizard Oil Co., 58 Ill. App. 123 (holding that an independent contractor with the corporation is not an agent); Chicago, etc., R. Co. *v.* Fell, 22 Ill. 333; Moinet *v.* Burnham, 143 Mich. 489, 106 N. W. 1126; Turner *v.* St. Claire Tunnel Co., 102 Mich. 574, 61 N. W. 72.

A traveling salesman has been held an agent for the purpose of service of process. Moinet *v.* Burnham, 143 Mich. 489, 106 N. W. 1126. But one who sells goods for a corporation upon commission, who pays his own expenses, is master of his own time and movements, and who is without authority to fix prices, collect accounts, or transact any other business for such corporation is not an agent upon whom process can be had. Temby *v.* William Brunt Pottery Co., 127 Ill. App. 441 [*affirmed* in 229 Ill. 540, 82 N. E. 336].

Termination of agency.—A corporation need not give notice of the termination of the relationship to those transacting business with its agent, so far as the service of process is concerned. If a person served with summons as the agent of a corporation is not at the time of service such agent, the service is bad. Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460. See also Persons *v.* Buffalo City Mills, 29 N. Y. App. Div. 45, 51 N. Y. Suppl. 645.

Estoppel of corporation to deny agency.— When the corporation has suffered a person to hold himself out to the public as its agent so as to render it inequitable for the ap-

some statutes the nature of the agency is limited by the requirement that service be upon a chief agent,[91] general agent,[92] local agent,[93] or agent having charge of the agency out of which the transaction in question arose.[94] Service upon a mere employee or servant of the corporation is not as a general rule sufficient,[95] although under some statutes service may be made upon any officer, agent, or employee.[96] In any event service upon one who is employed by the officer of the corporation, and not the corporation, is insufficient.[97] Particular provisions are frequently made with regard to service upon railroad companies, authorizing service upon particular classes of agents, such as depot or ticket agents,[98] or freight

parent agency to be denied, service of process upon such agent will be sufficient. Combs *v.* Hamlin Wizard Oil Co., 58 Ill. App. 123.

A person not hired or paid by a corporation, and who is not subject to the orders of such corporation, who cannot be discharged by it, and who performs no function in its behalf, is not such an agent as represents it for the purposes of service of summons. Chicago, etc., R. Co. *v.* Suta, 123 Ill. App. 125.

Service upon the agent of one corporation in an action against another corporation which he does not represent is insufficient. International Text-Book Co. *v.* Heartt, 136 Fed. 129, 69 C. C. A. 127.

Residence.— Under some statutes the agent must be a resident within the jurisdiction. Chicago, etc., R. Co. *v.* Walker, 9 Lea (Tenn.) 475, holding that service upon a traveling passenger agent of a railroad company was insufficient.

91. Louisville, etc., R. Co. *v.* Com., 5 Ky. L. Rep. 317, holding that where there are several agents of the corporation having similar powers in the county, any one of the class is a chief agent.

92. Great West. Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204, holding that summons was properly served upon a foreman of a mine, who was under the orders of and made his reports to a general agent.

93. See the statutes of the several states. And see the following cases:

Indiana.— Globe Acc. Ins. Co. *v.* Reid, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291.

Kentucky.— National Bldg., etc., Assoc. *v.* Gallagher, 54 S. W. 209, 21 Ky. L. Rep. 1140.

North Carolina.— Katzenstein *v.* Raleigh, etc., R. Co., 78 N. C. 286.

Oregon.— Hildebrand *v.* United Artisans, 46 Oreg. 134, 79 Pac. 347, 114 Am. St. Rep. 852.

Texas.— Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808; Choctaw, etc., R. Co. *v.* Locke, (Civ. App. 1906) 92 S. W. 258; El Paso, etc., R. Co. *v.* Kelly, (Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660].

United States.— Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699.

94. Gross *v.* Nichols, 72 Iowa 239, 33 N. W. 653 (holding that an agency would not be regarded as terminated upon the last day of the agency agreement if it did not appear that the corporation finally settled with or discharged the agent after the determination of the agreed time); Centennial Mut. Life Assoc. *v.* Walker, 50 Iowa 75; Mark Twain Lumber Co. *v.* Lieberman, 106 Tenn. 153, 61 S. W. 70 (holding that such a statute did not authorize service upon an agent who operated in several counties, traveling from place to place and stopping whenever convenient, sometimes for three or four days at a time in the county where service was made).

95. See State Medical College *v.* Rushing, 124 Ga. 239, 52 S. E. 333, holding that an instructor in a college was not an officer or agent upon whom process could be served.

96. Hartford City F. Ins. Co. *v.* Carrugi, 41 Ga. 660.

97. Jones *v.* Manganese Iron Ore Co., (N. J. Ch. 1885) 3 Atl. 517.

98. *Michigan.*— Detroit *v.* Wabash, etc., R. Co., 63 Mich. 712, 30 N. W. 321, holding that service upon a commercial agent was not good under a statute permitting service upon any station agent or ticket agent.

Mississippi.—Alabama, etc., R. Co. *v.* Bolding, 69 Miss. 255, 13 So. 844, 30 Am. St. Rep. 541.

Missouri.— Hudson *v.* St. Louis, etc., R. Co., 53 Mo. 525.

West Virginia.—Douglass *v.* Kanawha, etc., R. Co., 44 W. Va. 267, 28 S. E. 705.

Wisconsin.— Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344.

United States.— Woodcock *v.* Baltimore, etc., R. Co., 107 Fed. 767, holding that service upon a regular ticket agent was sufficient, although he was not employed upon the line of the road.

But *compare* Richardson *v.* Mine Hill, etc., R. Co., 1 Leg. Rec. (Pa.) 169.

Nearest station or freight agent.— Under some statutes the service may be made upon the nearest passenger or freight agent. See Louisville, etc., R. Co. *v.* Com., 104 Ky. 35, 46 S. W. 207, 20 Ky. L. Rep. 371; State *v.* Hannibal, etc., R. Co., 51 Mo. 532; Antonelli *v.* Basile, 93 Mo. App. 138; Horn *v.* Mississippi River, etc., R. Co., 88 Mo. App. 469; Werries *v.* Missouri Pac. R. Co., 19 Mo. App. 398; Farmer *v.* Medcap, 19 Mo. App. 250. Under such a statute the agent may be located in another county. Nashville, etc., R. Co. *v.* Mattingly, 101 Ky. 219, 40 S. W. 673, 19 Ky. L. Rep. 373, 374.

A union depot employee may be regarded as the ticket agent of a railroad company. Hillary *v.* Great Northern R. Co., 64 Minn.

agents.[99] A general passenger agent has been regarded as a chief agent for the service of process,[1] and service may be made upon a freight solicitor as an agent.[2] In some jurisdictions service upon a railroad conductor is sustained.[3] A section foreman may be regarded as a local superintendent;[4] but a track master is not a proper person to be served, where it appears that there are officers of the corporation upon whom service may be had.[5]

(v) *Officer De Facto.* Where service is made upon a person who is *de facto* one of the officers comprehended by the statute, it is as a general rule regarded as sufficient.[6] Where a corporation has not yet received its charter, service upon one as its officer is insufficient.[7]

(vi) *Persons Interested Adversely to Corporation.* Where service is made upon an officer or agent who, although within the terms of the statute, sustains such a relation to plaintiff or the claim in suit as to make it to his interest to suppress the fact of service, such service is unauthorized.[8] So service will not be sustained where it is upon a person who is a party plaintiff,[9] or plaintiff's attorney in fact,[10] or who is plaintiff's assignor.[11]

(vii) *After Resignation of Officer or Failure to Elect.* An officer designated by statute may be served as such as long as he remains an officer *de jure*.[12] Service upon an officer who has effected a valid resignation is, however, inoperative.[13] But where the resignation of a corporate officer has never been acted upon and he continues to discharge his duties as officer, the corporation

361, 67 N. W. 80, 32 L. R. A. 448; Union Pac. R. Co. *v.* Novak, 61 Fed. 573, 9 C. C. A. 629.

The ticket agent of another corporation who sells interchangeable tickets issued by defendant corporation, good over the roads of both defendant and the first corporation, cannot be regarded as an agent of defendant. Doster *v.* Ft. Worth, etc., R. Co., (Tex. Civ. App. 1908) 107 S. W. 579.

99. Toledo, etc., R. Co. *v.* Owen, 43 Ind. 405; Harrow *v.* Ohio River R. Co., 38 W. Va. 711, 18 S. E. 926. See also cases cited *supra*, 98.

Where shipment is by connecting carriers, service upon the agent of the first carrier is insufficient in an action against the last of the several connecting carriers. Louisville, etc., R. Co. *v.* Chestnut, 72 S. W. 351, 24 Ky. L. Rep. 1846.

1. Chesapeake, etc., R. Co. *v.* Cowherd, 96 Ky. 113, 27 S. W. 990, 16 Ky. L. Rep. 373.

2. Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965.

3. Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426; New Albany, etc., R. Co. *v.* Tilton, 12 Ind. 3, 74 Am. Dec. 195; New Albany, etc., R. Co. *v.* Grooms, 9 Ind. 243. *Contra*, Chicago, etc., R. Co. *v.* Groves, 7 Okla. 315, 54 Pac. 484.

4. St. Louis, etc., R. Co. *v.* De Ford, 38 Kan. 299, 16 Pac. 442, so holding, where it appeared that the company had not taken advantage of a statute allowing it to designate an agent for the service of process.

5. Richardson *v.* Burlington, etc., R. Co., 8 Iowa 260.

6. McCall *v.* Byram Mfg. Co., 6 Conn. 428; Perry Dist. Fair Soc. *v.* Zenor, 95 Iowa 515, 64 N. W. 598; Berrian *v.* Methodist Soc., 6 Duer (N. Y.) 682, 4 Abb. Pr. 424; Stillman *v.* Associated Lace Makers' Co., 14 Misc. (N. Y.) 503, 35 N. Y. Suppl. 1071.

7. Bartram *v.* Collins Mfg. Co., 69 Ga. 751.

8. Atwood *v.* Sault Ste. Marie Light, etc., Co., 148 Mich. 224, 111 N. W. 747.

9. St. Louis, etc., Coal, etc., Co. *v.* Sandoval Coal, etc., Co., 111 Ill. 32; St. Louis, etc., Coal, etc., Co. *v.* Edwards, 103 Ill. 472; Buck *v.* Ashuelot Mfg. Co., 4 Allen (Mass.) 357.

10. George *v.* American Ginning Co., 46 S. C. 1, 24 S. E. 41, 57 Am. St. Rep. 671, 32 L. R. A. 764. See Thompson *v.* Pfeiffer, 60 Kan. 409, 56 Pac. 763. But see U. S. Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342, holding that service of process upon the president of a defendant corporation who is attorney for plaintiff in the suit is not void but voidable upon proper exception thereto.

11. White House Mountain Gold Min. Co. *v.* Powell, 30 Colo. 397, 70 Pac. 679; Atwood *v.* Sault Ste. Marie Light, etc., Co., 148 Mich. 224, 111 N. W. 747; Swift *v.* Globe Varnish Co., 1 N. Y. City Ct. Suppl. 43.

12. Eel River Nav. Co. *v.* Struver, 41 Cal. 616, holding that the president of a corporation might be served as such, although he had ceased to take part in the management of the corporate affairs.

13. Yorkville Bank *v.* Henry Zeltner Brewing Co., 80 N. Y. App. Div. 578, 80 N. Y. Suppl. 839; Buchanan *v.* Prospect Park Hotel Co., 14 Misc. (N. Y.) 435, 35 N. Y. Suppl. 712.

Before acceptance.— It has been held that service of process upon one who has sent his resignation as director of the corporation to the president is not service on the corporation, although the resignation has not been accepted, and although such resignation reduced the number of directors below the minimum allowed by law. Wilson *v.* Brentwood Hotel Co., 16 Misc. (N. Y.) 48, 37 N. Y. Suppl. 655.

cannot, after he has been served by parties having no knowledge that his resignation has been tendered, assert that he has resigned prior to the service of process.[14] A fraudulent resignation to prevent service of process will not invalidate a service upon the officer who has attempted to resign.[15] Under some statutes it is provided that where a corporation has failed to elect officers upon whom process may be served it may be brought into court by publication,[16] or that service may be made upon the late proper officers.[17] Service upon the stock-holders as such, however, is not authorized, although no officers have been elected for many years.[18]

(VIII) *Receiver or Agent of Receiver.* Where a corporation is being operated by a receiver, service of process upon the corporation cannot be made upon the agent of the receiver.[19] Service upon the receivers, however, may be made upon their local agents in accordance with statutory provisions referring primarily to corporations,[20] and it has been held that the receivers themselves may be served as principal officers.[21] After the appointment of a receiver service upon one who previously has had the custody of the corporate property, but who has at no time been a statutory agent for the service of process, is invalid.[22] The appointment of a receiver for a railroad does not bring it within the provisions of a statute providing for the service of process, where a railroad has permitted its road to be used by any other person or corporation.[23] Where the receivers of a foreign

14. Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036.

Election of successor.— In case the by-laws or articles of association provide that an officer shall hold until his successor has been elected and qualified, service may be had on an officer who has resigned until the corporation has elected his successor. Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036; Colorado Debenture Corp. *v.* Lombard Inv. Co., 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373. See also Fridenberg *v.* Lee Constr. Co., 27 Misc. (N. Y.) 651, 58 N. Y. Suppl. 391; Parker *v.* Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706.

Where there has been no formal resignation by the director, but the president declared at the close of a meeting of the board of directors that there were no longer any directors and stock-holders, and "we have here dissolved," process might still be served upon the directors in their official capacity. Carnaghan *v.* Exporters', etc., Oil Co., 11 N. Y. Suppl. 172.

15. Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447, holding further that where all of the officers of an insolvent corporation transferred their stock to its former president and resigned their offices for the purpose of preventing suit being brought against the corporation, personal service by leaving a copy with the president as the actual stockholder would be sufficient to confer jurisdiction of the corporation. See also J. L. Mott Iron Works *v.* West Coast Plumbing Supply Co., 113 Cal. 341, 45 Pac. 683.

16. United New Jersey R., etc., Co. *v.* Hoppock, 28 N. J. Eq. 261.

17. Blake *v.* Hinkle, 10 Yerg. (Tenn.) 218.

18. Bache *v.* Nashville Horticultural Soc., 10 Lea (Tenn.) 436.

19. Cherry *v.* North, etc., R. Co., 59 Ga. 446 (holding that where the state has seized a railroad for non-payment of its bonds, and the receiver retains the employees of the company in office, such employees cannot be regarded as agents of the railroad company for purposes of service); Heath *v.* Missouri, etc., R. Co., 83 Mo. 617; Cincinnati, etc., R. Co. *v.* Orme, 1 Ohio Cir. Ct. 511, 1 Ohio Cir. Dec. 285; Collins *v.* Baltimore, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 445, 7 Ohio N. P. 270. But *compare* Faltiska *v.* New York, etc., R. Co., 12 Misc. (N. Y.) 478, 33 N. Y. Suppl. 679 [*affirmed* in 151 N. Y. 650, 46 N. E. 1146] (holding that the appointment of a receiver for a railroad company did not affect the relation of a division superintendent as managing agent, upon whom process might be served, where he was never removed by the company but retained his position after the appointment of the receiver); Simpson *v.* East Tennessee, etc., R. Co., 89 Tenn. 304, 15 S. W. 735 (holding that where in an action against a railroad company there had been service of process on an agent duly appointed by defendant, who had never been discharged, it was no ground for plea in abatement by the railroad company that since the appointment of such agent the road had gone into the hands of a receiver).

But where the receiver is the statutory agent of a corporation in the sense that the corporation is charged with certain statutory liabilities for injuries resulting from its operation, whether in the hands of a receiver or not, service may be made upon the agent of the receiver. Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 227.

20. Grady *v.* Richmond, etc., R. Co., 116 N. C. 952, 21 S. E. 304; Farris *v.* Richmond, etc., R. Co., 115 N. C. 600, 20 S. E. 167.

21. Wert *v.* Keim, 2 Pa. Co. Ct. 405.

22. Nickolson *v.* Wheeling, etc., Coal Co., 110 Fed. 105.

23. *Ex p.* Charles, 106 Ala. 203, 18 So. 73.

railroad corporation operate a domestic railroad corporation, using the rolling stock of the foreign corporation and dividing the earnings, service of process against the domestic corporation upon its local agents is sufficient.[24]

(IX) *Consolidated and Lessor or Lessee Corporations.* Where a domestic and a foreign corporation are consolidated under the laws of the state, it has been held that the resulting corporation is to be regarded as a domestic corporation within the meaning of a statute providing for the service of process upon domestic corporations.[25] A statutory provision continuing the right of the creditors of the constituent corporations against a corporation formed by their consolidation is not in itself sufficient to make the new corporation the agent of the old for the purpose of service of process,[26] although it has been held that under such a statute a petition in a pending action against one of the constituent corporations may be amended by substituting the consolidated company as a defendant, and the judgment may be entered without additional notice to the consolidated company.[27] Although under the provisions of a statute a lessor railroad company may be liable for the negligence of servants of a lessee railroad in operating it under the lease, the agents of the lessee are not thereby made agents of the lessor for the purpose of service of process.[28] Under a provision that service may be made upon the ticket agent of a corporation in any county in which its railroad is located, the line which passes through the county need not be absolutely owned, but may be leased by defendant.[29]

e. Acknowledgment of Service. An attorney retained by a corporation defendant to represent it in an action may by his acknowledgment of service of summons submit the corporation to the jurisdiction of the court.[30]

f. Service Procured by Fraud. Jurisdiction cannot be obtained where the officer served has been induced by fraud to come within the jurisdiction of the court.[31]

g. Evasion of Service. It has been held that where the officers of the company conceal themselves to prevent service, the service may be made upon one who has repeatedly appeared as an attorney of the company.[32] And where the officer knows that a person in his presence is desirous of serving him with summons he cannot evade service by flight.[33]

h. Service by Publication.[34] By statute provision is sometimes expressly made for the service of process against domestic corporations by publication in case personal service cannot be had.[35] And in some jurisdictions personal judgment is

24. Georgia Southern R. Co. *v.* Bigelow, 68 Ga. 219, holding that especially was such service good when supplemented by service on the sole resident director of the domestic corporation.

25. *In re* St. Paul, etc., R. Co., 36 Minn. 85, 30 N. W. 432.

26. Thompson *v.* McMorran Milling Co., 132 Mich. 591, 94 N. W. 188.

27. Kinion *v.* Kansas City, etc., R. Co., 39 Mo. App. 574.

28. Perry *v.* Brunswick, etc., R. Co., 119 Ga. 819, 47 S. E. 172; Atlanta, etc., Air-Line R. Co. *v.* Harrison, 76 Ga. 757 (holding that under provision of the Georgia code requiring that in suits against railroad companies which have leased their line service shall be made by sending a letter to the president of the leasing company, the leasing company is the lessor and not the lessee); Chicago, etc., R. Co. *v.* Webber, 219 Ill. 372, 76 N. E. 489, 4 L. R. A. N. S. 272; Chicago, etc., R. Co. *v.* Suta, 123 Ill. App. 125. See also Branan *v.* Nashville, etc., R. Co., 119 Ga. 738, 46 S. E. 882.

29. Cleveland, etc., R. Co. *v.* McLean, 1 Ohio Cir. Ct. 112, 1 Ohio Cir. Dec. 67.

30. Beebe *v.* Geo. H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

31. Columbia Placer Co. *v.* Bucyrus Steam Shovel, etc., Co., 60 Minn. 142, 62 N. W. 115.

Service obtained by fraud generally see *supra*, II, B, 3.

32. Golden Gate Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628.

33. Boggs *v.* Inter-American Min., etc., Co., 105 Md. 371, 66 Atl. 259. See, generally, *supra*, II, B, 10, d.

34. Publication generally see supra, II, D.

35. See the statutes of the several states. And see Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77; Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254; Styles *v.* Laurel Fork Oil, etc., Co., 45 W. Va. 374, 32 S. E. 227, holding an order for publication insufficient to include a corporation defendant.

Place.— Under Ill. Pr. Act, c. 110, § 4, au-

authorized upon such service.[36] An affidavit for an order of publication must show that the statutory grounds therefor exist.[37]

7. Return — a. Sufficiency. In an action against a private corporation the return of the officer must affirmatively show that service was made upon an officer or an agent of the corporation specified in the statute as one upon whom service may be made.[38] The connection between the person served and defendant corporation must appear[39] together with the mode of service[40] and the facts author-

thorizing service on corporations by publication in certain cases, service cannot be made upon a corporation by publication except in the county where it has its residence. Mt. Olive Coal Co. *v.* Hughes, 45 Ill. App. 566.

Effect of delay.— Where a declaration was filed and process attached against a corporation, and a regular return was made by the sheriff that defendant was not to be found, and that the president of the corporation was dead, plaintiff was not entitled after the lapse of five terms of the court, without having taken any further action in showing sufficient legal reason for the delay, to amend the process so as to make it returnable to the then ensuing term. Branch *v.* Mechanics' Bank, 50 Ga. 413.

36. Clearwater Mercantile Co. *v.* Roberts', etc., Shoe Co., 51 Fla. 176, 40 So. 436, 4 L. R. A. N. S. 117; Nelson *v.* Chicago, etc., R. Co., 225 Ill. 197, 80 N. E. 109, 116 Am. St. Rep. 133, 8 L. R. A. N. S. 1186.

Personal judgment upon constructive service generally see Judgments, 23 Cyc. 686.

37. Leavenworth, etc., R. Co. *v.* Stone, 60 Kan. 57, 55 Pac. 346; Newton *v.* Pittston Coal Co., 7 Kulp (Pa.) 11. See, generally, *supra*, II, D, 5, d.

38. *Arkansas.*—Arkansas Constr. Co. *v.* Mullins, 69 Ark. 429, 64 S. W. 225.

California.— O'Brien *v.* Shaw's Flat, etc., Canal Co., 10 Cal. 343; Aiken *v.* Quartz Rock Mariposa Gold Min. Co., 6 Cal. 186.

Illinois.— Rock Valley Paper Co. *v.* Nixon, 84 Ill. 11.

Indiana.— New Albany, etc., R. Co. *v.* Powell, 13 Ind. 373.

Kansas.— Dickerson *v.* Burlington, etc., R. Co., 43 Kan. 702, 23 Pac. 936; Union Pac. R. Co. *v.* Pillsbury, 29 Kan. 652.

Kentucky.— Youngstown Bridge Co. *v.* White, 105 Ky. 273, 49 S. W. 36, 20 Ky. L. Rep. 1175.

Maryland.— Northern Cent. R. Co. *v.* Rider, 45 Md. 24.

Michigan.— American Express Co. *v.* Conant, 45 Mich. 642, 8 N. W. 574.

Missouri.— Heath *v.* Missouri, etc., R. Co., 83 Mo. 617; Haley *v.* Hannibal, etc., R. Co., 80 Mo. 112; Gate City Electric Co. *v.* Corby, 61 Mo. App. 630.

New York.— New York, etc., R. Co. *v.* Purdy, 18 Barb. 574.

Ohio.— Jones *v.* Toledo, etc., R. Co., 20 Ohio Cir. Ct. 63, 10 Ohio Cir. Dec. 789.

Pennsylvania.— Emmensite Gun, etc., Co. *v.* Pool, 6 Pa. Dist. 47; Dale *v.* Blue Mountain Mfg. Co., 3 Pa. Dist. 763, 15 Pa. Co. Ct. 513, 35 Wkly. Notes Cas. 509 [*affirmed* in 167 Pa. St. 402, 31 Atl. 633]; Powder Co. *v.* Oakdale Coal, etc., Co., 14 Phila. 166; Ohio, etc., R. Co. *v.* Brittain, 1 Pittsb. 271.

South Dakota.— Mars *v.* Oro Fino Min. Co., 7 S. D. 605, 65 N. W. 19.

West Virginia.— Frazier *v.* Kanawha, etc., R. Co., 40 W. Va. 224, 21 S. E. 723.

United States.—Tallman *v.* Baltimore, etc., R. Co., 45 Fed. 156.

Compare Crawford *v.* Wilmington Bank, 61 N. C. 136 (holding that the failure to state the office held by the person served was cured by judgment); Wartrace *v.* Wartrace, etc., Turnpike Co., 2 Coldw. (Tenn.) 515 (holding that, to sustain a judgment of default against a corporation for non-appearance, the return of the summons need not show that the person on whom the process was served is the president, or other head cashier, treasurer, secretary, director, or chief agent, of the corporation in the county.

The affidavit of the secretary of state that two true duplicate copies of the summons against a domestic corporation, having no officers within the state upon whom service could be had, were deposited in his office, one of which he mailed to defendant at the place of his residence, as appeared from the records in his office, held to show service in accordance with the provisions of the statute. Hinckley *v.* Kettle River R. Co., 70 Minn. 105, 72 N. W. 835.

39. *Alabama.*— Oxford Iron Co. *v.* Spradley, 42 Ala. 24.

Colorado.— White House Mountain Gold Min. Co. *v.* Powell, 30 Colo. 397, 70 Pac. 679.

Illinois.— Chicago Planing Mill Co. *v.* Merchants' Nat. Bank, 86 Ill. 587; Illinois, etc., R. Co. *v.* Kennedy, 24 Ill. 319; Imperial Bldg. Co. *v.* Cook, 46 Ill. App. 279.

Michigan.— Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006. But see Talbot *v.* Minneapolis, etc., R. Co., 82 Mich. 66, 45 N. W. 1113, holding that in an action against a railroad company for killing stock a return stating that the "within summons" was served "on the defendant by handing a copy to the station agent," is not objectionable on the ground that it does not show that the station agent was the agent of defendant.

Montana.— Mathias *v.* White Sulphur Springs Assoc., 17 Mont. 542, 43 Pac. 921.

New Jersey.— Den *v.* Fen, 10 N. J. L. 237.

Oregon.— Willamette Falls Canal, etc., Co. *v.* Williams, 1 Oreg. 112.

Wisconsin.— Sturtevant *v.* Milwaukee, etc., R. Co., 11 Wis. 61.

40. Hayden *v.* Atlanta Sav. Bank, 66 Ga. 150; Behan *v.* Phelps, 27 Misc. (N. Y.) 718, 59 N. Y. Suppl. 713; Park *v.* Oil City Boiler Works, 204 Pa. St. 453, 54 Atl. 334.

izing the adoption of that particular method.[41] The return should show the place of service [42] and the name of the person served.[43] Where service upon a certain inferior class of officers or agents is permitted by statute only in case service cannot be had upon a superior class, the inability to serve any member of the superior class must appear from the return of a process served upon a member of the inferior class.[44]

Leaving copy.— Where two separate citations are issued against one person as the agent of two different corporations, and the return of the officer upon each citation is that he delivered a copy of "this writ," it is to be presumed, the writs being different in wording, that one was delivered for each of the corporations. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457.

41. Eel River R. Co. *v.* State, 143 Ind. 231, 42 N. E. 617; Hildebrand *v.* United Artisans, 46 Oreg. 134, 79 Pac. 347, 114 Am. St. Rep. 852; Caro *v.* Oregon, etc., R. Co., 10 Oreg. 510; Otto Gas Engine Co. *v.* McFarland, 8 Pa. Dist. 133, 21 Pa. Co. Ct. 622.

Sufficient if facts appear from record.— The return of service on an agent of a corporation need not show all the facts set out in the statute which authorizes and provides for such service, but it is sufficient if they are shown from the record. El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660].

42. Richardson *v.* Mine Hill, etc., R. Co., 1 Leg. Rec. (Pa.) 169; Taylor *v.* Ohio River R. Co., 35 W. Va. 328, 13 S. E. 1009.

Statement that office is defendant's.— In an action against a railway company, a sheriff's return reciting the delivery of the summons to a person having charge of a business office on the line of the railway company, where the ordinary business of the company was regularly transacted, without stating that the office was the office of defendant company, and that he left a copy of the summons with a person in charge of such office, shows an insufficient service of the summons. Vickery *v.* Omaha, etc., R. Co., 93 Mo. App. 1.

43. Grand Tower Min., etc., Co. *v.* Schirmer, 64 Ill. 106; Southern Indiana R. Co. *v.* Indianapolis, etc., R. Co., 168 Ind. 360, 81 N. E. 65; Singer *v.* Singer Mfg. Co., 2 Pa. Co. Ct. 578. *Compare* Cincinnati, etc., R. Co. *v.* McDougall, 108 Ind. 179, 8 N. E. 571, holding that it is not essential to the validity of the service of a summons on a railroad company, under Ind. Rev. St. (1881) § 4027, that the return should set forth the full name of the conductor on whom it was served.

44. *Arkansas.*—Arkansas Coal, etc., Mfg. Co. *v.* Haley, 62 Ark. 144, 34 S. W. 545; Cairo, etc., R. Co. *v.* Rea, 32 Ark. 29; Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17.

Colorado.— Venner *v.* Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061, want of such an averment cannot be cured by presumption.

Florida.— Drew Lumber Co. *v.* Walter, 45 Fla. 252, 34 So. 244.

Illinois.— Chicago Sectional Electric Underground Co. *v.* Congdon Brake Shoe Mfg. Co., 111 Ill. 309; Chicago Planing Mill Co. *v.* Merchants' Nat. Bank, 86 Ill. 587; Chicago, etc., R. Co. *v.* Kaehler, 79 Ill. 354; Cairo, etc., R. Co. *v.* Joiner, 72 Ill. 520; Reed *v.* Tyler, 56 Ill. 288; St. Louis, etc., R. Co. *v.* Dorsey, 47 Ill. 288; Peoria, etc., R. Co. *v.* Duggan, 32 Ill. App. 351.

Indiana.— Southern Indiana R. Co. *v.* Indianapolis, etc., R. Co., 168 Ind. 360, 81 N. E. 65; Western Union Tel. Co. *v.* Lindley, 62 Ind. 371.

Kansas.— Colorado Debenture Corp. *v.* Lombard Inv. Co., 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373; Palmetto Town Co. *v.* Rucker, McCahon 146.

Mississippi.— Southern Express Co. *v.* Hunt, 54 Miss. 664.

Missouri.— Hoen *v.* Atlantic, etc., R. Co., 64 Mo. 561; Thomasson *v.* Mercantile Town Mut. Ins. Co., (App. 1904) 81 S. W. 911; Rixke *v.* Western Union Tel. Co., 96 Mo. App. 406, 70 S. W. 265.

Ohio.— Fee *v.* Big Sand Iron Co., 13 Ohio St. 563; Bucket Pump Co. *v.* Eagle Iron, etc., Co., 21 Ohio Cir. Ct. 229, 11 Ohio Cir. Dec. 418; Cincinnati Hotel Co. *v.* Central Trust, etc., Co., 11 Ohio Dec. (Reprint) 255, 25 Cinc. L. Bul. 375.

Oregon.— Weaver *v.* Southern Oregon Co., 30 Oreg. 348, 48 Pac. 171, holding, however, that service of summons on a corporation, by delivering a copy to its secretary at its principal office or place of business in the county where action is brought, is sufficient, although the return does not show that he resided or had an office in the county.

United States.—Collins *v.* American Spirit Mfg. Co., 96 Fed. 133; Miller *v.* Norfolk, etc., R. Co., 41 Fed. 431.

But see Congdon *v.* Butte Consol. R. Co., 17 Mont. 481, 43 Pac. 629, holding that since the provision of Comp. St. (1887) div. 1, § 75 (originally enacted in 1883), that service on any corporation doing business in the state may be made on the president or other officer, and, if they cannot be found, then by serving the same on certain subordinate employees, does not repeal section 72, reënacted from Rev. St. (1879), allowing service on the managing agent of a domestic corporation in the first instance, a return of service on such agent need not show that the president or other officer could not be found.

Returns held sufficient to show propriety of service upon inferior class see Crowley *v.* Sumner, 97 Ill. App. 301; Ft. Wayne Ins. Co. *v.* Irwin, 23 Ind. App. 53, 54 N. E. 817; New South Brewing, etc., Co. *v.* Price, 50 S. W. 963, 21 Ky. L. Rep. 11; Brassfield *v.* Quincy, etc., R. Co., 109 Mo. App. 710, 83 S. W. 1032; McMurtry *v.* Tuttle, 13 Nebr.

b. Construction and Conclusiveness. As a general rule the return of service is to be strictly construed.[45] In accordance with the rules already stated,[46] the sheriff's return is in some jurisdictions conclusive between the parties as to the facts stated,[47] while in other jurisdictions it may be controverted.[48] For example, while in any event the return is at least *prima facie* evidence that persons described in it as officers or agents of the corporation are in fact such,[49] in some jurisdictions it is conclusive as to such fact,[50] while in other jurisdictions it may be controverted.[51] It will be presumed in support of the return that the officer acted within the limits of his jurisdiction.[52] So where it is shown that a person was at one time a director it may be presumed that his character as director continued until the time of service of process.[53]

8. Defects, Objections, and Waiver.[54] As a general rule defects in the process or service thereof against a corporation are properly urged by a motion to quash the process or return[55] and cannot be urged after a general appearance to the

232, 13 N. W. 213; Kansas City, etc., R. Co. *v.* Daughtry, 138 U. S. 298, 11 S. Ct. 306, 34 L. ed. 963 [*affirming* 88 Tenn. 721, 13 S. W. 698].

45. Holtschneider *v.* Chicago, etc., R. Co., 107 Mo. App. 381, 81 N. W. 489; Vickery *v.* Omaha, etc., R. Co., 93 Mo. App. 1, holding that where an officer's return of a summons on a certain railroad company showed service upon a person in charge of an office of a railway of identically the same name, the appellate court in order to sustain jurisdiction of the trial court could not hold that the railway and the railroad were identical. But *compare* Hill *v.* St. Louis Ore, etc., Co., 90 Mo. 103, 2 S. W. 289.

Delivery by and through agent.—A sheriff's return on a citation that he executed it by delivering it to defendant named in person "by and through" an officer named, is fatally defective as indicating that the officer and not the sheriff served the process. Galveston, etc., R. Co. *v.* Ware, 74 Tex. 47, 11 S. W. 918; Texas Home Mut. F. Ins. Co. *v.* Bowlin, (Tex. Civ. App. 1902) 70 S. W. 797.

46. See *supra*, III, D, 3, b.

47. Taussig *v.* St. Louis, etc., R. Co., 186 Mo. 269, 85 S. W. 378.

48. Perry *v.* Brunswick, etc., R. Co., 119 Ga. 819, 47 S. E. 172; Wheeler *v.* New York, etc., R. Co., 24 Barb. (N. Y.) 414.

49. Keener *v.* Eagle Lake Land, etc., Co., 110 Cal. 627, 43 Pac. 14; Rowe *v.* Table Mountain Water Co., 10 Cal. 441; San Antonio, etc., R. Co. *v.* Wells, 3 Tex. Civ. App. 307, 23 S. W. 31, holding that further proof than the return was not necessary to support a default in judgment. See *contra*, Southern Express Co. *v.* Carroll, 42 Ala. 437; Wetumpka, etc., R. Co. *v.* Coles, 6 Ala. 655; St. John *v.* Tombeckbee Bank, 3 Stew. 146, all holding that where process against a corporation is returned as served on one as being an officer, proof of his official character must be made to the court and so appear on the record to sustain a judgment by default.

50. State *v.* O'Neill, 4 Mo. App. 221; Stratton *v.* Lyons, 53 Vt. 130.

51. Equitable Produce, etc., Exch. *v.* Keyes, 67 Ill. App. 460; Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833; Galveston, etc., R. Co. *v.* Gage, 63 Tex. 568; El Paso, etc., R. Co. *v.* Kelly, (Tex. Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in 99 Tex. 87, 87 S. W. 660]; Carr *v.* Commercial Bank, 16 Wis. 50.

Where an allegation that a railroad company has an agency within the state is denied in order to avoid the effect of a service on the alleged agent, the return of the officer serving the process as to the fact of the agency is not conclusive. Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124. See also Porter *v.* Chicago, etc., R. Co., 1 Nebr. 14.

52. Baltimore, etc., R. Co. *v.* Brant, 132 Ind. 37, 31 N. E. 464; Ohio, etc., R. Co. *v.* Quier, 16 Ind. 440. See Missouri, etc., R. Co. *v.* Crowe, 9 Kan. 496.

53. Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675.

54. Process generally see *supra*, IV.

55. American Cereal Co. *v.* Eli Pettijohn Cereal Co., 70 Fed. 276 (holding that the objection that the person served was not in fact the agent of the corporation should be urged by motion to quash the return); American Bell Tel. Co. *v.* Pan Electric Tel. Co., 28 Fed. 625.

Plea in abatement.— The question whether a summons has been served on the proper person as agent of the corporation cannot be raised by plea in abatement. Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88.

Denial must be under oath.— Where a return shows that citation was served on the president, secretary, and local agent of a corporation, the citation will not be quashed on motion, upon the ground that the names of such officers were not in the petition and writ, where defendant does not deny under oath that the persons served were the officers or agents. Illinois Steel Co. *v.* San Antonio, etc., R. Co., 67 Fed. 561.

Burden of proof.— The burden is on defendant to disprove the fact of agency, where the denial of agency is ground for the motion to quash. Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88.

Remand to rules.— Where the return of a summons is quashed as having been served less than ten days before return-day, the case is properly remanded to rules. Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517.

merits,[56] although where the corporation is not correctly named the defect should be taken advantage of by a plea in abatement showing the correct name.[57] Defendant must inform plaintiff how better service may be had,[58] and the corporation may by its acts be estopped from asserting that the person served was not a proper one.[59] But a failure on the part of the person served to object at the time of service that he does not occupy the office as incumbent of which he is served will not overcome his positive oath that he is not such officer on a motion to set aside the service.[60] Where a corporation sues out a writ of error after default has been taken against it, employing the name under which it was served, it cannot assert a misnomer.[61]

B. Foreign Corporations[62]— **1. In General.** At common law foreign corporations could not be served with process by any of the courts of common law, nor could their property be attached to compel their appearance. The authority whenever it exists results from special custom or statutory provision.[63] Where a foreign corporation confines its operation to the state within which it is created, it cannot be sued in a state where it has no office and transacts no business, by serving process on its president or other officer or agent when accidentally or casually present within such state.[64] In order that jurisdiction may be obtained of a foreign corporation it must have entered the state in which it is served for the purpose of carrying on its business there,[65] and process must have been served upon an agent sustaining such a relation to it that notice to the agent might well be deemed notice

Service may be set aside on rule, and it is not necessary to file a plea in abatement. Park *v.* Oil City Boiler Works, 204 Pa. St. 453, 54 Atl. 334.

56. Burlington, etc., R. Co. *v.* Burch, 17 Colo. App. 491, 69 Pac. 6; Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Ireton *v.* Baltimore, 61 Md. 432; Fee *v.* Big Sand Iron Co., 13 Ohio St. 563.

Misnomer may then be cured by amendment.— Keech *v.* Baltimore, etc., R. Co., 17 Md. 32; Roberts *v.* National Ice Co., 6 Daly (N. Y.) 426.

Cured by judgment.—A return served on an officer of the corporation, without designating his office, is if thereby invalid cured by judgment. Crawford *v.* Wilmington Bank, 61 N. C. 136.

57. Wilhite *v.* Good Shepherd Convent, 117 Ky. 251, 78 S. W. 138, 25 Ky. L. Rep. 1375, holding that the objection could not be urged upon a motion to quash the return.

58. Hill *v.* Morgan, 9 Ida. 718, 76 Pac. 323 (holding that service of summons on a corporation is sufficient where it is served upon one who had theretofore been served with process and the corporation accepted such service by its appearance, where it is not shown that the corporation through its attorney or some one authorized to act for it did not inform the party in interest how better service could be had); Newport News, etc., R. Co. *v.* Thomas, 96 Ky. 613, 29 S. W. 437, 16 Ky. L. Rep. 706 (holding that a motion to quash the return should not only state the grounds of the motion, but should point out the person on whom service should be made).

Where knowledge on the part of plaintiff appears from the record such a showing need not be made. Youngstown Bridge Co. *v.* White, 105 Ky. 273, 49 S. W. 36, 20 Ky. L. Rep. 1175.

59. Wilson *v.* California Wine Co., 95 Mich. 117, 54 N. W. 643 (holding that where summons is served on a member of a corporation as its president, and he tells the officer there is another person president, as does also the treasurer of the corporation, and service is made on him, the corporation cannot for the purpose of showing that it was not properly summoned prove that such person was not its president); Taylor Provision Co. *v.* Adams Express Co., 71 N. J. L. 523, 59 Atl. 10 (holding that a corporation cannot question the sufficiency of service upon an agent whom the corporation's general counsel had stated to plaintiff's attorney was authorized to accept such service).

60. Scott *v.* Stockholders' Oil Co., 120 Fed. 698.

61. Brassfield *v.* Quincy, etc., R. Co., 109 Mo. App. 710, 83 S. W. 1032.

62. **Appointment of agent for service of process** see Foreign Corporations, 19 Cyc. 1255.

Jurisdiction of proceedings in rem against corporation see Foreign Corporations, 19 Cyc. 1330.

Process against foreign fire insurance company see Fire Insurance, 19 Cyc. 916.

Process against foreign life insurance company see Life Insurance, 25 Cyc. 915.

Process against foreign mutual benefit insurance company see Mutual Benefit Insurance, 29 Cyc. 220.

Service on corporation after withdrawal from state see Foreign Corporations, 19 Cyc. 1346.

63. Clarke *v.* New Jersey Steam Nav. Co., 5 Fed. Cas. No. 2,859, 1 Story 531.

64. See Foreign Corporations, 19 Cyc. 1327.

65. **What constitutes carrying on business** see Foreign Corporations, 19 Cyc. 1267 *et seq.*

to the principal, without a violation of the principles of natural justice.[66] A corporation is held to have impliedly agreed that it may be served with process according to the statutes of the state in which it does business by the fact that it enters the state and transacts business therein.[67] Whether a corporation has subjected itself to the laws of a state other than that of its domicile, so as to be bound by service of process in such state, in a personal action, made in accordance with its laws, is a question of general and not of local law.[68] An agreement by a corporation as a condition of doing business within the state that service of process may be made upon an agent resident for that purpose does not authorize service of process against him within the state in a transitory action for personal injuries arising in another state.[69] Under some statutes it is provided that service may be made upon a corporation which has property within the state, although the cause of action has not arisen within the state.[70] Under such a statute no specific quantity of property or value thereof is necessary to confer jurisdiction, but it must be property of a kind and value to justify a reasonable probability that the creditor may acquire something from the sale thereof.[71]

2. Statutory Provisions. As a general rule specific provisions are made by statute for the service of process upon foreign corporations.[72] And such statutes may in a proper case be construed as cumulative to statutes making provision as to the service of process upon corporations generally;[73] but as a general rule statutes making no express provisions as to service upon foreign corporations will not be deemed to apply to them,[74] although in some cases a contrary rule has been applied.[75] In case specific provisions for a particular kind of process are made by statutes relating to foreign corporations they are exclusive.[76] The fact that a corporation is required by the statute to appoint an attorney or agent upon whom process may be served is not exclusive of other methods of service;[77] and

66. See Foreign Corporations, 19 Cyc. 1328.

67. See Foreign Corporations, 19 Cyc. 1329.

68. Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259.

69. Olson *v.* Buffalo Hump Min. Co., 130 Fed. 1017.

70. See the statutes of the several states. And see Strom *v.* Montana Cent. R. Co., 81 Minn. 346, 84 N. W. 46; Fontana *v.* Post Printing, etc., Co., 87 N. Y. App. Div. 233, 84 N. Y. Suppl. 308; Reilly *v.* Philadelphia, etc., R. Co., 109 Fed. 349; Fontana *v.* Chronicle-Tel. Co., 83 Fed. 824.

71. Strom *v.* Montana Cent. R. Co., 81 Minn. 346, 84 N. W. 46, holding that while in the case of a foreign railroad corporation railroad cars in transit through the state would not constitute such property, nor would unissued passenger tickets, nor a cash book, nor similar books, the credits due the corporation from persons or corporations within the state would be sufficient. See also Reilly *v.* Philadelphia, etc., R. Co., 109 Fed. 349 (holding that a leasehold interest in vessels within the state, under a lease for the term of forty-nine years, constituted property); Fontana *v.* Chronicle-Tel. Co., 83 Fed. 824 (holding that debts due a foreign corporation from solvent debtors residing in New York constituted property within the state).

72. See the statutes of the several states.

Repeal.—A statute requiring that service of process shall be made upon an agent found within the county where the suit is brought, and that the clerk shall mail a copy of the process to the home office of the corporation, does not by implication repeal a statute regulating the service of process on a foreign corporation having a resident local agent. Cumberland Tel., etc., Co. *v.* Turner, 88 Tenn. 265, 12 S. W. 544. A statute providing that where defendant is a foreign corporation having an agent in the state service of process may be made on such agent is not repealed by a statute providing that to entitle the foreign corporation to carry on business in the state it shall designate an agent on whom service of process may be made. Lesser Cotton Co. *v.* Yates, 69 Ark. 396, 63 S. W. 997.

73. Eagle Life Assoc. *v.* Redden, 121 Ala. 346, 25 So. 779.

74. Grand Trunk R. Co. *v.* Wayne Cir. Judge, 106 Mich. 248, 64 N. W. 17; People *v.* Judge Wayne Cir. Ct., 24 Mich. 38; Sullivan *v.* La Crosse, etc., Steam Packet Co., 10 Minn. 386; Combs *v.* Kentucky Bank, 3 Pa. L. J. 58; Hall *v.* Vermont, etc., R. Co., 28 Vt. 401. *Compare* Williams *v.* Iron Belt Bldg., etc., Assoc., 131 N. C. 267, 42 S. E. 607.

75. Western Union Tel. Co. *v.* Pleasants, 46 Ala. 641; Gross *v.* Nichols, 72 Iowa 239, 33 N. W. 653; Chicago, etc., R. Co. *v.* Manning, 23 Nebr. 552, 37 N. W. 462.

76. Quade *v.* New York, etc., R. Co., 59 N. Y. Super. Ct. 479, 14 N. Y. Suppl. 875; Smith *v.* Hoover, 39 Ohio St. 249.

77. *Arkansas.*— Lesser Cotton Co. *v.* Yates, 69 Ark. 396, 63 S. W. 997.

the same is true where the corporation is required by the statute to designate a place for service.[78]

3. General Form and Requisites. Under the present statutes process against a foreign corporation may usually issue in the form required in other civil actions.[79] Under early statutes, however, it was sometimes held that an action against such a defendant must be begun by attachment.[80] The summons need not set forth the circumstances rendering the corporation liable to suit within the state,[81] and need not name the agent on whom it is to be served.[82] The petition need not pray for the issuance of citation.[83]

4. Place of Service. In case the statute fix the place at which process shall be served its provisions must be followed.[84] Where an agent has been designated to receive service of process, service may be made upon him in a county other than that in which suit is brought.[85] Where process may be served on the principal officer of a foreign corporation it may be served on him in the county where he resides.[86] Service must be made within the limits of the state in order to authorize a personal judgment.[87]

5. Persons Who May Be Served — a. In General. In the absence of statutory provisions, process, in an action against a corporation, is sufficient if served upon some person upon whom it may fairly be presumed the duty involves, by virtue of his official position or his employment, to communicate the fact of service to the governing power of the corporation.[88] In case the statute designates the officer or agent who may be served its provisions must be followed.[89] The statutory provi-

Colorado.— Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036.

Kansas.— See Federal Betterment Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560, 4 L. R. A. N. S. 460.

Louisiana.— *In re* Curtis, 115 La. 918, 40 So. 334, 112 Am. St. Rep. 284.

New York.— Howard *v.* Prudential Ins. Co., 1 N. Y. App. Div. 135, 37 N. Y. Suppl. 832. *Contra*, Travis *v.* Railway Educational Assoc., 33 Misc. 577, 68 N. Y. Suppl. 893.

United States.— Henrietta Min., etc., Co. *v.* Johnson, 173 U. S. 221, 19 S. Ct. 402, 43 L. ed. 675 [*affirming* 5 Ariz. 222, 81 Pac. 1126]; Mutual Reserve Fund Life Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

Contra.— Bes Line Constr. Co. *v.* Taylor, 16 Okla. 481, 85 Pac. 713; Bes Line Constr. Co. *v.* Schmidt, 16 Okla. 429, 85 Pac. 711; Hewes *v.* Machine Co., 2 Leg. Rec. (Pa.) 210.

78. Littlejohn *v.* Southern R. Co., 45 S. C. 96, 22 S. E. 761.

79. Western Union Tel. Co. *v.* Pleasants, 46 Ala. 641; Farnsworth *v.* Terre Haute, etc., R. Co., 29 Mo. 75; Gibbs *v.* Queen Ins. Co., 63 N. Y. 114, 20 Am. Rep. 513; Hulbert *v.* Hope Mut. Ins. Co., 4 How. Pr. (N. Y.) 275, 2 Code Rep. 148 [*affirmed* in 4 How. Pr. 415]. See also Middough *v.* St. Joseph, etc., R. Co., 51 Mo. 520.

80. Middlebrooks *v.* Springfield F. Ins. Co., 14 Conn. 301; Lawrence *v.* New Jersey R., etc., Co., 1 How. Pr. (N. Y.) 250.

81. Benwood Ironworks *v.* Hutchinson, 101 Pa. St. 359.

82. Frick Co. *v.* Wright, 23 Tex. Civ. App. 340, 55 S. W. 608; Missouri Pac. R. Co. *v.* Wise, 3 Tex. App. Civ. Cas. § 386. But *compare* Continental Ins. Co. *v.* Mansfield, 45 Miss. 311.

83. Sun Mut. Ins. Co. *v.* Holland, 2 Tex. App. Civ. Cas. § 443.

84. Wagner *v.* Shank, 59 Md. 313; American Surety Co. *v.* Holly Springs, 77 Miss. 428, 27 So. 612; Lehigh Valley Ins. Co. *v.* Fuller, 81 Pa. St. 398; Hammel *v.* Fidelity Mut Aid Assoc., 42 Wash. 448, 85 Pac. 35.

85. Sattler *v.* Aultman, etc., Mach. Co., 6 Pa. Dist. 419.

86. Augusta Nat. Bank *v.* Southern Porcelain Mfg. Co., 55 Ga. 36, holding that where the president of a foreign corporation doing business in this state, as well as a majority of the stock-holders, resided in this state, and all meetings of the stock-holders had been here held, and its books were in the hands of the president, service upon the president at his residence in this state, at which place the stock-holders were at the time under notice to meet, was sufficient service on the company.

87. Steele *v.* Schaffer, 107 Ill. App. 320; Louisville, etc., R. Co. *v.* Emerson, 43 Tex. Civ. App. 281, 94 S. W. 1105; Louisville, etc., R. Co. *v.* Missouri, etc., R. Co., 40 Tex. Civ. App. 296, 88 S. W. 413, 89 S. W. 276.

Right to sue in personam where corporation is not found see Foreign Corporations, 19 Cyc. 1325.

88. Georgia Cent. R. Co. *v.* Eichberg, (Md. 1908) 68 Atl. 690.

Curator ad hoc.—A private corporation, having no resident agent in Louisiana, may be cited through a curator *ad hoc*, in a suit for the annulment of an ordinance and an executory contract made thereunder between the foreign corporation and the police jury of a parish for the erection of bridges to be paid for in notes of the parish, which the police jury has no authority to issue. Snelling *v.* Joffrion, 42 La. Ann. 886, 8 So. 609.

89. See the statutes of the several states.

sions vary to a considerable degree.[90] Under some statutes the officers or agents who may be served are the same as in the case of actions against domestic corporations.[91] Where an officer or agent is appointed under a statutory requirement to receive service of process, service may be made upon him.[92] In the application of particular statutes it has been held that service may be properly made upon the president of a foreign corporation where he is a resident within the state,[93] or upon a director.[94] A locomotive engineer may by statute be made a proper person for service.[95]

b. Agents — (I) *In General.* Under some statutes process may be served upon any agent.[96] Under other statutes the character of the agent is more specifically defined, he being required to be a local agent,[97] or resident agent.[98]

(II) *Authority.* Service of process upon an agent of a foreign corporation doing business within the state must be upon an agent representing the corporation with respect to such business.[99] The agent must be an agent in fact, not merely

And see Pennsylvania R. Co. *v.* Kreitzman, 57 N. J. L. 60, 29 Atl. 587; State *v.* King Bridge Co., 28 Ohio Cir. Ct. 147; Farmers' L. & T. Co. *v.* Warring, 20 Wis. 290; Sobrio *v.* Manhattan L. Ins. Co., 72 Fed. 566.

90. See the statutes of the several states. And see cases cited *infra*, this section.

91. Hartford City F. Ins. Co. *v.* Carrugi, 41 Ga. 660. See also Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

92. Eureka Lake, etc., Co. *v.* Yuba County Super. Ct., 66 Cal. 311, 5 Pac. 490; Swallow *v.* Duncan, 18 Mo. App. 622.

93. Grant *v.* Cananea Consol. Copper Co., 189 N. Y. 241, 82 N. E. 191 [*reversing* 117 N. Y. App. Div. 576, 102 N. Y. Suppl. 642]; Epstein *v.* S. Weisberger Co., 52 Misc. (N. Y.) 572, 102 N. Y. Suppl. 488; Revans *v.* Southern Missouri, etc., R. Co., 114 Fed. 982, having office and performing duties in state.

94. Meyer *v.* Pennsylvania Lumbermen's Mut. F. Ins. Co., 108 Fed. 169. See Childs *v.* Harris Mfg. Co., 104 N. Y. 477, 11 N. E. 50. *Contra*, Barney *v.* New Albany, etc., R. Co., 1 Handy (Ohio) 571, 12 Ohio Dec. (Reprint) 295.

Must be charged with business of the corporation.— Service upon a director who is found within the district, but who neither transacts any corporate business therein nor is charged with any business of the corporation. is not under the general law a sufficient service to give a federal court jurisdiction over the corporation. Reilly *v.* Philadelphia, etc., R. Co., 109 Fed. 349.

95. De Vere *v.* Delaware, etc., R. Co., 60 Fed. 886. But see Carroll *v.* New York, etc., R. Co., 65 N. J. L. 124, 46 Atl. 708.

96. *Kentucky.*— Nelson *v.* Rekhopf, 75 S. W. 203, 25 Ky. L. Rep. 352; Boyd Commission Co. *v.* Coates, 69 S. W. 1090, 24 Ky. L. Rep. 730; L. Dodge Lumber Co. *v.* Macquithy, 14 Ky. L. Rep. 142.

New Jersey.— Norton *v.* Berlin Iron Bridge Co., 51 N. J. L. 442, 17 Atl. 1079.

Pennsylvania.— Hagerman *v.* Empire Slate Co., 97 Pa. St. 534.

South Carolina.—Sellers *v.* Home Fertilizer Chemical Works, 76 S. C. 343, 56 S. E. 978; Jenkins *v.* Penn Bridge Co., 73 S. C. 526, 53 S. E. 991.

Washington.— Sievers *v.* Dalles, etc., Nav. Co., 24 Wash. 302, 64 Pac. 539.

Wisconsin.— Burgess *v.* Aultman, 80 Wis. 292, 50 N. W. 175.

United States.— *In re* Hohorst, 150 U. S. 653, 14 S. Ct. 221, 37 L. ed. 1121.

Receiver.— Under Colo. Code, p. 13, § 37, providing that service of process against a corporation may be made upon the agent, cashier, or secretary, a service upon the receiver of a foreign corporation is sufficient. Ganebin *v.* Phelan, 5 Colo. 83.

97. People *v.* Tilden, 121 N. Y. App. Div. 352, 106 N. Y. Suppl. 247; Westinghouse Electric Mfg. Co. *v.* Trolle, 30 Tex. Civ. App. 200, 70 S. W. 324; Société Foncière et Agricole des États Unis *v.* Milliken, 135 U. S. 304, 10 S. Ct. 823, 34 L. ed. 208; Barnes *v.* Western Union Tel. Co., 120 Fed. 550.

Who are local agents.—A local agent is a representative of the corporation to transact its business and represent it in a particular locality; it does not embrace the idea of an agent who casually happens to be in the particular territory, or one who is temporarily sent to such territory to perform some particular purpose or specific act. Frick Co. *v.* Wright, 23 Tex. Civ. App. 340, 55 S. W. 608. In accordance with this rule it has been held that a person may be served as local agent who is the acting secretary (Cameron *v.* Jones, 41 Tex. Civ. App. 4, 90 S. W. 1129), or a local operator of defendant wireless telegraph company (Copland *v.* American De Forest Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501). But service cannot be had upon an attorney having claims to collect for a foreign corporation (Moore *v.* Freeman's Nat. Bank, 92 N. C. 590), a state agent (Western Cottage Piano, etc., Co. *v.* Anderson, 97 Tex. 432, 79 S. W. 516), a traveling auditor (Sherwood Higgins Co. *v.* Sperry, etc., 139 N. C. 299, 51 S. E. 1020), one who merely hired a watchman for a foreign corporation's premises (Kelly *v.* Lefavier, 144 N. C. 4, 56 S. E. 510), or one who had charge of the warehouse jointly used by defendant and other corporations, but over whom defendant had no control (Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699).

98. Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695.

99. Georgia Cent. R. Co. *v.* Eichberg, (Md.

by construction of law, and must be one having in fact representative capacity and derivative authority.[1] But the fact that the parties, as between themselves especially, disclaim their relation to be that of principal and agent is not decisive as against an inference of law from the facts surrounding the relationship.[2] The name which the person assumes, even with the knowledge of his principal, will not be controlling when the real character of his employment appears.[3] In general the agent or employee should sustain such relation to the matter growing out of the character of his employment as will impose on him the duty to report the fact to his principal or employer.[4] One corporation may be served as the agent of another corporation.[5] The person served may also be the agent of other corporations.[6] Under some statutes the person may be carrying on the business as defendant, although not technically its agent.[7] Service upon an agent of an agent has been held insufficient.[8]

(III) *Managing Agents.* By statute provision is frequently made that the managing agent of a foreign corporation is a proper person to receive service of process.[9] It is difficult to formulate a general rule as to what will constitute a person a managing agent,[10] and it is necessary to determine each case upon its particular facts.[11] The later decisions are apparently more liberal in interpreting

1908) 68 Atl. 690; Texas, etc., R. Co. *v.* Neal, (Tex. 1895) 33 S. W. 693; Bay City Iron Works *v.* Reeves, 43 Tex. Civ. App. 254, 95 S. W. 739; Honerine Min., etc., Co. *v.* Tallerday Steel Pipe, etc., Co., 31 Utah 326, 88 Pac. 9; Peterson *v.* Chicago, etc., R. Co., 205 U. S. 364, 27 S. Ct. 513, 51 L. ed. 841; Boardman *v.* S. S. McClure Co., 123 Fed. 614; Evansville Currier Co. *v.* United Press Co., 74 Fed. 918.

1. Chicago, etc., R. Co. *v.* Suta, 123 Ill. App. 125; Wold *v.* J. B. Colt Co., 102 Minn. 386, 114 N. W. 243; Mikolas *v.* Walker, 73 Minn. 305, 76 N. W. 36; Doe *v.* Springfield Boiler, etc., Co., 104 Fed. 684, 44 C. C. A. 128; U. S. *v.* American Bell Tel. Co., 29 Fed. 17.

2. Chicago Bd. of Trade *v.* Hammond Elevator Co., 198 U. S. 424, 25 S. Ct. 740, 49 L. ed. 1111; Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569.

A person selling goods consigned to him on commission has been held an agent. American Gold Min. Co. *v.* Giant Powder Co., 1 Alaska 664; Gross *v.* Nichols, 72 Iowa 239, 33 N. W. 653.

3. Boardman *v.* S. S. McClure Co., 123 Fed. 614.

4. Palmer *v.* Pennsylvania Co., 35 Hun (N. Y.) 369 [*affirmed* in 99 N. Y. 679]; Strain *v.* Chicago Portrait Co., 126 Fed. 821. See also Foreign Corporations, 19 Cyc. 1328.

5. Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069.

Lessee corporation.— Where a foreign corporation owning a railroad in the state leases the same to another company, without the authority or consent of the state, but continues its corporate existence and receives a revenue under the lease, its lessee must be considered as its agent to carry on the business, and in an action for a tort committed in operating the road, service of summons upon the agent of the lessee is service upon the lessor. Van Dresser *v.* Oregon, etc., Nav. Co., 48 Fed. 202.

6. *In re* La Bourgogne, [1899] P. 1, 8 Aspin. 462, 68 L. J. P. & Adm. 1, 79 L. T. Rep. N. S. 331, 15 T. L. R. 28 [*affirmed* in [1899] A. C. 431, 8 Aspin. 550, 68 L. J. P. D. & Adm. 104, 80 L. T. Rep. N. S. 845, 15 T. L. R. 424].

7. Ricketts *v.* Sun Printing, etc., Assoc., 27 App. Cas. (D. C.) 222.

8. Union Pac. R. Co. *v.* Miller, 87 Ill. 45.

9. *California.*— Lawrence *v.* Ballou, 50 Cal. 258.

Nebraska.— Ord Hardware Co. *v.* J. I. Case Threshing Mach. Co., 77 Nebr. 847, 110 N. W. 551, 8 L. R. A. N. S. 770; Council Bluffs Canning Co. *v.* Omaha Tinware Mfg. Co., 49 Nebr. 537, 68 N. W. 929.

New York.— Evans *v.* American Steel Foundry Co., 30 Misc. 806, 61 N. Y. Suppl. 922.

North Dakota.— Brown *v.* Chicago, etc., R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564.

Ohio.— Wheeling, etc., Transp. Co. *v.* Baltimore, etc., R. Co., 1 Cinc. Super. Ct. 311.

Evidence as to capacity.— Where a person stated on different occasions that he was a managing agent of a certain foreign corporation, such declarations, although in themselves insufficient to prove such agency, would nevertheless destroy the force of his statements and affidavits that he was not the managing agent of such corporation, and tend to show that service on him as such agent was proper. Perrine *v.* Ransom Gas Mach. Co., 60 N. Y. App. Div. 32, 69 N. Y. Suppl. 698.

10. Federal Betterment Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560, 4 L. R. A. N. S. 460;

11. Federal Betterment Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560, 5 L. R. A. N. S. 460; Cunningham *v.* Southern Express Co., 67 N. C. 425.

Persons held to be managing agents.— For persons held to be managing agents with regard to particular lines of business see as to manufacturing business (Hat-Sweat Mfg. Co. *v.* Davis Sewing Mach. Co., 31 Fed. 294), railroad company (Fremont, etc., R. Co. *v.*

the term "managing agent" than were the earlier ones;[12] and it would seem that the rule supported by the weight of authority is, that an agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in the business affairs of his principal, and who has charge of all the business of his principal in the territory covered by the contract, is a managing agent.[13] The agent may be under the general direction of the corporation, but in the management of his particular department he must have authority to manage and conduct it as his discretion and judgment direct;[14] although in some cases it is held that the managing agent is limited to one who has full and complete authority in all branches of the corporation's business.[15]

(iv) *Salesmen and Solicitors.* A foreign corporation may in some jurisdictions be served with process by service upon its traveling salesmen;[16] but in other jurisdictions such service is not regarded as sufficient,[17] particularly where

New York, etc., R. Co., 66 Nebr. 159, 92 N. W. 131, 59 L. R. A. 939; Porter *v.* Chicago, etc., R. Co., 1 Nebr. 14; Tuchband *v.* Chicago, etc., R. Co., 115 N. Y. 437, 22 N. E. 360; Tuchband *v.* Chicago, etc., R. Co., 2 Silv. Sup. 352, 5 N. Y. Suppl. 493, 16 N. Y. Civ. Proc. 241; Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; Norton *v.* Atchison, etc., R. Co., 61 Fed. 618 [*distinguishing* Stout *v.* Sioux City, etc., R. Co., 8 Fed. 794, 3 McCrary 1]), newspaper (Palmer *v.* Chicago Evening Post Co., 85 Hun (N. Y.) 403, 32 N. Y. Suppl. 992, 2 N. Y. Annot. Cas. 69; Brewer *v.* Knapp, 82 Fed. 694 [not *followed* in Union Associated Press *v.* Times-Star Co., 84 Fed. 419]; Palmer *v.* Chicago Herald Co., 70 Fed. 886), express company (American Express Co. *v.* Johnson, 17 Ohio St. 641), lumber company (Foster *v.* Charles Betcher Lumber Co., 5 S. D. 57, 58 N. W. 9, 49 Am. St. Rep. 859, 23 L. R. A. 490), construction company (Clinard *v.* White, 129 N. C. 250, 39 S. E. 960).

Persons not to be managing agents.—A director of a foreign corporation who was a subscriber to its lands and had collected payments from other subscribers in the vicinity (Foote *v.* Central American Commercial Co., 26 Ohio Cir. Ct. 378), an agent of a foreign newspaper company having authority only to contract for advertising (Fontana *v.* Post Printing, etc., Co., 87 N. Y. App. Div. 233, 84 N. Y. Suppl. 308; Vitola *v.* Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Suppl. 273; Union Associated Press *v.* Times Star Co., 84 Fed. 419 [not *following* Brewer *v.* Knapp, 82 Fed. 694]), an assistant secretary of a foreign railroad (Sterett *v.* Denver, etc., R. Co., 17 Hun (N. Y.) 316), captain of a steamboat (Upper Mississippi Transp. Co. *v.* Whittaker, 16 Wis. 220), attorney of a foreign corporation (Taylor *v.* Granite State Provident Assoc., 136 N. Y. 343, 32 N. E. 992, 32 Am. St. Rep. 749), licensee of a foreign telephone company (U. S. *v.* American Bell Tel. Co., 29 Fed. 17), one whose duty is merely to receive what is sent to him and remit back the proceeds (Gibbons *v.* Kanawha, etc., Coal Co., 2 Cinc. Super. Ct. 75), the "representative" in a city outside the state, whose name appeared in the directory of that city as "manager" of defendant (Coler *v.* Pittsburgh Bridge Co., 146 N. Y. 281, 40 N. E. 779 [*reversing* 84 Hun 285, 32 N. Y. Suppl. 439, 1 N. Y. Annot. Cas. 232]) have been held not to be managing agents.

Sales agent.—A person who chiefly represents a corporation as agent for the sale of its goods in a locality in the state, and who maintains an office or storeroom where such goods are kept, is a managing agent, although he is paid only by commissions on sales made within his district. Toledo Computing Scale Co. *v.* Computing Scale Co., 142 Fed. 919, 74 C. C. A. 89.

General counsel.— Where a foreign corporation has ceased to do business in the state, an attorney who as general counsel has charge of all the business of the company in this state, and who is its only general officer in the state, may be regarded as its managing agent. Newport News, etc., Co. *v.* McDonald Brick Co., 109 Ky. 408, 59 S. W. 332, 22 Ky. L. Rep. 934.

12. Federal Betterment Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560.

13. Ord Hardware Co. *v.* J. I. Case Threshing Mach. Co., 77 Nebr. 847, 110 N. W. 551; Shackleton *v.* Wainwright Mfg. Co., 7 N. Y. St. 872.

14. Federal Betterment Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560.

The term "managing agent" means one invested with general power involving the exercise of discretion as distinguished from one who acts under the control of a superior authority, both as to the extent of the work and the manner of executing it. Reddington *v.* Mariposa Land, etc., Co., 19 Hun (N. Y.) 405.

15. Wheeler, etc., Sewing Mach. Co. *v.* Lawson, 57 Wis. 400, 15 N. W. 398; Farmers' Loan, etc., Co. *v.* Warring, 20 Wis. 290; Upper Mississippi Transp. Co. *v.* Whittaker, 16 Wis. 220. See also Brewster *v.* Michigan Cent. R. Co., 5 How. Pr. (N. Y.) 183, 3 Code Rep. 215.

16. Ryerson *v.* Steere, 114 Mich. 352, 72 N. W. 131; Abbeville Electric Light, etc., Co. *v.* Western Electrical Supply Co., 61 S. C. 361, 39 S. E. 559. See also Bragdon *v.* Perkins-Campbell Co., 19 Pa. Co. Ct. 305.

17. Hodge *v.* Acorn Brass Mfg. Co., 50 Misc. (N. Y.) 627, 98 N. Y. Suppl. 673; Frankel *v.* Dover Mfg. Co., 104 N. Y. Suppl. 459; Strain *v.* Chicago Portrait Co., 126 Fed. 831.

there is a resident agent.[18] In any event, to warrant service upon a traveling salesman, the corporation must be doing business within the state.[19] A mere solicitor for advertising is not to be regarded as the agent of a foreign newspaper or publishing corporation;[20] and the same rule is usually applied with regard to the freight and passenger solicitors of foreign railroad corporations.[21]

(v) *Agents Connected With Cause of Action.* Under some statutes where a corporation has an office or agency in any county other than that in which the principal resides, process may be made on any agent or clerk employed in such office or agency in all actions growing out of a connection with the business of that office or agency.[22]

c. Alternative Provisions. As a general rule the statutes provide that where certain principal officers or agents cannot be found service may be made upon officers or agents of less rank[23] or upon stock-holders.[24] Under other statutes where the corporation has no agent in the state upon whom service may be had process may be served on the secretary of state.[25] To support service in these alternative forms, however, the inability to make service in the preferred manner must appear.[26]

18. W. T. Adams Mach. Co. *v.* Castleberry, 84 Ark. 573, 106 S. W. 940.

19. See Boardman *v.* S. S. McClure Co., 123 Fed. 614.

What constitutes doing business see Foreign Corporations, 19 Cyc. 1267 *et seq.*

20. Mulhearn *v.* Press Pub. Co., 53 N. J. L. 150, 20 Atl. 760; Boardman *v.* S. S. McClure Co., 123 Fed. 614.

21. Wilson *v.* Northern Pac. R. Co., 9 Ohio Dec. (Reprint) 634, 16 Cinc. L. Bul. 6; McGuire *v.* Great Northern R. Co., 155 Fed. 230; Wall *v.* Chesapeake, etc., R. Co., 95 Fed. 398, 37 C. C. A. 129; Fairbanks *v.* Cincinnati, etc., R. Co., 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271; Maxwell *v.* Atchison, etc., R. Co., 34 Fed. 286. *Contra,* Bell *v.* New Orleans, etc., R. Co., 2 Ga. App. 812, 59 S. E. 102; Georgia Cent. R. Co. *v.* Eichberg, (Md. 1908) 68 Atl. 690.

22. Ætna Ins. Co. *v.* Black, 80 Ind. 513; Locke *v.* Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49.

After termination of agency.—In an action against a non-resident corporation on a contract made with an agent, if the agency for carrying on the business out of which the contract in question arose has been discontinued, and the agent's authority revoked, service cannot be made on an agent in the same place, employed by defendant to transact other business. Winney *v.* Sandwich Mfg. Co., (Iowa 1891) 50 N. W. 565. In an action against a non-resident corporation on the warranty of a harvesting machine made by an agent, the court properly charged that, if the agency for carrying on the business out of which the warranty arose was discontinued, and the agent's authority revoked, service could not be made on an agent in the same place, employed by defendant to "sell his repairs and other implements." Winney *v.* Sandwich Mfg. Co., 86 Iowa 608, 53 N. W. 421, 18 L. R. A. 524. But where a foreign corporation agreed to furnish A, as its agent, machines to be sold on commission; the agreement to be in force until a certain date, it was held in an action against the corporation for breach of warranty of a machine sold by the agent, that service on the agent bound the corporation, although the action was brought after the termination of the agreement between the agent and defendant, it further appearing that defendant had not finally settled with its agent. Brunson *v.* Nichols, 72 Iowa 763, 34 N. W. 289; Gross *v.* Nichols, 72 Iowa 239, 33 N. W. 653.

Such a statute is not exclusive and merely fixes the county in which suit may be brought, but does not define the manner of acquiring jurisdiction. Moffitt *v.* Chicago Chronicle Co., 107 Iowa 407, 78 N. W. 45.

23. See the statutes of the several states. And see Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527; Debs *v.* Dalton, 7 Ind. App. 84, 34 N. E. 236; American Bonding Co. *v.* Dickey, 74 Kan. 791, 88 Pac. 66; McCulloh *v.* Paillard Non-Magnetic Watch Co., 14 N. Y. Suppl. 491, 20 N. Y. Civ. Proc. 386; Saunders *v.* Sioux City Nursery, 6 Utah 431, 24 Pac. 532.

24. Colorado Iron-Works *v.* Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433, holding that one who gratuitously transfers his stock in a foreign corporation to trustees, whose names he does not know, for some unknown and undefined purpose, and at the same time contributes fifty dollars to cover the expense of the transfer, is still a stock-holder in such foreign corporation.

25. Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597.

26. Venner *v.* Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061; Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Doherty *v.* Evening Journal Assoc., 98 N. Y. App. Div. 136, 90 N. Y. Suppl. 671; Vitolo *v.* Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Suppl. 273; Honeyman *v.* Colorado Fuel, etc., Co., 133 Fed. 96, holding that a plaintiff exercised due diligence to obtain service of summons and complaint on the officers of a foreign corporation defendant, so as to authorize service on a director under the laws of New York, where before making

d. After Termination of Office or Agency. After termination of the relationship the agent cannot be served as such,[27] and where an officer has effected a valid resignation, jurisdiction of the corporation cannot be obtained by service upon him.[28] An officer may be served as such, although appointed receiver of the corporation.[29]

e. Officer or Agent Temporarily Within Jurisdiction. Service may be made on an officer designated by the statute if found within the state, although he may be present on private business.[30] In case the officer or agent is sent into the state on the corporate business process may be served on him.[31] In any event the presence of the officer must not be secured by fraud or misrepresentation.[32] Under some statutes service may be made upon a managing agent, although he is only temporarily in the state upon the business of the corporation.[33]

6. Service Upon Corporation Failing to Comply With Statute. Where a corporation has failed to appoint an agent to receive service of process as required by statute it will be presumed to have assented to service upon one who acts as its agent within the state.[34] Under some statutes where there has been a failure to

service on the director he called at the office of the secretary, and was told by the clerk in charge that neither the secretary nor any other officer of the company was within the state, and was given by such clerk the names of resident directors on whom service might be made. See Perrine *v.* Ransome Gas Mach. Co., 60 N. Y. App. Div. 32, 69 N. Y. Suppl. 698.

27. Haas *v.* Security, etc., Co., 57 N. J. L. 388, 30 Atl. 430; Cooper *v.* Brazelton, 135 Fed. 476, 66 C. C. A. 188.

28. Sturgis *v.* Crescent Jute Mfg. Co., 57 Hun (N. Y.) 587, 10 N. Y. Suppl. 470; Ervin *v.* Oregon Steam Nav. Co., 22 Hun (N. Y.) 598 (holding that whether the resignation of the president of a foreign corporation was made and accepted with a view to prevent the service of summons and complaint upon the president as such is not a material question, if in fact the resignation was actually made and accepted, so that he ceased to be the president of such corporation); Continental Wall-Paper Co. *v.* Lewis Voight, etc., Co., 106 Fed. 550.

29. Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036.

30. *Colorado.*— Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036.

Michigan.— Shickle, etc., Iron Co. *v.* S. L. Wiley Constr. Co., 61 Mich. 226, 28 N. W. 77 [*distinguishing* Newell *v.* Great Western R. Co., 19 Mich. 336, as decided prior to statutory provisions as to suits against foreign corporations].

New York.— Pope *v.* Terre Haute Car, etc., Co., 87 N. Y. 137 [*affirming* 24 Hun 238, 60 How. Pr. 419]. *Compare* Hulbert *v.* Hope Mut. Ins. Co., 4 How. Pr. 275, 2 Code Rep. 148 [*affirmed* in 4 How. Pr. 415].

North Carolina.—Jester *v.* Baltimore Steam Packet Co., 131 N. C. 54, 42 S. E. 447.

Texas.— Cameron *v.* Jones, 4 Tex. Civ. App. 4, 90 S. W. 1129.

Compare Moulin *v.* Trenton Mut. L., etc., Ins. Co., 25 N. J. L. 57.

Where corporation has not done business within the state see Foreign Corporations, 19 Cyc. 1327.

31. Rush *v.* Foos Mfg. Co., 20 Ind. App. 515, 51 N. E. 143; Brush Creek Coal, etc., Co. *v.* Morgan-Gardner Electric Co., 136 Fed. 505; Houston *v.* Filer, etc., Co., 85 Fed. 757. But *compare* Ladd Metals Co. *v.* American Min. Co., 152 Fed. 1008, holding that the fact that the secretary of a corporation went into another state for the purpose of attending to the taking of depositions, in a suit to which the corporation was a party, does not render the corporation amenable to suit in a federal court therein by service upon such secretary while there.

Must act with reference to claim.— Under La. Act No. 149 (1890), p. 188, providing for service of citation in an action against a foreign corporation upon each person or persons, company, or firm thus transacting business for the corporation, process in an action against a non-resident corporation cannot be served upon the latter's secretary while temporarily within the state, where the transaction which gave rise to plaintiff's claim was not one brought about by the secretary. Southern Saw Mill Co. *v.* American Hard Wood Lumber Co., 115 La. 237, 38 So. 977, 112 Am. St. Rep. 267.

32. Olean St. R. Co. *v.* Fairmount Constr. Co., 55 N. Y. App. Div. 292, 67 N. Y. Suppl. 165, 8 N. Y. Annot. Cas. 404.

33. Guernsey *v.* American Ins. Co., 13 Minn. 278; Klopp *v.* Creston City Guarantee Water Works Co., 34 Nebr. 808, 52 N. W. 819, 33 Am. St. Rep. 666; Young, etc., Co. *v.* Welsbach Light Co., 55 N. Y. App. Div. 16, 66 N. Y. Suppl. 1024; Rudd *v.* McClean Arms, etc., Co., 54 Misc. (N. Y.) 49, 105 N. Y. Suppl. 387; Porter *v.* Sewall Safety Car Heating Co., 7 N. Y. Suppl. 166, 17 N. Y. Civ. Proc. 386, 23 Abb. N. Cas. 233; Estes *v.* Belford, 22 Fed. 275, 23 Blatchf. 1.

34. Grant *v.* Cananea Consol. Copper Co., 189 N. Y. 241, 82 N. E. 191 [*reversing* 117 N. Y. App. Div. 576, 102 N. Y. Suppl. 642] (holding that under the express provisions of N. Y. Code Civ. Proc. § 432, subd. 1, service of summons upon a foreign corporation may be made within the state by delivering a copy to its president, etc., even if the foreign corporation has not designated or authorized any person to accept service upon it in the state);

appoint a resident agent service must be by delivery of a copy to the secretary of state.[35]

7. Acceptance of Service. The fact that a person is an agent or employee upon whom service of process may be legally made does not in the absence of any statutory provision authorizing him to accept service raise any presumption as to his authority to bind the company by accepting service.[36] An admission of service must identify the process served.[37]

8. Service by Publication. Service by publication is not authorized in the absence of statutory provision.[38] But under the statutes provision is usually expressly made for such service,[39] as where the corporation has property within the state,[40] or where no officer or agent may be found upon whom service may be made.[41] And in some cases service by publication has been held to be authorized by statutes authorizing such service generally.[42] Under some statutes where the corporation has designated no agent for the service of process, service of process upon the secretary of state is substituted for service by publication.[43] Failure to publish a notice in the newspaper designated by statute is not fatal to the jurisdiction of the court, unless the statute so provides.[44] The order for publication is usually required to be based upon affidavits showing the statutory prerequisites to exist.[45] Under some statutes personal service without the state is allowed in lieu of publication.[46]

Clews *v.* Rockford, etc., R. Co., 49 How. Pr. (N. Y.) 117 (holding that service of a summons on the general solicitor or counsel is good service); Hagerman *v.* Empire Slate Co., 97 Pa. St. 534; Foster *v.* Charles Betcher Lumber Co., 5 S. D. 57, 58 N. W. 9, 49 Am. St. Rep. 859, 23 L. R. A. 490; American Cotton Co. *v.* Beasley, 116 Fed. 256, 53 C. C. A. 446.

35. See Brooks *v.* Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Lonkey *v.* Keyes Silver-Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351, holding that service on the deputy secretary of state, where the secretary was out of the state, was unauthorized, and gave the court no jurisdiction. See also *infra*, text and note 43.

36. New River Mineral Co. *v.* Seeley, 120 Fed. 193, 56 C. C. A. 505.

37. McKeever *v.* Supreme Court I. O. F., 122 N. Y. App. Div. 465, 106 N. Y. Suppl. 1041.

38. Dearing *v.* Charleston Bank, 5 Ga. 497, 48 Am. Dec. 300, holding that since the act of 5 Geo. II, authorizing service of notice of suit by publication is intended to apply only to citizens of foreign states, who having been in the state depart to avoid service of process, it does not authorize service by publication upon a foreign corporation.

39. See the statutes of the several states.

40. Broome *v.* Galena, etc., Packet Co., 9 Minn. 239.

Property may be in custodia legis.— Under Kan. Comp. Laws, c. 80, § 72, authorizing service by publication where defendant is a foreign corporation having property within the state, such service may be made where there is property in the hands of a receiver of the court in which the action is pending, which was delivered to him by the sheriff who seized the same in an action of replevin by defendant against a third person, which is still pending before the same court. U. S. Electric Lighting Co. *v.* Martin, 43 Kan. 526, 23 Pac. 586.

Necessity that corporation have property within the state see *supra*, VI, B, 1.

41. *Illinois.*— Price *v.* American Bible Soc., 29 Ill. App. 476.

Nevada.—Victor Mill, etc., Co. *v.* Esmeralda County Justice Ct., 18 Nev. 21, 1 Pac. 831.

Ohio.— Foote *v.* Central American Commercial Co., 26 Ohio Cir. Ct. 378.

Pennsylvania.— Boyer *v.* Iron Co., 1 Leg. Rec. 89.

United States.— Ranch *v.* Werley, 152 Fed. 509.

42. Douglass *v.* Pacific Mail Steamship Co., 4 Cal. 304; Peoples' Nat. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20; McLaren *v.* Byrnes, 80 Mich. 275, 45 N. W. 143. But *compare* Smith *v.* Hoover, 39 Ohio St. 249.

43. Olender *v.* Chrystaline Min. Co., 149 Cal. 482, 86 Pac. 1082. See also *supra*, text and note 35.

44. Lanier *v.* Houston City Bank, 9 N. Y. Civ. Proc. 161.

45. *Minnesota.*— Broome *v.* Galena, etc., Packet Co., 9 Minn. 239.

New York.— Coffin *v.* Chicago Northern Pacific Constr. Co., 67 Barb. 337.

Oregon.— Knapp *v.* Wallace, (1907) 92 Pac. 1054.

Wisconsin.— Rollins *v.* Maxwell Bros. Co., 127 Wis. 142, 106 N. W. 677.

United States.— Ranch *v.* Werley, 152 Fed. 509.

46. See the statutes of the several states. And see Morrison *v.* National Rubber Co., 13 N. Y. Civ. Proc. 233 (holding that the fact that an order for the service of summons on a foreign corporation without the state did not designate the officer on whom service was to be made did not vitiate the order or render the service void, where in fact the secretary of the corporation was duly served without the state; a substantial compliance with the

9. Mailing Process. A statutory provision requiring the mailing of notice of the suit to the home office of the corporation is not jurisdictional.[47] And where there has been no personal service such mailing is insufficient to confer jurisdiction,[48] unless consent to such a method of service is made a condition to the doing of business within the state by the corporation.[49]

10. Return — a. Sufficiency. The return must show affirmatively the facts constituting a valid service.[50] So the return must show that service was upon an officer or agent designated by statute.[51] A return of process served upon the agent appointed by a foreign corporation to accept service of process must show that the person served is such agent.[52] All the facts sustaining the jurisdiction need not appear from the return, however, if they otherwise are shown by the record.[53] The officer should confine himself to a statement of what he actually

provisions of the code being all that is required); Wood *v.* St. Louis Bolt, etc., Co., 1 N. Y. Civ. Proc. 220 (holding that an attachment is not necessary to confer jurisdiction on the court to grant an order for personal service without the state on a foreign corporation).

47. Emerson *v.* McCormick Mach. Co., 51 Mich. 5, 16 N. W. 182, so holding where personal service of the writ was made on the proper officer. See Nashville, etc., R. Co. *v.* McMahon, 70 Ga. 585.

48. Lonkey *v.* Keyes Silver Min. Co., 21 Nev. 312, 31 Pac. 57, 17 L. R. A. 351.

49. Mohr, etc., Distilling Co. *v.* Firemen's Ins. Co., 10 Cinc. L. Bul. 82, 6 Ohio Dec. (Reprint) 1180, 12 Am. L. Rec. 168.

50. Southern Bldg., etc., Assoc. *v.* Hallum, 59 Ark. 583, 28 S. W. 420; Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Zelnicker Supply Co. *v.* Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321; Gamasche *v.* Smythe, 60 Mo. App. 161; Knapp *v.* Wallace, (Oreg. 1907) 92 Pac. 1054; Allen *v.* Yellowstone Park Transp. Co., 154 Fed. 504; Jackson *v.* Delaware River Amusement Co., 131 Fed. 134; U. S. *v.* American Bell Tel. Co., 29 Fed. 17.

Returns held sufficient under particular statutes.— For cases holding particular returns sufficient see Putnam Lumber Co. *v.* Ellis-Young Co., 50 Fla. 251, 39 So. 193; Farrel *v.* Oregon Gold-Min. Co., 31 Oreg. 463, 49 Pac. 876; Wintermute *v.* New Jersey Cent. R. Co., 5 Pa. Co. Ct. 648; Yeich *v.* Peterson, 2 Leg. Chron. (Pa.) 269; Patton *v.* American Mut. Ins. Co., 1 Phila. (Pa.) 396; Kennard *v.* New Jersey R., etc., Co., 1 Phila. (Pa.) 41.

51. *Arkansas.*— Southern Bldg., etc., Assoc. *v.* Hallum, 59 Ark. 583, 28 S. W. 420.

Michigan.— Toledo Ice Co. *v.* Munger, 124 Mich. 4, 82 N. W. 663.

Missouri.— Gamasche *v.* Smythe, 60 Mo. App. 161.

New Jersey.— Roake *v.* Pennsylvania R. Co., 70 N. J. L. 494, 57 Atl. 160.

Ohio.— Fleckmyer Wheel Co. *v.* Commercial Wheel Co., 8 Ohio S. & C. Pl. Dec. 686, 7 Ohio N. P. 613.

Texas.— National Cereal Co. *v.* Earnest, (Civ. App. 1905) 87 S. W. 734.

United States.— U. S. *v.* American Bell Tel. Co., 29 Fed. 17; Kiufeke *v.* Merchants' Dispatch Transp. Co., 11 Fed. 282, 3 McCrary 547.

But *compare* Hagerman *v.* Empire Slate Co., 97 Pa. St. 534.

52. Adkins *v.* Globe F. Ins. Co., 45 W. Va. 384, 32 S. E. 194. But see Turner *v.* Franklin, (Ariz. 1906) 85 Pac. 1070; Webster Wagon Co. *v.* Home Ins. Co., 27 W. Va. 314, holding that a return of service on the "lawful attorney" of a foreign corporation is good, where the law authorizes service on a certain attorney.

In case no agent has been designated.— Under Cal. St. (1899) p. 111, c. 94, § 1, requiring foreign corporation to designate an agent for the service of process, and to file such designation with the secretary of state, in which case process may be served on the agent, or, if no person is designated, on the secretary of state, a return reciting service on the secretary of state, but failing to state that there was no designation of an agent on file, is insufficient to confer jurisdiction over the corporation, and cannot be aided and rendered sufficient by a certificate of the secretary of state, attached to the summons as returned, showing that the corporation had not made the required designation. Willey *v.* Benedict Co., 145 Cal. 601, 79 Pac. 270.

53. Nelson *v.* Rehkopf, 75 S. W. 203, 25 Ky. L. Rep. 352; Farrel *v.* Oregon Gold-Min. Co., 31 Oreg. 463, 49 Pac. 876. See Willey *v.* Benedict Co., 145 Cal. 601, 79 Pac. 270 (holding that under Cal. Code Civ. Proc. § 670, providing that in case of judgment by default the judgment-roll consists of the summons, with affidavit of proof of service, the complaint, with memorandum indorsed thereon of defendant's default, and a copy of the judgment, a certificate of the secretary of state, attached to a summons served on him for a foreign corporation, under St. (1899) p. 111, c. 94, § 1, providing for such service in case no person is designated by the foreign corporation as an agent for the service of process, is not a part of the record, and cannot be looked to, on a motion made on the record to quash the service and return, to supply an omission of the return to recite that the corporation had not designated an agent for the service of process); Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Frick Co. *v.* Wright, 23 Tex. Civ. App. 340, 55 S. W. 608.

does in serving the process and should not state conclusions of law and fact apart from what was done.[54]

b. Operation and Effect.[55] The sheriff's return is in any event *prima facie* evidence of good service,[56] while in some jurisdictions it is conclusive as between the parties.[57] But even where it is held that the return is conclusive the actual facts may be inquired into where the return itself is not full or explicit.[58]

11. Amendment. Where the facts warrant such procedure a return of service may be corrected by amendment so as to show conformity to the statute.[59] But in case it is permissible to allow an amendment upon affidavits of person not making service, which is doubtful,[60] an amendment will not be allowed upon affidavits which are merely hearsay.[61]

12. Defects, Objections, and Waiver. In some jurisdictions the sufficiency of the service of a summons may be tried upon motion to quash the return, supported by affidavits.[62] In other jurisdictions the question may be raised by a plea in abatement.[63] But a return will not be set aside upon motion for merely technical defects which do not appear upon its face.[64] Upon a motion to vacate the service of summons, the moving party must distinctly negative the existence of circumstances which would render the service valid under the statute,[65] and the burden is on defendant to establish the grounds of his motion.[66] An appearance for the purpose of quashing the service of summons will not be regarded as a waiver of jurisdiction.[67]

PROCESS. A word which may be applied either to methods of action such as legal proceedings,[1] or to the treatment of substance in transforming and reducing

54. U. S. *v.* American Bell Tel. Co., 29 Fed. 17.

55. Return generally see *supra*, III.

56. Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036; Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. (D. C.) 300; Bragdon *v.* Perkins-Campbell Co., 82 Fed. 338.

57. Lebanon Nat. Bank *v.* Mascoma Flannel Co., 70 N. H. 227, 46 Atl. 49; Wintermute *v.* New Jersey Cent. R. Co., 5 Pa. Co. Ct. 648; Kennard *v.* New Jersey R., etc., Co., 1 Phila. (Pa.) 41.

58. Jackson *v.* Delaware River Amusement Co., 131 Fed. 134, holding that while a marshal's return of service on a corporation is conclusive on the parties, and cannot be contradicted, yet, where the return did not show that the corporation was doing business in the state in which the court was sitting, and in fact the corporation transacted no business in such state, service being made on its president while he was engaged in private business therein, an application to set aside such service might be made by a rule to show cause, instead of by plea in abatement.

59. Walter A. Zelnicker Supply Co. *v.* Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321; Frick Co. *v.* Wright, 23 Tex. Civ. App. 340, 55 S. W. 608, holding that an amendment might be permitted so as to give the proper name and description of the person served.

60. Brown *v.* Gaston, etc., Gold, etc., Min. Co., 1 Mont. 57.

61. Brown *v.* Gaston, etc., Gold, etc., Min. Co., 1 Mont. 57.

62. Wall *v.* Chesapeake, etc., R. Co., 95 Fed. 398, 37 C. C. A. 129, holding that the local practice might be followed in such regard.

63. Perry *v.* New Brunswick R. Co., 71 Me. 359 (holding that a plea in abatement should contain a direct and positive averment of what the service was and that no other service was in fact made); Walter A. Zelnicker Supply Co. *v.* Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321; Youngblood *v.* Strahorn-Hutton-Evans Commission Co., (Tex. Civ. App. 1897) 40 S. W. 648 (holding that where process is served upon the wrong person a plea in abatement will be sustained).

64. Union Pac. R. Co. *v.* Novak, 61 Fed. 573, 9 C. C. A. 629, so holding where a marshal returned that he had made personal service on the agent of a foreign corporation, where he had in fact left the summons with a person in charge of the agent's office who handed it to the agent on the following day, on which day the agent admitted service in a conversation with the marshal.

65. Wamsley *v.* Horton, 68 Hun (N. Y.) 549, 23 N. Y. Suppl. 85; Scherer *v.* Ground Hog Min., etc., Co., 55 N. Y. Suppl. 743, 28 N. Y. Civ. Proc. 231 [*affirmed* in 55 N. Y. Suppl. 1148].

66. Hess *v.* Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 74, so holding where it was alleged that the agency of the person served had terminated.

67. Ladd Metals Co. *v.* American Min. Co. Lim., 152 Fed. 1008.

1. See Process.

Process of law.—"Due process of law" see Constitutional Law, 8 Cyc. 1080–1136. "Ordinary process of law" cannot mean ordinary personal judgment and execution, but such process as is adapted to enforce a lien or specific charge upon property specially assessed. Neenan *v.* Smith, 50 Mo. 525, 529 [*overruling* St. Louis *v.* Clemens, 36 Mo. 467],

it to a different state [2] and the means of such treatment.[3] (See Process Roll; Procès Verbal.)

PROCESSIONING. A proceeding to determine boundaries, in use in some of the United States, similar in all respects to the English Perambulation,[4] *q. v.* (See Boundaries, 5 Cyc. 945–948; Perambulation, 30 Cyc. 1389.)

PROCESS PATENT. See Patents, 30 Cyc. 822–825.

PROCESS ROLL. In practice, a roll used for the entry of process to save the statute of limitations.[5]

PROCESSUM CONTINUANDO. In English practice, a writ for the continuance of process, after the death of the chief justice or other justices in the commission of Oyer and Terminer.[6]

PROCESSUS LEGIS EST GRAVIS VEXATIO; EXECUTIO LEGIS CORONAT OPUS. A maxim meaning "The process of law is a grievous vexation; the execution of the law crowns the work." [7]

PROCÈS VERBAL. A written official act; [8] a true relation in writing, in due form of law, of what has been done and said verbally in the presence of a public officer, and what he himself does on the occasion.[9]

PROCHEIN AMI. Next friend,[10] the latter term being defined as one who, without being appointed guardian, acts for the benefit of an infant, married woman, or other person *non sui juris*.[11] (Prochein Ami: Of Lunatic, see Insane Persons, 22 Cyc. 1230–1235. Of Married Woman, see Husband and Wife, 21 Cyc. 1513 text and note 13. Of Minor, see Infants, 22 Cyc. 634.)

PROCHEIN AVOIDANCE. Next vacancy; a power to appoint a minister to a church when it shall next become void.[12]

PROCLAMATION. The act of proclaiming; a declaration or notice by public outcry; [13] a public notice in writing given by a state or city official of some act done by the government, or to be done by the people; [14] the act of causing some state matters to be published or made generally known; a written or printed document in which are contained such matters issued by proper authority; [15] a notice publicly given of anything whereof the executive thinks fit to inform and notify the public; a publication by authority; an official notice given to the public; [16]

so construing the phrase as used in a statute providing for the collection of assessments for street work. "Under process of law" does not describe an entry upon mortgaged premises by the mortgagee upon voluntary surrender. Riddle *v.* George, 58 N. H. 25, 26.

2. **Art or process** see Patents, 30 Cyc. 822–825.

Distinguished from "product" see Durand *v.* Green, 60 Fed. 392, 396.

"Other process for forcing water" see Richardson *v.* Clements, 89 Pa. St. 503, 506, 33 Am. Rep. 784.

"Process butter" see Hathaway *v.* McDonald, 27 Wash. 659, 663, 68 Pac. 376, 91 Am. St. Rep. 889. See Adulteration, 1 Cyc. 939; Food, 19 Cyc. 1084.

3. See Richardson *v.* Clements, 89 Pa. St. 503, 506, 33 Am. Rep. 784, where the phrase "other process of forcing water," following the specification "hydraulic ram, wheel," was held to include a windmill.

4. Black L. Dict.

5. Black L. Dict.

6. Black L. Dict.

7. Burrill L. Dict. [*citing* Coke Litt. 289*b*, where, however, the initial word is "*prosecutio*." not "*processus*"].

8. See Lyons *v.* Cenas, 22 La. Ann. 113, 114, where the term, though not defined, is used as follows: "The proces verbal of the succession sale . . . was filed in the clerk's office"; and again "the act or proces verbal of the sale set up as conveying title to the plaintiff, could have no effect as to third persons until duly recorded or registered in the parish where the property is located."

9. Bouvier L. Dict. [*quoted* in Hall *v.* Hall, 11 Tex. 526].

10. See Infants, 22 Cyc. 634; Tarr's Estate, 4 Pa. Co. Ct. 182, 183.

11. Bouvier L. Dict. [*quoted* in Mackey *v.* Peters, 22 App. Cas. (D. C.) 341, 347].

12. Black L. Dict.

13. Webster Dict. [*quoted* in Mackin *v.* State, 62 Md. 244, 247].

14. Webster Dict. [*quoted* in Mackin *v.* State, 62 Md. 244, 247].

15. Black L. Dict.

16. Carter *v.* Territory, 1 N. M. 317, 336.

A proclamation by the president reserving lands from sale is an official, public announcement of an order to that effect. No particular form of such announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. Wolsey *v.* Chapman, 101 U. S. 755, 770, 25 L. ed. 915 [*quoted* in Wood *v.* Beach, 156 U. S. 548, 549, 15 S. Ct. 410, 39 L. ed. 528].

"In the English law the instrument is thus defined: 'Proclamation — *proclamatio* — is a notice publicly given of anything whereof the king thinks fit to advertise his subjects.'" Cowell L. Dict. [*quoted* in Lapeyre *v.* U. S.,

also used to express the public nomination made of any one to a high office.[17] In practice, the declaration made by the crier, by authority of the court, that something is about to be done.[18] In equity practice the term is applied to a public proclamation directed, in a writ of attachment, to be made by the sheriff throughout the county, summoning the defendant personally to appear and answer the plaintiff's bill.[19] (Proclamation: As Subject of Judicial Notice, see EVIDENCE, 16 Cyc. 903, 904 text and note 53. Of Amnesty, see PARDONS, 29 Cyc. 1560 text and note 5. Of War, see WAR.)

PROCLAMATOR. An officer of the English Court of Common Pleas.[20] (See, generally, COURTS, 11 Cyc. 633; OFFICERS, 29 Cyc. 1356.)

PRO CONFESSO. A confession by the party against whom it is taken that the allegations of the bill in so far as they affect him are true.[21] (Pro Confesso: Decree, see EQUITY, 16 Cyc. 474, 490.)

PRO CONSILIO. For counsel given.[22]

PROCTOR. One who manages the business of another, on the mandate or commission of his principal; an attorney.[23] In practice, an officer in the admiralty and ecclesiastical courts, corresponding with attorney, at common law, and solicitor, in equity;[24] he who undertakes to manage another man's case in any court of the civil law, or ecclesiastical, for his fee.[25] (See ATTORNEY AND CLIENT, 4 Cyc. 898; and, generally, ATTORNEY AND CLIENT, 4 Cyc. 889; PRINCIPAL AND AGENT, 31 Cyc. 1175. See also PROCURATOR.)

PROCURADOR DEL COMUN. In Spanish law, relating to grants of land, the officer appointed to make inquiry, put the petitioner in possession of the land prayed for, and execute the lieutenant-governor's and commandant's orders relative to the premises.[26]

PROCURATION. Agency; proxy; the act of constituting another one's

17 Wall. (U. S.) 191, 195, 21 L. ed. 606, by way of analogy in reference to a president's proclamation]; 3 Tomlin L. Dict. 326 [*quoted* in Carter *v.* Territory, 1 N. M. 317, 336].

17. Black L. Dict.

18. Black L. Dict.

19. See 3 Blackstone Comm. 444 [*cited* in Black L. Dict.].

20. Black L. Dict.

21. Austin *v.* Barber, 88 Miss. 553, 560, 41 So. 265, holding that it is at most nothing but that, and adding: "It confesses only such case as is made by the pleadings against the party against whom the '*pro confesso*' is taken."

22. Black L. Dict., adding: "An annuity *pro consilio* amounts to a condition, but in a feoffment or lease for life, etc., it is the consideration, and does not amount to a condition; for the state of the land by the feoffment is executed, and the grant of the annuity is executory."

Pro consilio impendendo, as consideration for annuity (see Mingay *v.* Hammond, Cro. Jac. 482, 79 Eng. Reprint 411 [*cited* in Burrill L. Dict., where the phrase is defined: "For counsel or advice to be given"]; Oliver *v.* Emsonne, Dyer 1*b*, 73 Eng. Reprint 4 [*cited* in Burrill L. Dict.]), *impenso* as consideration for annuity (see Baker *v.* Brook, Dyer 65*a*, 73 Eng. Reprint 137 [*cited* in Burrill L. Dict. where the term is defined: "For counsel given"]).

23. Burrill L. Dict.

24. Burrill L. Dict.

Proctors of the clergy are they who are chosen and appointed to appear for cathedral or other collegiate churches; as also for the common clergy of every diocese, to sit in the convocation house in the time of parliament. Black L. Dict.

In admiralty.—"Although counsel and attorneys are distinct officers, performing different functions, and receiving and holding their offices under distinct appellations (U. S. Sup. Ct. Rules, Feb. 5, 1790), and proctors and advocates in admiralty correspond to those law officers (1 Conk. Adm. Prac. 355, Betts, Adm. 9, 10), yet the attorney and proctor are the stamen of their respective orders, and are only subdivided in names and functions for the convenience, or pursuant to the usages, of the tribunals in which they practice (Jac. Law Dict. 'Attorney, Proctor,' etc.). In admiralty, the proctor is the only proxy of the party known upon the act or dockets of the court, and, in strictness, advocates are but a class of proctors, and not independent officers, in the constitution of that court. Clarke, Praxis, tit. 8 (Hall's annotations). . . . The act of February 26, 1853, would thus naturally be interpreted as implying the term 'proctor' to embrace all proxies of the party in an admiralty cause, as does 'attorney' and 'solicitor' those in common-law and equity cases." Thorne *v.* The Victoria, 23 Fed. Cas. No. 13,988.

25. Cowell L. Dict. [*quoted* in Stephenson *v.* Higginson, 3 H. L. Cas. 638, 648, 18 Eng. L. & Eq. 50, 10 Eng. Reprint 252]. See likewise Jacob L. Dict.; Tomlinson L. Dict.; Cunningham L. Dict. [all *cited* in Stephenson *v.* Higginson, *supra*].

26. Lecompte *v.* U. S., 11 How. (U. S.) 115, 126, 13 L. ed. 627, where the term is translated "solicitor-general."

attorney in fact; action under a power of attorney or other constitution of agency.[27] As an ecclesiastical term, the providing necessaries for the bishops, who, in traveling through their dioceses, visit the churches subject to them.[28] (See PROCURATOR, and Cross-References Thereunder.)

PROCURATOR. In the civil law, a PROCTOR, *q. v.*; a person who acts for another by virtue of a procuration.[29] In old English law an agent or attorney; a bailiff or servant; a proxy of a lord in parliament.[30] In ecclesiastical law, one who collected the fruits of a benefice for another; an advocate of a religious house, who was to solicit the interest and plead the causes of the society; a proxy or representative of a parish church.[31] (See PROCTOR; PROCURATION; and, generally, ATTORNEY AND CLIENT, 4 Cyc. 889; PRINCIPAL AND AGENT, 31 Cyc. 1175.)

PROCURE.[32] To contrive, to bring about, to effect, to cause;[33] to acquire or provide for oneself or for another;[34] to acquire for oneself; to cause.[35] As used in the pleadings in an action, and acted on by the court, a term which imports an initial, active and wrongful effort.[36] (See ACQUIRE, 1 Cyc. 630; EFFECTED, 14 Cyc. 1231; OBTAIN, 29 Cyc. 1339. See also PROCUREMENT; PROCURING.)

27. Black L. Dict.

Compared with "mandate" see MANDATE, 26 Cyc. 514 note 10.

28. "Procuratio *est exhibitio sumptuum necessariorum facta prælatis, que diœceses peragrando, ecclesias subjectus visitant.*" Davis Ir. K. B. [*quoted* and translated, as in text, in Black L. Dict.].

29. Black L. Dict.

30. Black L. Dict.

31. Black L. Dict.

32. **Distinguished from "incite"; "request"; "advise,"** see Long *v.* State, 23 Nebr. 33, 45, 36 N. W. 310.

33. Webster Dict. [*quoted* in Marcus *v.* Bernstein, 117 N. C. 31, 34, 23 S. E. 38, where it is added "procure means action"].

Said to mean "affect."— The following definition has been quoted, as it would seem by the context, from Webster Dict. "To contrive, effect, or bring about; to affect; to cause" (see Long *v.* State, 23 Nebr. 33, 45, 36 N. W. 310, construing the word as used in Cr. Code, § 1, in the phrase "procure another to commit a crime"), but "affect" is not among the definitions given in Webster Int. Dict.

34. Webster Dict. [*quoted* in Jenkins *v.* State, 82 Miss. 500, 503, 34 So. 217].

"If he shall procure," construed "if he shall have ready to be delivered" in a contract see Borden *v.* Borden, 5 Mass. 67, 74, 4 Am. Dec. 32.

To obtain from others.— To procure money, for the purpose of influencing a vote, within the meaning of Del. St. Feb. 11, 1845, § 3, is to obtain it from others. State *v.* Harker, 4 Harr. (Del.) 559, 561.

For another.— To "procure a female to have illicit carnal connection with any man" within the meaning of Cal. St. (1871–1872) p. 184, does not apply to mere seduction but to the crime of a procurer or procuress — in behalf of another. People *v.* Roderigas, 49 Cal. 9, 11. To procure liquor for a person in the habit of becoming intoxicated may be accomplished without delivery of the liquor to such person. Jenkins *v.* State, 82 Miss. 500, 503, 34 So. 217.

"Did 'procure a revolver'" is not equivalent to a charge of personal use and handling of the weapon. Reg. *v.* Mines, 1 Can. Cr. Cas. 217, 218.

35. Sisk *v.* Citizens' Ins. Co., 16 Ind. App. 565, 45 N. E. 804, 805.

To procure manufacture, as involving implied warranty.— Of the use of the word in the passage "wherever the vendor, therefore, has himself manufactured the article sold, or procured it to be done by others . . . a warranty should be implied" (Hoe *v.* Sanborn, 21 N. Y. 552, 562, 78 Am. Dec. 163), it has been said that in a number of cases where the phrase has been quoted by itself "the word 'procured' has been seized upon as meaning buying it in the open market from another manufacturer, or ordering it from another manufacturer, when it is very clear from the text of the whole of the quotation . . . that by procuring it to be done is meant procuring it to be done by the manufacturer's own servants or agents" (Howard Iron Works *v.* Buffalo Elevating Co., 113 N. Y. App. Div. 562, 583, 99 N. Y. Suppl. 163).

36. Nash *v.* Douglass, 12 Abb. Pr. N. S. (N. Y.) 187, 190.

"Corrupt or procure" any person to vote or forbear voting.— Of these words as used in St. 2 Geo. II, c. 24, § 7, it is said: "These two words mean different things. To procure is to get the thing done; the corruption is completed by effecting an agreement amounting to corruption." Henslow *v.* Fawcett, 3 A. & E. 51, 56, 1 Harr. & W. 125, 30 E. C. L. 46.

"Caused and procured."— One causes or procures an adjudication of bankruptcy based on his petition alleging an act of bankruptcy and his deposition in support thereof. Farley *v.* Danks, 4 E. & B. 493, 1 Jur. N. S. 331, 24 L. J. Q. B. 244, 3 Wkly. Rep. 173, 499, 82 E. C. L. 493.

Procure, advise, and assist.— In an indictment charging that one did procure, advise, and assist another to secrete and embezzle, "procure and assist" necessarily imply that the act was done. U. S. *v.* Mills, 7 Pet. (U. S.) 138, 141, 8 L. ed. 636. "If a person does no more than procure, advise and assist, he is only an accessory." U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78, 103, where the jury was so instructed.

PROCUREMENT. The act of procuring, obtaining, bringing about, or effecting.[37] (See PROCURE; PROCURING.)

PROCURING. Bringing into possession; obtaining.[38] (See PROCURE; PROCUREMENT.)

PRO DEFECTU EXITUS. For, or in case of, default of issue.[39]

PRO DEFENDENTE. For the defendant. Commonly abbreviated "*pro def.*" [40]

PRODUCE. As a noun the word has no definite, exact, and particular meaning; it may be used in a larger or more restricted sense.[41] As a verb: To bring forward;

To cause see Rosenbarger *v.* State, 154 Ind. 425, 427, 56 N. E. 914, where, in construing the phrase "to procure any poison to be administered" as used in Ind. Rev. St. (1881) § 1919 (Horner, § 1919; Burns, § 1992) it was held that "procure" is there employed in the sense of cause.

"Procure or suffer" in bankruptcy acts.— "Procure" is active — "suffer" passive, in the phrase, in U. S. Bankruptcy Act, "procure or suffer his property to be taken on legal process" (Campbell *v.* Traders' Nat. Bank, 4 Fed. Cas. No. 2,370, 2 Biss. 423, 430, 3 Nat. Bankr. Reg. 498; *In re* Dibblee, 7 Fed. Cas. No. 3,884, 3 Ben. 283, 292, 293, 2 Nat. Bankr. Reg. 617); also in the phrase "procured or suffered" a judgment (Fry *v.* Pennsylvania Trust Co., 195 Pa. St. 343, 345, 46 Atl. 10, holding that a judgment in proceedings instituted by a *cestui que trust* to have the trustee removed on the ground of insolvency is not "procured or suffered" within the meaning of the statute. *Compare* Benedict *v.* Deshel, 77 N. Y. App. Div. 276, 278, 79 N. Y. Suppl. 205, where it is said that the phrase "has procured or suffered a judgment" as used in the Bankruptcy Act, § 60 (39 U. S. St. at L. 562) indicate an act and necessarily imply intent). Of the words as used in the English bankruptcy law it is said: "The act of Parliament speaks of two different classes of acts of bankruptcy; one is by the party's 'suffering,' the other by his 'procuring,' certain acts to be done. . . . A person's procuring his goods to be taken in execution means that the initiative comes from him — he is the person who 'begins' to *procure* — who initiates the proceeding, and causes the thing to be done, in the ordinary sense of the word" (Gore *v.* Lloyd, 13 L. J. Exch. 366, 372, 12 M. & W. 463).

Importing accomplishment through instigation but not stronger than "instigate." In considering an objection to the word "procured" as used in a judicial opinion, summarizing the contents of a petition where it seems the word did not appear, it was said: "In referring to the act of sale, and the defendant's connection with it, it was stated in the opinion that the defendant 'requested, instigated and procured' the mortgagors to sell and dispose of the sheep, etc. The word 'procured' was evidently used for the purpose of expressing the idea that through the instigation of the defendant the sale had been accomplished, and could have been understood in no other way. In the petition for rehearing, in briefs of counsel, and at the argument, a great deal was said about the use of the word 'procured.' . . . One or two illustrations . . . will demonstrate whether there was any substantial ground for the objection or whether it owes its origin to a spirit of mere hair-splitting hypercriticism. At page 36, Book 4, Blackstone's Commentaries, the author . . . uses with approval Sir Matthew Hale's definition of an accessory before the fact, as 'one who being absent at the time of the crime committed, doth yet procure, counsel or command another to commit a crime.' And in the text just preceding this definition he states that a servant who 'instigates' a stranger to kill his master is an accessory before the fact. There can be no doubt then that it may properly be said of one at whose 'instigation' a crime was committed, that he 'procured' the commission thereof. At section 604 of 1st Bishop's Criminal Law, the author uses this language: 'Persuasion is one form of attempt.' It is therefore indictable to persuade or hire a person to commit a crime, especially of the heavier sort, though he declines to do it, or undertakes it and fails. Yet if this person actually does what he is persuaded or hired to do, the effort of the procurer ceases to be called an attempt, because it has become a success.' Can we doubt that here the word 'procurer' is used to mean the same thing as 'persuader,' and certainly the word 'persuade' is not so strong a word as the word 'instigate.'" Cone *v.* Ivinson, 4 Wyo. 203, 248, 33 Pac. 31, 35 Pac. 933.

37. Webster Dict. [*quoted* in Willey *v.* State, 52 Ind. 246, 251].

38. Mighell *v.* Dougherty, 86 Iowa 480, 481, 53 N. W. 402, 41 Am. St. Rep. 511, 17 L. R. A. 755.

Procuring cause.— Broker as procuring cause of transaction see FACTORS AND BROKERS, 19 Cyc. 257–259; 283–284. As applied to an agent the phrase does not always in itself alone describe that condition which entitles such person to commission and a jury should be instructed as to the particular circumstances. See Leviness *v.* Kaplan, 99 Md. 683, 688, 59 Atl. 127.

39. Black L. Dict.

Example.— After a devise, "*et pro defectu talus exitus*, to the use of himself and his heirs." Idle *v.* Coke, 2 Salk. 620, 91 Eng. Reprint 525 [*cited* in Black L. Dict.].

40. Black L. Dict.

41. District of Columbia *v.* Oyster, 4 Mackey (D. C.) 285, 286, 54 Am. Rep. 275.

"Produce of the state."— In construing Tenn. Const. art. 2, § 30, relating to taxation, it is said: "It is difficult to give a correct definition of the terms 'articles manufactured of the produce of the State.' It is evident that they are not the same as the direct product of the soil, in the hands of the producer or his immediate vendee. The direct product of the soil is necessarily in every

to show or exhibit; to bring into view or notice; as, to produce books or writings at a trial in obedience to a subpœna *duces tecum*; [42] to bring forward; to offer to view or notice; to show; [43] give being or form to manufacture, make.[44] (Produce:

instance the produce of the State, but it does not follow that the produce of the State is confined to the direct products of the soil. And while the direct product of the soil is necessarily embraced within the terms 'produce of the State,' it may not fall within the definition of 'an article manufactured of the produce of the State.' To illustrate: Wheat is a direct product of the soil, but it is not an article manufactured of the produce of the State. Flour made of wheat grown upon Tennessee soil is an article manufactured of the produce of the State, but it is not a direct product of the soil, though manufactured out of the direct product of the soil." Benedict *v.* Davidson County, 110 Tenn. 183, 186, 67 S. W. 806.

Produce of transfer of stock see Longdale *v.* Bovey, Anstr. 570, 572, holding that where testator directed by will that stock be transferred and the "produce" given, the word could not be satisfied without changing the stock into money.

Any article of commerce usually shipped from the loading port is understood by the word as used in an agreement to ship "a full and complete cargo of produce." Warren *v.* Peabody, 8 C. B. 800, 808, 14 Jur. 150, 19 L. J. C. P. 43, 65 E. C. L. 800.

"'Interest' or 'produce' of a fund" see Craft *v.* Snook, 13 N. J. Eq. 121, 122, 78 Am. Dec. 94.

Includes butter and eggs as much as cereals, fruits or what is ordinarily called "garden stuff" (District of Columbia *v.* Oyster, 4 Mackey (D. C.) 285, 286, 54 Am. Rep. 275); pork (Fitch *v.* Madison, 24 Ind. 425, 427); cement, "which is taken from the earth, manufactured and then becomes an article of merchandise" within the meaning of New York Produce Exchange Charter (Haebler *v.* New York Produce Exch. 149 N. Y. 414, 424, 44 N. E. 87).

In the name of the New York Produce Exchange, in its charter the term is not sufficient to indicate that the purpose of the statute was to limit jurisdiction of the exchange to contracts relating to agricultural products. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 424, 44 N. E. 87.

Arising from homesteads.— "Produce, rents or profits arising from homesteads" described in an act of exemption must be that "arising directly from the use of the homestead or exempted property, such as crops and rent from the realty, and the profits or increase of the personalty." The provision is not intended to exempt "proceeds or earnings of professional men, whose skill is the principal element which produces the earnings." Staples *v.* Keister, 81 Ga. 772, 774, 8 S. E. 421.

"Income and produce."— The terms are very comprehensive, the income and produce of an estate including, however, a trust fund consisting in the residue of the estate after debts and legacies shall produce. Sohier *v.* Eldredge, 103 Mass. 345, 350.

"Produce or commodity" in a penal statute satisfied by the use of the word "cotton" in an indictment see State *v.* Borroum, 23 Miss. 477, 482.

42. Black L. Dict.

"Witnesses produced" for the purpose of obtaining warrant.— Of such use of the word in Wis. Rev. Sts. § 4776, it is said of the complainant "he cannot 'produce' them in any other way than to suggest their names to the magistrate. If they come voluntarily with the complainant, he cannot be said to produce them in any other way than to make them known to the justice as witnesses who know something about the case. They are produced as parties produce their witnesses in court." State *v.* Keyes, 75 Wis. 288, 293, 44 N. W. 13.

43. Webster Dict. [*quoted* in McCray *v.* Pfost, 118 Mo. App. 672, 678, 94 S. W. 998].

In a broader sense — "Produce a purchaser."— In construing the rule that a real estate agent must find and produce a purchaser, etc., in order to be entitled to commissions, it was said that the word so used could not be restricted to Webster's definition (see *supra*, text and note); that to produce a purchaser it was not necessary that plaintiff should exhibit him to defendant. All that was required was for the defendant to know that there was such a purchaser. McCray *v.* Pfost, 118 Mo. App. 672, 678, 94 S. W. 998. The precise use of the word in the rule would be somewhat in doubt if the exact language of the many cases on the subject were to be separately examined. See, generally, the cases cited under FACTORS AND BROKERS, 19 Cyc. 217, 288.

44. See Mighell *v.* Dougherty, 86 Iowa 480, 485, 53 N. W. 402, 403, 41 Am. St. Rep. 511, 17 L. R. A. 755, where the participle as used in an exception, in cases where labor, skill, or money are necessary to be spent in "producing" the article sold, is defined as "giving being or form to," "manufacturing," "making."

In evidence.— In the phrase an issue at law shall be made up "whether the writing produced be the will of the testator" (see Starr & C. Annot. St. Ill. c. 148, par. 7) "the word 'produced' . . . must be understood as meaning produced in evidence." Henline *v.* Brady, 110 Ill. App. 75, 84.

Devices produced on bottles.— Following an enumeration of terms, such as "branded, stamped, engraved," indicating means of unerasable impressions, the term "or otherwise produced" refers to a like means of production and is not satisfied by the pasting of labels. People *v.* Elfenbein, 65 Hun (N. Y.) 434, 435, 437, 20 N. Y. Suppl. 364, construing N. Y. St. (1887) c. 377 (as amended by St. (1888) c. 181), § 1.

Producing capacity of distillery as factor in determining assessment for taxation under Act Cong. July 20, 1868, § 20 (15 U. S. St. at L. 129) see Stevenson *v.* Beggs, 17 Wall. (U. S.) 182, 184, 190, 21 L. ed. 624.

Exchange, see EXCHANGES, 17 Cyc. 849 text and note 3. See also PRODUCE BROKER; PRODUCE BUSINESS; PRODUCE DEALER; PRODUCER; PRODUCT; PRODUCTION; PRODUCTIVE.)

PRODUCE BROKER. A term which has been defined by ordinance as one who for commission or other compensation is engaged in selling or negotiating the sale of produce belonging to others;[45] by statute, as a person whose occupation it is to buy or sell agricultural or farm products.[46] (See PRODUCE; and, generally, FACTORS AND BROKERS, 19 Cyc. 108.)

PRODUCE BUSINESS. A term which has been held to apply to business of buying and selling butter, eggs, poultry and produce, selling from cars, a railway depot and a store.[47] (See PRODUCE.)

PRODUCE DEALER. A term held to be included within the scope of the word "merchant."[48] As defined by statute, every person whose duty it is to buy and sell produce, fish, meats and fruits from wagons and carts.[49] (See PRODUCE.)

PRODUCE EXCHANGE. See EXCHANGES, 17 Cyc. 829.

PRODUCER. A term which, as used in a special act, has been said to be identical with "manufacturer," applying both to him who actually makes, and him who causes to be made.[50] (See PRODUCE.)

PRODUCT.[51] A word which has been said to import an article which is made of something and which, when made, has characteristics which are apparent to the senses.[52] (See PRODUCE; PRODUCTION.)

45. See the definition of "merchandise, produce or grain broker" by Chicago ordinance, quoted in O'Neill *v.* Sinclair, 153 Ill. 525, 526, 39 N. E. 124.

46. U. S. Internal Revenue St. (1866) § 79 [*quoted* in U. S. *v.* Simons, 27 Fed. Cas. No. 16,291, 1 Abb. 470, 472, 473, 7 Phila. (Pa.) 607, 3 Pittsb. (Pa.) 261, where it is added: "If he buys or 'sells,' whether he does it for himself or for another, he is to be 'regarded,' in the language of the act, as a 'produce broker.' Congress might have used a better term, but all refinement upon the words is at an end in the face of this definition"].

47. Kansas City *v.* Lorber, 64 Mo. App. 604, 609.

48. Kansas City *v.* Lorber, 64 Mo. App. 604, 607, so holding within the meaning of the Kansas City charter.

49. D. C. License Law, [*quoted* in District of Columbia *v.* Oyster, 4 Mackey (D. C.) 285, 286, 54 Am. Rep. 275, where it is said that the term applies "to one who brings eggs and butter to vend in the market as much as to one who brings only cereals or fruits or what is ordinarily called 'garden stuff'"], providing that every such person shall be regarded as a produce dealer.

Incidental dealing in certain meats.— The provision "every person whose business it is to buy and sell produce, fish, meats and fruits from wagons and carts shall be regarded as a produce dealer," together with the qualification that "no additional license shall be required from produce dealers for selling meat" seems "to indicate, not that the selling of meat is characteristic of a produce dealer, but that the produce dealer who gets his license as such, has the further privilege, or a sort of grace and favor extended to him, within the limited amount mentioned in the statute . . . that he might supply the necessities of society in having at his stall not only the product of the garden and the product of the stream . . . but that he might also sell a limited quantity of bacon and the like, with dried beef and other things which go to make up the complement of a produce dealer's establishment, without thereby depriving himself of the character and privileges of a produce dealer," and one who sells only meat is not a produce dealer within the meaning of the statute. District of Columbia *v.* Oyster, 4 Mackey (D. C.) 285, 287, 54 Am. Dec. 275.

50. Hancock *v.* State, 114 Ga. 439, 441, 40 S. E. 317, construing a domestic wine act, St. (1887) § 8.

More often applied when product is agricultural.— "The word 'producer' does not differ essentially in its legal aspects from the word "manufacturer," except that it is more commonly used to denote a person who raises agricultural crops and puts them in a condition for the market." Allen *v.* Smith, 173 U. S. 389, 399, 19 S. Ct. 446, 43 L. ed. 471.

Of raw material and finished product respectively, distinguished.— "One who raises the cane is undoubtedly entitled to be considered the producer of the cane, but he is not the producer of the sugar." Allen *v.* Smith, 173 U. S. 389, 400, 19 S. Ct. 446, 43 L. ed. 471.

51. **Distinguished from "process"** see Durand *v.* Green, 60 Fed. 392, 396.

52. White *v.* Barney, 43 Fed. 474, 477 [*affirmed* in 159 U. S. 246, 15 S. Ct. 1037, 40 L. ed. 146], where the above statement was made in a charge to the jury with the addition that in judging as to similarity of product it is proper to take into consideration the material of which it is made and its appearance when made.

In N. Y. St. (1871) c. 176, relating to assessment for taxation on "products of any State of the United States, consigned to agents in any town or ward in this State," etc., the word, while it may be supposed to mean the "natural agricultural products of

PRODUCTION. A term which may designate as well the entire produce as the operation of producing;[53] the creation of objects which constitute wealth;[54] that which is produced or made, product, fruit of labor, as the productions of the earth, comprehending all vegetables and fruits, the production of intellect, of genius, as poems and prose compositions, the productions of art, as manufactures of any kind.[55] (Production: Of Documents by Way of Discovery, see DISCOVERY, 14 Cyc. 337–339, 368–380. Of Documents in Evidence — In General, see EVIDENCE, 17 Cyc. 431 text and notes 4, 5, 457–463, 465–467, 532–535, 556–567; Of Ship's Papers in Action on Marine Policy, see MARINE INSURANCE, 26 Cyc. 734. See also PRODUCE.)

PRODUCTIVE. A word which has been held to apply to a deposit in a dividend paying savings bank;[56] but not to apply to property which may only be made productive.[57] (See PRODUCE.)

PRO EO QUOD. In pleading, for this that. This is a phrase of affirmation, and is sufficiently direct and positive for introducing a material averment.[58]

PROFANE. A term whose applicability to language may depend on the sense in which the words described by it are used.[59] (Profane: In General, see BLASPHEMY, 5 Cyc. 710–716. Language — As Breach of Peace When Abusive and Insulting, see BREACH OF THE PEACE, 5 Cyc. 1025; As Disorderly Conduct When Offensive, see DISORDERLY CONDUCT, 14 Cyc. 468 note 5, 469–471 text and notes 6–18; As Profanity, see PROFANITY.)

the country" does not, however, preclude from the scope of the provision other commodities equally within its reason. People *v.* New York Tax Com'rs, 23 N. Y. 242, 245.

Whole output.— The word, as used in an offer for "the product of the Robert E. Lee mine" imports the entire output. Robert E. Lee-Silver Min. Co. *v.* Omaha, etc., Smelting, etc., Co., 16 Colo. 118, 131, 26 Pac. 326.

"Other product" as used in 11 Geo. II, c. 19, § 8, was held to apply to products of like kind to those specified, to all of which the process of ripening and being cut, gathered, made, and laid up when ripe, was incidental. Clark *v.* Gaskarth, 2 Moore C. P. 491, 495, 8 Taunt. 431, 20 Rev. Rep. 516, 4 E. C. L. 216.

Products of a farm do not include tolls earned by a grist mill. State *v.* Kennerly, 98 N. C. 657, 659, 4 S. E. 47.

Product of distillation does not include vinegar, nor a component thereof, separately manufactured by a still and mash, which is neither distilled spirits not alcohol, and contains alcohol only in such a combination that the latter cannot be obtained from it by any mechanical or chemical process. One Vaporizer, 18 Fed. Cas. No. 10,537, 2 Ben. 438, 441, 442.

In the pork-packing business the term has a known meaning peculiar to the trade, which may be shown by oral evidence to explain a writing (Stewart *v.* Smith, 28 Ill. 397, 407, referring to the local use of the word; Morningstar *v.* Cunningham, 110 Ind. 328, 333, 11 N. E. 593, 59 Am. Rep. 211) and which does not include such parts of slaughtered hogs as bristles, feet, fat from the entrails, and other offal (Morningstar *v.* Cunningham, *supra*).

"Product and profit of his work."— In construing N. Y. Const. (1894) art. 3, § 29, these words were held to apply, not to articles of merchandise, but to the net value of labor. People *v.* Hawkins, 157 N. Y. 1, 13, 51 N. E. 257, 68 Am. St. Rep. 736, 42 L. R. A. 490.

53. Durand *v.* Green, 60 Fed. 392, 395.

54. Wharton L. Lex. [*citing* Mill Pol. Econ. and *quoted* in Black L. Dict.], adding [on the same authority and quoted likewise]: "The requisites of production are labour, capital, and the materials and motive forces afforded by nature. Of these, labour, and the raw material of the globe, are primary and indispensable. Natural motive powers may be called in to the assistance of labour, and are a help, but not an essential of production. The remaining requisite, capital, is itself the product of labour; its instrumentality in production is therefore, in reality, that of labour in an indirect shape."

55. Webster Dict. [*quoted* in Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564, 567].

Production of labor.—A provision granting laborers a lien on "the production of their labor" does not give a lien on the land, but only on movables produced by their labor. Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564, 567 [*cited* in Emerson *v.* Hedrick, 42 Ark. 263, 265; Taylor *v.* Hathaway, 29 Ark. 597, 601].

The legal source of the proprietary right of authorship is called "production," as distinguished from "invention." Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, 4 Phila. (Pa.) 157.

56. Carpenter *v.* Carpenter, 12 R. I. 544, 550, 34 Am. Rep. 716, where such deposit was held productive property.

57. Holcomb *v.* Holcomb, 11 N. J. Eq. 476, 485, 491, where a lot good only for making bricks, and a vacant city lot, conveyed to an esstate by one of its executors directed to invest in "productive real estate" were held not to come within the term.

58. Black L. Dict.

59. See the following passage: "As a general rule, words are profane or not, according to the sense in which they are used; and it is necessary to show by other words coupled with them the sense in which they are used, to make a valid charge of using profane language." Roberts *v.* State, 120 Ga. 177, 47 S. E. 511.

PROFANITY

By John Lehman*

CROSS-REFERENCES

For Matters Relating to:

Blasphemy, see Blasphemy, 5 Cyc. 710 *et seq.*
Breach of the Peace, see Breach of the Peace, 5 Cyc. 1024.
Criminal Law Generally, see Criminal Law, 12 Cyc. 70.
Disorderly Conduct, see Disorderly Conduct, 14 Cyc. 479.
Indictment or Information Generally, see Indictments and Informations, 22 Cyc. 157.

I. Definition and Nature.

Broadly, profanity is language irreverent toward God or holy things, covering especially all oaths that literally interpreted treat lightly of the attributes or acts of God.[1]

II. Character and Elements of Offense.

A. Character as Nuisance in General. But as used in this article it refers to cursing or swearing by the name of God,[2] or any word importing an imprecation of divine vengeance or implying divine condemnation, although the name of God is not used.[3] Profane swearing and cursing, in a loud and boisterous tone of voice, and in the presence and hearing of citizens of the commonwealth in a public place, to such an extent as to be a common nuisance to all citizens being present and

1. Century. Dict.

"A disrespect to the name of God or His divine providence" is profanity. Bouvier L. Dict.

Blasphemy distinguished see Blasphemy, 5 Cyc. 710 note 1.

2. Com. *v.* Hardy, 1 Ashm. (Pa.) 410, 411, holding that the words "God damn you," and "You are a God damned liar," are profane curses, within a statute directed against profane cursing by the name of God.

3. Holcomb *v.* Cornish, 8 Conn. 375; State *v.* Wiley, 76 Miss. 282, 24 So. 194, 71 Am. St. Rep. 531; Gaines *v.* State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64.

"Damned."— Thus to say "arrest and be damned" was held to be profane within the rule stated in the text. Foster *v.* State, 99 Ga. 56, 25 S. E. 613. And the same was held of the expression "You are a damned rascal and a damned liar." State *v.* Wiley, 76 Miss. 282, 24 So. 194, 71 Am. St. Rep. 531.

"Go to hell, you low-down devils," is not a violation of Miss. Code (1905), § 1295, making it an offense to "profanely swear or curse in any public place in the presence" of others, since the language does not imprecate divine vengeance nor imply divine condemnation. Stafford *v.* State, (Miss. 1907) 44 So. 801.

* Author of "Abduction," 1 Cyc. 140.

hearing the same, is an indictable offense and was so at common law,[4] because such conduct tends to disturb the peace and corrupt the morals and is contrary to the good order of society.[5] Hence it may be said that the gravamen of the offense of profanity or profane cursing or swearing is in its being a public nuisance, in so far as the offense is an indictable one, and it is necessary that the profanity should take such form and be uttered under such circumstances as to constitute such a nuisance.[6]

B. Publicity and Hearing of Others. So, as the act charged must be a nuisance to be an indictable offense at common law, it follows that to make the profane swearing a nuisance, the profanity must be uttered in the hearing of other persons,[7] and it is not enough merely that it was done in the public streets.[8] But if the acts are committed in the presence of other persons, then, as far as the character of the place may be material, such presence will, it is said, make any place for the occasion public.[9]

C. Repetition of Language. A single utterance of a profane oath, at least when not repeated or in a loud voice, is held not to be *per se* indictable.[10] But the act must be so repeated in public as to become an annoyance and inconvenience to the public,[11] although the continued and public use of profane oaths, frequently and boisterously repeated, on a single occasion, is indictable as a public nuisance.[12] And even a single oath, either by its terms, its tone, or its manner, might under the peculiar circumstances be held to be a nuisance, but such cases would constitute exceptions to the general rule.[13]

D. Under Statute. In some jurisdictions the offense of profanity or profane cursing is made punishable by statute,[14] or municipal ordinance,[15] sometimes

4. Goree *v.* State, 71 Ala. 7; State *v.* Brewington, 84 N. C. 783; State *v.* Ellar, 12 N. C. 267; State *v.* Kirby, 5 N. C. 254; Com. *v.* Linn, 158 Pa. St. 22, 27 Atl. 843, 22 L. R. A. 353; Gaines *v.* State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64; State *v.* Steele, 3 Heisk. (Tenn.) 135; State *v.* Graham, 3 Sneed (Tenn.) 134.

5. Goree *v.* State, 71 Ala. 7; State *v.* Chrisp, 85 N. C. 528, 39 Am. Rep. 713; Gaines *v.* State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64.

Sufficient evidence of disorderly conduct.— See Com. *v.* Murray, 14 Gray (Mass.) 397, holding that evidence of the habitual use of profane language is evidence of disorderly conduct.

Breach of peace.— If one calls another a "God damn liar" he is guilty of using language calculated to bring on a difficulty to support a conviction for a breach of the peace. Johnson *v.* State, (Tex. Cr. App. 1902) 66 S. W. 1097.

6. Goree *v.* State, 71 Ala. 7; Young *v.* State, 10 Lea (Tenn.) 165. See also *infra*, II, B, C.

7. State *v.* Cainan, 94 N. C. 880; State *v.* Brewington, 84 N. C. 783; State *v.* Pepper, 68 N. C. 259, 12 Am. Rep. 637; Young *v.* State, 10 Lea (Tenn.) 165.

If three or four persons were present and heard the words uttered, the common-law offense of profane swearing is complete. Goree *v.* State, 71 Ala. 7.

8. State *v.* Pepper, 68 N. C. 259, 12 Am. Rep. 637; Com. *v.* Linn, 158 Pa. St. 22, 27 Atl. 843, 22 L. R. A. 353.

9. Young *v.* State, 10 Lea (Tenn.) 165.

10. Goree *v.* State, 71 Ala. 7; State *v.* Brewington, 84 N. C. 783; State *v.* Powell, 70 N. C. 67; Young *v.* State, 10 Lea (Tenn.) 165; Gaines *v.* State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64.

11. State *v.* Pepper, 68 N. C. 259, 12 Am. Rep. 637; State *v.* Jones, 31 N. C. 38.

12. State *v.* Chrisp, 85 N. C. 528, 39 Am. Rep. 713; State *v.* Powell, 70 N. C. 67.

13. Young *v.* State, 10 Lea (Tenn.) 165; Gaines *v.* State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64. But see State *v.* Baldwin, 18 N. C. 195, where the indictment charged that defendant, with others assembled at a certain meeting-house, did loudly and profanely, and in the hearing of divers good citizens of the state there assembled, curse, swear, and quarrel, whereby a certain singing school there held and kept was disturbed and broken up, to the common nuisance, etc., and it was held to be so defective that no judgment could be pronounced thereunder against defendants. As laid in the indictment, the offense consisted of a single and distinct act of cursing, without any averment that it was continued for any space of time, or that the words were many times repeated, and that in later cases (State *v.* Chrisp, 85 N. C. 528, 39 Am. Rep. 713; State *v.* Brewington, 84 N. C. 783) is said to have been the point on which the decision turned.

Question for jury.— Whether a single act of profanity by its terms, tone, manner, and other circumstances amounts to an indictable nuisance is for the jury to decide. Young *v.* State, 10 Lea (Tenn.) 165.

14. See the statutes of the several states. And see *infra*, III, A, B.

15. *Ex p.* Delaney, 43 Cal. 478 (under an ordinance of San Francisco which prohibited

directed against disorderly conduct under particular conditions specified,[16] or against disturbing the peace by cursing and swearing,[17] under which specific acts of profanity under particular circumstances are made punishable.[18] Under some such statutory provisions the act is punishable notwithstanding it may not be a nuisance,[19] either being of a lesser grade than an indictable offense,[20] or being indictable under the theory that the statute punishing the particular act furnishes the definition of the offense, and as it does not prescribe the characteristics of the common-law nuisance, they are not necessary elements.[21]

the utterance of profane language, words, or epithets in the hearing of two or more persons, the court holding that when the charter of a municipal corporation authorizes the municipal legislative body to enact ordinances to prohibit practices which are against good morals, or contrary to public decency, and such body determines as a fact that the uttering of profane language is against good morals, and prohibits it by ordinance, the decision of such body on this question is final); Reg. *v.* Bell, 25 Ont. 272 (holding that a municipal by-law of the city of Toronto "relative to public morals," which provided that "no person shall make use of any profane swearing . . . blasphemous . . . language," etc., was intended to preserve public morals, and that in order to bring one within this provision the offense must have been committed in a public place, such as a street, square, park, or other open place, or where the public may have the right to be, and that defendant's offense in the custom-house, and the use of the language behind the counter in a room, was not such a place).

16. See DISORDERLY CONDUCT, 14 Cyc. 466. And see State *v.* Cainan, 94 N. C. 880, under an ordinance providing that "every person found guilty of loud and boisterous cursing and swearing in any street, house, or elsewhere in the city . . . disturbing the peace of the city, or violating the rules of decency, shall be fined five dollars for every offence," the court holding that the acts and things forbidden do not constitute nuisances, but that the purpose of the ordinance is to promote good morals, the decencies and proprieties of society, and prevent nuisances and other criminal offenses, that might result from the acts and conduct prohibited.

The legislature can empower a municipality to make the use of such language punishable by its ordinances, when it falls short of being a nuisance, punishable by state law, from not having been "committed in the presence and hearing of divers persons, to their annoyance," etc., and it could do this directly, if it could do it indirectly, as by authorizing a municipality to make an ordinance to that effect. Such a provision is a police regulation, and hence may be limited in its operation to such localities as the legislature may prescribe. State *v.* Warren, 113 N. C. 683, 18 S. E. 498.

17. State *v.* Hocker, 68 Mo. App. 415.

18. See State *v.* Shanks, 88 Miss. 410, 40 So. 1005, under a statute against profane cursing in a public place.

[II, D]

Profane language in presence of female — *In general.*— In Georgia the use of profane language, without provocation, in the presence of a female, is made a misdemeanor. See Foster *v.* State, 99 Ga. 56, 25 S. E. 613.

Words spoken.— The statute is held, under the rule of strict construction applicable to penal statutes, to contemplate spoken words only. Williams *v.* State, 117 Ga. 13, 43 S. E. 436.

Provocation and knowledge of presence.— There being no evidence that the profane language alleged to have been used by defendant in the presence of females was without provocation, or that defendant knew of the proximity of the females, it was held that his conviction was contrary to law. Hardin *v.* State, 114 Ga. 58, 39 S. E. 879; Parks *v.* State, 110 Ga. 760, 33 S. E. 73. The accused may defend by showing that he was provoked to use the language by one other than such female; the sufficiency of the provocation being a question for the jury, under all the circumstances of the case. Ray *v.* State, 113 Ga. 1065, 39 S. E. 408. It is not necessary, to make the offense complete, that the female should be an eye-witness of the conduct. She could hear oaths as well with her back turned as though she were looking at the person using them. Roberts *v.* State, 123 Ga. 505, 51 S. E. 505; Sailors *v.* State, 108 Ga. 35, 33 S. E. 813, 75 Am. St. Rep. 17.

19. Taney *v.* State, 9 Ind. App. 46, 36 N. E. 295.

20. State *v.* Graham, 3 Sneed (Tenn.) 134, holding that an isolated case of profanity may be punishable under a local statute imposing a pecuniary penalty for each oath, to be recovered before a justice of the peace. In *Ex p.* Delaney, 43 Cal. 478, it was held that under a municipal charter authorizing the passage of ordinances to prohibit "practices" against good morals, etc., an ordinance is not unauthorized because it punishes a single utterance of profane words, upon the theory that the word "practices," as used in the statute, necessarily implied an act often repeated by the same person, as, if this were so, an ordinance which should punish the discharge of firearms in a crowded street of the city, or the indecent exposure of one's person, would be nugatory, unless each individual complained of was found to have frequently repeated the same offense.

21. Bodenhamer *v.* State, 60 Ark. 10, 28 S. W. 507, where the statute was held not to require that the profane language shall be used publicly in order to constitute the crime.

III. PROSECUTION.

A. In General. Although profane swearing when committed in single acts may be punished summarily by a justice of the peace, under the statute,[22] nevertheless, where the acts are repeated so as to become an annoyance and an inconvenience to the citizens at large, they are indictable as common nuisances.[23] Distinct convictions may be had for distinct offenses of profane cursing by the same defendant in relation to the same person on the same day.[24] But an information and conviction for swearing the same profane oath several times on the same day need not complain or convict of each of them separately.[25]

B. Indictment,[26] Information,[27] or Complaint[28]— 1. In General. In accordance with the elements of the offense of profanity as a nuisance at common law,[29] an indictment must specifically set forth all the facts and circumstances which go to make up such offense;[30] and the averment to the common nuisance or its equivalent is essential.[31] The offense may be charged in the usual form, although there is but a single act, the question whether the manner, tone, and other circumstances make it a nuisance being for the jury.[32]

2. Setting Out Words Spoken. On a prosecution for profane swearing the words spoken constitute the gist of the offense and must be set out in the indictment,[33] in order that the court may decide as to their quality.[34] But a charge in

22. State *v.* Eller, 12 N. C. 267; State *v.* Kirby, 5 N. C. 254, referring to an early statute in North Carolina. See also State *v.* Graham, 3 Sneed (Tenn.) 134, referring to the same statute as the last case, the court saying that in England several similar statutes had been passed, the last of which superseding and repealing all others, being that of 19 Geo. II, c. 21, by which laborers, sailors, and soldiers were to forfeit 1*s.* and all others under the degree of gentlemen, 2*s.*, and every gentleman, or person of rank, 5*s.*, for each oath, to the poor of the parish, and that under these acts, each oath or curse is a distinct and complete offense.

23. State *v.* Ellar, 12 N. C. 267; State *v.* Waller, 7 N. C. 229; State *v.* Kirby, 5 N. C. 254.

24. Holcomb *v.* Cornish, 8 Conn. 375.

25. Johnson *v.* Barclay, 16 N. J. L. 1, referring to a conviction before a magistrate on an information given on oath to him to justify his issuing process.

26. **Form of indictment** see Bodenhamer *v.* State, 60 Ark. 10, 28 S. W. 507 (charging statutory offense in language of the statute); State *v.* Brewington, 84 N. C. 783; Young *v.* State, 10 Lea (Tenn.) 165; State *v.* Steele, 3 Heisk. (Tenn.) 135.

27. **Form of information** see State *v.* Hocker, 68 Mo. App. 415, 417, before a justice of the peace charging statutory offense of disturbing the peace by cursing and swearing.

28. **Form of complaint** see Taney *v.* State, 9 Ind. App. 46, 36 N. E. 295, 296, affidavit for profane swearing charging the offense in the language of the statute.

29. See *supra*, II, A, B, C.

30. State *v.* Brewington, 84 N. C. 783; State *v.* Jones, 31 N. C. 38; Com. *v.* Linn, 158 Pa. St. 22, 27 Atl. 843, 22 L. R. A. 353, holding that it is not sufficient merely to charge profane swearing and to allege that it was "to the evil example and to the common nuisance of the good citizens of the state of Pennsylvania."

Proof cannot aid omission of allegation.— An indictment which merely charges that defendant "did profanely curse and swear, and take the name of Almighty God in vain," etc., "to the common nuisance," etc., charges no offense, and cannot be sustained by proof of acts which would constitute a nuisance, as the allegation would not support such proof. State *v.* Powell, 70 N. C. 67; State *v.* Jones, 31 N. C. 38.

31. Young *v.* State, 10 Lea (Tenn.) 165; Gaines *v.* State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64.

32. Young *v.* State, 10 Lea (Tenn.) 165.

33. Walton *v.* State, 64 Miss. 207, 8 So. 171; State *v.* Barham, 79 N. C. 646; State *v.* Pepper, 68 N. C. 259, 12 Am. Rep. 637; State *v.* Jones, 31 N. C. 38.

34. State *v.* Pepper, 68 N. C. 259, 12 Am. Rep. 637.

Number of oaths.— An information is not uncertain which charges thirty-three oaths, and sets forth the words of one only. Johnson *v.* Barclay, 16 N. J. L. 1, holding that the information need not specify the offense or offenses with as much certainty as is necessary in an indictment, the proceeding by "information" not being in the nature of a public prosecution in a criminal case in which an indictment would lie but the information being given under oath to a magistrate to justify his issuing process for the accused, and thus is different from an information filed by the attorney-general, in lieu of an indictment.

After verdict a complaint for the offense under the statute which charges the offense inhibited without setting out the curses will be held sufficient. State *v.* Freeman, 63 Vt. 496, 22 Atl. 621, where the court referring to Rex *v.* Sparling, Str. 497, and the

the precise words of the oath spoken is sufficiently specific as a setting out of the nature of the oath.[35]

3. Publicity and Repetition. An indictment for profane swearing should allege that the words were uttered in the presence or hearing of others,[36] for which purpose it should be alleged in express or equivalent terms that the utterances were in the presence of divers persons, and the omission of the averment or the substitution of any other or equivocal one which does not mean the same thing will render the indictment bad;[37] and it should be alleged that the acts were so repeated in public as to have become an annoyance and inconvenience to the public.[38] An allegation that the words were uttered publicly will not do.[39] But the averment that the words were uttered "in a public place" to the common nuisance of the citizens has been held sufficient.[40]

4. Charge in Language of Statute. In this as in other offenses [41] whose elements are fixed by statute, it has been held that the statutory offense of profane swearing may be sufficiently charged by employing the language of the statute defining the offense.[42] Where the statute is directed against disturbing the peace, and the use of the language is not of the gist of the offense, it is held that it is sufficient to charge

reason there given why the words should be set forth, that what is a profane oath or curse is matter of law, and what is matter of law ought not to be left to the judgment of the witness, approved it but distinguished that case from this in that in the trial below the question was not left to the witness, for the words used were in evidence and in issue, and whether as matter of law they were profane curses or not was left, as the respondent claimed it should be, to the jury. The respondent claimed that the jury were judges of the law and the court instructed them that they had the power to judge of it, and gave them suitable instructions as to what constituted profane curses, in a charge not excepted to.

35. Johnson *v.* Barclay, 16 N. J. L. 1, as to an information before a magistrate.

The whole conversation need not be set out, and a presentment charging that defendant, in a public place, and in the presence and hearing of divers good citizens of the state, unlawfully uttered, published, and spoke the gross, scandalous, profane, and blasphemous language therein stated, to the great scandal and common nuisance of all good citizens, etc., was held sufficient, it being necessary to set out only so much of the conversation as clearly describes the language used, and the useless *et ceteras* in the presentment may be rejected as surplusage. State *v.* Steele, 3 Heisk. (Tenn.) 135. See also Johnson *v.* Barclay, 16 N. J. L. 1.

36. Goree *v.* State, 71 Ala. 7.

37. State *v.* Barham, 79 N. C. 646; State *v.* Pepper, 68 N. C. 259, 12 Am. Rep. 637, holding that an averment that the profanity was "to the common nuisance of all the good citizens of the State, then and there being assembled," is equivocal; that taken literally it would mean that all the citizens of the state were assembled in the particular place laid, which would be absurd; that if it be understood as alleging that the profanity was to the nuisance of all such citizens of the state as were then and there assembled, it is not a direct and positive averment that any citizens were so assembled, and the averment might be true, although there were no persons assembled.

38. State *v.* Barham, 79 N. C. 646; State *v.* Pepper, 68 N. C. 259, 12 Am. Rep. 637; State *v.* Jones, 31 N. C. 38. See also State *v.* Brewington, 84 N. C. 783, where the indictment was held sufficient which charged the swearing to have been in the presence and hearing of divers persons then and there assembled; in a public street and highway; that the utterances were on divers days and times and thus became an annoyance to the public, "a common nuisance to all the good citizens of the state there assembled," that is, the divers persons present on the divers days and times all of whom are alleged to have heard the offensive words spoken.

39. Goree *v.* State, 71 Ala. 7; State *v.* Jones, 31 N. C. 38.

40. Young *v.* State, 10 Lea (Tenn.) 165 [*citing* Gaines *v.* State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64; State *v.* Steele, 3 Heisk. (Tenn.) 135; State *v.* Graham, 3 Sneed (Tenn.) 134, holding that if the indictment be in other respects good, it is not a fatal defect to omit the allegation that the words were uttered in the presence of divers good citizens, the omission being supplied by the other averments].

Particular public place.— An indictment charging a violation of a statute making it an offense to use profanity in any public place, which states that accused cursed in a public place, was held fatally bad for failing to state the particular public place. State *v.* Shanks, 88 Miss. 410, 40 So. 1005.

41. See Indictments and Informations, 22 Cyc. 339.

42. Bodenhamer *v.* State, 60 Ark. 10, 28 S. W. 507; Taney *v.* State, 9 Ind. App. 46, 36 N. E. 295, holding that an affidavit following the words of Rev. St. (1881) § 1999, to the effect that defendant being over fourteen, did unlawfully and "profanely curse, swear, aver, and imprecate by and in the name of God," etc., by "unlawfully saying. 'God

the offense in the language of the statute without setting out the words used by the accused.[43]

C. Conviction Before Magistrate.[44] It has been held that the record of a conviction before a magistrate must set forth the oaths and curses so that the court may judge whether they are profane;[45] but where an oath is repeated a number of times the conviction need not set out the oaths separately for each utterance, but is sufficient if it states the particular oath once and shows the number of times it was repeated.[46]

PROFECTITIUM PECULIUM. A Latin name applied to the acquisition of property by children by making it out of the property of their father.[1]

PROFERT. The usual short form of PROFERT IN CURIA, or PROFERT IN CURIAM,[2] *q. v.* (Profert: In General, see PLEADING, 31 Cyc. 547. As Affecting Record on Appeal, see APPEAL AND ERROR, 2 Cyc. 1059 text and notes 83–85. Of Account Verified, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 481 note 78. Of Bond, see BONDS, 5 Cyc. 823 note 99. Of Letters Testamentary or of Administration, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 988–989. Of Note, in Writ of Attachment, see ATTACHMENT, 4 Cyc. 547 note 86. Of Patent, see PATENTS, 30 Cyc. 1031 note 48. See also PROFERT IN CURIA.)

PROFERT IN CURIA or PROFERT IN CURIAM. Literally "He produces in court;"[3] hence, a term, which has been defined as, in old practice, the production in court, by a party, of an instrument alleged by him in the pleading; or rather, the entry made on the record, that the party shall produce the instrument;[4] and as, in modern practice, an allegation formally made in a pleading, where a party alleges a deed, that he shows it in court, it being in fact retained in his own custody;[5] but has not been confined in usage to the case of a deed.[6] (See PLEADING, 31 Cyc. 547. See also PROFERT.)

PROFESS. A term sometimes used as synonymous with "pretend."[7] (See PROFESSION.)

PROFESSION. A calling, an employment;[8] calling, vocation, known employment;[9] a vocation in which a professed knowledge of some department of science

damned,'" is not bad for failure to aver that he said such words profanely.

43. State *v.* Hocker, 68 Mo. App. 415; State *v.* Cainan, 94 N. C. 880, holding that in an indictment for the violation of a municipal ordinance against disorderly conduct by cursing and swearing, it is not necessary to set out the words used by defendant.

44. Form of record of conviction before a justice of the peace see Holcomb *v.* Cornish, 8 Conn. 375.

45. Rex *v.* Popplewell, Str. 686; Rex *v.* Sparling, Str. 497.

A conviction in the words of the statute is sufficient. Johnson *v.* Barclay, 16 N. J. L. 1.

46. Johnson *v.* Barclay, 16 N. J. L. 1; Rex *v.* Roberts, 2 Ld. Raym. 1376, Str. 608.

1. See Sparks *v.* Spence, 40 Tex. 693, 699.

2. See Bowles *v.* Elmore, 7 Gratt. (Va.) 385, 389 (where the word is used synonymously with "*profert in curiam*"); Germain *v.* Wilgus, 67 Fed. 597, 599, 14 C. C. A. 561; Black L. Dict. (the latter defining "*profert in curia*" and *quoted* in the former as defining "*profert*").

3. Black L. Dict. (using only the form "*Profert in curia*" and adding: "In old practice, these words were inserted in a declaration, as an allegation that the plaintiff was ready to produce, or did actually produce, in court, the deed or other written instrument on which his suit was founded, in order that the court might inspect the same and the defendant hear it read. The same formula was used where the defendant pleaded a written instrument"); Burrill L. Dict. (using both forms).

4. Burrill L. Dict.

5. See Stephen Pl. 67 [*cited* as so defining "*profert in curia*" in Black L. Dict. (*quoted* as so defining "*profert*" in Germain *v.* Wilgus, 67 Fed. 597, 599, 14 C. C. A. 561); also *cited* as so defining "*profert in curia*" or "*profert in curiam*" in Burrill L. Dict.].

6. See Smith *v.* Simms, 9 Ga. 418, 422, where it is said: "Under our Judiciary, *profert in curiam* is necessary to be made by the plaintiff, of any note or other instrument which is the foundation of the action." See also PROFERT, and Cross-References Thereunder.

7. People *v.* Elmer, 109 Mich. 493, 496, 67 N. W. 550.

8. Thompson *v.* Bertrand, 23 Ark. 730, 733.

9. Black L. Dict. [*quoted* in Betz *v.* Maier, 12 Tex. Civ. App. 219, 220, 33 S. W. 710].

Possibly thought a more dignified term than "occupation." Lebanon County Com'rs *v.* Reynolds, 7 Watts & S. (Pa.) 329, 330.

Recognized profession.—Within the mean-

or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it;[10] the occupation, if not mechanical or agricultural or the like, to which one devotes one's self; the business which one professes to understand and to follow for subsistence; calling, vocation; employment;[11] employment, especially an employment requiring a learned education, as those of divinity, law and physic;[12] in its restricted sense, applying only to the learned professions.[13] In another sense, a public declaration respecting something;[14] in ecclesiastical law, the act of entering into a religious order.[15] (See PROFESSIONAL.)

ing of the exception in Act Cong. March 3, 1891, c. 551, 26 U. S. St. at L. 1084 [U. S. Comp. St. (1901) p. 1294], concerning the exclusion of immigration under contract, the services of a chemist on a sugar plantation are those of one in "a recognized profession" (U. S. *v.* Laws, 163 U. S. 258, 265, 16 S. Ct. 998, 41 L. ed. 151), but since the amendment of the statute by the U. S. St. March, 1903, c. 1012, § 2, 32 U. S. St. at L. 1214, the exception does not apply to expert accountants (*In re* Ellis, 124 Fed. 637, 643).

Compared with "trade."— Neither word is equivalent to occupation in its general sense. State *v.* Hunt, 129 N. C. 686, 689, 40 S. E. 216, 85 Am. St. Rep. 758. Exclusion of alien under contract to perform services or contract see ALIENS, 2 Cyc. 121–122 text and notes 59, 60.

Business of life insurance agent is included by the words "trade or profession" and his iron safe is one of the tools and apparatus of his trade or profession within the meaning of Sayles Civ. St. Tex. art. 2337. Betz *v.* Maier, 12 Tex. Civ. App. 219, 222, 33 S. W. 710.

"The business of conducting iron-works . . . requires a very considerable degree of skill, derived from experience in the business, as well as great vigilance and unremitted attention . . . and might well therefore be considered, perhaps, as being embraced by the term 'profession.'" Lebanon County Com'rs *v.* Reynolds, 7 Watts & S. (Pa.) 329, 330.

Denoting a condition presumed to continue. — Professions, like trades, within the legal acceptation of those terms, in the line of cases respecting slander or libel of a man in his trade or profession, refer to conditions which by law are presumed to continue and not to be altered. Bellamy *v.* Burch, 16 M. & W. 590.

The renting of tolls probably not included see Bellamy *v.* Burch, 16 M. & W. 590.

10. Century Dict. [*quoted* in U. S. *v.* Laws, 163 U. S. 258, 266, 16 S. Ct. 998, 41 L. ed. 151 (*cited* in *In re* Ellis, 124 Fed. 637, 643, referring to the phrase "person belonging to any recognized profession" in 32 U. S. St. at L. 1214, § 2)].

"Formerly, theology, law, and medicine were specifically known as 'the professions;' but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge as distinguished from mere skill. A practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for its own purposes." Century Dict. [*quoted* in U. S. *v.* Laws, 163 U. S. 258, 266, 16 S. Ct. 998, 41 L. ed. 151].

11. Webster Dict. [*quoted* in Betz *v.* Maier, 12 Tex. Civ. App. 219, 220, 33 S. W. 710]. And see State *v.* Hunt, 129 N. C. 686, 689, 40 S. E. 216, 85 Am. St. Rep. 758, where the words "calling; vocation; employment" are omitted and the quotation given as follows: "That of which one professes knowledge, the occupation, 'if not mechanical, agricultural or the like,' to which one devotes one's self; the business which one professes to understand, and to follow for subsistence," and said to be the definition most probably contemplated by Const. art. 5, § 3.

12. Worcester Dict. [*quoted* in U. S. *v.* Laws, 163 U. S. 258, 266, 16 S. Ct. 998, 41 L. ed. 151].

Learned professions.— The term includes "preachers of the gospel . . . just as much as physicians, teachers, and lawyers." Flanders *v.* Daley, 120 Ga. 885, 889, 48 S. E. 337. "We speak of the professions of medicine, law, and divinity, as the learned professions, and also of the profession of arms; so, also, the term has come to be applied to other occupations or callings, all of which require learned and special preparation in the acquirement of scientific knowledge and skill, necessary to a proper understanding of and successful management of such occupations. Com. *v.* Fitler, 147 Pa. St. 288, 292, 23 Atl. 568, 15 L. R. A. 205. "It is universally understood that ministers of the gospel are members of a learned profession." Miller *v.* Kirkpatrick, 29 Pa. St. 226, 229.

"Especially applicable to persons who teach or practise in law, physic, or divinity." Miller *v.* Kirkpatrick, 29 Pa. St. 226, 229, holding, in construing St. April 29, 1844, § 32, subjecting "professions" to taxation, that the term designates the calling of a minister of the gospel with sufficient precision.

13. Betz *v.* Maier, 12 Tex. Civ. App. 219, 220, 33 S. W. 710.

Used in instruction to jury as equivalent to "physicians and surgeons" see Lawson *v.* Conaway, 37 W. Va. 159, 165, 16 S. E. 564, 23 Am. St. Rep. 17, 18 L. R. A. 627.

Professional charges under English Municipal Corporation Act see Reg. *v.* Trest, 16 Q. B. 31, 44, 15 Jur. 554, 20 L. J. Q. B. 17, 71 E. C. L. 31.

14. Black L. Dict.

15. Black L. Dict.

PROFESSIONAL. An adjective applied to men who work rather with their heads than with their hands, to services such as those of a consulting engineer or lawyer as distinguished from those of a laborer or operative.[16] Also applied to a calling or occupation to the proper use and understanding of which scientific learning and knowledge is essential;[17] to the capacity in which a physician acts toward a patient,[18] or that of an attorney to his client.[19] (See PROFESSION.)

PROFIT or **PROFITS.** A word susceptible of various meanings;[20] particu-

16. See Ericsson *v.* Brown, 38 Barb. (N. Y.) 390, 391, where in holding that the services of a consulting engineer were professional, it was said: "If we should attempt to define the plaintiff in reference to the services he rendered, we should scarcely describe him as a 'laborer' or an 'operative.' . . . Such words we should ordinarily apply to an entirely different class of men. To a class who obtain their living by coarse manual labor, as distinguished from professional men; men who work with their hands, rather than their heads. . . . The plaintiff . . . correctly described his services as 'professional' as contradistinguished from those of a 'laborer' or 'operative.'"

"Professional occupation" does not include the business of a merchant, or a blacksmith, or a carpenter, or tailor. Com. *v.* Fitler, 147 Pa. St. 288, 292, 23 Atl. 568, 15 L. R. A. 205.

Not applicable to agents and commission merchants see Pennock *v.* Fuller, 41 Mich. 153, 155, 2 N. W. 176, 32 Am. Rep. 148. See also People *v.* McAllister, 19 Mich. 215, 217, holding that the employment of a sewing machine agent is not professional.

"Professional employment" in a statute concerning misconduct or neglect therein (Mich. Comp. Laws, § 5734; Mich. St. 1839, p. 76), "can only relate to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially" (Pennock *v.* Fuller, 41 Mich. 153, 155, 2 N. W. 176, 32 Am. Rep. 148), and does not apply to service which is not such that it can be performed only by an attorney at law when undertaken by one who does not appear to have held himself out as or to have been an attorney, and in whom it does not appear that confidence was imposed in reliance upon any supposed or assumed professional character (Bronson *v.* Newberry, 2 Dougl. (Mich.) 38, 52).

17. See Com. *v.* Fitler, 147 Pa. St. 288, 292, 23 Atl. 568, 15 L. R. A. 205, where it is said: "It is not unusual now to regard the occupation of a civil or mining engineer, or of an electrician, as a professional occupation, because scientific learning and knowledge is essential to a proper understanding of such a calling."

"Professional artist" does not apply to a trimmer of hats. U. S. *v.* Thompson, 41 Fed. 28, 29.

"Professional earnings" does not include debts due the owner or proprietor of a hotel for board or accommodation. Youst *v.* Willis, 5 Okla. 170, 172, 49 Pac. 56.

Professional gambler see State *v.* Newton, 59 Ind. 173, 175.

18. See Meyer *v.* Supreme Lodge K. P., 178 N. Y. 63, 67, 70 N. E. 111 [*affirmed* in 198 U. S. 508, 25 S. Ct. 754, 49 L. ed. 1146, holding that a physician acted in a professional capacity in treating a patient, although the treatment was against the patient's will].

Professional experts within the peculiar meaning of a statute excepting persons who serve the city in that capacity from examination as prerequisite to their election or appointment, as visiting physicians of the Philadelphia Hospital, see Com. *v.* Fitler, 147 Pa. St. 288, 290, 23 Atl. 568, 15 L. R. A. 205.

Applied to the services of physicians and nurses see Duke *v.* Missouri Pac. R. Co., 99 Mo. 347, 351, 12 S. W. 636.

19. Doe *v.* Harris, 5 C. & P. 592, 593, 24 E. C. L. 724, holding that an application to an attorney to draw a deed is made to him in his professional capacity.

"Professional men" see Reid *v.* Langlois, 2 Hall & T. 59, 73, 47 Eng. Reprint 1596, 14 Jur. 467, 19 L. J. Ch. 337, 1 Macn. & G. 627, 47 Eng. Ch. 498, 41 Eng. Reprint 1408 [*explained* in Anderson *v.* British Columbia Bank, 2 Ch. D. 644, 651, 45 L. J. Ch. 449, 35 L. T. Rep. N. S. 76, 24 Wkly. Rep. 624, as there referring to members of the legal profession and nothing else].

20. See Rogers-Ruger Co. *v.* McCord, 115 Wis. 261, 264, 91 N. W. 685, where it is said: "Much discussion and some authority is offered as to the meaning of the word 'profits,' with no result save to satisfy us that such word may well carry differing meaning under variant circumstances, and that in ascertaining its significance in this contract we may be aided by the situation and the general purpose to be accomplished."

"A word of ambiguous meaning" see *In re* Bridgewater Nav. Co., 39 Ch. D. 1, 14, 57 L. J. Ch. 809, 58 L. T. Rep. N. S. 476, 36 Wkly. Rep. 769, where it is said that an increment in assets due partly to the rise in corporate property, partly to an appropriation of moneys which the directors might have divided as profit, and partly to an enhancement in price by the statutory sale of the undertaking of a prosperous company, might be called "profits" in the largest sense of the word, but held that such increment was not profits divisible under a certain article of association.

"In common use, unambiguous" see Curry *v.* Charles Warner Co., 2 Marv. (Del.) 98, 110, 42 Atl. 425, in charge to jury.

"Has a fixed and definite meaning" see Jones *v.* Davidson, 2 Sneed (Tenn.) 447, 452.

Compared with various terms see Andrews *v.* Boyd, 5 Me. 199, 203 [*quoted* in People *v.*

larized as either "gross" or "net," the former being the entire difference between the value of advances and the value of returns, and the latter so much of this difference as arises exclusively from the capital employed; [21] and variously defined

San Francisco Sav. Union, 72 Cal. 199, 203, 13 Pac. 498] (where "rents and profits" and "income" and "net income" of an estate are said to be all equivalent); Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 416, 417, 83 N. Y. Suppl. 849 (where it is said: "The terms 'profits,' 'gains,' 'income' and 'profits and income' all refer to the annual return from the continuous business of the testator which is to be carried on with his estate and property. There is no such technical or peculiar meaning to the phrase 'rents and profits' as to deny a synonym in 'profits and gains.' A rent is a profit, and the profit in rents and profits is a profit still. Not only does the testator use the words 'profits and gains,' but also the word 'income' to describe the same property. . . . I think that the words 'gains' or 'profits' are also equipollent with the terms 'interest,' 'income' or 'profits' of personal property"); Matter of Proctor, 85 Hun (N. Y.) 572, 574, 33 N. Y. Suppl. 196 (holding that "interest, income, profits," in a bequest thereof, when the fund was not intended for traffic, were tautological); Matter of Clark, 62 Hun (N. Y.) 275, 282, 17 N. Y. Suppl. 93 [*quoted* in Linsly *v.* Bogert, 33 N. Y. Suppl. 975, 981 (also *reported*, but without the referee's approved decision containing this point, in 87 Hun (N. Y.) 137)] (where "income," "profits," and "income and profits," as used in a will, are construed as synonymous); Matter of Vedder, 15 N. Y. Suppl. 798, 2 Connoly Surr. (N. Y.) 548, 562 (where it is said that the supreme court in construing a will used the phrase "income and profits" as synonymous with "use and income").

Compared with "income" see Bates *v.* Porter, 74 Cal. 224, 239, 15 Pac. 732, and Beers *v.* Narramore, 61 Conn. 13, 23, 22 Atl. 1061 (in each of which it is held to be used synonymously with "income," in a will); People *v.* Niagara County, 4 Hill (N. Y.) 20, 23 (where it is said: "It is undoubtedly true that 'profits' and 'income' are sometimes used as synonymous terms; but, strictly speaking, 'income' means that which comes in, or is received from any business or investment of capital without reference to the outgoing expenditures; while 'profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account"); Burt *v.* Rattle, 31 Ohio St. 116, 130 (where it is said to be incorrectly used as "income" in Act March 25, 1870, § 4, making expenses payable out of surplus of profits, whereas there are no profits until the "expenses" are all paid or deducted).

Distinguished from "compensation" see COMPENSATION, 8 Cyc. 402 note 72.

Including "rents and issues" see 2 Bouvier L. Dict. (Rawles Rev.) 878 [*quoted* in Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 417, 83 N. Y. Suppl. 849].

Increase in value not profit see *In re* Gerry, 103 N. Y. 445, 449, 450, 9 N. E. 235 [*cited* and *followed* in Cross *v.* Long Island L. & T. Co., 75 Hun (N. Y.) 533, 27 N. Y. Suppl. 495; Duclos *v.* Benner, 62 Hun (N. Y.) 428, 435, 17 N. Y. Suppl. 168 (*reversed* on other grounds but *affirmed* in this particular in 136 N. Y. 560, 566, 567, 32 N. E. 1002)] (holding that an increase in value of securities owing to a depreciation in the rate of interest effected by natural causes is not a profit upon an investment in such securities, but rather an accretion to the principal fund so invested); Jennery *v.* Olmstead, 36 Hun (N. Y.) 536, 539 (holding that an increase in value of property held and not sold is not a profit, but a profit has not accrued simply from the fact that property if sold would have resulted in a profit); Gray *v.* Darlington, 15 Wall. (U. S.) 63, 66, 21 L. ed. 45 [*quoted* in Graham's Estate, 198 Pa. St. 216, 221, 47 Atl. 1108] (holding that the mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of a tax on the amount of the advance as on gains, profits, or income). *Compare*, however, Jones *v.* Davis, 48 N. J. Eq. 493, 499, 21 Atl. 1035 (holding that as between the persons under contract to divide them, profits do not necessarily imply money to be divided; they may be represented by the unsold portion of the property which was the subject of the speculation); Halhead *v.* Young, 6 E. & B. 312, 324, 2 Jur. N. S. 970, 25 L. J. Q. B. 290, 4 Wkly. Rep. 530, 88 E. C. L. 312 (holding that "profit on cargo" as used in a policy of insurance thereon means "the improved value of the cargo when it has been landed at its destined port").

Annuity not profits see Booth *v.* Ammerman, 4 Bradf. Surr. (N. Y.) 129, 133.

Rents and profits not an annuity.— Rents and profits of certain real estate in trust to be applied to the use of a person during life clearly do not constitute an annuity; the words refer to the sum annually yielded and to the annual yield as its sole source. Delaney *v.* Van Aulen, 84 N. Y. 16, 23.

Option to take new shares not a profit see CORPORATIONS, 10 Cyc. 565, text and note 53.

On insurance policy.— In the term "nonforfeiture endowment policy with profits" the word applies to those earned in fact, and not to those which merely ought to be earned. Bruce *v.* Continental L. Ins. Co., 58 Vt. 253, 260, 2 Atl. 710.

In distinction from the wages of labor, it is well understood to imply the net return to the capital or stock employed after deducting all the expenses, including not only the wages of those employed by the capitalist but the wages of the capitalist himself for superintending the employment of his capital stock. People *v.* San Francisco Sav. Union, 72 Cal. 199, 202, 13 Pac. 498.

21. People *v.* San Francisco Sav. Union, 72 Cal. 199, 203, 13 Pac. 498, where it is said

as: Any advantage, any acquisition of good from labor or exertion;[22] the pecuniary advantage resulting from dealing or trafficking in property;[23] the excess of returns over profits;[24] acquisitions beyond expenditures;[25] the excess of receipts over expenditures; that is, net earnings;[26] the excess of returns over advances;[27] the excess of sale or value received over costs;[28] excess of value received for producing, keeping, or selling over costs;[29] excess of value received over cost;[30] an excess of the value of returns over the value of advances;[31] the gain made on any business or any investment when both the receipts and payments are taken into the account,[32] as distinguished from the strict meaning of the term income;

that "profits are divided by writers on political economy."

"The terms 'gross' and 'net' profits . . . may be properly applied where . . . out of the whole profits certain payments or deductions are to be made, and what remains only to be treated as profits to be divided, 'divisible' profits or surplus as ordinarily termed by insurance companies." Bain *v.* Ætna L. Ins. Co., 21 Ont. 233, 241.

"Profits," as distinguished from "net profits," is susceptible of the construction that it should include the difference between the actual cost and selling prices; "net profits" may be construed to mean what is left, after deducting from the selling price the actual cost price together with all expenses incidental to the procurement of the property in the first instance and to its sale thereafter. Cooke *v.* Cain, 35 Wash. 353, 359, 77 Pac. 682.

"Interest or profits earned" as used in N. Y. St. (1875) c. 371, § 33, concerning savings bank dividends greater than such interest or profits is distinguished from "interest or profits received" and is not limited to net profits. Van Dyck *v.* McQuade, 86 N. Y. 38, 54.

"Net profits" distinguished from "income" see INCOME, 22 Cyc. 65 note 56.

22. Imperial Dict. [*quoted* in Workman *v.* Robb, 7 Ont. App. 389, 399].

23. Matter of Proctor, 85 Hun (N. Y.) 572, 573, 33 N. Y. Suppl. 196, so defining the word as in common parlance.

24. Mayer *v.* Nethersole, 71 N. Y. App. Div. 383, 388, 75 N. Y. Suppl. 987, where the above definition is stated to be the ordinary meaning of the word in manufacture, agriculture, and ordinary business.

Profits of manufacture "are contributed to by all and not one only of the various elements which combine to produce them. All the different kinds of work and labor, which enter into the manufacture of an article form the source and basis of profits." Wood *v.* State, 66 Md. 61, 66, 5 Atl. 476 [*quoted* in Maryland Ice Co. *v.* Arctic Ice Mach. Mfg. Co., 79 Md. 103, 108, 29 Atl. 69].

25. Prince *v.* Lamb, 128 Cal. 120, 126, 60 Pac. 689; Curry *v.* Charles Warner Co., 2 Marv. (Del.) 98, 110, 42 Atl. 425; Webster Dict. [*quoted* in Carter *v.* Arnold, 134 Mo. 195, 208, 35 S. W. 584, and *cited* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783].

26. Connolly *v.* Davidson, 15 Minn. 519, 2 Am. Rep. 154 [*quoted* in People *v.* San Francisco Sav. Union, 72 Cal. 199, 202, 13 Pac. 498].

27. Lindley Partn. 38 [*quoted* in Hentz *v.* Pennsylvania L. Ins., etc., Co., 134 Pa. St. 343, 346, 19 Atl. 685, as at page 8].

Contrasted with capital.—Where testator, referring to an agreement whereby each partner was to be entitled to a certain proportion of profits, but not to draw more than a certain sum per month, without consent, accrued or undivided profits to be used only for carrying on the business, provided by will that his "present capital" remain in the business for two years; his executors to collect the "net profits" arising under such agreement; after referring to his "interest" in the business as distinct from capital; the accumulated and undivided profits were not intended to be included by the word "capital." Dean *v.* Dean, 54 Wis. 23, 30–35, 11 N. W. 239.

28. Curry *v.* Charles Warner Co., 2 Marv. (Del.) 98, 110, 42 Atl. 425, in charge to jury, where the definition is preceded by the word "primarily."

29. Webster Int. Dict. [*cited* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783].

Distinguished from income see Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783.

Distinguished from "compensation for labor" see Commercial League Assoc. of America *v.* People, 90 Ill. 166, 173.

Profit of work.—As used in N. Y. Const. (1894) art. 3, § 39, prohibiting the farming out of any convict or the "product and profit of his work" the words quoted do not refer to articles of property but to the net value of labor. People *v.* Hawkins, 157 N. Y. 1, 13, 51 N. E. 257, 68 Am. St. Rep. 736, 42 L. R. A. 490.

Pecuniary profit see PECUNIARY, 30 Cyc. 1328 note 20.

As purpose of using invention see PATENTS, 30 Cyc. 867.

30. Prince *v.* Lamb, 128 Cal. 120, 126, 60 Pac. 689.

31. People *v.* San Francisco Sav. Union, 72 Cal. 199, 202, 13 Pac. 498.

32. People *v.* Niagara County, 4 Hill (N. Y.) 20, 23 [*quoted* in Bates *v.* Porter, 74 Cal. 224, 239, 15 Pac. 732; People *v.* San Francisco Sav. Union, 72 Cal. 199, 203, 13 Pac. 498; Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411, 417, 10 Atl. 328, 1 Am. St. Rep. 330; Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 417, 83 N. Y. Suppl. 849]; Providence Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 804, 19 L. ed. 566 [*quoted* in Freeman *v.* Freeman, 142 Mass. 98, 102, 7 N. E. 710].

As ordinarily used "the gain made upon any business or investment." Commercial

the gains realized from trade;[33] pecuniary gain in any transaction or occupation;[34] the net gains or earnings;[35] the net amount made after deducting any proper expenses incident to the business;[36] what remains after deducting debts, expenses, and the capital paid in;[37] the benefit or advantage remaining after all costs, charges, and expenses have been deducted;[38] the incomings of the concern after deducting the expenses of earning them; income of whatever character it may be over and above the costs and expenses of receipt and collection;[39] emolument;[40] one of the definitions of "gain";[41] one of the definitions of income.[42] Of a business, the gains upon the capital invested in the business;[43] the advance in price of goods sold beyond the cost of purchase;[44] in the popular sense, the receipts over and above current expenses, net receipts.[45] Of a cor-

League Assoc. of America *v.* People, 90 Ill. 166, 173.

33. Nelson *v.* Hiatt, 38 Nebr. 478, 485, 56 N. W. 1029.

Distinct from good-will see Nelson *v.* Hiatt, 38 Nebr. 478, 485, 56 N. W. 1029.

"Proceeds and profits" from any occupation or trade carried on by a married woman separately protected under Ont. Rev. St. c. 125, § 7, from debts or dispositions of her husband have given rise to the *quære* whether or not they mean the same thing. Dominion Loan, etc., Co. *v.* Kilroy, 14 Ont. 468, 475.

34. Webster Int. Dict. [*cited* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783].

35. Bain *v.* Ætna L. Ins. Co., 21 Ont. 233, 241.

Compared with "earnings."— "Profits derived from capital invested in business cannot be considered as earnings, but in many cases profits derived from the management of a business may properly be considered as measuring the earning power." Wallace *v.* Pennsylvania R. Co., 195 Pa. St. 127, 129, 130, 45 Atl. 685, 52 L. R. A. 33 [*criticizing* as correct as applied to the facts of that case but altogether too broad for general application and misleading, the following statements in Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 15, 35 Atl. 191, 55 Am. St. Rep. 705, where it is said: "Profits derived from . . . the management of a business enterprise are not earnings. . . . The profits of a business with which one is connected cannot therefore be made use of as a measure of his earning power"]. "The terms 'gross' and 'net' profits are often inaccurately use for the gross or net gains or earnings; though the terms 'gross' and 'net' profits may be properly applied where, as in this case, out of the whole profits certain payments or deductions are to be made, and what remains only to be treated as profits to be divided, 'divisible' profits or surplus as ordinarily termed by insurance companies." Bain *v.* Ætna L. Ins. Co., 21 Ont. 233, 241.

36. Jones *v.* Davidson, 2 Sneed (Tenn.) 447, 452, so defining the word as used in a contract to share profits of prosecution of pension claims.

Used in the sense of "net profits" see Crichton *v.* Webb Press Co., 113 La. 167, 191, 36 So. 926, 104 Am. St. Rep. 500, 67 L. R. A. 76. "Profits represent the net gain made from an investment or from the prosecution of some business after the payment of all expenses incurred." Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 15, 35 Atl. 191, 55 Am. St. Rep. 705. "Profits and net profits are, for all legal purposes, synonymous expressions." Lindley Partn. 29 [*quoted* in Hentz *v.* Pennsylvania L. Ins., etc., Co., 134 Pa. St. 343, 346, 19 Atl. 685]. Net profits intended by an agreement that one receive a yearly sum "out of the profits" of a business. Bond *v.* Pittard, 1 H. & H. 82, 83, 2 Jur. 183, 7 L. J. Exch. 78, 3 M. & W. 357 [*cited* in Bain *v.* Ætna L. Ins. Co., 21 Ont. 233, 241]. As used in Act Cong. June 30, 1864, § 121 (13 U. S. St. at L. 284), concerning the ascertainment and return to the assessor by banks of the amount of profits which have accrued, returned does not mean gross but net profits after all losses and expenses which have occurred in the legitimate business have been deducted. U. S. *v.* Central Nat. Bank, 10 Fed. 612, 614.

Limiting "income" in context.— In construing a mortgage in the common form of a railroad mortgage including all "ships, property, leases, tolls, income, rents, issues and profits" of a steamship company, the word "profits" clearly signifies that only the net income was intended. Freights of The Kate, 63 Fed. 707, 708, 716.

37. Hayes *v.* Hayes, 66 N. H. 134, 135, 19 Atl. 571, where the words "the profits of any business are of course only" precede the definition.

38. Mackey *v.* Millar, 6 Phila. (Pa.) 527.

39. Mersey Docks, etc., Bd. *v.* Lucas, 8 App. Cas. 891, 905, 912, 48 J. P. 212, 53 L. J. Q. B. 4, 49 L. T. Rep. N. S. 781, 32 Wkly. Rep. 34 [*quoted* in Last *v.* London Assur. Corp., 10 App. Cas. 438, 450, 50 J. P. 116, 55 L. J. Q. B. 92, 53 L. T. Rep. N. S. 634, 34 Wkly. Rep. 233 (*quoted* in Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 416, 83 N. Y. Suppl. 849)].

40. Webster Int. Dict. [*cited* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783].

41. See GAIN, 20 Cyc. 869, text and note 66.

42. See INCOME, 22 Cyc. 65 text and note 56. See *supra*, note 20.

43. Dean *v.* Dean, 54 Wis. 23, 34, 11 N. W. 239.

44. People *v.* San Francisco Sav. Union, 72 Cal. 199, 202, 13 Pac. 498 (so defining the word as applied to commerce); Bouvier L. Dict. [*quoted* in Matter of Vedder, 15 N. Y. Suppl. 798, 805, 2 Connoly Surr. 548] (so defining the word as applied to trade or business).

45. See Eyster *v.* Centennial Bd. of Finance, 94 U. S. 500, 503, 24 L. ed. 188 [*cited* in People *v.* San Francisco Sav. Union, 72 Cal. 199, 202, 13 Pac. 498], where it is said: "The receipts of the exhibition, over and

poration, gain made upon an investment when both receipts and payments are taken into account.[46] Of an estate, the balance of the income after paying above its current expenses, are the profits of the business. . . . They are, in fact, the net receipts, which, according to the common understanding, ordinarily represent the profits of a business. . . . Popularly speaking, the net receipts of a business are its profits."

Potential gain.— A jury was instructed to allow as damages such profits as they might find the plaintiff had been deprived of by the termination of a contract by defendants. In reply to the argument that only actual damages and not profits were to be inquired into, it was said: "But it by no means follows that profits are not to be allowed, understanding, as we must, the word profits in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract." Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, 343, 14 L. ed. 157 [*quoted* in Hinckley *v.* Pittsburg Bessemer Steel Co., 121 U. S. 264, 275, 7 S. Ct. 875, 30 L. ed. 967].

Depreciation of buildings seldom counted.— "The public, when referring to the profits of the business of a merchant, rarely ever take into account the depreciation of the buildings in which the business is carried on, notwithstanding they may have been erected out of the capital invested." Eyster *v.* Centennial Bd. of Finance, 94 U. S. 500, 503, 24 L. ed. 188, where the doctrine is applied in relation to the profits of the Centennial Exposition.

46. Angell & A. Corp. (3d ed.) § 454 [*quoted* in Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 135], defining the word as used in provisions for the taxation of corporations in New York.

Annual profits of a business cannot exist unless it has endured for a year, therefore it is held that a bank which has not done business as long as a year cannot avail itself of a provision for lenient taxation based on proof that the annual profits have not equaled a certain per cent of capital. Park Bank *v.* Wood, 24 N. Y. 93, 96.

Of a bank.— The amount of money received by the bank from its investments by way of interest over and above the amount of interest it has to pay its depositors. Jennery *v.* Olmstead, 36 Hun (N. Y. 93, 96.

"'Profits for the year' . . . mean the surplus in receipts, after paying expenses and restoring the capital to the position it was in on the 1st of January in that year." Dent *v.* London Tramways Co., 16 Ch. Div. 344, 354, 50 L. J. Ch. 190, 44 L. T. Rep. N. S. 91 [*quoted* in Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411, 417, 10 Atl. 328, 1 Am. St. Rep. 330].

As the basis of a dividend by a corporation a profit exists where the assets, reserves, and funds, consisting in cash on hand and other property, exceed the liabilities. Hubbard *v.* Weare, 79 Iowa 678, 689, 44 N. W. 915.

Distinguished from dividend see Allegheny *v.* Pittsburgh, etc., Pass. R. Co., 179 Pa. St. 414, 420, 36 Atl. 161.

Distinguished from "earnings" see Burt *v.* Rattle, 31 Ohio St. 116, 130 (where it is said to have been incorrectly used as "earnings"); Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 15, 35 Atl. 191, 55 Am. St. Rep. 705.

Cannot consist of earnings never yet received see People *v.* San Francisco Sav. Union, 72 Cal. 199, 203, 13 Pac. 498, holding that a bank authorized to pay dividends out of surplus profits could not base them on interest due, but not collected.

Under Internal Revenue Act (13 U. S. St. at L. 281, c. 173, §§ 116, 117), providing that the gains and profits of companies other than those there specified shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise, referring to a former case not named, in which it had been held that the gains and profits a stockholder was entitled to in any particular year were his proportion of such part of the profits as the directors or trustees acting in good faith should deem it beneficial and wise and prudent to subtract from the business and set apart for division, and following that case, it was held that profits, in the sense not of net profits but of earnings over and above the amount so set aside and expended by the company in the course of its business, were not the kind of profits to which the stockholder was entitled. Hubbard *v.* Brainard, 35 Conn. 563, 569–573. As used in Internal Revenue Act, § 122, as amended in 1866, taxing railroad or canal companies upon "all profits of such company carried to the account of any fund, or used for construction," the word refers to the profits arising from the operation of the road or canal, without deduction of interest paid to its bondholders or dividends paid to its stockholders. Sioux City, etc., R. Co. *v.* U. S., 110 U. S. 205, 207, 3 S. Ct. 565, 28 L. ed. 120.

For purposes of taxation.— As used in 1 N. Y. Rev. St. p. 416, § 9, providing that in all certain companies duly shown, any party in receipt of any profits or income shall not be taxed, net profits and income are not intended. People *v.* New York, 18 Wend. (N. Y.) 605, 606, 607.

Legislative synonym for the dividend measuring a certain tax see Com. *v.* Pittsburg, etc., R. Co., 74 Pa. St. 83, 91.

"Profits used in construction," as the phrase occurs in Internal Revenue Act, June 30, 1864 (13 U. S. St. at L. 284), does not include profits used in repairs, but only those used in betterments. Grant *v.* Hartford, etc., R. Co., 93 U. S. 225, 227, 23 L. ed. 878.

Of Centennial Exposition.— As used in Act Cong. Feb. 16, 1876, concerning the centennial board of finance, postponing payment of dividend or percentage of profits to stockholders therein to repayment of the appropriated fund to the United States, the word "profits" was said to represent the net receipts of the business of the exhibition to

expenses.[47] The word alone or with "rents" and kindred words, indicating the source from which a fund is to be raised, may be interpreted as including the results of a sale when there is nothing to exclude that construction.[48] Of real

be had in the buildings erected and upon the grounds prepared for its accommodation by means of the capital of the centennial board of finance. Eyster *v.* Centennial Bd. of Finance, 94 U. S. 500, 505, 24 L. ed. 188.

Accruing on stock of company formed for a single venture.—"Such profits as may accrue" on the capital stock of a company formed only for the development and sale of a certain tract of land, are not "the ordinary dividends which are annually declared out of the yearly earnings of an ordinary trading corporation which is organized to continue for a long term of years, and whose profits result from reinvesting and turning over its funds periodically," but "those which will from time to time and finally be derived from the sale of the lands of the corporation originally purchased by it." Morris *v.* Shepard, (N. J. Ch. 1902) 53 Atl. 172, 174.

47. Guthrie *v.* Wheeler, 51 Conn. 207, 213.

The net profits realized from the sale by trustees of a mortgage in which they have invested moneys of the estate are "income and profits" and not a part of the *corpus* of the estate. Park's Estate, 173 Pa. St. 190, 195, 197, 199, 33 Atl. 884, in dissenting opinion below, adopted on appeal.

"The 'entire' rents and profits" of an estate, as used in a testamentary trust to pay annually for life, may be construed "'all' the rents and profits," and is as applicable to the net income as to the gross income, the better construction of the word in question being that the income shall bear the expenses. Guthrie *v.* Wheeler, 51 Conn. 207, 213.

"Rents and profits" of a trust estate, while they do not include purchase-money received in part payment for land the purchase of which was abandoned by the purchasers, and wherein the trustee is bound to reimburse the latter, do include as chargeable against the trustee, all the rents and profits he has received or would have received by reasonable efforts. Mansfield *v.* Alwood, 84 Ill. 497.

Not limiting accompanying word.—A widow to whom "rents and profits" are bequeathed is entitled to gross rents without deduction. "The use of the word 'profits' can not be deemed to be a limitation upon, or qualification of, the preceding word, 'rents.'" Morton *v.* Morton, 112 Ky. 706, 710, 66 S. W. 641, 23 Ky. L. Rep. 2079.

"Net profits" bequeathed during widowhood construed as meaning "only the profits accruing to the widow after the taxes and expenditures for repairs had been paid out of what would be obtained from the estate." Earl *v.* Rowe, 35 Me. 414, 420, 58 Am. Dec. 714.

Increase of live stock included in "rents, issues and profits," although perhaps not in a strictly etymological sense. Harris *v.* Van de Vanter, 17 Wash. 489, 492, 50 Pac. 50.

48. See Schermerhorne *v.* Schermerhorne, 6 Johns. Ch. (N. Y.) 70, 71 [*distinguished* in Lewisburg University *v.* Tucker, *infra*]; Lewisburg University *v.* Tucker, 31 W. Va. 621, 627, 628, 8 S. E. 410 (where it is said that, where the word is used to indicate the source of a gross sum to be raised at a fixed time, the court will extend its meaning unless restricted by other words, so as to confer a power to raise such a sum by sale or mortgage); Green *v.* Belchier, 1 Atk. 505, 507, 26 Eng. Reprint 319 (where it is said that rents and profits will, in general, warrant a sale unless the manner be restrained by subsequent words); Mills *v.* Banks, 3 P. Wms. 1, 7, 24 Eng. Reprint 943 (where it is said: "I admit the word 'profits,' if found alone, would include a mortgage or sale. But here the subsequent clause shews, that thereby must be intended annual profits only. . . . The natural meaning of the word 'profits' is confined to such as are annual, though in this court on particular occasions, and to serve particular purposes, the sense thereof has been extended, unless where subsequent words were thought to abridge it; but still any one not a lawyer would understand it in the restrained sense"); Bootle *v.* Bundell, 19 Ves. Jr. 494, 528, 34 Eng. Reprint 600 (where it is said that in case of a gross sum to be paid out of rents and profits the trustees, if the trust requires payment, are not confined to annual rents although such is the meaning of the words *prima facie*).

Permitting sale or mortgage see Schermerhorne *v.* Schermerhorne, 6 Johns. Ch. (N. Y.) 70, 74; Lyon *v.* Chandos, 3 Atk. 416, 418, 26 Eng. Reprint 1040; Lingon *v.* Foley, 2 Ch. Cas. 205, 22 Eng. Reprint 912; Bootle *v.* Blundell, 1 Meriv. 193, 232, 35 Eng. Reprint 646, 19 Ves. Jr. 494, 34 Eng. Reprint 600; Ravenhill *v.* Dansey, 2 P. Wms. 179, 180, 24 Eng. Reprint 691; Trafford *v.* Ashton, 1 P. Wms. 415, 420, 24 Eng. Reprint 451; Warburton *v.* Warburton, 2 Vern. Ch. 420, 23 Eng. Reprint 869; Berry *v.* Askham, 2 Vern. Ch. 26, 23 Eng. Reprint 627; Heycock *v.* Heycock, 1 Vern. Ch. 256, 23 Eng. Reprint 452; Baines *v.* Dixon, 1 Ves. 41, 42, 27 Eng. Reprint 878; Allan *v.* Backhouse, 2 Ves. & B. 65, 73, 35 Eng. Reprint 243; Codrington *v.* Foley, 6 Ves. Jr. 364, 384, 5 Rev. Rep. 332, 31 Eng. Reprint 1095; Shrewsbury *v.* Shrewsbury, 1 Ves. Jr. 227, 234, 30 Eng. Reprint 314.

Restricted to annual profits see Delaney *v.* Van Aulen, 84 N. Y. 16, 23, 27 [*reaffirmed* in 92 N. Y. 627, and *reversing* 21 Hun 274]; Lewisburg University *v.* Tucker, 31 W. Va. 621, 631, 8 S. E. 410; Ridout *v.* Plymouth, 2 Atk. 104, 105, 26 Eng. Reprint 465; Okeden *v.* Okeden, 1 Atk. 549, 550, 26 Eng. Reprint 345; Green *v.* Belchier, 1 Atk. 505, 506, 26 Eng. Reprint 319; Ivy *v.* Gilbert, 2 P. Wms. 13, 20, 24 Eng. Reprint 622; Sandys *v.* Sandys, 1 P. Wms. 707, 709, 24 Eng. Reprint 580; Pierpoint *v.* Cheney, 1 P. Wms. 489, 494, 24 Eng. Reprint 485; Greaves *v.*

estate, the produce of lands; [49] although it has been held to include a building or addition; [50] and an unqualified grant or devise of profits is a devise of the land.[51]

Mattison, T. Jones 201, 203, 84 Eng. Reprint 1216 (where a sale was denied, even though provided as an alternative in the deed of settlement); Rivers *v.* Derby, 2 Vern. Ch. 72, 74, 23 Eng. Reprint 656; Conyngham *v.* Conyngham, 1 Ves. 522, 523, 27 Eng. Reprint 1181.

49. Burrill L. Dict. [*quoted* in Matter of Vedder, 15 N. Y. Suppl. 798, 805, 2 Connoly Surr. 548].

"Comprehends the produce of the soil, whether it arises above or below the surface; as herbage, wood, turf, coal, minerals, stones; also fish in a pond or running water." Bouvier L. Dict. [*quoted* in Russell *v.* Berry, 70 Ark. 317, 318, 67 S. W. 864].

Grass eaten by cattle of the owner of land whereon it grows is "profits" of such land received by the owner in such sense as to prevent exclusive possession against him by another. Rennie *v.* Frame, 29 Ont. 586, 588.

"Profits from the farm," with a further specification of "crops, stock, hogs and poultry," agreed upon as compensation for the labor of production, the latter being furnished by the tenant, is construed to mean all the products and not "net profits," merely. Richmond *v.* Connell, 55 Conn. 403, 404, 11 Atl. 853.

Used by mistake instead of "proceeds" or an equivalent term, in a will mentioning "profits" obtained from sale of realty see Stewart *v.* Stewart, 31 N. J. Eq. 398, 406.

Of a plantation.— In the case of the cultivation of a plantation, as early as 1859, the word had (at least in Montgomery county, Alabama), a general popular signification. "It was never confounded with rents, or with proceeds; it denoted the annual gain, or income, from the sale of products, after a deduction of the expenses of cultivation. There was no deduction because of the value of the labor, for the labor was the property of the owner, as was the land cultivated." Taylor *v.* Harwell, 65 Ala. 1, 11.

Actual proceeds.— "It is clear that the expression 'in receipt of the profits of any land' is used in the Act, in conjunction with the words 'in possession' of the land, to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land; and they were no doubt introduced to prevent any question arising when the owner, although he received the proceeds, did not actually occupy the land." Lord St. Leonard Prop. Stat. 47 [*quoted* in Darley & Bosanquet Limitations (2d ed.), 301 (*quoted* in Rennie *v.* Frame, 29 Ont. 586, 590)] commenting on the phrase as used in a statute of limitations.

"Other annual profits," in a will, include tiles, brick, and earth taken, though not annually, from an estate, when words immediately preceding, namely "timber felled," so that the testator did not use "annual" in its true sense. Stapleton *v.* Stapleton, 21 L. J. Ch. 434, 437, 2 Sim. N. S. 212, 42 Eng. Ch. 212, 61 Eng. Reprint 321.

Evidence.— Testimony as to net profits of a neighboring farm is not admissible to show mesne profits. Profits made during years barred by the statute of limitations cannot be assumed, so that an instruction that taxes should be charged on profits of such years would be erroneous. Mitchell *v.* Mitchell, 10 Md. 234, 241.

Compared with "rent" or "rents" see Otis *v.* Conway, 114 N. Y. 13, 16, 20 N. E. 628 (where it is said: "Rent is something which a tenant renders out of the profits"); Bennett *v.* Austin, 81 N. Y. 308, 319 (where it is said that "profits" is distinguished from "rent," which is a fixed and certain sum of "the result of trade, which is fluctuating and uncertain and dependent upon skill, care and the nature and amount of the business transacted"); People *v.* Van Rensselaer, 8 Barb. (N. Y.) 189, 200 (where it is said: "Rents 'or' profits . . . often mean the same thing; though rent is a tribute which issues out of land, as a part of its actual or supposed profits; and the word 'profits,' means yearly 'profits'").

Under lease.— Money paid as a forfeiture under a lease for failing to work leased premises is "profits" within a homestead exemption under Ga. Code, § 2026. Larey *v.* Baker, 85 Ga. 687, 691, 11 S. E. 800. Profits payable for use of premises under a lease, whether rent reserved or an additional sum in consideration of service rendered, is not a basis of distress for rent when unascertained. Melick *v.* Benedict, 43 N. J. L. 425.

50. See Workman *v.* Robb, 7 Ont. App. 389, 398, so holding within section 5 of the Real Property Limitations Act, providing that the right to make an entry shall be deemed to have first accrued at the last time at which any profits or rent of the land have been received, the owner receives profit from the time a building or addition is put upon the land.

51. Coke Litt. 4, *b* [*cited* in Schriver *v.* Cobeau, 4 Watts (Pa.) 130, 131] (holding that a grant of the profits of the land conveys the land itself); Bush *v.* Allen, 5 Mod. 63, 64, 87 Eng. Reprint 520 (where it is said that, although a devise of the profits be a devise of the land itself if there be no other circumstance in the case, it is not so where the contrary is declared in the will); Johnson *v.* Arnold, 1 Ves. 169, 171, 27 Eng. Reprint 962 (holding that a devise of profits of land is a devise of the lands).

With "rents," "benefits," "issues" see Collier *v.* Grimesey, 36 Ohio St. 17, 21, 22 (where it is said: "We do not question that a devise of the rents and profits, or of the 'profits and benefits' of lands, without qualification or limitation, will impliedly carry the fee. But in order to determine whether there is such qualification or limitation, we must look into the whole will"); *In re* France, 75 Pa. St. 220, 224 (where it is said: "It is well settled as a general rule of law, that a devise of the rents, issues and profits of land, is equivalent to a devise

Of sale, the excess of the money actually received over the price paid.[52] Of patent infringed,[53] the gains or savings made by the wrongdoer by an invasion of another's property right in his patent; [54] the gain, or saving, or both, which the defendant has made by employing the infringing invention; [55] difference between cost and yield.[56] (Profit: *À Prendre*, see EASEMENTS, 14 Cyc. 1142. *À Rendre*, see PROFITS À RENDRE. As Basis of Dividend, see CORPORATIONS, 10 Cyc. 546 text and note 14, 548 text and note 32, 550 text and note 45, 551, 559, 561, 565; INSURANCE, 22 Cyc. 1402, 1419. As Basis of Wages, see MASTER AND SERVANT, 26 Cyc. 1034. As Dower, see DOWER, 14 Cyc. 1004. As Element of Damages, see ATTACHMENT, 4 Cyc. 882; DAMAGES, 13 Cyc. 36, 49, 57–59 text and notes 85–90, 92–95, 74 text and notes 50, 51, 157 text and note 7, 159 note 17, 161–162 text and notes 25–29, 163 text and note 34, 164 text and notes 38–41, 165, 190 text and note 22, 191, 212, 219; DEEDS, 13 Cyc. 713; FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1169 note 14; LANDLORD AND TENANT, 24 Cyc. 922 text and note 13, 1133 text and note 42; PATENTS, 30 Cyc. 1021 note 95; TELEGRAPHS AND TELEPHONES. As Subject of

of the land itself") ; Baines *v.* Dixon, 1 Ves. 41, 42, 27 Eng. Reprint 878 (where it is said: "As to the intention, there is not one case in ten, where the court had decreed a sale on the words 'rents and profits,' that it has been agreeable to the testator's intention; yet the court has, in aid of a creditor directed a sale, by a kind of discretionary power, on the ground of law, that 'rents and profits' in a will, mean to pass the land itself").

Measure of mesne profits.— Either profits actually received or annual rental value. Worthington *v.* Hiss, 70 Md. 172, 185, 16 Atl. 534, 17 Atl. 1026. Where there is occupation of a farm or land used only for agricultural purposes and the income and profits are of necessity the produce of the soil, the owner may have an account of the proceeds of the crops or other products actually raised or sold thereon, deducting the expenses of cultivation. There are necessarily rents and profits in such cases, but even there, it is more usual to arrive at the same result, by charging the occupier, as tenant, with a fair annual money-rent. But the proprietor of city lots, with improvements thereon, can only derive therefrom as owner, a fair occupation-rent for the purposes for which the premises are adapted. This constitutes the rents and profits in the legal sense of the terms of such property, and is all the owner can justly claim in this shape from the occupier. McLaughlin *v.* Barnum, 31 Md. 425, 452. Profits actually received or probable value. West *v.* Hughes, 1 Harr. & J. (Md.) 574, 2 Am. Dec. 539.

52. So construed within the meaning of a contract in Rogers-Ruger Co. *v.* McCord, 115 Wis. 261, 264, 91 N. W. 685.

"Half the profits," as compensation for purchase of hay, held to be one half the amount realized for the hay sold, by the persons for whom it was bought, over and above the entire expense to them of the property so purchased at the time the sales were made. Chilberg *v.* Jones, 3 Wash. 530, 532, 28 Pac. 1104.

53. Profits of infringed patent: As measure of damages at law see PATENTS, 30 Cyc. 1021 note 95. Recoverable in equity see PATENTS, 30 Cyc. 1024.

54. Head *v.* Porter, 70 Fed. 498, 501, adding: "They are the direct pecuniary benefits received, and are capable of a definite measurement. Calling them the 'measure of damages in equity' does not mean that they are the same as damages in an action at law."

55. 3 Robinson Patents, § 1062, note 7, par. 3 [*quoted* in Head *v.* Porter, 70 Fed. 498, 501], adding: "This gain or saving is a fact. It is an actual pecuniary benefit which has resulted directly from the defendant's wrongful use of the plaintiff's property, which he has had and enjoyed, and to which, on equitable theories, the plaintiff is entitled."

Loss and gain to be considered in computing.— In ascertaining profits upon the use of a patent he that claims them may not take such items of the business as may show gain, and reject such as show loss, but must take the entire business where the use of the patent covers the entire business. Curry *v.* Charles Warner Co., 2 Marv. (Del.) 98, 112, 42 Atl. 425.

Distinguished from "damages" under the Patent Act.— As used in the provision awarding "in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby . . . the terms . . . are hardly convertible. They seem to mean different things. The latter are to be awarded 'in addition' to the former. Profits, doubtless, refer to what the defendant has gained by the unlawful use of the patented invention, and damages, to what the complainant has lost." Goodyear Dental Vulcanite Co. *v.* Van Antwerp, 10 Fed. Cas. No. 5,600, 2 Ban. & A. 252, 9 Off. Gaz. 497. "Profits may be defined to be the net gains of the infringer from the use of the patented invention, while damages are the losses sustained by the owner in consequence of the infringement." La Baw *v.* Hawkins, 14 Fed. Cas. No. 7,961, 1 Ban. & A. 561.

"Damages" is used synonymously in decrees in copyright and patent cases with "profits" which is the more accurrate and sufficient word. Social Register Assoc. *v.* Murphy, 129 Fed. 148.

56. Burdett *v.* Estey, 3 Fed. 566, 569, 19 Blatchf. 1 [*reversed* on other grounds in 109 U. S. 633, 3 S. Ct. 531, 27 L. ed. 1058].

Accounting, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 407, 430; DESCENT AND DISTRIBUTION, 14 Cyc. 116; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1137 text and notes 46, 49, 50; HOMESTEADS, 21 Cyc. 560 text and notes 43, 45; PARTITION, 30 Cyc. 232. As Subject of Assignment, see ASSIGNMENTS, 4 Cyc. 68–69 text and note 41. As Subject of Chattel Mortgage, as Potential Interest, In General, see CHATTEL MORTGAGES, 6 Cyc. 1045–1051. As Subject of Exemption, see EXEMPTIONS, 18 Cyc. 1432 text and note 12; HOMESTEADS, 21 Cyc. 496. As Subject of Insurance, see FIRE INSURANCE, 19 Cyc. 592, 840; MARINE INSURANCE, 26 Cyc. 564, 587, 671, 689, 697. As Subject of Perpetuity, see PERPETUITIES, 30 Cyc. 1481. As Subject of Taxation, see INTERNAL REVENUE, 22 Cyc. 1612–1613, 1614 text and note 68; TAXATION. Clear, see CLEAR, 7 Cyc. 187 text and note 7. Community of, see COMMUNITY, 8 Cyc. 398 note 35. Mesne — Defined, see MESNE PROFITS, 27 Cyc. 484; Subject to Recovery, see EJECTMENT, 15 Cyc. 200; ENTRY, WRIT OF, 15 Cyc. 1068; EQUITY, 16 Cyc. 53 note 18; TRESPASS TO TRY TITLE. Neat, see NEAT PROFITS, 29 Cyc. 376. Net — In General, see NET PROFITS, 29 Cyc. 672; As Basis of Wages, see MASTER AND SERVANT, 26 Cyc. 1035. Of Corporations, see CORPORATIONS, 10 Cyc. 546 text and note 14, 548 text and note 32, 550 text and note 45, 551, 556, 559, 561, 565; INSURANCE, 22 Cyc. 1402, 1419; INTERNAL REVENUE, 22 Cyc. 1612–1613, 1614 text and note 68; TAXATION. Of Decedent's Estate, see CORPORATIONS, 10 Cyc. 561; CURTESY, 12 Cyc. 1014 text and note 82; DESCENT AND DISTRIBUTION, 14 Cyc. 113, 180, 197; DOWER, 14 Cyc. 1004; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1137 text and notes 46, 49, 50. Of Homestead, see HOMESTEADS, 21 Cyc. 496, 560, 573. Of Joint Property, see JOINT TENANCY, 23 Cyc. 491. Of Married Person — Husband, see HUSBAND AND WIFE, 21 Cyc. 1646, 1657; Wife, see HUSBAND AND WIFE, 21 Cyc. 1166, 1390, 1405 note 25, 1412 text and note 87, 1429, 1538, 1646, 1657. Of Partners, see PARTNERSHIP, 30 Cyc. 356 text and note 38, 358 text and notes 53, 56, 366 text and note 88, 367 text and notes 90, 91, 369, 396 text and notes 3, 5, 451, 454 text and note 80, 459 text and note 13, 460 text and note 18. Of Patent Infringed, see PATENTS, 30 Cyc. 1021, 1024, 1025. Of Property Under — Attachment, see ATTACHMENT, 4 Cyc. 658 note 45; Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1050 text and note 46; Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 622, 628 text and notes 86, 87, 635; Judgment, When Not Included in Appeal-Bond, see APPEAL AND ERROR, 2 Cyc. 952–953 text and note 8, 959 note 38; Judicial Sale, see JUDICIAL SALES, 24 Cyc. 64, 72 text and note 34; Mortgage, see MORTGAGES, 27 Cyc. 1249, 1490, 1626, 1730, 1838; Partition, see PARTITION, 30 Cyc. 232. Of Voyage, see CHATTEL MORTGAGES, 6 Cyc. 1045 note 17; MARINE INSURANCE, 202, 564, 587, 671, 689, 697.)

PROFIT À PRENDRE. See EASEMENTS, 14 Cyc. 1142; PROFIT.

PROFITS À RENDRE. A term which includes rents and services.[57] (See PROFIT.)

PRO FORMA. As a matter of form.[58]

PROGRESS. A word which, when used in the phrase "in progress" implies the present condition of having been begun.[59]

57. See Hammond Nisi Prius 192 [*cited* in Bouvier L. Dict. *sub verb.* "*A rendre*" there defined: "(Fr. to render, to yield). "Which are to be paid or yielded;" Burrill L. Dict. *sub. verb.* "*A rendre*"].

58. Black L. Dict.

Examples.— "The ruling of the court, made somewhat *pro forma*" (Paine *v.* Hutchins, 49 Vt. 314, 318); "*pro forma* invoice" (U. S. *v.* Commercial Cable Co., 141 Fed. 473, 474); "committed to the marshal *pro formâ*, and then recommitted to 'Newgate'" (Taylor's Case, 3 East 232).

59. See *In re* Blodgett, 91 N. Y. 117, 122 [*quoted* in Smith *v.* New York, 32 Hun (N. Y.) 570, 572, 31 N. Y. Suppl. 783 (*affirmed* in 145 N. Y. 641, 41 N. E. 90)], where it is said: "The general and dominant idea was to do all of the city's work by the contract system, and that only was intended to be exempted which was already begun, which was 'in progress' on a system and in a mode of its own," construing Charter (N. Y. St. (1873) c. 335) § 91, excepting work in progress from the provision requiring public letting of contracts.

PROGRESSIVE TAX; PROGRESSIVE TAXATION. See TAXATION.

PRO HAC VICE. For this turn; for this one particular occasion.[60] (See JUDGES, 23 Cyc. 506.)

PROHIBETUR QUIS FACIAT IN SUO QUOD NOCERE POSSIT ALIENO. A maxim meaning "It is prohibited to do on one's own property that which may injure another's." [61]

PROHIBIT. To forbid by authority, to interdict, to hinder, to debar, to prevent, to preclude; [62] a word hardly differing from "prevent." [63] Power to pro-

"**In progress**" as used in N. Y. Charter (1873), § 91, does not apply to a separate section of construction work not connected with or dependent on any other part of the work, constituting an independent work by itself and not begun, although other sections of the same general plan of construction have been begun. *In re* Blodgett, 91 N. Y. 117, 122 [*followed* in Tripler *v.* New York, 139 N. Y. 1, 3, 34 N. E. 729, 125 N. Y. 617, 625, 26 N. E. 721]; *In re* Weil, 83 N. Y. 543, 549; Boas *v.* New York, 85 Hun (N. Y.) 311, 312, 32 N. Y. Suppl. 967; *In re* French, 30 Hun (N. Y.) 83 [*affirmed* in 93 N. Y. 634, and *cited* in Boas *v.* New York, 85 Hun (N. Y.) 311, 313, 32 N. Y. Suppl. 967].

60. Black L. Dict.

Examples.— "Under such a contract the carrier selected by the vendor is his agent to perform the contract to deliver, and the vessel in which the goods are carried is *pro hac vice* the vendor's vessel" (McNeal *v.* Braun, 53 N. J. L. 617, 627, 23 Atl. 687, 26 Am. St. Rep. 441); "if an individual assume a name for the purpose of making a written contract, and put that name to a contract with a view to bind himself, there seems to be no reason why courts should not consider the name thus assumed as his name, *pro hac vice*" (Grafton Bank *v.* Flanders, 4 N. H. 239, 247 [*quoted* in David *v.* Williamsburg City F. Ins. Co., 83 N. Y. 265, 269, 38 Am. Rep. 418]); "a motion for a new trial is *pro hac vice* a proceeding independent of the trial of the case on the merits" (State *v.* Lewis, etc., County Dist. Ct., 33 Mont. 138, 146, 82 Pac. 789).

61. Griffin *v.* Fairmont Coal Co., 59 W. Va. 480, 542, 53 S. E. 24, 2 L. R. A. N. S. 1115.

Applied in: Deane *v.* Clayton, 1 Moore C. P. 203, 210, 7 Taunt. 489, 18 Rev. Rep. 553, 2 E. C. L. 461 (where, after quoting from Jacob's L. Grammar the maxim, in conjunction with "*sic utere tuo, ut alienum non lædas*" it was said: "This principle is, in all its parts, restrictive of the use a man may make of his own property. It shews he is not to make 'any use' he pleases of it, but that he is so to use it, as not thereby to injure another he must look forward to the situation of others. . . . He is not to injure another in the enjoyment of his rights or property. Every case of (what is ordinarily called) nuisance . . . whether by setting up a noxious trade, a noisy occupation, or by erecting a building which darkens another's lights, is an instance fully within the rule, and governed by it"); Aldred's Case, 9 Coke 57*b*, 59*a*, 77 Eng. Reprint 816.

62. Nelson *v.* State, 17 Ind. App. 403, 46 N. E. 941, 942; Webster Int. Dict., where the first two definitions are numbered "1," the last four "2." See also People *v.* Gadway, 61 Mich. 285, 287, 28 N. W. 101, 1 Am. St. Rep. 578, where, in the victorious argument for the respondent, Webster's Dictionary is quoted as defining prohibited to "forbid,—to interdict by authority."

63. See *Ex p.* Florence, 78 Ala. 419, 424, where, after alluding to a power conferred by a city charter to "prevent" selling intoxicating liquors it is said: "In respect to express grants of other police powers, sometimes the word 'prohibit' is used; and it is insisted that this indicates a change of legislative intent. The two words appear to be used indiscriminately, and as synonyms, apparently to avoid too frequent repetition."

Compared with "prevent."— After discussing a synonymous use of the two words in a city charter conferring police power, it was said: "The rule is, that if there be a 'material' alteration in the words or phrases used, a different intent may be inferred. The difference between 'prevent' and 'prohibit' is not sufficiently material. If any difference, 'prevent' is the stronger word, conveying the idea of prohibition, and the use of the means necessary to give it effect." *Ex p.* Florence, 78 Ala. 419, 424.

Not synonymous with "restrain" see Gunnarssohn *v.* Sterling, 92 Ill. 569 [*distinguished* in State *v.* Fay, 44 N. J. L. 474, 476, where, by authority conferred on a city to restrain and prohibit tippling houses, "the legislature intended to give the corporation by the words 'restrain and prohibit'" two powers]; Emporia *v.* Volmer, 12 Kan. 622, 630 [*cited* in Stebbins *v.* Mayer, 38 Kan. 573, 577, 16 Pac. 745, where it is said to hold also that "prohibit" is not synonymous with "regulate"].

Not included within "regulate" see Miller *v.* Jones, 80 Ala. 89, 97; Cantril *v.* Sainer, 59 Iowa 26, 27, 12 N. W. 753 [*quoted* in *In re* Hauck, 70 Mich. 396, 407, 38 N. W. 269]. See also *infra*, text and note.

"Prohibited from running at large" in Kan. St. (1874) c. 128, in relation to certain animals, and "confined" in Kan. Gen. St. c. 105, art. 1, requiring that stock be confined in the night-time, mean substantially the same thing. St. Louis, etc., R. Co. *v.* Mossman, 30 Kan. 336, 341, 2 Pac. 146 [*quoted* in Osborne *v.* Kimball, 41 Kan. 187, 191, 21 Pac. 163]. As used in an ordinance prohibiting animals from running at large in the city, it does not include mere restriction and regulation, or permit the animals specified to run at large under certain conditions. Stebbins *v.* Mayer, 38 Kan. 573, 577, 16 Pac. 745.

hibit [64] does not embrace power to regulate,[65] and *vice versa*.[66] (See PROHIBITION *post* p. 632, and Cross-References Thereunder.)

Constituting a warranty.— In a policy of insurance, in a provision that a vessel "is prohibited from" a certain port, the word "prohibited" constitutes a warranty that the vessel shall not go to the place designated within the prescribed time. Odiorne *v.* New England Mut. Mar. Ins. Co., 101 Mass. 551, 553, 554, 3 Am. Rep. 401.

"Prohibited by law."— Where an act is made punishable but not otherwise expressly forbidden, by statute, it is sufficiently "prohibited" to satisfy the purpose of a statute forbidding the obstruction of the view of a saloon on days when "sales are prohibited by law." Nelson *v.* State, 17 Ind. App. 403, 46 N. E. 941, 943.

64. To be wielded only for suppression see State *v.* Fay, 44 N. J. L. 474, 476.

The power to prohibit includes power to hinder, interdict, prevent, and so to license, which in a degree hinders and prevents traffic in liquors (Keokuk *v.* Dressell, 47 Iowa 597, 599); includes power to prohibit conditionally (Cantini *v.* Tillman, 54 Fed. 969, 974).

Power to punish included in power "to prohibit and suppress" see Rogers *v.* People, 9 Colo. 450, 453, 12 Pac. 843, 59 Am. Rep. 146.

65. People *v.* Gadway, 61 Mich. 285, 28 N. W. 101, 1 Am. St. Rep. 578 [*followed* in *In re* Hauck, 70 Mich. 396, 407, 409, 38 N. W. 269]; State *v.* Burgdoerfer, 107 Mo. 1, 24, 17 S. W. 646, 14 L. R. A. 846; State *v.* Fay, 44 N. J. L. 474, 476.

66. Power to regulate does not embrace power to prohibit.— Sweet *v.* Wabash, 41 Ind. 7, 11 [*cited* in *In re* Hauck, 70 Mich. 396, 408, 38 N. W. 269]; State *v.* Mott, 61 Md. 297, 308, 48 Am. Rep. 105 [*cited* in *In re* Hauck, *supra*]; Bronson *v.* Oberlin, 41 Ohio St. 476, 483, 52 Am. Rep. 90 [*quoted* in *In re* Hauck, *supra*]. See also MUNICIPAL CORPORATIONS, 28 Cyc. 751.

Power to license and regulate not the power to prohibit see Merced County *v.* Fleming, 111 Cal. 46, 50, 43 Pac. 392.

PROHIBITION

EDITED BY JAMES C. MACRAE
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CROSS-REFERENCES

For Matters Relating to:

Mandamus Distinguished From Prohibition, see MANDAMUS, 26 Cyc. 143.

Mandamus to Set Aside Prohibition, see MANDAMUS, 26 Cyc. 226.

Power of Judge to Issue in Vacation, see JUDGES, 23 Cyc. 553.

Prevention of Crime, see CRIMINAL LAW, 12 Cyc. 973.

Preventive Relief by Injunction, see INJUNCTIONS, 22 Cyc. 724.

Prohibition of:

Alienation of Indian Land, see INDIANS, 22 Cyc. 135.

Combination in Restraint of Trade, see MONOPOLIES, 27 Cyc. 888.

Enactment of Certain Statutes, see CONSTITUTIONAL LAW, 8 Cyc. 695 *et seq.*

Gaming, see GAMING, 20 Cyc. 873.

Importation of Certain Goods, see CUSTOMS DUTIES, 12 Cyc. 1104.

Imprisonment For Debt, see ARREST, 3 Cyc. 899.

Keeping or Using Certain Articles, see EXPLOSIVES, 19 Cyc. 1; FIRE INSURANCE, 19 Cyc. 734; WEAPONS.

Limitation of Carrier's Liability, see CARRIERS, 6 Cyc. 385 *et seq.*

Liquor Traffic, see INTOXICATING LIQUORS, 23 Cyc. 43.

Lottery, see LOTTERIES, 25 Cyc. 1631.

Sale Other Than in Public Market, see MUNICIPAL CORPORATIONS, 28 Cyc. 734.

Taking or Killing Fish and Game, see FISH AND GAME, 19 Cyc. 986.

Prohibition to Court Martial, see ARMY AND NAVY, 3 Cyc. 861 note 2.

Writ of:

Certiorari, see CERTORARI, 6 Cyc. 730.

Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 279.

Injunction, see INJUNCTIONS, 22 Cyc. 724.

Mandamus, see MANDAMUS, 26 Cyc. 125.

Quo Warranto, see QUO WARRANTO.

I. DEFINITION AND GENERAL NATURE OF WRIT.

The writ of prohibition is an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal properly and technically denominated such, or to an inferior ministerial tribunal possessing incidentally judicial powers and known as a quasi-judicial tribunal, or even in extreme cases to a purely ministerial body, commanding it to cease abusing or usurping judicial functions.[1] A writ of prohibition is a prerogative writ to be used with great

1. See Brazie *v.* Fayette County Com'rs, 25 W. Va. 213, 219. See also Crittenden *v.* Booneville, (Miss. 1908) 45 So. 723; and cases cited *infra*, this note.

Other definitions are: "A writ issuing out of the Superior Courts, 'directed to the judge and parties of an inferior court, commanding them to cease from the prosecution of a suit, upon a suggestion, that either the cause, originally, or some collateral matter therein, does not belong to that jurisdiction, but to the cognizance of some other court." Camron *v.* Kenfield, 57 Cal. 550, 553; People *v.* San Francisco Election Com'rs, 54 Cal. 404, 406; Maurer *v.* Mitchell, 53 Cal. 289, 291; Washburn *v.* Phillips, 2 Metc. (Mass.) 296, 298; State *v.* Christ Church Parish Road Com'rs, 1 Mill (S. C.) 55, 57, 12 Am. Dec. 596; Bouvier L. Dict.

"An extraordinary writ issuing out of a court of superior jurisdiction, and directed to an inferior court, commanding it to cease entertaining jurisdiction in a cause or proceeding over which it has no control, or where such inferior tribunal assumes to entertain a cause over which it has jurisdiction, but goes beyond its legitimate powers, and transgresses the bounds prescribed to it by law." State *v.* Ward, 70 Minn. 58, 63, 72 N. W. 825; State *v.* Evans, 88 Wis. 255, 263, 60 N. W. 433.

caution and forbearance for the furtherance of justice, and for securing order and regularity in all the tribunals where there is no other regular and ordinary remedy.[2] The legitimate scope and purpose of the writ is to keep inferior courts within the limits of their own jurisdiction, and to prevent them from encroaching upon the jurisdiction of other tribunals.[3] The practice in issuing and enforcing the writ of prohibition is regulated by statute, but its nature, object, and function, as well as the facts governing the issue thereof, are regulated by the common law.[4]

II. Discretion as to Grant of Writ.

According to the weight of authority a writ of prohibition is not a writ of right, but of sound discretion, to be granted or withheld by the court exercising super-

"That process by which a superior court prevents an inferior court or tribunal from usurping or exercising a jurisdiction with which it has not been vested by law." State *v.* Weston County Dist. Ct., 5 Wyo. 227, 232, 39 Pac. 749.

"A writ to forbid any court to proceed in any case there depending, on the suggestion that the cognizance thereof belongs not to such court." Wharton L. Lex.

"A writ . . . to prevent the exercise by a tribunal possessing judicial powers of jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance." People *v.* Judge Detroit Super. Ct., (Mich. 1879) 2 N. W. 919; Thomson *v.* Tracy, 60 N. Y. 31, 37; People *v.* Doyle, 28 Misc. (N. Y.) 411, 418, 59 N. Y. Suppl. 959 [*affirmed* in 44 N. Y. App. Div. 402, 60 N. Y. Suppl. 1088 (*affirmed* in 162 N. Y. 659, 57 N. E. 1122)].

"A remedy provided by the common law to prevent the encroachment of jurisdiction." Hudson *v.* Judge Detroit Super. Ct., 42 Mich. 239, 248, 3 N. W. 850, 913.

Statutory definition.—A writ of prohibition is defined by statute in Kentucky to be an order of a circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction. Clark County Ct. *v.* Warner, 116 Ky. 801, 76 S. W. 828, 830, 25 Ky. L. Rep. 857; Gibbs *v.* Louisville, 95 Ky. 471, 474, 26 S. W. 186, 16 Ky. L. Rep. 46; Thomas *v.* Davis, 110 S. W. 408, 33 Ky. L. Rep. 569.

Under Ida. Rev. St. (1887) § 4994, the writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person where such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. Bragaw *v.* Gooding, 14 Ida. 288, 94 Pac. 438.

As action or special proceeding see Actions, 1 Cyc. 724.

As collateral proceeding.—The remedy by the writ of prohibition is not a part or continuation of the prohibited proceeding, by removing it from one court to another for the purpose of adjudication in the latter; but it is wholly collateral to that proceeding, and is intended to arrest it and prevent its being further prosecuted in a court having no jurisdiction. It is in effect a proceeding between two courts, a superior and an inferior, and is the means whereby the superior exercises its due superintendence over the inferior, and keeps it within the limits and bounds of the jurisdiction prescribed to it by law. Mayo *v.* James, 12 Gratt. (Va.) 17.

As adequate remedy preventing injunction see Injunctions, 22 Cyc. 775.

Distinguished from mandamus and procedendo see Yates *v.* People, 6 Johns. (N. Y.) 337. See also Mandamus, 26 Cyc. 143.

2. Sherwood *v.* New England Knitting Co., 68 Conn. 543, 37 Atl. 388. See also Priddie *v.* Thompson, 82 Fed. 186.

Origin of writ.—"This writ is of English origin, being one of the great common-law prerogative writs long in use. It is known and recognized as a judicial remedy in most of the states, yet is but little regulated, so far as we are aware, by a statute, the English precedents and practice being very generally followed in this country. In early times, in England, the chief use of prohibitions is said to have been to restrain the ecclesiastical courts from interfering in matters which were properly subject to the jurisdiction of the courts of common law; and the clergy complained earnestly that the common-law courts extended their interference with the spiritual courts by means of their prohibitions too far. Power to issue it was vested not only in the king's bench, but also in the courts of chancery, exchequer, and common pleas; and it might issue to any inferior court of common law, or to the courts of the counties palatine, to the county courts or courts baron, or to the courts christian or ecclesiastical, the university courts, the court of chivalry or the court of admiralty, when they were about to act in any matter not within their jurisdiction, or were to transgress the bounds prescribed to them by the laws of the realm." Abbott L. Dict.

For a complete history of the province of the writ of prohibition at common law see *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

3. State *v.* Reynolds, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 15 L. R. A. N. S. 963. See also *infra*, IV, C, 1; IV, C, 9, a *et seq.*

The function of the writ is to arrest proceedings without or in excess of jurisdiction. Hindman *v.* Colvin, 46 Wash. 317, 89 Pac. 894. See also *infra*, IV, C, 1.

When writ will lie see *infra*, IV.

4. People *v.* Wyatt, 186 N. Y. 383, 79

visory control, according to the nature and circumstances of each particular case.[5] It has been held in some cases, however, that the writ is a matter of right where the inferior court had no jurisdiction originally,[6] or when it is invoked by a party aggrieved, who brings himself clearly within the law.[7] In any event the issue of the writ is a matter of discretion where there is another legal remedy,[8] where the question of jurisdiction is doubtful or depends upon facts which are not made matter of record,[9] where the application for the writ is made by a stranger,[10] or where want of jurisdiction of the inferior court does not appear on the face of the proceedings and the application for prohibition is not made until after judgment or verdict in that court.[11]

III. Acts and Proceedings Subject to Writ.

A. Of Inferior Judicial Tribunals Generally. The writ will lie only to restrain the unlawful exercise of judicial functions by an inferior tribunal,[12] acts

N. E. 330 [*affirming* 113 N. Y. App. Div. 111, 99 N. Y. Suppl. 114].

Proceedings see *infra*, VI, B.

5. *Alabama.*— *Ex p.* Smith, 23 Ala. 94.

Arkansas.— Jacks *v.* Adair, 33 Ark. 161.

Colorado.— People *v.* Lake County Ct., 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850; McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516.

Louisiana.— State *v.* Houston, 35 La. Ann. 538; State *v.* Judge Twenty-First Judicial Dist. Ct., 33 La. Ann. 1284; State *v.* Monroe, 33 La. Ann. 923; State *v.* Judge Orleans Parish Fourth Dist. Ct., 21 La. Ann. 123; State *v.* First Dist. Judge, 19 La. 174.

Michigan.— Hudson *v.* Judge Detroit Super. Ct., 42 Mich. 239, 3 N. W. 850, 913.

Minnesota.— State *v.* Ward, 70 Minn. 58, 72 N. W. 825; State *v.* St. Paul Municipal Ct., 26 Minn. 162, 2 N. W. 166.

Missouri.— Davison *v.* Hough, 165 Mo. 561, 65 S. W. 731; State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; State *v.* Levens, 32 Mo. App. 520; State *v.* Seay, 23 Mo. App. 623.

New York.— People *v.* Wyatt, 186 N. Y. 383, 79 N. E. 330; People *v.* Trial Term Part 1, 184 N. Y. 30, 76 N. E. 732; People *v.* Westbrook, 89 N. Y. 152; People *v.* Wood, 21 N. Y. App. Div. 245, 47 N. Y. Suppl. 676; Sweet *v.* Hulbert, 51 Barb. 312; *Ex p.* Braudlacht, 2 Hill 367, 38 Am. Dec. 593; People *v.* Kings County Ct., 23 N. Y. Wkly. Dig. 137.

North Carolina.— Holly Shelter R. Co. *v.* Newton, 133 N. C. 136, 45 S. E. 549, 98 Am. St. Rep. 701.

North Dakota.— Zinn *v.* Barnes County Dist. Ct., (1908) 114 N. W. 475.

South Carolina.— Kinloch *v.* Harvey, Harp. 508; Gray *v.* Magistrates, etc., Ct., 3 McCord 175; State *v.* Hudnall, 2 Nott & M. 419.

England.— Clay *v.* Snelgrave, 1 Ld. Raym. 576, 91 Eng. Reprint 1285; St. David *v.* Lucy, 1 Ld. Raym. 539, 91 Eng. Reprint 1260.

See 40 Cent. Dig. tit. "Prohibition," § 3.

6. Crowned King Min. Co. *v.* Fourth Judicial Dist. Ct., 7 Ariz. 263, 64 Pac. 439; *In re* New York, etc., Steamship Co., 155 U. S. 523, 15 S. Ct. 183, 39 L. ed. 246; *In re* Rice, 155 U. S. 396, 15 S. Ct. 149, 39 L. ed. 198.

7. Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; Burder *v.* Veley, 12 A. & E. 233, 40 E. C. L. 123; Forster *v.* Forster, 4 B. & S. 187, 116 E. C. L. 187.

8. Crowned King Min. Co. *v.* Fourth Judicial Dist. Ct., 7 Ariz. 263, 64 Pac. 439; *In re* New York, etc., Steamship Co., 155 U. S. 523, 15 S. Ct. 183, 39 L. ed. 246; *In re* Rice, 155 U. S. 396, 15 S. Ct. 149, 39 L. ed. 198.

Adequate remedy existing see *infra*, IV, D.

9. Crowned King Min. Co. *v.* Fourth Judicial Dist. Ct., 7 Ariz. 263, 64 Pac. 439; *In re* Huguley Mfg. Co., 184 U. S. 297, 22 S. Ct. 455, 46 L. ed. 549; *In re* New York, etc., Steamship Co., 155 U. S. 523, 15 S. Ct. 183, 39 L. ed. 246; *In re* Rice, 155 U. S. 396, 15 S. Ct. 149, 39 L. ed. 198; Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601.

Want or excess of jurisdiction see *infra*, IV, C, 1.

10. Crowned King Min. Co. *v.* Fourth Judicial Dist. Ct., 7 Ariz. 263, 64 Pac. 439; Kilty *v.* Railroad Com'rs, 184 Mass. 310, 68 N. E. 236; *In re* New York, etc., Steamship Co., 155 U. S. 523, 15 S. Ct. 183, 39 L. ed. 246; *In re* Rice, 155 U. S. 396, 15 S. Ct. 149, 39 L. ed. 198; London *v.* Cox, L. R. 2 H. L. 239; Forster *v.* Forster, 4 B. & S. 187, 116 E. C. L. 187.

Parties see *infra*, VI, B, 2.

Who entitled to writ see *infra*, V.

11. *In re* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232; Maxwell *v.* Clark, 10 Manitoba 406.

After judgment or sentence see *infra*, VI, B, 6, b, c.

12. *Arkansas.*— *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

Idaho.— See Bragaw *v.* Gooding, 14 Ida. 288, 94 Pac. 438.

Kentucky.— Daviess County Common Schools *v.* Taylor, 105 Ky. 387, 49 S. W. 38, 20 Ky. L. Rep. 1241.

Minnesota.— State *v.* Simons, 32 Minn. 540, 21 N. W. 750. See also State *v.* Pees, 33 Minn. 81, 21 N. W. 860.

Missouri.— State *v.* Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; Harrison County School Dist. No. 6 *v.* Burris, 84 Mo. App. 654.

New York.— People *v.* Albany County, 63

of an administrative or ministerial [13] or of a legislative [14] character not falling within its province.

B. Of Public Boards — 1. Acting in Quasi-Judicial Capacity. A public board acting in a quasi-judicial character becomes an inferior tribunal amenable to the writ whenever it exceeds its authority or exercises an authority which it does not possess.[15]

2. Having Power to Legislate. But the writ will not lie against a public board having the power to legislate for the purpose of arresting the progress of any legislation pending therein.[16]

How. Pr. 411; People *v.* Cooper, 57 How. Pr. 416.

South Carolina.— State *v.* Simons, 2 Speers 761; State *v.* Christ Church Parish Road Com'rs, 1 Mill 55, 12 Am. Dec. 596.

West Virginia.— Brown *v.* Randolph County Election Canvassers, 45 W. Va. 826, 32 S. E. 168; Fleming *v.* Commissioners, 31 W. Va. 608, 8 S. E. 267; Brazie *v.* Fayette County Com'rs, 25 W. Va. 213.

England.— Edward's Case, 13 Coke 9, 77 Eng. Reprint 1421; Prohibition, 12 Coke 76, 77 Eng. Reprint 1354.

Canada.— *In re* Hickson, 17 Can. L. T. Occ. Notes 303; *Ex p.* Baird, 29 N. Brunsw. 162.

See 40 Cent. Dig. tit. "Prohibition," § 20.

Tribunal relatively inferior.—The writ may go from the supreme court of a territory to a district court thereof, the latter, although not technically an inferior court, being relatively inferior to the former. Lincoln-Lucky, etc., Min. Co. *v.* First Judicial Dist. Ct., 7 N. M. 486, 38 Pac. 580.

13. *Alabama.*— Goodwin *v.* State, 145 Ala. 536, 40 So. 122; State *v.* Bradley, 134 Ala. 549, 33 So. 339; *Ex p.* State, 89 Ala. 177, 8 So. 74; Atkins *v.* Siddons, 66 Ala. 453.

California.— Spring Valley Water Works *v.* Bartlett, 63 Cal. 245; People *v.* Board of Election Com'rs, 54 Cal. 404.

Colorado.— People *v.* Lake County Dist. Ct., 6 Colo. 534.

Connecticut.—La Croix *v.* Fairfield County Com'rs, 49 Conn. 591.

Georgia.—Seymour *v.* Almond, 75 Ga. 112; Cody *v.* Lennard, 45 Ga. 85.

Idaho.— Stein *v.* Morrison, 9 Ida. 426, 75 Pac. 246; Miller *v.* Davenport, 8 Ida. 593, 70 Pac. 610.

Louisiana.— State *v.* Spearing, 31 La. Ann. 122.

Minnesota.— Dayton *v.* Paine, 13 Minn. 493; Home Ins. Co. *v.* Flint, 13 Minn. 228.

Mississippi.— Clayton *v.* Heidelberg, 9 Sm. & M. 623.

Missouri.— State *v.* Goodier, 195 Mo. 551, 93 S. W. 928; Kalbfell *v.* Wood, 193 Mo. 675, 92 S. W. 230; Hockaday *v.* Newsom, 48 Mo. 196; Vitt *v.* Owens, 42 Mo. 512; Casby *v.* Thompson, 42 Mo. 133; West *v.* Justices Clark County Ct., 41 Mo. 44; State *v.* Laughlin, 7 Mo. App. 529.

New York.— People *v.* Milliken, 185 N. Y. 35, 77 N. E. 872; Thomson *v.* Tracy, 60 N. Y. 31; People *v.* Doyle, 44 N. Y. App. Div. 402, 60 N. Y. Suppl. 1088; People *v.* New York Excise Com'rs, 1 N. Y. Civ. Proc. 244; Norton *v.* Dowling, 46 How. Pr. 7; *Ex p.* Braudlacht, 2 Hill 367, 38 Am. Dec. 593; *In re* Mt. Morris Square, 2 Hill 14; People *v.* Queens County, 1 Hill 195.

South Carolina.— Grier *v.* Taylor, 4 McCord 206, 17 Am. Dec. 739.

Utah.— People *v.* House, 4 Utah 369, 10 Pac. 838.

Virginia.— Burch *v.* Hardwicke, 23 Gratt. 51.

Washington.— State *v.* Ross, 39 Wash. 399, 81 Pac. 865; Winsor *v.* Bridges, 24 Wash. 540, 64 Pac. 780; State *v.* State Land Com'rs, 23 Wash. 700, 62 Pac. 532.

West Virginia.— Campbell *v.* Doolittle, 58 W. Va. 317, 52 S. E. 260; Virginia Pocahontas Coal Co. *v.* McDowell County Ct., 58 W. Va. 86, 51 S. E. 1; Williamson *v.* Mingo County Ct., 56 W. Va. 38, 48 S. E. 835; Davis Dist. Bd. of Education *v.* Holt, 54 W. Va. 167, 46 S. E. 134; Hassinger *v.* Holt, 47 W. Va. 348, 34 S. E. 728; Bloxton *v.* McWhorter, 46 W. Va. 32, 32 S. E. 1004; Norfolk, etc., R. Co. *v.* Pinnacle Coal Co., 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414; Fleming *v.* Commissioners, 31 W. Va. 608, 8 S. E. 267.

Wisconsin.— State *v.* Gary, 33 Wis. 93; State *v.* Gay, 31 Wis. 93.

Wyoming.— Dobson *v.* Westheimer, 5 Wyo. 34, 36 Pac. 626.

United States.— Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601; U. S. *v.* Berry, 4 Fed. 779, 2 McCrary 58.

Canada.— Godson *v.* Toronto, 18 Can. Sup. Ct. 36; Reg. *v.* Coursey, 27 Ont. 181.

See 40 Cent. Dig. tit. "Prohibition," § 32.

Issuing execution.— Prohibition will not be granted to restrain the issuing of an execution to an inferior court, since the act is a ministerial one. State *v.* Houston, 35 La. Ann. 236; *Ex p.* Braudlacht, 2 Hill (N. Y.) 367, 38 Am. Dec. 593.

14. Mealing *v.* Augusta, Dudley (Ga.) 221.

15. Harriman *v.* Wald County Com'rs, 53 Me. 83; Connecticut River R. Co. *v.* Franklin County Com'rs, 127 Mass. 50, 34 Am. Rep. 338; Speed *v.* Detroit, 98 Mich. 360, 57 N. W. 406, 39 Am. St. Rep. 555, 22 L. R. A. 842. See also Bragaw *v.* Gooding, 14 Ida. 288, 94 Pac. 438. *Compare* Thomas *v.* Thompson, 102 S. W. 849, 31 Ky. L. Rep. 524.

16. Washington County Com'rs *v.* State, 151 Ala. 561, 44 So. 465; Spring Valley Water Works *v.* San Francisco, 52 Cal. 111; Patton *v.* Stephens, 14 Bush (Ky.) 324; McWhorter *v.* Dorr, 57 W. Va. 608, 50 S. E. 838, 110 Am. St. Rep. 815.

3. **Performing Purely Minsterial Duties.** Nor will the writ lie to restrain such a board from performing purely ministerial or executive acts.[17]

C. Of Public Officers — 1. In General. Prohibition will not lie to restrain a public officer from performing purely ministerial duties,[18] or from performing judicial acts within his jurisdiction.[19] But any abuse or usurpation of judicial power on the part of a public officer acting in a judicial or quasi-judicial character will be restrained by prohibition.[20]

2. **Levy and Assessment of Taxes.** The common-law writ of prohibition will not lie to restrain the levy or collection by a public officer of an illegal assessment or levy of taxes.[21]

D. Of Private Persons. Where the unlawful thing done or proposed to be done is not being done or proposed to be done by a judicial or quasi-judicial tribunal, but by a private individual, prohibition will not lie.[22]

IV. When Writ Will Lie.

A. In General. A writ of prohibition will lie only in cases of manifest necessity, and after a fruitless application for relief to the inferior tribunals.[23] It is

17. Washington County *v.* State, 151 Ala. 561, 44 So. 465; State *v.* Hawkins, 130 Mo. App. 41, 109 S. W. 77; State *v.* State Land Commission, 23 Wash. 700, 63 Pac. 532.

18. Camron *v.* Kenfield, 57 Cal. 550; Higgins *v.* Talty, 157 Mo. 280, 57 S. W. 724; Casby *v.* Thompson, 42 Mo. 133; People *v.* Nussbaum, 32 Misc. (N.Y.) 1, 66 N. Y. Suppl. 129 [*affirmed* in 168 N. Y. 89, 61 N. E. 118 (*reversing* 55 N. Y. App. Div. 245, 67 N. Y. Suppl. 492 upon other grounds)]; *Re* North Perth, 21 Ont. 538 [not *following Re* Simmons, 12 Ont. 505].

19. Chapman *v.* Stoneman, 63 Cal. 490; People *v.* Doyle, 44 N. Y. App. Div. 402, 60 N. Y. Suppl. 1088 [*affirmed* in 162 N. Y. 659, 57 N. E. 1122]; *Re* North Perth, 21 Ont. 538 [not *following Re* Simmons, 12 Ont. 505].

20. People *v.* Sherman, 66 N. Y. App. Div. 231, 72 N. Y. Suppl. 718 [*affirmed* in 171 N. Y. 684, 64 N. E. 1124]; People *v.* Cooper, 57 How. Pr. (N. Y.) 416; State *v.* Lancaster Dist. Road Com'rs, 3 Hill (S. C.) 314; Lynah *v.* St. Paul's Parish Road Com'rs, Harp. (S. C.) 336; Harrington *v.* Newberry Dist. Road Com'rs, 2 McCord (S. C.) 400; Gills *v.* Brown, 1 Mill (S. C.) 230; State *v.* Christ Church Parish Road Com'rs, 1 Mill (S. C.) 55, 12 Am. Dec. 596. See also Bragaw *v.* Gooding, 14 Ida. 288, 94 Pac. 438. *Compare Re* Simmons, 12 Ont. 505 [*criticized* in *Re* North Perth, 21 Ont. 538]. See also *infra*, text and notes 30–32.

To prevent a court commissioner from proceeding without jurisdiction, a writ of prohibition or other appropriate common-law writ should be used. Potter *v.* Frohbach, 133 Wis. 1, 112 N. W. 1087.

21. Coronado *v.* San Diego, 97 Cal. 440, 32 Pac. 518; Hobart *v.* Tillson, 66 Cal. 210, 5 Pac. 83; Farmers' Co-Operative Union *v.* Thresher, 62 Cal. 407; Le Conte *v.* Berkeley, 57 Cal. 269; Cody *v.* Lennard, 45 Ga. 85; Talbot *v.* Dent, 9 B. Mon. (Ky.) 526. But see People *v.* Works, 7 Wend. (N. Y.) 486; State *v.* Graham, 2 Hill (S. C.) 457; State *v.* Burger, 1 McMull. (S. C.) 410.

Under statutory provisions in Kentucky the collector of Louisville may be prevented by prohibition from collecting an illegal city tax. Talbot *v.* Dent, 9 B. Mon. (Ky.) 526.

22. Southern R. Co. *v.* Birmingham, etc., R. Co., 131 Ala. 663, 29 So. 191; State *v.* King County Super. Ct. 13 Wash. 226, 43 Pac. 43; Moore *v.* Colt, 55 W. Va. 507, 47 S. E. 251. But see Koury *v.* Castillo, (N. M. 1905) 79 Pac. 293. See also Bragaw *v.* Gooding, 14 Ida. 288, 94 Pac. 438.

Except so far as it is authorized by statute courts do not exercise jurisdiction in matters which are purely political pertaining to the management and proceedings of a political party. Kump *v.* McDonald, (W. Va. 1908) 61 S. E. 909. *Compare Re* North Perth, 21 Ont. 538 [*criticizing Re* Simmons, 12 Ont. 505].

Committee of political party.—A writ of prohibition will not lie against the executive committee of a political party while canvassing returns of a primary election for nomination to office to prohibit it from recounting the ballots. Kump *v.* McDonald, (W. Va. 1908) 61 S. E. 909.

23. *Alabama.*— *Ex p.* Greene, 29 Ala. 52.

Louisiana.— State *v.* Mayer, 52 La. Ann. 255, 26 So. 823; State *v.* Rightor, 40 La. Ann. 837, 6 So. 102; State *v.* Falls, 32 La. Ann. 553; State *v.* Judge of Fourth Judicial Dist., 10 Rob. 169; State *v.* Judge New Orleans Prob. Ct., 4 Rob. 48. See also *In re* Theriot, 117 La. 532, 40 So. 93.

Mississippi.— Crittenden *v.* Booneville, (1908) 45 So. 723.

Montana.— State *v.* Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219.

New York.— People *v.* Westbrook, 89 N. Y. 152; People *v.* McCue, 37 Misc. 741, 76 N. Y. Suppl. 485 [*affirmed* in 74 N. Y. App. Div. 302, 77 N. Y. Suppl. 451].

North Carolina.— State *v.* Allen, 24 N. C. 183.

West Virginia.— Johnston *v.* Hunter, 50 W. Va. 52, 40 S. E. 448.

See 40 Cent. Dig. tit. "Prohibition," § 66; and *infra*, VI, B, 1; VI, B, 3, a, (II).

At common law, the rule was that **no pro-**

properly issued only in cases of extreme necessity.[24] It will not be granted where a greater injustice would be done by its issue than would be prevented by its operation,[25] or where the legal right is doubtful and the remedy would involve public inconvenience.[26]

B. When Ineffectual or Not Beneficial. Since the office of the writ is primarily preventive, it will not be granted when the act sought to be prevented is already done,[27] even where such act has been done pending the application for the writ;[28] but where the act sought to be prohibited is not a full, complete, and accomplished judicial act, the writ will lie.[29]

hibition lay to an inferior court in a cause arising out of their jurisdiction, until that matter had been pleaded in the inferior court and the plea refused. *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; Marriott *v.* Shaw, Comyns 274, 92 Eng. Reprint 1069; Cook *v.* Licence, 1 Ld. Raym. 346, 91 Eng. Reprint 1128; Mendyke *v.* Stint, 2 Mod. 272, 86 Eng. Reprint 1067; Waineman *v.* Smith, 1 Sid. 464, 82 Eng. Reprint 1219.

24. Crittenden *v.* Booneville, (Miss. 1908) 45 So. 723.

25. People *v.* McCue, 74 N. Y. App. Div. 302, 77 N. Y. Suppl. 451.

26. People *v.* Ulster County, 31 How. Pr. (N. Y.) 237. *Compare* State *v.* Cass County Dist. Ct., (N. D. 1908) 115 N. W. 675, 15 L. R. A. N. S. 331.

27. *Arizona.*— Sanford *v.* Pima County Dist. Ct., 8 Ariz. 256, 71 Pac. 906.

California.— Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; Hull *v.* Shasta County Super. Ct., 63 Cal. 179; Blade *v.* Fresno County Super. Ct., 60 Cal. 290.

Georgia.— Pope *v.* Colbert, 95 Ga. 791, 22 S. E. 703.

Idaho.— Bellevue Water Co. *v.* Stockslager, 4 Ida. 636, 43 Pac. 568.

Indiana.— Blufflon *v.* Silver, 63 Ind. 262.

Louisiana.— State *v.* Foster, 111 La. 241, 35 So. 536; State *v.* St. Paul, 104 La. 280, 29 So. 112; State *v.* Ellis, 50 La. Ann. 361, 24 So. 25; State *v.* Potts, 50 La. Ann. 109, 23 So. 97; State *v.* Judges Cir. Ct., 48 La. Ann. 1166, 20 So. 678; State *v.* Perrault, 48 La. Ann. 474, 19 So. 455; State *v.* Judge New Orleans Second Recorder's Ct., 44 La. Ann. 1093, 11 So. 872; Holden *v.* Judge Second City Ct., 35 La. Ann. 1110.

Minnesota.— Dayton *v.* Paine, 13 Minn. 493.

Missouri.— State *v.* Ryan, 180 Mo. 32, 79 S. W. 429; Klingelhoefer *v.* Smith, 171 Mo. 455, 71 S. W. 1008; State *v.* Burckhartt, 87 Mo. 533.

New Mexico.— *In re* Roe Chung, 9 N. M. 136, 49 Pac. 952.

New York.— People *v.* Excise Com'rs, 61 How. Pr. 514; People *v.* New York Excise Com'rs, 1 N. Y. Civ. Proc. 244.

South Carolina.— State *v.* Stackhouse, 14 S. C. 417.

Utah.— Brooks *v.* Warren, 5 Utah 89, 12 Pac. 659.

Washington.— State *v.* King County Super. Ct., 13 Wash. 226, 43 Pac. 43; State *v.* Yakima County Super. Ct., 4 Wash. 30, 29 Pac. 764; State *v.* Whatcom County Super. Ct., 2 Wash. 9, 25 Pac. 1007.

West Virginia.— Williamson *v.* Mingo County Ct., 56 W. Va. 38, 48 S. E. 835; Hawk's Nest *v.* Fayette County Ct., 55 W. Va. 689, 48 S. E. 205; King *v.* Doolittle, 51 W. Va. 91, 41 S. E. 145; Haldeman *v.* Davis, 28 W. Va. 324.

Wyoming.— State *v.* Ausherman, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548. See also State *v.* Weston County Dist. Ct., 5 Wyo. 227, 39 Pac. 749.

United States.— *Ex p.* Joins, 191 U. S. 93, 24 S. Ct. 27, 48 L. ed. 110; U. S. *v.* Hoffman, 4 Wall. 158, 18 L. ed. 354.

England.— Denton *v.* Marshall, 1 H. & C. 654, 9 Jur. N. S. 337, 32 L. J. Exch. 89, 7 L. T. Rep. N. S. 689, 11 Wkly. Rep. 268.

See 40 Cent. Dig. tit. "Prohibition," § 62.

28. Bellevue Water Co. *v.* Stockslager, 4 Ida. 636, 43 Pac. 568; U. S. *v.* Hoffman, 4 Wall. (U. S.) 158, 18 L. ed. 354.

An order of the supreme court dissolving an injunction, and determining the principal case by affirming the judgment of a lower court, accomplishes all that is sought by a writ of prohibition against another court in a collateral proceeding in respect to the same subject-matter. People *v.* Fourth Judicial Dist. Ct., 7 Colo. 462, 4 Pac. 745.

29. *California.*— Crosby *v.* Los Angeles County Super. Ct., 110 Cal. 45, 42 Pac. 460; Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; Primm *v.* Shasta County Super. Ct., 3 Cal. App. 208, 84 Pac. 786.

Colorado.— People *v.* Denver Dist. Ct., 33 Colo. 293, 80 Pac. 908.

Louisiana.— State *v.* Lee, 106 La. 400, 31 So. 14.

Missouri.— State *v.* Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; State *v.* Rombauer, 105 Mo. 103, 16 S. W. 695; State *v.* St. Louis Ct. of Appeals, 97 Mo. 276, 10 S. W. 874.

West Virginia.— Ingersoll *v.* Buchanan, 1 W. Va. 181.

See 40 Cent. Dig. tit. "Prohibition," § 62.

Stipulating to discontinue proceedings sought to be restrained.—An application to one of the justices of the supreme court for writs of certiorari and prohibition directed to the recorder of the city of New Orleans will be dismissed, but without prejudice, when the recorder, in answer to a rule to show cause why the writs should not issue, announces his intention to discontinue the proceedings

C. Want or Excess of Jurisdiction — 1. In General. Although it has been held that the writ will not lie where an inferior tribunal, in a cause properly within its jurisdiction, purposes to exceed its powers,[30] but only to restrain such a tribunal from usurping jurisdiction,[31] yet the rule supported by the great weight of authority is that the writ will lie in all cases either of abuse or usurpation of jurisdiction by an inferior tribunal.[32] And this rule applies to a court of equity as well

sought to be prohibited. State *v.* Marmouget, 104 La. 1, 28 So. 920.

30. Denning *v.* Moscow, 11 Ida. 415, 83 Pac. 339; State *v.* St. Paul, 104 La. 280, 29 So. 112; State *v.* McDowell, 43 La. Ann. 1193, 10 So. 174; State *v.* Holmes, 43 La. Ann. 1185, 10 So. 172; State *v.* Judge Twenty-First Judicial Dist. Ct., 33 La. Ann. 1284; State *v.* Monroe, 33 La. Ann. 923; State *v.* Skinner, 32 La. Ann. 1092; State *v.* Judge Super. Dist. Ct., 29 La. Ann. 360; State *v.* Judge New Orleans Fourth Dist. Ct., 20 La. Ann. 177; State *v.* Judge Third Dist. Ct., 14 La. Ann. 504; North Yakima *v.* Kings County Super. Ct., 4 Wash. 655, 30 Pac. 1053; Morrison *v.* U. S. District Ct., Southern Dist. New York, 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60.

31. State *v.* St. Paul, 104 La. 280, 29 So. 112; State *v.* Judge Twenty-Sixth Judicial Dist. Ct., 34 La. Ann. 782. See also State *v.* New Orleans Third Dist. Ct., 16 La. Ann. 185.

32. *Alabama.*— *Ex p.* State, 150 Ala. 489, 43 So. 490, 10 L. R. A. N. S. 1129; *Ex p.* Brown, 58 Ala. 536; *Ex p.* Hamilton, 51 Ala. 62; *Ex p.* Smith, 34 Ala. 455; *Ex p.* Smith, 23 Ala. 94.

Arkansas.— Russell *v.* Jacoway, 33 Ark. 191; *Ex p.* Little Rock, 26 Ark. 52. See Hanger *v.* Keating, 26 Ark. 51.

California.— Brown *v.* Moore, 61 Cal. 432; Coker *v.* Colusa County Super. Ct., 58 Cal. 177; Maurer *v.* Mitchell, 53 Cal. 289; Beaulieu Vineyard *v.* Napa County Super. Ct., 6 Cal. App. 242, 91 Pac. 1015; Dakan *v.* Santa Cruz Super. Ct., 2 Cal. App. 52, 82 Pac. 1129; Raine *v.* Lawlor, 1 Cal. App. 483, 82 Pac. 688.

Colorado.— People *v.* Second Judicial Dist. Ct., 29 Colo. 83, 66 Pac. 1068; People *v.* Boulder County Dist. Ct., 28 Colo. 161, 63 Pac. 321; People *v.* Lake County Dist. Ct., 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850.

District of Columbia.— U. S. *v.* Scott, 25 App. Cas. 88.

Florida.— State *v.* White, 40 Fla. 297, 24 So. 160; Sherlock *v.* Jacksonville, 17 Fla. 93.

Idaho.— Gunderson *v.* Fourth Judicial Dist. Ct., 14 Ida. 478, 94 Pac. 166; Bragaw *v.* Gooding, 14 Ida. 288, 94 Pac. 438.

Massachusetts.— Tehan *v.* Justices Boston Municipal Ct., 191 Mass. 92, 77 N. E. 313; Washburn *v.* Phillips, 2 Metc. 296.

Michigan.— Hudson *v.* Judge Detroit Super. Ct., 42 Mich. 239, 3 N. W. 850, 913.

Minnesota.— State *v.* Craig, 100 Minn. 352, 111 N. W. 3; Prignitz *v.* Fischer, 4 Minn. 366.

Missouri.— State *v.* Fort, 210 Mo. 512, 109 S. W. 737; State *v.* Stobie, 194 Mo. 14, 92 S. W. 191; State *v.* Wood, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596; State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341; State *v.* Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; State *v.* Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; Carter *v.* Bolster, 122 Mo. App. 135, 98 S. W. 105; State *v.* Cline, 85 Mo. App. 628; Roper *v.* Cady, 4 Mo. App. 593. See also State *v.* Reynolds, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 15 L. R. A. N. S. 963.

New York.— People *v.* McAdam, 84 N. Y. 287; Thomson *v.* Tracy, 60 N. Y. 31; Appo *v.* People, 20 N. Y. 531; People *v.* Davy, 105 N. Y. App. Div. 598, 94 N. Y. Suppl. 1037 [*affirmed* in 184 N. Y. 30, 76 N. E. 732]; People *v.* Russel, 19 Abb. Pr. 136; People *v.* Parker, 63 How. Pr. 3; People *v.* Grogan, 3 N. Y. Cr. 335.

North Dakota.—State *v.* Cass County Dist. Ct., (1908) 115 N. W. 675, 5 L. R. A. N. S. 331; Zinn *v.* Barnes County Dist. Ct., (1908) 114 N. W. 475.

Rhode Island.— Taylor *v.* Bliss, 26 R. I. 16, 57 Atl. 939.

South Carolina.—State *v.* Hopkins, Dudley 101; State *v.* Whyte, 2 Nott & M. 174.

Vermont.— Wilkins *v.* Stiles, 75 Vt. 42, 52 Atl. 1048, 98 Am. St. Rep. 804. See Bullard *v.* Thorpe, 66 Vt. 599, 30 Atl. 36, 44 Am. St. Rep. 867, 25 L. R. A. 605.

Washington.— Hindman *v.* Colvin, 46 Wash. 317, 89 Pac. 894.

West Virginia.— Powhatan Coal, etc., Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. N. S. 1225; Black Fork Dist. Bd. of Education *v.* Holt, 51 W. Va. 435, 41 S. E. 337; Johnston *v.* Hunter, 50 W. Va. 52, 40 S. E. 448; Norfolk, etc., R. Co. *v.* Pinnacle Coal Co., 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414; Flemming *v.* Com'rs, 31 W. Va. 608, 8 S. E. 267; McConiha *v.* Guthrie, 21 W. Va. 134.

England.— Toft *v.* Rayner, 5 C. B. 162, 57 E. C. L. 162; Leman *v.* Goulty, 3 T. R. 3, 1 Rev. Rep. 624; Darby *v.* Cosens, 1 T. R. 552.

Canada.— Wright *v.* Arnold, 6 Manitoba 1; *Re* Cummings, 25 Ont. 607.

See 40 Cent. Dig. tit. "Prohibition," § 37.

At common law the writ lies where an inferior court was proceeding without jurisdiction (*Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; Martyn *v.* Canterbury, Andr. 258; Pringe *v.* Child, Moore K. B. 780, 72 Eng. Reprint 902); or where the jurisdiction belonged properly to another court (*Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; Edward's Case, 13 Coke 9, 77 Eng. Reprint 1421; Prohibition Case, 12 Coke 76, 77 Eng.

as a court of law.[33] Where the lower tribunal has jurisdiction of the parties and the subject-matter prohibition will not lie.[34] And it will not be assumed that a court having limited jurisdiction will exceed its jurisdiction.[35]

2. Jurisdiction of Person. Prohibition will issue to restrain action where the inferior tribunal has, by reason of want of service [36] or invalidity of service [37] of process, not acquired jurisdiction of the person. However, where the court has jurisdiction of the subject-matter, and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error for which prohibition is not the proper remedy.[38]

3. Jurisdiction of Subject-Matter. If the inferior tribunal is assuming to act when it has not jurisdiction of the subject-matter of the proceeding,[39] or if it has

Reprint 1354); or where the judges proceeded in cases, where they were prohibited by law from so doing (*Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; Porter *v.* Rochester, 13 Coke 4, 77 Eng. Reprint 1416).

Even in a case brought within its jurisdiction by legal fraud prohibition will lie to an inferior court to restrain proceedings. Ramsay *v.* Wardens, 2 Bay (S. C.) 180.

When office of writ not enlarged by statute. — Mont. Code Civ. Proc. § 1980, making a writ of prohibition the counterpart of a writ of mandate, does not enlarge the class of cases in which the writ may be resorted to, in view of the clause providing that the writ is to arrest the proceedings of any tribunal which are without, or in excess of, jurisdiction. State *v.* Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219.

Statutory definition see *supra*, note 1.

33. St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341.

34. *Alabama.*— *Ex p.* Brown, 58 Ala. 536; *Ex p.* Keeling, 50 Ala. 474.

Arkansas.— *Ex p.* Tucker, 25 Ark. 567; *Ex p.* Blackburn, 5 Ark. 21.

California.— Thomas *v.* Justice's Court, 80 Cal. 40, 22 Pac. 80; Curtis *v.* San Francisco Super. Ct., 63 Cal. 435; Kalloch *v.* San Francisco Super. Ct., 56 Cal. 229; People *v.* Whitney, 47 Cal. 584; People *v.* Kerm County, 47 Cal. 81.

Georgia.— Tupper *v.* Dart, 104 Ga. 179, 30 S. E. 624; Seymour *v.* Almond, 75 Ga. 112.

Indiana.— Jasper County Com'rs *v.* Spitler, 13 Ind. 235.

Kentucky.— Thomas *v.* Davis, 110 S. W. 408, 33 Ky. L. Rep. 569.

Louisiana.— State *v.* Scott, 48 La. Ann. 293, 19 So. 141; State *v.* McDowell, 43 La. Ann. 1193, 10 So. 174; State *v.* Duffel, 41 La. Ann. 557, 6 So. 514; State *v.* Judge Twenty-Sixth Judicial Dist. Ct., 34 La. Ann. 782; State *v.* Judge Super. Dist. Ct., 29 La. Ann. 360; Haynes *v.* Rogillio, 20 La. Ann. 238.

Massachusetts.— Washburn *v.* Phillips, 2 Metc. 296.

Missouri.— Davison *v.* Hough, 165 Mo. 561, 65 S. W. 731; State *v.* Fox, 85 Mo. 61; Morris *v.* Lenox, 8 Mo. 252.

New York.— People *v.* McAdam, 84 N. Y. 287; Matter of Mason, 51 Hun 138, 4 N. Y. Suppl. 664; People *v.* Court Oyer & Terminer, 27 How. Pr. 14; People *v.* Seward, 7 Wend. 518.

Washington.— State *v.* King County Super. Ct., 45 Wash. 248, 88 Pac. 207.

Canada.— England *v.* Jannette, 23 Can. Sup. Ct. 415.

See 40 Cent. Dig. tit. "Prohibition," § 37 *et seq.*

35. Burns *v.* Glover, (Cal. App. 1908) 96 Pac. 788, holding that an allegation in the complaint, in an action in justice's court, on a note reciting "on the first . . . day of July, I promise to pay . . . the sum of $one hundred and eighteen cents with interest," that by mistake the figures "1906" were omitted after the word "July," and that by mistake the word "dollars" was omitted after the word "hundred," without demanding a reformation of the note, is surplusage, and does not convert the action into a suit in equity beyond the jurisdiction of the justice, and prohibition will not lie to prohibit him from proceeding with the trial, for it cannot be assumed that he will exceed his jurisdiction by undertaking to reform the note. See also *infra*, VI, B, 10.

Under Ky. Civ. Code Pr. § 479, providing that the writ of prohibition is an order to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction, the circuit court cannot award prohibition to prevent an inferior court, having jurisdiction of a cause, from deciding the cause, although the circuit court is of the opinion that the inferior court will not decide it properly, and the circuit court cannot direct the inferior court as to how it shall proceed. Hughes *v.* Holbrook, 108 S. W. 225, 32 Ky. L. Rep. 1210.

36. People *v.* Judge Wayne Cir. Ct., 26 Mich. 100; Coger *v.* Coger, 48 W. Va. 135, 35 S. E. 823. See also Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

37. People *v.* Inman, 74 Hun (N. Y.) 130, 26 N. Y. Suppl. 329; Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

38. Troegel *v.* Judge Second City Ct., 35 La. Ann. 1164; Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 6 L. R. A. 178.

39. *California.*— Grangers' Bank *v.* San Francisco Super. Ct., (1893) 33 Pac. 1095.

Georgia.— South Carolina R. Co. *v.* Ells, 40 Ga. 87.

Massachusetts.— Henshaw *v.* Cotton, 127 Mass. 60.

jurisdiction thereof but is exceeding its legitimate powers in the particular matter,[40] the writ will lie.

4. Territorial Jurisdiction. A writ of prohibition lies for excess of territorial jurisdiction.[41]

5. Jurisdiction Dependent Upon Amount or Value in Controversy. If the court's jurisdiction is dependent upon the amount or value in controversy, prohibition will lie to restrain further proceedings in a cause involving more than the jurisdictional limit,[42] even where an entire cause of action has been split up in an attempt, by an oblique method, to confer a jurisdiction not otherwise possessed.[43] So too where the jurisdiction of an appellate court depends upon the amount in dispute, prohibition lies to restrain it from further proceeding in a cause involving less than the jurisdictional limit.[44]

6. Jurisdiction Under Unconstitutional Acts or Ordinances. Where jurisdiction is conferred by [45] or proceedings instituted under [46] unconstitutional acts or ordinances, prohibition will lie.

Missouri.— State *v.* Allen, 45 Mo. App. 551.

Virginia.— Miller *v.* Marshall, 1 Va. Cas. 158.

Canada.— Sims *v.* Kelly, 20 Ont. 291; Wright *v.* Arnold, 6 Manitoba 1.

See 40 Cent. Dig. tit. "Prohibition," § 39.

Compare Ex p. Blackburn, 5 Ark. 21.

That one has a clear defense to a proceeding of which the court has jurisdiction furnishes no ground for prohibition. People *v.* Russell, 3 Abb. Pr. N. S. (N. Y.) 232.

40. Harrison County School Dist. No. 6 *v.* Burris, 84 Mo. App. 654.

41. *Kentucky.*— Bardstown *v.* Hurst, 121 Ky. 119, 89 S. W. 147, 724, 28 Ky. L. Rep. 92, 603.

Missouri.— State *v.* Laughlin, 75 Mo. 147.

Washington.— North Yakima *v.* King County Super. Ct., 4 Wash. 653, 30 Pac. 1053.

West Virginia.— Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

Canada.— Wilkes *v.* Home Life Assoc., 8 Ont. L. Rep. 91, 3 Ont. Wkly. Rep. 589, 675; Thompson *v.* Hay, 20 Ont. App. 379.

See 40 Cent. Dig. tit. "Prohibition," § 40.

42. State *v.* Judges Ct. of App., 40 La. Ann. 771, 5 So. 114; State *v.* Lapeyrollerie, 38 La. Ann. 912; Zylstra *v.* Charleston, 1 Bay (S. C.) 382; Bodley *v.* Archibald, 33 W. Va. 229, 10 S. E. 392; *Re* Shepherd, 25 Ont. 274; Sherwood *v.* Cline, 17 Ont. 30; Walsh *v.* Elliott, 11 Ont. Pr. 520; *In re* Judge Northumberland, etc., County Ct., 19 U. C. C. P. 299. See also *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

43. *Arkansas.*—*Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

Louisiana.— State *v.* Newman, 49 La. Ann. 52, 21 So. 189.

Vermont.— Bullard *v.* Thorpe, 66 Vt. 599, 30 Atl. 36, 44 Am. St. Rep. 867, 25 L. R. A. 605.

Virginia.— James *v.* Stokes, 77 Va. 225; Hutson *v.* Lowry, 2 Va. Cas. 42.

England.— Girling *v.* Aldas, 2 Keb. 617, 84 Eng. Reprint 388; Catchmade's Case, 6 Mod. 91, 87 Eng. Reprint 848; Lawrence *v.* Warbeck, 1 Keb. 260, 83 Eng. Reprint 933.

Canada.— McDonald *v.* Dowdall, 28 Ont. 212.

Adequate remedy by appeal.— However, where appeals are allowed to the circuit courts from the judgments of justices, the cause to be tried *de novo*, so that there is an adequate remedy by appeal, prohibition will not lie even when an entire cause of action has been split up for the purpose of conferring jurisdiction. Shaw *v.* Pollard, 84 Mo. App. 286.

A trial judge has no power to strike out the excess, so as to bring the claim within his jurisdiction, if the claim is entire and beyond his jurisdiction. Cleveland Press *v.* Fleming, 24 Ont. 335.

Where a cause of action is severable, prohibition will be limited to the excess over the jurisdictional limit. Fitzsimmons *v.* McIntyre, 5 Ont. Pr. 119; Lott *v.* Cameron, 29 Ont. 70; McDonald *v.* Dowdall, 28 Ont. 212; Trimble *v.* Miller, 22 Ont. 500; Elliott *v.* Biette, 21 Ont. 595. See also Beattie *v.* Holmes, 29 Ont. 264.

If a claim for interest is clearly severable from the balance of the claim, prohibition will be limited to that part of the claim which exceeds the jurisdictional limit. Lott *v.* Cameron, 29 Ont. 70; Trimble *v.* Miller, 22 Ont. 500.

44. State *v.* Boone, 42 La. Ann. 982, 8 So. 468.

45. *Ex p.* Roundtree, 51 Ala. 42.

One whose place of business has been closed and his property made useless to him by reason of unauthorized prosecutions for the violation of a void ordinance against the operation of his pool room has no other adequate remedy, and hence is entitled to a writ of prohibition, under Miss. Code (1906), § 992, authorizing such writ when necessary to attain the ends of right and justice. Crittenden *v.* Booneville, (Miss. 1908) 45 So. 723.

46. *Kentucky.*—Pennington *v.* Woolfolk, 79 Ky. 13.

Michigan.—Hughes *v.* Recorder's Court, 75 Mich. 574, 42 N. W. 984, 13 Am. St. Rep. 475, 4 L. R. A. 863.

Missouri.— State *v.* Eby, 170 Mo. 497, 71 S. W. 52. *Compare* State *v.* Nortoni, 201 Mo. 1, 98 S. W. 554.

7. Disqualification of Judge by Interest. In jurisdictions where there are no statutes prohibiting judges from sitting in causes in which they are interested [47] as well as in jurisdictions where such statutes exist,[48] the authorities uniformly hold that when a judge of an inferior court is recused before judgment in a cause in which he has an interest, such as disqualifies him, and a prohibition is applied for to restrain him from sitting in the cause, it will be granted, although the court over which he presides has jurisdiction. And the writ will be awarded without inquiry as to whether the parties will call or not, for an adjudication on the particular matter as to which the interest of the judge exists.[49]

8. Usurping or Exceeding Appellate Jurisdiction. Prohibition will be granted to restrain an appellate court from entertaining an appeal whenever such appeal does not properly lie to it,[50] or whenever, owing to the defective manner of taking the appeal,[51] jurisdiction has not been acquired. So too prohibition will lie where an appellate court having only jurisdiction to affirm, modify, or reverse the judgment appealed from, permits defendant to file an answer and retry the case,[52] or makes an allowance against the respondent in favor of the appellant for the payment of the expense of prosecuting the appeal.[53]

9. Interference With Proceedings in Other Courts — a. In General. Prohibition will issue to restrain an inferior court from proceeding in an action or proceeding of which another inferior court has exclusive jurisdiction;[54] but the

New York.— People *v.* Dayton, 120 N. Y. App. Div. 814, 105 N. Y. Suppl. 809.

South Carolina.— Zylstra *v.* Charleston, 1 Bay. 382.

West Virginia.— Judy *v.* Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413.

Canada.— Watson *v.* Lillico, 6 Manitoba 59.

See 40 Cent. Dig. tit. "Prohibition," § 47.

But *compare* In re Schumaker, 90 Wis. 488, 63 N. W. 1050.

Attempt must be made to enforce invalid ordinance.— But the writ can only issue to test the validity of an alleged invalid ordinance in a case where a judge is attempting to enforce the same, and cannot be granted against a private corporation to prohibit it from acting under the ordinance. Campbellsville Tel. Co. *v.* Patteson Cir. Judge, 114 Ky. 52, 69 S. W. 1070, 24 Ky. L. Rep. 832.

Existence of other remedy.—Although in exceptional instances a writ of prohibition will issue to prevent a court from proceeding with a cause arising under an unconstitutional statute or a void municipal ordinance, the remedy will not be granted where the same relief can be granted on appeal or writ of error, and, under Mo. Rev. St. (1899) § 5937 [Annot. St. (1906) p. 3001], allowing appeals from a judgment of a police judge in cases arising under ordinances of cities of the fourth class, one charged with violating such an ordinance is not entitled to a writ prohibiting the prosecution, on the ground that the ordinance is void. State *v.* Shannon, 130 Mo. App. 90, 108 S. W. 1097. See also *infra*, IV, D.

47. Samuels *v.* California St. Cable R. Co., 124 Cal. 294, 56 Pac. 1115; North Bloomfield Gravel Min. Co. *v.* Keyser, 58 Cal. 315; People *v.* Petty, 32 Hun (N. Y.) 443; State *v.* Seattle Bd. of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317. See also Benton *v.* Budd, 120 Cal. 329, 52 Pac. 851; Bowman's Case, 67 Mo. 146.

48. Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238; Dimes *v.* Grand Junction Canal, 3 H. L. Cas. 759, 17 Jur. 73, 10 Eng. Reprint 301.

Want of judicial power personal to judge.— The judge's interest in a collateral matter which arises in a cause over which the court has full jurisdiction renders him powerless to further act, and this want of judicial power which is personal to him is want of jurisdiction. Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238; Dimes *v.* Grand Junction Canal, 3 H. L. Cas. 759, 17 Jur. 73, 10 Eng. Reprint 301.

49. Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

50. State *v.* Voorhies, 41 La. Ann. 540, 6 So. 821; State *v.* Nortoni, 201 Mo. 1, 98 S. W. 554; State *v.* St. Louis Court of Appeals, 97 Mo. 276, 10 S. W. 874; French *v.* Noel, 22 Gratt. (Va.) 454; County Court *v.* Armstrong, 34 W. Va. 326, 12 S. E. 488.

51. McConky *v.* Alameda County Super. Ct., 56 Cal. 83; Lane *v.* Kings County Super. Ct., 5 Cal. App. 762, 91 Pac. 405; State *v.* Spokane County Super. Ct., 20 Wash. 709, 54 Pac. 937; State *v.* King County Super. Ct., 17 Wash. 54, 48 Pac. 733; McLure *v.* Parker, 39 Nova Scotia 413.

Permitting the filing of new undertaking.— On appeal from a justice to a superior court, prohibition will not lie to prevent the superior court from authorizing appellant to file a new undertaking in lieu of one insufficient in form. Gray *v.* Amador County Super Ct., 61 Cal. 337.

52. Rickey *v.* Nevada County Super. Ct., 59 Cal. 661.

53. State *v.* St. Louis Ct. of App., 88 Mo. 135.

54. Russell *v.* Jacoway, 33 Ark. 191; People *v.* Superior Ct. Judge, (Mich. 1879) 2

writ will not lie where the inferior courts are of concurrent jurisdiction,[55] or where it is clear that the proceedings in one court will in no wise interfere with those in the other.[56]

b. Admiralty Jurisdiction. Where the United States district court is proceeding as a court of admiralty in a cause of which it has no jurisdiction, prohibition will lie.[57] But it will not lie to restrain the district court, sitting in admiralty, from entertaining jurisdiction of suits or proceedings cognizable in admiralty,[58] such as to recover pilotage,[59] or a suit on a contract made by the master or owner of a ship to recover wharfage charges,[60] or a suit for damages against a steamer for drowning seamen of a vessel with which the steamer wrongfully collided,[61] or a proceeding by an owner of a vessel before suit brought against him to obtain the benefit of limitation of liability provided for by statute.[62]

c. Proceedings in Trial Court After Removal of Cause. Where defendant is entitled to have the action tried in the county of his residence, having fully complied with the statutory provisions necessary to entitle him to such removal, the court will be prohibited from proceeding further in the case except to cause it be certified in the proper county.[63]

d. Proceedings in Lower Court After Appeal Taken. Pending an appeal

N. W. 919; Sullivan *v.* Reynolds, 209 Mo. 161, 107 S. W. 487; Merriam *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; Thomas *v.* Mead, 36 Mo. 232.

One branch of court interfering with another.—A writ of prohibition will issue from the court of appeals to restrain one branch of a court, composed of four judges, from attempting, by a summary proceeding, to obtain jurisdiction of an action on the docket, and subject to orders of another branch. Hindman *v.* Toney, 97 Ky. 513, 30 S. W. 1006, 17 Ky. L. Rep. 286.

55. State *v.* Withrow, 108 Mo. 1, 18 S. W. 41. But see State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534, holding that prohibition from the supreme court is appropriate to restrain the lower court's unlawful exercise of jurisdiction over the subject-matter of which jurisdiction has been properly acquired by another court, in view of the imminent possibility of physical conflict between the officers of the two courts for possession of the property.

In custodia legis.—A receiver was appointed by the circuit court of St. Louis county, a court of competent jurisdiction, to take charge of the assets of a corporation and administer them. This receiver was removed and another appointed in his stead. From an order refusing to vacate the second appointment an appeal was granted and the assets turned over to the corporation on the giving of bond. During pendency of this appeal the circuit court of the city of St. Louis, having concurrent jurisdiction with the county court, took jurisdiction of an action by creditors of the corporation, and a receiver was appointed to administer the assets. It was held that, since the assets were by the first action *in custodia legis*, and that court still retained the cause, the circuit court of the city of St. Louis had no jurisdiction of the cause, and prohibition was the proper remedy to prevent its exercise of jurisdiction. State *v.* Reynolds, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 15 L. R. A. N. S. 963.

56. Day *v.* San Francisco Super. Ct., 61 Cal. 489.

In Quebec a judge of the superior court, whether sitting in court or in chambers, has no power to order the issue of a writ of prohibition to a judge of the same court to restrain him, while sitting in the circuit court, from proceeding with any suit or action in that court. Pallisir *v.* Terrebonne Cir. Ct., 28 Quebec Super. Ct. 66.

57. *Ex p.* Phenix Ins. Co., 118 U. S. 610, 7 S. Ct. 25, 30 L. ed. 274 (holding that where the district court in admiralty is called upon by the petition of an owner of a vessel, to first determine the question of its liability for loss or damage to property by fire on land alleged to have been set by the vessel, it having no jurisdiction of the cause of action, and then to determine whether the statutes for the limitation of liability cover the case, a writ of prohibition will lie to prohibit the court from proceeding to give the relief prayed for in the petition); U. S. *v.* Peters, 3 Dall. (U. S.) 121, 1 L. ed. 535 (holding that the district court has no jurisdiction of a libel for damages against a privateer, commissioned by a foreign belligerent power, for the capture of American vessels as prizes, and the supreme court will grant a writ of prohibition to restrain proceedings by the district court therein).

58. See cases cited *infra*, notes 59 *et seq.*

59. *Ex p.* Hagar, 104 U. S. 520, 26 L. ed. 816.

60. *Ex p.* Easton, 95 U. S. 68, 24 L. ed. 373.

61. *Ex p.* Gordon, 104 U. S. 515, 26 L. ed. 814.

62. *Ex p.* Engles, 146 U. S. 357, 13 S. Ct. 281, 36 L. ed. 1004; *Ex p.* Fassett, 142 U. S. 479, 12 S. Ct. 295, 35 L. ed. 1087; *Ex p.* Slayton, 105 U. S. 451, 26 L. ed. 1066.

63. State *v.* Stallcup, 11 Wash. 713, 40 Pac. 341; State *v.* King County Super. Ct., 5 Wash. 518, 32 Pac. 457, 771.

After removal to federal court see REMOVAL OF CAUSES.

which operates as a stay of proceedings,[64] or pending a decision on the application for such an appeal,[65] prohibition will issue to restrain the trial court from proceeding further in the cause. If the appeal is defective [66] or merely incidental to the main action,[67] or if the order or judgment appealed from does not command or permit some act to be done,[68] so that the appeal does not operate as a stay of proceedings, then the lower court will not be restrained from proceeding further in the cause.

e. With Orders or Decrees of Appellate Court. The writ will lie to restrain the court below from interpreting the decisions of the appellate court and enforcing decrees different from those rendered by it.[69] And of course where a cause has been appealed and a judgment rendered by the appellate court, interference therewith on the part of the lower court by any proceeding in the cause other than such as is directed by the appellate court will be prohibited.[70]

10. Proceedings in Probate Courts. Prohibition will lie where a probate judge attempts, without administration, to exercise power over the estate of an intestate.[71] So too will prohibition lie to restrain a probate court from vacating an administrator's sale of realty after such court has confirmed the same.[72]

64. *California.*— Livermore *v.* Campbell, 52 Cal. 75.

Georgia.— Fite *v.* Black, 85 Ga. 413, 11 S. E. 782.

Louisiana.— State *v.* Allen, 51 La. Ann. 1842, 26 So. 434; State *v.* Davey, 37 La. Ann. 827; State *v.* Rightor, 36 La. Ann. 711; State *v.* Judge Twenty-Second Judicial Dist. Ct., 33 La. Ann. 760; State *v.* Judge Third Dist. Ct., 31 La. Ann. 120; State *v.* Judge Orleans Parish Super. Dist. Ct., 28 La. Ann. 143; State *v.* Judge Orleans Parish Eighth Dist. Ct., 24 La. Ann. 600; State *v.* Judge Orleans Parish Second Dist. Ct., 23 La. Ann. 31; State *v.* Jefferson Parish Judge, 22 La. Ann. 61; State *v.* Judge New Orleans Sixth Dist. Ct., 22 La. Ann. 37; State *v.* Judge Orleans Parish Fourth Dist. Ct., 21 La. Ann. 735; State *v.* First Dist. Judge, 19 La. 174.

Missouri.— State *v.* Sale, 188 Mo. 493, 87 S. W. 967; State *v.* Hirzel, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; State *v.* Lewis, 76 Mo. 370.

Washington.—State *v.* King County Super. Ct., 6 Wash. 112, 32 Pac. 1072; State *v.* Jefferson County Super. Ct., 3 Wash. 696, 29 Pac. 202.

See 40 Cent. Dig. tit. "Prohibition," § 52.

Pendency of appeal in independent action.—Pending appeal from a decision in an action for possession of land claimed under an administrator's sale, the decision being adverse to plaintiff, on the ground of want of jurisdiction of the court who ordered the sale, and of irregularities in the sale, the court will be prohibited from acting on a petition to vacate the sale, based on the same grounds as those urged against plaintiff's title in the action, and for the same purpose of defeating his title, the parties in interest being the same in the action and under the petition. State *v.* Walla Walla County Super. Ct., 10 Wash. 168, 38 Pac. 998.

Premature appeal.— The supreme court will not grant a writ of prohibition to a judge of the superior court when acting as chancellor to restrain him from hearing a motion, on the ground that one of the parties has excepted to his decision on a point made during the hearing of such motion, and has sued out a writ of error before any decision of the main question. Jones *v.* Dougherty, 11 Ga. 305.

Restraining an appointment of a successor to an office.— Pending an appeal from a judgment removing a sheriff from office for malfeasance, prohibition will lie to the board of supervisors to restrain it from proceeding to appoint a successor to the office. Covarrubias *v.* Santa Barbara County, 52 Cal. 622.

Restraining lower court from dismissing appeal.—After an appeal-bond has been given and delivered, the jurisdiction of the lower court is limited to inquiry as to the solvency of the surety on the bond, and prohibition will lie to restrain such court from dismissing the appeal. State *v.* Judge Second Judicial Dist. Ct., 23 La. Ann. 714.

65. State *v.* Judge Orleans Parish Sixth Dist. Ct., 22 La. Ann. 120.

66. State *v.* Tissot, 34 La. Ann. 90; State *v.* Judge Orleans Parish Fourth Dist. Ct., 22 La. Ann. 115; State *v.* Judge Orleans Parish Seventh Dist. Ct., 21 La. Ann. 178; State *v.* Dillon, 31 Mo. App. 535.

Surety becoming insolvent after appeal perfected.— However, where appellant has taken and perfected a suspensive appeal, and thereafter one of the sureties on his appeal-bond becomes insolvent, it is the duty of the court from which the appeal was taken to allow him to substitute a sufficient surety, and where this right is denied and the appeal dismissed and an execution issued on the judgment, a writ of prohibition will issue to arrest proceedings thereunder. Gray *v.* Lowe, 9 La. Ann. 478.

67. State *v.* Judge First Dist. Ct., 17 La. 511.

68. Bliss *v.* Santa Clara County Super. Ct., 62 Cal. 543. See also State *v.* Judge Tenth Judicial Dist. Ct., 42 La. Ann. 71, 7 So. 69.

69. State *v.* Drew, 38 La. Ann. 274; *In re* State, 18 La. Ann. 102.

70. State *v.* Spokane County Super. Ct., 8 Wash. 591, 36 Pac. 443.

71. State *v.* Mitchell, 2 Bailey (S. C.) 225.

72. State *v.* Ramsey County Prob. Ct., 19 Minn. 117.

11. Particular Proceedings in Civil Actions. Under the general rules already stated the writ will issue to restrain any unauthorized proceedings in civil actions, as where the presiding judge determines a plea recusing him on the ground of interest,[73] or denies a motion for a stay made by a person claiming the ownership of personalty of which he has been deprived by a summary order of the court,[74] or appoints a receiver,[75] or orders a debtor's arrest,[76] or sets aside a judgment,[77] or entertains [78] or grants [79] a new trial.

12. Contempt Proceedings. Prohibition will lie where an inferior tribunal entertains a contempt proceeding of which it has no jurisdiction.[80] But if a contempt is of an inferior court, so that it alone has jurisdiction to try and punish therefor, prohibition will not lie to restrain the judge presiding from proceeding therein.[81]

13. Receivership Proceedings. Prohibition will not lie to restrain an inferior court acting within its jurisdiction from appointing a receiver; [82] but where the appointment is unauthorized, as being without the jurisdiction of the court, the writ will lie.[83]

14. Jurisdiction to Issue Particular Writs. Prohibition is an available remedy for the purpose of restraining an inferior court, not having the necessary power, from issuing writs of attachment,[84] certiorari,[85] habeas corpus,[86] injunction;[87]

73. State *v.* Third Judicial Dist. Judge, 38 La. Ann. 247; State *v.* Twenty-First Judicial Dist. Judge, 37 La. Ann. 253.

74. Stuparich Mfg. Co. *v.* San Francisco Super. Ct., 123 Cal. 290, 55 Pac. 985.

75. *Ex p.* Smith, 23 Ala. 94; Murray *v.* Los Angeles Super. Ct., 129 Cal. 628, 62 Pac. 191; Fischer *v.* San Francisco Super. Ct., 110 Cal. 129, 42 Pac. 561; State *v.* Ellis, 108 La. 521, 32 So. 335.

76. Keough *v.* Grime, 172 Mass. 519, 53 N. E. 135.

77. State *v.* Williams, 48 Ark. 227, 2 S. W. 843; Doughty *v.* Walker, 54 Ga. 595.

78. White *v.* Sacramento County Super. Ct., 72 Cal. 475, 14 Pac. 87.

79. State *v.* Williams, 48 Ark. 227, 2 S. W. 843; State *v.* Walls, 113 Mo. 42, 20 S. W. 883; Burroughs *v.* Taylor, 90 Va. 55, 17 S. E. 745.

80. *California.*— Ruggles *v.* San Francisco Super. Ct., 103 Cal. 125, 37 Pac. 211; Gordan *v.* Buckles, 92 Cal. 481, 28 Pac. 490; Burke *v.* Los Angeles County Super. Ct., 93 Pac. 1058.

Georgia.— Ormond *v.* Ball, 120 Ga. 916, 48 S. E. 383.

Louisiana.— State *v.* Houston, 35 La. Ann. 1194.

Minnesota.— State *v.* Wedge, 24 Minn. 150.

New York.— People *v.* Mayer, 71 Hun 182, 24 N. Y. Suppl. 621; People *v.* Court Oyer & Terminer, 27 How. Pr. 14.

Utah.— People *v.* Carrington, 5 Utah 531, 17 Pac. 735.

Washington.—State *v.* Spokane County Super. Ct., 31 Wash. 481, 71 Pac. 1095; State *v.* Langhorne, 8 Wash. 447, 36 Pac. 438.

Wisconsin.— State *v.* Eau Claire County Cir. Ct., 97 Wis. 1, 72 N. W. 193.

See 40 Cent. Dig. tit. "Prohibition," § 44.

Denial of jurisdiction.— Where a relator seeking a writ of prohibition against a proceeding for contempt denied that respondent had any jurisdiction over such proceedings, and made no attack upon the form or sufficiency of the proceedings or papers therein, prohibition was held to be the proper remedy to determine the question raised. Nichols *v.* Judge Grand Rapids Super. Ct., 130 Mich. 187, 89 N. W. 691.

81. *California.*— People *v.* Placer County Judge, 27 Cal. 151.

New York.— People *v.* Williams, 51 N. Y. App. Div. 102, 64 N. Y. Suppl. 457.

Washington.— See State *v.* Yakima County Super. Ct., 4 Wash. 30, 29 Pac. 764.

West Virginia.— Powhatan Coal, etc., Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. N. S. 1225.

Canada.— Kay *v.* Storry, 8 Ont. L. Rep. 45, 3 Ont. Wkly. Rep. 784.

See 40 Cent. Dig. tit. "Prohibition," § 44.

Compare Louisville, etc., R. Co. *v.* Miller, 112 Ky. 464, 66 S. W. 5, 23 Ky. L. Rep. 1714, holding that a writ of prohibition will be issued to restrain a trial court from proceeding to enforce an order adjudging a defendant to be in contempt, and imposing a fine for an alleged violation of an injunction order, where the act complained of is not within the order, fairly construed.

Remedy by appeal.— However, a writ of prohibition will not issue to prohibit a district court from punishing for contempt a party defendant in an injunction suit, on the ground that said court has no jurisdiction of the suit, where such defendant has an adequate remedy by appeal. State *v.* Rightor, 32 La. Ann. 1182. See also *infra*, IV, D.

82. State *v.* Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219.

83. State *v.* Reynolds, 209 Mo. 161, 107 S. W. 487.

84. *Re* Pacquette, 11 Ont. Pr. 463.

85. County Court *v.* Boreman, 34 W. Va. 87, 11 S. E. 747.

86. *Ex p.* Ray, 45 Ala. 15; *Ex p.* Hill, 38 Ala. 429; State *v.* Murphy, 132 Mo. 382, 33 S. W. 1136, 56 Am. St. Rep. 491.

87. *California.*— Glide *v.* Yolo County Super. Ct., 147 Cal. 21, 81 Pac. 225.

and under similar conditions it may be resorted to for the purpose of restraining the issuing of mandamus,[88] or prohibition.[89]

15. Imposition of Fines and Penalties. Prohibition will lie to restrain an inferior court from imposing a fine or penalty without [90] or in excess of [91] jurisdiction.

16. Criminal or Quasi-Criminal Prosecutions. Prohibition will lie to restrain a criminal or quasi-criminal prosecution for an offense beyond the jurisdiction of the court.[92] But it will not lie where the court is acting within its jurisdic-

Colorado.— People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242; State *v.* Lake County Dist. Ct., 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850.

Louisiana.— State *v.* Judge Eleventh Judicial Dist., 48 La. Ann. 1501, 21 So. 94.

Missouri.— State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; Thomas *v.* Mead, 36 Mo. 232; State *v.* Riley, 127 Mo. App. 469, 105 S. W. 696.

North Dakota.— State *v.* Fisk, 15 N. D. 219, 107 N. W. 191.

See 40 Cent. Dig. tit. "Prohibition," § 45.

Compare Powhatan Coal, etc., Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. N. S. 1225.

However where a court of equity has jurisdiction to grant an injunction, prohibition will not lie. *Ex p.* Scott, 47 Ala. 609; Sherwood *v.* New England Knitting Co., 68 Conn. 543, 37 Atl. 388; State *v.* Leche, 113 La. 1, 36 So. 868; State *v.* Riley, 127 Mo. App. 469, 105 S. W. 696; State *v.* Kennan, 35 Wash. 52, 76 Pac. 516; Powhatan Coal, etc., Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. N. S. 1225. See also *Ex p.* Greene, 29 Ala. 52.

An order made by a judge disqualified to act awarding a temporary injunction is not void, but voidable, and its enforcement will not be prevented by writ of prohibition on the ground alone that the judge was disqualified by reason of interest when he entered the order. Grafton *v.* Holt, 58 W. Va. 182, 52 S. E. 21.

When it does not appear that the chancellor has made any order in the premises, or done any act, showing that he entertained, or will entertain, the cause, a writ of prohibition to restrain the proceedings in an injunction suit does not lie. *Ex p.* Greene, 29 Ala. 52.

Under Mo. Rev. St. (1899) § 3631 [Annot. St. (1906) p. 2049], providing that an injunction to stay a suit shall be had in the county where the suit is pending, an order granted by the circuit court of New Madrid county restraining the prosecution of an action in the circuit court of the city of St. Louis until the final determination of a cause pending in the supreme court is beyond the jurisdiction of the court granting the order, where the injunction is the primary purpose of the suit, and not incidental to some other relief, and a writ of prohibition will issue against further entertaining the matter. State *v.* Riley, 127 Mo. App. 469, 105 S. W. 696.

Record leaving question in doubt.— Prohibition will not issue against the district court to restrain it from further proceeding in an action to enjoin the pure food commissioner, when the issue is the legality or illegality of acts threatened by the commissioner, and the record leaves the question in doubt. State *v.* Cass County Dist. Ct., 115 N. W. 675, 15 L. R. A. N. S. 331.

88. State *v.* Houston, 34 La. Ann. 875; Trainer *v.* Porter, 45 Mo. 336.

The supreme court will not anticipate by prohibition any action of the court of appeals on an application for the issuance of a writ of mandamus in aid of its appellate jurisdiction. Gleason *v.* Wisdom, 120 La. 374, 45 So. 282.

But if the inferior court has jurisdiction, prohibition will not go to restrain the issuance of a writ of mandamus. *Ex p.* Due, 116 Ala. 491, 23 So. 2; *Ex p.* Peterson, 33 Ala. 74; Wilson *v.* Berkstresser, 45 Mo. 283.

89. *Ex p.* Boothe, 64 Ala. 312, holding, however, that the supreme court will not, at the instance of an inferior tribunal, interfere by prohibition to restrain action under a writ of prohibition irregularly issued by a circuit judge, where such circuit judge has authority to issue writs of prohibition.

90. State *v.* Moultrieville, Rice (S. C.) 158; Zylstra *v.* Charleston, 1 Bay (S. C.) 382.

However, where the inferior court has jurisdiction to impose a fine, prohibition will be refused. State *v.* Edwards, 1 McMull. (S. C.) 215.

91. State *v.* McDuffie, 52 Ala. 4.

92. *California.*— Bruner *v.* San Francisco Super. Ct., 92 Cal. 239, 28 Pac. 341; Kalloch *v.* San Francisco Super. Ct., 56 Cal. 229.

Mississippi.— See Crittenden *v.* Booneville, (1908) 45 So. 723.

Missouri.— State *v.* Eby, 170 Mo. 497, 71 S. W. 52; State *v.* Laughlin, 75 Mo. 147; State *v.* Laughlin, 73 Mo. 443.

West Virginia.— Powhatan Coal, etc., Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. N. S. 1225.

England.— *In re* Murphy, 8 Ont. Pr. 420.

Canada.— Paré *v.* Montreal, 27 Quebec Super. Ct. 424; Reg. *v.* T. Eaton Co., 29 Ont. 591.

See 40 Cent. Dig. tit. "Prohibition," § 43.

For example, as a court cannot determine, as a criminal charge, a matter that would not constitute an offense, if charged in such form as would be good and sufficient pleading, if it were punishable, such action may be prevented by prohibition. Powhatan Coal, etc., Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. N. S. 1225.

Conviction under void ordinance.— In view of Miss. Code (1906), § 3893, authorizing relief by prohibition according to right and

tion.[93] The only question involved on an application for a writ of prohibition to restrain a lower court from proceeding with a criminal trial is whether or not that court has jurisdiction to determine the matter before it and of the person of accused.[94]

17. Determination of Question of Jurisdiction by Trial Court. Where the jurisdiction of a tribunal rests upon contested facts, prohibition will not lie to restrain it from proceeding in a cause while the question of jurisdiction, after being raised by an appropriate pleading or objection, remains undetermined;[95] and although the lower tribunal may in such case err in its determination of the question of jurisdiction, prohibition will not lie to review such error.[96]

18. Waiver of Right to Remedy. It may be a good defense to an application for prohibition in some instances that the applicant waived the excess of jurisdiction on the part of the inferior tribunal, either expressly, or impliedly by his conduct as suitor,[97] although the remedy might remain available notwithstanding the con-

justice, the writ is not confined to cases where an inferior court is attempting to act; and hence the fact that one has been convicted will not preclude such relief against prosecutions under a void ordinance, preventing the use of his property and depriving him of the right to conduct his business. Crittenden *v.* Booneville, (Miss. 1908) 45 So. 723. See also *supra*, IV, C, 6.

93. *California.*— Borello *v.* Amador County Super. Ct., (Cal. App. 1908) 96 Pac. 404; Brobeck *v.* San Francisco Super. Ct., 152 Cal. 289, 92 Pac. 646; Kitts *v.* Nevada County Super. Ct., 5 Cal. App. 462, 90 Pac. 977.

Kentucky.— Owensboro *v.* Sparks, 99 Ky. 351, 36 S. W. 4, 18 Ky. L. Rep. 269.

Missouri.— State *v.* Stobie, 194 Mo. 14, 92 S. W. 191.

New Jersey.— State *v.* Price, 8 N. J. L. 358.

New York.— People *v.* Davy, 105 N. Y. App. Div. 598, 94 N. Y. Suppl. 1037 [*affirmed* in 184 N. Y. 30, 76 N. E. 732]; People *v.* Jerome, 36 Misc. 256, 73 N. Y. Suppl. 306.

West Virginia.— Powhatan Coal, etc., Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. N. S. 1225; Woods *v.* Cottrell, 55 W. Va. 476, 47 S. E. 275, 104 Am. St. Rep. 1004, 65 L. R. A. 616.

Wisconsin.— State *v.* Evans, 88 Wis. 255, 60 N. W. 433.

Canada.— Rex *v.* Phillips, 11 Ont. L. Rep. 478, 7 Ont. Wkly. Rep. 418.

See 40 Cent. Dig. tit. "Prohibition," § 43.

94. Borello *v.* Amador County Super. Ct., (Cal. App. 1908) 96 Pac. 404.

Prohibition will not lie to restrain a superior court from proceeding with the trial of petitioner on an indictment alleged to have been found by the grand jury without evidence to show that petitioner was guilty of a public offense. Brobeck *v.* San Francisco Super. Ct., 152 Cal. 289, 92 Pac. 646.

Refusal of examination of grand jurors.— As the privilege granted an accused, who has not been held to answer, to examine grand jurors touching their qualifications before they are impaneled and sworn, is merely one of grace and not of right, a restriction of accused to the examination of only a few of them could at the most only be error and could not be reviewed by prohibition. Borello *v.* Amador County Superior Ct., (Cal. App. 1908) 96 Pac. 404.

Refusing to allow the character of evidence received by the grand jury to be shown on a motion to set aside their indictment, being within the jurisdiction of the court, cannot be reviewed by prohibition. Borello *v.* Amador County Super. Ct., (Cal. App. 1908) 96 Pac. 404.

Where an indictment purports, or attempts, to state an offense of a kind of which the court has jurisdiction, it is sufficient as against an application for a writ to prohibit the court from taking further proceedings in the case whether it would be sufficient as against a special or general demurrer or not. Kitts *v.* Nevada County Super. Ct., 5 Cal. App. 462, 90 Pac. 977.

95. *Arkansas.*— *Ex p.* Little Rock, 26 Ark. 52; *Ex p.* McMeechen, 12 Ark. 70; *Ex p.* Blackburn, 5 Ark. 21; *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

California.— Woodworth *v.* Marin County Super. Ct., 153 Cal. 38, 94 Pac. 232; Chester *v.* Colby, 52 Cal. 516.

Louisiana.— State *v.* Allen, 51 La. Ann. 1842, 26 So. 434; Whipple's Succession, 2 La. Ann. 236.

New York.— People *v.* Russell, 49 Barb. 351; People *v.* Kelly, 12 N. Y. Civ. Proc. 414; People *v.* McAdam, 2 N. Y. Civ. Proc. 52. But see People *v.* McAdam, 22 Hun 559 [*reversed* on other grounds in 84 N. Y. 287].

Canada.— Matter of Dixon, 6 Ont. Pr. 336.

See 40 Cent. Dig. tit. "Prohibition," § 54.

Restraining determination of jurisdictional question.— So too where the jurisdiction of the lower court depends upon contested facts, prohibition will not issue to prevent it determining the question of jurisdiction. State *v.* Voorhies, 34 La. Ann. 1142.

96. Bankers' Life Assoc. *v.* Shelton, 84 Mo. App. 634; Coleman *v.* Dalton, 71 Mo. App. 14; State *v.* Seay, 23 Mo. App. 623; State *v.* Snohomish County Super. Ct., 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893; *In re* Alix, 166 U. S. 136, 17 S. Ct. 522, 41 L. ed. 948.

97. Chase *v.* Sing, 6 Brit. Col. 454; Jones *v.* Julian, 28 Ont. 601; Richardson *v.* Shaw, 6 Ont. Pr. 296.

Instances of waiver by conduct: Cross-examining witnesses and arguing cause. *In re* Burrowes, 18 U. C. C. P. 493. Filing an answer after excepting to the jurisdiction.

duct of the party if there were a want of jurisdiction of the subject-matter apparent on the face of the proceedings.[98]

D. Adequate Existing Remedy — 1. In General. Prohibition will not issue where there is another adequate remedy at law [99] or in equity [1] readily avail-

State *v.* Judge Civil Dist. Ct., 36 La. Ann. 768.

98. "If the party below, whether plaintiff or defendant, thinks proper, instead of moving for a prohibition, to proceed to trial in the special or inferior court, and is defeated, then, if the defect be of power to try the particular issue only (*defectus triationis*, as it has been called), the right to move for a prohibition is gone. If the defect be of jurisdiction over the cause (*defectus jurisdictionis*), and that defect be apparent upon the proceedings, a prohibition goes after sentence." London *v.* Cox, L. R. 2 H. L. 239, 282 [*quoted* in Richardson *v.* Shaw, 6 Ont. Pr. 296]. But in State *v.* Whatcom County Super. Ct., 2 Wash. 9, 25 Pac. 1007, the court denied an application by one who had not applied to the inferior tribunal for a determination of the question of its jurisdiction but stood by and permitted that tribunal to proceed to final action and subsequently filed an answer and asked for a rehearing, and moved for a vacation of the judgment, which steps were taken after notice of appeal. It was held that by giving notice of appeal the party had entered a general appearance and that the question of jurisdiction would not be determined on an application for prohibition, being necessarily involved in the appeal. See also *infra*, VI, B, 1 *et seq.*

Conduct not amounting to waiver. — In a proceeding for a writ of prohibition directing the district court to refrain from issuing an injunction, that petitioners file a motion for change of venue in the district court is not a waiver of the right to contest its jurisdiction in the supreme court. People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242. The fact that petitioners for prohibition to restrain proceedings under an order of court appointing a receiver for a refinery and directing him to take possession of the property were parties as stock-holders to a suit against the corporation for the forfeiture of its charter, and as such objected to the jurisdiction of the court to appoint a receiver only, cannot be construed as a waiver of their right to object as purchasers of the refinery, since they could not know that it was to be made subject to the receivership. Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. Where the receiver appointed by the circuit court in an action for a receivership of an insolvent corporation did not, by answering to the merits, waive his right to appeal from an order overruling his demurrer to a complaint in an action brought against him in another circuit court to enjoin him from acting as receiver, nor to appeal from the order denying a motion to dissolve the temporary injunction restraining him from acting as receiver, he did not waive his right to have such rulings corrected by prohibition. Gates *v.* McGee, 15 S. D. 247, 88 N. W. 115.

99. *Alabama.* — *Ex p.* Smith, 23 Ala. 94.

Arkansas. — Russell *v.* Jacoway, 33 Ark. 191.

California. — McDonald *v.* Agnew, 122 Cal. 448, 55 Pac. 125.

Colorado. — People *v.* Third Judicial Dist. Ct., 33 Colo. 66, 79 Pac. 1024; Aichele *v.* Johnson, 30 Colo. 461, 71 Pac. 367.

District of Columbia. — U. S. *v.* Barnard, 29 App. Cas. 431.

Florida. — Sherlock *v.* Jacksonville, 17 Fla. 93.

Idaho. — Rust *v.* Stewart, 7 Ida. 558, 64 Pac. 222; Bellevue Water Co. *v.* Stockslager, 4 Ida. 636, 43 Pac. 568.

Illinois. — People *v.* Hoglund, 93 Ill. App. 292.

Kansas. — Mason *v.* Grubel, 64 Kan. 835, 68 Pac. 660.

Louisiana. — Josephson *v.* Powers, 121 La. 190, 46 So. 206.

Massachusetts. — Kilty *v.* Hartford, etc., St. R. Co., 184 Mass. 310, 68 N. E. 236; Fairweather *v.* McKim, 168 Mass. 103, 46 N. E. 427.

Michigan. — Nichols *v.* Judge Grand Rapids Super. Ct., 130 Mich. 187, 89 N. W. 691; Hudson *v.* Judge Super. Ct., 42 Mich. 239, 3 N. W. 850, 913; People *v.* Wayne County Cir. Ct., 11 Mich. 393, 83 Am. Dec. 754.

Minnesota. — State *v.* St. Paul Municipal Ct., 26 Minn. 162, 2 N. W. 166.

Mississippi. — Crittenden *v.* Booneville, (1908) 45 So. 723.

Missouri. — State *v.* Shannon, 130 Mo. App. 90, 108 S. W. 1097.

Nevada. — Low *v.* Crown Point Min. Co., 2 Nev. 75.

New York. — Sweet *v.* Hulbert, 51 Barb. 312; People *v.* Russell, 29 How. Pr. 176; *Ex p.* Braudlacht, 2 Hill 367, 38 Am. Dec. 593; People *v.* Grogan, 3 N. Y. Cr. 335; People *v.* Kings County Ct., 23 N. Y. Wkly. Dig. 137.

North Carolina. — State *v.* Whitaker, 114 N. C. 818, 19 S. E. 376.

Utah. — Ducheneau *v.* Ireland, 5 Utah 108, 13 Pac. 87.

Washington. — State *v.* Hogg, 22 Wash. 646, 62 Pac. 143.

Wisconsin. — State *v.* Pollard, 112 Wis. 232, 87 N. W. 1107; State *v.* La Crosse County Ct. Judge, 11 Wis. 50.

Canada. — Tessier *v.* Desnoyers, 12 Quebec Super. Ct. 35.

See 40 Cent. Dig. tit. "Prohibition," § 4.

1. Kilty *v.* Hartford, etc., St. R. Co., 184 Mass. 310, 68 N. E. 236; Jaquith *v.* Fuller, 167 Mass. 123, 45 N. E. 54; People *v.* Grogan, 3 N. Y. Cr. 335. *Compare* McAneny *v.* Santa Clara County Super. Ct., 150 Cal. 6, 87 Pac. 1020.

For example where a bank was sued in assumpsit and pleaded the general issue and gave notice of set-off, and while the suit was pending plaintiff in assumpsit filed a bill

able to the applicant, either by appeal or writ of error,[2] or by any

against the bank and its cashier for an accounting, and the bank's plea to the jurisdiction setting up the pendency of the action at law was overruled and complainant elected to proceed in chancery, and an appeal from the order overruling the bank's plea was dismissed as from a non-appealable order, a writ of prohibition will not issue to restrain the judge and complainant from proceeding with the chancery suit in which all the questions raised by the bank could be determined. Port Huron Sav. Bank *v.* St. Clair Cir. Judge, 147 Mich. 551, 111 N. W. 202.

2. *Alabama.*— Bickley *v.* Bickley, 129 Ala. 403, 29 So. 854.

Arizona.— Walker *v.* Pinal County Second Judicial Dist. Ct., 4 Ariz. 249, 35 Pac. 982.

Arkansas.— Dunbar *v.* Wallace, 84 Ark. 231, 105 S. W. 257; Kastor *v.* Elliott, 77 Ark. 148, 91 S. W. 8; Finley *v.* Moose, 74 Ark. 217, 109 Am. St. Rep. 79, 85 S. W. 238.

California.— Herbert *v.* Fresno County Super. Ct., (1907) 91 Pac. 800; Carr *v.* Monterey County Super. Ct., 147 Cal. 227, 81 Pac. 515; Valentine *v.* San Francisco Police Ct., 141 Cal. 615, 75 Pac. 336; Lindley *v.* Siskiyou County Super. Ct., 141 Cal. 220, 74 Pac. 765; Jacobs *v.* San Joaquin County Super. Ct., 133 Cal. 364, 65 Pac. 826; McDonald *v.* Agnew, 122 Cal. 448, 55 Pac. 125; Grant *v.* Los Angeles Super. Ct., 106 Cal. 324, 39 Pac. 604; Mines D'Or de Quartz Mountain Société Anonyme *v.* Fresno County Super. Ct., 91 Cal. 101, 27 Pac. 532; Agassiz *v.* San Francisco Super. Ct., 90 Cal. 101, 27 Pac. 49; Murphy *v.* Santa Clara Super. Ct., 84 Cal. 592, 24 Pac. 310; Powelson *v.* Lockwood, 82 Cal. 613, 23 Pac. 143; Mancello *v.* Bellrude, (1886) 11 Pac. 501; Levy *v.* Wilson, 69 Cal. 105, 10 Pac. 272; Childs *v.* Edmunds, (1886) 10 Pac. 130; Wreden *v.* Stanislaus County Super Ct., 55 Cal. 504; Clark *v.* Lassen County Super. Ct., 55 Cal. 199; Beaulieu Vineyard *v.* Napa County Super Ct., 6 Cal. App. 242, 91 Pac. 1015; Hubbard *v.* San Jose Tp. County Ct., 5 Cal. App. 90, 89 Pac. 865; Johnston *v.* Sacramento County Super. Ct., 4 Cal. App. 90, 87 Pac. 211; Cross *v.* San Francisco Super. Ct., 2 Cal. App. 342, 83 Pac. 815; Kinard *v.* Oakland Police Ct., 2 Cal. App. 179, 83 Pac. 175.

Colorado.— People *v.* Thirteenth Judicial Dist. Ct., 37 Colo. 440, 86 Pac. 322; People *v.* Stevens, 33 Colo. 306, 79 Pac. 1018; People *v.* Second Judicial Dist. Ct., 32 Colo. 469, 77 Pac. 239; People *v.* Arapahoe County Dist. Ct., 29 Colo. 1, 66 Pac. 888; Tomboy Gold Mines Co. *v.* Arapahoe County Dist. Ct., 23 Colo. 441, 48 Pac. 537; People *v.* Second Judicial Dist. Ct., 21 Colo. 251, 40 Pac. 460; People *v.* Larimer County Dist. Ct., 11 Colo. 574, 19 Pac. 541.

District of Columbia.— U. S. *v.* Barnard, 29 App. Cas. 431; U. S. *v.* Scott, 25 App. Cas. 88.

Florida.— State *v.* Malone, 40 Fla. 129, 23 So. 575; State *v.* Hocker, 33 Fla. 283, 14 So. 586; Sherlock *v.* Jacksonville, 17 Fla. 93.

Idaho.— Willman *v.* Alturas County Dist. Ct., 4 Ida. 11, 35 Pac. 692.

Illinois.— People *v.* Cook County Cir. Ct., 173 Ill. 272, 50 N. E. 928; People *v.* Hoglund, 93 Ill. App. 292.

Indiana.— Jasper County *v.* Spitler, 13 Ind. 235.

Kentucky.— Com. *v.* Peter, 106 S. W. 306, 32 Ky. L. Rep. 579.

Louisiana.— State *v.* Leche, 113 La. 1, 36 So. 868; State *v.* St. Paul, 52 La. Ann. 1039, 27 So. 571; State *v.* King, 50 La. Ann. 19, 22 So. 928; State *v.* Richardson, 49 La. Ann. 1612, 22 So. 960; State *v.* Rost, 49 La. Ann. 1451, 22 So. 421; State *v.* Wilder, 49 La. Ann. 1211, 22 So. 661; State *v.* Perez, 48 La. Ann. 1348, 20 So. 164; State *v.* Monroe, 48 La. Ann. 27, 18 So. 701; State *v.* Fournet, 45 La. Ann. 943, 13 So. 185; State *v.* Rightor, 44 La. Ann. 298, 10 So. 774; State *v.* Rightor, 40 La. Ann. 837, 6 So. 102; State *v.* Koenig, 39 La. Ann. 776, 2 So. 559; State *v.* Judge Twenty-Sixth Judicial Dist. Ct., 34 La. Ann. 782; State *v.* Judge Twenty-First Judicial Ct., 33 La. Ann. 1284; State *v.* Judge Civil Dist. Ct., 33 La. Ann. 927; State *v.* Monroe, 33 La. Ann. 923; State *v.* Judge Orleans Parish Second Dist. Ct., 25 La. Ann. 381; State *v.* Judge Orleans Parish Fourth Dist. Ct., 21 La. Ann. 123; State *v.* Judge New Orleans Fourth Dist. Ct., 11 La. Ann. 696; State *v.* Sixth Judicial Dist. Judge, 9 La. Ann. 350; State *v.* Judge New Orleans Commercial Ct., 2 Rob. 566. See also State *v.* Ellis, 47 La. Ann. 1602, 18 So. 636.

Michigan.— People *v.* Wayne County Cir. Ct., 11 Mich. 393, 83 Am. Dec. 754.

Minnesota.— State *v.* Ward, 70 Minn. 58, 72 N. W. 825; State *v.* Cory, 35 Minn. 178, 28 N. W. 217; State *v.* Ramsey County Dist. Ct., 26 Minn. 233, 2 N. W. 698; State *v.* St. Paul Municipal Ct., 26 Minn. 162, 2 N. W. 166.

Mississippi.— Crittenden *v.* Booneville, (1908) 45 So. 723.

Missouri.— State *v.* Stobie, 194 Mo. 14, 92 S. W. 191; Wand *v.* Ryan, 166 Mo. 646, 65 S. W. 1025; State *v.* Scarritt, 128 Mo. 331, 30 S. W. 1026; State *v.* Klein, 116 Mo. 259, 22 S. W. 693; State *v.* Withrow, 108 Mo. 1, 18 S. W. 41; State *v.* Burckhart, 87 Mo. 533; State *v.* Shannon, 130 Mo. App. 90, 108 S. W. 1097; State *v.* Riley, 127 Mo. App. 469, 105 S. W. 696; State *v.* Williams, 117 Mo. App. 564, 92 S. W. 151; Mastin *v.* Sloan, 98 Mo. App. 252, 11 S. W. 558; Eckerle *v.* Wood, 95 Mo. App. 378, 69 S. W. 45; Shaw *v.* Pollard, 84 Mo. App. 286; State *v.* Anthony, 65 Mo. App. 543; State *v.* Heege, 39 Mo. App. 49; State *v.* Seay, 23 Mo. App. 623.

Montana.— State *v.* Benton, 12 Mont. 66, 29 Pac. 425. See also State *v.* Dist. Ct., 95 Pac. 843.

Nevada.— Turner *v.* Langan, 29 Nev. 281, 88 Pac. 1088.

New York.— People *v.* Smith, 184 N. Y. 96, 76 N. E. 925; People *v.* Trial Term Part 1, 184 N. Y. 30, 76 N. E. 732; People *v.*

other writ, motion, or proceeding appropriate to the relief, as a writ of

Nichols, 79 N. Y. 582; People *v.* McCue, 74 N. Y. App. Div. 302, 77 N. Y. Suppl. 451; People *v.* Sherman, 66 N. Y. App. Div. 231, 72 N. Y. Suppl. 718 [*affirmed* in 171 N. Y. 684, 64 N. E. 1124]; People *v.* Williams, 51 N. Y. App. Div. 102, 64 N. Y. Suppl. 457; Matter of Mason, 51 Hun 138, 4 N. Y. Suppl. 664; People *v.* New York Mar. Ct., 36 Barb. 341; People *v.* New York Fourth Judicial Dist. Ct., 13 N. Y. Civ. Proc. 134; People *v.* Seward, 7 Wend. 518; People *v.* Grogan, 3 N. Y. Cr. 335.

South Carolina.— State *v.* Columbia, etc., R. Co., 1 S. C. 46.

Utah.— Overland Gold Min. Co. *v.* McMaster, 19 Utah 177, 56 Pac. 977; People *v.* Hills, 5 Utah 410, 16 Pac. 405.

Virginia.— Shell *v.* Cousins, 77 Va. 328; Hogan *v.* Guigon, 29 Gratt. 705; Bedford County Sup'rs *v.* Wingfield, 27 Gratt. 329.

Washington.— State *v.* King County Super. Ct., 48 Wash. 671, 94 Pac. 472; State *v.* Hinkle, 47 Wash. 156, 91 Pac. 640; State *v.* Mason County Super. Ct., 47 Wash. 154, 91 Pac. 639; State *v.* King County Super. Ct., 41 Wash. 128, 83 Pac. 14; State *v.* Tallman, 38 Wash. 132, 80 Pac. 272; State *v.* King County Super. Ct., 36 Wash. 566, 79 Pac. 29; State *v.* King County Super. Ct., 34 Wash. 643, 76 Pac. 282; State *v.* Kitsap County Super. Ct., 31 Wash. 410, 71 Pac. 1100; State *v.* Neal, 30 Wash. 702, 71 Pac. 647; State *v.* Moore, 23 Wash. 115, 62 Pac. 441; State *v.* Hogg, 22 Wash. 646, 62 Pac. 143; State *v.* Benson, 21 Wash. 571, 58 Pac. 1066; State *v.* Island County Super. Ct., 19 Wash. 198, 52 Pac. 1009; State *v.* Lewis County Super. Ct., 16 Wash. 444, 47 Pac. 965; State *v.* Jones, 2 Wash. 662, 27 Pac. 452, 26 Am. St. Rep. 897.

West Virginia.— Knight *v.* Zahnhiser, 53 W. Va. 370, 44 S. E. 778; King *v.* Doolittle, 51 W. Va. 91, 41 S. E. 145; Johnston *v.* Hunter, 50 W. Va. 52, 40 S. E. 448; McConiha *v.* Guthrie, 21 W. Va. 134.

Wisconsin.— *In re* Gates, 117 Wis. 445, 94 N. W. 292.

United States.—Alexander *v.* Crollott, 199 U. S. 580, 26 S. Ct. 161, 50 L. ed. 317; *In re* Huguley Mfg. Co., 184 U. S. 297, 22 S. Ct. 455, 46 L. ed. 549; *In re* New York, etc., Steamship Co., 155 U. S. 523, 15 S. Ct. 183, 39 L. ed. 246; *In re* Rice, 155 U. S. 396, 15 S. Ct. 149, 39 L. ed. 198; Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601; *Ex p.* Detroit River Ferry Co., 104 U. S. 519, 26 L. ed. 815; *Ex p.* Gordon, 104 U. S. 515, 26 L. ed. 814.

England.— Smith *v.* London, 6 Mod. 78, 87 Eng. Reprint 835; Guillan *v.* Gill, 1 Lev. 164, 83 Eng. Reprint 350.

Canada.— Bastian *v.* Amyot, 11 Can. Cr. Cas. 232, 15 Quebec K. B. 22 [*reversing* 28 Quebec Super. Ct. 54]; Doidge *v.* Mimms, 12 Manitoba 618.

See 40 Cent. Dig. tit. "Prohibition," § 5.

Compare Lincoln-Lucky, etc., Min. Co. *v.* First Judicial Dist. Ct., 7 N. M. 486, 38 Pac. 580, holding that a judgment of a court in a cause of which it has no jurisdiction being a nullity the party should not be compelled to appeal, even if he can, but the writ of prohibition is properly issued.

Extraordinary proceeding.—However, where a court is attempting to exercise unauthorized jurisdiction in an extraordinary proceeding, the writ will issue, although there may be for the party aggrieved a remedy by appeal. State *v.* Wilcox, 24 Minn. 143.

While the mere fact that an appeal will lie from an erroneous decision on the question of jurisdiction will not bar a writ of prohibition, yet it ought to do so unless there is something out of the ordinary to suggest that justice requires the writ. Bankers' Life Assoc. *v.* Shelton, 84 Mo. App. 634.

Prohibition will not serve as a second appeal, after the adverse determination of the only appeal given by statute. Valentine *v.* San Francisco Police Ct., 141 Cal. 615, 75 Pac. 336.

But the remedy by appeal must be complete and adequate in order to prevent the issuance of the writ. White *v.* San Francisco Super. Ct., 126 Cal. 245, 58 Pac. 450 (holding that where a mortgagor has a present right to the dismissal of an action of foreclosure on the ground of plaintiff's failure to serve the summons within three years after the commencement of the action, as provided by statute, a writ of prohibition to arrest the prosecution of such action as to him will be issued, notwithstanding the mortgagor could appeal from the judgment in the foreclosure suit, because such remedy is not adequate); Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; People *v.* Second Judicial Dist. Ct., 32 Colo. 15, 74 Pac. 896; State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; State *v.* Allen, 45 Mo. App. 551; Crisler *v.* Morrison, 57 Miss. 791; Bell *v.* First Judicial Dist. Ct., 28 Nev. 280, 81 Pac. 875, 113 Am. St. Rep. 854, 1 L. R. A. N. S. 843. See also Appo *v.* People, 20 N. Y. 531; Gates *v.* McGee, 15 S. D. 247, 88 N. W. 115; Yearian *v.* Spiers, 4 Utah 385, 11 Pac. 618.

The requirement of a bond to perfect the appeal does not make that remedy any the less adequate so that the prohibition will lie. Alexander *v.* Crollott, 199 U. S. 580, 26 S. Ct. 161, 50 L. ed. 317.

Expense incident to appeal as affecting its adequacy.— Prohibition will lie where the remedy by appeal is wholely inadequate for the reason that the greater amount of the expense incident to pursuing such remedy cannot be recovered as legal costs. Ophir Silver Min. Co. *v.* San Francisco Super. Ct., 147 Cal. 467, 82 Pac. 70. Where the relators for a writ of prohibition would have been compelled, in case they failed to obtain the relief prayed, to defend one thousand two hundred and three misdemeanor cases, and if defeated appeal at a cost aggregating twelve thousand three hundred dollars, as well as counsel fees, the remedy of submitting to trial and then appealing, although

review,[3] writ of supersedeas,[4] certiorari,[5] habeas corpus,[6] injunction,[7] mandamus,[8] quo warranto,[9] action for trespass,[10] amendment,[11] motion to change venue,[12] motion to set aside,[13] motion to stay proceedings,[14] or proceedings for con-

available, was held to be so inadequate as to justify the application for prohibition. State *v.* Elby, 170 Mo. 497, 71 S. W. 52. It has been held, however, that expense of an appeal, and delays and annoyance incident thereto, do not affect its adequacy, so as to warrant employment of the writ of prohibition in place of the appeal. State *v.* King County Super. Ct., 30 Wash. 700, 71 Pac. 648.

Where rights of third parties intervene.— Where the order of a court in an election contest attempts to expose the manner in which voters exercise their right of franchise, by authorizing comparison of the ballots with the voting lists, the damage to the voters cannot be repaired by appeal or writ of error, and such order is therefore properly reviewable on a writ of prohibition. State *v.* Spencer, 166 Mo. 271, 65 S. W. 981.

An appeal from an order continuing an attachment in force, pending an appeal from a judgment for defendant in an action in which the attachment issued, is not an adequate remedy at law, precluding the issuance of a writ of prohibition to prevent the court from continuing the attachment. Primm *v.* Shasta County Super. Ct., 3 Cal. App. 208, 84 Pac. 786.

Where a superior court assumed the jurisdiction of the administration of an estate, after an application for letters of administration had been made in another county, the remedy by appeal was held not to be adequate so as to bar the right to relief by prohibition. Dungan *v.* Fresno County Super. Ct., 149 Cal. 98, 84 Pac. 767, 117 Am. St. Rep. 119.

3. Hayes *v.* Oceanside, 6 Cal. App. 520, 92 Pac. 492.

4. McAneny *v.* Santa Clara County Super. Ct., 150 Cal. 6, 87 Pac. 1020.

5. *California.*—Grant *v.* Los Angeles Super. Ct., 106 Cal. 324, 39 Pac. 604.

Colorada.— People *v.* De France, 29 Cal. 309, 68 Pac. 267.

District of Columbia.— U. S. *v.* Barnard, 29 App. Cas. 431; U. S. *v.* Kimball, 7 App. Cas. 499.

Georgia.— Montezuma *v.* Minor, 70 Ga. 191; Hart *v.* Taylor, 61 Ga. 156.

Illinois.— People *v.* Cook County Cir. Ct., 173 Ill. 272, 50 N. E. 928.

Minnesota.— State *v.* Ward, 70 Minn. 58, 72 N. W. 825.

Mississippi.— Crittenden *v.* Booneville, (1908) 45 So. 723; Planters' Ins. Co. *v.* Cramer, 47 Miss. 200.

Missouri.— State *v.* Stobie, 194 Mo. 14, 92 S. W. 191; State *v.* Hickman, 85 Mo. App. 198; State *v.* Bowerman, 40 Mo. App. 576.

New York.— People *v.* Russell, 49 Barb. 351; People *v.* Butler, 53 Misc. 366, 103 N. Y. Suppl. 329; People *v.* Clute, 42 How. Pr. 157; People *v.* Seward, 7 Wend. 518; People *v.* Grogan, 3 N. Y. Cr. 335.

South Carolina.— State *v.* Kirkland, 41 S. C. 29, 19 S. E. 215; Cooper *v.* Stocker, 9 Rich. 292.

Utah.— People *v.* Hills, 5 Utah 410, 16 Pac. 405.

Washington.— State *v.* Moore, 23 Wash. 115, 62 Pac. 441.

West Virginia.— Johnston *v.* Hunter, 50 W. Va. 52, 40 S. E. 448; Davis *v.* Davis, 40 W. Va. 464, 21 S. E. 906.

United States.— Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601.

Canada.— Breton *v.* Landry, 13 Quebec Super. Ct. 31.

See 40 Cent. Dig. tit. "Prohibition," § 6.

Contrary view.— It has been held in Massachusetts that the fact that remedy by certiorari will be open to a party after final judgment affords no reason for refusing a writ of prohibition where the tribunal has no jurisdiction of the case and timely objection on that ground was made. Connecticut River R. Co. *v.* Franklin County Com'rs, 127 Mass. 50, 34 Am. Rep. 338.

When both prohibition and certiorari will lie concurrently.— A proper proceeding to prevent a disqualified county judge from entertaining a motion is by certiorari and prohibition from the district court, where it is the duty of the county judge because of his disqualification to certify the cause to the district court. People *v.* Yuma County Dist. Ct., 26 Colo. 226, 56 Pac. 1115.

6. People *v.* Wyatt, 186 N. Y. 383, 79 N. E. 330 [*affirming* 113 N. Y. App. Div. 111, 99 N. Y. Suppl. 114], holding that where, in issuing a subpœna, the magistrate was not only acting without jurisdiction, but the subpœna was void on its face and the witness was not bound to obey it, he could lawfully decline to attend or to be sworn, or to answer any questions, and any attempt to punish him would be unlawful, he would have right to relief by the writ of habeas corpus, and therefore he was not entitled to writ of prohibition to prevent the magistrate from proceeding with the examination.

7. Murphy *v.* Bantel, 6 Cal. App. 215, 91 Pac. 805; State *v.* Judge Twenty-Fourth Judicial Dist. Ct., 32 La. Ann. 814; People *v.* Parker, 63 How. Pr. (N. Y.) 3; State *v.* Hunter, 4 Wash. 712, 30 Pac. 1055.

8. Crittenden *v.* Booneville, (Miss. 1908) 45 So. 723.

9. Davenport *v.* Elrod, 20 S. D. 567, 107 N. W. 833.

10. See *Ex p.* Braudlacht, 2 Hill (N. Y.) 367, 38 Am. Dec. 593.

11. Allen *v.* Fairfax Cheese Co., 21 Ont. 598, even in a court having no equitable jurisdiction.

12. Fresno Nat. Bank *v.* San Joaquin County Super. Ct., 83 Cal. 491, 24 Pac. 157.

13. North American L. Assur. Co. *v.* Collins, 9 Ont. L. Rep. 579, 5 Ont. Wkly. Rep. 342.

14. McAneny *v.* Santa Clara Super. Ct., 150 Cal. 6, 87 Pac. 6.

tempt.[15] But the concurrent remedy is not regarded as adequate, so as to prevent the issuance of a writ, if it does not afford the particular right to the party aggrieved,[16] or if its slowness is likely to produce immediate injury or mischief.[17]

2. Errors and Irregularities. If the inferior court or tribunal has jurisdiction of both the subject-matter and of the person, prohibition will not lie to correct errors of law or fact, for which there is an adequate remedy by appeal or otherwise, whether such errors are merely apprehended [18] or have been actually committed.[19]

15. *Ex p.* Braudlacht, 2 Hill (N. Y.) 367, 38 Am. Dec. 593.

16. State *v.* Cline, 85 Mo. App. 628; Keefe *v.* Carbon County Dist. Ct., 16 Wyo. 381, 94 Pac. 459.

The efficiency of a concurrent remedy is a question to be determined in each particular case and the court is not bound to refuse the writ because a concurrent remedy happens to exist. State *v.* Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037.

17. *California.*— Terrell *v.* Santa Clara County Super. Ct., (1899) 60 Pac. 38.

Colorado.— McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516.

Idaho.— Cronan *v.* Kootenai County Dist. Ct., (1908) 96 Pac. 768.

Louisiana.— State *v.* Judge New Orleans Commercial Ct., 4 Rob. 48.

Missouri.— State *v.* Denton, 128 Mo. App. 304, 107 S. W. 446.

Utah.— People *v.* Carrington, 5 Utah 531, 17 Pac. 735.

Washington.— See State *v.* Yakima County Super. Ct., 4 Wash. 30, 29 Pac. 764.

Wisconsin.— State *v.* Eau Claire County Cir. Ct., 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554.

See 40 Cent. Dig. tit. "Prohibition," § 4.

18. *California.*—Wreden *v.* Stanislaus County Super. Ct., 55 Cal. 504; Beaulieu Vineyard *v.* Napa County Super. Ct., 6 Cal. App. 195, 91 Pac. 1015.

Kentucky.— Scott *v.* Tully, 106 Ky. 69, 49 S. W. 1063, 20 Ky. L. Rep. 1734; Bank Lick Turnpike Co. *v.* Phelps, 81 Ky. 613.

Louisiana.— State *v.* Judge Twenty-First Judicial Dist. Ct., 33 La. Ann. 1284; State *v.* Monroe, 33 La. Ann. 923.

Missouri.— State *v.* Riley, 203 Mo. 175, 101 S. W. 567, 12 L. R. A. N. S. 900; State *v.* Gates, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. N. S. 152.

New York.— People *v.* Wyatt, 186 N. Y. 383, 79 N. E. 330; People *v.* Smith, 184 N. Y. 96, 76 N. E. 925; People *v.* Russel, 19 Abb. Pr. 136.

North Dakota.— Zinn *v.* Barnes County Dist. Ct., (1908) 114 N. W. 475.

Washington.—State *v.* King County Super. Ct., 45 Wash. 248, 88 Pac. 207; Corcoran *v.* Bell, 36 Wash. 217, 78 Pac. 945.

See 40 Cent. Dig. tit. "Prohibition," §§ 4, 5.

19. *Alabama.*— Epperson *v.* Rice, 102 Ala. 668, 15 So. 434; *Ex p.* Brown, 58 Ala. 536; *Ex p.* Greene, 29 Ala. 52; *Ex p.* Montgomery, 24 Ala. 98.

California.— Woodward *v.* San Francisco Super. Ct., 95 Cal. 272, 30 Pac. 535, (1892) 30 Pac. 537; Spect *v.* Colusa County Super. Ct., 59 Cal. 319; Murphy *v.* Colusa County Super. Ct., 58 Cal. 520; People *v.* Kern County, 47 Cal. 81; Borello *v.* Amador County Super. Ct., (App. 1908) 96 Pac. 404; Kinard *v.* Oakland City Police Ct., 2 Cal. App. 179, 83 Pac. 175.

Colorado.— People *v.* Fremont County Dist. Ct., 30 Colo. 488, 71 Pac. 388; People *v.* Second Judicial Dist. Ct., 29 Colo. 83, 66 Pac. 1068; Leonard *v.* Bartels, 4 Colo. 95.

Florida.— State *v.* Malone, 40 Fla. 129, 23 So. 575; State *v.* Smith, 32 Fla. 476, 14 So. 43.

Illinois.— People *v.* Hoglund, 93 Ill. App. 292.

Kentucky.— Schobarg *v.* Manson, 110 Ky. 483, 61 S. W. 999, 22 Ky. L. Rep. 1892; Coe *v.* Standiford, 11 B. Mon. 196; Bank Lick Turnpike Co. *v.* Phelps, 5 Ky. L. Rep. 713.

Louisiana.— State *v.* Judge Fourth City Ct., 38 La. Ann. 921; State *v.* Judge Fourth City Ct., 38 La. Ann. 377; State *v.* Thompson, 34 La. Ann. 758; State *v.* Twenty-Sixth Judicial Dist. Judge, 34 La. Ann. 611.

Massachusetts.— Hyde Park *v.* Wiggin, 157 Mass. 94, 31 N. E. 693.

Minnesota.— State *v.* Crosby, 92 Minn. 176, 99 N. W. 636.

Mississippi.— Clayton *v.* Heidelberg, 9 Sm. & M. 623.

Missouri.— State *v.* Stobie, 194 Mo. 14, 92 S. W. 191; State *v.* Evans, 184 Mo. 632, 83 S. W. 447; Delaney *v.* Kansas City Police Ct., 167 Mo. 667, 67 S. W. 589; State *v.* Moehlenkamp, 133 Mo. 134, 34 S. W. 468; State *v.* Burckhartt, 87 Mo. 533; *In re* Bowman, 67 Mo. 146; State *v.* Harrison, 53 Mo. App. 346.

Nevada.— Low *v.* Crown Point Min. Co., 2 Nev. 75.

New Mexico.— Tapia *v.* Martinez, 4 N. M. 165, 16 Pac. 272.

New York.— People *v.* Nichols, 79 N. Y. 582, 58 How. Pr. 200; People *v.* Doyle, 44 N. Y. App. Div. 402, 60 N. Y. Suppl. 1088 [*affirmed* in 162 N. Y. 659, 57 N. E. 1122]; People *v.* New York Ct. of C. Pl., 43 Barb. 278; People *v.* New York Mar. Ct., 36 Barb. 341; People *v.* Boswick, 2 N. Y. Ct. 163; *Ex p.* Gordon, 2 Hill 363; People *v.* Seward, 7 Wend. 518.

South Carolina.— State *v.* Raborn, 60 S. C. 78, 38 S. E. 260; State *v.* Kirkland, 41 S. C. 29, 19 S. E. 215; State *v.* Columbia, 17 S. C. 80; State *v.* Fickling, 10 S. C. 301; State *v.* Columbia, etc., R. Co., 1 S. C. 46; Cooper *v.* Stocker, 9 Rich. 292; *Ex p.* Bradley, 9 Rich. 95; State *v.* Nathan, 4 Rich. 513; *In re* State, 3 Rich. 111; State *v.* Lancaster Dist. Road Com'rs, 3 Hill 314; State *v.*

3. Change of Venue and Removal of Cause. A denial of a change of venue reviewable by appeal is not ground for a writ of prohibition to restrain the court from further proceeding in the cause.[20] Nor will the writ lie, after the removal of the cause to another court, to restrain the court to which it has been removed from

Ridgell, 2 Bailey 560; McDonald *v.* Elfe, 1 Nott & M. 501.

Virginia.— Moss *v.* Barham, 94 Va. 12, 26 S. E. 388.

Washington.— Hindman *v.* Colvin, 46 Wash. 317, 89 Pac. 894; State *v.* King County Super. Ct., 32 Wash. 498, 73 Pac. 479; State *v.* Island County Super. Ct., 21 Wash. 631, 59 Pac. 505; State *v.* Benson, 21 Wash. 571, 58 Pac. 1066.

West Virginia.— Ward *v.* Evans, 49 W. Va. 184, 38 S. E. 524; Buskirk *v.* Circuit Ct. Judge, 7 W. Va. 91.

Wyoming.— State *v.* Ausherman, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548; Dobson *v.* Westheimer, 5 Wyo. 34, 36 Pac. 626.

United States.— *Ex p.* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232; *Ex p.* Pennsylvania, 109 U. S. 174, 3 S. Ct. 84, 27 L. ed. 894.

England.— *In re* Crawford, 13 Q. B. 613, 13 Jur. 955, 18 L. J. Q. B. 225, 66 E. C. L. 613.

Canada.— England *v.* Joannette, 23 Can. Sup. Ct. 415; Long Point Co. *v.* Anderson, 18 Ont. App. 401; Reid *v.* Graham, 25 Ont. 573; Gould *v.* Hope, 21 Ont. 624; Field *v.* Rice, 20 Ont. 309; McKay *v.* Palmer, 12 Ont. Pr. 219; Western Fair Assoc. *v.* Hutchinson, 12 Ont. Pr. 40; Fee *v.* McIlhargey, 9 Ont. Pr. 329; McLean *v.* McLeod, 5 Ont. Pr. 467; Higginbotham *v.* Moore, 21 U. C. Q. B. 326. See also Sato *v.* Hubbard, 8 Ont. Pr. 445; *In re* Brown, 6 Ont. Pr. 1; Siddall *v.* Gibson, 17 U. C. Q. B. 98.

See 40 Cent. Dig. tit. "Prohibition," §§ 4, 5, 36. And see *supra*, text and note 97 *et seq.*

The power of a court to decide erroneously respecting matters within its jurisdiction is as clear and undoubted as its power to decide correctly. Powhatan Coal, etc., Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. N. S. 1225.

Error must be gross and wilful.— Where property has been seized under execution the question of its exempt character is one of mixed law and fact for the court, and error, unless gross or wilful, is not ground for prohibition. Holden *v.* Judge Second City Ct., 35 La. Ann. 1110.

Error in construing statute.— That the inferior tribunal has erred in the construction of a statute furnishes no ground for prohibition, if by so doing it does not usurp jurisdiction. Long Point Co. *v.* Anderson, 18 Ont. App. 401.

In awarding a preliminary injunction, the court must determine, provisionally, what the *status quo* is, and an erroneous conclusion as to it, resulting in the awarding of an injunction, not warranted by the allegations of the bill, but within the power of the court to award upon sufficient allegations, is judicial error, but no usurpation, or abuse, of judicial power. Powhatan Coal, etc., Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. N. S. 1225.

In condemnation proceedings.— The action of the court in denying to defendant in proceedings to condemn land for a railway right of way the benefit of a jury trial is not in excess of the jurisdiction of the court, and is not reviewable by writ of prohibition. Beaulieu Vineyard *v.* Napa County Super. Ct., 6 Cal. App. 242, 91 Pac. 1015. Where the complaint, in a proceeding to condemn land for a railroad right of way, shows a case where property of the kind sought to be taken may be taken for the use for which it is sought, the question whether the facts justify the taking is for the trial court in the exercise of its jurisdiction, and cannot be determined on prohibition to restrain the court from proceeding with the trial. Reclamation Dist. No. 551 *v.* Sacramento County Super. Ct., 151 Cal. 263, 90 Pac. 545.

The writ will not lie to correct alleged errors in rulings of the trial judge, where it does not appear that the judge has usurped power or has refused to discharge any duty imposed on him by law, or that there has been any irregularity operating as a denial of justice in the proceedings complained of. The supervisory jurisdiction of the supreme court will not be so exercised as to give to relator the benefit of an appeal in a case in which the law-makers have not thought proper to authorize such appeal. *In re* Theriot, 117 La. 532, 42 So. 93.

20. *Alabama.*— *Ex p.* Mobile, etc., R. Co., 63 Ala. 349.

California.— People *v.* Whitney, 47 Cal. 584.

Louisiana.— State *v.* Judge Super. Dist. Ct., 26 La. Ann. 146.

Minnesota.— State *v.* St. Paul Municipal Ct., 26 Minn. 162, 2 N. W. 166.

Missouri.— State *v.* Evans, 184 Mo. 632, 83 S. W. 447.

Montana.— State *v.* Second Judicial Dist. Ct., 30 Mont. 547, 77 Pac. 318.

Nevada.— Walcott *v.* Wells, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59.

New York.— People *v.* New York Fourth Judicial Dist. Ct., 13 N. Y. Civ. Proc. 134.

Washington.— State *v.* Spokane County Super. Ct., 40 Wash. 555, 82 Pac. 877, 111 Am. St. Rep. 925, 2 L. R. A. N. S. 395. To the same effect see State *v.* Mason County Super. Ct., 47 Wash. 154, 91 Pac. 639, holding the rule to be applicable notwithstanding the delay and expense incident to the remedy by appeal.

Failure to seasonably pass on motion.— A petition for a writ of prohibition to a district

further proceeding, if there exists an adequate remedy by appeal.[21] But the writ will lie to restrain the court, from which the cause has been removed, from trying defendant on a second indictment or information for the same offense.[22]

4. Proceedings Relating to Injunction. If there exists an adequate remedy by appeal or otherwise, the writ never lies to restrain the issuance of an injunction,[23] or to review any order therefor.[24]

5. Proceedings Relating to Receivership. Where an appeal lies from and is an adequate remedy to prevent execution of an order of court appointing a receiver, prohibition will not issue for such purpose, although the order is in excess of the jurisdiction of the court.[25] An order fixing a receiver's compensation, being subject to review upon appeal or certiorari, will not be arrested by a writ of prohibition.[26]

6. Proceedings Relating to Reference. Where a remedy by appeal or writ of error exists, prohibition will not issue to restrain the appointment of a referee,[27] or to restrain action by an appointee as referee.[28]

court, on the ground that the judge thereof has failed for an unreasonable time to pass on a motion for a change of venue, cannot be entertained. People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242.

Remedy by appeal inadequate.— Where a defendant in divorce was denied a change of venue to which he was entitled as a matter of right under a statutory provision, it was held that, although the erroneous action of the court in denying the application was reviewable on appeal, nevertheless owing to the nature of the action and the fact that any further proceedings would be entirely beyond the court's jurisdiction, defendant was entitled to a writ of prohibition restraining further proceedings. People *v.* Second Judicial Dist. Ct., 30 Colo. 123, 69 Pac. 597. A holder of a dramshop license is entitled to prohibition on the refusal of the court to grant his application for a change of venue in certiorari to review the proceedings in the county court granting him a license, the remedy by appeal from a judgment denying his right to a license not being adequate. State *v.* Denton, 128 Mo. App. 304, 107 S. W. 446.

Overruling order granting change of venue. — Prohibition will lie in a supreme court to prevent a circuit judge from taking further action in a disbarment proceeding wherein he has overruled an order made at the previous term disqualifying himself and granting a change of venue, although there is no statute expressly authorizing change of venue in disbarment proceedings, and no appellate jurisdiction is conferred on the supreme court in such cases. State *v.* Fort, 178 Mo. 518, 77 S. W. 741.

21. Weaver *v.* Leatherman, 66 Ark. 211, 49 S. W. 977; People *v.* Fremont County Dist. Ct., 30 Colo. 488, 71 Pac. 388; People *v.* Hoglund, 93 Ill. App. 292.

22. Keefe *v.* Carbon County Dist. Ct., 16 Wyo. 381, 94 Pac. 459, change of venue in a homicide case, the remedy by appeal from a conviction being inadequate.

23. *Ex p.* Reid, 50 Ala. 439.

Remedy by appeal.— The fact that a district court has overruled a motion to dissolve a preliminary injunction against certain state officers, prohibiting them from paying money to certain institutions under an act of the legislature, which motion challenged the jurisdiction of the court over the subject-matter, and is about to hear the cause on its merits, will not authorize a writ of prohibition, as the ruling may be reviewed on appeal. State *v.* Jones, 2 Wash. 662, 27 Pac. 452, 26 Am. St. Rep. 897.

24. Stoddard *v.* Stanislaus County Super. Ct., (Cal. 1895) 40 Pac. 491; *Ex p.* Warmouth, 17 Wall. (U. S.) 64, 21 L. ed. 543.

25. White *v.* San Francisco Super. Ct., 110 Cal. 54, 42 Pac. 471.

Remedy not adequate.— However, where a receiver was ordered to close down a great sugar refinery and sell its stock, machinery, and utensils, the right to appeal from the order of appointment does not afford a plain, speedy, and adequate remedy, especialy where the appeal would not stay proceedings under the receivership. Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. Under Ida. Rev. St. (1887) § 4995, authorizing a writ of prohibition to arrest proceedings without or in excess of jurisdiction where there is not a plain, speedy, and adequate remedy in the ordinary course of law, a writ of prohibition may issue to prevent a court from further proceeding in the conduct of the business of a private corporation through a receiver where a period of six months or more would elapse before an appeal could be heard, during which time all of the property and assets of the corporation would continue in the hands of the receiver and the corporation be kept running, and the creditors delayed for that length of time at least in the collection of their claims. Cronan *v.* Kootenai County Dist. Ct., (Ida. 1908) 96 Pac. 768. *Compare* McAneny *v.* Santa Clara Super. Ct., 150 Cal. 6, 87 Pac. 1020.

26. Grant *v.* Los Angeles Super. Ct., 106 Cal. 324, 39 Pac. 604.

27. State *v.* Johnson, 132 Mo. 105, 33 S. W. 781.

28. Dupoyster *v.* Clarke, 121 Ky. 694, 90 S. W. 1, 28 Ky. L. Rep. 655.

A writ of supervisory control will not be granted where the district court, in an action

7. Execution of Contracts. Prohibition is not the proper remedy to prevent the execution of a contract, where a remedy by injunction [29] or by quo warranto [30] exists.

8. Title to Office. Prohibition never issues to try the title to an office, there being another adequate remedy by quo warranto for that purpose.[31] So, where an adequate remedy by certiorari is available, the same rule is applicable.[32]

9. Proceedings of Election Officers. Prohibition, from a court of equity, does not lie to control election officers when there is another remedy as by statutory proceedings to contest the election,[33] or by appeal or writ of error.[34]

10. Contempt Proceedings. A writ of prohibition will not be granted to restrain contempt proceedings in an inferior court, based on an alleged violation of an injunction, where the party applying for the writ has an adequate remedy by motion to dissolve the injunction.[35]

11. Criminal Prosecutions. Prohibition will not lie to restrain criminal prosecutions where the usual and ordinary forms of remedy are sufficient to afford redress, as by a motion, trial, appeal, habeas corpus, or otherwise;[36] but where

in which plaintiff claims commissions and that a long account is involved, has ordered a reference at request of plaintiff, and has refused to vacate its order therefor, and defendant, in obedience to the subpœna of the referee, but under protest, has produced its books, and plaintiff is proceeding to examine them, it appearing that some sort of accounts exist on the books with reference to plaintiff's transactions with defendant, and that plaintiff had previously examined them with the consent of defendant, it not appearing there can be any further damage to defendant, the books being pertinent and material, if plaintiff's interpretation of his contract is correct, and this, although the court had not directly passed on the question of the existence of a contract making the taking of an account necessary; any remedy being by appeal, as would be the case had the court proceeded with the trial itself, and, in its discretion as to order of proof, allowed plaintiff to put in his whole case, defendant being first required to produce its books before trial of the question of contract. State *v.* Silver Bow County Second Judicial Dist. Ct., (Mont. 1908) 95 Pac. 843.

29. Bluffton *v.* Silver, 63 Ind. 262.

30. Davenport *v.* Elrod, 20 S. D. 567, 107 N. W. 833.

31. *Alabama.*— Goodwin *v.* State, 145 Ala. 536, 40 So. 122.

California.— Buckner *v.* Veuve, 63 Cal. 304; Hull *v.* Shasta County Super. Ct., 63 Cal. 179.

Minnesota.— State *v.* McMartin, 42 Minn. 30, 43 N. W. 572.

Missouri.— State *v.* Laughlin, 7 Mo. App. 529.

Nevada.— Walcott *v.* Wells, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59.

North Carolina.— See State *v.* Allen, 24 N. C. 183.

West Virginia.— Moore *v.* Holt, 55 W. Va. 507, 47 S. E. 251.

Wisconsin.— *In re* Radl, 86 Wis. 645, 57 N. W. 1105, 39 Am. St. Rep. 918.

See 40 Cent. Dig. tit. "Prohibition," § 17.

Mandamus to try title see MANDAMUS, 26 Cyc. 251 *et seq.*

Quo warranto to try title to office see QUO WARRANTO.

Effect of unconstitutionality of act designating judicial officer.— However, where the act creating a court and making a given individual presiding judge thereof has been declared unconstitutional, prohibition will lie to test the title to the office, since the purpose of the writ is to prevent usurpation of judicial power. *Ex p.* Roundtree, 51 Ala. 42.

Contest cognizable by common council and mayor.— So too where by statute an election contest is expressly made cognizable by the common council and mayor of the city, prohibition will lie to prevent the county court from trying the same. Booth *v.* Arapahoe County Ct., 18 Colo. 561, 33 Pac. 581.

32. People *v.* Butler, 53 Misc. (N. Y.) 366, 103 N. Y. Suppl. 329, where relator was a veteran of the class specified in N. Y. Laws (1904), p. 1694, c. 697, under the express provisions whereof he had a remedy by certiorari to review proceedings against him in case they resulted in his removal or attempted removal from a position held by him by appointment or employment in the city of New York.

33. Kemp *v.* Ventulett, 58 Ga. 419.

34. Lemon *v.* Peyton, 64 Miss. 161, 8 So. 235; State *v.* McElhinney, 199 Mo. 67, 97 S. W. 159; Turner *v.* Langan, 28 Nev. 281, 88 Pac. 1088.

35. Toomey *v.* Comley, 72 Conn. 458, 44 Atl. 741. *Compare* People *v.* Wyatt, 186 N. Y. 383, 79 N. E. 330.

36. *California.*— Rebstock *v.* San Francisco Super. Ct., 146 Cal. 308, 80 Pac. 65; Strouse *v.* San Francisco Police Ct., 85 Cal. 49, 24 Pac. 747; Powelson *v.* Lockwood, 82 Cal. 613, 23 Pac. 143; Levy *v.* Wilson, 69 Cal. 105, 10 Pac. 272.

District of Columbia.— U. S. *v.* Kimball, 7 App. Cas. 499.

Georgia.— Turner *v.* Forsyth, 78 Ga. 683, 3 S. E. 649.

Louisiana.— State *v.* Judge Second Recorder's Ct., 44 La. Ann. 1100, 11 So. 683.

these forms of redress are wholly inadequate and insufficient, the writ has been allowed.[37]

12. Vacating or Amending Judgment. Unless the remedy by appeal is inadequate,[38] prohibition will not lie to restrain an inferior court from vacating a judgment.[39] Nor will the writ lie to set aside an amendment made to correct an obvious slip or mistake in the entry of a judgment.[40]

13. Enforcement of Judgment. The enforcement of a judgment, where there is

New York.— People *v.* Wyatt, 113 N. Y. App. Div. 111, 99 N. Y. Suppl. 114 [*affirmed* in 186 N. Y. 383, 79 N. E. 330]; People *v.* Wood, 21 N. Y. App. Div. 245, 47 N. Y. Suppl. 676.

North Dakota.— Zinn *v.* Barnes County Dist. Ct., (1908) 114 N. W. 475.

South Carolina.— State *v.* Nathan, 4 Rich. 513.

Utah.— State *v.* Third Judicial Dist. Ct., 27 Utah 336, 75 Pac. 739.

Washington.— State *v.* Hinkle, 47 Wash. 156, 91 Pac. 640.

Wisconsin.— State *v.* Evans, 88 Wis. 255, 60 N. W. 433.

See 40 Cent. Dig. tit. "Prohibition," §§ 15, 30.

That no appeal lies from the judgment of an inferior tribunal on an indictment for a certain defense will not entitle defendant to a writ of prohibition from the court of appeals if the inferior court was acting within its jurisdiction. Standard Oil Co. *v.* Linn, 32 S. W. 932, 17 Ky. L. Rep. 832.

Irregularities in the summoning of a grand jury, not affecting the court's jurisdiction, are not ground for the issuance of a writ of prohibition. The writ of prohibition will not be granted to arrest further proceedings on an indictment found by a grand jury irregularly summoned and impaneled, as district courts have jurisdiction to impanel such juries, and, if erroneous rulings are made on these questions, no question of the jurisdiction of the subject-matter nor of the person is presented which can be reviewed through a writ of prohibition. Zinn *v.* Barnes County Dist. Ct., (N. D. 1908) 114 N. W. 475.

Violation of ordinance.— Prohibition will not lie to restrain a court from proceeding with a trial for violation of a city ordinance; the only question being whether the city, in the absence of special authority, had power to make an act an offense when it was such under a statute of the state, and there being an adequate remedy in the ordinary course of law, either by appeal from an adverse judgment or by habeas corpus. State *v.* Hinkle, 47 Wash. 156, 91 Pac. 640.

37. *Ex p.* State, 150 Ala. 489, 43 So. 490, 10 L. R. A. N. S. 1129 (holding that where, under express authority of statute, a circuit court committed one convicted of crime for safe-keeping to the jail of another county, the judge of the criminal court of the latter county had no jurisdiction to entertain a petition for habeas corpus on the ground that subsequent to his conviction the prisoner had become insane, and a writ of prohibition was the proper remedy to prevent the entertaining of such petition); Terrill *v.* Santa Clara County Super. Ct., (Cal. 1899) 60 Pac. 38 (holding that where defendant has been tried and convicted on a void indictment, the writ will issue to prevent the trial judge from pronouncing sentence or proceeding further in the cause, since the remedy by appeal is not adequate); Huntington *v.* San Francisco Super. Ct., 5 Cal. App. 288, 90 Pac. 141 (holding that where an information charged the accused with murder, and he was convicted of manslaughter, and on appeal a new trial was ordered, the trial court has no jurisdiction to try accused for any other crime than that of manslaughter, and a writ of prohibition will lie to prevent his trial on the charge of murder); McInerney *v.* Denner, 17 Colo. 302, 29 Pac. 516 (holding that a petition for a writ of prohibition restraining a police magistrate from proceeding to a judgment in a prosecution for keeping a tippling house open on Sunday, on the ground that the act creating the police court was unconstitutional, as is also the ordinance prohibiting such offense, will lie where, besides an illegal forfeiture of his license by petitioner, an illegal imprisonment may follow a judgment of conviction; and this, although the petitioner on being convicted might have the questions reconsidered on a trial *de novo* in the county court, and again by the supreme court on writ of error, since the latter remedies would be inadequate).

Right to appeal not determinable until trial and sentence.— In a criminal case where it cannot be determined until trial or sentence whether an appeal will be permissible under a constitutional provision restricting a right of appeal in criminal cases to those in which the punishment of death or imprisonment at hard labor may be inflicted, or a fine exceeding a given sum is actually imposed, the exercise of the supervisory power of the supreme court by writs of prohibition and certiorari is properly invoked on an issue as to the validity of a change of venue which forces defendants to meet a trial in a parish different from their domicile, and subjects the state to the expense and trouble of a fruitless trial. State *v.* Judges Tenth Dist. Ct., 45 La. Ann. 246, 12 So. 135; Brouilette *v.* Judge Tenth Dist. Ct., 45 La. Ann. 243, 12 So. 134.

38. Kirby *v.* Nevada County Super. Ct., 68 Cal. 604, 10 Pac. 119.

39. State *v.* Weston County Dist. Ct., 5 Wyo. 227, 39 Pac. 749.

40. North American L. Assur. Co. *v.* Collins, 9 Ont. L. Rep. 579, 5 Ont. Wkly. Rep. 342, where the judge's minutes directed judgment "for defendant" when clearly he intended it "for plaintiff."

a remedy by appeal [41] or otherwise,[42] or the enforcement of an execution issued thereon where there is a remedy by motion to quash,[43] will not be restrained by prohibition. But if there is no other remedy available to the party aggrieved, prohibition will lie to restrain the enforcement of a void decree or judgment.[44]

V. PERSONS ENTITLED.

A. Generally. The petitioner must be injured or affected by the proceedings sought to be restrained,[45] otherwise prohibition will not lie.[46]

41. *Arizona.*— Sanford *v.* Pima County Dist. Ct., 8 Ariz. 256, 71 Pac. 906.

California.— Mancello *v.* Bellrude, (1886) 11 Pac. 501; Childs *v.* Edmunds, (1886) 10 Pac. 130.

Kentucky.— Bank Lick Turnpike Co. *v.* Phelps, 81 Ky. 613.

Louisiana.— Martel *v.* Jennings-Heywood Oil Syndicate, 115 La. 615, 39 So. 705. See also State *v.* Robinson, 38 La. Ann. 968.

New York.— Lenham Mercantile Co. *v.* Herke, 55 Misc. 310, 105 N. Y. Suppl. 472.

In Louisiana where a rule against applicant for injunction to show cause why the truth of his allegation could not be proven or the writ dissolved has been made absolute, and another application for injunction is made, prohibition will not lie to restrain the trial court from proceeding to enforce execution of the writ of seizure and sale to restrain which injunction was asked. Josephson *v.* Powers, 121 La. 190, 46 So. 206.

Mere ministerial act.— A writ of prohibition will not issue against an inferior court to restrain the issuance of an execution on a judgment, since such issuance is a ministerial, and not a judicial, act. *Ex p.* Braudlacht, 2 Hill (N. Y.) 367, 38 Am. Dec. 593.

42. *Ex p.* Braudlacht, 2 Hill (N. Y.) 367, 38 Am. Dec. 593, as by action for trespass or proceedings for contempt.

43. Ducheneau *v.* Ireland, 5 Utah 108, 13 Pac. 87.

44. *Ex p.* Lyon, 60 Ala. 650; People *v.* Fitzgerald, 15 N. Y. App. Div. 539, 44 N. Y. Suppl. 556; Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152; Wilkinson *v.* Hoke, 39 W. Va. 403, 19 S. E. 520. See also Yates *v.* Taylor County Ct., 47 W. Va. 376, 35 S. E. 24.

The enforcement of a judgment for costs, not authorized by any statute, may be prohibited as a judgment rendered without jurisdiction, when the court rendering it has no jurisdiction of the cause on any other ground. Bice *v.* Boothsville Tel. Co., 62 W. Va. 521, 59 S. E. 501.

45. Dungan *v.* Fresno County Super. Ct., 149 Cal. 98, 84 Pac. 767, 117 Am. St. Rep. 119; Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

Any party to the proceeding affected by the excess or improper assumption of jurisdiction is entitled to the writ. Hudson *v.* Judge Super. Ct., 42 Mich. 239, 3 N. W. 850, 913.

Person under subpœna.—Where an information filed with a justice of the peace was insufficient to confer jurisdiction on the justice to conduct an inquisition, a person subpœnaed to appear before the justice and answer questions was held to be entitled to prohibition to restrain further proceedings. People *v.* Dunning, 113 N. Y. App. Div. 35, 98 N. Y. Suppl. 1067.

Question of corporate existence cannot be raised to defeat corporation beneficially interested.— Under a statute providing that a writ of prohibition will issue "on the application of the person beneficially interested," an application for such writ, made by a corporation *de facto* which is beneficially interested, will not be refused on the ground that it is not a corporation *de jure*. State *v.* Spokane County Super. Ct., 15 Wash. 668, 47 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111.

Officer and taxpayer.— N. Y. Laws (1907), p. 1123, c. 538, providing for a judicial recount of the ballots cast for the office of mayor in the November, 1905, election in cities of the first class, declares that such proceedings shall have precedence over all other business of the court, and allows an appeal only from a final order to the appellate division of the supreme court, without any provision authorizing an application to the court by any party to vacate the original order, or to stay such recount, and without allowing an appeal from any interlocutory order or determination of the court, expressly declaring that there shall be no appeal to the court of appeals. It was held that prohibition is the proper remedy of an officer and taxpayer, claiming that the act is unconstitutional, to restrain proceedings thereunder. People *v.* Dayton, 120 N. Y. App. Div. 814, 105 N. Y. Suppl. 809 [*reversed* on other grounds in 189 N. Y. 460, 82 N. E. 507, 121 Am. St. Rep. 909].

46. Gage *v.* Fritz, 137 Cal. 108, 69 Pac. 854 (holding that where a criminal charge of libel is pending in a justice's court, on the complaint of the person libeled, such person has no such beneficial interest in the charge as will entitle him, under Cal. Code Civ. Proc. § 1003, authorizing a writ of prohibition to issue upon the application of the person beneficially interested, to apply for prohibition to restrain a police justice from taking jurisdiction of the charge upon the complaint of other parties); Haile *v.* San Bernardino County Super. Ct., 78 Cal. 418, 20 Pac. 878; People *v.* Mayer, 41 Misc. (N. Y.) 289, 84 N. Y. Suppl. 71; Harbor Line Com'rs *v.* State, 2 Wash. 530, 27 Pac. 550 (holding that where a riparian proprietor has no right of title to tide lands, simply owning the wharfage thereon, the inclusion of such lands within the harbor lines is not such an inter-

B. In Official Capacity. When it is made by statute the duty of a public officer to represent the county in all civil actions and proceedings to which it is a party, such officer is the proper relator in prohibition proceedings on behalf of the county.[47]

VI. JURISDICTION AND PROCEEDINGS.

A. Jurisdiction — 1. FEDERAL COURTS. The supreme court has no jurisdiction to issue a writ of prohibition where there is no appellate power given by law, nor any special authority to issue the writ.[48] The circuit court has power to issue a writ of prohibition only in cases where such writ is necessary to the exercise of its jurisdiction.[49] A territorial supreme court has jurisdiction to issue writs of prohibition to a territorial district court.[50]

2. STATE COURTS — a. Appellate. The writ will be granted by a court of last resort only in aid of its appellate jurisdiction,[51] except where the constitution in express terms confers either the original jurisdiction for that purpose,[52] or the power to award "original remedial writs," [53] or the power to issue any remedial writs

ference with the ownership or possession of the wharf as to authorize a court to issue a writ of prohibition); Fleming *v.* Guthrie, 32 W. Va. 1, 9 S. E. 23, 25 Am. St. Rep. 792, 3 L. R. A. 53.

A mere witness whose examination has been concluded and is under no requirement to attend further is not entitled to the writ of prohibition restraining a proceeding pending before a magistrate. People *v.* Mayer, 41 Misc. (N. Y.) 289, 84 N. Y. Suppl. 71.

Not parties to suit.— The supreme court will not grant a motion for a writ of prohibition against the circuit court to vacate an order sentencing the petitioners to be imprisoned for a contempt of the authority of that court in a matter pertaining to a suit therein to which they are not parties. *Ex p.* Stickney, 40 Ala. 160. A party seeking relief by writ of prohibition need not necessarily be named as a party to the original action, but may make himself a party by showing that he has an interest in the controversy, and by moving to set aside the judgment or order affecting his interest. Cronan *v.* Kootenai County Dist. Ct., (Ida. 1908) 96 Pac. 768.

Taxpayer.— A railroad corporation, which owns no property, is not a taxpayer or resident of a village, has no vested rights therein, no village consent or franchise, and has applied for none over the route proposed by the defendant company, and has no certificate of convenience and necessity for that route, is not entitled to a writ of prohibition to prevent the village authorities from granting a franchise to defendant to construct a line of trolley railroad through the village. People *v.* Bauer, 54 Misc. (N. Y.) 28, 103 N. Y. Suppl. 1081.

Stranger applying for writ see *supra*, II, text and note 10.

47. State *v.* Yakima County Super. Ct., 4 Wash. 30, 29 Pac. 764.

48. See COURTS, 11 Cyc. 913.

49. *In re* Binniger, 3 Fed. Cas. No. 1,417, 7 Blatchf. 159, 3 Nat. Bankr. Reg. 481; Markson *v.* Heaney, 16 Fed. Cas. No. 9,098, 1 Dill. 497, 4 Nat. Bankr. Reg. 510.

50. Lincoln-Lucky, etc., Min. Co. *v.* First Judicial Dist. Ct., 7 N. M. 486, 38 Pac. 580.

51. People *v.* Cook County Cir. Ct., 173 Ill. 272, 50 N. E. 928; People *v.* Cook County Cir. Ct., 169 Ill. 201, 48 N. E. 717; State *v.* Judge First Dist. Ct., 45 La. Ann. 1206, 14 So. 73; State *v.* Judge Civ. Dist. Ct., 45 La. Ann. 532, 12 So. 941; State *v.* Judge Super. Dist. Ct., 26 La. Ann. 146; State *v.* Judge Second Dist. Ct., 25 La. Ann. 381; Bush *v.* Head, 22 La. Ann. 459; State *v.* New Orleans Commercial Ct. Judge, 4 Rob. (La.) 48. See also State *v.* Hall, 47 Nebr. 579, 66 N. W. 642.

Even in aid of its appellate jurisdiction, the supreme court of Tennessee has no power to issue writs of prohibition. Memphis *v.* Halsey, 12 Heisk. (Tenn.) 210.

52. *California.*— Hyatt *v.* Allen, 54 Cal. 353; Tyler *v.* Houghton, 25 Cal. 26.

Florida.— Singer Mfg. Co. *v.* Spratt, 20 Fla. 122; Sherlock *v.* Jacksonville, 17 Fla. 93.

Nevada.— Low *v.* Crown Point Min. Co., 2 Nev. 75.

Virginia.— Com. *v.* Latham, 85 Va. 632, 8 S. E. 488; Gresham *v.* Ewell, 84 Va. 784, 6 S. E. 134; James *v.* Stokes, 77 Va. 225; Culpeper County *v.* Gorrell, 20 Gratt. 484.

Washington.—State *v.* Pierce County Super. Ct., 12 Wash. 677, 42 Pac. 123.

West Virginia.— Fleming *v.* Commissioners, 31 W. Va. 608, 8 S. E. 267; McConiha *v.* Guthrie, 21 W. Va. 134.

Wyoming.— Dobson *v.* Westheimer, 5 Wyo. 34, 36 Pac. 626.

See 40 Cent. Dig. tit. "Prohibition," § 65.

By statute the supreme courts of Maine, Massachusetts, and Vermont are expressly vested with power to issue writs of prohibition. See Harriman *v.* Waldo County Com'rs, 53 Me. 83; Jaquith *v.* Fuller, 167 Mass. 123, 45 N. E. 54; Connecticut River R. Co. *v.* Franklin County Com'rs, 127 Mass. 50, 34 Am. Rep. 338; Bullard *v.* Thorpe, 66 Vt. 599, 30 Atl. 36, 44 Am. St. Rep. 867, 25 L. R. A. 605.

53. State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; State *v.* St. Louis Ct.

necessary to give the court of last resort general control over courts of inferior jurisdiction.[54]

b. Of Common-Law Jurisdiction. Courts of general common-law cognizance may grant writs of prohibition to inferior tribunals.[55]

B. Proceedings [56] **— 1. Presentation of Objections in Original Proceeding.** An application for a writ of prohibition will not be considered unless a plea to the jurisdiction has been first filed and overruled in the lower court.[57] Until the inferior court has been asked in some form, and without avail, to refrain from proceeding with the trial of a cause, or to dismiss the same, a superior court will not entertain an application for a writ of prohibition.[58] This rule has, however, been held to be inapplicable to *ex parte* proceedings,[59] or to proceedings in which the applicant for the writ had no opportunity to object.[60] And in some jurisdictions an exception to the rule is recognized where a want of jurisdiction is apparent on the face of the record.[61]

of App., 99 Mo. 216, 12 S. W. 661; Thomas *v.* Mead, 36 Mo. 232.

54. *Alabama.*— *Ex p.* Greene, 29 Ala. 52.

Kentucky.— Standard Oil Co. *v.* Linn, 32 S. W. 932, 17 Ky. L. Rep. 832; Hindman *v.* Toney, 97 Ky. 413, 30 S. W. 1006, 17 Ky. L. Rep. 286; Com. *v.* Jones, 118 Ky. 889, 82 S. W. 643, 26 Ky. L. Rep. 867.

North Carolina.— State *v.* Whitaker, 114 N. C. 818, 19 S. E. 376; Perry *v.* Shepherd, 78 N. C. 83.

South Carolina.— State *v.* Columbia, 16 S. C. 412; State *v.* Columbia, etc., R. Co., 1 S. C. 46.

Wisconsin.— State *v.* Pollard, 112 Wis. 232, 87 N. W. 1107.

See 40 Cent. Dig. tit. "Prohibition," § 65.

Where an appeal has been dismissed by the appellate court, its jurisdiction over the cause ceases, and it cannot thereafter issue prohibition against an enforcement of the judgment from which the appeal was taken. Olmstead *v.* Mason, 3 Bush (Ky.) 693.

55. *Ex p.* Ray, 45 Ala. 15; Planters' Ins. Co. *v.* Cramer, 47 Miss. 200; Jackson *v.* Maxwell, 5 Rand. (Va.) 636; Campbell *v.* Doolittle, 58 W. Va. 317, 52 S. E. 260. See also *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; Reese *v.* Lawless, 4 Bibb (Ky.) 394.

Right of judge to issue prohibition in vacation see Judges, 23 Cyc. 553.

In England writs of prohibition were granted both in the common pleas and king's bench. Langdale's Case, 12 Coke 58, 109, 77 Eng. Reprint 1338, 1385; Harrison *v.* Burwell, Vaughan 206, 209; Burshell's Case, Vaughan 135, 157.

56. Method of proceeding at common law see *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

The practice in issuing and enforcing the writ of prohibition is generally regulated by statute. People *v.* Wyatt, 186 N. Y. 3, 83, 79 N. E. 330 [*affirming* 113 N. Y. App. Div. 111, 99 N. Y. Suppl. 114].

57. *Alabama.*— *Ex p.* Hamilton, 51 Ala. 62.

Arkansas.— *Ex p.* Little Rock, 26 Ark. 572; *Ex p.* McMeechen, 12 Ark. 70.

California.— McAneny *v.* Santa Clara County Super. Ct., 150 Cal. 6, 87 Pac. 1020.

Louisiana.—State *v.* Allen, 47 La. Ann. 1600, 18 So. 634.

Michigan.— Hudson *v.* Detroit Super. Ct., 42 Mich. 239, 3 N. W. 850, 913.

Missouri.— State *v.* Laughlin, 9 Mo. App. 486.

Washington.— State *v.* Whatcomb Super. Ct., 2 Wash. 9, 25 Pac. 1007.

England.— Bouton *v.* Hursler, 1 Barn. 71; Edmundson *v.* Walker, Carth. 166, 90 Eng. Reprint 701.

Canada.— Wright *v.* Arnold, 6 Manitoba 1.

See 40 Cent. Dig. tit. "Prohibition," § 66. See also cases cited *infra*, VI, B, 3, a, (II).

58. Barnes *v.* Gottschalk, 3 Mo. App. 111.

59. St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341.

60. Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

61. *Alabama.*— Hill *v.* Tarver, 130 Ala. 592, 30 So. 499.

California.— Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

Colorado.— People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242.

Florida.— State *v.* White, 40 Fla. 297, 24 So. 160.

Kentucky.— Arnold *v.* Shields, 5 Dana 18, 30 Am. Dec. 669.

Missouri.— State *v.* Dearing, 184 Mo. 647, 84 S. W. 21; State *v.* Eby, 170 Mo. 497, 71 S. W. 52; State *v.* Oliver, 163 Mo. 679, 64 S. W. 128; State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341; State *v.* Riley, 127 Mo. App. 469, 105 S. W. 696; Barnes *v.* Gottschalk, 3 Mo. App. 111.

South Carolina.— State *v.* Scott, 1 Bailey 294.

West Virginia.— Pennsylvainia R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178; Swinburn *v.* Smith, 15 W. Va. 483.

England.— London *v.* Cox, L. R. 2 H. L. 239; Farquharson *v.* Morgan, [1894] 1 Q. B. 552, 58 J. P. 495, 63 L. J. Q. B. 474, 70 L. T. Rep. N. S. 152, 9 Reports 202, 42 Wkly. Rep. 306.

Canada.— Wright *v.* Arnold, 6 Manitoba 1.

See 40 Cent. Dig. tit "Prohibition," § 66.

Compare Lincoln-Lucky, etc., Min. Co. *v.*

2. Parties — a. Relators. Although a writ of prohibition is properly sued out in the name of the state,[62] yet it is well settled that the state is not a necessary party.[63]

b. Respondents. The common-law writ may be directed to the judges of the inferior tribunal,[64] or the parties to a cause pending therein,[65] or both conjointly.[66] It has been held, however, that the only necessary defendant is the tribunal whose proceedings are sought to be restrained.[67]

3. Petition or Suggestion[68] — a. What It Must Contain — (i) *In General.* The writ is obtained on a suggestion or petition therefor.[69] The petition or suggestion for the writ of prohibition must show unequivocally every fact requisite to justify its issuance; [70] and facts will not be presumed which can only be stated

First Judicial Dist. Ct., 7 N. M. 486, 38 Pac. 580, holding that it is only necessary to plead to the jurisdiction below as a foundation for the writ where the lower court had jurisdiction of the original subject-matter.

That the plea to the jurisdiction was verified or tendered in person during the sitting of the lower court must be alleged in the petitioner's suggestion or petition. *Ex p.* McMeechen, 12 Ark. 70.

Discretion of court.— The rule as to application to an inferior court to vacate its unauthorized judgment before awarding a writ of prohibition to prevent the enforcement is discretionary, and the judgment of the circuit court on review in the supreme court will not be reversed for failure of the circuit court to require such application before awarding the writ. Bice *v.* Boothsville Tel. Co., 62 W. Va. 521, 59 S. E. 501.

62. Connecticut River R. Co. *v.* Franklin County Com'rs, 127 Mass. 50, 34 Am. Rep. 338; State *v.* Burckhartt, 87 Mo. 533; State *v.* Clark County Ct. Justices, 41 Mo. 44; State *v.* Seay, 23 Mo. App. 623.

Entitling proceeding.— Under N. Y. Code Civ. Proc. § 1994, providing that a writ of prohibition must be issued in behalf of the state; but where it is awarded on the application of a private person, it must show it was issued on his relation; and the officer or other person against whom it is issued shall be styled "the defendant"— the proceeding on application of F, a private person, against W and G, officers, should be entitled, "The People of the State of New York, on the relation of F, against W. and G. as such officers." Matter of Fenton, 58 Misc. (N. Y.) 303, 109 N. Y. Suppl. 321.

63. Trainer *v.* Porter, 45 Mo. 336; Vitt *v.* Owens, 42 Mo. 512; Howard *v.* Pierce, 38 Mo. 296; Thomas *v.* Mead, 36 Mo. 232; State *v.* Seay, 23 Mo. App. 623; Baldwin *v.* Cooley, 1 S. C. 256.

Less strictness than in writ of mandate.— Ida. Rev. St. (1887) § 4994, declares that the writ of prohibition is a counterpart of the writ of mandate, and the same degree of strictness in regard to parties is not maintained in prohibition as in mandate. Cronan *v.* Kootenai County Dist. Ct., (Ida. 1908) 96 Pac. 768.

64. Norton *v.* Dowling, 46 How. Pr. (N. Y.) 7.

65. Norton *v.* Dowling, 46 How. Pr. (N. Y.) 7.

When the parties to a cause are adversely interested they are indispensable party respondents. Walton *v.* Greenwood, 60 Me. 356; Armstrong *v.* Taylor County Ct., 15 W. Va. 190.

66. Arnold *v.* Shields, 5 Dana (Ky.) 18, 30 Am. Dec. 669; Norton *v.* Dowling, 46 How. Pr. (N. Y.) 7. See also *Ex p.* Peterson, 33 Ala. 74.

Under the Louisiana code of civil procedure, the writ may not be directed conjointly to the judge of the inferior court and the parties to the cause unless the judge is himself a main defendant in the prohibition proceedings and they are necessary adjuncts. State *v.* Mix, 33 La. Ann. 794.

67. Connecticut River R. Co. *v.* Franklin County Com'rs, 127 Mass. 50, 34 Am. Rep. 367.

68. **Form of declaration, petition or suggestion for writ of prohibition** see *Ex p.* Williams, 4 Ark. 537, 538, 38 Am. Dec. 46.

69. *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; Bishop *v.* Corbet, 1 Lev. 253, 83 Eng. Reprint 394; Blaxton *v.* Honore, 12 Mod. 435, 88 Eng. Reprint 1432; and cases cited *infra*, note 70 *et seq.*

The filing of the declaration for a writ of prohibition constitutes the commencement of the action. *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

70. *California.*— Dakan *v.* Santa Cruz Super Ct., 2 Cal. App. 52, 82 Pac. 1129.

Idaho.— *In re* Francis, 7 Ida. 98, 60 Pac. 561.

Louisiana.— State *v.* Judge Twenty-Fourth Judicial Dist. Ct., 32 La. Ann. 814.

Missouri.— Barnes *v.* Gottschalk, 3 Mo. App. 222.

Washington.— Clifford *v.* Parker, 13 Wash. 518, 43 Pac. 717.

West Virginia.— Haldeman *v.* Davis, 28 W. Va. 324.

See 40 Cent. Dig. tit. "Prohibition," § 69.

The suggestion should state the nature of the case, and the proceedings in the court below. *Ex. p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

Alleging conclusions.— An allegation that petitioner has no remedy other than through the special relief asked does not entitle him to a writ of prohibition, in the absence of a statement of facts showing the correctness of the conclusion alleged. State *v.* Ellis, 48 La. Ann. 1602, 18 So. 636.

Construed against relator.— A council of a

conjecturally and which cannot arise except upon a contingency which is at least equally uncertain.[71]

(II) *Particular Allegations.* The petition or other application must allege what, if any, action the lower court contemplates,[72] that petitioner would be injured thereby,[73] and that he either has not consented to the jurisdiction [74] or has objected to it in the lower court.[75]

city adopted a resolution citing the chief of police for trial for an offense, with a view to removing him from office. The charge against the officer was not specific as to time and place of the commission of the offense. The petition of the officer praying for a writ of prohibition against the council did not point out where the alleged offense was committed, and did not deny that it was committed. It was held that as the officer's failure to set out where he committed the act must be construed most strongly against him, and therefore authorized the court to presume that the offense was committed in the city, the court, although possessing the power under Ky. Civ. Code Pr. § 479, to restrain the council from proceeding by issuing a writ of prohibition, should not exercise it. Thomas *v.* Thompson, 102 S. W. 849, 31 Ky. L. Rep. 524.

71. Barnes *v.* Gottschalk, 3 Mo. App. 222.

72. Harris *v.* Brooker, 8 Wash. 138, 35 Pac. 599.

Want of jurisdiction.—A petition for a writ of prohibition which does not clearly and affirmatively show by its allegations that the inferior tribunal is about to proceed in a matter over which it has no jurisdiction is insufficient. Bowyer *v.* Green, 63 W. Va. 498, 60 S. E. 492. However, that the lower tribunal contemplates proceeding in some matter over which it possesses no jurisdiction may be shown in the petition or suggestion by setting forth any acts or declarations of the court indicative of its intention to pursue such course. Prignitz *v.* Fischer, 4 Minn. 366.

Unless it clearly appears from the averments of plaintiff's petition that such is its purpose, prohibition does not lie to test the jurisdiction of one of the divisions of the civil district court of the parish of Orleans, to which a suit has been allotted, on the ground that its object is to annul its proceedings had before another division. State *v.* Rightor, 44 La. Ann. 298, 10 So. 774.

73. Harris *v.* Brooker, 8 Wash. 138, 35 Pac. 599.

Insufficient showing.— By stating in the suggestions filed for a preliminary rule prohibiting a police judge from entertaining a prosecution under an ordinance claimed to be void that relator will be subjected to successive prosecutions, relator did not show his right to the remedy, where the averment was traversed and remained unproved, and where it seemed improbable that further arrests would be made pending an appeal. State *v.* Shannon, 130 Mo. App. 90, 108 S. W. 1097.

74. Harris *v.* Brooker, 8 Wash. 138, 35 Pac. 599.

75. *Alabama.*— Hill *v.* Tarver, 130 Ala. 592, 30 So. 499; *Ex p.* Hamilton, 51 Ala. 62.

Arkansas.— Reese *v.* Steel, 73 Ark. 66, 83 S. W. 335, 1136; *Ex p.* Little Rock, 26 Ark. 52; Hanger *v.* Keating, 26 Ark. 51; *Ex p.* McMeechen, 12 Ark. 70.

California.— Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121.

Colorado.— People *v.* Fremont County Dist. Ct., 30 Colo. 488, 71 Pac. 388; Callbreath *v.* Fremont County Dist. Ct., 30 Colo. 486, 71 Pac. 387.

Louisiana.— State *v.* Judge Third City Ct., 45 La. Ann. 213, 11 So. 935; State *v.* Judge Second Recorder's Ct., 44 La. Ann. 1093, 11 So. 872; State *v.* Judge Div. A Civ. Dist. Ct., 44 La. Ann. 190, 10 So. 768; State *v.* Judge Second Recorders' Ct., 43 La. Ann. 1119, 10 So. 179; State *v.* Henry, 41 La. Ann. 908, 6 So. 807; State *v.* Judge Civ. Dist. Ct., Div. E, 40 La. Ann. 607, 4 So. 485; State *v.* Judge St. Tammany Dist. Ct., 38 La. Ann. 920; State *v.* Steele, 38 La. Ann. 569; State *v.* Judges Ct. of App., 37 La. Ann. 845; State *v.* Judge Fifth Dist. Ct., 29 La. Ann. 806; State *v.* Gardere, McGloin 225.

Michigan.— Hudson *v.* Judge Super. Ct., 42 Mich. 239, 3 N. W. 850, 913.

Missouri.— State *v.* Gill, 137 Mo. 681, 39 S. W. 276; Forsee *v.* Gates, 89 Mo. App. 577; State *v.* Laughlin, 9 Mo. App. 486.

South Carolina.— State *v.* Scott, 1 Bailey 294.

Washington.— Harris *v.* Brooker, 8 Wash. 138, 35 Pac. 599; State *v.* Whatcom County Super. Ct., 2 Wash. 9, 25 Pac. 1007.

West Virginia.— Jennings *v.* Bennett, 56 W. Va. 146, 49 S. E. 23; Knight *v.* Zahnhiser, 53 W. Va. 370, 44 S. E. 778; Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300; Black Fork Dist. Bd. of Education *v.* Holt, 51 W. Va. 435, 41 S. E. 337.

Wyoming.— State *v.* Albany County Dist. Ct., 12 Wyo. 547, 76 Pac. 680; State *v.* Weston County Dist. Ct., 5 Wyo. 227, 39 Pac. 749.

Canada.—Wright *v.* Arnold, 6 Manitoba 1; Soules *v.* Little, 12 Ont. Pr. 533; Hogel *v.* Rockwell, 20 Quebec Super. Ct. 309.

See 40 Cent. Dig. tit. "Prohibition," § 66. See also *supra*, note 57.

At common law it must appear in the suggestion that the plea was verified and tendered in person during the sitting of the inferior court. *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; Sparks *v.* Wood, 6 Mod. 146, 87 Eng. Reprint 905; Clerk *v.* Andrews, 1 Show. 9, 89 Eng. Reprint 414.

An exception to this rule is recognized in some jurisdictions where a want of jurisdiction is apparent on the face of the record. See cases cited *supra*, note 61.

b. Prayer. The ultimate prayer of the petition in a proceeding for prohibition should be that a writ of prohibition be awarded.[76]

c. Verification by Affidavit. When the matter suggested as ground for a prohibition appears on the face of the proceedings, an affidavit of the truth of the suggestion is unnecessary.[77] But where it does not so appear, then it is essential that the suggestion should be verified by affidavit.[78]

4. Rule to Show Cause — a. Usually Issued in First Instance. Unless otherwise agreed upon between the parties,[79] the usual practice on application for prohibition is, in some jurisdictions, to issue, in the first instance, a rule to show cause why the writ should not be granted.[80] This rule to show cause why the writ should not issue will afterward be made absolute or discharged, according to the circumstances of the case.[81]

b. Effect of Service. When such rule is granted and served, it operates as a prohibition *quousque* or until further action of the court.[82]

c. Motion to Quash. A petition for a writ of prohibition will be dismissed if

76. Burch *v.* Hardwicke, 23 Gratt. (Va.) 51.

The suggestion should conclude with a prayer for prohibition. *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

Inconsistent prayer.— A writ of prohibition will be granted according to the averments of the petition, although the special prayer be inconsistent therewith, if there be a prayer for general relief. State *v.* Lapeyrollerie, 38 La. Ann. 912.

77. State *v.* Judge First Dist., 19 La. 174; Berthaud *v.* Jefferson Parish Police Jury, 7 Rob. (La.) 550; State *v.* Hudnal, 2 Nott & M. (S. C.) 419; Godfrey *v.* Llewellin, 2 Salk. 549, 91 Eng. Reprint 464. See also *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

78. *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; State *v.* Hudnal, 2 Nott & M. (S. C.) 419; Bodley *v.* Archibald, 33 W. Va. 229, 10 S. E. 392; Burdett *v.* Newell, 2 Ld. Raym. 1211, 92 Eng. Reprint 299; Godfrey *v.* Llewellin, 2 Salk. 549, 91 Eng. Reprint 464.

An affidavit must state that the affiant has either knowledge or information as to matters stated in the petition. Cariaga *v.* Dryden, 30 Cal. 244.

The applicant's attorney may make the affidavit where he knows the facts and his client has no knowledge of them. State *v.* King County Super. Ct., 17 Wash. 54, 48 Pac. 733.

The affidavit should be entitled in the court to which application is to be made, but should not be entitled in any cause. Miron *v.* McCabe, 4 Ont. Pr. 171; Siddall *v.* Gibson, 17 U. C. Q. B. 98.

79. *Ex p.* Keeling, 50 Ala. 474.

80. *Alabama.*— *Ex p.* Boothe, 64 Ala. 312; *Ex p.* Keeling, 50 Ala. 474; *Ex p.* Ray, 45 Ala. 15.

Arkansas.— *Ex p.* Tucker, 25 Ark. 567; *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

Kentucky.— Arnold *v.* Shields, 5 Dana 18, 30 Am. Dec. 669.

Louisiana.— State *v.* Courillon, 109 La. 267, 33 So. 309.

South Carolina.— Withers *v.* Claremont County Road Com'rs, 3 Brev. 83.

Virginia.— Mayo *v.* James, 12 Gratt. 17.

West Virginia.— Williamson *v.* Mingo County Ct., 56 W. Va. 38, 48 S. E. 835; Jelly *v.* Dils, 27 W. Va. 267.

England.— St. John's College *v.* Todington, 1 Burr. 158.

See 40 Cent. Dig. tit. "Prohibition," § 71.

The supreme court will without a rule nisi, if there has been due notice, award a writ of prohibition to prevent the enforcement of a decree in chancery, in favor of the special administrator appointed under Ala. Code, § 2625, rendered against the administrator in chief. *Ex p.* Lyon, 60 Ala. 650.

Nature of rule.— The rule to show cause is not a writ within the meaning of the W. Va. Const. art. 2, § 8, and need not run in the name of the state. Williamson *v.* Mingo County Ct., 56 W. Va. 38, 48 S. E. 835.

Runs against whom.— In prohibition the rule to show cause against the issuance of the writ must go against both the tribunals to be prohibited from exercising jurisdiction and the person having adverse interests to be affected by the writ. Kump *v.* McDonald, (W. Va. 1908) 61 S. E. 909.

81. See *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

If there was no plea or demurrer in due time, at common law judgment went by *nihil dicit*. *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; Turton *v.* Reiner, 12 Mod. 447, 88 Eng. Reprint 1442.

82. *Ex p.* Ray, 45 Ala. 15; *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; Mayo *v.* James, 12 Gratt. (Va.) 17; Jelly *v.* Dils, 27 W. Va. 267.

Sufficient service.— Rule 67 of the rules of the Idaho supreme court, requiring service of a certified copy of the affidavit for the writ and notice of the time of hearing of the application for the writ on the parties in interest, is complied with, on application for a writ to prevent the court from further proceeding in the conduct of the business of a private corporation through a receiver, where all the parties who have shown themselves to be interested are served, and the record does not disclose the names of all creditors of the corporation, and it would therefore be impossible to make service on them. Cronan *v.* Kootenai County Dist. Ct., (Ida. 1908) 96 Pac. 768.

submitted simply on the petition and answer, and the answer denies the leading allegations in the petition.[83] Where the parties have withdrawn the proceeding sought to be prohibited and have stipulated not to commence such proceeding anew, the alternative writ will be dismissed.[84]

5. Preliminary or Alternative Writ[85] — a. Necessity For. When only a question of law is involved, it is not necessary to issue an alternative writ in the first instance.[86]

b. Service of. If by statute time for service of an alternative writ is left to the discretion of the court, the service is not void merely because of the shortness of notice of the hearing.[87]

c. Effect of. When served the alternative writ operates as a prohibition until the further order of the court.[88]

6. Time For Application — a. Before Cause Pending. An application for the writ before the actual commencement of an action or proceeding is premature, since there must be a cause pending before the writ will issue.[89]

b. After Judgment. Prohibition will issue after as well as before judgment.[90]

c. After Sentence. Where the case has proceeded to sentence and the want of jurisdiction does not appear upon the face of the record the writ will not lie.[91]

7. Return or Answer[92] — a. In General. If the return to an alternative writ of prohibition is not full enough, the relator should move for a further return, instead of moving for an absolute writ upon the papers as they stood.[93] Where

83. Cariaga *v.* Dryden, 30 Cal. 307.

The rule in New York is that an alternative writ of prohibition when allowed by a justice out of court may be quashed on motion at special term, although made returnable at the general term. People *v.* Russell, 29 How. Pr. (N. Y.) 176. Code Civ. Proc. § 2097, provides that an objection to the legal sufficiency of the papers upon which a writ of prohibition was granted may be taken in the return, and that a motion to set aside the alternative writ for any matter not involving the merits must be made at a term where the writ might have been granted. It was held that an objection to the sufficiency of the papers upon which a writ was granted may be taken in the return or presented at a special term of the court before the return day. People *v.* Bauer, 54 Misc. (N. Y.) 28, 103 N. Y. Suppl. 1081.

84. Pezuela *v.* San Francisco Super. Ct., 83 Cal. 49, 23 Pac. 321.

85. **Form of writ** of prohibition see *Ex p.* Williams, 4 Ark. 537, 541, 38 Am. Dec. 46.

86. People *v.* Mayer, 71 Hun (N. Y.) 182, 24 N. Y. Suppl. 621.

87. People *v.* House, 4 Utah 382, 10 Pac. 843.

88. *Ex p.* Campbell, 130 Ala. 171, 30 So. 385; *Ex p.* Ray, 45 Ala. 15; Mayor *v.* James, 12 Gratt. (Va.) 17.

89. State *v.* Ryan, 180 Mo. 32, 79 S. W. 429; Darnell *v.* Vandine, (W. Va. 1908) 60 S. E. 996.

It cannot be used to prevent institution of an action. Darnell *v.* Vandine, (W. Va. 1908) 60 S. E. 996. And a petition asking for a writ of prohibition, alleging as a ground therefor a threatened prosecution, is demurrable. Darnell *v.* Vandine, *supra*.

90. State *v.* Lee, 106 La. 400, 31 So. 14; Clarke *v.* Rosenda, 5 Rob. (La.) 27; State *v.* Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; Bodley *v.* Archibald, 33 W. Va. 229, 10 S. E. 392; Ensign Mfg. Co. *v.* Carroll, 30 W. Va. 532, 4 S. E. 782; Hein *v.* Smith, 13 W. Va. 358; Brazill *v.* Johns, 24 Ont. 209. *Compare* Maxwell *v.* Clark, 10 Manitoba 406, holding that where the want of jurisdiction of the inferior court does not appear upon the face of the proceedings, and the application for prohibition is not made until after judgment or verdict in that court, the applicant is not, of right, entitled to the writ, but the superior court has a discretion to refuse prohibition if it seems to it inequitable to grant it.

91. State *v.* Whyte, 2 Nott & M. (S. C.) 174; *Ex p.* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232; Paxton *v.* Knight, 1 Burr. 314; Full *v.* Hutchins, Cowp. 422.

Admitting jurisdiction by plea. — A prohibition may be awarded as well before as after sentence unless the party by pleading has admitted the jurisdiction. Gray *v.* Magistrates, etc., Ct., 3 McCord (S. C.) 175; Full *v.* Hutchins, Cowp. 422.

Conviction under unconstitutional statute. — Defendant was convicted in a criminal case which was unappealable, and brought certiorari and prohibition, seeking to prevent the imposition of sentence on the ground that the statute under which he was convicted was unconstitutional. It was held that the supreme court would not interpose its authority to prevent the imposing of the sentence, but relator should have recourse to writs after the sentence had been imposed. State *v.* Abrams, 119 La. 981, 44 So. 807.

92. **Form of plea** see *Ex p.* Williams, 4 Ark. 537, 539, 38 Am. Dec. 46.

93. People *v.* Wyatt, 186 N. Y. 383, 79 N. E. 330 [*affirming* 113 N. Y. App. Div. 111, 99 N. Y. Suppl. 114].

That the information was sworn to is sufficiently shown by a return to an alternative

a writ of prohibition is issued to an officer he is required to make a return, upon which issue is joined; but where it is to a court and prosecuting party, the party is not required or allowed to make return, but may be allowed to adopt that of the court, although not required to do so.[94]

b. Effect of Failure to Deny Part of Return. A part of a return to an alternative writ of prohibition, not denied on the application for the writ absolute, must be taken as true.[95]

c. Quashing Return. A motion to quash the return to an alternative writ of prohibition, on the ground that the facts stated therein are insufficient, is in the nature of a demurrer, and reaches back to the first defective pleading.[96]

8. Demurrer to Petition or Alternative Writ[97]**— a. For Variance.** In a case of prohibition a variance between the suggestion and the declaration which is not a matter in bar of the proceeding is not ground of demurrer.[98]

b. Effect of. Where defendant demurs to an application for an alternative writ of prohibition for insufficiency of facts, and no objection is made to the return, the court will consider the matter as an application, on notice for a peremptory writ of prohibition, to which defendant has answered without raising an issue of fact, and will therefore regard the facts disclosed in the application as true.[99]

9. Scope of Hearing. Upon application for prohibition the only inquiries permitted are whether the inferior tribunal is exercising a jurisdiction it does not possess, or, having jurisdiction, has exceeded its legitimate powers.[1] Consequently

writ of prohibition alleging that an information in writing had been filed with the respondent charging, "upon information and belief of the affiant," that a crime had been committed by a person named. People *v.* Wyatt, 186 N. Y. 383, 79 N. E. 330 [*affirming* 113 N. Y. App. Div. 111, 99 N. Y. Suppl. 114].

94. Dayton *v.* Paine, 13 Minn. 493.

95. People *v.* Wyatt, 113 N. Y. App. Div. 111, 99 N. Y. Suppl. 114 [*affirmed* in 186 N. Y. 383, 79 N. E. 330].

96. State *v.* Braun, 31 Wis. 600.

Quashing for omissions in return.— Where a peremptory writ of prohibition commanded defendants to conform their official action as judges of the county court to the judgment of the supreme court, and defendants, in their return thereto, omitted to state that they conformed their action to the judgment, the return should be quashed. State *v.* Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037.

97. **Form of demurrer** see *Ex p.* Williams, 4 Ark. 537, 539, 38 Am. Dec. 46.

98. Warwick *v.* Mayo, 15 Gratt. (Va.) 528.

99. Gates *v.* McGee, 15 S. D. 247, 88 N. W. 115. See also State *v.* Hudnal, 2 Nott & M. (S. C.) 419.

1. *Colorado.*—McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516.

Idaho.— See Bellevue Water Co. *v.* Stockslager, 4 Ida. 636, 43 Pac. 568.

Louisiana.— State *v.* Houston, 40 La. Ann. 393, 4 So. 5, 8 Am. St. Rep. 532.

Missouri.— State *v.* Ross, (1895) 31 S. W. 600.

New York.— Thomson *v.* Tracy, 60 N. Y. 31; People *v.* O'Gorman, 124 N. Y. App. Div. 222, 108 N. Y. Suppl. 737.

United States.— *Ex p.* Cooper, 143 U. S. 472, 12 S. Ct. 453, 36 L. ed. 232. See also *Ex p.* Slayton, 105 U. S. 451, 26 L. ed. 1066.

See 40 Cent. Dig. tit. "Prohibition," § 77.

An attempt in an answer in mandamus proceedings to set up matters which would oust the court of jurisdiction cannot be considered on an application for a writ of prohibition where the petition states a cause of action of which the court has jurisdiction. People *v.* Third Judicial Dist. Ct., 33 Colo. 66, 79 Pac. 1024.

Jurisdictional amount.— The correctness of a statement of facts by the court below respecting the jurisdictional amount will be accepted, unless it be made clearly evident that an error has been committed. State *v.* McDowell, 43 La. Ann. 1193, 10 So. 174.

Moot question.— The question of the validity of a statute which has been expressly repealed is a moot one, and will not be considered on application for a writ of prohibition. *Ex p.* Perryman, (Ala. 1908) 46 So. 866.

Sufficiency of appeal-bond.— Upon application for prohibition the court will inquire into the sufficiency of the appeal-bond to entitle the appellant to suspensive appeal. State *v.* Judge Super. Dist. Ct., 27 La. Ann. 697; State *v.* Judge Seventh Dist. Ct., 24 La. Ann. 328; State *v.* Judge Second Judicial Dist. Ct., 23 La. Ann. 714; State *v.* Judge Orleans Parish Fifth Dist. Ct., 23 La. Ann. 491; State *v.* Judge Orleans Parish Seventh Dist. Ct., 23 La. Ann. 279; State *v.* Judge Orleans Parish Sixth Dist. Ct., 22 La. Ann. 591; State *v.* Judge New Orleans Second Dist. Ct., 21 La. Ann. 43.

The verity of the recitals of the findings and judgment of the trial court cannot be impeached on a hearing for the writ of prohibition as any error in the decision based on the insufficiency of the evidence may be disposed of by appeal. Beaulieu Vineyard *v.* Napa County Super. Ct., 6 Cal. App. 242, 91 Pac. 1015.

the court will not investigate the merits of the cause upon the application for a writ of prohibition.[2]

10. Evidence. The general rules of the law of evidence relating to burden of proof and presumptions[3] and the admissibility and sufficiency of evidence[4] are ordinarily applicable in prohibition proceedings.

11. Scope and Extent of Relief.[5] Where anything remains to be done by the court, prohibition will give complete relief, not only by preventing what remains to be done but by undoing what has been done.[6]

2. State *v.* Houston, 40 La. Ann. 393, 4 So. 50, 8 Am. St. Rep. 532; State *v.* Judge Fourth Dist. Ct., 9 Rob. (La.) 480.

3. See Evidence, 16 Cyc. 926, 1050; and see Boca, etc., R. Co. *v.* Lassen County Super. Ct., 150 Cal. 153, 88 Pac. 718 (holding that where, at the time an application was made for a writ of prohibition to restrain the superior court from making any order in a certain action other than an order of dismissal, a motion to dismiss had only been partially heard and a preliminary injunction issued had been suspended, it could not be presumed, on the hearing of the application for such writ, that the court would not award petitioner all the relief he was entitled to on the determination of the motion to dismiss); People *v.* Soto, (Cal. App. 1908) 96 Pac. 913 (holding that on application for a writ of prohibition prohibiting the trial judge from settling a bill of exceptions in a criminal case, on the ground that no notice of application for additional time was given, as required by statute, it will be assumed that the court, if necessary, would before settling the bill make its formal order granting relief, under Cal. Code Civ. Proc. § 473, providing that the court may relieve a party from a judgment, order, etc., taken against him through his mistake, inadvertence, etc.); State *v.* Evans, 184 Mo. 632, 83 S. W. 447 (holding that it will be assumed on an application for a writ of prohibition to restrain the hearing of an election contest, that the court before which the contest was pending would, if the contest should result in an unconstitutional exposure of the vote of the electors, perform its duty in the premises, and take proper precautions to prevent such exposure); State *v.* Pierce County Super. Ct., 14 Wash. 203, 44 Pac. 131 (holding that when summons in an action brought against an insurance company in the superior court is served upon an alleged agent of the company in the county in which the action is brought, a writ of prohibition will not issue to prohibit the court from proceeding in the action, unless it is affirmatively shown that the person upon whom service was made was not an agent of the company residing in said county).

Presumption in favor of jurisdiction.— Even were the contention sound that a proceeding by the commissioner of agriculture under Agricultural Law, § 32 (N. Y. Laws (1893), p. 665, c. 338), to summon and examine persons under oath, would be unlawful were its object the obtaining of information on which to base some judicial action, prohibition would not issue, it not appearing for what the testimoney is to be used; so that the proceeding may be treated as one to obtain information in aid of legislation, which is proper; and for which purpose, presumably, the commissioner is required by section 5 (page 657) to make an annual report to the legislature. Matter of Fenton, 58 Misc. (N. Y.) 303, 109 N. Y. Suppl. 321.

4. See Evidence, 16 Cyc. 821 *et seq.* And see Talbot *v.* Pirkey, 139 Cal. 326, 73 Pac. 858 (holding that where it did not affirmatively appear that no counter-affidavits were filed for an application for change of judge by reason of prejudice, the finding that the charge of prejudice had not been sustained must stand); Shinkle *v.* Covington, 83 Ky. 420, 7 Ky. L. Rep. 412 (holding that upon an application for prohibition to restrain an inferior court from proceeding under a city ordinance alleged to be invalid, extrinsic evidence is inadmissible to show its invalidity); *In re* Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. ed. 222 (holding that on a petition by defendant to the supreme court to prohibit the district courts from taking jurisdiction of an action against him on the ground that he was a public minister, after a denial of a motion to dismiss for want of jurisdiction, official papers tending to show that the defendant is not a public minister are admissible in evidence, although they were not produced in the district court, where defendant was given an opportunity to explain them and introduce other evidence).

An unverified petition is not proof within N. Y. Code Civ. Proc. § 2091, providing that a writ of prohibition may be granted "on an affidavit or other written proof, showing a proper case therefor." Matter of Fenton, 58 Misc. (N. Y.) 303, 109 N. Y. Suppl. 321.

5. **Form of judgment by default** see *Ex p.* Williams, 4 Ark. 537, 540, 38 Am. Dec. 46.

Writ of consultation see *infra*, X.

6. *Alabama.*— *Ex p.* Smith, 23 Ala. 94.

California.— Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627, holding that prohibition to a court which in excess of its jurisdiction has appointed a receiver will not only stay further proceedings under the receivership, but will restore the property to its owner, even though the receiver has gained complete possession.

Colorado.— People *v.* Denver Dist. Ct., 33 Colo. 293, 80 Pac. 908.

Missouri.— State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; State *v.* Rombauer, 105 Mo. 103, 16 S. W. 695.

England.— Serjeant *v.* Dale, 2 Q. B. D. 558, 46 L. J. Q. B. 781, 37 L. T. Rep. N. S. 153; White *v.* Steele, 12 C. B. N. S. 383, 8

12. Damages. In a proceeding in prohibition plaintiff can only recover nominal damages.[7]

13. Costs. In the absence of some statute or distinct regulation of the court[8] the prevailing party in prohibition is not entitled to costs unless the court, in disposing of the proceedings, so orders.[9] A public officer, against whom a prohibition is sought to restrain an official act, is not liable for the costs of the motion or of any proceeding therein.[10]

VII. Operation and Effect of Writ.

A. In General. A writ of prohibition will not operate to restrain the party named therein generally, or from doing any act save that in a pending suit or matter which it is issued to control.[11]

B. Upon Person Not Party of Record. A writ of prohibition to restrain further proceedings in a given cause does not affect a person not a party to the record nor in privity with any party to the cause.[12]

C. As Validating Rival Proceedings in Another Court. The writ when issued to restrain proceedings in one court does not validate rival proceedings brought in a different court for the same purpose.[13]

VIII. Punishment for Violation of Writ.

One who violates the command of a writ of prohibition is punishable as for contempt.[14]

IX. Appeal and Error.

Where the granting of the writ of prohibition is regarded as purely discretionary, no appeal lies from an order granting or denying it;[15] but the rule is otherwise

Jur. N. S. 1177, 31 L. J. C. P. 265, 6 L. T. Rep. N. S. 686, 104 E. C. L. 383.

See 40 Cent. Dig. tit. "Prohibition," § 79.

Issuance of writ where act already done see *supra*, IV, B.

When immediate prohibition will be withheld.— In a case where the supreme court, after an examination of voluminous records, finds that the court below was acting upon the sincere conviction that it possessed full power to make certain orders, which were in fact made without authority of law, an appeal having been taken to the circuit court, prohibition will be withheld, leaving the lower court to revise its action, with liberty to renew the application for prohibition if necessary. Bronson *v.* La Crosse, etc., R. Co., 1 Wall. (U. S.) 405, 17 L. ed. 616.

7. Mittleberger *v.* Merritt, 2 U. C. Q. B. 413.

Where an issue was made up in prohibition to try the facts in a case concerning authority of the commissioners of roads, it is for the purpose of informing the court and therefore is a case for mere nominal damages. Glover *v.* Simmons, 4 McCord (S. C.) 67.

8. Bartless *v.* Beaufort, 47 S. C. 225, 25 S. E. 38; McLeod *v.* Emigh, 12 Ont. Pr. 503.

9. Beaufort *v.* Danner, 1 Strobh. (S. C.) 176; *In re* Murphy, 8 Ont. Pr. 420; Nerlich *v.* Clifford, 6 Ont. Pr. 212.

A proceeding of prohibition is a qui tam action, and a bond for costs is not necessary before the filing of the declaration. *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

10. State *v.* Jervey, 4 Strobh. (S. C.) 304.

11. Thomson *v.* Tracy, 60 N. Y. 31.

At common law the writ is directed to both the court and the party, and commands the one not to hold, and the other not to follow the plea. *Ex p.* Williams, 4 Ark. 537, 544, 38 Am. Dec. 46.

Bringing second suit.— The prohibition of an action on a contract on the ground of lack of jurisdiction will not operate to prevent the bringing of a second action in the same court on an account stated confessedly within the jurisdiction of the court. Grundy *v.* Townsend, 36 Wkly. Rep. 531.

12. State *v.* Moore, 16 Wash. 350, 47 Pac. 757.

13. State *v.* Ross, 136 Mo. 259, 41 S. W. 1041.

14. Havemeyer *v.* San Francisco Super. Ct., 87 Cal. 267, 25 Pac. 433, 10 L. R. A. 650; State *v.* Judge Eleventh Judicial Dist. Ct., 48 La. Ann. 1501, 21 So. 94; State *v.* Ross, 136 Mo. 259, 41 S. W. 1041; Howard *v.* Pierce, 38 Mo. 296; State *v.* Hungerford, 8 Wis. 345.

Punishment of contempt see Contempt, 9 Cyc. 52.

Entertaining jurisdiction of second suit.— The pleadings in an injunction suit stated the property to be worth a sum greater than one hundred dollars, wherefore the judge was inhibited by writ of prohibition from entertaining the suit. A new suit was then begun identical with the last, except that the value of the same property was stated to be less than one hundred dollars. It was held that the judge might entertain this suit, notwithstanding the writ of prohibition. State *v.* Voorhies, 34 La. Ann. 1151.

15. State *v.* Bowerman, 40 Mo. App. 576; State *v.* Levens, 32 Mo. App. 520; People *v.* Westbrook, 89 N. Y. 152; Free *v.* Burgoyne,

when the writ is regarded as a matter of right because a tribunal is proceeding clearly without jurisdiction.[16] In those jurisdictions where an appeal lies only from a final judgment or order, a judgment, whether for or against issuing the writ, rendered after the cause has been fully heard, is appealable.[17] Under a statute providing that an appeal from any final judgment in prohibition shall not operate as a stay of proceedings pending the appeal, an appeal from the judgment of a circuit court dissolving a temporary order prohibiting the execution of a justice's judgment, does not prevent the execution of the judgment pending the appeal, since the appeal does not operate as a stay.[18]

X. WRIT OF CONSULTATION.

A. Defined. In English practice, a writ of consultation is a writ in the nature of a procedendo,[19] whereby a cause being removed by prohibition out of an inferior court to one of the superior courts of law is returnable thither again to be there determined.[20]

B. When Awarded. At old common law, if the verdict was for defendant, or the court upon demurrer was of opinion that there was no ground for prohibition, then a writ of consultation was awarded; and where this writ was awarded on the merits there could never be another prohibition upon the same suggestion.[21]

PROHIBITION. Of a business, to prevent the business engaged in or carried on, entirely or partially.[1] (Prohibition: By Constitution — Against Enactment

5 B. & C. 765, 11 E. C. L. 672; St. David *v.* Lucy, 1 Ld. Raym. 539, 91 Eng. Reprint 1260.

Discretionary because petitioner is stranger to the proceedings.— Where the petitioner for a writ of prohibition to restrain railroad commissioners from issuing a certificate of compliance to a certain street railway company was a stranger to the proceedings, having no other interest than that of an inhabitant of the town, the refusal of the writ rested in the discretion of the court, and was not reviewable. Kilty *v.* Railroad Com'rs, 184 Mass. 310, 68 N. E. 236.

Where the writ is granted with costs against defendant he has the right to appeal. People *v.* Williams, 51 N. Y. App. Div. 102, 64 N. Y. Suppl. 457.

Under the provisions of a statute authorizing appeals to the supreme court from the judgment of judges of the circuit courts and city courts on applications for writs of certiorari, mandamus, and other remedial writs upon certain conditions therein specified, an appeal will lie from a judgment of the city court granting a rule *nisi* on an application for a writ of prohibition. *Ex p.* Campbell, 130 Ala. 171, 30 So. 385.

16. Smith *v.* Whitney, 116 U. S. 167, 6 S. Ct. 570, 29 L. ed. 601; London *v.* Cox, L. R. 2 H. L. 239; Chambers *v.* Green, L. R. 20 Eq. 552, 44 L. J. Ch. 600; Worthington *v.* Jeffries, L. R. 10 C. P. 379, 44 L. J. C. P. 209, 32 L. T. Rep. N. S. 606, 23 Wkly. Rep. 750; Forster *v.* Forster, 4 B. & S. 187, 116 E. C. L. 187. See also Gaynor *v.* Lafontaine, 14 Quebec K. B. 99.

At common law on final judgment in a proceeding for prohibition, a writ of error will lie as in common cases. *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

Finality of order dismissing application for prohibition see APPEAL AND ERROR, 2 Cyc. 609.

Pecuniary limitations on appellate jurisdiction see APPEAL AND ERROR, 2 Cyc. 550.

17. *Arkansas.*—*Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

Connecticut.— Fayerweather *v.* Monson, 61 Conn. 431, 23 Atl. 878.

Oklahoma.— Healy *v.* Loofbourrow, 2 Okla. 458, 37 Pac. 823.

Virginia.— Burch *v.* Hardwicke, 23 Gratt. 51.

United States.— Weston *v.* Charleston, 2 Pet. 449, 7 L. ed. 481.

See 40 Cent. Dig. tit. "Prohibition," § 83.

18. Graham *v.* Conway, 82 Mo. App. 647.

19. **Procedendo** see *ante*, p. 405.

20. Burrill L. Dict. [*citing* 3 Blackstone Comm. 114; Tidd Pr. 948].

This writ was so called because upon consultation had the judges found the prohibition to be ill-founded, and therefore by this writ they returned the cause to its original jurisdiction to be there determined, and commanded the inferior court to proceed to determine it, the prohibition to the contrary notwithstanding. *Ex p.* Williams, 4 Ark. 537, 544, 38 Am. Dec. 46.

21. *Ex p.* Williams, 4 Ark. 537, 544, 38 Am. Dec. 46.

In some of the courts in the United States a similar writ has been used. Burrill L. Dict. See *Ex p.* Williams, 4 Ark. 537, 544, 38 Am. Dec. 46.

Form of writ of consultation see *Ex p.* Williams, 4 Ark. 537, 542, 38 Am. Dec. 46.

Form of plea for consultation see *Ex p.* Williams, 4 Ark. 537, 542, 38 Am. Dec. 46.

1. Miller *v.* Jones, 80 Ala. 89, 97 [*quoted* in *In re* Hauck, 70 Mich. 396, 409, 38 N. W.

of Local and Special Laws, see CONSTITUTIONAL LAW, 8 Cyc. 751; Against Impairing Obligations of Contracts, see CONSTITUTIONAL LAW, 8 Cyc. 773; Self-Executing, see CONSTITUTIONAL LAW, 8 Cyc. 754; To States, Implied, see CONSTITUTIONAL LAW, 8 Cyc. 773. By Injunction, see INJUNCTIONS, 22 Cyc. 724. By Insurance Policy — Of Certain Articles on Insured Property, see FIRE INSURANCE, 19 Cyc. 734; Of Change in Title, Interest or Possession of Insured Property, see FIRE INSURANCE, 19 Cyc. 745. By Ordinance — Of Certain Articles of Food or Drink, see MUNICIPAL CORPORATIONS, 28 Cyc. 734 text and notes 30–34, 735 text and note 43; Of Erection of Private Hospital, see MUNICIPAL CORPORATIONS, 28 Cyc. 727 text and note 48; Of Profanity, see MUNICIPAL CORPORATIONS, 28 Cyc. 712; Of Slaughter-House Within Limits of Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 731 text and note 84; Of Use of Steam Power, see MUNICIPAL CORPORATIONS, 28 Cyc. 728 text and note 59. By Statute — For Protection of Fish and Game, see FISH AND GAME, 19 Cyc. 1008–1018; Of Combination in Restraint of Trade, see MONOPOLIES, 27 Cyc. 898–904; Of Gaming, see GAMING, 20 Cyc. 878 *et seq.*; Of Imprisonment For Debt, see ARREST, 3 Cyc. 899; Of Limitation of Carrier's Liability, see CARRIERS, 6 Cyc. 397, 578–580 text and notes 45–57, 663 text and note 14, 664 note 14; Of Liquor Traffic, see, generally, INTOXICATING LIQUORS, 23 Cyc. 43; Of Lottery, see LOTTERIES, 25 Cyc. 1641, 1653; Of Lottery Advertisement, see LOTTERIES, 25 Cyc. 1647. By Statute and Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 697. Writ of, see PROHIBITION, *post*, p. 596. See also PROHIBIT.)

PROJECT. When used in relation to existing things such as streets, to construct in the same direction; to extend.[2]

PROJET. In international law, the draft of a proposed treaty or convention.[3]

PRO LÆSIONE FIDEI. For breach of faith.[4]

PROLEM ANTE MATRIMONIUM NATAM, ITA UT POST LEGITIMAM, LEX CIVILIS SUCCEDERE FACIT IN HÆREDITATE PARENTUM; SED PROLEM, QUAM MATRIMONIUM NON PARIT, SUCCEDERE NON SINIT LEX ANGLORUM. "The civil law permits the offspring born before marriage [provided such offspring be afterwards legitimized] to be the heirs of their parents; but the law of the English does not suffer the offspring not produced by the marriage to succeed." [5]

PROLES SEQUITUR SORTEM PATERNAM. A maxim meaning "The offspring follows the condition of the father." [6]

PROLICIDE. The destruction of the human offspring; fœticide; infanticide.[7] (See, generally, ABORTION, 1 Cyc. 167; HOMICIDE, 21 Cyc. 646.)

PROLIXITY. The unnecessary and superfluous statement of facts in pleading or in evidence.[8] (See, generally, PLEADING, 31 Cyc. 1 *et seq.*)

PROMISE. As a noun, in a general sense, an express undertaking or agreement to carry the purpose into effect; [9] a declaration which binds the person who makes it, either in honor, conscience or law, to do or forbear a certain act specified; [10] a declaration which gives to the person to whom it is made a right to expect

269; State *v.* Burgdoerfer, 107 Mo. 1, 25, 17 S. W. 646, 14 L. R. A 846]; Los Angeles County *v.* Hollywood Cemetery Assoc., 124 Cal. 344, 349, 57 Pac. 153, 71 Am. St. Rep. 75.

2. See Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 157, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

"Projected street," as used in connection with certain deeds and plans, not a designed, intended, or contemplated street merely, but a street already projected and then in process of construction. Greenhood *v.* Carroll, 114 Mass. 588, 592.

3. Black L. Dict.

4. Black L. Dict.

Example.—"The clergy . . . had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro lœsione fidei*, as a spiritual offence against conscience in case of non-payment of debts or any breach of civil contracts: till checked by the constitutions of Clarendon." 3 Blackstone Comm. 52 [*cited* in Black L. Dict.].

5. Black L. Dict.

6. Bouvier L. Dict.

Applied in Lynch *v.* Clarke, 1 Sandf. Ch. (N. Y.) 583, 660.

7. Black L. Dict.

8. Black L. Dict. [*citing* 7 Price 278 note].

9. Stewart *v.* Reckless, 24 N. J. L. 427, 430; Shaw *v.* Burney, 86 N. C. 331, 333, 41 Am. Rep. 461.

10. U. S. *v.* Baltic Mills Co., 124 Fed. 38, 39, 59 C. C. A. 558.

or claim the performance or non-performance of some particular thing;[11] in a legal sense, a declaration, verbal or written, made by one person to another for a good or valuable consideration, by which the promisor binds himself to do or forbear some act, and give to the promisee a legal right to demand and enforce a fulfilment.[12] As a verb, to make a declaration of some benefit, or an assurance of some ill;[13] to agree; to pledge oneself; to engage; to assure or make sure; to pledge by contract;[14] assurance of a benefit.[15] (Promise: In General, see Assumpsit, Action of, 4 Cyc. 317; Contracts, 9 Cyc. 213. By Executor or Administrator and Effect of Statute of Frauds, see Frauds, Statute of, 20 Cyc. 158. By Master to Remedy Defect or Remove Danger as Affecting Servant's Assumption of Risk or Contributory Negligence, see Master and Servant, 26 Cyc. 1209. Gift Inter Vivos Distinguished From Promise of Gift, see Gifts, 20 Cyc. 1214. New Promise to Pay Debt — Barred, see Limitations of Actions, 25 Cyc. 1325; Discharged in Bankruptcy, see Bankruptcy, 5 Cyc. 407; Discharged in Insolvency Proceedings, see Insolvency, 22 Cyc. 1351. Of Marriage, see Breach of Promise to Marry, 5 Cyc. 998. To Answer For the Debt, Default, or Miscarriage of Another, see Frauds, Statute of, 20 Cyc. 160. To Pay — Debt as Part of Purchase-Money of Mortgaged Property, see Mortgages, 27 Cyc. 1344; Judgment as Waiver of Right to Appeal, see Appeal and Error, 2 Cyc. 647 note 58.)

PROMISEE. One to whom a promise has been made.[16]

PROMISE OF MARRIAGE. See Breach of Promise to Marry, 5 Cyc. 997.

PROMISOR. One who makes a promise.[17]

PROMISSORY NOTE. See Commercial Paper, 7 Cyc. 532.

PROMISSORY OATH. One where the affiant swears that he will perform some duty to be performed subsequent to the taking of the oath.[18] (See, generally, Oaths and Affirmations, 29 Cyc. 1296.)

PROMISSORY REPRESENTATIONS. In the law of insurance, those which are

11. Taylor *v.* Miller, 113 N. C. 340, 342, 18 S. E. 504; Webster Dict. [*quoted* in Lanagin *v.* Nowland, 44 Ark. 84, 89].

12. Newcomb *v.* Clark, 1 Den. (N. Y.) 226, 228; U. S. *v.* Baltic Mills Co., 124 Fed. 38, 39, 59 C. C. A. 558.

"Intention" compared and distinguished see 22 Cyc. 1456 note 31.

As used in the federal statutes making it penal to "assist or encourage" migration of aliens "by promise of employment through advertisement" published in a foreign country, provided this shall not apply to states advertising the inducements they offer for emigration to such states, the term is not employed in its strict legal meaning, but rather in the sense of an assurance or inducement to encourage aliens to migrate. U. S. *v.* Baltic Mills Co., 124 Fed. 38, 41, 59 C. C. A. 558. See also Downie *v.* Vancouver Engineering Works, 8 Can. Cr. Cas. 66, 68.

"The law recognizes two kinds of promises, express and implied promises; the first is the express stipulation of the party making it, to do or not to do a particular thing; the second the law presumes, from some benefit received by the party against whom it is raised; or, to illustrate it by the old rule, to take a case out of the statute of limitations, payment, or an acknowledgment of the justice of a debt, implied a promise to pay." Foute *v.* Bacon, 24 Miss. 156, 164.

13. Bassett *v.* Denn, 17 N. J. L. 432, 433.

14. Worcester Dict. [*quoted* in Knecht *v.* New York Mut. L. Ins. Co., 90 Pa. St. 118, 121, 35 Am. Rep. 641].

15. Worcester Dict. [*quoted* in U. S. *v.* Baltic Mills Co., 124 Fed. 38, 39, 59 C. C. A. 558].

"Expression of intention" distinguished see Lanagin *v.* Nowland, 44 Ark. 84, 89.

"'I promise' that I will" do so and so, means the same thing as "I declare that I will" do so and so. Bassett *v.* Denn, 17 N. J. L. 432, 433.

Where an indictment sets out a note according to the "purport and effect following, &c., I 'promise,'" &c., and the proof was that the note was written "I promised," it was held that the variance was not material and that "I promised" would be construed to mean "I promise." Com. *v.* Parmenter, 5 Pick. (Mass.) 279.

As used in a statute imposing a forfeiture upon the person who shall give, offer, or promise, any reward, gift, favor, or benefit, to any voter to hire, bribe, or influence him, in giving his vote, "to promise" is to make a declaration or engagement that it shall be given. State *v.* Harker, 4 Harr. (Del.) 559, 561.

16. Black L. Dict.

17. Black L. Dict.

18. Case *v.* People, 6 Abb. N. Cas. (N. Y.) 151, 163.

As for example where an officer on taking an official oath swears that he will well and faithfully discharge the duties of his office. Case *v.* People, 6 Abb. N. Cas. (N. Y.) 151, 163.

made by the assured concerning what is to happen during the term of the insurance, stated as matters of expectation, or, it may be, of contract.[19] (See Fire Insurance, 19 Cyc. 708; Life Insurance, 25 Cyc. 821; Marine Insurance, 26 Cyc. 636.)

Promissory warranty. See Fire Insurance, 19 Cyc. 708; Life Insurance, 25 Cyc. 821.

Promote. To contribute to the establishment, growth, enlargement or improvement of, as of anything valuable, or to the development, increase, or influence of, as of anything evil; forward; advance.[20] (See Promoter; Promotion.)

Promoter. The name given to persons who travel through the mining regions for the purpose of obtaining options for the purchase of mining property from the owners of a mine, and "trust to luck" to be able to market the same in the money centers of the world.[21] (Promoter: Of Corporation — Definition, see Corporations, 10 Cyc. 262; Duties, Powers, and Liabilities, see Corporations, 10 Cyc. 268; Liability as Partners to Third Persons, see Partnership, 30 Cyc. 400.)

Promotion. An advancement to a higher position, an elevation, a preferment; [22] advancement to a higher position, grade, class or rank; preferment in honor or dignity; [23] the act of exalting in rank or honor.[24] (Promotion: Of Army or Navy Officer, see Army and Navy, 3 Cyc. 820. Of Honorably Discharged Union Soldier Under Civil Service Laws, see Mandamus, 26 Cyc. 254. Of Militia Officers, see Militia, 27 Cyc. 493 note 17. Of Policemen, see Municipal Corporations, 28 Cyc. 500.)

Promovent. A plaintiff in a suit of *duplex querela*.[25]

Prompt. Ready, quick, expeditious, done or rendered quickly or immediately.[26] (See Promptly.)

19. New Jersey Rubber Co. *v.* Commercial Union Assur. Co., 64 N. J. L. 580, 584, 46 Atl. 777.

Distinguished from "affirmative representations." Kimball *v.* Ætna Ins. Co., 9 Allen (Mass.) 540, 543, 85 Am. Dec. 786; New Jersey Rubber Co. *v.* Commercial Union Assur. Co., 64 N. J. L. 580, 584, 46 Atl. 777.

20. Century Dict.

Promoting lottery.— A person who prints, vends, or has in his possession with intent to vend, lottery tickets, or who wrongfully permits the setting up or managing of a lottery, or exchange or sale of lottery tickets or the advertising of lottery tickets "promotes a lottery" within the meaning of a statute prohibiting any person from promoting the disposing of money or other thing of value by way of lottery. Miller *v.* Com., 13 Bush (Ky.) 731, 739.

Promoting science, etc.— Under the federal constitution conferring on congress the power to pass copyright and patent laws to "promote the progress of science and useful arts," the power does not extend to writings of a grossly immoral or indecent character, or to inventions expressly designed to facilitate the commission of crime. Martinetti *v.* Maguire, 16 Fed. Cas. No. 9,173, Abb. 356, Deady 216.

21. Snow *v.* Nelson, 113 Fed. 353, 355.

22. Hale *v.* Worstell, 185 N. Y. 247, 253, 77 N. E. 1177, 113 Am. St. Rep. 895.

23. Standard Dict. [*quoted* in People *v.* Partridge, 89 N. Y. App. Div. 497, 499, 85 N. Y. Suppl. 853].

24. Webster Dict. [*quoted* in People *v.* Partridge, 89 N. Y. App. Div. 497, 499, 85 N. Y. Suppl. 853].

As used in a bequest to trustees of a sum of money "to be by them applied for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropic purposes at their discretion," the term is construed to mean the acquisition and dissemination of knowledge, the study and inculcation of principles affecting those departments of industry, or of sciences relating thereto. Rotch *v.* Emerson, 105 Mass. 431, 432.

25. Black L. Dict. [*citing* Willis *v.* Oxford, 2 P. D. 192].

26. McKnight *v.* Whipple, 25 Colo. 469, 472, 55 Pac. 182.

"Quick," "sudden," and "precipitate" are synonyms. Tobias *v.* Lissberger, 150 N. Y. 404, 412, 12 N. E. 13, 59 Am. Rep. 509.

A convertible term with "at once," "forthwith." Webster Dict. [*quoted* in Lewis *v.* Hojer, 16 N. Y. Suppl. 534, 536].

"One who is ready is said to be prepared at the moment, one who is prompt is said to be prepared beforehand." Tobias *v.* Lissberger, 105 N. Y. 404, 412, 12 N. E. 13, 59 Am. Rep. 509.

Prompt shipment.— As used in a contract providing for "prompt shipment" of from rails from Europe to New York, the term implies expedition, admits of less delay than would be permitted under a covenant to act merely within a reasonable time. Tobias *v.* Lissberger, 105 N. Y. 404, 410, 12 N. E. 13, 59 Am. Rep. 509.

"To be shipped prompt" by usage of the

PROMPTLY. Quickly; expeditiously.[27] (See PROMPT.)

PROMULGATION. The order given to cause a law to be executed, and to make it public.[28]

PRONOUNCE. To utter formally, officially or solemnly; to declare or affirm.[29]

PROOF.[30] A sufficient reason for assenting to a proposition [31] as true.[32] In law, evidence before a court or jury, in a judicial way; [33] that quantity of evidence which produces a reasonable assurance of the existence of the ultimate fact; [34] that quantity of appropriate evidence which produces assurance and certainty; [35] that degree and quantity of evidence that produces conviction; [36] the establishing of the truth of allegations.[37] In reference to prints or engravings, an impression

Boston grain trade means to be shipped within ten days. Soper *v.* Tyler, 77 Conn. 104, 106, 58 Atl. 699.

"Prompt payment" see Gay *v.* Ward, 67 Conn. 147, 155, 34 Atl. 1025, 32 L. R. A. 818; National Exch. Bank *v.* Gay, 57 Conn. 224, 236, 17 Atl. 555, 4 L. R. A. 343.

27. Denver *v.* Moewes, 15 Colo. App. 28, 60 Pac. 986, 987.

As used in a lease providing that the lessee would pay all general taxes promptly when the same became due and payable, the word was meant to emphasize that the taxes were to be paid as soon as they became due. "Certain it is, that the word . . . as used . . . means something more definite and covers a shorter time than a reasonable time." Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248, 259, 71 S. W. 696.

28. Black L. Dict. [*citing* Blackstone Comm. 45], where it is said: "It differs from publication."

As used in reference to a law requiring the promulgation by railroad companies of their rules and regulations, the term means that such rule shall be brought to the attention of the servants affected thereby, or that it be given such publicity as that the servant, in the proper discharge of his duties, is bound to take notice of it when knowledge is presumed. Wooden *v.* Western New York, etc., R. Co., 18 N. Y. Suppl. 768, 769.

29. *Ex p.* Crawford, 36 Tex. Cr. 180, 181, 36 S. W. 92.

When applied to a sentence of the court, the term means to utter formally and solemnly the judgment of the court, and order the same to be carried into execution. *Ex p.* Crawford, 36 Tex. Cr. 180, 181, 36 S. W. 92.

30. Distinguished from: Evidence see EVIDENCE, 16 Cyc. 849. Probability see Brown *v.* Atlantic, etc., R. Co., 19 S. C. 39, 59.

Proof is evident see 17 Cyc. 822.

31. Orth *v.* St. Paul, etc., R. Co., 47 Minn. 384, 389, 50 N. W. 363.

32. Minick *v.* Tharp, 5 Pa. Dist. 44, 46.

33. Lenox *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 224, 225.

34. Missouri, etc., Trust Co. *v.* McLachlan, 59 Minn. 468, 475, 61 N. W. 560.

An affidavit of belief is not "proof" under a statute providing that when a defendant pleads or gives notice of the defense of usury, and shall verify the truth of his plea or notice by affidavit, he may call and examine the plaintiff to prove the usury. Kingsland *v.* Cowman, 5 Hill (N. Y.) 608, 610.

35. Buffalo, etc., R. Co. *v.* Reynolds, 6 How. Pr. (N. Y.) 96, 98.

36. Nevling *v.* Com., 98 Pa. St. 322, 328.

Whenever all of the evidence is of such a character as to convince the intellect and conscience of men of a fact, then that fact is proved. Nevling *v.* Com., 98 Pa. St. 322, 328.

37. Neiderer *v.* Bender, 15 Pa. Dist. 309, 310.

When used in a legislative enactment, the term means legal evidence upon which judicial action may be rested. State *v.* Brodie, 148 Ala. 381, 384, 41 So. 180; Githens *v.* Mount, 64 N. J. L. 166, 168, 44 Atl. 851; Inglis *v.* Schreimer, 58 N. J. L. 120, 122, 32 Atl. 131. As used in a statute providing that, in any action founded upon contract, the defendant may be held to bail upon proof to the satisfaction of a justice of the supreme court, or a commissioner to take bail and affidavits, that the defendant is about to remove any of his property out of the jurisdiction of the court in which an action is about to be commenced, with intent to defraud his creditors, it is a technical word, used in a technical sense, and implies the application, to some extent, of those rules under which evidence is ordinarily admitted; as thus, a party to the record and having a direct interest in the event of the suit, cannot be a witness for himself at the trial against the adverse party. Hunt *v.* Hill, 20 N. J. L. 476, 478. When a statute requires proof to be made, it must be made by legal evidence, unless from the context or other qualifying words it is apparent that the legislature intended that the fact might be shown by affidavit, or in some other manner. Buffalo, etc., R. Co. *v.* Reynolds, 6 How. Pr. (N. Y.) 96, 98. See also Brown *v.* Hinchman, 9 Johns. (N. Y.) 75. Under a statute providing that a confession of a defendant in a criminal case is not sufficient to warrant his conviction, without proof that the offense charged has been committed, the term means, not corroborating circumstances merely, but the *corpus delicto* must be proved beyond a reasonable doubt by evidence other than the confessions. State *v.* Laliyer, 4 Minn. 368. Under a statute giving a town power to subscribe for railroad stock and issue bonds in payment therefor, provided twelve or more freeholders, residents of the town, should apply to the county judge for the appointment of commissioners, and provided the consent in writing of a majority in number and amount of the resident taxpayers of said town, that such subscription be made and bonds issued, designating the amount, and further providing that the proof of the au-

taken from an engraved plate to show its progress during the execution of it.[38] In the internal revenue law, the act of testing the strength of alcoholic spirits; also, the degree of strength, as high proof, first proof, second, third and fourth proofs.[39] (Proof: In General, see Evidence, 16 Cyc. 849; Criminal Law, 12 Cyc. 379; Depositions, 13 Cyc. 822; Discovery, 14 Cyc. 301; Witnesses. Burden of in — Civil Action, see Evidence, 16 Cyc. 926; Criminal Prosecution, see Criminal Law, 12 Cyc. 379. In Admiralty — In General, see Admiralty, 1 Cyc. 882; Review on Appeal, see Admiralty, 1 Cyc. 906; Taking and Filing, see Admiralty, 1 Cyc. 888; Taking on Appeal, see Admiralty, 1 Cyc. 905. In Civil Action — In General, see Evidence, 16 Cyc. 849; Reception of Evidence or Taking of Proof, see Depositions, 13 Cyc. 925; Discovery, 14 Cyc. 301; Trial; Review on Appeal, see Appeal and Error, 3 Cyc. 345; Taking Additional Proofs in Appellate Court, see Appeal and Error, 3 Cyc. 259. In Criminal Prosecution — In General, see Criminal Law, 12 Cyc. 379; Reception of Evidence or Taking of Proof, see Criminal Law, 12 Cyc. 543; Review on Appeal, see Criminal Law, 12 Cyc. 906. In Equity — In General, see Equity, 16 Cyc. 370; Taking and Filing, see Equity, 16 Cyc. 375. Of Death, see Death, 13 Cyc. 295. Of Instrument, see Acknowledgments, 1 Cyc. 571. Of Loss Under Insurance Policies, see Accident Insurance, 1 Cyc. 274; Fidelity Insurance, 19 Cyc. 523; Fire Insurance, 19 Cyc. 843; Life Insurance, 25 Cyc. 883; Live-Stock Insurance, 25 Cyc. 1520; Marine Insurance, 26 Cyc. 708. Of Service of Notice — By Mail, see Notice, 29 Cyc. 1123; By Personal Service of, see Notice, 29 Cyc. 1119; By Posting, see Notice, 29 Cyc. 1124; By Publication, see Notice, 29 Cyc. 1122. Of Service of Process, see Process, *ante*, p. 496. Of Will, see Wills. Order of in — Civil Action, see Trial; Criminal Prosecution, see Criminal Law, 12 Cyc. 555. Pleading, Proof, and Variance, see Pleading, 31 Cyc. 670.)

PROOF BEYOND A REASONABLE DOUBT. Such evidence as establishes the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it; [40] such proof as precludes every reasonable hypothesis except that which it tends to support; proof to a moral certainty, as distinguished from an absolute certainty.[41] (See Criminal Law, 12 Cyc. 490, 622.)

PROOF OF LOSS. See Accident Insurance, 1 Cyc. 274; Fidelity Insurance, 19 Cyc. 523; Fire Insurance, 19 Cyc. 843; Life Insurance, 25 Cyc. 883; Live-Stock Insurance, 25 Cyc. 1520; Marine Insurance, 26 Cyc. 708.

PROPER. Appropriate or suitable in all respects; [42] consistent with propriety; appropriate, or suited to; [43] that which is essential, suitable, adapted, and correct.[44]

thority of the commissioners to sign for stock and issue bonds in payment, might be made by affidavit filed in the town and county clerks' offices, the term means a statement and verification of such facts as are requisite to establish the principal fact sought to be maintained. Duanesburg *v.* Jenkins, 40 Barb. (N. Y.) 574, 584.

38. Century Dict. [*quoted* in Turner *v.* Osgood Art Colorotype Co., 125 Ill. App. 602, 612 (*affirmed* in 223 Ill. 629, 79 N. E. 306)].

39. Webster Dict. [*quoted* in Louisville Public Warehouse Co. *v.* Collector of Customs, 49 Fed. 561, 568, 1 C. C. A. 371].

40. Com. *v.* Kendall, 162 Mass. 221, 222, 38 N. E. 504.

41. Carlton *v.* People, 150 Ill. 181, 192, 37 N. E. 244, 41 Am. St. Rep. 346.

A synonym of the phrase "proof 'to a moral certainty.'" Carlton *v.* People, 150 Ill. 181, 192, 37 N. E. 244, 41 Am. St. Rep. 346.

42. Merchant's Estate, 15 Pa. Dist. 60, 61.

43. Martin *v.* Martin, 20 N. J. Eq. 421, 434.

44. Bouvier L. Dict. [*quoted* in Pickle *v.* Smalley, 21 Wash. 473, 477, 58 Pac. 581].

"The word 'proper' admits different senses. — There is no covenant almost, which a landlord can propose, that, generally speaking, could be called an improper covenant; for he has a right to let his land upon any terms he may think fit to propose; and there are many covenants, not usual or common, that could not be objected to. But there are many covenants, though proper, that do not naturally flow out of the contract. . . . It cannot mean those covenants, which would not be unreasonable. It must mean such as are calculated to secure the full effect of the contract." Jones *v.* Jones, 12 Ves. Jr. 186, 189, 33 Eng. Reprint 71.

Used synonymously with "competent" see 8 Cyc. 405 note 97.

As used in the federal constitution providing that congress shall have power "to make

PROPERLY. In a proper manner; with propriety; fitly; suitably; correctly.[45] (See PROPER.)

PROPER PARTY. See PARTIES, 30 Cyc. 1.

all laws which shall be necessary and proper for carrying into execution," of the powers exclusively vested by the constitution in the federal government, the term is not synonymous with "necessary." Griswold *v.* Hepburn, 2 Duv. (Ky.) 20, 25.

Proper depth.—As used in an ordinance providing for a cement sidewalk and providing that the "space for the sidewalk shall be excavated to the proper depth and width," the width of the walk is not thereby prescribed, nor does it by the use of the term so refer to the width prescribed by a prior general ordinance as to make such general ordinance, by reference, a part of the one in question. People *v.* Hills, 193 Ill. 281, 284, 61 N. E. 1061.

A proper indorsement is such an indorsement as the law merchant requires in order to authorize a payment to the owner. Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 492, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444.

Proper influence is that which one person gains over another, by acts of kindness, attention, etc. Millican *v.* Millican, 24 Tex. 426.

Used in connection with other words see the following phrases: "Proper action" see Richardson *v.* Stuesser, 125 Wis. 66, 70, 103 N. W. 261, 69 L. R. A. 829. "Proper authorities" see Glenn *v.* York County Com'rs, 6 S. C. 412, 419. "'Proper' books of account" see *In re* Good, 78 Cal. 399, 401, 20 Pac. 860; Wilkins *v.* Jenkins, 136 Mass. 38, 39; *In re* Bartenbach, 2 Fed. Cas. No. 1,068, 11 Nat. Bankr. Reg. 61; *In re* Winsor, 30 Fed. Cas. No. 17,885, 16 Nat. Bankr. Reg. 152, 156. "Proper care" see Gawlack *v.* Michigan Cent. R. Co., 11 Ohio Cir. Ct. 59, 63, 5 Ohio Cir. Dec. 313. "Proper case" see Slack *v.* Jacob, 8 W. Va. 612, 660. "Proper cash items" see U. S. *v.* Young, 128 Fed. 111, 115. "Proper civil action" see Fillmore *v.* Wells, 10 Colo. 228, 238, 15 Pac. 343, 3 Am. St. Rep. 567. "Proper clerk" see Alton *v.* Middleton, 158 Ill. 442, 447, 41 N. E. 926; Grand Tower Min., etc., Co. *v.* Gill, 111 Ill. 541, 558. "Proper contract" see State *v.* Associated Press, 159 Mo. 410, 422, 60 S. W. 91. "Proper conveyance" see Traver *v.* Halsted, 23 Wend. (N. Y.) 66, 69. "Proper county" see Kennedy *v.* Spencer, 4 Port. (Ala.) 428, 432; Cook *v.* Pendergast, 61 Cal. 72, 78; Eel River R. Co. *v.* State, 143 Ind. 231, 233, 42 N. E. 617; State *v.* Lake, 28 Minn. 362, 364, 10 N. W. 17; Merrill *v.* Shaw, 5 Minn. 148; Wells *v.* Clarkson, 5 Mont. 336, 343, 5 Pac. 894; *In re* Keenan's Estate, 5 N. Y. Suppl. 200, 201, 1 Connoly Surr. 226; Finley *v.* Smith, 14 N. C. 247, 248; *In re* Chartiers Ferry Co., 2 Chest. Co. Rep. (Pa.) 91; Sargent *v.* Kindred, 49 Fed. 485, 488. "Proper custody" see Nowlin *v.* Burwell, 75 Va. 551, 554. "Proper delivery" see Calderon *v.* Atlas Steamship Co., 64 Fed. 874, 876. "Proper District Court" see *Ex p.* Phenix Ins. Co., 118 U. S. 610, 623, 7 S. Ct. 25, 30 L. ed. 274. "Proper election see State *v.* Nash, 66 Ohio St. 612, 620, 64 N. E. 558. "Proper executive authority" see *In re* Sheazle, 21 Fed. Cas. No. 12,734, 1 Woodb. & M. 66. "Proper gift" see Fisk *v.* Flores, 43 Tex. 340, 344. "Proper manner" see Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 325, 11 S. W. 18, 957, 11 Ky. L. Rep. 146. "Proper means" see Hoard *v.* Garner, 10 N. Y. 261, 267. "Proper mixture" see Foley *v.* Addenbrooke, 14 L. J. Exch. 169, 177, 13 M. & W. 174. "'Proper' notice" see Hein *v.* Fairchild, 87 Wis. 258, 263, 58 N. W. 413. "Proper officer" see Pickle *v.* Smalley, 21 Wash. 473, 477, 58 Pac. 581. "Proper ordinance" see Keena *v.* Placer County, 89 Cal. 11, 14, 26 Pac. 615. "Proper parties" see PARTIES, 30 Cyc. 1. "Proper precinct" see Aspermont Drug Co. *v.* J. W. Crowdus Drug Co., (Tex. Civ. App. 1904) 80 S. W. 258, 259. "Proper representative" see Zaegel *v.* Kuster, 51 Wis. 31, 39, 7 N. W. 781. "Proper residence" see State *v.* Dodge County, 56 Wis. 79, 86, 13 N. W. 680. "Proper title" see Knight *v.* Lawrence, 19 Colo. 425, 432, 36 Pac. 242; Latta *v.* Clifford, 47 Fed. 614, 618. "Proper tools or implements of a farmer" see Meyer *v.* Meyer, 23 Iowa 359, 375, 92 Am. Dec. 432.

45. Century Dict.

A finding of fact that a load was "properly" placed on a wagon meant carefully and prudently placed. Davis *v.* Guilford, 55 Conn. 351, 356, 11 Atl. 350.

Properly filed.—As used in a statute requiring a certificate of a clerk attached to a transcript that the undertaking on appeal has been properly filed, the term has reference to the time of filing of the undertaking; and if it appears by fair intendment from the wording of the certificate or by a comparison of the date of its filing with that of the filing of the notice of appeal, that the undertaking has been filed in time, this is sufficient. Davidson *v.* Wampler, 29 Mont. 61, 65, 74 Pac. 82.

Where a city is required to "properly" repair its sidewalks, the requirement is not that it shall repair them so as to make them absolutely safe, but reasonably safe for the use of the traveling public. Mattoon *v.* Faller, 217 Ill. 273, 279, 75 N. E. 387.

Used in connection with other words see the following phrases: "Properly and legally authenticated" see *In re* Fowler, 4 Fed. 303, 311, 18 Blatchf. 430. "Properly executed" see Horner *v.* Huffman, 52 W. Va. 40, 46, 43 S. E. 132. "Properly guarded" see Spaulding *v.* Tucker, etc., Cordage Co., 13 Misc. (N. Y.) 398, 400, 34 N. Y. Suppl. 237. "Properly handled and transported" see Missouri, etc., R. Co. *v.* Chittim, 24 Tex. Civ. App. 599, 602, 60 S. W. 284. "Properly made" see Adams *v.* Houston, etc., R. Co., 70 Tex. 252, 276, 7 S. W. 729. "Properly provisioned" see U. S. *v.* Reed, 86 Fed. 308, 311. "Properly shod" see Morse *v.* Pitman, 64 N. H. 11, 12, 4 Atl. 880.

PROPERTY

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CROSS-REFERENCES

For Matters Relating to:

Actions Relating to or Affecting Property:

Abatement and Revival of Actions Affecting Personal and Real, see Abatement and Revival, 1 Cyc. 89.

Accrual of Right of Action as Dependent on Title or Possession, see Limitations of Actions, 25 Cyc. 1091.

Actions by Heirs or Distributees Relating to Personal Property, see Descent and Distribution, 14 Cyc. 143.

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Actions Relating to or Affecting Property — (*continued*)
Affected:
By Execution and Enforcement of Judgment in Suits to Enforce Mechanics' Liens, see MECHANICS' LIENS, 27 Cyc. 448.
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Equitable Relief Against Mistake in Description of Property or Estate, see EQUITY, 16 Cyc. 72.
Evidence:
As to Ownership of Lost Goods, see FINDING LOST GOODS, 19 Cyc. 542.
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To Identify, see DEEDS, 13 Cyc. 729; EVIDENCE, 16 Cyc. 1175.
Exclusive or Concurrent Jurisdiction of Equity, in Suits Involving Property Rights, see EQUITY, 16 Cyc. 50, 52, 88.
Exempt From Creditors' Suits, see CREDITORS' SUITS, 12 Cyc. 32.
Fraudulent Removal or Disposition as Ground of Arrest in Civil Action, see ARREST, 3 Cyc. 904, 907, 911.
Instructions as to Measure of Damages For Injury to Property, see DAMAGES, 13 Cyc. 236.
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Jurisdiction:
Determined by Value of Property in Suit, see COURTS, 11 Cyc. 774.
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Jurisdiction of Justice's Court:
Of Actions and Proceedings For Possession, see JUSTICES OF THE PEACE, 24 Cyc. 450.
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Of Actions Involving Title to Real Property, see JUSTICES OF THE PEACE, 24 Cyc. 450.
Jurisdiction of Probate Courts to Determine Title to Property, see COURTS, 11 Cyc. 796.
Levy of Attachment, see ATTACHMENT, 4 Cyc. 571.
Liable to Costs in General, see COSTS, 11 Cyc. 254, 261.
Lien of Attorney on Land in Litigation, see ATTORNEY AND CLIENT, 4 Cyc. 1014.
Limitations as Affected by Concealment, see LIMITATIONS OF ACTIONS, 25 Cyc. 1212.
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Actions Relating to or Affecting Property — (*continued*)
Ownership:
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Provisions as to Sale of, in Judgment or Decree of Foreclosure, see MORTGAGES, 27 Cyc. 1333, 1475, 1680.
Right to Maintain Action of Forcible Entry and Detainer to Recover Possession, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1128.
Subject:
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To Attachment in Justices' Courts, see JUSTICES OF THE PEACE, 24 Cyc. 535.
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To Execution, see EXECUTIONS, 17 Cyc. 940; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 587; JUSTICES OF THE PEACE, 24 Cyc. 618.
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To Levy on Execution of Mortgage Foreclosure Judgment or Decree, see MORTGAGES, 27 Cyc. 1672.
To Partition, see PARTITION, 30 Cyc. 174.
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Title Acquired by Officer to Property Taken Under Execution, see EXECUTIONS, 17 Cyc. 1121.
Title and Possession as Affecting Right:
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To Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 29.
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For Trespass, see TRESPASS.
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For Matters Relating to — (*continued*)
Actions Relating to or Affecting Property — (*continued*)
Title and Possession as Affecting Right of Action — (*continued*)
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Affecting Jurisdiction Regardless of Amount Claimed, see APPEAL AND ERROR, 2 Cyc. 569, 577.
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Arrest in Civil Action For Injury to Property, see ARREST, 3 Cyc. 904.
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Conspiracy to Injure Property or Business, see CONSPIRACY, 8 Cyc. 650.
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To Bridges, see BRIDGES, 5 Cyc. 1115.
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Affected by Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 941.
Appropriation Under Eminent Domain Proceedings, see EMINENT DOMAIN, 15 Cyc. 602.
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Award as to Title to Property, see ARBITRATION AND AWARD, 3 Cyc. 705.
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Dedication, see DEDICATION, 13 Cyc. 434.
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Escheat, see ESCHEAT, 16 Cyc. 548.
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Hiring, see BAILMENT, 5 Cyc. 163.
In Dead Bodies, see DEAD BODIES, 13 Cyc. 267.
In Intoxicating Liquors, see INTOXICATING LIQUORS, 23 Cyc. 333.
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Liable:
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To Assessments and Special Taxes For Levees, see LEVEES, 25 Cyc. 201.
To Assessments For Benefits For Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1115.
Life-Estates in Personal Property, see ESTATES, 16 Cyc. 618.
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Nature, Subjects, and Incidents of Estates or Interests — (*continued*)
Subject — (*continued*)
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Rights and Remedies of Adjoining Owners, see Adjoining Landowners, 1 Cyc. 766; Party-Walls, 30 Cyc. 770.
Specific Performance of Contracts Involving, see Specific Performance.
Taking For Public Use, see Constitutional Law, 8 Cyc. 1124; Eminent Domain, 15 Cyc. 578.
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Covenants, see Covenants, 11 Cyc. 1035.
Deeds, see Deeds, 13 Cyc. 505.
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Suspension of Absolute Power of Alienation, see Perpetuities, 30 Cyc. 1464.
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I. Definition and Nature.

Property has been defined as the right and interest which a man has in lands and chattels to the exclusion of others.[1] The term "property" is a generic term

1. McKeon *v.* Bisbee, 9 Cal. 137, 142, 70 Am. Dec. 642; Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549, 551; Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 662, 39 N. E. 574; Watkins *v.* Wyatt, 9 Baxt. (Tenn.) 250, 255, 40 Am. Rep. 90.

Other definitions are: "The exclusive right of possessing, enjoying, and disposing of a thing." McKeon *v.* Bisbee, 9 Cal. 137, 142, 70 Am. Dec. 642.

"The exclusive right of any person to freely use, enjoy, and dispose of any deter-

of extensive application,[2] and while strictly speaking it means only the right which a person has in relation to some thing,[3] or that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects,[4] it is frequently used to denote the subject of the property, or thing itself, which is owned or in relation to which the right of property exists.[5] In the former sense it extends to every species of valuable right or interest,[6] in either real or personal property,[7] or in easements, franchises, and incorporeal hereditaments,[8] and in the latter to everything which is the subject of ownership,[9] or to which the right of property may legally attach,[10] or in other words every class of acquisitions which a man can own or have an interest in.[11] The term is therefore said to be *nomen generalissimum*,[12] and to include everything which is the subject of ownership,[13] corporeal or incorporeal,[14] tangible or intangible,[15] visible or invisible,[16]

minate object whether real or personal." St. Louis *v.* Hill, 116 Mo. 527, 533, 22 S. W. 861, 21 L. R. A. 226.

"The highest right a man can have to any thing; being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's courtesy." Jackson *v.* Housel, 17 Johns. (N. Y.) 281, 283.

"The right of any person to possess, use, enjoy, and dispose of a thing." Smith *v.* Furbish, 68 N. H. 123, 144, 44 Atl. 398, 47 L. R. A. 226; Wynehamer *v.* People, 13 N. Y. 378, 433.

"The interest one may have in lands or chattels to the exclusion of others." Wilson *v.* Harris, 21 Mont. 374, 387, 54 Pac. 46.

As to the origin and development of the rights of property and individual ownership which is now chiefly of historical interest see 2 Blackstone Comm. 1–16.

2. Bates *v.* Robinson, 8 Iowa 318, 320; Adams *v.* Jones, 59 N. C. 221, 223; Russell *v.* Ralph, 53 Wis. 328, 331, 10 N. W. 518.

3. *Missouri.*— St. Louis *v.* Hill, 116 Mo. 527, 533, 22 S. W. 861, 21 L. R. A. 226.

Nebraska.— Low *v.* Rees Printing Co., 41 Nebr. 127, 146, 59 N. W. 362, 43 Am. St. Rep. 664, 24 L. R. A. 709.

New Hampshire.— Smith *v.* Furbish, 68 N. H. 123, 144, 44 Atl. 398, 47 L. R. A. 226.

New York.— Wynehamer *v.* People, 13 N. Y. 378, 433.

United States.— *Ex p.* Law, 15 Fed. Cas. No. 8,126, 35 Ga. 285, 295.

4. *Georgia.*— Fears *v.* State, 102 Ga. 274, 279, 29 S. E. 463.

Illinois.— Illinois Cent. R. Co. *v.* Mattoon, 161 Ill. 247, 251, 43 N. E. 1100; Illinois Cent. R. Co. *v.* Chicago, 156 Ill. 98, 103, 41 N. E. 45; Rigney *v.* Chicago, 102 Ill. 64, 77.

Maryland.— De Lauder *v.* Baltimore County, 94 Md. 1, 6, 50 Atl. 427.

Nebraska.— Jaynes *v.* Omaha St. R. Co., 53 Nebr. 631, 653, 74 N. W. 67, 39 L. R. A. 751.

Pennsylvania.— Waters *v.* Wolfe, 162 Pa. St. 153, 169, 29 Atl. 646, 42 Am. St. Rep. 815.

5. Rigney *v.* Chicago, 102 Ill. 64, 77; St. Louis *v.* Hill, 116 Mo. 527, 533, 22 S. W. 861, 21 L. R. A. 226; Wilson *v.* Harris, 21 Mont. 374, 387, 54 Pac. 46; Wynehamer *v.* People, 13 N. Y. 378, 433.

The things themselves, however, although the subjects of property, are, when coupled with possession, but the *indicia*, the visible manifestations of invisible rights, "the evidence of things not seen." St. Louis *v.* Hill, 116 Mo. 527, 533, 22 S. W. 861, 21 L. R. A. 226.

6. Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 662, 39 N. E. 574; Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1, 35; Wilson *v.* Beckwith, 140 Mo. 359, 372, 41 S. W. 985; Caro *v.* Metropolitan El. R. Co., 46 N. Y. Super. Ct. 138, 164.

7. Metropolitan City R. Co. *v.* Chicago West. Div. R. Co., 87 Ill. 317, 324.

8. Metropolitan City R. Co. *v.* Chicago West. Div. R. Co., 87 Ill. 317, 324; Caro *v.* Metropolitan El. R. Co., 46 N. Y. Super. Ct. 138, 164.

9. Stanton *v.* Lewis, 26 Conn. 444, 449; Fears *v.* State, 102 Ga. 274, 279, 29 S. E. 463; Northwestern Mut. L. Ins. Co. *v.* Lewis etc., County, 28 Mont. 484, 491, 72 Pac. 982, 98 Am. St. Rep. 572.

10. Pell *v.* Ball, Speers Eq. (S. C.) 48, 83; Wilson *v.* Ward Lumber Co., 67 Fed. 674, 677.

The one vigintillionth part of a lot of land is not too infinitesimal to deprive it of its character of property. Connecticut Mut. L. Ins. Co. *v.* Stinson, 62 Ill. App. 319.

11. *In re* Fixen, 102 Fed. 295, 296, 42 C. C. A. 354, 50 L. R. A. 605; Wilson *v.* Ward Lumber Co., 67 Fed. 674, 677.

12. Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1, 35; Wilson *v.* Beckwith, 140 Mo. 359, 372, 41 S. W. 985; Rossetter *v.* Simmons, 6 Serg. & R. (Pa.) 452, 456.

13. Stanton *v.* Lewis, 26 Conn. 444, 449; Fears *v.* State, 102 Ga. 274, 279, 29 S. E. 463.

14. King *v.* Gotz, 70 Cal. 236, 240, 11 Pac. 656; Northwestern Mut. L. Ins. Co. *v.* Lewis, etc., County, 28 Mont. 484, 491, 72 Pac. 982, 98 Am. St. Rep. 572; Rehfuss *v.* Moore, 26 Wkly. Notes Cas. (Pa.) 105, 107.

15. De Lauder *v.* Baltimore County, 94 Md. 1, 6, 50 Atl. 427; Northwestern Mut. L. Ins. Co. *v.* Lewis, etc., County, 28 Mont. 484, 491, 72 Pac. 982, 98 Am. St. Rep. 572; National Tel. News Co. *v.* Western Union Tel. Co., 119 Fed. 294, 299, 56 C. C. A. 198, 60 L. R. A. 805.

16. Northwestern Mut. L. Ins. Co. *v.* Lewis,

real or personal,[17] choses in action as well as in possession,[18] everything which has an exchangeable value,[19] or which goes to make up one's wealth or estate.[20] As regards realty the term includes every right, title, estate, or interest therein,[21] whether legal or equitable,[22] perfect or imperfect,[23] inchoate or complete,[24] and rights which lie in contract whether executory or executed.[25] The word "property" may have different meanings depending upon the connection in which and the purposes for which it is used,[26] as indicating the intention of the parties,[27] or the proper construction or application of constitutional or statutory provisions.[28] And its meaning may be and often is restricted by the context so as not to apply in its most comprehensive sense,[29] or it may be necessary so to restrict its application in one section of a statute in order to give effect to another.[30] So while the word "property" will ordinarily be construed as including both real and personal property,[31] and in some statutes is expressly so defined,[32] its use in a par-

County, etc., 28 Mont. 484, 491, 72 Pac. 982, 98 Am. St. Rep. 572.

17. McKeon *v.* Bisbee, 9 Cal. 137, 142, 70 Am. Dec. 642; Primm *v.* Belleville, 59 Ill. 142, 144; Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1, 35; White *v.* Keller, 68 Fed. 796, 800, 15 C. C. A. 683.

18. Carlton *v.* Carlton, 72 Me. 115, 116, 39 Am. Rep. 307; Winfree *v.* Bagley, 102 N. C. 515, 516, 9 S. E. 198.

Choses in action see *infra*, V, C, 3.

19. Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 430, 53 S. W. 955, 76 Am. St. Rep. 682, 56 L. R. A. 316; Butchers Benev. Assoc. *v.* Crescent City Live-Stock Landing, etc., Co., 16 Wall. (U. S.) 36, 127, 21 L. ed. 394; *In re* Parrott, 1 Fed. 481, 506, 6 Sawy. 349.

Labor is property and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. *In re* Parrott, 1 Fed. 481, 506, 6 Sawy. 349, and cases cited *supra*, this note.

20. Carlton *v.* Carlton, 72 Me. 115, 116, 39 Am. Rep. 307; Rossetter *v.* Simmons, 6 Serg. & R. (Pa.) 452, 456.

21. *California.*— Harvey *v.* Barker, 126 Cal. 262, 273, 58 Pac. 692 [*affirmed* in 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963]; King *v.* Gatz, 70 Cal. 236, 240, 11 Pac. 656; Leese *v.* Clark, 20 Cal. 387, 421; Teschemacher *v.* Thompson, 18 Cal. 11, 24, 79 Am. Dec. 151.

Colorado.— Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549, 551.

Indiana.— Figg *v.* Snook, 9 Ind. 202, 204.

Mississippi.— Moody *v.* Farr, 33 Miss. 192, 195.

New Mexico.— Pino *v.* Hatch, 1 N. M. 125, 143.

United States.— Knight *v.* U. S. Land Assoc., 142 U. S. 161, 201, 12 S. Ct. 258, 35 L. ed. 974; Soulard *v.* U. S., 4 Pet. 511, 512, 7 L. ed. 938.

22. Harvey *v.* Barker, 126 Cal. 262, 273, 58 Pac. 692 [*affirmed* in 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963]; Leese *v.* Clark, 20 Cal. 387, 421; Knight *v.* U. S. Land Assoc., 142 U. S. 161, 201, 12 S. Ct. 258, 35 L. ed. 974.

23. Harvey *v.* Barker, 126 Cal. 262, 273, 58 Pac. 692 [*affirmed* in 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963]; Knight *v.* U. S. Land Assoc., 142 U. S. 161, 201, 12 S. Ct. 258, 35 L. ed. 974.

24. King *v.* Gotz, 70 Cal. 236, 240, 11 Pac. 656; Leese *v.* Clark, 20 Cal. 387, 421; Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549, 551; Figg *v.* Snook, 9 Ind. 202, 204; Delassus *v.* U. S., 9 Pet. (U. S.) 117, 133, 9 L. ed. 71.

25. Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549, 551; Figg *v.* Snook, 9 Ind. 202, 204; Pino *v.* Hatch, 1 N. M. 125, 143; Soulard *v.* U. S., 4 Pet. (U. S.) 511, 512, 7 L. ed. 938.

26. Rigney *v.* Chicago, 102 Ill. 64, 77; Wilson *v.* Beckwith, 140 Mo. 359, 372, 41 S. W. 985; Springfield F. Ins. Co. *v.* Allen, 43 N. Y. 389, 395, 3 Am. Rep. 711.

In an insurance policy the word "property," as used in a clause forbidding alienation, is used to designate the thing insured as distinguished from the policy-holder's insurable interest therein. Oakes *v.* Manufacturers' F. & M. Ins. Co., 131 Mass. 164, 165; Springfield F. Ins. Co. *v.* Allen, 43 N. Y. 389, 395, 3 Am. Rep. 711.

After-acquired property.—A lease reserving a lien upon the "property" of the lessee will not include after-acquired property. Borden *v.* Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23 [*affirming* 33 Ill. App. 389].

27. Springfield F. Ins. Co. *v.* Allen, 43 N. Y. 389, 395, 3 Am. Rep. 711; Doe *v.* Lainchbury, 11 East 290, 296.

28. Wilson *v.* Beckwith, 140 Mo. 359, 372, 41 S. W. 985.

29. Wilson *v.* Beckwith, 140 Mo. 359, 372, 41 S. W. 985; Brawley *v.* Collins, 88 N. C. 605, 607.

30. Hickman *v.* Ruff, 55 Miss. 549, 550.

31. Briggs *v.* Briggs, 69 Iowa 617, 618, 29 N. W. 632; Pino *v.* Hatch, 1 N. M. 125, 143; Mason *v.* Hackett, 35 Hun (N. Y.) 238, 240; White *v.* Keller, 68 Fed. 796, 800, 15 C. C. A. 683.

32. *Georgia.*— Fears *v.* State, 102 Ga. 274, 279, 29 S. E. 463.

Indiana.— Aurora Nat. Bank *v.* Black, 129 Ind. 595, 598, 29 N. E. 396.

Kansas.— State *v.* Topeka Water Co., 61 Kan. 547, 561, 60 Pac. 337.

Mississippi.— Moody *v.* Farr, 33 Miss. 192, 195.

ticular case may be restricted to real property only,[33] or to personal property only,[34] and it may, according to the context, refer either to the right of property or the thing itself.[35]

II. KINDS AND CLASSIFICATIONS OF PROPERTY.

A. In General. In the civil law, property was divided into movables and immovables,[36] and formerly in England it was divided into lands, tenements, and hereditaments on the one hand and chattels on the other,[37] but now all property is divided into the two classes, real and personal.[38] The terms "real" and "personal" as applied to property are of comparatively modern origin, going back apparently to about the middle of the seventeenth century,[39] and are derived from the names of the forms of action resorted to by one who had been deprived of the possession of these different classes of property.[40] The terms "real" and "personal" do not entirely correspond with the terms "movables" and "immovables."[41]

B. Corporeal and Incorporeal. Property may be classified as being either corporeal or incorporeal,[42] corporeal property being that which affects the senses and may be seen or handled,[43] and incorporeal that which cannot be seen or handled,[44] but which consists merely in legal right.[45] The terms are used most frequently in connection with the term "hereditaments."[46]

C. Public and Private.[47] Property, with regard to the nature of its ownership and use, may be either public or private.[48] Private property is that which

Missouri.— State *v.* Barr, 28 Mo. App. 84, 85.

New York.— Wing *v.* Disse, 15 Hun 190, 194; Campbell *v.* Perry, 9 N. Y. Suppl. 330, 333.

North Carolina.— Worth *v.* Wright, 122 N. C. 335, 336, 29 S. E. 361; Winfree *v.* Bagley, 102 N. C. 515, 516, 9 S. E. 198.

Tennessee.— Woolridge *v.* Page, 1 Lea 135, 142.

Utah.— Utah Nat. Bank *v.* Beardsley, 10 Utah 404, 409, 37 Pac. 586.

33. Hickman *v.* Ruff, 55 Miss. 549, 550.

34. Brawley *v.* Collins, 88 N. C. 605, 607; Russell *v.* Ralph, 53 Wis. 328, 331, 10 N. W. 518.

35. Rigney *v.* Chicago, 102 Ill. 64, 77.

36. Penniman *v.* French, 17 Pick. (Mass.) 404, 405, 28 Am. Dec. 309.

Movables are defined as "such subjects of property as attend a man's person wherever he goes, in contradistinction to things immovable." Cyclopedic L. Dict.

Immovables are defined as "property which, from its nature, destination, or the object to which it is applied, cannot move itself or be removed." Cyclopedic L. Dict.

"Immovables are tangible things which cannot be moved, such as are lands and houses, whatever be the interest or estate which a person has in them." Dicey Confl. Laws 71.

37. *In re* Althause, 63 N. Y. App. Div. 252, 255, 71 N. Y. Suppl. 445 [*affirmed* in 168 N. Y. 670, 61 N. E. 1127].

38. *In re* Althause, 63 N. Y. App. Div. 252, 255, 71 N. Y. Suppl. 445 [*affirmed* in 168 N. Y. 670, 61 N. E. 1127]; Turner *v.* State, 1 Ohio St. 422, 426; Scogin *v.* Perry, 32 Tex. 21, 28.

39. Tiffany Mod. L. Real Prop. § 2.

40. Washburn Real Prop. (6th ed.) § 2.

41. Dicey Confl. Laws 70.

42. Sullivan *v.* Richardson, 33 Fla. 1, 116, 14 So. 692; Rehfuss *v.* Moore, 26 Wkly. Notes Cas. (Pa.) 105, 107.

43. Sullivan *v.* Richardson, 33 Fla. 1, 116, 14 So. 692.

Corporeal property has been defined as follows: "Such as affects the senses, and may be seen and handled by the body, as opposed to incorporeal property, which cannot be seen or handled, and exists only in contemplation. Thus a house is corporeal, but the annual rent payable for its occupation is incorporeal." Black L. Dict.

44. Sullivan *v.* Richardson, 33 Fla. 1, 116, 14 So. 692.

45. Black L. Dict.; Bouvier L. Dict.

Incorporeal property has been defined as "a right issuing out of or annexed to a thing corporeal, and consists of the right to have some part only, of the produce or benefit of the corporeal property, or to exercise a right or have an easement or privilege or advantage over or out of it." Nellis *v.* Munson, 108 N. Y. 453, 458, 15 N. E. 939 [*reversing* 24 Hun 575].

46. See *infra*, IV, D.

47. Public lands see PUBLIC LANDS.

48. Mundy *v.* Van Hoose, 104 Ga. 292, 30 S. E. 783.

The necessity for determining what is private and what is public property arises most frequently as regards private property in connection with the taking of private property for public use under the power of eminent domain (see Williams *v.* Detroit, 2 Mich. 560; Lycoming Gas, etc., Co. *v.* Moyer, 99 Pa. St. 615; People *v.* Daniels, 6 Utah 288, 22 Pac. 159, 5 L. R. A. 444; and, generally, EMINENT DOMAIN, 15 Cyc. 638 *et seq.*); and as regards public property in the application of constitutional and statutory provisions relating to the exemption of public property from taxation (see Mundy *v.* Van

belongs exclusively to an individual,[49] and the term applies to all kinds of private property,[50] and necessarily includes everything that can be held or owned by private persons.[51] The term "public property" is commonly used as a designation of those things which are *publici juris* and therefore considered as being owned by "the public," the entire state or community, and not restricted to the domain of a private person,[52] or that which belongs to a state or political division thereof;[53] and property owned by private persons or corporations and from which a private or corporate income is derived is not public property, although used for a purpose which is in its nature public,[54] such as a school,[55] public market,[56] or armory for state troops.[57] In one sense the same property may be said to be both public and private.[58]

III. SUBJECTS OF PROPERTY.[59]

Any attempt to enumerate the subjects of property would be impracticable, since property includes whatever things may be the subject of ownership, and all rights, titles, and interests therein.[60] That and that only is property which the law recognizes as such,[61] and so there may be things in which there is no right of property,[62] and others which, while property in the broad sense of the term, are

Hoose, 104 Ga. 292, 30 S. E. 783; Owensboro *v.* Com., 105 Ky. 344, 49 S. W. 320, 20 Ky. L. Rep. 1281, 44 L. R. A. 202; State *v.* Cooley, 62 Minn. 183, 64 N. W. 379, 29 L. R. A. 777; and, generally, TAXATION).

49. Homochitto River Com'rs *v.* Withers, 29 Miss. 21, 32, 64 Am. Dec. 126; Scranton *v.* Wheeler, 179 U. S. 141, 170, 21 S. Ct. 48, 45 L. ed. 126.

Streams.— The term "private property" includes surface streams, but the rules in reference thereto are very different from those governing subterranean streams (Roath *v.* Driscoll, 20 Conn. 533, 52 Am. Dec. 352); and the right of private property exists in an individual in relation to streams of water exclusively his own, such as springs or small watercourses in the interior of his lands and bounded by them on both sides, and may exist in regard to public rivers against the interference of private individuals, but it cannot prevail as to public rivers and highways used for navigation against the paramount jurisdiction of the state (Homochitto River Com'rs *v.* Withers, 29 Miss. 21, 32, 64 Am. Dec. 126).

50. People *v.* Daniels, 6 Utah 288, 298, 22 Pac. 159, 5 L. R. A. 444.

The term "private property," in a constitutional provision prohibiting the taking of private property for public purposes without compensation, includes the franchise of a toll bridge company, which is an incorporeal hereditament (Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716); and the property of a private charitable corporation, although charged with the maintenance of a college or other public charity, is "private property" within the meaning of a constitutional provision that private property shall ever be held inviolate (State *v.* Neff, 52 Ohio St. 375, 40 N. E. 720, 28 L. R. A. 409).

51. Lycoming Gas, etc., Co. *v.* Moyer, 99 Pa. St. 615, 619.

52. Black L. Dict.

53. Gate City Guard *v.* Atlanta, 113 Ga. 883, 39 S. E. 394, 54 L. R. A. 806; Mundy *v.* Van Hoose, 104 Ga. 292, 30 S. E. 783; Owensboro *v.* Com., 105 Ky. 344, 49 S. W. 320, 20 Ky. L. Rep. 1281, 44 L. R. A. 202.

A public park maintained by a city at the public expense for the public good and to which all the public without distinction have access is public property. Owensboro *v.* Com., 105 Ky. 344, 49 S. W. 320, 20 Ky. L. Rep. 1281, 44 L. R. A. 202.

A dispensary consisting of a building and stock of liquors, owned and operated by a municipal corporation, is public property within the application of a statutory exemption from taxation of "all public property." Walden *v.* Whigham, 120 Ga. 646, 48 S. E. 159.

54. Gate City Guard *v.* Atlanta, 113 Ga. 883, 39 S. E. 394, 54 L. R. A. 806; Mundy *v.* Van Hoose, 104 Ga. 292, 30 S. E. 783; Frankfort *v.* Com., 82 S. W. 1008, 26 Ky. L. Rep. 957; State *v.* Cooley, 62 Minn. 183, 64 N. W. 379, 29 L. R. A. 777.

55. Mundy *v.* Van Hoose, 104 Ga. 292, 30 S. E. 783; St. Edwards' College *v.* Morris, 82 Tex. 1, 17 S. W. 512.

56. State *v.* Cooley, 62 Minn. 183, 64 N. W. 379, 29 L. R. A. 777.

57. Gate City Guard *v.* Atlanta, 113 Ga. 883, 39 S. E. 394, 54 L. R. A. 806.

58. Coyle *v.* Gray, 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109, holding that while property held by a municipality for the public use of its inhabitants is properly termed public property, it is also private property in the sense that it is owned by the municipality and cannot be taken for any other public use by the state or by the authority of the state without compensation being made.

59. Corporate franchise as property see FRANCHISES, 19 Cyc. 1460–1462.

60. See *supra*, I.

61. Cooley Const. L. (3d ed.) 345.

62. Guthrie *v.* Weaver, 1 Mo. App. 136; Haskins *v.* Ryan, 71 N. J. Eq. 575, 64 Atl. 436.

not so regarded for certain purposes or within the application of certain statutes,[63] and others which from their nature, such as light, air, water, and wild animals, must necessarily remain common, subject only to a usufructuary right or to be considered as property only when and while reduced to and retained in possession.[64] There is no right of property in the dead body of a human being,[65] and the same has been held with regard to a coffin deposited in a grave;[66] but ornaments of gold and precious stones, deposited in a tomb with the body of the deceased, are corporeal things, susceptible of ownership and may be taken and alienated by the rightful owner.[67] There is no property or legal ownership in a mere idea unconnected with any physical device and unprotected by contract or statute;[68] but independent of patent or copyright, an inventor or author has by common law an exclusive property in his invention or composition until by publication it becomes the property of the general public.[69] The nature of this right, in the absence of statutory protection, is that while he has no exclusive right to manufacture or use the thing invented except as against one acquiring the knowledge thereof by wrongful means,[70] he has a right to maintain the secrecy of his invention or composition,[71] and to prevent its disclosure or use by one who obtains a knowledge of it through fraud or breach of contract with him;[72] but any one who acquires knowledge of the

63. Hart *v.* Smith, 159 Ind. 182, 64 N. W. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949; Hickman *v.* Ruff, 55 Miss. 549.

Property for particular purposes: As assets of decedent's estate see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 171. As subject to appropriation in condemnation proceedings see EMINENT DOMAIN, 15 Cyc. 602. As subject to attachment see ATTACHMENT, 4 Cyc. 554. As subject to execution see EXECUTIONS, 17 Cyc. 940. As subject to garnishment see GARNISHMENT, 20 Cyc. 990. As within constitutional prohibitions against depriving persons of property without due process of law see CONSTITUTIONAL LAW, 8 Cyc. 1094. For purposes of taxation see TAXATION.

64. Mitchell *v.* Warner, 5 Conn. 497; 2 Blackstone Comm. 14.

Water.— "Water, when reduced to possession, is property, and it may be bought and sold and have a market value, but it must be in actual possession, subject to control and management. Running water in natural streams is not property and never was." Syracuse *v.* Stacey, 169 N. Y. 231, 245, 62 N. E. 354 [*affirming* 45 N. Y. App. Div. 249, 61 N. Y. Suppl. 165].

Mineral oil, like water, is not the subject of property, except while in actual possession. Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732.

Property in wild animals see ANIMALS, 2 Cyc. 306.

Riparian and other rights in water and watercourses see WATERS.

65. See DEAD BODIES, 13 Cyc. 267.

66. Guthrie *v.* Weaver, 1 Mo. App. 136, holding that a coffin which, with the consent of all persons having any pecuniary interest therein, has been deposited in the grave for the purpose of interment with a corpse inclosed within it, is no longer a subject of property. But see State *v.* Doepke, 68 Mo. 208, 30 Am. Rep. 785, holding that a coffin is to be considered as the property of the person who buried the deceased and therefore a subject of larceny.

67. Ternant *v.* Boudreau, 6 Rob. (La.) 488.

68. Haskins *v.* Ryan, 71 N. J. Eq. 575, 64 Atl. 436; Bristol *v.* Equitable L. Assur. Soc., 52 Hun (N. Y.) 161, 5 N. Y. Suppl. 131 [*affirmed* in 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568].

69. Tabor *v.* Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016.

An architect has a common-law right of property in his design of a novel and artistic porch to a building of his own erection before its publication by application. Gendell *v.* Orr, 13 Phila. (Pa.) 191.

A mercantile company has a property right in a code or system of letters, figures, and characters showing the cost and selling prices of its wares, which it invented and prepared for its traveling salesmen. Simmons Hardware Co. *v.* Waibel, 1 S. D. 488, 47 N. W. 814, 36 Am. St. Rep. 755, 11 L. R. A. 267.

Where chemists unite agencies, the separate properties of which are well understood, but the combination of which results in producing something not previously known and having a new or superior use, it is an invention to which, as a trade secret, a proprietary right may attach. Eastman Co. *v.* Reichenbach, 20 N. Y. Suppl. 110.

Literary property see LITERARY PROPERTY, 25 Cyc. 1489.

70. Chadwick *v.* Covell, 151 Mass. 190, 23 N. E. 1068, 21 Am. St. Rep. 442, 6 L. R. A. 839; Park *v.* Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. N. S. 135 [*modifying* 145 Fed. 358]. See also, generally, PATENTS, 30 Cyc. 815.

71. O'Bear-Nester Glass Co. *v.* Antiexplo Co., (Tex. 1908) 108 S. W. 967, 109 S. W. 931 [*reversing* (Civ. App. 1907) 106 S. W. 180].

72. *Massachusetts.*— Peabody *v.* Norfolk, 98 Mass. 452, 96 Am. Dec. 664.

New Jersey.— Stone *v.* Grasselli Chemical

secret by lawful means and without fraud or breach of contract or confidence is entitled to use it,[73] as where he works out the secret by his own efforts through experiment or analysis,[74] and in such cases he may publish the fact that his product is made in accordance with the original formula therefor.[75] It is well settled that an invention secured by patent is property in the holder of the patent; [76] but after expiration of the patent any person may make and sell the article provided his knowledge of the means of doing so was not acquired by unlawful or improper means.[77] The exclusive right in an invention not secured by patent ceases whenever the secret device or design is published or made known to the public; [78] but the sale of a manufactured article or compound is not a publication of the formula or device used in its manufacture.[79] A public office is not regarded as property.[80]

Co., 65 N. J. Eq. 756, 55 Atl. 736, 103 Am. St. Rep. 794, 63 L. R. A. 344; Salomon *v.* Hertz, 40 N. J. Eq. 400, 2 Atl. 379.

New York.— Eastman Co. *v.* Reichenbach, 20 N. Y. Suppl. 110.

South Dakota.— Simmons Hardwood Co. *v.* Waibel, 1 S. D. 488, 47 N. W. 814, 36 Am. St. Rep. 755, 11 L. R. A. 267.

Texas.— O'Bear-Nester Glass Co. *v.* Antiexplo Co., (1908) 108 S. W. 967, 109 S. W. 931 [*reversing* (Civ. App. 1907) 106 S. W. 180].

England.— Morison *v.* Moat, 16 Jur. 321, 21 L. J. Ch. 248.

See 40 Cent. Dig. tit. "Property," § 2.

Where a company compiles advance information of intended public improvements and sells it to its customers under an agreement to use it in confidence and for themselves only, the furnishing company has a property right therein which will be protected against a non-customer who surreptitiously obtains the information and imparts it to others. F. W. Dodge Co. *v.* Construction Information Co., 183 Mass. 62, 66 N. E. 204, 97 Am. St. Rep. 412, 60 L. R. A. 810.

73. Chadwick *v.* Covell, 151 Mass. 190, 23 N. E. 1068, 21 Am. St. Rep. 442, 6 L. R. A. 839; Elaterite Paint, etc., Co. *v.* S. E. Frost Co., (Minn. 1908) 117 N. W. 388; Watkins *v.* London, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236; O'Bear-Nester Glass Co. *v.* Antiexplo Co., (Tex. 1908) 108 S. W. 967, 109 S. W. 931 [*reversing* (Civ. App. 1907) 106 S. W. 180]; Park *v.* Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. 135 [*modifying* 145 Fed. 358].

74. Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016.

75. Watkins *v.* London, 52 Minn. 389, 54 N. W. 193, 38 Am. St. Rep. 560, 19 L. R. A. 236, holding that where one lawfully acquires knowledge of the composition of a non-patented medical preparation, he may make and use it and publish the fact that it is made in accordance with the original formula.

76. Vail *v.* Hammond, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330; Cammeyer *v.* Newton, 94 U. S. 225, 24 L. ed. 72. See also, generally, PATENTS, 30 Cyc. 819.

77. Westcott Chuck Co. *v.* Oneida Nat. Chuck Co., 122 N. Y. App. Div. 260, 106 N. Y. Suppl. 1016.

78. Tabor *v.* Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; Gendell *v.* Orr, 13 Phila. (Pa.) 191, holding that where an architect erected a porch of novel and artistic design in front of his house and facing on a public highway, this was a publication of the design which in the absence of copyright might be copied by others.

79. Tabor *v.* Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740, holding that an inventor may sell an unpatented machine and retain the exclusive property in the patterns for making the machine, where the dimensions of such patterns cannot be obtained by merely measuring the completed machine.

80. *Alabama.*— Hawkins *v.* Roberts, 122 Ala. 130, 27 So. 327.

Illinois.— Donahue *v.* Will County, 100 Ill. 94.

Kansas.— Lynch *v.* Chase, 55 Kan. 367, 40 Pac. 666.

Kentucky.— Standeford *v.* Wingate, 2 Duv. 440.

Maine.— Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325.

Michigan.— Atty.-Gen. *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699.

Missouri.— State *v.* Davis, 44 Mo. 129.

Nebraska.— Douglas County *v.* Timme, 32 Nebr. 272, 49 N. W. 266.

New York.— Smith *v.* New York, 37 N. Y. 518; Conner *v.* New York, 5 N. Y. 285; Wilson *v.* New York, 31 Misc. 693, 65 N. Y. Suppl. 328.

North Carolina.— Mial *v.* Ellington, 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697 [*overruling* Hoke *v.* Henderson, 15 N. C. 1, 25 Am. Dec. 677].

Ohio.— State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228.

Oklahoma.— Cameron *v.* Parker, 2 Okla. 277, 38 Pac. 14.

Texas.— State *v.* Crumbaugh, 26 Tex. Civ. App. 521, 63 S. W. 925.

West Virginia.— Moore *v.* Strickling, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279.

Wisconsin.— State *v.* Douglas, 26 Wis. 428, 7 Am. Rep. 87.

United States.— Taylor *v.* Beckham, 178 U. S. 548, 577, 20 S. Ct. 890, 1009, 44 L. ed. 1187.

The same rule applies to the members of a county committee of a political party, although it receives and pays out money for election expenses, as a part of its prescribed duty, having, however, no personal interest in the fund. Kearns *v.* Howley, 188 Pa. St. 116,

Property in the broad sense of the term includes money,[81] choses in action,[82] the good-will of a business,[83] and various rights of a personal nature or exercisable with reference to some particular subject of property.[84]

41 Atl. 273, 68 Am. St. Rep. 852, 42 L. R. A. 235.

A public office is not property within the application of a constitutional prohibition against depriving a person of his property without due process of law (see CONSTITUTIONAL LAW, 8 Cyc. 1094), so that as between the officer and the state the legislature may abolish the office or reduce the tenure during the term of the incumbent (State *v.* Davis, 44 Mo. 129), or provide for a summary removal without trial (Lynch *v.* Chase, 55 Kan. 367, 40 Pac. 666); nor is it property in the sense that it may be bought, sold, or encumbered (Smith *v.* New York, 37 N. Y. 518, 520); but as between individuals claiming the same office the office is property, and the lawful owner, if kept out of possession by an intruder, has the same right through the courts to have himself placed in possession of it as to recover any other property unlawfully withheld from him (State *v.* Owens, 63 Tex. 261, 267).

81. *District of Columbia.*—*In re* McKnight, 1 App. Cas. 28.

Indiana.— Baker *v.* State, 109 Ind. 47, 9 N. E. 711.

Kentucky.— Com. *v.* Morrison, 2 A. K. Marsh. 75.

Michigan.— People *v.* Williams, 24 Mich. 156, 9 Am. Rep. 119.

Mississippi.— Chism *v.* Citizens' Bank, 77 Miss. 599, 27 So. 637; Mitchell *v.* Mitchell, 35 Miss. 108.

Missouri.— Sherman *v.* Luckhardt, 96 Mo. App. 320, 70 S. W. 388.

New York.— Brown *v.* Brown, 41 N. Y. 507.

Rhode Island.— Landry *v.* Andrews, 22 R. I. 597, 48 Atl. 1036.

South Carolina.— Stuckey *v.* Stuckey, 1 Hill Eq. 308.

Tennessee.— Fry *v.* Shipley, 94 Tenn. 252, 29 S. W. 6.

Texas.— Brown *v.* State, 23 Tex. App. 214, 4 S. W. 588; Bryant *v.* State, 16 Tex. App. 144.

United States.— Pirie *v.* Chicago Title, etc., Co., 182 U. S. 438, 21 S. Ct. 906, 45 L. ed. 1171; *In re* Fixen, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605; *In re* Conhaim, 97 Fed. 923; *In re* Ft. Wayne Electric Corporation, 96 Fed. 803; Kuter *v.* Michigan Cent. R. Co., 14 Fed. Cas. No. 7,955, 1 Biss. 35.

Money defined see 27 Cyc. 817.

Confederate notes.— In regard to Confederate notes it has been said: "This court cannot recognize any legal proprietary right in Confederate notes, unless such rights be based upon some positive law of Congress, or upon some legitimate military order of the Government of the United States." Murphy *v.* Denman, 18 La. Ann. 55.

Deposits in savings banks are property. Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

82. *Alabama.*— Sloan *v.* Frothingham, 72 Ala. 589.

California.— People *v.* Cadman, 57 Cal. 562; Lick *v.* Austin, 43 Cal. 590; People *v.* Eddy, 43 Cal. 331, 13 Am. Rep. 143.

Connecticut.— Beach's Appeal, 76 Conn. 118, 55 Atl. 596; Sherwood *v.* Sherwood, 32 Conn. 1.

Illinois.— Stahl *v.* Webster, 11 Ill. 511.

Maine.— Carlton *v.* Carlton, 72 Me. 115, 39 Am. Rep. 307.

Massachusetts.— Goreley *v.* Butler, 147 Mass. 8, 16 N. E. 734.

Michigan.— Power *v.* Harlow, 57 Mich. 107, 23 N. W. 606; Dunlap *v.* Toledo, etc., R. Co., 50 Mich. 470, 15 N. W. 555.

New Hampshire.— Pearson *v.* Gooch, 69 N. H. 571, 45 Atl. 406.

New York.— Seaman *v.* Clarke, 60 N. Y. App. Div. 416, 69 N. Y. Suppl. 1002 [*affirmed* in 170 N. Y. 594, 63 N. E. 1122]; Morris Canal, etc., Co. *v.* Townsend, 24 Barb. 658; Smith *v.* New York Consol. Stage Co., 28 How. Pr. 277; Ten Broeck *v.* Sloo, 13 How. Pr. 28.

North Carolina.— Winfree *v.* Bagley, 102 N. C. 515, 9 S. E. 198.

Ohio.— Cincinnati *v.* Hafer, 49 Ohio St. 60, 30 N. E. 197.

Rhode Island.— Cooney *v.* Lincoln, 20 R. I. 183, 37 Atl. 1031.

South Carolina.— McLemore *v.* Blocker, Harp. Eq. 272.

United States.— Meyerson *v.* Alter, 11 Fed. 688, 4 Woods 126.

Restricted use of term.— While the term "property" in its broad sense includes choses in action, it is sometimes used in a more restricted sense (Jameson's Appeal, 1 Mich. 99, 102), and does not include choses in action (Jameson's Appeal, *supra*; Vaughan *v.* Murfreesboro, 96 N. C. 317, 320, 2 S. E. 676, 60 Am. Rep. 413; Pippin *v.* Ellison, 34 N. C. 61, 62, 55 Am. Dec. 403).

Chose in action defined see *infra*, V, C, 3.

83. *California.*— Merchants' Ad-Sign Co. *v.* Sterling, 124 Cal. 429, 57 Pac. 468, 71 Am. St. Rep. 94, 46 L. R. A. 142.

Indiana.— Trentman *v.* Wahrenburg, 30 Ind. App. 304, 65 N. E. 1057.

Nebraska.—Lobeck *v.* Lee-Clarke-Andreesen Hardware Co., 37 Nebr. 158, 55 N. W. 650, 23 L. R. A. 795.

New York.— People *v.* Dederick, 161 N. Y. 195, 55 N. E. 927.

North Dakota.—Mapes *v.* Metcalf, 10 N. D. 601, 88 N. W. 713.

United States.— Washburn *v.* National Wall-Paper Co., 81 Fed. 17, 26 C. C. A. 312.

See also, generally, GOOD-WILL, 20 Cyc. 1276.

84. Kuhn *v.* Detroit, 70 Mich. 534, 38 N. W. 470.

Illustrations.— Property includes the right to contract (Kuhn *v.* Detroit, 70 Mich. 534, 38 N. W. 470), the right to acquire property

IV. Lands, Tenements, and Hereditaments.

A. In General. Things real are usually said to consist of lands, tenements, and hereditaments,[85] each of which terms has its own peculiar signification.[86]

B. Lands. The term "land" is a word of very extensive signification,[87] which is used in different senses,[88] and ordinarily defined only in general terms.[89] Blackstone defines land under "things real" as comprehending all things of a permanent and substantial nature,[90] and any ground, soil, or earth whatsoever,[91] as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath.[92] It includes not only the face of the earth but everything under it or over it,[93] and has in its legal signification an indefinite extent upward and downward,[94] giving rise to the

by any lawful mode or by following any lawful pursuit (Low *v.* Rees Printing Co., 41 Nebr. 127, 146, 59 N. W. 362, 43 Am. St. Rep. 670, 24 L. R. A. 702), and the right to labor and transact business (State *v.* Cadigan, 73 Vt. 245, 50 Atl. 1079, 87 Am. St. Rep. 714, 57 L. R. A. 666).

85. Alexander *v.* Miller, 7 Heisk. (Tenn.) 65, 82; 2 Blackstone Comm. 16; 3 Kent Comm. 401.

86. Alexander *v.* Miller, 7 Heisk. (Tenn.) 65, 82.

87. Nessler *v.* Neher, 18 Nebr. 649, 650, 26 N. W. 471; 2 Blackstone Comm. 16.

88. Hogan *v.* Manners, 23 Kan. 551, 557, 33 Am. Rep. 199; Johnson *v.* Richardson, 33 Miss. 462, 464; Chelsea Waterworks Co. *v.* Bowley, 17 Q. B. 358, 362, 15 Jur. 1129, 20 L. J. Q. B. 520, 79 E. C. L. 358.

89. *Ex p.* Leland, 1 Nott & M. (S. C.) 460, 463.

Land has been defined as follows: "In law, 'land' signifies any ground forming part of the earth's surface which can be held as individual property, whether soil or rock, or water-covered, and everything annexed to it, whether by nature, as trees, water, etc., or by the hand of man, as buildings, fences, etc." Century Dict. [*quoted* in Connecticut Mut. L. Ins. Co. *v.* Wood, 115 Mich. 444, 448, 74 N. W. 656].

90. Nessler *v.* Neher, 18 Nebr. 649, 650, 26 N. W. 471; *Ex p.* Leland, 1 Nott & M. (S. C.) 460, 463; Higgins Oil, etc., Co. *v.* Snow, 113 Fed. 433, 438, 51 C. C. A. 267; 2 Blackstone Comm. 16.

91. Lux *v.* Haggin, (Cal. 1884) 4 Pac. 919, 920; Mitchell *v.* Warner, 5 Conn. 497, 517; Johnson *v.* Richardson, 33 Miss. 462, 464; *Ex p.* Leland, 1 Nott & M. (S. C.) 460; 463; 2 Blackstone Comm. 17.

Town lots are "lands." Helena *v.* Hornor, 58 Ark. 151, 157, 23 S. W. 966.

92. Lux *v.* Haggin, (Cal. 1884) 4 Pac. 919, 920; 2 Blackstone Comm. 17.

93. *Georgia.*— Smith *v.* Atlanta, 92 Ga. 119, 120, 17 S. E. 981.

Indiana.— State *v.* Pottmeyer, 33 Ind. 402, 403, 5 Am. Rep. 224.

Maine.— Lime Rock R. Co. *v.* Farnsworth, 86 Me. 127, 131, 29 Atl. 957.

Mississippi.— Weems *v.* Mayfield, 75 Miss. 286, 293, 22 So. 892.

United States.— Higgins Oil, etc., Co. *v.* Snow, 113 Fed. 433, 438, 51 C. C. A. 267.

Land therefore includes stone embedded in the earth (Baker *v.* Johnson, 2 Hill (N. Y.) 342, 348); marble or lime rock (Lime Rock R. Co. *v.* Farnsworth, 86 Me. 127, 131, 29 Atl. 957); coal and other minerals (Catlin Coal Co. *v.* Lloyd, 176 Ill. 275, 282, 52 N. E. 144; Lenfers *v.* Henke, 73 Ill. 405, 408, 24 Am. Rep. 263; Seager *v.* McCabe, 92 Mich. 186, 195, 52 N. W. 299, 16 L. R. A. 247; Higgins Oil, etc., Co. *v.* Snow, 113 Fed. 433, 438, 57 C. C. A. 267); and petroleum oil as it is found in the crevices of the rock (South Penn. Oil Co. *v.* McIntire, 44 W. Va. 296, 305, 28 S. E. 922; Wilson *v.* Youst, 43 W. Va. 826, 834, 28 S. E. 781, 39 L. R. A. 292).

Water.— Water is included under the general term "land" (Lux *v.* Haggin, (Cal. 1884) 4 Pac. 919, 920; State *v.* Pottmeyer, 33 Ind. 402, 403, 5 Am. Rep. 224; McGee Irr. Ditch Co. *v.* Hudson, (Tex. 1893) 22 S. W. 967, 968; 2 Blackstone Comm. 18; Coke Litt. 4*a*); and a pond or other body of water cannot be conveyed or possession thereof recovered by the name of water but only as land covered by water (2 Blackstone Comm. 18); and while water is not land in the sense that land is a thing of fixed and permanent character and capable of an exclusive ownership (Mitchell *v.* Warner, 5 Conn. 497, 518), the right which a land owner has in the waters of a stream flowing through his land is a corporeal right (Lux *v.* Haggin, *supra*; Cary *v.* Daniels, 5 Metc. (Mass.) 236, 238); as much the subject of individual property as the stones scattered upon the soil (Buckingham *v.* Smith, 10 Ohio 288, 297); and which passes by a conveyance of the land (Lux *v.* Haggin, *supra*); and may be taken under a power to condemn land (McGee Irr. Ditch Co. *v.* Hudson, *supra*). The term "land" also includes a water power, used or unused (Kimberly *v.* Hewitt, 75 Wis. 371, 374, 44 N. W. 303); and water in the earth which is the result of natural and ordinary percolation through the soil (Edwards *v.* Haeger, 180 Ill. 99, 106, 54 N. E. 176).

Riparian and other rights in and to the use of waters see Waters.

94. *Connecticut.*— Isham *v.* Morgan, 9 Conn. 374, 378, 23 Am. Dec. 361.

Georgia.— Smith *v.* Atlanta, 92 Ga. 119, 120, 17 S. E. 981.

Illinois.— Stevenson *v.* Bachrach, 170 Ill. 253, 256, 48 N. E. 327; Lenfers *v.* Henke, 73 Ill. 405, 408, 24 Am. Rep. 263.

maxim "*cujus est solum, ejus est usque ad cœlum.*[95]" It includes not only the soil or earth but also things of a permanent nature affixed thereto,[96] whether by nature or by the hand of man.[97] So it includes those natural products such as grow ng trees,[98] grass, herbage, and other natural or perennial products of the land,[99] as distinguished from crops which are the annual products of industry and agriculture and are ordinarily regarded as personal property.[1] It also includes structures of a permanent character erected upon the land,[2] such as buildings,[3] fences,[4] and bridges.[5] So in a conveyance everything terrestrial, such as mines, woods, waters, and houses, as well as fields, will pass by the name of land,[6] which is *nomen generalissimum*,[7] and while the particular names of these things are sufficient to pass them except in the case of water,[8] yet nothing else will pass except what falls with the utmost propriety under the term made use of.[9] The foregoing designations of land treat of it only in reference to its physical attributes as distinguished from estates or interest therein,[10] and in a number of cases it has been held that the term "land" includes only such real property as has a corporeal existence,[11] and that properly it does not include either incorporeal hereditaments,[12] or what are termed

Ohio.— Winton *v.* Cornish, 5 Ohio 477, 478.

United States.— Higgins Oil, etc., Co. *v.* Snow, 113 Fed. 433, 438, 51 C. C. A. 267.

Land extends upward indefinitely and therefore one man has no right to construct a roof which projects over the land of another no matter how far above the soil. Murphy *v.* Bolger, 60 Vt. 723, 726, 15 Atl. 365, 1 L. R. A. 309.

95. Isham *v.* Morgan, 9 Conn. 374, 377, 23 Am. Dec. 361; Stevenson *v.* Bachrach, 170 Ill. 253, 256, 48 N. E. 327; Weems *v.* Mayfield, 75 Miss. 286, 293, 22 So. 892; 2 Blackstone Comm. 18.

96. Crawford Co. *v.* Hathaway, 67 Nebr. 325, 348, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889; Kingsley *v.* Holbrook, 45 N. H. 313, 319, 86 Am. Dec. 173; Brocket *v.* Ohio, etc., R. Co., 14 Pa. St. 241, 243, 53 Am. Rep. 534; McGee Irr. Ditch Co. *v.* Hudson, (Tex. 1893) 22 S. W. 967, 968.

97. Crawford Co. *v.* Hathaway, 67 Nebr. 325, 348, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889; McGee Irr. Ditch Co. *v.* Hudson, (Tex. 1893) 22 S. W. 967, 968; Higgins Oil, etc., Co. *v.* Snow, 113 Fed. 433, 438, 51 C. C. A. 267.

Ice formed by the congealing of a flowing stream running in its natural channel attached to the soil constitutes a part of the land and belongs to the owner of the bed of the stream. State *v.* Pottmeyer, 33 Ind. 402, 406, 5 Am. Rep. 224.

98. Gulf Red Timber Lumber Co. *v.* O'Neal, 131 Ala. 117, 135, 30 So. 466, 90 Am. St. Rep. 22; Fox *v.* Pearl River Lumber Co., 80 Miss. 1, 6, 31 So. 583; Harrell *v.* Miller, 35 Miss. 700, 702, 72 Am. Dec. 154; Kingsley *v.* Holbrook, 45 N. H. 313, 319, 86 Am. Dec. 173; Gulf, etc., R. Co. *v.* Foster, (Tex. Civ. App. 1898) 44 S. W. 198, 199.

99. Bagley *v.* Columbus So. R. Co., 98 Ga. 626, 627, 25 S. E. 638, 58 Am. St. Rep. 325, 34 L. R. A. 286; Green *v.* Armstrong, 1 Den. (N. Y.) 550, 554; Pattison's Appeal, 61 Pa. St. 294, 297, 100 Am. Dec. 637.

1. See *infra*, V, C, 1.

2. Stauffer *v.* Cincinnati, etc., R. Co., 33 Ind. App. 356, 70 N. E. 543, 544; People *v.* Barker, 153 N. Y. 98, 100, 47 N. E. 46.

A shed erected upon a pier is land. People *v.* Barker, 153 N. Y. 98, 100, 47 N. E. 46.

3. *Connecticut.*— Isham *v.* Morgan, 9 Conn. 374, 378, 23 Am. Dec. 361.

Illinois.— Stevenson *v.* Bachrach, 170 Ill. 253, 256, 48 N. E. 327.

Indiana.— Stauffer *v.* Cincinnati, etc., R. Co., 33 Ind. App. 356, 70 N. E. 543, 544.

Kansas.— Chicago, etc., R. Co. *v.* Knuffkee, 36 Kan. 367, 369, 13 Pac. 582.

Missouri.— Union Cent. L. Ins. Co. *v.* Tillery, 152 Mo. 421, 425, 54 S. W. 220, 75 Am. St. Rep. 480.

New Hampshire.— Gibson *v.* Brockway, 8 N. H. 465, 470, 31 Am. Dec. 200.

New York.— Hilton, etc., Lumber Co. *v.* Murray, 47 N. Y. App. Div. 289, 293, 62 N. Y. Suppl. 35; *In re* Park Com'rs, 1 N. Y. Suppl. 763, 765.

Ohio.— Cincinnati College *v.* Yeatman, 30 Ohio St. 276, 282.

Pennsylvania.— Brocket *v.* Ohio, etc., R. Co., 14 Pa. St. 241, 243, 53 Am. Dec. 534.

4. Bagley *v.* Columbus So. R. Co., 98 Ga. 626, 627, 25 S. E. 638, 58 Am. St. Rep. 325, 34 L. R. A. 286; Mott *v.* Palmer, 1 N. Y. 564, 569; Murray *v.* Van Derlyn, 24 Wis. 67.

5. Monmouth County *v.* Red Bank, etc., Turnpike Co., 18 N. J. Eq. 91, 94.

6. Seager *v.* McCabe, 92 Mich. 186, 194, 52 N. W. 299, 16 L. R. A. 247; Mott *v.* Palmer, 1 N. Y. 564, 570; Warren *v.* Leland, 2 Barb. (N. Y.) 613, 618; Green *v.* Armstrong, 1 Den. (N. Y.) 550, 554; *Ex p.* Leland, 1 Nott & M. (S. C.) 460, 463; 2 Blackstone Comm. 18, 19.

7. *Ex p.* Leland, 1 Nott & M. (S. C.) 460, 463; 2 Blackstone Comm. 18, 19.

8. 2 Blackstone Comm. 18, 19.

9. Winton *v.* Cornish, 5 Ohio 477, 479; 2 Blackstone Comm. 19.

10. *Ex p.* Leland, 1 Nott & M. (S. C.) 460, 463.

11. U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 263, 41 Atl. 759, 42 L. R. A. 572; Whitlock *v.* Greacen, 48 N. J. Eq. 359, 360, 21 Atl. 944; *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278, 281.

12. *Kentucky.*— Hegan *v.* Pendennis Club, 64 S. W. 464, 465, 23 Ky. L. Rep. 861.

chattel interests in land;[13] but in other cases it is held that even at common law the term "land" has a two-fold meaning including not only the thing corporeal, but the estate or interest which one may have therein.[14] The meaning and application of the word "land" is in some cases defined by statute,[15] and its meaning in particular cases frequently depends upon the proper construction of a deed, will, or other instrument,[16] or of a constitutional or statutory provision,[17] in which it may be used in a sense more restricted,[18] or on the other hand more comprehensive than its proper technical signification.[19] So while the use may be technically inaccurate,[20] the term "land" as so used or defined may include any estate or interest in lands,[21] either legal or equitable,[22] and easements,[23] incor-

New Jersey.— De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43, 53 [*affirmed* in 47 N. J. L. 518, 4 Atl. 318, 54 Am. Rep. 197]; Whitlock *v.* Greacen, 48 N. J. Eq. 359, 360, 21 Atl. 944.

New York.— *In re* Metropolitan El. R. Co., 2 N. Y. Suppl. 278, 281.

Pennsylvania.— *In re* Handley, 208 Pa. St. 388, 392, 57 Atl. 755.

Rhode Island.— Stone *v.* Stone, 1 R. I. 425, 428.

An advowson is not included under the term "lands." Westfaling *v.* Westfaling, 3 Atk. 460, 464, 26 Eng. Reprint 1064.

A corporate franchise is an incorporeal hereditament (Gibbs *v.* Drew, 16 Fla. 147, 149, 26 Am. Rep. 700); and is not included under the term "land" (Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76, 87, 23 Atl. 705; People *v.* New York Tax Com'rs, 104 N. Y. 240, 248, 10 N. E. 437).

Conflict of laws.—As subject to the *lex loci rei sitæ*, the term "land" includes servitudes, easements, rents, and other incorporeal hereditaments and interests in and appurtenances to land. Butler *v.* Green, 65 Hun (N. Y.) 99, 107, 19 N. Y. Suppl. 890.

13. Stone *v.* Stone, 1 R. I. 425, 428.

14. Hogan *v.* Manners, 23 Kan. 551, 557, 33 Am. Rep. 199; Johnson *v.* Richardson, 33 Miss. 462, 464.

15. See the statutes of the several states; and the following cases:

Arkansas.— Union Compress Co. *v.* State, 64 Ark. 136, 138, 41 S. W. 52.

Colorado.— McKee *v.* Howe, 17 Colo. 538, 541, 31 Pac. 115.

Dakota.— Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887.

Iowa.— Strong *v.* Garrett, 90 Iowa 100, 104, 57 N. W. 715.

Kansas.— Missouri, etc., R. Co. *v.* Miami County, 67 Kan. 434, 439, 73 Pac. 103; Hogan *v.* Manners, 23 Kan. 551, 558, 33 Am. Rep. 199.

New York.— People *v.* New York Tax Com'rs, 104 N. Y. 240, 248, 10 N. E. 437; People *v.* Brooklyn, 39 N. Y. 81, 87.

Ohio.— Chapman *v.* Wellington First Nat. Bank, 56 Ohio St. 310, 516, 47 N. E. 54; Cincinnati College *v.* Yeatman, 30 Ohio St. 276, 281.

Rhode Island.— Potter *v.* Arnold, 15 R. I. 350, 353, 5 Atl. 379.

Tennessee.— Lewis *v.* Glass, 92 Tenn. 147, 150, 20 S. W. 571; Alexander *v.* Miller, 7 Heisk. 65, 82.

Utah.— Conant *v.* Deep Creek, etc., Irr. Co., 23 Utah 627, 629, 66 Pac. 188, 90 Am. St. Rep. 721.

Wisconsin.— Edwards, etc., Lumber Co. *v.* Mosher, 88 Wis. 672, 677, 60 N. W. 264.

United States.— Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 414, 5 S. Ct. 573, 28 L. ed. 1009.

A railroad track consisting of stringers, ties, and rails is land for the purpose of taxation within the statutory definition of the term, although the railroad company does not own the fee in the soil upon which it is laid. People *v.* Cassity, 46 N. Y. 46, 49.

16. Overton *v.* Moseley, 135 Ala. 599, 605, 33 So. 696.

17. *Connecticut.*— Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76, 85, 23 Atl. 705.

Kansas.— Hogan *v.* Manners, 23 Kan. 551, 557, 33 Am. Rep. 199.

Mississippi.— Johnson *v.* Richardson, 33 Miss. 462, 464.

New Jersey.— New Jersey Zinc, etc., Co. *v.* Morris Canal, etc., Co., 44 N. J. Eq. 398, 406, 15 Atl. 227, 1 L. R. A. 133 [*affirmed* in 47 N. J. Eq. 598, 22 Atl. 1076].

Vermont.— Whitman *v.* Pownal, 19 Vt. 223, 227.

England.— Chelsea Waterworks Co. *v.* Bowley, 17 Q. B. 358, 362, 15 Jur. 1129, 20 L. J. Q. B. 520, 79 E. C. L. 358; Ely *v.* Bliss, 2 De G. M. & G. 459, 472, 51 Eng. Ch. 360, 19 Eng. L. & Eq. 190, 42 Eng. Reprint 950.

18. Zumstein *v.* Consolidated Coal, etc., Co., 54 Ohio St. 264, 271, 43 N. E. 329; Lightfoot *v.* Grove, 5 Heisk. (Tenn.) 473, 479.

As agricultural land.— The term "land" as used in some statutes means only agricultural land. Shufflin *v.* House, 45 W. Va. 731, 733, 31 S. E. 974, 72 Am. St. Rep. 851; Reg. *v.* Midland R. Co., 30 Eng. L. & Eq. 399, 400.

19. Overton *v.* Moseley, 135 Ala. 599, 606, 33 So. 696; Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76, 85, 23 Atl. 705.

20. Overton *v.* Moseley, 135 Ala. 599, 606, 33 So. 696.

21. Fish *v.* Fowlie, 58 Cal. 373, 375; McKee *v.* Howe, 17 Colo. 538, 541, 31 Pac. 115; Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76, 85, 23 Atl. 705; *Ex p.* Leland, 1 Nott & M. (S. C.) 460, 464.

22. Fish *v.* Fowlie, 58 Cal. 373, 375; State *v.* King County, 31 Wash. 445, 457, 72 Pac. 89.

23. *Alabama.*— Overton *v.* Moseley, 135 Ala. 599, 606, 33 So. 696.

Connecticut.— Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76, 85, 23 Atl. 705.

poreal hereditaments,[24] and chattel interests such as a leasehold interest or estate for years.[25]

C. Tenements. The word "tenement" is more extensive and comprehensive than the word "land," [26] and while sometimes used in a restricted sense, as signifying a house or building,[27] in its original, proper, and legal sense it signifies everything, provided it be of a permanent nature, that may be holden,[28] so as to create a tenancy in the feudal sense of the word,[29] whether it be substantial and sensible or of an unsubstantial and ideal kind.[30] So it embraces not only what may be inherited but what may be holden,[31] and not only lands but incorporeal rights, such as rents, commons, and the like;[32] but it is essential that a tenement shall have the quality of permanence.[33] In this country the word "tenement" is said to be used exclusively with reference to lands or what is usually denominated real property,[34] and imports at least an estate or freehold.[35]

Indiana.— Indianapolis, etc., R. Co. *v.* Capitol Paving, etc., Co., 24 Ind. App. 114, 54 N. E. 1076, 1077.

Massachusetts.— Googins *v.* Boston, etc., R. Co., 155 Mass. 505, 30 N. E. 71; Boston Water Power Co. *v.* Boston, etc., R. Co., 23 Pick. 360, 395.

New Jersey.— State *v.* Tichenor, 41 N. J. L. 345, 346.

Vermont.— Whitman *v.* Pownal, 19 Vt. 223, 227.

24. Overton *v.* Moseley, 135 Ala. 599, 606, 33 So. 696; Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76, 85, 23 Atl. 705; Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103, 108; Conant *v.* Deep Creek, etc., Irr. Co., 23 Utah 627, 629, 66 Pac. 188, 90 Am. St. Rep. 721.

25. *Colorado.*— McKee *v.* Howe, 17 Colo. 538, 541, 31 Pac. 115.

Kansas.— Hogan *v.* Manners, 23 Kan. 551, 558, 33 Am. Rep. 199.

Mississippi.— Johnson *v.* Richardson, 33 Miss. 462, 464.

Rhode Island.— Potter *v.* Arnold, 15 R. I. 350, 353, 5 Atl. 379.

South Carolina.— *Ex p.* Leland, 1 Nott & M. 460, 464.

Tennessee.— Kelley *v.* Shultz, 12 Heisk. 218, 219; Burr *v.* Graves, 4 Lea 552, 557.

United States.— Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 415, 5 S. Ct. 573, 28 L. ed. 1009.

26. Lenfers *v.* Henke, 73 Ill. 405, 408, 24 Am. Rep. 263; Canfield *v.* Ford, 28 Barb. (N. Y.) 336, 338; Keller *v.* Pagan, 54 S. C. 255, 261, 32 S. E. 353.

27. Oskaloosa Water Co. *v.* Oskaloosa Bd. of Equalization, 84 Iowa 407, 412, 51 N. W. 18, 15 L. R. A. 296; Sacket *v.* Wheaton, 17 Pick. (Mass.) 103, 105; Musgrave *v.* Sherwood, 23 Hun (N. Y.) 669, 679 note.

28. *Connecticut.*— Mitchell *v.* Warner, 5 Conn. 497, 518.

Illinois.— Lenfers *v.* Henke, 73 Ill. 405, 408, 24 Am. Rep. 263.

Iowa.— Oskaloosa Water Co. *v.* Oskaloosa Bd. of Equalization, 84 Iowa 407, 412, 51 N. W. 18, 15 L. R. A. 296.

Massachusetts.— Sacket *v.* Wheaton, 17 Pick. 103, 105.

New York.— Musgrave *v.* Sherwood, 23 Hun 669, 679 note; People *v.* Kelsey, 14 Abb. Pr. 372, 376.

South Carolina.— Keller *v.* Pagan, 54 S. C. 255, 261, 32 S. E. 353.

A wharf or pier reclaimed from tide-water by embankment or by raising the bottom with stone, earth, or other material, is a tenement since it is so permanent that it becomes a part of the soil and freehold itself. People *v.* Kelsey, 14 Abb. Pr. (N. Y.) 372, 376.

29. Field *v.* Higgins, 35 Me. 339, 341; 3 Kent Comm. 401.

Tenure under the ancient and modern English law see 2 Blackstone Comm. 59–101; 3 Kent Comm. 487–514.

30. Mitchell *v.* Warner, 5 Conn. 497, 518; Lenfers *v.* Henke, 73 Ill. 405, 408, 24 Am. Rep. 263; 2 Blackstone Comm. 17.

31. Pond *v.* Bergh, 10 Paige (N. Y.) 140, 156.

32. New York *v.* Mabie, 13 N. Y. 151, 159, 64 Am. Dec. 538; Canfield *v.* Ford, 28 Barb. (N. Y.) 336, 338; Musgrave *v.* Sherwood, 23 Hun (N. Y.) 669, 679 note; 2 Blackstone Comm. 17.

Offices and franchises are included by Blackstone under the term "tenements" (2 Blackstone Comm. 17. See also Thompson *v.* People, 23 Wend. (N. Y.) 537, 584); but in this country a public office is not even regarded as property (See *supra*, III; and, generally, OFFICERS, 29 Cyc. 1367, 1415); and while the term "tenements" may embrace some franchises, still as used in a statute relating to forcible entry and detainer it must from the nature of the proceeding, be restricted to tenements upon which an entry can be made and of which there can be tangible possession (Gibbs *v.* Drew, 16 Fla. 147, 150, 26 Am. Rep. 700).

33. Mitchell *v.* Warner, 5 Conn. 497, 518.

34. Gibson *v.* Brockway, 8 N. H. 465, 471, 31 Am. Dec. 200.

The word "tenement" in its legal sense means an estate in land or some estate or interest connected with, pertaining to, or growing out of the realty, of which the owner might be disseized. Field *v.* Higgins, 35 Me. 339, 342.

35. New York *v.* Mabie, 13 N. Y. 151, 159, 64 Am. Dec. 538; People *v.* Westervelt, 17 Wend. (N. Y.) 674, 676 [*affirmed* in 20 Wend. 416]. *Contra*, Merry *v.* Hallet, 2 Cow. (N. Y.) 497, holding that the word "tenement" includes not only an estate of inherit-

D. Hereditaments — 1. In General. The term "hereditament" is more comprehensive than either "land" or "tenement," [36] being, according to Lord Coke, "the largest word of all in that kind." [37] It includes both lands and tenements, [38] and generally everything which is capable of being inherited, [39] whether corporeal, or incorporeal, real, personal, or mixed. [40] So in England the term included heirlooms which were mere movables and neither lands nor tenements, but by custom descended to the heir. [41] As applied to real property it includes any estate of inheritance; [42] but not those less than estates of inheritance, such as estates for years. [43] Hereditaments are of two kinds, corporeal and incorporeal. [44]

2. Corporeal Hereditaments. Corporeal hereditaments consist wholly of substantial and permanent objects, [45] all of which may be comprehended under the general denomination of land only, [46] and are confined to land. [47] As distinguished from incorporeal hereditaments they are said to be the substance which may always be seen or handled, while incorporeal hereditaments are a sort of accidents which inhere in and are supported by that substance and exist only in idea and abstracted contemplation. [48]

3. Incorporeal Hereditaments. An incorporeal hereditament is a right issuing out of a thing corporate, whether real or personal, or concerning, or annexed to, or exercisable within, the same. [49] An incorporeal hereditament is not the

ance or other freehold, but also a term for years.

36. Owens *v.* Lewis, 46 Ind. 488, 508, 15 Am. Rep. 295; Nellis *v.* Munson, 108 N. Y. 453, 458, 15 N. E. 739; Canfield *v.* Ford, 28 Barb. (N. Y.) 336, 338.

37. Coke Litt. 6*a* [*quoted* in New York *v.* Mabie, 13 N. Y. 151, 159, 64 Am. Dec. 538].

38. Owens *v.* Lewis, 46 Ind. 488, 508, 15 Am. Rep. 295; 2 Blackstone Comm. 17.

39. *Connecticut.*— Mitchell *v.* Warner, 5 Conn. 497, 518.

Indiana.— Owens *v.* Lewis, 46 Ind. 488, 508, 15 Am. Rep. 295.

Iowa.—Oskaloosa Water Co. *v.* Oskaloosa Bd. of Equalization, 84 Iowa 407, 412, 51 N. W. 18, 15 L. R. A. 296.

New Jersey.— Whitlock *v.* Greacen, 48 N. J. Eq. 359, 360, 21 Atl. 944.

New York.— Nellis *v.* Munson, 108 N. Y. 453, 458, 15 N. E. 739; New York *v.* Mabie, 13 N. Y. 151, 159, 64 Am. Dec. 538; Canfield *v.* Ford, 28 Barb. 336, 338; Canal Com'rs *v.* People, 5 Wend. 423, 453; McNabb *v.* Pond, 4 Bradf. Surr. 1, 10.

South Carolina.— *Ex p.* Leland, 1 Nott & M. 460, 462.

A right of drainage being an easement which is inheritable is a hereditament. Nellis *v.* Munson, 108 N. Y. 453, 460, 15 N. E. 739.

40. Cloyes *v.* Beebe, 14 Ark. 489, 494; New York *v.* Mabie, 13 N. Y. 151, 159, 64 Am. Dec. 538; Canfield *v.* Ford, 28 Barb. (N. Y.) 336, 338; Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423, 453; McNabb *v.* Pond, 5 Bradf. Surr. (N. Y.) 1, 10; 2 Blackstone Comm. 17.

41. Mitchell *v.* Warner, 5 Conn. 497, 518; 2 Blackstone Comm. 17.

42. Canfield *v.* Ford, 28 Barb. (N. Y.) 336, 338.

43. New York *v.* Mabie, 13 N. Y. 151, 159, 64 Am. Dec. 538.

44. Whitlock *v.* Greacen, 48 N. J. Eq. 359, 360, 21 Atl. 944; Nellis *v.* Munson, 108 N. Y. 453, 458, 15 N. E. 739; 2 Blackstone Comm. 17.

45. 2 Blackstone Comm. 17.

Corporeal hereditaments are defined as "substantial, permanent objects which may be inherited." Black L. Dict.; Bouvier L. Dict.

Coal, stone, oil, and gas.— Coal, stone, and other like materials are corporeal hereditaments and constitute an essential part of the land itself, and are capable of present absolute grant, while oil and gas are of a fugitive and volatile nature, a grant of either of which creates only an inchoate right, which will become absolute only upon its reduction to possession. A lease to mine for oil or gas is a mere incorporeal right to be exercised in the land of another. Federal Oil Co. *v.* Western Oil Co., 112 Fed. 373, 375 [*affirmed* in 121 Fed. 674, 57 C. C. A. 428].

46. 2 Blackstone Comm. 17.

47. 3 Kent Comm. 401 [*quoted* in Whitlock *v.* Greacen, 48 N. J. Eq. 359, 360, 21 Atl. 944].

48. 2 Blackstone Comm. 20 [*quoted* in Whitlock *v.* Greacen, 48 N. J. Eq. 359, 360, 21 Atl. 944].

A railroad franchise is an incorporeal hereditament as distinguished from land which is a corporeal hereditament. Gibbs *v.* Drew, 16 Fla. 147, 149, 26 Am. Rep. 700.

49. 2 Blackstone Comm. 20.

Other definitions are: "A right issuing out of a thing corporate, whether real or personal." Walker *v.* Daly, 80 Wis. 222, 227, 49 N. W. 812.

"Anything, the subject of property, which is inheritable, and not tangible or visible." Cyclopedic L. Dict.

An incorporeal hereditament is so called because it is inheritable but not tangible. Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 230, 60 N. Y. Suppl. 12 [*affirmed* in 169 N. Y. 60, 61 N. E. 995].

A claim to land under a certificate of location is not a chattel but an incorporeal

land or thing corporeal, but is something merely collateral thereto,[50] an invisible and intangible right;[51] and it must also not be confounded with the profit or thing of a corporeal nature which the right may produce.[52] At common law incorporeal hereditaments were said to lie in grant because, livery being impossible, they would pass by a simple deed or grant; but livery being necessary to the transfer of corporeal hereditaments, they were said to lie in livery;[53] but this distinction has long since been abolished, even in England.[54] There were ten principal incorporeal hereditaments known to the ancient English law, viz: (1) Advowsons; (2) tithes; (3) commons; (4) ways; (5) offices; (6) dignities; (7) franchises; (8) corodies or pensions; (9) annuities; and (10) rents.[55] In the United States we have no such rights as advowsons, tithes, dignities, or franchises of the chase;[56] but there are still a number of incorporeal hereditaments which have a present interest.[57] An annuity[58] is an incorporeal hereditament.[59] A right of common[60] is an incorporeal hereditament.[61] An easement[62] is an incorporeal hereditament.[63] A franchise[64] is ordinarily classed as an incorporeal hereditament,[65] although the propriety of classing incorporated franchises as hereditaments has been questioned.[66] An office[67] is classified by Blackstone as an incorporeal hereditament,[68] on the ground that a man may have an estate therein to himself and his heirs as well as for life or a term of years;[69] but in this country no public office can properly be termed an incorporeal hereditament or thing capable of being inherited,[70] since the duration of office is regulated by constitutional or statutory provisions and is never more permanent than during good behavior,[71] and it seems now to be

hereditament. The claim until perfected by location and patent is simply a right granted by the United States to receive so many acres of land, a mere equity. Walker *v.* Daly, 80 Wis. 222, 227, 49 N. W. 812.

50. Stone *v.* Stone, 1 R. I. 425, 428; 2 Blackstone Comm. 20.

51. Hegan *v.* Pendennis Club, 64 S. W. 464, 465, 23 Ky. L. Rep. 861.

52. Stone *v.* Stone, 1 R. I. 425, 428; 2 Blackstone Comm. 20.

Illustrations.—An annuity is an incorporeal hereditament which produces money which is of a corporeal nature, yet the annuity itself is a thing invisible which has only a mental existence (2 Blackstone Comm. 20); and a patent right is an incorporeal right as distinguished from the patented article (Com. *v.* Petty, 96 Ky. 452, 29 S. W. 291, 16 Ky. L. Rep. 488, 29 L. R. A. 786).

53. 2 Blackstone Comm. 317.

54. 1 Washburn Real Prop. (6th ed.) § 49.

55. 2 Blackstone Comm. 21.

56. 3 Kent Comm. 402.

Definition and explanation of advowsons see 1 Cyc. 1156; 2 Blackstone Comm. 21. Tithes see 2 Blackstone Comm. 24. Corrodies see 9 Cyc. 979; 2 Blackstone Comm. 40. Dignities see 14 Cyc. 289; 2 Blackstone Comm. 37. Franchises of forest, chase, free-warren, and free-fisheries, see 2 Blackstone Comm. 38, 39.

57. 3 Kent Comm. 402, 403.

58. **Annuity defined** see ANNUITIES, 2 Cyc. 459; 2 Blackstone Comm. 40.

59. 2 Blackstone Comm. 40; 3 Kent Comm. 460.

60. **Right of common defined** see COMMON LANDS, 8 Cyc. 346; 2 Blackstone Comm. 32.

61. Smith *v.* Floyd, 18 Barb. (N. Y.) 522, 527; Western University *v.* Robinson, 12 Serg. & R. (Pa.) 29, 32; 2 Blackstone Comm. 32. See also COMMON LANDS, 8 Cyc. 346.

62. **Easement defined** see EASEMENTS, 14 Cyc. 1139.

63. Mackey *v.* Harmon, 34 Minn. 168, 172, 24 N. W. 702; Warner *v.* Rogers, 23 Minn. 34, 38; McMillan *v.* Lauer, 24 N. Y. Suppl. 951, 953; Wolfe *v.* Frost, 4 Sandf. Ch. (N. Y.) 72, 89; Clawson *v.* Wallace, 16 Utah 300, 307, 52 Pac. 9. See also, generally, EASEMENTS, 14 Cyc. 1139.

A way or right of passing over the land of another is an easement and an incorporeal hereditament. Johnson *v.* Lewis, 47 Ark. 66, 70, 14 S. W. 466; Hegan *v.* Pendennis Club, 64 S. W. 464, 465, 23 Ky. L. Rep. 861; Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 230, 60 N. Y. Suppl. 12; Stone *v.* Stone, 1 R. I. 425, 428.

Water right.— The right which one has to the use of water flowing over his land is identified with the realty and is a real or corporeal hereditament, but the right to have the water of a stream or watercourse flow to or from his land or mill over the land of another is an easement and an incorporeal hereditament. Cary *v.* Daniels, 5 Metc. (Mass.) 236, 238.

64. **Franchise defined** see FRANCHISES, 19 Cyc. 1451; 2 Blackstone Comm. 38.

65. See FRANCHISES, 19 Cyc. 1460; 2 Blackstone Comm. 37.

66. See FRANCHISES, 19 Cyc. 1462; 3 Kent Comm. 459.

67. **Office defined** see OFFICERS, 29 Cyc. 1361; 2 Blackstone Comm. 36.

68. People *v.* Wells, 2 Cal. 198, 203; 2 Blackstone Comm. 36.

69. 2 Blackstone Comm. 36.

70. Conner *v.* New York, 5 N. Y. 285, 295; 3 Kent Comm. 454.

71. 3 Kent Comm. 454.

uniformly held that a public office is not even property.[72] Rent[73] is an incorporeal hereditament.[74] The right of the owner of a pew in a church is also an incorporeal hereditament.[75]

V. Real and Personal Property Distinguished.

A. In General. While the essential differences between real and personal property as ordinarily defined[76] are well understood and uniformly recognized,[77] the distinction is in some cases difficult in its application,[78] since the same thing or substance is at different times classified as the one or the other according to its local situation, conformation, use or other accidental qualities,[79] and may at the same time be realty as to one person and personalty as to another,[80] and may by the mode of dealing with it be changed from the one to the other.[81] That which is in its nature personal may become a part of the realty by annexation thereto,[82] or notwithstanding it is so annexed may by reason of the intention, understanding, or agreement of the parties, retain its character as personalty,[83] or that which is a part of the realty may become personalty by severance.[84] So also every government has the right to establish and regulate the rights of property in things within its jurisdiction, and to impose upon it any character which it may choose,[85] and no other state can impugn or vary that character,[86] so that the same thing may be realty in one state and personalty in another.[87]

72. See *supra*, III; and, generally, Officers, 29 Cyc. 1367, 1415.

73. **Rent defined** see Ground-Rents, 20 Cyc. 1370; Landlord and Tenant, 24 Cyc. 1137; 2 Blackstone Comm. 41.

74. Brown *v.* Brown, 33 N. J. Eq. 650, 659; Van Wicklen *v.* Paulson, 14 Barb. (N. Y.) 654, 655; Payn *v.* Beal, 4 Den. (N. Y.) 405, 412; 2 Blackstone Comm. 41; 3 Kent Comm. 460.

75. *Louisiana.*— Gamble's Succession, 23 La. Ann. 9.

Massachusetts.—Bates *v.* Sparrell, 10 Mass. 323.

New Jersey.— Third Presb. Cong. *v.* Andruss, 21 N. J. L. 325.

New York.— Shaw *v.* Beveridge, 3 Hill 26, 38 Am. Dec. 616; McNabb *v.* Pond, 4 Bradf. Surr. 7.

South Carolina.—White *v.* Marshall, Harp. 122.

Vermont.— O'Hear *v.* De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653; Perrin *v.* Granger, 33 Vt. 101; Barnard *v.* Whipple, 29 Vt. 401, 70 Am. Dec. 422.

See 40 Cent. Dig. tit. "Property," § 6.

As real property see *infra*, V, B, 2.

Pews and rights of pew holders in general see Religious Societies.

76. **Real property defined** see *infra*, V, B, 1.

Personal property defined see *infra*, V, C, 1.

77. Hunt *v.* Bullock, 23 Ill. 320.

78. Bemis *v.* First Nat. Bank, 63 Ark. 625, 40 S. W. 127; Stone *v.* Proctor, 2 D. Chipm. (Vt.) 108.

79. Stone *v.* Proctor, 2 D. Chipm. (Vt.) 108.

80. Mott *v.* Palmer, 1 N. Y. 564; Fuller-Warren Co. *v.* Harter, 110 Wis. 80, 85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603.

81. See *infra*, V, D.

82. Guernsey *v.* Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270; State *v.* Graves, 74 N. C. 396. See also, generally, Fixtures, 19 Cyc. 1036.

83. Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149; Handforth *v.* Jackson, 150 Mass. 149, 22 N. E. 634; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130. See also, generally, Fixtures, 19 Cyc. 1045, 1048.

Ordinarily the nature of the thing itself determines the distinction between real and personal property, but things which are originally personal in their nature and are attached to the realty in such a manner that they may be detached without being destroyed or materially injured are subject to the convention of the parties. Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130.

Slag dumped as refuse from an ore smelter or mill, while ordinarily appurtenant to the land on which it is dumped, may be treated by the owner of both the land and the dump as personalty and sold and delivered as such. Manson *v.* Dayton, 153 Fed. 258, 82 C. C. A. 588.

84. Fulton *v.* Norton, 64 Me. 410; Peck *v.* Brown, 5 Nev. 81. See also *infra*, V. D; and, generally, Fixtures, 19 Cyc. 1069 *et seq.*

85. Harper *v.* Stanbrough, 2 La. Ann. 377; McCollum *v.* Smith, Meigs (Tenn.) 342, 33 Am. Dec. 147.

The rolling stock of a railroad company is personal property (Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124), but it is within the power of the legislature to treat it as real property for the purpose of taxation (Louisville, etc., R. Co. *v.* State, 25 Ind. 177, 87 Am. Dec. 358).

86. McCollum *v.* Smith, Meigs (Tenn.) 342, 33 Am. Dec. 147, holding that slaves in Louisiana, being "immovables" under the law of Louisiana, go as real estate, although by the law of the domicile of the owner (Tennessee) slaves were personalty.

87. McCollum *v.* Smith, Meigs (Tenn.) 342, 33 Am. Dec. 147.

B. Real Property — 1. In General. Real property or real estate has been defined as the interest which a man has in lands, tenements, or hereditaments,[88] and also as such things as are permanent, fixed, and immovable, and which cannot be carried out of their places, as lands and tenements,[89] which is the definition given by Blackstone of "things real."[90] So while strictly speaking the term means the estate, title, or interest which one has in lands,[91] it is frequently used in the sense of things real to denote the subjects of real property.[92] The term "real property" or "real estate" is substantially coextensive with the phrase "lands, tenements, and hereditaments,"[93] and in some cases is expressly declared to be so by statute.[94] In a number of jurisdictions the meaning and application of the terms "real estate" or "real property" have been defined by statute;[95] but it is to be

Slaves were in some jurisdictions declared to be real property (Chinn *v.* Respass, 1 T. B. Mon. (Ky.) 25, 27; Plumpton *v.* Cook, 2 A. K. Marsh. (Ky.) 450, 451), and in Louisiana were classed as immovables (Hyams *v.* Smith, 6 La. Ann. 362, 363; Girard *v.* New Orleans, 2 La. Ann. 897, 901; Harper *v.* Stanbrough, 2 La. Ann. 377, 382), but although termed "immovables" were held not to be real estate (Girard *v.* New Orleans, *supra*).

88. Avery *v.* Dufrees, 9 Ohio 145, 147.

Other definitions are: "Something that may be held by tenure, or will pass to the heir of the possessor at his death instead of his executor, including lands, tenements and hereditaments, whether the latter be corporeal or incorporeal." Gillett *v.* Gaffney, 3 Colo. 351, 360.

"Real property is land, and, generally, whatever is erected or growing upon or affixed to land." State *v.* Wolf, (Del. 1907) 66 Atl. 739, 740.

"Real property consists of land, and of all rights and profits arising from and annexed to land, that are of a permanent and immovable nature, and is comprehended under the words, lands, tenements, and hereditaments." Scogin *v.* Perry, 32 Tex. 21, 28.

Real estate; real property.— "These terms are used indifferently for interest or ownership in land, immovable things, and things of the nature of land, or for the land and things themselves, considered as subjects of property." Abbott L. Dict.

89. Hunt *v.* Bullock, 23 Ill. 320.

90. 2 Blackstone Comm. 16.

91. Bates *v.* Sparrell, 10 Mass. 323, 324.

"**The expression, real estate,** signifies such an interest as the tenant hath in land. It is the condition or circumstance in which the owner stands with regard to his property." Jackson *v.* Catlin, 2 Johns. (N. Y.) 248, 260, 3 Am. Dec. 415 [*affirmed* in 8 Johns. 520].

92. Bates *v.* Sparrell, 10 Mass. 323, 324.

93. Fretwell *v.* McLemore, 52 Ala. 124, 145; Murphy *v.* Los Angeles County Super. Ct., 138 Cal. 69, 71, 70 Pac. 1070; Martinovich *v.* Marsicano, 137 Cal. 354, 356, 70 Pac. 459.

94. Purifoy *v.* Lamar, 112 Ala. 123, 131, 20 So. 975; *In re* McCabe, 29 Mont. 28, 30, 73 Pac. 1106; Nellis *v.* Munson, 108 N. Y. 453, 458, 15 N. E. 739; Matter of Ehrsam, 37 N. Y. App. Div. 272, 274, 55 N. Y. Suppl. 942; Olendorf *v.* Cook, 1 Lans. 37, 40; Pelletreau *v.* Smith, 30 Barb. 494, 496; Rogers *v.* Kimsey, 101 N. C. 559, 564, 8 S. E. 159.

Synonymous with "lands."— The words "lands" and "real estate" are said to be used in the Montana statutes as synonymous terms (Black *v.* Elkhorn Min. Co., 49 Fed. 549, 552); but the code of California "makes a distinction between real property and land — one of the elements of real property" (Mount Carmel Fruit Co. *v.* Webster, 140 Cal. 183, 187, 73 Pac. 826).

95. *Alabama.*— Citizens' Mut. Ins. Co. *v.* Lott, 45 Ala. 185, 195.

Arkansas.— Ft. Smith School Dist. *v.* Ft. Smith Sewer Dist. No. 1 Bd. of Imp., 65 Ark. 343, 348, 46 S. W. 418; Stull *v.* Graham, 60 Ark. 461, 473, 474, 31 S. W. 46.

California.— Lavenson *v.* Standard Soap Co., 80 Cal. 245, 259, 22 Pac. 184, 13 Am. St. Rep. 147.

Colorado.— Gillett *v.* Gaffney, 3 Colo. 351, 359.

Georgia.— Smith *v.* Odom, 63 Ga. 499, 502.

Illinois.— Henderson *v.* Harness, 176 Ill. 302, 307, 52 N. E. 68.

Iowa.— Strong *v.* Garrett, 90 Iowa 100, 104, 57 N. W. 715; White *v.* Butt, 32 Iowa 335, 345; Burton *v.* Hintrager, 18 Iowa 348, 351.

Kansas.— Bodwell *v.* Heaton, 40 Kan. 36, 38, 18 Pac. 901; Kiser *v.* Sawyer, 4 Kan. 503, 508.

Missouri.— Rankin *v.* Oliphant, 9 Mo. 239, 241.

New York.— Barber *v.* Brundage, 50 N. Y. App. Div. 123, 125, 63 N. Y. Suppl. 347 [*affirmed* in 169 N. Y. 368, 62 N. E. 417]; State Trust Co. *v.* Casino Co., 5 N. Y. App. Div. 381, 387, 39 N. Y. Suppl. 258.

Tennessee.— Nichols *v.* Guthrie, 109 Tenn. 535, 542, 73 S. W. 107; Burr *v.* Graves, 4 Lea 552, 556.

Utah.— Lavagnino *v.* Uhlig, 26 Utah 1, 24, 71 Pac. 1046, 99 Am. St. Rep. 808 [*affirmed* in 198 U. S. 443, 25 S. Ct. 716, 49 L. ed. 1119]; Conant *v.* Deep Creek, etc., Irr. Co., 23 Utah 627, 629, 66 Pac. 188, 90 Am. St. Rep. 721.

Wisconsin.— Edwards, etc., Lumber Co. *v.* Mosher, 88 Wis. 672, 677, 60 N. W. 264.

As defined for purposes of taxation the term "real property" sometimes includes things which in a strict sense should be regarded as personal property. Union Compress Co. *v.* State, 64 Ark. 136, 138, 41 S. W. 52.

observed that even in the same jurisdiction the terms are sometimes differently defined in different statutes or for different purposes,[96] and that in some cases the statutory definitions apply only to the terms as used in statutory provisions.[97]

2. As an Estate or Interest. As an estate or interest, real property or real estate imports at least an estate of freehold,[98] which is an estate of inheritance or for life;[99] but it includes all freehold estates,[1] whether corporeal or incorporeal,[2] and whether in possession, reversion, or remainder.[3] It therefore includes hereditaments,[4] whether corporeal,[5] or incorporeal,[6] such as easements.[7] The right of the owner of a pew in a church belonging to a religious society is also ordinarily held to be real estate,[8] although the right is in some respects of a qualified, limited, and subordinate nature.[9] Properly speaking, real property or real estate does not include any estate less than a freehold, such as leaseholds and estates for years,[10]

96. Wilmont *v.* Meserole, 41 N. Y. Super. Ct. 274, 277. See also Stull *v.* Graham, 60 Ark. 461, 473, 474, 31 S. W. 46.

97. Lewis *v.* Glass, 92 Tenn. 147, 151, 20 S. W. 571, holding that the provision of the code of Tennessee defining the meaning and application of the words "real estate" and "real property," wherever used in the code, is not applicable in determining to what property of the wife the husband's right of tenancy by curtesy shall attach, the right being derived from the common law and there being no statutory provision that he shall have curtesy in the "land" or "real property" of his wife.

98. Meni *v.* Rathbone, 21 Ind. 454, 466; Allender *v.* Sussan, 33 Md. 11, 17, 3 Am. Rep. 171; Bates *v.* Sparrell, 10 Mass. 323, 325.

As fee-simple title.— In a Texas case the court said: "Since the only title that the owners of real estate in Texas have is a fee simple; and, conversely, those who have the fee simple title, and those only, are the owners of the land, it would follow that real estate and a title in fee simple to real estate, are convertible terms." Scogin *v.* Perry, 32 Tex. 21, 29.

99. See Estates, 16 Cyc. 601.

1. Bates *v.* Sparrell, 10 Mass. 323, 325; Nellis *v.* Munson, 108 N. Y. 453, 458, 15 N. E. 739; Jenkins *v.* Fahey, 73 N. Y. 355, 362; Westervelt *v.* People, 20 Wend. (N. Y.) 416, 417; Jackson *v.* Parker, 9 Cow. (N. Y.) 73, 81.

Life-estates and remainders.— "The term 'real estate' applies as well to life estates or estates in remainder, as to absolute or entire fees." Cooper *v.* Hepburn, 15 Gratt. (Va.) 551, 563.

Ground-rents are real estate and may be mortgaged like other real estate. McKibbin *v.* Peters, 185 Pa. St. 518, 526, 40 Atl. 288.

A mortgagor's equity of redemption has been held to be a legal estate, until barred by foreclosure or otherwise, which may be conveyed as land, sold on execution, and in which a widow is entitled to dower. Borst *v.* Boyd, 3 Sandf. Ch. (N. Y.) 501, 509.

Partnership property.— Real property, the title to which vested in the members of a firm, but which is in fact owned and used by the firm as partnership property, although regarded in equity as part of the assets of the concern, and as such subject to some of the incidents of personal property, is nevertheless in law real estate. Miller *v.* Proctor, 20 Ohio St. 442, 448.

A mining claim is real property. See Mines and Minerals, 27 Cyc. 580 note 64.

2. Bates *v.* Sparrell, 10 Mass. 323, 325; Nellis *v.* Munson, 108 N. Y. 453, 458, 15 N. E. 739.

3. Floyd *v.* Carow, 88 N. Y. 560, 569.

A remainder in fee is clearly real estate, both as the term is used at common law and as defined by statute. Jenkins *v.* Fahey, 73 N. Y. 355, 362; Sheridan *v.* House, 4 Abb. Dec. (N. Y.) 218, 226, 4 Keyes 569.

4. Bates *v.* Sparrell, 10 Mass. 323, 325; State *v.* Tichenor, 41 N. J. L. 345, 346.

5. Bates *v.* Sparrell, 10 Mass. 323, 325.

6. Nellis *v.* Munson, 108 N. Y. 453, 458, 15 N. E. 739.

7. State *v.* Tichenor, 41 N. J. L. 345, 346; Nellis *v.* Munson, 108 N. Y. 453, 458, 15 N. E. 739.

8. *Massachusetts.*— Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159; Bates *v.* Sparrell, 10 Mass. 323.

New Jersey.— Newark Third Presb. Cong. *v.* Andruss, 21 N. J. L. 325.

New York.— St. Paul's Church *v.* Ford, 34 Barb. 16; Ithaca First Baptist Church *v.* Bigelow, 16 Wend. 28; McNabb *v.* Pond, 4 Bradf. Surr. 1. *Compare* Heeney *v.* St. Peter's Church, 2 Edw. 608.

Ohio.— Deutsch *v.* Stone, 11 Ohio Dec. (Reprint) 436, 27 Cinc. L. Bul. 20.

Vermont.— O'Hear *v.* De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653; Barnard *v.* Whipple, 29 Vt. 401, 70 Am. Dec. 422; Hodges *v.* Green, 28 Vt. 358; Kellogg *v.* Dickinson, 18 Vt. 266.

See 40 Cent. Dig. tit. "Property," § 6.

Contra.— Church *v.* Wells, 24 Pa. St. 249.

In Massachusetts the right of a pew holder is real estate, except in the city of Boston. Kimball *v.* Rowley Second Cong. Parish, 24 Pick. (Mass.) 347.

As an incorporeal hereditament see *supra*, IV, D, 3.

9. Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159; Ithaca First Baptist Church *v.* Bigelow, 16 Wend. (N. Y.) 28; Kellogg *v.* Dickinson, 18 Vt. 266.

Pews and rights of pew holders in general see Religious Societies.

10. Meni *v.* Rathbone, 21 Ind. 454, 466; Allender *v.* Sussan, 33 Md. 11, 17, 3 Am.

ordinarily termed "chattels real" and classed as personal property.[11] Under some of the statutory definitions, however,[12] the term "real property" "or real estate" includes, any estate or interest in land,[13] legal or equitable,[14] the interest of a mortgagor,[15] or mortgagee,[16] and also chattel interests;[17] but even under the statutory definitions there must, to constitute real property, be some estate or interest in lands,[18] and which must be an interest or property distinct from that of the public at large.[19]

3. As Subject-Matter of Real Property.[20] Considered as the subject-matter of property, the term "real property" or "real estate" is construed like the term "lands," [21] as including not only the surface of the earth but things of a permanent nature attached thereto,[22] and improvements of a permanent character placed upon it,[23] and also the natural products or growths of the land,[24] such as growing trees,[25]

Rep. 171; Grover *v.* Fox, 36 Mich. 453, 459; *In re* Ehrsam, 37 N. Y. App. Div. 272, 274, 55 N. Y. Suppl. 942; State Trust Co. *v.* Casino Co., 18 Misc. (N. Y.) 327, 329, 41 N. Y. Suppl. 1; Barnes *v.* Meyer, 41 N. Y. Suppl. 210, 211, 25 N. Y. Civ. Proc. 372; Taylor *v.* Wynne, 8 N. Y. Suppl. 759; Westervelt *v.* People, 20 Wend. (N. Y.) 416, 417.

11. See *infra*, V, C, 2.

12. **Statutory definitions** see *supra*, V, B, 1.

13. Block *v.* Morrison, 112 Mo. 343, 351, 20 S. W. 340; Rankin *v.* Oliphant, 9 Mo. 239, 241.

14. White *v.* Butt, 32 Iowa 335, 345; Burton *v.* Hintrager, 18 Iowa 348, 351; Blain *v.* Stewart, 2 Iowa 378, 381; Kiser *v.* Sawyer, 4 Kan. 503, 508; Louisville Bank *v.* Barrick, 1 Duv. (Ky.) 51, 54; Avery *v.* Dufrees, 9 Ohio 145, 147.

15. Cottingham *v.* Springer, 88 Ill. 90, 94.

16. Turpin *v.* Ogle, 4 Ill. App. 611, 621; Bodwell *v.* Heaton, 40 Kan. 36, 48, 18 Pac. 901.

17. Knapp *v.* Jones, 143 Ill. 375, 379, 32 N. E. 382 [*affirming* 38 Ill. App. 489]; Joliet First Nat. Bank *v.* Adam, (Ill. 1890) 25 N. E. 576, 577; Willoughby *v.* Lawrence, 116 Ill. 11, 21, 4 N. E. 356, 56 Am. Rep. 758; Burr *v.* Graves, 4 Lea (Tenn.) 552, 556; Kelley *v.* Shultz, 12 Heisk. (Tenn.) 218, 219.

18. Bowman *v.* People, 82 Ill. 246, 248, 25 Am. Rep. 316 (holding that the interest of a purchaser of land at an execution sale is not, prior to the expiration of the period allowed by law for the judgment debtor to redeem, real estate even under a statute defining real estate as "lands, tenements, hereditaments, and all legal and equitable rights and interests therein and thereto," his interest being merely an inceptive and contingent one, not constituting either a legal or equitable estate in the land); Jackson *v.* Catlin, 2 Johns. (N. Y.) 248, 260, 3 Am. Dec. 415; Wall *v.* Fairley, 77 N. C. 105, 109.

19. Barnard *v.* Hinkley, 10 Mich. 458, 459, holding that the right of navigation on a public river cannot with propriety be termed "real estate" vested in the public or the state for the benefit of every individual who may have occasion to use it.

20. **Corporate franchise** as real property see Franchises, 19 Cyc. 1461.

21. Bemis *v.* First Nat. Bank, 63 Ark. 625, 628, 40 S. W. 127.

Lands see *supra*, IV, B.

Coal before it is mined is a part and parcel of the realty. Duff's Appeal, 10 Pa. Cas. 483, 14 Atl. 364, 367.

Water and ice (see, generally, Waters) are, under some conditions, to be regarded as real estate belonging to the owner of the land beneath them (State *v.* Pottmeyer, 33 Ind. 402, 406, 5 Am. Rep. 224; Marsh *v.* McNider, 88 Iowa 390, 395, 55 N. W. 469, 45 Am. St. Rep. 240, 20 L. R. A. 333), although it is held that ice formed on a pond should not be considered as realty where the owner chooses to sell it by itself (Higgins *v.* Kusterer, 41 Mich. 318, 324, 2 N. W. 13, 32 Am. Rep. 160).

22. Bemis *v.* First Nat. Bank, 63 Ark. 625, 628, 40 S. W. 127; Mound City Constr. Co. *v.* Macgurn, 97 Mo. App. 403, 408, 71 S. W. 460.

23. Mathes *v.* Dobschuetz, 72 Ill. 438, 441.

Improvements on public lands belonging to the United States are not included under the term "real estate" as used in a revenue act relating to the taxation of real estate. People *v.* Owyhee Lumber Co., 1 Ida. 420, 421.

24. Craddock *v.* Riddlesbarger, 2 Dana (Ky.) 205; Brehen *v.* O'Donnell, 36 N. J. L. 257; Flynt *v.* Conrad, 61 N. C. 190, 192, 45 Am. Dec. 588; Brittain *v.* McKay, 23 N. C. 265, 268, 35 Am. Dec. 738.

Crops or *fructus industriales* as personal property see *infra*, V, C, 1.

25. *Alabama.*— Milliken *v.* Faulk, 111 Ala. 658, 660, 20 So. 594; Heflin *v.* Bingham, 56 Ala. 566, 28 Am. Rep. 776.

Florida.— Griffing Bros. Co. *v.* Winfield, 53 Fla. 589, 43 So. 687.

Georgia.— Moore *v.* Vickers, 126 Ga. 42, 54 S. E. 814; Balkcom *v.* Empire Lumber Co., 91 Ga. 651, 655, 17 S. E. 1020, 44 Am. St. Rep. 58; Coody *v.* Gress Lumber Co., 82 Ga. 793, 10 S. E. 218.

Illinois.— Osborn *v.* Rabe, 67 Ill. 108; Adams *v.* Smith, 1 Ill. 283.

Indiana.— Armstrong *v.* Lawson, 73 Ind. 498.

Mississippi.— Harrell *v.* Miller, 35 Miss. 700, 72 Am. Dec. 154.

New Hampshire.— Howe *v.* Batchelder, 49 N. H. 204; Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Olmstead *v.* Niles, 7 N. H. 522; Putney *v.* Day, 6 N. H. 430, 25 Am. Dec. 470.

and grass growing upon the land of the owner.[26] It is also held to include manure made in the course of husbandry upon a farm,[27] a meteorite or aerolite, whether imbedded in the soil,[28] or merely resting upon it,[29] buildings,[30] fences,[31] a party-wall,[32] an extra story built by one person on a house belonging to another,[33] a single room in a house,[34] a pew in a church,[35] a railroad bridge,[36] toll bridge,[37] pier,[38] railroad road bed with its superstructure,[39] the foundations, columns, and superstructure of an elevated railroad,[40] dams, sluices, and waterways connected with the land,[41] electric light wires and poles,[42] and a pipe line for conveying petroleum.[43] The mains and pipes of gas and water companies if laid in lands belonging to the company are a part of the realty;[44] but as to their status when laid in streets or property belonging to others the authorities are conflicting.[45]

New Jersey.— Slocum *v.* Seymour, 36 N. J. L. 138, 13 Am. Rep. 432.

New York.— Vorebeck *v.* Roe, 50 Barb. 302, 306; Goodyear *v.* Vosburgh, 39 How. Pr. 377; Green *v.* Armstrong, 1 Den. 550; McIntyre *v.* Barnard, 1 Sandf. Ch. 52.

North Carolina.— Mizell *v.* Burnett, 49 N. C. 249, 69 Am. Dec. 744.

Ohio.— Hirth *v.* Graham, 50 Ohio St. 57, 33 N. E. 90, 40 Am. St. Rep. 641, 19 L. R. A. 721.

Pennsylvania.— Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350; Bowers *v.* Bowers, 95 Pa. St. 477; Pattison's Appeal, 61 Pa. St. 294, 100 Am. Dec. 637.

Tennessee.— Knox *v.* Haralson, 2 Tenn. Ch. 232.

Vermont.— Buck *v.* Pickwell, 27 Vt. 157.

Wisconsin.— Williams *v.* Jones, 131 Wis. 361, 111 N. W. 505; Lillie *v.* Dunbar, 62 Wis. 198, 22 N. W. 467; Daniels *v.* Bailey, 43 Wis. 566; Strasson *v.* Montgomery, 32 Wis. 52.

United States.— Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360.

England.— Scorrell *v.* Boxall, 1 Y. & J. 396.

See 40 Cent. Dig. tit. "Property," §§ 4, 8.

Growing fruit trees are considered as part of the land. Griffing Bros. Co. *v.* Winfield, 53 Fla. 589, 43 So. 687.

26. See Smith *v.* Jenks, 1 Den. (N. Y.) 580 [*reversed* on other grounds in 1 N. Y. 90].

27. Fay *v.* Muzzey, 13 Gray (Mass.) 53, 55, 74 Am. Dec. 619; Daniels *v.* Pond, 21 Pick. (Mass.) 367, 371, 32 Am. Dec. 269.

Conversion or change of form see *infra*, V, D, 1.

28. Goddard *v.* Winchell, 86 Iowa 71, 52 N. W. 1124, 41 Am. St. Rep. 481, 17 L. R. A. 788.

29. Oregon Iron Co. *v.* Hughes, 48 Oreg. 313, 81 Pac. 572.

30. *California.*— Commercial Bank *v.* Pritchard, 126 Cal. 600, 605, 59 Pac. 130.

Georgia.— Smith *v.* Odom, 63 Ga. 499, 502.

Illinois.— Mathes *v.* Dobschuetz, 72 Ill. 438, 441.

Indiana.— Indianapolis, etc., R. Co. *v.* Indianapolis First Nat. Bank, 134 Ind. 127, 129, 33 N. E. 679.

Massachusetts.— Roberts *v.* Lynn Ice Co., 187 Mass. 402, 73 N. E. 523.

Michigan.— Pangborn *v.* Continental Ins. Co., 62 Mich. 638, 640, 29 N. W. 475.

United States.— Lycoming F. Ins. Co. *v.* Haven, 95 U. S. 242, 245, 24 L. ed. 473.

Buildings as personal property see *infra*, V, C, 1.

31. Hereford *v.* Pusch, 8 Ariz. 76, 68 Pac. 547; Glidden *v.* Bennett, 43 N. H. 306; State *v.* Graves, 74 N. C. 396.

32. McGittigan *v.* Evans, 8 Phila. (Pa.) 264.

33. Madison *v.* Madison, 206 Ill. 534, 69 N. E. 625.

34. White *v.* White, 16 N. J. L. 202, 214, 31 Am. Dec. 232, holding that where a testator devised to his widow for life a certain room in a house, the room was real estate.

35. Bates *v.* Sparrell, 10 Mass. 323.

Right or interest of pew holder as real property see *supra*, V, B, 2.

36. Keithsburg Bridge Co. *v.* McKay, 42 Fed. 427, 429.

37. Kittery *v.* Proprietors Portsmouth Bridge, 78 Me. 93, 97, 2 Atl. 847; *In re* Meason, 4 Watts (Pa.) 341, 346.

38. Smith *v.* New York, 68 N. Y. 552, 555.

39. Purifoy *v.* Lamar, 112 Ala. 123, 131, 20 So. 975; Neary *v.* Philadelphia, etc., R. Co., 7 Houst. (Del.) 419, 442, 9 Atl. 405; People *v.* New York Tax, etc., Com'r, 4 N. Y. Suppl. 41, 42.

40. People *v.* New York Tax, etc., Com'rs, 82 N. Y. 459, 462.

41. Flax Pond Water Co. *v.* Lynn, 147 Mass. 31, 33, 16 N. E. 742.

42. Keating Implement Co. *v.* Marshall Electric Light, etc., Co., 74 Tex. 605, 12 S. W. 489.

43. Tide Water Pipe Line Co. *v.* Berry, 53 N. J. L. 212, 21 Atl. 490.

44. Monroe Water Co. *v.* Frenchtown Tp., 98 Mich. 431, 57 N. W. 268.

45. **Considered as real property** see Colorado Fuel, etc., Co. *v.* Pueblo Water Co., 11 Colo. App. 352, 53 Pac. 232; Oskaloosa Water Co. *v.* Oskaloosa Bd. of Equalization, 84 Iowa 407, 51 N. W. 18, 15 L. R. A. 206; Des Moines Water Co.'s Appeal, 48 Iowa 324; Paris *v.* Norway Water Co., 85 Me. 330, 27 Atl. 143, 35 Am. St. Rep. 371, 21 L. R. A. 525; Providence Gas Co. *v.* Thurber, 2 R. I. 15, 55 Am. Dec. 621.

Considered as personal property see Shelbyville Water Co. *v.* People, 140 Ill. 545, 30 N. E. 678, 16 L. R. A. 505; Mulrooney *v.* Obear, 171 Mo. 613, 71 S. W. 1019; People *v.* Brooklyn Bd. of Assessors, 39 N. Y. 81; Memphis Gaslight Co. *v.* State, 6 Coldw.

C. Personal Property — 1. In General. Personal property has been defined as the right or interest which a man has in things personal,[46] or the right or interest less than a freehold which a man has in realty, or any right or interest which he has in things movable.[47] It has also been defined as goods, money, and all other movables which may attend the person of the owner wherever he may think proper to go,[48] which is the definition given by Blackstone of "things personal."[49] The term "personal property" is used to apply both to the thing itself and the right or interest of the owner therein.[50] To define personal property as consisting of movables, is not, even in the sense of things personal, strictly accurate,[51] for there may be personal property of an immovable character,[52] such as growing crops,[53] standing trees, sold but not actually severed from the soil,[54] and buildings and other structures affixed to the soil but with the understanding that they are to be removed;[55] but all things personal may be included under the term "chattels,"[56] which consist of chattels real and chattels personal,[57] and the property in which may be either in possession or in action.[58] In some cases the meaning and application of the term "personal property" is defined by statute,[59] and it is also sometimes

(Tenn.) 310, 98 Am. Dec. 452; Dunsmuir *v.* Port Angeles Gas, etc., Co., 24 Wash. 104, 63 Pac. 1095.

For purposes of taxation see Taxation.

46. Bouvier L. Dict.

47. Bouvier L. Dict.

48. Hunt *v.* Bullock, 23 Ill. 320.

Personal property has been otherwise defined as "property of a personal or movable nature, as opposed to property of a local or immovable character, (such as land or houses,) the latter being called 'real property.'" Black L. Dict.

The words "personal estate" in their ordinary and constant use, whether among professional persons or laymen, mean goods, chattels, securities and moneys, and do not mean land or houses, and in a will should not be construed as including property of both classes owned by the testator. *In re* Bruckman, 195 Pa. St. 363, 368, 45 Atl. 1078.

49. 2 Blackstone Comm. 16.

"Personal property is to be distinguished from things personal. There may be, for example, a personal estate in realty, as chattels real; but the only property which a man can have in things personal must be a personal property." Bouvier L. Dict.

50. Stief *v.* Hart, 1 N. Y. 20, 24.

51. Reed *v.* Johnson, 14 Ill. 257, 258.

52. Hardeman *v.* State, 16 Tex. App. 1, 5, 49 Am. Rep. 821.

53. Reed *v.* Johnson, 14 Ill. 257, 258; Hardeman *v.* State, 16 Tex. App. 1, 5, 49 Am. Rep. 821.

54. Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Warren *v.* Leland, 2 Barb. (N. Y.) 613. See also *infra*, V, D, 2.

55. Curtiss *v.* Hoyt, 19 Conn. 154, 165, 48 Am. Dec. 149; Handforth *v.* Jackson, 150 Mass. 149, 154, 22 N. E. 634.

56. Reed *v.* Johnson, 14 Ill. 257, 258; 2 Blackstone Comm. 385.

Chattels defined see 7 Cyc. 122.

57. Matter of Althause, 63 N. Y. App. Div. 252, 255, 71 N. Y. Suppl. 445 [*affirmed* in 168 N. Y. 670, 61 N. E. 1127]; 2 Blackstone Comm. 386.

Chattels personal defined see 7 Cyc. 123.

Chattels real see *infra*, V, C, 2.

58. Magee *v.* Toland, 8 Port. (Ala.) 36, 39; Adams *v.* Hackett, 7 Cal. 187, 203; Turner *v.* State, 1 Ohio St. 422, 426; 2 Blackstone Comm. 389.

Chose in action see *infra*, V, C, 3.

59. *Alabama.*— Shannon *v.* Sims, 146 Ala. 673, 677, 40 So. 574; Du Bois *v.* State, 50 Ala. 139, 140.

Hawaii.— McBryde *v.* Kala, 6 Hawaii 529, 531.

Indiana.— State Tax Com'rs *v.* Holliday, 150 Ind. 216, 219, 49 N. E. 14, 42 L. R. A. 826; Aurora Nat. Bank *v.* Black, 129 Ind. 595, 598, 29 N. E. 396.

Kansas.— Missouri, etc., R. Co. *v.* Miami County, 67 Kan. 434, 440, 73 Pac. 103; State *v.* Topeka Water Co., 61 Kan. 547, 561, 60 Pac. 337; Kingman County *v.* Leonard, 57 Kan. 531, 532, 46 Pac. 960, 34 L. R. A. 810; Dykes *v.* Lockwood Mortg. Co., 2 Kan. App. 217, 43 Pac. 268, 270.

Kentucky.— Trimble *v.* Mt. Sterling, 12 S. W. 1066, 1067, 11 Ky. L. Rep. 727.

Minnesota.— Smith *v.* Webb, 11 Minn. 500, 507.

Missouri.— State *v.* Barr, 28 Mo. App. 84, 85.

New Jersey.— State *v.* Darcy, 51 N. J. L. 140, 142, 16 Atl. 160, 2 L. R. A. 350; Newark City Bank *v.* Newark, 30 N. J. L. 13, 21.

New York.— *In re* Jones, 142 N. Y. 575, 578, 65 N. E. 570, 60 L. R. A. 476; People *v.* Waldron, 26 N. Y. App. Div. 527, 528, 50 N. Y. Suppl. 523; State Trust Co. *v.* Casino Co., 18 Misc. 327, 329, 41 N. Y. Suppl. 1; People *v.* Stevens, 3 N. Y. Cr. 583, 586.

North Carolina.— Worth *v.* Wright, 122 N. C. 335, 336, 29 S. E. 361.

Oregon.— Poppleton *v.* Yamhill County, 18 Oreg. 377, 384, 23 Pac. 253, 7 L. R. A. 449.

Tennessee.— Duke *v.* Hall, 9 Baxt. 282, 286.

West Virginia.— State *v.* South Penn. Oil Co., 42 W. Va. 80, 104, 24 S. E. 688.

United States.— Atlanta *v.* Chattanooga Foundry, etc., Co., 101 Fed. 900, 907 [*affirmed* in 203 U. S. 390, 27 S. Ct. 65, 51 L. ed. 241].

Synonymous with "goods and chattels."— The words "personal property" in their gen-

used in a sense different from its proper and technical meaning,[60] so that its application must be determined by the ordinary rules of construction.[61] In its broad and general sense, however, personal property includes everything which is the subject of ownership not coming under the denomination of real estate,[62] and has been held to include growing crops,[63] growing strawberry plants,[64] crude turpentine or "scrape," [65] peat, dry or in process of drying,[66] rails not in a fence,[67] grass owned by one person but growing upon the land of another,[68] a railway laid upon the land of another,[69] a dam built on another man's land with his consent,[70] the rolling-stock of a railroad company,[71] office furniture, safes, tables, chairs, and desks not attached to the building,[72] a building which has been sold and is being removed,[73] buildings constructed upon the land of another, but with the understanding or agreement that they are to be removed or considered as personal

eral sense are synonymous with the words "personal goods," and by the Tennessee statute of interpretation the words "personal property" mean "goods and chattels." State *v.* Brown, 9 Baxt. (Tenn.) 53, 55, 40 Am. Rep. 81.

60. Chicago *v.* Hulbert, 118 Ill. 632, 636, 8 N. E. 812, 59 Am. Rep. 400; Saugerties First Nat. Bank *v.* Hurlbut, 22 Hun (N. Y.) 310, 311.

61. Loeber *v.* Leininger, 175 Ill. 484, 487, 51 N. E. 703; Bond *v.* Martin, 76 S. W. 326, 328, 25 Ky. L. Rep. 719.

62. Boyd *v.* Selma, 96 Ala. 144, 149, 11 So. 393, 16 L. R. A. 729; Matter of Althause, 63 N. Y. App. Div. 252, 255, 71 N. Y. Suppl. 445 [*affirmed* in 168 N. Y. 670, 61 N. E. 1127]; Bellows *v.* Allen, 22 Vt. 108, 110.

Personal property therefore includes "all subjects of property not of a freehold nature, nor descendible to the heir at law." Reed *v.* Johnson, 14 Ill. 257, 258.

63. *California.*—Raventas *v.* Green, 57 Cal. 254, 255.

Illinois.— Reed *v.* Johnson, 14 Ill. 257, 258.

Kansas.— Mabry *v.* Harp, 53 Kan. 398, 36 Pac. 743.

Kentucky.— Craddock *v.* Riddlesbarger, 2 Dana 205; Parham *v.* Tompson, 2 J. J. Marsh. 159.

New Jersey.— Westbrook *v.* Eager, 16 N. J. L. 81, 85.

New York.— Harder *v.* Plass, 57 Hun 540, 11 N. Y. Suppl. 226.

North Carolina.— Flynt *v.* Conrad, 61 N. C. 190, 95 Am. Dec. 588; Brittain *v.* McKay, 23 N. C. 265, 35 Am. Dec. 738.

Pennsylvania.— Hershey *v.* Metzgar, 90 Pa. St. 217, 218; Pattison's Appeal, 61 Pa. St. 294, 297, 100 Am. Dec. 637; Backenstoss *v.* Stahler, 33 Pa. St. 251, 254, 75 Am. Dec. 592; Bear *v.* Bitzer, 16 Pa. St. 175, 178, 55 Am. Dec. 490; Stanbaugh *v.* Yeates, 2 Rawle 161, 162.

There is a recognized distinction between the natural growths of the land and the annual products of agriculture, the former being regarded as realty and the latter as personalty (Westbrook *v.* Eager, 16 N. J. L. 81, 85; Pattison's Appeal, 61 Pa. St. 294, 297, 100 Am. Dec. 637); but the rule is not uniform that crops are to be regarded as personal property, since for some purposes or within the application of some statutes they are regarded as a part of the realty (McCall *v.* State, 69 Ala. 227, 228; State *v.* Helmes, 27 N. C. 364, 365), and the decisions are by no means uniform as to when and for what purposes they are to be considered realty or personalty, it being said that the question has become involved in a "mystic maze of uncertainty and contradiction," the only conclusion deducible from the authorities being that "a growing crop is a sort of legal species of chameleon" (Bagley *v.* Columbus Southern R. Co., 98 Ga. 626, 631, 25 S. E. 638, 58 Am. St. Rep. 325, 34 L. R. A. 286), and that there is no fixed rule by which to determine in every case when they are to be considered personal and when real estate (Reed *v.* Johnson, 14 Ill. 257, 258).

Status of crops as *fructus industriales* see CROPS, 12 Cyc. 976. As part of decedent's estate see DESCENT AND DISTRIBUTION, 14 Cyc. 114; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 184. As passing by a conveyance of the land see CROPS, 12 Cyc. 977. As property subject to attachment see ATTACHMENT, 4 Cyc. 556. As property subject to execution see EXECUTIONS, 17 Cyc. 941. As within application of statute of frauds see FRAUDS, STATUTE OF, 20 Cyc. 212, 228, 244.

64. Cannon *v.* Mathews, 75 Ark. 336, 87 S. W. 428, 112 Am. St. Rep. 64, 69 L. R. A. 827.

65. Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69; Lewis *v.* McNatt, 65 N. C. 63; Branch *v.* Morrison, 50 N. C. 16, 69 Am. Dec. 770.

66. Gile *v.* Stevens, 13 Gray (Mass.) 146.

67. Robertson *v.* Phillips, 3 Greene (Iowa) 220; Fullington *v.* Goodwin, 57 Vt. 641.

68. Smith *v.* Jenks, 1 Den. (N. Y.) 580 [*reversed* on other grounds in 1 N. Y. 90].

69. State *v.* Mexican Gulf R. Co., 3 Rob. (La.) 513.

70. Southard *v.* Hill, 44 Me. 92, 69 Am. Dec. 85.

71. Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124; Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Randall *v.* Elwell, 52 N. Y. 521, 11 Am. Rep. 747; Chicago, etc., R. Co. *v.* Ft. Howard, 21 Wis. 44, 91 Am. Dec. 458.

72. Atlantic Safe Deposit, etc., Co. *v.* Atlantic City Laundry Co., 64 N. J. Eq. 140, 53 Atl. 212.

73. Hine *v.* New Haven, 40 Conn. 478.

property,[74] and generally things which have been annexed to the realty, but which may be detached or removed under the law relating to fixtures.[75] Shares of corporate stock are personal property.[76] A land certificate, while it symbolizes the right to acquire land, is in itself personal property.[77] Improvement claims have also been considered as chattels,[78] and a title deed is a personal chattel,[79] although it is so connected with and essential to the ownership of the realty that it descends to the heir,[80] while land scrip, which is also a chattel, is unlike an ordinary deed and has a market value in itself.[81]

2. Chattels Real. Personal property includes chattels real as well as chattels personal.[82] Chattels real are such as concern or savor of the realty,[83] and include all estates and interests in real property less than estates of freehold,[84] a freehold being an estate of inheritance or for life.[85] And so properly speaking all lesser estates or interests, such as leaseholds and estates for years, are personal property,[86]

74. *Connecticut.*— Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149.

Illinois.— Gilkerson *v.* Brown, 61 Ill. 486, 489.

Iowa.— Melhop *v.* Meinhart, 70 Iowa 685, 688, 28 N. W. 545.

Massachusetts.—Handforth *v.* Jackson, 150 Mass. 149, 154, 22 N. E. 634.

Missouri.— Brown *v.* Turner, 113 Mo. 27, 32, 20 S. W. 660.

North Dakota.— Dame *v.* Dame, 38 N. H. 429, 430, 75 Am. Dec. 195.

See also, generally, Fixtures, 19 Cyc. 1045, 1048.

75. Bartlett *v.* Haviland, 92 Mich. 552, 555, 52 N. W. 1008; Hovey *v.* Smith, 1 Barb. (N. Y.) 372, 376; Lemar *v.* Miles, 4 Watts (Pa.) 330, 333; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 7, 3 McCrary 130.

Fixtures see generally, Fixtures, 19 Cyc. 1033 *et seq.*

76. *Alabama.*— State *v.* Kidd, 125 Ala. 413, 420, 28 So. 480.

California.— Tregear *v.* Etiwanda Water Co., 76 Cal. 537, 539, 18 Pac. 658, 9 Am. St. Rep. 245.

Colorado.— McClaskey *v.* Lake View Min., etc., Co., 18 Colo. 65, 31 Pac. 333.

Florida.— Southern L. Ins., etc., Co. *v.* Cole, 4 Fla. 359, 378.

Illinois.— Greenleaf *v.* Morgan County, 184 Ill. 226, 228, 56 N. E. 295, 75 Am. St. Rep. 168.

Minnesota.— Puget Sound Nat. Bank *v.* Mather, 60 Minn. 362, 363, 62 N. W. 396.

New York.— *In re* Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476; *In re* Fitch, 160 N. Y. 87, 54 N. E. 701.

North Carolina.— Worth *v.* Ashe County, 90 N. C. 409, 411.

Rhode Island.— Dyer *v.* Osborne, 11 R. I. 321, 323, 23 Am. Rep. 460.

Contra.— Welles *v.* Cowles, 2 Conn. 567, 574, holding that shares of stock in a turnpike company are not personal property, but real property of the species denominated tenements.

Nature and status of corporate stock in general see Corporations, 10 Cyc. 664; for purposes of taxation see Taxation.

77. Groesbeck *v.* Bodman, 73 Tex. 287, 11 S. W. 322; Porter *v.* Burnett, 60 Tex. 220, 222; Collins *v.* Durward, 4 Tex. Civ. App. 339, 342, 23 S. W. 561.

"**There is a wide difference** between the mere right to acquire land and the land itself afterwards acquired by virtue of that right." Collins *v.* Durward, 4 Tex. Civ. App. 339, 342, 23 S. W. 561.

78. McTeer *v.* Buttorff, 4 Yeates (Pa.) 300.

79. Wilson *v.* Rybolt, 17 Ind. 391, 79 Am. Dec. 486.

80. Wilson *v.* Rybolt, 17 Ind. 391, 79 Am. Dec. 486; 2 Blackstone Comm. 428.

81. Nelson *v.* King, 25 Tex. 655.

82. Matter of Althause, 63 N. Y. App. Div. 252, 255, 71 N. Y. Suppl. 445 [*affirmed* in 168 N. Y. 670, 61 N. E. 1127].

83. People *v.* McComber, 7 N. Y. Suppl. 71, 72; Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 415, 5 S. Ct. 573, 28 L. ed. 1009; Lycoming F. Ins. Co. *v.* Haven, 95 U. S. 242, 251, 24 L. ed. 473; 2 Blackstone Comm. 386.

Chattels real defined see 7 Cyc. 127.

These chattel interests are called "real" because they issue out of or are annexed to real estates of which they have one quality, namely, that of immobility; and "chattels" because they lack the further quality of a sufficient legal indeterminate duration. Putnam *v.* Westcott, 19 Johns. (N. Y.) 73, 76; Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 415, 5 S. Ct. 573, 28 L. ed. 1009; 2 Blackstone Comm. 386.

84. Taylor *v.* Taylor, 47 Md. 295, 300; Allender *v.* Sussan, 33 Md. 11, 17, 3 Am. Rep. 171; Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, 382, 7 Atl. 873.

85. See Estates, 16 Cyc. 601.

86. *Arkansas.*— Lenow *v.* Fones, 48 Ark. 556, 557, 4 S. W. 56.

Indiana.— Mark *v.* North, 155 Ind. 575, 577, 57 N. E. 902; Schee *v.* Wiseman, 79 Ind. 389, 392; Meni *v.* Rathbone, 21 Ind. 454, 467; Barr *v.* Doe, 6 Blackf. 335, 336, 38 Am. Dec. 146.

Maryland.— Taylor *v.* Taylor, 47 Md. 295, 299.

Massachusetts.— *In re* Gay, 5 Mass. 419.

Michigan.— Buhl *v.* Kenyon, 11 Mich. 249, 251, 83 Am. Dec. 738.

New Hampshire.— Brewster *v.* Hill, 1 N. H. 350.

New Jersey.— Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, 382, 7 Atl. 873.

although under some of the statutory definitions of the terms "real estate" and "real property" chattel interests are included.[87]

3. Choses in Action. A chose in action is personal property.[88] A chose in action has been defined as a right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be inforced without action;[89] any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract;[90] or a right to personal things of which the owner has not the possession, but merely a right of action for their possession.[91] The last definition is substantially that given by Blackstone of property in action,[92] which he further says depends entirely upon contracts either express or implied;[93] but this statement is too limited,[94] as

New York.— Matter of Althause, 63 N. Y. App. Div. 252, 255, 71 N. Y. Suppl. 445 [*affirmed* in 168 N. Y. 670, 61 N. E. 1127]; State Trust Co. *v.* Casino Co., 19 N. Y. App. Div. 344, 346, 46 N. Y. Suppl. 492; Huntington *v.* Moore, 59 Hun 351, 352, 13 N. Y. Suppl. 97.

Tennessee.—Choate *v.* Tighe, 10 Heisk. 621, 624.

United States.— Lycoming F. Ins. Co. *v.* Haven, 95 U. S. 242, 250, 24 L. ed. 473.

As assets of decedent's estate see Executors and Administrators, 18 Cyc. 186.

The duration of the term of the lease is immaterial, provided it be fixed and determinate, and there be a reversion or remainder in fee in some other person (Brewster *v.* Hill, 1 N. H. 350; 2 Kent Comm. 342); and so a leasehold is merely personal property, although for nine hundred and ninety-nine years (*In re* Gay, 5 Mass. 419); and notwithstanding the lease is renewable forever, it it still an estate less than freehold and to be regarded as personal property (Allender *v.* Sussan, 33 Md. 11, 17, 3 Am. Rep. 171).

At common law chattels real included terms for years, wardships in chivalry, the next presentation to a church, estates by statute-merchant, statute-staple, elegit and the like. 2 Blackstone Comm. 386.

87. See *supra*, V, B, 2.

88. *Alabama.*— Boyd *v.* Selma, 96 Ala. 144, 11 So. 393, 16 L. R. A. 729; Enzor *v.* Hurt, 76 Ala. 595.

Connecticut.— Sherwood *v.* Sherwood, 32 Conn. 1.

Indiana.— Buck *v.* Miller, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8, 62 Am. St. Rep. 436, 37 L. R. A. 384.

Kentucky.— Trimble *v.* Mt. Sterling, 12 S. W. 1066, 11 Ky. L. Rep. 727.

Maryland.— Engel *v.* State, 65 Md. 539, 5 Atl. 249.

Missouri.—Cummings *v.* Cummings, 51 Mo. 261.

Restricted use of term.— While the words "personal property" in a general sense include choses in action, they are sometimes used in a restricted sense so that a chose in action is not included. Curtis *v.* Richland, 56 Mich. 478, 480, 23 N. W. 175; Leonard *v.* Lawrence, 32 N. J. L. 355, 356; Woodward *v.* Laporte, 70 Vt. 399, 403, 41 Atl. 443; Aultman *v.* McConnell, 34 Fed. 724.

89. Bouvier L. Dict. [*quoted* in Sellers *v.* Arie, 99 Iowa 515, 518, 68 N. W. 814; Streever *v.* Birch, 62 Hun (N. Y.) 298, 302, 17 N. Y. Suppl. 195; Campbell *v.* Perry, 9 N. Y. Suppl. 330, 333].

Other definitions are: "A right not reduced into possession." Haskell *v.* Blair, 3 Cush. (Mass.) 534, 545.

"The interest in a contract, which, in case of non-performance, can only be reduced into beneficial possession by an action or suit." Haskell *v.* Blair, *supra.*

By the California code, "a thing in action is a right to recover money or other personal property by a judicial proceeding." Haskins *v.* Jordan, 123 Cal. 157, 161, 55 Pac. 786; Henderson *v.* Henshall, 54 Fed. 320, 331, 4 C. C. A. 357.

Distinguished from "debt."— "The terms or phrases 'choses in actions' and 'debt' are used by courts to represent the same thing when viewed from opposite sides. 'The chose in action is the right of the creditor to be paid, while the debt is the obligation of the debtor to pay.'" Smead *v.* Chandler, 71 Ark. 505, 512, 76 S. W. 1066, 65 L. R. A. 353.

As incorporeal right.— "Choses in action correspond substantially to, or, at least, are included within the civil law definition of incorporeal rights." Gordon *v.* Müchler, 34 La. Ann. 604, 608.

90. Pitts *v.* Curtis, 4 Ala. 350, 351; Magee *v.* Toland, 8 Port. (Ala.) 36, 40; Black L. Dict.

91. Black L. Dict.

92. **Blackstone defines property in action** as "such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law; from whence the thing, so recoverable, is called a thing, or chose in action." 2 Blackstone Comm. 396 [*quoted* in Turner *v.* State, 1 Ohio St. 422, 426].

93. 2 Blackstone Comm. 397 [*quoted* in Van Wicklen *v.* Paulson, 14 Barb. (N. Y.) 654, 656]. See also Magee *v.* Toland, 8 Port. (Ala.) 36, 40.

94. Gillet *v.* Fairchild, 4 Den. (N. Y.) 80, 82.

"While by a chose in action is ordinarily understood a right of action for money arising under contract, the term is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a

the term "chose in action" is now used to apply to rights of action arising out of tort as well as contract,[95] and whether such right of action is for an injury to the person or to property.[96] But the term "chose in action" is used in contradistinction to chose in possession,[97] and it is not every chattel, of which the owner is not in actual possession, that may be termed a chose in action,[98] and it is not a chose in action if the owner is in either the actual or constructive possession thereof.[99] So also it must be a thing or claim for which an action may be brought,[1] although it has been held that a present right of action is not necessary.[2] While the application of the term "chose in action" must in some cases be determined by the construction of a particular statute,[3] it is, as ordinarily used, very broad and comprehensive,[4] being applied both to the right of bringing an action and the thing itself, which is the subject-matter of the right,[5] and it has been held to include bank-notes,[6] a bill of lading,[7] a certificate or share of stock in a corporation,[8]

wrong inflicted either upon the person or property. It embraces demands arising out of a tort, as well as causes of action originating in the breach of a contract." Cincinnati *v.* Hafer, 49 Ohio St. 60, 65, 30 N. E. 197.

95. Campbell *v.* Perry, 9 N. Y. Suppl. 330, 333; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80, 82; People *v.* Tioga C. Pl., 19 Wend. (N. Y.) 73, 75; Cincinnati *v.* Hafer, 49 Ohio St. 60, 65, 30 N. E. 197.

There are two recognized significations of the term "chose in action." It is sometimes used in the broad sense of all rights of action, whether *ex contractu* or *ex delicto*. In its narrower and more general sense it is confined to assignable rights of action *ex contractu*, or perhaps *ex delicto* for injuries to property, but excluding actions *ex delicto* for personal injuries. It may be used in either of these senses, and in a statute the intention of the legislature must govern. Gibson *v.* Gibson, 43 Wis. 23, 32, 28 Am. St. Rep. 527.

96. People *v.* Tioga C. Pl., 19 Wend. (N. Y.) 73, 75; Cincinnati *v.* Hafer, 49 Ohio St. 60, 65, 30 N. E. 197.

97. Gillet *v.* Fairchild, 4 Den. (N. Y.) 80, 82.

Chose in possession defined.—"A chose in possession is where a person has not only the right to enjoy but also the actual enjoyment of the thing." Abbott L. Dict. [*quoted* in Sterling *v.* Simms, 72 Ga. 51, 53].

"Personal things of which one has possession." Bouvier L. Dict. [*quoted* in Vawter *v.* Griffin, 40 Ind. 593, 601].

98. Banks *v.* Marksberry, 3 Litt. (Ky.) 275, 283.

99. Pitts *v.* Curtis, 4 Ala. 350, 352; Magee *v.* Toland, 8 Port. (Ala.) 36.

1. Divine *v.* Harvie, 7 T. B. Mon. (Ky.) 439, 443, 18 Am. Dec. 194.

2. Haskell *v.* Blair, 3 Cush. (Mass.) 534, 536, where the court, holding that a present right of action was not necessary, said: "A note, bond, or other promise not negotiable, is denominated a chose in action, before the promisor or obligor is liable to an action on it, as well as after. A note for money, payable on time, is a chose in action, as soon as it is made." But see Hillman *v.* Shannahan, 4 Oreg. 163, 18 Am. Rep. 281, holding that where the purchaser of a business takes a bond conditioned that the seller will not engage in business of the same character for a stated period, it is not a chose in action until there has been a breach of condition.

3. Gibson *v.* Gibson, 43 Wis. 23, 32, 28 Am. Rep. 527.

As used in the federal statutes limiting the jurisdiction of the circuit and district courts, the phrase "chose in action" cannot be construed as including rights of action founded on some wrongful act or neglect of duty causing damages (Ambler *v.* Eppinger, 137 U. S. 480, 11 S. Ct. 173, 34 L. ed. 765); and does not include a claim against a railroad company for overcharges in freight (Com. *v.* Chicago, etc., R. Co., 48 Fed. 177).

4. Sheldon *v.* Sill, 8 How. (U. S.) 441, 449, L. ed. 1147).

The term includes "all rights to personal property not in possession, which may be enforced by action" (Sterling *v.* Sims, 72 Ga. 51, 53; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80, 82); and "the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another, by action" (Sheldon *v.* Sill, 8 How. (U. S.) 441, 449, 12 L. ed. 1147).

5. Sterling *v.* Sims, 72 Ga. 51, 53; Black L. Dict.

"An evidence of indebtedness, under whatsoever name it may be termed, whether note, bond, bill of exchange or other instrument, and however secured, is a mere chattel personal, included within the term 'chose in action.'" Easton *v.* Peoria County, 183 Ill. 255, 257, 55 N. E. 716.

Properly speaking, there is a distinction between the security or evidence of the debt and the thing due. A deed, bill of exchange, or promissory note may be in the possession of the owner, but the money or damages due on them are no less choses in action. The chose in action is the money, damages, or thing owing, the bond or note, etc., is but the evidence of it. Richmond First Nat. Bank *v.* Holland, 99 Va. 495, 504, 39 S. E. 126, 86 Am. St. Rep. 898, 55 L. R. A. 155.

6. Turner *v.* State, 1 Ohio St. 422.

7. Knight *v.* St. Louis, etc., R. Co., 40 Ill. App. 471.

8. Spalding *v.* Paine, 81 Ky. 416; Richmond First Nat. Bank *v.* Holland, 99 Va.

unpaid subscriptions to the capital stock of a corporation,[9] a judgment of a court,[10] a life insurance policy,[11] either before or after the death of the insured,[12] a note payable in work, although the performance of the work has not been demanded,[13] a warrant drawn upon the treasurer of a municipality,[14] a bond,[15] mortgage,[16] or debt secured by bond and mortgage,[17] an indebtedness for borrowed money,[18] a debt due a plaintiff from a third person which defendant agreed to pay to the extent of a certain fund which was put into defendant's hands for that purpose,[19] a claim for compensation for land taken by a city,[20] any claim on which an action of assumpsit would lie at common law,[21] a right to county bonds held in escrow and to be delivered upon the completion of a contract,[22] a right given by statute to recover money paid for intoxicating liquors,[23] the right of the owner of a liquor tax certificate to recover its surrender value upon a discontinuation of the business under a statute requiring it to be refunded,[24] a widow's right of dower in lands previous to an assignment thereof,[25] a right to have the interest of an heir in an estate in the hands of an administrator,[26] a right of action for breach of contract,[27] or for the specific performance of a contract,[28] or for a tort connected with contract,[29] or for the conversion of personal property,[30] or an injury to real property,[31] or for a personal injury,[32] or for damages for malicious abuse of legal process,[33] or for false representations as to the value of a thing sold,[34] or an action of review which, by virtue of an adjudication of bankruptcy, became vested in the assignee.[35] The term "chose in action" has been held not to include credit, although credit may be a benefit as a means of procuring property,[36] a claim for a loss of services by the injury of an infant who was bound to serve plaintiff in consideration of his support and maintenance,[37] rent not yet due, which is a part

495, 39 S. E. 126, 86 Am. St. Rep. 898, 55 L. R. A. 155.

9. Barkalow *v.* Totten, 53 N. J. Eq. 573, 32 Atl. 2; Coler *v.* Grainger County, 74 Fed. 16, 20 C. C. A. 267.

10. Tiffany *v.* Stewart, 60 Iowa 207, 14 N. W. 241; Murphy *v.* Cochran, 1 Hill (N. Y.) 339.

11. Prudential Ins. Co. *v.* Hunn, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; Ionia County Sav. Bank *v.* McLean, 84 Mich. 625, 628, 48 N. W. 159.

12. Steele *v.* Gatlin, 115 Ga. 929, 42 S. E. 253, 59 L. R. A. 129.

13. Haskell *v.* Blair, 3 Cush. (Mass.) 534.

14. Easton *v.* Peoria County, 183 Ill. 255, 55 N. E. 716.

15. Winfree *v.* Bagley, 102 N. C. 515, 9 S. E. 198.

16. Hall *v.* Bartlett, 9 Barb. (N. Y.) 297; Hill *v.* Winne, 12 Fed. Cas. No. 6,503, 1 Biss. 275.

17. Sheldon *v.* Sill, 8 How. (U. S.) 441, 12 L. ed. 1147; Hill *v.* Winne, 12 Fed. Cas. No. 6,503, 1 Biss. 275.

18. Scripps *v.* Fulton County, 183 Ill. 278, 55 N. E. 700; Bushnell *v.* Kennedy, 9 Wall. (U. S.) 387, 19 L. ed. 736.

19. Mexican Nat. R. Co. *v.* Davidson, 157 U. S. 201, 15 S. Ct. 563, 39 L. ed. 672.

20. People *v.* Halsted, 26 N. Y. App. Div. 316, 49 N. Y. Suppl. 685 [*affirmed* in 159 N. Y. 533, 53 N. E. 1130].

21. Merriwether *v.* Bell, 58 S. W. 987, 22 Ky. L. Rep. 844.

22. Jackson, etc., Co. *v.* Pearson, 60 Fed. 113.

23. Sellers *v.* Arie, 99 Iowa 515, 68 N. W. 814.

24. Niles *v.* Mathusa, 20 N. Y. App. Div. 483, 47 N. Y. Suppl. 38 [*affirmed* in 162 N. Y. 546, 57 N. E. 184].

25. Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200; Payne *v.* Becker, 87 N. Y. 153; Tompkins *v.* Fonda, 4 Paige Ch. (N. Y.) 448; Boltz *v.* Stolz, 41 Ohio St. 540; Maxon *v.* Gray, 14 R. I. 641.

26. Sterling *v.* Sims, 72 Ga. 51.

27. Goldman *v.* Furness, 101 Fed. 467; Simons *v.* Ypsilanti Paper Co., 33 Fed. 193.

28. Shoecraft *v.* Bloxham, 124 U. S. 730, 8 S. Ct. 686, 31 L. ed. 574; Corbin *v.* Black Hawk County, 105 U. S. 659, 26 L. ed. 1136.

29. Denning *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215.

30. McKee *v.* Judd, 12 N. Y. 622, 64 Am. Dec. 515; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80; Denning *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215.

31. Cincinnati *v.* Hafer, 49 Ohio St. 60, 30 N. E. 197.

32. Bennett *v.* Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Campbell *v.* Perry, 9 N. Y. Suppl. 330.

33. Noonan *v.* Orton, 34 Wis. 259, 17 Am. Rep. 441.

34. Henderson *v.* Henshall, 54 Fed. 320, 4 C. C. A. 357.

35. Zollar *v.* Janvrin, 49 N. H. 114, 6 Am. Rep. 469.

36. Dry Dock Bank *v.* American L. Ins., etc., Co., 3 N. Y. 344.

37. Streever *v.* Birch, 62 Hun (N. Y.) 298, 17 N. Y. Suppl. 195, holding that such a claim is not a chose in action, because the contract, not being binding or enforceable by plaintiff, he has no property therein.

of the realty,[38] a right of remainder in a slave devised to another for a term of years,[39] a slave held by a bailee for hire, it being a thing in possession,[40] or a debt due from a state for which an appropriation has been made, the state not being suable.[41]

D. Conversion or Change of Form — 1. In General. The form or character of property may, in some instances, be changed from personalty to realty, or from realty to personalty by the act of the owner or other person, in dealing with it.[42] Thus, where manure lies on the soil where it was originally deposited it becomes a part of the soil and is to be treated as real estate;[43] but if it be severed from the soil, gathered up and secured for use elsewhere, it becomes a mere personal chattel,[44] and if, after having been gathered up it is spread upon the land and appropriated to fertilizing purposes, it again becomes realty.[45] Stones taken from the ground and sold, and removed to another part of the premises, become personal property by the severance.[46] Rails made up into a fence upon the land become a part of the realty,[47] but old fence rails, constituting the refuse of a removed fence, are personalty.[48] Brick and lumber, although personalty before they are put into a house, become by such use a part of the realty and remain so until severed and reconverted by the owner;[49] but the sale of a house and the materials in it with the understanding that they are to be removed constitutes a severance thereof from the land and converts them into personal property.[50] It is held, however, that, to convert an article which is a part of the realty into a chattel by severance, the act must be done by one having the right or authority to do so,[51] and with the intention of so converting it,[52] and that what is realty continues to be so until the owner by his election gives it a different character.[53] So in the absence of any act to show a severance, the bricks of houses destroyed by fire and the lumber of those blown down by storms remain realty,[54] and pass with a conveyance of the land so that they cannot subsequently be removed therefrom by the former owner.[55]

2. Severance of Trees. Trees growing upon the land are a part of the realty,[56] but ordinarily when severed therefrom they become personal property,[57] although

38. Van Wicklen *v.* Paulson, 14 Barb. (N. Y.) 654.

39. Pitts *v.* Curtis, 4 Ala. 350.

40. Magee *v.* Toland, 8 Port. (Ala.) 36.

41. Divine *v.* Harvie, 7 T. B. Mon. (Ky.) 439, 18 Am. Dec. 194.

42. Stone *v.* Proctor, 2 D. Chipm. (Vt.) 108.

43. Goodrich *v.* Jones, 2 Hill (N. Y.) 142; French *v.* Freeman, 43 Vt. 93; Stone *v.* Proctor, 2 D. Chipm. (Vt.) 108.

Manure dropped in the street does not, as in the case of that made in the usual course of husbandry upon a farm, become appurtenant to the soil but is to be regarded as personal property. Haslem *v.* Lockwood, 37 Conn. 500, 9 Am. Rep. 350.

44. French *v.* Freeman, 43 Vt. 93.

45. Ruckman *v.* Outwater, 28 N. J. L. 581.

46. Fulton *v.* Norton, 64 Me. 410.

47. State *v.* Graves, 74 N. C. 396.

48. Fullington *v.* Goodwin, 57 Vt. 641.

49. Guernsey *v.* Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270.

50. Stackpole *v.* Eastern R. Co., 62 N. H. 493.

51. Lewis *v.* Rosler, 16 W. Va. 333.

52. Goodrich *v.* Jones, 2 Hill (N. Y.) 142; Lewis *v.* Rosler, 16 W. Va. 333.

Poles used in cultivating hops, which are taken down for the purpose of gathering the crop and piled up with the intention of replacing them in the next season of hop raising, retain their character as a part of the realty. Bishop *v.* Bishop, 11 N. Y. 123, 62 Am. Dec. 68.

53. Guernsey *v.* Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270; Leidy *v.* Proctor, 97 Pa. St. 486; Rogers *v.* Gilinger, 30 Pa. St. 185, 72 Am. Dec. 694.

The criterion by which it is to be determined whether that which was once a part of the realty has become personalty on being detached is not the capability of restoration to the former connection, but the true rule would seem rather to be that what was real shall continue to be so until the owner of the freehold shall by his election give it a different character. Rogers *v.* Gilinger, 30 Pa. St. 185, 72 Am. Dec. 694.

54. Guernsey *v.* Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270; Rogers *v.* Gilinger, 30 Pa. St. 185, 72 Am. Dec. 694.

55. Guernsey *v.* Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270.

56. See *supra*, V, B, 3.

57. *California.*— Kimball *v.* Lohmas, 31 Cal. 154.

Louisiana.— Woodruff *v.* Roberts, 4 La. Ann. 127.

Maine.— Whidden *v.* Seelye, 40 Me. 247,

the title of the owner to them is not affected thereby,[58] and after severance they will not pass by a subsequent conveyance of the land.[59] This conversion from realty to personalty ordinarily takes place, although the trees are severed by a trespasser or person temporarily in possession of the land but having no right to cut them;[60] but the trees severed are the property of the person owning the fee in the land or estate in reversion or remainder.[61] Where a sale is made of trees which are to be removed within a given time, those cut within the time limited become personalty,[62] although not actually removed from the land;[63] but trees not cut within the time limited do not become personalty.[64] In order to constitute a con-

63 Am. Dec. 661; Moody *v.* Whitney, 34 Me. 563; Richardson *v.* York, 14 Me. 216.

Massachusetts.— Giles *v.* Simonds, 15 Gray 441, 77 Am. Dec. 373; Douglas *v.* Shumway, 13 Gray 498; Clark *v.* Holden, 7 Gray 8, 66 Am. Dec. 450.

Michigan.— Macomber *v.* Detroit, etc., R. Co., 108 Mich. 491, 66 N. W. 376, 62 Am. St. Rep. 713, 32 L. R. A. 102; White *v.* King, 87 Mich. 107, 49 N. W. 518.

Minnesota.— Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 233.

Missouri.—Kelley *v.* Vandiver, 75 Mo. App. 435.

Nevada.— Peck *v.* Brown, 5 Nev. 81.

New Hampshire.—Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173.

New Jersey.— Porch *v.* Fries, 18 N. J. Eq. 204.

New York.— Pierrepont *v.* Barnard, 6 N. Y. 279 [*reversing* 5 Barb. 364]; Warren *v.* Leland, 2 Barb. 613.

North Carolina.— Wall *v.* Williams, 91 N. C. 477.

Oregon.— Schmidt *v.* Vogt, 8 Oreg. 344.

Pennsylvania.— Brewer *v.* Fleming, 51 Pa. St. 102.

Vermont.— Yale *v.* Seely, 15 Vt. 221.

Wisconsin.— Hicks *v.* Smith, 77 Wis. 146, 46 N. W. 133; Golden *v.* Clock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32.

See 40 Cent. Dig. tit. "Property," § 8.

Trees which have fallen or been blown down by storms do not lose their character of realty unless the owner does some act showing an intention on his part to give them a different character, in the absence of which they will pass by a conveyance of the land as a part thereof. Leidy *v.* Proctor, 97 Pa. St. 486.

58. Kimball *v.* Lohmas, 31 Cal. 154; Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661; Kelley *v.* Vandiver, 75 Mo. App. 435; Brewer *v.* Fleming, 51 Pa. St. 102.

59. Woodruff *v.* Roberts, 4 La. Ann. 127; Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 233; Peck *v.* Brown, 5 Nev. 81; Schmidt *v.* Voght, 8 Oreg. 344.

Although the severance is merely constructive as by a valid sale and conveyance of the trees, they do not pass by a subsequent conveyance of the land (Warren *v.* Leland, 2 Barb. (N. Y.) 613); although it is held that if the sale or contract is oral, a purchaser of the land without notice thereof will be entitled to the trees, and the vendee of the trees must look to his vendor for damages (Byassee *v.* Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; Lockeshan *v.* Miller, 16 Ky. L. Rep. 55); but one who purchases the land with notice of such sale will be bound thereby (New York, etc., Iron Co. *v.* Green County Iron Co., 11 Heisk. (Tenn.) 434).

60. Kimball *v.* Lohmas, 31 Cal. 154; Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661; Moody *v.* Whitney, 34 Me. 563; Richardson *v.* York, 14 Me. 216; Wall *v.* Williams, 91 N. C. 477; Brewer *v.* Fleming, 51 Pa. St. 102.

Exception to rule.— Ordinarily timber cut by a trespasser or by a tenant without right becomes personalty of the owner of the land, and on his death passes to the personal representative instead of to the heirs, but if the person who cut it is one who would profit by its conversion into personalty, equity will not permit him to gain an advantage from his own wrongful act, but it will be held to retain its character as realty and to pass to those who would have been entitled thereto if it had not been severed. Porch *v.* Fries, 18 N. J. Eq. 204.

61. Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661; Richardson *v.* York, 14 Me. 216; Wall *v.* Williams, 91 N. C. 477.

Remedies of owner.— Where trees are severed by a trespasser or one having no right to do so, the owner may maintain replevin (Kimball *v.* Lohmas, 31 Cal. 154; Richardson *v.* York, 14 Me. 216; Brewer *v.* Fleming, 51 Pa. St. 102); or sue in trover for the conversion (Whidden *v.* Seelye, 40 Me. 247, 63 Am. Dec. 661; Moody *v.* Whitney, 34 Me. 563); or if not in possession of the land may enter and take possession of the timber (Clark *v.* Holden, 7 Gray (Mass.) 8, 66 Am. Dec. 450); or maintain an action on the case for damages in the nature of waste (see Wall *v.* Williams, 91 N. C. 477); or if the timber has been sold may waive the tort and recover upon a count for money had and received to his use (Wall *v.* Williams, *supra*).

62. Douglas *v.* Shumway, 13 Gray (Mass.) 498; Macomber *v.* Detroit, etc., R. Co., 108 Mich. 491, 66 N. W. 376, 62 Am. St. Rep. 713, 32 L. R. A. 102; Yale *v.* Seely, 15 Vt. 221; Hicks *v.* Smith, 77 Wis. 146, 46 N. W. 133; Golden *v.* Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32.

63. Yale *v.* Seely, 15 Vt. 221; Hicks *v.* Smith, 77 Wis. 146, 46 N. W. 133; Golden *v.* Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32.

Effect of stipulation as to time for cutting and removal see LOGGING, 25 Cyc. 1551, 1552.

64. Bell County Land, etc., Co. *v.* Moss, 97 S. W. 354, 30 Ky. L. Rep. 6.

version the severance need not be actual but may be constructive,[65] as by a valid sale or conveyance of the timber, or of the land reserving the right to the timber;[66] but there is a direct conflict of authority as to what will constitute a valid conveyance, sale, or contract in regard to standing trees under the statute of frauds.[67] It is settled, however, that a license to enter upon land and cut and remove timber may be given by parol,[68] and that an ineffectual attempt to sell or convey may operate as such a license,[69] and timber actually severed prior to a revocation of such a license will become personal property of the purchaser or licensee.[70]

E. What Law Governs — 1. Real Property. It is a principle firmly established that the law of the state wherein real estate is situated (*lex loci rei sitæ*) controls and governs its descent and alienation; the construction, validity, and effect of wills and other conveyances thereof; and the capacity of the parties to such contracts or conveyances, and their rights thereunder.[71] This rule is without

65. Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Warren *v.* Leland, 2 Barb. (N. Y.) 613.

66. Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Warren *v.* Leland, 2 Barb. (N. Y.) 613.

Trees selected, marked, and sold are constructively severed and become personalty. Asher Lumber Co. *v.* Cornett, 58 S. W. 438, 22 Ky. L. Rep. 569, 56 L. R. A. 672.

Sale in contemplation of immediate severance.— It has been held that a sale of trees, although oral, if made in contemplation of immediate severance and the trees are selected, marked, or designated, operates as a constructive severance and converts them into personalty (Tilford *v.* Dotson, 106 Ky. 755, 51 S. W. 583, 21 Ky. L. Rep. 333; Byassee *v.* Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; Cain *v.* McGuire, 13 B. Mon. (Ky.) 340; Lockeshan *v.* Miller, 16 Ky. L. Rep. 55; Strause *v.* Berger, 220 Pa. St. 367, 69 Atl. 818); but if the sale is not in contemplation of immediate severance, they do not become personal property (Bell County Land, etc., Co. *v.* Moss, 97 S. W. 354, 30 Ky. L. Rep. 6; Asher Lumber Co. *v.* Cornett, 63 S. W. 974, 23 Ky. L. Rep. 602, 56 L. R. A. 672); and if sold in contemplation of immediate severance and they are not removed within a reasonable time or within the time specified or a reasonable time thereafter, they cease to be personal property and are restored to their rightful position as a part of the realty (Bell County Land Co. *v.* Moss, *supra*).

67. Kingsley *v.* Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Hirth *v.* Graham, 50 Ohio St. 57, 33 N. E. 90, 40 Am. St. Rep. 641, 19 L. R. A. 721.

Statute of frauds as applicable to sales, conveyances, and contracts relating to growing trees see Frauds, Statute of, 20 Cyc. 212, 217, 229, 244.

68. See Frauds, Statute of, 20 Cyc. 217; Licenses, 25 Cyc. 641, 649.

69. See Licenses, 25 Cyc. 642, 649.

70. *Maine.*— Erskine *v.* Plummer, 7 Me. 447, 22 Am. Dec. 216.

Massachusetts.— Drake *v.* Wells, 11 Allen 141; Giles *v.* Simonds, 15 Gray 441, 77 Am. Dec. 373; Nettleton *v.* Sikes, 8 Metc. 34.

Michigan.— White *v.* King, 87 Mich. 107, 49 N. W. 518; Spalding *v.* Archibald, 52 Mich. 365, 17 N. W. 940, 50 Am. Rep. 253.

New York.—Pierrepont *v.* Barnard, 6 N. Y. 279 [*reversing* 5 Barb. 364]; Bennett *v.* Scutt, 18 Barb. 347.

South Dakota.—Price, etc., Co. *v.* Madison, 17 S. D. 247, 95 N. W. 933.

Vermont.— Yale *v.* Seeley, 15 Vt. 221.

See 40 Cent. Dig. tit. "Property," § 8.

Right of licensee to enter and remove trees cut prior to the revocation of the license see Licenses, 25 Cyc. 649, 650.

71. *Florida.*— Walling *v.* Christian, etc., Grocery Co., 41 Fla. 479, 27 So. 46, 47 L. R. A. 608; Thompson *v.* Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193.

Illinois.— Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

Iowa.— Acker *v.* Priest, 92 Iowa 610, 61 N. W. 235.

Kentucky.— Short *v.* Galway, 83 Ky. 501, 4 Am. St. Rep. 168; Williams *v.* Jones, 14 Bush 418; Sneed *v.* Ewing, 5 J. J. Marsh. 460, 22 Am. Dec. 41.

Minnesota.— Bronson *v.* St. Croix Lumber Co., 44 Minn. 348, 46 N. W. 570.

Missouri.— Depas *v.* Mayo, 11 Mo. 314, 49 Am. Dec. 88.

Nebraska.—Morris *v.* Linton, 74 Nebr. 411, 104 N. W. 927.

New Hampshire.— Holbrook *v.* Bowman, 62 N. H. 313; Bryant *v.* Morrison, 44 N. H. 288; Eyre *v.* Storer, 37 N. H. 114; Heydock's Appeal, 7 N. H. 496.

New Jersey.— Bentley *v.* Whittemore, 18 N. J. Eq. 366 [*affirmed* in 19 N. J. Eq. 462, 97 Am. Dec. 671].

New York.— Hosford *v.* Nichols, 1 Paige 220.

Ohio.— Wills *v.* Cooper, 2 Ohio 124.

Pennsylvania.— Swearingen *v.* Barnsdall, 210 Pa. St. 84, 59 Atl. 477; Williams *v.* Maus, 6 Watts 278, 31 Am. Dec. 465.

South Carolina.—Lamar *v.* Scott, 3 Strobh. 562.

Tennessee.— McCullum *v.* Smith, Meigs 342, 33 Am. Dec. 147.

Texas.— Barnett *v.* Pool, 23 Tex. 517.

United States.—Clarke *v.* Clarke, 178 U. S. 186, 20 S. Ct. 873, 44 L. ed. 1028; DeVaughan *v.* Hutchinson, 165 U. S. 566, 17

exception,[72] and it is not in the power of any state by any legislative act to prescribe the mode in which lands in another state may be disposed of or title thereto passed from one person to another.[73]

2. Personal Property. The general rule is that personal property has no locality but follows the person of the owner, and is assignable, transferable, or transmissible by his voluntary act, according to the laws of the country of his domicile.[74] The soundness of this rule as a general proposition has been seriously questioned,[75] and it is certainly not of universal application,[76] but subject to various exceptions;[77] and the tendency of modern authority is steadily toward a greater recognition of the law of the situs,[78] and a restriction of the old rule to

S. Ct. 461, 41 L. ed. 827; Brine *v.* Hartford F. Ins. Co., 96 U. S. 627, 24 L. ed. 858; McGoon *v.* Scales, 9 Wall. 23, 19 L. ed. 545; Oakley *v.* Bennett, 11 How. 33, 13 L. ed. 593; Morris *v.* Harmer, 7 Pet. 554, 8 L. ed. 781; Darby *v.* Mayer, 10 Wheat. 465, 6 L. ed. 367; McCormick *v.* Sullivant, 10 Wheat. 192, 6 L. ed. 300; Kerr *v.* Moon, 9 Wheat. 565, 6 L. ed. 161; Clark *v.* Graham, 6 Wheat. 577, 5 L. ed. 334; U. S. *v.* Crosby, 7 Cranch 115, 3 L. ed. 287; Society for Propagation of Gospel *v.* Wheeler, 22 Fed. Cas. No. 13,156, 2 Gall. 105.

See 40 Cent. Dig. tit. "Property," § 3.

"It is a doctrine firmly established that the law of a state in which land is situated controls and governs its transmission by will or its passage in case of intestacy" (Clarke *v.* Clarke, 178 U. S. 186, 190, 20 S. Ct. 873, 44 L. ed. 1028); and "that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances" (De Vaughan *v.* Hutchinson, 165 U. S. 566, 570, 17 S. Ct. 461, 41 L. ed. 827).

Equitable conversion of realty into personalty by will see Conversion, 9 Cyc. 840 note 59.

Whether a trust interest has been created in lands lying in another state must be determined by the laws of that state where the land is situated. Acker *v.* Priest, 92 Iowa 610, 61 N. W. 235.

72. Bentley *v.* Whittemore, 18 N. J. Eq. 366 [*reversed* on other grounds in 19 N. J. Eq. 462, 79 Am. Dec. 671].

73. Wills *v.* Cowper, 2 Ohio 124.

74. *Georgia.*—Molyneux *v.* Seymour, 30 Ga. 440, 76 Am. Dec. 662.

Kentucky.—Short *v.* Galway, 83 Ky. 501, 4 Am. St. Rep. 168; U. S. Bank *v.* Huth, 4 B. Mon. 423.

Missouri.—Minor *v.* Cardwell, 37 Mo. 350, 90 Am. Dec. 390.

New Hampshire.—Heydock's Appeal, 7 N. H. 496; Saunders *v.* Williams, 5 N. H. 213.

North Carolina.—McLean *v.* Hardin, 56 N. C. 294, 69 Am. Dec. 740.

Oregon.—Johnson *v.* Oregon City Council, 3 Oreg. 13, 2 Oreg. 327.

Pennsylvania.—Speed *v.* May, 17 Pa. St. 91, 55 Am. Dec. 540.

West Virginia.—Yost *v.* Graham, 50 W. Va. 199, 40 S. E. 361.

See 40 Cent. Dig. tit. "Property," § 3.

A voluntary transfer of personal property, including choses in action, rights, and credits, if valid where made will be recognized by the courts of another state provided it is not contrary to good morals or repugnant to the policy or positive institutions of that state. Walters *v.* Whitlock, 9 Fla. 86, 76 Am. Dec. 607.

Trust in personal property.— The validity of a will creating a trust in personal property will be determined by the law of the testator's domicile and not that of the place where the property is situated (Hussey *v.* Sargent, 116 Ky. 53, 75 S. W. 211, 25 Ky. L. Rep. 315); and the laws of the state in which a trust of personalty was created and in which the parties interested then resided will govern questions relating to the interests of a beneficiary (Paterson First Nat. Bank *v.* National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139).

75. Ames Iron Works *v.* Warren, 76 Ind. 512, 514, 40 Am. Rep. 258, where the court said: "The general rule must be deemed settled although many judges and many authors have spoken of it with bitter censure and yielded to it with extreme reluctance. . . . Recognizing the fact that the general rule is itself of doubtful soundness, courts have created many exceptions."

76. Green *v.* Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109.

77. Ames Iron Works *v.* Warren, 76 Ind. 512, 40 Am. Rep. 258; U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Loftus *v.* Farmers', etc., Nat. Bank, 133 Pa. St. 97, 19 Atl. 347, 7 L. R. A. 313; Milne *v.* Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466.

78. Loftus *v.* Farmers', etc., Nat. Bank, 133 Pa. St. 97, 19 Atl. 347, 7 L. R. A. 313.

The old rule expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the middle ages when movable property consisted chiefly of gold and jewels which could easily be carried by the owner from place to place or secreted in spots known only to himself. In modern times since the great increase in amount and variety of personal property not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. Pullman's Palace-Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 S. Ct. 876, 35 L. ed. 613.

personal property of an intangible character.[79] The rule is based upon a legal fiction,[80] which should yield whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined.[81] It is also subject to the right of every state to make laws for the protection and security of its own citizens and to regulate modes of transfer with regard to property actually situated within its jurisdiction,[82] and if when adopted such regulations conflict with the general rule, the former will prevail.[83] So for some purposes personal property of a tangible character may be said to have locality and be subject to the law of the state where it is situated,[84] as in regard to the rights of creditors;[85] and for purposes of taxation, personalty may be separated from the owner and be taxed, on its account, at the place where it is actually located.[86]

VI. OWNERSHIP AND INCIDENTS THEREOF.

Ownership has been defined as the right by which a thing belongs to an individual to the exclusion of all other persons,[87] but ownership does not always mean absolute ownership.[88] Ownership may be absolute or conditional,[89] and there may be distinct properties held by several persons in the same thing.[90] The ownership of property may be in the sovereign, and the use private or public,[91]

79. Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 [*reversing* 118 Ky. 131, 80 S. W. 490, 81 S. W. 268, 26 Ky. L. Rep. 23, 397].

80. Ames Iron Works *v.* Warren, 76 Ind. 512, 40 Am. Rep. 258; Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep. 616.

81. Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep 616; Green *v.* Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109.

82. U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Loftus *v.* Farmers', etc., Nat. Bank, 133 Pa. St. 97, 19 Atl. 347, 7 L. R. A. 313.

83. U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep 616; Green *v.* Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109.

84. Ames Iron Works *v.* Warren, 76 Ind. 512, 40 Am. Rep. 258; Milne *v.* Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466; Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 [*reversing* 118 Ky. 131, 80 S. W. 490, 81 S. W. 268, 26 Ky. L. Rep. 23, 397]; Pullman's Palace-Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 S. Ct. 876, 35 L. ed. 613; Betton *v.* Valentine, 3 Fed. Cas. No. 1,370, 1 Curt. 168.

85. Ames Iron Works *v.* Warren, 76 Ind. 512, 40 Am. Rep. 258; Milne *v.* Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466; Betton *v.* Valentine, 3 Fed. Cas. No. 1,370, 1 Curt. 168; 2 Kent Comm. 406.

86. Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 [*reversing* 118 Ky. 131, 80 S. W. 490, 81 S. W. 268, 26 Ky. L. Rep. 23, 397]; Pullman's Palace-Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 S. Ct. 876, 35 L. ed. 613; Tappan *v.* Merchants Nat. Bank, 19 Wall. (U. S.) 490, 22 L. ed. 189. See also, generally, TAXATION.

87. Converse *v.* Kellogg, 7 Barb. (N. Y.) 590, 597; Hill *v.* Cumberland Valley Mut. Protection Co., 59 Pa. St. 474, 477.

Own defined see 29 Cyc. 1548.

Owner defined see 29 Cyc. 1549.

Seizin and ownership as to corporeal hereditaments in the common-law sense of the term mean practically the same thing (Ft. Dearborn Lodge *v.* Klein, 115 Ill. 177, 182, 3 N. E. 272, 56 Am. Rep. 133); and ownership or seizin of real property is a fact that may be pleaded, proved, and found as a material ultimate fact in any case involving title to the property (Gavin *v.* Swain, 113 Cal. 324, 45 Pac. 677).

Ownership of particular things.— Manure left in the streets is to be regarded as abandoned by the owners of the animals and belongs to the first person who gathers it up. Haslem *v.* Lockwood, 37 Conn. 500, 9 Am. Rep. 350. One who employs another to make brick in the yard and with the machinery of the employer, at a stated price per thousand, is the owner of the brick when made, although by agreement they are to be inspected and to be of a certain quality, and payment may be refused if they do not come up to a certain standard. Quillan *v.* Central R., etc., Co., 52 Ga. 374. An aerolite weighing sixty-six pounds, which falls from the sky and is imbedded in the soil to a depth of three feet, is the property of the owner of the land rather than of the first person who finds it and digs it up. Goddard *v.* Winchell, 86 Iowa 71, 52 N. W. 1124, 41 Am. St. Rep. 481, 17 L. R. A. 788.

88. Edwards, etc., Lumber Co. *v.* Mosher, 88 Wis. 672, 677, 60 N. W. 264.

Possession as ownership see 31 Cyc. 926.

89. Converse *v.* Kellogg, 7 Barb. (N. Y.) 590, 597.

90. Wilson *v.* Harris, 21 Mont. 374, 387, 54 Pac. 46.

There is no inconsistency in a concurrent existence of a qualified ownership of property in one party and a control and dominion over it for certain purposes in another party. Oliver *v.* Lake, 3 La. Ann. 78, 83.

91. Hart *v.* Burnett, 15 Cal. 530, 548.

or the ownership may be public and the use private,[92] or the ownership or legal title may be in one person and the right of possession in another,[93] or either the ownership or possession may be in several persons jointly or in common.[94] The chief incidents of the ownership of property are the rights to its possession, use, and enjoyment,[95] and to sell or otherwise dispose of it according to the will of the owner,[96] usually to the exclusion of all others,[97] and without any diminution or control save only by the laws of the land.[98] Indeed property is often defined as the right to possess, use, enjoy, and dispose of a thing,[99] or the power of one to do with it as he pleases so long as he does not violate the law.[1] On the other hand property is held subject to certain duties, restraints, and liabilities,[2] such as that each person must so use his property as not unnecessarily to injure another,[3] that generally speaking it shall be liable for the debts of the owner,[4] subject to taxation,[5] liable to be taken for public use in the exercise of the power of eminent domain,[6] and lastly all property is held subject to such restraints and regulations as the state may constitutionally make in the exercise of its police power.[7]

VII. Possession and Incidents Thereof.[8]

Physical occupancy and legal possession of property are not necessarily identical,[9] but, although the presumption arising therefrom is a rebuttable one,[10] possession is *prima facie* evidence of title to and ownership of either real[11] or personal

92. Hart *v.* Burnett, 15 Cal. 530, 548.

93. Oliver *v.* Lake, 3 La. Ann. 78, 83; Wilson *v.* Harris, 21 Mont. 374, 387, 54 Pac. 46.

94. See, generally, Joint Tenancy, 23 Cyc. 483 *et seq.*; Tenancy in Common.

95. Chicago, etc., R. Co. *v.* Englewood Connecting R. Co., 115 Ill. 375, 385, 4 N. E. 246, 56 Am. Rep. 173; Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308, 321; Jaynes *v.* Omaha St. R. Co., 53 Nebr. 631, 653, 74 N. W. 67, 39 L. R. A. 751; Wynehamer *v.* People, 13 N. Y. 378, 396.

96. Sherman *v.* Elder, 24 N. Y. 381, 384; Wynehamer *v.* People, 13 N. Y. 378, 396; *Ex p.* Law, 15 Fed. Cas. No. 8,126, 35 Ga. 285, 295; 1 Blackstone Comm. 138.

The right of alienation of real property is not of equal antiquity with that of taking it by descent, but is the result of a long process of development and various statutory enactments. See 2 Blackstone Comm. 287 *et seq.*

It is said that there is no definition of property which does not include the power of disposition and sale as well as the right of private use and enjoyment. Wynehamer *v.* People, 13 N. Y. 378, 396.

97. Rigney *v.* Chicago, 102 Ill. 64, 77; Jaynes *v.* Omaha St. R. Co., 53 Nebr. 631, 653, 74 N. W. 67, 39 L. R. A. 751.

98. Stevens *v.* State, 2 Ark. 291, 299, 35 Am. Dec. 72; Crow *v.* State, 14 Mo. 237, 262; Wynehamer *v.* People, 13 N. Y. 378, 396; 1 Blackstone Comm. 138.

99. Chicago, etc., R. Co. *v.* Englewood Conn. R. Co., 115 Ill. 375, 385, 4 N. E. 246, 56 Am. Rep. 173; Easton *v.* Boston, etc., R. Co., 51 N. H. 504, 511, 12 Am. Rep. 147; *Ex p.* Law, 15 Fed. Cas. No. 8,126, 35 Ga. 285, 295.

Property defined see *supra*, I.

"Property in its legal sense is not the thing itself, but certain rights in and over the thing, those rights being: 1, user; 2, exclusion; 3, disposition." Dixon *v.* People, 168 Ill. 179, 190, 48 N. E. 108, 39 L. R. A. 116 [*affirming* 63 Ill. App. 585].

1. Smith *v.* Campbell, 10 N. C. 590, 597.

2. West River Bridge Co. *v.* Dix, 6 Wall. (U. S.) 507, 532, 12 L. ed. 535.

3. Patterson *v.* Kentucky, 97 U. S. 501, 505, 24 L. ed. 1115; Munn *v.* Illinois, 94 U. S. 113, 145, 24 L. ed. 77.

This rule is expressed in the maxim "*sic utere tuo ut alienum non lædas.*" Munn *v.* Illinois, 94 U. S. 113, 145, 24 L. ed. 77.

4. Hough *v.* Cress, 57 N. C. 295.

Property subject to attachment see Attachment, 4 Cyc. 554.

Property subject to execution see Executions, 17 Cyc. 940.

Property subject to garnishment see Garnishment, 20 Cyc. 990.

5. Munn *v.* Illinois, 94 U. S. 113, 145, 24 L. ed. 77. See also, generally, Taxation.

6. New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196, 198; Munn *v.* Illinois, 94 U. S. 113, 145, 24 L. ed. 77; West River Bridge Co. *v.* Dix, 6 Wall. (U. S.) 507, 532, 12 L. ed. 535. See also, generally, Eminent Domain, 15 Cyc. 602.

7. Com. *v.* Alger, 7 Cush. (Mass.) 53, 85; Patterson *v.* Kentucky, 97 U. S. 501, 505, 24 L. ed. 1115; Munn *v.* Illinois, 94 U. S. 113, 145, 24 L. ed. 77. See also, generally, Constitutional Law, 8 Cyc. 866.

8. **Possession defined** and compared with occupancy, seizin, ownership, and title see 31 Cyc. 923–952.

9. State *v.* King, 110 La. 961, 35 So. 181.

10. See Evidence, 16 Cyc. 1074.

11. Finch *v.* Alston, 2 Stew. & P. (Ala.) 83, 23 Am. Dec. 299; Brookings *v.* Woodin, 74 Me. 222; Bradshaw *v.* Ashley, 180 U. S. 59, 21 S. Ct. 297, 45 L. ed. 423; 2 Blackstone Comm. 196. See also, generally, Evidence, 16 Cyc. 1074.

But the fact that a railroad company entered into possession of terminal property,

property,[12] and is good against any one but the true owner,[13] and so one in the actual possession of land, although without title, is entitled to retain possession thereof as against a stranger.[14] Possession of land is also notice to the world of a claim and interest, equitable as well as legal.[15] In the absence of actual possession of land in any one else, the possession follows the legal title, and the holder thereof is deemed to be in constructive possession,[16] and so the possession of wild and vacant lands follows the record title.[17] So also actual possession of a part, with title to the whole of a tract of land coupled with an intent to possess the whole, is possession of the whole;[18] but there cannot be two conflicting constructive possessions at the same time of the same land;[19] and where one in actual possession of a tract of land conveys legal title to that portion on which is the actual possession, his constructive possession of the residue of the tract ceases.[20]

VIII. TITLE TO AND MODES OF ACQUIRING OR LOSING PROPERTY.

A. Definition and Nature of Title. The term "title" has been defined as the right whereby we hold our own;[21] the just or lawful cause or ground of possessing that which is ours;[22] that which is the foundation of ownership,[23] of either real or personal property;[24] that which constitutes a just cause of exclusive possession.[25] Title has also been defined as the evidence of the right which a person has to the possession of property,[26] or the evidence of ownership;[27] the means whereby the owner is entitled to assert or maintain his possession,[28] or the means whereby a person's right to property is established;[29] the right of the owner, considered with reference either to the manner in which it has been acquired, or its capacity

the title to which was in another, and made improvements thereon, does not tend to prove ownership of the property in fee by the company in favor of its bondholders without proof of a contract for the transfer of the title, and where the possession is as readily attributable to a lease or license. Hook *v.* Mercantile Trust Co., 89 Fed. 410, 32 C. C. A. 238.

12. *Indiana.*— La Porte *v.* Henry, (App. 1908) 83 N. E. 655.

Maine.— Smith *v.* Colby, 67 Me. 169.

Massachusetts.— Gurley *v.* Armstead, 148 Mass. 267, 19 N. E. 389, 12 Am. St. Rep. 555, 2 L. R. A. 80.

Missouri.— Robert C. White Live Stock Commission Co. *v.* Chicago, etc., R. Co., 87 Mo. App. 330; Nanson *v.* Jacob, 12 Mo. App. 125 [*affirmed* in 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531].

North Dakota.—Mariner *v.* Wasser, (1908) 117 N. W. 343.

West Virginia.— Hannis Distilling Co. *v.* Berkeley County Ct., 62 W. Va. 442, 59 S. E. 1051.

See also, generally, EVIDENCE, 16 Cyc. 1074.

13. Brookings *v.* Woodin, 74 Me. 222.

14. Bachman *v.* Oskaloosa, 130 Iowa 600, 104 N. W. 347.

15. Weber *v.* Shelby, 116 Ill. App. 31.

16. Ladd *v.* Powell, 144 Ala. 408, 39 So. 46; Newman *v.* Mountain Park Land Co., 85 Ark. 208, 107 S. W. 391; Lindsay *v.* Austin, 139 N. C. 463, 51 S. E. 990.

17. St. Louis Refrigerator, etc., Co. *v.* Thornton, 74 Ark. 383, 86 S. W. 852; Kelley *v.* Laconia Levee Dist., 74 Ark. 202, 85 S. W. 249, 87 S. W. 638; Weir *v.* Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341.

18. Jones *v.* Goss, 115 La. 926, 40 So. 357.

19. Gilmore *v.* Schenck, 115 La. 386, 39 So. 40.

20. State *v.* Harman, 57 W. Va. 447, 50 S. E. 828.

21. Jacob Tome Inst. *v.* Davis, 87 Md. 591, 601, 41 Atl. 166.

22. Pratt *v.* Fountain, 73 Ga. 261, 262; Hunt *v.* Eaton, 55 Mich. 362, 365, 21 N. W. 429; Loy *v.* Home Ins. Co., 24 Minn. 315, 318, 31 Am. Rep. 346.

23. Houston *v.* Farris, 71 Ala. 570, 571; Pratt *v.* Fountain, 73 Ga. 261, 262; Hunt *v.* Eaton, 55 Mich. 362, 365, 21 N. W. 429; Springfield F. & M. Ins. Co. *v.* Allen, 43 N. Y. 389, 395, 3 Am. Rep. 711.

24. Pratt *v.* Fountain, 73 Ga. 261, 262; Hunt *v.* Eaton, 55 Mich. 362, 365, 21 N. W. 429.

25. Houston *v.* Farris, 71 Ala. 570, 571.

26. Chapman *v.* Dougherty, 87 Mo. 617, 620, 56 Am. Rep. 469; Joy *v.* Stump, 14 Oreg. 361, 362, 12 Pac. 929.

"The word 'title,' when used in connection with real estate, is generally defined to be the evidence of right by which a person has possession of property." Guier *v.* Bridges, 114 Ky. 148, 152, 70 S. W. 288, 24 Ky. L. Rep. 945.

27. Chapman *v.* Dougherty, 87 Mo. 617, 620, 56 Am. Rep. 469.

28. Robinson *v.* Vancleave, 129 Ind. 217, 232, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

"In its usual and ordinary acceptation, the word 'title' signifies the means by which the owner of land rightfully holds the possession thereof." Fitzgerald *v.* Miller, 7 S. D. 61, 66, 63 N. W. 221.

29. Pratt *v.* Fountain, 73 Ga. 261, 262, statutory definition.

of being effectually transferred.[30] Blackstone defines title to land as the means whereby the owner of lands hath the just possession of his property,[31] and further states that there are several stages or degrees requisite to form a complete title to land,[32] which are actual possession, right of possession and right of property.[33] The term "title" is used in different senses,[34] sometimes in the sense of ownership,[35] or of right, interest, or estate,[36] and in this connection sometimes broadly as signifying any estate or interest,[37] but usually in the sense of absolute ownership,[38] or estate in fee simple,[39] although title does not necessarily mean absolute ownership.[40] It is also used in the sense of right of possession as distinguished from the mere fact of possession,[41] and in the sense of the evidence of one's right as distinguished from the actual beneficial ownership or right or interest in the property.[42] Properly speaking there is a clear distinction between title and estate,[43] and title is also a broader and more general term than right,[44] and is also

30. Robertson *v.* Vancleave, 129 Ind. 217, 232, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

31. 2 Blackstone Comm. 195 [*quoted* in Houston *v.* Farris, 71 Ala. 570, 571; Donovan *v.* Pitcher, 53 Ala. 411, 417, 25 Am. Rep. 634; Arrington *v.* Liscom, 34 Cal. 365, 385, 94 Am. Dec. 722; Botsford *v.* Morehouse, 4 Conn. 550, 551; Kamphouse *v.* Gaffner, 73 Ill. 453, 458; Woodruff *v.* Wallace, 3 Okla. 355, 362, 41 Pac. 357; Parker *v.* Metzger, 12 Oreg. 407, 412, 7 Pac. 518; Pannill *v.* Coles, 81 Va. 380, 383].

32. 2 Blackstone Comm. 195 [*quoted* in Woodruff *v.* Wallace, 3 Okla. 355, 362, 41 Pac. 357; Pannill *v.* Coles, 81 Va. 380, 383].

33. *Alabama.*— Donovan *v.* Pitcher, 53 Ala. 411, 417, 25 Am. Rep. 634.

Missouri.— Chapman *v.* Dougherty, 87 Mo. 617, 620, 56 Am. Rep. 469.

New York.— Converse *v.* Kellogg, 7 Barb. 590, 597.

Oklahoma.— Woodruff *v.* Wallace, 3 Okla. 355, 362, 41 Pac. 357.

Virginia.— Pannill *v.* Coles, 81 Va. 380, 383.

These several constituent parts of title may be divided and distributed among several persons so that one may have the possession, another the right of possession, and the third the right of property, but unless all are united in one and the same party there cannot be that consolidated right which forms a complete title. Donovan *v.* Pitcher, 53 Ala. 411, 417, 25 Am. Rep. 634.

34. Patty *v.* Middleton, 82 Tex. 586, 591, 17 S. W. 909.

The term "title" is used to signify, as applied to lands or goods, "either a party's right to the enjoyment thereof, or the means whereby such right has accrued, or by which it is evidenced." Pratt *v.* Fountain, 73 Ga. 261, 262.

35. Livingston *v.* Ruff, 65 S. C. 284, 286, 43 S. E. 678.

36. See Patty *v.* Middleton, 82 Tex. 586, 591, 17 S. W. 909.

37. See U. S. *v.* Hunter, 21 Fed. 615, 617.

38. Langmede *v.* Weaver, 65 Ohio St. 17, 37, 60 N. E. 992.

39. Gillespie *v.* Broas, 23 Barb. (N. Y.) 370, 381; Jones *v.* Gardner, 10 Johns. (N. Y.) 266, 269; U. S. *v.* Hunter, 21 Fed. 615, 617.

40. Roberts *v.* Wentworth, 5 Cush. (Mass.) 192, 193, where the court said: "A party may have a title to property although he is not the absolute owner. If he has the actual or constructive possession of property or the right of possession, he has a title thereto, although another party may be the owner."

41. Campfield *v.* Johnson, 21 N. J. L. 83, 85; Dunster *v.* Kelly, 110 N. Y. 558, 561, 18 N. E. 361; Ehle *v.* Quackenboss, 6 Hill (N. Y.) 537, 539.

In a statute relating to summary process providing that if the lessee obtains a title after the date of the lease against the lessor he may show it, title means a right to the possession paramount to that of complainant. Rodgers *v.* Palmer, 33 Conn. 155, 156.

Jurisdiction of justices of the peace.— In statutes excluding from the jurisdiction of justices of the peace actions wherein the title to land is involved, the term "title" is used with reference to the right of possession as distinguished from the mere fact of possession. Campfield *v.* Johnson, 21 N. J. L. 83; Gregory *v.* Kanouse, 11 N. J. L. 62; Manfredi *v.* Wiederman, 14 Misc. (N. Y.) 342, 35 N. Y. Suppl. 680; Ehle *v.* Quackenboss, 6 Hill (N. Y.) 537; Carroll *v.* Rigney, 15 R. I. 81, 23 Atl. 46; Grosso *v.* Lead City, 9 S. D. 165, 68 N. W. 310. See also JUSTICES OF THE PEACE, 24 Cyc. 450.

42. Patty *v.* Middleton, 82 Tex. 586, 591, 17 S. W. 909, where the court said: "There is no doubt that the word 'title' is often used to signify the right or interest a person has in or to the thing referred to, and when thus used is the equivalent of the word 'estate'; but this is not the sense in which it is used when it has reference to a purchase of real or personal property by a *bona fide* purchaser, for the inquiry in such cases is, upon what evidence did the purchaser act. . . . The question is not one of real beneficial ownership or of superior right, but of apparent ownership evidenced as the law requires ownership to be."

43. Robertson *v.* Vancleave, 129 Ind. 217, 232, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

44. Pratt *v.* Fountain, 73 Ga. 261, 262; Campfield *v.* Johnson, 21 N. J. L. 83, 85.

Lord Coke, discussing the terms right and title, says: "Title is the more generall

to be distinguished from the deed or document which is the evidence of one's title.[45]

B. Modes of Acquisition or Loss. The modes of acquiring or losing title to property may properly be considered together, since the terms are of a reciprocal nature, and generally by whatever method one person gains an estate by that same method or its correlative some other person has lost it.[46] The methods of acquiring or losing title to real property may be reduced to two; namely, by descent,[47] and by purchase.[48] In this connection the term "purchase" is not used in its popular sense as signifying a transaction in the nature of a bargain and sale, but as contradistinguished from acquisition by right of blood,[49] and embracing every means by which property may be acquired other than by descent.[50] It therefore includes escheat,[51] occupancy,[52] prescription,[53] adverse possession,[54] forfeiture,[55] and alienation,[56] which embraces any method by which property is voluntarily transferred from one person to another by mutual consent of the parties,[57] and is usually by deed,[58] or devise.[59] There are, according to Blackstone, twelve principal modes of acquiring or losing one's right or title to personal property,[60] namely, by occupancy,[61] by prerogative,[62] by forfeiture,[63] by

word; for every right is a title, but every title is not such a right for which an action lieth; and therefore *Titulus est justa causa possidendi quod nostrum est*, and signifieth the meanes whereby a man commeth to land, as his title is by fine or by feoffment, &c." Coke Litt. 345*b*.

45. Botsford *v.* Morehouse, 4 Conn. 550, 551, where the court, holding that it was necessary to discriminate "between title to the land in question and the evidence originating such title," said: "The evidence of title may be very various; as by descent, by deed, by record, by devise, and by many other modes, which need not be enumerated. A deed, duly executed, is only a mode of transfer, by the operation of which the law conveys the estate; and if this instrument of conveyance becomes accidently lost or destroyed, the title still remains permanent and immovable."

46. 2 Blackstone Comm. 200.

47. Allen *v.* Bland, 134 Ind. 78, 79, 33 N. E. 774; *In re* Gill, 79 Iowa 296, 300, 44 N. W. 553, 9 L. R. A. 126; 2 Blackstone Comm. 201. See also, generally, DESCENT AND DISTRIBUTION, 14 Cyc. 1.

48. Allen *v.* Bland, 134 Ind. 78, 79, 33 N. E. 774; *In re* Gill, 79 Iowa 296, 300, 44 N. W. 553, 9 L. R. A. 126; 2 Blackstone Comm. 201, 241.

49. 2 Blackstone Comm. 241.

50. Falley *v.* Gribling, 128 Ind. 110, 115, 26 N. E. 794; Bennett *v.* Hibbert, 88 Iowa 154, 163, 55 N. W. 93; Enterprise *v.* Smith, 62 Kan. 815, 816, 62 Pac. 324; Stamm *v.* Bostwick, 40 Hun (N. Y.) 35, 38 [*affirmed* in 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597]; Watson *v.* Donnelly, 28 Barb. (N. Y.) 653, 658; McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 491, 18 Am. Dec. 516; 2 Blackstone Comm. 241.

51. 2 Blackstone Comm. 244. See also, generally, ESCHEAT, 16 Cyc. 548.

52. 2 Blackstone Comm. 258.

The right of occupancy as applied to lands was confined to the single instance of where an estate was granted to a person, without naming his heirs, for the life of another person, and he died during the life of the *cestui que vie*, in which case the person who first entered upon the land might lawfully retain the possession by right of occupancy so long as the *cestui que vie* lived. 2 Blackstone Comm. 258. See also ESTATES, 16 Cyc. 614.

53. 2 Blackstone Comm. 263. See also EASEMENTS, 14 Cyc. 1145.

"Title by limitation, and title by prescription, to real estate, are practically synonymous." Dalton *v.* Rentaria, 2 Ariz. 275, 284, 15 Pac. 37.

54. See ADVERSE POSSESSION, 1 Cyc. 968.

55. 2 Blackstone Comm. 267. See also, generally, FORFEITURES, 19 Cyc. 1355.

56. 2 Blackstone Comm. 287. See also, generally, DEEDS, 13 Cyc. 505; WILLS.

57. 2 Blackstone Comm. 287.

Alienation defined see 2 Cyc. 79.

58. 2 Blackstone Comm. 295. See also, generally, DEEDS, 13 Cyc. 505.

59. McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 491, 18 Am. Dec. 516 (holding that the term "purchase" includes a devise); 2 Blackstone Comm. 373. See also, generally, EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1; WILLS.

Devise defined see 14 Cyc. 284.

60. 2 Blackstone Comm. 400.

61. 2 Blackstone Comm. 400.

Occupancy includes, according to Blackstone, the rights acquired in personal property by seizure of the goods of an alien enemy, finding lost goods, rights in regard to light, air, water and wild animals, emblements, property arising from accession, confusion of goods, and the property in literary productions and inventions. 2 Blackstone Comm. 400–407. See also, generally, ACCESSION, 1 Cyc. 222; ANIMALS, 2 Cyc. 288; CONFUSION OF GOODS, 8 Cyc. 570; COPYRIGHT 9 Cyc. 889; EASEMENTS, 14 Cyc. 1134; FINDING LOST GOODS, 19 Cyc. 535; LITERARY PROPERTY, 25 Cyc. 1488; PATENTS, 30 Cyc. 803.

62. 2 Blackstone Comm. 408.

63. 2 Blackstone Comm. 420. See also, generally, FORFEITURES, 19 Cyc. 1355.

custom,[64] by succession,[65] by marriage,[66] by judgment,[67] by gift or grant,[68] by contract,[69] by bankruptcy,[70] and lastly, by testament and administration which may properly be considered together.[71] Title to personal property may also be lost by abandonment.[72]

PROPERTY RATIONE PRIVILEGII. The right which, by a peculiar franchise anciently granted by the Crown, by virtue of its prerogative, one man had of killing and taking animals *ferœ naturœ* on the land of another.[1] (See ANIMALS, 2 Cyc. 308, 309.)

PROPERTY RATIONE SOLI. The common law right which every owner of land has to kill and take all such animals *ferœ naturœ* as may from time to time be found on his land.[2] (See ANIMALS, 2 Cyc. 308, 309.)

PROPERTY TORT. A tort embracing all injuries and damages to property real or personal.[3] (See TORTS.)

PROPIEDADES. In Mexican law, a term meaning property of all kinds, real, personal, and mixed.[4]

PROPINQUIOR EXCLUDIT PROPINQUUM; PROPINQUUS REMOTUM; ET REMOTUS, REMOTIOREM. A maxim meaning "He who is nearer excludes him who is near; he who is near, him who is remote; he who is remote, him who is remoter."[5]

PROPINQUITY. Kindred; parentage.[6]

PROPONENT. The propounder of a thing.[7] (Proponent: Of a Will, see WILLS.)

PROPORTION. A word appropriately and generally employed to indicate one's share or portion when the whole of a thing is distributed according to value; as when it is arranged and divided with relation to magnitude or quantity;[8] the portion which falls to one's lot when a whole is distributed by a rule or principle; equal or just share; lot.[9] (See PROPORTIONAL.)

64. 2 Blackstone Comm. 422. See also, generally, CUSTOMS AND USAGES, 12 Cyc. 1028, 1032.

65. 2 Blackstone Comm. 430, where the term "succession" is used with reference to corporations and not to the rights of succession to property of a decedent.

66. 2 Blackstone Comm. 433. See also, generally, HUSBAND AND WIFE, 21 Cyc. 1119.

67. 2 Blackstone Comm. 436. See also, generally, JUDGMENTS, 23 Cyc. 623.

68. 2 Blackstone Comm. 440. See also, generally, GIFTS, 20 Cyc. 1189.

69. 2 Blackstone Comm. 442. See also, generally, CONTRACTS, 9 Cyc. 213.

The most usual contracts whereby the right of personal property may be acquired are contracts of sale or exchange, of bailment, of hiring and borrowing and of debt. 2 Blackstone Comm. 446. See also, generally, BAILMENTS, 5 Cyc. 157; CONTRACTS, 9 Cyc. 213; DEBT, ACTION OF, 13 Cyc. 402; EXCHANGE OF PROPERTY, 17 Cyc. 829; SALES.

Definitions of borrow see 5 Cyc. 860; of debt see 13 Cyc. 393; of hire and hiring see 21 Cyc. 437.

70. 2 Blackstone Comm. 471. See also, generally, BANKRUPTCY, 5 Cyc. 227.

71. 2 Blackstone Comm. 489 *et seq.* See also, generally, DESCENT AND DISTRIBUTION, 14 Cyc. 1; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1; WILLS.

72. See ABANDONMENT, 1 Cyc. 7, 8.

1. Payne *v.* Sheets, 75 Vt. 335, 338, 55 Atl. 656.

2. Payne *v.* Sheets, 75 Vt. 335, 338, 55 Atl. 656.

3. Mumford *v.* Wright, 12 Colo. App. 214, 217, 55 Pac. 744.

4. U. S. *v.* Santistevan, 1 N. M. 583, 592.

5. Peloubet Leg. Max. [*citing* Coke Litt. 10, b].

6. Black L. Dict.

7. Black L. Dict.

8. State *v.* School, etc., Land Com'rs, 34 Wis. 162, 167.

9. Webster Dict. [*quoted* in State *v.* School, etc., Land Com'rs, 34 Wis. 162, 167].

Synonymous with "*pro rata.*" Hager *v.* McDonald, 65 Fed. 200, 202.

Where certain lands were granted to aid in the construction of a ship canal and the statute provided that when the governor of the state is satisfied that the grantee has done one fourth, one half, or three fourths of the work required in the construction of such canal, he shall certify the same and the certificate shall determine the "proportion" of said lands the said grantee has become entitled to, it was held that the word "proportion" meant proportion in value and not in quantity. State *v.* School, etc., Land Com'rs, 34 Wis. 162, 167.

As used in a city charter requiring a land commissioner's jury to assess property adjoining condemned land in proportion that said property may be respectively benefited by the proposed improvement, the terms should be construed to mean that no assessment shall exceed the actual benefits. Tyler *v.* St. Louis, 56 Mo. 60.

In a contract for the improvement of a street which provided that each property-

PROPORTIONAL. Based upon proportion; pertaining to or having proportion.[10] (See PROPORTION.)

PROPORTIONATE MEASUREMENT. In surveying a measurement having the same ratio to that recorded in the original field notes, as the length of the chain used in the new measurement has to the length of the chain used in the original survey, assuming that the original measurement was correctly made.[11]

PROPOSAL. An offer;[12] an introduction;[13] an expression of intention or design.[14] (Proposal: As Element of Contract, see CONTRACTS, 9 Cyc. 247; FIRE INSURANCE, 19 Cyc. 599; GUARANTY, 20 Cyc. 1404; LANDLORD AND TENANT, 24 Cyc. 896; LIFE INSURANCE, 25 Cyc. 713; MARINE INSURANCE, 26 Cyc. 568 note 81; SALES; VENDOR AND PURCHASER. Invitation of For Contracts and Response Thereto, see COUNTIES, 11 Cyc. 479, 481; MUNICIPAL CORPORATIONS, 28 Cyc. 657; SCHOOLS AND SCHOOL-DISTRICTS; STATES; TOWNS; UNITED STATES. See also PROPOSE.)

PROPOSE. To offer as a plan or scheme; to put and hold before one's mind as a design or determination; to form as a purpose;[15] to form or declare a purpose or intention.[16] (See PROPOSAL.)

PROPOSITIO INDEFINITA ÆQUIPOLLET UNIVERSALI. A maxim meaning "An indefinite proposition is equivalent to a general one."[17]

PROPOSITION. A single logical sentence; also an offer to do a thing.[18] (See PROPOSAL; PROPOSE.)

owner was to pay "in proportion to his ownership and interest in the property abutting and proximate to said Roy street" as the same shall be distributed by the city engineer, the phrase quoted is equivalent to the phrase "each party thereto to pay only such part of the total cost as his front footage has to the total frontage improved in said street," and the interlineation of the latter phrase in such contract did not alter the contract as originally drawn. Young *v.* Borzone, 26 Wash. 4, 21, 66 Pac. 135, 421.

10. Century Dict.

A "proportional system" of taxation means a tax at a fixed and uniform rate, in proportion to the amount of taxable property, based upon a cash valuation. State *v.* Bazille, 97 Minn. 11, 17, 106 N. W. 93, 6 L. R. A. N. S. 732.

"Proportional tariffs" of a railroad company are a collection of freight rates which apply upon interstate shipments from certain given points to certain other given points, when the commodities shipped originate beyond the place of shipping, or their ultimate destination is beyond the point to which the proportional rates apply. J. Rosenbaum Grain Co. *v.* Chicago, etc., R. Co., 130 Fed. 46, 47.

Proportional taxation.— Under a state constitution requiring taxes to be proportional and reasonable, it is not enough that it is levied upon one entire class of citizens, but it should be upon all classes. State *v.* U. S., etc., Express Co., 60 N. H. 219, 220, brief of counsel.

11. Caylor *v.* Luzadder, 137 Ind. 319, 323, 36 N. E. 909, 45 Am. St. Rep. 183.

12. Taylor *v.* Miller, 113 N. C. 340, 341, 18 S. E. 504.

As of marriage see Taylor *v.* Miller, 113 N. C. 340, 341, 18 S. E. 504.

13. Taylor *v.* Miller, 113 N. C. 340, 341, 18 S. E. 504.

As of a measure in a legislative assembly see Taylor *v.* Miller, 113 N. C. 340, 341, 18 S. E. 504.

14. Taylor *v.* Miller, 113 N. C. 340, 341, 18 S. E. 504.

15. Hand *v.* Shaw, 27 N. Y. App. Div. 107, 111, 50 N. Y. Suppl. 117.

"What is proposed is something that is held before one's mind as a design or determination, not as an accomplished fact." Hence a contract agreeing to pay a certain sum for an advertisement, the amount to be deducted from merchandise to be sold for a proposed new hotel, does not require the completion of the hotel before the merchandise should be furnished. Hand *v.* Shaw, 27 N. Y. App. Div. 107, 111, 50 N. Y. Suppl. 117.

16. Webster Dict. [*quoted* in Taylor *v.* Miller, 113 N. C. 340, 342, 18 S. E. 504].

"'I propose to settle' is the same as 'I intend or mean to settle,'" and such a statement contained in a letter written in reply to a letter demanding payment of a note barred by the statute of limitations amounts to an acknowledgment or new promise sufficient to take the case out of the operation of the statute. Taylor *v.* Miller, 113 N. C. 340, 342, 18 S. E. 504.

"Proposed highway" see Matter of Trask, 45 Misc. (N. Y.) 244, 246, 92 N. Y. Suppl. 156.

17. Morgan Leg. Max. [*citing* Wharton Leg. Max.].

18. Black L. Dict.

"A proposition is reasonably certain when it is supported by the strong probabilities." People *v.* Fielding, 14 N. Y. Cr. 34, 42.

It does not become a contract until the maker or his agent is notified of its acceptance. Perry *v.* Dwelling-House Ins. Co., 67 N. H. 291, 295, 33 Atl. 731, 68 Am. St. Rep. 668; Stebbins *v.* Lancashire Ins. Co., 60 N. H. 65, 70; Beckwith *v.* Cheever, 21 N. H. 41, 44.

A proposition does not become twofold by annexing to it some condition or qualifica-

PROPOSITUS. In the law of descents, the person proposed, (*persona proposita*;) the person from whom succession is to be traced or degrees of consanguinity reckoned.[19] (See, generally, DESCENT AND DISTRIBUTION, 14 Cyc. 1.)

PRO POSSESSORE HABETUR QUI DOLO INJURIARE DESIIT POSSIDERE. A maxim meaning "He is counted a possessor who, by fraud or injury, prevents another from possessing." [20]

PROPOUNDING. See WILLS.

PROPRIETARY. Relating to a certain owner or proprietor; [21] belonging to ownership; as proprietary rights; [22] belonging, or pertaining to a proprietor.[23] (Proprietary: Article, see PROPRIETARY ARTICLES. Grant, see COMMON LANDS, 8 Cyc. 342; PUBLIC LANDS.)

PROPRIETARY ARTICLES. Goods manufactured under some exclusive individual right to make and sell them.[24] (Proprietary Articles: In General, see DRUGGISTS, 14 Cyc. 1078. Customs Duties, see CUSTOMS DUTIES, 12 Cyc. 1118. Internal Revenue, see INTERNAL REVENUE, 22 Cyc. 1626.)

PROPRIETARY GRANT. See COMMON LANDS, 8 Cyc. 342; PUBLIC LANDS.

PROPRIETAS TOTIUS NAVIS CARINÆ CAUSAM SEQUITUR. A maxim meaning "The property of the whole ship follows the condition of the keel." [25]

PROPRIETAS VERBORUM EST SALUS PROPRIETATUM. A maxim meaning "Propriety of words is the salvation of property." [26]

PROPRIETATES VERBORUM OBSERVANDÆ SUNT. A maxim meaning "The proprieties (i. e. proper meanings) of words are to be observed." [27]

PROPRIETOR. An owner, the person who has the legal right or exclusive title to anything, whether in possession or not; [28] one who has the legal right or exclusive title to anything,[29] whether in possession or not; an owner; as the proprietor of a farm or mill; [30] a possessor in his own right; an owner; a proprietary.[31] (Pro-

tion. The condition is not of itself a proposition but only a part of one. Hubbard *v.* Woodsum, 87 Me. 88, 94, 32 Atl. 802.

A "proposition fee" is the fee required to be paid to a lodge for entertaining an application for membership. Matkin *v.* Supreme Lodge K. H., 82 Tex. 301, 302, 18 S. W. 306, 27 Am. St. Rep. 886.

19. Burrill L. Dict. [*citing* Blackstone Comm. 224].

20. Morgan Leg. Max. [*citing* Wentworth Off. Ex.].

21. Ferguson *v.* Arthur, 117 U. S. 482, 487, 6 S. Ct. 861, 29 L. ed. 979.

22. Imperial Dict. [*quoted* in Ferguson *v.* Arthur, 117 U. S. 482, 487, 6 S. Ct. 861, 29 L. ed. 979].

23. Webster Dict. [*quoted* in Ferguson *v.* Arthur, 117 U. S. 482, 487, 6 S. Ct. 861, 29 L. ed. 979].

Proprietary government.— This expression is used by Blackstone to denote governments granted out by the crown to individuals, in the nature of feudatory principalities, with inferior regalities and subordinate powers of legislation such as formerly belonged to the owners of counties palatine. Black L. Dict. [*citing* 1 Blackstone Comm. 108].

Proprietary interest.— Interest as an owner or legal right or title. Cooney *v.* Sheppard, 23 Ont. App. 4, 6.

24. Black L. Dict.

A medicinal preparation may be proprietary, without being made by a private formula, or under an exclusive right claimed to the making or preparing it, or under a patent, where it is recommended by the manufacturer to the public as a proprietary medicine or as a remedy for disease. Ferguson *v.* Arthur, 117 U. S. 482, 487, 6 S. Ct. 861, 29 L. ed. 979.

"Proprietary preparations" see Grommes *v.* Seeberger, 41 Fed. 32, 33.

The liquor cordial known as "Benedictine" is not included under the customs act providing for a certain duty on proprietary articles. *In re* Gourd, 49 Fed. 728, 729.

25. Burrill L. Dict. [*citing* Dig. 6, 1, 61].

Applied in: Perkins *v.* Pike, 42 Me. 141, 147, 66 Am. Dec. 267; Glover *v.* Austin, 6 Pick. (Mass.) 209, 220; Coursin's Appeal, 79 Pa. St. 220, 229.

26. Peloubet Leg. Max. [*citing* Jenkins Cent. 136].

27. Bouvier L. Dict. [*citing* Jenkins Cent. 136].

28. Latham *v.* Roach, 72 Ill. 179, 181; Davis *v.* Murphy, 3 Minn. 119, 125.

29. Webster Dict. [*quoted* in Turner *v.* Cross, 83 Tex. 218, 225, 18 S. W. 578, 15 L. R. A. 262; Allen *v.* Dillingham, 60 Fed. 176, 181, 8 C. C. A. 544].

30. Webster Dict. [*quoted* in Koppel *v.* Downing, 11 App. Cas. (D. C.) 93, 103].

31. Webster Dict. [*quoted* in Koppel *v.* Downing, 11 App. Cas. (D. C.) 93, 103].

The term has a well defined meaning.— Koppel *v.* Downing, 11 App. Cas. (D. C.) 93, 103.

Distinguished from "owner" see Brown *v.* Grand Trunk R. Co., 24 U. C. Q. B. 350, 354.

As applied to realty the term does not necessarily import that the party is the occupier of such premises. Russell *v.* Shenton, 3 Q. B. 449, 457, 2 G. & D. 573, 6 Jur. 1059, 11 L. J. Q. B. 289, 43 E. C. L. 814.

Synonym of the word "owner" see Abbott L. Dict.; Bouvier L. Dict.; Webster Dict.

prietor: In General, see PROPERTY. Of Copyright, see COPYRIGHT, 9 Cyc. 912. Of Lands Held in Common, see COMMON LANDS, 8 Cyc. 351. Of Newspaper, see NEWSPAPERS, 29 Cyc. 705 note 90. Of Public Lands, see PUBLIC LANDS. Of Restaurant as Innkeeper, see INNKEEPERS, 22 Cyc. 1070 note 1. Of Trade-Mark, see TRADE-MARKS AND TRADE-NAMES. See also PROPRIETORSHIP.)

PROPRIETORSHIP. A certain or contingent exclusive right of unlimited or limited profitable use of an ascertainable subject, corporeal or incorporal.[32] (See PROPRIETOR.)

[all *quoted* in Turner *v.* Cross, 83 Tex. 218, 225, 18 S. W. 578, 15 L. R. A. 262; Allen *v.* Dillingham, 60 Fed. 176, 181, 8 C. C. A. 544].

Used in a statute relative to the copyright of paintings the term means the person who not only obtains the right to physical possession of the painting, but the common-law rights of publication or preventing publication which belong to the author. Werckmeister *v.* Springer Lithograph Co., 63 Fed. 808, 811. "The history of the use of the term . . . shows that it has always been used in the copyright laws in the limited and restricted sense of a person who by purchase or otherwise has lawfully acquired the exclusive rights of some native or resident author or artist, and in no other manner." Yuengling *v.* Schile, 12 Fed. 97, 105, 20 Blatchf. 452.

"Proprietor of a trade mark" means a person who has appropriated and acquired a right to the exclusive use of the mark. Partlo *v.* Todd, 17 Can. Sup. Ct. 196, 201.

Used instead of "printer."— Where an affidavit of the publication of a summons was made by one who styled himself "proprietor" instead of "printer," which last was the language of the statute, it was held that the terms, in the sense of the statute, were synonymous and that the variance was no ground for objection. Woodward *v.* Brown, 119 Cal. 283, 301, 51 Pac. 2, 7, 542, 63 Am. St. Rep. 108; Quivey *v.* Porter, 37 Cal. 458, 464; Sharp *v.* Daugney, 33 Cal. 505, 513.

Where an applicant for insurance against fire on a cotton mill and machinery had answered to previous questions that the buildings and machinery, with certain specified exceptions, belonged to one person (himself), and that certain machinery not to be insured in the policy belonged to one A H, and that the works were not operated by the proprietors, but were rented, and in reply to the question, "Are they (the works) immediately superintended by 'one' of the 'proprietors?'" answered, "Yes," the answer is sufficiently verified by the fact that the works were superintended by the tenant, A H,— in common parlance, a "proprietor" as distinguished from his employees — and who actually owned a part of the machinery run in the works, whether the meaning intended to be conveyed or actually conveyed by the answer, under the circumstances, be considered. Wilson *v.* Hampden F. Ins. Co., 4 R. I. 159, 166.

The term has been held to include: The defaulting owner, or person under obligation to pay taxes, under a statute providing that if any sales of tax shall prove invalid the purchaser of the land shall be entitled to receive from the "proprietor" of such land the amount of taxes, interest, penalty, and cost of advertising, etc. Hunt *v.* Curry, 37 Ark. 100, 105. "Lessees" as well as "owners" under a statute prohibiting fishing in portions of ponds where fish are lawfully cultivated, without permission of the proprietor. Com. *v.* Skatt, 162 Mass. 219, 220, 38 N. E. 499. Owners of a private railroad, who with the consent of a railroad corporation, run their rolling stock over the tracks of said corporation and while so doing violate a statute providing that no proprietors of a railroad shall obstruct by their engines, cars, or train, any highway more than two minutes at any one time, under penalty to the party delayed. Hall *v.* Brown, 54 N. H. 495, 497. Persons occupying the premises either as tenant or owner, under a statute providing that "an injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure, or annoy an adjoining proprietor." Winsor *v.* German Sav., etc., Soc., 31 Wash. 365, 368, 72 Pac. 66.

The term has been held not to include: A railroad acquiring a right under statute to use the track of another railroad, within the meaning of a statute providing that "any town . . . may by vote require the proprietors of any railroad to secure the crossing of any highway by said railroad, by a bridge, or a pass under said way, or by gates on both sides of said railroad." Eastern R. Co. *v.* Portsmouth, 62 N. H. 344, 345. A person wrongfully entering upon and filling up land under navigable water, thereby raising it above the water, where a statute empowers land commissioners to grant lands under navigable waters, but contains the proviso that "no such grant shall be made to any person other than the proprietor of the adjacent lands." People *v.* Land Office Com'rs, 135 N. Y. 447, 448, 32 N. E. 139. A receiver within the meaning of a statute giving a right of action against a "proprietor," "owner," "charterer" or "hirer" of a railroad for injuries resulting in death caused by the negligence of their servants. Houston, etc., R. Co. *v.* Roberts, (Tex. 1892) 19 S. W. 512; Turner *v.* Cross, 83 Tex. 218, 227, 18 S. W. 578, 15 L. R. A. 262; Bonner *v.* Thomas, (Tex. Civ. App. 1892) 20 S. W. 722; Allen *v.* Dillingham, 60 Fed. 176, 184, 8 C. C. A. 544.

"Proprietor in occupancy" see Reg. *v.* Parlee, 23 U. C. C. P. 359, 363.

"Proprietors of land" see Trichmopoly *v.* Lekkamani, L. R. 1 Indian App. 282, 306.

32. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, 5 Pa. L. J. 501, 4 Phila. (Pa.) 157.

"Proprietorship, thus defined, is compounded of the proprietor's beneficial rights,

PROPRIETY. Suitableness to an acknowledged or correct standard or rule; consonance with established principles, rules, or customs; fitness; justness; correctness.[33] In old English law, property.[34]

PROPRIOS. In Spanish law, productive lands the usufruct of which had been set apart to the several municipalities for the purpose of defraying the charges of their respective governments; [35] municipal lands, from which revenues are derived to defray the expenses of the municipal administration.[36]

PROPRIO VIGORE. By its own force; by its intrinsic meaning.[37]

PROPRIUM EST REGIS GRATIAM DELICTI FACERE. A maxim meaning "It is the prerogative of the king to pardon transgressions." [38]

PROPTER AFFECTUM. A challenge to a juror on account of the likelihood or suspicion of bias or prejudice;[39] suspicion of bias or partiality.[40] (See JURIES, 24 Cyc. 334.)

PROPTER DEFECTUM. On account of or for some defect; the name of a species of "challenge." [41] (See JURIES, 24 Cyc. 334.)

PRO RATA. According to a measure which fixes proportions;[42] according to a certain part; in proportion;[43] according to the rate; in proportion;[44] in proportion;[45] implying the disposition of a fund or sum indicated in proportion

and his right of excluding other persons from the use or profit." Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, 5 Pa. L. J. 501, 4 Phila. (Pa.) 157.

33. Century Dict.

"'Propriety' of the amount of damages," under a statute providing that an appeal from an award in condemnation proceedings shall bring before the supreme court, the propriety and justness of the amount of damages in respect to the parties to the appeal, means the proper amount. State *v.* Walla Walla County Super. Ct., 43 Wash. 91, 94, 86 Pac. 205. This phrase means that the court may review the propriety of the award as well as the justness of the amount. State *v.* King County Super. Ct., 31 Wash. 32, 33, 71 Pac. 601.

34. Black L. Dict.

As used in a statute providing that "in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining shall have propriety to the low water mark." The word is nearly, if not precisely, equivalent to "property." Com. *v.* Alger, 7 Cush. (Mass.) 53, 67, 70.

35. Sheldon *v.* Milmo, 90 Tex. 1, 14, 36 S. W. 413 [*citing* Escriche Dict.].

36. Hart *v.* Burnett, 15 Cal. 530, 554, in which case the word is spelled "propios."

37. Black L. Dict.

For illustration of the use of the term see Reaves *v.* Reaves, 15 Okla. 240, 252, 82 Pac. 490, 2 L. R. A. N. S. 353.

38. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

39. State *v.* Williams, 9 Houst. (Del.) 508, 525, 18 Atl. 949.

40. State *v.* Baldwin, 1 Treadw. (S. C.) 289, 296.

41. Black L. Dict.

42. Brombacher *v.* Berking, 56 N. J. Eq. 251, 253, 39 Atl. 134.

It has no meaning unless referable to some rule or standard; and so where a testator directed the income of a trust estate created by will, to be divided among his wife and children in unequal proportions, and in case of the death of his wife, her share of the income to be divided among the children *pro rata*, it was held that the widow's income was to be paid to the children in the same proportions as the income given them immediately upon the testator's death. Brombacher *v.* Berking, 56 N. J. Eq. 251, 253, 39 Atl. 134. See also State *v.* Boston, etc., Express Co., 100 Me. 278, 283, 61 Atl. 697.

43. Webster Dict. [*quoted* in Rosenberg *v.* Frank, 58 Cal. 387, 405].

44. Worcester Dict. [*quoted* in Rosenberg *v.* Frank, 58 Cal. 387, 405].

45. Kennedy *v.* Protestant Orphans' Home, 25 Ont. 235, 240.

A synonym of "proportion" see Hager *v.* McDonald, 65 Fed. 200, 202.

An expression of frequent use in statutes, in the opinions of learned judges, and by text-writers on various titles of the law. See Rosenberg *v.* Frank, 58 Cal. 387, 405.

A pro rata interest in a mortgage is the right to share *pro rata* in whatever security the mortgage affords. When a part of the notes secured by a mortgage are assigned, without any provision in regard to the security, a proportionate interest in the mortgage passes with the notes by operation of the law, and there can be no claim based upon the order in which the notes matured. Bartlett *v.* Wade, 66 Vt. 629, 631, 30 Atl. 4.

In an assignment for benefit of creditors the provision "that the surplus, after paying the preferred debts, shall be paid *pro rata* to all the other creditors," was held to authorize and direct the assignees to pay the whole amount of the unpaid debts, if there should be assets sufficient for that purpose. Taylor *v.* Stevens, 7 How. Pr. (N. Y.) 415.

In the articles of submission to arbitration in the settlement of an estate providing that the arbitrators "shall find what is due the estate by each heir, including the *pro rata* for each," the term means the proportion which each devisee ought to contribute to pay the claims against the estate. Cross *v.* Cross, 17 N. J. Eq. 288, 291.

Pro rata loss or gain.—An agreement, between two persons of the one part and one

to some rate or standard, fixed in the mind of the person speaking or writing, manifested by the words spoken or written, according to which rate or standard the allowance is to be made or calculated.[46] (See PRO-RATE.)

PRO-RATE. To divide or distribute proportionately; to assess *pro rata*.[47] (See PRO RATA.)

PROROGATION. In English law, the continuance of parliament from one session to another.[48] In the civil law, the giving time to do a thing beyond the term previously fixed.[49] (See ADJOURNMENT, 1 Cyc. 793; POSTPONEMENT, 31 Cyc. 1027.)

PRO SE. For himself; in his own behalf; in person.[50]

PROSECUTE. To proceed against judicially.[51] In reference to a suit or action, to follow up or carry on such suit or action;[52] to continue that demand.[53] (See PROSECUTION.)

person of the other part, to *pro rata* the loss or gain in the value of certain shares of stock of a corporation, is not that the two persons on the one side of the contract shall divide the loss or gain between themselves, but shall divide it with the party with whom they contract. Penniman *v.* Stanley, 122 Mass. 310, 317.

The phrase "pro rata cost of tuition," in a statute providing that the educable children may attend the school of any such separate school-district in that county, and the county shall pay, during its free-school term, the actual *pro rata* cost of tuition for all such pupils, means "such proportionate part of the entire cost of tuition in the separate school-district as the number of outside pupils bears to the whole number of scholars attending such schools." State *v.* Hamilton, 69 Miss. 116, 120, 10 So. 57.

"Pro rata per cent" see Raymond *v.* Rhodes, 135 Mass. 337, 338.

46. Rosenberg *v.* Frank, 58 Cal. 387, 406.

47. Rosenberg *v.* Frank, 58 Cal. 387, 405.

It is derived from pro rata and has become a part of the common English tongue, with all the characteristics of such a part of speech. Rosenberg *v.* Frank, 58 Cal. 387, 405.

48. Burrill L. Dict. [*citing* 1 Blackstone Comm. 186, 187].

49. Black L. Dict. [*citing* Dig. 2, 14, 27, 1].

50. Black L. Dict.

51. Brooks *v.* Bates, 7 Colo. 576, 580, 4 Pac. 1069.

52. Knowlton Tp. *v.* Read, 11 N. J. L. 320, 321.

53. Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 408, 5 L. ed. 257.

Synonymous with "put in suit" see Gwynne *v.* Burnell, 6 Bing. N. Cas. 453, 547, 37 E. C. L. 713, 7 Cl. & F. 572, 7 Eng. Reprint 1188, 1 Scott N. R. 711, West. 342, 9 Eng. Reprint 522.

One who is sued for a debt is prosecuted. Hall *v.* Kellogg, 13 Barb. (N. Y.) 603, 619.

"Prosecute a certiorari" see Marryott *v.* Young, 33 N. J. L. 336, 338.

"Prosecute to conclusion" see Fuller *v.* Montague, 53 Fed. 206, 207.

"Prosecute to conviction" see Porterfield *v.* State, 92 Tenn. 289, 291, 21 S. W. 519.

"Prosecute . . . to success" see Kennedy *v.* Crawford, 138 Pa. St. 561, 569, 21 Atl. 19.

Prosecute with effect.— A condition of a replevin bond that the plaintiff shall prosecute said action with effect means with success, or to a successful termination. McAlester *v.* Suchy, 1 Indian Terr. 666, 669, 43 S. W. 952; Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253, 254, 22 N. W. 538; Berghoff *v.* Heckwolf, 26 Mo. 511, 513; Trent *v.* Rhomberg, 66 Tex. 249, 254, 18 S. W. 510; Perreau *v.* Bevan, 5 B. & C. 284, 300, 8 D. & R. 72, 4 L. J. K. B. O. S. 177, 11 E. C. L. 464; Jackson *v.* Hanson, 1 Dowl. P. C. N. S. 69, 75, 10 L. J. Exch. 396, 8 M. & W. 476; Tummons *v.* Ogle, 6 E. & B. 571, 580, 3 Jur. N. S. 82, 25 L. J. Q. B. 403, 4 Wkly. Rep. 596, 88 E. C. L. 571; Morgan *v.* Griffith, 7 Mod. 380, 381, 87 Eng. Reprint 1304. See also Gibbs *v.* Bartlett, 2 Watts & S. (Pa.) 29, 33; Turnor *v.* Turner, 2 B. & B. 107, 112, 4 Moore C. P. 606, 6 E. C. L. 58. Hence the condition is not performed where the party submits to a nonsuit. Covenhoven *v.* Seaman, 1 Johns. Cas. (N. Y.) 23, 24. But a plaintiff in replevin "prosecutes with effect" within the meaning of the replevin bond where he takes steps to try his right but is interrupted by his death. Morris *v.* Matthews, 2 Q. B. 293, 299, 1 G. & D. 677, 6 Jur. 600, 11 L. J. Q. B. 57, 42 E. C. L. 681. The condition in an appeal-bond, that the appellant shall prosecute his appeal to effect means that he will prosecute the same with due diligence to a final issue or judgment whether successful or not. Kasson *v.* Brocker, 47 Wis. 79, 87, 1 N. W. 418. See also Hobart *v.* Hilliard, 11 Pick. (Mass.) 143, 144; Riley *v.* Mitchell, 38 Minn. 9, 12, 35 N. W. 472; State *v.* McCarty, 4 R. I. 82, 86. But see *contra*, Legate *v.* Marr, 8 Blackf. (Ind.) 404, 405; Doe *v.* Daniels, 6 Blackf. (Ind.) 8, 10; Karthaus *v.* Owings, 6 Harr. & J. (Md.) 134, 138; McSweeney *v.* Reeves, 28 Nova Scotia 422, 423. See also Smith *v.* Caldwell, 96 Mo. App. 632, 635, 70 S. W. 926. "To prosecute with effect" in an attachment bond means to prosecute with diligence according to law. Kahn *v.* Herman, 3 Ga. 266, 273.

The word "prosecuted" in a provision of a code of civil procedure that "every action shall be 'prosecuted' in the name of the real party in interest," is used in the sense of "commenced." Hickox *v.* Elliott, 22 Fed. 13, 19, 10 Sawy. 415.

"Prosecuting witness" see Illinois Cent. R. Co. *v.* Herr, 54 Ill. 356, 359.

PROSECUTING AND DISTRICT ATTORNEYS

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CROSS-REFERENCES

For Matters Relating to:

Argument and Conduct in Criminal Cases, see CRIMINAL LAW, 12 Cyc. 519, 535.

Attorney-General, see ATTORNEY-GENERAL, 4 Cyc. 1024.

Corporation or City Attorneys, see MUNICIPAL CORPORATIONS, 28 Cyc. 584.

Grand Jury, see GRAND JURIES, 20 Cyc. 1338.

Indictment or Information, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 203.

Mandamus, see MANDAMUS, 26 Cyc. 200.

Quo Warranto, see QUO WARRANTO.

For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW, 12 Cyc. 70.

I. NATURE AND FUNCTIONS OF OFFICE.

Prosecuting and district attorneys are judicial officers of the state,[1] within their respective districts, although not officers of the state at large.[2] Under some statutes they are county officers,[3] while under others they are not, but are circuit or district officers.[4] The state may provide as many as are necessary to prosecute criminals and otherwise protect its interests,[5] subject of course to constitutional restrictions;[6] and where the office is not created by the constitution, but by statute, it may be abolished or changed by the legislature.[7] Like other attorneys, prosecuting and district attorneys are officers of the court;[8] but they are not a part of the court because of their office. A prosecuting attorney is a public officer because he represents the sovereign power of the people of the state by whose authority and in whose name, under the constitution, all prosecutions must be conducted, and not because of his relation to the court.[9]

1. Griffith *v.* Slinkard, 146 Ind. 117, 44 N. E. 1001; State *v.* Henning, 33 Ind. 189; Fellows *v.* New York, 8 Hun (N. Y.) 484. And see State *v.* Lucas County, 28 Ohio Cir. Ct. 170.

State office.— The office of prosecuting attorney is a state office within Ark. Const. art. 19, § 23, limiting the amount of compensation of officers of the state. Griffin *v.* Rhoton, 85 Ark. 89, 107 S. W. 380.

2. *Ex p.* Wiley, 54 Ala. 226; State *v.* Tucker, 46 Ind. 355.

An act authorizing employment of a prosecuting attorney for an inferior court, at the option of the judge, does not create a state office; but such attorney, when employed, is for the time a state officer. Tesh *v.* Com., 4 Dana (Ky.) 522.

3. State *v.* Barnes, 24 Fla. 29, 3 So. 433; People *v.* Williams, 232 Ill. 519, 83 N. E. 1047; Cook County *v.* Healy, 222 Ill. 310, 78 N. E. 623; Clark *v.* Tracy, 95 Iowa 410, 64 N. W. 290; State *v.* Kovolosky, 92 Iowa 498, 61 N. W. 223; Nothstein *v.* Carbon County, 17 Pa. Co. Ct. 206.

In Washington the office of prosecuting attorney created by the act of Feb. 3, 1891, is identical with that of county attorney existing before the passage of that act. Spokane County *v.* Allen, 9 Wash. 229, 37 Pac. 428, 43 Am. St. Rep. 830.

County attorneys are "municipal officers" within the meaning of Ill. Const. art. 9, § 11, providing that the fees, salary, or compensation of no municipal officer shall be changed during his term. People *v.* Williams, 232 Ill. 519, 83 N. E. 1047.

4. Merwin *v.* Boulder County, 29 Colo. 169, 67 Pac. 285; State *v.* Tucker, 46 Ind. 355.

5. It may provide one for each county or for certain counties only (*Ex p.* Lusk, 82 Ala. 519, 2 So. 140), or separate officers within the same district, one representing the state in superior courts, and the other in inferior courts (Dodd *v.* Sweetser, 14 Ind. 292).

6. Fleming *v.* Hance, 153 Cal. 162, 94 Pac. 620, holding that Cal. St. (1901) p. 95, c. 81, as amended by St. (1907) p. 850, c. 465, providing for the appointment of prosecuting attorneys for police courts, and making it the duty of such prosecuting attorneys to attend the sessions of the police courts and conduct all prosecutions for public offenses, conflicts with Const. art. 11, § 5, requiring the legislature to provide by general laws for election or appointment of district attorneys and to prescribe their duties, Pol. Code, § 4256 (County Government Act (1897), p. 488, c. 277, § 132), making it the duty of district attorneys to "conduct on behalf of the people all prosecutions for public offenses," and St. (1889) p. 472, c. 1, § 49, making it the duty of a city attorney to prosecute all criminal cases arising upon violations of the charter or ordinances, and Const. art. 11, § 6, exempting charters from legislative control in municipal affairs; and is invalid in so far as it imposes on the city the duty of paying the salary of prosecuting attorneys for prosecuting offenses either under the statute generally or under the charter or ordinances; and its invalidity is not affected by St. (1901) p. 96, c. 81, providing that the fines imposed by the police courts shall be paid into the city treasury.

7. Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445, holding that the office of district attorney was not created by the constitution, but by general law before the adoption of the constitution, and that the legislature has constitutionally abolished it and created the office of county attorney instead.

8. *In re* Leaken, 137 Fed. 680; Fifth Nat. Bank *v.* Long, 9 Fed. Cas. No. 4,780, 7 Biss. 502, holding, however, that a United States district attorney is not so far an officer of the United States court that it can compel him to enter the appearance of the government in a case.

Assistant district attorneys appointed by a United States district judge, as authorized by Act Cong. May 28, 1896, c. 252, § 8 (29 U. S. St. at L. 181 [U. S. Comp. St. (1901) p. 613]), are officers of the United States courts for their respective districts. *In re* Leaken, 137 Fed. 680.

9. Fleming *v.* Hance, 153 Cal. 162, 94 Pac. 620.

II. Election or Appointment, Qualification, Tenure, Etc.

A. Election or Appointment[10] — **1. In General.** The manner of appointment or election of prosecuting and district attorneys in the state depends entirely upon the constitution and laws of the several states.[11] District attorneys of the United States are appointed by the president by and with the advice and consent of the senate.[12] If no other mode of filling the office is provided by law, any court having criminal jurisdiction has the power to appoint an attorney to prosecute.[13]

2. Appointment to Fill Vacancy.[14] Vacancies in the office of prosecuting or district attorney are usually filled by the executive, by the circuit, district, or county courts, or by a county board, the power and mode of appointment being provided by statute.[15] Power to appoint a district attorney *pro tempore*, in the absence of the regular incumbent, has been held to include the power to fill a vacancy.[16] A statute creating the office of county attorney and providing for vacancies therein will prevail over general laws as to the manner of filling vacancies,[17] unless the general law is contained in a new constitution.[18] Since a district attorney duly appointed or elected holds until his successor is qualified,[19] if one duly elected or appointed fails to qualify and enter upon the duties of the office, or dies or resigns before qualifying, there is no vacancy, but his predecessor holds over until the next election,[20] except where the predecessor's term is limited expressly by the constitution or statute.[21] Where, however, a duly qualified prosecuting attorney-elect resigns or dies, although his predecessor's term has not yet expired, the latter cannot hold over, but a vacancy is created.[22] An unauthorized resignation does not create a vacancy.[23]

B. Eligibility[24] — **1. In General.** In some jurisdictions it has been held that, unless expressly required by the constitution or statute, a license to practise law is not necessary to render one eligible to the office of prosecuting or district attorney;[25]

10. **Of deputies, assistants, and substitutes** see *infra*, VI, A.

11. See *Ex p.* Lusk, 82 Ala. 519, 2 So. 140; People *v.* Brown, 16 Cal. 441; State *v.* Tucker, 46 Ind. 355; State *v.* Saline County, 60 Nebr. 275, 83 N. W. 70 (elections only in even-numbered years); People *v.* Albany C. Pl., 19 Wend. (N. Y.) 27.

Election generally see Elections, 15 Cyc. 268.

12. U. S. Const. art. 2, § 2; U. S. Rev. St. (1878) § 767 [U. S. Comp. St. (1901) p. 599]. And see Parsons *v.* U. S., 167 U. S. 324, 17 S. Ct. 880, 42 L. ed. 185.

13. Tesh *v.* Com., 4 Dana (Ky.) 522.

14. **Tenure of appointee to fill vacancy** see *infra*, II, D, 2.

15. See the statutes of the several states. And see People *v.* Brown, 16 Cal. 441; State *v.* Davis, 44 Mo. 129.

Appointment by a county board is sufficiently attested by entry upon the records of the board, the statute not prescribing the manner in which such appointments shall be made. State *v.* Walker, 30 Nebr. 501, 46 N. W. 648.

United States district attorneys.— U. S. Rev. St. (1878) § 793. [U. S. Comp. St. (1901) p. 610], providing that, "in case of a vacancy in the office of the district attorney or marshal within any circuit, the circuit justice of such circuit may fill the same, and the person appointed by him shall serve until an appointment is made by the President . . . and no longer," did not oust the power of the president to appoint under U. S. Const. art. 2, § 2, and U. S. Rev. St. (1878) § 1769, but merely authorized the circuit justice to fill the vacancy until the president should act. *In re* Farrow, 3 Fed. 112, 4 Woods 491.

16. Com. *v.* King, 8 Gray (Mass.) 501.

17. State *v.* Saline County, 60 Nebr. 275, 83 N. W. 70; State *v.* Rankin, 33 Nebr. 266, 49 N. W. 1121; State *v.* Walker, 30 Nebr. 501, 46 N. W. 648.

18. State *v.* Whitney, 9 Wash. 377, 37 Pac. 473.

19. See *infra*, II, D, 1.

20. Bechtel *v.* Farquhar, 21 Pa. Co. Ct. 580.

Failure of a duly elected district attorney pro tem. to qualify within the time prescribed by law creates a vacancy. State *v.* Barrow, 30 La. Ann. 657.

21. Gosman *v.* State, 106 Ind. 203, 6 N. E. 349.

22. Glass *v.* Hutchinson, 55 Kan. 162, 40 Pac. 287.

23. State *v.* Brown, 12 Ohio St. 614. See *infra*, II, E, 2.

24. **Of deputies, assistants, and substitutes** see *infra*, VI, B.

Disqualification by engaging in insurrection or rebellion see *In re* Tate, 63 N. C. 308.

Disqualification in particular cases see Criminal Law, 12 Cyc. 530.

Holding other office see Officers, 29 Cyc. 1381.

25. People *v.* Dorsey, 32 Cal. 296; State *v.* Swan, 60 Kan. 461, 56 Pac. 750; State *v.*

but the better opinion is to the contrary.[26] It has also been held in a state holding the former view that disbarment will not disqualify unless it is named as a circumstance creating a vacancy.[27] A requirement that the prosecuting attorney must be learned in the law is satisfied by admission to practice in the courts of the same or another state, provided a license from the latter entitles him to admission in his own state.[28] If the prosecuting or district attorney is required to be a practising attorney in the state, a suspension from practice in any court thereof renders him ineligible so long as the order of suspension remains in force.[29] If his qualifications are prescribed by the constitution, the legislature cannot change or add to them.[30] Residence within the county or district is usually necessary,[31] and sometimes residence for a certain length of time is required.[32]

2. Women. Unless otherwise provided, it is always understood that only electors may hold public office;[33] and therefore women are not usually eligible as prosecuting attorneys.[34]

3. How Determined. If an appointee has already entered upon the duties of his office, neither the appointing body nor the court may summarily declare the office vacant because of his ineligibility. That question can then be determined only upon quo warranto proceedings in the proper court.[35] It is also a well-settled rule of public policy that the right of an incumbent *de facto* cannot be attacked collaterally. It can be determined only in a direct proceeding instituted for that purpose.[36] A district attorney appointed by authority of law becomes a *de facto* officer after undisturbed and unquestioned exercise of the powers of the office for a time, although at the time of appointment he was ineligible.[37]

C. Qualification[38] **— 1. In General.** On his election or appointment a district or prosecuting attorney must qualify as required by law before entering upon the discharge of his duties.[39] Unless required by law it is not necessary that the amount of the bond be fixed for each incumbent. A prosecuting attorney-elect may give bond in the sum last fixed, and it shall be deemed sufficient until a larger one is ordered.[40] Failure to file the certificate of election, properly indorsed and within the time required, will not work a forfeiture of the office, but the person elected cannot enter upon the duties of the office until he has complied with the law in that respect.[41]

Smith, 50 Kan. 69, 31 Pac. 784; State *v.* Clough, 23 Minn. 17.

26. People *v.* May, 3 Mich. 598; State *v.* Russell, 83 Wis. 330, 53 N. W. 441. Excluding consideration of local statutes, the reason given for these decisions appears more logical. It is certainly reasonable to assume that lawmakers, using the word "attorney," had in mind an attorney at law, one fitted to discharge the duties of the office, rather than one without knowledge of the law. See also People *v.* Hallett, 1 Colo. 352, in which the two judges disagreed on this point.

27. State *v.* Swan, 60 Kan. 461, 56 Pac. 750.

28. Howard *v.* Burns, 14 S. D. 383, 85 N. W. 920.

29. Brown *v.* Woods, 2 Okla. 601, 39 Pac. 473.

30. Howard *v.* Burns, 14 S. D. 383, 85 N. W. 920, holding that since the constitution (art. 5, §§ 24, 25) provides that no person shall be eligible to the office of state's attorney, unless he be learned in the law, a statute (Laws (1887), § 427) requiring persons eligible to the office of district attorney to be admitted to practice as an attorney in some court of record in the territory was without effect, since the legislature could not prescribe additional qualifications or modify those imposed by the statute.

31. See State *v.* Johnston, 101 Ind. 223.

32. Territory *v.* Smith, 3 Minn. 240, 74 Am. Dec. 749.

33. See Officers, 29 Cyc. 1376, 1377.

34. Atty.-Gen. *v.* Abbott, 121 Mich. 540, 80 N. W. 372, 47 L. R. A. 92. See Officers, 29 Cyc. 1377.

35. People *v.* Hallett, 1 Colo. 352; Howard *v.* Burns, 14 S. D. 383, 85 N. W. 920. See Officers, 29 Cyc. 1380.

36. U. S. *v.* Mitchell, 136 Fed. 896. See Officers, 29 Cyc. 1389.

37. U. S. *v.* Mitchell, 136 Fed. 896, nonresidence. See Officers, 29 Cyc. 1393.

One who has done nothing so far, except to sign an information as assistant, cannot be regarded as a *de facto* officer. Murrey *v.* State, 48 Tex. Cr. 219, 87 S. W. 349. See Officers, 29 Cyc. 1391.

38. Of deputies, assistants, and substitutes see *infra*, VI, C.

39. State *v.* Colvig, 15 Oreg. 57, 13 Pac. 639. And see Officers, 29 Cyc. 1385 *et seq.*

40. Glass *v.* Hutchinson, 55 Kan. 162, 40 Pac. 287.

41. State *v.* Colvig, 15 Oreg. 57, 13 Pac. 639.

2. Refusal of Court to Allow Qualification. The action of the court in denying leave to one duly appointed, to take the oath of office and enter upon the duties thereof is judicial in its nature, and therefore subject to review by the appellate court.[42]

D. Tenure[43]— 1. In General. The term and tenure of office of district and prosecuting attorneys in the states depends of course upon the constitution and statutes of the particular state.[44] United States district attorneys are appointed for four years.[45] In the absence of any provision of law to the contrary, a district attorney holds office until the expiration of his term as fixed by law and until his successor has qualified.[46] If the office is created and the term fixed by the constitution, the legislature can neither abolish the office nor abridge the term,[47] as by providing for a new election before the expiration thereof,[48] by redivision of the state into judicial circuits,[49] by rediviging one circuit into two,[50] by changing the name of the criminal court of the circuit,[51] or by assigning his duties to the attorney of another district.[52] Even when the constitution confers upon the legislature power to abolish the office, it cannot abolish the tenure of any rightful incumbent.[53] Nor will a constitutional amendment creating the office of prosecuting attorney, but not abolishing the tenure of district attorneys then in office, take effect until the close of the term for which the latter were elected.[54] If the office be created by the legislature, the same body may either abolish the office, or extend or abridge the term, in the absence of constitutional prohibition.[55] The term of office, being fixed by law, cannot be extended by the governor's commission for a longer period.[56]

2. Of Appointee to Fill Vacancy.[57] An appointee to fill a vacancy caused by death, resignation, or removal, where the office is an elective one, holds only until the next general election, and until his successor shall qualify.[58] But when, as in

42. Bruce *v.* Fox, 1 Dana (Ky.) 447.

43. Of deputies, assistants, and substitutes see *infra*, VI, D.

44. See Cropsey *v.* Henderson, 63 Ind. 268; Craft *v.* State, 3 Kan. 450; Bruce *v.* Fox, 1 Dana (Ky.) 447 (during good behavior and the continuance of the office); Opinion of Justices, 3 Gray (Mass.) 601; State *v.* Davis, 44 Mo. 129; State *v.* Jeter, 1 McCord (S. C.) 233.

45. U. S. Rev. St. (1878) § 769 [U. S. Comp. St. (1901) p. 600].

46. State *v.* Wells, 8 Nev. 105; Upshaw *v.* Booth, 37 Tex. 125. And see Officers, 29 Cyc. 1399.

47. Moser *v.* Long, 64 Ind. 189; Adams *v.* Roberts, 119 Ky. 364, 83 S. W. 1035, 26 Ky. L. Rep. 1271; People *v.* Palmer, 154 N. Y. 133, 47 N. E. 1084 [*affirming* 21 N. Y. App. Div. 101, 47 N. Y. Suppl. 403]. See Officers, 29 Cyc. 1396.

Constitutionality of statute postponing beginning of term.— The Ohio act of April 19, 1898, "To amend section 1267 of the Revised Statutes" (93 Ohio Laws, p. 125), postponing the beginning of the official terms of prosecuting attorneys from the first Monday in January to the first Monday in September, is void, being in violation of the tenth article of the constitution, which requires that county officers shall be elected, and not within the authority to provide for the filling of vacancies conferred upon the general assembly by the twenty-seventh section of the second article. State *v.* Beal, 60 Ohio St. 208, 54 N. E. 84.

48. Barkwell *v.* State, 4 Ind. 179.

49. In such case those holding office in the original circuits become attorneys for the new circuits in which they reside for the remainder of the original term. Moser *v.* Long, 64 Ind. 189; State *v.* Tucker, 46 Ind. 355. And see State *v.* Peterson, 74 Ind. 174.

50. State *v.* Johnston, 101 Ind. 223, holding that, although the legislature has the power to make such a division, the act is unconstitutional so far as it attempts to oust the prosecuting attorney for the original circuit before expiration of his term.

51. Elam *v.* State, 75 Ind. 518, holding that if such an act purports to continue him in office, he does not hold by virtue thereof, nor succeed himself, but holds only for his original term.

52. Fant *v.* Gibbs, 54 Miss. 396.

53. Adams *v.* Roberts, 119 Ky. 364, 83 S. W. 1035, 26 Ky. L. Rep. 1271. And see Officers, 29 Cyc. 1397.

54. Hays *v.* Hays, 5 Ida. 154, 47 Pac. 732.

55. State *v.* Trewhitt, 113 Tenn. 561, 82 S. W. 480. See Officers, 29 Cyc. 1396.

Although the legislature has power to extend the term thereof, it cannot continue in office those previously elected, beyond their original terms, the constitution providing that no office created by the legislature shall be filled otherwise than by the people or the county court. State *v.* Trewhitt, 113 Tenn. 561, 82 S. W. 480.

56. Hench *v.* State, 72 Ind. 297; Moser *v.* Long, 64 Ind. 189.

57. Appointment to fill vacancies see *supra*, II, A, 2.

58. *Florida.*— Simonton *v.* State, 44 Fla. 289, 31 So. 821.

case of sickness and the like, the vacancy is contingent, the appointment lasts only until such disability is removed.[59]

E. Removal and Resignation — 1. Removal[60] — a. In General. A district attorney of the United States may be removed before the expiration of his term by the president with the consent of the senate, notwithstanding the requirement of the statute [61] that he shall be appointed for a term of four years. These are words of limitation, not of grant.[62] And appointment and confirmation by the senate of a successor nominated by the president is sufficient ratification of the order of removal.[63] The power of a court to remove its attorney for the state or commonwealth has been recognized.[64] But a state prosecuting attorney whose term of office is fixed by law cannot, in the absence of a statute, be removed at the pleasure of the executive.[65] If guilty of nonfeasance or malfeasance in office, a prosecuting attorney forfeits his office and may be removed therefrom by quo warranto proceedings, or proceedings under the statute, in the proper court.[66]

Kansas.— State *v.* Mechem, 31 Kan. 435, 2 Pac. 816.

Louisiana.— Walsh *v.* Knickerbocker, 18 La. Ann. 180.

Nebraska.— State *v.* Saline County, 60 Nebr. 275, 83 N. W. 70; State *v.* Rankin, 33 Nebr. 266, 49 N. W. 1121.

Ohio.— Matter of Prosecuting Atty., 2 Ohio Dec. (Reprint) 602, 4 West. L. Month. 147.

See 17 Cent. Dig. tit. "District and Prosecuting Attorneys," § 3.

59. *Ex p.* Diggs, 50 Ala. 78; Matter of Prosecuting Atty., 2 Ohio Dec. (Reprint) 602, 4 West. L. Month. 147.

60. See, generally, Officers, 29 Cyc. 1406.

Temporary suspension from practice for misconduct in making misstatement as to decision of supreme court see *In re* Maestretti, (Nev. 1908) 93 Pac. 1004, where a prosecuting attorney was temporarily suspended from practice except as to his official duties as district attorney.

61. U. S. Rev. St. (1878) § 769 [U. S. Comp. St. (1901) p. 600].

62. Parsons *v.* U. S., 167 U. S. 324, 17 S. Ct. 880, 42 L. ed. 185 [*affirming* 30 Ct. Cl. 222].

63. Parsons *v.* U. S., 30 Ct. Cl. 222 [*affirmed* in 167 U. S. 324, 17 S. Ct. 880, 42 L. ed. 185].

64. Mills *v.* Pulaski Cir. Ct., Hard. (Ky.) 139, holding that the circuit courts had power to remove their attorney for the commonwealth on the ground that he had removed from the county, and that great inconvenience had arisen therefrom.

65. Upshaw *v.* Booth, 37 Tex. 125.

66. State *v.* Foster, 32 Kan. 14, 765, 3 Pac. 534 [*affirmed* in 112 U. S. 201, 5 S. Ct. 8, 28 L. ed. 629].

Prosecuting attorneys are not state officers, who may be removed by impeachment only, as provided in the constitution; but the legislature may provide other modes for their removal. *Ex p.* Wiley, 54 Ala. 226.

The prosecuting attorney is subject to forfeiture of his office for giving professional assistance to a defendant in a criminal prosecution (*In re* Voss, 11 N. D. 540, 90 N. W. 15), or for gross immorality (Moore *v.* Strickling, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279). A state's attorney, who, on several occasions, enters a public gambling house, and bets money on a roulette wheel, or otherwise gambles for money there, and wilfully refrains from informing and prosecuting the keeper of such place, is guilty of a misdemeanor involving moral turpitude, as such failure to inform and prosecute such keeper involves the violation of an official oath and the violation of the express command of N. D. Rev. Codes (1899), § 7243. *In re* Voss, *supra.* If a public officer, whose duty it is to prosecute the keeper and inmates of a house of ill fame, resorts to the same for immoral purposes, he is guilty of gross immorality, and thereby forfeits his office. Moore *v.* Strickling, *supra.*

Neglect.— Failure to prosecute violations of law within his knowledge is ground for forfeiture of office, as well as disbarment and suspension. *In re* Voss, 11 N. D. 540, 90 N. W. 15.

It is no excuse for nonfeasance that public sentiment was adverse to the enforcement of the law. State *v.* Foster, 32 Kan. 14, 765, 3 Pac. 534 [*affirmed* in 112 U. S. 201, 5 S. Ct. 8, 28 L. ed. 629]; *In re* Voss, 11 N. D. 540, 90 N. W. 15.

In quo warranto to remove from office a county attorney charged with violating his duty in respect to the enforcement of the prohibitory liquor law the issue of primary importance is that concerning defendant's good faith in his official conduct. The law presumes that defendant acted in good faith in all the matters charged against him, and the burden rests upon the state to show otherwise by a preponderance of the evidence. State *v.* Trinkle, 70 Kan. 396, 78 Pac. 854. A county attorney is not obliged to institute proceedings for the punishment of offenders against the prohibitory liquor law upon his own knowledge; but whenever notified by an officer or other person of any violation of that law it is his duty forthwith to exercise diligently all the authority conferred on him by law for the purpose of disclosing, prosecuting, and punishing the offender. State *v.* Trinkle, *supra.* Upon the trial of such an action evidence that saloons were run openly and publicly in defendant's county is relevant as bearing upon his motives in dealing with specific offenses of which he had been duly

Mere misconduct while in office, not official misconduct, is not sufficient.[67] Causes of removal or suspension are sometimes prescribed by the constitution or by statute; but if they are prescribed by the constitution the legislature cannot prescribe other or different causes.[68]

b. Method.[69] If the law prescribes no other method of removing prosecuting attorneys, the appointing body may remove them, the power of removal being incident to the power of appointment.[70] In such case, if no term of office is fixed by law, the appointing body may remove them and appoint others in their stead without assigning any reason therefor.[71] If the method of removal is prescribed by the constitution, the legislature has no power to prescribe any other mode.[72]

c. Practice.[73] Unless required by statute, neither indictment, trial, nor conviction are a prerequisite to the removal of a prosecuting attorney for official misconduct.[74] The trial of charges against a prosecuting attorney for his removal from office is not within the constitutional provision for trial by jury;[75] nor is it necessary that the complaint of official neglect or misconduct shall be verified by oath, where the statute does not require it.[76] A criminal prosecution against a county attorney will not prevent proceedings by a statutory civil action to remove him for misconduct in office.[77] On the trial of a proceeding to remove a prosecuting attorney for misconduct in office, based upon charges of crime, he cannot be required to testify, where a statute provides that on trial of all indictments, complaints, or proceedings against any person, he shall not be a competent witness except upon his own request.[78] As a rule an appeal or writ of error will lie to or from a judgment of removal.[79]

2. Resignation. The resignation of prosecuting and district attorneys is governed by the same principles as that of other officers.[80] The mode of resigning and the formalities to be observed are usually prescribed by statute.[81] Where a resignation is required to be made to the court it cannot be made to the judge

notified. State *v.* Trinkle, *supra*. If a county attorney be notified of a violation of the prohibitory liquor law, and be furnished with the names of witnesses by whom the fact of such violation may be established, he cannot unnecessarily delay an investigation of the matter, or a prosecution, if the facts warrant, merely because the city in which the offense occurred is about to institute or has instituted proceedings under its ordinances for punishing the offense. His duties are not dischargeable by the city authorities, and a city prosecution is not a mere substitute for a prosecution by the state. State *v.* Trinkle, *supra*.

67. Graham *v.* Stein, 18 Ohio Cir. Ct. 770, 4 Ohio Cir. Dec. 140.

Failure to perform, or an agreement not to perform, any of the duties of the office is "official misconduct." Graham *v.* Stein, 18 Ohio Cir. Ct. 770, 4 Ohio Cir. Dec. 140.

Sufficiency of charge of "official misconduct" see Trigg *v.* State, 49 Tex. 645.

68. Lowe *v.* Com., 3 Metc. (Ky.) 237.

A statute providing for removal or suspension while under indictment does not apply to indictments found for an offense which was committed before the act. *Ex p.* Diggs, 52 Ala. 381.

69. See, generally, Officers, 29 Cyc. 1406.

Quo warranto see *supra*, II, E, 1, 9; and, generally, Quo Warranto.

70. *Ex p.* Bouldin, 6 Leigh (Va.) 639. See also Officers, 29 Cyc. 1406.

71. *Ex p.* Bouldin, 6 Leigh (Va.) 639.

72. Lowe *v.* Com., 3 Metc. (Ky.) 237. See also Officers, 29 Cyc. 1410.

73. See, generally, Officers, 29 Cyc. 1409–1413.

74. State *v.* Foster, 32 Kan. 14, 765, 3 Pac. 534 [*affirmed* in 112 U. S. 201, 5 S. Ct. 8, 28 L. ed. 629]; Graham *v.* Stein, 18 Ohio Cir. Ct. 770, 4 Ohio Cir. Dec. 140.

75. Moore *v.* Strickling, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279. See, generally, Juries, 24 Cyc. 82.

76. Graham *v.* Stein, 18 Ohio Cir. Ct. 770, 4 Ohio Cir. Dec. 140.

77. State *v.* Foster, 32 Kan. 14, 765, 3 Pac. 534 [*affirmed* in 112 U. S. 201, 5 S. Ct. 8, 28 L. ed. 629].

78. Killits *v.* State, 19 Ohio Cir. Ct. 740, 10 Ohio Cir. Dec. 722.

79. Killits *v.* State, 19 Ohio Cir. Ct. 740, 10 Ohio Cir. Dec. 722.

80. See Officers, 29 Cyc. 1403.

81. State *v.* Kovolosky, 92 Iowa 498, 62 N. W. 223, holding that under Iowa Code (1873), § 782, subd. 4, providing for the resignation of all "county officers" to be tendered to the board of supervisors, and subdivision 2, requiring resignation of "district attorneys" to be tendered to the governor, and the later act creating the office of county attorney and providing that whenever the term "district attorney" appears in the laws, it shall mean "county attorney," and repealing all inconsistent acts, the resignation of a county attorney is properly tendered to the board of supervisors.

during vacation. Although accepted by him and entered upon the record, such resignation does not create a vacancy.[82]

F. Effect of Redividing State into Judicial Districts. Such division, as has been seen, cannot be so made as to abridge the constitutional term of office of any rightful incumbent.[83] If the legislature, acting under authority expressly conferred by the constitution, transfers the county of residence of a district attorney to another district, he does not become the prosecuting attorney for the latter district.[84] But he remains the attorney for his original district.[85] When a new county is added to a criminal circuit, the solicitor for that circuit is entitled to the office for that county also, no other solicitor being provided.[86]

III. COMPENSATION AND FEES.[87]

A. Of State Prosecuting and District Attorneys — 1. IN GENERAL. At common law those who accepted public office were presumed to give their services.[88] The right of a prosecuting attorney to compensation is therefore purely statutory. He is not entitled to any salary, fees, or costs except as expressly provided by law.[89] Being in derogation of the common law, fees provided by

82. State *v.* Brown, 12 Ohio St. 614.

83. See *supra*, II, D, 1.

84. People *v.* Annis, 10 Colo. 53, 14 Pac. 52.

85. Adams *v.* Roberts, 119 Ky. 364, 83 S. W. 1035, 26 Ky. L. Rep. 1271.

Notwithstanding the constitutional provisions that he must be a resident of the district in which he is elected, his term of office being fixed by the constitution, the legislature cannot by such method abridge it. Adams *v.* Roberts, 119 Ky. 364, 83 S. W. 1035, 26 Ky. L. Rep. 1271. See *supra*, II, D, 1.

86. McCall *v.* Webb, 125 N. C. 243, 34 S. E. 430; McCall *v.* Gardner, 125 N. C. 238, 34 S. E. 434.

87. See, generally, OFFICERS, 29 Cyc. 1422.

Change during term see People *v.* Williams, 232 Ill. 519, 83 N. E. 1047; Spalding *v.* Thornbery, 103 S. W. 291, 31 Ky. L. Rep. 738; and OFFICERS, 29 Cyc. 1427.

88. Benton County *v.* Harman, 101 Ind. 551; Bynum *v.* Greene County, 100 Ind. 90. See OFFICERS, 29 Cyc. 1422.

89. *Arkansas.*— Phillips County *v.* Jackson, 85 Ark. 382, 108 S. W. 212; State *v.* McNair, 70 Ark. 65, 66 S. W. 144.

Colorado.— Merwin *v.* Boulder County, 29 Colo. 169, 67 Pac. 285; Fremont County *v.* Wilson, 3 Colo. App. 492, 34 Pac. 265.

Georgia.— See Tanner *v.* O'Neill, 108 Ga. 245, 33 S. E. 884.

Illinois.— Cook County *v.* Healy, 222 Ill. 310, 78 N. E. 623.

Indiana.—Wood *v.* Madison County, 125 Ind. 270, 25 N. E. 188; State *v.* Jackson, 68 Ind. 58.

Kentucky.— Power *v.* Fleming County, 99 Ky. 200, 35 S. W. 541, 18 Ky. L. Rep. 61.

Michigan.— Willcox *v.* Wayne Cir. Judge, 83 Mich. 1, 47 N. W. 29.

Mississippi.— Miller *v.* State, 69 Miss. 112, 12 So. 265.

Missouri.— Hill *v.* Butler County, 195 Mo. 511, 94 S. W. 518.

Nevada.— State *v.* Shearer, 23 Nev. 76, 42 Pac. 582.

New Hampshire.— Fletcher *v.* Merrimack County, 71 N. H. 96, 51 Atl. 271.

Tennessee.— State *v.* Lowenstine, 4 Lea 737; State *v.* Foster, 4 Lea 736; State *v.* Frost, 4 Lea 735; State *v.* Miller, 4 Lea 734; Mooneys *v.* State, 2 Yerg. 578.

Texas.— State *v.* Moore, 57 Tex. 307; Howth *v.* Greer, 40 Tex. Civ. App. 552, 90 S. W. 211; Harris County *v.* Stewart, 17 Tex. Civ. App. 1, 43 S. W. 52. Under Sayles Civ. St. arts. 2495*c*, 2495*d*, providing that county attorneys in counties that cast seven thousand five hundred votes in the presidential election of 1896 shall receive fees amounting to two thousand five hundred dollars per annum, and, in addition thereto, one fourth of the excess of fees collected by them, and requiring them to pay to the county treasurers all fees collected in excess of the maximum amount allowed and of the one fourth of the excess of such maximum for their services, and for the services of their assistants, the attorneys are entitled to two thousand five hundred dollars out of the fees collected and one fourth the fees above such sum, and their assistants are to be paid out of the remainder, and the balance paid to the county treasurers. Hare *v.* Grayson County, (Civ. App. 1899), 51 S. W. 656.

Wisconsin.— State *v.* Kromer, 38 Wis. 547.

See 17 Cent. Dig. tit. "District and Prosecuting Attorneys," § 18 *et seq.*

Validity of particular statutes as to compensation see State *v.* McMillan, 55 Fla. 246, 45 So. 882; Butler *v.* Stephens, 119 Ky. 616, 84 S. W. 745, 27 Ky. L. Rep. 241; Goldsborough *v.* Lloyd, 86 Md. 374, 38 Atl. 773; State *v.* Lucas County, 28 Ohio Cir. Ct. 170; and *infra*, this section, text and note 1.

Power of county board.— Under Kan. Gen. St. (1889) par. 1799 (Gen. St. (1897) c. 30, §§ 66–68), the board of county commissioners of a county having a population between one thousand and five thousand was given the authority and discretion to fix the salary of the county attorney of such county

statute, to be paid to the prosecuting attorney in a certain event, cannot be recovered if the proceeding does not take the course mentioned.[90] He is not entitled to compensation for services not required by law;[91] nor for services required by law and actually performed, if no fees are provided for.[92] Salary is an incident of the office; it is not dependent upon the rendition of services. Payment to an incumbent *de facto* does not deprive the district attorney having legal title to the office, of his right to such salary.[93] But the right to fees arises only upon services rendered.[94] In providing fees, it is not always clear what is meant by "each case," "each prosecution," or "proceeding," etc.[95] If the statute pro-

at a less sum than four hundred dollars. Naylor *v.* Gray County, 8 Kan. App. 761, 61 Pac. 763.

In divorce cases.— When the prosecuting attorney merely appears at the examination of the witnesses in a divorce case the parties to which have one child, and at the conclusion of the testimony announces that he does not think it necessary to contest the granting of a divorce, he is entitled to no fee, under Mich. Pub. Acts (1887), p. 152, providing that every petition for divorce shall set forth the names and ages of all the children of the marriage, and when there are any under fourteen years old, a subpœna shall issue to the prosecuting attorney, who shall enter his appearance, and oppose the granting of a divorce, if in his judgment the interests of the children or the public good require it, and that for every case he contests he shall receive five dollars. Willcox *v.* Hosmer, 83 Mich. 1, 47 N. W. 29.

In Illinois section 2 of the act of 1901 (Laws (1901), p. 207), fixing the salary of the state's attorney of Cook county, is void because of alterations and irregularities in its passage, but the other sections of the act are unaffected and valid; and as the act of 1871, relating to the salaries of judges of the circuit and superior courts and the state's attorney of Cook county, is thereby repealed, there is no law in force fixing the salary to be paid by the county of Cook to its state's attorney. Cook County *v.* Healy, 222 Ill. 310, 78 N. E. 623.

In Kentucky, under St. (1903) § 132, providing that the county attorney shall be allowed annually a reasonable salary to be paid out of the county levy, the salary must be a fixed sum, and not dependent on contingent fees, since to make an allowance payable out of such levy necessarily means that a certain sum is to be allowed, so that the county treasurer will have a definite order of the fiscal court to direct him in paying the claim. Spalding *v.* Thornbury, 103 S. W. 291, 108 S. W. 906, 31 Ky. L. Rep. 738, 33 Ky. L. Rep. 362.

90. Willcox *v.* Hosmer, 83 Mich. 1, 47 N. W. 29.

No fee can be recovered for services upon the imposition of fines for contempt (Buckingham *v.* People, 26 Ill. App. 269); nor in suits for forfeitures on recognizances (Buckingham *v.* People, 26 Ill. App. 269; People *v.* Van Wyck, 4 Cow. (N. Y.) 260); nor on a recognizance to keep the peace (State *v.* Red, 24 N. C. 265; Mooneys *v.* State, 2 Yerg. (Tenn.) 578); where the statute does not provide any. He is not entitled to compensation for attendance upon the court except when the attorney-general also attends upon requisition of the governor, or of a judge of the supreme or circuit court, the statute providing a fee only in such cases. People *v.* Schoharie Sup'rs, 6 Wend. (N. Y.) 505.

A fee allowed in the event a certain judgment is rendered cannot be recovered except upon final judgment, unreversed by a higher court. People *v.* Flynn, 59 Ill. App. 173.

A percentage, to be paid to the attorney who assisted "when judgment was rendered" cannot be recovered by the county attorney whose term expired before rendition of the judgment, although he assisted at the trial. Spaulding *v.* Hill, 115 Ky. 1, 72 S. W. 307, 24 Ky. L. Rep. 1802.

91. *California.*— San Diego County *v.* California, etc., R. Co., (1884) 1 Pac. 897.

Kentucky.— Power *v.* Fleming County, 99 Ky. 200, 35 S. W. 541, 18 Ky. L. Rep. 61.

Missouri.— Lackland *v.* Dougherty, 15 Mo. 260.

New York.— People *v.* New York, 1 Hill 362; People *v.* Van Wyck, 4 Cow. 260.

North Carolina.— Randolph County Ct. *v.* Johnson, 10 N. C. 238.

Texas.— Spencer *v.* Galveston County, 56 Tex. 384; Harris County *v.* Stewart, 17 Tex. Civ. App. 1, 43 S. W. 52.

See 17 Cent. Dig. tit. "District and Prosecuting Attorneys," § 18 *et seq.*

92. Reynolds *v.* McAfee, 44 Ala. 237; Thomas *v.* Thomas, 61 Ga. 70; Dodd *v.* Sweetser, 14 Ind. 292; Miller *v.* State, 69 Miss. 112, 12 So. 265.

The court has no power to allow fees where the law has failed to do so. State *v.* Moore, 57 Tex. 307.

93. People *v.* Smyth, 28 Cal. 21. See also *infra*, III, A, 10, c; and OFFICERS, 29 Cyc. 1430.

94. O'Connor *v.* East Baton Rouge Parish, 31 La. Ann. 221; Foute *v.* New Orleans, 20 La. Ann. 22.

One who merely enters an appearance but takes no further steps is not entitled to fees. Edwards *v.* Fresno County, 74 Cal. 475, 16 Pac. 239; McMullin *v.* Montrose County, 18 Colo. App. 117, 70 Pac. 449; State *v.* Jackson, 68 Ind. 58.

95. It seems that the prosecuting attorney is entitled to the fee allowed by law when the costs are adjudged against the defendant, on scire facias against a delinquent public officer, if the costs are adjudged against him.

vides a fee "for each judgment recovered" against a sheriff for failure to return executions, he is entitled to such fee for each motion made, although the court consolidated all such motions and rendered but one judgment.[96] Under a statute allowing a fee for each prosecution in behalf of the state in which costs are taxed against the defendant, only one fee is earned by the commonwealth attorney upon scire facias issued to several persons bound together in a recognizance which has been forfeited.[97] A special act fixing the fee of a certain prosecuting attorney is not repealed by a general fee law.[98] Nor does a later act increasing the fees of prosecuting attorneys generally increase those of a solicitor whose office was created by a special act providing that his fees should be the same as those then received by other prosecuting attorneys for like services.[99] Of course if the fees or other compensation of prosecuting attorneys are fixed by the constitution, they cannot be reduced or otherwise changed by the legislature.[1] Sometimes prosecuting attorneys are required to account to the county for fees collected by them.[2]

State *v.* Whitsenhunt, 5 N. C. 287; State *v.* Fields, Mart. & Y. (Tenn.) 137. A fee allowed "for all other cases" in the supreme court is to be paid only for each bill of exception, although there may be more than one plaintiff therein. Each bill of exceptions is one case. *In re* Kenan, 109 Ga. 819, 35 S. E. 312. If allowed for proceeding against a clerk for failure to enroll cases as required by law, he is entitled to the same for each case which the clerk failed to enroll, notwithstanding but one motion is made by the state's attorney for all such delinquencies occurring during his term. Wright *v.* Shelby County, 9 Baxt. (Tenn.) 145.

96. State *v.* McDonald, 9 Humphr. (Tenn.) 606. *Contra*, State *v.* Moore, 57 Tex. 307.

97. State *v.* Robinson, 8 Yerg. (Tenn.) 370.

98. Mauro *v.* Buffington, 26 Mo. 184.

99. Johnston *v.* Lovett, 65 Ga. 716.

1. Goldsborough *v.* Lloyd, 86 Md. 374, 38 Atl. 773, holding that under Const. art. 15, § 1, providing for compensation of certain officials (among others, state's attorneys), and allowing them to retain for their remuneration fees received to the amount of three thousand dollars, Loc. Acts (1894), c. 213, limiting the compensation of state's attorney in the county of Dorchester to one thousand two hundred dollars, is unconstitutional, if the fees actually earned according to the rates fixed by law amount to more than the sum total specified in the act. But under Ky. Const. § 235, providing that the salaries of public officers shall not be changed during their term of office, and section 98 declaring that the compensation of the commonwealth's attorney shall be by salary of five hundred dollars per annum, payable out of the state treasury, and such percentage of fines and forfeitures as may be fixed by law, it was held that an act creating an additional judicial district, the effect of which was to withdraw one of the counties from the district in which complainant was commonwealth's attorney during his term of office, and lessen the amount of the fines and penalties he would otherwise have received, but which did not diminish his salary of five hundred dollars nor the "percentage" of fines and forfeitures to which he was entitled, was not unconstitutional. Butler *v.* Stephens, 119 Ky. 616, 84 S. W. 745, 27 Ky. L. Rep. 241. Tex. Const. art. 5, § 21, prescribes that county attorneys "shall represent the state in all cases in the district and inferior courts in their respective counties," with the qualification that, if a county is in a district having a district attorney, the respective duties of district and county attorneys shall be regulated by the legislature. The act of the twenty-sixth legislature establishing corporation courts provides that in state cases prosecuted by the city attorney the county attorney, if he so desires, may so represent the state, but that he shall not be entitled to receive any fees or compensation therefor. It was held that such act is not unconstitutional, in so far as it provides that the county attorney shall not be entitled to receive any fees or compensation in such cases. Upton *v.* San Angelo, 42 Tex. Civ. App. 76, 94 S. W. 436. Sayles Civ. St. Tex. art. 2495*c*, entitling county attorneys of certain counties to only a part of the fees attached to their office, is not repugnant to Const. art. 5, § 21, providing that county attorneys shall receive as compensation only such fees as may be prescribed by law. Hare *v.* Grayson County, (Tex. Civ. App. 1899), 51 S. W. 656.

The office of prosecuting attorney must be held a state office within Ark. St. art. 19, § 23, providing that no officer of a state, nor of any county, city, or town shall receive for salary, fees, etc., more than five thousand dollars net profits per annum, and requiring all sums in excess thereof to be paid into the state, county, or city treasury, notwithstanding the act of Feb. 1, 1875, p. 124, carrying out the provisions of the article as to other state and county officers, construed it as not applying to the office of prosecuting attorney. Griffin *v.* Rhoton, 85 Ark. 89, 107 S. W. 380.

Constitutional provision not self-executing. — Griffin *v.* Rhoton, 85 Ark. 89, 107 S. W. 380, referred to *supra*, this note. And see CONSTITUTIONAL LAW, 8 Cyc. 752.

2. See Nolan *v.* Ellis County, 65 Kan. 57, 68 Pac. 1068.

2. In Criminal Prosecutions[3] — a. In General. The fees of prosecuting attorneys in criminal cases depend of course upon the statutes in the particular jurisdiction.[4] The fees of the prosecuting attorney are a proper item of costs to be taxed against the defendant; and it has been held that they are not imposed as a part of the punishment, but in order that the state may prosecute the guilty at their own expense.[5] On the other hand, however, it has been held that the act providing therefor is penal in its nature,[6] and the solicitor therefore is not entitled to such fee on a conviction for an offense committed before the passage of the act, although the defendant was indicted and tried afterward.[7] If a lesser fee be provided by the new act, the solicitor shall receive only that, notwithstanding the indictment was found and returned before its enactment.[8] An act which reduces the grade of an offense necessarily reduces the fee allowed in such cases, where the existing law provides different fees for the respective grades.[9]

b. Indictment and Trial Fees. For instruments returned by the grand jury "not true bills," it has been held that the prosecuting attorney is not entitled to the fee allowed for drawing indictments;[10] nor to the fee in criminal actions, since such action is commenced only when an indictment is found and filed with the clerk.[11] If the statute provides fees, so much for drawing indictments, and so much for engrossing them, the district attorney is entitled to the full fee for an indictment so well drawn that it is not necessary to engross it.[12] If the prosecuting attorney is also a justice of the peace, he is not entitled to justice's fees for drawing complaints and warrants which it is his duty as solicitor to draw, the statute providing that his salary shall be in full for all services.[13]

c. Upon Termination of Prosecution. A case placed upon the retired docket is not thereby disposed of, and the attorney cannot then recover the fee provided in cases *nolle prossed.* or of acquittal.[14] A statute fixing fees in cases settled by leave of court includes those in which a *nolle pros.* has been entered.[15] He cannot recover fees provided for "convictions," "judgments in favor of the state," etc.,

Tenn. Acts (1897), c. 41, which fixes the compensation of each district attorney-general, and provides that the fees provided by law shall be taxed as costs against the losing party, and turned over to the state, requires that the costs allowed a district attorney-general in an inheritance tax case shall be turned over to the state. Harrison *v.* Johnston, 109 Tenn. 245, 70 S. W. 414.

3. Criminal and civil proceedings distinguished see *infra*, III, A, 3.

4. See *supra*, III, A, 1.

Construction of particular statutes see *In re* Kenan, 109 Ga. 819, 35 S. E. 312 (fees of solicitors-general); Tanner *v.* O'Neill, 108 Ga. 245, 33 S. E. 884 (solicitor of criminal court of Atlanta); Taylor *v.* Van Epps, 58 Ga. 139 (solicitor-general of city court of Atlanta). Under Shannon Code Tenn. § 6380, providing that in cases of misdemeanor, where a *nolle prosequi* is entered, no fee shall be allowed the attorney-general, and section 6383, prohibiting fees to the attorney-general where a bill of indictment is ignored by the grand jury, the district attorney is not entitled to fees from the county in cases in which a *nolle prosequi* was entered after indictment, and in those which were ignored by the grand jury, and no indictments found. Donaldson *v.* Walker, 101 Tenn. 236, 47 S. W. 417.

Attendance at preliminary examinations.— Mo. Rev. St. (1899) § 3237, authorizing fees to a prosecuting attorney for judgment on any proceeding of a criminal nature, otherwise than by indictment or information, and for his services in actions which it shall be made his duty by law to prosecute or defend, does not authorize the payment of a fee for his attendance at the preliminary examination in felony cases. Hill *v.* Butler County, 195 Mo. 511, 94 S. W. 518.

5. Fanning *v.* State, 47 Ark. 442, 2 S. W. 70; State *v.* Schmidt, 34 Kan. 399, 8 Pac. 867; Fears *v.* Ellis County, 20 Tex. Civ. App. 159, 49 S. W. 139.

Costs in criminal cases see Costs, 11 Cyc. 267.

Taxing fees as costs see Costs, 11 Cyc. 280.

6. Dent *v.* State, 42 Ala. 514.

7. Caldwell *v.* State, 55 Ala. 133.

8. Charter *v.* State, 36 Miss. 75.

9. *In re* Kenan, 109 Ga. 819, 35 S. E. 312; State *v.* Tyler, 85 N. C. 569.

10. Arapahoe County *v.* Graham, 4 Colo. 201. *Contra*, Williams *v.* Jefferson County, 2 Mont. 26, notwithstanding the same statute provides that it shall not be allowed for drawing any indictment that may be quashed.

11. Union County *v.* Hyde, 26 Oreg. 24, 37 Pac. 76.

12. *In re* Dist. Attys.' Fees, 6 Hill (N. Y.) 402.

13. Fletcher *v.* Merrimack County, 71 N. H. 96, 51 Atl. 271.

14. State *v.* Ellis, 6 Baxt. (Tenn.) 549.

15. Koch *v.* Schuylkill County, 12 Pa.

for services rendered in the trial of criminal actions which are *nolle prossed* or result otherwise than in conviction.[16] He cannot claim a fee as for "final conviction," if, after conviction, the case is *nolle prossed.* or reversed;[17] nor the fee allowed for prosecuting certain crimes, if defendant is convicted of a lesser offense.[18] If the fee is simply for conviction, but one can be recovered, although the defendant is convicted in both courts.[19] An agreement by the defendant, on condition of dismissing the prosecution, to pay costs as on conviction, is contrary to public policy, and the attorney cannot have his fee taxed as upon conviction.[20] He is entitled only to the fee provided for cases *nolle prossed.*[21] Under a statute permitting the attorney to recover from the county one-half the regular fee if costs cannot be collected from the defendant, he is not entitled to the full fee when the defendant works out his costs in hard labor for the county.[22] And where there are several defendants he is not entitled to receive from the state compensation for services rendered in the supreme court without a certificate from the clerk of the trial court that each defendant is insolvent.[23]

d. Several Defendants. As a rule the prosecuting attorney is entitled to but one fee where several persons are jointly indicted and jointly tried.[24] He is entitled to but one fee where separate trials are ordered, but on conviction of one the others plead guilty and but a single judgment is rendered against all.[25]

e. Several Counts. Under some statutes, if there are several counts in an indictment and the defendant is convicted upon two or more, the prosecuting attorney is allowed the fee for conviction upon each count, although there is but one judgment;[26] but under others only one fee is allowed.[27]

3. Civil Actions and Proceedings. Fees fixed for civil and for criminal proceedings are to be distinguished. Scire facias on the bail-bond of a criminal is a civil action, and the prosecuting attorney in such case is entitled only to the fee provided

Super. Ct. 567, but not if entered before indictment found.

16. Canthorn *v.* State, 41 Ark. 488; Patton *v.* State, 41 Ark. 486; Nourse *v.* Warren County, 17 Ind. 355; State *v.* Foss, 52 Mo. 416; State *v.* Thompson, 39 Mo. 427; State *v.* Beard, 31 Mo. 34; Dunkle *v.* Warren County, 17 Pa. Co. Ct. 400.

The fee for "convictions where the punishment is death" is due upon conviction of such crime, notwithstanding the sentence be commuted by the governor, court, or jury. State *v.* Hill, 3 Coldw. (Tenn.) 98.

17. Leach *v.* State, 8 Lea (Tenn.) 35; Keys *v.* State, 7 Lea (Tenn.) 408.

Where a prisoner escapes before trial, the solicitor is entitled only to the costs which have accrued up to that time. Robinson *v.* Smith, 57 Ga. 332.

18. Bales *v.* State, 19 Ark. 220; *In re* Maddox, 111 Ga. 647, 36 S. E. 859; State *v.* O'Kane, 23 Kan. 244; State *v.* Kennedy, 4 Lea (Tenn.) 223.

19. Com. *v.* Rogers, 9 Gray (Mass.) 278; Huizar *v.* State, (Tex. Cr. App. 1901) 63 S. W. 329.

If allowed "in all prosecutions," the district attorney is entitled to same in each court in which the case is tried. Fields *v.* State, Mart. & Y. (Tenn.) 168.

Upon conviction, appeal, and reversal, and acquittal after new trial, he is entitled to both fees, viz., to that allowed in case of conviction, and to that allowed for acquittal. State *v.* Graves, 6 Baxt. (Tenn.) 488.

If fees are allowed for conviction in an inferior court, and also for all prosecutions in the superior or circuit court, an appeal from one to the other does not vacate the judgment of the former so as to deprive the attorney of such fee allowed for conviction therein; in such case he is entitled to both. Ard *v.* State, 114 Ind. 542, 16 N. E. 504.

20. State *v.* Foss, 52 Mo. 416; State *v.* Narramore, 52 Mo. 27.

21. State *v.* Bachman, 6 Lea (Tenn.) 649.

22. Knox *v.* State, 9 Baxt. (Tenn.) 202.

23. *In re* Kenan, 109 Ga. 819, 35 S. E. 312.

24. *Alabama.*— Brown *v.* State, 46 Ala. 148; Dent *v.* State, 42 Ala. 514.

Arkansas.— Fanning *v.* State, 47 Ark. 442, 2 S. W. 70.

Indiana.— Bunday *v.* State, 6 Ind. 398.

Missouri.— *In re* Murphy, 22 Mo. App. 476.

Oregon.— Union County *v.* Hyde, 26 Oreg. 24, 37 Pac. 76.

Tennessee.— Carroway *v.* State, 5 Humphr. 523.

See 17 Cent. Dig. tit. "District and Prosecuting Attorneys," § 19.

Contra.— State *v.* Kinneman, 39 Ind. 36; State *v.* Cripe, 5 Blackf. (Ind.) 6; State *v.* Hunter, 33 Iowa 361; Penland *v.* State, 1 Humphr. (Tenn.) 383.

25. State *v.* Granville, 26 Kan. 158.

26. Hempstead County *v.* McCollum, 58 Ark. 159, 24 S. W. 9 (where the statute allowed a fee "for each conviction"); Borschenious *v.* People, 41 Ill. 236 ("for each conviction").

27. State *v.* Peck, 51 Mo. 111; *Ex p.* Craig, 19 Mo. 337, where the statute allowed a fee "for a conviction in any case."

by law for the prosecution of civil actions.[28] If the sureties on a forfeited appeal-bond consent to judgment and pay over the amount to the district attorney, he is entitled to the fee allowed in "civil proceedings," although none were had.[29] It has been held in Kentucky that if a judgment of forfeiture be rendered, the county attorney is not entitled to the percentage allowed "in all prosecutions in which judgment is rendered in favor of the commonwealth," on the ground that the word "prosecutions" means criminal proceedings;[30] but in Tennessee, under a statute providing a fee in all "prosecutions in behalf of the state," it was held that a prosecuting attorney is entitled to the fee in scire facias on a bail-bond [31] and also in a proceeding against a constable to remove him from office,[32] as such proceedings are "prosecutions" within the meaning of the statute. *Qui tam* actions for a penalty, although tried as civil actions, are within the statute providing fees in proceedings of a criminal nature.[33]

4. Deductions. The legislature having entire control of the compensation of district and prosecuting attorneys, it may direct deduction therefrom for the payment of attorneys *pro tem.*[34] But the court cannot make any deduction for any purposes, unless expressly permitted to do so by law.[35]

5. Commissions on Fines and Collections. Fees taxed against the defendant and commissions on fines and forfeitures were formerly given in lieu of salary. Salaries are now generally provided by statute, the district or prosecuting attorney being sometimes allowed certain commissions besides. But he is not entitled to commissions in any case unless clearly allowed by law.[36] No commissions are

28. State *v.* Armstrong, 3 Blackf. (Ind.) 42.

29. Colvig *v.* Klamath, 16 Oreg. 244, 19 Pac. 86.

30. Williams *v.* Shelbourne, 102 Ky. 579, 44 S. W. 110, 19 Ky. L. Rep. 1927; Fultz *v.* Crofton, 42 S. W. 841, 19 Ky. L. Rep. 1921.

31. State *v.* Robinson, 8 Yerg. (Tenn.) 370.

32. State *v.* Fields, Mart. & Y. (Tenn.) 137.

33. State *v.* Hannibal, etc., R. Co., 30 Mo. App. 494.

34. White *v.* Berry, 28 Ark. 198.

A constitutional provision that the prosecuting attorney's salary shall be "fixed" by the legislature is not violated by a statute directing deduction from such salary for other causes than those named in the constitution, the word "fixed" serving merely to denote the change from a fee system to salaries. Cole *v.* Humphries, 78 Miss. 163, 28 So. 808.

35. State *v.* Lauder, 11 N. D. 136, 90 N. W. 564, holding that the court could not deduct compensation of an appointee who prosecuted the action upon refusal of the state's attorney to do so, notwithstanding the court had power and it was its duty to appoint another to prosecute in such case; where the statute made no provision for deduction from the salary of the state's attorney except when "absent . . . or unable to perform the duties of his office."

36. He is not entitled to the commission allowed on forfeited bail-bonds, fines, etc., until forfeiture has been declared, by judgment or otherwise, and the money collected thereon. Stamper *v.* State, 11 Ga. 643; *Ex p.* Ford, 74 Ind. 415; State *v.* Barron, 74 Ind. 374; Christian *v.* Byars, 90 Ky. 536, 14 S. W. 491, 12 Ky. L. Rep. 460; Com. *v.* Offut, 82 Ky. 326; Stone *v.* Riddell, 5 Bush (Ky.) 349; Bryant *v.* Com., 3 Bush (Ky.) 9. No commission is earned upon a forfeited bail bond if the accused is surrendered in open court by his sureties in discharge of their liability. Stamper *v.* State, 11 Ga. 643.

La. Const. (1898) arts. 125, 180, providing for compensation of district attorneys, and prohibiting any officer whose salary is fixed by the constitution to be allowed any other fees or perquisites except those otherwise provided for by the constitution, are not susceptible of the construction that they intended to allow district attorneys to collect commissions, as distinguished from fees, save as provided by the constitution itself. State *v.* Henderson, 120 La. 535, 45 So. 430.

La. Act (1880), p. 122, No. 96, defining the duties of district attorneys, deals with the whole subject of their duties and compensation, and it so modified and superseded the then existing law as to preclude any recovery by the district attorneys of the one fifth part of the fines imposed after deducting the commission of the sheriff, in addition to the fee provided by section 3 of said act. State *v.* Henderson, 120 La. 535, 45 So. 430.

On remission of forfeiture.— Under N. C. Revisal (1905), § 2768, providing that the state solicitors shall prosecute suits to recover all penalties, and on forfeited recognizances entered in their courts, and as compensation, shall receive a sum to be fixed by the court, not more than five per cent of the amount collected on such penalty or forfeited recognizance, where a judgment absolute is entered on a recognizance according to a scire facias in a prosecution for misdemeanor, such judgment does not confer on the solicitor a vested right to the commission so as to preclude the judge from subsequently depriving the solicitor thereof by remission as authorized by section 3220. State *v.* King, 143 N. C. 677, 57 S. E. 516.

due upon a money judgment compromised by the acceptance of property;[37] nor out of moneys which do not go to the benefit of the county;[38] nor on fines or forfeitures paid in work for the county;[39] nor on fines remitted by the governor.[40] A percentage of amounts "recovered," "collected," etc., in favor of the state applies only to cases of money demand;[41] and only to moneys collected by himself. He has no interest in fines imposed or collected without the aid of his services.[42] It has been held that a prosecuting attorney is not entitled to a commission on money collected during his term of office on a judgment rendered during the term of his predecessor on a forfeited bail-bond or recognizance.[43]

6. Expenses. An officer is not entitled to reimbursement for expenses, unless provided by law.[44] Generally, however, provision is made for their allow-

Compromises.—Although by statute no commissions are allowed on moneys paid on a compromise, yet if it was effected largely through the efforts of the prosecuting attorney, and the money was paid into the county treasury in order to deprive him of his fees, he may collect the same from the county. Herrington *v.* Santa Clara County, 44 Cal. 496.

If the state attorney is not to receive any commission in excess of a certain amount, including his salary; and after receiving that amount in one year, judgment is rendered for certain fines and forfeitures, which, however, are not paid until after the commencement of the second year, he is entitled to his commissions thereon. Hager *v.* Franklin, 119 Ky. 542, 81 S. W. 926, 84 S. W. 541, 26 Ky. L. Rep. 94, 27 Ky. L. Rep. 189.

37. Donelson *v.* Howard County, 23 Kan. 70.

38. Madison County *v.* Wood, 126 Ind. 168, 25 N. E. 190; Wood *v.* Madison County, 125 Ind. 270, 25 N. E. 188.

39. Power *v.* Fleming County, 99 Ky. 200, 35 S. W. 541, 18 Ky. L. Rep. 61. *Contra*, Abbott *v.* Louisville, 14 S. W. 540, 13 Ky. L. Rep. 87; Fears *v.* Ellis County, 20 Tex. Civ. App. 159, 49 S. W. 139.

40. Com. *v.* Spraggins, 18 B. Mon. (Ky.) 512; Routt *v.* Feemster, 7 J. J. Marsh. (Ky.) 131; State *v.* Dyches, 28 Tex. 535; Smith *v.* State, 26 Tex. App. 49, 9 S. W. 274.

Respite of a part of the fine leaves the attorney entitled to his commission on the whole, although such commission amount to the whole of the residue. Frazier *v.* Com., 12 B. Mon. (Ky.) 369.

If the governor be prohibited from remitting the fees of public officers, the remission of a fine operates only upon such part as goes ultimately to the state, but it does not deprive the prosecuting attorney of the percentage of the whole to which he is entitled. Berry *v.* Sheehan, 87 Ky. 434, 9 S. W. 286, 10 Ky. L. Rep. 426.

41. Fisk *v.* Jefferson Police Jury, 26 La. Ann. 20. It is not essential, however, that there be an action in debt; it is sufficient if the judgment is substantially a money recovery; as, mandamus compelling state officers to pay money into the county treasury. Higby *v.* Calaveras County, 18 Cal. 176; Territory *v.* Cascade County, 8 Mont. 396, 20 Pac. 809, 7 L. R. A. 105.

"Bonds and recognizances."— Commissions on moneys collected on forfeited "bonds and recognizances" are not due out of moneys collected on official bonds, the statute plainly referring only to such securities as district attorneys have to deal with in the performance of their official duties, namely, appearance bonds and recognizances. Miller *v.* State, 69 Misc. 112, 12 So. 265.

"Fines, penalties, or forfeitures," etc.— Nor are actions on official bonds "actions for the recovery of fines, penalties, or forfeitures," on the collection of which the district attorney is entitled to a percentage. *In re* Ison, 6 Oreg. 469; *In re* Ison, 6 Oreg. 465. These words apply only to moneys collected under the penal code. State *v.* Moore, 57 Tex. 307. They include all penalties for the violation of law. People *v.* Nedrow, 122 Ill. 363, 13 N. E. 533 [*affirming* 25 Ill. App. 28].

Successful defense of an injunction suit against a sheriff and county treasurer to enjoin the collection of taxes is not a "collection for the state or county" (Johnson County Com'rs *v.* Ogg, 13 Kan. 198); nor is the defense of an injunction suit brought by a delinquent sheriff to stay an execution issued against himself (Scarborough *v.* Stevens, 3 Rob. (La.) 147).

42. State *v.* Stone, 72 Ala. 185; Foute *v.* New Orleans, 20 La. Ann. 22; State *v.* Brewster, 44 Ohio St. 249, 6 N. E. 653.

But it is not essential that the money actually pass through his hands; it is enough if he be the efficient cause of its payment. Herrington *v.* Santa Clara County, 44 Cal. 496; Smith *v.* Linn County, 55 Iowa 232, 7 N. W. 510.

43. Herrn *v.* Sharp County, 81 Ark. 33, 98 S. W. 704, under a statute allowing "ten per cent. of the amount on forfeited bail bonds and recognizances." Two of the judges dissented on the grounds that "the fee is a perquisite of the office and a method of recompensing the officer for his public services, and inheres to the office and not to the officer."

44. The services of a clerk or stenographer are not personal expenses, and no allowance can be made therefor to a prosecuting attorney who receives a salary in full for all services rendered. Humiston *v.* Shaffer, 145 Cal. 195, 78 Pac. 651. However, such clerk is entitled to payment out of a fund appropriated for assistants, although his services consist in making out reports, etc., for years

ance.[45] An incumbent may recover for proper expenses paid by himself, although incurred by his predecessor.[46]

7. Additional Compensation and Extra Allowance — a. In General. A prosecuting attorney is not entitled to any extra allowance beyond the compensation provided by law,[47] although that may be inadequate, and his duties have been increased,[48] and although he has performed with ability and fidelity services

preceding the act authorizing his employment. Martin *v.* Jefferson County, 100 Ala. 428, 14 So. 203. A district attorney is not entitled to deduct from the fees of his office amounts necessarily expended by him as such district attorney for office rent, clerk hire, etc.; he not being required to keep an office as are other state and county officers, and there being no statutory provision which imposes on the county commissioners the duty of furnishing an office to the district attorney as they are required to do for other officers. Teller County *v.* Trowbridge, 42 Colo. 449, 95 Pac. 554.

45. Under statute making the county liable for all expenses necessarily incurred by any county officer in executing the duties of his office, the traveling expenses of the prosecuting attorney in pursuit of a fugitive beyond the limits of the United States has been held a proper item. People *v.* Columbia County, 134 N. Y. 1, 31 N. E. 322 [*affirming* 56 Hun 17, 8 N. Y. Suppl. 752 (*reversing* 2 N. Y. Suppl. 351)]. See also Terrell *v.* Trimble, 108 S. W. 848, 33 Ky. L. Rep. 364. But N. Y. Laws (1892), c. 686 (County Law), making "all expenses necessarily incurred by the district attorney" in the discharge of his duty a county charge, does not authorize an allowance to him for the expense of meals while in his county. Matter of Pinney, 17 Misc. (N. Y.) 24, 40 N. Y. Suppl. 716.

46. People *v.* New York, 32 N. Y. 473.

47. Jay County *v.* Templer, 34 Ind. 322; Freeman *v.* Henry County, 32 Mo. 446; People *v.* Neff, 121 N. Y. App. Div. 44, 105 N. Y. Suppl. 559 [*affirmed* in 191 N. Y. 286, 84 N. E. 63]; People *v.* New York, 1 Hill (N. Y.) 362. See also People *v.* Delaware County, 108 N. Y. App. Div. 83, 95 N. Y. Suppl. 458.

In Kentucky, under St. (1903) § 126, providing that each county attorney shall attend all county and fiscal courts held in the county, and conduct all cases and business in such courts affecting the county's interest, etc., section 127 requiring him, when so directed by the county or fiscal court, to institute or defend actions and proceedings of every character before any of the courts of the commonwealth, sections 128, 129, 130, and 131 imposing other duties on him, and section 132 providing that he shall be allowed annually a reasonable salary, to be paid out of the county levy, services rendered by the county attorney, when directed by the county or fiscal court, are included in his official duties, and are covered by his annual salary allowed by section 132, although where, by statute, duties are imposed on him and compensation by way of commissions or otherwise is provided, he is entitled to such compensation in addition to the salary allowed by the fiscal court under said section. Spalding *v.* Thornbery, 103 S. W. 291, 31 Ky. L. Rep. 738, 108 S. W. 906, 33 Ky. L. Rep. 362. The salary paid to a county attorney for his services under the express provisions of said section 132 is in full for all his official services, including those required of him expressly by the statute and those rendered by direction of the fiscal court in the prosecution and defense of actions under section 127, and, where the salary has been fixed by the fiscal court, it has, under the express provisions of Const. § 161, no power to diminish his compensation during the term for which he was elected, nor to increase it by allowing him a commission on unpaid taxes collected by him. Terrell *v.* Trimble County, 108 S. W. 848, 33 Ky. L. Rep. 364. St. (1903) § 4068, providing that the county attorney shall prosecute under the preceding sections and receive for his services twenty-five per cent of the amount recovered, relates solely to proceedings brought against delinquent taxpayers under "preceding" sections, to recover penalties prescribed thereby, and does not entitle the county attorney to any part of taxes on omitted property collected by an auditor's agent in a proceeding brought under succeeding sections 4241, 4260, 4263, providing for the collection of taxes on omitted property, in which the county attorney rendered professional assistance. Bingham *v.* Hager, 110 S. W. 246, 33 Ky. L. Rep. 278.

In Pennsylvania, under the act of May 22, 1895 (Pamphl. Laws 101), county commissioners are authorized to appoint a solicitor and determine the amount of his salary, and, when an attorney is appointed solicitor and the salary is fixed, he cannot claim compensation for services rendered in litigation in proceedings to condemn toll bridges, although the commissioners agreed that his salary should only be for services as general counsel. Nelson *v.* Beaver County, 219 Pa. St. 320, 68 Atl. 832.

On change of venue.— Where the place of trial of a prosecution was changed from E county, in which an indictment had been found, to W county, it was held that it was the duty of the district attorney of W county to assist in the prosecution, so that he was not entitled to extra compensation therefor, although he was employed therefor by the district attorney, with the approval of the county judge of E county. People *v.* Neff, 121 N. Y. App. Div. 44, 105 N. Y. Suppl. 559 [*affirmed* in 191 N. Y. 286, 84 N. E. 63].

48. State *v.* Shearer, 23 Nev. 76, 42 Pac. 582; People *v.* New York, 1 Hill (N. Y.) 362.

which resulted in substantial benefit to the county.[49] If the salary or fees of the office are payable out of the county treasury, a statute taxing an attorney's fee against defendant in certain cases does not give him extra compensation but is intended to reimburse the county.[50]

b. By Contract.[51] Although he is not entitled to anything for services not required by law, yet the prosecuting or district attorney may make a valid contract with the county for such services to be rendered in another county than his own,[52] or in another state,[53] or in the federal court where the services are not within his duties,[54] or beyond his term of office,[55] or otherwise not within the scope of his official duties,[56] and for extra compensation therefor.[57] And he may be entitled to compensation for services rendered to a school-district which are not within the duties imposed upon him by law.[58] In the absence of express contract, such employment in good faith is legal, and the law will imply a contract for extra compensation.[59] But a contract for extra official services and extra compensation is void under a constitutional provision that no county officer shall in any manner be pecuniarily interested in or receive the benefit of any contract executed by the county.[60]

49. McHenderson *v.* Anderson County, 105 Tenn. 591, 59 S. W. 1016.

50. Com. *v.* Rogers, 9 Gray (Mass.) 278; Spokane County *v.* Allen, 9 Wash. 229, 37 Pac. 428, 43 Am. St. Rep. 830.

51. See OFFICERS, 29 Cyc. 1424.

52. Bevington *v.* Woodbury County, 107 Iowa 424, 78 N. W. 222; Huffman *v.* Greenwood County, 23 Kan. 281; Gillett *v.* Lyon County Com'rs, 18 Kan. 410; Leavenworth County *v.* Brewer, 9 Kan. 307.

53. Slayton *v.* Rogers, 107 S. W. 696, 32 Ky. L. Rep. 897.

54. Nichols *v.* Shawnee County, 76 Kan. 266, 91 Pac. 79 (holding that a county attorney, directed by the county commissioners to represent his county in litigation pending in the United States court, may recover for such services, although at the time the services are performed the court may be held in the same county, and although Gen. St. (1868) c. 136, § 25, requires a county attorney to appear "in the several courts of their respective counties" on behalf of the people in civil or criminal cases in which their county is interested); Leavenworth County *v.* Brewer, 9 Kan. 307 (in another county); Slayton *v.* Rogers, 107 S. W. 696, 32 Ky. L. Rep. 897.

55. Jones *v.* Morgan, 67 Cal. 308, 7 Pac. 734.

56. Slayton *v.* Rogers, 107 S. W. 696, 32 Ky. L. Rep. 897.

Settlement and compromise of bonded indebtedness.— In Kentucky the county attorney performing services under an appointment by the fiscal court as commissioner in the settlement and compromise of the bonded indebtedness of the county performs services outside of his official duties, and is entitled to compensation therefor, notwithstanding Const. § 161, providing that the compensation of any county officer shall not be changed after his election or appointment. Slayton *v.* Rogers, 107 S. W. 696, 32 Ky. L. Rep. 897.

57. See the cases cited in the preceding notes.

Construction of contract between district attorney and board of supervisors see People *v.* Delaware County, 108 N. Y. App. Div. 83, 95 N. Y. Suppl. 458.

58. Bates *v.* Pierce County School Dist. No. 10, 45 Wash. 498, 88 Pac. 944, holding that 1 Ballinger Annot. Codes & St. § 468, requiring prosecuting attorneys to give advice to all county and precinct officers and directors and superintendents of common schools as to their official business, and to draw up in writing all contracts and like instruments of an official nature, for the use of said officers, does not require a prosecuting attorney to appear in court and conduct litigation on behalf of a school-district without compensation other than that received in his official capacity, and having done so at the request of the school-district, he was entitled to reasonable compensation for such services.

59. Huffman *v.* Greenwood County, 23 Kan. 281; Bates *v.* Pierce County School Dist. No. 10, 45 Wash. 498, 88 Pac. 944.

He is not entitled to additional compensation for consultation and advice within his district concerning the removal of cases to another county (Huffman *v.* Greenwood County, 25 Kan. 64); nor for attending to a suit in another county to which his own county was a party, it being his statutory duty to appear for his county in all suits to which it is a party (Hennepin County *v.* Robinson, 16 Minn. 381).

Amount of compensation.— In an action by a prosecuting attorney against a school-district for services, where the agreed statement of facts showed that the attorney submitted a bill for one hundred and fifty dollars for his services, and where it did not appear that such bill was an offer of compromise or a mere attempt to settle a disputed claim, it was held that a finding for plaintiff in an amount exceeding one hundred and fifty dollars was erroneous. Bates *v.* Pierce County School Dist. No. 10, 45 Wash. 498, 88 Pac. 944.

60. Wilson *v.* Otoe County, 71 Nebr. 435, 98 N. W. 1050 [*overruling* Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941].

c. Fees in Addition to Salary. A constitution or statute fixing a salary in full payment for all services abolishes all fees pertaining to the office.[61] But unless it is clear that the salary is in lieu of other compensation, the fees provided for prosecuting certain cases may still be allowed.[62] Prosecuting attorneys cannot be allowed anything for the payment of deputies, clerks, etc., if their salaries are declared by law to be in full for all services rendered.[63]

8. Liability of State, County, City, and Private Citizens. The liability of the state, county, or city to pay the salary or other compensation of prosecuting attorneys depends upon the constitution and statutes of the state.[64] The prosecuting attorney's fee is a part of the cost of a criminal proceeding; [65] and under

61. Kern County *v.* Fay, 131 Cal. 547, 63 Pac. 857. See Cook County *v.* Healy, 222 Ill. 310, 78 N. E. 623; People *v.* Neff, 121 N. Y. App. Div. 44, 105 N. Y. Suppl. 559 [*affirmed* in 191 N. Y. 286, 84 N. E. 63]; People *v.* Queens County, 1 Hill (N. Y.) 362.

In Illinois it has been held that, in view of the uncertainty of the language of Const. art. 6, § 25, and the practical construction given thereto by the various acts of the legislature in permitting state's attorneys to retain fees in addition to the salary paid by the state and county, such provision will not be held to restrict the compensation of state's attorneys to the salary paid to them by the state and county or to require them to pay over to the county all fees collected by them in excess of such salary. Cook County *v.* Healy, 222 Ill. 310, 78 N. E. 623.

Under Mo. Rev. St. (1899) § 4949, providing that the prosecuting attorney shall receive for his services a certain salary and shall also receive such fees as are allowed by law, he is entitled to additional fees only where they are expressly allowed him by statute. Hill *v.* Butler County, 195 Mo. 511, 94 S. W. 518.

Classification of counties by population see Lewis *v.* Lackawanna County, 200 Pa. St. 590, 50 Atl. 162 [*reversing* 17 Pa. Super. Ct. 25].

In divorce suits.— Hill Annot. Laws Oreg. § 1074, requiring plaintiff in a divorce suit to deposit ten dollars with the clerk of court, to be paid the district attorney as his fee, is repealed, except as to the fourth judicial district, where the fee is continued in force for the benefit of the county, by Sess. Laws (1898), p. 7, § 8, and by Sess. Laws (1899), p. 184, which by section 3 provides that no compensation shall be paid the district attorney except his salary, and by section 5 repeals all acts in conflict therewith. Howard *v.* Clatsop County, 41 Oreg. 149, 68 Pac. 425.

Collection of taxes for contingent fee.— Under Ky. St. (1903) § 126, providing that each county attorney shall attend all county and fiscal courts held in the county and conduct all cases and business in such courts affecting the county's interest, etc., section 127 requiring him to represent the county and commonwealth in all cases in which they are interested, and, when directed by the fiscal court, to institute proceedings before it, and section 132 providing that the county attorney shall be allowed annually a reasonable salary, to be paid out of the county levy, the fiscal court has no power to appoint the county attorney back-tax collector, and to require him to collect such taxes for a contingent fee. Spalding *v.* Thornbury, 103 S. W. 291, 31 Ky. L. Rep. 738.

62. Pillsbury *v.* Brown, 45 Cal. 46; Farr *v.* Seaward, 82 Iowa 221, 48 N. W. 67; Nolan *v.* Ellis County, 65 Kan. 57, 68 Pac. 1068. County attorneys are not required by the provisions of Kan. Laws (1899), c. 141 (Gen. St. (1901) c. 39), to account to the county for any fees collected by them under the provisions of the prohibitory law (Laws (1885), c. 149, § 10, Gen. St. (1901) § 2475). Nolan *v.* Ellis County, *supra*.

63. Humiston *v.* Shaffer, 145 Cal. 195, 78 Pac. 651.

64. See State *v.* Barnes, 24 Fla. 29, 3 So. 433; Cropsey *v.* Henderson, 63 Ind. 268.

Police courts.— In Fleming *v.* Hance, 153 Cal. 162, 94 Pac. 620, a statute providing for prosecuting attorneys for police courts, and imposing upon the city the obligation to pay their salary, was held unconstitutional.

In Alabama the solicitor's fee in a criminal case is payable by the state, although execution against defendant has not been returned "No property found," since Code (1896), § 4570, providing that sheriff's fees in a criminal case shall be paid by the state where an execution against either the defendant on conviction or the prosecutor on acquittal is returned "No property found," does not apply to a solicitor's fee. Trapp *v.* State, 120 Ala. 397, 24 So. 1001.

In Florida, under Gen. St. (1906) § 3878, the prosecuting attorney is entitled to a conviction fee of five dollars for each misdemeanor, to be paid by the proper county when defendant is insolvent or discharged, as prescribed by law. State *v.* McMillan, 55 Fla. 254, 45 So. 882. And section 3266, providing that every person convicted of carrying concealed weapons shall pay a conviction fee of ten dollars to be taxed as costs, fixes a fee unconstitutional as against the convicted person, whether solvent or insolvent, and a proviso exempting the counties from liability when the convicted person is insolvent is in conflict with the constitutional provision that, when defendant is insolvent, the costs and expenses shall be paid by the county. State *v.* McMillan, *supra*.

65. See *supra*, III, A, 2.

Civil action.— Not so his fee for representing the state in civil actions. Davis *v.* State, 33 Ga. 531.

a statute providing that upon failure of the defendant against whom judgment is rendered to pay the costs, the county shall be liable for the same, it is liable for his fees.[66] A statutory fee of a percentage of certain fines, etc., gives the prosecuting attorney a vested interest therein. If wholly remitted, he is not entitled to have such fee taxed against the defendant as costs, but he must look to the state or county for payment thereof; otherwise, the remission relieves the defendant only of that portion which would go to the state or county, and the attorney may recover his percentage from the defendant.[67] A statute requiring the county attorney's *per diem* to be paid by the state is void, where the constitution directs that county officers receiving stated salaries shall be paid by the county, a *per diem* being a stated salary.[68] A mere request by private citizens that proceedings be instituted against the accused, does not raise an implied contract to pay therefor, the attorney being charged by law with the duty of such prosecution.[69] Fees fixed by law are not to be taxed against defendants unless it is so provided, but they are to be paid by the state or county.[70]

9. Allowance and Collection — a. Allowance.[71] The allowance of compensation by a judge or county board having statutory authority to fix the amount is a judicial act.[72] Hence it must be evidenced by an order entered on the authority of the judge or board and purporting to be so.[73] The amount which should be allowed is a question of fact to be tried on evidence by the court which is to

66. Phillips County *v.* Clayton, 29 Ark. 246.

An agreement by the defendant, in consideration of dismissal of the proceeding, to pay costs as upon conviction, is contrary to public policy; and in such case, if the costs cannot be made out of the defendant, the county is not liable. State *v.* Narramore, 52 Mo. 27.

Upon a change of venue the county in which the indictment was found is liable for the costs of prosecution, including the prosecuting attorney's fees, notwithstanding he is an officer of the county to which the cause was removed. Bevington *v.* Woodbury County, 107 Iowa 424, 78 N. W. 222; State *v.* Whitworth, 26 Mont. 107, 66 Pac. 748; Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108.

67. Berry *v.* Sheehan, 87 Ky. 434, 9 S. W. 286, 9 Ky. L. Rep. 426; Dewey *v.* Com., 7 B. Mon. (Ky.) 78.

The prosecuting attorney of a special court is not entitled to the salary or fees allowed regular prosecuting attorneys out of the state treasury, the statute providing that he shall be paid by the county. Cropsey *v.* Henderson, 63 Ind. 268; Moore *v.* Roberts, 87 N. C. 11.

68. State *v.* Barnes, 24 Fla. 29, 3 So. 433.

69. Cincinnati, etc., R. Co. *v.* Lee, 37 Ohio St. 479.

70. Com. *v.* Shanks, 10 B. Mon. (Ky.) 304.

Docket fees not mentioned in the statute providing for taxation of costs and fees against the defendant, are not taxable against him. Jewett *v.* Talbott, 11 Ind. 298.

Payment out of convict fund.— Under Ala. Acts (1896–1897), p. 1532, providing that, on convictions for which penitentiary sentences are imposed, the clerk shall certify the bill of costs, including the solicitor's fee, to the president of the board of convict inspectors, who shall request the auditor to draw a warrant for its payment out of the convict fund, the solicitor's fee is payable out of the convict fund, and it is the duty of said president to request the drawing of such warrant. Trapp *v.* State, 117 Ala. 227, 23 So. 829.

Divorce cases.— A statute fixing a salary in addition to fees already provided, excepting only those allowed for services on behalf of the state or county, does not abolish the fee to be paid by the plaintiff in divorce suits, the exception being intended to apply only to such fees as were formerly paid by the state. State *v.* Moore, 37 Oreg. 536, 62 Pac. 26.

71. **Compensation and fees of deputies, assistants, and substitutes** see *infra*, VI, F, 3.

72. Baltimore *v.* Baltimore County Com'rs, 19 Md. 554; Meador *v.* Texas County, 167 Mo. 201, 66 S. W. 944; Onondaga *v.* Briggs, 2 Den. (N. Y.) 26.

Definiteness of claim.— A claim by a district attorney for "car fares and other incidental expenses necessarily incurred by S., stenographer," and for "traveling and other expenses necessarily incurred in" a certain case, is not sufficiently definite to justify its allowance by the board of supervisors. Matter of Pinney, 17 Misc. (N. Y.) 24, 40 N. Y. Suppl. 716.

Warrant for fees.— Where a warrant for fees of a district attorney covers some items improperly allowed, the remainder being undisputed, it is proper for the county judge to refuse to issue a new warrant for the correct items unless the previous warrant is surrendered. Donaldson *v.* Walker, 101 Tenn. 236, 47 S. W. 417. The issuance by the county judge of a warrant for district attorney's fees inadvertently or erroneously does not preclude him, as financial agent of the county, from forbidding its payment until it can be purged of illegal and unauthorized items. Donaldson *v.* Walker, *supra*.

73. Baltimore *v.* Baltimore County Com'rs, 19 Md. 554, holding that mere taxation by the clerk of a prosecuting attorney's fee as costs is not sufficient evidence of its allowance by the court.

pass judgment on the claim when presented, of which neither the attorney nor the county court in its administrative capacity is the judge;[74] and the order of allowance cannot be questioned in a collateral proceeding.[75] Mandamus will lie to enforce the exercise of the discretion to allow attorney's fees, but not to correct an allowance.[76] If the law requires solicitor's charges certified by the judge to be audited before allowance by the county board,[77] or if the board has by law exclusive control of all county expenditures,[78] the amount lies within the discretion of the board and it is not controlled by the certificate of the judge. The solicitor cannot appeal from an order allowing his fee and taxing it as costs, in a case in which the state has n right of appeal.[79]

b. Collection. The district or prosecuting attorney cannot be required to wait until fees payable out of the state treasury "on conviction" are collected by the state from the defendant.[80] But if due from the state only in case of the insolvency of the defendant, he is not entitled to payment until after sentence of conviction, the failure of the defendant to pay, and return by the sheriff "no property found."[81] Not being entitled to fees allowed by law, except for services actually performed,[82] the payment of warrants issued on account of commissions due a prosecuting attorney *pro tem.* may be resisted on the ground that the services were not rendered.[83]

c. Lien or Charge on Fund or Judgment. Prosecuting or district attorneys have no lien for their fees on judgments in behalf of the state or county, nor upon public funds of any kind,[84] unless expressly conferred by law. But if made payable out of a certain fund they become a charge thereon as soon as ascertained or fixed,[85] and the attorney may retain the same out of any such funds in his hands before paying over the balance.[86] They cannot be collected or retained out of any other funds than those provided by law.[87] Commissions on judgments for fines and forfeitures, being fixed by statute, give a vested interest in the judgment itself, and

74. Meador *v.* Texas County, 167 Mo. 201, 66 S. W. 944.

75. Onondaga *v.* Briggs, 2 Den. (N. Y.) 26.

76. People *v.* Fulton County, 14 Barb. (N. Y.) 52; People *v.* New York, 1 Hill (N. Y.) 362.

77. People *v.* Fulton County, 14 Barb. (N. Y.) 52.

78. State *v.* Bonebrake, 4 Kan. 247.

79. State *v.* Tyler, 85 N. C. 569.

When he has the right of appeal from an order denying claims in excess of a certain amount, the appeal lies in the case of a claim for "reasonable salary," without specifying the amount; but if upon the trial the proof shows a reasonable salary to be less than such sum, the appeal should be dismissed. Gudgell *v.* Bath County Ct., 8 Ky. L. Rep. 677, 1 Ky. L. Rep. 336.

80. Trapp *v.* State, 122 Ala. 394, 25 So. 194, 120 Ala. 397, 24 So. 1001; Purifoy *v.* Godfrey, 105 Ala. 142, 16 So. 701.

Presentment to the county board is not necessary, the claim being for fees paid by defendant to the clerk and by him erroneously turned over to the county, the law requiring presentment and demand only of unliquidated claims. Farr *v.* Seaward, 82 Iowa 221, 48 N. W. 67.

Statute of limitations.—A district attorney's claim for money collected by him for the state is an "action upon a liability created by statute, other than a penalty or forfeiture," and is barred by the period of limitation prescribed in such case. Higby *v.* Calaveras County, 18 Cal. 176.

81. State *v.* Barnes, 24 Fla. 153, 4 So. 560.

82. See *supra*, III, A, 1.

83. O'Connor *v.* East Baton Rouge Parish, 31 La. Ann. 221.

But payment of salary cannot be denied on the ground that he was inefficient or without learning. O'Connor *v.* East Baton Rouge Parish, 31 La. Ann. 221.

84. Wood *v.* State, 125 Ind. 219, 25 N. E. 190; Woodward *v.* Gregg, 3 Greene (Iowa) 287.

85. Peeples *v.* Walker, 12 Ga. 353.

86. Buckingham *v.* People, 26 Ill. App. 269.

Under a statute making insolvent costs due prosecuting attorneys payable out of funds arising from fines, etc., the lien attaches to all such already collected as have not been previously appropriated. Pittman *v.* Glenn, 61 Ga. 376.

87. The prosecuting attorney cannot deduct his compensation out of funds which should have been previously paid over to the state or county. Chadwick *v.* People, 206 Ill. 122, 68 N. E. 1108 [*affirming* 108 Ill. App. 620]. Nor can they be paid out of funds collected from taxes for the previous year, the legislature having declared void all contracts made by the county to pay salaries in excess of its annual income. Territory *v.* Bernalillo County, (N. M. 1905) 79 Pac. 709.

the prosecuting attorney has the same right as the state to collect his part of the judgment in any manner provided by law.[88]

10. Conflicting Claims[89]— **a. Between Incumbent and Predecessor.** He who actually renders the particular service for which the fee is allowed is entitled to the same.[90] If the fee is for "conviction," etc., the attorney in office when the defendant is actually convicted is entitled to receive the commission, although his predecessor instituted the action,[91] and although he prosecuted it to a judgment which was pending on appeal when his term expired.[92] Money deposited in lieu of bail becomes the property of the state immediately upon forfeiture; and therefore the attorney then in office is entitled to the commission thereon, and not his successor who took formal judgment against the depositors.[93] A statute providing for an equal division of fees in certain suits instituted by one county attorney and prosecuted to final judgment by his successor applies to actions pending at the time of the passage of the act, and it is not for that reason obnoxious to the constitutional prohibition of retroactive legislation.[94] If the commission is for the entire services in connection with the suit, the outgoing attorney should receive a ratable proportion.[95] An act providing that solicitors, for insolvent costs due them, may retain the amount thereof out of any funds collected by them for the state or county, requires payment to each officer in the order of priority.[96]

b. Between Superior and Inferior Officers. It is equally true of solicitor-generals and county solicitors that he who actually renders the service is entitled to the fee.[97] There being but one fee provided for conviction, if a conviction is obtained by an attorney for the commonwealth in a trial before a magistrate, and is affirmed upon appeal to the circuit court by the district attorney, he who first secured the conviction has the fee, although if the appeal had resulted in acquittal, neither would have earned the same.[98]

c. Between Incumbent De Facto and Rightful Officer. Salary being an incident of the office, not dependent upon services rendered, the attorney having legal title

88. Berry *v.* Sheehan, 87 Ky. 434, 9 S. W. 286, 10 Ky. L. Rep. 426.

89. Between prosecuting attorney and attorney pro tem see *infra*, VI, F, 2.

Deductions see *supra*, III, A, 4.

Division of fees see *infra*, VI, F, 2.

90. Vastine *v.* Voullaire, 45 Mo. 504, holding that where the former circuit attorney drew up certain indictments and performed all the services which were rendered, the cases having been continued but not brought to trial by his successor, the former is entitled to the fees accrued.

91. Ashlock *v.* Com., 7 B. Mon. (Ky.) 44.

92. Flint *v.* Jones County, 20 Tex. Civ. App. 641, 50 S. W. 203.

93. Arnsparger *v.* Norman, 101 Ky. 208, 40 S. W. 574, 79 Ky. L. Rep. 381.

Collection on bail-bond forfeited during term of predecessor see Herrn *v.* Sharp County, 81 Ark. 33, 98 S. W. 704, referred to *supra*, III, A, 5, note 43.

94. Swayne *v.* Terrell, 20 Tex. Civ. App. 31, 48 S. W. 218.

95. Cole *v.* McKune, 19 Cal. 422.

96. Hackett *v.* Jones, 2 Ga. 282. Under a later act making the insolvent costs of the incumbent who brings the fund into court first payable, and then the costs of former solicitors, it was held that the legislature could not divest the rights of former solicitors; and the law, therefore, as to their accounts allowed before the passage of the act, remained as it was, and they must be paid to the exclusion of the incumbent. Peeples *v.* Walker, 12 Ga. 353. But the only discrimination made by this act is between solicitors. As to costs due a clerk of the court, the solicitor having in hand a fund from the collection of fines is entitled to retain his own costs first, only in the event he holds the oldest lien. Brown *v.* Bleckley, 26 Ga. 328. If after paying his immediate predecessor he is required to pay the balance to the county treasurer, former solicitors cannot require payment from him, but must look to the county for payment of their fees out of such excess. Bartlett *v.* Brunson, 115 Ga. 459, 41 S. E. 601.

97. Thomas *v.* Thomas, 61 Ga. 70, holding that if the solicitor-general draws indictments which are found in the superior court, but afterward transferred to the county court and there tried, he, and not the county attorney who tries them, is entitled to the fees allowed for drawing indictments.

98. Com. *v.* Rogers, 9 Gray (Mass.) 278.

Bail-bond.— The county attorney who appeared in the examining court and succeeded in having the accused bound over, and admitted to bail, is entitled to share the commonwealth attorney's fee on forfeiture of the bond in the circuit court, although the bond was taken by the county judge after adjournment of the examining court. It is nevertheless a "bail-bond taken by the examining court" within the statute. Day *v.* Brooks, 8 Ky. L. Rep. 429.

to the office is, in the absence of a statute, entitled to the salary to the exclusion of the *de facto* incumbent.[99]

B. Of United States District Attorneys — 1. Salary.[1] Since July 1, 1896, the district attorneys of the United States have been allowed an annual salary, varying in amount in the different districts, in full compensation for all official services performed by them, including services in the circuit courts of appeal for their respective districts, wherever sitting. These salaries are in lieu of all fees, commissions, etc., formerly allowed.[2]

2. Expenses. By the act of congress of 1896 it is provided that the necessary office expenses of the district attorneys shall be allowed when authorized by the attorney-general.[3] Clerk hire is not allowed as an office expense, but the district attorney may be allowed a clerk, with the approval of the attorney-general, at a salary to be fixed by the latter.[4] It is also provided that the necessary expenses for lodging and subsistence actually paid, not exceeding four dollars per day, and actual and necessary traveling expenses of the district attorney and his assistants, while absent from their respective official residences and necessarily employed in going to, returning from, and attending before any United States court, commissioner, or other committing magistrate, and while necessarily absent from their respective official residences on official business, shall be allowed and paid in the manner provided by the statute.[5]

99. People *v.* Smyth, 28 Cal. 21. See Officers, 29 Cyc. 1393.

Payment of the salary to such incumbent, who has performed substantial services, does not deprive the legal officer of his right to same. People *v.* Smyth, 28 Cal. 21.

1. **Assistants to United States district attorneys** see *infra*, VI, F, 5.

2. Act Cong. May 28, 1896, c. 252, §§ 6, 7.

This act does not apply to the district attorney for the southern district of New York, who receives a salary of six thousand dollars per annum under U. S. Rev. St. (1878) § 770 [U. S. Comp. St. (1901) p. 600]. Act Cong. May 28, 1896, c. 252, § 24.

Prior to this act their compensation consisted of docket fees, *per diems*, commissions, etc., taxed as costs, not to exceed six thousand dollars per annum (U. S. Rev. St. (1878) §§ 824–827, 835, and 838 [U. S. Comp. St. (1901) pp. 632–634]), exclusive of allowances to be made in prize cases (§§ 836 and 4647) and of the commission on moneys collected under the revenue laws under section 825 and allowance for defending officers of the revenue under section 827 (§§ 834 and 835).

These fees and emoluments, except those charged against and collected from the United States, are to be charged and collected as formerly, and paid to the clerk of the court having jurisdiction, and by him covered into the treasury. Act Cong. May 28, 1896, c. 252, § 6.

3. Act Cong. May 28, 1896, c. 252, § 14.

4. Act Cong. May 28, 1896, c. 252, §§ 15, 16.

5. Act Cong. May 28, 1896, c. 252, § 8.

When authorized by the attorney-general, the expenses of travel and subsistence of a clerk to a district attorney while attending with the attorney a term of court held at a place other than that of the official residence of the attorney, are properly payable as a necessary part of the district attorney's office. 3 Comp. Dec. 253. Expenses for lodging and subsistence must not exceed four dollars for any one day. If they amount to less than four dollars for one day, and more than four dollars on the succeeding day, the expenses cannot be averaged so as to charge eight dollars for the two days. 4 Comp. Dec. 418.

The expense of a berth in a sleeping car will be allowed as a traveling expense, and not as expense for lodging. 3 Comp. Dec. 386.

Verifying account.—A district attorney or assistant is not entitled to reimbursement for the necessary expenses incurred in verifying his account. 4 Comp. Dec. 494; 3 Comp. Dec. 646.

Prior to the act of 1896 the district attorney was allowed a mileage of ten cents per mile for traveling from his place of abode to the place of holding any court, examination before a commissioner, etc., and ten cents per mile for returning, in lieu of all traveling expenses. U. S. Rev. St. (1878) § 824 [U. S. Comp. St. (1901) p. 632]. Under this section it was held that, where there was no adjournment of court for any judicial day, but only from Saturday to Monday, the district attorney was not entitled to mileage for going to and returning from his home during the adjournment over Sunday. U. S. *v.* Shields, 153 U. S. 86, 14 S. Ct. 735, 38 L. ed. 645; Baxter *v.* U. S., 51 Fed. 671, 2 C. C. A. 411. But if the court adjourned over one or more judicial days, it was allowed. Baxter *v.* U. S., *supra*. Mileage was also held allowable, although charged for attending upon successive days before the same commissioner, unless the necessity for his presence on the next day was known to the district attorney before departure. U. S. *v.* Colman, 76 Fed. 214, 22 C. C. A. 135. He was entitled to mileage for traveling by the most convenient and practical routes in the

3. Extra Allowance. Extra compensation cannot be allowed a United States district attorney for any service performed in the course of his official employment,[6] nor can any allowance or compensation be made for any extra service whatever, although required by the department of justice, unless expressly authorized by law.[7]

4. Allowance and Collection. Salaries are paid monthly by the department of justice.[8] Accounts showing all disbursements on account of lodging, subsistence, and traveling expenses, provided in the act, must be made out quarterly and submitted to the circuit or district court of the district.[9] Said accounts, together with the vouchers and items thereof, made out in duplicate, shall be proven in open court by the district attorney, by his oath or that of some other person having knowledge of the facts, to be attached to such accounts, that the disbursements so charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account.[10] When approved, the clerk of said court shall forward the originals to the attorney-general for examination under his supervision.[11] They shall then be sent to the proper accounting officers of the treasury department, where they shall be subject to revision upon their merits, as in case of other public accounts.[12]

5. Demand or Receipt of Other Compensation. To accept, receive, or demand any fee or other compensation for the performance of an official service, other than the salary provided by law, or to fail to account for any fee received, is an offense punishable by fine or imprisonment or both, at the discretion of the court.[13] Any fees or extra compensation so received may be treated by the government as moneys in the hands of the district attorney belonging to it.[14]

discharge of his official duties, although these may not have been the shortest routes. U. S. *v.* Perry, 50 Fed. 743, 1 C. C. A. 648. An allowance for travel and mileage was not to be regarded as part of the attorney's compensation, but rather as reimbursement for expenses. U. S. *v.* Smith, 158 U. S. 346, 15 S. Ct. 846, 39 L. ed. 1011.

6. Instructions to U. S. District Attorneys, April 1, 1907, § 1037; Gibson *v.* Peters, 150 U. S. 342, 14 S. Ct. 134, 37 L. ed. 1104; Sill *v.* U. S., 87 Fed. 699, 31 C. C. A. 200; U. S. *v.* Fleming, 80 Fed. 372, 25 C. C. A. 498; U. S. *v.* Ady, 76 Fed. 359, 22 C. C. A. 223.

Prize cases.— It has been held that the compensation allowed by U. S. Rev. St. (1878) § 4646 [U. S. Comp. St. (1901) p. 3138], in prize cases, viz., "a just and suitable compensation . . . to be adjusted and determined by the court," is still to be allowed, in addition to the annual salary provided by the act of 1896; that said act does not repeal said section 4646, and the district attorney is not required to pay the allowance so made him, into the treasury; his services in such cases being in the nature of special services, on behalf both of the government, and officers and men of the navy entitled to share in the proceeds of the capture. The Adula, 127 Fed. 853.

7. U. S. Rev. St. (1878) § 1764 [U. S. Comp. St. (1901) p. 1206]. And see Colman *v.* U. S., 66 Fed. 695, 14 C. C. A. 65.

Assistant district attorney see *infra*, VI, F, 5.

8. Act Cong. May 28, 1896, c. 252, § 16.

9. Act Cong. May 28, 1896, c. 252, § 13.

10. 18 U. S. St. at L. 333, c. 95, § 1 [U. S. Comp. St. (1901) p. 648].

11. 28 U. S. St. at L. 210, c. 174, § 13 [U. S. Comp. St. (1901) p. 166].

12. U. S. Rev. St. (1878) § 846 [U. S. Comp. St. (1901) p. 647].

The approval or dismissal by the court of such accounts, under the act of 1875, is not a judicial act, but merely a step in the executive business of settling accounts. Waters *v.* U. S., 21 Ct. Cl. 30 [*affirmed* in 133 U. S. 208, 10 S. Ct. 249, 33 L. ed. 594]. It is, however, *prima facie* evidence of the correctness or incorrectness of the account, and, in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive. U. S. *v.* Jones, 134 U. S. 483, 10 S. Ct. 615, 33 L. ed. 1007.

Presentation to the accounting officers of the treasury is not a condition precedent to the right of recovery, said officers having previously disallowed similar items; nor will rejection of a claim bar an action thereon. Van Hoorebeke *v.* U. S., 46 Fed. 456; Erwin *v.* U. S., 37 Fed. 470, 2 L. R. A. 229; Ravesies *v.* U. S., 21 Ct. Cl. 243.

Where accounts have been duly approved by the court and passed by the proper accounting officers of the treasury, they cannot afterward be impeached except for fraud or palpable mistake. U. S. *v.* Tuthill, 136 U. S. 652, 10 S. Ct. 1075, 34 L. ed. 557.

A district attorney is not entitled to interest on his accounts for the period intervening between the time of their allowance by the treasury department, and the time of their payment. Baxter *v.* U. S., 51 Fed. 671, 2 C. C. A. 411.

13. 29 U. S. St. at L. 183, c. 252, § 18 [U. S. Comp. St. (1901) p. 617].

14. Bliss *v.* U. S., 37 Fed. 191 [*affirmed* in 38 Fed. 230].

IV. POWERS AND DUTIES.[15]

A. Representation of United States, State, or County — 1. UNITED STATES. District attorneys of the United States are charged with the duty of prosecuting, in their respective districts, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned.[16] It is also their duty to conduct all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents are parties;[17] and all suits or proceedings pending in their district against collectors, or other officers of the revenue, for any act done by them, or for the recovery of money exacted by or paid to such officers and by them paid into the treasury;[18] and, on request of the secretary of the treasury, to defend any action brought against any officer of either house of congress on account of anything done by him in the discharge of his official duties in executing any order of such house.[19] All legal services connected with the procurement of titles to sites for public buildings, other than life-saving stations and pier-head lights, are required to be rendered by United States district attorneys.[20]

2. STATE AND COUNTY — a. In General. It is the duty, and the right and privilege as well, of the prosecuting attorney for the state or territory,[21] generally to conduct prosecutions in the courts of his district, for crimes and offenses committed therein; also to represent the state, and the counties within his district, in the prosecution or defense of all civil actions in such courts in which either may be a party or interested.[22] It is his duty to appear for the state or county, notwith-

15. Of deputies, assistants, and substitutes see *infra*, VI, E.

16. U. S. Rev. St. (1878) § 771 [U. S. Comp. St. (1901) p. 601].

Circuit courts of appeal.— Under the act of March 3, 1891, establishing these courts, it was held not the duty of the district attorneys to appear therein for the United States. U. S. *v.* Garter, 170 U. S. 527, 18 S. Ct. 703, 42 L. ed. 1133; U. S. *v.* Winston, 170 U. S. 522, 18 S. Ct. 701, 42 L ed. 1130; Garter *v.* U. S., 31 Ct. Cl. 344. But such is now their duty under the act of May 28, 1896, c. 252, § 6 (29 U. S. St. at L. 179 [U. S. Comp. St. (1901) p. 611]).

Civil actions.— A suit to condemn lands for public buildings is a "civil action in which the United States are concerned" (U. S. *v.* Johnson, 173 U. S. 363, 19 S. Ct. 427, 43 L. ed. 731); and so is the defense of a habeas corpus proceeding brought to release Chinese immigrants detained by order of the collector of the port (Hilborn *v.* U. S., 163 U. S. 342, 16 S. Ct. 1017, 41 L. ed. 183 [*affirming* 28 Ct. Cl. 237]); a suit to recover pensions fraudulently received (Ruhm *v.* U. S., 66 Fed. 531); and an action to enforce a statutory lien for unpaid revenue taxes (Bliss *v.* U. S., 37 Fed. 191 [*affirmed* in 38 Fed. 230]).

The prosecution of Chinese persons found in his district unlawfully within the United States under the exclusion acts is also a part of the duty of the district attorney under section 771. Chin Ying *v.* U. S., 186 U. S. 202, 22 S. Ct. 895, 46 L. ed. 1126; Chin Bak Kan *v.* U. S., 186 U. S. 193, 22 S. Ct. 891, 46 L. ed. 1121.

District of Columbia.— Violations of all laws of the United States applicable to the district are to be prosecuted by the district attorney of the United States; but violations of municipal ordinances therein are to be prosecuted by the attorney for the district. U. S. *v.* Hoskins, 5 Mackey 478.

17. U. S. Rev. St. (1878) § 380 [U. S. Comp. St. (1901) p. 213].

Suits brought by receivers of national banks for the collection of assets and to wind up their affairs fall within this provision. Gibson *v.* Peters, 150 U. S. 342, 14 S. Ct. 134, 37 L. ed. 1104 [*affirming* 36 Fed. 487 (*overruling* 35 Fed. 721)].

18. U. S. Rev. St. (1878) § 771 [U. S. Comp. St. (1901) p. 601].

19. 18 U. S. St. at L. c. 130, § 8 [U. S. Comp. St. (1901) p. 602]; U. S. Rev. St. Suppl. p. 76, § 8.

20. 25 U. S. St. at L. 941, c. 411 [U. S. Comp. St. (1901) p. 2518]. This includes all examinations of such titles and opinions thereon. Sill *v.* U. S., 87 Fed. 699, 31 C. C. A. 200; U. S. *v.* Ady, 76 Fed. 359, 22 C. C. A. 223; Ruhm *v.* U. S., 66 Fed. 531. *Compare* Weed *v.* U. S., 65 Fed. 399, 82 Fed. 414.

21. The prosecuting attorney for the territory, not the United States district attorney, prosecutes cases arising under territorial laws. People *v.* Heed, 1 Ida. 402; Snow *v.* U. S., 18 Wall. (U. S.) 317, 21 L. ed. 784.

22. *Colorado.*— Atchison, etc., R. Co. *v.* People, 5 Colo. 60.

Idaho.— Under Act Feb. 22, 1899 (Laws 1899, p. 25), prescribing the powers and duties of county attorneys, it is the duty of the prosecuting attorney to defend all applications or motions in the district court of his county in which the people of the state or the

standing the law makes provision for the employment of other counsel in special cases,[23] and the control of the case cannot be taken from him and given to those so employed.[24] He must represent the state whether nominally plaintiff or defendant.[25] He is not prohibited from representing private litigants where he owes no duty to the state.[26] If his official duties are prescribed by the constitution, they

county is interested or a party. Twin Falls County *v.* Bassett, 14 Ida. 324, 93 Pac. 774.

Iowa.— Lewis *v.* Lyon County, 38 Iowa 695; Clark *v.* Lyon County, 37 Iowa 469.

Kentucky.— Daviess County *v.* Daviess County Gravel Road Co., 63 S. W. 752, 23 Ky. L. Rep. 711.

Michigan.— People *v.* Brady, 90 Mich. 459, 51 N. W. 537.

Nebraska.— Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

Oklahoma.— Logan County Com'rs *v.* State Capital Co., 16 Okla. 625, 86 Pac. 518; Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342.

Texas.— Howth *v.* Greer, 40 Tex. Civ. App. 552, 90 S. W. 211.

United States.— Moreland *v.* Marion County, 17 Fed. Cas. No. 9,794, 1 N. Y. Wkly. Dig. 326.

Mills Annot. St. Colo. § 1551, making it the duty of the district attorney to appear for any county in his district in any suit, wherein such county is a party, pending in the district court of any county in his district was not repealed by section 813, authorizing the board of county commissioners to employ an attorney, and there is no statute which takes from the office of district attorney any of the duties belonging to it under section 1551, or which vests the same in the office of county attorney, or authorizes the board of county commissioners to do so. McMullin *v.* Montrose County, 29 Colo. 478, 68 Pac. 779.

Magistrate's court.— The prosecuting attorney's duty extends to prosecutions or examinations before magistrates. State *v.* Jackson, 68 Ind. 58; State *v.* Morrison, 64 Ind. 141; State *v.* Brown, 106 La. 437, 31 So. 50. The district attorney may appear for the state in a criminal prosecution on the part of the state before the committing magistrate. State *v.* Bezou, 48 La. Ann. 1369, 20 So. 892. *Contra*, Smith *v.* Portage County, 9 Ohio 25, the statute naming the courts in which he must appear, not including magistrates' courts.

On appeal by citizen from finding of county board.— On an appeal by a citizen, under Iowa Code, § 2450, to a district court from a finding by a board of supervisors that a statement of consent to the sale of intoxicating liquors in the county is sufficient, it is proper for the county attorney to appear against the statement in the district court, and said section requires him to so appear. Green *v.* Smith, 111 Iowa 183, 82 N. W. 448.

Mandamus to compel judge to allow county attorney to take charge of prosecution in city court see Jackson *v.* Swayne, 92 Tex. 242, 47 S. W. 711 [*reversing* (Civ. App. 1898) 45 S. W. 619].

Proceeding to set aside forfeiture of recognizance.— The prosecuting attorney is the proper person to represent the state in a proceeding to set aside the forfeiture of a recognizance for the appearance of a defendant to answer to an indictment, and upon his appearance to the motion the court has jurisdiction of the state. State *v.* Shideler, 51 Ind. 64.

In England.— There has been such an officer in England for centuries, his principal duty being the prosecution of crimes and misdemeanors. Rex *v.* Philips, 3 Burr. 1564, 4 Burr. 2089. He is the only legal representative of the crown in the courts, and he must be before the court in every suit in which the rights of the crown are concerned. Atty.-Gen. *v.* Galway Corp., 1 Molloy 95; Hovenden *v.* Annesley, 2 Sch. & Lef. 617. He is the officer of the crown, and in that sense only the officer of the public. Atty.-Gen. *v.* Brown, 1 Swanst. 265, 36 Eng. Reprint 384, 1 Wils. Ch. 323, 37 Eng. Reprint 138. During a vacancy in the office his duties and authority devolved upon the solicitor-general. Rex *v.* Wilkes, 4 Burr. 2527, 2554, 2570. In all suits at the instance of the crown, the attorney-general of a province has a right to represent the crown, if the right claimed is a right in behalf of the province. Atty.-Gen. *v.* Esquimalt, etc., R. Co., 7 Brit. Col. 221; Monk *v.* Ouimet, 19 L. C. Jur. 71 [*reforming* judgment in 17 L. C. Jur. 57]. A clerk of the crown, whether a queen's counsel or not, may conduct a case on behalf of the crown, although he may not practice for individuals. Reg. *v.* Leboeuf, 9 L. C. Jur. 197, 15 L. C. Rep. 291.

23. *In re* Ison, 6 Oreg. 465; Terrell *v.* Greene, 88 Tex. 539, 31 S. W. 631; Howth *v.* Greer, 40 Tex. Civ. App. 552, 90 S. W. 211.

24. Sheridan County *v.* Hanna, 9 Wyo. 368, 63 Pac. 1054.

25. If he prosecute in the name of the state or county a suit in which either is really interested as a defendant he violates his duty. Whiteside County *v.* Burchell, 31 Ill. 68; Coulson *v.* Territory, 8 Okla. 113, 56 Pac. 956; Spokane County *v.* Bracht, 23 Wash. 102, 62 Pac. 446. He cannot enforce laws for his own benefit. Although bound to sue for a penalty given by statute to the person suing therefor he cannot retain it for himself. People *v.* Wabash, etc., R. Co., 12 Ill. App. 263. If he renders professional assistance to a defendant in a criminal trial, he violates his duty. *In re* Voss, 11 N. D. 540, 90 N. W. 15. And he is not excused from enforcing the laws because of local sentiment or prejudice. *In re* Voss, *supra*.

26. An action for damages for the illegal sale of liquor to plaintiff's husband is not a suit "based upon the same facts as an in-

cannot be restricted by statute.[27] If fixed by statute, they may be increased or diminished at the pleasure of the legislature.[28] But in the absence of a statute, neither the court nor the county board has any power to curtail the exercise of his lawful authority or control him therein.[29] One who fails to bring a suit which he is required by law to bring may be compelled by mandamus.[30] The prosecuting attorney is bound to follow the business of the state or county into whatever courts in his district it is authorized by law to be tried,[31] including courts created subsequent to his appointment or election;[32] but as a rule he is under no duty to perform services in a federal court or in a court outside of the state.[33] If the administrative body of a county has by law the direction and control of litigation except in certain cases, the district attorney cannot institute any other proceeding on behalf of the county without authority from such body.[34] But his duty to institute proceedings on behalf of the state is not dependent upon authority from any public officer required to report violations of law and direct prosecutions in certain cases.[35] It is the duty of the outgoing attorney to turn over to his successor the

dictment" against the defendant for the illegal sale of liquors not including the sale to plaintiff's husband. Bellison *v.* Apland, 115 Iowa 599, 89 N. W. 22.

27. Harris County *v.* Stewart, 91 Tex. 133, 41 S. W. 650; State *v.* Moore, 57 Tex. 307; Howth *v.* Greer, 40 Tex. Civ. App. 552, 90 S. W. 211. And see Thompson *v.* Carr, 13 Bush (Ky.) 215. Under Tex. Const. art. 5, § 21, prescribing that county attorneys "shall represent the State in all cases in the District and inferior courts in their respective counties," except where the county is in a district having a district attorney, any act of the legislature attempting to deprive a county attorney of his right to appear and represent the state in any criminal case charging violation of a state law, or making the county attorney merely the associate or assistant of a city attorney, and depriving him of unrestricted control in such cases, would be void. Upton *v.* San Angelo, 42 Tex. Civ. App. 76, 94 S. W. 436.

28. State *v.* Morrison, 64 Ind. 141.

29. Clark *v.* Lyon County, 37 Iowa 469; Logan County *v.* State Capital Co., 16 Okla. 625, 86 Pac. 518; Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342.

Mandamus will lie to compel a judge to permit the district attorney to appear for the state or county in a case in which he has the right to appear. *Ex p.* Lusk, 82 Ala. 519, 2 So. 140; *Ex p.* Wiley, 54 Ala. 226; *Ex p.* Diggs, 52 Ala. 381; People *v.* Hallett, 1 Colo. 352; State *v.* Brown, 106 La. 437, 31 So. 50 (mandamus to compel justice of the peace); Terrell *v.* Greene, 88 Tex. 539, 31 S. W. 631.

30. Berhil *v.* Fisk, 24 La. Ann. 149; State *v.* Lynch, 23 La. Ann. 786; Hayes *v.* Thompson, 21 La. Ann. 655.

31. Blalock *v.* Pillsbury, 76 Ga. 493; Com. *v.* Hipple, 69 Pa. St. 9. But the court, not the attorney, shall determine what courts have jurisdiction thereof. Com. *v.* Hipple, *supra*.

32. Moore *v.* State, 5 Sneed (Tenn.) 510.

Removal of case to federal court.— It is the duty of the state's attorney to continue the prosecution of cases against federal officers begun in the state court and removed to a federal court within the district. Delaware *v.* Emerson, 8 Fed. 411.

33. Nichols *v.* Shawnee County, 76 Kan. 266, 91 Pac. 79; Leavenworth County *v.* Brewer, 9 Kan. 307; Slayton *v.* Rogers, 107 S. W. 696, 32 Ky. L. Rep. 897. Ky. St. (1903) §§ 126, 127, requiring each county attorney to attend all county and fiscal courts in his county, etc., and providing that he shall conduct actions before "any of the courts of this commonwealth" in which the county is interested, etc., do not require a county attorney to perform services in a federal court or in a court outside of the commonwealth; the words "courts of this commonwealth" meaning only courts organized under the constitution and laws of the commonwealth. Slayton *v.* Rogers, *supra*.

34. *California.*— Contra Costa County *v.* Soto, 138 Cal. 57, 70 Pac. 1019; Ventura County *v.* Clay, 119 Cal. 213, 51 Pac. 189.

Illinois.— Kankakee *v.* Kankakee, etc., R. Co., 115 Ill. 88, 3 N. E. 741; Frye *v.* Calhoun County, 14 Ill. 132.

Kansas.— Kerby *v.* Clay County, 71 Kan. 683, 81 Pac. 503.

Texas.— Looscan *v.* Harris County, 58 Tex. 511.

United States.— Hughes County *v.* Ward, 81 Fed. 314.

Presumption.— In the absence of an affirmative showing to the contrary, the court will presume that suits on behalf of the county were properly authorized. Jerauld County *v.* Williams, 7 S. D. 196, 63 N. W. 905.

Ratification.— The county has power to ratify the action of the attorney in bringing suit without authority. Hughes County *v.* Ward, 81 Fed. 314.

Appeals.— If he may prosecute "when so directed by the county or fiscal court," he may, upon direction of the county court, prosecute an appeal from an order of the fiscal court, although the latter direct him to dismiss the appeal. Boyd County *v.* Arthur, 118 Ky. 932, 82 S. W. 613, 26 Ky. L. Rep. 906; Jefferson County *v.* Waters, 111 Ky. 286, 63 S. W. 613, 23 Ky. L. Rep. 669.

35. Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744. But where the railroad commis-

management and control of all unfinished litigation.[36] He has no authority to represent the state after the expiration of his term.[37]

b. Contracts and Expenses. As a general rule, in the absence of a statute, a district or prosecuting attorney cannot bind the county by a contract or for expenses without authority from the county board;[38] but it has been held that where he is required by law or by the order of the county board to institute actions for the benefit of the county, he may bind it to pay the reasonable and necessary expenses incident thereto.[39]

B. Conduct of Criminal Proceedings. At common law the prosecuting attorney has absolute control of criminal prosecutions.[40] He is vested with the responsibility of determining whether or not a criminal accusation should be pressed to trial.[41] He may, in the absence of a statute, proceed without a prosecutor.[42] A criminal prosecution is the suit of the state; the prosecutor has no right of control.[43] The duty to conduct such prosecutions embraces whatever is

sion was charged with enforcing certain laws, it was held that the district attorney could not bring suit for violation thereof without authority from the commission. Moore *v.* Bell, 95 Tex. 151, 66 S. W. 45.

36. Cole *v.* McKune, 19 Cal. 422.

37. State *v.* Schloss, 92 Ind. 293; State *v.* Duff, 83 Wis. 291, 53 N. W. 446. It has been held, however, that it is not error to permit a former district attorney, who conducted the first or later trials of a case during his term, to appear in a new trial had after the expiration of his term, where his successor makes no objection. Wiggins *v.* Com., 53 S. W. 649, 21 Ky. L. Rep. 939.

38. Jones *v.* Sunflower County, 84 Miss. 98, 36 So. 188, holding that he could not make the county liable by contracting with a surgeon to make an analysis of the stomach of one thought to have been poisoned. See also Independent Pub. Co. *v.* Lewis, etc., County, 30 Mont. 83, 75 Pac. 860. A county is not bound to pay for legal services rendered at the instance of the county attorney, without the previous authorization or subsequent official ratification of the county board. Card *v.* Dawes County, 71 Nebr. 78, 99 N. W. 662.

Under the New York county law (Laws (1892), p. 1792, c. 686), § 230, subd. 2, providing that all expenses necessarily incurred by the district attorney in criminal actions shall be a county charge, and subd. 9, providing that the moneys necessarily expended by any county office in executing the duties of his office, where no specific compensation is provided by law, shall be a county charge, it was held that a district attorney, anticipating that in a murder trial the defense of suicide induced by insanity would be made, had authority, in good faith, to engage the services of eight experts of high standing, at fifty dollars and expenses each per day while attending court and making experiments, and to bind the county by such contract. People *v.* Cayuga County, 22 Misc. 616, 50 N. Y. Suppl. 16. See also People *v.* Cortland County, 15 N. Y. Suppl. 748. It has also been held that, although a district attorney may engage, when necessary, at the county's expense, an expert witness in a criminal case, under this statute he can bind the county to pay only what is just and reasonable therefor. People *v.* Jefferson County, 35 N. Y. App. Div. 239, 54 N. Y. Suppl. 782. Said subdivision 2 does not authorize a district attorney to offer a reward to be paid by the county for evidence by which to secure the conviction of an offense not yet committed, the same not being an expense necessarily incurred in a criminal action. McNeil *v.* Suffolk County, 114 N. Y. App. Div. 761, 100 N. Y. Suppl. 239. Nor does said subdivision 9 authorize him to offer a reward to be paid by the county for evidence by which to secure the conviction for an offense not yet committed. McNeil *v.* Suffolk County, *supra.*

39. Christner *v.* Hayes County, 79 Nebr. 157, 112 N. W. 347.

40. State *v.* Lauder, 13 N. D. 136, 90 N. W. 564.

U. S. Rev. St. (1878) § 362 [U. S. Comp. St. (1901) p. 208], conferring upon the attorney-general of the United States power to superintend any criminal prosecution instituted by the district attorney, does not authorize him to make general regulations for the control of criminal prosecutions. It confers power merely to give particular direction in particular cases. Fish *v.* U. S., 36 Fed. 677.

In Nova Scotia delegation by the attorney-general, under statutory authority, of power to prefer an indictment, must be special and relate to a particular case. Reg. *v.* Townsend, 28 Nova Scotia 468.

41. State *v.* Lauder, 13 N. D. 136, 90 N. W. 564; Rex *v.* Philips, 3 Burr. 1564, 4 Burr. 2089.

42. U. S. *v.* Mundell, 27 Fed. Cas. No. 15,834, 1 Hughes 415, 6 Call (Va.) 245.

Under a statute requiring a prosecutor except in certain cases, an order of court directing the attorney to prefer an indictment *ex officio* need not show on its face that no one would prosecute. State *v.* Kittrell, 7 Baxt. (Tenn.) 167; Bennett *v.* State, 8 Humphr. (Tenn.) 118. The power so conferred does not expire with the term, but operates as a mandate of the court so long as the thing commanded remains unaccomplished. State *v.* Cross, 2 Humphr. (Tenn.) 301.

43. Chambers *v.* State, 3 Humphr. (Tenn.) 237; *Ex p.* Gillespie, 3 Yerg. (Tenn.) 325.

properly necessary to bring a criminal to trial.[44] It does not include the power of dispensing with criminal prosecution.[45] In the absence of statute, the prosecuting attorney generally has power to stay proceedings or enter a *nolle prosequi* without the consent of the court.[46] But he has no control over the final judgment of the court.[47] The attorney-general of the state usually has the right to represent the state in the supreme court; but the duty of appealing lies with the district attorney.[48] The latter may also sue out writs of error or certiorari to bring an indictment into the supreme court.[49] But as soon as a case reaches the supreme court, the district attorney has no further control.[50] The duty of prosecuting does not end

44. People *v.* Columbia County, 134 N. Y. 1, 31 N. E. 322 [*affirming* 56 Hun 17, 8 N. Y. Suppl. 752 (*reversing* 2 N. Y. Suppl. 351)].

Inspection of papers.— For that purpose the district attorney is entitled to an inspection of all papers and documents under the control of the court, including a magistrate's papers. People *v.* Olmstead, 25 Misc. (N. Y.) 346, 55 N. Y. Suppl. 472, holding, in the absence of statutory limitation, that the district attorney is entitled to an inspection and examination of all papers and documents under the control of a city magistrate or clerk of his court, and that on an application by him for a writ of mandamus compelling a magistrate to permit him to examine such papers, the claim that, as a judicial officer, the latter had the right to take time for the consideration and determination of the demand for such examination, is no defense.

Agreement upon special judge.— A district attorney has power in a criminal case to agree on behalf of the state with defendant upon a special judge, when the district judge is disqualified to try the case, under a statute allowing the parties to agree upon a special judge under such circumstances. Davis *v.* State, 44 Tex. 523 [*overruling* Murray *v.* State, 34 Tex. 331]; Early *v.* State, 9 Tex. App. 476.

Authority to subpœna witnesses to testify to violations of law includes power to administer the oath, on examination concerning suspected violations. Bailey *v.* State, 40 Tex. Cr. 150, 49 S. W. 102, 41 Tex. Cr. 157, 53 S. W. 117.

The practice of acting as inquisitor and extorting admissions or confessions from persons accused of crime is improper. State *v.* Hagan, 164 Mo. 654, 65 S. W. 249.

Questioning defendant's witnesses.— But there is no impropriety merely in asking defendant's witnesses what they know of the case. Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

An expenditure of public money to a county detective in purchasing liquors at various saloons, for the purpose of procuring evidence of violations of law, is not against public policy. People *v.* Grout, 38 Misc. (N. Y.) 181, 77 N. Y. Suppl. 321. But such expense was not authorized by the common law, and the prosecuting attorney had no power to bind the county by a contract to pay therefor. Gibboney *v.* Camden County, 122 Fed. 46, 58 C. C. A. 228.

45. Thus, where a statute renders an offense punishable by imprisonment or fine, or both, the district attorney cannot waive imprisonment and sue in debt for the fine. U. S. *v.* Morin, 26 Fed. Cas. No. 15,810, 4 Biss. 93. Nor can he delay investigation or prosecution of violations of law because the city in which such offenses occurred is about to institute proceedings for their punishment. State *v.* Trinkle, 70 Kan. 396, 78 Pac. 854. And he has no authority to determine whether warrants issued to a marshal shall be executed or not. U. S. *v.* Scroggins, 27 Fed. Cas. No. 16,244, 3 Woods 529. A prosecuting attorney has no right, at his own discretion, to stop criminal proceedings instituted before a justice of the peace, or to direct the sheriff not to execute a valid warrant of arrest in his hands for execution. Beecher *v.* Anderson, 45 Mich. 543, 8 N. W. 539.

Stipulation as to forfeiture of recognizance. — If he is not in a position either to go to trial or to demand a forfeiture of the recognizance, he may agree, in consideration of consent to the forfeiture, to set it aside upon the appearance of defendant at the next term of the court. State *v.* Trinkle, 70 Kan. 396, 78 Pac. 854; State *v.* Foster, 32 Kan. 14, 3 Pac. 534.

46. See CRIMINAL LAW, 12 Cyc. 374.

47. He has no authority to compromise a judgment (Whittington *v.* Ross, 8 Ill. App. 234; Routt *v.* Feemster, 7 J. J. Marsh. (Ky.) 131); or to allow an indulgence of time within which to make payment of a fine or other money judgment (Routt *v.* Feemster, *supra*; Bennett *v.* State, 2 Yerg. (Tenn.) 472); nor to remit any portion of a sentence (State *v.* Brewer, 7 Blackf. (Ind.) 45).

But power to collect fines implies the power to receive the money, and to give a receipt therefor which will discharge the defendant. People *v.* Christerson, 59 Ill. 157.

48. State *v.* Grimmell, 116 Iowa 596, 88 N. W. 342; State *v.* Fleming, 13 Iowa 443. And see Independent Pub. Co. *v.* Lewis, etc., County, 30 Mont. 83, 75 Pac. 860.

49. State *v.* New Jersey Jockey Club, 52 N. J. L. 493, 19 Atl. 976; State *v.* Zabriskie, 43 N. J. L. 369 [*reversed* on other grounds in 43 N. J. L. 640, 39 Am. Rep. 610]; Com. *v.* Capp, 48 Pa. St. 53.

50. State *v.* Fleming, 13 Iowa 443; Independent Pub. Co. *v.* Lewis, etc., County, 30 Mont. 83, 75 Pac. 860.

If he be required to appear in the supreme court, he is there subject to the direction of the attorney-general. People *v.* Bussey, 80 Mich. 501, 45 N. W. 594.

In Georgia, however, where writs of error lie direct to the supreme court from city

with judgment. The district attorney must cause to be issued all process necessary to carry into execution the judgment of the court.[51]

C. Prosecution and Defense of Civil Actions and Proceedings. The duty of representing the state in the courts, although purely statutory, usually lies with the district or prosecuting attorney in all cases, unless expressly imposed upon another officer. No special enabling statute is necessary where his authority is conferred in general terms, requiring him to prosecute and defend on behalf of the state and county all actions, motions, etc., civil and criminal, before the courts in his district or any judge thereof.[52] Unless otherwise provided by law, all suits

courts, the solicitor of which is required by statute to represent the state in all criminal cases prosecuted therein, it is held that it is the duty of such solicitor to represent the state in the supreme court in criminal cases brought there from the city court. Fambrough *v.* State, 113 Ga. 934, 39 S. E. 324; Cooper *v.* State, 103 Ga. 405, 30 S. E. 249. It is the duty of the solicitor-general of the Atlanta circuit to represent the state in the supreme court in a case pending there on a writ of error from the supreme court of Fulton county, in which error is assigned upon the refusal of the judge of the superior court to sanction a petition for a certiorari, to be directed to the criminal court of Atlanta. Williams *v.* State, 121 Ga. 195, 48 S. E. 938.

51. Washington County Levy Ct. *v.* Ringgold, 15 Fed. Cas. No. 8,305, 2 Cranch C. C. 659 [*affirmed* in 5 Pet. 451, 8 L. ed. 188].

52. State *v.* Smith, 13 La. Ann. 424; Matter of Arnett, 49 Hun (N. Y.) 599, 2 N. Y. Suppl. 428. See also People *v.* Brady, 90 Mich. 459, 51 N. W. 537; Logan County *v.* State Capital Co., 16 Okla. 625, 86 Pac. 518.

Federal courts.— This duty extends to suit brought in a federal court against his county. Graham *v.* Parham, 32 Ark. 676.

He generally has authority, and it is his duty, to institute proceedings: To restrain public nuisances. Tottenham Urban Dist. Council *v.* Wiliamson, [1896] 2 Q. B. 353, 60 J. P. 225, 65 L. J. Q. B. 591, 75 L. T. Rep. N. S. 238, 44 Wkly. Rep. 676; Atty.-Gen. *v.* Wimbledon House Estate Co., [1904] 2 Ch. 34, 68 J. P. 341, 73 L. J. Ch. 593, 2 Loc. Gov. 826, 91 L. T. Rep. N. S. 163, 20 T. L. R. 489; Atty.-Gen. *v.* Ashborne Recreation Ground Co., [1903] 1 Ch. 101, 67 J. P. 73, 72 L. J. Ch. 67, 87 L. T. Rep. N. S. 561, 19 T. L. R. 39, 51 Wkly. Rep. 125; Wallasey Local Bd. *v.* Gracey, 36 Ch. D. 593, 51 J. P. 740, 56 L. J. Ch. 739, 57 L. T. Rep. N. S. 51, 35 Wkly. Rep. 694; Atty.-Gen. *v.* Shrewsbury Bridge Co., 21 Ch. D. 752, 51 L. J. Ch. 746, 46 L. T. Rep. N. S. 687, 30 Wkly. Rep. 916; Soltau *v.* De Held, 16 Jur. 326, 21 L. J. Ch. 153, 2 Sim. N. S. 133, 42 Eng. Ch. 133, 61 Eng. Reprint 291, unless plaintiff has sustained special damages. He may then file a bill without making the attorney-general a party. To restrain erection of a public building illegally authorized. Hornaday *v.* State, 62 Kan. 822, 62 Pac. 329; State *v.* Marion County Com'rs, 21 Kan. 419. To recover penalties incurred for violations of law. People *v.* Brady, 90 Mich. 459, 51 N. W. 537. Mandamus to enforce performance of a public duty. State *v.* Faulkner, 20 Kan. 541; Bobbett *v.* State, 10 Kan. 9. See MANDAMUS, 26 Cyc. 398 *et seq.* Quo warranto to try title to public office. Bartlett *v.* State, 13 Kan. 99. See, generally, QUO WARRANTO. To enjoin an unauthorized issue of bonds by city officials. State *v.* Kansas City, 60 Kan. 518, 57 Pac. 118. To enjoin payment of a claim wrongfully allowed by the county. State *v.* Headlee, 18 Wash. 220, 51 Pac. 369. And see Tehama County *v.* Sisson, 152 Cal. 167, 92 Pac. 64, holding that under County Government Act (St. (1897) p. 452, c. 277), § 8, requiring the district attorney to sue where the board of supervisors shall without authority of law order any money paid, etc., the district attorney may, without authority from the board, sue to restrain the payment of a warrant issued in violation of Const. art. 11, § 18, providing that no county shall in any year incur an indebtedness in excess of the revenues for the year. To prevent public officers from misappropriating public funds. Territory Bd. of Education *v.* Territory, 12 Okla. 286, 70 Pac. 792. To prosecute foreclosure suits to which the state is a party. State *v.* Fitzpatrick, 5 Ida. 499, 51 Pac. 112. To proceed against corporations for penalties imposed for failure to comply with state laws (Com. *v.* Grand Cent. Bldg., etc., Assoc., 97 Ky. 325, 30 S. W. 626, 17 Ky. L. Rep. 215), or for breach of charter (Atty.-Gen. *v.* Great Northern R. Co., 6 Jur. N. S. 1006, 29 L. J. Ch. 794, 2 L. T. Rep. N. S. 653, 8 Wkly. Rep. 556). To compel the performance of a public trust imposed upon a corporation. Evan *v.* Avon, 29 Beav. 144, 6 Jur. N. S. 1361, 30 L. J. Ch. 165, 3 L. T. Rep. N. S. 347, 9 Wkly. Rep. 84, 54 Eng. Reprint 581. To restrain, or afterward to impeach, the alienation of corporate property made pending the granting of a charter. Atty.-Gen. *v.* Avon, 3 De G. J. & S. 637, 33 L. J. Ch. 172, 9 L. T. Rep. N. S. 187, 2 New Rep. 564, 11 Wkly. Rep. 1050, 68 Eng. Ch. 483, 46 Eng. Reprint 783.

The attorney-general alone has power to inquire into excess of statutory powers by a public corporation. Pudsey Coal Gas Co. *v.* Bradford, L. R. 15 Eq. 167, 42 L. J. Ch. 293, 28 L. T. Rep. N. S. 11, 21 Wkly. Rep. 286; Ware *v.* Regent's Canal Co., 3 De G. & J. 212, 5 Jur. N. S. 25, 28 L. J. Ch. 153, 7 Wkly. Rep. 67, 60 Eng. Ch. 165, 44 Eng. Reprint 1250.

Appeals.— As the county attorney may not generally bring suit on behalf of the county without authority from the proper officers

on behalf of the state should be brought by the prosecuting attorney in the name of the state.[53] A relator is not necessary,[54] unless required by statute.[55] The prosecuting attorney has entire dominion and control over every proceeding on behalf of the state, whether it be prosecuted *ex officio* or at the instance of a relator.[56] He may, with the permission of the court, avail himself of the assistance of

(see *supra*, IV, A, 2), so he may not take an appeal on behalf of the county without such authority (Montgomery County *v.* Tipton, 15 S. W. 249, 12 Ky. L. Rep. 847 [*overruling* Com. *v.* Kimberlin, 8 Bush (Ky.) 444). But under Ky. St. (1903) § 127, the county attorney is required to prosecute appeals from orders of the fiscal court when directed to do so by the county court. Jefferson County *v.* Young, 120 Ky. 456, 86 S. W. 985, 27 Ky. L. Rep. 849; Boyd County *v.* Arthur, 118 Ky. 932, 82 S. W. 613, 26 Ky. L. Rep. 906. Under Ky. St. (1903) §§ 126, 127, 129, 978, 4303, requiring the county attorney to attend courts in his county, conduct all cases touching the interests of the county, oppose the allowance of all unjust claims, and authorizing appeals to the circuit court from judgments of the fiscal court in civil cases, and to the circuit court from the decision of the county court in proceedings for establishing highways, etc., the county attorney may, without order from the county or fiscal court, appeal from an allowance of damages awarded to an owner over whose land a proposed highway is to run; section 127 not imposing any limitation on the authority of the county attorney. Breckinridge County *v.* Rhodes, 105 S. W. 903, 32 Ky. L. Rep. 352. In Idaho, under the act of Feb. 2, 1899 (Laws (1899), p. 25), fixing the powers and duties of county attorneys, and Rev. St. (1887) § 1759, subd. 13, giving county commissioners power to direct prosecutions and defense of suits to which the county is a party, the prosecuting attorney must look after and defend all litigation instituted against the county, and has power to appeal from the district court to the supreme court without an order of the commissioners authorizing him to do so. Twin Falls County *v.* Bassett, 14 Ida. 324, 93 Pac. 774.

Waiver of service of summons.— A county attorney has authority to waive issuance and service of summons in error in a case against a county in which he has appeared for it at the trial. Dakota County *v.* Bartlett, 67 Nebr. 62, 93 N. W. 192.

Action to rescind contract.— The county attorney, especially when authorized by the fiscal court and counsel employed by authority of the court to assist him, had authority to institute an action in the name of the county to rescind a contract made by the county. Daviess County *v.* Daviess County Gravel Road Co., 63 S. W. 752, 23 Ky. L. Rep. 711.

Qui tam actions.— It is not the duty of the attorney-general to prosecute *qui tam* actions, although the state is entitled to a part of the proceeds. *In re* Atty.-Gen., Mart. & Y. (Tenn.) 285.

Collection of taxes.— Under Ky. St. (1903) § 127, making it a county attorney's duty to prosecute all cases in his county in which the county is interested, and when so directed by the fiscal court to institute actions before any court in the commonwealth in which the county is interested, it is his duty to conduct a proceeding to ascertain the amount of taxes due and unpaid preliminary to a suit for their collection, when directed to do so by the fiscal court. Terrell *v.* Trimble, County, 108 S. W. 848, 33 Ky. L. Rep. 364.

Instructions to a district attorney of the United States "to appear and defend the interests of the United States involved" in an action against federal officers does not authorize the district attorney to make the United States a party defendant and liable to have judgment rendered against it. Stanley *v.* Schwalby, 162 U. S. 255, 16 S. Ct. 754, 40 L. ed. 960.

District and county attorneys.— The general authority of the district attorney to represent the state in all actions in the district court does not supersede the right of the county attorney to maintain therein, on behalf of the state, certain actions which he is directed by special statute to prosecute. San Antonio, etc., R. Co. *v.* State, 79 Tex. 264, 14 S. W. 1063.

53. In the absence of statutory authority, a suit brought by the "prosecuting attorney in behalf of the people of the state," should be dismissed for want of proper parties. Patterson *v.* Temple, 27 Ark. 202.

United States.— A bill purporting to be brought by the United States on relation of certain persons, but not stating that it is brought by the district attorney and not signed by him, is bad on demurrer. U. S. *v.* Doughty, 25 Fed. Cas. No. 14,986, 7 Blatchf. 424.

54. *In re* Bedford Charity, 2 Swanst. 470, 19 Rev. Rep. 107, 36 Eng. Reprint 696.

55. Where the sole relator dies, application for a new relator must be made by the attorney-general (Atty.-Gen. *v.* Plumptree, 5 Madd. 452, 56 Eng. Reprint 968); but after decree the application must be made by the new relator, with the consent of the attorney-general (Atty.-Gen. *v.* Harvey, 3 Eq. Rep. 992, 1 Jur. N. S. 1062, 3 Wkly. Rep. 636).

The names of relators will not be struck out, although defendants would not be prejudiced, unless it appears, either that justice cannot be done without the alteration, or that the suit can so be more conveniently prosecuted. Atty.-Gen. *v.* Cooper, 1 Jur. 790, 3 Myl. & C. 258, 14 Eng. Ch. 258, 40 Eng. Reprint 923.

Where relators refuse to proceed, new relators will be substituted upon giving indemnity for all costs. Atty.-Gen. *v.* Cashel Corp., Sau. & Sc. 333.

56. Atty.-Gen. *v.* Haberdashers' Co., 15

other counsel.[57] He has the same power to bind the state by agreement to submit a matter to arbitration as the attorney for a private litigant would have; [58] but he has no right to accept a compromise judgment.[59] Nor can he accept anything but money in satisfaction of a money judgment in favor of the state. He has no authority to purchase in the name of the state lands sold under an execution in its favor.[60] He represents the state and is presumed always to be in court.[61] As the statutes of limitations do not run against the state, delay or laches will not be imputed to him.[62] It is his duty to take an appeal in all cases where, according to his judgment, the state has been injured by a decision.[63] In some states it is for the county board to determine whether suits shall be brought on behalf of the county.[64]

D. Outside of County or District. A district or prosecuting attorney is not required to go beyond the limits of his district to prosecute or defend litigation for the state [65] or county.[66] Upon a change of venue the duty to represent the state devolves upon the prosecuting attorney of the county to which the cause is removed.[67] He cannot, without express statutory authority, appear for the state in the supreme court, upon the appeal of criminal cases.[68] Nor is he required to appear for the county in the supreme court unless the statute so directs.[69]

V. LIABILITIES.

A. Civil Liability. A prosecuting attorney, being a judicial officer of the state, is not liable in damages for acts done in the course of his duty, although wilful, malicious, or libelous.[70] Neither he nor his sureties are liable for his neglect

Beav. 397, 16 Jur. 717, 51 Eng. Reprint 591; Ludlow *v.* Greenhouse, 1 Bligh N. S. 17, 4 Eng. Reprint 780; Atty.-Gen. *v.* Ironmongers Co., Cr. & Ph. 208, 5 Jur. 356, 10 L. J. Ch. 201, 18 Eng. Ch. 208, 41 Eng. Reprint 469 [*affirming* 2 Beav. 313, 17 Eng. Ch. 313, 48 Eng. Reprint 1201].

However, the courts have the same authority over him as over other suitors, and he will not be permitted to prosecute any case merely vexatious, or without legal object. Reg. *v.* Prosser, 11 Beav. 306, 13 Jur. 71, 18 L. J. Ch. 35, 50 Eng. Reprint 834.

The relator is not a party, has no control, and cannot be heard in person. Atty.-Gen. *v.* Galway, 1 Molloy 95; Atty.-Gen. *v.* Barker, 4 Myl. & C. 262, 18 Eng. Ch. 262, 41 Eng. Reprint 103. His counsel cannot be heard in any other capacity than as counsel for the prosecuting attorney. Atty.-Gen. *v.* Ironmongers Co., Cr. & Ph. 208, 5 Jur. 356, 10 L. J. Ch. 201, 18 Eng. Ch. 208, 41 Eng. Reprint 469).

57. Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25. See CRIMINAL LAW, 12 Cyc. 530.

58. Judson *v.* U. S., 120 Fed. 637, 57 C. C. A. 99.

59. State *v.* Allen, 32 Tex. 273; U. S. *v.* Beebe, 180 U. S. 343, 21 S. Ct. 371, 45 L. ed. 563.

60. Littleton *v.* State, 2 Lea (Tenn.) 669.

61. If he does not appear it must be considered as a *nil dicit*; the court will not order him to appear. Barcley *v.* Russell, Dick. 729, 21 Eng. Reprint 454.

62. Atty.-Gen. *v.* Bradford Canal, L. R. 2 Eq. 71, 35 L. J. Ch. 619, 15 L. T. Rep. 9, 14 Wkly. Rep. 579.

But where he is merely acting for the interests of individuals, he will be barred by the statute of limitations if they would be. St. Mary Magdalen College *v.* Atty.-Gen., 6 H. L. Cas. 189, 3 Jur. N. S. 675, 26 L. J. Ch. 620, 5 Wkly. Rep. 716, 10 Eng. Reprint 1267 [*reversing* 18 Beav. 223, 18 Jur. 363, 23 L. J. Ch. 844, 2 Wkly. Rep. 349, 52 Eng. Reprint 88].

63. Fields *v.* State, Mart. & Y. (Tenn.) 168.

64. Kerby *v.* Clay County, 71 Kan. 683, 81 Pac. 503, holding that the board of county commissioners, being given the management and control of the business and the financial affairs of the county, has the right to determine whether actions shall be brought in its name to recover moneys allowed and paid out of the county treasury without authority; and the county attorney may not institute and carry on such litigation without the consent and concurrence of the board. See *supra*, IV, A, 2.

65. Martin *v.* State, 39 Kan. 576, 18 Pac. 472.

66. Herrington *v.* Santa Clara County, 44 Cal. 496; Leavenworth County Com'rs *v.* Brewer, 9 Kan. 307; Thompson *v.* Carr, 13 Bush (Ky.) 215.

67. Bevington *v.* Woodbury County, 107 Iowa 424, 78 N. W. 222; State *v.* Whitworth, 26 Mont. 107, 66 Pac. 748; Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108. *Compare* People *v.* Neff, 121 N. Y. App. Div. 44, 105 N. Y. Suppl. 559 [*affirmed* in 191 N. Y. 286, 84 N. E. 63].

68. *Ex p.* State, 115 Ala. 123, 22 So. 115.

69. Eagle River *v.* Oneida County, 86 Wis. 266, 56 N. W. 644.

70. Griffith *v.* Slinkard, 146 Ind. 117, 44 N. E. 1001; Farrar *v.* Steele, 31 La. Ann.

to perform any duty not expressly enjoined upon him by statute.[71] He is liable for moneys actually received in his official capacity;[72] but the mere failure to collect moneys which it was his duty to collect does not make him liable, if not actually received,[73] unless lost through his unwarrantable neglect.[74] The sureties on his official bond are not liable for moneys received by him, which it was not his duty to collect.[75] Nor is he responsible for the default or fraud of subordinate officers.[76]

B. Criminal Responsibility.[77] For official misconduct, as the taking of a bribe, etc., a prosecuting attorney may be indicted and punished, either for the common-law offense of malfeasance in office or under the statutes.[78] The fact that he is by law subject to impeachment for misdemeanors in office does not make impeachment a condition precedent to an indictment for malfeasance in office and punishment thereunder.[79] Approval of a bail-bond for the purpose of enabling a prisoner to escape arrest for another offense committed in another county is misbehavior in office.[80] If a county attorney be removed from office by a statutory civil action on account of misconduct in office, he is not thereby relieved from criminal prosecution.[81]

VI. DEPUTIES, ASSISTANTS, AND SUBSTITUTES.

A. Appointment[82]**— 1. In General.** The legislature has control of the office of prosecuting attorney and power to provide for the appointment of attorneys *pro tempore* to act during the absence, disqualification, or neglect or refusal to act, of the state's attorney, and this notwithstanding the office is created, and the method of election or appointment provided for, by the constitution;[83] and

640; Parker *v.* Huntington, 2 Gray (Mass.) 124.

71. State *v.* Egbert, 123 Ind. 448, 22 N. E. 256.

72. Gilbert *v.* Isham, 16 Conn. 525.

Action by county for fines collected.— Under Ga. Pen. Code (1895), § 798 (7), providing that solicitors-general shall at the fall term of each court yearly settle with the county treasurer and pay over to him all moneys due according to law, an action by the county to recover fines collected was prematurely brought before the close of the fall term of the court. Butts County *v.* Bloodworth, 127 Ga. 141, 56 S. E. 106.

73. Fairlie *v.* Maxwell, 1 Wend. (N. Y.) 17; People *v.* Van Wyck, 4 Cow. (N. Y.) 260.

74. U. S. *v.* Ingersoll, 26 Fed. Cas. No. 15,440, Crabbe 135.

75. Wilson *v.* State, 67 Kan. 44, 72 Pac. 517.

76. U. S. *v.* Ingersoll, 26 Fed. Cas. No. 15,440, Crabbe 135.

77. **Suspension or removal and disbarment** see *supra*, II, E, 1.

Demand or receipt by United States district attorney of other compensation than that provided by law see *supra*, III, B, 5.

Punishment of assistant United States district attorney for contempt of state court.— An assistant United States district attorney appointed by a United States district judge, as authorized by Act Cong. May 28, 1896, c. 252, § 8, 29 U. S. St. at L. 181 [U. S. Comp. St. (1901) p. 613], is an officer of the court, and where one, in his official capacity as such assistant district attorney, procures the production of state court records before a federal grand jury under an ordinary subpœna *duces tecum*, and thereafter holds possession of such records as such attorney, he is not subject to punishment for contempt of the state court for failure to return such records on demand. *In re* Leaken, 137 Fed. 680.

78. Com. *v.* Rowe, 112 Ky. 482, 66 S. W. 29, 23 Ky. L. Rep. 1718.

79. Com. *v.* Rowe, 112 Ky. 482, 66 S. W. 29, 23 Ky. L. Rep. 1718 [*citing* Com. *v.* Thomas, 9 Ky. L. Rep. 289].

80. State *v.* Wedge, 24 Minn. 150.

81. State *v.* Foster, 32 Kan. 14, 3 Pac. 534.

82. **De facto assistant** see *supra*, II, B, 3.

As officers of the court see *supra*, I.

83. *Colorado.*— Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221.

Florida.— King *v.* State, 43 Fla. 211, 31 So. 254.

Kansas.— *In re* Gilson, 34 Kan. 641, 9 Pac. 763; State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623.

Louisiana.— State *v.* Reid, 113 La. 890, 37 So. 866; State *v.* Boudreaux, 14 La. Ann. 88; State *v.* Bass, 12 La. Ann. 862.

Mississippi.— Keithler *v.* State, 10 Sm. & M. 192.

Missouri.— State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

Nebraska.— Spaulding *v.* State, 61 Nebr. 289, 85 N. W. 80. The fact that an attorney appointed under Comp. St. (1895) c. 7, § 21, as a substitute for a county attorney in the latter's absence or sickness, may prosecute offenses by information does not render that section obnoxious to Bill of Rights, § 10, requiring the legislature to provide for holding persons to answer for crimes on information

notwithstanding the fundamental law also provides the method of filling vacancies.[84] The appointment must be in the manner, if any, prescribed by law. If it is required to be in writing, mere oral authority to act is not sufficient.[85] A special act providing for the appointment of a deputy solicitor for a certain court supersedes the general law on the subject of appointment of solicitors *pro tem.*[86]

2. By the Court. Courts of general criminal jurisdiction have inherent power, in the absence of statute, to appoint special attorneys for the state when the regular officer is absent or disqualified, in order to prevent a failure of justice.[87] And it is the duty of the court to make such appointment whenever the state's attorney for any cause fails to act.[88] Such power is frequently conferred by express statutory provision.[89] If it be provided by law that the court may appoint a prosecuting attorney *pro tem.* or assistant attorney under certain circumstances, it has no power to do so except upon the contingencies specified,[90] especially if the power

of a public prosecutor. Korth *v.* State, 46 Nebr. 631, 65 N. W. 792.

Pennsylvania.— Com. *v.* McHale, 97 Pa. St. 397, 36 Am. Rep. 808.

Vermont.— *In re* Snell, 58 Vt. 207, 1 Atl. 566.

See 17 Cent. Dig. tit. "District and Prosecuting Attorneys," § 10 *et seq.*

Cal. County Government Act (1893) (St. (1893) p. 359), § 25, subd. 36, declaring that the county board of supervisors shall have authority to authorize the district attorney to appoint an assistant district attorney, which office was thereby created, was not unconstitutional, since the assistant district attorney was but a deputy, and by section 61 of the same act the district attorney could appoint as many deputies as he saw fit, and, if not a deputy, the board had power to authorize the district attorney to fill the office when in their judgment the public interest required it. Freeman *v.* Barnum, 131 Cal. 386, 63 Pac. 691.

84. State *v.* Johnson, 41 La. Ann. 1076, 6 So. 802.

85. Murray *v.* State, 48 Tex. Cr. 219, 87 S. W. 349.

86. Douglass *v.* Prowell, 130 Ala. 580, 30 So. 498.

87. *Alabama.*— *Ex p.* Diggs, 50 Ala. 78.

Florida.— King *v.* State, 43 Fla. 211, 31 So. 254.

Georgia.— Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493.

Indiana.— Tull *v.* State, 99 Ind. 238.

Iowa.— White *v.* Polk County, 17 Iowa 413.

Missouri.— State *v.* Duncan, 116 Mo. 288, 22 S. W. 699; State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

Tennessee.— Wilson *v.* State, 8 Yerg. 509; Douglass *v.* State, 6 Yerg. 525; *In re* Gillespie, 3 Yerg. 325.

Texas.— State *v.* Gonzales, 26 Tex. 197; State *v.* Johnson, 12 Tex. 231.

See 17 Cent. Dig. tit. "District and Prosecuting Attorneys," § 11. And see Criminal Law, 12 Cyc. 531.

Justices of the peace have no such power in the absence of statute conferring it. Davis *v.* Linn County, 24 Iowa 508.

88. Mitchell *v.* State, 22 Ga. 211, 68 Am. Dec. 493. See Criminal Law, 12 Cyc. 531.

89. Under statutes see Joyner *v.* State, 78 Ala. 648; *Ex p.* Diggs, 50 Ala. 78; Adams *v.* Com., 111 S. W. 348, 33 Ky. L. Rep. 779; State *v.* Johnson, 41 La. Ann. 1076, 6 So. 802; State *v.* Boudreaux, 14 La. Ann. 88; State *v.* Bass, 12 La. Ann. 862; Mathews *v.* Lincoln County, 90 Minn. 348, 97 N. W. 101; People *v.* Lytle, 7 N. Y. App. Div. 553, 40 N. Y. Suppl. 153; State *v.* Franklin County Com'rs, 20 Ohio St. 421; *In re* Prosecuting Atty., 2 Ohio Dec. (Reprint) 602, 4 West. L. Month. 147; Com. *v.* McHale, 97 Pa. St. 397, 39 Am. Rep. 808; Daniels *v.* State, (Tex Cr. App. 1903) 77 S. W. 215.

90. Toland *v.* Ventura County, 135 Cal. 412, 67 Pac. 498; Adams *v.* Com., 111 S. W. 348, 33 Ky. L. Rep. 779; Sayles *v.* Genesee Cir. Judge, 82 Mich. 84, 46 N. W. 29; Kouns *v.* Draper, 43 Mo. 225; Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342.

Under Mills Annot. St. Colo. § 1556, authorizing the court to appoint a special attorney if the district attorney is interested, or shall have been employed as counsel in any case which it shall be his duty to prosecute or defend, and section 1557, providing that, if the district attorney be sick or absent, the court shall appoint some person to discharge the duties of the office, where the court does not find that the district attorney's motives in dismissing prosecutions are corrupt, but finds that they are not impure but that an impartial investigation cannot be had through the district attorney's office because of the partiality of the prosecutor, the appointment of a special prosecutor is not authorized. Gray *v.* Ninth Judicial Dist. Court, 42 Colo. 298, 94 Pac. 287.

Under Ida. Sess. Laws (1897), p. 74, § 2, only on the happening of some one of the reasons that disqualify the county attorney can the court appoint a suitable person to perform the duties of such attorney for the time being. State *v.* Barber, 13 Ida. 65, 88 Pac. 418.

Iowa Code, § 304, empowering the district court to appoint an attorney to act as county attorney in case of the disability of the county attorney, authorizes the district court to appoint an attorney to act for the county attorney in a matter before the grand jury in which he is personally interested, but does not authorize the court to appoint an attorney to have charge of another matter before that

of appointing them in other contingencies be vested elsewhere.[91] The court also has inherent power, independent of statute, in its discretion to allow assistant counsel to the prosecuting attorney,[92] unless the power of appointing assistants is vested in other hands.[93] The number of assistants to be allowed is within the discretion of the court.[94] The statutes sometimes provide for appointment by the court of a substitute state's attorney in civil cases.[95] An illegal order of appoint-

body. State *v.* Miller, 132 Iowa 587, 109 N. W. 1087.

Under Ky. St. (1903) § 118, requiring commonwealth's attorneys to attend the circuit court and prosecute public offenses, and under section 120, authorizing circuit judges to appoint a suitable attorney to act in a commonwealth attorney's absence, it was held error to refuse to permit one appointed and commissioned as commonwealth attorney to conduct a murder prosecution, or if the court believed he had no right to act, to appoint a commonwealth's attorney *pro tempore*. Keeton *v.* Com., 108 S. W. 315, 32 Ky. L. Rep. 1164. See also Adams *v.* Com., 111 S. W. 348, 33 Ky. L. Rep. 779.

By recorder.— Tex. Code Cr. Proc. (1895) art. 38, provides that when any district or county attorney shall fail to attend any term of the court the judge or justice may appoint an attorney for the term, who shall be allowed the compensation allowed to the district or county attorney. The recorder of the city of Houston has no term of court. It was held that when acting as a justice in prosecutions for violations of the penal code the recorder could only appoint where the district or county attorney failed to attend, and, there being no term, the appointment must be made in each case. Harris County *v.* Stewart, 91 Tex. 133, 41 S. W. 650.

91. Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342. Under a statute authorizing the court to appoint a substitute during the absence or disqualification of the district attorney and his assistant, if he has one, it may make such appointment in the absence of the district attorney although his assistant be present. People *v.* Lytle, 7 N. Y. App. Div. 553, 40 N. Y. Suppl. 153. Under a statute authorizing the appointment of a substitute for the county attorney when he is "unable to attend to his duties," physical or mental incapacity is meant, not mere lack of experience, knowledge, or skill. Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342. Power to appoint a substitute in cases in which the district attorney has been involved may be exercised without first taking steps for the removal of the latter. People *v.* Second Judicial Dist. Ct., 29 Colo. 5, 66 Pac. 896. A special attorney may not be appointed for the sole purpose of examining a bill of costs (State *v.* Seibert, 130 Mo. 202, 32 S. W. 670), nor to prosecute an appeal (State *v.* Marshall County, 14 S. D. 149, 84 N. W. 775).

92. *Alabama.*— Shelton *v.* State, 1 Stew. & P. 208.

California.— People *v.* Blackwell, 27 Cal. 65.

Colorado.— Hinsdale County *v.* Crump, 18 Colo. App. 59, 70 Pac. 159; Raymond *v.* People, 2 Colo. App. 329, 30 Pac. 504.

Idaho.— State *v.* Crump, 5 Ida. 166, 47 Pac. 814, assistant employed by county commissioners.

Indiana.— Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097; Shular *v.* State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211; Tull *v.* State, 99 Ind. 238; Siebert *v.* State, 95 Ind. 471; Wood *v.* State, 92 Ind. 269; Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370.

Kansas.— State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257.

Kentucky.— Tesh *v.* Com., 4 Dana 522.

Maine.— State *v.* Bartlett, 55 Me. 200.

Massachusetts.— Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81; Com. *v.* King, 8 Gray 501; Com. *v.* Williams, 2 Cush. 582; Com. *v.* Knapp, 10 Pick. 477, 20 Am. Dec. 534.

Michigan.— People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540.

Mississippi.— Edwards *v.* State, 47 Miss. 581.

Montana.— State *v.* Whitworth, 26 Mont. 107, 66 Pac. 748.

Ohio.— Price *v.* State, 35 Ohio St. 601.

Tennessee.— Staggs *v.* State, 3 Humphr. 372; Jarnagin *v.* State, 10 Yerg. 529.

Virginia.— Hopper *v.* Com., 6 Gratt. 684.

Wisconsin.—Richards *v.* State, 82 Wis. 172, 51 N. W. 652; Lawrence *v.* State, 50 Wis. 507, 7 N. W. 343.

United States.— U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139.

See also CRIMINAL LAW, 12 Cyc. 530 *et seq.*

93. Seaton *v.* Polk County, 59 Iowa 626, 13 N. W. 725; Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342.

In reading the indictment to the jury, private counsel, appointed assistant, acts as county attorney. State *v.* Crafton, 89 Iowa 109, 56 N. W. 257.

94. Thalheim *v.* State, 38 Fla. 169, 20 So. 938; Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097; Tull *v.* State, 99 Ind. 238; State *v.* Sweeney, 93 Mo. 38, 5 S. W. 614; State *v.* Griffin, 87 Mo. 608; Richards *v.* State, 82 Wis. 172, 51 N. W. 652. See also Com. *v.* Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; and CRIMINAL LAW, 12 Cyc. 532.

95. Thus by statute in Illinois it is made the duty of the state's attorney to prosecute "'all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the State, or his county, or to any school or road district in his county'; and . . . it is made the duty of the court, whenever he is absent or unable to attend, or is interested in any cause or proceeding, civil or criminal, to appoint some competent attorney to prosecute or defend such cause or proceeding." See Mix *v.* People, 116 Ill. 265, 4 N. E. 783.

ment of a special prosecuting attorney at the instance of a complaining witness may be vacated by mandamus.[96]

3. By Governor, Attorney-General, Prosecuting Attorney, or Assistant, County Board, Etc. The statutes sometimes provide for the appointment of deputies, substitutes, or assistants to district or prosecuting attorneys by others than the courts, as by the governor,[97] attorney-general,[98] district or prosecuting attorney,[99] county board,[1] police jury,[2] etc. The prosecuting attorney has power to employ an assistant, by virtue of his statutory authority to use all diligence to indict and convict offenders,[3] unless the duty of providing assistants be imposed by law upon some other authority.[4] He may also appoint a deputy in the prosecution of civil cases.[5] But a general delegation of his powers by a prosecuting attorney is against public policy and illegal, and it can furnish no basis for a claim by the person to whom the powers were delegated for personal compensation for his services.[6] An assistant has no power to employ an assistant.[7] In some states counsel to assist the prosecuting attorney in a particular prosecution may properly be employed by the board of supervisors, with the sanction of the court and approval of the prosecuting attorney,[8] unless prevented by statute. If the statute prescribes the circumstances under which the county board may employ assistant counsel, it is controlling.[9] The attorney-general of the United States is required to appoint such assistants as he may think necessary to assist the district attorneys in the discharge of their duties.[10]

96. Sayles *v.* Genesee Cir. Judge, 82 Mich. 84, 46 N. W. 29.

97. James *v.* Helm, 111 S. W. 335, 33 Ky. L. Rep. 871 (to assist county attorney in civil cases, under St. (1903) § 118); State *v.* Barrow, 30 La. Ann. 657; State *v.* Garrett, 29 La. Ann. 637; *In re* Snell, 58 Vt. 207, 1 Atl. 566. The Wisconsin statute authorizing the governor to employ attorneys in certain cases was held not to be applicable to a proceeding before the governor to remove an officer from office, such a proceeding not being one in which the rights, interest, or other property of the state are liable to be injuriously affected, nor an action prosecuted or defended on behalf of the state. Randall *v.* State, 16 Wis. 340.

98. State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623; State *v.* Russell, 26 La. Ann. 68.

99. State *v.* Harris, 12 Nev. 414; People *v.* Neff, 191 N. Y. 286, 84 N. E. 63 [*affirming* 121 N. Y. App. Div. 44, 105 N. Y. Suppl. 559].

Number of deputies or assistants.— Under Mo. Rev. St. (1899) § 3286 (Acts (1893), pp. 168, 169), providing that the prosecuting attorney in a county having a population of one hundred thousand and less than three hundred thousand shall be entitled to such a number of deputies and assistants to be appointed by him as the county court shall deem necessary, and such deputies and assistants shall be divided into classes and paid as follows: Class A, chief deputy, one thousand five hundred dollars per year; class B, assistants or deputies, one thousand two hundred dollars per year; and section 3287 providing that the appointment and number of deputies and assistants of a prosecuting attorney, not expressly fixed by this article, shall be subject to the approval of the judges of the criminal court, only one chief deputy can be appointed in a county of the class named, and the criminal court has power only to determine the number to be appointed in class B. Elliott *v.* Jackson County, 194 Mo. 532, 92 S. W. 480.

1. See Storey *v.* Murphey, 9 N. D. 115, 81 N. W. 23.

2. A statute authorizing police juries to appoint a district attorney *pro tem.* within thirty days does not prohibit such appointment thereafter, provided the power of the judge to act in such case has not been exercised in the meantime. State *v.* Montgomery, 25 La. Ann. 138; State *v.* Lynch, 23 La. Ann. 786.

3. State *v.* Recorder, 48 La. Ann. 1369, 20 So. 892; State *v.* Anderson, 29 La. Ann. 774; Engle *v.* Chipman, 51 Mich. 524, 16 N. W. 886; State *v.* Harris, 12 Nev. 414; State *v.* Ocean County, 47 N. J. L. 417, 1 Atl. 701. And see State *v.* Mack, 45 La. Ann. 1155, 14 So. 141; State *v.* Mangrum, 35 La. Ann. 619. See Criminal Law, 12 Cyc. 530.

Preliminary examinations.— In Louisiana the district attorney, if he is employed in the discharge of other duties, may secure counsel to appear in his stead before the committing court in which a preliminary examination is held. State *v.* Bezou, 48 La. Ann. 1369, 20 So. 892.

4. Seaton *v.* Polk County, 59 Iowa 626, 13 N. W. 725; Foster *v.* Clinton County, 51 Iowa 541, 2 N. W. 207; Tatlock *v.* Louisa County, 46 Iowa 138.

5. Parker *v.* May, 5 Cush. (Mass.) 336.

6. Engle *v.* Chipman, 51 Mich. 524, 16 N. W. 886.

7. People *v.* Hurst, 41 Mich. 328, 1 N. W. 1027.

8. People *v.* Bemis, 51 Mich. 422, 16 N. W. 794. See Counties, 11 Cyc. 473; Criminal Law, 12 Cyc. 530.

9. See Storey *v.* Murphy, 9 N. D. 115, 81 N. W. 23.

10. U. S. Rev. St. (1878) § 363 [U. S. Comp. St. (1901) p. 208].

4. Upon Change of Venue. Since the proper officer to continue the prosecution on a change of venue is the district or prosecuting attorney of the county to which the removal has been made,[11] if he is absent or disqualified, or unable to prosecute alone, the duty of appointing a deputy or assistant lies with the court or other appointing power of that county, not the court of original venue.[12]

5. Presumption and Record. The law presumes that the appointment of a prosecuting attorney *pro tem.*, appearing of record, was legally and properly made, although the record fails to state facts authorizing it. One who has acted as a public officer is presumed to have been duly appointed until the contrary appears.[13] And unless required by statute, it is not necessary that the appointment itself be shown by the record. The fact that another is permitted by the court to take the place of the prosecuting attorney raises a presumption of, and is generally tantamount to, an appointment.[14] However, this presumption may be overcome by other facts upon the face of the record.[15]

B. Eligibility.[16] The qualifications prescribed by law for prosecuting attorneys are not all required of assistants,[17] since the latter are not state officers,[18] unless the office of assistant is expressly provided for by law.[19] Attorneys at law, being officers of the court, are presumed to be qualified to conduct criminal prosecutions, and when employed to assist the state's attorney need not be sworn as to their

11. See *supra*, IV, D.

12. State *v.* Whitworth, 26 Mont. 107, 66 Pac. 748; Sands *v.* Frontier County, 42 Nebr. 837, 60 N. W. 1017; Fuller *v.* Madison County, 33 Nebr. 422, 50 N. W. 255; Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108. *Contra*, Bevington *v.* Woodbury County, 107 Iowa 424, 78 N. W. 222, holding that the county of original venue, being liable for the entire costs of the prosecution, has power to appoint an assistant to aid in the prosecution in the county to which it is removed.

Since N. Y. County Law (Laws (1892), p. 1786, c. 686, § 204), providing that the district attorney of any county in which an important criminal action is to be tried may employ assistant counsel with the written approval of the county judge of the county filed in the county clerk's office, and that the costs and expenses thereof, to be certified by the presiding judge, shall be charged on the county in which the indictment is found, is the only source of authority for employment of assistant counsel, the presiding justice at the trial of a prosecution changed from another county has no authority to fix the compensation of an assistant employed by the district attorney of the county where the indictment was found, with the approval of the county judge of that county, as the statute clearly grants such authority only to the district attorney of the county in which the case is to be tried. People *v.* Neff, 191 N. Y. 286, 84 N. E. 63 [*affirming* 121 N. Y. App. Div. 44, 105 N. Y. Suppl. 595].

13. Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221; State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623; Price *v.* State, 35 Ohio St. 601; Turner *v.* State, 89 Tenn. 547, 15 S. W. 838 [*overruling* Pippin *v.* State, 2 Sneed (Tenn.) 43, and Staggs *v.* State, 3 Humphr. (Tenn.) 372, so far as these hold that the facts authorizing the appointment must appear upon the record]. See also Isham *v.* State, 1 Sneed (Tenn.) 111; Hite *v.* State, 9 Yerg. (Tenn.) 198; Wilson *v.* State, 8 Yerg. (Tenn.) 509; Douglass *v.* State, 6 Yerg. (Tenn.) 525; Kelly *v.* State, 36 Tex. Cr. 480, 38 S. W. 39; U. S. *v.* Twining, 132 Fed. 129.

14. *California.*— People *v.* Walters, 98 Cal. 138, 32 Pac. 864.

Colorado.— Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221.

Missouri.— State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

Ohio.— State *v.* Moore, 1 Ohio Dec. (Reprint) 506, 10 West. L. J. 219.

Tennessee.— Isham *v.* State, 1 Sneed 111.

Contra.— Joyner *v.* State, 78 Ala. 448, holding that the appointment must be entered upon the record, and can be shown only by the record.

Sufficiency of record.— Under Mo. Rev. St. (1899) § 4955, providing for the appointment of a special prosecuting attorney where the regular prosecutor's interest in a case is inconsistent with his official duties, the recital of a record that the regular prosecuting attorney had been employed as counsel by defendant, and that for that reason S was appointed special prosecuting attorney in the case, was sufficient to sustain the appointment. State *v.* Wilson, 200 Mo. 23, 98 S. W. 68.

15. State *v.* Davidson, 2 Coldw. (Tenn.) 184.

16. See also Criminal Law, 12 Cyc. 530.

17. State *v.* Phelps, 5 S. D. 480, 59 N. W. 471, holding that the provision of Const. art. 5, § 24, requiring a state's attorney to be of the age of twenty-five years or more, does not extend to a deputy appointed under Laws (1891), c. 108, § 1, authorizing a state's attorney to appoint a deputy.

18. Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

19. Assistant district attorneys of the United States hold office by virtue of statute. They are officers of the United States within their respective districts. *In re* Leaken, 137 Fed. 680; San Francisco *v.* U. S., 21 Fed. Cas. No. 12,316, 4 Sawy. 553.

qualifications.[20] In most jurisdictions, but not in all, counsel employed by persons interested in a prosecution may be appointed or permitted by the court to assist the state's attorney, and such private employment does not disqualify them.[21] They are not disqualified, although employed to prosecute civil suits based on the same transactions;[22] nor by reason of their own interest in the prosecution.[23] One may be permitted to assist the state's attorney, although a non-resident of the county,[24] or of the state.[25] No one may act as such assistant who has been previously engaged by the defendant, if the latter has disclosed his case to him.[26] But a conditional employment by the accused[27] or appointment to act as his counsel,[28] without any confidential communication having passed between them, does not disqualify.

C. Qualification. Unless required by the statute, an attorney appointed to assist the prosecuting attorney need not be sworn nor give bond.[29] But if appointed to fill a vacancy, he shall give bond and take the oath of the prosecuting attorney.[30] Assistants to the district attorneys of the United States are required to take the oath prescribed for the district attorneys.[31]

D. Tenure. The office of prosecuting attorney *pro tem.* may be expressly

20. People *v.* Wright, 89 Mich. 70, 50 N. W. 792.

21. *Florida.*— King *v.* State, 43 Fla. 211, 31 So. 254; Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

Indiana.— Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097.

Iowa.— State *v.* Helm, 92 Iowa 540, 61 N. W. 246; State *v.* Shreves, 81 Iowa 615, 47 N. W. 899; State *v.* Montgomery, 65 Iowa 483, 22 N. W. 639; State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148.

Kansas.— State *v.* Wilson, 24 Kan. 189, 36 Am. Rep. 257.

Kentucky.— Bennyfield *v.* Com., 17 S. W. 271, 13 Ky. L. Rep. 446.

Maine.— State *v.* Bartlett, 55 Me. 200.

Nebraska.— Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108; Bradshaw *v.* State, 17 Nebr. 147, 22 N. W. 361; Polin *v.* State, 14 Nebr. 540, 16 N. W. 898.

New Jersey.— Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30 [*affirmed* in 55 N. J. L. 652, 30 Atl. 429].

North Dakota.— State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

Tennessee.— *Ex p.* Gillespie, 3 Yerg. 325.

Texas.— Burkhard *v.* State, 18 Tex. App. 599.

Utah.— People *v.* Tidwell, 4 Utah 506, 12 Pac. 61.

Virginia.— Hopper *v.* Com., 6 Gratt. 684.

See CRIMINAL LAW, 12 Cyc. 531.

Contra.— Com. *v.* Gibbs, 4 Gray (Mass.) 146; Com. *v.* Williams, 2 Cush. (Mass.) 582; Com. *v.* Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; People *v.* Cline, 44 Mich. 290, 6 N. W. 671; People *v.* Hurst, 41 Mich. 328, 1 N. W. 1027; Sneed *v.* People, 38 Mich. 248; Meister *v.* People, 31 Mich. 99; Bird *v.* State, 77 Wis. 276, 45 N. W. 1126; Biemel *v.* State, 71 Wis. 444, 37 N. W. 244.

22. Jackson *v.* State, 81 Wis. 127, 51 N. W. 89; U. S. *v.* Twining, 132 Fed. 129. *Contra*, Com. *v.* Gibbs, 4 Gray (Mass.) 146; People *v.* Hillhouse, 80 Mich. 580, 45 N. W. 484; People *v.* Hendryx, 58 Mich. 319, 25 N. W. 299.

23. Dale *v.* State, 88 Ga. 552, 15 S. E. 287; Lawrence *v.* State, 50 Wis. 507, 7 N. Y. 343.

Not disqualified because, before employment, he was consulted by citizens at whose instance the case is to be prosecuted (State *v.* Reid, 113 La. 890, 37 So. 866), or because he was district judge at the time the crime was committed, and as such refused bail to the accused (Ross *v.* State, 8 Wyo. 351, 57 Pac. 924).

Not ineligible to prosecute violations of the liquor law, although he has a strong prejudice against the liquor traffic (People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540); nor because, after being retained by the state, he was employed by the prosecuting witness to defend him in other proceedings (People *v.* Whittemore, 102 Mich. 519, 61 N. W. 13).

Discretion of court.—The propriety of permitting one to assist in the prosecution who has been employed against defendant's brother, but not against defendant, is within the discretion of the court. People *v.* Montague, 71 Mich. 447, 39 N. W. 585.

24. State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034; People *v.* Thacker, 108 Mich. 652, 66 N. W. 562.

25. State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. *Contra*, State *v.* Russell, 83 Wis. 330, 53 N. W. 441.

26. Wilson *v.* State, 16 Ind. 392.

Nor if he represented defendant on a preliminary examination, although defendant was discharged, if the present indictment is for the same offense. State *v.* Halstead, 73 Iowa 376, 35 N. W. 457.

27. State *v.* Lewis, 96 Iowa 286, 65 N. W. 295.

28. State *v.* Howard, 118 Mo. 127, 24 S. W. 41.

29. People *v.* Wright, 89 Mich. 70, 50 N. W. 792; State *v.* Taylor, 98 Mo. 240, 11 S. W. 570; Bush *v.* State, 62 Nebr. 128, 86 N. W. 1062; Martin *v.* State, 16 Ohio 364; Matter of Prosecuting Atty., 2 Ohio Dec. (Reprint) 602, 4 West. L. Month. 147.

30. Matter of Prosecuting Atty., 2 Ohio Dec. (Reprint) 602, 4 West. L. Month. 147.

31. U. S. Rev. St. (1878) § 366 [U. S. Comp. St. (1901) p. 209].

created by law, in which case the tenure may be coterminous with that of the office of district attorney.[32] But unless the law provides for a permanent incumbent, the tenure of office of one appointed prosecuting attorney *pro tem.* cannot extend beyond the absence, disqualification or incapacity of the regular incumbent,[33] or beyond the term of court at which he was appointed.[34]

E. Powers and Duties. Counsel employed to assist in prosecuting criminal cases have no authority to appear without first obtaining permission or appointment from the court.[35] Assistants are appointed to aid the state's attorney in the discharge of the duties of his office. They have no authority to direct him, nor, as against him, to control proceedings.[36] A prosecuting attorney may not delegate all of his powers to a deputy. Such delegation of powers by a public officer is contrary to public policy.[37] However, if present himself, he may intrust to his associate the exclusive conduct of the case.[38] But an assistant duly appointed or permitted to prosecute is clothed with all the powers and privileges of the prosecuting attorney, and all acts done by him in that capacity must be regarded as if done by the prosecuting attorney himself.[39] The same is true of prosecuting attorneys *pro tem.* They may do whatever the district attorney is authorized to do.[40]

F. Compensation and Fees — 1. In General. The deputy, like his principal, at common law received nothing for his services.[41] Salary or fees being now generally provided, to be paid prosecuting attorneys, their assistants or deputies appointed by authority of law are entitled to compensation, and the county is liable therefor.[42] But he cannot recover for services in cases which he is not

32. State *v.* Parlange, 26 La. Ann. 548; State *v.* Montgomery, 25 La. Ann. 138.

A statute authorizing the appointment of district attorneys pro tem applies only where vacancies exist, but does not abolish the office of district attorney *pro tem.* nor effect the tenure of one already occupying that office. State *v.* Parlange, 26 La. Ann. 548.

33. *Ex p.* Diggs, 50 Ala. 78; State *v.* Manlove, 33 Tex. 798.

34. State *v.* Manlove, 33 Tex. 798.

Where the law provides for the appointment of a substitute for any term at which the district attorney fails to attend, a city recorder who has no term of court must make the appointment for each case. Harris County *v.* Stewart, 91 Tex. 133, 41 S. W. 650.

35. *Ex p.* Gillespie, 3 Yerg. (Tenn.) 325; Biemel *v.* State, 71 Wis. 444, 37 N. W. 244.

The decision of the court, granting or withholding such permission, is final. From it there is no appeal. *Ex p.* Gillespie, 3 Yerg. (Tenn.) 325.

36. Com. *v.* Williams, 2 Cush. (Mass.) 582; San Francisco *v.* U. S., 21 Fed. Cas. No. 12,316, 4 Sawy. 553. And see Criminal Law, 12 Cyc. 532.

37. Engle *v.* Chipman, 51 Mich. 524, 16 N. W. 886.

38. State *v.* Anderson, 29 La. Ann. 774.

39. People *v.* Magallones, 15 Cal. 426; State *v.* Crafton, 89 Iowa 109, 56 N. W. 257; State *v.* Taylor, 98 Mo. 240, 11 S. W. 570; U. S. *v.* Twining, 132 Fed. 129.

40. *Idaho.*— State *v.* Corcoran, 7 Ida. 220, 61 Pac. 1034.

Indiana.— Choen *v.* State, 85 Ind. 209.

Louisiana.— State *v.* Montgomery, 41 La. Ann. 1087, 6 So. 803.

Missouri.— Browne's Appeal, 69 Mo. App. 159; State *v.* Hynes, 39 Mo. App. 569. Under the express provisions of Rev. St. (1899) §§ 4955, 4957, providing for the appointment of a special prosecuting attorney where the regular prosecutor's interest in a case is inconsistent with his official duties, the special prosecutor has all the power for the purposes of the case in which he is appointed that the regular attorney would have had. State *v.* Wilson, 200 Mo. 23, 98 S. W. 68.

Nebraska.— Korth *v.* State, 46 Nebr. 631, 65 N. W. 792.

Oklahoma.— Canada *v.* Territory, 12 Okla. 409, 72 Pac. 375.

South Dakota.— State *v.* Phelps, 5 S. D. 480, 59 N. W. 471.

Texas.— State *v.* Lackey, 35 Tex. 357.

See 17 Cent. Dig. tit. "District and Prosecuting Attorneys," § 16.

41. See *supra*, III, A, 1.

42. Tull *v.* State, 99 Ind. 238; Work *v.* Wapello County, 73 Iowa 357, 35 N. W. 452; White *v.* Polk County, 17 Iowa 413; Sneed *v.* People, 38 Mich. 248. *Contra*, under a statute where there was no existing appropriation therefor. Turner *v.* Elkhard County, 158 Ind. 166, 63 N. E. 210.

Right to compensation implied.—Where, under Minn. Gen. St. (1894) § 813, a judge of the district court, upon due hearing, determines that a county attorney is disqualified from taking part in the prosecution of a person accused of crime, and directs another attorney of the court to conduct the same in place of the regular official, the substitute is entitled to receive compensation for the services he performs, under the court's appointment, from the county where the crime is alleged to have been committed, although the statute makes no express provision for

authorized to prosecute;[43] nor can he recover fees in cases which do not come within the statute allowing them.[44] If appointed without authority of law he is not entitled to anything, notwithstanding the services have been rendered and accepted.[45] The mode of payment is usually prescribed by the statute.[46] A contract by a prosecuting attorney to pay a deputy more compensation than that provided by law is contrary to public policy and void.[47]

2. Division of Fees. If the same fee is provided by law for conviction in either the county or circuit court, or in both, the attorney *pro tem.* must share the fee with the state's attorney in case of conviction obtained by one in the county court, and affirmance on appeal to the circuit court by the other.[48]

compensation. Mathews *v.* Lincoln County, 90 Minn. 348, 97 N. W. 101.

Amount of salary.— The provision of the California County Government Act of 1893 that the district attorney may appoint one assistant at a salary of two thousand dollars, and two deputies at a salary of one thousand five hundred dollars per annum, does not mean one thousand five hundred dollars for the two deputies, but for each. Freman *v.* Marshal, 137 Cal. 159, 69 Pac. 986.

In California, under Acts (1893), § 173, and Acts (1897), §§ 59, 215, 233, the deputy district attorneys of Tulare county who were holding office at the time of the enactment of the law of 1897 are entitled to the salary provided by the law of 1893. McPhail *v.* Jefferds, 130 Cal. 480, 62 Pac. 735.

Fixing of salary by county board.— Since deputy county attorneys are included by Act March 19, 1895, in Mont. Pol. Code, § 4596, fixing the maximum salary of county officers, the board of county commissioners have power to fix the salaries of deputy county attorneys under Sess. Laws (1893), p. 60, establishing the number of deputy county officers, and providing that their compensation shall be determined by the board of county commissioners, within the maximum limits fixed by the act, although deputy county attorneys are not provided for therein. Penwell *v.* Lewis, etc., County, 23 Mont. 351, 59 Pac. 167. Construing said section 4596, which declares that the maximum compensation of any deputy is as follows, setting out various officers whose salaries are declared "not to exceed" the sum fixed, but in which, in providing for the salary of chief deputy county attorney, the words "not to exceed" are omitted, it was held that, since the act provides that all the amounts fixed shall be "the maximum compensation" allowed, the words "not to exceed" before the statement of each amount is surplusage, and hence the salary of chief deputy county attorney is not fixed by the act at the sum stated, but may be established at any sum less than such amount. Penwell *v.* Lewis, etc., County, *supra.*

43. State *v.* McNair, 70 Ark. 65, 66 S. W. 144.

44. Phillips County *v.* Jackson, 85 Ark. 382, 108 S. W. 212, deputy prosecuting attorney filing an information under Kirby Dig. § 6388, not entitled to a fee for conviction, where defendant pleads guilty.

45. *Iowa.*— Seaton *v.* Polk County, 59 Iowa 626, 13 N. W. 725; Foster *v.* Clinton County, 51 Iowa 541, 2 N. W. 207; Tatlock *v.* Louisa County, 46 Iowa 138; Blair *v.* Dubuque County, 27 Iowa 181; Davis *v.* Linn County, 24 Iowa 508. A county is not liable to an attorney for his fee in representing it in a habeas corpus proceeding, although he was appointed by the judge in the absence of the district attorney, where the latter had not been notified of the proceeding as required by law. Miller *v.* Buena Vista County, 68 Iowa 711, 28 N. W. 31.

Missouri.— Kouns *v.* Draper, 43 Mo. 225.

Nebraska.— Sands *v.* Frontier County, 42 Nebr. 837, 60 N. W. 1017; Cuming County *v.* Tate, 10 Nebr. 193, 4 N. W. 1044.

New York.— People *v.* Neff, 191 N. Y. 286, 84 N. E. 63 [*affirming* 121 N. Y. App. Div. 44, 105 N. Y. Suppl. 559].

South Dakota.— State *v.* Marshall County, 14 S. D. 149, 84 N. W. 775.

Tennessee.— McHenderson *v.* Anderson County, 105 Tenn. 591, 59 S. W. 1016.

If a prosecuting attorney retires because he disagrees with the court as to the manner of conducting the case, private counsel who has been assisting him and who continues the prosecution under the direction of the court does not become acting state's attorney, and is not entitled to any compensation as such. *In re* Herring, 10 Kulp (Pa.) 74.

An assistant appointed under a special act is not entitled to the compensation provided for assistants in counties of a certain class. Edwards *v.* Allegheny County, 181 Pa. St. 216, 37 Atl. 337.

46. Under Ala. Code (1896), §§ 5522, 5529, providing that the solicitor's fee required to be taxed against one convicted of crime by section 4561 shall belong to the state where the conviction was secured by a salaried solicitor, and to the solicitor if secured by solicitor *pro tem.*, and Code (1896), p. 214, and section 4431 *et seq.*, providing that certain bills of costs in a criminal case, including a solicitor's fee where the conviction was secured by one not a salaried solicitor, shall be paid by the state out of the convict funds, if conviction is secured by a solicitor *pro tem.*, he is entitled to payment by the state, out of the convict funds, of the fee taxed against defendant by section 4561. Trapp *v.* State, 120 Ala. 397, 24 So. 1001.

47. Cobb *v.* Scoggin, 85 Ark. 106, 107 S. W. 188. And see Contracts, 9 Cyc. 496; Officers, 29 Cyc. 1426.

48. Banks *v.* State, 96 Ala. 41, 11 So. 469.

3. Allowance and Collection. The fees of assistants are usually required by law to be fixed by the court, or by the administrative board of the county.[49] Under statutes directing payment of "compensation," or "reasonable compensation," a decision of the board allowing an unreasonably small sum is not final, but proper compensation may be recovered.[50] Nor is an allowance made by the court conclusive; the board may reduce it to a reasonable sum.[51] However a fee fixed by the court is at least *prima facie* evidence of the value of the services rendered.[52] The act of the judge in certifying the amount of such fee is a judicial one which cannot be questioned in a collateral proceeding for mandamus to compel payment of the same.[53] If dissatisfied with the allowance, the attorney should take an appeal from the order granting the same.[54] Statutory discretion to allow or disallow fees to an assistant in certain cases, vested in a county board, is administrative rather than judicial. The action of the board disallowing the same is not subject to review by the courts.[55] If the board refuses to act at all, the attorney may have mandamus to compel it to act, although not in any particular way; but he cannot recover on a *quantum meruit*, since his right to compensation depends wholly upon the statute.[56] Mandamus is also the proper remedy to compel the court or other

If the law provides a special deputy to prosecute certain cases before magistrates, and for a fee to be paid him on conviction, viz., the same fee allowed for conviction in the circuit court, on conviction before a magistrate and affirmance in the circuit court, both he and the regular state's attorney are entitled to such fee. Goad *v.* State, 73 Ark. 458, 84 S. W. 638.

49. See the cases cited in the notes following.

Excessive allowance.— Where an attorney was appointed to act as county attorney in a matter before the grand jury, in which the county attorney was interested, and an indictment was returned, but before the trial the order appointing the attorney was revoked, and the court, in fixing the compensation for the attorney, made an allowance to cover, not only for the services rendered before the grand jury, but also in the prosecution of the case, it was held that as the attorney could not earn compensation for prosecuting the case, the allowance was erroneous. State *v.* Miller, 132 Iowa 587, 109 N. W. 1087. And where, under Iowa Code, § 304, authorizing the district court to appoint an attorney for the county attorney in case of his disability, and to fix for his services a reasonable compensation, the district court appointed an attorney to act for the county attorney in a case before the grand jury wherein the county attorney was under disability by reason of interest, and also "to act as county attorney in another matter" before the grand jury, and then, by general order, fixed the payment of the attorney for his services, it was held that the order fixing the compensation was invalid, as it must be assumed that payment for services under the order appointing the attorney to act in "another matter" was included. State *v.* Miller, *supra*.

Opportunity to prosecuting attorney to be heard.— Since Iowa Code, § 304, empowering the district court to appoint an attorney for the county attorney in case of his disability, and empowering the judge thereof to fix the attorney's compensation, provides that such compensation shall be paid out of the compensation allowed to the county attorney, the court cannot fix the compensation of an attorney appointed to act in place of the county attorney without giving the county attorney an opportunity to be heard, for otherwise he may be deprived of his property without due process of law, in violation of Const. art. 1, § 9. State *v.* Miller, 132 Iowa 587, 109 N. W. 1087.

50. Stone *v.* Marion County, 78 Iowa 14, 42 N. W. 570.

51. Carroll County *v.* Pollard, 17 Ind. App. 470, 46 N. E. 1012; Commissioners *v.* State, 60 Ohio St. 475, 54 N. E. 519, holding that the compensation allowed by the court to the assistant prosecutor under Ohio Rev. St. § 7264, is by that section made part of the costs; and such allowance is not conclusive as against the board of county commissioners, but the same may be reduced by the board before allowance and payment, to such sum as in its judgment is just and reasonable.

But if the statute directs payment of "such sum 'as the court approves, and to them (the commissioners) seems just and proper,'" their joint action is final. Commissioners *v.* Osborn, 46 Ohio St. 271, 20 N. E. 333; Weldy *v.* Hocking County, 8 Ohio Dec. (Reprint) 767, 9 Cinc. L. Bul. 313.

52. Hindsdale County *v.* Crump, 18 Colo. App. 59, 70 Pac. 159; Carroll County *v.* Pollard, 17 Ind. App. 470, 46 N. E. 1012.

53. People *v.* New York Bd. of Education, 26 N. Y. App. Div. 208, 49 N. Y. Suppl. 915; People *v.* Coler, 35 Misc. (N. Y.) 454, 71 N. Y. Suppl. 127 [*reversed* on other grounds in 67 N. Y. App. Div. 619, 73 N. Y. Suppl. 1144].

54. People *v.* Coler, 35 Misc. (N. Y.) 454, 71 N. Y. Suppl. 127 [*reversed* on other grounds in 67 N. Y. App. Div. 619, 73 N. Y. Suppl. 1144].

55. Merwin *v.* Boulder County, 29 Colo. 169, 67 Pac. 285.

56. Merwin *v.* Boulder County, 29 Colo. 169, 67 Pac. 285.

authority to make requisition on the proper officer for payment of an assistant's legal fees.[57] There can be no recovery of compensation until it has been fixed or allowed in the mode, if any, prescribed by statute.[58]

4. Upon Change of Venue. Upon a new trial, held in another county to which the cause has been removed, the trial judge cannot allow the assistant attorney a fee for any services except those rendered in prosecuting the case before him. For services in the court of original venue, including argument of motion for new trial and change of venue, allowance may be made only by the judge of that court.[59] The county in which the indictment was found is liable for the fees of the assistant in the court to which the cause is removed.[60]

5. Assistants to United States District Attorneys.[61] Assistants to the district attorneys of the United States are paid such salary as the attorney-general may from time to time determine as to each, which in no case shall exceed two thousand five hundred dollars per annum.[62] Special assistants to the district attorneys shall receive such compensation only as may be allowed them by the attorney-general, by stipulation in the appointment, or otherwise.[63]

PROSECUTING WITNESS.[1] See Common Informer, 8 Cyc. 341; Criminal Law, 12 Cyc. 292; Informer, 22 Cyc. 720; Private Prosecutor, *ante*, p. 361; Prosecutor.

PROSECUTIO LEGIS EST GRAVIS VEXATIO; EXECUTIO LEGIS CORONAT OPUS. A maxim meaning "Litigation is vexatious, but an execution crowns the work."[2]

PROSECUTION. As applied to actions or suits generally, the following up or carrying on of an action or suit already commenced until the remedy be attained;[3] the act of conducting or waging a proceeding in court;[4] the institution and carry-

57. Merwin *v.* Boulder County, 29 Colo. 169, 67 Pac. 285; People *v.* New York Bd. of Education, 26 N. Y. App. Div. 208, 49 N. Y. Suppl. 915.

58. Thus under Sanborn & B. Annot. St. Wis. § 752*a*, authorizing the appointment by the court of counsel to assist the district attorney in a criminal case, and providing that such counsel "shall be paid in the same manner as is now provided by law for the payment of counsel for indigent criminals"; and Rev. St. § 4713, providing for the payment of counsel for indigent criminals, by the terms of which a county is liable to pay only such sum as the court in which the services are performed shall, "by an order, to be entered in the minutes thereof, certify to be a reasonable compensation," an attorney appointed to assist the district attorney cannot maintain an action against the county for his services unless an order of court has been entered certifying the amount of his reasonable compensation. Williams *v.* Dodge County, 95 Wis. 604, 70 N. W. 821.

59. People *v.* Genesee County, 61 N. Y. App. Div. 545, 70 N. Y. Suppl. 578, 15 N. Y. Cr. 463 [*affirmed* in 168 N. Y. 640, 61 N. E. 1133].

60. Bevington *v.* Woodbury County, 107 Iowa 424, 78 N. W. 222; Sands *v.* Frontier County, 42 Nebr. 837, 60 N. W. 1017; Fuller *v.* Madison County, 33 Nebr. 422, 50 N. W. 255.

61. Expenses of assistants see *supra*, III, B, 2.

62. 29 U. S. St. at L. 181, c. 252, § 8 [U. S. Comp. St. (1901) p. 613].

63. U. S. Rev. St. (1878) § 363 [U. S. Comp. St. (1901) p. 208]. One who is already employed as an assistant district attorney cannot recover extra compensation, as one specially appointed by the attorney-general, for services that could not be performed by an officer of the department or district attorney. U. S. Rev. St. (1878) §§ 363–366 [U. S. Comp. St. (1901) pp. 208–209]; Cole *v.* U. S., 28 Ct. Cl. 501. One who receives a commission as a special assistant for particular cases, or for a single term of the court, is not an assistant within U. S. Rev. St. (1878) § 365 [U. S. Comp. St. (1901) p. 209], and he cannot recover for his services without the certificate of the attorney-general required by that section, viz., that such services have been actually performed, and that they could not have been rendered by the district attorney or his assistant or any of the officers of the department of justice. U. S. *v.* Herron, 170 U. S. 527, 18 S. Ct. 703, 42 L. ed. 1132; U. S. *v.* Crosthwaite, 168 U. S. 375, 18 S. Ct. 107, 42 L. ed. 507.

1. See also Illinois Cent. R. Co. *v.* Herr, 54 Ill. 356.

2. Bouvier L. Dict. [*citing* Coke Litt. 289*b*].

3. State *v.* Hardenburgh, 2 N. J. L. 355, 360.

In this sense, it is on an action or suit. State *v.* Hardenburgh, 2 N. J. L. 353, 360.

Distinguished from the "bringing" of an action see Buecker *v.* Carr, 60 N. J. Eq. 300, 307, 47 Atl. 34.

4. State *v.* Bowles, 70 Kan. 821, 827, 79 Pac. 726, 69 L. R. A. 176.

ing on of a suit in a court of law or equity, to obtain some right, or to redress and punish some wrong.[5] In criminal law, the mode of the formal accusation of offenders,[6] the means adopted to bring a supposed offender to justice and punishment by due course of law; [7] a criminal proceeding at the suit of the government; [8] the whole or any part of the procedure which the law provides for bringing the offenders to justice; [9] a criminal action; a proceeding constituted to carry on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime; [10] the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information.[11] (Prose-

5. Webster Dict. [*quoted* in Dolloway *v.* Turrill, 26 Wend. (N. Y.) 383, 399].

"As applied to proceedings upon the civil side of a court the ordinary meaning of the word . . . includes the institution of a suit, and is not confined to the mere pursuit of a remedy after proceedings have been instituted." Clinton *v.* Heagney, 175 Mass. 134, 136, 55 N. E. 894. When applied to legal proceedings the term implies the beginning of a civil action. Hirshbach *v.* Ketchum, 5 N. Y. App. Div. 324, 326, 39 N. Y. Suppl. 291.

"The word is inapt, in legal use and popular sense, when applied to a defence, but not entirely so in its derivative sense, when the defence consists of an affirmative counterclaim, like payment." Badger *v.* Taft, 58 Vt. 585, 586, 3 Atl. 535.

In common parlance the term is frequently applied to civil actions for torts. Malli *v.* Willett, 57 Iowa 705, 710, 11 N. W. 661.

In its broadest sense the term would embrace all proceedings in the courts of justice or even elsewhere, for the protection or enforcement of a right or the punishment of a wrong, whether of a public or private character. Donnelly *v.* People, 11 Ill. 552, 553, 52 Am. Dec. 459.

6. Burnap *v.* Marsh, 13 Ill. 535, 540; Donnelly *v.* People, 11 Ill. 552, 553, 52 Am. Dec. 459.

7. State *v.* Bowles, 70 Kan. 821, 827, 79 Pac. 726, 69 L. R. A. 176; Bouvier L. Dict. [*quoted* in Schulte *v.* Keokuk County, 74 Iowa 292, 293, 37 N. W. 376; Sigsbee *v.* State, 43 Fla. 524, 529, 30 So. 816].

8. *Ex p.* Fagg, 38 Tex. Cr. 573, 589, 44 S. W. 294, 40 L. R. A. 212; Tennessee *v.* Davis, 100 U. S. 257, 269, 25 L. ed. 648.

9. *Ex p.* Fagg, 38 Tex. Cr. 573, 589, 44 S. W. 294, 40 L. R. A. 212 [*quoting* Tex. Pen. Code, art. 26].

10. Black L. Dict. [*quoted* in State *v.* Rozum, 8 N. D. 548, 554, 80 N. W. 477].

11. State *v.* Bowles, 70 Kan. 821, 827, 79 Pac. 726, 69 L. R. A. 176; Burrill L. Dict. [*quoted* in Corbin *v.* People, 52 Ill. App. 355, 356; Schulte *v.* Keokuk County, 74 Iowa 292, 293, 37 N. W. 376]; Webster Dict. [*quoted* in Territory *v.* Nelson, 2 Wyo. 346, 352].

The term usually denotes a criminal proceeding. U. S. *v.* Reisinger, 128 U. S. 398, 403, 9 S. Ct. 99, 23 L. ed. 480; U. S. *v.* Mathews, 23 Fed. 74, 75.

As used in the state constitution providing that all prosecutions shall be carried on in the name and by the authority of the people of the state of Illinois, and conclude against the peace and dignity of the same, the term embraces prosecutions of a criminal character only. Moutray *v.* People, 162 Ill. 194, 197, 44 N. E. 496. To the same effect see Davenport *v.* Bird, 34 Iowa 524, 527. As used in the Kentucky constitution providing that "all prosecutions shall be carried on in the name and by the authority of the 'Commonwealth of Kentucky,' and conclude against the peace and dignity of the same," the term is construed to embrace only such transgressions as were at common law indictable offenses, or were punishable by imprisonment or other infamous mode and does not include a prosecution in the municipal court in the name of a city for the violation of an ordinance. Louisville *v.* Wehmhoff, 116 Ky. 812, 824, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 995, 1924.

As used in a statute providing that "all indictments and prosecutions for all misdemeanors — perjury excepted — shall be brought or exhibited within two years next after such misdemeanor shall have been committed," the term is synonymous with "indictment," though standing by itself it has a larger signification. Com. *v.* Haas, 57 Pa. St. 443, 444. "In a sense, the making of a complaint for the purpose of procuring a warrant of arrest upon preliminary examination is a prosecution. Should such complaint be made maliciously and without probable cause, the complainant might be liable for malicious prosecution." But in proceedings under the liquor laws of a state, it was held that the term was used in the sense of criminal action. State *v.* Rozum, 8 N. D. 548, 553, 80 N. W. 477. Under a statute providing that when any prosecution instituted in the name of the state for breaking any law of the state shall fail, or where the defendant shall prove insolvent, or escape or be unable to pay the fees when convicted, the fees shall be paid out of the county treasury, unless otherwise ordered by the court, the provision relates to purely criminal cases and not to causes which though in form criminal, yet are really civil actions. Ives *v.* Jefferson County Sup'rs, 18 Wis. 166, 168. As used in a statute providing "when two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defense, direct any defendant to be discharged, that he may be a witness for the territory," the term is inter-

cution: For Criminal Offense, see CRIMINAL LAW, 12 Cyc. 70 *et seq.*; and the Particular Criminal Titles.)

PROSECUTOR. One who investigates the prosecution by making the affidavit upon which a defendant is arrested.[12] (Prosecutor: Attorney, see PROSECUTING AND DISTRICT ATTORNEYS, *ante*, p. 687. Indorsement on Indictment or Presentment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 280. Infant as, see INFANTS, 22 Cyc. 516. Of Adultery, see ADULTERY, 1 Cyc. 955. Of Bastardy Proceedings, see BASTARDS, 5 Cyc. 650. Of Crime in General, see CRIMINAL LAW, 12 Cyc. 292. Of Penal Action, see PENALTIES, 30 Cyc. 1340. Of Violation of Liquor Laws, see INTOXICATING LIQUORS, 23 Cyc. 169. See also COMMON INFORMER, 8 Cyc. 341; PRIVATE PROSECUTOR, *ante*, p. 361.)

PRO SOLIDO. For the whole; as one; jointly; without division.[13]

PROSPECT. As a noun, an undeveloped mine.[14] As a verb, to explore for unworked deposits or ore, as a mining region; to do experimental work upon, as a new mining claim, for the purpose of ascertaining its probable value.[15] (See, generally, MINES AND MINERALS, 27 Cyc. 516.)

PROSPECTIVE. Looking forward; contemplating the future.[16] (Prospective: Damages, see DAMAGES, 13 Cyc. 22 *et seq.* Law, see CONSTITUTIONAL LAW, 8 Cyc. 1017 *et seq.* Statute, see STATUTES.)

PROSPECTIVE DAMAGES. Damages which are expected to follow from the

preted to mean "trial." Edwards *v.* State, 2 Wash. 291, 294, 26 Pac. 258. "Though the term . . . may, according to the etymological signification, be applied as well to private actions as to suits at the instance of the commonwealth; yet, whenever it is used as a denomination of the suit, it is applied to the latter only, according to the invariable acceptation of the term, both by the learned and the unlearned." Com. *v.* Clarke, 1 A. K. Marsh. (Ky.) 323, 324.

"'Prosecution' of business" means its continuance. Young *v.* Equitable L. Ins. Soc., 49 Misc. (N. Y.) 347, 357, 99 N. Y. Suppl. 446.

"Prosecution pending" see State *v.* Jackson, 111 La. 343, 355, 35 So. 593.

"Prosecution 'to effect'" see Kasson *v.* Brocker, 47 Wis. 79, 87, 1 N. W. 418.

12. State *v.* Cohn, 9 Nev. 179, 191.

As used in a statute providing "that if any person shall, by contract or loan, accept or receive for the loan of, or giving day of payment for any money above the value of $6 for $100 for one year, every person so offending shall forfeit the full value of the money so lent, one moiety to the use of the state, and the other to the use of the prosecutor," the term means any one who may see fit to bring the action, in other words a common informer. Phillips *v.* Bevans, 23 N. J. L. 373, 374, 375. As used in a statute providing "and the name and surname of the prosecutor, and the town or county in which he shall reside, with his title or profession, shall be written at the foot of every bill of indictment for any trespass or misdemeanor, before it be presented to the grand jury," the term means the person who voluntarily goes before the grand jury with his complaint and does not show that the legislature meant to require a prosecutor for every misdemeanor. U. S. *v.* Sandford, 27 Fed. Cas. No. 16,221, 1 Cranch C. C. 323. And see Com. *v.* Hutcheson, 1 Bibb (Ky.) 355, where it is held under a similar statute that a person summoned to give evidence before a grand jury on an indictment for trespass is not a prosecutor.

13. Black L. Dict. [*citing* Dig. 50, 17, 141, 1].

14. Montana R. Co. *v.* Warren, 6 Mont. 275, 278, 12 Pac. 641.

A prospect differs from a mine only in the fact that ore has been taken from the latter in large quantities. It is no more a matter of speculation than is a mine from which ore has been taken. The future of each is equally uncertain. Montana R. Co. *v.* Warren, 6 Mont. 275, 278, 12 Pac. 641.

15. Century Dict. [*quoted* in Martin *v.* Eagle Development Co., 41 Oreg. 448, 457, 69 Pac. 216, where the court, after giving the above definition, says that this is the common or current acceptation of the term. Hence the court will not take judicial notice that the word "prospected," as applied to placer mines, signifies that the holes have been sunk to the bed rock, and a test made of the earth in each, and the average ascertained, so that, if the meaning ascribed attaches to the word under discussion it should have been made understood by appropriate allegations, by the party contending for such meaning].

Under a statute requiring the claimant of a mining claim to perform work and labor thereon in prospecting and developing it to the amount of one hundred dollars annually, the word "prospecting," when used with reference to such annual labor to be expended upon the mining claim, is not used in the sense of "exploration and discovery," which is necessary before a valid location can be made, but rather in the sense of "development and demonstration," that the value of the ledge may be determined, as distinguished from the ascertainment of its existence. Bishop v. Baisley, 28 Oreg. 119, 136, 41 Pac. 936.

"Prospecting partnership" see MINES AND MINERALS, 27 Cyc. 757.

16. Black L. Dict.

act or state of facts made the basis of a plaintiff's suit; damages which have not accrued, at the time of the trial, but which in the nature of things must necessarily, or most probably, result from the acts or fact complained of.[17] (See, generally, DAMAGES, 13 Cyc. 22 *et seq.*)

PROSPECTUS. See CORPORATIONS, 10 Cyc. 421.

PROSTITUTE. As an adjective, openly devoted to lewdness; sold to wickedness or infamous practices.[18] As a noun, a female given to indiscriminate lewdness,[19] for gain; [20] a female given to promiscuous sexual intercourse for the sake of gain; [21] a hireling; [22] a mercenary; [23] a strumpet; [24] a public strumpet; [25] one who is let to sale.[26] As a verb to offer freely to a lewd use, or to indiscriminate lewdness; [27] to expose upon vile terms.[28] (See BAWD, 5 Cyc. 676; CONCUBINE, 8 Cyc. 552; and, generally, PROSTITUTION, *post*, p. 731.)

"**Prospective advantage**" see Schutz *v.* State, 125 Wis. 452, 456, 104 N. W. 90, construing Wis. St. (1898) § 4475.

17. Black L. Dict.

18. Carpenter *v.* People, 8 Barb. (N. Y.) 603, 611.

19. Carpenter *v.* People, 8 Barb. (N. Y.) 603, 607; Webster Dict. [*quoted* in State *v.* Ruhl, 8 Iowa 447, 454; Com. *v.* Cook, 12 Metc. (Mass.) 93, 97].

20. State *v.* Stoyell, 54 Me. 24, 27, 89 Am. Dec. 716 [*quoted* in Davis *v.* Sladden, 17 Oreg. 259, 264, 21 Pac. 140]. See also Reg. *v.* Rehe, 6 Quebec Q. B. 274, 276.

21. Davis *v.* Sladden, 17 Oreg. 259, 264, 21 Pac. 140.

22. Johnson Dict. [*quoted* in Com. *v.* Cook, 12 Metc. (Mass.) 93, 97]; Walker Dict. [*quoted* in Com. *v.* Cook, 12 Metc. (Mass.) 93, 97].

23. Walker Dict. [*quoted* in Com. *v.* Cook, 12 Metc. (Mass.) 93, 97].

24. Carpenter *v.* People, 8 Barb. (N. Y.) 603, 611; Webster Dict. [*quoted* in State *v.* Ruhl, 8 Iowa 447, 454; Com. *v.* Cook, 12 Metc. (Mass.) 93, 97].

25. Johnson Dict. [*quoted* in Com. *v.* Cook, 12 Metc. (Mass.) 93, 97]; Walker Dict. [*quoted* in Com. *v.* Cook, 12 Metc. (Mass.) 93, 97].

26. Walker Dict. [*quoted* in Com. *v.* Cook, 12 Metc. (Mass.) 93, 97].

27. Carpenter *v.* People, 8 Barb. (N. Y.) 603, 611.

28. Johnson Dict. [*quoted* in Com. *v.* Cook, 12 Metc. (Mass.) 93, 97].

PROSTITUTION

By John Lehman*

CROSS-REFERENCES

For Matters Relating to:

Bawdy Houses, Keeping, Letting, and Frequenting, see Disorderly Houses, 14 Cyc. 479 *et seq.*

Concubinage, see Concubinage, 8 Cyc. 552.

Conspiracy to Commit Offense Against Chastity, see Conspiracy, 8 Cyc. 635.

Disorderly Conduct, see Disorderly Conduct, 14 Cyc. 466.

Disorderly Houses, see Disorderly Houses, 14 Cyc. 479.

Importation of Women For Purposes of Prostitution, see Aliens, 2 Cyc. 124.

Lewdness and Lascivious Conduct Generally, see Lewdness, 25 Cyc. 209.

Taking of Females by Force or Under Designated Ages, see Abduction, 1 Cyc. 140 *et seq.*

Vagrancy, see Vagrancy.

I. Definition.

In its most general sense prostitution is the setting one's self to sale or devoting to infamous purposes what is in one's power.[1] In its more restricted and legal sense, it is the practice of a female offering her body to an indiscriminate intercourse with men,[2] as distinguished from sexual intercourse confined to one man;[3]

1. State *v.* Stoyell, 54 Me. 24, 27, 89 Am. Dec. 716.

2. *Alabama.*— Haygood *v.* State, 98 Ala. 61, 62, 13 So. 325.

California.— People *v.* Demousset, 71 Cal. 611, 613, 12 Pac. 788.

Indiana.— Miller *v.* State, 121 Ind. 294, 23 N. E. 94; Fahnestock *v.* State, 102 Ind. 156, 161, 1 N. E. 372; Osborn *v.* State, 52 Ind. 526, 528.

Iowa.— State *v.* Toombs, 79 Iowa 741, 744, 45 N. W. 300; State *v.* Ruhl, 8 Iowa 447, 454.

Kansas.— State *v.* Goodwin, 33 Kan. 538, 541, 6 Pac. 899.

Maine.— State *v.* Stoyell 54 Me. 24, 27, 89 Am. Dec. 716.

Massachusetts.— Com. *v.* Cook, 12 Metc. 93, 97.

New Hampshire.— State *v.* Brow, 64 N. H. 577, 578, 15 Atl. 216.

New York.— Carpenter *v.* People, 8 Barb. 603, 610.

United States.— U. S. *v.* Bitty, 155 Fed. 938 [*reversed* on other grounds in 208 U. S. 393, 28 S. Ct. 396, 52 L. ed. 543].

See 41 Cent. Dig. tit. "Prostitution," § 1.

At common law.— It is said that the word "prostitution" has no common-law meaning. People *v.* Cummons, 56 Mich. 544, 23 N. W. 215. See also the cases cited *infra,* note 7 *et seq.*

3. Van Dalsen *v.* Com., 89 S. W. 255, 28 Ky. L. Rep. 238; U. S. *v.* Smith, 35 Fed. 490. See also the cases cited *supra,* note 2. But under the Tenement Act in New York which provided that a woman who "resides in or commits prostitution . . . or assignation of any description in a tenement house," etc., shall be deemed a vagrant and punished as such, it was held that it made no difference whether the act constituting the offense be a single one or one of a series, the object of the statute being to protect virtuous women and children who inhabit tenement-houses from the intrusion of prostitutes. People *v.*

* Author of "Abduction," 1 Cyc. 140; "Accounts and Accounting," 1 Cyc. 351; "Live-Stock Insurance," 25 Cyc. 1504; "Profanity," *ante,* p. 578; and joint editor of "Limitations of Actions," 25 Cyc. 963.

or as sometimes stated, common lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire.[4] Sometimes the term "prostitute" is particularly defined by statute which prescribes the several acts the commission of any of which will render a woman a common prostitute and subject her to punishment for that substantive offense.[5]

II. NATURE OF OFFENSES.

A. In General. To be a common prostitute is not at common law [6] indictable as a distinct and substantive offense, but the offender is subject to be treated as a vagrant,[7] and in this sense to be a common prostitute may be said to be unlawful so that an indictment would be maintainable at common law for a conspiracy to induce one to become a common prostitute.[8] However, by statute, to be a common prostitute,[9] to procure females for that purpose,[10] and various acts

Flynn, 37 Misc. (N. Y.) 90, 74 N. Y. Suppl. 740.

Number of men not only test.— Whether or not a woman is a prostitute is a question of fact which does not alone depend on the number of persons with whom she has had illicit intercourse, but a jury may consider her general conduct and other circumstances tending to show whether or not she so holds herself out to the public. State *v.* Rice, 56 Iowa 431, 9 N. W. 343.

To procure a female for the purpose of illicit intercourse with the individual who enticed her to accompany him is not sufficient to constitute the offense of enticing a person for the purpose of prostitution. Com. *v.* Cook, 12 Metc (Mass.) 93, 97; State *v.* Brow, 64 N. H. 577, 579, 12 Atl. 216. See also ABDUCTION, 1 Cyc. 140.

4. Munfill *v.* People, 154 Ill. 640, 647, 39 N. E. 565; State *v.* Gibson, 111 Mo. 92, 97, 19 S. W. 980 [*quoting* 2 Bouvier L. Dict.].

Element of gain not essential.— Prostitution does not alone consist in sexual commerce for gain. If a woman submits to indiscriminate sexual intercourse, which she invites or solicits by word or act or any device, she is a prostitute. Her avocation may be known from the manner in which she plies it, and from pecuniary charges and compensation gained in any other manner. State *v.* Clark, 78 Iowa 492, 43 N. W. 273; State *v.* Rice, 56 Iowa 431, 9 N. W. 343. See also Stokes *v.* State, 92 Ala. 73, 9 So. 400, 25 Am. St. Rep. 22. And see *infra*, note 5.

5. Miller *v.* State, 121 Ind. 294, 297, 23 N. E. 94 (holding that under a statute which declares that "any female who frequents or lives in houses of ill-fame, or associates with women of bad character for chastity, either in public or at a house which men of bad character, for chastity, frequent or visit; or who commits fornication for hire,— shall be deemed a prostitute," prostitution must mean the frequenting or living in houses of ill-fame, or associating with women of bad character for chastity, or the practice of committing fornication for hire); Fahnestock *v.* State, 102 Ind. 156, 1 N. E. 372 (holding that the statute referred to in the case last cited furnished the definition of "prostitution"; that wherever the term is used in the criminal laws of this state, it must be held that it is used as so defined, unless the context clearly shows that the legislature intended to give it a broader or different meaning; and that the meaning of prostitution as common, indiscriminate, meretricious, illicit intercourse, and not sexual intercourse confined exclusively to one man, is in harmony with the statutory definition of the word "prostitute"). See also Stanton *v.* State, 27 Ind. App. 105, 60 N. E. 999.

6. **Definition** see *supra*, note 2.

7. Reg. *v.* Howell, 4 F. & F. 160. See also Toney *v.* State, 60 Ala. 97 (statutory vagrancy); Peabody *v.* State, 72 Miss. 104, 17 So. 213; Arnold *v.* State, 28 Tex. App. 480, 13 S. W. 774 (charge of vagrancy, in that defendant was a common prostitute).

8. Reg. *v.* Howell, 4 F. & F. 160.

Chastity of woman.— Conspiracy to procure a woman to become a common prostitute may be committed without regard to the woman's chastity. Reg. *v.* Howell, 4 F. & F. 160.

9. See *supra*, note 5.

In New York it was held that there was no such offense under the criminal code as that of being a common prostitute, such conduct being treated as evidence of vagrancy, but that under Laws (1881), c. 187, as amended by Laws (1887), c. 17, which, in enumerating offenses punishable by confinement in the house of refuge for women, names "common prostitutes," it is a crime to be a common prostitute, although such offense is not provided for in the penal code or code of criminal procedure. People *v.* Cowie, 88 Hun 498, 34 N. Y. Suppl. 888; People *v.* Coon, 67 Hun 523, 22 N. Y. Suppl. 865. A later act (Laws (1901), c. 334, § 141), known as the Tenement Act, makes a woman punishable as a vagrant who knowingly resides in or commits prostitution, etc., in a tenement-house, etc., and provides that the procedure shall be the same as in other cases of vagrancy. People *v.* Flynn, 37 Misc. 90, 74 N. Y. Suppl. 740.

10. **For taking females by force,** express or implied, including the enticing or taking of females under fixed ages, for the purpose of prostitution see ABDUCTION, 1 Cyc. 140.

"Carnal connection with any man."—A statute making it an offense to "procure a

in connection with or inducing this form of vice are made punishable, the provisions of the statute controlling the nature and elements of the particular offense charged,[11] as living with or accepting the earnings of a prostitute,[12] associating with prostitutes,[13] placing one's wife in a house of prostitution, or consenting to, or conniving at, her remaining in such a house, etc.[14]

B. Common Night-Walkers.[15] A woman who is a common night-walker is indictable at common law[16] for night-walking for the purpose of picking up men for lewd practices.[17]

female to have illicit carnal connection with any man" is not violated by one inducing a female to have illicit intercourse with himself, the offense provided by the statute being that of a procurer or procuress — of a pander. People *v.* Roderigas, 49 Cal. 9.

Soliciting to enter house for purpose of prostitution — *Character of house.*— Under a statute providing that every keeper of a house of ill-fame, resorted to for the purpose of prostitution, and every person who shall solicit a female to enter such house for the purpose of becoming a prostitute, is guilty of a felony, etc., it need not appear that the house which the female was solicited to enter had already been resorted to for the purpose of prostitution, but it is sufficient if the house was prepared and intended for such purpose. People *v.* Cook, 96 Mich. 368, 55 N. W. 980.

Soliciting prostitute to change residence.— The soliciting a prostitute, who is an inmate of a house of ill-fame, to become an inmate of another such house is not a violation of a statute which provides for the punishment of any person who solicits a female to enter such house for the purpose of "becoming" a prostitute. People *v.* Cook, 96 Mich. 368, 55 N. W. 980.

Inducement must be in jurisdiction.— Upon a charge of procuring a girl to come to Canada from abroad with intent that she may become an inmate of a brothel in Canada, the acts of inducement must be shown to have been committed in Canada to give jurisdiction to a Canadian court, unless the accused is a British subject. *Re* Johnson, 8 Can. Cr. Cas. 243.

11. See the statutes of the various states.

12. State *v.* Zenner, 35 Wash. 249, 77 Pac. 191, holding that a statute making it a felony for any male person to live with or accept the earnings of a prostitute is not invalid because of the omission of the word "knowingly" or its equivalent, so as to make knowledge of the relationship an element of the crime, but that if one accepts such earnings innocently and without knowledge of the female's character, this ignorance will be a defense.

13. Zorger *v.* Greensburgh, 60 Ind. 1, holding that an ordinance must be construed in accordance with the rules governing the construction of other legislation, and that applying the rule that the real intention must be gathered from the whole ordinance rather than from the literal sense of some terms used, an ordinance against associating with a prostitute "in any public place, street, alley, common, or within said city," must be construed to read, "alley or common within," etc., and that a prosecution could not be maintained for associating with a prostitute in a private place in the city.

Number of prostitutes.— Under a statute making it a criminal offense for a man to associate "with females known or reputed as prostitutes," an indictment which charges a defendant with associating with one female known and reputed as a prostitute is sufficient. Jessup *v.* State, 14 Ind. App. 257, 42 N. E. 950.

14. People *v.* Conness, 150 Cal. 114, 88 Pac. 821 (holding that as the statute does not make it an element of the offense that the placing of the wife or consenting to her remaining in a house of prostitution shall be for the purpose of prostitution, such purpose is not necessary; but on the other hand under evidence that the husband was anxious to have the wife leave the house and tried to induce her to do so, an instruction that evidence of the woman's living in a house of prostitution and of her husband's knowledge of it would not justify any presumption of law against the husband and that if no other facts are established defendant should be acquitted, should be given); People *v.* Mead, 145 Cal. 500, 78 Pac. 1047; People *v.* Bosquet, 116 Cal. 75, 42 Pac. 879 (holding that the consent of the husband may be shown by some omission on his part as well as by his acts or declarations); State *v.* Ilomaki, 40 Wash. 629, 82 Pac. 873 (holding that upon a prosecution for such crime, where defendant claimed to have protested against his wife's going to or remaining in the place, it was proper to instruct that such protest must have been *bona fide* and not made merely for a defense, especially where the wife actually remained there and the accused lived with her at such place).

15. Common night-walker defined see COMMON NIGHT-WALKER, 8 Cyc. 390.

16. Nuisance.— Night-walking is a common nuisance at common law. Stokes *v.* State, 92 Ala. 73, 9 So. 400, 25 Am. St. Rep. 22 [*citing* 1 Bishop Cr. L. (7th ed.) § 502]; Braddy *v.* Milledgeville, 74 Ga. 516, 58 Am. Rep. 443 (as tending to lewdness, etc.).

17. Stokes *v.* State, 92 Ala. 73, 9 So. 400, 25 Am. St. Rep. 22. See in this connection *infra*, text and note 24.

The expectation of gain is not an essential ingredient of the offense. Stokes *v.* State, 92 Ala. 73, 9 So. 400, 25 Am. St. Rep. 22.

Disorderly conduct see *infra*, note 35.

III. PROSECUTION AND PUNISHMENT.

A. Indictment,[18] Information,[19] and Complaint[20]—1. In General. Under a statute defining the acts which will render a woman a prostitute, it is not sufficient to allege that the accused is a prostitute, but the statutory facts must be alleged.[21] On the other hand, it will be sufficient to charge the offense in the language of the statute which defines the acts constituting the offense,[22] or in language equivalent to that employed in the statute.[23] To charge one with being a common night-walker is sufficient without setting out the particular practices.[24]

2. Joinder and Duplicity.[25] The statutory offense of being a common prosti-

18. **Form of indictment** see Williams *v.* State, 98 Ala. 52, 13 So. 333; Stokes *v.* State, 92 Ala. 73, 74, 9 So. 400, 25 Am. St. Rep. 22 (which cases are for street-walking for the purpose of picking up men for lewd practices); Fahnestock *v.* State, 102 Ind. 156, 157, 1 N. E. 372 (for offense under statute enumerating several acts which will constitute one a prostitute).

19. **Form of information** see People *v.* Mead, 145 Cal. 500, 502, 78 Pac. 1047 (for placing wife in a house of prostitution); State *v.* Stout, 112 Ind. 245, 13 N. E. 715 (under statute enumerating several acts which will constitute one a prostitute); People *v.* Cowie, 88 Hun (N. Y.) 498, 499, 34 N. Y. Suppl. 888 (information before magistrate charging offense of being common prostitute under statute enumerating offenses punishable by confinement in the "house of refuge for women"); State *v.* Barker, 43 Wash. 69, 71, 86 Pac. 387 (conniving at the prostitution of one's wife); State *v.* Ilomaki, 40 Wash. 629, 630, 82 Pac. 873 (for placing wife in a house of prostitution); State *v.* Zenner, 35 Wash. 249, 77 Pac. 191 (under statute against living with or accepting earnings of a prostitute); State *v.* Richards, 76 Wis. 354, 44 N. W. 1104 (becoming an inmate of a house of ill-fame).

20. **Form of complaint** charging a woman as a common night-walker see State *v.* Dowers, 45 N. H. 543.

Form of affidavit under statute enumerating several acts which will constitute one a prostitute see Stanton *v.* State, 27 Ind. App. 105, 60 N. E. 999.

21. Delano *v.* State, 66 Ind. 348. So in People *v.* Pratt, 22 Hun (N. Y.) 300, an information before an inferior court which charged upon information and belief that the accused was, at the times mentioned, a disorderly person, to wit, a common prostitute, without stating any facts or circumstances showing or tending to show that she was a prostitute, was held to be at most an allegation that affiant had heard and believed that accused was a common prostitute, and was insufficient. But see People *v.* Cowie, 88 Hun (N. Y.) 498, 34 N. Y. Suppl. 888.

Vagrancy is not sufficiently charged under the statute by an allegation that the accused was a common prostitute, or the keeper of a house of prostitution. Toney *v.* State, 60 Ala. 97.

22. Stanton *v.* State, 27 Ind. App. 105, 60 N. E. 999.

Knowledge.— Under a statute making it an offense to live with or accept the earnings of a prostitute, the statute not making knowledge of the woman's character an element of the offense, such knowledge need not be alleged. State *v.* Zenner, 35 Wash. 249, 77 Pac. 191. See also State *v.* Barker, 43 Wash. 69, 86 Pac. 387, holding that in a prosecution for conniving at the prostitution of defendant's wife an information charging that defendant did then and there unlawfully and feloniously connive at, consent to, and permit the placing and leaving of his wife in a certain house of prostitution, sufficiently alleged that defendant knew the character of the house and the nature of his act.

Intent.— In People *v.* Conners, 150 Cal. 114, 116, 88 Pac. 821, under a statute providing that "any man who . . . connives at, consents to, or permits the placing or leaving of his wife in a house of prostitution, or allows or permits his wife to remain therein, shall be guilty of a felony," etc., it was held that the language of the act did not render material a purpose of prostitution in placing or permitting one's wife to remain in such a place; that an information following the language of the statute was sufficient and such purpose on the part of the accused need not be shown. See also People *v.* Mead, 145 Cal. 500, 78 Pac. 1047.

23. State *v.* Dickerhoff, 127 Iowa 404, 103 N. W. 350, holding that under a provision against inveigling or enticing any female before reputed virtuous to a house of ill-fame for the purpose of prostitution or lewdness, an indictment charging the enticing of "a virtuous female," instead of in the language of the statute, is sufficient, in view of other provisions that a charge of crime shall be made in ordinary and concise language, with such certainty and in such manner as to enable a person of common understanding to know what was intended, and that no indictment shall be held insufficient because of any matter which was formerly deemed a defect or imperfection, which does not tend to prejudice the substantial rights of the defendant on the merits.

24. State *v.* Dowers, 45 N. H. 543; State *v.* Russell, 14 R. I. 506, which cases hold that the same reasoning applies as in the case of charging one with being a common scold or a common barrator. *Contra*, see Thomas *v.* State, 55 Ala. 260.

25. See, generally, Indictments and Informations, 22 Cyc. 376.

tute and the common-law offense of keeping a bawdy house are held to be of the same class or character so that they may be joined in separate counts of the same indictment.[26] And where the statute enumerates several acts, either of which will constitute the offender a prostitute,[27] or will render the accused liable in respect of the particular offense relating to prostitution, all of such acts may be charged conjunctively.[28]

B. Evidence. General rules of evidence are applicable to prosecutions for offenses relating to prostitution.[29] Evidence of bad character is not admissible in the first instance, as a fact showing the accused to be a prostitute, under an indictment charging her to be a common prostitute, under a vagrancy statute.[30] It has been held that to make a defendant amenable to the charge of being a "common prostitute" she must maintain that character at the time of the prosecution, still the fact may be established by proof of improper and lascivious conduct immediately before prosecution.[31] Where the character of a house as a house

26. Wooster *v.* State, 55 Ala. 217. See also DISORDERLY HOUSES, 14 Cyc. 494.

27. State *v.* Stout, 112 Ind. 245, 13 N. E. 715; Fahnestock *v.* State, 102 Ind. 156, 1 N. E. 372.

28. State *v.* Ilomaki, 40 Wash. 629, 82 Pac. 873, sustaining an information which charged that the accused consented to the placing of his wife in a house of prostitution and also that he allowed and permitted her to remain in such house.

29. See, generally, CRIMINAL LAW, 12 Cyc. 87.

Acts and declarations of husband and wife. — In a prosecution for the statutory offense of enticing a virtuous female to a house of ill fame for the purpose of prostitution, upon the theory of the state that defendant and his wife were jointly engaged in a scheme to get the prosecuting witness into their house for immoral purposes evidence of their acts and declarations in the promotion of the common purpose was held admissible even though both were not present at the time and place. State *v.* Dickerhoff, 127 Iowa 404, 103 N. W. 350.

Immaterial evidence.— On a prosecution of one for the statutory offense of permitting his wife to remain in a house of prostitution, the wife having testified that she had previously been in "quite a few" houses of prostitution, it is not error to exclude a question on cross-examination as to whether she had not been an inmate of a house of prostitution at a certain place kept by her sister. The object of the question was to show that as witness had previously been an inmate of a house of prostitution she would be more likely to enter such house again of her own volition, and this purpose had been accomplished by the testimony the witness had already given and the fact sought to be elicited by the question was immaterial. People *v.* Mead, 145 Cal. 500, 78 Pac. 1047.

Evidence of age see ABDUCTION, 1 Cyc. 160.

30. Toney *v.* State, 60 Ala. 97, holding that it may be shown that she resided in a house kept for prostitution; that she was visited by lewd and disorderly persons, and that her associates were persons of ill repute; that she, on the other hand, may introduce evidence which may remove or tend to remove all unfavorable inferences arising from such facts, as that her physical condition rendered prostitution improbable, if not impossible. In Arnold *v.* State, 28 Tex. App. 480, 13 S. W. 774, it was held that under an information charging defendant with being a vagrant, to-wit, a common prostitute, the offense must be proven by evidence of the particular facts, and neither evidence of defendant's general reputation nor of the bad character of women who lived near her and with whom she sometimes associated was admissible.

Night-walkers.— But it has been held that in a prosecution under a city ordinance punishing street-walkers for loitering about the streets or stores at night, evidence of the woman's general character is admissible. Braddy *v.* Milledgeville, 74 Ga. 516, 58 Am. Rep. 443.

31. People *v.* Cowie, 88 Hun (N. Y.) 498, 34 N. Y. Suppl. 888.

Sufficiency of proof.— The nature of the offense of being a "common prostitute without other means of support or employment" is such that it is rarely established with the same fulness and directness of proof by which more open violations of law are made out, and it is held that where it appeared that defendants lived by themselves and had no occupation, were frequently on the streets, dressed up at night, and sat on their doorstep and solicited passing men, and that when men entered their house they followed and closed the doors and shutters, and that twice men were seen in bed with them, a conviction was proper. Peabody *v.* State, 72 Miss. 104, 107, 17 So. 213, where Whitfield, J., drew the following classic parallel: "The character of these appellants was graven with 'the point of a diamond on the rock forever,' some centuries since, by an unerring artist, as will at once be seen by the marvelous correspondence between that character, as thus sketched, and as reflected in this record. In the record we are told that they did nothing, went out on the streets night and day, attired themselves in the evenings; sat upon the steps of the house, and called, in honeyed phrases, men passing through the street near their house, and they went after them into the house, and the shutters were drawn and the doors closed. In Proverbs, c. 7, verses 6–23, we are told, *inter alia*, of 'the flattery of the tongue of the

of prostitution and defendant's knowledge of such character are material, evidence of the general reputation of the house is admissible.[32]

C. Sentence and Punishment. To be a common prostitute, as already shown,[33] subjects the offender to be treated as a vagrant,[34] or to the particular penalty of the statute which may control the subject and which may punish the act as disorderly conduct, as an element of vagrancy, or as a distinct offense.[35]

strange woman,' and then admonished: 'I discerned among the youths, a young man, void of understanding, passing through the street near her corner; and he went the way to her house, in the twilight, in the evening; . . . and there met him a woman in the attire of an harlot, and subtle of heart; she is loud and stubborn, her feet abide not in her house; now is she without, now in the streets, and lieth in wait at every corner. . . . With her much fair speech she caused him to yield with the flattery of her lips she forced him. He goeth after her straightway . . . as a fool to the correction of the stock.' This portrait is accurate; its colors have lost none of their vividness in the lapse of centuries; and, upon the authority of this great text, reflected in all text-books and decisions, the judgment is affirmed."

Night-walking.— In Williams *v.* State, 98 Ala. 52, 13 So. 333, on a trial for night-walking witnesses were permitted to testify to the following facts: That defendant had been seen on the street late at night, coming from a saloon frequented by prostitutes, and had also been seen, but not accompanied by a man, coming from a dance attended by "tough" people, and that she had once been seen standing on a corner near the saloon, talking to a man; that defendant had been seen at night talking to men at a certain bar, and that the women who visited the bar were prostitutes, though the proprietor of the bar also had a general grocery store under the same roof, and other people went there besides prostitutes; and that defendant and another girl had been found in bed with a man.

32. State *v.* Ilomaki, 40 Wash. 629, 82 Pac. 873, holding such evidence admissible in a prosecution for placing one's wife in a house of prostitution, the accused having attempted to maintain that he did not know the character of the house. But as to the admissibility of such evidence in a prosecution for keeping a bawdy-house see DISORDERLY HOUSES, 14 Cyc. 503.

Other evidence of character of house.— Evidence that the house in question contained twelve rooms, commonly known as "cribs," each one of which was occupied by a different woman as a place of prostitution for herself alone, and that defendant's wife occupied one of them for that purpose, amounted to a showing that she was in a "house of prostitution," within the statute. People *v.* Mead, 145 Cal. 500, 78 Pac. 1047.

33. See *supra*, notes 7, 9.

34. See VAGRANCY.

35. See the statutes of the various states, and see also *supra*, notes 5, 9.

In New York under Consol. Act, §§ 1458, 1461, providing that "every person in said city and county shall be deemed guilty of disorderly conduct that tends to a breach of the peace, who shall in any thoroughfare or public place . . . commit any of the following offenses . . . (2) Every common prostitute or nightwalker loitering or being in any thoroughfare or public place for the purpose of prostitution," etc., it was held that a police magistrate may require the offender to give surety for good behavior, that the offenses enumerated do not reach the dignity of misdemeanors under the common law, that a magistrate, under the Greater New York Charter (Laws (1901), c. 466) may compel the giving of peace bonds or impose fines not exceeding ten dollars on conviction. People *v.* Davis, 80 N. Y. App. Div. 448, 452, 80 N. Y. Suppl. 872 [*affirmed* in 176 N. Y. 465, 68 N. E. 884]; People *v.* City Prison, 44 Misc. 149, 89 N. Y. Suppl. 830; People *v.* State Reformatory, 44 Misc. 122, 89 N. Y. Suppl. 87. But this offense is distinct from that embraced under Laws (1896), c. 546, as amended by Laws (1899), c. 632, which provides that a female between certain ages convicted by any magistrate "of being a common prostitute," etc., may be committed to a house of refuge for three years; the latter offense is not the disorderly conduct mentioned in the act first above mentioned, and one summarily convicted of the first offense cannot be committed by the magistrate for three years under the last mentioned act. People *v.* Davis, 80 N. Y. App. Div. 448, 80 N. Y. Suppl. 872 [*affirmed* in 176 N. Y. 465, 68 N. E. 884]; People *v.* State Reformatory, 44 Misc. 122, 89 N. Y. Suppl. 87; People *v.* State Reformatory, 38 Misc. 243, 77 N. Y. Suppl. 153. Under the Tenement Act (Laws (1901), c. 334), providing for the punishment, as a vagrant, of any person violating such act by committing prostitution in her apartment, the procedure to be the same as that provided by the law for other cases of vagrancy, it is held that on conviction the person convicted, if she is over twenty-one years old, and is not committed to the reformatory, may be committed under the charter to the workhouse on Blackwell's Island. People *v.* Flynn, 37 Misc. 90, 74 N. Y. Suppl. 740. See also as to jurisdiction to commit to reformatories, REFORMATORIES.

Record of magistrate.— Upon a habeas corpus to review a commitment of a woman convicted as a disorderly person, a record in which the magistrate simply states that the prisoner has been duly convicted of being a disorderly person, because a common prostitute, is insufficient to warrant detention of the prisoner. The record of the conviction, in such cases, is required by the statute to show the circumstances of the offense. *In re* Travis,

So the punishment of other statutory offenses such as those hereinbefore noticed,[36] under inhibitions looking to the protection of female chastity, depends upon the statute, although these offenses are generally more serious,[37] and are made felonies.[38]

PRO TANTO. For so much; to that extent.[1]

PROTECT. To cover, shield, or defend from injury, harm or danger of any kind.[2] (See PROTECTION.)

PROTECTION. Preservation; defense; guard; shelter; security; safety.[3] (Protection: Equal, see CONSTITUTIONAL LAW, 8 Cyc. 1058. Of Attorney Against Assignment, see ATTORNEY AND CLIENT, 4 Cyc. 1019. Of Banks of Navigable Water, see NAVIGABLE WATERS, 29 Cyc. 338. Of Exemption Rights, see EXEMPTIONS, 18 Cyc. 1462. Of Fish and Game, see FISH AND GAME, 19 Cyc. 1006. Of Homestead Rights, see HOMESTEADS, 21 Cyc. 622. Of Infant, see INFANTS, 22 Cyc. 519. Of Mines From Fire, see MINES AND MINERALS, 27 Cyc. 747. Of Mortgaged Property Pending Foreclosure, see CHATTEL MORTGAGES, 7 Cyc. 102; MORTGAGES, 27 Cyc. 1621. Of Person, Property, or Habitation as Excuse or Justification For Homicide, see HOMICIDE, 21 Cyc. 826–830. Of Property Pending Litigation, see INJUNCTIONS, 22 Cyc. 821; RECEIVERS; SEQUESTRATION. See also PROTECT.)

55 How. Pr. (N. Y.) 347. See also People *v.* Davis, 176 N. Y. 465, 68 N. E. 884. But under an act providing for the commitment to a house of refuge of women convicted "of being common prostitutes," it was held that this was a distinct offense from that embraced in N. Y. Code Cr. Proc. § 887, relating to vagrancy, and that the fact that the record of conviction of a female, of being a common prostitute, and the commitment to the House of Refuge, recited that she was convicted of being a common prostitute, "and associating with disreputable people," did not render her commitment and detention unlawful, as the words quoted may be rejected as surplusage. People *v.* Coon, 67 Hun (N. Y.) 523, 22 N. Y. Suppl. 865.

36. See *supra*, notes 10, 12 *et seq.*

37. See ABDUCTION, 1 Cyc. 140.

38. People *v.* Conness, 150 Cal. 114, 88 Pac. 821 (holding that a statute authorizing a sentence of from three to ten years for the offense of placing one's wife in a house of prostitution, or consenting to or conniving at her remaining in such house, etc., is not in conflict with the constitutional provision against cruel and inhuman punishment); State *v.* Ilomaki, 40 Wash. 629, 82 Pac. 873; State *v.* Zenner, 35 Wash. 249, 77 Pac. 191.

1. Burrill L. Dict. [*citing* Story Eq. Jur. § 563; Pool *v.* Bousfield, 1 Campb. 55; Thomas *v.* Evans, 2 East 488; Chaplin *v.* Chaplin, 3 P. Wms. 245, 24 Eng. Reprint 1047; Talbot *v.* Braddill, 1 Vern. Ch. 183, 23 Eng. Reprint 402]. See also Coonan *v.* Loewenthal, 147 Cal. 218, 81 Pac. 527, 109 Am. St. Rep. 128; McDaniel *v.* Maxwell, 21 Oreg. 202, 204, 27 Pac. 952, 28 Am. St. Rep. 740; Phinney *v.* State, 36 Wash. 236, 78 Pac. 927, 104 Am. St. Rep. 973, 68 L. R. A. 281; The Carlos F. Roses, 177 U. S. 655, 671, 20 S. Ct. 803, 44 L. ed. 529.

2. Standard Oil Co. *v.* Lane, 75 Wis. 636, 638, 44 N. W. 644, 7 L. R. A. 191, where it is said that while such is often the meaning of the term, in a statute providing that every person who as principal contractor, architect, etc., performs any work or furnishes any material, in or about the erection, construction, protection, or removal of any dwelling-house or other building, or any machinery erected or constructed so as to be or become a part of the freehold upon which it is to be situated, shall have a lien for such labor and materials, the word imports something used or furnished for the machinery which not only preserves it from injury but becomes a part of the machinery itself.

Synonymous with "cover" see Grey *v.* Mobile Trade Co., 55 Ala. 387, 398, 28 Am. Rep. 729.

To "protect a bill" for the seller see Robbins *v.* Robinson, 176 Pa. St. 341, 346, 35 Atl. 337.

To "protect and guarantee" a customer see Beymer Bauman Lead Co. *v.* Haynes, 81 Me. 27, 29, 16 Atl. 326.

To "protect the sale of the heater" from infringement on other heaters see Croninger *v.* Paige, 48 Wis. 229, 232, 4 N. W. 106. See also Wiggin *v.* Consolidated Adjustable Shoe Co., 161 Mass. 597, 599, 37 N. E. 752.

"Shall be protected" applied to bonds and debts see Wabash, etc., R. Co. *v.* Ham, 114 U. S. 587, 596, 5 S. Ct. 1081, 29 L. ed. 235.

3. Webster Int. Dict.

As used in the Federal Bankruptcy Act of 1867, authorizing the appointment of Registers to assist the judge of the district court in the performance of his duties under the act, and giving power to every register, and making it his duty, "to grant protection," the word means protection to the bankrupt from being arrested in cases where he is not liable to arrest. *In re* Glaser, 10 Fed. Cas. No. 5,474, 1 Nat. Bankr. Reg. 336.

"Protection purposes" see Arkansas Ins Co. *v.* Bostick, 27 Ark. 539, 547.

Formerly in English law, it was a writ by which the king might, by a special preroga-

PROTECTIO TRAHIT SUBJECTIONEM, ET SUBJECTIO PROTECTIONEM. A maxim meaning "Protection draws to it subjection; and subjection, protection." [4]

PROTECTORY. An institution for the education and care of destitute or homeless boys, especially those in danger of becoming vicious.[5] (See Asylums, 4 Cyc. 362; Charities, 6 Cyc. 895; Criminal Law, 12 Cyc. 70; Paupers, 30 Cyc. 1058; Prisons, *ante*, p. 312; Reformatories.)

PRO TEMPORE. For the time being; temporarily; provisionally.[6]

PRO TEMPORE, PRO SPE, PRO COMMODO MINUITUR EORUM PRETIUM ATQUE AUGET. A maxim meaning "The value of things is lessened or increased according to time, expectation, or profit." [7]

PROTEST. As a noun, a solemn declaration of opinion; [8] a solemn declaration against an act about to be done, or already done, expressive of disapprobation or dissent, or made with a view of preserving some right, which but for such declaration, might be taken to be relinquished; [9] in admiralty law, a declaration on oath by the master, of the circumstances attending the loss of his vessel, intended to show that the loss occurred by the perils of the sea, and concluding with a protestation against any liability of the owner to the freighters.[10] As a verb, to make a solemn declaration of opposition.[11] (Protest: Against Duties on Imports, see Customs Duties, 12 Cyc. 1160. Liability of Notary For Negligence in Making, see Notaries, 29 Cyc. 1106 note 17. Of Commercial Paper, see Commercial Paper, 7 Cyc. 1051. Of Firm Notes, Waiver by Partner, see Partnership, 30 Cyc. 515. Of Master of Ship, Admissibility in Evidence, see Evidence, 17 Cyc. 405; Marine Insurance, 26 Cyc. 732. On Acceptance of Part Payment, see Accord and Satisfaction, 1 Cyc. 331. Power of Notary to Make, see Notaries, 29 Cyc. 1081. Proof of Marine Protest, see Admiralty, 1 Cyc. 884 note 29. Recovery of Payment Made Under, see Payment, 30 Cyc. 1310.)

PROTESTANDO. Literally "protesting." The emphatic word formerly used in pleading by way of protestation.[12]

PROTESTANT. One who protests; a Christian who protests against the doctrines and practices of the Roman Catholic Church; one who adheres to the doctrines of the Reformation; [13] a collective name for a large class of Christian denominations, and embracing all said denominations, except the Roman Catholic and Eastern Churches; [14] a general term comprehending all those who, professing Christianity, yet are not in the communion of the Church of Rome; [15] a term now

tive, privilege a defendant from all personal and many real suits for one year at a time, and no longer, in respect of his being engaged in his service out of the realm. Black L. Dict. [*citing* 2 Blackstone Comm. 289].

4. Peloubet Leg. Max. [*citing* Coke Litt. 65*a*].

5. Duggan *v.* Slocum, 83 Fed. 244, 246.

6. Black L. Dict. See also Cutter *v.* Tole, 3 Me. 38, 41.

7. Morgan Leg. Max. [*citing* Tayler Leg. Max.].

8. Auditor-Gen. *v.* Menominee County, 89 Mich. 552, 576, 51 N. W. 483, where it is said: "Undoubtedly the framers of the Constitution, when they so freely granted every member the right of protest of record, intended just that, and nothing more." It has no force as a legislative action and cannot be resorted to to nullify a legislative act.

9. Burrill L. Dict. [*quoted* in Meyer *v.* Clark, 2 Daly (N. Y.) 497, 510].

The term is not equivalent to "exception" in law. Hence where the record shows that on refusal of the court to grant further time for argument, defendant erroneously "protested" it will not be construed to show an exception reserved. The word, as here used, means an expression of dissent to the act of the court, on the ground of impropriety or illegality, and nothing more. Robinson *v.* State, 152 Ind. 304, 307, 53 N. E. 223.

As used in an election statute providing that on protest of any member of an election board, any ballot bearing a distinguishing mark or mutilation shall be preserved, and such ballot may be submitted in evidence in any contest of election, the term includes a ballot rejected by consent of the entire election board. Tombaugh *v.* Grogg, 156 Ind. 355, 362, 59 N. E. 1060.

10. Cudworth *v.* South Carolina Ins. Co., 4 Rich. (S. C.) 416, 419, 55 Am. Dec. 692.

11. Webster Dict. [*quoted* in Tombaugh *v.* Grogg, 156 Ind. 355, 362, 59 N. E. 1060].

12. Black L. Dict. [*citing* 3 Blackstone Comm. 311].

Its purpose is to preserve the liberty of disputing the fact protested against in some other suit or proceeding. State *v.* Beasom, 40 N. H. 367, 372.

13. Webster Dict. [*quoted* in Hale *v.* Everett, 53 N. H. 9, 57, 16 Am. Rep. 82].

14. Hale *v.* Everett, 53 N. H. 9, 56, 16 Am. Rep. 82.

15. Hale *v.* Everett, 53 N. H. 9, 56, 16 Am. Rep. 82.

applied to all Christians who, in any country or of any sect, dissent from the principles and discipline of the Church of Rome.[16]

PROTESTATION. In pleading, a saving to the party who takes it, from being concluded by any matter alleged or objected against him, upon which he cannot join issue, and it is no more than an exclusion of a conclusion, for he that takes it excludes the other from concluding him.[17]

PROTHONOTARY. A chief notary; a chief clerk in the English courts of King's Bench and Common Pleas; [18] a chief clerk or register of a court in some of the United States.[19] (See CLERKS OF COURTS, 7 Cyc. 193.)

PROTOCOL. See TREATIES.

PROTRACTED. A term which, applied to a line, means the extension of a line in its original direction.[20]

PROUT PATET PER RECORDUM. Literally "as appears by the record." In the Latin phraseology of pleading, this was the proper formula for making reference to a record.[21]

PROVABLE DEBT OR CLAIM. See BANKRUPTCY, 5 Cyc. 323; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 405; INSOLVENCY, 22 Cyc. 1310.

PROVE. To make trial or experiment; to be found by experience to be; to be found in the event; to turn out; [22] to establish or ascertain, as truth, reality or fact by testimony or other evidence.[23]

16. Nicholson Encycl. [*quoted* in Hale *v.* Everett, 53 N. H. 9, 57, 16 Am. Rep. 82].

"The term includes all those who believe in the Christian religion and do not acknowledge the supremacy of the pope." Tappan's Appeal, 52 Conn. 412, 418.

In a state constitution requiring certain officers to be of the Protestant religion, "something more is evidently intended by these expressions than that a man should simply not be a Roman Catholic in order to hold these offices. The requirement is not negative, but positive and affirmative. It is not that these offices may be filled with those who are 'not' Roman Catholics, or who are 'not' pagans, or Jews, or Mohammedans, but only by those who 'are' of the Protestant religion. This is so in every case; each provision requires a positive and affirmative qualification in order to hold the office. A Mohammedan is not a Roman Catholic; but he cannot hold these offices, or either of them, because he is not of the Protestant religion, as the law requires he should be. So of the Jew; so of the pagan. The same would be true of an infidel; he is not a Roman Catholic, but he is not of the Protestant religion, because, to be a Protestant he must be a Christian; to be of the Protestant religion, he must be of the Christian religion." Hale *v.* Everett, 53 N. H. 9, 53, 16 Am. Rep. 82.

"Protestant charitable institutions" are such charitable institutions as are managed and controlled exclusively by Protestants and are designed for the bestowal of charity upon Protestants alone. Manning *v.* Robinson, 29 Ont. 483, 486.

"Protestant dissenters" is not a term of fixed legal meaning. Of itself, it implies that the parties are protestants against the Church of Rome, and dissentients from the Church of England; but that is all. Drummond *v.* Atty.-Gen., 2 H. L. Cas. 837, 14 Jur. 137, 9 Eng. Reprint 1312, 2 Eng. L. & Eq. 15, 24.

17. Graysbrook *v.* Fox, 1 Plowd. 275, 75 Eng. Reprint 419 [*cited* in note to Holdipp *v.* Otway, 2 Saund. 102, 103, 85 Eng. Reprint 802].

18. Burrill L. Dict.

Being merely a ministerial officer, he may not decide whether he will or will not file an order as altered and settled by the court. McDougald *v.* Mullins, 30 Nova Scotia 313, 315.

19. Trebilcox *v.* McAlpine, 46 Hun (N. Y.) 469, 472, 11 N. Y. St. 847.

The prothonotary of the court of common pleas of Pennsylvania is merely the clerk of the court. He has no authority, *virtute officii*, to act as the clerk, agent, or attorney of any person. It is his duty to record upon the minutes of the court all judgments rendered by or confessed before the court whose clerk he is. Whitney *v.* Hopkins, 135 Pa. St. 246, 253, 19 Atl. 1075.

20. Knight *v.* Wilder, 2 Cush. (Mass.) 199, 211, 48 Am. Dec. 660.

21. Black L. Dict.

For illustrations of its use see Brown *v.* Balde, 3 Lans. (N. Y.) 283, 291; Smith *v.* Nicholls, 1 Arn. 474, 483, 5 Bing. N. Cas. 208, 7 Dowl. P. C. 282, 8 L. J. C. P. 92, 7 Scott 147, 35 E. C. L. 120; Thompson *v.* Leslie, 9 U. C. Q. B. 360, 362; Gillespie *v.* Grant, 3 U. C. Q. B. 400, 404.

22. Whitehead *v.* Howard, 11 Nova Scotia 423, 430, dissenting opinion.

Not the equivalent of "be" see Whitehead *v.* Howard, 11 Nova Scotia 423, 430.

23. State *v.* Flye, 26 Me. 312, 320.

"Proved" in reference to an alibi as a matter of defense is held to mean the production of sufficient evidence to raise a reasonable doubt. People *v.* Winters, 125 Cal. 325, 328, 57 Pac. 1067. Things established by competent and satisfactory evidence are said to be "proved." Cooper *v.* Holmes, 71 Md. 20, 28, 17 Atl. 711. "Proved according to law" means duly, regularly, lawfully, etc. Anderson L. Dict. [*quoted* in

PROVEN. A term which has been erroneously employed instead of "found." [24]

PROVIDE.[25] To take measures for counteracting or escaping something; often followed by "against" or "for;" [26] to procure beforehand; get, collect or make ready for future use; prepare, furnish, supply; [27] to make ready; to prepare; to furnish or supply; [28] to furnish and supply; [29] to procure as suitable or necessary; to prepare; to make ready for future use; to furnish; to procure beforehand; [30] to make ready for future use; to furnish; to supply.[31]

PROVIDED. On condition; [32] on condition; by stipulation; [33] the appropriate term for creating a condition precedent; [34] sometimes used in the sense of

Williams *v.* Starkweather, (R. I. 1907) 66 Atl. 67, 69]. "Proved to the satisfaction of the court" see People *v.* Molleneaux, 168 N. Y. 264, 327, 61 N. E. 286, 62 L. R. A. 193; Farrell *v.* Manhattan R. Co., 83 N. Y. App. Div. 393, 397, 82 N. Y. Suppl. 334.

"Proving a will in chancery" see Ellis *v.* Davis, 109 U. S. 485, 494, 3 S. Ct. 327, 27 L. ed. 1006.

24. Ketchum *v.* Packer, 65 Conn. 544, 551, 33 Atl. 499.

25. **Distinguished from "regulate"** see Savanna *v.* Robinson, 81 Ill. App. 471, 480.

26. Century Dict. [*quoted* in Western Ranches *v.* Custer County, 28 Mont. 278, 285, 72 Pac. 659].

To "provide against" is to anticipate and take precautionary measures against harm or danger. Com. *v.* Arow, 32 Pa. Super. Ct. 1, 3.

"'Provide' for" the punishment of the unlicensed sale of liquors, etc. see State *v.* Zeigler, 46 N. J. L. 307, 311.

27. Century Dict. [*quoted* in Savanna *v.* Robinson, 81 Ill. App. 471, 480].

28. Century Dict. [*quoted* in Swartz *v.* Lake County, 158 Ind. 141, 149, 63 N. E. 31].

29. U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,975.

30. Webster Dict. [*quoted* in Swartz *v.* Lake County, 158 Ind. 141, 149, 63 N. E. 31].

31. Webster Dict. [*quoted* in Ware *v.* Gay, 11 Pick. (Mass.) 106, 109].

"Provide for" as used in a will see Taylor *v.* Elder, 39 Ohio St. 535, 542.

"Provide for the location of any railroad" see Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 164, 3 N. E. 448.

To provide means to meet the payment of a designated debt see U. S. *v.* Burlington, 24 Fed. Cas. No. 14,687.

To "provide or prepare the means" for any military expedition or enterprise see Charge to Grand Jury, 30 Fed. Cas. No. 18,267, Taney 615, construing Neutrality Laws.

When sufficiently comprehensive to include a provision by purchase see State *v.* Hiawatha, 53 Kan. 477, 479, 36 Pac. 1119.

"Providing by ordinance" see Strassheim *v.* Jermain, 56 Mo. 104, 106.

"Power to provide" see Zalesky *v.* Cedar Rapids, 118 Iowa 714, 719, 92 N. W. 657.

32. De Vitt *v.* Kaufman County, 27 Tex. Civ. App. 332, 334, 66 S. W. 224. See also Piedmont Nat. Bldg., etc., Assoc. *v.* Bryant, 115 Ga. 417, 420, 41 S. E. 661.

33. Webster Dict. [*quoted* in Ormsby *v.* Phenix Ins. Co., 5 S. D. 72, 79, 58 N. W. 301].

Not necessarily implying a proviso.— It does not necessarily follow because the term "provided" is used in a statute, that that which may succeed it is a "proviso," though that is the form in which an exception is generally made to, or a restraint or qualification imposed on the enacting clause. It is the matter of the succeeding words, and not the form, which determines whether it is or not a technical "proviso." Carroll *v.* State, 58 Ala. 396, 401. See also Terrell *v.* Paducah, 122 Ky. 331, 92 S. W. 310, 28 Ky. L. Rep. 1237, 5 L. R. A. N. S. 289; Smalley *v.* Ashland Browne-Stone Co., 114 Mich. 104, 107, 72 N. W. 29.

As a conjunction.— The word is often used in a statute as a conjunction to an independent paragraph. Carter *v.* U. S., 143 Fed. 256, 259, 74 C. C. A. 394. See also Brace *v.* Solmer, 1 Alaska 361, 370.

34. Robertson *v.* Caw, 3 Barb. (N. Y.) 410, 418.

No better word expresses a condition, and it is always so taken unless the context shows that the intent was to create a covenant. Rich *v.* Atwater, 16 Conn. 409, 419; Wright *v.* Tuttle, 4 Day (Conn.) 313, 326; Anderson L. Dict. [*quoted* in Ormsby *v.* Phenix Ins. Co., 5 S. D. 72, 79, 58 N. W. 301].

The word generally creates a condition. (Brennan *v.* Brennan, 185 Mass. 560, 561, 71 N. E. 80, 102 Am. St. Rep. 363; Forscht *v.* Green, 53 Pa. St. 138, 140); but the clause is to be construed from the words employed and from the purpose of the parties gathered from the whole instrument (Safe Deposit, etc., Co. *v.* Thomas, 59 Kan. 470, 472, 53 Pac. 472; Heaston *v.* Randolph County, 20 Ind. 398, 403; Paschall *v.* Passmore, 15 Pa. St. 295, 308).

The word itself may sometimes be taken as a condition, sometimes as a limitation. Heaston *v.* Randolph County, 20 Ind. 398, 403; Lyon *v.* Hersey, 103 N. Y. 264, 270, 8 N. E. 518. See also Chapin *v.* Harris, 8 Allen (Mass.) 594, 596.

"Provide" or "provided" as employed in a will see Colt *v.* Hubbard, 33 Conn. 281, 285; Gifford *v.* Thorn, 9 N. J. Eq. 702, 705; Purdy *v.* Davis, 13 Wash. 164, 165, 42 Pac. 520; Bower *v.* Bower, 5 Wash. 225, 227, 31 Pac. 598; Bowman *v.* Bowman, 47 Fed. 849.

"Provided by law" see Pearsons *v.* Webster, 17 R. I. 86, 87, 20 Atl. 230.

The phrase "provided, however," when used in a deed, will be construed to be a covenant rather than a condition, when such construction can reasonably be given. Hartung *v.* Witte, 59 Wis. 285, 292, 18 N. W. 175. **But**

"unless." [35] (See PROVIDE, *ante*, p. 740; PROVISO, *post*, p. 743. See also CONDITION, 8 Cyc. 555 and Cross-References Thereunder.)

PROVIDENTIALLY HINDERED. A term which includes such acts only as may be attributed to the act of God, and not to mere unavoidable cause, such as accident resulting from, and attributable to, human conduct.[36] (See ACT OF GOD, 1 Cyc. 758.)

PROVINCE OF COURT AND JURY. See CRIMINAL LAW, 12 Cyc. 587; TRIAL.

PROVINCIAL. Of or pertaining to a province.[37]

PROVISION.[38] In law a stipulation; a rule provided; a distinct clause in an instrument or statute; a rule or principle to be referred to for guidance, as the provisions of law, the provisions of the constitution, etc.[39] Applied to legislation, actual expression in language; the clothing of legislative ideas in words, which can be pointed out upon the page and read with the eye; not a conjecture, or a supposition, or an inference drawn from other language referring to a different subject or matter.[40] (See, generally, STATUTES; STIPULATIONS.)

it usually indicates a condition and as used in a will creating a trust, provided, however, that on the death of the beneficiary his share should be paid to a certain institution, would seem to show a trust for the life of the beneficiary, with a subsequent condition that on its termination the portion allotted to the beneficiary should go to the institution. Locke *v.* Farmers' L. & T. Co., 140 N. Y. 135, 148, 35 N. E. 578. Used in the sense of a condition. See also Smith's Appeal, 103 Pa. St. 559, 562; Wright *v.* Page, 10 Wheat. (U. S.) 204, 239, 6 L. ed. 303; Huggins *v.* Daley, 99 Fed. 606, 610, 40 C. C. A. 12, 48 L. R. A. 320.

The phrase "'provided' that they shall perform" in a contract has been held to mean "so long as they shall perform" and is most clearly a condition precedent to the agreement to forbear. Stoel *v.* Flanders, 68 Wis. 256, 267, 32 N. W. 114.

35. Burgwyn *v.* Whitfield, 81 N. C. 261, 266.

36. Day *v.* Jeffords, 102 Ga. 714, 719, 29 S. E. 591.

Those words have a strict legal significance, are wholly unambiguous, and parties will be presumed to have contracted rather with reference to their strict legal significance than with reference to any understanding of their own touching the import of them. Day *v.* Jeffords, 102 Ga. 714, 719, 29 S. E. 591.

37. Webster Int. Dict.

"Provincial frontier," as used in the Canada statute providing that no ferry license shall in the future be granted to any person or body corporate beyond the limits of the province, but such license in all cases shall be granted to the municipality within the limits of which such ferry exists, or in case of the establishment of an additional ferry on the provincial frontier, then to the municipality in which such additional ferry shall be established, refers to the provincial frontier opposite the United States and not to the boundary line between Upper Canada and Lower Canada. Smith *v.* Ratté, 13 Grant Ch. (U. C.) 696, 697.

The term "Provincial objects" in the British North America Act means "local objects" within a Province in contradistinction to objects common to the several Provinces in their collective or Dominion quality. Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 313, 315.

38. **Very unusual meaning of term.**— In the law of Edw. III, enacted to repress the usurpations of the papal see, by construction the term "provisions" was made to restrain the nomination to benefices by the pope (a very peculiar meaning of the term). Middletown Bank *v.* Magill, 5 Conn. 28, 52.

39. Century Dict. [*quoted* in Snyder *v.* Dwelling House Ins. Co., 59 N. J. L. 544, 548, 37 Atl. 1022, 59 Am. St. Rep. 625].

A word in common use to express the terms, stipulations, and conditions in deeds, contracts, statutes, and constitutions. Snyder *v.* Dwelling House Ins. Co., 59 N. J. L. 544, 548, 37 Atl. 1022, 59 Am. St. Rep. 625.

A general term which may include either a promise or undertaking of some kind or a condition. Blackman *v.* U. S. Casualty Co., 117 Tenn. 578, 588, 103 S. W. 784.

In a stipulation that no agent of the insurer shall have power to waive any provision or condition of an insurance policy, the word is synonymous with "terms and conditions" contained in the body of the policy. Snyder *v.* Dwelling House Ins. Co., 59 N. J. L. 544, 548, 37 Atl. 1022, 59 Am. St. Rep. 625.

40. State *v.* Lund, 167 Mo. 228, 255, 66 S. W. 1062, 67 S. W. 572, dissenting opinion.

The phrase "provisions of law" as used in a statute providing that a quo warranto may be maintained "against a public officer, civil or military, who does or suffers an act, which, by the provisions of law, works a forfeiture of his office" means such act as has been made a cause of forfeiture or removal by statute. State *v.* Ganson, 58 Ohio St. 313, 319, 321, 50 N. E. 907. "The phrase 'provisions of law' is a broad and general one. It cannot justly be confined to statutes, or legislative enactments. A rule or doctrine established by judicial decision is a 'provision of law' equally with one enacted by the legislature." Clark *v.* Lake Shore, etc., R. Co., 94 N. Y. 217, 220.

"Provisions for the payment thereof . . . made by law" see Shattuck *v.* Kincaid, 31 Oreg. 379, 393, 49 Pac. 758.

PROVISIONAL. Provided for present need, or for the occasion.[41] (Provisional: Injunction, see INJUNCTIONS, 22 Cyc. 724. Remedy, see PROVISIONAL REMEDY, and Cross-References Thereunder.)

PROVISIONAL INJUNCTION. See INJUNCTIONS, 22 Cyc. 724.

PROVISIONAL REMEDY. A collateral proceeding, permitted only in connection with a regular action, and as one of its incidents;[42] one which is provided for present need, or for the occasion, that is, one adapted to meet a particular exigency.[43] (Provisional Remedy: Generally, see ARREST, 3 Cyc. 867; BAIL, 5 Cyc. 1; GARNISHMENT, 20 Cyc. 969; INJUNCTIONS, 22 Cyc. 724; NE EXEAT, 29 Cyc. 382; RECEIVERS; SEQUESTRATION. Review of Order Relating to, see APPEAL AND ERROR, 2 Cyc. 609.)

PROVISIONAL SEIZURE. A remedy known under the law of Louisiana and substantially the same in general nature as attachment to property in other states.[44] (See, generally, ATTACHMENT, 4 Cyc. 368.)

PROVISIONS. Food and provender for men and beasts;[45] food; victuals; fare; provender;[46] food; victuals; eatables;[47] a stock of food; any kind of eatable, collected or stored;[48] a supply of food; that on which one subsists;[49] whatever is fit for the food of families and is usually eaten as food;[50] something in a con-

41. Webster Dict. [*quoted* in McCarthy *v.* McCarthy, 54 How. Pr. (N. Y.) 97, 100].

"Provisional appointment" is one that will meet the present needs in an emergency, and "to continue until the vacancy is regularly filled." State *v.* Lovell, 70 Miss. 309, 318, 12 So. 341.

"Provisional government" is one temporarily established, in anticipation of, and to exist and continue until, another shall be instituted and organized in its stead. Chambers *v.* Fisk, 22 Tex. 504, 535.

42. Snavely *v.* Buggy Co., 36 Kan. 106, 110, 12 Pac. 522; Ellinger *v.* Equitable L. Assur. Soc., 125 Wis. 643, 648, 104 N. W. 811.

43. McCarthy *v.* McCarthy, 54 How. Pr. (N. Y.) 97, 100.

Distinguished from "special proceeding" see Snavely *v.* Buggy Co., 36 Kan. 106, 110, 12 Pac. 522; Witter *v.* Lyon, 34 Wis. 564, 575.

Under a statute giving an appeal from an order which grants a provisional remedy, an order requiring defendant to give plaintiff an inspection and copies of certain papers in his possession is a provisional remedy. Noonan *v.* Orton, 28 Wis. 386, 387. Under a statute providing that "from the time of the service of a summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings" the approval of an undertaking by the sheriff in an action of claim and delivery is not the allowance of a provisional remedy so as to give the court jurisdiction under said section. Nosser *v.* Corwin, 36 How. Pr. (N. Y.) 540, 542. See also APPEAL AND ERROR, 2 Cyc. 609.

44. Black L. Dict. [*citing* La. Code Proc. 284 *et seq.*].

45. McLester *v.* Somerville, 54 Ala. 670, 675.

46. Com. *v.* Caldwell, 190 Mass. 355, 356, 76 N. E. 955, 112 Am. St. Rep. 334; Com. *v.* Reid, 175 Mass. 325, 329, 56 N. E. 617.

47. State *v.* Angelo, 71 N. H. 224, 226, 51 Atl. 905.

48. Webster Dict. [*quoted* in Armour *v.* Western Constr. Co., 36 Wash. 529, 538, 78 Pac. 1106].

49. Standard Dict. [*quoted* in Moise's Succession, 107 La. 717, 720, 31 So. 990].

50. Cochran *v.* Harvey, 88 Ga. 352, 354, 14 S. E. 580.

"'Provisions' and 'stores.'"—In a statute giving a lien on a vessel to a person furnishing provisions and stores, the term, strictly considered, would be confined to such articles as enter into the food or sustenance of hands and passengers, but stores is a more general term and would fairly embrace wood and coal furnished to a steamboat for her usual trips. Crooke *v.* Slack, 20 Wend. (N. Y.) 177.

The term has been held to include: Beans raised for food, under a statute imposing a certain duty on vegetables in their natural state not specially enumerated under the head of provisions. Windmuller *v.* Robertson, 23 Fed. 652, 653, 23 Blatchf. 233. Corn, under a statute exempting from execution all such provisions as may be on hand for family use. Atkinson *v.* Gatcher, 23 Ark. 101, 103; Cochran *v.* Harvey, 88 Ga. 352, 354, 14 S. E. 580. Fat cattle, within the meaning of a statute prohibiting a citizen of the United States to transport "provisions or munitions of war" from any place in the United States into hostile territory. U. S. *v.* Barber, 9 Cranch (U. S.) 243, 244, 3 L. ed. 719. Fruits, especially apples, pears, peaches, bananas, oranges, and pineapples. State *v.* Angelo, 71 N. H. 224, 226, 51 Atl. 905. Grain, oats, and bran. Kansas City, etc., R. Co. *v.* Graham, 67 Kan. 791, 792, 74 Pac. 232. Oleomargarine and butterine. Com. *v.* Lutton, 157 Mass. 392, 393, 32 N. E. 348. Wine and brandy kept by a testator for his own use, under a clause of his will giving to his wife all grain, fodder, meat, and other provisions on hand at his death. Mooney *v.* Evans, 41 N. C. 363, 364.

The term has been held not to include: Canned beans, peas, tomatoes, corned beef, sardines, or red herring kept for sale by a

dition to be consumed as food, such as meal, flour, lard, meat and other articles of that kind — articles which need no change but cooking.[51] (See Food, 19 Cyc. 1084. See also Provision.)

PROVISO. A clause which generally contains a condition that a certain thing shall or shall not be done in order that something in another clause shall take effect;[52] something engrafted upon a preceding enactment, generally introduced by the word "provided";[53] something engrafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of the general enactments, and providing specially for them;[54] something taken back from the power first declared;[55] an article or clause in a statute by which a condition is introduced;[56] a clause inserted in an act of the legislature, a deed, a written agreement, or other instrument which generally contains a condition that a certain thing shall or shall not be done, in order that an agreement contained in another clause shall take effect;[57] in deeds or laws, a limitation or exception to a grant made, or authority conferred, the effect of which is to declare that the one shall not operate,

mercantile firm of which the debtor is a member. *In re* Lentz, 97 Fed. 486, 487. See also Nash *v.* Farrington, 4 Allen (Mass.) 157, 158. Cotton, under a statute providing that no waiver of exemptions can be effectual to render wearing apparel, household and kitchen furniture and provisions subject to execution. Butler *v.* Shiver, 79 Ga. 172, 174, 4 S. E. 115. A field of standing corn, within a statute exempting from execution "provisions actually prepared and designed for the use of the family." Donahue *v.* Steele, 1 Ohio Dec. (Reprint) 130, 131, 2 West. L. J. 402. Ice, within a statute providing that any person may go from place to place in the same town exposing for sale and selling, among other things, provisions. Com. *v.* Reid, 175 Mass. 325, 329, 56 N. E. 617. Meat purchased by a dealer to be sold again in the usual course of his trade. Bond *v.* Tucker, 65 N. H. 165, 166, 18 Atl. 653. A **milch cow, under a homestead** law exempting a certain amount of provisions. Wilson *v.* McMillan, 80 Ga. 733, 735, 6 S. E. 182). Money, for the purchase of labor, or to pay the hire of laborers, under a "crop lien" law providing that such lien shall have preference of all other liens, except that for the rent of land, for advances in horses, mules, oxen, or other necessary provisions, etc. McLester *v.* Somerville, 54 Ala. 670, 674. "Rye-chop" which is a food for horses, under a statute prohibiting the forestalling of the market by buying any provision or article of food coming to market. Botelor *v.* Washington, 3 Fed. Cas. No. 1,685, 2 Cranch C. C. 676.

Question of fact for jury.— Under a statute exempting provisions of a debtor from attachment it was held that whether the term included unthreshed wheat and oats was a question of fact for the jury. But Ladd, J., dissenting, said: "There is nothing technical, scientific, or unusual in the term provisions, as used in the statute, calling for interpretation by the jury; and if the fact that both wheat and oats are used as food for man were in dispute, still, that question was not submitted to the jury. It seems to me the question whether or not any given thing is provisions, within the meaning of the statute, must depend on the nature of the thing itself, and the uses to which it is or may be put." Plummer *v.* Currier, 52 N. H. 287, 297.

51. Wilson *v.* McMillan, 80 Ga. 733, 735, 6 S. E. 182, as employed in an exemption statute.

52. Walsh *v.* Van Horn, 22 Ill. App. 170, 173.

It implies a condition and defeats the operation of the antecedent clause conditionally; it avoids such antecedent clause by way of defeasance. Walsh *v.* Van Horn, 22 Ill. App. 170, 173.

53. De Graff *v.* Went, 164 Ill. 485, 492, 45 N. E. 1075.

54. *Ex p.* Lusk, 82 Ala. 519, 522, 2 So. 140.

55. People *v.* Kelly, 5 Abb. N. Cas. (N. Y.) 383, 405.

56. Webster Dict. [*quoted* in *In re* Portuondo, 191 Pa. St. 28, 41, 43 Atl. 1102].

Its office, generally, is, either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. *Ex p.* Lusk, 82 Ala. 519, 522, 2 So. 140; De Graff *v.* Went, 164 Ill. 485, 492, 45 N. E. 1075; Farmers' Bank *v.* Hale, 59 N. Y. 53, 59; People *v.* Kelly, 5 Abb. N. Cas. (N. Y.) 383, 404; Minis *v.* U. S., 15 Pet. (U. S.) 423, 445, 10 L. ed. 791; *In re* Matthews, 109 Fed. 603, 614. And if repugnant to the purview it is not void but stands as the last expression of the legislature. Farmers' Bank *v.* Hale, 59 N. Y. 53, 59.

It is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause. *Ex p.* Lusk, 82 Ala. 519, 522, 2 So. 140; McRae *v.* Holcomb, 46 Ark. 306, 310; State *v.* Stapp, 29 Iowa 551, 553; Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 30, 6 L. ed. 253.

"A recognized effect and operation of a proviso is to deny or prohibit; and when connected with a delegation of authority . . . it is tantamount to a command not to exercise the authority." State *v.* Orleans Levee Dist. Com'rs, 109 La. 403, 434, 33 So. 385.

57. Bouvier L. Dict. [*quoted* in Wilkes-

or the other be exercised, unless in the case provided.[58] Whether the term implies a condition or not, must of course depend on the context; sometimes it is a mere explanation, sometimes it is an exception.[59] (Proviso: Allegation in Pleading, see Indictments and Informations, 22 Cyc. 344; Pleading. Construction and Operation — In Contract, see Accident Insurance, 1 Cyc. 243; Contracts, 9 Cyc. 615; Fire Insurance, 19 Cyc. 657; In Deed, see Deeds, 13 Cyc. 687; In Statute, see Statutes; In Will, see Wills. See Provided.)

PROVISO EST PROVIDERE PRÆSENTIA ET FUTURA, NON PRÆTERITA. A maxim meaning "A proviso is to provide for the present and future, not the past." [60]

PROVOCATION. That treatment by another which arouses anger or passion;[61] the state of being provoked; vexation; anger.[62] (Provocation: As Element of Affray, see Affray, 2 Cyc. 42. As Ground or Mitigation of Libel or Slander, see Libel and Slander, 25 Cyc. 421. Defense to Action For Divorce, see Divorce, 14 Cyc. 629. For Assault and Battery, see Assault and Batery, 3 Cyc. 1077. For Assault With Intent to Kill, see Homicide, 21 Cyc. 789. For Homicide, see Homicide, 21 Cyc. 741. Provoking Assault as Risk and Cause of Loss Under Accident Policy, see Accident Insurance, 1 Cyc. 267. Provoking Breach of the Peace, see Breach of the Peace, 5 Cyc. 1025. See Provoke.)

PROVOKE. To excite; to stimulate; to arouse;[63] to excite to anger, or passion; to exasperate; to irritate; to enrage.[64] (See Provocation.)

PROVOST MARSHAL. See Army and Navy, 3 Cyc. 833 note 37.

PROWL. To rove or wander over in a stealthy manner; to collect by plunder; to rove or wander stealthily [65]

PROXIMATE. Immediate; nearest; next in order;[66] direct or immediate;[67] the opposite of " remote; " that which stands next in causal connection.[68] (Proximate: Cause, see Proximate Cause. Damages, see Damages, 13 Cyc. 25.)

Barre Electric Light Co. *v.* Wilkes-Barre Light, etc., Co., 4 Kulp (Pa.) 47, 52].

58. People *v.* Boston, etc., R. Co., 12 Abb. N. Cas. (N. Y.) 230, 247. See also Stockton *v.* Weber, 98 Cal. 433, 440, 33 Pac. 332; State *v.* Orleans Levee Dist. Com'rs, 109 La. 403, 434, 33 So. 385; *In re* Shewell Ave., 20 Pa. Co. Ct. 278, 280; State *v.* Bellew, 86 Wis. 189, 195, 56 N. W. 782; Voorhees *v.* Jackson, 10 Pet. (U. S.) 449, 471, 9 L. ed. 490.

With reference to contracts the term is properly the statement of something extrinsic of the subject-matter of the contract, which shall go in discharge of the contract, and, if it is a covenant, by way of defeasance. Wilmington, etc., R. Co. *v.* Robeson, 27 N. C. 391, 393.

With reference to a covenant it is properly the statement of something extrinsic of the subject-matter of the covenant, which shall grow in discharge of that covenant by way of defeasance. LaPoint *v.* Cady, 2 Pinn. (Wis.) 515, 522. It is generally a limitation of a covenant, but there are cases in which it may be treated as a covenant itself. Lantz *v.* Baker, 3 Brit. Col. 269, 271.

59. Bastin *v.* Bidwell, 18 Ch. D. 238, 244, 44 L. T. Rep. N. S. 742.

For time out of mind, conditions have usually been preceded by such words as *proviso, ita quod,* and *sub conditione,* or their modern equivalents. Graves *v.* Deterling, 120 N. Y. 447, 456, 24 N. E. 655; Union College *v.* New York, 65 N. Y. App. Div. 553, 555, 73 N. Y. Suppl. 51.

In a statute, it always implies a condition, unless modified by subsequent words. Waffle *v.* Goble, 53 Barb. (N. Y.) 517, 522, where it is distinguished from "exception." And see Snyder *v.* Dwelling House Ins. Co., 59 N. J. L. 544, 548, 37 Atl. 1022, 59 Am. St. Rep. 625.

Distinguished from "exception" see Waffle *v.* Goble, 53 Barb. (N. Y.) 517, 522; Wilmington, etc., R. Co. *v.* Robeson, 27 N. C. 391, 393; LaPoint *v.* Cady, 2 Pinn. (Wis.) 515, 522; Bouvier L. Dict. [*quoted* in Western Assur. Co. *v.* J. H. Mohlman Co., 83 Fed. 811, 815, 28 C. C. A. 157, 40 L. R. A. 561].

60. Peloubet Leg. Max. [*citing* 2 Coke 72].

61. State *v.* Byrd, 52 S. C. 480, 481, 30 S. E. 482.

62. Webster Dict. [*quoted* in Ruble *v.* People, 67 Ill. App. 438, 439].

In law the word has no meaning different from that of popular acceptation. Ruble *v.* People, 67 Ill. App. 438, 439.

63. State *v.* Warner, 34 Conn. 276, 279.

64. Cook *v.* State, 43 Tex. Cr. 182, 188, 63 S. W. 872, 96 Am. St. Rep. 854; Century Dict. [*quoted* in Casner *v.* State, 43 Tex. Cr. 12, 13, 62 S. W. 914].

"Provoking a difficulty" see Foutch *v.* State, 95 Tenn. 711, 717, 34 S. W. 423, 45 L. R. A. 687.

65. Swart *v.* Rickard, 148 N. Y. 264, 268, 42 N. E. 655.

"Prowling assignee" see Wickson *v.* Pearson, 3 Manitoba 457, 461.

66. Smith *v.* Los Angeles, etc., R. Co., 98 Cal. 210, 214, 33 Pac. 53.

67. Jung *v.* Stevens Point, 74 Wis. 547, 554, 43 N. W. 513.

68. Bouvier L. Dict. [*quoted* in Missouri, etc., R. Co. *v.* Lyons, (Tex. Civ. App. 1899) 53 S. W. 96, 97].

PROXIMATE CAUSE.[69] An act which directly produced or concurred directly in producing the injury;[70] an immediate, direct, or efficient cause of injury;[71] that cause which naturally lead to and which might have been expected to produce the result;[72] that from which the effect might be expected to follow without the concurrence of any unusual circumstances;[73] that which immediately precedes and produces the effect,[74] as distinguished from a remote,[75] mediate, or predisposing cause;[76] that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred;[77] that which stands next in causation to the effect — not neces-

69. **Synonymous.**— "First cause," "initial cause," "efficient cause," and "proximate cause," all mean the same thing in the law of negligence. Winchel *v.* Goodyear, 126 Wis. 271, 279, 105 N. W. 824.

The definitions of the term are easily given in general terms, but they are very difficult in practical application to the facts of each particular case. There is, however, a marked distinction between the proximate cause of an accident and the proximate cause of the injury resulting from the accident. Anderson *v.* Miller, 96 Tenn. 35, 44, 33 S. W. 615, 54 Am. St. Rep. 812, 31 L. R. A. 604.

It has been found impracticable to prescribe by abstract definition, applicable to all possible states of fact, what is a proximate and what a remote cause. Cleveland *v.* Bangor, 87 Me. 259, 267, 32 Atl. 892, 47 Am. St. Rep. 326.

"Great ability and research have been expended in attempting to arrive at and determine upon some general definition of the terms 'proximate' and 'remote' causes, and establish a rule and a line of demarkation between the two. Such efforts appear to have been but partially successful. Both have received various definitions, though differently worded, amounting to practically the same thing. But, in almost every instance where they have been attempted to be applied, their applicability seems to have been determined by the peculiar circumstances of the case under consideration." Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 335, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615.

Important distinction.—The relation of the doctrine of proximate cause to an action for negligence distinguished from its relation to a contract to indemnify for the result of a given cause. Travelers' Ins. Co. *v.* Melick, 65 Fed. 178, 184, 12 C. C. A. 544, 27 L. R. A. 629.

70. Baltimore, etc., R. Co. *v.* State, 33 Md. 542, 554; Troy *v.* Cape Fear, etc., R. Co., 99 N. C. 298, 306, 6 S. E. 77, 6 Am. St. Rep. 521.

71. Ready *v.* Peavy Elevator Co., 89 Minn. 154, 159, 94 N. W. 442.

"Immediate" and "proximate" are indiscriminately used to express the same meaning. Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271, 294.

Distinguished from "immediate" cause see Davis *v.* Standish, 26 Hun (N. Y.) 608, 615.

Does not mean the same thing as "direct cause" see Wills *v.* Ashland Light, etc., R. Co., 108 Wis. 255, 261, 84 N. W. 998; Ward *v.* Chicago, etc., R. Co., 102 Wis. 215, 220, 78 N. W. 442.

72. Black Law and Proc. [*quoted* in Louisville Home Tel. Co. *v.* Gasper, 123 Ky. 128, 135, 93 S. W. 1057, 29 Ky. L. Rep. 578, 9 L. R. A. N. S. 548].

73. Century Dict. [*quoted* in Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 365, 74 N. Y. Suppl. 130].

Similar definition is: "One which in natural sequence, undisturbed by any independent cause, produces the result complained of." Behling *v.* Southwest Pennsylvania Pipe Lines, 160 Pa. St. 359, 366, 28 Atl. 777, 40 Am. St. Rep. 724.

74. Webster Dict. [*quoted* in Hoffman *v.* King, 160 N. Y. 618, 629, 55 N. E. 401, 73 Am. St. Rep. 715, 46 L. R. A. 672; Murphy *v.* New York, 89 N. Y. App. Div. 93, 98, 85 N. Y. Suppl. 445; Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 365, 74 N. Y. Suppl. 130, 132].

75. Travelers' Ins. Co. *v.* Murray, 16 Colo. 296, 303, 26 Pac. 774, 25 Am. St. Rep. 267; Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271, 294.

76. Denver, etc., R. Co. *v.* Sipes, 26 Colo. 17, 23, 55 Pac. 1093; Burlington, etc., R. Co. *v.* Budin, 6 Colo. App. 275, 40 Pac. 503, 504; Webster Dict. [*quoted* in Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 336, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615; Boyce *v.* Chicago, etc., R. Co., 120 Mo. App. 168, 173, 96 S. W. 670].

77. Bosqui *v.* Sutro R. Co., 131 Cal. 390, 397, 63 Pac. 682; Liming *v.* Illinois Cent. R. Co., 81 Iowa 246, 251, 47 N. W. 66; Setter *v.* Maysville, 114 Ky. 60, 71, 69 S. W. 1074, 24 Ky. L. Rep. 828; Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, 149, 27 S. W. 476, 46 Am. St. Rep. 429, 25 L. R. A. 320; Hudson *v.* Wabash Western R. Co., 101 Mo. 13, 35, 14 S. W. 15; Glick *v.* Kansas City, etc., R. Co., 57 Mo. App. 97, 104; Laidlaw *v.* Sage, 158 N. Y. 73, 99, 52 N. E. 679, 44 L. R. A. 216; Roedecker *v.* Metropolitan St. R. Co., 87 N. Y. App. Div. 227, 231, 84 N. Y. Suppl. 300; Purcell *v.* Lauer, 14 N. Y. App. Div. 33, 40, 43 N. Y. Suppl. 988; Alice, etc., Tel. Co. *v.* Billingsley, 33 Tex. Civ. App. 452, 455, 77 S. W. 255; Wehner *v.* Lagerfelt, 27 Tex. Civ. App. 520, 523, 66 S. W. 221; Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 191, 16 S. E. 457, 18 L. R. A. 519; Smith *v.* Kanawha County Ct., 33 W. Va. 713, 718, 11 S. E. 1, 8 L. R. A. 82; Forwood *v.* Toronto, 22 Ont. 351, 359.

Similar definition is: "That act or omis-

sarily in time or space, but in causal relation;[78] the efficient cause; the one that necessarily sets the other causes in operation;[79] the first direct cause producing the injury;[80] the nearest, the immediate, the direct cause; the efficient cause; the cause that sets another or other causes in operation, or dominant cause.[81] (Proximate Cause: Consequences of Injury Entitling One to Compensatory Damages, see Damages, 13 Cyc. 25. Of Dominion, see Dominion, 14 Cyc. 866 note 4. Of Injury — In General, see Negligence, 29 Cyc. 488; To Servant, see Master and Servant, 26 Cyc. 1092. Of Loss, Death, or Injury as Applied to Insurance, see Accident Insurance, 1 Cyc. 273; Fire Insurance, 19 Cyc. 827; Life Insurance, 25 Cyc. 876; Marine Insurance, 26 Cyc. 662.)

PROXIMATE DAMAGES. See Damages, 13 Cyc. 25.

PROXIMUS EST CUI NEMO ANTECEDIT; SUPREMUS EST QUEM NEMO SEQUITUR. A maxim meaning "He is next whom no one precedes; he is last whom no one follows."[82]

PROXY. An authority or power to do a certain thing.[83] (Proxy: Right of Church Society as Shareholder in Building and Loan Association to Vote by, see Religious Societies. Right of Corporation as Shareholder in Building and Loan Association to Vote by Proxy, see Building and Loan Societies, 6 Cyc. 125

sion which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted," notwithstanding the latter. Chattanooga Light, etc., Co. *v.* Hodges, 109 Tenn. 331, 338, 70 S. W. 616, 97 Am. St. Rep. 844, 60 L. R. A. 459; Postal Tel.-Cable Co. *v.* Zopfi, 93 Tenn. 369, 374, 24 S. W. 633; East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. 699, 704, 20 S. W. 312, 30 Am. St. Rep. 902, 17 L. R. A. 691; Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 353, 17 S. W. 89, 13 L. R. A. 518.

78. Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 262, 32 N. E. 285, 18 L. R. A. 215; McRae *v.* Hill, 126 Ill. App. 349, 353.

Proximity in point of time or space, however, is not a part of the definition. That is of no importance, except as it may afford evidence for or against the proximity or causation. Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, 149, 27 S. W. 476, 46 Am. St. Rep. 429, 25 L. R. A. 320. See also Godwin *v.* Atlantic Coast Line R. Co., 120 Ga. 747, 751, 48 S. E. 139; Freeman *v.* Mercantile Mut. Acc. Assoc., 156 Mass. 351, 353, 30 N. E. 1013, 17 L. R. A. 753.

79. Hawthorne *v.* Siegel, 88 Cal. 159, 165, 25 Pac. 1114, 22 Am. St. Rep. 291; Atchison, etc., R. Co. *v.* Dickens, (Indian Terr. 1907) 103 S. W. 750, 755; Kremer *v.* New York Edison Co., 102 N. Y. App. Div. 433, 441, 92 N. Y. Suppl. 883 (dissenting opinion); Wheeler *v.* Norton, 92 N. Y. App. Div. 368, 373, 86 N. Y. Suppl. 1095; Turner *v.* Nassau Electric R. Co., 41 N. Y. App. Div. 213, 217, 58 N. Y. Suppl. 490; Edgar *v.* Rio Grande Western R. Co., 32 Utah 330, 340, 90 Pac. 745, 11 L. R. A. N. S. 738; Danville R., etc., Co. *v.* Hodnett, 101 Va. 361, 370, 43 S. E. 606; Ætna Ins. Co. *v.* Boon, 95 U. S. 117, 130, 24 L. ed. 395; McGill *v.* Michigan Steamship Co., 144 Fed. 788, 792, 75 C. C. A. 518; Demolli *v.* U. S., 144 Fed. 363, 366, 75 C. C. A. 365, 6 L. R. A. N. S. 424; The Germanic, 124 Fed. 1, 9, 59 C. C. A. 521.

80. Thackston *v.* Port Royal, etc., R. Co., 40 S. C. 80, 82, 18 S. E. 177.

81. Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 336, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615.

Similar definitions are: "That cause which is nearest, most immediate to, and is the direct cause of the injury complained of." Chicago, etc., R. Co. *v.* Martelle, 65 Nebr. 540, 545, 91 N. W. 364.

"The nearest or next cause, as distinguished from a remote or predisposing cause." Story *v.* Chicago, etc., R. Co., 79 Iowa 402, 406, 44 N. W. 690.

It is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. Owen *v.* Cook, 9 N. D. 134, 139, 81 N. W. 285, 47 L. R. A. 646; Yoders *v.* Amwell Tp., 172 Pa. St. 447, 460, 33 Atl. 1017, 51 Am. St. Rep. 750; Ætna Ins. Co. *v.* Boon, 95 U. S. 117, 132, 24 L. ed. 395.

Literally, the term means the cause nearest to the effect produced, but in legal terminology the terms are not confined to their literal meaning. Gulf, etc., R. Co. *v.* Rowland, 90 Tex. 365, 370, 38 S. W. 756; Central Texas, etc., R. Co. *v.* Hoard, (Tex. Civ. App. 1908) 49 S. W. 142, 143.

"An act is the proximate cause of an event, when, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result, the *causa causans* of the schoolmen." Beach Contributory Neg. [*quoted* in Oakland Sav. Bank *v.* Murfey, 68 Cal. 455, 462, 9 Pac. 843].

82. Black L. Dict. [*citing* Dig. 50, 16, 92].

83. Tunis *v.* Hestonville, etc., Pass. R. Co., 149 Pa. St. 70, 84, 24 Atl. 88, 15 L. R. A. 665. See also *In re* English, etc., Chartered Bank, [1893] 3 Ch. 385, 409, 62 L. J. Ch. 825, 69 L. T. Rep. N. S. 268, 2 Reports 574, 42 Wkly. Rep. 4, as meaning some agent properly appointed.

note 43. Voting by, see BANKRUPTCY, 5 Cyc. 321; CORPORATIONS, 10 Cyc. 338, 776; INSOLVENCY, 22 Cyc. 1278 note 49.)

PRUDENCE. That degree of care required by the exigencies or circumstances under which it is to be exercised.[84]

PRUDENT. Cautious and wise in measures and conduct.[85]

PRUDENTIAL AFFAIRS. A term in use in the statutes of the New England states in reference to municipal corporations, and embracing that large class of miscellaneous subjects for the accommodation and convenience of the inhabitants, which have been placed under the municipal jurisdiction of towns, by statute or by usage.[86]

PRUNE. To lop off superfluous twigs or branches, as from a vine, bush, or tree.[87]

PT. An abbreviation for PART,[88] *q. v.* (See PART, 29 Cyc. 1694.)

PTOMAINE. A poisonous product of putrefaction.[89]

PUBLIC. As a noun, the whole body politic; all the inhabitants of a particular place;[90] the body of the people at large; the people of the neighborhood; the community at large; the people;[91] the whole body politic, or all the citizens of

84. Anderson L. Dict. [*quoted* in Cronk *v.* Chicago, etc., R. Co., 3 S. D. 93, 98, 52 N. W. 420].

Sometimes synonymous with "judgment" see Garneau Cracker Co. *v.* Palmer, 28 Nebr. 307, 311, 44 N. W. 463.

85. Worcester Dict. [*quoted* in Mahler *v.* Dunn, 15 Pa. Dist. 273, 276].

A synonym of "cautious" see Mahler *v.* Dunn, 15 Pa. Dist. 273, 276. See 6 Cyc. 706.

Prudent person.—As used in an instruction that "ordinary care and caution is such as a prudent person would exercise under the same or similar circumstances," the term means the average prudent person or the ordinarily prudent person, and the omission of the word "ordinarily" before the expression "prudent person" does not make the instruction erroneous. Texas, etc., R. Co. *v.* Black, (Tex. Civ. App. 1898) 44 S. W. 672, 675. May mean a person of more than ordinary prudence. La Prelle *v.* Fordyce, 4 Tex. Civ. App. 391, 394, 23 S. W. 453.

86. Willard *v.* Newburyport, 12 Pick. (Mass.) 227, 231.

"In the ordinary signification of the term is intended the transaction of business on behalf of the town, requiring the exercise of discretion and prudence." New London *v.* Davis, 73 N. H. 72, 76, 59 Atl. 369; Sumner *v.* Dalton, 58 N. H. 295, 297.

Construed as used in particular statutes.—Where a legislature by statute authorized municipalities to adopt ordinances for purposes named in twelve separate paragraphs, and paragraph one provided "for managing their prudential affairs," it was held that while the words "prudential affairs" are very indefinite and unsatisfactory, they were not intended to cover the matters enumerated in the other paragraphs of the section. State *v.* Boardman, 93 Me. 73, 77, 78, 44 Atl. 118, 46 L. R. A. 750. Under a statute providing that the selectmen "shall have the ordering and managing of all the prudential affairs of the town," the term includes the assessment and collection of taxes (Pike *v.* Middleton, 12 N. H. 278, 282); under this statute a selectman may discharge, in behalf of the town, debts which are due and of such a character that they should be paid (Sanborn *v.* Deerfield, 2 N. H. 251, 252); or institute a suit in favor of their town to recover back illegal interest (Albany *v.* Abbott, 61 N. H. 157, 159); but he has no authority, under this general power, to adjust controversies or suits of the corporation; or to bind them to the payment of money for such an adjustment by a written contract (Underhill *v.* Gibson, 2 N. H. 352, 355, 9 Am. Dec. 82); or to borrow money upon the credit of the town without a vote of the town (Rich *v.* Errol, 51 N. H. 350, 354, 357).

87. Century Dict.

"To prune and cultivate an orchard according to the best horticultural methods, would require the doing of all those things which are essential to keep the trees in a good condition and preserve their fruit-bearing qualities, which would include the cutting off of suckers and water-sprouts when necessary to the health of the trees, as well as the taking of proper steps to remove insects pests, which sapped their lives, when the trees are so infested." Anderson *v.* Hammon, 19 Oreg. 446, 449, 24 Pac. 228, 20 Am. St. Rep. 832.

88. Jackson *v.* Cummings, 15 Ill. 449, 453; Blakeley *v.* Bestor, 13 Ill. 708, 715; Hunt *v.* Smith, 9 Kan. 137, 153.

89. People *v.* Buchanan, 145 N. Y. 1, 11, 39 N. E. 846.

90. Loraine *v.* Pittsburg, etc., R. Co., 27 Pa. Co. Ct. 359, 361.

Consists of the entire community; persons who pay taxes and persons who do not. Knight *v.* Thomas, 93 Me. 494, 500, 45 Atl. 499.

91. Anderson L. Dict. [*quoted* in Wyatt *v.* Lariner, etc., Irr. Co., 1 Colo. App. 480, 29 Pac. 906, 911].

A synonym of "people." Wyatt *v.* Lariner, etc., Irr. Co., 1 Colo. App. 480, 29 Pac. 906, 911.

As used in the law relating to nuisances the term means "those who reside in definite municipal boundaries, entitled to the protection of the local laws and to be represented by the local officers." With respect to the

the state;[92] the inhabitants of a particular place.[93] As an adjective, pertaining to, or belonging to, the people; relating to a nation, state, or community;[94] open to all the people; shared in or to be shared or participated in or enjoyed by people at large; not limited or restricted to any particular class of the community;[95] of or pertaining to the people; belonging to the people.[96] The word is used variously, depending for its meaning upon the subjects to which it is applied."[97]

collective body in whose behalf a prosecution to abate a common nuisance must be brought, the term means those who come in contact with the nuisance and are annoyed thereby. Jones *v.* Chanute, 65 Kan. 243, 246, 65 Pac. 243.

"The term . . . does not mean all the people, nor most of the people, nor very many of the people of a place; but so many of them as contradistinguishes them from a few." State *v.* Luce, 9 Houst. (Del.) 396, 399, 32 Atl. 1076; U. S. *v.* Luce, 141 Fed. 385, 392.

92. Bouvier L. Dict. [*quoted* in Wyatt *v.* Lariner, etc., Irr. Co., 1 Colo. App. 480, 29 Pac. 906, 911; South Highland, etc., Co. *v.* Kansas City, 172 Mo. 523, 534, 72 S. W. 944].

93. Bouvier L. Dict. [*quoted* in South Highland, etc., Co. *v.* Kansas City, 172 Mo. 523, 534, 72 S. W. 944].

94. State *v.* Whitesides, 30 S. C. 579, 585, 9 S. E. 661, 3 L. R. A. 777.

But to make a matter a public matter, it need not pertain to the whole nation or state. It is sufficient if it pertains to any separate or distinct portion thereof or community. State *v.* Whitesides, 30 S. C. 579, 585, 9 S. E. 661, 3 L. R. A. 777.

95. Century Dict. [*quoted* in South Highland Land, etc., Co. *v.* Kansas City, 172 Mo. 523, 534, 72 S. W. 944].

96. Webster Dict. [*quoted* in State *v.* Bryan, 50 Fla. 293, 384, 39 So. 929].

"The word . . . has two proper meanings.— A thing may be said to be public when owned by the public, and also when its uses are public." Hennepin County *v.* Gethsemane Brotherhood, 27 Minn. 460, 462, 8 N. W. 595, 38 Am. Rep. 298. See also O'Hara *v.* Miller, 1 Kulp (Pa.) 288, 295.

97. Morgan *v.* Cree, 46 Vt. 773, 786, 14 Am. Rep. 640.

"Public" and "general" are sometimes used as synonymous, meaning, merely, that which concerns a multitude of persons. Greenleaf Ev. [*quoted* in Stockton *v.* Williams, 1 Dougl. (Mich.) 546, 570].

Distinguished from "private." Webster Dict. [*quoted* in Chamberlain *v.* Burlington, 19 Iowa 395, 403].

The term signifies that which is open for general or common use or entertainment, as a public highway or road, a public house. Austin *v.* Soule, 36 Vt. 645, 648.

It is "a convertible term, and when used in an act of assembly may refer to the whole body politic; that is to say, to all the inhabitants of the state, or to the inhabitants of a particular place only; it may be properly applied to the affairs of the state or of a county or of a community. . . . The word . . . in its most comprehensive sense, is the opposite of private." Huston Tp. Poor Dist. *v.* Benezette Tp. Poor Dist., 135 Pa. St. 393, 398, 19 Atl. 1060.

As used in a statute authorizing and perpetuating grants for religious, public, and charitable uses, the term was not used in its technical sense, as referring to the public at large, but in its more natural sense, to distinguish the use provided for from a private charity for the benefit of some arbitrary class, set apart without reference to the good of others. The fact that relief provided for in a will is confined to members of one or two particular churches of a particular denomination does not make the bequest subject to the rules against perpetuities. Eliot's Appeal, 74 Conn. 586, 606, 51 Atl. 558.

"Some of the affairs of a railroad company are public and some are private. . . . The safety of a bridge on the line is a subject of public moment. The public, in this sense, is a number of persons who are or will be interested, and yet who are at present unascertainable. All the future passengers on the road are the public, in respect to the safety of the bridge." Crane *v.* Waters, 10 Fed. 619, 621.

Under a statute providing "that the funeral and other expenses of the last sickness, charges of probate of the will, or of letters of administration, [of a testator or intestate] shall be first paid; next, debts due to the public," &c., a "debt due to the public" is one in which the state has an interest. A debt due to a bank is not such a debt even though the bank is owned by the state. State Bank *v.* Gibbs, 3 McCord (S. C.) 377.

Used in connection with other words.— "Public acknowledgment" see *In re* Jessup, 81 Cal. 408, 424, 21 Pac. 976, 22 Pac. 742, 6 L. R. A. 549; Crane *v.* State, 94 Tenn. 86, 94, 28 S. W. 317. "Public action" see Ketchum *v.* Buffalo, 14 N. Y. 356, 371. "Public address" see Com. *v.* Davis, 162 Mass. 510, 512, 39 N. E. 113, 44 Am. St. Rep. 389, 26 L. R. A. 712. "Public applicants for aid" see Matter of Ward, 20 N. Y. Suppl. 606, 611, 29 Abb. N. Cas. 187. "Public assembly" see Smith *v.* State, 63 Ala. 55, 56; Summerlin *v.* State, 3 Tex. App. 444, 446. "Public benefit" see Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45, 73, 22 Am. Dec. 679 note; Tyler *v.* Beacher, 44 Vt. 648, 652, 8 Am. Rep. 398; Curtis *v.* Whipple, 24 Wis. 350, 354, 1 Am. Rep. 187; Rex *v.* Russell, 6 B. & C. 566, 594, 9 D. & R. 566, 5 L. J. M. C. O. S. 80, 30 Rev. Rep. 432, 13 E. C. L. 258. "Public body" see Harris *v.* Whiteside County, 105 Ill. 445, 451, 44 Am. Rep. 808. "Public business" see Howes *v.* Abbott, 78 Cal. 270, 272; Gregg *v.* Matlock, 31 Ind. 373, 375; Slater *v.* Schack, 41 Minn.

(Public: Act, see Statutes. Administrator, see Executors and Administrators, 18 Cyc. 114. Aid, see Public Aid, and Cross-References Thereunder. Amusement, see Theaters and Shows. Assemblage, see Constitutional Law, 8 Cyc. 894; Disturbance of Public Meetings, 14 Cyc. 539; Unlawful Assembly. Auction, see Auctions and Auctioneers, 4 Cyc. 1037. Building, see Public Building, and Cross-References Thereunder. Carrier, see Carriers, 6 Cyc. 352. Charity, see Charities, 6 Cyc. 895. Contempt, see Contempt, 9 Cyc. 1. Contract, see Public Contract, and Cross-References Thereunder. Conveyance, see Conveyance, 9 Cyc. 863 note 34. Corporation, see Public Corporation, and Cross-References Thereunder. Criticism, see Libel and Slander, 25 Cyc. 375. Crossing, see Railroads. Debt, see Public Debt, and Cross-References Thereunder. Defamation, see Divorce, 14 Cyc. 627. Department, see Public Department. Detective, see Public Detective. Document, see Evidence, 17 Cyc. 296 note 38. Domain, see Public Lands, *post*, p. 759. Drain, see Drains, 14 Cyc. 1023. Easement, see Easements, 14 Cyc. 1142; Navigable Waters, 29 Cyc. 285; Streets and Highways; Wharves. Enemy, see Enemy, 15 Cyc. 1046. Examiner, see Banks and Banking, 5 Cyc. 600; States. Exhibition, see Theaters and Shows. Ferry, see Ferries, 19 Cyc. 492. Franchise, see Franchises, 19 Cyc. 1451. Funds, see Public Funds, and Cross-References Thereunder. Grant, see Public Grant, and Cross-References Thereunder. Ground, see Public Ground, and Cross-References Thereunder. Hackman, see Carriers, 8 Cyc. 352. Health, see Health, 21 Cyc. 382. Highway, see Streets and Highways. Holiday, see Holidays, 21 Cyc. 440. House, see Innkeepers, 22 Cyc. 1068. Ignominy, see Public Ignominy. Improvement, see Public Improvement, and Cross-References Thereunder. Indecency, see Obscenity, 29 Cyc. 1314. Injury to Private Rights in Course of Works of Incidental Benefit to, see Actions, 1 Cyc. 653. Institution, see Public Institutions. Interest, see Libel and Slander, 25 Cyc. 400. Interest, Destruction of Property in, see Actions, 1 Cyc. 654. Landing, see Public Landing. Lands, see Public Lands, *post*, p. 759. Law, see Statutes. Letting, see Public Letting, and Cross-References Thereunder. Library, see Public Library. Lots, see Public Lots. Meeting, see Constitutional Law, 8 Cyc. 894; Disturbance of Public Meetings, 14 Cyc. 539; Unlawful Assembly. Minister, see Ambassadors and Consuls, 2 Cyc. 259. Money, see Public Money, and Cross-References Thereunder. Morals, see Public Morals, and Cross-References Thereunder. Navigable Waters, see Navigable Waters, 29 Cyc. 285. Necessity, see Public Necessity, and Cross-References Thereunder. Newspaper, see Newspapers, 29 Cyc. 692. Notice, see Notice, 29 Cyc. 1110. Nuisance, see Nuisances, 29 Cyc. 1143. Offense, see Public Offense, and Cross-References Thereunder. Officer, see Officers, 29 Cyc. 1356, and Cross-References Thereunder. Park, see Municipal Corporations, 28 Cyc. 935; Park, 29 Cyc. 1684. Peace, see Public Peace, and Cross-References Thereunder. Performance, see Theaters and Shows. Place, see Public Place, and Cross-References Thereunder. Policy, see Public Policy, and Cross-References Thereunder. Printing, see Public Printing, and Cross-References Thereunder. Property, see Public Property, and Cross-References Thereunder. Prosecutor, see Prosecuting and District Attorneys, *ante*, p. 687. Protection of in General by Injunction, see Injunctions, 22 Cyc. 897. Purpose, Adverse Possession by Occupant For, see Adverse Possession, 1 Cyc. 1082. Purposes, see Public Purposes, and Cross-References Thereunder. Quarters, see Public Quarters. Recitation, see Public Recitation. Record, see Records. Representation, see Public Representation. Revenue, see Public Revenue, and Cross-References Thereunder. Right, Abandonment of, see Abandonment, 1 Cyc. 5. River, see Public River. Road, see Streets and Highways. Safety, see Public Safety, and Cross-References Thereunder. Sale, see Public Sale, and Cross-References Thereunder. School, see Schools and School-Districts. Security, see Public Security. Sentiment, see Public

Sentiment. Servant, see Officers, 29 Cyc. 1356, and Cross-References Thereunder. Service Corporation, see Public Service Corporation, and Cross-References Thereunder. Sewer, see Public Sewer. Society, see Public Society. Sport, see Public Sport. Square, see Public Square. Statute, see Statutes. Swearing, see Profanity, *ante*, p. 578. Taxes, see Public Taxes. Trial, see Public Trial. Trust, see Public Trust. Trust, Injury to Private Rights in Execution of, see Actions, 1 Cyc. 648. Use, see Public Use, and Cross-References Thereunder. Vehicle, see Licenses, 25 Cyc. 616. War, see War. Warehouseman, see Warehousemen. Waters, see Navigable Waters, 29 Cyc. 285; Waters. Water-Supply, see Municipal Corporations, 28 Cyc. 615, 636; Waters. Way, see Municipal Corporations, 28 Cyc. 823, 1340; Pent Roads, 30 Cyc. 1379; Private Roads, *ante*, p. 363; Streets and Highways. Welfare, see Public Welfare, and Cross-References Thereunder. Wharf, see Wharves. Work, see Public Work. Works, see Public Works, and Cross-References Thereunder. Worship, see Public Worship, and Cross-References Thereunder. Writing, see Public Writing. Wrong, see Public Wrong. See also Private, and Cross-References Thereunder.)

PUBLIC ACT. See Statutes.

PUBLIC ADMINISTRATOR. See Executors and Administrators, 18 Cyc. 114.

PUBLIC AGENT. One that acts in behalf of the government or some department thereof, and who has no principal whom he can legally bind.[98]

PUBLICATION. The act by which a thing is made public;[99] the act of publishing or making public;[1] the act of publishing or making known; notification to the people at large, either by words, writing or printing;[2] divulgation; that which

269, 43 N. W. 7; Wickenden *v.* Webster, 6 E. & B. 387, 391, 2 Jur. N. S. 590, 25 L. J. Q. B. 264, 4 Wkly. Rep. 562, 88 E. C. L. 387. "Public character" see Corliss *v.* E. W. Walker Co., 64 Fed. 280, 282, 31 L. R. A. 283. "Public commons" see McManaway *v.* Crispin, 22 Ind. App. 368, 53 N. E. 840, 841. "Public company" see Nicholls *v.* Rosewarne, 6 C. B. N. S. 480, 5 Jur. N. S. 1266, 28 L. J. C. P. 273, 7 Wkly. Rep. 612, 95 E. C. L. 480, 493. "Public concern" see People *v.* Nichols, 52 N. Y. 478, 482, 11 Am. Rep. 734. "Public convenience requires" see Hunter *v.* Newport, 5 R. I. 325, 328. "Public corporate bodies" see Parke *v.* Pittsburgh, 1 Pittsb. (Pa.) 218, 221. "Public cotton seed buyer" see Johnson *v.* Jennings, 72 Miss. 349, 351, 16 So. 791; Jones *v.* State, 69 Miss. 406, 407, 13 So. 728. "Public crossing" see Galveston, etc., R. Co. *v.* Kief, (Tex. Civ. App. 1901) 58 S. W. 625, 626. "Public defamation" see Ashton *v.* Grucker, 48 La. Ann. 1194, 1199, 20 So. 738. "Public dues" see Anderson *v.* Thompson, 10 Bush (Ky.) 132, 136; Bolling *v.* Stokes, 2 Leigh (Va.) 178, 181, 21 Am. Dec. 606. "Public duty or function" see Strohmeyer *v.* Consumers' Electric Co., 111 La. 506, 509, 35 So. 703. "Public elective office" see State *v.* Sheppard, 192 Mo. 497, 509, 91 S. W. 477. "Public emoluments or privileges" see Williams *v.* Cammack, 27 Miss. 209, 218, 61 Am. Dec. 508. "Public expense" see Fisk *v.* Cuthbert, 2 Mont. 593, 596. "Public footway" see Boston, etc., R. Co. *v.* Boston, 140 Mass. 87, 2 N. E. 943. "Public injury" see Mountclair Military Academy *v.* North Jersey St. R. Co., 65 N. J. L. 328, 336, 47 Atl. 890. "Public inspection" see Marsh *v.* Sanders, 110 La. 726, 732, 34 So. 752; State *v.* Citizens' Bank, 51 La. Ann. 426, 430, 25 So. 318; State *v.* New Orleans Gas-light Co., 49 La. Ann. 1556, 1558, 22 So. 815. "Public journal" see Hopt *v.* Utah, 120 U. S. 430, 435, 7 S. Ct. 614, 30 L. ed. 708. "Public resort" see Bandalow *v.* People, 90 Ill. 218, 220; State *v.* Spaulding, 61 Vt. 505, 512, 17 Atl. 844; Shaw *v.* Carpenter, 54 Vt. 155, 161, 41 Am. Rep. 837; Sewell *v.* Taylor, 7 C. B. N. S. 160, 162, 6 Jur. N. S. 582, 29 L. J. M. C. 50, 1 L. T. Rep. N. S. 37, 8 Wkly. Rep. 26, 97 E. C. L. 160. "Public trade or employment" see Brown *v.* Shevill, 2 A. & E. 138, 144, 4 L. J. K. B. 50, 4 N. & M. 277, 29 E. C. L. 82.

98. Ives *v.* Hulet, 12 Vt. 314, 320.

99. Bouvier L. Dict. [*quoted* in Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369].

The term in its ordinary and popular sense has a narrower meaning than its technical legal meaning, which, in the law of libel, embrances the entire means whereby libelous matter is made public. Wheaton *v.* Beecher, 79 Mich. 443, 446, 44 N. W. 927.

1. Webster Dict. [*quoted* in Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369].

2. State *v.* Grey, 21 Nev. 378, 381, 32 Pac. 190, 19 L. R. A. 134; Webster Dict. [*quoted* in Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369].

More than printing.—As used in a state constitution directing that the legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as may be deemed expedient, the term cannot be

is published or made known; an act done in public; [3] notifying or printing; proclamation; divulgation; promulgation; [4] issuing; sending out; placing on sale; [5] putting forth; issuing to the public; [6] the act of offering a book to the public by sale or distribution; [7] something — as a book or print — which has been published, made public or known to the world; [8] a book or writing published, especially one offered for sale or to public notice.[9] (Publication: In General, see Newspapers, 29 Cyc. 692. Advertisement — As Equivalent of Memorandum in Writing Required by Statute of Frauds, see Frauds, Statute of, 20 Cyc. 254 note 63; Of Loss by Person Suing on Lost Instrument, see Lost Instruments, 25 Cyc. 1619. Best and Secondary Evidence, see Evidence, 17 Cyc. 496. Collateral Attack on Judgment Based on Defects in Service by, see Judgments, 23 Cyc. 1076. Constituting Contempt of Court, see Contempt, 9 Cyc. 20. Contracts For, see Newspapers, 29 Cyc. 701. Injunction Against Publication of — Black List, see Labor Unions, 24 Cyc. 837 note 87; Private Writings, see Injunctions, 22 Cyc. 899. In Official Newspapers, see Newspapers, 29 Cyc. 692. Judgment on Service by, see Executions, 17 Cyc. 931. Matters Admitted by Default Judgment Where Service Is by, see Judgments, 23 Cyc. 753. Necessity and Sufficiency of Notice to Parties to Be Bound by Judgment In Rem, see Judgments, 23 Cyc. 1407. Obscene, see Obscenity, 29 Cyc. 1318. Of Annual Report of Officers of Corporation, see Corporations, 10 Cyc. 866. Of Award of Arbitrators, see Arbitration and Award, 3 Cyc. 670. Of Certificate, Affidavit, or Notice of Formation of Limited Partnership, see Partnership, 30 Cyc. 754. Of Copyrighted Works, see Copyright, 9 Cyc. 920. Of Correspondence and of Information From Reports of Mercantile Agencies, see Injunctions, 22 Cyc. 1016 note 20. Of Counterfeit, see Counterfeiting, 11 Cyc. 308. Of Delinquent List, see Taxation. Of Depositions After Return, see Depositions, 13 Cyc. 967. Of Facts as Constructive Notice Thereof, see Notice, 29 Cyc. 1116. Of Firm-Name, see Partnership, 30 Cyc. 420. Of Forged Instrument, see Forgery, 19 Cyc. 1388. Of Immoral Character as to Procurement of Abortions, see Abortion, 1 Cyc. 178. Of Libel or Slander, see Libel and Slander, 25 Cyc. 365. Of List of Jurors Summoned, see Juries, 24 Cyc. 222. Of Marriage Banns, see Marriage, 26 Cyc. 850. Of Municipal Ordinance, see Municipal Corporations, 28 Cyc. 359. Of Nominations, see Elections, 15 Cyc. 336. Of Notice — In General, see Notice, 29 Cyc. 1119; In Proceedings to Appoint Administrators, see Executors and Administrators, 18 Cyc. 120; Of Appeal, see Appeal and Error, 2 Cyc. 871; Of Application For Discharge of Poor Debtor, see Executions, 17 Cyc. 1555 note 90; Of Application For Liquor License, see Intoxicating Liquors, 23 Cyc. 127; Of Assessments For Benefits From Public Improvements, see Municipal Corporations, 28 Cyc. 1148; Of Attachment Proceedings, see Attachment, 4 Cyc. 815; Of Dissolution of Firm, see Partnership, 30 Cyc. 671; Of Election, see Elections, 15 Cyc. 324; Of Election Under Local Option Law, see Intoxicating Liquors, 23 Cyc. 99; Of Entry on Mortgaged Premises or Condition Broken, see Mortgages, 27 Cyc. 1441; Of Execution Sale, see Executions, 17 Cyc. 1245; Of Foreclosure

confined to the limited signification of mere printing, but comprehends the exercise of additional labor and skill, as for instance, that the general laws which cannot be enforced until published, shall be published in the public journals, that being the most speedy method, or in pamphlet form, that being the more convenient for many purposes; or even by proclamation at the door of the court-house in each county, and that the whole body of the laws and the decisions of the supreme court shall be published in the more permanent form of a bound book — that is, the provision implies discretion as to method. Sholes *v.* State, 2 Pinn. (Wis.) 499, 511, 2 Chandl. 182.

3. Webster Dict. [*quoted* in U. S. *v.* Comerford, 25 Fed. 902, 903].

4. State *v.* Grey, 21 Nev. 378, 381, 32 Pac. 190, 19 L. R. A. 134.

5. Standard Dict. [*quoted* in Mooney *v.* U. S. Industrial Pub. Co., 27 Ind. App. 407, 61 N. E. 607, 608].

6. Worcester Dict. [*quoted* in Mooney *v.* U. S. Industrial Pub. Co., 27 Ind. App. 407, 61 N. E. 607, 608].

7. Webster Dict. [*quoted* in Mooney *v.* U. S. Industrial Pub. Co., 27 Ind. App. 407, 61 N. E. 607, 608].

8. U. S. *v.* Loftus, 12 Fed. 671, 673, 8 Sawy. 194.

9. U. S. *v.* Williams, 3 Fed. 484, 486.

Sale, see MORTGAGES, 27 Cyc. 1690; Of Judicial Sale, see JUDICIAL SALES, 24 Cyc. 18; Of Proceedings on Reference to Take Account, see REFERENCES; Of Proposed Public Improvements or Resolution, see MUNICIPAL CORPORATIONS, 28 Cyc. 983; Of Sale of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 731; Of Sale Under Power in Mortgage, see MORTGAGES, 27 Cyc. 1471; Of Tax-Sale, see TAXATION; To Redeem From Tax-Sale, see TAXATION; To Take Deposition, see DEPOSITIONS, 13 Cyc. 912. Of Order —Appointing Special Term of Court, see COURTS, 11 Cyc. 731; Of Court, see ORDERS, 29 Cyc. 1518. Of Ordinance or Resolutions of County Board, see COUNTIES, 11 Cyc. 402. Of Ordinances, Resolutions, or Orders For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 359. Of Proceedings For Sale of Land For Assessments For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1232. Of Process — In General, see PROCESS; As Commencement of Lis Pendens, see LIS PENDENS, 25 Cyc. 1465; In Action Against Infant, see INFANTS, 22 Cyc. 679; In Action in Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 524; In Garnishment Proceeding, see GARNISHMENT, 20 Cyc. 1056; To Sustain the Decree Pro Confesso, see EQUITY, 16 Cyc. 490. Of Proposed Constitutional Amendments, see CONSTITUTIONAL LAW, 8 Cyc. 723. Of Special Municipal Charters or Acts, see MUNICIPAL CORPORATIONS, 28 Cyc. 155. Of Testimony in Equity Taken by Depositions, see EQUITY, 16 Cyc. 376. Of Will, see WILLS. Patentability of Invention Formerly Described in Printed Publication, see PATENTS, 30 Cyc. 830. Printed Publication as Evidence, see EVIDENCE, 17 Cyc. 421. Proof of Publication of — Citation or Notice in Proceedings For Sale of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 731; Notice of Sale by Guardian Under Order of Court, see GUARDIAN AND WARD, 21 Cyc. 134 note 45. Right to Control Publication of Literary Property, and Dedication Thereof to Public by Publication Thereof, see LITERARY PROPERTY, 25 Cyc. 1495. Right to Defend After Judgment on Service of Publication, see JUDGMENTS, 23 Cyc. 915. Right to Mandamus to Compel Publication of Laws, Records, and Official Statements, see MANDAMUS, 26 Cyc. 242. Time For —Application to Open or Set Aside Default Judgment Against Non-Resident Where Service Is by, see JUDGMENTS, 23 Cyc. 915; Taking Judgment by Default Where Service Is by Publication, see JUDGMENTS, 23 Cyc. 756. See also PUBLISH.)

PUBLIC AUCTION. See AUCTIONS AND AUCTIONEERS, 4 Cyc. 1037.

PUBLIC BLOCKADES. See WAR.

PUBLIC BOUNDARY. See BOUNDARIES, 5 Cyc. 869.

PUBLIC BRIDGE. See BRIDGES, 5 Cyc. 1052 note 2.

PUBLIC BUILDING. A building erected and owned by state, county, or municipal authorities;[10] a building owned or controlled, and held by the public authorities for public use.[11] (Public Building: In General, see COUNTIES, 11 Cyc.

10. McIntyre *v.* El Paso County, 15 Colo. App. 78, 61 Pac. 237, 240.

11. Brown *v.* State, 16 Tex. App. 245, 248.

A bridge is a public building.—Arnell *v.* London, etc., R. Co., 12 C. B. 697, 717, 74 E. C. L. 697.

An engine-house owned and occupied by a fire company, and situated on private land is not a public building within the meaning of the statute prohibiting the pulling down of "any dwelling-house, market-house, or other public building heretofore erected," for the purpose of opening a road. State *v.* Troth, 34 N. J. L. 377, 381.

An infirmary is a public building within the meaning of the statute providing that public buildings shall be free from all parliamentary and parochial taxes, etc. Bedford Gen. Infirmary *v.* Bedford Imp. Com'rs, 7 Exch. 768, 21 L. J. M. C. 224, 14 Eng. L. & Eq. 424, 425.

In a city charter authorizing the purchase of public buildings, etc., the term "public buildings" does not include schoolhouses, where schoolhouses are otherwise mentioned in this section of the charter. Field *v.* Bayonne, 49 N. J. L. 308, 310, 8 Atl. 114.

Injuring or defacing "public building."—Under a statute making it an offense punishable by fine to wilfully injure or deface any public building in the state, the term means the capitol and all other buildings in the capitol grounds at the seat of government, including the general land office and the executive mansion, the various state asylums and all buildings belonging to either; all college or university buildings erected by

460; District of Columbia, 14 Cyc. 532; Municipal Corporations, 28 Cyc. 922; School and School-Districts; States; Territories; Towns; United States. Court House, see Courts, 11 Cyc. 738. Department of, see Municipal Corporations, 28 Cyc. 539. Exemption From Appropriation Under Eminent Domain Proceeding, see Eminent Domain, 15 Cyc. 604. Mechanic's Lien on, see Mechanics' Liens, 27 Cyc. 25. Validity of Contract to Procure Location of, see Contracts, 9 Cyc. 490.)

PUBLIC CARRIER. See Carriers, 6 Cyc. 364.

PUBLIC CHARITY. See Charities, 6 Cyc. 902.

PUBLIC CONTRACT. One to which the state is a party and which concerns all its citizens.[12] (Public Contract: In General, see Bridges, 5 Cyc. 1066; Counties, 11 Cyc. 467; District of Columbia, 14 Cyc. 536; Drains, 14 Cyc. 1052; Municipal Corporations, 28 Cyc. 633; Schools and School-Districts; States; Streets and Highways; Territories; Towns; United States. Validity of — In Which Officer Has Personal Interest, see Contracts, 9 Cyc. 493 note 84; To Influence Public Officer in Granting Contract, see Contracts, 9 Cyc. 490; To Prevent Competition For Public Contract, see Contracts, 9 Cyc. 491.)

PUBLIC CONVEYANCE. See Conveyance, 9 Cyc. 863 note 34.

PUBLIC CORPORATION. A corporation formed or organized for the government of a portion of the state;[13] a corporation which has for its object the government of a portion of the state;[14] any corporation intended as an agency in the administration of civil government;[15] one that is created for political purposes, with political powers to be exercised for purposes connected with the public good in the administration of civil government, an instrument of the government, subject to the control of the legislature;[16] one which is founded for public, although not political or municipal purposes;[17] the embodiment of political power for the purposes of public government.[18] Such corporations are towns, cities, counties, parishes, and the like.[19] (Public Corporation: In General, see Counties, 11 Cyc.

the state, all courthouses and jails, and all other buildings held for public use by any department or branch of government, state, county, or municipal and other buildings not named properly coming within the meaning and description of a public building. Brown *v.* State, 16 Tex. App. 245, 247. See also Yolo County *v.* Barney, 79 Cal. 375, 380, 21 Pac. 833, 12 Am. St. Rep. 152. Under a similar statute a church is not a public building. Collum *v.* State, 109 Ga. 531, 35 S. E. 121.

"Reserved for 'public buildings'" as used in a dedication by plat of land laid out into lots see McIntyre *v.* El Paso County, 15 Colo. App. 78, 61 Pac. 237, 240.

Under a local act imposing a certain rate on "all halls, gaols, chapels, meeting-houses, schools, alms-houses, and other public buildings," the term public buildings includes an infirmary for sick persons, because it is a building devoted to public purposes. And those buildings which are not devoted to public purposes are to be rated as private buildings. Bedford Gen. Infirmary *v.* Bedford Imp. Com'rs, 7 Exch. 768, 775, 21 L. J. M. C. 224, 14 Eng. L. & Eq. 424.

When term applied exclusively to buildings of the state see Babcock *v.* Goodrich, 47 Cal. 488, 510.

12. People *v.* Palmer, 14 Misc. (N. Y.) 41, 45, 35 N. Y. Suppl. 222.

13. Dean *v.* Davis, 51 Cal. 406, 409.

14. Dean *v.* Davis, 51 Cal. 406, 409; Cleaveland *v.* Stewart, 3 Ga. 283, 291; Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544.

15. People *v.* McAdams, 82 Ill. 356, 361.

16. Downing *v.* Indiana Agriculture State Bd., 129 Ind. 443, 450, 28 N. E. 123, 12 L. R. A. 664; Baltimore *v.* Keeley Inst., 81 Md. 106, 115, 31 Atl. 437, 27 L. R. A. 646; Wooster *v.* Plymouth, 62 N. H. 193, 209.

17. Cleaveland *v.* Stewart, 3 Ga. 283, 291.

18. Wooster *v.* Plymouth, 62 N. H. 193, 209.

19. Spalding *v.* People, 172 Ill. 40, 48, 49 N. E. 993; State Bd. of Education *v.* Bakewell, 122 Ill. 339, 344, 10 N. E. 378; Armstrong *v.* Dalton, 15 N. C. 568, 570; Wheeling *v.* Campbell, 12 W. Va. 36, 37; Burhop *v.* Milwaukee, 21 Wis. 257, 260; Dartmouth College *v.* Woodruff, 4 Wheat. (U. S.) 518, 668, 4 L. ed. 629; Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205; Sweatt *v.* Boston, etc., R. Co., 23 Fed. Cas. No. 13,684, Nat. Bankr. Rep. 234. See also Counties, 11 Cyc. 325; Municipal Corporations, 28 Cyc. 55; Towns.

Distinguished from "municipal corporations see Coyle *v.* McIntyre, 7 Houst. (Del.) 44, 89, 30 Atl. 728, 40 Am. St. Rep. 109; Dillon Mun. Corp. [*quoted* in Knowles *v.* Topeka Bd. of Education, 33 Kan. 692, 697, 7 Pac. 561; Brown *v.* Newport Bd. of Education, 108 Ky. 783, 787, 57 S. W. 612, 22 Ky. L. Rep. 483].

325; Municipal Corporations, 28 Cyc. 55; Schools and School-Districts; Towns. Distinguished From Private Corporation, see Corporations, 10 Cyc. 157; Municipal Corporations, 28 Cyc. 127. Drainage or Reclamation District, see Drains, 14 Cyc. 1026. Irrigation District, see Waters. Levee District, see Levees, 26 Cyc. 194. Liability to Federal Taxation, see Internal Revenue, 22 Cyc. 1602.)

PUBLIC DEBT. A national or state obligation; a public security; rarely, if ever, the obligation of a town;[20] that which is due or owing by the govern-

Synonymous with the terms "municipal corporation" or "political corporation" see Curry *v.* Sioux City Dist. Tp., 62 Iowa 102, 104, 17 N. W. 191; Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544; Cook *v.* Portland, 20 Oreg. 580, 585, 27 Pac. 263, 13 L. R. A. 533.

Railroads, canals, and gas companies must have the right of eminent domain in order to perform their functions. St. Mary's Gas Co. *v.* Elk County, 191 Pa. St. 458, 462, 43 Atl. 321; Alleghany County *v.* McKeesport Diamond Market, 123 Pa. St. 164, 169, 16 Atl. 619.

A corporation is public when it must give all persons the same measure of service for the same measure of money. State *v.* Towers, 71 Conn. 657, 665, 42 Atl. 1083. Public or municipal corporations are not associations, but are subdivisions of the state. The charter of such a corporation is not a contract between the corporation and the state, nor between the corporators themselves. The effect of an act of the legislature incorporating a municipality is to invest the governing authorities of the municipality — either a majority of the voters, or such officers as are prescribed — with the power of local government over the inhabitants of that district. Such an act, strictly speaking, confers power which did not exist before; it confers on the governing authorities the power of laying taxes, and passing local laws for the purposes named in the act, without the previous consent of the people of the district. The governing authorities possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or by other statutes applicable to them. Goodwin *v.* East Hartford, 70 Conn. 18, 39, 38 Atl. 876. See also Washingtonian Home *v.* Chicago, 57 Ill. 414, 423, 41 N. E. 893, 29 L. R. A. 798; Carrick Academy *v.* Clark, 112 Tenn. 483, 497, 80 S. W. 64; Sweatt *v.* Boston, etc., R. Co., 23 Fed. Cas. No. 13,684, 5 Nat. Bankr. Rep. 234.

It is not a legal entity or person, whose interest can be considered separate and apart from its people. It is but an instrumentality created and perpetuated for their benefit. Its officers as such are nothing more than agents of the public. They must act within the scope of their authority. Their acts outside are perfectly impotent from a legal standpoint. Ogden *v.* Bear Lake, etc., River Water-Works, etc., Co., 16 Utah 440, 452, 52 Pac. 697, 41 L. R. A. 305.

"Where a corporation is composed exclusively of officers of the government having no personal interest in it or with its concerns, and only acting as the organs of the State in effecting a great public improvement, it is a public corporation." Angell & Ames Corp. [*quoted* in Dean *v.* Davis, 51 Cal. 406, 410].

The donation of an annual appropriation by a municipality to a private corporation does not make such corporation a public corporation. Clark *v.* Maryland Inst. for Promotion of Mechanic Arts, 87 Md. 643, 658, 41 Atl. 126.

Their powers are subject to the control of the legislature, and a charter of such incorporation may be altered or repealed at the pleasure of the legislature. Tinsman *v.* Belvidere Delaware R. Co., 26 N. J. L. 148, 172, 69 Am. Dec. 565; Laramie County *v.* Albany County, 92 U. S. 307, 310, 23 L. ed. 552. And see Heffner *v.* Cass, etc., Counties, 193 Ill. 439, 448, 62 N. E. 201, 58 L. R. A. 353.

The term includes: A bank created by the government for its own uses, and where the stock is exclusively owned by the government. State *v.* Heyward, 3 Rich. (S. C.) 389, 408. Railroad companies in a limited sense. Illinois Cent. R. Co. *v.* Willenborg, 117 Ill. 203, 209, 7 N. E. 698, 57 Am. Rep. 862; Illinois Cent. R. Co. *v.* Copiah County, 81 Miss. 685, 695, 33 So. 502. A school-district. San Bernardino County *v.* Southern Pac. R. Co., 137 Cal. 659, 662, 70 Pac. 782. A state university. *In re* Royer, 123 Cal. 614, 621, 56 Pac. 461, 44 L. R. A. 364.

The term does not include: An agricultural society of a state. Lane *v.* Minnesota State Agricultural Soc., 62 Minn. 175, 181, 64 N. W. 382, 29 L. R. A. 708. A corporation formed for the erection of an armory building. Arrison *v.* Company D. North Dakota Nat. Guard, 12 N. D. 554, 557, 98 N. W. 83. A hospital founded by a private benefactor, though dedicated by its charter to general charity. State *v.* Heyward, 3 Rich. (S. C.) 389, 408.

A statute providing that railroad companies which shall be unable to purchase lands for their roads from the owners on the respective routes, at rates to be agreed upon, shall be public corporations, does not make such roads public corporations in the sense in which the term is used in another statute providing that members of public corporations shall be competent witnesses, in cases affecting the interests of such corporations. Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179, 189.

The power of acquiring and holding property, although almost always given, is by no means a necessary incident to all corporations of this class. McKim *v.* Odom, 3 Bland (Md.) 407, 417.

20. Anderson L. Dict. [*quoted* in State *v.*

ment.[21] (Public Debt: In General, see COUNTIES, 11 Cyc. 502; DISTRICT OF COLUMBIA, 14 Cyc. 536; MUNICIPAL CORPORATIONS, 28 Cyc. 1533; SCHOOLS AND SCHOOL-DISTRICTS; STATES; TERRITORIES; TOWNS; UNITED STATES. Of Drainage and Reclamation District, see DRAINS, 14 Cyc. 1029. Of Irrigation District, see WATERS. Of Levee District, see LEVEES, 25 Cyc. 198.)

PUBLIC DEPARTMENT. A division of official duties or functions; a branch of government; a distinct part of a governmental organization, as the legislative, executive, and judicial department; the department of state, of the treasury, etc.[22]

PUBLIC DETECTIVE. A detective engaged by the public for the protection of society.[23] (See DETECTIVES, 14 Cyc. 234.)

PUBLIC DOCUMENT. See EVIDENCE, 17 Cyc. 296 note 38.

PUBLIC DOMAIN. See PUBLIC LANDS, *post*, p. 759.

PUBLIC DRAIN. See DRAINS, 14 Cyc. 1023.

PUBLIC EASEMENT. See DEDICATION, 13 Cyc. 434; EASEMENTS, 14 Cyc. 1142; NAVIGABLE WATERS, 29 Cyc. 285; STREETS AND HIGHWAYS; WHARVES.

PUBLIC ENEMY. See ENEMY, 15 Cyc. 1046.

PUBLIC EXAMINER. See BANKS AND BANKING, 5 Cyc. 600; STATES.

PUBLIC EXHIBITION. See THEATERS AND SHOWS.

PUBLIC FERRY. See FERRIES, 19 Cyc. 492.

PUBLIC FRANCHISE. See FRANCHISES, 19 Cyc. 1451.

PUBLIC FUNDS. A term applicable to taxes, customs, etc., and appropriated by the government to the discharge of its obligations.[24] (Public Funds: In General, see BRIDGES, 5 Cyc. 1058; COUNTIES, 11 Cyc. 509; DISTRICT OF COLUMBIA, 14 Cyc. 535; DRAINS, 14 Cyc. 1028; LEVEES, 25 Cyc. 197; MUNICIPAL CORPORATIONS, 28 Cyc. 1562; SCHOOLS AND SCHOOL-DISTRICTS; STATES; TERRITORIES; TOWNS; UNITED STATES. Accrual of Right of Action For Misappropriation of, see LIMITATIONS OF ACTIONS, 25 Cyc. 1050. Depositaries of, see DEPOSITARIES, 13 Cyc. 812. Disposition — Of Highway Taxes, see STREETS AND HIGHWAYS; Of License-Taxes, see LICENSES, 25 Cyc. 631; Of Proceeds of Fines, Forfeitures, and Penalties, see CUSTOMS DUTIES, 12 Cyc. 1187; FINES, 19 Cyc. 559; FORFEITURES, 19 Cyc. 1362; INTOXICATING LIQUORS, 23 Cyc. 171; PENALTIES, 30 Cyc. 1342; Of Taxes, see TAXATION. Duty of Officer as to Custody and Care of, see OFFICERS, 29 Cyc. 1437. Liability of Bank in Paying Out, see BANKS AND BANKING, 5 Cyc. 514. Payment or Other Disposition of as Subject of Protection and Relief by Injunction, see INJUNCTIONS, 22 Cyc. 898. Use of in Aid of Public and Private Enterprises, see PUBLIC AID, and Cross-References Thereunder.)

Hickman, 11 Mont. 541, 542, 29 Pac. 92, brief of counsel].

The term is generally applied to national or state obligations and dues, and would rarely, if ever, be construed to include town debts or obligations. Morgan *v.* Cree, 46 Vt. 773, 786, 14 Am. Rep. 640.

21. Bouvier L. Dict. [*quoted* in State *v.* Hickman, 11 Mont. 541, 542, 29 Pac. 92, brief of counsel].

As used in a state constitution providing that "no money shall be paid out of the treasury except upon appropriations made by law . . . except interest on the public debt," the term embraces not only bonded indebtedness but also other debts for which warrants have been issued. State *v.* Hickman, 11 Mont. 541, 542, 29 Pac. 92. See also Grand Island, etc., R. Co. *v.* Baker, 6 Wyo. 369, 397, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L. R. A. 835.

22. Ellis *v.* Grand Rapids, 123 Mich. 567, 569, 82 N. W. 244.

Is not the same thing as "public works."— Ellis *v.* Grand Rapids, 123 Mich. 567, 569, 82 N. W. 244. See PUBLIC WORKS.

23. Byrnes *v.* Mathews, 12 N. Y. St. 74, 81.

24. Ayers *v.* Lawrence, 59 N. Y. 192, 198.

Within the rule of law excusing a trustee from liability for a trust fund, if invested in "public funds," the term means government stock, depending, for its credit and security, on the faith, solvency, and stability of the government. Smith *v.* Smith, 7 J. J. Marsh. (Ky.) 238, 239.

"Public parochial fund."— Under a statute providing that "no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices of the peace," etc., the phrase "public parochial fund" does not apply where particular individuals, or a particular class are pointed out as the objects of a gift for the relief of the poor. Rex *v.* Halesworth, 3 B. & Ad. 717, 718, 725, 23 E. C. L. 315.

PUBLIC GRANT. An instrument by which the state, as sovereign, passes to an individual title to land before vested in the state;[25] the mode and act of creating a title in an individual to land which has previously belonged to the government.[26] (Public Grant: In General, see FRANCHISES, 19 Cyc. 1459; MINES AND MINERALS, 27 Cyc. 546; PUBLIC LANDS, *post*, p. 759. Limitations Applicable to Actions For Recovery of Real Property Where Title Is Claimed Under Grant of Public Land, see LIMITATIONS OF ACTIONS, 25 Cyc. 1029.)

PUBLIC GROUND. In the ordinary sense, ground in which the general public has a common use;[27] ground owned by the public and used publicly; that is, by the public indiscriminately, in a public manner.[28] (Public Ground: In General, see CEMETERIES, 6 Cyc. 707; COMMON LANDS, 8 Cyc. 342; COUNTIES, 11 Cyc. 457; MUNICIPAL CORPORATIONS, 28 Cyc. 604. Acquisition, Ownership, and Disposition of Public Property in General, see MUNICIPAL CORPORATIONS, 28 Cyc. 620. Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 1117. As Boundary, see BOUNDARIES, 5 Cyc. 905. Assessment and Special Taxes For Improvement of, see MUNICIPAL CORPORATIONS, 28 Cyc. 1115. Damages From Discontinuance of Public Parks, see MUNICIPAL CORPORATIONS, 28 Cyc. 939. Dedication, see DEDICATION, 13 Cyc. 448. Department of Parks, see MUNICIPAL CORPORATIONS, 28 Cyc. 575. Grant of Rights in, see MUNICIPAL CORPORATIONS, 28 Cyc. 938. Improvement of, see MUNICIPAL CORPORATIONS, 28 Cyc. 953. Injuries to Persons on Public Grounds, Liability of City, see MUNICIPAL CORPORATIONS, 28 Cyc. 1311. Issue of Municipal Bonds For Improvement of, see MUNICIPAL CORPORATIONS, 28 Cyc. 1577. Park Commissioners — Delegation of Legislative Powers Thereto, see CONSTITUTIONAL LAW, 8 Cyc. 833; Powers and Duties, see MUNICIPAL CORPORATIONS, 28 Cyc. 576. Powers of City — As to Construction and Improvement of, see MUNICIPAL CORPORATIONS, 28 Cyc. 935; To Convey Property Acquired or Held For Special Purposes, see MUNICIPAL CORPORATIONS, 28 Cyc. 938. Taking of Private Property For Parks, see EMINENT DOMAIN, 15 Cyc. 601.)

PUBLIC HACKMAN. See CARRIERS, 6 Cyc. 352.

PUBLIC HEALTH. See HEALTH, 21 Cyc. 382.

PUBLIC HIGHWAYS. See MUNICIPAL CORPORATIONS, 28 Cyc. 832; STREETS AND HIGHWAYS.

PUBLIC HOLIDAY. See HOLIDAYS, 21 Cyc. 440.

PUBLIC HOUSE. See INNKEEPERS, 22 Cyc. 1068.

25. State *v.* Harman, 57 W. Va. 447, 460, 50 S. E. 828.

26. Bouvier L. Dict. [*quoted* in State *v.* Harman, 57 W. Va. 447, 460, 50 S. E. 828].

27. Patrick *v.* Kalamazoo Y. M. C. A., 120 Mich. 185, 191, 79 N. W. 208.

28. Winters *v.* Duluth, 82 Minn. 127, 134, 87 N. W. 788, dissenting opinion.

The designation "public ground" on the plat of a town, in reference to a lot in a town, of shape, dimensions, and position suitable for this purpose, naturally, though not necessarily, means a public square. Lebanon *v.* Warren County, 9 Ohio 80, 81, 34 Am. Dec. 422.

The term does not include: Land devoted to the use of a local religious society, or hospital, or academy, created for church, hospital, or academic purposes. Patrick *v.* Kalamazoo Y. M. C. A., 120 Mich. 185, 191, 79 N. W. 208. Public or navigable canals of a state. State *v.* Cincinnati Cent. R. Co., 37 Ohio St. 157, 175. Common school lands. State *v.* Chilan County Super. Ct., 36 Wash. 381, 383, 78 Pac. 1011.

Under a statute providing that all market houses, public squares, or other public grounds used exclusively for public purposes shall be exempt from taxation, lands belonging to a sanitary district, which can only be used for drainage by the inhabitants of such district and not by the general public, are not exempt. Chicago Sanitary Dist. *v.* Martin, 173 Ill. 243, 252, 50 N. E. 201, 84 Am. St. Rep. 110.

Where a dedication by a board of county commissioners expressly donates to the public streets, alleys, market place, and public ground, as represented on a plat, the fact that a tract designated on the plat as "public square" was not mentioned in the donating clause, but was specifically mentioned in another clause, as being reserved for the purpose of building a courthouse thereon, and that the tract designated as "public ground" was specifically bounded and described in the acknowledgment, shows that the term "public ground" was not intended to include the tract designated as public square. Youngerman *v.* Polk County, 110 Iowa 731, 735, 81 N. W. 166.

Where land in a town is dedicated as "public ground" for the use of the inhabitants of the town, it may be used as sites for the

PUBLIC IGNOMINY. Public disgrace; public dishonor.[29]

PUBLIC IMPROVEMENT. An improvement upon any real property belonging to the state or a municipal corporation.[30] (Public Improvement: By Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 941. By State, see STATES. By United States, see UNITED STATES. Constitutionality of Law Validating Assessment, see CONSTITUTIONAL LAW, 8 Cyc. 1025. Construction, Improvement, and Repair — Of Bridge, see BRIDGES, 5 Cyc. 1054, 1078; Of Drain, see DRAINS, 14 Cyc. 1024; Of Highway, see STREETS AND HIGHWAYS; Of Levee, see LEVEES, 25 Cyc. 189. Delegation of Power — To Judiciary of Legislative Power to Determine Necessity of, see CONSTITUTIONAL LAW, 8 Cyc. 835; To Levy Assessments For Benefit of, see CONSTITUTIONAL LAW, 8 Cyc. 837. Gifts For, see CHARITIES, 6 Cyc. 923. In District of Columbia, see DISTRICT OF COLUMBIA, 14 Cyc. 534. Of Channels and Streams, see NAVIGABLE WATERS, 29 Cyc. 298. Power of County to Issue Bonds For, see COUNTIES, 11 Cyc. 550.)

PUBLIC INDECENCY. See OBSCENITY, 29 Cyc. 1314.

PUBLIC INSTITUTION. One which is created and exists by law or public authority.[31] (See INSTITUTION, 22 Cyc. 1373, and Cross-References Thereunder.)

PUBLIC INTEREST. See LIBEL AND SLANDER, 25 Cyc. 400.

PUBLIC LANDING. A piece of ground on the bank or margin of a river, provided for the open and common use of all persons in the debarkation of themselves or their goods,[32] dedicated to the public use and held in trust for the

erection of buildings for the use of the public, such as courthouses, market houses, schoolhouses, and churches; also as a common for pasture, public pounds for stray animals, even under some conditions, common dumping grounds, or as common landing places for those using the river. Com. *v.* Connellsville Borough, 201 Pa. St. 154, 158, 50 Atl. 825.

29. Brown *v.* Kingsley, 38 Iowa 220, 221.

30. Brace *v.* Gloversville, 39 N. Y. App. Div. 25, 29, 56 N. Y. Suppl. 331.

As used in a statute providing that state convicts shall not be worked within a certain city, except on "public improvements, and buildings and grounds owned by the State," the term includes not merely the grounds, buildings, and improvements which are the property of the state, but also all public works belonging to or prosecuted by the state, the county, or the city. Ward *v.* Little Rock, 41 Ark. 526, 529, 48 Am. Rep. 46.

In a city charter providing that the expense of making, constructing, or altering sewers or other public works or improvements, may be collected in part by assessments upon the property of individuals benefited thereby, the language as used in connection with the word "sewer" imports a class of distinct public works or improvements, other than the mere repairing of highways, and does not include macadamizing a street. New Haven *v.* Whitney, 36 Conn. 373, 376.

In a mechanic's lien act providing that any person furnishing any material or labor to any contractor for a public improvement shall have a lien on the money, bond, or warrant due or to become due such contractor, the term includes a public school building erected by a board of education. Spalding Lumber Co. *v.* Brown, 171 Ill. 487, 692, 49 N. E. 725; Beardsley *v.* Brown, 71 Ill. App. 199, 201.

The common council of a village cannot by its fiat make that a public improvement for which the legislature itself could not authorize the municipality to expend money or create an indebtedness; and an appropriation of the bonds of the village, which had been voted to be issued for public improvements, to the use of and to aid a railroad, by an ordinance declaring such railroad to be a public improvement, upon an appropriation of such bonds. Risley *v.* Howell, 57 Fed. 544, 547.

The term does not comprehend services rendered in carrying on the ordinary functions of a municipality, such as a matter of public lighting which must be provided from day to day, but relates rather to public works in the nature of betterments. Blank *v.* Kearny, 44 N. Y. App. Div. 592, 595, 61 N. Y. Suppl. 79.

Under a statute authorizing a city to donate money or bonds in aid of public improvements or public works, a city is not authorized to render aid, by donation in money or bonds, in locating therein a county seat and constructing the necessary county buildings. Schneck *v.* Jeffersonville, 152 Ind. 204, 214, 52 N. E. 212.

When applied to a municipal government, the term must be taken in a limited sense as applying to those improvements which are the proper subject of police and municipal regulations, such as gas, water, almshouses, hospitals, etc., and cannot be extended to subject foreign to the object of the incorporation and beyond its territorial limits. Low *v.* Marysville, 5 Cal. 214, 215.

31. Toledo Bank *v.* Bond, 1 Ohio St. 622, 643.

32. Gardiner *v.* Tisdale, 2 Wis. 153, 188, 60 Am. Dec. 407.

But it is not a place to be permanently encumbered with piles of lumber or other merchandise or goods any more than a public highway or street, because the benefits and accommodation to the public, which were intended to be conferred, would be greatly af-

public the same as a street.[33] (See LANDING, 24 Cyc. 843, and Cross-References Thereunder.)

PUBLIC LANDMARK. See BOUNDARIES, 5 Cyc. 861, 873–875 text and notes 22–25, 884 text and note 71, 905, 962.

fected if not wholly destroyed by any such permanent encumbrance. Gardiner *v.* Tisdale, 2 Wis. 153, 188, 60 Am. Dec. 407.

Meaning the same thing as "levee" see Chicago, etc., R. Co. *v.* People, 222 Ill. 427, 437, 78 N. E. 790.

The term as used, designating a space on a plat of a town site, is at least evidence of dedication. Mankato *v.* Meagher, 17 Minn. 265.

33. Chicago, etc., R. Co. *v.* People, 222 Ill. 427, 437, 78 N. E. 790.

PUBLIC LANDS

By Joseph Walker Magrath*

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* Author of "Infants," 22 Cyc. 503; "Nuisances," 29 Cyc. 1143; "Parent and Child," 29 Cyc. 1576; etc. Joint author of "Evidence," 16 Cyc. 821; "Mechanics' Liens," 27 Cyc. 1.

CROSS-REFERENCES

For Matters Relating to:

Adverse Possession of Public Land, see ADVERSE POSSESSION, 1 Cyc. 968, 1111.
Appropriation of Water on Public Land, see WATERS.
Common Lands, see COMMON LANDS, 8 Cyc. 342.
Compensation For Land Taken For Public Use, see EMINENT DOMAIN, 15 Cyc. 543, 638.
Government Survey as Establishing Boundary, see BOUNDARIES, 5 Cyc. 861, 948.
Indian Lands, see INDIANS, 22 Cyc. 109, 123.
Interest in Public Land to Support Action of Ejectment, see EJECTMENT, 15 Cyc. 1, 18.
Judicial Notice of:
  Location and Area of Public Land, see EVIDENCE, 16 Cyc. 821, 905.
  Public Surveys, see EVIDENCE, 16 Cyc. 821, 905.
Jurisdiction:
  Of Federal Court:
    Of Question Relating to Public Land, see COURTS, 11 Cyc. 633, 859 text and n. 58.
    To Review Decision of the State Court Affecting Public Lands, see COURTS, 11 Cyc. 633, 930 text and n. 64.
  Of Offense Committed on Public Lands or Reservation, see CRIMINAL LAW, 12 Cyc. 70, 218.
Lands Under Navigable Waters, see NAVIGABLE WATERS, 29 Cyc. 285.
Location of Government Corner, see BOUNDARIES, 5 Cyc. 861, 873.
Mandamus as Remedy in Relation to Act of Public Officer in Disposal of Land, see MANDAMUS, 26 Cyc. 125, 243.
Mines and Minerals in Public Land, see MINES AND MINERALS, 27 Cyc. 516.
Patent as Color of Title, see ADVERSE POSSESSION, 1 Cyc. 968, 1097.
Perjury on Proceeding Before Land Office, see PERJURY, 30 Cyc. 1394, 1410.
Property of:
  County, see COUNTIES, 11 Cyc. 325, 457.
  Municipal Corporation, see MUNICIPAL CORPORATIONS, 28 Cyc. 55, 604.
  State in General, see STATES.
  Town, see TOWNS.
  United States in General, see UNITED STATES.
Right in Public Land as Asset of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1, 187.
Taxation of Public Land and Right and Interest Therein, see TAXATION.
Vested Right in Public Land, see CONSTITUTIONAL LAW, 8 Cyc. 695, 907.

I. GOVERNMENT OWNERSHIP AND CONTROL.

A. What Are Public Lands. The terms "public lands" or "public domain"[1] are habitually used in the United States to designate such lands of the United States or of the states as are subject to sale or other disposal under general laws,[2]

1. The terms are synonymous. Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963.

2. *Kansas.*— Rierson *v.* St. Louis, etc., R. Co., 59 Kan. 32, 51 Pac. 901.
Nebraska.—State *v.* Kennard, 56 Nebr. 254, 76 N. W. 545.
Texas.— Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865.
Utah.— Oregon Short Line R. Co. *v.* Fisher, 26 Utah 179, 72 Pac. 931; U. S. *v.* Elliott, 7 Utah 389, 26 Pac. 1117.
United States.— Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963; Northern Pac. R. Co. *v.* Musser-Sauntry Land, etc., Mfg. Co., 168 U. S. 604, 18 S. Ct. 205, 42 L. ed. 596; Mann *v.* Tacoma Land Co., 153 U. S. 273, 14 S. Ct. 820, 38 L. ed. 714; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091; Bardon *v.* Northern Pac. R. Co., 145 U. S. 535, 12 S. Ct. 856, 36 L. ed. 806; U. S. *v.* McLaughlin, 127 U. S. 428, 8 S. Ct. 1177, 32 L. ed. 213; Doolan *v.* Carr, 125 U. S. 618, 8 S. Ct. 1228, 31 L. ed.

and are not held back or reserved for any special governmental or public purpose.[3] But there is no statutory definition of the words "public lands," and their meaning may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of congress in their use.[4]

B. United States and State Lands. When the thirteen original states established their independence, each state became the owner of the vacant and unappropriated lands within its borders,[5] and when new states were formed out of the territory of such original states, and admitted into the Union, such new states became entitled to vacant and unappropriated lands within their borders,[6] and the ownership of the United States of lands within the limits of the original states is based upon cessions from the states.[7] But when foreign governments ceded territory to the United States government, the vacant and unappropriated land therein passed to the United States,[8] and the new states which have been formed

844; Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769; Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 23 L. ed. 634; Williams *v.* Baker, 17 Wall. 144, 21 L. ed. 561; U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131; Stearns *v.* U. S., 152 Fed. 900, 82 C. C. A. 48; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659; Northern Pac. R. Co. *v.* Hinchman, 53 Fed. 523; U. S. *v.* Garretson, 42 Fed. 22. See also U. S. *v.* Reese, 27 Fed. Cas. No. 16,137, 5 Dill. 405.

See 41 Cent. Dig. tit. "Public Lands," § 5.

Term includes public school land.— Cotulla *v.* Larsen, 60 Tex. 443.

3. Northern Pac. R. Co. *v.* Musser-Sauntry Land, etc., Mfg. Co., 168 U. S. 604, 18 S. Ct. 205, 42 L. ed. 596; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091; Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769; Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 23 L. ed. 634; Williams *v.* Baker, 17 Wall. (U. S.) 144, 21 L. ed. 561; U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131; Stearns *v.* U. S., 152 Fed. 900, 82 C. C. A. 48; U. S. *v.* Garretson, 42 Fed. 22.

4. U. S. *v.* Bisel, 8 Mont. 20, 19 Pac. 251 [*quoted* in U. S. *v.* Blendaur, 128 Fed. 910, 63 C. C. A. 636 (*reversing* 122 Fed. 703)].

In the act of congress of July 4, 1866, concerning certain lands granted to the state of Nevada, enacting that in extending the surveys of the "public lands" in that state the secretary of the interior might in his discretion vary the lines of the subdivision from a rectangular form to suit the circumstances of the country, reserving mineral lands in all cases, the word "public" applied to all the unsurveyed land, whether the same had been previously granted or not, and was used to distinguish the unsurveyed from the surveyed and segregated lands where the rights of private ownership had attached. Heydenfeldt *v.* Daney Gold, etc., Min. Co., 10 Nev. 290.

5. People *v.* Livingston, 8 Barb. (N. Y.) 253; People *v.* Van Rensselaer, 8 Barb. (N. Y.) 189 [*reversed* on other grounds in 9 N. Y. 291]; State *v.* Pinckney, 22 S. C. 484. See also Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565.

6. Pollard *v.* Hagan, 3 How. (U. S.) 212, 221, 11 L. ed. 565, where it is said: "The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama, or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic, of the 30th of April, 1803, with France, ceding Louisiana."

The United States has no title to islands lying in the St. Mary's river between the Michigan shore and the thread of the stream, which were not surveyed or claimed at the time of its general survey; but such title, like that to the submerged land, remained in the state, and under the law of Michigan is surrendered to and vests in the owner of the adjoining shore land. U. S. *v.* Chandler-Dunbar Water Power Co., 152 Fed. 25, 81 C. C. A. 221.

7. See Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565.

Boundary of state reservation.— Congress had the power to fix the western boundary of the tract reserved by Virginia in the Northwest Territory for her quota of continental troops in her cession to the United States in case she neglected so to do. Bonner *v.* U. S., 1 Ct. Cl. 125.

After a cession of territory to the United States a state has no power to grant lands therein to a person who had no incipient title before the cession. Polk *v.* Wendell, 9 Cranch (U. S.) 87, 3 L. ed. 665 [*reversing* 19 Fed. Cas. No. 11,251, Brunn. Col. Cas. 168, 2 Overt. (Tenn.) 433].

Reservations of rights of settlers in cessions by states to United States see Doe *v.* Hill, 1 Ill. 304; Langdeau *v.* Hanes, 21 Wall. (U. S.) 521, 22 L. ed. 606; Hickie *v.* Starke, 1 Pet. (U. S.) 94, 7 L. ed. 67.

8. *Alaska.*— U. S. *v.* Berrigan, 2 Alaska 442.

California.— People *v.* Folsom, 5 Cal. 373; Woodworth *v.* Fulton, 1 Cal. 295.

Minnesota.— See Sims *v.* Morrison, 92 Minn. 341, 100 N. W. 88.

Montana.— Territory *v.* Lee, 2 Mont. 124.

out of such territory have no title to vacant and unappropriated lands within their borders,[9] save in so far as such lands have been granted to them by the United States,[10] and consequently have no right to dispose of land not so granted to them.[11] So also a treaty by which an Indian nation relinquishes and conveys to the United States its right, title, and interest in and to certain territory vests the title in the United States.[12] The policy of the United States has been not to dispose of its tide lands, but to retain them for the benefit of the future states in which they may lie, and to grant them to such states upon their admission;[13] but it has the right, if it sees fit to do so, to grant rights in or titles to the tide lands in the territories as well as to the public lands therein situated above high water mark,[14] and lands previously disposed of by the United States do not pass to a state upon its admission.[15]

C. Lands in Dominion of Canada. The original title to vacant and unappropriated lands in the Dominion of Canada is in the crown,[16] but a large portion of the crown lands has been transferred to the dominion government or the various provinces for their benefit and use.[17]

Nebraska.— State *v.* Kennard, 57 Nebr. 711, 78 N. W. 282, 56 Nebr. 254, 76 N. W. 545.

New Mexico.— Territory *v.* Bernalillo County Delinquent Tax List, 12 N. M. 169, 76 Pac. 316.

Tennessee.— Moss *v.* Gibbs, 10 Heisk. 283.

United States.— Irvine *v.* Marshall, 20 How. 558, 561, 15 L. ed. 994; U. S. *v.* Shannon, 151 Fed. 863; Carroll *v.* Price, 81 Fed. 137; Friedman *v.* Goodwin, 9 Fed. Cas. No. 5,119, McAllister 142; Seabury *v.* Field, 21 Fed. Cas. No. 12,574, McAllister 1 [*reversed* on other grounds in 19 How. 323, 15 L. ed. 650, 655].

See 41 Cent. Dig. tit. "Public Lands," §§ 1, 5.

The United States' title to the public domain in California relates back to the time of the occupation of the country by the American army, from which period the laws of Mexico relative to the disposal of the public lands ceased to operate. Woodworth *v.* Fulton, 1 Cal. 295.

Grants by former sovereignties see *infra*, V.

9. Stoner *v.* Royer, 200 Mo. 444, 98 S. W. 601; Bradshaw *v.* Edelen, 194 Mo. 640, 92 S. W. 691; Irvine *v.* Marshall, 20 How. (U. S.) 558, 15 L. ed. 994; Shannon *v.* U. S., 160 Fed. 870, 88 C. C. A. 52 [*affirming* 151 Fed. 863]; Widdicombe *v.* Rosenmiller, 118 Fed. 295; Patterson *v.* Tatum, 18 Fed. Cas. No. 10,830, 3 Sawy. 164. See also Irvine *v.* Marshall, 20 How. (U. S.) 558, 15 L. ed. 994; Turner *v.* American Baptist Missionary Union, 24 Fed. Cas. No. 14,251, 5 McLean 344.

10. Friedman *v.* Goodwin, 9 Fed. Cas. No. 5,119, McAllister 142. See also Ward *v.* Mulford, 32 Cal. 365.

The acts of congress approved April 20, 1818, authorizing the reservation of ten sections in any one land district, in the Alabama and Mississippi territories, for the purpose of laying out and establishing towns thereon, did not give any title or interest in the sections so reserved to the state of Alabama, or the towns built upon them. Tuscumbia *v.* Lindsay, 46 Ala. 581.

11. Kile *v.* Tubbs, 23 Cal. 431. See also Jones *v.* Callvert, 32 Wash. 610, 73 Pac. 701.

12. McCracken *v.* Todd, 1 Kan. 148; Robinson *v.* Caldwell, 67 Fed. 391, 14 C. C. A. 448.

13. Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333; U. S. *v.* Roth, 2 Alaska 257; Juneau Ferry Co. *v.* Alaska Steamship Co., 1 Alaska 533; Hallett *v.* Beebee, 13 How. (U. S.) 25, 14 L. ed. 35; Goodtitle *v.* Kiobe, 9 How. (U. S.) 471, 13 L. ed. 220; Heckman *v.* Sutter, 128 Fed. 393, 63 C. C. A. 135; Seabury *v.* Field, 21 Fed. Cas. No. 12,574, McAllister 1 [*reversed* on other grounds in 19 How. 323, 15 L. ed. 650]. See also Hardin *v.* Jordan, 16 Fed. 823.

14. Shively *v.* Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331; Heckman *v.* Sutter, 128 Fed. 393, 63 C. C. A. 135.

15. Jones *v.* Soulard, 24 How. (U. S.) 41, 16 L. ed. 604.

16. See Atty.-Gen. *v.* Harris, 33 U. C. Q. B. 94.

The "chain reserve" along the bank of the Niagara river is part of the waste lands of the crown held for public purposes. Queen Victoria Niagara Falls Park *v.* Howard, 23 Ont. 1 [*affirmed* in 23 Ont. App. 355].

17. See Manitoba Atty.-Gen. *v.* Canada Atty.-Gen., [1904] A. C. 799, 73 L. J. P. C. 100, 91 L. T. Rep. N. S. 300, 20 T. L. R. 769 [*affirming* 34 Can. Sup. Ct. 287 (*affirming* 8 Can. Exch. 337)].

Canada Act, 48 & 49 Vict. c. 50, did not operate an immediate transfer to the province of any swamp lands or of the profits arising therefrom, but the transfer was effective only from the date of the order in council, made after survey and selection as prescribed by the act, directing that the selected lands be vested in the province, and down to that time the profits resulting from the transferred lands belonged to the dominion. Manitoba Atty.-Gen. *v.* Canada Atty.-Gen., [1904] A. C. 799, 73 L. J. P. C. 100, 91 L. T. Rep. N. S. 300, 20 T. L. R. 769 [*affirming* 34 Can. Sup. Ct. 287 (*affirming* 8 Can. Exch. 337)].

Deadman's Island is a military reserve and belongs to the dominion of Canada and not

D. Trespasses [18] on Public Lands.[19] The United States may restrain trespasses on its lands.[20] In trespass by the United States, a permit to enter on the land may be admitted in evidence to show the nature and object of the entry,[21] and a receipt of an authorized agent of the government in full for rent, dated after the trespass declared on, is a full discharge in the absence of fraud or mistake.[22] It has been held that the remedy of a state for a trespass upon its public lands is by information for intrusion,[23] but under some statutes such a trespass is an indictable offense.[24]

E. Cutting or Removing Timber — 1. Statutory Prohibition. As owner of the public lands the United States has the same right and dominion over them that any other owner would have,[25] and may protect the same from depredation,[26] and no one has the right to enter upon such lands or cut timber thereon without its consent.[27] The statutes make it unlawful to cut,[28] or cause or procure to be cut,[29] or wantonly destroy,[30] any timber growing on lands of the United States,[31] or to

to the province of British Columbia. Atty.-Gen. *v.* Ludgate, 11 Brit. Col. 258 [*affirmed* in [1906] A. C. 552, 75 L. J. P. C. 114, 95 L. T. Rep. N. S. 571, 22 T. L. R. 764].

The purchase-money of ordnance land comprised in the second schedule of 19 Vict. c. 45, but sold by the principal officers before that act, is thereby transferred to the provincial government. Secretary of State for War Department *v.* Great Western R. Co., 13 Grant Ch. (U. C.) 503.

Grant of railway belt by British Columbia to dominion government see Reg. *v.* Farwell, 14 Can. Sup. Ct. 392, 3 Can. Exch. 271.

Lands which were held under preëmption, right, or crown grant, at the time the statutory conveyance of the railway belt by the province of British Columbia to the Dominion of Canada took effect, are exempt from the operation of such statutory conveyance, and upon such preëmption right being abandoned or canceled all lands held thereunder become the property of the crown in the right of the province and not in the right of the Dominion. Reg. *v.* Demers, 3 Can. Exch. 293 [*affirmed* in 22 Can. Sup. Ct. 482].

The soil and bed of the foreshore in navigable harbors belong to the crown as representing the Dominion of Canada, and a grant thereof by the provincial government passes no title. Holman *v.* Green, 6 Can. Sup. Ct. 707 [*followed* in Fader *v.* Smith, 18 Nova Scotia 433].

18. See, generally, Trespass.

19. **Cutting or removing timber** see *infra*, I, E.

Settlers not treated as trespassers see *infra*, II, C, 5, b.

20. Shannon *v.* U. S., 160 Fed. 870, 88 C. C. A. 52 [*affirming* 151 Fed. 863].

21. U. S. *v.* Gear, 25 Fed. Cas. No. 15,195, 2 McLean 571.

22. U. S. *v.* Gear, 25 Fed. Cas. No. 15,195, 3 McLean 571, holding that this is true, although the agent may never have accounted for the money.

23. State *v.* Arledge, 1 Bailey (S. C.) 551; Com. *v.* Hite, 6 Leigh (Va.) 588, 29 Am. Dec. 226.

24. Broward *v.* State, 9 Fla. 422.

25. Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366, 16 S. Ct. 831, 40 L. ed. 1002.

26. English *v.* U. S., 116 Fed. 625, 54 C. C. A. 81 [*affirming* 107 Fed. 867].

27. Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366, 16 S. Ct. 831, 40 L. ed. 1002.

28. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; 20 U. S. St. at L. 90 [U. S. Comp. St. (1901) p. 1529].

Boxing pine trees on the public lands for the purpose of the manufacture of turpentine is not a cutting of the trees, within the prohibition of the statute. Bryant *v.* U. S., 105 Fed. 941, 45 C. C. A. 145 [*approving* Leatherbury *v.* U. S., 32 Fed. 780 (*reversing* 27 Fed. 606)]. But *compare* U. S. *v.* Taylor, 35 Fed. 484.

29. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; 20 U. S. St. at L. 90 [U. S. Comp. St. (1901) p. 1529].

30. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; 20 U. S. St at L. 90 [U. S. Comp. St. (1901) p. 1529].

31. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; 20 U. S. St at L. 90 [U. S. Comp. St. (1901) p. 1529].

Statute does not apply to Indian reservations in Wisconsin.— U. S. *v.* Konkapot, 43 Fed. 64.

The act of congress of July 2, 1864, by which the odd-numbered sections along the line of the Northern Pacific Railroad Company, for forty miles on either side of the line in the territories and twenty miles in the states, is set apart and devoted to construction of the road of said corporation, is not a present grant of said lands to said corporation, but only in effect an agreement or provision that the same shall be conveyed to it absolutely when and as fast as any twenty-five miles of said road is constructed and accepted by the United States, and in the meantime the legal title to the unearned and unpatented sections is in the United States, which may therefore maintain legal proceedings against any one who unlawfully cuts timber thereon. U. S. *v.* Childers, 12 Fed. 586, 8 Sawy. 171. See, generally, as to grants in aid of railroads, II, K, 1.

Timber upon mineral lands in California is protected and governed by the provisions of the act of June 3, 1878, c. 151, 20 U. S. St. at L. 90 [U. S. Comp. St. (1901) p.

remove or cause to be removed any such timber with intent to export or dispose of the same;[32] but it is provided that this shall not prevent any miner or agriculturist from clearing land or taking timber to support his improvements.[33] The general rule is that one who takes timber from the public domain is a wilful trespasser,[34] and the presumption, in the absence of any evidence of right, is that the cutting was illegal.[35] But where a claim to land under a Mexican grant was presented to the land commission and approved, but such approval was reversed by the district court, a contract, made pending an appeal from such reversal, between the claimant and another, respecting the cutting of timber on the land, was not void.[36]

2. Right to Timber Cut. Timber cut or removed from the public lands in violation of the statute remains the property of the United States,[37] and the person by whom it is cut acquires no property therein.[38] One who purchases timber wrongfully cut from the public domain acquires no better title than the vendor;[39]

1529], made specifically applicable to that state, and not by the general provisions of the act of June 3, 1878, c. 150, 20 U. S. St. at L. 88 [U. S. Comp. St. (1901) p. 1528], which can only operate upon "mineral districts," if any there be, not specifically provided for by designating by name the particular state or territory in which they are situated. U. S. *v.* Benjamin, 21 Fed. 285.

32. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; 20 U. S. St. at L. 90 [U. S. Comp. Ct. (1901) p. 1529].

U. S. Rev. St. (1878) § 5388 [U. S. Comp. St. (1901) p. 3649], as amended June 4, 1888, which forbids the cutting or wanton destruction of timber upon military or Indian reservations, does not apply to one who removes and uses for building purposes timber which has been cut on an Indian reservation by another person without his aid or encouragement. U. S. *v.* Konkapot, 43 Fed. 64.

33. 20 U. S. St. at L. 90 [U. S. Comp. St. (1901) p. 1529]; U. S. *v.* English, 107 Fed. 867 [*affirmed* in 116 Fed. 625, 54 C. C. A. 81].

The taking of timber for use in a quartz mill adjacent to the land from which it was cut was not within the proviso, and hence was prohibited by the act. U. S. *v.* English, 107 Fed. 867 [*affirmed* in 116 Fed. 625, 54 C. C. A. 81], holding, however, that as the lawfulness of such a taking was open to question — the question never having been before decided — a cutting for such a purpose would not be held to have been wilful, and the penalty would not be imposed, but the defendants held liable only for the actual value of the wood.

34. Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366, 16 S. Ct. 831, 40 L. ed. 1002 [*reversing* 51 Fed. 658, 2 C. C. A. 446]; U. S. *v.* Gentry, 119 Fed. 70, 55 C. C. A. 658; Grubbs *v.* U. S., 105 Fed. 314, 44 C. C. A. 513; U. S. *v.* Baxter, 46 Fed. 350; U. S. *v.* Taylor, 35 Fed. 484.

35. Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366, 16 S. Ct. 831, 40 L. ed. 1002; U. S. *v.* Cook, 19 Wall. (U. S.) 591, 22 L. ed. 210. See also Anderson *v.* U. S., 152 Fed. 87, 81 C. C. A. 311, holding that where certain of the defendants located unsurveyed government land by scrip, and immediately proceeded to cut timber therefrom and from adjoining lands without reference to boundary lines, and the timber cut from the adjoining lands exceeded that cut on the land located, it would be presumed that the cutting from such adjoining lands was unlawful.

36. *In re* Whitmore, Myr. Prob. (Cal.) 103.

37. U. S. *v.* Cook, 19 Wall. (U. S.) 591, 22 L. ed. 210; English *v.* U. S., 116 Fed. 625, 54 C. C. A. 81 [*affirming* 107 Fed. 867]; U. S. *v.* Perkins, 44 Fed. 670; Bly *v.* U. S., 3 Fed. Cas. No. 1,581, 4 Dill. 464.

Where logs cut from public land were mixed with other logs in a river so that the identical logs could not be conveniently separated, the United States had a proportionate interest in the entire mass of logs. Norris *v.* U. S., 44 Fed. 735.

Contract precluding United States from claiming ownership see Teller *v.* U. S., 117 Fed. 577, 54 C. C. A. 349; U. S. *v.* Teller, 106 Fed. 447, 45 C. C. A. 416; U. S. *v.* Scott, 38 Fed. 393.

Agreement not amounting to relinquishment of rights of United States see U. S. *v.* Pine River Logging, etc., Co., 78 Fed. 319, 24 C. C. A. 101.

Where lands were granted to a state in aid of a railroad, but forfeited for non-performance of conditions, the resumption by act of congress of title to these unearned lands did not, by relation, revest in the United States title to timber which had been cut and removed therefrom by third persons while the title to the lands remained in the state. U. S. *v.* Loughrey, 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420 [*affirming* 71 Fed. 921, 18 C. C. A. 391].

38. Brock *v.* Smith, 14 Ark. 431; Stevens *v.* Perrier, 12 Kan. 297; Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366, 16 S. Ct. 831, 40 L. ed. 1002 [*reversing* 51 Fed. 658, 2 C. C. A. 446]; Spencer *v.* U. S., 10 Ct. Cl. 255.

39. Anderson *v.* U. S., 152 Fed. 87, 81 C. C. A. 311.

If a settler cuts more timber than is authorized, with intent to defraud the government, a purchaser from him acquires no title thereto; but if, in improving the land, he cuts and disposes of surplus timber without intent to defraud, one who purchases from him under the belief that there is no such intent is protected. Stone *v.* U. S., 167

but is liable to the United States for such timber [40] and cannot defend an action by the United States to recover the value of the timber on the ground that he was acting in good faith.[41] Where timber has been wrongfully cut from public lands of the United States, and while in the hands of a purchaser has been claimed as the property of the United States by its agent, the title of the government cannot be divested by a subsequent sale of the timber by such purchaser to a railroad company for use in the construction of its road, although the company would have had the right to cut it for such purpose had it been standing.[42] Timber once severed from land ceases to be a part of the realty and does not pass to a person other than the one who cut it who subsequently acquires the land from the United States.[43]

3. Recovery of Timber Cut. Where the United States claims the ownership of logs in the possession of another on the ground that they were cut from government land, its remedy for the recovery of the timber, like that of an individual, is by an action of replevin,[44] and it cannot seize the logs from one having them in his possession, and, by filing a libel against them, cast upon him the burden of proving his ownership.[45] The title to the land may be investigated and determined in an action of replevin brought by the United States to recover timber cut thereon, where the ownership of the timber depends on the ownership of the land.[46]

4. Recovery of Value of Timber or Damages — a. Right of Action. The United States may recover the value of timber unlawfully cut and removed from its public lands,[47] and damages for the trespass committed by such cutting or

U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451].

40. U. S. *v.* Norris, 41 Fed. 424.

41. Anderson *v.* U. S., 152 Fed. 87, 81 C. C. A. 311.

42. U. S. *v.* Price, 109 Fed. 239, 48 C. C. A. 331.

Grant to railroads of right to take timber from public lands see *infra*, II, K, 3.

43. *Alabama.*— Carpenter *v.* Lewis, 6 Ala. 682.

Illinois.— Wincher *v.* Shrewsbury, 3 Ill. 283, 35 Am. Dec. 108.

Iowa.—Robertson *v.* Phillips, 3 Greene 220.

Louisiana.— Woodruff *v.* Roberts, 4 La. Ann. 127 [*following* Nimmo *v.* Allen, 2 La. Ann. 451].

Missouri.— Keeton *v.* Audsley, 19 Mo. 362, 61 Am. Dec. 560.

Nevada.— Peck *v.* Brown, 5 Nev. 81.

See 41 Cent. Dig. tit. "Public Lands," § 15.

Relation back of title.— Where, after certain deficiency lands had been earned by a railway company, and had been selected and certified to the general land office, but prior to the issuance of the patent timber was wrongfully cut and removed therefrom by trespassers, the title acquired by the patent related back to the selection of the lands, so as to save to purchasers to whom the lands had been granted by the company, before the trespasses, a right of action for the timber wrongfully removed from the land, or its value. Musser *v.* McRae, 44 Minn. 343, 46 N. W. 673.

44. Handford *v.* U. S., 92 Fed. 881, 35 C. C. A. 75; Bly *v.* U. S., 3 Fed. Cas. No. 1,581, 4 Dill. 464.

45. Handford *v.* U. S., 92 Fed. 881, 35 C. C. A. 75. But *compare* Stephenson *v.* Little, 10 Mich. 433 [*followed* in Ballou *v.* O'Brien, 20 Mich. 304], holding that the commissioner of the general land office has lawful authority to order a seizure and sale by the register and receiver of the land office of timber cut by trespassers on the public land.

46. U. S. *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 552.

47. U. S. *v.* Montana Lumber Co., 196 U. S. 573, 25 S. Ct. 367, 49 L. ed. 604; Camfield *v.* U. S., 167 U. S. 518, 17 S. Ct. 864, 42 L. ed. 260; Bolles Wooden-Ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230; U. S. *v.* Birdseye, 137 Fed. 516, 70 C. C. A. 100; English *v.* U. S., 116 Fed. 625, 54 C. C. A. 81 [*affirming* 107 Fed. 867]; U. S. *v.* Eureka, etc., R. Co., 40 Fed. 419; U. S. *v.* Scott, 39 Fed. 900; U. S. *v.* Taylor, 35 Fed. 484; Bly *v.* U. S., 3 Fed. Cas. No. 1,581, 4 Dill. 464; U. S. *v.* Nelson, 27 Fed. Cas. No. 15,864, 5 Sawy. 68.

Land in railroad grant.— The United States cannot maintain an action to recover the value of timber cut and removed from unsurveyed land within the limits of a railroad grant, and which, when surveyed, would be within the limits of an odd-numbered section, to which the government had parted with its title. U. S. *v.* Losekamp, 127 Fed. 959, 62 C. C. A. 591; U. S. *v.* Mullan Fuel Co., 118 Fed. 663. But *compare* U. S. *v.* Birdseye, 137 Fed. 516, 70 C. C. A. 100 [*following* U. S. *v.* Montana Lumber, etc., Co., 196 U. S. 573, 25 S. Ct. 367, 49 L. ed. 604], holding that a partial survey by the United States of a section of public land by running lines on two sides of it is insufficient to identify it as an odd-numbered section, within the grant to the Northern Pacific Railroad Company, so as to relieve one cutting timber thereon from liability to the United States. See, generally, as to railroad grants, *infra*, II, K, 1.

Lands granted to state but forfeitable.— Where lands granted to a state to aid in rail-

removal,[48] and the question whether or not defendant's operations were profitable to him does not affect either the government's right to recover or the amount of recovery.[49] A partner may be sued individually for damages for the cutting of timber by the firm.[50]

b. Form of Action. Trespass *quare clausum fregit* [51] or an action in the nature of trover [52] is the remedy for the recovery of damages for the unlawful cutting of timber, and the United States cannot maintain a suit in equity for an accounting of the gains and profits made by defendant by the cutting and removal of the timber.[53]

c. Defenses. It is no defense to an action to recover the value of ties cut by a trespasser that he had an intent to purchase the land, and that it was the custom in that community to begin the cutting of timber on government land intended to be purchased before actually entering or doing any act indicative of such intention.[54] An acquittal on an indictment for unlawfully and feloniously cutting and removing timber from public lands is not a bar to an action to recover the value of such timber,[55] nor does the fact that defendant has compromised a prosecution against him for cutting timber [56] relieve him of civil liability for his acts.[57]

d. Pleading.[58] A complaint which alleges that defendants had cut so many cords of wood from timber growing on the public lands, and the value thereof, and other formal matters, shows a sufficient cause of action to put defendants on their defense.[59] One who relies upon a statutory license as a defense to an action for the unlawful cutting of timber should set out in his answer the acts done in compliance with the regulations, and all the facts necessary to constitute the license.[60] Where the damages claimed in the complaint are based not only on the value of the timber in the standing trees, but also upon the value bestowed on the same in converting it into lumber and putting it in the market, an allegation that defendants cut and removed the timber under the belief that the land belonged to a railroad

road construction have become forfeitable to the United States for non-performance of conditions subsequent, the unauthorized cutting of timber therefrom gives the government no right of action, unless, before the cutting it has actually declared a forfeiture, and reinvested itself with the title; otherwise, the cause of action is in the state, and remains therein, notwithstanding a subsequent declaration of forfeiture by congress. U. S. *v.* Loughrey, 71 Fed. 921, 18 C. C. A. 391 [*affirmed* in 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420]. See, generally, as to forfeiture of lands granted in aid of railroads, *infra*, II, K, 1, n, (VII).

Location of mining claims.— The right of the United States to maintain an action to recover the value of timber cut from unsurveyed mineral lands to which its title has not been divested is not affected by the locating of mining claims thereon by third persons. Powers *v.* U. S., 119 Fed. 562, 56 C. C. A. 128. See, generally, as to mining claims, MINES AND MINERALS, 27 Cyc. 541.

Repeal of regulation.— A right of action by the United States for cutting timber less than eight inches in diameter, on public mineral lands, in violation of the regulation of the secretary of the interior, does not fail by the subsequent repeal of the regulation. U. S. *v.* Williams, 8 Mont. 85, 19 Pac. 288.

48. Nickelson *v.* Cameron Lumber Co., 39 Wash. 569, 81 Pac. 1059; U. S. *v.* Bitter Root Dev. Co., 133 Fed. 274, 66 C. C. A. 652 [*affirmed* in 200 U. S. 451, 26 S. Ct. 318, 50 L. ed. 550]; U. S. *v.* Taylor, 35 Fed. 484; U. S. *v.* Smith, 11 Fed. 487, 8 Sawy. 100.

49. U. S. *v.* Humphries, 149 U. S. 277, 13 S. Ct. 850, 37 L. ed. 734.

50. U. S. *v.* Gumm, 9 N. M. 611, 58 Pac. 398.

51. Cotton *v.* U. S., 11 How. (U. S.) 229, 13 L. ed. 675 (holding that the United States is not confined to the remedy by indictment); Handford *v.* U. S., 92 Fed. 881, 35 C. C. A. 75.

52. U. S. *v.* Bitter Root Dev. Co., 133 Fed. 274, 66 C. C. A. 652 [*affirmed* in 200 U. S. 451, 26 S. Ct. 318, 50 L. ed. 550]; Bly *v.* U. S., 3 Fed. Cas. No. 1,581, 4 Dill. 464.

53. U. S. *v.* Northern Pac. R. Co., 6 Mont. 351, 12 Pac. 769; U. S. *v.* Bitter Root Dev. Co., 133 Fed. 274, 66 C. C. A. 652 [*affirmed* in 200 U. S. 451, 26 S. Ct. 318, 50 L. ed. 550]; U. S. *v.* Van Winkle, 113 Fed. 903, 51 C. C. A. 533.

54. Teller *v.* U. S., 117 Fed. 577, 54 C. C. A. 349.

55. Stone *v.* U. S., 64 Fed. 667, 12 C. C. A. 451 [*affirmed* in 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127, and *distinguishing* Coffey *v.* U. S., 116 U. S. 436, 6 S. Ct. 437, 29 L. ed. 684].

56. Compromise of prosecution see *infra*, I, E, 10, g.

57. U. S. *v.* Scott, 39 Fed. 900.

58. See, generally, PLEADING, 31 Cyc. 1.

59. U. S. *v.* Williams, 6 Mont. 379, 12 Pac. 851.

60. U. S. *v.* Mullan Fuel Co., 118 Fed. 663.

company from whom they had a license is a defense in mitigation of damages, which ought to be pleaded in the answer as a distinct defense.[61]

e. Presumptions.[62] Where the receiver of the United States land office testifies that a preëmptor has paid for the land as required by law, the presumption is that final proof has been made by the preëmptor, and that the final certificate has been issued to him, vesting him with the equitable title to the land, and leaving only the naked legal title in the United States, so that it cannot maintain trover for timber cut where the statute requires every action to be prosecuted in the name of the real party in interest.[63]

f. Burden of Proof.[64] In an action for cutting timber upon public lands, the burden is upon the government to show that the timber was taken from public lands;[65] but a *prima facie* case is made out by proof of the government ownership of the lands, the cutting and asportation of the timber, its value, and subsequent possession by defendant,[66] and if defendant relies upon statutory authority to take the timber the burden is upon him to bring himself within the statute,[67] and show that the timber was taken for an authorized purpose,[68] and that he complied with the rules and regulations established by the secretary of the interior.[69] So also where defendant claims that he purchased the timber from settlers under the preëmption and homestead laws, the burden is on him to show the good faith of such settlers, and their right to cut and sell such timber;[70] and where defendant claims that the trespass was not wilful or intentional the burden of proving this rests upon him.[71]

g. Admissibility of Evidence.[72] Where it was claimed that defendants had unlawfully cut timber sued for from the public domain and sold the same and defendants justified under the statute, evidence that about the time they made the contract of sale they located a number of placer mining claims, etc., at another point, and then, without doing any work on such claims except the necessary assessment work, proceeded to cut timber from such claims and from adjoining lands without reference to the boundaries thereof, was admissible on the issue of their good faith.[73]

h. Instructions.[74] Where defendant has introduced evidence to prove a

61. U. S. *v.* Ordway, 30 Fed. 30, holding, however, that as no motion was made to strike out the answer on this ground the objection was waived.

62. See, generally, EVIDENCE, 16 Cyc. 1050.

63. U. S. *v.* Saucier, 5 N. M. 569, 25 Pac. 791.

The fact that a contest for the land was heard in the land office in the year preceding the cutting of the timber does not enable the United States to maintain the action, in the absence of any showing as to how or when the contest was instituted, as, under rule 5 of practice in contest cases in the local land offices, a contest may be instituted after the final certificate issues, as well as before. U. S. *v.* Saucier, 5 N. M. 569, 25 Pac. 791.

64. See, generally, EVIDENCE, 16 Cyc. 926.

65. U. S. *v.* Denver, etc., R. Co., 31 Fed. 886. See also Norris *v.* U. S., 44 Fed. 739.

When burden shifts.— Where the evidence shows that defendant purchased from the trespasser and converted to his own use a large number of logs, among which were some of those cut from the public land, the burden is on defendant to show that all the logs so bought by him were not so cut. Norris *v.* U. S., 44 Fed. 735.

66. U. S. *v.* Williams, 8 Mont. 85, 19 Pac. 288; U. S. *v.* Denver, etc., R. Co., 191 U. S. 84, 24 S. Ct. 33, 48 L. ed. 106 [*reversing* 9 N. M. 382, 55 Pac. 241, 11 N. M. 145, 66 Pac. 550].

67. U. S. *v.* Gumm, 9 N. M. 611, 58 Pac. 398; U. S. *v.* Eccles, 111 Fed. 490; U. S. *v.* Price Trading Co., 109 Fed. 239, 48 C. C. A. 331; U. S. *v.* Denver, etc., R. Co., 31 Fed. 886.

68. U. S. *v.* Denver, etc., R. Co., 191 U. S. 84, 24 S. Ct. 33, 48 L. ed. 106 [*reversing* 9 N. M. 382, 55 Pac. 241, 11 N. M. 145, 66 Pac. 550].

69. U. S. *v.* Basic Co., 121 Fed. 504, 57 C. C. A. 624; Stubbs *v.* U. S., 111 Fed. 366, 104 Fed. 988, 44 C. C. A. 292; U. S. *v.* Price Trading Co., 109 Fed. 239, 48 C. C. A. 331.

70. Stone *v.* U. S., 64 Fed. 667, 12 C. C. A. 451 [*affirmed* in 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127], holding that it was improper to withdraw from the jury evidence that defendant's vendors abandoned the land after cutting the timber.

71. U. S. *v.* Baxter, 46 Fed. 350.

72. See, generally, EVIDENCE, 16 Cyc. 821.

73. Anderson *v.* U. S., 152 Fed. 87, 81 C. C. A. 311.

74. See, generally, TRIAL.

license from the secretary of the interior, it is error to refuse an instruction requested by plaintiff, embodying the rules prescribed by the secretary of the interior, where such a license is issued.[75] Where defendant had a sawmill near the land, and cut and sawed lumber, which he sold for profit, it is error for the court, in its charge, to refer, as a ground of justification, to the fact that the government has always tacitly permitted pioneer settlers to cut timber from the public domain for domestic use.[76] Where the only evidence as to the quantity of timber taken was the testimony of scalers, who made their estimates from measurements of stumps and tops remaining upon the land several years after the trespass was committed, an instruction that if the jury found that the timber was taken by defendants, but were in doubt as to the quantity so taken, they might indulge every fair and reasonable inference justified by the evidence in favor of the United States and against defendants, was proper and applicable to the case, although there was substantially no conflict in the estimates of the witnesses.[77]

i. Amount of Recovery. When the trespass was not intentional or wilful the measure of damages is the value of the timber after it was cut at the place where it was cut;[78] but when the trespass was wilful the government may recover the value of the timber at the place to which it has been brought,[79] and at any time before suit is commenced,[80] without deduction for the enhanced value arising from the labor of defendant.[81] The government is entitled at least to a verdict for nominal damages, although there is no evidence as to the value of the standing trees,[82] and exemplary damages may be recovered where the trespass was wilful, or the acts of defendant were the result of a negligence so gross as to show wilfulness or a reckless indifference to the rights of the government.[83] A purchaser of timber wrongfully cut from the public domain may be held liable for the value thereof[84] at the time when and the place where it was purchased by him,[85] notwithstanding the fact that he was guilty of no wilful wrong and purchased without notice of the trespass,[86]

75. U. S. *v.* Gumm, 9 N. M. 611, 58 Pac. 398.

76. U. S. *v.* Mock, 149 U. S. 273, 13 S. Ct. 848, 37 L. ed. 732.

77. Sauntry *v.* U. S., 117 Fed. 132, 55 C. C. A. 148.

78. U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 [*reversing* 114 Fed. 722, 52 C. C. A. 354, and *distinguishing* Pine River Logging, etc., Co. *v.* U. S., 186 U. S. 279, 22 S. Ct. 920, 46 L. ed. 1164; Bolles Wooden-Ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230]; U. S. *v.* McKee, 128 Fed. 1002 (holding the stumpage value of bark taken from trees to be the measure of damages); U. S. *v.* Van Winkle, 113 Fed. 903, 51 C. C. A. 533; U. S. *v.* Eccles, 111 Fed. 490; Gentry *v.* U. S., 101 Fed. 51, 41 C. C. A. 185. See also Powers *v.* U. S., 119 Fed. 562, 56 C. C. A. 128; U. S. *v.* Northern Pac. R. Co., 67 Fed. 890.

Defendant entitled to have issue of good faith submitted to jury.— Gentry *v.* U. S., 101 Fed. 51, 41 C. C. A. 185. See also U. S. *v.* Teller, 106 Fed. 447, 45 C. C. A. 416.

Value of timber when standing in trees the measure of damages.— U. S. *v.* Teller, 106 Fed. 447, 45 C. C. A. 416; U. S. *v.* Williams, 18 Fed. 475, 9 Sawy. 374.

79. U. S. *v.* Baxter, 46 Fed. 350. See also U. S. *v.* Williams, 18 Fed. 475, 9 Sawy. 374.

80. Bolles Wooden-Ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230; U. S. *v.* Ordway, 30 Fed. 30.

81. Bolles Wooden-Ware Co. *v.* U. S., 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230; U. S. *v.* Ordway, 30 Fed. 30; Bly *v.* U. S., 3 Fed. Cas. No. 1,581, 4 Dill. 464.

Damages based on the value of the manufactured product are recoverable in an action for the unlawful cutting of timber. U. S. *v.* Bitter Root Dev. Co., 133 Fed. 274, 66 C. C. A. 652 [*affirmed* in 200 U. S. 451, 26 S. Ct. 318, 50 L. ed. 550].

82. U. S. *v.* Mock, 149 U. S. 273, 13 S. Ct. 848, 37 L. ed. 732.

83. U. S. *v.* Mullan Fuel Co., 118 Fed. 663; U. S. *v.* Taylor, 35 Fed. 484.

Evidence of good faith.— It is competent for defendant, in support of a plea of good faith and to prevent exemplary damages, to show that he acted under the advice of counsel. U. S. *v.* Mullan Fuel Co., 118 Fed. 663.

84. U. S. *v.* Kelly, 3 Wash. Terr. 421, 17 Pac. 878; Bolles Wooden-Ware Co. *v.* U. S. 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230; U. S. *v.* Heilner, 26 Fed. 80. See also U. S. *v.* Flint Lumber Co. (Ark. 1908), 112 S. W. 217.

85. U. S. *v.* Kelly, 3 Wash. Terr. 421, 17 Pac. 878; Bolles Wooden-Ware Co. *v.* U. S. 106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230; U. S. *v.* Perkins, 44 Fed. 670; U. S. *v.* Heilner, 26 Fed. 80, including the value of all labor and expense which the trespasser had then bestowed upon it.

86. U. S. *v.* Kelly, 3 Wash. Terr. 421, 17 Pac. 878; Bolles Wooden-Ware Co. *v.* U. S.,

but he cannot be held for the value of lumber manufactured by him from such timber.[87]

5. Right to Cut Timber on Mineral Lands.[88] *Bona fide* residents[89] on the public domain, being regarded with favor, are allowed by the statute to cut timber from public lands in the mineral districts[90] for building,[91] agricultural,[92] mining,[93]

106 U. S. 432, 1 S. Ct. 398, 27 L. ed. 230; U. S. *v.* Heilner, 26 Fed. 80.

87. U. S. *v.* Kelly, 3 Wash. Terr. 421, 17 Pac. 878.

88. What are mineral lands see Mines and Minerals, 27 Cyc. 516.

89. 20 U. S. St. at L. 88 [U. S. Comp. St. (1901) p. 1528]; 26 U. S. St. at L. 1099 [U. S. Comp. St. (1901) p. 1531]; U. S. *v.* Price Trading Co., 109 Fed. 239, 48 C. C. A. 331; U. S. *v.* Lynde, 47 Fed. 297.

The statute includes aliens as well as citizens, provided they are *bona fide* residents. U. S. *v.* Copper Queen Consol. Min. Co., 7 Ariz. 80, 60 Pac. 885.

One who had resided in a state for ten years, and engaged in business there, was a *bona fide* resident, within the meaning of the statute. U. S. *v.* Copper Queen Consol. Min. Co., 7 Ariz. 80, 60 Pac. 885.

90. 20 U. S. St. at L. 88 [U. S. Comp. St. (1901) p. 1528]; 26 U. S. St. at L. 1099 [U. S. Comp. St. (1901) p. 1531]; U. S. *v.* Saucier, 5 N. M. 569, 25 Pac. 791; U. S. *v.* Price Trading Co., 109 Fed. 239, 48 C. C. A. 331 (holding that the right given by the act of June 3, 1878 (20 U. S. St. at L. 88 [U. S. Comp. St. (1901) p. 1528], to citizens of the states of Colorado and Nevada, and the territories excepting Washington, to cut timber from public mineral lands for certain domestic purposes, was not affected by the act of the same date (20 U. S. at L. 89 [U. S. Comp. St. (1901) p. 1529]) for the sale of timber lands in the states of California, Oregon, Nevada, and in Washington territory, and which prohibited the cutting of timber on any public lands in those states and territory with intent "to export or dispose of the same," as amended by the act of August 4, 1892 (27 U. S. St. at L. 348 [U. S. Comp. St. (1901) p. 1547]), by striking out the names of the states and territory therein named, and inserting in lieu thereof the words "public land states"). U. S. *v.* Lynde, 47 Fed. 297.

What are mineral lands.— The act of June 3, 1878, 20 U. S. St. at L. 88, c. 150, § 1 [U. S. Comp. St. (1901) p. 1528], authorizes the removal of timber not only from land on which mining claims had been located, or in which mineral has actually been discovered, but also on other lands lying in close proximity, or in the neighborhood of such mining claims, having the general character of mineral lands. U. S. *v.* Basic Co., 121 Fed. 504, 57 C. C. A. 624. See also U. S. *v.* Richmond Min. Co., 40 Fed. 415. But the statute refers only to such lands as contain mineral in sufficient quantities to justify present exploration and development. U. S. *v.* Copper Queen Consol. Min. Co., 7 Ariz. 80, 60 Pac. 885. The mere appearance of mineral is not sufficient to constitute the land mineral, but there must be sufficient mineral to induce mining men of experience to go on the land and take and work it with the expectation of finding mineral. Anderson *v.* U. S., 152 Fed. 87, 81 C. C. A. 311. Land returned on the government survey as mineral land, of broken and rugged surface, with every indication of mineral ground, but on which no mines have been located, although in the vicinity of valuable mines, and which is unfit for cultivation and entry as agricultural lands, is within the meaning of the act of congress of June 3, 1878, 20 U. S. St. at L. 88 [U. S. Comp. St. (1901) p. 1528], allowing timber to be taken from mineral lands on the public domain for building, agricultural, mining, or other domestic purposes. U. S. *v.* Edwards, 38 Fed. 812.

The right extends to all lands in the states and territories named.— U. S. *v.* Edgar, 140 Fed. 655.

Evidence as to mineral character of land see Anderson *v.* U. S., 152 Fed. 87, 81 C. C. A. 311; Lynch *v.* U. S., 138 Fed. 535, 71 C. C. A. 59; U. S. *v.* Rossi, 133 Fed. 380, 66 C. C. A. 442; U. S. *v.* Van Winkle, 113 Fed. 903, 51 C. C. A. 533.

Entry of land as agricultural.— The action of a preëmptor in entering land at the land office as agricultural does not preclude an inquiry into its character in an action against third persons for unlawfully cutting timber thereon. U. S. *v.* Saucier, 5 N. M. 569, 25 Pac. 791.

The act of June 3, 1878, is not applicable to state of Oregon.—U. S. *v.* English, 107 Fed. 867 [*affirmed* in 116 Fed. 625, 54 C. C. A. 81, and *following* U. S. *v.* Benjamin, 21 Fed. 285; U. S. *v.* Smith, 11 Fed. 487, 8 Sawy. 100].

91. 20 U. S. St. at L. 88 [U. S. Comp. St. (1901) p. 1528]; U. S. *v.* Lynde, 47 Fed. 297.

92. 20 U. S. St. at L. 88 [U. S. Comp. St. (1901) p. 1528]; 26 U. S. St. at L. 1099 [U. S. Comp. St. (1901) p. 1531]; U. S. *v.* Lynde, 47 Fed. 297.

93. 20 U. S. St. at L. 88 [U. S. Comp. St. (1901) p. 1528]; 26 U. S. at L. 1099; U. S. *v.* United Verde Copper Co., 8 Ariz. 186, 71 Pac. 954 [*affirmed* in 196 U. S. 207, 25 S. Ct. 222, 49 L. ed. 449]; U. S. *v.* Lynde, 47 Fed. 297.

"Roasting" ores.— The removal of timber by a mine owner for the purpose of "roasting" ores at the mine — a process whereby the ores are not fused, but the volatile substances are driven off in vapor, gases, etc., and whereby the ores are more readily smelted thereafter — is a taking for a "mining" purpose. U. S. *v.* United Verde Copper Co., 8 Ariz. 186, 71 Pac. 954 [*affirmed* in 196 U. S. 207, 25 S. Ct. 222, 49 L. ed. 449].

manufacturing,[94] or domestic[95] purposes, under rules and regulations prescribed by the secretary of the interior.[96] Accordingly the secretary of the interior may prescribe regulations concerning the removal of timber,[97] and his interpretation of the intent of the statute is entitled to weight;[98] but the regulations must be reasonable,[99] and not such as to annul or limit the effect of the statute,[1] and he has no power to enlarge or restrict the purposes for which timber may be cut or used.[2] A full and fair compliance with the statute and the rules prescribed thereunder is necessary to justify a taking of timber;[3] but one who fails, through ignorance, to comply with the rules and regulations, does not thereby become liable to the same extent as a wilful trespasser.[4] Where timber is cut for an authorized purpose, the fact that it is afterward manufactured into lumber and sold as an article of merchandise to be used in the state does not render the cutting unlawful.[5]

94. 26 U. S. St. at L. 1099 [U. S. Comp. St. (1901) p. 1531]; U. S. *v.* Lynde, 47 Fed. 297.

95. 20 U. S. St. at L. 88 [U. S. Comp. St. (1901) p. 1528]; 26 U. S. St. at L. 1099 [U. S. Comp. St. (1901) p. 1531]; U. S. *v.* Edgar, 140 Fed. 655; U. S. *v.* Lynde, 47 Fed. 297.

Cutting for firewood.— One may lawfully cut timber for firewood from public mineral lands and ship the same to any part of the state for sale and use there in households, hoisting works in mines, smelters, or other local purposes, as all of these are "domestic" purposes within the meaning of the statute. U. S. *v.* Edgar, 140 Fed. 655.

96. 20 U. S. St. at L. 88 [U. S. Comp. St. (1901) p. 1528]; 26 U. S. St. at L. 1099 [U. S. Comp. St. (1901) p. 1531]; U. S. *v.* United Verde Copper Co., 8 Ariz. 186, 71 Pac. 954 [*affirmed* in 196 U. S. 207, 25 S. Ct. 222, 49 L. ed. 449]; U. S. *v.* Mullan Fuel Co., 118 Fed. 663; U. S. *v.* Lynde, 47 Fed. 297.

97. U. S. *v.* United Verde Copper Co., 8 Ariz. 186, 71 Pac. 954 [*affirmed* in 196 U. S. 207, 25 S. Ct. 222, 49 L. ed. 449].

Such rules and regulations are intended merely to furnish detailed instructions as to the manner of taking the timber so as to avoid waste and unnecessary destruction. U. S. *v.* Rossi, 133 Fed. 380, 66 C. C. A. 442.

Construction of regulations.— The regulations prescribed by the secretary of the interior, which require "every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this act," to keep a record showing by whom such timber was cut, from what lands, evidence of mineral character, to whom the timber was sold, and for what purpose, etc., and to take from each purchaser a written certificate under oath, that the purchase is made for his own use, and for an authorized purpose, contemplate the keeping of such records only by persons who, like the proprietors of sawmills, make a business of cutting timber on mineral lands and selling it, or who are engaged to a considerable extent in such business, and they do not apply to settlers engaged chiefly in other pursuits, who cut small quantities of timber from mineral lands which they occupy, and who barter the same to a trader, with the understanding that it will be resold to other farmers or ranchmen in the vicinity for domestic uses, so as to render such cutting or sale unlawful, although the prescribed conditions are not complied with. U. S. *v.* Price Trading Co., 109 Fed. 239, 48 C. C. A. 331.

98. U. S. *v.* United Verde Copper Co., 8 Ariz. 186, 71 Pac. 954 [*affirmed* in 196 U. S. 207, 25 S. Ct. 222, 49 L. ed. 449]. See, generally, as to weight attached to interpretation of statute by land officers, *infra*, II, L, 15, a.

99. U. S. *v.* Mullan Fuel Co., 118 Fed. 663.

1. U. S. *v.* Mullan Fuel Co., 118 Fed. 663.

2. U. S. *v.* United Verde Copper Co., 8 Ariz. 186, 71 Pac. 954 [*affirmed* in 196 U. S. 207, 25 S. Ct. 222, 49 L. ed. 449]; U. S. *v.* Copper Queen Consol. Min. Co., (Ariz. 1900) 60 Pac. 885; U. S. *v.* Rossi, 133 Fed. 380, 66 C. C. A. 442; U. S. *v.* Murphy, 32 Fed. 376.

3. U. S. *v.* Gumm, 9 N. M. 611, 58 Pac. 398; U. S. *v.* Edgar, 140 Fed. 655; U. S. *v.* Basic Co., 121 Fed. 504, 57 C. C. A. 624; U. S. *v.* Gentry, 119 Fed. 70, 55 C. C. A. 658; U. S. *v.* Mullan Fuel Co., 118 Fed. 663; Stubbs *v.* U. S., 111 Fed. 366, 104 Fed. 988, 44 C. C. A. 292; U. S. *v.* Price Trading Co., 109 Fed. 239, 48 C. C. A. 331.

Written agreement as to use.— The regulations require one who cuts and removes timber from mineral lands of the United States, and sells the same, or the lumber manufactured therefrom, to take from the purchaser a written agreement that the timber shall not be used except for building, agricultural, mining, or domestic purposes within the state or territory (U. S. *v.* Gentry, 119 Fed. 70, 55 C. C. A. 658; U. S. *v.* Reder, 69 Fed. 965); and this agreement must be taken at the time of the sale (U. S. *v.* Gentry, *supra*, holding that obtaining the contract three months thereafter is not a substantial compliance with the rule).

4. Powers *v.* U. S., 119 Fed. 562, 56 C. C. A. 128.

5. U. S. *v.* Rossi, 133 Fed. 380, 66 C. C. A. 442.

6. Rights of Settlers and Occupants. A person who in good faith [6] enters and occupies lands under the land laws [7] may, before becoming the owner thereof, cut and use the timber thereon so far as the same may be necessary to accomplish the purpose for which the land is occupied,[8] as for the purpose of building a house,[9] outbuildings,[10] or fences,[11] or of clearing the land [12] and fitting it for pasturage and occupation [13] or for cultivation,[14] and he cannot be held liable for trespass, and for the value of the timber so cut and used.[15] He may also take other timber from the public lands, if need be, sufficient to maintain the necessary improvements on the lands so occupied;[16] and where the cutting of timber is to prepare the land for

6. Potter *v.* U. S., 122 Fed. 49, 58 C. C. A. 231; Grubbs *v.* U. S., 105 Fed. 314, 44 C. C. A. 513, holding that the vital question is as to whether the homestead was taken and is being held in good faith, with intent to acquire title thereto by a compliance with the requirements of the Homestead Act.

Fraudulent declaration.— Where settlers on public lands file declarations under the preëmption or homestead laws, with intent to defraud the government by merely removing the timber, a purchaser of such timber is liable to the government for its value. Stone *v.* U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451].

A final certificate of entry of public lands, obtained by and canceled for fraud, will not estop the United States from recovering of the grantee, or of the vendee of the grantee who had notice of the fraud, for the conversion of logs or ore wrongfully taken from the land by the grantee before the cancellation of the certificate. Potter *v.* U. S., 122 Fed. 49, 58 C. C. A. 231.

Intent a question of fact.— Whether claimants under the homestead and preëmption laws who, after occupation for a time, abandon the lands, intended in cutting timber to defraud the government, is a question for the jury. Stone *v.* U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451].

7. Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881; U. S. *v.* Routledge, 8 N. M. 385, 45 Pac. 883; Shiver *v.* U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. ed. 231; U. S. *v.* Ellis, 122 Fed. 1016 [*following* U. S. *v.* Ball, 31 Fed. 667, 12 Sawy. 519]; Potter *v.* U. S., 122 Fed. 49, 58 C. C. A. 231; Grubbs *v.* U. S., 105 Fed. 314, 44 C. C. A. 513; U. S. *v.* Niemeyer, 94 Fed. 147; U. S. *v.* Taylor, 35 Fed. 484; U. S. *v.* Ball, 31 Fed. 667, 12 Sawy. 514; U. S. *v.* Lane, 19 Fed. 910; U. S. *v.* Williams, 18 Fed. 475, 9 Sawy. 374; U. S. *v.* Smith, 11 Fed. 487, 8 Sawy. 100; The Timber Cases, 11 Fed. 81, 3 McCrary 519; U. S. *v.* Nelson, 27 Fed. Cas. No. 15,864, 5 Sawy. 68.

Relinquishment of entry.— The rule applies where, instead of completing his term of residence under the homestead law, the homesteader obtained title to the land by locating scrip thereon, relinquishing his homestead entry for that purpose. U. S. *v.* Ellis, 122 Fed. 1016.

8. Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881; U. S. *v.* Ellis, 122 Fed. 1016; Potter *v.* U. S., 122 Fed. 49, 58 C. C. A. 231; Grubbs *v.* U. S., 105 Fed. 314; 44 C. C. A. 513; U. S. *v.* Ball, 31 Fed. 667, 12 Sawy. 519; U. S. *v.* Lane, 19 Fed. 910; U. S. *v.* Yoder, 18 Fed. 372, 5 McCrary, 615; U. S. *v.* Smith, 11 Fed. 487, 8 Sawy. 100; The Timber Cases, 11 Fed. 81, 3 McCrary 519; U. S. *v.* Nelson, 27 Fed. Cas. No. 15,864, 5 Sawy. 68.

The cutting or removal must be for a legitimate purpose, and whether it is so or not is a question of fact, which depends on all the circumstances in each particular case, in determining which the situation and financial condition of the homesteader are proper matters to be taken into consideration. Grubbs *v.* U. S., 105 Fed. 314, 44 C. C. A. 513.

Right prior to filing of entry.— A settler, claiming in good faith a homestead, can, for the purpose of improving the land, cut down the necessary timber before he files his entry in the land office. U. S. *v.* Yoder, 18 Fed. 372, 5 McCrary 615.

9. U. S. *v.* Blendauer, 122 Fed. 703 [*reversed* on other grounds in 128 Fed. 910, 63 C. C. A. 636].

10. Shiver *v.* U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. ed. 231.

11. Shiver *v.* U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. ed. 231.

12. U. S. *v.* Murphy, 32 Fed. 376; U. S. *v.* Williams, 18 Fed. 475, 9 Sawy. 374.

13. Conway *v.* U. S., 95 Fed. 615, 37 C. C. A. 200, where the timber was cut by one doing such work for the homesteader under contract with him.

14. Stone *v.* U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451]; Shiver *v.* U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. ed. 231; U. S. *v.* Taylor, 35 Fed. 484; U. S. *v.* Murphy, 32 Fed. 376; U. S. *v.* Freyberg, 32 Fed. 195; U. S. *v.* Ball, 31 Fed. 667, 12 Sawy. 514; U. S. *v.* Lane, 19 Fed. 910; The Timber Cases, 11 Fed. 81, 3 McCrary 519.

The use of land for grazing purposes without plowing it up is not cultivation in a legal sense. U. S. *v.* Niemeyer, 94 Fed. 147.

15. U. S. *v.* Blendauer, 122 Fed. 703 [*reversed* on other grounds in 128 Fed. 910, 63 C. C. A. 636], although he had not filed his entry and the local land office had previously been ordered by the land department not to accept any filing on such land.

16. U. S. *v.* Smith, 11 Fed. 487, 8 Sawy. 100.

occupation or cultivation, the occupant may, after applying such portion as can be used for the improvement, sell or dispose of the balance.[17] But until he has received his patent,[18] it is unlawful for such an occupant to cut more timber than is necessary for the purposes of his occupation,[19] or to cut and sell the timber except as hereinbefore stated,[20] and if he exceeds his rights he is liable as to such excess the same as if he had been a trespasser *ab initio*.[21]

7. Effect of Entry, Purchase, or Issue of Patent Subsequent to Trespass. An innocent trespasser on public lands is relieved of liability for timber cut thereon where he afterward enters the land from the government and pays the price therefor and the costs up to the time of entry.[22] Where a homesteader sold timber cut from the land which he had entered as a homestead, but for which he had not yet paid or procured the patent, and after the commencement of an action by the government for the recovery of the timber, he commuted his entry and paid for the land, receiving the receipt therefor from the land office, this proceeding made a completed purchase of the land, and so changed the status of the original entry as to deprive the United States of the right to recover for timber previously cut from the land.[23] But where one made the application and paid the fee required by the homestead laws to enter public land, in bad faith, for the purpose only of appropriating the timber on the land, and never complied with his obligations as a homesteader, but was afterward allowed to become a beneficiary under the act of congress providing that those entering lands under the homestead laws might become entitled thereto by paying the government price, and a patent was issued to him, whatever title he obtained by his patent it did not relate back to the application so as to affect the liability of a purchaser of timber cut before the patent issued.[24] Where a homesteader, who has never had possession of the land included in his homestead claim, and whose entry has been canceled, buys the land from the government, such purchase does not pass title to timber which he had cut from the land before his purchase, and after he had learned that his homestead entry was invalid.[25]

17. Shiver *v.* U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. ed. 231; U. S. *v.* Taylor, 35 Fed. 484; U. S. *v.* Murphy, 32 Fed. 376; U. S. *v.* Williams, 18 Fed. 475, 9 Sawy. 374; Timber Cases, 11 Fed. 81, 3 McCrary, 519.

18. See Brown *v.* Throckmorton, 11 Ill. 529; U. S. *v.* Lane, 19 Fed. 910. And see, generally, as to patents, *infra*, II, M.

19. Stone *v.* U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451]; U. S. *v.* Niemeyer, 94 Fed. 147; U. S. *v.* Murphy, 32 Fed. 376; U. S. *v.* Freyberg, 32 Fed. 195; U. S. *v.* Ball, 31 Fed. 667, 12 Sawy. 514; U. S. *v.* Lane, 19 Fed. 910; U. S. *v.* Williams, 18 Fed. 475, 9 Sawy. 374; U. S. *v.* Stores, 14 Fed. 824, 4 Woods 641; U. S. *v.* Smith, 11 Fed. 487, 8 Sawy. 100; Timber Cases, 11 Fed. 81, 3 McCrary 519; U. S. *v.* Nelson, 27 Fed. Cas. No. 15,864, 5 Sawy. 68.

Effect of certificate of compliance with law. — Where a settler on the public lands under the Homestead Act, pending his residence thereon, and prior to the issue of a final certificate, cuts and removes timber therefrom for export and sale merely, and afterward obtains a certificate from the register and receiver of his compliance with the law, as such settler, the United States cannot thereafter maintain an action against him for damages for cutting such timber, or against any one to whom he may have disposed of the same, for the conversion thereof. U. S. *v.* Ball, 31 Fed. 667, 12 Sawy. 514.

Misrepresentations of government official. — The fact that defendant was induced, through the erroneous representations of the register of the land office, to believe in the unrestricted right of the homesteader to cut timber from his entry, does not estop the government from prosecuting him for such unlawful cutting. U. S. *v.* Murphy, 32 Fed. 376.

20. Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881; Shivers *v.* U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. ed. 231; Cunningham *v.* Metropolitan Lumber Co., 110 Fed. 332, 49 C. C. A. 72; U. S. *v.* Niemeyer, 94 Fed. 147; U. S. *v.* Taylor, 35 Fed. 484; U. S. *v.* Murphy, 32 Fed. 376; U. S. *v.* Williams, 18 Fed. 475, 9 Sawy. 374; U. S. *v.* McEntee, 26 Fed. Cas. No. 15,673.

21. Shiver *v.* U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. ed. 231; U. S. *v.* Taylor, 35 Fed. 484; U. S. *v.* Williams, 18 Fed. 475, 9 Sawy. 374.

Possession by the homestead claimant, and a receiver's receipt issued since bringing the action, do not divest the government of possession or title so that it cannot bring trespass for cutting timber on the land. U. S. *v.* Taylor, 35 Fed. 484.

22. U. S. *v.* Mills, 9 Fed. 684.

23. U. S. *v.* Freyberg, 32 Fed. 195.

24. U. S. *v.* Norris, 41 Fed. 424.

25. U. S. *v.* Perkins, 44 Fed. 670.

8. Relief to Private Individuals. A person claiming land as a preëmptor cannot maintain replevin for timber cut thereon, before his right has been proved,[26] and a settler on unsurveyed land cannot recover damages for the cutting and removing of the timber;[27] but cutting down trees on public land is waste, within the meaning of a state statute providing that where there are opposing claimants to public land, and one is threatening to commit on such lands waste which tends materially to lessen the value of the inheritance, and which cannot be compensated by damages, an injunction will lie to restrain him therefrom.[28] When a person has entered land, payment of the price vests an equitable title in him which relates back to the entry, and he may recover from a trespasser the value of timber cut by the latter after the entry.[29] It has been held that a territorial statute, giving a person having a claim on public land marked out but not inclosed power to maintain trespass for cutting trees thereon, did not interfere with the primary disposal of the soil and was valid.[30] In an action under such a statute for cutting timber on a tract of government land occupied by plaintiff as a claim, plaintiff should be nonsuited, unless the evidence shows that his claim is so marked out that the boundaries can be readily traced and its extent easily known.[31]

9. Forfeiture.[32] The statute provides that if the master, owner, or consignee of any vessel shall knowingly take on board any timber cut on reserved lands without proper authority and for the use of the navy of the United States, or shall take on board any live oak or red cedar timber cut on other lands of the United States, with intent to transport the same to any port or place within the United States or to export the same to any foreign country, the vessel, with all her tackle, apparel, and furniture shall be wholly forfeited to the United States.[33] Under this provision a forfeiture is incurred if any timber cut on lands reserved is knowingly taken on board the vessel, but to incur a forfeiture for taking timber from lands not reserved for naval purposes the timber must be "live oak or red cedar,"[34] and a forfeiture cannot be enforced except upon an averment in the libel and proof that the acts charged were done wilfully or with knowledge of their culpability.[35]

10. Criminal Prosecution[36]**— a. Criminal Liability.** The statutes make it a criminal offense for any person to cut or remove timber[37] from lands of the United

26. Bower *v.* Higbee, 9 Mo. 259.

27. Nickelson *v.* Cameron Lumber Co., 39 Wash. 569, 81 Pac. 1059.

28. Arment *v.* Hensel, 5 Wash. 152, 31 Pac. 464.

29. Teller *v.* U. S., 117 Fed. 577, 54 C. C. A. 349.

30. Hughell *v.* Wilson, Morr. (Iowa) 383.

31. Jones *v.* Donahoo, Morr. (Iowa) 493.

32. See, generally, Forfeitures, 19 Cyc. 1355.

33. U. S. Rev. St. (1878) § 2462 [U. S. Comp. St. (1901) p. 1527].

34. U. S. *v.* The Helena, 26 Fed. Cas. No. 15,342, 5 McLean 273 [*reversing* 26 Fed. Cas. No. 15,341], holding that the libel must allege either that the timber was knowingly taken from lands reserved for naval purposes or that it was live oak or red cedar.

35. The Cherokee, 5 Fed. Cas. No. 2,639, 12 N. Y. Leg. Obs. 33, holding that knowledge must be charged and proved where the timber was taken from lands not reserved as well as where it was taken from lands reserved.

36. See, generally, Criminal Law, 12 Cyc. 70.

37. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; 20 U. S. St. at L. 90 [U. S. Comp. St. (1901) p. 1529]; Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881; U. S. *v.* Stone, 49 Fed. 848.

What is "timber" within the statute.— The statute was not intended to protect only such timber as is of a size and kind adapted to house or ship building (U. S. *v.* Soto, 7 Ariz. 230, 64 Pac. 419; U. S. *v.* Stores, 14 Fed. 824, 4 Woods 641); but includes trees of any size, of a character or sort that may be used in any kind of manufacture or the construction of any article (U. S. *v.* Stores, *supra*). The term "timber" signifies the standing trees and the felled trees prepared for transportation to a vessel or sawmill, such as saw logs, or lumber in bulk, but does not embrace any article manufactured from the tree, as shingles or boards. U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28. It cannot be held as matter of law that the mesquite tree is not timber within the meaning of the statute, since some mesquite wood is fit for some constructive purposes; but the question whether mesquite trees cut by defendant were "timber" is for the jury. U. S. *v.* Soto, *supra* [*overruling* Bustemente *v.* U. S., 4 Ariz. 344, 42 Pac. 111].

An occupant of a mineral claim, who has applied for a patent before the purchase-price is paid and before he receives a certificate, has no right to cut the timber on such claim

States[38] with the intent to export or dispose of the same[39] or to use it except for certain specified purposes;[40] or to wantonly destroy timber on lands reserved for public uses.[41] The offense is committed when timber is unlawfully cut or removed and a criminal intent is not necessary,[42] and if the timber is converted to the use of defendant it is immaterial to what purposes it is applied after being cut.[43]

b. Indictment or Information.[44] The indictment or information should allege the intent to use the timber for a purpose other than the statute authorizes[45] or to export or dispose of the same;[46] but it is not necessary to allege that defendant knowingly committed the act,[47] to specify the class of lands on which the trespass was committed,[48] to describe every kind of timber that was cut,[49] to set out the use to which the timber was appropriated,[50] or to allege that the cutting or removal was not justified under any of the various land laws.[51] It must be stated that the timber was cut or was removed from the lands of the United States, specially described according to the public survey;[52] but an indictment for removal merely need not allege that the timber was removed from the land where it was grown and cut.[53] An indictment charging the "cutting and removing" of timber is not bad

with intent to export or remove the same, and a license from him to so cut the timber gives no protection to the licensee as against the government. Teller *v.* U. S., 113 Fed. 273, 51 C. C. A. 230.

Offenses of cutting and of removal distinct. — U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28.

38. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; 20 U. S. St. at L. 90 [U. S. Comp. St. (1901) p. 1529]; Shiver *v.* U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. ed. 231; U. S. *v.* Briggs, 9 How. (U. S.) 351, 13 L. ed. 170; Teller *v.* U. S., 113 Fed. 273, 51 C. C. A. 230; U. S. *v.* Stone, 49 Fed. 848; U. S. *v.* Smith, 11 Fed. 487, 8 Sawy. 100; Bly *v.* U. S., 3 Fed. Cas. No. 1,581, 4 Dill. 464.

State statute applicable. — The United States is a "person" within the meaning of a state statute making it an offense to cut down, injure, or destroy, or take or remove any tree, timber, rails or wood, "standing, being, or growing on the land of any other person." State *v.* Herold, 9 Kan. 194.

Cutting or removing timber from any of the public land is indictable, although the land is not reserved for naval purposes. U. S. *v.* Redy, 27 Fed. Cas. No. 16,133, 5 McLean 358; U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28.

A homestead entry by a third person works no change in the title to the land which will prevent a prosecution. U. S. *v.* Stores, 14 Fed. 824, 4 Woods 641.

39. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; 20 U. S. St. at L. 90 [U. S. Comp. St. (1901) p. 1529]; Teller *v.* U. S., 113 Fed. 273, 51 C. C. A. 230; U. S. *v.* Stone, 49 Fed. 848.

The only intent necessary to be shown is the intent to export or dispose of the timber. Teller *v.* U. S., 113 Fed. 273, 51 C. C. A. 230.

40. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; U. S. *v.* Stone, 49 Fed. 848; U. S. *v.* Garretson, 42 Fed. 22.

Cutting, with intent to appropriate to one's own use, of trees other than live oak or red cedar, on lands not reserved to supply timber for the navy, is indictable. U. S. *v.* Briggs, 9 How. (U. S.) 351, 13 L. ed. 170.

41. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; 20 U. S. St. at L. 90 [U. S. Comp. St. (1901) p. 1529].

This provision does not cover the wanton destruction of timber on lands open for preëmption, homestead, and cash entries. U. S. *v.* Garretson, 42 Fed. 22.

42. U. S. *v.* Reder, 69 Fed. 965; U. S. *v.* Murphy, 32 Fed. 376. But *compare* U. S. *v.* Darton, 25 Fed. Cas. No. 14,919, 6 McLean 46.

43. U. S. *v.* Stores, 14 Fed. 824, 4 Woods 641, holding that it is no defense that the timber cut was used for firewood or burning into charcoal.

44. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

45. U. S. *v.* Garretson, 42 Fed. 22.

46. U. S. *v.* Hacker, 73 Fed. 292, holding that this is necessary in an indictment for cutting as well as in an indictment for removal.

47. U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28.

48. U. S. *v.* Thompson, 28 Fed. Cas. No. 16,490, 6 McLean 56, holding that it is not necessary to distinguish between the lands reserved and those not reserved for naval purposes, but it is sufficient to specify the place of the trespass by township, range, or section.

49. U. S. *v.* Redy, 27 Fed. Cas. No. 16,133, 5 McLean 358, holding that it is sufficient to name one or more species, and, in the words of the statute, allege other timbers, and that under an indictment for cutting walnut and other trees proof of cutting trees other than walnut is admissible.

50. U. S. *v.* Stone, 49 Fed. 848.

51. U. S. *v.* Stone, 49 Fed. 848.

52. U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28.

Indictment must state the particular section or quarter section from which the timber was taken. U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28.

53. U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28.

as charging two offenses in one count.[54] An information charging the unlawful cutting and removal of timber, drawn to conform to the requirements of one statute and intended to charge an offense thereunder, may be treated as drawn under another statute where it contains all the averments necessary to charge an offense thereunder.[55]

c. Presumptions and Burden of Proof.[56] The United States must prove the cutting of timber by defendant on the land specified in the indictment,[57] and that such land belonged to the United States,[58] and the proof of the kind of timber cut must correspond with that specified in the indictment.[59] Where the cutting and removal is not authorized by the statute it is presumed that defendant intended to take the timber unlawfully.[60] A defendant who justifies under statutory authority has the burden of establishing his defense; [61] but where defendant shows that he had a mineral entry on the land, which, under the law, entitled him to cut timber therefrom for certain purposes, the presumption arises that the cutting done was for such legal purposes; and the burden of proving otherwise rests upon the government.[62]

d. Admissibility and Sufficiency of Evidence.[63] Evidence that about the time of the cutting defendant purchased and paid for the full quantity of similar land which he could purchase under the statute is inadmissible to show that he would not intentionally commit a trespass.[64] Evidence of a custom in the locality known to the general land office, of entering on land and cutting timber therefrom before patent was obtained, is inadmissible, since a custom to violate the law cannot justify itself,[65] nor is the fact that defendant acted in accordance with a general custom in that locality evidence of an honest intent on his part.[66] Neither is the fact that before cutting he endeavored to ascertain whether the land was surveyed, and also notified a special agent of the government that he was cutting the timber, and was not warned off for three weeks, evidence of an honest intent.[67] Where defendant admits that he had cut timber on three hundred acres of unsurveyed government land, to which he had no claim or color of title, and there is evidence that he was informed by the register of the land office that he could not acquire the title because the lands were not open to entry, and that he promised his workmen that he would stand between them and the government, and that he had fully exhausted all his privileges of purchasing such lands, the intent constituting the offense of unlawfully cutting timber on government land is sufficiently shown.[68]

e. Instructions.[69] A charge that, in order to convict, the jury must find that there existed in defendant's mind a wilful and wrongful purpose to obtain the timber in violation of law, and that if he entered on public land knowing it was such, without having complied with the provisions of law giving him a right

54. U. S. *v.* Stone, 49 Fed. 848.

55. Stubbs *v.* U. S., 111 Fed. 366, 49 C. C. A. 392, 104 Fed. 988, 44 C. C. A. 292.

56. See, generally, EVIDENCE, 16 Cyc. 926, 1050.

57. U. S. *v.* Darton, 25 Fed. Cas. No. 14,919, 6 McLean 46.

58. See State *v.* Herold, 9 Kan. 194, holding that in a prosecution for trespass under Kan. Gen. St. c. 113, which makes the cutting and carrying away of timber from land belonging to the United States a criminal offense, proof on behalf of the prosecution that the trespass was committed in 1870 on a tract of land within the Sac and Fox Diminished Reservation, ceded to the United States by treaty in 1868 was some proof that the federal government owned the land at the time of the commission of the trespass.

59. U. S. *v.* Darton, 25 Fed. Cas. No. 14,919, 6 McLean 46.

60. U. S. *v.* Niemeyer, 94 Fed. 147.

61. Stubbs *v.* U. S., 111 Fed. 366, 49 C. C. A. 392, 104 Fed. 988, 44 C. C. A. 292.

62. U. S. *v.* Routledge, 8 N. M. 385, 45 Pac. 883.

63. See, generally, EVIDENCE, 16 Cyc. 820; 17 Cyc. 753.

64. Teller *v.* U. S., 113 Fed. 273, 51 C. C. A. 230.

65. Teller *v.* U. S., 113 Fed. 273, 51 C. C. A. 230.

66. Teller *v.* U. S., 113 Fed. 273, 51 C. C. A. 230.

67. Teller *v.* U. S., 113 Fed. 273, 51 C. C. A. 230.

68. Teller *v.* U. S., 113 Fed. 273, 51 C. C. A. 230.

69. See, generally, TRIAL.

to do so, and cut timber therefrom, they would be authorized to find the requisite criminal intent, fairly states the law, and is as favorable to defendant as he is entitled to.[70]

f. Punishment. The statute formerly provided that a person who cut or removed timber from lands of the United States without authority should be punished by fine and imprisonment,[71] but the provision for imprisonment has been repealed and under the present statute the punishment is by fine only.[72]

g. Compromising Prosecution. The statute allows a person to relieve himself of any further prosecution or criminal liability for unlawfully cutting or removing timber a violation of the law in this respect — except cutting timber for export from the United States — by paying into court two dollars and fifty cents per acre for all lands on which the offense has been committed,[73] and before the enactment of this statute it was held that only a nominal fine would be imposed where defendant had made full reparation, and it appeared that he had no intention of defrauding the public.[74]

11. Timber on State Lands. Timber unlawfully cut from state lands remains the property of the state,[75] and can be pursued wherever it is carried,[76] or a state may maintain trespass against persons who, without authority, cut timber on the state lands,[77] and recover damages for the injury sustained,[78] or statutory penalties

70. Teller *v.* U. S., 113 Fed. 273, 51 C. C. A. 230.

71. U. S. Rev. St. (1878) § 2461 [U. S. Comp. St. (1901) p. 1527]; U. S. *v.* Briggs, 9 How. (U. S.) 351, 13 L. ed. 170.

72. 20 U. S. St. at L. 90 [U. S. Comp. St. (1901) p. 1530]; Morgan *v.* U. S., 148 Fed. 189, 78 C. C. A. 323.

73. 20 U. S. St. at L. 90 [U. S. Comp. St. (1901) p. 1530]; Morgan *v.* U. S., 148 Fed. 189, 78 C. C. A. 323; U. S. *v.* Scott, 39 Fed. 900.

Payment under this statute does not relieve from civil liability.— U. S. *v.* Scott, 39 Fed. 900.

A compromise is not conclusive evidence of guilt even if it is competent at all. Cox *v.* Cameron Lumber Co., 39 Wash. 562, 82 Pac. 116.

An employee who compromises a prosecution against him cannot recover from his employer the amount paid; for if he was not guilty there was no obligation on his part to pay, while if he was guilty the law permits no contribution between wrong-doers. Cox *v.* Cameron Lumber Co., 39 Wash. 562, 82 Pac. 116.

74. U. S. *v.* Murray, 27 Fed. Cas. No. 15,843, 5 McLean 207.

75. Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551 [*affirming* 21 Fed. Cas. No. 12,486, 2 Dill. 398]. See also State *v.* Rat Portage Lumber Co., (Minn. 1908) 115 N. W. 162.

One who purchases from a trespasser ties unlawfully cut by him from state lands acquires no title thereto, but the title remains in the state. Raber *v.* Hyde, 138 Mich. 101, 101 N. W. 61.

A purchaser of state land acquires no title to timber cut therefrom prior to his purchase and piled thereon at the time of his purchase. Rogers *v.* Bates, 1 Mich. N. P. 93.

Right to purchase timber cut see State *v.* School, etc., Land Com'rs, 19 Wis. 237.

76. Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551 [*affirming* 21 Fed. Cas. No. 12,486, 2 Dill. 398].

Mingling.— Under the law of Minnesota, where logs cut from lands of the state without license have been intermingled with logs cut from other lands so as not to be distinguishable the state is entitled to replevy an equal amount from the whole mass. Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551 [*affirming* 21 Fed. Cas. No. 12,486, 2 Dill. 398].

Sale of reclaimed timber.— In the absence of any showing of fraud, a sale of timber reclaimed from trespassers on the state lands is not invalidated by the fact that it was made privately instead of publicly. Ballou *v.* O'Brien, 20 Mich. 304. Under a statute authorizing the agents of the state to take possession of logs cut by trespassers on state lands and sell the same "at public auction to the highest bidder, for cash," a sale for anything but money paid at once is unauthorized and void. State *v.* Torinus, 24 Minn. 332.

77. State *v.* Mullen, 97 Me. 331, 54 Atl. 841; State *v.* Cutler, 16 Me. 349; Newcomb *v.* Butterfield, 8 Johns. (N. Y.) 342; Graham *v.* Moore, 4 Serg. & R. (Pa.) 467.

Reserved lands.— The state is the trustee of reserved lands, and may maintain trespass for injury to them, but it is only such trustee until the township in which they are situated is incorporated. State *v.* Mullen, 97 Me. 331, 54 Atl. 841.

78. State *v.* Shevlin-Carpenter Co., 102 Minn. 470, 113 N. W. 634, 114 N. W. 738.

Treble damages — Complaint.— N. Y. Code Civ. Proc. §§ 1667, 1668, providing for treble damages for the cutting of trees, do not relate to damages to trees on lands of the state; but a complaint, otherwise sufficient, is not liable to demurrer because it demands such damages. People *v.* Bennett, 56 Misc. (N. Y.) 160, 107 N. Y. Suppl. 406 [*affirmed* in 125 N. Y. App. Div. 912, 109 N. Y. Suppl. 1140].

The state is not estopped, in a civil action,

for the wrongful act.[79] Under some statutes it is a criminal offense to cut or remove timber from state lands; [80] but in Texas cutting and carrying away timber from lands belonging to the state, without the consent of the state, has been held not a punishable offense under a statute declaring that a person wilfully cutting down and carrying away, etc., timber from any land not his own, without the consent of the owner, shall be guilty of misdemeanor.[81] In California the right to use the growing wood and timber upon the public mineral lands, as between the claims of miners on the one hand and agriculturists on the other, is governed by the rule of priority of appropriation.[82] In an action under a statute prohibiting the cutting and carrying away of trees from the lands of the state under a fixed penalty for each tree cut, plaintiff may allege in a single count the cutting and carrying away of any number of trees, and under such a count the amount of penalties that can be proved may be recovered, although the number of trees cut is less than that alleged.[83] Where in an action to recover penalties for cutting timber on public land, there is evidence that defendant said he owned the land, and that he was cutting timber there, and that the trees were cut on that lot, it is proper to submit the question to the jury whether defendant cut the timber himself, or whether one cutting on adjacent lands by his authority had without his sanction cut the timber in question.[84] Where in an action by the state to recover for cutting timber from state lands, defendant claimed that he was an innocent purchaser, and that he paid the person who had cut the timber on orders of the party from whom he purchased, and the evidence of the state was to the effect that defendant knew that the timber was cut from the state lands, that he employed the cutter, and that the arrangement which he claimed to have made was a mere subterfuge, an instruction that, if defendant only agreed to pay the cutter on orders from the purchaser, he was not liable to the state, was properly refused, as excluding from the consideration of the jury the claim that he had assisted in the trespass.[85]

to recover double the amount of value of timber taken by reason of the fact that the land commissioner gave defendant, who had obtained the timber, to understand that a further extension of the permit would be granted, or by reason of the fact that defendant proceeded in good faith, and the state caused the timber to be scaled, received payment therefor, with interest, and retained the same. State *v.* Shevlin-Carpenter Co., 102 Minn. 470, 113 N. W. 634, 114 N. W. 738.

79. People *v.* Bennett, 56 Misc. (N. Y.) 160, 107 N. Y. Suppl. 406 [*affirmed* in 125 N. Y. App. Div. 912, 109 N. Y. Suppl. 1140], holding that N. Y. Laws (1900), p. 63, c. 20, § 222, authorizing the recovery of penalties for cutting trees on state lands, in an action for trespass or in a separate action, was not repealed by the amendment to Code Civ. Proc. § 488, taking effect April 23, 1900.

80. See People *v.* Christian, 144 Mich. 247, 107 N. W. 919; State *v.* Shevlin-Carpenter Co., 99 Minn. 158, 108 N. W. 935; State *v.* Dorman, 9 S. D. 528, 70 N. W. 848.

Intent.— Under the Michigan statute it is a felony to enter upon state tax homestead lands and cut timber therefrom or to induce or direct another to do so, and an intent to commit a trespass is not necessary to complete the offense. People *v.* Christian, 144 Mich. 247, 107 N. W. 919. And the Minnesota statute declaring cutting or removing timber from state lands a crime, imposing a penalty, and fixing the measure of damages in a civil action, imposes on a casual or involuntary trespasser criminal punishment and also double damages for his wrongful act. State *v.* Shevlin-Carpenter Co., 99 Minn. 158, 108 N. W. 935, construing Gen. Laws (1895), c. 163, p. 349, and holding that such statute as construed is not obnoxious to constitutional principles. So also as the South Dakota statute does not require that the offense shall be "knowingly" committed, it is no defense that defendant did not know that the land from which he removed the timber was school land. State *v.* Dorman, 9 S. D. 528, 70 N. W. 848.

Indictment.— An indictment charging that defendant did wilfully, etc., "cut and remove" from school land certain timber then and there growing, charges an offense within Laws (1890), c. 140, § 2, prescribing punishment for any person "who shall remove" any timber standing or growing on such land, the word "cut" being mere surplusage. State *v.* Dorman, 9 S. D. 528, 70 N. W. 848.

To deaden a tree standing on public ground is an indictable misdemeanor. Com. *v.* Eckert, 2 Browne (Pa.) 249.

81. State *v.* Howard, 21 Tex. 416.

82. Rogers *v.* Soggs, 22 Cal. 444.

83. People *v.* McFadden, 13 Wend. (N. Y.) 396.

84. People *v.* Turner, 49 Hun (N. Y.) 466, 2 N. Y. Suppl. 253 [*affirmed* in 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498].

85. People *v.* Holmes, 166 N. Y. 540, 60

12. Licenses and Permits to Cut Timber.[86] A permit, granted by the secretary of the interior, to cut timber on the public lands of the United States, does not attach to land upon which a homestead filing has been previously made, and remains uncanceled.[87] In Maine the county commissioners formerly had authority to grant permits to cut timber on the public lands,[88] but the statute authorizing them to do this has been repealed;[89] and a subsequent statute authorized the land agent to sell the right to cut timber and grass growing on lots reserved for public uses in unincorporated townships.[90] The Minnesota statute prohibits the sale of any pine timber on state lands except in special cases where the timber is liable to waste,[91] and a permit to remove timber purchased from the state at public sale is limited in the first instance to the period of two logging seasons, with authority to the timber commissioner to grant, for good reasons, an extension of one year.[92] A person to whom such a permit is issued has the right to cut and remove timber only during the life of the permit, and after the expiration of such term logs cut but not removed are the property of the state.[93] In Canada licenses are issued to cut timber on ungranted land.[94] Timber licenses are not retroactive as against prior grantees of the lands,[95] and lots granted or located prior to the date of the license are not subject to the rights conferred thereby.[96] A license to cut a specified amount of timber from certain land does not vest in the licensee any estate, right, or title in the land, or prevent the government giving like licenses, or others of equal authority, to other persons, so long as there is sufficient timber

N. E. 249 [*affirming* 53 N. Y. App. Div. 626, 65 N. Y. Suppl. 1142].

86. **Grants to railroads of right to cut timber** see *infra*, II, K, 3.

87. Nelson *v.* Big Blackfoot Milling Co., 17 Mont. 553, 44 Pac. 81.

88. Small *v.* Small, 35 Me. 400, holding that such permits did not continue in force more than a year, and the person to whom a permit was granted was liable for cutting the timber after the expiration of the year.

89. Small *v.* Small, 35 Me. 400.

90. Walker *v.* Lincoln, 45 Me. 67, holding that the act of Aug. 28, 1850, so providing, should be construed to include in its provisions a lot which was reserved "for the benefit of public education in general."

A permit to cut timber generally authorizes the holder to cut spruce timber, although its price is not stipulated in the instrument, but is only stated on another page of the sheet on which it is written. Mason *v.* Sprague, 47 Me. 18.

Validity of permit.— A permit from the land agent to cut timber on the state lands is valid, although it does not appear whether the holder gave the bond for the payment of "stumpage" required by the statute, as the bond is a matter subsequent to and independent of the permit. Mason *v.* Sprague, 47 Me. 18.

Right to permit.— The provision of Laws (1850), c. 196, authorizing the land agent to sell the right to cut grass and timber from public lands to the persons owning lands in any township if they elect to purchase, otherwise to any other person, is purely gratuitous, and neither such owners nor other persons can claim a conveyance thereof as of right. Coe *v.* Bradley, 49 Me. 388.

Termination of right.— The right of one who has secured a permit to cut grass and timber on reserved lands is terminated when such lands are incorporated in a township (State *v.* Mullen, 97 Me. 331, 54 Atl. 841), or an organization for either election or plantation purposes is perfected (Bragg *v.* Burleigh, 61 Me. 444, holding that the right under a deed conveying the right to cut until the organization for plantation purposes expired upon an earlier organization for election purposes).

91. State *v.* Shevlin-Carpenter Co., 62 Minn. 99, 64 N. W. 81, holding that the state auditor, acting as commissioner of the state land office, has no authority to sell any pine timber, under any conditions unless the governor, the treasurer, and the commissioner, or a majority of them, shall first officially sign a statement to be indorsed upon the appraisal and estimate of such pine timber as it is proposed to sell, to the effect that a sale thereof is necessary to protect the state from loss, and that if such commissioner does attempt to sell any pine timber and issues a permit to the purchaser to cut and remove the same without such official statement and sanction, such sale and permit are void, and the permit may be attacked collaterally, although it recites on its face facts showing that the law has been complied with.

92. State *v.* Shevlin-Carpenter Co., 102 Minn. 470, 113 N. W. 634, 114 N. W. 738.

93. State *v.* Rat Portage Lumber Co., (Minn. 1908) 115 N. W. 162.

94. Leblanc *v.* Robitaille, 31 Can. Sup. Ct. 582.

A sale by a local land agent which has not been approved by the commissioner of crown lands does not prevent the issuance of a timber license. Leblanc *v.* Robitaille, 31 Can. Sup. Ct. 582.

95. Price *v.* Delisle, 21 Quebec Super. Ct. 411.

96. Price *v.* Delisle, 21 Quebec Super. Ct. 411.

to satisfy the requirements of the first license.[97] Orders in council authorizing the minister of the interior to grant licenses to cut timber do not constitute contracts between the crown and proposed licensees, but are revocable by the crown until acted upon by the granting of licenses under them.[98] Where the holder of a timber license does not verify the correctness of the official description of the lands to be covered by the license before it issues, and after its issue works on lands and makes improvements on a branch of a river which he believes forms part of his limits, but is subsequently ascertained by survey to form part of adjoining limits, he cannot recover from the crown for losses sustained by acting on an understanding derived from a plan furnished by the crown prior to the sale.[99] A timber license may be assigned without an instrument under seal registered in the county where the land is situated.[1]

F. Inclosure, Assertion of Exclusive Right, or Obstruction of Transit. Any inclosure of the public lands of the United States made or maintained by a person without color of title or an asserted right thereto, claimed in good faith, is unlawful,[2] as is also the assertion of a right to the exclusive use and occupancy of any of the public land without a claim or color of title or an asserted right to such claim or title made in good faith,[3] or the prevention or obstruction of free passage or transit over or through the public lands.[4] The United States may protect its lands from inclosure so long as the legal title remains in the government,[5] and may compel the destruction or removal of fences inclosing public lands.[6] The appropriate civil remedy is by injunction,[7] which may be mandatory as to so much of the fence complained of as exists,[8] and prohibitory as to building any future fences.[9] The provision against inclosure was only intended to prevent mere trespassers from inclosing public lands,[10] and in a proceeding under the statute it is a sufficient defense to show that the lands inclosed are not public lands,[11] or that

97. Sinnott *v.* Scoble, 11 Can. Sup. Ct. 571.

98. Bulmer *v.* Reg., 23 Can. Sup. Ct. 488.

99. Grant *v.* Reg., 20 Can. Sup. Ct. 297.

1. Laughlan *v.* Prescott, 1 N. Brunsw. Eq. 406, holding, however, that the instrument in question was not an assignment of the license, but at most a mere sublicense, conferring no right of renewal against the crown, and amounting only to a sale of, or an agreement to sell, rights under the license, enforceable by specific performance against the original licensee upon the license being renewed to him, or, if not renewed, giving rise to an action at law for breach of the agreement.

2. 23 U. S. St. at L. 321 [U. S. Comp. St. (1901) p. 1524]; Clemmons *v.* Gillette, 33 Mont. 321, 83 Pac. 879, 114 Am. St. Rep. 814; Garst *v.* Love, 6 Okla. 46, 55 Pac. 19.

Statute forbidding inclosure constitutional. — Camfield *v.* U. S., 167 U. S. 518, 17 S. Ct. 864, 42 L. ed. 260 [*affirming* 66 Fed. 101, 13 C. C. A. 359 (*affirming* 59 Fed. 562)].

3. 23 U. S. St. at L. 321 [U. S. Comp. St. (1901) p. 1524].

4. Krause *v.* U. S., 147 Fed. 442, 78 C. C. A. 642.

5. U. S. *v.* Brighton Ranch Co., 25 Fed. 465.

Where land has been entered, the government can protect it in the same manner, except where the person who has entered the land has built his own fences or given an express license to others to build fences. U. S. *v.* Brighton Ranch Co., 25 Fed. 465.

Land reserved and set apart for school purposes in a territory remains part of the public land. U. S. *v.* Bisel, 8 Mont. 20, 19 Pac. 251; U. S. *v.* Elliot, 12 Utah 119, 41 Pac. 720 [*overruling* U. S. *v.* Elliot, 7 Utah 389, 26 Pac. 1117]; Barkley *v.* U. S., 3 Wash. Terr. 522, 19 Pac. 36.

6. Camfield *v.* U. S., 167 U. S. 518, 17 S. Ct. 864, 42 L. ed. 260 [*affirming* 66 Fed. 101, 13 C. C. A. 359 (*affirming* 59 Fed. 562)], although the fences are erected on private property.

7. U. S. *v.* Brighton Ranche Co., 26 Fed. 218.

8. U. S. *v.* Brighton Ranche Co., 26 Fed. 218, 25 Fed. 465.

9. U. S. *v.* Brighton Ranche Co., 25 Fed. 465.

10. Cameron *v.* U. S., 148 U. S. 301, 13 S. Ct. 595, 37 L. ed. 459 [*reversing* 3 Ariz. 100, 21 Pac. 177].

11. U. S. *v.* Godwin, 7 Mont. 402, 16 Pac. 850 [*following* U. S. *v.* Williams, 6 Mont. 379, 12 Pac. 851; Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116; Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 2 Pac. 322] (land included in a railroad grant and conveyed by the railroad to defendant, although it had not been surveyed); Cameron *v.* U. S., 148 U. S. 301, 13 S. Ct. 595, 37 L. ed. 459 [*reversing* 3 Ariz. 100, 21 Pac. 177]; U. S. *v.* White, 110 Fed. 598 (where the evidence showed that of two sections inclosed one was a state school section and the other was embraced in a railroad grant); U. S. *v.* Elliot, 74 Fed. 92 (holding that where, after a suit was brought, the land was transferred to a state, the suit must be dismissed).

defendant had a claim or color of title to the land acquired in good faith.[12] It is not necessary to constitute the offense of unlawfully inclosing public lands that the person accused should entirely surround the land with his own fences;[13] but the offense is complete where he completely incloses the land by constructing his fence so as to connect with fences erected and maintained by others,[14] or so as to take advantage of a natural barrier impassable for cattle.[15] Neither is it necessary that the fence should be on public land,[16] for when a person under the guise of inclosing his own land, builds a fence thereon for the purpose and with the intention of inclosing public lands, such fence or inclosure is unlawful.[17] But where a landowner in good faith, for the purpose of inclosing his own land, builds a fence on the line extending around the tract, such act is not unlawful, even though such fence so connects with fenced lands of other owners as thereby to inclose unclaimed public lands.[18] One who unlawfully incloses government lands with his own acquires no right to the exclusive possession of such government lands;[19] nor can he by such inclosure deprive others of the right to peaceably turn cattle thereon.[20] The making or maintaining of such unlawful inclosure or the assertion of such exclusive right, or the obstruction of passage, is a criminal offense under the statute.[21] All three offenses may be embraced in one indictment,[22] or if there are separate indictments they may be consolidated for trial.[23] An indictment for unlawfully inclosing a portion of the public lands must show that defendant is not within any of the exceptions permitting such inclosure.[24] Where an indictment contains three counts, the first charging the unlawful erection and construction of an inclosure of certain public lands, the second the unlawful maintenance and control of such inclosure, and the third the unlawful prevention and obstruction of free passage over said lands by means of fencing and inclosing the same, a verdict of not guilty on the first and third counts is not inconsistent with one of guilty

12. U. S. *v.* Godwin, 7 Mont. 402, 16 Pac. 850 (inclosure by person who had filed notice of declaration as a settler on the land); Cameron *v.* U. S., 148 U. S. 301, 13 S. Ct. 595, 37 L. ed. 459 [*reversing* 3 Ariz. 100, 21 Pac. 177]; U. S. *v.* Osborn, 44 Fed. 29; U. S. *v.* Brandestein, 32 Fed. 738, 13 Sawy. 64 (where defendant as licensee of a railroad inclosed lands embraced in a grant to such railroad and which had been withdrawn from settlement although not yet earned).

What constitutes color of title see Los Angeles Farming, etc., Co. *v.* Hoff, (Cal. 1893) 34 Pac. 518; Cameron *v.* U. S., 148 U. S. 301, 13 S. Ct. 595, 37 L. ed. 459 [*reversing* 3 Ariz. 100, 21 Pac. 177]. And see, generally, ADVERSE POSSESSION, 1 Cyc. 1052.

13. Thomas *v.* U. S., 136 Fed. 159, 69 C. C. A. 157.

14. Thomas *v.* U. S., 136 Fed. 159, 69 C. C. A. 594.

15. Thomas *v.* U. S., 136 Fed. 159, 69 C. C. A. 157.

16. Camfield *v.* U. S., 167 U. S. 518, 17 S. Ct. 864, 42 L. ed. 260 [*affirming* 66 Fed. 101 (*affirming* 59 Fed. 562), and *followed* in Cardwell *v.* U. S., 136 Fed. 593, 69 C. C. A. 367].

17. U. S. *v.* Buford, 8 Utah 173, 30 Pac. 433; Camfield *v.* U. S., 167 U. S. 518, 17 S. Ct. 864, 42 L. ed. 260 [*affirming* 66 Fed. 101, 13 C. C. A. 359 (*affirming* 59 Fed. 562), and *followed* in Cardwell *v.* U. S., 136 Fed. 593, 69 C. C. A. 367]; Potts *v.* U. S., 114 Fed. 52, 51 C. C. A. 678.

18. Potts *v.* U. S., 114 Fed. 52, 51 C. C. A. 678. See also Camfield *v.* U. S., 167 U. S. 518, 17 S. Ct. 864, 42 L. ed. 260 [*affirming* 66 Fed. 101, 13 C. C. A. 359 (*affirming* 59 Fed. 562)].

19. Hardman *v.* King, 15 Wyo. 503, 85 Pac. 382.

Payment under a contract for pasturage on land unlawfully inclosed cannot be enforced. Garst *v.* Love, 6 Okla. 46, 55 Pac. 19.

20. Hardman *v.* King, 15 Wyo. 503, 85 Pac. 382. A person inclosing a section of land of the public domain for the purpose of pasturing his stock thereon has no right to recover damages for the pasturing of the land by another and the consequential injury resulting from his being compelled to allow his stock to run at large on the common range, nor can he maintain a suit in equity to prevent another from trespassing on the land. Clemmons *v.* Gillette, 33 Mont. 321, 83 Pac. 879, 114 Am. St. Rep. 814.

21. 23 U. S. St. at L. 322 [U. S. Comp. St. (1901) p. 1525]; Clemmons *v.* Gillette, 33 Mont. 321, 83 Pac. 879, 114 Am. St. Rep. 814.

Indictment held sufficient see Krause *v.* U. S., 147 Fed. 442, 78 C. C. A. 642.

22. Krause *v.* U. S., 147 Fed. 442, 78 C. C. A. 642. See also Carroll *v.* U. S., 154 Fed. 425, 83 C. C. A. 245.

23. Krause *v.* U. S., 147 Fed. 442, 78 C. C. A. 642.

24. U. S. *v.* Churchill, 101 Fed. 443; U. S. *v.* Felderward, 36 Fed. 490, 13 Sawy. 513. *Contra*, U. S. *v.* Cook, 36 Fed. 896, 13 Sawy. 495.

[I, F]

on the second.[25] On the trial of an indictment for inclosing and asserting an exclusive right to public land without claim or color of title, acts, conduct, and statements of defendants tending to show the assertion of a right to exclude the general public or others from the lands described are competent evidence;[26] but a deed from a railroad company to defendant for unsurveyed public lands, described by section and subdivision as though surveyed, is inadmissible to show color of title, since it creates no right to any particular land.[27] In Texas the inclosure of state land is a penal offense under statute, but the state has also the right to proceed for a mandatory injunction to compel the removal of the inclosure.[28]

G. Grazing and Pasturage. While the United States government has always maintained its right to the exclusive possession of the public domain,[29] such right has not always been exercised,[30] and there is an implied license that the public lands of the United States shall be free to persons who seek to use them for the purpose of grazing or pasturing stock, so long as the government does not forbid such use.[31] This privilege is common to all who wish to enjoy it,[32] and is not dependent upon or enlarged by the ownership of neighboring lands.[33] No prior right is gained by priority of use,[34] nor can the privilege be monopolized by any one directly or indirectly, or under claim that he is but protecting his own lands.[35] The use of public lands for grazing and pasturage of stock confers no title on the person so using them, but the government may at any time withdraw its consent to such use.[36] There is no implied license to use for pasture purposes land reserved for the preservation of forests, to the destruction or injury of such forests,[37] and such use of the forest reservations may be enjoined.[38]

25. Carroll *v.* U. S., 154 Fed. 425, 83 C. C. A. 245.

26. Krause *v.* U. S., 147 Fed. 442, 78 C. C. A. 642.

27. Carroll *v.* U. S., 154 Fed. 425, 83 C. C. A. 245.

28. State *v.* Goodnight, 70 Tex. 682, 11 S. W. 119.

29. U. S. *v.* Shannon, 151 Fed. 863.

30. U. S. *v.* Shannon, 151 Fed. 863.

31. *Colorado.*— Richards *v.* Sanderson, 39 Colo. 270, 89 Pac. 769, 121 Am. St. Rep. 167; Nuckolls *v.* Gaut, 12 Colo. 361, 21 Pac. 41; Willard *v.* Mathesus, 7 Colo. 76, 1 Pac. 690; Morris *v.* Fraker, 5 Colo. 425.

Idaho.— McGinnis *v.* Friedman, 2 Ida. (Hasb.) 393, 17 Pac. 635.

North Dakota.— Mathews *v.* Great Northern R. Co., 7 N. D. 81, 72 N. W. 1085.

Oklahoma.— Garst *v.* Love, 6 Okla. 46, 55 Pac. 19.

Texas.— Pace *v.* Potts, 85 Tex. 473, 22 S. W. 300.

Wyoming.— Anthony Wilkinson Live Stock Co. *v.* McIlquam, 14 Wyo. 209, 83 Pac. 364, 5 L. R. A. N. S. 733.

United States.— Buford *v.* Houtz, 133 U. S. 320, 10 S. Ct. 305, 33 L. ed. 618 [*affirming* 5 Utah 591, 18 Pac. 633]; Stearns *v.* U. S., 152 Fed. 900, 82 S. W. 48. See also U. S. *v.* Tygh Valley Land, etc., Co., 76 Fed. 693.

See 41 Cent. Dig. tit. "Public Lands," § 23.

32. McGinnis *v.* Friedman, 2 Ida. (Hasb.) 393, 17 Pac. 635; Garst *v.* Love, 6 Okla. 46, 55 Pac. 19; Anthony Wilkinson Live Stock Co. *v.* McIlquam, 14 Wyo. 209, 83 Pac. 364, 5 L. R. A. N. S. 733.

33. Anthony Wilkinson Live Stock Co. *v.* McIlquam, 14 Wyo. 209, 83 Pac. 364, 5 L. R. A. N. S. 733.

34. McGinnis *v.* Friedman, 2 Ida. (Hasb.) 393, 17 Pac. 635; Healy *v.* Smith, 14 Wyo. 263, 83 Pac. 583, 116 Am. St. Rep. 1004; Anthony Wilkinson Live Stock Co. *v.* McIlquam, 14 Wyo. 209, 83 Pac. 364, 5 L. R. A. N. S. 733.

35. *Colorado.*— Richards *v.* Sanderson, 39 Colo. 270, 89 Pac. 769, 121 Am. St. Rep. 167.

Oklahoma.— Garst *v.* Love, 6 Okla. 46, 55 Pac. 19.

Utah.— Taylor *v.* Buford, 8 Utah 112, 29 Pac. 880.

Wyoming.—Hardman *v.* King, 14 Wyo. 503, 85 Pac. 382; Martin *v.* Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093.

United States.— Buford *v.* Houtz, 133 U. S. 320, 10 S. Ct. 305, 33 L. ed. 618 [*affirming* 5 Utah 591, 18 Pac. 633].

See 41 Cent. Dig. tit. "Public Lands," § 23.

36. Anthony Wilkinson Live Stock Co. *v.* McIlquam, 14 Wyo. 209, 83 Pac. 364, 5 L. R. A. N. S. 733; U. S. *v.* Shannon, 151 Fed. 863.

37. U. S. *v.* Tygh Valley Land, etc., Co., 76 Fed. 693.

The policy of a state to permit live stock to run at large and graze on all open lands, or its laws enacted to carry such policy into effect, cannot affect the right of the general government to require stock owners to restrain their stock from grazing on the national forest reserves except under prescribed regulations. U. S. *v.* Shannon, 151 Fed. 863.

38. Dastervignes *v.* U. S., 122 Fed. 30, 58 C. C. A. 346 [*affirming* 118 Fed. 199], holding that where a bill filed by the United States to enjoin the pasturage of sheep in a forest reservation, in violation of the regulations prescribed by the secretary of the interior, alleged that the sheep pastured within the reservation were committing great and

H. Cutting Hay From Public Lands. There is an implied license to the public to go upon the unappropriated public lands of the United States, and cut the native grasses therefrom, for the purpose of making hay,[39] and one who has cut hay from such land is the owner thereof, and may sue for its destruction by fire negligently set by another.[40] Replevin for hay cut on public lands cannot be maintained by a prior possessor against one who was in adverse possession, claiming a preëmption right, when he cut the hay.[41]

I. Crops [42] Grown on Public Lands.[43] Where one in possession of public land plows it and sows grain, the title to the growing crop is in him, as against one who afterward enters and attempts to claim it as a preëmptor, but who does not get into possession;[44] and one in possession of public lands, and in good faith endeavoring to perfect his title, is entitled to crops sown and harvested by him during his possession, as against another who is finally adjudged the owner by virtue of an entry, etc., made by himself.[45]

II. Survey and Disposal of Lands of the United States.

A. In General. The United States has a perfect title to the public lands,[46] and congress is vested with the power of disposition and of making all needful rules and regulations with respect to the public domain,[47] and has the absolute right to prescribe the times, the conditions, and the mode of transferring this property or any

irreparable injury to the public lands therein, and to the undergrowth, timber, and water supply, and affidavits filed in support of such allegations recited that the sheep of defendants destroyed undergrowth, young and growing trees and seedlings, and ate and destroyed the roots of the vegetation and grasses, leaving the ground bare and subject to disastrous washings by the rains, to the irreparable injury of the reservation, such allegation and showing constituted a sufficient ground for the granting of a preliminary injunction.

39. Mathews *v.* Great Northern R. Co., 7 N. D. 81, 72 N. W. 1085.

40. Mathews *v.* Great Northern R. Co., 7 N. D. 81, 72 N. W. 1085.

41. Page *v.* Fowler, 28 Cal. 605, holding that in an action of replevin for hay raised on public land, which plaintiff lays claim to on the ground of prior possession and as being engaged in perfecting his claim under the preëmption laws, evidence is admissible to prove that defendant possessed the qualifications of a preëmptor, and had filed his declaratory statement to preëmpt, in connection with proof of entry and actual possession of the premises up to the time the hay was cut, for the purpose of proving adverse possession.

42. See, generally, Crops, 12 Cyc. 975.

43. **Right of purchaser to growing crops** see *infra*, II, C, 6, g.

44. West *v.* Smith, 52 Cal. 322.

45. Rathbone *v.* Boyd, 30 Kan. 485, 2 Pac. 664; Pearce *v.* Frantum, 16 La. 414.

46. Union Mill, etc., Co. *v.* Ferris, 24 Fed. Cas. No. 14,371, 2 Sawy. 176. See also U. S. *v.* Four Bottles Sour-Mash Whisky, 90 Fed. 720.

The legal title to the public lands is vested in the United States government. Dickson *v.* Marks, 10 La. Ann. 518.

Interest simply proprietary.— The interest of the United States in lands held by it within state boundaries is simply proprietary, the sovereignty residing in the state, and its rights differ from those of any ordinary landholder in the state only as provided in the constitution of the United States and by the terms of the compact between the general and the state government at the time of the admission of the latter into the Union. State *v.* Bachelder, 5 Minn. 223, 80 Am. Dec. 410; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441. And so the United States has no power to authorize its grantees of public lands to invade the private rights of other proprietors. Woodruff *v.* North Bloomfield Gravel Min. Co., *supra*.

47. *California.*— People *v.* Folsom, 5 Cal. 373.

Idaho.— Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401.

Iowa.— David *v.* Rickabaugh, 32 Iowa 540.

Kansas.— McCracken *v.* Todd, 1 Kan. 148.

Louisiana.— Terry *v.* Hennen, 4 La. Ann. 458.

Minnesota.— State *v.* Bachelder, 5 Minn. 223, 80 Am. Dec. 410.

Montana.— Territory *v.* Lee, 2 Mont. 124.

Wisconsin.— Farrington *v.* Wilson, 29 Wis. 383.

United States.— Gibson *v.* Chouteau, 13 Wall. 92, 20 L. ed. 534; Irvine *v.* Marshall, 20 How. 558, 15 L. ed. 994; Wilcox *v.* McConnell, 13 Pet. 498, 10 L. ed. 264; U. S. *v.* Shannon, 151 Fed. 863; Carroll *v.* Price, 81 Fed. 137; Union Mill, etc., Co. *v.* Ferris, 24 Fed. Cas. No. 14,371, 2 Sawy. 176.

See 41 Cent. Dig. tit. "Public Lands," § 9.

The power of congress over the public lands is plenary so long as title thereto remains in the government and no right of property therein has vested in another. Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401; Northern Pac. R. Co. *v.* Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. ed. 157; Campbell *v.*

part of it,[48] and to designate the persons to whom the transfer shall be made.[49] No state legislature can interfere with this right or embarrass its exercise,[50] and to prevent the possibility of any interference with it a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil by the United States shall never be made.[51] The treaty-making power has a right to convey title to the lands of the United States without an act of congress, and if a treaty acts directly on the subject of the grant, it is equivalent to an act of congress, and the grantee has a good title.[52] The United States has no power to grant lands which it has previously granted to a state [53] or to an individual;[54] but the ultimate right to the soil occupied by Indian tribes is in the United States, which can grant the soil while in the possession of the natives and without their consent.[55] The department of the interior

Wade, 132 U. S. 34, 10 S. Ct. 9, 33 L. ed. 240; Buxton *v.* Traver, 130 U. S. 232, 9 S. Ct. 509, 32 L. ed. 920; Hutchings *v.* Lowe, 15 Wall. (U. S.) 77, 21 L. ed. 82; Frisbie *v.* Whitney, 9 Wall. (U. S.) 187, 19 L. ed. 668; Norton *v.* Evans, 82 Fed. 804, 27 C. C. A. 168.

Power cannot be delegated to territorial assembly.— Territory *v.* Lee, 2 Mont. 124.

Decisions under special, temporary, or superseded acts of congress see Keeran *v.* Allen, 33 Cal. 542 (Act July 23, 1866 [14 U. S. St. at L. 218]); Edwards *v.* Begole, 121 Fed. 1, 57 C. C. A. 245 (Act March 2, 1889 [25 U. S. St. at L. 1008]); Vilas *v.* Algar, 109 Fed. 519, 48 C. C. A. 524 (Act March 3, 1877, c. 113, § 2 [19 U. S. St. at L. 392]).

48. Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Irvine *v.* Marshall, 20 How. (U. S.) 558, 15 L. ed. 994; U. S. *v.* Shannon, 151 Fed. 863.

The paramount control over the disposition of the public lands remains in congress, and the fact that a contest over the right of entry of such lands is pending before the land department does not deprive congress of such paramount control; and it may at any time, by an act passed for that purpose, withdraw such contest from the jurisdiction of the department, and itself determine the rights of the parties. Emblen *v.* Lincoln Land Co., 94 Fed. 710 [*affirmed* in 102 Fed. 559, 42 C. C. A. 499].

49. Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; U. S. *v.* Shannon, 151 Fed. 863.

50. Terry *v.* Hennen, 4 La. Ann. 458; Farrington *v.* Wilson, 29 Wis. 383; Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Irvine *v.* Marshall, 20 How. (U. S.) 558, 15 L. ed. 994; U. S. *v.* Shannon, 151 Fed. 863.

When lands pass from the United States, they lose all their privileged features, stand as any other property within the state, and are within the jurisdiction of the state courts, equally with other lands, where the questions of conflicting claims arise between citizens of the state or between citizens and the state. State *v.* Bachelder, 5 Minn. 223, 80 Am. Dec. 410.

The jurisdiction over land purchased by the United States, lying within the limits of a state, remains in the state, unless the consent of the state be given, according to the constitution. Com. *v.* Young, 1 Journ. Jurispr. (Pa.) 47. See, generally, UNITED STATES.

51. Collins *v.* Bartlett, 44 Cal. 371; Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; U. S. *v.* Shannon, 151 Fed. 863; Mission Rock Co. *v.* U. S., 109 Fed. 763, 48 C. C. A. 641 [*affirmed* in 189 U. S. 391, 23 S. Ct. 606, 47 L. ed. 865].

52. Dequindre *v.* Williams, 31 Ind. 444; Stockton *v.* Williams, 1 Dougl. (Mich.) 546; Utah Min., etc., Co. *v.* Dickert, etc., Sulphur Co., 6 Utah 183, 21 Pac. 1002, 5 L. R. A. 259; U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289 [*citing* Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; U. S. *v.* Brooks, 10 How. (U. S.) 442, 13 L. ed. 489; Meigs *v.* McClung, 9 Cranch (U. S.) 11, 3 L. ed. 639].

Direct grants by act of congress see *infra*, II, E.

Treaty provisions not amounting to grants. — The third article of the treaty of 1837 between the United States and the Miami Indians, providing that the lands mentioned in a schedule thereto annexed should be granted to the persons therein named, by patent from the president, was not of itself a grant, but was only a contract that the land should be afterward properly located, and granted by such patent to the persons named. Langlois *v.* Coffin, 1 Ind. 446. The first supplementary article to the treaty of 1835 between the United States and the Caddo Indians relative to a reservation in favor of the heirs of François Grappe, was a mere confirmation of the grant made by that tribe in 1801, and not a substantive grant from the government, and the recital by the Indians that they had made such a grant did not conclude the government. Brooks *v.* Norris, 6 Rob. (La.) 175.

53. Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333; Hallett *v.* Beebee, 13 How. (U. S.) 25, 14 L. ed. 35; Goodtitle *v.* Kibbe, 9 How. (U. S.) 471, 13 L. ed. 220.

54. Witcher *v.* Conklin, 84 Cal. 499, 24 Pac. 302; Hutton *v.* Frisbie, 37 Cal. 475; Payne *v.* Markle, 89 Ill. 66; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482.

55. Breaux *v.* Johns, 4 La. Ann. 141, 50 Am. Dec. 555; Veeder *v.* Guppy, 3 Wis. 502.

Such grants convey title subject to Indian right of occupancy.— Breaux *v.* Johns, 4 La. Ann. 141, 50 Am. Dec. 555.

has sole jurisdiction over matters concerning tide lands in Alaska, and its action thereon is final.[56]

B. Surveys[57] — **1. Necessity For.** Although the statutes have sometimes authorized the acquisition of settlement rights in unsurveyed lands,[58] the rule is that it is a prerequisite to the right to enter public lands that the same shall have been surveyed under the laws of the United States,[59] and the plat of survey filed in the proper office.[60] There can be no township on the public lands except it has been actually surveyed and marked;[61] and a grant by the federal government to a state of school lands, described by the designation of section numbers only, vests no title in the state to any specific portion until the official survey is made and approved by the federal authorities.[62] A sale of public lands before the public survey may be treated as void;[63] but if the public survey be regularly made, returned, and approved, a sale will be valid, although the survey should be defective or erroneous, if such defect does not render the identity of the tract uncertain as to the locality or quantity.[64]

2. Mode of Making, Sufficiency, and Validity of Surveys. Under the statutes,[65] public lands are to be surveyed into townships six miles square, and each, in turn, subdivided into thirty-six sections of a mile square, except where a line of an Indian reservation or of a tract of land theretofore surveyed or patented or the course of a navigable river may render this impracticable, and in that case the rule must be departed from no further than such particular circumstances require.[66] A survey is sufficient where parallel lines are run each way at intervals of two miles and a corner made on each line at the end of every mile, and the survey completed by running straight lines from the established corners to the opposite corresponding corners, or, where no such opposite or corresponding corners have been or can be fixed by running from the established corners due north, south, east, or west to the watercourse or other exterior boundary of the fractional township.[67] The corners of quarter sections are not definitely fixed but are to be placed equidistant between the section corners on the same line.[68] Where all the lines of the north half of a section are actually run but the west, the survey is sufficient to authorize the issuance of a patent.[69] The surveyor-general has no authority

56. Lewis *v.* Johnson, 1 Alaska 529.

57. **Surveyors-general and deputy surveyors** see *infra*, II, L, 4.

58. The act of congress of Aug. 4, 1854 (10 U. S. St. at L. 576), extended the right of preëmption and town-site settlement to unsurveyed lands in Minnesota. Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539 [*followed* in Wood *v.* Cullen, 13 Minn. 394].

59. Stark *v.* Starr, 6 Wall. (U. S.) 402, 18 L. ed. 925. See also O'Conner *v.* Corbitt, 3 Cal. 370.

A state selection of land granted by congress, made before it is surveyed by the United States, is invalid. Chant *v.* Reynolds, 49 Cal. 213; U. S. *v.* Curtner, 38 Fed. 1. But *compare* Coombs *v.* Lane, 4 Ohio St. 112.

60. Daniels *v.* Lansdale, 43 Cal. 41, holding that the filing of a declaratory statement in the register's office, before the surveyor-general files files the plat of the survey, is premature, and of no effect.

61. Powers *v.* Jackson, 50 Cal. 429.

62. Clemmons *v.* Gillette, 33 Mont. 321, 83 Pac. 879, 114 Am. St. Rep. 814, holding that until the official survey has been made and approved by the federal authorities, the state cannot assert title to any portion and convey the fee or grant a lease thereof. See, generally, *infra*, II, H, 1, c.

63. Rector *v.* Gaines, 19 Ark. 70.

64. Rector *v.* Gaines, 19 Ark. 70.

65. U. S. Rev. St. (1878) §§ 2395, 2396 [U. S. Comp. St. (1901) pp. 1471, 1473].

66. Johnson *v.* Johnson, 14 Ida. 561, 95 Pac. 499 [*followed* in Moss *v.* Ramey, 14 Ida. 598, 95 Pac. 513].

67. Kean *v.* Roby, 145 Ind. 221, 42 N. E. 1011; Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690.

68. Walters *v.* Commons, 2 Port. (Ala.) 38 [*followed* in Nolan *v.* Palmer, 24 Ala. 391].

A purchaser of a half or quarter section is entitled to one half or one fourth of whatever the section contains. Walters *v.* Commons, 2 Port. (Ala.) 38.

69. Holler *v.* Emerson, 112 Cal. 573, 44 Pac. 1073.

Method of locating west line. — Where the north line of a government section is actually run, and the northwest corner of the southwest quarter section located, the northwest section corner is located by running a line due north from the northwest corner of the southwest quarter section until it intersects the north line, and the point of intersection will be the true northwest corner. Holler *v.* Emerson, 112 Cal. 573, 44 Pac. 1073, holding that this method should be

to extend a south fraction north of the east and west quarter line of the section.[70] The statute provides that fractional sections containing one hundred and sixty acres or upwards shall as nearly as practicable be divided into half quarter sections; [71] but it is considered that this provision is not imperative,[72] but leaves some latitude of discretion to surveyors.[73] Where a quarter section containing an excess over one hundred and sixty acres is to be divided, the excess must fall into the exterior half.[74] In extending the surveys of the public domain, fractional sections are caused by lakes or other bodies of water, and streams which are meandered, and Indian and other reservations.[75] A fraction smaller than sixty acres in extent may, according to the circumstances of the case, and the judgment of the surveyor-general, be reported to the register with a separate area, or may be attached by him to an adjoining tract for sale, and its area merged into that of the tract to which it is attached, which should always be shown on the plat by peculiar marks drawn across the division line.[76] Where a fractional section has been subdivided a deficiency in the contents of the section must, as between a quarter section and a residuary fraction, fall entirely on the latter, and cannot be apportioned between them.[77] It is the duty of the surveyor to note all watercourses over which the line he runs may pass,[78] and also the quality of the land.[79] Townships are fractional only when the outer boundary lines cannot be carried out in full because of a watercourse, Indian boundary, or other external interference,[80] and the fact that in laying a township off into sections there is a deficiency or excess to be carried into the northern or western sections or half sections according to the statute does not render such township fractional.[81] Surplus lands do not vitiate a survey, nor does a deficiency of acres called for in the survey operate against it.[82] Where the boundaries of a camp ground reserved to Indians by a treaty were fixed by a government survey of the adjoining lands and shown by the plat returned, the tract containing less than forty acres, such survey was sufficient for the purpose of a subsequent conveyance of the land by the land department after the reservation had been relinquished by the Indians.[83]

3. Plats. Plats of surveys of lands forming a part of the public domain are required to be made and filed in the land office of the district [84] and the general land

adopted, although the length of the north line being given as eighty chains, and the northeast section corner established, it would appear that a point on the north line eighty chains due west from the northeast section corner would establish the northwest section corner.

70. Keyser *v.* Sutherland, 59 Mich. 455, 26 N. W. 865.

71. U. S. Rev. St. (1878) § 2397 [U. S. Comp. St. (1901) p. 1473].

72. Doe *v.* Hunt, 4 Ala. 129; Gazzam *v.* Phillips, 20 How. (U. S.) 372, 15 L. ed. 958 [*overruling* Brown *v.* Clements, 3 How. (U. S.) 650, 11 L. ed. 767].

73. Gazzam *v.* Phillips, 20 How. (U. S.) 372, 15 L. ed. 958 [*overruling* Brown *v.* Clements, 3 How (U. S.) 650, 11 L. ed. 767],

Where there is a running stream through a fractional section the subdivision of a quarter section into two tracts divided by the stream is not in contravention of the statute. Stein *v.* Ashby, 24 Ala. 521.

74. Grover *v.* Paddock, 84 Ind. 244.

75. Wilson *v.* Hoffman, 70 Mich. 552, 38 N. W. 558.

Where a stream of sufficient magnitude to be meandered runs through a section cutting it into two parcels, both are thereby made fractional. Wilson *v.* Hoffman, 70 Mich. 552, 38 N. W. 558.

76. Campbell *v.* Wood, 116 Mo. 196, 22 S. W. 796, quoting instructions of surveyor-general of Illinois and Missouri to deputy surveyors.

77. Wharton *v.* Littlefield, 30 Ala. 245.

78. Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.

79. Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.

80. Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

81. Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

82. Robinson *v.* Moore, 20 Fed. Cas. No. 11,960, 4 McLean 279.

83. U. S. *v.* Chandler-Dunbar Water Power Co., 152 Fed. 25, 81 C. C. A. 221 [*affirmed* in 209 U. S. 447, 28 S. Ct. 579, 52 L. ed. 42].

84. U. S. Rev. St. (1878) § 2223 [U. S. Comp. St. (1901) p. 1362]; U. S. *v.* Curtner, 38 Fed. 1, holding that until such filing the survey is not regarded as official.

An indorsement on the plat of survey that it was filed in the land office on a day named therein, which is not signed by any one, will, in the absence of other evidence on the subject, be taken as fixing the time of

office.[85] The law makes it the surveyor-general's duty to calculate the areas, and state the result thereof on the plat, and it is competent for him to note thereon, as part of the plat, the distances of quarter section lines on which such calculations were based.[86] A copy of the plat of survey must be kept for public information in the office of the surveyor-general,[87] in the offices where the lands are to be sold,[88] and also in the office of the commissioner of public lands.[89]

4. Construction, Operation, and Effect of Surveys. The official surveys of the public lands of the United States are controlling.[90] So the description and plat of the original government survey, made by the surveyor-general from the field-notes, and filed in the general land office, are conclusive,[91] and the section lines and corners as laid down in the description and plat are binding upon the general government and upon all other persons concerned.[92] Where land is laid out into ranges, townships, etc., the survey of a particular township approved by the surveyor-general of the district settles the rights of the parties to land purchased from the United States in that township.[93] A diagram from the office of the secretary of the interior, certified to by the acting commissioner of the general land office, showing the primary limits of land, must be taken *prima facie* to correctly indicate the limits of the grant.[94] Where the surveyor-general has examined the field-notes of a survey and platted and returned certain land as one tract this is final as to its boundaries as but one tract.[95] The official survey and plat of any town-site located on government lands, and the lots and blocks thereof, are permanent landmarks, which may be considered in establishing the location of adjoining lands outside the town-site.[96] The provision of the statute that "each section or sub-division of section the contents of which have been returned by the surveyor general shall be held and considered as containing the exact quantity expressed in such return," fixes the quantity at which the government must dispose of the tract,[97] but does not control the area in contracts between private persons.[98] The location of a township upon the public domain is where the government surveyor has actually lined it out, and is to be determined by the monuments placed by

filing the plat. Pappe *v.* Athearn, 42 Cal. 606.

85. U. S. Rev. St. (1878) § 2223 [U. S. Comp. St. (1901) p. 1362].

Evidence as to time of filing.— Copies of official letters written by the commissioner of the general land office to the person then claiming title under a warrant and survey, reciting the facts, which copies are sworn to by a witness who is a clerk in the general land office, and acquainted with the facts, he having, as such clerk, written the originals for the commissioner, by whom they were signed, are competent for the purpose of showing the date when a survey was filed in the general land office. Coan *v.* Flagg, 123 U. S. 117, 8 S. Ct. 47, 31 L. ed. 107.

86. Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

87. Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.

88. Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.

89. Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.

90. Gleason *v.* White, 199 U. S. 54, 25 S. Ct. 782, 50 L. ed. 87; Whitaker *v.* McBride, 197 U. S. 510, 25 S. Ct. 530, 49 L. ed. 857; U. S. *v.* Montana Lumber, etc., Co., 196 U. S. 573, 25 S. Ct. 367, 49 L. ed. 604; Russell *v.* Maxwell Land-Grant Co., 158 U. S. 253, 15 S. Ct. 827, 39 L. ed. 971; Stoneroad *v.* Stoneroad, 158 U. S. 240, 15 S. Ct. 822, 39 L. ed. 966.

91. Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; Goltermann *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484, 20 L. R. A. 161. See also McGill *v.* Somers, 15 Mo. 80; Trotter *v.* St. Louis Public Schools, 9 Mo. 69; Haydel *v.* Dufresne, 17 How. (U. S.) 23, 15 L. ed. 115.

92. Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; Lindsey *v.* Hawes, 2 Black (U. S.) 554, 17 L. ed. 265.

Corners of sections fixed by survey cannot be removed.— Walters *v.* Commons, 2 Port. (Ala.) 38.

Where land is patented according to the official plat the purchaser is limited to the tract as marked upon such plat. Wilson *v.* Hoffman, 70 Mich. 552, 38 N. W. 558.

93. Jourdan *v.* Barrett, 4 How. (U. S.) 169, 11 L. ed. 924. See also Stewart *v.* Boyd, 15 La. Ann. 171.

94. Eastern Oregon Land Co. *v.* Andrews, 45 Oreg. 203, 77 Pac. 117, holding the evidence insufficient to overcome the *prima facie* case made by the diagram.

95. Hunt *v.* Rowley, 87 Ill. 491.

96. Carroll *v.* Price, 81 Fed. 137.

97. Heald *v.* Yumiska, 7 N. D. 422, 75 N. W. 806.

98. Heald *v.* Yumiska, 7 N. D. 422, 75 N. W. 806.

him in the field,[99] and the true corner of a government subdivision is where the United States surveyor established it, whether this location is right or wrong.[1] A grant of land from the government according to the legal subdivisions established by the United States presupposes an actual ground survey of the land,[2] and the patent must be considered as conveying the land as actually surveyed.[3] Locations by surveyors cannot affect the rights of individuals recognized by the proper government officers;[4] and it has been said that without some action of the government other than the mere approval by the surveyor-general, a survey designating certain land as public land cannot be considered as a disturbance of the title of a proprietor, and still less as evidence that the land belongs to the public domain.[5] In locating the lines of subdivisions of a government survey, the courses and distances and monuments given in the field-notes of the government surveyor should be followed, without regard to whether this gives more land to one subdivision than to another.[6] In case of discrepancy between the field-notes and the plat the former govern,[7] and the land department may properly correct the plat so as to conform to the field-notes, in which case the plat as corrected supersedes the original.[8] When an entry is surveyed, its boundaries are designated, and cannot afterward be varied by the locator to the injury of the rights of others.[9] The official surveys made by the government are not open to collateral attack in an action at law by private parties;[10] and where no question is made as to the form and correctness of a survey, by proper parties, before the district court, the approval of the surveyor-general and of the land department is final.[11] The courts will not correct alleged mistakes in the original government surveys unless the mistakes are established by clear and convincing evidence,[12] and the construction placed upon a survey by the land department and their decision in reference to it, while not conclusive, should receive great consideration by the courts.[13] The original survey must govern as to the range line between two townships, and such line and the section corners, as established by such original survey

99. Harrington *v.* Boehmer, 134 Cal. 196, 66 Pac. 214, 489.

1. Nesselrode *v.* Parish, 59 Iowa 570, 13 N. W. 746; Beltz *v.* Mathiowitz, 72 Minn. 443, 75 N. W. 699; Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740.

If a government quarter section or section post has disappeared, the site of its location, if established by clear and satisfactory evidence, will control and govern as fully as if the original post remained. Beltz *v.* Mathiowitz, 72 Minn. 443, 75 N. W. 699.

2. Stonewall Phosphate Co. *v.* Peyton, 39 Fla. 726, 23 So. 440.

3. Stonewall Phosphate Co. *v.* Peyton, 39 Fla. 726, 23 So. 440.

Where there is a conflict between the quantity expressed in the patent and that shown by the survey, the survey will control. Stonewall Phosphate Co. *v.* Peyton, 39 Fla. 726, 23 So. 440. See also Miller *v.* Grunsky, 141 Cal. 441, 75 Pac. 48, 66 Pac. 858; Kane *v.* Otty, 25 Oreg. 531, 36 Pac. 537; State *v.* Board of Tide Land Appraisers, 5 Wash. 425, 32 Pac. 97, 775.

4. Kittridge *v.* Breaud, 2 Rob. (La.) 40.

5. Roubieu *v.* Michel, 2 La. Ann. 808, 809, where the court said: "The frequent errors in the surveys of lands in Louisiana made by the United States surveyors are matters of history." See also Gibson *v.* Chouteau, 39 Mo. 536.

6. Yolo County *v.* Nolan, 144 Cal. 445, 77 Pac. 1006 [*following* Kaiser *v.* Dalto, 140 Cal. 167, 73 Pac. 828; Harrington *v.* Boehmer, 134 Cal. 196, 66 Pac. 214, 489; Tognazzini *v.* Morganti, 84 Cal. 159, 23 Pac. 1085].

7. Harrington *v.* Boehmer, 134 Cal. 196, 66 Pac. 214, 489.

8. Harrington *v.* Boehmer, 134 Cal. 196, 66 Pac. 214, 489.

9. Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876.

10. Rood *v.* Wallace, 109 Iowa 5, 79 N. W. 449; McBride *v.* Whitaker, 65 Nebr. 137, 90 N. W. 966; Kneeland *v.* Korter, 40 Wash. 359, 82 Pac. 608, 1 L. R. A. N. S. 745; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566; Greer *v.* Mezes, 24 How. (U. S.) 268, 16 L. ed. 661.

A plat of the survey, made and approved by the land department of the general government, cannot be impeached, except upon a direct proceeding for that purpose. McBride *v.* Whitaker, 65 Nebr. 137, 90 N. W. 966.

11. Mott *v.* Smith, 16 Cal. 533.

12. Blair *v.* Brown, 17 Wash. 570, 50 Pac. 483.

13. Blair *v.* Brown, 17 Wash. 570, 50 Pac. 483; Keane *v.* Brygger, 3 Wash. 338, 28 Pac. 653; McSorley *v.* Hill, 2 Wash. 638, 27 Pac. 552.

Effect of decisions of land department generally see *infra*, II, L, 15.

cannot be changed in a subsequent survey made for the purpose of subdividing the sections;[14] but surveys by United States surveyors, although sanctioned by the principal deputy surveyor of the district, may be corrected when erroneous.[15] So also the United States, continuing in the ownership of lands which by public survey appear to abut on non-navigable waters, has the right to readjust the marginal survey, and reserve uplands which appear between the survey and the actual margin of the water supposed to have been previously meandered;[16] and a purchaser from the United States under timber-culture entries after a second survey, reserving upland between the first survey and the margin of a non-navigable lake, purchases the land with notice thereof, and is estopped to claim beyond the boundary under which he purchased.[17] The official platting of lands by authority of the United States, indicating the character thereof as regards whether they are swamp or marsh lands or lands covered by the waters of a lake, as the same appeared to the official surveyors when the original survey was made, is *prima facie* evidence as to their character at that time in an action involving the question whether they were a part of the public domain and subject to sale to private persons;[18] but a United States survey, fixing land covered with water as being a lake, followed by a sale of adjacent land with reference to the survey, is not conclusive, so as to preclude the land department from determining that the land is a swamp, if the purchasers of the adjacent land are not prejudiced.[19] Where land has been entered and purchased according to an official survey and plat, a subsequent change in the plat or of quantities cannot divest the purchaser or his grantees of what he lawfully purchased and paid for and for which he received a patent.[20] The failure of the government to survey and plat a small island at the time lands on the side of the river near which the island lay were surveyed does not raise a presumption that it was the intention to relinquish title thereto in favor of riparian owners on that side, the island having been included in the survey of the opposite side of the river a few years later.[21]

5. Boundaries[22]— a. In General. The boundary lines actually run and marked in the surveys returned by the surveyor-general are established as the proper boundary lines of the sections or subdivisions for which they were intended,[23] and the length of such lines as returned is to be held and considered as the true length thereof,[24] and so a patent issued "according to the official plat" is limited by calls for bayous noted on the official plat certified to the state by the general land office and the interior department.[25] The United States, in providing for the survey of the public domain, has established the rule that sections of land shall be held to contain the exact quantity returned by the surveyor-general;[26] and lands sold under the United States surveys pass according to the descriptions of the legal subdivisions whether those subdivisions contain the exact legal quantity or more or less.[27] The boundaries of lots patented by the United States as numbered lots of their respective sections cannot extend beyond the boundaries of

14. Palmer *v.* Montgomery, 59 Mich. 338, 26 N. W. 535.
15. Kittridge *v.* Landry, 2 Rob. (La.) 72 [*followed* in Kittredge *v.* Dugas, 2 Rob. (La.) 85].
16. Warner Valley Stock Co. *v.* Calderwood, 36 Oreg. 228, 59 Pac. 115; Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.
17. Warner Valley Stock Co. *v.* Calderwood, 36 Oreg. 228, 59 Pac. 115.
18. Illinois Steel Co. *v.* Budzisz, 115 Wis. 68, 90 N. W. 1019.
19. Rood *v.* Wallace, 109 Iowa 5, 79 N. W. 449.
20. Hunt *v.* Rowley, 87 Ill. 491.
21. Harding *v.* Minneapolis, etc., R. Co., 84 Fed. 287, 28 C. C. A. 419.
22. See, generally, Boundaries, 5 Cyc. 861.
23. Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.
24. Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.
25. Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.
26. Walters *v.* Commons, 2 Port. (Ala.) 38.
27. Walters *v.* Commons, 2 Port. (Ala.) 38; Fulton *v.* McAfee, 5 How. (Miss.) 751; Goltermann *v.* Schiermeyer, 11 Mo. 404, 19 S. W. 484, 20 S. W. 161.

the sections themselves.[28] Where an inland non-navigable lake covers a portion of a section of land, and the government survey designates the dry land in each subdivision as a fractional subdivision or lot, the purchaser from the government of such lots acquires title to such portion of the bed of the lake as will make out the full subdivision in which his land is situated.[29]

b. Meander Lines. A meander line is supposed to be along the shore of a body of water and to follow the windings of the stream or lake and the sinuosities of the banks.[30] Meander lines are run in surveying fractional portions of the public lands bordering on navigable rivers or lakes, not as boundaries of the tract, but for the purpose of defining sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale and which is to be paid for,[31] and the river or lake is the true boundary [32] where it appears that the government intended to sell all the land to the river or body of water.[33] But the mere fact that a line is run and designated as meandered is not conclusive against the government; [34] and where for any reason the surveyor omits to include

28. Tolleston Club *v.* Clough, 146 Ind. 93, 43 N. E. 647.

29. Stoner *v.* Rice, 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387.

30. Grant *v.* Hemphill, 92 Iowa 218, 59 N. W. 263, 60 N. W. 618; Lammers *v.* Nissen, 4 Nebr. 245.

Rivulets or branch streams are not to be meandered, but should be crossed and their width noted in the field book. Hunt *v.* Rowley, 87 Ill. 491.

31. *Idaho.*— Johnson *v.* Johnson, 14 Ida. 561, 95 Pac. 499 [*followed* in Moss *v.* Ramey, 14 Ida. 598, 95 Pac. 513].

Illinois.— Fuller *v.* Dauphin, 124 Ill. 542, 16 N. E. 917, 7 Am. St. Rep. 388; Houck *v.* Yates, 82 Ill. 179; Illinois, etc., Canal *v.* Haven, 10 Ill. 548; Middleton *v.* Pritchard, 4 Ill. 510, 38 Am. Dec. 112.

Indiana.— Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690.

Iowa.— Grant *v.* Hemphill, 92 Iowa 218, 59 N. W. 263, 60 N. W. 618; Glenn *v.* Jeffrey, 75 Iowa 20, 39 N. W. 160; Kraut *v.* Crawford, 18 Iowa 549, 87 Am. Dec. 414.

Wisconsin.— Lally *v.* Rossman, 82 Wis. 147, 51 N. W. 1132.

United States.— Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 35 L. ed. 428; St. Paul, etc., R. Co. *v.* Schurmeier, 7 Wall. 272, 19 L. ed. 74 [*affirming* 10 Minn. 82, 88 Am. Dec. 59]; *Ex p.* Davidson, 57 Fed. 883; Forsythe *v.* Smale, 9 Fed. Cas. No. 4,950, 7 Biss. 201, 7 Reporter 262.

See 41 Cent. Dig. tit. "Public Lands," § 36.

Where land is conveyed by governmental division, the whole division, both within and without the meander lines drawn on the original plat, and the wet land as well as the dry, passes by the deed. Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690.

32. *Idaho.*— Johnson *v.* Johnson, 14 Ida. 561, 95 Pac. 499 [*followed* in Moss *v.* Ramey, 14 Ida. 598, 95 Pac. 513].

Minnesota.— Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 88 Am. Dec. 59 [*affirmed* in 7 Wall. (U. S.) 272, 19 L. ed. 74], holding that where the government survey shows the meander line of a river the government cannot show that the river is in a different place from that designated by the field books and plat.

Oregon.— Little *v.* Pherson, 35 Oreg. 51, 56 Pac. 807; Barnhart *v.* Ehrhart, 33 Oreg. 274, 54 Pac. 195; Weiss *v.* Oregon Iron, etc., R. Co., 13 Oreg. 496, 11 Pac. 255.

Utah.— Kundsen *v.* Omanson, 10 Utah 124, 37 Pac. 250.

Wisconsin.— Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185; Lally *v.* Rossman, 82 Wis. 147, 51 N. W. 1132; Whitney *v.* Detroit Land Co., 78 Wis. 240, 47 N. W. 425; Menasha Wooden-Ware Co. *v.* Lawson, 70 Wis. 600, 36 N. W. 412; Boorman *v.* Sunnuchs, 42 Wis. 233.

United States.— French-Glenn Live Stock Co. *v.* Springer, 185 U. S. 47, 22 S. Ct. 563, 46 L. ed. 800 [*affirming* 35 Oreg. 312, 58 Pac. 102]; Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 35 L. ed. 428; Jeffris *v.* East Omaha Land Co., 134 U. S. 196, 10 S. Ct. 518, 33 L. ed. 872 [*affirming* 40 Fed. 386]; St. Paul, etc., R. Co. *v.* Schurmeier, 7 Wall. 272, 19 L. ed. 74; *Ex p.* Davidson, 57 Fed. 883; Forsyth *v.* Smale, 9 Fed. Cas. No. 4,950, 7 Biss. 201, 7 Reporter 262; *In re* Hemphill, 6 Land Dec. Dep. Int. 555.

See 41 Cent. Dig. tit. "Public Lands," § 36.

Where ledges or spits or tongues of land project out beyond the meander line of a bay, they are included as part of the fractions of sections shown on the government survey, and conveyed by government patent. *Ex p.* Davidson, 57 Fed. 883.

The grantee cannot go beyond the line which would bound his section or lot if it were not fractional, in search of his boundary. Lally *v.* Rossman, 82 Wis. 147, 51 N. W. 1132 [*following* Whitney *v.* Detroit Lumber Co., 78 Wis. 240, 47 N. W. 425].

Accretions after a survey and sale belong to the land. Kraut *v.* Crawford, 18 Iowa 549, 87 Am. Dec. 414.

33. Grant *v.* Hemphill, 92 Iowa 218, 59 N. W. 263, 60 N. W. 618; Kraut *v.* Crawford, 18 Iowa 549, 87 Am. Dec. 44.

34. Lammers *v.* Nissen, 4 Nebr. 245 [*fol-*

in his survey large tracts of land lying between the meander line as surveyed or pretended to have been run upon the ground, and the streams or bodies of water meandered, the patents for the adjoining lots, although referring to the official plat of the survey, are merely grants of the premises limited by such meander line, and not by the water.[35] So also where the government plat and field-notes described the meander line of a tract of land as being a river, but in fact the meander line was not run along the river, but along a bayou, some distance from the river, and land between the bayou and the river, although in existence at the time of the survey, had never been surveyed, such land did not pass by a conveyance from the government of the surveyed tract.[36] Where there is no body of water anywhere within the section to which a meander line on the plat can be referred, the meander line must be taken as the boundary and the land granted cannot be extended beyond it.[37] Where land on one side of a non-navigable stream is a Mexican grant having the stream as its boundary, the true boundary of land surveyed by the government on the other side of the stream is the thread of the stream and not the meander line indicated by the field notes of the survey along the bank.[38] The courses and distances as set forth in the plat of an official survey, and referred to in patents from the United States which show an alleged meander line of a lake as one boundary, control in ejectment, as against the actual boundary of the lake, where the survey was grossly fraudulent, and the lake never existed within half a mile of the point indicated on the plat, and where to fix the lake as the boundary would give the patentees an area very largely in excess of that described in the patents and actually paid for, and the extension of the side lines to the lake is a matter of considerable difficulty and would necessitate going outside of the section in which the description and plat placed the land.[39]

6. Resurveys. Rights which have been acquired under a government survey cannot be affected or interfered with by a subsequent survey;[40] but until some rights to a specific tract of land have been acquired under a survey, a corrected survey can be made and substituted therefor.[41] A resurvey of land originally belonging to the United States must follow the boundaries and monuments, as run and made by the government survey, if the monuments placed to indicate the section corners and quarter section posts can be found, or the places where they were originally placed can be identified;[42] but, in relocating lost monuments desig-

lowed in Bissell *v.* Fletcher, 19 Nebr. 725, 28 N. W. 303].

35. Lammers *v.* Nissen, 4 Nebr. 245 [*followed* in Harrison *v.* Stipes, 34 Nebr. 431, 51 N. W. 976; Bissell *v.* Fletcher, 19 Nebr. 725, 28 N. W. 303]; Barnhart *v.* Ehrhart, 33 Oreg. 274, 54 Pac. 195 [*followed* in Little *v.* Pherson, 35 Oreg. 51, 56 Pac. 807]; Granger *v.* Swart, 10 Fed. Cas. No. 5,685, 1 Woolw. 88. See also Smith *v.* Miller, 105 Iowa 688, 70 N. W. 123, 75 N. W. 499.

36. Glenn *v.* Jeffrey, 75 Iowa 20, 39 N. W. 160.

37. Grant *v.* Hemphill, 92 Iowa 218, 59 N. W. 263, 60 N. W. 618; French-Glenn Live Stock Co. *v.* Springer, 185 U. S. 47, 22 S. Ct. 563, 46 L. ed. 800 [*affirming* 35 Oreg. 312, 58 Pac. 102].

38. Kirby *v.* Potter, 138 Cal. 686, 72 Pac. 338.

39. Security Land, etc., Co. *v.* Weckey, 193 U. S. 188, 24 S. Ct. 431, 48 L. ed. 674 [*affirming* 87 Minn. 97, 91 N. W. 304, 94 Am. St. Rep. 684, 63 L. R. A. 157, and *following* French-Glenn Live Stock Co. *v.* Springer, 185 U. S. 47, 22 S. Ct. 563, 46 L. ed. 800].

40. Kean *v.* Roby, 145 Ind. 221, 42 N. E. 1011; Spawr *v.* Johnson, 49 Kan. 788, 31 Pac. 664; Cage *v.* Danks, 13 La. Ann. 128; Sprigg *v.* Hooper, 9 Rob. (La.) 248; Slack *v.* Orillion, 13 La. 56, 33 Am. Dec. 551; Burt *v.* Busch, 82 Mich. 506, 46 N. W. 790.

The affirmance of a resurvey by the interior department is not binding on the courts, when it appears that title to the lands has passed from the government by patent under a prior legal survey. Kean *v.* Roby, 145 Ind. 221, 42 N. E. 1011.

41. Murphy *v.* Sumner, 74 Cal. 316, 16 Pac. 3.

42. Randall *v.* Burk Tp., 4 S. D. 337, 57 N. W. 4. See also Washington Rock Co. *v.* Young, 29 Utah 108, 80 Pac. 382, 110 Am. St. Rep. 666.

Where only section and quarter section corner posts were established by the original government survey of a quarter section bordering on the north line of a town, the sixteenth corner posts must be determined, on a resurvey by reference to the established corners. Westphal *v.* Schultz, 48 Wis. 75, 4 N. W. 136 [*following* Jones *v.* Kimble, 19 Wis. 429 (*following* Moreland *v.* Page, 2 Iowa 139)].

nating the boundaries of government lands, a person in possession of the land under an assumed survey cannot be disturbed unless resort be had to other known lines and monuments as a basis of survey.[43]

7. Surveys of Omitted Lands. In order to give jurisdiction to the commissioner of the land office to order a survey of such islands as were omitted in the general survey of the adjacent lands, it must appear that there are such omitted islands, and that the land has not been previously conveyed by the United States.[44]

8. Conflicting Surveys. Of two overlapping surveys, the one first made has priority, particularly where the second is bounded with express reference to the first.[45] Where two separate and conflicting surveys of land have been made by the authority of the United States, the first of which has never been approved, but the parties have entered into a notarial agreement to respect it in preference to the last, they are bound by this agreement so long as it remains in force, and has not been set aside by a direct action of rescission.[46]

C. Entries,[47] Sales, and Possessory Rights — 1. In General — a. Meaning of Term "Entry." The term "entry" as used in reference to public lands means, in its technical sense, the filing with the register of the land office of a claim to a portion of the public lands for the purpose of acquiring an inceptive right thereto;[48] but the term is applied somewhat loosely to various proceedings under the land laws,[49] and the courts also use it in its ordinary sense as importing the physical act of entering and settling upon land.[50]

b. Time For Entry. An application for entry can be received by the local land officers only at their offices and during the prescribed office hours.[51]

c. Change of Entry. The acts of congress entitling one entering land at a land office of the United States to a change of the entry and a transfer of the payment made to another tract apply only in case such purchaser has made entry of a tract not intended to be entered by reason of a mistake as to the true numbers of the tract intended to be entered,[52] and authorize such transfer only when the tract intended remains unsold.[53] The fact that a person applied for leave to withdraw and change his entry and that the request was granted does not of itself show that he availed himself of the liberty given or that the entry was actually withdrawn.[54]

d. Validity of Entries. The rights of one claiming public land must be determined by the validity of the original entry at the time it was made,[55] and where one was at the time of his original entry disqualified to enter land, his continuing in

43. Sawyer *v.* Cox, 63 Ill. 130.

44. Webber *v.* Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469.

45. Van Amburgh *v.* Randall, 115 Mo. 607, 22 S. W. 636, holding that any calls of the second survey conflicting with monuments and calls of the first must yield thereto.

46. Dugas *v.* Truxillo, 15 La. Ann. 116.

47. Making and record of entries in land-office and proceedings thereon see *infra*, II, L, 9.

48. Lockwitz *v.* Larson, 16 Utah 275, 52 Pac. 279. See also Donohue *v.* St. Paul, etc., R. Co., 101 Minn. 239, 112 N. W. 413; St. Paul, etc., R. Co. *v.* Greenhalgh, 26 Fed. 563 [*affirmed* in 139 U. S. 19, 11 S. Ct. 395, 35 L. ed. 71].

49. U. S. *v.* Stearns, 152 Fed. 900, 907, 82 C. C. A. 48, where it is said: "In statutes and in common parlance the word 'entries,' when applied to proceedings in the land offices under the homestead law, is used with various meanings — sometimes in the sense of preliminary entries, at other times in the sense of final entries, and again in the sense of the proceedings as a whole."

50. See St. Paul, etc., R. Co. *v.* Greenhalgh, 26 Fed. 563 [*affirmed* in 139 U. S. 19, 11 S. Ct. 395, 35 L. ed. 71].

51. Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348 [*reversing* 82 Fed. 807], holding that a rule established by the land department to that effect is proper, just, and reasonable.

Rules of land department generally see *infra*, II, L, 8.

52. Carman *v.* Johnson, 29 Mo. 84.

Where the entry is void by reason of a prior sale of the land, the only relief to which the purchaser is entitled is the repayment of the money paid by him. Carman *v.* Johnson, 29 Mo. 84.

53. Manual *v.* Fabyanski, 44 Minn. 71, 46 N. W. 208.

A purchaser of the tract intended cannot be charged with constructive notice of a prior application for the transfer. Manuel *v.* Fabyanski, 44 Minn. 71, 46 N. W. 208.

54. Hedrick *v.* Stohl, 105 Mo. 43, 16 S. W. 835.

55. Prosser *v.* Finn, 208 U. S. 67, 28 S. Ct. 225 [*affirming* 41 Wash. 604, 84 Pac. 404].

possession after the disqualification had ceased was not equivalent to a new entry.[56] Where an entry on public land is allowed at the land office and payment for the land is received, the entry is *prima facie* valid;[57] but an entry made without warrant and authority of law, is a nullity.[58] So an entry of land covered by an existing entry of another person confers no rights,[59] and an entry in the name of a dead man is void.[60]

e. Evidence of Entry. The statute makes the official certificate of the register or receiver of any land office evidence of an entry of any tract of land in his district,[61] and a book certified by the state auditor to the county clerk, in which a certain entry appears, is not admissible in evidence to prove the entry.[62]

2. Lands Subject to Entry or Sale[63]**— a. In General.** All the vacant and unappropriated public lands not reserved or excepted[64] are subject to entry under the land laws.[65] But public lands are open to settlement only when they are free from any other claim of record,[66] and the fact that the title to land may be in the United States does not necessarily make it part of the public domain which is subject to entry or settlement.[67] So no entry can be made or title acquired to tide lands in Alaska.[68] The fact that land is unfit for cultivation and valuable chiefly for timber does not prevent a homstead entry thereof,[69] and where a railroad is granted the odd-numbered sections along its line, the even-numbered sections are subject to entry[70] unless reserved to the United States.[71] One who enters a tract of land shown by the government records to be vacant is not affected with notice of the title of another person thereto, although he may know that such other person had entered another tract intending to enter the tract in question, and that he claimed title thereto.[72] Where certain lands are not in law subject to location, the actual location of warrants thereon in good faith, and entry under such location, does not color or give character to the possession.[73]

b. Lands Previously Granted, Appropriated, or Reserved — (I) *In General.* Land which, although originally a part of the public domain, has been granted,[74]

56. Prosser *v.* Finn, 208 U. S. 67, 28 S. Ct. 225 [*affirming* 41 Wash. 604, 84 Pac. 404].

57. Lewis *v.* Shaw, 57 Fed. 516.

58. Carman *v.* Johnson, 29 Mo. 84.

59. Holt *v.* Murphy, 15 Okla. 12, 79 Pac. 265 [*affirmed* in 207 U. S. 407, 28 S. Ct. 212, 52 L. ed. 271]. See, generally, *infra*, II, C, 2, b, (II).

Appeal from rejection of entry.— Where an application to enter land already covered by a homestead entry is received by the local land office and rejected, and an appeal is taken, it is not a pending application that will attach on the cancellation of the previous entry, since the appeal cannot operate to create, as a matter of law, any right not secured by the application. Holt *v.* Murphy, 15 Okla. 12, 79 Pac. 265.

60. Stubblefield *v.* Boggs, 2 Ohio St. 216 [*distinguishing* McArthur *v.* Dun, 7 How. (U. S.) 262, 12 L. ed. 693; Galloway *v.* Finley, 12 Pet. (U. S.) 264, 9 L. ed. 1079]; Price *v.* Johnston, 1 Ohio St. 390; Wallace *v.* Saunders, 7 Ohio 173; Hall *v.* Prindle, 2 Ohio Dec. (Reprint) 261, 2 West. L. Month. 193; McDonald *v.* Smalley, 6 Pet. (U. S.) 261, 8 L. ed. 391; Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876. *Compare* McArthur *v.* Dun, 7 How. (U. S.) 262, 12 L. ed. 693.

61. Neiderer *v.* Bell, 174 Ill. 325, 51 N. E. 855.

Land office records and proceedings as evidence see, generally, *infra*, II, N.

62. Neiderer *v.* Bell, 174 Ill. 325, 51 N. E. 855 [*approving* Huls *v.* Buntin, 47 Ill. 396].

63. Land subject to entry under mining laws see Mines and Minerals, 27 Cyc. 516.

64. Reservations see *infra*, II, D.

Upon the filing of the plat of the Central Pacific Railroad withdrawing the vacant odd-numbered sections within the twenty-mile limit, the even-numbered sections remained subject to preëmption and homestead as before. Pratt *v.* Crane, 58 Cal. 533.

65. McCracken *v.* Todd, 1 Kan. 148; Sherman *v.* Buick, 93 U. S. 209, 23 L. ed. 849. See also Smith *v.* Mosier, 5 Blackf. (Ind.) 51.

66. Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79 [*affirming* 104 Fed. 20, and *affirmed* in 190 U. S. 301, 23 S. Ct. 692, 47 L. ed. 1064]. And see *infra*, II, C, 2, b, (II), (IV).

67. U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 239. See also Garnett *v.* Voe, 17 Ala. 74.

68. U. S. *v.* Roth, 2 Alaska 257; Juneau Ferry Co. *v.* Alaska Steamship Co., 1 Alaska 533.

69. Johnson *v.* Bridal Veil Lumbering Co., 24 Oreg. 182, 33 Pac. 528.

70. Stalnaker *v.* Morrison, 6 Nebr. 363.

71. Walker *v.* Hedrick, 18 Ill. 570. And see *infra*, II, D.

72. Sensenderfer *v.* Smith, 66 Mo. 80.

73. Farish *v.* Coon, 40 Cal. 33.

74. *Alabama.*— Dudley *v.* Gallups, 128 Ala. 236, 29 So. 616.

appropriated,[75] reserved,[76] or withdrawn from entry or sale,[77] or certified to [78] or selected by[79] a state or a railroad company under its grant,[80] is not subsequently subject to entry or sale under the United States land laws.

(II) *Land Previously Entered by Another.*[81] An entry of land, valid on its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain [82] and appropriate it to private use,[83] and even though the entry may be in fact invalid,[84] no lawful entry or settlement on the land

California.— Sousa *v.* Pereira, 132 Cal. 77, 64 Pac. 90; Sherman *v.* Buick, 45 Cal. 656.

Michigan.— Minnesota Min. Co. *v.* National Min. Co., 11 Mich. 186.

Minnesota.— Winona, etc., R. Co. *v.* Randall, 29 Minn. 283, 13 N. W. 127.

Missouri.— Cummings *v.* Powell, 97 Mo. 524, 10 S. W. 819.

Nebraska.— Stark *v.* Baldwin, 7 Nebr. 114.

Washington.— Wheeler *v.* Smith, 5 Wash. 704, 32 Pac. 784.

United States.— Durand *v.* Martin, 120 U. S. 366, 7 S. Ct. 587, 30 L. ed. 675; Simmons *v.* Wagner, 101 U. S. 260, 25 L. ed. 910; Kissell *v.* St. Louis Public Schools, 18 How. 19, 15 L. ed. 324 [*affirming* 16 Mo. 553]; Linebeck *v.* Vos, 160 Fed. 540; Edwards *v.* Begole, 121 Fed. 1, 57 C. C. A. 245; Taboreck *v.* Burlington, etc., R. Co., 13 Fed. 103, 2 McCrary 407. See also Mower *v.* Fletcher, 116 U. S. 380, 6 S. Ct. 409, 29 L. ed. 593.

See 41 Cent. Dig. tit. "Public Lands," § 44.

Entries on land within railroad aid grants see *infra*, II, K, 1, o.

75. Ross *v.* Barland, 1 Pet. (U. S.) 655, 7 L. ed. 302; Turner *v.* American Baptist Missionary Union, 24 Fed. Cas. No. 14,251, 5 McLean 344.

76. *Alaska.*— Gavigan *v.* Crary, 2 Alaska 370, military reserve.

Illinois.— Walker *v.* Hedrick, 18 Ill. 570.

Iowa.— Bellows *v.* Todd, 34 Iowa 18.

Missouri.— Wright *v.* Rutgers, 14 Mo. 585; Hunter *v.* Hemphill, 6 Mo. 106.

Nebraska.— Smiley *v.* Sampson, 1 Nebr. 56.

Oregon.— Kelly *v.* Dalles City, 19 Oreg. 299, 24 Pac. 449.

United States.— Scott *v.* Carew, 196 U. S. 100, 25 S. Ct. 193, 49 L. ed. 403 [*affirming* 121 Fed. 1021, 56 C. C. A. 684]; Morris *v.* U. S., 174 U. S. 196, 19 S. Ct. 649, 43 L. ed. 946; Rector *v.* U. S., 92 U. S. 698, 23 L. ed. 690; Stone *v.* U. S., 2 Wall. 525, 17 L. ed. 765; Hale *v.* Gaines, 22 How. 144, 16 L. ed. 264; Stoddard *v.* Chambers, 2 How. 284, 11 L. ed. 269; Wilcox *v.* McConnell, 13 Pet. 498, 10 L. ed. 264; Dunn *v.* Barnum, 51 Fed. 355, 2 C. C. A. 265; U. S. *v.* McGraw, 12 Fed. 449, 8 Sawy. 156; Turner *v.* American Baptist Missionary Union, 24 Fed. Cas. No. 14,251, 5 McLean 344.

See 41 Cent. Dig. tit. "Public Lands," § 44.

Erroneous reservation.— The reservation from entry and sale by the secretary of the interior, of the lands granted to the state for the improvement of the navigation of the Des Moines river, under the act of Aug. 8, 1846, although erroneous in holding that the grant extended to lands lying above the Raccoon Fork to the northern boundary of the state, was nevertheless a reservation of such lands "by competent authority," and the land was not subject to entry. Bellows *v.* Todd, 34 Iowa 18.

An unauthorized occupation of lands for military purposes does not withdraw them from entry. Jackson *v.* Wilcox, 2 Ill. 344. See also U. S. *v.* Tichenor, 12 Fed. 415, 8 Sawy. 142; Johnson *v.* U. S., 2 Ct. Cl. 391.

On the abandonment of a military reservation the land becomes a part of the public lands open to entry and sale as other lands. U. S. *v.* Railroad Bridge Co., 27 Fed. Cas. No. 16,114, 6 McLean 517.

77. Sage *v.* Swenson, 64 Minn. 517, 67 N. W. 544 [*followed* in Sjoli *v.* Dreschel, 90 Minn. 108, 95 N. W. 763]; Wood *v.* Beach, 156 U. S. 548, 15 S. Ct. 410, 39 L. ed. 528.

78. Bellows *v.* Todd, 39 Iowa 209; Bellows *v.* Todd, 34 Iowa 18; Frasher *v.* O'Connor, 115 U. S. 102, 5 S. Ct. 1141, 29 L. ed. 311; Deweese *v.* Reinhard, 61 Fed. 777, 10 C. C. A. 55.

79. Johnson *v.* Washington, 190 U. S. 179, 23 S. Ct. 825, 47 L. ed. 1008, 57 C. C. A. 26 [*affirming* 26 Wash. 668, 67 Pac. 40]; Durand *v.* Martin, 120 U. S. 366, 7 S. Ct. 587, 30 L. ed. 675; Barnard *v.* Ashley, 18 How. (U. S.) 43, 15 L. ed. 285, lands selected for state under Act Cong. March 2, 1831. See also Chillicothe Land Dist. *v.* Campbell, 17 Ohio 267; Campbell *v.* Doe, 13 How. (U. S.) 244, 14 L. ed. 130.

80. U. S. *v.* Chicago, etc., R. Co., 195 U. S. 524, 25 S. Ct. 113, 49 L. ed. 306 [*affirming* 116 Fed. 969, 54 C. C. A. 545].

81. Rights acquired by entry see *infra*, II, C, 4.

82. Holt *v.* Murphy, 207 U. S. 407, 28 S. Ct. 212, 52 L. ed. 271 [*affirming* 15 Okla. 12, 79 Pac. 265]; McMichael *v.* Murphy, 197 U. S. 304, 25 S. Ct. 460, 49 L. ed. 766 [*affirming* 12 Okla. 155, 70 Pac. 189 (*followed* in Hodges *v.* Colcord, 12 Okla. 313, 70 Pac. 383 [*affirmed* in 193 U. S. 192, 24 S. Ct. 433, 48 L. ed. 677])]; Parsons *v.* Venzke, 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360 [*affirming* 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669]; Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69]; U. S. *v.* Turner, 54 Fed. 228.

83. Stubblefield *v.* Boggs, 2 Ohio St. 216; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476.

84. McMichael *v.* Murphy, 197 U. S. 304, 25 S. Ct. 460, 49 L. ed. 766 [*affirming* 12 Okla. 155, 70 Pac. 189 (*followed* in Hodges *v.* Colcord, 12 Okla. 313, 70 Pac. 383 [*affirmed* in 193 U. S. 192, 24 S. Ct. 433, 48 L. ed. 677])].

can be made by any other person,[85] nor will a subsequent grant by the government be construed to include such land,[86] unless and until the original entry is canceled or forfeited,[87] or relinquished,[88] in which case the land reverts to the United

85. Sallee *v.* Corder, 67 Cal. 174, 7 Pac. 455; Holt *v.* Classon, (Okla. 1907) 91 Pac. 866; Holt *v.* Murphy, 207 U. S. 407, 28 S. Ct. 212, 52 L. ed. 271 [*affirming* 15 Okla. 12, 79 Pac. 265]; McMichael *v.* Murphy, 197 U. S. 304, 25 S. Ct. 460, 49 L. ed. 766 [*affirming* 12 Okla. 155, 70 Pac. 189 (*followed* in Hodges *v.* Colcord, 12 Okla. 313, 70 Pac. 383 [*affirmed* in 193 U. S. 192, 24 S. Ct. 433, 48 L. ed. 677])]; Sturr *v.* Beck, 133 U. S. 541, 10 S. Ct. 350, 33 L. ed. 761; Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69]; Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122; Wirth *v.* Branson, 98 U. S. 118, 25 L. ed. 86; Hughes *v.* U. S., 4 Wall. (U. S.) 232, 18 L. ed. 303; Witherspoon *v.* Wallace, 4 Wall. (U. S.) 210, 18 L. ed. 339; Carroll *v.* Safford, 3 How. (U. S.) 441, 11 L. ed. 671; Wilcox *v.* McConnell, 13 Pet. (U. S.) 498, 10 L. ed. 264; Stringer *v.* Young, 3 Pet. (U. S.) 320, 7 L. ed. 693; Linebeck *v.* Vos, 160 Fed. 540; Le Marchel *v.* Teagarden, 152 Fed. 662; Thallman *v.* Thomas, 111 Fed. 277, 49 C. C. A. 317 [*affirming* 102 Fed. 935]; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Hartman *v.* Warner, 76 Fed. 157, 22 C. C. A. 30; Hartmann *v.* Warren, 70 Fed. 946; McIntyre *v.* Roeschlaub, 37 Fed. 556; Faulkner *v.* Miller, 16 Land Dec. Dep. Int. 130; Hanscom *v.* Sines, 15 Land Dec. Dep. Int. 27; *In re* Milne, 14 Land Dec. Dep. Int. 242; Swims *v.* Ward, 13 Land Dec. Dep. Int. 686; Russell *v.* Gerold, 10 Land Dec. Dep. Int. 18; James *v.* Froward, 8 Land Dec. Dep. Int. 528; Allen *v.* Curtis, 7 Land Dec. Dep. Int. 444; Schrotberger *v.* Arnold, 6 Land Dec. Dep. Int. 425; Hollarts *v.* Sullivan, 5 Land Dec. Dep. Int. 115; Johnson *v.* Forseth, 3 Land Dec. Dep. Int. 446; R. Co. *v.* Leach, 2 Land Dec. Dep. Int. 506; Whitney *v.* Maxwell, 2 Land Dec. Dep. Int. 98.

If the register of a land office has duly admitted the location of land, and granted a certificate thereof, a subsequent sale of the same land is void, although to a *bona fide* purchaser without notice. Moyer *v.* McCullough, 1 Ind. 339.

Issuance of patent for wrong land.— Where a person made a cash entry on land, but by mistake of the register in a land office a patent was issued for another tract and long after the patentee's death, the error was corrected, the original patent canceled, and a correct patent issued to the patentee and his heirs for the land, pending which another person had made a homestead entry thereon, the original patentee and his heirs were entitled to the land, for it was not subject to homestead entry at the time the other person attempted to enter it, and he had no rights therein. Le Marchel *v.* Teagarden, 152 Fed. 662.

86. See Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69]; Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122.

87. Holt *v.* Murphy, 207 U. S. 407, 28 S. Ct. 212, 52 L. ed. 271 [*affirming* 15 Okla. 12, 79 Pac. 265]; McMichael *v.* Murphy, 197 U. S. 304, 25 S. Ct. 460, 49 L. ed. 766 [*affirming* 12 Okla. 155, 70 Pac. 189 (*followed* in Hodges *v.* Colcord, 12 Okla. 313, 70 Pac. 383 [*affirmed* in 193 U. S. 192, 24 S. Ct. 433, 48 L. ed. 677])]; Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69]; Hartman *v.* Warren, 70 Fed. 946, holding that the fact that the certificate or scrip under which an entry was made under the Chippewa Indian treaty may have been illegally issued by the commissioner of Indian affairs, and that the action of the secretary of the interior in instructing the register of the land office to permit location may have been unauthorized, would not alter the effect of the entry as withdrawing the land from further disposition or sale; the scrip being valid on its face and the land-office records showing an acceptance of the entry. But *compare* Rogers *v.* Voss, 6 Iowa 405 (holding that where a person, although he had obtained a preëmption certificate, had not complied with the statute and had no right of preëmption, the land might be entered by another); Stubblefield *v.* Boggs, 2 Ohio St. 216 (holding that an entry is not unlawful because made on land covered by a previous but unsurveyed and void entry).

Notation of cancellation in local land office. — After a decision of the secretary of the interior, canceling an entry, has been made, a subsequent entry of the same lands cannot be made until the decision has been officially communicated to the local land officers, and a notation of the cancellation made on their plats and records. Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348 [*reversing* 82 Fed. 807], holding that a rule of the land department to that effect is proper, just, and reasonable, and in accordance with the policy of congress, which makes the local offices the place for the initiation and establishment of all claims.

Erroneous cancellation.— Where it appears that a decision of the commissioner of the general land office canceling an occupying claimant's entry for alleged abandonment was erroneous, and that the entryman had done everything required by law and had not in fact abandoned his claim, and the successful contestant had not exercised his preference rights, a stranger to that contest whose application to enter the land as a homestead had been accepted while the occupying claimant's entry appeared canceled of record acquired no equitable right to the land by such entry. Martinson *v.* Marzolf, 15 N. D. 471, 108 N. W. 801.

88. McMichael *v.* Murphy, 197 U. S. 304, 25

States,[89] and again becomes subject to entry.[90] The register and receiver of the local land office can neither allow an entry, receive an application, nor do any other act affecting the disposition of the land after an entry of it has been allowed and while a contest for it is pending and undecided.[91]

(III) *LANDS OCCUPIED BY SETTLERS.*[92] Land which a person has settled upon and improved and actually occupies and holds possession of is not subject to entry by another under the land laws,[93] although the entry is open and peace-

S. Ct. 460, 49 L. ed. 766 [*affirming* 12 Okla. 155, 70 Pac. 189 (*followed* in Hodges *v.* Colcord, 12 Okla. 313, 70 Pac. 383 [*affirmed* in 193 U. S. 192, 24 S. Ct. 433, 48 L. ed. 677])].

89. Holt *v.* Murphy, 15 Okla. 12, 79 Pac. 265; McMichael *v.* Murphy, 197 U. S. 304, 25 S. Ct. 460, 49 L. ed. 766 [*affirming* 12 Okla. 155, 70 Pac. 189 (*followed* in Hodges *v.* Colcord, 12 Okla. 313, 70 Pac. 383 [*affirmed* in 193 U. S. 192, 24 S. Ct. 433, 48 L. ed. 677])]; Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69].

90. Holt *v.* Murphy, 207 U. S. 407, 28 S. Ct. 212, 52 L. ed. 271 [*affirming* 15 Okla. 12, 79 Pac. 265]; McMichael *v.* Murphy, 197 U. S. 304, 25 S. Ct. 460, 47 L. ed. 766 [*affirming* 12 Okla. 155, 70 Pac. 189 (*followed* in Hodges *v.* Colcord, 12 Okla. 313, 70 Pac. 383 [*affirmed* in 193 U. S. 192, 24 S. Ct. 433, 48 L. ed. 677])]; Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69].

Attaching of settler's right on relinquishment of entry.— The rights of a settler in good faith, who takes possession of public land at a time when there is on record a homestead entry by another person who has never made any settlement, will attach instantly on the filing of a relinquishment of the prior entry, although at the same time one who has paid money for such relinquishment makes a new entry; and the settler may thereafter make an entry and perfect his right to a patent as against the prior entry made by a person not in possession. Moss *v.* Dowman, 176 U. S. 413, 20 S. Ct. 429, 44 L. ed. 526 [*affirming* 88 Fed. 181, 131 C. C. A. 447].

91. Holt *v.* Murphy, 207 U. S. 407, 28 S. Ct. 212, 52 L. ed. 271 [*affirming* 15 Okla. 12, 79 Pac. 265]; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; *In re* Peterson, 8 Land Dec. Dep. Int. 121; Grove *v.* Crooks, 7 Land Dec. Dep. Int. 140; Gilbert *v.* Spearing, 4 Land Dec. Dep. Int. 463; Keith *v.* Grand Junction, 3 Land Dec. Dep. Int. 431; *In re* Fritzsche, 3 Land Dec. Dep. Int. 208; Hoyt *v.* Sullivan, 2 Land Dec. Dep. Int. 283; Hawker *v.* Fowlks, 2 Land Dec. Dep. Int. 53; Smith *v.* Oakes, 1 Land Dec. Dep. Int. 181.

92. **Rights acquired by occupancy** see *infra*, II, C, 5.

93. *California.*— Gragg *v.* Cooper, 150 Cal. 584, 89 Pac. 346; Rouke *v.* McNally, 98 Cal. 291, 33 Pac. 62; Bullock *v.* Rouse, 81 Cal. 590, 22 Pac. 919; Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705; Bishop *v.* Glassen, (1886) 12 Pac. 258; Hambleton *v.* Duhain, 71 Cal. 136, 11 Pac. 865; Kendall *v.* Waters, 68 Cal. 26, 8 Pac. 510; McBrown *v.* Morris, 59 Cal. 64; Davis *v.* Scott, 56 Cal. 165; Carmichael *v.* Campodonico, (App. 1908) 95 Pac. 164.

Idaho.— See Leirbaugh *v.* Masterson, 1 Ida. 135.

Iowa.— Bisson *v.* Curry, 35 Iowa 72.

Nevada.— Short *v.* Read, (1908) 96 Pac. 1060; Nickals *v.* Winn, 17 Nev. 188, 30 Pac. 435 [*followed* in Reinhart *v.* Bradshaw, 19 Nev. 255, 9 Pac. 245, 3 Am. St. Rep. 886].

Washington.— Laurendeau *v.* Fugelli, 1 Wash. 559, 21 Pac. 29, 5 Wash. 94, 31 Pac. 421, 5 Wash. 632, 32 Pac. 465, holding that an entry on inclosed and improved land occupied and claimed by another under a certificate from a railroad company is not authorized by 23 U. S. St. at L. 321 [U. S. Comp. St. (1901) p. 1524], forbidding the fencing of public land, or preventing settlement thereon; but the person so entering is a naked trespasser, although after entry he files a statement of preëmption.

Wyoming.— Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

United States.— Trenouth *v.* San Francisco, 100 U. S. 251, 25 L. ed. 626; Hosmer *v.* Wallace, 97 U. S. 575, 24 L. ed. 1130; Atherton *v.* Fowler, 96 U. S. 513, 24 L. ed. 732 [*followed* in Cahalan *v.* McTague, 46 Fed. 251]; Lyle *v.* Patterson, 160 Fed. 545; Dockendorf *v.* Bassett, 160 Fed. 543; Harvey *v.* Holles, 160 Fed. 531; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79 [*affirming* 104 Fed. 20, and *affirmed* in 190 U. S. 301, 24 S. Ct. 860, 47 L. ed. 1064]; Tustin *v.* Adams, 87 Fed. 377.

See 41 Cent. Dig. tit. "Public Lands," § 53.

But *compare* Pacific Live Stock Co. *v.* Isaacs, (Oreg. 1908) 96 Pac. 460.

Fences and natural barriers may constitute such inclosure of public lands as to give actual possession to one making or using the inclosure, and another cannot acquire a preëmption or homestead claim thereto by intruding upon such possession; but, where the fences are dilapidated and down in places, and it does not appear that anything has been done to repair them, or that herders or other means are employed to prevent the escape of stock pastured on the land, or the intrusion of other stock, another may make valid settlement on, and acquire title to, the land, under the homestead law. Bullock *v.* Rouse, 81 Cal. 590, 22 Pac. 919.

Possession not sufficient to prevent entry. — Where one incloses with his own government land, which he uses only for grazing purposes, and at his invitation a homestead entry is made by another on part of the government lands, and a gate is maintained through which the public are licensed to pass,

able.[94] But constructive possession by one without other title will not prevent an entry of the land by another,[95] and so, where a prior occupant, without title, has possession of a part only of a governmental subdivision of land, and a claimant enters upon the unoccupied part, claiming the right to enter the whole of it, and in pursuance of such claim files his declaratory statement and obtains a certificate of entry on the whole tract, he will be allowed to recover possession of the part occupied by the prior possessor.[96] Lands actually used and occupied by the native tribes of Alaska are reserved from sale or other disposal by the laws of the United States.[97]

(iv) *Lands Claimed Under Spanish, Mexican, or French Grants.*[98] Land lying within the boundaries of a specific Spanish, Mexican, or French grant, to determine the validity of which proceedings are pending in the United States tribunals, is not subject to grant, entry, or sale;[99] but a floating grant — that is, a

he has not the exclusive possession of the land which will prevent a valid homestead entry being made on the government land inclosed, not covered by the prior entry, and which has on it no improvements, by one who peaceably enters through the gate under the general license to the public. Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488, (1896) 46 Pac. 1092.

An abandoned and dilapidated cabin, and the remnant of an abandoned fence, are not such "improvements" as are contemplated by Act Cong. June 3, 1878 (20 U. S. St. at L. 89 [U. S. Comp. St. (1901) p. 1545]), providing for the sale of timber lands in the Pacific coast states, but excepting from its operation such lands as have upon them "the improvements of any *bona fide* settler." U. S. *v.* Budd, 43 Fed. 630 [*affirmed* in 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384].

The act of congress of Feb. 25, 1885, declaring unlawful all inclosures of any public lands to any of which the person or corporation making or controlling such inclosure "had no claim or color of title, made or acquired in good faith," at the time of making such inclosure, does not authorize a person to enter upon a tract of less than one hundred and sixty acres which had been inclosed by the original settler, as an incident to his settlement and cultivation thereof, all of which is in actual use for agricultural purposes, and is held by the occupant under conveyances of record from such original settler and his grantees. Tidwell *v.* Chiricahua Cattle Co., 5 Ariz. 352, 53 Pac. 192.

A mere trespasser on the public lands of the United States, with an inclosure erected and maintained contrary to the express provisions of the statute (23 U. S. St. at L. 321 [U. S. Comp. St. (1901) p. 1524]), cannot by such occupancy prevent a homestead entry by a citizen who goes peaceably on a portion of the tract, and in other respects complies with the law. Whittaker *v.* Pendola, 78 Cal. 296, 20 Pac. 680.

A tenant in common cannot acquire a right of homestead to government land of which he is in possession for himself and his cotenants. Reinhart *v.* Bradshaw, 19 Nev. 255, 9 Pac. 245, 3 Am. St. Rep. 886.

94. Gragg *v.* Cooper, 150 Cal. 584, 89 Pac. 346; Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705; McBrown *v.* Morris, 59 Cal. 64; Davis *v.* Scott, 56 Cal. 165.

95. Gragg *v.* Cooper, 150 Cal. 584, 89 Pac. 346; Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 706; McBrown *v.* Morris, 59 Cal. 64; Davis *v.* Scott, 56 Cal. 165.

96. Gragg *v.* Cooper, 150 Cal. 584, 89 Pac. 346; Wormouth *v.* Gardner, 105 Cal. 149, 38 Pac. 646; Whittaker *v.* Pendola, 78 Cal. 296, 20 Pac. 680; Haven *v.* Haws, 63 Cal. 514.

Where one is in possession of a stable on unsurveyed public land, but without any fixed boundaries or other claim of right to any portion of the ground, his right, as against subsequent locators, is limited to the land actually occupied by his stable. Crawford *v.* Burr, 2 Alaska 33 [*following* Havens *v.* Dale, 18 Cal. 359, and *distinguishing* Atherton *v.* Fowler, 96 U. S. 513, 24 L. ed. 732].

97. U. S. *v.* Berrigan, 2 Alaska 442; Johnson *v.* Pacific Coast Steamship Co., 2 Alaska 224; Russian-American Packing Co. *v.* U. S., 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314 [*affirming* 39 Ct. Cl. 460].

98. **Spanish, Mexican, and French grants** generally see *infra*, V.

99. Millaudon *v.* De Lalande, 9 La. Ann. 438; Cameron *v.* U. S., 148 U. S. 301, 13 S. Ct. 595, 37 L. ed. 459 [*reversing* 3 Ariz. 100, 21 Pac. 177]; Trenouth *v.* San Francisco, 100 U. S. 251, 25 L. ed. 626; Hosmer *v.* Wallace, 97 U. S. 575, 24 L. ed. 1130; Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769. See also Carr *v.* Quigley, 149 U. S. 652, 13 S. Ct. 961, 37 L. ed. 885; U. S. *v.* McLaughlin, 127 U. S. 428, 8 S. Ct. 1177, 32 L. ed. 213 [*affirming* 30 Fed. 147].

The mere designation of a claim to land on the books of the land office, by a stranger, is not sufficient to authorize the register to withhold such lands from sale under Act Cong. March 3, 1811, § 10. Hunter *v.* Hemphill, 6 Mo. 106.

The act of congress of April 22, 1854, section 8, which required the surveyor-general to ascertain and report for confirmation all Spanish or Mexican grants in New Mexico and other territories, and which provided that the report should be laid before congress for action thereon, and until the final action thereon all claims covered by such claims should be reserved from sale or other dispo-

grant of a certain quantity of land to be located within exterior boundaries including a larger amount — does not prevent a grant, sale, or entry of any land within the exterior boundaries, so long as enough is left to satisfy the grant,[1] and *a fortiori*, after such a grant is surveyed and located, the remainder of the land within the exterior boundaries becomes subject to disposal like other public lands.[2] So also lands claimed under a Mexican grant, but excluded from the exterior limits of the grant by the express terms of the decree of confirmation, are public lands, subject to survey and sale as such from the time when the decree of confirmation so excluding them becomes final.[3] Where an inchoate Mexican grant is not presented for confirmation by the persons claiming under it, as required by statute, the land is, as to them, deemed public land of the United States subject to disposal.[4] The final rejection of a claim under a Mexican grant restores the land to the mass of the public domain and it becomes at once subject to location or appropriation in any manner provided by law.[5]

c. Town Sites.[6] Land situated within the corporate limits of a city or town or selected as the site of a city or town is not subject to entry under the general land laws.[7] But the statute provides that the existence or incorporation of any town upon the public lands shall not exclude from entry more than two thousand five hundred and sixty acres of land unless the entire tract incorporated including and in excess of such area shall be actually settled upon, inhabited, improved, and

sition by the government, did not create a reservation until the coming in of the report of the surveyor-general, when the location and extent of the land could be known, and therefore a homestead entry made five years before the coming in of the report of the surveyor-general was valid. Chavez *v.* Chavez De Sanchez, 7 N. M. 58, 32 Pac. 137.

Land within confirmed Mexican grant is, *a fortiori*, not subject to entry. Sanborn *v.* Vance, 69 Mich. 224, 37 N. W. 273.

1. Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 596, 861; Carr *v.* Quigley, 149 U. S. 652, 13 S. Ct. 961, 37 L. ed. 885 [*reversing* 79 Cal. 130, 21 Pac. 607]; U. S. *v.* McLaughlin, 127 U. S. 428, 8 S. Ct. 1177, 32 L. ed. 213 [*affirming* 30 Fed. 147, and *explaining* Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769]. See also Durand *v.* Martin, 120 U. S. 366, 7 S. Ct. 587, 30 L. ed. 675.

2. McCreery *v.* Haskell, 119 U. S. 327, 7 S. Ct. 176, 30 L. ed. 408; Frasher *v.* O'Connor, 115 U. S. 102, 5 S. Ct. 1141, 29 L. ed. 311.

Unapproved survey.— Where a survey is made by the United States surveyor-general for California of a claim to land under a confirmed Mexican grant, and land is set off by him in satisfaction of the grant, the survey is operative without the approval of the commissioner of the general land office, and land lying outside of such survey then becomes subject to state selection in lieu of school sections covered by the grant, and is open to settlement under the preëmption laws. McCreery *v.* Haskell, 119 U. S. 327, 7 S. Ct. 176, 30 L. ed. 408 [*following* Frasher *v.* O'Connor, 115 U. S. 102, 5 S. Ct. 1141, 29 L. ed. 311].

3. Dodge *v.* Perez, 7 Fed. Cas. No. 3,953, 2 Sawy. 645.

4. Thompson *v.* Doaksum, 68 Cal. 593, 10 Pac. 199; Bouldin *v.* Phelps, 30 Fed. 547.

5. Rush *v.* Casey, 39 Cal. 339.

6. Town-site entries see *infra*, II, C, 12.

7. *Colorado.*— Tucker *v.* McCoy, 8 Colo. 368, 8 Pac. 667; Poire *v.* Wells, 6 Colo. 406.

Idaho.— White *v.* Whitcomb, 13 Ida. 490, 90 Pac. 1080.

Illinois.— Ballance *v.* Underhill, 6 Ill. 113.

Minnesota.— Leech *v.* Ranch, 3 Minn. 448. See also Carson *v.* Smith, 12 Minn. 546.

Nebraska.— Smiley *v.* Sampson, 1 Nebr. 56.

Wisconsin.— Houlton *v.* Chicago, etc., R. Co., 86 Wis. 59, 56 N. W. 336.

United States.—Burfenning *v.* Chicago, etc., R. Co., 163 U. S. 321, 16 S. Ct. 1018, 41 L. ed. 175 [*affirming* 46 Minn. 20, 48 N. W. 444]; Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. ed. 226; Kissell *v.* St. Louis Public Schools, 18 How. 19, 15 L. ed. 324; Chotard *v.* Pope, 12 Wheat. 586, 6 L. ed. 737; Root *v.* Shields, 20 Fed. Cas. No. 12,038, Woolw. 340.

See 41 Cent. Dig. tit. "Public Lands," § 47.

The fact that land entered as part of a town site was not included in a plat of the site does not give one the right to enter it as public land included in a government subdivision. Neill *v.* Jordan, 15 Mont. 47, 38 Pac. 223; Brooke *v.* Jordan, 14 Mont. 375, 36 Pac. 450.

Statutory limitation of area to be entered under town-site law.—Act Cong. May 23, 1844 (5 U. S. St. at L. 657) authorizing town-site entries to the extent of three hundred and twenty acres, did not restrict the corporate limits of a city to that area; and land in excess of that area within the corporate limits could not be preëmpted by an individual. Root *v.* Shields, 20 Fed. Cas. No. 12,038, Woolw. 340.

An abandoned town site could be taken up and held under the Oregon Donation Act as unoccupied public land. Bear *v.* Luse, 2 Fed. Cas. No. 1,179, 6 Sawy. 148.

The acts of congress of May 23, 1844, and March 3, 1853, did not reserve town sites from public sale, but only from preëmption. Doll *v.* Meador, 16 Cal. 295.

used for business and municipal purposes; [8] and a territorial legislature cannot, by including within the limits of a municipality land in excess of that allowed by the laws of the United States, prevent the entry of such lands.[9]

d. Mineral Lands.[10] Where land is known to be valuable for its minerals, no title can be obtained from the United States in any other way than as prescribed in the laws relating to mineral lands; [11] but in order to invalidate an entry the existence of minerals must have been known at the time of the entry.[12]

e. Indian Lands.[13] Although the United States has the right to grant land occupied by Indians,[14] land reserved by a treaty or act of congress for the exclusive occupancy of Indian tribes is not a part of the public lands, and until the Indian title is extinguished no one but congress can initiate any preferential right upon or restrict the nation's power to dispose of it.[15] Accordingly land to which the Indian

8. 19 U. S. St. at L. 392, c. 113, § 1 [U. S. Comp. St. (1901) p. 1460] .

This statute applies only to cities laid out exclusively on the public lands of the United States, and not to cities laid out mostly on private lands, but including some of the lands of the United States. Houlton *v.* Chicago, etc., R. Co., 86 Wis. 59, 56 N. W. 336.

Confirmation of prior entries.— The act of congress of March 3, 1877, section 2, relative to territories, confirmed entries which had been theretofore allowed on lands afterward ascertained to have been embraced within the corporate limits of any town, but which entries were or should be shown to include only unoccupied land of the United States not used for municipal purposes, and under this statute no knowledge of the law or the fact of incorporation was imputed to the entryman, and the fact that an entryman of land within the limits of a city was the marshal thereof raised no presumption that he knew the corporate limits of the city. Alger *v.* Hill, 2 Wash. 344, 27 Pac. 922, 6 Wash. 358, 33 Pac. 872.

9. Carroll *v.* Patrick, 23 Nebr. 834, 37 N. W. 671.

10. See, generally, MINES AND MINERALS, **Town-site entries on mineral lands** see *infra*, II, C, 12, c, (D).

11. Blackburn *v.* U. S., 5 Ariz. 162, 48 Pac. 904; Kansas City Min., etc., Co. *v.* Clay, 3 Ariz. 326, 29 Pac. 9; Peters *v.* Van Horn, 37 Wash. 550, 79 Pac. 1110; Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182; Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423 (except in the states of Kansas, Michigan, Minnesota, Missouri, and Wisconsin); Morton *v.* Nebraska, 21 Wall. (U. S.) 660, 22 L. ed. 639; U. S. *v.* Gear, 3 How. (U. S.) 120, 11 L. ed. 523, 838; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230 [*affirming* 104 Fed. 20, and *affirmed* in 190 U. S. 301, 47 L. ed. 1064]; Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568; U. S. *v.* Reed, 28 Fed. 482; U. S. *v.* Mullan, 10 Fed. 785, 7 Sawy. 466 [*affirmed* in 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170].

Acquisition of mineral lands see MINES AND MINERALS, 27 Cyc. 516.

Lands occupied by persons exploring for mineral.— Land was not "vacant and open to settlement," where at the time of the application it was in the actual occupancy of others engaged in exploring it for oil, under oil placer mining locations previously made by them, although such locations did not appear by the records of the local land office, and although they were not valid as against the United States, because there had been no previous discovery of oil on the land, where the locators prosecuted the work of exploration with due diligence, and with the result of discovering oil in paying quantities before the selection by an applicant under the Forest Reserve Act had been approved by the land department. Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79 [*affirming* 104 Fed. 20, and *affirmed* in 190 U. S. 301, 24 S. Ct. 860, 47 L. ed. 1064].

12. Blackburn *v.* U. S., 5 Ariz. 162, 48 Pac. 904; Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568.

Mere indication of minerals are not sufficient to defeat an entry.— Blackburn *v.* U. S., 5 Ariz. 162, 48 Pac. 904 (holding that the fact that at the time of entry there are indications of abandoned mining claims on land susceptible of cultivation, and that it contains some mineral, which cannot, however, be worked at a profit, will not invalidate the entry); Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182; Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568 (holding that a selection of land is valid, although it is situated in the vicinity of producing oil wells and has surface indications of oil, and the selection is made with a view to the possible value of the land as oil land, where at the time of selection no discovery of oil has been made thereon); U. S. *v.* Reed, 28 Fed. 482 (holding that land is subject to entry under the homestead law as agricultural land, although there is some measure of gold deposited therein, if, under the circumstances as they exist, or as may reasonably be expected, it is more valuable for agriculture than for mining).

The fact that mining operations had been commenced and abandoned does not show the existence of a known mine at the time of the execution of a patent to a homestead entryman. Standard Quicksilver Co. *v.* Habishaw, 132 Cal. 115, 64 Pac. 113.

13. See, generally, INDIANS, 22 Cyc. 109.

14. See *supra*, II, A.

15. King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430].

title has not been extinguished is not subject to entry,[16] nor can land scrip be located thereon.[17] No vested right is obtained in public land by reason of the filing of a contest against an Indian allotment, when the contest does not result in the cancellation of the allotment entry.[18] After the Indian right to lands reserved has been extinguished by treaty, the land becomes public land subject to disposition under the land laws.[19] A statute opening an abandoned military reservation for settlement under the homestead laws has been held not to apply to a portion of such land which was ceded to the United States by an Indian tribe to be sold and the proceeds held for their benefit.[20]

f. Previous Offer at Public Sale. It was formerly a fundamental principle underlying the land system of the United States that private entries were never permitted until after the lands had been exposed to public auction at the price for which they were afterward subject to entry.[21] But under the present statute no public lands of the United States, except abandoned military or other reservations, isolated and disconnected fractions authorized to be sold by the statute, and mineral and other lands, the sale of which at public auction has been authorized by special acts of congress, can be sold at public sale.[22]

3. Persons Entitled to Enter or Acquire Land — a. In General. In order to entitle a person to enter or acquire public lands he must possess the qualifications prescribed by the statutes,[23] and whether a claimant possesses the qualifications prescribed by the statute is a question for the jury,[24] the burden of proof being upon the claimant.[25] The usual qualifications are that the applicant shall be the head

The lands in the Columbian Indian reservation having been opened to settlement through a misunderstanding of the Indians' attitude in respect to an agreement for such opening, never became part of the public domain, and homestead settlers thereon were not entitled to hold the lands. U. S. *v.* La Chappelle, 81 Fed. 152.

Erroneous Indian allotment.— The secretary of the interior has authority to deny an application to make a homestead entry, made by a person who has no equities in the land, when such land is covered by an Indian allotment, even though such Indian allotment has been erroneously made, when the equities in favor of the allottee are such that a great injustice would be done him if the allotment should be canceled. Baldwin *v.* Keith, 13 Okla. 624, 75 Pac. 1124.

16. Stephens *v.* Westwood, 20 Ala. 275, 25 Ala. 716; Spalding *v.* Chandler, 84 Mich. 140, 47 N. W. 593; Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330 [*affirming* 3 Dak. 217, 14 N. W. 103]; Pintard *v.* Goodloe, 19 Fed. Cas. No. 11,171, Hempst. 502; Russell *v.* Beebe, 21 Fed. Cas. No. 12,153, Hempst. 704. See also Jarvis *v.* Campbell, 23 Kan. 370.

17. U. S. *v.* Carpenter, 111 U. S. 347, 4 S. Ct. 435, 28 L. ed. 451.

18. Baldwin *v.* Keith, 13 Okla. 624, 75 Pac. 1124.

19. U. S. *v.* Chandler-Dunbar Water Power Co., 152 Fed. 25, 81 C. C. A. 221.

Where land reserved for an Indian warrior under a treaty is offered for sale and a patent issued for it, the presumption is that the secretary of the treasury decided that the Indian had abandoned the land, and issued the order for the sale. Minter *v.* Crommelin, 18 How. (U. S.) 87, 15 L. ed. 279.

20. Frost *v.* Wenie, 157 U. S. 46, 15 S. Ct. 532, 39 L. ed. 614.

21. Smiley *v.* Sampson, 1 Nebr. 56; Eldred *v.* Sexton, 19 Wall. (U. S.) 189, 22 L. ed. 146 [*affirming* 30 Wis. 193]; U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708. See also Atty.-Gen. *v.* Smith, 31 Mich. 359; U. S. *v.* Railroad Bridge Co., 27 Fed. Cas. No. 16,114, 6 McLean 517. But *compare* Saltmarsh *v.* Crommelin, 39 Ala. 54, holding that the right to enter land under the preëmption law of 1834 did not depend upon the fact of the land having been previously exposed to public sale.

22. 26 U. S. St. at L. 1099, c. 561, § 9 [U. S. Comp. St. (1901) p. 1443].

23. See U. S. Rev. St. (1878) § 2259 (relating to preëmptions, and now repealed); U. S. Rev. St. (1878) § 2289 [U. S. Comp. St. (1901) p. 1388]. And see also Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79.

The act of congress of Aug. 4, 1854, graduating and reducing the price of the public lands to actual settlers and cultivators, contemplated persons who were, at least, capable of acting and contracting for themselves, and not persons who were like married women and minors, who were under legal incapacities and subject to the dominion of another. Garton *v.* Cannada, 39 Mo. 357.

The act of congress of May 30, 1862, authorizing settlements on the public lands of the United States in the state of California, did not change the qualifications of preëmption claimants prescribed by the act of congress of Sept. 4, 1841, or the limitations on which the privilege of preëmption was granted. Gimmy *v.* Culverson, 10 Fed. Cas. No. 5,454, 5 Sawy. 605.

24. Megerle *v.* Ashe, 33 Cal. 74.

25. Page *v.* Hobbs, 27 Cal. 483.

Evidence of qualification.— Testimony that

of a family,[26] a widow,[27] or a person over the age of twenty-one years,[28] and shall be a citizen of the United States,[29] or have filed his declaration of intention to become such [30] at the time of his entry.[31] But it has been held that an entry by an alien is merely voidable and not void.[32] A contestant who by his contest procures the cancellation or relinquishment of an entry has a preference right of entry for thirty days after being notified of such cancellation or relinquishment.[33] One holding land by virtue of a receiver's final certificate prior to the issue of a patent is not seized in fee simple of the land described in the certificate within the meaning of the statute providing that no person who is at the time seized in fee simple of one hundred and sixty acres of land in any state or territory shall be entitled to enter land in Oklahoma.[34] The statute authorizing "any citizen

a person has been accepted by the United States land officers as qualified to enter public lands is *prima facie* proof of such qualification. Barnhart *v.* Lord, 41 Kan. 341, 21 Pac. 239.

26. Page *v.* Hobbs, 27 Cal. 483; Ely *v.* Ellington, 7 Mo. 302.

27. Page *v.* Hobbs, 27 Cal. 483.

Where a husband who is a citizen of the United States enters on land and dies leaving a widow who might lawfully be naturalized, she is entitled to the acquisition of land under the homestead laws. Potter *v.* Hall, 11 Okla. 173, 65 Pac. 841 [*reversed* on other grounds in 189 U. S. 292, 23 S. Ct. 545, 47 L. ed. 817]. See, generally, as to death of homesteader, *infra*, II, C, 8, g.

28. Page *v.* Hobbs, 27 Cal. 483; Tatro *v.* French, 33 Kan. 49, 5 Pac. 426; Ely *v.* Ellington, 7 Mo. 302.

The filing of a declaratory statement by a minor being void, it will not prevent him, on attaining majority, from obtaining a preëmption right to the same or another tract of land. Tatro *v.* French, 33 Kan. 49, 5 Pac. 426.

29. Page *v.* Hobbs, 27 Cal. 483; Bogan *v.* Edinburgh American Land Mortg. Co., 63 Fed. 192, 11 C. C. A. 128.

Evidence of alienage.— The fact that an applicant under the laws of the United States, after filing his declaratory statement, made a declaration of his intention to become a citizen, is evidence tending to prove that at that time he was not a citizen, but would not necessarily prove fraud on the part of the applicant. Burrell *v.* Haw, 40 Cal. 373.

Where one becomes an alien after her right to land is vested, but before it is consummated by a grant from the federal government, the right is not forfeited. Wynn *v.* Morris, 16 Ark. 414.

30. Page *v.* Hobbs, 27 Cal. 483; Boyce *v.* Danz, 29 Mich. 146; Bogan *v.* Edinburgh American Land Mortg. Co., 63 Fed. 192, 11 C. C. A. 128.

The policy of the government has been to encourage the immigration of foreigners, and to this extent a system of preëmption has been adopted in all the territories and new states in which there is no discrimination between foreigners and native citizens. People *v.* Folsom, 5 Cal. 373.

A judgment in an action in a state court for the possession of public land prior to the issue of a patent, based on the ground that defendant in possession was an alien born, and had not declared her intention to become a citizen prior to her filing, did not conclude the action of the land office on the question of defendant's alienage and the claimant's right to enter land, or control the title evidenced by the patent subsequently issued. Merriam *v.* Bachioni, 112 Cal. 191, 44 Pac. 481.

31. Ely *v.* Ellington, 7 Mo. 302; Bogan *v.* Edinburgh American Land Mortg. Co., 63 Fed. 192, 11 C. C. A. 128.

In the absence of an adverse claim, a qualified preëmptor is not deprived of his right to enter and purchase land, as such, by the fact that he made an application for and occupied the land as a homestead before he declared his intention to become a citizen. Bogan *v.* Edinburgh American Land Mortg. Co., 63 Fed. 192, 11 C. C. A. 128, holding that the sale was a waiver by the United States of the objection. See also Boyce *v.* Danz, 29 Mich. 146.

32. McMichael *v.* Murphy, 20 Land Dec. Dep. Int. 147; Leary *v.* Manuel, 12 Land Dec. Dep. Int. 345; Hollants *v.* Sullivan, 5 Land Dec. Dep. Int. 15; Pfaff *v.* Williams, 4 Land Dec. Dep. Int. 445; St. Paul, etc., R. Co. *v.* Forsyth, 3 Land Dec. Dep. Int. 446.

33. 21 U. S. St. at L. 140, c. 89, § 2 [U. S. Comp. St. (1901) p. 1392]; McCord *v.* Hill, 111 Wis. 499, 84 N. W. 27, 85 N. W. 145, 87 N. W. 481; Hodges *v.* Colcord, 193 U. S. 192, 24 S. Ct. 433, 48 L. ed. 677 [*affirming* 12 Okla. 313, 70 Pac. 383].

The contestant has no rights in the land until the prior entry is canceled.— Emblen *v.* Lincoln Land Co., 102 Fed. 559, 42 C. C. A. 499 [*affirmed* in 184 U. S. 660, 22 S. Ct. 523, 46 L. ed. 736].

The statute does not embrace the case of one who has procured the cancellation of an entry under the Desert Land Act. Gray *v.* Dixon, 83 Cal. 33, 23 Pac. 60, holding that the fact that defendant procured the cancellation of such an entry made by another, and at the same time filed his own application under another act, gave him no preference over the right of plaintiff, who also filed an application for entry; and plaintiff, having made the first settlement, was entitled to recover the land.

34. Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427, decided under Act May 2, 1890,

of the United States, or any person of requisite age," etc., to make an entry of desert lands, does not include corporations,[35] and an entry made by an individual acting on behalf of a corporation by which the expenses are borne and to which the individual conveys the land, is invalid;[36] but the mere fact that an individual reclaiming and purchasing desert lands with his own money intended from the beginning to transfer them to a corporation when the title was perfected does not render his acquisition unlawful, when there was no prior conspiracy whereby he became the mere agent of the corporation for the purpose of procuring title for it.[37] Where two persons have an equal right to acquire public land, the one by location and purchase from a state, and the other by locating as a homestead under the laws of the United States, the one who first commences his proceedings to acquire the title acquires the better right.[38] The statute prohibits officers, clerks, and employees in the general land office from directly or indirectly purchasing or becoming interested in the purchase of any of the public land,[39] under penalty of removal from office.[40]

b. Opening of Oklahoma Lands. The one-hundred-foot strip set apart in the president's proclamation from which the run into the Cherokee strip could be made on the opening thereof meant a strip of land one hundred feet wide around and immediately within the outer boundary of the entire tract of country to be opened to settlement, and not around the outer boundaries of the entire tract specified in the cession and relinquishment of the Cherokee Indians and hence one who made the race from the Ponca, Osage, or Chilocco Indian reservation was a qualified entryman.[41] One who was within territory in Oklahoma within the prohibited period prior to the opening thereof for settlement was disqualified from entering or acquiring any of the land,[42] unless his violation of the law in this respect was

c. 182, § 20, 26 U. S. St. at L. 91 [U. S. Comp. St. (1901) p. 1616].

35. Pacific Live Stock Co. *v.* Isaacs, (Oreg. 1908) 96 Pac. 460; Salina Stock Co. *v.* U. S., 85 Fed. 339, 29 C. C. A. 181. See also Pacific Livestock Co. *v.* Gentry, 38 Oreg. 275, 61 Pac. 422, 65 Pac. 597.

36. Salina Stock Co. *v.* U. S., 85 Fed. 339, 29 C. C. A. 181. See also Pacific Livestock Co. *v.* Gentry, 38 Oreg. 275, 61 Pac. 422, 65 Pac. 597.

37. U. S. *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176.

38. Young *v.* Shinn, 48 Cal. 26, holding that therefore the holder of a state certificate of purchase of school land listed over to the state can recover, in ejectment, against one who filed a homestead claim on the land in the United States land office after the holder of the certificate located it on the land in question.

39. U. S. Rev. St. (1878) § 452 [U. S. Comp. St. (1901) p. 257].

A special timber agent appointed by the commissioner of the general land office is disqualified to make a timber culture entry on land belonging to the United States. Prosser *v.* Finn, 41 Wash. 604, 84 Pac. 404 [*affirmed* in 208 U. S. 67, 28 S. Ct. 225, 52 L. ed. 392].

The register of the land office might legally purchase lands at public sales, under the act of congress of May 1800. Steele *v.* Worthington, 2 Ohio 182, holding also that a purchase of public land by the register of the land office could not be impeached by the register's heirs as a fraud upon the government.

An erroneous interpretation of the statute by the commissioner of the general land office cannot confer any legal right upon one who purchased in opposition to the statutory prohibition. Prosser *v.* Finn, 208 U. S. 67, 28 S. Ct. 225, 52 L. ed. 392 [*affirming* 41 Wash. 604, 84 Pac. 404].

40. See Hand *v.* Cook, 29 Nev. 518, 92 Pac. 3, holding that, as the statute imposes a penalty or forfeiture, it must be strictly construed.

41. Winebrenner *v.* Forney, 189 U. S. 148, 23 S. Ct. 590, 47 L. ed. 754 [*affirming* 11 Okla. 565, 69 Pac. 879, and *followed* in McCalla *v.* Acker, 15 Okla. 52, 78 Pac. 223 (*affirmed* in 200 U. S. 613, 26 S. Ct. 754, 50 L. ed. 620, and *followed* in Lee *v.* Ellis, 16 Okla. 24, 83 Pac. 715); Saylor *v.* Frantz, 17 Okla. 37, 86 Pac. 432; McClung *v.* Penny, 12 Okla. 303, 70 Pac. 404].

42. Patterson *v.* Wilson, 11 Okla. 75, 65 Pac. 921, holding that one was disqualified from making a valid homestead entry and acquiring any title to the land where he entered the territory without license and encamped in the vicinity of the land, forming the intention of entering a tract of land in the neighborhood, and remained there for about a month previous to the opening, when he went outside and awaited the proclamation.

The disqualification attached to any person who was within the boundaries of the lands, when the same were opened, by proclamation of the president, and who attempted to make an entry without first departing therefrom. Smith *v.* Townsend, 148 U. S. 490, 13 S. Ct. 634, 37 L. ed. 533 [*affirming* 1 Okla. 117, 29

incidental and he derived therefrom no advantage over other persons seeking to enter the land opened for settlement.[43]

4. Rights Acquired by Entry.[44] Although the naked legal title to land of the United States remains in the government until the issuance of a patent therefor,[45] one who has entered public land and paid the purchase-price or performed all the conditions requisite to entitle him to a patent therefor is vested with the equitable title,[46] which cannot, if his entry was legal and valid, be divested without his consent,[47] and his right to the patent can only be defeated by a finding by the land department that he was not qualified to acquire the title,[48] or that the land was not subject to his entry,[49] and in this respect the character of the land is to be determined by the facts as known to exist at the date of such entry.[50] But until the entryman has become entitled to a patent he has no vested rights in the land as against the United States [51] such as will deprive congress of the power to dis-

Pac. 80, and *followed* in Payne *v.* Robertson, 169 U. S. 323, 18 S. Ct. 337, 42 L. ed. 764 (*affirming* (Okla. 1893) 33 Pac. 424)].

An honorably discharged soldier who entered the territory in violation of the restrictions was thereby disqualified to acquire a homestead. Calhoun *v.* Violet, 173 U. S. 60, 19 S. Ct. 324, 43 L. ed. 614 [*affirming* 4 Okla. 321, 47 Pac. 479].

43. Potter *v.* Hall, 189 U. S. 292, 23 S. Ct. 545, 47 L. ed. 817 [*reversing* 11 Okla. 173, 65 Pac. 841], holding that one who was outside territory opened to settlement at the time of such opening was not disqualified from participating in the race for the land, because, prior to that date and within the prohibited period, he had been within such territory, where no manifest advantage over his competitors resulted to him from his prior entry into such territory, and that the finding of the land department that no advantage resulted from the previous entry was not reviewable.

44. Right to cut timber see *supra*, I, E, 6.

45. Schoolfield *v.* Houle, 13 Colo. 394, 22 Pac. 781; Hagan *v.* Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. Rep. 167; Bolton *v.* La Gamas Water Power Co., 10 Wash. 246, 38 Pac. 1043; U. S. *v.* Turner, 54 Fed. 228.

46. *Florida.*— Hagan *v.* Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. Rep. 167; Lovell *v.* Wall, 31 Fla. 73, 12 So. 659.

Illinois.— Brill *v.* Stiles, 35 Ill. 305, 85 Am. Dec. 364; McDowell *v.* Morgan, 28 Ill. 528.

Michigan.— Ives *v.* Ely, 57 Mich. 569, 24 N. W. 812.

Minnesota.— Roy *v.* Duluth, etc., R. Co., 69 Minn. 547, 72 N. W. 794.

Missouri.— Wilcox *v.* Phillips, 199 Mo. 288, 97 S. W. 886; Johnson *v.* Fluetsch, 176 Mo. 452, 75 S. W. 1005; Swisher *v.* Sensenderfer, 84 Mo. 104; Sensenderfer *v.* Kemp, 83 Mo. 581.

Ohio.— Stubblefield *v.* Boggs, 2 Ohio St. 216.

United States.— Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482; Wirth *v.* Branson, 98 U. S. 118, 25 L. ed. 86; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568; Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348 [*reversing* 82 Fed. 807]; Shreve *v.* Cheesman, 69 Fed. 785, 16 C. C. A. 413; Union Mill, etc., Co. *v.* Dangberg, 24 Fed. Cas. No. 14,370, 2 Sawy. 450.

See 41 Cent. Dig. tit. "Public Lands," §§ 54, 70, 76.

The wrongful rejection of an entry does not deprive the entryman of his equitable rights. Ard *v.* Brandon, 156 U. S. 537, 15 S. Ct. 406, 39 L. ed. 524 [*reversing* 43 Kan. 419, 23 Pac. 646].

47. McDowell *v.* Morgan, 28 Ill. 528; Ives *v.* Ely, 57 Mich. 569, 24 N. W. 812; Groom *v.* Hill, 9 Mo. 323; Union Mill, etc., Co. *v.* Dangberg, 24 Fed. Cas. No. 14,370, 2 Sawy. 450, holding that a person who entered and paid for his land before the passage of the Homestead Act holds the land unaffected by it.

The government's failure to perform its obligations, preventing one, who has entered land according to law and done everything in his power to fulfil the conditions, from completing his purchase, cannot deprive him of his rights. Marsh *v.* Gonsoulin, 16 La. 84.

Subsequent rulings of land office.—The equitable title to land acquired by a lawful entry cannot be divested or affected by subsequent rules, decisions, or practice of the land office. Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348 [*reversing* 82 Fed. 807]; Shreve *v.* Cheesman, 69 Fed. 785, 16 C. C. A. 413.

48. Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568.

49. Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568.

50. Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568.

Subsequent discovery.— The rights of the entryman cannot be affected by any subsequent discovery of mineral or of any other fact which would take the land out of the class in which it stood when the entry was made. Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568.

51. Schoolfield *v.* Houle, 13 Colo. 394, 22 Pac. 781; Lovell *v.* Wall, 31 Fla. 73, 12 So. 659; Shiver *v.* U. S., 159 U. S. 491, 16 S. Ct. 54, 40 L. ed. 231; Campbell *v.* Wade, 132 U. S. 34, 10 S. Ct. 9, 33 L. ed. 240; Buxton

pose of the land otherwise than by a patent to him.[52] So also, where an entry was made upon a bounty land warrant, which was void because of a duplicate having been issued, and upon which, consequently, no patent could issue and the warrant was afterward canceled, the entryman had no such right to procure a patent by substitution as would preclude a purchase of the land from the government by third persons.[53] The entryman acquires the right to exclusive possession of the land,[54] and to use it for all purposes incidental to its cultivation[55] and may protect it from trespasses by others.[56] There can be no rightful occupation of the land or any part thereof by any other person as against him,[57] nor can any rights be founded on such intrusion,[58] but the entryman may maintain ejectment.[59] An

v. Traver, 130 U. S. 232, 9 S. Ct. 509, 32 L. ed. 920; Hutchings *v.* Low, 15 Wall. (U. S.) 77, 21 L. ed. 82; Frisbie *v.* Whitney, 9 Wall. (U. S.) 187, 19 L. ed. 668; Wagstaff *v.* Collins, 97 Fed. 3, 38 C. C. A. 19; Norton *v.* Evans, 82 Fed. 804, 27 C. C. A. 168; La Chapelle *v.* Bubb, 69 Fed. 481.

52. Wagstaff *v.* Collins, 97 Fed. 3, 38 C. C. A. 19; Norton *v.* Evans, 82 Fed. 804, 27 C. C. A. 168; La Chapelle *v.* Bubb, 69 Fed. 481.

53. Boyd *v.* Mammoth Spring Imp., etc., Co., 137 Mo. 482, 38 S. W. 964.

54. *Alaska.*— U. S. *v.* Roth, 2 Alaska 257.

California.— Wormouth *v.* Gardner, 105 Cal. 149, 38 Pac. 646; Kitts *v.* Austin, 83 Cal. 167, 23 Pac. 290; Sallee *v.* Corder, 67 Cal. 174, 7 Pac. 455.

Kansas.— Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 16 Pac. 125.

Minnesota.— Hastay *v.* Bonness, 84 Minn. 120, 86 N. W. 896; Michaelis *v.* Michaelis, 43 Minn. 123, 44 N. W. 1149.

Mississippi.— Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881.

Missouri.— Wilcox *v.* Phillips, 199 Mo. 288, 97 S. W. 886.

Montana.— Lee *v.* Watson, 15 Mont. 228, 38 Pac. 1077.

Nebraska.— Tiernan *v.* Miller, 69 Nebr. 764, 96 N. W. 661; Culbertson Irr., etc., Co. *v.* Olander, 51 Nebr. 539, 71 N. W. 298.

Oklahoma.— Bilyeu *v.* Pitcher, 16 Okla. 228, 83 Pac. 546; Bay *v.* Oklahoma Southern Gas, etc., Co., 13 Okla. 425, 73 Pac. 936, except as against one having a valid prior, equal, or superior right.

Oregon.— Jackson *v.* Jackson, 17 Oreg. 110, 19 Pac. 847.

South Dakota.— Reservation State Bank *v.* Holst, 17 S. D. 240, 95 N. W. 931, 70 L. R. A. 799; Olson *v.* Huntamer, 6 S. D. 364, 61 N. W. 479.

Wyoming.— See Clear Creek Land, etc., Co. *v.* Kilkenny, 5 Wyo. 38, 36 Pac. 819.

United States.— U. S. *v.* Waddell, 112 U. S. 76, 5 S. Ct. 35, 28 L. ed. 673 [*affirming* 16 Fed. 221, 5 McCrary 155]; Stearns *v.* U. S., 152 Fed. 900, 82 C. C. A. 48; U. S. *v.* Turner, 54 Fed. 228.

See 41 Cent. Dig. tit. "Public Lands," §§ 54, 70, 76.

Right to shore lands.—A homestead entry perfected under the United States land laws, where the land abuts upon the waters of a navigable stream, gives to the qualified entryman the exclusive right to the use and occupation of the shore lands between high and low water mark as against a mere trespasser. U. S. *v.* Roth, 2 Alaska 257.

A lease by a homestead entryman gives the lessee a like right of possession. Tiernan *v.* Leith, 69 Nebr. 764, 96 N. W. 661.

Entry on lands not declared public.—Although a preëmption claim on lands not declared public confers no right on the preëmptor as against the government, he has a right and will be protected as against intrusion from others while awaiting the action of the government, giving him a positive right. Coleman *v.* Allen, 5 Mo. App. 127 [*affirmed* in 75 Mo. 332].

55. Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881.

56. Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881; Culbertson Irr., etc., Co. *v.* Olander, 51 Nebr. 539, 71 N. W. 298. See also Broussard *v.* Broussard, 43 La. Ann. 921, 9 So. 910; Michaelis *v.* Michaelis, 43 Minn. 123, 44 N. W. 1149.

57. Wormouth *v.* Gardner, 105 Cal. 149, 38 Pac. 646 (holding that one who has made a United States homestead entry, and obtained a receipt from the land office on making full cash payment for the land, being a resident on the land at the time of such entry, and continuing to reside thereon, and to comply in good faith with the homestead law, till after final payment, may recover possession of that part of the land covered by the entry, of which another, not in privity with the United States, had adverse possession at the time of the entry, and continued in adverse possession); McMichael *v.* Murphy, 12 Okla. 155, 70 Pac. 189 [*followed* in Hodges *v.* Colcord, 12 Okla. 313, 70 Pac. 383]; Reservation State Bank *v.* Holst, 17 S. D. 240, 95 N. W. 931, 70 L. R. A. 799; Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568 (holding that one acquiring equitable title to land by selecting the same in lieu of the relinquished land in a forest reservation may maintain a suit in equity to enjoin another from sinking oil wells thereon to take the oil therefrom, although he has not yet secured the patent).

58. McMichael *v.* Murphy, 12 Okla. 155, 70 Pac. 189 [*followed* in Hodges *v.* Colcord, 12 Okla. 313, 70 Pac. 383].

59. Wilcox *v.* Phillips, 199 Mo. 288, 97 S. W. 886; Egbert *v.* Bond, 148 Mo. 19, 49 S. W. 873; Nolan *v.* Taylor, 131 Mo. 224, 32 S. W. 1144; Hedrick *v.* Beeles, 110 Mo. 91, 19 S. W. 492; Callahan *v.* Davis, 90

entryman is also entitled to riparian rights appurtenant to the land.[60] As between two claimants to public land it is the settled rule of law that the first in time is the first in right;[61] but a junior entry limits the survey of a prior entry to its calls, as, until an entry is surveyed, a subsequent locator must be governed by its calls.[62]

5. Rights Acquired by Occupancy[63]— a. In General. Mere settlement on or occupation of the public lands of the United States confers no rights upon the settler as against the government[64] or persons claiming by legal or equitable title under it,[65] although the occupant has made improvements on the

Mo. 78, 2 S. W. 216; Wilhite *v.* Barr, 67 Mo. 284.

60. Union Mill, etc., Co. *v.* Dangberg, 24 Fed. Cas. No. 14,370, 2 Sawy. 450.

61. Kissell *v.* St. Louis Public Schools, 16 Mo. 553; Groom *v.* Hill, 9 Mo. 323; Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 24 S. Ct. 676, 48 L. ed. 1039; McCreery *v.* Haskell, 119 U. S. 327, 7 S. Ct. 176, 30 L. ed. 408; Wirth *v.* Branson, 98 U. S. 118, 25 L. ed. 86; Shepley *v.* Cowen, 91 U. S. 330, 23 L. ed. 424; Stringer *v.* Young, 3 Pet. (U. S.) 320, 7 L. ed. 693; Waldron *v.* U. S., 143 Fed. 413; Carroll *v.* Price, 81 Fed. 137.

The doctrine of notice does not apply in cases arising under conflicting entries of government lands. Klein *v.* Argenbright, 26 Iowa 493.

62. Holmes *v.* Trout, 7 Pet. (U. S.) 171, 8 L. ed. 647.

63. Rights of settlers on lands subsequently included in forest reservation see *infra*, II, D, 6, b.

Right to cut timber see *supra*, I, E, 6.

64. *Alaska.*— Crawford *v.* Burr, 2 Alaska 33.

Arkansas.— Gaines *v.* Hale, 26 Ark. 168; Cain *v.* Leslie, 15 Ark. 312.

California.— New England, etc., Oil Co. *v.* Congdon, 152 Cal. 211, 92 Pac. 180.

Idaho.— Le Fevre *v.* Amonson, 11 Ida. 45, 81 Pac. 71.

Louisiana.— Bres *v.* Louviere, 37 La. Ann. 736; Villey *v.* Jarreau, 35 La. Ann. 542; Gibson *v.* Hutchins, 12 La. Ann. 545, 68 Am. Dec. 772.

Minnesota.— Shea *v.* Cloquet Lumber Co., 97 Minn. 41, 105 N. W. 552.

Mississippi.— Merrell *v.* Legrand, 1 How. 150.

Missouri.— Tigh *v.* Chouquette, 21 Mo. 233.

Montana.— Parks *v.* Barkley, 1 Mont. 514.

South Dakota.— Wells *v.* Pennington County, 2 S. D. 1, 48 N. W. 305, 39 Am. St. Rep. 758.

Utah.— Helstrom *v.* Rodes, 30 Utah 122, 83 Pac. 730.

United States.— Russian-American Packing Co. *v.* U. S., 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314 [*affirming* 39 Ct. Cl. 460]; Tarpey *v.* Madsen, 178 U. S. 215, 20 S. Ct. 849, 44 L. ed. 1042 [*reversing* 17 Utah 352, 53 Pac. 996]; Northern Pac. R. Co. *v.* Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. ed. 157 [*reversing* 69 Fed. 579, 16 C. C. A. 336]; Camfield *v.* U. S., 167 U. S. 518, 17 S. Ct. 864, 42 L. ed. 260; Northern Pac. R. Co. *v.* Colburn, 164 U. S. 383, 17 S. Ct. 98, 41 L. ed. 479; Gonzales *v.* French, 164 U. S. 338, 17 S. Ct. 102, 41 L. ed. 458; Wood *v.* Beach, 156 U. S. 548, 15 S. Ct. 410, 39 L. ed. 528; Maddox *v.* Burnham, 156 U. S. 544, 15 S. Ct. 448, 39 L. ed. 527; Lansdale *v.* Daniels, 100 U. S. 113, 25 L. ed. 587; Hutchings *v.* Low, 15 Wall. 77, 21 L. ed. 82; Frisbie *v.* Whitney, 9 Wall. 187, 19 L. ed. 668; Holmes *v.* U. S., 118 Fed. 995, 55 C. C. A. 489 [*reversing* 105 Fed. 41]; Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659; U. S. *v.* Brown, 24 Fed. Cas. No. 14,668, 4 McLean 378. See also Lownsdale *v.* City of Portland, 15 Fed. Cas. No. 8,578, Deady 1, 1 Oreg. 381.

See 41 Cent. Dig. tit. "Public Lands," §§ 27, 51, 52.

Occupants merely tenants by sufferance.— Villey *v.* Jarreau, 35 La. Ann. 542.

An agreement as to boundaries between the occupants of adjoining public lands is of no validity, unless the parties thereto have obtained a title from the United States government. Carpentier *v.* Thirston, 24 Cal. 268.

65. *Alabama.*— Cruise *v.* Riddle, 21 Ala. 791; Duncan *v.* Hall, 9 Ala. 128. See also Higgins *v.* State University, 94 Ala. 380, 10 So. 312.

Arkansas.— Gaines *v.* Hale, 26 Ark. 168; Cain *v.* Leslie, 15 Ark. 312.

Idaho.— Le Fevre *v.* Amonson, 11 Ida. 45, 81 Pac. 71.

Illinois.— Attridge *v.* Billings, 57 Ill. 489.

Iowa.— Kitteringham *v.* Blair Town Lot, etc., Co., 73 Iowa 421, 35 N. W. 502.

Montana.— Parks *v.* Barkley, 1 Mont. 514.

Nebraska.— Hiatt *v.* Brooks, 17 Nebr. 33, 22 N. W. 73.

Nevada.— Springer *v.* Clopath, 26 Nev. 183, 65 Pac. 804.

South Dakota.— Wells *v.* Pennington County, 2 S. D. 1, 48 N. W. 305, 39 Am. St. Rep. 758.

Utah.— Helstrom *v.* Rodes, 30 Utah 122, 83 Pac. 730.

Washington.— See Northern Pac. R. Co. *v.* Nelson, 22 Wash. 521, 61 Pac. 703.

United States.— Northern Pac. R. Co. *v.* Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. ed. 157 [*reversing* 69 Fed. 579, 16 C. C. A. 336]; Johnson *v.* Drew, 171 U. S. 93, 18 S. Ct. 800, 43 L. ed. 88 [*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172]; Gonzales *v.* French, 164 U. S. 338, 17 S. Ct. 102, 41 L. ed. 458; Maddox *v.* Burnham, 156 U. S. 544, 15 S. Ct. 448, 39 L. ed. 527; Sparks *v.* Pierce, 115 U. S. 408, 6 S. Ct. 102, 29 L. ed. 428; Hutchings *v.* Low, 15 Wall. 77, 21 L. ed. 82; Burgess *v.* Gray, 16 How. 48,

land,[66] and his occupation was for the purpose of subsequently acquiring title under the land laws; [67] and so the settler is not entitled to compensation from the United States for losses sustained by reason of his enforced removal from the land.[68] The settler acquires no vested interest in the land until he has entered the same at the proper land office, and obtained a certificate of entry; [69] but until then the land continues subject to the absolute disposing power of congress,[70] and may be withdrawn from entry,[71] without imposing upon the government any liability to reimburse the occupant for his improvements.[72]

b. Preference in Acquisition and Possessory Right.[73] Settlers who make valuable improvements on public lands, which have not been reserved for the exclusive use of the United States, are not regarded as trespassers; [74] but on the contrary the occupation and cultivation of public lands with a view to purchas-

14 L. ed. 839 [*affirming* 15 Mo. 220]; Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568.

See 41 Cent. Dig. tit. "Public Lands," §§ 27, 51, 52.

A railroad company's right of selection of lands within its indemnity limits cannot be defeated by mere occupancy and cultivation of such lands by one who makes no attempt to comply with the land laws. McHenry *v.* Nygaard, 72 Minn. 2, 74 N. W. 1106 [*followed* in Sjoli *v.* Dreschel, 90 Minn. 108, 95 N. W. 763].

66. *Illinois.*—Attridge *v.* Billings, 57 Ill. 489.

Louisiana.— Gibson *v.* Hutchins, 12 La. Ann. 545, 68 Am. Dec. 772.

Nebraska.— Hiatt *v.* Brooks, 17 Nebr. 33, 22 N. W. 73.

Utah.— Helstrom *v.* Rodes, 30 Utah 122, 83 Pac. 730.

United States.— Russian-American Packing Co. *v.* U. S., 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314 [*affirming* 39 Ct. Cl. 460]; Northern Pac. R. Co. *v.* Colburn, 164 U. S. 383, 17 S. Ct. 98, 41 L. ed. 479; Holmes *v.* U. S., 118 Fed. 995, 55 C. C. A. 489 [*reversing* 105 Fed. 41].

See 41 Cent. Dig. tit. "Public Lands," §§ 27, 51, 52.

Right of purchaser as to improvements see *infra*, II, C, 6, g.

67. Northern Pac. R. Co. *v.* Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. ed. 157 [*reversing* 69 Fed. 579, 16 C. C. A. 336]; Gonzales *v.* French, 164 U. S. 338, 17 S. Ct. 102, 41 L. ed. 458; Wood *v.* Beach, 156 U. S. 548, 15 S. Ct. 410, 39 L. ed. 528; Maddox *v.* Burnham, 156 U. S. 544, 15 S. Ct. 448, 39 L. ed. 527; Frisbie *v.* Whitney, 9 Wall. (U. S.) 187, 19 L. ed. 668.

68. Russian-American Packing Co. *v.* U. S., 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314 [*affirming* 39 Ct. Cl. 460].

69. *California.*— Mott *v.* Hawthorn, 17 Cal. 58.

Idaho.— Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401, holding that no right of property as against the government vests in a settler on public lands until he has complied with all the prerequisites for acquiring title and paid the purchase-money.

Iowa.— Kitteringham *v.* Blair Town Lot, etc., Co., 73 Iowa 421, 35 N. W. 502.

Louisiana.— Gibson *v.* Hutchins, 12 La. Ann. 545, 68 Am. Dec. 772.

South Dakota.— Wells *v.* Pennington County, 2 S. D. 1, 48 N. W. 305, 39 Am. St. Rep. 758.

Washington.— Northern Pac. R. Co. *v.* Nelson, 22 Wash. 521, 61 Pac. 703.

United States.— Northern Pac. R. Co. *v.* Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. ed. 157 [*reversing* 69 Fed. 579]; Johnson *v.* Drew, 171 U. S. 93, 18 S. Ct. 800, 43 L. ed. 88 [*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172]; Northern Pac. R. Co. *v.* Colburn, 164 U. S. 383, 386, 17 S. Ct. 98, 41 L. ed. 479; Maddox *v.* Burnham, 156 U. S. 544, 15 S. Ct. 448, 39 L. ed. 527; Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330; Lansdale *v.* Daniels, 100 U. S. 113, 25 L. ed. 587; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659. See also U. S. *v.* Brown, 24 Fed. Cas. No. 14,668, 4 McLean 378.

See 41 Cent. Dig. tit. "Public Lands," §§ 51, 52.

70. Wells *v.* Pennington County, 2 S. D. 1, 48 N. W. 305, 39 Am. St. Rep. 758; Northern Pac. R. Co. *v.* Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. ed. 157 [*reversing* 69 Fed. 579, 16 C. C. A. 336]; Gonzales *v.* French, 164 U. S. 338, 17 S. Ct. 102, 41 L. ed. 458.

71. Northern Pac. R. Co. *v.* Nelson, 22 Wash. 521, 61 Pac. 703; Maddox *v.* Burnham, 156 U. S. 544, 15 S. Ct. 448, 39 L. ed. 527; Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330; Hutchings *v.* Low, 15 Wall. (U. S.) 77, 21 L. ed. 82; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659; Russian-American Packing Co. *v.* U. S., 39 Ct. Cl. 460 [*affirmed* in 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314].

72. Russian-American Packing Co. *v.* U. S., 39 Ct. Cl. 460 [*affirmed* in 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314].

73. See also *infra*, II, C, 7.

74. *Arkansas.*— Gaines *v.* Hale, 26 Ark. 168.

California.—California Northern R. Co. *v.* Gould, 21 Cal. 254.

Louisiana.— Kellar *v.* Belleandeau, 6 La. Ann. 643.

Oregon.— Pacific Livestock Co. *v.* Gentry, 38 Oreg. 275, 61 Pac. 422, 65 Pac. 597.

United States.— Carroll *v.* Price, 81 Fed. 137; Osborn *v.* U. S., 33 Ct. Cl. 304.

See 41 Cent. Dig. tit. "Public Lands," § 51.

ing or acquiring the same under the land laws [75] confers on the settler a preference over others as to the acquisition of such lands,[76] provided he takes the steps prescribed by statute within the time allowed therefor by the statute,[77] and gives

75. See Lamb *v.* Davenport, 18 Wall. (U. S.) 307, 21 L. ed. 759.

Mere naked possession of public land does not place an occupant in position of a settler in good faith under color of title. Iowa R. Land Co. *v.* Adkins, 38 Iowa 351. See also Kile *v.* Tubbs, 28 Cal. 402; Bufgess *v.* Gray, 16 How. (U. S.) 48, 14 L. ed. 839 [*affirming* 15 Mo. 220].

"Actual occupation" means residence.— Edwards *v.* Begole, 121 Fed. 1, 57 C. C. A. 245.

76. *Missouri.*— Coleman *v.* Allen, 5 Mo. App. 127 [*affirmed* in 75 Mo. 332].

Nebraska.— State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235.

Nevada.— Nickals *v.* Winn, 17 Nev. 188, 30 Pac. 435.

Oregon.—Huffman *v.* Smyth, 47 Oreg. 573, 84 Pac. 80, 114 Am. St. Rep. 938; Pacific Livestock Co. *v.* Gentry, 38 Oreg. 275, 61 Pac. 422, 65 Pac. 597.

Wisconsin.—McCord *v.* Hill, 117 Wis. 306, 94 N. W. 65.

United States.— Russian-American Packing Co. *v.* U. S., 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314 [*affirming* 39 Ct. Cl. 460]; Ard *v.* Brandon, 156 U. S. 537, 15 S. Ct. 406, 39 L. ed. 524 [*reversing* 43 Kan. 419, 23 Pac. 646]; Frisbie *v.* Whitney, 9 Wall. 187, 19 L. ed. 668; Hughes *v.* U. S., 4 Wall. 232, 18 L. ed. 303; Holmes *v.* U. S., 118 Fed. 995, 55 C. C. A. 489 [*reversing* 105 Fed. 41]; Wallerton *v.* Snow, 15 Fed. 401, 5 McCrary 64; Gimmy *v.* Culverson, 10 Fed. Cas. No. 5,454, 5 Sawy. 605.

See 41 Cent. Dig. tit. "Public Lands," §§ 51, 52.

Tide lands in Alaska cannot be occupied as of right, as can uplands, with a view of obtaining title thereto from the government when the land shall come into the market. Juneau Ferry Co. *v.* Alaska Steamship Co., 1 Alaska 533.

One who settles on public land covered by a valid homestead entry is a mere trespasser, and acquires no rights against a contestant who secures the cancellation of the first entry and is awarded the preference right to enter the land. Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427; Sproat *v.* Durland, 2 Okla. 24, 35 Pac. 682, 886. But if the first entry is relinquished, and there are no intervening superior rights, the rights of the settler attach *eo instanti*, and if qualified, he is entitled to the homestead entry if he applies within ninety days of the time his rights attach. Gourley *v.* Countryman, *supra*.

The act of congress of May 29, 1830, § 2, providing that, "if two or more persons be settled upon the same quarter-section, the same may be divided between the two first actual settlers, if by a north and south, or east and west, line, the settlement or improvement of each can be included in a half-quarter-section," referred only to tracts of land containing one hundred and sixty acres, and did not operate on a smaller tract. Downes *v.* Scott, 4 How. (U. S.) 500, 11 L. ed. 1074.

A preference right of entry arising from settlement does not constitute an entry, so as to entitle the settler to commute the same under the statute authorizing the commutation of preëmption entries after fourteen months' residence from the date of the entry. McCord *v.* Hill, 117 Wis. 306, 94 N. W. 65.

The owner of the improvements at the time when the land is brought into the market is entitled to make the purchase. Illinois, etc., Canal Trustees *v.* Brainard, 12 Ill. 487.

An owner of land who extends his improvements over adjoining public land without any intention of settlement upon or improvement of such land has no preferred right to purchase the same. Wright *v.* Green, 24 Ark. 38.

Since the repeal of the preëmption laws by the act of congress of March 3, 1891, 26 U. S. St. at L. 1097 [U. S. Comp. St. (1901) p. 1381] this preference right is much curtailed. See *infra*, II, C, 7.

77. *California.*—Mott *v.* Hawthorn, 17 Cal. 58.

Kansas.— State *v.* Stringfellow, 2 Kan. 263.

Nevada.— Nickals *v.* Winn, 17 Nev. 188, 30 Pac. 435.

Washington.— Northern Pac. R. Co. *v.* Nelson, 22 Wash. 521, 61 Pac. 703.

United States.— Tarpey *v.* Marsden, 178 U. S. 215, 20 S. Ct. 849, 44 L. ed. 1042 [*reversing* 17 Utah 352, 53 Pac. 996]; Osborne *v.* Altschul, 101 Fed. 739.

See 41 Cent. Dig. tit. "Public Lands," §§ 51, 52. And see *supra*, II, C, 1, b.

Unavoidable delay.— The right of one who has actually occupied public lands, with an intent to make a homestead or preëmption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent, if he makes his entry as soon as an office is opened where he can do so. Tarpey *v.* Madsen, 178 U. S. 215, 20 S. Ct. 849, 44 L. ed. 1042 [*reversing* 17 Utah 352, 53 Pac. 996].

The refusal of a local land officer to receive the purchase-money tendered by a settler on the "Osage ceded lands" in Kansas, on the ground that it was too late to give notice to others who were supposed to have an adverse claim, will not defeat such settler's rights. Wallerton *v.* Snow, 15 Fed. 401, 5 McCrary 64.

Deprivation of preferred right.— Congress has the right and the power at any time before all the preliminary acts prescribed for the acquisition of title to the public lands, including the payment of the fees, have been performed, to deprive any one who has a preferred right to acquire the title of this privilege, and to confer it on another.

the settler a possessory right in the land itself [78] as against all the world but the United States and persons claiming by legal or equitable title under it,[79] which the settler may protect against other individuals,[80] and the settler's improve-

King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430].

78. *Alabama.*— Cruise *v.* Riddle, 21 Ala. 791; Duncan *v.* Potts, 5 Stew. & P. 82, 24 Am. Dec. 766.

Arizona.— Davis *v.* Simmons, 1 Ariz. 25, 25 Pac. 535.

Arkansas.— Gaines *v.* Hale, 26 Ark. 168; Cain *v.* Leslie, 15 Ark. 312; Nick *v.* Rector, 4 Ark. 251.

California.— New England, etc., Oil Co. *v.* Congdon, 150 Cal. 211, 92 Pac. 180; Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705.

Idaho.— Feirbaugh *v.* Masterson, 1 Ida. 135.

Illinois.— Sargent *v.* Kellogg, 10 Ill. 273.

Louisiana.— Griffin *v.* Cotton, 1 Rob. 142; Miller *v.* Lelen, 19 La. 331.

Missouri.— Coleman *v.* Allen, 5 Mo. App. 127 [*affirmed* in 75 Mo. 332].

Montana.—Parks *v.* Barkley, 1 Mont. 314.

Nevada.— Brown *v.* Killabrew, 21 Nev. 437, 33 Pac. 865.

Oregon.—Huffman *v.* Smyth, 47 Oreg. 573, 84 Pac. 80, 114 Am. St. Rep. 938; Pacific Livestock Co. *v.* Gentry, 38 Oreg. 275, 61 Pac. 422, 65 Pac. 597.

Utah.— Hyndman *v.* Stowe, 9 Utah 23, 33 Pac. 227.

Washington.— Laurendeau *v.* Fugelli, 1 Wash. 559, 21 Pac. 29, 5 Wash. 94, 31 Pac. 421, 5 Wash. 632, 32 Pac. 465.

United States.— Frisbie *v.* Whitney, 9 Wall. 187, 19 L. ed. 668; Holmes *v.* U. S., 118 Fed. 995, 55 C. C. A. 489 [*reversing* 105 Fed. 41]. See also Harvey *v.* Halles, 160 Fed. 531.

See 41 Cent. Dig. tit. "Public Lands," §§ 27, 51, 52.

As against one claiming a simple privilege — like that granted to railroads by congress to build over the public lands — the occupant is entitled to be protected in his possession. California Northern R. Co. *v.* Gould, 21 Cal. 254. See also Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636, where the occupant was allowed to recover for damages done to his rights as a mere occupant, although expressly refused compensation for the land.

The occupancy is in the nature of a tenancy at will and not a tenancy from year to year. Duncan *v.* Potts, 5 Stew. & P. (Ala.) 82, 24 Am. Dec. 766.

The essential legal requisites of a possessory right in lands are the intention of the occupant permanently to occupy and improve the same for his home, and the manifestation of that intention as early as practicable by such improvements and badges of ownership as shall make it known to others. Davis *v.* Simmons, 1 Ariz. 25, 25 Pac. 535.

Occupation of a possessory claim within boundaries so clearly marked and defined as to notify strangers that the land is taken up or located is a sufficient possession. Courtney *v.* Turner, 12 Nev. 345, holding further that the lines of the survey of a possessory claim need not necessarily be marked by stakes and ditches, or by the means which are usually employed for defining the boundary of such claim, as such means are not exclusive; but it is a question of fact whether in any given case the limits of the claim are sufficiently defined to acquaint the public with their extent. See also Sargeant *v.* Kellogg, 10 Ill. 273.

A right to the possession of public lands cannot be initiated by a forcible entry and trespass on the peaceable possession of another person. Walsh *v.* Ford, 1 Alaska 146.

Extent of possession.— The mere fact of going upon a portion of public land, and building a house and corral, and even cutting hay on a part, no claim being made under the Possessory Act, nor under the United States preëmption laws, will not extend the possession beyond the premises actually occupied. Garrison *v.* Sampson, 15 Cal. 93.

Maintaining possession by agent or tenant. — A *bona fide* settler who incloses the land for a farm, and makes valuable improvements thereon, with the intention of purchasing the land from the government whenever a title can be procured, does not lose his possessory rights by removal from the territory, where he places an agent or tenant in possession to hold the land for him. Hyndman *v.* Stowe, 9 Utah 23, 33 Pac. 227.

Sale of possessory right see *infra*, II, P, 1, a, (VII).

79. See *supra*, II, C, 5, a.

80. *Arizona.*— Howard *v.* Perrin, 8 Ariz. 347, 76 Pac. 460; Tidwell *v.* Chiricahua Cattle Co., (1898) 53 Pac. 192.

Arkansas.— Nick *v.* Rector, 4 Ark. 251.

California.— Rourke *v.* McNally, 98 Cal. 291, 33 Pac. 62; Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705; Page *v.* Fowler, 37 Cal. 100; Coryell *v.* Cain, 16 Cal. 567; Taylor *v.* Woodward, 10 Cal. 90; Conger *v.* Weaver, 6 Cal. 548, 65 Am. Dec. 528.

Idaho.—Maydole *v.* Watson, (1900) 60 Pac. 86; Feirbaugh *v.* Masterson, 1 Ida. 135.

Louisiana.— Griffin *v.* Cotten, 1 Rob. 142; Miller *v.* Lelen, 19 La. 331.

Montana.— Parks *v.* Barkley, 1 Mont. 514.

Nevada.— Brown *v.* Killabrew, 21 Nev. 437, 33 Pac. 865; Staininger *v.* Andrews, 4 Nev. 59.

Oregon.— Huffman *v.* Smyth, 47 Oreg. 573, 84 Pac. 80, 114 Am. St. Rep. 938; Pacific Livestock Co. *v.* Gentry, 38 Oreg. 275, 61 Pac. 422, 65 Pac. 597.

Utah.— Hyndman *v.* Stowe, 9 Utah 23, 33 Pac. 227.

Washington.—Waring *v.* Loomis, 35 Wash. 85, 76 Pac. 510; Laurensdeau *v.* Fugelli, 1 Wash. 559, 21 Pac. 29, 5 Wash. 94, 31 Pac. 421, 5 Wash. 632, 32 Pac. 465.

United States.— Russian-American Packing Co. *v.* U. S., 199 U. S. 570, 26 S. Ct.

ments are treated and protected as property.[81] No person can question the occupation or possession of one residing on lands belonging to the United States, unless he shows a better right or title in himself.[82] Where one claims public lands of the United States by virtue of possession alone, he is bound to take such precautionary steps as will advise all the world of his rights; [83] otherwise one purchasing without knowledge of such claim will hold the lands against the claimant.[84] The question of what acts are sufficient to give a right of possession to public lands is one to be determined upon the facts of each particular case,[85] such as the character of the land, its locality, and the object and purpose for which it is taken up and claimed,[86] the only general rule being that the acts must be of such a character as to show the dominion and control of the claimant over the land.[87] Rights acquired by settlement upon and improvement of unsurveyed

157, 50 L. ed. 314 [*affirming* 39 Ct. Cl. 460]; Frisbie *v.* Whitney, 9 Wall. 187, 19 L. ed. 668; Gimmy *v.* Culverson, 10 Fed. Cas. No. 5,454, 5 Sawy. 605; Lamb *v.* Davenport, 14 Fed. Cas. No. 8,015, 1 Sawy. 609.

See 41 Cent. Dig. tit. "Public Lands," §§ 51, 52.

The right to be protected in possession is founded on the presumption of a license from the United States to occupy the land. Conger *v.* Weaver, 6 Cal. 548, 65 Am. Dec. 528.

The occupant may maintain trespass if the bounds of the public lands settled on are so well defined that the lines can be readily traced. Taylor *v.* Woodward, 10 Cal. 90.

Action to recover possession of premises located on public domain not an action of ejectment.— Maydole *v.* Watson, 7 Ida. 66, 60 Pac. 86.

What constitutes possession.— One who has public land inclosed by a fence, and has a shed on it, and cuts hay on it, but does not reside on it, has possession. Kelly *v.* Mack, 49 Cal. 523.

One who appropriates public land for a road is as much estitled to it as one who appropriates land for any other purpose. Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 361, 93 Am. Dec. 409.

Persons in the casual and temporary occupancy of an island, a part of the public domain, engaged in the pursuit of hunting, fishing, or gathering the eggs of wild birds deposited there, and who do not occupy the land for purposes of husbandry, residence, or commerce, are not in such possession of the same as to entitle them to exclude others who desire to occupy it for a like purpose, or to justify them in resisting by force others who attempt to land upon it to engage in the same pursuit. People *v.* Batchelder, 27 Cal. 69, 85 Am. Dec. 231.

In order to entitle an assignee of the settler to protection the assignee must be a person entitled to acquire the land, and where a corporation has purchased the interest of a settler before survey, a court of equity will not lend its aid to such corporation to restrain trespasses on the land and award damages therefor. Pacific Livestock Co. *v.* Gentry, 38 Oreg. 275, 61 Pac. 422, 65 Pac. 597.

An alien will be protected in the possession of public lands the same as a citizen, against mere naked trespassers who do not connect themselves with the government title. Courtney *v.* Turner, 12 Nev. 345.

Right of persons occupying lands in violation of statute.— Notwithstanding the provision of the act of congress of March 2, 1889, opening the Oklahoma lands to settlement, that, "until said lands are opened for settlement by proclamation of the president, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any right thereto," persons who entered the lands in violation of this act, and settled upon and occupied lots upon a government town site for town-site purposes, and made improvements thereon, and who were unlawfully dispossessed while in the peaceable and actual occupancy of the buildings on the lots, by the authorities of the city, which had no right to or interest in the lots, can maintain an action for damages for the trespass. Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242.

Interest in growing timber.— One who has been in possession of land for several years, and has made application to enter the same under the homestead laws, which was refused, has, as against a trespasser, an inchoate interest in the timber growing on the land. Shea *v.* Choquet Lumber Co., 97 Minn. 41, 105 N. W. 552.

81. Gaines *v.* Hale, 26 Ark. 168; California Northern R. Co. *v.* Gould, 21 Cal. 254; Attridge *v.* Billings, 57 Ill. 489; French *v.* Carr, 7 Ill. 664.

Sale of improvements see *infra*, II, P, 1, a, (VIII).

Such improvements will pass to an assignee in bankruptcy.— French *v.* Carr, 7 Ill. 664.

Improvements made upon the public lands cannot form the object of a contract when the person making them is not in a situation to avail himself of the preëmption laws. Jenkins *v.* Gibson, 3 La. Ann. 203 [*followed* in Hollon *v.* Sapp, 4 La. Ann. 519].

82. Walsh *v.* Ford, 1 Alaska 146.
83. Forsythe *v.* Richardson, 1 Ida. 459.
84. Forsythe *v.* Richardson, 1 Ida. 459.
85. Ritter *v.* Lynch, 123 Fed. 930.
86. Ritter *v.* Lynch, 123 Fed. 930.
87. Ritter *v.* Lynch, 123 Fed. 930.

land, duly and timely asserted upon filing of the plat of survey, will, as against an intervening indemnity railroad selection, be protected in their entirety, although the lands claimed lie in different quarter sections, and the improvements are confined to a single quarter section.[88]

c. Occupancy Rights in Alaska. A citizen may, under the statute, use and occupy a tract of the public domain in Alaska, not to exceed eighty acres in area for the purpose of trade, manufactures, or other productive industry.[89] Whenever one has marked out the tract and erected his mill or other machinery for trade and manufacture upon any part of it, he may hold the entire tract under this law, and it is not necessary that he shall cover the entire tract claimed by him with structures or fence it in order to maintain his exclusive possession thereof.[90] But one who abandons a portion of his possessory rights on the public domain, including one entire boundary line, thus leaving the limits of his claim open, indefinite, and undetermined, is limited in his possessory claim in the direction of his abandoned boundary to lands actually occupied and used.[91] A mere occupancy for a brief time by camping on the ground in a tent is not a sufficient evidence of the occupation of public land for the purpose of trade and manufacture on which to base title.[92] Under the organic act Indians and settlers are protected in the exclusive possession of those lands only which they actually use and occupy,[93] and this provision applies to all lands, including tide lands, over which the federal government has exclusive jurisdiction and power of disposal, and protects possessory rights which were then exercised and claimed for fishing or other purposes by occupants of adjoining uplands against others who assert a common right to fish thereon.[94]

6. Sales — a. Price and Terms of Sale — (i) *In General.* The price at which public lands are to be offered for sale is fixed by statute at two dollars and fifty cents per acre for alternate reserved lands along the line of railroads and one dollar and twenty-five cents per acre for other lands,[95] and the higher price must be paid for any lands within the place limits of a railroad grant, although they are of a class which another statute provides may be sold at the lower price.[96] Under the statute credit cannot be allowed for the purchase-money on the sale of any of the public lands, but every purchaser of land sold at public sale must, on the day of the purchase, make complete payment therefor.[97]

(ii) *Recovery by Purchaser of Excess Payments.* It is provided by

88. Donohue *v.* St. Paul, etc., R. Co., 101 Minn. 239, 112 N. W. 413.

89. 30 U. S. St. at L. 413, c. 299, § 10 [U. S. Comp. St. (1901) p. 1469]; Copper River Lumber Co. *v.* Humphreys, 2 Alaska 39.

90. Copper River Lumber Co. *v.* Humphreys, 2 Alaska 39.

91. Haines Wharf Co. *v.* Dalton, 1 Alaska 555.

92. Osgood *v.* Donnelly, 1 Alaska 385.

93. 23 U. S. St. at L. 24, c. 53, § 8. See Young *v.* Goldsteen, 97 Fed. 303.

94. Heckman *v.* Sutter, 128 Fed. 393, 63 C. C. A. 135 [*affirming* 119 Fed. 83, 55 C. C. A. 635 (*affirming* 1 Alaska 188)].

95. U. S. Rev. St. (1878) § 2357 [U. S. Comp. St. (1901) p. 1444].

Price of lands within forfeited railroad grant.— Under the act of congress of Feb. 28, 1885 (23 U. S. St. at L. 337), which declared forfeited the lands granted to the Texas Pacific railroad, and restored them to the public domain, and provided that "the price of the lands so forfeited and restored shall be the same as heretofore fixed for the even sections within said grant," the price of the forfeited land was properly fixed at two dollars and fifty cents per acre. Southworth *v.* U. S., 30 Ct. Cl. 78.

96. U. S. *v.* Ingram, 172 U. S. 327, 19 S. Ct. 177, 43 L. ed. 465; U. S. *v.* Healey, 160 U. S. 136, 16 S. Ct. 247, 40 L. ed. 369, holding that the provision of U. S. Rev. St. (1878) § 2357 [U. S. Comp. St. (1901) p. 1444], that the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of congress shall be two dollars and fifty cents per acre was not affected or repealed by the act of March 3, 1877, c. 107, § 1, 19 U. S. St. at L. 377 [U. S. Comp. St. (1901) p. 1548], providing for the sale of desert lands at one dollar and twenty-five cents per acre. Price of desert lands see *infra*, II, C, 10.

97. U. S. Rev. St. (1878) § 2356 [U. S. Comp. St. (1901) p. 1444]; U. S. *v.* Boyd, 5 How. (U. S.) 29, 12 L. ed. 36, holding that this statute makes no exception in favor of the receiver, and if he can purchase at all, it must be by placing his own money with the other moneys which he holds in trust for the government.

statute that where a person has paid double the minimum price for land, which is afterward found to be not within the limits of a railroad grant, the excess shall be repaid to the purchaser, or to his heirs or assigns.[98] But this statute applies only to cases where there was a mutual mistake as to the location of the road at the time when the entry was made,[99] or where the route is changed so as to exclude the land,[1] and does not authorize repayment where the land was within a railroad grant when patented, but the grant has been subsequently forfeited.[2] In cases not within the statute a purchaser who has obtained and still has possession cannot reopen the transaction and recover back a part of the purchase-money, on the ground that by reason of an erroneous construction of the statutes he paid more than the price prescribed by congress,[3] or that the original contract of purchase has been annulled by mutual agreement between the claimant and the United States and a new contract of purchase at a smaller price substituted.[4]

b. Right to Purchase. The fact that a married woman procured from her husband the money with which to make payment for public land is not a sufficient ground for refusing to permit the purchase to be made by her.[5] Some of the earlier acts of congress gave to the owners of lands fronting on watercourses a preference right to purchase public lands lying back of their lands, but such statutes are no longer in force, and rights under them are now finally settled, and hence it is sufficient to merely refer to some of the principal decisions under such statutes.[6]

c. Amount Which May Be Purchased. Where the statute limits the amount of land which a single purchaser may buy, one who has purchased the full quantity allowed is disqualified from any further purchase.[7]

d. Withdrawal of Land From Sale. Where public lands were withdrawn from sale for the subsequent benefit of certain Indians, the fact that the withdrawal was conditional on the land being required for purposes of the Indian treaties, and that the Indians were to have no rights in such lands until after legislation should invest them with a legal title, did not destroy the effectiveness of the withdrawal.[8]

e. Agreements as to Bidding. The statute prohibits, under penalty of fine and imprisonment, any agreement not to bid upon or purchase lands offered at public sale by the United States,[9] and a contract designed to prevent competition at such a sale is void as against public policy;[10] but it is not unlawful for individuals to associate together to purchase public lands for their joint interests,[11]

98. 21 U. S. St. at L. 287, c. 244, § 2 [U. S. Comp. St. (1901) p. 1416].

99. Medbury *v.* U. S., 173 U. S. 492, 19 S. Ct. 503, 43 L. ed. 779 [*approved* in U. S. *v.* Edmonston, 181 U. S. 500, 21 S. Ct. 718, 45 L. ed. 971]; Southworth *v.* U. S., 30 Ct. Cl. 78.

1. Southworth *v.* U. S., 30 Ct. Cl. 78.

2. Medbury *v.* U. S., 173 U. S. 492, 19 S. Ct. 503, 43 L. ed. 779 [*approved* in U. S. *v.* Edmonston, 181 U. S. 500, 21 S. Ct. 718, 45 L. ed. 971].

3. U. S. *v.* Edmonston, 181 U. S. 500, 21 S. Ct. 718, 45 L. ed. 971 [*followed* in Miller *v.* U. S., 42 Ct. Cl. 121; Elliott *v.* U. S., 37 Ct. Cl. 136]; Shang *v.* U. S., 36 Ct. Cl. 466, holding that such a case comes within the rule of voluntary payments.

4. Miller *v.* U. S., 42 Ct. Cl. 121.

5. Hoover *v.* Salling, 110 Fed. 43, 49 C. C. A. 26 [*reversing* 102 Fed. 716].

6. See Ford *v.* Morancy, 14 La. Ann. 77; Dufresne *v.* Haydel, 7 La. Ann. 660; Kittridge *v.* Dugas, 2 Rob. (La.) 85; Kittridge *v.* Landry, 2 Rob. (La.) 72; Kittridge *v.* Breaud, 2 Rob. (La.) 40; Landry *v.* Gautreau, 1 Rob. (La.) 372; Terrill *v.* Chambers, 12 La. 578; Dufau *v.* De Gruys, 5 Mart. N. S. (La.) 416; Surgett *v.* Lapice, 8 How. (U. S.) 48, 12 L. ed. 982; Jourdan *v.* Barrett, 4 How. (U. S.) 169, 11 L. ed. 924 [*reversing* 13 La. 24]. See 41 Cent. Dig. tit. "Public Lands," § 57.

7. See Jones *v.* Hoover, 144 Fed. 217, construing Acts Cong. July 1, 1902 [32 U. S. St. at L. 730], March 3, 1885 [23 U. S. St. at L. 340].

8. U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131.

Withdrawal of railroad lands from entry or sale see *infra*, II, K, 1, p.

9. U. S. Rev. St. (1878) § 2373 [U. S. Comp. St. (1901) p. 1451]; Stannard *v.* McCarty, Morr. (Iowa) 124.

Nature of agreement.— While something more than a vague understanding is necessary to render a person liable to the penalty of this statute, still a positive but indirect agreement is sufficient. Stannard *v.* McCarty, Morr. (Iowa) 124.

Crimes in connection with acquisition of public lands, generally, see *infra*, II, R.

10. Kine *v.* Turner, 27 Oreg. 356, 41 Pac. 664.

11. Piatt *v.* Oliver, 19 Fed. Cas. No. 11,115, 2 McLean 267 [*affirmed* in 3 How. 333, 11

although an association formed for the purpose of making speculative purchases of lands of the United States at public sales has been held unlawful as preventing competition.[12]

f. Validity of Sale. Where the commissioner of the general land office, under the act of congress authorizing him to order into the market all lands of a certain class which in his judgment it would be proper to expose for sale, instructs land officers to offer said lands for sale if after examination of the books and maps in their offices there appears on them no objection to so doing, a sale made in accordance with such instructions is valid.[13] The validity of a government sale is not affected by the register's omission to mark it on the township plat, or by a subsequent sale in error to another.[14] A sale of lands which is not authorized by law is void and neither confers any title on the purchaser nor divests the title of the United States.[15]

g. Title and Rights of Purchaser. One who purchases lands from the government becomes invested with all the title of the United States[16] and the occupation of the land by another after such purchase is a trespass for which the purchaser can recover damages.[17] The purchaser is entitled to growing crops,[18] and improvements forming part of the realty[19] which are on the land at the

L. ed. 622]. See also Ellis *v.* Mosier, 2 Greene (Iowa) 246.

Right to attack agreement.— Where the land department, denying an unfounded preëmption claim in government lands set up by a debtor, proceeded to sell the lands at public auction, as part of a public domain, and the debtor and several of his creditors entered into an agreement that the land should not be bid up, but should be struck off at as low a price as possible to one of the creditors, who should divide it among such creditors as would come into an agreement to receive it in satisfaction of their debts, and the land was thus sold at an under price, creditors who had not come into the agreement could not set the arrangement aside, but the government alone could interpose. Easley *v.* Kellom, 14 Wall. (U. S.) 279, 20 L. ed. 890.

12. Carrington *v.* Caller, 2 Stew. (Ala.) 175.

13. McTyer *v.* McDowell, 36 Ala. 39, decided under U. S. Rev. St. (1878) § 2455.

14. Kittridge *v.* Breaud, 4 Rob. (La.) 79, 39 Am. Dec. 512.

15. Drew *v.* Valentine, 18 Fed. 712; U. S. *v.* Tichenor, 12 Fed. 415, 8 Sawy. 142.

The act of congress of June 15, 1844, did not cure sales of land not subject to entry. Drew *v.* Valentine, 18 Fed. 712.

16. Blevins *v.* Cole, 1 Ala. 210; Aldrich *v.* Aldrich, 37 Ill. 32, 36 (where it is said: "When a person enters land at a Government Land Office and pays for it, either by a land warrant or in money, he acquires precisely the same equitable rights that he would in a similar transaction with a private individual"); Thompson *v.* Schlater, 13 La. 115, 33 Am. Dec. 556 [*followed* in Combs *v.* Dodd, 4 Rob. (La.) 58].

17. Blevins *v.* Cole, 1 Ala. 210 (holding that the purchaser can maintain action for damages against the trespasser after the latter has abandoned the property and the purchaser has obtained possession); Gale *v.* Davis, 7 Mo. 544 (holding that a purchaser of lands from the United States may maintain trespass *quare clausum fregit* for an injury to the freehold after the purchase by a person entering and keeping possession without claim or title before the purchase). But *compare* Dickson *v.* Marks, 10 La. Ann. 518, holding that the United States government has no such actual possession of the public domain as will enable its vendee to maintain a possessory action for a disturbance of possession subsequent to the vendee's purchase.

18. Graham *v.* Roark, 23 Ark. 19; Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374; Rasor *v.* Qualls, 4 Blackf. 286, 30 Am. Dec. 658; Boyer *v.* Williams, 5 Mo. 335, 32 Am. Dec. 324; Moore *v.* Linn, 19 Okla. 279, 91 Pac. 910. See also Brock *v.* Smith, 14 Ark. 431.

Trespass quare clausum fregit will not lie by a person who settles on public land and plants a crop, against a person who subsequently purchases the land from the United States and enters for the purpose of gathering and converting such crop to his own use. Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374.

19. *Arkansas.*— Graham *v.* Roark, 23 Ark. 19; Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374; McFarland *v.* Mathis, 10 Ark. 560.

California.— McKiernan *v.* Hesse, 51 Cal. 594; Collins *v.* Bartlett, 44 Cal. 371 [*approved* but *distinguished* in Pennybecker *v.* McDougal, 48 Cal. 160], holding that the act of March 30, 1868, allowing those who have made erections or improvements on lands of the United States to remove the same within six months after the land shall have become the private property of any person, is void in so far as it relates to improvements which become a part of the realty as fixtures, because in conflict with the act admitting the state into the Union.

Illinois.— Carson *v.* Clark, 2 Ill. 113, 25 Am. Dec. 79 [*followed* in Townsend *v.* Briggs, 2 Ill. 472; Roberts *v.* Garen, 2 Ill. 396; Hutson *v.* Overturf, 2 Ill. 170].

time of his purchase and were planted or made by an unauthorized settler [20] or by an adjoining owner through mistake,[21] and the person to whom the improvements were made has no right to remove them [22] or to retain possession of the land.[23] Neither can the maker of the improvements recover their value from a purchaser.[24] But improvements which are personal property do not pass but may be removed by the owner.[25] The rights of the purchaser cannot be affected by a subsequent entry or location of the land by another [26] or disturbed by subsequent legislation.[27]

h. Right to Attack Sale. One who bids for land at a public land sale is estopped from denying the validity of the sale on the ground that it was land liable to private entry which he had unsuccessfully applied to enter.[28] A person who is not himself injured thereby cannot defeat the title of a purchaser of public land at a sale by auction by showing a combination to prevent competition in bidding.[29]

7. Preëmption. The statutes formerly gave to settlers on public lands who had improved the same a preference right to purchase such lands up to a certain amount, at the minimum price of such lands, upon complying with the statutory

Indiana.— Seymour *v.* Watson, 5 Blackf. 555, 36 Am. Dec. 556.

Iowa.— Hamilton *v.* Walters, 3 Greene 556; Burlerson *v.* Teeple, 2 Greene 542.

Louisiana.— See Hollon *v.* Sapp, 4 La. Ann. 519.

Mississippi.— Welborn *v.* Spears, 32 Miss. 138.

Nebraska.— Hiatt *v.* Brooks, 17 Nebr. 33, 22 N. W. 73.

Oklahoma.— Moore *v.* Linn, 19 Okla. 279, 91 Pac. 910.

See 41 Cent. Dig. tit. "Public Lands," § 62.

Promise to pay settler for improvements invalid see *infra*, II, P, 1, a, (VIII).

20. Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374.

21. Seymour *v.* Watson, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556; Burlerson *v.* Teeple, 2 Greene (Iowa) 542.

22. Duncan *v.* Hall, 9 Ala. 128; Welborn *v.* Spears, 32 Miss. 138, holding that the purchaser may recover the value of improvements removed after his purchase, although he was never in actual possession of the premises. But *compare* Wallbrecht *v.* Blush, (Colo. 1908) 95 Pac. 927; Bingham County Agricultural Assoc. *v.* Rogers, 7 Ida. 63, 59 Pac. 931.

Right of homestead settler whose entry is canceled see *infra*, II, L, 12 h.

23. Hollon *v.* Sapp, 4 La. Ann. 519 (holding that if such person does retain possession the purchaser may recover damages therefor); Cook *v.* McCord, 13 Okla. 506, 75 Pac. 294; Helstrom *v.* Rodes, 30 Utah 122, 83 Pac. 730.

24. *Louisiana.*— Lawrence *v.* Grout, 12 La. Ann. 835; Gibson *v.* Hutchins, 12 La. Ann. 545, 68 Am. Dec. 772 [*following* Hemkin *v.* Overby, not reported (*overruling* Williams *v.* Booker, 12 Rob. 253; Kellam *v.* Rippey, 3 Rob. 138; Pearce *v.* Frantum, 16 La. 423)]; Hollon *v.* Sapp, 4 La. Ann. 519; Jenkins *v.* Gibson, 3 La. Ann. 203 [*followed* in Wood *v.* Lyle, 4 La. Ann. 145].

New Mexico.—Chavez *v.* Chavez de Sanchez, 7 N. M. 58, 32 Pac. 137.

Oklahoma.— Cook *v.* McCord, 13 Okla. 506, 75 Pac. 294; Woodruff *v.* Wallace, 3 Okla. 355, 41 Pac. 357 [*followed* in Calhoun *v.* McCornack, 7 Okla. 347, 54 Pac. 493].

Utah.— Helstrom *v.* Rodes, 30 Utah 122, 83 Pac. 730.

Washington.— Smith *v.* Arthur, 7 Wash. 60, 34 Pac. 433.

United States.— See Vilas *v.* Prince, 88 Fed. 682.

See 41 Cent. Dig. tit. "Public Lands," § 350.

An occupant of swamp land under a void patent from the United States, who in good faith drains the land, may recover money expended in such drainage from one who afterward acquires good title to such land from the state in which it is situated. Sherman *v.* A. P. Cook Co., 98 Mich. 61, 57 N. W. 23.

One who has entered and paid for land and received a certificate therefor may be awarded compensation for his improvements as against one who, with notice of the facts, has entered and obtained a patent for the land. Russell *v.* Defrance, 39 Mo. 506.

Under the Iowa statute occupants of lands falling within the Des Moines river grant have been held entitled to compensation for their improvements. Litchfield *v.* Johnson, 15 Fed. Cas. No. 8,387, 4 Dill. 551; Wells *v.* Riley, 29 Fed. Cas. No. 17,404, 2 Dill. 566.

25. Collins *v.* Bartlett, 44 Cal. 371; Bingham County Agricultural Assoc. *v.* Rogers, 7 Ida. 63, 59 Pac. 931.

Portable buildings and fences not attached to the soil do not pass to the purchaser but may be removed. Pennybecker *v.* McDougal, 48 Cal. 160.

26. Ashley *v.* Rector, 20 Ark. 359; Thompson *v.* Schlater, 13 La. 115, 33 Am. Dec. 556 [*followed* in Combs *v.* Dodd, 4 Rob. (La.) 58]; Lefebvre *v.* Comeau, 11 La. 321; Waller *v.* Von Phul, 14 Mo. 84.

27. Thompson *v.* Schlater, 13 La. 115, 33 Am. Dec. 556 [*followed* in Combs *v.* Dodd, 4 Rob. (La.) 58]; Waller *v.* Von Phul, 14 Mo. 84.

28. Hulse *v.* Dorsey, 14 La. Ann. 302.

29. Root *v.* Shields, 20 Fed. Cas. No. 12,038, Woolw. 340.

requirements, which was termed the right of preëmption.[30] Preëmption rights have been the subject of much litigation, but as the preëmption laws have been repealed, save in a few particulars,[31] it is deemed sufficient to merely refer in the note to a number of cases in which such rights have been referred to or discussed,[32]

30. U. S. Rev. St. (1878) §§ 2257–2288.

31. 26 U. S. St. at L. 1097, c. 561, § 4 [U. S. Comp. St. (1901) p. 1381].

32. See the following cases:

Alabama.— Tennessee Coal, etc., Co. *v.* Tutwiler, 108 Ala. 483, 18 So. 668; Doe *v.* Beck, 108 Ala. 71, 19 So. 802; McTyer *v.* McDowell, 36 Ala. 39; Johnson *v.* Collins, 12 Ala. 322; Mann *v.* Bissent, 4 Ala. 731; Cundiff *v.* Orms, 7 Port. 58; McElyea *v.* Hayter, 2 Port. 148, 27 Am. Dec. 645.

Arizona.— Blackburn *v.* U. S., 5 Ariz. 162, 48 Pac. 904; Gonzales *v.* French, 4 Ariz 77, 33 Pac. 501; Kansas City Min., etc., Co. *v.* Clay, 3 Ariz. 326, 29 Pac. 9.

Arkansas.— St. Louis, etc., R. Co. *v.* Tapp, 64 Ark. 357, 42 S. W. 667; Chowning *v.* Stanfield, 49 Ark. 87, 4 S. W. 276; Marshall *v.* Cowles, 48 Ark. 362, 3 S. W. 188; Shorman *v.* Eakin, 47 Ark. 351, 1 S. W. 559; McIvor *v.* Williams, 24 Ark. 33; Rector *v.* Gaines, 19 Ark. 70; Wynn *v.* Garland, 16 Ark. 440; Wynn *v.* Morris, 16 Ark. 414; Ashley *v.* Cunningham, 16 Ark. 168; Lytle *v.* State, 12 Ark. 9.

California.— Wittenbrock *v.* Wheadon, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32; Wormouth *v.* Gardner, 112 Cal. 506, 44 Pac. 806; Merriam *v.* Bachioni, 112 Cal. 191, 44 Pac. 481; Irvine *v.* Tarbat, 105 Cal. 237, 38 Pac. 896; Merrill *v.* Clark, 103 Cal. 367, 37 Pac. 238; Green *v.* Green, 103 Cal. 108, 37 Pac. 188; McHarry *v.* Stewart, (1893) 35 Pac. 141; Stewart *v.* Powers, 98 Cal. 514, 33 Pac. 486; Moffatt *v.* Bulson, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192; Morgan *v.* Lones, 78 Cal. 58, 20 Pac. 248; Sparrow *v.* Rhoades, 76 Cal. 208, 18 Pac. 245, 9 Am. St. Rep. 197; Harris *v.* Harris, 71 Cal. 314, 12 Pac. 274; Heath *v.* Wallace, 71 Cal. 50, 11 Pac. 842; Turner *v.* Donnelly, 70 Cal. 597, 12 Pac. 469; Schieffery *v.* Tapia, 68 Cal. 184, 8 Pac. 878; Cothrin *v.* Faber, 68 Cal. 39, 4 Pac. 940, 8 Pac. 599; Buxton *v.* Traver, 67 Cal. 171, 7 Pac. 450; Haven *v.* Haws, 63 Cal. 514; Elliott *v.* Figg, 59 Cal. 117; McBrown *v.* Morris, 59 Cal. 64; Farley *v.* Spring Valley Min., etc., Co., 58 Cal. 142; Cumens *v.* Cyphers, 56 Cal. 383; Chapman *v.* Quinn, 56 Cal. 266; Smer *v.* Duggan, 56 Cal. 257; Snow *v.* Kimmer, 52 Cal. 624; Hollinshead *v.* Simms, 51 Cal. 158; Central Pac. R. Co. *v.* Yolland, 49 Cal. 438; Megerle *v.* Ashe, 47 Cal. 632; Iburg *v.* Suanet, 47 Cal. 265; Collins *v.* Bartlett, 44 Cal. 371; Montgomery *v.* Whiting, 40 Cal. 294; Damrell *v.* Meyer, 40 Cal. 166; Hemphill *v.* Davies, 38 Cal. 577; Hutton *v.* Frisbie, 37 Cal. 475; Keeran *v.* Allen, 33 Cal. 542; Megerle *v.* Ashe, 33 Cal. 74; Page *v.* Hobbs, 27 Cal. 483; Terry *v.* Megerle, 24 Cal. 609, 85 Am. Dec. 84; Mott *v.* Hawthorn, 17 Cal. 58; Whitney *v.* Buckman, 13 Cal. 536; Sweetland *v.* Froe, 6 Cal. 144; Larue *v.* Gaskins, 5 Cal. 164.

Colorado.— Wilcox *v.* John, 21 Colo. 367, 40 Pac. 880, 52 Am. St. Rep. 246; Everett *v.* Todd, 19 Colo. 322, 35 Pac. 544; Denver, etc., R. Co. *v.* Hanoum, 19 Colo. 162, 34 Pac. 838; McMillen *v.* Gerstle, 19 Colo. 98, 34 Pac. 681; St. Onge *v.* Day, 11 Colo. 368, 18 Pac. 278; Cooper *v.* Hunter, 8 Colo. App. 101, 44 Pac. 944; Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832.

Dakota.— Forbes *v.* Driscoll, 4 Dak. 336, 31 N. W. 633.

Florida.— Lee *v.* Patten, 34 Fla. 149, 15 So. 775.

Idaho.— Hamilton *v.* Spokane, etc., R. Co., 3 Ida. 164, 28 Pac. 408; Jones *v.* Meyers, 3 Ida. 51, 26 Pac. 215.

Illinois.— Close *v.* Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161; Robbins *v.* Bunn, 54 Ill. 48, 5 Am. Rep. 75; Baty *v.* Sale, 43 Ill. 351, 92 Am. Dec. 128; May *v.* Symms, 20 Ill. 95; Phelps *v.* Smith, 15 Ill. 572; Phelps *v.* Kellogg, 15 Ill. 131; Brown *v.* Throckmorton, 11 Ill. 529; Delaunay *v.* Burnett, 9 Ill. 454; Isaacs *v.* Steel, 4 Ill. 97; Jackson *v.* Wilcox, 2 Ill. 344; Davenport *v.* Farrar, 2 Ill. 314.

Indiana.— Sumner *v.* Coleman, 23 Ind. 91; Grant *v.* Cromwell, 15 Ind. 315; Stewart *v.* Haynes, 5 Blackf. 163; Shanks *v.* Lucas, 4 Blackf. 476; Carr *v.* Allison, 5 Blackf. 63; Rasor *v.* Qualls, 4 Blackf. 286, 30 Am. Dec. 658; Doe *v.* Hays, Smith 177.

Iowa.— Purcell *v.* Lang, 108 Iowa 198, 78 N. W. 1005; Andrews *v.* Murray, 85 Iowa 736, 52 N. W. 357; Wood *v.* Murry, 85 Iowa 505, 52 N. W. 356; Johns *v.* Warren, 85 Iowa 300, 52 N. W. 230; Bullard *v.* Des Moines, etc., R. Co., 62 Iowa 382, 17 N. W. 609; Cady *v.* Eighmey, 54 Iowa 615, 7 N. W. 102; Walker *v.* Stone, 48 Iowa 92; De Land *v.* Day, 45 Iowa 37; Burdick *v.* Wentworth, 42 Iowa 440; Wilson *v.* McLernan, 20 Iowa 30; Bowers *v.* Keesecker, 14 Iowa 301; Arnold *v.* Grimes, 2 Iowa 1; Harrington *v.* Sharp, 1 Greene 131, 48 Am. Dec. 365; Pierson *v.* David, 1 Iowa 23.

Kansas.— Ware *v.* Hitchcock, 65 Kan. 328, 69 Pac. 355; Freese *v.* Scouten, 53 Kan. 347, 36 Pac. 741; Caldwell *v.* Miller, 44 Kan. 12, 23 Pac. 946; Ard *v.* Pratt, 43 Kan. 419, 23 Pac. 646; Tatro *v.* French, 33 Kan. 49, 5 Pac. 426; Chapman *v.* Price, 32 Kan. 446, 4 Pac. 807; Rogers *v.* Clemmans, 26 Kan. 522; Ainsworth *v.* Miller, 20 Kan. 220; McKean *v.* Massey, 6 Kan. 122; McKean *v.* Crawford, 6 Kan. 112; State *v.* Stringfellow, 2 Kan. 263.

Louisiana.— Ludeling *v.* Vester, 20 La. Ann. 433; Ludeling *v.* Vester, 16 La. Ann. 450; Ellis *v.* Old, 16 La. Ann. 146; Mast *v.* Hamilton, 14 La. Ann. 774; Richardson *v.* Emswiler, 14 La. Ann. 658; Moore *v.* Jourdan, 14 La. Ann. 414; Knox *v.* Pulliam, 14 La. Ann. 123; Millard *v.* Richard, 13 La. Ann. 572; Stanbrough *v.* Wilson, 13

and to draw attention to the facts that the right of preëmption was nothing more than an offer by the government to an individual settled upon public lands, which

La. Ann. 494; Gibson *v.* Hutchings, 12 La. Ann. 545, 68 Am. Dec. 772; Penn *v.* Ott, 12 La. Ann. 233; Arbour *v.* Nettles, 12 La. Ann. 217; Climer *v.* Selby, 10 La. Ann. 182; Seaton *v.* Sharkey, 3 La. Ann. 332; Poirrier *v.* White, 2 La. Ann. 934; Kittridge *v.* Breaud, 4 Rob. 79, 39 Am. Dec. 512; Kellam *v.* Rippey, 3 Rob. 138; Barton *v.* Hempkin, 19 La. 510; Kirkby *v.* Togleman, 16 La. 277; Strong *v.* Rachal, 16 La. 232; Marsh *v.* Gonsoulin, 16 La. 84; Orillion *v.* Deslonde, 9 La. 53; Primot *v.* Thibodeaux, 6 La. 10; Henry *v.* Welsh, 4 La. 547, 23 Am. Dec. 490; Godeau *v.* Phillips, 3 La. 59; Milligan *v.* Hargrove, 6 Mart. N. S. 337; Woods *v.* Kimbal, 5 Mart. N. S. 246.

Michigan.— Spalding *v.* Chandler, 84 Mich. 140, 47 N. W. 593; Busch *v.* Donohue, 31 Mich. 481.

Minnesota.— Gross *v.* Hafemann, 91 Minn. 1, 97 N. W. 430, 103 Am. St. Rep. 471; Hayes *v.* Carroll, 74 Minn. 134, 76 N. W. 1017; Bishop Iron Co. *v.* Hyde, 66 Minn. 24, 68 N. W. 95; Burfenning *v.* Chicago, etc., R. Co., 46 Minn. 20, 48 N. W. 444; Olson *v.* Octon, 28 Minn. 36, 8 N. W. 878; Peterson *v.* St. Paul, etc., R. Co., 27 Minn. 218, 6 N. W. 615; Sharon *v.* Wooldrick, 18 Minn. 354; Woodbury *v.* Dorman, 15 Minn. 338; Kelley *v.* Wallace, 14 Minn. 236; Warren *v.* Van Brunt, 12 Minn. 70; Gray *v.* Stockton, 8 Minn. 529; Randall *v.* Edert, 7 Minn. 450; Camp *v.* Smith, 2 Minn. 155; Brisbois *v.* Sibley, 1 Minn. 230.

Mississippi.— Wilkerson *v.* Mayfield, 27 Miss. 542; Glenn *v.* Thistle, 23 Miss. 42; Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. 234; McAfee *v.* Keirn, 7 Sm. & M. 780, 45 Am. Dec. 331; Fulton *v.* Doe, 5 How. 751; Carter *v.* Spencer, 4 How. 42, 34 Am. Dec. 106.

Missouri.— Johnson *v.* Fluetsch, 176 Mo. 452, 75 S. W. 1005; Coleman *v.* Allen, 75 Mo. 332 [*affirming* 5 Mo. App. 127]; Bray *v.* Ragsdale, 53 Mo. 170; Hill *v.* Miller, 36 Mo. 182; Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100; Evans *v.* Labaddie, 10 Mo. 425; O'Hanlon *v.* Perry, 9 Mo. 804; Allison *v.* Hunter, 9 Mo. 749; Pettigrew *v.* Shirley, 9 Mo. 683; Bower *v.* Higbee, 9 Mo. 259; Rector *v.* Welch, 1 Mo. 334.

Montana.— Norris *v.* Heald, 12 Mont. 282, 29 Pac. 1121, 33 Am. St. Rep. 581; Bass *v.* Buker, 6 Mont. 442, 12 Pac. 922.

Nebraska.— Robinson *v.* Jones, 31 Nebr. 20, 47 N. W. 480; Franklin *v.* Kelley, 2 Nebr. 79; Towsley *v.* Johnson, 1 Nebr. 95; Smiley *v.* Sampson, 1 Nebr. 56.

Nevada.— Nickals *v.* Winn, 17 Nev. 188, 30 Pac. 435; Brown *v.* Warren, 16 Nev. 228.

New Mexico.— U. S. *v.* Hall, 5 N. M. 178, 21 Pac. 85.

Oklahoma.— Commager *v.* Dicks, 1 Okla. 82, 28 Pac. 864.

Oregon.— Hyde *v.* Holland, 18 Oreg. 331, 22 Pac. 1104; Jackson *v.* Jackson, 17 Oreg. 110, 19 Pac. 847.

South Dakota.— Scott *v.* Toomey, 8 S. D. 639, 67 N. W. 838; McNamara *v.* Dakota F. & M. Ins. Co., 1 S. D. 342, 47 N. W. 288.

Utah.— Rio Grande Western R. Co. *v.* Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995; Miles *v.* Johnson, 18 Utah 428, 56 Pac. 299; Steele *v.* Boley, 6 Utah 308, 22 Pac. 311; Terry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571.

Washington.— Northern Pac. R. Co. *v.* Nelson, 22 Wash. 521, 61 Pac. 703; Lawrence *v.* Potter, 22 Wash. 32, 60 Pac. 147; McSorley *v.* Hill, 2 Wash. 638, 27 Pac. 552; Pierce *v.* Frace, 2 Wash. 81, 26 Pac. 192, 807; Carson *v.* Railsback, 3 Wash. Terr. 168, 13 Pac. 618; Burch *v.* McDaniel, 2 Wash. Terr. 58, 3 Pac. 586.

Wisconsin.— McCord *v.* Hill, 117 Wis. 306, 94 N. W. 65; Houlton *v.* Chicago, etc., R. Co., 86 Wis. 59, 56 N. W. 336; Spaulding *v.* Wood, 8 Wis. 195; Dillingham *v.* Fisher, 5 Wis. 475; Woodward *v.* McReynolds, 2 Pinn. 268, 1 Chandl. 244.

United States.— Russian-American Packing Co. *v.* U. S., 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314; Oregon, etc., R. Co. *v.* U. S., 190 U. S. 186, 23 S. Ct. 673, 47 L. ed. 1012; Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157; Tarpey *v.* Madsen, 178 U. S. 215, 20 S. Ct. 849, 44 L. ed. 1042 [*reversing* 17 Utah 352, 53 Pac. 996]; Hyde *v.* Bishop Iron Co., 177 U. S. 281, 20 S. Ct. 592, 44 L. ed. 771 [*affirming* 72 Minn. 16, 74 N. W. 1016]; Northern Pac. R. Co. *v.* De Lacey, 174 U. S. 662, 19 S. Ct. 791, 43 L. ed. 1111 [*reversing* 72 Fed. 726, 19 C. C. A. 157, 66 Fed. 450]; Smith *v.* U. S., 170 U. S. 372, 18 S. Ct. 626, 42 L. ed. 1074; Gonzales *v.* French, 164 U. S. 338, 17 S. Ct. 102, 41 L. ed. 458; Burfenning *v.* Chicago, etc., R. Co., 163 U. S. 321, 16 S. Ct. 1018, 41 L. ed. 175; *In re* Emblen, 161 U. S. 52, 16 S. Ct. 487, 40 L. ed. 613; U. S. *v.* Healey, 160 U. S. 136, 16 S. Ct. 247, 40 L. ed. 369; Weeks *v.* Bridgman, 159 U. S. 541, 16 S. Ct. 72, 40 L. ed. 253; Whitney *v.* Taylor, 158 U. S. 85, 15 S. Ct. 796, 39 L. ed. 906; Orchard *v.* Alexander, 157 U. S. 372, 15 S. Ct. 635, 39 L. ed. 737; Wood *v.* Beach, 156 U. S. 548, 15 S. Ct. 410, 39 L. ed. 528; Hutchinson Inv. Co. *v.* Caldwell, 152 U. S. 65, 14 S. Ct. 504, 38 L. ed. 356 [*affirming* 44 Kan. 12, 23 Pac. 946]; Sanford *v.* Sanford, 139 U. S. 642, 11 S. Ct. 666, 35 L. ed. 290 [*affirming* 19 Oreg. 1, 13 Pac. 602]; Buxton *v.* Traver, 130 U. S. 232, 9 S. Ct. 509, 32 L. ed. 920 [*affirming* 67 Cal. 171, 7 Pac. 450]; Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182; Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330; Mullan *v.* U. S., 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170; Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423; U. S. *v.* Minor, 114 U. S. 233, 5 S. Ct. 836, 29 L. ed. 110; Bohall *v.* Dilla, 114 U. S. 47, 5 S. Ct. 782, 29 L. ed. 61; Nix *v.* Allen, 112 U. S. 129, 5 S. Ct. 70, 28 L. ed. 675; Butterworth *v.* U. S., 112 U. S. 50, 5 S. Ct. 25, 28 L. ed. 656; Quinn *v.* Chapman, 111

the latter might or might not accept, that the settler got no title until he had complied with the conditions of the law, and that if he was unable or unwilling to purchase at the government price at the time fixed by law, he had no further rights but was liable to be turned out of possession as an intruder.[33]

U. S. 445, 4 S. Ct. 508, 28 L. ed. 476; Baldwin *v.* Starks, 107 U. S. 463, 2 S. Ct. 473, 27 L. ed. 526; Potter *v.* U. S., 107 U. S. 126, 1 S. Ct. 524, 27 L. ed. 330; Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; Morrison *v.* Stalnaker, 104 U. S. 213, 26 L. ed. 741; Lansdale *v.* Daniels, 100 U. S. 113, 25 L. ed. 587; Hosmer *v.* Wallace, 97 U. S. 575, 24 L. ed. 1130; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Atherton *v.* Fowler, 96 U. S. 513, 24 L. ed. 732; Ferguson *v.* McLaughlin, 96 U. S. 174, 24 L. ed. 624; Sherman *v.* Buick, 93 U. S. 209, 23 L. ed. 849; Shepley *v.* Cowan, 91 U. S. 330, 23 L. ed. 424; Minor *v.* Happersett, 21 Wall. 162, 22 L. ed. 627; Warren *v.* Van Brunt, 19 Wall. 646, 22 L. ed. 219; Myers *v.* Croft, 13 Wall. 291, 20 L. ed. 562; Johnson *v.* Towsley, 13 Wall. 72, 20 L. ed. 485; Irvine *v.* Irvine, 9 Wall. 617, 19 L. ed. 800; Frisbie *v.* Whitney, 9 Wall. 187, 19 L. ed. 668; Stark *v.* Starr, 6 Wall. 402, 18 L. ed. 925 [*reversing* 2 Oreg. 118]; Hughes *v.* U. S., 4 Wall. 232, 18 L. ed. 303; Minnesota *v.* Bachelder, 1 Wall. 109, 17 L. ed. 551 [*reversing* 5 Minn. 223, 80 Am. Dec. 410]; Lindsey *v.* Hawes, 2 Black 554, 17 L. ed. 265; Harkness *v.* Underhill, 1 Black 316, 17 L. ed. 208; Clements *v.* Warner, 24 How. 394, 16 L. ed. 695; Marks *v.* Dickson, 20 How. 501, 15 L. ed. 1002; Barnard *v.* Ashley, 18 How. 43, 15 L. ed. 285; Cunningham *v.* Ashley, 14 How. 377, 14 L. ed. 462; Thredgill *v.* Pintard, 12 How. 24, 13 L. ed. 877; Lytle *v.* Arkansas, 9 How. 314, 664, 13 L. ed. 153; U. S. *v.* Fitzgerald, 15 Pet. 407, 10 L. ed. 785; Wilcox *v.* McConnell, 13 Pet. 498, 10 L. ed. 264; Simms *v.* Guthrie, 9 Cranch 19, 3 L. ed. 642; U. S. *v.* Blendauer, 122 Fed. 703; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29; Chicago, etc., R. Co. *v.* U. S., 108 Fed. 311, 47 C. C. A. 343; Grubbs *v.* U. S., 105 Fed. 314, 44 C. C. A. 513; Olive Land, etc., Co. *v.* Olmstead, 103 Fed. 568; Osborne *v.* Abtschul, 101 Fed. 739; Northern Pac. R. Co. *v.* McCormick, 94 Fed. 932, 36 C. C. A. 560; U. S. *v.* Central Pac. R. Co., 94 Fed. 906, 36 C. C. A. 546; McFadden *v.* Mountain View Min., etc., Co., 87 Fed. 154; U. S. *v.* Central Pac. R. Co., 84 Fed. 88; Meads *v.* U. S., 81 Fed. 684, 26 C. C. A. 229; U. S. *v.* La Chappelle, 81 Fed. 152; Durango Land, etc., Co. *v.* Evans, 80 Fed. 425, 25 C. C. A. 523; Swigett *v.* U. S., 78 Fed. 456; Hartman *v.* Warren, 76 Fed. 157, 22 C. C. A. 30; U. S. *v.* Winona, etc., R. Co., 67 Fed. 969, 15 C. C. A. 117; Hebert *v.* Brown, 65 Fed. 2; American Mortg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293; Bogan *v.* Edinburgh American Land Mortg. Co., 63 Fed. 192, 11 C. C. A. 128; Stimson Land Co. *v.* Rawson, 62 Fed. 426; Northern Pac. R. Co. *v.* Hussey, 61 Fed. 231, 9 C. C. A. 463; U. S. *v.* Union Pac. R. Co., 61 Fed. 143; Amacker *v.* Northern Pac. R. Co., 58 Fed. 850, 7 C. C. A. 518 [*reversing* 53 Fed. 48]; *Ex p.* Davidson, 57 Fed. 883; Minneapolis *v.* Reum, 56 Fed. 576, 6 C. C. A. 31; American Mortg. Co. *v.* Hopper, 56 Fed. 67; Northern Pac. R. Co. *v.* Hinchman, 53 Fed. 523; U. S. *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 554; U. S. *v.* Bedgood, 49 Fed. 54; Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604; Potter *v.* Tibbetts, 43 Fed. 505; U. S. *v.* Garretson, 42 Fed. 22; U. S. *v.* Howard, 37 Fed. 666; Felix *v.* Patrick, 36 Fed. 457 [*affirmed* in 145 U. S. 317, 12 S. Ct. 862, 36 L. ed. 719]; U. S. *v.* Freyberg, 32 Fed. 195; Glidden *v.* Union Pac. R. Co., 30 Fed. 660; U. S. *v.* Williams, 30 Fed. 309; U. S. *v.* Minor, 29 Fed. 134; U. S. *v.* Reed, 28 Fed. 482; St. Paul, etc., R. Co. *v.* Greenhalgh, 26 Fed. 563; Smith *v.* Ewing, 23 Fed. 741; Cowell *v.* Lammers, 21 Fed. 200; U. S. *v.* White, 17 Fed. 561, 9 Sawy. 125; Wallerton *v.* Snow, 15 Fed. 401, 5 McCrary 64; The Timber Cases, 11 Fed. 81, 3 McCrary 519; U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289; Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79; Bronson *v.* Kukuk, 4 Fed. Cas. No. 1,929, 3 Dill. 490; Gimmy *v.* Culverson, 10 Fed. Cas. No. 5,454, 5 Sawy. 605; Kellom *v.* Easley, 14 Fed. Cas. No. 7,668, 2 Abb. 559, 1 Dill. 281 [*affirmed* in 14 Wall. 279, 20 L. ed. 890]; Litchfield *v.* Register, 15 Fed. Cas. No. 8,388, 1 Woolw. 299 [*affirmed* in 9 Wall. 575, 19 L. ed. 681]; Pintard *v.* Goodloe, 19 Fed. Cas. No. 11,171, Hempst. 502; Russell *v.* Beebe, 21 Fed. Cas. No. 12,153, Hempst. 704; U. S. *v.* Stanley, 27 Fed. Cas. No. 16,376, 6 McLean 409.

See 41 Cent. Dig. tit. "Public Lands," §§ 65–71.

33. See the following cases:

California.— Buxton *v.* Traver, 67 Cal. 171, 7 Pac. 450.

Illinois.— Brown *v.* Throckmorton, 11 Ill. 529; Jackson *v.* Wilcox, 2 Ill. 344; Davenport *v.* Farrar, 2 Ill. 314.

Iowa.— Bowers *v.* Keesecher, 14 Iowa 301.

Michigan.— Busch *v.* Donohue, 31 Mich. 481.

Mississippi.— Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. 234.

Missouri.— Bray *v.* Ragsdale, 53 Mo. 170; Bower *v.* Higbee, 9 Mo. 259.

Nebraska.— Franklin *v.* Kelley, 2 Nebr. 79.

South Dakota.— McNamara *v.* Dakota F. & M. Ins. Co., 1 S. D. 342, 47 N. W. 288.

Wisconsin.— Dillingham *v.* Fisher, 5 Wis. 475; Woodward *v.* McReynolds, 2 Pinn. 268.

United States.— Nix *v.* Allen, 112 U. S. 129, 5 S. Ct. 70, 28 L. ed. 675; Hutchings *v.* Low, 15 Wall. 77, 21 L. ed. 82; Hartman *v.* Warren, 76 Fed. 157, 22 C. C. A. 30; Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79.

See 41 Cent. Dig. tit. "Public Lands," § 70.

8. Homesteads [34]— a. In General. The object and purpose of the homestead laws of the United States are to grant land to actual, *bona fide* settlers, persons making settlements upon the public lands for use as homesteads, and to encourage residence upon, cultivation, and improvement of the public domain.[35] Under the statute [36] every person who is the head of a family [37] or has arrived at the age of twenty-one years and is a citizen of the United States, or has filed his declaration of intention to become such,[38] is entitled to enter one-fourth section or a less quantity of unappropriated public lands to be located in a body in conformity to the legal subdivisions of the public lands; [39] and every person owning and residing on land may, under the provisions of the homestead law, enter other land lying contiguous to his land which shall not with the land so already owned and occupied exceed in the aggregate one hundred and sixty acres.[40]

b. Application, Affidavit, and Entry. Under the homestead law three things are needed to be done in order to constitute an entry on public lands: (1) The applicant must make an affidavit setting forth the facts which entitle him to make such an entry; [41] (2) he must make a formal application; [42] and (3) he must make payment of the money required.[43] The applicant is required to state in his affidavit that he does not apply to enter the land for the purpose of speculation, but as a home for himself,[44] that his application made is in good faith for the purpose of actual settlement and cultivation, and not for the benefit of any other per-

34. **Homestead exemption** see Homesteads, 21 Cyc. 448.

35. U. S. *v.* Richards, 149 Fed. 443.

36. U. S. Rev. St. (1878) § 2289 [U. S. Comp. St. (1901) p. 1388].

37. **A deserted wife is to be treated as the head of a family** and if she retains possession of the land entered by the husband she may continue to reside thereon and may make final proof in his name, or make an entry thereof in her own name upon proof of her husband's desertion, and this right of the deserted wife cannot be defeated by a fraudulent and collusive relinquishment by the husband in hostility to her rights. Michaelis *v.* Michaelis, 43 Minn. 123, 44 N. W. 1149.

38. **A person who is the proprietor of more than one hundred and sixty acres of land,** in any state or territory, can acquire no right under the homestead law. U. S. Rev. St. (1878) § 2289 [U. S. Comp. St. (1901) p. 1388].

39. **A tract of land platted as a quarter section** may be entered as a quarter section regardless of its actual area, whether more or less than one hundred and sixty acres. Tictin *v.* U. S., 36 Ct. Cl. 1; Wood *v.* Bick, 13 Land Dec. Dep. Int. 520; *In re* Douglas, 10 Land Dec. Dep. Int. 116; *In re* Tingley, 8 Land Dec. Dep. Int. 205; *In re* Burnes, 7 Land Dec. Dep. Int. 20; *In re* Elson, 6 Land Dec. Dep. Int. 767.

Claim extending over contiguous quarter sections.— A homesteader who initiates a right as to either surveyed or unsurveyed land, and complies with the legal regulations, may, when he enters the land, embrace in his claim land in contiguous quarter sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract, and that he does such acts as put the public upon notice of the extent of his claim. St. Paul, etc., R. Co. *v.* Donohue, 210 U. S. 21, 28 S. Ct. 600, 52 L. ed. 941 [*affirming* 101 Minn. 239, 112 N. W. 413, and *distinguishing* Ferguson *v.* McLaughlin, 96 U. S. 174, 26 L. ed. 624].

40. **Title sufficient to warrant claim of additional farm homestead.**— One having minor children by a former deceased husband has, under Cal. Code Civ. Proc. § 1468, such absolute title in one half of the latter's real estate that by a conveyance to her second husband of land which may on partition be included in such half, even though it has been allotted as a homestead to her and her children, the husband acquires a title sufficient to allow him to claim an additional farm homestead. Stewart *v.* McHarry, 159 U. S. 643, 13 S. Ct. 117, 40 L. ed. 290 [*affirming* (Cal. 1893) 35 Pac. 141], holding that such purchaser's right to file upon an adjoining farm homestead under the statute cannot be defeated by reason of the fact that it is possible that on the partition other land not adjoining that filed upon may be alloted to him instead of the specified part conveyed to him.

41. Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69].

An application for the entry of a soldier's additional homestead, under U. S. Rev. St. (1878) § 2306 [U. S. Comp. St. (1901) p. 1415], is not made under the homestead laws, but such grant is in the nature of a bounty to the soldier, and hence a notary public is authorized to administer the oath. U. S. *v.* Lair, 118 Fed. 98.

42. Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69].

43. Hastings, etc., R. Co *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69].

44. U. S. *v.* Richards, 149 Fed. 443.

son;[45] and that he will faithfully and honestly endeavor to comply with the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for.[46] If the affidavit and application are sufficient it is the duty of the register and receiver of the local land office to make the entry immediately upon receiving the proper fees,[47] and the receipt of the land office for entry fees is *prima facie* evidence of a homestead entry.[48] If the affidavit is insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the application may be rejected;[49] or if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterward canceled on account of these defects by the commissioner, or on appeal by the secretary of the interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the department; and on failure to do so the entry may then be canceled.[50] But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity.[51] When a person settled upon government land and applied to the land office claiming the right to enter it as a homestead, but omitted to insert in his application one forty-acre tract, his right and title to such tract failed.[52] A soldier's additional homestead may be located and entered by an agent or attorney in fact or assignee of the claimant.[53]

c. Validity of Entries. Fraud in the making of homestead entries is not to be inferred from the fact that a large number of entries may have been solicited and located by one person, if the entries themselves are legal.[54] The good faith of a homestead settler is not impeached by the fact that the land when he settled upon it was within the limits of a railroad grant, under which it had been withdrawn from market, where he had knowledge that the terms of the grant had not been complied with, and the land had not been earned thereunder, and good reason to believe that it would soon be restored to the public domain, as in fact it was.[55]

d. Priority Between Entries. As between two simultaneous applications for homestead entries on the same land, the question as to which of the applicants had made the prior settlement is one of fact for the determination of the land department.[56]

45. U. S. *v.* Richards, 149 Fed. 443.

The applicant must state that he has not directly or indirectly made any agreement or contract in any way or manner with any person or corporation by which the title he may acquire shall inure in whole or in part to the benefit of any one except himself. U. S. *v.* Richards, 149 Fed. 443.

Promise to concede right of way.— The affidavit that the application is not made for the use or benefit of any other person is not contradicted or falsified by the fact that the applicant has already promised to concede a right of way over the premises for a neighborhood road. U. S. *v.* Reed, 28 Fed. 482.

46. U. S. *v.* Stearns, 152 Fed. 900, 82 C. C. A. 48; U. S. *v.* Richards, 149 Fed. 443.

47. Whittaker *v.* Pendola, 78 Cal. 296, 20 Pac. 680.

When the certificate of entry is executed and delivered to the entryman, the entry is made and the land is entered. Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69].

48. Whittaker *v.* Pendola, 78 Cal. 296, 20 Pac. 680, so holding on the ground that it must be presumed that the register and receiver had done his duty.

49. Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69].

50. Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69].

Cancellation of entries generally see *infra*, II, L, 12.

51. Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69].

52. Kitteringham *v.* Blair-Town Lot, etc., Co., 73 Iowa 421, 35 N. W. 502.

53. Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122; Rose *v.* Nevada, etc., Wood, etc., Co., 73 Cal. 385, 15 Pac. 19.

Soldier need not see land before entering it. — U. S. *v.* Richards, 149 Fed. 443.

54. U. S. *v.* Richards, 149 Fed. 443.

55. Manley *v.* Tow, 110 Fed. 241.

56. Love *v.* Flahive, 33 Mont. 348, 83 Pac. 882, holding that where such applications are filed after the expiration of three months

e. Rights Acquired by Entry.[57] The homestead law clearly confers the right of possession on the entryman when the preliminary entry is made,[58] and although title does not finally pass from the United States until the issuance of a patent,[59] the receiver's receipt issued to a homestead entryman in possession and claiming land under the statute constitutes ample title to enable him to maintain or defend a suit concerning the land,[60] and to entitle him to damages for an injury to the land.[61] But the holder of a certificate of a homestead entry in possession of the land cannot defend against an action of ejectment brought by the grantee in fee of the United States, whether plaintiff's patent was issued before or after the issuance of the certificate.[62] One contesting for a preference right and for cancellation of a homestead entry has no right of possession of the land pending the litigation.[63] Where a husband has entered on such lands, and complied with the statutory requirements, his equitable right to have the title vested in him is complete, and he cannot be deprived of it by his wife, whom he has deserted, making the final proof of occupancy for him.[64] The assignee of a soldier's additional homestead certificate, on filing an application for a specific tract of land at the government office, acquires an equitable title therein, which ripens into a legal title, relating back to the date of application on issuance of a government patent.[65] No vested right is obtained in a piece of government land, by reason of an application for a homestead entry thereon, when such application is denied.[66]

f. Residence and Cultivation. Actual settlement, followed by residence and cultivation for a period of five years, is a condition of obtaining the title,[67] except that where an entryman at the date of his entry or subsequently thereto is actually enlisted and employed in the army or navy of the United States, his service therein is equivalent to a residence of the same length of time upon the tract entered.[68]

from the date when the official plat was approved and filed in the local land office, a finding of the secretary of the interior that the applicant who had preserved his right to the land intact since his settlement should be given preference over the other, who had relinquished or abandoned his right, in the absence of evidence that such right had ever been established prior to the date of settlement by such other applicant, was proper.

57. See, generally, *supra*, II, C, 4.

58. Tiernan *v.* Miller, 69 Nebr. 764, 96 N. W. 661; Stearns *v.* U. S., 152 Fed. 900, 82 C. C. A. 48.

59. Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321. See, generally, *infra*, II, M, 2.

60. Case *v.* Edgeworth, 87 Ala. 203, 5 So. 783 [*followed* in Morrison *v.* Coleman, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384]; Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321; Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705; Gulf, etc., R. Co. *v.* Clark, 101 Fed. 678, 41 C. C. A. 597.

61. Parrier *v.* Itasca County, 68 Minn. 297, 71 N. W. 382 (establishment by county commissioners of public road across land); McLeod *v.* Spencer, (Okla. 1908) 95 Pac. 754 (overflowing land).

The measure of damages is not the same as if he owned the land in fee simple. McLeod *v.* Spencer, (Okla. 1905) 95 Pac. 754.

62. Lowery *v.* Baker, 141 Ala. 600, 37 So. 637 [*following* Knabe *v.* Burden, 88 Ala. 436, 7 So. 92], holding that Code (1896), § 1813, providing that all certificates issued pursuant to any act of congress on any warrant or order of survey or for any donation or preëmption claim vesting title in the holders, etc., did not operate to pass the title of the United States, nor was it competent for the legislature to make it so operate.

63. Bilyeu *v.* Pitcher, 16 Okla. 228, 83 Pac. 546.

64. Egbert *v.* Bond, 148 Mo. 19, 49 S. W. 873.

65. Gilbert *v.* McDonald, 94 Minn. 289, 102 N. W. 712, 110 Am. St. Rep. 368 [*following* Hastay *v.* Bonness, 84 Minn. 120, 86 N. W. 896].

Relation back of patents generally see *infra*, II, M, 9, d.

66. Baldwin *v.* Keith, 13 Okla. 624, 75 Pac. 1124.

67. *Alabama.*— Lindsey *v.* Veasy, 62 Ala. 421.

California.— Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321.

Iowa.— McCorkell *v.* Herron, 128 Iowa 324, 103 N. W. 988, 111 Am. St. Rep. 201.

Washington.— Bolton *v.* La Camas Water Power Co., 10 Wash. 246, 38 Pac. 1043.

United States.— U. S. *v.* Waddell, 112 U. S. 76, 5 S. Ct. 35, 28 L. ed. 673 [*affirming* 16 Fed. 221, 5 McCrary 155]; U. S. *v.* Stearns, 152 Fed. 900, 82 C. C. A. 48; U. S. *v.* Richards, 149 Fed. 443.

See 41 Cent. Dig. tit. "Public Lands," § 74.

68. Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69]; U. S. *v.* Richards, 149 Fed. 443, provided that in any event he must reside at least one year upon the land.

In establishing a residence, as required by the homestead law, there must be a combination of act and intent — the act of occupying and living upon the claim, and the intention of making the same a home to the exclusion of a home elsewhere.[69] If it is proved to the satisfaction of the register of the land office that a homestead entryman has changed his residence or abandoned the land for more than six months at any time, the settler's rights are forfeited and the land reverts to the government.[70]

g. Death of Entryman. Before a homestead entryman has become entitled to a patent, he has no such interest in the land as will make it, on his death, a part of his estate and subject to the payment of his debts.[71] But, under the statute,[72] in case of the death of a homestead entryman before the five years' residence is complete, the right passes to his widow,[73] or, if there be no widow left surviving, to the entryman's heirs or devisees,[74] who may complete the residence required by law and thereupon become entitled to a patent.[75] In such case, however, the heirs succeed to the rights of the homesteader not as heirs who have inherited his title, but because the law gives them preference as new homesteaders, allowing to them the benefit of the residence of their ancestor upon the land,[76] and it has been held that the entryman has no interest in the land which can pass by his will,[77] nor can his administrator make final proof or perfect the entry for a patent.[78] The statute providing that in the case of the death of both father and mother, leaving infant children, the right and fee shall inure to the benefit of such infants,[79] applies only when there are no other children, and if there are adult as well as infant children all share alike.[80]

69. U. S. *v.* Richards, 149 Fed. 443.

A residence for voting purposes in another precinct than that in which land is situated precludes an entryman from claiming residence at the same time on the land for homestead purposes. Small *v.* Rakestraw, 196 U. S. 403, 25 S. Ct. 285, 50 L. ed. 717 [*affirming* 28 Mont. 413, 72 Pac. 746, 104 Am. St. Rep. 691].

Where one made a preëmption filing on eighty acres of public land, and claimed the same under the preëmption laws, he could not before final proof claim another eighty acres under a homestead entry. Ard *v.* Brandon, 43 Kan. 425, 23 Pac. 648, so holding on the ground that residence was essential under both the preëmption and the homestead law.

Mistake as to location.—A homestead entry is valid, although the house in which the person making the entry was at the time living was a short distance outside the land entered, where he believed that it was on the land entered, and moved his actual residence to the land covered by the entry as soon as the true boundaries were discovered. Wormouth *v.* Gardner, 105 Cal. 149, 38 Pac. 646.

70. Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321.

71. Gjerstadengen *v.* Van Duzen, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 679.

72. U. S. Rev. St. (1878) § 2291 [U. S. Comp. St. (1901) p. 1390].

73. Jarvis *v.* Hoffman, 43 Cal. 314; Egbert *v.* Bond, 148 Mo. 19, 49 S. W. 873; Perry *v.* Ashby, 5 Nebr. 291.

Widow acquires title free from trust in favor of children.— Jarvis *v.* Hoffman, 43 Cal. 314. See also Baker *v.* Brickell, 87 Cal. 329, 25 Pac. 489, 1067 [*followed* in Whelan *v.* Buckell, (Cal. 1893) 33 Pac. 396].

74. Crumb *v.* Hambleton, 86 Mo. 501; Marley *v.* Sturkert, 62 Nebr. 163, 86 N. W. 1056, 89 Am. St. Rep. 749.

Heirs take as tenants in common.— Crumb *v.* Hambleton, 86 Mo. 501.

75. Perry *v.* Ashby, 5 Nebr. 291. And see cases cited *supra*, notes 73, 74.

Issuance of patent after death of entryman see *infra*, II, M, 7.

76. Marley *v.* Sturkert, 62 Nebr. 163, 86 N. W. 1056, 89 Am. St. Rep. 749; Gjerstadengen *v.* Van Duzen, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 679; Demars *v.* Hickey, 13 Wyo. 371, 80 Pac. 521, 81 Pac. 705.

77. Chapman *v.* Price, 32 Kan. 446, 4 Pac. 807; Lewis *v.* Lichty, 3 Wash. 213, 28 Pac. 356, 28 Am. St. Rep. 25.

78. Demars *v.* Hickey, 13 Wyo. 371, 80 Pac. 521, 81 Pac. 705.

79. U. S. Rev. St. (1878) § 2292 [U. S. Comp. St. (1901) p. 1394]. See Anderson *v.* Peterson, 36 Minn. 547, 32 N. W. 861, 1 Am. St. Rep. 698.

80. Bernier *v.* Bernier, 147 U. S. 242, 13 S. Ct. 244, 37 L. ed. 152 [*reversing* 72 Mich. 43, 40 N. W. 50, and *followed* in Holloman *v.* Bullock, 82 Miss. 405, 34 So. 355].

Limitation of actions for partition.—Act March 3, 1891, c. 561, § 8, 26 U. S. St. at L. 1099 [U. S. Comp. St. (1901) p. 1521], which provides that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance," has no application to a suit brought by the heirs of the one making the entry on public land to partition the same. Holloman *v.* Bullock, 82 Miss. 405, 34 So. 355.

h. Commutation of Homestead Entries. The statute permits a homestead entryman, at any time after the expiration of fourteen months from the date of his entry, to pay the minimum price for the land entered and obtain a patent, upon proof of settlement and residence on and cultivation of the land for such period of fourteen months.[81]

i. Issuance of Patent.[82] A patent may issue to the person making the homestead entry upon proof of residence and cultivation for the period of five years, and compliance with the other statutory conditions.[83]

9. Timber Culture. The statutes formerly allowed the right to receive a patent for public land to be acquired by the planting and culture of timber thereon,[84] but these statutes have been repealed with a saving of existing rights and claims,[85] and hence it is sufficient to refer to some of the cases in which these statutes have been cited or construed,[86] and to state that before his right to a patent accrued a timber culture entryman had the same right of possession as any other entryman,[87] and was the owner of the trees standing on the land,[88] but prior to such time the

81. U. S. Rev. St. (1878) § 2301 [U. S. Comp. St. (1901) p. 1406]; McCorkell *v.* Herron, 128 Iowa 324, 103 N. W. 988, 111 Am. St. Rep. 201.

Curing of premature commutation.—As originally enacted (U. S. Rev. St. (1878) § 2301) the statute permitted commutation of homestead entries at any time before the expiration of the five years' residence, but it was amended in 1891 (26 U. S. St. at L. 1098, c. 561, § 6 [U. S. Comp. St. (1901) p. 1406]), so as to allow commutation only after the expiration of fourteen calendar months from the date of the entry. Act June 3, 1896, c. 312, § 1 (29 U. S. St. at L. 197 [U. S. Comp. St. (1901) p. 1409]) confirmed commutation entries made in good faith after the passage of the act of 1891, and in actual ignorance of the amendment, and which were invalid only because prematurely made; and the right to a confirmation under this latter statute was not defeated by the entryman's subsequent efforts to protect his grantees by taking a reconveyance and again residing upon the land for the purpose of enabling him to make proof and secure a title for them. Hill *v.* McCord, 195 U. S. 395, 25 S. Ct. 96, 49 L. ed. 251 [*affirming* 117 Wis. 306, 94 N. W. 65]. Under the requirement of the act of congress of June 3, 1896, that it shall be made to appear that there was at least six months' actual residence in good faith by the homestead entryman prior to such confirmation, the six months' residence need not be subsequent to the entry. McCord *v.* Hill, 111 Wis. 499, 84 N. W. 27, 85 N. W. 145, 87 N. W. 481. The allowance of thirty days by Laws (1880), c. 89, § 2 (21 U. S. St. at L. 140), to one who has secured the cancellation of any preëmption, in which time he may enter the lands, is a mere privilege to enter, and not an entry, within the act of congress of June 3, 1896, so as to preclude the confirmation of a homestead entry prematurely commuted. McCord *v.* Hill, *supra*.

82. **Patents** generally see *infra*, II, M.

83. Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321.

84. U. S. Rev. St. (1878) §§ 2464–2468.

85. Acts March 3, 1891, March 3, 1893 (26 U. S. St. at L. 1095, 27 U. S. St. at L. 593 [U. S. Comp. St. (1901) pp. 1535]).

86. *California.*— Barnard *v.* Boller, 105 Cal. 214, 38 Pac. 728; Miller *v.* Little, 47 Cal. 348.

Kansas.— Nash *v.* Farmers', etc., Bank, 3 Kan. App. 694, 44 Pac. 907.

Minnesota.— Palmer *v.* March, 34 Minn. 127, 24 N. W. 374; Russell *v.* Lowth, 21 Minn. 167, 18 Am. Rep. 389.

Montana.— Graham *v.* Great Falls Water Power, etc., Co., 30 Mont. 393, 76 Pac. 808; Ferguson *v.* Speith, 13 Mont. 487, 34 Pac. 1020, 40 Am. St. Rep. 459.

Nebraska.— Brandhoefer *v.* Bain, 45 Nebr. 781, 64 N. W. 213; Baldwin *v.* Boyd, 18 Nebr. 444, 25 N. W. 580; Smith *v.* Steele, 13 Nebr. 1, 12 N. W. 830.

North Dakota.— Fleischer *v.* Fleischer, 11 N. D. 221, 91 N. W. 51.

Oregon.—Adams *v.* Church, 42 Oreg. 270, 70 Pac. 1037, 95 Am. St. Rep. 740, 59 L. R. A. 782; Church *v.* Adams, 37 Oreg. 355, 61 Pac. 639; Wallowa Nat. Bank *v.* Riley, 29 Oreg. 289, 45 Pac. 766, 54 Am. St. Rep. 794; Clark *v.* Bayley, 5 Oreg. 343.

South Dakota.— Van Doren *v.* Miller, 14 S. D. 264, 85 N. W. 187.

Washington.— Dennis *v.* Kass, 11 Wash. 353, 39 Pac. 656, 48 Am. St. Rep. 880; Jean *v.* Dee, 5 Wash. 580, 32 Pac. 460.

Wisconsin.— Gile *v.* Hallock, 33 Wis. 523.

United States.—Adams *v.* Church, 193 U. S. 510, 24 S. Ct. 512, 48 L. ed. 769; U. S. *v.* Thompson, 29 Fed. 86; U. S. *v.* Stores, 14 Fed. 824, 4 Woods 641; U. S. *v.* Shinn, 14 Fed. 447, 8 Sawy. 403; *In re* Read, 5 Land Dec. Dep. Int. 313; Sims *v.* Busse, 4 Land Dec. Dep. Int. 369.

See 41 Cent. Dig. tit. "Public Lands," §§ 78–80.

87. Braun *v.* Mathieson, (Iowa 1908) 116 N. W. 789; Lee *v.* Watson, 15 Mont. 228, 38 Pac. 1077; Olson *v.* Huntamer, 6 S. D. 364, 61 N. W. 479. See, generally, as to right of possession, *supra*, II, C, 4.

88. Carner *v.* Chicago, etc., R. Co., 43 Minn. 375, 45 N. W. 713, holding that he could recover for the destruction of the trees by fire caused by a locomotive.

claimant had no vested right [89] or devisable interest [90] in the land; but upon his death his interest passed, under the statute, to his heirs, who took as donees of the United States and not by inheritance,[91] and if he left no heirs the land reverted to the United States.[92]

10. Desert Lands. The statute [93] gives to any citizen or person entitled to become a citizen who has filed his declaration of intention to become such the right, in certain states and territories,[94] upon payment of twenty-five cents per acre, to file a declaration under oath stating that he intends to reclaim a tract of desert land,[95] not exceeding one section,[96] by conducting water upon the same within the period of three years thereafter,[97] and at any time within such period the claimant may become entitled to a patent upon making satisfactory proof of the reclamation of the land and paying the further sum of one dollar per acre.[98] The entryman has the right of possession of the land entered for three years from the date of his entry.[99] It is a sufficient reclamation to entitle the purchaser to a patent under the Desert Land Act that he has acquired a right to sufficient water to irrigate the land, and has constructed main ditches sufficient to carry it over the accessible parts of the tract, for purposes of cultivation in the ordinary manner, although he has not actually used and cultivated the land.[1] On the death of the entryman his rights descend to his heirs or devisees.[2]

11. Timber and Stone Lands. Under the statute [3] land which is valuable chiefly for timber or stone, but unfit for cultivation,[4] and which has not been

89. Braun *v.* Mathieson, (Iowa 1908) 116 N. W. 789.

90. Cooper *v.* Wilder, 111 Cal. 191, 43 Pac. 591, 52 Am. St. Rep. 163, (1895) 41 Pac. 26; Walker *v.* Ehresman, 79 Nebr. 775, 113 N. W. 218; Kelsay *v.* Eaton, 45 Oreg. 70, 76 Pac. 770, 106 Am. St. Rep. 662.

91. Cooper *v.* Wilder, 111 Cal. 191, 43 Pac. 591, 52 Am. St. Rep. 163, (1895) 41 Pac. 26; Braun *v.* Mathieson, (Iowa 1908) 116 N. W. 789; Fleischer *v.* Fleischer, 11 N. D. 221, 91 N. W. 51; Kelsay *v.* Eaton, 45 Oreg. 70, 76 Pac. 770, 106 Am. St. Rep. 662; Gould *v.* Tucker, 20 S. D. 226, 105 N. W. 624; Aspey *v.* Barry, 13 S. D. 220, 83 N. W. 91.

The heirs took equally, and not according to the laws of descent of the state where the land was situated. Cooper *v.* Wilder, 111 Cal. 191, 43 Pac. 591, 52 Am. St. Rep. 163, (1895) 41 Pac. 26.

State law governed as to who were heirs.— Cooper *v.* Wilder, 111 Cal. 191, 43 Pac. 591, 52 Am. St. Rep. 163, (1895) 41 Pac. 26; Braun *v.* Mathieson, (Iowa 1908) 116 N. W. 789.

92. Gould *v.* Tucker, 20 S. D. 226, 105 N. W. 624.

93. U. S. Comp. St. (1901) p. 1548 *et seq.*

94. U. S. *v.* Healey, 160 U. S. 136, 16 S. Ct. 247, 40 L. ed. 369.

95. **Whether the land is desert land is a matter of preliminary proof** to be shown to the satisfaction of the register of the land-office by affidavits or other appropriate evidence. U. S. *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176.

A decision by the register of the local land office that a particular tract is desert land is not reviewable by the courts in the absence of fraud. U. S. *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176 [*following* U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384]. See, generally, *infra*, II, L, 15, b.

96. **Description of land.—** If the land has been surveyed, the declaration must particularly describe the section, and if it is unsurveyed, it must be described as near as practicable. U. S. *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176.

97. U. S. *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176.

98. **Price of alternate railroad sections.—** The price of one dollar and twenty-five cents per acre applies to desert lands constituting alternate sections reserved to the United States along the lines of railroads. U. S. *v.* Healey, 160 U. S. 136, 16 S. Ct. 247, 40 L. ed. 369 [*reversing* 29 Ct. Cl. 115], holding, however, that under the act of 1877, the price of such lands was two dollars and fifty cents per acre, and that the amendatory act of 1891 fixing the price at one dollar and twenty-five cents per acre did not authorize lands entered before its passage to be patented at one dollar and twenty-five cents per acre.

99. Sallee *v.* Corder, 67 Cal. 174, 7 Pac. 455.

Right of possession of entryman generally see *supra*, II, C, 4.

1. U. S. *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176; Dickinson *v.* Auerbach, 18 Land Dec. Dep. Int. 16.

2. Phillips *v.* Carter, 135 Cal. 604, 67 Pac. 1031.

3. 20 U. S. St. at L. 89, c. 151, § 1 [U. S. Comp. St. (1901) p. 1545].

4. **The condition of the land at the time of the application** to purchase determines whether it is within the statute, and lands which are heavily timbered, and in their present condition unfit for cultivation, are not excluded from the scope of the act because in the future, by large expenditures of

offered at public sale according to law,[5] may be sold to citizens of the United States or persons who have declared their intention to become such,[6] in quantities not exceeding one hundred and sixty acres to any one person or association of persons [7] at the minimum price of two dollars and fifty cents per acre.[8] The applicant must file a statement under oath [9] that the land is unfit for cultivation and valuable chiefly for its timber or stone,[10] that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit,[11] and that he has not directly or indirectly made any agreement or contract with any person or persons, by which the title which he may acquire shall inure, in whole or in part, to the benefit of any person except himself.[12] The statute does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation;[13] all that it prohibits is a prior agreement, the acting for another in the purchase, and if, when the title passes from the government, no one save the purchaser has any claim upon the land, or any contract or agreement for it, the law is satisfied.[14] An application to purchase lands under the

money and labor, they may be rendered suitable for cultivation. U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384 [*affirming* 43 Fed. 630, and *followed* in Thayer *v.* Spratt, 189 U. S. 346, 23 S. Ct. 576, 47 L. ed. 845 (*affirming* 25 Wash. 62, 64 Pac. 919)].

5. Offer and withdrawal.— Lands which have been offered for sale but not sold by the United States, and which were thereafter withdrawn from sale because they were situated within the limits of the land grant to the Northern Pacific Railroad Company, are to be considered as "lands which have not been offered for sale according to law," within the meaning of the statute. U. S. *v.* Budd, 43 Fed. 630 [*affirmed* in 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384].

6. Misstatement of grounds of right.— The fact that one who is actually qualified to make an entry of timber land by having declared his intention to become a citizen of the United States erroneously states in his application to purchase such land that he is a citizen is immaterial, and does not invalidate his entry, no statement on the subject being required. Lewis *v.* Shaw, 70 Fed. 289.

7. Olson *v.* U. S., 133 Fed. 849, 67 C. C. A. 21.

8. Olson *v.* U. S., 133 Fed. 849, 67 C. C. A. 21.

9. Wheeler *v.* Smith, 5 Wash. 704, 32 Pac. 784; Hoover *v.* Saling, 110 Fed. 43, 49 C. C. A. 26.

10. Wheeler *v.* Smith, 5 Wash. 704, 32 Pac. 784; Hoover *v.* Salling, 110 Fed. 43, 49 C. C. A. 26.

This statement must be true not only when made but also when the land is paid for and the applicant receives his certificate of purchase or receiver's receipt. U. S. *v.* Brace, 149 Fed. 869; U. S. *v.* Bailey, 17 Land Dec. Dep. Int. 468. See also U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384.

An applicant is not required to personally inspect the land before filing his statement so as to be able to verify the same from personal knowledge. Hoover *v.* Salling, 110 Fed. 43, 49 C. C. A. 26 [*reversing* 102 Fed. 716].

11. Wheeler *v.* Smith, 5 Wash. 704, 32 Pac. 784; Olson *v.* U. S., 133 Fed. 849, 67 C. C. A. 21.

Investigation as to good faith.—The officers of the land department are not required to accept the statements contained in the application to purchase as conclusively establishing the *bona fides* of the applicant, but the statute contemplates an inquiry into these matters by such officers. U. S. *v.* Brace, 149 Fed. 869, 873, where it is said: "The statute contemplates that the Commissioner of the General Land Office shall make regulations giving to the register and receiver the authority to subject the applicant and his witnesses to an oral examination, for the purpose of satisfying themselves that the entry is made in good faith for the benefit of the applicant, and not in the interest of another."

12. Wheeler *v.* Smith, 5 Wash. 704, 32 Pac. 284; U. S. *v.* Brace, 149 Fed. 869; Olson *v.* U. S., 133 Fed. 849, 67 C. C. A. 21.

A false statement in this respect is a criminal offense, although the agreement is in parol and within the statute of frauds. Olson *v.* U. S., 133 Fed. 849, 67 C. C. A. 21.

Proof of a prior unlawful agreement in purchasing other lands does not establish such an agreement in reference to a subsequent purchase. U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384 [*affirming* 43 Fed. 630].

Facts insufficient to establish that entry was made for benefit of another see Lewis *v.* Shaw, 70 Fed. 289.

13. U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384.

Intent to sell.— The fact that persons entered land under the Timber Land Act with the intention of selling the timber for their own benefit does not render the entries invalid as being made on speculation. U. S. *v.* Detroit Timber, etc., Co., 124 Fed. 393 [*reversed* on other grounds in 131 Fed. 668, 67 C. C. A. 1 (*affirmed* in 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499)].

14. U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384; U. S. *v.* Detroit Timber, etc., Co., 124 Fed. 393 [*reversed* on other grounds in 131 Fed. 668, 67 C. C. A. 1 (*af-*

timber and stone acts confers no vested rights therein on the applicant prior to the payment of the purchase-money,[15] but the government may withdraw the land from sale.[16] It is, however, the duty of the commissioner of the general land office on receiving the papers and testimony in the case, if it appears *prima facie* therefrom that the law has been complied with, to cause a patent to issue to the purchaser.[17] To justify a forfeiture, the proof of the fraud or perjury must be clear and convincing; mere inferences are not sufficient.[18]

12. Town Sites — a. In General. The town-site laws of the United States are designed by congress for the benefit and relief of persons who, having settled upon portions of the public domain, desire to lay out and establish a town or city, including their possessions, and to enable those who have already laid out a town or city on unoccupied public lands, and settled upon lots or municipal subdivisions within the boundaries thereof, to procure title thereto from the United States at a minimum price, and to enable other persons desiring to purchase lots within an established city or town, upon the public lands, to procure a valid title thereto.[19] Under the statute[20] whenever any portion of the public lands is settled upon and occupied as a town site,[21] the corporate authorities of the town, if it is incorporated,[22] or, if it is not incorporated, the judge of the county court of the county in which the town is situated,[23] may enter at the proper

firmed in 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499)]. See also U. S. *v.* Maxwell Land Grant Co., 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949.

Loan of money to purchase.— The fact that a lumber company lent money without security to persons to enable them to enter and pay for land under the Timber and Stone Act, in the expectation that when the entrymen obtained title it would be enabled to buy the timber from such lands by reason of the fact that it had the only mill in the vicinity, does not render the entries invalid for fraud, where there was no agreement for the sale prior to the entries, but each man was free to keep the timber or to sell it to others. U. S. *v.* Detroit Timber, etc., Co., 124 Fed. 393 [*reversed* on other grounds in 131 Fed. 668, 67 C. C. A. 1 (*affirmed* in 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499)].

15. U. S. *v.* Braddock, 50 Fed. 669 [*following* Hutchings *v.* Low, 15 Wall. (U. S.) 77, 21 L. ed. 82].

16. U. S. *v.* Braddock, 50 Fed. 669 [*following* Hutchings *v.* Low, 15 Wall. (U. S.) 77, 21 L. ed. 82].

17. Montgomery *v.* U. S., 36 Fed. 4, 13 Sawy. 383 [*reversed* on other grounds in 131 U. S. 1, 9 S. Ct. 669, 33 L. ed. 90].

18. Lewis *v.* Shaw, 70 Fed. 289 [*following* U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384 (*affirming* 43 Fed. 630)].

Where circumstantial evidence is relied on to show that entries of lands under the Timber and Stone Act were fraudulent, and made for the benefit of others than the entrymen, to whom the timber on the lands was subsequently conveyed for a consideration shown, it is competent for either party to show the value of such timber, as a circumstance bearing upon the *bona fides* of the transaction. Olson *v.* U. S., 133 Fed. 849, 67 C. C. A. 21.

19. Jones *v.* Petaluma, 38 Cal. 397 [*approved* in Alemany *v.* Petaluma, 38 Cal. 553]; Pascoe *v.* Green, 18 Colo. 326, 32 Pac. 824; Winfield Town Co. *v.* Maris, 11 Kan. 128. See also *In re* Selby, 6 Mich. 193.

Congress had in view the individual interests of bona fide settlers upon small parcels of public lands, as well as the common interests of a community of persons so contiguously settled as to justify the establishment of a city or town, in the enactment of these laws, and they were not intended for the especial benefit of municipal organizations or corporations. Jones *v.* Petaluma, 38 Cal. 397.

20. U. S. Rev. St. (1878) § 2387 [U. S. Comp. St. (1901) p. 1457].

The act of congress of May 23, 1844 (5 U. S. St. at L. 657), was substantially like the later statute cited above. See Doll *v.* Meador, 16 Cal. 295. The act of 1844 was not in force in Oregon until July 17, 1854. Stark *v.* Starr, 6 Wall. (U. S.) 402, 18 L. ed. 925 [*reversing* 2 Oreg. 118, and *followed* in Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15]. See also Marlin *v.* T'Vault, 1 Oreg. 77; Chapman *v.* School Dist., 5 Fed. Cas. No 2,607, Deady 108; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,578, Deady 1, 1 Oreg. 381.

21. Carson *v.* Smith, 12 Minn. 546.

22. **The statute contemplates the corporate authorities in the commonly accepted meaning** of the words, possessing and exercising the powers of a local or municipal government, and as a body incorporated under the provisions of Wis. Laws (1858), c. 151, entitled "An act to authorize the inhabitants upon government lands to form themselves into bodies corporate to carry out the provisions of an act of Congress approved May 23d, 1844," does not possess such powers, it is not authorized to make a town-site entry. Clarke *v.* Roy, 20 Wis. 478 [*followed* in Perry *v.* Superior City, 26 Wis. 64].

23. **The probate judge** of the county makes the entry in some states. See the statutes of the various states. So in Kansas, whenever any public land of the United States has been

land office[24] and for the minimum price[25] the land so settled[26] and occupied[27] in trust for the several use and benefit of the occupants thereof[28] according to their respective interests;[29] and the execution of this trust as to the disposal of lots in the town[30] and the proceeds of the sale thereof[31] is to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the town is situated.[32] The grant made by this statute is twofold, consisting of a several grant to the several occupants of the lots which they occupy, and a general grant of all unoccupied lots, for public purposes, to all the occupants as an aggregation.[33]

b. Right to Enter Land as Town Site. Land must be actually settled upon and occupied as a town site before it can be entered under the town-site law,[34] and merely platting the land as a town is not sufficient.[35] A right to have lands entered as a town site, even where a plat has been made and recorded, may be lost by abandonment of the occupancy so that other persons may become entitled to have the lands entered for their benefit.[36]

c. Lands Subject to Town-Site Entry[37]— (i) *In General.* Land which has been dedicated by the United States government to use for homesteads is not subject to town-site entry.[38] The offer of public lands for sale at auction is not a condition precedent to their being patented for a town site.[39]

(ii) *Mineral Lands.*[40] Town-site entries, by incorporated cities and towns,

settled upon and occupied as a town site, and the town is not incorporated, it is the duty of the probate judge, upon being furnished with the entrance money, to enter such land for the benefit of the occupants of such town site according to their respective interests; and any contract made by one of the occupants of said town site with a third person that the probate judge shall not so enter the land is illegal and void. McTaggart *v.* Harrison, 12 Kan. 62. And after such power has been exercised by the probate judge, it cannot be questioned by a person having no interest in the land. Sherry *v.* Sampson, 11 Kan. 611.

24. Newhouse *v.* Simino, 3 Wash. 648, 29 Pac. 263.

25. Newhouse *v.* Simino, 3 Wash. 648, 29 Pac. 263.

26. "Settled upon" means taken possession of. It includes such an improvement of the lot by the erection of buildings or fences, or by actual residence thereon, or by such other acts of possession and improvement as clearly and unmistakably show that it is *bona fide* the intention of the settler to take and hold possession of the lot, and that his possession and improvement is intended to be permanent and for himself. Sawyer *v.* Van Hook, 1 Alaska 108.

27. "Occupied" means taken and held in possession. Sawyer *v.* Van Hook, 1 Alaska 108.

28. The trust imposed on the mayor of an incorporated town under the Town-Site Act is for the benefit of the inhabitants, first as individuals, and then as a community, and the title to the occupied lots becomes vested in the trustee for the benefit of the occupants severally at the time such entry is made. Scully *v.* Squier, 13 Ida. 417, 90 Pac. 573. See *infra*, II, C, 12, f.

29. Newhouse *v.* Simino, 3 Wash. 648, 29 Pac. 263.

30. Clark *v.* Titus, 2 Ariz. 147, 11 Pac. 312; Ashby *v.* Hall, 119 U. S. 526, 7 S. Ct. 308, 30 L. ed. 469.

The word "disposal," as used in this connection, must be construed to mean "distribution" when applied to lots actually settled and possessed. Scully *v.* Squier, 1 Ida. 417, 90 Pac. 573.

31. Newhouse *v.* Simino, 3 Wash. 648, 29 Pac. 263.

32. Clark *v.* Titus, 2 Ariz. 147, 11 Pac. 312.

Act Cong. March 3, 1891, c. 543, § 17 (26 U. S. St. at L. 1026), providing that probate judges in Oklahoma shall have "such jurisdiction in townsite matters and under such regulations as are provided by the laws of the state of Kansas," repudiated Okla. St. (1893) p. 1145, relating to such jurisdiction, and left the matter to be determined wholly by the laws of the United States and of Kansas. Brown *v.* Parker, 2 Okla. 258, 39 Pac. 567.

33. Newhouse *v.* Simino, 3 Wash. 648, 29 Pac. 263. See also *In re* Selby, 6 Mich. 193.

34. *In re* Selby, 6 Mich. 193; Carson *v.* Smith, 12 Minn. 546.

35. Carson *v.* Smith, 12 Minn. 546.

36. Weisberger *v.* Tenny, 8 Minn. 456.

37. Lands subject to entry or sale generally see *supra*, II, C, 2.

38. Long-Bell Lumber Co. *v.* Martin, 11 Okla. 192, 66 Pac. 328, holding that where, after the opening of the Cherokee Outlet to settlement and private acquisition under the United States homestead laws, certain settlers, under an assumed organization of a town-site company, occupied a quarter section and undertook to divide it into blocks, streets, etc., but no title or right was ever acquired from the government by either the company or the settlers and the claimants thereunder, all the acts of the company and claimants under it were void, as against public policy.

39. Carter *v.* Thompson, 65 Fed. 329.

40. See, generally, Mines and Minerals, 27 Cyc. 516.

may, under the statutes,[41] be made on the mineral lands of the United States; but no title is thereby acquired to any mine or vein of gold, silver, cinnebar, copper, or lead,[42] or to any lands known at the time to be mineral lands,[43] or to any valid mining claim or possession held under existing laws,[44] even though it is not known at the time that the claim contains minerals of sufficient value to justify expenditure for extracting them.[45] It is well established, however, that in order to except lands not held as mineral claims at the time of the entry from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals when the township patent takes effect, but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them;[46] and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterward discovered to be valuable for such purposes, does not defeat or impair the title of persons claiming under the town-site patent.[47] An owner of land under a town-site patent issued prior to the passage of the act regulating the width of quartz-mining claims, in which land a gold quartz ledge was known to exist at the date of the patent, has an absolute title in fee simple to the land not actually included in the quartz ledge.[48]

Mineral lands not subject to entry or sale generally see *supra*, II, C, 2, d.

41. U. S. Rev. St. (1878) § 2392 [U. S. Comp. St. (1901) p. 1459]; 26 U. S. St. at L. 1101, c. 561, § 16 [U. S. Comp. St. (1901) p. 1459].

42. Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 27 L. ed. 226.

43. Tombstone Town Site Cases, 2 Ariz. 272, 15 Pac. 26; Moyle *v.* Bullene, 7 Colo. App. 308, 44 Pac. 69; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. 858; Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423 [*affirming* 4 Dak. 20, 22 N. W. 480].

44. Callahan *v.* James, 141 Cal. 291, 74 Pac. 853, (1902) 71 Pac. 104; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. 858; Silver Bow Min., etc., Co. *v.* Clark, 5 Mont. 378, 5 Pac. 570; Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226.

A town-site patent can confer no title in a mining claim. Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. 858.

The mere possession of shafts, dumps, etc., on an exhausted vein, which has been abandoned, does not prevent the land from passing by town-site patent. Richards *v.* Dower, 81 Cal. 44, 22 Pac. 304 [*affirmed* in 151 U. S. 658, 14 S. Ct. 452, 38 L. ed. 305].

A mill site, located and used as appurtenant to a mining claim, is not subject to town-site entry, although such mill site is on non-mineral land. Hartman *v.* Smith, 7 Mont. 19, 14 Pac. 648.

Adverse claim not necessary.— The owner of a valid mining claim which is within the boundaries of land included in a town-site entry or patent is not required to file an adverse claim to such entry or patent in order to protect his rights. Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 Pac. 858 [*followed* in King *v.* Thomas, 6 Mont. 409, 12 Pac. 865]; Silver Bow Min., etc., Co. *v.* Clark, 5 Mont. 378, 5 Pac. 570.

45. Callahan *v.* James, 141 Cal. 291, 74 Pac. 853, (1902) 71 Pac. 104.

46. Dower *v.* Richards, 151 U. S. 658, 14 S. Ct. 452, 38 L. ed. 305 [*affirming* 81 Cal. 44, 22 Pac. 304]; Davis *v.* Wiebbold, 139 U. S. 507, 11 S. Ct. 628, 35 L. ed. 238 [*reversing* 7 Mont. 107, 14 Pac. 865]; Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423 [*affirming* 4 Dak. 20, 22 N. W. 480 (*followed* in Pierce *v.* Sparks, 4 Dak. 1, 22 N. W. 491)].

47. Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26; McCormick *v.* Sutton, 97 Cal. 373, 32 Pac. 444; Smith *v.* Hill, 89 Cal. 122, 26 Pac. 644; Dower *v.* Richards, 151 U. S. 658, 14 S. Ct. 452, 38 L. ed. 305 [*affirming* 81 Cal. 44, 22 Pac. 304]; Davis *v.* Weibbold, 139 U. S. 507, 11 S. Ct. 628, 35 L. ed. 238 [*reversing* 7 Mont. 107, 14 Pac. 865]; Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423 [*affirming* 4 Dak. 20, 22 N. W. 480 (*followed* in Pierce *v.* Sparks, 4 Dak. 1, 22 N. W. 491)].

Evidence of knowledge.— A location uncertain as to the lands claimed, and unaided by proof of monuments, possession, or working, cannot be evidence that lands were then known to be mineral lands. Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26.

Proof of lack of knowledge admissible.— In ejectment against one claiming under a town-site patent, where plaintiff relies on a subsequently issued patent of the land as mineral, raising the presumption that it was mineral land when the town-site patent was issued, defendant should be allowed to prove that it was not known to be mineral land. Davis *v.* Wiebbold, 139 U. S. 507, 11 S. Ct. 628, 35 L. ed. 238 [*reversing* 7 Mont. 107, 14 Pac. 865].

48. Dower *v.* Richards, 73 Cal. 477, 15 Pac. 105, holding that another person has no right, without the consent of the owner, to run a tunnel under the portion of the land not included in the ledge for the purpose of working the ledge.

d. Area of Town Sites. A statute authorizing the entry of town sites to the extent of a certain number of acres has been held to merely limit the amount of land which could be acquired under the town-site law and not to restrict the corporate limits to such area.[49]

e. Entry — (I) *Necessity For.* Mere possession or occupancy of lands as a town site for town-site purposes without any entry or filing any plat gives no right to the land as against a subsequent grantee of the United States.[50]

(II) *Notice of Entry.* A statute providing that, within thirty days after a town-site entry, the corporate authorities or judge entering the lands shall give notice of such entry, requires the notice to be given within thirty days after the issuance of the final certificate of entry, and not within thirty days from the application for the entry.[51]

(III) *Evidence of Entry.* The duplicate of the record in the proper land office, on entry of land as a town site, is conclusive evidence in the state courts that the lands described therein have been settled on and occupied as a town site in accordance with the law.[52] On a question as to the validity of a certain town-site entry, letters addressed by the commissioner of the general land office to a certain person described therein as the attorney of the proprietors are admissible in connection with the proofs of entry and of the action of the department upon the application for entry.[53]

f. Right and Title Acquired by Entry.[54] The entry and payment vests the legal title in the judge or the corporate authorities, according as to which made the entry,[55] who are seized as trustees[56] for the occupants according to their

49. Root *v.* Shields, 20 Fed. Cas. No. 12,038, Woolw. 340, construing the act of May 23, 1844 (5 U. S. St. at L. 657).

50. Northern Pac. R. Co. *v.* Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. ed. 157 [*reversing* 69 Fed. 579, 16 C. C. A. 336] (land grant to railroad); Sparks *v.* Pierce, 115 U. S. 408, 6 S. Ct. 102, 29 L. ed. 428 (patent for land as placer miner claim).

51. Holland *v.* Buchanan, 19 Utah 11, 56 Pac. 561, construing Comp. Laws (1888), § 2816.

52. Leech *v.* Rauch, 3 Minn. 448.

53. Mankato *v.* Meagher, 17 Minn. 265.

54. Rights acquired by entry generally see *supra*, II, C, 4.

55. Wheeler *v.* Wade, 1 Colo. App. 66, 27 Pac. 719; Eakin *v.* McCraith, 2 Wash. Terr. 112, 3 Pac. 838; Hussey *v.* Smith, 99 U. S. 20, 25 L. ed. 314; McCloskey *v.* Pacific Coast Co., 160 Fed. 794, 87 C. C. A. 568.

Delay in payment of price.— The title vests in the trustee for the use of the occupants, at the time when the application is made, although the price is not paid and the receipt issued until several years afterward. Lockwitz *v.* Larsen, 16 Utah 275, 52 Pac. 279.

The estate and trust powers are vested in the corporate officers, and not in the corporation itself. Aspen *v.* Rucker, 10 Colo. 184, 15 Pac. 791; Georgetown *v.* Glaze, 3 Colo. 230; Burbank *v.* Ellis, 7 Nebr. 156.

A freehold of inheritance must be implied in town-site trustees notwithstanding the omission of the words of succession in the statute, for this is necessary to the accomplishment of the trust. Smith *v.* Pipe, 3 Colo. 187.

In Oklahoma, where lands are entered by trustees in trust for town-site occupants, the land still belongs to the United States, in every substantial sense so far as real ownership is concerned. Bockfinger *v.* Foster, 190 U. S. 116, 23 S. Ct. 836, 47 L. ed. 975 [*affirming* 10 Okla. 488, 62 Pac. 799], holding that therefore one claiming under the homestead laws of the United States cannot maintain a suit against Oklahoma town-site trustees to divest them of the title held by them, under Act May 14, 1890, c. 207, 26 U. S. St. at L. 109 [U. S. Comp. St. (1901) p. 1463]. Town-site trustees in Oklahoma are officers or agents of the government, and the issuance of patent to them for a town site, and the recording of the same, did not operate to divest the department of the interior of all control over the land embraced therein. Hammer *v.* Hermann, 11 Okla. 127, 65 Pac. 943, holding that the conveyance of a town site to such trustees was for a particular use named by congress, and the courts had not the right to intercept the legal title in the hands of the government agents.

56. *Arizona.*— Clark *v.* Titus, 2 Ariz. 147, 11 Pac. 312.

Colorado.— Denver *v.* Kent, 1 Colo. 336.

Minnesota.— Buffalo *v.* Harling, 50 Minn. 551, 52 N. W. 931; Mankato *v.* Meagher, 17 Minn. 265.

Montana.— Hartman *v.* Smith, 6 Mont. 295, 12 Pac. 655.

Nebraska.— Burbank *v.* Ellis, 7 Nebr. 156.

South Dakota.— Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

Utah.— Lockwitz *v.* Larsen, 16 Utah 275, 52 Pac. 279.

Washington.— Eakin *v.* McCraith, 2 Wash. Terr. 112, 3 Pac. 838.

United States.— Bockfinger *v.* Foster, 190 U. S. 116, 23 S. Ct. 836, 47 L. ed. 975 [*affirming* 10 Okla. 488]; McCloskey *v.* Pa-

respective interests.[57] Portions of the town site not subject to individual claims are held by the trustees for the benefit of the community at large.[58] The judge or the corporate authorities take the title and the execution of the trust in their official and political capacity,[59] and not as individuals, so that the title and the trust passes to their successors in office until the trust is finally exhausted.[60]

g. Execution of Trust.[61] The trust is to be executed by the county judge or by the corporate authorities according as to which made the entry.[62] The legislature of the state or territory has the power to regulate the execution of the trust in respect to town-site lands,[63] by establishing rules and regulations relating to the determination of claims to possession,[64] the extent of possession which may fairly be considered as an occupancy for town purposes,[65] the execution and delivery to those found to be occupants in good faith of some official recognition of title in the

cific Coast Co., 160 Fed. 794, 87 C. C. A. 568.

See 41 Cent. Dig. tit. "Public Lands," § 87.

The trustee has power to sue to protect his title as trustee. Hartman *v.* Smith, 6 Mont. 295, 12 Pac. 655.

57. *Arizona.*— Clark *v.* Titus, 2 Ariz. 147, 11 Pac. 312.

Minnesota.— Mankato *v.* Meagher, 17 Minn. 265.

South Dakota.— Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

Utah.— Lockwitz *v.* Larson, 16 Utah 275, 52 Pac. 279.

Washington.— Eakin *v.* McCraith, 2 Wash. Terr. 112, 3 Pac. 838.

See 41 Cent. Dig. tit. "Public Lands," § 87.

Persons claiming adversely to trust.— Town-site trustees in Oklahoma cannot be adjudged in equity to be trustees for the benefit of one claiming adversely to the trust created by the act of congress under which the patent was issued to them. Hammer *v.* Hermann, 11 Okla. 127, 65 Pac. 943.

58. Denver *v.* Kent, 1 Colo. 336, holding that Act, Feb. 9, 1866, § 6, not providing for the sale of the land, but affecting to "give" certain unclaimed lots to the city of Denver for the use of schools, was void.

Joinder of town in action to obtain title.— Where a county judge has entered land for town purposes, he is a naked trustee, and in a suit to obtain title of any of the land, the town, as a residuary beneficiary, should be joined as defendant with him. Graves *v.* Steel, 4 Greene (Iowa) 377.

59. Smith *v.* Hill, 89 Cal. 122, 26 Pac. 644; Georgetown *v.* Glaze, 3 Colo. 230; Smith *v.* Pipe, 3 Colo. 187; Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355 [*followed* in Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101].

60. Smith *v.* Pipe, 3 Colo. 187; Wheeler *v.* Wade, 1 Colo. App. 66, 27 Pac. 719; Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355 [*followed* in Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101].

Where a new county is formed embracing a town site previously patented to the judge of the county court of the original county, the judge of the county court of the new county is the proper person to execute the trust and convey to the beneficiaries. Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355 [*followed* in Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101].

Superior court as successor of county court. — Under Cal. Const. art. 6, §§ 5, 6, making the superior courts the successors to the county courts, and clothing the judges of the superior courts with the powers formerly exercised by the county judges, where land was patented to the county judge under the town-site act, to be held in trust for the use and benefit of the inhabitants of a town, the superior court judge who succeeds him is the proper person to convey the land. Smith *v.* Hill, 89 Cal. 122, 26 Pac. 644.

61. See, generally, TRUSTS.

62. Wheeler *v.* Wade, 1 Colo. App. 66, 27 Pac. 719 (holding that where a town site is entered by and patented to a county judge the legal title and the execution of the trust vests in him and his successors in office, although the town is incorporated between the time of the entry and the issuance of the patent); Allen *v.* Houston, 21 Kan. 194 (holding that commissioners to divide a town site among the several occupants thereof, in pursuance of the Kansas statute, can be appointed by the probate judge only in cases where he himself entered the town site and not where it was entered by the corporate authorities).

63. *Arizona.*— Clark *v.* Titus, 2 Ariz. 147, 11 Pac. 312.

Colorado.— Pueblo *v.* Budd, 19 Colo. 579, 36 Pac. 599; Cofield *v.* McClellan, 1 Colo. 370.

Kansas.— Winfield Town Co. *v.* Maris, 11 Kan. 128.

Montana.— Helena *v.* Albertose, 8 Mont. 499, 20 Pac. 817; Hall *v.* Ashby, 2 Mont. 489.

Nebraska.— Tecumseh Town Site Case, 3 Nebr. 267.

Oklahoma.— Brown *v.* Parker, 2 Okla. 258, 39 Pac. 567.

See 41 Cent. Dig. tit. "Public Lands," § 88.

64. *In re* Selby, 6 Mich. 193; Brown *v.* Parker, 2 Okla. 258, 39 Pac. 567. See also Ricks *v.* Reed, 19 Cal. 551.

65. Pueblo *v.* Budd, 19 Colo. 579, 36 Pac. 599; *In re* Selby, 6 Mich. 193; Ashby *v.* Hall, 119 U. S. 526, 7 S. Ct. 308, 30 L. ed. 469.

nature of a conveyance,[66] and the disposition of the land not occupied for town purposes by individuals,[67] and of the proceeds of sales; [68] but it cannot change or alter the conditions of the trust,[69] substitute one *cestui que trust* for another,[70] or in any way diminish the rights of occupants.[71] The trustee has no authority except such as is conferred upon him in express terms,[72] and in performing his trust must strictly comply with the requirements of the statute,[73] and cannot give any rights, or change or take away the rights of occupants.[74] The corporation may maintain its bill to correct an abuse of the trust affecting the common interest of all the beneficiaries,[75] but cannot interfere between individual applicants.[76] The trust continues until the whole town site is finally disposed of.[77]

h. Surveys and Plats. The only authority of a surveyor employed to plat and lay out the lands in a town site is to plat the town in conformity with the lots and blocks,[78] and a survey or plat not coinciding with the rights of occupants is void.[79] Commissioners appointed by a probate judge to survey and plat town sites, set apart the lots to occupants, and assess the expenses against the several lots cannot collect the costs of such proceedings, or require a deposit from applicants.[80]

i. Dedication or Designation of Land For Streets or Other Public Uses. A part of a town site in the actual possession of an occupant, and covered with his improvements, cannot be cut off and included in a street;[81] but the selection of a lot in a projected town site in Oklahoma, in accordance with a plat agreed upon by a portion of the occupants at or near the date of the opening to settlement, did not vest such an unconditional title in the selector as would prevail against the right of the city to the use and occupation of the lot as a public street under a subsequent survey, made or approved pursuant to the statute by trustees appointed to make town-site entries for the several use and benefit of the occupants, the selector not being an occupant thereof when the trustees made entry of the land, nor when the conveyance to them was made by the government.[82] So also one who has no title to real estate claimed by a city as a street under a deed made by the probate judge under the Town-Site Act cannot by mere occupancy and use acquire the right

66. Pueblo *v.* Budd, 19 Colo. 579, 36 Pac. 599; Ashby *v.* Hall, 119 U. S. 526, 7 S. Ct. 308, 30 L. ed. 469.

A territorial statute requiring the payment by the "claimant" to the trustee of a fixed purchase-price before he is entitled to a deed applies to actual occupants, and not only to those who merely claim the right to possession, and an occupant, to be entitled to his deed, must be a claimant, file his statement, and pay to the trustee the purchase-price. Robertson *v.* Martin, 8 Ariz. 422, 76 Pac. 614.

67. *In re* Selby, 6 Mich. 193.

68. Newhouse *v.* Simond, 3 Wash. 648, 29 Pac. 263; Ashby *v.* Hall, 119 U. S. 526, 7 S. Ct. 308, 30 L. ed. 469.

69. Clark *v.* Titus, (Ariz. 1886) 11 Pac. 312; Winfield Town Co. *v.* Maris, 11 Kan. 128; *In re* Selby, 6 Mich. 193; Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

70. Pueblo *v.* Budd, 19 Colo. 579, 36 Pac. 599; Helena *v.* Albertose, 8 Mont. 499, 20 Pac. 817.

71. Pueblo *v.* Budd, 19 Colo. 579, 36 Pac. 599; Winfield Town Co. *v.* Maris, 11 Kan. 128; Helena *v.* Albertose, 8 Mont. 499, 20 Pac. 817; Ashby *v.* Hall, 119 U. S. 526, 7 S. Ct. 308, 30 L. ed. 469.

72. Hall *v.* Ashby, 2 Mont. 489.

73. Hall *v.* Ashby, 2 Mont. 489; Edward *v.* Tracy, 2 Mont. 49; Ming *v.* Truett, 1 Mont. 322.

74. Parchen *v.* Ashby, 5 Mont. 68, 1 Pac. 204.

75. Aspen *v.* Rucker, 10 Colo. 184, 15 Pac. 791; Georgetown *v.* Glaze, 3 Colo. 230.

76. Georgetown *v.* Glaze, 3 Colo. 230.

77. Aspen *v.* Rucker, 10 Colo. 184, 15 Pac. 791.

78. Scully *v.* Squier, 13 Ida. 417, 90 Pac. 573.

79. Scully *v.* Squier, 13 Ida. 417, 90 Pac. 573; Parchen *v.* Ashby, 5 Mont. 68, 1 Pac. 204.

The approval of the county commissioners under statutory authority cannot give any validity to such survey or plat. Parchen *v.* Ashby, 5 Mont. 68, 1 Pac. 204.

80. Brown *v.* Parker, 2 Okla. 258, 39 Pac. 567.

81. Pueblo *v.* Budd, 19 Colo. 579, 36 Pac. 599 [*explaining* Denver *v.* Clements, 3 Colo. 472]; Scully *v.* Squier, 13 Ida. 417, 90 Pac. 573; Helena *v.* Albertose, 8 Mont. 499, 20 Pac. 817. See also People *v.* Jones, 6 Mich. 176.

82. Oklahoma City *v.* McMaster, 196 U. S. 529, 25 S. Ct. 324, 49 L. ed. 587 [*reversing* 12 Okla. 570, 73 Pac. 1012], decided under Act May 14, 1890, c. 207 (26 U. S. St. at L. 109 [U. S. Comp. St. (1901) p. 1463].

to question whether all the conditions precedent to the execution of such conveyance had been complied with by the city.[83] Where the governing officers of a town site made and adopted a survey and plat of a town site, on which were designated streets, lots, alleys, and blocks, and the same was generally accepted by the inhabitants, and thereafter the act of congress relating to the entry of town sites in Oklahoma[84] was passed, and the secretary of the interior under that act appointed town-site trustees, and adopted the survey and plat formerly made, and conveyance was made of the lots according to the plat, this constituted a dedication of the lands designated on the plat as streets, so as to divest the rights therein of one claiming as occupant, leaving the occupant no remedy against the city or the trustees.[85] After the township plat has been accepted and filed according to law the trustee has no authority to establish an alley or street.[86] Under the provision of the Town-Site Act which allows a city to acquire undisposed of lots for public use as sites for public buildings, the city acquires no right to the use and occupancy of the lots until the secretary of the interior has directed that the lots be reserved for such purpose for the city, or has executed a proper conveyance, or directed it to be executed by the town-site trustees, to the city for such purpose;[87] and a trustee to whom lands are patented under the town-site law has no power to dedicate any of such lands to public use.[88]

j. Persons Entitled to Benefit of Entry — (i) *In General.* The beneficiaries of the trust created by the town-site laws are those who at the time the entry is made are the occupants of the land,[89] or entitled to the occupancy thereof,[90] according to their respective interests.[91] Any occupant capable of acquiring title to real estate may be a beneficiary under the town-site law;[92] but it was the intention of congress to dispose of lots in town sites to those only who would possess and use them,[93] and to give the benefit of the entry to *bona fide*, and not to mere temporary, occupants,[94] nor to persons claiming the land for purely speculative purposes;[95]

83. Laughlin *v.* Denver, 24 Colo. 255, 50 Pac. 917, holding that it must be presumed that the judge did his duty in ascertaining whether there had been compliance with such conditions before executing the deed.

84. 26 U. S. St. at L. 109, c. 207 [U. S. Comp. St. (1901) p. 1463].

85. Guthrie *v.* Beamer, 3 Okla. 652, 41 Pac. 647.

86. Globe *v.* Slack, (Ariz. 1908) 95 Pac. 126; Hall *v.* Ashby, 2 Mont. 489; McCloskey *v.* Pacific Coast Co., 160 Fed. 794, 87 C. C. A. 568.

The legislature may authorize the trustee of such town sites to divide unoccupied land within the town sites into lots and blocks and dispose of them for the public benefit, and to that end establish streets and alleys to such unoccupied land. Globe *v.* Slack, (Ariz. 1908) 95 Pac. 126.

87. Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242.

88. Buffalo *v.* Harling, 50 Minn. 551, 52 N. W. 931; McCloskey *v.* Pacific Coast Co., 160 Fed. 794, 87 C. C. A. 568.

89. *Arizona.*— Globe *v.* Slack, (1908) 95 Pac. 126.

California.— Neil *v.* McNear, 57 Cal. 424.

Colorado.— Pascoe *v.* Green, 18 Colo. 326, 32 Pac. 824; Tucker *v.* McCoy, 8 Colo. 368, 8 Pac. 667; Adams *v.* Binkley, 4 Colo. 247; Webber *v.* Petty, 2 Colo. App. 63, 29 Pac. 1016.

Kansas.— Rathbone *v.* Sterling, 25 Kan. 444; Sherry *v.* Sampson, 11 Kan. 611.

Minnesota.— Morris *v.* Watson, 15 Minn. 212; Carson *v.* Smith, 12 Minn. 546; Leech *v.* Rauch, 3 Minn. 448.

South Dakota.— Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

United States.— Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421; Cofield *v.* McClelland, 16 Wall. 331, 21 L. ed. 339 [*affirming* 1 Colo. 370].

See 41 Cent. Dig. tit. "Public Lands," § 92.

90. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421; Cofield *v.* McClelland, 16 Wall. (U. S.) 331, 21 L. ed. 339 [*affirming* 1 Colo. 370]. See also Black *v.* Galindo, 40 Cal. 171.

91. Sherry *v.* Sampson, 11 Kan. 611.

92. Blue Earth County *v.* St. Paul, etc., R. Co., 28 Minn. 503, 11 N. W. 73.

93. Sawyer *v.* Van Hook, 1 Alaska 108.

94. Ricks *v.* Reed, 19 Cal. 551, holding that state legislation requiring the claimant of the title to town-site lands to show that he was one of the original occupants or locators of the town, or derives his title from such an occupant or locator, is valid.

95. Clark *v.* Titus, (Ariz. 1886) 11 Pac. 312; Lechler *v.* Chapin, 12 Nev. 65.

A deed conveying two thousand one hundred out of two thousand three hundred lots of a town site to a company, as tenants in common, is evidently for purposes of speculation, and a breach of the trust, and is invalid. Clark *v.* Titus, (Ariz. 1886) 11 Pac. 312.

and such lots can be claimed and held only by one in the actual use, occupation, or possession thereof,[96] which may be evidenced by stakes, fencing, buildings, residence, and improvements showing the fact.[97] A county or municipal corporation, capable of holding and acquiring real estate, if in the actual occupancy of any part of a town site at the time of the entry is capable of becoming a beneficiary under the town-site law;[98] and when a town-site company settles upon and occupies land it is entitled to have a trust established and declared in its favor.[99] Indian natives of Alaska, although living in villages, are not entitled to become the owners of town lots in any towns located under the act of congress.[1]

(II) *Character and Sufficiency of Occupancy.* The occupancy may be for residence,[2] or business,[3] or other use;[4] but the residence, business, or use must be by the claimant,[5] as no one is allowed to take up lots by his agent.[6] The occupancy must consist in actual residence on the land claimed,[7] or an inclosure,[8] or some permanent improvement thereon;[9] and must be of a character which evidences an intention to use the land for residence or business purposes,[10] and not to hold it for speculation merely.[11] The possession or occupancy must be actual,[12] open,[13] apparent,[14] notorious,[15] unequivocal,[16] uninterrupted,[17] exclusive,[18] right-

96. *Alaska.*— Price *v.* Brockway, 1 Alaska 233.

Arizona.— Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818.

Colorado.—Aspen *v.* Aspen Town, etc., Co., 10 Colo. 191, 15 Pac. 794, 16 Pac. 160; Aspen *v.* Rucker, 10 Colo. 184, 15 Pac. 791; Adams *v.* Binkley, 4 Colo. 247.

Kansas.— Winfield Town Co. *v.* Maris, 11 Kan. 128.

Montana.— Schnepel *v.* Mellen, 3 Mont. 118.

Nevada.— Lechler *v.* Chapin, 12 Nev. 65.

Utah.— Holland *v.* Buchanan, 19 Utah 11, 56 Pac. 561.

See 41 Cent. Dig. tit. "Public Lands," § 92.

One who lays out a town site into lots, blocks, streets, and alleys acquires no rights thereby. Price *v.* Brockway, 1 Alaska 233.

Circumstances not amounting to occupancy. — Where a claimant for a tract of land within a town site camped on the ground two nights while passing on a journey, and also two nights on his return, at which time he set stakes at its corners, without any other mark of settlement or occupancy, and later next spring he occupied a tent on the tract for a short time with dozens of other persons, but made no other settlement or occupancy, these were not such acts of occupancy and use as enabled him to acquire a preference right by possession against one who first built a dwelling-house on the lot, and continuously and in good faith occupied the ground thereafter. Osgood *v.* Donnelly, 1 Alaska 385.

97. Price *v.* Brockway, 1 Alaska 233.

98. Blue Earth County *v.* St. Paul, etc., R. Co., 28 Minn. 503, 11 N. W. 73. See also Jones *v.* Petaluma, 38 Cal. 397 [*followed* in Alemany *v.* Petaluma, 38 Cal. 553].

99. Mankato *v.* Meagher, 17 Minn. 265.

1. Johnson *v.* Pacific Coast Steamship Co., 2 Alaska 224, decided under the act of March 3, 1891 (26 U. S. St. at L. 1099 [U. S. Comp. St. (1901) p. 1467]).

2. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Cain *v.* Young, 1 Utah 361.

3. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Cain *v.* Young, 1 Utah 361.

4. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Cain *v.* Young, 1 Utah 361.

5. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Cain *v.* Young, 1 Utah 361.

6. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Cain *v.* Young, 1 Utah 361.

Under the act of congress of May 23, 1844 (5 U. S. St. at L. 657), settlements might be otherwise than in person, and there need be no cultivation of the soil; and lands might be held by a person residing without the state, if he kept a representative fairly on the land, by improvement, tenant, or agent. Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539; Leech *v.* Rauch, 3 Minn. 448.

7. Thompson *v.* Holbrook, 1 Ida. 609, according to the legal subdivision of the town into lots, blocks, acres, or fractions thereof.

8. Thompson *v.* Holbrook, 1 Ida. 609.

9. Thompson *v.* Holbrook, 1 Ida. 609.

10. Pascoe *v.* Green, 18 Colo. 326, 32 Pac. 824.

The partial building of a rough board shanty on one of several lots, which building remained unfinished and uninhabitable, and the placing of posts around a portion of the lot, is not such a *bona fide* occupancy as will entitle one to a conveyance of lots under the Town-Site Act. Pascoe *v.* Green, 18 Colo. 326, 32 Pac. 824.

11. Pascoe *v.* Green, 18 Colo. 326, 32 Pac. 824; Lechler *v.* Chapin, 12 Nev. 65.

12. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Schnepel *v.* Mellen, 3 Mont. 118; Cain *v.* Young, 1 Utah 361; Pratt *v.* Young, 1 Utah 347; Hussey *v.* Smith, 1 Utah 129 [*reversed* on other grounds in 99 U. S. 20, 25 L. ed. 314].

13. Schnepel *v.* Mellen, 3 Mont. 118.

14. Schnepel *v.* Mellen, 3 Mont. 118.

15. Schnepel *v.* Mellen, 3 Mont. 118.

16. Schnepel *v.* Mellen, 3 Mont. 118.

17. Schnepel *v.* Mellen, 3 Mont. 118.

18. Schnepel *v.* Mellen, 3 Mont. 118.

ful,[19] and in good faith.[20] It must be such an occupation and possession as openly asserts the right and dominion of the claimant over the property as against each and every other person,[21] and carries with it the evidence of ownership,[22] and a mere temporary and partial occupation by a trespasser gives him no rights in the land.[23] One who has never been in the actual possession of land cannot be an occupant thereof within the town-site law;[24] and while in order to protect his rights the claimant need not maintain an actual occupancy,[25] he must in some form retain control of the property to the exclusion of any adverse entry.[26]

(III) *Residence of Occupant.* While it has been said that the town-site law is intended for the benefit and protection of actual citizens or residents of the town,[27] it is well established that one who uses a lot and occupies it in good faith with buildings or other improvements or property, which show his intention to possess and claim it under the town-site law, can acquire title thereto, although he may not reside on such lot,[28] or even in the town,[29] and has never resided in the town.[30]

(IV) *Extent of Occupancy.* The occupation of one legal subdivision does not draw to it another subdivision, although adjoining or contiguous thereto.[31]

(V) *Time of Occupancy.* The trust closes upon the entry of the town site,[32] and the rights of persons as beneficiaries thereunder must be determined as of that date;[33] and so the rights of an occupant under the law cannot be acquired by settling upon town-site land after the entry thereof,[34] or after the submission of the proofs on which the entry is allowed,[35] nor does one who previously occupied the land but had ceased to occupy it before the entry acquire any rights under the entry.[36]

(VI) *Notice of Intention to Claim Property.* The improvements of a

19. Pratt *v.* Young, 1 Utah 347.

20. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Pratt *v.* Young, 1 Utah 347.

21. Schnepel *v.* Mellen, 3 Mont. 118.

22. Schnepel *v.* Mellen, 3 Mont. 118.

23. Schnepel *v.* Mellen, 3 Mont. 118.

24. Pratt *v.* Young, 1 Utah 347; Hussey *v.* Smith, 1 Utah 129 [*reversed* on other grounds in 99 U. S. 20, 25 L. ed. 314].

Attempts to gain possession.— Where settlers have staked town lots, and have attempted to take peaceable possession of them, and have been prevented by force, by one claiming the rightful possession thereof, from occupying or making any improvements thereon, such an attempt to stake and take possession of such lots is equivalent to the erection of improvements, as against him who prevented by force the staking of the lots and the improvement thereof, and will be regarded as such, as against any one attempting to set up a claim by, through, or under him who exercised the force, if such attempts at occupancy are not abandoned. Jackson *v.* Thornton, 8 Okla. 331, 58 Pac. 951 [*following* Downman *v.* Saunders, 3 Okla. 227, 41 Pac. 104].

25. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421.

26. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421.

27. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Lechler *v.* Chapin, 12 Nev. 65.

28. *Alaska.*—Sawyer *v.* Van Hook, 1 Alaska 108.

Kansas.— Greiner *v.* Fulton, 46 Kan. 405, 26 Pac. 705.

Minnesota.— Leech *v.* Rauch, 3 Minn. 448.

Oklahoma.— Downman *v.* Saunders, 3 Okla. 227, 41 Pac. 104; Hagar *v.* Wikoff, 2 Okla. 580, 39 Pac. 281.

United States.— Hussey *v.* Smith, 99 U. S. 20, 25 L. ed. 314; Stringfellow *v.* Cain, 98 U. S. 610, 25 L. ed. 421.

See 41 Cent. Dig. tit. "Public Lands," § 92.

29. Downman *v.* Saunders, 3 Okla. 227, 41 Pac. 104; Hagar *v.* Wikoff, 2 Okla. 580, 39 Pac. 281; Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421; Hussey *v.* Smith, 99 U. S. 20, 25 L. ed. 314.

30. Hagar *v.* Wikoff, 2 Okla. 580, 39 Pac. 281.

31. Thompson *v.* Holbrook, 1 Ida. 609.

32. Pascoe *v.* Green, 18 Colo. 326, 32 Pac. 324; Adams *v.* Binkley, 4 Colo. 247; Clayton *v.* Spencer, 2 Colo. 378; Cook *v.* Rice, 2 Colo. 131.

33. Globe *v.* Slack, (Ariz. 1908) 95 Pac. 126; Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Pascoe *v.* Green, 18 Colo. 326, 32 Pac. 824; Lockwitz *v.* Larson, 16 Utah 275, 52 Pac. 279.

34. Leech *v.* Rauch, 3 Minn. 448; Lockwitz *v.* Larson, 16 Utah 275, 52 Pac. 279. See also Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921. But *compare* Lechler *v.* Chapin, 12 Nev. 65.

35. Castner *v.* Gunther, 6 Minn. 119.

36. Lockwitz *v.* Larson, 16 Utah 295, 52 Pac. 279; West *v.* Child, 8 Utah 223, 30 Pac. 755; Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421.

settler upon a town lot, by which he gains possession, are in themselves equivalent to an announcement of his intention to claim and hold the property under the law,[37] and a notice of such intention, filed in the recorder's office, adds nothing to his rights.[38]

(VII) *SALE* [39] *OR LEASE* [40] *BY OCCUPANT.* The occupant has such an equitable interest in the premises as he can sell and convey,[41] and the purchaser acquires such an interest as entitles him to a conveyance under the trust.[42] So also one having a *bona fide* occupancy can afterward lease the land and still retain his right thereto.[43] But a contract of sale or lease which conflicts with the statutory requirement that the title shall be made to an inhabitant who is an occupant and has an interest will not be recognized in deciding to whom the government title shall go.[44]

(VIII) *DEATH OF CLAIMANT.* The possessory right of the occupant of town-site lots, subject to entry under acts of congress, has the status of real estate,[45] and, upon the death of the occupant, descends according to the rules established by the statutes of the state,[46] and if the heirs maintain such possession they are entitled to the land when the town site is entered.[47] *A fortiori* the equitable title of the occupant of land in a town site which has been entered descends to his heirs.[48]

(IX) *ABANDONMENT OF OCCUPANCY AFTER ENTRY.*[49] Even after the entry an occupant may lose his rights by abandonment of the property at any time before he becomes entitled to a deed.[50]

37. Sawyer *v.* Van Hook, 1 Alaska 108.

38. Sawyer *v.* Van Hook, 1 Alaska 108.

39. See, generally, as to sales by occupants of and entrymen on public lands, *infra*, II, P.

Sales generally see VENDOR AND PURCHASER.

40. Leases generally see LANDLORD AND TENANT, 24 Cyc. 845.

41. *Arizona.*— Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818.

Minnesota.— See Mankato *v.* Meagher, 17 Minn. 265; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539; Davis *v.* Murphy, 3 Minn. 119.

Oklahoma.— Hagar *v.* Wikoff, 2 Okla. 580, 39 Pac. 281.

Utah.— Clawson *v.* Wallace, 16 Utah 300, 52 Pac. 9; Cain *v.* Young, 1 Utah 361.

United States.— Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421; Hussey *v.* Smith, 99 U. S. 20, 25 L. ed. 314 [*reversing* 1 Utah 129].

See 41 Cent. Dig. tit. "Public Lands," § 355.

Recording conveyance.— The inchoate interests of occupants in town-site lots are within the recording acts, and conveyances of such interests duly recorded are notice to subsequent purchasers. Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539; Davis *v.* Murphy, 3 Minn. 119.

42. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421; Hussey *v.* Smith, 99 U. S. 20, 25 L. ed. 314 [*reversing* 1 Utah 129]. But *compare* Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355.

43. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Hagar *v.* Wikoff, 2 Okla. 580, 39 Pac. 281; Cain *v.* Young, 1 Utah 361. See also Tucker *v.* McCoy, 8 Colo. 368, 8 Pac. 667.

44. Singer Mfg. Co. *v.* Tillman, 3 Ariz. 122, 21 Pac. 818; Cain *v.* Young, 1 Utah 361.

45. Filmore *v.* Reithman, 6 Colo. 120.

46. Filmore *v.* Reithman, 6 Colo. 120; Coy *v.* Coy, 15 Minn. 119; West *v.* Child, 8 Utah 223, 30 Pac. 755; Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421.

The administrator of a decedent is his "legal representative" within the meaning of the act of congress of Feb. 2, 1829, granting the right to purchase town lots to occupants and their legal representatives. Morehouse *v.* Phelps, 21 How. (U. S.) 294, 16 L. ed. 140 [*reversing* 18 Ill. 472].

47. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421.

48. Eversdon *v.* Mayhew, 65 Cal. 163, 3 Pac. 641.

49. **Abandonment before entry** see *supra*, II, C, 12, j, (V).

Abandonment or relinquishment of claims to public land generally see *infra*, II, C, 14.

50. Boise City *v.* Flanagan, 6 Ida. 149, 53 Pac. 453; Young *v.* Tiner, 4 Ida. 269, 38 Pac. 697 [*following* Thompson *v.* Holbrook, 1 Ida. 609], holding the occupant's rights are lost where, after inclosing the land, he leaves the state or territory and gives the land no attention for a number of years.

Compulsory vacation.— A town-lot claimant, who vacates a lot in obedience to an award made by a board of arbitration created under one of the provisional governments for the cities of Oklahoma in 1889, cannot be held by such action to have voluntarily abandoned his claim to the lot. Cook *v.* McCord, 9 Okla. 200, 60 Pac. 497.

Admissibility of evidence to rebut claim of abandonment.— In an action to compel the trustees to convey certain town lots evidence that plaintiff complied with a regular notification, directed to him as owner and occupant of the lots in controversy, to grade the street on which they fronted, is pertinent and material in rebuttal of a claim that he had abandoned them and was not

(x) *Amount of Land Which May Be Acquired by Individuals.* If the occupancy embraces more than one lot, block, etc., the occupant is entitled to a deed for the whole,[51] except that perhaps, where a street intervenes between blocks, lots, etc., the claim cannot go over or beyond it.[52]

k. Rights of Occupants. Prior to the entry of a town site, all the interest which an occupant has in the land which he occupies is an inchoate right to the benefit of the town-site law in case the property shall be purchased from the United States by the corporate authorities or the county judge under the provisions of that law,[53] and he holds the position of one seeking to acquire a title by a possession adverse to all the other inhabitants of the town.[54] But simultaneously with the entry each occupant takes a vested equitable interest in the lot which he occupies,[55] which cannot legally be divested except by his neglect or failure to avail himself of the privileges secured by the law or by a voluntary relinquishment.[56] A *bona fide* occupant of a portion of a town site has a right of possession,[57] and is entitled to be protected in such right.[58] His interest extends to his actual and beneficial holdings at the time of the entry,[59] and cannot be limited by a plat, filed with a survey of the prospective town, dividing it into lots, blocks, streets, and alleys.[60]

l. Statement of Claim by Occupant. The state statutes sometimes require an occupant claiming a town-site lot to file a written statement of his claim,[61] describing the land,[62] and setting forth all the facts necessary to entitle the applicant to a deed;[63] but such a requirement does not apply to a claim of an easement on adjoining land,[64] or to a claim by a village for lands dedicated for streets, etc.[65] Where a town-site statement, required by statute to be signed by the occupant, or his agent or attorney in fact, is signed by an attorney in fact in his own name, without disclosing his principal, it may be amended to conform to the real facts, if no adverse claims are thereby prejudiced.[66] It is entirely proper for the state or territorial legislature, in regulating the execution of the trust in town-site lots, to

entitled to them. Bliss *v.* Ellsworth, 36 Cal. 310.

51. Thompson *v.* Holbrook, 1 Ida. 609.

Persons occupying a reasonable quantity of public land in Alaska for manufacturing, business, houses, or for a wharf may obtain title to such land, and are not necessarily restricted to a single lot, the size of which may be fixed by an arbitrary rule of the trustee. Johnson *v.* Pacific Coast Steamship Co., 2 Alaska 224.

52. Thompson *v.* Holbrook, 1 Ida. 609.

53. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421.

54. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421.

55. *Arkansas.*— Jones *v.* Eureka Imp. Co., 53 Ark. 191, 13 S. W. 1094.

California.— Eversdon *v.* Mayhew, 65 Cal. 163, 3 Pac. 641.

Colorado.— Pueblo *v.* Budd, 19 Colo. 579, 36 Pac. 599.

Idaho.— Scully *v.* Squier, 13 Ida. 417, 90 Pac. 573.

Kansas.— Rathbone *v.* Sterling, 25 Kan. 444; Winfield Town Co. *v.* Maris, 11 Kan. 128.

Minnesota.— Leech *v.* Rauck, 3 Minn. 448.

South Dakota.— Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

United States.— Hussy *v.* Smith, 99 U. S. 20, 25 L. ed. 314 [*reversing* 1 Utah 129].

See 41 Cent. Dig. tit. "Public Lands," §§ 87, 92.

Rights of occupants become fixed at time of application to enter.— Mankato *v.* Meagher, 17 Minn. 265.

Where the entry is delayed by appeal or otherwise the rights of occupants are fixed at the date on which the proofs on which the entry is allowed are submitted. Castner *v.* Gunther, 6 Minn. 119.

56. Jones *v.* Petaluma, 38 Cal. 397 [*followed* in Alemany *v.* Petaluma, 38 Cal. 553].

The mayor and surveyor have no authority to change the beneficiaries under the trust. Scully *v.* Squier, 13 Ida. 417, 90 Pac. 57.

57. Greiner *v.* Fulton, 46 Kan. 405, 26 Pac. 705.

58. Greiner *v.* Fulton, 46 Kan. 405, 26 Pac. 705.

59. Bingham *v.* Walla Walla, 3 Wash. Terr. 68, 13 Pac. 408.

60. Bingham *v.* Walla Walla, 3 Wash. Terr. 68, 13 Pac. 408.

61. See Robertson *v.* Martin, 8 Ariz. 422, 76 Pac. 614; Young *v.* Tiner, 4 Ida. 269, 38 Pac. 697; Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208; Clark *v.* Kirby, 18 Utah 258, 55 Pac. 372.

62. See Clark *v.* Kirby, 18 Utah 258, 55 Pac. 372.

63. Greathouse *v.* Heed, 1 Ida. 482.

64. Clawson *v.* Wallace, 16 Utah 300, 52 Pac. 9.

65. Mankato *v.* Willard, 13 Minn. 13, 97 Am. Dec. 208.

66. Clark *v.* Kirby, 18 Utah 258, 55 Pac. 372.

fix a period within which the claim of a beneficiary must be asserted, in order to prevent its becoming barred,[67] and a claimant who fails to file his statement within the time so limited is barred of the right to the land.[68]

m. Payment of Price. A town-site occupant must pay the price for the land before he becomes entitled to a deed.[69]

n. Adverse Claims. In case two or more persons claim the same lot under the town-site law, the person having the prior claim by settlement and occupancy is authorized to acquire the title;[70] and an actual occupant and owner of improvements on a lot in the city, at the date of the entry of the town site, is entitled thereto as against one who derives title from the town-site company, and not by possession or occupation.[71] Under some statutes the town-site trustees are empowered to pass upon claims to lands within the town site,[72] and such statutes sometimes

67. Cofield *v.* McClelland, 1 Colo. 370 [*affirmed* in 16 Wall. (U. S.) 331, 21 L. ed. 339].

68. Cofield *v.* McClelland, 16 Wall. (U. S.) 331, 336, 21 L. ed. 339 [*affirming* 1 Colo. 370, and *followed* in Tucker *v.* McCoy, 3 Colo. 284; Territory *v.* Deegan, 3 Mont. 82; Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121; Drake *v.* Reggel, 10 Utah 376, 37 Pac. 583; Rogers *v.* Thompson, 9 Utah 46, 33 Pac. 234], where it is said: "Appellant, by omitting to sign and deliver the statement required by section four of the Territorial statute, became barred of the right to the lands, both in law and equity." But *compare* Pueblo *v.* Budd, 19 Colo. 579, 36 Pac. 599 [*distinguishing* Cofield *v.* McClelland, 1 Colo. 370 (*affirmed* in 16 Wall. (U. S.) 331, 21 L. ed. 339), and *approving* Treadway *v.* Wilder, 8 Nev. 91], holding that a statute requiring claimants under the town-site law to file their statements within a specified time, and providing that if they fail to do so they shall be forever barred of the right of claiming or recovering such lands, or any estate or interest therein, in any court of law or equity, bars the remedy only and does not work a forfeiture of the vested right of the occupant in the land so long as he remains in possession of or exercises exclusive dominion over the same, and that the occupant's failure to acquire the legal title does not in any manner affect the rights of others, or his own right to protect and defend his right of possession.

Statute not declaring forfeiture.— Where the state statute requires the occupant of a town lot to file his statement of claim within a specified time after the publication of notice of the town-site entry, but declares no forfeiture for failure to do so, a lot not claimed within the time prescribed becomes subject to claim by a third person or may be sold, but in the absence of intervening rights the occupant may subsequently file his claim. Schnepel *v.* Mellen, 3 Mont. 118.

Infant heirs.— Minnesota territorial act of March 3, 1855, requiring claimants of town-site lots to sign and deliver to the town-site trustee a statement of the nature and extent of their claims within sixty days after publication of notice of entry by the trustee, did not apply to the infant heirs of such claimant so as to bar a recovery by them in case of default by them in making such statement. Coy *v.* Coy, 15 Minn. 119. But *compare* Rogers *v.* Thompson, 9 Utah 46, 33 Pac. 234.

69. Young *v.* Tiner, 4 Ida. 269, 38 Pac. 697.

70. Sawyer *v.* Van Hook, 1 Alaska 108; Webber *v.* Petty, 2 Colo. App. 63, 29 Pac. 1016, holding that where plaintiff had gone into possession of a lot, erected a log cabin — the only improvement ever made thereon — and on one or two occasions had temporary actual possession, and thereafter defendant's grantor, knowing of plaintiff's claim to the property and ownership of the cabin, took possession, and repaired the cabin, and used it as a stable, and while said grantor was in possession he made no claim to the property, when plaintiff told him that he wanted to sell it, as between the two, plaintiff had the superior right to the lot, the fact of abandonment by him not being established.

Wrongful ouster.— One who was in actual occupancy of a town-site lot, but was wrongfully ousted by an intruder before the entry, should receive the legal title, notwithstanding the wrongful occupancy of the intruder at the time of entry. Pratt *v.* Young, 1 Utah 347.

One who forcibly enters the possession of another on a government town site, and ejects him therefrom, and prevents him from making further improvements by force and intimidation, cannot defeat the prior settler's acquisition of title because of the meagerness of the improvements made by such settler. Downman *v.* Saunders, 3 Okla. 227, 41 Pac. 104.

71. Clayton *v.* Spencer, 2 Colo. 378.

72. See the statutes of the various states.

In an action brought under the Minnesota statute (act March 3, 1855) prescribing rules and regulations for the execution of the trust arising under the town-site act to determine adverse claims, the supreme court must, on the request of either party, pass upon all questions of fact as well as of law, and make final disposition of the case, except in the single instance where the questions of fact have been passed upon by a jury, when a new trial in the court below may be awarded. Castner *v.* Gunther, 6 Minn. 119.

Validity of statute.— A statute providing that, where two or more persons claim adversely the title to any lot or lots within the boundaries of a town, the corporate authorities or probate judge shall transmit the mat-

empower the town-site trustees to pass upon such claims,[73] and provide for a review in the courts of the decision of the trustees on contested claims.[74] In an action brought to determine conflicting claims to lands entered as a town site, an answer which merely denies plaintiff's right is bad, as facts showing defendant's right to be superior to that of plaintiff should be set out,[75] and a defendant who does not show any title himself cannot, by a mere denial, compel plaintiff to establish his own title.[76] In Oklahoma the town-site trustees are required to pass upon controverted questions of fact between adverse claimants to lots,[77] and for errors of judgment on the weight of evidence, the only remedy is by an appeal to their superiors in the land department,[78] and the courts will not interfere to determine the title to town-

ter to the superior court of the county in which the lot or lots are situated, and that, on the final determination of the contest, the clerk of the court shall certify the decision to the corporate authorities or probate judge, who on the receipt thereof shall execute and deliver to the successful party or parties a conveyance in fee simple for the lot or lots awarded, is unwarranted by the act of congress, and therefore void, because under such act, where plaintiff fails to establish title, and judgment is rendered for defendant, the lot in question must be conveyed to him as the "successful party," although he may have shown no title to it. Newhouse *v.* Simino, 3 Wash. 648, 29 Pac. 263 [*followed* in Kellogg *v.* Sessions, 4 Wash. 814, 30 Pac. 82, 674; Ruud *v.* Jensen, 3 Wash. 785, 29 Pac. 265].

73. See Wilson *v.* Chicago Lumber, etc., Co., 143 Fed. 705, 74 C. C. A. 529 [*reversing* 129 Fed. 636].

Quasi-judicial capacity of trustee.— Where the statute regulating the execution of the trust charges the probate judge with certain duties which involve the hearing and consideration of testimony concerning the rights of claimants to lots, and passing upon its competency, credibility, and weight, and which also involve judicial trials before him in certain instances, wherein he is required to enter judgments from which appeals may be prosecuted, the trust position of the probate judge in these matters is quasi-judicial in its character. Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515 [*overruling* Ming *v.* Truett, 1 Mont. 322 (*approved* in Hall *v.* Ashby, 2 Mont. 489), and *distinguishing* Helena *v.* Albertose, 8 Mont. 499, 20 Pac. 817; Schnepel *v.* Mellen, 3 Mont. 118; Edwards *v.* Tracy, 3 Mont. 49]. See also Anderson *v.* Bartels, 7 Colo. 256, 3 Pac. 225.

Where lands have been conveyed by a probate judge of the county, his successor in office has no title to the lands so conveyed, and therefore no power to proceed in a summary manner to hear and determine controversies affecting the title to such lands. Cook *v.* Rice, 2 Colo. 131, decided under Rev. St. p. 622.

Effect of decision.— Where a probate judge, in whom title to a town site is vested by law in trust for the benefit of the several occupants of the land, is authorized by statute to determine summarily, on a petition filed before him, the right of any occupant to land claimed by him and to execute a conveyance therefor, his decision to be final and conclusive, unless a rehearing is obtained, the validity and effect of a decision and conveyance made by him thereunder are not affected by the fact that the extent or boundaries of the tract conveyed are not the same as those claimed in the petition, whether the quantity be more or less. Wilson *v.* Chicago Lumber, etc., Co., 143 Fed. 705, 74 C. C. A. 529 [*reversing* 129 Fed. 636].

74. See Ricks *v.* Reed, 19 Cal. 551.

Nature of jurisdiction.— The jurisdiction vested in the county court by the California act of Jan. 24, 1860, amending the act of 1856 regulating the mode of settling claims to lots in town sites on public lands in Humboldt county, was not strictly appellate, but original; the use of the word "appeal" in the act did not make the jurisdiction appellate, but meant merely that if a claimant was dissatisfied with the decision of the trustees, he might have his right investigated and determined in an action against the successful claimant in the county court, where the whole matter was to be investigated anew without regard to the proceedings before the trustees. Ricks *v.* Reed, 19 Cal. 551.

75. Weisberger *v.* Tenny, 8 Minn. 456.

76. Cathcart *v.* Peck, 11 Minn. 45.

77. King *v.* Thompson, 3 Okla. 644, 39 Pac. 466.

Deposit by contestant.— A rule of the secretary of the interior requiring a contestant before town-site trustees appointed under the act relating to town sites in Oklahoma, to deposit thirty-two dollars with the treasurer of the board before a cause will be heard, is reasonable, and a contestant failing to comply therewith cannot invoke the aid of a court of equity. Twine *v.* Carey, 2 Okla. 249, 37 Pac. 1096 [*followed* in Matthews *v.* Young, 3 Okla. 649, 41 Pac. 432; Shultz *v.* Jones, 3 Okla. 504, 41 Pac. 400; Baldwin *v.* Mason, 3 Okla. 237, 41 Pac. 388]. And the contestant's inability, because of poverty, to make the deposit, is not a sufficient excuse for his failure to comply with the rule. Matthews *v.* Young, 3 Okla. 649, 41 Pac. 432; Baldwin *v.* Mason, 3 Okla. 237, 41 Pac. 388.

78. King *v.* Thompson, 3 Okla. 644, 39 Pac. 466; McDaid *v.* Oklahoma Terr., 150 U. S. 209, 14 S. Ct. 59, 37 L. ed. 1055 [*reversing* 1 Okla. 92, 30 Pac. 438, and *recognized* in Herbien *v.* Warren, 2 Okla. 4, 35 Pac. 575], holding that under the special act relating to town sites in Oklahoma (26 U. S. St. at L. 109 [U. S. Comp. St. (1901) p. 1463]) the issuance of a patent to the town-site trustees appointed by the secretary of the interior is not a final disposition of the

site lands until adverse claims have been finally settled by the land department,[79] or exercise any jurisdiction over such questions unless it is made clearly manifest that some fraud or imposition was practised, which occasioned a conclusion different from what it would otherwise have been.[80] In order to authorize a court to interfere with the final action of the town-site trustees on the ground of misapplication of the law by such trustees the petition must specifically set out the findings of fact made by the trustees in order that the court may determine whether or not the law was properly applied to the facts found.[81] Under the statute providing for the disposition of town-site lots in Alaska,[82] and the rules of the department of the interior established pursuant thereto the town-site trustee is charged with the duty of determining which of several claimants to a lot or lots was in rightful possession,[83] and the decision of the trustees is final, in the absence of fraud, accident, or mistake, with reference to all questions of fact arising in such proceeding except as the same may be reversed by the commissioner of the general land office or the secretary of the interior.[84]

o. Conveyances[85] by Trustees — (i) *Deeds to Occupants.* Town-site trustees do not hold an indefeasible title as of private right with power to dispose of the land at will, but only as trustees for such occupants as shall be ascertained to be entitled to particular lots within the town-site boundary;[86] and it is their duty to make deeds for the land to the respective occupants.[87] In conveying town-site

government's title and control, but is a conveyance in trust, to be carried out by the trustees under the control of the secretary, and, although the act devolves upon the trustees the duty of determining adverse claims to lots, the secretary has power to provide for appeals therefrom to the commissioner of the general land office, and finally to himself, and the pendency of such an appeal deprives the trustees of power to make conveyances of the lots in controversy.

Findings of trustees conclusive unless on appeal to proper departmental officers.— King *v.* Thompson, 3 Okla. 644, 39 Pac. 466; Myers *v.* Berry, 3 Okla. 612, 41 Pac. 580.

79. Herbien *v.* Warren, 2 Okla. 4, 35 Pac. 575, holding that a complaint to set aside an award of town-site trustees which does not allege such final settlement fails to state a cause of action. See, generally, *infra*, II, L, 16, a.

Laches of claimant.— Where a claimant of a town-site lot failed, through his own laches, to assert any claim to the lot before the town-site trustees, he is estopped from seeking relief in a court of equity. Bassett *v.* Mitchell, 3 Okla. 177, 41 Pac. 601.

80. Cummings *v.* McDermid, 4 Okla. 272, 44 Pac. 276; King *v.* Thompson, 3 Okla. 644, 39 Pac. 466; Myers *v.* Berry, 3 Okla. 612, 41 Pac. 580. But *compare* Downman *v.* Saunders, 3 Okla. 227, 41 Pac. 104.

Sufficiency of allegations of fraud.— In order to give the courts jurisdiction to go behind the findings of fact made in a lot contest instituted before a board of town-site trustees and render a decree adverse to the award made in such contest, on the ground of fraud, it is necessary that the complaint should allege the facts constituting the fraud with such fulness and particularity as to show to the court that the action of the officers whose duty it was to determine the controversy must necessarily have been affected thereby to the defeat of the complainant in the contest, and that the fraud which caused the defeat of the complainant was extrinsic or collateral to the matter tried, and not a fraud which was in issue in the contest; and mere general allegations that defendant, through false and fraudulent representations and false testimony, procured the deed to the lot, are not sufficient. Cummings *v.* McDermid, 4 Okla. 272, 44 Pac. 276.

81. Myers *v.* Berry, 3 Okla. 612, 41 Pac. 580 [*followed* in Cummings *v.* McDermid, 4 Okla. 272, 44 Pac. 276].

82. 26 U. S. St. at L. 1099, c. 561, § 11 [U. S. Comp. St. (1901) p. 1467].

83. Lewis *v.* Johnson, 1 Alaska 529; Miller *v.* Margerie, 149 Fed. 694, 79 C. C. A. 382.

84. Miller *v.* Margerie, 149 Fed. 694, 79 C. C. A. 382.

85. See, generally, Deeds, 13 Cyc. 505.

Patents see *infra*, II, M.

86. Martin *v.* Hoff, 7 Ariz. 247, 64 Pac. 445; Edwards *v.* Tracy, 2 Mont. 49; Bockfinger *v.* Foster, 190 U. S. 116, 23 S. Ct. 836, 47 L. ed. 975 [*affirming* 10 Okla. 488, 62 Pac. 799].

Certificate of title to person not an occupant.— A certificate of title to town-site land, executed by the county judge to one who never occupied the land certified to him and who never had any right to occupy it, conveys no title. Biddick *v.* Kobler, 110 Cal. 191, 42 Pac. 578; Roberts *v.* Warde, 3 Cal. App. 101, 84 Pac. 430.

87. Lewis *v.* Johnson, 1 Alaska 529; Sherry *v.* Sampson, 11 Kan. 611; Burbank *v.* Ellis, 7 Nebr. 156.

The deed should be made to the person entitled thereto when it is made, and not to the person who was entitled to the land when the act of congress authorizing the town-site entry was passed. Hall *v.* Doran, 6 Iowa 433.

lands to individuals, the trustees act in the execution of a power;[88] but the omission to recite in the deed the authority under which the conveyance is made does not invalidate it.[89] As soon as the land is entered, the trustee may proceed to execute the trust by giving deeds to the beneficiaries,[90] although the patent from the United States has not yet been issued,[91] and the patent when issued relates back to the date of the entry,[92] so that no further deed from the trustees is necessary to vest title in such beneficiaries.[93] But it must appear that the trustee had already entered the land when he executed the deed,[94] and a recital of that fact in the deed itself is not evidence as against a stranger.[95]

(II) *Disposal of Unoccupied Lands.* The trustees have no authority to sell any portion of the town site until so authorized by the state or territorial legislature,[96] and the disposal of lots which are unoccupied or undisposed of must be governed by the state or territorial statute.[97] Any profit accruing from the sale of unoccupied lots must inure to the benefit of the inhabitants of the town.[98] Town-site trustees have no power to execute a deed conveying undisposed of lots to the city for public use while applications of individuals for deeds to such lots by virtue of occupancy are pending.[99] A purchaser from the trustee, who relies in part upon the original settlement of an occupant, who has platted such town site, and dedicated a portion thereof to public use, takes subject to such dedication, where the plat and survey are also recognized by the trustee's deed.[1]

(III) *Conveyances of Streets or Alleys.* The trustee of a town site has no authority to issue a deed conveying any part of a street or alley;[2] but he may execute a deed to the claimant of a lot which has been improperly described as an alley by his predecessor in office.[3]

(IV) *By Whom Deeds Executed.* Where a patent from the government names the president of the board of trustees of an incorporated town as the grantee of land in trust for the use and benefit of occupants, the president may convey the land.[4] Where the title to a town site is vested by government patent in the county judge and his successors in trust for the several occupants thereof, a deed for a lot executed by a commissioner appointed by the corporate authorities of the town for that purpose is of no effect.[5]

88. Burbank *v.* Ellis, 7 Nebr. 156.

A recital in the trustee's deed that it is made in consideration of the power vested in the grantor by the act which prescribed the procedure for executing it shows that it was intended as an execution of the trust. Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355.

89. Burbank *v.* Ellis, 7 Nebr. 156. See also Green *v.* Barker, 47 Nebr. 934, 66 N. W. 1032.

90. Taylor *v.* Winona, etc., R. Co., 45 Minn. 66, 47 N. W. 453.

91. Taylor *v.* Winona, etc., R. Co., 45 Minn. 66, 47 N. W. 453.

92. Taylor *v.* Winona, etc., R. Co., 45 Minn. 66, 47 N. W. 453.

Relation back of patents generally see *infra*, II, M, 9, d.

93. Taylor *v.* Winona, etc., R. Co., 45 Minn. 66, 47 N. W. 453.

94. Taylor *v.* Winona, etc., R. Co., 45 Minn. 66, 47 N. W. 453.

95. Taylor *v.* Winona, etc., R. Co., 45 Minn. 66, 47 N. W. 453.

96. Denver *v.* Kent, 1 Colo. 336.

97. *Arizona.*— Martin *v.* Hoff, 7 Ariz. 247, 64 Pac. 445.

California.—Amador County *v.* Gilbert, 133 Cal. 51, 65 Pac. 130.

Colorado.— Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921.

Minnesota.— Remillard *v.* Blackmarr, 49 Minn. 490, 52 N. W. 133.

Montana.— State *v.* Webster, 28 Mont. 104, 72 Pac. 295.

See 41 Cent. Dig. tit. "Public Lands," § 88.

Sale by trustees in any manner other than that prescribed by statute void.— Denver *v.* Kent, 1 Colo. 336.

98. Clark *v.* Titus, 2 Ariz. 147, 11 Pac. 312.

99. Oklahoma City *v.* Hill, 6 Okla. 114, 50 Pac. 242, holding that such a deed was void when executed pending an appeal from a decision of the town-site trustees adverse to the applicants.

1. Winona *v.* Huff, 11 Minn. 119.

2. State *v.* Webster, 28 Mont. 104, 72 Pac. 295; Hershfield *v.* Rocky Mountain Bell Tel. Co., 12 Mont. 102, 29 Pac. 883; Parchen *v.* Ashby, 5 Mont. 68, 1 Pac. 204.

3. Hall *v.* Ashby, 2 Mont. 489.

4. Thomas *v.* Wilcox, 18 S. D. 625, 101 N. W. 1072, holding that his deed is admissible in evidence without showing that the corporate authorities either joined in or authorized its execution.

5. Rice *v.* Goodwin, 2 Colo. App. 267, 30 Pac. 330 [*following* Aspen *v.* Aspen Town,

(v) *Formal Requisites of Deeds.* A special act providing that upon the compliance with certain requirements the mayor of the town shall make the occupant a deed "under the seal of the corporation" controls a general law requiring deeds to be attested by two witnesses, and a deed attested by the corporate seal, without witnesses is sufficient.[6]

(vi) *Validity and Effect of Deeds.* Where a town-site trustee has made a deed for any portion of the land, it will be presumed, in the absence of any showing to the contrary, that he did his duty in all respects,[7] that all statutory requirements were complied with,[8] and that the property was conveyed to the proper person.[9] The person really entitled to the land is not, however, deprived of his rights by a deed of the trustee conveying the land to a person not entitled thereto;[10] but may show, in an action by the grantee against him, that at the time of the execution of the deed he, and not the grantee, was in possession and entitled to the occupancy of the land.[11] Where a judge who had entered a town site conveyed the same to the occupants jointly, instead of to the incorporated town-site company composed of such occupants, and they treated it as common property belonging to the company, such individuals were the full legal and equitable owners as against persons having no rights acquired through the company.[12] Where a husband deeded land which was subject to the land laws of the United States to his wife for her life, and after her decease to become the property of her son, but the wife afterward filed her declaratory statement to said land, under a town-site statute, providing that claimants of any interest in such land should file such statement, or be forever barred from any interest therein, and she was adjudged to be the original owner thereof, and a deed thereto in fee simple was executed to her by the mayor of the city, she did not hold the property in trust for her son.[13] It has been held that a town-site occupant, who receives a deed from the trustee takes the legal title

etc., Co., 10 Colo. 191, 15 Pac. 794, 16 Pac. 160; Webber *v.* Petty, 2 Colo. App. 63, 29 Pac. 1016; Wheeler *v.* Wade, 1 Colo. App. 66, 27 Pac. 719].

6. Townsend *v.* Little, 109 U. S. 504, 3 S. Ct. 357, 27 L. ed. 1012.

7. Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Taylor *v.* Winona, etc., R. Co., 45 Minn. 66, 47 N. W. 453.

8. *Colorado.*— Chever *v.* Horner, 11 Colo. 68, 17 Pac. 495, 7 Am. St. Rep. 217.

Minnesota.— Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Taylor *v.* Winona, etc., R. Co., 45 Minn. 66, 47 N. W. 453.

Montana.— Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515.

Nebraska.— Green *v.* Barker, 47 Nebr. 934, 66 N. W. 1032.

South Dakota.— Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

Wisconsin.— Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355.

See 41 Cent. Dig. tit. "Public Lands," § 96.

Presumption not conclusive.— Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

9. Marysville Inv. Co. *v.* Munson, 44 Kan. 491, 24 Pac. 977 (holding that, although Pub. Laws (1858), c. 72, § 2, provided that, where the persons who were entitled to the town site had been incorporated as a town company, the person entering the town site should convey to the company, where such persons had been incorporated, but the probate judge conveyed to them as individuals, it would be presumed that they, and not the town company, were entitled to such conveyances); Sherry *v.* Sampson, 11 Kan. 611; Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Taylor *v.* Winona, etc., R. Co., 45 Minn. 66, 47 N. W. 453; Morris *v.* Watson, 15 Minn. 212.

The trustee is estopped to deny this fact.— Morris *v.* Watson, 15 Minn. 212.

Conveyance to person not an occupant.— Where one in whose name a town site is preëmpted, for the benefit of the occupants, thereafter makes a deed for a town lot to a person who was not an occupant, but who might lawfully receive a deed, and there is nothing to show the purpose or consideration of the deed, or that it was not made with the assent and pursuant to the direction of all the occupants, such deed cannot be held void and of no effect, as not made in conformity to the duty of the trustee and preëmptor. Setter *v.* Alvey, 15 Kan. 157.

10. Biddick *v.* Kobler, 110 Cal. 191, 42 Pac. 578; Guffin *v.* Linney, 26 Kan. 717; Rathbone *v.* Sterling, 25 Kan. 444; Chisolm *v.* Weisse, 2 Okla. 611, 39 Pac. 467.

11. Biddick *v.* Kobler, 110 Cal. 191, 42 Pac. 578.

12. Marysville Inv. Co. *v.* Holle, 58 Kan. 773, 51 Pac. 281 [*reversing* 5 Kan. App. 408, 49 Pac. 332].

13. Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121, so holding, on the ground that the statute contained no provision saving the rights of persons under disability.

to land occupied for streets adjoining his lots, subject to the public easement, the same as in ordinary cases of conveyances of land adjoining a highway.[14] The fact that the consideration named in the face of the deed is less than the legal one is not material, as the statement of the consideration is not conclusive.[15]

(VII) *CONSTRUCTION OF DEEDS.* A deed granting the land as described, "not interfering with the plan of the streets and alleys adopted in the town plat," does not reserve land which would be included within the lines of streets as extended where the lines are not extended even on the plat.[16]

p. Attack on Deeds and Actions For Equitable Relief. As the trustee's deed evidences his determination of the existence of the facts warranting a conveyance,[17] and that the person to whom the deed runs is the one entitled to receive it,[18] such deed is not subject to collateral attack,[19] and a person who has no interest in the land will not be allowed to raise any question as to the validity or regularity of the deed.[20] The title of the grantee in a deed from the town-site trustee may be impeached by proof that he had not done acts necessary to constitute occupancy and entitle him to a deed.[21] If a deed has been executed by a trustee to one not entitled to it, the remedy of the person injured is a direct proceeding to set the deed aside,[22] or to hold the grantee as a trustee [23] and compel a conveyance to the person entitled to the land,[24] or for other equitable relief consistent with the facts and circumstances of the particular case.[25] The petition or complaint should show the interest of plaintiff,[26] and state facts sufficient to call for the interference of a court of equity.[27] A petition against town-site trustee

14. Harrington *v.* St. Paul, etc., Co., 17 Minn. 215.

15. Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515.

16. Mills *v.* Hobson, 10 Colo. 78, 13 Pac. 927.

17. Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515; Green *v.* Barker, 47 Nebr. 934, 66 N. W. 1032.

18. Green *v.* Barker, 47 Nebr. 934, 66 N. W. 1032.

19. Chever *v.* Horner, 11 Colo. 68, 17 Pac. 495, 7 Am. St. Rep. 217; Anderson *v.* Bartels, 7 Colo. 256, 3 Pac. 225; Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515; Green *v.* Barker, 47 Nebr. 934, 66 N. W. 1032; Tucker *v.* Chicago, etc., R. Co., 91 Wis. 576, 65 N. W. 515.

20. Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921; Cook *v.* Rice, 2 Colo. 131; Marysville Inv. Co. *v.* Munson, 44 Kan. 491, 24 Pac. 977; Jackson *v.* Winfield Town Co., 23 Kan. 542; Sherry *v.* Sampson, 11 Kan. 611; Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Taylor *v.* Winona, etc., R. Co., 45 Minn. 66, 47 N. W. 453; Tucker *v.* Chicago, etc., R. Co., 91 Wis. 576, 65 N. W. 515.

21. Mankato *v.* Meagher, 17 Minn. 265.

22. Anderson *v.* Bartels, 7 Colo. 256, 3 Pac. 225; Cathcart *v.* Peck, 11 Minn. 45; Tucker *v.* Chicago, etc., R. Co., 91 Wis. 576, 65 N. W. 515.

Setting aside patents see *infra*, II, O, 2, b.

23. Leak *v.* Joslin, (Okla. 1908) 94 Pac. 518.

Equitable relief where patent issued to wrong person see *infra*, II, O, 2, c.

24. Cathcart *v.* Peck, 11 Minn. 45.

Action may be maintained without tendering proportion of expense of entering land.— Cathcart *v.* Peck, 11 Minn. 45.

25. Anderson *v.* Bartels, 7 Colo. 256, 3 Pac. 225.

Protection of settler's rights, although conveyance cannot be enforced.— The rights of a settler in a town which has availed itself of the Town-Site Act, as against the town, should be protected by a court of equity on the ground of the trust relation existing between the parties, although, under the local legislation, as it stands, a conveyance of the legal title cannot be enforced. Bingham *v.* Walla Walla, 3 Wash. Terr. 68, 13 Pac. 408.

26. Cathcart *v.* Peck, 11 Minn. 45, holding that in an action by a claimant, under the town-site law to compel a conveyance to him, a complaint alleging that at the time of the making of the survey and plat and the record thereof plaintiff was the occupant of certain land, occupying and improving the same as a town site; that at the date of application to enter said lands, and at the entry and purchase thereof, he was the sole and exclusive occupant of the lots, blocks, etc., enumerated in his statement in writing addressed to the town council, occupying and improving the same for the purpose of erecting and building a town thereon, and that defendant never occupied any portion thereof, sufficiently shows acts of improvement and occupancy by plaintiff.

27. Brown *v.* Parker, 2 Okla. 258, 39 Pac. 567 (holding that a petition which shows that plaintiff is qualified to enter public lands; that he has occupied and improved a town lot from the day it was subject to settlement to the date of suit; that he duly filed his application for a deed; that he was the only occupant of the lot; that he tendered all fees and assessments; and that the commissioners refused to hear his claim because he refused to deposit twenty-five dollars with them as security for costs; and

to declare them trustees for the benefit of plaintiff, which discloses that the trustees at the commencement of the suit had not conveyed the title by deed, but still retained the same, fails to state a cause of action for a resulting trust.[28] The act of congress abolishing town-site trustees in Oklahoma and conferring on the commissioner of the general land office the execution of so much of the trust vested in such boards as was unexecuted simply charged the commissioner of the general land office with the execution and completion of the trust formerly conferred on the town-site boards; and hence the commissioner could not be sued as trustee of such lands for the benefit of another, in any case where formerly the town-site trustees could not be sued.[29]

q. Recovery of Expense of Town-Site Entry. One who defrays the expenses of entering a town site has no cause of action for the recovery of such money directly against the occupants of the town site, but can only collect for such expenses under the provisions of the state law applicable to such case.[30]

13. Effect of Receipts, Certificates, Etc. A receipt from the proper officer of the United States, showing the payment of the purchase-price of lands, is evidence of title,[31] sufficient, when uncontrolled by other evidence, to sustain an action of ejectment by, or defeat such an action against, the holder,[32] or to enable him to maintain trespass to try title.[33] It has been held that the certificate of

that the lot was wrongfully deeded to another; and offers to reimburse defendant for all assessments and costs paid by him — presents a case for equitable interference); Linck *v.* Salt Lake City, 6 Utah 109, 21 Pac. 459 (holding that a complaint alleging that defendant city claimed certain unoccupied land in a town site as its private property; that its custom had been to sell arbitrarily parcels thereof without regard to occupancy, right, or price; that portions had been sold to friends of members of the city council, or to persons whom they desired to favor, the city refusing to sell to others on like terms; and that there was no uniform rule for such sales; that certain of such lands had never been occupied, appropriated, conveyed, or platted; and plaintiff took possession for the purpose of appropriating it under the town-site law, but defendant forcibly ejected him therefrom, and destroyed his property, states, as against a general demurrer, a proper case for the intervention of a court of equity); Miller *v.* Margerie, 149 Fed. 694, 79 C. C. A. 382.

28. Hammer *v.* Hermann, 11 Okla. 127, 65 Pac. 943.

29. Hammer *v.* Hermann, 11 Okla. 127, 65 Pac. 943, construing the Act of July 7, 1898, c. 571 (30 U. S. St. at L. 674 [U. S. Comp. St. p. 1466]).

30. Morgan *v.* Van Wyck, 5 Kan. App. 520, 48 Pac. 206, holding that a recovery could be had only under Gen. St. (1889) par. 7044, providing for the levy of a tax by the town-site commissioners for the payment of such expenses; and holding further that the probate judge had no power to levy such a tax.

31. *Colorado.*— Godding *v.* Deker, 3 Colo. App. 198, 32 Pac. 832, so holding that under Gen. St. § 1310, providing that the certificate of the register and receiver shall be deemed evidence of title to government land, and superior to all other evidence of title except a patent for the same tract, a person holding a receiver's receipt for the purchase-money of land has a marketable title thereto.

Indiana.— Doe *v.* Stephenson, 9 Ind. 144. But *compare* Mosier *v.* Smith, 3 Blackf. 132.

Louisiana.— Lott *v.* Prudhomme, 3 Rob. 293; Newport *v.* Cooper, 10 La. 155; Herriot *v.* Broussard, 4 Mart. N. S. 260.

Missouri.— See Wickersham *v.* Woodbeck, 57 Mo. 59.

Wisconsin.— Bigelow *v.* Blake, 18 Wis. 520.

See 41 Cent. Dig. tit. "Public Lands," § 104.

A land-office receipt is equivalent to a patent against all but the holder of an actual patent. Weeks *v.* White, 41 Kan. 569, 21 Pac. 600; Kinney *v.* Degman, 12 Nebr. 237, 11 N. W. 318.

Certificate not constituting evidence of title. — A certificate signed by the receiver of a United States land office, stating that from the books and records of said office it appears that on, etc., A B entered, purchased, and paid for at public sale certain specified lands, is not entitled to be received in evidence of title to the land therein mentioned. Bigelow *v.* Blake, 18 Wis. 520.

32. Bates *v.* Herron, 35 Ala. 117 [*citing* Long *v.* McDougald, 23 Ala. 413; Falkner *v.* Leith, 15 Ala. 9, 12 Ala. 170; Johnson *v.* McGehee, 1 Ala. 186; Rosser *v.* Bradford, 9 Port. (Ala.) 354; Goodlet *v.* Smithson, 5 Port. (Ala.) 245, 30 Am. Dec. 561; Birdwell *v.* Bowlinger, 5 Port. (Ala.) 86; Masters *v.* Eastis, 3 Port. (Ala.) 368; Bullock *v.* Wilson, 2 Port. (Ala.) 436]; Moore *v.* Coulter, 31 Ga. 278. See also Beaumont *v.* Covington, 6 Rob. (La.) 189.

33. Bullock *v.* Wilson, 2 Port. (Ala.) 436. See also Gill *v.* Taylor, 3 Port. (Ala.) 182.

A certificate of the first payment for lands sold by the United States under the credit system, it not appearing that the terms of the purchase have been complied with and final payment made, upon a failure to do which the lands become forfeited, is not sufficient to rebut the presumption of forfeiture,

a register of a land office of the purchase of a tract of land from the United States is of as high authority as a patent and the holder may recover possession of the land;[34] but it has also been asserted that while such a certificate is evidence of an equitable interest in the purchaser,[35] it is not always final evidence of title from the government, although courts generally consider it sufficient to support a petitory action.[36] A certificate by the register or receiver of a United States land office, showing a preëmption settlement and entry of public land, was evidence that the holder's preëmption right commenced at the date of settlement, and was consummated at the date of entry, stated therein;[37] and has been held to give a title good as against all the world but the United States.[38] But a person's possession under a certificate that he had filed proof of his preëmption right with the register and receiver was insufficient, without proof of a compliance with the act of congress, to sustain a possessory action against another in actual possession under a similar certificate of subsequent date.[39] A declaratory statement filed by one as an occupant of public land is not evidence of his peaceable possession;[40] but the receipt for the officer's fees for filing a declaratory statement made by a settler on government land, and a certificate of the filing, given by the register and receiver of the United States land office, are admissible in evidence in an action involving the possession of the land filed on to show the good faith and the character of the possession of claimant.[41]

14. Abandonment or Relinquishment of Claims to Public Land[42]— **a. In General.** A person occupying, settling upon, improving, or entering public land is not bound to do all further acts necessary to give him a right to a patent,[43] but his rights may be relinquished or abandoned.[44] A mere relinquishment of possession on the part of the occupant is not, however, necessarily an abandonment;[45] but to constitute an abandonment of the land there must be a voluntary,[46] and

and authorize the holder to maintain an action for trespass upon the land. Gill *v.* Taylor, 3 Port. (Ala.) 182.

34. Gallipot *v.* Manlove, 2 Ill. 156 [*followed* in Jackson *v.* Wilcox, 2 Ill. 344]. See also Brill *v.* Stiles, 35 Ill. 305, 85 Am. Dec. 364. A certificate of the receiver of a land office that a person had made full payment for a tract of land is evidence that such person has paid for the same and establishes in him a right to the possession as against one who shows no title. McDonald *v.* Edmonds, 44 Cal. 328 [*followed* in Witcher *v.* Conklin, 84 Cal. 499, 24 Pac. 302].

Form of certificate held sufficient see Witcher *v.* Conklin, 84 Cal. 499, 24 Pac. 302.

The absence of any record in the local land office showing payment does not overcome the evidence of such certificate. Witcher *v.* Conklin, 84 Cal. 499, 24 Pac. 302.

35. Kay *v.* Watson, 17 Ohio 27.

36. Guidry *v.* Woods, 19 La. 334, 36 Am. Dec. 677.

37. Winona, etc., R. Co. *v.* Randall, 29 Minn. 283, 13 N. W. 127. But *compare* Pickard *v.* Kelley, 52 Cal. 89.

38. Cox *v.* Easter, 1 Port. (Ala.) 130. See also Lewis *v.* Goguette, 3 Stew. & P. (Ala.) 184.

39. Courtney *v.* Perkins, 5 La. Ann. 216.

40. Brand *v.* Servoss, 11 Mont. 86, 27 Pac. 407.

41. Barnhart *v.* Ford, 41 Kan. 341, 21 Pac. 239.

42. Cancellation of entries see *infra*, II, L, 12.

43. Love *v.* Flahive, 206 U. S. 356, 27 S. Ct. 729, 51 L. ed. 1092, 205 U. S. 195, 27 S. Ct. 486, 51 L. ed. 768 [*affirming* 33 Mont. 348, 83 Pac. 882], so holding with respect to a homestead entryman.

44. *California.*— Gluckauf *v.* Reed, 22 Cal. 468.

Minnesota.— Foster *v.* Bailley, 1 Minn. 436.

Missouri.— Barada *v.* Blumenthal, 20 Mo. 162.

Oklahoma.— Moore *v.* Linn, 19 Okla. 279, 91 Pac. 910.

Oregon.— Huffman *v.* Smyth, 47 Oreg. 573, 84 Pac. 80, 114 Am. St. Rep. 938.

Washington.— Keane *v.* Brygger, 3 Wash. 338, 28 Pac. 655.

Wisconsin.— Sanborn *v.* Knight, 100 Wis. 216, 75 N. W. 1009.

United States.— Love *v.* Flahive, 206 U. S. 356, 27 S. Ct. 729, 51 L. ed. 1092, 205 U. S. 195, 27 S. Ct. 486, 51 L. ed. 768 [*affirming* 33 Mont. 348, 83 Pac. 882]; U. S. *v.* Ingram, 172 U. S. 327, 19 S. Ct. 177, 43 L. ed. 465; Amacker *v.* Northern Pac. R. Co., 58 Fed. 850, 7 C. C. A. 518.

See 41 Cent. Dig. tit. "Public Lands," § 100.

45. Huffman *v.* Smyth, 47 Oreg. 573, 84 Pac. 80, 114 Am. St. Rep. 938.

46. Huffman *v.* Smyth, 47 Oreg. 573, 84 Pac. 80, 114 Am. St. Rep. 938.

Where one becomes insane and wanders away his absence raises no presumption of an intention to abandon his possessory claims on the public lands. White *v.* Martin, 2 Alaska 495.

An absence caused by confinement in a penitentiary upon conviction of a crime does

actual [47] relinquishment of possession with an intention to abandon,[48] and without the intention of returning.[49] A sale by a homestead claimant before the issuance of a patent may be treated as a relinquishment and abandonment of his homestead entry,[50] and one who, while in possession of a tract of public land with intent to enter it as a homestead, makes a sale, which the land department treats as an abandonment of his right of entry, cannot, by merely continuing in possession, create a new right of entry as against the person in whose favor he has relinquished his right.[51] Where one claiming homestead rights in a tract of land acquiesces in a decision of the land department adverse to his claim, and thereafter files a new application to enter the same as a homestead on the ground that a prior entry thereof by another is invalid, he must be regarded as having abandoned his original claim, and cannot thereafter maintain a suit based thereon.[52]

b. Effect of Abandonment or Relinquishment. An abandonment or relinquishment divests all the right of the settler,[53] and restores land to the public domain,[54] and leaves it subject to disposition according to law,[55] and occupation or entry by another person,[56] although no formal cancellation is entered of record.[57] There can be no such thing as an abandonment in favor of a particular individual,[58] and so when, on the relinquishment of a homestead entry, the land is, and for some time past has been, in the possession of another, who is a *bona fide* settler, his rights as such immediately attach to the exclusion of a third person, who procures the relinquishment to be made, and who simultaneously with the relinquishment tenders an application for entry of the lands, and immediately enters thereon and makes improvements.[59] Where grantees of the United States relinquished their title as against persons having good preëmption rights prior to their purchase, they were estopped to set up their title only as against such settlers and not as against a mere possessor.[60]

not amount to an abandonment. Huffman *v.* Smyth, 47 Oreg. 573, 84 Pac. 80, 114 Am. St. Rep. 938.

47. Judson *v.* Malloy, 40 Cal. 299; Richardson *v.* McNulty, 24 Cal. 339.

48. Huffman *v.* Smyth, 47 Oreg. 573, 84 Pac. 80, 114 Am. St. Rep. 938.

Evidence.— The fact that a claimant of a lot of land applied for and obtained the benefit of the act for the relief of insolvent debtors, and that in his inventory he did not include the lot in question, coupled with the fact that he had previously removed from it the machinery of the mill which he had erected on it, and the occupation of which was his only possession of the lot, was evidence of abandonment entitled to great weight. Barada *v.* Blumenthal, 20 Mo. 162.

Final payment made by an applicant for a land warrant at the proper time and place, and to the proper officer, and in the expectation of receiving therefor his final certificate of entry, is conclusive evidence that he did not intend to abandon his entry. Slocum *v.* U. S., 35 Ct. Cl. 485.

49. Judson *v.* Malloy, 40 Cal. 299; Richardson *v.* McNulty, 24 Cal. 339.

Evidence sufficient to disprove abandonment see Kelley *v.* Wallace, 14 Minn. 236.

50. Love *v.* Flahive, 206 U. S. 356, 27 S. Ct. 729, 51 L. ed. 1092, 205 U. S. 195, 27 S. Ct. 486, 51 L. ed. 768 [*affirming* 33 Mont. 348, 83 Pac. 882].

51. Love *v.* Flahive, 206 U. S. 356, 27 S. Ct. 729, 51 L. ed. 1092, 205 U. S. 195, 27 S. Ct. 486, 51 L. ed. 768 [*affirming* 33 Mont. 348, 83 Pac. 882].

52. Edwards *v.* Begole, 121 Fed. 1, 57 C. C. A. 245.

53. Gluckauf *v.* Reed, 22 Cal. 468; Carroll *v.* Price, 81 Fed. 137.

Improvements.— When a preëmptor abandons his preëmption and leaves buildings or other permanent improvements thereon, he abandons such improvements and has no right to remove them. Hiatt *v.* Brooks, 17 Nebr. 33, 22 N. W. 73 [*followed* in Hill *v.* Pitt, 2 Nebr. (Unoff.) 151, 96 N. W. 339].

54. McCollum *v.* Edmonds, 109 Ala. 322, 19 So. 501; Donohue *v.* St. Paul, etc., R. Co., 101 Minn. 239, 112 N. W. 413; Keane *v.* Brygger, 3 Wash. 338, 28 Pac. 653 [*affirmed* in 160 U. S. 276, 16 S. Ct. 278, 40 L. ed. 426]; Sanborn *v.* Knight, 100 Wis. 216, 75 N. W. 1009; Moss *v.* Dowman, 88 Fed. 181, 31 C. C. A. 447 [*affirmed* in 176 U. S. 413, 20 S. Ct. 429, 44 L. ed. 526]; Carroll *v.* Price, 81 Fed. 137.

55. Donohue *v.* St. Paul, etc., R. Co., 101 Minn. 239, 112 N. W. 413; Moss *v.* Dowman, 88 Fed. 181, 31 C. C. A. 447 [*affirmed* in 176 U. S. 413, 20 S. Ct. 429, 44 L. ed. 526].

56. McCollum *v.* Edmonds, 109 Ala. 322, 19 So. 501; Gluckauf *v.* Reed, 22 Cal. 468; Carroll *v.* Price, 81 Fed. 137.

57. Keane *v.* Brygger, 3 Wash. 338, 28 Pac. 653 [*affirmed* in 160 U. S. 276, 16 S. Ct. 278, 40 L. ed. 426]; Sanborn *v.* Knight, 100 Wis. 216, 75 N. W. 1009.

58. Stephens *v.* Mansfield, 11 Cal. 363.

59. Moss *v.* Dowman, 88 Fed. 181, 31 C. C. A. 447 [*affirmed* in 176 U. S. 413, 20 S. Ct. 429, 44 L. ed. 526].

60. Gibson *v.* Hutchins, 12 La. Ann. 545, 68 Am. Dec. 772.

c. Resumption of Possession. Where an occupant of land, who has abandoned the same, resumes possession thereof before occupation or entry by another person, his possessory rights are restored.[61]

d. Recovery of Amount Paid For Entry.[62] One who voluntarily abandons or relinquishes his entry has no cause of action to recover the sum which he paid to initiate it.[63]

15. Curative or Confirmatory Statutes. Congress has from time to time passed various acts curing defects in entries or confirming rights claimed under defective entries or entries which have been improperly disallowed.[64]

D. Reservations[65] to United States — 1. Meaning of Term. The term "reservation," as used with relation to the public lands, means a withdrawal of a specified portion of the public domain from the administration of the land office and from disposal under the land laws, and the appropriation thereof, for the time being, to some particular use or purpose of the general government.[66]

2. Power to Make Reservations. A reservation of the public lands may be made by congress,[67] or by the treaty-making power; [68] in addition to which from an early period in the history of the government it has been the practice of the president to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.[69] The authority of the president in this respect is recognized in numerous acts of congress [70] and decisions of the courts,[71] independ-

61. Carroll *v.* Price, 81 Fed. 137.

62. **Right to reimbursement on cancellation of entry** see *infra*, II, C, 12, g.

63. U. S. *v.* Ingram, 172 U. S. 327, 19 S. Ct. 177, 43 L. ed. 465 [*distinguishing* Frost *v.* Wenie, 157 U. S. 46, 15 S. Ct. 532, 39 L. ed. 614); Tictin *v.* U. S., 36 Ct. Cl. 1.

Payment for excess over one hundred and sixty acres.—Where the subdivision entered as a homestead contains more than one hundred and sixty acres, the amount paid for the excess cannot be recovered as an erroneous payment. Tictin *v.* U. S., 36 Ct. Cl. 1.

64. See Woodstock Iron Co. *v.* Strickland, 121 Ala. 616, 25 So. 818 (construing Act Cong. June 15, 1880); Garner *v.* Willett, 18 Ill. 455 (construing Act Cong. July 2, 1836); McCord *v.* Hill, 111 Wis. 499, 84 N. W. 27, 85 N. W. 145, 87 N. W. 481 (construing Act Cong. June 3, 1896); Northern Pac. R. Co. *v.* Amacker, 175 U. S. 564, 20 S. Ct. 236, 44 L. ed. 274 [*affirming* 58 Fed. 850, 7 C. C. A. 518 (*reversing* 53 Fed. 48)] (construing Act Cong. April 21, 1876); Parsons *v.* Venzke, 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360 [*affirming* 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669] (construing Act Cong. March 3, 1891, 26 U. S. St. at L. 1098 [U. S. Comp. St. (1901) p. 1521]); Fee *v.* Brown, 162 U. S. 602, 16 S. Ct. 875, 40 L. ed. 1086 [*affirming* 17 Colo. 510, 30 Pac. 340] (construing Act Cong. June 8, 1872, c. 357, (17 U. S. St. at L. 340); Green *v.* Willhite, 160 Fed. 755 (construing Act Cong. Aug. 30, 1890, c. 837, 26 U. S. St. at L. 391 [U. S. Comp. St. (1901) p. 1570], as to the reservation of a right of way for ditches and canals in patents for land the entries on or claims to which were validated by the act); U. S. *v.* Hendy, 54 Fed. 447 (construing Act Cong. March 1, 1877, 19 U. S. St. at L. 267); St. Paul, etc., R. Co. *v.* Greenhalgh, 26 Fed. 563 [*affirmed* in 139 U. S. 19, 11 S. Ct. 395, 35 L. ed. 71] (construing Acts Cong. June 22, 1874, c. 400, 18 U. S. St. at L. 194 [U. S. Comp. St. (1901) p. 1593], and April 21, 1876, c. 72; 19 U. S. St. at L. 35 [U. S. Comp. St. (1901) p. 1593]).

65. **Indian reservations** see Indians, 22 Cyc. 124.

66. See Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808. And see also Jackson *v.* Wilcox, 2 Ill. 344.

67. U. S. *v.* Shannon, 151 Fed. 863; U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289. See also Doll *v.* Meador, 16 Cal. 295.

68. Spalding *v.* Chandler, 160 U. S. 394, 16 S. Ct. 360, 40 L. ed. 469; U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289.

69. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 381, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597, and *quoted* in Russian-American Packing Co. *v.* U. S., 39 Ct. Cl. 460, 483 (*affirmed* in 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314)]; U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289.

70. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 381, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597, and *quoted* in Russian-American Packing Co. *v.* U. S., 39 Ct. Cl. 460, 483 (*affirmed* in 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314)].

71. See Onderdonk *v.* San Francisco, 75 Cal. 534, 17 Pac. 678; Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450; Nevada Ditch Co. *v.* Bennett, 30 Oreg. 59, 45 Pac. 472, 60 Am. St. Rep. 777; Apis *v.* U. S., 88 Fed. 931; U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289.

The president may modify a reservation previously made by reducing or enlarging it. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863, holding that where a reservation by the president of a tract of public lands for military purposes was afterward modified and reduced and described more particularly by a subsequent order, its validity was not

ent of any act of congress expressly authorizing him to make such reservations.[73] and congress has, moreover, by express enactment conferred upon the president the power to make reservations of the public lands for certain purposes.[73]

3. How Reservation Effected. The president may effect a reservation of public land by proclamation,[74] or by executive order;[75] and as the president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties,[76] the act of the secretary of the navy in reserving a part of the public domain for naval purposes,[77] of the secretary of war in establishing a military reservation,[78] or of the secretary of the interior in setting apart public lands as a forest reservation,[79] is in legal effect the act of the president. No set form of words or phrases is necessary to effect a reservation;[80] but it is enough if there are sufficient words to indicate the purpose of the power that can act and to show that in the given case it intended to act.[81] A reservation for the future disposal of the United States is a reservation to the United States.[82] A tract of public land which is actually set apart by an order of the war department for military purposes, and government appropriations expended in fitting it for such use, and of which the military forces remain in possession until its abandonment by a formal notice posted by the military authorities is a military reservation.[83]

4. Lands Which May Be Reserved. Lands which have been granted to a state by act of congress cannot be subsequently reserved for the purposes of the general government,[84] and a provision in a statute creating a land district that the president shall have authority to set apart such portions of lands within the district as are necessary for public uses does not empower him to interfere with reservations existing by force of a treaty.[85] Lands formerly occupied by Indians, but from which the Indians have been removed, and which have been made by statute subject to sale and to homestead entry are a part of the public domain and, as such, subject to be set apart as forest reservations.[86] Where a qualified claimant

affected by the fact that the description in the original order was defective and indefinite.

72. Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450. But *compare* Jackson *v.* Wilcox, 2 Ill. 344, 354, where it is said: "We take it for granted that there can be neither a reservation nor appropriation of the public domain for any purpose whatever without the express authority of the law."

73. See Spalding *v.* Chandler, 160 U. S. 394, 16 S. Ct. 360, 40 L. ed. 469; U. S. *v.* Blendauer, 128 Fed. 910, 63 C. C. A. 636.

74. Russian-American Packing Co. *v.* U. S., 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314 [*affirming* 39 Ct Cl. 460]; Holmes *v.* U. S., 118 Fed. 995, 55 C. C. A. 489. See also Doll *v.* Meador, 16 Cal. 295; Jones *v.* Callvert, 32 Wash. 610, 73 Pac. 701.

75. Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450; U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289.

76. Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 513, 10 L. ed. 264 [*quoted* in Scott *v.* Carew, 196 U. S. 100, 110, 25 S. Ct. 193, 49 L. ed. 403 (*affirming* 121 Fed. 1021, 56 C. C. A. 684)].

77. Behrends *v.* Goldstein, 1 Alaska 518, holding that a portion of the public lands in Alaska set apart by order of the secretary of the navy, and used by that department for public purposes connected with the navy, constitutes a valid reservation by the executive.

78. Scott *v.* Carew, 196 U. S. 100, 25 S. Ct. 193, 49 L. ed. 403 [*affirming* 121 Fed. 1021, 56 C. C. A. 684]; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264. See also Stone *v.* U. S., 2 Wall. (U. S.) 525, 17 L. ed. 765.

79. U. S. *v.* Blendauer, 122 Fed. 703 [*reversed* on other grounds in 128 Fed. 910, 63 C. C. A. 636], holding that proclamation making such reservation need not be signed by the president, but, if made by the secretary of the interior, will be presumed to have been by direction of the president.

80. U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289.

81. U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289.

82. Hot Springs Cases, 92 U. S. 698, 23 L. ed. 690.

83. Gavigan *v.* Crary, 2 Alaska 370.

84. Sterling *v.* Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405, holding that a reservation for light-house purposes, made after the statutory grant, although before a patent issued, was of no legal validity.

School sections situated within the limits of a forest reservation created after such sections have been granted and surveyed are not a part of such reservation. Hibberd *v.* Slack, 84 Fed. 571 [*citing* Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264].

85. Spalding *v.* Chandler, 160 U. S. 394, 16 S. Ct. 360, 40 L. ed. 469.

86. U. S. *v.* Blendauer, 128 Fed. 910, 63 C. C. A. 636 [*reversing* 122 Fed. 703].

under the Oregon Donation Act [87] duly made a settlement upon the public domain, and filed a notification with the surveyor-general claiming the parcel of land described therein as a donation claim under the act, such land could not be thereafter set apart as a military reservation without obtaining the claimant's relinquishment thereof or making him due compensation therefor.[88] The title of the city of San Francisco to its lands was so far subject to the control of the Mexican government, previous to the conquest and cession of the country, and of the United States subsequently, that portions of the land within the limits claimed by the city could have been reserved by those governments, respectively, for public purposes at any time before the title had become vested in private persons by action of the city authorities.[89]

5. Validity of Reservations. The reasons which govern the president in making a reservation of public lands for military purposes cannot affect the validity of his action.[90] A military post established by the proper department of the government is none the less a valid reservation because when it was established it may have been within the contemplation of the authorities that a time would come when the necessity for the post would cease and it would be abandoned.[91] Where it does not appear that any reservation was ever made by the authority of the president, and it does appear that an alleged reservation, not appearing to have been for a fort, included more than two hundred acres, while the law applicable to such lands at that time limited the amount which might be reserved at one place for any purpose other than a "fort" to twenty acres, no reservation was in fact lawfully established.[92] An order of the secretary of war directing the commanding officers of the military stations "on the route to Oregon" to make a reserve of ten miles square around the same, and the act thereunder of the commanding officers stationed at a place in Oregon in causing a survey to be made of such a tract were not sufficient to constitute such tract a military reservation.[93]

6. Effect of Reservations — a. In General. Lands which are reserved are effectually segregated from the public domain,[94] and pass beyond the control of the general land office,[95] until in some lawful manner it reacquires jurisdiction over them.[96]

87. For provisions of Oregon Donation Act see *supra*, II, E, 7.

88. Kelly *v.* Dalles City, 19 Oreg. 299, 24 Pac. 449.

89. U. S. *v.* Carr, 25 Fed. Cas. No. 14,731, 3 Sawy. 477 [*affirmed* in 98 U. S. 433, 25 L. ed. 209].

90. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597], holding that a reservation is not invalidated because a modification thereof was made on a compromise of an opposing private claim.

91. Scott *v.* Carew, 196 U. S. 100, 25 S. Ct. 193, 49 L. ed. 403 [*affirming* 121 Fed. 1021, 56 C. C. A. 684].

92. U. S. *v.* McGraw, 12 Fed. 449, 8 Sawy. 156.

93. Kelly *v.* Dalles City, 19 Oreg. 299, 312, 24 Pac. 449, where it is said: "No authority was shown for locating any such reservation at that place."

94. Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450; Scott *v.* Carew, 196 U. S. 100, 25 S. Ct. 193, 49 L. ed. 403 [*affirming* 121 Fed. 1021, 56 C. C. A. 684]; Stone *v.* U. S., 2 Wall. (U. S.) 525, 17 L. ed. 765; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264.

A subsequent law or proclamation or sale will not be construed to embrace the land so reserved or to operate upon it, although no exception is made of it. Scott *v.* Carew, 196 U. S. 100, 25 S. Ct. 193, 49 L. ed. 403 [*affirming* 121 Fed. 1021, 56 C. C. A. 684]; Wilcox *v.* Jackson, 12 Pet. (U. S.) 498, 10 L. ed. 264.

95. Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450.

Any action taken in the land office with regard to such lands, whether resulting in the issuance of a patent therefor or in the certification thereof to a state, has no binding force or effect whatever, but is subject to attack whenever and wherever it is asserted as the basis of a title. Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450; Burfenning *v.* Chicago, etc., R. Co., 163 U. S. 321, 16 S. Ct. 1018, 41 L. ed. 175; Lake Superior Ship Canal R., etc., Co. *v.* Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183; Doolan *v.* Carr, 125 U. S. 618, 8 S. Ct. 1228, 31 L. ed. 844; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96; U. S. *v.* McGraw, 12 Fed. 449, 8 Sawy. 156. See also Stone *v.* U. S., 2 Wall. (U. S.) 525, 17 L. ed. 765. And see, generally, *infra*, II, M, 12.

96. Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450.

b. Rights of Settlers and Occupants. The claims of persons who have settled upon, occupied, and improved land afterward included in a reservation are considered worthy of protection and are usually respected;[97] but where the president, as authorized by law, issues a proclamation reserving certain lands, and warning all persons to depart therefrom, this terminates any rights previously acquired in such lands by a settler.[98]

7. Regulations Respecting Reservations. Lands reserved to the United States are the absolute property of the government,[99] and the government, acting through congress, has the right to control them,[1] or refuse the use of them to the public,[2] or, if it permits the public to use them, to prescribe the terms and conditions under which this privilege may be enjoyed,[3] and regulations in regard to such use adopted or authorized by congress cannot be interfered with by the courts on the ground that they are unreasonable and oppressive.[4]

8. Relinquishment of Lands Within Forest Reservations. Under the statute providing that an owner of land within a forest reserve may relinquish the tract to the government and select other vacant land in lieu thereof,[5] the legal title

97. See State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235, holding that the rights acquired by actual occupation and settlement of land subsequently set apart as a military reservation, recognized by Act Cong. July 5, 1884, c. 214, 23 U. S. St. at L. 103 [U. S. Comp. St. (1901) p. 1607], are the "lawful rights" which it is declared shall not be prejudiced in Act Cong. March 3, 1893, c. 200, 27 U. S. St. at L. 555, granting lands from an abandoned military reservation to the state as indemnity school lands, in lieu of other lands theretofore lost.

Exception of land on which "valid settlement" made.— One who has improved unsurveyed public land, and occupies the same, and makes it his home, with the intention of entering it under the land laws when it is surveyed, must be regarded as having made a valid settlement pursuant to law within the meaning of a proclamation setting aside certain lands, including those so occupied, as a forest reserve, but excepting from the reservation all lands "upon which any valid settlement has been made pursuant to law." Holmes *v.* U. S., 118 Fed. 995, 55 C. C. A. 489 [*reversing* 105 Fed. 41], holding that it was immaterial that the land had been withdrawn from entry as being within a railroad grant, and had never been formally restored to the public domain, where such withdrawal was in fact unauthorized, and holding further, although "not without some doubt," that under Act Jan. 13, 1881 (21 U. S. St. at L. 315 [U. S. Comp. St. (1901) p. 1594]), giving all persons who have settled and made valuable and permanent improvements upon any odd-numbered section of land within a railroad withdrawal, in good faith, and with the permission or license of the railroad company, and with expectation of purchasing one hundred and sixty acres of the same from the United States, if for any cause it shall be restored to the public domain, the right so given a settler is not defeated by the fact that after the withdrawal has been set aside the land is included within the boundaries of a forest reservation, created by proclamation of the president, before it has been surveyed so as to give the settler an opportunity to purchase.

Claims to land in Hot Springs reservation and determination thereof see Little Rock, etc., R. Co. *v.* Greer, 77 Ark. 387, 96 S. W. 129; Goode *v.* Gaines, 145 U. S. 141, 12 S. Ct. 839, 36 L. ed. 654; Rector *v.* Gibbon, 111 U. S. 276, 4 S. Ct. 605, 28 L. ed. 427 [*reversing* 9 Fed. 16]; Rector *v.* U. S., 92 U. S. 698, 23 L. ed. 690, 11 Ct. Cl. 238 [*affirming* 10 Ct. Cl. 289, 433].

Relinquishment of lands within forest reservations see *infra*, II, D, 8.

98. Russian-American Packing Co. *v.* U. S., 199 U. S. 570, 26 S. Ct. 157, 50 L. ed. 314 [*affirming* 39 Ct. Cl. 460].

99. Rector *v.* U. S., 92 U. S. 698, 23 L. ed. 690; Van Lear *v.* Eisele, 126 Fed. 823.

1. U. S. *v.* Shannon, 151 Fed. 863; Van Lear *v.* Eisele, 126 Fed. 823.

2. Van Lear *v.* Eisele, 126 Fed. 823.

3. Van Lear *v.* Eisele, 126 Fed. 823.

Congress may delegate the power to make regulations in regard to the use of reservations to the secretary of the interior (U. S. *v.* Shannon, 151 Fed. 863; Van Lear *v.* Eisele, 126 Fed. 823), but any exercise by him of such power must rest upon some statute delegating it either expressly or by necessary implication (Van Lear *v.* Eisele, 126 Fed. 823, holding certain regulations as to the use of water from the Arkansas Hot Springs to be not within the power conferred).

The land department has power to adopt rules and regulations for the administration of the Forest Reserve Act. Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 24 S. Ct. 860, 47 L. ed. 1064.

The policy of a state to permit live stock to run at large and graze on all open lands, or its laws enacted to carry such policy into effect, cannot affect the right of the general government to require stock owners to restrain their stock from grazing on the national forest reserves except under prescribed regulations. U. S. *v.* Shannon, 151 Fed. 863.

4. Van Lear *v.* Eisele, 126 Fed. 823.

5. Act Cong. June 4, 1897, c. 2 [30 U. S. St. at L. 36, U. S. Comp. St. (1901) p. 1541].

vests in the United States immediately upon the filing for record of the deed of relinquishment,[6] subject perhaps to be divested should the secretary of the interior disapprove of the abstract of title,[7] and the vesting of such title is not dependent upon the making and approval of the selection of lieu lands.[8] But the title to lands selected in lieu of relinquished lands does not vest until the selection is approved by the land department,[9] and such a selection is liable to be defeated by adverse claims antedating it,[10] or by the land selected proving to be mineral in character.[11]

9. Disposal of Reservations. Under an act of congress authorizing the secretary of war to cause certain military sites to be sold, the sale can be made through an agent specially appointed for that purpose acting under power of attorney,[12] and if, in selling land within the limits of, or near to, a municipal corporation, a subdivision of the tract into lots, blocks, and streets would be most beneficial to the government, it is the duty of the secretary of war to adopt that method.[13] An exchange of a military site for other land is valid as a sale.[14]

E. Direct Grants by Act of Congress[15]**— 1. Power to Make Direct Grants.** Although the ordinary legislation with respect to the public domain contemplates the retention by the United States of entire power over the land until a patent is issued,[16] the United States may by act of congress at once divest itself of all property in a portion of the public lands and transfer it to an individual or to a state without any patent;[17] and a patent subsequently issued for land so granted is merely documentary evidence of such title.[18]

2. Form of Grants. No particular form of words is necessary to make such a grant, but it is sufficient that the words used show an intention of congress that certain lands shall be separated from the mass of the public domain and set apart and appropriated to the grantee.[19]

6. Territory *v.* Perrin, 9 Ariz. 316, 83 Pac. 361.

7. Territory *v.* Perrin, 9 Ariz. 316, 83 Pac. 361.

8. Territory *v.* Perrin, 9 Ariz. 316, 83 Pac. 361 [*distinguishing* Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 24 S. Ct. 860, 47 L. ed. 1064].

9. Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 24 S. Ct. 860, 47 L. ed. 1064. See also Pacific Live Stock Co. *v.* Isaacs, (Okla. 1908) 96 Pac. 460.

10. Peters *v.* Van Horn, 37 Wash. 550, 79 Pac. 1110. And see *supra*, II, C, 2, b.

11. Peters *v.* Van Horn, 37 Wash. 550, 79 Pac. 1110. And see *supra*, II, C, 2, d.

12. State *v.* Illinois Cent. R. Co., 33 Fed. 730 [*affirmed* in 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018].

13. State *v.* Illinois Cent. R. Co., 33 Fed. 730 [*affirmed* in 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018].

14. Culliver *v.* Berge, 1 Rob. (La.) 427, so holding on the ground that an exchange is in effect but a double sale.

15. See also *infra*, II, H, I, J, K.

16. Boatner *v.* Ventress, 8 Mart. N. S. (La.) 644, 20 Am. Dec. 266. And see *infra*, II, M, 2.

17. *California.*— People *v.* Ashburner, 55 Cal. 517.

Illinois.— Hall *v.* Jarvis, 65 Ill. 302; Ballance *v.* Tesson, 12 Ill. 326.

Louisiana.— Slack *v.* Orillion, 13 La. 56, 33 Am. Dec. 551; Boatner *v.* Ventress, 8 Mart. N. S. 644, 20 Am. Dec. 266.

Michigan.— Stockton *v.* Williams, 1 Dougl. 546.

Missouri.— Lessieur *v.* Price, 12 Mo. 14 [*affirmed* in 12 How. (U. S.) 59, 13 L. ed. 893].

Ohio.— Board of Trustees *v.* Cuppett, 52 Ohio St. 567, 40 N. E. 792; State University *v.* Satterfield, 2 Ohio Cir. Ct. 86, 1 Ohio Cir. Dec. 377.

Wisconsin.— Challefoux *v.* Ducharme, 8 Wis. 287.

United States.— Shaw *v.* Kellogg, 170 U. S. 312, 18 S. Ct. 632, 42 L. ed. 1050; Morrow *v.* Whitney, 95 U. S. 551, 24 L. ed. 456. See also Coan *v.* Flagg, 123 U. S. 117, 8 S. Ct. 47, 31 L. ed. 107 [*affirming* 38 Ohio St. 156].

See 41 Cent. Dig. tit. "Public Lands," § 120 *et seq.*

Vesting of title on issuance of certificate.— Where an act of congress, in consideration of certain relinquishments by Jefferson college, authorized it to enter certain sections of land, and required the register where entry was made to issue a certificate, which the act declared should vest a full and complete title to the land, and that thereupon a patent should issue, the college acquired by the certificate an absolute title equivalent to a patent. Fulton *v.* Doe, 5 How. (Miss.) 751.

18. Morrow *v.* Whitney, 95 U. S. 551, 24 L. ed. 456.

19. See Republican River Bridge Co. *v.* Kansas Pac. R. Co., 12 Kan. 409 [*affirmed* in 92 U. S. 315, 23 L. ed. 515] (holding that the joint resolution of congress approved July 26, 1866, authorizing the president "to

3. Grant of Lands to Be Selected. A grant by congress of lands to be selected within a larger area does not attach to any particular lands until the selections are made and approved,[20] at which time the title passes;[21] but before the selection has been made the grantee has such a contingent interest in all the lands subject to selection that it may maintain a suit in equity to enjoin an unauthorized sale thereof for taxes.[22]

4. Determination of Character of Land. Where congress grants non-mineral lands to be selected by the grantees in a certain territory, and requires the surveyor-general to make survey and location of the land selected, it becomes his duty, under the supervision of the land department, to determine the character of the land selected, and his decision that it is not mineral, when ratified by the department, is final and conclusive, so that, after title passes, no subsequent discovery of minerals can affect the title or possession;[23] and neither the surveyor-general nor the land department has any authority to insert in the certificate of approval of the location and survey a reservation of any mineral lands contained therein, but such a reservation is void.[24]

5. Construction[25] and Effect of Statutory Grants. A statutory grant in the nature of a bounty must be construed most strongly in favor of the United States.[26] An act of congress providing that certain lands "shall be" alloted for and given to a certain person[27] or that certain lands "be and the same are hereby ceded" to a state is a grant *in præsenti*.[28] In a statutory grant of a section of land, "to embrace the buildings and improvements thereon," the word "embrace" means to inclose, as by surrounding or encircling.[29] Where congress grants land in words of present grant the legal title passes to and immediately vests in the grantee,[30] and this is not the less true because the title vests in him conditionally and subject to be defeated by his failure to comply with the law,[31] or because the boundaries are yet to be determined by survey.[32]

set apart to the Union Pacific Railway Company, eastern division, twenty acres of the Fort Riley military reservation, for depot and other purposes, in the bottom opposite Riley City; also fractional section 'one' on the west side of said reservation, near Junction City, for the same purposes," with a proviso that the president should not do so, so as in any manner to impair the usefulness of the reserve for military purposes, was a grant of land, dependent upon the favorable judgment and action of the president; and when the president, by executive order, set apart the land, the title of the railway company thereto became absolute); State *v.* Stringfellow, 2 Kan. 263.

20. Altschul *v.* Gittings, 102 Fed. 36.

21. Shaw *v.* Kellogg, 170 U. S. 312, 18 S. Ct. 632, 42 L. ed. 1050.

22. Altschul *v.* Gittings, 102 Fed. 36.

23. Shaw *v.* Kellogg, 170 U. S. 312, 18 S. Ct. 632, 42 L. ed. 1050.

24. Shaw *v.* Kellogg, 170 U. S. 312, 18 S. Ct. 632, 42 L. ed. 1050.

25. Construction of particular grants see People *v.* Ashburner, 55 Cal. 517 (act June 30, 1864); Corkran Oil, etc., Co. *v.* Arnaudet, 111 La. 563, 34 So. 747 (act Feb. 10, 1897); *In re* Opinion of Judges, 13 S. D. 191, 83 N. W. 96 (act Oct. 1, 1890); Mission Rock Co. *v.* U. S., 109 Fed. 763, 48 C. C. A. 641 [*affirmed* in 189 U. S. 391, 23 S. Ct. 606, 47 L. ed. 865] (act July 1, 1864).

26. Story *v.* Woolverton, 31 Mont. 346, 78 Pac. 589, grant to state for public purposes. But see Ross *v.* Barland, 1 Pet. (U. S.) 655, 7 L. ed. 302, holding that where an act of congress relating to the public lands is intended to confer a bounty on a numerous class of individuals, it is the duty of the courts in construing ambiguous words, to adopt that construction which will best effect the liberal intentions of congress.

27. Rutherford *v.* Greene, 2 Wheat. (U. S.) 196, 4 L. ed. 218.

28. Board of Trustees *v.* Cuppett, 52 Ohio St. 567, 40 N. E. 792.

29. Story *v.* Woolverton, 31 Mont. 346, 78 Pac. 589, holding that such a grant did not carry the right to the use of the water of a stream from which the government had taken water by means of a ditch across other lands to the land granted.

30. Lee *v.* Summers, 2 Oreg. 260; Fremont *v.* U. S., 17 How. (U. S.) 542, 15 L. ed. 241; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264. See also Forsythe *v.* Ballance, 9 Fed. Cas. No. 4,951, 6 McLean 562, holding that where an act of congress, which makes a grant to settlers in a village whose buildings have been destroyed by a company of militia in the service of the United States, refers back to the destruction of such buildings and recognizes the fact as a consideration for the grant, such grant cannot be considered as a gratuity, so that no right vests until the issuing of the patent; and, where one of such settlers dies before the grant is made, a patent issued to his legal representatives is valid.

31. Lee *v.* Summers, 2 Oreg. 260.

32. Lee *v.* Summers, 2 Oreg. 260.

6. Grants to States in General.[33] Large quantities of the public domain have been granted by congress to the individual states either generally or for some particular purposes, and the rule is that lands granted for a particular object are held in trust for the fulfilment of the purpose of the grant and cannot be diverted to other purposes.[34] A grant by congress to a state is no more subject to be recalled at the will of congress than a grant to an individual.[35]

7. Particular Grants and Donations.[36] It is not the purpose of this article to discuss in detail matters relating to particular grants which are of little or no present importance or general interest and hence it is deemed sufficient to refer in the notes to some of the principal cases relating to land grants to particular cities,[37] and acts making land grants to private persons or confirming claims.[38] The New Madrid Act was passed for the relief of persons owing lands in the county of New Madrid in the Missouri territory, which had been injured by earthquakes; and authorized such persons to locate a like quantity of land on any of the public lands of the said territory in lieu of the injured lands.[39] Rights under this statute and others supplementary thereto are now finally settled, and hence it is deemed sufficient to refer in the note to some of the principal cases relating to what are commonly termed "New Madrid locations."[40] The Oregon Donation Act granted

33. **Grants for internal improvements** see *infra*, II, J.
Grants in aid of railroads see *infra*, II, K.
School land grants see *infra*, II, H.
Swamp land grants see *infra*, II, I.

34. *In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274 (holding that the provision in the act of April 17, 1893, providing for payment of materials and labor in the completion of a state canal by certificates of indebtedness to be issued by the state auditor, that the certificates might be accepted by the state in payment of lands without regard to location, not being limited to lands which might be used for canal purposes, violated Const. art. 9, § 10, providing that the lands should be held in trust for the objects for which they were granted to the state); State *v.* Vincennes University, 2 Ind. 293; State *v.* Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503 (holding that school lands cannot be set apart for a state park).

35. Busch *v.* Donohue, 31 Mich. 481.

36. **Grants to states for particular internal improvements** see *infra*, II, J, 1, a.

37. Le Roy *v.* Cunningham, 44 Cal. 599; Fischer *v.* Benicia, 36 Cal. 562; Jones *v.* Petaluma, 36 Cal. 230; Cook *v.* Burlington, 30 Iowa 94, 6 Am. Rep. 649; Burlington Gaslight Co. *v.* Burlington, etc., R. Co., 165 U. S. 370, 17 S. Ct. 359, 41 L. ed. 749 [*affirming* 91 Iowa 470, 59 N. W. 292]; Carondelet *v.* St. Louis, 1 Black (U. S.) 179, 17 L. ed. 102; Les Bois *v.* Bramell, 4 How. (U. S.) 449, 11 L. ed. 1051; U. S. *v.* Carr, 25 Fed. Cas. No. 14,731, 3 Sawy. 477 [*affirmed* in 98 U. S. 433, 25 L. ed. 209]. See 41 Cent. Dig. tit. "Public Lands," § 121.

38. Kennedy *v.* Townsley, 16 Ala. 239; McComas *v.* Gannard, Minor (Ala.) 422; Kissell *v.* St. Louis Public Schools, 16 Mo. 553; McSorley *v.* Hill, 2 Wash. 638, 27 Pac. 552; Baer *v.* Moran Bros. Co., 2 Wash. 608, 27 Pac. 470; Mobile *v.* Eslava, 16 Pet. (U. S.) 234, 10 L. ed. 948; Chotard *v.* Pope, 12 Wheat. (U. S.) 586, 6 L. ed. 737; Hartmann *v.* Warren, 70 Fed. 946; Mann *v.* Tacoma Land Co., 44 Fed. 27 [*affirmed* in 153 U. S. 273, 14 S. Ct. 820, 38 L. ed. 714]. See 41 Cent. Dig. tit. "Public Lands," § 122.

Lands in Northwest Territory.— Reichart *v.* Felps, 33 Ill 433; Doe *v.* Hill, 1 Ill. 304. See 41 Cent. Dig. tit. "Public Lands," § 123.

Lands in Michigan.— Tregent *v.* Whiting, 14 Mich. 77; Moran *v.* Palmer, 13 Mich. 367; Farmers', etc., Bank *v.* Detroit, 12 Mich. 445; State University *v.* Detroit Bd. of Education, 4 Mich. 213; Scott *v.* Detroit Young Men's Soc., 1 Dougl. (Mich.) 119; Chene *v.* State Bank, Walk. (Mich.) 511. See 41 Cent. Dig. tit. "Public Lands," § 125.

Lands in Peoria, Illinois.— Payne *v.* Markle, 89 Ill. 66; Rankin *v.* Curtenius, 12 Ill. 334; Ballance *v.* Tesson, 12 Ill. 326; Gray *v.* McFadden, 12 Ill. 324; Ballance *v.* McFadden, 12 Ill. 317; Dredge *v.* Forsyth, 2 Black (U. S.) 563, 17 L. ed. 253; Ballance *v.* Forsyth, 24 How. (U. S.) 183, 16 L. ed. 733; Hall *v.* Papin, 24 How. (U. S.) 132, 16 L. ed. 641; Ballance *v.* Papin, 19 How. (U. S.) 342, 15 L. ed. 678; Forsyth *v.* Reynolds, 15 How. (U. S.) 358, 14 L. ed. 729; Ballance *v.* Forsyth, 13 How. (U. S.) 18, 14 L. ed. 32 [*affirming* 9 Fed. Cas. No. 4,951, 6 McLean 562]. See 41 Cent. Dig. tit. "Public Lands," § 125.

Lands at Green Bay, Prairie du Chien, and Michilimackinac.— Challefoux *v.* Ducharme, 8 Wis. 287; Challefoux *v.* Ducharme, 4 Wis. 554; Dousman *v.* Hooe, 3 Wis. 466. See 41 Cent. Dig. tit. "Public Lands," § 126.

Confirmation of title to lands occupied as missionary stations.— Nesqually Catholic Bishop *v.* Gibbon, 1 Wash. 592, 21 Pac. 315; Nesqually Catholic Bishop *v.* Gibbon, 158 U. S. 155, 15 S. Ct. 779, 39 L. ed. 931 [*affirming* 44 Fed. 321]; M. E. Church Missionary Soc. *v.* Dalles City, 107 U. S. 336, 2 S. Ct. 672, 27 L. ed. 545 [*affirming* 6 Fed. 356, 6 Sawy. 126]. See 41 Cent. Dig. tit. "Public Lands," § 127.

39. 3 U. S. St. at L. 211, c. 45.

40. Ashley *v.* Rector, 20 Ark. 359; Rector *v.* Gaines, 19 Ark. 70; Moore *v.* Maxwell, 18 Ark. 469; Finley *v.* Woodruff, 8 Ark. 328;

to every white settler or occupant of the public lands in the territory of Oregon, who was above the age of eighteen years, and was a citizen of the United States, or had declared his intention of becoming such, or should make such declaration on or before December 1, 1850, or who was a resident of the territory at the time of the passage of the act or should become a resident on or before December 1, 1850, and who had resided upon or cultivated the land for four consecutive years and otherwise conformed to the provisions of the act, one half section of land if he was single, and if he was married one section (one half for himself and the other half to his wife to be held in her own right); and made a similar grant, but of only half the above quantities to persons emigrating to Oregon between December 1, 1850, and December 1, 1853.[41] The rights of claimants under this act and its supplements are also practically all settled by this time, and hence it is deemed sufficient to cite in the note some of the principal cases which have been decided thereunder.[42]

F. Bounty Land Warrants. The statutes have made provision for the issuing to those who have performed military services for the United States, bounty land warrants for a certain amount of land, which might be located on

Cummings *v.* Powell, (Mo. 1892) 20 S. W. 486; Cummings *v.* Powell, 97 Mo. 524, 10 S. W. 819; Gibson *v.* Chouteau, 39 Mo. 536; Pacific R. Co. *v.* McCombs, 39 Mo. 329; McCamant *v.* Patterson, 39 Mo. 100; Holme *v.* Strautman, 35 Mo. 293; Gray *v.* Givens, 26 Mo. 291; Lee *v.* Parker, 25 Mo. 35; Mitchell *v.* Parker, 25 Mo. 31; Wright *v.* Rutgers, 14 Mo. 585; Kennett *v.* Cole County Ct., 13 Mo. 139; Cabanne *v.* Lindell, 12 Mo. 184; Lessieur *v.* Price, 12 Mo. 14; Page *v.* Hill, 11 Mo. 149; Kirk *v.* Green, 10 Mo. 252; Wear *v.* Bryant, 5 Mo. 147; Bryan *v.* Wear, 4 Mo. 106; Dunn *v.* Miller, 8 Mo. App. 467; Hammond *v.* Coleman, 4 Mo. App. 307; Mackay *v.* Easton, 19 Wall. (U. S.) 619, 22 L. ed. 211 [*affirming* 16 Fed. Cas. No. 8,843, 2 Dill. 41]; Rector *v.* Ashley, 6 Wall. (U. S.) 142, 18 L. ed. 733; Hale *v.* Gaines, 22 How. (U. S.) 144, 16 L. ed. 264; Lessieur *v.* Price, 12 How. (U. S.) 59, 13 L. ed. 893; Barry *v.* Gamble, 3 How. (U. S.) 32, 11 L. ed. 479; Stoddard *v.* Chambers, 2 How. (U. S.) 284, 11 L. ed. 269; Kingman *v.* Holthaus, 59 Fed. 305. See 41 Cent. Dig. tit. "Public Lands," §§ 108–111.

41. 9 U. S. St. at L. 496, c. 76, § 4.

42. Parker *v.* Rogers, 8 Oreg. 183; McKay *v.* Freeman, 6 Oreg. 449; Ramsey *v.* Loomis, 6 Oreg. 367; Dolph *v.* Barney, 5 Oreg. 191; Chambers *v.* Chambers, 4 Oreg. 153; Newton *v.* Spencer, 3 Oreg. 548; Cowenia *v.* Hannah, 3 Oreg. 465; Delay *v.* Chapman, 3 Oreg. 459; Groslouis *v.* Northcut, 3 Oreg. 394; White *v.* Allen, 3 Oreg. 103; Carter *v.* Chapman, 2 Oreg. 93; Keith *v.* Cheeny, 1 Oreg. 285; Ford *v.* Kennedy, 1 Oreg. 166; Lee *v.* Simonds, 1 Oreg. 158; Vandolf *v.* Otis, 1 Oreg. 153; Marlin *v.* T'Vault, 1 Oreg. 77; State *v.* Board of Land Appraisers, 5 Wash. 425, 32 Pac. 97, 225; Roeder *v.* Fouts, 5 Wash. 135, 31 Pac. 432; McAleer *v.* Hill, 2 Wash. 653, 27 Pac. 557; McSorley *v.* Hill, 2 Wash. 638, 27 Pac. 552; Maynard *v.* Hill, 2 Wash. Terr. 321, 5 Pac. 717; Brazee *v.* Scofield, 2 Wash. Terr. 209, 3 Pac 265; Maynard *v.* Valentine, 2 Wash. Terr. 3, 3 Pac. 195; Shockley *v.* Brown, 1 Wash. Terr. 463; Ward *v.* Moorey, 1 Wash. Terr. 104; Oregon, etc., R. Co. *v.* U. S., 190 U. S. 186, 23 S. Ct. 673, 47 L. ed. 1012 [*reversing* 109 Fed. 514, 48 C. C. A. 520]; Brazee *v.* Scofield, 124 U. S. 495, 8 S. Ct. 604, 31 L. ed. 484; Vance *v.* Burbank, 101 U. S. 514, 25 L. ed. 929; Hall *v.* Russell, 101 U. S. 503, 25 L. ed. 829; Barney *v.* Dolph, 97 U. S. 652, 24 L. ed. 1063; Stark *v.* Starr, 94 U. S. 477, 24 L. ed. 276; Lamb *v.* Davenport, 18 Wall. (U. S.) 307, 21 L. ed. 759 [*affirming* 14 Fed. Cas. No. 8,015, 1 Sawy. 609]; Davenport *v.* Lamb, 13 Wall. (U. S.) 418, 20 L. ed. 655; Silver *v.* Ladd, 7 Wall. (U. S.) 219, 19 L. ed. 138; Henry *v.* Lilliwaup Falls Land Co., 83 Fed. 747; Robinson *v.* Caldwell, 67 Fed. 391, 14 C. C. A. 448; Caldwell *v.* Robinson, 59 Fed. 653 [*affirmed* in 165 U. S. 359, 17 S. Ct. 343, 41 L. ed. 745]; Hershberger *v.* Blewett, 55 Fed. 170; Shively *v.* Welch, 20 Fed. 28; Traver *v.* Tribou, 15 Fed. 25, 8 Sawy. 511; U. S. *v.* Tichenor, 12 Fed. 415, 8 Sawy. 142; Cutting *v.* Cutting, 6 Fed. 259, 6 Sawy. 396; Adams *v.* Burke, 1 Fed. Cas. No. 49, 3 Sawy. 415; Bear *v.* Luse, 2 Fed. Cas. No. 1,179, 6 Sawy. 148; Chapman *v.* School Dist., 5 Fed. Cas. No. 2,607, Deady 108; Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366; Fitzpatrick *v.* Dubois, 9 Fed. Cas. No. 4,842, 2 Sawy. 434; Hall *v.* Russell, 11 Fed. Cas. No. 5,943, 3 Sawy. 506 [*affirmed* in 101 U. S. 503, 25 L. ed. 829]; Lamb *v.* Starr, 14 Fed. Cas. No. 8,021, Deady 350; Lamb *v.* Starr, 14 Fed. Cas. No. 8,022, Deady 447; Lamb *v.* Vaughn, 14 Fed. Cas. No. 8,023, 2 Sawy. 161; Lamb *v.* Wakefield, 14 Fed. Cas. No. 8,024, 1 Sawy. 251; Lownsdale *v.* Portland, 15 Fed. Cas. No. 8,578, Deady 1, 1 Oreg. 381; Mizner *v.* Vaughn, 17 Fed. Cas. No. 9,678, 2 Sawy. 269; Starr *v.* Stark, 22 Fed. Cas. No. 13,317, 2 Sawy. 603, 642 [*affirmed* in 94 U. S. 477, 24 L. ed. 276]; Town *v.* De Haven, 24 Fed. Cas. No. 14,113, 5 Sawy. 146; Wythe *v.* Haskell, 30 Fed. Cas. No. 18,118, 3 Sawy. 574; Wythe *v.* Palmer, 30 Fed. Cas. No. 18,120, 3 Sawy. 412; Johnson *v.* U. S., 2 Ct. Cl. 391. See 41 Cent. Dig. tit. "Public Lands," §§ 112–119, 357.

the public lands of the United States, and were receivable at the rate of one dollar and a quarter per acre, in full or part payment for such land as the case might be.[43] The holder of a land warrant, free from question, had, by statute, an absolute right to locate land under it, and to receive a patent for such land,[44] and a land warrant was not canceled, nor did the title thereto pass from the locator, until it was accepted in payment for land by the United States.[45] One who entered land under a bounty land warrant became the equitable owner thereof, and the mere naked legal title remained in the United States until the issuance of the patent,[46] and it has been held that a certificate of location of such a warrant was *prima facie* evidence of legal title in the holder of the certificate.[47] A bounty warrant could not be located on land reserved by congress for school purposes.[48] Bounty land warrants were regarded as lands, so that unless specifically devised they would pass to the owner's heirs.[49]

G. Rights of Way Through the Public Domain[50] **— 1. For Highways.** The United States statute grants the right of way for the construction of highways over public lands not reserved for public use,[51] and one who acquires title

43. See U. S. Comp. St. (1901) pp. 1491–1504.

Virginia military land warrants see Saunders *v.* Niswanger, 11 Ohio St. 298; Stubblefield *v.* Boggs, 2 Ohio St. 216; Price *v.* Johnston, 1 Ohio St. 390; Latham *v.* Oppy, 18 Ohio 104; Buckley *v.* Gilmore, 12 Ohio 63; Huston *v.* McArthur, 7 Ohio, Pt. II, 54; Wallace *v.* Saunders, 7 Ohio 173; Parker *v.* Dunn, 4 Ohio 232; McArthur *v.* Nevill, 3 Ohio 178; McArthur *v.* Phœbus, 2 Ohio 415; Martin *v.* Boon, 2 Ohio 237; Kerr *v.* Mack, 1 Ohio 161; Hall *v.* Prindle, 2 Ohio Dec. (Reprint) 261, 2 West. L. Month. 193; Niswanger *v.* Saunders, 1 Wall. (U. S.) 424, 17 L. ed. 599; McArthur *v.* Dun, 7 How. (U. S.) 262, 12 L. ed. 693; Brush *v.* Ware, 15 Pet. (U. S.) 93, 10 L. ed. 672; Galloway *v.* Finley, 12 Pet. (U. S.) 264, 9 L. ed. 1079; Lindsey *v.* Miller, 6 Pet. (U. S.) 666, 8 L. ed. 538 [*affirming* 19 Fed. Cas. No. 9,580]; McDonald *v.* Smalley, 6 Pet. (U. S.) 261, 8 L. ed. 391; Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876; Jackson *v.* Clark, 1 Pet. (U. S.) 628, 7 L. ed. 290; Kerr *v.* Moon, 9 Wheat. (U. S.) 565, 6 L. ed. 161; Doddridge *v.* Thompson, 9 Wheat. (U. S.) 469, 6 L. ed. 137; Watts *v.* Lindsey, 7 Wheat. (U. S.) 158, 5 L. ed. 423; Miller *v.* Kerr, 7 Wheat. (U. S.) 1, 5 L. ed. 381; McArthur *v.* Browder, 4 Wheat. (U. S.) 488, 4 L. ed. 622; Bonner *v.* U. S., 1 Ct. Cl. 125. See 41 Cent. Dig. tit. "Public Lands," § 129.

Surveys of military lands and entries see Board of Trustees *v.* Cuppett, 52 Ohio St. 567, 40 N. E. 792; Latham *v.* Oppy, 18 Ohio 104; Harlan *v.* Thatcher, 18 Ohio 48; Wyckoff *v.* Stephenson, 14 Ohio 13; Huston *v.* McArthur, 7 Ohio, Pt. II, 54; Gill *v.* Towler, 3 Ohio 207; McArthur *v.* Neville, 3 Ohio 178; McArthur *v.* Phœbus, 2 Ohio 415; Hastings *v.* Stevenson, 2 Ohio 8; Coan *v.* Flagg, 123 U. S. 117, 8 S. Ct. 47, 31 L. ed. 107 [*affirming* 38 Ohio St. 156]; Fussell *v.* Gregg, 113 U. S. 550, 5 S. Ct. 631, 28 L. ed. 993; Niswanger *v.* Saunders, 1 Wall. (U. S.) 424, 17 L. ed. 599; Kerr *v.* Watts, 6 Wheat. (U. S.) 550, 5 L. ed. 328; Massie *v.* Watts, 6 Cranch (U. S.) 148, 3 L. ed. 181; Gault *v.* McMillan, 10 Fed. Cas. No. 5,274, 3 McLean 20. See 41 Cent. Dig. tit. "Public Lands," § 130.

Withdrawal or abandonment of entry see Wallace *v.* Patten, 14 Ohio 272; McArthur *v.* Phœbus, 2 Ohio 415; Saum *v.* Latham, Wright (Ohio) 309; Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876; Taylor *v.* Myers, 7 Wheat. (U. S.) 23, 5 L. ed. 387; Gault *v.* McMillan, 10 Fed. Cas. No. 5,274, 3 McLean 20. See 41 Cent. Dig. tit. "Public Lands," § 131.

44. Merrill *v.* Hartwell, 11 Mich. 200; Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876.

45. Johnson *v.* Gilfillan, 8 Minn. 395, holding that such acceptance was not consummated until the entry was fully confirmed by the general land office.

46. Swisher *v.* Sensenderfer, 84 Mo. 104; Sensenderfer *v.* Kemp, 83 Mo. 581; Matthews *v.* Rector, 24 Ohio St. 439; McArthur *v.* Browder, 4 Wheat. (U. S.) 488, 4 L. ed. 622; Gray *v.* Jones, 14 Fed. 83, 4 McCrary 515. See also Bates *v.* Herron, 35 Ala. 117.

47. Butterfield *v.* Central Pac. R. Co., 31 Cal. 264.

48. Dunn *v.* Barnum, 51 Fed. 355, 2 C. C. A. 265.

49. Atwood *v.* Beck, 21 Ala. 590.

50. **Grants of rights of way to railroads** see *infra*, II, K, 2.

51. U. S. Rev. St. (1878) § 2477 [U. S. Comp. St. (1901) p. 1567]; Van Wanning *v.* Deeter, 78 Nebr. 282, 284, 110 N. W. 703, 112 N. W. 902 (holding that the land in question was not a part of the public domain at the time of the passage of the act of congress referred to); Streeter *v.* Stalnaker, 61 Nebr. 205, 85 N. W. 47.

This grant was in præsenti, and when it was accepted by the territory of Dakota it took effect as of the date of the act. Walcott Tp. *v.* Skauge, 6 N. D. 382, 71 N. W. 544.

Reservation for schools.— A provision in an act of congress organizing a territory reserving certain sections for school purposes is neither a grant nor a reservation for public uses within the exception of the statute, but such land is subject to the highway ease-

to or rights in a part of the public domain takes and holds subject to this easement.[52]

2. For Canals and Ditches.[53] The statute grants to canal and ditch companies formed for the purpose of irrigation the right of way through the public lands and reservations of the United States for their reservoirs, canals, and ditches.[54] This grant is operative as against the United States and persons acquiring rights in or title to land after a right of way has been taken;[55] but land which has been entered by an individual cannot be subsequently taken for such purposes, to his damage, without liability to him therefor.[56]

H. School and University Lands — 1. Grants For School Purposes[57]**— a. In General.** The policy of the government has been a generous one in respect to grants for school purposes,[58] and on the admission with the Union of a number of the states, land grants have been made to them by congress for such purposes.[59] These grants have usually been of section 16, or sections 16 and 36 in each township,[60] and in addition to this congress has granted to each of several states and territories seventy-two sections of land for the use and support of a state univer-

ment without compensation to the owner. Riverside Tp. *v.* Newton, 11 S. D. 120, 75 N. W. 899.

52. Van Wanning *v.* Deeter, 78 Nebr. 282, 284, 110 N. W. 703, 112 N. W. 902 (holding that a settler on public lands on which there is a road in common use as a highway takes subject to the public easement of such way as a road, although it was never established by the public authorities under the general road laws); Riverside Tp. *v.* Newton, 11 S. D. 120, 75 N. W. 899; Wells *v.* Pennington County, 2 S. D. 1, 48 N. W. 305, 39 Am. St. Rep. 758 [*followed* in Keen *v.* Fairview Tp., 8 S. D. 558, 67 N. W. 623] (holding that under the act of congress and Dak. Comp. Laws, § 1189, providing that all section lines shall be public highways so far as practicable, persons filing on public lands take the same subject to the right of way along section lines for highway purposes).

53. Grants to states for internal improvements see *infra*, II, J.

54. 26 U. S. St. at L. 1101, c. 561, § 18 [U. S. Comp. St. (1901) p. 1570].

55. See Farmers' High Line Canal, etc., Co. *v.* Moon, 22 Colo. 560, 45 Pac. 437; Clear Creek Land, etc., Co. *v.* Kilkenny, 5 Wyo. 38, 36 Pac. 819.

Appropriation of unearned and subsequently forfeited railroad land.— Where an appropriation of a right of way for a flume, such as congress has authorized upon unoccupied public land, is made upon granted, but unearned, railroad land, and subsequently the land so occupied is forfeited to the government, the appropriation is effective, so far as the government is concerned; and a homesteader, whose settlement was begun before the forfeiture, but subsequent to the location and construction of the flume, takes subject to the burden of such flume. Maffet *v.* Quine, 95 Fed. 199, 93 Fed. 347, holding further that it was immaterial whether the appropriation was made prior or subsequent to the time the government was reinvested with title.

56. Clear Creek Land, etc., Co. *v.* Kilkenny, 5 Wyo. 38, 36 Pac. 819, holding that where defendant constructed a ditch through land entered by plaintiff under the laws of the United States for the reclamation of desert lands, and about two years afterward plaintiff relinquished this entry, and at the same time homesteaded the land, the land did not revert to the United States by the relinquishment of the desert land entry, so as to give defendant the right of way for its ditch, and that even if such a right of way had been acquired defendant could not subsequently enlarge the ditch without liability to plaintiff for the resulting damage.

Act Cong. July 26, 1866 (14 U. S. St. at L. 253), granting a right of way to ditch and canal owners, was prospective in its operation, and did not in any manner qualify or limit the effect of a patent issued before its passage. Union Mill, etc., Co. *v.* Ferris, 24 Fed. Cas. No. 14,371, 2 Sawy. 176.

57. Grants in aid of agricultural and mechanical colleges see Colleges and Universities, 7 Cyc. 292.

On the admission of Mississippi as a state the title to the sixteenth sections vested in it without grant from the United States. Jones *v.* Madison County, 72 Miss. 777, 18 So. 87 [*overruling* Hester *v.* Crisler, 36 Miss. 681].

58. Johanson *v.* Washington, 190 U. S. 179, 23 S. Ct. 825, 47 L. ed. 1008 [*affirming* 26 Wash. 668, 67 Pac. 401]; Cooper *v.* Roberts, 18 How. (U. S.) 173, 15 L. ed. 338.

59. See State *v.* Jennings, 47 Fla. 302, 307, 35 So. 986; Cabanne *v.* Walker, 31 Mo. 274.

60. *Indiana.*— State *v.* Newton, 5 Blackf. 455.

Kansas.— State *v.* Stringfellow, 2 Kan. 263.

Nevada.— State *v.* Blasdel, 4 Nev. 241.

Ohio.— Coombs *v.* Lane, 4 Ohio St. 112.

South Dakota.— Riverside Tp. *v.* Newton, 11 S. D. 120, 75 N. W. 899.

United States.— Dickens *v.* Mahana, 21 How. 276, 16 L. ed. 158; Cooper *v.* Roberts, 18 How. 173, 15 L. ed. 338.

See 41 Cent. Dig. tit. "Public Lands," § 138 *et seq.*

Validity of grant.— The fact that at the

sity.[61] Land has also been granted to cities and villages for the support of schools therein.[62]

b. Title Acquired. A grant by congress of land to a state "for the use of schools" is an absolute grant, vesting title for a specific purpose, and not a grant as on a condition subsequent.[63] The grant and its acceptance by the state constitute a solemn compact between the state and the United States whereby the state becomes the purchaser of the school sections for a valuable consideration with full power to sell or lease the same for the use of schools as the state may deem most beneficial to the inhabitants of the respective townships,[64] and the grant cannot be withdrawn after its acceptance by the state.[65] The legal title to school lands is in the state,[66] in trust under some of the grants, for the support of schools for the inhabitants of the respective townships in which the lands lie.[67]

c. When Title Vests. While the grants to various states vary somewhat in their terms, grants of certain designated sections are usually considered as grants *in præsenti;*[68] but when the lands are unsurveyed at the time the grants are sub-

time of the grant by congress of the sixteenth section in each township "to the inhabitants thereof, for the use of schools," there were no inhabitants in most of the townships, did not affect the validity of the grant. State *v.* Springfield Tp., 6 Ind. 83.

61. See U. S. Comp. St. (1901) p. 1384.

62. Eberle *v.* St. Louis Public Schools, 11 Mo. 247; Trotter *v.* St. Louis Public Schools, 9 Mo. 69; Jones *v.* Soulard, 24 How. (U. S.) 41, 16 L. ed. 604; Kissell *v.* St. Louis Public Schools, 18 How. (U. S.) 19, 15 L. ed. 324 [*affirming* 16 Mo. 553]. See also Bowlin *v.* Furman, 28 Mo. 427.

63. Schneider *v.* Hutchinson, 35 Oreg. 253, 57 Pac. 324, 76 Am. St. Rep. 474. See also Street *v.* Columbus, 75 Miss. 822, 23 So. 773.

64. Morgan County School Trustees *v.* Schroll, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575 [*following* Bradley *v.* Case, 4 Ill. 585], holding that the school sections could not thereafter be considered public lands and were not affected by a subsequent act of congress enabling certain states to reclaim swamp lands.

65. Daggett *v.* Bonewitz, 107 Ind. 276, 7 N. E. 900.

66. Long *v.* Brown, 4 Ala. 622; Mississippi County School Dist. No. 10 *v.* Driver, 50 Ark. 346, 7 S. W. 387 [*following* Widner *v.* State, 49 Ark. 172, 4 S. W. 657] (holding that therefore a school-district cannot maintain an action for the possession of such lands); State *v.* Stark, 111 La. 594, 35 So. 760; State University *v.* Hart, 7 Minn. 61.

67. *Alabama.*— Long *v.* Brown, 4 Ala. 622.

Arkansas.— Widner *v.* State, 49 Ark. 172, 4 S. W. 657 [*followed* in Mississippi County School Dist. No. 10 *v.* Driver, 50 Ark. 346, 7 S. W. 387]; Mayers *v.* Byrne, 19 Ark. 308.

Indiana.— State *v.* Springfield Tp., 6 Ind. 83.

Louisiana.— State *v.* Stark, 111 La. 594, 35 So. 760; Concordia School Directors *v.* Ober, 32 La. Ann. 417; Hunter *v.* Williams, 16 La. Ann. 129.

Mississippi.— Edwards *v.* Butler, 89 Miss. 179, 42 So. 381; Morton *v.* Granada, etc., Academies, 8 Sm. & M. 773.

Missouri.— Marion County *v.* Moffett, 15 Mo. 604.

Ohio.— Greene Tp. *v.* Campbell, 16 Ohio St. 11.

Wisconsin.— State *v.* Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503.

See 41 Cent. Dig. tit. "Public Lands," § 138 *et seq.*

68. *Alabama.*— Sprayberry *v.* State, 62 Ala. 459.

California.— Hermocilla *v.* Hubbell, 89 Cal. 5, 26 Pac. 611; Sherman *v.* Buick, 45 Cal. 656; Higgins *v.* Houghton, 25 Cal. 252.

Florida.— State *v.* Jennings, 47 Fla. 302, 307, 35 So. 986.

Indiana.— Daggett *v.* Bonewitz, 107 Ind. 276, 7 N. E. 900.

Kansas.— State *v.* Stringfellow, 2 Kan. 263.

Ohio.— See Coombs *v.* Lane, 4 Ohio St. 112.

Washington.— Wheeler *v.* Smith, 5 Wash. 704, 32 Pac. 784.

United States.— Heydenfeldt *v.* Daney Gold, etc., Min. Co., 93 U. S. 634, 23 L. ed. 995 [*affirming* 10 Nev. 290]. But *compare* Minnesota *v.* Bachelder, 1 Wall. 109, 17 L. ed. 551, holding that there was nothing in the legislation of congress nor in the organic law of the territory of Minnesota which amounted so completely to a "dedication," in the stricter legal sense of that word, of any part of the public lands to school purposes, that congress, with the assent of the territorial legislature, could not bring them within the terms of the Preëmption Act of 1841, and give them to settlers who, on the faith of that act, which had been extended in 1854 to the Minnesota territory, had settled on and improved them.

See 41 Cent. Dig. tit. "Public Lands," § 138.

But *compare* Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571.

The act of 1812 in relation to claims in Missouri which reserved vacant lots for the use of schools did not pass the legal title to the property so reserved out of the United States. Hammond *v.* St. Louis Public Schools, 8 Mo. 65.

ject to location by the federal government,[69] and title to the particular sections vests absolutely in the state upon the land being surveyed and laid off into sections and townships,[70] without the necessity of the issuance of a patent.[71] A grant of lands to be selected becomes absolute and the state becomes vested with the fee-simple title, on its acceptance of the terms of the grant and its selection of the lands;[72] but the mere acceptance of the grant gives no title to any particular lands before they are selected and listed.[73]

d. Beneficiaries of Grants. Where congress grants to a state a certain amount of land for state charitable, educational, penal, and reformatory institutions, the legislature may appropriate to one institution more than its proportionate share of the grant.[74] Although the enabling act of a state grants seventy-two sections of land to the state for a university the state university is not excluded from the benefits of a subsequent section of the enabling act granting two hundred thousand acres to the state for charitable, educational, penal, and reformatory institutions.[75] School sections are held for the benefit of the whole township in which they are situated, and the legislature has no power to divert them from that purpose.[76]

e. Lands Included in Grant or Subject to Selection — (i) *In General.* A provision in a grant to a state excepting lands which have "heretofore been disposed of by the United States" applies only to lands of which a valid disposition has been made.[77] In Louisiana it has been held that the act of congress consecrating section 16 of each township to school purposes applies only to such

The territory of Oklahoma received no title to sections 16 and 36 in each township in said territory by virtue of Act Cong. May 2, 1890, c. 182, § 18 (26 U. S. St. at L. 89), reserving such sections for the purpose of being applied to public schools in the state to be created out of the territory in the future, and could not recover the value of such land appropriated for railway purposes. Territory *v.* Choctaw, etc., R. Co., (Okla. 1908) 95 Pac. 420.

69. Higgins *v.* Houghton, 25 Cal. 252; Papin *v.* Ryan, 32 Mo. 21; Heydenfeldt *v.* Daney Gold, etc., Min. Co., 93 U. S. 634, 640, 23 L. ed. 995 [*affirming* 10 Nev. 290], where it is said: "Until the status of lands was fixed by a surety, and they were capable of identification, Congress reserved absolute power over them." See also Middleton *v.* Low, 30 Cal. 596.

The survey merely identifies and distinguishes the land.— Sprayberry *v.* State, 62 Ala. 459.

70. *California.*— Sherman *v.* Buick, 45 Cal. 656; Higgins *v.* Houghton, 25 Cal. 252.

Florida.— State *v.* Jennings, 47 Fla. 307, 35 So. 986.

Missouri.— Patterson *v.* Fagan, 38 Mo. 70 [*following* Kissell *v.* St. Louis Public Schools, 16 Mo. 553 (*affirmed* in 18 How. (U. S.) 19. 15 L. ed. 324)].

Nevada.— State *v.* Blasdel, 4 Nev. 241.

Utah.— U. S. *v.* Elliot, 7 Utah 389, 26 Pac. 1117.

United States.— Heydenfeldt *v.* Daney Gold, etc., Min. Co., 93 U. S. 634, 23 L. ed. 995 [*affirming* 10 Nev. 290]; Cooper *v.* Roberts, 18 How. 173, 15 L. ed. 338; Hibbard *v.* Slack, 84 Fed. 571; Pereira *v.* Jacks, 15 Land Dec. Dep. Int. 273; *In re* Miner, 9 Land Dec. Dep. Int. 408; *In re* Virginia Lode, 7 Land Dec. Dep. Int. 459; *In re* Colorado, 6 Land Dec. Dep. Int. 412.

See 41 Cent. Dig. tit. "Public Lands," § 138 *et seq.*

71. State *v.* Jennings, 47 Fla. 307, 35 So. 986. And see, generally, *supra*, II, E, 1.

When lists of lands are certified to a state as school lands by the commissioner of the general land office and the secretary of the interior, they convey as complete a title as patents. Frasher *v.* O'Connor, 115 U. S. 102, 5 S. Ct. 1141, 29 L. ed. 311.

72. State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235; U. S. *v.* Williams, 30 Fed. 309 [*affirmed* in 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026].

The state may by legislative act accept the terms of an act of congress granting to it lands as indemnity school lands, and authorize the commissioner of public lands and buildings to select them, without violating any of the provisions of the fundamental law. State *v.* Turner, 73 Nebr. 104, 102 N. W. 235.

73. McNee *v.* Donahue, 142 U. S. 587, 12 S. Ct. 211, 35 L. ed. 1122 [*affirming* 76 Cal. 499, 18 Pac. 438].

74. State *v.* Callvert, 33 Wash. 58, 74 Pac. 1018.

75. State *v.* Callvert, 34 Wash. 58, 74 Pac. 1018, where the court laid stress upon the fact that the grant to Washington differed from the grants to North and South Dakota in that it did not, like the grants to the latter states, grant the land "for such other educational and charitable purposes."

76. Morton *v.* Grenada Male, etc., Academies, 8 Sm. & M. (Miss.) 773.

77. Cummings *v.* Powell, 116 Mo. 473, 21 S. W. 1079, 20 S. W. 486, 38 Am. St. Rep. 610.

sections as have been surveyed as square or rectangular and not to radiating anomalous or irregular sections,[78] or to fractional sections.[79]

(II) *Lands Subject to Preëxisting Rights.*[80] A grant of certain sections to a state for school purposes does not carry lands which are subject to preëxisting rights of others.[81] And so such a grant does not carry land subject to the rights of a settler,[82] unless he loses such right by failure to comply with the statutory requirements.[83] Neither does such a grant confer any title to land which is within the limits of a valid or confirmed Spanish or Mexican grant,[84] although it does carry title to land claimed under an imperfect title under a former government which has been rejected,[85] and to land claimed under a Spanish or Mexican grant but excluded therefrom by the terms of the decree of confirmation.[86] But it has been held that the title of the state of Missouri to the sixteenth sections granted to it by congress was not impaired by the location of a New Madrid certificate thereon previous to the grant to the state.[87] A selection of land for university purposes which, although ineffectual at the date thereof, by reason of an existing adverse claim upon the land, is maintained and acted upon continuously, becomes effectual upon the termination of such adverse claim.[88]

(III) *Reservations.*[89] Land included within reservations to the United States does not pass under school land grants.[90]

78. Bres *v.* Louviere, 37 La. Ann. 736.

79. Lauve *v.* Wilson, 114 La. 699, 38 So. 522.

80. **Rights acquired by entry** see *supra*, II, C, 4.

Rights acquired by occupancy see *supra*, II, C, 5.

81. Keeran *v.* Griffith, 34 Cal. 580; Bradley *v.* Parkhurst, 20 Kan. 462. See also St. Louis Public Schools *v.* Walker, 9 Wall. (U. S.) 282, 19 L. ed. 576.

82. Bullock *v.* Rouse, 81 Cal. 590, 22 Pac. 919; Green *v.* Hayes, 70 Cal. 276, 11 Pac. 716; Wedekind *v.* Craig, 56 Cal. 642; State *v.* Batchelder, 7 Minn. 121; State *v.* Batchelder, 5 Minn. 223, 80 Am. Dec. 410; Mullan *v.* U. S., 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170 [*affirming* 10 Fed. 785, 7 Sawy. 466]; Ivanhoe Min. Co. *v.* Keystone Consol. Min. Co., 102 U. S. 167, 26 L. ed. 126; Natoma Water, etc., Co. *v.* Bugbey, 96 U. S. 165, 24 L. ed. 621; U. S. *v.* Williams, 30 Fed. 309 [*affirmed* in 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026].

Nature of settlement.— A settlement within the meaning of Act Cong. March 3, 1853, § 7, granting the sixteenth and thirty-sixth sections of public lands to the state of California for school purposes, and providing that, where any settlement by the erection of a dwelling-house or the cultivation of any portion of the land shall be made on such sections before the claim shall be surveyed, other lands shall be selected by the state in lieu thereof, is not required, either in regard to the acts to be done or the qualifications of the settler, to be precisely the same as that whereby a preëmption right can be secured under 5 U. S. St. at L. 453. Ivanhoe Min. Co. *v.* Keystone Consol. Min. Co., 102 U. S. 167, 26 L. ed. 126.

The question of the good faith of a settler is one of fact, or at any rate a mixed question of law and fact, and the decision of the department of the interior thereon is final. Green *v.* Hayes, 70 Cal. 276, 11 Pac. 716. See, generally, II, L, 15, b.

Settlement made at about time of grant.— The proviso of Act Cong. March 3, 1893, c. 200, 27 U. S. St. at L. 555, granting to the state of Nebraska certain indemnity lands, to the effect that no existing lawful rights arising under the public land laws shall be prejudiced by the act, cannot inure to the benefit of one who settled on and improved the lands about the time of the passage of the act, and before a survey, and before the expiration of the time in which the state might make its selection. State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235.

83. State *v.* Stringfellow, 2 Kan. 263; Natoma Water, etc., Co. *v.* Bugbey, 96 U. S. 165, 24 L. ed. 621. See also Hellman *v.* Jones, 56 Cal. 462.

84. Martin *v.* Durand, 63 Cal. 39; Middleton *v.* Low, 30 Cal. 696; St. Louis Public Schools *v.* Walker, 40 Mo. 383; Mitchell *v.* Handfield, 33 Mo. 431; Hammond *v.* St. Louis Public Schools, 8 Mo. 65; McCreery *v.* Haskell, 119 U. S. 327, 7 S. Ct. 176, 30 L. ed. 408. See also Rosecrans *v.* Douglass, 52 Cal. 213. As to Spanish, Mexican, and French grants, see, generally, *infra*, V.

85. Ham *v.* Missouri, 18 How. (U. S.) 126, 15 L. ed. 334.

86. Dodge *v.* Perez, 7 Fed. Cas. No. 3,953, 2 Sawy. 645.

87. Kennett *v.* Cole County Ct., 13 Mo. 139.

88. Brygger *v.* Schweitzer, 5 Wash. 564, 32 Pac. 462, 33 Pac. 388.

89. **Reservations** generally see *supra*, II, D.

90. Alberger *v.* Kingsbury, 6 Cal. App. 93, 91 Pac. 674.

Land is within a reservation where it has been withdrawn by the secretary of the interior pending a determination as to the advisability of including it within a forest reservation. Alberger *v.* Kingsbury, 6 Cal. App. 93, 91 Pac. 674.

(iv) *Mineral Lands.*[91] A grant to the state of certain designated sections for school purposes does not include mineral lands,[92] nor can mineral lands be selected by the state under a general grant of a certain amount of land for school purposes.[93]

(v) *Stone Lands.*[94] Stone lands may be selected by a state under a grant to it for educational purposes.[95]

(vi) *Indian Lands.*[96] A general grant to a state of a designated section in every township for school purposes does not give the state any control over sections occupied by Indians under treaty provisions;[97] but it does vest the fee to such sections in the state, subject to the occupancy of the Indians so long as it continues.[98]

f. Selection and Reservation. The selection by a state of public land as a portion of the seventy-two sections granted to it for the use of a state university, even if approved by the register and receiver of the local land office, does not confer a title on the state until the selection is approved by the secretary of the interior.[99] Where congress directed certain lands to be laid out in a certain

91. See, generally, Mines and Minerals, 27 Cyc. 516.

92. Wheeler *v.* Smith, 5 Wash. 704, 32 Pac. 784; Ivanhoe Min. Co. *v.* Keystone Consol. Min. Co., 102 U. S. 167, 26 L. ed. 126 [*followed* in Hermocilla *v.* Hubbard, 89 Cal. 5, 26 Pac. 611 (*overruling* Wedekind *v.* Craig, 56 Cal. 642; Higgins *v.* Houghton, 25 Cal. 252)]; Johnston *v.* Morris, 72 Fed. 890, 19 C. C. A. 229. See also Heydenfeldt *v.* Daney Cold, etc., Min. Co., 10 Nev. 290 [*affirmed* in 93 U. S. 634, 23 L. ed. 995]. But *compare* Cooper *v.* Roberts, 18 How. (U. S.) 173, 15 L. ed. 338 [*reversing* 6 Fed. Cas. No. 3,201, 6 McLean 93]. And see also Nims *v.* Johnson, 7 Cal. 110.

Coal land is mineral land, and hence does not pass. Mullan *v.* U. S., 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170 [*affirming* 10 Fed. 785, 7 Sawy. 466].

Exhausting of minerals.—When land within a school section is known to be mineral at the time of the grant, it is excluded therefrom, and does not pass to the state upon the mines being subsequently worked out and abandoned as unprofitable. Hermocilla *v.* Hubbell, 89 Cal. 5, 26 Pac. 611.

93. Ah Yew *v.* Choate, 24 Cal. 562; Burdge *v.* Smith, 14 Cal. 380; Garrard *v.* Silver Peak Mines, 82 Fed. 578; U. S. *v.* Curtner, 38 Fed. 1.

Determination as to character of land.—The act of the secretary of the interior in certifying and listing to a state the lands selected by it is a conclusive determination that the lands so listed and certified were such as to be within the terms of the grant, and such determination cannot be questioned collaterally in a suit involving title to the lands. Buena Vista Petroleum Co. *v.* Tulare Oil, etc., Co., 67 Fed. 226. See, generally, *infra*, II, L, 15, b, as to questions concluded by determination of land officers.

94. **Stone lands** generally see *supra*, II, C, 11.

95. Wheeler *v.* Smith, 5 Wash. 704, 32 Pac. 784.

96. See, generally, Indians, 22 Cyc. 123.

Grant of lands ceded by Indians.—The provision of 16 U. S. St. at L. 55, that the sixteenth and thirty-sixth sections of each township of lands ceded by the Osage Indians by the treaty of Sept. 29, 1865, "shall be reserved for state school purposes, in accordance with the provisions of the act of admission of the state of Kansas," operated as a grant of said sections to the state for school purposes; and such grant was not in violation of the terms of the trust on which the lands were ceded. Baker *v.* Newland, 25 Kan. 25, holding further that even if such grant were a breach of the trust, the title of the grantee would not thereby fail, although the Indians might have an equitable claim on the government for compensation.

97. Wisconsin *v.* Hitchcock, 201 U. S. 202, 26 S. Ct. 498, 50 L. ed. 727 [*following* Minnesota *v.* Hitchcock, 185 U. S. 373, 22 S. Ct. 650, 46 L. ed. 954; U. S. *v.* Thomas, 151 U. S. 577, 14 S. Ct. 426, 38 L. ed. 276], holding that the state of Wisconsin has not, by reason of the cession for school purposes in Enabling Act, Aug. 6, 1846, c. 89, 9 U. S. St. at L. 57, of the sixteenth section in every township, not sold or otherwise disposed of, any such interest, in the several sixteenth sections of the lands ceded to the United States by the Chippewa Indians in the treaty of March 23, 1843, 7 U. S. St. at L. 592, where those Indians have not surrendered the right of occupancy reserved therein, as entitles that state to interfere with the administration, by the interior department, for the benefit of the Indians, of such sections of the land so ceded as were subsequently included within the tracts set aside as a part of the Bad River or La Pointe and the Flambeau reservations.

98. Ballou *v.* O'Brien, 20 Mich. 304; Beecher *v.* Wetherby, 95 U. S. 517, 24 L. ed. 440. See also U. S. *v.* Thomas, 151 U. S. 577, 14 S. Ct. 426, 38 L. ed. 276. But *compare* Missouri, etc., R. Co. *v.* Roberts, 152 U. S. 114, 14 S. Ct. 496, 38 L. ed. 377 [*reversing* 43 Kan. 102, 22 Pac. 1006].

99. Buhne *v.* Chism, 48 Cal. 467, holding that a claimant of the land under the state must prove such approval.

manner and sold, except certain lots which the secretary of the treasury might reserve for the support of schools, it was held that whether those lots were so reserved by the secretary for school purposes was a question of fact for the jury to determine, and there was no legal presumption that he made the selection.[1]

g. Indemnity and Lieu Lands — (i) *In General.* It frequently happens that a state does not obtain land within the school sections, by reason of the land being of a character excluded from the grant,[2] or because it has been already disposed of or is subject to preëxisting rights entitled to protection;[3] and hence through various enactments of congress has arisen the law of indemnity whose cardinal doctrine is compensation for such loss,[4] and which allows the state, in lieu of lands which have been thus lost to it, to select other lands,[5] of equal acreage,[6] and as contiguous thereto as may be.[7]

(ii) *By Whom Selection Made.* When the statute designates a particular officer to make the selection it must be made by him in order that title may pass.[8]

(iii) *Lands Subject to Selection.*[9] A state has no such vested right to select indemnity or lieu lands as precludes the withdrawal from selection of any particular lands or class of lands at any time before a selection is actually made.[10] Lands which are of such a character or are subject to such claims that they would not pass by a grant of certain sections, or be subject to selection under a general grant [11] cannot be selected as indemnity or lieu lands.[12] Under the act of congress authorizing the state of Alabama "to select by legal subdivisions, from any of the surveyed public lands" in lieu of lost school lands, the state acquired a perfect title to lands selected in the territory of Nebraska, and might hold such lands after the admission of Nebraska as a state.[13]

(iv) *Certification, Approval, and Listing of Selections.* A selection of indemnity or lieu lands must be certified to and approved by the secretary

1. Dickens *v.* Mahana, 21 How. (U. S.) 276, 16 L. ed. 158.

2. See Johnston *v.* Morris, 72 Fed. 890, 19 C. C. A. 229, holding that when school lands surveyed by a United States deputy surveyor are certified by him to be mineral, and his field-notes and plats are approved by the surveyor-general and the commissioner of the general land office, and filed in the land office, this is a sufficient determination that the lands are mineral in character to give the state a right to select other lands as indemnity for the loss. See, generally, *supra*, II, H, 1, e, (III)–(VI).

3. See State *v.* Stringfellow, 2 Kan. 263; Hibberd *v.* Slack, 84 Fed. 571. See, generally, II, H, 1, e, (II).

4. Hibberd *v.* Slack, 84 Fed. 571; Poesal *v.* Fitzgerald, 15 Land Dec. Dep. Int. 19.

The statute does not contemplate an exchange of lands between a state and the United States, but only indemnity for loss to a state by reason of lands to which it is entitled being disposed of by the United States. Hibberd *v.* Slack, 84 Fed. 571.

When land considered lost.—A school section which is included within the limits of a confirmed Mexican grant is not lost to the state so that other land can be selected in lieu thereof until there has been a final survey of the grant. Rosecrans *v.* Douglass, 52 Cal. 213.

5. *Alabama.*— Sprayberry *v.* State, 62 Ala. 459.

California.— Bullock *v.* Rouse, 81 Cal. 590, 22 Pac. 919; Wedekind *v.* Craig, 56 Cal. 642; Alberger *v.* Kingsbury, 6 Cal. App. 93, 91 Pac. 674.

Michigan.— Ballou *v.* O'Brien, 20 Mich. 304.

Nebraska.— State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235.

Ohio.— Coombs *v.* Lane, 4 Ohio St. 112.

United States.— Johanson *v.* Washington, 190 U. S. 179, 23 S. Ct. 825, 47 L. ed. 1008 [*affirming* 26 Wash. 668, 67 Pac. 401]; Minnesota *v.* Hitchcock, 185 U. S. 373, 22 S. Ct. 650, 46 L. ed. 954; Ivanhoe Min. Co. *v.* Keystone Consol. Min. Co., 102 U. S. 167, 26 L. ed. 126.

See 41 Cent. Dig. tit. "Public Lands," § 143.

6. Johnston *v.* Morris, 72 Fed. 890, 19 C. C. A. 229.

7. Ballou *v.* O'Brien, 20 Mich. 304.

8. Peck *v.* Louisville, etc., R. Co., 101 Ind. 366, selection by secretary of the treasury under 4 U. S. St. at L. 179.

9. **Lands subject to entry or sale** generally see *supra*, II, C, 2.

10. U. S. *v.* Mullan, 10 Fed. 785, 7 Sawy. 466 [*affirmed* in 118 U. S. 271 6 S. Ct. 1041, 30 L. ed. 170].

11. **Lands included in grant or subject to selection** see *supra*, II, H, 1, e.

12. See Hellman *v.* Jones, 56 Cal. 462; Rosecrans *v.* Douglass, 52 Cal. 213; Mullan *v.* U. S., 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170 [*affirming* 10 Fed. 785, 7 Sawy. 466].

13. Stoutz *v.* Brown, 23 Fed. Cas. No. 13,505, 5 Dill. 445.

of the interior,[14] and noted on the records of the department,[15] and the lands listed in the state by the commissioner of the general land office,[16] and the list transmitted to the local land office.[17] When all the requisites of the selection are complied with, the fee vests in the state,[18] as of the date of the selection,[19] and a patent for such lands is not necessary.[20]

14. Roberts *v.* Gebhart, 104 Cal. 67, 37 Pac. 782; Buhne *v.* Chism, 48 Cal. 467; Baker *v.* Jamison, 54 Minn. 17, 55 N. W. 749; State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235; Johanson *v.* Washington, 190 U. S. 179, 182, 23 S. Ct. 825, 47 L. ed. 1008 [*affirming* 26 Wash. 668, 67 Pac. 401] (where it is said: "The approval by the Secretary of the Interior of a selection made by one claiming to be the agent of a Territory or State of land in lieu of school sections 16 and 36 is, if nothing more, in effect a withdrawal from private entry of the selected land, and such withdrawal continues until the approval of the selection is itself set aside"); McCreery *v.* Haskell, 119 U. S. 327, 7 S. Ct. 176, 30 L. ed. 408.

It is the consent of the United States, as manifested by the approval of the secretary of the interior, which gives legal efficacy to the selection, and until such approval the selection does not give to the state any legal or equitable right to the land. Roberts *v.* Gebhart, 104 Cal. 67, 37 Pac. 782 (holding further that, in any event, where the purchaser of lands selected in lieu of other land by a state has notice of an order vacating the selection, and fails to appeal therefrom, but permits another to perfect a homestead claim to the land, such laches will bar him from any relief); Buhne *v.* Chism, 48 Cal. 467.

Past, as well as future, approval by the secretary of the interior of selections of public land in lieu of school sections was covered by the provision of the act of Dec. 18, 1902, c. 5 (32 U. S. St. at L. 756 [U. S. Comp. St. Suppl. (1907) p. 462]) confirming title of the state of Washington to lands so selected, "when the same shall have been approved by the Secretary of the Interior." Johanson *v.* Washington, 190 U. S. 179, 23 S. Ct. 825, 47 L. ed. 1008 [*affirming* 26 Wash. 668, 67 Pac. 401].

A certified transcript from the general land office, showing a selection of lands for the benefit of a township and its approval by the secretary of the treasury, is competent evidence to support an action of ejectment by the state, although such transcript fails to show on its face that the sixteenth section had been disposed of in the township to which the lands were allotted, the presumption being that all facts necessary to sustain the action of the secretary of the treasury existed, and, the papers showing such selection being on file in the general land office, a certified transcript by the head of that department is admissible. Sprayberry *v.* State, 62 Ala. 459.

15. State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235.

16. Howell *v.* Slauson, 83 Cal. 539, 23 Pac. 692; Churchill *v.* Anderson, 53 Cal. 212 (holding that the state acquires no title to lieu lands, which it can convey to a purchaser, until the land has been listed over to the state by the United States); Buhne *v.* Chism, 48 Cal. 467; McCreery *v.* Haskell, 119 U. S. 327, 7 S. Ct. 176, 30 L. ed. 408. See also Baker *v.* Jamison, 54 Minn. 17, 55 N. W. 749.

The act of congress of March 1, 1877, entitled "An act relating to indemnity school selections in the state of California," confirmed only such of the state selections as were certified by the United States to the state. U. S. *v.* Southern Pac. R. Co., 76 Fed. 134.

17. Howell *v.* Slauson, 83 Cal. 539, 23 Pac. 692.

A transcript of the original list prepared in the general land office, and transmitted by it to the local land office, and which is subsequently treated as properly authenticated both by the local and general land offices, cannot be attacked because of the alleged spurious signature of the commissioner of the general land office in an action to quiet title by a patentee of the United States against a purchaser from the state of a quarter section of the listed land. Howell *v.* Slauson, 83 Cal. 539, 23 Pac. 692.

An indorsement on the transcript of the lands selected by the state as indemnity lands for the loss of school lands, "Received and filed December 5, 1871," and testimony by the register of the local land office that he received the transcript from the general land office, and that it was deposited as part of the records of the office, is sufficient evidence of filing in the local land office, although it lacks a file mark. Howell *v.* Slauson, 83 Cal. 539, 23 Pac. 692.

An entry by the register of the land office in the tract book that a certain tract of land was set off as school lands is presumptive evidence that such lands were selected and approved as such by the secretary of the treasury. Coombs *v.* Lane, 4 Ohio St. 112.

18. Sprayberry *v.* State, 62 Ala. 459; Howell *v.* Slauson, 83 Cal. 539, 23 Pac. 692; State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235; Durand *v.* Martin, 120 U. S. 366, 7 S. Ct. 587, 30 L. ed. 675 (holding that if a selection of indemnity school lands by a state is bad when made, but would be good at a subsequent date, the certification of such land to the state by the proper United States officer at such subsequent date, no other rights having meanwhile intervened, will transfer the title to the state); McCreery *v.* Haskell, 119 U. S. 327, 7 S. Ct. 176, 30 L. ed. 408.

19. Howell *v.* Slauson, 83 Cal. 539, 23 Pac. 692; McCreery *v.* Haskell, 119 U. S. 327, 7 S. Ct. 176, 30 L. ed. 408.

20. Howell *v.* Slauson, 83 Cal. 539, 23 Pac. 692; Hedrick *v.* Hughes, 15 Wall. (U. S.)

(v) *Effect of Selection.* Where lieu lands have been selected and sold and the proceeds applied to the benefit of schools, the state is estopped from afterward claiming the lands in lieu of which the selection was made.[21]

(vi) *Confirmation of Selections.* In California much confusion and hardship was caused by the selection of lieu lands before the same were surveyed, by the selection of lands in lieu of lands not lost to the state, and by other defective and invalid selections, but congress has cleared up these matters by the passage of acts confirming such selections.[22]

(vii) *Vacating Selections.* A listing to a state of lieu lands selected by it, which has been confirmed by act of congress, cannot subsequently be canceled by the secretary of the interior.[23]

h. Control of School Lands. After the title to school lands has vested in the state such lands are not subject to any further legislation by congress;[24] but the absolute control of such lands, where not transferred, is in the state,[25] and it is for the state to determine how and by whom these lands shall be managed.[26]

i. Protection of School Lands and Rights Therein. In Arkansas the state has a right to sue for the injury committed by cutting and converting timber on school lands,[27] and it is no defense that the school directors consented to such cutting, where the state statute has not conferred upon school boards any power in reference to such lands.[28] In Missouri the members of the county court of each county are vested with the trust of managing the school lands for the benefit of the respective townships, and are justified in taking the same measures to protect the property of the state as though it were their own.[29] In Mississippi the

123, 21 L. ed. 52, holding that under the grant to Missouri, when a selection of lieu lands was made and entered in the register's book, the title to such lands vested in the state without any patent. And see *supra*, II, H, 1, c.

21. State *v.* Dent, 18 Mo. 313.

22. 14 U. S. St. at L. 218, 19 U. S. St. at L. 268. And see the following cases: People *v.* Noyo Lumber Co., 99 Cal. 456, 34 Pac. 96; Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359; Daniels *v.* Gualala Mill Co., 77 Cal. 300, 19 Pac. 519; Hambleton *v.* Duhain, 71 Cal. 136, 11 Pac. 865; Martin *v.* Durand, 63 Cal. 39; People *v.* Jackson, 62 Cal. 548; Aurrecoechea *v.* Sinclair, 60 Cal. 532; Mastick *v.* Cave, 52 Cal. 67; Laughlin *v.* McGarvey, 50 Cal. 169; Huff *v.* Doyle, 50 Cal. 16; Central Pac. R. Co. *v.* Robinson, 49 Cal. 446; Chant *v.* Reynolds, 49 Cal. 213; Young *v.* Shinn, 48 Cal. 26; Collins *v.* Bartlett, 44 Cal. 371; Hastings *v.* Devlin, 40 Cal. 358; Hodapp *v.* Sharp, 40 Cal. 69; Toland *v.* Mandell, 38 Cal. 30; Smith *v.* Athern, 34 Cal. 506; Grogan *v.* Knight, 27 Cal. 515; McNee *v.* Donahue, 142 U. S. 587, 12 S. Ct. 211, 35 L. ed. 1122 [*affirming* 76 Cal. 499, 18 Pac. 438]; Durand *v.* Martin, 120 U. S. 366, 7 S. Ct. 587, 30 L. ed. 675; Mower *v.* Fletcher, 116 U. S. 380, 6 S. Ct. 409, 29 L. ed. 593; Frasher *v.* O'Connor, 115 U. S. 102, 5 S. Ct. 1141, 29 L. ed. 311; Aurrecoechea *v.* Bangs, 114 U. S. 381, 5 S. Ct. 892, 29 L. ed. 170; Huff *v.* Doyle, 93 U. S. 558, 23 L. ed. 975; Barnard *v.* Ashley, 18 How. (U. S.) 43, 15 L. ed. 285; U. S. *v.* Curtner, 38 Fed. 1. See 41 Cent. Dig. tit. "Public Lands," §§ 145, 168.

23. Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359.

24. Mayers *v.* Byrne, 19 Ark. 308; Hibberd *v.* Slack, 84 Fed. 571.

25. Widner *v.* State, 49 Ark. 172, 4 S. W. 657 [*followed* in Mississippi County School Dist. No. 10 *v.* Driver, 50 Ark. 346, 7 S. W. 387]; Street *v.* Columbus, 75 Miss. 822, 23 So. 773.

The constitutional provisions relating to the control and management of educational lands and the creation of commissioners for that purpose are not applicable to the means employed whereby title to lands is acquired by the state for the benefit of the public schools, but only to the control and management after the title has become vested in the state. State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235.

26. Widner *v.* State, 49 Ark. 172, 4 S. W. 657 [*followed* in Mississippi County School Dist. No. 10 *v.* Driver, 50 Ark. 346, 7 S. W. 387].

In Nebraska the "saline lands" granted to the state by the enabling act have not been placed in the class of educational lands, and the board of educational lands and funds has no jurisdiction over the disposal of such lands. McMurtry *v.* Engelhardt, 5 Nebr. (Unoff.) 271, 98 N. W. 40.

27. Widner *v.* State, 49 Ark. 172, 4 S. W. 657.

28. Widner *v.* State, 49 Ark. 172, 4 S. W. 657.

29. Washington County *v.* Boyd, 64 Mo. 179 [*citing* Washington County Bd. of Education *v.* Boyd, 58 Mo. 176; Cedar County *v.* Johnson, 50 Mo. 225; Ray County *v.* Bentley, 49 Mo. 236; Marion County *v.* Moffett, 15 Mo. 604], holding that where, prior to the payment of the purchase-money for a sixteenth section school land, an injunction suit was brought in good faith on behalf of

statute [30] makes it the duty of the county board of supervisors to institute and prosecute all necessary suits to establish and confirm in itself as representative of the county the title to school section lands and to fix the date of the expiration of any lease of the same,[31] and authorizes any person interested to institute and prosecute such a suit if the board fails to do so.[32]

j. Improvements [33] on School Lands. In Nebraska persons living on lands selected by the state in lieu of school selections are not thereby deprived of their improvements, but such improvements remain their property.[34] In Washington the appraisers are required to appraise all improvements found upon school lands,[35] and if the purchaser is a person other than the owner of the improvements, he is required to deposit the appraised value thereof with the state treasurer.[36] Formerly the statute required the purchaser to pay the appraised value of the improvements to the owner thereof, in cash, within thirty days,[37] and under this provision the owner of the improvements could retain possession of the land until

the county against the purchaser to stay waste, and certain members of the county court executed the injunction bond, those officers were entitled to reimbursement out of the purchase-money, when paid by the vendee of the land into the township fund, for any sum recovered from them on the bond on dissolution of the injunction.

30. Miss. Code (1892), § 4147.

31. Bolivar County *v.* Coleman, 71 Miss. 832, 15 So. 107.

Suit may be brought to recover lands held under a lease, to expire at a fixed date, with absolute reversion to the state, in trust, where such lease is void. Bolivar County *v.* Coleman, 71 Miss. 832, 15 So. 107.

Statute authorizes suit against one claiming in fee simple under conveyance from lessee of the term.— Carroll County *v.* Jones, 71 Miss. 947, 15 So. 106.

Pleading.—A bill by a county to establish the title to township school lands need not set out the investigations as to title, and the abstracts thereof, required by Miss. Code (1892), §§ 4144, 4155, but it sufficiently deraigns title when it avers the reservation of title by the United States to such lands for school purposes, and charges that the legal title remains therein, and that there is a public trust in such lands for the support of schools in the township on which the land is situated; neither need the bill make deraignment of defendants' claim of title, but it is sufficient to aver that defendants are in possession and claim title in fee simple, and that such possession and claim cast a cloud on the title to the land, and render it unavailable for carrying out the trust. Wright *v.* Lauderdale County, 71 Miss. 800, 15 So. 116.

Effect of adverse possession.— Under Miss. Code (1892), § 4148, which provides that adverse possession of a sixteenth section for more than twenty-five years under a claim of right is *prima facie* evidence that the lease or sale thereof has been duly made, the occupant is not obliged to also show that the lease or sale was actually made. Amite County *v.* Steen, 72 Miss. 567, 17 So. 930. The only presumption that there had once been a lease or a sale of such school lands now recognized by the law is that arising under the above section, and section 1806 of the code has no application to school lands. Leflore County *v.* Bush, 76 Miss. 551, 25 So. 351.

Limitation of actions.— Purchasers of school lands sold under Miss. Act, Feb. 25, 1854, without the affirmative consent of the inhabitants, as required by the act of congress of May 19, 1852, cannot set up the statute of limitations as a defense to an action by the county supervisors to quiet title. Lauderdale County *v.* East Mississippi Mills Co., (Miss. 1894) 16 So. 210.

32. Osborn *v.* Hinds County, 71 Miss. 19, 14 So. 457.

The statute refers to a person interested as a citizen of the civil subdivision in the assertion of the rights of the public in such lands and leases, and does not authorize a suit by one claiming the land as owner or lessee. Osborn *v.* Hinds County, 71 Miss. 19, 14 So. 457, holding, however, that under Code (1892), § 499, a leaseholder in possession may bring a suit against the county to confirm his title and fix the time of the expiration of his lease.

33. See, generally, IMPROVEMENTS, 22 Cyc. 1.

34. State *v.* McCright, 76 Nebr. 732, 108 N. W. 138, 112 N. W. 315.

35. Pearson *v.* Ashley, 5 Wash. 169, 31 Pac. 410.

Time of appraisement.—An appraisement of the value of improvements on school land is not invalidated by reason of the fact that it was made at the time of the sale, and not at the time when the land was appraised. Hart Lumber Co. *v.* Rucker, 15 Wash. 456, 46 Pac. 728 [*distinguishing* Holm *v.* Prater, 7 Wash. 207, 34 Pac. 919].

An appeal will not lie from the commissioner's failure to appraise the improvements on leased school lands. Wilkes *v.* Hunt, 4 Wash. 100, 29 Pac. 830.

36. Ballinger Annot. Wash. Code & St. (1897) § 2142.

Rights of purchaser as to improvements generally see *supra*, II, C, 6, g.

37. Wash. Gen. St. § 2146. See State *v.* School Land Com'rs, 9 Wis. 200.

compensated for his improvements,[38] or sue the purchaser of the land for the value of the improvements;[39] but he was not entitled to an injunction restraining the commissioner of public lands from executing and delivering a contract of sale of such land.[40]

2. Sale and Conveyance of School Lands[41]**— a. In General.** The states to which school lands have been granted have full power to sell and dispose of such lands,[42] and an act of congress imposing conditions on the state's power of sale, passed after the title has vested in the state, is not binding on the state.[43] It is the policy of the states to encourage the settlement and sale of school lands,[44] but in order for a sale of such lands to be valid, it must conform to the statutes regulating such sales.[45]

b. Control of Sales — (i) *In General.* It is for the state to determine how and by whom school lands shall be sold,[46] and accordingly there have been established in the various states regulations designating certain officers or boards to whom is committed the authority and duty to control the sale of such lands.[47]

38. Pearson *v.* Ashley, 5 Wash. 169, 31 Pac. 410 (holding that this was true notwithstanding he might find an adequate remedy to compel payment in an action at law); Wilkes *v.* Hunt, 4 Wash. 100, 29 Pac. 830.

39. Wilkes *v.* Hunt, 4 Wash. 100, 102, 29 Pac. 830, where it is said: "If there has been no appraisement, the court and a jury can fix the reasonable value as well as the commissioners."

The owner of the improvements need not surrender possession before suing for the value of his improvements. Wilkes *v.* Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

Evidence that a lessee made the improvements, and assigned his claim therefor to plaintiff shows *prima facie* plaintiff's right to recover the value of such improvements. Hart Lumber Co. *v.* Rucker, 15 Wash. 456, 46 Pac. 728.

Proof of appraisement.— That the improvements were appraised by the board of county commissioners before the sale may be shown by the county records, and by proof of what transpired at the time of the sale. Hart Lumber Co. *v.* Rucker, 15 Wash. 456, 46 Pac. 728.

That the appraisement was fraudulent is a matter of defense. Hart Lumber Co. *v.* Rucker, 15 Wash. 456, 46 Pac. 728.

Informality of lease.— Where possession of school lands has been taken under a lease from the county commissioners and improvements made thereon, a subsequent purchaser of such lands cannot escape liability for the value of the improvements by reason of any informality in the making of the lease. Hart Lumber Co. *v.* Rucker, 15 Wash. 456, 46 Pac. 728.

Location of improvements.— In a sale of school lands, the appraisement having stated that certain improvements were upon a lot designated, a purchaser of such lot must be presumed to have bid with the expectation that he must pay to the owner thereof the amount of such appraisement, and he cannot take advantage of the fact that some portion of the improvements were upon the tide land in front of the upland purchased by him. Hart Lumber Co. *v.* Rucker, 15 Wash. 456, 46 Pac. 728.

40. Wilkes *v.* Hunt, 4 Wash. 100, 29 Pac. 830.

41. **Sale of Texas school lands** see *infra*, III, C, 3, b.

42. Bradley *v.* Case, 4 Ill. 585; Cooper *v.* Roberts, 18 How. (U. S.) 173, 15 L. ed. 338.

Under the grant to Kansas the territorial authorities had power to sell school lands prior to the establishment of the state. State *v.* Stringfellow, 2 Kan. 263.

Authority of congress.— Where grants have been made to a state for school purposes, it has been usual for congress to authorize the sale of the land if the state desires it (Cooper *v.* Roberts, 18 How. (U. S.) 173, 15 L. ed. 338. See also State *v.* Nicholls, 42 La. Ann. 209, 7 So. 738), but such authority is not necessary, as a state has the right to sell school sections granted to it without the consent of congress (Cooper *v.* Roberts, *supra*).

State statute authorizing sale not repugnant to grant.— Maupin *v.* Parker, 3 Mo. 310 [*followed* in Payne *v.* St. Louis County, 8 Mo. 473].

43. Mayers *v.* Byrne, 19 Ark. 308.

44. Bushey *v.* Hardin, 74 Kan. 285, 86 Pac. 146; True *v.* Brandt, 72 Kan. 502, 83 Pac. 826.

45. McDonald *v.* Mangold, 61 Mo. App. 291.

Conditional sale unauthorized.— In Minnesota school lands can be disposed of only by absolute sale, and a conditional sale thereof is unauthorized and void. Wright *v.* Burnham, 31 Minn. 285, 17 N. W. 479.

A parish school board in Louisiana has no power to sell the timber on a school section. State *v.* Stark, 111 La. 594, 35 So. 760.

46. Widner *v.* State, 49 Ark. 172, 4 S. W. 657 [*followed* in Mississippi County School Dist. No. 10 *v.* Driver, 50 Ark. 346, 7 S. W. 387].

47. See cases cited *infra*, this note.

In California instructions to the land agent of the University of California, directing him to receive applications for surveyed

Where this matter is provided for by the state constitution it is not within the power of the legislature to authorize the control, sale, or leasing of school lands by an officer or individual other than those named in the constitution,[48] or to exercise any power as to such lands which the constitution vested in designated officers.[49]

(II) *Ratification of Unauthorized Contract of Sale.* A contract by a county school superintendent to convey school lands, although outside his authority, is ratified by the state's acceptance of the price, so as to bind it to make a deed to the lands.[50]

(III) *Compensation of Officers Making Sales.* The compensation of the officers making the sales is regulated by the statutes.[51]

c. Lands Subject to Sale. As a general rule school lands are not subject to sale or location until they have been surveyed;[52] and lieu lands cannot be sold by

land, in accordance with a designated plan, whether they emanate from the board of regents or not, if subsequently recognized and enforced by them, will be held to be the instructions of the board. White *v.* Douglass, (1885) 8 Pac. 801.

In Colorado the state board of land commissioners is a constitutional tribunal in which is vested the power of direction, control, and disposition of the public lands of the state, under such regulations as may be prescribed by law. The sale of school lands is confided entirely to the discretion of the board, and the only requirement prescribed by the statutes as a condition to the exercise of the power to sell school lands is that the board shall be of the opinion that the best interests of the school fund will be served by offering the same for sale. It need not be shown by the records of the proceedings of the board that it was of the opinion that a sale would be for the best interests of the school fund, for the fact that the board offered the land for sale is evidence of the existence of the condition authorizing the exercise of its power. Routt *v.* Greenwood Cemetery Land Co., 18 Colo. 132, 31 Pac. 858.

In Illinois the acts of two school trustees in dividing and appraising school lands to be offered for sale are valid, although the third trustee be not notified of their proceedings. McLean County School Trustees *v.* Allen, 21 Ill. 120. It is for the school commissioner to decide, before making a sale of school lands, whether the township contains a sufficient number of inhabitants to warrant the sale of an entire section. McLean County School Trustees *v.* Allen, 21 Ill. 120.

In Michigan the commissioner of the land office may refuse to sell land forming part of the primary school lands, if in his opinion such refusal would benefit the several school funds affected thereby. People *v.* State Land Office Com'r, 26 Mich. 146.

In Louisiana the power to sell and convey school indemnity lands is vested in the governor and the register of the land office. State *v.* Nicholls, 42 La. Ann. 209, 7 So. 738.

In Oregon the constitution constitutes the governor, the secretary of state, and the state treasurer a board of commissioners for the sale of school and university lands and for the investment of the funds arising therefrom with such powers and duties as may be prescribed by law, and the statutes authorize the state land board to make rules for the transaction of its business, and to decide all questions of priority of settlement, etc., and other disputes between applicants for the purchase of school lands, and provide that all its acts and decisions as to the legal title shall be final as to the right to a deed from the state. Such board is the state's instrument for the sale and disposition of the state school lands, and its decisions with reference to who is entitled to a patent prior to the issuance thereof are not subject to review by the courts. De Laittre *v.* Board of Com'rs, 149 Fed. 800.

48. *In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274; State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235 [*following* State *v.* Scott, 18 Nebr. 597, 26 N. W. 386].

49. State *v.* Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503, holding that the legislature has no power to withhold school lands from sale, as the constitution confides such power solely to the commissioners of public lands.

50. Ambrose *v.* Huntington, 34 Oreg. 484, 56 Pac. 513.

51. See Harrington *v.* Smith, 28 Wis. 43 (holding that, although Laws (1865), c. 537, was entitled "An act to dispose of the swamp and overflowed lands, and the proceeds thereof," the provision of section 22 that the commissioners, "in lieu of all compensation for services rendered necessary by this act, shall be entitled each to receive fifty cents on every patent, and fifty cents on every certificate hereafter issued by them; and no revenue stamps need be affixed to such patents or certificates," included every certificate and every patent issued for land sold by the state, and was not limited to those issued on sales of swamp land only, as the fact that no distinction regarding the revenue stamp could lawfully be made between the patents for the different lands showed the intention that the act was to apply to patents for school lands); Bickerton *v.* Grimes, 8 Wash. 451, 36 Pac. 252.

52. Bullock *v.* Rouse, 81 Cal. 590, 22 Pac.

the state officers until the selection of them by the state has been approved by the proper officer of the United States.[53] Under the Kansas statute, providing that all school lands may be sold in the manner provided, it is competent for the officers of a county to sell school land lying in an unorganized county attached thereto for judicial purposes.[54] Under the provision of the Wisconsin constitution giving the commissioners of public lands power to withhold from sale any portion of the school lands when they deem it expedient, the commissioners may withdraw from sale school lands which have previously been offered at public sale.[55]

d. Sale of Leased Lands. The Kansas statute providing for the sale of leased lands contemplates that such sales shall be made during the life of the lease and subject to the existing lease,[56] and it is improper to inaugurate proceedings to sell land subject to an existing lease, when the lease will expire before the sale can be legally made.[57] Whenever a lease upon school lands has expired, proceedings to sell such lands to actual settlers are proper.[58]

e. Direction or Consent of Inhabitants. In some states the power to decide upon a sale of school land is vested in the inhabitants of the township in which the land is located, and it is a prerequisite to a valid sale that they shall direct or consent to the same,[59] by presenting a petition requiring the land to be sold,[60] or by an affirmative vote at an election held to determine the question.[61] Where

919; Gilson *v.* Robinson, (Cal. 1885) 7 Pac. 428; Medley *v.* Robertson, 55 Cal. 396; Oakley *v.* Stuart, 52 Cal. 521; Finney *v.* Berger, 50 Cal. 248; Rooker *v.* Johnston, 49 Cal. 3; Young *v.* Shinn, 48 Cal. 26; Collins *v.* Bartlett, 44 Cal. 371; Hastings *v.* Devlin, 40 Cal. 358; Smith *v.* Athern, 34 Cal. 506; Middleton *v.* Low, 30 Cal. 596. See also Rogers *v.* Shannon, 52 Cal. 99. But *compare* Nims *v.* Johnson, 7 Cal. 110; Nims *v.* Palmer, 6 Cal. 8.

53. Roberts *v.* Gebhart, 104 Cal. 67, 37 Pac. 782; Berry *v.* Cammet, 44 Cal. 347.

54. Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573.

55. State *v.* Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503.

56. Bushey *v.* Hardin, 74 Kan. 285, 86 Pac. 146.

57. Bushey *v.* Hardin, 74 Kan. 285, 86 Pac. 146.

58. Bushey *v.* Hardin, 74 Kan. 285, 86 Pac. 146.

59. *Alabama.*— Tankersly *v.* State Bank, 6 Ala. 277 [*followed* in Mobile Branch Bank *v.* Tellman, 10 Ala. 149].

Arkansas.— *Ex p.* Young, 74 Ark. 361, 85 S. W. 1133.

Indiana.— McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634.

Louisiana.— State *v.* Stark, 111 La. 594, 35 So. 760 (approval of majority of legal voters); Telle *v.* St. Tammany Parish School Bd., 44 La. Ann. 365, 10 So. 801.

Mississippi.— Lauderdale County *v.* East Mississippi Mills Co., (1894) 16 So. 210.

See 41 Cent. Dig. tit. "Public Lands," § 156.

Consent cannot be presumed.—Act Cong. May 19, 1852 (10 U. S. St. at L. 6), which allows the legislature of Mississippi to convey or lease school lands, provided they shall in no case be sold or leased without the consent of the inhabitants thereof, to be obtained as the legislature may direct, contemplates that the affirmative consent of the inhabitants shall be obtained; and a sale or lease of school lands under the act of Feb. 25, 1854, providing that the assent of the inhabitants shall be presumed if no petition showing their dissent is presented to the school commissioners after the advertisement of the lands for sale or lease, conveys no title. Lauderdale County *v.* East Mississippi Mills Co., (Miss. 1894) 16 So. 210.

Consent of voters not necessary to resale of forfeited land.— McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634.

60. *Ex p.* Young, 74 Ark. 361, 85 S. W. 1133.

Petition signed by majority of adult male inhabitants sufficient.— Brown *v.* Rushing, 70 Ark. 111, 66 S. W. 442.

A mere mistake in form will not invalidate the petition, as where it is directed to the sheriff, who is *ex officio* tax collector, as sheriff and not as collector. Brown *v.* Rush-Ark. 111, 66 S. W. 442.

A petition filed with one collector authorizes a subsequent collector to sell, although the lands have not been offered for sale at intervening terms of the county court. Brown *v.* Rushing, 70 Ark. 111, 66 S. W. 442.

61. Tankersly *v.* State Bank, 6 Ala. 277; Telle *v.* St. Tammany Parish School Bd., 44 La. Ann. 365, 10 So. 801, holding that a sale made without an election held according to the statute to determine the will of the voters is a nullity and passes no title to the purchaser.

Place for holding election.— It is not essential that an election to ascertain the sense of the township as to a sale of the sixteenth section should be held upon the sixteenth section, but the commissioners may consult the convenience of the people by holding it at another place. Tankersly *v.* State Bank, 6 Ala. 277.

Time for contest of election.— If there has been an election in fact to ascertain the sense of the qualified voters as to the sale of the sixteenth section of the township, which

an order of sale from the court provided for by the statute is a mere notification of the fact that no one has contested the election, and that there is no obstacle to a sale of the land, the officers empowered to sell may proceed to sell upon their own knowledge of the facts without such an order.[62]

f. Right to Purchase — (i) *In General.* School land can be sold only to persons qualified to purchase under the state statutes,[63] some of which extend the right to purchase such land to persons over eighteen years of age,[64] who are citizens[65] or have declared their intention of becoming such,[66] and who desire to purchase the same for their own use and benefit[67] and not for a speculation,[68] and have made no contract or agreement to sell the same.[69] In California the rule that land suitable for cultivation can be purchased only by actual settlers[70] applies to school lands.[71] In Louisiana the fact that one is an employee in the land-office does not disqualify him from acquiring scrips and warrants and a valid title to school land under them.[72]

(ii) *Rights of Settlers.* In some states a preference right to purchase is given to settlers on school sections,[73] and to persons residing on land selected

is not contested within twenty days, and a sale of the land is actually made, all persons are concluded from contesting the validity of the election in a court of law. Tankersly *v.* State Bank, 6 Ala. 277. See also Mobile Branch Bank *v.* Tillman, 10 Ala. 149.

62. Tankersly *v.* State Bank, 6 Ala. 277 [*followed* in Mobile Branch Bank *v.* Tillman, 10 Ala. 149].

63. White *v.* Douglass, 71 Cal. 115, 11 Pac. 860.

64. De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

65. De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

66. De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

67. Henshall *v.* Marsh, 151 Cal. 289, 90 Pac. 693; De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

The fact that an applicant has agreed to pay another person for attending to the matter in the land office, such payment to be made when the land is sold by the applicant, does not show that the applicant did not desire to purchase for his own use and benefit. Henshall *v.* March, 151 Cal. 289, 90 Pac. 693.

Loan of money to pay for land.—An arrangement between an applicant for the purchase of school lands and another for the borrowing by the applicant of sufficient money to make payment for the land, to be repaid on a sale of the land or to be secured by a mortgage after obtaining the certificate of purchase, constitutes simply a loan, and does not give the lender an interest in the land, and does not show that the applicant did not desire to purchase the same for his own use and benefit. Henshall *v.* Marsh, 157 Cal. 289, 90 Pac. 693.

68. De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

69. Henshall *v.* Marsh, 151 Cal. 289, 90 Pac. 693; De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

Contemplation of sale.—An applicant is not deprived of the right to purchase by reason of the fact that at the time of his application he may contemplate selling the land at a profit after obtaining a certificate of purchase, he having made no contract or agreement to sell the same. Henshall *v.* Marsh, 151 Cal. 289, 90 Pac. 693.

70. See *infra*, III, C, 2, a.

71. Albert *v.* Hobler, 111 Cal. 398, 43 Pac. 1104; Jacobs *v.* Walker, 90 Cal. 43, 27 Pac. 48; Taylor *v.* Weston, 77 Cal. 534, 20 Pac. 62; Reeves *v.* Hyde, 77 Cal. 397, 19 Pac. 685; Manley *v.* Cunningham, 72 Cal. 236, 13 Pac. 622; Gavitt *v.* Mohr, 68 Cal. 506, 10 Pac. 337; Dillon *v.* Saloude, 68 Cal. 267, 9 Pac. 162; Urton *v.* Wilson, 65 Cal. 11, 2 Pac. 411.

72. Bres *v.* Louviere, 37 La. Ann. 736.

73. *California.*— White *v.* Douglass, 71 Cal. 115, 11 Pac. 860.

Illinois.— Gullett *v.* Lippincott, 76 Ill. 327.

Kansas.— Wilson *v.* Winfrey, 72 Kan. 468, 84 Pac. 123; State *v.* Budgett, 35 Kan. 600, 11 Pac. 910; Bratton *v.* Cross, 22 Kan. 673; Beedy *v.* State, 4 Kan. App. 575, 46 Pac. 65.

Nevada.— O'Neale *v.* Cleaveland, 3 Nev. 485.

Oregon.— Hurst *v.* Hawn, 5 Oreg. 275.

Utah.— Twiggs *v.* State Land Com'rs, 27 Utah 241, 75 Pac. 729.

See 41 Cent. Dig. tit. "Public Lands," § 157.

Actual residence is necessary to give a preference right to purchase. Bratton *v.* Cross, 22 Kan. 673. *Contra*, Twiggs *v.* State Land Com'rs, 27 Utah 241, 75 Pac. 729, holding that under Rev. St. (1898) § 2337, providing that settlers who have resided on, occupied, or cultivated land granted to the state for school purposes should have a preference right to purchase the same, it is not necessary that a person shall actually reside upon the land in order to be an "occupant" thereof.

An intention to permanently establish a residence on the land is necessary to give the settler a right to purchase. Christisen *v.* Bartlett, (Kan. 1908) 95 Pac. 1130.

A settlement on lands while a lease thereof is in force gives the settler no preference

by the state in lieu of school sections; [74] but a settlement upon and improvement of school land confers on the settler no legal or equitable right against the state,[75] and one seeking to purchase as a settler must comply with all the requirements of the statute in force when he presents his petition.[76] A settler's preference right is lost unless he makes application to purchase within the time limited by the statute.[77] On who has purchased a possessory right from an original settler is entitled to the same privileges and benefits under the Utah statute, as his grantor would have had had he continued in possession of the land, and not parted with his interest therein.[78] In Kansas the commencement of proceedings to sell land as leased land does not remove it from settlement or prevent a settler from obtaining the right to purchase; [79] and where land has been leased for a term of years and the lessee is in arrears and has abandoned the land, although no steps have been taken to forfeit the lease, one who enters upon the land the day before the lease expires is not a trespasser as against the state, and can acquire the rights of settler when his occupancy continues without interruption, and he makes valuable improvements with the intention of purchasing the land as a settler.[80]

(III) *Priority of Application.* As between persons other than actual settlers, the first applicant is ordinarily entitled to preference.[81]

(IV) *Contests.* In California the general rules established with reference to contests over the right to purchase state lands [82] are applicable in the case of school lands.[83] In Kansas the probate court is invested with jurisdiction to hear and determine whether a settler upon school lands is qualified and entitled to purchase the land at the appraised value, and its decision upon the facts duly submitted and upon every question involved is binding upon both the settler and the state unless appealed from.[84] No appeal or cost bond is required to perfect an appeal by the county superintendent of schools to the district court, in a proceeding to purchase school land instituted in the probate court by a settler,[85] and the county attorney cannot arbitrarily dismiss such an appeal over the objection of the county superintendent.[86]

g. Amount Which May Be Purchased. The state statutes usually limit the amount of school land which an individual may purchase,[87] and a certificate of

right to purchase. Hopper *v.* Nation, (Kan. 1908) 96 Pac. 77.

Right to enjoin sale to another.— One who settled on school lands with intent of becoming the purchaser, and who placed valuable improvements thereon and occupies the land with his family, has such an interest in the land, aside from the public generally, as will entitle him to maintain an action to enjoin the county treasurer from selling the land. Schwab *v.* Wilson, 72 Kan. 617, 84 Pac. 123.

The Illinois statute applies to those who are residents on the land at the time of the appraisement thereof, and not residents at the time of the passage of the act. Gullett *v.* Lippincott, 76 Ill. 327.

In Iowa the right to preëmpt school lands belonging to the five-hundred-thousand-acre grant has been denied. Perrin *v.* Griffith, 13 Iowa 151.

The fact that another person offers a higher price does not deprive the settler of his right to purchase at the minimum price. State *v.* Blasdel, 4 Nev. 241.

74. State *v.* McCright, 76 Nebr. 732, 108 N. W. 138, 112 N. W. 315; State *v.* Blasdel, 4 Nev. 241.

75. State *v.* Budgett, 35 Kan. 600, 11 Pac. 910.

76. Christisen *v.* Bartlett, (Kan. 1908) 95 Pac. 1130; State *v.* Budgett, 35 Kan. 600, 11 Pac. 910.

77. State *v.* Blasdel, 4 Nev. 241; Hurst *v.* Hawn, 5 Oreg. 275.

78. Twiggs *v.* State Land Com'rs, 27 Utah 241, 75 Pac. 729 [*following* Hagar *v.* Wikoff, 2 Okla. 580, 39 Pac. 281; Stringfellow *v.* Cain, 99 U. S. 610, 25 L. ed. 421; Hussey *v.* Smith, 99 U. S. 20, 25 L. ed. 314].

79. Davies *v.* Benedict, 75 Kan. 47, 88 Pac. 536 [*following* Bushey *v.* Hardin, 74 Kan. 285, 86 Pac. 146; Schwab *v.* Wilson, 72 Kan. 617, 84 Pac. 123].

80. Davies *v.* Benedict, 75 Kan. 47, 88 Pac. 536.

81. Hurst *v.* Hawn, 5 Oreg. 275.

82. **Contests over right to purchase state lands in California** see *infra*, III, C, 2, g.

83. Youle *v.* Thomas, 146 Cal. 537, 80 Pac. 714; Jacobs *v.* Walker, 76 Cal. 175, 18 Pac. 129.

84. State *v.* Dennis, 39 Kan. 509, 18 Pac. 723.

85. State *v.* Heaton, 10 Kan. App. 296, 63 Pac. 546.

86. State *v.* Heaton, 10 Kan. App. 296, 62 Pac. 546.

87. See Hicken *v.* French, 70 Cal. 430, 11 Pac. 840; O'Neale *v.* Cleaveland, 3 Nev. 485;

sale of more than the amount so fixed is void and passes no title.[88] But it has been held that one who has purchased the maximum quantity of land which he is authorized to purchase is not thereby disqualified from taking an assignment of a certificate of purchase issued to another person, or from receiving a deed in his own name for the land included in such certificate.[89] One who claims to have purchased school lands in tracts of less than forty acres must, in order to enforce his right as such purchaser, show that it was so subdivided by the county superintendent of public instruction and the appraisers.[90]

h. Price. It is not usually necessary that all the school lands of a state shall be sold at a uniform price,[91] but the price may be fixed by the state officers having jurisdiction over the sale of such lands.[92] In a number of states, however, the statutes have fixed a minimum price at which public school lands may be sold.[93]

i. Appraisement. In Nebraska the county treasurer, county judge, and county clerk are required, in appointing appraisers to value school lands for the purpose of sale, to act together or collectively; and an appointment otherwise made is invalid.[94] The board of educational lands and funds is vested with discretionary power in passing on the appraisement of school lands under an application by a lessee to purchase,[95] and where the board, exercising a reasonable discretion in such a matter, has determined that the appraisement is too low, and it appears that such judgment or determination is well founded, its order will justify the commissioner of public lands and buildings in refusing to execute a contract of purchase;[96] but an unreasonable refusal of the board to approve a fair appraisement does not justify the commissioner in refusing to execute a contract of purchase to which the lessee would otherwise be entitled.[97] Where land occupied by settlers is selected by the state in lieu of school sections, the settlers are entitled to have the land appraised separately from their improvements.[98] The Kansas statute [99] requires each legal subdivision of school land to be separately appraised prior to its being offered for sale.[1] It is the duty of the county commissioners of the county

De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

88. Hicken *v.* French, 70 Cal. 430, 11 Pac. 840.

89. Gliem *v.* School, etc., Land Com'rs, 16 Oreg. 479, 19 Pac. 16.

90. Hopper *v.* Nation, (Kan. 1908) 96 Pac. 77.

91. Miles *v.* Wells, 22 Utah 55, 61 Pac. 534.

92. See Miles *v.* Wells, 22 Utah 55, 61 Pac. 534.

Duty to obtain highest price possible.— It is the duty of the board intrusted with the sale of the educational lands of the state to sell the same for the highest price possible to be obtained and increase and protect by all honorable means the fund for the support of the educational institutions, and so long as the board is faithfully performing its duty in that respect the court will refuse to interfere. State *v.* Scott, 18 Nebr. 597, 26 N. W. 386.

93. **Arkansas.**— *Ex p.* Young, 74 Ark. 361, 85 S. W. 1133, not less than three fourths — or on a resale two thirds — of its appraised value, and not less than one dollar and twenty-five cents per acre.

Louisiana.—Acts (1857), p. 239, No. 239, fixed the minimum price at one dollar and twenty-five cents per acre (School Directors *v.* Coleman, 14 La. Ann. 186); but this statute was superseded by Rev. St. (1870) § 2960 of which prescribes the manner, terms, and conditions of the sale of such land and says nothing of a minimum price, and the repealing clause of which repeals all laws on the same subject-matter (Livingston Parish *v.* Lanier, 117 La. 307, 41 So. 583 [*explaining* Telle *v.* Tammany Parish School Bd., 44 La. Ann. 365, 10 So. 801]).

Nebraska.— State *v.* Tanner, 73 Nebr. 104, 102 N. W. 235, not less than seven dollars per acre nor less than appraised value.

Utah.— Twiggs *v.* State Land Com'rs, 27 Utah 241, 75 Pac. 729, sale to settlers at not less than twenty-five per cent of appraised value and not less than one dollar and twenty-five cents per acre.

See 41 Cent. Dig. tit. "Public Lands," § 162.

94. State *v.* Eaton, 78 Nebr. 202, 208, 110 N. W. 709, 112 N. W. 592.

95. State *v.* Eaton, 78 Nebr. 202, 208, 110 N. W. 709, 112 N. W. 592.

96. State *v.* Eaton, 78 Nebr. 202, 208, 110 N. W. 709, 112 N. W. 592.

97. State *v.* Eaton, 78 Nebr. 202, 208, 110 N. W. 709, 112 N. W. 592.

98. State *v.* McCright, 76 Nebr. 732, 108 N. W. 138, 112 N. W. 315.

99. Kan. Gen. St. (1901) § 6339.

1. Hopper *v.* Nation, (Kan. 1908) 96 Pac. 77.

The phrase "legal subdivision," refers to the smallest regular subdivision under the congressional system of surveying, namely, a

to give their consent to the appointment of appraisers made by the county superintendent of public instruction in proper proceedings for the sale of school lands, when such appraisers are duly qualified and satisfactory.[2] Where two petitions are pending for the sale of the same tract of school land, one of which requests that it be sold as leased land and the other that it be sold to an actual settler, and appraisers are appointed and qualified to appraise the land as leased land, they cannot be compelled by mandamus to appraise under the other petition, the performance of such act not being within the scope of their duty.[3]

j. Terms of Sale. While it is sometimes required that school lands shall be sold for cash,[4] the more general method is to sell on credit or for part cash and the balance in deferred payments [5] of instalments of the purchase-price [6] with interest on the unpaid balance.[7]

k. Proceedings For Sale. Proceedings for the sale of school land must be in conformity to the statute.[8]

l. Application or Affidavit of Purchaser — (i) *In General.* A person wishing to purchase school land is in some states required to file an application therefor,[9]

forty-acre tract. Hopper *v.* Nation, (Kan. 1908) 96 Pac. 77.

2. Bushey *v.* Hardin, 74 Kan. 285, 86 Pac. 146.

3. Wilson *v.* Winfrey, 72 Kan. 468, 84 Pac. 123.

4. Brown *v.* Toler, 66 Ark. 361, 50 S. W. 696.

What constitutes immediate payment.— Under Sandels & H. Dig. Ark. § 7118, providing that a sale of school lands shall be for cash, and, if any bidder shall fail to pay, the collector shall "immediately" resell, where a bidder was allowed an hour after his bid in which to procure the money and make the payment, a finding that the payment was made "immediately" was justified. Brown *v.* Toler, 66 Ark. 361, 50 S. W. 696.

5. *Arkansas.*— State *v.* Morgan, 52 Ark. 150, 12 S. W. 243.

California.— People *v.* Morris, 77 Cal. 204, 19 Pac. 378.

Illinois.— Kidder *v.* School Trustees, 10 Ill. 191.

Indiana.— St. Joseph County *v.* State, 120 Ind. 442, 22 N. E. 339.

Kansas.— Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573.

Oregon.— Sehlbrede *v.* State Land Bd., 46 Oreg. 615, 81 Pac. 702; Robertson *v.* Low, 44 Oreg. 587, 77 Pac. 744.

Washington.— State *v.* Frost, 25 Wash. 134, 64 Pac. 902.

Wisconsin.— Smith *v.* Mariner, 5 Wis. 551, 68 Am. Dec. 73.

A statutory provision that any person may pay the amount in cash applies only to purchasers, and does not permit one person to pay cash and thus acquire land sold to another. State *v.* Morgan, 52 Ark. 150, 12 S. W. 243.

Filing of note.— Under the Mississippi statute (Hutchinson Code 239), providing that all notes given for the purchase or lease of any school land, shall be recorded by the clerk of the circuit court, and, when due, if not punctually paid, the clerk shall indorse on the record of said note that the same remains unpaid; and the same shall thereafter have the force and effect of a judgment of said circuit court, and said clerk shall issue execution, etc., the note should be filed and recorded before it becomes due, and must be in the possession of the clerk when it becomes due, and where a note was filed after the day it became due, an execution issued on it under the statute may be quashed on motion, and the proceedings declared void. Matthews *v.* Parker, 27 Miss. 642.

6. State *v.* Frost, 25 Wash. 134, 64 Pac. 902.

7. *Arkansas.*— State *v.* Morgan, 52 Ark. 150, 12 S. W. 243.

California.— People *v.* Morris, 77 Cal. 204, 19 Pac. 378.

Indiana.— St. Joseph County *v.* State, 120 Ind. 442, 22 N. E. 339.

Kansas.— Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573.

Minnesota.— McKinney *v.* Bode, 32 Minn. 228, 20 N. W. 94.

Oregon.— Sehlbrede *v.* State Land Bd., 46 Oreg. 615, 81 Pac. 702; Robertson *v.* Low, 44 Oreg. 587, 77 Pac. 744.

See also *infra*, II, H, 2, q, (III), (A).

8. Yokum *v.* Snyder, 42 W. Va. 352, 26 S. E. 181, holding that all lands proceeded against as liable to sale for the benefit of the school fund, and not sold before Feb. 25, 1893, must be proceeded against under the provisions of chapter 105 of the code as amended and reënacted by chapter 24 of the acts of 1893.

9. White *v.* Douglass, 71 Cal. 115, 11 Pac. 860; State *v.* Janssen, 2 Wis. 423.

The written application is indispensable to the validity of the purchaser's title as against one who subsequently purchases the land upon such an application. Gough *v.* Dorsey, 27 Wis. 119 [*following* State *v.* Gray, 4 Wis. 380; State *v.* Janssen, 2 Wis. 423].

Application must appear of record.—Where the books in the office of secretary of state fail to show the record of the application to purchase state lands required by statute, the presumption that public officers have done their duty is not sufficient to overcome the evidence that no application for such pur-

together with an affidavit showing the matters which the statute requires to be shown in relation to his right to purchase the land applied for.[10] The application to purchase must be in the form prescribed by the statute,[11] and must state that the applicant desires to purchase the land,[12] and give a description of the same by legal subdivisions.[13] The application must also be accompanied by the fee and deposit required by the statute in order to make it the duty of the surveyor-general to file such application.[14] The affidavit must state truly all the facts required by statutes regulating such purchases to be stated therein.[15] So in some states the affidavit must show that there is no adverse occupation of the land,[16] and that the applicant desires to purchase the same for his own use and benefit [17] and not for speculation,[18] and that he has made no contract or agreement for the sale or disposition of the land.[19] An affidavit by a female applicant for the purchase of school lands, which avers that she is entitled to purchase and hold real estate in her own name, is not void under a statute declaring that, where the applicant is a female, the affidavit must "show" that she is entitled to purchase and hold real estate in her own name, where on a contest for the land it appears that she is unmarried.[20]

(II) *NOTICE OF APPLICATION.* In Kansas a settler claiming a preferred right to purchase school lands must publish notice of his application to purchase the same ten days prior to the date set for the hearing of the same.[21]

(III) *APPROVAL OF APPLICATION.* In California an application to purchase school land must be retained by the surveyor-general for ninety days before approval,[22] and must be approved by him without any demand at the end of six months if there is no conflict;[23] but if there is a conflict the application becomes

chase was made. Gough *v.* Dorsey, 27 Wis. 119.

It is competent for the state to waive the written application for the purchase of school and university lands required by the statute as well after as before the entry. State *v.* Gray, 4 Wis. 380.

10. Hogan *v.* Winslow, 45 Cal. 588, holding that no rights will attach in favor of an applicant to purchase school land under the California act of April 27, 1863, until he files the affidavit prescribed by sections 28 and 29 of such act, indorsed on a description of the land, in the office of the county recorder.

An application to purchase state lands by the location of school land warrants required no affidavit, being within the proviso of the act of April 27, 1663. Wright *v.* Laugenour, 55 Cal. 280.

11. McEntee *v.* Cook, 76 Cal. 187, 18 Pac. 258; White *v.* Douglass, 71 Cal. 115, 11 Pac. 860; Woods *v.* Sawtelle, 46 Cal. 389.

The approval of an application does not raise the presumption that it conformed to the statute. Woods *v.* Sawtelle, 46 Cal. 389.

12. Hildebrand *v.* Stewart, 41 Cal. 387.

13. Hildebrand *v.* Stewart, 41 Cal. 387.

Description in affidavit.— An application for the purchase of indemnity school lands which does not describe the land, in an affidavit, by legal subdivisions, as required by the statute is invalid, although the land is properly described in the unsworn application. Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359.

14. Buttle *v.* Wright, 139 Cal. 624, 73 Pac. 454, holding that where an application was returned by reason of the applicant's failure to inclose the twenty-dollar deposit required by the California act of March 20, 1889 (Sts. (1889) p. 434, c. 281), he could not compel the surveyor-general to subsequently file his application, accompanied by such fee, as of the date when it was previously presented.

15. Jacobs *v.* Walker, 90 Cal. 43, 27 Pac. 48; McEntee *v.* Cook, 76 Cal. 187, 18 Pac. 258; Harbin *v.* Burghart, 76 Cal. 119, 18 Pac. 127; McKenzie *v.* Brandon, 71 Cal. 209, 12 Pac. 428; Millidge *v.* Hyde, 67 Cal. 5, 6 Pac. 852.

16. Plummer *v.* Woodruff, 72 Cal. 29, 11 Pac. 871, 13 Pac. 51; Rogers *v.* Shannon, 52 Cal. 99.

What constitutes adverse occupation.— There is an adverse occupation within the meaning of the statute, where another person has inclosed three quarters of the land, has a cabin and corral on it, and uses it for a sheep pasture. Plummer *v.* Woodruff, 72 Cal. 29, 11 Pac. 871, 13 Pac. 51.

17. Henshall *v.* Marsh, 151 Cal. 289, 90 Pac. 693; De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

18. De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

19. De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

20. Henshall *v.* Marsh, 151 Cal. 289, 90 Pac. 693.

21. Beedy *v.* State, 4 Kan. App. 575, 46 Pac. 65, holding that it is not necessary that such notice be published ten days prior to the filing of the petition.

Form of notice held sufficient see Beedy *v.* State, 4 Kan. App. 575, 46 Pac. 65.

22. Barnum *v.* Bridges, 81 Cal. 604, 22 Pac. 924.

23. Barnum *v.* Bridges, 81 Cal. 604, 22 Pac. 924.

invalid if it is unapproved at the end of six months, unless approval has been demanded, or the contest has been referred, or such reference has been demanded.[24] In Wisconsin the mere filing of the application to purchase does not constitute a contract between the applicant and the state or vest any exclusive right of purchase in the applicant until his application is approved and he pays or tenders the purchase-money or otherwise complies with the conditions of the sale.[25]

(IV) *Rights of Applicant.* The Utah statute providing that when a qualified person makes application in writing for the selection of any tract of land in satisfaction of a grant to the state, the board of land commissioners "may select and contract to sell the same" does not make it the duty of the board to so select the same and contract to sell the land applied for, but leaves the matter to their discretion,[26] and the applicant acquires no vested rights until the lands are selected, and the price and terms of sale are fixed by the land commissioners, and a contract of sale containing the stipulations agreed upon is executed.[27]

m. Conduct of Sale. Under some statutes the sale of school land is required to be at public auction;[28] but other statutes permit such land to be sold at private sale;[29] and it is sometimes required that the lands be first offered at public auction, and if they are not sold, they may then be disposed of at private sale.[30] In Colorado the state board of land commissioners is not required to perform the details incident to the sale, nor to be personally present thereat, and it may direct its register to perform all such acts without in any manner surrendering or delegating its trust functions.[31] The Washington statute requiring county commissioners to make sales of school lands, and providing for payment for their services and necessary expenses, does not authorize them to incur expenses for auctioneers.[32] In Kansas notice of the sale of leased lands must be published at least one year prior to the sale.[33] The provision of the Colorado statute that sales "shall be advertised in four consecutive issues of some weekly newspaper of the county in which such land is situated," and in such other papers as the board of land commissioners may direct, does not make it necessary for the board to designate the county newspaper in which a sale of school lands shall be advertised.[34]

n. Reports, Returns, Records, and Confirmation. In Alabama it is not essential to the validity of a sale of school lands that the commissioners should return the particulars of sale to the county court.[35] In Arkansas the sale must be

24. Barnum *v.* Bridges, 81 Cal. 604, 22 Pac. 924.

25. Gough *v.* Dorsey, 27 Wis. 119; State *v.* Gray, 4 Wis. 380 [*followed* in State *v.* Jones, 6 Wis. 334].

26. Miles *v.* Wells, 22 Utah 55, 61 Pac. 534.

27. Miles *v.* Wells, 22 Utah 55, 61 Pac. 534.

28. State *v.* Stark, 111 La. 594, 35 So. 760; Brooke *v.* Eastman, 17 S. D. 339, 96 N. W. 699.

29. Miles *v.* Wells, 22 Utah 55, 61 Pac. 534.

30. McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634; State *v.* Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503.

What constitutes an offering for sale.—A proclamation of the governor, although published for the time and in the manner prescribed by law, is not sufficient to constitute such an "offering for sale" of the seminary lands under the Arkansas act of Dec. 28, 1840, by the governor, as to subject the land, if not sold, to be entered at private sale at the graduation prices, but the land must have been regularly proposed for sale to the highest bidder by the crier of the sale on the day designated for the sale in the proclamation. Hardwick *v.* Reardon, 6 Ark. 77.

Forfeited lands.—A purchaser of school lands which have been forfeited for his nonpayment of instalments of the purchase-money can insist that they shall be reoffered for sale at public auction before they shall be open for private entry. State *v.* School Com'rs, 5 Wis. 348.

31. Routt *v.* Greenwood Cemetery Land Co., 18 Colo. 132, 31 Pac. 858.

32. Bickerton *v.* Grimes, 8 Wash. 451, 452, 36 Pac. 252, where it is said: "It is the duty of the commissioners to make sales, and their per diem covers all allowable expenses connected therewith."

33. Bushey *v.* Hardin, 74 Kan. 285, 86 Pac. 146.

34. Routt *v.* Greenwood Cemetery Land Co., 18 Colo. 132, 31 Pac. 858.

35. Tankersly *v.* State Bank, 6 Ala. 277. See also Mobile Branch Bank *v.* Tillman, 10 Ala. 149.

reported to the county court, which may confirm or reject the same;[36] but the jurisdiction of the court is confined to protecting the inhabitants against a sacrifice of the land,[37] and any act of the court amounting to a prohibition of the sale is a violation of the rights of the inhabitants and contrary to the statute.[38] Consequently, upon rejecting a sale, it is the duty of the court to order a resale.[39] Under the Washington statute a sale of school lands must be reported to the board of appraisers,[40] who are to confirm the same if they are satisfied that the land would not, upon a resale, bring an advance of twenty-five per cent,[41] and it is held that under these provisions the power of the board to refuse confirmation and order a new sale is discretionary,[42] and the board cannot be compelled to order a new sale even at the instance of one who offers an advance of twenty-five per cent on the price realized.[43] In Wisconsin it is not essential to the validity of a sale of school and university lands by the commissioners that they should make, sign, and cause to be recorded a statement of the sale;[44] and it has been held in Illinois that the validity of a sale of school lands, legally and fairly made, is not affected by the neglect of the school commissioners to keep the books and records required by statute.[45]

o. Certificates of Purchase. A sale or contract for the sale of school lands is, in a number of states, evidenced by the issuance to the purchaser of a certificate of purchase,[46] which must be issued by the officer designated by the state statute.[47] Where a statute requires commissioners selling lands to give a certificate of sale upon payment therefor in cash, but does not prescribe the form and contents of the certificate, it is for the commissioners to prepare a certificate which shall comply with the requirements of the law.[48] A certificate of purchase issued by the state land office before the acceptance by the proper officer of the United States of the land as a part of the grant to the state is subject to such acceptance.[49] If a certificate of purchase is not absolutely void it cannot be attacked collaterally,[50] and while such a certificate is in full force and effect the state land department cannot entertain an application by another person to purchase the land, or take any step looking to the sale of such land to another person.[51] Although a certificate of

36. *Ex p.* Young, 74 Ark. 361, 85 S. W. 1133.

Confirmation necessarily implies that sufficient petition for sale was filed.— Brown *v.* Rushing, 70 Ark. 111, 66 S. W. 442, holding that when a portion of the school lands located in a township was sold by the tax collector and the sale was confirmed as required by law, the report of the sale, as so confirmed, reciting the filing of a petition, in a suit by a subsequent collector for damages against a bidder at a subsequent sale for failing to keep his bid good, after the loss of the original petition, the confirmation record was sufficient to show the filing of the petition authorizing the sale of such lands.

37. *Ex p.* Young, 74 Ark. 361, 85 S. W. 1133.

38. *Ex p.* Young, 74 Ark. 361, 85 S. W. 1133.

39. *Ex p.* Young, 74 Ark. 361, 85 S. W. 1133.

40. State *v.* Bridges, 30 Wash. 268, 70 Pac. 506.

41. State *v.* Bridges, 30 Wash. 268, 70 Pac. 506.

42. State *v.* Bridges, 30 Wash. 268, 70 Pac. 506.

43. State *v.* Bridges, 30 Wash. 268, 70 Pac. 506.

44. State *v.* School, etc., Land Com'rs, 14 Wis. 345 [*explaining* and *distinguishing* Krebs *v.* Dodge, 9 Wis. 1].

45. McLean County School Trustees *v.* Allen, 21 Ill. 120, construing Laws (1847), p. 121, § 11, to be directory merely.

46. See Harrington *v.* Smith, 28 Wis. 43, holding that Rev. St. c. 28, § 42, requires the issue of duplicate certificates of sale upon all sales of lands made by the commissioners of the school and university lands, whether made for cash or upon credit.

Defective certificate.— The certificate of the sale of school lands to be given by the commissioners to the purchaser, setting forth the particulars of sale, was intended solely for his benefit, and the fact that such certificate was defective would not vacate the sale. Tankersly *v.* State Bank, 6 Ala. 277.

47. Matthews *v.* Baker, 36 Ala. 186 (holding that a certificate of purchase issued by an officer other than the one so designated is ineffective); Lee *v.* Payne, 4 Mich. 106.

48. Harrington *v.* Smith, 28 Wis. 43, holding that such a statute is valid.

49. Oakley *v.* Stuart, 52 Cal. 521.

50. Combs *v.* Jelly, 28 Cal. 498.

51. Smith *v.* Mitchell, 32 Fed. 680, 12 Sawy. 651, stating law of California.

purchase does not divest the title of the state,[52] it is *prima facie* evidence of title in the holder as against other persons;[53] but it is not conclusive of title in the holder, and is no bar to an action to contest the right of the holder to purchase such lands,[54] and in an action of ejectment such a certificate may be impeached by a defendant who is in the actual occupation of the premises, by showing that the person to whom the certificate was issued was never legally entitled to purchase the land.[55]

p. Validity and Effect of Sale. A sale of a school section, pursuant to the state statute, is binding on the inhabitants of the township.[56] After a lapse of forty years it will be presumed that a sale of school lands was regularly made and valid.[57] The acceptance by the county treasurer of the purchase-price of school land under color of a void sale does not bind the state to issue a patent for the land.[58]

q. Purchase-Money and Payment or Recovery Thereof — (i) *In General.* Payment of the purchase-money should be made to the officer designated by the statute to receive payment,[59] but a payment made to the wrong officer operates as a discharge of the purchaser's obligation, where the officer to whom the money is paid turns it over to the proper officer.[60] Where interest on the unpaid balance on a certificate of purchase of school lands has in fact been seasonably paid to and accepted by the state, it is no ground of attack on a title claimed under the certificate that the payment was made by persons other than the purchaser, whether claiming under him or not.[61] Where, at a sale of school lands, a lot is in form struck off to one person with the understanding that another is to become the purchaser, and the second person carries out the agreement by having his name entered as purchaser, and pays the ten per cent of the purchase-price required to consummate the sale, he cannot avoid the contract on the ground that

52. Taylor *v.* Weston, 77 Cal. 534, 20 Pac. 62; Gilson *v.* Robinson, 66 Cal. 539, 10 Pac. 193.

In Alabama a certificate of purchase clothes the person to whom it is issued with the legal title, with condition of defeasance or reversion on the happening of one of the enumerated events on which the statute declares that the land shall revert. Watson *v.* Prestwood, 79 Ala. 416. See also Doe *v.* Godwin, 30 Ala. 242.

53. McFaul *v.* Pfan Kuch, 98 Cal. 400, 33 Pac. 397; Miller *v.* Prentice, 82 Cal. 104, 23 Pac. 8; Taylor *v.* Weston, 77 Cal. 534, 20 Pac. 62; True *v.* Thompson, 42 Cal. 293; Combs *v.* Jelly, 28 Cal. 498; Smith *v.* Mitchell, 32 Fed. 680, 12 Sawy. 651, stating law of California.

A duplicate, dated in 1873, of a certificate of purchase for lieu lands, issued by the register of the state land office in 1861, is not evidence sufficient to show that the state had sold the land in 1861, as against the holder of a United States patent for the same land, dated prior to the time the duplicate certificate was issued. Laughlin *v.* McGarvey, 50 Cal. 169.

Certificate of location of college scrip.— The original certificate of the register of a land office of the United States of the location of agricultural college scrip upon land within his district is *prima facie* evidence of title in the person locating it, and is not overcome by a showing that scrip of the same number was located on another tract of land. Pierson *v.* Reed, 36 Iowa 257.

A sheriff's certificate of purchase on a sale of school lands by the county court is not evidence of the facts therein recited. McDonald *v.* Mangold, 61 Mo. App. 291.

54. McFaul *v.* Pfan Kuch, 98 Cal. 400, 33 Pac. 397; Miller *v.* Prentice, 82 Cal. 104, 23 Pac. 8; Taylor *v.* Weston, 77 Cal. 534, 20 Pac. 62; Jacobs *v.* Walker, 76 Cal. 175, 18 Pac. 129; Gilson *v.* Robinson, (Cal. 1885) 7 Pac. 428.

55. Trimmer *v.* Bode, 82 Cal. 647, 23 Pac. 136; Miller *v.* Prentice, 82 Cal. 104, 23 Pac. 8.

56. Long *v.* Brown, 4 Ala. 622.

57. McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634.

58. Hopper *v.* Nation, (Kan. 1908) 96 Pac. 77, holding further that where a claimant of school land under a void sale seeks mandamus to compel a public officer to take some step preliminary to the issuance of a patent, and the state intervenes to support the officer in his refusal to do so, it is not necessary to a denial of such relief that the state shall restore to plaintiff the amount he has paid to the county treasurer as the purchase-price.

59. Kerken *v.* Sibley County, 39 Minn. 433, 40 N. W. 508, holding that Gen. St. (1878) c. 38, §§ 35, 40, authorize payments for school lands, principal and interest, to be made to the county treasurer, who is required to pay the same over to the state treasurer.

60. Poweshiek County *v.* Buttles, 70 Iowa 246, 30 N. W. 558.

61. McKinney *v.* Bode, 32 Minn. 228, 20 N. W. 94.

he was not in fact the purchaser at the sale.[62] In Kansas, after the probate court has adjudged that a person is entitled to purchase school land, it is the duty of the county treasurer to receive the purchase-money when tendered by such person and to give him a receipt therefor.[63]

(II) *School-Land Warrants.* In California school land warrants issued by authority of the state are receivable in payment of the purchase-money of any part of the five hundred thousand acres granted to the state for school purposes.[64] In Nevada school-land warrants can be used only in the purchase of school sections or lands selected in lieu thereof, and not in the purchase of other lands.[65]

(III) *Interest* [66] *on Unpaid Purchase-Money* [67]—(A) *In General.* A school commissioner who is authorized to sell school lands upon a credit may contract with the purchaser for the payment of interest;[68] but a statute authorizing the computation of interest at the rate of twenty per cent per annum on money loaned by the school commissioners, where the same is not paid when due, does not apply to money due upon notes given for the purchase-money of school lands.[69]

(B) *Liability of County.* Under a statute requiring one fourth of the purchase-price of school land, sold by county authorities, to be paid, with the interest on the residue for one year, in advance, and the residue in ten years, with interest in advance, deferred payments to be regarded as part of the school fund, and reported as such to the superintendent of public instruction, the county has been held liable for the interest on the whole purchase-money, although the purchaser defaulted in the payment of the deferred instalments, and the land was forfeited.[70]

(IV) *Recovery of Purchase-Money.* Where the parties, intending to execute a sale of school land, made a mutual mistake whereby the purchaser obtained a deed for the land on payment of a less sum than was due, a cause of action thereby accrued to the state, after the sale was so executed, to recover the residue of the money.[71] A plea by the purchaser in an action for the purchase-money, which sets up the cancellation of the contract of sale by the consent of the

62. Hart Lumber Co. *v.* Rucker, 15 Wash. 456, 46 Pac. 728.

63. Wilkie *v.* Howe, 27 Kan. 518, holding that where A and B applied to the probate court to purchase the same land and that court decided in favor of A's right and against that of B, the judgment in favor of A was not vacated by B's taking an appeal from the judgment against his right, and securing a decision in the district court that he was entitled to purchase the land.

Tender after forfeiture proceedings.—Where an assignee of an original or prior certificate of sale of school lands tenders to the county treasurer payment of delinquent interest on such certificate or delinquent taxes on the land, the treasurer must receive and receipt for it, although he may know that forfeiture proceedings have been had to bar the rights of the certificate holder, and that the land had been resold, and may believe the second purchaser has the better title, for the treasurer is an executive officer without judicial powers and has no power to decide, as between rival claimants, which has the better title to the land. Beatty *v.* Smith, 75 Kan. 803, 90 Pac. 272.

64. Cal. Pol. Code (1906), § 3502.

A purchase of school land, by application to the land office, at one dollar and twenty-five cents per acre, in gold coin, accompanied by a payment of twenty per cent of the purchase-money, followed by the issue of a certificate of purchase, in conformity with Cal. Pol. Code, § 3494, cannot be completed by payment in land warrants, under section 3502, enacting that two dollars per acre state school land warrants shall be receivable in payment for school land, but that such payment shall be to the register, and the warrants canceled before the certificate is issued; and a patent issued on such payment, under the latter section, will be set aside. People *v.* Morris, 77 Cal. 204, 19 Pac. 378.

Location of land warrants under earlier statutes see Roberts *v.* Columbet, 63 Cal. 22; Farish *v.* Coon, 40 Cal. 33; Stuart *v.* Haight, 39 Cal. 87; Smith *v.* Athern, 34 Cal. 506; Bludworth *v.* Lake, 33 Cal. 255; Van Valkenburg *v.* McCloud, 21 Cal. 330; Watson *v.* Robey, 9 Cal. 52.

65. State *v.* Treatway, 7 Nev. 241.

66. See, generally, Interest, 22 Cyc. 1459.

67. See also *supra*, II, H, 2, j.

68. Kidder *v.* School Trustees, 10 Ill. 191.

69. Bradley *v.* Case, 4 Ill. 585.

70. St. Joseph County *v.* State, 120 Ind. 442, 22 N. E. 339, construing Rev. St. (1881) § 4346.

71. Seeley *v.* Thomas, 31 Ohio St. 301.

voters, as provided by the statute, need not allege the specific reason which induced the voters to assent to such a cancellation.[72]

(v) *Compromise of Balance Due.* Under a statute authorizing boards of supervisors to do all acts relating to lands belonging to the public school fund necessary to protect that fund, such a board has power to compromise a balance due by an insolvent purchaser of school lands after sale of the land on execution for the purchase-money.[73]

(vi) *Transfer of Purchase-Money Mortgage.* In Wisconsin the commissioners of school and university lands are authorized to sell and transfer a mortgage given to secure the purchase-money of school lands, after the same becomes due, to a subsequent purchaser or encumbrancer of such lands.[74]

(vii) *Sale Under Purchase-Money Mortgage.* A purchaser of land sold as school land cannot enjoin the auditor of the county from selling the land under his mortgage to secure the purchase-money, on the ground that the title to the land was not in the inhabitants of the county.[75]

r. Forfeiture and Resale — (i) *Forfeiture in General.* In some of the states a purchaser of school land who fails to pay the purchase-money [76] or instalments thereof which have become due,[77] or interest on the unpaid balance,[78] or taxes assessed against the land,[79] or commits waste upon the land,[80] forfeits his rights under the contract or certificate of sale,[81] and all payments made

72. Lewis *v.* Montgomery Branch Bank, 6 Ala. 496.

73. Poweshiek County *v.* Buttles, 70 Iowa 246, 30 N. W. 558.

74. Ely *v.* Cram, 17 Wis. 537.

75. Cartright *v.* Briggs, 41 Ind. 184, so holding on the ground that plaintiff had acquired just such title as the inhabitants of the township had, and had mortgaged back just such title as he had received, and hence if the inhabitants had no title plaintiff had none and a sale of the land under the mortgage could not injure him, there being no attempt to hold him personally liable for the residue of the purchase-money.

76. State University *v.* Winston, 5 Stew. & P. (Ala.) 17; Hansen *v.* Wilson, 40 Kan. 211, 19 Pac. 717; State *v.* Emmert, 19 Kan. 546; Hunter *v.* Williams, 16 La. Ann. 129.

77. *California.*— People *v.* Harrison, 107 Cal. 541, 40 Pac. 956.

Indiana.— McPheeters *v.* Wright, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176; St. Joseph County *v.* State, 120 Ind. 442, 22 N. E. 339.

Nebraska.— Smith *v.* White, 5 Nebr. 405.

Washington.— State *v.* Frost, 25 Wash. 134, 64 Pac. 902.

Wisconsin.— State *v.* School Com'rs, 5 Wis. 348.

See 41 Cent. Dig. tit. "Public Lands," § 163.

78. *Arkansas.*— Orr *v.* State, 56 Ark. 107, 19 S. W. 319.

Indiana.— McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634.

Kansas.— Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573; Hansen *v.* Wilson, 40 Kan. 211, 19 Pac. 717; Ewing *v.* Baldwin, 24 Kan. 82; State *v.* Emmert, 19 Kan. 546; Scott *v.* Flinn, (App. 1898) 55 Pac. 675.

Minnesota.— McKinney *v.* Bode, 32 Minn. 228, 20 N. W. 94.

Nebraska.— State *v.* Clark, 39 Nebr. 899, 58 N. W. 585; State *v.* Graham, 21 Nebr. 329, 32 N. W. 142; Smith *v.* White, 5 Nebr. 405.

Oregon.— Sehlbrede *v.* State Land Bd., 46 Oreg. 615, 81 Pac. 702; Robertson *v.* Low, 44 Oreg. 587, 77 Pac. 744.

Wisconsin.— State *v.* School, etc., Land Com'rs, 13 Wis. 409.

See 41 Cent. Dig. tit. "Public Lands," § 163.

79. Simpson *v.* Robinson, 37 Ark. 132; Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573; Ewing *v.* Baldwin, 24 Kan. 82.

80. Smith *v.* White, 5 Nebr. 405.

81. *Alabama.*— State University *v.* Winston, 5 Stew. & P. 17.

Arkansas.— Orr *v.* State, 56 Ark. 107, 19 S. W. 319.

California.— Batchelder *v.* Willey, 64 Cal. 44, 30 Pac. 573; Rowell *v.* Perkins, 56 Cal. 219.

Indiana.— McPheeters *v.* Wright, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176; St. Joseph County *v.* State, 120 Ind. 442, 22 N. E. 339; McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634.

Iowa.— Henn *v.* State University, 22 Iowa 185, holding that the repeal of Code (1851), § 1052, which provided that, if any purchaser of university lands should fail to pay the interest due under the contract of sale, the trustees might consider the contract as forfeited and proceed to resell the land, etc., did not deprive the university of the equitable right of every vendor of land to rescind a contract forfeited by the vendee's laches, nor was this right affected by Revision (1860), §§ 1975, 1979.

Kansas.— Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573; Hansen *v.* Wilson, 40 Kan. 211, 19 Pac. 717; Ewing *v.* Baldwin, 24 Kan. 82; State *v.* Emmert, 19 Kan. 546.

Louisiana.— Hunter *v.* Williams, 16 La. Ann. 129.

thereon.[82] Upon such a forfeiture the land reverts to the state,[83] and is deemed vacant,[84] and is subject to sale as though it had never been sold.[85] In some states it is held that a default in payment *ipso facto* forfeits the contract of purchase and all rights of the purchaser thereunder;[86] but in other states such default merely gives rise to a liability to forfeiture which must be enforced by appropriate proceedings[87] after the purchaser has been notified of his default and called upon to fulfil his contract.[88]

(II) *Proceedings to Enforce Forfeiture.* In Kansas it is held that the statute must be strictly complied with in order to effect a forfeiture.[89] In

Minnesota.— McKinney *v.* Bode, 32 Minn. 228, 20 N. W. 94.

Nebraska.— State *v.* Clark, 39 Nebr. 899, 58 N. W. 585; State *v.* Graham, 21 Nebr. 329, 32 N. W. 142; Smith *v.* White, 5 Nebr. 405.

Ohio.— State *v.* Glidden, 31 Ohio St. 309.

Oregon.— Sehlbrede *v.* State Land Bd., 46 Oreg. 615, 81 Pac. 702; Robertson *v.* Low, 44 Oreg. 587, 77 Pac. 744.

Washington.—State *v.* Frost, 25 Wash. 134, 64 Pac. 902.

Wisconsin.— State *v.* School, etc., Land Com'rs, 13 Wis. 409; Smith *v.* Mariner, 5 Wis. 551, 68 Am. Dec. 73.

See 41 Cent. Dig. tit. "Public Lands," § 163.

Loan of purchase-money.— Where a piece of school land was sold and a receipt given to the purchaser for the price, and a note for the amount was executed by third persons and secured and approved by the county commissioners, it was held that if, at the time of the sale and the execution of said note, it was understood by all the parties, the purchaser, the school treasurer, who had power under the statute to lend on good security money received from the sale of school lands, the county commissioners, and the makers of the note that the land was paid for, and that said note was given for money loaned by the school treasurer to the parties executing the note, and all was done in good faith, a subsequent failure to pay the note would not work a forfeiture of the purchaser's right to the land; as it was not absolutely necessary, in a transaction like the foregoing, that the money should pass from the purchaser to the school treasurer, and then from the school treasurer to the makers of the note, in order to make the transaction valid. Stout *v.* Hyatt, 13 Kan. 232.

82. Sehlbrede *v.* State Land Bd., 46 Oreg. 615, 81 Pac. 702; Robertson *v.* Low, 44 Oreg. 587, 77 Pac. 744.

83. Smith *v.* White, 5 Nebr. 405.

In Indiana the forfeiture of the contract does not vest the title absolutely in the state, but merely authorizes it to resell the land. McPheeters *v.* Wright, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176.

84. Sehlbrede *v.* State Land Bd., 46 Oreg. 615, 81 Pac. 702.

85. Sehlbrede *v.* State Land Bd., 46 Oreg. 615, 81 Pac. 702; Robertson *v.* Low, 44 Oreg. 587, 77 Pac. 744.

86. State University *v.* Winston, 5 Stew. & P. (Ala.) 17; Sehlbrede *v.* State Land Bd., 46 Oreg. 615, 81 Pac. 702.

This rule formerly prevailed in Kansas.— Ewing *v.* Baldwin, 24 Kan. 82; State *v.* Emmert, 19 Kan. 546. But the present rule is otherwise. See *infra*, note 87.

87. Orr *v.* State, 56 Ark. 107, 19 S. W. 319; Phares *v.* Gleason, 73 Kan. 604, 85 Pac. 572; Hansen *v.* Wilson, 40 Kan. 211, 19 Pac. 717; Smith *v.* White, 5 Nebr. 405.

88. State *v.* Clark, 39 Nebr. 899, 58 N. W. 585; State *v.* Graham, 21 Nebr. 329, 32 N. W. 142; Richardson *v.* Pratt, 20 Nebr. 196, 29 N. W. 382; Smith *v.* White, 5 Nebr. 405.

When personal service necessary.— Where the purchaser of school lands is a resident of the state, and his address is known, notice of a proposed forfeiture for non-payment of interest must be served on him personally. State *v.* Clark, 39 Nebr. 899, 58 N. W. 585.

Notice by publication is sufficient where the purchaser is absent from the state. Richardson *v.* Pratt, 20 Nebr. 196, 29 N. W. 382 [*following* State *v.* Scott, 17 Nebr. 686, 24 N. W. 337].

Presumption of notice.— Where a purchaser has failed for many years to pay interest, and the lands in the meantime have been declared forfeited and resold, it will be presumed that proper notice was given before forfeiture was declared. State *v.* Graham, 21 Nebr. 329, 32 N. W. 142.

Estoppel to set up lack of notice.— Where the first purchaser knowingly suffers another to purchase his lands upon a forfeiture declared and a resale, he will be estopped from subsequently setting up the invalidity of the proceedings on account of want of notice to him of default in payment of interest. State *v.* Graham, 21 Nebr. 329, 32 N. W. 142.

89. Phares *v.* Gleason, 73 Kan. 604, 85 Pac. 572; Knott *v.* Tade, 58 Kan. 94, 48 Pac. 561; Hansen *v.* Wilson, 40 Kan. 211, 19 Pac. 717.

Notice of default must be given and served as provided by the statute. Hansen *v.* Wilson. 40 Kan. 211, 19 Pac. 717.

Service on assignee of purchaser.— Where a purchaser of school lands sells and assigns his interest, and the assignment is brought to the attention of the proper officers, and entered on the records of the county clerk, the service of notice of forfeiture or default must be made on the assignee. Oberlin Loan, etc., Co. *v.* Flinn, 58 Kan. 83, 48 Pac. 560.

Notice to all parties in interest necessary.— Where an assignment of two persons jointly of the certificate of purchase and rights of the original purchaser of school lands is

Louisiana it is held that when notes for the credit portion of the price of school land are made payable to the state treasurer, that officer may bring suit for the rescission of the sale for non-payment of such notes, and stand in judgment for the state,[90] and that the board of school directors of a parish are without authority to bring suit for revendication, unless empowered to do so by a legislative act.[91] In California in an action by the state to foreclose the interest of a purchaser of school lands for default in the payment of instalments of the price, publication of summons must be based on an affidavit and order of publication, as in other cases,[92] and the expense of publishing the summons must be taxed in the costs, and if the judgment therefor cannot be collected by execution out of defendant's property, the cost of the publication must be paid by the state out of the general fund.[93]

(III) *SAVING OF RIGHTS OR WAIVER OF FORFEITURE.* In Kansas a purchaser of school lands who is in default may save his rights by paying the delinquent interest and taxes at any time before the forfeiture is actually enforced by proper proceedings,[94] and in Wisconsin, where school lands are to be resold for a non-payment of the purchase-money, the purchaser may claim the

brought to the attention of the officers, forfeiture cannot be enforced unless notice be given to both assignees. Abernathy Furniture Co. *v.* Spencer, 59 Kan. 168, 52 Pac. 425.

School land in actual cultivation by a tenant of the assignee of the original purchaser, but upon which no one resides, is nevertheless in possession of such assignee, and service upon him of notice of default of payment is necessary to a forfeiture of his interest in the land. Knott *v.* Tade, 58 Kan. 94, 48 Pac. 561.

Sufficiency of notice.— Kan. Gen. St. (1897) c. 65, § 26, requiring the county clerk to include in notice of interest due on public land certificates all tracts sold to the same purchaser on which there is default, does not require each forty acres to be referred to separately; they being all included in one certificate, and in one comprehensive description. Scott *v.* Flinn, (Kan. App. 1898) 55 Pac. 675.

Defective notice or return.— A forfeiture of the rights of a purchaser of school land is based on the written notice of default issued by the county clerk and the return of the sheriff showing the time and manner of service on file in the county clerk's office, and where these fail to show legal notice to the purchaser, there is no forfeiture; and in a proceeding to compel the treasurer to accept the money tendered by a purchaser to pay delinquent interest and taxes, oral proof to show that the notice was sufficient in fact, or to amend the return of service, is not admissible. Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573. Where the return of a sheriff on notice of default in payment fails to show that it was served on all persons in possession of the lands, as required by Kan. Gen. St. (1901) § 6356, a forfeiture cannot be predicated thereon. Phares *v.* Gleason, 73 Kan. 604, 85 Pac. 572. A sheriff's return of service of notice of forfeiture of school-land contracts which states that he "found no one in possession" of the land is not a finding or return that no one was in possession, and a forfeiture cannot be based upon such a return. True *v.* Brandt, 72 Kan. 502, 83 Pac. 826. A return by the sheriff that he posted the notice of default of payment in the county clerk's office, when the statute requires it to be posted "in a conspicuous place" in such office, is insufficient. Knott *v.* Tade, 58 Kan. 94, 48 Pac. 561.

Amendment of return.— An officer serving notice of interest due on public land certificates may correct his return so as to show service on the party in possession of the land, as required by Kan. Gen. St. (1897) c. 65, § 27. Scott *v.* Flinn, (Kan. App. 1898) 55 Pac. 675.

Constructive notice.— Before constructive notice to the purchaser of school land is warranted, in proceedings to enforce forfeiture, the sheriff's return must show that the purchaser cannot be found, and that no person is in possession of the land, and a return stating that the purchaser was not found is not sufficient. Abernathy Furniture Co. *v.* Spencer, 59 Kan. 168, 52 Pac. 425.

90. Hunter *v.* Williams, 16 La. Ann. 129 [*approved* in Concordia School Directors *v.* Ober, 32 La. Ann. 417].

91. Concordia School Directors *v.* Ober, 32 La. Ann. 417.

92. People *v.* Harrison, 107 Cal. 541, 40 Pac. 956.

93. Lawrence *v.* Booth, 46 Cal. 187.

94. Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573; True *v.* Brandt, 72 Kan. 502, 83 Pac. 826.

Even after notice of forfeiture is given the purchaser still has sixty days within which to make payment of the delinquency and thus prevent a forfeiture. Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573.

Void proceedings for forfeiture of the land do not deprive the purchaser of such right. True *v.* Brandt, 72 Kan. 502 83 Pac. 826.

Mandamus will lie to compel the county treasurer to accept such payment. Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573; True *v.* Brandt, 72 Kan. 502, 83 Pac. 826.

benefit of his contract, at any time before the resale, by paying the principal, interest, and costs, with five per cent damages on the purchase-money.[95] The Oregon statute providing that the holder of a certificate of sale of public lands theretofore issued might pay up arrears of interest within six months of the date of the act, and that all forfeitures of the certificate were suspended for such period, waived a forfeiture of the certificate only so far as one existed at the date of the act for default in payment of interest, and did not waive a forfeiture for default in payment of interest thereafter accruing;[96] but the state land board in Oregon has power to waive a forfeiture for the non-payment of interest within the time limited.[97]

(IV) *Liability of Purchaser After Forfeiture.* When the statute provides for an absolute forfeiture, such forfeiture discharges the purchaser's liability on his undertaking for subsequent payments;[98] but under a statute providing that if the purchaser should "fail to pay two installments of interest upon said purchase-money, he shall forfeit said purchase, and it shall be the duty of the collector to offer such land for sale again as soon as practicable after such forfeiture, as in other cases under this act," it has been held that such a default by a purchaser of school land does not rescind the contract, but the purchaser remains liable for the amount of the purchase-money unpaid.[99]

(V) *Resale* — (A) *In General.* The state statutes generally provide for a resale of forfeited land,[1] and a resale is not invalidated by the facts that at the time of sale, the land had been marked "Redeemed" on the books of the office, and that a receipt to that effect had been given to the certificate holder, where this was done by mistake, and it had not in fact been redeemed.[2] A sale in chancery by the state to enforce its lien for the purchase-money for school lands, made after the lands had been forfeited for taxes, passes the whole title to the purchaser, free from the tax lien.[3] Where the commissioners agreed to reserve from a sale of forfeited school lands certain tracts which the purchaser wished to redeem, but by mistake of their clerk the lands were put upon the sales book and sold, but before the last day of the sales the original purchaser paid the redemption money for all but one of the tracts, and the commissioners declared the resales rescinded, it was proper to refuse to give certificates of sale to the purchaser at the resale, although he had deposited his purchase-money with the state treasurer.[4] An attempted resale of school lands to which the rights of a prior purchaser have not been legally forfeited is without authority of law.[5]

(B) *Notice of Resale.* A sale of school land for unpaid purchase-money pursuant to a notice in all respects as required by the statute is not void in law merely because another and defective notice for the same sale, on another day, was published in another paper.[6]

(C) *Conduct of Resale.* A statute providing that the order of sale at auction of school lands shall be to begin at the lowest number of sections, townships, and ranges in each county, and proceed regularly to the highest, until all then to be sold are offered for sale has been held to apply only to the first sale and not to refer to or regulate sales of forfeited lands.[7]

95. Smith *v.* Mariner, 5 Wis. 551, 68 Am. Dec. 73; State *v.* School Com'rs, 5 Wis. 348.

96. Sehlbrede *v.* State Land Bd., 46 Oreg. 615, 81 Pac. 702, construing Laws (1899), p. 77, § 5.

97. Robertson *v.* Low, 44 Oreg. 587, 77 Pac. 744.

The act of the board in accepting payment and awarding a deed to the purchaser is a waiver on the part of the state of the forfeiture. Robertson *v.* Low, 44 Oreg. 587, 77 Pac. 744.

98. State University *v.* Winston, 5 Stew. & P. (Ala.) 17.

99. Orr *v.* State, 56 Ark. 107, 19 S. W. 319. See also *infra*, II, K, 2, r, (V), (D).

1. See McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634.

Petition of voters not necessary to authorize resale.— McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634.

2. State *v.* School, etc., Land Com'rs, 13 Wis. 409.

3. Simpson *v.* Robinson, 37 Ark. 132.

4. State *v.* School, etc., Land Com'rs, 14 Wis. 345.

5. Hickert *v.* Van Doren, 76 Kan. 674, 92 Pac. 593.

6. Sealing *v.* Lawrence, 27 Ohio St. 441.

7. State *v.* School, etc., Land Com'rs, 14 Wis. 345.

(D) *Liability of Purchaser For Deficiency.*[8] A condition that, if the vendee fails to comply with the terms of sale, the land may be resold at his risk is proper, and is enforceable after a legal resale;[9] but if the land is resold for less than the minimum price fixed by statute, the first purchaser cannot be held liable for the difference between the amount of the first and of the second sale.[10]

(E) *Disposition of Surplus.* Where school lands, which the statute authorizes to be taxed immediately after sale thereof, revert to the state and are afterward resold by the state, the payment of the taxes charged thereon may be made out of the proceeds of the resale after the payment of the balance of the original purchase-money.[11] In Indiana, if the resale produces more than is sufficient to pay the amount due, with interest and penalties, the excess must be paid over to the purchaser or his legal representatives.[12]

(F) *Setting Aside Resale.* Where the agent of a person holding a certificate of sale of school lands paid the annual interest in due time, but failed to specify the object of the payment so as to be understood by the state treasurer, or to deliver to him the receipt obtained from the secretary of state, and in consequence such payment was not entered on the treasurer's books, and the land was resold as forfeited, it was held that the commissioners of school and university lands, upon ascertaining the mistake, were authorized to declare the resale void.[13]

s. Abandonment. In Kansas it is held that the equitable interest in school land acquired by a purchaser under a certificate of sale is not lost by mere abandonment,[14] but in other states a different view has obtained.[15]

t. Attack on and Setting Aside Sales. In Illinois only the school trustees can question the title of a purchaser of school land on the ground that the statutory provisions regarding the sale of such land were not complied with,[16] and in Arkansas one who is not an inhabitant of the township or county where school lands are located cannot object to a sale thereof.[17] In Louisiana the residents and taxpayers of a township in whom is vested the title to the sixteenth section granted by the general government for the maintenance of the schools may sue to annul an illegal sale of the section by the parish treasurer,[18] without tendering to the adjudicatee the amount of the purchase-money which was paid by him, and which has been paid into the state treasury to be held by the state in trust for the township.[19] But

8. See also *supra*, II, K, 2, r, (IV).

9. School Com'rs *v.* Aikin, 5 Port. (Ala.) 169.

10. School Com'rs *v.* Aikin, 5 Port. (Ala.) 169.

11. State *v.* Purcel, 31 Ohio St. 352.

12. McPheeters *v.* Wright, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176.

13. State *v.* School, etc., Land Com'rs, 17 Wis. 248.

14. Spencer *v.* Smith, 74 Kan. 142, 85 Pac. 573 [*following* Barrett *v.* Kansas, etc., Coal Co., 70 Kan. 649, 79 Pac. 150].

15. Murphy *v.* Burke, 47 Minn. 99, 49 N. W. 387 (holding that where the holder of school-land certificates, who purchased them for a merely nominal consideration, never paid the taxes levied on the land, and for more than ten years failed to pay the annual interest accruing on the certificates, although by their terms they were to become utterly void on a default for more than six days, these facts, taken into connection with the fact that, at the time of the purchase, there was a tax judgment and tax-sale against the land, and that the time for redemption had expired, justified a finding that the holder had abandoned all claim to the land, and that the equity of such certificate holder was not superior to that of one who, under a void tax-sale of the land, complied with the requirements of the certificates and of the law and received the patents); Richardson *v.* Doty, 25 Nebr. 420, 41 N. W. 282 [*approving* Richardson *v.* Pratt, 20 Nebr. 196, 29 N. W. 382] (holding that where a first purchaser had for fifteen years failed to pay interest on the purchase-money and asserted no ownership or any interest in the property, and during ten years of that time the property had been in the possession of a subsequent purchaser from the state, in good faith, relying upon the abandonment of the first purchaser, the right of such first purchaser to assert his title as against that of the second would be barred).

16. Chicago Sanitary Dist. *v.* Adam, 179 Ill. 406, 53 N. E. 743, holding that such question cannot be raised by plaintiff in a proceeding to condemn the land.

17. Brown *v.* Toler, 66 Ark. 361, 50 S. W. 696.

18. Telle *v.* St. Tammany Parish School Bd., 44 La. Ann. 365, 10 So. 801.

19. Telle *v.* St. Tammany Parish School Bd., 44 La. Ann. 365, 10 So. 801.

in Kansas before the state can bring suit to annul a contract for the sale of school land held by an innocent assignee, for irregularities or non-compliance with the statutory requirements for a sale, it must do equity by paying or tendering back the purchase-money received under the contract.[20] In Oregon the state land board, on receiving information that an application for the sale of state school lands was fraudulent, has power, notwithstanding the receipt of a portion of the purchase-price, to institute a hearing on notice, and on proof of the fraud to decline to issue a deed,[21] and its decision is not reviewable by the courts.[22] Where fraud and illegality are charged as the grounds for the cancellation of a contract for the sale of school lands, the specific facts constituting the fraud and illegality must be set forth.[23] Where a township has received a part of the purchase-money of school lands and interest for several years on the balance, and has expended the money for the purposes contemplated by the grant, and the purchaser has taken possession of the lands and made valuable improvements thereon, the township must be deemed to have acquiesced in the sale and is estopped to deny its validity;[24] and it has also been held that certificates for the purchase of "agricultural college lands" will not be canceled, on the ground of fraud, where there has been a prior controversy over the same certificates, and a settlement of it by the payment of money by the person holding the certificates, and the settlement has been approved by the land board.[25] One excepting to a sale of school lands cannot, on appeal to the circuit court, question the authority to make the sale, where the exceptions do not raise such question.[26]

u. Patents [27] and Deeds [28]— (I) *When Issued.* A patent or deed is usually not issued for school land until it is fully paid for.[29]

(II) *By Whom Executed.* The state statutes usually designate the officers by whom patents or deeds for school lands shall be executed,[30] and a patent or deed executed by officers other than those so designated is invalid.[31]

20. State *v.* Dennis, 39 Kan. 509, 18 Pac. 723 [*followed* in State *v.* Williams, 39 Kan. 517, 18 Pac. 727].

21. De Laittre *v.* Board of Com'rs, 149 Fed. 800.

22. De Laittre *v.* Board of Com'rs, 149 Fed. 800. See also Corpe *v.* Brooks, 8 Oreg. 222.

23. State *v.* Williams, 39 Kan. 517, 18 Pac. 727 [*following* State *v.* Dennis, 39 Kan. 509, 18 Pac. 723, and *followed* in State *v.* Garlander, (Kan. 1888) 18 Pac. 818], holding that a mere general averment of fraud and illegality, without stating the facts on which the charge is based, presents no issue and no proof is admissible thereunder.

Insufficient allegations.— Where, in an action to set aside a contract and cancel a certificate evidencing a private sale of school land to a settler, which had been assigned to another, it was alleged that all of the persons who signed the petition requesting a sale of the school land were not legal householders, and also that the appraisers appointed to appraise the land were not disinterested householders, but it was not averred or claimed that the officers acted dishonestly in determining the sufficiency of the petition or in appointing appraisers, or that the assignee of the school land contract had any knowledge of any incompetency on the part of the petitioners or appraisers, nor that he had any notice of any irregularities in the proceedings preliminary to the sale, it was held that the defects mentioned were not sufficient grounds for the cancellation of the contract in the hands of the assignee. State *v.* Dennis, 39 Kan. 509, 18 Pac. 723 [*followed* in State *v.* Williams, 39 Kan. 517, 18 Pac. 727].

24. State *v.* Stanley, 14 Ind. 409.

25. Atty.-Gen. *v.* Ruggles, 59 Mich. 123, 26 N. W. 419, where it was considered, however, that the facts showed fraud sufficient to warrant a cancellation but for such settlement.

26. Brown *v.* Toler, 66 Ark. 361, 50 S. W. 696.

27. **Patents** generally see *infra*, II, M.

28. See, generally, Deeds, 13 Cyc. 505.

29. State *v.* Thompson, 22 Kan. 219 [*distinguishing* Iles *v.* Elledge, 18 Kan. 296]; Brooke *v.* Eastman, 17 S. D. 339, 96 N. W. 699.

30. See State *v.* Morgan, 52 Ark. 150, 12 S. W. 243.

A title given by trustees de facto of school lands is valid, and cannot be questioned by their successors in office, or any other person. Moore *v.* Caldwell, Freem. (Miss.) 222.

31. State *v.* Morgan, 52 Ark. 150, 12 S. W. 243; McCabe *v.* Mazzuchelli, 13 Wis. 478, holding that as Const. art. 10, §§ 7, 8, requires deeds and conveyances of the school and university lands to be made by the board of commissioners, a patent for such land, signed by the governor and countersigned by the secretary of state, is invalid.

Practice not conforming to statute.—Where the statute lodges the authority and duty to issue patents for university land with the

(III) *Person Entitled to Receive Patent.* In California, where school land has been sold by the state and certificates of purchase issued on part payment of the purchase-money, and such land has been subsequently sold under execution and a sheriff's deed issued therefor, the grantee in such deed is entitled to a patent for the land on making full payment therefor.[32]

(IV) *Validity of Patents.* A patent for school land is not invalidated by irregularities in the sale or the proceedings leading up thereto,[33] nor does the fact that a patent, reciting that it is issued under a particular statute, does not refer to later statutes by which such statute was materially amended, render the patent void.[34] Ordinarily a patent for land which has been previously sold to another person who has paid the entire purchase-price, with interest and taxes, is void and confers no title on the patentee;[35] but where a patent is issued to a purchaser and sent to the school commissioner, who returns the same, requesting that the patent be issued to an assignee, a second patent to the assignee will be good.[36]

(V) *Effect of Patents.* A patent from the state cures defects and irregularities in the application to purchase,[37] and after a patent has issued it will be presumed, in the absence of fraud, that the necessary proceedings have been had to make the sale legal and valid.[38] As against the state and those claiming under it, a patent for school lands vests in the purchaser the legal fee simple title thereto,[39] which will prevail over an equitable title accompanied by possession,[40] and as against all the world a patent for school lands regular in form is *prima facie* evidence of title in the patentee.[41]

(VI) *Attack on Patents.* The decision of a board of school land commissioners as to the right to a deed, although final so far as the interest of the state is concerned, does not prevent another person claiming the land under the same law from showing, in a proper proceeding, that a deed made by the board was obtained through fraud or upon false testimony;[42] and where one claiming under a

governor, mandamus will not lie to the secretary of state to issue a patent therefor, although it has been the practice for him to issue them. Crane *v.* Secretary of State, 51 Mich. 195, 16 N. W. 376.

32. Cerf *v.* Reichert, 73 Cal. 360, 15 Pac. 10, holding this to be true, although the holder of the certificate has assigned it to another person.

33. Sexton *v.* Appleyard, 34 Wis. 235.

34. Bradley *v.* Parkhurst, 20 Kan. 462.

35. Richards *v.* Griffith, 1 Kan. App. 518, 41 Pac. 196.

36. Welch *v.* Dutton, 79 Ill. 465.

37. Green *v.* Hayes, 70 Cal. 276, 11 Pac. 716.

38. Township No. 23 School Trustees *v.* Allen, 21 Ill. 120.

Selection of land.— A patent from the state conveying, as school land, land outside of a school section, and uninterrupted and notorious possession under such patent for over twenty years, authorizes the presumption that a proper selection of the land conveyed was made before the state asserted title to it and issued the patent. Knabe *v.* Burden, 88 Ala. 436, 7 So. 92 [*following* Woodstock Iron Co. *v.* Fullenwider, 87 Ala. 584, 6 So. 197, 13 Am. St. Rep. 73; Bozeman *v.* Bozeman, 82 Ala. 389, 2 So. 732; Long *v.* Parmer, 81 Ala. 384, 1 So. 900; Gosson *v.* Ladd, 77 Ala. 223; Kelly *v.* Hancock, 75 Ala. 229; Matthews *v.* McDade, 72 Ala. 377; McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529]. But *compare* Butler *v.* Drake, 62 Minn. 229, 64 N. W. 559, holding that a patent of lands in a section other than a school section which recites the act of congress granting to the state for school purposes sections 16 and 36 in each township, but contains no recital as to the acts or proceedings whereby the state acquired title to the land covered by the patent, does not raise a presumption that the state ever owned such land.

39. People *v.* Auditor of Public Accounts, 3 Ill. 567 (holding that under the statutes then existing in relation to the sale of school lands, the school commissioner might be considered the legally constituted agent, both for the state and the purchaser, to receive the patents, and when they were delivered to him, in compliance with the statute, the title was divested out of the state and became vested in the purchaser, and one to whom the certificate of purchase was assigned after the issuance of patent was not entitled to receive a patent in his own name); Robinson *v.* Hague, 63 Iowa 273, 19 N. W. 208; Harmon *v.* Steinman, 9 Iowa 112.

Prior to the issuance of the patent the purchaser has only an equitable interest. Beatty *v.* Wilson, 161 Fed. 453.

40. Harmon *v.* Steinman, 9 Iowa 112.

41. Richards *v.* Griffith, 57 Kan. 234, 45 Pac. 600 [*reversing* 1 Kan. App. 518, 41 Pac. 196]; Reynolds *v.* Weiss, 27 Wis. 450, holding that a patent issued by the commissioner of school and university lands may be read in evidence without preliminary proof of title in the state.

42. Hurst *v.* Hawn, 5 Oreg. 275.

patent for school lands from the state brings ejectment against persons who are in possession of the land as mining claims under locations made in accordance with the law and the local customs, defendants can contest the patent, as they are in privity with the United States.[43] The state is a necessary party to a suit to set aside a deed from the state to school lands,[44] and such a suit cannot be maintained by a private citizen having no interest in the land.[45] But where a sale of school lands has been set aside and the lands sold and patented to another, the latter may, upon the refusal of the first patentee to deliver up his patent, maintain a suit to have it canceled and to enjoin the holder from asserting any claim to land.[46] The failure of the holder of the beneficial estate to appear before the register of the state land office and contest the patentee's right to a patent does not conclude him from asserting his right.[47] In an action brought by a person in possession of school lands under a certificate of purchase to quiet his title against the holder of a patent to such land, the burden rests on plaintiff to show the invalidity of the patent.[48] A patent for school lands, valid on its face, is not subject to collateral attack;[49] but a patent which is void on its face may be attacked in any controversy.[50]

(VII) *Suits to Compel Issuance of Patents.* The state commissioner of public lands, being a mere ministerial officer of the state to execute its deed, is not a necessary party to a suit against the state to compel a conveyance of school lands.[51]

v. Title and Rights of Purchaser — (I) *In General.* A purchaser of state school lands derives title from the state and not from the United States.[52] A purchaser of school lands who has made the first payment and received a contract of sale has an interest in the land which is subject to execution.[53] Where the statute authorizing a sale of school lands imposes no condition upon the purchaser as to the manner in which he shall use the land, one who has purchased such land and paid a part of the purchase-money and given his notes for the balance and is in lawful possession, has a right to cut timber on the land.[54] Although the state may maintain an action against a purchaser in possession for cutting timber which he is prohibited by the statute from cutting,[55] an injury to the security is an essential element of such a cause of action,[56] and the state is not entitled to recover the full value of the timber cut, irrespective of the question whether there remains a sufficient security for the unpaid purchase-money.[57] One who purchases school land from the state does not acquire any title to timber cut therefrom by a trespasser before his purchase.[58] A purchaser of school lands is not bound to see the purchase-money

43. Hermocilla *v.* Hubbell, 89 Cal. 5, 26 Pac. 611.

44. Powers *v.* Webster, 47 Wash. 99, 91 Pac. 569, so holding for the reason that, if the deed is set aside, the property reverts to the state.

45. Powers *v.* Webster, 47 Wash. 99, 91 Pac. 569.

46. Burrows *v.* Rutledge, 76 Wis. 22, 44 N. W. 847.

47. Bludworth *v.* Lake, 33 Cal. 255.

48. Richards *v.* Griffith, 57 Kan. 234, 45 Pac. 600 [*reversing* 1 Kan. App. 518, 41 Pac. 196].

Sufficiency of evidence.— The facts that the certificate of purchase is prior to the date of the patent, that plaintiff is in possession of the land, that he has paid all the interest payments required by law, and that the balance of the purchase-money is not due, are insufficient to overcome the patent, where it appears that the land has been taxable for a considerable number of years, and no proof is made with reference to the payment of the taxes or with reference to the transactions between the patentee and the officers authorized to make sales of school lands on which the action of the governor in issuing the patent was based. Richards *v.* Griffith, 57 Kan. 234, 45 Pac. 600 [*reversing* 1 Kan. App. 518, 41 Pac. 196].

49. State *v.* Morgan, 52 Ark. 150, 12 S. W. 243; Churchill *v.* Anderson, 56 Cal. 55 [*following* Doll *v.* Meador, 16 Cal. 325]; Dodge *v.* Perez, 7 Fed. Cas. No. 3,953, 2 Sawy. 645.

50. State *v.* Morrow, 52 Ark. 150, 12 S. W. 243; Churchill *v.* Anderson, 56 Cal. 55 [*following* Doll *v.* Meador, 16 Cal. 325].

51. Romine *v.* State, 7 Wash. 215, 34 Pac. 924.

52. Street *v.* Columbus, 75 Miss. 822, 23 So. 773.

53. Brooke *v.* Eastman, 17 S. D. 339, 96 N. W. 699.

54. Schmidt *v.* Vogt, 8 Oreg. 344.

55. State *v.* Weston, 17 Wis. 107.

56. State *v.* Weston, 17 Wis. 107.

57. State *v.* Weston, 17 Wis. 107.

58. Paine *v.* White, 21 Wis. 423 [*following*

properly applied, and hence his title is not defeated by an illegal application of the proceeds;[59] and if he purchases at a price for which the lands could be lawfully sold his title is not affected by the fact that the land was worth more than the price paid and would probably have brought more if sold at public auction.[60] One who has procured a location of land to himself, pending an appeal to determine the rights of the parties to a location of the land under the School Land Act, must be deemed to hold the land in trust for the successful party to such appeal and may be decreed to transfer the same to such party on being reimbursed his expenses.[61]

(II) *Assignment by Purchaser.* In some states a purchaser of school land may assign his certificate or contract of sale, and his interest in the land thereunder,[62] and the assignee acquires all the rights of the original purchaser;[63] but he does not take the certificate of sale as an innocent holder for value, and has no greater protection or rights than his assignor.[64]

(III) *Sales For Taxes.* In Kansas where school lands, on which only a part of the original purchase-money has been paid, are sold for taxes, the right of redemption from such tax-sale is limited to one year from the date of the certificate of sale;[65] and, if the original purchaser fails to redeem within such time, the holder of the tax-sale certificate, on payment of the balance due the school fund, and compliance with the other provisions of the statute in relation to sales of school lands, is entitled to a patent from the state.[66] In Washington, where the state has canceled a sale of school lands for non-payment of instalments due on the purchase-price a purchaser under a subsequent sale for county taxes acquires no interest in the lands.[67]

w. Curative Acts. In some of the states defects and irregularities in sales of school land have been cured by statute.[68]

3. Leases of School Lands[69]— a. Authority to Lease. In a number of states the statutes authorize the leasing of school lands.[70]

State *v.* School, etc., Land Com'rs, 19 Wis. 237].

59. State *v.* Stringfellow, 2 Kan. 263, 315, where it is said: "If the purchase money were improperly applied by the trustee it might be that the lands would be subject to a charge for the amount of the value thereof fixed by the legislature, but the purchaser would have the title nevertheless."

60. State *v.* Stringfellow, 2 Kan. 263.

61. Dolhequy *v.* Tabor, 22 Cal. 279.

62. Henshall *v.* Marsh, 151 Cal. 289, 90 Pac. 693; Abernathy Furniture Co. *v.* Spencer, 59 Kan. 168, 52 Pac. 425; Knott *v.* Tade, 58 Kan. 94, 48 Pac. 561; Oberlin Loan, etc., Banking Co. *v.* Flinn, 58 Kan. 83, 48 Pac. 560; De Laittre *v.* Board of Com'rs, 149 Fed. 800, stating law of Oregon.

Transfer may be by deed or assignment.— Henshall *v.* Marsh, 151 Cal. 289, 90 Pac. 693.

63. Henshall *v.* Marsh, 151 Cal. 289, 90 Pac. 693.

64. De Laittre *v.* Board of Com'rs, 149 Fed. 800, holding that an assignee of a certificate obtained by fraud is not entitled to a deed from the state.

65. Larabee *v.* Prather, 51 Kan. 743, 33 Pac. 608.

66. Larabee *v.* Prather, 51 Kan. 743, 33 Pac. 608, holding that on presentation of a certificate of the county clerk showing that the holder of a tax-sale certificate of school lands which had been issued more than one year, and from which sale the original purchaser had failed to redeem, has paid the full amount of purchase-money, and all interest due, for the school lands described in the tax-sale certificate, it is the duty of the auditor of state to certify thereon that he has charged the county treasurer of the county where the land is situated with the ful amount of the purchase-money mentioned in the original sale certificate, in order to enable the holder of such tax-sale certificate to obtain a patent for the land. See also Ewing *v.* Baldwin, 24 Kan. 82.

Title thus conveyed cannot be questioned by any private person.— Baker *v.* Newland, 25 Kan. 25. See also Ewing *v.* Baldwin, 24 Kan. 82.

67. State *v.* Frost, 25 Wash. 134, 64 Pac. 902.

68. See State *v.* Sickler, 9 Ind. 67; Hester *v.* Crisler, 36 Miss. 681; Keane *v.* Brygger, 3 Wash. 338, 28 Pac. 653. And see 41 Cent. Dig. tit. "Public Lands," § 168.

California curative acts see *infra*, III, C, 2, l.

69. **Leases of Texas school lands** see *infra*, III, C, 3, c.

70. *Alabama.*— Bullock *v.* Governor, 2 Port. 484.

Colorado.— *In re* Leasing State Lands, 18 Colo. 359, 32 Pac. 986.

Indiana.— Garwood *v.* Cox, 4 Blackf. 93.

Louisiana.— Garland *v.* Jackson, 7 La. Ann. 68.

Mississippi.— Moss Point Lumber Co. *v.* Harrison County, 89 Miss. 448, 42 So. 290, 873.

Nebraska.— Hile *v.* Troupe, 77 Nebr. 199, 109 N. W. 218.

b. Establishment of Rules Governing Making of Leases. The legislature, on authorizing the leasing of the school lands, has the right to fix the terms on which a lease shall be made,[71] and a board on which the statute confers general powers with reference to the leasing of school lands has power to establish reasonable rules, consistent with the statute, for its government in the transaction of such business.[72]

c. What Constitutes a Lease. Where the statute grants only the power to lease school lands, a conveyance executed by the president of the board of supervisors of a county by authority of the board and in pursuance of the statute reciting that he thereby leases a section of school land for ninety-nine years to the highest bidder at a public sale of a lease of the section, and stipulating that the lease is made for a specified consideration, constituting a lien on the land leased, until payment thereof, creates a leasehold estate only.[73]

d. Area Which May Be Leased. The amount of school land which an individual may lease is sometimes limited by statute,[74] and where there is such a limitation, public policy forbids that another person shall lease and hold such lands for a lessee, and one who has a valid lease on school lands to the maximum amount permitted is estopped from claiming that another lease is held for him.[75]

e. Persons Entitled to Lease. In Arizona *bona fide* settlers who have placed improvements on school lands have a preferred right to lease the same,[76] and in Nebraska persons living on lands selected by the state in lieu of school sections must be given an opportunity to lease the land on an appraisement not including their improvements before being ejected therefrom.[77]

f. Term of Lease. The term for which school lands can be leased is usually fixed or limited by statute,[78] and a lease for a longer term is unauthorized.[79] State

Ohio.— Hart *v.* Johnson, 6 Ohio 87, 538.

Oklahoma.— Noel *v.* Barrett, 18 Okla. 304, 90 Pac. 12.

Washington.— Holm *v.* Prater, 7 Wash. 207, 34 Pac. 919.

See 41 Cent. Dig. tit. "Public Lands," § 170 *et seq.*

A territorial legislature has no power to pass a law authorizing the county court to lease sections of land reserved by the United States for school purposes. Burrows *v.* Kimball, 11 Utah 149, 41 Pac. 719.

71. Moss Point Lumber Co. *v.* Harrison County, 89 Miss. 448, 42 So. 290, 873.

72. State *v.* Kendall, 15 Nebr. 242, 18 N. W. 41, holding that a rule of the board of educational lands and funds "that all surrenders of sale or leases of school lands shall be held thirty days before lease will be issued on the same, and the county treasurer notified of said surrender and that applications will be received to lease the same," although not in terms authorized by any statute, is in keeping and consistent with the general powers to sell and lease public lands, conferred on such board by Const. art. 8, § 1, and Comp. St. c. 80, § 1, passed in pursuance thereof, and is therefore valid.

73. Moss Point Lumber Co. *v.* Harrison County, 89 Miss. 448, 42 So. 290, 873, holding that the provisions of the statute authorizing the leasing of school lands, which require the lessees to pay the taxes, and which give them the right to bring suit for waste, are not inconsistent with the idea that a conveyance of school lands for a term of ninety-nine years, made under such statute, creates a leasehold estate only. See also Hart *v.* Johnson, 6 Ohio 87, holding that a conveyance of school lands, under a statute directing leases to be granted for ninety-nine years, renewable forever, reciting the law under which it was executed, is to be construed a lease according to the statute, although in terms it imports a conveyance in fee.

74. See Noel *v.* Barrett, 18 Okla. 304, 90 Pac. 12, limitation to one quarter section.

75. Noel *v.* Barrett, 18 Okla. 304, 90 Pac. 12.

76. Schley *v.* Vail, (Ariz. 1908) 95 Pac. 113, holding that the settler must have placed on the land improvements permanent in character, the result of labor or capital, and which enhance the value of the land, and that the improvements in the case at bar were sufficient.

77. State *v.* McCright, 76 Nebr. 732, 108 N. W. 138, 112 N. W. 315.

78. See the following cases:

Colorado.— *In re* Leasing State Lands, 18 Colo. 359, 32 Pac. 986.

Indiana.— Garwood *v.* Cox, 4 Blackf. 93.

Louisiana.— Garland *v.* Jackson, 7 La. Ann. 68, fifty-year leases.

Mississippi.— Moss Point Lumber Co. *v.* Harrison County, 89 Miss. 448, 42 So. 290, 873, ninety-year leases.

Oklahoma.— Renfrow *v.* Grimes, 6 Okla. 608, 52 Pac. 389.

See 41 Cent. Dig. tit. "Public Lands," § 170 *et seq.*

79. *In re* Leasing State Lands, 18 Colo. 359, 32 Pac. 986 (although the board of land commissioners is satisfied that by a longer lease it can secure the greatest annual rev-

statutes authorizing the leasing of such lands for a term of fifty years do not conflict with any act of congress or with the constitution of the United States.[80]

g. Application For Lease and Acceptance Thereof. A statutory application for a lease of school lands, and its acceptance by the state and the issuance of a receipt in due form for an instalment of rent paid by the applicant, create an enforceable contract, where the antecedent conditions have been performed.[81]

h. Validity of Leases. Where the statute provides that no title shall vest in the lessee until the whole consideration is paid, a lease on which no money is paid is void and passes no title;[82] but a lease is not invalid because the entire consideration is paid in cash whereas the statute provides for payment in annual instalments.[83]

i. Rent and Recovery Thereof. It is the duty of the board intrusted with the leasing of school lands to lease them for the highest price possible and increase and protect by all honorable means the funds for the support of the educational institutions,[84] and the courts will not interfere with the board so long as it is faithfully performing its duty in this respect.[85] Under some statutes the rent of school lands is fixed with reference to the appraised value of the land,[86] and land leased for a long term of years is subject to revaluation from time to time.[87] Where a lessee of school lands knows of an irregularity in leasing them, and without any fraud on the part of the school trustees, acting as lessors, gives his note in payment of the rent, he cannot set up such irregularity in defense to an action on the note.[88]

j. Title, Rights, and Liabilities of Lessee. The title, rights, and liabilities of a lessee of school land are in general the same as those of a lessee of any other land.[89] In Oklahoma, by the law and regulations for the leasing of school lands,

enue to the state); Garwood *v.* Cox, 4 Blackf. (Ind.) 93.

The board for leasing school lands has no power to accept an application for a lease for a period longer than that for which it is authorized to lease lands, and thereby compel the person making the application to comply with the terms and conditions thereof. Renfrow *v.* Grimes, 6 Okla. 608, 52 Pac. 389.

80. Garland *v.* Jackson, 7 La. Ann. 68.

81. Luse *v.* Rankin, 57 Nebr. 632, 78 N. W. 258.

82. Sexton *v.* Coahoma County, 86 Miss. 380, 38 So. 636 [*following* Jones *v.* Madison County, 72 Miss. 777, 18 So. 87], holding that such a lease is beyond the power of a curative statute.

83. Sexton *v.* Coahoma County, 86 Miss. 380, 38 So. 636.

84. *In re* Leasing State Lands, 18 Colo. 359, 32 Pac. 986; State *v.* Scott, 18 Nebr. 597, 26 N. W. 386.

85. State *v.* Scott, 18 Nebr. 597, 26 N. W. 386, holding that mandamus will not lie to compel the board of educational lands to award a lease to a bidder unless the bid is in excess of the sum fixed by statute, and is at least the full rental value of the land, and there is an abuse of discretion on the part of the board in refusing to execute the lease; and that where the highest bidder at a public letting of educational lands has refused to accept the lease and pay the amount due thereon and perform the contract on his part, the board will not be compelled to accept a lower bid subsequently made by him for the same tract of land.

86. McVey *v.* State University, 11 Ohio 134.

An appraisement of a whole tract by the acre is *prima facie* an appraisement of each acre in the tract, and sufficient foundation upon which to assess the rent of a part of the tract. Marietta School Trustees *v.* Hough, Wright (Ohio) 160.

87. School Section 16 Trustees *v.* Odlin, 8 Ohio St. 293; McVey *v.* State University, 11 Ohio 134.

How reappraisement made.— Where separate leases of two tracts have become vested in the same person by assignment, it is not proper, on a reappraisement, to value the two tracts as one entire tract, but they should be appraised separately. School Section 16 Trustees *v.* Odlin, 8 Ohio St. 293.

88. Cole *v.* Harman, 8 Sm. & M. (Miss.) 562.

89. See Moss Point Lumber Co. *v.* Harrison County, 89 Miss. 448, 42 So. 290, 873 (holding that in order to ascertain the rights of a lessee of school lands for a term of ninety-nine years, the courts must, where the terms of the lease are plain and the rights which go with it are measured by the law, seek the definition of the term "lease," and they cannot turn from that definition to seek aid by recalling the conditions of the country which existed at the time the lease was made); Forest Products Co. *v.* Russell, 161 Fed. 1004 (holding that under the Mississippi act of Feb. 27, 1833, authorizing the leasing by the state of sixteenth section school lands for a term of ninety-nine years based on an appraisal, which statute contained no provision against waste, a lessee acquired as full and complete ownership of the land as

a lessee of such lands has a preference right to renew or release, subject to sale and purchase.[90]

k. Transfer of Lease. A lessee of school lands may assign or transfer his lease.[91]

l. Termination of Lease — (i) *By Voluntary Act of Lessee.* A lessee of school land cannot terminate his lease so as to throw the land open to settlement by any act of his own without the concurrence of the board of county commissioners.[92]

(ii) *By Forfeiture.* In Nebraska if a lessee defaults in payment of the rent his lease may be forfeited[93] after publication of the notice required by statute;[94] but the lessee is entitled to redeem the lease by paying all the delinquencies and costs at any time before the land is sold or again leased,[95] and it has been held that where no proceedings against a defaulting lessee have been taken, such lessee or his assignee, who is in possession of the leased premises, cannot be deprived thereof by a second lease, or a sale of the premises by the county authorities to a third person.[96] In Ohio it has been held that the trustees of the township, after suit brought for non-payment of rent and execution returned *nulla bona*, are authorized to enter on the land and sell all the right of the lessee in the lease,[97] and an entry to forfeit a leasehold for non-payment of rent must be for the entire tract leased, without references to subleases of a part.[98]

though the title was in fee subject only to termination at the end of the term, and where the value of the land was in the timber he had the right to cut and sell the same with all rights of action with respect thereto as a fee-simple owner.

Construction of statute.— A statute providing that lessees of school lands shall be vested with "the right, title, use, interest, and occupation of" the lands, must be construed as using these words in connection with the character of the estate which is authorized to be conveyed, which is a leasehold estate, and a lessee has only such right, title, use, interest, and occupation as go with a leasehold estate. Moss Point Lumber Co. *v.* Harrison County, 89 Miss. 448, 42 So. 290, 873.

Presumption as to purpose of lease.— A lessee of a school section is conclusively presumed, in the absence of a stipulation in the lease to the contrary, to have taken the lease for agricultural purposes, and with only such rights as go with a lease of land, which do not include the right to cut and sell the timber thereon. Moss Point Lumber Co. *v.* Harrison County, 89 Miss. 448, 42 So. 290, 873.

A lessee of school lands is liable for waste, although he holds under a ninety-nine year lease. Moss Point Lumber Co. *v.* Harrison County, 89 Miss. 448, 42 So. 290, 873.

90. Noel *v.* Barrett, 18 Okla. 304, 90 Pac. 12.

91. Hile *v.* Troupe, 77 Nebr. 199, 109 N. W. 218; Noel *v.* Barrett, 18 Okla. 304, 90 Pac. 12, with the consent of the leasing board.

Recording assignment.— A statute providing that no assignment of a lease of school lands shall be valid unless it is entered of record in the office of the commissioner of public lands and buildings is intended by the legislature for the protection of the state and no assignee obtains any right, as against the state, until the assignment has been so recorded. Langan *v.* Binfield, 49 Nebr. 857, 69 N. W. 123. An assignment of a lease of school lands which was executed prior to the passage of Nebr. Act, March 5, 1885 (Laws (1885), p. 335, c. 85), is not affected by the provisions of that act requiring such assignments to be recorded in the office of the commissioner of public lands and buildings. Hile *v.* Troupe, 77 Nebr. 199, 109 N. W. 218.

92. Hopper *v.* Nation, (Kan. 1908) 96 Pac. 77.

93. Hile *v.* Troupe, 77 Nebr. 199, 109 N. W. 218; State *v.* McCright, 76 Nebr. 732, 108 N. W. 138, 112 N. W. 315; Hoxie *v.* Iiams, 26 Nebr. 616, 42 N. W. 711; State *v.* Scott, 17 Nebr. 686, 24 N. W. 337.

Statute providing for forfeiture applicable to leases made before its passage.— State *v.* Scott, 17 Nebr. 686, 24 N. W. 337.

94. State *v.* Henton, 48 Nebr. 488, 67 N. W. 443 (holding that the forfeiture of a school-land lease upon notice published for less time than required by the statute for that purpose is ineffective, and that the provision of Comp. St. c. 80, art. 1, § 16, that in the case of school land leases held by non-residents, "the forfeiture may be entered by said board after ninety days from the date of such published notice," has the same meaning as though it read "after ninety days from the completion of the publications required by the statute"); State *v.* Scott, 17 Nebr. 686, 24 N. W. 337.

95. Hile *v.* Troupe, 77 Nebr. 199, 109 N. W. 218.

An assignee of a lease whose assignment has not been recorded in the office of the commissioner of public lands and buildings, as required by Nebr. Comp. St. c. 80, art. 1, § 14, is not entitled to redeem from a forfeiture of the lease. Langan *v.* Binfield, 49 Nebr. 857, 69 N. W. 123.

96. Hibbeler *v.* Gutheart, 12 Nebr. 526, 12 N. W. 5.

97. Hart *v.* Johnson, 6 Ohio 87.

98. Hart *v.* Johnson, 6 Ohio 87.

4. Proceeds of Sales and Leases — a. State Control. A provision in an act of congress conferring on the state legislature authority to prescribe the manner in which lands granted to the state for school purposes by the same act shall be held, appropriated, and disposed of, relates only to the management and disposition of the lands themselves and cannot control the funds derived from sales or leases, and hence is not contravened by a provision in the state constitution with reference to the management of such funds.[99]

b. Uses to Which Proceeds Applicable. The proceeds of the sale or leasing of school lands form a trust fund for the establishment and maintenance of public schools and cannot be used for any other purpose.[1] Where congress has granted school sections directly to the inhabitants of the townships, or to the state for the use of such inhabitants, the proceeds of the sale or lease of school sections must be applied for the use of schools in the townships in which the respective sections lie;[2] but where the grant is a general one to the state for the use of schools the state is free to adopt such system, to be general in its character, as the legislature shall deem most beneficial to the people and is not bound to apply the proceeds of school sections for schools in the townships where they are located.[3] In Idaho the interest or income from the proceeds of the sale of the seventy-two sections of land granted for university purposes can be used only in the support and maintenance of such university, and in the payment of the current expenses thereof and charges for conducting the same,[4] and cannot be used for the erection or equipment of university buildings or buildings connected therewith.[5]

c. By Whom Proceeds Disbursed. In Indiana it has been held that money derived from the rent of unsold school lands belonging to the sixteenth section should be paid into the county treasury and be distributed by the county auditor, and a township trustee has nothing to do with its distribution, except as to so much of it as may be apportioned to such parts of his township as are within the congressional township.[6]

99. State *v.* Rice, 33 Mont. 365, 83 Pac. 874.

1. *Colorado.*— *In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274.

Indiana.— State *v.* Springfield Tp., 6 Ind. 83.

Nebraska.—State *v.* McBride, 5 Nebr. 102.

Nevada.— State *v.* Rhoades, 4 Nev. 312.

United States.— Springfield Tp. *v.* Quick, 22 How. 56, 16 L. ed. 256.

See 41 Cent. Dig. tit. "Public Lands," § 176 *et seq.*

The rents of unsold school lands must be applied to the support and maintenance of common schools throughout the state and are not vested in the permanent school fund. State *v.* McBride, 5 Nebr. 102.

Expense of selection and sale.— Nev. Acts (1867), p. 165, § 17, providing for the selection and sale of lands ceded to the state by the United States government, and providing for the drawing of warrants on the general school fund for the expense of carrying out the act, was not in conflict with Const. art. 9, § 3, providing that the proceeds of lands ceded for school purposes should not be used for any other purpose. State *v.* Rhoades, 4 Nev. 312.

2. Wyman *v.* Banvard, 22 Cal. 524; State *v.* Springfield Tp., 6 Ind. 83; Bishop *v.* McDonald, 27 Miss. 371; Davis *v.* Indiana, 94 U. S. 792, 24 L. ed. 320 [*affirming* 44 Ind. 38]. And see *supra*, II, H, 1, d.

The actual location of the school, whether within the township or not, is immaterial, so long as the fund is applied for the benefit of the children who reside in the township. Bishop *v.* McDonald, 27 Miss. 371, holding that a statute allowing children to be admitted into schools in adjoining townships, when nearer or more convenient than any schools in the township in which they resided, and authorizing a payment to the township in which the children attended school of a proportionate amount of the fund belonging to the township in which they resided, was not in conflict with the act of congress.

The state is not bound to provide any additional fund for a township receiving the bounty of congress, no matter to what extent other parts of the state are supplied from the state treasury. Springfield Tp. *v.* Quick, 22 How. (U. S.) 56, 16 L. ed. 256 [*followed* in Davis *v.* Indiana, 94 U. S. 792, 24 L. ed. 320 (*affirming* 44 Ind. 38)].

A repeal by the legislature of the act establishing congressional townships cannot alter the effect of the act of congress granting a sixteenth section in each of said townships to the inhabitants thereof for the use of schools, or give the state any better right than it had before to divert such fund. State *v.* Springfield Tp., 6 Ind. 83.

3. Wyman *v.* Banvard, 22 Cal. 524.

4. Roach *v.* Gooding, 11 Ida. 244, 81 Pac. 642.

5. Roach *v.* Gooding, 11 Ida. 244, 81 Pac. 642.

6. Davis *v.* State, 44 Ind. 38 [*affirmed* in 94 U. S. 792, 24 L. ed. 320].

d. Loan of Proceeds. In order that the funds derived from school lands may be made productive, the statutes in a number of states have provided for loans of such funds on good security.[7]

e. Recovery of Proceeds From Wrong-Doers. The state, having the legal title to funds arising from the sale of school lands by the board of land commissioners, is entitled to maintain an action against wrong-doers for the recovery thereof.[8] Where a commissioner, appointed to rent university lands, fails to report and pay over the rents, he is chargeable with interest.[9]

I. Swamp and Overflowed Lands — 1. Grant to States[10] — a. In General. In order to enable the several states to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, congress has granted all such lands to the respective states;[11] and a subsequent act of congress has confirmed to the respective states all lands selected and reported to the general land office as swamp and overflowed land prior to March 3, 1857, so far as the same remained vacant and unappropriated, and not interfered with by an actual settlement under any law of the United States.[12] The selections so confirmed could not be set aside, nor could titles be obtained to any of the land which they embraced, unless it came within the exceptions mentioned in the act.[13] The original swamp land grant applied only to states in existence at the date of the act and states subsequently admitted acquired no rights under it,[14] but similar grants have been made by special acts of congress to some of the later states.[15]

b. When Title Vested. The Swamp Land Act was a grant *in præsenti*[16] by

7. See Kubli *v.* Martin, 5 Oreg. 436; Alexander *v.* Knox, 1 Fed. Cas. No. 170, 6 Sawy. 54, holding that in 1858 the only fund which a county treasurer in Oregon was authorized by law to loan was the common school fund in his custody, arising from the sales of sections 16 and 36 of the public lands of the territory, and in doing this he was the agent of the territory, the trustee of the fund, and not the county, and a suit to enforce the obligation of a note and mortgage given for a loan of such funds should be brought in the name of such treasurer.

Constitutionality of statute.— The Oregon act of Dec. 19, 1865, which required the county treasurers of the several counties to loan the school fund in their respective counties, provided that nothing therein should be construed so as to deprive the state of the right to control the common school fund created by the sale of school lands, was not in violation of Const. art. 8, providing that the governor, secretary of state, and state treasurer should constitute a board of commissioners for the sale of school lands and for the investment of the funds derived therefrom. Kubli *v.* Martin, 5 Oreg. 436.

8. State *v.* Chadwick, 10 Oreg. 423.

9. Bullock *v.* State, 2 Port. (Ala.) 484.

10. Effect of secession of state on title to swamp lands see States.

11. U. S. Rev. St. (1878) § 2479 [U. S. Comp. St. (1901) p. 1586].

A similar grant was previously made to Louisiana by the act of congress of March 2, 1849 (9 U. S. St. at L. 352).

Title of state not released.— There has been no act of the legislature of Indiana or act of congress which can be construed as contemplating a release of the state's title to any of the lands, to which title from the government had previously accrued to the state by virtue of the Swamp-Land Act, without compensation for the lands released. Matthews *v.* Goodrich, 102 Ind. 557, 1 N. E. 175.

12. U. S. Rev. St. (1878) § 2484 [U. S. Comp. St. (1901) p. 1588]. See Frederick *v.* Goodbee, 120 La. 783, 45 So. 606.

Selections made by the state of California prior to July 23, 1866, were confirmed to the state by Act July 23, 1866, c. 219, § 1; U. S. Rev. St. (1878) § 2485 [U. S. Comp. St. (1901) p. 1589]. See Sacramento Sav. Bank *v.* Hynes, 50 Cal. 195.

13 Martin *v.* Marks, 97 U. S. 345, 24 L. ed. 940.

14. Rice *v.* Sioux City, etc., R. Co., 110 U. S. 695, 4 S. Ct. 177, 28 L. ed. 289 [*affirming* 9 Fed. 368, 3 McCrary 410]. See also French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941.

The states of Kansas, Nebraska, and Nevada are not included in this grant. U. S. Rev. St. (1878) § 2479 [U. S. Comp. St. (1901) p. 1586].

Subsequent acts admitting new states to the Union declare that the provisions of the section referred to are not extended to such states, and in lieu of any claim by them under such provisions make grants to each state for various purposes. See U. S. Comp. St. (1901) p. 1587.

15. See Pengra *v.* Munz, 29 Fed. 830, construing Act March 12, 1860, c. 5 (U. S. Rev. St. (1878) § 2490 [U. S. Comp. St. (1901) p. 1591]), extending the swamp land grant to Minnesota and Oregon.

16. *Arkansas.*— Hibben *v.* Malone, 85 Ark. 584, 109 S. W. 1008; Kelly *v.* Cotton Belt Lumber Co., 74 Ark. 400, 86 S. W. 436, 827; Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031; Hendry *v.* Willis, 33 Ark. 833.

which title to the swamp and overflowed lands passed at once to the state in which they lay,[17] but which left it to the secretary of the interior to determine and identify what lands were and what lands were not swamp lands.[18] While it has been frequently asserted that the Swamp Land Act followed by an identification of the land passed the legal title to the states *ex proprio vigore*, without the necessity of a patent,[19] the correct rule is that the legal title passed only upon issuance of

California.— Tubbs *v.* Wilhoit, 73 Cal. 61, 14 Pac. 361 [*affirmed* in 138 U. S. 134, 11 S. Ct. 279, 34 L. ed. 887]; Kernan *v.* Griffith, 27 Cal. 87.

Florida.— State *v.* Jennings, 47 Fla. 307, 35 So. 986.

Illinois.— Cook County *v.* Calumet, etc., Canal, etc., Co., 131 Ill. 505, 23 N. E. 629 [*affirmed* in 138 U. S. 635, 11 S. Ct. 435, 34 L. ed. 1110].

Indiana.— State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379; Matthews *v.* Goodrich, 102 Ind. 557, 1 N. E. 175.

Iowa.— Ogden *v.* Buckley, 116 Iowa 352, 89 N. W. 1115; Smith *v.* Miller, 105 Iowa 688, 70 N. W. 123, 75 N. W. 499; Bailey *v.* Callanan, 87 Iowa 107, 53 N. W. 1074; Snell *v* Dubuque, etc., R. Co., 78 Iowa 88, 42 N. W. 588, 80 Iowa 767, 45 N. W. 763.

Michigan.— People *v.* Warner, 116 Mich. 228, 74 N. W. 705; Sherman *v.* A. P. Cook Co., 98 Mich. 61, 57 N. W. 23; Busch *v.* Donohue, 31 Mich. 481.

Missouri.— Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700.

Oregon.— Warner Valley Stock Co. *v.* Calderwood, 36 Oreg. 228, 59 Pac. 115; Gaston *v.* Stott, 5 Oreg. 48.

United States.— Michigan Land, etc., Co. *v.* Rust, 168 U. S. 589, 18 S. Ct. 208, 42 L. ed. 591 [*affirming* 68 Fed. 155, 15 C. C. A. 335]; Chandler *v.* Calumet, etc., Min. Co., 149 U. S. 79, 13 S. Ct. 798, 37 L. ed. 657 [*affirming* 36 Fed. 665]; Cook County *v.* Calumet, etc., Canal, etc., Co., 138 U. S. 635, 11 S. Ct. 435, 34 L. ed. 1110 [*affirming* 131 Ill. 505, 23 N. E. 629]; Wright *v.* Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039 [*reversing* 81 Cal. 87, 22 Pac. 336, and *followed* in Tubbs *v.* Wilhoit, 138 U. S. 134, 11 S. Ct. 279, 34 L. ed. 887 (*affirming* 73 Cal. 61, 14 Pac. 361)]; Rice *v.* Sioux City, etc., R. Co., 110 U. S. 695, 4 S. Ct. 177, 28 L. ed. 289; French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812; Hannibal, etc., R. Co. *v.* Smith, 9 Wall. 95, 19 L. ed. 599; Kerns *v.* Lee, 142 Fed. 985; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941; Cahn *v.* Barnes, 5 Fed. 326, 7 Sawy. 48.

See 41 Cent. Dig. tit. "Public Lands," § 181.

17. Kelly *v.* Cotton Belt Lumber Co., 74 Ark. 400, 86 S. W. 436, 827; Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031; Hendry *v.* Willis, 33 Ark. 833; Branch *v.* Mitchell, 24 Ark. 431; Fletcher *v.* Pool, 20 Ark. 100 [*followed* in Hempstead *v.* Underhill, 20 Ark. 337]; People *v.* Warner, 116 Mich. 228, 74 N. W. 705; Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700; Michigan Land, etc., Co. *v.* Rust, 168 U. S. 589, 18 S. Ct. 208, 42 L. ed. 591 [*affirming* 68 Fed. 155, 15 C. C. A. 335]; Tubbs *v.* Wilhoit, 138 U. S. 134, 11 S. Ct. 279, 34 L. ed. 887; Wright *v.* Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039 [*followed* in Irwin *v.* San Francisco Sav. Union, 136 U. S. 578, 10 S. Ct. 1064, 34 L. ed. 540]; Rice *v.* Sioux City, etc., R. Co., 110 U. S. 695, 4 S. Ct. 177, 28 L. ed. 289; Martin *v.* Marks, 97 U. S. 345, 24 L. ed. 940; French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812; Hannibal, etc., R. Co. *v.* Smith, 9 Wall. (U. S.) 95, 19 L. ed. 599; Kerns *v.* Lee, 142 Fed. 985; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941; San Francisco Sav. Union *v.* Irwin, 28 Fed. 708.

18. *California.*— Tubbs *v.* Wilhoit, 73 Cal. 61, 14 Pac. 361 [*affirmed* in 138 U. S. 134, 11 S. Ct. 279, 34 L. ed. 887].

Indiana.— State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379.

Iowa.— Ogden *v.* Buckley, 116 Iowa 352, 89 N. W. 1115. See also Boynton *v.* Miller, 22 Iowa 579.

Michigan.— People *v.* Warner, 116 Mich. 228, 74 N. W. 705.

Mississippi.— Funston *v.* Metcalf, 40 Miss. 504.

Missouri.— Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700.

United States.— Michigan Land, etc., Co. *v.* Rust, 168 U. S. 589, 18 S. Ct. 208, 42 L. ed. 591 [*affirming* 68 Fed. 155, 15 C. C. A. 335]; Rogers Locomotive Mach. Works *v.* American Emigrant Co., 164 U. S. 559, 17 S. Ct. 188, 41 L. ed. 552 [*reversing* 83 Iowa 612, 50 N. W. 52]; Wright *v.* Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039 [*reversing* 81 Cal. 87, 22 Pac. 336, and *followed* in Tubbs *v.* Wilhoit, 138 U. S. 134, 11 S. Ct. 279, 34 L. ed. 887 (*affirming* 73 Cal. 61, 14 Pac. 361)]; Hannibal, etc., R. Co. *v.* Smith, 9 Wall. 95, 19 L. ed. 599; U. S. *v.* Chicago, etc., R. Co., 160 Fed. 818, 87 C. C. A. 592 [*affirming* 148 Fed. 884]; Kerns *v.* Lee, 142 Fed. 985; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941; Cahn *v.* Barnes, 5 Fed. 326, 7 Sawy. 48.

See 41 Cent. Dig. tit. "Public Lands," § 181.

Necessity of selection and approval.— It is necessary, in order to confer title on the state to land as swamp land, that it shall have been selected as swamp land and the selection approved by the secretary of the treasury, or, if not so approved, it must come within the provision of Act Cong. March 3, 1857, c. 117 (U. S. Rev. St. (1878) § 2484 [U. S. Comp. St. (1901) p. 1588]). Stephenson *v.* Stephenson, 71 Mo. 127.

19. *California.*— Kernan *v.* Griffith, 27 Cal. 87.

Illinois.— Dart *v.* Hercules, 34 Ill. 395.

Indiana.— Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; Edmondson *v.* Corn, 62 Ind. 17.

patent,[20] and when the lands were identified as swamp lands, and not before, the state was entitled to a patent therefor,[21] on the issuance of which what was previously an inchoate or equitable title [22] became a perfect legal title in fee simple.[23] The legal title, when acquired, related back to the date of the act of congress making the grant.[24]

c. Survey. A survey into legal subdivisions is a necessary prerequisite to the passing of the title from the government to a state under the Swamp Land Act,[25] and unsurveyed swamp land should not be treated as excluded from the swamp land grant because not in the list filed by the interior department embrac-

Iowa.— Bailey *v.* Callanan, 87 Iowa 107, 53 N. W. 1074; Hays *v.* McCormick, 83 Iowa 89, 49 N. W. 69; Chicago, etc., R. Co. *v.* Brown, 40 Iowa 333; Montgomery County *v.* Burlington, etc., R. Co., 38 Iowa 208; Allison *v.* Halfacre, 11 Iowa 450.

Mississippi.— Daniel *v.* Purvis, 50 Miss. 261; Funston *v.* Metcalf, 40 Miss. 504 [*following* Fore *v.* Williams, 35 Miss. 533].

Missouri.— Masterson *v.* Marshall, 65 Mo. 94; Campbell *v.* Wortman, 58 Mo. 258.

Oregon.— Gaston *v.* Stott, 5 Oreg. 48.

See 41 Cent. Dig. tit. "Public Lands," § 181.

Title vests upon approval of plats of survey.— Tubbs *v.* Wilhoit, 73 Cal. 61, 14 Pac. 361 [*affirmed* in 138 U. S. 134, 11 S. Ct. 279, 34 L. ed. 887]. *Compare* Wright *v.* Roseberry, 63 Cal. 252.

20. *Alabama.*— Henry *v.* Brannan, 149 Ala. 323, 42 So. 995.

District of Columbia.— Brown *v.* Bliss, 13 App. Cas. 279 [*following* Warner Valley Stock Co. *v.* Smith, 9 App. Cas. 187].

Illinois.— Thompson *v.* Prince, 67 Ill. 281; Grantham *v.* Atkins, 63 Ill. 359.

Iowa.— Schlosser *v.* Hemphill, 118 Iowa 452, 90 N. W. 842; Ogden *v.* Buckley, 116 Iowa 352, 89 N. W. 1115.

Wisconsin.— State *v.* School, etc., Land Com'rs, 9 Wis. 236.

United States.— Brown *v.* Hitchcock, 173 U. S. 473, 19 S. Ct. 485, 43 L. ed. 772; Michigan Land, etc., Co. *v.* Rust, 168 U. S. 589, 18 S. Ct. 208, 42 L. ed. 591 [*affirming* 68 Fed. 170, 15 C. C. A. 350]; Rogers Locomotive, etc., Works *v.* American Emigrant Co., 164 U. S. 559, 7 S. Ct. 188, 41 L. ed. 552 [*reversing* 83 Iowa 612, 50 N. W. 52]; Kerns *v.* Lee, 142 Fed. 985; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941; Pengra *v.* Munz, 29 Fed. 830.

See 41 Cent. Dig. tit. "Public Lands," § 181.

21. Rogers Locomotive, etc., Works *v.* American Emigrant Co., 164 U. S. 559, 7 S. Ct. 188, 41 L. ed. 552 [*reversing* 83 Iowa 612, 50 N. W. 52]; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941.

22. Ogden *v.* Buckley, 116 Iowa 352, 89 N. W. 1115; Rogers Locomotive, etc., Works *v.* American Emigrant Co., 164 U. S. 559, 7 S. Ct. 188, 41 L. ed. 552 [*reversing* 83 Iowa 612, 50 N. W. 52]; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941.

23. Whiteside County *v.* Burchell, 31 Ill. 68; Rogers Locomotive, etc., Works *v.* American Emigrant Co., 164 U. S. 559, 7 S. Ct. 188, 41 L. ed. 552 [*reversing* 83 Iowa 612, 50 N. W. 52]; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941.

24. *Arkansas.*— Kelly *v.* Cotton Belt Lumber Co., 74 Ark. 400, 86 S. W. 436, 827; Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031; Hendry *v.* Willis, 33 Ark. 833; Fletcher *v.* Pool, 20 Ark. 100 [*followed* in Hempstead *v.* Underhill, 20 Ark. 337].

California.— Sacramento Valley Reclamation Co. *v.* Cook, 61 Cal. 341.

Illinois.— Smith *v.* Goodell, 66 Ill. 450.

Indiana.— State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379.

Michigan.— Sherman *v.* A. P. Cook Co., 98 Mich. 61, 57 N. W. 23; Busch *v.* Donohue, 31 Mich. 481.

Missouri.— Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700; Cramer *v.* Keller, 98 Mo. 279, 11 S. W. 734.

Oregon.— Warner Valley Stock Co. *v.* Calderwood, 36 Oreg. 228, 59 Pac. 115.

United States.— Rogers Locomotive, etc., Works *v.* American Emigrant Co., 164 U. S. 559, 17 S. Ct. 188, 41 L. ed. 552 [*reversing* 83 Iowa 612, 50 N. W. 52]; Tubbs *v.* Wilhoit, 138 U. S. 134, 11 S. Ct. 279, 34 L. ed. 887; Wright *v.* Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039; Martin *v.* Marks, 97 U. S. 345, 24 L. ed. 940; French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941; Pengra *v.* Munz, 29 Fed. 830.

See 41 Cent. Dig. tit. "Public Lands," § 181.

25. Schlosser *v.* Hemphill, 118 Iowa 452, 90 N. W. 842 [*following* Boynton *v.* Miller, 22 Iowa 579]; Cole *v.* Thompson, 35 La. Ann. 1026; State *v.* Lake St. Clair Fishing, etc., Club, 127 Mich. 580, 87 N. W. 117.

"Segregation survey" under Act Cong. July 23, 1866, § 4, in relation to California see Heath *v.* Wallace, 138 U. S. 573, 11 S. Ct. 380, 34 L. ed. 1063 [*affirming* 71 Cal. 50, 11 Pac. 842].

Presumption as to survey.— There is a legal presumption that all swamp lands were surveyed before their selection was approved by the general government. Cole *v.* Thompson, 35 La. Ann. 1026.

Survey as selection.— A survey of swamp and overflowed lands granted to the state by congress is a sufficient selection and identification of same to segregate them from the public domain, and render them liable to sale or entry as property of the state. Betz *v.* Illinois Cent. R. Co., 52 La. Ann. 893, 24 So. 644.

ing such lands.[26] Where a government survey establishes the section corners, identifies the land, and determines its overflowed character it is sufficient to serve as a basis for the selection of swamp lands.[27] The act of a state in accepting a new and corrected survey as the basis of adjustment of its swamp land grant is tantamount to a waiver of any claim under the prior and erroneous survey.[28] A state or county surveyor, in surveying swamp and overflowed lands, should conform his survey in the field to the United States surveys of the adjoining upland, and connect with the lines thereof;[29] but if he does not do so, and the survey and stakes and marks in the field place a line between sections or subdivisions to the one side or the other of the United States survey, the courts will not inquire into the matter, but parties who purchase the lands on either side of the line are bound by this survey in the field.[30]

d. Land Included in Grant — (i) *In General.* The character of the land at the date of the swamp land grant determines whether or not it is within the grant.[31] The capacity of land to produce a staple crop as the result of cultivation

26. People *v.* Warner, 116 Mich. 228, 74 N. W. 705.

27. McDade *v.* Bossier Levee Bd., 109 La. 625, 33 So. 628, holding that the survey of a township by the general government is not insufficient for such purpose because the section lines were not run across the traverse of a so-called lake of about one thousand acres in extent, lying diagonally across the township and cutting off the corners of some sections and passing through the body of others, but not covering any section in its entirety, and because this water-covered area was not surveyed.

Survey as evidence of character of land.— The official platting of lands by authority of the United States, indicating the character thereof as swamp lands or lands covered by the waters of a lake, as the same appeared to the official surveyors when the original survey was made, is *prima facie* evidence as to their then character, in an action involving the question whether they were part of the public domain and subject to sale. Illinois Steel Co. *v.* Budzisz, 115 Wis. 68, 90 N. W. 1019, holding further that such *prima facie* evidence becomes conclusive after the lapse of a term of years so long that it is difficult to establish definitely, if at all, the conditions existing at the time of the original survey, and will not be so disturbed as to permit a finding contrary thereto upon the evidence of witnesses whose personal knowledge does not reach back farther than within ten years from the time of the original survey, and who do not agree as to the conditions during the time covered by their testimony. Where swampy land adjacent to a lake was surveyed by the federal government as bounded by the meander line of the lake, such survey is conclusive that the land is not a part of the bed of the lake. Brown *v.* Parker, 127 Mich. 390, 86 N. W. 989.

An irregular platting and listing of swamp and overflowed lands to a state, in conformity to the requirements of the act of congress relating to legal subdivisions of land, but bounding the land platted and listed by a meandering line which excludes from its limits the smaller portion of some legal subdivisions and includes therein the smaller portion of other legal subdivisions, is nevertheless a conclusive adjudication that all of the lands so platted and listed are swamp and overflowed, and that all of the lands excluded from the plat are not swamp and overflowed but belong to the United States. Bates *v.* Halstead, 130 Cal. 62, 62 Pac. 305, 80 Am. St. Rep. 70, holding further that if it be conceded that the land department made a mistake in the manner in which the land was platted and listed to the state, such mistake cannot be reached in an action by the holder of the United States patent to quiet his title therein as against the holder of a state patent, as such action involves only the legal title to the land patented.

28. Michigan Land, etc., Co. *v.* Rust, 168 U. S. 589, 18 S. Ct. 208, 42 L. ed. 591 [*affirming* 68 Fed. 155 (*followed* in Michigan *v.* Jackson, etc., R. Co., 69 Fed. 116, 16 C. C. A. 345; Michigan Land, etc., Co. *v.* Pack, 68 Fed. 170, 15 C. C. A. 350)], holding that the facts shown amounted to such acceptance.

29. Mahon *v.* Richardson, 50 Cal. 333; Ringstorf *v.* Guth, 50 Cal. 86.

30. Ringstorf *v.* Guth, 50 Cal. 86.

31. *California.*— Thompson *v.* Thornton, 50 Cal. 142.

Iowa.— Connors *v.* Meservey, 76 Iowa 691, 39 N. W. 388.

Michigan.— Olds *v.* State Land Office, 150 Mich. 134, 112 N. W. 952, holding the evidence not sufficient to show that the land in question was swamp or overflowed land in 1850.

Wisconsin.— Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121.

United States.— Kirby *v.* Lewis, 39 Fed. 66.

See 41 Cent. Dig. tit. "Public Lands," § 184.

Evidence as to remote time but not going back to 1850.— Evidence that land, at a remote time, before the prairie sod in the part of the state in which it was situated had been broken, was swamp land, is sufficient to show that it was swamp land in 1850, although the evidence does not go

is the proper test as to whether or not it is swamp and overflowed,[32] and in applying such test the question is whether such crops can be successfully raised [33] and not whether they can be profitably raised.[34] Land which is unfit for cultivation in grain and other staple products by reason of the overflow is regarded as swamp land,[35] although a crop of grass may spring up there when the overflow subsides,[36] or although the land may be sowed in grass and mowed from year to year.[37] The fact that land is subject to periodical overflow does not of itself constitute such land swamp and overflowed; [38] but land which, although subject to overflow, is such that annually, after the subsidence of the waters, grain or other staple crops can be raised on it, cannot be considered within the meaning of the grant.[39] On the other hand land which is subject to overflow and requires artificial means to subject it to beneficial use is within the swamp land grant, although it may not be overflowed annually.[40] The swamp land grant was not limited to lands which might in the future be fitted for cultivation,[41] but included partly submerged islands.[42] Permanently overflowed swamps or shallow lakes, destined to become dry as the necessary effect of the building of the levees, in aid of the construction of which the swamp land grants were made, passed to the state under those grants.[43] Where there is no access to a lake except by land, and it is impossible to use it for purposes of travel or commerce, or for pleasure other than that of hunting, it is competent for the United States, by its survey and patent, to select and convey the lands beneath the waters of such lake as swamp and overflowed lands, and for the state to receive and convey them as such, without reservation or restriction.[44] Land which at the time of the Federal Swamp Land Act was connected with an island in a navigable lake, but was so low that it was ordinarily but a few inches above the water, and in times of high water wholly submerged, was swamp land, within the act, so as to pass to the state thereby.[45] Lands the selection of which as swamp and overflowed has been approved by the proper officer are segregated from the public domain and vest in the state, although they may have been, at the date of the Swamp Land Act, artificially covered by navigable water as a result of trespasses on the public domain.[46] The title to lands patented to a state under the Swamp Land Act cannot be affected by a resurvey by the United States.[47] The acts of congress confirming to the states lands selected by

back as far as 1850. Bourne *v.* Ragan, 96 Iowa 566, 65 N. W. 826.

Drying up of stream.— The bed of what was a navigable stream at the time of the swamp land grant, but which has since become dry, did not pass to the state as swamp and overflowed land. Edwards *v.* Rolley, 96 Cal. 408, 31 Pac. 267, 31 Am. St. Rep. 234.

An island which arose near the middle of a navigable river after the passage of the Swamp Land Act did not pass under such act. Holman *v.* Hodges, 112 Iowa 714, 84 N. W. 950, 84 Am. St. Rep. 367, 58 L. R. A. 673.

32. Keeran *v.* Allen, 33 Cal. 542; American Emigrant Co. *v.* Rogers Locomotive, etc., Works, 83 Iowa 612, 50 N. W. 52 [*reversed* on other grounds in 164 U. S. 559, 17 S. Ct. 188, 41 L. ed. 552].

33. Thompson *v.* Thornton, 50 Cal. 142; Wright *v.* Carpenter, 47 Cal. 436.

The fact that some of such crops may be raised at some seasons does not exclude a tract of land from the description of swamp and overflowed lands but the question is whether the staple crops may usually be successfully cultivated. Thompson *v.* Thornton, 50 Cal. 142.

34. Wright *v.* Carpenter, 47 Cal. 436.

35. Keeran *v.* Griffith, 31 Cal. 461; Merrill *v.* Tobin, 30 Fed. 738.

36. Keeran *v.* Griffith, 31 Cal. 461.

37. American Emigrant Co. *v.* Rogers Locomotive Mach. Works, 83 Iowa 612, 50 N. W. 52 [*reversed* on other grounds in 164 U. S. 559, 17 S. Ct. 188, 41 L. ed. 552].

38. California *v.* Fleming, 5 Land Dec. Dep. Int. 37 [*approved* in Heath *v.* Wallace, 138 U. S. 573, 11 S. Ct. 380, 34 L. ed. 1063 (*affirming* 71 Cal. 50, 11 Pac. 842)].

39. Keeran *v.* Allen, 33 Cal. 542.

40. Keller *v.* Brickey, 78 Ill. 133.

41. People *v.* Warner, 116 Mich. 228, 74 N. W. 705.

42. People *v.* Warner, 116 Mich. 228, 74 N. W. 705.

43. McDade *v.* Bossier Levee Bd., 109 La. 625, 33 So. 628.

44. Lamprey *v.* Danz, 86 Minn. 317, 90 N. W. 578.

45. State *v.* Lake St. Clair Fishing, etc., Club, 127 Mich. 580, 87 N. W. 117.

46. Diana Shooting Club *v.* Lamoreux, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898.

47. Kean *v.* Calumet Canal, etc., Co., 190 U. S. 452, 23 S. Ct. 651, 47 L. ed. 1134 [*affirming* 150 Ind. 699, 50 N. E. 85].

them as swamp and overflowed applied even though the lands so selected were not actually of that character.[48]

(II) *Land Previously Granted or Reserved.* The swamp land grant did not include a sixteenth or thirty-sixth section embraced in such a previous grant for school purposes,[49] or land which had been previously reserved for military purposes.[50]

(III) *Land Subject to Preëxisting Rights.* The swamp land grant did not pass to the states land of the United States which was subject to preëxisting rights at the time of the grant [51] even though a patent for such land was not issued by the United States until afterward.[52]

(IV) *Prevailing Character of Legal Subdivision.* In determining whether particular land passes to the state as swamp land the prevailing character of the legal subdivision governs,[53] so that if the greater part of such a subdivision is wet and unfit for cultivation, the entire subdivision, including the dry land, passes to the state,[54] while if the greater part of the subdivision is dry land, none of the land therein passes to the state.[55]

(V) *Identification, Selection, and Certification.* In order for a state to acquire title to land under the swamp land grant, the land must have been identified and selected as swamp land,[56] and such selection must have been approved

48. Sacramento Sav. Bank *v.* Hynes, 50 Cal. 195.

Approval of state survey.—Lands not swamp or overflowed, which had been surveyed by the United States prior to act of congress of July 23, 1866, providing for the quieting of land titles in California, and which were segregated as swamp and overflowed lands by the state by surveys conforming to those of the United States, did not pass to the state by virtue of the act of July 23, 1866, unless the state surveys made by the county surveyor were approved by the surveyor-general of the state prior to the passage of the act. Sutton *v.* Fassett, 51 Cal. 12.

49. State *v.* Jennings, 47 Fla. 307, 35 So. 986 [*following* Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450; Beecher *v.* Wetherby, 95 U. S. 517, 24 L. ed. 440], holding that a patent to the state of such land as swamp land and overflowed land was void, and that the trustees of the internal improvement fund had no power to convey such section to a railroad company as swamp and overflowed lands.

50. Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450.

51. Shanklin *v.* McNamara, 87 Cal. 371, 26 Pac. 345 (holding that the Swamp Land Act did not grant lands, the right to the possession of which was at the time vested in a grantee under a Mexican grant, although such land might have afterward, on final survey, been excluded from the grant); Culver *v.* Uthe, 133 U. S. 655, 10 S. Ct. 415, 33 L. ed. 776 [*affirming* 116 Ill. 643, 7 N. E. 73] (land on which military warrant located). See also McConnaughy *v.* Wiley, 33 Fed. 449, 13 Sawy. 148.

The reservation in act of congress of March 2, 1849, of lands which were "claimed or held by individuals," did not apply to persons who claimed or held lands without a sufficient basis for perfe ting a title thereto. Lawrence *v.* Grout, 12 La. Ann. 835.

The Illinois act granting swamp lands to counties did not convey land previously sold by the United States. Cook County *v.* Calumet, etc., Canal, etc., Co., 131 Ill. 505, 23 N. E. 629.

The mere assertion of a claim to public land, not recognized by the land department of the United States in any manner, does not operate to reserve or segregate such land from the public domain so as to prevent it from passing under the swamp land grant. U. S. *v.* Chicago, etc., R. Co., 160 Fed. 818, 87 C. C. A. 592 [*affirming* 148 Fed. 884].

52. Culver *v.* Uthe, 133 U. S. 655, 10 S. Ct. 415, 33 L. ed. 776 [*affirming* 116 Ill. 643, 7 N. E. 73].

53. Fredericks *v.* Zumwalt, 134 Cal. 44, 66 Pac. 38; Hall *v.* Bossier Levee Dist., 111 La. 913, 35 So. 976.

The phrase "legal subdivision" refers to the smallest subdivision under the congressional system of surveys, which is a quarter quarter-section or forty-acre lot. Fredericks *v.* Zumwalt, 134 Cal. 44, 66 Pac. 38.

54. Fredericks *v.* Zumwalt, 134 Cal. 44, 66 Pac. 38; Robinson *v.* Forrest, 29 Cal. 317; Hall *v.* Bossier Levee Dist., 111 La. 913, 35 So. 976; Hannibal, etc., R. Co. *v.* Smith, 9 Wall. (U. S.) 95, 19 L. ed. 599.

55. Fredericks *v.* Zumwalt, 134 Cal. 44, 66 Pac. 38; Hogaboom *v.* Ehrhardt, 58 Cal. 231; Robinson *v.* Forrest, 29 Cal. 317; Hall *v.* Bossier Levee Dist., 111 La. 913, 35 So. 976.

56. Carr *v.* Moore, 119 Iowa 152, 93 N. W. 52, 97 Am. St. Rep. 292; Funston *v.* Metcalf, 40 Miss. 504 [*following* Fore *v.* Williams, 35 Miss. 533, and *followed* in Dowd *v.* Louisville, etc., R. Co., 68 Miss. 159, 8 So. 295]; Stephenson *v.* Stephenson, 71 Mo. 127; Birch *v.* Gillis, 67 Mo. 102 [*following* Morgan *v.* Hannibal, etc., R. Co., 63 Mo. 129]; Lockwood *v.* Hannibal, etc., R. Co., 65 Mo. 233; U. S. *v.* Chicago, etc., R. Co.,

by the secretary of the interior,[57] or, if not so approved, the tract must fall within the provisions of the confirmatory act of congress of 1857.[58] The listing of swamp lands by the secretary of the interior is a sufficient identification,[59] and the confirmation by the secretary of the interior of a list of such lands, made by a commissioner appointed by the governor of the state, is a substantial compliance with the statute and a sufficient designation.[60] When the secretary of the interior has failed to act on the lists of swamp lands and proof thereof filed in his office, or neglected to identify the land, the character of the land may be determined by a court of competent jurisdiction, in a suit by a grantee of the state to quiet title thereto,[61] and it is competent for the grantees of the state, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object,[62] and a resort to such mode of identification would also seem to be permissible when the secretary declares his inability to certify the lands to the state for any cause other than a consideration of their character.[63] So also, where the plat of the government survey designates certain lands "wet marsh," but the particular legal subdivisions that covered such marsh have not been found, and the secretary of the interior has disclaimed power to decide con-

160 Fed. 818, 87 C. C. A. 592 [*affirming* 148 Fed. 884]; Kerns *v.* Lee, 142 Fed. 985.

Time of selection.— The grant to Oregon was made on the condition precedent that the selection of the lands thereunder be made within the time limited in the act, and on failure to make such selection the grant lapsed and became of no effect. Pengra *v.* Munz, 29 Fed. 830, construing Act Cong. March 12, 1860, U. S. Rev. St. (1878) § 2490 [U. S. Comp. St. (1901) p. 1591]. *Contra* Gaston *v.* Stott, 5 Oreg. 48.

57. Funston *v.* Metcalf, 40 Miss. 504 [*following* Fore *v.* Williams, 35 Miss. 533, and *followed* in Dowd *v.* Louisville, etc., R. Co., 68 Miss. 159, 8 So. 295]; Stephenson *v.* Stephenson, 71 Mo. 127; Buena Vista County *v.* Iowa Falls, etc., R. Co., 112 U. S. 165, 5 S. Ct. 84, 28 L. ed. 680, holding that the act of congress of March 5, 1872 (17 U. S. St. at L. 37), directing the commissioner of the land office to receive and examine selections of swamp lands in Iowa, and allow or disallow the same, did not make the decision of the commissioner final, but an appeal would lie to the secretary of the interior as in other cases.

The courts cannot interfere by injunction or mandamus with the exercise by the secretary of the interior of the discretion vested in him to determine whether lands are in fact "swamp and overflowed," and whether they are such as the government may have reserved, sold, or disposed of prior to the confirmation of title. Warner Valley Stock Co. *v.* Smith, 9 App. Cas. (D. C.) 187.

Identification where secretary fails or refuses to act see *infra*, notes 61–64.

58. Stephenson *v.* Stephenson, 71 Mo. 127.

This act was not intended to apply to and confirm old lists of lands passing under the Swamp Land Act, which were founded on erroneous surveys, and had been superseded by new lists, or to override the power of the secretary of the interior to correct mistakes. Michigan Land, etc., Co. *v.* Rust, 68 Fed. 155, 15 C. C. A. 335.

59. Busch *v.* Donohoe, 31 Mich. 481.

60. Fore *v.* Williams, 35 Miss. 533.

61. American Emigrant Co. *v.* Fuller, 83 Iowa 599, 50 N. W. 48. See also Snell *v.* Dubuque, etc., R. Co., 78 Iowa 88, 42 N. W. 588, 80 Iowa 767, 45 N. W. 763.

62. Southern Pac. R. Co. *v.* McCusker, 67 Cal. 67, 7 Pac. 122, 123; Wright *v.* Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039 [*followed* in Irwin *v.* San Francisco Sav. Union, 136 U. S. 578, 10 S. Ct. 1064, 34 L. ed. 540]; Hannibal, etc., R. Co. *v.* Smith, 9 Wall. (U. S.) 95, 19 L. ed. 599; San Francisco Sav. Union *v.* Irwin, 28 Fed. 708 [*affirmed* in 136 U. S. 578, 10 S. Ct. 1064, 34 L. ed. 540].

Parol evidence as to character of land.— If the secretary of the interior has not designated any particular tract as swamp land, and has not decided to the contrary, and neglects and refuses to act in the premises, it may be shown by parol, in behalf of the state or those claiming under it, as against wrongful claimants, that the land is in fact swamp land. State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. W. 379.

Burden of proof.— Where the state makes a quitclaim deed to land alleged to be swamp land, but which has never been selected, certified, or designated as such by any officer or agent of the state or the United States, the burden of the proof is on the grantee in such deed to show by clear and satisfactory proof that the land was swamp land at the date of the Swamp Land Act. Kirby *v.* Lewis, 39 Fed. 66.

The fact that the land was never selected by the state, as required by the Swamp Land Act, is not conclusive that it was not swamp land, but its actual character may be shown. Hays *v.* McCormick, 83 Iowa 89, 49 N. W. 69.

Evidence sufficient to show swampy character of land see Connors *v.* Meservey, 76 Iowa 691, 39 N. W. 388.

Evidence insufficient to prove swampy character of land see Buena Vista County *v.* Iowa Falls, etc., R. Co., 55 Iowa 157, 7 N. W. 474 [*distinguishing* Page County *v.* Burlington, etc., R. Co., 40 Iowa 522].

63. Wright *v.* Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039.

cerning such land, the state may identify the land by a survey and take possession, or bring an action to recover such land, on the theory that the grant was certain because it could be made certain.[64] The presumption is that a register of a United States land office followed the instructions of the commissioner of the general land office with respect to the transmission of lists of swamp lands.[65] Where a state has elected to select the swamp lands to which it is entitled, and for that purpose has appointed an agent in each county to select all such lands in the county, and such agent has selected and reported lands, it will be presumed that the agent selected all such lands, and after thirty years such presumption is conclusive.[66]

(VI) *DETERMINATION OF CHARACTER OF LAND.* Whether or not any particular tract of land was or is swamp land within the terms of the swamp land grant is a question for the decision of the secretary of the interior,[67] and his determination and identification of the land is conclusive [68] in the absence of fraud or mistake,[69] except as against persons claiming under a paramount title,[70] and cannot be collaterally attacked,[71] or questioned or overthrown by parol evidence.[72] So land which the secretary of the interior has listed to a state as swamp and over-

64. People *v.* Warner, 116 Mich. 228, 74 N. W. 705.

65. Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690, holding that where the commissioner of the general land office of the United States directed a local land register to make a list of land and transmit a copy thereof to the general land office, and it appeared that such list was completed on April 15, 1851, and that it was on file in the general land office in 1893, it would be presumed that the register transmitted it to such office before March 3, 1857, the date of the act confirming the state's selection of swamp lands theretofore made and reported to the commissioner.

66. Kirby *v.* Lewis, 39 Fed. 66.

67. State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379.

A selection of swamp lands made by state officers under an act of the legislature was not binding upon the United States, unless approved and confirmed by the secretary of the interior, and gave the state no equitable title to or vested right in any of the lands so selected, which it could convey to another, where the selection has not been ratified and confirmed by the secretary. Kerns *v.* Lee, 142 Fed. 985.

Under the act with relation to California, whether or not lands described in the approved plats of township surveys made under authority of the United States as "subject to periodical overflow" are "swamp and overflowed" lands, is a question for the decision of the land department and its decision is not reviewable by the courts. Heath *v.* Wallace, 138 U. S. 573, 11 S. Ct. 380, 34 L. ed. 1063 [*affirming* 71 Cal. 50, 11 Pac. 842]. The filing and approval by the surveyor-general of a township plat on which certain lands are designated as swamp and overflowed lands, pursuant to the act of congress providing an additional mode for identifying swamp and overflowed lands in California, operates as a determination by the United States that the lands were on the date of the later act swamp and overflowed lands, and within the grant. McCabe *v.* Goodwin, 106 Cal. 486, 39 Pac. 941.

68. *Arkansas.*— Hendry *v.* Willis, 33 Ark. 833.

California.— See Shanklin *v.* McNamara, 87 Cal. 371, 26 Pac. 345, decision of register and receiver of district land office.

Iowa.— See Connors *v.* Meservey, 76 Iowa 691, 39 N. W. 388.

Missouri.— Jasper County *v.* Mickey, (1887) 4 S. W. 424 [*following* Jasper County *v.* Wadlow, 82 Mo. 172].

Wisconsin.— Diana Shooting Club *v.* Lamoreaux, 114 Wis. 44, 89 N. W. 880.

United States.— Rogers Locomotive Mach. Works *v.* American Emigrant Co., 164 U. S. 559, 17 S. Ct. 188, 41 L. ed. 552 [*reversing* 83 Iowa 612, 50 N. W. 52]; Wright *v.* Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039; U. S. *v.* Chicago, etc., R. Co., 148 Fed. 884; Crane Creek Shooting Club Co. *v.* Cedar Point Club Co., 46 Fed. 273; Pengra *v.* Munz, 29 Fed. 830.

See 41 Cent. Dig. tit. "Public Lands," § 187.

Conclusiveness of decisions in land department generally see *infra*, II, L, 15.

Opinion not involving decision that lands were not swamp and overflowed see Shanklin *v.* McNamara, 87 Cal. 371, 26 Pac. 345.

The acceptance by the state of lands certified to it by the secretary of the interior as swamp and overflowed is conclusive on the state as to the title to and character of the lands so certified and subsequently sold by the state as such. Chauvin *v.* Louisiana Oyster Commission, 121 La. 10, 46 So. 38.

69. Hendry *v.* Willis, 33 Ark. 833; U. S. *v.* Chicago, etc., R. Co., 148 Fed. 884; Pengra *v.* Munz, 29 Fed. 830.

70. Diana Shooting Club *v.* Lamoreux, 114 Wis. 44, 89 N. W. 880.

71. Williamson *v.* Baugh, 71 Ark. 491, 76 S. W. 423; Sacramento Valley Reclamation Co. *v.* Cook, 61 Cal. 341; Jasper County *v.* Mickey, (Mo. 1887) 4 S. W. 424 [*following* Jasper County *v.* Wadlow, 82 Mo. 172]; Wright *v.* Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039; Pengra *v.* Munz, 29 Fed. 830.

72. *Arkansas.*— Williamson *v.* Baugh, 71 Ark. 491, 76 S. W. 423.

flowed passes under the grant, whether or not it is actually of that character.[73] But although lands have been listed to a state as swamp lands the decision as to their character may be reconsidered and set aside by the secretary or his successor in office at any time before a patent is issued.[74]

(VII) *CONTEST OF RIGHT OF STATE.* A proceeding instituted to contest the right of the state to land claimed by it under the swamp land grant is not conclusive as to the rights of a grantee of the state who was not a party to the proceeding, and was not served with notice of his right to appeal, as required by the commissioner of the general land office.[75]

(VIII) *ESTOPPEL*[76] *OF STATE.* A state or its grantee is estopped to set up that land inured to it under the swamp land grant, where it in effect procured such land to be certified to another person under a different grant;[77] but the state, having title to swamp lands, is not estopped to assert it as to the even-numbered lots, by accepting and approving a deed to the odd-numbered lots in settlement of a claim, by assessing and collecting taxes on the even-numbered lots, or by allowing improvements to be made, the title being equally open to the notice of all parties.[78] A state is not estopped to assert that lands were submerged and not swamp lands in 1850 by the fact that the state land office had approved a survey of the lands made over thirty years afterward showing them to be swamp lands, and had attempted to have it adopted as a government survey.[79]

e. Patent[80] **to State.** A patent issued to a state under the Swamp Land Act is conclusive against collateral attack,[81] and cannot be impeached in an action at law by showing that the land which it conveys is not in fact swamp and overflowed.[82] Letters patent from the United States to a state purporting to be in pursuance of the Swamp Land Act, which refer to the official plat of survey and describe the land as "the whole of fractional sections" therein enumerated, have been held to convey to the extent of full subdivisions the land under non-navigable water on which such fractional sections border, as appears from the meander line shown on such plat beyond which the survey did not extend.[83]

Indiana.— State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379.

Iowa.— See Connors *v.* Meservey, 76 Iowa 691, 39 N. W. 388.

Missouri.—Jasper County *v.* Mickey, (1887) 4 S. W. 424 [*following* Jasper County *v.* Wadlow, 82 Mo. 172].

United States.— McCormick *v.* Hayes, 159 U. S. 332, 16 S. Ct. 37, 40 L. ed. 171; Chandler *v.* Calumet, etc., Min. Co., 149 U. S. 79, 13 S. Ct. 798, 37 L. ed. 657 [*affirming* 36 Fed. 665].

See 41 Cent. Dig. tit. "Public Lands," § 187.

73. Bristol *v.* Carroll County, 95 Ill. 84.

The act of congress of 1857 confirming selections of swamp lands vested the selected lands absolutely in the state, whether actually swamp or not. American Emigrant Co. *v.* Chicago, etc., R. Co., 47 Iowa 515 [*following* Fremont County *v.* Burlington, etc., R. Co., 22 Iowa 91].

74. Brown *v.* Bliss, 13 App. Cas. (D. C.) 279; Michigan Land, etc., Co. *v.* Rust, 68 Fed. 155, 15 C. C. A. 335.

Review of decisions in land department generally see *infra*, II, L, 14.

75. Snell *v.* Dubuque, etc., R. Co., 78 Iowa 88, 42 N. W. 588.

76. See, generally, ESTOPPEL, 16 Cyc. 671.

77. Pengra *v.* Munz, 29 Fed. 830. Where, under an act of congress granting certain lands to a state to aid in the construction of railroads, the lands were selected, the United States, at the direction of the state, had conveyed the title to the railroad company, which became a purchaser for value, such action on the part of the state defeats its right to subsequently claim the same lands under the swamp land grant; especially where no patent had been issued to the state under the Swamp Land Act, and where those claiming under such act had, during twenty-five years, done nothing to perfect the evidence of their title or to assert any right to the land. Hough *v.* Buchanan, 27 Fed. 328.

78. State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379.

79. Olds *v.* State Land Office Com'r, 150 Mich. 134, 112 N. W. 952, holding also that the state was not estopped by the passage of the Survey and Sale Act of 1899 (Mich. Act No. 175, p. 261, Acts 1899), providing for the survey and sale of certain lands, since it was not the intention of the legislature to make the lands subject to entry under the law applicable to swamp land scrip.

80. **Patents** generally see *infra*, M.

81. French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812.

82. Warner Valley Stock Co. *v.* Calderwood, 36 Oreg. 228, 59 Pac. 115; Chandler *v.* Calumet, etc., Min. Co., 149 U. S. 79, 13 S. Ct. 798, 37 L. ed. 657 [*affirming* 36 Fed. 665]; French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812.

83. Kean *v.* Calumet Canal, etc., Co., 190

f. Protection of Swamp Lands and Rights Therein. Under the Missouri statute making it the duty of the attorney of the board of education when any of the state school fund has been diverted from its lawful use, to institute suit for collection and return of the fund to its legitimate channel, the power of the board's attorney is not limited to the recovery of misappropriated swamp lands, or funds arising from the sale thereof; but the board is authorized to employ him to assist in the defense of a suit by private parties against a county to set aside a decree in favor of the county, and to quiet title to certain of such lands.[84]

g. Disposition by United States After Swamp Land Grant. It is a well-known fact that after the passage of the Swamp Land Act of 1850 the various land offices continued open and lands were sold by the United States which were subsequently claimed by the states under the provisions of the Swamp Act,[85] and while such grants were beyond the power of the United States and have been frequently held invalid,[86] it was competent for the states to ratify and confirm such grants,[87] and they have in a number of instances been recognized and confirmed by state legislation,[88] and congress has provided for the issuance by the United States of

U. S. 452, 23 S. Ct. 651, 47 L. ed. 1134 [*affirming* 150 Ind. 699, 50 N. E. 85].

84. Phillips *v.* Butler County, 187 Mo. 698, 86 S. W. 231, construing Rev. St. (1899) §§ 9816, 9817.

85. Cook County *v.* Calumet, etc., Canal, etc., Co., 131 Ill. 505, 23 N. E. 629 [*affirmed* in 138 U. S. 635, 11 S. Ct. 435, 34 L. ed. 1110].

The act of congress of March 12, 1860, extending the swamp land grant to Oregon, and declaring that the grant should not include any lands which the government of the United States might have disposed of in pursuance of any law theretofore enacted prior to the confirmation of title to be made under the authority of said act, limited the perfect grant of the indefeasible estate conferred by the first act. Gaston *v.* Stott, 5 Oreg. 48.

86. *Arkansas.*— Ringo *v.* Rotan, 29 Ark. 56; Branch *v.* Mitchell, 24 Ark. 431.

California.— Sutton *v.* Fassett, 51 Cal. 12. See also Sacramento Valley Reclamation Co. *v.* Cook, 61 Cal. 341, holding that the state of California, by the selection and segregation of certain lands as swamp lands before the passage of the United States act of July 23, 1866, acquired the right, under that act, to have the character of the lands determined in the mode prescribed therein, and a purchaser from the United States, pending proceedings for the determination of the character of the lands, took subject to such determination.

Illinois.— Keller *v.* Brickey, 78 Ill. 133.

Indiana.— Matthews *v.* Goodrich, 102 Ind. 557, 1 N. E. 175. See also Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690, holding that the title to swamp land acquired by the state under a patent from the United States is not affected by a subsequent act of congress granting a company the right to drain such land and authorizing its survey and sale.

Louisiana.— See Frederick *v.* Goodbee, 120 La. 783, 45 So. 606 (holding that a sale by the United States of land confirmed to the state by Act Cong. March 3, 1857, c. 117 [11 U. S. St. at L. 251] was null and void); Thibodeaux *v.* Broussard, 32 La. Ann. 881 (holding swamp lands not subject to homestead entry).

Michigan.— Sherman *v.* A. P. Cook Co., 98 Mich. 61, 57 N. W. 23; Busch *v.* Donohue, 31 Mich. 481.

Missouri.— Masterson *v.* Marshall, 65 Mo. 94; Campbell *v.* Wortman, 58 Mo. 258.

United States.— Kirby *v.* Lewis, 39 Fed. 66; McConnaughy *v.* Wiley, 33 Fed. 449, 13 Sawy. 148.

See 41 Cent. Dig. tit. "Public Lands," § 189.

87. Railroad Lands Co. *v.* Shreveport, 117 La. 140, 41 So. 443; Kirby *v.* Lewis, 39 Fed. 66.

Where such subsequent grant is made to the state itself, in aid of a railroad, and the state accepts the grant, and in its turn grants the land to a railroad company, such action operates as a ratification and confirmation of the subsequent grant. Railroad Lands Co. *v.* Shreveport, 117 La. 140, 41 So. 443, holding that where, owing to such subsequent grant, the general land office refused to confirm the land to the state under the swamp land grants, but the state nevertheless issued a patent for the land as land belonging to it under the swamp land grants, and the patent so issued came in opposition to the title under the subsequent grant, the latter would prevail.

88. See Bruce *v.* Patton, 54 Ark. 455, 16 S. W. 195 [*following* Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031 (*followed* in Kelly *v.* Cotton Belt Lumber Co., 74 Ark. 400, 86 S. W. 436, 827)]; Cook County *v.* Calumet, etc., Canal, etc., Co., 131 Ill. 505, 23 N. E. 629 [*affirmed* in 138 U. S. 635, 11 S. Ct. 435, 34 L. ed. 1110]; Ives *v.* Ely, 57 Mich. 569, 24 N. W. 812 (holding that Howell Annot. St. Mich. §§ 5384, 5385, authorizing the state treasurer to receive from the general government the proceeds of swamp lands sold by it after the grant of all such lands to the state in 1850, amounted to a waiver of the state's claim to all such lands as against intermediate buyers); Kirby *v.* Lewis, 39 Fed. 66.

Ark. Act Jan. 15, 1851, did not operate as a confirmation to the federal grantees as to lands sold until indemnity was recovered

patents to such purchasers,[89] and that the purchase-money of swamp lands erroneously sold by the United States shall be paid over to the state wherein the land is situated,[90] and that when the lands have been located by warrant or scrip the state shall be authorized to locate a like quantity of any of the public lands subject to entry at one dollar and twenty-five cents per acre or less.[91]

2. Transfer to Counties. In some states the title to and control of swamp and overflowed lands have been vested in the respective counties in which such lands are located,[92] for the primary purpose of drainage and reclamation,[93] and

from the federal government. Fletcher *v.* Pool, 20 Ark. 100.

Construction of confirmatory statute.—Ark. Act Jan. 11, 1852, § 5, must be construed to be a consent on the part of the state to receive from the United States the purchase-money paid to the latter for all such of the swamp lands as the state could rightfully relinquish, and not for any land which any person might obtain a right to, as against the state, before the purchase of the same by another from the United States. Branch *v.* Mitchell, 24 Ark. 431.

Effect of patent to state.— The most that can be claimed for a patent issued to the state for land previously disposed of by the United States by cash entry is that it vested the legal title in the state to be held in trust for the grantee of the federal government. Bruce *v.* Patton, 54 Ark. 455, 16 S. W. 195 [*following* Coleman *v.* Hill, 44 Ark. 452].

Under the California statute providing that thereafter no claim shall be made by the state for any land as swamp or overflow, for which preëmption or homestead patents have been issued by the United States, a certificate subsequently issued by the register of the state land office is void where the tract was patented by the United States to a settler prior to the passage of such statute. Fredericks *v.* Zumwalt, 134 Cal. 44, 66 Pac. 38.

89. U. S. Rev. St. (1878) § 2483 [U. S. Comp. St. (1901) p. 1588]. See Dale *v.* Turner, 34 Mich. 405 [*followed* in Huggett *v.* Case, 61 Mich. 480, 28 N. W. 670], holding that the rights of one who purchased of the United States in 1852, and went into possession of, land which was embraced in the act of 1850, were paramount to those of the state under said grant, or of its patentees or assigns.

90. U. S. Rev. St. (1878) § 2482 [U. S. Comp. St. (1901) p. 1587].

91. U. S. Rev. St. (1878) § 2482 [U. S. Comp. St. (1901) p. 1587].

92. *Illinois.*— Gilbreath *v.* Dilday, 152 Ill. 207, 38 N. E. 572; Cook County *v.* Calumet, etc., Canal, etc., Co., 131 Ill. 505, 23 N. E. 629 [*affirmed* in 138 U. S. 635, 11 S. Ct. 435, 34 L. ed. 1110]; Bristol *v.* Carroll County, 95 Ill. 84; Keller *v.* Brickey, 78 Ill. 133; Newell *v.* Bureau County, 37 Ill. 253; Dart *v.* Hercules, 34 Ill. 395; Whiteside County *v.* Burchell, 31 Ill. 68.

Iowa.— Schlosser *v.* Hemphill, 118 Iowa 452, 90 N. W. 842; Smith *v.* Miller, 105 Iowa 688, 70 N. W. 123, 75 N. W. 499.

Mississippi.— Jackson *v.* Dilworth, 39 Miss. 772.

Missouri.— Phillips *v.* Butler County, 187 Mo. 698, 86 S. W. 231; Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700; Pool *v.* Brown, 98 Mo. 675, 11 S. W. 743; Sturgeon *v.* Hampton, 88 Mo. 203; State *v.* Register of Lands, 48 Mo. 59; Barton County *v.* Walser, 47 Mo. 189.

United States.— Merrill *v.* Tobin, 30 Fed. 738, stating law of Iowa.

See 41 Cent. Dig. tit. "Public Lands," § 183.

The title passed to the counties immediately upon the taking effect of the statute granting such lands to them, without any conveyance. Bailey *v.* Callanan, 87 Iowa 107, 53 N. W. 1074.

County holds title as trustee.— State *v.* Crumb, 157 Mo. 545, 57 S. W. 1030; Stone *v.* Perkins, 86 Fed. 616. *Contra*, Bureau County *v.* Thompson, 39 Ill. 566 [*following* Whiteside County *v.* Burchell, 31 Ill. 68].

Omission to claim land.— The claim of a county or its grantee to swamp land is not affected by the omission of the proper officers to claim it as such, since, the grant being for the benefit of the county, an acceptance is presumed in the absence of a showing to the contrary, and since a sale of such land by the county is evidence of an acceptance of the grant. Bailey *v.* Callanan, 87 Iowa 107, 53 N. W. 1074.

The legislature cannot divest the right of a county without its consent.— Jackson *v.* Dilworth, 39 Miss. 772.

Mo. Laws (1875), p. 32, did not enlarge the powers of the county courts over the swamp lands. Sturgeon *v.* Hampton, 88 Mo. 203.

Documents sufficient to show title to be in county see Bristol *v.* Carroll County, 95 Ill. 84; Dart *v.* Hercules, 34 Ill. 395.

List held incompetent as evidence of title in county see Buena Vista County *v.* Iowa Falls, etc., R. Co., 55 Iowa 157, 7 N. W. 474.

The state of California has not, by any legislation, parted with the title to its swamp and overflowed lands, or the funds arising from sales thereof, to the counties of the state. Kings County *v.* Tulare County, 119 Cal. 509, 51 Pac. 866.

93. Whiteside County *v.* Burchell, 31 Ill. 68; Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700.

Appropriation to counties a sufficient execution of trust.— The appropriation by the state of the swamp lands to the counties, "for the purpose of constructing the necessary levees and drains to reclaim the same," is a sufficient execution of the trust under which the state received them from the general government. Montgomery County *v.* Burlington, etc., R. Co., 38 Iowa 208

the balance, after this is accomplished, as a part of the school fund,[94] or for the construction of roads and bridges,[95] the erection of public buildings or school buildings for the use of the county,[96] or such other purposes as may be deemed expedient by the county authorities.[97] A statute granting to the various counties all the swamp lands within their borders does not pass to a county swamp land previously selected by a railroad company under a valid grant from the state.[98] Under a statute authorizing the conveyance of the swamp lands of the state to the several counties in which such lands are situated, lands lying in one county cannot be patented to another,[99] and a patent to a county may be avoided on extrinsic evidence showing that at the time of the patent the lands covered thereby were not situated within the county.[1]

3. Sale of Swamp Lands — a. Power to Sell. Under the swamp land grant each state became the absolute owner of the swamp and overflowed lands within its borders,[2] and has the power to sell and dispose of its swamp lands [3] in such manner and for such purposes as to it may seem most expedient.[4] In those states where the swamp lands have been granted to the respective counties, the power of selling such lands has also been vested in the counties;[5] but lands belonging to a county can be sold and conveyed only in the manner pointed out by the statute,[6] and a sale by a county in contravention of the statute governing such sales is void.[7]

94. Whiteside County *v.* Burchell, 31 Ill. 68; Phillips *v.* Butler County, 187 Mo. 698, 86 S. W. 231; Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700.

Maintenance of swamp land fund.— A statute providing that the net proceeds arising from the sale of swamp lands, after deducting the expenses of draining and reclaiming the same, shall be paid into the county treasury, and become a part of the public school fund of the county, does not prevent the county from maintaining a fund in its treasury as a "swamp-land fund," since the money paid in on account of such land does not become a part of the school fund prior to the payment of draining and reclaiming expenses. State *v.* Adams, 161 Mo. 349, 61 S. W. 894.

95. Whiteside County *v.* Burchell, 31 Ill. 68.

Popular vote.— A statute conveying swamp lands to the county in which they are situated, for the purpose of constructing the necessary levees and drains, and providing that the balance shall be applied to the building of roads and bridges through or across the lands, is not repealed by a subsequent statute authorizing the swamp lands or the proceeds thereof to be devoted to the erection of educational buildings and the construction of bridges and roads, provided the question of such use be first submitted to a vote of the people of the county; and hence a popular vote is required only where roads and bridges are to be built in portions of the county apart from the swamp district, and the county may lay out a road through the swamp lands without submitting the question to popular vote. Nelson *v.* Harrison County, 126 Iowa 438, 102 N. W. 197.

96. Rock *v.* Rinehart, 88 Iowa 37, 55 N. W. 21; Gray *v.* Mount, 45 Iowa 591.

97. Whiteside County *v.* Burchell, 31 Ill. 68.

98. Illinois Cent. R. Co. *v.* Union County, 94 Ill. 70.

99. State *v.* Register of Lands, 58 Mo. 59.

The county lines as they existed at the date of the act authorizing swamp lands to be patented to the counties govern. State *v.* Register of Lands, 58 Mo. 59.

1. Morgan *v.* Stoddard, 187 Mo. 323, 86 S. W. 133.

2. Whiteside County *v.* Burchell, 31 Ill. 68; Barrett *v.* Brooks, 21 Iowa 144.

3. *California.*— Packard *v.* Johnson, (1884) 4 Pac. 639.

Illinois.— Whiteside County *v.* Burchell, 31 Ill. 68.

Iowa.— Montgomery County *v.* Chicago, etc., R. Co., 38 Iowa 208; Barrett *v.* Brooks, 21 Iowa 144.

Louisiana.— Hall *v.* Bossier Levee Dist., 111 La. 913, 35 So. 976.

Michigan.— McRae *v.* State Land Office Com'r, 89 Mich. 463, 50 N. W. 1091.

Missouri.— Dunklin County *v.* Dunklin County Dist., 23 Mo. 449.

See 41 Cent. Dig. tit. "Public Lands," § 192.

The legislature has plenary power over the disposition of such lands. McRae *v.* State Land Office Com'r, 89 Mich. 463, 50 N. W. 1091.

Congress alone can question the acts of a state legislature in reference to the disposition of swamp lands of the state. McRae *v.* State Land Office Com'r, 89 Mich. 463, 50 N. W. 1091.

4. Whiteside County *v.* Burchell, 31 Ill. 68.

5. Dunklin County *v.* Dunklin County Dist. Ct., 23 Mo. 449.

Validity of sale by county.—A county which has disposed of its swamp lands in pursuance of the state grant cannot rescind its contract on the ground of its being a violation of the act of congress. American Emigrant Co. *v.* Adams County, 100 U. S. 61, 25 L. ed. 563.

6. Hooke *v.* Chitwood, 127 Mo. 372, 30 S. W. 167.

7. Savery *v.* Moore, (Iowa 1882) 12 N. W. 548; Robinson *v.* Bailey, 26 Fed. 219.

b. Survey, Selection, and Patent to State as Prerequisites to Sale. It is a necessary prerequisite to a sale of swamp land that the land shall have been surveyed,[8] and segregated to the state as swamp land;[9] but it is held that a state has power to grant swamp lands within its borders, in trust or otherwise, before patent to it by the United States,[10] although such a grant amounts only to a quitclaim of the state's interest in the land,[11] and is subject to the right of the secretary of the interior to determine what lands are embraced within the provisions of the grant.[12] A conveyance by a county of swamp lands in violation of a state statute prohibiting the sale or disposal of such lands until title thereto is perfected in the state is void;[13] but such a statute does not render invalid a contract made by a county with attorneys, by which, in return for services rendered by the latter in securing and perfecting the title to swamp lands, it is stipulated that a portion of the lands shall be conveyed to them when the title to the whole is acquired.[14]

c. Land Subject to Sale. A certificate of purchase of swamp land which is by the statute excluded from the provisions relating to the sale of swamp lands is void;[15] but where a certificate is issued for swamp land which is at the time subject to sale, the purchaser's rights are not affected by a subsequent statute

8. Barker *v.* Freeman, 85 Cal. 533, 24 Pac. 926; State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379; Hall *v.* Bossier Levee Dist., 111 La. 913, 35 So. 976, holding that shallow and non-navigable lakes acquired by the state under the swamp land grant could be sold only after their areas had been ascertained and determined by surveys recognized by the state.

An unauthorized survey by a private person is not sufficient. Maddux *v.* Brown, 91 Cal. 523, 27 Pac. 771.

State survey.— A patent issued by a state for lands sold by it as "swamp and overflowed" upon its own survey without the concurrence of the United States, and which describes the land as swamp and overflowed, is neither presumptive nor *prima facie* evidence that such was the character of the land as against one claiming under the United States. Keeran *v.* Griffith, 31 Cal. 461.

9. Marsh *v.* Hendy, (Cal. 1891) 27 Pac. 647; Dewar *v.* Ruiz, 89 Cal. 385, 26 Pac. 832; Buchanan *v.* Nagle, 88 Cal. 591, 26 Pac. 512 [*followed* in Nuttall *v.* Lovejoy, 90 Cal. 163, 27 Pac. 69]; Wren *v.* Mangan, 88 Cal. 274, 26 Pac. 100; Funkhouser *v.* Peck, 67 Mo. 19.

Prior to identification the state acquired no interest which it could convey, and while it could perhaps contract with relation to the swamp land grant, it could convey no interest in any particular parcel. Kerns *v.* Lee, 142 Fed. 985. See also Carr *v.* Moore, 119 Iowa 152, 93 N. W. 52, 97 Am. St. Rep. 292.

10. *Arkansas.*— Hempstead *v.* Underhill, 20 Ark. 337.

California.— Summers *v.* Dickinson, 9 Cal. 554; Owens *v.* Jackson, 9 Cal. 322. See also Kile *v.* Tubbs, 23 Cal. 431.

Indiana.— See State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379.

Oregon.— Gaston *v.* Stott, 5 Oreg. 48.

United States.— Wright *v.* Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941.

See 41 Cent. Dig. tit. "Public Lands," § 193.

As soon as there has been a legal selection of swamp and overflowed lands tantamount to identification, the state must be considered to have acquired the equitable title, which it may dispose of as it may deem advantageous or profitable. Kerns *v.* Lee, 142 Fed. 985.

Under Ala. Acts (1861), p. 12, the state has no power to issue a patent for swamp land until the land has been patented to it by the government of the United States or certified by the authority of the state as belonging to it. Henry *v.* Brannan, 149 Ala. 323, 42 So. 995.

11. Kile *v.* Tubbs, 23 Cal. 431.

Showing as to character of land.— Where one to whom the state has granted lands as swamp and overflowed, before they were patented to it by the United States, brings a possessory action to recover the land, defendant, if he brings himself in privity of title with the United States, may show in defense that the land is not in fact swamp and overflowed. Kile *v.* Tubbs, 23 Cal. 431, holding that a preëmptioner was in such privity with the United States. See also Reed *v.* Caruthers, 47 Cal. 181; Keeran *v.* Griffith, 34 Cal. 580; Robinson *v.* Forrest, 29 Cal. 317.

12. Kile *v.* Tubbs, 23 Cal. 431; State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379; Kittel *v.* Florida Internal Imp. Fund, 139 Fed. 941.

The purchaser takes with notice that the secretary of the interior may reject the state's selection of the land. Williamson *v.* Baugh, 71 Ark. 491, 76 S. W. 423.

13. Ogden *v.* Buckley, 116 Iowa 352, 89 N. W. 1115; Viele *v.* Van Steenberg, 31 Fed. 249, holding that purchasers are bound to know that the county cannot convey.

14. Emmet County *v.* Allen, 76 Iowa 499, 41 N. W. 201.

15. Fredericks *v.* Zumwalt, 134 Cal. 44, 66 Pac. 38, so holding under Pol. Code, § 3488, excluding from the provisions of the law re-

prohibiting the sale of such land, nor does such prohibition defeat his right to a patent.[16] Lands received by a county as swamp and overflowed lands or indemnity therefor are subject to be disposed of as swamp and overflowed lands, although they are not in fact such.[17]

d. Price. In some states the statutes forbid the sale of swamp lands for less than a designated price,[18] and a sale at a less price is invalid.[19] But a county court may, if it deems it expedient, sell the land for the minimum price fixed by statute, receiving payment by the construction of levees and drains by the purchaser at the full price of the land, the sale being in good faith, and not a fraudulent device to donate the land to the purchaser;[20] and in Iowa a county may devote its swamp lands to the purposes specified in the statute upon such terms as may be agreed upon without limit as to price, if the contract be approved by a vote of the people.[21] The fixing of a minimum price implies that a greater price may be demanded,[22] and hence mandamus will not lie to compel the land commissioner to issue certificates to one offering to purchase at the minimum price land worth double that amount.[23]

e. Terms of Sale. Swamp lands are usually sold for part cash and the balance in deferred payments.[24]

f. By Whom Sale Made. Sales of swamp land are to be made by the officer or board designated by statute for that purpose;[25] and the powers of such officers

lating to swamp lands all such lands lying within two miles of any town or village.

16. Easton *v.* O'Reilly, 63 Cal. 305; McNear *v.* Hutchinson, 31 Cal. 177.

17. Rock *v.* Rinehart, 88 Iowa 37, 55 N. W. 21.

18. *Indiana.*— Carver *v.* Chute, 8 Ind. 145, not less than one dollar and twenty-five cents per acre.

Iowa.— Savery *v.* Moore, (1882) 12 N. W. 548, 61 Iowa 505, 16 N. W. 529, not less than one dollar and twenty-five cents per acre.

Louisiana.— Louisiana Sulphur Min. Co. *v.* Krause, 110 La. 690, 34 So. 738, holding that Acts (1861), p. 209, No. 267, § 16, fixing the minimum price of public lands at one dollar and twenty-five cents, did not repeal that part of Acts (1859), p. 159, No. 197, authorizing the entry of lands subject to regular tidal overflow at twenty-five cents an acre.

Michigan.— McRae *v.* State Land Office Com'r, 89 Mich. 463, 50 N. W. 1091, not less than four dollars per acre.

Missouri.— Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700 [*explaining* Cape Girardeau Southwestern R. Co. *v.* Hatton, 102 Mo. 45, 14 S. W. 763], not less than one dollar and twenty-five cents per acre under the act of 1874.

Oregon.— Miller *v.* Wattier, 44 Oreg. 347, 75 Pac. 209, not less than one dollar per acre.

United States.— Bradford *v.* Hall, 36 Fed. 801, not less than twelve and one-half cents per acre under Miss. Act Nov. 21, 1865, and not less than twenty-five cents per acre under Miss. Act April 2, 1871.

See 41 Cent. Dig. tit. "Public Lands," § 204.

Under the Missouri act of 1869, swamp lands could be sold at private sale for less than one dollar and twenty-five cents per acre. Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700 [*following* Pool *v.* Brown, 98 Mo. 675, 11 S. W. 743; Linville *v.* Bohanan, 60 Mo. 554, *explaining* Cape Girardeau Southwestern R. Co. *v.* Hatton, 102 Mo. 45, 14 S. W. 763, and *overruling* State *v.* Crumb, 157 Mo. 545, 57 S. W. 1030].

19. Savery *v.* Moore, 61 Iowa 505, 16 N. W. 529; Stone *v.* Perkins, 85 Fed. 616, holding that a conveyance made for less than one dollar and twenty-five cents per acre, pursuant to a compromise and settlement effected by the court with purchasers claiming under an invalid sale on execution against the county, was invalid, as being an indirect appropriation of the land to the payment of the judgment, and as being a bartering instead of a sale.

20. State *v.* Wayne County Ct., 98 Mo. 362, 11 S. W. 758.

21. Audubon County *v.* American Emigrant Co., 40 Iowa 460 [*followed* in American Emigrant Co. *v.* Adams County, 100 U. S. 61, 25 L. ed. 563].

22. McRae *v.* State Land Office Com'r, 89 Mich. 463, 50 N. W. 1091.

23. McRae *v.* State Land Office Com'r, 89 Mich. 463, 50 N. W. 1091.

24. See Borland *v.* Lewis, 43 Cal. 569; Miller *v.* Wattier, 44 Oreg. 347, 75 Pac. 209; Husbands *v.* Mosier, 26 Oreg. 55, 37 Pac. 80.

25. See Deloach *v.* Brownfield, 22 Ark. 344.

In Arkansas the land agents had no power to sell or receive applications for the purchase of swamp lands until the districts were laid off and the maps, etc., received (Deloach *v.* Brownfield, 22 Ark. 344; Hempstead *v.* Underhill, 20 Ark. 337), and at the period when the authority of the land agent in any district to act was perfected, the power of the swamp land commissioners to sell the lands within such district wholly ceased (Deloach *v.* Brownfield, *supra*).

or board are derived from and limited by the statute,[26] and cannot be delegated unless the statute authorizes such delegation.[27] Where a county court having power to do so has authorized the sheriff to sell certain lands, he cannot sell lands not within the scope of the order giving him such authority.[28]

g. Appraisement. The statutes sometimes require an appraisement of swamp lands as a prerequisite to a sale;[29] but where a sale has been actually made, it will be presumed, in the absence of proof to the contrary, that the law was complied with in this respect.[30]

h. Advertisement of Sale. Under a statute providing for the election of agents for each land district, and authorizing them to advertise the swamp lands therein for sale, and to sell the same at public auction, the duty of auditing and certifying accounts for printing the advertisements devolves on such agents, and cannot be exercised by the board of swamp land commissioners.[31]

i. Public or Private Sale. In some states the statutes require that swamp lands shall be offered at public sale[32] before they can be disposed of at private sale or by private entry.[33]

j. Right to Purchase — (i) *In General.* Swamp lands may be sold to any person who is over the age of twenty-one years[34] and is a citizen of the United States,[35] or has filed his declaration of intention to become such.[36] The provision of the constitution of California that lands belonging to the state and suitable for cultivation shall be sold to actual settlers only applies to swamp and over-

The county courts in Iowa had authority in December, 1860, to execute conveyances of swamp lands. Snell *v.* Dubuque, etc., R. Co., 78 Iowa 88, 42 N. W. 588.

The governor, without express authority of the legislature, has no power, by any form of conveyance, to transfer to the United States government the control of land previously made the property of the state by virtue of the Swamp Land Act. Matthews *v.* Goodrich, 102 Ind. 557, 1 N. E. 175. See also Masterson *v.* Marshall, 65 Mo. 94.

In Missouri proof that a person bought the title to swamp land from a county is tantamount to proof of sale by the county court, since no swamp land can be bought from a county without an order of the court. Elliott *v.* Buffington, 149 Mo. 663, 51 S. W. 408.

26. Deloach *v.* Brownfield, 22 Ark. 344 (holding that the board of swamp land commissioners could not enlarge their powers by resolution); State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379.

27. Cheatham *v.* Phillips, 23 Ark. 80, holding that as the statute of Arkansas creating the board of commissioners to sell swamp lands contained no provision for the delegation of their authority, a sale made by a subcommissioner appointed by them while they had power to sell and ratified by them after their power had ceased, was invalid.

28. Prior *v.* Scott, 87 Mo. 303, holding that a sheriff, having authority from the county court to sell swamp land when it had been certified to the office of the county clerk by the state register of lands, could not sell and transfer title to land which at the time of the sale had not been so certified.

29. See Spitler *v.* Scofield, 43 Iowa 571.

30. Spitler *v.* Scofield, 43 Iowa 571.

31. Butler *v.* Reardon, 19 Ark. 9, construing the act of June 12, 1853.

32. *Indiana.*— Carver *v.* Chute, 8 Ind. 145.

Iowa.— Savery *v.* Moore, (1882) 12 N. W. 548.

Michigan.— Atty.-Gen. *v.* Thomas, 31 Mich. 365.

Missouri.— Williams *v.* Brownlee, 101 Mo. 309, 13 S. W. 1049.

Wisconsin.— State *v.* Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503.

See 41 Cent. Dig. tit. "Public Lands," § 197.

Recital consistent with public sale.— Where a mortgage given by a purchaser of swamp lands from a county to secure school money borrowed from the county to pay the purchase-price is foreclosed by the county, a recital in a deed from the county for such land after the foreclosure, stating that the grantee therein had become the purchaser and paid the price in full, with interest, does not tend to show that the land was sold to him privately, but is consistent with a public sale, as required by Mo. Rev. St. (1879) § 7115. Williams *v.* Brownlee, 101 Mo. 309, 13 S. W. 1049.

33. Carver *v.* Chute, 8 Ind. 145; Atty.-Gen. *v.* Thomas, 31 Mich. 365; State *v.* Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503.

The rule applies to "indemnity lands" of the state (Atty.-Gen. *v.* Thomas, 31 Mich. 365), and to lands which have been withdrawn from sale by the commissioners of public lands, although they were withdrawn before the enactment of the statute establishing the rule (State *v.* Cunningham, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503).

34. Miller *v.* Wattier, 44 Oreg. 347, 75 Pac. 209; Husbands *v.* Mosier, 26 Oreg. 55, 37 Pac. 80.

35. Miller *v.* Wattier, 44 Oreg. 347, 75 Pac. 209.

36. Miller *v.* Wattier, 44 Oreg. 347, 75 Pac. 209.

flowed lands which can be reclaimed and cultivated by an actual settler.[37] A person who has been authorized by special act of the legislature to purchase certain lands cannot be deprived of the privilege without any act or omission on his part sufficient to forfeit the same.[38] A purchaser of government lands whose purchase has been set aside and canceled because the lands were swamp lands, and who accepts and locates warrants on other land in lieu of the land so purchased, has no assignable interest in the land first purchased, within a state statute providing that, where a purchase of government land is canceled because the lands are swamp lands, the purchaser, his heirs or assigns, shall be preferred in their application to purchase the same from the state.[39] A county treasurer whose duties in respect to swamp lands are merely to receive payment of the purchase-money, whose amount and the conditions of whose payment are fixed by statute, and report the same to the register of the land office, is not disqualified to apply for and purchase such land himself.[40] Under the California statute requiring persons who desire to purchase swamp lands which have been segregated by authority of the United States, but not sectionized, to apply to the county surveyor for a survey and providing that a certificate of such survey shall be attached to the affidavit for purchase, where the survey was made on plaintiff's application, defendant could not defeat plaintiff's claim by making application for the land on a certificate of such survey issued prior to the certificate furnished to plaintiff.[41]

(II) *PREËMPTION.* In some states the statutes have given a preference right to purchase swamp lands to settlers upon such lands,[42] or persons who have occupied

37. Fulton *v.* Brannan, 88 Cal. 454, 26 Pac. 506 [*overruling* McIntyre *v.* Sherwood, 82 Cal. 139, 22 Pac. 937, and *followed* in Polk *v.* Sleeper, 143 Cal. 70, 76 Pac. 819; Goldberg *v.* Thompson, 96 Cal. 117, 30 Pac. 1019; Marsh *v.* Hendy, (Cal. 1891) 27 Pac. 647; McDonald *v.* Taylor, 89 Cal. 42, 26 Pac. 595; McNee *v.* Lynch, 88 Cal. 519, 26 Pac. 508]. See, generally, *infra*, III, C, 2, a.

Evidence sufficient to show actual settlement.— Evidence tending to prove that plaintiff determined to settle on swamp land at the time he examined the boundaries, and then intended to proceed immediately to build his cabin and to complete it in a reasonable time, and that he commenced to build the cabin as soon as he could get the lumber and in fact completed it within a week after making application, is sufficient to justify a finding that he was an actual settler at the time he made his application, where there is no pretense that defendant ever settled on the land. McDonald *v.* Taylor, 89 Cal. 42, 26 Pac. 595.

Temporary removal.— Where a settler on swamp land suitable for cultivation removed his family from the land temporarily only, and because of the ill health of a member thereof, such removal is no evidence that he was not an actual settler entitled to purchase the land. Maddux *v.* Brown, 91 Cal. 523, 27 Pac. 771.

38. Beridon *v.* Barbin, 13 La. Ann. 458.

39. Ely *v.* State Land-Office Com'r, 49 Mich. 17, 12 N. W. 893, 13 N. W. 784.

40. Miller *v.* Byrd, 90 Cal. 150, 27 Pac. 51.

41. Maddux *v.* Brown, 91 Cal. 523, 27 Pac. 771.

42. *Arkansas.*— Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031; Casselberry *v.* Fletcher, 27 Ark. 385; Branch *v.* Mitchell, 24 Ark. 431; Hempstead *v.* Underhill, 20 Ark. 337.

California.— Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617.

Illinois.—Songer *v.* Gallatin County Ct., 17 Ill. 53.

Iowa.— Collins *v.* Dallas County, 44 Iowa 396; Wilson *v.* McLernan, 20 Iowa 30; Givens *v.* Decatur County, 9 Iowa 278; Rogers *v.* Vass, 6 Iowa 405.

Louisiana.— McDade *v.* Bossier Levee Bd., 109 La. 625, 33 So. 628.

Michigan.— People *v.* State Treasurer, 7 Mich. 366.

Missouri.— Himmelberger-Luce Land, etc., Co. *v.* Blackman, 202 Mo. 296, 100 S. W. 1049.

Wisconsin.— Hasler *v.* Schumacher, 10 Wis. 419.

See 41 Cent. Dig. tit. "Public Lands," § 198.

Preemptive rights can be acquired only upon lands belonging to the state, and not upon lands belonging to one of the levee boards of the state. Hall *v.* Bossier Levee Dist., 111 La. 913, 35 So. 976; McDade *v.* Bossier Levee Bd., 109 La. 625, 33 So. 628.

The term "unconfirmed lands," as used in Ark. Act March 18, 1879 (Mansfield Dig. § 4227), giving preëmptors and settlers upon selected and unconfirmed swamp lands a preference right to purchase, applies only to lands the selections of which have not been made by the state agents, sent to the secretary of the interior through the commissioner of the general land office, and approved and returned to the governor, and includes the lands which were confirmed by the act of congress of March 3, 1857, without the approval of the secretary, and returned to the governor. Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031.

and improved lands adjoining the same,[43] provided they make application therefor within the time limited by the statute,[44] and make and file the declaration and affidavit required by the statute,[45] and make satisfactory proof of their claims,[46] and in all substantial particulars comply with every provision of the law upon which the right depends,[47] failing in which the right is lost [48] and the land may be sold to another.[49] In order to sustain a claim of the right to preëmption the claimant must be an actual settler [50] and show a substantial *bona fide* improvement, made with the intention of making himself a home or reclaiming the land for cultivation.[51] The right of the occupant to swamp lands will not be defeated by showing that, at the time of his original entry, the lands were in the market under the laws of the United States, so that he was technically a trespasser; [52] but the bare fact that an inconsiderable portion of a settlement or clearing happens to extend into a section of swamp and overflowed land, when the main body of the settlement, including the settler's dwelling, is upon land never donated to the state by the United States, does not authorize the settler to claim the swamp and overflowed section by right of preëmption.[53] It has been held that a widow having possession of swamp lands of her deceased husband, which are subject to preëmption, has the right to perfect the inchoate title, but is a trustee of the fee for the benefit of his estate, subject to her right of dower.[54] Where a county judge has issued preëmption certificates to each of two claimants of the same land, the first recipient, in a suit to remove the cloud from his title, need not allege or prove the facts which were necessary to constitute or prove his right, and which should have been shown to and adjudicated upon by the county judge.[55]

(III) *CONTESTS.* In Arkansas it is held that a person who shows no superior right in himself to preëmpt swamp lands cannot contest the right of another

Lands withdrawn from sale.—One who took possession of swamp lands after the board of supervisors of the county wherein the lands were situated had refused to accept the price offered, as it had a right to do, in pursuance of an order of the county court withdrawing such lands from sale, acquired no legal or equitable title to the land. Chicago, etc., R. Co. *v.* Jackson, 68 Iowa 301, 27 N. W. 248.

Forfeiture of right.— A settler's license, under Mich. Act Feb. 15. 1859, providing for the settlement and drainage of swamp lands, could not be forfeited without a showing both of non-residence on the part of the settler and of abandonment of the land; and a showing that the licensee, a single man, lived with his father on an adjoining parcel, which was used and partially inclosed with the tract covered by the license, did not sufficiently establish such facts and hence did not authorize a forfeiture of the license. Hedley *v.* Leonard, 35 Mich. 71.

43. People *v.* State Treasurer, 7 Mich. 366, holding that occupancy of land adjoining the state swamp lands, which entitled the occupant to purchase the swamp lands under Mich. Laws (1858), p. 173, might consist of cultivation and use without actual residence, or might be by a tenant, and the commissioner of the state land office had no right to require actual residence.

44. Rice *v.* Harrell, 24 Ark. 402 [*followed* in Kirby *v.* Lewis, 39 Fed. 66]; Hempstead *v.* Underhill, 20 Ark. 337; Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617.

45. Rice *v.* Harrell, 24 Ark. 402 [*followed* in Kirby *v.* Lewis, 39 Fed. 66].

46. Givens *v.* Decatur County, 9 Iowa 278.

Application must be supported by other proof than plaintiff's affidavit.— Givens *v.* Decatur County, 9 Iowa 278.

47. Remeau *v.* Mills, 24 Mich. 15.

48. Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617.

49. Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617.

50. Bixby *v.* Adams County, 49 Iowa 507.

The improvement must exist at the time of the application to make the entry, and a former improvement which has been destroyed is not sufficient. McIvor *v.* Williams, 24 Ark. 33.

51. Bixby *v.* Adams County, 49 Iowa 507; Givens *v.* Decatur County, 9 Iowa 278, holding that where a person entered on a tract of swamp land about ten miles distant from his residence, cleared about one eighth of an acre, and laid four or five rounds of a log house, and a few months later he removed from the county, but subsequently finished the log house ready for the roof, he was not entitled to enter the land under Iowa Sessions Laws (1855), c. 156, § 9, giving such right to any person having a *bona fide* claim by actual settlement or improvement on any of the swamp or overflowed lands.

Sham improvements made for the purpose of acquiring title to swamp lands without actual settlement will not support a claim of preëmption. Wilson *v.* McLernan, 20 Iowa 30.

52. Hesler *v.* Schumacher, 10 Wis. 419 [*following* Veeder *v.* Guppy, 3 Wis. 502].

53. Robertson *v.* Mershon, 13 La. Ann. 373.

54. Miller *v.* Gibbons, 34 Ark. 212.

55. Colvin *v.* McCasky, 9 Iowa 585.

person to do so;[56] but in California, although a person shows no right in himself to purchase swamp land, and does not in any way connect himself with any claim thereto, he may nevertheless contest the right of another person to purchase such land.[57] In Arkansas the auditor and governor constitute a quasi-judicial tribunal empowered to hear and determine the question as to who is entitled to swamp land,[58] and to execute their judgments by issuing patents or deeds of the state to persons whom they find to be entitled to the land.[59] In California the district courts have no jurisdiction to determine a contest as to the right to purchase swamp and overflowed lands unless the contest arose in the office of the surveyor-general,[60] and a demand was made by one of the parties that a trial be had in court [61] or in the judgment of the surveyor-general a question of law is involved;[62] and the surveyor-general has no authority to refer a contest between applicants for the purchase of such lands to the district court for trial until six months after the land has been segregated as swamp and overflowed by authority of the United States or of the state by legislative enactment.[63] In a contest over the right to purchase swamp land, each party is an actor and must allege and prove all the facts entitling him to purchase, in order to be awarded that right.[64] The complaint of a contestant for the purchase of swamp and overflowed lands is subject to the ordinary rules of pleading;[65] and must set forth the facts upon which the complainant relies to sustain his claim of right of purchase if he desires to purchase,[66] and must also state facts sufficient to make a *prima facie* case to defeat defendant's right before defendant can be required to answer.[67] If the complaint fails to do either, a demurrer thereto should be sustained,[68] but otherwise it is incumbent upon defendant to show in his answer that he is entitled to purchase the land.[69] The court cannot ignore the character of the land or the

56. Miller *v.* Gibbons, 34 Ark. 212.

57. Polk *v.* Sleeper, 143 Cal. 70, 76 Pac. 819; Perri *v.* Beaumont, 91 Cal. 30, 27 Pac. 534 [*approving* Cunningham *v.* Crowley, 51 Cal. 128, and *disapproving* Millidge *v.* Hyde, 67 Cal. 5, 6 Pac. 852; Urton *v.* Wilson, 65 Cal. 11, 2 Pac. 411]; Garfield *v.* Wilson, 74 Cal. 175, 15 Pac. 620 [*following* Thompson *v.* True, 48 Cal. 601; Tyler *v.* Houghton, 25 Cal. 26].

58. Boynton *v.* Haggart, 120 Fed. 819.

Under Ark. Act Jan. 20, 1855, the land agents had the power to pass upon contested claims to swamp lands (Hempstead *v.* Underhill, 20 Ark. 337, holding that such act was constitutional), and their decisions were conclusive upon the courts except in cases of fraud or mistake (Miller *v.* Gibbons, 34 Ark. 212).

59. Boynton *v.* Haggart, 120 Fed. 819.

60. Keema *v.* Doherty, 51 Cal. 3; Allen *v.* Dake, 50 Cal. 80.

61. Keema *v.* Doherty, 51 Cal. 3.

62. Keema *v.* Doherty, 51 Cal. 3.

63. Cox *v.* Jones, 47 Cal. 412.

64. Goldberg *v.* Thompson, 96 Cal. 117, 30 Pac. 1019.

65. Polk *v.* Sleeper, 143 Cal. 70, 76 Pac. 819.

66. Polk *v.* Sleeper, 143 Cal. 70, 76 Pac. 819.

Allegations as to filing of affidavit.—A complaint in a contest as to the right to purchase swamp lands must allege that an affidavit containing the matter specified in the statute was made and filed and set out the substance of such affidavit, and it is not sufficient to allege merely that an application was made in due form of law and filed. Reese *v.* Thorburn, 78 Cal. 116, 20 Pac. 131.

Insufficient complaint.— Where the complaint does not allege that the swamp and overflowed land sought to be purchased has been surveyed or segregated by authority of the United States, or that it is not suitable for cultivation, or that plaintiff is an actual settler thereon, it does not state facts sufficient to show any right in plaintiff to purchase. Polk *v.* Sleeper, 143 Cal. 70, 76 Pac. 819.

67. Polk *v.* Sleeper, 143 Cal. 70, 76 Pac. 819.

Insufficient complaint.— A complaint is insufficient to require defendant to answer thereto and set forth his right of purchase where it merely alleges that defendant's certificate of purchase was illegally issued and that no application for survey by him was recorded in the county clerk's office and that no affidavit and application were ever made as required by law. Polk *v.* Sleeper, 143 Cal. 70, 76 Pac. 819, holding that the latter averment was a mere conclusion of law and the complaint should have alleged wherein the affidavits for application were defective.

68. Polk *v.* Sleeper, 143 Cal. 70, 76 Pac. 819.

69. Ramsey *v.* Flournoy, 58 Cal. 260, holding that a mere denial of plaintiff's right to purchase the land claimed by him, without any allegation of facts showing a right in defendant, will not raise any contest between plaintiff and defendant, or give the latter any standing in court.

Where defendant claims to be a preferred purchaser under Cal. Act, April 4, 1870, on

question of residence because no issues in regard thereto are made by the pleadings; [70] and so it is competent to show on behalf of an actual settler that the land in question, although granted to the state as swamp land, has been so far changed by natural causes as to have become suitable for cultivation.[71] The court must decide against both parties if neither is entitled to purchase; [72] and a judgment that neither of the parties is entitled to purchase the land or any part thereof is equivalent in its effect to a dismissal of the action.[73] Where a person made application to purchase swamp and overflowed land from the state, and three other persons made applications, each asking to purchase distinct parcels of the land described by the original applicant, and all three cases were referred to the same court, the fact that the court decided in favor of original applicant's right to purchase two of the parcels does not entitle him to a writ of mandate for a conveyance of the whole tract claimed, before the determination of the right to purchase in the third contest.[74] In Wisconsin on appeal from the decision awarding the right to purchase swamp lands, the claimant's statement and affidavit stand for his pleadings, and constitute the record of his claim, and may be read in full.[75] Under a statute providing that a person aggrieved by the decision of the county judge in a proceeding to preëmpt swamp land "may appeal therefrom to the District Court of the proper county, which shall have final jurisdiction over the matter, and shall make such decision in the premises, as justice and equity may require," no appeal will lie to the supreme court from the judgment of the district court.[76]

k. Amount Which May Be Purchased. In some states the amount of swamp lands which a single individual may purchase has been limited by constitutional or statutory provisions.[77]

l. Application and Affidavit For Purchase. In some states a person desiring to purchase swamp lands must make a written application therefor,[78] describing the land,[79] which must be accompanied by an affidavit showing his right to pur-

the ground of settlement prior to survey, he must allege in his answer that the land was "occupied for the purposes of tillage or grazing," and, if the plat has been filed, that within ninety days after the filing he filed an application to have his possessory claim surveyed. Ramsey *v.* Flournoy, 58 Cal. 260.

70. Goldberg *v.* Thompson, 96 Cal. 117, 30 Pac. 1019.

71. Dewar *v.* Ruiz, 89 Cal. 385, 26 Pac. 832.

72. Goldberg *v.* Thompson, 96 Cal. 117, 30 Pac. 1019.

73. Cox *v.* Jones, 47 Cal. 412.

74. Byrd *v.* Reichert, 74 Cal. 579, 16 Pac. 499.

75. Hasler *v.* Schumacher, 10 Wis. 419.

76. Lampson *v.* Platt, 1 Iowa 556.

77. Fulton *v.* Brannan, 88 Cal. 454, 26 Pac. 506 [*overruling* McIntyre *v.* Sherwood, 82 Cal. 139, 22 Pac. 937, and *followed* in Polk *v.* Sleeper, 143 Cal. 70, 76 Pac. 819; Goldberg *v.* Thompson, 96 Cal. 117, 30 Pac. 1019; Marsh *v.* Hendy, (Cal. 1891) 27 Pac. 647; McDonald *v.* Taylor, 89 Cal. 42, 26 Pac. 595; McNee *v.* Lynch, 88 Cal. 519, 26 Pac. 508] (holding that the provision of the constitution of California that state lands which are suitable for cultivation shall be granted in quantities not exceeding three hundred and twenty acres to each settler applies to swamp lands which can be reclaimed and cultivated by an actual settler); Songer *v.* Gallatin County Ct., 17 Ill. 53 (holding that under the Illinois act of June 22, 1852, a preëmptor might purchase by legal subdivisions as many quarter quarter-sections or forty-acre lots as his improvements encroached upon, not exceeding in all a quarter section); Wilson *v.* McLernan, 20 Iowa 30 (holding that one settlement or improvement could not be available to preëmpt more than one hundred and sixty acres in all, which must be in a body, except that it might be situated in two distinct tracts, if one was timber); Phillips *v.* Gastrell, 62 Miss. 362 (holding that Act, Feb. 1, 1877, authorizing the swamp land commissioner to sell the swamp lands, but providing that no person should be allowed to enter more than "two hundred and forty acres," must be construed as meaning "three eighths or six sixteenths of a section" according to the United States survey, and any sale which did not exceed such subdivision was good whether the land contained therein was more or less than two hundred and forty acres).

78. Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617; Givens *v.* Decatur County, 9 Iowa 278; Miller *v.* Wattier, 44 Oreg. 347, 75 Pac. 209.

A commissioner of the United States circuit court for California is not authorized to administer the oath on an application for the purchase of swamp and overflowed lands from the state, and an application sworn to before such officer is null and void and confers on the applicant no right to purchase. Garfield *v.* Wilson, 74 Cal. 175, 15 Pac. 620.

79. Miller *v.* Wattier, 44 Oreg. 347, 75 Pac. 209.

chase the land for which he applies,[80] and filed in the office designated therefor by the statute.[81] The affidavit must state all the matters required by the statute.[82] So it must show that the applicant knows the land applied for [83] and the exterior bounds thereof; [84] that he knows of his own knowledge that there are no settlers on the land,[85] or if there are settlers thereon, that the land has been segregated more than six months by authority of the United States; [86] and that he does not know of any legal or equitable claim to the land other than his own.[87] If the applicant is a female the affidavit must show that she is entitled to purchase real estate in her own name.[88] The facts required to be averred in the affidavit must be stated directly and positively, and not in an alternative form.[89] The affidavit must be true in all particulars,[90] and upon the hearing of a contest [91] it must be shown to be true,[92] or the court cannot award to the applicant any right to the land.[93] An application to purchase swamp land made before the land is subject to sale confers no rights on the applicant,[94] although after such time it is approved,[95] and a cer-

80. Rice *v.* Harrell, 24 Ark. 402 [*followed* in Kirby *v.* Lewis, 39 Fed. 661]; Walters *v.* Pool, 149 Cal. 795, 87 Pac. 617; Hasler *v.* Schumacher, 10 Wis. 419.

Alteration of affidavit.— Where the claimant filed in the office of the land agent his declaration, supported by his affidavit, and the affidavit of two witnesses, stating that he had made an improvement upon and claimed to enter by preëmption certain lands, and the claimant's attorney afterward went to the land office and by permission of the land agent erased from the declaration and affidavits the land as before described, and inserted in lieu thereof a new description, the affidavit, as altered, not having been sworn to, could have no legal effect. Rice *v.* Harrell, 24 Ark. 402.

81. Reese *v.* Thorburn, 78 Cal. 116, 20 Pac. 131, office of surveyor-general.

It is a prerequisite to the right to purchase and the power to sell that the applicant shall file the declaration and affidavit of preëmption required by statute. Rice *v.* Harrell, 24 Ark. 402 [*followed* in Kirby *v.* Lewis, 39 Fed. 66].

Neglect of officer to indorse and forward application.— The failure of a county surveyor to indorse on an application to buy swamp land the date of its receipt, and to forward it to the surveyor-general for approval within the time required by statute, if the applicant does not procure such neglect or omission, do not vitiate his application as against one making a subsequent application. Allen *v.* Dake, 50 Cal. 80.

82. Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617; Reese *v.* Thorburn, 78 Cal. 116, 20 Pac. 131.

83. Geer *v.* Sibley, 83 Cal. 1, 23 Pac. 220; Price *v.* Beaver, 73 Cal. 625, 15 Pac. 356.

84. Geer *v.* Sibley, 83 Cal. 1, 23 Pac. 220; Price *v.* Beaver, 73 Cal. 625, 15 Pac. 356.

Knowledge of identity and bounds sufficient to satisfy requirement see Geer *v.* Sibley, 83 Cal. 1, 23 Pac. 220.

Information gained from others as to the identity and exterior boundaries of the land is sufficient to support the affidavit. Price *v.* Beaver, 73 Cal. 625, 15 Pac. 356.

85. Price *v.* Beaver, 73 Cal. 625, 15 Pac. 356; Botsford *v.* Howell, 52 Cal. 158.

86. Botsford *v.* Howell, 52 Cal. 158.

87. Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617; Botsford *v.* Howell, 52 Cal. 158.

88. Price *v.* Beaver, 73 Cal. 625, 15 Pac. 356, holding that such requirement is complied with by a statement in such affidavit that applicant "is an unmarried woman, over the age of eighteen years, a citizen of the United States, and a resident of the state of California, of lawful age."

89. Botsford *v.* Howell, 52 Cal. 158.

90. Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617.

Treating affidavit as new application.— Where a survey of swamp lands was made at the instance of one who applied for the purchase thereof, and the affidavit of purchase was in its essence true, but, after the survey was made, it was found that it conflicted with another survey previously made, and approval thereof was refused, and thereafter a new survey was made, removing the conflict, to which the original affidavit was attached, and payment was made and a certificate was issued, it was held that the affidavit must be treated as a new application made subsequent to the time of the rejection of the first survey, and must be tested as if made subsequent to that time. Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617.

91. Contests see *infra*, II, I, 3, j, (III).

92. Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617; Garfield *v.* Wilson, 74 Cal. 175, 15 Pac. 620.

Evidence held sufficient to warrant a finding that an affidavit was truthful in averring the applicant did not know of any claim to the land other than his own see Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617.

93. Waters *v.* Pool, 149 Cal. 795, 87 Pac. 617.

94. Maddux *v.* Brown, 91 Cal. 523, 27 Pac. 771; Marsh *v.* Hendy, (Cal. 1891) 27 Pac. 647; Dewar *v.* Ruiz, 89 Cal. 385, 26 Pac. 832; Buchanan *v.* Nagle, 88 Cal. 591, 26 Pac. 512 [*followed* in Nuttall *v.* Lovejoy, 90 Cal. 163, 27 Pac. 69]; Wren *v.* Mangan, 88 Cal. 274, 26 Pac. 100; Garfield *v.* Wilson, 74 Cal. 175, 15 Pac. 620.

95. Buchanan *v.* Nagle, 88 Cal. 591, 26 Pac. 512 [*followed* in Nuttall *v.* Lovejoy, 90 Cal. 163, 27 Pac. 69].

tificate of purchase issued thereon.[96] Under a statute providing that persons desiring to purchase swamp lands which have been segregated by authority of the United States, but which have not been sectionized by the same authority, must apply to the county surveyor to have the desired lands surveyed, and that a certificate of such survey must be attached to the affidavit of purchase, an application for purchase, not accompanied by such certificate, is invalid.[97]

m. Consideration and Payment — (i) *In General.* A contract by a county for a sale of its swamp lands is not rendered illegal by the fact that a part of the consideration therefor is the bringing of actual settlers into the county,[98] and it has been held that a county may convey swamp lands in consideration of services rendered.[99] Where a statute authorizes a conveyance of swamp lands to a corporation on certain conditions, a substantial compliance with the statute authorizes a conveyance.[1] Payments on account of the purchase-price of swamp lands must be made within the time allowed by the statute,[2] and the time of payment cannot be postponed or extended on account of accident, mistake, neglect, or inadvertence,[3] nor can payment be received after such time has expired.[4] A contract between a county and one who had bid for swamp lands, whereby it was agreed that the bidder should not carry out his contract until the title of the county to all the swamp lands should be judicially determined in litigation then pending has been held to be invalid.[5] A purchaser of swamp lands cannot claim the right to pay the purchase-money, for which he has given his notes, in labor to be bestowed in reclamation of the lands except by being the lowest bidder at the lettings of the work.[6] Where swamp lands have been sold by the state and paid for in state bonds, afterward adjudged to be void, and a deed has been made and the lands have passed into the hands of innocent third persons, who have paid value for them,

96. Buchanan *v.* Nagle, 88 Cal. 591, 26 Pac. 512 [*followed* in Nuttall *v.* Lovejoy, 90 Cal. 163, 27 Pac. 69].

97. Maddux *v.* Brown, 91 Cal. 523, 27 Pac. 771.

98. Audubon County *v.* American Emigrant Co., 40 Iowa 460.

99. Allen *v.* Cerro Gordo County, 34 Iowa 54, holding that where swamp lands were granted by the state to the counties in which the same were situated, but the interests and claims of a certain county were involved in doubt, such county might through its board of supervisors enter into a valid contract with an individual to the effect that, in case he succeeded through his efforts and labor, in having the claims of the county established and allowed by the general government, he should be entitled to receive, as compensation for his services, one half of the lands, or the indemnity granted in lieu thereof.

Invalid contract.— The supervisors of a county have no power to make a contract to convey all of the swamp lands belonging to the county as compensation for services to be rendered by the other party in procuring the patenting of the portion not yet patented to the county. Palo Alto County *v.* Harrison, 68 Iowa 81, 26 N. W. 16 [*distinguishing* Allen *v.* Cerro Gordo County, 34 Iowa 54].

1. Southern Pine Co. *v.* Hall, 105 Fed. 85, 44 C. C. A. 363, holding that where the statute authorized such a conveyance upon the corporation filing in the office of the secretary of state a bond for a certain amount "with two or more good securities . . . to be approved by the governor," to secure the compliance by the corporation with the provisions of the statute, and a bond was filed in all respects as required, signed by four obligors, but not signed by the company, there was a substantial compliance with the act, there being no express provision therein requiring the company to sign the bond, and such signature being unnecessary to bind it, and the bond filed having been recognized as sufficient by both the executive and legislative departments of the state.

2. Keema *v.* Doherty, 51 Cal. 3; Carpenter *v.* Sargent, 41 Cal. 557 (holding that under the California act of April 27, 1863, the first payment must be made within thirty days after the record in the county surveyor's office of the approval of the surveyor-general); Husbands *v.* Mosier, 26 Oreg. 55, 62, 37 Pac. 80 (where it is said: "We think it cannot be successfully contended that the state lacked power to provide, as one of the terms of the contract for the sale of its swamp land, that time of payment and proof of reclamation should be of the essence of the contract, and that, on a failure by the applicant to comply with such terms, his right to purchase should cease, and his contract be at an end").

Where an act for the relief of purchasers does not prescribe the time within which the balance of the purchase-money must be paid, it is to be paid as prescribed by the general law providing for the sale of swamp lands. Yoakum *v.* Brower, 52 Cal. 373.

3. Carpenter *v.* Sargent, 41 Cal. 557.

4. Keema *v.* Doherty, 51 Cal. 3.

5. Wheeler *v.* Reynolds Land Co., 193 Mo. 279, 91 S. W. 1050.

6. Whiteside County *v.* Burchell, 31 Ill. 68.

the state is estopped by its own grant to resort to the land,[7] but may maintain an action against its grantee for the purchase-price;[8] but the state may treat the supposed payment as a nullity and subject the land to payment of the purchase-price, where the contract is still executory, no deed having been made, but the purchaser or his assigns holding a certificate of entry,[9] or where the land, although patented, is in the hands of the original vendee, or of persons claiming under him otherwise than by purchase for a valuable consideration without notice that the entry money is unpaid.[10] Under the Missouri statute a county is not required to tender a deed before demanding payment of the amount due upon a purchase of swamp land or suing the purchaser for such amount.[11] Where the law under which a sale of swamp lands was made by a county authorized the taking of a bond as security for the purchase-money and reserved a lien to secure the bond, which the county had no power to relinquish, it was held that where the county sold land to one person, taking his bond, and the purchaser sold to another person who also gave a bond, which the county applied in payment *pro tanto* on the bond of the original purchaser, the county did not thereby lose or waive its lien on the land for the original purchase-price, and that subsequent purchasers necessarily took with notice of the rights of the county.[12] A judgment foreclosing the vendor's lien retained by a county upon swamp lands sold by it, filed before the rendition of a judgment in favor of the state, in a suit by it to enforce its lien for taxes upon the same lands, passes to the county whatever equitable interest the purchaser from the county had in the lands, and gives it a better title — the county not being a party to the suit by the state — than the purchaser at the tax-sale took therefrom.[13]

(II) *Swamp Land Scrip.* In some states provision has been made by statute for the issuance of swamp land scrip which may be located on such land and received in payment therefor.[14]

n. Certificates. Certificates of entry of swamp lands are presumed to be good and regular,[15] and the burden of proof of fraud or irregularity in the issuance thereof is on the party attacking them;[16] and it has been held that the certificate of the land commissioners granting an application to purchase necessarily implies a finding that the applicant has the necessary qualifications,[17] which is not subject to review by the courts in an action between the certificate holder and a subsequent grantee of the land.[18] A patent certificate issued by a land agent after he has permitted another person to enter the land is ineffective,[19] and where two certificates of preëmption of the same tract of swamp land have been issued to different persons, a court of equity will cancel the one which was obtained through fraud, mistake, or erroneous proceedings.[20] A certificate of purchase of swamp lands does not ordinarily operate as a conveyance of the title.[21] The officer who issued a

7. Cochran *v.* Cobb, 43 Ark. 180 [*following* Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162].

8. Cochran *v.* Cobb, 43 Ark. 180.

9. Cochran *v.* Cobb, 43 Ark. 180.

10. Cochran *v.* Cobb, 43 Ark. 180.

11. Andrew County *v.* Craig, 32 Mo. 528, construing Acts 1850–1851, p. 239.

12. Cedar County *v.* Williams, 79 Mo. 581.

13. Jasper County *v.* Mickey, (Mo. 1887) 4 S. W. 424.

14. See Jackson *v.* Dilworth, 39 Miss. 772, construing Acts March 15, 1852, c. 16, and March 16, 1852, c. 14.

The term "scrip" as used in Howell Annot. St. Mich. §§ 5249–5252, respecting swamp lands, indicates the credit of land to which a contractor, who has assisted in draining them, is entitled on the books of the land office, although no certificate or other written evidence of right be issued. Wait *v.* State Land-Office Com'r, 87 Mich. 353, 49 N. W. 600.

15. Harrison *v.* Lewis, 27 Ark. 152.

16. Harrison *v.* Lewis, 27 Ark. 152.

17. Miller *v.* Wattier, 44 Oreg. 347, 75 Pac. 209.

18. Miller *v.* Wattier, 44 Oreg. 347, 75 Pac. 209.

19. Cheatham *v.* Phillips, 23 Ark. 80.

20. Colvin *v.* McCasky, 9 Iowa 585.

21. Pendergast *v.* Burlington, etc., R. Co., 53 Iowa 326, 5 N. W. 171. But *compare* Reed *v.* Hamilton, 18 Ind. 476.

Certificates issued by the board of swamp land commissioners in Arkansas were not a sale of the land, but simply evidence of an application to purchase, which the commissioners might subsequently accept or reject: and such certificates secured to the holders no right as against any other purchaser who adopted legal means in securing his lands.

certificate of preëmption is not a necessary party to a bill to set aside such certificate.[22] A swamp land agent cannot be required to issue a patent certificate, except upon the surrender of the original certificate of purchase.[23] The registry laws of the state have no bearing upon a title to swamp lands by virtue of a certificate issued to a purchaser by the board of commissioners when the certificates are not required to be registered as notice to the world of their existence.[24]

o. Rights Acquired by Entries, Certificates, Etc. A mere certificate of the making of an application to purchase swamp land does not import a contract or give the applicant a vested right to the lands;[25] but where an officer having authority under the statute to sell swamp lands has sold the same and given the purchaser a certificate of purchase, the purchaser thereby becomes vested with the complete equitable title,[26] and a patent from the state is the only act necessary to vest in him the complete legal title.[27] So also the lawful entry of swamp lands vests an equitable title, with an absolute right to a patent, which a subsequent sale and patent to another cannot defeat.[28] The owner of a state certificate of sale of swamp land is entitled to possession of the land,[29] and to its rents and profits,[30] and is to be treated as the owner of the land,[31] as against all the world except the state.[32] He may maintain ejectment for possession of the land [33] or trespass against a wrongdoer.[34] Where one who had registered a claim for a tract of swamp lands agreed to accept another tract instead, this was a waiver of his equities as to the former, and the title of a subsequent purchaser was paramount.[35] Where the state has issued a settler's license under a statute providing for the settlement and drainage

Pence *v.* Sandford, 28 Ark. 235 [*approved* as to this point in Brewer *v.* Hall, 36 Ark. 334].

22. Rogers *v.* Vass, 6 Iowa 405.

23. Hempstead *v.* Underhill, 20 Ark. 337.

24. Bradford *v.* Hall, 36 Fed. 801.

25. Brewer *v.* Hall, 36 Ark. 334.

26. Hibben *v.* Malone, 85 Ark. 584, 109 S. W. 1008; Brewer *v.* Hall, 36 Ark. 334; Bradford *v.* Hall, 36 Fed. 801.

Under the Oregon statute an application for the purchase of swamp lands, from the date of its receipt and filing by the land commissioner, constitutes a contract between the state and the applicant for the sale to the latter of the tract or tracts therein mentioned, with the right of immediate possession thereof, and on the performance of the conditions subsequent or payment and reclamation within the terms and requirements of the statute, the applicant or his assigns is entitled to a patent for the land. McConnaughy *v.* Pennoyer, 43 Fed. 196, 339 [*affirmed* in 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363].

Repeal of statute before issuance of patent. — One who has purchased from the state and paid for a tract of swamp land, and complied with all the requirements of the law, acquires a vested right in the land which is not affected by a subsequent repeal of the statute under which he purchased before the issuance of his patent. McNear *v.* Hutchinson, 31 Cal. 177; Husbands *v.* Mosier, 26 Oreg. 55, 37 Pac. 80.

27. Bradford *v.* Hall, 36 Fed. 801.

A claim of title in a stranger is no defense to a proceeding by mandamus to compel the issuance by the secretary of state of a patent to a purchaser of swamp land. Myers *v.* State, 61 Miss. 138.

28. Coleman *v.* Hill, 44 Ark. 452. See also Smith *v.* Hollis, 46 Ark. 17.

An entry of swamp lands made irregularly, but ratified by a deed of the governor and within the equity of the statutes, gives a valid title. Brodie *v.* Moseby, 23 Ark. 313.

29. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371; McConnaughy *v.* Wiley, 33 Fed. 449, 13 Sawy. 148.

30. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371.

Recovery for timber cut before issuance of patent.— One who has purchased lands from the state and paid the price thereof is entitled to recover for logs subsequently cut from the land, although the patent for the land was not issued until after the commencement of the action. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371.

Forfeiture and resale.— After a county has declared a forfeiture of the contract of a purchaser of swamp lands and has conveyed the land to another person, the latter is entitled to maintain an action of debt against the former for illegally causing timber to be cut from the land. Cushman *v.* Oliver, 81 Ill. 444.

31. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371.

32. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371.

33. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371; McConnaughy *v.* Wiley, 33 Fed. 449, 13 Sawy. 148.

34. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371.

Right of preëmptor.—A person who is in possession of and has improved land under a preëmption claim can maintain trespass for its protection. Barden *v.* Smith, 7 Wis. 439.

35. Foster *v.* Bettsworth, 37 Iowa 415.

of the swamp lands by actual settlers, it is a condition precedent to a sale to any one else of such lands that the commissioner of the land office should make a declaration avoiding the license.[36] Where, after a preëmption certificate is issued, another claim to the land is allowed and another certificate is issued, the first is the better in law and will prevail unless it is shown to be defective.[37] In an action by the assignee of a preëmption certificate against a county to quiet title to swamp land, the county may set up fraud in the procurement of the certificate,[38] unless it is in some way estopped to set up such defense.[39]

p. Reports and Records of Sales. In Arkansas it has been held that the report by the swamp land commissioners to the auditor is conclusive evidence of sales by them until impeached for fraud, mistake, or some other cause;[40] and the records of such sales in the swamp land agent's and auditor's offices constitute notice to subsequent settlers and purchasers.[41]

q. Revocation and Forfeiture. A contract for the purchase of swamp land can be canceled only in the cases provided for by the statute.[42] Under some statutes a failure to pay the purchase-money[43] or interest on deferred payments[44] within the time allowed by the statute *ipso facto* works a forfeiture of the land,[45] and the state may resell the land as if no purchase had been made;[46] but under other statutes such default merely subjects the purchaser to a judicial declaration of forfeiture,[47] and where the sum due is paid before entry of judgment forfeiting the certificate of purchase for non-payment of the price, the state holds the land in trust for the purchaser and cannot convey to another.[48] Where swamp lands once sold have been forfeited for a default in payment of principal or interest, the certificates of sale become utterly void,[49] and the right of action for trespass on the land, by cutting and renoving timber therefrom, is in the state until the land is resold.[50] A forfeiture which has been incurred by a failure to pay for the land within the time allowed by statute may be waived by the subsequent acceptance by the land commissioners of payment of the balance due.[51] Where a swamp land commissioner is without power to declare the forfeiture of a contract of sale of swamp land, a purchaser from such officer of lands previously sold to another is chargeable with notice of such lack of power.[52] In Arkansas it has been held that swamp land commissioners might revoke a sale of such land which had not become

36. Hedley *v.* Leonard, 35 Mich. 71.
37. Colvin *v.* McCasky, 9 Iowa 585.
38. Bixby *v.* Adams County, 49 Iowa 507.
39. Briggs *v.* Jasper County, 49 Iowa 481, holding that where the action was instituted to quiet plaintiff's title to land held under a certificate of preëmption given twenty-two years before, and plaintiff had purchased the land in good faith and made valuable improvements thereon, the county was estopped to set up as a defense fraud in the procurement of the certificate by the person under whom plaintiff claimed.
40. Brewer *v.* Hall, 36 Ark. 334 [*overruling* Pence *v.* Sandford, 28 Ark. 235].
41. Brewer *v.* Hall, 36 Ark. 334.
42. State *v.* Adams, 161 Mo. 349, 61 S. W. 894, holding that in order to authorize a court to proceed to cancel a contract for the purchase of swamp lands under Rev. St. (1899) § 2213, it must appear affirmatively that the purchaser was unable to carry out his contract and pay the balance of the purchase-money and that the contract was rescinded on his application.
43. Borland *v.* Lewis, 43 Cal. 569; Husbands *v.* Mosier, 26 Oreg. 55, 37 Pac. 80.
44. Borland *v.* Lewis, 43 Cal. 569.
45. Borland *v.* Lewis, 43 Cal. 569 (construing St. (1855) p. 189); Husbands *v.* Mosier, 26 Oreg. 55, 37 Pac. 80 (construing the act of Oct. 26, 1870, providing for a forfeiture on failure to make proof of reclamation and payment within ten years after the purchase).

Impairment of obligation of contract.— Where the statute under which swamp land is purchased allows purchasers a certain time within which to make payment of the purchase-money or instalments thereof, a subsequent statute forfeiting contracts on which payments have not been made in a shorter time is void because its effect is to impair the obligations of such contracts. McConnaughy *v.* Pennoyer, 43 Fed. 196, 339 [*affirmed* in 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363].

46. Borland *v.* Lewis, 43 Cal. 569.
47. Pioneer Land Co. *v.* Maddux, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67, construing Act April 9, 1861.
48. Pioneer Land Co. *v.* Maddux, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67.
49. Conklin *v.* Hawthorn, 29 Wis. 476.
50. Conklin *v.* Hawthorn, 29 Wis. 476.
51. Miller *v.* Wattier, 44 Oreg. 347, 75 Pac. 209.
52. Dart *v.* Hercules, 57 Ill. 446.

complete;[53] but in Michigan after land has been sold the land-office commissioner cannot resell it unless the certificate of sale has been voluntarily returned or adjudged void by the proper court.[54] An order of the state commissioners of public lands, declaring a patent for swamp land void for fraud, is not a judicial order, nor is it conclusive as to the title of the patentee of the land.[55] Under proper circumstances *bona fide* purchasers from the first grantee may be protected against defects in the original sale or conveyance.[56]

r. Patents[57] and Deeds.[58] A state may issue patents for swamp lands at any time after the selection of such lands is confirmed.[59] The fee in swamp lands remains in the state or the county until the execution by the proper officer of a patent or deed as provided by the statute,[60] but when the patent for such land issues it relates back to the date of the sale.[61] A patent for swamp lands is conclusive evidence of legal title as against the state and persons claiming under it,[62] and *prima facie* evidence of legal title as against all the world,[63] and must prevail,

53. Walworth *v.* Miles, 23 Ark. 653 [*followed* in Gaster *v.* Gaines, 23 Ark. 712 (*followed* in Beckham *v.* Worthen, 23 Ark. 720)], holding that where a subcommissioner reported the measurement and estimates of the value of work done and furnished by a levee contractor, and the reports were confirmed by the board of swamp land commissioners, and the contractor then applied to enter certain lands in part payment of the sum reported due him for levee work, and received from the secretary of the board a certificate that he had applied to enter lands, and also a certificate of the balance due him after deducting the price of the lands, these matters did not constitute a complete sale of the lands so as to pass the matter beyond the control and revoking power of the commissioners, but they had authority to cancel the certificate on ascertaining the insufficiency of the levee work, of which they were the judges, the court saying that a sale by the swamp land commissioners was not complete until the lands were legally paid for and patent certificate issued.

54. People *v.* State Treasurer, 7 Mich. 336, holding that, although Laws (1858), p. 173, providing for the sale of swamp lands, made void any certificate of purchase under it, issued through mistake, fraud, etc., it did not confer upon the commissioners of the land office power to adjudge void and cancel such certificate.

55. State *v.* Timme, 70 Wis. 627, 36 N. W. 325 [*following* State *v.* Timme, 60 Wis. 344, 18 N. W. 837; Gunderson *v.* Cook, 33 Wis. 551; Gough *v.* Dorsey, 27 Wis. 119].

56. See Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700, holding that where a county court having power to sell swamp lands belonging to the county, appointed a commissioner to make the sales, and the commissioner's patent, which was the only paper relating to the conveyance entitled to registration in the land records of the county, was regular on its face, and there was nothing therein to indicate any insufficiency in the order appointing the commissioner and authorizing such sale, a subsequent *bona fide* purchaser of the land was not charged with notice of defects in such order for which the conveyance might have been set aside.

57. Patents generally see *infra*, II, M.

58. See, generally, DEEDS, 13 Cyc. 505.

59. Hendry *v.* Willis, 33 Ark. 833.

60. Heeler *v.* Gist, 27 Ark. 200; Tama County *v.* Melendy, 55 Iowa 395, 7 N. W. 669.

A resolution of the board of county supervisors cannot operate as a conveyance of swamp lands. Tama County *v.* Melendy, 55 Iowa 395, 7 N. W. 669.

Under the Missouri statutes county swamp lands may be conveyed either by a deed executed by order of the county court by a commissioner appointed to sell the lands or by a conveyance by the president of the county court countersigned by the clerk. Hall *v.* Gregg, 138 Mo. 286, 39 S. W. 804 [*following* Prior *v.* Scott, 87 Mo. 303; Wilcoxon *v.* Osborn, 77 Mo. 621, *distinguishing* Sturgeon *v.* Hampton, 88 Mo. 203, and *followed* in Elliott *v.* Buffington, 149 Mo. 663, 57 S. W. 663].

Deed for swamp lands confers no title unless given pursuant to law.— Remeau *v.* Mills, 24 Mich. 15. See also Atty.-Gen. *v.* Smith, 31 Mich. 359.

Mode of execution.— Under a statute providing that patents "shall be signed by the governor, and attested by the secretary of state, with the great seal of the State," a patent signed by the governor and attested by the great seal, is sufficient, and it need not be signed by the secretary of state. Exum *v.* Brister, 35 Miss. 391.

61. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371; Simpson *v.* Kilpatrick, 148 Mo. 507, 50 S. W. 435.

In Iowa the title under a deed for swamp lands vests as of the date of the deed. Pendergast *v.* Burlington, etc., R. Co., 53 Iowa 326, 5 N. W. 171.

62. Holland *v.* Moon, 39 Ark. 120; Chrisman *v.* Jones, 31 Ark. 609; Heeler *v.* Gist, 27 Ark. 200; Boynton *v.* Haggart, 120 Fed. 819, except in a direct proceeding to avoid it for fraud or gross mistake.

63. Covington *v.* Berry, 76 Ark. 460, 88 S. W. 1005; Hendry *v.* Willis, 33 Ark. 833. See also Murphy *v.* Ewing, 23 Ind. 297.

No preliminary proof necessary.— A patent by the governor, under the seal of the state,

unless a prior right or superior equity in the opposing claimant is shown.[64] In ejectment where both parties claim under deeds to swamp lands from the state or a county, the elder deed must prevail.[65] A patent for swamp lands issued by the state is *prima facie* evidence of all facts recited in it which are necessary to confer power to issue it,[66] and of the fact that all the incipient steps have been regularly taken;[67] but a state patent to a tract of land as "swamp" does not *per se* prove that the title passed to the state under the swamp land grants,[68] and it has been held that such a patent is not even *prima facie* evidence of the character of the land as against one claiming under the United States.[69] A deed to swamp land is not invalidated by an erroneous recital as to a matter which it is unnecessary to recite,[70] nor does the fact that such a deed contains an unauthorized covenant of warranty impair its effect as a conveyance of title.[71] A person claiming under a deed from a swamp land commissioner cannot ask the court to reject recitals therein as mistakes.[72] Where a state patent of swamp lands describes the land conveyed by subdivisions, according to the United States survey, and continues the description by giving the number of the swamp land survey, and saying that the land is more particularly described in the field-notes of the survey, and then recites the field-notes, the land conveyed is limited to that actually surveyed in the field, and described in the field-notes, even though the survey did not include all the land in the subdivision.[73] Where the channel of a river bordering on swamp lands was changed by a freshet after the survey but before the issuance of a patent calling for the bank of the river as a boundary, land which formerly bordered on the bank of the stream but was changed to an island by the freshet does not pass under such patent.[74] A conveyance of swamp lands by a county will not pass the right of the county to drafts or scrip given by the general government to the state, and by the state to the county, for swamp and overflowed lands sold by the general government after they had been selected under the act of congress.[75] Under some statutes the delivery of a deed for swamp lands is necessary to pass the title.[76] In Indiana a deed or patent for swamp land is required to be recorded in the office of the secretary of state and when so recorded is notice,[77] but it is not necessary

of state swamp lands, is admissible in evidence to prove title in the patentee, without proof of the title of the state or the authority of the governor to issue the patent. Grant *v.* Smith, 26 Mich. 201.

64. Holland *v.* Moon, 39 Ark. 120; Shaer *v.* Gliston, 24 Ark. 137 [*following* Wright *v.* Green, 24 Ark. 38; McIvor *v.* Williams, 24 Ark. 23].

65. Bacon *v.* Tate, 22 Ark. 531; Simpson *v.* Kilpatrick, 148 Mo. 507, 50 S. W. 435. But *compare* Walker *v.* Plumer, 44 Iowa 406, holding that in a case where the title of one party to a tract of swamp land was based upon a deed and certificate of preëmption, and the title of another was based upon a deed executed prior to the former, but there was no evidence that a certificate had ever been issued to the grantee in the deed or those from whom he claimed, the burden was upon the party having no certificate to establish the fact that one had been issued, and that its date was prior to that of the other, and that, in its absence, the title based upon the certificate offered in evidence must prevail.

66. Hendry *v.* Willis, 33 Ark. 833.

67. Cramer *v.* Keller, 98 Mo. 279, 11 S. W. 734 [*following* Minter *v.* Crommelin, 18 How. (U. S.) 87, 15 L. ed. 279].

A deed executed by the officer or officers authorized by law is, equally with a patent, *prima facie* evidence of a prior purchase in conformity with law, and of a payment of the purchase-price at the established rate. Carrington *v.* Potter, 37 Fed. 767.

68. Moulierre *v.* Coco, 116 La. 845, 41 So. 113.

69. Keeran *v.* Griffith, 31 Cal. 461. See also Kile *v.* Tubbs, 23 Cal. 431 [*distinguishing* Doll *v.* Meador, 16 Cal. 295].

70. Wabash, etc., R. Co. *v.* McDougal, 113 Ill. 603 (imperfect recital as to date of act under which deed made); Dunklin County *v.* Chouteau, 120 Mo. 577, 25 S. W. 553 [*following* Chouteau *v.* Allen, 70 Mo. 290] (holding that a patent issued by a county to a railroad for swamp lands, which recites, by mistake, a different act than the one under which the issue was made, is not void).

71. Pool *v.* Brown, 98 Mo. 675, 11 S. W. 743.

72. Kirby *v.* Lewis, 39 Fed. 66, recitals that lands are a "portion of the swamp and overflowed land selected by the state."

73. Mahon *v.* Richardson, 50 Cal. 333.

74. Heckman *v.* Swett, 99 Cal. 303, 33 Pac. 1099

75. Henry County *v.* Winnebago Swamp Drainage Co., 52 Ill. 299.

76. Rountree *v.* Little, 54 Ill. 323.

77. Mason *v.* Cooksey, 51 Ind. 519.

The failure to record a deed of swamp lands in the office of the secretary of state

or proper that such instrument should be recorded in the county where the land is situated.[78] In Iowa a deed for swamp lands purchased of a county cannot be recorded so as to affect with notice a subsequent purchaser, unless it is executed as required by statute.[79] A patent issued without authority of law is void,[80] as is also a patent conveying as "swamp land," land which is a part of the five-hundred-thousand-acre grant to the state for internal improvements.[81]

s. Attack on Patents. A patent from the state to swamp land is not subject to collateral attack;[82] but may be avoided in a direct proceeding for fraud or gross mistake,[83] and where both parties to a suit to quiet title to swamp lands claim under patents from a county, either may attack the other's patent.[84]

t. Title and Rights of Purchasers. A person claiming title to swamp lands under a patent from the state is deemed to have acquired his title with full knowledge of the terms, conditions, and purposes of the grant by congress to the state, and to have accepted the title in subordination to the paramount right and duty of the state to cause such land to be reclaimed.[85] Where an act of the legislature has transferred swamp lands to a corporation upon certain conditions, a purchaser from the corporation is chargeable with notice of such conditions and of the failure of the corporation to comply therewith.[86] Where a state statute gave a certain person a right to enter certain swamp lands, but before the transfer from the United States to the state had been completed the claimant died, and immediately upon the completion of the transfer certain other persons who knew of his equities and had obtained quitclaims from some of the heirs, took patents to themselves claiming under such act, it was held that those who had notice of the claimant's rights took the title in trust for themselves and the remaining heirs, and it was decreed that they convey to the latter an unencumbered title to their proportion.[87]

renders the deed void as against a subsequent purchaser from the state in good faith and without notice. Nitchie *v.* Earle, 88 Ind. 375.

78. Mason *v.* Cooksey, 51 Ind. 519.

79. Acker *v.* Walker, 53 Iowa 454, 5 N. W. 584.

80. People *v.* Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481, holding that under the California Reclamation Act of 1862, a patent for lands signed by the governor, and countersigned by the register of the state land office, was not a sufficient certificate by the surveyor-general that such lands had been reclaimed, although the office of register and surveyor-general were held by the same person, and, in the absence of a proper certificate, no title vested in the grantees under such patent, as against the state.

A patent issued by a county in compromise of a groundless suit for damages is invalid for lack of a consideration. Wheeler *v.* Reynolds Land Co., 193 Mo. 279, 91 S. W. 1050.

Deed void as to part of land.— Where the governor pursuant to a statute conveyed certain swamp lands to a railroad company, the fact that in a deed he included by mistake certain lands which he was not authorized to convey did not affect the title to such land, but the conveyance, as far as it affected the same, was void. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371.

81. Laugenour *v.* Shanklin, 57 Cal. 70.

Grants for internal improvements see *infra*, II, J.

82. Boynton *v.* Haggart, 120 Fed. 819, 57 C. C. A. 301. See also White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371; Dosh *v.* Cape Fear Lumber Co., 128 N. C. 84, 38 S. E. 284.

83. Boynton *v.* Haggart, 120 Fed. 819, 57 C. C. A. 301.

One who has acquired a preëmption right to swamp land donated to the state by the general government may maintain a real action against one to whom a patent has been issued by the state to annul such patent, when he shows that he had not been able to perfect his title by making payment of the purchase-money because the land had not been conveyed by the general government to the state, after which time only payment could be required of him. Mast *v.* Hamilton, 14 La. Ann. 774.

84. Wheeler *v.* Reynolds Land Co., 193 Mo. 279, 91 S. W. 1050 [*explaining* Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700].

85. Kimball *v.* Reclamation Fund Com'rs, 45 Cal. 344 [*followed* in Packard *v.* Johnson, (Cal. 1884) 4 Pac. 632], holding that the legislature may divide the swamp lands into districts, have an estimate made of the cost of reclamation, issue bonds for the payment of the expenses therefor, and levy an assessment on the lands in the district to pay the same, even though the state has sold the lands and given patents therefor without conditions.

Drainage taxes under Michigan statutes see A. P. Cook Co. *v.* Auditor-Gen., 79 Mich. 100, 44 N. W. 420.

86. Bradford *v.* Hall, 36 Fed. 301.

87. Davis *v.* Filer, 40 Mich. 310.

Where a county contracted to convey its swamp lands to an emigrant company upon the latter's undertaking to convey all lands to which preëmption rights had attached to the holders of certificates, and although the land was never actually conveyed to the company, it conveyed to an individual on presentation of a fraudulent preëmption certificate, the grantee acquired no right as against the county.[88] Under the California statute a purchaser who has reclaimed his swamp land, or his assigns, is entitled to be repaid out of the swamp land fund for the work of reclamation his proportion of the amount which has been contributed to that fund.[89]

u. Disposition of Proceeds. The act of congress making the swamp land grant provides that the proceeds of swamp and overflowed lands whether from sale or by direct appropriation in kind shall be applied exclusively so far as is necessary to the reclaiming of the lands by means of levees and drains;[90] but it has been said that this provision is at the utmost the expression of a wish or desire on the part of congress as to the use of the proceeds and not a condition of the grant;[91] and that it is very questionable whether the security for application of the proceeds thus pointed out does not rest upon the good faith of the state and whether the state may not exercise its discretion in that behalf without being liable to be called to account and without affecting the titles to the lands disposed of,[92] and at all events congress alone has power to enforce the conditions of the grant either by a revocation thereof or other suitable action in a clear case of failure of the conditions.[93] As the application of the proceeds to the named objects is only prescribed "as far as necessary," room is left for the exercise by the state of a large discretion as to the extent of the necessity;[94] and the settled doctrine now is that the states have full power of disposition of swamp lands, and that the application of the proceeds to the purposes of the grant rests upon the good faith of the state, which may exercise its discretion as to their disposal,[95] and that title of a grantee is not affected by any disposition which the state may make of the proceeds.[96] The state legislatures have generally recognized the obligation to reclaim swamp lands donated to the state by the general government with that object,[97] but a purchaser of swamp lands cannot compel the appropriation of the proceeds to the reclamation of such lands,[98] nor can he interpose as a defense in an action for the purchase-money that

88. Bixby *v.* Adams County, 49 Iowa 507.

89. Miller *v.* Batz, 131 Cal. 402, 63 Pac. 680, (1900) 61 Pac. 935.

This amount is to be repaid to the original purchaser or his assigns, and the right to such amount does not pass by a conveyance of the land after reclamation has been effected. Carpenter *v.* San Francisco Sav. Union, 128 Cal. 516, 61 Pac. 92.

Formation of new county.— Where the purchase-money was paid into and remained in the treasury of A county, and thereafter there was formed the county of B out of the territory of A county and reclamation was afterward effected, and all of the reclamation district was situated in B county, the treasurer of A county was authorized to make the payments to purchasers of the land on the register making a certificate to him. California Pastoral, etc., Co. *v.* Whitson, 129 Cal. 373, 62 Pac. 28.

90. U. S. Rev. St. (1878) § 2481 [U. S. Comp. St. (1901) p. 1587].

91. Whiteside County *v.* Burchell, 31 Ill. 68, 78, where it is said: "From the act itself no inference can be drawn that it was the desire of Congress to resume the grant, if the lands were not appropriated to their drainage."

92. American Emigrant Co. *v.* Adams County, 100 U. S. 61, 25 L. ed. 563.

93. Barrett *v.* Brooks, 21 Iowa 144; American Emigrant Co. *v.* Adams County, 100 U. S. 61, 25 L. ed. 563.

94. American Emigrant Co. *v.* Adams County, 100 U. S. 61, 25 L. ed. 563.

95. Cook County *v.* Calumet, etc., Canal, etc., Co., 138 U. S. 635, 11 S. Ct. 435, 34 L. ed. 1110 [*affirming* 131 Ill. 505, 23 N. E. 629]; U. S. *v.* Louisiana, 127 U. S. 182, 8 S. Ct. 1047, 32 L. ed. 66; Mills County *v.* Burlington, etc., R. Co., 107 U. S. 557, 2 S. Ct. 654, 27 L. ed. 578. See also Whiteside County *v.* Burchell, 31 Ill. 68.

96. Mills County *v.* Burlington, etc., R. Co., 107 U. S. 557, 2 S. Ct. 654, 27 L. ed. 578. See also Pool *v.* Brown, 98 Mo. 675, 11 S. W. 743; Dunklin County *v.* Dunklin County Dist. Ct., 23 Mo. 449.

97. Kimball *v.* Reclamation Fund Com'rs, 45 Cal. 344.

98. Whiteside County *v.* Burchell, 31 Ill. 68 [*followed* in Bureau County *v.* Thompson, 39 Ill. 566]. See also Baugh *v.* Lamb, 40 Miss. 493, holding that a purchaser of swamp lands from the state has no right of action against a state swamp land commissioner because of the latter's failure to appropriate

the proceeds of sales have not been applied to the reclamation of the lands.[99] Where the state legislature has appropriated the proceeds of swamp lands to certain purposes, they cannot be diverted to other purposes by the state or county authorities.[1] A statute setting apart a certain portion of the proceeds of swamp land for the primary school fund is not an appropriation of the lands, but only of the proceeds of land actually sold, and does not preclude the state from making any provision deemed expedient concerning future sales.[2] In Missouri the trust in favor of the school fund with relation to the sale of swamp lands applies only to "the net proceeds of the sales," and does not run with the land, so as to charge a *bona fide* purchaser with the county's misapplication of such proceeds.[3]

v. Relief of Purchasers. Provision has sometimes been made by statute for the refunding of moneys paid by mistake on purchases as swamp land of land which could not be sold by the state,[4] and various statutes curing defective sales of swamp lands have been enacted from time to time.[5] Purchasers of swamp lands from a corporation created by statute to dispose of such lands have been held entitled, on failure of their title, to have refunded money expended by them in good faith in the payment of taxes and for the purchase of a tax title of the state.[6] A purchaser of swamp land who has received no patent is not entitled to a refunding certificate merely because the state has resold and patented the land to another; his remedy being against the patentee for the land itself.[7]

4. Statutory Grants of Swamp Lands — a. In General. Whether or not a statutory grant by a state of its swamp lands operates as a grant *in præsenti* depends upon the intention of the legislature.[8]

b. Appropriation For State Institutions. Swamp lands appropriated to certain charitable and educational institutions by a statute authorizing the setting apart of such lands "not otherwise disposed of prior to the passage of this act" can be lawfully set apart to such institutions only from the surplus of such lands over the amount required to fill grants made by the state prior to the passage of the statute.[9] Where the state land commissioner is authorized by statute to select swamp lands for the benefit of state institutions, a selection is not invalidated by a failure to apportion the lands in the certificate of selection to the several institutions for whose benefit they were selected.[10]

c. Appropriations in Aid of Internal Improvements.[11] In some states the legislatures have appropriated swamp lands in aid of internal improvements,[12] or

the proceeds to the reclamation of the land purchased.

99. Newell *v.* Bureau County, 37 Ill. 253.

1. State *v.* Hastings, 11 Wis. 448.

2. People *v.* Auditor-Gen., 12 Mich. 171.

3. Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700.

4. Baird *v.* Tulare County, 74 Cal. 397, 16 Pac. 205, construing the act of March 27, 1872, and Cal. Pol. Act, § 3572.

5. See the following cases:

Arkansas.— Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031.

California.— Barker *v.* Freeman, 85 Cal. 533, 24 Pac. 926; Yoakum *v.* Brower, 52 Cal. 373.

Mississippi.— Boddie *v.* Pardee, 74 Miss. 13, 20 So. 1.

Missouri.— Simpson *v.* Stoddard County, 173 Mo. 421, 73 S. W. 700; Sturgeon *v.* Hampton, 88 Mo. 203.

United States.— Tubbs *v.* Wilhoit, 138 U. S. 134, 11 S. Ct. 279, 34 L. ed. 887 [*affirming* 73 Cal. 61, 14 Pac. 361]; Bradford *v.* Hall, 36 Fed. 801.

See 41 Cent. Dig. tit. "Public Lands," § 212.

6. Bradford *v.* Hall, 36 Fed. 801.

7. Smithee *v.* Auditor, 40 Ark. 328.

8. See Kelly *v.* Cotton Belt Lumber Co., 74 Ark. 400, 86 S. W. 436, 827 (holding that the act of Jan. 16, 1891, was not a present grant); McDade *v.* Bossier Levee Bd., 109 La. 625, 33 So. 628 (holding that under La. Acts (1892), No. 89, § 9, title to lands granted to the Bossier levee district did not vest in such district until formal act of conveyance, and hence the district board was in no position to demand rents of persons in possession of such lands prior to such conveyance).

9. St. Paul, etc., R. Co. *v.* Brown, 24 Minn. 517.

10. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371.

11. Grants to states for internal improvements see *infra*, II, J.

12. Wineman *v.* Gastrell, 53 Fed. 697, 3 C. C. A. 621, 54 Fed. 819, 4 C. C. A. 596, holding that the Mississippi act of March 3, 1852, by which thirty-five thousand acres of swamp lands were "hereby granted" to the state

provided for payment in swamp lands to contractors engaged in works of internal improvement,[13] and for the reservation of lands for the purpose of such payment.[14] Where a statute provides for the withholding of swamp lands from the market for the time specified in the contract, rights acquired by third persons after the expiration of such time cannot be affected by a subsequent extension of the contract in favor of the contractor.[15] Where one under contract with the state under an act of the legislature for public improvements obtained the right to make selection from certain swamp lands in payment thereof, it was no fraud on the state that he selected the most valuable lands.[16] Where an act of the legislature appointed certain persons to survey, locate, and construct a road, and provided that, on completion of the survey, ten thousand acres of swamp lands of the state within six miles of the road as located, on either side thereof, should be conveyed to them, it was held that in case of a deficiency in quantity of swamp lands within the prescribed limits, the parties had no claim on the state for other lands to make up such deficiency.[17] Where a state has appropriated swamp lands to a county for the construction of a road, the right of the county or its assignee to select lands which have been earned under the terms of the grant is not affected by lapse of time.[18]

commissioners for the improvement of the Homochitto river, and their successors, for the purpose of carrying on their work, was a present grant of the title to them, although patents were to issue from the state upon certificates issued by them to any purchaser or grantee, and the title to particular tracts would become perfect upon the designation of the person entitled to take from the commissioners and an identification of the lands, and that the commissioners had authority to sell or grant the lands for services rendered in furthering the purposes for which the commission was created.

Lands not withdrawn from the market until commissioner notified of selection.— People *v.* State Land Office Com'r, 23 Mich. 270.

Right attaches to each parcel in order of selection.— People *v.* State Land Office Com'r, 23 Mich. 270.

Appropriation of lands for such purpose not in violation of constitution.— Sparrow *v.* State Land Office Com'rs, 56 Mich. 567, 23 N. W. 315 [*followed* in State *v.* Sparrow, 89 Mich. 263, 50 N. W. 1088].

Grant to levee board.— Where a state selected certain land as swamp and overflowed land passing to it from the general government under the swamp land grants, and the land department of the general government approved the selection, and the state granted and conveyed the land to a levee board, the title to the land vested in such board. McDade *v.* Bossier Levee Bd., 109 La. 625, 33 So. 628.

13. See People *v.* Pritchard, 17 Mich. 260.

What lands may be selected in payment see Olds *v.* State Land Com'r, (Mich. 1901) 86 N. W. 956; Mays *v.* State Land Office Com'r, 89 Mich. 460, 50 N. W. 993; State *v.* Sparrow, 89 Mich. 253, 50 N. W. 1088; People *v.* Pritchard, 17 Mich. 260; Himmelberger-Luce Land, etc., Co. *v.* Blackman, 202 Mo. 296, 100 S. W. 1049.

Grant to levee contractors of reclaimed lands see Branch *v.* Mitchell, 24 Ark. 431; Deloach *v.* Brownfield, 22 Ark. 344.

Reclamation of the lands is a condition precedent to the acquisition of title to lands under the California act of April 11, 1857, granting to canal contractors the lands reclaimed by them. Montgomery *v.* Kasson, 16 Cal. 189.

14. See Chadbourne *v.* State Land Office Com'rs, 59 Mich. 113, 26 N. W. 414.

Time for filing list of selections.— Under Howell Annot. St. Mich., § 514, a contractor with the state for building state roads through the unsettled part of the state, where the state swamp lands are chiefly located, applying for the reservation of swamp lands on the road contract, must file a list of the lands wanted before the expiration of the time specified in the contract for the completion of the work. French *v.* Christy, 37 Mich. 279.

Time from which period of reservation runs. — Under Mich. Acts (1879), No. 19, authorizing two counties to construct a state road for which an appropriation of swamp land had already been made, and providing that the commissioner, on the filing of a list of lands selected, should reserve these lands from sale for a period not to exceed three years, the three years began to run from the time when the list of lands was filed with the commissioner, and the filing of the swamp land commissioner's certificate was sufficient to show the completion of the road, the statute not requiring that the road should be constructed to the satisfaction of the board of control of swamp lands. Chadbourne *v.* State Land Office Com'rs, 59 Mich. 113, 26 N. W. 414.

15. Newcombe *v.* Chesebrough, 33 Mich. 321.

16. State *v.* Sparrow, 89 Mich. 263, 50 N. W. 1088.

17. Goodwin *v.* Rice, 26 Minn. 20, 1 N. W. 257.

18. Robson *v.* State Land Office Com'r, 148 Mich. 12, 111 N. W. 906, holding further that in the case at bar there had been no voluntary relinquishment of the right.

d. Appropriations in Aid of Railroads.[19] Some of the states have appropriated swamp lands in aid of railroads,[20] but such grants are subject to the rule that nothing will pass thereby except what is clearly and manifestly intended.[21] A state grant in aid of a railroad of swamp lands, to be selected within ten miles on each side of its road, providing that if there was not enough of such land within those limits, the deficiency might be made up from any swamp lands in three named counties, has been held to be a float, the right of selection belonging to the state; so that before such selection was made the state had the right to grant any lands provided only that it retained enough to satisfy the prior grant to the railroad.[22] A provision in a grant to a railroad "that no lands shall accrue to the said company under this act, until all grants of swamp lands previously made shall be fully satisfied," was not intended to postpone the appropriation of any land to the railroad's grant until all prior grants had been actually filled by the selection of specific lands to their full amounts, but merely to provide that in case there were not enough lands to fill all the grants, including that of the railroad, the prior grantees should have their full amounts, and the railroad stand the shortage.[23] The counties to which swamp lands have been granted have also been sometimes authorized to appropriate such lands in aid of railroads;[24] but the power of a county in this respect is strictly limited by the statute,[25] and a county having no statutory authority to grant such aid cannot donate its swamp lands to a railroad under the guise of a contract for the reclamation of the lands.[26] Where a proposition for

19. **Grants in aid of railroads** generally see *infra*, II, K.

20. See Chouteau *v.* Allen, 70 Mo. 290; State *v.* Duluth, etc., R. Co., 97 Fed. 353.

Reserved lien of state.— The swamp lands appropriated by Mo. Acts (1855), p. 314, to the construction of the road of the Cairo & Fulton Railroad Company were subject to the lien reserved by the state in its own favor to secure payment of the bonds issued by it for the benefit of that company, and passed to the purchaser at the foreclosure sale made under Acts (1866), pp. 107, 115, but those lands which had been conveyed by the counties in payment of subscriptions did not pass by the sale. Chouteau *v.* Allen, 70 Mo. 290.

Determination as to compliance with conditions.— Under the Minnesota act of March 9, 1875, granting swamp lands of the state in aid of the construction of the road of the Duluth & Iron Range Railroad Company, the executive department of the state was vested with authority to determine not only as to the proper construction of the road, but also as to whether the route selected was in compliance with the act; and, in the absence of fraud, its determination of such questions in favor of the company, and the conveyance to it of a portion of the lands in accordance with the provisions of the act, were conclusive upon the state, not only as to the lands so conveyed, but as to all others earned, and to which the company was entitled, under the terms of the grant. State *v.* Duluth, etc., R. Co., 97 Fed. 353.

21. St. Paul, etc., R. Co. *v.* Brown, 24 Minn. 517, holding that the act of March 6, 1863, which granted to the St. Paul & Pacific Railway Company seven miles of swamp lands "on each side of said line" for a certain distance, was a grant of seven, and not fourteen, full sections per mile.

22. Minneapolis, etc., R. Co *v.* Duluth, etc., R. Co., 45 Minn. 104, 47 N. W. 464, holding that there not being enough swamp lands in the three counties named to fill such grant, and there being enough outside these counties to fill a grant to another road, the state had no right to appropriate to the latter lands in these counties, at least after the first road's grant had, by selection, attached specifically to such lands.

23. Minneapolis, etc., R. Co *v.* Duluth, etc., R. Co., 45 Minn. 104, 47 N. W. 464.

24. See Chouteau *v.* Allen, 70 Mo. 290.

25. Moss *v.* Kauffman, 131 Mo. 424, 33 S. W. 20, holding that, under Gen. St. (1865) c. 63, § 20, providing that a county might mortgage or sell its swamp lands to pay its subscription for railroad stock, a county had no right to deed its swamp lands in payment of such subscription.

Construction of statute.—A statute providing that any county through which a certain railroad may run, and every county through which any other railroad may run, with which the first road may be joined, connected, or intersected, is authorized and empowered to aid in the construction of the same or of such other road with which it may so connect, using its swamp lands for that purpose, does not require that the road to be aided shall be actually built before the county is authorized to give it aid, but the authority to construct the connecting road and the entering into a contract for its construction form a connection within the meaning of the statute so as to uphold a mortgage and conveyance by the county of its swamp and overflowed land in aid of such railroad. Kenicott *v.* Wayne County, 16 Wall. (U. S.) 452, 21 L. ed. 319.

26. Cape Girardeau, etc., R. Co. *v.* Hatton, 102 Mo. 45, 14 S. W. 763 [*followed* in St. Louis, etc., R. Co. *v.* Wayne County, 125 Mo.

appropriating the swamp and overflowed lands of a county to aid in the construction of a railroad has been ratified by the voters of a county, a contract in accordance therewith, made with the company, cannot be construed as entitling the company to a cash indemnity paid by the government to the county for swamp lands sold before selection.[27] It has been held that an amendment to a state constitution, providing generally the manner in which "all swamp lands now held by the state" should be disposed of, did not operate as a forfeiture or resumption of a grant of swamp lands previously made by the legislature to a railroad company, although the company was in default under the conditions of the grant;[28] but it has also been held that the interest of a railroad in lands granted to it was revested in the state without the further act on its part, on failure of the railroad company to complete the last section of its road within the time limited by the grant.[29]

J. Grants For Internal Improvements — 1. In General — a. Grants of Public Lands. Congress has from time to time made various grants to states of portions of the public domain to aid in internal improvements,[30] and whether or not such grants are *in præsenti* is a matter to be determined according to the intention of congress, as evidenced by the wording of the statutes.[31] Such grants should be strictly construed against the grantee and pass nothing but what is conveyed in clear and explicit language.[32] Many of the grants have been for designated improvements rather than for such improvements generally, and as the construction of such grants is in most respects of little general importance, it is deemed sufficient to refer in the note to some of the cases in which the various grants have been construed.[33]

351, 28 S. W. 494; Brown Estate Co. *v.* Wayne County, 123 Mo. 464, 27 S. W. 322].

27. Palmer *v.* Howard County, 45 Iowa 61, holding that this was true even though a subsequent act of the legislature recited that "the proceeds" of the swamp lands had been donated to the railroad company.

28. State *v.* Duluth, etc., R. Co., 97 Fed. 353.

Change of location of road.— Such amendment did not prevent the grant from attaching to a new location, especially where it appeared that, because of deficiencies within the grant limits, the grant would, in any event, cover all the swamp lands in the region in controversy, so that the lands which would pass under the grant were in no wise changed by the change of location. Cobb *v.* Clough, 83 Fed. 604.

29. White, etc., Townsite Co. *v.* J. Neils Lumber Co., 100 Minn. 16, 110 N. W. 371.

30. See Doll *v.* Meador, 16 Cal. 295; Godwin *v.* Davis, 74 Miss. 742, 21 So. 764; Werling *v.* Ingersoll, 181 U. S. 131, 21 S. Ct. 570, 45 L. ed. 782 [*affirming* 182 Ill. 25, 54 N. E. 1008]; Foley *v.* Harrison, 15 How. (U. S.) 433, 14 L. ed. 761 [*affirming* 5 La. Ann. 75]; Lessieur *v.* Price, 12 How. (U. S.) 59, 13 L. ed. 893.

31. See Van Valkenburg *v.* McCloud, 21 Cal. 330 [*following* Doll *v.* Meador, 16 Cal. 295, and *distinguishing* Foley *v.* Harrison, 15 How. (U. S.) 433, 14 L. ed. 761 (*affirming* 5 La. Ann. 75)] (holding that the act of congress of Sept. 4, 1841, granting land to certain states for internal improvements, although not a present grant as to states then in existence, was as to states subsequently admitted a present grant to each upon its admission to the Union); Strong *v.* Lehmer, 10 Ohio St. 93 (holding that the act of congress of May 24, 1828, granting lands to the state of Ohio for the construction of canals was a present grant requiring only an identification of the lands); Werling *v.* Ingersoll, 181 U. S. 131, 21 S. Ct. 570, 45 L. ed. 782 [*affirming* 182 Ill. 25, 54 N. E. 1008 (*following* Chicago *v.* McGraw, 75 Ill. 566)] (holding that the act of congress of March 30, 1822 [3 U. S. St. at L. 659] was not a present grant, but a reservation for the use of the state); Foley *v.* Harrison, 15 How. (U. S.) 433, 14 L. ed. 761 [*affirming* 5 La. Ann. 75, and *followed* in Godwin *v.* Davis, 74 Miss. 742, 21 So. 764] (holding that the act of congress of Sept. 4, 1841, providing for land grants to certain states for internal improvements was not a present grant, as the words "that there shall be granted to each State" imported that the grant should be made in the future); Lessieur *v.* Price, 12 How. (U. S.) 59, 13 L. ed. 893 (holding that the act of congress of March 6, 1820, granting four sections of land to the state of Missouri for a seat of government was a present grant); Cahn *v.* Barnes, 5 Fed. 326, 7 Sawy. 48 (holding that the act of congress of July 5, 1866 [14 U. S. St. at L. 89], granting land to the state of Oregon to aid in the construction of a wagon road was a grant *in præsenti*).

32. Dubuque, etc., R. Co. *v.* Litchfield, 23 How. (U. S.) 66, 16 L. ed. 500.

33. Des Moines river improvement grant see Whitehead *v.* Plummer, 76 Iowa 181, 40 N. W. 709; Bullard *v.* Des Moines, etc., R. Co., 62 Iowa 382, 17 N. W. 609; Des Moines Nav., etc., Co. *v.* Cooper, 41 Iowa 275; Stone *v.* McMahan, 4 Greene (Iowa) 72; U. S. *v.* Des Moines Nav., etc., Co., 142 U. S. 510, 12 S. Ct. 308, 35 L. ed. 1099 [*affirming* 43 Fed. 1]; Dubuque, etc., R. Co. *v.* Des Moines Valley R. Co., 109 U. S. 329, 3 S. Ct. 188, 27

b. Grants of Proceeds of Sales. Congress has also granted to certain states for internal improvements a certain percentage of the "net proceeds" of public lands lying within the state and afterward sold by the United States;[34] but under such a grant the state is not entitled to a percentage on the value of lands disposed of by the United States in satisfaction of military land warrants.[35] In a proceeding by the state to recover the amount so granted the United States may offset a claim against the state on state bonds held by the United States.[36]

2. Conditions of Grant. Whether conditions annexed to a grant are conditions precedent or subsequent is a matter which must be determined by the terms of the grant.[37] A grant in aid of a road, subject to the condition that the road be completed within a limited time, becomes absolute upon the performance of the condition within the time limited,[38] and where the government has made a grant *in præsenti* to aid in the construction of a road, with a condition subsequent that the road be completed in a certain time, a construction of the road after the time limited in the grant, but before the assertion of a claim to a forfeiture, is sufficient to prevent a forfeiture.[39] A duty imposed upon the governor of a state by acts of congress making a land grant for the construction of a canal and harbor, and by the state legislation on the subject, to issue his certificate of the fact, when he shall be satisfied that the work has been done in conformity with the law, is not one of a purely ministerial character, where he is left to no discretion.[40]

3. Lands Included in Grant or Subject to Selection. Whether lands are within the limits or subject to the operation of a grant for internal improvements is not a question of fact within the rule which makes the consideration and judgment of the land department upon questions of fact final.[41] And the land department cannot enlarge the limits of a grant of land by congress, but its act in issuing patents thereunder for lands lying outside the boundary fixed by the grant itself is without validity to convey title, and the patents will be canceled at the suit of the government.[42] Under a grant of public lands to a state for the improvement of the navigation of a river, to be selected in alternate sections within five miles of the river, the fact that government and state officers, in plats and lists of lands elected, mistook a branch of the river for the main river, in consequence of an

L. ed. 952; Wolsey *v.* Chapman, 101 U. S. 755, 25 L. ed. 915; Dubuque, etc., R. Co. *v.* Litchfield, 23 How. (U. S.) 66, 63 L. ed. 500; U. S. *v.* Des Moines Valley R. Co., 84 Fed. 40, 28 C. C. A. 267 [*affirming* 70 Fed. 435]. See 41 Cent. Dig. tit. "Public Lands," § 224.

Fox and Wisconsin rivers improvement grant see Zemlock *v.* U. S., 73 Wis. 363, 41 N. W. 445; Veeder *v.* Guppy, 3 Wis. 502. See 41 Cent. Dig. tit. "Public Lands," § 225.

Oregon wagon road grant see Altschul *v.* Clark, 39 Oreg. 315, 65 Pac. 991; U. S. *v.* Dalles Military Road Co., 140 U. S. 599, 11 S. Ct. 988, 35 L. ed. 560 [*reversing* 42 Fed. 351, 41 Fed. 493, 40 Fed. 114]; U. S. *v.* Willamette Valley, etc., Wagon Road Co., 55 Fed. 711; U. S. *v.* Dalles Military Road Co., 51 Fed. 629, 2 C. C. A. 419 [*affirmed* in 148 U. S. 49, 13 S. Ct. 465, 37 L. ed. 362]; U. S. *v.* California, etc., Land Co., 49 Fed. 496, 1 C. C. A. 330 [*affirmed* in 148 U. S. 31, 13 S. Ct. 458, 37 L. ed. 354]; Pengra *v.* Munz, 29 Fed. 830.

St. Mary's river canal grant see U. S. *v.* Michigan, 190 U. S. 379, 23 S. Ct. 742, 47 L. ed. 1103.

Western reserve and Miami road grant see Hollister *v.* Hunt, 9 Ohio 8.

34. See Indiana *v.* U. S., 148 U. S. 148, 13 S. Ct. 564, 37 L. ed. 401, 28 Ct. Cl. 553 [*affirming* 26 Ct. Cl. 583] construing Acts Cong. March 2, 1855, c. 139 (10 U. S. St. at L. 630), and March 3, 1857, c. 104 (11 U. S. St. at L. 200)].

35. Iowa *v.* McFarland, 110 U. S. 471, 4 S. Ct. 210, 28 L. ed. 198, construing Acts Cong. March 3, 1845, c. 76 (5 U. S. St. at L. 790), and April 18, 1818, c. 67 (3 U. S. St. at L. 431).

36. U. S. *v.* Louisiana, 127 U. S. 182, 8 S. Ct. 1047, 32 L. ed. 66 [*reversing* 23 Ct. Cl. 53].

37. See Wheeler *v.* Chicago, 68 Fed. 526, holding that the grants of land by congress in 1822 and 1827, in aid of the Illinois and Michigan canal, vested the lands at once in the state, the conditions as to filing maps and commencement and completion of the canal being conditions subsequent, and an entry and patent of part of the land, subsequent to such acts, vested no title in the patentee.

38. Pengra *v.* Munz, 29 Fed. 830.

39. U. S. *v.* Willamette Valley, etc., Wagon Road Co., 54 Fed. 807.

40. People *v.* State, 29 Mich. 320, 18 Am. Rep. 89.

41. U. S. *v.* Coos Bay Wagon-Road Co., 89 Fed. 151.

Conclusiveness of decisions of land department see, generally, *infra*, II, L, 15.

42. U. S. *v.* Coos Bay Wagon-Road Co., 89 Fed. 151.

imperfect knowledge of the geography of the county, will not affect the validity of the grant as really made, nor subject the lands along the main river to a subsequent railroad grant, within the description of which they would otherwise fall.[43] A grant to a state of alternate sections of land to aid in the construction of a canal plainly implies a grant of a right of way for the canal through the sections reserved to the United States.[44] A grant to a state in aid of internal improvements does not include, or authorize the state to select, land previously granted to the state for other purposes,[45] or otherwise disposed of [46] or reserved [47] by the United States, or land which is occupied by a claimant who has acquired rights therein under the general land laws.[48] A decree in a bill in equity brought by the United States to avoid patents for internal improvement land on the ground of forfeiture is a bar to a subsequent suit against the same defendant to recover the same land on the ground that it was not included in the grant.[49]

4. Selection and Certification. Congressional grants are frequently of certain amounts of land to be selected by the state,[50] or by the land officers,[51] and such a grant does not attach to any particular lands until the selections have been made, and approved by the land department,[52] when the general gift of the quantity becomes a particular gift of the lands located, vesting in the state a perfect and

Cancellation of patents see, generally, *infra*, II, O, 2, b.

43. Dubuque, etc., R. Co. *v.* Des Moines Valley R. Co., 109 U. S. 329, 3 S. Ct. 188, 27 L. ed. 952.

44. Werling *v.* Ingersoll, 181 U. S. 131, 21 S. Ct. 570, 45 L. ed. 782 [*affirming* 182 Ill. 25, 54 N. E. 1008].

45. Illinois, etc., Canal *v.* Haven, 10 Ill. 548; Lake Superior Ship-Canal, etc., Co. *v.* Finan, 155 U. S. 385, 15 S. Ct. 115, 39 L. ed. 194 [*reversing* 44 Fed. 587]; Lake Superior Ship Canal, etc., Co. *v.* Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183 [*affirming* 44 Fed. 587]; Lake Superior Ship-Canal, etc., Co. *v.* Cunningham, 44 Fed. 819.

46. Creps *v.* Wilkinson, 9 Ohio 200.

Lands previously sold to an individual on credit did not pass, although the purchaser had defaulted, where an extension of credit had been given which had not expired at the time of the grant to the state. Creps *v.* Wilkinson, 9 Ohio 200.

Pending a determination as to whether certain land is included in a prior grant, it cannot be selected by the state as part of the land granted to it for internal improvements. Shepley *v.* Cowan, 91 U. S. 330, 23 L. ed. 424.

47. Spaulding *v.* Martin, 11 Wis. 262; Wolsey *v.* Chapman, 101 U. S. 755, 25 L. ed. 915; Patterson *v.* Tatum, 18 Fed. Cas. No. 10,830, 3 Sawy. 164. See also Copley *v.* Dinkgrave, 27 La. Ann. 601.

48. Terry *v.* Megerle, 24 Cal. 609, 85 Am. Dec. 84; Eastern Oregon Land Co. *v.* Brosnan, 147 Fed. 807.

Priority of right gives priority of title, in the case of a conflict between a preëmption claim and the location of an internal improvement land warrant on lands granted to the state by congress. Ellis *v.* Old, 16 La. Ann. 146. See also Copley *v.* Dinkgrave, 27 La. Ann. 601.

An act of congress confirming selections made by a state does not embrace or affect preëmption rights previously acquired by individual settlers by conforming to the requisitions of the statute. Doe *v.* Stephenson, 9 Ind. 144.

Land merely occupied by a settler who has made no filing thereon under the land laws at the time of the grant to the state for internal improvements passes under such grant. Eastern Oregon Land Co. *v.* Brosnan, 147 Fed. 807.

Unsurveyed land lying within the boundaries of a grant reserving from its operation all lands to which homestead or preëmption rights had attached, which at the date of the grant was occupied by a homestead settler, who took timely action after its survey to acquire title, is not subject to the grant, and its certification thereunder by the land department conveys no title. U. S. *v.* Coos Bay Wagon-Road Co., 89 Fed. 151.

49. U. S. *v.* California, etc., Land Co., 192 U. S. 355, 24 S. Ct. 266, 48 L. ed. 476 [*reversing* 103 Fed. 549].

50. See Godwin *v.* Davis, 74 Miss. 742, 21 So. 764.

How amount of grant made up.—A grant by act of congress of four sections of the public lands to a state, for the purpose of fixing the seat of government there, to be located under the direction of the legislature of the state, in one body as near as might be, did not oblige the state to select four entire sections, but authorized it to select fractional parts of more than four sections to make up the amount of land granted. Lessieur *v.* Price, 12 How. (U. S.) 59, 13 L. ed. 893.

51. Koch *v.* Streuter, 232 Ill. 594, 83 N. E. 1072.

52. Koch *v.* Streuter, 232 Ill. 594, 83 N. E. 1072; Altschul *v.* Gittings, 102 Fed. 36, holding that until such time the lands granted are not taxable by the state.

The only legal evidence of the selection of lands given to the state of Indiana by the act of congress of March 2, 1827, is a certified copy thereof from the office of the secretary of the treasury at Washington, unless it be made to appear that the original is no longer to be

absolute title to the same.[53] A patent to the state takes effect as of the date of the location and selection of the land,[54] and the regularity of the selection cannot be questioned by one who does not claim under either the state or the United States.[55] Where an act of congress has confirmed to a state and its grantees certain lands erroneously certified to the state by the secretary of the interior under a prior grant for an internal improvement, the United States is estopped from asserting any claim or right to such lands.[56]

5. Disposal of Lands by State.[57] It is the province of the state legislature alone to determine the manner in which lands granted by congress to the state for internal improvements may be disposed of in furtherance of the purposes of the grant,[58] and its action in such matters is final unless in violation of some consti-

found there. Doe *v.* Stephenson, 1 Ind. 115, Smith (Ind.) 20.

53. Godwin *v.* Davis, 74 Miss. 742, 21 So. 764 [*following* Van Wyck *v.* Knevals, 106 U. S. 360, 1 S. Ct. 336, 27 L. ed. 201]; Lessieur *v.* Price, 12 How. (U. S.) 59, 13 L. ed. 893; Patterson *v.* Tatum, 18 Fed. Cas. No. 10,830, 3 Sawy. 164 [*approving* Doll *v.* Meador, 16 Cal. 295].

Survey a prerequisite to selection.—A state has no right to select and locate the lands granted it by the act of congress of Sept. 4, 1841, section 8, for internal improvements until after the lands have been surveyed by the general government. Terry *v.* Megerle, 24 Cal. 609, 85 Am. Dec. 84 [*disapproving* Doll *v.* Meador, 16 Cal. 295, and *followed* in Hastings *v.* Jackson, 46 Cal. 234].

The approval of the United States land department of the list of lands to be transferred to Louisiana under the donation act of 1841 vested the title to those lands in the state, subject to any equitable right existing at the time to the lands, and there was not reserved to the land department the power to annul the vested title of the state by subsequently conferring on other parties an unconditional and conclusive title to the same land. Ludeling *v.* Vester, 20 La. Ann. 433.

Presumption of selection.— The fact that a grant was confirmed by subsequent acts of congress and accepted by acts of the state raises a presumption that a selection was properly made. Strong *v.* Lehmer, 10 Ohio St. 93.

Evidence.— In a suit by canal trustees for a trespass upon certain lands alleged to belong to them, a list of lands selected by the state for the completion of the canal, embracing the lands trespassed upon, is *prima facie* evidence to establish title in the trustees. Evans *v.* Wabash, etc., Canal, 15 Ind. 319.

54. Patterson *v.* Tatum, 18 Fed. Cas. No. 10,830, 3 Sawy. 164.

Relation back of patents generally see *infra*, II, M, 9, d.

55. Godwin *v.* Davis, 74 Miss. 742, 21 So. 764.

56. U. S. *v.* Des Moines Valley R. Co., 84 Fed. 40, 28 C. C. A. 267 [*affirming* 70 Fed. 435], holding that a provision in the confirmatory act that nothing therein should be so construed as to adversely affect any existing right or title, or right to acquire title, under the homestead and preëmption laws, etc., did not reserve to the United States the privilege of itself asserting the rights of homestead claimants.

57. Disposal of canal lands in Illinois see Whipple *v.* Whipple, 109 Ill. 418; People *v.* Force, 100 Ill. 549; Williams *v.* Crean, 25 Ill. 60; Granger *v.* Illinois, etc., Canal, 18 Ill. 443; Granger *v.* Illinois, etc., Canal, 13 Ill. 740; Illinois, etc., Canal *v.* Brainard, 12 Ill. 487; People *v.* Illinois, etc., Canal, 4 Ill. 153; Illinois, etc., Canal *v.* Calhoun, 2 Ill. 521. See 41 Cent. Dig. tit. "Public Lands," § 223.

Disposal of canal lands in Indiana see Burnet *v.* Wabash, etc., Canal, 50 Ind. 251.

58. See State *v.* Budge, 14 N. D. 532, 105 N. W. 724, so holding in respect to a grant for public buildings.

Appraisal.—An agent of the state has no power to sell internal improvement lands until they have been appraised as provided by statute. Crans *v.* Francis, 24 Kan. 750.

Absolute sale.—Internal improvement lands of the state can be disposed of only by absolute sale, and a conditional sale thereof is unauthorized and void. Wright *v.* Burnham, 31 Minn. 285, 17 N. W. 479.

Proportion of lands to be conveyed.—When a state law confers on a ship canal and harbor company certain lands granted by congress to aid in the construction of a ship canal, and provides that, when the governor is satisfied that such company has done a specified portion of the work required in the construction of the canal, he shall certify the same, and in his certificate "shall determine the proportion of said lands the said company has become entitled to in consideration of said work," whereupon the commissioners of school lands shall convey by patent to the company "said proportion of said lands respectively as selected by said company," the proportion of such lands to be conveyed must be based upon the value, and not on the quantity. State *v.* School, etc., Land Com'rs, 34 Wis. 162.

Lands which by an act of the legislature have been made a trust estate for the payment of certain bonds and placed under the control of trustees appointed by law are subject to the power of a court of equity to raise therefrom the money due and chargeable thereon, and the court may appoint its own agents to make sales thereof, and compel the trustees holding the legal title to execute conveyances for the lands sold by its agents.

tutional provision or clearly contrary to the terms of the grant.[59] Where a state has disposed of lands granted to it for internal improvements, the United States only is entitled to object to the non-performance of the conditions with reference to the disposition of the lands.[60] A patent from the state for land as internal improvement land is conclusive as against the state and persons claiming under it that the land was included in the internal improvement grant;[61] but it has been held that a deed of conveyance, executed by the trustees of the internal improvement fund, does not carry with it a presumption that the title was in them and that they could lawfully convey the premises.[62] A certificate for canal land which shows on its face that a part of the purchase-money is unpaid is not evidence of legal title.[63] Where a purchaser of canal lands assigns and delivers his certificate of purchase to another, the assignor has thereafter no interest in the lands which will descend to his heirs.[64] Where the grant is a present grant of the fee simple upon condition subsequent, *bona fide* purchasers of the land will not be denied protection as such on the ground that no patents had been issued for the land when they purchased.[65] Where the act making a grant for a road authorized the sale of the lands on the certificate of the governor that the road was completed, *bona fide* purchasers from the road company had a right to rely on such certificate.[66] A state statute providing that the decision of the state board of land commissioners on a contest shall be final until set aside by a court of competent jurisdiction does not authorize an appeal from the decision of the board in a contest determined by it.[67] One not claiming under either the state or the United States cannot urge that the state's patent of lands selected by it under an act of congress making a grant for internal improvements is invalid because the lands were sold for less than the price prescribed by such act.[68] Where it appears from evidence *dehors* conflicting grants that those last issued were predicated upon prior locations made under internal improvement certificates in due form of law, and those first issued were not founded upon sufficient proofs, the last in date of issuance will reflect the paramount title.[69] The title of a purchaser of internal improvement land does not depend upon the faithful application by the state of the funds derived from such lands to the purposes for which the grants were made.[70] The fact that a sale under decree in a

Vose *v.* Internal Imp. Fund, 28 Fed. Cas. No. 17,008, 2 Woods 647.

Ascertainment of preëmption rights.—A state legislature has authority to provide for the appointment of commissioners to ascertain and report the persons entitled as occupants to preëmption rights in land granted to the state for internal improvements, and to make the decision of such commissioners final. Bell *v.* Payne, 2 Stew. (Ala.) 414.

59. State *v.* Budge, 14 N. D. 532, 105 N. W. 724.

Diversion from purpose of grant.— The lands granted by congress to new states for "roads, railroads, bridges, canals and improvements of water courses, and drainage of swamps" could not be donated to schools by the state without consent of congress. King *v.* Missouri River, etc., R. Co., 8 Ohio Dec. (Reprint) 187, 6 Cinc. L. Bul. 213.

60. Nichols *v.* Southern Oregon Co., 135 Fed. 232, holding that no such objection can be raised by a subsequent applicant to purchase the land.

61. Chandler *v.* Calumet, etc., Min. Co., 36 Fed. 665 [*affirmed* in 149 U. S. 79, 13 S. Ct. 798, 37 L. ed. 657]; Cahn *v.* Barnes, 5 Fed. 326, 7 Sawy. 48. See also Pengra *v.* Munz, 29 Fed. 830.

62. Doe *v.* Roe, 13 Fla. 602, holding that their title is not original, and like that of any other person should be proved and is subject to be overcome by a superior title.

63. Dickerson *v.* Nelson, 4 Ind. 160, 280.

64. Wright *v.* Shepherd, 47 Ind. 176, holding that a conveyance made by heirs of the purchaser passed no title.

65. U. S. *v.* Willamette Valley, etc., Wagon Road Co., 55 Fed. 711.

66. U. S. *v.* Dalles Military Road Co., 51 Fed. 629, 2 C. C. A. 419 [*affirmed* in 148 U. S. 49, 13 S. Ct. 465, 37 L. ed. 362], holding further that the fact that the governor's certificate of the completion of the road was dated only about eight months after the date of a state act granting the lands to a road company was not sufficient to put a purchaser from the road company on inquiry as to whether the road had been actually built, since there was nothing to show that the work might not have been commenced before the date of such grant.

67. Pierson *v.* State Land Com'rs, 14 Ida. 159, 93 Pac. 775.

68. Godwin *v.* Davis, 74 Miss. 742, 21 So. 764.

69. Broussard *v.* Pharr, 48 La. Ann. 230, 19 So. 272.

70. Scuddy *v.* Shaffer, 10 La. Ann. 133.

proceeding to enforce a state lien for purchase-money on internal improvement land was for an inadequate price is not ground for vacating it, in the absence of complaint by the state, and where there is no evidence that on a resale the land would bring more than the debt due the state; [71] but a purchaser from the state's vendee, who is not made a party or served with notice of the proceeding on the part of the state to foreclose, may, after decree and sale thereunder, and before a confirmation of the sale, apply to redeem and be allowed to do so.[72] Under some statutes where a purchaser fails to pay the purchase-money, the land reverts to the state.[73] Where the holder of a patent issued by the state to lands entered with internal improvement warrants consents to the cancellation of his entries and authorizes the delivery of the warrants to a third person, by whose transferee they are used for the entry of other lands, the title to the lands first entered becomes again vested in the state, and cannot be divested by a sale for taxes.[74]

6. Disposition and Application of Proceeds. Where a grant for "internal improvements" does not further specify what kind of improvements is intended, the courts must consider the sense in which the words are used in American legislation; [75] and so, to come within such a grant, the improvements must be within the state and must be of a fixed and permanent nature, as improvements of real property, and must be designed and intended for the benefit of the public.[76] So the construction of a system of reservoirs and canals for the purpose of irrigation and domestic use, or for changing the channels of streams so as to better control the water for such uses, is within such a grant, provided the control of the improvements is retained by the state; [77] but public buildings, such as asylums, state houses, universities, colleges, and other public institutions of a like character, are not internal improvements within the meaning of a grant for this purpose.[78] The erection of a residence for the governor at the capital is within the purposes of a grant to the state for public buildings at the capital.[79] A statute providing for the distribution of the internal improvement fund among the counties of the state has been held not in conflict with the act of congress donating such lands to the state.[80]

K. Grants in Aid of Railroads — 1. Grants of Land to Aid in Construction — a. In General. Congress has from time to time made numerous and liberal grants of public lands to aid in the construction of railroads. Some of such grants have been made directly to the railroad companies to which the aid was extended,[81] while other grants have been made to the states for the purpose of enabling them to aid the companies which were the real beneficiaries of the grants.[82] Such grants are usually of the odd-numbered sections of land within a certain distance from the line of the road, usually called the place limits.[83]

Disposition and application of proceeds see *infra*, II, J, 6.

71. McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597.

72. Haskell *v.* State, 31 Ark. 91, holding further that the fact that the purchaser under the decree has procured a patent from the governor, before confirmation of the sale, will not divest the chancellor of the power to set it aside, and permit the land to be redeemed.

73. Lewis *v.* Moorman, 7 Port. (Ala.) 522, holding that the state could not enforce a claim against a purchaser for the unpaid purchase-money.

74. Slattery *v.* Glassell, 117 La. 550, 42 So. 135.

75. *In re* Internal Imp., 18 Colo. 317, 32 Pac. 611 [*approved* in *In re* Internal Imp. Fund, 24 Colo. 247, 48 Pac. 807]. See, generally, Internal Improvements, 22 Cyc. 1589.

76. *In re* Internal Improvements, 18 Colo. 317, 32 Pac. 611.

77. *In re* Internal Imp. Fund, 12 Colo. 287, 21 Pac. 484; *In re* Internal Imp. Fund, 12 Colo. 285, 21 Pac. 483.

78. *In re* Internal Imp. Fund, 24 Colo. 247, 48 Pac. 807; *In re* Internal Imp., 18 Colo. 317, 32 Pac. 611.

79. State *v.* Budge, 14 N. D. 532, 105 N. W. 724.

80. Featherston *v.* Adams, 10 Ark. 163, holding further that such a statute was not in conflict with the state constitution.

81. See Oregon, etc., R. Co. *v.* U. S., 67 Fed. 650, 14 C. C. A. 600; Southern Pac. R. Co. *v.* Poole, 32 Fed. 451, 12 Sawy. 538.

82. See Illinois Cent. R. Co. *v.* Chicago, 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622 [*affirming* 173 Ill. 471, 50 N. E. 1104, 53 L. R. A. 408]; Kansas City, etc., R. Co. *v.* Brewster, 118 U. S. 682, 7 S. Ct. 66, 30 L. ed. 281; Grinnell *v.* Chicago, etc., R. Co., 103 U. S. 739, 26 L. ed. 456.

83. See U. S. *v.* Union Pac. R. Co., 148

b. When Title Vests — (i) *In General.* Grants in aid of railroads have usually been *in præsenti*,[84] but the definite location of the road is necessary to identify the sections on either side of it.[85] The grant is in the nature of a float

U. S. 562, 13 S. Ct. 724, 37 L. ed. 560 [*affirming* 37 Fed. 551].

84. *Alabama.*— Vankirk Land, etc., Co. *v.* Green, 132 Ala. 348, 31 So. 484; McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3; Swann *v.* Larmore, 70 Ala. 555; Swann *v.* Lindsey, 70 Ala. 507.

California.— Southern Pac. Co. *v.* Lipman, 148 Cal. 480, 83 Pac. 445; Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388; Jatunn *v.* Smith, 95 Cal. 154, 30 Pac. 200; Forrester *v.* Scott, 92 Cal. 398, 28 Pac. 575; McLaughlin *v.* Menotti, 89 Cal. 354, 26 Pac. 880.

Idaho.— Washington, etc., R. Co. *v.* Northern Pac. R. Co., 2 Ida. (Hasb.) 550, 21 Pac. 658.

Iowa.— Cole *v.* Des Moines Valley R. Co., 76 Iowa 185, 40 N. W. 711; Whitehead *v.* Plummer, 76 Iowa 181, 40 N. W. 709; Burlington, etc., R. Co. *v.* Lawson, 58 Iowa 145, 12 N. W. 229; Chicago, etc., R. Co. *v.* Grinnell, 51 Iowa 476, 1 N. W. 712.

Kansas.— Atchison, etc., R. Co. *v.* Rockwood, 25 Kan. 292.

Michigan.— Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 437, 32 N. W. 726, 37 N. W. 537; Johnson *v.* Ballou, 28 Mich. 379.

Minnesota.— Sage *v.* Rudnick, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106; Weeks *v.* Bridgman, 41 Minn. 352, 43 N. W. 81, 46 Minn. 390, 49 N. W. 191.

Missouri.— Wilson *v.* Beckwith, 140 Mo. 359, 41 S. W. 985; Wright *v.* Gish, 94 Mo. 110, 6 S. W. 704 [*followed* in Wunderlich *v.* Spradling, 121 Mo. 361, 25 S. W. 1063]; Wright *v.* Howe, (1888) 8 S. W. 561; St. Louis, etc., R. Co. *v.* McGee, 75 Mo. 522.

Montana.— Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116; Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 2 Pac. 322.

Nebraska.— Wiese *v.* Union Pac. R. Co., 77 Nebr. 40, 108 N. W. 175; Vance *v.* Burlington, etc., R. Co., 12 Nebr. 285, 11 N. W. 334.

North Dakota.— Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 51 N. W. 386.

Wisconsin.— Paige *v.* Kolman, 93 Wis. 435, 67 N. W. 700.

United States.— Missouri Valley Land Co. *v.* Wiese, 208 U. S. 234, 28 S. Ct. 294, 52 L. ed. 466 [*affirming* 77 Nebr. 40, 108 N. W. 175]; Northern Lumber Co. *v.* O'Brien, 204 U. S. 190, 27 S. Ct. 249, 51 L. ed. 438 [*affirming* 139 Fed. 614, 71 C. C. A. 598 (*affirming* 134 Fed. 303)]; Southern Pac. R. Co. *v.* Bell, 183 U. S. 675, 22 S. Ct. 232, 46 L. ed. 383 [*affirming* (Cal. 1899) 58 Pac. 1116 (*following* Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388)]; Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, 22 S. Ct. 154, 46 L. ed. 307 [*reversing* 98 Fed. 27, 38 C. C. A. 619 (*affirming* 86 Fed. 962)]; U. S. *v.* Loughrey, 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420 [*affirming* 71 Fed. 921, 18 C. C. A. 391]; Missouri, etc., R. Co. *v.* Cook, 163 U. S. 491, 16 S. Ct. 1093, 41 L. ed. 239 [*affirming* 47 Kan. 216, 27 Pac. 847]; Lake Superior Ship Canal, etc., Co. *v.* Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183; U. S. *v.* Union Pac. R. Co., 148 U. S. 562, 13 S. Ct. 724, 37 L. ed. 560 [*affirming* 37 Fed. 551]; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 45 Fed. 596]; Desseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 380, 35 L. ed. 77 [*affirming* 26 Fed. 551]; St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. ed. 767 [*reversing* 26 Fed. 569]; Wood *v.* Burlington, etc., R. Co., 104 U. S. 329, 26 L. ed. 772; Grinnell *v.* Chicago, etc., R. Co., 103 U. S. 739, 26 L. ed. 456; Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 23 L. ed. 634; Schulenberg *v.* Harriman, 21 Wall. 44, 22 L. ed. 551 [*affirming* 21 Fed. Cas. No. 12,486, 2 Dill. 398]; U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131; Francœur *v.* Newhouse, 40 Fed. 618, 14 Sawy. 351; Shepard *v.* Northwestern L. Ins. Co., 40 Fed. 341; U. S. *v.* Curtner, 38 Fed. 1 [*reversed* on other grounds in 149 U. S. 662, 13 S. Ct. 985, 37 L. ed. 890]; Denny *v.* Dodson, 32 Fed. 899, 13 Sawy. 68; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457; Southern Pac. R. Co. *v.* Dull, 22 Fed. 489; Sanger *v.* Sargent, 21 Fed. Cas. No. 12,319, 8 Sawy. 93; Iowa Railroad Grants, 8 Op. Att.-Gen. 244.

See 41 Cent. Dig. tit. "Public Lands," § 232.

85. *Alabama.*— Swann *v.* Larmore, 70 Ala. 555; Swann *v.* Lindsey, 70 Ala. 507.

California.— Jatunn *v.* Smith, 95 Cal. 154, 30 Pac. 200.

Kansas.— Atchison, etc., R. Co. *v.* Rockwood, 25 Kan. 292.

Minnesota.— Donohue *v.* St. Paul, etc. R. Co., 101 Minn. 239, 112 N. W. 413; Weeks *v.* Bridgman, 41 Minn. 352, 43 N. W. 81, 46 Minn. 390, 49 N. W. 191.

Missouri.— Hannibal, etc., R. Co. *v.* Moore, 37 Mo. 338.

Montana.— U. S. *v.* Northern Pac. R. Co., 6 Mont. 351, 12 Pac. 769.

United States.— Northern Pac. R. Co. *v.* O'Brien, 204 U. S. 190, 27 S. Ct. 249, 37 L. ed. 438 [*affirming* 139 Fed. 614, 71 C. C. A. 598 (*affirming* 134 Fed. 303)]; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77; Grinnell *v.* Chicago, etc., R. Co., 103 U. S. 739, 26 L. ed. 456; Sanger *v.* Sargent, 21 Fed. Cas. No. 12,319, 8 Sawy. 93; Iowa Railroad Grants, 8 Op. Atty.-Gen. 244.

See 41 Cent. Dig. tit. "Public Lands," § 232.

Places named in grant as defining route.— A definite location of the road is required to

and does not attach to any particular parcel of the public lands, until the road is located,[86] and a map of the definite location filed,[87] and accepted and approved by the secretary of the interior,[88] or, under some grants, until the general route of the road is fixed; [89] but when this is done so that a surveyor or the officers of the land department can protract the line of the route on the maps of the public

be established in the manner stated, even with respect to land in the vicinity of places named in the granting act as defining the route. Weeks *v.* Bridgman, 41 Minn. 352, 43 N. W. 81, 46 Minn. 390, 49 N. W. 191.

86. *Iowa.*— Burlington, etc., R. Co. *v.* Lawson, 58 Iowa 145, 12 N. W. 229; American Emigrant Co. *v.* Chicago, etc., R. Co., 47 Iowa 515.

Michigan.— Johnson *v.* Ballou, 28 Mich. 379.

Minnesota.— Weeks *v.* Bridgman, 41 Minn. 352, 43 N. W. 81, 46 Minn. 390, 49 N. W. 191.

Missouri.— Wright *v.* Howe, (1888) 8 S. W. 561.

North Dakota.— Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 51 N. W. 386.

United States.— Northern Pac. R. Co. *v.* O'Brien, 204 U. S. 190, 27 S. Ct. 249, 51 L. ed. 438 [*affirming* 139 Fed. 614, 71 C. C. A. 598 (*affirming* 134 Fed. 303)]; Nelson *v.* Northern Pac. R. Co., 188 U. S. 108, 23 S. Ct. 302, 47 L. ed. 406 [*reversing* 22 Wash. 521, 61 Pac. 703]; U. S. *v.* Loughrey, 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420 [*affirming* 71 Fed. 921, 18 C. C. A. 391]; Menotti *v.* Dillon, 167 U. S. 703, 17 S. Ct. 945, 42 L. ed. 333; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 45 Fed. 596]; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77 [*affirming* 26 Fed. 551]; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659; Northern Pac. R. Co. *v.* Cannon, 46 Fed. 224; Iowa Railroad Grants, 8 Op. Atty.-Gen. 244.

See 41 Cent. Dig. tit. "Public Lands," § 232.

87. *California.*— Southern Pac. R. Co. *v.* Lipman, 148 Cal. 480, 83 Pac. 445.

Iowa.— Sioux City, etc., Land Co. *v.* Griffey, 72 Iowa 505, 34 N. W. 304; Iowa Falls, etc., R. Co. *v.* Beck, 67 Iowa 421, 25 N. W. 686.

Kansas.— Walbridge *v.* Russell County Com'rs, 74 Kan. 341, 86 Pac. 473.

Minnesota.— Sage *v.* Rudnick, 91 Minn. 325, 100 N. W. 106, 98 N. W. 89; Weeks *v.* Bridgman, 41 Minn. 352, 43 N. W. 81, 46 Minn. 390, 49 N. W. 191.

Missouri.— Wright *v.* Howe, (1888) 8 S. W. 561.

Nebraska.— Wiese *v.* Union Pac. R. Co., 77 Nebr. 40, 108 N. W. 175.

Nevada.— Stanton *v.* Crane, 25 Nev. 114, 58 Pac. 53.

United States.— Missouri Valley Land Co. *v.* Wiese, 208 U. S. 234, 28 S. Ct. 294, 52 L. ed. 466 [*affirming* 77 Nebr. 40, 108 N. W. 175]; U. S. *v.* Northern Pac. R. Co., 193 U. S. 1, 24 S. Ct. 330, 43 L. ed. 593; Southern Pac. R. Co. *v.* Bell, 183 U. S. 675, 22 S. Ct. 232, 46 L. ed. 383 [*affirming* (Cal. 1899) 58 Pac. 1116 (*following* Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388)]; Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, 22 S. Ct. 154, 46 L. ed. 307 [*reversing* 98 Fed. 27, 38 C. C. A. 619 (*affirming* 86 Fed. 962)]; U. S. *v.* Oregon, etc., R. Co., 176 U. S. 28, 20 S. Ct. 261, 44 L. ed. 358 [*affirming* 77 Fed. 67, 23 C. C. A. 15 (*reversing* 69 Fed. 899), and *followed* in Wilcox *v.* Eastern Oregon Land Co., 176 U. S. 51, 20 S. Ct. 269, 44 L. ed. 368 (*affirming* 79 Fed. 719, 25 C. C. A. 164)]; Northern Pac. R. Co. *v.* De Lacey, 174 U. S. 622, 19 S. Ct. 791, 43 L. ed. 1111 [*reversing* 66 Fed. 450]; Northern Pac. R. Co. *v.* Sanders, 166 U. S. 620, 17 S. Ct. 671, 41 L. ed. 620; Sioux City, etc., Town-Lot, etc., Co. *v.* Griffey, 143 U. S. 32, 12 S. Ct. 362, 36 L. ed. 64 [*affirming* 72 Iowa 505, 34 N. W. 304]; Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; Walden *v.* Knevals, 114 U. S. 373, 5 S. Ct. 898, 29 L. ed. 167; Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122; Van Wyck *v.* Knevals, 106 U. S. 360, 1 S. Ct. 336, 27 L. ed. 201; Hoyt *v.* Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404; U. S. *v.* Oregon, etc., R. Co., 152 Fed. 473; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659; St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558; Northern Pac. R. Co. *v.* Hinchman, 53 Fed. 523; Northern Pac. R. Co. *v.* Sanders, 46 Fed. 239 [*affirmed* in 47 Fed. 604]; Parker *v.* New Orleans, etc., R. Co., 33 Fed. 693; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457; Southern Pac. R. Co. *v.* Dull, 22 Fed. 489, 10 Sawy. 506.

See 41 Cent. Dig. tit. "Public Lands," § 232.

Maps held insufficient see U. S. *v.* Northern Pac. R. Co., 193 U. S. 1, 24 S. Ct. 330, 43 L. ed. 593; Doherty *v.* Northern Pac. R. Co., 177 U. S. 421, 20 S. Ct. 677, 44 L. ed. 830; U. S. *v.* Oregon, etc., R. Co., 176 U. S. 28, 20 S. Ct. 621, 44 L. ed. 358; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 45 Fed. 596].

88. Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, 22 S. Ct. 154, 46 L. ed. 307 [*reversing* 98 Fed. 27, 38 C. C. A. 619 (*affirming* 86 Fed. 962)]; Hoyt *v.* Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404; U. S. *v.* Oregon, etc., R. Co., 152 Fed. 473.

89. Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116.

Fixing the line of definite location if the same is along the line of the general route does not add anything to the efficacy of the grant. Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116.

domain within the limits of the grants, the identity of the lands granted is mathematically ascertained,[90] and the grant takes effect.[91] The title when perfected relates back to the date of the grant,[92] and after the rights of a railroad company

90. Wood *v.* Burlington, etc., R. Co., 104 U. S. 329, 26 L. ed. 772; Grinnell *v.* Chicago, etc., R. Co., 103 U. S. 739, 26 L. ed. 456; Missouri and Arkansas Grants, 9 Op. Atty.-Gen. 41. See also Lake Superior Ship Canal, etc., Co. *v.* Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183 [*affirming* 44 Fed. 819].

91. *California.*— Southern Pac. Co. *v.* Lipman, 148 Cal. 480, 83 Pac. 445; Jatunn *v.* Smith, 95 Cal. 154, 30 Pac. 200; McLaughlin *v.* Menotti, 89 Cal. 354, 26 Pac. 880.

Iowa.— Sioux City, etc., Town Lot, etc., Co. *v.* Griffey, 72 Iowa 505, 34 N. W. 304; Chicago, etc., R. Co. *v.* Grinnell, 51 Iowa 476, 1 N. W. 712.

Kansas.— Walbridge *v.* Russell County, 74 Kan. 341, 86 Pac. 473; Atchison, etc., R. Co. *v.* Bobb, 24 Kan. 673.

Minnesota.— Donohue *v.* St. Paul, etc., R. Co., 101 Minn. 239, 112 N. W. 413; Sage *v.* Rudnick, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106.

Missouri.—Wright *v.* Howe, (1888) 8 S. W. 561; Hannibal, etc., R. Co. *v.* Moore, 37 Mo. 338.

Montana.— Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116.

Nevada.— Stanton *v.* Crane, 25 Nev. 114, 58 Pac. 53.

Wisconsin.— Paige *v.* Kolman, 93 Wis. 435, 67 N. W. 700.

United States.— Missouri Valley Land Co. *v.* Wiese, 208 U. S. 234, 28 S. Ct. 294, 52 L. ed. 466 [*affirming* 77 Nebr. 40, 108 N. W. 175]; Southern Pac. R. Co. *v.* Bell, 183 U. S. 675, 22 S. Ct. 232, 46 L. ed. 383 [*affirming* (Cal. 1899) 58 Pac. 1116 (*following* Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388)]; Northern Pac. R. Co. *v.* De Lacey, 174 U. S. 622, 19 S. Ct. 791, 43 L. ed. 1111 [*reversing* 66 Fed. 450]; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 109 [*reversing* 45 Fed. 596]; Sioux City, etc., Town-Lot, etc., Co. *v.* Griffey, 143 U. S. 32, 12 S. Ct. 362, 36 L. ed. 64 [*affirming* 72 Iowa 505, 34 N. W. 304]; Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77 [*affirming* 26 Fed. 551]; St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. ed. 767 [*reversing* 26 Fed. 569]; Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858; Walden *v.* Knevals, 114 U. S. 373, 5 S. Ct. 898, 29 L. ed. 167; Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122; Van Wyck *v.* Knevals, 106 U. S. 360, 1 S. Ct. 336, 27 L. ed. 201; Schulenberg *v.* Harriman, 21 Wall. 44, 22 L. ed. 551 [*affirming* 21 Fed. Cas. No. 12,486, 2 Dill. 398]; U. S. *v.* Oregon, etc., R. Co., 152 Fed. 473; St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558; Southern Pac. R. Co. *v.* Stanley, 49 Fed. 263; Northern Pac. R. Co. *v.* Cannon, 46 Fed. 224; U. S. *v.* Northern Pac. R. Co., 41 Fed. 842; Parker *v.* New Orleans, etc., R. Co., 33 Fed. 693 [*reversed* on other grounds in 143 U. S. 42, 12 S. Ct. 364, 36 L. ed. 66]; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457; Southern Pac. R. Co. *v.* Dull, 22 Fed. 489, 10 Sawy. 60; Taboreck *v.* Burlington, etc., R. Co., 13 Fed. 103, 2 McCrary 407; Knevals *v.* Hyde, 6 Fed. 651, 1 McCrary 402; Sanger *v.* Sargent, 21 Fed. Cas. No. 12,319, 8 Sawy. 93.

See 41 Cent. Dig. tit. "Public Lands," § 232.

A grant in aid of a branch railroad to be constructed on the same terms and conditions as the main line is not taken out of the general rule that the grant is one *in præsenti*, and that, on filing the map of definite location, the title passes to the railway company so that it can be held adversely as against such company, because the road which might build the branch was not, or may not have been, in existence at the time of the passage of the act, nor because of a provision that the company shall be "entitled to receive" alternate sections of land for ten miles in width on each side of the right of way along the whole branch, nor because of a supposed limited character of the forfeiture provided for failure to complete the branch. Missouri Valley Land Co. *v.* Wiese, 208 U. S. 234, 28 S. Ct. 294, 52 L. ed. 466 [*affirming* 77 Nebr. 40, 108 N. W. 175].

92. *Alabama.*— Swann *v.* Larmore, 70 Ala. 555; Swann *v.* Lindsey, 70 Ala. 507.

California.— Southern Pac. R. Co. *v.* Lipman, 148 Cal. 480, 83 Pac. 445; Jatunn *v.* Smith, 95 Cal. 154, 30 Pac. 200.

Kansas.— Walbridge *v.* Russell County, 74 Kan. 341, 86 Pac. 473.

Montana.— Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116.

Nebraska.— Wiese *v.* Union Pac. R. Co., 77 Nebr. 40, 108 N. W. 175 [*affirmed* in 208 U. S. 234, 28 S. Ct. 294, 52 L. ed. 466].

Nevada.— Stanton *v.* Crane, 25 Nev. 114, 38 Pac. 53.

North Dakota.— Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 51 N. W. 386.

Wisconsin.—Paige *v.* Kolman, 93 Wis. 435, 67 N. W. 700.

United States.— Northern Pac. R. Co. *v.* O'Brien, 204 U. S. 190, 27 S. Ct. 249, 51 L. ed. 438 [*affirming* 139 Fed. 614, 71 C. C. A. 598 (*affirming* 134 Fed. 303)]; Southern Pac. R. Co. *v.* Bell, 183 U. S. 675, 22 S. Ct. 232, 46 L. ed. 383 [*affirming* (Cal. 1899) 58 Pac. 1116 (*following* Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388)]; Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, 22 S. Ct. 154, 46 L. ed. 307 [*reversing* 98 Fed. 27, 38 C. C. A. 619 (*affirming* 86 Fed. 962)]; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 45 Fed. 596]; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77 [*affirming* 26 Fed. 551]; St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34

under a grant to it have vested, they cannot be divested or in any way limited or modified by any act of any officers of the government.[93]

(II) *Determination as to Character of Land.* Where a grant to a railroad company excepts mineral lands from its operation and requires a determination of the character of the lands to be made before the issue of any patent, no title of any kind passes to the company until the final determination is made.[94]

(III) *Earning Land.* Some of the grants do not take effect until the land is earned by the construction of definite portions of the roads,[95] while other grants convey a present estate in the lands, subject to be divested on failure to comply with conditions subsequent as to construction of the roads.[96] The railroad company does not acquire a complete title to land until it has completed such part of its road as is necessary to earn such land.[97] Where a railroad company has earned land, and its title is perfect, and nothing remains except to receive the certificate of title from the government, limitations begin to run when the company is entitled to the certificate, the government then retaining the mere naked legal title, while the company is the real owner;[98] but, in the absence of evidence to the contrary, it will be presumed that it acquired ownership at the time it received its certificate, so as to make the statute run from that date.[99]

c. Sufficiency and Effect of Location and Adoption of Line. The map of the route of a division of a railroad as finally located and constructed, filed with the secretary of the interior, and accepted as such by that officer, is the map of definite location within the meaning of a land grant act;[1] and the location of land by a railroad company is not complete until all the acts required by statute to make the location are done.[2] The filing by a railroad company of a map of the line

L. ed. 767 [*reversing* 26 Fed. 569]; Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858; Wood *v.* Burlington, etc., R. Co., 104 U. S. 329, 26 L. ed. 772; Grinnell *v.* Chicago, etc., R. Co., 103 U. S. 739, 26 L. ed. 456; U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131; St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558.

See 41 Cent. Dig. tit. "Public Lands," § 232.

93. Southern Pac. R. Co. *v.* Dull, 22 Fed. 489, 10 Sawy. 506.

94. Oakes *v.* Myers, 68 Fed. 807.

95. See the following cases:

California.— Broder *v.* Natoma Water, etc., Co., 50 Cal. 621.

Iowa.— Sioux City, etc., R. Co. *v.* Osceola County, 43 Iowa 318.

Michigan.— Bowes *v.* Haywood, 35 Mich. 241 (construing Act Cong. June 3, 1856 (11 U. S. St. at L. 21) and Mich. Laws (1857) p. 346); Johnson *v.* Ballou, 28 Mich. 379.

Nebraska.— White *v.* Burlington, etc., R. Co., 5 Nebr. 393.

United States.— Shepard *v.* Northwestern L. Ins. Co., 40 Fed. 341.

See 41 Cent. Dig. tit. "Public Lands," §§ 231, 232.

Title remains in United States until performance of conditions.— Beecher *v.* Chicago, etc., R. Co., 14 Fed. 211, 11 Biss. 246.

96. See U. S. *v.* Minnesota, etc., R. Co., 1 Minn. 127; Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 2 Pac. 322.

Forfeiture for non-performance of conditions see *infra*, II, K, 1, n (VII).

97. Sullivan *v.* Vankirk Land, etc., Co., 123 Ala. 225, 26 So. 925; Goodrich *v.* Beaman, 37 Iowa 563.

Disposition of timber.— Before land is earned by the construction of the section of the road adjacent and opposite thereto, the railroad company has no such interest therein as authorizes it to dispose of the timber thereon. U. S. *v.* Ordway, 30 Fed. 30 [*following* U. S. *v.* Childers, 12 Fed. 586, 8 Sawy. 171, and *distinguishing* Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330].

98. Iowa R. Land Co. *v.* Fehring, 126 Iowa 1, 101 N. W. 120.

99. Iowa R. Land Co. *v.* Fehring, 126 Iowa 1, 101 N. W. 120.

1. U. S. *v.* McLaughlin, 30 Fed. 147 [*affirmed* in 127 U. S. 428, 8 S. Ct. 1177, 32 L. ed. 213].

Errors in map.— The line is definitely fixed, for the purpose of determining the lands to which the grant applies, by the filing of the map, notwithstanding the fact that no actual survey has been made or that the line surveyed has been wrongfully located on the map, in consequence of errors in projecting township and section lines over unsurveyed parts of the public domain. Southern Pac. R. Co. *v.* U. S., 69 Fed. 47, 16 C. C. A. 114 [*affirmed* in 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355].

2. Baker *v.* Gee, 1 Wall. (U. S.) 333, 17 L. ed. 563, holding that under the act of congress of June 10, 1852, giving to the state of Missouri certain lands for railroad purposes, and the Missouri act of Sept. 20, 1852, accepting them, and making provision in regard to them, the location of the lands was not fixed until the railroad company caused a map of the road to be recorded in the office for recording deeds in the county where the land

surveyed for the route, in order to secure the withdrawal of the lands granted, operates to definitely locate the line and limits of the right of way, so that it cannot be changed in such a way as to affect the rights of one who has in the meantime legally entered other land in the government land office;[3] but where the location first made fails to meet the requirements of the act of congress making the grant, it is not final and conclusive as to the land included in the grant, and the consent of congress is not necessary to the making of a new and valid location.[4] It is not necessary that a railroad company should fix its entire route between the termini named in its charter before it becomes entitled to lands granted to it;[5] but upon the location of such reasonable portions of the general route as will intelligently guide the officers of the land department with reference to the patents to be issued it is entitled to the lands along the located portion of the line.[6] The general route of a railroad may be considered as fixed when its general course and direction are determined after an actual examination of the country or from knowledge of it, and designated by a line on a map showing the general features of the adjacent country and the places through or by which the road will pass;[7] and it is not necessary, in order to fix the general route of the road, to file a map thereof in the office of the secretary of the interior, or of the commissioner of the general land office.[8]

d. Survey and Selection — (i) *Necessity For Survey and Rights Prior Thereto.* A grant to a railroad of the odd-numbered sections within certain limits does not attach to any particular land until identification by government survey;[9] but a land grant railroad company has such an interest in the unsur-

was situated, this sort of location being the kind required by the provisions of the last act.

The filing of a map of the general route of a railroad does not, prior to the filing of the map of definite location, constitute such a disposal of lands within the exterior lines of that route as to preclude a subsequent grant of the lands to another company. U. S. *v.* Oregon, etc., R. Co., 176 U. S. 28, 20 S. Ct. 261, 44 L. ed. 358 [*affirming* 77 Fed. 67, 23 C. C. A. 15].

3. Missouri, etc., R. Co. *v.* Cook, 163 U. S. 491, 16 S. Ct. 1093, 41 L. ed. 239 [*affirming* 47 Kan. 216, 27 Pac. 847].

4. Western Land Co. *v.* Hamblin, 79 Iowa 539, 44 N. W. 807.

Abandonment of earlier line.— Where a railroad company filed a map of a line which was rejected, and later it filed maps of another line, on which lands were reserved, this amounted to an adoption of the later line, and an abandonment of the earlier, notwithstanding the fact that in a controversy relating to its right to build the line, the company in correspondence and documents referred to and appeared to claim the earlier line. Southern Pac. R. Co. *v.* U. S., 69 Fed. 47, 16 C. C. A. 114 [*affirmed* in 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355]. See also St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558.

5. St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77 [*affirming* 26 Fed. 551].

6. St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77 [*affirming* 26 Fed. 551]. See also U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 45 Fed. 596].

Under an act giving a railroad company the right to select the granted lands opposite each twenty-five miles of road as the same was constructed and approved in the manner required by the act, the right of the company to select lands was not dependent upon its filing with the commissioner of the general land office a map of the definite location of every portion of the entire road, if the road was completed opposite the land selected. Groeck *v.* Southern Pac. R. Co., 102 Fed. 32, 42 C. C. A. 144.

7. Buttz *v.* R. Co., 119 U. S. 55, 7 S. Ct. 100, 35 L. ed. 330; Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604 [*affirmed* in 49 Fed. 129, 1 C. C. A. 192], 46 Fed. 239.

8. Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604 [*affirmed* in 49 Fed. 129, 1 C. C. A. 192], 46 Fed. 239.

9. U. S. *v.* Northern Pac. R. Co., 6 Mont. 351, 12 Pac. 769; U. S. *v.* Montana Lumber, etc., Co., 196 U. S. 573, 25 S. Ct. 367, 49 L. ed. 604. But *compare* U. S. *v.* Mullan Fuel Co., 118 Fed. 663, holding that the United States could not maintain an action to recover the value of timber cut and removed from unsurveyed land within the limits of a railroad grant, and which when surveyed would be within the limits of an odd-numbered section.

A land grant railroad company is not a tenant in common with the United States in respect to lands which lie within its grant limits, opposite the completed line, but which have not yet been surveyed, so as to render the odd sections belonging to the company distinguishable from the even sections reserved to the government. Northern Pac. R. Co. *v.* Hussey, 61 Fed. 231, 9 C. C. A. 493. See also U. S. *v.* Northern Pac. R. Co., 6 Mont. 351, 12 Pac. 769.

veyed lands as will entitle it to maintain alone, the government having refused to join with it, a suit to enjoin trespassers who are cutting timber from the lands in such manner that the denuded portions will fall within the odd as well as the even sections when the survey is made.[10]

(II) *Selection.* Where a grant to a railroad is of all the odd-numbered sections, not excepted in the grant, within a certain distance on each side of the road, no specific selection is necessary to the validity of the company's title.[11] Where a grant is of a certain number of odd-numbered sections per mile of road, with no express limitations of distance from the road in which the land is to be selected, it is necessarily implied that the selection must be of the alternate sections nearest the road which have not been previously sold, reserved, or otherwise disposed of.[12]

(III) *Payment of Cost of Survey, Selection, and Conveyance.* The statute requires that before any land granted to a railroad company by the United States is conveyed to such company or any persons entitled thereto, under any of the acts incorporating or relating to such company, the company or the persons in interest shall first pay into the treasury of the United States the cost of surveying, selecting, and conveying the land,[13] unless the company is exempted by law from the payment of such cost.[14] The object of this provision is to preserve to the government such control over the property granted as to enable it to enforce payment of these costs,[15] and until such payment neither the issuance of the patents[16] nor any sale for taxes by state authority[17] is permitted, thus preserving unimpaired the lien contemplated.[18] But the provision was not designed to impair the force of the operative words of transfer in the grants of the United States,[19] or to invalidate the numerous conveyances by sale and mortgage of the lands made by the railroad companies with the express or implied assent of the

10. Northern Pac. R. Co. *v.* Hussey, 61 Fed. 231, 9 C. C. A. 463.

11. Vance *v.* Burlington, etc., R. Co., 12 Nebr. 285, 11 N. W. 334; Howard *v.* Perrin, 200 U. S. 71, 26 S. Ct. 195, 50 L. ed. 374 [*affirming* 8 Ariz. 347, 76 Pac. 460].

12. Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 51 N. W. 386; Wood *v.* Burlington, etc., R. Co., 104 U. S. 329, 26 L. ed. 772.

13. 19 U. S. St. at L. 121, c. 246 [U. S. Comp. St. (1901) p. 1475]. See New Orleans Pac. R. Co. *v.* U. S., 124 U. S. 124, 8 S. Ct. 417, 31 L. ed. 383 [*affirming* 21 Ct. Cl. 459].

This provision is a general one and applies whether the cost has been incurred or expended before the passage of the act or is to be incurred or expended thereafter. New Orleans Pac. R. Co. *v.* U. S., 124 U. S. 124, 8 S. Ct. 417, 31 L. ed. 383 [*affirming* 21 Ct. Cl. 459].

A reserved power "to add to, alter, amend, or repeal" the act making the grant authorizes the subsequent imposition of such a condition before any of the land has been earned. Northern Pac. R. Co. *v.* Rockne, 115 U. S. 600, 6 S. Ct. 201, 29 L. ed. 477 [*disapproving* Cass County *v.* Morrison, 28 Minn. 257, 9 N. W. 761].

14. 19 U. S. St. at L. 121, c. 246 [U. S. Comp. St. (1901) p. 1475].

The fact that the granting act contains no provision as to the payment of such cost does not amount to an exemption. New Orleans Pac. R. Co. *v.* U. S., 124 U. S. 124, 8 S. Ct. 417, 31 L. ed. 383 [*affirming* 21 Ct. Cl. 459].

15. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631, and *approved* in Ankeny *v.* Clark, 148 U. S. 345, 13 S. Ct. 617, 37 L. ed. 475 (*affirming* 1 Wash. 549, 20 Pac. 583)].

16. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; New Orleans Pac. R. Co. *v.* U. S., 124 U. S. 124, 8 S. Ct. 417, 31 L. ed. 383 [*affirming* 21 Ct. Cl. 459]; Northern Pac. R. Co. *v.* Rockne, 115 U. S. 600, 6 S. Ct. 201, 29 L. ed. 477; Union Pac. R. Co. *v.* McShane, 22 Wall. (U. S.) 444, 22 L. ed. 747; Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603, 21 L. ed. 373 [*reversing* 9 Kan. 38].

17. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; Northern Pac. R. Co. *v.* Rockne, 115 U. S. 600, 6 S. Ct. 201, 29 L. ed. 477 [*following* Union Pac. R. Co. *v.* McShane, 22 Wall. (U. S.) 444, 22 L. ed. 747; Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603, 21 L. ed. 373 (*reversing* 9 Kan. 38)]. See, generally, Taxation.

18. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631, and *approved* in Ankeny *v.* Clark, 148 U. S. 345, 13 S. Ct. 617, 37 L. ed. 475 (*affirming* 1 Wash. 549, 20 Pac. 583)].

19. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631].

government,[20] although where such costs have not been paid, a grantee of the company has not such title to the land as a vendee in a contract for the sale thereof can be compelled to accept.[21] It is uncertain what is meant by the costs of conveying the lands by the government, the conveyance being by patent and there being no statute authorizing a charge or fee for issuing a patent;[22] and as the selection is made by the grantee, it is difficult to imagine what costs the government incurs in the selection which are to be paid by the grantee.[23]

e. Certification. The certificate of the secretary of the interior certifying to a state certain land as being included within a grant in aid of railroads has the force and effect of a patent,[24] notwithstanding an erroneous designation therein of the railroad company for the benefit of which the certification is made,[25] and its effect in passing the title to particular lands cannot be questioned collaterally by one not interested.[26] After land has been certified to a state as railroad land and accepted by the state as such, the state cannot claim the land as swamp land or give to another the right to make such claim.[27]

f. Patents. Some of the grants in aid of railroads have vested in the grantees a fee-simple, by force of the acts themselves, without any patents,[28] while under other grants the title does not pass until the issuance of the patents,[29] although when a patent is issued it relates back to the date of the grant.[30] Even where the terms of a grant to a railroad company are such that no patents are necessary to transfer the legal title, patents are frequently issued, and serve many useful purposes;[31] they are evidence that the grantee has complied with the conditions of the grant and, to that extent, that the grant is relieved from the possibility of

20. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631].

21. Ankeny *v.* Clark, 148 U. S. 345, 13 S. Ct. 617, 37 L. ed. 475 [*affirming* 1 Wash. 549, 20 Pac. 583].

22. Hunnewell *v.* Cass County, 22 Wall. (U. S.) 464, 22 L. ed. 752 [*affirming* 12 Fed. Cas. No. 6,879, 3 Dill. 313].

23. Hunnewell *v.* Cass County, 22 Wall. (U. S.) 464, 22 L. ed. 752 [*affirming* 12 Fed. Cas. No. 6,879, 3 Dill. 313], where the court refused to sustain a contention that the costs of selection referred to are the statutory fees of the local land officers for final locations.

24. Minnesota Land, etc., Co. *v.* Davis, 40 Minn. 455, 42 N. W. 299 [*followed* in Winona, etc., Land Co. *v.* Ebilcisor, 52 Minn. 312, 54 N. W. 91]; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789]. See also Funkhouser *v.* Peck, 67 Mo. 19. But *compare* Hannibal, etc., R. Co. *v.* Smith, 41 Mo. 310, holding that while such certified lists are competent evidence to show what lands passed by the grant, they are not intended to be final and conclusive upon that question but may admit of rebuttal and disproof by any competent and admissible evidence, and if the lands embraced in the lists are not of the character contemplated by the acts of congress, or are not such as were intended to be granted, the certified lists have no effect whatever as evidence.

25. Winona, etc., Land Co. *v.* Ebilcisor, 52 Minn. 312, 54 N. W. 91.

26. Minnesota Land, etc., Co. *v.* Davis, 40 Minn. 455, 42 N. W. 299 [*followed* in Winona, etc., Land Co. *v.* Ebilcisor, 52 Minn. 312, 54 N. W. 91].

27. Young *v.* Charnquist, 114 Iowa 116, 86 N. W. 205.

28. See the following cases:

California.— Jatunn *v.* Smith, 95 Cal. 154, 30 Pac. 200; Forrester *v.* Scott, 92 Cal. 398, 28 Pac. 575.

Minnesota.— Weeks *v.* Bridgman, 41 Minn. 352, 43 N. W. 81, 46 Minn. 390, 49 N. W. 191.

Missouri.— St. Louis, etc., R. Co. *v.* McGee, 75 Mo. 522.

Montana.— Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116; Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 2 Pac. 322.

United States.—Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687; Northern Pac. R. Co. *v.* Cannon, 46 Fed. 224; Shepard *v.* Northwestern L. Ins. Co., 40 Fed. 341; Taboreck *v.* Burlington, etc., R. Co., 13 Fed. 103, 2 McCrary 407; Missouri and Arkansas Grants, 9 Op. Atty.-Gen. 41.

29. See Sioux City, etc., R. Co. *v.* Osceola County, 43 Iowa 318.

Necessity of patent to vest title generally see *infra*, II, M, 2.

30. Wiese *v.* Union Pac. R. Co., 77 Nebr. 40, 108 N. W. 175.

Relation back of patents generally see *infra*, II, M, 9, d.

31. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687.

forfeiture for breach of its conditions,[32] they serve to identify the lands as coterminous with the road completed,[33] obviate the necessity of any other evidence as to the grantee's right to the lands,[34] and are evidence that the lands are subject to the disposal of the railroad company with the consent of the government,[35] and are thus, in the grantee's hands, deeds of further assurance of his title and therefore a source of quiet and peace to him in its possession.[36] Where land is granted upon conditions, with a provision for the issuance of a patent, the performance of the conditions gives a right to the patent.[37] Where an act granting lands to a state to aid in the construction of a certain railroad directs that the patents be issued, not to the company, but to the state for the company's benefit, the issuance of patents to the state does not vest title in the company, or affect the liability of the lands to forfeiture under the act.[38]

g. Title Acquired — (i) *By States.* States which have received land grants in aid of railroads are usually vested with the legal title to the lands.[39] The state takes the legal title as trustee for the benefit of the railroads to aid in whose construction the grant is made,[40] and has no power to dispose of them in aid of any other railroad.[41] The interest of the state is not, however, a mere naked trust, but is coupled with a beneficial interest in the lands.[42]

(ii) *By Railroad Companies.* Where a grant to a railroad company provides for the patenting of lands to the company as earned by the construction of sections of the road, the issuance of the patents vests in the company the complete title — the legal title coupled with the beneficial interest[43]— and the company does not hold subject to any trust, although the act making the grant provides that the land, when patented, shall be subject to the disposal of the company for purposes of constructing and equipping the road and no other.[44] The title of

32. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687.

33. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687.

34. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687.

35. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687.

36. Deseret Salt Co. *v.* Tarpey, 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999 [*affirming* 5 Utah 494, 17 Pac. 631]; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687.

37. Kansas Pac. R. Co. *v.* Culp, 9 Kan. 38.

38. Sioux City, etc., R. Co. *v.* U. S., 159 U. S. 349, 16 S. Ct. 17, 40 L. ed. 177.

39. Weeks *v.* Bridgman, 41 Minn. 352, 43 N. W. 81, 46 Minn. 390, 49 N. W. 191. See also Lake Superior Ship-Canal, etc., Co. *v.* Cunningham, 44 Fed. 819 [*affirmed* in 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183].

Grant carrying mere power of disposition.— Where an act granting land to a territory to aid in the construction of a railroad, provided that "such lands shall be subject to the disposal of any Legislature thereof for the purpose aforesaid, and no other," and further provided that "the lands . . . shall be disposed of by said Territory only in the manner following — that is to say: no title shall vest in the said territory of Minnesota, nor shall any patent issue for any part of the lands hereinbefore mentioned, until a continuous line of twenty miles of said road shall be completed through the lands hereby granted," and that, if the road was not completed in ten years, the unsold lands should revert to the United States, the territory took no title in or right to the land, but a bare power of disposition. Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147.

40. McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3 [*followed* in Galloway *v.* Doe, 136 Ala. 315, 34 So. 957]; Swann *v.* Miller, 82 Ala. 530, 1 So. 65; Swann *v.* Lindsey, 70 Ala. 507.

41. McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3.

42. Farmers' L. & T. Co. *v.* Henning, 8 Fed. Cas. No. 4,666 [*distinguishing* Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147]. See also Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 23 L. ed. 634.

43. North Wisconsin R. Co. *v.* Barron County, 18 Fed. Cas. No. 10,347, 8 Biss. 414.

44. North Wisconsin R. Co. *v.* Barron County, 18 Fed. Cas. No. 10,347, 8 Biss. 414.

Reasons of the rule.— "The obligation on the part of the company to faithfully apply the proceeds of sales to the construction of the road, is of the same character as the one to keep the railroad forever open to the use

the United States is fully divested by a grant *in præsenti* of all lands within the place limits of a railroad aid grant, and not within the exceptions thereto;[45] and subsequent proceedings affecting the patent to such land in the interior department do not suspend the running of the statute of limitations in favor of one claiming under the grant.[46]

h. Transfer of and Succession to Right to Lands — (i) *In General.* In the absence of statutory authority a railroad company cannot transfer its land grant to another company;[47] and where such a transfer is authorized by statute, the right of transferee company to earn and obtain the land grant is based upon the statute, rather than upon the assignment to it.[48] Where after the selection of lands the railroad company's franchise was forfeited, but within three years the company transferred its property to the assignee in trust for the benefit of its stock-holders, under a state statute permitting a corporation whose charter has been forfeited three years in which to settle its affairs, such transfer was a valid disposition of the lands.[49] Under the Alabama Debt Settlement Act relating to the disposition of railroad aid land granted to the state by the federal government, and providing for a conveyance thereof to the trustees to act until a certain time when the trust should expire, and providing that all lands then remaining unsold should be conveyed by the trustees to such persons as were entitled to share in the trust moneys or to such person or persons as they might direct, the trustees

of the government as a public highway, free from all toll or other charges, for the transportation of the property and troops of the United States. Both, in my judgment, are personal and corporate obligations, to be enforced as other obligations of like character, and do not confer a property interest in the land after it is sold to the company, or in the road itself when completed. The legislative and judicial powers are ample for the enforcement of these several obligations, and for the protection of the rights of the government growing out of them." North Wisconsin R. Co. *v.* Barron County, 18 Fed. Cas. No. 10,347, 8 Biss. 414, where it is further said: "It was urged, on the argument by complainant's counsel, that a purchaser of the lands from the company would take with full knowledge of the law, and of the conditions upon which the title vested, and of the claim upon the land which the government would retain until the road should be completed. It is undoubtedly true that the purchaser would take with full notice of the law and of the company's title, but instead of this being an argument to sustain the complainant's position, I think it is one against it. Because the purpose of the grant being the construction of the road, and the means of carrying out that purpose being mainly the sale or mortgaging of the lands to raise the necessary funds, it is not to be supposed, without the clearest evidence, that Congress would provide for the company's conveying an imperfect title or one which should be liable to be defeated by the subsequent misconduct of the officers of the corporation, or a failure on their part to comply with the conditions of the grant. Of course, no sane business man would pay the full value for land on a purchase, or loan money upon a mortgage of the land, when he knew that his title was subject to be defeated by the subsequent acts or misconduct of persons, over whom he had no control, in misappropriating the proceeds of the sale or otherwise failing to comply with the law. If such were the law, no person would buy or part with money on a mortgage, and so the very object of the grant, which is the building of the road, would be defeated."

45. Wiese *v.* Union Pac. R. Co., 77 Nebr. 40, 108 N. W. 175.

46. Wiese *v.* Union Pac. R. Co., 77 Nebr. 40, 108 N. W. 175.

47. Southern Pac. R. Co. *v.* Esquibel, 4 N. M. 337, 20 Pac. 109. See also Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 437, 32 N. W. 726, 37 N. W. 537.

48. Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 437, 32 N. W. 726, 37 N. W. 537.

Construction of act authorizing transfer.— Where a railroad company having a land grant is authorized by a later statute to contract with another company for the construction and operation of its road between certain points and to grant to the latter company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges pertaining to that part of the road, and it is further provided that "said companies are hereby authorized to mortgage their respective portions of said roads, as herein defined," for a certain amount per mile, "and each of said companies shall receive patents to the alternate sections of land along their respective lines of road," in the same manner as under the previous grant, the original grant remains a continuous grant between the original terminals and the only effect of the act is to divide the grant between the two companies. U. S. *v.* Union Pac. R. Co., 148 U. S. 562, 13 S. Ct. 724, 37 L. ed. 560 [*affirming* 37 Fed. 551].

49. Sage *v.* Crowley, 83 Minn. 314, 86 N. W. 409.

were not incapacitated from conveying such remaining land after the expiration of the time for the termination of the trust.[50]

(II) *Consolidation of Corporations.*[51] A consolidation of land grant railroad companies under statutory authority may operate to vest in the new corporation the rights of the constituent corporations under their grants;[52] but when the act of congress has vested the title in the state for the purpose of disposing of the lands for the benefit of certain railroads, an act of the state legislature conferring the benefit of that grant on a certain company does not convey the legal title to that company so that it will vest in a new company by virtue of consolidation.[53]

i. Validity of Grants. A grant contained in an act of congress authorizing a railroad company "subject to the laws of" a certain state to construct a line of railroad is not invalid because when the act was passed the company did not have legal authority under the laws of the state to construct the road on that line, where under the laws then in force the company could, by its own voluntary act alone and without any further legislation, qualify itself to construct the road strictly in all particulars subject to the laws of the state.[54]

j. Construction of Grants.[55] An act of congress making a grant in aid of railroads is a law as well as a grant,[56] and is subject to the same rules of construction as other legislative acts,[57] and the intent of congress, when ascertained, is to control in the interpretation of the law.[58] In cases of doubt as to the intention of

50. Warrior River Coal, etc., Co. *v.* Alabama State Land Co., (Ala. 1907) 45 So. 53, construing Acts (1875–1876), p. 130, and holding that where a deed by trustees of state land contained recitals of the legislation with reference to the land, its conveyance to the trustees, the official performance of the direction to the governor to convey the lands to the trustees, with a full enumeration of the duties, powers, etc., fixed by the statute carried forward into the governor's deed to the trustees, and also declared that no personal warranty of title should be construed to exist under the deed, but that it should operate only as a conveyance of all estate and interest vested in the grantors, although signed by the trustees in their individual names, it was a conveyance by them as trustees only.

51. See, generally, Corporations, 10 Cyc. 288.

52. Southern Pac. R. Co. *v.* Poole, 32 Fed. 451, 12 Sawy. 538. See also U. S. *v.* Southern Pac. R. Co., 46 Fed. 683 [*reversed* on other grounds in 146 U. S. 570, 615, 13 S. Ct. 152, 163, 36 L. ed. 1091, 1104]; U. S. *v.* Southern Pac. R. Co., 45 Fed. 596 [*reversed* on other grounds in 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091].

Provision sufficient to effect transfer.— A provision in the articles of amalgamation and incorporation of certain railroad companies that "the said several parties, each for itself, hereby transfers, grants, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns, forever, all its property, real, personal, and mixed, of every kind and description; . . . contracts, agreements, claims . . . and all rights, privileges, and franchises, corporate and otherwise, held, owned, or claimed by said parties of first and second parts, in possession or in expectancy, either at law or in equity," is sufficient to transfer land granted the companies by the government by an act declaring the purposes for which it was granted. Tarpey *v.* Deseret Salt Co., 5 Utah 494, 17 Pac. 631 [*affirmed* in 142 U. S. 241, 12 S. Ct. 158, 35 L. ed. 999].

The filing of a map of general location by one of the constituent corporations will inure to the benefit of the new corporation. Southern Pac. R. Co. *v.* Poole, 32 Fed. 451, 12 Sawy. 538.

53. Lake Superior Ship-Canal, etc., Co. *v.* Cunningham, 44 Fed. 819 [*affirmed* in 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183].

54. Southern Pac. R. Co. *v.* Poole, 32 Fed. 451, 12 Sawy. 538.

55. Weight attaching to construction by land department see *infra*, II, L, 15, a.

56. McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3 [*followed* in Galloway *v.* Doe, 136 Ala. 315, 34 So. 957]; Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 437, 32 N. W. 726, 37 N. W. 537; Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71 [*reversing* 43 Fed. 867]; Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858; Missouri, etc., R. Co. *v.* Kansas Pac. R. Co., 97 U. S. 491, 24 L. ed. 1095; Astoria, etc., R. Co. *v.* U. S., 41 Ct. Cl. 284. See also Swann *v.* Miller, 82 Ala. 530, 1 So. 65; Swann *v.* Lindsey, 70 Ala. 507.

57. Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858; Missouri, etc., R. Co. *v.* Kansas Pac. R. Co., 97 U. S. 491, 24 L. ed. 1095; Astoria, etc., R. Co. *v.* U. S., 41 Ct. Cl. 284.

58. Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 437, 32 N. W. 726, 37 N. W. 537; Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71 [*reversing* 43 Fed. 867]. See also Kansas City, etc., R. Co. *v.* Brewster, 118 U. S. 682, 7 S. Ct. 66, 30 L. ed. 281 [*reversing* 25 Fed. 243].

congress, such grants are to be construed strictly [59] and most strongly against the grantee,[60] so that what is not unequivocally granted will be deemed to have been withheld.[61] But such grants are not to be so construed as to defeat the intention of congress,[62] or to withhold what is given either expressly or by necessary or fair implication,[63] and it is considered that a general law offering grants and valuable privileges to corporations or individuals as an inducement to the construction of railroads or other works of a quasi-public character through a great, undeveloped public domain, should not be construed with the strictness of a merely private grant, but should receive a more liberal interpretation in favor of the purposes for which it was enacted.[64] In the construction of railroad aid grants there is a well-established distinction between "granted lands," which are those falling within the limits specially designated, and "indemnity lands," which are those selected in lieu of lands lost by reason of previous disposition or reservation for other purposes.[65]

k. Lands Included In or Excepted From Grant — (i) *In General.* A railroad land grant includes only public lands within the usual meaning of the term, that is, land subject to disposal under the general land laws of the United States,[66]

Construction of particular grants see the following cases:

Illinois.— State Bd. of Equalization *v.* People, 229 Ill. 430, 82 N. E. 324.

Iowa.— Cedar Rapids, etc., R. Co. *v.* Herring, 52 Iowa 687, 3 N. W. 786; Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153.

Minnesota.— Minneapolis, etc., R. Co. *v.* Duluth, etc., R. Co., 45 Minn. 104, 47 N. W. 464; Nash *v.* Sullivan, 29 Minn. 206, 12 N. W. 698; Western R. Co. *v.* De Graff, 27 Minn. 1, 6 N. W. 341.

Missouri.— Wunderlich *v.* Spradling, 121 Mo. 364, 25 S. W. 1063.

United States.— U. S. *v.* Oregon, etc., R. Co., 164 U. S. 526, 17 S. Ct. 165, 41 L. ed. 541 [*reversing* 67 Fed. 650, 14 C. C. A. 600 (*reversing* 57 Fed. 890), and *affirming* 57 Fed. 890]; Lake Superior Ship-Canal, etc., Co. *v.* Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183; U. S. *v.* Northern Pac. R. Co., 152 U. S. 284, 14 S. Ct. 598, 38 L. ed. 443 [*reversing* 41 Fed. 842]; U. S. *v.* Union Pac. R. Co., 148 U. S. 562, 13 S. Ct. 724, 37 L. ed. 560 [*affirming* 37 Fed. 551]; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 45 Fed. 596]; U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766 [*reversing* 37 Fed. 68]; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77 [*affirming* 26 Fed. 551]; Kansas City, etc., R. Co. *v.* Brewster, 118 U. S. 682, 7 S. Ct. 66, 30 L. ed. 281 [*reversing* 25 Fed. 243]; Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858 [*reversing* 24 Fed. 889, and *explaining* Winona, etc., R. Co. *v.* Barney, 113 U. S. 618, 5 S. Ct. 606, 28 L. ed. 1109]; U. S. *v.* Burlington, etc., R. Co., 98 U. S. 334, 25 L. ed. 198; Humbird *v.* Avery, 110 Fed. 465 [*affirmed* in 195 U. S. 480, 25 S. Ct. 123, 49 L. ed. 286]; Southern Pac. R. Co. *v.* U. S., 109 Fed. 913, 48 C. C. A. 712 [*affirmed* in 189 U. S. 447, 23 S. Ct. 567, 47 L. ed. 896]; U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 [*affirmed* in 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836]; Oregon, etc., R. Co. *v.* U. S., 67 Fed. 650, 14 C. C. A. 600 [*reversing* 57 Fed. 426, 890]; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 6 Sawy. 157; Southern Pac. R. Co. *v.* Poole, 32 Fed. 451, 12 Sawy. 538; Taboreck *v.* Burlington, etc., R. Co., 13 Fed. 103, 2 McCrary 407; Madison, etc., R. Co. *v.* Wisconsin, 16 Fed. Cas. No. 8,938; Schulenburg *v.* Harriman, 21 Fed. Cas. No. 12,486, 2 Dill. 398 [*affirmed* in 21 Wall. 44, 22 L. ed. 551].

See 41 Cent. Dig. tit. "Public Lands," §§ 227, 231.

59. Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153.

60. Swann *v.* Jenkins, 82 Ala. 478, 2 So. 136 [*followed* in Anderson *v.* Howard, 69 Fed. 84, 16 C. C. A. 149]; Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153; Burlington, etc., R. Co. *v.* Abink, 14 Nebr. 95, 15 N. W. 317; U. S. *v.* Denver, etc., R. Co., 150 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975; Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 23 L. ed. 634; Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147.

61. Swann *v.* Jenkins, 82 Ala. 478, 2 So. 136 [*followed* in Anderson *v.* Howard, 69 Fed. 84, 16 C. C. A. 149].

62. U. S. *v.* Denver, etc., R. Co., 150 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975; Winona, etc., R. Co. *v.* Barney, 113 U. S. 618, 5 S. Ct. 606, 28 L. ed. 1109.

63. U. S. *v.* Denver, etc., R. Co., 150 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975.

64. U. S. *v.* Denver, etc., R. Co., 150 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975. See also Bradley *v.* New York, etc., R. Co., 21 Conn. 294.

65. Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858 [*reversing* 24 Fed. 889].

Indemnity or lieu lands see *infra*, II, K, 1, l.

66. Northern Lumber Co. *v.* O'Brien, 204 U. S. 190, 27 S. Ct. 249, 51 L. ed. 438 [*affirming* 139 Fed. 614, 71 C. C. A. 598 (*affirming* 134 Fed. 303)]; U. S. *v.* Northern

and lands which were not public at the date of the grant do not pass thereunder, although they subsequently become of that character,[67] and are restored to the mass of the public domain before the definite location of the road.[68] But the converse of this rule does not hold; and so, although land may have been public land at the time of the grant, it does not pass to the railroad company if it has been sold, reserved, entered, or otherwise appropriated prior to the filing of a map of the definite location of the road,[69] unless such disposition is invalid because of its having been made after the land was withdrawn from entry or sale and reserved for the railroad.[70] And indeed railroad aid grants have usually contained express exceptions of lands previously sold, reserved, or otherwise disposed of.[71] The action of the land department in defining the limits of a grant to a railroad company, pursuant to its duty, on the line of the road being located, and the map showing the location being furnished to it, is final, as between persons claiming land within such limits — one under the homestead law, and the other as a purchaser from the railroad company.[72]

(II) *Situs of Lands.* Congress has the power to grant to a state lands in another state or territory to aid in the construction of a railroad wholly within its own limits,[73] and while in most if not all of the grants of land made to the various states in aid of railroads within their respective limits, some words of limi-

Pac. R. Co., 152 U. S. 284, 14 S. Ct. 598, 38 L. ed. 443; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 46 Fed. 683, 45 Fed. 596]; Bardon *v.* Northern Pac. R. Co., 145 U. S. 535, 12 S. Ct. 856, 36 L. ed. 806; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77; Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122; Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769; Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 23 L. ed. 634; U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131; U. S. *v.* Southern Pac. R. Co., 76 Fed. 134; Southern Pac. R. Co. *v.* Brown, 75 Fed. 85, 21 C. C. A. 236; Northern Pac. R. Co. *v.* Maclay, 61 Fed. 554, 9 C. C. A. 609 [*affirming* 53 Fed. 523].

What are public lands see *supra*, I, A.

67. San Jose Land, etc., Co. *v.* San Jose Ranch Co., 129 Cal. 673, 62 Pac. 269; Northern Lumber Co. *v.* O'Brien, 204 U. S. 190, 27 S. Ct. 249, 51 L. ed. 438 [*affirming* 139 Fed. 614, 71 C. C. A. 598 (*affirming* 134 Fed. 303)]; Northern Pac. R. Co. *v.* De Lacey, 174 U. S. 622, 19 S. Ct. 791, 43 L. ed. 1111; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 46 Fed. 683, 45 Fed. 596]; Bardon *v.* Northern Pac. R. Co., 145 U. S. 535, 12 S. Ct. 856, 36 L. ed. 806; Northern Pac. R. Co. *v.* Maclay, 61 Fed. 554, 9 C. C. A. 609.

68. U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131. But *compare* Chicago, etc., R. Co. *v.* U. S., 108 Fed. 311, 47 C. C. A. 343. See, generally, *infra*, II, K, 1, k, (XI), (D).

69. U. S. *v.* Oregon, etc., R. Co., 176 U. S. 28, 20 S. Ct. 261, 44 L. ed. 358 [*affirming* 77 Fed. 67, 23 C. C. A. 15].

70. See *infra*, II, K, 1, p.

71. See Kansas Pac. R. Co. *v.* Culp, 9 Kan. 38 (holding that such a grant passes the title to all the lands not embraced within the exception); U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766 [*reversing* 37 Fed. 68]; Burlington, etc., R. Co. *v.* Fremont County, 9 Wall. (U. S.) 89, 19 L. ed. 563; U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131 (holding that a grant excepting lands previously reserved is confined to lands belonging to the government at the date of the grant). And see, generally, *infra*, II, K, 1, k, (XI).

Construction of exceptions.—An exception in a railroad grant of "any pre-emption, homestead, swamp-land, or other lawful claim" includes the right of a water and mining company to use its canal previously constructed over public land. Broder *v.* Natoma Water, etc., Co., 101 U. S. 274, 25 L. ed. 790. An exception in a railroad grant of lands otherwise disposed of before the definite location of its route does not cover subsequent grants for the construction of other roads before the location of the first road, as to permit such exception would be to embody in the first grant a repugnant provision. St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77 [*affirming* 26 Fed. 551]. All lands situated above the Raccoon Fork of the Des Moines river which were reserved by the land department under the river grant prior to 1856 and granted to the state to aid in the improvement of the river by the act of congress of July 12, 1862, were excepted from the railroad grant made to the state by the act of congress of May 15, 1856. Dubuque, etc., R. Co. *v.* Des Moines Valley R. Co., 54 Iowa 89, 6 N. W. 157 [*following* Iowa Homestead Co. *v.* Des Moines Nav., etc., Co., 17 Wall. (U. S.) 153, 21 L. ed. 622; Williams *v.* Baker, 17 Wall. (U. S.) 144, 21 L. ed. 561; Wolcott *v.* Des Moines Nav., etc., Co., 5 Wall. (U. S.) 681, 18 L. ed. 689].

72. Brett *v.* Meisterling, 117 Fed. 768.

Conclusiveness of decisions in land department generally see *infra*, II, L, 15, a.

73. St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. ed. 767 [*reversing* 26 Fed. 569].

tation have been used to denote that the grant was restricted to lands within each particular state when such restriction was intended,[74] it cannot be safely asserted that it has been a general policy of the United States government to restrict a grant made to a state in aid of railroads to lands within such state where a part of the line of road extended into one of the territories.[75] So it is entirely competent for congress to confer upon a corporation of any state the right to construct a railroad in any of the territories and to obtain lands of the territory in aid thereof,[76] and *a fortiori* a territorial corporation may, under congressional authority, construct a railroad in such territory and obtain its full quota of lands, although a part of the territory embracing the granted lands afterward becomes a state,[77] and such company also obtains title to lands embraced within the terms of the grant and which, although within the former territory, are outside the boundaries of the state.[78] Where an act of congress makes the lateral extent of the grant depend upon the location of the road, whether in a state or territory, the lateral extent being greater in the latter case, the location of the road itself determines this matter and the nearness of the line to any territory or state other than that in which it is actually located has nothing to do with it, although the grant extends over the boundary.[79]

(III) *Location on Either Side of Road.* Land grants to railroads are usually of a certain amount of land on either side of the road,[80] and even though the grant does not so specify it is an implied condition that the land must be taken in equal quantities on each side of the road,[81] and the land department, in executing a grant, cannot enlarge the quantity of land on one side to make up a deficiency on the other.[82]

(IV) *Curves and Angles of Road.* A grant to a railroad of the odd-numbered sections within a certain distance of its road does not become inoperative at a point where the road makes a curve or right angle, so as to exclude the wedge-shaped section of land lying outside of the curve or angle and bounded by lines at right angles to the road approaching the curve or angle from either side, but the railroad is entitled to all the odd-numbered sections within the limits specified in the grant and it is not necessary that the lands should be reached by a line run at right angles to the road.[83] But where the act making a grant contemplates two distinct roads — a main line, and a branch road running at right angles from a point on the main line — and the entire branch line is constructed but the main line is constructed only from one of its designated termini to the

74. St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. ed. 767 [*reversing* 26 Fed. 569]. Act Cong. June 3, 1856 (11 U. S. St. at L. 17), afterward revived and kept in force by Act Cong. April 10, 1869 (16 U. S. St. at L. 45), granting to the state of Alabama, in aid of the construction of railroads in that state, every alternate section of land designated by odd numbers, and within six miles of either side of the projected line of said roads, does not embrace, by implication, land within six miles of that portion of the roads constructed through the state of Georgia. Swann *v.* Jenkins, 82 Ala. 478, 2 So. 136 [*followed* in Anderson *v.* Howard, 69 Fed. 84, 16 C. C. A. 149].

75. St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. ed. 767 [*reversing* 26 Fed. 569].

76. Van Wyck *v.* Knevals, 106 U. S. 360, 1 S. Ct. 336, 27 L. ed. 201 [*approved* in St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. ed. 767 (*reversing* 26 Fed. 569)].

77. St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. ed. 767 [*reversing* 26 Fed. 569].

78. St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. ed. 767 [*reversing* 26 Fed. 569].

79. Denny *v* Dodson, 32 Fed. 899, 13 Sawy. 68.

80. U. S. *v.* Burlington, etc., R. Co., 98 U. S. 334, 25 L. ed. 198.

81. Wood *v.* Burlington, etc., R. Co., 104 U. S. 329, 26 L. ed. 772.

82. U. S. *v.* Burlington, etc., R. Co., 98 U. S. 334, 25 L. ed. 198, holding, however, that at the suit of the United States, patents embracing any alleged excess on one side cannot be adjudged invalid as to any lands which are not identified, so as to be separated from the remainder, nor can any decree be rendered in such a suit against the railroad company to which the lands have been patented for their value.

83. U. S. *v.* Union Pac. R. Co., 148 U. S. 562, 13 S. Ct. 724, 37 L. ed. 560 [*affirming* 37 Fed. 551].

point of junction with the branch road, the railroad company is entitled only to the lands opposite the main line and the branch road, bounded by lines at right angles to the respective roads where they terminate and not to any land within the wedge-shaped tract outside the point of junction and bounded by the lines referred to.[84]

(v) *AMOUNT OF LAND TO WHICH RAILROAD ENTITLED.* It is the uniform policy of congress in granting land in aid of railroads that the quantity of land is measured according to the length of the road constructed or required to be constructed,[85] and so where an act of congress granting, to aid in the construction of a railroad upon a designated route, six sections of land for every mile of road constructed, was amended by a subsequent act permitting the railroad to build by a shorter way, being "entitled for such modified line to the same lands, and to the same amount of lands per mile, as originally granted," the railroad was only entitled to six sections for each mile of road actually constructed, and not to six sections for each mile of the original route.[86]

(vi) *SWAMP LANDS.*[87] Lands which have passed to the various states by virtue of the Swamp Land Act are excluded from subsequent railroad grants whether to the states or to particular railroad companies;[88] but the Swamp Land Act was not intended to operate against the will of a state,[89] and a state may become estopped to claim that lands passed under the swamp land grant rather than the railroad grant by its laches and acquiescence and treating the land as railroad land.[90]

84. U. S. *v.* Oregon, etc., R. Co., 164 U. S. 526, 17 S. Ct. 165, 41 L. ed. 541 [*reversing* 67 Fed. 650, 14 C. C. A. 600 (*reversing* 57 Fed. 426), *affirming* 57 Fed. 426, and *distinguishing* U. S. *v.* Union Pac. R. Co., 148 U. S. 562, 13 S. Ct. 724, 37 L. ed. 560 (*affirming* 37 Fed. 551)].

85. Cedar Rapids, etc., R. Co. *v.* Herring, 110 U. S. 27, 3 S. Ct. 485, 28 L. ed. 57 [*affirming* 61 Iowa 410, 16 N. W. 344].

86. Cedar Rapids, etc., R. Co. *v.* Herring, 110 U. S. 27, 3 S. Ct. 485, 28 L. ed. 57 [*affirming* 61 Iowa 410, 16 N. W. 344].

87. Swamp lands generally see *supra*, II, I.

88. *Arkansas.*— Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031.

California.— Southern Pac. R. Co. *v.* McCusker, 67 Cal. 67, 7 Pac. 122.

Iowa.— Montgomery County *v.* Burlington, etc., R. Co., 38 Iowa 208; Fremont County *v.* Burlington, etc., R. Co., 22 Iowa 91.

Missouri.— Hannibal, etc., R. Co. *v.* Snead, 65 Mo. 239.

United States.— Hannibal, etc., R. Co. *v.* Smith, 9 Wall. 95, 19 L. ed. 599; Burlington, etc., R. Co. *v.* Fremont County, 9 Wall. 89, 19 L. ed. 563.

See 41 Cent. Dig. tit. "Public Lands," § 240.

The mere selection of lands as swamp lands and the filing of lists thereof by the state agents does not operate to segregate such lands from the public lands of the United States or prevent their passing under the railroad grant as within an exception of "lands reserved by the United States for any purpose whatever," where such lands are subsequently determined not to be swamp lands, although the determination is not made until after the map of definite location of the road is filed. U. S. *v.* Chicago, etc., R. Co., 148 Fed. 884.

89. Vicksburg, etc., R. Co. *v.* Tibbs, 112 La. 51, 36 So. 223, holding that where the state failed to select, and the secretary of the interior failed to approve, certain lands as falling within the terms of those statutes, and such lands were certified to and accepted by the state under an act of congress granting lands in aid of railroads, the title thus acquired by the railroads could not be defeated by an individual claiming to have purchased the lands as swamp lands, and whose title had been annulled at the suit of the state.

90. State *v.* Flint, etc., R. Co., 89 Mich. 481, 51 N. W. 103, holding that where after the swamp land grant congress granted certain lands to the state to aid in the construction of railroads, and the state accepted the grant and provided that on certain conditions a certain railroad company should be entitled to the lands and the company complied with all the conditions imposed upon it, and the state officials selected and certified the alternate sections to the department of the interior, which returned the certificates to be filed in the proper state department, and the state levied and collected taxes on the lands and failed to lay claim to the lands for twenty-eight years, during which time the railroad company conveyed a large part thereof to innocent purchasers, the state was estopped to claim the lands under the swamp land grant.

Circumstances not amounting to estoppel.— The act of the governor in transmitting to the general land office the list of lands claimed by a railroad company under a railroad grant does not estop the state to claim swamp lands, nor is the approval by the land department of the railroad's list of selected lands a determination that the lands embraced therein had not passed to the state by the swamp

(VII) *SCHOOL LANDS.*[91] The existence of a claim by the state for lands, to make good alleged losses of portions of a thirty-sixth section granted for school purposes, is sufficient, without regard to its validity, to take such lands out of the category of "public lands," within the meaning of a railroad grant attaching to such lands alone.[92]

(VIII) *TIDE LANDS.* Where tide land between high and low water mark within the place limits of a railroad grant in Washington had been surveyed, identified, and defined, and the railroad had performed all conditions entitling it to such land, before Washington became a state, the railroad and its grantees were entitled to such land, under the provision of the Washington constitution, by which the state disclaimed all title in and claim to all tide land patented by the United States, although the patent was not actually issued until after the adoption of the constitution.[93]

(IX) *INDIAN RESERVATIONS.*[94] As a general rule lands included within an Indian reservation do not pass by a grant in aid of railroads;[95] but congress may, and in some instances has, granted such lands subject to the Indian right of occupancy and provided for the vesting of title to such lands in the grantee after the extinguishment of the Indian title.[96]

(X) *LAND CLAIMED UNDER SPANISH OR MEXICAN GRANT.*[97] Land which is claimed under a Spanish or Mexican grant at the time when a railroad grant is made does not pass to the railroad,[98] although the Spanish or Mexican grant is subsequently barred by lapse of time,[99] or rejected by the tribunals of the United States.[1] Nor does a railroad take land which was at the time of the filing and approval of its map of definite location within the claimed but undetermined

land grant; but the failure of the land department to determine this question leaves the matter open for judicial determination. Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031.

91. School lands generally see *supra*, II, H.

92. U. S. *v.* Southern Pac. R. Co., 76 Fed. 134.

93. Kneeland *v.* Korter, 40 Wash. 359, 82 Pac. 608, 1 L. R. A. N. S. 745.

94. Indian reservations generally see INDIANS, 22 Cyc. 123.

95. Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770; Missouri, etc., R. Co. *v.* U. S., 92 U. S. 760, 23 L. ed. 645 [*affirming* 26 Fed. Cas. No. 15,786, 1 McCrary 624]; Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 23 L. ed. 634 [*affirming* 26 Fed. Cas. No. 15,582, 1 McCrary 610]; U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131; Northern Pac. R. Co. *v.* Maclay, 61 Fed. 554, 9 C. C. A. 609.

Lands reserved pending a determination whether they shall be appropriated to Indians do not pass. Northern Pac. R. Co. *v.* Maclay, 61 Fed. 554, 9 C. C. A. 609 [*affirming* 53 Fed. 523].

96. St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. ed. 767 [*reversing* 26 Fed. 569]; Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330 [*affirming* 3 Dak. 217, 14 N. W. 103]; Shepard *v.* Northwestern L. Ins. Co., 40 Fed. 341. See also Northern Pac. R. Co. *v.* Dudley, 85 Fed. 82.

Effect of trust in United States.— Where the title of the Indians to land and their right of occupation had been fully extinguished, the lands passed under the act of congress of June 3, 1856, conveying them to the state of Michigan for railroad purposes, notwithstanding the fact that they were held by the United States in trust to sell them for the benefit of the Indians. Shepard *v.* Northwestern L. Ins. Co., 40 Fed. 341.

Effect of provision for extinguishment.— A provision in the granting act that the United States shall extinguish, "as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession," the Indian title to all lands granted by the act, is not an absolute undertaking by the government to extinguish such title and the grantee cannot claim a breach by the government of its undertaking, or set up the failure to extinguish such title as an excuse for a failure to complete the road, without showing that the Indians were willing to cede the lands and that their interest and public policy required such cession. Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770.

97. Spanish, Mexican, and French grants generally, see *infra*, V.

98. Foss *v.* Hinkell, 78 Cal. 158, 20 Pac. 393 [*following* McLaughlin *v.* Heid, 63 Cal. 208; Carr *v.* Quigley, 57 Cal. 394]; Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769.

99. Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769.

1. Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769.

A contrary doctrine was asserted in some earlier cases (Central Pac. R. Co. *v.* Robinson, 49 Cal. 446; Central Pac. R. Co. *v.* Yolland, 49 Cal. 438; Sanger *v.* Sargent, 21 Fed. Cas. No. 12,319, 8 Sawy. 93), but these cases must be regarded as overruled.

limits of a Spanish or Mexican grant, but was subsequently excluded therefrom.[2] But a railroad grant passes land which was excluded from a Spanish or Mexican grant, the survey of which became final before the date of the railroad grant, although there were subsequent unsuccessful efforts to avoid such survey and procure a new survey including such land.[3] A railroad company obtains a good title to lands selected by and patented to it as indemnity land where, although such land was claimed under a Mexican grant and was *sub judice* at the time of the railroad grant, the Mexican grant had been finally rejected as invalid before the selection was made.[4] Where a Mexican grant is of a designated quantity of land within a larger tract, patents issued to a railroad company under its grant for land within the exterior boundaries are valid so long as there is enough land left within such boundaries to satisfy the Mexican grant.[5]

(xi) *Land Entered or Settled Upon Under General Laws* — (a) *Exclusion From Grant.* Land which has been entered or settled upon under the general land laws of the United States providing for homesteads, preëmptions, and the like, prior to the passage of an act making a grant in aid of railroads, is excluded from the grant.[6] It has also been the policy of congress to keep the public lands open to occupation and preëmption and appropriation to public uses, notwithstanding any grant which it might make, until it is ascertained what lands are included within the grant;[7] and so as a general rule a railroad land grant does not include land entered or settled upon under the general land laws at any time before the

2. Southern Pac. R. Co. *v.* U. S., 200 U. S. 354, 26 S. Ct. 298, 50 L. ed. 512 [*affirming* 133 Fed. 662, 66 C. C. A. 560 (*affirming* 123 Fed. 1007)]; Southern Pac. R. Co. *v.* Brown, 75 Fed. 85, 21 C. C. A. 236 [*affirming* 68 Fed. 333]. See also Carr *v.* Quigley, (Cal. 1887) 16 Pac. 9.

The objection that there had not been the final order of confirmation requisite under the Act of March 3, 1851, c. 41, 9 U. S. St. at L. 631, to justify an official survey of a Mexican grant, because the federal government had appealed to the federal supreme court from the decree of confirmation in the district court, is not available to defeat the contention that lands within the place limits of a railroad grant, which were also, when the map of definite location was filed and approved, included by the lines of such survey, were *sub judice*, and therefore excluded from the grant to the railroad company, where such appeal had practically been abandoned before the survey through a delay of ten years in filing the transcript of record in the appellate court, and the government did not question the right to the survey when the application therefor was made. Southern Pac. R. Co. *v.* U. S., 200 U. S. 354, 26 S. Ct. 298, 50 L. ed. 512 [*affirming* 133 Fed. 662, 66 C. C. A. 560 (*affirming* 123 Fed. 1007)].

3. Southern Pac. R. Co. *v.* Dull, 22 Fed. 489, 10 Sawy. 506.

A mere claim that lands were within the exterior limits of a Spanish or Mexican grant based upon a rejected survey for a patent made after the final decree of confirmation has fixed the specific boundaries of the grant contrary to the survey, does not render the land *sub judice* until the final rejection of such survey so as to exclude it from the railroad grant. Foss *v.* Hinkell, 91 Cal. 194, 25 Pac. 762, 27 Pac. 644, 861.

4. Ryan *v.* Central Pac. R. Co., 99 U. S. 382, 25 L. ed. 305 [*affirming* 21 Fed. Cas. No. 12,185, 5 Sawy. 260, 6 Reporter 641, and *distinguishing* Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769]. See, generally, *infra*, II, K, 1, l, (III).

5. U. S. *v.* McLaughlin, 127 U. S. 428, 8 S. Ct. 1177, 32 L. ed. 213 [*affirming* 30 Fed. 147, and *followed* in Carr *v.* Quigley, 149 U. S. 652, 13 S. Ct. 961, 37 L. ed. 885 (*reversing* 79 Cal. 130, 21 Pac. 607, and *explaining* Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769)]. See also U. S. *v.* Central Pac. R. Co., 11 Fed. 449, 8 Sawy. 81.

6. Harmon *v.* Clayton, 51 Iowa 36, 50 N. W. 541; Brown *v.* Corson, 16 Oreg. 388, 19 Pac. 66, 21 Pac. 47; Northern Pac. R. Co. *v.* Amacker, 175 U. S. 564, 20 S. Ct. 236, 44 L. ed. 274 [*affirming* 58 Fed. 850, 7 C. C. A. 518]; Northern Pac. R. Co. *v.* De Lacey, 174 U. S. 622, 19 S. Ct. 791, 43 L. ed. 1111 [*reversing* 72 Fed. 726, 19 C. C. A. 157 (*reversing* 66 Fed. 450)]; U. S. *v.* Oregon, etc., R. Co., 143 Fed. 765, 75 C. C. A. 66 [*reversing* 133 Fed. 953]; Taboreck *v.* Burlington, etc., R. Co., 13 Fed. 103, 2 McCrary 407.

Evidence of preëmption.—A paper, certified by the register of the land office to be a correct copy of the form of pages 160 and 161 of the register of declaratory statements on file in said office, and which is headed "Register of declaratory statements under act of Congress of September 4, 1841, and amendments thereto," and which describes the land in question, etc., is not sufficient proof that the land had been preëmpted at the time a railroad grant attached. Brown *v.* Corson, 16 Oreg. 388, 19 Pac. 66, 21 Pac. 47.

7. Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116; St. Joseph, etc., R. Co. *v.* Baldwin, 103 U. S. 426, 26 L. ed. 578 [*reversing* on other grounds 7 Nebr. 247]; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659.

railroad grant became fixed and attached to specific lands by the filing of a map of the definite location;[8] although such entry may have been made after the passage of the act of congress by which the grant was made,[9] or even after the map of the general route has been filed,[10] or after the line of the road has been surveyed and staked out.[11] So also a valid title may be predicated upon an entry upon land within the indemnity limits of a railroad grant made at any time before the selection of the indemnity lands,[12] where there has been no valid withdrawal of such lands from entry,[13] and the railroad company cannot question the *bona fides* of a prior entry.[14] When a railroad company has located its road but has forfeited its grant by failure to complete its road within the time limited, it is within the power of congress, upon subsequently extending such time and confirming the grant to save the rights of settlers who have acquired rights in the land prior to the passage of the act granting the extension;[15] but in order to entitle one to the protection he must have settled on the land before the act granting the extension was passed.[16]

(B) *Sufficiency and Validity of Entry.* The mere fact that land is in the possession of an individual does not exclude it from a railroad grant,[17] although the occupant may have made his settlement with the intention of acquiring the land under the land laws;[18] but it is necessary that at the time when the grant attaches

8. *Iowa.*— Iowa Falls, etc., R. Co. *v.* Beck, 67 Iowa 421, 25 N. W. 686.

Kansas.— Atchison, etc., R. Co. *v.* Pracht, 30 Kan. 66, 1 Pac. 319.

Louisiana.— Lisso *v.* Devillier, 118 La. 559, 43 So. 163.

Minnesota.— Winona, etc., Land Co. *v.* Ebilcisor, 52 Minn. 312, 54 N. W. 91; St. Paul, etc., R. Co. *v.* Ward, 47 Minn. 40, 49 N. W. 401; Weeks *v.* Bridgman, 41 Minn. 352, 43 N. W. 81, 46 Minn. 390, 49 N. W. 191.

Missouri.—Hannibal, etc., R. Co. *v.* Moore, 37 Mo. 338.

Nebraska.— St. Joseph, etc., R. Co. *v.* Baldwin, 7 Nebr. 247 [*reversed* on other grounds in 103 U. S. 426, 26 L. ed. 578].

Nevada.— Peers *v.* Deluchi, 21 Nev. 164, 26 Pac. 228.

United States.— Oregon, etc., R. Co. *v.* U. S., 190 U. S. 186, 23 S. Ct. 673, 47 L. ed. 1012 [*reversing* 109 Fed. 514 (*affirming* 101 Fed. 316)]; Nelson *v.* Northern Pac. R. Co., 188 U. S. 108, 23 S. Ct. 302, 47 L. ed. 406 [*reversing* 22 Wash. 521, 61 Pac. 703]; Sioux City, etc., Town Lot, etc., Co. *v.* Griffey, 143 U. S. 32, 12 S. Ct. 362, 36 L. ed. 64 [*affirming* 72 Iowa 505, 34 N. W. 304]; Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122 [*followed* in Glidden *v.* Union Pac. R. Co., 30 Fed. 660]; Oregon, etc., R. Co. *v.* U. S., 148 Fed. 603, 78 C. C. A. 375 [*affirming* 133 Fed. 953]; Northern Pac. R. Co. *v.* McCormick, 94 Fed. 932, 36 C. C. A. 560; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659; Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604 [*affirming* 46 Fed. 239]. See also Weeks *v.* Bridgman, 159 U. S. 541, 16 S. Ct. 72, 40 L. ed. 253; Humbird *v.* Avery, 110 Fed. 465 [*affirmed* in 195 U. S. 480, 25 S. Ct. 123, 49 L. ed. 286.

9. Sioux City, etc., Town Lot, etc., Co. *v.* Griffey, 143 U. S. 32, 12 S. Ct. 362, 36 L. ed. 64 [*affirming* 72 Iowa 505, 34 N. W. 304]; Northern Pac. R. Co. *v.* McCormick, 94 Fed. 932, 36 C. C. A. 560.

10. Nelson *v.* Northern Pac. R. Co., 188 U. S. 108, 23 S. Ct. 302, 47 L. ed. 406 [*reversing* 22 Wash. 521, 61 Pac. 703]; Northern Pac. R. Co. *v.* McCormick, 94 Fed. 932, 36 C. C. A. 560.

11. Sioux City, etc., Town Lot, etc., Co. *v.* Griffey, 143 U. S. 32, 12 S. Ct. 362, 36 L. ed. 64 [*affirming* 72 Iowa 505, 34 N. W. 304].

12. Prince Inv. Co. *v.* Eheim, 55 Minn. 36, 56 N. W. 239; Southern Pac. R. Co. *v.* Bell, 183 U. S. 675, 22 S. Ct. 232, 46 L. ed. 383 [*affirming* 124 Cal. 475, 57 Pac. 388, and *followed* in Groeck *v.* Southern Pac. R. Co., 183 U. S. 690, 22 S. Ct. 268, 46 L. ed. 390 (*reversing* 74 Fed. 585)].

13. Southern Pac. R. Co. *v.* Bell, 183 U. S. 675, 22 S. Ct. 232, 46 L. ed. 383 [*affirming* 124 Cal. 475, 57 Pac. 388, and *followed* in Groeck *v.* Southern Pac. R. Co., 183 U. S. 690, 22 S. Ct. 268, 46 L. ed. 390 (*reversing* 74 Fed. 585)].

Withdrawal of lands see *infra*, II, K, 1, p.

14. Prince Inv. Co. *v.* Eheim, 55 Minn. 36, 56 N. W. 239.

15. St. Paul, etc., R. Co. *v.* Greenhalgh, 26 Fed. 563 [*affirmed* in 139 U. S. 19, 11 S. Ct. 395, 35 L. ed. 71].

16. St. Paul, etc., R. Co. *v.* Broulette, 65 Minn. 367, 67 N. W. 1010.

17. Charlton *v.* Southern Pac. R. Co., (Cal. 1893) 33 Pac. 1119; McLaughlin *v.* Menotti, 89 Cal. 354, 26 Pac. 880; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886; Kitteringham *v.* Blair Town Lot, etc., Co., 73 Iowa 421, 35 N. W. 502; Iowa R. Land Co. *v.* Adkins, 38 Iowa 351; Burnham *v.* Starkey, 41 Kan. 604, 21 Pac. 624; Atchison, etc., R. Co. *v.* Mecklim, 23 Kan. 167; Cahalan *v.* McTague, 46 Fed. 251.

18. Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886; Atchison, etc., R. Co. *v.* Mecklim, 23 Kan. 167.

the occupant shall have acquired a right or lawful claim to the land by compliance with the provisions of the law under which he sought to acquire the land.[19] But land for which a certificate of entry has been issued is excluded from a railroad grant, although the application misdescribed the range in which the section is situated;[20] and it has been held that a settler who has made lasting and valuable improvements on the land and has attempted to make a homestead entry thereof but through mistake made an entry of another piece of land acquires an interest in the land improved which cannot be divested by the subsequent definite location of a railroad.[21] Where an application to enter land, made before a railroad grant attached, was refused, but on appeal the secretary of the interior decided that the entry should be allowed, the land did not pass under the railroad grant, although the road was definitely located before the decision allowing the entry was rendered.[22] It has been held that land which is subject to a homestead entry of record, valid on its face, does not pass under a railroad grant, whether or not the entry is valid in fact;[23] but it has also been laid down that an exception in a railroad grant of lands to which preëmption or homestead claims have attached, does not operate in favor of a sham and fraudulent homestead claim,[24] nor was the mere filing of a declaratory statement, without previous settlement, as required by the preëmption laws, sufficient to cause a preëmption claim to become "attached" to the land so as to except it from such a grant.[25]

(c) *Extent of Land Excluded by Reason of Prior Settlement.* A settler on unsurveyed public lands, who, at the time a railroad grant attached by the definite location of the line of road, had in no way indicated the boundaries of his claim, could not, by thereafter extending his improvements over a tract which he had not at that time claimed or improved, and which by the subsequent survey was shown to be within a section granted to the railroad company, acquire any claim or rights thereto as against the railroad company.[26]

(d) *Relinquishment, Abandonment, or Cancellation of Entry.* Land which was entered by an individual, but abandoned before the passage of an act making a railroad grant, passes under the grant,[27] although the records of the land office do not show that the prior claim was abandoned.[28] Where lands are subject to a live entry at the time of the passage of the act making a railroad grant, they are not brought within the grant by subsequent relinquishment or cancellation of the entry,[29] even though this occurs before the map of definite location of the road is

19. Central Pac. R. Co. *v.* McCann, 126 Cal. 553, 58 Pac. 1045 (holding that when a qualified preëmptor settled upon land in 1859, and performed all the acts required, until after plaintiff's line of railroad was fixed, and before it was fixed he applied at the proper land office to make a preëmption filing and was refused permission so to do, but did not appeal; and in 1867, after the line was fixed, he moved off the land, without having filed any claim, the preëmption claim did not "attach" to the land, within the meaning of the act of congress of July 1, 1862, section 3, excepting from the alternate sections granted thereby lands to which a homestead or preëmption claim had attached before the line of the railroad was fixed); McLaughlin *v.* Menotti, 89 Cal. 354, 26 Pac. 880; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886; Weaver *v.* Fairchild, 50 Cal. 360; Burnham *v.* Starkey, 41 Kan. 604, 21 Pac. 624; Atchison, etc., R. Co. *v.* Mecklim, 23 Kan. 167.

Land erroneously noted as entered.—Where it appeared from the tract-book in a local land office that certain land was posted as entered, but it appeared from the records in the general land office that such posting was a mistake and that the land had in fact never been entered, such land was not excepted from a subsequent grant in aid of a railroad. Wright *v.* Gish, 94 Mo. 110, 6 S. W. 704.

20. Hedrick *v.* Atchison, etc., R. Co., 120 Mo. 516, 25 S. W. 759.

21. Fearns *v.* Atchison, etc., R. Co., 33 Kan. 275, 6 Pac. 237.

22. Weeks *v.* Bridgman, 41 Minn. 352, 43 N. W. 81, 46 Minn. 390, 49 N. W. 191.

23. Hastings, etc., R. Co. *v.* Whitney, 34 Minn. 538, 27 N. W. 69.

24. Union Pac. R. Co. *v.* Watts, 24 Fed. Cas. No. 14,385, 2 Dill. 310.

25. U. S. *v.* Union Pac. R. Co., 61 Fed. 143 [*affirmed in* 67 Fed. 974, 15 C. C. A. 122].

26. U. S. *v.* Central Pac. R. Co., 94 Fed. 906, 36 C. C. A. 546.

27. U. S. *v.* Oregon, etc., R. Co., 152 Fed. 473.

28. U. S. *v.* Oregon, etc., R. Co., 152 Fed. 473.

29. Whitney *v.* Taylor, 158 U. S. 85, 15 S. Ct. 796, 39 L. ed. 906 [*affirming* 45 Fed.

filed.[30] Land which was entered prior to the filing of the map of definite location is not brought within the railroad grant by the loss of the entryman's rights after such map is filed by reason of his failure to comply with the law, his abandonment of the land, or the setting aside of his entry;[31] but if the entry is made after the grant and the entryman's rights are lost before the map of definite location is filed, the land passes under the grant.[32] The fact that land within the indemnity limits of a railroad grant was entered under the land laws prior to the date of the grant does not prevent a valid selection of such land by the railroad company, where the rights under the entry were lost prior to the time of selection.[33] Where an entry has been canceled for failure to comply with the requirements of the law, but the rights of the entryman have been restored under a curative act prior to the filing of the map of the definite location of the road, the land does not pass under the railroad grant.[34]

(XII) *MINERAL LANDS*[35]— (A) *Exclusion From Grant.* Grants of land in aid of railroads ordinarily exclude mineral lands from their operation,[36] and so a patent to a railroad company under its grant for lands which are known to be mineral at the time of the issuance of the patent is void[37] and will be set aside at the suit of the United States as "issued by mistake and without authority of law."[38]

(B) *What Are Mineral Lands.* The mere fact that land contains particles of gold or other metals or veins of gold or metal bearing rock does not necessarily impress it with the character of "mineral land" so as to exclude it from a grant in aid of a railroad;[39] but it must contain metals in quantities sufficient to render it available and valuable for mining purposes,[40] and the land must be more valuable for such purposes than for agriculture.[41] The word "mineral" in a railroad grant excluding mineral lands is not synonymous with "metal,"[42] and so land which

616]; Bardon *v.* Northern Pac. R. Co., 145 U. S. 535, 12 S. Ct. 856, 36 L. ed. 806.

30. U. S. *v.* Oregon, etc., R. Co., 143 Fed. 765, 75 C. C. A. 66 [*reversing* 133 Fed. 953].

31. Burlington, etc., R. Co. *v.* Abink, 14 Nebr. 95, 15 N. W. 317; Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122; McIntyre *v.* Roeschlaub, 37 Fed. 556.

32. Emslie *v.* Young, 24 Kan. 732 [*followed* in Young *v.* Goss, 42 Kan. 502, 22 Pac. 572 (*distinguishing* Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122)] (although the filing was not canceled until after the location); Northern Pac. R. Co. *v.* De Lacey, 174 U. S. 622, 19 S. Ct. 791, 43 L. ed. 1111 [*reversing* 72 Fed. 726, 19 C. C. A. 157 (*reversing* 66 Fed. 450), *distinguishing* Whitney *v.* Taylor, 158 U. S. 85, 15 S. Ct. 796, 39 L. ed. 906, and *followed* in Chicago, etc., R. Co. *v.* U. S., 108 Fed. 311, 47 C. C. A. 343 (where the court applied the same rule to an entry on public lands which was made before the railroad grant and forfeited after the railroad grant, but before the map of definite location was filed, and in so doing, it would seem, fell into error); U. S. *v.* Northern Pac. R. Co., 103 Fed. 389]. See also Northern Pac. R. Co. *v.* Meadows, 46 Fed. 254.

33. Oregon, etc., R. Co. *v.* U. S., 190 U. S. 186, 23 S. Ct. 673, 47 L. ed. 1012 [*reversing* 109 Fed. 514, 48 C. C. A. 520 (*affirming* 101 Fed. 316)].

34. Amacker *v.* Northern Pac. R. Co., 58 Fed. 850, 7 C. C. A. 518 [*reversing* 53 Fed. 48].

35. Mineral lands generally see MINES AND MINERALS, 27 Cyc. 516.

36. See Alford *v.* Barnum, 45 Cal. 482; Merrill *v.* Dixon, 15 Nev. 401; Northern Lumber Co. *v.* O'Brien, 204 U. S. 190, 27 S. Ct. 249, 51 L. ed. 438 [*affirming* 139 Fed. 614, 71 C. C. A. 598 (*affirming* 134 Fed. 303)]; Northern Pac. R. Co. *v.* Myers, 172 U. S. 589, 19 S. Ct. 276, 43 L. ed. 564; Northern Pac. R. Co. *v.* Sanders, 166 U. S. 620, 17 S. Ct. 671, 41 L. ed. 1139; Corinne Mill, etc., Co. *v.* Johnson, 156 U. S. 574, 15 S. Ct. 409, 39 L. ed. 537; Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122; U. S. *v.* Northern Pac. R. Co., 103 Fed. 389; Oakes *v.* Myers, 68 Fed. 807; Valentine *v.* Valentine, 47 Fed. 597.

37. U. S. *v.* Central Pac. R. Co., 84 Fed. 218.

38. Western Pac. R. Co. *v.* U. S., 108 U. S. 510, 2 S. Ct. 802, 27 L. ed. 806.

39. Alford *v.* Barnum, 45 Cal. 482; Merrill *v.* Dixon, 15 Nev. 401.

40. Alford *v.* Barnum, 45 Cal. 482; Merrill *v.* Dixon, 15 Nev. 401.

41. Hunt *v.* Steese, 75 Cal. 620, 17 Pac. 920.

42. Northern Pac. R. Co. *v.* Soderberg, 99 Fed. 506.

Term subject to enlargement.— The term "mineral lands" as used in a railroad grant excepting such lands is subject to enlargement in its meaning at any time before the grant attaches by the definite location of the road. Northern Pac. R. Co. *v.* Soderberg, 104 Fed. 425, 43 C. C. A. 620 [*affirmed* in 188 U. S. 526, 23 S. Ct. 365, 47 L. ed. 575],

is chiefly valuable for the building stone which it contains is not within a grant excluding mineral lands.[43]

(c) *Time of Discovery of Minerals.* A railroad grant providing that "all mineral lands be, and the same are hereby, excluded from the operations of this act" does not except only those mineral lands which are known to be such on the identification of the granted sections by the definite location of the road, but excludes from the grant all actual mineral lands whether or not their mineral character is known;[44] but the privilege of exploring for minerals continues in full force notwithstanding the location of the road,[45] and the question of the mineral or non-mineral character of the lands is open to consideration up to the time of issuing a patent.[46]

(d) *Mineral Entries Prior to Location of Road.* A railroad grant which creates a reserve of the odd-numbered sections of lands "not mineral," within the limits defined, "which are free from preëmption or other claims or rights," from the time of filing a plat of the general route in the general land office, does not prevent persons taking up mining claims in the reserved lands after the filing of such map, and before the definite location of the road.[47] Under a grant of odd sections, "not mineral," to which the United States has full title, free from preemption "or other claims," at the time of the definite location of the road, no title passes to lands in the odd sections which, at the time of the definite location of the road, there were pending applications to purchase as mineral lands, although they are afterward ascertained not to be mineral lands and mineral entries thereon held invalid,[48] and *a fortiori* a railroad company cannot maintain a suit in equity

holding that, conceding that the term "mineral lands" as used and understood by congress at the time of the grant of July 2, 1864, to the Northern Pacific Railroad Company, excluding such lands, did not include lands chiefly valuable for the building stone they contained, subsequent acts of congress prior to 1879 fixed the status of such lands as mineral, and they were excluded from the grant along the portions of the road not definitely located until after that date.

43. Northern Pac. R. Co. *v.* Soderberg, 104 Fed. 425, 43 C. C. A. 620 [*affirmed* in 188 U. S. 526, 23 S. Ct. 365, 47 L. ed. 575]; Northern Pac. R. Co. *v.* Soderberg, 99 Fed. 506.

44. Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992 [*reversing* 46 Fed. 592, *distinguishing* and *explaining* Davis *v.* Weibbold, 139 U. S. 507, 11 S. Ct. 628, 35 L. ed. 238; Deffeback *v.* Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. ed. 423, and *followed*, although *criticized*, in Adams *v.* Reed, 11 Utah 480, 40 Pac. 720 (*affirmed* in 168 U. S. 573, 18 S. Ct. 179, 42 L. ed. 584)], three justices dissenting. This case must be considered as overruling earlier cases in the inferior federal courts (Northern Pac. R. Co. *v.* Walker, 47 Fed. 681 [*reversed* on other grounds in 148 U. S. 391, 13 S. Ct. 650, 37 L. ed. 494]; Valentine *v.* Valentine, 47 Fed. 597; Francoeur *v.* Newhouse, 43 Fed. 236, 14 Sawy. 600, 40 Fed. 618, 14 Sawy. 351), holding that the title attached to all lands not known to be mineral when the map of definite location was filed and was not subject to be defeated by a subsequent discovery of minerals.

45. Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992 [*reversing* 46 Fed. 592, *approved* in U. S. *v.* Oregon, etc., R. Co., 176 U. S. 28, 20 S. Ct. 261, 44 L. ed. 358, and *followed* in Adams *v.* Reed, 11 Utah 480, 40 Pac. 720 (*affirmed* in 168 U. S. 573, 18 S. Ct. 179, 42 L. ed. 584)].

46. Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992 [*reversing* 46 Fed. 592, *explained* and *approved* in Shaw *v.* Kellogg, 170 U. S. 312, 18 S. Ct. 632, 42 L. ed. 1050; Central Pac. R. Co. *v.* Nevada, 162 U. S. 512, 16 S. Ct. 885, 40 L. ed. 1057, and *followed* in Adams *v.* Reed, 11 Utah 480, 40 Pac. 720 (*affirmed* in 168 U. S. 573, 18 S. Ct. 179, 42 L. ed. 584)].

Effect of patent see *infra*, II, K, 1, k, (XII), (F).

47. Northern Pac. R. Co. *v.* Cannon, 54 Fed. 252, 4 C. C. A. 303; Northern Pac. R. Co. *v.* Sanders, 49 Fed. 129, 1 C. C. A. 192 [*affirming* 47 Fed. 604, 46 Fed. 239].

The railroad company is not entitled to any notice of an application for a mineral patent to lands lying within the boundaries of the grant, other than the general notice prescribed by U. S. Rev. St. (1878) § 2325 [U. S. Comp. St. (1901) p. 1429], to all persons who may claim an interest in the land, except that, in case it initiates a contest under U. S. Rev. St. (1878) § 2335 [U. S. Comp. St. (1901) p. 1435], to determine the character of the land, it is then entitled to personal notice of all subsequent proceedings; and, if it fails to initiate such contest, the question whether the lands are mineral or agricultural becomes a matter solely between the patentee and the government. Northern Pac. R. Co. *v.* Cannon, 54 Fed. 252, 4 C. C. A. 303.

48. Northern Pac. R. Co. *v.* Sanders, 166

to quiet its title to lands within the limits of its grant which have been patented to individuals as "mineral lands," before the line of road was definitely fixed.[49]

(E) *Rights of Railroad Before Determination of Character of Land.* A railroad company has an interest in the odd-numbered sections within its grant, and, before the question of the mineral or non-mineral character of such land has been determined by the land department, the commission of waste thereon calculated to work irreparable injury to the land itself will be restrained at its instance,[50] and in such a suit the court will not undertake to determine, in advance of a decision by the land department, the question as to whether the land is mineral or non-mineral.[51]

(F) *Effect of Patent.*[52] The issuance of a patent to the railroad is a conclusive determination by the government that the land is agricultural,[53] and such a patent conveys to the railroad company the legal title free from the contingency of being defeated by a future discovery of minerals.[54]

U. S. 620, 17 S. Ct. 671, 41 L. ed. 1139; Northern Pac. R. Co. *v.* Sanders, 49 Fed. 129, 1 C. C. A. 192 [*affirming* 47 Fed. 604, 46 Fed. 239].

49. Northern Pac. R. Co. *v.* Cannon, 54 Fed. 252, 4 C. C. A. 303.

50. Northern Pac. R. Co. *v.* Soderberg, 86 Fed. 49.

51. Northern Pac. R. Co. *v.* Soderberg, 86 Fed. 49.

General rule as to decisions in advance of land department see *infra*, II, L, 16, a.

52. Effect of patents generally see *infra*, II, M, 9.

53. Gale *v.* Best, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44.

54. Adams *v.* Reed, 11 Utah 480, 40 Pac. 720; Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992 [*reversing* 46 Fed. 592, and *explained* and *approved* in Shaw *v.* Kellogg, 170 U. S. 312, 18 S. Ct. 632, 42 L. ed. 1050].

Even though a patent expressly excepts "all mineral lands," it is conclusive, as against collateral attack, of the non-mineral character of all the land conveyed. Cowell *v.* Lammers, 21 Fed. 200, 207, where it is said: "The exception of mineral lands from the grant in the act of congress is explicit. There is no express authority, no provision at all, requiring or authorizing this exception to be repeated in the patent. Lands patentable under the grant, and no others, are authorized to be patented. If the exception in the patent is no broader in its signification than the statute, it adds nothing to and takes nothing from the effect of the statute itself in this respect, or to the effect of the patent issued in pursuance of the statute. If it is broader than the statute, then it is wholly unauthorized by law, and as to the part which goes beyond the statute, at least, is utterly void. A patent upon its face should either grant or not grant. It must be seen from a construction of the language of the grant itself whether anything is granted or not, and, if anything be granted, what it is. There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not. The most that can be said, then, is that the clause of exception and exclusion in the patent in no way affects the rights of the parties given by the statute, in no way enlarges or restricts those rights, and the same force and effect must be given to the patent on a collateral attack as would be given to it had the clause been omitted, as both classes of patents would depend upon and be controlled by the same or similar statutory provision. We have seen, in the cases cited from the supreme court reports, that patents issued under the various acts of congress excepting and reserving mineral lands from sale or grant, in precisely similar language, but which omit the clause of exception and exclusion found in the patent in question, have always been held by the supreme court to be unassailable collaterally. The same rule must be held applicable to the patent in question and those like it." But *compare* McLaughlin *v.* Powell, 50 Cal. 64, 68 [*followed* in Chicago Quartz Min Co. *v.* Oliver, 75 Cal. 194, 16 Pac. 780, 7 Am. St. Rep. 143], holding that, although in an action to recover lands, the party claiming under a patent from the United States to a railroad excluding "all mineral lands" can introduce the patent in evidence without making preliminary proof that the lands in suit are not mineral lands, the party claiming adversely to the patent is entitled to introduce affirmative evidence that the lands in suit are mineral lands and so are excepted from the grant; the court saying: "The exception contained in the patent, introduced by the plaintiff, is part of the description, and is equivalent to an exception of all the subdivisions of land mentioned, which were 'mineral' lands. In other words, the patent grants all of the tracts named in it which are not mineral lands. If all are mineral lands, it may be that the exception is void; but the fact cannot be assumed, as by its terms the exception is limited to such as are mineral lands, and does not necessarily extend to all the tracts granted."

(XIII) *ADJUSTMENT OF GRANTS.*[55] After a railroad company has accepted the provisions of an act of congress enacted to settle disputes concerning its grant, it cannot by sales of or contracts respecting particular lands withdraw them from the operation of the act.[56]

l. Indemnity or Lieu Lands — (I) *IN GENERAL.* Grants of alternate sections in aid of railroads usually contain a provision that in case, when the lines of the roads are definitely fixed, it appears that the United States has sold any of the land so granted, or preëmption rights have attached thereto, other lands may be selected in lieu of those so lost;[57] and such an indemnity clause covers losses from the grant by reason of sales and the attachment of preëmption rights before the date of the act, as well as such losses accruing after such date and before the final determination of the route of the road.[58] But a railroad company has no power to relinquish land within its primary limits to which it has good title under a grant from the United States for the purpose of making an indemnity selection of other land in lieu thereof.[59] A grant of all the odd-numbered sections within a certain distance from the road does not import that each section shall contain its full complement of six hundred and forty acres, nor obligate the United States to make good the difference where sections contain less than this amount,[60] and a grant "to the amount of twenty alternate sections per mile," with a provision for indemnity for such lands as have been granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of, gives no right to indemnity for a deficiency in the quantity granted arising from the non-existence of such quantity of land within forty miles of the line on each side, as where the granted limits overlap large bodies of water.[61] Where the grants of two railroads overlap or intersect, and the circumstances of the grants are such that the land within the overlap must be divided between the two roads,[62] neither road is entitled to select indemnity lands

55. Protection of purchasers under adjustment act see *infra*, II, K, 1, t.

56. Humbird *v.* Avery, 195 U. S. 480, 25 S. Ct. 123, 49 L. ed. 286 [*affirming* 110 Fed. 465], so holding in relation to Act Cong. July 1, 1898, c. 546 (30 U. S. at L. 597, 620), permitting any purchaser or settler claiming in good faith, under any law of the United States or ruling of the land department, any land so situated that a right thereto in the railroad grantee or its successor in interest attached by reason of definite location or selection, to elect whether to retain or transfer his claim, and requiring the secretary of the interior to furnish the company with a list of the lands so retained, and allowing the company to select other lands in lieu thereof upon executing a proper relinquishment, although the statute contains a provision that the railroad grantee or its successor in interest shall not be bound to relinquish lands sold or contracted by it.

57. See the following cases:

Alabama.— Galloway *v.* Doe, 136 Ala. 315, 34 So. 957.

California.— Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388.

Minnesota.— St. Paul, etc., R. Co. *v.* Brown, 24 Minn. 517, grant by state.

Montana.— Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116.

United States.—Kansas City, etc., R. Co. *v.* Brewster, 118 U. S. 682, 7 S. Ct. 66, 30 L. ed. 281; Grinnell *v.* Chicago, etc., R. Co., 103 U. S. 739, 26 L. ed. 456; U. S. *v.* Burlington, etc., R. Co., 98 U. S. 334, 25 L. ed. 198; Humbird *v.* Avery, 110 Fed. 465 [*affirmed* in 195 U. S. 480, 25 St. 123, 49 L. ed. 286].

See 41 Cent. Dig. tit. "Public Lands." § 250.

Act Cong. July 17, 1866 (14 U. S. St. at L. 292), granting lands to the Southern Pacific Railroad Company, was a grant of quantity; and the grantee, upon accepting the grant, filing its map of location, and building and equipping its road in the time and manner prescribed by the act, was entitled to its full complement of land, to the amount of ten alternate sections per mile on each side of the road so constructed, provided the same could be found either within the specified present grant or indemnity limits. Southern Pac. R. Co. *v.* Wiggs, 43 Fed. 333.

58. Winona, etc., R. Co. *v.* Barney, 113 U. S. 618, 5 S. Ct. 606, 28 L. ed. 1109 [*reversing* on other grounds 6 Fed. 802, 2 McCrary 421, *distinguishing* St. Joseph, etc., R. Co. *v.* Baldwin, 103 U. S. 426, 26 L. ed. 578. *explaining* Leavenworth, etc., R. Co. *v.* U. S., 92 U. S. 733, 23 L. ed. 634, and *followed* in Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687]; Madison, etc., R. Co. *v.* Wisconsin, 16 Fed. Cas. No. 8,938.

59. Sousa *v.* Pereira, 132 Cal. 77, 64 Pac. 90.

60. Sioux City, etc., R. Co. *v.* U. S., 159 U. S. 349, 16 S. Ct. 17, 40 L. ed. 177 [*affirming* 43 Fed. 617]; Madison, etc., R. Co. *v.* Wisconsin, 16 Fed. Cas. No. 8,938.

61. Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 51 N. W. 386.

62. See *infra*, II, K, 1, q, (I).

in lieu of those which, under the grant, pass to the other road, in the absence of an express provision in the grant for such selection.[63]

(II) *When Title Vests.* A railroad company takes no title to land within the indemnity limits of the grant until the deficiency within the place limits has been ascertained [64] and the indemnity lands have been selected,[65] and the selection approved by the secretary of the interior,[66] and the lands certified to the grantee

63 Sioux City, etc., R. Co. *v.* Countryman, 83 Iowa 172, 49 N. W. 72; Sioux City, etc., R. Co. *v.* U. S., 159 U. S. 349, 16 S. Ct. 17, 40 L. ed. 177.

64. Sage *v.* Maxwell, 91 Minn. 527, 69 N. W. 42; Moore *v.* Cormode, 20 Wash. 305, 55 Pac. 217 [*affirmed* in 180 U. S. 167, 21 S. Ct. 324, 45 L. ed. 476]; Southern Pac. R. Co. *v.* Bell, 183 U. S. 675, 22 S. Ct. 232, 46 L. ed. 383 [*affirming* (Cal. 1899) 58 Pac. 1116 (*following* Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388), and *followed* in Groeck *v.* Southern Pac. R. Co., 183 U. S. 690, 22 S. Ct. 268, 46 L. ed. 390 (*reversing* 74 Fed. 585)].

65. *California.*— Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388; Southern Pac. R. Co. *v.* Bovard, 4 Cal. App. 76, 87 Pac. 203.

Iowa.— Young *v.* Charnquist, 114 Iowa 116, 86 N. W. 205; Iowa Falls, etc., R. Co. *v.* Beck, 67 Iowa 421, 25 N. W. 686; Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842 [*followed* in Johnson *v.* Thornton, 54 Iowa 144, 6 N. W. 165].

Kansas.— Herrington *v.* Clark, 56 Kan. 644, 44 Pac. 624; Missouri, etc., R. Co. *v.* Noyes, 25 Kan. 340; Atchison, etc., R. Co. *v.* Rockwood, 25 Kan. 292.

Minnesota.— Donohue *v.* St. Paul, etc., R. Co., 101 Minn. 239, 112 N. W. 413; Sage *v.* Maxwell, 91 Minn. 527, 99 N. W. 42; Prince Inv. Co. *v.* Eheim, 55 Minn. 36, 56 N. W. 239; Musser *v.* McRae, 38 Minn. 409, 38 N. W. 103.

Montana.— Elling *v.* Thexton, 7 Mont. 330, 16 Pac. 931.

North Dakota.— Grandin *v.* La Bar, 3 N. D. 446, 57 N. W. 241.

Washington.— Northern Pac. R. Co. *v.* Spray, 27 Wash. 1, 67 Pac. 377; Howard *v.* Hibbs, 22 Wash. 513, 61 Pac. 159.

United States.— Oregon, etc., R. Co. *v.* U. S., 189 U. S. 103, 23 S. Ct. 615, 47 L. ed. 726 [*affirming* 109 Fed. 514, 48 C. C. A. 520 (*affirming* 101 Fed. 316)]; Clark *v.* Herington, 186 U. S. 206, 22 S. Ct. 872, 46 L. ed. 1128 [*affirming* (Kan. 1900) 62 Pac. 1116]; Southern Pac. R. Co. *v.* Bell, 183 U. S. 675, 22 S. Ct. 232, 46 L. ed. 383 [*affirming* (Cal. 1899) 58 Pac. 1116 (*following* 124 Cal. 475, 57 Pac. 388), and *followed* in Groeck *v.* Southern Pac. R. Co., 183 U. S. 690, 22 S. Ct. 268, 46 L. ed. 390 (*reversing* 74 Fed. 585)]; Northern Pac. R. Co. *v.* Musser-Sauntry, Land, etc., Co., 168 U. S. 604, 18 S. Ct. 205, 42 L. ed. 596 [*affirming* 68 Fed. 993, 16 C. C. A. 97]; Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71 [*reversing* 43 Fed. 867]; U. S. *v.* Colton Marble, etc., Co., 146 U. S. 615, 13 S. Ct. 163, 36 L. ed. 1104 [*reversing* 46 Fed. 683]; U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766 [*reversing* 37 Fed. 68]; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687 [*followed* in Davis *v.* Capitol Phosphate Co., 57 Fed. 118, 6 C. C. A. 278]; Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858 [*reversing* 24 Fed. 889]; Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, 5 S. Ct. 208, 28 L. ed. 794 [*reversing* 13 Fed. 106, 2 McCrary 550]; Cedar Rapids, etc., R. Co. *v.* Herring, 110 U. S. 27, 3 S. Ct. 485, 28 L. ed. 57 [*affirming* 61 Iowa 410, 16 N. W. 344]; Grinnell *v.* Chicago, etc., R. Co., 103 U. S. 739, 26 L. ed. 456; Ryan *v.* Central Pac. R. Co., 99 U. S. 382, 25 L. ed. 305; U. S. *v.* Oregon, etc., R. Co., 152 Fed. 473; St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558; Hastings, etc., R. Co. *v.* St. Paul, etc., R. Co., 32 Fed. 821; St. Paul, etc., R. Co. *v.* Greenhalgh, 26 Fed. 563 [*affirmed* in 139 U. S. 19, 11 S. Ct. 395, 35 L. ed. 71]; U. S. *v.* Central Pac. R. Co., 26 Fed. 479.

See 41 Cent. Dig. tit. "Public Lands," § 251.

Necessity for selection as between railroads whose indemnity limits overlap see *infra* II, K, 1, q, (III).

The filing of a map of definite location of a railroad does not perfect the title of the railroad company to any indemnity lands. Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388.

Proof of loss and selection.—A plaintiff in ejectment, claiming under a railroad company whose title is based upon a selection of the land as indemnity land, must show that the lands thus selected were selected in lieu of lands actually lost by the railroad company from lands granted it, for the court will not take judicial notice of losses of lands which the railroad sustained by reason of Indian reservations and settlements made within the limits of its grant prior to the location of the company's line, and that the selection of the lands in question was in lieu of losses thus sustained. Elling *v.* Thexton, 7 Mont. 330, 16 Pac. 931.

66. *California.*— Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388.

Iowa.— Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842 [*followed* in Johnson *v.* Thornton, 54 Iowa 144, 6 N. W. 165].

Kansas.— Atchison, etc., R. Co. *v.* Rockwood, 25 Kan. 292.

Minnesota.— Sage *v.* Maxwell, 91 Minn. 527, 99 N. W. 42; Resser *v.* Carney, 52 Minn. 397, 54 N. W. 89; Musser *v.* McRae, 38 Minn. 409, 38 N. W. 103.

as indemnity lands;[67] but until such time the title remains in the government [68] and the land is subject to its disposal at its pleasure.[69] It has been considered, however, that if at the time of the definite location of the line of the road it should appear that there were not more unappropriated lands within the indemnity limits than were sufficient to satisfy the quantity to be taken therefrom, or if at first there were more than sufficient and the quantity should be subsequently reduced from any cause, until the quantity granted equaled the number of acres applicable to the satisfaction thereof, the grant would at once attach to these remaining lands, vesting in the grantee title thereto without either selection or approval thereof.[70] The title to indemnity lands does not relate back to the date of the act making the railroad grant but only to the date of selection;[71] but the doctrine of relation precludes the United States from retaining, as against its grantees of land within the indemnity limits of the grant, a sum which it has collected from trespassers thereon for the removal of iron and stone from the land during the period between the selection of such lands to supply in part a large deficiency in the place limits, and the approval of such selection by the secretary of the interior.[72]

Missouri.— Pacific R. Co. *v.* McCombs, 39 Mo. 329.

Montana.— Elling *v.* Thexton, 7 Mont. 330, 16 Pac. 931.

North Dakota.— Grandin *v.* LaBar, 3 N. D. 446, 57 N. W. 241.

Washington.— Northern Pac. R. Co. *v.* Spray, 27 Wash. 1, 67 Pac. 377.

United States.— Sjoli *v.* Dreschel, 199 U. S. 564, 26 S. Ct. 154, 50 L. ed. 311 [*reversing* 90 Minn. 108, 95 N. W. 763 (*following* McHenry *v.* Nygaard, 72 Minn. 2, 74 N. W. 1106; Sage *v.* Swenson, 64 Minn. 517, 67 N. W. 544)]; Humbird *v.* Avery, 195 U. S. 480, 25 S. Ct. 123, 49 L. ed. 286 [*affirming* 110 Fed. 465]; Oregon, etc., R. Co. *v.* U. S., 189 U. S. 103, 23 S. Ct. 615, 47 L. ed. 726 [*affirming* 109 Fed. 514, 48 C. C. A. 520 (*affirming* 101 Fed. 316)]; Clark *v.* Herington, 186 U. S. 206, 22 S. Ct. 872, 46 L ed. 1128 [*affirming* (Kan. 1900) 62 Pac. 1116]; U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766 [*reversing* 37 Fed. 68]; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687 [*followed* in Davis *v.* Capitol Phosphate Co., 57 Fed. 118, 6 C. C. A. 278]; Hoyt *v.* Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404; U. S. *v.* Oregon, etc., R. Co., 152 Fed. 473.

See 41 Cent. Dig. tit. "Public Lands," § 251.

Selection under directions of secretary of interior.— Where the selection of indemnity lands is required to be made "under the direction of the secretary of the interior" a selection does not become effectual or pass the title until it is approved or in some way sanctioned by the secretary of the interior. Resser *v.* Carney, 52 Minn. 397, 54 N. W. 89; *Contra,* Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 51 N. W. 386; Groeck *v.* Southern Pac. R. Co., 102 Fed. 32, 42 C. C. A. 144.

67. Young *v.* Charnquist, 114 Iowa 116, 86 N. W. 205.

68. Young *v.* Charnquist, 114 Iowa 116, 86 N. W. 205; Clark *v.* Herington, 186 U. S. 206, 22 S. Ct. 872, 46 L. ed. 1128 [*affirming* (Kan. 1900) 62 Pac. 1116]; Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71 [*reversing* 43 Fed. 867]; U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687; U. S. *v.* McLaughlin, 127 U. S. 428, 8 S. Ct. 1177, 32 L. ed. 213; St. Paul, etc., R. Co. *v.* Winona, etc., R. Co., 112 U. S. 720, 5 S. Ct. 334, 28 L. ed. 872; Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, 5 S. Ct. 208, 28 L. ed. 794.

There can be no adverse possession prior to selection and certification.— Young *v.* Charnquist, 114 Iowa 116, 86 N. W. 205.

69. Herrington *v.* Clark, 56 Kan. 644, 44 Pac. 624; Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 51 N. W. 386; Clark *v.* Herington, 186 U. S. 206, 22 S. Ct. 872, 46 L. ed. 1128 [*affirming* (Kan. 1900) 62 Pac. 1116]; Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71 [*reversing* 43 Fed. 867]; Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, 5 S. Ct. 208, 28 L. ed. 794.

70. Sage *v.* Crowley, 83 Minn. 314, 86 N. W. 409; Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 363, 51 N. W. 386 [*citing* Minneapolis, etc., R. Co. *v.* Duluth, etc., R. Co., 45 Minn. 104, 47 N. W. 464; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77; U. S. *v.* McLaughlin, 127 U. S. 428, 8 St. Ct. 1177, 32 L. ed. 213], where it is said: "When all of the odd-numbered sections are necessary to give the quantity granted, there can, of course, be no selection. There is no choice to be taken from among a number. The indemnity lands would be as fully identified as the place lands."

71. Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388; Musser *v.* McRae, 44 Minn. 343, 46 N. W. 673; Northern Pac. R. Co. *v.* Musser-Sauntry Land, etc., Co., 168 U. S. 604, 18 S. Ct. 205, 42 L. ed. 596 [*affirming* 68 Fed. 993, 16 C. C. A. 97].

72. U. S. *v.* Anderson, 194 U. S. 394, 24 S. Ct. 716, 48 L. ed. 1035 [*affirming* 38 Ct. Cl. 759].

(III) *Land Subject to Selection.* It is usually provided that indemnity lands shall be selected within a certain distance of the line of the road, and the limits so established are termed the "indemnity limits;" [73] and the fact that land within the indemnity limits is a part of the public domain and free from private claims at the time of its selection is sufficient to authorize such selection regardless of the status of the land at the time of the passage of the act making the grant or of the definite location of the road, or at any other time.[74] A railroad company, to which a grant has been made by congress of alternate sections of public lands, on each side of its road, with the right to select other lands, within a limited distance, in lieu of lands sold or otherwise disposed of by the government, cannot select indemnity lands on one side of its road, to make good losses sustained on the other side; [75] and where the intent of the act granting lands is to create two separate roads, deficiencies within the grant limits of one road cannot be made up by selections from the indemnity limits of the other.[76] Lands which the United States has sold or reserved for any purpose are not subject to selection as indemnity lands.[77] After the price of even-numbered sections within the place limits of a railroad grant has been fixed at double the price of other public lands, such sections cannot be selected as indemnity lands by another railroad company within whose indemnity limits they lie.[78]

(IV) *Time When Selection May Be Made.* A railroad company can make no valid selection of indemnity lands until the line of its road has been fixed by the filing of a map of definite location.[79]

(V) *Validity of Selection.* Where both the act of congress granting lands to a state in aid of a railroad and the act of the state legislature accepting the grant provided for the selection of the land by an agent to be appointed by the governor, the state act providing for his nomination by the railroad company; but neither act required the selection or report of the agent to be preserved or filed, the list of lands filed with the land commissioner by the company, and approved by the secretary of the interior, will be presumed to have been properly selected, after it has been certified as true and correct by the land commissioner, and the secretary of the interior has approved it as such.[80]

(VI) *Attack on Selection.* The fact that a selection of indemnity lands was prematurely made by one who was not selected by the state as an agent for that purpose cannot be made a ground of attack upon the title by a mere stranger, where both the state and the federal governments have recognized the selections made and certified the lands covered thereby as within the grant.[81]

73. See U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131; Southern Pac. R. Co. *v.* Wiggs, 43 Fed. 333.

Extension of indemnity limits see Northern Pac. R. Co. *v.* U. S., 36 Fed. 282, construing the act of congress of July 2, 1864, and resolution of May 31, 1870.

74. Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388; Southern Pac. R. Co. *v.* Bovard, 4 Cal. App. 76, 87 Pac. 203; Donohue *v.* St. Paul, etc., R. Co., 101 Minn. 239, 112 N. W. 413; U. S. *v.* Chicago, etc., R. Co., 195 U. S. 524, 25 S. Ct. 113, 49 L. ed. 306 [*affirming* 116 Fed. 969, 54 C. C. A. 545]; Ryan *v.* Central Pac. R. Co., 99 U. S. 382, 25 L. ed. 305 [*affirming* 21 Fed. Cas. No. 12,185, 6 Reporter 641, 5 Sawy. 260, and *distinguishing* Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769]; U. S. *v.* Southern Pac. R. Co., 152 Fed. 303; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789]; U. S. *v.* Central Pac. R. Co., 26 Fed. 479.

75. Southern Pac. R. Co. *v.* Smith, 74 Fed. 588 [*following* U. S. *v.* Burlington, etc., R. Co., 98 U. S. 334, 25 L. ed. 198].

76. Madison, etc., R. Co. *v.* Wisconsin, 16 Fed. Cas. No. 8,938.

77. Herrington *v.* Clark, 56 Kan. 644, 44 Pac. 624; Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, 5 S. Ct. 208, 28 L. ed. 794 [*reversing* 13 Fed. 106, 2 McCrary 550].

78. Clark *v.* Herrington, 186 U. S. 206, 22 S. Ct. 872, 46 L. ed. 1128 [*affirming* (Kan. 1900) 62 Pac. 1116, and *following* U. S. *v.* Missouri, etc. R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766 (*reversing* 37 Fed. 68)], holding that the approval by the land department of the selection of such lands did not operate to vest the title in the railroad company.

79. St. Paul, etc., R. Co. *v.* Ward, 47 Minn. 40, 49 N. W. 401.

80. Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837.

81. Chicago, etc., R. Co. *v.* Grinnell, 51 Iowa 476, 1 N. W. 712.

(vii) *Evidence of Selection.* The certificate of the commissioner of the general land office, showing that certain lands were contained in the list of lands covered by a railroad grant, and the certificate of the secretary of the interior, approving such list, are competent and sufficient evidence that the lands described passed to the railroad company under the grant.[82]

(viii) *Amount of Land to Which Railroad Company Entitled.* A railroad company is not entitled to select a full section or six hundred and forty acres of indemnity land for every section lost to it within the place limits, but the selection is limited to the quantity of land actually contained in the sections lost.[83]

(ix) *Entry or Settlement Prior to Selection or Approval.* Lands within the indemnity limits of a railroad grant are not reserved prior to their selection as indemnity lands,[84] and the approval of the selection by the secretary of the interior,[85] but remain open to entry and settlement under the general land laws, in consequence of which the right to select them may be lost,[86] unless they have been withdrawn from the market by the secretary of the interior pursuant to the terms of the act making the grant.[87]

82. Johnson *v.* Thornton, 54 Iowa 144, 6 N. W. 165 [*following* Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842], holding that such evidence rendered harmless the erroneous admission of the county book of "original entries" to show the same fact.

83. Sioux City, etc., R. Co. *v.* U. S., 159 U. S. 349, 16 S. Ct. 17, 40 L. ed. 177 [*affirming* 43 Fed. 617]. But *compare* Madison, etc., R. Co. *v.* Wisconsin, 16 Fed. Cas. No. 8,938, where it is said: "When there was not land in place to meet the call of the grants, whether the deficiency was more or less, it was competent to supply it by sections from the indemnity limits; or if, as might happen, there were parts of sections of the lands in place excluded from the grants by the terms of the acts, it was competent to supply the deficiency from the indemnity limits by a similar legal subdivision of land. It would seem to be impracticable to administer the trust on any other basis. In supplying deficiencies it must be by sections, whether full or fractional, and by legal subdivisions."

84. Moore *v.* Cormode, 20 Wash. 305, 55 Pac. 217 [*affirmed* in 180 U. S. 167, 21 S. Ct. 324, 45 L. ed. 476]; St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558.

85. Sjoli *v.* Dreschel, 199 U. S. 564, 26 S. Ct. 154, 50 L. ed. 311 [*reversing* 90 Minn. 108, 95 N. W. 763 (*following* McHenry *v.* Nygaard, 72 Minn. 2, 74 N. W. 1106; Sage *v.* Swenson, 64 Minn. 517, 67 N. W. 544)], holding that even after a railroad company has filed its list of selections the land remains open to settlement and occupation under the preëmption or homestead laws until the selection is approved. But *compare* Grandin *v.* Le Bar, 3 N. D. 446, 57 N. W. 241, holding that the selection of itself so far segregates the land selected from the public domain that any person subsequently seeking to acquire rights therein takes the same subject to the ultimate decision of the interior department as to the legality of such selection.

86. Northern Pac. R. Co. *v.* Wass, 104 Minn. 411, 116 N. W. 937, 117 N. W. 1126; Sage *v.* Maxwell, 91 Minn. 527, 99 N. W. 42 [*followed* in Osborn *v.* Forsyth, (Minn. 1908) 116 N. W. 1113]; Northern Pac. R. Co. *v.* Spray, 27 Wash. 1, 67 Pac. 377; Howard *v.* Hibbs, 22 Wash. 513, 61 Pac. 159; St. Paul, etc., R. Co. *v.* Donohue, 210 U. S. 21, 28 S. Ct. 600, 52 L. ed. 941 [*affirming* 101 Minn. 239, 112 N. W. 413]; Oregon, etc., R. Co. *v.* U. S., 189 U. S. 103, 23 S. Ct. 615, 47 L. ed. 726 [*affirming* 109 Fed. 514, 48 C. C. A. 520 (*affirming* 101 Fed. 316)]; Southern Pac. R. Co. *v.* Bell, 183 U. S. 675, 22 S. Ct. 232, 46 L. ed. 383; Hewitt *v.* Schultz, 180 U. S. 139, 21 S. Ct. 309, 45 L. ed. 463; U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766 [*reversing* 37 Fed. 69]; Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858; Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, 5 S. Ct. 208, 28 L. ed. 794; Cedar Rapids, etc., R. Co. *v.* Herring, 110 U. S. 27, 3 S. Ct. 485, 28 L. ed. 57 [*affirming* 61 Iowa 410, 16 N. W. 344]; Hoyt *v.* Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404.

The fact that all the lands within the indemnity limits are necessary to supply the deficit in the place limits of the grant in aid of a railroad does not affect the rights acquired by *bona fide* settlers prior to a selection of the indemnity lands. Oregon, etc., R. Co. *v.* U. S., 189 U. S. 103, 23 S. Ct. 615, 47 L. ed. 726 [*affirming* 109 Fed. 514, 48 C. C. A. 520 (*affirming* 101 Fed. 316), and *followed* in Sage *v.* Maxwell, 91 Minn. 527, 99 N. W. 42].

Mere occupancy and cultivation of land within the indemnity limits without any attempt to comply with the homestead law will not defeat the right of the railroad company to select such land. McHenry *v.* Nygaard, 72 Minn. 2, 74 N. W. 1106.

The relinquishment of a homestead entry after final decision of the secretary of the interior in favor of the entryman in a contest with a railway company claiming under a subsequent selection of indemnity lands does not inure to the benefit of the railroad company, but the land reverts to the United States. St. Paul, etc., R. Co. *v.* Donohue, 210 U. S. 21, 28 S. Ct. 600, 52 L. ed. 941 [*affirming* 101 Minn. 239, 112 N. W. 413].

87. Sage *v.* Maxwell, 91 Minn. 527, 99

m. Grants and Conveyances by States to Railroad Companies — (i) *In General.* A state statute conferring railroad aid lands on a railroad corporation may be as effective in vesting the title in the corporation as a formal conveyance of the lands,[88] and it has been held that a certified list of lands authorized by a state statute to be signed by the governor and certified by the register of the state land office in order to pass title to railroad companies which have complied with the requirements of the grant is not essential to establish the title to the lands in the company, but in the absence of such certificate the company must prove its title by showing a selection of the lands in question, that they are within the grant, and the construction of the road, so as to entitle the company to the land under the act granting it.[89] A patent issued by the governor of a state in pursuance of an express grant, not void on its face, passes the legal title to the property therein granted,[90] and while such a patent may be impeached for fraud,[91] or set aside for other sufficient cause,[92] it cannot be assailed collaterally.[93] A grant from a state to a railroad company is necessarily limited by the conditions imposed by the act of congress granting the lands in question to the state;[94] and where a state statute confers the land on a certain railroad company, subject to the conditions of the grant, such company acquires no legal title to the lands, by virtue of the grants, until it earns them by performance of the conditions.[95] Where an act of congress makes distinct grants to a state in favor of named roads, with the design to provide for two distinct lines and to aid each by a grant of the lands lying within the prescribed distance along and near it, a conveyance to one company of lands pertaining to the other line provided for is invalid,[96] and an act of the legislature purport-

N. W. 42; St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558.

Withdrawal of lands from entry or sale see *supra*, II, K, 1, p.

88. Courtright *v.* Cedar Rapids, etc., R. Co., 35 Iowa 386.

When grant effective.— Railroad lands became the property of the railroad to which the state granted them as soon as the railroad had complied with the conditions of the act, although the secretary of the interior had not yet certified them to the state and although the governor refused to execute patents therefor to the company until some years thereafter. Whitehead *v.* Plummer, 76 Iowa 181, 40 N. W. 709 [*following* Dubuque, etc., R. Co. *v.* Webster County, 21 Iowa 235; Iowa Homestead Co. *v.* Webster County, 21 Iowa 221, and *followed* in Cole *v.* Des Moines Valley R. Co., 76 Iowa 185, 40 N. W. 711], holding that the land became taxable at that time.

Acceptance of grant.— Where a state accepted a grant in aid of railroads and set aside the lands for the benefit of certain railroads, on condition that "each of said companies shall severally assent and agree to the provisions and requirements of this act, which acceptance shall be filed in the office of the Secretary of State," within a certain time an unqualified acceptance by a railroad company was a necessary condition precedent to the vesting in it of any title or rights under the act. Rogers *v.* Port Huron, etc., R. Co., 45 Mich. 460, 8 N. W. 46.

Construction of grant.— Submerged lands along the shore of Lake Michigan were not included in the grant to the Illinois Central Railroad Company by its charter, authorizing it to enter upon and use "any lands, streams and materials of every kind," and declaring that "all such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes." Illinois Cent. R. Co. *v.* Chicago, 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622 [*affirming* 173 Ill. 471, 50 N. E. 1104, 53 L. R. A. 408].

89. Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842 [*followed* in Johnson *v.* Thornton, 54 Iowa 144, 6 N. W. 165]. But *compare* Sioux City, etc., R. Co. *v.* Osceola County, 50 Iowa 177.

90. State *v.* Sioux City, etc., R. Co., 7 Nebr. 357.

A state patent is evidence that the title has ceased to be in the state and has vested in the grantee after compliance with the conditions of the grant. Iowa Falls, etc., R. Co. *v.* Woodbury County, 38 Iowa 498.

91. State *v.* Sioux City, etc., R. Co., 7 Nebr. 357.

92. State *v.* Sioux City, etc., R. Co., 7 Nebr. 357.

93. State *v.* Sioux City, etc., R. Co., 7 Nebr. 357.

94. Sioux City, etc., R. Co. *v.* Countryman, 83 Iowa 172, 49 N. W. 72, holding that where the act of congress provided that if the railroads were not completed within ten years from the time of their acceptance of the grant the lands not patented should revert to the state, the right to resume control of all lands not earned in ten years remained in the state, although not specifically reserved by it.

95. Bowne *v.* Bilsland, 83 Iowa 162, 49 N. W. 161.

96. Bowes *v.* Haywood, 35 Mich. 241 [*approved* in Fenn *v.* Kinsey, 45 Mich. 446, 8 N. W. 64], construing 11 U. S. St. at L. 21.

ing to ratify and confirm the attempted transfer cannot have the effect of rendering it valid.[97]

(II) *Grants of Lands Thereafter to Be Granted to State.* A state statute granting to a railroad in aid of its construction land thereafter to be granted to the state by the United States can pass nothing as a grant;[98] but such a statute is not merely a grant, but also a law, which must be given such effect as will carry out the intent of the legislature, and such intent cannot be defeated by applying to the grant the common-law rules applicable to mere conveyances;[99] and hence conveyances of such land executed to the railroad company by the governor of the state in accordance with such act of the legislature after the land has been granted to the state by the United States, are valid and operative to convey title to the railroad company.[1]

n. Conditions of Grant — (I) *In General.* Grants in aid of railroads are usually conditional[2] and subject to be defeated on non-compliance with the terms of the grant;[3] and where land is granted to a state in aid of railroads it may impose conditions on the railroad companies to benefit thereby.[4]

(II) *Construction of Road* — (A) *Necessity For.* The actual construction of the road is invariably made a condition to the obtaining of an indefeasible title to the lands granted;[5] and a railroad is "completed," within the meaning of a land grant act when made ready for the running of trains, although not actually equipped with rolling stock.[6]

(B) *Partial Construction.* An act granting to a railroad land to be received by it as the construction proceeds does not impose a legal obligation to complete the entire road;[7] and the failure of the company to complete one section of its line does not affect its right to the lands coterminous with the completed part of its road,[8] and to indemnity for so much of such lands as are lost to it.[9] But the railroad is entitled to only such part of the grant as is proportioned to the part of the road actually built.[10]

97. Fenn *v.* Kinsey, 45 Mich. 446, 8 N. W. 64.

98. Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147, holding that where a charter contained such a grant, and congress subsequently made a grant to the state but revoked it before the state reënacted the charter, the company took nothing.

99. Nash *v.* Sullivan, 29 Minn. 206, 12 N. W. 698 [*distinguishing* Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147, and *following* Missouri, etc., R. Co. *v.* Kansas Pac. R. Co., 97 U. S. 491, 24 L. ed. 1095; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551].

1. Nash *v.* Sullivan, 29 Minn. 206, 12 N. W. 698.

2. See Washington, etc., R. Co. *v.* Northern Pac. R. Co., 2 Ida. (Hasb.) 550, 21 Pac. 658; Minneapolis, etc., R. Co. *v.* Duluth, etc., R. Co., 45 Minn. 104, 47 N. W. 464.

3. Washington, etc., R. Co. *v.* Northern Pac. R. Co., 2 Ida. (Hasb.) 550, 21 Pac. 658; U. S. *v.* Loughrey, 71 Fed. 921, 18 C. C. A. 391 [*affirmed* in 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420].

4. See State *v.* Kirkwood, 14 Iowa 162.

Mandamus would not issue to compel the governor to issue a certificate to a railroad company, which would entitle it to acquire lands granted to the state by the acts of congress of May 15, 1856, to aid in the construction of a railroad from Lyons City to a point on the Iowa Central railroad near Maquoketa, until the conditions expressed in Iowa Laws (1860), c. 37, §§ 6, 7, providing that the company should build a road from Lyons City to Clinton, before Dec. 1, 1861, and that a portion of said road should be constructed from Cedar Rapids to Marion, were complied with. State *v.* Kirkwood, 14 Iowa 162.

5. See State *v.* Southern Minnesota R. Co., 18 Minn. 40.

6. De Graff *v.* St. Paul, etc., R. Co., 23 Minn. 144.

7. State *v.* Southern Minnesota R. Co., 18 Minn. 40.

8. Vankirk Land, etc., Co. *v.* Green, 132 Ala. 348, 31 So. 484; U. S. *v.* Tennessee, etc., R. Co., 176 U. S. 242, 20 S. Ct. 370, 44 L. ed. 452 [*reversing* 81 Fed. 544, 26 C. C. A. 499]; Southern Pac. R. Co. *v.* Groeck, 93 Fed. 707 [*affirmed* in 102 Fed. 32, 42 C. C. A. 144].

9. Southern Pac. R. Co. *v.* Groeck, 93 Fed. 707 [*affirmed* in 102 Fed. 32, 42 C. C. A. 144].

10. Sioux City, etc., R. Co. *v.* U. S., 159 U. S. 349, 16 S. Ct. 17, 40 L. ed. 177 [*affirming* 43 Fed. 617].

Section partially completed.— Where the granting act provides that patents shall be issued for the coterminous lands on the completion of each ten miles of road, the company is not entitled to any additional lands for the construction of an additional fractional part of ten miles, unless the road is entirely completed. Sioux City, etc., R. Co. *v.* U. S., 159 U. S. 349, 16 S. Ct. 17, 40 L. ed. 177 [*affirming* 43 Fed. 617].

(III) *Completion of Road Within Specified Time.* Many of the grants have been conditioned upon a completion of the road within a limited time,[11] and if the company fails to comply with such condition its rights under the grant are lost,[12] and it cannot complain of the forfeiture by congress of all or any part of the land,[13] or the restoration thereof to the public domain.[14] But in the absence of any declaration of forfeiture the railroad may perfect its right to the land by completing the road after such time.[15] Where an act of congress grants land to a state in aid of a railroad to be constructed within a certain time, thus constituting the state a trustee for the purpose of supervising the building of the railroad and transferring the land to the railroad company when earned, the grant carries with it the implied power in the state to make such reasonable extensions of the time as may under the circumstances, be necessary for the accomplishment of that purpose.[16]

(IV) *Operation of Road.* Where a railroad company has received a grant of land upon condition that it will build a railroad from one town to another, it has no authority whatever afterward to abandon any portion of such line and take up and remove the track.[17]

(V) *Transportation of United States Mail, Troops, and Property.* Many of the land grants contain a provision that the roads in aid of which such grants are made shall transport the United States mails,[18] troops, munitions of war, and military supplies and property over their roads at rates to be fixed by the government.[19] Under such a grant the right to the use of the railroad by the government as a post route and military road is a right annexed to

In determining the quantity of acres earned by the partial construction of the stipulated railroad, the latest official measurement of the area of the granted limits, not shown to have been fraudulently made, may be accepted as the best evidence. Sioux City, etc., R. Co. *v.* U. S., 159 U. S. 349, 16 S. Ct. 17, 40 L. ed. 177 [*affirming* 43 Fed. 617].

11. See Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842 [*followed* in Johnson *v.* Thornton, 54 Iowa 144, 6 N. W. 165]; Neer *v.* Williams, 27 Kan. 1; Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830; Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770; Angle *v.* Chicago, etc., R. Co., 151 U. S. 1, 14 S. Ct. 240, 38 L. ed. 55 [*reversing* 39 Fed. 143, 912]; Manley *v.* Tow, 110 Fed. 241; Northern Pac. R. Co. *v.* Dudley, 85 Fed. 82; U. S. *v.* Loughrey, 71 Fed. 921, 18 C. C. A. 391 [*affirmed* in 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420].

Statute not extending time for completion see Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770 [*affirming* 7 N. M. 360, 34 Pac. 592].

It is not an excuse for the failure of the company to complete the road within the stipulated time that the government, after passage of the act making the grant, made reservations to the Indians of lands within the limits of the grant. Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770.

12. See U. S. *v.* Oregon, etc., R. Co., 164 U. S. 526, 17 S. Ct. 165, 41 L. ed. 541 [*reversing* 67 Fed. 650, 14 C. C. A. 600 (*reversing* 57 Fed. 426)].

13. Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770.

14. Northern Pac. R. Co. *v.* Dudley, 85 Fed. 82.

15. Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701; State *v.* Vicksburg, etc., R. Co., 44 La. Ann. 981, 11 So. 865; Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830; Minneapolis, etc., R. Co. *v.* Duluth, etc., R. Co., 45 Minn. 104, 47 N. W. 464; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*followed* in Southern Pac. R. Co. *v.* U. S., 69 Fed. 47, 16 C. C. A. 114]; Bybee *v.* Oregon, etc., R. Co., 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305 [*affirming* 26 Fed. 586].

Necessity of declaration of forfeiture generally, see *infra*, II, K, 1, n, (VII), (B).

A subsequent certification of the land to the railroad company by the government is a waiver of the government's right to a forfeiture. Chicago, etc., R. Co. *v.* Grinnell, 51 Iowa 476, 1 N. W. 712.

Where a forfeiture has been declared because of the failure to complete the road within the time limited the company cannot, merely by doing certain grading, acquire any vested rights in the land such as will prevent the operation of the forfeiture. Madison, etc., R. Co. *v.* Wisconsin, 16 Fed. Cas. No. 8,938.

16. Sage *v.* Crowley, 83 Minn. 314, 86 N. W. 409.

17. State *v.* Sioux City, etc., R. Co., 7 Nebr. 357.

The unprofitableness of operating the road furnishes no excuse whatever for a failure to comply with the conditions of the grant. State *v.* Sioux City, etc., R. Co., 7 Nebr. 357.

Duty to operate railroad generally see RAILROADS.

18. See Wisconsin Cent. R. Co. *v.* U. S., 27 Ct. Cl. 440.

19. See Astoria, etc., R. Co. *v.* U. S., 41 Ct. Cl. 284.

and forming a part of the grant, in the nature of a covenant running with the land — the roadway;[20] and that right cannot be separated from the railroad without the consent of congress by appropriate legislation.[21] So where a non-land grant railroad operates a through line in part over its own road and in part over a land grant road, under a contract with the company owning the latter road, the non-aided road must transport troops, munitions of war, and military supplies at land grant rates over so much of its route as extends over the land grant road;[22] and it cannot compel the government to tranship freight at the point of junction with the land grant road, so that the transportation over the latter road shall be by the land grant company.[23] A provision in an act of congress, granting lands to aid in the construction of a railroad, that "said railroad shall be and remain a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States," merely secures to the government the free use of the road for transportation in its own vehicles, and does not entitle the government to have troops or property transported over the road, by the railroad company, free of charge for transporting the same.[24]

(VI) *Evidence of Compliance With Conditions.* Where the granting act provides that none of the lands granted shall be certified to the companies until the governor of the state shall certify to the secretary of the interior that the said company has completed" the road as specified in the act, in an action by the grantee of one of such railroad companies for the possession of land embraced in the act, the certificate of the governor, referred to, is admissible in evidence to show compliance by the company with the terms of the grant.[25]

(VII) *Breach and Forfeiture* — (A) *In General.* After title has vested in a railroad company under a grant upon conditions subsequent, the title can be defeated only by breach of the conditions of the grant,[26] and a divestiture of title thereupon by proper proceedings by or on behalf of the United States.[27] The right of the government to forfeit a grant for breach of conditions subsequent is in no way dependent upon express words of forfeiture or reinvestiture of title in the granting act, but exists, although there are no such words;[28] nor does the fact that the government imposed as a further condition the right to complete the road itself deprive it of the power to forfeit the grant upon failure of the railroad company to construct the road.[29]

(B) *Necessity For Declaration of Forfeiture.* A condition attached to a grant of land in aid of a railroad requiring the completion of the road within a certain time,[30]

20. Astoria, etc., R. Co. *v.* U. S., 41 Ct. Cl. 284.

21. Astoria, etc., R. Co. *v.* U. S., 41 Ct. Cl. 284.

22. Astoria, etc., R. Co. *v.* U. S., 41 Ct. Cl. 284.

23. Astoria, etc., R. Co. *v.* U. S., 41 Ct. Cl. 284.

24. Lake Shore, etc., R. Co. *v.* U. S., 93 U. S. 442, 23 L. ed. 965, 971, where it is said that the manifest intent of congress in the legislation under discussion was "to reserve only the free use of the road, and not the active service of the company in transportation."

25. Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842 [*followed* in Johnson *v.* Thornton, 54 Iowa 144, 6 N. W. 165]; U. S. *v.* Curtner, 38 Fed. 1 [*reversed* on other grounds in 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. ed. 890].

26. Francoeur *v.* Newhouse, 40 Fed. 618, 14 Sawy. 351.

27. Spokane, etc., R. Co. *v.* Washington, etc., R. Co., 49 Wash. 280, 95 Pac. 64; Francoeur *v.* Newhouse, 40 Fed. 618, 14 Sawy. 351; U. S. *v.* Curtner, 38 Fed. 1 [*reversed* on other grounds in 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. ed. 890]. See *infra*, II, K, 1, n, (VII), (B).

28. Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770 [*affirming* 7 N. M. 360, 34 Pac. 592].

29. Southern Pac. R. Co. *v.* Esquibel, 4 N. M. 123, 20 Pac. 109; Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770 [*affirming* 7 N. M. 360, 34 Pac. 592].

30. Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830; Bybee *v.* Oregon, etc., R. Co., 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305 [*affirming* 26 Fed. 586]; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551 [*affirming* 21 Fed. Cas. No. 12,486, 2 Dill. 398]; U. S. *v.* Loughrey, 71 Fed. 921, 18 C. C. A. 391 [*affirmed* in 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420]; Denny *v.* Dodson, 32 Fed. 899, 13 Sawy. 68.

or imposing limitations on the right of the grantee to dispose of the land,[31] is in the nature of a condition subsequent;[32] and hence a failure to comply therewith does not *ipso facto* work a forfeiture of the land;[33] but merely subjects the grantee to a liability to have a forfeiture declared or enforced,[34] which can be done only by appropriate action on the part of the granting government,[35] and until a forfeiture has been actually enforced by legislative declaration or judicial proceedings the land does not revert to the grantor but the title remains in the grantee.[36]

(c) *How Forfeiture Declared or Ascertained* — (1) In General. Congress or a state legislature may declare a forfeiture of a railroad grant without a judicial inquiry to determine whether there has been a breach of the conditions, leaving the question of such breach to be determined by subsequent judicial proceedings,[37]

31. Warrior River Coal, etc., Co. *v.* Alabama State Land Co., (Ala. 1907) 45 So. 53 [*following* Sullivan *v.* Van Kirk Land, etc., Co., 124 Ala. 225, 26 So. 925], holding that a limitation in the grant that the lands granted shall be sold to actual settlers only, in quantities not greater than one-quarter section to any one purchaser, and at a price not exceeding two dollars and a half per acre, is at most a condition subsequent.

32. See *supra*, notes 30, 31.

33. Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842 [*followed* in Johnson *v.* Thornton, 54 Iowa 144, 6 N. W. 165]; Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701; Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830; U. S. *v.* Northern Pac. R. Co., 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836 [*affirming* 95 Fed. 864, 37 C. C. A. 290]; Bybee *v.* Oregon, etc., R. Co., 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305 [*affirming* 26 Fed. 586].

34. Warrior River Coal, etc., Co. *v.* Alabama State Land Co., (Ala. 1907) 45 So. 53 [*following* Sullivan *v.* Van Kirk Land, etc., Co., 124 Ala. 225, 26 So. 925]; Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830; Denny *v.* Dodson, 32 Fed. 899, 13 Sawy. 68; Bybee *v.* Oregon, etc., R. Co., 26 Fed. 586 [*affirmed* in 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305].

35. Warrior River Coal, etc., Co. *v.* Alabama State Land Co., (Ala. 1907) 45 So. 53 [*following* Sullivan *v.* Van Kirk Land, etc., Co., 124 Ala. 225, 26 So. 925]; Northern Pac. R. Co. *v.* Peronto, 3 Dak. 217, 14 N. W. 103 [*affirmed* in 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330]; Minneapolis, etc., R. Co. *v.* Duluth, etc., R. Co., 45 Minn. 104, 47 N. W. 464; U. S. *v.* Northern Pac. R. Co., 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836 [*affirming* 95 Fed. 864, 37 C. C. A. 290]; U. S. *v.* Tennessee, etc., R. Co., 176 U. S. 242, 20 S. Ct. 370, 44 L. ed. 452 [*reversing* 81 Fed. 544, 26 C. C. A. 499]; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551; U. S. *v.* Tennessee, etc., R. Co., 71 Fed. 71; Knevals *v.* Hyde, 6 Fed. 651, 1 McCrary 402.

How forfeiture declared or enforced see *infra*, II, K, 1, n, (VII), (c).

36. Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842 [*followed* in Johnson *v.* Thornton, 54 Iowa 144, 6 N. W. 165]; Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701; Vicksburg, etc., R. Co. *v.* Sledge, 41 La. Ann. 896, 6 So. 725; Wisconsin Cent. R. Co. *v.* Price County, 64 Wis. 579, 26 N. W. 93; U. S. *v.* Tennessee, etc., R. Co., 176 U. S. 242, 20 S. Ct. 370, 44 L. ed. 452 [*reversing* 81 Fed. 544, 26 C. C. A. 499]; U. S. *v.* Loughrey, 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420 [*affirming* 71 Fed. 921, 18 C. C. A. 391]; Lake Superior Ship-Canal, etc., Co. *v.* Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183; Bybee *v.* Oregon, etc., R. Co., 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305 [*affirming* 26 Fed. 586]; St. Louis, etc., R. Co. *v.* McGee, 115 U. S. 469, 6 S. Ct. 123, 29 L. ed. 446 [*followed* in Doe *v.* Larmore, 116 U. S. 198, 6 S. Ct. 365, 29 L. ed. 598]; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551 [*affirming* 21 Fed. Cas. No. 12,486, 2 Dill. 398]; U. S. *v.* Loughrey, 71 Fed. 921, 18 C. C. A. 391 [*affirmed* in 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420]; U. S. *v.* Tennessee, etc., R. Co., 71 Fed. 71. But *compare* McGregor, etc., R. Co. *v.* Sioux City, etc., R. Co., 49 Iowa 604; Madison, etc., R. Co. *v.* Wisconsin, 16 Fed. Cas. No. 8,938, holding that the acceptance by a state of a grant of lands made by an act of congress, with conditions requiring the land to be disposed of upon the coterminous principle, operated of itself, and without any formal act of forfeiture, to cut off any claim to lands beyond the terminus of its own road, made by a company, which, prior to the act of congress, had violated the conditions upon which the state had granted lands to it.

The grantee may maintain ejectment against an intruder or trespasser before the government has claimed a forfeiture. Denny *v.* Dodson, 32 Fed. 899, 13 Sawy. 68.

The right of action for the unauthorized cutting of timber from the land is in the grantee and not in the government unless the latter has actually declared a forfeiture and reinvested itself with the title. U. S. *v.* Loughrey, 71 Fed. 921, 18 C. C. A. 391 [*affirmed* in 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420, and *following* Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551].

37. Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770; Farnsworth *v.* Minnesota, etc., R. Co., 92 U. S. 49, 23 L. ed. 530.

Where the state is appointed a mere trustee, it cannot declare a forfeiture of the lands granted. Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701 [*following* State *v.* Vicksburg, etc., R. Co., 44 La. Ann. 981, 11 So. 865]; Vicksburg, etc.,

and any public assertion by legislative act of the ownership of the United States or the state, after default of the grantee — such as an act resuming control of the lands and franchises and appropriating them to particular uses, or granting them to others to carry out the original object — is equally effective and operative.[38]

(2) Proceedings For Forfeiture. In a suit by the United States to forfeit a land grant the fact that the bill is framed to procure a forfeiture of the entire grant does not preclude a forfeiture of a part of the grant only.[39] A decretal order of a federal court appointing a receiver, in a suit by the United States to forfeit lands covered by a grant of congress, the conditions of which have not been performed, and to recover timber severed therefrom, which directs the receiver to take possession of the lands, and all timber and logs thereon, is not void as to a claimant of such logs because he was not a party to the suit, the sequestration of the property being *in rem*.[40]

(D) *Who May Set Up Breach of Condition.* No one but the United States can take advantage of a breach of a condition subsequent in a federal railroad grant or question the title based upon the grant because of such breach.[41]

(E) *Waiver of Default.* A default of a railroad company in not filing its map

R. Co. *v.* Sledge, 41 La. Ann. 896, 6 So. 725. See also Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830.

Construction of statutes declaring forfeitures see Lake Superior Ship Canal, etc., Co. *v.* Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183; St. Paul, etc., R. Co. *v.* St. Paul, etc., R. Co., 68 Fed. 2, 15 C. C. A. 167 [*reversing* 57 Fed. 272].

General forfeiture act.— By Act Cong. Sept. 29, 1890, c. 1040 (26 U. S. St. at L. 496 [U. S. Comp. St. (1901) p. 1598]), all lands previously granted to states or corporations in aid of railroads and which had not been earned by the construction and operation of roads to which they would appertain under the terms of the grant, were declared forfeited, and the United States resumed title thereto and restored the lands to the public domain. See Southern R. Co. *v.* Choate, 119 Ala. 358, 24 So. 726; U. S. *v.* Northern Pac. R. Co., 193 U. S. 1, 24 S. Ct. 330, 48 L. ed. 593. But this act did not have the effect of forfeiting lands coterminous with the completed line of a railroad (U. S. *v.* Tennessee, etc., R. Co., 176 U. S. 242, 20 S. Ct. 370, 44 L. ed. 452 [*reversing* 81 Fed. 544, 26 C. C. A. 499]. See also *supra*, II, K, 1, n, (II), (B)), nor did it forfeit a right of way over such land acquired by condemnation proceedings by a railroad other than the one for which a grant was made, after the grant and before the forfeiture (Southern R. Co. *v.* Choate, 119 Ala. 358, 24 So. 726).

38. Farnsworth *v.* Minnesota, etc., R. Co., 92 U. S. 49, 23 L. ed. 530.

39. U. S. *v.* Tennessee, etc., R. Co., 176 U. S. 242, 20 S. Ct. 370, 44 L. ed. 452 [*reversing* 81 Fed. 544, 26 C. C. A. 499].

40. Steele *v.* Walker, 115 Ala. 485, 21 So. 942, 67 Am. St. Rep. 62, holding further that such an order being interlocutory only, a description of lands excepted therefrom as such lands, described in the bill, as are coterminous with a portion of the railroad between two designated points, which is shown by the bill to have been constructed within the time required by the grant, is sufficiently definite.

41. *Idaho.*— Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

Iowa.— Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842 [*followed* in Johnson *v.* Thornton, 54 Iowa 144, 6 N. W. 165]; Chicago, etc., R. Co. *v.* Grinnell, 51 Iowa 476, 1 N. W. 712.

Louisiana.— Vicksburg, etc., R. Co., *v.* Elmore, 46 La. Ann. 1237, 15 So. 701; Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830; Vicksburg, etc., R. Co. *v.* Sledge, 41 La. Ann. 896, 6 So. 725.

Missouri.— Kennett *v.* Plummer, 28 Mo. 142.

Montana.—Northern Pac. R. Co. *v.* Majors, 5 Mont. 111, 2 Pac. 322.

Washington.— Spokane, etc., R. Co. *v.* Washington, etc., R. Co., 49 Wash. 280, 95 Pac. 64.

United States.— U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*followed* in Southern Pac. R. Co. *v.* U. S., 69 Fed. 47, 16 C. C. A. 114]; Van Wyck *v.* Knevals, 106 U. S. 360, 1 S. Ct. 336, 27 L. ed. 201; U. S. *v.* Loughrey, 71 Fed. 921, 18 C. C. A. 391 [*affirmed* in 172 U. S. 206, 19 S. Ct. 153, 43 L. ed. 420]; Denny *v.* Dodson, 32 Fed. 899, 13 Sawy. 68; Bybee *v.* Oregon, etc., R. Co., 26 Fed. 586 [*affirmed* in 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305]; Knevals *v.* Hyde, 6 Fed. 651, 1 McCrary 402.

See 41 Cent. Dig. tit. "Public Lands," § 265.

A bona fide purchaser from a patentee whose patent was issued by the United States after the route of the railroad was definitely fixed has no title and cannot take advantage of the breach. Knevals *v.* Hyde, 6 Fed. 651, 1 McCrary 402.

Persons settling on the land after a breach of the condition are possessors in bad faith where no forfeiture has been declared. Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701.

of definite location or constructing its road within the time limited by the grant may be waived by the government,[42] and if the road is subsequently constructed on the faith of the grant and the waiver, and patents issued for the land, the grant becomes irrevocable.[43]

(F) *Effect of Forfeiture* [44]— (1) In General. A forfeiture declared or adjudged in proper manner frees the land from all rights or claims arising under the grant,[45] reinvests the legal title in the United States,[46] restores the land to the public domain,[47] and renders it subject to disposition under the general land laws.[48]

(2) Subsequent Grants. Where lands which have been forfeited by one railroad company are subsequently granted to another company the latter takes the land free from any claims of or any trust in favor of the creditors of the first grantee.[49]

o. Entries or Grants Subsequent to Railroad Grant or Vesting of Title Thereunder. Congress may dispose of lands within the exterior limits of a railroad grant at any time before the title has vested by the filing of the map of definite location;[50] but after the grant has attached to specific lands no title thereto or

42. Chicago, etc., R. Co. *v.* Grinnell, 51 Iowa 476, 1 N. W. 712; U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 [*affirmed* in 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836].

43. U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 [*affirmed* in 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836, holding that the fact that a railroad company did not file its map of the definite location of its line as extended eastward, or construct such line or select its eastern terminus, until after the time fixed by the acts of congress for the completion of its road had expired, would not afford ground on which a court of equity, at suit of the United States, would cancel a patent for lands issued under the grant on account of such extension, where no action of congress looking to a forfeiture was taken, the map of route and selection of terminus were approved by the land department, and the road, when built, was examined and accepted, and the patent issued thereon.

44. **Effect of forfeiture of lands within conflicting or overlapping grants** see *infra*, II, K, 1, q, (IV).

45. Neer *v.* Williams, 27 Kan. 1.

A patent subsequently issued passes no title.— Neer *v.* Williams, 27 Kan. 1.

46. Williams Inv. Co. *v.* Pugh, 137 Ala. 346, 34 So. 377.

47. McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3; Southern Pac. R. Co. *v.* U. S., 189 U. S. 447, 23 S. Ct. 567, 47 L. ed. 896 [*affirming* 109 Fed. 913, 48 C. C. A. 712 (*affirming* 94 Fed. 427)]; San Jose Land, etc., Co. *v.* San Jose Ranch Co., 189 U. S. 177, 23 S. Ct. 487, 47 L. ed. 765 [*affirming* 129 Cal. 673, 62 Pac. 269]; Sioux City, etc., R. Co. *v.* Countryman, 159 U. S. 377, 16 S. Ct. 28, 40 L. ed. 187; U. S. *v.* Northern Pac. R. Co., 152 U. S. 284, 14 S. Ct. 598, 38 L. ed. 443 [*reversing* 41 Fed. 842]; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*followed* in Southern Pac. R. Co. *v.* U. S., 69 Fed. 47, 16 C. C. A. 114]; Maffet *v.* Quine, 93 Fed. 347, 95 Fed. 199; Oregon, etc., R. Co. *v.* U. S., 77 Fed. 67, 23 C. C. A. 15 [*reversing* 69 Fed. 899, and *affirmed* in 176 U. S. 28, 20 S. Ct. 261, 44 L. ed. 358]; Johnston *v.* Morris, 72 Fed. 890, 19 C. C. A. 229.

48. Johnston *v.* Morris, 72 Fed. 890, 19 C. C. A. 229.

Provision for opening lands to "homestead entry."— Where an act of congress expressly confirmed the rights of a certain railroad to specified lands subject to certain conditions, and provided for a forfeiture of the lands if the same should be violated, in which case they should be "open to homestead entry under the provisions of this act," and the lands were forfeited, they were subject to homestead and not to town-site entry. Sanford *v.* King, 19 S. D. 334, 103 N. W. 28.

49. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 163 U. S. 31, 16 S. Ct. 917, 41 L. ed. 60; Chamberlain *v.* St. Paul, etc., R. Co., 5 Fed. Cas. No. 2,578 [*affirmed* in 92 U. S. 299, 23 L. ed. 715].

50. U. S. *v.* Oregon, etc., R. Co., 176 U. S. 28, 20 S. Ct. 261, 44 L. ed. 358 [*affirming* 77 Fed. 67, 23 C. C. A. 15 (*reversing* 69 Fed. 899), and *followed* in Wilcox *v.* Eastern Oregon Land Co., 176 U. S. 51, 20 S. Ct. 269, 44 L. ed. 368 (*affirming* 79 Fed. 719, 25 C. C. A. 164)]; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659.

Under the Pacific Railroad land grant (Act Cong. July 1, 1862, 12 U. S. St. at L. 489) the right was reserved to congress to otherwise dispose of the land at any time prior to the definite location of the line of the railroad. Menotti *v.* Dillon, 167 U. S. 703, 17 S. Ct. 945, 42 L. ed. 333.

Act confirming state selections.— Act Cong. July 23, 1866 (14 U. S. St. at L. 218), entitled "An act to quiet land titles in California," which confirmed to the state in "all cases," with certain specified exceptions, for the benefit of its grantees, the title to lands theretofore selected by the state as a part of grants made it, where it had disposed of such lands to *bona fide* purchasers, applied to and validated a location of land made by the state in lieu of school land, on an application to purchase under a state law by one who had settled on the land in 1858, and to whom

rights therein can be obtained by persons entering the same under the general land laws,[51] nor can the United States grant or convey the lands to another person.[52]

p. Withdrawal of Lands From Entry or Sale — (i) *In General.* It is sometimes provided that as soon as the general route of the railroad is fixed the alternate sections along the line within the place limits shall be reserved from sale or preëmption under the land laws, and no rights can be acquired by a subsequent entry thereon;[53] but in order that lands may be withdrawn before the map of definite location is filed it must clearly appear that such was the intention of congress.[54]

the state had issued a certificate of purchase, although such land was within the Pacific Railroad grant, and had been, prior to its location by the state, withdrawn from preëmption, private entry, and sale, by order of the secretary of the interior, on the filing by the railroad company of the map of its general route, no map showing the definite location of the line of road having been filed. Menotti *v.* Dillon, 167 U. S. 703, 17 S. Ct. 945, 42 L. ed. 333.

51. *Iowa.*— Burlington, etc., R. Co. *v.* Lawson, 58 Iowa 145, 12 N. W. 229; Chicago, etc., R. Co. *v.* Grinnell, 51 Iowa 476, 1 N. W. 712; Blair Town Lot, etc., Co. *v.* Kitteringham, 43 Iowa 462.

Kansas.— Atchison, etc., R. Co. *v.* Bobb, 24 Kan. 673.

Minnesota.— Weeks *v.* Bridgman, 41 Minn. 352, 43 N. W. 81, 46 Minn. 390, 49 N. W. 191.

Missouri.— Wright *v.* Howe, (1888) 8 S. W. 561.

Washington.— Laurendeau *v.* Fugelli, 1 Wash. 553, 21 Pac. 29.

United States.— Walden *v.* Knevals, 114 U. S. 373, 5 S. Ct. 898, 29 L. ed. 167; Van Wyck *v.* Knevals, 106 U. S. 360, 1 S. Ct. 336, 27 L. ed. 201; Grinnell *v.* Chicago, etc., R. Co., 103 U. S. 739, 26 L. ed. 456; Southern Pac. R. Co. *v.* Stanley, 49 Fed. 263; U. S. *v.* Northern Pac. R. Co., 41 Fed. 842; Denny *v.* Dodson, 32 Fed. 899, 13 Sawy. 68; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 6 Sawy. 157; Southern Pac. R. Co. *v.* Dull, 22 Fed. 489, 10 Sawy. 506; Knevals *v.* Hyde, 6 Fed. 651, 1 McCrary 402, although the purchaser had no notice of the location of the road.

See 41 Cent. Dig. tit. "Public Lands," § 234.

Deviation from route adopted.— Where a railroad company which has been granted land within a certain distance of its road has adopted a route designated on a map filed with the secretary of the interior, and accepted by that officer, a deviation from the routes so adopted will not avail a preëmptor, where it appears that the land claimed by him is within the required limit, whether measured from the line of the road as adopted or from that constructed. Van Wyck *v.* Knevals, 106 U. S. 360, 1 S. Ct. 336, 27 L. ed. 201.

Right attaching in interim between expiration of grant and renewal.— Where the original grant to a state in aid of railroads expired by limitation but was subsequently renewed, subject to all the conditions of the original grant, one of which was that if the right of preëmption had attached to any of the lands thus granted other lands should be selected in lieu thereof, one whose preëmption right attached in the interim between the expiration of the original grant and its renewal was entitled to the land. South Alabama, etc., R. Co. *v.* Gilliam, 85 Ala. 171, 4 So. 694.

Confirmation of title of settlers.— A person who, in March, 1888, settled on land granted to the Ontonagon R. Co., but which had not been earned by such company, with a view of making a homestead of it under the laws of the United States, expecting at the time that such grant would be removed, and that he could then enter the land, is a *bona fide* claimant of such homestead, within the meaning of the act of congress of March 2, 1889 (25 U. S. St. at L. 1008), confirming title in such claimants, although he knew of the grant to such railroad company. Lake Superior Ship-Canal, etc., Co. *v.* Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183.

52. Paige *v.* Kolman, 93 Wis. 435, 67 N. W. 700; U. S. *v.* Curtner, 38 Fed. 1 [*reversed* on other grounds in 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. ed. 890].

Land to which rights had previously attached, not being within the railroad grant, may be patented at any time. See *infra*, II, K, 1, k, (xi).

53. McLaughlin *v.* Menotti, 89 Cal. 354, 26 Pac. 880; Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116; Northern Lumber Co. *v.* O'Brien, 204 U. S. 190, 27 S. Ct. 249, 51 L. ed. 438 [*affirming* 139 Fed. 614, 71 C. C. A. 598 (*affirming* 134 Fed. 303)]; St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558; U. S. *v.* Curtner, 38 Fed. 1 [*reversed* on other grounds in 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. ed. 890].

54. Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604, 46 Fed. 239 [*affirmed* in 49 Fed. 129, 1 C. C. A. 192, and *followed* in Northern Pac. R. Co. *v.* Hinchman, 53 Fed. 523 (*affirmed* in 61 Fed. 554, 9 C. C. A. 609)], holding that the provision of the Northern Pacific Railroad Company's grant of public lands, that "the president of the United States shall cause the lands to be surveyed for forty miles on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or preëmption be-

(II) *Power of Secretary of Interior or Land Department Apart From Statutory Authority.* It has been held that as the interior department possesses plenary power to withdraw public lands from settlement and market at will, an order of the secretary of the interior withdrawing lands within a railroad grant is valid without and independent of any statutory authority;[55] but it has also been held that where a railroad grant expressly reserves from its operations all lands to which the right of preëmption or homestead settlement has attached when the line is fixed, the land commissioner, in the absence of express direction by congress, and prior to the location of the line, has no authority to withdraw lands within the general grant from preëmption or homestead settlement.[56] Under a railroad grant providing that the "odd sections of land hereby granted shall not be liable to sale or entry or preëmption, before or after they are surveyed, except by said company as provided in this act," but that the provisions of the preëmption and homestead laws "shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company," the secretary of the interior is not authorized to withdraw from settlement lands outside the place limits but within the indemnity limits, in advance of any selection by the railroad company.[57]

(III) *How Withdrawal Effected.* Some of the grants effect such a withdrawal by their own force when the route is fixed,[58] while others contemplate that the withdrawal shall be effected by some more or less formal action on the part of the secretary of the interior or the land department,[59] and until such action

fore or after they are surveyed, except by said company, as provided in this act," would not be construed as withdrawing the lands within the limits indicated from sale or entry until the line of the road was definitely fixed by filing a map thereof with the commissioner of the general land office, as required by the statute. See also George *v.* Riddle, 94 Fed. 689.

55. O'Connor *v.* Gertgens, 85 Minn. 481, 89 N. W. 866, holding that therefore where the secretary has issued such an order pursuant to a statutory provision making it his duty to do so, the repeal of such provision does not of itself revoke or annul such order and restore the land to the public domain.

56. Brandon *v.* Ard, 74 Kan. 424, 87 Pac. 366. See also Hoyt *v.* Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404.

57. Hewitt *v.* Schultz, 180 U. S. 139, 21 S. Ct. 309, 45 L. ed. 463 [*reversing* 7 N. D. 601, 76 N. W. 230, *approving* Northern Pac. R. Co. *v.* Miller, 7 Land Dec. Dep. Int. 100; Atlantic, etc., R. Co. *v.* ——, 6 Land Dec. Dep. Int. 84, and *followed* in Oregon, etc., R. Co. *v.* U. S., 189 U. S. 103, 23 S. Ct. 615, 47 L. ed. 726 (*affirming* 109 Fed. 514, 48 C. C. A. 520 [*affirming* 101 Fed. 316]); Southern Pac. R. Co. *v.* Bell, 183 U. S. 675, 22 S. Ct. 232, 46 L. ed. 383 (*affirming* (Cal. 1899) 58 Pac. 1116 [*following* Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388], *approving* Northern Pac. R. Co. *v.* Davis, 19 Land Dec. Dep. Int. 87, and *followed* in Groeck *v.* Southern Pac. R. Co., 183 U. S. 690, 22 S. Ct. 268, 46 L. ed. 390 [*reversing* 87 Fed. 970, 31 C. C. A. 334]); Moore *v.* Stone, 180 U. S. 180, 21 S. Ct. 322, 45 L. ed. 483 (*affirming* 20 Wash. 713, 55 Pac. 1103); Moore *v.* Cormode, 180 U. S. 167, 21 S. Ct. 324, 45 L. ed. 476 (*affirming* 20 Wash. 305, 55 Pac. 217)].

58. Northern Pac. R. Co. *v.* Lilly, 6 Mont. 65, 9 Pac. 116; Southern Pac. R. Co. *v.* Groeck, 68 Fed. 609; Southern Pac. R. Co. *v.* Wiggs, 43 Fed. 333; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 6 Sawy. 157.

The filing of a map of the general route which is rejected by the commissioner of the land office as being indefinite and not properly authenticated does not operate as a withdrawal or segregation of the lands along the route. Oregon, etc., R. Co. *v.* U. S., 77 Fed. 67, 23 C. C. A. 15 [*reversing* 69 Fed. 899, and *affirmed* in 176 U. S. 28, 20 S. Ct. 261, 44 L. ed. 358].

The secretary of the interior has no power to allow a preëmption upon a section within the indemnity limits subject to selection, while an unsatisfied deficiency exists within the place limits. Southern Pac. R. Co. *v.* Wiggs, 43 Fed. 333.

59. McLaughlin *v.* Menotti, 89 Cal. 354, 26 Pac. 880; Kansas Pac. R. Co. *v.* Dunmeyer, 24 Kan. 725; St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558.

A withdrawal may be made by order of the interior department and need not be by proclamation of the president. Wood *v.* Beach, 156 U. S. 548, 15 S. Ct. 410, 39 L. ed. 528.

Duty to withdraw lands.— Under a statute providing that as soon as maps designating the routes of a railroad and its branches are filed with the secretary of the interior it shall be his duty to withdraw the lands from the market, it is not his duty to withdraw the lands until such maps are filed. St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558.

Sufficiency of order of withdrawal.—An order of the land department directing the local land office to suspend the preëmption, settlement, and sale a "body of land about

is taken the land remains subject to acquisition by individuals under the general land laws.[60]

(iv) *Validity of Withdrawal.* When railroad lands are withdrawn from preëmption and sale by the direction of the secretary of the interior, it will be presumed that the railroad company has filed a map designating the general route of the road.[61] Whether the land commissioner included too much land in an order of withdrawal is a matter for the determination of the land department and cannot be revised by the courts.[62]

(v) *Effect of Withdrawal* — (a) *In General.* The withdrawal passes no title,[63] and does not affect any rights in the land previously acquired,[64] or prevent the perfection of such rights; [65] but it prevents the subsequent acquisition, under the general land laws, of any interest in the lands, by persons having no interest therein at the time of the withdrawal,[66] although the railroad company for whose

twenty miles in width," is not so uncertain and indefinite as to be without legal force as to lands which are coterminous with and within ten miles of the line of the general route of the railroad for the benefit of which the order was made where such route is defined on a map or diagram to which the order refers. Northern Lumber Co. *v.* O'Brien, 204 U. S. 190, 27 S. Ct. 249, 51 L. ed. 438 [*affirming* 139 Fed. 614, 71 C. C. A. 598].

60. Kansas Pac. R. Co. *v.* Dunmeyer, 24 Kan. 725 [*affirmed* in 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122] (holding that where the act making a railroad grant provides that upon the filing of the map of the general route "the secretary of the interior shall cause the land within fifteen miles of said designated route or routes to be withdrawn from preëmption, private entry, and sale," the mere filing of such a map does not effect a withdrawal of the lands, but a valid title may be predicated upon a homestead entry made after such filing but before a letter of the commissioner of the general land office directing a withdrawal of the lands was received at the local land office); St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558.

61. Weaver *v.* Fairchild, 50 Cal. 360.

62. Spencer *v.* McDougal, 159 U. S. 62, 15 S. Ct. 1026, 40 L. ed. 76.

63. St. Paul, etc., R. Co. *v.* Greenhalgh, 26 Fed. 563 [*affirmed* in 139 U. S. 19, 11 S. Ct. 395, 35 L. ed. 71].

64. Atchison, etc., R. Co. *v.* Rockwood, 25 Kan. 292.

65. Atchison, etc., R. Co. *v.* Rockwood, 25 Kan. 292.

Where an entry had not been perfected at the time of the withdrawal and the entryman did not subsequently take possession of the land but acquiesced in the withdrawal, the land is properly certified to the railroad. U. S. *v.* Chicago, etc., R. Co., 195 U. S. 524, 25 S. Ct. 113, 49 L. ed. 306 [*affirming* 116 Fed. 969, 54 C. C. A. 545].

66. *California.*— McLaughlin *v.* Menotti, 89 Cal. 354, 26 Pac. 880.

Kansas.— Wood *v.* Beach, 43 Kan. 427, 23 Pac. 649; Atchison, etc., R. Co. *v.* Rockwood, 25 Kan. 292.

Louisiana.— Mower *v.* Kemp, 42 La. Ann. 1007, 8 So. 830.

Minnesota.— Sage *v.* Crowley, 83 Minn. 314, 86 N. W. 409 [*approving* Sage *v.* Swenson, 64 Minn. 517, 67 N. W. 544], holding that one who entered on lands granted to a railroad company by an act of congress, after they had been withdrawn from settlement and after the railroad had been completed, is not in a position to attack a title based upon the railroad grant.

United States.— Gertzens *v.* O'Connor, 191 U. S. 237, 24 S. Ct. 94, 48 L. ed. 163 [*affirming* 85 Minn. 481, 89 N. W. 866]; Spencer *v.* McDougal, 159 U. S. 62, 15 S. Ct. 1026, 40 L. ed. 76; Wood *v.* Beach, 156 U. S. 548, 15 S. Ct. 410, 39 L. ed. 528; Hamblin *v.* Western Land Co., 147 U. S. 531, 13 S. Ct. 353, 37 L. ed. 267; U. S. *v.* Des Moines Nav., etc., Co., 142 U. S. 510, 12 S. Ct. 308, 35 L. ed. 1099; Bullard *v.* Des Moines, etc., R. Co., 122 U. S. 167, 7 S. Ct. 1149, 30 L. ed. 1123; Wolsey *v.* Chapman, 101 U. S. 755, 25 L. ed. 915; Wolcott *v.* Des Moines Nav., etc., Co., 5 Wall. 681, 18 L. ed. 689; Thompson *v.* St. Paul, etc., R. Co., 83 Fed. 546; Merrill *v.* Chicago, etc., R. Co., 70 Fed. 464, 17 C. C. A. 199; Southern Pac. R. Co. *v.* Araiza, 57 Fed. 98; Southern Pac. R. Co. *v.* Wiggs, 43 Fed. 333; U. S. *v.* Curtner, 38 Fed. 1 [*reversed* on other grounds in 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. ed. 890]; Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 6 Sawy. 157; St. Paul, etc., R. Co. *v.* Greenhalgh, 26 Fed. 563 [*affirmed* in 139 U. S. 19, 11 S. Ct. 395, 35 L. ed. 71].

See 41 Cent. Dig. tit. "Public Lands," § 248.

A mere executive withdrawal has this effect so long as it remains in force, although the railroad company has no vested right in such withdrawal. Sage *v.* Swenson, 64 Minn. 517, 67 N. W. 544 [*approved* in Sage *v.* Crowley, 83 Minn. 314, 86 N. W. 409].

Lands without the primary limits but within the indemnity limits are not open to homestead entry after an order has been issued from the general land office, directing the withdrawal of such lands from entry. Southern Pac. R. Co. *v.* Araiza, 57 Fed. 98 [*following* Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330, and *overruling* Southern Pac. R. Co. *v.* Tilley, 41 Fed. 729].

A joint resolution of congress "saving and reserving all the rights of actual settlers" confers no new rights upon a preëmptor going upon railroad lands subsequent to the

benefit the lands are withdrawn is not at the time authorized under the law of the state to take a perfect title to the lands.[67] And even though the land is ultimately found not to be within the grant no rights can be obtained therein prior to its restoration to the public domain.[68] A withdrawal of lands from "sale or entry, or preëmption" applies to the sale, preëmption or entry of lands under and by virtue of the general laws of congress, and does not cover any other mode of disposal of the public lands by the United States.[69]

(B) *Lands Affected by Withdrawal.* An order of the land department, withdrawing the odd-numbered sections within the indemnity limits of a railroad land grant, is inoperative as respects lands then occupied and claimed by a qualified preëmptor,[70] and if such lands are subsequently abandoned, they will, until a selection is made by the railway company, be deemed still open for homestead settlement.[71] A withdrawal of the lands "hereby granted" applies only to the odd-numbered sections within the place limits and leaves such sections within the indemnity limits subject to entry and acquisition under the general laws.[72]

(C) *Relief of Settlers.* The act of congress of 1880 for the relief of settlers on the public lands [73] so far modified a previous order of withdrawal based merely on general route that such order would not affect any occupancy or settlement made in good faith, after the passage of that act, and prior to definite location.[74]

(VI) *REVOCATION OF WITHDRAWAL AND RESTORATION OF LAND TO PUBLIC DOMAIN.* Where an unconditional withdrawal is made by statute the lands can be restored to the public domain by statutory authority only,[75] and the secretary of the interior has no power to repeal or modify the statute, or restore the lands to their former condition.[76] But a voluntary order of the secretary of the interior, reserving and withdrawing certain lands from sale and entry, as subject to selection under a railroad grant, vests no rights in the railroad beneficiary inconsistent with the right of a preëmptor to settle and enter, but such order is revocable, and is *pro tanto* revoked by allowing a settlement and entry of a tract under the preëmption laws.[77] Where the commissioner of the land office withdrew lands, within the limits of a railroad grant, from settlement, and subsequently the secretary of the interior made an order revoking the withdrawal, but directing that entries should not be received until after thirty days' notice by

order of withdrawal. Southern Pac. R. Co. *v.* Wiggs, 43 Fed. 333.

A state selection of such lands in lieu of school lands lost is inoperative. U. S. *v.* Curtner, 38 Fed. 1 [*reversed* on other grounds in 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. ed. 890].

67. Southern Pac. R. Co. *v.* Orton, 32 Fed. 457.

68. Hamblin *v.* Western Land Co., 147 U. S. 531, 13 S. Ct. 353, 37 L. ed. 267.

Restoration of land to public domain see *infra*, II, K, 1, p, (VI).

69. Northern Pac. R. Co. *v.* Hinchman, 53 Fed. 523 [*affirmed* in 61 Fed. 554, 9 C. C. A. 609] (holding that such a withdrawal does not preclude an appropriation of such lands by the giving of certain rights of preëmption without cost to Indians actually occupying and cultivating any portion thereof); Northern Pac. R. Co. *v.* Sanders, 49 Fed. 129, 1 C. C. A. 192 [*affirming* 47 Fed. 604, 46 Fed. 239] (holding that such a withdrawal does not prevent the taking up of a mining claim on such land, where the grant is of land "not mineral"). See also Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71 [*reversing* 43 Fed. 867].

70. St. Paul, etc., R. Co. *v.* Ward, 47 Minn. 40, 49 N. W. 401.

71. St. Paul, etc., R. Co. *v.* Ward, 47 Minn. 40, 49 N. W. 401.

72. Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388. But *compare* Southern Pac. R. Co. *v.* Araiza, 57 Fed. 98, 103, where it is said by Ross, J.: "An order of withdrawal made before the line of road is definitely fixed is as applicable to lands within the indemnity limit as to those within the primary limits of the grant; for up to that time the grant is no more attached to specific tracts of the one class of lands than of the other, neither being in any way identified."

73. 21 U. S. St. at L. 140, c. 89, § 3 [U. S. Comp. St. (1901) p. 1393].

74. Nelson *v.* Northern Pac. R. Co., 188 U. S. 108, 23 S. Ct. 302, 47 L. ed. 406 [*reversing* 22 Wash. 521, 61 Pac. 703].

75. Southern Pac. R. Co. *v.* Orton, 32 Fed. 457.

76. Southern Pac. R. Co. *v.* Orton, 32 Fed. 457.

77. Prince Inv. Co. *v.* Eheim, 55 Minn. 36, 56 N. W. 239. See also Sage *v.* Swenson, 64 Minn. 517, 67 N. W. 544 [*approved* in Sage *v.* Crowley, 83 Minn. 314, 86 N. W. 409].

advertisement, and a few days later, and before notice was given, the secretary directed the local officers to suspend the restoration, until further orders, the effect of the last order was to suspend the order of revocation, and to withdraw the lands from settlement, and persons settling on the lands after such orders acquired no rights in them.[78]

q. Rights Under Conflicting or Overlapping Grants — (I) *Overlap of Place Limits* — (A) *Simultaneous Grants.* Where by the same statute or by statutes of the same date grants are made for the benefit of several different railroads, and two or more roads legally located in pursuance of such grants cross each other or approach each other so nearly that the limits of the primary grants for the benefit of each overlap, each of the roads is entitled to an equal undivided share of the land within the overlap,[79] without regard to priority of location of the lines of road,[80] or priority of construction,[81] unless the statute itself indicates an intention on the part of congress that one grant shall be subordinate to the other,[82]

78. Merrill *v.* Chicago, etc., R. Co., 70 Fed. 464, 17 C. C. A. 199.

79. McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3 [*followed* in Galloway *v.* Henderson, 136 Ala. 315, 34 So. 957]; Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, 22 S. Ct. 154, 21 L. ed. 307 [*reversing* 98 Fed. 27, 38 C. C. A. 619 (*affirming* 86 Fed. 962)]; Chicago, etc., R. Co. *v.* U. S., 159 U. S. 372, 16 S. Ct. 26, 40 L. ed. 185 [*affirming* 46 Fed. 502]; Sioux City, etc., R. Co. *v.* U. S., 159 U. S. 349, 16 S. Ct. 17, 40 L. ed. 177; Donahue *v.* Lake Superior Ship Canal, etc., Co., 155 U. S. 386, 15 S. Ct. 115, 39 L. ed. 194 [*reversing* 44 Fed. 587]; Lake Superior, etc., R. Co. *v.* Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183; Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 117 U. S. 406, 6 S. Ct. 790, 29 L. ed. 928; St. Paul, etc., R. Co. *v.* Winona, etc., R. Co., 112 U. S. 720, 5 S. Ct. 334, 28 L. ed. 872; Sioux City, etc., R. Co. *v.* Union Pac. R. Co., 22 Fed. Cas. No. 12,909, 4 Dill. 307. See also Northern Pac. R. Co. *v.* Miller, 20 Wash. 21, 54 Pac. 603, where the same principle was applied to a grant for a main line and a branch road.

Grants not simultaneous by relation.— By Act Cong. July 27, 1866, § 3 (14 U. S. St. at L. 292), organizing the Atlantic and Pacific Railroad Company, congress, in the usual terms, granted lands to it to aid in the construction of a transcontinental railroad. In section 18 it authorized the Southern Pacific Railroad Company, a California corporation, to connect with such road near the California boundary, for a road to San Francisco, and, to aid in the construction thereof, declared that that company should have similar grants of land, subject to all the conditions and limitations of the grant to the former company. By Act Cong. March 3, 1871 (16 U. S. St. at L. 573), the Texas Pacific railroad was incorporated, grants of land were made to it, and in section 23 authority was also given to the Southern Pacific Company to build a connecting road from a certain point on the Colorado river to San Francisco, "with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions," as were granted to it by the act incorporating the Atlantic and Pacific Company, provided that no rights of the latter company should be impaired. In a contest concerning these grants it was held that the fact that the act of 1871, in terms, bestowed upon the Southern Pacific Company the same rights, grants, and privileges as it received under the act of 1866, did not operate to make the grant relate back to that date, so as to present the case of simultaneous grants of the same lands to different companies. U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 46 Fed. 683].

80. Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, 22 S. Ct. 154, 46 L. ed. 307 [*reversing* 98 Fed. 27, 38 C. C. A. 619 (*affirming* 86 Fed. 962)]; Donahue *v.* Lake Superior Ship Canal, etc., Co., 155 U. S. 386, 15 S. Ct. 115, 39 L. ed. 194 [*reversing* 44 Fed. 587]; Sioux City, etc., R. Co. *v.* Union Pac. R. Co., 22 Fed. Cas. No. 12,909, 4 Dill. 307.

81. Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, 22 S. Ct. 154, 46 L. ed. 307 [*reversing* 98 Fed. 27, 38 C. C. A. 619 (*affirming* 86 Fed. 962)]; Donahue *v.* Lake Superior Ship Canal, etc., Co., 155 U. S. 386, 15 S. Ct. 115, 39 L. ed. 194 [*reversing* 44 Fed. 587]; Sioux City, etc., R. Co. *v.* Union Pac. R. Co., 22 Fed. Cas. No. 12,909, 4 Dill. 307.

82. Southern Pac. R. Co. *v.* U. S., 189 U. S. 447, 23 S. Ct. 567, 47 L. ed. 896 [*affirming* 109 Fed. 913, 48 C. C. A. 712 (*affirming* 94 Fed. 427)], holding that under Act Cong. March 3, 1871, c. 122 (16 U. S. St. at L. 573), the grant to the Southern Pacific Railroad Company was subordinate to that to the Texas Pacific Railroad Company.

Right to subordinate earlier grant.—A grant to a railroad company of sections on either side of its road "not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed," providing that whenever, "prior to said time," any land included in the grant shall have been disposed of, the company may select indemnity lands, does not preclude congress from subsequently giving another railroad company the right to earn lands which may be within the general grant to the first company before its road is definitely located and the

and under such circumstances it has been held proper to patent the land within the overlap to the grantees as tenants in common.[83]

(B) *Grants of Different Dates.* In case of an overlap of the place limits of two or more railroads having land grants of different dates, the road having the earlier grant takes all the land within the overlap to the total exclusion of the road having the later grant,[84] without regard to when the respective maps of definite location were filed,[85] or the roads constructed.[86]

(II) *Conflict Between Place and Indemnity Limits.* Lands within the primary or place limits of one grant, and also within the indemnity limits of an earlier grant, pass under the later grant, when at the time of the filing of the map of definite location of the road claiming under the later grant such lands had not been selected under the earlier grant,[87] or withdrawn by the secretary of the

plat filed. U. S. *v.* Oregon, etc., R. Co., 176 U. S. 28, 20 S. Ct. 261, 44 L. ed. 358 [*affirming* 77 Fed. 67, 23 C. C. A. 15 (*reversing* 69 Fed. 899)].

83. Sioux City, etc., R. Co. *v.* Union Pac. R. Co., 22 Fed. Cas. No. 12,909, 4 Dill. 307.

84. Owen *v.* Pomona Land, etc., Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253 [*reversing* (1900) 61 Pac. 472]; San Jose Land, etc., Co. *v.* San Jose Ranch Co., 129 Cal. 673, 62 Pac. 269; Northern Pac. R. Co. *v.* Musser-Sauntry Land, etc., Co., 168 U. S. 604, 18 S. Ct. 205, 42 L. ed. 596 [*affirming* 68 Fed. 993, 16 C. C. A. 97]; Southern Pac. R. Co. *v.* U. S., 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355; Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71 [*reversing* 43 Fed. 867]; U. S. *v.* Northern Pac. R. Co., 152 U. S. 284, 14 S. Ct. 598, 38 L. ed. 443 [*reversing* 41 Fed. 842]; U. S. *v.* Union Pac. R. Co., 148 U. S. 562, 13 S Ct. 724, 37 L. ed. 560 [*affirming* 37 Fed. 551]; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 45 Fed. 596]; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77 [*affirming* 26 Fed. 551]; Barney *v.* Winona, etc., R. Co., 117 U. S. 228, 6 S. Ct. 654, 29 L. ed. 858 [*reversing* 24 Fed. 889]; Winona, etc., R. Co. *v.* Barney, 113 U. S. 618, 5 S. Ct. 606, 28 L. ed. 1109 [*reversing* 6 Fed. 802, 2 McCrary 421]; St. Paul, etc., R. Co. *v.* Winona, etc., R. Co., 112 U. S. 720, 5 S. Ct. 334, 28 L. ed. 872 [*affirming* 27 Minn. 128, 6 N. W. 461, and *followed* in Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 117 U. S. 406, 6 S. Ct. 790, 29 L. ed. 928 (*reversing* 10 Fed. 435, 3 McCrary 280)]; Missouri, etc., R. Co. *v.* Kansas Pac. R. Co., 97 U. S. 491, 24 L. ed. 1095 [*affirming* 15 Kan. 15]; U. S. *v.* Southern Pac. R. Co., 152 Fed. 314; U. S. *v.* Southern Pac. R. Co., 117 Fed. 544 [*affirmed* in 200 U. S. 341, 26 S. Ct. 296, 50 L. ed. 507]; Southern Pac. R. Co. *v.* U. S., 69 Fed. 47, 16 C. C. A. 114 [*affirmed* in 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355].

Where an act making a grant to one railroad also enlarges a previous grant to another railroad, and such enlargement is made not by words of new and additional grant but by providing that the original numbers of sections granted shall be stricken out and larger numbers inserted, the company claiming under the later act takes subject to the enlarged grant to the other company. U. S. *v.* Burlington, etc., R. Co., 98 U. S. 334, 25 L. ed. 198.

85. Northern Pac. R. Co. *v.* Musser-Sauntry Land, etc., Co., 168 U. S. 604, 18 S. Ct. 205, 42 L. ed. 596 [*affirming* 68 Fed. 993, 16 C. C. A. 97]; U. S. *v.* Northern Pac. R. Co., 152 U. S. 284, 14 S. Ct. 598, 38 L. ed. 443 [*reversing* 41 Fed. 842]; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 45 Fed. 596]; St. Paul, etc., R. Co. *v.* Winona, etc., R. Co., 112 U. S. 720, 5 S. Ct. 334, 28 L. ed. 872 [*affirming* 27 Minn. 128, 6 N. W. 461, and *followed* in Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 117 U. S. 406, 6 S. Ct. 790, 29 L. ed. 928 (*reversing* 10 Fed. 435, 3 McCrary 280)]; Missouri, etc., R. Co. *v.* Kansas Pac. R. Co., 97 U. S. 491, 24 L. ed. 1095 [*affirming* 15 Kan. 15].

Where line never definitely located.— The Northern Pacific Railroad Company not having definitely located any line of road between Portland and Wallula, the original grant of lands to it by Act July 2, 1864 (13 U. S. St. at L. 365, § 3), never took effect as to lands between those points; and those of such lands lying contiguous to the line built from Portland to Tacoma, and within the limits of the grant made by the joint resolution of May 31, 1870 (16 U. S. St. at L. 378), to the same company were embraced within the latter grant, and on compliance with its conditions the title thereto vested in the company and its grantees, and was not affected by the forfeiture act of Sept. 29, 1890 (26 U. S. St. at L. 496). Northern Pac. R. Co. *v.* Balthazar, 82 Fed. 270.

86. Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 117 U. S. 406, 6 S. Ct. 790, 29 L. ed. 928 [*reversing* 10 Fed. 435, 3 McCrary 280, and *following* St. Paul, etc., R. Co. *v.* Winona, etc., R. Co., 112 U. S. 720, 5 S. Ct. 334, 28 L. ed. 872 (*affirming* 27 Minn. 128, 6 N. W. 461)].

87. St. Paul, etc., R. Co. *v.* Winona, etc., R. Co., 112 U. S. 720, 5 S. Ct. 334, 28 L. ed. 872 [*affirming* 27 Minn. 128, 6 N. W. 461, and *followed* in Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 117 U. S. 406, 6 S. Ct. 790, 29 L. ed. 928 (*reversing* 10 Fed. 435, 3 McCrary 280)]; Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, 5 S. Ct. 208, 28 L. ed. 794 [*reversing* 13 Fed. 106, 2 McCrary 550]; Hastings, etc., R. Co. *v.* St. Paul, etc., R.

interior.[88] A withdrawal of land within the indemnity limits made in aid of an earlier grant, prior to the filing of a map of definite location by a company having a later grant containing an exception of land subject to other claims or rights, operates to except the withdrawn lands from the scope of the later grant,[89] where the later grant is entirely independent of and distinct from the earlier grant;[90] but where land withdrawn as being within the indemnity limits of a grant is included within the place limits of a later grant to the same grantee, it passes under the later grant.[91]

(III) *Overlap of Indemnity Limits.* The general rule is that where the indemnity limits of two railroad grants overlap, the right to any particular lands within the overlap is determined solely by priority of selection and is not affected by priority of grant, location, or construction;[92] but it has been held that where the deficiency within the granted limits is so great that all the indemnity lands will not make good the loss, no formal selection is necessary to give them to the company having the older grant, as against the other company.[93]

(IV) *Effect of Forfeiture.*[94] If lands included within overlapping grants are forfeited by the grantee entitled thereto, they revert to the United States and again become a part of the public domain and do not fall within an inferior grant or another grant of the same date;[95] but forfeited lands within the

Co., 32 Fed. 821, 44 Fed. 817 [*reversed* on other grounds in 49 Fed. 315].

The proviso in the grant to the Southern Pacific Railroad Company, Act Cong. March 3, 1871, c, 122, § 23, (16 U. S. St. at L. 579), that it should "in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company" operated to exempt from the grant the indemnity lands of the Atlantic and Pacific Railroad Company. U. S. *v.* Colton Marble, etc., Co., 146 U. S. 615, 13 S. Ct. 163, 36 L. ed. 1104 [*reversing* 46 Fed. 683].

88. St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558.

89. Northern Pac. R. Co. *v.* Musser-Sauntry Land, etc., Co., 168 U. S. 604, 18 S. Ct. 205, 42 L. ed. 596 [*affirming* 68 Fed. 993, 16 C. C. A. 97]; Spencer *v.* McDougal, 159 U. S. 62, 15 S. Ct. 1026, 40 L. ed. 76; Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71 [*reversing* 43 Fed. 867]; St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77.

90. Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71 [*reversing* 43 Fed. 867].

91. Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71 [*reversing* 43 Fed. 867], holding that the act of congress of May 5, 1864 (13 U. S. St. at L. 66), granting lands to the state of Wisconsin in aid of railroads, was a mere enlargement of the act of congress of June 3, 1856 (11 U. S. St. at L. 20), granting lands to that state for the same purpose, and the two acts were *in pari materia.*

92. U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766 [*reversing* 37 Fed. 68]; St. Paul, etc., R. Co. *v.* Winona, etc., R. Co., 112 U. S. 720, 5 S. Ct. 334, 28 L. ed. 872 [*affirming* 27 Minn. 128, and *followed* in Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 117 U. S. 406, 6 S. Ct. 790, 29 L. ed. 928 (*reversing* 10 Fed. 435, 3 McCrary 280)].

A mere trespasser on land situated within the indemnity limit grant to one railroad company cannot avail himself of the rights of that company so as to attack a patent for the same land issued to another company. Foss *v.* Hinkell, 78 Cal. 158, 20 Pac. 393.

93. St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 139 U. S. 1, 11 S. Ct. 389, 35 L. ed. 77 [*affirming* 26 Fed. 55, 23 Blatchf. 419, *approved* in U. S. *v.* Colton, etc., R. Co., 146 U. S. 615, 15 S. Ct. 163, 37 L. ed. 1104 (*reversing* 46 Fed. 683), and *explained* in Southern Pac. R. Co. *v.* Wood, 124 Cal. 475, 57 Pac. 388)].

94. See, generally, *supra*, II, K, 1, n, (VII), (F).

95. McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3; San Jose Land, etc., Co. *v.* San Jose Ranch Co., 129 Cal. 673, 62 Pac. 269 [*affirmed* in 189 U. S. 177, 23 S. Ct. 487, 47 L. ed. 765]; Southern Pac. R. Co. *v.* U. S., 189 U. S. 447, 23 S. Ct. 567, 47 L. ed. 896 [*affirming* 109 Fed. 913, 48 C. C. A. 712 (*affirming* 94 Fed. 427)]; Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, 22 S. Ct. 154, 46 L. ed. 307 [*reversing* 98 Fed. 27, 38 C. C. A. 619 (*affirming* 86 Fed. 962)]; Chicago, etc., R. Co. *v.* U. S., 159 U. S. 372, 16 S. Ct. 26, 40 L. ed. 185 [*affirming* 46 Fed. 502]; U. S. *v.* Northern Pac. R. Co., 152 U. S. 284, 14 S. Ct. 598, 38 L. ed. 443 [*reversing* 41 Fed. 842]; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091 [*reversing* 46 Fed. 683, and *followed* in U. S. *v.* Southern Pac. R. Co., 62 Fed. 531 (*affirmed* in 69 Fed. 47, 16 C. C. A. 114 [*affirmed* in 168 U. S. 1, 18 S. Ct. 18, 42 L. ed. 355])]; Oregon, etc., R. Co. *v.* U. S., 77 Fed. 67, 23 C. C. A. 15 [*reversing* 69 Fed. 899, *affirmed* in 176 U. S. 28, 20 S. Ct. 261, 44 L. ed. 358, and *followed* in Eastern Oregon Land Co. *v.* Wilcox, 79 Fed. 719, 25 C. C. A. 164]. See also Northern Pac. R. Co. *v.* Mil-

place limits of the elder grant may be selected by a railroad company having a later grant within whose indemnity limits the lands lie.[96]

r. Revocation of Grant. Where by a true construction of an act of congress granting public lands to a state in aid of railroads the state acquires a beneficial interest in the land, the act is irrepealable and a subsequent act attempting to revoke the grant is void.[97] But the grant may be revoked if under its terms the state acquired a mere naked trust or power to dispose of the land for certain specified uses and purposes,[98] although even in such case, if the state has exercised its power and conferred upon a railroad company any right, title, or interest in the land, as it was authorized to do, it is not competent for congress to afterward repeal the grant and divest the title of the company.[99] Where the act making a railroad grant expressly reserves to the government the right at any time to alter, amend, or repeal it, a part of the grant may be withdrawn and the grant to that extent superseded.[1]

s. Disposition of Lands — (i) *Power of State.* By accepting a grant of lands in aid of railroads a state becomes the trustee of the United States, and as such its power of disposition of the lands is limited to the purposes expressed in the act creating the trust,[2] and the lands can be disposed of only as authorized by the act,[3] and any application or disposition of the lands by the state in violation of the terms of the grant is absolutely void.[4]

(ii) *Power of Railroad Company.* A power given by act of congress to a railroad company to mortgage its aid lands, etc., for means to construct and operate its road, does not include the power to sell and assign them.[5] Where a purchaser from a railroad company has taken possession under his purchase and is still holding it undisturbed, but in a suit by the railroad company to enforce a vendor's lien sets up the defense that the railroad company had no

ler, 20 Wash. 21, 54 Pac. 603, holding that where a grant was made for a main line and a branch road and there was a conflict, the construction of the branch road entitled the company to only one half of the land within the overlap, although the grant for the main line was forfeited.

State legislature cannot confer on one company forfeited lands of another.— McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3; Chicago, etc., R. Co. *v.* U. S., 159 U. S. 372, 16 S. Ct. 26, 40 L. ed. 185 [*affirming* 46 Fed. 502].

96. Southern Pac. R. Co. *v.* Bovard, 4 Cal. App. 76, 87 Pac. 203 [*following* Southern Pac. R. Co. *v.* Lipman, 148 Cal. 480, 83 Pac. 445; Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, 22 Pac. 154, 46 L. ed. 307; Ryan *v.* Central Pac. R. Co., 99 U. S. 382, 25 L. ed. 305, and *distinguishing* Southern Pac. R. Co. *v.* Painter, 113 Cal. 247, 47 Pac. 320; U. S. *v.* Southern Pac. R. Co., 146 U. S. 570, 13 S. Ct. 152, 36 L. ed. 1091].

97. Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147. See also U. S. *v.* Minnesota, etc., R. Co., 1 Minn. 127.

98. Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147.

99. Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147. See also Crapo *v.* Troy Tp., 98 Mich. 635, 57 N. W. 806.

1. Northern Pac. R. Co. *v.* Dudley, 85 Fed. 82, holding that the effect of the various steps taken by the government in reference to the Cœur d'Alene Indian reservation, in northern Idaho, including the act of March 3, 1891, and the two treaties ratified by it, was to withdraw it from the operation of the prior grant of alternate sections to the Northern Pacific Railway Company, and to restore the northern portion of the reservation to the public domain.

2. McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3 [*followed* in Galloway *v.* Doe, 136 Ala. 315, 34 So. 957]. See also Swann *v.* Miller, 82 Ala. 530, 1 So. 65; Swann *v.* Lindsey, 70 Ala. 507.

3. See Courtright *v.* Cedar Rapids, etc., R. Co., 35 Iowa 386.

4. McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3 [*followed* in Galloway *v.* Doe, 136 Ala. 315, 34 So. 957]. See also Swann *v.* Miller, 82 Ala. 530, 1 So. 65; Swann *v.* Lindsey, 70 Ala. 507.

Right to object to disposition.— Where congress gives lands to a state for railroad purposes, and for "no other," and the state, granting the great bulk of them to such purposes, allows settlements by preëmption, where improvement and occupancy have been made on the lands, prior to the date of the grant by congress, and since continued, a purchaser from the railroad company of a part which the state has thus opened to preëmption cannot object to the act of the state in having thus appropriated the part, the railroad company having, by formal acceptance of the bulk of the land, under the same act which opened a fractional part to a preëmption, itself waived the right to do so. Baker *v.* Gee, 1 Wall. (U. S.) 333, 17 L. ed. 563.

5. Southern Pac. R. Co. *v.* Esquibel, 4 N. M. 337, 20 Pac. 109.

authority to sell the land and that he acquired no title, the burden of proof is upon him.[6]

(III) *Selection of Lands For Sale.* Where lands to be sold are to be selected, a sale by the road of any specific parcels of land, not exceeding the quantity earned and lying within the limits specified in the grant is, to that extent, an effectual selection.[7] When a railroad commences its selection on any twenty miles it has earned, the title to all the land within the limits embraced in the grant becomes vested in it, and grants for lands outside are invalid as far as they are for land the company has no right to select.[8]

(IV) *Time of Sale* — (A) *In General.* A conveyance by the railroad company after the line of the road is definitely fixed, although before a patent is issued to it, passes the title.[9]

(B) *Construction of Road as Prerequisite to Sale.* In a number of instances the acts of congress granting lands in aid of railroads have provided for the disposition of portions of the grant from time to time as the road progressed,[10] permitting, in some cases, the disposition of a part of the lands before any part of the road is built;[11] but making the construction of certain portions of the road a condition precedent to the disposition of any more land,[12] and a conveyance in disregard of such a condition cannot pass any title[13] even though the lands conveyed are subsequently earned by the railroad company.[14]

6. Mathis *v.* Tennessee, etc., R. Co., 83 Ala. 411, 3 So. 793.

7. Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 32 N. W. 726, 65 Mich. 437, 37 N. W. 537.

8. Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 32 N. W. 726, 65 Mich. 437, 37 N. W. 537.

9. Stanton *v.* Crane, 25 Nev. 114, 58 Pac. 53.

10. Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 32 N. W. 726, 65 Mich. 437, 37 N. W. 537. See also Farnsworth *v.* Minnesota, etc., R. Co., 92 U. S. 49, 23 L. ed. 530.

11. Courtright *v.* Cedar Rapids, etc., R. Co., 35 Iowa 386 [*affirmed* in 21 Wall. (U. S.) 310, 22 L. ed. 582, and *followed* in Miller *v.* Iowa Land Co., 56 Iowa 374, 9 N. W. 316]; Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 32 N. W. 726, 65 Mich. 437, 37 N. W. 537.

Location of lands to be first sold.— Under the act of congress of May 15, 1856 (11 U. S. St. at L. 9), granting alternate sections to the state of Iowa in aid of railroads and authorizing a sale of the first one hundred and twenty sections before any portion of the road was built, the choice of such one hundred and twenty sections was not confined to any specific locality, but they could be chosen anywhere within a continuous twenty miles. Courtright *v.* Cedar Rapids, etc., R. Co., 35 Iowa 386 [*affirmed* in 21 Wall. (U. S.) 310, 22 L. ed. 582].

Exhaustion of power to sell not presumed. — Where a railroad company is shown to have certain lands within the prescribed distance from its line, and the record fails to show that it has sold any other lands granted to aid in its construction, it cannot be presumed that it had previously exhausted the power given it by the grant to sell one hundred and twenty sections before doing any work of construction. Swann *v.* Larmore, 70 Ala. 555.

Approval of state.— Where the act of congress granting land to a state allows a certain portion thereof to be sold before construction of the railroads, and an act of the state legislature granting the land to the state imposes no further restriction upon the right of the company to sell, the company may sell land within such amount before construction, and without the knowledge, consent, or approval of the state. Courtright *v.* Cedar Rapids, etc., R. Co., 35 Iowa 386 [*affirmed* in 21 Wall. (U. S.) 310, and *followed* in Miller *v.* Iowa Land Co., 56 Iowa 371, 9 N. W. 316].

12. See Farnsworth *v.* Minnesota, etc., R. Co., 92 U. S. 49, 23 L. ed. 530; Denny *v.* Dodson, 32 Fed. 899, 13 Sawy. 68.

13. Swann *v.* Miller, 82 Ala. 530, 1 So. 65; Swann *v.* Lindsey, 70 Ala. 507 [*followed* in Galloway *v.* Doe, 136 Ala. 315, 34 So. 957]; Sioux City, etc., R. Co. *v.* Osceola County, 43 Iowa 318; Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 32 N. W. 726, 65 Mich. 437, 37 N. W. 537; Farnsworth *v.* Minnesota, etc., R. Co., 92 U. S. 49, 23 L. ed. 530 [*following* Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551].

Conveyance voidable only and not void.— St. Paul, etc., R. Co. *v.* St. Paul, etc., R. Co., 57 Fed. 272 [*reversed* on other grounds in 68 Fed. 2, 15 C. C. A. 167].

Conveyance void.— Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 32 N. W. 726, 65 Mich. 437, 37 N. W. 537.

The statute of limitations — even if applicable in such a case — does not and cannot commence to run as to the lands to which a particular railroad becomes entitled until the completion of that road. Galloway *v.* Doe, 136 Ala. 315, 34 So. 957. But *compare* St. Louis, etc., R. Co. *v.* McGee, 75 Mo. 522 [*affirmed* in 115 U. S. 469, 6 S. Ct. 123, 29 L. ed. 446].

14. Jackson, etc., R. Co. *v.* Davison, 65

(v) *Preference Right of Actual Settlers.* Under some of the statutes persons who have settled in good faith on railroad lands prior to the time when the line of the road was definitely fixed and located are given the right to purchase the land on which they have settled, at a fixed price;[15] but the fact that one was in actual occupancy of land patented to a railroad company did not of itself give him a superior right to purchase the same from the railroad, as against another between whom and himself there was no privity.[16]

(vi) *Contracts of Sale.*[17] Where a railroad company has contracted to sell land claimed as part of its grant, the contract providing that it will use "ordinary diligence" to procure a patent from the United States and will thereupon convey to the purchaser, and that "in case it be finally determined that patents shall not issue" to the railroad company for the land it will repay the amount paid in by the purchaser, the purchaser cannot rescind the contract and reclaim the money paid where the railroad company has taken all proper steps to procure patents and prosecuted and defended expensive litigation for that purpose, and it has not been finally decided that it is not entitled thereto.[18]

(vii) *Patents and Certificates From State.* A state patent for land as railroad aid land passes such title as the state has, but does not establish that it has any title.[19] Under a statute providing that certificates or patents from the state shall be *prima facie* evidence of title in fee, such a certificate or patent is conclusive evidence of title in fee in the absence of any evidence to overcome the presumption imported thereby;[20] but such a statute merely prescribes a rule of evidence for the courts of the state and is not binding upon the courts of other states so as to make a patent evidence, in such courts, that the title had passed from the United States to the state.[21]

(viii) *Purchase of Land Certificates Issued to Railroad Company.* Where a trust deed, executed by a railroad company to secure its bonds, purported to convey a large number of sections of public lands, being a portion of what the company would be entitled to on the completion of its road, the certificates for which were receivable from time to time as portions of the road were completed, purchasers in good faith from the railroad company of a part of the

Mich. 416, 32 N. W. 726, 65 Mich. 437, 37 N. W. 537.

15. See Little Rock, etc., R. Co. *v.* Howell, 31 Ark. 119 (construing Acts, Nov. 26, 1856, and Feb. 1, 1859); Peterson *v.* First Div. St. Paul, etc., R. Co., 27 Minn. 218, 6 N. W. 615 (construing Special Laws (1862), c. 20, § 8).

Insufficient settlement.— Where some two months before a line of road was located a person entered on land within the grant, built a shanty, and dug a well, but did not reside on the land or in any way occupy the shanty, and during the following winter, after the location of the road, he cut some rails and built fences on the land, but never slept on the land until about three years after the road was located, it was held that he was not a settler in good faith prior to the time when the road was located. Peterson *v.* First Div. St. Paul, etc., R. Co., 27 Minn. 218, 6 N. W. 615.

A patentee of part of a quarter section of land, who had erected a house on such part, and lived in it, and cultivated the residue of the quarter section, did not reside on the residue so cultivated, within Ark. Acts (1871), c. 289, providing that "any settler, who, on or before the eighth day of March, 1870, was residing . . . on the lands belonging to or claimed by" a certain railroad company, "shall have the right to purchase the same, not to exceed one hundred and sixty acres." Nix *v.* Allen, 112 U. S. 129, 5 S. Ct. 70, 28 L. ed. 675.

16. Cavanaugh *v.* Wholey, 143 Cal. 164, 169, 76 Pac. 979, where it is said: "There is no pretense of acceptance by the defendant of the company's offer to sell — either by application to purchase or by occupation with such intent — otherwise than through Cavanaugh under the alleged agreement; as to which the finding is adverse to him."

17. See, generally, Vendor and Purchaser.

18. Wilson *v.* Southern Pac. R. Co., 135 Cal. 421, 67 Pac. 688 [*followed* in Southern Pac. R. Co. *v.* Lipman, 148 Cal. 480, 83 Pac. 445; Cook *v.* Southern Pac. R. Co., 4 Cal. App. 687, 88 Pac. 1100], holding that the facts brought out by the evidence showed that the railroad company had not been in any respect negligent in its attempts to comply with its contract and to secure patents for the land.

19. Musser *v.* McRae, 38 Minn. 409, 38 N. W. 103.

20. Stringham *v.* Cook, 75 Wis. 589, 44 N. W. 777.

21. Musser *v.* McRae, 38 Minn. 409, 38 N. W. 103.

certificates, without notice that they were covered by said deed of trust, acquired a good title free from the encumbrance of the trust deed.[22]

(IX) *PAYMENT FOR LANDS AND RECOVERY OF PRICE.* The governor is under no duty to issue a patent for railroad aid land sold by the state until it is fully paid for.[23] A *bona fide* purchaser whose title has been confirmed by statute [24] cannot resist the enforcement of the vendor's lien for the purchase-money on the ground of the vendor's defect in title.[25]

(X) *MORTGAGES* [26] *BY RAILROAD COMPANY.*[27] It is competent for a railroad company, to whom the state has granted lands, granted to the state by the United States, subject to the rights reserved by the United States in its grant, to mortgage the alternate sections to the state on its guaranteeing bonds issued to raise money to construct the road,[28] and where such lands were mortgaged back to the state by an instrument containing a provision, authorized by statute to be inserted, that the railroad company should have the privilege of "selling said lands, or any part thereof, in accordance with the acts of congress granting the same," one who derived title to a portion of such lands from a subsequent sale by the railroad company, made in direct violation of said acts of congress, took subject to the lien of the mortgage.[29] The trustees of a mortgage on lands claimed under a grant made by congress to aid in the construction of a railroad, and also the holders of bonds secured thereby, are affected with notice of the conditions under which the secretary of the interior was authorized to issue patents in pursuance of the grant.[30]

(XI) *SALE UNDER GENERAL LAWS OF LAND NOT DISPOSED OF BY GRANTEE.* Under some of the railroad grants, land which is not sold or disposed of within a certain time after the completion of the road becomes liable to be sold to actual settlers under the general land laws [31] without further action of the railroad company [32] or of congress.[33] Such sales are to be at the same price as is established for other public lands,[34] and the purchase-money is to be paid to the railroad company.[35] Such a provision precludes any sale of the land for taxes under state authority prior to the expiration of the time limited.[36]

22. Campbell *v.* Texas, etc., R. Co., 4 Fed. Cas. No. 2,369, 2 Woods 263.

23. *In re* Cunningham, 14 Kan. 416, holding that neither Act, Feb. 23, 1866, Laws (1866), p. 142) entitled "an act providing for the sale of public lands to aid in the construction of certain railroads," nor any other act, makes it the duty of the governor to issue a patent for land sold under the act of 1866 until "a receipt of the state treasurer for full payment" for the lands has been presented to him.

24. See *infra*, II, K, 1, t, (I).

25. Southern Pac. R. Co. *v.* Choate, 132 Cal. 278, 64 Pac. 292.

26. See, generally, MORTGAGES, 27 Cyc. 916.

27. Railroad mortgages generally see RAILROADS.

28. Wilson *v.* Beckwith, 140 Mo. 359, 41 S. W. 985.

29 Miller *v.* Swann, 89 Ala. 631, 7 So. 771.

30. Sioux City, etc., R. Co. *v.* U. S., 159 U. S. 349, 16 S. Ct. 17, 40 L. ed. 177.

31. Platt *v.* Union Pac. R. Co., 99 U. S. 48, 25 L. ed. 424; Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603, 21 L. ed. 373 [*reversing* 9 Kan. 38].

The land grant to the Burlington and Missouri River Railroad Company made by Act July 2, 1864 (13 U. S. St. at L. 356), was not subject to the proviso in the original act of July 1, 1862 (12 U. S. St. at L. 489), giving the public the right of settlement and preëmption if the lands granted were not sold or disposed of within three years after the entire line of the road was completed. Hunnewell *v.* Burlington, etc., R. Co., 12 Fed. Cas. No. 6,879, 3 Dill. 313 [*affirmed* in 22 Wall. 464, 22 L. ed. 752].

Lands covered by a mortgage executed by the railroad company are "disposed of" within the meaning of such a provision and are not subject to settlement or preëmption at the expiration of the time limited. Platt *v.* Union Pac. R. Co., 99 U. S. 48, 25 L. ed. 424.

32. Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603, 21 L. ed. 373 [*reversing* 9 Kan. 38].

33. Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603, 21 L. ed. 373 [*reversing* 9 Kan. 38].

34. Platt *v.* Union Pac. R. Co., 99 U. S. 48, 25 L. ed. 424; Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603, 21 L. ed. 373 [*reversing* 9 Kan. 38].

35. Platt *v.* Union Pac. R. Co., 99 U. S. 48, 25 L. ed. 424; Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603, 21 L. ed. 373 [*reversing* 9 Kan. 38].

36. Kansas Pac. R. Co. *v.* Prescott, 16

t. Protection of Rights Acquired in Reliance Upon Railroad Grant — (i) *The Adjustment Act and Supplementary Legislation.* In the statute known as the Adjustment Act, passed for the purpose of adjusting railroad land grants congress has made provision for the protection of the rights of citizens of the United States, or persons who have declared their intention of becoming such, who have in good faith purchased from a railroad company land not within its grant.[37] Where such persons have purchased land erroneously patented or certified to the railroad company, their titles are confirmed,[38] while if they have purchased land within the numbered sections prescribed in the grant and coterminous with the constructed part of the road, but which land has not been conveyed to or for the use of the company, and is for any reason excepted from the grant, they are entitled to purchase the land from the government at the ordinary government price for like lands,[39] unless the land was at the date of the sale in the *bona fide* occupation of adverse claimants under the homestead or preëmption laws, whose claims and occupation have not been since voluntarily abandoned.[40] It has also been provided by a later act supplementary to the Adjustment Act that no patent for railroad lands held by a *bona fide* purchaser shall be vacated or annulled but the title of such purchaser is confirmed.[41]

(ii) *Lands Within Provision.* The Adjustment Act confirmed in *bona fide* purchasers from a railroad company the title to lands which, when certified under the grant, were public lands of the United States, and not subject to individual claims, although at the time the grant attached they had been withdrawn from its operation, where they were subsequently restored to the public domain, were within the limits of the grant, and were earned by the company;[42] but no protection is given to innocent purchasers of lands unlawfully selected by a railroad company as indemnity lands, where the railroad company has never received any patent or certificate therefor.[43] Lands granted by congress to a state and by the state to a railroad company on condition, and which were afterward resumed by the state for the failure of the company to comply with such condition and reverted to the United States, are not lands "excepted from the operation of the grant," within the meaning of the Adjustment Act; and hence a purchaser from the company acquires no right to purchase the lands from the United States.[44]

(iii) *Time of Purchase.* The Adjustment Act affords protection not only as to purchases made prior to its enactment but also as to purchases which were made after that time and before the final adjustment of the grant;[45] and the same

Wall. (U. S.) 603, 21 L. ed. 373 [*reversing* 9 Kan. 38].

37. 24 U. S. St. at L. 556, c. 376 [U. S. Comp. St. (1901) p. 1595 *et seq.*]. See Brett *v.* Meisterling, 117 Fed. 768.

38. 24 U. S. St. at L. 556, c. 376, § 4 [U. S. Comp. St. (1901) p. 1596]. See Adams *v.* Henderson, 168 U. S. 573, 42 L. ed. 584 [*affirming* 11 Utah 480, 40 Pac. 720]; U. S. *v.* Winona, etc., R. Co., 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789 [*affirming* 67 Fed. 948, 15 C. C. A. 96]; U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131; U. S. *v.* Union Pac. R. Co., 67 Fed. 974, 15 C. C. A. 122; U. S. *v.* St. Paul, etc., R. Co., 67 Fed. 973, 15 C. C. A. 121 [*affirmed* in 165 U. S. 482, 17 S. Ct. 1001, 41 L. ed. 797].

39. 24 U. S. St. at L. 557, c. 376, § 5 [U. S. Comp. St. (1901) p. 1597]. See Gertgens *v.* O'Connor, 191 U. S. 237, 24 S. Ct. 94, 48 L. ed. 163 [*affirming* 85 Minn. 481, 89 N. W. 866].

40. 24 U. S. St. at L. 557, c. 376, § 5 [U. S. Comp. St. (1901) p. 1597]. See San Jose Land, etc., Co. *v.* San Jose Ranch Co., 189 U. S. 177, 23 S. Ct. 487, 47 L. ed. 765 [*affirming* 129 Cal. 673, 62 Pac. 269]; Benner *v.* Lane, 110 Fed. 467; Manley *v.* Tow, 110 Fed. 241.

41. 29 U. S. St. at L. 42, c. 39 [U. S. Comp. St. (1901) p. 1603]. See Southern Pac. R. Co. *v.* Choate, 132 Cal. 278, 64 Pac. 292; U. S. *v.* Southern Pac. R. Co., 184 U. S. 49, 22 S. Ct. 285, 46 L. ed. 425 [*affirming* 98 Fed. 45, 38 C. C. A. 635 [*affirming* 88 Fed. 832)].

This statute did not confirm the title of a railroad company or enlarge its rights.—U. S. *v.* Southern Pac. R. Co., 117 Fed. 544 [*affirmed* in 133 Fed. 651, 66 C. C. A. 581 [*affirmed* in 200 U. S. 341, 26 S. Ct. 296, 50 L. ed. 507)].

42. U. S. *v.* Flint, etc., R. Co., 95 Fed. 551, 37 C. C. A. 156.

43. Clark *v.* Herington, 186 U. S. 206, 22 S. Ct. 872, 46 L. ed. 1128.

44. Ostrom *v.* Wood, 140 Fed. 294.

45. U. S. *v.* Southern Pac. R. Co., 184 U. S. 49, 22 S. Ct. 285, 46 L. ed. 425 [*affirming* 98 Fed. 45, 38 C. C. A. 637 (*affirming* 88

is true of the supplementary act of 1896 confirming the title of purchasers in good faith.[46]

(IV) *Persons Entitled to Protection* — (A) *In General.* In order to entitle a person to protection under the Adjustment Act it is essential that he should have purchased in good faith.[47] Purchasers from the railroad company are not protected unless they are citizens of the United States, or have declared their intention of becoming such citizens.[48] A state corporation is entitled to protection,[49] but a corporation organized under the laws of a foreign country is not.[50] The right of purchase from the government is not limited to the immediate purchaser from the company but may be exercised by a subsequent grantee who has the necessary qualifications,[51] and in such case it is immaterial what were the qualifications of the original purchaser;[52] but the subsequent grantee must himself be a *bona fide* purchaser and not one whose purchase is a purely speculative transaction entered into for the purpose of acquiring title from the government for the benefit of a foreigner.[53] The preferential right of purchase from the government inures to the benefit of a person seeking to bring settlers on such lands and who was given, by written agreement with the railway company, the right to purchase land for himself and others when title thereto should be acquired by the company.[54] The protection afforded by the Adjustment Act does not extend to one who purchased, after the date of that act, certain unearned lands included in a grant to a state, the title to which the state, before the passage of the Adjustment Act, had resumed by legislative enactment, upon the railway company's default, and then relinquished to the United States.[55] The grantees in a conveyance of land "granted by said acts of congress" without specific description do not become *bona fide* purchasers of any particular tract not then patented to the railroad company and not actually included in the grant.[56]

(B) *Mortgagees.*[57] The act of congress of 1887 confirming the titles of purchasers

Fed. 832), *approving* Neilson *v.* Central Pac. R. Co., 26 Land. Dec. Dep. Int. 252; Grandin *v.* Le Bar, 25 Land Dec. Dep. Int. 194; Carlton *v.* Seaver, 23 Land Dec. Dep. Int. 108; Briley *v.* Brach, 22 Land Dec. Dep. Int. 549; Andrus *v.* Balch, 22 Land Dec. Dep. Int. 238; Sethman *v.* Clise, 17 Land Dec. Dep. Int. 307, and *followed* in Benner *v.* Lane, 116 Fed. 407 (*overruling* Manley *v.* Tow, 110 Fed. 241)].

46. U. S. *v.* Southern Pac. R. Co., 98 Fed. 27, 38 C. C. A. 619 [*affirming* 86 Fed. 962, and *reversed* on other grounds in 183 U. S. 519, 22 S. Ct. 154, 46 L. ed. 307].

47. Ostrom *v.* Wood, 140 Fed. 294, holding that good faith is essential to securing the protection of the Adjustment Act, whether the purchaser claims the right to have his title confirmed or the right to purchase from the United States.

Who are purchasers in good faith see *infra*, II, K, 1, t, (IV), (D).

48. Clark *v.* Herington, 186 U. S. 206, 22 S. Ct. 872, 46 L. ed. 1128, 62 Pac. 1116; U. S. *v.* Southern Pac. R. Co., 88 Fed. 832 [*affirmed* in 184 U. S. 49, 22 S. Ct. 285, 46 L. ed. 425].

49. Ramsey *v.* Tacoma Land Co., 196 U. S. 360, 25 S. Ct. 286, 49 L. ed. 513 [*affirming* 31 Wash. 351, 71 Pac. 1024, and *following* U. S. *v.* Northwestern Express, etc., Co., 164 U. S. 686, 17 S. Ct. 206, 41 L. ed. 599].

50. U. S. *v.* Southern Pac. R. Co., 184 U. S. 49, 22 S. Ct. 285, 46 L. ed. 425 [*affirming* 98 Fed. 45, 38 C. C. A. 637 (*affirming* 88 Fed. 832)].

51. U. S. *v.* Southern Pac. R. Co., 184 U. S. 49, 22 S. Ct. 285, 46 L. ed. 425 [*affirming* 98 Fed. 45, 38 C. C. A. 637 (*affirming* 88 Fed. 832)].

52. U. S. *v.* Southern Pac. R. Co., 184 U. S. 49, 22 S. Ct. 285, 46 L. ed. 425 [*affirming* 98 Fed. 45, 38 C. C. A. 637 (*affirming* 88 Fed. 832)].

53. U. S. *v.* Southern Pac. R. Co., 184 U. S. 49, 22 S. Ct. 285, 46 L. ed. 425 [*reversing* as to this point 98 Fed. 45, 38 C. C. A. 637 (*affirming* 88 Fed. 832)], holding that one who pays nothing for the land except by giving his legal services and making advances of money in the way of taxes, under his agreement with the original purchaser to protect it in its purchase-money and receive for himself whatever he can obtain over and above that sum is not a *bona fide* purchaser.

54. Gertgens *v.* O'Connor, 191 U. S. 237, 24 S. Ct. 94, 48 L. ed. 163 [*affirming* 85 Minn. 481, 89 N. W. 866, and *approving* Austin *v.* Luey, 21 Land Dec. Dep. Int. 507; Holton *v.* Rutledge, 20 Land Dec. Dep. Int. 227; Telford *v.* Keystone Lumber Co., 19 Land Dec. Dep. Int. 141, 18 Land Dec. Dep. Int. 176; *In re* Campbell, 12 Land Dec. Dep. Int. 247].

55. Knepper *v.* Sands, 194 U. S. 476, 24 S. Ct. 744, 48 L. ed. 1083.

56. Southern Pac. R. Co. *v.* U. S., 133 Fed. 662, 66 C. C. A. 560 [*affirming* 123 Fed. 1007, and *affirmed* in 200 U. S. 354, 26 S. Ct. 298, 50 L. ed. 512].

57. See, generally, Mortgages, 27 Cyc. 916.

in good faith from railroad companies expressly excepts mortgagees from its operation;[58] but where a railroad company to which a land grant was made, and to which lands were certified thereunder as earned, conveyed the legal title to such lands in trust for its bondholders, and on the foreclosure of a subsequent mortgage its equity of redemption was sold, leaving the title in the trustees, and subject to the rights of the first bondholders, such sale operated to extinguish all title and interest of the original grantee in the lands, and the trustees and purchaser of the equity of redemption became *bona fide* purchasers, within the meaning of the statute.[59] The act of 1896 does not expressly exclude mortgagees from its operation,[60] but even under that act it is held that mortgagees have no other or greater rights than the company itself in lands erroneously patented or certified under its grant.[61]

(c) *Settlers Under License.*[62] A mere license given by a railroad company to settle upon a tract of land does not constitute the settler a purchaser, within the meaning of the Adjustment Act where the company expressly declined to enter into a contract of sale.[63]

(d) *Who Are Purchasers in Good Faith.* In order to entitle a person to protection it is only necessary that he should have purchased in good faith and the presence of all the elements necessary to constitute him a technical "*bona fide* purchaser" is not necessary;[64] and so it matters not what constructive notice may be chargeable to the purchaser, if, in actual ignorance of any defect in the railroad company's title and in reliance upon the action of the government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands.[65] It is, however, essential to entitle a purchaser from the railroad company to protection that he should have no notice subsequent to and independent of the certification or patent of any defect in title,[66] and a person cannot claim to be a purchaser in good faith if he has notice of facts outside of the records of the land department disclosing a prior right,[67] and so where a preëmptor, who had filed his claim was in possession when the certification was made and when the land was purchased by another person from the railroad company, the purchaser was not entitled to protection.[68] But a mere change in the opinions of the officers of the

58. 24 U. S. St. at L. 557, c. 376, § 4 [U. S. Comp. St. (1901) p. 1596]. See U. S. *v.* Southern Pac. R. Co., 76 Fed. 134.

59. U. S. *v.* Flint, etc., R. Co., 95 Fed. 551, 37 C. C. A. 156.

60. 29 U. S. St. at L. 42, c. 39 [U. S. Comp. St. (1901) p. 1603].

61. U. S. *v.* Southern Pac. R. Co., 117 Fed. 544 [*affirmed* in 133 Fed. 651, 66 C. C. A. 581 (*affirmed* in 200 U. S. 354, 26 S. Ct. 298, 50 L. ed. 512)].

62. Statutory rights of permissive settlers see *infra*, II, K, 1, t, (IX).

63. U. S. *v.* Holmes, 105 Fed. 41 [*reversed* on other grounds in 118 Fed. 995, 55 C. C. A. 489].

64. U. S. *v.* Winona, etc., R. Co., 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789 [*followed* in U. S. *v.* Chicago, etc., R. Co., 195 U. S. 524, 25 S. Ct. 113, 49 L. ed. 306 (*affirming* 116 Fed. 969, 54 C. C. A. 545); Gertgens *v.* O'Connor, 191 U. S. 237, 24 S. Ct. 94, 48 L. ed. 163 (*affirming* 85 Minn. 481, 89 N. W. 866); U. S. *v.* Southern Pac. R. Co., 184 U. S. 49, 22 S. Ct. 285, 46 L. ed. 425 (*affirming* 98 Fed. 45, 38 C. C. A. 637 [*affirming* 88 Fed. 832])].

65. U. S. *v.* Winona, etc., R. Co., 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789 [*followed* in U. S. *v.* Chicago, etc., R. Co., 195 U. S. 524, 25 S. Ct. 113, 49 L. ed. 306 [*affirming* 116 Fed. 969, 54 C. C. A. 545)]; U. S. *v.* Southern Pac. R. Co., 88 Fed. 832 [*affirmed* in 184 U. S. 49, 22 S. Ct. 285, 46 L. ed. 425]. See also U. S. *v.* Southern Pac. R. Co., 76 Fed. 134.

66. Winona, etc., R. Co. *v.* U. S., 165 U. S. 483, 17 S. Ct. 381, 41 L. ed. 798 [*affirming* 67 Fed. 969, 15 C. C. A. 117, and *distinguishing* U. S. *v.* Winona, etc., R. Co., 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789].

67. Winona, etc., R. Co. *v.* U. S., 165 U. S. 483, 486, 17 S. Ct. 381, 41 L. ed. 798 [*affirming* 67 Fed. 969, 15 C. C. A. 117, *distinguishing* U. S. *v.* Winona, etc., R. Co., 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789, and *quoted* in Benner *v.* Lane, 116 Fed. 407, 410], where it is said by Brewer, J., delivering the opinion of the court: "The statute was not intended to cut off the rights of parties continuing after the certification, and of which at the time of his purchase the purchaser had notice. Only the purely technical claims of the government were waived."

68. Winona, etc., R. Co. *v.* U. S., 165 U. S. 483, 17 S. Ct. 381, 41 L. ed. 798 [*affirming* 67 Fed. 969, 15 C. C. A. 117, *distinguishing* U. S. *v.* Winona, etc., R. Co., 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789, and *followed* in Benner *v.* Lane, 116 Fed. 407].

government as to the validity of the railroad company's title, although made known to persons proposing to purchase from such company, is not sufficient to take away from the purchasers the protection of good faith.[69] The fact that, at the time a contract was made for the purchase of land from a railroad company, its road was not completed, and its grant not fully earned, although it was built beyond the point where the land was situated, and that it was subsequently determined that the land purchased did not pass to the company, because it had previously received and disposed of as much in quantity as it had earned, cannot charge the purchaser with knowledge of facts which would, as a matter of law, affect the good faith of his purchase.[70] The fact that a purchaser of lands patented to a railroad company holds under a contract, and has paid only a portion of the purchase-money, does not affect his character as a *bona fide* purchaser.[71] The Adjustment Act commits the determination of the good faith of purchasers to the land department and its finding that a purchase was made in good faith will not be disturbed unless clearly shown to have been based on an erroneous construction of the law.[72]

(v) *Reservations in Deed From Company.* The statutory provisions confirming the title of *bona fide* purchasers as against the United States cannot operate to free the title of a purchaser of reservations contained in the railroad company's deed to him.[73]

(vi) *Adverse Rights of Individual Claimants.* One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the protection afforded vested ditch and water rights by act of congress,[74] as against subsequent purchasers of the land from a railroad company, whose only claim to such land rests upon the right of purchase from the United States, given by the Adjustment Act.[75] When the issue is between individual claimants, purchasers from defaulting railroad companies of unearned lands are not to be favored over other good faith claimants without regard being paid to the actual equities of such persons, but the respective rights of such contesting claimants must be settled according to the established and recognized rules of equity and public policy.[76]

69. U. S. *v.* Southern Pac. R. Co., 184 U. S. 49, 54, 22 S. Ct. 285, 46 L. ed. 425 [*affirming* 98 Fed. 45, 38 C. C. A. 637 (*affirming* 88 Fed. 832)], where it was said: "A party may have notice of conflicting claims and still, in the exercise of an honest judgment as to the rightful owner, buy property and pay for it, and be acting in good faith."

70. Linkswiler *v.* Schneider, 95 Fed. 203.

71. U. S. *v.* Southern Pac. R. Co., 88 Fed. 832 [*affirmed* in 184 U. S. 49, 22 S. Ct. 285, 46 L. ed. 425].

72. Linkswiler *v.* Schneider, 95 Fed. 203.

Conclusiveness of determinations of land department generally see *infra*, II, L, 15, a.

73. Adams *v.* Henderson, 168 U. S. 573, 18 St. Ct. 179, 42 L. ed. 584 [*affirming* 11 Utah 480, 40 Pac. 720].

74. U. S. Rev. St. (1878) § 2339 [U. S. Comp. St. (1901) p. 1437].

75. San Jose Land, etc., Co. *v.* Jan Jose Ranch Co., 189 U. S. 177, 23 S. Ct. 487, 47 L. ed. 765 [*affirming* 129 Cal. 673, 62 Pac. 269].

76. Benner *v.* Lane, 116 Fed. 407, holding that the right of a *bona fide* homestead settler upon public land, which, while within the limits of a railroad grant, was never earned nor patented thereunder, and to which the company and the state had forfeited their rights under the terms of the grant many years prior to his settlement, to make entry of such land under the homestead law upon its restoration to the public domain, is superior to the right and equity of one claiming the land under a contract of purchase from the railroad company entered into for speculative purposes, after the land had been improved by the settler, and while he was residing thereon with his family, of which facts the purchaser had actual knowledge, and that the good faith of the homestead settler is not impeached by the fact that the land when he settled upon it was within the limits of a railroad grant, under which it had been withdrawn from market, where he had knowledge that the terms of the grant had not been complied with, nor the land earned thereunder, and good reason to believe that it would be restored to the public domain, as it in fact was.

Protection of homestead and preëmption claimants.—A provision in an act of congress confirming the title of *bona fide* purchasers from the railroads that such confirmation shall not apply to any tract "upon which there were *bona fide* preëmption or homestead claims" on a certain day "arising or asserted by actual occupation of the land under color of the laws of the United States,

(VII) *Recovery of Price From Railroad Companies.* The acts confirming the titles of persons who have purchased in good faith from railroad companies lands not within the grant also authorize a recovery by the government from the railroad companies of the price of such lands;[77] and it is established that these provisions are a valid exercise of the power of congress.[78] The effect of such provisions is to give a right of action to recover the value of land previously patented and sold, when the sum sought to be recovered does not exceed that received by the company for the land;[79] and a suit for such recovery is within the cognizance of a court of equity where the sales cover numerous tracts and were made during a series of years and the bill prays for a discovery and accounting with respect thereto.[80] A suit may be brought against the railroad company where, although no claim to the land has been presented to the land department, it appears that there is a basis for one.[81] It is no defense that some of the lands involved were sold by the company for less than the government price, where it received a larger average price for the lands, taken as a whole,[82] nor will the fact that the company has not yet received the full quantity of land to which it is entitled prevent a recovery, where there are sufficient other lands within its indemnity limits from which it may select to make up the deficiency.[83] The fact that the error in issuing pat-

and all such preëmption and homestead claims are hereby confirmed," does not vest title in the preëmption and homestead claimants to the land occupied by them, but merely confirms their claims as they then stand, leaving it incumbent on them to comply with the requirements of the law in the usual manner before acquiring title. Cunningham *v.* Metropolitan Lumber Co., 110 Fed. 332, 49 C. C. A. 72.

Where a homestead settler surrendered possession to the railroad company before the time when he could have proved up under his entry, yielding to the construction then given to railroad grants by the land department, and the company afterward sold the lands to *bona fide* purchasers, the homestead settler could assert no right to the land as against such purchasers. Wagstaff *v.* Collins, 97 Fed. 3, 38 C. C. A. 19.

77. 24 U. S. St. at L. 557, § 4 [U. S. Comp. St. (1901) p. 1596]; 29 U. S. St. at L. 43, c. 39, § 2; U. S. Comp. St. (1901) p. 1603].

78. Southern Pac. R. Co. *v.* U. S., 200 U. S. 341, 353, 26 S. Ct. 296, 50 L. ed. 507 [*affirming* 133 Fed. 651, 66 C. C. A. 581 (*affirming* 117 Fed. 544), and *followed* in Southern Pac. R. Co. *v.* U. S., 200 U. S. 354, 26 S. Ct. 298, 50 L. ed. 512 (*affirming* 133 Fed. 662, 66 C. C. A. 560 [*affirming* 123 Fed. 1007])] (where it is said: "When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyances and reëstablish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser. The conveyance to the innocent purchaser is equivalent to a conversion of personal property. Irrespective, therefore, of the act of Congress the Government had the right, when it found that these lands had been erroneously patented to the railroad company and by it sold to persons who dealt with it in good faith, to sue the railroad company and recover the value of the lands so wrongfully received and subsequently conveyed. The acts of Congress really inure to the benefit of the railroad company and restrict the right of the Government, for they provide that the recovery shall in no case be more than the minimum government price. In other words, the Government asks only its minimum price for public land, no matter what the value of the tracts or the amount received by the company may be"); U. S. *v.* Southern Pac. R. Co., 157 Fed. 96; Oregon, etc., R. Co. *v.* U. S., 144 Fed. 832, 75 C. C. A. 486 [*affirming* 133 Fed. 953].

79. Oregon, etc., R. Co. *v.* U. S., 144 Fed. 832, 75 C. C. A. 486 [*affirming* 133 Fed. 953, 958, where it is said: "This construction put upon the act of 1896 does not give it a retroactive effect. The act does not create a liability, but provides a means of enforcing one already existing"].

80. U. S. *v.* Southern Pac. R. Co., 157 Fed. 96, holding that having obtained jurisdiction for such purpose, the court may, from the evidence so obtained, determine the amount due the complainant and render judgment therefor.

81. U. S. *v.* Oregon, etc., R. Co., 122 Fed. 541.

In order to warrant a decree the proof must establish all those facts upon which the right to cancellation, but for the intervention of the *bona fide* purchaser's claim, depends. U. S. *v.* Oregon, etc., R. Co., 122 Fed. 541.

82. Southern Pac. R. Co. *v.* U. S., 133 Fed. 662, 66 C. C. A. 560 [*affirming* 123 Fed. 1007, and *affirmed* in 200 U. S. 354, 26 S. Ct. 298, 50 L. ed. 512 (*following* Southern Pac. R. Co. *v.* U. S., 200 U. S. 341, 26 S. Ct. 296, 50 L. ed. 507 [*affirming* 133 Fed. 651, 66 C. C. A. 581 (*affirming* 117 Fed. 544)])].

83. Southern Pac. R. Co. *v.* U. S., 133 Fed.

ents to a railroad company for land to which it was not entitled was that of the land department is no defense to an action by the United States to recover the value of the land, where the error did not prevent the company from obtaining all the land to which it was entitled under the grant; [84] but a railroad company will not be held liable for the value of lands erroneously certified to it or to a state for it where at the time of such certification other lands were open to certification which could have been rightfully certified, but the government has since disposed of such lands so that there remains no way of filling the grant.[85] In a suit by the government to cancel the erroneous certification of lands to the state for the benefit of a railroad company, a decree will not be granted against the company for the value of lands sold by it to a *bona fide* purchaser where the government has not asked such decree.[86]

(VIII) *Purchasers From Railroad Forfeiting Grant.* Where an act of congress provided that if a land grant railroad did not perform certain conditions in a certain time it should forfeit all right to lands granted in aid of the railroad; that, in case of failure to so perform such conditions, the legislature might confer the grant upon some other corporation upon such terms as it should see fit, to carry out the purposes of the original act donating the land; and that the corporation upon whom the grant should be so conferred by the legislature should be entitled to enjoy all of the grant not then lawfully disposed of, as if the same had been originally conferred upon it; and on the failure of the grantee to perform the required conditions, the legislature conferred the grant upon another company under an arrangement to that effect between the two companies, the later grantee was not the mere assignee of the first grantee and did not take the unearned lands subject to the conveyances of the latter company; and hence patents of such lands subsequently issued to the later grantee did not inure to the benefit of the grantees of the first grantee.[87] An act of congress forfeiting and resuming title to lands not earned by the completion of a railroad, but confirming the title of purchasers from the company of such lands, does not confirm the title of a purchaser at an unauthorized tax-sale under state authority.[88]

(IX) *Rights of Permissive Settlers Upon Railroad Land Restored to Public Domain.* Congress has given to all persons who have settled and made valuable and permanent improvements upon any odd-numbered sections of land within a railroad withdrawal, in good faith, and with the permission or license of the railroad company, and with the expectation of purchasing the same, the right to purchase not exceeding one hundred and sixty acres of the same from the United States if, for any cause, it shall be restored to the public domain,[89] and the right so given a settler is not defeated by the fact that after the withdrawal has been set aside the land is included within the boundary of a forest reservation, created by proclamation of the president, before it has been surveyed, so as to give the settler an opportunity to purchase.[90] The right of purchase extends to persons who took possession and made improvements under a circular letter of the

662, 66 C. C. A. 560 [*affirming* 123 Fed. 1007, and *affirmed* in 200 U. S. 354, 26 S. Ct. 298, 50 L. ed. 512 (*following* Southern Pac. R. Co. *v.* U. S., 200 U. S. 341, 26 S. Ct. 296, 50 L. ed. 507 [*affirming* 133 Fed. 651, 66 C. C. A. 581 (*affirming* 117 Fed. 544)])].

84. U. S. *v.* Southern Pac. R. Co., 117 Fed. 544 [*affirmed* in 133 Fed. 651, 66 C. C. A. 581 (*affirmed* in 200 U. S. 341, 26 S. Ct. 296, 50 L. ed. 507)].

85. U. S. *v.* Winona, etc., R. Co., 165 U. S. 463, 482, 17 S. Ct. 368, 41 L. ed. 789 [*affirming* 67 Fed. 948, 15 C. C. A. 96, and *followed* in U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131], where it is said: "The mistake of the officers of the government cannot be both potent to prevent the railroad company obtaining its full quota of lands, and at the same time potent to enable the government to recover from the company the value of lands erroneously certified."

86. U. S. *v.* Winona, etc., R. Co., 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789 [*affirming* 67 Fed. 948, 15 C. C. A. 96].

87. Shepard *v.* Northwestern L. Ins. Co., 40 Fed. 341.

88. Sullivan *v.* Van Kirk Land, etc., Co., 124 Ala. 225, 26 So. 925.

89. 21 U. S. St. at L. 315, c. 19 [U. S. Comp. St. (1901) p. 1594].

90. Holmes *v.* U. S., 118 Fed. 995, 55 C. C. A. 409 [*reversing* 105 Fed. 41].

railroad company announcing that persons making improvements would be given a right to purchase in preference to others,[91] although they have not actually settled on the lands.[92]

2. Grants of Rights of Way and Land For Station Purposes, Etc.— a. Congressional Grants. Congress has from time to time made various grants to particular railroads of rights of way through the public domain;[93] and it has been held that a railroad is a highway within the meaning of the statute granting the right of way for the construction of highways over public lands not reserved for public uses.[94] In 1875, however, congress made a general grant to any railroad company which filed with the secretary of the interior a copy of its articles of incorporation and due proofs of its organization thereunder, of a right of way through the public domain, to the extent of one hundred feet upon each side of the central line of the road,[95] and also of ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.[96]

b. Prerequisites to Obtaining Benefits of Grant— (i) *In General.* The act of congress granting to railroads the right of way through the public lands and land for stations, etc., is in the nature of a general offer;[97] and in order to entitle a particular railroad company to the benefits of the act, it is necessary that the company shall comply with the requirements thereof.[98]

(ii) *Proof of Organization.* The due organization of the railroad company and the furnishing of due proof thereof are conditions precedent to the acquirement of a right of way by virtue of the general grant to railroads,[99] and the duty of furnishing such proof rests upon the railroad company.[1] Where the law of the territory in which a railroad company is incorporated provides that the due incorporation of a company shall, without further proof or acts, operate as its

91. Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

92. Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

93. See Doherty *v.* Northern Pac. R. Co., 177 U. S. 421, 20 S. Ct. 677, 44 L. ed. 830 [*affirming* 100 Wis. 39, 75 N. W. 1079], construing the act of congress of July 2, 1864, c. 217 (13 U. S. St. at L. 365], granting a right of way to the Northern Pacific Railroad Company.

94. Tennessee, etc., R. Co. *v.* Taylor, 102 Ala. 224, 14 So. 379 [*approving* Flint, etc., R. Co. *v.* Gordon, 41 Mich. 420, 2 N. W. 648; Sams *v.* Port Royal, etc., R. Co., 15 S. C. 484; Verdier *v.* Port Royal R. Co., 15 S. C. 476, and *disapproving* Red River, etc., R. Co. *v.* Sture, 32 Minn. 95, 20 N. W. 229]. *Contra*, Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 16 Pac. 125.

Grant of right of way through public domain for highways see *supra*, II, G, 1.

Status of railroads as highways generally see Railroads.

95. 18 U. S. St. at L. 482, c. 152, § 1 [U. S. Comp. St. (1901) p. 1568]. See Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

The act of congress of March 3, 1855 (10 U. S. St. at L. 683), entitled "An Act extending the Provisions of the Act of August four, eighteen hundred and fifty-two, entitled 'An Act to grant the Right of Way to all Rail and plankroads and Macadamized Turnpikes passing through the Public Lands belonging to the United States,' to the Public Lands in the Territories of the United States," simply extended the act of 1852, with all its provisions, exceptions, and restrictions, so as to operate in the territories the same as in the states. Simonson *v.* Thompson, 25 Minn. 450.

96. 18 U. S. St. at L. 482 [U. S. Comp. St. (1901) p. 1568]. See Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

97. Red River, etc., R. Co. *v.* Sture, 32 Minn. 95, 20 N. W. 229.

98. Savannah, etc., R. Co. *v.* Davis, 25 Fla. 917, 7 So. 29 (holding that a railroad company which had failed to comply with the provisions of the act had no right to run its road through the land of a homesteader who had complied with the terms of the homestead law, although the homesteader had not at the time received his patent from the government, and could not assail the title of such homesteader); Red River, etc., R. Co. *v.* Sture, 32 Minn. 95, 20 N. W. 229. See also Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 16 Pac. 125.

99. Larsen *v.* Oregon R., etc., Co., 19 Oreg. 240, 23 Pac. 974; Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 52 Fed. 765 [*affirmed* in 60 Fed. 981, 9 C. C. A. 303 (*affirmed* in 160 U. S. 77, 16 S. Ct. 231, 40 L. ed. 355)].

1. Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. 812, holding that it is not the duty of the contractor who builds the road to file a copy of the articles of incorporation of the

organization, the filing with the secretary of the interior of a copy of articles of incorporation of a railroad under said statute, and a copy of the statute, operates as proof of the organization.[2]

(III) *Filing and Approval of Profile.* The statute requires that any railroad company desiring to secure its benefits shall, within twelve months after the location of any section of twenty miles of its road, if the same is upon surveyed land, and if it is upon unsurveyed land, within twelve months after the United States survey thereof, file with the register of the land office for the district where the land is located a profile of its road,[3] and upon approval thereof by the secretary of the interior the same shall be noted upon the plats in the local land office,[4] and thereafter the lands over which the right of way passes are to be disposed of subject to such right of way.[5] This provision, however, relates merely to the case of a railroad company which desires to secure a present grant and give to it fixity of location before its road is constructed,[6] and the actual construction of the road is a definite location which entitles it to the benefits of the grant, although the profile map of the road has not been filed.[7]

(IV) *Filing Map of General Route.* A provision in an act of congress granting to a railroad a right of way through the public domain, that the railroad company shall within two years designate the general route of the road as near as may be and file a map of the same in the department of the interior, does not affect the grant of the right of way, but only furnishes the means by which the secretary can withdraw the land within a specified distance of such designated route from preëmption, private entry, and sale.[8]

(V) *Approval of President.* Where a grant of a right of way was made to a railroad company subject to the approval of the president of the United States, and the company filed its map of definite location with the secretary of the interior, it did everything required of it to obtain title to its right of way, and

railroad company and proof of organization thereunder.

2. Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 52 Fed. 765 [*affirmed* in 60 Fed. 981, 9 C. C. A. 303 (*affirmed* in 160 U. S. 77, 16 S. Ct. 231, 40 L. ed. 355]].

3. 18 U. S. St. at L. 483, c. 152, § 4 [U. S. Comp. St. (1901) p. 1569]. See Larsen *v.* Oregon R., etc., Co., 19 Oreg. 240, 23 Pac. 974; Rio Grande Western R. Co. *v.* Telluride Power, etc., Co., 16 Utah 125, 51 Pac. 146; Lilienthal *v.* Southern California R. Co., 56 Fed. 701.

This duty rests upon the railroad company and not upon the contractor who builds the road. Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. 812.

4. 18 U. S. St. at L. 483, c. 152, § 4 [U. S. Comp. St. (1901) p. 1569].

When the profile appears to have been made capriciously or for an ulterior purpose, the secretary of the interior should withhold his approval thereof. Phœnix, etc., R. Co. *v.* Arizona Eastern R. Co., 9 Ariz. 434, 84 Pac. 1097; Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330; St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558. See also Savannah, etc., R. Co. *v.* Davis, 25 Fla. 917, 7 So. 29.

When a profile has been approved it is presumed that the preliminary steps necessary to such approval have been taken. Rierson *v.* St. Louis, etc., R. Co., 59 Kan. 32, 51 Pac. 901.

5. 18 U. S. St. at L. 483, c. 152, § 4 [U. S. Comp. St. (1901) p. 1569]. See *infra*, II, K, 2, m.

6. Dakota Cent. R. Co. *v.* Downey, 8 Land Dec. Dep. Int. 117 [*followed* in Jamestown, etc., R. Co. *v.* Jones, 177 U. S. 125, 20 S. Ct. 568, 44 L. ed. 698 (*reversing* 7 N. D. 619, 76 N. W. 227, and *followed* in Minneapolis, etc., R. Co. *v.* Doughty, 208 U. S. 251, 28 S. Ct. 291 [*affirming* 15 N. D. 290, 107 N. W. 971])].

7. Denver, etc., R. Co. *v.* Hanoum, 19 Colo. 162, 34 Pac. 838; Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401; Jamestown, etc., R. Co. *v.* Jones, 177 U. S. 125, 20 S. Ct. 568, 44 L. ed. 698 [*reversing* 7 N. D. 619, 76 N. W. 227, *following* Dakota Cent. R. Co. *v.* Downey, 8 Land Dec. Dep. Int. 117, *distinguishing* Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 5 S. Ct. 566, 28 L. ed. 1122; Van Wyck *v.* Knevals, 106 U. S. 360, 1 S. Ct. 336, 27 L. ed. 201, and *followed* in Pennsylvania Min., etc., Co. *v.* Everett, etc., R. Co., 29 Wash. 102, 69 Pac. 628; Minneapolis, etc., R. Co. *v.* Doughty, 208 U. S. 251, 28 S. Ct. 291 (*affirming* 15 N. D. 290, 107 N. W. 971)]; Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 52 Fed. 765 [*affirmed* in 60 Fed. 981, 9 C. C. A. 303 (*affirmed* in 160 U. S. 77, 16 S. Ct. 231, 40 L. ed. 355)]; Montana Cent. R. Co. *v.* ——, 25 Land Dec. Dep. Int. 250; St. Paul, etc., R. Co. *v.* Maloney, 24 Land Dec. Dep. Int. 460.

8. Central Pac. R. Co. *v.* Dyer, 5 Fed. Cas. No. 2,552, 1 Sawy. 641.

in a suit against a party other than the United States, approval by the president must be presumed.[9]

c. Lines as to Which Right of Way May Be Acquired — (I) *In General.* A railroad company can acquire a right of way through the public domain as to such line or lines as are described in the charter or articles of incorporation and such only,[10] and the act of a company in making surveys is of no avail until the power to build the road upon the surveyed line is in a proper manner assumed by or conferred upon the company.[11]

(II) *Change of Location.* A railroad company which has obtained approval of a profile of its road by the interior department may change its route or a portion thereof, providing such change does not affect intervening rights;[12] but a railroad which has exercised its right under its grant, by surveying its line and filing a map of its route, cannot subsequently reclaim its grant on changing its line of road, so as to affect the rights of one who has purchased from the government land within the new right of way.[13]

d. Lands Subject to Right of Way — (I) *In General.* The right to appropriate lands for a right of way extends to any lands of the United States not already disposed of or reserved.[14]

(II) *Land Subject to Preëxisting Rights* — (A) *In General.* Rights in public lands acquired by an individual, by entry or settlement under the land laws, before the profile of a railroad is filed and approved or the road constructed, are superior to the rights of the railroad under the grant of a right of way through the public domain,[15] although the company qualified to take under the grant and determined by a final survey the exact location for its road across the claimant's

9. Missouri, etc., R. Co. *v.* Watson, 74 Kan. 494, 87 Pac. 687.

10. Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 160 U. S. 77, 16 S. Ct. 231, 40 L. ed. 355 [*affirming* 60 Fed. 981, 9 C. C. A. 303 (*affirming* 52 Fed. 765)].

11. Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 160 U. S. 77, 16 S. Ct. 231, 40 L. ed. 355 [*affirming* 60 Fed. 981, 9 C. C. A. 303 (*affirming* 52 Fed. 765)], holding that a company which surveys a line over public lands beyond the terminal fixed by its charter, and afterward files supplemental articles of incorporation authorizing an extension covering the survey, acquires no right of way beyond such termini, as against another company which, having full powers, makes a survey over the same land after the other company's survey, but before the filing of its supplemental articles.

12. Phœnix, etc., R. Co. *v.* Arizona Eastern R. Co., 9 Ariz. 434, 84 Pac. 1097; Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 160 U. S. 77, 16 S. Ct. 231, 40 L. ed. 355 [*affirming* 60 Fed. 981, 9 C. C. A. 303 (*affirming* 52 Fed. 765)].

A rival company which is not misled by the acts of the company seeking to change the location of its right of way through the public lands and which has not acquired intervening rights, cannot complain of such change. Phœnix, etc., R. Co. *v.* Arizona Eastern R. Co., 9 Ariz. 434, 84 Pac. 1097; Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 160 U. S. 77, 16 S. Ct. 231, 40 L. ed. 355 [*affirming* 60 Fed. 981, 9 C. C. A. 303 (*affirming* 52 Fed. 765)].

13. Missouri, etc., R. Co. *v.* Cook, 47 Kan. 216, 27 Pac. 847 [*affirmed* in 163 U. S. 491, 16 S. Ct. 1093, 41 L. ed. 239]; Sioux City, etc., Town-Lot, etc., Co. *v.* Griffey, 143 U. S. 32, 12 S. Ct. 362, 36 L. ed. 64; Smith *v.* Northern Pac. R. Co., 58 Fed. 513, 7 C. C. A. 397.

14. Tuttle *v.* Chicago, etc., R. Co., 61 Minn. 190, 63 N. W. 618.

15. *Alabama.*—Alabama, etc., R. Co. *v.* Burkett, 46 Ala. 569.

Colorado.— Denver, etc., R. Co. *v.* Wilson, 28 Colo. 6, 62 Pac. 843.

Idaho.— Washington, etc., R. Co. *v.* Osborne, 2 Ida. 557, 21 Pac. 421.

Kansas.— Union Pac. R. Co. *v.* Harris, 76 Kan. 255, 91 Pac. 68; Chicago, etc., R. Co. *v.* Van Cleave, 52 Kan. 665, 33 Pac. 472.

Minnesota.— Red River, etc., R. Co. *v.* Sture, 32 Minn. 95, 20 N. W. 229. See also Radke *v.* Winona, etc., R. Co., 39 Minn. 262, 39 N. W. 624, 42 Minn. 61, 43 N. W. 967.

Missouri.— Alexander *v.* Kansas City, etc., R. Co., 138 Mo. 464, 40 S. W. 104; Kinion *v.* Kansas City, etc., R. Co., 118 Mo. 577, 24 S. W. 636.

North Dakota.— Doughty *v.* Minneapolis, etc., R. Co., 15 N. D. 290, 107 N. W. 971.

Oklahoma.— Enid, etc., R. Co. *v.* Kephart, (1906) 91 Pac. 1049.

Oregon.— Johnson *v.* Bridal Veil Lumbering Co., 24 Oreg. 182, 33 Pac. 528; Larsen *v.* Oregon R., etc., Nav. Co., 19 Oreg. 240, 23 Pac. 974.

Washington.— Slaght *v.* Northern Pac. R. Co., 39 Wash. 576, 81 Pac. 1062; Reidt *v.* Spokane Falls, etc., R. Co., 6 Wash. 623, 34 Pac. 150; Enoch *v.* Spokane Falls, etc., R. Co., 6 Wash. 393, 33 Pac. 966.

United States.— Minneapolis, etc., R. Co. *v.* Doughty, 208 U. S. 251, 28 S. Ct. 291, 52

land before the latter acquired any rights,[16] or although the company has done all that is necessary to vest in it the title to the specific lands before the issuance of a patent to the individual claimant.[17] If the road is built across the lands of such claimant he must be compensated therefor,[18] and no rights of the railroad company attach to the land until a condemnation as provided by law.[19] Where, however, a railroad company locates its road across land occupied by a claimant under the land laws whose title is inchoate, and complies with the law, the railroad company acquires all the interest of the United States in the land within the right of way, subject to the contingency of the claimant perfecting his title, so that if the claimant abandons the land there immediately accrues to the railroad company a perfect title as against the United States and all persons who then have no rights in the land.[20] The grant applies to land which has been entered upon and improved by an individual who, at the time when the grant becomes effective, has taken none of the steps toward the acquisition of the title which are necessary to give him an interest in the land such as the law recognizes,[21] and the railroad company may maintain ejectment against such an occupant.[22]

(B) *Land Within Railroad Aid Grant.*[23] After a railroad has been definitely located and a grant in aid of its construction has attached to specific lands, such lands cease to be "public lands" and cannot be appropriated by another railroad for its right of way.[24]

(C) *Town-Sites.* Land which has been entered as a town-site, pursuant to the statute,[25] is not subject to appropriation for a railroad right of way under a subsequent grant.[26]

L. ed. 474 [*affirming* 15 N. D. 290, 107 N. W. 971]; Spokane Falls, etc., R. Co. *v.* Zeigler, 167 U. S. 65, 17 S. Ct. 728, 42 L. ed. 79 [*affirming* 61 Fed. 392, 9 C. C. A. 548]; Washington, etc., R. Co. *v.* Osborn, 160 U. S. 103, 16 S. Ct. 219, 40 L. ed. 346; Lilienthal *v.* Southern California R. Co., 56 Fed. 701. See also Northern Pac. R. Co. *v.* Murray, 87 Fed. 648, 31 C. C. A. 183.

See 41 Cent. Dig. tit. "Public Lands," § 277.

A special grant to a particular railroad company of a right of way over public lands does not include lands which, at the time of the passage of the act making the grant, are subject to an existing, uncanceled homestead entry. Oregon Short Line R. Co. *v.* Fisher, 26 Utah 179, 72 Pac. 931.

Cancellation of entry at instance of adverse claimant.— Where A made a homestead entry and B entered thereon and made a settlement, and a railroad appropriated a strip across the tract for its right of way, and thereafter B by contest secured the relinquishment of A to be filed in the United States land office, and thereafter made homestead entry for such land under a preference right, and complied with all the provisions of the law, the cancellation of A's entry did not cause a reversion of the right of way to the railroad company. Enid, etc., R. Co. *v.* Kephart, (Okla. 1906) 91 Pac. 1049.

The fact that a settler commutes his homestead entry does not allow the rights of the railroad entering thereon for the purpose of acquiring a right of way, to become paramount. Johnson *v.* Bridal Veil Lumbering Co., 24 Oreg. 182, 33 Pac. 528.

The statute of limitations does not begin to run in favor of a railroad company in possession of its right of way as against a claimant who had prior rights under the land laws until such claimant, by a full compliance with the law, becomes entitled to a patent. Denver, etc., R. Co. *v.* Wilson, 28 Colo. 6, 62 Pac. 843; Slaght *v.* Northern Pac. R. Co., 39 Wash. 576, 81 Pac. 1062.

16. Doughty *v.* Minneapolis, etc., R. Co., 15 N. D. 290, 107 N. W. 971.

17. Denver, etc., R. Co. *v.* Wilson, 28 Colo. 6, 62 Pac. 843.

18. Denver, etc., R. Co. *v.* Wilson, 28 Colo. 6, 62 Pac. 843; Washington, etc., R. Co. *v.* Osborne, 2 Ida. 557, 21 Pac. 421; Washington, etc., R. Co. *v.* Osborn, 160 U. S. 103, 16 S. Ct. 219, 40 L. ed. 346. And see cases cited *supra*, note 15.

19. Washington, etc., R. Co. *v.* Osborne, 2 Ida. 557, 21 Pac. 421; Slaght *v.* Northern Pac. R. Co., 39 Wash. 576, 81 Pac. 1062.

Condemnation of land see EMINENT DOMAIN, 15 Cyc. 543.

20. Alexander *v.* Kansas City, etc., R. Co., 138 Mo. 464, 40 S. W. 104.

21. Southern Pac. R. Co. *v.* Burr, 86 Cal. 279, 24 Pac. 1032; Western Pac. R. Co. *v.* Tevis, 41 Cal. 489; Flint, etc., R. Co. *v.* Gordon, 41 Mich. 420, 2 N. W. 648; Burton *v.* Laughrey, 18 Mont. 43, 44 Pac. 406.

22. Southern Pac. R. Co. *v.* Burr, 86 Cal. 279, 24 Pac. 1032.

23. **Lands included in or excepted from grant in aid of railroads** see *supra*, II, K, 1, k.

24. Washington, etc., R. Co. *v.* Northern Pac. R. Co., 2 Ida. (Hasb.) 550, 21 Pac. 658.

25. **Town-sites** see *supra*, II, C, 12.

26. Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215.

(D) *Indian Lands.*[27] The general grant of rights of way through the public lands does not apply to Indian reservations,[28] but in some of the grants to particular railroads rights of way through Indian reservations have been specifically granted.[29] Lands ceded to the United States by an Indian nation are public lands within the grant of rights of way.[30]

(E) *School Sections.*[31] A grant of a right of way applies to sections reserved by the organic act of a territory for the purpose of being granted to the future state as school lands;[32] but on general principles it would seem that such a grant does not apply to school sections the title to which has previously vested in a state.[33]

(III) *Mineral Lands.*[34] A congressional grant of a right of way through the public lands includes a right of way over mineral lands.[35]

(IV) *Unsurveyed Lands.* The act of 1875 granting lands for rights of way and stations, etc., does not limit the right to acquire lands for such purposes to surveyed lands but contemplates that railroads may be extended across unsurveyed lands, and such lands may be acquired under the grant.[36]

e. When Title Vests. Some of the acts of congress making special grants have vested title from their dates.[37] The general act of 1875 was a grant *in præ-*

27. **Indian lands** generally see INDIANS, 22 Cyc. 109.

28. 18 U. S. St. at L. 483, c. 152, § 5 [U. S. Comp. St. (1901) p. 1569].

29. See Maricopa, etc., R. Co. *v.* Arizona, 156 U. S. 347, 15 S. Ct. 391, 39 L. ed. 447 (holding that Act Cong. Jan. 17, 1887, c. 26, § 2 (24 U. S. St. at L. 361), granting to the Maricopa and Phœnix Railway Company a right of way, and authority to construct and operate a road thereon, through an Indian reservation created by congress within the limits of a territory previously organized, withdrew the land from the act of reservation, to the extent of the grant, and for the purposes thereof, and reëstablished over the property and rights withdrawn, the authority of the territory, including the power to tax); Missouri, etc., R. Co. *v.* Roberts, 152 U. S. 114, 14 S. Ct. 496, 38 L. ed. 377 [*reversing* 43 Kan. 102, 22 Pac. 1006] (holding that Act Cong. July 26, 1866 (14 U. S. St. at L. 289), granting lands to the Union Pacific Railroad Company operated of itself to extinguish the Indian right, and carried both title and right of possession).

Railroad company not liable to compensate members of Indian tribe whose lands are crossed by its road.— Grinter *v.* Kansas Pac. R. Co., 23 Kan. 642.

30. Rierson *v.* St. Louis, etc., R. Co., 59 Kan. 32, 51 Pac. 901.

31. **School lands** generally see *supra*, II, H.

32. Coleman *v.* St. Paul, etc., R. Co., 38 Minn. 260, 36 N. W. 638 [*following* Simonson *v.* Thompson, 25 Minn. 450, and *followed* in Radke *v.* Winona, etc., R. Co., 39 Minn. 262, 39 N. W. 624, 42 Minn. 61, 43 N. W. 967]; Union Pac. R. Co. *v.* Douglas County, 31 Fed. 540.

33. See *supra*, II, H, 1, b.

34. See, generally, MINES AND MINERALS, 27 Cyc. 516.

35. Doran *v.* Central Pac. R. Co., 24 Cal. 245 (construing the act of congress of July 1, 1862 [12 U. S. St. at L. 489], granting a right of way to the Central Pacific Railroad Company and holding that section 3 of the act, excepting mineral lands, only applies to the alternate sections of land granted the railroad company to aid in construction); Wilkinson *v.* Northern Pac. R. Co., 5 Mont. 538, 6 Pac. 349 (where the court placed an exactly similar construction upon the act of congress of July 2, 1864 [13 U. S. St. at L. 365], granting a right of way to the Northern Pacific Railroad Company).

36. *Ex p.* Davidson, 57 Fed. 883.

37. Churchill *v.* Choctaw R. Co., 4 Okla. 462, 46 Pac. 503 [*following* U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 41 Pac. 729] (construing the act of congress of Feb. 18, 1888, granting to the Choctaw Coal and Railway Company a right of way through the Choctaw Indian nation); Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438 [*reversing* 5 Fed. Cas. No. 2,387] (holding that in passing the act of congress of June 8, 1872 (17 U. S. at L. 399), granting to the Denver and Rio Grande Railway Company a right of way through the public domain, it was the intention of congress to grant to the company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located and in good faith appropriated for the purposes contemplated by the charter of the company and the act of congress, at which time the grant acquired precision and, by relation, took effect as of its date).

Words importing present absolute grant.— A statute providing "that the right of way through the public lands be, and the same is hereby, granted" to a certain railroad is a present absolute grant, and all persons acquiring any portions of the public lands after the passage of such act take the same subject to the right of way conferred by it for the proposed road. Missouri, etc., R. Co. *v.* Watson, 74 Kan. 494, 87 Pac. 687; St. Joseph, etc., R. Co. *v.* Baldwin, 103 U. S. 426, 429, 430, 26 L. ed. 578 [*reversing* 7 Nebr. 247, and *followed* in Rider *v.* Burlington, etc., R. Co., 14 Nebr. 120, 15 N. W. 371] (where it is said: "The grant of the right of way . . .

senti of lands to be thereafter identified,[38] and when the articles of incorporation and proof of organization are filed, a railroad company becomes specifically a grantee under the act;[39] but the legal title to the right of way vests upon the filing of the profile and its approval by the secretary of the interior and not prior thereto,[40] although that title, for some purposes at least, relates back to the date of location of the railroad.[41] When the secretary of the interior has approved the maps for station grounds, this is an adjudication of the fact that such station grounds are necessary for the purposes mentioned, and the grant attaches,[42] and relates back to the time of filing the maps.[43]

f. Nature of Estate Acquired. It has been held that the estate acquired by a railroad company under the act of congress granting lands for right of way and station grounds, etc., is more than a mere easement, and is a base, qualified, or limited fee,[44] giving the right to the exclusive possession and use of the land for the purposes contemplated by the law,[45] with a reversionary interest remaining in the United States to be conveyed by it to the person to whom the land may be

contains no reservations or exceptions. . . . Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. . . . The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be very often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route. The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists"); Central Pac. R. Co. *v.* Dyer, 5 Fed. Cas. No. 2,552, 1 Sawy. 641.

38. Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123 [*affirming* 20 D. C. 555, and *following* Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438 (*reversing* 5 Fed. Cas. No. 2,387)].

39. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56; Rio Grande, etc., R. Co. *v.* Telluride Power, etc., Co., 16 Utah 125, 51 Pac. 146; Jamestown, etc., R. Co. *v.* Jones, 177 U. S. 125, 20 S. Ct. 568, 44 L. ed. 698 [*reversing* 7 N. D. 619, 76 N. W. 227, and *followed* in Minneapolis, etc., R. Co. *v.* Doughty, 208 U. S. 251, 28 S. Ct. 291, 52 L. ed. 474 (*affirming* 15 N. D. 290, 107 N. W. 971)]; Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123; Wallula Pac. R. Co. *v.* Portland, etc., R. Co., 154 Fed. 902; Dakota Cent. R. Co. *v.* Downey, 8 Land Dec. Dep. Int. 115.

40. *Arizona.*— Phœnix, etc., R. Co. *v.* Arizona Eastern R. Co., 9 Ariz. 434, 84 Pac. 1097.

Colorado.— Denver, etc., R. Co. *v.* Wilson, 28 Colo. 6, 62 Pac. 843.

Kansas.— Chicago, etc., R. Co. *v.* Van Cleave, 52 Kan. 665, 33 Pac. 472.

Oregon.— Larsen *v.* Oregon R., etc., Nav. Co., 19 Oreg. 240, 23 Pac. 974.

Utah.— Lewis *v.* Rio Grande, Western R. Co., 17 Utah 504, 54 Pac. 981.

Washington.— Enoch *v.* Spokane Falls, etc., R. Co., 6 Wash. 393, 33 Pac. 966.

United States.— Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123 [*affirming* 20 D. C. 555]. *Compare* Wallula Pac. R. Co. *v.* Portland, etc., R. Co., 154 Fed. 902, where the court, without expressly deciding the point, inclined to the view that the title vested upon the filing of the profile, although it had not been approved by the secretary of the interior.

The approval of the profile cannot be annulled by the successor of the secretary of the interior who approved it. Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123 [*affirming* 20 D. C. 555].

41. Phœnix, etc., R. Co. *v.* Arizona Eastern R. Co., 9 Ariz. 434, 84 Pac. 1097; Rierson *v.* St. Louis, etc., R. Co., 59 Kan. 32, 51 Pac. 901; Kinion *v.* Kansas City, etc., R. Co., 118 Mo. 577, 24 S. W. 636; Lewis *v.* Rio Grande Western R. Co., 17 Utah 504, 54 Pac. 981.

42. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

43. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

44. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56; Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401. But *compare* Mercantile Trust Co. *v.* Atlantic, etc., R. Co., 63 Fed. 910, holding that Act Cong. July 27, 1866, c. 278, § 2 (14 U. S. St. at L. 294), granting a railroad right of way to the Atlantic and Pacific Railroad Company, did not carry the fee to the right of way, but only an easement therein.

45. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56; Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401; Central Pac. R. Co. *v.* Benity, 5 Fed. Cas. No. 2,551, 5 Sawy. 118, 5 Reporter 229.

The railroad company may recover in ejectment the possession of a portion of its right

patented, whose rights will be subject to those of the grantee of the right of way and station grounds.[46] A railroad company cannot convey any part of its right of way in any manner which would sever the right of possession from the franchise to operate and maintain a railroad line thereon,[47] neither can it lawfully acquiesce in an adverse possession, and so the statute of limitations does not run against an action by the railroad company to recover possession and maintain the integrity of its right of way.[48]

g. Width and Location of Right of Way[49]— (i) *In General.* A railroad company is entitled to the full width of right of way prescribed by the act making the grant, and is not limited to so much as it occupies and uses or is actually necessary for the use for which the grant was made.[50] The precise location of the right of way is governed by the location of the central line of the road as shown on the map filed in the land office, and is not affected by the fact that the road as actually constructed deviates from such line [51]

(ii) *Right of Way Through Canyons, Etc.* The statute provides that a railroad company whose right of way or whose track or road-bed upon such right of way passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located.[52] Under this provision, where a canyon is broad enough to enable both railroad companies to proceed without interference with each other in the construction of their respective roads, they should be allowed to do so; [53] and if in any portion of a canyon it is

of way from one who has wrongfully entered thereon. Central Pac. R. Co. *v.* Benity, 5 Fed. Cas. No. 2,551, 5 Sawy. 118, 5 Reporter 229.

46. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

47. *Idaho.*— Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401.

Kansas.— Union Pac. R. Co. *v.* Kindred, 43 Kan. 134, 23 Pac. 112.

Nebraska.— See McLucas *v.* St. Joseph, etc., R. Co., 67 Nebr. 603, 93 N. W. 928, 97 N. W. 312, 2 Nebr. (Unoff.) 154, 96 N. W. 115.

Tennessee.— East Tennessee, etc., R. Co. *v.* Telford, 89 Tenn. 293, 14 S. W. 776, 10 L. R. A. 855.

Wisconsin.— Yellow River Imp. Co. *v.* Wood County, 81 Wis. 554, 51 N. W. 1004, 17 L. R. A. 92.

United States.— Northern Pac. R. Co. *v.* Townsend, 190 U. S. 267, 23 S. Ct. 671, 47 L. ed. 1044; East Alabama R. Co. *v.* Doe, 114 U. S. 340, 5 S. Ct. 869, 29 L. ed. 136; Northern Pac. R. Co. *v.* Spokane, 56 Fed. 915 [*affirmed* in 64 Fed. 506, 12 C. C. A. 246].

See 41 Cent. Dig. tit. "Public Lands," § 280.

A railroad company has power to dedicate to the public the right of way across its track and right of way, for this is not an alienation of its right of way so as to interfere with the purpose of the grant. Northern Pac. R. Co. *v.* Spokane, 64 Fed. 506, 12 C. C. A. 246 [*affirming* 56 Fed. 915].

48. Southern Pac. Co. *v.* Hyatt, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522; Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401; McLucas *v.* St. Joseph, etc., R. Co., 67 Nebr. 603, 93 N. W. 928, 97 N. W. 312, 2 Nebr. (Unoff.) 154, 96 N. W. 115.

49. See, generally, Railroads.

50. Southern Pac. Co. *v.* Burr, 86 Cal. 279, 24 Pac. 1032 [*followed* in Burton *v.* Laughrey, 18 Mont. 43, 44 Pac. 406]; Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401; New Mexico *v.* U. S. Trust Co., 172 U. S. 186, 19 S. Ct. 881, 43 L. ed. 413; Northern Pac. R. Co. *v.* Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. ed. 157. See also Bell *v.* Atlantic, etc., R. Co., 63 Fed. 417, 11 C. C. A. 271.

The action of congress in prescribing the width of the right of way is a conclusive determination of the reasonable and necessary quantity of land to be dedicated to such use. Southern Pac. Co. *v.* Burr, 86 Cal. 279, 24 Pac. 1032 [*followed* in Burton *v.* Laughrey, 18 Mont. 43, 44 Pac. 406]; Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401; Northern Pac. R. Co. *v.* Smith, 171 U. S. 260, 18 S. Ct. 794, 43 L. ed. 157.

51. Smith *v.* Northern Pac. R. Co., 58 Fed. 513, 7 C. C. A. 397, holding that the grant to the Northern Pacific Railroad Company of a right of way "to the extent of two hundred feet in width on each side of said railroad," did not extend to land more than two hundred feet from the line of the railroad as "definitely fixed" by the map thereof filed by the company but within two hundred feet of the line of the railroad actually constructed, as against one holding title to such land under a patent from the United States without reservation.

52. Act Cong. March 3, 1875, c. 152, § 2 (18 U. S. St. at L. 482) [U. S. Comp. St. p. 1568]. See Denver, etc., R. Co. *v.* Denver, etc., R. Co., 17 Fed. 867, 5 McCrary 443.

53. Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438 [*reversing* 5 Fed. Cas. No. 2,387].

impracticable or impossible to lay down more than one road-bed and track, the court, while recognizing the prior right of the railroad company entitled thereto to construct and operate that track for its own business, should by proper orders and upon such terms as may be just and equitable establish and secure the right of another railroad company whose route passes through the canyon, to use the same road-bed and track after completion, in common with the company to which it belongs.[54]

h. Conditions of Grant. The grant of a right of way through the public lands is absolute and subject to no conditions save those necessarily implied, such as that the railroad shall be constructed and used for the purpose designated.[55] A railroad company which accepts a special grant of a right of way is bound by the conditions imposed by the act making the grant.[56]

i. Conflicting Claims. As between two rival railroad companies, each claiming a right of way on the same route over public lands under the statute, that one is prior in right which first definitely adopts the line on which its road is to be built by appropriate corporate action, and then files its map of the location so adopted,[57] and it is immaterial which company first entered on the land to make surveys or do other work prior to such definite location.[58] Where rival aspirants for the same right of way file profiles covering it, it devolves upon the secretary of the interior to determine from the facts which company has the superior claim to the approval of its profile and to give his approval accordingly.[59] While a contest is pending before the secretary the courts should not assume jurisdiction to determine the ultimate right of possession of the right of way in controversy;[60] but a court should upon application of the company showing the greater immediate equity, protect it in the construction of its road, by appropriate temporary orders.[61]

j. Method of Securing Land For Station Purposes, Etc. The acquisition of the right of way by compliance with the provisions of the statute is a prerequisite to the attaching of any right to land for station purposes, etc.[62] The statute contains no requirements for the filing of maps and plats designating the station grounds, etc., selected,[63] and all proceedings relative thereto are governed by the rules and regulations of the interior department,[64] which provide that if a railroad

54. Denver, etc., R. Co. *v.* Alling, 99 U. S. 463, 25 L. ed. 438 [*reversing* 5 Fed. Cas. No. 2,387].

55. See Wilkinson *v.* Northern Pac. R. Co., 5 Mont. 538, 6 Pac. 349; St. Joseph, etc., R. Co. *v.* Baldwin, 103 U. S. 426, 26 L. ed. 578 [*reversing* 7 Nebr. 247], both construing special grants in language substantially the same as that used in the general grant made by Act Cong. March 3, 1875, c. 152, § 1 [18 U. S. St. at L. 482, U. S. Comp. St. (1901) p. 1568].

56. Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 69 Pac. 1050, holding that the Southern Kansas Railway Company having accepted the act of congress of July 4, 1884, granting it a right of way through the Indian Territory, is bound by the conditions imposed by section 9 of such act, and must maintain at its own expense any road or highway crossing without condemnation proceedings, and without compensation or claim for damages, whenever the same may be done without destroying the use of the improvements made by the company for the purpose for which congress granted the right of way.

57. Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879, holding that some appropriate corporate action is necessary to initiate any right to a particular location.

58. Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879.

59. Phœnix, etc., R. Co. *v.* Arizona Eastern R. Co., 9 Ariz. 434, 84 Pac. 1097; Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123.

60. Phœnix, etc., R. Co. *v.* Arizona Eastern R. Co., 9 Ariz. 434, 84 Pac. 1097 [*following* Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 23 S. Ct. 692, 24 S. Ct. 860, 47 L. ed. 1064]. See also Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879. See generally, *infra*, II, L, 16, a.

61. Phœnix, etc., R. Co. *v.* Arizona, etc., R. Co., 9 Ariz. 434, 84 Pac. 1097. See, generally, *infra*, II, L, 16, a.

62. Lilienthal *v.* Southern California R. Co., 56 Fed. 701, holding that no rights are acquired by filing a map of land desired for station purposes before the filing of the profile of the road.

63. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56, holding that the provisions of Act March 3, 1875, c. 152, § 4, prescribing the method of securing a right of way (see *supra* II, K, 2, b, (III)) have no application to the method of securing station grounds.

64. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

company desires to avail itself of the provisions of the statute granting ground for station buildings, etc., it must file for approval in each separate instance a plat showing in connection with the public survey the surveyed limits and areas of the ground desired; [65] and that when there is received from the office of the secretary of the interior a copy of an approved plat of the ground selected by the company for station purposes, etc., the local officers shall mark the township plat accordingly, and make the necessary notes on the tract books,[66] and note on the certificate of entry of any such lands, in addition to the note concerning the right of way, that the entry is permitted subject to the use and occupation of such railroad company for station purposes.[67]

k. Rights of Way in Alaska. In 1898 congress enacted a law, similar in many respects to the law of 1875,[68] granting the right of way for railroads through public lands in Alaska, and also land for station buildings, etc.[69] Under this act a railroad acquires no right of way over the public lands until the primary survey and plat thereof have been made.[70] Such a survey and plat reserves the right of the railroad company for one year,[71] while, upon the making of the final survey and filing the definite maps of location for a railroad across the public lands, the rights of the railroad are reserved permanently and the land is not subject to any further disposition except subject to such right of way.[72] A valid location of oil claims on public land prior to a survey withdraws such land from entry so that a railroad company cannot subsequently obtain a right of way over it under the statute.[73] A change in the preliminary lines of a right of way, so that the same shall for the first time be located on a placer mine location, can be made only with the consent of the mine locator or upon condemnation proceedings.[74]

l. Construction of Special Grants. Special acts of congress making grants to railroads of lands for right of way, stations, etc., are subject to the general rule of construction that the intent of congress is to govern.[75]

m. Titles or Rights Acquired After Vesting of Title to Right of Way. Titles or rights acquired in public lands after a right of way has vested in a railroad company under a statutory grant are subject to such right of way.[76]

65. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

66. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

The rights of a railroad company which has done everything required of it cannot be defeated through the neglect of the local officers to make the proper notation, etc., on the plats and books of the office, or by reason of the fact that such officers have lost or misplaced the plat filed by the company after it has been approved by the secretary of the interior and returned to the local land office. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

67. Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56.

68. See *supra*, II, K, 2, a.

69. Act Cong. May 14, 1898, c. 299, § 2 *et seq.* [30 U. S. St. at L. 409, U. S. Comp. St. (1901), p. 1575].

70. Steele *v.* Tanana Mines R. Co., 2 Alaska 451.

71. Steele *v.* Tanana Mines R. Co., 2 Alaska 451.

72. Steele *v.* Tanana Mines R. Co., 2 Alaska 451.

73. Alaska Pac. R., etc., Co. *v.* Copper River, etc., R. Co., 160 Fed. 862, 87 C. C. A. 666.

74. Steele *v.* Tanana Mines R. Co., 2 Alaska 451.

75. Moon *v.* Salt Lake County, 27 Utah 435, 76 Pac. 222, holding that Act Cong. Dec. 15, 1870 (16 U. S. St. at L. 395), granting to the Utah Central Railroad Company a right of way through the public lands from a point at or near Ogden City in the territory of Utah "to Salt Lake City" in said territory, and land for necessary grounds for stations, workshops, depots, etc., should not be construed as limiting the grant to the boundary of Salt Lake City, but authorized the construction of the road over public lands within the city limits.

76. *California.*— Doran *v.* Central Pac. R. Co., 24 Cal. 245.

Idaho.— Oregon Short Line R. Co. *v.* Quigley, 10 Ida. 770, 80 Pac. 401; Hamilton *v.* Spokane, etc., R. Co., 3 Ida. 164, 28 Pac. 408.

Kansas.— Missouri, etc., R. Co. *v.* Watson, 74 Kan. 494, 87 Pac. 687.

Minnesota.— Tuttle *v.* Chicago, etc., R. Co., 61 Minn. 190, 63 N. W. 618 [*following* Simmonson *v.* Thompson, 25 Minn. 450].

Missouri.— Alexander *v.* Kansas City, etc., R. Co., 138 Mo. 464, 40 S. W. 104; Kinion *v.* Kansas City, etc., R. Co., 118 Mo. 577, 24 S. W. 636.

Nebraska.— Rider *v.* Burlington, etc., R. Co., 14 Nebr. 120, 15 N. W. 371.

Oklahoma.— Churchill *v.* Choctaw R. Co., 4 Okla. 462, 46 Pac. 503 [*following* U. S. *v.*

n. Forfeiture. The statute provides that if any section of a railroad is not completed within five years after the location of such section, the grant of the right of way and land for stations, etc., shall be forfeited as to such uncompleted section.[77] Under this provision, however, the failure to complete the road within the time limited does not *ipso facto* operate as a forfeiture of the grant;[78] but merely authorizes the government to forfeit it by judicial proceedings or by an act of congress resuming title to the lands.[79] In 1906 congress passed a general act declaring a forfeiture of all rights subject to forfeiture under the act of 1875,[80] and the forfeiture so declared is complete and effective without any judicial or other or further proceedings on the part of the government.[81]

o. Abandonment. A railroad company may lose its right to claim depot and station grounds under the statutory grant by abandonment.[82]

Choctaw, etc., R. Co., 3 Okla. 404, 41 Pac. 729].

South Carolina.— Sams *v.* Port Royal, etc., R. Co., 15 S. C. 484; Verdier *v.* Port Royal R. Co., 15 S. C. 476.

Utah.— Lewis *v.* Rio Grande Western R. Co., 17 Utah 504, 54 Pac. 981 (holding that where, after a railroad was located, although before the profile was filed and approved, a person moved on to land with the intent to preëmpt the same, but he did not make his preëmption filing until after the road was completed and the profile filed and approved, the entryman took the title subject to the right of way); Rio Grande Western R. Co. *v.* Telluride Power, etc., Co., 16 Utah 125, 51 Pac. 146.

Washington.— Slaght *v.* Northern Pac. R. Co., 39 Wash. 576, 81 Pac. 1062; Pennsylvania Min., etc., Co. *v.* Everett, etc., R. Co., 29 Wash. 102, 69 Pac. 628.

United States.— Jamestown, etc., R. Co. *v.* Jones, 177 U. S. 125, 20 S. Ct. 568, 44 L. ed. 698; Bybee *v.* Oregon, etc., R. Co., 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305; St. Joseph, etc., R. Co. *v.* Baldwin, 103 U. S. 426, 26 L. ed. 578; Central Pac. R. Co. *v.* Dyer, 5 Fed. Cas. No. 2,552, 1 Sawy. 641.

See 41 Cent. Dig. tit. "Public Lands," § 281.

A report that a railroad is completed in a good, substantial, and workmanlike manner, and as required by the act granting a right of way, made by commissioners appointed by the president, under the act, to examine and report whether the road was ready for the service contemplated, is not a judicial determination that the road is constructed where it should be, or that the company has title to a right of way over the land on which the road is constructed, as against one holding such land under a patent issued by the United States without reservation. Smith *v.* Northern Pac. R. Co., 58 Fed. 513, 7 C. C. A. 397.

Appropriation of unsurveyed land.— Land appropriated by a railroad company for a right of way or station purposes is withdrawn from the public domain, and cannot be settled on except subject to such rights, although the land is unsurveyed so that the company cannot perfect its title by filing the map required by the statute. *Ex p.* Davidson, 57 Fed. 883.

77. Act Cong. March 3, 1875, c. 152, § 4 [18 U. S. St. at L. 483, U. S. Comp. St. (1901) p. 1569].

78. Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879. See also San Pedro *v.* Southern Pac. R. Co., 101 Cal. 333, 35 Pac. 993, decided under a state grant of a right of way.

79. Utah, etc., R. Co. *v.* Utah, etc., R. Co., 110 Fed. 879 [*following* U. S. *v.* Northern Pac. R. Co., 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836; Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770; Bybee *v.* Oregon, etc., R. Co., 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305; St. Louis, etc., R. Co. *v.* McGee, 115 U. S. 469, 6 S. Ct. 123, 29 L. ed. 446; Van Wyck *v.* Knevals, 106 U. S. 360, 1 S. Ct. 336, 27 L. ed. 201; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551].

80. Act Cong. June 26, 1906, c. 3550 [34 U. S. St. at L. 482, U. S. Comp. St. (Suppl. 1907) p. 553].

81. Columbia Valley R. Co. *v.* Portland, etc., R. Co., 48 Wash. 472, 93 Pac. 1067.

The question of fact upon which the forfeiture depends may be inquired into and determined in any judicial proceedings in which rights claimed under the original grants are involved. Columbia Valley R. Co. *v.* Portland, etc., R. Co., 48 Wash. 472, 93 Pac. 1067.

82. See Oregon Short Line R. Co. *v.* Stalker, 14 Ida. 362, 94 Pac. 56, holding that where a railway company filed a profile map of its right of way and depot and station grounds and had the same approved by the secretary of the interior, but failed and neglected to have the selection noted on the plats in the local land office, and the map so furnished was lost or destroyed, and no notation of the selection was ever made on the plats of the local land office, and the company failed and neglected for more than seventeen years to take possession of the grounds claimed for depot and station sites, and exercised no acts of ownership or right of possession over the premises, and eight days after the filing of such profile map a preëmptor settled and filed upon the legal subdivisions comprising and including the station and depot grounds claimed by the company, and thereafter made final proof upon and received a patent for the entire legal subdivision, and had no notice, either actual or constructive, that the railway company claimed any station and depot grounds within the limits of his preëmption claim,

p. Repeal of Statutory Grant. A railroad company secures no right of way by constructing its road over lands of a state after the repeal of the act of the legislature by which a right of way over such lands was given.[83]

3. Grant of Right to Take Timber and Materials — a. Statutory Grant. By a general act passed in 1875, congress granted to any railroad company "the right to take, from the public lands adjacent to the line of said road, materials, earth, stone, and timber necessary for the construction of said railroad,"[84] and the fact that a particular railroad had previously accepted a grant of the same privilege, which was subsisting at the time of the passage of the act of 1875, does not preclude it from claiming the benefit of the latter act.[85]

b. Prerequisites to Exercise of Right. Before a railroad company is entitled to take timber or other materials from the public lands it must comply with the requirements of the statute;[86] and where timber is cut prior to such time, its subsequent use in the construction of the road does not render the cutting lawful or divest the title of the United States to such timber.[87]

c. Lands to Which Right Extends. While the right to take timber and materials is not limited to lands contiguous to or adjoining the line of the road,[88] the statute was not intended to furnish a general license to a railroad company to enter upon any public land and to range to any extent thereon for timber and other materials for its road;[89] but material may be taken only from lands which are "adjacent" to the right of way.[90] The term "adjacent" is a somewhat relative and uncertain one,[91] and may sometimes depend for its proper application upon the facts in the particular case,[92] the question of whether the lands are adjacent being, according to one decision, a mixed question of law and fact;[93] and while the courts are not disposed to unduly limit the meaning of the word so as to exclude lands which might otherwise fairly be regarded as within the purpose of the grant,[94] the language used will not be extraordinarily enlarged by construction in order to obtain some special and particular end,[95] and in some aspects the meaning of the word may be determined with at least some reference to the size of the strip or right

and received no such notice or information until long after the receipt of his patent for the land, the railroad company would be deemed to have forfeited and abandoned its rights, and would not be allowed to maintain ejectment against the grantees and successors in interest of the patentee of such lands.

83. Roberts *v.* Missouri, etc., R. Co., 43 Kan. 102, 22 Pac. 1006 [*reversed* on other grounds in 152 U. S. 114, 14 S. Ct. 496, 38 L. ed. 377].

84. 19 U. S. St. at L. 482, c. 152, § 1 [U. S. Comp. St. (1901) p. 1568].

85. U. S. *v.* Denver, etc., R. Co., 150 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975 [*affirming* 34 Fed. 838]; U. S. *v.* Denver, etc., R. Co., 31 Fed. 886.

86. U. S. *v.* Denver, etc., R. Co., 150 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975 [*affirming* 34 Fed. 838]; U. S. *v.* Eccles, 111 Fed. 490. As to such requirements see *supra*, II, K, 2, b.

87. U. S. *v.* Eccles, 111 Fed. 490, so holding on the ground that the act does not give the right to appropriate timber already cut.

88. U. S. *v.* Lynde, 47 Fed. 297, construing the grant to the Northern Pacific Railroad Company, which was in terms similar to the general grant.

89. U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 [*reversing* 114 Fed. 722, 52 C. C. A. 354]; Stone *v.* U. S. 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451].

90. U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 [*reversing* 114 Fed. 722, 52 C. C. A. 354].

91. U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 [*reversing* 114 Fed. 722, 52 C. C. A. 354].

92. U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 [*reversing* 114 Fed. 722, 52 C. C. A. 354].

93. Bacheldor *v.* U. S., 83 Fed. 986, 28 C. C. A. 246 [*reversing* 9 N. M. 15, 48 Pac. 310].

94. U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 [*reversing* 114 Fed. 722, 52 C. C. A. 354].

Land within three miles of the track is adjacent.— U. S. *v.* Denver, etc., R. Co., 11 N. M. 145, 66 Pac. 550.

The cutting of timber twenty-five miles from the railroad is not, as a matter of law, unlawful. Bacheldor *v.* U. S., 83 Fed. 986, 28 C. C. A. 246 [*reversing* 9 N. M. 15, 48 Pac. 310].

95. U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 [*reversing* 114 Fed. 722, 52 C. C. A. 354].

Land fifty miles distant from the railroad is not adjacent, and timber cannot be taken therefrom, notwithstanding the fact that there is no available timber nearer to the railroad. Stone *v.* U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451].

of way granted,[96] as the term might naturally perhaps be regarded as more extended when used with reference to a large object than when used with reference to a comparatively small one.[97] It has been suggested in the lower federal courts that land is properly regarded as adjacent, which can be reached by ordinary transportation in wagons,[98] or which is directly benefited by the construction of the railroad by reason of its proximity thereto;[99] but the supreme court of the United States has expressed the view that neither of these rules is correct.[1]

d. Purpose of Taking. The right to take materials is not limited to such as are necessary for the actual road-bed and tracks, but those structures which are necessary appurtenances of all railroads may fairly be regarded as parts or portions of the "railroad," the construction of which it was the purpose of congress to aid.[2] The statute was intended merely to aid in the first construction of a railroad, and does not authorize the taking of timber and materials for mere additions or improvements to a road already completed;[3] but a railroad company is authorized to take timber from lands adjacent to any portion of its completed main line, for use in the original construction of a branch line which it is authorized by its charter to build, although such branch is not constructed for several years after the main line.[4]

e. Place of Using Material. The act does not confine the use of the timber and material that may be taken from a proper place for the purpose of construction to any particular or definite portion of the road;[5] but a railroad company has the right to cut or take timber or material from public lands adjacent to the line of its road, and use the same on portions of its line remote from the place from which it was taken.[6]

f. Who May Take Materials. Any person who has a contract with a railroad company to build its road or any part thereof, or to furnish material therefor, is, without any special agreement to that effect, authorized to take the necessary materials from the public lands the same as the railroad company might do;[7]

96. U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 [*reversing* 114 Fed. 722, 52 C. C. A. 354], holding that lands more than twenty miles distant from the right of way are not "adjacent" to a railroad forty miles long.

97. U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 [*reversing* 114 Fed. 722, 52 C. C. A. 354].

98. U. S. *v.* Denver, etc., R. Co., 31 Fed. 886 [*approved* in Bacheldor *v.* U. S., 83 Fed. 986, 28 C. C. A. 246 (*reversing* 9 N. M. 15, 48 Pac. 310)].

99. U. S. *v.* Chaplin, 31 Fed. 890, 12 Sawy. 605.

1. U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 [*reversing* 114 Fed. 722, 52 C. C. A. 354].

2. U. S. *v.* Denver, etc., R. Co., 150 U. S. 1, 13, 14 S. Ct. 11, 37 L. ed. 975 [*affirming* 34 Fed. 838, and *approved* in U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 (*reversing* 114 Fed. 722, 52 C. C. A. 354); U. S. *v.* Price Trading Co., 109 Fed. 239, 48 C. C. A. 331] (where it is said: "It could hardly be questioned that a grant of power to construct a railroad would include the right to erect necessary structures, such as station houses, water tanks, &c., as essential and constituent parts thereof. This being so, it is difficult to understand why the grant of a right to take timber for the construction of a railroad should not equally extend to and include the same structures, constituting, as they do, necessary and indispensable appendages thereto"]; U. S. *v.* Chaplin, 31 Fed. 890, 12 Sawy. 605 (holding that the license to take material for the construction of the road includes the right to take material for the construction of station buildings, depots, machine shops, side-tracks, turn-outs, water stations, and the like).

3. Denver, etc., R. Co. *v.* U. S., 34 Fed. 838 [*affirmed* in 150 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975], so holding as to new switches and side-tracks.

4. U. S. *v.* Price Trading Co., 109 Fed. 239, 48 C. C. A. 331 [*distinguishing* Denver, etc., R. Co. *v.* U. S., 34 Fed. 838 (*affirmed* in 150 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975)].

5. U. S. *v.* Denver, etc., R. Co., 150 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975 [*affirming* 34 Fed. 838, and *approved* in U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 (*reversing* 114 Fed. 722, 52 C. C. A. 354)].

6. U. S. *v.* Denver, etc., R. Co., 150 U. S. 1, 14 S. Ct. 11, 37 L. ed. 975 [*affirming* 34 Fed. 838 (*followed* in U. S. *v.* Lynde, 47 Fed. 297), *approved* in U. S. *v.* St. Anthony R. Co., 192 U. S. 524, 24 S. Ct. 333, 48 L. ed. 548 (*reversing* 114 Fed. 722, 52 C. C. A. 354); U. S. *v.* Price Trading Co., 109 Fed. 239, 48 C. C. A. 331, and necessarily *overruling* as to this point U. S. *v.* Denver, etc., R. Co., 31 Fed. 886].

7. U. S. *v.* Chaplin, 31 Fed. 890, 12 Sawy 605.

and if a person not in the employment of the company and having no contract therewith cuts timber off the land adjacent to the line of the road, and the company acquires such timber for the purpose of constructing its road, and so uses it, neither such person nor the company is liable as a wrong-doer.[8]

g. Regulations by Land Department. The grant under discussion is a license to the railroad company "to take" the material necessary for the construction of its road without application to or consent of any officer of the land department, and such department has no authority to make any regulations on the subject of such license.[9]

h. Wrongful Taking. The rights of railroad companies are limited by the grant, and if a company takes material from public lands not adjacent to the line of its road, or takes more than is permitted by the statute, it is liable to the United States as a wrong-doer.[10] But in trover against a railroad company for the alleged wrongful cutting of timber from the public domain, where defendant proves a right under an act of congress to enter on public lands adjacent to its railroad line and cut timber therefrom for certain specified purposes, the presumption is that such cutting was done in accordance with the terms of the act,[11] and the burden of proving that defendant exceeded its grant is on plaintiff.[12]

L. Land Department and Proceedings Therein — 1. In General. The constitution of the United States declares that congress shall have power to dispose of, and make all needful rules and regulations respecting the territory and other property belonging to the United States.[13] Under this provision the sale of the public lands has been placed by statute under the control of the secretary of the interior;[14] and to aid him in the performance of this duty a bureau called the land department has been created, at the head of which is the commissioner of the general land office, with many subordinates.[15] To them, as a special tribunal,[16] congress has confided the execution of the laws which regulate the surveying, the selling, and the general care of the public lands;[17] and in the absence of some specific provision to the contrary in respect to any particular grant of or other provision respecting the public lands,[18] its administration falls wholly

Lien for services.— Where a railroad company has appointed an agent to enter upon public lands and take railroad ties necessary for the road, the agent to receive for his services a certain price for each accepted tie, such agent has no interest in the ties which can be the subject of a sale or pledge, as the title to the ties passes directly from the United States to the railroad company. Falke *v.* Fassett, 4 Colo. App. 171, 34 Pac. 1005.

8. U. S. *v.* Chaplin, 31 Fed. 890, 12 Sawy. 605.

9. U. S. *v.* Chaplin, 31 Fed. 890, 12 Sawy. 605.

10. U. S. *v.* Chaplin, 31 Fed. 890, 12 Sawy. 605.

11. Denver, etc., R. Co. *v.* U. S., 9 N. M. 382, 54 Pac. 241.

12. Denver, etc., R. Co. *v.* U. S., 9 N. M. 382, 54 Pac. 241.

13. U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167.

14. U. S. Rev. St. (1878) § 441 [U. S. Comp. St. (1901) p. 252]. See U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167.

Prior to the establishment of the department of the interior by the act of congress of March 2, 1849, the administration of the public lands belonged to the treasury department. 8 Americana, tit. "Interior, Department of the."

15. U. S. Rev. St. (1878) § 446 *et seq.* [U. S. Comp. St. (1901) p. 255]. See U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430].

16. **The land department is a quasi-judicial tribunal.**— U. S. *v.* Minor, 114 U. S. 233, 5 S. Ct. 836, 29 L. ed. 110; New Dunderberg Min. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789].

The test of jurisdiction of the land department is whether or not it has power to enter upon the inquiry, not whether its conclusions are right or wrong. New Dunderberg Min. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116.

17. Eastern Banking Co. *v.* Lovejoy, (Nebr. 1908) 115 N. W. 857; Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488; U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651.

A state statute, purporting to regulate the effect of final receipts issued by the land department of the United States, cannot restrict the authority of the officers of that department in the disposition of the public lands, or withhold from the grantees of the United States any of the incidents of the transfer of the government title. Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651.

18. Nesqually Catholic Bishop *v.* Gibbon, 158 U. S. 155, 167, 15 S. Ct. 779, 39 L. ed.

and absolutely within the jurisdiction of the land department.[19] The power of the land department in respect to the administration of the public lands cannot be divested by the fraudulent action of a subordinate officer, outside of his authority and in violation of the statute.[20] The land department is charged with the duty of surveying the public lands,[21] and must primarily determine what are public lands subject to survey and disposal under the public land laws,[22] what lands have been surveyed, what are to be surveyed, what have been disposed of, what remain to be disposed of, and what are reserved,[23] and its exercise of jurisdiction cannot be questioned by the courts before it has taken final action.[24] The land department has jurisdiction to determine the right of a railroad company to public lands under its grant, and issue patents therefor,[25] and to pass upon an application by one claiming a right to purchase land, wherein a person having acquired a homestead entry is made defendant.[26] Officers of the land department are agents of the law and cannot act beyond its provisions or make any disposition of land not sanctioned by law;[27] and no authority can be conferred nor duty enforced upon the department by the treaty-making power, in respect to the sale, conveyance, or disposition of the public lands, except with the consent of congress.[28] In proceedings to acquire a title to public land under the laws of the United States, the power of the land department ceases when the last official act necessary to transfer the title to the successful claimant has been performed.[29]

931 [*followed* in Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 23 S. Ct. 692, 47 L. ed. 1064 (*affirming* 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230), and *quoted* in U. S. *v.* Hitchcock, 28 App. Cas. (D. C.) 338, 350], where it is said: "It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary."

19. Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 23 S. Ct. 692, 47 L. ed. 1064 [*affirming* 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230]; Kirwan *v.* Murphy, 189 U. S. 35, 23 S. Ct. 599, 47 L. ed. 698 [*reversing* 109 Fed. 354, 48 C. C. A. 399 (*affirming* 103 Fed. 104)]; Nesqually Catholic Bishop *v.* Gibbon, 158 U. S. 155, 15 S. Ct. 779, 39 L. ed. 931 [*followed* in U. S. *v.* Hitchcock, 28 App. Cas. (D. C.) 338]. See also Saltmarsh *v.* Crommelin, 39 Ala. 54.

20. Kirwan *v.* Murphy, 189 U. S. 35, 23 S. Ct. 599, 47 L. ed. 698 [*reversing* 109 Fed. 354, 48 C. C. A. 399 (*affirming* 103 Fed. 104)]; Hume *v.* U. S., 132 U. S. 406, 10 S. Ct. 134, 33 L. ed. 393; Moffat *v.* U. S., 112 U. S. 24, 5 S. Ct. 10, 28 L. ed. 623; Whiteside *v.* U. S., 93 U. S. 247, 23 L. ed. 882.

21. McBride *v.* Whitaker, 65 Nebr. 137, 90 N. W. 966; Kirwan *v.* Murphy, 189 U. S. 35, 54, 23 S. Ct. 599, 47 L. ed. 698 [*reversing* 109 Fed. 354, 48 C. C. A. 399 (*affirming* 103 Fed. 104)]; Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566; Castro *v.* Hendricks, 23 How. (U. S.) 438, 16 L. ed. 576, holding that if a survey embraces too much land the commissioner should refuse to issue a patent. See, generally, as to surveys, *supra*, II, B.

Courts have no concurrent or original power to correct surveys.— Kirwan *v.* Murphy, 189 U. S. 35, 23 S. Ct. 599, 47 L. ed. 698 [*reversing* 109 Fed. 354, 48 C. C. A. 399 (*affirming* 103 Fed. 104)]; Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.

22. Guidry *v.* Woods, 19 La. 334, 36 Am. Dec. 677; Kirwan *v.* Murphy, 189 U. S. 35, 23 S. Ct. 599, 47 L. ed. 698 [*reversing* 109 Fed. 354, 48 C. C. A. 399 (*affirming* 103 Fed. 104)].

23. Kirwan *v.* Murphy, 189 U. S. 35, 23 S. Ct. 599, 47 L. ed. 698 [*reversing* 109 Fed. 354, 48 C. C. A. 399 (*affirming* 103 Fed. 104)].

24. Kirwan *v.* Murphy, 189 U. S. 35, 23 S. Ct. 599, 47 L. ed. 698 [*reversing* 109 Fed. 354, 48 C. C. A. 399 (*affirming* 103 Fed. 104)]; Brown *v.* Hitchcock, 173 U. S. 473, 19 S. Ct. 485, 43 L. ed. 772. See, generally, *infra*, II, L, 16, a.

25. U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 [*affirmed* in 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836].

Determining good faith of location.— It is within the powers and duties of the commissioner of the land office to determine whether a land grant railroad was located in good faith on as direct a line as the topography of the country would permit, or was unnecessarily deflected to increase the land grant. St. Paul, etc., R. Co. *v.* Sage, 71 Fed. 40, 17 C. C. A. 558.

26. Wormouth *v.* Gardner, 125 Cal. 316, 58 Pac. 20.

27. Parker *v.* Duff, 47 Cal. 554 (holding that the department has no authority to direct or permit entries of land in the local offices except in cases authorized by congress); Cunningham *v.* Ashley, 14 How. (U. S.) 377, 14 L. ed. 462; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

28. Parker *v.* Duff, 47 Cal. 554.

29. U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

2. Secretary of the Interior.[30] The general supervision of the affairs of the land department is vested in the secretary of the interior,[31] who has final control of the public business relating to the public lands,[32] and unless congress clearly designates some other officer to act in such matters it will be assumed that he is the officer to represent the government.[33] A recital in an opinion of the secretary of the interior given in a contest as to a right in public lands of the facts on which the right is based is not evidence of the facts recited.[34]

3. Commissioner of General Land Office.[35] The commissioner of the general land office being authorized to perform executive duties relative to the public lands, under the direction of the secretary of the interior, it will be presumed that such an act done by him was performed by the direction of the secretary of the interior.[36] The decision of the commissioner of the general land office, issuing a patent for public lands, if unreversed on any appeal to the secretary of the interior, must be held conclusive in all courts and proceedings, as far as the legal title is concerned,[37] and a decision of the commissioner vacating a selection of land in lieu of other land by a state is final where the state does not appeal.[38] The statute requires that rulings of the commissioner of the general land office on suspended entries shall be approved by the secretary of the interior, and the attorney-general acting as a board;[39] but the fact that a ruling of the commissioner of the general land office canceling an entry of public land for fraud has not been so approved gives no right to the holder of the certificate based on such entry to assert title as against the holder of a patent to the land issued upon another title.[40]

4. Surveyors-General and Deputy Surveyors. The statute provides for the appointment of surveyors-general for the various land districts who are to cause the public lands within their respective districts to be surveyed and platted.[41] The surveyor-general is required to engage a number of skilful surveyors as his deputies,[42] and cannot lawfully remove a deputy surveyor except for negligence or misconduct.[43] A surveyor of public lands is to be regarded as a disbursing

30. Conclusiveness of decisions of secretary of the interior see *infra*, II, L, 15, a.

Powers of and decisions by secretary of the treasury prior to establishment of department of the interior see Mitchell *v.* Cobb, 13 Ala. 137; Terry *v.* Hennen, 4 La. Ann. 458; Jourdan *v.* Barrett, 13 La. 24; Bracken *v.* Parkinson, 1 Pinn. (Wis.) 685. See 41 Cent. Dig. tit. "Public Lands," § 305.

31. Johanson *v.* Washington, 190 U. S. 179, 23 S. Ct. 825, 47 L. ed. 1008 [*affirming* 26 Wash. 668, 67 Pac. 401]; Nesqually Catholic Bishop *v.* Gibbon, 158 U. S. 155, 15 S. Ct. 779, 39 L. ed. 931 [*followed* in U. S. *v.* Hitchcock, 28 App. Cas. (D. C.) 338]; Patterson *v.* Tatum, 18 Fed. Cas. No. 10,830, 3 Sawy. 164.

32. Pengra *v.* Munz, 29 Fed. 830.

33. Johanson *v.* Washington, 190 U. S. 179, 23 S. Ct. 825, 47 L. ed. 1008 [*affirming* 26 Wash. 668, 67 Pac. 401]; Nesqually Catholic Bishop *v.* Gibbon, 158 U. S. 155, 15 S. Ct. 779, 39 L. ed. 931.

34. Megerle *v.* Ashe, 33 Cal. 74.

35. General rule as to conclusiveness of decisions of commissioner of general land office see *infra*, II, L, 15, a.

36. Weaver *v.* Fairchild, 50 Cal. 360, withdrawal of railroad lands.

37. Johnson *v.* Towsley, 13 Wall. (U. S.) 72, 20 L. ed. 485, holding this to be true on the general principle that where a special tribunal is authorized to determine a particular class of questions, its decisions within its authority are final.

A decision of the commissioner of the general land office is not technically res judicata. — Butler *v.* Watts, 13 La. Ann. 390, holding, however, that an exception to an action in warranty on the ground that such an appeal is pending does not go to the dismissal of the action but is only ground for a continuance until the matter is decided.

38. Roberts *v.* Gebhart, 104 Cal. 67, 37 Pac. 782, holding this to be true, although the reason assigned for such order is insufficient.

39. U. S. Rev. St. (1878) § 2451.

40. California Redwood Co. *v.* Litle, 79 Fed. 854 [*affirmed* in 87 Fed. 1004, 31 C. C. A. 591].

41. U. S. Comp. St. (1901) p. 1355 *et seq.*

The surveyor-general has charge of the public surveys and is the proper person to certify the township maps. Lawrence *v.* Grant, 12 La. Ann. 835; Millaudon *v.* McDonough, 18 La. 102.

42. U. S. Rev. St. (1878) § 2223 [U. S. Comp. St. (1901) p. 1362]. See Reed *v.* Conway, 26 Mo. 13.

43. Reed *v.* Conway, 26 Mo. 13.

The removal of a deputy surveyor when not under contract is *damnum absque injuria*. Reed *v.* Conway, 26 Mo. 13.

No liability for removal in good faith.— The surveyor-general will not be liable for removing a deputy, although under a contract with which his removal was an unwise and unlawful interference, provided he acted according to his best judgment, or from a de-

officer,[44] and must give bond for the faithful disbursement of all public money in his hands and the faithful performance of the duties of his office,[45] and his sureties are responsible for a default occurring after the expiration of his commission but before his successor enters upon the duties of the office.[46] The approval by the surveyor general then in office of sureties on bonds of deputies for the performance of their contracts is sufficient until notice to the obligor that other security is required.[47]

5. Registers and Receivers[48] — a. The Officials of Local Land Offices. Each local land office, to be legally constituted and authorized to do business, must have a register and a receiver[49] who are mere agents of the interior department to carry out its orders,[50] and have no personal interest in the public lands or in lands claimed to be such.[51]

b. Authority and Duties — (i) *In General.* The functions of the registers and receivers of the local land offices are in general ministerial rather than judicial,[52] and while they are, in the exercise of their functions, authorized to decide upon certain questions of fact,[53] they are not authorized to adjudicate finally on the question of title,[54] but their decisions are subject to the supervision of the commissioner of the general land office.[55] In permitting entries of the public lands to be made the register and receiver must look only to the acts of congress and to such regulations of the general land office as have been made in pursuance of law, as they have no powers except such as are derived from these sources.[56] The issuing of certificates to settlers properly belongs to the register and receiver.[57] The payment of money for an entry to the receiver of a land office is a payment to the government,[58] and no sale of the public land can take place in the absence of the receiver.[59] The register of a land office cannot lawfully act as attorney for any applicant for a patent for land, whose application is filed, and the proceedings on which are to be conducted before him and in his office.[60]

(ii) *Acting by Deputy.* The mere ministerial or clerical acts of the register of the land office may be performed by a deputy,[61] but acts of a judicial nature, as granting preëmptions, must be performed by the register himself.[62]

(iii) *Action Upon Claims.* The register and receiver acting as land com-

sire to promote the public interests, and not from malice. Reed *v.* Conway, 26 Mo. 13.

44. Farrar *v.* U. S., 5 Pet. (U. S.) 373, 8 L. ed. 159.

45. Farrar *v.* U. S., 5 Pet. (U. S.) 373, 8 L. ed. 159.

The omission to stipulate for his faithful disbursement of public money does not invalidate that part of the condition which respects the faithful discharge of the duties of his office. Farrar *v.* U. S., 5 Pet. (U. S.) 373, 8 L. ed. 159.

46. U. S. *v.* Jameson, 16 Fed. 331, 3 McCrary 620.

47. Reed *v.* Conway, 26 Mo. 13.

48. **Conclusiveness of decisions of register and receiver** see *infra*, II, L, 15, a.

49. Peters *v.* U. S., 2 Okla. 116, 33 Pac. 1031.

A receiver of the land department, acting also as register, by authority of an order from the land department, is a *de facto* officer, and his official acts as register are valid. Jeffords *v.* Hine, 2 Ariz. 162, 11 Pac. 351.

50. Litchfield *v.* Register, 15 Fed. Cas. No. 8,388 [*affirmed* in 9 Wall. (U. S.) 575, 19 L. ed. 681].

51. Litchfield *v.* Register, 15 Fed. Cas. No. 8,388 [*affirmed* in 9 Wall. (U. S.) 575, 19 L. ed. 681].

52. Barbarie *v.* Eslava, 9 How. (U. S.) 421, 13 L. ed. 200.

53. Morancy *v.* Ford, 2 La. Ann. 299; Barton *v.* Hempkin, 19 La. 510.

54. Barnard *v.* Ashley, 18 How. (U. S.) 43, 15 L. ed. 285; Barbarie *v.* Eslava, 9 How. (U. S.) 421, 13 L. ed. 200.

A statute giving such officers power "to decide on conflicting and interfering claims" must be considered as empowering them to decide only as to the true location of grants or confirmations. Barbarie *v.* Eslava, 9 How. (U. S.) 421, 13 L. ed. 200 [*followed* in Barbarie *v.* Mobile, 9 How. (U. S.) 451, 13 L. ed. 212].

55. Barton *v.* Hempkin, 19 La. 510; Lewis *v.* Lewis, 9 Mo. 183, 43 Am. Dec. 540; Barnard *v.* Ashley, 18 How. (U. S.) 43, 15 L. ed. 285.

56. Parker *v.* Duff, 47 Cal. 554.

57. Keith *v.* Cheeny, 1 Oreg. 285, so holding under the Oregon Donation Act, as to which see *supra*, II, F, 7.

58. Slocum *v.* U. S., 35 Ct. Cl. 485.

59. Groom *v.* Hill, 9 Mo. 323.

The act of the register in receiving money and taking a note of the time of its receipt is entirely unofficial, and no claim to the land can be based thereon. Groom *v.* Hill, 9 Mo. 323.

60. U. S. *v.* Waitz, 28 Fed. Cas. No. 16,631, 3 Sawy. 473.

61. Hunter *v.* Hemphill, 6 Mo. 106.

62. Hunter *v.* Hemphill, 6 Mo. 106.

missioners for the adjustment of claims have full authority to act in cases of conflicting locations under different certificates,[63] but are not authorized to revoke or annul a certificate of claim already granted.[64] The submission of the proof of a donation claim gives to the register and receiver jurisdiction to decide upon the claim and an application to locate is unnecessary to give them authority to adjudicate thereon,[65] and their allowance of such claim is sufficient to show that the statement, which purports to be sworn before, but is not signed by, them was made on oath.[66] A certificate of the register issued to one who applies to him to locate a state land warrant on public land that he approves of the location by the state is a legal and valid consent of the United States to such location.[67]

c. Bond. The statute requires that every register and receiver shall, before entering on the duties of his office, give bond in the penal sum of ten thousand dollars, with approved security, for the faithful discharge of his trust.[68] A receiver is liable on his bond for money received by him from entrymen before it was payable under a rule of the interior department; [69] but his sureties are not liable for moneys received by him as proceeds of the sale of Indian lands.[70] The refusal of a register or receiver to pay over to the United States the surplus, beyond the maximum compensation to which he is entitled by law for his services,[71] is a breach of his official bond, for which his sureties are liable.[72] A receiver and his sureties are liable for any moneys paid on entries and not accounted for by the receiver, although, at the time the bond was given and the payments were made, the law of the department was that an entry would not be allowed if the moneys were not properly accounted for, or deposited to the credit of the United States treasurer; [73] and where a receiver has received as public moneys amounts paid in as a consideration for titles to public lands and charged himself with such moneys in his accounts with the government, his sureties cannot, in a suit on the bond for failure to pay over such moneys, defend on the ground that the title to the land was not properly transferred.[74] In an action brought by the United States on the official bond of a receiver of public money, a plea that the receiver had issued receipts and made returns to the treasury department for money that he had never in fact received is bad,[75] as is also a plea that the United States had accepted another bond from the receiver.[76] Neither can the sureties on the official bond of a receiver who is in default escape liability for the amount of a draft issued by the government to the receiver because an inspector of the interior

63. Newport *v.* Cooper, 10 La. 155.

The court will presume that a certificate given by such commissioners in relation to a claim to government land was issued in pursuance of the provisions of the law, and entitles the holder to a patent when its conditions are complied with. Newport *v.* Cooper, 10 La. 155.

64. Newport *v.* Cooper, 10 La. 155.

65. Finley *v.* Woodruff, 8 Ark. 328.

66. Finley *v.* Woodruff, 8 Ark. 328, holding that the omission of the officers to sign is a mere irregularity not affecting the validity of their acts or their jurisdiction.

67. Poppe *v.* Athearn, 42 Cal. 606.

68. U. S. Rev. St. (1878) § 2236 [U. S. Comp. St. (1901) p. 1366].

Increase of bond.— Where the bond of a receiver of public moneys of a land district was increased by direction of the president from ten thousand dollars, the sum required by statute, to thirty thousand dollars, the bond was not void on the ground that it was extorted by duress. Smith *v.* U. S., (Ariz. 1896) 45 Pac. 341.

69. Meads *v.* U. S., 81 Fed. 684, 26 C. C. A. 229, holding that this is true even though such rule be given the force of an act of congress, since it merely regulates the time and mode of payment of money which becomes due by virtue of other and independent law.

70. U. S. *v.* Rogers, 81 Fed. 941, 27 C. C. A. 14, so holding on the ground that such moneys are at all times, in equity, the moneys of the Indians, and not public moneys.

71. See *infra*, II, L, 5, d.

72. U. S. *v.* Babbitt, 95 U. S. 334, 24 L. ed. 480, holding also that the United States is under no necessity to proceed against the principal in the bond by an action on the case for money had and received.

73. Smith *v.* U. S., 5 Ariz. 56, 45 Pac. 341.

74. Potter *v.* U. S., 107 U. S. 126, 1 S. Ct. 524, 27 L. ed. 330.

75. U. S. *v.* Girault, 11 How. (U. S.) 22, 13 L. ed. 587, so holding on the ground that such plea addressed itself entirely to the evidence which, it was supposed, the United States would bring forward upon the trial.

76. U. S. *v.* Girault, 11 How. (U. S.) 22, 13 L. ed. 587, so holding on the ground that the new bond was no satisfaction for the

department refused to telegraph to the treasury department to stop payment on request of one of such sureties.[77] The sureties on the bond of a register or receiver are responsible for a default occurring after the expiration of his commission, and before his successor enters upon the duties of the office.[78] In an action on the official bond of a receiver, the United States treasurer's transcript certified as required by statute is admissible and is evidence of all things contained in it which came within the official knowledge of the accounting officers of the treasury department.[79] Where a receiver was charged with a shortage in his accounts, but claimed that the money had been stolen from him, it was decisive against him that he had never in any manner presented to any accounting officer of the treasury a claim for a credit in that sum, and had not at the trial shown himself to be in possession of any vouchers not before in his power to procure.[80]

d. Compensation. Registers and receivers are allowed an annual salary of five hundred dollars,[81] and fees and commissions in addition thereto for certain services;[82] but it is expressly provided that the compensation of these officers shall in no case exceed in the aggregate three thousand dollars a year,[83] nor shall they receive for any one quarter or fractional quarter more than a *pro rata* allowance of such maximum,[84] and any receipts at the land office in excess of this amount are to be paid into the treasury as other public moneys.[85] The compensation of registers and receivers commences and is to be calculated from the time when they enter on the discharge of their duties,[86] and in this connection the doing of the preliminary work incidental to the opening of a newly created land office is a part of the duties of such officers.[87]

damages which had accrued for the breach of the old bond.

77. Smith *v.* U. S., 5 Ariz. 56, 45 Pac. 341.

78. U. S. *v.* Jameson, 16 Fed. 331, 3 McCrary 620.

79. Smith *v.* U. S., 5 Ariz. 56, 45 Pac. 341.

80. U. S. *v.* Reymert, 27 Fed. Cas. No. 16,149.

81. U. S. Rev. St. (1878) § 2237 [U. S. Comp. St. (1901) p. 1366].

82. U. S. Rev. St. (1878) §§ 2238, 2239 [U. S. Comp. St. (1901) p. 1368].

83. U. S. Rev. St. (1878) § 2240 [U. S. Comp. St. (1901) p. 1369]. See U. S. *v.* Brindle, 110 U. S. 688, 4 S. Ct. 180, 28 L. ed. 286; U. S. *v.* Babbitt, 95 U. S. 334, 24 L. ed. 480; U. S. *v.* Babbit, 1 Black (U. S.) 55, 17 L. ed. 94.

The fiscal year is the basis on which compensation must be estimated. Sweet *v.* U. S., 34 Ct. Cl. 377.

Sale of Indian lands.— Where the receiver of public moneys, at a government land office, was appointed special receiver and superintendent to assist in disposing of lands held by the United States in trust for the Indians, the trust moneys paid for the land not being public moneys, the receiver, whose official duty only required him to receive public moneys, was entitled to take, in addition to his salary, the compensation provided by government for the separate services rendered in respect of the trust lands. U. S. *v.* Brindle, 110 U. S. 688, 4 S. Ct. 180, 28 L. ed. 286. But the secretary of the interior, acting through the commissioner of the general land office, had the right to charge the various registers and receivers with the duty to sell the lands ceded by the Osage Indians to the United States by the treaty of Sept. 29, 1865 (14 U. S. St. at L. 687), to be sold for their benefit, and to limit the annual compensation of such officers for this and all other services to the existing legal maximum. Stewart *v.* U. S., 206 U. S. 185, 27 S. Ct. 631, 51 L. ed. 1017 [*affirming* 39 Ct. Cl. 321, and *distinguishing* U. S. *v.* Brindle, *supra*].

84. U. S. Rev. St. (1878) § 2240. See Sweet *v.* U. S., 34 Ct. Cl. 377.

Before this provision was added to the statute it was held that a receiver had a right to charge the whole yearly maximum of commissions for the fractional portion of the year in which he resigned or was removed. U. S. *v.* Dickson, 15 Pet. (U. S.) 141, 10 L. ed. 689; U. S. *v.* Edwards, 25 Fed. Cas. No. 15,026, 1 McLean 467.

85. U. S. Rev. St. (1878) § 2241 [U. S. Comp. St. (1901) p. 1369]. See U. S. *v.* Babbitt, 95 U. S. 334, 24 L. ed. 480.

All fees received by a register of a land office, whether for locating military bounty land warrants or for other services, in excess of the maximum fixed by law as compensation, must be paid into the United States treasury. U. S. *v.* Babbit, 1 Black (U. S.) 55, 17 L. ed. 94 [*followed* in U. S. *v.* Brindle, 110 U. S. 688, 4 S. Ct. 180, 28 L. ed. 286, and *approved* in U. S. *v.* Babbitt, 95 U. S. 334, 24 L. ed. 480].

86. U. S. Rev. St. (1878) § 2243 [U. S. Comp. St. (1901) p. 1370].

87. U. S. *v.* Delany, 164 U. S. 282, 17 S. Ct. 84, 41 L. ed. 435, holding that where the register and receiver of a newly created land office engages, at request of the commissioner of the general land office, in securing and fitting up rooms to be occupied by the office, advertising the date of its opening, and doing such other work as is necessarily incidental

e. Allowance For Office Rent. The secretary of the interior is authorized by statute to make a reasonable allowance for office rent for each consolidated land office; [88] but where the receiver of such an office rents an office for the transaction of his official business without authority from the commissioner of the general land office, he has no legal claim for reimbursement from the appropriation for incidental expenses of land offices.[89]

6. Subordinate Agents. If any authority from congress is necessary to authorize the appointment of special agents of the land department for particular purposes, such authority may be fairly inferred from appropriations made by congress to pay for the services of such agents.[90]

7. Jurisdiction as Between Different Local Land Offices. After the erection of a land district the lands included therein cannot be sold at the office of another land district in which they were formerly included.[91]

8. Mode and Rules of Procedure — a. In General. The land department has power to adopt rules and regulations for the administration of the law with regard to the public domain,[92] and such rules, when promulgated, become laws of property,[93] and will be judicially noticed by the courts,[94] and cannot be ignored by the department to the subversion of rights acquired in accordance with their requirements.[95] Rules of practice of the land department formerly established and promulgated by authority of the secretary of the interior can be repealed or abrogated by like formal action and publication only,[96] and neither the secretary of the interior nor the commissioner of the general land office has power to make a retroactive decision abrogating such rules.[97] Neither can the equitable title to land acquired by lawful entry be divested or affected by subsequent rules or modification of rules of practice in the land department.[98]

b. Validity of Regulations. Regulations of the land department for the disposal of the public lands must be appropriate,[99] reasonable,[1] within the limitations of the law for the enforcement of which they are provided,[2] consistent with

to opening the office, he has "entered upon the discharge of his duties," and is entitled to compensation for the time so employed.

88. U. S. Rev. St. (1878) § 2255 [U. S. Comp. St. (1901) p. 1375].

89. Bane *v.* U. S., 19 Ct. Cl. 644.

90. Wells *v.* Nickles, 104 U. S. 444, 26 L. ed. 825.

91. Matthews *v.* Zane, 7 Wheat. (U. S.) 164, 5 L. ed. 425, 5 Cranch 92, 3 L. ed. 46.

92. *California.*— Poppe *v.* Athearn, 42 Cal. 606.

Colorado.— Freeport German Ins. Co. *v.* Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206.

Illinois.— McDowell *v.* Morgan, 28 Ill. 528.

Nebraska.— Eastern Banking Co. *v.* Lovejoy, (1908) 115 N. W. 857.

United States.— Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 23 S. Ct. 692, 47 L. ed. 1064 [*affirming* 112 Fed. 4, 50 C. C. A. 79]; Lytle *v.* Arkansas, 9 How. 314, 13 L. ed. 153; Van Gesner *v.* U. S., 153 Fed. 46, 82 C. C. A. 180 [*reversed* on other grounds in 207 U. S. 425, 28 S. Ct. 163, 52 L. ed. 278]; Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348 [*reversing* 82 Fed. 807]; Anchor *v.* Howe, 50 Fed. 366.

See 41 Cent. Dig. tit. "Public Lands," § 288.

93. Poppe *v.* Athearn, 42 Cal. 606; Van Gesner *v.* U. S., 153 Fed. 46, 82 C. C. A. 180 [*reversed* on other grounds in 207 U. S. 425, 28 S. Ct. 163, 52 L. ed. 278]; Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348 [*reversing* 82 Fed. 807].

94. Peters *v.* U. S., 2 Okla. 116, 33 Pac. 1031; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 23 S. Ct. 692, 47 L. ed. 1064 [*affirming* 112 Fed. 4, 50 C. C. A. 79]; Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415; Van Gesner *v.* U. S., 153 Fed. 46, 82 C. C. A. 180 [*reversed* on other grounds in 207 U. S. 425, 28 S. Ct. 163, 52 L. ed. 278].

95. Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348 [*reversing* 82 Fed. 807].

96. James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476.

Decisions or opinions of the secretary and the commissioner in contests between claimants for specific tracts of land, ignoring or violating rules, neither repeal nor modify them. James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476.

97. Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348 [*reversing* 82 Fed. 807], holding that such a decision, giving to an application made in violation of the rules in force when it was made preference over an entry made in accordance with such rules is an error of law reviewable by the courts.

98. James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476.

99. Anchor *v.* Howe, 50 Fed. 366.

1. McDowell *v.* Morgan, 28 Ill. 528; Anchor *v.* Howe, 50 Fed. 366.

2. Anchor *v.* Howe, 50 Fed. 336, holding

such law,[3] and of such a nature as to tend to its enforcement;[4] and the land department is not authorized to adopt rules and regulations which are destructive of rights conferred by congress,[5] or to annex conditions or provisions to the law.[6]

c. Permissible Departures From Rules. The government may sanction, as against itself, the widest departure on the part of its own agents from its regulations as to sale of public lands, or waive any irregularity therein.[7] So the secretary of the interior may suspend or disregard rules of procedure,[8] and observance of a regulation of the land department may be dispensed with by the commissioner of the general land office for reasons satisfactory to him, where no private rights are injuriously affected thereby.[9]

d. Instructions by Commissioner of General Land Office. The "special instructions of the commissioner" of the general land office are made by law a part of every contract for the survey of the public lands,[10] but instructions given by the commissioner of the general land office to registers and receivers are not judgments binding upon any one.[11] A letter from the commissioner of the general land office, addressed to the register and receiver at the local office, asserting that in his opinion certain land was subject to entry under the preëmption law, was a special direction to allow the land to be entered under the preëmption law, within the meaning of a statute authorizing the commissioner to give special directions as to such land.[12]

9. Making and Record of Entries and Proceedings Thereon. The duty of noting entries on the books of the land office rests upon the register,[13] and where an applicant for a cash entry of public land has regularly applied to enter the land, paid the price, and obtained his receipt therefor, he has done all that the law requires of him, and is under no obligation to supervise the entries on the books of the register of the land office, in order to see that the proper entries are made.[14] The validity of an entry properly made and certified on a county plat by a register is not affected by the fact that he afterward makes other entries on the same plat.[15] A statute providing that a settler on government land must

that as U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430], relating to the filing of an adverse claim to public lands, merely requires that the claim "shall show the nature, boundaries, and extent" thereof, a land-office regulation, requiring the plat showing the boundaries to be made from an actual survey "by a deputy United States surveyor," is void in so far as it prevents the survey from being made by any other surveyor.

3. Poppe *v.* Athearn, 42 Cal. 606; McDowell *v.* Morgan, 28 Ill. 528.

4. Williamson *v.* U. S., 207 U. S. 425, 28 S. Ct. 163, 52 L. ed. 278 [*reversing* on other grounds 153 Fed. 46, 82 C. C. A. 180].

5. Williamson *v.* U. S., 207 U. S. 425, 28 S. Ct. 163, 52 L. ed. 278 [*reversing* 153 Fed. 46, 82 C. C. A. 180], holding that the authority of the commissioner of the general land office under Timber and Stone Act June 3, 1878, c. 151, § 3 (20 U. S. St. at L. 89 [U. S. Comp. St. (1901) p. 1545]), to prescribe regulations to carry out the provisions of that act, does not embrace the power to require an applicant to make oath on final hearing of his *bona fides* and of the absence of contract or agreement in respect to the title, which congress in that act, by express intendment, excluded from the requirements to be observed on such final hearing.

A practice of local officers, by which written applications could be made for land at times when those offices were closed to private entry, to give the applicant a preference or preëmption, was unauthorized. McDowell *v.* Morgan, 28 Ill. 528.

6. Baty *v.* Sale, 43 Ill. 351, 92 Am. Dec. 128.

7. Bernard *v.* Ashley, 3 Fed. Cas. No. 1,346, Hempst. 665 [*affirmed* in 18 How. 43, 15 L. ed. 285].

8. Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Knight *v.* U. S. Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974.

In the exercise of his power to supervise proceedings for securing titles to public lands, the secretary of the interior is not limited by any prescribed forms or rules of procedure. Stimson Land Co. *v.* Rawson, 62 Fed. 426.

9. Lytle *v.* Arkansas, 9 How. (U. S.) 314, 13 L. ed. 153.

10. Bowles *v.* U. S., 7 Ct. Cl. 454, holding that therefore where the terms of the contract contained one description of the tract to be conveyed, and the special instructions another, extrinsic evidence was admissible to ascertain the extent of the subject-matter of the contract as intended by the parties.

11. Foley *v.* Harrison, 5 La. Ann. 75.

12. Saltmarsh *v.* Crommelin, 39 Ala. 54.

13. See Le Marchel *v.* Teagarden, 152 Fed. 662.

14. Le Marchel *v.* Teagarden, 152 Fed. 662.

15. Wilhite *v.* Barr, 67 Mo. 284.

file his claim within three months means calendar months.[16] The application of a person entitled to enter land at a government land office, made in good faith, must be regarded as filed when it is delivered by the applicant for filing;[17] and the neglect of the clerks to do their duty in noting thereon a statement that the same was filed as of that date does not deprive the person making such entry of his rights as of the date of its actual filing.[18]

10. Determination of Adverse or Conflicting Claims — a. Jurisdiction of Land Department. The land department of the United States is a quasi-judicial tribunal invested with authority to hear and determine claims to the public lands, subject to its disposition,[19] and to determine all questions of fact that may arise in any controversy respecting the right of any person to receive a patent for any of the publicn lads,[20] and to execute its judgments by issuing patents to the parties entitled to them;[21] but after the legal title to public land has passed from the government, the land department has no jurisdiction to determine controversies between individual claimants concerning the title or right to the possession thereof.[22]

b. Original Determinations and Review. Questions of fact arising in a contest between claimants of the public lands are to be decided primarily by the local land officers,[23] whose decisions are subject to appeal and review by the land department,[24] which may on such review decide questions arising on the evidence

16. Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702.

17. Hastay *v.* Bonness, 84 Minn. 120, 86 N. W. 896.

18. Hastay *v.* Bonness, 84 Minn. 120, 86 N. W. 896.

19. Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321; Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; McCord *v.* Hill, 111 Wis. 499, 84 N. W. 27, 85 N. W. 145, 87 N. W. 481; Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 24 S. Ct. 860, 47 L. ed. 1064 [*affirming* 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230 (*affirming* 104 Fed. 20)]; Brown *v.* Hitchcock, 173 U. S. 473, 19 S. Ct. 485, 43 L. ed. 772; Michigan Land, etc., Co. *v.* Rust, 168 U. S. 589, 18 S. Ct. 208, 42 L. ed. 591 [*affirming* 68 Fed. 155, 15 C. C. A. 335]; Le Marchel *v.* Teagarden, 152 Fed. 662; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430]; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348 [*reversing* 82 Fed. 807]; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789]. See also Hammond *v.* St. Louis Public Schools, 8 Mo. 65.

The land department has power to determine all contests arising under the statutes granting a right to acquire title to the public lands, and a statute prescribing certain causes for the institution of a contest does not preclude the department from hearing contests instituted for other causes. Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398 [*followed* in Lawrence *v.* Potter, 22 Wash. 32, 60 Pac. 147].

20. Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321; Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Love *v.* Flahive, 33 Mont. 348, 83 Pac. 882.

Questions proper for determination.— The land department has jurisdiction to determine such questions as which of two persons making simultaneous applications for homestead entries made the prior settlement on the land (Love *v.* Flahive, 33 Mont. 348, 83 Pac. 882), the *bona fides* of an entry, the length of an entryman's residence, and the sufficiency of his proofs (McCord *v.* Hill, 117 Wis. 306, 94 N. W. 65 [*affirmed* in 195 U. S. 395, 25 S. Ct. 96, 49 L. ed. 251]). See, generally, *infra*, II, L, 15, b.

21. King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430].

22. Sage *v.* Ruduick, 91 Minn. 325, 100 N. W. 106, 98 N. W. 89, 100 N. W. 106. See also Arnold *v.* Grimes, 2 Iowa 1.

The inadvertent issuance of a patent to public lands in which a contest is pending puts an end to the jurisdiction of the land department, and the contestant whose rights are undetermined is entitled to resort to the courts to establish them. Northern Pac. R. Co. *v.* Spray, 27 Wash. 1, 67 Pac. 377.

23. *Alabama.*— Mobile *v.* Farmer, 6 Ala. 738.

California.— McHarry *v.* Stewart, (1893) 35 Pac. 141.

Oklahoma.— Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702.

Wisconsin.— McCord *v.* Hill, 117 Wis. 306, 94 N. W. 65 [*affirmed* in 195 U. S. 395, 25 S. Ct. 96, 49 L. ed. 251].

United States.— Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848.

See 41 Cent. Dig. tit. "Public Lands," § 298.

24. German Ins. Co. *v.* Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206; Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832; Davis *v.* Richards, 23 Wash. 432, 63 Pac. 211; McCord *v.* Hill, 117 Wis. 306, 94 N. W. 65 [*affirmed* in 195 U. S. 395, 25 S. Ct.

but not decided by the local officers.[25] A contestant who unsuccessfully appeals from the order of the local land office does not thereby lose any rights accruing to him under the order appealed from.[26]

c. Right to Institute Contest. No one can be heard to question or contest the right of another to a patent for public land until he shows some right in himself in or to the premises.[27] The allowance of an application to contest a final entry of public land is vested exclusively in the discretion of the commissioner of the general land office,[28] and the courts will not interfere with the exercise of such discretion unless there has been such an abuse of discretion as to amount practically to a denial of a clear right.[29]

d. Hearing. The filing of a contest gives the contestant no right or interest in the land itself;[30] but where the land department entertains a contest against a homestead entry, and permits it to be filed, the party so filing has the right to have the contest heard,[31] and jurisdiction to hear the cause is acquired by the issuance and service of notice of the contest.[32] The register or receiver of a United States land office is authorized to administer oaths and take testimony in contest proceedings.[33] Where the secretary of the interior, on the passage of a special act of congress confirming the entry of one of the parties to a contest, suspends the contest proceedings, and a patent issues, the other party to the contest cannot, by mandamus, compel the secretary to proceed with the contest on the ground that the special act was unconstitutional and void.[34]

e. Occupancy and Possession Pending Determination. Pending a contest in the land department over the right to acquire certain land, a claimant who is in possession under color of right is entitled to retain possession as against the adverse claimant,[35] and the courts will protect the occupying claimant in such posses-

96, 49 L. ed. 251]; Orchard *v.* Alexander, 157 U. S. 372, 15 S. Ct. 635, 39 L. ed. 737 [*affirming* 2 Wash. 81, 26 Pac. 192, 807]; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848.

A statute expressly giving to settlers the right of appeal excludes by implication all other classes of persons. Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832.

The commissioner of the general land office has supervisory control over the subordinate officers of the land department, and can revise and correct their decisions; and, where an erroneous entry made by the register and receiver was canceled by the commissioner, it will be presumed, in the absence of evidence to the contrary, that it was done in accordance with the rules governing such action, and upon sufficient evidence. Darcy *v.* McCarthy, 35 Kan. 722, 12 Pac. 104.

In the absence of any limit of time in which appeals from registers and receivers shall be taken to the department, a reasonable time will be understood. Moore *v.* Fields, 1 Oreg. 317.

25. McHarry *v.* Stewart, (Cal. 1893) 35 Pac. 141.

26. Davis *v.* Richards, 23 Wash. 432, 63 Pac. 211, holding that one who appealed from an order of the local land office allowing an adverse claimant to make a homestead entry for their joint benefit, and refused to accept an agreement securing such benefit tendered by the entryman, in pursuance of the order, pending the appeal, did not thereby waive or lose any rights which had accrued to him under such order, although the appeal was determined against him.

27. Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79.

28. Parryman *v.* Cunningham, 16 Okla. 94, 82 Pac. 822.

29. Parryman *v.* Cunningham, 16 Okla. 94, 82 Pac. 822.

If the land department rejects the contest and a patent is issued to the entryman, the contestant cannot maintain an action to declare the patentee a trustee for his use and benefit. Parker *v.* Lynch, 7 Okla. 631, 56 Pac. 1082.

30. Parker *v.* Lynch, 7 Okla. 631, 56 Pac. 1082.

31. Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702; Parker *v.* Lynch, 7 Okla. 631, 56 Pac. 1082. See also Gray *v.* McCance, 14 Ill. 343.

32. Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702.

The rule of the department that all contests shall be corroborated was promulgated merely for the purpose of showing the *bona fides* of the contestant, and such corroboration is not necessary to confer jurisdiction upon the land officers to hear the cause. Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702.

33. Peters *v.* U. S., 2 Okla. 116, 33 Pac. 1031, holding that in these matters the register and receiver need not act jointly.

34. *In re* Emblen, 161 U. S. 52, 16 S. Ct. 487, 41 L. ed. 613.

35. Zimmerman *v.* McCurdy, 15 N. D. 79, 106 N. W. 125; Habeisen *v.* Hatchell, 12 Okla. 29, 69 Pac. 888 [*followed* in Best *v.* Frazier, 16 Okla. 523, 85 Pac. 1119]; Glover *v.* Swartz, 8 Okla. 642, 58 Pac. 943.

A contest to cancel a homestead entry on the ground of abandonment is a contest for a preference right of entry after the existing

sion.[36] Where two parties are claiming the right to reside on a homestead — one by settlement, the other by a filing in the United States land office — each party has a right to reside on and occupy the land until the land department has determined to whom it belongs.[37]

f. Conclusiveness and Effect of Decisions.[38] The decisions of the land department upon the issues presented for its consideration at hearings concerning contested claims to the public lands are presumably right,[39] and are conclusive [40] as between the parties to the contest,[41] as to matters of fact within the jurisdiction

entry has been canceled, and one contesting for a preference right is not entitled to reside on or occupy any portion of the land in controversy, as against the entryman, until after he shall have procured the cancellation of the contested entry. Glover *v.* Swartz, 8 Okla. 642, 58 Pac. 943.

36. Wood *v.* Murray, 85 Iowa 505, 52 N. W. 356; Zimmerman *v.* McCurdy, 15 N. D. 79, 106 N. W. 125; Peckham *v.* Faught, 2 Okla. 173, 37 Pac. 1085; Sproat *v.* Durland, 2 Okla. 24, 35 Pac. 682, 886 [*followed* in Potts *v.* Hollon, 6 Okla. 696, 52 Pac. 917]; Reservation State Bank *v.* Holst, 17 S. D. 240, 95 N. W. 931, 70 L. R. A. 799.

Jurisdiction and powers of courts generally see *infra*, II, L, 16, a.

Injunction is the proper remedy to protect the occupying claimant's possession against the other claimant's attempts to take forcible possession before the rights of the parties have been determined. Zimmerman *v.* McCurdy, 15 N. D. 79, 106 N. W. 125.

The court may issue any order necessary to give effect to the law, pending the determination of the contest in the land department. Peckham *v.* Faught, 2 Okla. 173, 37 Pac. 1085.

37. Peckham *v.* Faught, 2 Okla. 173, 37 Pac. 1085, holding that the district court had power to make an order granting the homestead claimant the right to remain inside a wire fence erected by the settlement claimant. See also Hadley *v.* Ulrich, 1 Okla. 380, 33 Pac. 705.

38. See, generally, *infra*, II, L, 15, a.

39. Le Marchel *v.* Teagarden, 152 Fed. 662; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476. See also Corbett *v.* Wood, 32 Minn. 509, 21 N. W. 734.

40. *Arizona.*— Old Dominion Copper Min., etc., Co. *v.* Haverly, (1907) 90 Pac. 333.

Arkansas.— Finley *v.* Woodruff, 8 Ark. 328.

California.—Stewart *v.* Sutherland, 93 Cal. 270, 28 Pac. 947; Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 596, 861; Plummer *v.* Brown, 70 Cal. 544, 12 Pac. 464; Mace *v.* Merrill, 56 Cal. 554; Wilkinson *v.* Merrill, 52 Cal. 424; Cragie *v.* Roberts, 6 Cal. App. 309, 92 Pac. 97.

Colorado.— Howell *v.* Killie, 17 Colo. 88, 28 Pac. 464.

Illinois.— Robbins *v.* Bunn, 54 Ill. 48, 5 Am. Rep. 75; McGhee *v.* Wright, 16 Ill. 555; Gray *v.* McCance, 14 Ill. 343; Bennett *v.* Farrar, 7 Ill. 598.

Iowa.— Barringer *v.* Davis, (1907) 112 N. W. 208; Young *v.* Charnquist, 114 Iowa 116, 86 N. W. 205.

Kansas.— Missouri, etc., R. Co. *v.* Pratt, 64 Kan. 118, 67 Pac. 464; Freese *v.* Rusk, 54 Kan. 274, 38 Pac. 255; Burnham *v.* Starkey, 41 Kan. 604, 21 Pac. 624; Cooke *v.* Blakely, 6 Kan. App. 707, 50 Pac. 981.

Louisiana.— Sandoz *v.* Ozenne, 13 La. Ann. 616; Primot *v.* Thibodeaux, 6 La. 10; Henry *v.* Welsh, 4 La. 547, 23 Am. Dec. 490. See also Kirkby *v.* Fogleman, 16 La. 277.

Michigan.— Male *v.* Chapman, 134 Mich. 511, 96 N. W. 582.

Minnesota.— Monette *v.* Cratt, 7 Minn. 234; State *v.* Batchelder, 7 Minn. 121; Castner *v.* Gunther, 6 Minn. 119; Leech *v.* Rauch, 3 Minn. 448. But *compare* Corbett *v.* Wood, 32 Minn. 509, 21 N. W. 734.

North Dakota.— Martinson *v.* Marzolf, 14 N. D. 301, 103 N. W. 937.

Oregon.— Morse *v.* Odell, 49 Oreg. 118, 89 Pac. 139; Small *v.* Lutz, 41 Oreg. 570, 67 Pac. 421, 69 Pac. 825; Johnson *v.* Bridal Veil Lumbering Co., 24 Oreg. 182, 33 Pac. 528.

South Dakota.— Reservation State Bank *v.* Holst, 17 S. D. 240, 95 N. W. 529, 931, 70 L. R. A. 799; Harrington *v.* Wilson, 10 S. D. 600, 74 N. W. 1055.

United States.— Gardner *v.* Bonestell, 180 U. S. 362, 21 S. Ct. 399, 45 L. ed. 574 [*affirming* 125 Cal. 316, 58 Pac. 20]; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651; Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79; Blodgett *v.* Central Pac. R. Co., 6 Land Dec. Dept. Int. 309; Southern Pac. R. Co. *v.* Burlingame, 5 Land Dec. Dept. Int. 415. But *compare* Northern Pac. R. Co. *v.* McCormick, 72 Fed. 736, 19 C. C. A. 165, holding that an adjudication by the land department that an individual claimant is entitled to land within the limits of a railroad grant is not sufficient to overcome the presumption in favor of the railroad company arising from its compliance with the terms of the grant before any steps were taken by such claimant to enter the land.

See 41 Cent. Dig. tit. "Public Lands," § 298.

Grounds of rejection of entry.— Where complainant's application to file a homestead on certain land was rejected in the land office on the ground that the land was withdrawn from settlement by the executive withdrawal of April 22, 1868, under a railroad aid grant, in the absence of evidence to indicate that there was any other matter in dispute, it will not be presumed that it was rejected on any other ground, and such rejection was not conclusive on the courts where it was subsequently determined that such withdrawal was ineffectual. Osborn *v.* Froyseth, (Minn. 1908) 116 N. W. 1113.

41. Uinta Tunnel Min., etc., Co. *v.* Creede,

of the department,[42] and not subject to collateral attack,[43] although subject to review in a direct proceeding.[44] It is the settled law and policy of the interior department that a second contest will not be entertained against an entry of public lands on a charge which has been once investigated or decided by the department,[45] and the unsuccessful party in a contest is also estopped from subsequently asserting a claim which was available and proper for introduction in such contest.[46] But in order for an adjudication in the land department to be available in a subsequent action it must be pleaded,[47] and the party relying on such decision must show how the contest arose and what issues were submitted for determination, so as to enable the court to determine whether the decision is within the proper limits as to jurisdiction.[48] A decision in favor of one of the claimants does not invest him with the legal title prior to the issuing of the patent.[49]

11. Suspension of Entries. The power of supervision possessed by the commissioner of the general land office over the register and receiver of the local land offices, in the disposition of the public lands, authorizes him to suspend entries on land,[50] and while the suspension of an entry remains in force, the receiver's

etc., Min., etc., Co., 119 Fed. 164, 57 C. C. A. 200 [*affirmed* in 196 U. S. 337, 25 S. Ct. 266, 49 L. ed. 501], holding that judgments of the land department permitting entries of land and the patents based thereon bind all the parties to the proceedings, but do not estop those who were not, and were not required to be, parties from establishing the truth as to any facts material to their claims in any litigation between them and the holders under the patents. See also Martinson *v.* Marzolf, 15 N. D. 471, 108 N. W. 801, holding that a decision by the commissioner of the general land office in a contest between an occupying claimant of public lands and a contestant, canceling the claimant's homestead entry for alleged abandonment, which decision became final by reason of the entryman's failure to appeal, is not a conclusive adjudication that the defeated claimant had no right to the land as against a subsequent homestead applicant, who was not a party to the first contest, nor in privity with the successful contestant.

42. Northern Pac. R. Co. *v.* McCormick, 72 Fed. 736, 19 C. C. A. 165.

43. *Arizona.*— Old Dominion Copper Min., etc., Co. *v.* Haverly, (1907) 90 Pac. 333.

Arkansas.— Williamson *v.* Baugh, 71 Ark. 491, 76 S. W. 423.

California.— Saunders *v.* La Purisima Gold Min. Co., 125 Cal. 159, 57 Pac. 656.

Iowa.— Rood *v.* Wallace, 109 Iowa 5, 79 N. W. 449.

Kansas.— Missouri etc., R. Co. *v.* Pratt, 64 Kan. 118, 67 Pac. 464; Cook *v.* Blakely, 6 Kan. App. 707, 50 Pac. 981.

Nebraska.— Van Sant *v.* Butler, 19 Nebr. 351, 27 N. W. 299; Rush *v.* Valentine, 12 Nebr. 513, 11 N. W. 746; Kinney *v.* Degman, 12 Nebr. 237, 11 N. W. 318.

Utah.— Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571.

Wisconsin.— Bradley *v.* Dells Lumber Co., 105 Wis. 245, 81 N. W. 394.

United States.— Shepley *v.* Cowan, 91 U. S. 330, 23 L. ed. 424; Le Marchel *v.* Teagarden, 152 Fed. 662; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; New Dunderberg Min. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116; U. S. *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 552; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355.

See 41 Cent. Dig. tit. "Public Lands," § 298.

Erroneous decisions of the land department upon questions within its jurisdiction are not void, but are valid until reversed on appeal or set aside by proper direct proceedings for that purpose. Hartman *v.* Warren, 76 Fed. 157, 22 C. C. A. 30.

44. Missouri, etc., R. Co. *v.* Pratt, 64 Kan. 118, 67 Pac. 464; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355. See, generally, *infra*, II, L, 16, b.

45. Parryman *v.* Cunningham, (Okla. 1905) 82 Pac. 822.

46. Howard *v.* Hibbs, 22 Wash. 513, 61 Pac. 159, holding that where defendant was awarded a patent to public land in a contest with plaintiff's grantor, extending from 1884 to 1896, before the interior department, and a relinquishment alleged to have been executed by the defendant in November, 1884, was not introduced in evidence in that contest by plaintiff's grantor, plaintiff is estopped from asserting the relinquishment.

47. Pacific Live Stock Co. *v.* Isaacs, (Oreg. 1908) 96 Pac. 460.

48. Pacific Live Stock Co. *v.* Isaacs, (Oreg. 1908) 96 Pac. 460.

49. Quinby *v.* Conlan, 51 Cal. 412 [*affirmed* in 104 U. S. 420, 26 L. ed. 800].

Necessity of patent to vest title see *infra*, II, M, 2.

50. Figg *v.* Hensley, 52 Cal. 299; Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482.

"The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency

duplicate receipt for the money paid by the entryman remains in abeyance and will not support an action of ejectment.[51] The statutes require that cases of suspended entries shall be tried according to the principles of equity, and under regulations to be prescribed by the secretary of the interior, the attorney-general, and the commissioner of the general land office;[52] and also that every such adjudication shall be approved by the secretary of the interior and the attorney-general acting as a board.[53]

12. Cancellation of Entries, Certificates, Etc.[54]—a. Power of Land Department. The land department, in the exercise of its power to supervise the actions of local land officers,[55] has jurisdiction to cancel an entry for public lands,[56] or

of the department." Cornelius *v.* Kessel, 128 U. S. 456, 461, 9 S. Ct. 122, 32 L. ed. 482 [*quoted* in Durham *v.* Hussman, 88 Iowa 29, 34, 55 N. W. 11].

51. Figg *v.* Hensley, 52 Cal. 299.

52. U. S. Rev. St. (1878) § 2450. See Stimson Land Co. *v.* Hollister, 75 Fed. 941.

53. U. S. Rev. St. (1878) § 2451. See Stimson Land Co. *v.* Hollister, 75 Fed. 941.

54. Recall, cancellation, or annulment of patent by land department see *infra*, II, M, 11.

55. See *infra*, II, L, 14.

56. *Alabama.*— Holmes *v.* State, 108 Ala. 24, 18 So. 529 [*following* Holmes *v.* State, 100 Ala. 29], 14 So. 51]; Bates *v.* Herron, 35 Ala. 117.

Idaho.— Jones *v.* Meyers, 3 Ida. 51, 26 Pac. 215, 35 Am. St. Rep. 259.

Illinois.— Gray *v.* McCance, 14 Ill. 343. But *compare* Brill *v.* Stiles, 35 Ill. 305, 309, 85 Am. Dec. 364, where it is said that the commissioner of the general land office "is not a judicial officer, and has no power to decree the rescission of contracts. His determination in reference to the validity of that sale concluded no one. . . . The cancellation of the entry by the commissioner was not, therefore, evidence that the first entry was illegal."

Iowa.— Bellows *v.* Todd, 34 Iowa 18.

Kansas.— Freese *v.* Rusk, 54 Kan. 274, 38 Pac. 255; Swigart *v.* Walker, 49 Kan. 100, 30 Pac. 162 [*followed* in Fernald *v.* Winch, 50 Kan. 79, 31 Pac. 665].

Louisiana.— Mumford *v.* McKinney, 21 La. Ann. 547; Scuddy *v.* Shaffer, 10 La. Ann. 133; Haydel *v.* Nixon, 5 La. Ann. 558.

Minnesota.— Judd *v.* Randall, 36 Minn. 12, 29 N. W. 589; Randall *v.* Edert, 7 Minn. 450.

Mississippi.— See Dickinson *v.* Doe, 9 Sm. & M. 130.

Montana.— Murray *v.* Polglase, 17 Mont. 455, 43 Pac. 505.

Nebraska.— Pfund *v.* Valley L. & T. Co., 52 Nebr. 473, 72 N. W. 480.

North Dakota.—Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360].

Oklahoma.— Calhoun *v.* McCornack, 7 Okla. 347, 54 Pac. 493.

South Dakota.— See Risdon *v.* Davenport, 4 S. D. 555, 57 N. W. 482.

Washington.— Pierce *v.* Frace, 2 Wash. 81, 26 Pac. 192, 807 [*affirmed* in 157 U. S. 372, 15 S. Ct. 635, 39 L. ed. 737].

Wisconsin.— See Cornelius *v.* Kessel, 58 Wis. 237, 16 N. W. 550.

Wyoming.— Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

United States.— U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)]; Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157 [*affirming* 81 Fed. 651, 26 C. C. A. 514 (*reversing* 75 Fed. 946)]; Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41]; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482; Lee *v.* Johnson, 116 U. S. 48, 6 S. Ct. 249, 29 L. ed. 570; Harkness *v.* Underhill, 1 Black 316, 17 L. ed. 208; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651; California Redwood Co. *v.* Litle, 79 Fed. 854 [*affirmed* in 87 Fed. 1004, 31 C. C. A. 591]; American Mortg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

See 41 Cent. Dig. tit. "Public Lands," § 294.

The exercise of this power must not be arbitrary see *infra*, II, L, 14.

The secretary of the interior, as head of the land department, is invested with supervisory power to control the public business relating to public lands, and may set aside any entry, survey, certificate, or decision allowed, made, issued, or rendered by officers or agents of the government, subordinate to him; and under his direction, and subject to his ultimate determinations, the commissioner of the general land office has a like supervising power. Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488; Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992; McDaid *v.* Oklahoma, 150 U. S. 209, 14 S. Ct. 59, 37 L. ed. 1055; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Williams *v.* U. S., 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026; Lee *v.* Johnson, 116 U. S. 48, 6 S. Ct. 249, 29 L. ed. 570; Buena Vista County *v.* Iowa Falls, etc., R. Co., 112 U. S. 165, 5 S. Ct. 84, 28 L. ed. 680; Snyder *v.* Sickles, 98 U. S. 203, 25 L. ed. 97; Harkness *v.* Underhill, 1 Black (U. S.) 316, 17 L. ed. 208; Magwire *v.* Tyler, 1 Black (U. S.) 195, 17 L. ed. 137; Barnard *v.* Ashley, 18 How. (U. S.) 43, 15 L. ed. 285; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

The power of the commissioner of the general land office to cancel entries to public

annul a certificate of purchase of such lands [57] at any time before a patent is issued,[58] and this can be done upon the same evidence which was before the register and receiver.[59] So also, where a selection or a designation of lands granted by congress has been made, under a mistake of fact induced by a false survey, the secretary of the interior has power, before the issue of a patent, to recall and correct such designation.[60] But after a patent has issued the land department cannot cancel the entry on which it was based.[61]

b. Grounds For Cancellation. An entry may be canceled on the ground that it was illegally,[62] improperly,[63] or fraudulently [64] made, or was attempted to be

lands after final proof has been made and a final certificate issued extends only to cases of entries made upon false testimony or without authority of law. Stimson *v.* Clarke, 45 Fed. 760.

A register and receiver, with the approbation of the commissioner of the general land office, have power to cancel a certificate of entry. Dickinson *v.* Doe, 9 Sm. & M. (Miss.) 130. But *compare* McDaniel *v.* Orton, 12 Mo. 12, holding that a register and receiver have no power to permit a person to vacate his entry.

Where one commutes his homestead entry into a cash entry, and the final receipt for the price is issued to him by the receiver, and the certificate is signed by the register, such receipt and certificate may entitle him *prima facie* to a patent, but do not conclude the land department from investigating the truth of the facts on which they were issued, and the *bona fides* of the homestead claim, and from canceling the same if found untrue and insufficient. Holmes *v.* State, 100 Ala. 291, 14 So. 51.

Power to cancel entry after transfer or assignment by entryman see *infra*, II, P, 1, f, (II).

57. Lott *v.* Prudhomme, 3 Rob. (La.) 293; U. S. *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 552 [*followed* in American Mortg. Co. *v.* Hopper, 56 Fed. 67 (*affirmed* in 64 Fed. 553, 12 C. C. A. 293, and *disapproving* Wilson *v.* Fine, 40 Fed. 52, 5 L. R. A. 141; Smith *v.* Ewing, 23 Fed. 741 [both *followed* in American Mortg. Co. *v.* Hopper, 48 Fed. 47])].

58. *Idaho.*— Jones *v.* Meyers, 3 Ida. 51, 26 Pac. 215, 35 Am. St. Rep. 259.

Kansas.— Freese *v.* Rusk, 54 Kan. 274, 38 Pac. 255; Swigart *v.* Walker, 49 Kan. 100, 30 Pac. 162 [*followed* in Fernald *v.* Winch, 50 Kan. 79, 31 Pac. 665].

Louisiana.— Scuddy *v.* Shaffer, 10 La. Ann. 133; Haydel *v.* Nixon, 5 La. Ann. 558.

Minnesota.— Judd *v.* Randall, 36 Minn. 12, 29 N. W. 589, holding that a homestead entry may be canceled for fraud even after final proof has been made.

Nebraska.— Pfund *v.* Valley L. & T. Co., 52 Nebr. 473, 72 N. W. 480.

Washington.— Pierce *v.* Frace, 2 Wash. 81, 26 Pac. 192, 807 [*affirmed* in 157 U. S. 372, 15 S. Ct. 635, 39 L. ed. 737].

Wyoming.— Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488, holding that an entry may be canceled after the issuance of a final certificate.

United States.— U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)]; Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157 [*affirming* 81 Fed. 651, 26 C. C. A. 514 (*reversing* 75 Fed. 946)]; Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41]; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Lee *v.* Johnson, 116 U. S. 48, 6 S. Ct. 249, 29 L. ed. 570; American Mortg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

See 41 Cent. Dig. tit. "Public Lands," § 294.

59. Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41].

60. Michigan Land, etc., Co. *v.* Rust, 68 Fed. 155, 15 C. C. A. 335 [*affirmed* in 168 U. S. 589, 18 S. Ct. 208, 42 L. ed. 591], so holding as to lands claimed under the swamp land grant.

61. Long *v.* Olson, 115 Iowa 388, 88 N. W. 933.

62. Jones *v.* Meyers, 3 Ida. 51, 26 Pac. 215, 35 Am. St. Rep. 259; Freese *v.* Rusk, 54 Kan. 274, 38 Pac. 255; U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 [*reversing* 124 Fed. 393)]; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

63. Bellows *v.* Todd, 34 Iowa 18.

64. *Idaho.*— Jones *v.* Meyers, 3 Ida. 51, 26 Pac. 215, 35 Am. St. Rep. 259.

Minnesota.— Judd *v.* Randall, 36 Minn. 12, 29 N. W. 589.

Montana.— Murray *v.* Polglase, 17 Mont. 455, 43 Pac. 505.

Nebraska.— Pfund *v.* Valley L. & T Co., 52 Nebr. 473, 72 N. W. 480.

Oklahoma.— Calhoun *v.* McCornack, 7 Okla. 347, 54 Pac. 493.

Wyoming.— Delles *v.* Brownsville Second Nat. Bank, 7 Wyo. 66, 50 Pac. 190, 75 Am. St. Rep. 875; Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

United States.— Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41]; Orchard *v.* Alexander, 157 U. S. 372, 15 S. Ct. 635, 39 L. ed. 737 [*affirming* 2 Wash. 108, 26 Pac. 196]; Harkness *v.* Underhill, 1 Black 316, 17 L. ed. 208; Dilles *v.* Hawley, 81 Fed. 651, 26 C. C. A. 514 [*reversing* 75 Fed. 946,

sustained upon false testimony,[65] or allowed upon fraudulent final proofs;[66] because the land was not subject to entry or sale,[67] or did not belong to the class as of which it was entered;[68] because the entryman does not possess the qualifications required by the statute,[69] is not a *bona fide* claimant,[70] has previously entered as much land as the law permits,[71] or has not complied with the law;[72] or because the entry conflicts with private claims.[73] But the power to cancel entries cannot be exercised so as to deprive any person of land lawfully entered and paid for.[74] The interior department has been authorized by statute to cancel bounty warrants which have been lost or destroyed,[75] and such a warrant may also be canceled because an assignment thereof is forged.[76]

c. Proceedings. The cancellation of an entry can be only after a hearing.[77] The general principles of equity must govern the actions of every officer and department of the government affecting private rights, and it is essential to the valid exercise of the power to cancel entries for any cause arising from facts not shown by the record of the proceedings prior to the issuance of the patent certificate that notice and an opportunity to rebut any new evidence shall be given to the party in interest,[78] and the secretary or commissioner must make of record findings of specific facts contradicting the evidence upon which the entry was allowed in a material point.[79] The land department is authorized to cancel an entry where the evidence is sufficient to justify the inference that there was some prior understanding between the entryman and others that his acts should inure to their benefit, and that he applied to purchase the land on a speculation and not

and *affirmed* in 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157]; California Redwood Co. *v.* Litle, 79 Fed. 854 [*affirmed* in 87 Fed. 1004, 31 C. C. A. 591]; U. S. *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 552 [*followed* in American Mortg. Co. *v.* Hopper, 56 Fed. 67 (*affirmed* in 64 Fed. 553, 12 C. C. A. 293, and *disapproving* Wilson *v.* Fine, 40 Fed. 52, 5 L. R. A. 141; Smith *v.* Ewing, 23 Fed. 741 [both *followed* in American Mortg. Co. *v.* Hopper, 48 Fed. 47])].

See 41 Cent. Dig. tit. "Public Lands," § 294.

65. Cooke *v.* Blakely, 6 Kan. App. 707, 50 Pac. 981; Pfund *v.* Valley L. & T. Co., 52 Nebr. 473, 72 N. W. 480; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482; American Mortg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293; Stimson Land Co. *v.* Rawson, 62 Fed. 426; U. S. *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 552.

66. Caldwell *v.* Burk, 6 Wyo. 342, 45 Pac. 488.

67. Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11; Freese *v.* Rusk, 54 Kan. 274, 38 Pac. 255; Lott *v.* Prudhomme, 3 Rob. (La.) 293; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482.

Where part of land subject to entry.— The commissioner of the general land office has no authority, where the receiver has taken the price of land, and given a receipt therefor, to cancel the entire entry, because one of the tracts embraced therein is not subject to entry, without first giving the party in interest the right of election as to whether he desires to retain the tract not in controversy, and an order canceling the whole entry is void, and therefore a subsequent order to reinstate such entry is not necessary. Cornelius *v.* Kessel, 58 Wis. 237, 16 N. W. 550 [*affirmed* in 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482].

68. Delles *v.* Brownsville Second Nat. Bank, 7 Wyo. 66, 50 Pac. 190, 75 Am. St. Rep. 875.

69. Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11; Freese *v.* Scouten, 53 Kan. 347, 36 Pac. 741; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482.

70. Diller *v.* Hawley, 81 Fed. 651, 26 C. C. A. 514 [*reversing* 75 Fed. 946, and *affirmed* in 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157]; Carr *v.* Fife, 44 Fed. 713 [*affirmed* in 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508], although such objection was not raised by the contestant.

71. Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482.

72. Pierce *v.* Frace, 2 Wash. 81, 26 Pac. 192, 807 [*affirmed* in 157 U. S. 372, 15 S. Ct. 635, 39 L. ed. 737].

73. Haydel *v.* Nixon, 5 La. Ann. 558.

74. Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

75. Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11.

Lost warrant presumed to have been regularly canceled.— Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11.

76. Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11.

77. Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

78. Stimson Land Co. *v.* Rawson, 62 Fed. 426.

Notice of proceedings in land office generally see *infra*, II, L, 13.

79. Stimson Land Co. *v.* Rawson, 62 Fed. 426; Lewis *v.* Shaw, 57 Fed. 516; Stimson *v.* Clarke, 45 Fed. 760.

in good faith to appropriate it to his own exclusive use and benefit, although this is not directly shown.[80] The statutory requirement of the approval of a commissioner's decision by the secretary of the interior and the attorney-general acting as a board applies only to decisions sustaining irregular entries, and thereby divesting the United States of its title, and does not extend to decisions rejecting or canceling entries.[81]

d. What Amounts to Cancellation. A decision of the commissioner of the general land office that "said entry is hereby held for cancellation" amounts to a cancellation of the entry; [82] and a decision of the secretary of the interior in respect to a protest as to the issuance of a patent, in which the commissioner had affirmed the cancellation of the entry by the local land office, in the form of a letter to the commissioner, saying: "Your judgment, from which an appeal has been taken, contains a satisfactory statement of the facts; and as no errors of law appear, said judgment is affirmed," a judgment of cancellation.[83] But it has been held that a statement by the commissioner of the general land office in a letter, to the effect that he had canceled a certificate, does not amount to an eviction authorizing the rescission of a sale between third persons.[84] An order to the local office to perfect the location of a warrant and issue a patent to the holder of the warrant so located, amounts to a cancellation of a prior entry.[85]

e. Evidence [86] of Cancellation. The depositions of a commissioner of the general land office are admissible to prove that a certificate of purchase of the register and receiver has been canceled.[87] The mere fact that the word "canceled" is written over a certificate of purchase is not sufficient evidence to establish that it was in fact canceled.[88]

f. Effect of Cancellation.[89] The cancellation of an entry does not preclude the entryman or his grantees from establishing a right to the land by proving a valid entry on his part and performance by him of the acts required to complete the entry,[90] and if it affirmatively appears that the cancellation was wrongfully made the courts will disregard it.[91] But the cancellation of an entry is presumed to have been made upon sufficient evidence and valid grounds and in accordance with the rules of the land department; [92] and one claiming the legal title to land,

80. Diller *v.* Hawley, 81 Fed. 651, 26 C. C. A. 514 [*reversing* 75 Fed. 946, and *affirmed* in 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157].

81. Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157 [*affirming* 81 Fed. 651, 26 C. C. A. 514 (*reversing* 75 Fed. 946)].

82. Murray *v.* Polglase, 17 Mont. 455, 43 Pac. 505, holding that this is true notwithstanding the addition of the words "subject to the right of further appeal."

83. Murray *v.* Polglase, 17 Mont. 455, 43 Pac. 505.

84. McDonold *v.* Vaughan, 14 La. Ann. 716.

85. Bates *v.* Herron, 35 Ala. 117.

86. See, generally, EVIDENCE, 16 Cyc. 821.

87. Guidry *v.* Woods, 19 La. 334, 36 Am. Dec. 677.

88. Doe *v.* Stephenson, 9 Ind. 144.

89. Preference right of person securing cancellation to enter land see *supra*, II, C, 3, a.

90. U. S. *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 552.

Estoppel.— Where the commissioner of the general land office assumes to cancel a location of lands, and tenders back the warrants on which the land was located, the act of the holder in receiving the warrants without objection, and using them to locate other lands, amounts to such an acquiescence in the cancellation as will preclude him or his assignee from thereafter relying on the original location as a step in the proceedings necessary to entitle them to a certificate of the purchase of the land first selected. Ely *v.* Land-Office Com'r, 49 Mich. 17, 12 N. W. 893, 13 N. W. 784.

91. Aldrich *v.* Aldrich, 37 Ill. 32; Stimson Land Co. *v.* Hollister, 75 Fed. 941 (holding that the action of the land department in canceling an entry is not binding if based upon testimony extorted by threats of criminal prosecution and promises of immunity in consideration of testimony satisfactory to the agent of the department); Stimson Land Co. *v.* Rawson, 62 Fed. 426 (holding that a decision by an officer of the executive branch of the government, canceling an entry after it has been allowed and the land paid for, and before the legal title has passed from the government, is not binding on the courts if supported only by a general conclusion that fraud has been committed, and that the entry was not made in good faith, with intent on the part of the entryman to take the land for his exclusive use and benefit).

92. Aldrich *v.* Aldrich, 37 Ill. 32; Freese *v.* Scouten, 53 Kan. 347, 36 Pac. 741; Fernald

despite the cancellation of the entry under which he claims, must prove that the entryman acted in good faith, and fully complied with the law.[93] On the valid cancellation of an entry, the land is restored to the public domain as free for occupation or purchase as if the entry had never attached thereto.[94]

g. Return of Amount Paid by Entryman. It is provided by statute [95] that in all cases where entries of public land are canceled for conflict [96] or have been erroneously allowed and cannot be confirmed [97] the secretary of the interior shall cause to be paid to the person who made such entry [98] or his heirs [99] or assigns [1] the fees and commissions, amount of purchase-money, etc., paid upon the same [2] upon the surrender of the duplicate receipt [3] and the execution of a proper relin-

v. Winch, 50 Kan. 79, 31 Pac. 665; Swigart *v.* Walker, 49 Kan. 100, 30 Pac. 162; Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360].

93. Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360].

94. Parsons *v.* Venzke, 164 U. S. 89, 17 S. Ct. 880, 42 L. ed. 185 [*affirming* 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669]; Northern Pac. R. Co. *v.* Amacker, 53 Fed. 48 [*reversed* on other grounds in 58 Fed. 850, 7 C. C. A. 518]. See also Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11.

95. 21 U. S. St. at L. 287, c. 244, § 2 [U. S. Comp. St. (1901) p. 1416].

96. See Hollister *v.* U. S., 36 Ct. Cl. 13.

The fact that there is no formal order of cancellation will not defeat the intent of the statute, or deprive an entryman of the right to repayment, but an award for repayment duly approved is a recognition of a substantial concellation and must be treated as an actual cancellation. Hollister *v.* U. S., 36 Ct. Cl. 13.

97. See U. S. *v.* Foreman, 5 Okla. 237, 48 Pac. 92.

Entry canceled for mistake.— Where both parties suppose that an entry in the land office covers the land which the claimant has improved, and in that belief the purchase-money is paid and the certificate issued, and it is subsequently discovered that the mistake of a numeral transfers the entry to an adjoining section of land, and the government cancels the entry, it is bound in equity, in good conscience, to refund the purchase-money, and an action for money had and received will lie against the government. Nelson *v.* U. S., 35 Ct. Cl. 427.

The fact that a defective entry could be corrected by the production of the proper affidavit of the entryman will not defeat the assignee's right to recover if the entryman cannot be found to make the affidavit, by reason of which the entry is canceled. Anthracite Mesa Coal-Min. Co. *v.* U. S., 38 Ct. Cl. 56.

98. See Hollister *v.* U. S., 36 Ct. Cl. 13.

Right to repayment not divested by sale under execution.— Commonwealth Title Ins., etc., Co. *v.* U. S., 37 Ct. Cl. 532 [*affirmed* in 193 U. S. 651, 24 S. Ct. 546, 48 L. ed. 830].

99. See Hoffeld *v.* U. S., 186 U. S. 273, 22 S. Ct. 927, 46 L. ed. 1160 [*affirming* 36 Ct. Cl. 26]; Stoiber *v.* U. S., 41 Ct. Cl. 269.

1. See Hoffeld *v.* U. S., 186 U. S. 273, 22 S. Ct. 927, 46 L. ed. 1160 [*affirming* 36 Ct. Cl. 26]; Anthracite Mesa Coal-Min. Co. *v.* U. S., 38 Ct. Cl. 56; Commonwealth Title Ins. etc., Co. *v.* U. S., 37 Ct. Cl. 532 [*affirmed* in 193 U. S. 651, 24 S. Ct. 546, 48 L. ed. 830].

The word "assigns" means those to whom the entryman's interest in the land was conveyed prior to the cancellation of the entry, and after cancellation the entryman has no interest in the land which he can assign, but only a claim for repayment which is not assignable under the statute. Commonwealth Title Ins., etc., Co. *v.* U. S., 37 Ct. Cl. 532 [*affirmed* in 193 U. S. 651, 24 S. Ct. 546, 48 L. ed. 830].

As between an entryman and a subsequent grantee, who is in possession, claiming through him, at the time the entry is canceled, the grantee is entitled to the purchase-money refunded by the government. Leete *v.* Pacific Mill, etc., Co., 88 Fed. 957 [*affirmed* in 94 Fed. 968, 36 C. C. A. 587].

Voluntary assigns only are contemplated by the statute, and hence a purchaser at sale under execution against the entryman or his grantee is not entitled to recover the amount paid on the entry. Hoffeld *v.* U. S., 186 U. S. 273, 22 S. Ct. 927, 46 L. ed. 1160 [*affirming* 36 Ct. Cl. 26, 230].

A mortgagee who has foreclosed his mortgage and purchased the property at a sheriff's sale under a decree of the court is an "assign" within the meaning of the statute. U. S. *v.* Commonwealth Title Ins., etc., Co., 193 U. S. 651, 24 S. Ct. 546, 48 L. ed. 830 [*affirming* 37 Ct. Cl. 532].

Where a person conveys a portion of the public land before he has made an entry and while he has no title, interest, or equity in the same, by deed without warranty, the grantee takes nothing, and if the grantor subsequently makes an entry on the land, which is ultimately canceled for an error of the land officers, the grantee has no right or interest in the money paid on the entry which the land office can recognize or which can be the subject of recovery in a suit at law. Anthracite Mesa Coal-Min. Co. *v.* U. S., 38 Ct. Cl. 56.

2. See Hollister *v.* U. S., 36 Ct. Cl. 13.

3. See U. S. *v.* Foreman, 5 Okla. 237, 48 Pac. 92.

The surrender of the duplicate receipt will be presumed from a finding that the secretary of the interior ordered repayment "on

quishment of all claims to enter the land.[4] An action to recover the amount paid on a canceled entry will lie [5] in the federal courts; [6] but one who seeks to recover the amount paid must show himself entitled, not only to the land itself, but to everything which the statute has annexed thereto as an incident,[7] and his petition is demurrable if it fails to show a surrender of the certificate of purchase issued to him, or to allege a relinquishment of all claim to the land under the entry.[8] The return of the purchase-money is not a condition precedent to the cancellation of an entry on account of false testimony in the final proof; [9] and in an action to recover the amount paid on entries, upon the ground that the entries were subsequently canceled by the land department because the lands were not subject to entry under the act under which the entry was made, an answer alleging that the entries were canceled because they were not made in good faith, but were fraudulent and were allowed upon false affidavits made by the entrymen, states a good defense.[10]

h. Right to Remove Improvements.[11] It has been held that a homestead settler who makes improvements upon a tract of government land whose entry is canceled may remove the same after the land has been awarded to an adverse settler.[12]

i. Reinstatement of Canceled Entry. Congress has power to reinstate an entry canceled by the land office,[13] and to provide that this shall relate back to the original entry, so as to inure to the benefit of intermediate grantees.[14]

13. Notice of Proceedings in Land Department. Proceedings in the land department to review prior rulings or cancel entries must be upon notice to the persons interested,[15] and such persons must be allowed an opportunity for a full

the relinquishment by the claimants of all claim to the land so cancelled," and a further finding that the relinquishment was made "as required by the rules and regulations of the Land Office." U. S. *v.* Commonwealth Title Ins., etc., Co., 193 U. S. 651, 656, 24 S. Ct. 546, 48 L. ed. 830 [*affirming* 37 Ct. Cl. 532].

4. See U. S. *v.* Foreman, 5 Okla. 237, 48 Pac. 92.

Burden of proof.— One suing to recover money paid for land of which entry was erroneously allowed and afterward canceled must show that he has surrendered to the secretary of the interior his duplicate receipt, and has executed a relinquishment of all claims to the land, as provided by the statute. U. S. *v.* Foreman, 5 Okla. 237, 48 Pac. 92.

5. Emmons *v.* U. S., 103 Fed. 771; Emmons *v.* U. S., 42 Fed. 26.

The refusal by the commissioner of the general land office of an application by an entryman for the refunding of the money paid for public lands, after his entry was canceled, does not render his claim *res judicata* so as to bar an action thereon in the courts, nor is his right to maintain such action affected by his conveyance of the land. Emmons *v.* U. S., 103 Fed. 771.

6. Emmons *v.* U. S., 42 Fed. 26.

7. Hoffeld *v.* U. S., 186 U. S. 273, 22 S. Ct. 927, 46 L. ed. 1160 [*affirming* 36 Ct. Cl. 26].

When entryman not entitled to recover.— Where the money paid at the time of making an entry was that of a coal company, to whom the person making the entry had previously quitclaimed the land, he cannot maintain an action to recover it back, although the entry was subsequently set aside by the secretary of the interior, and the money is still in the treasury. Stoiber *v.* U. S., 41 Ct. Cl. 269, 275, where it is said: "The act contemplates repayment 'to the person who made the entry;' or, in case of his death, to his heirs; or, in case of sale, to his assignees. To entitle the claimant to recover he must bring himself within the statute. True, the Government received the money for the lands, and the same is now in the Treasury, where, in the absence of fraud, it is held as a trust fund for the benefit of the rightful owner. As the claimant was not allowed to enter the lands and paid no money therefor, he is not entitled to recover, and his petition is therefore dismissed."

8. Emmons *v.* U. S., 42 Fed. 26.

9. Cooke *v.* Blakely, 6 Kan. App. 707, 50 Pac. 981.

10. Emmons *v.* U. S., 103 Fed. 771.

A prior sale by the entryman may raise the presumption that the entry was not made for his use and benefit, but it is not sufficient of itself to establish fraud so as to defeat a recovery by his assignee. Anthracite Mesa Coal-Min. Co. *v.* U. S., 38 Ct. Cl. 56.

11. **Rights in improvements on public lands** generally see *supra*, II, C, 5, b; II, C, 6, g.

12. Winans *v.* Beidler, 6 Okla. 603, 52 Pac. 405.

13. McCarty *v.* Mann, 15 Fed. Cas. No. 8,685, 2 Dill. 441 [*affirmed* in 19 Wall. 20, 22 L. ed. 49].

14. McCarty *v.* Mann, 15 Fed. Cas. No. 8,685, 2 Dill. 441 [*affirmed* in 19 Wall. 20, 22 L. ed. 49], holding that in such case the intermediate grantees receive the benefit whether they took with or without warranty.

15. *Iowa.*— Young *v.* Hanson, 95 Iowa 717, 64 N. W. 654.

hearing.[16] In the absence of any showing to the contrary, it will be presumed that due notice was given to all persons interested before an entry or warrant was canceled;[17] but there is no such presumption, where the party in interest testifies positively that no such notice was given.[18] Where notice of hearing before the land officers for the confirmation of a claim, pursuant to an act of congress, is given by serving a personal notice on the parties known to be interested in the claim and also by publication, the notice is sufficient, and the decision at the hearing is binding on those acquiring title after the institution of the proceedings.[19] A general appearance by the entryman at the hearing for cancellation of the entry is a waiver of any insufficiency of the notice,[20] and a failure to give notice to transferees of an entryman of an order of the secretary of the interior to send him the papers in proceedings for the cancellation of the entry is immaterial, if they had an opportunity to be heard before the secretary while the case was in his hands.[21] It has been held that a cancellation of a warrant or entry without notice to the persons in interest is void,[22] but there is also authority to

Michigan.— Boyce *v.* Danz, 29 Mich. 146.

Oklahoma.— Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702.

Washington.— Whitney *v.* Spratt, 25 Wash. 62, 64 Pac. 919, 87 Am. St. Rep. 738 [*affirmed* in 189 U. S. 346, 23 S. Ct. 576, 47 L. ed. 845].

Wyoming.— Delles *v.* Brownsville Second Nat. Bank, 7 Wyo. 66, 50 Pac. 190, 75 Am. St. Rep. 875; Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

United States.— U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)]; Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41]; Parsons *v.* Venzke, 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360 [*affirming* 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669]; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651; George *v.* Riddle, 94 Fed. 689; Puget Mill Co. *v.* Brown, 54 Fed. 987 [*affirmed* in 59 Fed. 35, 7 C. C. A. 643].

See 41 Cent. Dig. tit. "Public Lands," § 295.

A transferee of an entryman is entitled to notice of proceedings to cancel the entry. Thayer *v.* Spratt, 189 U. S. 346, 23 S. Ct. 576, 47 L. ed. 845 [*affirming* 25 Wash. 62, 64 Pac. 919, 87 Am. St. Rep. 738]. But *compare* Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488. But he must give notice to the local land office of his interest in order to be entitled to notice of proceedings against his grantor. Eastern Banking Co. *v.* Lovejoy, (Nebr. 1908) 115 N. W. 857.

Notice to mortgagee.— In a contest case involving the validity of an entry upon a tract of Osage Indian trust lands, it was not necessary to notify a mortgagee of the tract, when it did not appear that he had filed a statement of his interest in the local land office. Cooke *v.* Blakely, 6 Kan. App. 707, 50 Pac. 981.

Notice to predecessors in interest of parties. — It is not necessary that notice of a contest before the land department between claimants under conflicting entries of public land should be given to the predecessors in interest of such claimants, who have parted with all their title, when the present claimants of the land are notified, and take part in the proceedings. Durango Land, etc., Co. *v.* Evans, 80 Fed. 425, 25 C. C. A. 523.

Notice of a motion for a review of a decision of the secretary of the interior before that officer need not be served on the attorney of the adverse party, but service upon the party himself is sufficient. Acers *v.* Snyder, 8 Okla. 659, 58 Pac. 780.

Notice by publication.— The failure of the land department to require the filing of an affidavit that the party to be served with notice of a contest of an entry cannot be personally served is not fatal to the power of the department to act on a mere publication of notice, without personal service, where the party does in fact know of the hearing, and has an opportunity to be heard. Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360].

Time of giving notice.— Where an order of the secretary of the interior finally disposing of a contest between parties is dated prior to the service of a notice to quit in an action of forcible entry and detainer, the notice is not premature, although the fact of such decision was not known to the parties at the time of the service thereof. Best *v.* Frazier, 16 Okla. 523, 85 Pac. 1119.

16. Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651.

17. Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11.

18. Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121.

19. Male *v.* Chapman, 134 Mich. 511, 96 N. W. 582.

20. Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

If the appearance was not general it is incumbent upon the entryman or those claiming under him to show that fact. Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

21. Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157 [*affirming* 81 Fed. 651, 26 C. C. A. 514 (*reversing* 75 Fed. 946)].

22. Young *v.* Hanson, 95 Iowa 717, 64 N. W. 654; Risdon *v.* Davenport, 4 S. D. 555, 57 N. W. 482; Lewis *v.* Shaw, 57 Fed. 516.

the contrary,[23] and the fact that a finding of the secretary of the interior that an assignment of a land warrant was a forgery, and his order canceling the warrant, were made without notice to the assignee, does not constitute a valid objection by a defendant not in privity with the assignee, but claiming under a sale of the land for taxes after the cancellation, where the assignee had accepted the adjudication of the secretary as binding, and the fact that the assignment was forged is admitted by defendant.[24]

14. Review of Decisions in Land Department. When a right of property has become vested by a decision of the land department, it cannot be taken away except by a proceeding directly therefor and upon due notice;[25] but an action not involving a final adjudication of the land department as to title is subject to be reopened and reviewed in the department.[26] The secretary of the interior has authority to review a previous decision of himself[27] or his predecessor,[28] and such authority cannot be taken away by any rules of procedure of the department.[29] So also irregularity of proceedings warrants the commissioner of the general land office in reviewing the decisions of his predecessor.[30] But it has been held that the register and receiver acting as commissioners for the adjustment of conflicting land claims have no power to annul a certificate of confirmation once granted or to revise their own decisions touching the location of conflicting claims, after rights have been acquired under them.[31] The decisions of the commissioner of the general land office are subject to review by the secretary of the interior;[32] but

23. Acers *v.* Snyder, 8 Okla. 659, 662, 58 Pac. 780 (holding that the action of the secretary of the interior in reviewing his own decision without notice to the parties is not void, the court saying: "It would evidently be error to proceed to hear a contested matter without notice to all parties in interest; yet the secretary of the interior has authority and jurisdiction on his own motion to review any decision pertaining to disposal of the public lands up to the time patent issues, and his action would not be void in such case, even though no notice was given until the final decision was reached"); Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41] (holding that the cancellation of a homestead entry upon due notice to the entryman, and after a hearing in the case, cannot be regarded as a mere nullity, when set up against his mortgagee, because the latter had no notice); California Redwood Co. *v.* Litle, 79 Fed. 854 [*affirmed* in 87 Fed. 1004, 31 C. C. A. 591, and *following* American Mortg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293 (*affirming* 56 Fed. 67)] (holding that the action of the commissioner of the general land office in canceling an entry of public land is not void because the holder of the certificate of purchase receives no notice).

24. Hussman *v.* Durham, 165 U. S. 144, 17 S. Ct. 253, 41 L. ed. 664.

25. Parsons *v.* Venzke, 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360 [*affirming* 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669]; Orchard *v.* Alexander, 157 U. S. 372, 15 S. Ct. 635, 39 L. ed. 737; Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123 [*affirming* 20 D. C. 555, and *followed* in U. S. *v.* Carter, 21 D. C. 587; Emblen *v.* Lincoln Land Co., 94 Fed. 710 (*affirmed* in 102 Fed. 559, 42 C. C. A. 499 [*affirmed* in 184 U. S. 660, 22 S. Ct. 523, 46 L. ed. 736])]; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482. See also Love *v.* Flahive, 205 U. S. 195, 27 S. Ct. 486, 51 L. ed. 768 [*affirming* 33 Mont. 348, 83 Pac. 882], 206 U. S. 356, 27 S. Ct. 729, 51 L. ed. 1092.

26. Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Warner Valley Stock Co. *v.* Smith, 9 App. Cas. (D. C.) 187; Love *v.* Flahive, 205 U. S. 195, 27 S. Ct. 486, 51 L. ed. 768 [*affirming* 33 Mont. 348, 83 Pac. 882], 206 U. S. 356, 27 S. Ct. 729, 51 L. ed. 1092; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651.

27. Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392 (*following* New Orleans *v.* Paine, 147 U. S. 261, 13 S. Ct. 303, 37 L. ed. 162), and *distinguishing* Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123; Stone *v.* U. S., 2 Wall. (U. S.) 525, 17 L. ed. 765].

28. Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Warner Valley Stock Co. *v.* Smith, 9 App. Cas. (D. C.) 187; Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392 (*following* New Orleans *v.* Paine, 147 U. S. 261, 13 S. Ct. 303, 37 L. ed. 162), and *distinguishing* Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123; Stone *v.* U. S., 2 Wall. (U. S.) 525, 17 L. ed. 765].

29. Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141.

30. Morse *v.* Odell, 49 Oreg. 118, 89 Pac. 139; Graham *v.* Hastings, etc., R. Co., 1 Land Dec. Dept. Int. 362.

31. Boatner *v.* Scott, 1 Rob. (La.) 546; Newport *v.* Cooper, 10 La. 155.

32. Hays *v.* Steiger, 76 Cal. 555, 18 Pac.

this power of review is supervisory rather than appellate in the sense in which the latter term is used with reference to the powers of courts,[33] and in the exercise of such supervisory power, the secretary may approve, modify, or annul the acts, proceedings, and decisions of the commissioner of the general land office, whenever certified to him, without the formality of an appeal.[34] The general land department has power to review and set aside the decisions of local officers relating to questions arising in the administration of the laws concerning the public domain;[35] but this power is not arbitrary and unlimited,[36] and its exercise is subject to judicial inquiry and review.[37]

15. Conclusiveness and Effect of Decisions in Land Department — a. In General. A decision rendered by the officers of the land department upon a question of fact is conclusive and not subject to be reviewed by the courts[38] in the

670 [*affirmed* in 156 U. S. 387, 15 S. Ct. 412, 39 L. ed. 463]; Hestres *v.* Brennan, 50 Cal. 211; German Ins. Co. *v.* Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974.

The secretary of the interior acting alone may review a judgment of the commissioner of the land office as to the entry in a local land office, as the provision of the statute requiring the adjudication in certain cases to be made by a board consisting of the secretary of the interior and the attorney-general acting as a board has no application to such a case. Diller *v.* Hawley, 81 Fed. 651, 26 C. C. A. 514 [*reversing* 75 Fed. 946, and *affirmed* in 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157].

33. Hestres *v.* Brennan, 50 Cal. 211.

34. Hestres *v.* Brennan, 50 Cal. 211.

Presumption as to proper transmission of papers.— Where the commissioner of the general land office transmits the papers to the secretary of the interior, the presumption is that they were regularly and properly transmitted. Hestres *v.* Brennan, 50 Cal. 211; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974.

35. Guidry *v.* Woods, 19 La. 334, 36 Am. Dec. 677; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 23 S. Ct. 692, 24 S. Ct. 860, 47 L. ed. 1064 [*affirming* 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230]; Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157; Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41]; Orchard *v.* Alexander, 157 U. S. 372, 15 S. Ct. 635, 39 L. ed. 737; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651.

36. Pfund *v.* Valley L. & T. Co., 52 Nebr. 473, 72 N. W. 480; U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)]; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 23 S. Ct. 69, 24 S. Ct. 860, 47 L. ed. 1064 [*affirming* 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230]; Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41]; Parsons *v.* Venzke, 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360 [*affirming* 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669]; Orchard *v.* Alexander, 157 U. S. 372, 15 S. Ct. 635, 39 L. ed. 737; Cornelius *v.* Kessel, 128 U. S. 456, 9 S. Ct. 122, 32 L. ed. 482; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651; George *v.* Riddle, 94 Fed. 689; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

37. Pfund *v.* Valley L. & T. Co., 52 Nebr. 473, 72 N. W. 480; Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41]; Parsons *v.* Venzke, 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360 [*affirming* 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669]; Orchard *v.* Alexander, 157 U. S. 372, 15 S. Ct. 635, 39 L. ed. 737; American Mortg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293. See, generally, *infra*, II, L, 16, b.

38. *Arizona.*— Old Dominion Copper Min., etc., Co. *v.* Haverly, (1907) 90 Pac. 333; Jeffords *v.* Hine, 2 Ariz. 162, 11 Pac. 351.

Arkansas.—Williamson *v.* Baugh, 71 Ark. 491, 76 S. W. 423.

California.— Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321; Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Potter *v.* Randolph, 126 Cal. 458, 58 Pac. 905; Wormouth *v.* Gardner, 125 Cal. 316, 58 Pac. 20; Hays *v.* Steiger, 76 Cal. 555, 18 Pac. 670; Haven *v.* Haws, 63 Cal. 452; Powers *v.* Leith, 53 Cal. 711; Dilla *v.* Bohall, 53 Cal. 709; Rutledge *v.* Murphy, 51 Cal. 388; Hosmer *v.* Wallace, 47 Cal. 461; Burrell *v.* Haw, 40 Cal. 373.

Colorado.— German Ins. Co. *v.* Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206.

Florida.— Porter *v.* Bishop, 25 Fla. 749, 6 So. 863.

Idaho.— White *v.* Whitcomb, 13 Ida. 490, 90 Pac. 1080; Le Fevre *v.* Amonson, 11 Ida. 45, 81 Pac. 71.

Illinois.— Danforth *v.* Morrical, 84 Ill. 456.

Indiana.— Stewart *v.* Haynes, 6 Blackf. 354.

Kansas.— Freese *v.* Rusk, 54 Kan. 274, 38 Pac. 255; Ard *v.* Pratt, 43 Kan. 419, 23 Pac. 646; Tatro *v.* French, 33 Kan. 49, 5 Pac. 426; Cooke *v.* Blakely, 6 Kan. App. 707, 50 Pac. 981.

Louisiana.— Henry *v.* Welsh, 4 La. 547, 23 Am. Dec. 490.

Michigan.— Boyce *v.* Danz, 29 Mich. 146.

Minnesota.— Lamson *v.* Coffin, 102 Minn. 493, 114 N. W. 248; Sage *v.* Maxwell, 91 Minn. 527, 99 N. W. 42; O'Connor *v.* Gert-

absence of a showing that such decision was rendered in consequence of fraud or

gens, 85 Minn. 481, 89 N. W. 866; Bishop Iron Co. *v.* Hyde, 66 Minn. 24, 68 N. W. 95; Warren *v.* Van Brunt, 12 Minn. 70; State *v.* Batchelder, 7 Minn. 121.

Missouri.— Lewis *v.* Lewis, 9 Mo. 183, 43 Am. Dec. 540.

Montana.— Kennedy *v.* Dickie, 34 Mont. 205, 85 Pac. 982; Love *v.* Flahive, 33 Mont. 348, 83 Pac. 882; Graham *v.* Great Falls Water Power, etc., Co., 30 Mont. 393, 76 Pac. 808.

Nebraska.— Van Sant *v.* Butler, 19 Nebr. 351, 27 N. W. 299; Rush *v.* Valentine, 12 Nebr. 513, 11 N. W. 746; Smiley *v.* Sampson, 1 Nebr. 56.

North Dakota.—Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 (*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360).

Oklahoma.— Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427; Parryman *v.* Cunningham, 16 Okla. 94, 82 Pac. 822; Cagle *v.* Dunham, 14 Okla. 610, 78 Pac. 561; Jordan *v.* Smith, 12 Okla. 703, 73 Pac. 308; Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702; Paine *v.* Foster, 9 Okla. 213, 53 Pac. 109; Cook *v.* McCord, 9 Okla. 200, 60 Pac. 497; Acers *v.* Snyder, 8 Okla. 659, 58 Pac. 780; Calhoun *v.* Violet, 4 Okla. 321, 47 Pac. 479.

Oregon.— Johnson *v.* Bridal Veil Lumbering Co., 24 Oreg. 182, 33 Pac. 528.

South Dakota.— Harrington *v.* Wilson, 10 S. D. 606, 74 N. W. 1055.

Washington.—Gray's Harbor Co. *v.* Drumm, 23 Wash. 706, 63 Pac. 530; Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

Wisconsin.— Lamont *v.* Stimson, 3 Wis. 545, 65 Am. Dec. 696.

Wyoming.— Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

United States.— Hartwell *v.* Havighorst, 196 U. S. 635, 25 S. Ct. 793, 49 L. ed. 629 [*affirming* 11 Okla. 189, 66 Pac. 337]; Potter *v.* Hall, 189 U. S. 292, 23 S. Ct. 545, 47 L. ed. 817 [*reversing* 11 Okla. 173, 65 Pac. 841]; De Cambra *v.* Rogers, 189 U. S. 119, 23 S. Ct. 519, 47 L. ed. 734 [*affirming* 132 Cal. 502, 60 Pac. 863, 64 Pac. 894]; Calhoun *v.* Violet, 173 U. S. 60, 19 S. Ct. 324, 43 L. ed. 614; Johnson *v.* Drew, 171 U. S. 93, 18 S. Ct. 800, 43 L. ed. 88 [*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172]; Stewart *v.* McHarry, 159 U. S. 643, 16 S. Ct. 117, 40 L. ed. 290 [*affirming* (Cal. 1893) 35 Pac. 141]); Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71; Nesqually Catholic Bishop *v.* Gibbon, 158 U. S. 155, 15 S. Ct. 779, 39 L. ed. 931; Carr *v.* Fife, 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508 [*affirming* 44 Fed. 713]; Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992; U. S. *v.* California, etc., Land Co., 148 U. S. 31, 13 S. Ct. 458, 37 L. ed. 354; Knight *v.* U. S. Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Sanford *v.* Sanford, 139 U. S. 642, 11 S. Ct. 666, 35 L. ed. 290; Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566; Wright *v.* Rosebery, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039; Lee *v.* Johnson, 116 U. S. 48, 6 S. Ct. 249, 29 L. ed. 570; U. S. *v.* Minor, 114 U. S. 233, 5 S. Ct. 836, 29 L. ed. 110; Baldwin *v.* Starks, 107 U. S. 463, 2 S. Ct. 473, 27 L. ed. 526; Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Quimby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; Vance *v.* Burbank, 101 U. S. 514, 25 L. ed. 929; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. ed. 800; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Shepley *v.* Cowan, 91 U. S. 330, 23 L. ed. 424; Warren *v.* Van Brunt, 19 Wall. 646, 22 L. ed. 219; Johnson *v.* Towsley, 13 Wall. 72, 20 L. ed. 485; McKenna *v.* Atherton, 160 Fed. 547; Harvey *v.* Holles, 160 Fed. 531; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651; Edwards *v.* Begole, 121 Fed. 1, 57 C. C. A. 245; Manley *v.* Tow, 110 Fed. 241; U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 [*affirmed* in 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836]; U. S. *v.* Coos Bay Wagon-Road Co., 89 Fed. 151; Moss. *v.* Dowman, 88 Fed. 181, 31 C. C. A. 447 [*affirmed* in 176 U. S. 413, 20 S. Ct. 429, 44 L. ed. 526]; Diller *v.* Hawley, 81 Fed. 651, 26 C. C. A. 514 [*reversing* 75 Fed. 946, and *affirmed* in 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157]; Stimson Land Co. *v.* Rawson, 62 Fed. 426; Scott *v.* Lockey Inv. Co., 60 Fed. 34; Puget Mill Co. *v.* Brown, 54 Fed. 987 [*affirmed* in 59 Fed. 35, 7 C. C. A. 643]; Stimson *v.* Clarke, 45 Fed. 760; Carr *v.* Fife, 44 Fed. 713 [*affirmed* in 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508]; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355; Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79; Bear *v.* Luse, 2 Fed. Cas. No. 1,179, 6 Sawy. 148; Leitensdorfer *v.* Campbell, 15 Fed. Cas. No. 8,225; Ayres *v.* U. S., 42 Ct. Cl. 385.

See 41 Cent. Dig. tit. "Public Lands," § 301.

Statutory rule as to Indian claimants.—The act of congress of Aug. 15, 1894 (28 U. S. St. at L. 305), amended by the act of congress of Feb. 6, 1901 (31 U. S. St. at L. 760), conferring upon the circuit courts "jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty," and further providing that any one in whole or in part of Indian blood, who claimed "to have allotment or parcel of land," might bring suit in the proper circuit court for the enforcement of his rights, was intended to vest such courts with full authority to hear and determine every question arising in any suit brought by a claimant to an allotment; and the fact that such questions have been decided by the land department adversely to the claimant neither affects the court's jurisdiction nor concludes it on any matter of law or fact. Sloan *v.* U. S., 118 Fed. 283.

imposition [39] or mistake,[40] other than an error of judgment in estimating the value or effect of evidence,[41] regardless of whether or not it is consistent with the preponderance of the evidence,[42] so long as there is some evidence upon which the finding in question could be made.[43] But the decisions of the department upon

Where a mixed question of law and fact is involved and the court cannot separate it so as to ascertain what the mistake of the law is, the decision of the land department is conclusive. Marquez *v.* Frisbie, 101 U. S. 473, 25 L. ed. 800.

39. *Arizona.*— Old Dominion Copper Min., etc., Co. *v.* Haverly, (1907) 90 Pac. 333; Jeffords *v.* Hine, (1886) 11 Pac. 351.

California.— Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321; Gaga *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Haven *v.* Haws, 63 Cal. 452; Hosmer *v.* Wallace, 47 Cal. 461; Burrell *v.* Haw, 40 Cal. 373.

Colorado.— German Ins. Co. *v.* Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206.

Florida.— Porter *v.* Bishop, 25 Fla. 749, 6 So. 863.

Illinois.— Danforth *v.* Morrical, 84 Ill. 456.

Kansas.— Freese *v.* Rusk, 54 Kan. 274, 38 Pac. 255.

Minnesota.—O'Connor *v.* Gertgens, 85 Minn. 481, 89 N. W. 866; Bishop Iron Co. *v.* Hyde, 66 Minn. 24, 68 N. W. 95.

Montana.— Love *v.* Flahive, 33 Mont. 348, 83 Pac. 882.

Oklahoma.— Cook *v.* McCord, 9 Okla. 200, 60 Pac. 497; King *v.* Thompson, 3 Okla. 644, 39 Pac. 466.

Oregon.— Johnson *v.* Bridal Veil Lumbering Co., 24 Oreg. 182, 33 Pac. 528.

South Dakota.— Harrington *v.* Wilson, 10 S. D. 606, 74 N. W. 1055.

Washington.— Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

Wisconsin.— Lamont *v.* Stimson, 3 Wis. 545, 62 Am. Dec. 696.

Wyoming.— Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

United States.— Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157 [*affirming* 81 Fed. 651, 26 C. C. A. 514 (*reversing* 75 Fed. 946)]; Calhoun *v.* Violett, 173 U. S. 60, 19 S. Ct. 324, 43 L. ed. 614; Johnson *v.* Drew, 171 U. S. 93, 18 S. Ct. 800, 43 L. ed. 88 [*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172]; Stewart *v.* McHarry, 159 U. S. 643, 16 S. Ct. 117, 40 L. ed. 290 (*affirming* (Cal. 1893) 35 Pac. 141); Stewart *v.* McHarry, 159 U. S. 603, 16 S. Ct. 117, 40 L. ed. 290; Carr *v.* Fife, 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508 [*affirming* 44 Fed. 713]; Sanford *v.* Sanford, 139 U. S. 642, 11 S. Ct. 666, 35 L. ed. 290; Lee *v.* Johnson, 116 U. S. 48, 6 S. Ct. 249, 29 L. ed. 570; U. S. *v.* Minor, 114 U. S. 233, 5 S. Ct. 836, 29 L. ed. 110; Baldwin *v.* Starks, 107 U. S. 463, 2 S. Ct. 473, 27 L. ed. 526; Shepley *v.* Cowan, 91 U. S. 330, 23 L. ed. 424; Warren *v.* Van Brunt, 19 Wall. (U. S.) 646, 22 L. ed. 219; Hoyt *v.* Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404; Harvey *v.* Holles, 160 Fed. 531; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 [*affirmed* in 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836]; Puget Mill Co. *v.* Brown, 54 Fed. 987 [*affirmed* in 59 Fed. 35, 7 C. C. A. 643]; Carr *v.* Fife, 44 Fed. 713; Pengra *v.* Munz, 29 Fed. 830; Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79; Bear *v.* Luse, 2 Fed. Cas. No. 1,179, 6 Sawy. 148; Leitensdorfer *v.* Campbell, 15 Fed. Cas. No. 8,225, 5 Dill. 419; Ayres *v.* U. S., 42 Ct. Cl. 385.

See 41 Cent. Dig. tit. "Public Lands," § 301.

Where an issue as to the existence of the fraud was made before the department, and evidence was offered in support thereof, the decision of the department cannot be reviewed because of the alleged fraud. Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

40. *Arizona.*— Old Dominion Copper Min., etc., Co. *v.* Haverly, (1907) 90 Pac. 333.

California.— Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141.

Illinois.— Danforth *v.* Morrical, 84 Ill. 456.

Minnesota.—O'Connor *v.* Gertgens, 85 Minn. 481, 89 N. W. 866.

Oklahoma.— Cook *v.* McCord, 9 Okla. 200, 60 Pac. 497.

South Dakota.— Harrington *v.* Wilson, 10 S. D. 606, 74 N. W. 1055.

United States.— Warren *v.* Van Brint, 19 Wall. 646, 22 L. ed. 219; Hoyt *v.* Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404; Harvey *v.* Hollis, 160 Fed. 531; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 [*affirmed* in 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836]; Pengra *v.* Munz, 29 Fed. 830; Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79; Bear *v.* Luse, 2 Fed. Cas. No. 1,179, 6 Sawy. 148.

See 41 Cent. Dig. tit. "Public Lands," § 301.

41. Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79; Bear *v.* Luse, 2 Fed. Cas. No. 1,179, 6 Sawy. 148.

42. Love *v.* Flahive, 33 Mont. 348, 83 Pac. 882; Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 42 L. ed. 185]; Jordan *v.* Smith, 12 Okla. 703, 73 Pac. 308; Shepley *v.* Cowan, 91 U. S. 330, 23 L. ed. 424.

Sufficiency and competency of evidence.— The courts will not review a decision of the land department on the ground that the evidence was insufficient, or that only incompetent evidence was before it, as the power of the department to try questions of fact embraces the power to pass on the weight and competency of evidence. Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

43. Jordan *v.* Smith, 12 Okla. 703, 73 Pac. 308; Hartwell *v.* Havighorst, 196 U. S. 635, 25 S. Ct. 793, 49 L. ed. 629 [*affirming* 11 Okla. 189, 66 Pac. 337].

questions of law arising upon undisputed evidence are in no sense conclusive upon the courts, but are subject to review,[44] and so any action of the department which is based upon a misconstruction of the law can be corrected by the courts.[45] The decisions of the department on the construction of the land laws are entitled to great respect at the hands of the court,[46] and should not be overruled unless they

Inability to procure attendance of witnesses.— The fact that, under the rules of the land department, the defeated party was unable to procure the attendance of unwilling witnesses, whose testimony would corroborate what had been given, is no ground for review of its decision. Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

44. *California.*— Sousa *v.* Pereira, 132 Cal. 77, 64 Pac. 90; Wormouth *v.* Gardner, 125 Cal. 517, 58 Pac. 20; Hays *v.* Steiger, 76 Cal. 555, 18 Pac. 670; Hosmer *v.* Wallace, 47 Cal. 461.

Florida.— Porter *v.* Bishop, 25 Fla. 749, 6 So. 863.

Kansas.— Tatro *v.* French, 33 Kan. 49, 5 Pac. 426; Emslie *v.* Young, 24 Kan. 732.

Minnesota.— Buffalo Land, etc., Co. *v.* Strong, 91 Minn. 84, 97 N. W. 575; O'Connor *v.* Gertgens, 85 Minn. 481, 89 N. W. 866.

Mississippi.— Shelton *v.* Keirn, 45 Miss. 106.

Missouri.— Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100.

Montana.— Hartman *v.* Smith, 7 Mont. 19, 14 Pac. 648.

Nebraska.— Smiley *v.* Sampson, 1 Nebr. 56.

Nevada.— Hand *v.* Cook, 29 Nev. 518, 92 Pac. 3.

North Dakota.— Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360].

Oklahoma.— U. S. *v.* Citizens' Trading Co., (1907) 93 Pac. 448; Thornton *v.* Peery, 7 Okla. 441, 54 Pac. 649; King *v.* Thompson, 3 Okla. 644, 39 Pac. 466.

Utah.— Lavagnino *v.* Uhlig, 26 Utah 1, 71 Pac. 1046, 99 Am. St. Rep. 808.

Washington.— Whitney *v.* Spratt, 25 Wash. 62, 64 Pac. 919, 87 Am. St. Rep. 738 [*affirmed* in 189 U. S. 346, 23 S. Ct. 576, 47 L. ed. 845]; Grays Harbor Co. *v.* Drumm, 23 Wash. 706, 63 Pac. 530; Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

United States.— Strong *v.* Buffalo Land, etc., Co., 203 U. S. 582, 27 S. Ct. 780, 51 L. ed. 327 [*affirming* 91 Minn. 84, 97 N. W. 575]; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 23 S. Ct. 692, 24 S. Ct. 860, 47 L. ed. 1064 [*affirming* 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230]; Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157 [*affirming* 81 Fed. 651, 26 C. C. A. 514 (*reversing* 75 Fed. 946)]; Black *v.* Jackson, 177 U. S. 349, 20 S. Ct. 648, 44 L. ed. 801 [*reversing* 6 Okla. 751, 52 Pac. 406]; Calhoun *v.* Violet, 173 U. S. 60, 19 S. Ct. 324, 43 L. ed. 614; Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71; Nesqually Catholic Bishop *v.* Gibbon, 158 U. S. 155, 15 S. Ct. 779, 39 L. ed. 931; Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 28 L. ed. 992; U. S. *v.* California., etc., Land Co., 148 U. S. 31, 13 S. Ct. 458, 37 L. ed. 354; Knight *v.* U. S. Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69]; Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566; Wright *v.* Rosebery, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039; Lee *v.* Johnson, 116 U. S. 48, 6 S. Ct. 249, 29 L. ed. 570; U. S. *v.* Minor, 114 U. S. 233, 5 S. Ct. 836, 29 L. ed. 110; Baldwin *v.* Starks, 107 U. S. 463, 2 S. Ct. 473, 27 L. ed. 526; Steele *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 29 L. ed. 667; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Quimby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; Vance *v.* Burbank, 101 U. S. 514, 25 L. ed. 929; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. ed. 800; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Shepley *v.* Cowan, 91 U. S. 330, 23 L. ed. 424; O'Brien *v.* Perry, 1 Black 132, 17 L. ed. 114; Warren *v.* Van Brunt, 19 Wall. 646, 22 L. ed. 219; Johnson *v.* Towsley, 13 Wall. 72, 20 L. ed. 485; Hoyt *v.* Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404; Manley *v.* Tow, 110 Fed. 241; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Linkswiler *v.* Schneider, 95 Fed. 203; Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348 [*reversing* 82 Fed. 807]; U. S. *v.* Coos Bay Wagon-Road Co., 89 Fed. 151; Moss *v.* Dowman, 88 Fed. 181, 31 C. C. A. 447 [*affirmed* in 176 U. S. 413, 20 S. Ct. 429, 44 L. ed. 526]; Diller *v.* Hawley, 81 Fed. 651, 26 C. C. A. 514 [*reversing* 75 Fed. 946, and *affirmed* in 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157]; Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604 [*affirmed* in 49 Fed. 129, 1 C. C. A. 192 [*affirmed* in 166 U. S. 620, 17 S. Ct. 671, 41 L. ed. 1139]; Stimson *v.* Clarke, 45 Fed. 760; Aurora Hill Consol. Min. Co. *v.* Eighty-Five Min. Co., 34 Fed. 515, 12 Sawy. 355; Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79; Bear *v.* Luse, 2 Fed. Cas. No. 1,179, 6 Sawy. 148; Leitendorfer *v.* Campbell, 15 Fed. Cas. No. 8,225, 5 Dill. 419; Ayres *v.* U. S., 42 Ct. Cl. 385.

See 41 Cent. Dig. tit. "Public Lands," § 301.

45. Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157 [*affirming* 81 Fed. 651, 26 C. C. A. 514].

46. U. S. *v.* Healey, 160 U. S. 136, 16 S. Ct. 247, 40 L. ed. 369 [*reversing* 29 Ct. Cl. 115]; Hastings, etc., R. Co. *v.* Whitney, 132 U. S. 357, 10 S. Ct. 112, 33 L. ed. 363 [*affirming* 34 Minn. 538, 27 N. W. 69]; Robertson *v.* Downing, 127 U. S. 607, 8 S. Ct. 1328, 32 L. ed. 269; U. S. *v.* Philbrick, 120 U. S. 52,

are clearly erroneous;[47] and in cases of doubt a construction placed upon a statute by the land department, for a number of years, under which grants have been administered and lands put upon the market and sold, is entitled to considerable weight;[48] but a construction put upon a statutory grant by the land department cannot prevail against a clearly correct legal interpretation.[49] The general rules as to the conclusiveness of decisions of the land department apply to decisions of the secretary of the interior,[50] of the commissioner of the general land office,[51] and of the registers and receivers of the local land offices[52] as to matters within

7 S. Ct. 413, 30 L. ed. 559; Edwards *v.* Darby, 12 Wheat. (U. S.) 206, 6 L. ed. 603; McFadden *v.* Mountain View Min., etc., Co., 97 Fed. 670, 38 C. C. A. 354 [*reversed* on other grounds in 180 U. S. 533, 21 S. Ct. 488, 45 L. ed. 656].

A finding that a subsequent contest is not a separate action, but merely a proceeding supplemental to the original contest brought before the secretary of the interior, will in a collateral action be adopted by the courts. Best *v.* Frazier, 16 Okla. 523, 85 Pac. 1119.

47. Hand *v.* Cook, 29 Nev. 518, 92 Pac. 3; Lavagnino *v.* Uhlig, 26 Utah 1, 71 Pac. 1046, 99 Am. St. Rep. 808; McFadden *v.* Mountain View Min., etc., Co., 97 Fed. 670, 38 C. C. A. 354 [*reversed* on other grounds in 180 U. S. 533, 21 S. Ct. 488, 45 L. ed. 656].

48. Hewitt *v.* Schultz, 180 U. S. 139, 21 S. Ct. 309, 45 L. ed. 463 [*reversing* 7 N. D. 601, 76 N. W. 230, and *followed* in Powers *v.* Slaght, 180 U. S. 173, 21 S. Ct. 319, 45 L. ed. 479 (*affirming* 20 Wash. 712, 55 Pac. 1103); Moore *v.* Cormode, 180 U. S. 167, 21 S. Ct. 324, 45 L. ed. 476 (*affirming* 20 Wash. 305, 55 Pac. 217)]; U. S. *v.* Union Pac. R. Co., 148 U. S. 562, 13 S. Ct. 724, 37 L. ed. 560 [*affirming* 37 Fed. 551].

49. Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264; U. S. *v.* Grand Rapids, etc., R. Co., 154 Fed. 131; Northern Pac. R. Co. *v.* Sanders, 47 Fed. 604 [*affirmed* in 49 Fed. 129, 1 C. C. A. 192 (*affirmed* in 166 U. S. 620, 17 S. Ct. 671, 41 L. ed. 1139)].

50. *Arkansas.*— Williamson *v.* Baugh, 71 Ark. 491, 76 S. W. 423.

California.— Rutledge *v.* Murphy, 51 Cal. 388.

Florida.— Porter *v.* Bishop, 25 Fla. 749, 6 So. 863.

Idaho.— White *v.* Whitcomb, 13 Ida. 490, 90 Pac. 1080.

Oklahoma.— Greenameyer *v.* Coate, 18 Okla. 160, 88 Pac. 1054; McCalla *v.* Acker, 15 Okla. 52, 78 Pac. 223; Forney *v.* Dow, 13 Okla. 258, 73 Pac. 1101; Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702; Acers *v.* Snyder, 8 Okla. 659, 58 Pac. 780.

Washington.— Keane *v.* Brygger, 3 Wash. 338, 28 Pac. 653 [*affirmed* in 160 U. S. 276, 16 S. Ct. 278, 40 L. ed. 426].

United States.— Northern Pac. R. Co. *v.* Colburn, 164 U. S. 383, 17 S. Ct. 98, 41 L. ed. 479 [*reversing* 13 Mont. 476, 34 Pac. 1017]; St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. ed. 767 [*reversing* 26 Fed. 569]; Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646 [*affirmed* in 161 U. S. 656, 12 S. Ct. 113, 35 L. ed. 891]; Diller *v.* Hawley, 81 Fed. 651, 26 C. C. A. 514 [*reversing* 75 Fed. 946, and *affirmed* in 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157]; Carr *v.* Fife, 44 Fed. 713; Southern Pac. R. Co. *v.* Wiggs, 43 Fed. 333; Pugsley *v.* Brown, 35 Fed. 688; U. S. *v.* Murphy, 32 Fed. 376; Pengra *v.* Munz, 29 Fed. 830.

See 41 Cent. Dig. tit. "Public Lands," § 304.

Courts will not entertain an inquiry as to the extent of the investigation by the secretary of the interior and his knowledge of the points involved in his decision of a contest in the land department, or as to the methods by which he reached his determination. De Camba *v.* Rogers, 189 U. S. 119, 23 S. Ct. 519, 47 L. ed. 734 [*affirming* 132 Cal. 502, 60 Pac. 863, 64 Pac. 894].

51. *California.*— Rutledge *v.* Murphy, 51 Cal. 388.

Mississippi.— Shelton *v.* Keirn, 45 Miss. 106.

Missouri.— Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100.

Montana.— Hartman *v.* Smith, 7 Mont. 19, 14 Pac. 648.

North Dakota.—Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360].

United States.— Glidden *v.* Union Pac. R. Co., 30 Fed. 660.

See 41 Cent. Dig. tit. "Public Lands," § 303.

52. *Arkansas.*— Nicks *v.* Rector, 4 Ark. 251.

California.— Hess *v.* Bolinger, 48 Cal. 349 [*following* Hosmer *v.* Wallace, 47 Cal. 461].

Illinois.— Jackson *v.* Wilcox, 2 Ill. 344.

Indiana.— Stewart *v.* Haynes, 6 Blackf. 354.

Louisiana.— Munford *v.* McKinney, 21 La. Ann. 547; Ford *v.* Morancy, 14 La. Ann. 77; Henry *v.* Welsh, 4 La. 547, 23 Am. Dec. 490.

Michigan.— Boyce *v.* Danz, 29 Mich. 146.

Missouri.— Lewis *v.* Lewis, 9 Mo. 183, 43 Am. Dec. 540; Bird *v.* Ward, 1 Mo. 398, 13 Am. Dec. 506.

Nebraska.— Van Sant *v.* Butler, 19 Nebr. 351, 27 N. W. 299; Rush *v.* Valentine, 12 Nebr. 513, 11 N. W. 746; Smiley *v.* Sampson, 1 Nebr. 56.

Wisconsin.—Bracken *v.* Parkinson, 1 Pinn. 685.

See 41 Cent. Dig. tit. "Public Lands," § 302.

their jurisdiction.[53] It is the duty of the courts to give full effect to the decisions of the land department so long as they stand unimpeached;[54] but in order to be conclusive upon the courts, the decisions of the land department must be made according to the regular rules of practice of the department,[55] and must be based on legal evidence or upon some formal inquest, at which the parties have a fair opportunity of presenting evidence to support the rights which they assert.[56]

b. Questions Concluded. The decision of the land department is conclusive as to the character of particular land;[57] whether or not certain land was settled upon and occupied[58] at a particular time[59] by a particular person;[60] the time when a claimant first became an actual settler;[61] the qualifications of an applicant to enter land;[62] the good faith of a purchaser, applicant, or contestant;[63] whether an entry was made for speculative purposes;[64] whether or not a claimant has conformed to the requirements of the law under which he claims,[65] the sufficiency of his proofs,[66] and the sufficiency and validity of documents presented with his application to enter the land;[67] the sufficiency of a claimant's settlement, residence, and improvements,[68] the character and purpose of his

Parties bound.— The decision of the receiver and register of the land office as to a preëmption right is conclusive only with relation to the preëmption right against the government, and not as to the equitable rights of prior grantees of the preëmptor. Bird *v.* Ward, 1 Mo. 398, 13 Am. Dec. 506.

53. Nick *v.* Rector, 4 Ark. 251, holding that a decision of the register and receiver that the improvement of an actual settler and preëmption claimant had been legally located by a donation claim, being beyond their jurisdiction, is not conclusive.

54. McDonald *v.* Brady, 9 Okla. 660, 60 Pac. 509.

The recitals in the decisions of the department officials will, in the absence of the pleadings, be taken as conclusive as to what issues of fact were determined by the department. Parryman *v.* Cunningham, 16 Okla. 94, 82 Pac. 822.

55. Puget Mill Co. *v.* Brown, 54 Fed. 987 [*affirmed* in 59 Fed. 35, 7 C. C. A. 643].

Mode and rules of procedure see *supra*, II, L, 8.

56. Puget Mill Co. *v.* Brown, 54 Fed. 987 [*affirmed* in 59 Fed. 35, 7 C. C. A. 643].

57. *Arkansas.*— Williamson *v.* Baugh, 71 Ark. 491, 76 S. W. 423.

California.— Standard Quicksilver Co. *v.* Habishaw, 132 Cal. 115, 64 Pac. 113; Potter *v.* Randolph, 126 Cal. 458, 58 Pac. 905; Saunders *v.* La Purisima Gold Min. Co., 125 Cal. 159, 57 Pac. 656; Cragie *v.* Roberts, 6 Cal. App. 309, 92 Pac. 97.

District of Columbia.— Warner Valley Stock Co. *v.* Smith, 9 App. Cas. 187.

Idaho.— Le Fevre *v.* Amonson, 11 Ida. 45, 81 Pac. 71.

Iowa.— Root *v.* Wallace, 109 Iowa 5, 79 N. W. 449; Iowa R. Land Co. *v.* Antoine, 52 Iowa 429, 3 N. W. 468.

Oregon.— Johnson *v.* Bridal Veil Lumbering Co., 24 Oreg. 182, 33 Pac. 528.

Utah.—Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571.

United States.— U. S. *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176; Scott *v.* Lockey Inv. Co., 60 Fed. 34.

See 41 Cent. Dig. tit. "Public Lands," § 301.

58. State *v.* Batchelder, 7 Minn. 121; Leech *v.* Rauch, 3 Minn. 448; Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571; Johnson *v.* Drew, 171 U. S. 93, 18 S. Ct. 800, 43 L. ed. 88 [*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172].

59. Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571; Johnson *v.* Drew, 171 U. S. 93, 18 S. Ct. 800, 43 L. ed. 88 [*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172].

60. Johnson *v.* Drew, 171 U. S. 93, 18 S. Ct. 800, 43 L. ed. 88 [*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172].

61. Edwards *v.* Begole, 121 Fed. 1, 57 C. C. A. 245.

62. Burrell *v.* Haw, 48 Cal. 222, 40 Cal. 373; Mankato *v.* Meagher, 17 Minn. 265 (competency of land company to take a town site); Brown *v.* Donnelly, 9 Okla. 32, 59 Pac. 975; Baldwin *v.* Starks, 107 U. S. 463, 2 S. Ct. 473, 27 L. ed. 526.

63. Graham *v.* Great Falls Water Power, etc., Co., 30 Mont. 393, 76 Pac. 808; Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427; Reaves *v.* Oliver, 3 Okla. 62, 41 Pac. 353; Linkswiler *v.* Schneider, 95 Fed. 203; Diller *v.* Hawley, 81 Fed. 651, 26 C. C. A. 514 [*reversing* 75 Fed. 946, and *affirmed* in 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157]; Pugsley *v.* Brown, 35 Fed. 688.

64. Diller *v.* Hawley, 81 Fed. 651, 26 C. C. A. 514 [*reversing* 75 Fed. 946, and *affirmed* in 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157].

65. Ard *v.* Pratt, 43 Kan. 419, 23 Pac. 646; Vance *v.* Burbank, 101 U. S. 514, 25 L. ed. 929.

66. Danforth *v.* Morrical, 84 Ill. 456; Castner *v.* Gunther, 6 Minn. 119.

67. Lamson *v.* Coffin, 102 Minn. 493, 114 N. W. 248.

68. Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321; Dilla *v.* Bohall, 53 Cal. 709; Danforth *v.* Morrical, 84 Ill. 456; Hill *v.* McCord, 195 U. S. 395, 25 S. Ct. 96, 49 L. ed. 251 [*affirming* 117 Wis. 306, 94 N. W. 65]; Stewart *v.* McHarry,

settlement,[69] and whether or not he has abandoned the land; [70] the boundaries of conflicting claims; [71] whether a homestead claimant to lands in Oklahoma entered the territory prior to the time fixed by the statute and the president's proclamation,[72] or obtained a substantial advantage over others taking part in the race for land opened to settlement; [73] the location and boundaries of a grant,[74] and whether particular lands are embraced therein; [75] within which of two grants to a state particular land falls; [76] and whether selections of land in satisfaction of grants were made as required by statute.[77] But the decision of the secretary of the interior or the officers of the land department is not conclusive as to the validity of a grant under a former sovereignty and its binding effect under the treaty of cession,[78] whether the United States had title to particular land at the time of its adjudication to certain persons by the land officers,[79] or whether the occupation and cultivation of land created a claim exempting the land from the operation of a railroad grant.[80]

16. Jurisdiction of Courts[81] — a. In General. The courts have no jurisdiction to determine the rights of adverse claimants to public lands until the disposition of the land has passed from the control of the federal land department,[82] but prior

159 U. S. 643, 16 S. Ct. 117, 40 L. ed. 290 [*affirming* (1893) 35 Pac. 141]; Vance *v.* Burbank, 101 U. S. 514, 25 L. ed. 929; Shepley *v.* Cowan, 91 U. S. 330, 23 L. ed. 424; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659.

Effect of later decision.— The conclusiveness on the courts of a finding of the land department made in allowing a homestead entry, of the sufficiency of settlement, residence, and improvements, is not affected by a later decision, in a second contest between the same parties, that the alienation of the land was a bar to supplemental proofs offered in aid of a premature commutation entry. Hill *v.* McCord, 195 U. S. 395, 25 S. Ct. 96, 49 L. ed. 251 [*affirming* 117 Wis. 306, 94 N. W. 65].

69. Lee *v.* Johnson, 116 U. S. 48, 6 S. Ct. 249, 29 L. ed. 570.

70. Cook *v.* McCord, 9 Okla. 200, 60 Pac. 497.

71. Sandoz *v.* Ozenne, 13 La. Ann. 616.

72. Calhoun *v.* Violet, 173 U. S. 60, 19 S. Ct. 324, 43 L. ed. 614.

73. Potter *v.* Hall, 189 U. S. 292, 23 S. Ct. 545, 47 L. ed. 817 [*reversing* 11 Okla. 173, 65 Pac. 841].

74. Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646.

75. Colburn *v.* Northern Pac. R. Co., 13 Mont. 476, 34 Pac. 1017 [*reversed* on other grounds in 164 U. S. 383, 17 S. Ct. 98, 41 L. ed. 479, and *followed* in Moore *v.* Northern Pac. R. Co., 18 Mont. 290, 45 Pac. 215]. But *compare* U. S. *v.* Coos Bay Wagon-Road Co., 89 Fed. 151, holding that whether lands are within the limits or subject to the operation of a grant for public improvements is not a question of fact so as to be concluded by the judgment of the land department.

76. Pengra *v.* Munz, 29 Fed. 830.

77. Wilkinson *v.* Merrill, 52 Cal. 424.

78. Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646.

79. Marks *v.* Martin, 27 La. Ann. 527; Copley *v.* Dinkgrave, 25 La. Ann. 577.

80. Northern Pac. R. Co. *v.* Colburn, 164 U. S. 383, 17 S. Ct. 98, 41 L. ed. 479 [*reversing* 13 Mont. 476, 34 Pac. 1017].

81. See, generally, Courts, 11 Cyc. 633.

82. *Alaska.*— Allen *v.* Myers, 1 Alaska 114.

California.— Thompson *v.* Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321; Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Brandt *v.* Wheaton, 52 Cal. 430.

Dakota.—Vantongreen *v.* Heffernan, 5 Dak. 180, 38 N. W. 52; Forbes *v.* Driscoll, 4 Dak. 336, 31 N. W. 633.

Florida.— Smith *v.* Love, 49 Fla. 230, 38 So. 376.

Idaho.— Le Fevre *v.* Amonson, 11 Ida. 45, 81 Pac. 71.

Iowa.— Wood *v.* Murray, 85 Iowa 505, 52 N. W. 356.

Louisiana.— Marks *v.* Martin, 27 La. Ann. 527; Copley *v.* Dinkgrave, 25 La. Ann. 577.

Minnesota.— Sims *v.* Morrison, 92 Minn. 341, 100 N. W. 88; St. Paul, etc., R. Co. *v.* Olson, 87 Minn. 117, 91 N. W. 294, 94 Am. St. Rep. 693; Matthews *v.* O'Brien, 84 Minn. 505, 88 N. W. 12 [*following* McHenry *v.* Nygaard, 72 Minn. 2, 74 N. W. 1106].

Nebraska.— Morton *v.* Green, 2 Nebr. 441.

North Dakota.— Zimmerman *v.* McCurdy, 15 N. D. 79, 106 N. W. 125; Healey *v.* Forman, 14 N. D. 449, 105 N. W. 233; Martinson *v.* Marzolf, 14 N. D. 301, 103 N. W. 937; Grandin *v.* La Bar, 3 N. D. 446, 57 N. W. 241.

Oklahoma.— Hamilton *v.* Foster, 16 Okla. 220, 82 Pac. 821; Jordan *v.* Smith, 12 Okla. 703, 73 Pac. 308; McQuiston *v.* Walton, 12 Okla. 130, 69 Pac. 1048; Hebeisen *v.* Hatchell, 12 Okla. 29, 69 Pac. 888 [*followed* in Best *v.* Frazier, 16 Okla. 523, 85 Pac. 1119]; Fitzgerald *v.* Foster, 11 Okla. 558, 69 Pac. 878; Hammer *v.* Hermann, 11 Okla. 127, 65 Pac. 943; Wilbourne *v.* Baldwin, 5 Okla. 265, 47 Pac. 1045; Fitzgerald *v.* Keith, 5 Okla. 260, 48 Pac. 110; Twine *v.* Carey, 2 Okla. 249, 37 Pac. 1096 [*followed* in Mathews *v.* Young, 2 Okla. 616, 39 Pac. 387]; Commager

to such time and pending a contest in the land department the courts can and will protect the rights of the parties so far as this can be done without deciding the controversy before the department.[83] So the courts will carry into effect the decisions of the officers of the land department and protect the possessory rights of the persons entitled to possession while the title remains in the United States.[84]

v. Dicks, 1 Okla. 82, 28 Pac. 864; Adams *v.* Couch, 1 Okla. 17, 26 Pac. 1009.

Oregon.— Frink *v.* Thomas, 20 Oreg. 265, 25 Pac. 717, 12 L. R. A. 239; Moore *v.* Fields, 1 Oreg. 317; Pin *v.* Morris, 1 Oreg. 230.

South Dakota.— Reservation State Bank *v.* Holst, 17 S. D. 240, 95 N. W. 931, 70 L. R. A. 799.

Washington.— Colwell *v.* Smith, 1 Wash. Terr. 92.

Wisconsin.— Empey *v.* Plugert, 64 Wis. 603, 25 N. W. 560.

United States.— Oregon *v.* Hitchcock, 202 U. S. 60, 26 S. Ct. 568, 50 L. ed. 935; Humbird *v.* Avery, 195 U. S. 480, 25 S. Ct. 123, 49 L. ed. 286 [*affirming* 110 Fed. 465]; Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S. 301, 24 S. Ct. 860, 47 L. ed. 1064 [*affirming* 112 Fed. 4 (*affirming* 104 Fed. 20)]; Brown *v.* Hitchcock, 173 U. S. 473, 19 S. Ct. 485, 43 L. ed. 772; U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. ed. 800 [*followed* in Casey *v.* Vassor, 50 Fed. 258]; Jones *v.* Hoover, 144 Fed. 217; Sage *v.* U. S., 140 Fed. 65, 71 C. C. A. 404; Northern Lumber Co. *v.* O'Brien, 124 Fed. 819; Casey *v.* Vassor, 50 Fed. 278. See also Walker *v.* Smith, 29 Fed. Cas. No. 17,085*a*, 2 Hayw. & H. 230 [*affirmed* in 21 How. 579, 16 L. ed. 223].

See 41 Cent. Dig. tit. "Public Lands," § 307.

The courts will not interfere with the discretion of the land officers in their transfer to whom they see fit of the title of the United States to land. Marks *v.* Martin, 27 La. Ann. 527; Copley *v.* Dinkgrave, 25 La. Ann. 577.

A state court has jurisdiction of an action to quiet title, pending the determination of a contest of plaintiff's title before the United States land department, dependent on whether the lands are agricultural or mineral; but it is proper to delay the trial until the question as to the character of the land is determined by the land department which alone has the power to decide that controversy. Potter *v.* Randolph, 126 Cal. 458, 58 Pac. 905.

The state courts cannot compel the conveyance of land subject to entry and settlement under the homestead laws of the United States to a person to whom the officials of the land department have denied the privilege of making such entry and settlement. McDonald *v.* Union Pac. R. Co., 70 Nebr. 346, 97 N. W. 440.

83. *Colorado.*— Fulmele *v.* Camp, 20 Colo. 495, 39 Pac. 407.

Iowa.— Wood *v.* Murray, 85 Iowa 505, 52 N. W. 356.

Minnesota.— Matthews *v.* O'Brien, 84 Minn. 505, 88 N. W. 12.

North Dakota.— Zimmerman *v.* McCurdy, 15 N. D. 79, 106 N. W. 125.

Oklahoma.— Clack *v.* Diehl, 5 Okla. 148, 48 Pac. 178; Reaves *v.* Oliver, 3 Okla. 62, 41 Pac. 353; Sproat *v.* Durland, 2 Okla. 24, 35 Pac. 682, 886 [*followed* in Potts *v.* Hollon, 6 Okla. 696, 52 Pac. 917].

Oregon.— Woodsides *v.* Rickey, 1 Oreg. 108.

South Dakota.— Reservation State Bank *v.* Holst, 17 S. D. 240, 95 N. W. 931, 70 L. R. A. 799.

Washington.— Colwell *v.* Smith, 1 Wash. Terr. 92.

Wyoming.— Laramie Nat. Bank *v.* Steinhoff, 11 Wyo. 290, 71 Pac. 992, 73 Pac. 209.

United States.— Jones *v.* Hoover, 144 Fed. 217; Northern Lumber Co. *v.* O'Brien, 124 Fed. 819.

See 41 Cent. Dig. tit. "Public Lands," § 307.

The courts have power to protect a settler from any invasion of or actual injury to his claim. Woodsides *v.* Rickey, 1 Oreg. 108.

The regulations of the commissioner of the general land office, whereby an adverse claimant may be held to prove his better right to enter public lands, do not oust the jurisdiction of the courts. Turner *v.* Sawyer, 150 U. S. 578, 14 S. Ct. 192, 37 L. ed. 1189.

84. McQuiston *v.* Walton, 12 Okla. 130, 69 Pac. 1048; Brown *v.* Hartshorn, 12 Okla. 121, 69 Pac. 1049; McDonald *v.* Brady, 9 Okla. 660, 60 Pac. 509; Barnett *v.* Ruyle, 9 Okla. 635, 60 Pac. 243; Brown *v.* Donnelly, 9 Okla. 32, 59 Pac. 975; Glover *v.* Swartz, 8 Okla. 642, 58 Pac. 943; Cox *v.* Garrett, 7 Okla. 375, 54 Pac. 546; Calhoun *v.* McCornack, 7 Okla. 347, 54 Pac. 493; Barnes *v.* Newton, 5 Okla. 428, 48 Pac. 190, 49 Pac. 1074; Woodruff *v.* Wallace, 3 Okla. 355, 41 Pac. 357; Reaves *v.* Oliver, 3 Okla. 62, 41 Pac. 353.

Mandatory injunction is a proper remedy to protect the possession of one having a valid homestead entry on public land against persons who are trespassing on the land. Reaves *v.* Oliver, 3 Okla. 62, 41 Pac. 353.

Sufficiency of complaint.—A complaint alleging the filing of plaintiff's declaratory statement, claiming to preëmpt two subdivisions of land under the laws of the United States; that he was a legally qualified preëmptor under said laws; that he had been in the peaceable possession of the land, complying with the requirements of said laws, in doing all necessary acts of residence and cultivation; that defendant unlawfully and wrongfully took possession of one of the subdivisions, and prevented and forcibly resisted plaintiff from taking possession thereof; that defendant forcibly resists plaintiff taking possession of the land in order to do the necessary acts of residence and

After a contest is finally disposed of in the land department and the legal title has passed from the United States, the parties must assert and enforce their rights in the courts,[85] which will decide their rights under the law, without reference to the actions of the officers of the land office.[86]

b. Review of Decisions of Land Department.[87] The courts cannot exercise any direct appellate jurisdiction over the rulings of the officers of the land department,[88] nor can they reverse or correct such rulings in collateral proceedings between private parties;[89] but the decisions of the land department are subject to review by the courts,[90] to the extent that where the department has fallen into error and denied to parties the rights to which they were entitled, the courts can in a proper proceeding interfere and refuse to give effect to the action of the department,[91] or set aside or correct its decisions as equity may require,[92] although this cannot be done until after title has passed from the government.[93] A decision of the land department in a contest should be sustained by the courts unless there are clear and cogent reasons for overthrowing it,[94] and it appears that there has been a clear misapplication of the law to the facts;[95] and a court of equity will not inquire into any question of a misapplication of law by the officers of the land department to a controverted question of fact before them, unless the findings of fact and conclusions of such officers are set out fully in the pleading of the complaining party.[96] An allegation, in a bill to review a decision of the land department, that at the time

cultivation thereon; and that defendant is wholly insolvent, is sufficient to sustain a suit for an injunction to compel defendant to desist from doing such acts, and to admit plaintiff into the possession of the land. Jackson *v.* Jackson, 17 Oreg. 110, 19 Pac. 847.

Where the court is satisfied of the correctness of the rulings of the land department, it will not stultify itself or compromise its judgment by withholding from the successful party a portion of the relief to which he is entitled, in order to enable the unsuccessful party to wage some future independent action to test the correctness of the department's conclusions and judgment. McDonald *v.* Brady, 9 Okla. 660, 60 Pac. 509.

Pendency of proceeding to reopen case.— The fact that proceedings are instituted by the unsuccessful contestant in a contest case before the general land office, asking the secretary of the interior to reopen the case, does not preclude the court from taking jurisdiction in forcible entry and detainer instituted by the successful contestant. Smith *v.* Finger, 15 Okla. 120, 79 Pac. 759. See also Cox *v.* Garrett, 7 Okla. 375, 54 Pac. 546.

85. Sage *v.* Rudnick, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106; Northern Pac. R. Co. *v.* Spray, 27 Wash. 1, 67 Pac. 377.

A notice of the final decision of the land officers is not an absolutely necessary condition precedent to the bringing of an action by the successful party to recover the possession of real estate. Kirtley *v.* Dykes, 10 Okla. 16, 62 Pac. 808.

When contest closed.—The hearing of a contest before the secretary of the interior on a motion for review or rehearing is the final determination of the case and decisive of the rights of the parties and closes the contest. Howe *v.* Parker, 18 Okla. 282, 90 Pac. 15; Cope *v.* Braden, 11 Okla. 291, 67 Pac. 475.

86. Walsh *v.* Lallande, 25 La. Ann. 188.

87. Attack on and setting aside patent see *infra*, II, D, 2.

88. Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800.

89. Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800.

90. Garton *v.* Cannada, 39 Mo. 357; Hill *v.* Miller, 36 Mo. 182; Lindsey *v.* Hawes, 2 Black (U. S.) 554, 17 L. ed. 265; Lytle *v.* Arkansas, 22 How. (U. S.) 193, 16 L. ed. 306 [*affirming* 17 Ark. 608].

91. Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800.

92. Lindsey *v.* Hawes, 2 Black (U. S.) 554, 17 L. ed. 265; Hoyt *v.* Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404.

93. Fitzgerald *v.* Keith, 5 Okla. 260, 48 Pac. 110. See, generally, *supra*, II, L, 16, a.

Cancellation of entry.— The court cannot revise the decision of the commissioner of the general land office canceling a certificate of entry, the government not being divested of title until the patent issues. Haydel *v.* Nixon, 5 La. Ann. 558.

94. Sanford *v.* King, 19 S. D. 334, 103 N. W. 28.

Presumption.— In a proceeding to review a decision of the secretary of the interior on a question of title to land, it will be presumed that the secretary found as proved sufficient facts to support his judgment, where his findings of fact are not set out, but the evidence on which the judgment is based is outlined. Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

95. Greenameyer *v.* Coate, 18 Okla. 160, 88 Pac. 1054; Small *v.* Rakestraw, 196 U. S. 403, 25 S. Ct. 285, 49 L. ed. 527 [*affirming* 28 Mont. 413, 72 Pac. 746, 104 Am. St. Rep. 691]; Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800.

96. Thornton *v.* Peery, 7 Okla. 441, 54 Pac. 649.

of an entry there was in force in the land department "a rule and regulation and a settled practice" to the effect stated is sufficient on demurrer.[97]

M. Patents[98]— **1. In General.** A patent is the government conveyance; the instrument which, under the land laws, passes the title of the United States.[99] Neither the president nor any officer of the government has any power to dispose of the public domain, or to sign or cause the seal of the United States to be affixed to a patent, except such as is conferred by a statute of the United States.[1]

2. Necessity of Patent to Vest Title.[2] As a general rule [3] the issuance of a patent is necessary to divest the United States of the legal title to any of the public lands, and vest such title in an individual; [4] and a state has no power to declare any title less than a patent valid against the claim of the United States, or against a title held under a patent granted by the United States.[5]

3. Status and Rights of Purchaser or Grantee Before Patent Issued. The execution and delivery of a patent to a person entitled thereto are mere ministerial acts of the officers charged with that duty,[6] and when the right to a patent becomes perfect the full equitable title passes to the purchaser or grantee [7] with all the

97. Germania Iron Co. *v.* James, 89 Fed. 811, 32 C. C. A. 348.

98. **Patents for inventions** see PATENTS, 30 Cyc. 803.

99. Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Stimson Land Co. *v.* Rawson, 62 Fed. 426; Patterson *v.* Tatum, 18 Fed. Cas. No. 10,830, 3 Sawy. 164.

1. McGarrahan *v.* New Idria Min. Co., 49 Cal. 331 [*affirmed* in 96 U. S. 316, 24 L. ed. 630].

2. **Under swamp land grant** see *supra*, II, I, l, e.

Under railroad grants see *supra*, II, K, l, f.

Direct grants by congress vesting title without patent see *supra*, II, E, 1.

3. This rule is not without exceptions. Ford *v.* Morancy, 14 La. Ann. 77; Climer *v.* Selby, 10 La. Ann. 182.

4. *Alabama.*— Wood *v.* Pittman, 113 Ala. 207, 20 So. 972.

Florida.— Hagan *v.* Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. Rep. 167.

Louisiana.— Ford *v.* Morancy, 14 La. Ann. 77; Climer *v.* Selby, 10 La. Ann. 182; Foley *v.* Harrison, 5 La. Ann. 75; Pepper *v.* Dunlap, 9 Rob. 283; Boatner *v.* Ventress, 8 Mart. N. S. 644, 20 Am. Dec. 266.

Mississippi.— Sweatt *v.* Corcoran, 37 Miss. 513.

Missouri.— Carman *v.* Johnson, 20 Mo. 108, 61 Am. Dec. 593.

North Dakota.— Bowne *v.* Wolcott, 1 N. D. 415, 48 N. W. 336.

Oklahoma.— Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427.

South Dakota.— Gould *v.* Tucker, 18 S. D. 281, 100 N. W. 427.

Wisconsin.— Hammer *v.* Hammer, 39 Wis. 182.

United States.— Niles *v.* Cedar Point Club, 175 U. S. 300, 20 S. Ct. 124, 44 L. ed. 171 [*affirming* 85 Fed. 45, 29 C. C. A. 5]; Michigan Land, etc., Co. *v.* Rust, 168 U. S. 589, 18 S. Ct. 208, 42 L. ed. 591 [*affirming* 68 Fed. 155, 15 C. C. A. 335] (where the granting act specifically provides for the issuance of patents); U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; Wilcox *v.* Jackson, 13 Pet. 498, 10 L. ed. 264; Bagnell *v.* Broderick, 13 Pet. 436, 10 L. ed. 235; Gibson *v.* Chouteau, 13 Wall. 92, 20 L. ed. 534; Stimson Land Co. *v.* Rawson, 62 Fed. 426; Bronson *v.* Kukuk, 4 Fed. Cas. No. 1,929, 3 Dill. 490.

See 41 Cent. Dig. tit. "Public Lands," § 309.

Confirmation of titles in ceded lands.— The confirmation by congress of titles to land within the Northwest Territory, ceded by Virginia to the United States on condition that the settlers in the territory should have their possession and titles confirmed to them, was not a grant by the United States, as the title had never vested in it, and therefore a patent was not necessary to show a settler's title, and any written evidence of the confirmation was sufficient. Reichert *v.* Felps, 6 Wall. (U. S.) 160, 18 L. ed. 849.

5. Foley *v.* Harrison, 5 La. Ann. 75; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264.

6. Simmons *v.* Wagner, 101 U. S. 260, 25 L. ed. 910; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

7. *Indiana.*— Doe *v.* Hearick, 14 Ind. 242.

Iowa.— McDaniel *v.* Large, 55 Iowa 312, 7 N. W. 632; Cady *v.* Eighmy, 54 Iowa 615, 7 N. W. 102; Rankin *v.* Miller, 43 Iowa 11; Waters *v.* Bush, 42 Iowa 255.

Mississippi.— Dale *v.* Griffith, (1908) 46 So. 543; Nelson *v.* Sims, 23 Miss. 383, 57 Am. Dec. 144.

Oklahoma.— Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427; Laughlin *v.* Fariss, 7 Okla. 1, 50 Pac. 254.

Oregon.— Budd *v.* Gallier, (1907) 89 Pac. 638.

Washington.— Peterson *v.* Sloss, 39 Wash. 207, 81 Pac. 744.

Wisconsin.— Hammer *v.* Hammer, 39 Wis. 182.

Wyoming.— Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

United States.— U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)]; Benson Min., etc., Co. *v.* Alta Min., etc., Co., 145 U. S. 428, 12

benefits, immunities, and burdens of ownership,[8] and the government holds the naked legal title in trust for him.[9]

4. Patent Certificates. A patent certificate or final certificate of purchase protects the purchaser's right as fully and is as binding on the government as a patent;[10] but it does not convey the legal title in fee simple,[11] although after the lapse of more than twenty years it may be presumed that a patent was issued to the certificate holder.[12]

5. Form and Requisites of Patents. It is provided by statute that all patents issuing from the general land office shall be issued in the name of the United States,[13] and be signed by the president,[14] or in the name of the president by his secretary,[15] or an executive clerk,[16] and countersigned by the recorder of the general land office,[17] and recorded in the general land office in books kept for that purpose.[18] These provisions are mandatory,[19] and each of the integral acts to be performed is essential to the validity of the patent,[20] and no equivalent for any of the required formalities is allowed.[21] It is not necessary that a patent should be attested by witnesses.[22] A description which will identify the lands is all that is necessary to the validity of a patent.[23]

S. Ct. 877, 36 L. ed. 762; Simmons *v.* Wagner, 101 U. S. 260, 25 L. ed. 910; Wirth *v.* Branson, 98 U. S. 118, 25 L. ed. 86; Stark *v.* Starr, 6 Wall. 402, 18 L. ed. 925; Witherspoon *v.* Duncan, 4 Wall. 210, 18 L. ed. 339; Carroll *v.* Safford, 3 How. 441, 11 L. ed. 671; Stimson Land Co. *v.* Rawson, 62 Fed. 426; McClung *v.* Steen, 32 Fed. 373; Wallerton *v.* Snow, 15 Fed. 401, 5 McCrary 64.

See 41 Cent. Dig. tit. "Public Lands," § 309.

8. Benson Min., etc., Co. *v.* Alta Min., etc., Co., 145 U. S. 428, 12 S. Ct. 877, 36 L. ed. 762; Robinson *v.* Caldwell, 67 Fed. 391, 14 C. C. A. 448 (grantee entitled to be quieted in possession); Stimson Land Co. *v.* Rawson, 62 Fed. 426. See also Goodlet *v.* Smithson, 5 Port. (Ala.) 245, 30 Am. Dec. 561.

9. Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488; Lindsey *v.* Hawes, 2 Black (U. S.) 554, 17 L. ed. 265; Carroll *v.* Safford, 3 How. (U. S.) 441, 11 L. ed. 671; Stimson Land Co. *v.* Rawson, 62 Fed. 426; U. S. *v.* Freyberg, 32 Fed. 195.

In case of a resale the second purchaser would take the title charged with the trust. Lindsey *v.* Hawes, 2 Black (U. S.) 554, 17 L. ed. 265; Carroll *v.* Safford, 3 How. (U. S.) 441, 11 L. ed. 671; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

10. Fulton *v.* Doe, 5 How. (Miss.) 751; Bowne *v.* Wolcott, 1 N. D. 415, 48 N. W. 336; Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427; Witherspoon *v.* Duncan, 4 Wall. (U. S.) 210, 18 L. ed. 339; Carroll *v.* Safford, 3 How. (U. S.) 441, 11 L. ed. 671; Stimson Land Co. *v.* Rawson, 62 Fed. 426; Astrom *v.* Hammond, 2 Fed. Cas. No. 596, 3 McLean 107.

The receiver's final receipt is an acknowledgment by the government that it has received full pay for the land, and that it holds the legal title in trust for the entryman and will in due course issue to him a patent therefor. Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488; U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)].

11. Bowne *v.* Wolcott, 1 N. D. 415, 48 N. W. 336. And see *supra*, II, M, 2.

12. Culbertson *v.* Coleman, 47 Wis. 193, 2 N. W. 124.

13. U. S. Rev. St. (1878) § 458 [U. S. Comp. St. (1901) p. 259].

14. U. S. Rev. St. (1878) § 458 [U. S. Comp. St. (1901) p. 259].

15. U. S. Rev. St. (1878) § 450 [U. S. Comp. St. (1901) p. 256]. See Bonds *v.* Hickman, 29 Cal. 460.

16. 20 U. S. St. at L. 183, c. 329, § 1 [U. S. Comp. St. (1901) p. 257].

17. U. S. Rev. St. (1878) § 458 [U. S. Comp. St. (1901) p. 259]. See McGarrahan *v.* New Idria Min. Co., 96 U. S. 316, 24 L. ed. 630 [*affirming* 49 Cal. 331].

18. U. S. Rev. St. (1878) § 458 [U. S. Comp. St. (1901) p. 259]. See also *infra*, II, M, 6.

19. Aspen *v.* Aspen Town, etc., Co., 10 Colo. 191, 15 Pac. 794, 16 Pac. 160; McGarrahan *v.* New Idria Min. Co., 96 U. S. 316, 24 L. ed. 630 [*affirming* 49 Cal. 331].

20. McGarrahan *v.* New Idria Min. Co., 96 U. S. 316, 24 L. ed. 630 [*affirming* 49 Cal. 331].

21. McGarrahan *v.* New Idria Min. Co., 96 U. S. 316, 24 L. ed. 630 [*affirming* 49 Cal. 331].

22. McCullough *v.* Wall, 4 Rich. (S. C.) 68, 53 Am. Dec. 715, holding that a patent, signed by the secretary of war, and authenticated by the seal of the war department, was sufficient to convey land from the United States to the state, congress having directed the secretary to convey and the state having impliedly recognized the conveyance.

23. Mapes *v.* Scott, 94 Ill. 379 (holding that a description of the land as "the west half of the south-west quarter of section 9, in township 15 north, range 10 west, in the district of lands offered for sale at Springfield, Illinois," was sufficiently certain); Hunt *v.* Rowley, 87 Ill. 491; Bledsoe *v.* Doe, 4 How. (Miss.) 13 (holding that a description giving the number of the section, township, and range, according to the public surveys, is

6. Record, Delivery, and Acceptance of Patents. The legal title to public lands passes when a patent is duly executed [24] upon a decision of the proper officers that the grantee named therein is entitled to the land,[25] and recorded in the record book kept in the land department of the government for that purpose,[26] and the delivery which is required when a deed is made by a private person is not necessary to give effect to the granting clause of the patent.[27] While an acceptance on the part of the grantee is necessary to the taking effect of a patent,[28] such acceptance will be presumed from the efforts of the grantee to secure the favorable action of the department,[29] his demand for possession of the patent,[30] or even from the mere beneficial nature of the grant,[31] in the absence of an express dissent.[32] The state laws usually allow and encourage the recording of United States patents in the local offices for recording deeds and other instruments affecting real property,[33] but the validity or operation of a government patent is not impaired by neglecting to record it in the local office.[34] When a patent has been duly executed and recorded, the grantee is entitled to possession thereof, and mandamus is an appropriate remedy to compel its delivery to him.[35]

7. Patents Issued After Death of Settler or Entryman. In case of the death

sufficient); McArthur *v.* Browder, 4 Wheat. (U. S.) 488, 4 L. ed. 622.

24. Wood *v.* Pittman, 113 Ala. 207, 20 So. 972; Houghton *v.* Hardenberg, 53 Cal. 181; Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83; U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; U. S. *v.* Laam, 149 Fed. 581; 3 Op. Atty.-Gen. 653.

25. U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; U. S. *v.* Laam, 149 Fed. 581.

26. Wood *v.* Pittman, 113 Ala. 207, 20 So. 972; Cruz *v.* Martinez, 53 Cal. 239; Warner Valley Stock Co. *v.* Morrow, 48 Oreg. 258, 86 Pac. 369; U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; U. S. *v.* Laam, 149 Fed. 581.

Necessity of recording patent see *supra*, II, M, 5.

Title by patent is a title by record.— Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647; Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739; Warner Valley Stock Co. *v.* Morrow, 48 Oreg. 258, 86 Pac. 369; Sayward *v.* Thompson, 11 Wash. 706, 40 Pac. 379. And the record of a patent in the proper office in Washington has the same force as the patent itself. Sands *v.* Davis, 40 Mich. 14; McGarrahan *v.* New Idria Min. Co., 96 U. S. 316, 24 L. ed. 630 [*affirming* 49 Cal. 331].

27. *Alabama.*— Wood *v.* Pittman, 113 Ala. 207, 20 So. 972.

California.— Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647; Cruz *v.* Martinez, 53 Cal. 239; Houghton *v.* Hardenberg, 53 Cal. 181; Miller *v.* Ellis, 51 Cal. 73; Chipley *v.* Farris, 45 Cal. 527; Donner *v.* Palmer, 31 Cal. 500.

Illinois.— Gilmore *v.* Sapp, 100 Ill. 297.

Louisiana.— See Kittridge *v.* Breaud, 2 Rob. 40, holding that delivery of the property is not necessary to vest title.

Minnesota.— Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739.

Missouri.— Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83.

Oregon.— Warner Valley Stock Co. *v.* Morrow, 48 Oreg. 258, 86 Pac. 369.

Washington.— Sayward *v.* Thompson, 11 Wash. 706, 40 Pac. 379.

United States.— U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; U. S. *v.* Laam, 149 Fed. 581; Le Roy *v.* Clayton, 15 Fed. Cas. No. 8,268, 2 Sawy. 493; 3 Op. Atty.-Gen. 653.

See 41 Cent. Dig. tit. "Public Lands," § 311.

28. Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

29. Alvarado *v.* Nordholt, 95 Cal. 116, 30 Pac. 211; U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

30. U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167.

31. Wood *v.* Pittman, 113 Ala. 207, 20 So. 972; U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369; 3 Op. Atty.-Gen. 653.

The presumption of acceptance is not conclusive but may be rebutted and overturned by proof that, although it was to the interest of the person named as patentee to accept the grant, yet he did not, in fact, consent to or accept it. Wood *v.* Pittman, 113 Ala. 207, 20 So. 972, holding that where the holder of a certificate of entry issued by the United States made affidavit that he had made a mistake in respect to the land he intended to purchase and thought he was entering, and the entry was set aside, the certificate surrendered and canceled, and the purchase-money refunded to him; but afterward a patent was inadvertently made out, and sent to the local land office, but before any acceptance on the part of such entryman the mistake was discovered, and the patent was recalled and canceled, the title did not pass from the United States.

Evidence insufficient to show non-acceptance see Alvarado *v.* Nordholt, 95 Cal. 116, 30 Pac. 211.

32. Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

33. Sands *v.* Davis, 40 Mich. 14.

34. Kittridge *v.* Breaud, 2 Rob. (La.) 40; Sands *v.* Davis, 40 Mich. 14; Sayward *v.* Thompson, 11 Wash. 706, 40 Pac. 379.

35. U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167.

of a settler or entryman before obtaining a patent the statutes generally allow the issuance of a patent to his widow or heirs,[36] and a patent describing the grantees merely as "the heirs of" a named decedent is not void for uncertainty.[37] A patent issued to "A, administrator of B, deceased" vests the legal title to the land in A.[38] Where a wife, as heir of her husband, applied for a patent which was issued to her as his assignee, a title in her, independent of her husband, cannot be inferred, and the patent must inure to the benefit of the husband's vendee.[39] Applying the principle that there must be a grantee before a grant can take effect, it was formerly held that a patent issued after the death of the patentee was void;[40] but it is now expressly provided by statute that when a patent is issued to a person who has died before the date of the patent, the title to the land shall inure to and become vested in the heirs, devisees, or assignees of the deceased patentee the same as if the patent had been issued during his life.[41]

8. VALIDITY OF PATENTS.[42] Under the rule that public officers are presumed to do their duty, the presumption is that all necessary preliminary steps to the issuance of a patent have been taken,[43] and that the patent was regularly issued [44]

36. See Wittenbrock *v.* Wheadon, 128 Cal. 150 60 Pac. 664, 79 Am. St. Rep. 32; Anderson *v.* Peterson, 36 Minn. 547, 32 N. W. 861, 1 Am. St. Rep. 698.

Rights on death of homestead entryman see *supra*, II, C, 8, g.

The heirs take by descent, and not by purchase. Bond *v.* Swearingen, 1 Ohio 395. But see *supra*, II, C, 8, g.

37. Payne *v.* Mathis, 92 Ala. 585, 9 So. 605.

The state law of descent governs in determining who are the grantees in such a patent. Braun *v.* Mathieson, (Iowa 1908) 116 N. W. 789.

38. Bonds *v.* Hickman, 32 Cal. 202, holding that a conveyance by A vests the legal title in his grantee, although it does not appear by the deed that it was made as administrator.

39. Beauvais *v.* Wall, 14 La. Ann. 199.

40. Tarver *v.* Smith, 38 Ala. 135; Wood *v.* Ferguson, 7 Ohio St. 288; Moreham *v.* Phelps, 21 How. (U. S.) 294, 16 L. ed. 140; Galloway *v.* Finley, 12 Pet. (U. S.) 264, 9 L. ed. 1079; McDonald *v.* Smalley, 6 Pet. (U. S.) 261, 8 L. ed. 391; Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876.

A patent to two grantees, one of whom was dead, vested the entire estate in the living grantee — one half for himself and the other half as trustee for the heirs of the deceased grantee. Reynolds *v.* Clark, Wright (Ohio) 656.

41. U. S. Rev. St. (1878) § 2448 [U. S. Comp. St. (1901) p. 1512]. See Tarver *v.* Smith, 38 Ala. 135; Phillips *v.* Sherman, 36 Ala. 189; Johnson *v.* Parcels, 48 Mo. 549; Stubblefield *v.* Boggs, 2 Ohio St. 216; Trimble *v.* Boothby, 14 Ohio 109, 45 Am. Dec. 526; Lamb *v.* Starr, 14 Fed. Cas. No. 8,022, Deady 447; Schedda *v.* Sawyer, 21 Fed. Cas. No. 12,443, 4 McLean 181.

42. **Patents void and hence subject to collateral attack** see *infra*, II, M, 12.

43. *Alabama.*— Ledbetter *v.* Borland, 128 Ala. 418, 29 So. 579.

California.— Hooper *v.* Young, 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 56; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886; Collins *v.* Bartlett, 44 Cal. 371.

Colorado.— Smith *v.* Pipe, 3 Colo. 187.

Louisiana.— Combs *v.* Dodd, 4 Rob. 58.

Michigan.— Webber *v.* Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469.

Minnesota.— Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739.

Mississippi.— Sweatt *v.* Corcoran, 37 Miss. 513; Carter *v.* Blanton, 33 Miss. 291; Surget *v.* Little, 24 Miss. 118; Fulton *v.* Doe, 5 How. 751; Carter *v.* Spencer, 4 How. 42, 34 Am. Dec. 106.

Missouri.— Bradshaw *v.* Edelen, 194 Mo. 640, 92 S. W. 691; Gibson *v.* Chouteau, 39 Mo. 536; Hill *v.* Miller, 36 Mo. 182 [*followed* in Stucker *v.* Duncan, 37 Mo. 160]; Barry *v.* Gamble, 8 Mo. 88.

Nebraska.— Green *v.* Barker, 47 Nebr. 934, 66 N. W. 1032.

Oregon.— Warner Valley Stock Co. *v.* Morrow, 48 Oreg. 258, 86 Pac. 369.

Wisconsin.— Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600.

Wyoming.— Demars *v.* Hickey, 13 Wyo. 371, 80 Pac. 521, 81 Pac. 705.

United States.— Bouldin *v.* Massie, 7 Wheat. 122, 5 L. ed. 414; Harkrader *v.* Carroll, 76 Fed. 474; U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708.

See 41 Cent. Dig. tit. "Public Lands," § 322.

44. *Indiana.*— Steeple *v.* Downing, 60 Ind. 478.

Mississippi.— Carter *v.* Blanton, 33 Miss. 291.

Wisconsin.— Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600; Parkison *v.* Bracken, 1 Pinn. 174, 39 Am. Dec. 296.

Wyoming.— Demars *v.* Hickey, 13 Wyo. 371, 80 Pac. 521, 81 Pac. 705.

United States.— Harkrader *v.* Carroll, 76 Fed. 474.

See 41 Cent. Dig. tit. "Public Lands," § 322.

Patent admissible in evidence without proof of execution or record.— Steeple *v.* Downing, 60 Ind. 478; Callaway *v.* Fash, 50 Mo. 420.

and is valid [45] and passes the legal title.[46] But the presumption of the validity of the patent may be rebutted by proof that it was issued without authority of law [47] or was obtained by fraud,[48] the burden of proof being upon the person who seeks to impeach the patent.[49] A patent issued to a fictitious person cannot transfer the title;[50] but a patent, paid for by one person, but delivered to another person of the same name who is described, by his residence, as the grantee, is valid until vacated for the mistake of description.[51] A patent is not invalidated by a misnomer of the county in which the land is situated.[52] Congress has power to cure defects in patents previously issued.[53]

9. Construction, Operation, and Effect of Patents [54] — a. In General. A patent issued for land which is a part of the public domain carries the legal title [55]

45. *California.*— Hooper *v.* Young, 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 56; Leviston *v.* Ryan, 75 Cal. 293, 17 Pac. 239.

Missouri.— Hill *v.* Miller, 36 Mo. 182 [*followed* in Stucker *v.* Duncan, 37 Mo. 160].

Ohio.— Milliken *v.* Starling, 16 Ohio 61.

Wisconsin.— Schnee *v.* Schnee, 23 Wis. 377, 99 Am. Dec. 183.

United States.— Minter *v.* Crommelin, 18 How. 87, 15 L. ed. 279; Bouldin *v.* Massie, 7 Wheat. 122, 5 L. ed. 414; Jenkins *v.* Trager, 40 Fed. 726.

See 41 Cent. Dig. tit. "Public Lands," § 322.

46. Hooper *v.* Young, 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 56; Long *v.* McDow, 87 Mo. 197 (holding that it will be presumed that the United States held the title to and the possession of the land at the time when the patent was issued); Schnee *v.* Schnee, 23 Wis. 377, 99 Am. Dec. 183; Minter *v.* Crommelin, 18 How. (U. S.) 87, 15 L. ed. 279; Jenkins *v.* Trager, 40 Fed. 726.

47. Ledbetter *v.* Borland, 128 Ala. 418, 29 So. 579; Gibson *v.* Chouteau, 39 Mo. 536; Minter *v.* Crommelin, 18 How. (U. S.) 87, 15 L. ed. 279.

Proof extrinsic of the instrument itself is admissible to ascertain whether it was issued without authority. Ledbetter *v.* Borland, 128 Ala. 418, 29 So. 579.

48. Gibson *v.* Chouteau, 39 Mo. 536.

Attack on and setting aside patents see *infra*, II, D, 2.

49. Hooper *v.* Young, 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 56; Leviston *v.* Ryan, 75 Cal. 293, 17 Pac. 239; Collins *v.* Bartlett, 44 Cal. 371; Hill *v.* Miller, 36 Mo. 182 [*followed* in Stucker *v.* Duncan, 37 Mo. 160].

50. Thomas *v.* Boerner, 25 Mo. 27; Thomas *v.* Wyatt, 25 Mo. 24, 69 Am. Dec. 446; Moffat *v.* U. S., 112 U. S. 24, 31, 5 S. Ct. 10, 28 L. ed. 623 (where it is said that such a patent "is, in legal effect, no more than a declaration that the government thereby conveys the property to no one"); U. S. *v.* Southern Colorado Coal, etc., Co., 18 Fed. 273, 5 McCrary 563 [*reversed* on other grounds in 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182].

51. Babcock *v.* Pettibone, 2 Fed. Cas. No. 700, 12 Blatchf. 354.

52. Stringer *v.* Young, 3 Pet. (U. S.) 320, 7 L. ed. 693, holding that the mistake is open to explanation.

53. Parkison *v.* Bracken, 1 Pinn. (Wis.) 174, 39 Am. Dec. 296, construing the act of congress March 3, 1841, and holding that it was immaterial that a suit was pending on the patent at the passage of the act.

54. Effect of issuance of patent to entryman who has transferred or assigned his rights see *infra*, II, P, 1, k.

55. *Arkansas.*— Fordyce *v.* Woman's Christian Nat. Library Assoc., 79 Ark. 550, 96 S. W. 155, 7 L. R. A. N. S. 485.

Florida.— Hagan *v.* Ellis, 39 Fla. 463, 22 So. 727, 63 Am. St. Rep. 167.

Illinois.— Wiggins *v.* Lusk, 12 Ill. 132; Cook *v.* Foster, 7 Ill. 652.

Indiana.— Verden *v.* Coleman, 4 Ind. 457.

Louisiana.— Foley *v.* Harrison, 5 La. Ann. 75.

Mississippi.— See Carter *v.* Spencer, 4 How. 42, 34 Am. Dec. 106.

Missouri.— Papin *v.* Ryan, 36 Mo. 406 [*following* Papin *v.* Hines, 23 Mo. 274]; Hill *v.* Miller, 36 Mo. 182 [*followed* in Stucker *v.* Duncan, 37 Mo. 160]; Griffith *v.* Deerfelt, 17 Mo. 31 [*followed* in Carman *v.* Johnson, 20 Mo. 108, 61 Am. Dec. 593].

Montana.— Silver Bow Min., etc., Co. *v.* Clark, 5 Mont. 378, 5 Pac. 570.

Ohio.— Milliken *v.* Starling, 16 Ohio 61. See also Porter *v.* Robb, 7 Ohio 206.

Oregon.— Oregon R., etc., Co. *v.* Hertzberg, 26 Oreg. 216, 37 Pac. 1019.

Wisconsin.— Bradley *v.* Dells Lumber Co., 105 Wis. 245, 81 N. W. 394.

United States.— Niles *v.* Cedar Point Club, 175 U. S. 300, 20 S. Ct. 124, 44 L. ed. 171 [*affirming* 85 Fed. 45, 29 C. C. A. 5]; *In re* Emblem, 161 U. S. 52, 16 S. Ct. 487, 40 L. ed. 613; Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Warren *v.* Van Brunt, 19 Wall. 646, 22 L. ed. 219; O'Brien *v.* Perry, 1 Black 132, 17 L. ed. 114; Bagnell *v.* Broderick, 13 Pet. 436, 10 L. ed. 235; Hoofnagle *v.* Anderson, 7 Wheat. 212, 5 L. ed. 437; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430]; U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 [*affirmed* in 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836]; New Dunderberg Min. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789]. See also Willot *v.* Sandford, 19 How. 79, 15 L. ed. 549; Patton *v.* Carothers, 18 Fed. Cas. No. 10,833, Brunner Col. Cas. 207, Cooke (Tenn.) 148.

in fee simple,[56] and its issuance by the land department is a final determination of the existence of all facts necessary to entitle the patentee to the patent,[57] and divests the department of all authority over and control of the land.[58] But a patent does not convey the title to land, the description of which is inserted after its issuance and delivery,[59] nor is it evidence of title to land which was not subject to disposition by the United States.[60] A patent issued to two or more persons creates presumptively a tenancy in common in the patentees.[61] The recitals of a patent are competent evidence of the facts recited,[62] and are to be taken as true,[63] and an owner of land is chargeable with notice of facts recited in a patent to which he traces his title.[64] United States patents or grants are to be strictly construed,[65] and are not subject to the general rule of construction

See 41 Cent. Dig. tit. "Public Lands," § 314.

Patent conveys legal title whether decision of land department as to right thereto correct or not.— King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430]; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789].

A patent founded on a void entry and survey passes the legal title from the government to the patentee, but the commencement of the title is the patent. Stubblefield *v.* Boggs, 2 Ohio St. 216.

56. Fordyce *v.* Woman's Christian Nat. Library Assoc., 79 Ark. 550, 96 S. W. 155, 7 L. R. A. N. S. 485; Seymour *v.* Cooley, 3 Mart. N. S. (La.) 396; Gilbert *v.* Auster, 135 Wis. 581, 116 N. W. 177; Dredge *v.* Forsyth, 2 Black (U. S.) 563, 17 L. ed. 253; Morgan *v.* Rogers, 79 Fed. 577, 25 C. C. A. 97.

A patent imports a complete appropriation and disposition of the lands which it assumes to convey. Bates *v.* Herron, 35 Ala. 117; Masters *v.* Eastis, 3 Port. (Ala.) 368; Surget *v.* Doe, 24 Miss. 118; Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100; Bagnell *v.* Broderick, 13 Pet. (U. S. 436, 10 L. ed. 235; Boardman *v.* Reed, 6 Pet. (U. S.) 328, 8 L. ed. 415; Patterson *v.* Winn, 11 Wheat. (U. S.) 380, 6 L. ed. 500.

A condition subsequent will not be implied. — Morgan *v.* Rogers, 79 Fed. 577, 25 C. C. A. 97.

57. Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141.

The question as to what rights go to a patentee of land depends not upon any supposed adjudication contained in the patent, but upon the general law of the state where the land is situated. Los Angeles *v.* Los Angeles Farming, etc., Co., 152 Cal. 645, 93 Pac. 869, 1135.

58. Johnson *v.* Pacific Coast Steamship Co., 2 Alaska 224; Bicknell *v.* Comstock, 113 U. S. 149, 5 S. Ct. 399, 28 L. ed. 962; U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 10 L. ed. 264; Linebeck *v.* Vos, 160 Fed. 540; Kirwan *v.* Murphy, 83 Fed. 275, 28 C. C. A. 348; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

Annexing conditions and limitations.— After the government has parted with the absolute title to land, it cannot annex any condition to that title, or limit the use to which the land may be devoted, especially after the title has passed from the original grantee to others. Morgan *v.* Rogers, 79 Fed. 577, 25 C. C. A. 97.

Certificate of location.— Where a federal statute provides for the issue of a certificate of location of public land to "a claimant or his legal representatives," the issuing of a certificate to one apparently a legal representative leaves the interior department *functus officio*, and without power to transmit to the court of claims the claim of one asserting himself to be the legal representative. Hodge *v.* U. S., 20 Ct. Cl. 352.

The issuance of a patent to town-site trustees does not divest the secretary of the interior of supervisory control over the land, as such trustees are officers and agents of the government. Bockfinger *v.* Foster, 10 Okla. 488, 62 Pac. 799 [*affirmed* in 190 U. S. 116, 23 S. Ct. 836, 47 L. ed. 975]. As to townsite entries generally see *supra*, II, C, 12.

59. Doe *v.* McCullough, (Ala. 1908) 46 So. 472.

60. Northern Pac. R. Co. *v.* McCormick, 72 Fed. 736, 19 C. C. A. 165, holding that the question whether land included within a patent was at the time of the issue thereof a part of the public domain or subject to such disposition is always open for consideration.

A patent for land covered by a paramount title does not vest the fee in the patentee. Nelson *v.* Moon, 17 Fed. Cas. No. 10,111, 3 McLean 319.

61. Frisbie *v.* Marques, 39 Cal. 451 [*affirmed* in 101 U. S. 473, 25 L. ed. 800].

62. Johnson *v.* Ballou, 28 Mich. 379, holding that the recitals in a patent are properly received as evidence of the time when the lands described in it were earned under a grant to the state for railroad purposes.

63. Sweatt *v.* Corcoran, 37 Miss. 513.

64. Bonner *v.* Ware, 10 Ohio 465; Weeks *v.* Milwaukee, etc., R. Co., 78 Wis. 501, 47 N. W. 737; Eaton *v.* North, 20 Wis. 449.

A purchaser of public lands is not affected with notice of latent defects in a chain of assignments recited in his patent, when such assignments purport to have been made by the proper persons. Bell *v.* Duncan, 11 Ohio 192.

65. McManus *v.* Carmichael, 3 Iowa 1.

Construction of particular patents see the following cases:

that a grant is to be construed most strongly in favor of the grantee and against the grantor.[66]

b. Property and Rights Included. A patent conveys title to all the lands within the established boundaries shown by the official maps of the government surveys.[67] The quantity of land granted must be ascertained from the description in the patent,[68] and patents are subject to the general rule of construction that where a subject-matter is found which may satisfy either part of a repugnant or contradictory description, but not the whole, that part of the description must prevail which is presumed to express with most certainty the intention of the parties.[69] A description by courses and distances must yield to visible or ascertained monuments erected as witnesses to limit the bounds of the tract conveyed,[70] and certain boundaries indicated in the patent will control a recital as to the quantity of land included.[71] A patent without any reservations or exceptions passes to the patentee everything anywise connected with the soil, forming any portion of its bed, or fixed to its surface,[72] and hence such a patent carries all the minerals in the land [73] to which no right has attached at the time the patent

Alabama.— Boulo *v.* New Orleans, etc., R. Co., 55 Ala. 480.

California.— Miller *v.* Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48; Paterson *v.* Ogden, 141 Cal. 43, 74 Pac. 443, 99 Am. St. Rep. 31.

Iowa.— Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85.

Kentucky.— Asher *v.* Brashear, 90 S. W. 1060, 28 Ky. L. Rep. 1012; Witt *v.* Middleton, 86 S. W. 968, 27 Ky. L. Rep. 831.

Michigan.— Church *v.* Case, 122 Mich. 554, 81 N. W. 334.

Mississippi.— Torre *v.* Jeanin, 76 Miss. 898, 25 So. 860, identity of patentee.

Nebraska.— Baldwin *v.* Boyd, 18 Nebr. 444, 25 N. W. 580.

Utah.— Washington Rock Co. *v.* Young, 29 Utah 108, 80 Pac. 382, 110 Am. St. Rep. 666.

Wisconsin.— Lyon *v.* Fairbank, 79 Wis. 455, 48 N. W. 492, 24 Am. St. Rep. 732; Sheppard *v.* Wilmott, 79 Wis. 15, 47 N. W. 1054.

United States.— Morehouse *v.* Phelps, 21 How. 294, 16 L. ed. 140 [*reversing* 18 Ill. 472]; Lafayette *v.* Kenton, 18 How. 197, 15 L. ed. 345.

See 41 Cent. Dig. tit. "Public Lands," § 314.

66. McManus *v.* Carmichael, 3 Iowa 1.

67. Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. ed. 428; *Ex p.* Davidson, 57 Fed. 883; Mann *v.* Tacoma Land Co., 44 Fed. 27; Forsyth *v.* Smale, 9 Fed. Cas. No. 4,950, 7 Biss. 201, 7 Reporter 262. See also Witt *v.* Middleton, 86 S. W. 968, 27 Ky. L. Rep. 831.

Reference to official plat.— In granting patents for the public lands it is usual to add, immediately after the statement of the number of acres which the tract contains, if it is fractional, the words "according to the official plat of the survey of said lands returned to the General Land-office by the Surveyor-General," and such language, when used, constitutes a part of the description of the premises conveyed, and limits the purchaser to the tract as marked upon the plat of the surveyor-general. Wilson *v.* Hoffman, 70 Mich. 552, 38 N. W. 558 [*following* Gazzam *v.* Phillips, 20 How. (U. S.) 372, 15 L. ed. 958 (*overruling* Brown *v.* Clements, 3 How. (U. S.) 650, 11 L. ed. 767)].

68. Gazzam *v.* Phillips, 20 How. (U. S.) 372, 15 L. ed. 958, holding that the quantity cannot be controlled by any supposed original equity to the whole of the quarter section to which a claim might have been made before the register and receiver.

69. Stein *v.* Ashby, 24 Ala. 521.

70. Kanne *v.* Otty, 25 Oreg. 531, 36 Pac. 537.

71. Stein *v.* Ashby, 24 Ala. 521.

Where land is granted by legal subdivisions, the grantee takes all the land in the subdivision, and is not limited by the number of acres specified in the patent. Palmer *v.* Dodd, 64 Mich. 474, 31 N. W. 209.

River as boundary — Accretions.— Where the official plat of the survey of government land shows a river as one boundary, a subsequent patent for the land, describing it by number, and referring to the plat on which it is marked as containing a certain amount, passes all accretions to the land. Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 10 S. Ct. 518, 33 L. ed. 872.

Patents for fractional sections of land facing on a marsh, which recite the number of acres granted, and refer to the official plat of the survey, by which plat the marsh is shown as the boundary, while the computed areas conform to the area included within the surveyed lines, without including any part of the marsh, must be limited by the surveyed boundaries, without including any land which is a part of the marsh. Niles *v.* Cedar Point Club, 175 U. S. 300, 20 S. Ct. 124, 44 L. ed. 171 [*affirming* 85 Fed. 45, 29 C. C. A. 5].

72. Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123; Johnson *v.* Johnson, 14 Ida. 561, 95 Pac. 499 [*followed* in Moss *v.* Ramey, 14 Ida. 598, 95 Pac. 513].

73. Moore *v.* Smaw, 17 Cal. 199, 79 Am. Dec. 123; Pacific Coast Min.. etc., Co. *v.* Spargo, 16 Fed. 348, 8 Sawy. 645. See also MINES AND MINERALS, 27 Cyc. 542 note 4. But *compare* Gold Hill Quartz Min. Co. *v.*

issues.[74] A patent for public land vests in the patentee the riparian rights in a stream flowing over or through the land;[75] but a purchaser of a tract of government land, which has on it a mill and dam, which cause the water of a stream running through it to overflow other public lands, the entry being made and a patent received in the usual form, has no right to continue the dam so as to overflow such other lands after they have been entered by individuals.[76] Patents for lands abutting on lakes, rivers, or other waters are to be construed, with reference to the quantity conveyed, in accordance with the laws of the state in which the land is situated;[77] but a purchase of a subdivision of public lands, which happens to have a pond for one of its boundaries, does not give the purchaser a part or all of another defined subdivision, in order to reach the center of such pond.[78] Where the government has parted with a larger acreage than it has received payment for by a patent to fractional lots abutting on a meandered stream, and the patentee takes possession under his patent of the lands between the meander line and the stream, he will be protected in his title and possession as against third persons who do not claim title from the government.[79]

c. Conditions, Reservations, and Exceptions. A patent containing a reservation of adverse claims or of claims under a certain act of congress is good and protects the patentee in his possession,[80] but is liable to be superseded by the issuance of a patent to or the confirmation of the claim of a claimant whose rights are within the reservation.[81] A right of way for an irrigating ditch acquired pursuant to the act of congress [82] is a vested and accrued right within a clause in a patent saving such rights.[83] Where an agricultural patent to public land reserves the right of a proprietor of a mining vein or lode to extract or remove his ore therefrom should it be found to penetrate or intersect the lands granted by the patent, the reservation refers only to persons who are proprietors at the time when the right of the patentee attaches to the land.[84] A condition or exception inserted in a patent, which is not authorized by the statute, is void.[85]

d. Relation Back. The doctrine of relation is applicable to public land transactions, and, where necessary to give effect to the intent of the statute or to cut

Ish, 5 Oreg. 104, holding that a patent for agricultural lands does not pass title to known deposits of precious metals.

74. Pacific Coast Min., etc., Co. *v.* Spargo, 16 Fed. 348, 8 Sawy. 645.

75. Vansickle *v.* Haines, 7 Nev. 249; Sturr *v.* Beck, 133 U. S. 541, 10 S. Ct. 350, 33 L. ed. 761; Union Mill, etc., Co. *v.* Ferris, 24 Fed. Cas. No. 14,371, 2 Sawy. 176.

Riparian rights generally see WATERS.

76. Wilcoxon *v.* McGhee, 12 Ill. 381, 54 Am. Dec. 409. See, generally, WATERS.

77. Lamprey *v.* State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670; Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018; Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. ed. 428 [*followed* in *In re* Valley, 116 Fed. 983].

78. Edwards *v.* Ogle, 76 Ind. 302.

79. Johnson *v.* Hurst, 10 Ida. 308, 77 Pac. 784.

80. Dredge *v.* Forsyth, 2 Black (U. S.) 563, 17 L. ed. 253.

Reservation not a confirmation of title under act referred to.— Meehan *v.* Forsyth, 24 How. (U. S.) 175, 16 L. ed. 730 [*followed* in Dredge *v.* Forsyth, 2 Black (U. S.) 563, 17 L. ed. 253].

81. Dredge *v.* Forsyth, 2 Black (U. S.) 563, 17 L. ed. 253 [*following* Meehan *v.* Forsyth, 24 How. (U. S.) 175, 16 L. ed. 730]; Gregg *v.* Tesson, 1 Black (U. S.) 150, 17 L. ed. 74; Bryan *v.* Forsyth, 19 How. (U. S.) 334, 15 L. ed. 674.

The second patent is valid and conveys the title.— Maguire *v.* Tyler, 8 Wall. (U. S.) 650, 19 L. ed. 320.

A patentee in possession for seven years before suit brought will be protected against a confirmed claim, under the act referred to in the patent. Dredge *v.* Forsyth, 2 Black (U. S.) 563, 17 L. ed. 253.

82. See *supra*, II, G, 2.

83. Farmers' High Line Canal, etc., Co. *v.* Moon, 22 Colo. 560, 45 Pac. 437.

Custom.— To bring a right of way for a ditch or canal within a reservation in a patent for public lands in favor of such rights, when they have accrued and vested under local customs, laws, and decisions, it is not necessary that a local custom in the immediate vicinity be shown, but it is sufficient if such custom is established with reference to the state as a whole. Maffet *v.* Quine, 93 Fed. 347.

84. Pacific Coast Min., etc., Co. *v.* Spargo, 16 Fed. 348, 8 Sawy. 645.

85. Innerarity *v.* Mims, 1 Ala. 660 (condition in patent certificate); Francoeur *v.* Newhouse, 40 Fed. 618, 14 Sawy. 351.

off intervening claimants, the patent is deemed to relate back to the time of the inception of the patentee's claim to the land,[86] and this relation back is effective in favor of persons to whom the claimant has assigned or transferred his rights in the land before the issuance of the patent.[87] But a title by relation extends no further backward than the inception of the equitable right,[88] and the doctrine of relation never carries a patent back to the date of any entry other than that upon which it is issued.[89] In the absence of any other evidence of the date of the

86. *California.*— Smith *v.* Athern, 34 Cal. 506; Gallup *v.* Armstrong, 22 Cal. 480.

Colorado.— Quinn *v.* Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552.

Iowa.— Weeks *v.* Loy, 52 Iowa 202, 2 N. W. 1075.

Louisiana.— Steinspring *v.* Bennett, 16 La. Ann. 201; Hood *v.* Martin, 11 La. Ann. 552.

Minnesota.— Nicholson *v.* Congdon, 95 Minn. 188, 103 N. W. 1034.

Mississippi.— Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881.

United States.— Sturr *v.* Beck, 133 U. S. 541, 10 S. Ct. 350, 33 L. ed. 761; Shepley *v.* Cowan, 91 U. S. 330, 23 L. ed. 424; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651.

See 41 Cent. Dig. tit. "Public Lands," § 315.

Patent relates back to date of entry.—

Colorado.— Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

Idaho.— Hamilton *v.* Spokane, etc., R. Co., 3 Ida. 164, 28 Pac. 408.

Iowa.— Rankin *v.* Miller, 43 Iowa 11; Waters *v.* Bush, 42 Iowa 255.

Louisiana.— Steinspring *v.* Bennett, 16 La. Ann. 201.

Michigan.— Clark *v.* Hall, 19 Mich. 356.

Mississippi.—Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881.

Ohio.— Magruder *v.* Esmay, 35 Ohio St. 221.

Utah.— Washington Rock Co. *v.* Young, 29 Utah 108, 80 Pac. 382, 110 Am. St. Rep. 666.

United States.— U. S. *v.* Clark, 200 U. S. 601, 26 S. Ct. 340, 50 L. ed. 613 [*affirming* 138 Fed. 294, 70 C. C. A. 584 (*affirming* 125 Fed. 774)]; U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)]; Sturr *v.* Beck, 133 U. S. 541, 10 S. Ct. 350, 33 L. ed. 761; Dunn *v.* Barnum, 51 Fed. 355, 2 C. C. A. 265; Coleman *v.* Peshtigo Lumber Co., 30 Fed. 317; Pacific Coast Min., etc., Co. *v.* Spargo, 16 Fed. 348, 8 Sawy. 645; Astrom *v.* Hammond, 2 Fed. Cas. No. 596, 3 McLean 107; Union Mill, etc., Co. *v.* Dangberg, 24 Fed. Cas. No. 14,370, 2 Sawy. 450.

See 41 Cent. Dig. tit. "Public Lands," § 315.

Patent relates back to date of purchase.— Cavender *v.* Smith, 5 Iowa 157; Cavender *v.* Smith, 3 Greene (Iowa) 349, 56 Am. Dec. 541; Fisher *v.* Hallock, 50 Mich. 463, 15 N. W. 552.

Patent relates back to date of certificate of location.— Klein *v.* Argenbright, 26 Iowa 493.

A patent can convey no interest anterior to its date but it may be shown to be connected with and to relate back to a previous inchoate legal title. Jones *v.* Inge, 5 Port. (Ala.) 327.

When doctrine not applicable.—A patent for public land will not be held to take effect as of the date of the initial step taken by the patentee to obtain a title to the land, where it appears that the rights by him acquired by such initial step were lost by his lack of diligence, and the effect of such relation back would be to render accountable for a large quantity of coal mined on the land a person who had made a cash entry of the land after the patentee's right to the land had apparently been abandoned, and who had opened and developed mines at large expense, and had worked them for several years, with the knowledge of the patentee. Evans *v.* Durango Land, etc., Co., 80 Fed. 433, 25 C. C. A. 531.

A patent founded on a void entry and survey does not relate back. Stubblefield *v.* Boggs, 2 Ohio St. 216.

87. *Indiana.*— Steeple *v.* Downing, 60 Ind. 478.

Louisiana.— Steinspring *v.* Bennett, 16 La. Ann. 201.

Michigan.— Fisher *v.* Hallock, 50 Mich. 463, 15 N. W. 552; Clark *v.* Hall, 19 Mich. 356.

Mississippi.— Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881.

Ohio.— Magruder *v.* Esmay, 35 Ohio St. 221; Douglass *v.* McCoy, 5 Ohio 522.

United States.— Dunn *v.* Barnum, 51 Fed. 355, 2 C. C. A. 265.

See 41 Cent. Dig. tit. "Public Lands," § 316.

88. Hussman *v.* Durham, 165 U. S. 144, 148, 17 S. Ct. 253, 41 L. ed. 664, where it is said: "If by mistake, inadvertence or fraud a certificate of location (which is equivalent to a receipt) is issued when in fact no consideration has been received, no equitable title is passed thereby; and a conveyance of the legal title does not operate by relation back of the time when the actual consideration is paid."

Title does not relate back to date of act giving right of entry.— Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

89. Hamilton *v.* Spokane, etc., R. Co., 3 Ida. 164, 28 Pac. 408; Lewis *v.* Rio Grande Western R. Co., 17 Utah 504, 54 Pac. 981 (holding that a preëmption patent to lands over which a railroad was constructed during an occupancy prior to that of the preëmptor will not relate back, so as to divest the railroad company of its easement for a right of way, although the patent contain no reservation of right of way); U. S. *v.* Detroit

actual severance of the land from the public domain, the date of the patent must be considered as the time when the severance took place.[90]

e. Conclusiveness. A patent to land, the disposition of which the land department has jurisdiction, is both the judgment of the department as a quasi-judicial tribunal and a conveyance of the legal title to the land,[91] and hence is conclusive in a court of law,[92] and as against all persons whose rights did not commence previous to its emanation,[93] as to the land thereby conveyed,[94] the qualifications of the person to whom the patent was issued,[95] the title of the patentee,[96] and his performance of the conditions required by the act of congress under which the patent was issued.[97] The issuance of a United States patent for land as of a certain class is conclusive as to the character of the land,[98] and where a grant of land by congress provides for the issuance of a patent, the patent when issued and accepted is conclusive as to the extent of the right passing under the grant.[99] Both the government and the grantee, as well as those in privity with him, are bound by the recitals of fact properly contained in the patent;[1] but an opinion of the executive officers as to matters of law indicated either by the act of issuing the patent or by the recitals contained therein, is not conclusive.[2] Where a patent issues to the person entering the land, "for the use of the heirs at law," of another, and is accepted and acquiesced in by him, he cannot afterward claim against the patent.[3]

f. Conflicting Patents. As between conflicting patents the rule, in the absence of controlling equities, is that the earlier patent passes the title to the exclusion of the later;[4] but in equity a junior patent will prevail over an older one if the right

Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)].

90. Laidlaw *v.* Landry, 12 La. Ann. 151.

91. Paterson *v.* Ogden, 141 Cal. 43, 74 Pac. 443, 99 Am. St. Rep. 31; Le Marchel *v.* Teagarden, 152 Fed. 662; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430]; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; New Dunderberg Min. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789]. See also *supra*, II, L, 1; II, M, 9, a.

92. Stringfellow *v.* Tennessee Coal, etc., Co., 117 Ala. 250, 22 So. 997; Knabe *v.* Burden, 88 Ala. 436, 7 So. 92; Case *v.* Edgeworth, 87 Ala. 203, 5 So. 783; Bates *v.* Herron, 35 Ala. 117; Masters *v.* Eastis, 3 Port. (Ala.) 368; Jones *v.* Wheelis, 4 La. Ann. 541; Lott *v.* Prudhomme, 3 Rob. (La.) 293 [*followed* in Carter *v.* Monetti, 6 Rob. (La.) 82] (unless attacked for error or fraud); De Guyer *v.* Banning, 167 U. S. 723, 17 S. Ct. 937, 42 L. ed. 340 [*affirming* 91 Cal. 400, 27 Pac. 761]; Johnson *v.* Towsley, 13 Wall. (U. S.) 72, 20 L. ed. 485.

Conclusiveness and effect of decisions in land department generally see *supra*, II, L, 15, a.

93. Hoofnagle *v.* Anderson, 7 Wheat. (U. S.) 212, 5 L. ed. 437.

94. Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600.

95. Kansas City Min., etc., Co. *v.* Clay, 3 Ariz. 326, 29 Pac. 9.

96. Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534.

97. Jenkins *v.* Gibson, 3 La. Ann. 203; Chapman *v.* School Dist., 5 Fed. Cas. No. 2,607, Deady 108.

98. Paterson *v.* Ogden, 141 Cal. 43, 74 Pac. 443, 99 Am. St. Rep. 31; Standard Quicksilver Co. *v.* Habishaw, 132 Cal. 115, 64 Pac. 113; Saunders *v.* La Purisima Gold Min. Co., 125 Cal. 159, 57 Pac. 656; Richards *v.* Wolfling, 98 Cal. 195, 32 Pac. 971; Gale *v.* Best, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44; Traphagen *v.* Kirk, 30 Mont. 562, 77 Pac. 58; Kerns *v.* Lee, 142 Fed. 985; Carter *v.* Thompson, 65 Fed. 329; Wight *v.* Dubois, 21 Fed. 693; Cahn *v.* Barnes, 5 Fed. 326, 7 Sawy. 48.

A homestead patent is conclusive as to the agricultural character of the land as against a subsequent mineral claimant of any part of the land not known to be valuable for minerals at the date of the patent. Standard Quicksilver Co. *v.* Habishaw, 132 Cal. 115, 64 Pac. 113.

A patent excepting "all mineral lands" is not conclusive that particular land is properly included in the grant. Chicago Quartz Min. Co. *v.* Oliver, 75 Cal. 194, 16 Pac. 780, 7 Am. St. Rep. 143.

99. Barringer *v.* Davis, (Iowa 1907) 112 N. W. 208.

1. McGarrahan *v.* New Idria Min. Co., 49 Cal. 331 [*affirmed* in 96 U. S. 316, 24 L. ed. 630]; Dean *v.* Long, 122 Ill. 447, 14 N. E. 34; Eaton *v.* North, 20 Wis. 449.

Erroneous recitals, the presence of which is not required by law, are not binding on the grantee. McCorkell *v.* Herron, 128 Iowa 324, 103 N. W. 988, 111 Am. St. Rep. 201.

2. McGarrahan *v.* New Idria Min. Co., 49 Cal. 331 [*affirmed* in 96 U. S. 316, 24 L. ed. 630].

3. Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

4. *Arizona.*— Tombstone Town Site Cases, 2 Ariz. 272, 15 Pac. 26.

on which it is based is prior;[5] and it has been held that in an action of ejectment the court will look behind the patents and ascertain which party had the prior equity and give effect thereto.[6] Where the title to the public lands has passed out of the United States by conflicting patents, there can be no objection to the practice adopted by the state courts to give effect to the better right in any form of remedy the legislature or courts of the state may prescribe.[7]

10. Correction of Mistakes in Patents. It is within the power of the courts to correct mistakes in patents where the existence of such mistakes is clearly established.[8]

11. Recall, Cancellation, or Annulment of Patents by Land Department.[9] When a patent for public land has been issued, recorded, and accepted, all authority or control over the land or the title passes away from the land department,[10] and from the entire executive department of the government,[11] and neither the executive nor the land department has any power to recall,[12] cancel,[13] annul,[14] or set

California.— Keeran *v.* Griffith, 34 Cal. 580; Smith *v.* Athern, 34 Cal. 506.

Illinois.— Garner *v.* Willett, 18 Ill. 455; Gallipot *v.* Manlove, 2 Ill. 156.

Missouri.— Magwire *v.* Tyler, 40 Mo. 406; McCabe *v.* Worthington, 16 Mo. 514 [*affirmed* in 16 How. (U. S.) 86, 14 L. ed. 856].

Wisconsin.— Parkinson *v.* Bracken, 1 Pinn. 174, 39 Am. Dec. 296.

See 41 Cent. Dig. tit. "Public Lands," § 327.

5. Isaacs *v.* Steel, 4 Ill. 97; Dickinson *v.* Brown, 9 Sm. & M. (Miss.) 130; McAfee *v.* Keirn, 7 Sm. & M. (Miss.) 780, 45 Am. Dec. 331; Parker *v.* Wallace, 3 Ohio 490 [*followed* in Parker *v.* Dunn, 4 Ohio 232]. See, generally, *infra*, II, D, 2, c.

The earlier patentee will not be allowed to profit by a mistake of the land officers of which he was cognizant in referring for a description of the land to a survey which had been superseded before the patent was issued. Gleason *v.* White, 199 U. S. 54, 25 S. Ct. 782, 50 L. ed. 87.

6. Smith *v.* Athern, 34 Cal. 506; Weeks *v.* Loy, 52 Iowa 202, 2 N. W. 1075. See also Hood *v.* Martin, 11 La. Ann. 552.

7. Bagnell *v.* Broderick, 13 Pet. (U. S.) 436, 10 L. ed. 235. See also Ludeling *v.* Vester, 20 La. Ann. 433, holding that where the United States land department has approved the list of lands selected for a state, under a donation act, the issuing by such department of a patent of such lands to a person claiming a prior equitable title does not *ipso facto* annul a state patent of the same lands issued before the United States patent, and the state court may pass upon the validity of the two titles.

8. Martin *v.* Brand, 182 Mo. 116, 81 S. W. 443 (holding that an error in the patent in stating the name of the patentee may be corrected by evidence *aliunde* identifying the true grantee); Boyd *v.* Mammoth Spring Imp., etc., Co., 137 Mo. 482, 38 S. W. 964 (holding that where one purchased from the government land previously located upon a void warrant, and his payment was received by the officers of the land department as if made in behalf of the prior entryman as a substitute for the warrant when in fact the payment was individual money of the purchaser, and was made solely in his own interest, and the patent subsequently issuing to the purchaser named the prior locator as patentee, equity would, as between the parties, reform the patent, by substituting the name of the purchaser for that of the prior locator); Godkin *v.* Cohn, 80 Fed. 458, 25 C. C. A. 557 (holding that where by a mistake in numbering lots on a plat in the local land office the proper numbers of two lots are interchanged and the mistake is perpetuated in the patents and subsequent conveyances, the purchasers being misled not as to the land purchased but as to the proper number of the lots, the mistake can be corrected as against one who with knowledge of the mistake purchases with the fraudulent purpose of claiming according to the proper numbers of the lots; that a remote grantee may avail himself of the mistake; and that a delay of twenty-four years in seeking to correct the mistake is not laches, where defendant was not prejudiced by the delay and there was nothing to put plaintiff or his grantor on inquiry).

9. **Cancellation or annulment by judicial proceedings** see *infra*, II, D, 2, b.

10. See *supra*, II, M, 9, a.

11. Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848.

12. Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Le Roy *v.* Clayton, 15 Fed. Cas. No. 8,268, 2 Sawy. 493; Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369. *Contra*, Phillips *v.* Sherman, 36 Ala. 189 [*misconstruing* Bell *v.* Hearne, 19 How. (U. S.) 252, 15 L. ed. 614 (see *infra*, note 21)].

13. Johnson *v.* Pacific Coast Steamship Co., 2 Alaska 224; Gilmore *v.* Sapp, 100 Ill. 297; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848.

Mutilation of patent and record thereof.— When a patent has been executed and recorded, the acts of the commissioner of the land office, in ordering the return of the patent to his office, tearing the seals from it, erasing the president's name from it, and mutilating the record of it, are nugatory and do not affect the validity of the patent or the title of the grantee. Bicknell *v.* Comstock, 113 U. S. 149, 5 S. Ct. 399, 28 L. ed. 962.

14. Oregon R., etc., Co. *v.* Hertzberg, 26

aside [15] the patent, even though it was obtained fraudulently or unlawfully; [16] but the only method in which a patent improperly issued can be set aside is by judicial proceedings instituted on behalf of the United States.[17] But where a patent has issued to one who protests against the survey on which it is made, and the record shows that he never accepted it, the secretary of the interior may recall it,[18] and the commissioner of the land office has power, with the consent of the party in interest, who refused to accept the patent on the ground that it was erroneously located, and because of defects in the proceedings prior to the patent, to recall the patent and order a resurvey.[19] So also where a tract of land located under a military warrant is lost, in whole or in part, by reason of prior claims the patent may be canceled by the land department on the application of the patentee,[20] and the commissioner of the general land office has power to correct a clerical mistake, by canceling a patent in which the christian name of the grantee is erroneously stated and which is surrendered by the grantee, and issuing a new patent in the true name of the grantee.[21] But an attempted cancellation of a patent by the land department at the request of the patentee on *ex parte* affidavits, without notice to a person who, since the patent, has purchased a part of the property at a tax-sale, is void.[22]

12. Collateral Attack on Patents. A patent issued by the land department for land which is within its jurisdiction and power of disposition is not open to collateral attack [23] for either mistake of fact or error of law on the part of the land

Oreg. 216, 37 Pac. 1019; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; U. S. *v.* Stone, 2 Wall. (U. S.) 525, 17 L. ed. 765; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

15. Johnson *v.* Pacific Coast Steamship Co., 2 Alaska 224; Arnold *v.* Grimes, 2 Iowa 1; Lott *v.* Prudhomme, 3 Rob. (La.) 293.

The same principle protects a grantee of public land by act of congress, after his rights have been passed upon and a record made in the general land office showing that, by full compliance with the requirements of the act, the grant has taken effect and the granted land has been identified and segregated from the body of the public domain. Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

16. U. S. *v.* Stone, 106 U. S. 525, 27 L. ed. 163; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

17. Gilmore *v.* Sapp, 100 Ill. 297; Bradley *v.* Dells Lumber Co., 105 Wis. 245, 81 N. W. 394; *In re* Emblen, 161 U. S. 52, 16 S. Ct. 487, 40 L. ed. 613; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848. See *infra*, p. 1051.

18. Magwire *v.* Tyler, 8 Wall. (U. S.) 650, 19 L. ed. 320.

19. Le Roy *v.* Clayton, 15 Fed. Cas. No. 8,268, 2 Sawy. 493.

20. Nelson *v.* Moon, 17 Fed. Cas. No. 10,111, 3 McLean 319.

21. Bell *v.* Hearne, 19 How. (U. S.) 252, 15 L. ed. 614.

22. Miller *v.* Donahue, 96 Wis. 498, 71 N. W. 900.

23. *Alabama.*— Phillips *v.* Sherman, 36 Ala. 189; Bates *v.* Herron, 35 Ala. 117; Masters *v.* Eastis, 3 Port. 368.

California.— Paterson *v.* Ogden, 141 Cal. 43, 74 Pac. 443, 99 Am. St. Rep. 31; Standard Quicksilver Co. *v.* Habishaw, 132 Cal. 115, 64 Pac. 113; Saunders *v.* La Purisima Gold Min. Co., 125 Cal. 159, 57 Pac. 656; Dreyfus *v.* Badger, 108 Cal. 58, 41 Pac. 279; Irvine *v.* Tarbat, 105 Cal. 237, 38 Pac. 896; Richards *v.* Wolfling, 98 Cal. 195, 32 Pac. 971; Alvarado *v.* Nordholt, 95 Cal. 116, 30 Pac. 211; Gale *v.* Best, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44; Turner *v.* Donnelly, 70 Cal. 597, 12 Pac. 469; Thompson *v.* Doaksum, 68 Cal. 593, 10 Pac. 199; O'Connor *v.* Frasher, 56 Cal. 499; Miller *v.* Dale, 44 Cal. 562; Bonds *v.* Hickman, 29 Cal. 460 (holding that a patent cannot be collaterally attacked because it was issued to the administrator of a deceased preëmptor); Yount *v.* Howell, 14 Cal. 465; Boggs *v.* Merced Min. Co., 14 Cal. 279.

Colorado.— Aspen *v.* Aspen Town, etc., Co., 10 Colo. 191, 15 Pac. 794, 16 Pac. 160; Poire *v.* Wells, 6 Colo. 406.

Iowa.— Klein *v.* Argenbright, 26 Iowa 493; Harmon *v.* Steinman, 9 Iowa 112; Arnold *v.* Grimes, 2 Greene 77.

Kentucky.— American Assoc. *v.* Innis, 109 Ky. 595, 60 S. W. 388, 22 Ky. L. Rep. 1196.

Michigan.— Webber *v.* Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Bruckner *v.* Lawrence, 1 Dougl. 19.

Mississippi.— Surget *v.* Doe, 24 Miss. 118; Dixon *v.* Doe, 23 Miss. 84. See also Sweatt *v.* Corcoran, 37 Miss. 513; Carter *v.* Spencer, 4 How. 42, 34 Am. Dec. 106.

Missouri.—Frank *v.* Goddin, 193 Mo. 390, 91 S. W. 1057, 112 Am. St. Rep. 493; Williams *v.* Carpenter, 35 Mo. 52; Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100; Allison *v.* Hunter, 9 Mo. 749.

Montana.— Horsky *v.* Moran, 21 Mont. 345, 53 Pac. 1064.

Nebraska.— Green *v.* Barker, 47 Nebr. 934, 66 N. W. 1032.

New Mexico.— Chavez *v.* Chavez de Sanchez, 7 N. M. 58, 32 Pac. 137.

Ohio.— See Milliken *v.* Starling, 16 Ohio 61.

department,[24] and the patentee can be deprived of his rights only by direct proceedings [25] in equity [26] to which he must be a party [27] and of which he must have notice.[28] But where the title to land had passed from the United States before the claim on which a patent is based was initiated,[29] or where the land is reserved from sale and disposition for government purposes,[30] or dedicated to any special

Oregon.— Warner Valley Stock Co. *v.* Morrow, 48 Oreg. 258, 86 Pac. 369; Sanford *v.* Sanford, 19 Oreg. 1, 13 Pac. 602.

South Dakota.— Deadwood Bd. of Education *v.* Mansfield, 17 S. D. 72, 95 N. W. 286, 106 Am. St. Rep. 771.

Utah.— Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571.

Wisconsin.— Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185; Parkison *v.* Bracken, 1 Pinn. 174, 39 Am. Dec. 296.

United States.— Thompson *v.* Los Angeles Farming, etc., Co., 180 U. S. 72, 21 S. Ct. 289, 45 L. ed. 432 [*affirming* 117 Cal. 594, 49 Pac. 714]; Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992; Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Heath *v.* Wallace, 138 U. S. 573, 11 S. Ct. 380, 34 L. ed. 1063; Lee *v.* Johnson, 116 U. S. 48, 6 S. Ct. 249, 29 L. ed. 570; Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; U. S. *v.* Schurz, 102 U. S. 378, 26 L. ed. 167; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812; Field *v.* Seabury, 19 How. 323, 333, 15 L. ed. 650, 655; Minter *v.* Crommelin, 18 How. 87, 15 L. ed. 279; Bagnell *v.* Broderick, 13 Pet. 436, 10 L. ed. 235; Boardman *v.* Reed, 6 Pet. 328, 8 L. ed. 415; Patterson *v.* Winn, 11 Wheat. 380, 6 L. ed. 500; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430]; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789]; Carter *v.* Thompson, 65 Fed. 329; Bouldin *v.* Phelps, 30 Fed. 547; Wight *v.* Dubois, 21 Fed. 693; Cowell *v.* Lammers, 21 Fed. 200; Cutting *v.* Cutting, 6 Fed. 259, 6 Sawy. 396; Le Roy *v.* Clayton, 15 Fed. Cas. No. 8,268, 2 Sawy. 493; Morgan *v.* Curtenius, 17 Fed. Cas. No. 9,799, 4 McLean 366; Sharp *v.* Stephens, 21 Fed. Cas. No. 12,710, 6 Sawy. 48, 8 Reporter 456.

See 41 Cent. Dig. tit. "Public Lands," §§ 324, 325.

A prior equitable title may be set up in bar of a suit by the patentee, according to the practice in Missouri. O'Brien *v.* Perry, 1 Black (U. S.) 132, 17 L. ed. 114.

24. King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430].

25. Lamprey *v.* Mead, 54 Minn. 290, 55 N. W. 1132, 40 Am. St. Rep. 328; Williams *v.* Carpenter, 35 Mo. 52; Allison *v.* Hunter, 9 Mo. 749; Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571; Ayers *v.* U. S., 42 Ct. Cl. 385.

Attack on and setting aside patents by direct proceedings see *infra*, II, D, 2.

26. Arnold *v.* Grimes, 2 Greene (Iowa) 77; State *v.* Bachelder, 5 Minn. 223, 80 Am. Dec. 410.

27. Lamprey *v.* Mead, 54 Minn. 290, 55 N. W. 1132, 40 Am. St. Rep. 328.

28. Ayres *v.* U. S., 42 Ct. Cl. 385.

29. *Alabama.*— Stephens *v.* Westwood, 20 Ala. 275.

California.— Mergerle *v.* Ashe, 27 Cal. 322, 87 Am. Dec. 76.

Indiana.— Daggett *v.* Bonewitz, 107 Ind. 276, 7 N. E. 900.

Iowa.— Rankin *v.* Miller, 43 Iowa 11.

Louisiana.— Wiggins *v.* Guier, 13 La. Ann. 356.

Michigan.— Butler *v.* Grand Rapids, etc., R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84.

Missouri.— Prior *v.* Lambeth, 78 Mo. 538.

Utah.— Ferry *v.* Street, 4 Utah 521, 11 Pac. 571.

United States.— McCreery *v.* Haskell, 119 U. S. 327, 7 S. Ct. 176, 30 L. ed. 408; Whitney *v.* Morrow, 112 U. S. 693, 5 S. Ct. 333, 28 L. ed. 871 [*affirming* 50 Wis. 197, 6 N. W. 494]; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789].

See 41 Cent. Dig. tit. "Public Lands," §§ 324, 325.

Burden of proof as to exception.— Where an act of congress confirming a claim to land forming a part of the public domain provides that it shall "not be so construed as to extend to any lands occupied by the United States for military purposes," a person claiming the land under a patent issued after the date of the act must show that the land claimed by him was occupied for military purposes at the date of the act. Whitney *v.* Morrow, 112 U. S. 693, 5 S. Ct. 333, 28 L. ed. 871 [*affirming* 50 Wis. 197, 6 N. W. 494].

30. Hit-tuk-ho-mi *v.* Watts, 7 Sm. & M. (Miss.) 363, 45 Am. Dec. 308; Wright *v.* Rutgers, 14 Mo. 585; Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100; Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571; Johnson *v.* Drew, 171 U. S. 93, 18 S. Ct. 800, 43 L. ed. 88 [*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172]; Burfenning *v.* Chicago, etc., R. Co., 163 U. S. 321, 16 S. Ct. 1018, 41 L. ed. 175; Morton *v.* Nebraska, 21 Wall. (U. S.) 660, 22 L. ed. 639; Stoddard *v.* Chambers, 2 How. (U. S.) 284, 11 L. ed. 269; Reynolds *v.* McArthur, 2 Pet. (U. S.) 417, 7 L. ed. 470; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789].

Reservations to United States see *supra*, II, D.

purpose,[31] or withdrawn from sale and entry as being within or subject to selection under a grant in aid of railroads or internal improvements;[32] or is reserved by a claim under a Spanish or Mexican grant *sub judice*,[33] or where congress has made no provision for the disposition of such land,[34] or the statute under which the patent was issued had been previously repealed,[35] or the land was known to be of a character not subject to an entry such as that on which the patent is based,[36] a patent for such land is void on its face and may be collaterally attacked in an action at law.[37]

31. Johnson *v.* Drew, 171 U. S. 93, 18 S. Ct. 800, 43 L. ed. 88 [*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172]; Burfenning *v.* Chicago, etc., R. Co., 163 U. S. 321, 16 S. Ct. 1018, 41 L. ed. 175.

32. Riley *v.* Welles, 154 U. S. 578, 14 S. Ct. 1166, 19 L. ed. 648.

Withdrawal of lands from entry or sale see *supra*, II, K, 1, p.

33. King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430]; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789].

Spanish, Mexican, and French grants see *infra*, V.

34. Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430]; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789].

35. Schwenke *v.* Union Depot R. Co., 7 Colo. 512, 4 Pac. 905.

36. Kansas City Min., etc., Co. *v.* Clay, 3 Ariz. 326, 29 Pac. 9, land not subject to entry because of known mineral deposits.

Lands subject to entry or sale see *supra*, II, C, 2.

37. *Alabama.*— Bates *v.* Herron, 35 Ala. 117; Iverson *v.* Dubose, 27 Ala. 418; Saltmarsh *v.* Crommelin, 24 Ala. 347; Stephens *v.* Westwood, 20 Ala. 275, 25 Ala. 716; Haden *v.* Ware, 15 Ala. 149; Crommelin *v.* Winter, 9 Ala. 594.

California.— Standard Quicksilver Co. *v.* Habishaw, 132 Cal. 115, 64 Pac. 113; Chapman *v.* Polack, 58 Cal. 553; Carr *v.* Quigley, 57 Cal 394; Rosecrans *v.* Douglass, 52 Cal. 213; Doll *v.* Meador, 16 Cal. 295.

Colorado.— Poire *v.* Wells, 6 Colo. 406.

Florida.— Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172.

Indiana.— Daggett *v.* Bonewitz, 107 Ind. 276, 7 N. E. 900.

Iowa.— Arnold *v.* Grimes, 2 Greene 77.

Kentucky.— American Assoc. *v.* Innis, 109 Ky. 595, 60 S. W. 388, 22 Ky. L. Rep. 1196.

Louisiana.— McGill *v.* McGill, 4 La. Ann. 262; Marsh *v.* Gousoulin, 16 La. 84.

Michigan.— Crapo *v.* Troy Tp., 98 Mich. 635, 57 N. W. 806; Webber *v.* Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469.

Minnesota.— Lamprey *v.* State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670; State *v.* Bachelder, 5 Minn. 223, 80 Am. Dec. 410.

Mississippi.— Dixon *v.* Doe, 23 Miss. 84; McAfee *v.* Keirn, 7 Sm. & M. 780, 45 Am. Dec. 331; Hit-tuk-ho-mi *v.* Watts, 7 Sm. & M. 363, 45 Am. Dec. 308.

Missouri.— Wright *v.* Rutgers, 14 Mo. 585.

Nevada.— Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105.

Ohio.— See Milliken *v.* Starling, 16 Ohio 61.

Pennsylvania.— Gingrich *v.* Foltz, 19 Pa. St. 38, 57 Am. Dec. 631; Gonzalus *v.* Hoover, 6 Serg. & R. 118.

Utah.— Kahn *v.* Old Tel. Min. Co., 2 Utah 174.

Washington.— Northern Pac. R. Co. *v.* Miller, 20 Wash. 21, 54 Pac. 603.

United States.— Johnson *v.* Drew, 171 U. S. 93, 18 S. Ct. 800, 43 L. ed. 88 [*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172]; Burfenning *v.* Chicago, etc., R. Co., 163 U. S. 321, 16 S. Ct. 1018, 41 L. ed. 175; Wisconsin Cent. R. Co. *v.* Forsythe, 159 U. S. 46, 15 S. Ct. 1020, 40 L. ed. 71; Lake Superior Ship Canal, etc., Co. *v.* Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. ed. 183; Knight *v.* U. S. Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Davis *v.* Weibold, 139 U. S. 507, 11 S. Ct. 628, 35 L. ed. 238; Doolan *v.* Carr, 125 U. S. 618, 8 S. Ct. 1228, 31 L. ed. 844; Wright *v.* Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. ed. 1039; St. Louis Smelting, etc., Co. *v.* Kemp, 104 U. S. 636, 26 L. ed. 875; Sherman *v.* Buick, 93 U. S. 209, 23 L. ed. 849; Morton *v.* Nebraska, 21 Wall. 660, 22 L. ed. 639; Best *v.* Polk, 18 Wall. 112, 21 L. ed. 805; Reichert *v.* Felps, 6 Wall. 160, 18 L. ed. 849 [*affirming* 33 Ill. 433]; Easton *v.* Salisbury, 21 How. 426, 16 L. ed. 181; Cunningham *v.* Ashley, 14 How. 377, 14 L. ed. 462; Ladiga *v.* Rowland, 2 How. 581, 11 L. ed. 387; Stoddard *v.* Chambers, 2 How. 284, 11 L. ed. 269; Wilcox *v.* Jackson, 13 Pet. 498, 10 L. ed. 264; Polk *v.* Wendal, 9 Cranch 87, 3 L. ed. 665; Eastern Oregon Land Co. *v.* Brosnan, 147 Fed. 807; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430]; Garrard *v.* Silver Peak Mines, 82 Fed. 578 [*affirmed* in 94 Fed. 983, 36 C. C. A. 603]; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789]; Francoeur *v.* Newhouse, 40 Fed. 618, 14 Sawy. 351; Nelson *v.* Moon, 17 Fed. Cas. No. 10,111, 3 McLean 319.

See 41 Cent. Dig. tit. "Public Lands," §§ 324, 325.

Effect of patent in passing title may be questioned in action at law.— Carswell *v.* Swindell, 102 Md. 636, 62 Atl. 956.

The want of authority which will make a patent void is a total want of authority to

N. Land Office Records and Proceedings as Evidence — 1. In General — a. Land Office Records in General. The records of the land office, being kept under the official sanction of the government, are always admissible as evidence of the facts therein stated,[38] and the facts proved by these records must be received as *prima facie* evidence of the right of the person at whose instance they were recorded, and as conclusive in regard to such things as the law requires to be recorded.[39]

b. Patents and Grants. A patent to public land is admissible in evidence,[40] without proof of execution,[41] record,[42] delivery,[43] or title in the United States or state.[44]

c. Surveys and Maps. Official surveys of lands of the United States[45] and

issue a patent for the subject of the grant, not a latent impropriety in exercising the authority when the proofs authorizing the act are formal and sufficient. Kahn *v.* Old Tel. Min. Co., 2 Utah 174.

A patent may be shown to be void by extrinsic evidence of a want of authority to issue it. Lakin *v.* Dolly, 53 Fed. 333 [*affirmed* in 54 Fed. 461, 4 C. C. A. 438].

38. Gregory *v.* McPherson, 13 Cal. 562; Welborn *v.* Spears, 32 Miss. 138; Norris *v.* Hamilton, 7 Watts (Pa.) 91; McGarrahan *v.* New Idria Min. Co., 96 U. S. 316, 24 L. ed. 630; Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876; Jesse D. Carr Land, etc., Co. *v.* U. S., 118 Fed. 821, 55 C. C. A. 433.

A receipt of a receiver of a land office is admissible as evidence of title in an action between individuals, although such receipt would not be evidence against the United States. Bracken *v.* Preston, 1 Pinn. (Wis.) 584, 44 Am. Dec. 412.

The minutes of a United States recorder of land titles, of testimony taken by him under the act of congress May 26, 1824, are only admissible in evidence to prove such facts as may be proved by hearsay. Williams *v.* Carpenter, 28 Mo. 453.

The pencil memorandum of a payment made on a sale of government lands in the books of the secretary of the treasury of the republic of Texas is proper evidence of such payment, in the absence of any showing of want of authority in the person making the memorandum. Franklin *v.* Tiernan, 62 Tex. 92.

The blotters found in the land office are not the records of any public transaction. They are the private entries of the clerk, and after his death are received only on the same principle which admits the private entries of other deceased persons. Fox *v.* Lyon, 27 Pa. St. 9; Strimpfler *v.* Roberts, 18 Pa. St. 283, 57 Am. Dec. 606.

The record of sales of school lands, kept by the school commissioner, is properly admissible in evidence in an action on his bond. Frazier *v.* Laughlin, 6 Ill. 347.

The tabular statement of the books of the recorder of land titles, showing the conformation of a lot, its size, etc., are admissible as evidence of the ownership, although the law had provided for the issuance of a certificate of confirmation of title. Biehler *v.* Coonce, 9 Mo. 347.

County record of patent. — Under a statute authorizing county recorders to record patents issued by the United States, such a patent may be proved by producing from the recorder's office the book in which it is recorded, without proof of loss of the original. Vance *v.* Kohlberg, 50 Cal. 346.

39. Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876.

40. Canfield *v.* Thompson, 49 Cal. 210; Callaway *v.* Fash, 50 Mo. 420; McCoy *v.* Michew, 7 Watts & S. (Pa.) 386. *Contra*, Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 3, 11 Pac. 515, holding that it is error to admit in evidence a patent from the United States to a mining company; the laws of the United States requiring all patents from the general land office to be recorded in that office, from which exemplifications authenticated by the seal and certificate of the commissioner may be obtained when required as evidence.

Evidence as to swamp or overflowed lands. — A patent from a state, of lands sold as swamp or overflowed lands, is not *prima facie* evidence, as against a claimant under the government, that such lands are swamp and overflowed. Keeran *v.* Allen, 33 Cal. 542; Keeran *v.* Griffith, 31 Cal. 461.

A patent is not evidence of title in an action commenced prior to its date, but it is not error to admit it in evidence to show a confirmation of the inchoate title by certificate, that being an immaterial point. Bullock *v.* Wilson, 5 Port. (Ala.) 338.

41. Robinson *v.* Cahalan, 91 Ala. 479, 8 So. 415; Gallup *v.* Armstrong, 22 Cal. 480; Yount *v.* Howell, 14 Cal. 465; Steeple *v.* Downing, 60 Ind. 478; Bowser *v.* Warren, 4 Blackf. (Ind.) 522. See also Mathews *v.* Buckingham, 22 Kan. 166.

42. Callaway *v.* Fash, 50 Mo. 420.

43. Downer *v.* Smith, 24 Cal. 114; Lavergne *v.* Elkins, 17 La. 220.

44. Knabe *v.* Burden, 88 Ala. 436, 7 So. 92; Grant *v.* Smith, 26 Mich. 201; Long *v.* McDow, 87 Mo. 197; Reynolds *v.* Weiss, 27 Wis. 450. *Compare* Wines *v.* Woods, 109 Ind. 291, 10 N. E. 399, holding that a deed purporting to be granted under a statute authorizing a county to convey land to the state in payment of county indebtedness is not admissible in evidence without proof that the lands conveyed belonged to the county, and were within the provisions of the statute.

45. O'Flaherty *v.* Kellogg, 59 Mo. 485; Chew *v.* Keck, 4 Rawle (Pa.) 163; Smyth *v.*

maps thereof[46] are admissible in evidence upon the certificate of the commissioner, without further evidence of authenticity.[47] But in order to be admissible a survey should be duly approved and recorded in accordance with the practice in the office of the surveyor-general,[48] and the authority under which it was made must also be shown.[49] The field-notes and plats of the survey of the public lands are competent evidence,[50] and have the force of a deposition.[51]

d. Official Correspondence. The official correspondence of the commissioner of the general land office and of the register and receiver of the United States land offices is admissible in evidence to prove the official acts of those officers;[52] but their unofficial letters, unauthenticated as legal certificates,[53] merely expressing opinions upon questions of law,[54] are not admissible.

e. Certificates of Land Officers — (i) *In General.* The certificate of a land officer to any fact of the existence of which he is required by law to give a certificate is receivable as evidence of the existence of that fact,[55] and such cer-

New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646.

Pertinent explanatory notes are as competent as any other part of the survey, whether above or below the signature of the surveyor. Pennsylvania Coal Co. *v.* Dunkel, 101 Pa. St. 103.

A memorandum in pencil mark on the return of a survey is admissible as evidence of the date of the return. Conkling *v.* Westbrook, 81* Pa. St. 81.

46. Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317 (holding, however, that the certificates of surveyors attached to a duly certified copy of a map from the archives of the land office are inadmissible to prove any disputed fact); Barrow *v.* Gridley, 25 Tex. Civ. App. 13, 59 S. W. 602, 913; Travis County *v.* Christian, (Tex. Civ. App. 1892) 21 S. W. 119; Fowler *v.* Scott, 64 Wis. 509, 25 N. W. 716; U. S. *v.* Van Winkle, 113 Fed. 903, 51 C. C. A. 533.

A connected map of a number of surveys, which had been recorded in the county, is evidence, accompanied by the explanations of the surveyors, without producing the separate surveys. Jones *v.* Bache, 13 Fed. Cas. No. 7,454, 3 Wash. 199.

47. Smith *v.* Hughes, 23 Tex. 248.

48. Gamache *v.* Piquignot, 17 Mo. 310.

49. Rose *v.* Davis, 11 Cal. 133.

Certificate of private surveyor.— In an action to establish a land grant a certificate of a private surveyor, who had surveyed the lands, that he had permission from the governor of the territory to make the survey, is not evidence that he had such authority. U. S. *v.* Hanson, 16 Pet. (U. S.) 196, 10 L. ed. 935.

A survey, adopted by the land office, although not made by the regular officer, is admissible in evidence. Shields *v.* Buchanan, 2 Yeates (Pa.) 219.

50. *California.*— Thompson *v.* Thornton, 50 Cal. 142; Richardson *v.* Forrest, 29 Cal. 317.

Illinois.— Cooney *v.* A. Booth Packing Co., 169 Ill. 370, 48 N. E. 406.

Pennsylvania.— Galbraith *v.* Elder, 8 Watts 81.

Tennessee.— Montgomery *v.* Lipscomb, 105 Tenn. 144, 58 S. W. 306, best evidence by statute.

United States.— Kirby *v.* Lewis, 39 Fed. 66.

See 20 Cent. Dig. tit. "Evidence," § 1274.

Township plats from the United States land office are inadmissible to show title to lands in the United States. Walsh *v.* Kattenburgh, 8 Minn. 127.

51. Kirby *v.* Lewis, 39 Fed. 66.

52. Bellows *v.* Todd, 34 Iowa 18; Carman *v.* Johnson, 29 Mo. 84; Ansley *v.* Peterson, 30 Wis. 653. See also Fothergill *v.* Stover, 1 Dall. (Pa.) 6, 1 L. ed. 13.

Court may consult such official correspondence, although not made formal proof in the case.— Kirby *v.* Lewis, 39 Fed. 66.

53. *Alabama.*— Brown *v.* Chambers, 12 Ala. 697.

Arkansas.— Hendry *v.* Willis, 33 Ark. 833.

Missouri.— Campbell *v.* Laclede Gas Light Co., 84 Mo. 352.

Pennsylvania.— Struthers *v.* Reese, 4 Pa. St. 129; Steel *v.* Finley, 3 Yeates 169.

Wisconsin.— Bovee *v.* McLean, 24 Wis. 225.

See 20 Cent. Dig. tit. "Evidence," § 1278.

54. Jeans *v.* Lawler, 33 Ala. 340.

Such a letter is inadmissible on an issue of title between other parties as being mere hearsay. Hanrick *v.* Dodd, 62 Tex. 75.

55. *Alabama.*— Doe *v.* Eslava, 11 Ala. 1028.

Arkansas.— Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374. But see Mays *v.* Johnson, 4 Ark. 613, holding that the certificate of a land officer cannot be evidence of any fact, unless expressly made so by statute of the state or of congress.

Mississippi.— Hardin *v.* Ho-yo-po-nubby, 27 Miss. 567; Wray *v.* Doe, 10 Sm. & M. 452.

Missouri.— Milburn *v.* Hardy, 28 Mo. 514; Cerre *v.* Hook, 6 Mo. 474; Gurno *v.* Janis, 6 Mo. 330.

Nevada.— Brown *v.* Warren, 16 Nev. 228.

Texas.— Strickel *v.* Tuberville, 28 Tex. Civ. App. 469, 67 S. W. 1058. *Contra,* Lott *v.* King, 79 Tex. 292, 15 S. W. 231, holding that under the Texas act of March 20, 1848, providing that the commissioner of the general land office shall give certificates on application as to any fact contained in the records of their offices, but not providing that such certificates shall be received in evidence, a

tificates have in some states been expressly made evidence by statute.[56] But only such certificates as the land officer is authorized by statute or regulation of the department to make are admissible in evidence,[57] and it is necessary that the certificate should be either to a copy of a paper or a statement of a fact contained in a paper which is a record of that office, and the original of which would be evidence in the case.[58] Mere certificates of the register or receiver as to his conclusions drawn from an examination of the records cannot be received as evidence.[59]

(II) *AUTHENTICATION.* It has been held that the certificate of the register of the United States land office needs no authentication;[60] but there are also decisions to the contrary.[61]

2. AUTHENTICATED TRANSCRIPTS AND COPIES — a. In General — (I) *LAND-OFFICE RECORDS IN GENERAL.* Duly certified copies of land office records are admissible in evidence,[62] and may be read in evidence without producing or accounting for the

certificate by a land commissioner is not admissible in evidence.

See 20 Cent. Dig. tit. "Evidence," § 1276.

The report of the register of the state land office is not a certificate of a public officer. Gordon *v.* Bucknell, 38 Iowa 438.

56. *Florida.*— Groover *v.* Coffee, 19 Fla. 61.

Illinois.— Wilcox *v.* Jackson, 109 Ill. 261; Seely *v.* Wells, 53 Ill. 120; Delaunay *v.* Burnett, 9 Ill. 454; Ross *v.* Reddick, 2 Ill. 73.

Minnesota.— Washburn *v.* Mendenhall, 21 Minn. 332; Dorman *v.* Ames, 12 Minn. 451.

Texas.— Talbert *v.* Dull, 70 Tex. 675, 8 S. W. 530.

Wisconsin.— Burdick *v.* Briggs, 11 Wis. 126.

See 20 Cent. Dig. tit. "Evidence," § 1276.

Under the Illinois statute the receiver's certificate is made evidence of any fact or matter on record in his office, and the register's certificate is made evidence of title. Wilcox *v.* Kinzie, 4 Ill. 218; Roper *v.* Clabaugh, 4 Ill. 166. The certificate of the receiver of the land office of the receipt of the purchase-money of land is not evidence of title thereto. Carson *v.* Merle, 5 Ill. 363; Roper *v.* Clabaugh, *supra.* To be evidence of title under this statute, the certificate must show an entry and purchase of land; it is not enough that the register certifies that a certificate had been granted to a certain person as claimant of a certain claim and survey. Aldes *v.* Abbott, 23 Ill. 61.

Defaced certificate.—A head-right land certificate was held admissible in evidence, although some of the words and parts of words contained in it had been obliterated, where offered in connection with testimony of witnesses who had seen and examined it before it was defaced. Pope *v.* Anthony, 29 Tex. Civ. App. 298, 68 S. W. 521.

57. *Alabama.*— Stephenson *v.* Reeves, 92 Ala. 582, 8 So. 695; Woods *v.* Nabors, 1 Stew. 172.

Arkansas.— Driver *v.* Evins, 47 Ark. 297, 1 S. W. 518.

California.— Murphy *v.* Sumner, 74 Cal. 316, 16 Pac. 3; Hastings *v.* Devlin, 40 Cal. 358.

Missouri.— Cutter *v.* Waddingham, 33 Mo. 269; Evans *v.* Labaddie, 10 Mo. 425.

Pennsylvania.— Garwood *v.* Dennis, 4 Binn. 314.

Texas.— Gaither *v.* Hanrick, 69 Tex. 92, 6 S. W. 619; Smithwick *v.* Andrews, 24 Tex. 488.

See 20 Cent. Dig. tit. "Evidence," § 1277.

58. Ashley *v.* Rector, 20 Ark. 359; Foute *v.* McDonald, 27 Miss. 610; Cockerel *v.* Doe, 12 Sm. & M. (Miss.) 117; Hamilton *v.* McAuley, 27 Tex. Civ. App. 256, 65 S. W. 205; Fisher *v.* Ullman, 3 Tex. Civ. App. 322, 22 S. W. 523.

59. *Alabama.*— Bonner *v.* Phillips, 77 Ala. 427.

Louisiana.— Judice *v.* Chrétien, 3 Rob. 15.

Mississippi.— Foute *v.* McDonald, 27 Miss. 610.

Texas.— Hamilton *v.* McAuley, 27 Tex. Civ. App. 256, 65 S. W. 205.

Wisconsin.— Reed *v.* Chicago, etc., R. Co., 71 Wis. 399, 37 N. W. 225; Cornelius *v.* Kessel, 53 Wis. 395, 10 N. W. 520; Farrand *v.* Chicago, etc., R. Co., 21 Wis. 435; Bigelow *v.* Blake, 18 Wis. 520; Gates *v.* Winslow, 1 Wis. 650.

See 20 Cent. Dig. tit. "Evidence," § 1276.

60. Cox *v.* Jones, 1 Stew. (Ala.) 379; Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374; Harris *v.* Doe, 4 Blackf. (Ind.) 369.

61. Jackson *v.* McMurray, 4 Colo. 76; Yellow River R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568; Fail *v.* Goodtitle, 1 Ill. 201.

62. *Alabama.*— Sprayberry *v.* State, 62 Ala. 459; Innerarity *v.* Mims, 1 Ala. 660.

California.—Gregory *v.* McPherson, 13 Cal. 562.

Florida.— Ropes *v.* Kemps, 38 Fla. 233, 20 So. 992.

Illinois.— Seely *v.* Wells, 53 Ill. 120.

Indiana.— Bonewits *v.* Wygant, 75 Ind. 41.

Kentucky.— Kentucky Seminary *v.* Payne, 3 T. B. Mon. 161.

Louisiana.— Franklin *v.* Woodland, 14 La. Ann. 188; Judice *v.* Chrétien, 3 Rob. 15; Seymour *v.* Cooley, 3 Mart. N. S. 396.

Maryland.— Casey *v.* Inloes, 1 Gill 430, 39 Am. Dec. 658; Lee *v.* Hoyes, 1 Gill 188.

Mississippi.— Fore *v.* Williams, 35 Miss. 533.

Nevada.— Peers *v.* Deluchi, 21 Nev. 164, 26 Pac. 228.

North Carolina.— Clarke *v.* Diggs, 28 N. C. 159, 44 Am. Dec. 73.

originals,[63] in all cases in which the originals would be evidence.[64] Such copies are sometimes made by statute evidence of equal grade with the originals,[65] and where such is the case they are primary evidence.[66]

(II) *Patents and Grants.* Certified copies of patents or grants, on file in the land office, are admissible in evidence,[67] except in favor of the patentees or

Pennsylvania.—Anderson *v.* Keim, 10 Watts 251; Oliphant *v.* Ferren, 1 Watts 57.

Texas.— Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 [*reversing* (Civ. App. 1906) 91 S. W. 606]; Texas Mexican R. Co. *v.* Jarvis, 69 Tex. 527, 7 S. W. 210; Allen *v.* Hoxey, 37 Tex. 320; Houston *v.* Perry, 3 Tex. 390; Kirby *v.* Hayden, 44 Tex. Civ. App. 207, 99 S. W. 746; Trimble *v.* Borroughs, 41 Tex. Civ. App. 554, 95 S. W. 614; Rogers *v.* Mexia, (Civ. App. 1896) 36 S. W. 825; Holt *v.* Maverick, (Civ. App. 1894) 24 S. W. 532.

United States.— Howard *v.* Perrin, 200 U. S. 71, 26 S. Ct. 195, 50 L. ed. 374, Adv. S. U. S. 195 [*affirming* 8 Ariz. 347, 76 Pac. 460]; Airhart *v.* Massieu, 98 U. S. 491, 25 L. ed. 213; U. S. *v.* Watkins, 97 U. S. 219, 24 L. ed. 952; Best *v.* Polk, 18 Wall. 112, 21 L. ed. 805; U. S. *v.* Perchman, 7 Pet. 51, 8 L. ed. 604.

See 20 Cent. Dig. tit. "Evidence," § 1302.

A certified copy of a copy is not admissible in evidence. Lawrence *v.* Grout, 12 La. Ann. 835; State *v.* Cardinas, 47 Tex. 250.

Where the recording act of a state has no reference to United States land patents, a certified copy of the record of such a patent is not evidence. Curtis *v.* Hunting, 6 Iowa 536.

63. *Alabama.*— Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744; Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682; Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349 [*overruling* Jones *v.* Walker, 47 Ala. 175]; Hines *v.* Greenlee, 3 Ala. 73.

Illinois.— Lee *v.* Getty, 26 Ill. 76.

Kansas.— Bernstein *v.* Smith, 10 Kan. 60.

Missouri.— Avery *v.* Adams, 69 Mo. 603; Barton *v.* Murrain, 27 Mo. 235, 72 Am. Dec. 259.

Tennessee.— State *v.* Cooper, (Ch. App. 1899) 53 S. W. 391.

United States.— Patterson *v.* Winn, 5 Pet. 233, 8 L. ed. 108.

See 20 Cent. Dig. tit. "Evidence," § 1303.

Contra.— Covington *v.* Berry, 76 Ark. 460, 88 S. W. 1005; Carpenter *v.* Smith, 76 Ark. 447, 88 S. W. 976; Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20; Hensley *v.* Tarpey, 7 Cal. 288; Stephenson *v.* Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; Smith *v.* Mosier, 5 Blackf. (Ind.) 51.

The original of a government patent being lots, an official copy under seal is admissible evidence. Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

64. Lee *v.* Getty, 26 Ill. 76; Smith *v.* Mosier, 5 Blackf. (Ind.) 51; Allen *v.* Hoxey, 37 Tex. 320; Dupree *v.* Frank, (Tex. Civ. App. 1897) 39 S. W. 988; McLane *v.* Bovee, 35 Wis. 27.

If the original would be inadmissible the copy is also inadmissible. Penn *v.* Hartman, 2 Dall. (Pa.) 230, 1 L. ed. 360; Paschal *v.* Perez, 7 Tex. 348.

The record must be one authorized by law in order for a certified copy thereof to be admissible. Stephenson *v.* Reeves, 92 Ala. 582, 8 So. 695; Carrington *v.* Potter, 37 Fed. 767.

65. *Arkansas.*— Dawson *v.* Parham, 55 Ark. 286, 18 S. W. 48.

California.— Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647; Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544.

Kansas.— Stinson *v.* Geer, 42 Kan. 520, 22 Pac. 586.

North Carolina.— Candler *v.* Lunsford, 20 N. C. 142.

Texas.—Van Sickle *v.* Catlett, 75 Tex. 404, 13 S. W. 31.

United States.— Culver *v.* Uthe, 133 U. S. 655, 10 S. Ct. 415, 33 L. ed. 776.

See 20 Cent. Dig. tit. "Evidence," § 1302.

Meaning of statute.— Such a statute does not mean that in all cases the copy should have the same probative force as the original instrument, but that it should be regarded as of the same class in the grades of evidence, as to written or parol, and primary or secondary. Campbell *v.* Laclede Gas-Light Co., 119 U. S. 445, 7 S. Ct. 278, 30 L. ed. 459.

Records of former government.— By statute in some states duly authenticated copies of Spanish records are made evidence, and the production of the originals dispensed with. Doe *v.* Eslava, 11 Ala. 1028; Herndon *v.* Casiano, 7 Tex. 322.

66. Finley *v.* Woodruff, 8 Ark. 328; Wheeler *v.* Moody, 9 Tex. 372.

67. *Alabama.*— Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744; Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682; Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349 [*overruling* Jones *v.* Walker, 47 Ala. 175]; Hines *v.* Greenlee, 3 Ala. 73.

Florida.— Ropes *v.* Kemps, 38 Fla. 233, 20 So. 992.

Georgia.— Reppard *v.* Warren, 103 Ga. 198, 29 S. E. 817.

Illinois.— Lane *v.* Bommelmann, 17 Ill. 95.

Kansas.— Bernstein *v.* Smith, 10 Kan. 60.

Louisiana.— Le Bleu *v.* North American Land, etc., Co., 46 La. Ann. 1465, 16 So. 501.

Missouri.— Avery *v.* Adams, 69 Mo. 603; Barton *v.* Murrain, 27 Mo. 235, 72 Am. Dec. 259.

New York.— New York Cent., etc., R. Co. *v.* Brockway Brick Co., 10 N. Y. App. Div. 387, 41 N. Y. Suppl. 762 [*affirmed* in 158 N. Y. 470, 53 N. E. 209]; McKineron *v.* Bliss, 31 Barb. 180 [*affirmed* in 21 N. Y. 206].

North Carolina.— Strickland *v.* Draughan, 88 N. C. 315; Archibald *v.* Davis, 49 N. C. 133; Candler *v.* Lunsford, 20 N. C. 142. See also Blount *v.* Benbury, 3 N. C. 353.

grantees themselves, or those claiming under them, who would be entitled to the possession of the originals.[68]

(III) *MAPS AND SURVEYS.* A certified copy of a map or survey on file in the land office is admissible in evidence,[69] with the same effect as the original,[70] provided the original has been so approved and recorded as to become a record of that office.[71]

(IV) *OFFICIAL CORRESPONDENCE.* Under a statute providing that duly certified copies of land office records shall be received in evidence equally with the originals, certified copies of official letters on record in the land office are admissible in evidence;[72] and where the official character of the letter is apparent upon its face, it is unnecessary for the certifying officer to state in his certificate that it is the copy of an official letter.[73]

(V) *TRANSFERS AND ASSIGNMENTS.* Copies of assignments of land claims, filed in the general land office, and certified by the land commissioner, are admissible[74]

Pennsylvania.— Carkhuff *v.* Anderson, 3 Binn. 4.

Texas.— Ney *v.* Mumme, 66 Tex. 268, 17 S. W. 407; McClelland *v.* Moore, 48 Tex. 355; Dikes *v.* Miller, 25 Tex. Suppl. 281, 78 Am. Dec. 571; Hollifield *v.* Landrum, 31 Tex. Civ. App. 187, 71 S. W. 979.

Virginia.— Lee *v.* Tapscott, 2 Wash. 276.

United States.— Hanrick *v.* Barton, 16 Wall. 166, 21 L. ed. 350; Patterson *v.* Winn, 5 Pet. 233, 8 L. ed. 108.

See 20 Cent. Dig. tit. "Evidence," § 1303.

This principle is sometimes recognized by statute.— *California.*— Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647.

Florida.— Liddon *v.* Hodnett, 22 Fla. 442.

Indiana.— Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749.

Kentucky.— Sneed *v.* Ward, 5 Dana 187.

Texas.— Van Sickle *v.* Catlett, 75 Tex. 404, 13 S. W. 31.

See 20 Cent. Dig. tit. "Evidence," § 1303.

The copy of a warrant for land sent by the surveyor-general to the deputy to be executed is evidence. Motz *v.* Bolard, 6 Serg. & R. (Pa.) 210.

Copy of patent from records of another state.—A copy from the register's office of Virginia of a patent which issued prior to the separation of Kentucky is valid evidence in the latter state. Gholson *v.* Lefevre, Litt. Sel. Cas. (Ky.) 191; Hedden *v.* Overton, 4 Bibb (Ky.) 406. See also Ott *v.* McHenry, 2 W. Va. 73.

The fact that a patent has not been recorded in the county where the land lies does not preclude it, or a duly certified copy from the land office, from being received in evidence. Jones *v.* Phillips, 59 Tex. 609.

68. Candler *v.* Lunsford, 20 N. C. 142.

69. *California.*— Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705.

Michigan.—Dewey *v.* Campau, 4 Mich. 565.

Mississippi.— Sessions *v.* Reynolds, 7 Sm. & M. 130.

Missouri.— Wood *v.* Nortman, 85 Mo. 298; Wilhite *v.* Barr, 67 Mo. 284. *Contra*, unless copies sworn to, Rector *v.* Welch, 1 Mo. 334.

Pennsylvania.— Wolf *v.* Goddard, 9 Watts 544; Hewes *v.* McDowell, 1 Dall. 5, 1 L. ed. 12.

Tennessee.— State *v.* Cooper, (Ch. App. 1899) 53 S. W. 391.

Texas.— Breckenridge *v.* Neill, 26 Tex. 101; Hollingsworth *v.* Holshousen, 17 Tex. 41; Rogers *v.* Mexia, (Civ. App. 1896) 36 S. W. 825; Houston, etc., R. Co. *v.* Bowie, 2 Tex. Civ. App. 437, 21 S. W. 304.

Virginia.— Pollard *v.* Lively, 4 Gratt. 73.

United States.— Meehan *v.* Forsyth, 24 How. 175, 16 L. ed. 730.

See 20 Cent. Dig. tit. "Evidence," § 1304.

Contra, unless copies sworn to. Hamner *v.* Eddins, 3 Stew. (Ala.) 192.

Copy of a copy.—A plat of survey purporting to be an extract from an approved map of a particular township, certified by the register of the land office, is inadmissible as evidence, it being only the copy of a copy and therefore not the best evidence. Lawrence *v.* Grout, 12 La. Ann. 835.

Certified copy of a certificate of resurvey admissible.— Thornton *v.* Edwards, 1 Harr. & M. (Md.) 158.

70. Rierson *v.* St. Louis, etc., R. Co., 59 Kan. 32, 51 Pac. 901.

71. Patrick *v.* Nance, 26 Tex. 298.

72. *Alabama.*— Holmes *v.* State, 108 Ala. 24, 18 So. 529.

California.— People *v.* Hagar, 52 Cal. 171.

Iowa.— Bellows *v.* Todd, 34 Iowa 18.

Kansas.— Darcy *v.* McCarthy, 35 Kan. 722, 12 Pac. 104.

Mississippi.— Davis *v.* Freeland, 32 Miss. 645.

Texas.— Trimble *v.* Burroughs, 41 Tex. Civ. App. 554, 95 S. W. 614; Flynt *v.* Taylor, (Civ. App. 1906) 91 S. W. 864, holding, however, that such a statute does not make certified copies of letters written to the commissioner competent evidence in the absence of proof that the letter from which the copy is made was written by the person by whom it purports to have been written.

See 20 Cent. Dig. tit. "Evidence," § 1306.

73. Darcy *v.* McCarthy, 35 Kan. 722, 12 Pac. 104.

74. Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868; Clark *v.* Hall, 19 Mich. 356; Mason *v.* McLaughlin, 16 Tex. 24; Sayward *v.* Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389.

Ancient document.—A certified copy from the general land office of a transfer of a

in evidence, provided such assignments constitute a portion of the records of that office.[75]

(VI) *Private Papers in Land Office.* The certificate of the commissioner of the general land office will not give legal authenticity to papers which are mere private property, and which do not belong to the archives of his office.[76]

(VII) *Extracts.* A certified extract from a paper in the land office is admissible,[77] if it appears to contain all that relates to the subject in controversy,[78] nor is it necessary that it should show by whom or when it was made, the presumption being in favor of its regularity.[79]

(VIII) *Duplicate or Second Copy.* A duplicate patent [80] or receipt,[81] or a second original,[82] is of as high authority as evidence as the original.

b. Form and Sufficiency of Copy. Whatever the law requires to be recorded as a part of the instrument ought to be contained in the copy before it can be admitted as evidence.[83] The seal is no part of a patent and need not be

land certificate, indorsed on the certificate, and attested by two witnesses, the transfer being dated 1838, and the certificate being approved in 1859 by the commissioner of claims, and filed in the land office in 1873, is admissible as an ancient instrument, delivery being inferable from its attestation by two witnesses. Huff *v.* Crawford, (Tex. Civ. App. 1895) 32 S. W. 592.

When an assignment of a conditional certificate for land was made on the back of it, and it was then deposited in the land office, from which it could not be taken, an affidavit of the fact was sufficient to render a certified copy admissible. Graham *v.* Henry, 17 Tex. 164.

75. Lott *v.* King, 79 Tex. 292, 15 S. W. 231; Halbert *v.* Carroll, (Tex. Civ. App. 1894) 25 S. W. 1102.

A deed of a grantee of the state cannot be considered as belonging to the archives of the state, so as to be proved by a copy made by the land agent. Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

In Texas, formerly, assignments of land certificates left in the general land office to procure a patent were not admissible in evidence as "copies of records," until constituted and recognized as records by the issuing of the patent. Short *v.* Wade, 25 Tex. 510. But by the act June 2, 1873, section 4, all transfers of land certificates on file in the land office, and coming within its terms, are made archives, and certified copies thereof are admissible in evidence. Parker *v.* Spencer, 61 Tex. 155; Burkett *v.* Scarborough, 59 Tex. 495; Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703. See also Day Land, etc., Co. *v.* New York, etc., Land Co., (Civ. App. 1894) 25 S. W. 1089.

76. Rogers *v.* Pettus, 80 Tex. 425, 15 S. W. 1093; Hatchett *v.* Conner, 30 Tex. 104; Mapes *v.* Leal, 27 Tex. 345; Herndon *v.* Casiano, 7 Tex. 322; Lanning *v.* Dolph, 14 Fed. Cas. No. 8,073, 4 Wash. 624.

77. *Arkansas.*— Finley *v.* Woodruff, 8 Ark. 328.

Michigan.— Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837.

North Carolina.— Strickland *v.* Draughan, 88 N. C. 315; McLenan *v.* Chisolm, 64 N. C. 323.

Pennsylvania.— Jennings *v.* McDowell, 25 Pa. St. 387; De France *v.* Stricker, 4 Watts 327.

United States.— Polk *v.* Wendell, 5 Wheat. 293, 5 L. ed. 92 [*reversing* 19 Fed. Cas. No. 11,251, Brunn. Col. Cas. 168, 2 Overt. (Tenn.) 433]. *Contra,* Griffith *v.* Evans, 11 Fed. Cas. No. 5,822, Pet. C. C. 166; Griffith *v.* Tunckhouser, 11 Fed. Cas. No. 5,823, Pet. C. C. 418.

See 20 Cent. Dig. tit. "Evidence," § 1311.

Contra.— Hallet *v.* Eslava, 3 Stew. & P. (Ala.) 105.

Where a negative use is intended to be made of such an extract, it is properly rejected. Polk *v.* Wendell, 5 Wheat. (U. S.) 293, 5 L. ed. 92.

78. Farr *v.* Swan, 2 Pa. St. 245.

79. Farr *v.* Swan, 2 Pa. St. 245.

80. Hines *v.* Greenlee, 3 Ala. 73.

Under Ill. Rev. St. (1874) c. 122, § 97, providing that "purchasers of common school lands, their heirs and assigns, may obtain duplicate copies of their certificates of purchase and of patents, upon filing affidavit . . . with the Auditor . . . proving the loss or destruction of the original; and such copies shall have all the force and effect of the originals," a duplicate copy of a patent is admissible. Reich *v.* Berdel, 120 Ill. 499, 11 N. E. 912.

81. Stone *v.* McMahan, 4 Greene (Iowa) 72; Burlerson *v.* Teeple, 2 Greene (Iowa) 542.

82. Blythe *v.* Houston, 46 Tex. 65; Titus *v.* Kimbro, 8 Tex. 210; Herndon *v.* Casiano, 7 Tex. 322; McPhaul *v.* Lapsley, 20 Wall. (U. S.) 264, 22 L. ed. 344.

A second copy of a title, issued to the interested party for his protection, and to serve him as evidence of his title, was not to be in the official custody of the commissioner of the general land office; and therefore a certified copy of it, from the general land office, was inadmissible. Paschal *v.* Perez, 7 Tex. 348.

83. Hedden *v.* Overton, 4 Bibb (Ky.) 406.

Presumption of correctness.— In the absence of testimony, it must be presumed that the copy discloses the instrument as it exists in the land office. Hooks *v.* Colley, 22 Tex. Civ. App. 1, 53 S. W. 56.

copied;[84] but a signature in some form must appear.[85] A copy of a patent is admissible without a map to which the patent refers, where the land may be identified without reference to the map.[86]

c. Authentication — (I) *Necessity.* A copy of a land office record not exemplified by the certificate of the proper officer or otherwise authenticated is inadmissible in evidence.[87]

(II) *Authority of Officer.* In order that copies of land office records may be admissible in evidence, they must be certified by the proper officer, having the custody of the original.[88] Thus certification by the commissioner or register of the land office,[89] or his deputy,[90] is sufficient, but a copy certified by a clerk in the land office[91] or by the recorder of a county[92] is not entitled to be received in evidence unless it is so provided by statute.[93]

(III) *Form and Mode.* Certified copies of land office records will not be admissible in evidence unless authenticated in the proper form and manner.[94] Thus it is generally required that the certificate should state that the paper is a true copy of the original.[95] As a rule a substantial compliance with the requirements of the

A variance as to date between a patent and a certified copy thereof does not affect the admissibility of the latter. The question of its identity is to be determined under all the evidence. Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

84. Jackson *v.* Berner, 48 Ill. 203; Bell *v.* Fry, 5 Dana (Ky.) 341; Sneed *v.* Ward, 5 Dana (Ky.) 187; Hedden *v.* Overton, 4 Bibb (Ky.) 406; Aycock *v.* Raleigh, etc., R. Co., 89 N. C. 321.

85. Liddon *v.* Hodnett, 22 Fla. 442 (signature by initials sufficient); Briggs *v.* Holmstrong, 72 Mo. 337 (signature by initials sufficient); McGarrahan *v.* New Idria Min. Co., 96 U. S. 316, 24 L. ed. 630.

Facsimile copies of signature.— It is not a valid objection to certified copies from the general land office as evidence, that the officers undertook to make, as nearly as they could, facsimile copies of a signature they could not read. McCamant *v.* Roberts, (Tex. Civ. App. 1894) 25 S. W. 731.

86. New York Cent., etc., R. Co. *v.* Brockway Brick Co., 10 N. Y. App. Div. 287, 41 N. Y. Suppl. 762; Rosamond *v.* McIlwain, 2 Brev. (S. C.) 132; Hooks *v.* Colley, 22 Tex. Civ. App. 1, 53 S. W. 56.

87. Huls *v.* Buntin, 47 Ill. 396; Woolley *v.* McCormick, 45 S. W. 885, 20 Ky. L. Rep. 272; Cockey *v.* Smith, 3 Harr. & J. (Md.) 20; Stewart *v.* Lead Belt Land Co., 200 Mo. 281, 98 S. W. 767.

The certificate is not itself evidence before the jury, its office being merely to make the copies of the entries evidence. Johnson *v.* Mays, 8 Ark. 386.

88. *Alabama.*— Johnson *v.* McGehee, 1 Ala. 186.

Indiana.— Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749.

Louisiana.— Boatner *v.* Scott, 1 Rob. 546.

Tennessee.— State *v.* Cooper, (Ch. App. 1899) 53 S. W. 391.

Texas.— Paschal *v.* Perez, 7 Tex. 348.

See 20 Cent. Dig. tit. "Evidence," § 1309.

89. Boatner *v.* Scott, 1 Rob. (La.) 546. *Compare* Millaudon *v.* McDonough, 18 La. 102, holding that the register has no authority to certify copies of public surveys.

Acting register.— Copies of papers from the register of the land office, certified by an acting register, may be admitted in evidence. Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349; Stephens *v.* Westwood, 25 Ala. 716; Murray *v.* Polglase, 17 Mont. 455, 43 Pac. 505; Ward *v.* Moorey, 1 Wash. Terr. 104.

90. Urket *v.* Coryell, 5 Watts & S. (Pa.) 60; Carlile *v.* Maxwell, 1 McCord (S. C.) 534; McCreight *v.* Gossitt, 1 Brev. (S. C.) 515; Barino *v.* Gourdine, Harp. (S. C.) 221, holding further that proof of appointment of the deputy is unnecessary. But see Lesassier *v.* Dashiell, 14 La. 467, holding that a certificate for the register is inadmissible in the absence of proof that he might act by proxy or had delegated his powers.

91. Sampson *v.* Overton, 4 Bibb (Ky.) 409.

92. Lyell *v.* Maynard, 15 Fed. Cas. No. 8,619, 6 McLean 15.

93. Lally *v.* Rossman, 82 Wis. 147, 51 N. W. 1132, certification by chief clerk authorized.

94. Scott *v.* Hancock, 3 Stew. & P. (Ala.) 44; Ryan *v.* Jackson, 11 Tex. 391, where the copy offered in evidence was rejected because the certificate was not accompanied by evidence of its genuineness.

No prescribed form of certificate.— Gratz *v.* Beates, 45 Pa. St. 495.

Necessity of seal.— Unless specially required, a copy of a land-office record, duly certified by the register, is admissible in evidence, although the certificate is without seal. Stewart *v.* Trenier, 49 Ala. 492; State *v.* Cooper, (Tenn. Ch. App. 1899) 53 S. W. 391. But see Brock *v.* Burchett, 2 Swan (Tenn.) 27.

The register's attestation to a copy does not authenticate an indorsement on the back of it; and in the absence of other evidence an indorsement upon the copy, offered as evidence of a like indorsement on the original, is properly rejected. McGowan *v.* Crooks, 5 Dana (Ky.) 65.

95. Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544; Wilson *v.* Hoffman, 54 Mich. 246, 20 N. W. 37; Martin *v.* King, 3 How.

statute as to certification is sufficient.[96] Translated copies must be certified by both the translator and the commissioner or register.[97]

3. Best and Secondary Evidence — a. In General. The best evidence of the contents of a land office record is the record itself or a duly authenticated copy thereof, and parol evidence of the facts contained therein is not admissible,[98] without first showing that the record evidence cannot be had.[99] But where it is satisfactorily shown that such a record has been lost or destroyed, its contents may be proved by parol or other competent secondary evidence.[1]

b. Limitations of Rule. Where a fact is not one which is required to appear of record it may be established by parol,[2] and so parol evidence is admissible to show the location of a tract of land, although there is record evidence of the fact.[3]

O. Remedies in Case of Fraud, Mistake, or Trust — 1. Cancellation of Certification to State. An improper certification of land to a state may be canceled or set aside at the suit of the United States on the ground of fraud or mistake,[4] although the state has already transferred the title to private individuals,[5] and the government has such a direct interest in such a suit as will prevent its becoming

(Miss.) 125; Harper *v.* Farmers', etc., Bank, 7 Watts & S. (Pa.) 204.

96. Young *v.* Emerson, 18 Cal. 416; Piatt County *v.* Gumley, 81 Ill. 350.

A certificate unusual in form, but not irregular, does not render the copy incompetent. Stevens *v.* Geiser, 71 Tex. 140, 8 S. W. 610.

97. Spillars *v.* Curry, 10 Tex. 143; Swift *v.* Herrera, 9 Tex. 263.

98. *Alabama.*— Mitchell *v.* Cobb, 13 Ala. 137.

Colorado.—Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832.

Georgia.— Williams *v.* Goodall, 60 Ga. 482.

Illinois.—Cornwell *v.* Cornwell, 91 Ill. 414; Chicago *v.* McGraw, 75 Ill. 566.

Kentucky.— Swan *v.* Wilson, 1 A. K. Marsh. 99.

Maryland.— Marshall *v.* Haney, 9 Gill 251.

Michigan.— Platt *v.* Haner, 27 Mich. 167.

Mississippi.— Harris *v.* Newman, 3 Sm. & M. 565.

Nebraska.— Smith *v.* Chadeon First Nat. Bank, 45 Nebr. 444, 63 N. W. 796.

New York.— McKineron *v.* Bliss, 31 Barb. 180 [*affirmed* in 21 N. Y. 206].

Tennessee.— Grubbs *v.* McClatchy, 2 Yerg. 432.

Wisconsin.— Cornelius *v.* Kessel, 53 Wis. 395, 10 N. W. 520.

United States.— McPhaul *v.* Lapsley, 20 Wall. 264, 22 L. ed. 344.

See 20 Cent. Dig. tit. "Evidence," § 503.

Testimony by the land commissioner as to the contents of an archive on file in his office is not admissible. Denn *v.* Pond, 1 N. J. L. 379; Stafford *v.* King, 30 Tex. 257, 94 Am. Dec. 304; Bass *v.* Mitchell, 22 Tex. 285; Meyer *v.* Hale, (Tex. Civ. App. 1893) 23 S. W. 990.

99. Phillips *v.* Beene, 16 Ala. 720; Yarborough *v.* Hood, 13 Ala. 176; Doe *v.* Stephenson, Smith (Ind.) 20.

The non-existence of a record may be proved by the oath of any one who has made a search therefor. Smith *v.* Chadron First Nat. Bank, 45 Nebr. 444, 63 N. W. 796.

1. Day *v.* Huggins, 29 Ga. 78; Stewart *v.* Crosby, (Tex. Civ. App. 1900) 56 S. W. 433; Peralta *v.* U. S., 3 Wall. (U. S.) 434, 18 L. ed. 221; U. S. *v.* Knight, 1 Black (U. S.) 227, 488, 17 L. ed. 76, 80; U. S. *v.* Castro, 24 How. (U. S.) 346, 16 L. ed. 659; Lemoine *v.* Dunklin County, 51 Fed. 487, 2 C. C. A. 343.

2. Phillips *v.* Doe, 13 Sm. & M. (Miss.) 31; Guitard *v.* Stoddard, 16 How. (U. S.) 494, 14 L. ed. 1030.

3. Colton Land, etc., Co. *v.* Swartz, 99 Cal. 278, 33 Pac. 878; Heinlen *v.* Heilbron, 97 Cal. 101, 31 Pac. 838; McKeen *v.* Haskell, 108 Ind. 97, 8 N. E. 901; Brooks *v.* Fairchild, 36 Mich. 231.

4. Williams *v.* U. S., 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026 [*affirming* 30 Fed. 309, and *followed* in U. S. *v.* Hendy, 54 Fed. 447]; U. S. *v.* Mullan, 10 Fed. 785, 7 Sawy. 466.

Sufficiency of allegations of bill.— Where the allegations of a bill filed by the United States to set aside a certification of lands to a state are of fraud or wrong but they also show inadvertence and mistake in the certification, the bill may be sustained upon the latter grounds, although no fraud or wrong be established. Williams *v.* U. S., 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026 [*affirming* 30 Fed. 309, and *followed* in U. S. *v.* Hendy, 54 Fed. 447], holding the facts sufficient to show mistake.

5. U. S. *v.* Mullan, 10 Fed. 785, 7 Sawy. 466.

Parties.— *Bona fide* purchasers holding the legal title to land, under a voidable certification to a state in aid of railroads, are indispensable parties to a suit in equity by the United States to annul that title. U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96.

Suit against transferee alone.— Where it is claimed that the title to land was illegally acquired from the United States by a state, which has since granted the equitable, but retained the legal, title, the United States may sue the holder of the equitable title alone to divest him thereof. Williams *v.* U. S., 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026 [*affirming* 30 Fed. 309].

barred by limitations or estoppel resulting from the negligence of the officers of the government.[6]

2. Attack on and Setting Aside of Patent — a. In General — (i) *Direct Proceedings Necessary.* The remedy for the wrongful and erroneous issuance of a patent for public lands is by a direct proceeding by bill in equity to set it aside or subject it to the rights of the person equitably entitled to the land.[7]

(ii) *Who May Attack Patent.* A patent conveying land which was a part of the public domain cannot be attached or impeached by a person having no interest in the land;[8] but is subject to impeachment only by the United States,[9]

6. U. S. *v.* Winona, etc., R. Co., 67 Fed. 969, 15 C. C. A. 117, holding that the fact that a preëmptioner, whose claim had been canceled, had petitioned the land office for the reinstatement of his preëmption claim to lands which lie within the place limits of a land grant railroad, raised no presumption that a suit subsequently brought, in the name of the United States, to cancel, as erroneous, the certifications of the lands to the state under the grant, was for his benefit alone; but, on the contrary, the government had a direct interest in the suit, for if the claims of the preëmptor were sustained, the government would receive from him at least the minimum price of the land, while if they were not sustained the government would have the land itself.

Delay by the United States in suing to cancel an erroneous certification of lands to a state in aid of a railroad, whereby the railroad company is prevented from acquiring indemnity lands in place thereof, raises no equitable estoppel against the United States. U. S. *v.* Winona, etc., R. Co., 67 Fed. 969, 15 C. C. A. 117.

7. Johnson *v.* Pacific Coast Steamship Co., 2 Alaska 224; Gonzales *v.* French, 164 U. S. 338, 17 S. Ct. 102, 41 L. ed. 458; Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992; Bernier *v.* Bernier, 147 U. S. 242, 13 S. Ct. 244, 37 L. ed. 152; U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384; Heath *v.* Wallace, 138 U. S. 573, 11 S. Ct. 380, 34 L. ed. 1063; Ehrhardt *v.* Hogaboom, 115 U. S. 67, 5 S. Ct. 1157, 29 L. ed. 346; Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226; U. S. *v.* Atherton, 102 U. S. 372, 26 L. ed. 213; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. ed. 800; U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812; Warren *v.* Van Brunt, 19 Wall. (U. S.) 646, 22 L. ed. 219; Johnson *v.* Towsley, 13 Wall. (U. S.) 72, 20 L. ed. 485; Lindsey *v.* Hawes, 2 Black (U. S.) 554, 17 L. ed. 265; Lytle *v.* Arkansas, 22 How. (U. S.) 193, 16 L. ed. 306; Garland *v.* Wynn, 20 How. (U. S.) 6, 15 L. ed. 801; Barnard *v.* Ashley, 18 How. (U. S.) 43, 15 L. ed. 285; Cunningham *v.* Ashley, 14 How. (U. S.) 377, 14 L. ed. 462; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29 [*reversing* 104 Fed. 430]; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290; U. S. *v.* Coos Bay Wagon-Road Co., 89 Fed. 151; U. S. *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176; U. S. *v.* Central Pac. R. Co., 84 Fed. 218; Kirwan *v.* Murphy, 83 Fed. 275, 28 C. C. A. 348; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96; Bogan *v.* Edinburgh American Land Mortg. Co., 63 Fed. 192, 11 C. C. A. 128; Root *v.* Shields, 20 Fed. Cas. No. 12,038, Woolw. 340.

8. *Alabama.*— Crommelin *v.* Minter, 9 Ala. 594.

Arkansas.— Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031.

California.— Dreyfus *v.* Badger, 108 Cal. 58, 41 Pac. 279; Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359; Burling *v.* Thompkins, 77 Cal. 257, 19 Pac. 429; Thompson *v.* Doaksum, 68 Cal. 593, 10 Pac. 199.

Florida.— Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172.

Kansas.— Houck *v.* Kelsey, 17 Kan. 333; James *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735.

Minnesota.— Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

Missouri.— Gibson *v.* Chouteau, 39 Mo. 536; Sarpy *v.* Papin, 7 Mo. 503.

Ohio.— Hall *v.* Prindle, 2 Ohio Dec. (Reprint) 261, 2 West. L. Month. 193.

Oregon.— Lee *v.* Summers, 2 Oreg. 260.

Washington.— Brygger *v.* Schweitzer, 5 Wash. 564, 32 Pac. 462, 33 Pac. 388.

United States.— Field *v.* Seabury, 19 How. 323, 333, 15 L. ed. 650, 655; Campbell *v.* Weyerhaeuser, 161 Fed. 332, 88 C. C. A. 412; Hartman *v.* Warren, 76 Fed. 157, 22 C. C. A. 30.

See 41 Cent. Dig. tit. "Public Lands," § 326.

One whose entry has been canceled by the land department cannot maintain a suit to establish a trust against a subsequent patentee. Jordan *v.* Ward, 64 Fed. 904, 12 C. C. A. 447.

A stranger cannot dispute the truth of recitals in the patent.— Jones *v.* Inge, 5 Port. (Ala.) 327.

A naked possessor of land, without higher claim of right, cannot question the validity of a patent issued to another. James *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735.

9. *Idaho.*— Johnson *v.* Hurst, 10 Ida. 808, 77 Pac. 784.

Kansas.— Houck *v.* Kelsey, 17 Kan. 333.

Minnesota.— Lamprey *v.* Mead, 54 Minn. 290, 55 N. W. 1132, 40 Am. St. Rep. 328; Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

Ohio.— Hall *v.* Prindle, 2 Ohio Dec. (Reprint) 261, 2 West. L. Month. 193.

or its grantee,[10] or a person who has succeeded to its rights,[11] or by a person who was defrauded or deprived of his rights by the issuance of a patent to another.[12] It has been laid down that in order to enable one to attack a patent from the government he must show that he himself was entitled to it; that is, it is not sufficient for him to show that there may have been error in adjudging the title to the patentee, but he must show that by the law properly administered the title should have been awarded to him;[13] but this does not mean that at the moment the patent issues it should have been awarded to the adverse claimant; but only that the claimant against the patent must so far bring himself within the law that he would have been entitled, if not obstructed or prevented, to complete his claim.[14]

(III) *Grounds of Attack on Patent.* A patent for public land may be attacked or impeached on the ground that its issuance was procured by fraud,[15]

Utah.— Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571.

United States.— Illinois Steel Co. *v.* Budzisz, 82 Fed. 160; Carter *v.* Thompson, 65 Fed. 329.

See 41 Cent. Dig. tit. "Public Lands," § 326.

Where the fraud is upon the government, only the government can attack the patent therefor. Myendorf *v.* Frohner, 3 Mont. 282; Scott *v.* Lockey Inv. Co., 60 Fed. 34.

10. Johnson *v.* Hurst, 10 Ida. 308, 77 Pac. 784.

A preëmptor is so far in privity with the United States, under whose laws he has settled on the land, that he may attack a patent of said land issued by the United States to a railroad company. Foss *v.* Hinkell, 78 Cal. 158, 20 Pac. 393.

One who received a patent from the United States as a homestead claimant is in such privity with the paramount source of title as enables him to attack a patent issued to another person by a state for the land as land selected in part satisfaction of a congressional grant. Chant *v.* Reynolds, 49 Cal. 213.

One whose entry has been declared null and void cannot maintain a bill impeaching the title of another to the lands. Evans *v.* St. Louis Public Schools, 32 Mo. 27.

11. Ferry *v.* Street, 4 Utah 521, 7 Pac. 712, 11 Pac. 571.

12. *Arkansas.*— Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031.

California.— Mery *v.* Brodt, 121 Cal. 332, 53 Pac. 818; Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359; Rosecrans *v.* Douglass, 52 Cal. 213.

Florida.— Smith *v.* Love, 49 Fla. 230, 38 So. 376; Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172.

Indiana.— Moyer *v.* McCullough, Smith 211.

Kansas.— Houck *v.* Kelsey, 17 Kan. 333.

Louisiana.— Leblanc *v.* Ludrique, 14 La. Ann. 772.

Minnesota.— Corbett *v.* Wood, 32 Minn. 509, 21 N. W. 734.

Missouri.— Carman *v.* Johnson, 29 Mo. 84.

United States.— Marquez *v.* Frisbie, 101 U. S. 473, 25 L. ed. 800; Kerns *v.* Lee, 142 Fed. 985; Illinois Steel Co. *v.* Budzisz, 82 Fed. 160.

See 41 Cent. Dig. tit. "Public Lands," § 326.

Connecting with original source of title.— A party seeking to attack a patent must show that he is connected in some way with the original source of title. Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359; Johnson *v.* Drew, 34 Fla. 780, 15 So. 780, 43 Am. St. Rep. 172.

13. Lee *v.* Johnson, 116 U. S. 48, 6 S. Ct. 249, 29 L. ed. 570; Sparks *v.* Pierce, 115 U. S. 408, 6 S. Ct. 102, 29 L. ed. 428; Bohall *v.* Dilla, 114 U. S. 47, 5 S. Ct. 782, 29 L. ed. 61; Peabody Gold Min. Co. *v.* Gold Hill Min. Co., 106 Fed. 241. See also Duluth, etc., R. Co. *v.* Roy, 173 U. S. 587, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794].

The mere cancellation of the patent with the reversion of the land to the government is not within the province of a private party to effect by a suit in equity, but that privilege rests solely with the government. Peabody Gold Min. Co. *v.* Gold Min. Co., 106 Fed. 241.

14. Duluth, etc., R. Co. *v.* Roy, 173 U. S. 587, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794, and *following* Ard *v.* Brandon, 156 U. S. 537, 15 S. Ct. 406, 39 L. ed. 524]; Morrison *v.* Stalnaker, 104 U. S. 213, 26 L. ed. 741.

15. *Arkansas.*— Green *v.* Clyde, 80 Ark. 391, 97 S. W. 437; Wynn *v.* Garland, 16 Ark. 440.

California.— Mery *v.* Brodt, 121 Cal. 332, 53 Pac. 818.

Florida.— Smith *v.* Love, 49 Fla. 230, 38 So. 376; Chesser *v.* De Prater, 20 Fla. 691.

Illinois.— Rogers *v.* Brent, 10 Ill. 573, 50 Am. Dec. 422.

Iowa.— Farber *v.* Levi, Morr. 372.

Louisiana.— Cannon *v.* White, 16 La. Ann. 85; Kittredge *v.* Breaud, 4 Rob. 79, 39 Am. Dec. 512.

Minnesota.— Corbett *v.* Wood, 32 Minn. 509, 21 N. W. 734.

Missouri.— Carman *v.* Johnson, 29 Mo. 84.

Oklahoma.— Lynch *v.* U. S., 13 Okla. 142, 73 Pac. 1095; Estes *v.* Timmons, 12 Okla. 537, 73 Pac. 303 [*affirmed* in 199 U. S. 391, 26 S. Ct. 85, 50 L. ed. 241]; Thornton *v.* Peery, 7 Okla. 441, 54 Pac. 649; Paine *v.* Foster, (1896) 53 Pac. 109; King *v.* Thompson, 3 Okla. 644, 39 Pac. 466.

misrepresentation,[16] or imposition,[17] or was the result of inadvertence,[18] mistake,[19] or error of law;[20] or because in issuing such patent the land officers acted without

Oregon.— Sanford *v.* Sanford, 19 Oreg. 1, 13 Pac. 602; Starr *v.* Stark, 2 Oreg. 118 [*reversed* on other grounds in 6 Wall. (U. S.) 402, 18 L. ed. 925].

Utah.— Parley's Park Silver Min. Co. *v.* Kerr, 3 Utah 235, 2 Pac. 709 [*affirmed* in 130 U. S. 256, 9 S. Ct. 511, 32 L. ed. 906].

Wisconsin.— Empey *v.* Plugert, 64 Wis. 603, 25 N. W. 560; Lamont *v.* Stimson, 3 Wis. 545, 62 Am. Dec. 696.

United States.— Duluth, etc., R. Co. *v.* Roy, 173 U. S. 587, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794]; U. S. *v.* Beebe, 127 U. S. 338, 8 S. Ct. 1083, 32 L. ed. 121; U. S. *v.* San Jacinto Tin Co., 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747; U. S. *v.* Minor, 114 U. S. 233, 5 S. Ct. 836, 29 L. ed. 110; Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; Johnson *v.* Towsley, 13 Wall. 72, 20 L. ed. 485; Minnesota *v.* Bachelder, 1 Wall. 109, 17 L. ed. 551 [*reversing* 5 Minn. 223, 80 Am. Dec. 410 (*followed* in State *v.* Stevens, 5 Minn. 521)]; Garland *v.* Wynn, 20 How. 6, 15 L. ed. 801; U. S. *v.* Robbins, 157 Fed. 999; U. S. *v.* Central Pac. R. Co., 84 Fed. 218; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96; U. S. *v.* Williams, 30 Fed. 309 [*affirmed* in 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026]; U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708; Mezes *v.* Greer, 17 Fed. Cas. No. 9,520, McAllister 401; Stevens *v.* Sharp, 23 Fed. Cas. No. 13,410, 6 Sawy. 113. See also Ayres *v.* U. S., 42 Ct. Cl. 385.

See 41 Cent. Dig. tit. "Public Lands," §§ 325, 331, 342.

The fact that the fraud was committed by the officers of the United States does not preclude a cancellation of the patent at the instance of the government. Moffat *v.* U. S., 112 U. S. 24, 5 S. Ct. 10, 28 L. ed. 623.

Nature of fraud.— The frauds for which courts will set aside a patent granted by the United States in the regular course of proceedings in the land office are frauds extrinsic or collateral to the matter tried and determined, upon which the patent issued, and not fraud consisting of perjury in the matter on which the determination was made. Kennedy *v.* Dickie, 34 Mont. 205, 85 Pac. 982; U. S. *v.* White, 17 Fed. 561, 9 Sawy. 125 [*followed* in U. S. *v.* Minor, 26 Fed. 672, 10 Sawy. 155]. See also Cragie *v.* Roberts, 6 Cal. App. 309, 92 Pac. 97; U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93.

The fraud or imposition must have affected the determination, which would otherwise have been in favor of the defeated party. The mere fact that fraud or imposition were practised on the department is not sufficient. Thornton *v.* Peery, 7 Okla. 441, 54 Pac. 649.

16. Parley's Park Silver Min. Co. *v.* Kerr, 3 Utah 235, 2 Pac. 709 [*affirmed* in 130 U. S. 256, 9 S. Ct. 511, 32 L. ed. 906].

A patent conveying mineral lands knowingly purchased as agricultural lands will be canceled. U. S. *v.* Central Pac. R. Co., 84 Fed. 218; U. S. *v.* Culver, 52 Fed. 81.

17. Wynn *v.* Garland, 16 Ark. 440; Estes *v.* Timmons, 12 Okla. 537, 73 Pac. 303 [*affirmed* in 199 U. S. 391, 26 S. Ct. 85, 50 L. ed. 241]; Thornton *v.* Peery, 7 Okla. 441, 54 Pac. 649; Paine *v.* Foster, (Okla. 1896) 53 Pac. 109; King *v.* Thompson, 3 Okla. 644, 39 Pac. 466; Sanford *v.* Sanford, 19 Oreg. 1, 13 Pac. 602; Duluth, etc., R. Co. *v.* Roy, 173 U. S. 587, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794]; Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; Minnesota *v.* Bachelder, 1 Wall. (U. S.) 109, 17 L. ed. 551 [*reversing* 5 Minn. 223, 80 Am. Dec. 410 (*followed* in State *v.* Stevens, 5 Minn. 521)].

18. Green *v.* Clyde, 80 Ark. 391, 97 S. W. 437; Duluth, etc., R. Co. *v.* Roy, 173 U. S. 587, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794]; Germania Iron Co. *v.* U. S., 165 U. S. 379, 17 S. Ct. 337, 41 L. ed. 754; Williams *v.* U. S., 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026; Stone *v.* U. S., 2 Wall. (U. S.) 525, 17 L. ed. 765; U. S. *v.* Laam, 149 Fed. 581.

19. *Arkansas.*— Green *v.* Clyde, 80 Ark. 391, 97 S. W. 437; Wynn *v.* Garland, 16 Ark. 440.

Indiana.— Moyer *v.* McCullough, Smith 211.

Oklahoma.— Estes *v.* Timmons, 12 Okla. 537, 73 Pac. 303 [*affirmed* in 199 U. S. 391, 26 S. Ct. 85, 50 L. ed. 241]; Paine *v.* Foster, 9 Okla. 213, 53 Pac. 109.

Oregon.— Sanford *v.* Sanford, 19 Oreg. 1, 13 Pac. 602.

Utah.— Parley's Park Silver Min. Co. *v.* Kerr, 3 Utah 235, 2 Pac. 709 [*affirmed* in 130 U. S. 256, 9 S. Ct. 511, 32 L. ed. 906].

United States.— Duluth, etc., R. Co. *v.* Roy, 173 U. S. 587, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794]; Hedrick *v.* Atchison, etc., R. Co., 167 U. S. 673, 17 S. Ct. 922, 42 L. ed. 320; Germania Iron Co. *v.* U. S., 165 U. S. 379, 17 S. Ct. 337, 41 L. ed. 754; Williams *v.* U. S., 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026; U. S. *v.* Beebe, 127 U. S. 338, 8 S. Ct. 1083, 32 L. ed. 121; U. S. *v.* San Jacinto Tin Co., 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747; Hughes *v.* U. S., 4 Wall. 232, 18 L. ed. 303; Stone *v.* U. S., 2 Wall. 525, 17 L. ed. 765; U. S. *v.* Laam, 149 Fed. 581; Sage *v.* U. S., 140 Fed. 65, 71 C. C. A. 404; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U S. 463, 17 S. Ct. 368, 41 L. ed. 789]; U. S. *v.* Reed, 53 Fed. 405.

See 41 Cent. Dig. tit. "Public Lands," §§ 325, 331, 343.

20. Hess *v.* Bolinger, 48 Cal. 349; Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360]; U. S. *v.* Citizens Trading Co., (Okla. 1907) 93 Pac. 448; Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427; Thornton *v.* Peery, 7 Okla. 441, 54 Pac. 649; King *v.* Thompson, 3 Okla. 644, 39 Pac. 466; Baldwin *v.* Starks, 107 U. S. 463, 2 S. Ct.

authority of law,[21] as where the land conveyed was by law reserved from sale,[22] or had been previously sold to another person;[23] where a person other than the patentee was equitably entitled to the land;[24] or where the patentee had not complied with the law so as to become entitled to a patent.[25]

b. Cancellation or Annulment of Patent[26]—(i) *In General.* The United States has the same remedy in a court of equity to set aside or annul a patent for lands on the ground of fraud in procuring it or mistake in its issuance as an individual would have in regard to his own deed procured under similar circumstances,[27] and even though a patent is void and would be so pronounced in a court of law, the United States is entitled to maintain a suit in equity to have such void patent canceled.[28] But the government must show that it has such an interest in the

473, 27 L. ed. 526; Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. ed. 800; Minnesota *v.* Bachelder, 1 Wall. (U. S.) 109, 17 L. ed. 551 [*reversing* 5 Minn. 223, 80 Am. Dec. 410 (*followed* in State *v.* Stevens, 5 Minn. 521)]; Kerns *v.* Lee, 142 Fed. 985 (whether or not it was attended by fraud or mistake of fact); Manley *v.* Tow, 110 Fed. 241; Moss *v.* Dowman, 88 Fed. 181, 31 C. C. A. 447 [*affirmed* in 176 U. S. 413, 20 S. Ct. 429, 44 L. ed. 526]; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789].

Error of law must distinctly appear.—Hosmer *v.* Wallace, 47 Cal. 461.

21. U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766 [*reversing* 37 Fed. 68].

22. Lynch *v.* U. S., 13 Okla. 142, 73 Pac. 1095; Mullan *v.* U. S., 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170 [*affirming* 10 Fed. 785, 7 Sawy. 466]; Stone *v.* U. S., 2 Wall. (U. S.) 525, 17 L. ed. 765; U. S. *v.* Culver, 52 Fed. 81.

Reservations to United States see *supra*, II, D.

23. Hughes *v.* U. S., 4 Wall. (U. S.) 232, 18 L. ed. 303.

24. *Alaska.*— Johnson *v.* Pacific Coast Steamship Co., 2 Alaska 224.

Arkansas.— Green *v.* Clyde, 80 Ark. 391, 97 S. W. 437.

Montana.— Love *v.* Flahive, 33 Mont. 348, 83 Pac. 882; Small *v.* Rakestraw, 28 Mont. 413, 72 Pac. 746, 104 Am. St. Rep. 691.

Oklahoma.— Lynch *v.* U. S., 13 Okla. 142, 73 Pac. 1095.

United States.—Germania Iron Co. *v.* U. S., 165 U. S. 379, 17 S. Ct. 337, 41 L. ed. 754; Gonzales *v.* French, 164 U. S. 338, 17 S. Ct. 102, 41 L. ed. 458; Bernier *v.* Bernier, 147 U. S. 242, 13 S. Ct. 244, 37 L. ed. 152; U. S. *v.* Beebe, 127 U. S. 338, 8 S. Ct. 1083, 32 L. ed. 121; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Johnson *v.* Towsley, 13 Wall. 72, 20 L. ed. 485; Lindsey *v.* Hawes, 2 Black 554, 17 L. ed. 265; Lytle *v.* Arkansas, 22 How. 193, 16 L. ed. 306; Garland *v.* Wynn, 20 How. 6, 15 L. ed. 801; Barnard *v.* Ashley, 18 How. 43, 15 L. ed. 285; Cunningham *v.* Ashley, 14 How. 377, 14 L. ed 462; Le Marchel *v.* Teagarden, 152 Fed. 662; U. S. *v.* Chicago, etc., R. Co., 116 Fed. 969, 54 C. C. A. 545; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; U. S. *v.* Oregon, etc., R. Co., 101 Fed. 316; U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789]; Bogan *v.* Edinburgh American Land Mortg. Co., 63 Fed. 192, 11 C. C. A. 128; U. S. *v.* Curtner, 26 Fed. 296.

See 41 Cent. Dig. tit. "Public Lands," § 341.

25. U. S. *v.* Perry, 45 Fed. 759.

26. Cancellation of instruments generally see CANCELLATION OF INSTRUMENTS, 6 Cyc. 282.

27. Janes *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735; Lynch *v.* U. S., 13 Okla. 142, 73 Pac. 1095; U. S. *v.* Stinson, 197 U. S. 200, 25 S. Ct. 426, 49 L. ed. 724 [*affirming* 125 Fed. 907, 60 C. C. A. 615]; Germania Iron Co. *v.* U. S., 165 U. S. 379, 17 S. Ct. 337, 41 L. ed. 754; U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766 [*reversing* 37 Fed. 68]; U. S. *v.* Beebe, 127 U. S. 338, 8 S. Ct. 1083, 32 L. ed. 121; U. S. *v.* San Jacinto Tin Co., 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747; Mullan *v.* U. S., 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170 [*affirming* 10 Fed. 785, 7 Sawy. 466]; U. S. *v.* Minor, 114 U. S. 233, 5 S. Ct. 836, 29 L. ed. 110 [*followed* in U. S. *v.* Rose, 24 Fed. 196]; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Hughes *v.* U. S., 4 Wall. (U. S.) 232, 18 L. ed. 303; Stone *v.* U. S., 2 Wall. (U. S.) 525, 17 L. ed. 765; U. S. *v.* Hughes, 11 How. (U. S.) 552, 13 L. ed. 809; U. S. *v.* Collett, 159 Fed. 932, 87 C. C. A. 460; U. S. *v.* Laam, 149 Fed. 581; U. S. *v.* Southern Pac. R. Co., 117 Fed. 544 [*affirmed* in 133 Fed. 651, 66 C. C. A. 581 (*affirmed* in 200 U. S. 341, 26 S. Ct. 296, 50 L. ed. 507)]; U. S. *v.* Chicago, etc., R. Co., 116 Fed. 969, 54 C. C. A. 545; U. S. *v.* Oregon, etc., R. Co., 101 Fed. 316; Germania Iron Co. *v.* U. S., 58 Fed. 334, 7 C. C. A. 256; U. S. *v.* Reed, 53 Fed. 405; U. S. *v.* Culver, 52 Fed. 81; U. S. *v.* Perry, 45 Fed. 759; U. S. *v.* Williams, 30 Fed. 309 [*affirmed* in 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026]; U. S. *v.* Curtner, 26 Fed. 296; U. S. *v.* Rose, 24 Fed. 196; U. S. *v.* Pratt Coal, etc., Co., 18 Fed. 708; U. S. *v.* Tichenor, 12 Fed. 415, 8 Sawy. 142.

28. U. S. *v.* Tichenor, 12 Fed. 415, 8 Sawy. 142.

relief sought as entitles it to move in the matter. If it be a question of property a case must be made out in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void the fraud must operate to the prejudice of the United States; and if the suit is brought for the benefit of some third person, and the United States has no pecuniary interest in the remedy sought, it must appear that the United States is under some obligation to the person who will be benefited to sustain an action for his use.[29] A state cannot maintain a suit to cancel patents from the United States to the state unless it shows that it has some interest in the land.[30]

(II) *Jurisdiction of Courts.* The United States courts have jurisdiction to vacate a patent to lands in a proper case.[31]

(III) *Form of Proceeding.* The proper form of proceeding is by a simple bill in equity by the United States against the patentee praying that the patent be annulled and surrendered by a decree in chancery,[32] but the patent may also be set aside by an information in the nature of a bill in equity filed by the attorney of the United States for the district in which the land lies.[33]

(IV) *Limitations*[34] *and Laches.* When the United States comes into a court of equity as a suitor it is subject to defenses peculiar to that court,[35] and hence it is held that laches may be a good defense to a suit to cancel a patent;[36] but this is true only where the real party in interest is a private individual and not where the United States is directly interested in the annulment sought by it.[37] An act of congress passed in 1891 provides that suits by the United States to vacate and annul patents previously issued before its passage shall be brought only within five years from its passage,[38] and as to patents subsequently issued, such suits shall be brought only within six years after such issuance.[39] While this statute in form only bars suits to annul patents, it must be taken to mean that, although a patent was originally invalid, if the prescribed time elapses without any attack thereon, the patent is to be held good and to have the same effect against the United States that it would have had if it had been valid in the first place.[40]

(V) *Parties.*[41] Unless by virtue of an act of congress, no one but the attorney-general, or someone authorized to use his name, can bring a suit to set aside a patent issued by the United States.[42] In a suit in equity to cancel a patent, every person having an interest in the land included in the patent is an indispensable party and equity will not proceed until they are all brought before the court.[43]

29. Lynch *v.* U. S., 13 Okla. 142, 73 Pac. 1095; U. S. *v.* San Jacinto Tin Co., 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747 [*affirming* 23 Fed. 279, 10 Sawy. 639, and *followed* in U. S. *v.* Des Moines Valley R. Co., 70 Fed. 435 (*affirmed* in 84 Fed. 40, 28 C. C. A. 267)]; U. S. *v.* Central Pac. R. Co., 26 Fed. 479. See also U. S. *v.* White, 17 Fed. 561, 9 Sawy. 125.

30. State *v.* Warner Stock Co., 48 Oreg. 378, 86 Pac. 780, 87 Pac. 534, holding that the allegations in the complaint showed no interest in the state.

31. U. S. *v.* White, 17 Fed. 561, 9 Sawy. 125.

32. U. S. *v.* Hughes, 11 How. (U. S.) 552, 13 L. ed. 809.

33. U. S. *v.* Hughes, 11 How. (U. S.) 552, 568, 13 L. ed. 809, where it is said: "In substance, this is a bill in equity for and on behalf of the United States . . . and we will not dismiss it for want of form."

34. See, generally, Limitations of Actions, 25 Cyc. 963.

35. Blackburn *v.* U. S., 5 Ariz. 162, 48 Pac. 904; U. S. *v.* White, 17 Fed. 561, 9 Sawy. 125; U. S. *v.* Tichenor, 12 Fed. 449, 8 Sawy. 156.

36. Blackburn *v.* U. S., 5 Ariz. 162, 48 Pac. 904; U. S. *v.* Marshall Silver Co., 129 U. S. 579, 9 S. Ct. 343, 32 L. ed. 734; U. S. *v.* McGraw, 12 Fed. 449, 8 Sawy. 156.

37. U. S. *v.* Beebe, 127 U. S. 338, 8 S. Ct. 1083, 32 L. ed. 121.

38. 26 U. S. St. at L. 1099, c. 561, § 8 [U. S. Comp. St. (1901) p. 1521]. See Peabody Gold Min. Co. *v.* Gold Hill Min. Co., 106 Fed. 241.

39. 26 U. S. St. at L. 1099, c. 561, § 8 [U. S. Comp. St. (1901) p. 1521].

40. U. S. *v.* Chandler-Dunbar Water Power Co., 209 U. S. 447, 28 S. Ct. 579, 52 L. ed. 881 [*affirming* 152 Fed. 25, 81 C. C. A. 221]. And see also U. S. *v.* Winona, etc., R. Co., 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789.

41. See, generally, Parties, 30 Cyc. 1.

42. U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93.

43. Lynch *v.* U. S., 13 Okla. 142, 73 Pac. 1095; U. S. *v.* Central Pac. R. Co., 11 Fed. 449, 8 Sawy. 81.

But entrymen by whom the land was conveyed to defendants before patents issued are not necessary parties;[44] and where lands have been improperly listed to a state and by it patented to private individuals, neither the state nor the persons equitably entitled to the land are necessary parties.[45]

(VI) *PLEADING.*[46] A petition by the United States to annul a patent for fraud must contain every material averment necessary to constitute a good bill in equity under the chancery practice;[47] and a mere general allegation of fraud or mistake is not sufficient, but the facts constituting such fraud or showing the mistake must be alleged and proved.[48] It is essential that it should appear in some way, without special regard to form, that the attorney-general has brought the suit himself, or given such authority for its institution as will make him officially responsible therefor through all stages of its presentation.[49] In a suit to cancel a patent as having been inadvertently issued it is not necessary for the United States to allege or prove that other persons than the patentee had a superior right to the land, but it is sufficient to show that other persons whose claims were pending and undetermined might have such superior right.[50] Where lands have been listed to a state under one act of congress, and by the state patented to individuals, a bill against several of such patentees, having no joint interest in the lands, to vacate several distinct patents of separate parcels is not multifarious.[51] Where a bill by the United States to cancel patents is demurred to generally for want of equity, and no specific objections are made, defendant, on appeal, cannot question the sufficiency of allegations as to the persons who have acquired homestead and preëmption rights, or as to the particular pieces of land to which their rights have attached.[52]

(VII) *EVIDENCE.*[53] Although the presumption as to the regularity of the proceedings leading up to the issuance of a patent [54] has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud in the conduct of the land officers,[55] the burden of proving fraud or mistake is upon the government when it attacks the patent,[56] and relief will be granted only when the allegations relied on are established by clear, unequivocal, and convincing evidence,[57] and not upon a bare preponderance of evidence which leaves the issue

44. U. S. *v.* Clark, 129 Fed. 241 [*affirmed* in 138 Fed. 294, 70 C. C. A. 584].

45. U. S. *v.* Curtner, 26 Fed. 296.

46. See, generally, PLEADING, 31 Cyc. 1.

47. Lynch *v.* U. S., 13 Okla. 142, 73 Pac. 1095.

Bill held sufficient see U. S. *v.* Clark, 129 Fed. 241 [*affirmed* in 138 Fed. 294, 70 C. C. A. 584 (*affirmed* in 200 U. S. 601, 26 S. Ct. 340, 50 L. ed. 613)].

48. U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384; U. S. *v.* San Jacinto Tin Co., 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747; U. S. *v.* Maxwell Land-Grant Co., 122 U. S. 365, 7 S. Ct. 1271, 30 L. ed. 1211, 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949 [*affirming* 26 Fed. 118]; U. S. *v.* Atherton, 102 U. S. 372, 26 L. ed. 213 [*following* Marquez *v.* Frisbie, 101 U. S. 473, 25 L. ed. 800]; U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 [*affirmed* in 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836]; U. S. *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176; Stimson Land Co. *v.* Rawson, 62 Fed. 426; U. S. *v.* McGraw, 12 Fed. 449, 8 Sawy. 156; U. S. *v.* Tichenor, 12 Fed. 415, 8 Sawy. 142.

49. U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93.

50. Germania Iron Co. *v.* U. S., 58 Fed. 334, 7 C. C. A. 256; U. S. *v.* Reed, 53 Fed. 405.

51. U. S. *v.* Curtner, 26 Fed. 296.

52. U. S. *v.* Missouri, etc., R. Co., 141 U. S. 358, 12 S. Ct. 13, 35 L. ed. 766 [*reversing* 37 Fed. 68].

53. See, generally, EVIDENCE, 16 Cyc. 821.

54. See *supra*, II, M, 8.

55. Moffat *v.* U. S., 112 U. S. 24, 5 S. Ct. 10, 28 L. ed. 623.

56. U. S. *v.* Maxwell Land-Grant Co., 122 U. S. 365, 7 S. Ct. 1271, 30 L. ed. 1211, 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949 [*affirming* 26 Fed. 118, and *followed* in U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384 (*affirming* 43 Fed. 630); U. S. *v.* Clark, 125 Fed. 774 (*affirmed* in 138 Fed. 294, 70 C. C. A. 584)]; Moffat *v.* U. S., 112 U. S. 24, 5 S. Ct. 10, 28 L. ed. 623; U. S. *v.* Central Pac. R. Co., 93 Fed. 871.

57. U. S. *v.* Stinson, 197 U. S. 200, 25 S. Ct. 426, 49 L. ed. 724 [*affirming* 125 Fed. 907, 60 C. C. A. 615]; U. S. *v.* Hancock, 133 U. S. 193, 10 S. Ct. 264, 33 L. ed. 601; Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182 [*reversing* 18 Fed. 273, 5 McCrary 563]; U. S. *v.* Maxwell Land-Grant Co., 122 U. S. 365, 7 S. Ct. 1271, 30 L. ed. 1211, 121 U. S. 325, 7 S. Ct.

in doubt.[58] Where the government charges an unlawful agreement on the part of the patentee to acquire title for another, it has a right to call the patentee and a purchaser from him and cross-examine them as adverse witnesses, and, if it fails to do so, no presumptions can be made in its favor from their failure to testify, as against the sworn denial in their answer.[59]

(VIII) *Rules Governing Action of Court.* When the government seeks the aid of a court to set aside a patent obtained by fraud, the general principles of equity must be applied,[60] and the patentee is entitled to protection to the same extent as the holder of a conveyance of title from an individual.[61] A suit by the government to cancel a patent alleged to have been issued to one person when another was entitled to the land is in effect a suit between private parties, involving no public interest or right, and the court may properly take into consideration the equities as between the real parties in interest.[62]

(IX) *Return of Purchase-Money.* Where the United States seeks to cancel a patent on the ground of mistake and no fraud or misconduct on the part of the patentee appears, it is essential to a recovery of the land that the purchase-money be refunded;[63] but an offer to return the purchase-money is not a prerequisite to maintaining a bill to cancel a patent for fraud,[64] or because it was issued to a fictitious person.[65] Where in a suit by the United States for the cancellation of a patent the invalidity of which was not apparent on its face, but was proved by extrinsic evidence, the holder did not abandon his claims thereunder, he is not entitled to a decree for a return of the purchase-money or for costs on the cancellation of the patent.[66]

(X) *Protection of Bona Fide Purchasers.*[67] The government cannot repudiate a patent on the ground of fraud and recover the land as against an innocent purchaser for value from the patentee,[68] and the fact that a person purchased

1015, 30 L. ed. 949 [*affirming* 26 Fed. 118, and *followed* in U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384 (*affirming* 43 Fed. 630); U. S. *v.* Clark, 125 Fed. 774 (*affirmed* in 138 Fed. 294, 70 C. C. A. 584)]; U. S. *v.* Collett, 159 Fed. 932, 87 C. C. A. 460; U. S. *v.* Central Pac. R. Co., 93 Fed. 871; U. S. *v.* Wenz, 34 Fed. 154; U. S. *v.* Edwards, 33 Fed. 104.

Evidence sufficient to establish fraud see U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384 [*affirming* 43 Fed. 630].

Evidence sufficient to establish mistake see U. S. *v.* Reed, 53 Fed. 405.

Evidence not sufficient to establish fraud see U. S. *v.* Hancock, 133 U. S. 193, 10 S. Ct. 264, 33 L. ed. 601; U. S. *v.* Collett, 159 Fed. 932, 87 C. C. A. 460; U. S. *v.* Maxwell Land-Grant Co., 26 Fed. 118 [*affirmed* in 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949].

Evidence not sufficient to establish mineral character of land see U. S. *v.* Central Pac. R. Co., 93 Fed. 871.

Evidence not sufficient to establish prior contract by patentee to obtain title for another see U. S. *v.* Budd, 43 Fed. 630 [*affirmed* in 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384].

58. Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182 [*reversing* 18 Fed. 273, 5 McCrary 563]; U. S. *v.* Maxwell Land-Grant Co., 122 U. S. 365, 7 S. Ct. 1271, 30 L. ed. 1211, 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949 [*affirming* 26 Fed. 118, and *followed* in U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384 (*affirming* 43 Fed. 630); U. S. *v.* Clark, 125 Fed. 774 (*affirmed* in 138 Fed. 294, 70 C. C. A. 584 [*affirmed* in 200 U. S. 601, 26 S. Ct. 340, 50 L. ed. 613])]; U. S. *v.* Meeker, 50 Fed. 146.

59. U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384 [*affirming* 43 Fed. 630].

60. Stimson Land Co. *v.* Rawson, 62 Fed. 426.

61. U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384; U. S. *v.* San Jacinto Tin Co., 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747; U. S. *v.* Maxwell Land-Grant Co., 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949; Stimson Land Co. *v.* Rawson, 62 Fed. 426.

62. U. S. *v.* Chicago, etc., R. Co., 116 Fed. 969, 54 C. C. A. 545.

63. U. S. *v.* Budd, 43 Fed. 630 [*affirmed* in 144 U. S. 154, 12 S. Ct. 575, 30 L. ed. 384]. But *compare* U. S. *v.* Laam, 149 Fed. 581.

64. U. S. *v.* Minor, 114 U. S. 233, 5 S. Ct. 836, 29 L. ed. 110. See also U. S. *v.* Budd, 43 Fed. 630 [*affirmed* in 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384]. But *compare* U. S. *v.* White, 17 Fed. 561, 9 Sawy. 125.

65. Moffat *v.* U. S., 112 U. S. 24, 5 S. Ct. 10, 28 L. ed. 623.

66. Morris *v.* U. S., 174 U. S. 196, 19 S. Ct. 649, 43 L. ed. 946.

67. **In suit for equitable relief** see *infra*, II, O, 2, c, (IV).

68. Janes *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735; Lynch *v.* U. S., 13 Okla. 142, 73 Pac. 1095; U. S. *v.* Stinson, 197 U. S. 200, 25 S. Ct. 426, 49 L. ed. 724 [*affirming* 125

from an entryman before the issuance of the patent does not deprive him of the character and rights of a *bona fide* purchaser for value.[69] A person who knew at the time when he purchased land erroneously patented as agricultural land that it was mineral land is not a *bona fide* purchaser.[70]

c. Equitable Relief[71]— (i) *In General.* The judgment of the land department that a certain person is entitled to land and its conveyance of the same to him by patent do not conclude or defeat the rights of claimants to the land;[72] but the courts may examine into equities prior to the patent,[73] and where a patent has issued to one person for land to which another person was equitably entitled, a court of equity will go behind the patent and give effect to such equitable right.[74]

Fed. 907, 60 C. C. A. 615]; Colorado, etc., Iron Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182; U. S. *v.* Clark, 138 Fed. 294, 70 C. C. A. 584 [*affirming* 125 Fed. 774, and *affirmed* in 200 U. S. 601, 26 S. Ct. 340, 50 L. ed. 613]; U. S. *v.* Detroit Timber, etc., Co., 131 Fed. 668, 67 C. C. A. 1 [*reversing* 124 Fed. 393, and *affirmed* in 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499]; U. S. *v.* Sierra Nevada Wood, etc., Co., 79 Fed. 691; U. S. *v.* Southern Pac. R. Co., 76 Fed. 134; U. S. *v.* Scholl, 45 Fed. 758; U. S. *v.* Wenz, 34 Fed. 154. See also Blackburn *v.* U. S., 5 Ariz. 162, 48 Pac. 904; U. S. *v.* Union Pac. R. Co., 37 Fed. 551 [*affirmed* in 148 U. S. 562, 13 S. Ct. 724, 37 L. ed. 560].

69. U. S. *v.* Detroit Timber, etc., Co., 131 Fed. 668, 67 C. C. A. 1 [*reversing* 124 Fed. 393, and *affirmed* in 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499]; U. S. *v.* Clark, 125 Fed. 774 [*affirmed* in 138 Fed. 294, 70 C. C. A. 584].

Receivers' final receipts are notice to the purchasers of the equitable title they evidence that they are voidable by the land department for fraud or error before the patents issue upon them, but they are not notice that the equitable titles they disclose were procured by fraud, perjury, or irregularity, but are *prima facie* evidence that the lands were honestly and regularly entered. U. S. *v.* Detroit Timber, etc., Co., 131 Fed. 668, 67 C. C. A. 1 [*reversing* 124 Fed. 393, and *affirmed* in 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499].

70. U. S. *v.* Central Pac. R. Co., 84 Fed. 218.

71. See, generally, EQUITY, 16 Cyc. 1.

72. *Alabama.*— Goolsbee *v.* Fordham, 49 Ala. 202.

Indiana.— Moyer *v.* McCullough, Smith 211.

Louisiana.— Hennen *v.* Wood, 16 La. Ann. 263.

Mississippi.—Hester *v.* Kembrough, 12 Sm. & M. 659.

Missouri.— Morton *v.* Blackenship, 5 Mo. 346.

Ohio.— Strong *v.* Lehemer, 10 Ohio St. 93.

Wisconsin.— McCord *v.* Hill, 111 Wis. 499, 84 N. W. 27, 85 N. W. 145, 87 N. W. 481.

United States.—Wirth *v.* Branson, 98 U. S. 118, 25 L. ed. 86. See also Irvine *v.* Marshall, 20 How. 558, 15 L. ed. 994.

See 41 Cent. Dig. tit. "Public Lands," § 341.

A clerical error of the register of the land office, in the location of a preëmption claim, will not defeat the preëmption claim, otherwise good, in favor of a subsequent patent issued to a third person, who knew of the preëmption claim at the time of effecting his entry and patent. Climer *v.* Selby, 10 La. Ann. 182; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476.

73. Climer *v.* Selby, 10 La. Ann. 182; Kittridge *v.* Breaud, 4 Rob. (La.) 79, 39 Am. Dec. 512; Strong *v.* Lehmer, 10 Ohio St. 93.

74. *Arkansas.*— Wynn *v.* Garland, 16 Ark. 440.

Florida.— Smith *v.* Love, 49 Fla. 230, 38 So. 376.

Illinois.— Danforth *v.* Morrical, 84 Ill. 456; McGhee *v.* Wright, 16 Ill. 555; Rogers *v.* Brent, 10 Ill. 573, 50 Am. Dec. 422.

Iowa.— Harmon *v.* Steinman, 9 Iowa 112.

Kansas.— James *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735.

Louisiana.— Hennen *v.* Wood, 16 La. Ann. 263; Cannon *v.* White, 16 La. Ann. 85; Knox *v.* Pulliam, 14 La. Ann. 123; Climer *v.* Selby, 10 La. Ann. 182; Dufresne *v.* Haydel, 7 La. Ann. 660; Kittridge *v.* Breaud, 4 Rob. 79, 39 Am. Dec. 512.

Michigan.— Johnson *v.* Lee, 47 Mich. 52, 10 N. W. 76.

Minnesota.— Corbett *v.* Wood, 32 Minn. 509, 21 N. W. 734.

Missouri.— Hedrick *v.* Atchison, etc., R. Co., 120 Mo. 516, 25 S. W. 759; Hedrick *v.* Beeler, 110 Mo. 91, 19 S. W. 492; Carman *v.* Johnson, 29 Mo. 84. See also Waller *v.* Von Rhul, 14 Mo. 84.

Mo tana.— Love *v.* Flahive, 33 Mont. 348, 83 Pac. 882; Graham *v.* Great Falls Water Power, etc., Co., 30 Mont. 393, 76 Pac. 808; Small *v.* Rakestraw, 28 Mont. 413, 72 Pac. 746, 104 Am. St. Rep. 691.

Ohio.— Wallace *v.* Patten, 14 Ohio 272. See also Rhodes *v.* Gunn, 35 Ohio St. 387.

Oklahoma.— U. S. *v.* Citizens' Trading Co., (1907) 93 Pac. 448; Watt *v.* Amos, 14 Okla. 178, 79 Pac. 109; Estes *v.* Timmons, 12 Okla. 537, 73 Pac. 303 [*affirmed* in 199 U. S. 391, 26 S. Ct. 85, 50 L. ed. 241]; Paine *v.* Foster, 9 Okla. 213, 53 Pac. 109; Thornton *v.* Peery, 7 Okla. 441, 54 Pac. 649; King *v.* Thompson, 3 Okla. 644, 39 Pac. 466.

Oregon.— Stewart *v.* Altstock, 22 Oreg. 182, 29 Pac. 553; Lee *v.* Summers, 2 Oreg. 260.

Utah.— Kimball *v.* McIntyre, 3 Utah 77, 1 Pac. 167.

But a court of equity will not interfere with the decision of the land department involved in the issuance of a patent to a particular person except to prevent injustice,[75] and upon the ground that an antecedent equity of the complainant was disregarded or overlooked in the issuance of the patent to another,[76] and so the mere fact that the patentee was not entitled to the patent does not entitle an adverse claimant to equitable relief unless he shows that he was entitled to receive a patent.[77] As between two adverse claimants to public land, one of whom has initiated his claim in violation of law and the other in obedience to law, the courts will sustain the one who has observed the law, even though no penalty is attached for violation thereof.[78] The mere fact that perjured testimony was introduced on behalf of the prevailing party in a contest in the land department is not sufficient ground for equitable relief against the decision of the department,[79] where the other party had an opportunity to meet such testimony and took all the appeals allowed by law,[80]

Washington.— Brygger *v.* Schweitzer, 5 Wash. 564, 32 Pac. 462, 33 Pac. 388.

Wisconsin.— Prickett *v.* Muck, 74 Wis. 199, 42 N. W. 256; Bross *v.* Wiley, 6 Wis. 485; Lamont *v.* Stimson, 3 Wis. 545, 62 Am. Dec. 696.

United States.— U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)]; Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41]; Duluth, etc., R. Co. *v.* Roy, 173 U. S. 587, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794]; Bernier *v.* Bernier, 147 U. S. 242, 13 S. Ct. 244, 37 L. ed. 152; Widdicomb *v.* Childers, 124 U. S. 400, 8 S. Ct. 517, 31 L. ed. 427 [*affirming* 84 Mo. 382]; Baldwin *v.* Starks, 107 U. S. 463, 2 S. Ct. 473, 27 L. ed. 526; Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. ed. 800; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Warren *v.* Van Brunt, 19 Wall. 646, 22 L. ed. 219; Johnson *v.* Towsley, 13 Wall. 72, 20 L. ed. 485 [*followed* in Samson *v.* Smiley, 13 Wall. 91, 20 L. ed. 489]; White *v.* Cannon, 6 Wall. 443, 18 L. ed. 923; Minnesota *v.* Bachelder, 1 Wall. 109, 17 L. ed. 551 [*reversing* 5 Minn. 223, 80 Am. Dec. 410 (*followed* in State *v.* Stevens, 5 Minn. 521)]; Lindsay *v.* Hawes, 2 Black 554, 17 L. ed. 265; Garland *v.* Wynn, 20 How. 6, 15 L. ed. 801; Barnard *v.* Ashley, 18 How. 43, 15 L. ed. 285; Cunningham *v.* Ashley, 14 How. 377, 14 L. ed. 462; Le Marchel *v.* Teagarden, 152 Fed. 662; Manley *v.* Tow, 110 Fed. 241; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Moss *v.* Dowman, 88 Fed. 181, 31 C. C. A. 447 [*affirmed* in 176 U. S. 413, 20 S. Ct. 429, 44 L. ed. 526]; Garrard *v.* Silver Peak Mines, 82 Fed. 578 [*affirmed* in 94 Fed. 983, 36 C. C. A. 603]; Bogan *v.* Edinburgh American Land Mortg. Co., 63 Fed. 192, 11 C. C. A. 128; Russell *v.* Beebe, 21 Fed. Cas. No. 12,153, Hempst. 704; Ware *v.* Brush, 29 Fed. Cas. No. 17,171, 1 McLean 533 [*affirmed* in 15 Pet. 93, 10 L. ed. 672].

See 41 Cent. Dig. tit. "Public Lands," § 341.

One claiming a portion of a town site adversely to the trustees, to whom it has been patented, cannot maintain an action against such trustees to enforce a resulting trust in his favor, as such trustees are officers and agents of the government, and the issuance of a patent to them does not divest the secretary of the interior of supervisory control over such land. Bockfinger *v.* Foster, 10 Okla. 488, 62 Pac. 799 [*affirmed* in 190 U. S. 116, 23 S. Ct. 836, 47 L. ed. 975].

75. King *v.* Thompson, 3 Okla. 644, 39 Pac. 466.

76. Sacramento Sav. Bank *v.* Hynes, 50 Cal. 195; Frisbie *v.* Whitney, 9 Wall. (U. S.) 187, 19 L. ed. 668; Stark *v.* Starr, 6 Wall. (U. S.) 402, 18 L. ed. 925; Bear *v.* Luse, 2 Fed. Cas. No. 1, 179, 6 Sawy. 148.

The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in defendant. Campbell *v.* Weyerhaeuser, 161 Fed. 332, 88 C. C. A. 412.

77. Small *v.* Rakestraw, 28 Mont. 413, 72 Pac. 746, 104 Am. St. Rep. 691 [*affirmed* in 196 U. S. 403, 25 S. Ct. 285, 49 L. ed. 527]; Baldwin *v.* Keith, 13 Okla. 624, 75 Pac. 1124.

One whose application to purchase public land is rejected when presented may not maintain a bill to charge the title acquired by another under a patent with a trust in his favor. Campbell *v.* Weyerhaeuser, 161 Fed. 332, 88 C. C. A. 412.

Where a contest against an entry is rejected by the land department, the person by whom such contest was filed acquires no interest in the land embraced in the entry, so as to be able to sue to declare the patentee, who was the entryman at the time he offered his contest, a trustee for his use and benefit. Parker *v.* Lynch, 7 Okla. 631, 56 Pac. 1082, holding that this is true even though the contest should have been entertained by the department and a hearing granted.

78. Watt *v.* Amos, 14 Okla. 178, 79 Pac. 109.

79. Kennedy *v.* Dickie, 34 Mont. 205, 85 Pac. 982; Greenameyer *v.* Coate, 18 Okla. 160, 88 Pac. 1054 [*following* Cagle *v.* Dunham, 14 Okla. 610, 78 Pac. 561]; Thornton *v.* Perry, 7 Okla. 441, 54 Pac. 649; Estes *v.* Timmons, 199 U. S. 391, 26 S. Ct. 85, 50 L. ed. 241 [*affirming* 12 Okla. 537, 73 Pac. 303]; Vance *v.* Burbank, 101 U. S. 514, 25 L. ed. 929.

80. Greenameyer *v.* Couse, 18 Okla. 160, 88

although relief may be granted upon a showing that there was no other evidence to support the findings.[81]

(II) *Establishment of Trust* [82]—(A) *In General.* Where a patent has been improperly issued to a person not entitled thereto, the patentee may be decreed to hold the legal title in trust for the person who was really entitled to the land [83] and compelled to convey the land to such person; [84] and such relief may be granted notwithstanding the fact that the statute under which the patent

Pac. 1054 [*following* Cagle *v.* Dunham, 14 Okla. 610, 78 Pac. 561]; Vance *v.* Burbank, 101 U. S. 514, 25 L. ed. 929.

81. Thornton *v.* Peery, 7 Okla. 441, 54 Pac. 649.

82. See, generally, Trusts.

83. *Arkansas.*— Green *v.* Clyde, 80 Ark. 391, 97 S. W. 437.

California.— Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Mery *v.* Brodt, 121 Cal. 332, 53 Pac. 818; McNee *v.* Donahue, 76 Cal. 499, 18 Pac. 438; Plummer *v.* Brown, 70 Cal. 544, 12 Pac. 464; Hess *v.* Bolinger, 48 Cal. 349. See also Thomas *v.* Lawlor, 53 Cal. 405.

Florida.— Smith *v.* Love, 49 Fla. 230, 38 So. 376; Chesser *v.* De Prater, 20 Fla. 691.

Illinois.— Forbes *v.* Hall, 34 Ill. 159, 85 Am. Dec. 301.

Iowa.— Hunter *v.* Aylworth, 38 Iowa 211.

Kansas.— Janes *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735.

Minnesota.— Hayes *v.* Carroll, 74 Minn. 134, 76 N. W. 1017.

Mississippi.— Stark *v.* Mather, Walk. 181, 12 Am. Dec. 553.

Missouri.— Hedrick *v.* Beeler, 110 Mo. 91, 19 S. W. 492; Widdicombe *v.* Childers, 84 Mo. 382 [*affirmed* in 124 U. S. 400, 8 S. Ct. 517, 31 L. ed. 427]; Sensenderfer *v.* Kemp, 83 Mo. 581.

Nevada.— Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 105.

Oklahoma.— Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427.

Oregon.— Oregon R., etc., Co. *v.* Hertzberg, 26 Oreg. 216, 37 Pac. 1019.

Wisconsin.— McCord *v.* Hill, 111 Wis. 499, 84 N. W. 27, 85 N. W. 145, 87 N. W. 481; Weeks *v.* Milwaukee, etc., R. Co., 78 Wis. 501, 47 N. W. 737.

United States.— Johnson *v.* Towsley, 13 Wall. 72, 20 L. ed. 485; Silver *v.* Ladd, 7 Wall. 219, 19 L. ed. 138; Stark *v.* Starr, 6 Wall. 402, 18 L. ed. 925; Minnesota *v.* Batchelder, 1 Wall. 109, 17 L. ed. 551; Hoyt *v.* Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404; McKenna *v.* Atherton, 160 Fed. 547; U. S. *v.* Winona, etc., R. Co., 67 Fed. 948, 15 C. C. A. 96 [*affirmed* in 165 U. S. 463, 17 S. Ct. 368, 41 L. ed. 789]; Southern Pac. R. Co. *v.* Araiza, 57 Fed. 98.

See 41 Cent. Dig. tit. "Public Lands," § 344.

84. *California.*— Mery *v.* Brodt, 121 Cal. 332, 53 Pac. 818; McNee *v.* Donahue, 76 Cal. 499, 18 Pac. 438; Plumer *v.* Brown, 70 Cal. 544, 12 Pac. 464; Hollinshead *v.* Simms, 51 Cal. 158; Hess *v.* Bolinger, 48 Cal. 349; Boggs *v.* Merced Min. Co., 14 Cal. 279.

Illinois.— Aldrich *v.* Aldrich, 37 Ill. 32; Bruner *v.* Manlove, 4 Ill. 339, 36 Am. Dec. 551.

Indiana.— Moyer *v.* McCullough, Smith 211.

Louisiana.— Hennen *v.* Wood, 16 La. Ann. 263; Davis *v.* Fletcher, 11 La. Ann. 506.

Michigan.— Johnson *v.* Lee, 47 Mich. 52, 10 N. W. 76.

Missouri.— Hedrick *v.* Beeler, 110 Mo. 91, 19 S. W. 492; Widdicombe *v.* Childers, 84 Mo. 382 [*affirmed* in 124 U. S. 400, 8 S. Ct. 517, 31 L. ed. 427]; Sensenderfer *v.* Kemp, 83 Mo. 581; Barksdale *v.* Brooks, 70 Mo. 197. See also Huntsucker *v.* Clark, 12 Mo. 333, holding that if a person obtains a certificate of purchase from the state land officers by fraudulent practices affecting the rights of another, a court of equity will compel a transfer of the certificate thus obtained to the person defrauded.

North Dakota.— Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360].

Ohio.— See Wallace *v.* Patten, 14 Ohio 272.

Oklahoma.— Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427.

Oregon.— Oregon, etc., R. Co. *v.* Hertzberg, 26 Oreg. 216, 37 Pac. 1019.

Wisconsin.— Empey *v.* Plugert, 64 Wis. 603, 25 N. W. 560.

United States.— Duluth, etc., R. Co. *v.* Roy, 173 U. S. 587, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794]; Hedrick *v.* Atchison, etc., R. Co., 167 U. S. 673, 17 S. Ct. 922, 42 L. ed. 320; Widdicombe *v.* Childers, 124 U. S. 400, 8 S. Ct. 517, 31 L. ed. 427; Silver *v.* Ladd, 7 Wall. 219, 19 L. ed. 138; White *v.* Cannon, 6 Wall. 443, 18 L. ed. 923; Stark *v.* Starr, 6 Wall. 402, 18 L. ed. 925; Minnesota *v.* Batchelder, 1 Wall. 109, 17 L. ed. 551; George *v.* Riddle, 94 Fed. 689; Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79; Stevens *v.* Sharp, 23 Fed. Cas. No. 13,410, 6 Sawy. 113.

See 41 Cent. Dig. tit. "Public Lands," § 344.

The holder of a state swamp land patent cannot maintain a suit to compel a conveyance from a patentee under the United States for the same land, for if the land was swamp land, the title having already passed from the United States to the state, the subsequent United States patent was void, while if the land was not swamp land the state patent was void and gave plaintiff no right. Kile *v.* Tubbs, 59 Cal. 191. But *compare* Miller *v.* Tobin, 16 Oreg. 540, 16 Pac. 161.

A railroad company which has, if anything, a legal title to lands by reason of a legislative grant, cannot maintain a bill in equity

was obtained provides that one who fraudulently obtains a patent shall forfeit all right and title to the land, and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.[85] But where a patent is absolutely void, its holder cannot be adjudged to hold it in trust for the person entitled to the land.[86] Where the consideration for public lands was paid or furnished by a person other than the patentee equity may declare a trust in favor of such person;[87] but equity will not recognize any resulting trust in favor of one who, in order to evade the law, enters in the name of another land which he cannot legally enter in his own name.[88] A charge that the patentee was not a citizen, and swore falsely on that point in his declaratory statement, is not sufficient to charge him as trustee for an adverse claimant who was defeated in a contest with him, but in order to so charge him it must appear that he produced witnesses and swore falsely as to his citizenship and thereby deceived the land officers.[89]

(B) *Interest Necessary to Maintain Suit.* In order to maintain a suit to control the operation of a patent the complainant must possess a title superior to that of the patentee,[90] and also to that of the government through which the patentee claims,[91] or he must possess equities which will control the title in the patentee's name.[92] In order to obtain the relief sought the complainant must show himself entitled to a patent from the government upon his equitable title,[93] and so he must show that he complied with the provisions of the law under which he claims [94] or was prevented from so doing by some act by means of which the patentee acquired an undue advantage in the proceeding.[95]

(C) *Jurisdiction of Courts.*[96] The state courts have jurisdiction of suits for

against parties claiming under a subsequent patent to have them decreed trustees of plaintiff and to convey the land to plaintiff, as, if plaintiff's title is good, then defendants have none, and such decree would not supply the place of the patient to which plaintiff is entitled. Northern Pac. R. Co. *v.* Cannon, 46 Fed. 237.

85. Mery *v.* Brodt, 121 Cal. 332, 53 Pac. 818.

86. Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105.

87. Franklin *v.* McEntyre, 23 Ill. 91; Barlow *v.* Barlow, 47 Kan. 676, 28 Pac. 607; Irvine *v.* Marshall, 7 Minn. 286.

A state statute declaring that, where a grant for a valuable consideration is made to one person on a consideration paid by another, no use or trust shall result in favor of the latter, does not apply to a sale of public lands. Irvine *v.* Marshall, 7 Minn. 286 [*following* Irvine *v.* Marshall, 20 How. (U. S.) 558, 15 L. ed. 994].

Entry by true owner of land warrant in name of nominal owner.— Where the true owner of a government land warrant issued in the name of another and not assigned by him, enters land under the warrant for himself, but, for want of the assignment, makes the entry in the name of the other, the latter takes the legal title to the land as trustee for the former. Key *v.* Jennings, 66 Mo. 356.

88. Alsworth *v.* Cordtz, 31 Miss. 32; Higgins *v.* Higgins, 55 Mo. 346; Clark *v.* Bayley, 5 Oreg. 343; Warren *v.* Van Brunt, 19 Wall. (U. S.) 646, 22 L. ed. 219.

89. Burrell *v.* Haw, 48 Cal. 222, 226, where it is said: "Any representation or allegation that defendant himself might have made, in his declaratory statement or otherwise, touching his citizenship, could not have influenced the tribunal, because it was not testimony. In the absence, then, of any facts showing that defendant proved his citizenship by false testimony, we must accept the decision of the Land Officers, upon that question, as conclusive."

90. Boggs *v.* Merced Min. Co., 14 Cal. 279.

91. Boggs *v.* Merced Min. Co., 14 Cal. 279.

92. Dreyfus *v.* Badger, 108 Cal. 58, 41 Pac. 279; Chapman *v.* Quinn, 56 Cal. 266; Boggs *v.* Merced Min. Co., 14 Cal. 279. See also Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172; Graham *v.* Great Falls Water Power, etc., Co., 30 Mont. 393, 76 Pac. 808; Savage *v.* Worsham, 72 Fed. 601.

Circumstances giving no right to relief.— One who was denied the right to enter, as a homestead, lands claimed under a railroad grant, and who thereafter attempted to make an actual settlement on the same, but was prevented by the threats of those claiming under the railroad title, has no right to the land as against the claimants under the railroad who were allowed to purchase under Act Cong. March 3, 1887, c. 376, § 5 (24 U. S. St. at L. 557 [U. S. Comp. St. (1901) p. 1597]). Norton *v.* Evans, 82 Fed. 804, 27 C. C. A. 168.

93. Meyendorf *v.* Frohner, 3 Mont. 282; Galliher *v.* Cadwell, 3 Wash. Terr. 501, 18 Pac. 68.

94. Sacramento Sav. Bank *v.* Hynes, 50 Cal. 195.

95. Sacramento Sav. Bank *v.* Hynes, 50 Cal. 195.

96. See, generally, COURTS, 11 Cyc. 633.

equitable relief by persons entitled to public lands which have been improperly patented to others.[97]

(D) *Laches.* The right to equitable relief against a patentee may be lost by laches and acquiescence in the ruling of the land department.[98]

(E) *Pleading.*[99] A petition or complaint which seeks to hold a patentee as trustee upon the ground of fraud must be as definite and precise as was formerly required in a bill of chancery.[1] The complainant must show that the United States has parted with its title, and that such title has become vested in the individual against whom it is sought to enforce the supposed equities,[2] and must aver and prove every fact necessary to make out a perfect case, and establish actual ownership by an equitable title superior to the legal title.[3] A mere general allegation of

97. Moyer *v.* McCullough, 1 Ind. 339; Empey *v.* Plugert, 64 Wis. 603, 25 N. W. 560.

98. Buckley *v.* Howe, 86 Cal. 596, 25 Pac. 132; Holt *v.* Murphy, 207 U. S. 407, 28 S. Ct. 212, 52 L. ed. 271 [*affirming* 15 Okla. 12, 79 Pac. 265] (holding that where the successful party in a land office contest filed a waiver of the preferential right of entry before a patent was finally issued to another, this fact coupled with a delay of four years in attempting to enforce such preferential right, defeats any right to charge the patentee and his grantees with a resulting trust); Harvey *v.* Holles, 160 Fed. 531 (acquiescence for six years in decision of land office); Osborn *v.* Altschul, 101 Fed. 739 (delay of seventeen years after the land was patented to another); Northern Pac. R. Co. *v.* Amacker, 49 Fed. 529, 1 C. C. A. 345 (holding that where a land grant railroad company contests the right of a homestead claimant to lands lying within its place limits, and is defeated on appeal to the secretary of the interior, and a patent is then issued to the claimant, a delay of more than three years in bringing suit for such lands, during which time they have been surveyed and platted as an addition to a town, will be considered as an acquiescence in the decision, and raises a presumption that the company has made a selection of indemnity lands in lieu of those thus lost to it). See also Sensenderfer *v.* Smith, 66 Mo. 80.

Two years from the date of a patent is not an unreasonable delay in prosecuting a suit against the patentee to recover the property on the ground that the right to purchase belonged to plaintiff, and not to the patentee. Whitlock *v.* Cohn, 72 Ark. 83, 80 S. W. 141.

99. See, generally, PLEADING, 31 Cyc. 1.

1. Hill *v.* Miller, 36 Mo. 182 [*followed* in Stucker *v.* Duncan, 37 Mo. 160].

2. McCord *v.* Hill, 104 Wis. 457, 80 N. W. 735.

3. Hays *v.* Steiger, 76 Cal. 555, 18 Pac. 670; Aurrecoechea *v.* Sinclair, 60 Cal. 532; Pierce *v.* Sparks, 4 Dak. 1, 22 N. W. 491; Baldwin *v.* Keith, 13 Okla. 624, 75 Pac. 1124; Duluth, etc., R. Co. *v.* Ray, 173 U. S. 589, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794]; Lee *v.* Johnson, 116 U. S. 48, 6 S. Ct. 249, 29 L. ed. 570; Stimson Land Co. *v.* Rawson, 62 Fed. 426; Puget Mill Co. *v.* Brown, 54 Fed. 987 [*affirmed* in 59 Fed. 35, 7 C. C. A. 643].

The complaint must state the facts showing that the complainant was entitled to the land, and a mere general averment of his right is insufficient. Stewart *v.* Altstock, 22 Oreg. 182, 29 Pac. 553.

The complaint must show that plaintiff was qualified to acquire the right in the lands under which he claims and that all the steps necessary to acquire it were taken. Quinn *v.* Kenyon, 38 Cal. 499.

Where plaintiff claims the land under the homestead laws, it is an essential averment of the petition that he has resided upon the land for the necessary period and cultivated and improved it to such an extent that, on final proof, he would be entitled to a patent. Baldwin *v.* Keith, 13 Okla. 624, 75 Pac. 1124.

It is not necessary for the complainant to show fraud in order to obtain relief, but it is enough for him to show that he has the equitable title and is entitled to the legal title, which by some means, no matter what, has been vested in defendant. McDowell *v.* Morgan, 28 Ill. 528.

Complaint not aided by implication.— Where the complaint alleged facts showing a prior settlement, residence, and improvements on the land, and defendant's answer expressly denied these allegations, and also put in issue the good faith of plaintiff's occupancy, and alleged that his improvements were made by others whose tenant he was, and that his preëmption entry was fraudulent, and had been duly canceled, it could not be implied, upon demurrer to the answer, that plaintiff's tenancy constituted him a *bona fide* settler and occupant, so as to support his claim by preëmption. Corbett *v.* Woods, 32 Minn. 509, 21 N. W. 734.

Complaints held insufficient.— A complaint alleging that defendant had, in violation of the statute, aliened a part of the land, and thereby forfeited his entry, and that the secretary of the interior erred in the contest in holding that such alienation did not work a forfeiture is insufficient where it does not also allege that the alienation was proved before the secretary, and found by him to be true, and that he had made such decision as a matter of law. Hays *v.* Steiger, 76 Cal. 555, 18 Pac. 670. A complaint alleging merely that plaintiff made application to purchase land as coal land, filing a declaratory statement in the land office and went into pos-

fraud or mistake is not sufficient, but the party seeking relief against the patent must allege and prove the facts showing that there was fraud or mistake and how it occurred,[4] and where fraud is relied on it must also be alleged and proved that the fraud affected the decision in the land department.[5]

(F) *Defenses.* In a suit to subject the patent to a prior right the patentee may set up fraud on the part of the complainant in obtaining and establishing his right,[6] and if the prior right is merely colorable it will not be enforced against the patent.[7] The fact that a person perfecting the title to scrip land was acting as trustee for another, and that both he and his *cestui que trust* intended to conceal from the federal land office their true relations, does not preclude the enforcement of the trust, where all the facts were known to and considered by the government officials before issuing the patent, and the government knowingly and willingly conveyed the land to the trustee, leaving him and his *cestui que trust* to settle the equities between themselves.[8]

(G) *Evidence.*[9] The decisions of the land department are *prima facie* correct,[10] and one who assails the correctness of such a decision must show affirmatively

session and improved it; that defendant caused a forged relinquishment of plaintiff's rights to be filed in the land office, of which she did not know till five months after expiration of the time within which she might have made proof and payment; and that defendant then purchased the land and a patent was issued to him — does not state a cause of action; it not showing that plaintiff did not also make a voluntary relinquishment, by failure to prosecute work on the land, or to make, or offer to make, seasonable period and payment, Gebo *v.* Clarke Fork Coal Min. Co., 30 Mont. 87, 75 Pac. 859. A complaint alleging that defendant had conveyed the land to another, who had farmed it, under a claim of title, prior to the institution of the contest suit between plaintiff and defendant, but not showing that there was no consideration for the conveyance, is insufficient to justify a review of the decision on the ground that defendant had executed the conveyance pursuant to a fraudulent agreement, previously made, to procure a patent in his own name as his grantee's pretended assignee, and for his grantee's benefit. Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398. A bill to control the title to lands patented to defendant cannot be maintained merely on allegations that plaintiff had made valuable improvements thereon under the belief that it was included in his homestead entry, long prior to defendant's homestead entry, there being no allegation that plaintiff had sought to amend his entry so as to include the land. Savage *v.* Worsham, 66 Fed. 852. Where complainant's bill showed affirmatively that defendant's entry had not been canceled, and failed to show that complainant had ever contested defendant's entry, and it did not aver that any evidence of the frauds which were claimed to vitiate defendant's patent had ever been presented to the register or receiver of the land office, complainant failed to show any right to or interest in the land. Savage *v.* Worsham, 72 Fed. 601.

4. *California.*— Sacramento Sav. Bank *v.* Hynes, 50 Cal. 195; Semple *v.* Hagar, 27 Cal. 163.

Minnesota.— Kelley *v.* Wallace, 14 Minn. 236.

Missouri.— Hill *v.* Miller, 36 Mo. 182 [*followed* in Stucker *v.* Duncan, 37 Mo. 160].

Washington.— Wiseman *v.* Eastman, 21 Wash. 163, 57 Pac. 398.

Wyoming.— Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

United States.— Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992; U. S. *v.* Budd, 144 U. S. 154, 12 S. Ct. 575, 36 L. ed. 384; Heath *v.* Wallace, 138 U. S. 573, 11 S. Ct. 380, 34 L. ed. 1063; Ehrhardt *v.* Hagaboom, 115 U. S. 67, 5 S. Ct. 1157, 29 L. ed. 346; Steele *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226; Quinby *v.* Conlan, 104 U. S. 420, 26 L. ed. 800; U. S. *v.* Atherton, 102 U. S. 372, 26 L. ed. 213; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. ed. 800; U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93; French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812; Le Marchel *v.* Teagarden, 152 Fed. 662, 133 Fed. 826; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; U. S. *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 [*affirmed* in 177 U. S. 435, 20 S. Ct. 706, 44 L. ed. 836]; U. S. *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176.

See 41 Cent. Dig. tit. "Public Lands," § 346.

Complaint held sufficient to show mistake see McCord *v.* Hill, 111 Wis. 499, 84 N. W. 27, 85 N. W. 145, 87 N. W. 481.

Allegations insufficient to charge fraud see Kerns *v.* Lee, 142 Fed. 985.

5. Durango Land, etc., Co. *v.* Evans, 80 Fed. 425, 25 C. C. A. 523.

6. Lytle *v.* State, 17 Ark. 608, holding that the patentee may do this, although his title was acquired after the commission of the fraud.

7. Lytle *v.* State, 17 Ark. 608.

8. Keely *v.* Gregg, 53 Mont. 216, 82 Pac. 27, 83 Pac. 222.

9. See, generally, EVIDENCE, 16 Cyc. 821.

10. Holmes *v.* State, 100 Ala. 291, 14 So. 51; Stewart *v.* Sutherland, 93 Cal. 270, 28 Pac. 947.

that it is illegal and unauthorized,[11] and has the burden of proving that he and not the patentee was entitled to the patent.[12] The claimant must establish his rights and the invalidity of the patent by clear and convincing evidence,[13] and if his evidence fails to establish a superior equity the legal title evidenced by the patent must prevail.[14] In order to authorize a decree in favor of an equitable claimant by a senior entry against a junior entry and patent, all the evidence must be produced which would be required in the general land office for the issue of a patent.[15] Where misconduct on the part of the land officials in a contest case is averred, a complete record of their proceedings is admissible, being not only relevant but of the utmost importance.[16]

(H) *Trial.*[17] In a suit by a private individual against the holder of a title to land by patent from the government only the plaintiff's right can be tried,[18] and questions as to non-compliance on the part of the patentee with the requirements of the law under which the patent was issued are not relevant.[19]

(I) *Deposit by Complainant of Fees and Charges.* Where the fees and commissions tendered by complainant to enter certain public land have been rejected by the local land office because it was then supposed that the land was not subject to entry, and complainant thereafter establishes his right to the land as against a patentee, complainant may be required as a prerequisite to a decree for a conveyance to deposit in court for the use of the United States the fees and other sums chargeable to him on the completion of his entry.[20]

(J) *Refunding Amount Paid by Patentee.* Where a patent has been procured through fraud the person entitled to the land is not required to pay to the patentee the amount expended by him in procuring the patent, as a condition to obtaining equitable relief by a declaration of trust and a decree for a conveyance to him by the patentee;[21] but where the patent has been issued by mistake and the patentee has been guilty of no fraud, the complainant may be decreed to pay the patentee

11. Holmes *v.* State, 100 Ala. 291, 14 So. 51.

12. Pfund *v.* Valley L. & T. Co., 52 Nebr. 473, 72 N. W. 480; Nisewanger *v.* Wallace, 16 Ohio 557; Furrer *v.* Ferris, 145 U. S. 132, 12 S. Ct. 821, 36 L. ed. 649; Kimberly *v.* Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. ed. 764; Tilghman *v.* Proctor, 125 U. S. 136, 8 S. Ct. 894, 31 L. ed. 664; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; North American Exploration Co. *v.* Adams, 104 Fed. 404, 45 C. C. A. 185; Mann *v.* Keene Guaranty Sav. Bank, 86 Fed. 51, 29 C. C. A. 547; California Redwood Co. *v.* Little, 79 Fed. 854; Farmers' L. & T. Co. *v.* McClure, 78 Fed. 209, 24 C. C. A. 64; Moline Plow Co. *v.* Carson, 72 Fed. 387, 18 C. C. A. 606; American Mortg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293; Warren *v.* Burt, 58 Fed. 101, 7 C. C. A. 105. See also *supra*, II, N, 2, c, (II), (E).

13. *Arkansas.*— Woodruff *v.* Core, 23 Ark. 341.

Iowa.— Atkins *v.* Faulkner, 11 Iowa 326.

Michigan.— Bernard *v.* Bougard, Harr. 130.

Montana.— Graham *v.* Great Falls Water Power, etc., Co., 30 Mont. 393, 76 Pac. 808 See also Kennedy *v.* Dickie, 34 Mont. 205, 85 Pac. 982.

Ohio.— Martin *v.* Boon, 2 Ohio 237.

Oklahoma.— Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702.

Wisconsin.— Empey *v.* Plugert, 64 Wis. 603, 25 N. W. 560.

See 41 Cent. Dig. tit "Public Lands," §§ 342–344.

Evidence sufficient to establish mistake see Mickey *v.* Barton, 194 Ill. 446, 62 N. E. 802.

Evidence insufficient to establish fraud or conspiracy see Kennedy *v.* Dickie, 34 Mont. 205, 85 Pac. 982.

14. Paty *v.* Harrell, 24 Ark. 40; Simmons *v.* Ogle, 105 U. S. 271, 26 L. ed. 1087. See also Kohn *v.* Barr, 52 Kan. 269, 34 Pac. 880

15. Wallace *v.* Patten, 14 Ohio 272.

16. Carr *v.* Fife, 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508.

17. See, generally, TRIAL.

18. Carr *v.* Fife, 44 Fed. 713 [*affirmed* in 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508].

19. Carr *v.* Fife, 44 Fed. 713 [*affirmed* in 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508].

20. McKenna *v.* Atherton, 160 Fed. 547.

21. Mery *v.* Brodt, 121 Cal. 332, 338, 53 Pac. 818, where it is said: "A court of equity is not inclined to treat the conduct of this defendant kindly. . . . The statutes of the United States, already noticed, declare that his money, paid to the government in the consummation of his fraud, shall be forfeited. . . . We are satisfied the same rule should be invoked in favor of these plaintiffs. The money paid by defendant being forfeited to the government by reason of his fraud, these plaintiffs should not be required to make it good. The labor and expense of prosecuting this action, necessarily entailed upon plaintiffs by defendant's fraudulent acts, may well be said to counter-balance

the amount which the latter paid for the land as a condition of a conveyance to the claimant of the land,[22] and where the government has in its possession the money paid by both the patentee and the person to whom he is compelled to convey the property natural justice and equity require that it refund to the patentee his purchase-money.[23]

(III) *Quieting Title*[24]— (A) *In General.* The relief may be in the form of quieting the title of the person entitled to the land as against the patentee,[25] and enjoining the patentee from asserting his title.[26] It is held in California that an action to quiet title to a parcel of land may be maintained, although the title to such land is still in the United States.[27]

(B) *Interest Necessary to Maintain Suit.* The rule that a suit to quiet title can only be maintained on the legal title does not apply as against a railroad company, with respect to lands granted to it by the government, when it has done everything required to entitle it to the grant, since it is powerless to compel the government to issue a patent therefor.[28]

(C) *Jurisdiction of Courts.*[29] An adverse suit brought to determine the respective rights of a claimant under the law permitting soldiers' additional homestead certificates to be located on the public land in Alaska and those who deny his right may be maintained in the district courts of Alaska; the practice and parties being controlled and regulated solely by the code of Alaska.[30]

(D) *Limitations*[31] *and Laches.* The right to maintain a suit to quiet title to lands held or claimed under patent from the government may be barred by limitations[32] or laches.[33]

(E) *Parties.*[34] In an action to quiet title to school lands, a county auditor and board of commissioners are neither necessary nor proper defendants, and a judgment against them cannot bind the state.[35] Settlers upon public lands claimed under the laws permitting soldiers' additional homestead certificates to be located in Alaska may intervene in an adverse suit brought to quiet title thereto, although they have not filed an adverse claim in the land office proceedings.[36]

(F) *Pleading.*[37] In a suit in chancery, to obtain the cancellation of a patent

any such alleged claim of equity in his favor."

22. Hollinshead *v.* Simms, 51 Cal. 158; Aiken *v.* Ferry, 1 Fed. Cas. No. 112, 6 Sawy. 79.

23. Hollister *v.* U. S., 36 Ct. Cl. 13.

24. See, generally, Quieting Title.

25. Boggs *v.* Merced Min. Co., 14 Cal. 279; Davis *v.* Fletcher, 11 La. Ann. 506; Duluth, etc., R. Co. *v.* Roy, 173 U. S. 587, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794].

The patent may be set aside as a cloud upon the title of the true owner of the land. Danforth *v.* Morrical, 84 Ill. 456; McGhee *v.* Wright, 16 Ill. 555; Cunningham *v.* Ashley, 14 How. (U. S.) 377, 14 L. ed. 462; Stoddard *v.* Chambers, 2 How. (U. S.) 284, 11 L. ed. 269.

26. Duluth, etc., R. Co. *v.* Roy, 173 U. S. 587, 19 S. Ct. 549, 43 L. ed. 820 [*affirming* 69 Minn. 547, 72 N. W. 794].

27. Orr *v.* Stewart, 67 Cal. 275, 7 Pac. 693 [*following* Wilson *v.* Madison, 55 Cal. 5; Brandt *v.* Wheaton, 52 Cal. 430].

28. Southern Pac. R. Co. *v.* Stanley, 49 Fed. 263.

29. See, generally, Courts, 11 Cyc. 633.

30. Gavigan *v.* Crary, 2 Alaska 370.

31. See, generally, Limitations of Actions, 25 Cyc. 963.

32. Ashley *v.* Rector, 20 Ark. 359, holding that where several persons are tenants in common of a New Madrid claim to a tract of land, and one of them purchases the land of the government, takes the title in his own name, and for more than ten years he and those claiming under him hold the land openly and adversely, doing repeated public and notorious acts hostile to the rights of the cotenants, the latter are barred by limitations.

33. U. S. *v.* Des Moines Valley R. Co., 70 Fed. 435, holding that delay for twenty years after completing a homestead entry, and fifteen after receiving a patent, before beginning suit to quiet the title against adverse claims, amounts to laches sufficient to bar relief.

Delay not amounting to laches.— Where only nine months had elapsed after the issue of the certificates of purchase to defendant's assignors, and the patents were not granted until after the commencement of the action, there was no such laches as to deprive plaintiff of his right to sue. Hyde *v.* Redding, 74 Cal. 493, 16 Pac. 380.

34. See, generally, Parties, 30 Cyc. 1.

35. State *v.* Wimer, 166 Ind. 530, 77 N. E. 1078.

36. Gavigan *v.* Crary, 2 Alaska 370.

37. See, generally, Pleading, 31 Cyc. 1.

for lands, and to have the title of complainant perfected and quieted, it is not necessary to allege fraud in order to give the court jurisdiction.[38] A bill by a railroad company to quiet title, alleging that the United States had full title at the time complainant's grant attached, and that defendant claims under a patent issued by the state as for land to which the state was entitled in lieu of certain other grants, shows a cloud upon the title, although it is not alleged that such lands were ever listed to the state.[39]

(G) *Defenses.* The question of the *bona fides* of the settlement by a preëmption claimant whose right attached before a railroad was definitely located and who has received a patent from the government cannot be raised in defense to his claim to have removed as a cloud on his title a patent from the state to the railroad.[40]

(H) *Evidence.*[41] The burden of proof is upon the complainant to establish the facts entitling him to the relief asked.[42]

(IV) *Protection of Bona Fide Purchasers.*[43] A *bona fide* purchaser from the patentee is entitled to protection against the claims of one who had a right to the land superior to that of the patentee;[44] but a mere statement that the person claiming protection "purchased the land in good faith and for a valuable consideration without notice of any claim of said plaintiff to the same or any part thereof" is not a sufficient statement of his right to entitle him to protection as a purchaser in good faith.[45]

P. Conveyances and Contracts — 1. Before Right to Patent Complete — a. Right to Sell, Assign, or Transfer — (I) *In General.* As it is against the policy of the government to permit the acquirement of public lands for speculative purposes,[46] some of the statutes prohibit the making of entries for the benefit of a person other than the entryman,[47] or the assignment of the right to purchase public lands.[48] But in the absence of any express or implied prohibition in the statute under which he is seeking to acquire the land,[49] an entryman or one whose

38. Branch *v.* Mitchell, 24 Ark. 431.

39. Southern Pac. R. Co. *v.* Stanley, 49 Fed. 263, so holding on the ground that the state patent creates a presumption that all steps necessary to its issuance have been properly taken.

40. Sioux City, etc., Town-Lot, etc., Co. *v.* Griffey, 143 U. S. 32, 12 S. Ct. 362, 36 L. ed. 64 [*affirming* 72 Iowa 505, 34 N. W. 304], so holding on the ground that the land did not pass under the grant to the state in aid of the railroad and only the government can question the good faith of the transaction.

41. See, generally, Evidence, 16 Cyc. 821.

42. White *v.* Chicago, etc., R. Co., 46 Iowa 222; Richards *v.* Griffith, 57 Kan. 234, 45 Pac. 600 [*reversing* 1 Kan. App. 518, 41 Pac. 196].

Evidence held insufficient.— In an action by a person in possession of school land under a certificate of purchase, to quiet his title against the holder of a patent to such land, the facts that the certificate is prior to the date of the patent, that plaintiff is in possession of the land, that he has paid all the interest payments required by law, and that the balance of the purchase-money is not due, are insufficient to overcome the patent, where it appears that the land has been taxable for a considerable number of years, and no proof is made with reference to the payment of the taxes, nor with reference to the transactions between the patentee and the officers authorized to make sales of school lands, on which the action of the governor in issuing the patent was based. Richards *v.* Griffith, 57 Kan. 234, 45 Pac. 600 [*reversing* 1 Kan. App. 518, 41 Pac. 196].

43. **In suit for cancellation or annulment of patent** see *supra*, II, O, 2, b, (x).

44. Janes *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735. See also Graham *v.* Great Falls Water Power, etc., Co., 30 Mont. 393, 76 Pac. 808.

Facts not showing defendant to be a bona fide purchaser see McKenna *v.* Atherton, 160 Fed. 547.

45. Bross *v.* Wiley, 6 Wis. 485.

46. McElhaney *v.* McElhaney, 125 Iowa 279, 101 N. W. 90; Meyers *v.* Croft, 13 Wall. (U. S.) 291, 20 L. ed. 562.

47. See McElhaney *v.* McElhaney, 125 Iowa 279, 101 N. W. 90. And see *infra*, II, P, 1, a, (II), (III), (IV).

A contract between a husband and wife that the latter shall receive one half of all the property which the former may acquire does not contravene such a provision. McElhaney *v.* McElhaney, 125 Iowa 279, 101 N. W. 90.

48. See Coleman *v.* Allen, 5 Mo. App. 127 [*affirmed* in 75 Mo. 332].

49. Phillips *v.* Carter, 135 Cal. 604, 67 Pac. 1031; Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600; Lamb *v.* Davenport, 18 Wall. (U. S.) 307, 21 L. ed. 759; Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366.

application to purchase land has been approved has an equitable interest in the land which he may assign or convey to another,[50] although he has not yet paid the government price for the land.[51] Where lands are granted by the government to individuals, on condition precedent, the grantees may assign them even before performance of the condition,[52] and the title of the assignees will be good against all persons except the government.[53] A sale of unappropriated public lands, to which the vendor has no valid claim, while not void as against public policy, has no consideration, so that recovery cannot be had on the purchase-money notes.[54]

(II) *Sale by Homestead Entryman*[55]— (A) *In General.* A homestead entryman has no right to sell or convey the land entered by him before he has made final proof and obtained the final receiver's receipt,[56] and an unauthorized alienation of the land defeats his right to a patent;[57] but the sale and surrender of a homestead claim and the improvements thereon is a good consideration for a promissory note, for although it conveys no interest in the land itself as against the government, the possessory right of the homesteader and his improvements are subjects of legitimate bargain and sale.[58] The alienation which is prohibited

50. *California.*—Phillips *v.* Carter, 135 Cal. 604, 67 Pac. 1031, 87 Am. St. Rep. 152, holding that an entry under the desert land act is assignable.

Iowa.— Sillyman *v.* King, 36 Iowa 207. See also Spry *v.* Sleppy, 15 Iowa 409, holding that the transfer of a "claim" right to land held in good faith, made after marking out and defining its boundaries and recording it, but before any improvements were made upon it, is a sufficient consideration to sustain an action upon a contract to pay therefor.

Minnesota.— Nicholson *v.* Congdon, 95 Minn. 188, 103 N. W. 1034.

Missouri.— See Keene *v.* Barnes, 29 Mo. 377.

Wisconsin.— Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600; Hayward *v.* Ormsbee, 11 Wis. 3.

United States.— Commonwealth Title Ins., etc., Co. *v.* U. S., 37 Ct. Cl. 532 [*affirmed* in 193 U. S. 651, 24 S. Ct. 546, 48 L. ed. 830]. See also Gilmer *v.* Poindexter, 10 How. 257, 13 L. ed. 411.

See 41 Cent. Dig. tit. "Public Lands," § 351.

Where a treaty with an Indian tribe reserves a certain quantity of land to be afterward selected by the president and patented to an individual of the tribe, such reservation gives the reservee an equitable estate in the land reserved, which he may sell before the issuance of a patent. Crews *v.* Burcham, 1 Black (U. S.) 352, 17 L. ed. 91.

51. Nicholson *v.* Congdon, 95 Minn. 188, 103 N. W. 1034.

52. Jinkins *v.* Noel, 3 Stew. (Ala.) 60.

53. Jinkins *v.* Noel, 3 Stew. (Ala.) 60.

54. Rayner Cattle Co. *v.* Bedford, 91 Tex. 642, 45 S. W. 554 [*affirming* (Civ. App. 1898) 44 S. W. 410, and *explaining* and *following* Beer *v.* Landman, 88 Tex. 450, 31 S. W. 805].

55. Homesteads generally see *supra*, II, C, 8.

56. *Alabama.*— Milliken *v.* Carmichael, 134 Ala. 623, 33 So. 9, 92 Am. St. Rep. 45; Woodstock Iron Co. *v.* Strickland, 121 Ala. 616, 25 So. 818; Mulloy *v.* Cook, 101 Ala. 178, 10 So. 349, 17 So. 899.

Arkansas.— Nichols *v.* Council, 51 Ark. 26, 9 S. W. 305, 14 Am. St. Rep. 20.

California.— Moffatt *v.* Bulson, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192.

Florida.— See Porter *v.* Bishop, 25 Fla. 749, 6 So. 863.

Iowa.— Sweesey *v.* Sparling, 81 Iowa 433, 46 N. W. 1068, 25 Am. St. Rep. 506, 9 L. R. A. 777.

Kansas.— Weeks *v.* White, 41 Kan. 569, 21 Pac. 600; Sutphen *v.* Sutphen, 30 Kan. 510, 2 Pac. 100 [*following* Mellison *v.* Allen, 30 Kan. 382, 2 Pac. 97].

Louisiana.— Wood *v.* Noel, 116 La. 516, 40 So. 857.

United States.— Love *v.* Flahive, 206 U. S. 356, 27 S. Ct. 729, 51 L. ed. 1092, 205 U. S. 195, 27 S. Ct. 486, 51 L. ed. 768 [*affirming* 33 Mont. 348, 83 Pac. 882]; Anderson v. Carkins, 135 U. S. 483, 10 S. Ct. 905, 34 L. ed. 272. See also Moss *v.* Dowman, 82 Fed. 810.

See 41 Cent. Dig. tit. "Public Lands," § 363.

Effect of sale as abandonment of right see *supra*, II, C, 14, a.

Act Cong. June 15, 1880, § 2, enabling transferees of "persons who have heretofore under any of the homestead laws entered lands," to entitle themselves to the land by paying the government price therefor, does not apply to persons claiming under attempted transfers made after the passage of the act. Woodstock Iron Co. *v.* Strickland, 121 Ala. 616, 25 So. 818.

After the homesteader has made his final proof he has a complete equitable title to the land which he may transfer to another, notwithstanding the fact that he has not yet received his patent. See *infra*, II, P, 2.

57. U. S. Rev. St. (1878) § 2291 [U. S. Comp. St. (1901) p. 1390]. See Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881.

58. Lindersmith *v.* Schwiso, 17 Minn. 26; Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am.

by the statute under consideration is an absolute alienation of the land or a part thereof.[59]

(B) *Purposes For Which Conveyance of Homestead Permitted.* It is expressly provided by statute that any *bona fide* settler under the preëmption, homestead, or other settlement law shall have the right to transfer, with warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it;[60] but this statute does not authorize a husband who with his wife occupies the land as a statutory homestead to make such a conveyance without the formalities required by the state law for the conveyance of the homestead.[61]

(C) *Assignment of Additional Homestead.* A soldier's or sailor's additional homestead right or the certificate or scrip evidencing the same is assignable,[62] before any land is entered thereunder,[63] notwithstanding the fact that the practice

Rep. 852 [*following* McWilliams *v.* Bridges, 7 Nebr. 419].

Sale of improvements see *infra*, II, P, 1, a, (VIII).

Sale of possessory right see *infra*, II, P, 1, a, (VII).

59. *Arkansas.*— Hot Springs R. Co. *v.* Tyler, 36 Ark. 205.

Iowa.— Fuller *v.* Hunt, 48 Iowa 166.

Mississippi.— Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881.

Missouri.— Dickerson *v.* Bridges, 147 Mo. 235, 48 S. W. 825.

Washington.— Weber *v.* Laidler, 26 Wash. 144, 66 Pac. 400, 90 Am. St. Rep. 726.

Wisconsin.— Meinhold *v.* Walters, 102 Wis. 389, 78 N. W. 574, 72 Am. St. Rep. 888.

See 41 Cent. Dig. tit. "Public Lands," § 363.

Agreement to share profits of mill on land. — Where a homesteader, before perfecting his title, unites with another as a partner, and builds a mill on the land, giving to such partner an interest therein and in its profits for his advances, this is not an alienation of the land in violation of the statute. Hot Springs R. Co. *v.* Tyler, 36 Ark. 205.

60. U. S. Rev. St. (1878) § 2288 [U. S. Comp. St. (1901) p. 1385]. See the following cases:

Alabama.—Griffin *v.* Chattanooga Southern R. Co., 127 Ala. 570, 30 So. 523, 85 Am. St. Rep. 143.

Arkansas.— St. Louis, etc., R. Co. *v.* Tapp, 64 Ark. 357, 42 S. W. 667.

Kansas.— Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 16 Pac. 125.

Mississippi.— Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881.

Missouri.— Kinion *v.* Kansas City, etc., R. Co., 118 Mo. 577, 24 S. W. 636.

United States.— U. S. *v.* Turner, 54 Fed. 228.

See 41 Cent. Dig. tit. "Public Lands," § 354.

Contract to convey right of way.— An agreement by a homestead entryman to convey to a railroad company, whenever he received a patent, a right of way through the homestead and a specified amount of land for a depot and other railroad purposes, having been acted on by the railroad company, will, upon the issuance of the patent, be specifically enforced as to the right of way and so much of the other land as is necessary for railroad purposes. St. Louis, etc., R. Co. *v.* Tapp, 64 Ark. 357, 42 S. W. 667. As to contracts of sale see, generally, *infra*, II, P, 1, j, (II).

61. Griffin *v.* Chattanooga, etc., R. Co., 127 Ala. 570, 30 So. 523, 85 Am. St. Rep. 143.

62. *Alaska.*— Gavigan *v.* Crary, 2 Alaska 370.

California.— Rose *v.* Nevada, etc., Wood, etc., Co., 73 Cal. 385, 15 Pac. 19. But *compare* Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122.

Minnesota.— Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739; Gilbert *v.* McDonald, 94 Minn. 289, 102 N. W. 712, 110 Am. St. Rep. 368; Pardoe *v.* Merritt, 75 Minn. 12, 77 N. W. 552; Tuman *v.* Pillsbury, 60 Minn. 520, 63 N. W. 104; Bradley *v.* Whitesides, 55 Minn. 455, 57 N. W. 148 [*distinguishing* Anderson *v.* Carkins, 135 U. S. 483, 10 S. Ct. 905, 34 L. ed. 272]; Whitesides *v.* Rutan, 53 Minn. 520, 55 N. W. 540.

Missouri.— Johnson *v.* Fluetsch, 176 Mo. 452, 75 S. W. 1005.

Utah.— Montague *v.* McCarroll, 15 Utah 318, 49 Pac. 418 [*following* Montague *v.* McCarroll, 10 Utah 22, 36 Pac. 50].

Wisconsin.— Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600.

United States.— Webster *v.* Luther, 163 U. S. 331, 16 S. Ct. 963, 41 L. ed. 179 [*affirming* 50 Minn. 77, 52 N. W. 271]; Barnes *v.* Poirier, 64 Fed. 14, 12 C. C. A. 9 [*affirming* 57 Fed. 956].

See 41 Cent. Dig. tit. "Public Lands," § 353.

Contra.— Nichols *v.* Council, 51 Ark. 6, 9 S. W. 305, 14 Am. St. Rep. 20; Mackintosh *v.* Renton, 3 Wash. Terr. 431, 19 Pac. 144, 2 Wash. Terr. 121, 3 Pac. 830.

Where the right to enter a soldier's additional homestead is owned by a minor it may be sold by his general guardian. Pardoe *v.* Merritt, 75 Minn. 12, 77 N. W. 552.

63. Tuman *v.* Pillsbury, 60 Minn. 520, 63 N. W. 104; Bradley *v.* Whitesides, 55 Minn.

of the land department is opposed to such assignment,[64] and the assignee may locate the certificate on any of the public lands of the United States subject to homestead entry,[65] in his own name.[66] The equitable interest obtained by the filing of an application for a specific tract of land by the assignee of a soldier's additional homestead certificate may be conveyed by quitclaim deed.[67] Where the vendor of an alleged soldier's additional homestead right guaranteed that the documents evidencing the right were genuine and entitled the holder to locate the land, and that, if they should prove invalid, he would replace the same or return the money, a decision of the land department, on an application to locate, that the documents were insufficient, with defendant's failure to replace the same or to refund the money, constituted a breach of the guaranty.[68]

(III) *SALE OF PREËMPTION RIGHT.*[69] The statute expressly prohibited and declared to be null and void all assignments or transfers of preëmption rights; [70] but this prohibition was not designed to apply to or invalidate contracts relating to and made in settlement of local disputes between settlers who were endeavoring to secure the same land under the law.[71]

(IV) *SALE OF BOUNTY LANDS OR WARRANTS.*[72] Under some of the earlier statutes bounty land warrants could not be assigned nor could bounty lands be conveyed prior to the issuance of the patent;[73] but the later statutes did not

455, 57 N. W. 148 [*distinguishing* Anderson *v.* Carkins, 135 U. S. 483, 10 S. Ct. 905, 34 L. ed. 272]; Montague *v.* McCarroll, 10 Utah 22, 36 Pac. 50; Webster *v.* Luther, 163 U. S. 331, 16 S. Ct. 963, 41 L. ed. 179 [*affirming* 50 Minn. 77, 52 N. W. 271]; Barnes *v.* Poirier, 64 Fed. 14, 12 C. C. A. 9 [*affirming* 57 Fed. 956].

64. Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739; Webster *v.* Luther, 163 U. S. 331, 16 S. Ct. 963, 41 L. ed. 179 [*affirming* 50 Minn. 77, 52 N. W. 271].

65. Gavigan *v.* Crary, 2 Alaska 370; Gilbert *v.* McDonald, 94 Minn. 289, 102 N. W. 712, 110 Am. St. Rep. 368; Johnson *v.* Fluetsch, 176 Mo. 452, 75 S. W. 1005; Webster *v.* Luther, 163 U. S. 331, 16 S. Ct. 963, 41 L. ed. 179 [*affirming* 50 Minn. 77, 52 N. W. 271].

66. Johnson *v.* Fluetsch, 176 Mo. 452, 75 S. W. 1005.

67. Gilbert *v.* McDonald, 94 Minn. 289, 102 N. W. 712, 110 Am. St. Rep. 368.

68. Lamson *v.* Coffin, 102 Minn. 493, 114 N. W. 248.

69. **Preëmption** generally see *supra*, II, C, 7.

70. U. S. Rev. St. (1878) § 2263. See the following cases:

Alabama.— McTyer *v.* McDowell, 36 Ala. 39; Cundiff *v.* Orms, 7 Port. 58; McElyea *v.* Hayter, 2 Port. 148, 27 Am. Dec. 645.

Arkansas.— Wynn *v.* Morris, 16 Ark. 414.

California.—Merrill *v.* Clark, 103 Cal. 367, 37 Pac. 238; Whitney *v.* Buckman, 13 Cal. 536.

Colorado.— Cooper *v.* Hunter, 8 Colo. App. 101, 44 Pac. 944.

Florida.— Taylor *v.* Baker, 1 Fla. 245.

Indiana.— Carr *v.* Allison, 5 Blackf. 63; Doe *v.* Hays, Smith 177.

Kansas.—Ainsworth *v.* Miller, 20 Kan. 220.

Louisiana.—Moore *v.* Jourdan, 14 La. Ann. 414; Stanbrough *v.* Wilson, 13 La. Ann. 494; Penn *v.* Ott, 12 La. Ann. 233 [*followed* in Gilbert *v.* Penn, 12 La. Ann. 235]; Arbour *v.* Nettles, 12 La. Ann. 217; Seaton *v.* Sharkey, 3 La. Ann. 332; Strong *v.* Rachal, 16 La. 232.

Minnesota.— Warren *v.* Van Brunt, 12 Minn. 70.

Mississippi.— Wilkinson *v.* Mayfield, 27 Miss. 542; Glenn *v.* Thistle, 23 Miss. 42.

Missouri.— Paulding *v.* Grimsley, 10 Mo. 210.

Oregon.— Richards *v.* Snyder, 11 Oreg. 501, 6 Pac. 186.

Washington.— Carson *v.* Railsback, 3 Wash. Terr. 168, 13 Pac. 618.

Wisconsin.— Dillingham *v.* Fisher, 5 Wis. 475.

United States.— Gonzales *v.* French, 164 U. S. 338, 17 S. Ct. 102, 41 L. ed. 458.

See 41 Cent. Dig. tit. "Public Lands," § 352.

When the preëmptor paid for the land and received a certificate of purchase, he ceased to be a preëmptor and became a purchaser and the holder of the equitable title to the land which he could then convey. See *infra*, II, P, 2.

71. Richards *v.* Snyder, 11 Oreg. 501, 6 Pac. 186.

Contracts to share land see *infra*, II, P, 1, j, (III).

72. **Bounty land warrants** generally see *supra*, II, F.

73. *Arkansas.*— Moore *v.* Maxwell, 18 Ark. 469.

Illinois.— Rose *v.* Buckland, 17 Ill. 309.

Iowa.— Johns *v.* Warren, 85 Iowa 300, 52 N. W. 230; Burlington, etc., R. Co. *v.* Clingman, 43 Iowa 306; Fort *v.* Wilson, 3 Iowa 153.

Ohio.— Smith *v.* Stark, 7 Ohio, Pt. II, 200.

Tennessee.— Moore *v.* Mills, 5 Sneed 461, contract for assignment of land warrant to be issued.

Wisconsin.— Stephenson *v.* Wilson, 37 Wis.

contain any such restrictions, and under them it was held that the warrants or the land located thereunder could be sold.[74]

(v) *Sale of Swamp Lands.*[75] One who holds a certificate of purchase of swamp lands has such an interest as he may lawfully convey or assign to another.[76]

(vi) *Sale of School Lands.*[77] A purchaser of school lands who has not yet received his patent or deed has nevertheless such an interest in the lands as he may convey to another.[78] Where two persons own school land certificates in common, possession thereof by one of them is not such *indicium* of exclusive title as will enable him to pass a good title to an innocent purchaser.[79]

(vii) *Sale of Possessory Right.*[80] The possessory right of an occupant of public lands is a valuable property right which he can legally transfer and convey to his vendee, or which may be the subject or consideration of a contract,[81] although

482 [*following* Nichols *v.* Nichols, 3 Chandl. 189, 3 Pinn. 174].

United States.—Maxwell *v.* Moore, 22 How. 185, 16 L. ed. 251; Smith *v.* Shane, 22 Fed. Cas. No. 13,105, 1 McLean 22; Wright *v.* Taylor, 30 Fed. Cas. No. 18,096, 2 Dill. 23.

See 41 Cent. Dig. tit. "Public Lands," § 356.

74. *Arkansas.*— Conway *v.* Kinsworthy, 21 Ark. 9; Moore *v.* Maxwell, 18 Ark. 469.

Illinois.— Reynolds *v.* Sumner, 126 Ill. 58, 18 N. E. 334, 9 Am. St. Rep. 523, 1 L. R. A. 327; Dyke *v.* McVey, 16 Ill. 41.

Indiana.— Johnson *v.* Houghton, 19 Ind. 359; Moyer *v.* McCullough, 1 Ind. 339; Moyer *v.* McCullough, Smith 211.

Iowa.— Waters *v.* Bush, 42 Iowa 255. See also Fort *v.* Wilson, 3 Iowa 153.

Kansas.— Stinson *v.* Geer, 42 Kan. 520, 22 Pac. 586.

Louisiana.— See Dupre *v.* McCright, 6 La. Ann. 146.

Michigan.— Merrill *v.* Hartwell, 11 Mich. 200.

Missouri.—Wilcox *v.* Phillips, 199 Mo. 288, 97 S. W. 886; Johnson *v.* Fluetsch, 176 Mo. 452, 75 S. W. 1005; Carman *v.* Johnson, 20 Mo. 108, 61 Am. Dec. 593. See also Ferguson *v.* Bartholomew, 67 Mo. 212.

Ohio.— Wallace *v.* Minor, 7 Ohio 249; Wallace *v.* Seymore, 7 Ohio 156; Allen *v.* Parish, 3 Ohio 107.

Washington.— McAleer *v.* Hill, 2 Wash. 653, 27 Pac. 557; McSorley *v.* Hill, 2 Wash. 638, 27 Pac. 552.

United States.— French *v.* Spencer, 21 How. 228, 16 L. ed. 97; Brush *v.* Ware, 15 Pet. 93, 10 L. ed. 672; Galt *v.* Galloway, 4 Pet. 332, 7 L. ed. 876; Gray *v.* Jones, 14 Fed. 83, 4 McCrary 515.

See 41 Cent. Dig. tit. "Public Lands," § 356.

75. **Swamp lands** generally see *supra*, II, I.

76. Alexander *v.* McCauley, 22 Ark. 553; Jasper County *v.* Tavis, 76 Mo. 13.

The vendee's remedy for defects of title must rest upon the covenants in his deed, and if there are no covenants that does not give him the right to resist the payment of the purchase-money in the absence of any proof of representations of title by the vendor. Alexander *v.* McCauley, 22 Ark. 553.

77. **School lands** generally see *supra*, II, H.

78. *California.*— Watkins *v.* Lynch, 71 Cal. 21, 11 Pac. 808; Stanway *v.* Rubio, 51 Cal. 41; Bludworth *v.* Lake, 33 Cal. 255.

Illinois.— Welch *v.* Dutton, 79 Ill. 465.

Iowa.— Churchill *v.* Morse, 23 Iowa 229, 92 Am. Dec. 422.

Kansas.— Reynolds *v.* Reynolds, 30 Kan. 91, 1 Pac. 388.

Nebraska.— Burrows v. Hovland, 40 Nebr. 464, 58 N. W. 947.

Wisconsin.— Jarvis *v.* Dutcher, 16 Wis. 307; Smith *v.* Mariner, 5 Wis. 551, 68 Am. Dec. 73. See also Johannesson *v.* Borschenius, 35 Wis. 131; Onson *v.* Cown, 22 Wis. 329.

See 41 Cent. Dig. tit. "Public Lands," § 359.

But *compare* McKinney *v.* Bode, 33 Minn. 450, 23 N. W. 851.

The assignment need not be filed for record in the commissioner's office in order to secure the rights of the assignee as against a purchaser at execution sale under a judgment against the assignor rendered subsequent to the assignment. Churchill *v.* Morse, 23 Iowa 229, 92 Am. Dec. 422.

Contract in violation of law.— Under Cal. Pol. Code, § 3500, relative to acquiring title to school lands from the state, and requiring the applicant to swear that he is a citizen of the county and a resident of the state, and that he has not entered any of said land, which, together with that then sought to be purchased, exceeded three hundred and twenty acres, a contract by which one of two persons, each of whom claims adversely to the other the right to acquire title to nearly five hundred acres of public land, agrees to convey to the other all the title which he had or might have in about four hundred acres of it, he having already taken steps to have other persons enter in it in their names, under the school-land laws, but for his benefit, is void as in violation of the spirit of the law, and will not be enforced. Kreamer *v.* Earl, 91 Cal. 112, 27 Pac. 735.

79. Smith *v.* Clarke, 7 Wis. 551.

80. **Possessory right** generally see *supra*, II, C, 5, b.

81. *Arizona.*— Tidwell *v.* Chiricahua Cattle Co., 5 Ariz. 352, 53 Pac. 192.

Illinois.— Sargeant *v.* Kellogg, 10 Ill. 273; Doyle *v.* Knapp, 4 Ill. 334.

Indiana.— Vest *v.* Weir, 4 Blackf. 135.

the purchaser acquires no rights as against the United States.[82] And while if such possessor conveys the land by warranty deed the purchaser on ascertaining that the title is in the government may immediately abandon possession thereof and institute suit for the recovery of the purchase-money paid,[83] he cannot retain possession of the land and improvements and, without notice to his vendor, by virtue of whose conveyance that possession was obtained, himself enter the land and acquire title from the government under the land laws, which such possession alone enabled him to acquire, and then recover the purchase-money from the vendor; [84] but in such case the purchaser can recover only the amount which he has been forced to expend for the protection of his possession and the perfection of his title, and such other damages as may have been caused by the breach of warranty.[85] One who obtains the possession of public lands of the United States from a prior possessor, under a contract of purchase with which he has not complied, is not, however, estopped from setting up a subsequently acquired title from the United States, in an action brought by the vendor to recover the possession.[86] A license given by a settler to another to locate a claim on the land cannot be validly exercised after the settler has sold his right and removed from the land.[87]

(VIII) *SALE OF IMPROVEMENTS.*[88] Improvements placed upon the public land by settlers or occupants being regarded and treated as property,[89] a possessor of public lands may transfer and convey his improvements to another [90] while

Iowa.— Pierson *v.* David, 1 Iowa 23.

Kansas.— Moore *v.* McIntosh, 6 Kan. 39.

Minnesota.— Lindersmith *v.* Schwiso, 17 Minn. 26. *Compare* Cole *v.* Maxfield, 13 Minn. 235, holding that a quitclaim deed by an occupant of unsurveyed lands is inoperative because the occupant has nothing to convey.

Mississippi.— Holloway *v.* Miller, 84 Miss. 776, 36 So. 531 [*following* Hooker *v.* McIntosh, 76 Miss. 693, 25 So. 866].

Missouri.— Coleman *v.* Allen, 5 Mo. App. 127 [*affirmed* in 75 Mo. 332].

Nebraska.— Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852 [*following* McWilliams *v.* Bridges, 7 Nebr. 419].

Nevada.— Brown *v.* Killabrew, 21 Nev. 437, 33 Pac. 865.

Oklahoma.— McKennon *v.* Winn, 1 Okla. 327, 33 Pac. 582, 22 L. R. A. 501 [*following* Lamb *v.* Davenport, 18 Wall. (U. S.) 307, 21 L. ed. 759].

Oregon.— Hindman *v.* Rizor, 21 Oreg 112, 27 Pac. 13 [*approved* in Pacific Live-Stock Co. *v.* Gentry, 38 Oreg. 275, 61 Pac. 422, 65 Pac. 597].

Washington.— Waring *v.* Loomis, 35 Wash. 85, 76 Pac. 510.

United States.— Tarpey *v.* Madsen, 178 U. S. 215, 20 S. Ct. 849, 44 L. ed. 1042 [*reversing* 17 Utah 352, 53 Pac. 996]; Lamb *v.* Davenport, 18 Wall. 307, 21 L. ed. 759; Carroll *v.* Price, 81 Fed. 137.

See 41 Cent. Dig. tit. "Public Lands," §§ 51, 52.

But *compare* Edwards *v.* Batts, 5 Yerg. (Tenn.) 441.

A deed by a settler on public lands, before the passage of any act of congress providing for settlement on such lands, conveys only the grantor's right of possession. Fields *v.* Squires, 9 Fed. Cas. No. 4,766, Deady 366.

Rights of purchaser.— The sale of a quarter section of public lands by one who had merely settled thereon does not confer on the purchaser any right of property in the land, and therefore, unless the purchaser incloses the land and actually occupies the same, he cannot maintain an action of forcible entry and detainer as to part of the land inclosed and occupied by his vendor. Packwood *v.* Thorp, 8 Mo. 636.

Occupant has no devisable or descendible estate.— Buxton *v.* Traver, 130 U. S. 232, 9 S. Ct. 249, 30 L. ed. 920 [*followed* in Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659].

82. Gonzales *v.* French, 164 U. S. 338, 17 S. Ct. 102, 41 L. ed. 458.

83. Holloway *v.* Miller, 84 Miss. 776, 36 So. 531.

84. Holloway *v.* Miller, 84 Miss. 776, 36 So. 531 [*distinguishing* Pevey *v.* Jones, 71 Miss. 647, 16 So. 252, 42 Am. St. Rep. 486].

85. Holloway *v.* Miller, 84 Miss. 776, 36 So. 531.

86. Holden *v.* Andrews, 38 Cal. 119.

87. Nicks *v.* Rector, 4 Ark. 251.

88. Improvements generally see IMPROVEMENTS, 22 Cyc. 1.

89. See *supra*, II, C, 5, b.

90. *Alabama.*— Tarrance *v.* Hatfield, 71 Ala. 234.

Arkansas.— Mantooth *v.* Burke, 35 Ark. 540; Wynn *v.* Morris, 16 Ark. 414; Glanton *v.* Anthony, 15 Ark. 543; Cain *v.* Leslie, 15 Ark. 312; Hughes *v.* Sloan, 8 Ark. 146.

California.— O'Hanlon *v.* Denvir, 81 Cal. 60, 22 Pac. 407, 15 Am. St. Rep. 19; Sweetland *v.* Froe, 6 Cal. 144.

Florida.— Taylor *v.* Baker, 1 Fla. 245.

Idaho.— Caldwell *v.* Ruddy, 2 Ida. 1, 1 Pac. 339.

Illinois.— Johnson *v.* Moulton, 2 Ill. 532. See also Taylor *v.* Davis, 11 Ill. 10.

the land on which they are located remains the property of the United States;[91] and a promise by the purchaser of the improvements to pay therefor is based upon a good consideration.[92] But as one who purchases public lands from the government is, by reason of his purchase, entitled to improvements previously placed on the land by a mere occupant, and the latter has no right to remove his improvements or to recover compensation therefor,[93] a promise made by such purchaser after his purchase, to pay for improvements placed on the land prior to his entry or purchase, is not supported by any consideration but is void.[94]

b. To Whom Transfer May Be Made. Rights in public land initiated by a qualified citizen may be sold and transferred to aliens, corporations, or other persons not possessing the qualifications which would enable them to initiate such rights and property interests,[95] and such transferees may own, possess, and hold and enjoy the use and profits of such rights and property interests,[96] and may sell

Indiana.— Vest *v.* Weir, 4 Blackf. 135.

Iowa.— Pierson *v.* David, 1 Iowa 23; Hamilton *v.* Walters, 3 Greene 556; Hill *v.* Smith, Morr. 70 [*followed* in Stannard *v.* McCarty, Morr. 124; Freeman *v.* Holliday, Morr. 80].

Louisiana.— Bryan *v.* Glass, 6 La. Ann. 740, 54 Am. Dec. 576.

Minnesota.— Lindersmith *v.* Schwiso, 17 Minn. 26.

Mississippi.— Holloway *v.* Miller, 84 Miss. 776, 36 So. 531 [*following* Hooker *v.* McIntosh, 76 Miss. 693, 25 So. 866].

Missouri.— See Bird *v.* Ward, 1 Mo. 398, 13 Am. Dec. 506.

Nebraska.— Paxton Cattle Co. *v.* Arapahoe First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852 [*following* McWilliams *v.* Bridges, 7 Nebr. 419].

Nevada.— Brown *v.* Killabrew, 21 Nev. 437, 33 Pac. 865.

Oklahoma.— Sproat *v.* Durland, 2 Okla. 24, 35 Pac. 682, 886.

See 41 Cent. Dig. tit. "Public Lands," § 367.

Promise to pay for improvements may be implied.— Johnson *v.* Moulton, 2 Ill. 532.

Where the party in possession cannot pre-empt the land the improvements cannot form the object of a contract. Spurlin *v.* Millikin, 16 La. Ann. 217; Lindsey *v.* Sellers, 26 Miss. 169 [*following* Merrell *v.* Legrand, 1 How. (Miss.) 150].

91. Hutson *v.* Overturf, 2 Ill. 170.

92. *Arkansas.*— Hughes *v.* Sloan, 8 Ark. 146.

California.— O'Hanlon *v.* Denvir, 81 Cal. 60, 22 Pac. 407, 15 Am. St. Rep. 19.

Florida.— Taylor *v.* Baker, 1 Fla. 245.

Idaho.— Caldwell *v.* Ruddy, 2 Ida. (Hasb.) 1, 1 Pac. 339.

Iowa.— Hamilton *v.* Walters, 3 Greene 556; Ellis *v.* Mosier, 2 Greene 246 [*following* Starr *v.* Wilson, Morr. 438; Stannard *v.* McCarty, Morr. 120; Freeman *v.* Holliday, Morr. 80; Hill *v.* Smith, Morr. 70].

Kansas.— Bell *v.* Parks, 18 Kan. 152.

Louisiana.— Dean *v.* Wade, 15 La. Ann. 230; Bryan *v.* Glass, 6 La. Ann. 740, 54 Am. Dec. 576; Norman *v.* Ellis, 5 La. Ann. 693; Ratcliff *v.* Bridger, 1 Rob. 57, 36 Am. Dec. 683.

Missouri.— Welch *v.* Bryan, 28 Mo. 30; Stubblefield *v.* Branson, 20 Mo. 301.

Nebraska.— Hiatt *v.* Brooks, 17 Nebr. 33, 22 N. W. 73; Brooks *v.* Hiatt, 13 Nebr. 503, 14 N. W. 480.

See 41 Cent. Dig. tit. "Public Lands," § 367.

Contra.— Carr *v.* Allison, 5 Blackf. (Ind.) 63.

93. See *supra*, II, C, 6, g.

94. *Alabama.*— Duncan *v.* Hall, 9 Ala. 128; Shaw *v.* Boyd, 1 Stew. & P. 83.

Arkansas.— McFarland *v.* Mathis, 10 Ark. 560.

Illinois.— Carson *v.* Clark, 2 Ill. 113, 25 Am. Dec. 79 [*followed* in Townsend *v.* Briggs, 2 Ill. 472; Roberts *v.* Garen, 2 Ill. 396; Hutson *v.* Overturf, 2 Ill. 170].

Mississippi.— Merrell *v.* Legrand, 1 How. 150.

Missouri.— Welch *v.* Bryan, 28 Mo. 30.

See 41 Cent. Dig. tit. "Public Lands," § 367.

There is no moral obligation resting upon the purchaser to compensate the settler for his improvements. Duncan *v.* Hall, 9 Ala. 128.

Under a statute making valid all "contracts, promises, assumpsits, or undertakings" made in good faith for the sale of improvements made on the public lands, such an agreement can be sustained and enforced. Blankenship *v.* Cutrell, 16 Ill. 62 (holding, however, that under such a statute no promise to pay for improvements can be implied but an express agreement must be shown); Taylor *v.* Davis, 11 Ill. 10, 13 (where it is said: "This statute does not require that there should in every case be a complete contract as defined by the common law, but authorizes a recovery upon such promises, and undertakings as do not strictly amount to a contract). See also Givens *v.* Burget, 7 Blackf. (Ind.) 577. *Contra,* Hutson *v.* Overturf, 2 Ill. 170.

95. Tidwell *v.* Chiricahua Cattle Co., 5 Ariz. 352, 53 Pac. 192; Manuel *v.* Wulff, 152 U. S. 505, 14 S. Ct. 651, 38 L. ed. 532.

96. Tidwell *v.* Chiricahua Cattle Co., 5 Ariz. 352, 53 Pac. 192; Manuel *v.* Wulff, 152 U. S. 505, 14 S. Ct. 651, 38 L. ed. 532.

and transfer the same to others and execute competent conveyances thereof,[97] and the incapacity of such persons to originally initiate such right or to subsequently perfect title can be called in question only by the United States and cannot be invoked by strangers to attack their right to be protected in the possession and enjoyment of such property or the validity of their conveyances of the same to subsequent grantees.[98]

c. Form and Requisites of Transfer or Assignment. The imperfect or inchoate title, acquired by entry on public lands, before the issuance of the patent, will pass by an assignment without words of inheritance.[99] An assignment of a certificate of purchase need not express the consideration,[1] nor is it necessary that it should be acknowledged in order to convey to the assignee the title of the assignor.[2] In Wisconsin it is held that, although the legal title to a school-land certificate cannot be transferred without an assignment in writing as required by the statute,[3] the equitable interest in the land created by the certificate may be mortgaged or transferred by deed without an assignment of the certificate;[4] but certificates of purchase of school lands can only be sold and transferred like any other real estate contract,[5] and the prevalence of a custom of assigning such certificates in blank and passing them from hand to hand is insufficient to give them the character of negotiable instruments.[6] An assignment of a land certificate issued under an act of congress is not within the registration acts of Alabama and does not become inoperative against a subsequent purchaser for the omission to register it.[7] A provision in the contract of sale of school lands that no assignment thereof shall be valid unless indorsed thereon is for the benefit of the state only, which alone can insist upon a compliance therewith, and hence a failure to indorse an assignment on the contract does not render such assignment void.[8] It has been held that an assignment, by an instrument not under seal, of land purchased of the United States, for which a certificate of final payment has been issued is not sufficient to sustain an action of trespass by the assignee,[9] nor is such an assignment proper evidence in ejectment.[10]

d. Annulment of Transfer or Assignment — (i) *In General.* An assignment of a certificate of entry of land may be set aside in equity, when shown to have been procured by fraud, and taking advantage of the assignor's intoxication,[11] but on a bill by the assignor of a certificate of purchase of school land to compel a reassignment, defendant cannot raise the objection that complainant procured the certificate by fraudulent representations as to the value of the land as this concerns only the state.[12]

(ii) *Who May Attack Transfer:* A person prosecuting a claim to lands, under a patent issued to him as assignee of an entry, is not bound to prove the legality of the assignment as against strangers;[13] and the validity of a verbal transfer of a settler's right of entry of unsurveyed lands cannot be questioned by

97. Tidwell *v.* Chiricahua Cattle Co., 5 Ariz. 352, 53 Pac. 192.

98. Tidwell *v.* Chiricahua Cattle Co., 5 Ariz. 352, 53 Pac. 192; Butte Hardware Co. *v.* Cobban, 13 Mont. 351, 34 Pac. 24; Manuel *v.* Wulff, 152 U. S. 505, 14 S. Ct. 651, 30 L. ed. 532.

99. Hayward *v.* Ormsbee, 11 Wis. 3.

1. Helluin *v.* Minor, 12 La. Ann. 124 (holding that it is sufficient if it is stated therein to be "for value received"); Bean *v.* Valle, 2 Mo. 126.

2. Clark *v.* Hall, 19 Mich. 356.

3. Jarvis *v.* Dutcher, 16 Wis. 307.

4. Jarvis *v.* Dutcher, 16 Wis. 307, holding, however, that where the grantee of an equitable estate acquired under a school land certificate does not procure the certificate to be assigned to him, he acquires no rights that can be enforced at law, and cannot obtain a patent for the land or maintain ejectment for it.

5. Whitney *v.* State Bank, 7 Wis. 620; Smith *v.* Clarke, 7 Wis. 551; Smith *v.* Mariner, 5 Wis. 551, 68 Am. Dec. 73.

6. Smith *v.* Clarke, 7 Wis. 551. See also Whitney *v.* State Bank, 7 Wis. 620.

7. Falkner *v.* Jones, 12 Ala. 165.

8. Burrows *v.* Hovland, 40 Nebr. 464, 58 N. W. 947.

9. Ansley *v.* Nolan, 6 Port. (Ala.) 379 [*followed* in Thrash *v.* Johnson, 6 Port. (Ala.) 458].

10. Falkner *v.* Jones, 12 Ala. 165.

11. Phillips *v.* Moore, 11 Mo. 600.

12. Spoon *v.* Gilbert, 44 Mich. 535, 7 N. W. 157.

13. McArthur *v.* Phœbus, 2 Ohio 415.

a third person, not claiming under the government.[14] A statutory restriction upon the transfer of an entryman's rights before the issuance of a patent cannot be taken advantage of by a subsequent purchaser who procured a deed in fraud of the rights of the first grantee.[15] Where a son agreed with his mother to make a timber culture entry, she to pay all the expenses and he to convey to her, and obtained a patent and died without making a conveyance, his wife and administratrix, not being, with reference to said illegal agreement with the mother, *in pari delicto* with her, could maintain an action to quiet title and recover possession from the mother.[16]

e. Warranty. It has been held that a person who sells a "claim" on public lands impliedly warrants the title thereto,[17] but another court has held that there is no implied warranty in an assignment of a certificate of location of a land warrant.[18]

f. Effect of Assignment or Transfer — (i) *In General.* An assignment of the land by an entryman divests all his interest therein;[19] and one who sells all his right, title, and interest in an improvement on public lands parts with all the advantages to which he may be entitled in virtue thereof.[20]

(ii) *Rights of Purchaser or Assignee.* Where one who has located a state school land warrant conveys all his right, title, and interest in the land before the issue of the patent of the state to him, he conveys not only his beneficial interest in the land, but also his right to a conveyance of the legal title;[21] but a purchase of the improvements of a settler on public lands confers no settlement right on the purchaser.[22] While there may be a *bona fide* purchaser before a patent issues, entitled to protection as such,[23] the general rule is that a purchaser of land prior to the issuance of a government patent is not entitled to protection against the government as a *bona fide* purchaser,[24] but acquires only such

14. McDonald *v.* Lannen, 19 Mont. 78, 47 Pac. 648.

15. McAlpine *v.* Resch, 82 Minn. 523, 85 N. W. 545.

16. Fleischer *v.* Fleischer, 11 N. D. 221, 91 N. W. 51.

17. Bowman *v.* Torr, 3 Iowa 571.

18. Johnson *v.* Houghton, 19 Ind. 359, where the assignor had expressly declined to give any warranty.

19. Wright *v.* Shepherd, 47 Ind. 176; King *v.* Coleman, 98 Tenn. 561, 40 S. W. 1082.

20. Noulen *v.* Perkins, 3 Rob. (La.) 233.

21. Stanway *v.* Rubio, 51 Cal. 41; Bludworth *v.* Lake, 33 Cal. 255; People *v.* Auditor of Public Accounts, 3 Ill. 567.

Where a patent has been issued to the first purchaser prior to the assignment of the certificate of purchase, the assignee is not entitled to receive a patent in his own name. People *v.* Auditor of Public Accounts, 3 Ill. 567.

22. Sproat *v.* Durland, 2 Okla. 24, 35 Pac. 682, 886.

23. U. S. *v.* Clark, 200 U. S. 601, 26 S. Ct. 340, 50 L. ed. 613 [*affirming* 138 Fed. 294, 70 C. C. A. 584 (*affirming* 125 Fed. 774), and following U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 (*affirming* 131 Fed. 668, 67 C. C. A. 1) [*reversing* 124 Fed. 393])].

Under the Timber and Stone Act (20 U. S. St. at L. 89, c. 15, § 2 [U. S. Comp. St. (1901) p. 1545]), the rights of a *bona fide* purchaser from one who has entered lands are not affected by a subsequent cancellation of the entry by the land department. Lewis *v.* Shaw, 70 Fed. 289.

Act Cong. March 3, 1891 (26 U. S. St. at L. 1098 [U. S. Comp. St. (1901) p. 1521]), protecting certain innocent purchasers and encumbrancers against cancellations of entries, refers only to entries in force when the act was passed, and not to those which had been previously canceled. Pfund *v.* Valley L. & T. Co., 52 Nebr. 473, 72 N. W. 480 [*following* Parsons *v.* Venzke, 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360 (*affirming* 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669)]; Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488; Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448, 20 S. Ct. 425, 44 L. ed. 540 [*affirming* 6 N. D. 108, 69 N. W. 41].

24. Taylor *v.* Weston, 77 Cal. 534, 20 Pac. 62; Harmon *v.* Clayton, 51 Iowa 36, 50 N. W. 541; Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157 [*affirming* 81 Fed. 651, 26 C. C. A. 514 (*reversing* 75 Fed. 946)]; U. S. *v.* Laam, 149 Fed. 581; Germania Iron Co. *v.* Craig, 98 Fed. 23 [*affirmed* in 127 Fed. 1020]; California Redwood Co. *v.* Litle, 79 Fed. 854; American Mortg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293 [*affirming* 56 Fed. 67]; Root *v.* Shields, 20 Fed. Cas. No. 12,038, Woolw. 340; Richardson *v.* Moore, 10 Land Dec. Dep. Int. 415; Powers *v.* Courtney, 9 Land Dec. Dep. Int. 480; Travelers' Ins. Co., 9 Land Dec. Dep. Int. 316. See also Ker *v.* Watts, 6 Wheat. (U. S.) 550, 5 L. ed. 328 (purchaser of land warant); Bronson *v.* Kukuk, 4 Fed. Cas. No. 1,929, 3 Dill. 490 (assignee of land warrant).

interest as his vendor has,[25] and takes subject to all equities as they exist at the time of his purchase,[26] and to the power of the land department to cancel the entry under which he claims,[27] although he had no knowledge of the facts because of which the entry is canceled,[28] and to the power of the courts to cancel a patent issued after his purchase for fraud or irregularity in the entry.[29] But where an entryman has conveyed the land by warranty deed and the entry is subsequently canceled, the grantee may recover damages for breach of the warranty.[30] Congress has given to *bona fide* purchasers of homestead entries the right to make cash entries;[31] but one who purchases a fraudulent homestead entry, or who purchases from persons claiming to represent a homestead entryman, is not a *bona fide* purchaser within this statute.[32]

g. Mortgages.[33] A person having an inchoate interest in public lands may mortgage the same,[34] even though the statute under which he claims prohibits

25. Southern Pac. R. Co. *v.* Dull, 22 Fed. 489, 10 Sawy. 506. See also Freese *v.* Rusk, 54 Kan. 274, 38 Pac. 255.

Assignment by widow of original purchaser. —Where one who had bought school land from the state before there was any statute declaring forfeiture for default in paying interest and taxes died with his taxes ten months overdue, and his widow assigned the certificate, and delivered possession to another, who paid all the balance of the price of the land, with interest and taxes, and got a patent, the title of the original purchaser's minor child to half the land remained unimpaired as against such patentee, subject to her payment of her share of the balance paid. Reynolds *v.* Reynolds, 30 Kan. 91, 1 Pac. 388.

26. Gray *v.* Stockton, 8 Minn. 529; Randall *v.* Edert, 7 Minn. 450; Jasper County *v.* Tavis, 76 Mo. 13; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651.

Where the terms of the contract of purchase have been changed before the sale the new purchaser takes subject to such altered terms, although no change has been made in the certificate of purchase. Jasper County *v.* Tavis, 76 Mo. 13.

27. *Idaho.*— Jones *v.* Meyers, 3 Ida. 51, 26 Pac. 215, 35 Am. St. Rep. 259.

Kansas.— Swigart *v.* Walker, 49 Kan. 100, 30 Pac. 162 [*followed* in Fernald *v.* Winch, 50 Kan. 79, 31 Pac. 665].

Minnesota.— Gray *v.* Stockton, 8 Minn. 529; Randall *v.* Edert, 7 Minn. 450.

North Dakota.—Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360].

Wyoming.— Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

United States.—Hawley *v.* Diller, 178 U. S. 476, 20 S. Ct. 986, 44 L. ed. 1157 [*affirming* 81 Fed. 651, 26 C. C. A. 514 (*reversing* 75 Fed. 946)]; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651; American Mortg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293 [*affirming* 56 Fed. 67].

See 41 Cent. Dig. tit. "Public Lands," § 368.

A mortgagee of the entryman, after final receipt is given, and before the issuance of the patent takes his mortgage subject to this supervisory power. Freese *v.* Scouten, 53 Kan. 347, 36 Pac. 741; Fernald *v.* Winch, 50 Kan. 79, 31 Pac. 665 [*following* Swigart *v.* Walker, 49 Kan. 100, 30 Pac. 162]. See also Freese *v.* Rusk, 54 Kan. 274, 38 Pac. 255. But such a mortgagee is not bound by a cancellation obtained fraudulently by the entryman for the purpose of defrauding him. Freese *v.* Scouten, *supra*.

Where a bounty land warrant is canceled after being located by an assignee thereof, the assignee has not, thereafter, such an interest in the land as renders it subject to taxation. Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11.

28. Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669 [*affirmed* in 164 U. S. 89, 17 S. Ct. 27, 41 L. ed. 360]; California Redwood Co. *v.* Litle, 79 Fed. 854.

29. U. S. *v.* Laam, 149 Fed. 581.

30. Menasha Wooden Ware Co. *v.* Nelson, 45 Wash. 543, 88 Pac. 1018, holding that it is not the duty of a grantee under a warranty deed of land for which a patent has not been issued to notify the general land office that he is the successor in interest of the prospective patentee and to take necessary steps to perfect the entry, or notify the prospective patentee so to do, and hence the failure of the grantee in these particulars is no bar to an action for damages for breach of warranty where the entry is canceled.

31. 21 U. S. St. at L. 237 [U. S. Comp. St. (1901) p. 1445]. See Fideler *v.* Norton, 4 Dak. 258, 30 N. W. 128, 32 N. W. 57.

32. Puget Mill Co. *v.* Brown, 59 Fed. 35, 7 C. C. A. 643 [*affirming* 54 Fed. 987].

33. See, generally, MORTGAGES, 27 Cyc. 916.

Statutory exemption of homestead as affecting mortgages see *infra*, II, Q, 4, d.

34. Miller *v.* Tipton, 6 Blackf. (Ind.) 238; Mallard *v.* Anderson, 36 La. Ann. 834.

A mortgage to pay for improvements on public lands is not invalidated by the fact that the mortgagor entered on the lands pursuant to an agreement with the mortgagee by which he was to obtain the title thereto, and then convey to the mortgagee, and that the mortgagee procured the mortgage to protect himself in the event of the locator's refusal to carry out the invalid agreement to convey. Hubbard *v.* Mulligan, 13 Colo. App. 116, 57 Pac. 738.

an alienation of his rights, for such a prohibition refers only to attempted conveyances of title and not to mortgages.[35] But a mortgage executed by an entryman cannot be enforced against the land in the hands of another person who does not deraign his title through the mortgagor,[36] and where one who has made an application for an entry mortgages it, with covenants of warranty, to a person with notice of his want of title, and his claim is afterward relinquished, another title to the same land, derived by him from the government under a different entry, does not inure to the benefit of the mortgagee.[37]

h. Leases.[38] A homestead entryman may lease the land or such portion thereof as he may desire to a third person,[39] and the lessee has a right of possession similar to that of his lessor.[40] But a lease for ninety-nine years of land to which the lessor has only a right of preëmption is void.[41]

i. Sales of Growing Timber. It has been held that, although a conveyance

Purchase-money mortgage.— Where an entryman borrowed money with which to pay the government price for the land, and executed a mortgage to secure the payment of the same, and thereafter on the same day made his final proof for said land, and paid the government price therefor from the money so borrowed, the mortgage was a purchase-price mortgage, and was a valid lien on said land, whether signed by the wife or not, and was prior to any right she might have to said land as community property by reason of having resided thereon at the date of the execution of such mortgage. Kneen *v.* Habin, 6 Ida. 621, 59 Pac. 14.

35. *California.*— Stewart *v.* Powers, 98 Cal. 514, 33 Pac. 486; Orr *v.* Stewart, 67 Cal. 275, 7 Pac. 693; Camp *v.* Grider, 62 Cal. 20; Christy *v.* Dana, 34 Cal. 548, 42 Cal. 174; Kirkaldie *v.* Larrabee, 31 Cal. 455, 89 Am. Dec. 205. See also Douglas *v.* Gould, 52 Cal. 656.

Colorado.— Wilcox *v.* John, 21 Colo. 367, 40 Pac. 880, 52 Am. St. Rep. 246; Hubbard *v.* Mulligan, 13 Colo. App. 116, 57 Pac. 738.

Idaho.— Kneen *v.* Halin, 6 Ida. 621, 59 Pac. 14.

Iowa.— Fuller *v.* Hunt, 48 Iowa 163.

Kansas.— Stark *v.* Morgan, 73 Kan. 453, 85 Pac. 567, 6 L. R. A. N. S. 934 [*overruling* Brewster *v.* Madden, 15 Kan. 249 (*followed* in Mellison *v.* Allen, 30 Kan. 382, 2 Pac. 97, and *disapproved* but *followed* in Biddle *v.* Adams, 5 Kan. App. 734, 46 Pac. 986)].

Minnesota.— Lang *v.* Morey, 40 Minn. 396, 42 N. W. 88, 12 Am. St. Rep. 748; Jones *v.* Tainter, 15 Minn. 512 [*overruling* Woodbury *v.* Dorman, 15 Minn. 338; McCue *v.* Smith, 9 Minn. 252, 86 Am. Dec. 100].

Missouri.— Dickerson *v.* Bridges, 147 Mo. 235, 48 S. W. 825.

Montana.— Norris *v.* Heald, 12 Mont. 282, 29 Pac. 1121, 33 Am. St. Rep. 581 [*overruling* Bass *v.* Buker, 6 Mont. 442, 12 Pac. 922].

Nebraska.— Jones *v.* Yoakam, 5 Nebr. 265; Towsley *v.* Johnson, 1 Nebr. 95.

Oklahoma.— Stark *v.* Duvall, 7 Okla. 213, 54 Pac. 453.

Washington.— Rogers *v.* Minneapolis Threshing Mach. Co., 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014; Weber *v.* Laidler, 26 Wash. 144, 66 Pac. 400, 90 Am. St. Rep. 726; Boggan *v.* Reid, 1 Wash. 514, 20 Pac. 425.

Wisconsin.— Spiess *v.* Neubery, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211.

See 41 Cent. Dig. tit. "Public Lands," §§ 365–366.

Preëmption right not subject to mortgage under Louisiana code.— Penn *v.* Ott, 12 La. Ann. 233 [*followed* in Gilbert *v.* Penn, 12 La. Ann. 235]; Strong *v.* Rachal, 16 La. 232.

The purpose for which money is borrowed is material as tending to show the *bona fides* of the mortgagor. Norris *v.* Heald, 12 Mont. 282, 29 Pac. 1121, 33 Am. St. Rep. 581.

36. Bull *v.* Shaw, 48 Cal. 455 (holding that where a person residing on public land subject to preëmption executed a mortgage thereon and then sold the land to another, who took possession and afterward preëmpted the land and obtained a title from the United States, the mortgage could not be enforced against the title thus acquired); Marley *v.* Sturkert, 62 Nebr. 163, 86 N. W. 1056, 89 Am. St. Rep. 749 (holding that where a homestead entryman dies before he has fully complied with the law and become entitled to make final proof, a mortgage executed by him does not constitute any lien upon the land as against his heirs, who have, as permitted by statute, fulfilled the requirements and completed the residence and obtained a patent to the land covered by the entry).

37. Hebert *v.* Brown, 65 Fed. 2.

38. See, generally, LANDLORD AND TENANT, 24 Cyc. 845.

39. Tiernan *v.* Miller, 69 Nebr. 764, 96 N. W. 661; Leatherbury *v.* U. S., 32 Fed. 780 [*reversing* 27 Fed. 606].

Timber lease.— A lease by a homestead settler of standing timber for turpentine purposes, prior to the issuance of the patent to him, is not violative of any statute, nor against the policy of the government, which is designed to secure for the homesteader the exclusive benefit of his homestead right. Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881. *Contra*, Milliken *v.* Carmichael, 134 Ala. 623, 33 So. 9, 92 Am. St. Rep. 45.

40. Tiernan *v.* Miller, 69 Nebr. 764, 96 N. W. 661.

41. Bower *v.* Higbee, 9 Mo. 259.

of the timber on a homestead by the entryman, before he has made final proof, does not affect the title of the government,[42] it is not void,[43] and does not defeat the right of the homesteader to a patent.[44]

j. Contracts[45] by Entrymen — (i) *In General.* Under some of the land laws an applicant for public land is forbidden to make directly or indirectly any contract or agreement by which the title which he may acquire from the government shall inure in whole or in part to any person except himself;[46] and an agreement between two or more persons having for its object the obtaining of title of public lands by an evasion of the land laws and in fraud of the government is illegal and void,[47] and does not estop one of the parties, who subsequently acquires a good legal title, from setting up the same against the fraudulent title obtained by the other in accordance with the contract.[48] Where after a sale of land it is ascertained that a part thereof belongs to the United States, an agreement that the vendee shall enter such land and the vendor shall reimburse him for the expense of perfecting his title is not invalid.[49] A covenant on the part of settlers on unsurveyed lands of the United States, to purchase those lands, as soon as

42. Anderson *v.* Wilder, 83 Miss. 606, 35 So. 875.

43. King-Ryder Lumber Co. *v.* Scott, 73 Ark. 329, 84 S. W. 487, 70 L. R. A. 873 (holding that a sale of timber by a homestead entryman, who has not received his final certificate, is not void when made for the purpose of carrying out in good faith the purposes of his settlement, even though an incidental profit results from the sale); Anderson *v.* Wilder, 83 Miss. 606, 35 So. 875. But *compare* Stevens *v.* Perrier, 12 Kan. 297.

44. Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561, 70 L. R. A. 881, holding that a sale of standing timber by a homestead settler prior to the issuance of his final certificate, although in direct violation of the rights vested in him by his inchoate entry, is not an alienation of a "part of the land" within the purview of U. S. Rev. St. (1878) § 2291 [U. S. Comp. St. (1901) p. 1390], requiring the settler, on final proof, to make affidavit that no part of the land has been alienated except for certain specified purposes. See also Teller *v.* U. S., 117 Fed. 577, 54 C. C. A. 349; U. S. *v.* Freyberg, 32 Fed. 195.

45. See, generally, CONTRACTS, 9 Cyc. 213.

46. U. S. *v.* Richards, 149 Fed. 443.

What constitutes an agreement within the prohibition.—As used in this connection, the word "agreement" means that there must be a meeting of minds expressed in some tangible way, and there must be an intent in some way to be binding upon the parties. One party may intend to sell and the other party may intend to buy, but this is not sufficient unless the intention of each is in some way communicated to the other and agreed to. The agreement need not be in writing nor need it be of sufficient form or of the nature to be enforced in court, but it is enough if it is proven that in some way the minds of the applicant and some other person have met definitely and understandingly, and that there is a mutual consent that when the applicant acquires title to the land from the United States it shall inure to the benefit of such other person for a consideration. And any words or acts manifesting this mutual consent of the minds of the parties are sufficient to constitute a contract or agreement. The provision that he shall not seek to acquire the land for speculation is not intended to limit the homesteader's dominion over the land after he has complied with the provisions of the homestead law, made his final proof, and acquired title, but only to prohibit his entering the land under an agreement whereby he is acting for another. He may acquire a valid title under the homestead law with a view of disposing of the land after he has completed the purchase, provided that at and before the time of completing such purchase he has not entered into an agreement whereby another shall receive any of the benefit of such purchase. U. S. *v.* Richards, 149 Fed. 443.

Agreement held not unlawful.— Where A, holding a contract to purchase lands from B, who was supposed to be the owner, agreed to convey them to C as soon as he procured the title, and the lands were afterward discovered to be public lands, and A and C then agreed that C should obtain title by filing on the lands as a homestead, and pay A the price originally stipulated, less any damages which A might recover from B for the failure of title, this agreement did not contemplate that the purchaser should procure the title from the government for the benefit of his vendor, and hence was not against public policy or invalid. Frink *v.* Hoke, 35 Oreg. 17, 56 Pac. 1093, holding further that on the rescission of such contract by A because of C's refusal to pay the price after obtaining a patent, C was properly adjudged to hold the title acquired from the government in trust for A, although A had since entered a homestead on other lands, since any outstanding title C obtained while in possession under the contract to buy inured to the benefit of his vendor, and he could not assert it against him.

47. Harkness *v.* Underhill, 1 Black (U. S.) 316, 17 L. ed. 208.

48. Harkness *v.* Underhill, 1 Black (U. S.) 316, 17 L. ed. 208.

49. Purcell *v.* Lay, 84 Ala. 287, 4 So. 196.

surveyed and offered for sale by the government, and then mortgage them to a creditor, to secure a debt, is not unlawful.[50]

(II) *Contracts of Sale*[51]— (A) *In General.* Some of the statutes relating to the disposal of public lands forbid the making of any contract by a settler or entryman, before his right to the land has become complete, to sell or transfer the land or his interest therein after he has perfected his title, and a contract in violation of such a provision is void;[52] but in the absence of any such statutory prohibition the entryman may contract for the sale of his rights while they remain inchoate.[53] An entryman may lawfully agree with any person at any time that

50. Wright *v.* Shumway, 30 Fed. Cas. No. 18,093, 1 Biss. 23.

51. See, generally, Vendor and Purchaser.

52. *Alabama.*— Mulloy *v.* Cook, 101 Ala. 178, 10 So. 349, 17 So. 899 (holding that a contract whereby one who made a homestead entry on public land, and afterward abandoned the same, agreed to purchase and convey the land to another, who furnished the money therefor, was violative of public policy, as the act of congress of 1880 provided that only the homesteader who had failed to perfect his entry, or his transferee, had the right of purchase); Marston *v.* Rowe, 43 Ala. 271 (bond for title); Cothran *v.* McCoy, 33 Ala. 65; Hudson *v.* Milner, 12 Ala. 667. See also Smith *v.* Johnson, 37 Ala. 633.

Arkansas.— Marshall *v.* Cowles, 48 Ark. 362, 3 S. W. 188; Shorman *v.* Eakin, 47 Ark. 351, 1 S. W. 559; Cox *v.* Donnelly, 34 Ark. 762. See also Baker *v.* Hollobaugh, 15 Ark. 322.

California.— Moore *v.* Moore, 130 Cal. 110, 62 Pac. 294, 80 Am. St. Rep. 78; *In re* Groome, 94 Cal. 69, 29 Pac. 487; Turner *v.* Donnelly, 70 Cal. 597, 12 Pac. 469 [*following* Hudson *v.* Johnson, 45 Cal. 21; Damrell *v.* Meyer, 40 Cal. 166]; Thompson *v.* Doaksum, 68 Cal. 593, 10 Pac. 199; Snow *v.* Kimmer, 52 Cal. 324.

Colorado.— Brown *v.* Kennedy, 12 Colo. 235, 20 Pac. 696.

Florida.— McCrillis *v.* Copp, 31 Fla. 100, 12 So. 643.

Iowa.— Persons *v.* Persons, 113 Iowa 745, 84 N. W. 668; Oaks *v.* Heaton, 44 Iowa 116.

Kansas.— Mellison *v.* Allen, 30 Kan. 382, 2 Pac. 97; Brake *v.* Ballou, 19 Kan. 397. See also Watkins Land Co. *v.* Creps, 72 Kan. 333, 83 Pac. 969.

Michigan.— Carley *v.* Gitchell, 105 Mich. 38, 62 N. W. 1003, 55 Am. St. Rep. 428.

Minnesota.— Olson *v.* Orton, 28 Minn. 36, 8 N. W. 878; Warren *v.* Van Brunt, 12 Minn. 70; Ferguson *v.* Kumler, 11 Minn. 104; McCue *v.* Smith, 9 Minn. 252, 86 Am. Dec. 100 (agreement to give mortgage); Evans *v.* Folsom, 5 Minn. 422; St. Peter Co. *v.* Bunker, 5 Minn. 192. But *compare* Townsend *v.* Fenton, 30 Minn. 528, 16 N. W. 421, holding that an agreement to convey a homestead after a patent is issued, for a consideration to be then paid, is not illegal.

Mississippi.— Collins *v.* Bounds, (1904) 36 So. 689.

Nebraska.— Dawson *v.* Merrille, 2 Nebr. 119.

North Dakota.— Fleischer *v.* Fleischer, 11 N. D. 221, 91 N. W. 51; Larison *v.* Wilbur, 1 N. D. 284, 47 N. W. 381.

Oklahoma.— Bass *v.* Smith, 12 Okla. 485, 71 Pac. 628; Higgins *v.* Butler, 10 Okla. 345, 62 Pac. 810.

Oregon.— Jackson *v.* Baker, 48 Oreg. 155, 85 Pac. 512; Horseman *v.* Horseman, 43 Oreg. 83, 72 Pac. 698.

Wisconsin.— Gale *v.* Cutler, 1 Pinn. 253.

United States.— Hafemann *v.* Gross, 199 U. S. 342, 26 S. Ct. 80, 50 L. ed. 220 [*affirming* 92 Minn. 367, 100 N. W. 1]; Hartman *v.* Butterfield Lumber Co., 199 U. S. 335, 26 S. Ct. 63, 50 L. ed. 217 [*affirming* 82 Miss. 494, 34 So. 328, 100 Am. St. Rep. 644]; Anderson *v.* Carkins, 135 U. S. 483, 10 S. Ct. 905, 34 L. ed. 272 [*reversing* 21 Nebr. 364, 32 N. W. 155]; U. S. *v.* Richards, 149 Fed. 443.

See 41 Cent. Dig. tit. "Public Lands," §§ 371–373.

An agreement to mortgage a homestead is not unlawful. Jones *v.* Tainter, 15 Minn. 512 [*overruling* Woodbury *v.* Dorman, 15 Minn. 338; McCue *v.* Smith, 9 Minn. 252, 86 Am. Dec. 100].

Recovery back of money paid.— Money paid upon a contract for the purchase of land, to be acquired under a preëmption right, made prior to entry and payment, cannot be recovered back. Bruggerman *v.* Hoerr, 7 Minn. 337, 82 Am. Dec. 97.

53. *Arizona.*— Arnold *v.* Christy, 4 Ariz. 19, 33 Pac. 619.

Arkansas.— Southerland *v.* Whittington, 46 Ark. 285; Conway *v.* Kingsworthy, 21 Ark. 9.

Kansas.— Watkins Land Co. *v.* Creps, 72 Kan. 333, 83 Pac. 969; Fackler *v.* Ford, McCahon 21.

Oregon.— Church *v.* Adams, 37 Oreg. 355, 61 Pac. 639 [*affirmed* in 193 U. S. 510, 24 S. Ct. 512, 48 L. ed. 769].

United States.— Lamb *v.* Davenport, 18 Wall. 307, 21 L. ed. 759 [*followed* in McKennon *v.* Winn, 1 Okla. 327, 33 Pac. 582, 22 L. R. A. 501]; Gaines *v.* Molen, 30 Fed. 27.

See 41 Cent. Dig. tit. "Public Lands," § 371.

Remedy of purchaser.— On failure to comply with such a contract the purchaser may either sue at law for the breach of the covenant to convey or file a bill in equity for specific performance of the contract. Conway *v.* Kinsworthy, 21 Ark. 9.

A statute prohibiting "future contracts" for the sale of land entered under its provisions is not contravened by a contract made, after its passage, by occupants of land who had previously sold lots in their claim to

if he desires to sell after he has proved up on the land, he will give such person the first chance to buy it.[54]

(B) *Conveyances Pursuant to Void Contracts.* Although a contract to convey the land made before the perfection of the entryman's rights may be void because in violation of the statute,[55] a conveyance made pursuant to such contract after the entryman has received his patent or his right thereto has become perfect is not void,[56] and cannot be repudiated by the grantor[57] or attacked by his subsequent grantee.[58]

(III) *Contracts to Share Land.* Ordinarily an agreement by a person seeking to acquire land under a law forbidding transfers of inchoate rights to share the land with another could not be enforced;[59] but where two persons have settled upon and claim the right to acquire the same tract, and each has, except as against the other, a perfect right to acquire it, an agreement between them that one shall procure title to the entire tract and it shall then be divided between them is valid and enforceable.[60]

(IV) *Contracts to Divide Proceeds.* A contract by an entryman to pay to another person a part of the proceeds of the sale of the land after he acquires title if he can find a purchaser and sell the same at a proper price is not unlawful, although the statute forbids contracts by which the title shall inure to the benefit of any person other than the entryman.[61]

(V) *Contracts to Relinquish Entries.* A contract by an entryman to relinquish his claim to and abandon the land and to cancel his entry at the land office in order that the other party may enter the land and ultimately secure a patent therefor is not illegal,[62] and constitutes a good consideration for the other

make deeds for such lots after they obtain patents. Lamb *v.* Davenport, 14 Fed. Cas. No. 8,015, 1 Sawy. 609.

54. U. S. *v.* Richards, 149 Fed. 443.

55. See *supra*, II, P, 1, j, (II), (A).

56. McMillen *v.* Gerstle, 19 Colo. 98, 34 Pac. 681; Larison *v.* Wilbur, 1 N. D. 284, 47 N. W. 381; Hartman *v.* Butterfield Lumber Co., 199 U. S. 335, 26 S. Ct. 63, 50 L. ed. 217 [*affirming* 82 Miss. 494, 34 So. 328, 100 Am. St. Rep. 644].

57. Ainsworth *v.* Miller, 20 Kan. 220; Hartman *v.* Butterfield Lumber Co., 199 U. S. 335, 26 S. Ct. 63, 50 L. ed. 217 [*affirming* 82 Miss. 494, 34 So. 328, 100 Am. St. Rep. 644].

58. Hartman *v.* Butterfield Lumber Co., 199 U. S. 335, 337, 26 S. Ct. 63, 50 L. ed. 217 [*affirming* 82 Miss. 494, 34 So. 328, 100 Am. St. Rep. 644], where it is said: "Whether the Government could challenge the conveyance we need not determine, for if it had any right to interfere, it has not chosen to do so."

59. Warren *v.* Van Brunt, 12 Minn. 70.

Recovery of amount advanced on contract. — If money claimed to have been advanced on a contract by which in return for such advances a homesteader was to convey an interest in the land was advanced and used for lawful purposes — as improving the claim and paying the expenses of obtaining a patent — such amount may be recovered by the person by whom it was advanced. Higgins *v.* Butler, 10 Okla. 345, 62 Pac. 810.

60. Sweesey *v.* Sparling, 81 Iowa 433, 46 N. W. 1068, 25 Am. St. Rep. 506, 9 L. R. A. 777; Snow *v.* Flannery, 10 Iowa 318, 77 Am. Dec. 120; Rose *v.* Treadway, 4 Nev. 455, 97 Am. Dec. 546. See also Waring *v.* Loomis, 48 Wash. 541, 93 Pac. 1088, holding that where joint occupants of unsurveyed government land contracted that one should occupy the land and pay the other a certain proportion of the annual product, etc., and obtain a patent thereto when it was in the market, for the benefit of the latter to the extent of his interest therein, it will not be presumed, in the absence of convincing proof, that the contract contemplated obtaining the patent unlawfully, under the homestead laws, when title could be, and was subsequently, obtained lawfully under the mining laws.

Agreement to transfer by way of compromise. — A settler does not forfeit his right to purchase from the government the land he has settled on and occupies by merely agreeing before he has so purchased the same to convey a portion thereof, by way of compromise, to an individual who is contesting his right to purchase. Foster *v.* Brost, 11 Kan. 350.

61. Hafemann *v.* Gross, 199 U. S. 342, 347, 26 S. Ct. 80, 50 L. ed. 220 [*affirming* 92 Minn. 367, 100 N. W. 1 (*following* 91 Minn. 1, 97 N. W. 430, 103 Am. St. Rep. 471)], where it is said: "In the case at bar, there was no mortgage, deed of trust or agreement for a specific lien of any kind. . . . It was a promise which in no event could be enforced against the land. It was simply a personal obligation of the patentee. It might never be enforced against him, and could not be except upon his sale of the land."

62. Hardesty *v.* Service, 45 Kan. 614, 26 Pac. 29; Palmer *v.* March, 34 Minn. 127, 24 N. W. 374; Olson *v.* Orton, 28 Minn. 36, 8 N. W. 878; Hooker *v.* McIntosh, 76 Miss. 693, 25 So. 866.

party's note for or promise to pay the agreed price.[63] But the preference right of entry given by statute to a person who has contested, paid the land office fees, and procured the cancellation of an entry is personal, and a contract by such person to relinquish the right to another is against public policy and specific performance thereof will not be enforced.[64]

(VI) *Contracts For Cutting Timber.*[65] Where a person whose inchoate right in land is not such as to entitle him to cut timber at his pleasure, a contract by which he grants to another the right to cut timber for purposes other than those authorized by statute is void,[66] as is also a promise to pay for timber unlawfully cut on public lands, to which the payee claimed a possessory right.[67]

k. Effect of Issuance of Patent to Grantor or Assignor. The issuance of a patent to one who has conveyed or assigned his interest in the lands vests the beneficial ownership in the grantee or assignee,[68] and the patentee holds the legal title in trust for his vendee [69] and may be compelled to convey to him.[70]

2. After Right to Patent Complete, but Before Patent Issued. One who has done everything which is necessary in order to entitle him to receive a patent for public land has, even before the patent is actually issued by the land department, a complete equitable estate in the land[71] which he can sell and convey,[72]

The person securing the relinquishment acquires no prior rights as against others seeking to enter and secure the land. See *supra*, II, C, 14, b.

63. Hardesty *v.* Service, 45 Kan. 614, 26 Pac. 29; McCabe *v.* Caner, 68 Mich. 182, 35 N. W. 901; Palmer *v.* March, 34 Minn. 127, 24 N. W. 374; Thompson *v.* Hanson, 28 Minn. 484, 11 N. W. 86; Hooker *v.* McIntosh, 76 Miss. 693, 25 So. 866. *Contra*, Tenison *v.* Martin, 13 Ala. 21.

64. Dameron *v.* Dingee, 1 Colo. App. 436, 29 Pac. 305.

65. Cutting or removing timber on public lands generally see *supra*, I, E.

66. Ladda *v.* Hawley, 57 Cal. 51, holding that a preëemptor could not, even after perfecting his title, recover the consideration of such a contract.

67. Swanger *v.* Mayberry, 59 Cal. 91.

68. *California.*— Watkins *v.* Lynch, 71 Cal. 21, 11 Pac. 808; Stanway *v.* Rubio, 51 Cal. 41.

Illinois.— Welch *v.* Dutton, 79 Ill. 465.

Iowa.— McDaniel *v.* Large, 55 Iowa 312, 7 N. W. 632.

Louisiana.— Steinspring *v.* Bennett, 16 La. Ann. 201.

Minnesota.— Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739; Gilbert *v.* McDonald, 94 Minn. 289, 102 N. W. 712, 110 Am. St. Rep. 368.

Missouri.— Callahan *v.* Davis, 90 Mo. 78, 2 S. W. 216.

Nebraska.— Gregory *v.* Kenyon, 34 Nebr. 640, 52 N. W. 685.

Nevada.— Brown *v.* Warren, 16 Nev. 228.

Oregon.— Hyde *v.* Holland, 18 Oreg. 331, 22 Pac. 1104.

Wisconsin.— Gilbert *v.* Auster, 135 Wis. 581, 116 N. W. 177; Hayward *v.* Ormsbee, 11 Wis. 3.

United States.— Crews *v.* Burcham, 1 Black 352, 17 L. ed. 91; McClung *v.* Steen, 32 Fed. 373.

Time when title deemed to have passed.— A quitclaim deed made by a settler after he has entered a claim, but prior to the grant of a United States patent to him, will, after the granting of the patent, be held to have passed the legal title as of the date of its execution. Callahan *v.* Davis, 90 Mo. 78, 2 S. W. 216.

69. Moore *v.* Maxwell, 18 Ark. 469; Stark *v.* Starr, 94 U. S. 477, 24 L. ed. 276 [*affirming* 22 Fed. Cas. No. 13,317, 2 Sawy. 603].

70. Starr *v.* Stark, 22 Fed. Cas. No. 13,317, 2 Sawy. 603 [*affirmed* in 94 U. S. 477, 24 L. ed. 276].

71. See *supra*, II, M, 3.

72. *Alabama.*— Falkner *v.* Jones, 12 Ala. 165; Mann *v.* Bissent, 4 Ala. 731; Goodlet *v.* Smithson, 5 Port. 245, 30 Am. Dec. 561 [*followed* in Wright *v.* Swan, 6 Port. 84].

California.— Merrill *v.* Clark, 103 Cal. 367, 37 Pac. 238; Witcher *v.* Conklin, 84 Cal. 499, 24 Pac. 302.

Illinois.— Robbins *v.* Bunn, 54 Ill. 48, 5 Am. Rep. 75.

Indiana.— Godfroy *v.* Cushman, 7 Blackf. 253.

Iowa.— McDaniel *v.* Large, 55 Iowa 312, 7 N. W. 632; Cady *v.* Eighmey, 54 Iowa 615, 7 N. W. 102.

Kansas.— Weeks *v.* White, 41 Kan. 569, 21 Pac. 600; Sutphen *v.* Sutphen, 30 Kan. 510, 2 Pac. 100; McKean *v.* Massey, 6 Kan. 122.

Louisiana.— Moore *v.* Jourdan, 14 La. Ann. 414; Helluin *v.* Minor, 12 La. Ann. 124; Marks *v.* Dickson, 10 La. Ann. 597 [*followed* in Steinspring *v.* Bennett, 16 La. Ann. 201].

Minnesota.— Sharon *v.* Wooldrick, 18 Minn. 354; Woodbury *v.* Dorman, 15 Minn. 338; Camp *v.* Smith, 2 Minn. 155.

Mississippi.— Dale *v.* Griffith, (1908) 46 So. 543.

Nebraska.— Franklin *v.* Kelly, 2 Nebr. 79.

Nevada.— Brown *v.* Warren, 16 Nev. 228.

Oklahoma.— Laughlin *v.* Fariss, 7 Okla. 1, 50 Pac. 254.

Oregon.— Hyde *v.* Holland, 18 Oreg. 331, 22 Pac. 1104; Richards *v.* Snyder, 11 Oreg. 501, 6 Pac. 186.

Washington.— Peterson *v.* Sloss, 39 Wash. 207, 81 Pac. 744; Carson *v.* Railsback, 3

mortgage,[73] or lease,[74] and *a fortiori* a contract to convey land made before the issuance of a patent but after final proof has been made and the land paid for is not illegal.[75] A conveyance of the land, and delivery of the certificate of final payment is sufficient evidence of an assignment of the certificate and all rights acquired thereby.[76] A *bona fide* purchaser of standing timber from the holders of receiver's final receipts for the purchase-price of land entered under the Timber Act cannot upon avoidance, for the fraud of the entryman, of the patents afterward issued, be required to account to the federal government for the timber which he has paid for and cut and removed in reliance upon his purchase.[77]

3. After Issuance of Patent. After a patent has issued to an entryman he has the full legal title [78] and may sell, give away, or otherwise deal with the land in such manner as he sees fit.[79] One who purchases from a patentee without knowledge or suspicion of wrong in the title is strictly and technically a *bona fide* purchaser and entitled to protection as such.[80]

Wash. Terr. 168, 13 Pac. 618. See also Sylvester *v.* State, 46 Wash. 585, 91 Pac. 15.

Wisconsin.— Dillingham *v.* Fisher, 5 Wis. 475.

Wyoming.— Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

United States.— Myers *v.* Croft, 13 Wall. 291, 20 L. ed. 562; Marks *v.* Dickson, 20 How. 501, 15 L. ed. 1002; U. S. *v.* Richards, 149 Fed. 443; U. S. *v.* Budd, 43 Fed. 630; McClung *v.* Steen, 32 Fed. 373; Wallerton *v.* Snow, 15 Fed. 401, 5 McCrary 64.

See 41 Cent. Dig. tit. "Public Lands," § 352.

Where a homesteader commutes his entry, pays the government for the land, and receives the usual final receiver's receipt, he has the right to sell and convey the lands, although the patent has not been issued. Gregory *v.* Kenyon, 34 Nebr. 640, 52 N. W. 685.

The fact that the vendor retains his duplicate receipt for the purchase-money does not affect the rights of the vendee. Godfroy *v.* Cushman, 7 Blackf. (Ind.) 253.

Where a deed bears the same date as the certificate of purchase there is no presumption that the deed was executed first. Carson *v.* Railsback, 3 Wash. Terr. 168, 13 Pac. 618.

The rule is not applicable where the entry was not made in good faith, as in such case the equitable title does not pass to the entryman. U. S. *v.* Lonabaugh, 158 Fed. 314.

73. *Alabama.*—Smart *v.* Kennedy, 123 Ala. 627, 26 So. 198.

Arkansas.— Gilkerson-Schloss Co. *v.* Forbes, 54 Ark. 148, 15 S. W. 191, 26 Am. St. Rep. 29.

California.— Kirkaldie *v.* Larrabee, 31 Cal. 455, 89 Am. Dec. 205.

Iowa.— Nycum *v.* McAllister, 33 Iowa 374.

Kansas.— Freese *v.* Scouten, 53 Kan. 347, 35 Pac. 741; Moore *v.* McIntosh, 6 Kan. 39; McFall *v.* Murray, 4 Kan. App. 554, 45 Pac. 1100.

Minnesota.— Lang *v.* Morey, 40 Minn. 396, 42 N. W. 88, 12 Am. St. Rep. 748; Townsend *v.* Fenton, 30 Minn. 528, 16 N. W. 421.

Nebraska.— Cheney *v.* White, 5 Nebr. 261, 25 Am. Rep. 487 [*followed* in Jones *v.* Yoakam, 5 Nebr. 265].

Oklahoma.— Fariss *v.* Deming Inv. Co., 5 Okla. 496, 49 Pac. 926.

United States.— Commonwealth Title Ins., etc., Co. *v.* U. S., 37 Ct. Cl. 532 [*affirmed* in 193 U. S. 651, 24 S. Ct. 546, 48 L. ed. 830].

See 41 Cent. Dig. tit. "Public Lands," §§ 364–366.

Pendency of contest.— Where a person who has made final proof for a homestead and received a final certificate therefor, thereafter executes a mortgage, the mortgagee may, upon default, foreclose the same, notwithstanding a contest may have been instituted in the land department to cancel the certificate issued to the entryman. Fariss *v.* Deming, 5 Okla. 496, 49 Pac. 926.

74. Walker *v.* Johnson, 53 Fla. 1076, 43 So. 771, holding that the fact that a patent from the United States to a homesteader did not actually issue until a few weeks after a lease by him does not invalidate the lease, it not appearing the lease was executed before the final entry was made. See also Orrell *v.* Bay Mfg. Co., 87 Miss. 632, 40 So. 429, 83 Miss. 800, 36 So. 561, 70 L. R. A. 881, holding that a lease of land for turpentine purposes, made by a claimant before his homestead entry has been perfected, is not invalid, in the absence of any showing that operations under the lease were commenced or intended to be commenced until after the entry had been confirmed and perfected.

75. Doll *v.* Stewart, 30 Colo. 320, 70 Pac. 326; Stone *v.* Young, 5 Kan. 229.

76. Witcher *v.* Conklin, 84 Cal. 499, 24 Pac. 302; McDonald *v.* Edmonds, 44 Cal. 328.

77. U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)].

78. See *supra*, II, M, 9, a.

79. Hartman *v.* Butterfield Lumber Co., 199 U. S. 335, 26 S. Ct. 63, 50 L. ed. 217 [*affirming* 82 Miss. 494, 34 So. 328, 100 Am. St. Rep. 644].

80. U. S. *v.* Detroit Timber, etc., Co., 200 U. S. 321, 26 S. Ct. 282, 50 L. ed. 499 [*affirming* 131 Fed. 668, 67 C. C. A. 1 (*reversing* 124 Fed. 393)]; Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182 [*reversing* 18 Fed. 273, 5 McCrary 563].

Q. Exemptions[81]**—1. In General.** As an encouragement to the settlement of the public lands,[82] it is expressly provided by statute that no lands acquired under the provisions of the homestead law shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor,[83] and that no lands acquired under the timber culture laws shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of the final certificate therefor.[84] It is settled beyond question that the creation of such

Purchaser not required to go behind patent. — The rule that a purchaser of public land is required to take notice of the records and proceedings in the land department does not apply to a purchaser after patent, who may rely on its presumptive validity, and is not required to go behind it. U. S. *v.* Laam, 149 Fed. 581; U. S. *v.* Minor, 29 Fed. 134.

Circumstances negativing good faith.— Where a person knowingly and by collusion obtained a patent for lands not subject to sale, and on the next day made a sale of them at a distant place, to another person who had never seen the lands and who paid for them almost double their value, the purchaser was not entitled to protection as a *bona fide* purchaser, in the absence of an explanation of the circumstances of his purchase. Atty.-Gen. *v.* Thomas, 31 Mich. 365.

81. Homestead exemption generally see Homesteads, 21 Cyc. 448.

Act Cong. Aug. 4, 1842, in reference to settlements in Florida was not intended to protect the land, after patent issued, from contracts or debts of the occupant, to the satisfaction and payment of which lands were subjected by the laws of Florida. Morse *v.* Garrason, 4 Fla. 460.

82. Gould *v.* Tucker, 18 S. D. 281, 100 N. W. 427.

83. U. S. Rev. St. (1878) § 2296 [U. S. Comp. St. (1901) p. 1398].

See the following cases:

Arkansas.— Shorman *v.* Eakin, 47 Ark. 351, 1 S. W. 559; Sorrels *v.* Self, 43 Ark. 451.

California.— Klempp *v.* Northrop, 137 Cal. 414, 70 Pac. 284; Barnard *v.* Boller, 105 Cal. 214, 38 Pac. 728.

Colorado.— Brown *v.* Kennedy, 12 Colo. 235, 20 Pac. 696.

Florida.— Adams *v.* White, 23 Fla. 352, 2 So. 774.

Iowa.— McCorkell *v.* Herron, 128 Iowa 324, 103 N. W. 988, 111 Am. St. Rep. 201.

Kansas.— Stark *v.* Morgan, 73 Kan. 453, 85 Pac. 567, 6 L. R. A. N. S. 934; Kansas Lumber Co. *v.* Jones, 32 Kan. 195, 4 Pac. 74; Johnson *v.* Borin, 7 Kan. App. 369, 54 Pac. 804.

Minnesota.— Russell *v.* Lowth, 21 Minn. 167, 18 Am. Rep. 389.

Missouri.— Dickerson *v.* Bridges, 147 Mo. 235, 48 S. W. 825.

Nebraska.— Jackett *v.* Bower, 62 Nebr. 232, 86 N. W. 1075; Duell *v.* Potter, 51 Nebr. 241, 70 N. W. 932 [*followed* in Hannah *v.* Perkins, 2 Nebr. (Unoff.) 614, 89 N. W. 599]; Brandhoefer *v.* Bain, 45 Nebr. 781, 64 N. W. 213; Baldwin *v.* Boyd, 18 Nebr. 444, 25 N. W. 580; Messick *v.* McCarty, 16 Nebr. 704, 21 N. W. 439; Kruger *v.* Adams, etc., Harvester Co., 13 Nebr. 97, 13 N. W. 3; Smith *v.* Steele, 13 Nebr. 1, 12 N. W. 830; Smith *v.* Schmitz, 10 Nebr. 600, 7 N. W. 329.

North Dakota.— Mahon *v.* Surerus, 9 N. D. 57, 81 N. W. 64.

Oklahoma.— Flanagan *v.* Forsythe, 6 Okla. 225, 50 Pac. 152.

Oregon.— Clark *v.* Bayley, 5 Oreg. 343.

South Dakota.— Van Doren *v.* Miller, 14 S. D. 264, 85 N. W. 187.

Washington.— Weber *v.* Laidler, 26 Wash. 144, 66 Pac. 400, 90 Am. St. Rep. 726.

Wisconsin.— Gile *v.* Hallock, 33 Wis. 523.

United States.— Brun *v.* Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. N. S. 154; Seymour *v.* Sanders, 21 Fed. Cas. No. 12,690, 3 Dill. 437.

See 41 Cent. Dig. tit. "Public Lands," § 378.

Ditches dug mainly through a homestead, and used to irrigate the land, without which the land would be of but little value, and could probably never have been used as a homestead, must be treated, with the water in them, as a part of the land, and not severable from the homestead, and therefore are not liable to be sold for debts contracted before the issue of the patent for such homestead. Faull *v.* Cooke, 19 Oreg. 455, 26 Pac. 662, 20 Am. St. Rep. 836.

84. 26 U. S. St. at L. 1095, c. 561 [U. S. Comp. St. (1901) p. 1535]; 20 U. S. St. at L. 113, c. 190, § 4 [U. S. Comp. St. (1901) p. 1534]; U. S. Rev. St. § 2468.

See the following cases:

California.— Miller *v.* Little, 47 Cal. 348.

Kansas.— Nash *v.* Farmers' etc., Bank, 3 Kan. App. 694, 44 Pac. 907.

Minnesota.— Russell *v.* Lowth, 21 Minn. 167, 18 Am. Rep. 389.

Nebraska.— Brandhoefer *v.* Bain, 45 Nebr. 781, 64 N. W. 213; Baldwin *v.* Boyd, 18 Nebr. 444, 25 N. W. 580.

Oregon.—Adams *v.* Church, 42 Oreg. 270, 70 Pac. 1037, 95 Am. St. Rep. 740, 59 L. R. A. 782; Wallowa Nat. Bank *v.* Riley, 29 Oreg. 289, 45 Pac. 766, 54 Am. St. Rep. 794; Faull *v.* Cooke, 19 Oreg. 455, 26 Pac. 662, 20 Am. St. Rep. 836; State *v.* O'Neil, 7 Oreg. 141; Clark *v.* Bayley, 5 Oreg. 343.

South Dakota.— Gould *v.* Tucker, 20 S. D. 226, 105 N. W. 624, 18 S. D. 281, 100 N. W. 427; Van Doren *v.* Miller, 14 S. D. 264, 85 N. W. 187.

Wisconsin.— Gile *v.* Hallock, 33 Wis. 523.

United States.— Brun *v.* Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. N. S. 154.

See 41 Cent. Dig. tit. "Public Lands," § 378.

exemptions is within the power of congress,[85] and they cannot be impaired by state legislation,[86] and will be enforced in the state as well as in the federal courts.[87]

2. Commutation of Entry. The exemption extends to the case of one who has commuted his homestead entry as permitted by the statute.[88]

3. Death of Entryman. Where the entryman dies before the issuance of a patent or final certificate and his heirs or devisees become entitled to the land [89] they take the land as free from their previously contracted debts as it would have been free from the debts of the original entryman if he had lived to receive the patent.[90] Where a homesteader dies after the issuance of a patent the probate court has no jurisdiction, in administering his estate, to order the homestead sold to pay debts contracted by the decedent prior to the issuance of the patent.[91]

4. Particular Debts and Claims — a. Judgments [92] Obtained After Patent Issued. A judgment rendered against a homesteader after he obtains his patent upon a debt contracted before that time is not a lien on the land.[93]

b. Mechanics' Liens.[94] A mechanic's lien for work done or materials furnished prior to the issuance of the patent cannot attach to the homestead; [95] but where under the state statutes a mechanic's lien can attach to a building as distinct from the land,[96] the exemption of a homestead from liability for debts contracted before the patent issues does not preclude the sale and removal on foreclosure of a mechanic's lien of a house erected on land on which a homestead filing has been made, but as to which the entryman has not made final proof.[97]

c. Debts Contracted After Right to Patent Complete But Before Patent Issued. It has been held that the provision of the homestead law exempting the homestead from liability for debts contracted prior to "the issuing of the patent" refers to the time when the patent ought to issue and not to the mere clerical work of issuing it, and hence the homestead is liable for debts contracted after the right to a patent became complete, although before it was actually issued; [98] but other courts hold that the date of the actual issuance of the patent fixes the time when the liability of the land begins, and it is not liable for debts contracted before that time, although after the right to the patent was complete.[99]

85. *California.*— Miller *v.* Little, 47 Cal. 348.
Iowa.—McCorkell *v.* Herron, 128 Iowa 324, 103 N. W. 988, 111 Am. St. Rep. 201.
Kansas.— Nash *v.* Farmers', etc., Bank, 3 Kan. App. 694, 44 Pac. 907.
Minnesota.— Russell *v.* Lowth, 21 Minn. 167, 18 Am. Rep. 389.
Oregon.— Adams *v.* Church, 42 Oreg. 270, 20 Pac. 1037, 95 Am. St. Rep. 740, 59 L. R. A. 782.
Wisconsin.— Gile *v.* Hallock, 33 Wis. 523.
United States.— Seymour *v.* Sanders, 21 Fed. Cas. No. 12,690, 3 Dill. 437.
See 41 Cent. Dig. tit. "Public Lands," § 378.

86. Russell *v.* Lowth, 21 Minn. 167, 18 Am. Rep. 389.

87. Gould *v.* Tucker, 18 S. D. 281, 100 N. W. 427.

88. McCorkell *v.* Herron, 128 Iowa 324, 103 N. W. 988, 111 Am. St. Rep. 201; Baldwin *v.* Boyd, 18 Nebr. 444, 25 N. W. 580; Clark *v.* Bayley, 5 Oreg. 343.

89. See *supra*, II, C, 8, g; II, C, 9.

90. Coleman *v.* McCormick, 37 Minn. 179, 33 N. W. 556; Gould *v.* Tucker, 20 S. D. 226, 105 N. W. 624.

91. Watkins Land Mortg. Co. *v.* Mullen, 8 Kan. App. 705, 54 Pac. 921.

92. See, generally, Judgments, 23 Cyc. 623.

93. Kruger *v.* Adams, etc., Harvester Co., 13 Nebr. 97, 13 N. W. 3.

94. See, generally, Mechanics' Liens, 27 Cyc. 1.

95. See Mechanics' Liens, 27 Cyc. 28 note 87.

96. See Mechanics' Liens, 27 Cyc. 226 note 68.

97. Mahon *v.* Surerus, 9 N. D. 57, 81 N. W. 64.

98. Struby-Estabrook Mercantile Co. *v.* Davis, 18 Colo. 93, 31 Pac. 495, 36 Am. St. Rep. 266; Leonard *v.* Ross, 23 Kan. 292 [*followed* in Johnson *v.* Borin, 7 Kan. App. 369, 54 Pac. 804 (*following* also Kansas Lumber Co. *v.* Jones, 32 Kan. 195, 4 Pac. 74)]; Flanagan *v.* Forsythe, 6 Okla. 225, 50 Pac. 152 [*approving* Leonard *v.* Ross, 23 Kan. 292, and *disapproving* Barnard *v.* Boller, 105 Cal. 214, 38 Pac. 728].

99. Barnard *v.* Boller, 105 Cal. 214, 38 Pac. 728 [*following* Miller *v.* Little, 47 Cal. 348]; Wallowa Nat. Bank *v.* Riley, 29 Oreg. 289, 293, 45 Pac. 766, 54 Am. St. Rep. 794 [*approving* Barnard *v.* Boller, *supra*, and *disapproving* Struby-Estabrook Mercantile Co. *v.* Davis, 18 Colo. 93, 31 Pac. 495, 36 Am. St. Rep. 266], where it is said: "Although the particular question before us has not been passed on by any of the courts, so far as we can learn, ex-

d. Liens Voluntarily Created. The exemption under consideration is designed merely to protect the settler from a forced sale under execution on a debt contracted prior to the time designated, and does not preclude him from borrowing money and voluntarily creating a lien on the land by way of mortgage to secure the same, or prevent the enforcement of such a mortgage,[1]

e. Liabilities For Torts.[2] The exemption of land acquired under the homestead or timber culture laws from liability for any "debt contracted" by the patentee prior to the isssuance of the patent or final certificate does not prevent the land being subjected to the satisfaction of a judgment based upon a tort of the patentee committed before that time.[3]

cept in the states of Colorado and California, yet the general trend we think of the decisions sustains the view we have expressed: Gilkerson-Sloss Commission Co. *v.* Forbes, 54 Ark. 148, 15 S. W. 191, 26 Am. St. Rep. 29; Sorrels *v.* Self, 43 Ark. 451; Miller *v.* Little, 47 Cal. 349; Russell *v.* Lowth, 21 Minn. 167, 18 Am. Rep. 389; Baldwin *v.* Boyd, 18 Nebr. 444, 25 N. W. 580; Smith *v.* Steele, 13 Nebr. 1, 12 N. W. 830; Jean *v.* Dee, 5 Wash. 580, 32 Pac. 460; Boggan *v.* Reid, 1 Wash. 514, 20 Pac. 425; Gile *v.* Hallock, 33 Wis. 523; Seymour *v.* Sanders, 21 Fed. Cas. No. 12,690, 3 Dill. 437."

1. *Alabama.*— Smart *v.* Kennedy, 123 Ala. 627, 26 So. 198.

California.— Klempp *v.* Northrop, 137 Cal. 414, 70 Pac. 284; Orr *v.* Stewart, 67 Cal. 275, 7 Pac. 693; Camp *v.* Grider, 62 Cal. 20; Christy *v.* Dana, 34 Cal. 548, 42 Cal. 174; Kirkaldie *v.* Larrabee, 31 Cal. 455, 89 Am. Dec. 205.

Colorado.— Wilcox *v.* John, 21 Colo. 367, 40 Pac. 880, 52 Am. St. Rep. 246.

Iowa.— Fuller *v.* Hunt, 48 Iowa 163; Nycum *v.* McAllister, 33 Iowa 374.

Kansas.— Stark *v.* Morgan, 73 Kan. 453, 85 Pac. 567, 6 L. R. A. N. S. 934; Watson *v.* Voorhees, 14 Kan. 328; Moore *v.* McIntosh, 6 Kan. 39.

Minnesota.— Lang *v.* Morey, 40 Minn. 396, 42 N. W. 88, 12 Am. St. Rep. 748; Lewis *v.* Wetherell, 36 Minn. 386, 31 N. W. 356, 1 Am. St. Rep. 674; Townsend *v.* Fenton, 30 Minn. 528, 16 N. W. 421.

Missouri.— Dickerson *v.* Bridges, 147 Mo. 235, 48 S. W. 825; Dickerson *v.* Cuthburth, 56 Mo. App. 647.

Montana.— Norris *v.* Heald, 12 Mont. 282, 29 Pac. 1121, 33 Am. St. Rep. 581.

Nebraska.— Duell *v.* Potter, 51 Nebr. 241, 70 N. W. 932 [*followed* in Hannah *v.* Perkins, 2 Nebr. (Unoff.) 614, 89 N. W. 599]; Blanchard *v.* Jamison, 14 Nebr. 244, 15 N. W. 212; Skinner *v.* Reynolds, 10 Nebr. 323, 6 N. W. 369, 35 Am. Rep. 479; Cheney *v.* White, 5 Nebr. 261, 25 Am. Rep. 487 [*followed* in Jones *v.* Yoakam, 5 Nebr. 265].

Nevada.— Orr *v.* Ulyatt, 23 Nev. 134, 43 Pac. 916.

Oklahoma.— Stark *v.* Duvall, 7 Okla. 213, 54 Pac. 453.

South Dakota.— Gould *v.* Tucker, 20 S. D. 226, 105 N. W. 624.

Washington.— Weber *v.* Laidler, 26 Wash. 144, 66 Pac. 1135; Boggan *v.* Reid, 1 Wash. 514, 20 Pac. 425.

Wisconsin.— Meinhold *v.* Walters, 102 Wis. 389, 78 N. W. 574, 72 Am. St. Rep. 888; Spiess *v.* Neubery, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211.

If the entryman dies before receiving a patent and therefore the title under a patent subsequently issued to him inures to the benefit of his heirs (see *supra*, II, M, 7) they take the land burdened with the debts of the original entryman so secured. Gould *v.* Tucker, 20 S. D. 226, 105 N. W. 624.

2. See, generally, TORTS.

3. Brun *v.* Mann, 151 Fed. 145, 157, 80 C. C. A. 513, 12 L. R. A. N. S. 154, where it is said: "In view of the patent distinction between debts by contract and liabilities for wrongs, of the familiar use of the term 'debt contracted' to indicate the former, and the term 'liability incurred' to signify both, of the marked distinction between the two classes of liabilities embodied in the Constitution of the United States and the decisions of the courts, of the public policy of the nation to release debtors from their honest obligations and to refuse to discharge them from their liabilities for frauds and malicious injuries, and of the evident rejection of the expression 'liability incurred' and the selection and adoption of the term 'debt contracted' by the Congress in the acts under consideration, the latter phrase is too clear in expression and too certain in significance to permit the substitution for it of the term 'liability incurred' by any rule of construction. Such a substitution would be judicial legislation which the courts are not authorized to enact, and would import into these acts of Congress an exemption which the Congress did not insert therein, and which the plain term it used conclusively demonstrates it never intended to enact. . . . The fact has not escaped attention that some courts have substituted the words 'liability incurred,' or their meaning, for the term 'debt contracted,' in these acts of Congress by the use of the rule of liberal construction, by the rejection of the primary and ordinary meaning of the words 'debt contracted' and by the imputation to them of an ingenious and secondary signification (Loomis *v.* Gerson, 62 Ill. 11; Conroy *v.* Sullivan, 44 Ill. 451; Warner *v.* Cammack, 37 Iowa 642; Mertz *v.* Berry, 101 Mich. 32, 59 N. W. 445, 45 Am. St. Rep. 379, 24 L. R. A. 789; Flanagan *v.* Forsythe, 6 Okla. 225, 50 Pac. 152; State *v.* O'Neil, 7 Oreg. 141; *In re* Radway, 20 Fed. Cas. No.

5. Effect of Cessation of Occupation of Land as Homestead. It is not necessary, to entitle one to hold lands acquired by him under the homestead law from liability for debts contracted prior to the issuance of the patent, that he should continue to occupy it as a homestead.[4]

6. Effect of Conveyance of Homestead. The homestead remains free from liability for debts of the homesteader contracted before the patent issued, although the homesteader has conveyed the land to another;[5] but the grantee does not hold the land exempt from the payment of his own debts, although such debts were contracted before the patent issued.[6] Where a homesteader conveys the land to another and afterward regains the ownership, the land remains, notwithstanding the transfer, free from liability for his debts contracted prior to the patent.[7] But the exemption does not extend to the proceeds of a sale of the homestead or to property purchased with such proceeds.[8]

R. Crimes[9] in Connection With Acquisition of Public Lands. It is a crime under the statutes to conspire to defraud the United States of any part of its public lands,[10] or to forge or counterfeit or pass forged or counterfeited military bounty land warrants or certificates, certificates of purchase, receipts for purchase-money, etc.,[11] or to forge or counterfeit any other writing intended to defraud the United States of its public lands or present or transmit any such writing to any officer of the United States with intent to defraud the United States,[12] or to bargain,

11,523, 3 Hughes 609), and that statutes which use other terms such as 'any debt or liability contracted' have been construed to include liabilities for torts (Smith *v.* Omans, 17 Wis. 395). But the arguments and the opinions in these cases are not convincing. Reasons which appeal more strongly to our minds sustain our conclusion, and it is not without the support of respectable authority. McLaren *v.* Anderson, 81 Ala. 106, 8 So. 188; Schuessler *v.* Dudley, 80 Ala. 547, 2 So. 526, 60 Am. Rep. 124; Vincent *v.* State, 74 Ala. 274; Williams *v.* Bowden, 69 Ala. 433; Meredith *v.* Holmes, 68 Ala. 190; McAfee *v.* Covington, 71 Ga. 272, 51 Am. Rep. 263; Bohn *v.* Brown, 33 Mich. 257; Lathrop *v.* Singer, 39 Barb. (N. Y.) 396; Schouton *v.* Kilmer, 8 How. Pr. (N. Y.) 527; Kenyon *v.* Gould, 61 Pa. St. 292; Kirkpatrick *v.* White, 29 Pa. St. 176; Leighton *v.* Campbell, 17 R. I. 51, 20 Atl. 14, 9 L. R. A. 187; Burton *v.* Mill, 78 Va. 468; Whiteacre *v.* Rector, 29 Gratt. (Va.) 714, 26 Am. Rep. 420."

4. Adams *v.* White, 23 Fla. 352, 2 So. 774; Jean *v.* Dee, 5 Wash. 580, 32 Pac. 460.

5. *California.*—De Lany *v.* Knapp, 111 Cal. 165, 43 Pac. 598, 52 Am. St. Rep. 160; Miller *v.* Little, 47 Cal. 348.

Iowa.— Bouscher *v.* Smith, 73 Iowa 610, 35 N. W. 681.

Minnesota.— Russell *v.* Lowth, 21 Minn. 167, 18 Am. Rep. 389.

Missouri.— Dickerson *v.* Cuthburth, 56 Mo. App. 647.

Nebraska.— Baldwin *v.* Boyd, 18 Nebr. 444, 25 N. W. 580; Smith *v.* Steele, 13 Nebr. 1, 12 N. W. 830.

Oklahoma.— Stark *v.* Glaser, (1907) 91 Pac. 1040.

Oregon.— Clark *v.* Bayley, 5 Oreg. 343.

Wisconsin.— Gile *v.* Hallock, 33 Wis. 523.

See 41 Cent. Dig. tit. "Public Lands," § 380.

6. Duell *v.* Potter, 51 Nebr. 241, 70 N. W. 932 [*followed* in Hannah *v.* Perkins, 2 Nebr. (Unoff.) 614, 89 N. W. 599].

7. McCorkell *v.* Herron, 128 Iowa 324, 103 N. W. 988, 111 Am. St. Rep. 201; Bouscher *v.* Smith, 73 Iowa 610, 35 N. W. 681 [*distinguishing* Butler *v.* Nebron, 72 Iowa 732, 32 N. W. 642]; Brandhoefer *v.* Bain, 45 Nebr. 781, 64 N. W. 213; Van Doren *v.* Miller, 14 S. D. 264, 85 N. W. 187 [*approving* Brandhoefer *v.* Bain, *supra*, *explaining* Duell *v.* Potter, 51 Nebr. 241, 70 N. W. 932, and *explaining* and *disapproving* De Lany *v.* Knapp, *infra*], where it appeared that both the transfer and the regaining of the ownership occurred before the debt was incurred or the patent issued, but the court did not appear to consider those facts material. *Contra*, De Lany *v.* Knapp, 111 Cal. 165, 43 Pac. 598, 52 Am. St. Rep. 160.

8. Ritzville Hardware Co. *v.* Bennington, 50 Wash. 111, 96 Pac. 826.

9. See, generally, Criminal Law, 12 Cyc. 70.

10. 21 U. S. St. at L. 4 [U. S. Comp. St. (1901) p. 3676].

This statute must be strictly construed.— U. S. *v.* Robbins, 157 Fed. 999. See also U. S. *v.* Keitel, 157 Fed. 396, construing U. S. Rev. St. (1878) § 4746 [U. S. Comp. St. (1901) p. 3279].

Where the gist of a conspiracy is the intent to give entries a false appearance for the purpose of misleading the United States, the offense is committed, although the defendants do not stand in such a position with respect to the government as to require a disclosure of the true facts. U. S. *v.* Robbins, 157 Fed. 999.

Indictment held insufficient see U. S. *v.* Keitel, 157 Fed. 396.

11. U. S. Rev. St. (1878) § 5420 [U. S. Comp. St. (1901) p. 3667].

12. U. S. Comp. St. (1901) pp. 3667, 3668. See U. S. *v.* Bickford, 24 Fed. Cas. No. 14,591,

contract, or agree with any person not to bid upon or purchase land offered at public sale by the United States.[13]

III. DISPOSAL OF STATE LANDS.[14]

A. Obsolete Matters. A number of questions in relation to land grants which arose in the early history of the United States have been long ago settled and are not likely to arise again. Hence it is deemed sufficient to merely refer to some of the principal cases relating to the land grants in territory originally belonging to one state but subsequently formed into a new state,[15] grants in territory claimed by two states because of a dispute as to the boundary,[16] Connecticut claims in Pennsylvania,[17] and a number of other matters relating to the disposal of state

4 Blackf. 337, holding that transmitting false papers to the pension office in support of an application for a bounty land warrant is punishable under the statute, although it expressly refers to the making and transmitting of false papers for the purpose of obtaining from the United States "any sum or sums of money."

The word "claim," as used in the act of March 3, 1823 (U. S. Comp. St. (1901) pp. 3667, 3668), will include bounty land granted under an act of congress, and therefore it is a felony, under that act, to transmit to the pension office forged papers in support of an application for such lands (U. S. *v.* Wilcox, 28 Fed. Cas. No. 16,691, 4 Blatchf. 385), and also a claim to exercise the right of preëmption, or a claim of right to bounty lands, and the claim to thereby acquire from the United States government title to the public lands (U. S. *v.* Spaulding, 3 Dak. 85, 13 N. W. 357, 358).

Indictment.— An indictment for transmitting forged papers to the pension office in support of a claim for bounty land need not show that the forged papers stated all the facts necessary to be established in order to entitle the party to the bounty land, provided it shows that they were transmitted for the purpose of obtaining the allowance of the claim for the bounty land applied for. U. S. *v.* Wilcox, 28 Fed. Cas. No. 16,691, 4 Blatchf. 385.

Variance.— Proof that a defendant forged papers purporting to transfer the right to an additional homestead, which is a vendible right, and sold and delivered the same to another for a consideration paid to him, and without any agreement or understanding with the purchaser with respect to the use to be made of them, will not support an indictment for transmitting such papers or procuring them to be transmitted to a land-office with intent to defraud the United States. U. S. *v.* Fout, 123 Fed. 625.

Sufficiency of evidence.— Upon a prosecution for the offense of transmitting false papers to the pension office in support of a bounty land warrant, it is not necessary to show that the prisoner actually transmitted the papers, but it is sufficient to prove that he procured the papers with a view to their transmission by another. U. S. *v.* Bickford, 24 Fed. Cas. No. 14,591, 4 Blatchf. 337.

13. U. S. Comp. St. (1901) p. 1451. See *supra*, II, C, 6, e.

An indirect agreement not to bid at a sale of public land is within the statute. Stannard *v.* McCarty, Morr. (Iowa) 124.

14. Disposal of lands granted by United States to state: As swamp and overflowed lands see *supra*, II, I, 3, 4. For internal improvements see *supra*, II, J, 5. For schools and universities see *supra*, II, H, 2. In aid of railroads see *supra*, II, K, 1, s.

15. See Henthorn *v.* Doe, 1 Blackf. (Ind.) 157; Kirksey *v.* Turner, 95 Ky. 226, 24 S. W. 620, 15 Ky. L. Rep. 585; Salmons *v.* Webb, 12 B. Mon. (Ky.) 365; Rollins *v.* Clark, 8 Dana (Ky.) 15; Boone *v.* Helm, 4 Dana (Ky.) 403; Hoay *v.* McMurry, 1 Litt. (Ky.) 364; Jasper *v.* Quarles, Hard. (Ky.) 461; Hickman *v.* Boffman, Hard. (Ky.) 348; Little *v.* Watson, 32 Me. 214; Gilman *v.* Brown, 14 Mass. 123; Downs *v.* Downs, 2 How. (Miss.) 915; Calloway *v.* Hopkins, 11 Heisk. (Tenn.) 349; Moss *v.* Gibbs, 11 Heisk. (Tenn.) 283; Buck *v.* Williams, 10 Heisk. (Tenn.) 264; Williams *v.* Donell, 2 Head (Tenn.) 695; Fogg *v.* Williams, 2 Head (Tenn.) 474; North Carolina University *v.* Cambreling, 6 Yerg. (Tenn.) 79; Pinson *v.* Ivey, 1 Yerg. (Tenn.) 296; Huntsman *v.* Randolph, 5 Hayw. (Tenn.) 263; Lester *v.* Craig, Cooke (Tenn.) 482; Goodloe *v.* Wilson, 2 Overt. (Tenn.) 59; Weakly *v.* Wilson, 1 Overt. (Tenn.) 370; Miller *v.* Holt, 1 Overt. (Tenn.) 243; Billingsley *v.* Rhea, 1 Overt. (Tenn.) 198; Kerr *v.* Porter, 1 Overt. (Tenn.) 15; Porterfield *v.* Clark, 2 How. (U. S.) 76, 11 L. ed. 185; Brush *v.* Ware, 15 Pet. (U. S.) 93, 10 L. ed. 672; Brown *v.* Jackson, 7 Wheat. (U. S.) 218, 5 L. ed. 438; Polk *v.* Wendell, 5 Wheat. (U. S.) 293, 5 L. ed. 92; Patton *v.* Easton, 1 Wheat. (U. S.) 476, 4 L. ed. 139; Simms *v.* Guthrie, 9 Cranch (U. S.) 19, 3 L. ed. 642; Gilman *v.* Brown, 10 Fed. Cas. No. 5,441, 1 Mason 191 [*affirmed* in 4 Wheat. (U. S.) 255, 4 L. ed. 564]. See 41 Cent. Dig. tit. "Public Lands," §§ 386–388.

16. See Freeman *v.* Loftis, 51 N. C. 524; Thomas *v.* Stigers, 39 Pa. St. 486; Brien *v.* Elliott, 2 Penr. & W. (Pa.) 49; Hyde *v.* Torrence, 2 Yeates (Pa.) 440; Smith *v.* Brown, 1 Yeates (Pa.) 513; Parker *v.* Claiborne, 2 Swan (Tenn.) 565; Marlatt *v.* Silk, 11 Pet. (U. S.) 1, 9 L. ed. 609. See 41 Cent. Dig. tit. "Public Lands," § 384.

17. See Barney *v.* Sutton, 2 Watts (Pa.) 31; Strickland *v.* Strickland, 6 Serg. & R. (Pa.) 94; Dailey *v.* Avery, 4 Serg. & R. (Pa.) 281; Perkins *v.* Gay, 3 Serg. & R. (Pa.) 327,

lands which are of little or no practical interest or importance at the present time.[18]

B. General Considerations — 1. State Control. The state does not surrender the dominion and control of the public domain until final and complete title has been issued,[19] and in all cases of land claims where the fee to the land remains in the state, it has the right to establish, alter, and modify such regulations, from time to time, as may be deemed necessary in maturing an imperfect into a perfect title.[20]

2. Power to Grant. The legislature of a state has the power to dispose of the unappropriated lands within the state,[21] but a grant by a state of land beyond its boundaries is void.[22] Where a state has ceded territory to the United States it cannot subsequently grant land therein,[23] nor can a state issue a valid patent to an individual for land which it has consented to sell to the United States.[24] A state cannot grant to one person land which it has previously granted to another,[25] or

8 Am. Dec. 653; Evans *v.* Com., 2 Serg. & R. (Pa.) 441; Pickering *v.* Rutty, 1 Serg. & R. (Pa.) 511; Sheperd *v.* Com., 1 Serg. & R. (Pa.) 1; Enslin *v.* Bowman, 6 Binn. (Pa.) 462; Irish *v.* Scovil, 6 Binn. (Pa.) 55; Coolbaugh *v.* Com., 4 Yeates (Pa.) 493; Keene *v.* Harris, 14 Fed. Cas. No. 7,642, 3 Wash. 178. And see 41 Cent. Dig. tit. "Public Lands," § 385.

18. See Cook *v.* Bonnet, 4 Cal. 397 (construction of act March 26, 1851, as to water lot property); Com. *v.* Bowman, 11 S. W. 28, 10 Ky. L. Rep. 891, 3 L. R. A. 220 (Kentucky grant of land in Tennesse under boundary agreement); Hollingsworth *v.* Barbour, 4 Pet. (U. S.) 466, 7 L. ed. 922 (right of person claiming land warrants under parol agreement of owner to assign them).

19. Hart *v.* Gibbons, 14 Tex. 213 [*following* Hosner *v.* De Young, 1 Tex. 764]. See also Warren *v.* Shuman, 5 Tex. 441.

20. Hosner *v.* De Young, 1 Tex. 764.

21. Patterson *v.* Trabue, 3 J. J. Marsh. (Ky.) 598; State *v.* Lanier, 47 La. Ann. 568, 17 So. 130; Wyman *v.* Taylor, 124 N. C. 426, 32 S. E. 740; McConnell *v.* Madisonville, 2 Humphr. (Tenn.) 53; Victoria *v.* Victoria County, 100 Tex. 438, 101 S. W. 190 [*reversing* (Civ. App. 1906) 94 S. W. 368]; Victory *v.* Wells, 39 Vt. 488; Eisenbach *v.* Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

A state has power to alienate tide lands subject only to the rights of the public to use them for the purpose of navigation and fishery. Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277 [*distinguishing* Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018]; Weber *v.* State Harbor Com'rs, 18 Wall. (U. S.) 57, 21 L. ed. 798; Chisholm *v.* Caines, 67 Fed. 285.

Grant not a violation of constitutional prohibition against exclusive privileges.— Patterson *v.* Trabue, 3 J. J. Marsh. (Ky.) 598.

A statute directing certain state lands to be leased does not authorize a sale of such lands in fee. Weiler *v.* Monroe County, 76 Miss. 492, 25 So. 352.

An undivided interest in land, held by the state, cannot be sold in the absence of a statute providing for such sale. Leet *v.* Black, 50 Cal. 84.

22. Baker *v.* Swan, 32 Md. 355; Moss *v.* Gibbs, 10 Heisk. (Tenn.) 283; Poole *v.* Fleeger, 11 Pet. (U. S.) 185, 9 L. ed. 680, 955 [*affirming* 9 Fed. Cas. No. 4,860, 1 McLean 185].

De facto jurisdiction.—Grants of land made by a state in territory over which it exercises political jurisdiction *de facto*, but which does not rightfully belong to it, are invalid as against the state to which the territory rightfully belongs. Coffee *v.* Groover, 123 U. S. 1, 8 S. Ct. 1, 31 L. ed. 51 [*reversing* 20 Fla. 64 (*reaffirming* 19 Fla. 61)], holding further that the confirmation by Florida of the grants made by Georgia did not invalidate or disturb a grant of the land in dispute previously made by itself.

A Georgia grant of land extending partly in the Indian territory is valid so far as it does not interfere with prior rights of others. Mitchel *v.* U. S., 15 Pet. (U. S.) 52, 10 L. ed. 658, 9 Pet. (U. S.) 711, 9 L. ed. 283.

State grants extending partly over the Indian boundary were good as to whatever land was within the boundary established between the state and the Indian territory, so far as they interfered with no prior rights. Mitchel *v.* U. S., 15 Pet. (U. S.) 52, 10 L. ed. 658 [*following* Winn *v.* Patterson, 9 Pet. (U. S.) 663, 9 L. ed. 266; Patterson *v.* Jenks, 2 Pet. (U. S.) 216, 7 L. ed. 402; Danforth *v.* Wear, 9 Wheat. (U. S.) 673, 6 L. ed. 188].

23. Polk *v.* Wendal, 9 Cranch (U. S.) 87, 3 L. ed. 665 (the grantee having no incipient title before the cession); Miller *v.* Lindsey, 17 Fed. Cas. No. 9,580, 1 McLean 32 [*affirmed* in 6 Pet. (U. S.) 666, 8 L. ed. 538].

Reserved right of perfecting inchoate titles see Burton *v.* Williams, 3 Wheat. (U. S.) 529, 4 L. ed. 452.

24. U. S. *v.* Great Falls Mfg. Co., 21 Md. 119.

25. *Arkansas.*— Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20.

Iowa.— Bailey *v.* Callanan, 87 Iowa 107, 53 N. W. 1074.

Kentucky.— Kentucky Union Co. *v.* Cor-

land included within a valid Spanish or Mexican grant,[26] and *a fortiori* the issuance of a patent, valid on its face, precludes the acquisition of inchoate rights to the same land by a subsequent entry or offer to enter.[27] But the mere intrusion of strangers on state land does not prevent the state from granting the same.[28]

3. Power of Officers and Agents of State. Officers appointed to sell state lands can dispose of such lands only as are contemplated by the statute providing for such sale.[29] The agent of a state, authorized to sell portions of its lands at

nett, 112 Ky. 677, 66 S. W. 728, 23 Ky. L. Rep. 1922; Cox *v.* Prewitt, 88 Ky. 156, 10 S. W. 432, 10 Ky. L. Rep. 734; Kirk *v.* Williamson, 82 Ky. 161 [*followed* in Gibson *v.* Board, 102 Ky. 505, 43 S. W. 684, 19 Ky. L. Rep. 1568; Goosling *v.* Smith, 90 Ky. 157, 13 S. W. 437, 11 Ky. L. Rep. 991; Gray *v.* Peay, 82 S. W. 1006, 26 Ky. L. Rep. 989]; Botts *v.* Shields, 3 Litt. 32; Combs *v.* Duff, 80 S. W. 165, 25 Ky. L. Rep. 1968; Hays *v.* Earls, 77 S. W. 706, 25 Ky. L. Rep. 1299; Combs *v.* Combs, 72 S. W. 8, 24 Ky. L. Rep. 1691; Crate *v.* Strong, 69 S. W. 957, 71 S. W. 1, 24 Ky. L. Rep. 710, 1221; Allen *v.* Pulliam, 66 S. W. 722, 23 Ky. L. Rep. 2129; Kennedy *v.* McElroy, 22 S. W. 442, 15 Ky. L. Rep. 168. See also Patterson *v.* Trabue, 3 J. J. Marsh. 598; Fox *v.* Cornett, 92 S. W. 959, 29 Ky. L. Rep. 246.

New Hampshire.— Bellows *v.* Copp, 20 N. H. 492.

New York.— Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567 [*affirming* 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 336]; Jackson *v.* Lawton, 10 Johns. 23, 6 Am. Dec. 311. See also Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567 [*affirming* 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 336].

North Carolina.— Janney *v.* Blackwell, 138 N. C. 437, 50 S. E. 857; Stewart *v.* Keener, 131 N. C. 486, 42 S. E. 935; Berry *v.* W. M. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278; Hoover *v.* Thomas, 61 N. C. 184; Atty.-Gen. *v.* Osborn, 59 N. C. 298; Stanmire *v.* Powell, 35 N. C. 312. See also Gilchrist *v.* Middleton, 108 N. C. 705, 13 S. E. 227.

Ohio.— Webster *v.* Clear, 49 Ohio St. 392, 31 N. E. 744.

Oregon.— Ambrose *v.* Huntington, 34 Oreg. 484, 56 Pac. 513.

South Carolina.— Thomson *v.* Gaillard, 3 Rich. 418, 45 Am. Dec. 778.

Tennessee.— Earnest *v.* Little River Land, etc., Co., 109 Tenn. 427, 75 S. W. 1122.

Texas.— Taylor *v.* Lewelyn, 79 Tex. 96, 14 S. W. 1052.

Virginia.— Hardman *v.* Boardman, 4 Leigh 377.

United States.— Chandler *v.* Calumet, etc., Min. Co., 149 U. S. 79, 13 S. Ct. 798, 37 L. ed. 657 [*affirming* 36 Fed. 665]; Moore *v.* Robbins, 96 U. S. 530, 24 L. ed. 848; Hughes *v.* U. S., 4 Wall. 232, 18 L. ed. 303; U. S. *v.* Hughes, 11 How. 552, 13 L. ed. 809; North Carolina Min. Co. *v.* Westfeldt, 151 Fed. 290; Braxton *v.* Rich, 47 Fed. 178 [*affirmed* in 158 U. S. 375, 15 S. Ct. 1006, 39 L. ed. 1022]; Oliver *v.* Pullam, 24 Fed. 127.

A junior patent reciting and alleging a mistake in issuing the first patent can pass no title, as the elder patent, being voidable only, must be given effect until set aside by proper proceedings. Jackson *v.* Lawton, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311.

Land in Kentucky patented by Virginia before separation.— Where, prior to the formation of the state of Kentucky, the state of Virginia granted land afterward included within Kentucky, the state of Kentucky had no title which it could pass to its subsequent patentee. Taulbee *v.* Buckner, 91 S. W. 734, 28 Ky. L. Rep. 1246.

Ky. St. (1903) § 4704, expressly provides that every entry, survey, or patent shall be void, so far as it embraces lands previously entered, surveyed, or patented. Gray *v.* Peay, 82 S. W. 1006, 26 Ky. L. Rep. 989.

A patent conflicting in its description with a prior patent issued before the entry or survey of the land included in the latter gives no title to the patentee or his vendees in so far as it so conflicts. Moore *v.* Mauney, 80 S. W. 458, 25 Ky. L. Rep. 2274; Uhl *v.* Reynolds, 64 S. W. 498, 23 Ky. L. Rep. 759; Ohio, etc., R. Co. *v.* Wooten, 46 S. W. 681, 20 Ky. L. Rep. 383; White *v.* Leovy, 49 La. Ann. 1660, 22 So. 931; Sampson *v.* Chester, (Tenn. 1904) 91 S. W. 43; Wyllie *v.* Wynne, 26 Tex. 42.

Where the earlier patent was fraudulently obtained the legal estate becomes vested in the second patentee. Boring *v.* Lemmon, 5 Harr. & J. (Md.) 223; Hancock *v.* Walsh, 11 Fed. Cas. No. 6,012, 3 Woods 351.

26. Coburn *v.* San Mateo County, 75 Fed. 520.

Spanish and Mexican land grants see *infra*, V.

27. Smith *v.* Crandall, 118 La. 1052, 43 So. 699.

Lands included in a grant, but excluded from the certificate of survey on which the grant issued, cannot be taken up as vacant land. Tolson *v.* Lanham, 2 Harr. & J. (Md.) 174.

Land granted to levee board.— Preëmption rights cannot be acquired in lands which have been granted to one of the levee boards of the state. West *v.* Roberts, 135 Fed. 350, 68 C. C. A. 58 [*following* Hall *v.* Bossier Levee Dist., 111 La. 913, 35 So. 976; McDade *v.* Bossier Levee Bd., 109 La. 913, 35 So. 976].

28. Hill *v.* Dyer, 3 Me. 441; Candee *v.* Haywood, 34 Barb. (N. Y.) 349 (holding that a state may grant lands, although a third person is in adverse possession); Austin *v.* Dungan, 46 Tex. 236.

29. See Knight *v.* Haight, 51 Cal. 169.

public sale, and such part as may then remain at private sale, exhausts all his power by a sale to one at the public sale, and a subsequent *bona fide* purchaser of the same land, without notice, who records his deed before the prior purchaser, obtains no title thereby.[30]

4. Land Subject to Disposal. Land reserved from sale by act of the legislature cannot be legally sold or purchased,[31] and a statute validating defective sales does not apply to such lands.[32]

5. Withdrawal of Land From Sale. A statutory grant to certain persons of the privilege of purchasing certain lands is a mere offer which may be withdrawn by the state at any time before acceptance.[33]

6. Who May Purchase or Acquire Land. The legislature has the right to prescribe who may become purchasers of state lands,[34] what steps shall be taken by one desiring to secure title,[35] and how adverse claims to the same tract shall be determined.[36] Where the constitution gives to foreigners becoming *bona fide* residents the same rights as citizens as to property, a subject of the Chinese empire, if a *bona fide* resident, may locate and purchase public lands of the state.[37] An officer attached to a state land office cannot purchase public lands by entry at his own office.[38]

7. Price of Lands. A statute fixing a minimum price for certain lands is not a declaration that any one may buy them for that price, but presumptively means that a higher price may be in some cases demandable.[39]

8. How Transfer Effected — Form and Requisites of Grants. A state may transfer lands by a special act, without the issuance of a patent;[40] but it must clearly appear that it was the intention of the legislature to make a grant,[41] although

30. Roseberry *v.* Hollister, 4 Ohio St. 297.

31. O'Neal *v.* Kirkpatrick, 5 Wall. (U. S.) 791, 18 L. ed. 606.

Patent for reserved lands void.— Where a sale of land by officers of the land department of the state is unauthorized because the particular tract named in the patent has been by legislative act absolutely reserved from disposal, the patent is void, and may be assailed from any quarter. Klauber *v.* Higgins, 117 Cal. 451, 49 Pac. 466, holding that in a statute excluding from its provisions for the sale of lands all swamp and tide lands within two miles of "any town or village," the term "town" includes cities. See also Williams *v.* San Pedro, 153 Cal. 44, 94 Pac. 234.

32. Klauber *v.* Higgins, 117 Cal. 451, 49 Pac. 466.

33. State *v.* Wenzel, 55 Nebr. 210, 75 N. W. 579, holding that Laws (1897), c. 71, § 1, withdrew the privilege extended by Laws (1879), p. 110, to lessees of school lands of purchasing the same at private sale.

34. State *v.* Nashville University, 4 Humphr. (Tenn.) 157, holding that the legislature has the constitutional power to exclude corporations from becoming purchasers of the public domain.

35. Blakeley *v.* Kingsbury, 6 Cal. App. 707, 93 Pac. 129.

36. Blakeley *v.* Kingsbury, 6 Cal. App. 707, 93 Pac. 129.

37. State *v.* Preble, 18 Nev. 251, 2 Pac. 754.

38. Massey *v.* Smith, 64 Mo. 347.

39. Potter *v.* State Land-Office Com'r, 55 Mich. 485, 21 N. W. 902.

40. Hall *v.* Jarvis, 65 Ill. 302; Cary *v.* Whitney, 48 Me. 516; Jackson *v.* Stanley, 10 Johns. (N. Y.) 133, 6 Am. Dec. 319; State *v.* Illinois Cent. R. Co., 33 Fed. 730; Friedman *v.* Goodman, 9 Fed. Cas. No. 5,119, McAllister 142.

Legislative grant of land equivalent to patent.— Friedman *v.* Goodwin, 9 Fed. Cas. No. 5,119, McAllister 142; Griffing *v.* Gibb, 11 Fed. Cas. No. 5,819, McAllister 212.

A legislative grant to a class of persons is as valid as one made to an individual. Friedman *v.* Goodwin, 9 Fed. Cas. No. 5,119, McAllister 142; Griffing *v.* Gibb, 11 Fed. Cas. No. 5,819, McAllister 212.

Confirmation of void grant.—A state legislature may, by statute, confirm a deed or grant of public land which was absolutely void at the time of confirmation, if the vested rights of third persons are not thereby divested. Friedman *v.* Goodwin, 9 Fed. Cas. No. 5,119, McAllister 142; Seabury *v.* Field, 21 Fed. Cas. No. 12,574, McAllister 1. See also Griffing *v.* Gibb, 11 Fed. Cas. No. 5,819, McAllister 212. The California act of March 17, 1866, was not a confirmation of a previous sheriff's sale of lands in San José attempted to be made under the ordinance of Nov. 10, 1851. Le Roy *v.* Chabolla, 15 Fed. Cas. No. 8,267, 2 Abb. 448, 1 Sawy. 456.

41. San Francisco *v.* Ellis, 54 Cal. 72, holding that the acts of 1874, page 711, requiring the supervisors of San Francisco to publicly sell certain salt marsh and tide land belonging to the state, and making the mayor's deed vest title in the purchaser, did not operate as a grant to the city. See also Heywood *v.* Wild River Lumber Co., 70 N. H. 24, 47 Atl. 294.

Hill Code Oreg. § 4227, which authorizes

no particular terms are necessary.[42] The legislature may direct the mode in which titles to the public lands shall be conveyed by the state.[43] A patent is as effectual to pass the estate without as with a consideration,[44] and it is not necessary to the passing of a complete title that a patent should be delivered,[45] or formally accepted by the grantee.[46] A grant or patent should describe and identify the land.[47] A compliance with all statutory requirements is required in order to give any title under an attempted purchase or alleged grant from the state.[48] The title to donation land located by mistake within lands not then owned by the state has been held to be confirmed by the subsequent purchase of such lands from the Indians by the state.[49]

9. Validity of Patents or Grants. Every grant or patent of land, issued in the form prescribed by law, is presumed to be valid,[50] and to have issued regularly;[51] and it is incumbent on a person who controverts such a grant to support his objections.[52] But a patent is void if the officer who issued it had no authority to do so,[53] or if it was issued without authority of law,[54] or the state had no title to the

riparian owners on navigable rivers, within the corporate limits of any incorporated town, to construct wharves in front of their land, is not a grant of the tide land. Bowlby *v.* Shively, 22 Oreg. 410, 30 Pac. 154 [*affirmed* in 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331, and *followed* in Astoria Exch. Co. *v.* Shively, 27 Oreg. 104, 39 Pac. 398, 40 Pac. 92].

42. Enfield Tp. *v.* Permit, 5 N. H. 280, 20 Am. Dec. 580.

43. Harris *v.* Dyer, 27 Ga. 211.

If the law directs only a certificate to issue to the purchaser as the evidence of his title, it is equally sacred as a grant. Harris *v.* Dyer, 27 Ga. 211.

Where the legislature gives authority to an agent to sell and convey lands belonging to the state, a conveyance in the name of the agent is sufficient. Thompson *v.* Carr, 5 N. H. 516.

44. Innes *v.* Crawford, 2 Bibb (Ky.) 412.

45. Shearer *v.* Clay, 1 Litt. (Ky.) 260; Innes *v.* Crawford, 2 Bibb (Ky.) 412.

46. Shearer *v.* Clay, 1 Litt. (Ky.) 260.

47. Chinoweth *v.* Haskell, 3 Pet. (U. S.) 92, 7 L. ed. 614.

An omission to insert the name of the county in which the land lies will not vitiate the patent, where the place is described with reasonable certainty. McClean *v.* Tomlinson, 5 Munf. (Va.) 220.

Descriptions held sufficient see Broadwell *v.* Morgan, 142 N. C. 475, 55 S. E. 340; East Lake Lumber Co. *v.* East Coast Cedar Co., 142 N. C. 412, 55 S. E. 304.

48. Dunn *v.* Ketchum, 38 Cal. 93 (holding that under the act of April 27, 1863, no right of possession or of purchase, inchoate or otherwise, attaches from any proceedings taken until a certificate of the oath prescribed by the act is indorsed on the description of the land and filed in the office of the county recorder); Hicks *v.* Whitesides, 35 Cal. 152 (sufficiency of notice under possessory act of April 20, 1852); Cohn *v.* Pearl River Lumber Co., 80 Miss. 649, 32 So. 292.

49. McCall *v.* Himebaugh, 4 Watts & S. (Pa.) 164; McCall *v.* Coover, 4 Watts & S. (Pa.) 151.

50. Munford *v.* Carpenter, 11 Bush (Ky.) 51; White *v.* Nicholson, 9 B. Mon. (Ky.) 268; Patterson *v.* Jenks, 2 Pet. (U. S.) 216, 7 L. ed. 402.

51. *Kentucky.*— Sutton *v.* Menser, 6 B. Mon. 433.

New York.— Jackson *v.* Marsh, 6 Cow. 281.

Tennessee.— Williams *v.* Donell, 2 Head 695; Tipton *v.* Sanders, 2 Head 690.

Texas.— Miller *v.* Moss, 65 Tex. 179.

United States.— Polk *v.* Wendal, 9 Cranch 87, 3 L. ed. 665; Polk *v.* Hill, 19 Fed. Cas. No. 11,249, Brunn. Col. Cas. 126, 2 Overt. (Tenn.) 118.

A patent issued in obedience to a statute cannot be deemed void in a court of law. Rollins *v.* Clark, 8 Dana (Ky.) 15.

The presumption that public officers did their duty applies in the case of official acts with reference to the disposal of state lands. Russ *v.* Crichton, 117 Cal. 695, 49 Pac. 1043; Upham *v.* Hosking, 62 Cal. 250; Hart *v.* Young, 3 J. J. Marsh. (Ky.) 408; Corrigan *v.* Fitzsimmons, 97 Tex. 595, 80 S. W. 989 [*reversing* (Civ. App. 1903) 76 S. W. 68]; Waterhouse *v.* Corbett, 43 Tex. Civ. App. 512, 96 S. W. 651; Stolley *v.* Lilwall, 38 Tex. Civ. App. 48, 84 S. W. 689; Jones *v.* League, (Tex. Civ. App. 1898) 46 S. W. 283; Briscoe *v.* Cuney, (Tex. Civ. App. 1896) 38 S. W. 399; Ross *v.* Reed, 1 Wheat. (U. S.) 482, 4 L. ed. 141. See also State *v.* De Leon, 64 Tex. 553; Harvey *v.* Preston, 3 Call (Va.) 495.

52. Patterson *v.* Jenks, 2 Pet. (U. S.) 216, 7 L. ed. 402.

53. United Land Assoc. *v.* Pacific Imp. Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988 (so holding as to a deed to pueblo lands by the tide land commissioners); Todd *v.* Fisher, 26 Tex. 239; Polk *v.* Wendal, 9 Cranch (U. S.) 87, 3 L. ed. 665.

54. Ellis *v.* Batts, 26 Tex. 703; Todd *v.* Fisher, 26 Tex. 239; State *v.* Delesdenier, 7 Tex. 76; Kempner *v.* State, 31 Tex. Civ. App. 363, 72 S. W. 888 [*following* Gunter *v.* Meade, 78 Tex. 634, 14 S. W. 562; Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865; Stone *v.* U. S., 2 Wall. (U. S.) 525, 17 L. ed. 765]; Polk *v.* Hill, 19 Fed. Cas. No. 11,249,

land.[55] A patent for lands previously granted to another person is of course void;[56] but a grant which includes lands not before granted, and also some portion of the elder grants, is valid for the portion not before granted.[57] Accordingly a patent is not void merely because it excludes prior grants without identifying or describing them;[58] and *a fortiori* a patent is not void for uncertainty where the land is accurately surveyed, and the exclusions specify the quantity of acres and the names of the owners of the excluded portions.[59] But it has been held that a patent with such sweeping lines as to include within it a large quantity of both vacant and already appropriated lands, without identifying the latter, cannot be sustained because of its uncertainty.[60] A patent issued irregularly, or through fraud or mistake or on a false suggestion, is voidable only and not void,[61] unless the defect appears on its face.[62] The fact that the number of acres contained in a grant by the state is much greater than the amount called for in the grant does not make the grant void.[63] Where the patentee is sufficiently described a mistake in his name will not invalidate the patent.[64] So also where the property granted is so described that it can be certainly identified the grant is good, although the description may be in some respects inaccurate or insufficient;[65] but a grant is insufficient where the description of the land is so indefinite that it cannot be identified.[66] A patent is not

2 Overt. (Tenn.) 118, Brunn. Col. Cas. 126.

A grant, purporting on its face to be issued by virtue of an unconstitutional law, is void, and can convey no title. Cannon *v.* Young, 92 Ga. 164, 17 S. E. 863; Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379.

55. Polk *v.* Wendal, 9 Cranch (U. S.) 87, 3 L. ed. 665.

56. See *supra*, III, B, 2.

57. Fox *v.* Cornett, 92 S. W. 959, 29 Ky. L. Rep. 246 [*following* Hall *v.* Martin, 89 Ky. 9, 11 S. W. 953, 11 Ky. L. Rep. 241]; Nickels *v.* Com., 64 S. W. 448, 23 Ky. L. Rep. 778 [*following* Hall *v.* Martin, 89 Ky. 9, 11 S. W. 953, 11 Ky. L. Rep. 241; Mansell *v.* Israel, 3 Bibb (Ky.) 510]; Thomson *v.* Gaillard, 3 Rich. (S. C.) 418, 45 Am. Dec. 778; Patterson *v.* Jenks, 2 Pet. (U. S.) 216, 7 L. ed. 402. See also Hays *v.* Earls, 77 S. W. 706, 25 Ky. L. Rep. 1299.

Junior patent void as to lap.— Cornett *v.* Combs, 53 S. W. 32, 21 Ky. L. Rep. 837; Morgan *v.* Morgan, 45 S. W. 497, 20 Ky. L. Rep. 190.

58. Breathitt Coal, etc., Co. *v.* Strong, 106 Ky. 699, 51 S. W. 189, 21 Ky. L. Rep. 302; Hall *v.* Martin, 89 Ky. 9, 11 S. W. 953, 11 Ky. L. Rep. 241; Kountze *v.* Hatfield, 99 S. W. 262, 30 Ky. L. Rep. 589; Goff *v.* Lowe, 80 S. W. 219, 25 Ky. L. Rep. 2176; Bryant *v.* Kendall, 79 S. W. 186, 25 Ky. L. Rep. 1859; Helton *v.* Central Trust, etc., Co., 69 S. W. 720, 24 Ky. L. Rep. 628; Kidd *v.* Central Trust, etc., Co., 65 S. W. 355, 23 Ky. L. Rep. 1402; Uhl *v.* Reynolds, 64 S. W. 498, 23 Ky. L. Rep. 759; Ballowe *v.* Hillman, 37 S. W. 950, 18 Ky. L. Rep. 677; Eastern Carolina Land, etc., Mfg. Co. *v.* Frey, 112 N. C. 158, 16 S. E. 902 [*distinguishing* Waugh *v.* Richardson, 30 N. C. 470] (if it can be shown what land was within the excepted grant); Fowler *v.* Nixon, 7 Heisk. (Tenn.) 719. See also Melton *v.* Monday, 64 N. C. 295. But *compare* Hillman *v.* Hurley, 82 Ky. 626; Hamilton *v.* Fugett, 81 Ky. 366.

59. Kirk *v.* Williamson, 82 Ky. 161.

60. Roberts *v.* Davidson, 83 Ky. 279.

61. Romain *v.* Lewis, 39 Mich. 233; Brady *v.* Begun, 36 Barb. (N. Y.) 533; Jackson *v.* Lawton, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311; Polk *v.* Hill, 19 Fed. Cas. No. 11,249, Brunn. Col. Cas. 126, 2 Overt. (Tenn.) 118. But *compare* De Leon *v.* White, 9 Tex. 598, holding that where a land commissioner makes a fraudulent grant to another, for whom he acts as agent, the grant is void.

62. Jackson *v.* Lawton, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311.

63. Goff *v.* Lowe, 80 S. W. 219, 25 Ky. L. Rep. 2176; Ballowe *v.* Hillman, 37 S. W. 950, 18 Ky. L. Rep. 677; Wyman *v.* Taylor, 124 N. C. 426, 32 S. E. 740 [*following* Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; Roan Mountain Steel, etc., Co. *v.* Edwards, 110 N. C. 353, 14 S. E. 861; Gudger *v.* Hensley, 82 N. C. 481].

64. Russell *v.* Marks, 3 Metc. (Ky.) 37; New York, etc., Land Co. *v.* Dooley, 33 Tex. Civ. App. 636, 77 S. W. 1030, mistake in spelling. See also Helm *v.* Handley, 1 Litt. (Ky.) 219.

Field-notes are admissible to show a mistake in the patent in relation to the name of the grantee. New York, etc., Land Co. *v.* Dooley, 33 Tex. Civ. App. 636, 77 S. W. 1030.

65. Lawless *v.* Jones, 1 A. K. Marsh. (Ky.) 16; Kidd *v.* Central Trust, etc., Co., 65 S. W. 355, 23 Ky. L. Rep. 1402; Brink *v.* Richtmyer, 14 Johns. (N. Y.) 255 (holding that a grant of "an island, commonly called and known by the name of 'Green Flats,'" was good, although the Green Flats were usually covered with water and therefore not strictly an island, there being no other land answering to the description); Leach *v.* Cooper, Cooke (Tenn.) 249; Phillips *v.* Crabtree, (Tenn. Ch. App. 1899) 52 S. W. 787; Calloway *v.* Sanford, (Tenn. Ch. App. 1895) 35 S. W. 776; Overton *v.* Davisson, 1 Gratt. (Va.) 211, 42 Am. Dec. 544; Blake *v.* Doherty, 5 Wheat. (U. S.) 359, 5 L. ed. 109.

66. Merritt *v.* Bunting, 107 Va. 174, 57

vitiated by the fact that it commences in the name of one person as governor, but is signed by another person, by whom, in the conclusion, it purports to be executed as governor.[67]

10. Construction of Patents or Grants. Where the terms of a grant or patent from the state are uncertain or doubtful, it is to be construed strictly against the grantee and most favorably for the state.[68] All the recitals of a patent are to be considered in determining the measure or quantity of land conveyed,[69] and, in determining the boundary, matters of description in connection with the circumstances of the case are to be looked to.[70] Courses and distances in a patent must yield to well known objects called for,[71] or to lines marked upon the ground;[72] but courses and distances must govern, unless controlled by artificial boundaries or natural objects.[73] An error of description in a survey, adopted in a patent, manifestly founded in mistake or falsehood, is insufficient to control other calls and expressions inconsistent therewith.[74] It is competent to resort to the survey to aid in supplying omissions or correcting mistakes in a patent;[75] and a plat, annexed to an old grant, which professes to delineate a parcel of land granted by the state, furnishes strong evidence on the question of location of the state grant, if unopposed by contrary title or possession.[76] Where lands are patented by the state "according to the official plat" in the state land office, the plat becomes a part of the grant.[77] Where the description of the land in a patent concluded with the words "plotting out of the survey all lands heretofore surveyed" older surveys were excluded from the grant.[78] Where two persons, father and son, bear the name appearing as grantee in a patent, the presumption is that the one who had the survey made and obtained the patent is the true grantee.[79] A number of illustrative cases on the construction of state patents and grants are cited in the note.[80]

S. E. 567; Boardman *v.* Reed, 6 Pet. (U. S.) 328, 8 L. ed. 415.

67. Hedden *v.* Overton, 4 Bibb (Ky.) 406.

68. Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; Creech *v.* Johnson, 116 Ky. 441, 76 S. W. 185, 25 Ky. L. Rep. 657; McGowan *v.* Crooks, 5 Dana (Ky.) 65; *In re* Green, 4 Md. Ch. 349; Townsend *v.* Brown, 24 N. J. L. 80; People *v.* New York, etc., Ferry Co., 68 N. Y. 71. See Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567 [*affirming* 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 336]. See also Jackson *v.* Murray, 7 Johns. (N. Y.) 5, 11, where it is said: "In all cases of any uncertainty in the location of patents and deeds, courts hold the party to his actual location."

Nothing passes by implication, in a grant from the state, except what necessarily flows from its nature. Allegheny *v.* Ohio, etc., R. Co., 26 Pa. St. 355.

69. White *v.* Leovy, 49 La. Ann. 1660, 22 So. 931.

70. Boon *v.* Hunter, 62 Tex. 582; French *v.* Bankhead, 11 Gratt. (Va.) 136.

71. Allen *v.* Pulliam, 66 S. W. 722, 23 Ky. L. Rep. 2129; Minor *v.* Kirkland, (Tex. Civ. App. 1892) 20 S. W. 932.

A known and well-ascertained place of beginning governs in the location of a grant or patent. Jackson *v.* Wendell, 5 Wend. (N. Y.) 142 [*affirmed* in 8 Wend. 183, 22 Am. Dec. 635].

72. Person *v.* Roundtree, 2 N. C. 378 note.

73. Martin *v.* Simpson, Harp. (S. C.) 454.

74. Wilson *v.* Inloes, 6 Gill (Md.) 121.

75. Bruce *v.* Taylor, 2 J. J. Marsh. (Ky.) 160; Hagins *v.* Whitaker, 42 S. W. 751, 19 Ky. L. Rep. 1050.

Where a grant refers to a map and field-notes of the surveyor as defining the boundaries of the grant, such field-notes and map may be considered in aid of the description contained in the grant and to supply words omitted therefrom. Goodson *v.* Fitzgerald, 40 Tex. Civ. App. 619, 90 S. W. 898.

76. Evans *v.* Corley, 9 Rich. (S. C.) 143.

Plat appended to grant controls calls of grant.—Childress *v.* Holland, 3 Hayw. (Tenn.) 274.

77. Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566.

78. Bryant *v.* Kendall, 79 S. W. 186, 25 Ky. L. Rep. 1859.

79. Huff *v.* Miniard, 73 S. W. 1036, 24 Ky. L. Rep. 2272, holding the evidence insufficient to overcome this presumption.

80. See the following cases:

Maine.— Roberts *v.* Richards, 84 Me. 1, 24 Atl. 425; Hovey *v.* Deane, 13 Me. 31; Porter *v.* Griswold, 6 Me. 430.

Maryland.— Budd *v.* Brooke, 3 Gill 198, 43 Am. Dec. 321; Tenant *v.* Hambleton, 3 Harr. & J. 233.

Mississippi.— Warren County *v.* Nall, 78 Miss. 726, 29 So. 755; Enfield *v.* Day, 11 N. H. 520.

New Jersey.— American Dock, etc., Co. *v.* Public School Trustees, 39 N. J. Eq. 409.

New York.— De Camp *v.* Dix, 159 N. Y. 436, 54 N. E. 63 [*affirming* 16 N. Y. App. Div. 528, 44 N. Y. Suppl. 1014] (reservation in patent of a certain number of acres for "highways"); People *v.* Saxton, 15 N. Y.

11. Effect of Patents or Grants. A patent is not a deed of bargain and sale in either the technical or the popular signification of the word,[81] but is merely in the nature of a quitclaim deed, passing such title and such title only as the state then has;[82] and the grantee takes subject to any and all encumbrances legally existing upon the land.[83] The patent or grant conveys the legal title to the patentee or grantee,[84] and by construction of law confers a seizin in deed upon him.[85] The patent or grant is binding on and conclusive against the state[86] and all subsequent claimants under the state,[87] but it does not affect preëxisting rights of third persons.[88] It takes effect from its date, and not from the time it is actually delivered to the grantee,[89] and is *prima facie* evidence of title[90] and of all the facts which

App. Div. 263, 44 N. Y. Suppl. 211 [*affirmed* in 154 N. Y. 748, 49 N. E. 1102].

North Carolina.— Brown *v.* Rickard, 107 N. C. 639, 12 S. E. 570; Waugh *v.* Richardson, 30 N. C. 470; Hughes *v.* University Trustees, 1 N. C. 446, property passing to university trustees under act of 1794.

Pennsylvania.— Delaware, etc., Canal Co. *v.* Dimock, 47 Pa. St. 393.

South Carolina.— State *v.* Pacific Guano Co., 22 S. C. 50; McMullen *v.* McCulloch, 2 Bailey 346.

Tennessee.— Peterson *v.* Turney, 2 Tenn. Ch. App. 519.

Texas.— Victoria *v.* Victoria County, 100 Tex. 438, 101 S. W. 190 [*reversing* (Civ. App. 1906) 94 S. W. 368] (effect of act Dec. 10, 1841, vesting unsold lands in town of Victoria); State *v.* Jadwin, (Civ. App. 1904) 85 S. W. 490 (grant by state of Texas to federal government of lands devoted to purposes of public defense).

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; Mumford *v.* Wardwell, 6 Wall. (U. S.) 423, 18 L. ed. 756 (construction of exception in the California act of March 26, 1851, granting certain lands to the city of San Francisco); White *v.* Blum, 79 Fed. 271, 24 C. C. A. 573; Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730 (effect of the Illinois act of April 16, 1869, granting certain submerged lands to the Illinois Central Railroad Company).

81. Innes *v.* Crawford, 2 Bibb (Ky.) 412.

82. Asher *v.* Howard, 122 Ky. 175, 91 S. W. 270, 28 Ky. L. Rep. 1097 [*following* Beeler *v.* Coy, 9 B. Mon. (Ky.) 312]; Baltimore *v.* McKim, 3 Bland (Md.) 453; Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174.

A legislative grant passes the title of the state to the grantee. McCaughal *v.* Ryan, 27 Barb. (N. Y.) 376.

A grant from the state does not imply any warranty.— Elmondorff *v.* Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86; State *v.* Crutchfield, 3 Head (Tenn.) 113.

A title subsequently acquired by the state by escheat from an elder patentee will not inure to the benefit of a junior patentee. Elmendorff *v.* Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86.

83. Baltimore *v.* McKim, 3 Bland (Md.) 453.

84. Smith *v.* Crandall, 118 La. 1052, 43 So. 699 [*following* Emblem *v.* Lincoln Land Co., 184 U. S. 660, 22 S. Ct. 523, 46 L. ed. 736; *In re* Emblem, 161 U. S. 52, 16 S. Ct. 487, 40 L. ed. 613]; Earnest *v.* Little River Land, etc., Co., 109 Tenn. 427, 75 S. W. 1122; McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044 [*affirming* (Civ. App. 1894) 25 S. W. 705]; Johnson *v.* Eldridge, 49 Tex. 507; Culmell *v.* Borroum, 13 Tex. Civ. App. 458, 35 S. W. 942; Ledbetter *v.* Higbee, 13 Tex. Civ. App. 267, 35 S. W. 801; Cresap *v.* McLean, 5 Leigh (Va.) 381; Johnson *v.* Brown, 3 Call (Va.) 259; Boardman *v.* Reed, 6 Pet. (U. S.) 328, 8 L. ed. 415; Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545; Braxton *v.* Rich, 47 Fed. 178 [*affirmed* in 158 U. S. 375, 15 S. Ct. 1006, 39 L. ed. 1022].

85. Enfield *v.* Day, 11 N. H. 520; Peyton *v.* Stith, 5 Pet. (U. S.) 485, 8 L. ed. 200 (the land being unimproved and no person being in possession thereof); Green *v.* Watkins, 7 Wheat. (U. S.) 27, 5 L. ed. 388 (holding that therefore a demandant in a writ of right makes a *prima facie* case by merely producing such a patent); Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545; Braxton *v.* Rich, 47 Fed. 178 [*affirmed* in 158 U. S. 375, 15 S. Ct. 1006, 39 L. ed. 1022]. But *compare* Speed *v.* Buford, 3 Bibb (Ky.) 57; Innes *v.* Crawford, 2 Bibb (Ky.) 412.

A grant of land by an act of the legislature vests an actual seizin in the grantee. Enfield Tp. *v.* Permit, 8 N. H. 512, 31 Am. Dec. 207.

86. Kidd *v.* Central Trust, etc., Co., 65 S. W. 355, 23 Ky. L. Rep. 1402; Earnest *v.* Little River Land, etc., Co., 109 Tenn. 427, 75 S. W. 1122. See also Ward *v.* Lee, 1 Bibb (Ky.) 18.

A grant of land from the state, based on a prior entry, and issued on the payment of the purchase-price in accordance with said entry, is not affected by a law enacted between the date of the entry and the issuance of the grant. Bealmear *v.* Hutchins, 148 Fed. 545, 78 C. C. A. 231 [*reversing* 134 Fed. 257].

Patent conclusive as to character and condition of land.— Worcester *v.* Kitts, (Cal. App. 1908) 96 Pac. 335.

87. Earnest *v.* Little River Land, etc., Co., 109 Tenn. 427, 75 S. W. 1122. See also Ward *v.* Lee, 1 Bibb (Ky.) 18.

88. Drinkard *v.* Barnett, 16 Tex. Civ. App. 550, 41 S. W. 198. See also Ward *v.* Lee, 1 Bibb (Ky.) 18.

89. Innes *v.* Crawford, 2 Bibb (Ky.) 412; Heath *v.* Ross, 12 Johns. (N. Y.) 140; *Ex p.* Kuhtman, 3 Rich. Eq. (S. C.) 257, 55 Am. Dec. 642.

90. Gingrich *v.* Folz, 19 Pa. St. 38, 57

are recited therein;[91] and has been held to be conclusive evidence of the fact that vacant land was the subject of patent and sale.[92] But neither a right nor a liability arising prior to a patent can be affected by recitals therein.[93] A patent cures or merges all irregularities in former proceedings,[94] and is notice to a subsequent claimant that the land is not vacant.[95] A conveyance of land by the state vests the grantees with the requisite power to take and hold it.[96] A patent vests the patentee with title to all vacant and unappropriated land within the exterior boundary;[97] but if prior claims are reserved, no title passes to the lands covered by such claims.[98] Where a grant is made to several persons, and one of the grantees rejects it, but the others accept it, end pay the consideration for the whole tract, which is accepted by the state, they take title to the whole.[99] When the state makes a sale of its land, its rights and those of its vendee, when neither restricted nor enlarged by statute, are the same as those of a vendor and purchaser, both of whom are natural persons.[1] The fact that a person paid the fees at the land office to obtain a patent on a land certificate of a decedent gives him no claim against the interest of the decedent's minor children, in the absence of a contract by a duly qualified guardian.[2]

12. Recording of Patents or Grants. The general registry laws do not apply to patents or deeds emanating directly from the state;[3] but such grants are entitled to enrolment and thereby become public records,[4] and in some states the

Am. Dec. 631; James *v.* Betz, 2 Binn. (Pa.) 12; Burkhead *v.* Bush, (Tex. Civ. App. 1903) 75 S. W. 67; Boyd *v.* Hamilton, 6 Munf. (Va.) 459; Huidekoper *v.* Burrus, 12 Fed. Cas. No. 6,848, 1 Wash. 109.

A grant from the state is sufficient evidence of its title in the absence of evidence that such title had in some way been divested prior to the grant. Clark *v.* Holdridge, 12 N. Y. App. Div. 613, 43 N. Y. Suppl. 115.

91. Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 447; Bachop *v.* Critchlow, 142 Pa. St. 518, 21 Atl. 984.

Recitals of compliance with law.— The recitals in a deed, made by the register of the land office, that the requirements of the law, to authorize him to sell, are complied with, are evidence of that fact. Morton *v.* Waring, 18 B. Mon. (Ky.) 72, holding, however, that such recitals are no evidence of other facts, as that the land sold was part of a patent for a number of acres, which did not appear in the entry listing the land for taxation, nor by the certificate of purchase issued by the register.

The truth of a recital in a legislative grant cannot be inquired into in an action by the grantee against a wrong-doer for the thing granted. Kershaw *v.* Boykin, 1 Brev. (S. C.) 301.

92. Koch *v.* Poerner, (Tex. Civ. App. 1900) 55 S. W. 336.

93. Green *v.* Brennesholtz, 73 Pa. St. 423.

94. Fritz *v.* Brandon, 78 Pa. St. 342; Balliott *v.* Bauman, 5 Watts & S. (Pa.) 150; Parker *v.* Claiborne, 2 Swan (Tenn.) 565; Boardman *v.* Reed, 6 Pet. (U. S.) 328, 8 L. ed. 415. See also Bushey *v.* South Mountain Min., etc., Co., 136 Pa. St. 541, 20 Atl. 549; McLean *v.* Tomlinson, 5 Munf. (Va.) 220; Witherspoon *v.* Olcott, 119 Fed. 175, 56 C. C. A. 171.

95. Balliott *v.* Bauman, 5 Watts & S. (Pa.) 150.

96. People *v.* Schermerhorn, 19 Barb. (N. Y.) 540.

97. Uhl *v.* Reynolds, 64 S. W. 498, 23 Ky. L. Rep. 759; Cresap *v.* McLean, 5 Leigh (Va.) 381.

98. Stockton *v.* Morris, 39 W. Va. 432, 19 S. E. 531; Bryan *v.* Willard, 21 W. Va. 65.

Where a grant is general the burden is on a person claiming under reservations therein to locate the same. Wyman *v.* Taylor, 124 N. C. 426, 32 S. E. 740; Berkhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725; Roan Mountain Steel, etc., Co. *v.* Edwards, 110 N. C. 353, 14 S. E. 861; Gudger *v.* Hensley, 82 N. C. 481.

Reservation in favor of state.— Where a patent contains a reservation, the title and seizin of the land so reserved does not pass to the patentee. Carter *v.* Hagan, 75 Va. 557.

99. Winnipisiogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542 [*following* Corbett *v.* Norcross, 35 N. H. 99].

1. Willoughby *v.* Long, 96 Tex. 194, 71 S. W. 545 [*reversing* (Civ. App. 1902) 69 S. W. 646, and *following* Fristoe *v.* Blum, 92 Tex. 76, 45 S. W. 998].

A grant of lands of the state to a corporation by an act of the legislature, for an actual consideration, is a conveyance, and the grantee takes, not as the recipient of corporate franchises, but as owner by the same title as would be acquired by an individual grantee, and with all the rights and privileges annexed. State *v.* Railroad Taxation Com'r, 37 N. J. L. 240.

2. Ellis *v.* Le Bow, 30 Tex. Civ. App. 449, 71 S. W. 576 [*affirmed* in 96 Tex. 532, 74 S. W. 528, and *following* Stone *v.* Ellis, 69 Tex. 325, 7 S. W. 349].

3. Rhinehart *v.* Schuyler, 7 Ill. 473; Evitts *v.* Roth, 61 Tex. 81; Ritchie *v.* Woods, 20 Fed. Cas. No. 11,865, 1 Wash. 11. See also Jackson *v.* Chamberlain, 8 Wend. (N. Y.) 620; Jackson *v.* Colver, 1 Wend. (N. Y.) 488; Webster *v.* Clear, 49 Ohio St. 392, 31 N. E. 744; Byrne *v.* Fagan, 16 Tex. 391.

4. Broadwell *v.* Morgan, 142 N. C. 475, 55 S. E. 340.

statutes require the recording of patents from the state the same as other conveyances of land.[5]

13. Presumptions and Evidence. A grant from the state may be presumed from long possession,[6] but, in a suit by the state to recover lands within its borders, it devolves on defendants to show that the state has parted with its title.[7] A recital in a statute of a previous grant by the state is sufficient evidence of such grant as against the state.[8]

14. Attack on and Setting Aside of Patents and Grants.[9] The power to issue land patents is an executive duty, defined and circumscribed by law, and when the law is violated in this regard, the judicial department may inquire into the matter and by decree annul patents illegally issued.[10] So a patent may be canceled or annulled where it was issued through mistake [11] or fraud,[12] or on a false suggestion,[13] and the state cannot be estopped by the unauthorized act of its officers in issuing patents to lands in disregard of law.[14] The title of a patentee can be attacked by the state or an individual having a prior legal or equitable claim to the land and by no one else;[15] and even the state can proceed for the annulment of its patents

5. See New York Cent., etc., R. Co. *v.* Brockway Brick Co., 158 N. Y. 470, 53 N. E. 209 [*affirming* 10 N. Y. App. Div. 387, 41 N. Y. Suppl. 762] (quoting Laws (1896), c. 517, so requiring, and holding that the previous statutes authorized such recording); Janney *v.* Blackwell, 138 N. C. 437, 50 S. E. 857.

It is not necessary to the validity of the registration of a grant from the state that its execution should be proven as in conveyances by individuals, but the great seal of the state is sufficient evidence of the authenticity of the grant to justify the register in putting it upon the record. Coltrane *v.* Lamb, 109 N. C. 209, 13 S. E. 784 [*following* Ray *v.* Stewart, 105 N. C. 472, 11 S. E. 182].

6. Bullard *v.* Barksdale, 33 N. C. 461; Reed *v.* Earnhart, 32 N. C. 516 (holding that after a possession from 1802 to 1822, and from 1827 to 1845, a grant from the state could be presumed, notwithstanding the interruption of the possession); Bryan *v.* Crump, 55 Tex. 1 (holding, however, that this rule has no application where such a grant was forbidden by law); Matthews *v.* Burton, 17 Gratt. (Va.) 312. See also Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378; Baum *v.* Currituck Shooting Club, 96 N. C. 310, 2 S. E. 673. But *compare* State *v.* Pacific Guano Co., 22 S. C. 50.

Privity of estate.— In order to establish the presumption that the original title to the state to real estate has become divested by the issue of a grant, it is not necessary to show that the successive occupants were in privity of estate. Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378 [*following* Davis *v.* McArthur, 78 N. C. 357].

In a suit to enjoin trespasses on land, where it appears that the person in possession or his grantors took some of the steps necessary to acquire title it will be presumed, in favor of the title by possession, that the land was severed from the public domain. Harmon *v.* Landers, (Tex. Civ. App. 1897) 41 S. W. 378.

7. State *v.* Jadwin, (Tex. Civ. App. 1904) 85 S. W. 490, where defendants claimed under the United States.

8. Lord *v.* Bigelow, 8 Vt. 445.

9. **Necessary allegations in scire facias to vacate grant** see Holland *v.* Crow, 27 N. C. 448.

Complaints held insufficient see People *v.* Martz, 74 Cal. 110, 15 Pac. 449; People *v.* Jackson, 24 Cal. 630.

10. Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865.

11. Brady *v.* Begun, 36 Barb. (N. Y.) 533; People *v.* Schermerhorn, 19 Barb. (N. Y.) 540.

After a recognition by the government of a grant to the extent of its boundaries for over thirty years, it will not be canceled on account of an excess of land covered by it. State *v.* Galveston City Co., 38 Tex. 12.

12. *Maryland.*— Singery *v.* Atty.-Gen., 2 Harr. & J. 487.

Minnesota.— State *v.* Bachelder, 5 Minn. 223, 80 Am. Dec. 410.

New York.— Jackson *v.* Lawton, 10 Johns. 23, 6 Am. Dec. 311.

Oregon.— Wilson *v.* Shiveley, 11 Oreg. 215, 4 Pac. 324.

Virginia.— White *v.* Jones, 4 Call 253, 2 Am. Dec. 564.

13. Brady *v.* Begun, 36 Barb. (N. Y.) 533; Jackson *v.* Lawton, 10 Johns. (N. Y.) 23, 6 Am. Dec. 311.

14. Eyl *v.* State, 37 Tex. Civ. App. 297, 84 S. W. 607 [*following* Dayland, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865; Woods *v.* Durrett, 28 Tex. 429; Todd *v.* Fisher, 26 Tex. 239; Sherwood *v.* Fleming, 25 Tex. Suppl. 408]. See also Galveston, etc., R. Co. *v.* State, (Tex Civ. App. 1896) 36 S. W. 111.

15. *Arkansas.*— Rozell *v.* Chicago Mill, etc., Co., 76 Ark. 525, 89 S. W. 469.

California.— Edwards *v.* Rolley, 96 Cal. 408, 31 Pac. 267, 31 Am. St. Rep. 234.

Georgia.— Williamson *v.* Matthews, 32 Ga. 524; Brunswick *v.* Dart, R. M. Charlt. 497.

Kentucky.— See Isaacs *v.* Willis, Hughes 22.

North Carolina.— Stewart *v.* Keener, 131 N. C. 486, 42 S. E. 935 [*following* Ray *v.* Castle, 79 N. C. 580; Crow *v.* Holland, 15 N. C. 417 (*approved* in Featherston *v.* Mills, 15 N. C. 596)].

only where its own interests are concerned,[16] and not for the sole purpose of protecting the interest of private individuals.[17] In order to avoid a patent it must be annulled in a direct proceeding, in equity,[18] for as a general rule a grant or patent from the state cannot be collaterally impeached,[19] unless it is void on its

Tennessee.— Dodson *v.* Cocke, 1 Overt. 314, 3 Am. Dec. 757.

Texas.— McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044 [*affirming* (Civ. App. 1894) 25 S. W. 705]; Culbertson *v.* Blanchard, 79 Tex. 486, 15 S. W. 700; Decourt *v.* Sproul, 66 Tex. 368, 1 S. W. 337; Martin *v.* Brown, 62 Tex. 485; Howard *v.* McKenzie, 54 Tex. 171; Bryan *v.* Shirley, 53 Tex. 440; Bowmer *v.* Hicks, 22 Tex. 155; Frontroy *v.* Atkinson, (Civ. App. 1907) 100 S. W. 1023; Yarbrough *v.* De Martin, 28 Tex. Civ. App. 276, 67 S. W. 177.

Person attacking patent has burden of showing prior equity.— Martin *v.* Brown, 62 Tex. 467.

Rule applies to school lands.— Culbertson *v.* Blanchard, 79 Tex. 486, 15 S. W. 700; Frontroy *v.* Atkinson, (Tex. Civ. App. 1907) 100 S. W. 1023; Carter *v.* Clifton, 44 Tex. Civ. App. 132, 98 S. W. 209.

A grantee from the state may proceed to have a junior grant vacated. Taylor *v.* Fletcher, 7 B. Mon. (Ky.) 80; Hoyt *v.* Rich, 20 N. C. 673 (holding that he may do this, although the junior grant covers only a part of the land included in his grant); Oliver *v.* Pullman, 24 Fed. 127. And he is entitled to relief whether or not he proves actual damage. Holland *v.* Crow, 34 N. C. 275, so holding on the ground that the junior grant is *per se* a cloud on the title.

Mere possession of land does not constitute such an interest therein as will entitle the possessor to call in question the validity of a grant to another from the state. Williamson *v.* Matthews, 32 Ga. 524.

A breach of conditions subsequent in a grant by the state can be taken advantage of by the state only, and then only in a direct proceeding for that purpose. Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567 [*affirming* 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 336].

State and persons having interest in lands may join in suit to annul patent.— People *v.* Morrill, 26 Cal. 336.

16. People *v.* Stratton, 25 Cal. 242; State *v.* Warner Stock Co., 48 Oreg. 378, 86 Pac. 780, 87 Pac. 534.

17. People *v.* Stratton, 25 Cal. 242.

18. Marshall *v.* McDaniel, 12 Bush (Ky.) 378 [*following* Jennings *v.* Whitaker, 4 T. B. Mon. (Ky.) 50; Bledsoe *v.* Wells, 4 Bibb (Ky.) 329]; State *v.* Bachelder, 5 Minn. 223, 80 Am. Dec. 410; Duncan *v.* Beard, 2 Nott & M. (S. C.) 400; Chandler *v.* Calumet, etc., Min. Co., 149 U. S. 79, 13 S. Ct. 798, 37 L. ed. 657 [*affirming* 36 Fed. 665]; Patterson *v.* Winn, 11 Wheat. (U. S.) 380, 6 L. ed. 500.

Proceeding by state.—A patent from the state cannot be revoked or set aside except on judicial proceedings instituted in behalf of the state. Smith *v.* Crandall, 118 La. 1052, 43 So. 699 [*following* Emblen *v.* Lincoln Land Co., 184 U. S. 660, 22 S. Ct. 523, 46 L. ed. 736; *In re* Emblen, 161 U. S. 52, 16 S. Ct. 487, 40 L. ed. 613]. See also Calhoun *v.* Cawley, 104 Ga. 335, 30 S. E. 773 [*following* Parker *v.* Hughes, 25 Ga. 374, *explaining* Dart *v.* Orme, 41 Ga. 376, and *followed* in Atkinson *v.* Cawley, 112 Ga. 485, 37 S. E. 715] (holding that a grant from the state cannot be set aside in any proceeding to which the state is not a party); Parker *v.* Hughes, 25 Ga. 374 (holding that the state should be plaintiff in a suit to set aside a grant from the state). But *compare* Hoye *v.* Johnston, 2 Gill (Md.) 291 (holding that on a bill by the holder of an equitable title to vacant land, against the patentee, to vacate the patent as fraudulent, the state need not be made a party); Andrus *v.* Wheeler, 18 Misc. (N. Y.) 646, 42 N. Y. Suppl. 525 (holding that letters patent, issued by the state, for lands to which it has no title, may be set aside in an action by the rightful owner against the holder of the patent).

19. *California.*— Harrington *v.* Goldsmith, 136 Cal. 168, 68 Pac. 594; Peabody *v.* Prince, 78 Cal. 511, 21 Pac. 123; Worcester *v.* Kitts, (App.) 96 Pac. 335.

Georgia.— Houston *v.* State, 124 Ga. 417, 52 S. E. 757; Patterson *v.* Buchanan, 37 Ga. 560; Martin *v.* Anderson, 21 Ga. 301; Vickery *v.* Scott, 20 Ga. 795; Tison *v.* Yawn, 15 Ga. 491, 60 Am. Dec. 708; Sykes *v.* McRory, 10 Ga. 465, 54 Am. Dec. 402; Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379 (the defect appearing on the face of the grant).

Kentucky.— American Assoc. *v.* Innis, 109 Ky. 595, 60 S. W. 388, 22 Ky. L. Rep. 1196; Frazier *v.* Frazier, 81 Ky. 137; Hartley *v.* Hartley, 3 Metc. 56; Little *v.* Bishop, 9 B. Mon. 240; Taylor *v.* Fletcher, 7 B. Mon. 80; Hardin *v.* Cain, 2 B. Mon. 56; Underwood *v.* Crutcher, 7 J. J. Marsh. 529; Jennings *v.* Whitaker, 4 T. B. Mon. 50; Allen *v.* Pulliam, 66 S. W. 722, 23 Ky. L. Rep. 2129; Uhl *v.* Reynolds, 64 S. W. 498, 23 Ky. L. Rep. 759.

Louisiana.— Chauvin *v.* Louisiana Oyster Commission, 121 La. 10, 46 So. 38.

New Jersey.— American Dock, etc., Co. *v.* Public School Trustees, 39 N. J. Eq. 409.

New York.— Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567 [*affirming* 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 536]; Brady *v.* Begun, 36 Barb. 533; Morgan *v.* Turner, 35 Misc. 399, 71 N. Y. Suppl. 996 [*affirmed* in 81 N. Y. App. Div. 645, 81 N. Y. Suppl. 1136, and *following* New York Cent., etc., R. Co. *v.* Aldridge, 135 N. Y. 83, 32 N. E. 50, 17 L. R. A. 516; Blakslee Mfg. Co. *v.* Blakslee's Sons Iron Works, 129 N. Y. 155, 29 N. E. 2]; Jackson *v.* Marsh, 6 Cow. 281; Jackson *v.* Hart, 12

face.[20] It is not necessary for the state to tender back money paid for its lands before it can maintain a suit to cancel the patents on the ground that they were fraudulently procured by the purchasers,[21] that the sales were illegally made,[22] or that the land was not properly surveyed;[23] but it has been held that the state cannot maintain a suit to cancel a patent for an innocent mistake in the procedure without first offering to return the purchase-money.[24] The party impeaching the validity of a patent has the burden of proof,[25] and must show by clear, satisfactory, and unequivocal evidence the facts which render it invalid.[26]

15. Relinquishment, Abandonment, or Revocation of Grants. Preëmptive rights arising from improvements or settlement may be lost by abandonment;[27]

Johns. 77, 7 Am. Dec. 280; Jackson *v.* Lawton, 10 Johns. 23, 6 Am. Dec. 311.

North Carolina.— Janney *v.* Blackwell, 138 N. C. 437, 50 S. E. 857; Holley *v.* Smith, 130 N. C. 85, 40 S. E. 847; Dosh *v.* Cape Fear Lumber Co., 128 N. C. 84, 38 S. E. 284; Wyman *v.* Taylor, 124 N. C. 426, 32 S. E. 740; Brown *v.* Brown, 106 N. C. 451, 11 S. E. 647; Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746; Lovinggood *v.* Burgess, 44 N. C. 407; Stanmire *v.* Powell, 35 N. C. 312; Holland *v.* Crow, 34 N. C. 275; Waugh *v.* Richardson, 30 N. C. 470.

Oregon.— Grant *v.* Oregon Nav. Co., 49 Oreg. 324, 90 Pac. 178, 1099.

Tennessee.— Curle *v.* Barrel, 2 Sneed 63; Overton *v.* Campbell, 5 Hayw. 165, 9 Am. Dec. 780.

Texas.— Martin *v.* Brown, 62 Tex. 485; Carter *v.* Clifton, 44 Tex. Civ. App. 132, 98 S. W. 209; Heil *v.* Martin, (Civ. App. 1902) 70 S. W. 430; Greenwood *v.* McLeary, (Civ. App. 1894) 25 S. W. 708.

Virginia.— Lassly *v.* Fontaine, 4 Hen. & M. 146, 4 Am. Dec. 510.

United States.— Chandler *v.* Calumet, etc., Min. Co., 149 U. S. 79, 13 S. Ct. 798, 37 L. ed. 657 [*affirming* 36 Fed. 665]; Patterson *v.* Winn, 11 Wheat. 380, 6 L. ed. 500; Bealmear *v.* Hutchins, 148 Fed. 545, 78 C. C. A. 231 [*reversing* 134 Fed. 257]; Oliver *v.* Pullam, 24 Fed. 127.

20. Klauber *v.* Higgins, 117 Cal. 451, 49 Pac. 466; Harris *v.* Dyer, 27 Ga. 211; Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379; Jackson *v.* Marsh, 6 Cow. (N. Y.) 281; Alexander *v.* Greenup, 1 Munf. (Va.) 134, 4 Am. Dec. 541. See also Hartley *v.* Hartley, 3 Metc. (Ky.) 56 (holding that a patent of land from the commonwealth can be declared void in collateral proceedings only so far as it embraces land previously entered, surveyed, or patented); Harris *v.* Norman, 96 N. C. 59, 2 S. E. 72.

If the land was not subject to entry the patent or grant is void and may be attacked collaterally. Janney *v.* Blackwell, 138 N. C. 437, 50 S. E. 857; Holley *v.* Smith, 130 N. C. 85, 40 S. E. 847; Gilchrist *v.* Middleton, 107 N. C. 663, 12 S. E. 85; Hoover *v.* Thomas, 61 N. C. 184; Lovinggood *v.* Burgess, 44 N. C. 407; Stanmire *v.* Powell, 35 N. C. 312; Oliver *v.* Pullam, 24 Fed. 127.

Lack of seal.— Where the statute requires a grant from the commonwealth to be under seal, a grant without a seal is void, and may be collaterally attacked. Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177.

Where patents, issuing under certain circumstances, are by statute declared absolutely void, a patent may be impeached for that cause collaterally. McMillan *v.* Hutcheson, 4 Bush (Ky.) 611; Hartley *v.* Hartley, 3 Metc. (Ky.) 56; Taylor *v.* Fletcher, 7 B. Mon. (Ky.) 80.

21. State *v.* Morgan, 52 Ark. 150, 12 S. W. 243; Randolph *v.* State, 73 Tex. 485, 11 S. W. 487; State *v.* Rhomberg, 69 Tex. 212, 7 S. W. 195; State *v.* Snyder, 66 Tex. 687, 18 S. W. 106.

22. Cameron *v.* State, 7 Tex. Civ. App. 35, 26 S. W. 869, so holding on the ground that it is to be presumed that the state will make restitution if justice demands it.

23. Bacon *v.* State, 2 Tex. Civ. App. 692, 21 S. W. 149.

24. People *v.* Bryan, 73 Cal. 376, 14 Pac. 893 [*followed* in People *v.* Morris, 77 Cal. 204, 19 Pac. 378].

25. Hebbron *v.* Graves, 78 Cal. 380, 20 Pac. 740; Leviston *v.* Ryan, 75 Cal. 293, 17 Pac. 239; People *v.* Stratton, 25 Cal. 242.

When presumption not applicable.— The presumptions which arise in support of a patent for public land, issued by a state, can have no force where the state selection of the land was originally void, and there is no proof that it has been validated by a curative act. Chant *v.* Reynolds, 49 Cal. 213.

26. Ashbrook *v.* Quarles, 15 B. Mon. (Ky.) 20.

Nature of evidence.—A patent which is legal and perfect upon its face is a record of the title having passed to the grantee and it cannot regularly be defeated but by matter of as high a nature as itself. Bledsoe *v.* Wells, 4 Bibb (Ky.) 329.

27. Grant *v.* Allison, 43 Pa. St. 427; Jacobs *v.* Figard, 25 Pa. St. 45; Farmers', etc., Bank *v.* Woods, 11 Pa. St. 99; Orr *v.* Cunningham, 4 Watts & S. (Pa.) 294; McDonald *v.* Mulhollan, 5 Watts (Pa.) 173; Brentlinger *v.* Hutchinson, 1 Watts (Pa.) 46; Fisher *v.* Larick, 3 Serg. & R. (Pa.) 319; Lilly *v.* Paschal, 2 Serg. & R. (Pa.) 394; Clark *v.* Hackethorn, 3 Yeates (Pa.) 269; Mobley *v.* Oeker, 3 Yeates (Pa.) 200; Ewing *v.* Barton, 2 Yeates (Pa.) 318; Drinker *v.* Holliday, 2 Yeates (Pa.) 87; Lowrey *v.* Gibson, 2 Yeates (Pa.) 81; Irwin *v.* Nicholls, 1 Yeates (Pa.) 293; Blaine *v.* Crawford, 1 Yeates (Pa.) 287.

but after title to land becomes vested under a grant from the state, there can be no abandonment thereof in the absence of adverse possession.[28] A failure to list land for taxation does not authorize an inference of a surrender of the possession,[29] nor will land which has been patented revest in the state merely because of the owner's neglect to pay the taxes.[30] A relinquishment of lands to the state, by the owner of a superior title, passes his claim to the government, and does not inure to the benefit of an inferior title,[31] and the state has the right to regrant the land.[32]

16. Reversion to State. Where land is granted by the state to persons named as trustees for a certain purpose and the object of the trust fails or becomes extinct, the title reverts to the state as a matter of law.[33] If land granted reverts to the state, the state only can take advantage thereof.[34] There is no presumption of a reversion to the state of a land grant, unless there be proof that neither the grantee nor his representatives or assigns have been heard of in the neighborhood of the land for a long series of years.[35]

17. Disposal of Land by Grantee. A deed made by the grantee of land from the state before the grant is issued takes precedence of a second deed made after the issuance of the grant,[36] and a statute granting land to persons on certain conditions, and providing that no sale of a claim thereto should be valid in law and binding upon the person making the sale until an unconditional deed should be obtained, has been held not to forbid the disposition of a claimant's interest in such land by will, where he was entitled to an unconditional deed at the time of making the will, although he had not yet received it.[37] A *bona fide* purchaser of lands under a state patent is entitled to protection.[38]

C. Land Grants in Particular States — 1. In General. There are a number of matters peculiar to the land grant systems of the various states, but as to the great majority of the states it is deemed sufficient to merely cite in the note some of the principal cases on the subject,[39] for in a great many states there is at

Mere verbal statements by a settler who has left his settlement, to the effect that he keeps up his claim, cannot prevent the relinquishment of possession from operating as an abandonment. Cluggage *v.* Duncan, 1 Serg. & R. (Pa.) 111.

A mere instruder on public land cannot set up an alleged abandonment by the owner of a location to defeat a title derived under it. Troutman *v.* May, 33 Pa. St. 455.

Forfeiture will not result from temporary absence.— Goodman *v.* Losey, 3 Watts & S. (Pa.) 526; McLaughlin *v.* Maybury, 4 Yeates (Pa.) 534; Clemmin *v.* Gottshall, 4 Yeates (Pa.) 330.

28. Calloway *v.* Sanford, (Tenn. Ch. App. 1895) 35 S. W. 776.

29. Smith *v.* Morrow, 7 T. B. Mon. (Ky.) 234.

30. Bear Valley Coal Co. *v.* Dewart, 95 Pa. St. 72.

31. Stith *v.* Hart, 6 T. B. Mon. (Ky.) 624.

32. Hardin *v.* Taylor, 4 T. B. Mon. (Ky.) 516.

33. Kennedy *v.* McElroy, 22 S. W. 442, 15 Ky. L. Rep. 168, 92 Ky. 72, 17 S. W. 202, 13 Ky. L. Rep. 378, holding that it is only in case of forfeiture of title by the grantee in consequence of some act of his that the forfeiture must be declared by a direct proceeding for that purpose.

34. American Dock, etc., Co. *v.* Public School Trustees, 39 N. J. Eq. 409.

35. Sutton *v.* McLeod, 29 Ga. 589.

36. Prigden *v.* Green, 80 Ga. 737, 7 S. E. 97 [*following* Thursby *v.* Myers, 57 Ga. 155; Dudley *v.* Bradshaw, 29 Ga. 17; Henderson *v.* Hackney, 23 Ga. 383, 68 Am. Dec. 529].

37. Dean *v.* Jugoe, (Tex. Civ. App. 1907) 103 S. W. 195.

38. Austin *v.* Dean, 40 Mich. 386.

39. See the following cases:

Arkansas.— Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20; Williams *v.* State, 70 Ark. 290, 88 S. W. 980; St. Louis Refrigerator, etc., Co. *v.* Langley, 66 Ark. 48, 51 S. W. 68; State *v.* Hicks, 53 Ark. 238, 13 S. W. 704; Winter *v.* Arnold, (1890) 13 S. W. 509; Thomas *v.* Joyner, 53 Ark. 22, 13 S. W. 391; Wilson *v.* State, 47 Ark. 199, 1 S. W. 71; Walker *v.* Taylor, 43 Ark. 543; Douglass *v.* Flynn, 43 Ark. 398; Worthen *v.* Ratcliffe, 42 Ark. 330; McCauley *v.* Six, 40 Ark. 244; Simpson *v.* Robinson, 37 Ark. 132; Crofton *v.* State, 34 Ark. 271; Surginer *v.* Paddock, 31 Ark. 528; O'Conner *v.* Auditor, 27 Ark. 242; Lacefield *v.* Stell, 21 Ark. 437. See 41 Cent. Dig. tit. "Public Lands," §§ 389, 390.

California.— See *infra*, III, C, 2.

Colorado.— *In re* State Lands, 18 Colo. 359, 32 Pac. 986; American Sulphur, etc., Co. *v.* Brennan, 20 Colo. App. 439, 79 Pac. 750; People *v.* Clough, 16 Colo. App. 120, 63 Pac. 1066; People *v.* Tynon, 2 Colo. App. 131, 29 Pac. 809. See 41 Cent. Dig. tit. "Public Lands," § 400.

Connecticut.— Huntington *v.* Edwards, 1

the present time little or no public land of the state subject to be taken up by

Conn. 564. See 41 Cent. Dig. tit. "Public Lands," § 401.

Delaware.— Records *v.* Melson, 1 Houst. 139; Barr *v.* West, 5 Harr. 319. See 41 Cent. Dig. tit. "Public Lands," § 402.

Georgia.— Houston *v.* State, 124 Ga. 417, 52 S. E. 757; Atkinson *v.* Cawley, 112 Ga. 485, 37 S. E. 715; Calhoun *v.* Cawley, 104 Ga. 335, 30 S. E. 773; Pritchett *v.* Ballard, 102 Ga. 210, 29 S. E. 210; Cannon *v.* Young, 92 Ga. 164, 17 S. E. 863; Prigden *v.* Green, 80 Ga. 737, 7 S. E. 97; Robinson *v.* Highsmith, 69 Ga. 753; Compton *v.* Killen, 60 Ga. 543; Thursby *v.* Myers, 57 Ga. 155; Dart *v.* Orme, 41 Ga. 376; Patterson *v.* Buchanan, 37 Ga. 560; Jackson *v.* Moye, 33 Ga. 296; Williamson *v.* Matthews, 32 Ga. 524; Doe *v.* Roe, 31 Ga. 593; Miller *v.* Woodard, 29 Ga. 753; Sutton *v.* McLeod, 29 Ga. 589; Dudley *v.* Bradshaw, 29 Ga. 17; Blackwell *v.* Bird, 27 Ga. 545; Tenant *v.* Blacker, 27 Ga. 418; Harris *v.* Dyer, 27 Ga. 211; McLeod *v.* Bozeman, 26 Ga. 177; Parker *v.* Hughes, 25 Ga. 374; Henderson *v.* Hackney, 23 Ga. 383, 68 Am. Dec. 529; Beaver *v.* Morrison, 22 Ga. 107, 68 Am. Dec. 486; Martin *v.* Anderson, 21 Ga. 301; Vickery *v.* Scott, 20 Ga. 795; McRory *v.* Sykes, 20 Ga. 571; Walker *v.* Wells, 17 Ga. 547, 63 Am. Dec. 252; Sanders *v.* Davison, 16 Ga. 537; Tison *v.* Yawn, 15 Ga. 491, 60 Am. Dec. 708; Robert *v.* Palmer, 14 Ga. 349; Doe *v.* Roe, 14 Ga. 252; Sykes *v.* Doe, 10 Ga. 465, 54 Am. Dec. 402; Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379; Lamb *v.* Harris, 8 Ga. 546; Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210; Brunswick *v.* Dart, R. M. Charlt. 497; Patterson *v.* Winn, 11 Wheat. (U. S.) 380, 6 L. ed. 500. See 41 Cent. Dig. tit. "Public Lands," §§ 403–408.

Illinois.— Hall *v.* Jarvis, 65 Ill. 302; Rhinehart *v.* Schuyler, 7 Ill. 473. See 41 Cent. Dig. tit. "Public Lands," § 409.

Indiana.— Vannoy *v.* Blessing, 36 Ind. 349; Smith *v.* Talbott, 11 Ind. 144. See 41 Cent. Dig. tit. "Public Lands," § 410.

Iowa.— Trimble *v.* Shaffer, 3 Greene 233.

Kansas.— *In re* Cunningham, 14 Kan. 416.

Kentucky.— Kentucky Union Co. *v.* Cornett, 112 Ky. 677, 66 S. W. 728, 23 Ky. L. Rep. 1922; American Assoc. *v.* Innis, 109 Ky. 595, 60 S. W. 388, 22 Ky. L. Rep. 1196; Gibson *v.* Board, 102 Ky. 505, 43 S. W. 684, 19 Ky. L. Rep. 1568; Terry *v.* Johnson, 96 Ky. 95, 27 S. W. 984, 16 Ky. L. Rep. 307; Bryant *v.* Wood, 90 Ky. 530, 14 S. W. 498, 12 Ky. L. Rep. 454; Goosling *v.* Smith, 90 Ky. 157, 13 S. W. 437, 11 Ky. L. Rep. 991; Cox *v.* Prewitt, 88 Ky. 156, 10 S. W. 432, 10 Ky. L. Rep. 734; Alexander *v.* Noland, 88 Ky. 143, 10 S. W. 423, 10 Ky. L. Rep. 694; Preston *v.* Preston, 85 Ky. 16, 2 S. W. 501, 8 Ky. L. Rep. 623; Roberts *v.* Davidson, 83 Ky. 279; Kirk *v.* Williamson, 82 Ky. 161; Register *v.* Reid, 9 Bush 103; Bowman *v.* Eggner, 7 Bush 68; McMillan *v.* Hutcheson, 4 Bush 611; Jones *v.* McCauley, 2 Duv. 14; Cobb *v.* Stewart, 4 Metc. 255, 83 Am. Dec. 465; Flippin *v.* Hays, 3 Metc. 215; Russell *v.* Mark, 3 Metc. 37; Vincent *v.* Eaves, 1 Metc. 247; Parker *v.* Patrick, 16 B. Mon. 567; Franklin Academy *v.* Hall, 16 B. Mon. 472; Doe *v.* Thomason, 11 B. Mon. 235; Hart *v.* Rogers, 9 B. Mon. 418; Whitley *v.* Bramble, 9 B. Mon. 143; Campbell *v.* Thomas, 9 B. Mon. 82; Rountree *v.* Barton, 8 B. Mon. 627; Davis *v.* Stafford, 8 B. Mon. 274; Camp *v.* Prather, 7 B. Mon. 599; Sutton *v.* Menser, 6 B. Mon. 433; Aulick *v.* Colvin, 6 B. Mon. 289, 43 Am. Dec. 164; Waller *v.* Logan, 5 B. Mon. 515; Kennedy *v.* Kennedy, 4 B. Mon. 396; Rays *v.* Woods, 2 B. Mon. 217; Gray *v.* Gray, 2 B. Mon. 200; Cardwell *v.* Payne, 1 B. Mon. 85; Redd *v.* Martin, 9 Dana 420; Derrington *v.* Goodman, 8 Dana 174; Rollins *v.* Clark, 8 Dana 15; Gossom *v.* Sharp, 7 Dana 140; Harrison *v.* Woodruff, 6 Dana 188; Johnson *v.* Gresham, 5 Dana 542; Burgess *v.* Tipton, 5 Dana 540; White *v.* Hardin, 5 Dana 141; McGowan *v.* Crooks, 5 Dana 65; Boone *v.* Helm, 4 Dana 403; Pearson *v.* Baker, 4 Dana 321; Barclay *v.* Hendrick, 3 Dana 378; Cardwell *v.* Strother, 2 Dana 439; Doe *v.* Buford, 1 Dana 481; Rice *v.* Williams, 1 Dana 192; Hall *v.* Pearl, 7 J. J. Marsh. 573; White *v.* Bates, 7 J. J. Marsh. 538; Underwood *v.* Crutcher, 7 J. J. Marsh. 529; Taylor *v.* Watkins, 7 J. J. Marsh. 363; Downing *v.* Pigman, 6 J. J. Marsh. 253; Green *v.* McKinney, 6 J. J. Marsh. 193; Stansberry *v.* Pope, 6 J. J. Marsh. 189; Buford *v.* Gaines, 6 J. J. Marsh. 34; Beard *v.* Russell, 5 J. J. Marsh. 221; Jones *v.* Chiles, 4 J. J. Marsh. 610; Overley *v.* Payne, 3 J. J. Marsh. 717; Patterson *v.* Trabue, 3 J. J. Marsh. 598; McDowell *v.* Kenney, 3 J. J. Marsh. 516; Hart *v.* Young, 3 J. J. Marsh. 408; Trabue *v.* Smeltzer, 3 J. J. Marsh. 333; McMahon *v.* Jones, 3 J. J. Marsh. 294; Taylor *v.* Hawkins, 2 J. J. Marsh. 344; Skinner *v.* Ingram, 2 J. J. Marsh. 210; Wallace *v.* Maxwell, 1 J. J. Marsh. 447; Parker *v.* Marshall, 1 J. J. Marsh. 353; Woodson *v.* Buford, 7 T. B. Mon. 417; Smith *v.* Morrow, 7 T. B. Mon. 234; Bowlin *v.* Pollock, 7 T. B. Mon. 26; Sharp *v.* Lexington, 7 T. B. Mon. 22; Stith *v.* Hart, 6 T. B. Mon. 624; Blight *v.* Banks, 6 T. B. Mon. 192, 17 Am. Dec. 136; Adams *v.* Logan, 6 T. B. Mon. 175; Moore *v.* Smith, 6 T. B. Mon. 62; Currie *v.* Tibbs, 5 T. B. Mon. 440; Seay *v.* Walton, 5 T. B. Mon. 368; Stewart *v.* Clark, 5 T. B. Mon. 366; Robinson *v.* Neal, 5 T. B. Mon. 212; Winn *v.* Davidson, 5 T. B. Mon. 162; Alexander *v.* Lively, 5 T. B. Mon. 159, 17 Am. Dec. 50; Bowman *v.* Violet, 4 T. B. Mon. 350; Humphreys *v.* Lewis, 4 T. B. Mon. 337; Withers *v.* Thompson, 4 T. B. Mon. 323; Estill *v.* Patrick, 4 T. B. Mon. 306; Shrowyer *v.* Cates, 4 T. B. Mon. 300; Hawkins *v.* Marshall, 4 T. B. Mon. 285; Thompson *v.* Daugherty, 4 T. B. Mon. 69; Jones *v.* Chiles, 3 T. B. Mon. 340; Stevens *v.* Terrel, 3 T. B. Mon. 131; Hite *v.* Lytle, 3 T. B. Mon. 120; Perry *v.* Hogg, 2 T. B. Mon. 112; Botts *v.* Chiles, 2 T. B. Mon. 36; Cates *v.* Raleigh, 1 T. B. Mon. 164; Creighton *v.* Bilbo, 1 T. B. Mon. 138; Breckinridge *v.* Hite, 1 T. B. Mon. 59;

settlers or granted otherwise than by an ordinary conveyance in which the state is

Meredith *v.* Kennedy, Litt. Sel. Cas. 516; Marshall *v.* Campbell, Litt. Sel. Cas. 496; McConnell *v.* Brown, Litt. Sel. Cas. 459; Holder *v.* Jouitt, Litt. Sel. Cas. 381; Bibb *v.* Pickett, Litt. Sel. Cas. 309; Guffy *v.* Herndon, Litt. Sel. Cas. 242; Henry *v.* Sturgis, Litt. Sel. Cas. 231; Gray *v.* Wells, Litt. Sel. Cas. 221; McNitt *v.* Logan, Litt. Sel. Cas. 60; Hunter *v.* Lynch, Litt. Sel. Cas. 35; Hardin *v.* Register, Litt. Sel. Cas. 28; Cole *v.* Damron, 5 Litt. 192; Meriwether *v.* Phillips, 5 Litt. 182; Shortridge *v.* Voorhies, 5 Litt. 54; Shields *v.* Dodd, 5 Litt. 25; McComb *v.* Sharp, 5 Litt. 16; Bodley *v.* Desha, 4 Litt. 291; Davis *v.* Gray, 3 Litt. 450; Powers *v.* Marshall, 3 Litt. 438; McIlhenny *v.* Biggerstaff, 3 Litt. 155; Biggerstaff *v.* McIlhenny, 3 Litt. 148; Jackman *v.* Walker, 3 Litt. 100; Fowler *v.* Gaines, 3 Litt. 73; Smith *v.* Lockridge, 3 Litt. 19; Crist *v.* Brashears, 3 Litt. 17; Clay *v.* Miller, 2 Litt. 279; Fowler *v.* Combs, 2 Litt. 271; Knox *v.* Gaines, 2 Litt. 238; Jones *v.* Plummer, 2 Litt. 161; Smith *v.* Nowells, 2 Litt. 159; Meriwether *v.* Davidge, 2 Litt. 38; Lewis *v.* Pickett, 2 Litt. 35; Winslow *v.* Holder, 2 Litt. 33; Anderson *v.* Gore, 2 Litt. 27; Redd *v.* Martin. 1 Litt. 399; McClung *v.* Overton, 1 Litt. 186; Ball *v.* Young, 1 Litt. 114; Rice *v.* Welch, 1 Litt. 74; Smith *v.* Crow, 3 A. K. Marsh. 603; Loftus *v.* Mitchel, 3 A. K. Marsh. 594; Horine *v.* Craig, 3 A. K. Marsh. 587; Morgan *v.* Mullins, 3 A. K. Marsh. 580; Theobalds *v.* Fowler, 3 A. K. Marsh. 577; Bulor *v.* McCawley, 3 A. K. Marsh. 573; Helm *v.* Crawford, 3 A. K. Marsh. 570; Clay *v.* McKinney, 3 A. K. Marsh. 568; Taylor *v.* Alexander, 3 A. K. Marsh. 501; Campbell *v.* Beatty, 3 A. K. Marsh. 213; McCracken *v.* Beall, 3 A. K. Marsh. 208; Cates *v.* Loftus, 3 A. K. Marsh. 202; Parker *v.* Stephens, 3 A. K. Marsh. 197; Reed *v.* Denwiddie, 3 A. K. Marsh. 195; Pope *v.* Garret, 3 A. K. Marsh. 194; Findlay *v.* Harlan, 3 A. K. Marsh. 188; Comb *v.* Hite, 3 A. K. Marsh. 186; Bowman *v.* Bartlett, 3 A. K. Marsh. 86; Finlay *v.* Humble, 2 A. K. Marsh. 569; Dallam *v.* Handley, 2 A. K. Marsh. 418; Haws *v.* Marshall, 2 A. K. Marsh. 413; Banta *v.* Clay, 2 A. K. Marsh. 409; Meaux *v.* Haggard, 2 A. K. Marsh. 407; Walker *v.* Monroe, 2 A. K. Marsh. 402; Barbour *v.* Foster, 2 A. K. Marsh. 400; Yocum *v.* Renfroe, 2 A. K. Marsh. 395; Myers *v.* Hite, 2 A. K. Marsh. 393; Shields *v.* Bryant, 2 A. K. Marsh. 342; Pitman *v.* Caldwell, 2 A. K. Marsh. 263; Cowan *v.* Hite, 2 A. K. Marsh. 238; Steele *v.* Payne, 2 A. K. Marsh. 187; Steele *v.* McDowell, 2 A. K. Marsh. 184; Finlay *v.* Granger, 2 A. K. Marsh. 175; Withers *v.* Anderson, 2 A. K. Marsh. 173; Banta *v.* Calhoun, 2 A. K. Marsh. 166; Clarke *v.* Markham, 2 A. K. Marsh. 164; Techenor *v.* Turnham, 2 A. K. Marsh. 163; Smith *v.* Norvel, 2 A. K. Marsh. 161; Allen County Justices *v.* Allen, 2 A. K. Marsh. 30; Brown *v.* Starke, 2 A. K. Marsh. 29; Kenton *v.* Taylor, 2 A. K. Marsh. 1; Wither *v.* Steele, 1 A. K. Marsh. 615; Ray *v.* McIlroy, 1 A. K. Marsh. 612; Ogden *v.* Spring, 1 A. K. Marsh. 610; Young *v.* Wilson, 1 A. K. Marsh. 609; Scroggs *v.* Bodley, 1 A. K. Marsh. 605; Cobb *v.* Thompson, 1 A. K. Marsh. 507; Clay *v.* Ballenger, 1 A. K. Marsh. 462; Register *v.* Haggin, 1 A. K. Marsh. 446; Shackleford *v.* Kennedy, 1 A. K. Marsh. 435; Patrick *v.* McMillan, 1 A. K. Marsh. 418; Ellis *v.* Horine, 1 A. K. Marsh. 417; Coleman *v.* Henderson, 1 A. K. Marsh. 412; Forbis *v.* Bowen, 1 A. K. Marsh. 407; Calk *v.* Lynn, 1 A. K. Marsh. 346; Miller *v.* Frame, 1 A. K. Marsh. 284; Bealle *v.* Houston, 1 A. K. Marsh. 281; Spurr *v.* Trimble, 1 A. K. Marsh. 278; Howard *v.* Todd, 1 A. K. Marsh. 275; McCracken *v.* Church, 1 A. K. Marsh. 273; Debell *v.* Marshall, 1 A. K. Marsh. 272; Marshall *v.* Russell, 1 A. K. Marsh. 271; Smith *v.* Reed, 1 A. K. Marsh. 259; Lewis *v.* McGee, 1 A. K. Marsh. 199; Fishback *v.* Major, 1 A. K. Marsh. 147; Moore *v.* Dodd, 1 A. K. Marsh. 140; Bodley *v.* Harris, 1 A. K. Marsh. 134; Galloway *v.* Webb, 1 A. K. Marsh. 129; Bradford *v.* Patterson, 4 Bibb 584; Calk *v.* Reed, 4 Bibb 578; Hanley *v.* Hardin, 4 Bibb 576; McClarey *v.* Bowmar, 4 Bibb 575; Fowler *v.* Caldwell, 4 Bibb 573; Morgan *v.* Fox, 4 Bibb 565; Nelson *v.* Wilson, 4 Bibb 561; Sharp *v.* Curds, 4 Bibb 547; Barnett *v.* Bell, 4 Bibb 447; Thomas *v.* Machis, 4 Bibb 412; Hansford *v.* Minor, 4 Bibb 385; Morrison *v.* Coghill, 4 Bibb 379; Woolfolk *v.* Trotter, 4 Bibb 378; Handley *v.* Young, 4 Bibb 376; Phelps *v.* Wilkeson, 4 Bibb 373; Brisco *v.* Prewet, 4 Bibb 370; Fearn *v.* Taylor, 4 Bibb 363; Kinkaid *v.* Thompson, 4 Bibb 361; Fowler *v.* Lynch, 4 Bibb 163; Clay *v.* Reed, 4 Bibb 162; Crockett *v.* Greenup, 4 Bibb 158; Overton *v.* Roberts, 4 Bibb 154; Clay *v.* Harris, 4 Bibb 153; Trabue *v.* Holt, 4 Bibb 150; Ashley *v.* Moore, 4 Bibb 147; Merry *v.* Swearingen, 4 Bibb 141; Smith *v.* Dobbins, 4 Bibb 139; Wolfscale *v.* Meriwether, 4 Bibb 138; Kenny *v.* McKinney, 4 Bibb 136; Johnson *v.* Marshall, 4 Bibb 133; Cullum *v.* Walton, 4 Bibb 132; May *v.* Mason, 4 Bibb 128; Todd *v.* Fry, 4 Bibb 110; Stephens *v.* Hedden, 4 Bibb 107; Hanson *v.* Lashbrooke, 3 Bibb 543; White *v.* Wilson, 3 Bibb 539; Oldham *v.* Rowan, 3 Bibb 534; Speed *v.* Patton, 3 Bibb 426; Snoddy *v.* Barnett, 3 Bibb 424; Hart *v.* Benton, 3 Bibb 420; Tandy *v.* Smith, 3 Bibb 418; Roberts *v.* Hardin, 3 Bibb 416; Bowman *v.* Brewer, 3 Bibb 411; Lipscomb *v.* Grubbs, 3 Bibb 392; Fowler *v.* Halbert, 3 Bibb 384; Hughes *v.* Collier, 3 Bibb 381; Hickman *v.* Blythe, 3 Bibb 188; Harris *v.* Johnson, 3 Bibb 165; Hardin *v.* Hargin, 3 Bibb 163; Carson *v.* Hanway, 3 Bibb 160; Allen *v.* Craig, 3 Bibb 156; Smith *v.* Walton, 3 Bibb 152; Blaine *v.* Thompson, 3 Bibb 142; Marshall *v.* Dupuy, 3 Bibb 131; Carland *v.* Rowland, 3 Bibb 125; Bowen *v.* Forbes, 3 Bibb 122; Bush *v.* Jameson, 3 Bibb 118; Marshall *v.* Rough, 2 Bibb 628; Manifee *v.* Conn, 2 Bibb 623; Allen *v.* Crockett, 2 Bibb 618; Greenup *v.* Sneed, 2 Bibb 527; Allen *v.* Blanton, 2 Bibb 523; Starling *v.* Hardin, 2 Bibb 519; Clinkingbeard *v.* Kenny, 2 Bibb 512; Young *v.*

grantor, and practically all questions relating to state land grants have been

Sympson, 2 Bibb 509; Brooks *v.* Clay, 2 Bibb 499; Bullitt *v.* Thorp, 2 Bibb 490; McMin *v.* Stafford, 2 Bibb 487; McKee *v.* Bodley, 2 Bibb 481; Kincaid *v.* Blythe, 2 Bibb 479; Hornbeck *v.* Stansbury, 2 Bibb 476; Kennedy *v.* Bruice, 2 Bibb 371; Greenup *v.* Lyne, 2 Bibb 369; Patrick *v.* Bogie, 2 Bibb 366; Doolin *v.* Farrow, 2 Bibb 361; Harrison *v.* Deremiah, 2 Bibb 349; Walker *v.* Montgomery, 2 Bibb 253; Bowman *v.* Melton, 2 Bibb 151; Hite *v.* Graham, 2 Bibb 141; Buckner *v.* Feagins, 2 Bibb 138; Davis *v.* Davis, 2 Bibb 134; Speed *v.* Severe, 2 Bibb 131; Coleman *v.* Talbot, 2 Bibb 129, 4 Am. Dec. 687; Steel *v.* McDowell, 2 Bibb 123; Preeble *v.* Vanhoozer, 2 Bibb 118; Shannon *v.* Buford, 2 Bibb 114; Davis *v.* Bryant, 2 Bibb 110; Grubbs *v.* Rice, 2 Bibb 107; Wooley *v.* Bruce, 2 Bibb 105; Patrick *v.* Marshall, 2 Bibb 40, 4 Am. Dec. 670; Chinowith *v.* Williamson, 2 Bibb 36; Com. *v.* Clark, 1 Bibb 531; Fitche *v.* Bullock, 1 Bibb 228; Galloway *v.* Neale, 1 Bibb 137; McGee *v.* Thompson, 1 Bibb 131; Smith *v.* Turley, 1 Bibb 125; Hogland *v.* Shepherd, 1 Bibb 121; Wilson *v.* McDowell, 1 Bibb 110; Green *v.* Watson, 1 Bibb 106; Black *v.* Botts, 1 Bibb 95; Swearingen *v.* Smith, 1 Bibb 92; Hathaway *v.* Forbes, 1 Bibb 90; Bowling *v.* Helm, 1 Bibb 88; Mosby *v.* Carland, 1 Bibb 84; McClure *v.* Winlock, 1 Bibb 80; Whitaker *v.* Hall, 1 Bibb 72; Bush *v.* Todd, 1 Bibb 64; Payton *v.* Goodlet, 1 Bibb 63; Jackson *v.* Johnson, 1 Bibb 58; McClure *v.* Byne, 1 Bibb 56; McCrackin *v.* Steele, 1 Bibb 46; Williams *v.* Taylor, 1 Bibb 41; Cleland *v.* Gray, 1 Bibb 35; Wilson *v.* McGee, 1 Bibb 34; Ward *v.* Lee, 1 Bibb 32; Ward *v.* Lee, 1 Bibb 18; Ward *v.* Lee, 1 Bibb 17; Craig *v.* Machir, 1 Bibb 10; Evans *v.* Manson, 1 Bibb 4; Estill *v.* Hart, Hard. 567; McMillen *v.* Miller, Hard. 494; Speed *v.* Lewis, Hard. 472; Jasper *v.* Quarles, Hard. 461; Lee *v.* Wall, Hard. 450; Crow *v.* Harrod, Hard. 435; Cox *v.* Smyth, Hard. 411; Craig *v.* Cogar, Hard. 383; Markham *v.* McGee, Hard. 374; Hickman *v.* Boffman, Hard. 348; Craig *v.* Baker, Hard. 281; Couchman *v.* Thomas, Hard. 261; Bosworth *v.* Maxwell, Hard. 205; Alstods *v.* Miller, Hard. 193; Smith *v.* Smith, Hard. 190; Cartright *v.* Collier, Hard. 179; Craig *v.* Doran, Hard. 139; Craig *v.* Rogers, Hard. 137; Helm *v.* Craig, Hard. 110; Patterson *v.* Bradford, Hard. 101; Hart *v.* Bodley, Hard. 98; Moore *v.* Whitledge, Hard. 89; Taylor *v.* Kincaid, Hard. 82; Key *v.* Matson, Hard. 70; Smith *v.* Morrow, Hard. 58; Higgin *v.* Darneal, Hard. 52; Currens *v.* Hart, Hard. 37; Talbot *v.* Calloway, Hard. 35; Drake *v.* Ramsey, Hard. 34; Moore *v.* Green, Hard. 32; Miller *v.* Haw, Hard. 30; McDermed *v.* McCastland, Hard. 18; Greenup *v.* Kenton, Hard. 12; Kennedy *v.* Payne, Hard. 10; McCrackin *v.* Craig, Ky. Dec. 339; Morgan *v.* Robinson, Ky. Dec. 228; Tandy *v.* Bledsoe, Ky. Dec. 198; Gaither *v.* Tilford, Ky. Dec. 159; Crow *v.* Brown, Ky. Dec. 102; Kenney *v.* Clinkinbeard, Ky. Dec. 86; Speed *v.* Wilson, Ky. Dec. 80; Speed *v.* Wilson, Ky. Dec. 78; Jones *v.* Taylor, Ky. Dec. 71; Woods *v.* Patrick, Ky. Dec. 54; Johnson *v.* Brown, Ky. Dec. 49; South *v.* Bowles, Ky. Dec. 23; Kilgore *v.* Kelly, Ky. Dec. 22; Moore *v.* Harris, Ky. Dec. 18; Bryan *v.* Wallace, Ky. Dec. 7; Fox *v.* Holeman, Hughes 399; Bryan *v.* Wallace, Hughes 369; Carter *v.* Odham, Hughes 345; McClanahan *v.* Litton, Hughes 337; McClanahan *v.* Berry, Hughes 323; McConnell *v.* Kenton, Hughes 257; Whitledge *v.* Kenny, Hughes 211; Cleland *v.* Thorp, Hughes 192; Myers *v.* Speed, Hughes 182; Jackson *v.* Wilson, Hughes 155; Owens *v.* Whitaker, Hughes 123; Frye *v.* Essry, Hughes 103; Miller *v.* Fox, Hughes 100; Whitledge *v.* McClanahan, Hughes 95; Swearingem *v.* Briscoe, Hughes 91; Consilla *v.* Briscoe, Hughes 84; Briscoe *v.* Speed, Hughes 81; Marshall *v.* Clark, Hughes 77; Dryden *v.* McGee, Hughes 71; Young *v.* McKee, Hughes 68; Dougherty *v.* Crow, Hughes 42; Madison *v.* James, Hughes 40; Walker *v.* Orr, Hughes 38; Jackman *v.* Merewether, Hughes 32; Hite *v.* Stevenson, Hughes 31; Hite *v.* Harrison, Hughes 29; Isaacs *v.* Willis, Hughes 25; Reed *v.* Laurence, Hughes 19; Morgan *v.* Dryden, Hughes 15; Eagan *v.* Bowdry, Hughes 12; Swearingen *v.* Higgins, Hughes 7; Hinton *v.* Stewart, Hughes 4; Herndon *v.* Hogan, Hughes 3; Hoy *v.* Boggs, Hughes 1; Fuller *v.* Kessee, 104 S. W. 700, 31 Ky. L. Rep. 1099; Ware *v.* Hager, 103 S. W. 283, 31 Ky. L. Rep. 728; Gray *v.* Peay, 82 S. W. 1006, 26 Ky. L. Rep. 989; Combs *v.* Duff, 80 S. W. 165, 25 Ky. L. Rep. 1968; Bryant *v.* Kendall, 79 S. W. 186, 25 Ky. L. Rep. 1859; Hall *v.* Blanton, 77 S. W. 1110, 25 Ky. L. Rep. 1400; Altemus *v.* Potter, 69 S. W. 1083, 24 Ky. L. Rep. 795; Bush *v.* Coomer, 69 S. W. 793, 24 Ky. L. Rep. 702; Slusher *v.* Simpson, 67 S. W. 380, 23 Ky. L. Rep. 2252; Eastern Kentucky Land Co. *v.* Ferguson, 65 S. W. 830, 24 Ky. L. Rep. 43; Potter *v.* Lewis, 64 S. W. 958, 23 Ky. L. Rep. 1218; Uhl *v.* Reynolds, 64 S. W. 498, 23 Ky. L. Rep. 759; Nichels *v.* Com., 64 S. W. 448, 23 Ky. L. Rep. 778; Ohio, etc., R. Co. *v.* Wooten, 46 S. W. 681, 20 Ky. L. Rep. 383; Boreing *v.* Hurst, 45 S. W. 522, 20 Ky. L. Rep. 184; Miracle *v.* Arnett, 44 S. W. 641, 19 Ky. L. Rep. 1854; Gillum *v.* Catron, 29 S. W. 302, 16 Ky. L. Rep. 575; McGuire *v.* Kirk, 26 S. W. 585, 16 Ky. L. Rep. 87; Adams *v.* Frazier, 20 S. W. 268, 14 Ky. L. Rep. 311; Rains *v.* King, 19 S. W. 329, 14 Ky. L. Rep. 49; King *v.* Hunt, 13 S. W. 214, 11 Ky. L. Rep. 802; McQuady *v.* Mattingly, 12 S. W. 758, 11 Ky. L. Rep. 600; Cornett *v.* Dixon, 11 S. W. 660, 11 Ky. L. Rep. 315; Bentley *v.* Childres, 7 S. W. 628, 9 Ky. L. Rep. 954; Porterfield *v.* Clark, 2 How. (U. S.) 76, 11 L. ed. 185; Clark *v.* Smith, 13 Pet. (U. S.) 195, 10 L. ed. 123; Garnett *v.* Jenkins, 8 Pet. (U. S.) 75, 8 L. ed. 871; Holmes *v.* Trout, 7 Pet. (U. S.) 171, 8 L. ed. 647 [*affirming* 12 Fed. Cas. No. 6,645, 1 McLean 1]; Peyton *v.* Stith, 5 Pet. (U. S.) 485, 8 L. ed. 200; Hunt *v.* Wickliffe, 2 Pet. (U. S.) 201, 7 L. ed. 397;

finally settled and are not likely to arise again, while in other states the statutes

Miller *v.* McIntire, 11 Wheat. (U. S.) 441, 6 L. ed. 515; Taylor *v.* Owing, 11 Wheat. (U. S.) 226, 6 L. ed. 460; Littlepage *v.* Fowler, 11 Wheat. (U. S.) 215, 6 L. ed. 458; McDowell *v.* Peyton, 10 Wheat. (U. S.) 454, 6 L. ed. 364; Elmendorf *v.* Taylor, 10 Wheat. (U. S.) 152, 6 L. ed. 289; Blunt *v.* Smith, 7 Wheat. (U. S.) 248, 5 L. ed. 446; Perkins *v.* Ramsey, 5 Wheat. (U. S.) 269, 5 L. ed. 84; Shipp *v.* Miller, 2 Wheat. (U. S.) 316, 4 L. ed. 248; Johnson *v.* Pannel, 2 Wheat. (U. S.) 206, 4 L. ed. 221; Taylor *v.* Walton, 1 Wheat. (U. S.) 141, 4 L. ed. 56; Matson *v.* Hord, 1 Wheat. (U. S.) 130, 4 L. ed. 53; Finley *v.* Williams, 9 Cranch (U. S.) 164, 3 L. ed. 691; Massie *v.* Watts, 6 Cranch (U. S.) 148, 3 L. ed. 181; Taylor *v.* Brown, 5 Cranch (U. S.) 234, 3 L. ed. 88; Bodley *v.* Taylor, 5 Cranch (U. S.) 191, 3 L. ed. 75; Marshall *v.* Currie, 4 Cranch (U. S.) 172, 2 L. ed. 585; Wilson *v.* Speed, 3 Cranch (U. S.) 283, 2 L. ed. 441; Wilson *v.* Mason, 1 Cranch (U. S.) 44, 2 L. ed. 29; Bramblet *v.* Davis, 141 Fed. 776, 72 C. C. A. 204; Lockard *v.* Asher Lumber Co., 131 Fed. 689, 65 C. C. A. 517 [*reversing* 123 Fed. 480]; Liggett *v.* Marshall, 15 Fed. Cas. No. 8,342. See 41 Cent. Dig. tit. "Public Lands," §§ 411–437.

Louisiana.— Freelsen *v.* Crandell, 120 La. 712, 45 So. 558; Darby *v.* Emma, 120 La. 684; 45 So. 548; Smith *v.* Crandall, 118 La. 1052, 43 So. 699; Darby *v.* Emmer, 118 La. 517, 43 So. 148; State *v.* Blanchard, 117 La. 91, 41 So. 363; State *v.* Smith, 111 La. 319, 35 So. 584; Bendich *v.* Scobel, 107 La. 242; 31 So. 703; Betz *v.* Illinois Cent. R. Co., 52 La. Ann. 893, 24 So. 644; White *v.* Leovy, 49 La. Ann. 1660, 22 So. 931; State *v.* Lanier, 47 La. Ann. 568, 17 So. 130; State *v.* Buck, 46 La. Ann. 656, 15 So. 531; Martin *v.* Walker, 43 La. Ann. 1019, 10 So. 365; Munday *v.* Muse, 15 La. Ann. 237; Mart *v.* Hamilton, 14 La. Ann. 774; Sage *v.* Cain, 14 La. Ann. 192; Franklin *v.* Woodland, 14 La. Ann. 188; Keller *v.* Loflin, 13 La. Ann. 185; Cragin *v.* Powell, 128 U. S. 691, 9 S. Ct. 203, 32 L. ed. 566. See 41 Cent. Dig. tit. "Public Lands," § 438.

Maine.— Lazell *v.* Boarcman, 103 Me. 292, 69 Atl. 97; Stetson *v.* Grant, 102 Me. 222, 66 Atl. 480; Banton *v.* Crosby, 95 Me. 429, 50 Atl. 86; Burleigh *v.* Mullen, 95 Me. 423, 50 Atl. 47; Donworth *v.* Sawyer, 94 Me. 242, 47 Atl. 521; Roberts *v.* Richards, 84 Me. 1, 24 Atl. 425; Stratton *v.* Cole, 78 Me. 553, 7 Atl. 472; Chandler *v.* Wilson, 77 Me. 76; Blake *v.* Bangor Sav. Bank, 76 Me. 377; Hinckley *v.* Haines, 69 Me. 76; European, etc., R. Co. *v.* Dunn, 60 Me. 453; State *v.* Patten, 49 Me. 383; Cary *v.* Whitney, 48 Me. 516; Scammon *v.* Scammon, 41 Me. 561; Rogers *v.* McPheters, 40 Me. 114; Dudley *v.* Greene, 35 Me. 14; *In re* Clifton, 33 Me. 369; Dillingham *v.* Smith, 30 Me. 370; Argyle *v.* Dwinel, 29 Me. 29; Farrar *v.* Loring, 26 Me. 202; Tilton *v.* Hunter, 24 Me. 29; Heald *v.* Hodgdon, 16 Me. 219; Hovey *v.* Deane, 15 Me. 216; Hovey *v.* Deane, 13 Me. 31; Copp *v.* Lamb, 12 Me. 312; Sargent *v.* Simpson, 8 Me. 148; State *v.* Baring, 8 Me. 135; Allen *v.* Littlefield, 7 Me. 220; Porter *v.* Griswold, 6 Me. 430; Lapish *v.* Wells, 6 Me. 175; Hill *v.* Dyer, 3 Me. 441; Winthrop *v.* Curtis, 3 Me. 110, 14 Am. Dec. 216; Bussey *v.* Luce, 2 Me. 367; Kennebec Purchase *v.* Lowell, 2 Me. 149. See 41 Cent. Dig. tit. "Public Lands," §§ 439–442.

Maryland.— Jay *v.* Van Bibber, 94 Md. 688, 51 Atl. 418; Koch *v.* Maryland Coal Co., 68 Md. 125, 11 Atl. 700; Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703; Armstrong *v.* Bittinger, 47 Md. 103; Goodsell *v.* Lawson, 42 Md. 348; Rayfield *v.* Dixon, 38 Md. 81; Armstrong *v.* Percy, 34 Md. 428; Hammond *v.* Morrison, 33 Md. 95; Baker *v.* Swan, 32 Md. 355; Smith *v.* Devecmon, 30 Md. 473; Stallings *v.* Ruby, 27 Md. 149; Patterson *v.* Gelston, 23 Md. 432; Gittings *v.* Moale, 21 Md. 135; U. S. *v.* Great Falls Mfg. Co., 21 Md. 119; Dorothy *v.* Hillert, 9 Md. 570; Houck *v.* Loveall, 8 Md. 63; Cook *v.* Carroll, 6 Md. 104; Hoye *v.* Swan, 5 Md. 237; Wilson *v.* Inloes, 6 Gill 121; Budd *v.* Brooke, 3 Gill 198, 43 Am. Dec. 321; Hoye *v.* Johnston, 2 Gill 291; Lee *v.* Hoye, 1 Gill 188; Steyer *v.* Hoye, 12 Gill & J. 202; Hammond *v.* Ridgely, 5 Harr. & J. 245, 9 Am. Dec. 522; Boring *v.* Lemmon, 5 Harr. & J. 223; Steuart *v.* Mason, 3 Harr. & J. 507; Hutchings *v.* Talbot, 3 Harr. & J. 378; Tenant *v.* Hambelton, 3 Harr. & J. 233; Singery *v.* Atty.-Gen., 2 Harr. & J. 487; Atty.-Gen. *v.* Jarrett, 2 Harr. & J. 472; Tolson *v.* Lanham, 2 Harr. & J. 174; Hammond *v.* Warfield, 2 Harr. & J. 151; Hammond *v.* Norris, 2 Harr. & J. 130; West *v.* Jarrett, 1 Harr. & J. 538; Jarrett *v.* West, 1 Harr. & J. 501; Garretson *v.* Cole, 1 Harr. & J. 370; Beall *v.* Beall, 1 Harr. & J. 346; Atty.-Gen. *v.* Snowden, 1 Harr. & J. 332; Ringgold *v.* Malott, 1 Harr. & J. 299; Howard *v.* Cromwell, 1 Harr. & J. 115; West *v.* Hughes, 1 Harr. & J. 6; Peter *v.* Mains, 4 Harr. & M. 423; Howard *v.* Cromwell, 4 Harr. & M. 325; Baker *v.* Naylor, 4 Md. Ch. 542; Wilson *v.* Markle, 4 Md. Ch. 534; Greene's Estate, 4 Md. Ch. 349; Jones *v.* Badley, 4 Md. Ch. 167; Smith *v.* Baker, 4 Md. Ch. 29; Chapman *v.* Hoskins, 2 Md. Ch. 485; Buckingham *v.* Dorsey, 1 Md. Ch. 31; *In re* Hughlett, 3 Bland 474; Baltimore *v.* McKim, 3 Bland 453; Baltimore, etc., R. Co. *v.* Hoye, 2 Bland 258; Cunningham *v.* Browning, 1 Bland 299; Hoffman *v.* Johnson, 1 Bland 103; Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170. See 41 Cent. Dig. tit. "Public Lands," §§ 443–451.

Massachusetts.— Thompson *v.* Bright, 1 Cush. 420; Ward *v.* Bartholomew, 6 Pick. 409; Foxcroft *v.* Mallett, 4 How. (U. S.) 353, 11 L. ed. 1008. See also Sargent *v.* Simpson, 8 Me. 148; Porter *v.* Griswold, 6 Me. 430; Chamberlain *v.* Bussey, 5 Me. 164. See 41 Cent. Dig. tit. "Public Lands," § 452.

Michigan.— Sanborn *v.* Loud, 150 Mich. 154, 113 N. W. 309, 121 Am. St. Rep. 614;

on the subject have been considered by the courts in so few cases that a discussion

Meagher *v.* Dumas, 143 Mich. 639, 107 N. W. 701; Gustin *v.* State Land Office Com'r, 126 Mich. 269, 85 N. W. 730; Foster *v.* Whelpley, 123 Mich. 350, 82 N. W. 123; Wait *v.* State Land Office Com'r, 87 Mich. 353, 49 N. W. 600; Webster *v.* Newell, 66 Mich. 503, 33 N. W. 535; Paine *v.* State Land Office Com'r, 66 Mich. 245, 33 N. W. 491; Bangs *v.* Stephenson, 63 Mich. 661, 30 N. W. 317; Potter *v.* State Land Office Com'r, 55 Mich. 485, 21 N. W. 902; Robertson *v.* State Land Office Com'r, 44 Mich. 274, 6 N. W. 659; Austin *v.* Dean, 40 Mich. 386; Romain *v.* Lewis, 39 Mich. 233; Bennett *v.* Dean, 35 Mich. 306; Atty.-Gen. *v.* Smith, 31 Mich. 359; People *v.* State Land Office Com'r, 23 Mich. 270; People *v.* Pritchard, 19 Mich. 470; People *v.* Pritchard, 17 Mich. 338. See 41 Cent. Dig. tit. "Public Lands," § 453.

Mississippi.— Cohn *v.* Pearl River Lumber Co., 80 Miss. 649, 32 So. 292; Cole *v.* Wineman, 80 Miss. 73, 31 So. 537; Warren County *v.* Nall, 78 Miss. 726, 29 So. 755; Holder *v.* Wineman, 76 Miss. 824, 25 So. 481; State *v.* Fitzgerald, 76 Miss. 502, 24 So. 872; Weiler *v.* Monroe County, 76 Miss. 492, 25 So. 352; State *v.* Mayes, 23 Miss. 516; Bingaman *v.* Phillips, 1 How. 285. See 41 Cent. Dig. tit. "Public Lands," § 454.

Missouri.— State *v.* Dines, 206 Mo. 649, 105 S. W. 722; Phillips *v.* Butler County, 187 Mo. 698, 86 S. W. 231; Massey *v.* Smith, 64 Mo. 347; Wickersham *v.* Woodbeck, 57 Mo. 59. See 41 Cent. Dig. tit. "Public Lands," § 455.

Montana.— State *v.* Wright, 17 Mont. 565, 44 Pac. 89.

Nebraska.— State *v.* Wenzel, 55 Nebr. 210, 75 N. W. 579; State Historical Assoc. *v.* Lincoln, 14 Nebr. 336, 15 N. W. 717; Blazier *v.* Johnson, 11 Nebr. 404, 9 N. W. 543. See 41 Cent. Dig. tit. "Public Lands," § 456.

Nevada.— State *v.* Preble, 20 Nev. 447, 14 Pac. 586; State *v.* Preble, 20 Nev. 38, 14 Pac. 584, 15 Pac. 470; State *v.* Preble, 18 Nev. 251, 2 Pac. 754; State *v.* Hatch, 15 Nev. 304; Street *v.* Lemon Mill, etc., Co., 9 Nev. 251; Neil *v.* Wynecoop, 9 Nev. 46; O'Neale *v.* Cleaveland, 3 Nev. 485; Brown *v.* Roberts, 1 Nev. 402; Desmond *v.* Stone, 1 Nev. 378. See 41 Cent. Dig. tit. "Public Lands, § 457.

New Hampshire.— Merrill *v.* Hilliard, 59 N. H. 481; Bellows *v.* Copp, 20 N. H. 492; Enfield Proprietors *v.* Day, 11 N. H. 520; Enfield Tp. Proprietors *v.* Permit, 8 N. H. 512, 31 Am. Dec. 207, 5 N. H. 280, 20 Am. Dec. 580; Thompson *v.* Carr, 5 N. H. 510; Woods *v.* Jackson Iron Mfg. Co., 30 Fed. Cas. No. 17,993, Holmes 379. See 41 Cent. Dig. tit. "Public Lands," § 458.

New Jersey.— State *v.* Railroad Taxation Com'r, 37 N. J. L. 240; Osborne *v.* Tunis, 25 N. J. L. 633; Townsend *v.* Brown, 24 N. J. L. 80; Lippincott *v.* Souder, 8 N. J. L. 161; American Dock, etc., Co. *v.* Public Schools Trustees, 39 N. J. Eq. 409, 35 N. J. Eq. 181; Central R. Co. *v.* Hetfield, 18 N. J. Eq. 323. See 41 Cent. Dig. tit. "Public Lands," § 459.

New York.— People *v.* Woodruff, 166 N. Y. 453, 60 N. E. 28 [*affirming* 57 N. Y. App. Div. 342, 68 N. Y. Suppl. 100, and *explaining* People *v.* Woodruff, 39 N. Y. App. Div. 123, 56 N. Y. Suppl. 681 (*affirmed* in 159 N. Y. 536, 53 N. E. 1129)] (grant of land under water within limits of city of New York); Decamp *v.* Dix, 159 N. Y. 436, 54 N. E. 63 [*affirming* 16 N. Y. App. Div. 528, 44 N. Y. Suppl. 1014]; New York Cent., etc., R. Co. *v.* Brockway Brick Co., 158 N. Y. 470, 53 N. E. 209 [*affirming* 10 N. Y. App. Div. 387, 41 N. Y. Suppl. 762]; Archibald *v.* New York Cent., etc., R. Co., 157 N. Y. 574, 52 N. E. 567 [*affirming* 1 N. Y. App. Div. 251, 37 N. Y. Suppl. 336]; Allen *v.* Land Office Com'rs, 38 N. Y. 312; Candee *v.* Hayward, 37 N. Y. 653 [*affirming* 34 Barb. 349]; Watkins *v.* Clough, 119 N. Y. App. Div. 527, 103 N. Y. Suppl. 270; Wheeler *v.* State, 97 N. Y. App. Div. 276, 90 N. Y. Suppl. 18 (claim for damages on failure of title); McCarty *v.* New York Cent., etc., R. Co., 73 N. Y. App. Div. 34, 76 N. Y. Suppl. 321; Killam *v.* State, 64 N. Y. App. Div. 243, 71 N. Y. Suppl. 1041 (claim for damages for failure of title); People *v.* Saxton, 15 N. Y. App. Div. 263, 44 N. Y. Suppl. 211 [*affirmed* in 154 N. Y. 748, 49 N. E. 1102 (grant of land under water); Clark *v.* Holdridge, 12 N. Y. App. Div. 613, 43 N. Y. Suppl. 115; Brady *v.* Begun, 36 Barb. 533; Candee *v.* Haywood, 34 Barb. 349 [*affirmed* in 37 N. Y. 653]; People *v.* Schermerhorn, 19 Barb. 540; Sedgwick *v.* Stanton, 18 Barb. 473 [*affirmed* in 14 N. Y. 289]; Hill *v.* Draper, 10 Barb. 454; Towle *v.* Palmer, 1 Rob. 437; *In re* Jerome Ave., 54 Misc. 345, 105 N. Y. Suppl. 1009; Morgan *v.* Turner, 35 Misc. 399, 71 N. Y. Suppl. 996 [*affirmed* in 81 N. Y. App. Div. 645, 81 N. Y. Suppl. 1136]; Andrus *v.* Wheeler, 18 Misc. 646, 42 N. Y. Suppl. 525; *In re* Harris, 12 Misc. 223, 33 N. Y. Suppl. 1102 [*affirmed* in 90 Hun 525, 36 N. Y. Suppl. 29]; Jackson *v.* Caywood, 7 Wend. 246; Jackson *v.* Miller, 6 Wend. 228, 21 Am. Dec. 316; Jackson *v.* Wendell, 5 Wend. 142 [*affirmed* in 8 Wend. 183, 22 Am. Dec. 635]; Jackson *v.* Oltz, 2 Wend. 537; Jackson *v.* Colver, 1 Wend. 488; Jackson *v.* Miller, 6 Cow. 751; Jackson *v.* Marsh, 6 Cow. 281; Jackson *v.* Douglass, 5 Cow. 458; Jackson *v.* Davis, 5 Cow. 123, 15 Am. Dec. 451; Wendell *v.* Wadsworth, 20 Johns. 659; Jackson *v.* Skeels, 19 Johns. 198; Jackson *v.* Cole, 16 Johns. 257; Jackson *v.* Blodget, 16 Johns. 172; Smith *v.* Van Dursen, 15 Johns. 343; Jackson *v.* Howe, 14 Johns. 405; Brink *v.* Richtmyer, 14 Johns. 255; Jackson *v.* Harter, 14 Johns. 226; Jackson *v.* Ambler, 14 Johns. 96; Heath *v.* Ross, 12 Johns. 140; Jackson *v.* Hart, 12 Johns. 77, 7 Am. Dec. 280; Jackson *v.* Ransom, 10 Johns. 407; Jackson *v.* Stanley, 10 Johns. 133, 6 Am. Dec. 319; Jackson *v.* Lawton, 10 Johns. 23, 6 Am. Dec. 311; Jackson *v.* Smith, 9 Johns. 100; Jackson *v.* Willson, 9 Johns. 92; Jackson *v.* Swartwout, 8 Johns. 490; Jackson *v.* McKee, 8 Johns. 429; Jackson *v.* Ogden, 7

of those cases apart from the provisions which have not been passed upon by the

Johns. 238; Jackson *v.* Teele, 7 Johns. 28; Jackson *v.* Murray, 7 Johns. 5; Jackson *v.* Todd, 6 Johns. 257; Jackson *v.* Livingston, 6 Johns. 149; Jackson *v.* Griswold, 5 Johns. 139; Jackson *v.* Huntley, 5 Johns. 59; Jackson *v.* Wright, 4 Johns. 75; Jackson *v.* Seaman, 3 Johns. 495; Jackson *v.* Livingston, 3 Johns. 455; Jackson *v.* Hudson, 3 Johns. 375, 3 Am. Dec. 500; Jackson *v.* Winslow, 2 Johns. 80; Jackson *v.* Hunter, 1 Johns. 495; Jackson *v.* Phelps, 3 Cai. 62; Armour *v.* Alexander, 10 Paige 571; Crowder *v.* Hopkins, 10 Paige 183; Quackenbush *v.* Leonard, 9 Paige 334; Lowndes *v.* Huntington, 153 U. S. 1, 14 S. Ct. 758, 38 L. ed. 615. See 41 Cent. Dig. tit. "Public Lands," §§ 460–465.

North Carolina.— Call *v.* Robinett, 147 N. C. 615, 61 S. E. 578; *In re* Williams, 146 N. C. 268, 59 S. E. 698; Drew *v.* Pyke, 145 N. C. 300, 59 S. E. 76; Bowser *v.* Westcott, 145 N. C. 56, 58 S. E. 748; Johnson *v.* Eversole Lumber Co., 144 N. C. 717, 57 S. E. 518; Walker *v.* Carpenter, 144 N. C. 674, 57 S. E. 461; Fisher *v.* Owen, 144 N. C. 649, 57 S. E. 393; Caldwell Land, etc., Co. *v.* Coffey, 144 N. C. 560, 57 S. E. 344; Frasier *v.* Gibson, 140 N. C. 272, 52 S. E. 1035; Johnson *v.* Westcott, 139 N. C. 29, 51 S. E. 784; Janney *v.* Blackwell, 138 N. C. 437, 50 S. E. 857; State *v.* Twiford, 136 N. C. 603, 48 S. E. 586; Weeks *v.* Wilkins, 134 N. C. 516, 47 S. E. 24; Newton *v.* Brown, 134 N. C. 439, 46 S. E. 994; Stewart *v.* Keener, 131 N. C. 486, 42 S. E. 935; *In re* Drewery, 130 N. C. 342, 41 S. E. 937, 129 N. C. 457, 40 S. E. 208; Holley *v.* Smith, 130 N. C. 85, 40 S. E. 847; Wyman *v.* Taylor, 124 N. C. 426, 32 S. E. 740; State *v.* Bland, 123 N. C. 739, 31 S. E. 475; Grayson *v.* English, 115 N. C. 358, 20 S. E. 478; Kimsey *v.* Munday, 112 N. C. 816, 17 S. E. 583; McNamee *v.* Alexander, 109 N. C. 242, 13 S. E. 777; Wool *v.* Saunders, 108 N. C. 729, 13 S. E. 294; Gilchrist *v.* Middleton, 107 N. C. 663, 12 S. E. 85; Bryan *v.* Hodges, 107 N. C. 492, 12 S. E. 430; Bond *v.* Wool, 107 N. C. 139, 12 S. E. 281; Brown *v.* Brown, 106 N. C. 451, 11 S. E. 647; McMillan *v.* Gambill, 106 N. C. 359, 11 S. E. 273; Brown *v.* Brown, 103 N. C. 221, 9 S. E. 706, 103 N. C. 213, 8 S. E. 111; Pearson *v.* Powell, 100 N. C. 86, 6 S. E. 188; Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746; Harris *v.* Norman, 96 N. C. 59, 2 S. E. 72; Hodges *v.* Williams, 95 N. C. 331, 59 Am. Rep. 242; State *v.* Bevers, 86 N. C. 588; Wilson *v.* Western North Carolina Land Co., 77 N. C. 445; Hall *v.* Hollifield, 76 N. C. 476; Mockridge *v.* Howerton, 72 N. C. 221; Hoover *v.* Thomas, 61 N. C. 184; Barnett *v.* Woods, 58 N. C. 428; McDiarmid *v.* McMillan, 58 N. C. 29; Stanly *v.* Biddle, 57 N. C. 383; Ashley *v.* Sumner, 57 N. C. 121; Currie *v.* Gibson, 57 N. C. 25; Burgess *v.* Lovengood, 55 N. C. 457; Barnett *v.* Woods, 55 N. C. 198; Horton *v.* Cook, 54 N. C. 270; Cooper *v.* Gibson, 51 N. C. 512; White *v.* Perry, 51 N. C. 198; Ward *v.* Willis, 51 N. C. 183, 72 Am. Dec. 570; Archibald *v.* Davis, 50 N. C. 322; Harshaw *v.* Taylor, 48 N. C. 513; Fuller *v.* Williams, 45 N. C. 162; Krous *v.* Long, 41 N. C. 259; Allen *v.* Gilreath, 41 N. C. 252; Buchannan *v.* Fitzgerald, 41 N. C. 121; Munroe *v.* McCormick, 41 N. C. 85; Russ *v.* Hawes, 40 N. C. 18; Johnston *v.* Shelton, 39 N. C. 85; Maxwell *v.* Wallace, 38 N. C. 593; Bryson *v.* Dobson, 38 N. C. 138; Plemmons *v.* Fore, 37 N. C. 312; Stanmire *v.* Powell, 35 N. C. 312; Holland *v.* Crow, 34 N. C. 275; Hatfield *v.* Grimstead, 29 N. C. 139; Rouche *v.* Williamson, 25 N. C. 141; Harris *v.* Ewing, 21 N. C. 369; Hough *v.* Dumas, 20 N. C. 473; Mendendall *v.* Cassells, 20 N. C. 43; O'Kelly *v.* Clayton, 19 N. C. 246; Den *v.* Pugh, 18 N. C. 210; Featherston *v.* Mills, 15 N. C. 596; Crow *v.* Holland, 15 N. C. 417; Graham *v.* Houston, 15 N. C. 232; Greenlee *v.* Tate, 12 N. C. 300; Tatum *v.* Sawyer, 9 N. C. 226; Hunter *v.* Williams, 8 N. C. 221; Avery *v.* Walker, 8 N. C. 140; Thompson *v.* England, 8 N. C. 137; Reddick *v.* Leggat, 7 N. C. 539; Merril *v.* Sloan, 5 N. C. 121; Person *v.* Davey, 5 N. C. 115; McNeil *v.* Lewis, 4 N. C. 517; Avery *v.* Strother, 1 N. C. 496; Bryan *v.* Carleton, 1 N. C. 59; Cornet *v.* Winton, 2 Yerg. (Tenn.) 143; Cobb *v.* Conway, 3 Hayw. (Tenn.) 21; Lattimer *v.* Poteet, 14 Pet. (U. S.) 4, 10 L. ed. 328; Edwards *v.* Darby, 12 Wheat. (U. S.) 206, 6 L. ed. 603; Danforth *v.* Wear, 9 Wheat. (U. S.) 673, 6 L. ed. 188; Danforth *v.* Thomas, 1 Wheat. (U. S.) 155, 4 L. ed. 59; Preston *v.* Browder, 1 Wheat. (U. S.) 115, 4 L. ed. 50; Polk *v.* Wendal, 9 Cranch (U. S.) 87, 3 L. ed. 665; Blackwell *v.* Patton, 7 Cranch (U. S.) 471, 3 L. ed. 408; North Carolina Min. Co. *v.* Westfeldt, 151 Fed. 290; Bealmar *v.* Hutchins, 148 Fed. 545, 78 C. C. A. 231 [*reversing* 134 Fed. 257]; Dougherty *v.* Edmiston, 7 Fed. Cas. No. 4,025, Brunn. Col. Cas. 194, Cooke (Tenn.) 134; Phillips *v.* Erwin, 19 Fed. Cas. No. 11,093, 1 Overt (Tenn.) 235; Polk *v.* Hill, 19 Fed. Cas. No. 11,249, Brunn. Col. Cas. 126, 2 Overt. (Tenn.) 118. See 41 Cent. Dig. tit. "Public Lands," §§ 466–476.

Ohio.— Webster *v.* Clear, 49 Ohio St. 392, 31 N. E. 744; Bridenbaugh *v.* King, 42 Ohio St. 410; Roseberry *v.* Hollister, 4 Ohio St. 297; Parker *v.* Wallace, 3 Ohio 490; State *v.* Cincinnati Tin, etc., Co., 21 Ohio Cir. Ct. 218, 11 Ohio Cir. Dec. 587; Edwards *v.* Schlund, 21 Ohio Cir. Ct. 193, 11 Ohio Cir. Dec. 697; Wilson *v.* Tischbein, 8 Ohio Dec. (Reprint) 612, 9 Cinc. L. Bul. 61; Goodhue *v.* Jackson, 8 Ohio Dec. (Reprint) 356, 7 Cinc. L. Bul. 175. See 41 Cent. Dig. tit. "Public Lands," § 477.

Oregon.— Summers *v.* Geer, (1907) 93 Pac. 133; Grant *v.* Oregon R., etc., Co., 49 Oreg. 324, 90 Pac. 178, 1099; Warner Valley Stock Co. *v.* Morrow, 48 Oreg. 258, 86 Pac. 369; Robertson *v.* State Land Bd., 42 Oreg. 183, 70 Pac. 614; State *v.* Carlson, 40 Oreg. 565, 67 Pac. 516; Spencer *v.* Carlson, 36 Oreg. 364, 59 Pac. 708; Warren *v.* De Force, 34 Oreg. 168, 55 Pac. 532; Astoria Exch. Co. *v.* Shively, 27 Oreg. 104, 39 Pac. 398, 40 Pac. 92; Shively *v.* Pennoyer, 27 Oreg. 33, 39 Pac.

courts would serve no good purpose; in addition to all of which the decisions of a

396; Hogg *v.* Davis, 22 Oreg. 428, 30 Pac. 160; Bowlby *v.* Shively, 22 Oreg. 410, 30 Pac. 154; Andrus *v.* Knot, 12 Oreg. 501, 8 Pac. 763; Wilson *v.* Shively, 11 Oreg. 215, 4 Pac. 324; De Force *v.* Welch, 10 Oreg. 507; Anderson *v.* Laughery, 3 Oreg. 277; Shively *v.* Welch, 20 Fed. 28. See 41 Cent. Dig. tit. "Public Lands," § 478.

Pennsylvania.— Reilly *v.* Mountain Coal Co., 204 Pa. St. 270, 54 Atl. 29; Lehigh Valley Coal Co. *v.* Beaver Lumber Co., 203 Pa. St. 544, 53 Atl. 379; Mineral R., etc., Co. *v.* Auten, 188 Pa. St. 568, 41 Atl. 327; Fisher *v.* Kaufman, 170 Pa. St. 444, 33 Atl. 137; Goodyear *v.* Brown, 155 Pa. St. 514, 26 Atl. 665, 35 Am. St. Rep. 903, 20 L. R. A. 838; Huntley *v.* Barclay, 149 Pa. St. 299, 24 Atl. 223; Bachop *v.* Critchlow, 142 Pa. St. 518, 21 Atl. 984; Bushey *v.* South Mountain Min., etc., Co., 136 Pa. St. 541, 20 Atl. 549; Hulings *v.* Lewis, (1888) 16 Atl. 24; Jackson *v.* Lambert, 121 Pa. St. 182, 15 Atl. 502; Smith *v.* Walker, 98 Pa. St. 133; Bear Valley Coal Co. *v.* Dewart, 95 Pa. St. 72; Brandon *v.* Fritz, 94 Pa. St. 88; Conkling *v.* Westbrook, 81* Pa. St. 81; Wolfe *v.* Reynolds, 80 Pa. St. 204; Fritz *v.* Brandon, 78 Pa. St. 342; Tryon *v.* Munson, 77 Pa. St. 250; Poor *v.* McClure, 77 Pa. St. 214; Smith *v.* Vasbinder, 77 Pa. St. 127; Fisher *v.* Philadelphia, 75 Pa. 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St. 260; Garver *v.* McNulty, 39 Pa. St. 473; Woods *v.* Wilson, 37 Pa. St. 379; Sabins *v.* McGhee, 36 Pa. St. 453; Ormsby *v.* Ihmsen, 34 Pa. St. 462; Wharton *v.* Garvin, 34 Pa. St. 340; Fox *v.* Lyon, 33 Pa. St. 474; Troutman *v.* May, 33 Pa. St. 455; Kirkpatrick *v.* Vanhorn, 32 Pa. St. 131; Brock *v.* Savage, 31 Pa. St. 410; Hagerty *v.* Mathers, 31 Pa. St. 348; Whitcomb *v.* Hoyt, 30 Pa. St. 403; King *v.* Baker, 29 Pa. St. 200; Fox *v.* Lyon, 27 Pa. St. 9; Allegheny *v.* Ohio, etc., R. Co., 26 Pa. St. 355; Coxe *v.* Woolbach, 26 Pa. St. 122; Cassidy *v.* Conway, 25 Pa. St. 240; Smith *v.* Beck, 25 Pa. St. 106; Carbon Run Imp. Co. *v.* Rockafeller, 25 Pa. St. 49; Jacobs *v.* Figard, 25 Pa. St. 45; Raush *v.* Miller, 24 Pa. St. 277; Allegheny *v.* Reed, 24 Pa. St. 39; Emery *v.* Spencer, 23 Pa. St. 271; Shoenberger *v.* Baker, 22 Pa. St. 398; Patterson *v.* Ross, 22 Pa. St. 340; Syphers *v.* Meighen, 22 Pa. St. 125; Ross *v.* Pleasants, 19 Pa. St. 157; Gingrich *v.* Foltz, 19 Pa. St. 38, 57 Am. Dec. 631; Baker *v.* King, 18 Pa. St. 138; Johns *v.* Davidson, 16 Pa. St. 512; Hughs *v.* Pickering, 14 Pa. St. 297; McCall *v.* Anchors, 14 Pa. St. 253; Roland *v.* Long, 13 Pa. St. 464; Mahon *v.* Duncan, 13 Pa. St. 459; Hoover *v.* Lock, 13 Pa. St. 356; Houston *v.* Sims, 12 Pa. St. 195; Heath *v.* Armstrong, 12 Pa. St. 178; Farmers', etc., Bank *v.* Woods, 11 Pa. St. 99; Heath *v.* Biddle, 9 Pa. St. 273; Stevens *v.* Wylie, 7 Pa. St. 114; Dull *v.* Heath, 7 Pa. St. 85; Mix *v.* Smith, 7 Pa. St. 75; Collins *v.* Barclay, 7 Pa. St. 67; Vastbinder *v.* Wager, 6 Pa. St. 339; Grant *v.* Levan, 4 Pa. St. 393; Wilson *v.* Watterson, 4 Pa. St. 214; Steiner *v.* Coxe, 4 Pa. St. 13; Schnable *v.* Doughty, 3 Pa. St. 392; Ege *v.* Sidle, 3 Pa. St. 115; Farr *v.* Swan, 2 Pa. St. 245; Jones *v.* Brownfield, 2 Pa. St. 55; Heath *v.* Knap, 1 Pa. St. 482; Stockwell *v.* Robinson, 1 Pa. St. 477; Sweeney *v.* Sheffield, 1 Pa. 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particular state as to the matters in question are of no general importance or

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Cas. No. 6,851, 1 Wash. 257; Atty.-Gen. *v.* Grantees, 4 Dall. 237, 1 L. ed. 815; McLaughlin *v.* Dawson, 4 Dall. 221, 1 L. ed. 809; Hepburn *v.* Levy, 4 Dall. 218, 1 L. ed. 807; Bell *v.* Levers, 4 Dall. 210, 1 L. ed. 804; Morris *v.*

interest outside of that state. In a few states, however, the question of land

Neighman, 4 Dall. 209, 1 L. ed. 804; Com. *v.* Coxe, 4 Dall. 170, 1 L. ed. 786; Ewalt *v.* Highlands, 4 Dall. 161, 1 L. ed. 783; Gander *v.* Burns, 4 Dall. 122, 1 L. ed. 768; Elliott *v.* Laidig, 8 Pa. Super. Ct. 147; Connelly *v.* Withers, 9 Lanc. Bar 117; Atty.-Gen. *v.* Woods, 5 Leg. Op. 65; Com. *v.* Smith, 4 Pa. L. J. 121; Ross *v.* Marcy, 2 Pa. L. J. 76; Murphy *v.* Packer, 152 U. S. 498, 14 S. Ct. 636, 38 L. ed. 489; Schraeder Min., etc., Mfg. Co. *v.* Packer, 129 U. S. 688, 9 S. Ct. 385, 32 L. ed. 760; Clement *v.* Packer, 125 U. S. 309, 8 S. Ct. 907, 31 L. ed. 721; Herron *v.* Dater, 120 U. S. 464, 7 S. Ct. 620, 30 L. ed. 748; Huidekoper *v.* Douglass, 3 Cranch (U. S.) 1, 2 L. ed. 347; Balfour *v.* Meade, 2 Fed. Cas. No. 808, 4 Dall. 363, 1 Wash. 18; Brown *v.* Arbunkle, 2 Fed. Cas. No. 1,990, 1 Wash. 484; Brown *v.* Galloway, 4 Fed. Cas. No. 2,006, Pet. C. C. 291; Conn *v.* Penn, 6 Fed. Cas. No. 3,104, Pet. C. C. 496; Dubois *v.* Newman, 7 Fed. Cas. No. 4,108, 4 Wash. 74; Fisher *v.* Carter, 9 Fed. Cas. No. 4,815, 1 Wall. Jr. 69; Gordon *v.* Kerr, 10 Fed. Cas. No. 5,611, 1 Wash. 322; Griffith *v.* Bradshaw, 11 Fed. Cas. No. 5,821, 4 Wash. 171; Griffith *v.* Evans, 11 Fed. Cas. No. 5,822, Pet. C. C. 166; Griffith *v.* Tunckhouser, 11 Fed. Cas. No. 5,823, Pet. C. C. 418; Harris *v.* Burchan, 11 Fed. Cas. No. 6,117, 1 Wash. 191; Huidekoper *v.* Burrus, 12 Fed. Cas. No. 6,848, 1 Wash. 109; Huidekoper *v.* Douglass, 12 Fed. Cas. No. 6,851, 4 Dall. 392, 1 Wash. 258; Huidekoper *v.* McClean, 12 Fed. Cas. No. 6,852, 1 Wash. 136; Hurst *v.* Durnell, 12 Fed. Cas. No. 6,927, 1 Wash. 262; James *v.* Gordon, 13 Fed. Cas. No. 7,181, 1 Wash. 333; Lanning *v.* London, 14 Fed. Cas. No. 8,074, 4 Wash. 159; Lewis *v.* Meredith, 15 Fed. Cas. No. 8,328, 3 Wash. 81; Milligan *v.* Dickson, 17 Fed. Cas. No. 9,604, Pet. C. C. 433 note, 2 Wash. 258; Penn *v.* Ingham, 19 Fed. Cas. No. 10,933, 3 Wash. 90; Penn *v.* Klyne, 19 Fed. Cas. No. 10,935, 4 Dall. 402, Pet. C. C. 497, 1 Wash. 207; Phillips *v.* Wilson, 19 Fed. Cas. No. 11,109, 1 Wash. 470; Smith *v.* Houtz, 22 Fed. Cas. No. 13,062; Torrey *v.* Beardsley, 24 Fed. Cas. No. 14,104, 4 Wash. 242; Wells *v.* Wright, 29 Fed. Cas. No. 17,405, 3 Wash. 250; Willis *v.* Bucher, 30 Fed. Cas. No. 17,769, 3 Wash. 369. See 41 Cent. Dig. tit. "Public Lands," §§ 479–500.

Rhode Island.—Murphy *v.* Bullock, 20 R. I. 35, 37 Atl. 348; Knowles *v.* Knowles, 12 R. I. 400; Knowles *v.* Nichols, 2 R. I. 198. See 41 Cent. Dig. tit. "Public Lands," § 501.

South Carolina.— Frampton *v.* Wheat, 27 S. C. 288, 3 S. E. 462; State *v.* Pacific Guano Co., 22 S. C. 50; Evans *v.* Corley, 9 Rich. 143; Dorn *v.* Patterson, 7 Rich. 91; Nicholas *v.* Hubbard, 5 Rich. 267; Thomson *v.* Gaillard, 3 Rich. 418, 45 Am. Dec. 778; Fulwood *v.* Graham, 1 Rich. 491; Guignard *v.* Felder, 2 Hill 401; McMullen *v.* McCulloch, 2 Bailey 346; Huggins *v.* Brewer, 2 Bailey 25; Martin *v.* Simpson, Harp. 454; De Graffinreid *v.* Greggory, Harp. 443; Smith *v.* Smith, 4 McCord 276; Thomas *v.* Daniel, 2 McCord 354; Trapier *v.* Wilson, 2 McCord 191; Duncan *v.* Beard, 2 Nott & M. 400; Sansbury *v.* Thornhill, 1 Nott. & M. 345; Thompson *v.* Hauser, 2 Mill 356; Henderson *v.* Jones, 2 Brev. 402; Kershaw *v.* Boykin, 1 Brev. 301; Kent *v.* Carwell, 1 Brev. 30; Mounce *v.* Ingraham, 2 Bay 454; Muse *v.* Laughridge, 2 Bay 426; Hawkins *v.* Arthur, 2 Bay 195; Tarrant *v.* Terry, 1 Bay 239; Moultrieville *v.* Patterson, 7 Rich. Eq. 344; Verdier *v.* McBurney, 3 Rich. Eq. 261 note; McBurney *v.* Walter, 3 Rich. Eq. 260 note; *Ex p.* Kuhtman, 3 Rich. Eq. 257, 55 Am. Dec. 642; Chisholm *v.* Caines, 67 Fed. 285. See 41 Cent. Dig. tit. "Public Lands," §§ 502–504.

Tennessee.— Sampson *v.* Chester, (1904) 91 S. W. 43; Earnest *v.* Little River Land, etc., Co., 109 Tenn. 427, 75 S. W. 1122; Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86; Hennegar *v.* Seymour, 93 Tenn. 253, 23 S. W. 969; Walker *v.* Phillips, 92 Tenn. 495, 22 S. W. 338; Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166, 204, 15 S. W. 737; Henegar *v.* Matthews, 88 Tenn. 132, 14 S. W. 554 [*distinguishing* Blevins *v.* Crew, 3 Sneed 152]; Graham *v.* Gunn, 87 Tenn. 458, 11 S. W. 214; Goodwin *v.* Thompson, 15 Lea 209, 54 Am. Rep. 410; Berry *v.* Wagner, 13 Lea 591; Cunningham *v.* O'Connor, 12 Lea 397; Berry *v.* Wagner, 5 Lea 564; Webb *v.* Haley, 7 Baxt. 600; Wood *v.* Elledge, 11 Heisk. 607; Hale *v.* Hord, 11 Heisk. 232; Moss *v.* Gibbs, 10 Heisk. 283; Fowler *v.* Nixon, 7 Heisk. 719; Sampson *v.* Galloway, 5 Heisk. 275; Sampson *v.* Bone, 4 Heisk. 702; Brummett *v.* Scott, 4 Heisk. 319; Rainey *v.* Aydelotte, 4 Heisk. 122; Thomas *v.* Tankersly, 5 Coldw. 165; Smith *v.* Lee, 1 Coldw. 549; State *v.* Crutchfield, 3 Head 113; Bowman *v.* Bowman, 3 Head 47; Williams *v.* Donnell, 2 Head 695; Tipton *v.* Sanders, 2 Head 690; Scott *v.* Price, 2 Head 532; Bullock *v.* Tipton, 2 Head 408; Egnew *v.* Cochrane, 2 Head 320; Goodman *v.* Tennessee Min. Co., 1 Head 172; Myse *v.* Lafferty, 1 Head 60; Creech *v.* Jones, 5 Sneed 631; Moore *v.* Mills, 5 Sneed 461; Ballard *v.* Nelson, 5 Sneed 217; Smith *v.* Jones, 3 Sneed 533; Blevins *v.* Crew, 3 Sneed 152; Fly *v.* East Tennessee College, 2 Sneed 689; Woodfolk *v.* Nall, 2 Sneed 674; Battle *v.* Rawles, 2 Sneed 576; Curle *v.* Barrel, 2 Sneed 63; Barnes *v.* Sellars, 2 Sneed 33; Sampson *v.* Taylor, 1 Sneed 600; Roach *v.* Boyd, 1 Sneed 134; Parker *v.* Claiborne, 2 Swan 565; Chester *v.* Campbell, 1 Swan 513; Marr *v.* Chester, 1 Swan 416; Whitley *v.* Davis, 1 Swan 333; Pickens *v.* Reed, 1 Swan 80; Conn *v.* Haislip, 1 Swan 31; Johnson *v.* Lucas, 11 Humphr. 306; Williamson *v.* Throop, 11 Humphr. 265; McKeown *v.* Cameron, 10 Humphr. 570; Martin *v.* State, 10 Humphr. 157; Hess *v.* Crawford, 8 Humphr. 609; Dearing *v.* Cate, 8 Humphr. 29; School Com'rs *v.* State, 7 Humphr. 113; Tymannus *v.* Williams, 7 Humphr. 80, 46 Am. Dec. 69; Coffee *v.* Tucker, 7 Humphr. 49; Peck *v.* Eskin, 7 Humphr. 22; Donegan *v.* Taylor, 6 Humphr. 501; Caldwell *v.* Watson, 6 Humphr.

grants is of such present importance that a detailed discussion of the systems prevailing appears to be necessary.

498; Lacy *v.* Anderson, 6 Humphr. 495; Barnhart *v.* Neisler, 6 Humphr. 493; Knox *v.* Thomas, 5 Humphr. 573; Patterson *v.* McCutchen, 5 Humphr. 322; Kennedy *v.* Wiggins, 5 Humphr. 125; Davis *v.* Williams, 5 Humphr. 42; Gardner *v.* Bright, 4 Humphr. 503; Chester *v.* Wood, 4 Humphr. 435; Crutchfield *v.* Hammock, 4 Humphr. 203; State *v.* Nashville University, 4 Humphr. 157; Davis *v.* Broomfield, 3 Humphr. 174; Harvey *v.* Jones, 3 Humphr. 157; Chester *v.* Hubbard, 2 Humphr. 354; Copeland *v.* Woods, 2 Humphr. 330; McConnell *v.* Madisonville, 2 Humphr. 53; Graham *v.* Smith, 1 Humphr. 546; Kelly *v.* Hare, 1 Humphr. 163; Horn *v.* Childress, Meigs 102; Riggs *v.* Parker, Meigs 43; Den *v.* Nixon, 10 Yerg. 518; Alderson *v.* Cheatham, 10 Yerg. 304; Maury *v.* Lewis, 10 Yerg. 115; Wilson *v.* Hudson, 8 Yerg. 398; Mitchell *v.* Nicholson, 8 Yerg. 194; Reese *v.* Crockett, 8 Yerg. 129; Irby *v.* McKissack, 8 Yerg. 42; Frazer *v.* Evans, 6 Yerg. 452; Pettyjohn *v.* Akers, 6 Yerg. 448; Crisp *v.* Kimble, 6 Yerg. 446; Bourland *v.* Tipton, 6 Yerg. 438; Edwards *v.* Batts, 5 Yerg. 441; Clark *v.* Hunt, 5 Yerg. 278; Vaughn *v.* Hatfield, 5 Yerg. 236; McGavock *v.* Shannon, 5 Yerg. 128; Porter *v.* Gordon, 5 Yerg. 100; Dunlap *v.* Smith, 4 Yerg. 509; Peeler *v.* Norris, 4 Yerg. 331; Bugg *v.* Norris, 4 Yerg. 326; Rhodes *v.* Perkins, 4 Yerg. 170; Read *v.* Long, 4 Yerg. 68; Smith *v.* Rankin, 4 Yerg. 1, 26 Am. Dec. 213; Pillow *v.* Shannon, 3 Yerg. 508; Tipton *v.* Miller, 3 Yerg. 423; Craig *v.* Polk, 3 Yerg. 248; Hogue *v.* Anderson, 3 Yerg. 245; Armstrong *v.* Campbell, 3 Yerg. 201, 24 Am. Dec. 556; Trousdale *v.* Campbell, 3 Yerg. 160; Lowry *v.* Francis, 2 Yerg. 534; Blair *v.* Pathkiller, 2 Yerg. 407; Malseley *v.* Kensinger, 2 Yerg. 72; Davis *v.* Smith, 1 Yerg. 496; Houston *v.* Pillow, 1 Yerg. 481; Pinson *v.* Ivey, 1 Yerg. 296; Talbot *v.* McGavock, 1 Yerg. 262; Proffit *v.* Williams, 1 Yerg. 89; Garner *v.* Norris, 1 Yerg. 62; Williams *v.* Wilson, Mart. & Y. 248; Hinton *v.* McGavock, Mart. & Y. 194; Den *v.* Cunningham, Mart. & Y. 67; Rogers *v.* Burton, Peck 108; Overton *v.* Campbell, 5 Hayw. 165, 9 Am. Dec. 780; Brown *v.* McCan, 5 Hayw. 124; McMillan *v.* Claxton, 4 Hayw. 274; Stubblefield *v.* Short, 4 Hayw. 265; Malone *v.* De Boe, 4 Hayw. 259; Wilson *v.* Kilcannon, 4 Hayw. 182; Mitchel *v.* Barry, 4 Hayw. 136; Clinton *v.* McClarin, 3 Hayw. 288; Childress *v.* Holland, 3 Hayw. 274; Smith *v.* Brooks, 3 Hayw. 248; White *v.* Crocket, 3 Hayw. 234; Winchester *v.* Gleaves, 3 Hayw. 213; Shute *v.* Buchanon, 3 Hayw. 206; White *v.* Crocket, 3 Hayw. 183; Norris *v.* Gilliam, 3 Hayw. 165; Gould *v.* Hoyle, 3 Hayw. 100; Danforth *v.* Lowry, 3 Hayw. 61; Blount *v.* Ramsey, Cooke 489; Mayfield *v.* Seawall, Cooke 437; Anderson *v.* Weakley, Cooke 410; Baird *v.* Trimble, Cooke 282; Leach *v.* Cooper, Cooke 249; Kendrick *v.* Dallum, Cooke 220, 1 Overt. 489; Williams *v.* West Tennessee Register, Cooke 214; Cook *v.* Shute, Cooke 67; Anderson *v.* Gannon, Cooke 27; Carter *v.* Ward, 2 Overt. 340; Wallen *v.* Campbell, 2 Overt. 320; Smith *v.* Buchannon, 2 Overt. 305; Bickerstaff *v.* Hughlet, 2 Overt. 269; Murfree *v.* Logan, 2 Overt. 220; Ross *v.* Brown, 2 Overt. 210; Smith *v.* Kain, 2 Overt. 196; Campbell *v.* Seahorn, 2 Overt. 195; Shields *v.* Walker, 2 Overt. 114; Barnet *v.* Russel, 2 Overt. 10; Reid *v.* Dodson, 1 Overt. 396; Craddock *v.* Stalcup, 1 Overt. 351; Dodson *v.* Cocke, 1 Overt. 314, 3 Am. Dec. 767; Philips *v.* Erwin, 1 Overt. 235, 19 Fed. Cas. No. 11,093; Hoggat *v.* McCrory, 1 Overt. 8; Sullivan *v.* Brown, 1 Overt. 6; Blakemore *v.* Chambles, 1 Overt. 3; Jones *v.* Snapp, 1 Tenn. Cas. 56, Thomps. Cas. 82; Christian *v.* Gernt, (Ch. App. 1900) 64 S. W. 399; Gass *v.* Waterhouse, (Ch. App. 1900) 61 S. W. 450; State *v.* Cooper, (Ch. App. 1899) 53 S. W. 391; Phillips *v.* Crabtree, (Ch. App. 1899) 52 S. W. 787; Duffield *v.* Spence, (Ch. App. 1897) 51 S. W. 492; Elk Valley Coal, etc., Co. *v.* Douglass, (Ch. App. 1898) 48 S. W. 365; Cowan *v.* Hatcher, (Ch. App. 1898) 48 S. W. 328; Riseden *v.* Harrison, (Ch. App. 1897) 42 S. W. 884; Hitchcock *v.* Southern Iron, etc., Co., (Ch. App. 1896) 38 S. W. 588; Galloway *v.* Sanford, (Ch. App. 1895) 35 S. W. 776; La Follette Coal, etc., Co. *v.* East Tennessee Iron, etc., Co., 2 Tenn. Ch. App. 668; Savage *v.* Bon Air Coal, etc., Co., 2 Tenn. Ch. App. 594; Peterson *v.* Turney, 2 Tenn. Ch. App. 519; Porterfield *v.* Clark, 2 How. (U. S.) 76, 11 L. ed. 185; Blunt *v.* Smith, 7 Wheat. (U. S.) 248, 5 L. ed. 446; Newson *v.* Pryor, 7 Wheat. (U. S.) 7, 5 L. ed. 382; Blake *v.* Doherty, 5 Wheat. (U. S.) 359, 5 L. ed. 109; Polk *v.* Wendell, 5 Wheat. (U. S.) 293, 5 L. ed. 92; Rutherford *v.* Greene, 2 Wheat. (U. S.) 196, 4 L. ed. 218; Ross *v.* Reed, 1 Wheat. (U. S.) 482, 4 L. ed. 141; Polk *v.* Wendal, 9 Cranch (U. S.) 87, 3 L. ed. 665; Bell *v.* North American Coal, etc., Co., 155 Fed. 712, 84 C. C. A. 60; Reeve *v.* North Carolina Land, etc., Co., 141 Fed. 821, 72 C. C. A. 287; Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324; Cross *v.* Sabin, 13 Fed. 308; Bass *v.* Dinwiddie, 2 Fed. Cas. No. 1,092, Brunn. Col. Cas. 190; Carson *v.* Gordon, 5 Fed. Cas. No. 2,463, Brunn. Col. Cas. 208; Dallum *v.* Breckenridge, 7 Fed. Cas. No. 3,547, Brunn. Col. Cas. 210; Graham *v.* Dudley, 10 Fed. Cas. No. 5,665, Brunn. Col. Cas. 228; Henderson *v.* Long, 11 Fed. Cas. No. 6,354, Brunn. Col. Cas. 188; Mitchell *v.* Thompson, 17 Fed. Cas. No. 9,669, 1 McLean 96; Polk *v.* Hill, 19 Fed. Cas. No. 11,249, Brunn. Col. Cas. 126, 2 Overt. 118; Shepherd *v.* Bailey, 21 Fed. Cas. No. 12,755, Brunn. Col. Cas. 242; Simms *v.* Dickson, 22 Fed. Cas. No. 12,869, Brunn. Col. Cas. 196; Thompson *v.* Norwood, 23 Fed. Cas. No. 13,970, Brunn. Col. Cas. 221. See 41 Cent. Dig. tit. "Public Lands," §§ 505–522.

Texas.— See *infra*, III, C, 3.

Utah.— Robinson *v.* Imperial Silver Min.

2. California [40]— a. Persons Entitled to Grants. Under the constitution, lands of the state which are suitable for cultivation can be granted only to actual settlers,[41] and this provision operates as a restriction on applications before as well

Co., 5 Nev. 44; Alford *v.* Dewin, 1 Nev. 207. See 41 Cent. Dig. tit. "Public Lands," § 585.

Vermont.— Davis *v.* Moyles, 76 Vt. 25, 56 Atl. 174; Victory *v.* Wells, 39 Vt. 488; Lord *v.* Bigelow, 8 Vt. 445. See 41 Cent. Dig. tit. "Public Lands," § 586.

Virginia.— Merrit *v.* Bunting, 107 Va. 174, 57 S. E. 567; Green *v.* Pennington, 105 Va. 801, 54 S. E. 877; Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491; Matney *v.* Ratliff, 96 Va. 231, 31 S. E. 512; Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601; Randolph *v.* Longdale Iron Co., 84 Va. 457, 5 S. E. 30; Carter *v.* Hagan, 75 Va. 557; Garrison *v.* Hall, 75 Va. 150; Trotter *v.* Newton, 30 Gratt. 582; Cline *v.* Catron, 22 Gratt. 378; Matthews *v.* Burton, 17 Gratt. 312; Blankenpickler *v.* Anderson, 16 Gratt. 59; Carter *v.* Ramey, 15 Gratt. 346; Atkins *v.* Lewis, 14 Gratt. 30; Clements *v.* Kyles, 13 Gratt. 468; Levasser *v.* Washburn, 11 Gratt. 572; McNeel *v.* Herold, 11 Gratt. 309; French *v.* Bankhead, 11 Gratt. 136; Smith *v.* Chapman, 10 Gratt. 445; Harper *v.* Baugh, 9 Gratt. 508; Walton *v.* Hale, 9 Gratt. 194; Shanks *v.* Lancaster, 5 Gratt. 110, 50 Am. Dec. 108; Hagan *v.* Wardens, 3 Gratt. 315; Goodwin *v.* McCluer, 3 Gratt. 291; Overton *v.* Davisson, 1 Gratt. 211, 42 Am. Dec. 544; Tichanal *v.* Roe, 2 Rob. 288; Warwick *v.* Norvell, 1 Rob. 308; Wilson *v.* Daggs, 8 Leigh 681; Donnell *v.* King, 7 Leigh 393; French *v.* Loyal Co., 5 Leigh 627; Cresap *v.* McLean, 5 Leigh 381; Hardman *v.* Boardman, 4 Leigh 377; Lewis *v.* Billips, 1 Leigh 353; Jackson *v.* McGavock, 5 Rand. 509; McClung *v.* Hughes, 5 Rand. 453; Nichols *v.* Covey, 4 Rand. 365; Whittington *v.* Christian, 2 Rand. 353; Morrison *v.* Campbell, 2 Rand. 206; Lyne *v.* Jackson, 1 Rand. 114; Boyd *v.* Hamilton, 6 Munf. 459; Norvell *v.* Camm, 6 Munf. 233, 8 Am. Dec. 742; Guerrant *v.* Bagby, 6 Munf. 160; Hopkins *v.* Ward, 6 Munf. 38; McClean *v.* Tomlinson, 5 Munf. 220; Gooseman *v.* Martin, 4 Munf. 533; Norvell *v.* Camm, 2 Munf. 257; Ross *v.* Keewood, 2 Munf. 141; Depew *v.* Howard, 1 Munf. 293; Hunter *v.* Fairfax, 1 Munf. 218; Alexander *v.* Greenup, 1 Munf. 134, 4 Am. Dec. 541; Lassly *v.* Fontaine, 4 Hen. & M. 146, 4 Am. Dec. 510; Preston *v.* Harvey, 2 Hen. & M. 55; Miller *v.* Page, 6 Call 28; Staples *v.* Webster, 5 Call 261; Johnson *v.* Pendleton, 5 Call 128; Marshall *v.* Clark, 4 Call 268; White *v.* Jones, 4 Call 253, 2 Am. Dec. 564; Hamilton *v.* Maze, 4 Call 196; Harvey *v.* Preston, 3 Call 495; Stever *v.* Gillis, 3 Call 417; Johnson *v.* Brown, 3 Call 259; Currie *v.* Martin, 3 Call 28; Field *v.* Culbreath, 2 Call 547; Stephens *v.* Cobun, 2 Call 440; Walcott *v.* Swan, 2 Call 298, 4 Call 462; Hunter *v.* Hall, 1 Call 206; Curry *v.* Burns, 2 Wash. 121; Johnson *v.* Buffington, 2 Wash. 116; Burnsides *v.* Reid, 2 Wash. 43; Jones *v.* Williams, 1 Wash. 230; Reynolds *v.* Waller, 1 Wash. 164; Legan *v.* Stevens, Jeff. 30; Wilson *v.* Rucker, Wythe 296; Burnsides *v.* Reid, Wythe 150; Mace *v.* Hamilton, Wythe 51; Fairfax *v.* Stephen, 1 Va. Cas. 3; Stockton *v.* Morris, 39 W. Va. 432, 19 S. E. 531; Bryan *v.* Willard, 21 W. Va. 65; Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765; Porterfield *v.* Clark, 2 How. (U. S.) 76, 11 L. ed. 185; Boardman *v.* Reed, 6 Pet. (U. S.) 328, 8 L. ed. 415; Chinoweth *v.* Haskell, 3 Pet. (U. S.) 92, 7 L. ed. 614; Stephens *v.* McCargo, 9 Wheat. (U. S.) 502, 6 L. ed. 145; Nicholas *v.* Anderson, 8 Wheat. (U. S.) 365, 5 L. ed. 637; Blunt *v.* Smith, 7 Wheat. (U. S.) 248, 5 L. ed. 446; Bouldin *v.* Massie, 7 Wheat. (U. S.) 122, 5 L. ed. 414; Simms *v.* Guthrie, 9 Cranch (U. S.) 19, 3 L. ed. 642; Vowles *v.* Craig, 8 Cranch (U. S.) 371, 3 L. ed. 593; Green *v.* Liter, 8 Cranch (U. S.) 229, 3 L. ed. 545; Fairfax *v.* Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453; Taylor *v.* Brown, 5 Cranch (U. S.) 234, 3 L. ed. 88; Brown *v.* Charles, 85 Fed. 172; Braxton *v.* Rich, 47 Fed. 178; Jones *v.* Bache, 13 Fed. Cas. No. 7,454, 3 Wash. 199; Ritchie *v.* Woods, 20 Fed. Cas. No. 11,865, 1 Wash. 11. See 41 Cent. Dig. tit. "Public Lands," §§ 587–597.

Washington.— See *infra*, III, C, 4.

West Virginia.— Starr *v.* Sampselle, 55 W. Va. 44, 47 S. E. 255; Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216; Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177; Bowers *v.* Dickinson, 30 W. Va. 709, 6 S. E. 335; Waggener *v.* Wolf, 28 W. Va. 820, 1 S. E. 25; Patrick *v.* Dryden, 10 W. Va. 387; King *v.* Hatfield, 130 Fed. 564. See 41 Cent. Dig. tit. "Public Lands," § 499.

Wisconsin.— State *v.* Public Land, 61 Wis. 274, 20 N. W. 915; State *v.* Timme, 60 Wis. 344, 18 N. W. 837; State *v.* Collins, 5 Wis. 339. See 41 Cent. Dig. tit. "Public Lands," § 600.

Wyoming.— Baker *v.* Brown, 11 Wyo. 198, 74 Pac. 94; State *v.* State Land Com'rs, 10 Wyo. 413, 69 Pac. 562; Cooper *v.* McCormick, 10 Wyo. 379, 69 Pac. 301; State *v.* State Land Com'rs, 7 Wyo. 478, 53 Pac. 292.

40. For matters of general interest see *supra*, III, B.

41. Boggs *v.* Ganeard, 148 Cal. 711, 84 Pac. 195; Manley *v.* Cunningham, 72 Cal. 236, 13 Pac. 622; Mosely *v.* Torrence, 71 Cal. 318, 12 Pac. 430; Gavitt *v.* Mohr, 68 Cal. 506, 10 Pac. 337; Dillon *v.* Saloude, 68 Cal. 267, 9 Pac. 162; Urton *v.* Wilson, 65 Cal. 11, 2 Pac. 411; Sanford *v.* Maxwell, 3 Cal. App. 242, 84 Pac. 1000, holding that land cannot be conveyed to others than actual settlers, if part of each subdivision is suitable for cultivation.

The applicant must be an actual settler at the time of his application.— Gavitt *v.* Mohr, 68 Cal. 506, 10 Pac. 337.

What constitutes actual settlement see Mosely *v.* Torrence, 71 Cal. 318, 12 Pac. 430; Gavitt *v.* Mohr, 68 Cal. 506, 10 Pac. 337.

as after the constitution took effect,[42] and applies to land originally unfit for cultivation, but which, at the time of application for purchase, has been made fit for cultivation, without regard to how it was reclaimed.[43] As to land which is not agricultural the rule is that other things being equal the first applicant has a prior right to purchase.[44]

b. Amount to Be Granted. Land suitable for cultivation can be granted only in quantities not exceeding three hundred and twenty acres to one person,[45] while lands which are not suitable for cultivation may be sold in quantities not exceeding six hundred and forty acres to any one person.[46]

c. Suitability For Cultivation or Reclaimability. The suitability of land for cultivation is, as has been seen, material both with respect to the persons who may purchase it [47] and the amount which may be purchased,[48] and such suitability must always be a question of fact.[49] The term "suitable for cultivation" includes all land which is ready for occupation and which by ordinary farming processes is fit for agricultural purposes;[50] even though it may be heavily timbered and more valuable for timber than for agricultural purposes,[51] and all tracts of land on which there is arable or tillable land sufficient, with the use of the other lands of the tract for pasturage or otherwise, to furnish a permanent support to the settler are within its meaning.[52] But land which is absolutely unfit for cultivation unless, by the boring of artesian wells, water may, in the future, be developed in such quantities as to render it possible to artificially irrigate it, is not suitable for

42. Manley *v.* Cunningham, 72 Cal. 236, 13 Pac. 622; Mosely *v.* Torrence, 71 Cal. 318, 12 Pac. 430; Dillon *v.* Saloude, 68 Cal. 267, 9 Pac. 162; Urton *v.* Wilson, 65 Cal. 11, 2 Pac. 411; Johnson *v.* Squires, 55 Cal. 103.

43. Boggs *v.* Ganeard, 148 Cal. 711, 84 Pac. 195, holding further that the question whether public land was suitable for cultivation, at the time of the application to purchase it, so that it could not be purchased by one not an actual settler, may be raised in a proper proceeding after the applicant has paid the purchase-price, and received a certificate of purchase.

44. Bieber *v.* Lambert, 2 Cal. 557, 93 Pac. 94.

Where the first application is imperfect and is not presented in amended form until after a second application in proper form has been made, the first applicant is not entitled to protection unless he was occupying the land before the second application was made. Bieber *v.* Lambert, 152 Cal. 557, 93 Pac. 94.

45. Robinson *v.* Eberhart, 148 Cal. 495, 83 Pac. 452; Youle *v.* Thomas, 146 Cal. 537, 80 Pac. 714.

Right to object to purchase.—An applicant to purchase state land, whose application is rejected, is not in privity with the state, in such sense as to entitle him to object that the parties to a contest referred to the superior court to determine their right to purchase the land have agreed to divide the land, in order to evade the provision that land suitable for cultivation shall be granted only to actual settlers in quantities not exceeding three hundred and twenty acres to each settler. Youle Thomas, 146 Cal. 537, 80 Pac. 714.

Swamp lands suitable for cultivation without reclamation can be sold only to actual settlers in tracts of one hundred and sixty acres. Dollenmayer *v.* Pryor, 150 Cal. 1, 87 Pac. 616 [*citing* St. (1899) p. 182].

46. Robinson *v.* Eberhart, 148 Cal. 495, 83 Pac. 452.

47. See *supra*, III, C, 2, a.

48. See *supra*, III, C, 2, b.

49. Robinson *v.* Eberhart, 148 Cal. 495, 83 Pac. 452; Albert *v.* Hobler, 111 Cal. 398, 43 Pac. 1104; Jacobs *v.* Walker, 90 Cal. 43, 27 Pac. 48; Fulton *v.* Brannan, 88 Cal. 454, 26 Pac. 506; Manley *v.* Cunningham, 72 Cal. 236, 13 Pac. 622.

50. Robinson *v.* Eberhart, 148 Cal. 495, 83 Pac. 452; Fulton *v.* Brannan, 88 Cal. 454, 26 Pac. 506; Manley *v.* Cunningham, 72 Cal. 236, 13 Pac. 622.

The fact that the land will not produce ordinary agricultural crops in average quantities does not establish that it is not suitable for cultivation within the meaning of the statute. Albert *v.* Hobler, 111 Cal. 398, 43 Pac. 1104; Jacobs *v.* Walker, 90 Cal. 43, 27 Pac. 48.

Lands suitable for the cultivation of the ordinary fruit crops grown in the state are agricultural lands within the meaning of the statute. Reeves *v.* Hyde, 77 Cal. 397, 19 Pac. 685.

51. Jacobs *v.* Walker, 90 Cal. 43, 27 Pac. 48.

52. Sanford *v.* Maxwell, 3 Cal. App. 242, 84 Pac. 1000, holding that Pol. Code, § 3495, providing that any smallest legal subdivision of school lands shall be deemed suitable for cultivation if any part not less than one half of its area will, without artificial irrigation, but with or without the clearing of timber or other growth therefrom, by the ordinary processes of tillage, produce ordinary agricultural crops in average quantities, is not intended to construe Const. art. 17, § 3, further than to affirmatively provide that every legal subdivision coming within the description shall be regarded as suitable for cultivation, and is not to be construed as providing that

cultivation, within the meaning of the constitution and statutes.[53] Land which is not reclaimable for agricultural purposes, except at an expense beyond its value after reclamation, is not reclaimable within the meaning of a statute authorizing the sale of reclaimable public land.[54]

d. Application or Affidavit For Purchase. An application or affidavit for the purchase of lands from the state must strictly conform to all the requirements of the statute,[55] and state all the matters which the statute requires;[56] and such statements must be true.[57] So it must be stated whether there are settlers on the land,[58] that the applicant knows of no valid claim to the land other than his own,[59] and that he has the qualifications necessary to entitle him to become a purchaser,[60] and the application must describe the land.[61] An application for unsurveyed lands is not vitiated by embracing more than six hundred and forty acres through mistake.[62] Applicants for the purchase of state lands acquire no vested rights until the applications have been approved, or payments have been made.[63]

e. Payment of Purchase-Money. The purchase-money must be paid at the times prescribed by the statute.[64]

land not coming within the description shall be held not suitable for cultivation.

53. Robinson *v.* Eberhart, 148 Cal. 495, 83 Pac. 452.

54. People *v.* Cowell, 60 Cal. 400.

55. Plummer *v.* Woodruff, 72 Cal. 29, 11 Pac. 871, 13 Pac. 51.

56. Davidson *v.* Cucamonga Fruit, etc., Co., 78 Cal. 4, 20 Pac. 152; Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159. See also Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359.

57. Davidson *v.* Cucamonga Fruit, etc., Co., 78 Cal. 4, 20 Pac. 152; McKenzie *v.* Brandon, 71 Cal. 209, 12 Pac. 428; Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159.

Effect of false statement.—A false statement in the affidavit required of the applicant defeats his right to purchase the land. Wrinkle *v.* Wright, 136 Cal. 491, 69 Pac. 148 (holding that this is true of swamp lands as well as school lands); Jacobs *v.* Walker, 90 Cal. 43, 27 Pac. 48; Taylor *v.* Weston, 77 Cal. 534, 20 Pac. 62; Harbin *v.* Burghart, 76 Cal. 119, 18 Pac. 127; Plummer *v.* Woodruff, 72 Cal. 29, 11 Pac. 871, 13 Pac. 51 (holding that no right accrues under an application containing a false statement as to adverse occupancy, although the actual facts entitled the applicant to purchase); Mosely *v.* Torrence, 71 Cal. 318, 12 Pac. 430 (holding that the right of an applicant is defeated by a false statement in the affidavit that there is no adverse occupation of the land, although the adverse possession which in fact exists is totally invalid for the purpose of acquiring title to the land occupied); Kleinsorge *v.* Burgbacher, 6 Cal. App. 346, 92 Pac. 199. See also Pardee *v.* Schanzlin, 3 Cal. App. 597, 86 Pac. 812. But the court has refused to forfeit an otherwise valid entry several years after the purchaser had paid in full for the land and become entitled to a patent, because the affidavit stated that the applicant was a citizen of the United States while the fact was that she had declared her intention to become a citizen. Pardee *v.* Schanzlin, *supra*. And it has also been held that a false statement as to certain subdivisions of the land not being suitable for cultivation did not defeat the right to purchase other subdivisions as to which the affidavit was true. Fairbanks *v.* Lampkin, 101 Cal. 520, 36 Pac. 6.

58. Geer *v.* Sibley, 83 Cal. 1, 23 Pac. 220; McCoy *v.* Byrd, 65 Cal. 92, 3 Pac. 121.

59. Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359; Vance *v.* Evans, 52 Cal. 93.

60. Peabody *v.* Prince, 78 Cal. 511, 21 Pac. 123.

61. Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359.

A description which the county surveyor can understand is sufficient.—Hinckley *v.* Fowler, 43 Cal. 56.

Effect of defective description.—Where an application described one forty-acre tract twice, so that the application seemed to cover but three hundred and sixty acres, although it called for four hundred acres, the entire application was invalid and it could not be held good for the three hundred and sixty acres described. Bieber *v.* Lambert, 152 Cal. 557, 93 Pac. 94.

62. Sherman *v.* Wrinkle, 121 Cal. 503, 53 Pac. 1090, 54 Pac. 270.

63. Klauber *v.* Higgins, 117 Cal. 451, 49 Pac. 466. *Compare* Pollard *v.* Putnam, 54 Cal. 630, holding that an application to purchase state lands, made according to law, gives the applicant as against the state, so long as the statute remains in force, a privilege to purchase the land applied for; and as against the officers of the state, and subsequent applicants, it gives him a right to purchase which can be lost only by his own failure to pursue the subsequent steps prescribed by the statute, and of which he cannot be deprived by the malfeasance or misfeasance of any of the officers, and therefore the fact that the surveyor-general's certificate and approval of an application to purchase state lands are void does not necessarily invalidate the application and the right of priority thereunder.

64. See People *v.* Washington, 40 Cal. 173, holding that the act of March 30, 1868, requires the payment by the purchaser of twenty-five per cent of the whole purchase-price within the first year after the purchase, and a like amount in each of the two follow-

f. Survey. The surveyor-general cannot be compelled to approve an application to purchase until the land has been surveyed and the field-notes and plat of the survey filed.[65] The survey which it is the duty of the surveyor to make [66] on an application to purchase lands should fix the boundaries of the land applied for with precision.[67]

g. Contests.[68] A contest arises when two persons make separate applications to purchase the same state land.[69] If a certificate of purchase of state lands is improperly issued by the register, a subsequent applicant to buy the same land may raise a contest,[70] and an application to purchase land may be contested by one who is qualified to purchase, although he was not an actual settler at the time of the prior application; [71] but one not claiming any right, title, or interest in the land, and who does not himself propose to purchase such land, cannot initiate a contest.[72] A person contesting the right of a holder of a land certificate to purchase need not refund to him the money he has paid.[73] The surveyor-general [74] may proceed to hear and determine the contest when the question involved is one of fact; [75] but it must be referred to the superior court of the county in which the land is situated when a question of law is involved,[76] or when either party demands a trial in the courts.[77] The superior court does not obtain jurisdiction of a state and contest merely by reason of a reference of the contest, but this must be fol-

ing years, and does not allow the purchaser three years in which to pay seventy-five per cent of the purchase-price.

If the first instalment of the purchase-money is not paid within the time required by law the officers and agents of the state may well treat the proposed purchase as abandoned (Carpenter *v.* Sargent, 41 Cal. 557; Eckart *v.* Campbell, 39 Cal. 256), and resell the land (People *v.* Washington, 40 Cal. 173 Eckart *v.* Campbell, *supra*), and the county treasurer is not bound to accept payment at the expiration of the time expressly limited by the statute within which it may be made (Carpenter *v.* Sargent, *supra*).

65. Wrinkle *v.* Wright, 136 Cal. 491, 69 Pac. 148, so holding under St. (1893) p. 341, § 2, providing that upon the filing of an application to purchase land not sectionized the surveyor-general shall have the same surveyed at the expense of the applicant, who shall file the field-notes and plat thereof within thirty days.

66. The duty of the county surveyor does not commence, nor can he officially act concerning any application, until the affidavit and application for a survey are officially put before him, and a survey made before such time had no official sanction. People *v.* Cowell, 60 Cal. 400.

67. Hinckley *v.* Fowler, 43 Cal. 56.

68. **Provisions as to contests applicable to schools lands.**— Youle *v.* Thomas, 146 Cal. 537, 80 Pac. 714.

69. Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159. See also Blakeley *v.* Kingsbury, 6 Cal. App. 707, 93 Pac. 129.

When contest may arise.— A contest may arise as to the right of the holder of a certificate of purchase, whether the original applicant or his assignee, so long as such certificate is outstanding, or at least until the holder thereof is entitled to call for his patent. Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159. See also Boggs *v.* Ganeard, 148 Cal. 711, 84 Pac. 195.

No contest can be made in respect to land for which a patent has been issued.— Somo *v.* Oliver, 52 Cal. 378. But *compare* Klauber *v.* Higgins, 117 Cal. 451, 49 Pac. 466, holding that a person in possession of lands at the commencement of the action may contest the right of another claiming under a void patent.

An applicant cannot, by making complete payment, prevent or nullify a contest, so as to become the real owner of the land and render the state a mere trustee of the legal title, with the obligation to convey on demand after expiration of the proper time. Blakeley *v.* Kingsbury, 6 Cal. App. 707, 93 Pac. 129.

Mode of payment.— Whether a payment for land has been made directly in coin or by reclamation does not affect the liability to a contest before the patent has been issued. Blakeley *v.* Kingsbury, 6 Cal. App. 707, 93 Pac. 129.

70. Gilson *v.* Robinson, 68 Cal. 539, 10 Pac. 193; Christian *v.* Brainard, 51 Cal. 534; Cunningham *v.* Crowley, 51 Cal. 128; Woods *v.* Sawtelle, 46 Cal. 389.

71. Wrinkle *v.* Wright, 136 Cal. 491, 69 Pac. 148.

72. Dollenmayer *v.* Pryor, 150 Cal. 1, 87 Pac. 616. But see Boggs *v.* Ganeard, 148 Cal. 711, 84 Pac. 195.

73. McFaul *v.* Pfan Kuch, 98 Cal. 400, 33 Pac. 397.

74. The surveyor-general is *ex officio* register of the state land office. Pol. Code, §§ 350, 497.

75. Pol. Code, § 3414. See Tyler *v.* Houghton, 25 Cal. 26.

76. Youle *v.* Thomas, 146 Cal. 537, 80 Pac. 714; Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159.

77. Youle *v.* Thomas, 146 Cal. 537, 80 Pac. 714; Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159.

Order of reference may be made by deputy surveyor-general.— Espinosa *v.* Phelan, 77 Cal. 100, 19 Pac. 188.

lowed by the commencement of an action,[78] which must be done within sixty days after the order of reference is made in order to save the rights of the contestant.[79] The jurisdiction exercised by the court to which the contest is referred is special and limited and is derived from and restricted to the matters embraced in the order of reference,[80] but the court may always determine the question whether the state has title to the land.[81] Persons claiming an interest in the land are entitled to

Form of order of reference held sufficient see Gilson *v.* Robinson, 68 Cal. 539, 10 Pac. 193.

Payment of fee.— The register is entitled to a fee of three dollars for certifying a contest, and prepayment of such fee is a prerequisite to the right to demand such reference. Sherman *v.* Wright, 133 Cal. 539, 65 Pac. 1096, holding that there could be no implied waiver of the payment of the fee in advance until the act was done for which the fee was to be paid, and that where the contestant failed for more than six months to pay the fee, the contestant's application might be canceled and patents issued to the prior applicants, and no subsequent payment could avail the contestant.

Jurisdiction based on reference.— The courts cannot entertain jurisdiction of a suit between opposing applicants for the purchase of state lands, unless by reference from the surveyor-general or register of the state land office. Lobree *v.* Mullan, 70 Cal. 150, 11 Pac. 685; Lane *v.* Pferdner, 56 Cal. 122; Danielwitz *v.* Temple, 55 Cal. 42. But the superior court obtains jurisdiction of an action to determine a contest which has been referred to it for trial, although the certified copy of the order for trial does not affirmatively show that the order was entered in a record book in the surveyor-general's office as required by the statute. Eads *v.* Clarke, 68 Cal. 481, 9 Pac. 666 [*followed* in Gould *v.* Lanterman, 70 Cal. 247, 11 Pac. 709].

An order of reference is sufficient if it shows that such contest has arisen, and that on demand of one party a reference is made, although by a clerical omission it does not recite that the reference was made on such demand. Espinosa *v.* Phelan, 77 Cal. 100, 19 Pac. 188.

The surveyor-general's approval of an ex parte application for the purchase of state land does not bar a subsequent applicant of his statutory right to have the contest between him and the prior applicant referred to the proper court for adjudication. Gould *v.* Lanterman, 70 Cal. 247, 11 Pac. 709.

A contestant is not required to file a statement of the specific grounds of contest with the surveyor-general in case the contest is so referred. Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159.

Land as to which contest referable.—Although a patent issues for land as "swamp land," and the land is part of the five-hundred-thousand-acre grant to the state, for internal improvements, the surveyor-general may refer to the courts a contest arising in his office between two or more claimants of the right to purchase the land. Laugenour *v.* Shanklin, 57 Cal. 70.

78. Sharp *v.* Salisbury, 144 Cal. 721, 78 Pac. 282; Polk *v.* Sleeper, 143 Cal. 70, 76 Pac. 819.

The action is strictly statutory.— Campbell *v.* Coburn, 77 Cal. 30, 18 Pac. 860; Berry *v.* Cammet, 44 Cal. 347.

Second reference.—After an order of reference to a court, by the surveyor-general, unless the contestant bring his action within sixty days, "his rights in the premises and under his application cease," but where a person, plaintiff, having once failed to bring his action under such reference, filed another application, obtained a second reference, and brought his action, it was held that he was not debarred from bringing such action by his first default, and that the second reference conferred jurisdiction on the court to try such action. Greenwade *v.* De Camp, 72 Cal. 448, 14 Pac. 177, holding further that the fact that plaintiff, who filed an application to purchase a tract of public land for which a certificate of purchase had been issued to defendant, did not sue within sixty days after the order of reference of the contest was made, did not, on a subsequent application being made by plaintiff, and on his suing within the required time, preclude him from giving evidence of acts of actual settlement performed by him upon the land prior to the time when the right to sue under the first order of reference terminated.

79. Cal. Pol. Code, § 3413. See Ewbank *v.* Mikel, 6 Cal. App. 139, 91 Pac. 672.

The limitation runs from the making and entry of the order, and not from the time at which the contestant is notified thereof, or from the date of the certified copy of the entry. Ewbank *v.* Mikel, 6 Cal. App. 139, 91 Pac. 672.

80. Youle *v.* Thomas, 146 Cal. 537, 80 Pac. 714; Byrd *v.* Reicherd, 74 Cal. 579, 16 Pac. 499; Vance *v.* Evans, 52 Cal. 93; Kleinsorge *v.* Burgbacher, 6 Cal. App. 346, 92 Pac. 199. See also McFaul *v.* Pfau Kuch, 98 Cal. 400, 33 Pac. 397; Perri *v.* Beaumont, 91 Cal. 30, 27 Pac. 534; Jacobs *v.* Walker, 90 Cal. 43, 27 Pac. 48.

81. Thompson *v.* True, 48 Cal. 601.

Estoppel to dispute authority of locating agent.— In an action to determine a contest arising from the applications of the parties to purchase land selected in lieu of school lands, plaintiff is estopped from denying the authority of the deputy locating agent, who, on application of defendant, made application to the register of the land office on behalf of the state for the land in controversy, in pursuance of which application it was listed to the state as school land. Wright *v.* Laugenour, 55 Cal. 280.

Title assumed to be in state in so far as parties concerned.— Bode *v.* Trimmer, 82 Cal. 513, 23 Pac. 187.

intervene in such an action; [82] and it has been held that the fact that a person's application to purchase school land, of some portion of which he is in possession, has been adjudged invalid, and that it has been determined that he has no right to purchase, makes him none the less a proper party to proceedings to determine a contest inaugurated by a protest in the surveyor-general's office against the purchase of the land by another person.[83] In cases of this kind, each party is an actor, and must set forth in his pleadings and show by his proofs that he has strictly complied with the law and has by such compliance become entitled to purchase the land.[84] The complaint must state that the parties are contesting claimants,[85] and set forth the facts conferring jurisdiction on the court.[86] Each party who is an applicant to purchase must state in his pleading all the facts on which he relies as showing his right to become a purchaser, and the steps which he has taken to secure his right to purchase.[87] One instituting a contest need not

82. Dollenmayer *v.* Pryor, 150 Cal. 1, 87 Pac. 616; Smith *v.* Roberts, 1 Cal. App. 148, 81 Pac. 1026, holding that one who alleges that he was at the time of making his application to purchase state lands, and for a year previous thereto had been, a settler on the lands, and that the same were suitable for cultivation, is entitled, before judgment, to intervene in an action to decide conflicting claims to purchase the lands, but one neither a party nor the legal representative of a party to the action is not entitled to have the judgment set aside for the purpose of allowing him to intervene, although he is a settler on the lands. But *compare* Youle *v.* Thomas, 146 Cal. 537, 80 Pac. 714.

Appeal from order denying right to intervene.—An order denying to one who claims to be a settler upon the land in suit the right to intervene is final and terminates the litigation as to him, and he is not required to await the judgment between the other parties, but has the immediate right to appeal from the order after its entry. Dollenmayer *v.* Pryor, 150 Cal. 1, 87 Pac. 616.

83. Jacobs *v.* Walker, (Cal. 1893) 33 Pac. 91 [*following* Perri *v.* Beaumout, 91 Cal. 30, 27 Pac. 534 (*overruling* Ramsey *v.* Flournoy, 58 Cal. 260); Garfield *v.* Wilson, 74 Cal. 175, 15 Pac. 620].

84. Prentice *v.* Miller, 82 Cal. 570, 23 Pac. 189; Gilson *v.* Robinson, 68 Cal. 539, 10 Pac. 193; Lane *v.* Pferdner, 56 Cal. 122; Christman *v.* Brainard, 51 Cal. 534; Cadierque *v.* Duran, 49 Cal. 356; Woods *v.* Sawtelle, 46 Cal. 389. Where a contest concerning the rights of the respective parties to buy state non-agricultural timbered land is brought by the one who first filed a proper application, the statement of facts, showing that the land was subject to sale, that he is a qualified purchaser, that he has made and filed due application to purchase, that defendant claims under a subsequent application, and that the order of reference has been made, sufficiently shows his own right, and he need not allege other facts to show that defendant was not entitled to purchase or that his application is void; but, where the contest is brought by the person whose application is second in point of time, in order to show that there is any contest to try, he must aver that there is a claim under an adverse application, and if he alleges that it was filed prior to his own, and it is not defective on its face, he must overcome the presumption in its favor, arising from such priority, by averment and proof of some fact establishing its invalidity. Bieber *v.* Lambert, 152 Cal. 557, 93 Pac. 94.

Material allegations not denied must be taken as true. Prentice *v.* Miller, 82 Cal. 570, 23 Pac. 189.

The complaint need not set forth the grounds of plaintiff's protest filed in the surveyor-general's office. Jacobs *v.* Walker, 76 Cal. 175, 18 Pac. 129.

Complaint held sufficient see McFaul *v.* Pfau Kuch, 98 Cal. 400, 33 Pac. 397.

Complaint held insufficient see Sharp *v.* Salisbury, 144 Cal. 721, 78 Pac. 282.

85. Berry *v.* Cammet, 44 Cal. 347.

86. Berry *v.* Cammet, 44 Cal. 347.

The order of reference to the superior court, being jurisdictional, must be averred and proved. Lane *v.* Pferdner, 56 Cal. 122; Danielwitz *v.* Temple, 55 Cal. 42.

Sufficiency of averments.— An allegation that the surveyor-general "referred the contest arising under the various applications to purchase said land to the superior court," with "profert of said order of reference," sufficiently avers that an order of reference was made. Riddell *v.* Mullan, 77 Cal. 577, 20 Pac. 91. A complaint setting forth plaintiff's application and affidavit and averring that he filed with the surveyor-general his written protest against the application and certificate of purchase issued to defendant, that he demanded that the conflicting claims of plaintiff and defendant be referred to the superior court, that said officer declared a contest to exist concerning the right to purchase the land, and that he thereupon made an entry and order referring such contest to said court, is sufficient. Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159.

The certified copy of the order need not show that it was entered in a record book in the office of the surveyor-general. Jacobs *v.* Walker, 76 Cal. 175, 18 Pac. 129 [*following* Eads *v.* Clarke, 68 Cal. 481, 9 Pac. 666].

It is unnecessary to aver the filing of the copy of the order in the district court before the commencement of the action. Lane *v.* Pferdner, 56 Cal. 122.

87. Cadierque *v.* Duran, 49 Cal. 356.

allege or prove previous knowledge or notice, on the part of an assignee of an applicant for the land intervening in the action, of any fraud in procuring his assignor's certificate, as such assignee has no equities entitling him to greater rights than his assignor.[88] The matters of fact required to be alleged in an affidavit for the purchase of state lands must be proved as set forth in order to establish the right to purchase in case of contest.[89] In a case where the court found that plaintiff had been and was an actual *bona fide* settler on the land, but also found that plaintiff had never been in actual possession thereof, such findings were, in order to reconcile them, construed to mean that plaintiff had made a *bona fide* settlement on the land without actual possession of more than his house and its environs.[90] In such a contest a certificate of purchase is *prima facie*, and not merely primary, evidence of title;[91] but the court may annul a certificate of purchase improperly issued and grant the right to purchase to a subsequent applicant.[92] A judgment for one of the applicants is conclusive only as to that part of the land mentioned in his application, which is also included in the application of the other party.[93] Where the right of an applicant has been adjudged after contest, another contest as to the same land cannot be made by a new party merely stating a different ground of contest.[94] The judgment of the superior court, or that of the appellate court, determining a contest concerning which has been referred by the surveyor-general or register to the superior court of the county where the land is situated, is conclusive on the officer referring the contest, and also on the state and the contestants,[95] and on the filing of the judgment with the surveyor-general, by any person, it is his duty to issue a certificate of purchase to the successful party.[96] The judgment on the contest cannot be collaterally attacked.[97] The state cannot receive applications for the land or sell it to a third applicant, pending a contest between two prior applicants, which has been referred by the surveyor-general to determine the right to purchase.[98]

h. Abandonment of Settlement. An actual settler on state lands who is compelled to seek a temporary residence elsewhere for the purpose of obtaining relief for a sick member of his family does not thereby abandon his settlement.[99]

i. Transfers. The mere filing of an application to purchase state land gives the applicant no right in the land which he can transfer to another;[1] but an applicant to purchase lands does not lose his right to purchase by making an agreement to sell after filing his application but before his certificate of purchase is issued, nothing in the statute prohibiting such an agreement to sell.[2] Where the vendor of a tract of land taken up under the possessory act of 1852 remained in possession, with the vendee's consent, of the only portion ever actually occupied

Qualifications to purchase.— When a person attempts to assert his right to state land under an application to purchase the same, he must affirmatively allege and prove that he possesses the necessary qualifications. Peabody *v.* Prince, 78 Cal. 511, 21 Pac. 123; Wright *v.* Laugenour, 55 Cal. 280; Christman *v.* Brainard, 51 Cal. 534; Burrell *v.* Haw, 40 Cal. 373.

88. Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159.

89. Plummer *v.* Woodruff, 72 Cal. 29, 11 Pac. 871, 13 Pac. 51.

90. Sanford *v.* Maxwell, 3 Cal. App. 242, 84 Pac. 1000.

91. Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159. See also *infra*, III, C, 2, j.

92. Cunningham *v.* Crowley, 51 Cal. 128.

93. Wrinkle *v.* Wright, 136 Cal. 491, 69 Pac. 148.

94. Wrinkle *v.* Wright, 136 Cal. 491, 69 Pac. 148.

95. Lobree *v.* Mullan, 70 Cal. 150, 11 Pac. 685.

96. Batchelder *v.* Willey, 64 Cal. 44, 30 Pac. 573.

Mandamus will issue to compel the surveyor-general to obey the judgment of the court in a contest case. Cunningham *v.* Shanklin, 60 Cal. 118.

97. Peabody *v.* Prince, 78 Cal. 511, 21 Pac. 123; Burrell *v.* Haw, 48 Cal. 222.

98. Youle *v.* Thomas, 146 Cal. 537, 80 Pac. 714; Wrinkle *v.* Wright, 136 Cal. 491, 69 Pac. 148; Cunningham *v.* Shanklin, 60 Cal. 118; Laugenour *v.* Shanklin, 57 Cal. 70. See also People *v.* Carrick, 51 Cal. 325; Darlington *v.* Butler, 3 Cal. App. 448, 86 Pac. 194.

99. Greenwade *v.* De Camp, 79 Cal. 1, 21 Pac. 379.

1. Cadierque *v.* Duran, 49 Cal. 356.

2. Bryan *v.* Graham, 5 Cal. App. 599, 91 Pac. 114.

by him, and the vendee never entered under his deed, the deed did not extend the vendee's possession by construction to any portion of the tract never in the actual possession of the vendor.[3]

j. Certificates and Patents.[4] A certificate of purchase does not pass the legal title, but such title remains in the state until the patent issues;[5] but when, on payment of part of the purchase-price of state lands, a certificate of purchase is issued by the state, an equitable title to the land vests in the purchaser.[6] The certificate of purchase is thus *prima facie* evidence of title,[7] but can be overcome by other evidence showing that the holder was not entitled to receive it.[8] A patent should not be issued until the applicant therefor surrenders the certificate of purchase,[9] and where a judgment debtor has a certificate of purchase of a tract of land sold him by the state, one who purchases at sheriff's sale a part only of the tract, and obtains a sheriff's deed therefor, is not entitled to a patent for such land.[10]

k. Forfeiture or Cancellation of Certificate or Patent. The state cannot avoid its patent on the ground alone that it was prematurely issued.[11] Where the state seeks to cancel patents issued by it on the ground of fraud practised in securing the patent, a suspicion of fraud, however strong, is not sufficient, but the proof must be clear and convincing;[12] and a patent will not be canceled on the ground that it was procured by the fraud of the patentee, where the land has passed to a *bona fide* purchaser from the patentee, for value and without notice of the fraud, although such purchase was made before the patent was issued, and while the patentee had only an equitable title.[13] In an action to annul a certificate of purchase of state lands for non-payment of principal or interest, the service of summons by publication must be made in the manner provided by the code of civil procedure for service by publication.[14] A complaint in an action to compel a surrender and cancellation of a certificate of the purchase of state land, which alleges that the purchaser has not paid the amount due and that he is the lawful holder and owner of the certificate, states a cause of action, although it does not aver that the purchaser has abandoned the title.[15] Where the terms affixed by the legislature to a special grant of public lands are not complied with, no action is necessary to enforce or to judicially establish the forfeiture which the statute declares.[16]

3. Hughes *v.* Hazard, 42 Cal. 149.

4. State patents generally see *supra*, III, B, 8, 9, 10, 11, 12.

5. Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159, holding that there is no difference as to the effect of the certificate upon the title to the land to which it relates whether a part or the whole of the purchase-price is paid.

6. Russ *v.* Crichton, 117 Cal. 695, 49 Pac. 1043.

An assignee of a certificate obtained on an affidavit containing false statements acquires no legal or equitable right by the assignment. Kleinsorge *v.* Burgbacher, 6 Cal. App. 346, 92 Pac. 199.

7. Bieber *v.* Lambert, 152 Cal. 557, 93 Pac. 94; McFaul *v.* Pfan Kuch, 98 Cal. 400, 33 Pac. 397; Davidson *v.* Cucamonga Fruit, etc., Co., 78 Cal. 4, 20 Pac. 152.

8. McFaul *v.* Pfan Kuch, 98 Cal. 400, 33 Pac. 397; Davidson *v.* Cucamonga Fruit, etc., Co., 78 Cal. 4, 20 Pac. 152; Jacobs *v.* Walker, 76 Cal. 175, 18 Pac. 129.

9. Duncan *v.* Gardner, 46 Cal. 24.

10. Duncan *v.* Gardner, 46 Cal. 24.

11. People *v.* Jackson, 62 Cal. 548.

12. People *v.* Swift, 96 Cal. 165, 31 Pac 16.

13. People *v.* Swift, 96 Cal. 165, 31 Pac. 16.

14. People *v.* Ray, (Cal. 1886) 12 Pac. 161 [*following* People *v.* Mullan, 65 Cal. 396, 4 Pac. 348; People *v.* Applegarth, 64 Cal. 229, 30 Pac. 805]. *Compare* People *v.* Herman, 45 Cal. 689, holding that where the action is against the owner of the certificate, and there is no allegation that his name is unknown so as to warrant bringing the action against a fictitious person, there is no authority to make service of the summons by publication under St. (1867–1868) p. 526. Lands," § 397.

Service may be by publication for four weeks only.— People *v.* Norris, 144 Cal. 422, 77 Pac. 998, holding that Pol. Code, § 3549, is to be construed as an exception to Code Civ. Proc. § 413, providing generally for publication for two months of a summons against a non-resident defendant, or one absent from the state.

15. Shepard *v.* Mace, 148 Cal. 270, 82 Pac. 1046.

16. Upham *v.* Hosking, 62 Cal. 250.

l. Curative Acts. There have been several statutes curing defects in proceedings for the purchase of state lands, which have been construed according to the usual rules applicable to such statutes.[17]

m. Possessory Actions. The protection of possessory rights and the maintenance of possessory actions was regulated by the act of 1852,[18] which was not repealed by the adoption of title 8 of the political code;[19] but as there have been no actions under that statute for many years it is deemed sufficient to refer to some of the principal cases decided under its provisions.[20]

3. Texas[21] — a. Introductory. When Texas seceded from Mexico and established its independence all vacant public lands vested in the republic of Texas,[22] and upon the admission of Texas to the United States the state of Texas retained all vacant and unappropriated lands within its limits.[23] In the early history of the state a large part of the public domain was disposed of by bounty warrants, grants to railroads, homestead donations, and land certificates and grants of various kinds, so that at the present time there are no vacant and unoccupied lands of the state except those which belong to the public school fund.[24] The disposal of this land is of much importance and is hereinafter discussed at length;[25] but as a detailed discussion of methods of obtaining title to other lands would be of comparatively little present value, it is deemed sufficient to merely cite some of the principal cases relating to the right of preëmption,[26] homestead donations,[27]

17. See People *v.* Harrison, 107 Cal. 541, 40 Pac. 956; People *v.* Noyo Lumber Co., 99 Cal. 456, 34 Pac. 96; Cucamonga Fruit-Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359; Gilson *v.* Robinson, 68 Cal. 539, 10 Pac. 193; Muller *v.* Carey, 58 Cal. 538; Rowell *v.* Perkins, 56 Cal. 219; Johnson *v.* Squires, 55 Cal. 103; Wanzer *v.* Somers, 53 Cal. 90; Rooker *v.* Johnston, 49 Cal. 3; Young *v.* Shinn, 48 Cal. 26; Copp *v.* Harrington, 47 Cal. 236. And see 41 Cent. Dig. tit. "Public Lands," § 397.

18. St. (1852) c. 82, p. 158.

19. Gray *v.* Dixon, 74 Cal. 508, 16 Pac. 305.

20. See Taylor *v.* Abbott, 103 Cal. 421, 37 Pac. 408; Gray *v.* Dixon, 74 Cal. 508, 16 Pac. 305; Crowell *v.* Lanfranco, 42 Cal. 654; Hodapp *v.* Sharp, 40 Cal. 69; Wolskill *v.* Malajowich, 39 Cal. 276; Hicks *v.* Whitesides, 35 Cal. 152; Hawxhurst *v.* Lander, 28 Cal. 331; Hicks *v.* Whiteside, 23 Cal. 404; Coryell *v.* Cain, 16 Cal. 567; Wright *v.* Whitesides, 15 Cal. 46. And see 41 Cent. Dig. tit. "Public Lands," § 398.

21. For matters of general interest see *supra*, III, B.

22. Houston *v.* Robertson, 2 Tex. 1; Milam County Land Com'rs *v.* Bell, 6 Dall. (Tex.) 366.

Recognition of rights acquired under laws of Mexico see Fields *v.* Burnett, (Tex. Civ. App. 1908) 108 S. W. 1048.

23. State *v.* Galveston City Co., 38 Tex. 12.

24. See *infra*, note 63.

25. See *infra*, III, C, 3, b, c.

26. McCarthy *v.* Gomez, 85 Tex. 10, 19 S. W. 999; Dawson *v.* Ward, 71 Tex. 72, 9 S. W. 106; Gammage *v.* Powell, 61 Tex. 629; Turner *v.* Ferguson, 58 Tex. 6; Thomas *v.* Porter, 57 Tex. 59; Gambrell *v.* Steele, 55 Tex. 582; Young *v.* O'Neal, 54 Tex. 544; Palmer *v.* Chandler, 47 Tex. 332; Rodgers *v.* Daily, 46 Tex. 578; Austin *v.* Dungan, 46 Tex. 236; Burleson *v.* Durham, 46 Tex. 152; Miller *v.* Hays, 42 Tex. 479; Spier *v.* Laman, 27 Tex. 205; Kohlhass *v.* Linney, 26 Tex. 332; Fowler *v.* Allred, 24 Tex. 184; Teel *v.* Huffman, 21 Tex. 781; Edgar *v.* Galveston City Co., 21 Tex. 302; Jennings *v.* De Cordova, 20 Tex. 508; Crockett *v.* Robinson, 20 Tex. 487; Allen *v.* Harper, 19 Tex. 501; Cravens *v.* Brooke, 17 Tex. 268; Thompson *v.* Johnson, 2 Tex. Unrep. Cas. 258; Perry *v.* Coleman, 1 Tex. Unrep. Cas. 312; Pope *v.* Anthony, 29 Tex. Civ. App. 298, 68 S. W. 521; Wynne *v.* Kennedy, 11 Tex. Civ. App. 693, 33 S. W. 298; Horne *v.* Gambrell, 1 Tex. App. Civ. Cas. § 996. See 41 Cent. Dig. tit. "Public Lands," § 538.

27. Yocham *v.* McCurdy, 95 Tex. 336, 67 S. W. 316 [*reversing* 27 Tex. Civ. App. 183, 65 S. W. 213]; Hogue *v.* Baker, 92 Tex. 58, 45 S. W. 1004; Busk *v.* Lowrie, 86 Tex. 128, 23 S. W. 983 [*reversing* Civ. App. (1893) 22 S. W. 414]; Swetman *v.* Sanders, 85 Tex. 294, 20 S. W. 124; McCarthy *v.* Gomez, 85 Tex. 10, 19 S. W. 999; Paston *v.* Blanks, 77 Tex. 330, 14 S. W. 67; Luckie *v.* Watt, 77 Tex. 262, 13 S. W. 1035; Garrett *v.* Weaver, 70 Tex. 463, 7 S. W. 766; Decourt *v.* Sproul, 66 Tex. 368, 1 S. W. 337; Vance *v.* Lindsey, 60 Tex. 286; Garrison *v.* Grant, 57 Tex. 602; Williamson *v.* Brown, (Tex. Civ. App. 1908) 109 S. W. 412; McClallahan *v.* Marshall, 35 Tex. Civ. App. 579, 80 S. W. 862; Pruitt *v.* Watson (Tex. Civ. App. 1900) 56 S. W. 692; Yochum *v.* McCurdy, (Tex. Civ. App. 1897) 39 S. W. 210; Votaw *v.* Pettigrew, 15 Tex. Civ. App. 87, 38 S. W. 215; Roberts *v.* Trout, 13 Tex. Civ. App. 70, 35 S. W. 323; Brinkley *v.* Smith, 12 Tex. Civ. App. 641, 35 S. W. 48; Clifton *v.* Thompson, (Tex. Civ. App. 1895) 29 S. W. 197; Jones *v.* Hart, (Tex. Civ. App. 1894) 25 S. W. 704; Traylor *v.* Hubbard, (Tex. Civ. App. 1893) 22 S. W. 241. See 41 Cent. Dig. tit. "Public Lands," § 539.

headright claims or certificates,[28] donation or bounty grants, certificates, or warrants,[29] and other land certificates,[30] the rights of settlers on state lands gener-

28. Smith *v.* Walton, 82 Tex. 547, 18 S. W. 217; McNeil *v.* O'Connor, 79 Tex. 227, 14 S. W. 1058; Blum *v.* Looney, 69 Tex. 1, 4 S. W. 857; Merrill *v.* Roberts, 64 Tex. 441; Clark *v.* Smith, 59 Tex. 275; Marks *v.* Hill, 46 Tex. 345; Willis *v.* Lewis, 28 Tex. 185; Babb *v.* Carroll, 21 Tex. 765; Pitts *v.* Booth, 15 Tex. 453; Morris *v.* Byers, 14 Tex. 278; Howard *v.* Perry, 7 Tex. 259; Nacogdoches County Land Com'rs *v.* Riley, 3 Tex. 237; League *v.* De Young, 2 Tex. 497; State *v.* Mason, 2 Tex. 315; Tichner *v.* State, 2 Tex. 269; State *v.* Skidmore, 2 Tex. 261; Lockhart *v.* State, 2 Tex. 127; Nacogdoches County Land Com'rs *v.* Raguet, 2 Tex. 98; Ximenes *v.* State, 1 Tex. 602; State *v.* Manchaca, 1 Tex. 586; Grooms *v.* State, 1 Tex. 568; Cunningham *v.* State, 1 Tex. 532; State *v.* Casinova, 1 Tex. 401; Howard *v.* State, 1 Tex. 83; Houston Oil Co. *v.* Gallup, (Tex. Civ. App. 1908) 109 S. W. 957; Buster *v.* Warren, 35 Tex. Civ. App. 644, 80 S. W. 1063 [*distinguishing* Davis *v.* Bargas, 88 Tex. 662, 32 S. W. 874]; Pope *v.* Anthony, 29 Tex. Civ. App. 298, 68 S. W. 521; Hereford *v.* House, 16 Tex. Civ. App. 356, 40 S. W. 847; Ferguson *v.* Johnson, 11 Tex. Civ. App. 413, 33 S. W. 138; Santana Live-Stock, etc., Co. *v.* Pendleton, 81 Fed. 784, 26 C. C. A. 608; Baylor *v.* Scottish-American Mortg. Co., 66 Fed. 631, 13 C. C. A. 659. See 41 Cent. Dig. tit. "Public Lands," §§ 540, 552.

29. Munson *v.* Terrell, (Tex. 1907) 105 S. W. 1114; Malone *v.* Dick, 94 Tex. 419, 61 S. W. 112 [*affirming* 24 Tex. Civ. App. 97, 58 S. W. 168]; McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044 [*reversing* (Civ. App. 1894) 25 S. W. 705]; Maxwell *v.* Bastrop Mfg. Co., 77 Tex. 233, 14 S. W. 35; Shinn *v.* Hicks, 68 Tex. 277, 4 S. W. 486; Bacon *v.* Russell, 57 Tex. 409; Rogers *v.* Kennard, 54 Tex. 30; Franklin *v.* Kesler, 25 Tex. 138; Warnell *v.* Finch, 15 Tex. 163; Eastland *v.* Lester, 15 Tex. 98; McNeese *v.* State, 2 Tex. 106; Clarke *v.* Hoover, (Tex. Civ. App. 1908) 110 S. W. 792; Halsted *v.* Allen, (Tex. Civ. App. 1903) 73 S. W. 1068 [*following* Nixon *v.* Wichita Land, etc., Co., 84 Tex. 408, 19 S. W. 560; Rogers *v.* Kennard, 54 Tex. 30; Goldsmith *v.* Herndon, 33 Tex. 705]; Hall *v.* Reese, 24 Tex. Civ. App. 221, 58 S. W. 974; Clifton *v.* Hewitt, (Tex. Civ. App. 1900) 56 S. W. 131; Leonard *v.* Rives, (Tex. Civ. App. 1895) 33 S. W. 291; Greenwood *v.* McLeary, (Tex. Civ. App. 1894) 25 S. W. 708; Travis County *v.* Christian, (Tex. Civ. App. 1892) 21 S. W. 119; Brownsville *v.* Cavazos, 4 Fed. Cas. No. 2,043, 2 Woods 293. See 41 Cent. Dig. tit. "Public Lands," § 542.

Donations, grants, or reservations in aid of railroads.— Houston, etc., R. Co. *v.* State, 95 Tex. 507, 68 S. W. 777 [*affirming* (Civ. App. 1896) 39 S. W. 390]; Houston, etc., R. Co. *v.* State, 90 Tex. 607, 40 S. W. 402; Thomson *v.* Baker, (Tex. 1896) 38 S. W. 21; Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738; Galveston, etc., R. Co. *v.* State, 89 Tex. 340, 34 S. W. 746; Galveston, etc., R. Co. *v.* State, 81 Tex. 572, 17 S. W. 67; Jumbo Cattle Co. *v.* Bacon, 79 Tex. 5, 14 S. W. 840, (1890) 17 S. W. 136; Houston, etc., R. Co. *v.* Texas, etc., R. Co., 70 Tex. 649, 8 S. W. 498; State *v.* International, etc., R. Co., 57 Tex. 534; Kuechler *v.* Wright, 40 Tex. 600; Wright *v.* Hawkins, 28 Tex. 452; Woods *v.* Durrett, 28 Tex. 429; Sherwood *v.* Fleming, 25 Tex. Suppl. 408; Kimmell *v.* Wheeler, 22 Tex. 77; Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1901) 62 S. W. 714; Houston, etc., R. Co. *v.* State, 24 Tex. Civ. App. 117, 56 S. W. 228; Wilson *v.* Dillingham, 14 Tex. Civ. App. 628, 38 S. W. 650; Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1896) 36 S. W. 819; Blum *v.* Houston, etc., R. Co., 10 Tex. Civ. App. 312, 31 S. W. 526; Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447. See 41 Cent. Dig. tit. "Public Lands," § 543.

Grants of rights of way through the public domain.— Texas Cent. R. Co. *v.* Bowman, 97 Tex. 417, 79 S. W. 295 [*reversing* (Civ. App. 1903) 75 S. W. 556]; Ayres *v.* Gulf, etc., R. Co., 39 Tex. Civ. App. 561, 88 S. W. 436, holding that a statute authorizing a railroad company to construct a railroad through a certain county and to other points impliedly authorizes it to construct its line over the public domain.

30. Ward *v.* Cameron, 97 Tex. 466, 80 S. W. 69; Hogue *v.* Baker, 92 Tex. 58, 45 S. W. 1004; Brackinridge *v.* Claridge, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593 [*reversing* (Civ. App. 1897) 42 S. W. 1005]; Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738; Smith *v.* McGaughey, 87 Tex. 61, 26 S. W. 1073; Von Rosenberg *v.* Cuellar, 80 Tex. 249, 16 S. W. 58; Lott *v.* King, 79 Tex. 292, 15 S. W. 231; Hill *v.* Kerr, 78 Tex. 213, 14 S. W. 566; Capp *v.* Terry, 75 Tex. 391, 13 S. W. 52; Stout *v.* Taul, 71 Tex. 438, 9 S. W. 329; White *v.* Martin, 66 Tex. 340, 17 S. W. 727; Sickles *v.* Epps, (Tex. 1888) 8 S. W. 124; Barker *v.* Swenson, 66 Tex. 407, 1 S. W. 117; Neal *v.* Bartleson, 65 Tex. 478; Kimbro *v.* Hamilton, 28 Tex. 560; Peck *v.* Moody, 23 Tex. 93; Fishback *v.* Young, 19 Tex. 515; Myers *v.* Cockrill, 14 Tex. 343; Peacock *v.* Hammond, 6 Tex. 544; Kemper *v.* Victoria Corp., 3 Tex. 135; Glasscock *v.* General Land Office Com'r, 3 Tex. 51; Hosner *v.* De Young, 1 Tex. 764; Whisler *v.* Cornelius, 34 Tex. Civ. App. 511, 79 S. W. 360; Brown *v.* Brown, (Tex. Civ. App. 1896) 36 S. W. 918; Summerlin *v.* Rabb, 11 Tex. Civ. App. 53, 31 S. W. 711; Quinlan *v.* Houston, etc., R. Co., (Tex. Civ. App. 1893) 24 S. W. 693. See 41 Cent. Dig. tit. "Public Lands," § 552.

Duplicates and new certificates see New York, etc., Land Co. *v.* Thomson, 83 Tex. 169, 17 S. W. 920; Morris *v.* Byer, 14 Tex. 278; Eyl *v.* State, 37 Tex. Civ. App. 297, 84 S. W. 607; Simmonds *v.* Simmonds, 35 Tex. Civ. App. 151, 79 S. W. 630; Kempner *v.* State, 31 Tex. Civ. App. 363, 72 S. W. 888;

ally,[31] settlements and contracts under the colonization laws,[32] the creation of land districts,[33] the location and survey of homesteads, land certificates, and warrants,[34] and the necessity therefor;[35] lands subject to location by settlers, certificate holders, homestead claimants, and other persons entitled to acquire land,[36] preferences in location,[37] relocation,[38] the requisites and validity of the survey or location,[39] the

Karnes *v.* Butler, (Tex. Civ. App. 1901) 62 S. W. 950; Seibert *v.* Richardson, 5 Tex. Civ. App. 504, 23 S. W. 899; Texas Land, etc., Co. *v.* State, 1 Tex. Civ. App. 616, 23 S. W. 258 [*following* Gunter *v.* Meade, 78 Tex. 634, 14 S. W. 562]; Schley *v.* Maddox, (Tex. Civ. App. 1893) 22 S. W. 998. See 41 Cent. Dig. tit. "Public Lands," § 553.

Validation of certificates see Ralston *v.* Skerrett, 82 Tex. 486, 17 S. W. 843, (1891) 17 S. W. 238; Whitehead *v.* Foley, 28 Tex. 1. See 41 Cent. Dig. tit. "Public Lands," § 554.

31. King *v.* Underwood, (Tex. Civ. App. 1908) 112 S. W. 334; McCullers *v.* Johnson, (Tex. Civ. App. 1907) 104 S. W. 502.

32. Caudle *v.* Welden, 32 Tex. 355; Todd *v.* Fisher, 26 Tex. 239; Cowan *v.* Hardman, 26 Tex. 217; European-American Colonization Soc. *v.* Reed, 25 Tex. Suppl. 343; Chambers *v.* Fisk, 22 Tex. 504; Stover *v.* Garvin, 22 Tex. 9; Melton *v.* Cobb, 21 Tex. 539; Edgar *v.* Galveston City Co., 21 Tex. 302; Causici *v.* La Coste, 20 Tex. 269; Edwards *v.* Beavers, 19 Tex. 506; Overton *v.* Crockett, 12 Tex. 509; State *v.* Skidmore, 5 Tex. 469; Linn *v.* State, 2 Tex. 317; Clay *v.* Clay, 2 Tex. Unrep. Cas. 357; McReynolds *v.* Bowlby, 1 Tex. Unrep. Cas. 452. See 41 Cent. Dig. tit. "Public Lands," § 540.

33. Pardee *v.* Adamson, 19 Tex. Civ. App. 263, 46 S. W. 43.

34. Calvert *v.* Ramsey, 59 Tex. 490; Wyllie *v.* Wynne, 26 Tex. 42; Bracken *v.* Wells, 3 Tex. 88; Hosner *v.* De Young, 1 Tex. 764; Smyth *v.* Saigling, (Tex. Civ. App. 1908) 110 S. W. 550; Wilkins *v.* Clawson, (Tex. Civ. App. 1908) 110 S. W. 103; Estell *v.* Kirby, (Tex. Civ. App. 1898) 48 S. W. 8; Pardee *v.* Adamson, 19 Tex. Civ. App. 263, 46 S. W. 43; Timmony *v.* Burns, (Tex. Civ. App. 1897) 42 S. W. 133; Maurice *v.* Upton, (Tex. Civ. App. 1897) 41 S. W. 504; Parker *v.* Walker, 15 Tex Civ. App. 370, 39 S. W. 611; Kirby *v.* Estell, (Tex. Civ. App. 1897) 39 S. W. 592; Yochum *v.* McCurdy, (Tex. Civ. App. 1897) 39 S. W. 210; Thompson *v.* Dumas, 85 Fed. 517, 29 C. C. A. 312. See 41 Cent. Dig. tit. "Public Lands," § 555 *et seq.*

35. Garza *v.* Cassin, 72 Tex. 440, 10 S. W. 539; De Montel *v.* Speed, 53 Tex. 339; Frederick *v.* Hamilton, 38 Tex. 321; Linn *v.* Scott, 3 Tex. 67; Robles *v.* Cooksey, (Tex. Civ. App. 1902) 70 S. W. 584. See 41 Cent. Dig. tit. "Public Lands," § 557.

36. Roberts *v.* Terrell, (Tex. 1908) 110 S. W. 733; Faulk *v.* Sanderson, 89 Tex. 692, 36 S. W. 403 [*reversing* (Civ. App. 1896) 35 S. W. 409]; McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044; Groesbeck *v.* Harris, 82 Tex. 411, 19 S. W. 850; Maddox *v.* Fenner, 79 Tex. 279, 15 S. W. 237; Beatty *v.* Masterson, 77 Tex. 168, 13 S. W. 1014; Maddox *v.* Fenner, (Tex. 1890) 13 S. W. 153; Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80; Garza *v.* Cassin, 72 Tex. 440, 10 S. W. 539; Adams *v.* Houston, etc., R. Co., 70 Tex. 252, 7 S. W. 729; Winsor *v.* O'Connor, 69 Tex. 571, 8 S. W. 519; Looney *v.* Bagley, (Tex. 1887) 7 S. W. 360; Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865; Hanrick *v.* Dodd, 62 Tex. 75; Atkinson *v.* Ward, 61 Tex. 383; Truehart *v.* Babcock, 51 Tex. 169; Luter *v.* Mayfield, 26 Tex. 325; Todd *v.* Fisher, 26 Tex. 239; Cowan *v.* Hardeman, 26 Tex. 217; European-American Colonization Soc. *v.* Reed, 25 Tex. Suppl. 343; Stewart *v.* Crosby, 15 Tex. 546; White *v.* Holliday, 11 Tex. 606; State *v.* Delesdenier, 7 Tex. 76; Warren *v.* Shuman, 5 Tex. 441; Hulett *v.* Platt, (Tex. Civ. App. 1908) 109 S. W. 207; Keenan *v.* Slaughter, (Tex. Civ. App. 1908) 108 S. W. 703; Gilbert *v.* Mansfield, 38 Tex. Civ. App. 300, 85 S. W. 830 [*affirmed* in 99 Tex. 18, 86 S. W. 922]; McCaleb *v.* Rector, (Tex. Civ. App. 1904) 78 S. W. 956; Texas, etc., R. Co. *v.* Barber, 31 Tex. Civ. App. 84, 71 S. W. 393; Mills *v.* Needham, 28 Tex. Civ. App. 547, 67 S. W. 1097; Besson *v.* Richards, 24 Tex. Civ. App. 64, 58 S. W. 611; Hall *v.* Rushing, 21 Tex. Civ. App. 631, 54 S. W. 30; Wright *v.* Nelson, (Tex. Civ. App. 1898) 46 S. W. 261; Sanderson *v.* Faulk, (Tex. Civ. App. 1896) 35 S. W. 409; Jones *v.* Crane, (Tex. Civ. App. 1894) 28 S. W. 1041; Creswell Ranche, etc., Co. *v.* Waldstein, (Tex. Civ. App. 1894) 28 S. W. 260; Massey *v.* Galveston, etc., R. Co., 7 Tex. Civ. App. 650, 27 S. W. 208; Teague *v.* Green, 7 Tex. Civ. App. 368, 26 S. W. 518. See 41 Cent. Dig. tit. "Public Lands," § 555.

37. European-American Colonization Soc. *v.* Reed, 25 Tex. Suppl. 343; Kimmell *v.* Wheeler, 22 Tex. 77; Edgar *v.* Galveston City Co., 21 Tex. 302; Crockett *v.* Robinson, 20 Tex. 487; Chadoin *v.* Magee, 20 Tex. 476; Patton *v.* Skidmore, 19 Tex. 533; Stewart *v.* Crosby, 15 Tex. 546; State *v.* Delesdenier, 7 Tex. 76. See 41 Cent. Dig. tit. "Public Lands," § 556.

38. Adams *v.* Houston, etc., R. Co., 70 Tex. 252, 7 S. W. 729; Westrope *v.* Chambers, 51 Tex. 178; Truehart *v.* Babcock, 51 Tex. 169; Johnson *v.* Eldridge, 49 Tex. 507; Sanders *v.* Duval, 39 Tex. 182; Lewis *v.* Mixon, 11 Tex. 564. See 41 Cent. Dig. tit. "Public Lands," § 563.

39. McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044; Smith *v.* McGaughey, 87 Tex. 61, 26 S. W. 1073; Duren *v.* Houston, etc., R. Co., 86 Tex. 287, 24 S. W. 258; Von Rosenberg *v.* Cuellar, 80 Tex. 249, 16 S. W. 58; Glasscock *v.* Hughes, 55 Tex. 461; Snider *v.* International, etc., R. Co., 52 Tex. 306; Ward *v.* Connor, 33 Tex. 549; Bohannan *v.* Hemby,

requisites of an application for the location of a land certificate,[40] the time for location and survey,[41] location or survey under certificates owned jointly by two or more persons,[42] transfer from one location or survey to another,[43] the return of the survey,[44] the construction, operation, effect, and conclusiveness of the location or survey,[45] and the title and rights acquired thereunder,[46] errors and omissions in the location or survey and the correction thereof,[47] conflicting locations and surveys and priorities in cases of conflict,[48] the issuance, requisites, and valid-

23 Tex. 475; Hughes *v.* Perry, 21 Tex. 778; Hollingsworth *v.* Holshousen, 17 Tex. 41; Ruis *v.* Chambers, 15 Tex. 586; Edwards *v.* James, 13 Tex. 52; Croft *v.* Rains, 10 Tex. 520; Horton *v.* Pace, 9 Tex. 81; Howard *v.* Perry, 7 Tex. 259; Linn *v.* Scott, 3 Tex. 67; Eyl *v.* State, 37 Tex. Civ. App. 297, 84 S. W. 607; Houston, etc., R. Co. *v.* De Berry, 34 Tex. Civ. App. 180, 78 S. W. 736; Olcott *v.* Smith, 30 Tex. Civ. App. 350, 70 S. W. 343; Yarbrough *v.* De Martin, 28 Tex. Civ. App. 276, 67 S. W. 177; Pardee *v.* Adamson, 19 Tex. Civ. App. 263, 46 S. W. 43; White *v.* Holley, 3 Tex. Civ. App. 590, 24 S. W. 831; Berger *v.* Arnold, (Tex. Civ. App. 1893) 24 S. W. 527; Bacon *v.* State, 2 Tex. Civ. App. 692, 21 S. W. 149; Telfener *v.* Russ, 162 U. S. 170, 16 S. Ct. 695, 40 L. ed. 930. See 41 Cent. Dig. tit. "Public Lands," § 558.

40. Raoul *v.* Terrell, 99 Tex. 157, 87 S. W. 1146.

41. Jones *v.* Lee, 86 Tex. 25, 22 S. W. 386, 1092; Von Rosenberg *v.* Cuellar, 80 Tex. 249, 16 S. W. 58; Thomson *v.* Houston, etc., R. Co., 68 Tex. 392, 4 S. W. 629; Booth *v.* Strippleman, 61 Tex. 378; Snider *v.* International, etc., R. Co., 52 Tex. 306; Jennings *v.* De Cordova, 20 Tex. 508; Williams *v.* Craig, 10 Tex. 437; Lewis *v.* Durst, 10 Tex. 398; Warren *v.* Shuman, 5 Tex. 441; Trueheart *v.* Simpson, (Tex. Civ. App. 1894) 24 S. W. 842; Taylor *v.* Criswell, 4 Tex. Civ. App. 106, 23 S. W. 424. See 41 Cent. Dig. tit. "Public Lands," § 559.

42. Smith *v.* Estill, 87 Tex. 264, 28 S. W. 801; Kirby *v.* Estill, 78 Tex. 426, 14 S. W. 695; Farris *v.* Gilbert, 50 Tex. 350; Kirby *v.* Estell, 24 Tex. Civ. App. 106, 58 S. W. 254. See 41 Cent. Dig. tit. "Public Lands," § 560.

43. Duren *v.* Houston, etc., R. Co., 86 Tex. 287, 24 S. W. 258; Jones *v.* Lee, 86 Tex. 25, 22 S. W. 386, 1092; Lockhart *v.* Keller, (Tex. 1888) 9 S. W. 179; Adams *v.* Houston, etc., R. Co., 70 Tex. 252, 7 S. W. 729; Johns *v.* Pace, 26 Tex. 270; Poor *v.* Boyce, 12 Tex. 440; McGimpsey *v.* Ramsdale, 3 Tex. 344; Houston, etc., R. Co. *v.* Carter, (Tex. Civ. App. 1894) 24 S. W. 1102; Gillespie *v.* Feris, 3 Tex. App. Civ. Cas. § 124. See 41 Cent. Dig. tit. "Public Lands," § 561.

44. Groesbeck *v.* Harris, 82 Tex. 411, 19 S. W. 850; Hill *v.* Kerr, 78 Tex. 213, 14 S. W. 566; Snider *v.* Methvin, 60 Tex. 487; Milam County *v.* Bateman, 54 Tex. 153; Henderson County *v.* Shook, 51 Tex. 370; Fannin County *v.* Riddle, 51 Tex. 360; Milan County *v.* Robertson, 33 Tex 366; Patrick *v.* Nance, 26 Tex. 298; Breckenridge *v.* Neill, 26 Tex. 101; Crow *v.* Reed, 25 Tex. Suppl. 392; Bohannan *v.* Hemby, 23 Tex. 475; Jennings *v.* De Cordova, 20 Tex. 508; Parish *v.* Weatherford, 19 Tex. 209; Hart *v.* Gibbons, 14 Tex. 213; Bledsoe *v.* Cains, 10 Tex. 455; Waterhouse *v.* Corbett, 43 Tex. Civ. App. 512, 96 S. W. 651; Lane *v.* Hoffman, (Tex. Civ. App. 1904) 82 S. W. 1070; Robles *v.* Cooksey, (Tex. Civ. App. 1902) 70 S. W. 584; New York, etc., Land Co. *v.* Gardner, 11 Tex. Civ. App. 404, 32 S. W. 786; White *v.* Holley, 3 Tex. Civ. App. 590, 24 S. W. 831. See 41 Cent. Dig. tit. "Public Lands," § 562.

45. Raoul *v.* Terrell, 99 Tex. 157, 87 S. W. 1146; Huff *v.* Crawford, 89 Tex. 214, 34 S. W. 606; Smith *v.* Estill, 87 Tex. 264, 28 S. W. 801; Forbes *v.* Withers, 71 Tex. 302, 9 S. W. 154; Schaeffer *v.* Berry, 62 Tex. 705; Morrill *v.* Bartlett, 58 Tex. 644; Ross *v.* Early, 39 Tex. 390; Wright *v.* Hawkins, 28 Tex. 452; Booth *v.* Strippleman, 26 Tex. 436; Booth *v.* Upshur, 26 Tex. 64; Hart *v.* Turner, 2 Tex. 374; Stubblefield *v.* Hanson, (Tex. Civ. App. 1906) 94 S. W. 406; Hickey *v.* Collyns, 40 Tex. Civ. App. 565, 90 S. W. 716 [*following* Juencke *v.* Terrell, 98 Tex. 237, 82 S. W. 1025; Yarbrough *v.* De Martin, 28 Tex. Civ. App. 276, 67 S. W. 177]; Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1901) 62 S. W. 114; Pool *v.* Greer, 23 Tex. Civ. App. 423, 58 S. W. 171. See 41 Cent. Dig. tit. "Public Lands," §§ 565, 567.

46. Threadgill *v.* Bickerstaff, 87 Tex. 520, 29 S. W. 757; Thompson *v.* Langdon, 87 Tex. 254, 28 S. W. 931; Stewart *v.* Cook, 62 Tex. 522; Snider *v.* Methvin, 60 Tex. 487; Swift *v.* Herrera, 9 Tex. 263; Howard *v.* Perry, 7 Tex. 259; Alford *v.* McDonald, 2 Tex. Unrep. Cas. 175; Atascosa County *v.* Alderman, (Tex. Civ. App. 1905) 91 S. W. 846; Watts *v.* Bruce, 31 Tex. Civ. App. 347, 72 S. W. 258; Roach *v.* Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585; Creswell Ranche, etc., Co. *v.* Waldstein, (Tex. Civ. App. 1894) 28 S. W. 260; Miller *v.* Texas, etc., R. Co., 132 U. S. 662, 10 S. Ct. 206, 33 L. ed. 487. See 41 Cent. Dig. tit. "Public Lands," § 566.

47. Smith *v.* McGaughey, 87 Tex. 61, 26 S. W. 1073; Texas, etc., R. Co. *v.* Thompson, 65 Tex. 186; Jones *v.* Andrews, 62 Tex. 652; Loving *v.* Corcoran, 26 Tex. 92; Eyl *v.* State, 37 Tex. Civ. App. 297, 84 S. W. 607; Matador Land, etc., Co. *v.* State, (Tex. Civ. App. 1899) 54 S. W. 256; Frisbie *v.* Smith, 13 Tex. Civ. App. 334, 35 S. W. 336. See 41 Cent. Dig. tit. "Public Lands," § 568.

48. Seibert *v.* Richardson, 86 Tex. 295, 24 S. W. 261; Garza *v.* Cassin, 72 Tex. 440, 10 S. W. 539; Sickels *v.* Epps, (Tex. 1888) 8 S. W. 124; Cassin *v.* O'Sullivan, 61 Tex. 594; Evitts *v.* Roth, 61 Tex. 81; Thomas *v.* Porter, 57 Tex. 59; Bryan *v.* Shirley, 53 Tex. 440; McKinney *v.* Grassmeyer, 51 Tex. 376; John-

ity of grants or patents,[49] the construction, operation, effect, and conclusiveness of the same,[50] and the title and rights acquired thereunder,[51] the abandonment, relinquishment, forfeiture, or loss of claims or rights acquired in public lands,[52] the setting aside, annulment, or cancellation of grants or patents,[53] relief to per-

son *v.* Eldridge, 49 Tex. 507; Houston, etc., R. Co. *v.* McGehee, 49 Tex. 481; Ward *v.* Conner, 33 Tex. 549; Magee *v.* Chadoin, 30 Tex. 644; Booth *v.* Upshur, 26 Tex. 64; Wyllie *v.* Wynne, 26 Tex. 42; Hollingsworth *v.* Holshausen, 25 Tex. 628; Fowler *v.* Hilburn, 21 Tex. 489; Upshur *v.* Pace, 15 Tex. 531; Morris *v.* Brinlee, 14 Tex. 285; Morris *v.* Byers, 14 Tex. 278; Lewis *v.* Durst, 10 Tex. 398; Byers *v.* Janes, 2 Tex. 529; Waterhouse *v.* Corbett, 43 Tex. Civ. App. 512, 96 S. W. 651; Houston, etc., R. Co. *v.* State, 24 Tex. Civ. App. 117, 56 S. W. 228; Childress County Land, etc., Co. *v.* Baker, 23 Tex. Civ. App. 451, 56 S. W. 756; Dawson *v.* McLeary, (Tex. Civ. App. 1894) 25 S. W. 705; Whitman *v.* Rhomberg. (Tex. Civ. App. 1894) 25 S. W. 451; Olcott *v.* Ferris, (Tex. Civ. App. 1894) 24 S. W. 848; Seibert *v.* Richardson, 5 Tex. Civ. App. 504. 23 S. W. 899; McWhirter *v.* Allen, 1 Tex. Civ. App. 649, 20 S. W. 1007; Miller *v.* Texas, etc., R. Co., 132 U. S. 662, 10 S. Ct. 206, 33 L. ed. 487. See 41 Cent. Dig. tit. "Public Lands," § 570.

49. Peterson *v.* Rogan, 94 Tex. 176, 59 S. W. 252; Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865; Boon *v.* Hunter, 62 Tex. 582; Spofford *v.* Bennett, 55 Tex. 293; Gullett *v.* O'Connor, 54 Tex. 408; Hendricks *v.* Wilson, 53 Tex. 463; Miller *v.* Brownson, 50 Tex. 583; Jones *v.* Burgett, 46 Tex. 284; Stafford *v.* King, 30 Tex. 257, 94 Am. Dec. 304; Franklin *v.* Kesler, 25 Tex. 138; Lake *v.* Wafer, 16 Tex. 570; Stewart *v.* Crosby, 15 Tex. 546; Keenan *v.* Slaughter, (Tex. Civ. App. 1908) 108 S. W. 703; Ward *v.* Forrester, (Tex. Civ. App. 1905) 87 S. W. 751; Thompson *v.* Ford, 14 Tex. Civ. App. 32, 36 S. W. 783; Dawson *v.* McLeary, (Tex. Civ. App. 1894) 25 S. W. 705; Russell *v.* Bates, 1 Tex. Civ. App. 669, 21 S. W. 132; Robertson *v.* Mooney, 1 Tex. Civ. App. 379, 21 S. W. 143; Tarlton *v.* Kirkpatrick, 1 Tex. Civ. App. 107, 21 S. W. 405. See 41 Cent. Dig. tit. "Public Lands," § 571.

50. Herndon *v.* Davenport, 75 Tex. 462, 12 S. W. 1111; Fuller *v.* Coddington, 74 Tex. 334, 12 S. W. 47; Hord *v.* Rivas, (Tex. 1887) 6 S. W. 183; Martin *v.* Brown, 62 Tex. 485; De Montel *v.* Speed, 53 Tex. 339; O'Neal *v.* Manning. 48 Tex. 403; Burleson *v.* Durham, 46 Tex. 152; State *v.* Galveston City Co., 38 Tex. 12; Kimbro *v.* Hamilton, 28 Tex. 560; Todd *v.* Fisher, 26 Tex. 239; Galveston *v.* Menard, 23 Tex. 349; Deen *v.* Wills, 21 Tex. 642; Styles *v.* Gray, 10 Tex. 503; Hanaford *v.* Morton, 22 Tex. Civ. App. 587, 55 S. W. 987; De Cordova *v.* Bliss, 12 Tex. Civ. App. 530, 34 S. W. 146; Western Union Beef Co. *v.* Thurman, 70 Fed. 960, 17 C. C. A. 542. See 41 Cent. Dig. tit. "Public Lands," §§ 572, 574.

51. Cole *v.* Grigsby, 89 Tex. 223, 35 S. W. 792; Capp *v.* Terry, 75 Tex. 391, 13 S. W. 52; Miller *v.* Moss, 65 Tex. 179; League *v.* Rogan, 59 Tex. 427; Morrill *v.* Bartlett, 58 Tex. 644; Wimberly *v.* Pabst, 55 Tex. 587; Bradshaw *v.* Smith, 53 Tex. 474; Keyes *v.* Houston, etc., R. Co., 50 Tex. 169; Johnson *v.* Eldridge, 49 Tex. 507; Wright *v.* Hawkins. 28 Tex. 452; Dikes *v.* Miller, 24 Tex. 417; Galveston *v.* Menard, 23 Tex. 349; Fishback *v.* Young, 19 Tex. 515; Edwards *v.* Beavers, 19 Tex. 506; Hamilton *v.* Rice, 15 Tex. 382; Wheat *v.* Owens, 15 Tex. 241, 65 Am. Dec. 164; Warren *v.* Shuman, 5 Tex. 441; Clements *v.* Eggleston, 2 Tex. Unrep. Cas. 483; Culmell *v.* Borroum, 13 Tex. Civ. App. 458, 35 S. W. 942; Ledbetter *v.* Higbee, 13 Tex. Civ. App. 267, 35 S. W. 801; Davis *v.* Bargas, 12 Tex. Civ. App. 59, 33 S. W. 548; Whitman *v.* Rhomberg, (Tex. Civ. App. 1894) 25 S. W. 451; Franklin *v.* Piper, 5 Tex. Civ. App. 253, 23 S. W. 942. See 41 Cent. Dig. tit. "Public Lands," § 573.

52. Seibert *v.* Richardson, 86 Tex. 295, 24 S. W. 261; Jones *v.* Leo, 86 Tex. 25, 22 S. W. 386, 1092; Von Rosenberg *v.* Cuellar, 80 Tex. 249, 16 S. W. 58; Portwood *v.* Newberry, 79 Tex. 337, 15 S. W. 270; Garrett *v.* Weaver, 70 Tex. 463, 7 S. W. 766; Sideck *v.* Duran, 67 Tex. 256, 3 S. W. 264; Hanrick *v.* Dodd, 62 Tex. 75; Atkinson *v.* Ward, 61 Tex. 383; Daughty *v.* Hale, 59 Tex. 518; State *v.* International, etc., R. Co., 57 Tex. 534; Thomas *v.* Porter, 57 Tex. 59; House *v.* Talbot, 51 Tex. 462; Johnson *v.* Eldridge, 49 Tex. 507; O'Neal *v.* Manning, 48 Tex. 403; Austin *v.* Dungan, 46 Tex. 236; Turner *v.* Ferguson, 39 Tex. 505; Frederick *v.* Hamilton, 38 Tex. 321; Ellis *v.* Batts, 26 Tex. 703; Johns *v.* Pace, 26 Tex. 270; Dikes *v.* Miller, 25 Tex. Suppl. 281, 24 Tex. 417, 78 Am. Dec. 571; Stover *v.* Garvin, 22 Tex. 9; White *v.* Holliday, 20 Tex. 679; Garvin *v.* Stover, 17 Tex. 292; Byrne *v.* Fagen, 16 Tex. 391; Upshur *v.* Pace, 15 Tex. 531; Patton *v.* Evans, 15 Tex. 363; Bledsoe *v.* Cains, 10 Tex. 455; Haney *v.* Atwood, 42 Tex. Civ. App. 270, 93 S. W. 1093 [*explaining* Clifton *v.* Thompson, (Tex. Civ. App. 1895) 29 S. W. 197]; Montgomery County *v.* Angier, 32 Tex. Civ. App. 451, 74 S. W. 957; Wise County Coal Co. *v.* Phillips, 21 Tex. Civ. App. 293, 51 S. W. 331; Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1896) 39 S. W. 390 [*affirmed* in 95 Tex. 507, 68 S. W. 777]; Kinsey *v.* Sasse, 3 Tex. Civ. App. 216, 22 S. W. 128 [*following* Gammage *v.* Powell, 61 Tex. 629; McCarthy *v.* Gomez, 85 Tex. 10, 19 S. W. 999]; Horne *v.* Gambrell, 1 Tex. App. Civ. Cas. § 996; Miller *v.* Texas, etc., R. Co., 132 U. S. 662, 10 S. Ct. 206, 33 L. ed. 487; Wood *v.* Collins, 60 Fed. 139, 8 C. C. A. 522. See 41 Cent. Dig. tit. "Public Lands," §§ 541, 564, 575.

53. State *v.* Hughes, 97 Tex. 520, 80 S. W. 524; Galveston, etc., R. Co. *v.* State, 89 Tex. 340, 34 S. W. 746; Wichita Land, etc., Co. *v.* State, 80 Tex. 684, 16 S. W. 649;

sons claiming rights or interests in the public lands,[54] assignments, sales, and transfers of titles and rights acquired in public lands,[55] or of land certificates or warrants,[56] contracts respecting the acquisition of public lands,[57] the sale of land

Tate *v.* Wyatt, 77 Tex. 492, 14 S. W. 25; Randolph *v.* State, 73 Tex. 485, 11 S. W. 487; State *v.* Wichita Land, etc., Co., 73 Tex. 450, 11 S. W. 488; State *v.* Rhomberg, 69 Tex. 212, 7 S. W. 195; Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865; State *v.* Snyder, 66 Tex. 687, 18 S. W. 106; State *v.* Thompson, 64 Tex. 690; Thompson *v.* Eanes, 32 Tex. 190; State *v.* Delesdenier, 7 Tex. 76; Galveston, etc., R. Co. *v.* State, (Tex. Civ. App. 1896) 36 S. W. 111; Cameron *v.* State, 7 Tex. Civ. App. 35, 26 S. W. 869; Bacon *v.* State, 2 Tex. Civ. App. 692, 21 S. W. 149; Flannagan *v.* Nasworthy, 1 Tex. Civ. App. 470, 20 S. W. 839; Cassin *v.* LaSalle County, 1 Tex. Civ. App. 127, 21 S. W. 122. See 41 Cent. Dig. tit. "Public Lands," §§ 576, 577.

54. Bell *v.* Warren, 39 Tex. 106; Walters *v.* Wells, 8 Tex. 202; Urquhart *v.* Burleson, 6 Tex. 502; Smith *v.* State, 5 Tex. 397; Yarbrough *v.* Johnson, 12 Tex. Civ. App. 95, 34 S. W. 310; Creech *v.* Davidson, 5 Tex. Civ. App. 41, 23 S. W. 995. See 41 Cent. Dig. tit. "Public Lands," § 578.

55. Walraven *v.* Farmers', etc., Nat. Bank, 96 Tex. 331, 74 S. W. 530; McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044; Swetman *v.* Sanders, 85 Tex. 294, 20 S. W. 124; Palmer *v.* Bennett, 81 Tex. 451, 19 S. W. 304; Gresham *v.* Chambers, 80 Tex. 544, 16 S. W. 326; Williams *v.* Wilson, 76 Tex. 69, 13 S. W. 69; Daughty *v.* Hall, 59 Tex. 518; Bryan *v.* Crump, 55 Tex. 1; Hollis *v.* Dashiell, 52 Tex. 187; Ames *v.* Hubby, 49 Tex. 705; Palmer *v.* Chandler, 47 Tex. 332; Walter *v.* Jewett, 28 Tex. 192; Glasscock *v.* Nelson, 26 Tex. 150; Moore *v.* Bullard, 24 Tex. 149; Babb *v.* Carroll, 21 Tex. 765; Jordan *v.* Godman, 19 Tex. 273; Cannon *v.* Vaughan, 12 Tex. 399; Bledsoe *v.* Cains, 10 Tex. 455; Bybee *v.* Wadlington, 2 Tex. Unrep. Cas. 464; Johnson *v.* Durst, 2 Tex. Unrep. Cas. 417; Thompson *v.* Johnson, 2 Tex. Unrep. Cas. 258; Overby *v.* Johnson, 42 Tex. Civ. App. 348, 94 S. W. 131 [*following* Williams *v.* Wilson, 76 Tex. 69, 13 S. W. 69; Ames *v.* Hubby, 49 Tex. 705]; Wilson *v.* Nugent, (Tex. Civ. App. 1906) 91 S. W. 241; Stone *v.* Crenshaw, 30 Tex. Civ. App. 394, 70 S. W. 582; Morgan *v.* Baker, (Tex. Civ. App. 1897) 40 S. W. 27; Buchanan *v.* Park, (Tex. Civ. App. 1896) 36 S. W. 807; Roberts *v.* Trout, 13 Tex. Civ. App. 70, 35 S. W. 323; Clifton *v.* Thompson, (Tex. Civ. App. 1895) 29 S. W. 197; Peterson *v.* Ward, 5 Tex. Civ. App. 208, 23 S. W. 637; Savoy *v.* Brewton, 3 Tex. Civ. App. 336, 22 S. W. 585; Kinsey *v.* Sasse, 3 Tex. Civ. App. 216, 22 S. W. 128; Russ *v.* Telfener, 57 Fed. 973 [*affirmed* in 60 Fed. 228, 8 C. C. A. 585]. See 41 Cent. Dig. tit. "Public Lands," § 579.

56. Barroum *v.* Culmell, 90 Tex. 93, 37 S. W. 313; Davis *v.* Bargas, 88 Tex. 662, 32 S. W. 874; Hume *v.* Ware, 87 Tex. 380, 28 S. W. 935; Parker *v.* Newberry, 83 Tex. 428, 18 S. W. 815; Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50; Howard *v.* Stubblefield, 79 Tex. 1, 14 S. W. 1044; Gunter *v.* Meade, 78 Tex. 634, 14 S. W. 562; Walker *v.* Caradine, 78 Tex. 489, 15 S. W. 31; Norton *v.* Conner, (Tex. 1890) 14 S. W. 193; Utzfield *v.* Bodman, 76 Tex. 359, 13 S. W. 474; Herndon *v.* Davenport, 75 Tex. 462, 12 S. W. 1111; Capp *v.* Terry, 75 Tex. 391, 13 S. W. 52; Dodge *v.* Litter, 73 Tex. 319, 11 S. W. 331; Shifflet *v.* Morelle, 68 Tex. 382, 4 S. W. 843; Hill *v.* Moore, 62 Tex. 610; Hearne *v.* Gillett, 62 Tex. 23; Smith *v.* Shinn, 58 Tex. 1; Renick *v.* Dawson, 55 Tex. 102; Palmer *v.* Curtner, 55 Tex. 64; McKinney *v.* Brown, 51 Tex. 94; Johnson *v.* Newman, 43 Tex. 628; Merriweather *v.* Kennard, 41 Tex. 273; Smith *v.* Sublett, 28 Tex. 163; Newman *v.* Dallas, 26 Tex. 642; Smith *v.* Tucker, 25 Tex. 594; Perry *v.* Glass, 25 Tex. 368; Andrews *v.* Smithwick, 20 Tex. 111; Graham *v.* Henry, 17 Tex. 164; Turner *v.* Hart, 10 Tex. 438; Smith *v.* Johnson, 8 Tex. 418; Smyth *v.* Veal, 2 Tex. Unrep. Cas. 393; Clark *v.* Hoover, (Tex. Civ. App. 1908) 110 S. W. 792; Stubblefield *v.* Hanson, (Tex. Civ. App. 1906) 94 S. W. 406; Alford *v.* Williams, 41 Tex. Civ. App. 436, 91 S. W. 636; Barrett *v.* Spence, 28 Tex. Civ. App. 344, 67 S. W. 921; Odell *v.* Kennedy, 26 Tex. Civ. App. 439, 64 S. W. 802; Harvey *v.* Petty, (Tex. Civ. App. 1901) 63 S. W. 893; Ehrenberg *v.* Baker, (Tex. Civ. App. 1899) 54 S. W. 435; Estell *v.* Kirby, (Tex. Civ. App. 1898) 48 S. W. 8; Batcheller *v.* Besancon, (Tex. Civ. App. 1898) 47 S. W. 296; Flash *v.* Herndon, (Tex. Civ. App. 1898) 44 S. W. 608; Staley *v.* Hankla, (Tex. Civ. App. 1897) 43 S. W. 20; Walker *v.* Peterson, (Tex. Civ. App. 1897) 42 S. W. 1045; Culmell *v.* Borroum, 13 Tex. Civ. App. 458, 35 S. W. 942; Riggs *v.* Nafe, (Tex. Civ. App. 1895) 30 S. W. 706; Hume *v.* Ware, (Tex. Civ. App. 1895) 29 S. W. 71; New York, etc., Land Co. *v.* Hyland, 8 Tex. Civ. App. 601, 28 S. W. 206; Hensel *v.* Kegans, 8 Tex. Civ. App. 583, 28 S. W. 705; French *v.* Koenig, 8 Tex. Civ. App. 341, 27 S. W. 1079; Jackson *v.* Waldstein, (Tex. Civ. App. 1894) 27 S. W. 26; Masterson *v.* Todd, 6 Tex. Civ. App. 131, 24 S. W. 682; Jones *v.* Reus, 5 Tex. Civ. App. 628, 24 S. W. 674; Myer *v.* Jones, 4 Tex. Civ. App. 330, 23 S. W. 562. See 41 Cent. Dig. tit. "Public Lands," § 581.

57. Reed *v.* Howard, 71 Tex. 204, 9 S. W. 109; Boone *v.* Hulsey, 71 Tex. 176, 9 S. W. 531; Hearne *v.* Gillett, 62 Tex. 23; Horm *v.* *v.* Shamblin, 57 Tex. 243; Doss *v.* Slaughter, 53 Tex. 235; Smith *v.* Crosby, 47 Tex. 121; Simpson *v.* Chapman, 45 Tex. 560; Sypert *v.* McCowen, 28 Tex. 635; Moore *v.* Bullard, 24 Tex. 149; Miller *v.* Roberts, 18 Tex. 16, 67 Am. Dec. 688; Branch *v.* Payne, (Tex. Civ. App. 1893) 22 S. W. 285; Branch *v.* Jones, 2 Tex. Civ. App. 550, 22 S. W. 245. See 41 Cent. Dig. tit. "Public Lands," § 582.

under statutes now superseded or inoperative,[58] the rights of *bona fide* settlers,[59] land officers and proceedings in the land offices under statutes now superseded,[60] and the operation and effect of various curative statutes.[61] The question as to what are school lands has been several times passed upon by the courts,[62] but by

58. Lands subject to sale.—Sanborn *v.* Gunter, 84 Tex. 273, 17 S. W. 117, 20 S. W. 72; Taylor *v.* Lewelyn, 79 Tex. 96, 14 S. W. 1052; Garrett *v.* Weaver, 70 Tex. 463, 7 S. W. 766; Tabor *v.* General Land Office Com'r, 29 Tex. 508.

Withdrawal of lands from sale.— Kentucky Cattle-Raising Co. *v.* Bruce, 78 Tex. 269, 14 S. W. 619; State *v.* Work, 63 Tex. 148.

Right to purchase land.— Joyner *v.* Johnson, 84 Tex. 465, 19 S. W. 522; State *v.* Thompson, 64 Tex. 690; Perkins *v.* Miller, 60 Tex. 61; Telfener *v.* Russ, 162 U. S. 170, 16 S. Ct. 695, 40 L. ed. 930 [*reversing* 57 Fed. 973]; Wortham *v.* Anderson, 6 Tex. Civ. App. 18, 24 S. W. 847.

Amount which might be purchased.— Looney *v.* Bagley, (Tex. 1887) 7 S. W. 360; Perkins *v.* Miller, 60 Tex. 61; State *v.* Swenson, (Tex. Civ. App. 1894) 26 S. W. 234; Russ *v.* Telfener, 57 Fed. 973.

Application to purchase.— Jumbo Cattle Co. *v.* Bacon, 79 Tex. 5, 14 S. W. 840, 17 S. W. 136; Cotulla *v.* Laxson, 60 Tex. 443; Monroe Cattle Co. *v.* Becker, 147 U. S. 47, 13 S. Ct. 217, 37 L. ed. 72.

Conflicting claims of applicants to purchase. — Kentucky Cattle-Raising Co. *v.* Bruce, 78 Tex. 269, 14 S. W. 619; Garrett *v.* Weaver, 70 Tex. 463, 7 S. W. 766.

Payment by purchaser.— Wanke *v.* Foit, 80 Tex. 591, 16 S. W. 329; Barker *v.* Torrey, 69 Tex. 7, 4 S. W. 646; Franklin *v.* Kesler, 25 Tex. 138; Chaney *v.* State, 11 Tex. Civ. App. 397, 32 S. W. 830; Bacon *v.* State, 2 Tex. Civ. App. 692, 21 S. W. 149; Schilling *v.* State, 2 Tex. Civ. App. 578, 22 S. W. 233.

Powers of land board.— State *v.* Opperman, 74 Tex. 136, 11 S. W. 1076.

Method of sale.— King *v.* Jones, 78 Tex. 285, 14 S. W. 571; State *v.* Opperman, 74 Tex. 136, 11 S. W. 1076; Martin *v.* McCarty, 74 Tex. 128. 10 S. W. 221; Norman *v.* McCleary, 10 Tex. Civ. App. 311, 30 S. W. 712; Collyns *v.* Cain, 9 Tex. Civ. App. 193, 28 S. W. 544; Flannagan *v.* Nasworthy, 1 Tex. Civ. App. 470, 20 S. W. 839.

Validity of purchase.— Bacon *v.* State, 2 Tex. Civ. App. 692, 21 S. W. 149.

Rights of purchaser.— Jumbo Cattle Co. *v.* Bacon, 79 Tex. 5, 14 S. W. 840, 17 S. W. 136; White *v.* Martin, 66 Tex. 340, 17 S. W. 727; Campbell *v.* Wade, 132 U. S. 34, 10 S. Ct. 9, 33 L. ed. 240.

59. Swetman *v.* Sanders, 85 Tex. 294, 20 S. W. 124; Baker *v.* Millman, 77 Tex. 46, 13 S. W. 618; Sickels *v.* Epps, (Tex. 1888) 8 S. W. 124; Sellman *v.* Lee, 55 Tex. 319; Howard *v.* Richeson, 13 Tex. 553; Sartain *v.* Hamilton, 12 Tex. 219, 62 Am. Dec. 524; Finks *v.* Cox, (Tex. Civ. App. 1895) 30 S. W. 512; Cook *v.* Burnley, 11 Wall. (U. S.) 659. 20 L. ed. 29. See 41 Cent. Dig. tit. "Public Lands," § 583.

60. Smith *v.* Walton, 82 Tex. 547, 18 S. W. 217; Luckie *v.* Watt, 77 Tex. 262, 13 S. W. 1035; Arnold *v.* State, 71 Tex. 239. 9 S. W. 120; Taylor *v.* Hall, 71 Tex. 213, 9 S. W. 141; Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865; State *v.* De Leon, 64 Tex. 553; Hanrick *v.* Cavanaugh, 60 Tex. 1; Burkett *v.* Scarborough, 59 Tex. 495; Palmer *v.* Curtner, 55 Tex. 64; Blythe *v.* Houston, 46 Tex. 65; Frederick *v.* Hamilton, 38 Tex. 321; Todd *v.* Fisher, 26 Tex. 239; Breckenridge *v.* Neill, 26 Tex. 101; Dikes *v.* Miller, 25 Tex. Suppl. 281, 78 Am. Dec. 571; Howard *v.* Perry, 7 Tex. 259; James *v.* Wilson, 7 Tex. 230; Norton *v.* General Land Office Com'r, 2 Tex. 357; Waterhouse *v.* Corbett, 43 Tex. Civ. App. 512, 96 S. W. 651; Eyl *v.* State, 37 Tex. Civ. App. 297, 84 S. W. 607; Harris *v.* Byrd, 3 Tex. Civ. App. 677, 22 S. W. 659; Bacon *v.* State, 2 Tex. Civ. App. 692, 21 S. W. 149; Miller *v.* Texas, etc., R. Co., 132 U. S. 662, 10 S. Ct. 206, 33 L. ed. 487.

61. Walraven *v.* Farmers', etc., Nat. Bank, 96 Tex. 331, 74 S. W. 530; Collyns *v.* Cain, 87 Tex. 612, 30 S. W. 858; Adams *v.* Houston, etc., R. Co., 70 Tex. 252, 7 S. W. 729; Franklin *v.* Tiernan, 56 Tex. 618; Sherwood *v.* Fleming, 25 Tex. Suppl. 408; Lane *v.* Huffman, (Tex. Civ. App. 1904) 82 S. W. 1070; Burkhead *v.* Bush, (Tex. Civ. App. 1903) 75 S. W. 67; Sheppard *v.* Avery, 28 Tex. Civ. App. 479, 69 S. W. 82; Kurtzman *v.* Blackwell, 21 Tex. Civ. App. 222, 51 S. W. 659; Blum *v.* Houston, etc., R. Co., 10 Tex. Civ. App. 312, 31 S. W. 526; Norman *v.* McCleary, 10 Tex. Civ. App. 311, 30 S. W. 712; Collyns *v.* Cain, 9 Tex. Civ. App. 193, 28 S. W. 544; State *v.* Strain, (Tex. Civ. App. 1893) 25 S. W. 1003; Houston, etc., R. Co. *v.* Carter, (Tex. Civ. App. 1894) 24 S. W. 1102; Howard *v.* Austin, etc., Land, etc., Co., (Tex. Civ. App. 1894) 24 S. W. 818; State *v.* Pendleton, 5 Tex. Civ. App. 40, 23 S. W. 923; Flannagan *v.* Nasworthy, 1 Tex. Civ. App. 470, 20 S. W. 839. See 41 Cent. Dig. tit. "Public Lands," §§ 550, 569.

62. See Galveston, etc., R. Co. *v.* State, 77 Tex. 367, 12 S. W. 988, 13 S. W. 619; Looney *v.* Bagley, (Tex. 1887) 7 S. W. 360; Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865; Fannin County *v.* Riddle, 51 Tex. 360; Galveston, etc., Narrow-Gauge R. Co. *v.* Gross, 47 Tex. 428; Williams *v.* Finley, (Tex. Civ. App. 1905) 87 S. W. 736; Eyl *v.* State, 37 Tex. Civ. App. 297, 84 S. W. 607; Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703; Mills *v.* Needham, 28 Tex. Civ. App. 547, 67 S. W. 1097; Barrow *v.* Gridley, 25 Tex. Civ. App. 13, 59 S. W. 602, 913; Childress County Land, etc., Co. *v.* Baker, 23 Tex. Civ. App. 451, 56 S. W. 756; Hall *v.* Rushing, 21 Tex. Civ. App. 631, 54 S. W. 30. See 41 Cent. Dig. tit. "Public Lands," § 544.

a recent act of the legislature all of the remaining unappropriated public domain is set apart and granted to the permanent school fund.[63]

b. Sale of School Lands — (i) *In General.* The constitution directs that the lands set apart for the public free school fund shall be sold under such regulations as may be prescribed by law,[64] and makes it the duty of the legislature to provide for the sale of school lands for the benefit of the school fund, and to regulate the sales in such manner as will be most beneficial to that fund.[65] The power to sell public school lands is vested in the commissioner of the general land office.[66] Where school land has been once sold, it cannot again be put upon the market or sold,[67] unless the former sale was or has become null and void,[68] or has been legally forfeited, and canceled,[69] and the land listed with the county clerk after the forfeiture.[70]

(ii) *Classification and Appraisement.* School lands are not subject to sale until they have been classified and appraised,[71] and placed on the market for sale,[72] and notice thereof has reached the county clerk of the county where the lands are situated;[73] but the purchaser is not required to show the classifica-

63. Tex. Acts (1900), p. 29, § 1.

64. Island City Sav. Bank *v.* Dowlearn, 94 Tex. 383, 60 S. W. 754; Mills *v.* Needham, 28 Tex. Civ. App. 547, 67 S. W. 1097.

65. Conn *v.* Terrell, 97 Tex. 578, 80 S. W. 608. See also Cameron *v.* State, 7 Tex. Civ. App. 35, 26 S. W. 869, holding that the constitutional provision reserving a portion of the public domain for the benefit of the public schools does not prevent the legislature from prescribing the terms of sale and the classes of persons who may purchase them.

66. Rogers *v.* Concho Cattle Co., (Tex. 1897) 39 S. W. 1081 [*reversing* (Civ. App. 1896) 38 S. W. 656], holding that a sale made by the commissioner on an application made from a county other than that in which the lands were situated passed title as against a subsequent purchaser under an application from the county in which they were situated.

67. Hamilton *v.* Terrell, (Tex. 1908) 107 S. W. 47; Weyert *v.* Terrell, (Tex. 1907) 100 S. W. 133 [*following* Nobles *v.* Magnolia Cattle Co., 69 Tex. 434, 9 S. W. 448]; Bumpass *v.* McLendon, (Tex. Civ. App. 1907) 101 S. W. 491; Bradford *v.* Brown, 37 Tex. Civ. App. 323, 84 S. W. 392.

68. Weyert *v.* Terrell, (Tex. 1907) 100 S. W. 133 [*following* Nobles *v.* Magnolia Cattle Co., 69 Tex. 434, 9 S. W. 448].

69. Hamilton *v.* Terrell, (Tex. 1908) 107 S. W. 47; Bumpass *v.* McLendon, (Tex. Civ. App. 1907) 101 S. W. 491. As to forfeitures see *infra*, III, C, 3, b, (xiii).

70. Willoughby *v.* Townsend, 93 Tex. 80, 53 S. W. 581 [*reversing* (Civ. App. 1899) 51 S. W. 335]. As to listing with county clerk see *infra*, III, C, 3, b, (ii).

71. Brown *v.* Shiner, 84 Tex. 505, 19 S. W. 686; State *v.* Opperman, 74 Tex. 136, 11 S. W. 1076; Martin *v.* McCarty, 74 Tex. 128, 10 S. W. 221; Snyder *v.* Nunn, 66 Tex. 255, 18 S. W. 340; Smithers *v.* Lowrance, 35 Tex. Civ. App. 25, 79 S. W. 1088; Corrigan *v.* Fitzsimmons, (Tex. Civ. App. 1903) 76 S. W. 68 [*reversed* on other grounds in 97 Tex. 595, 80 S. W. 989]; Anderson *v.* Walker, (Tex. Civ. App. 1902) 70 S. W. 1003; Thomson *v.* Hubbard, 22 Tex. Civ. App. 101, 53 S. W. 841; Cordill *v.* Moore, 17 Tex. Civ. App. 217, 43 S. W. 298. See also Ramsey *v.* Medlin, 55 Tex. 248; Davis *v.* Burnett, 35 Tex. Civ. App. 30, 79 S. W. 105; Adair *v.* Hays, 31 Tex. Civ. App. 446, 72 S. W. 256, holding that where one had made application to purchase unsurveyed school lands and caused a survey to be made, but the commissioner had not approved the notes or classified the land, an entry on the land by the applicant was a trespass, as against one holding the same under a lease from the commissioner of the general land office.

Gen. Laws (1901), p. 292, requiring the commissioner of the general land office to make a correct and revised list for each county of all unsold school lands therein, and forward the same to the county clerk, did not require a new classification and appraisement of such lands, or suspend the sale thereof until the revised lists could be made up and sent out. Briggs *v.* Key, 30 Tex. Civ. App. 565, 71 S. W. 43.

The fact that an application to purchase was dated prior to the approval of the survey of the land by the commissioner of the land office, standing alone, is insufficient to warrant a conclusion that the application was entertained by the surveyor before the land was on the market. Dooley *v.* Maywald, 18 Tex. Civ. App. 386, 45 S. W. 221, holding further that the action of the surveyor in entertaining an application to purchase school land before the commissioner of the land office approved of the appraisal report of the commissioners' court would not render the sale of the land to the applicant void, in the absence of the rights of third persons intervening.

72. Cordill *v.* Moore, 17 Tex. Civ. App. 217, 43 S. W. 298.

73. Boswell *v.* Terrell, 97 Tex. 259, 78 S. W. 4; Ford *v.* Brown, 96 Tex. 537, 74 S. W. 535 [*approved* in Corrigan *v.* Fitzsimmons, (Tex. Civ. App. 1903) 76 S. W. 68 (*reversed* on other grounds in (1904) 80 S. W. 989)]. See also State *v.* Opperman,

tion and appraisement by direct proof, for it is presumed that the commissioner performed his duty in this respect.[74] Where a classification and appraisement of public lands has been actually made, it will be assumed to be legal.[75]

(III) *Right to Purchase.* Formerly school lands could be sold to actual settlers only;[76] but a new policy has been inaugurated by a recent statute which

74 Tex. 136, 11 S. W. 1076; Martin *v.* McCarty, 74 Tex. 128, 10 S. W. 221. But *compare* Cordill *v.* Moore, 17 Tex. Civ. App. 217, 43 S. W. 298.

Healing act.— The objection that on the sale of state land no tabulated statement was filed in the surveyor's office, showing the classification or appraisement, cannot be made available where the omission was cured by a healing act. Garrett *v.* Findlater, 21 Tex. Civ. App. 635, 53 S. W. 839.

The fact that the commissioner previously advertised the land for sale does not dispense with the statutory requirement of notice to the county clerk. Boswell *v.* Terrell, 97 Tex. 259, 78 S. W. 4.

Lands which may be included in list.— The statute requiring the commissioner of the general land office to notify in writing the county clerk of each county of the classification and valuation fixed on each section of land in his county authorizes him to include in the list of lands certified not only unsold lands but also land sold but to which the title in a purchaser has not been perfected. Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 [*reversing* (Civ. App. 1906) 91 S. W. 606], construing Gen. Laws (1901), c. 125, § 1.

When the commissioner has notified the county clerk of the appraisement of lands which have never been leased, he has thereafter no authority to fix a date for the receiving of bids on the land different from the date when notice was received by the county clerk. Estes *v.* Terrell, (Tex. 1906) 92 S. W. 407.

74. Corrigan *v.* Fitzsimmons, 97 Tex. 595, 80 S. W. 989 [*reversing* (Civ. App. 1903) 76 S. W. 68, *overruling* Thompson *v.* Gallagher, 52 Tex. Civ. App. 591, 75 S. W. 567; Anderson *v.* Walker, (Tex. Civ. App. 1902) 70 S. W. 1003; Faucett *v.* Sheppard, 24 Tex. Civ. App. 552, 60 S. W. 276; Thompson *v.* Autry, (Tex. Civ. App. 1899) 52 S. W. 581, and *distinguishing* State *v.* Opperman, 74 Tex. 139, 11 S. W. 1076; Martin *v.* McCarty, 74 Tex. 128, 10 S. W. 221; Ramsey *v.* Medlin, 55 Tex. 248]. See also Smyth *v.* Saigling, (Tex. Civ. App. 1908) 110 S. W. 550.

75. Clark *v.* McKnight, 25 Tex. Civ. App. 60, 61 S. W. 349.

A certificate of the commissioner of the general land office, not objected to, reciting that certain land was "classified as dry grazing land, and appraised at one dollar per acre, under the act of 1897, on the 23d day of March, 1899, and placed on the market the same day at the office," is sufficient evidence to prove *prima facie* that the commissioner reclassified and reappraised the land, and notified the clerk of the county court of such action, as required by the statute. White *v.* Pyron, (Tex. Civ. App. 1901) 62 S. W. 82.

76. Lufkin Land, etc., Co. *v.* Terrell, (Tex. 1907) 100 S. W. 134; King *v.* Jones, 78 Tex. 285, 14 S. W. 571; Corrigan *v.* Fitzsimmons, (Tex. Civ. App. 1908) 111 S. W. 793; Williams *v.* Barnes, (Tex. Civ. App. 1908) 111 S. W. 432; Perry *v.* Rutherford, 39 Tex. Civ. App. 477, 87 S. W. 1054; Nowlin *v.* Hall, (Tex. Civ. App. 1903) 77 S. W. 419 [*affirmed* in 97 Tex. 441, 79 S. W. 806]; Lewis *v.* Scharbauer, 33 Tex. Civ. App. 220, 76 S. W. 225; Allen *v.* Frost, 31 Tex. Civ. App. 232, 71 S. W. 767; Coody *v.* Harris, 31 Tex. Civ. App. 169, 71 S. W. 607; Briggs *v.* Key, 30 Tex. Civ. App. 565, 71 S. W. 43; Sterling *v.* Self, 30 Tex. Civ. App. 284, 70 S. W. 238; Martin *v.* Mass, 26 Tex. Civ. App. 55, 62 S. W. 932; Weatherford *v.* McFadden, 21 Tex. Civ. App. 260, 51 S. W. 548; Wilgus *v.* Arnold, (Tex. Civ. App. 1895) 29 S. W. 823; Eastin *v.* Ferguson, 4 Tex. Civ. App. 643, 23 S. W. 918; Hitson *v.* Glascock, 2 Tex. Civ. App. 617, 21 S. W. 710; Metzler *v.* Johnson, 1 Tex. Civ. App. 137, 20 S. W. 1116. See also Parker *v.* Brown, 80 Tex. 555, 16 S. W. 262; Hobert *v.* Wilson, (Tex. Civ. App. 1895) 31 S. W. 710.

Real and not constructive settlement required.— Payton *v.* Love, 20 Tex. Civ. App. 613, 49 S. W. 1109; Waggoner *v.* Daniels, (Tex. Civ. App. 1898) 44 S. W. 946. See also Burleson *v.* Durham, 46 Tex. 152.

One who actually occupies and settles on land intending to make it his home is an actual settler. May *v.* Hollingsworth, 35 Tex. Civ. App. 665, 80 S. W. 841.

Bona fide settlement for express purpose of making a home necessary.— Willoughby *v.* Townsend, 18 Tex. Civ. App. 724, 45 S. W. 861.

Burden of proof rests on person setting up actual settlement.— Jordan *v.* Payne, 18 Tex. Civ. App. 382, 45 S. W. 189.

Evidence held admissible on question whether a person was a settler see March *v.* Shaw, (Tex. Civ. App. 1905) 87 S. W. 360; Lewis *v.* Scharbauer, 33 Tex. Civ. App. 220, 76 S. W. 225.

Weight of evidence on question whether person an actual settler see Anderson *v.* Walker, (Tex. Civ. App. 1902) 70 S. W. 1003.

Circumstances showing person to be an actual settler see Corrigan *v.* Fitzsimmons, (Tex. Civ. App. 1908) 111 S. W. 793; Price *v.* Bates, 32 Tex. Civ. App. 374, 74 S. W. 608; Willingham *v.* Floyd, 32 Tex. Civ. App. 161, 73 S. W. 831; Smith *v.* Russell, 23 Tex. Civ. App. 554, 56 S. W. 687; Chesser *v.* Baughman, 22 Tex. Civ. App. 435, 55 S. W. 132; Wilgus *v.* Arnold, (Tex. Civ. App. 1895) 29 S. W. 823.

permits any one otherwise qualified to make application to purchase without settlement on the land, but requires that in case lands are awarded to him he shall settle on his home tract within a limited time thereafter.[77] A minor may purchase school land,[78] as may also a married woman, with the consent of her husband.[79] But a district surveyor is forbidden to be concerned in the purchase of any right, title, or interest in any public land in his own name or in the name of any other person under penalty of removal from office, a fine, and exclusion from subsequently holding office.[80] Some of the statutes have given to settlers a preferred right to purchase the lands on which they have settled,[81] and a lessee for-

Circumstances not amounting to actual settlement see Martin *v.* McCarty, 74 Tex. 128, 10 S. W. 221; Smith *v.* Florence, (Tex. Civ. App. 1906) 96 S. W. 1096; Thompson *v.* Hubbard, (Tex. Civ. App. 1902) 69 S. W. 649, 70 S. W. 572; Jones *v.* Bourbonnais, 25 Tex. Civ. App. 94, 60 S. W. 986; Lee *v.* Green, 24 Tex. Civ. App. 109, 58 S. W. 196, 847; Renner *v.* Peterson, (Tex. Civ. App. 1899) 51 S. W. 867; Hart *v.* Menefee, (Tex. Civ. App. 1898) 45 S. W. 854; Jordan *v.* Payne, 18 Tex. Civ. App. 382, 45 S. W. 189; State *v.* Strain, (Tex. Civ. App. 1893) 25 S. W. 1003; Swan *v.* Busby, 5 Tex. Civ. App. 63, 24 S. W. 303; Atkeson *v.* Bilger, 4 Tex. Civ. App. 99, 23 S. W. 415.

Settlement a question for jury.— Wyatt *v.* Lyons, 25 Tex. Civ. App. 88, 60 S. W. 575; Thomson *v.* Hubbard, 22 Tex. Civ. App. 101, 53 S. W. 841; Cordill *v.* Moore, 17 Tex. Civ. App. 217, 43 S. W. 298; Borchers *v.* Mead, 17 Tex. Civ. App. 32, 43 S. W. 300. See also Crawford *v.* Wyatt, 22 Tex. Civ. App. 569, 55 S. W. 540.

Mistake as to location.—An applicant to purchase school lands, as an actual settler, who built his house, through mistake, on adjoining lands, was an actual settler, and did not lose his right to the land (Moody *v.* Hahn, 25 Tex. Civ. App. 474, 62 S. W. 940), when on discovering his mistake he moved on to the land applied for (Hall *v.* White, 94 Tex. 452, 61 S. W. 385 [*affirming* (Civ. App. 1900) 59 S. W. 810, and *followed* in Martin *v.* Marr, 26 Tex. Civ. App. 55, 62 S. W. 932]; Morgan *v.* Armstrong, (Tex. Civ. App. 1907) 102 S. W. 1164). But where a subsequent applicant proved that he settled on the land and complied with the requirements of the statute entitling him to purchase as an actual settler, the burden of proof was on the prior applicant to show that his prior nonresidence on the land was the result of a mistake and a well-founded belief that he was in fact residing on the land. Morgan *v.* Armstrong, (Tex. Civ. App. 1907) 102 S. W. 1164.

Isolated and detached lands could, under Rev. St. (1895) art. 4218*y*, be sold to any person, except a corporation without actual settlement (Lufkin Land, etc., Co. *v.* Terrell, (Tex. 1907) 100 S. W. 134; Weber *v.* Rogan, 94 Tex. 62, 54 S. W. 1016, 55 S. W. 559, 57 S. W. 940; Tompkins *v.* McKinney, 93 Tex. 629, 57 S. W. 804; Wurzbach *v.* Burkett, (Tex. Civ. App. 1900) 60 S. W. 590; Thomas *v.* Wolfe, 16 Tex. Civ. App. 22, 40 S. W. 182. See also Maney *v.* Eyres, 33 Tex. Civ. App. 497, 77 S. W. 428, 969; Hamilton *v.* Votaw, 31 Tex. Civ. App. 684, 73 S. W. 1091; Faulk *v.* Byerly, 14 Tex. Civ. App. 388, 37 S. W. 984; Wilgus *v.* Arnold, (Tex. Civ. App. 1895) 29 S. W. 823; Cameron *v.* State, 7 Tex. Civ. App. 35, 26 S. W. 869), but this exception was expressly eliminated by Gen. Laws (1901), c. 125, § 7 (Lufkin Land, etc., Co. *v.* Terrell, (Tex. 1907) 100 S. W. 134). The latter statute did not, however, repeal Gen. Laws (1901), c. 88, § 1, providing that tracts or parcels of unsurveyed school lands containing six hundred and forty acres or less, and which were detached from other public lands, might be sold without the condition of actual settlement. McGrady *v.* Terrell, 98 Tex. 427, 84 S. W. 641.

"Decker Healing Act" of 1899 see Bates *v.* Bratton, 96 Tex. 279, 72 S. W. 157 [*reversing* (Civ. App. 1902) 71 S. W. 38]; Spence *v.* Mitchell, 96 Tex. 43, 70 S. W. 73 [*affirming* (Civ. App. 1902) 67 S. W. 180]; Taylor *v.* Lewis, 38 Tex. Civ. App. 390, 85 S. W. 1011; Strickel *v.* Turberville, 28 Tex. Civ. App. 469, 67 S. W. 1058; Jones *v.* Dowlen, 26 Tex. Civ. App. 253, 63 S. W. 938.

77. Gen. Laws (1905), c. 103. And see *infra*, III, C, 3, (x).

78. Taylor *v.* Lewis, 38 Tex. Civ. App. 390, 85 S. W. 1011; White *v.* Watson, 34 Tex. Civ. App. 169, 78 S. W. 237; Johnson *v.* Bibb, 32 Tex. Civ. App. 471, 75 S. W. 71; Watson *v.* White, 26 Tex. Civ. App. 442, 64 S. W. 826. See also Johnson *v.* Bibb, 32 Tex. Civ. App. 471, 75 S. W. 71 (holding that even if a sale of public school lands in 1898 was void, because to a minor, it was validated by Gen. Laws (1899), p. 259, c. 150); O'Keefe *v.* McPherson, 25 Tex. Civ. App. 313, 61 S. W. 534; Weatherford *v.* McFadden, 21 Tex. Civ. App. 260, 51 S. W. 548. *Aliter*, under earlier statutes. Walker *v.* Rogan, 93 Tex. 248, 54 S. W. 1018; Adams *v.* King, 28 Tex. Civ. App. 17, 66 S. W. 484.

79. Neighbors *v.* Anderson, 94 Tex. 487, 61 S. W. 145, 62 S. W. 417 [*affirming* 25 Civ. App. 504, 61 S. W. 145], 94 Tex. 236, 59 S. W. 543; Barnett *v.* Murray, (Tex. Civ. App. 1899) 54 S. W. 784 [*approved* in Lee *v.* Green, 24 Tex. Civ. App. 109, 58 S. W. 196, 847].

80. Tompkins *v.* Creighton-McShane Oil Co., 160 Fed. 303, 87 C. C. A. 427, holding, however, that Tex. Pen. Code (1857), art. 244, so providing, did not invalidate the title of lands acquired by a surveyor in violation of its provisions.

81. Yocham *v.* McCurdy, 95 Tex. 336, 67 S. W. 316 [*reversing* 27 Tex. Civ. App. 183,

merly had a prior right to purchase the leased lands at any time within sixty days after the expiration of the lease.[82] It is one of the essentials of a valid title from the state that the purchaser shall purchase for himself and not for another,[83] and it was never intended that any land subject to classification as agricultural or grazing land should ever be sold to a corporation either directly or indirectly.[84] Where school land is unsold, and is lawfully on the market for sale, the commissioner of the land office has no power to arbitrarily reject the application of one entitled to purchase, and who complies with all the terms required by the statute and the rules of the land office for the purchase thereof;[85] but a judgment in favor of an applicant for the purchase of public land against one holding it as tenant of the state does not estop the state to deny that the applicant has acquired the right to purchase.[86] One who has withdrawn his application for the purchase of school land cannot subsequently claim rights to it as a purchaser.[87]

(IV) *Amount Which May Be Purchased.* The statutes limit, as to some of the counties, the amount of land which one person may purchase;[88] and it has been held that in an action of trespass to try title between applicants to purchase school lands, the burden is on plaintiff to show that he had not, previous to his application, purchased from the state the maximum amount which one person can purchase.[89] Under a recent statute sales of school lands are to be made "in

65 S. W. 213]; Hume *v.* Gracy, 86 Tex. 671, 27 S. W. 584; King *v.* Underwood, (Tex. Civ. App. 1908) 112 S. W. 334; Simon *v.* Stearns, 17 Tex. Civ. App. 13, 43 S. W. 50. But *compare* Wurzbach *v.* Burkett, (Tex. Civ. App. 1900) 60 S. W. 590, holding that under a statute providing that lands of a certain character might be sold to any person, without actual settlement, an actual settler had no superior right of purchase over any other proposed purchaser.

82. Adkinson *v.* Porter, (Tex. Civ. App. 1903) 73 S. W. 43 [*following* Hazelwood *v.* Rogan, 95 Tex. 295, 67 S. W. 80], holding that this was a personal privilege which could not be transferred, and was lost by an assignment of the lease.

This right no longer exists, as it is now expressly provided by statute that "when a lease expires or is cancelled for any cause no one shall have any preference to buy any land therein." Tex. Gen. Laws (1905), p. 163, c. 103, § 5. See Patterson *v.* Crenshaw, (Tex. Civ. App. 1907) 105 S. W. 996.

Right of lessee to purchase during existence of lease see *infra*, III, C, 3, b, (v).

83. Thomson *v.* Hubbard, 22 Tex. Civ. App. 101, 53 S. W. 841.

84. Lufkin Land, etc., Co. *v.* Terrell, (Tex. 1907) 100 S. W. 134.

85. Knapp *v.* Patterson, (Tex. Civ. App. 1905) 87 S. W. 391.

86. Willoughby *v.* Terrell, 99 Tex. 488, 90 S. W. 1091.

87. Hamilton *v.* Gouldy, (Tex. Civ. App. 1907) 103 S. W. 1117, holding that where a person after he had sent his application for the purchase of certain school land to the land commissioner, and made the required cash payment thereon, was informed by the land commissioner that he had no application on file in the land office and that the land had been awarded to another, he was put to his election as to whether he would proceed on the assumption that he was entitled to be treated as a purchaser and take steps to enforce that right, or whether he would accept the statement of the commissioner that he had lost his opportunity to become a purchaser and was only entitled to a return of the cash payment then in the hands of the state treasurer; and where he chose the latter alternative, and requested a return of the cash payment, he in effect withdrew his application for the purchase of the land; and that the act of the land commissioner did not work an estoppel against the state.

88. See Cameron *v.* Terrell, (Tex. 1908) 107 S. W. 46; Ross *v.* Terrell, 99 Tex. 502, 90 S. W. 1093 (holding that Gen. Laws (1905), c. 103, § 6, authorizes one who has purchased four sections in one of the designated counties to purchase four sections additional in such county); Conn *v.* Terrell, 97 Tex. 578, 80 S. W. 608; Hazelwood *v.* Rogan, 95 Tex. 295, 67 S. W. 80; Nowlin *v.* Hall, (Tex. Civ. App. 1902) 66 S. W. 116, 851, 67 S. W. 900.

Mutual transfers by purchasers.— Where a father purchased from the state four sections of school land, and his son purchased two sections, and to promote their convenience the son conveyed a section of his original purchase to the father, and the father conveyed a section of his original purchase to the son, the conveyance to the father was not illegal, under Tex. Gen. Laws (1907), p. 494, c. 20, §§ 6*d*, 6*e*, providing that a purchaser of school lands may sell the same to another purchaser, provided the total tract purchased by the latter shall not exceed one complement of sections, since by the same transaction the son took as purchaser one of the sections originally purchased by the father. Cunningham *v.* Terrell, (Tex. 1908) 111 S. W. 651.

89. Nowlin *v.* Hall, (Tex. Civ. App. 1902) 66 S. W. 116, 851, 67 S. W. 900.

Plaintiff's verified application to purchase lands, which recites that he has purchased no other lands from the state, does not au-

whole surveys (or sections of six hundred and forty acres) only," save in the case of fractional sections.[90]

(v) *Purchase of Leased Lands.* Leased lands are subject to sale at any time unless they fall within some of the exceptions named in the statute.[91] A section or part of a section covered by a lease cannot be sold during the term of the lease when the lessee has placed thereon improvements of the value of two hundred dollars.[92] The lessee or the assignee of a lease of school lands has the right to purchase the same during the existence of the lease;[93] but lands in the

thorize the court to find such fact as a matter of law, as even if *prima facie* evidence of all the facts stated therein, it is the testimony of an interested party, which the jury may discredit. Nowlin *v.* Hall, (Tex. Civ. App. 1902) 66 S. W. 116, 851, 67 S. W. 900.

90. Tex. Gen. Laws (1907), p. 491, c. 20, §§ 5, 6. See Ford *v.* Terrell, (Tex. 1908) 107 S. W. 40, holding that this provision applies to a section of which one half is under lease.

91. Joyce *v.* Sisk, 26 Tex. Civ. App. 68, 62 S. W. 960; Coates *v.* Bush, 23 Tex. Civ. App. 139, 56 S. W. 617.

Exception where lessee has but one watered section under act of 1883 see Swenson *v.* Taylor, 80 Tex. 584, 16 S. W. 336; Smisson *v.* State, 71 Tex. 222, 9 S. W. 112; Nobles *v.* Magnolia Cattle Co., 69 Tex. 434, 9 S. W. 448.

92. Shelton *v.* Willis, 23 Tex. Civ. App. 547, 58 S. W. 176; Coates *v.* Bush, 23 Tex. Civ. App. 139, 56 S. W. 617. See also Clark *v.* McKnight, 25 Tex. Civ. App. 60, 61 S. W. 349, holding that the circumstances shown did not bring the lessee within this exception.

A lessee who purchased improvements made by a purchaser who forfeited his purchase has the burden of proving that he purchased the improvements before they reverted to the state by reason of the forfeiture of the purchase. Shelton *v.* Willis, 23 Tex. Civ. App. 547, 58 S. W. 176.

Burden of proof as to value of improvements.— Where an application to purchase leased land is refused on the ground that the lessee has two hundred dollars' worth of improvements thereon, the applicant has the burden of showing the lessee has not improvements of that value. White *v.* Pyron, 23 Tex. Civ. App. 105, 57 S. W. 56. But where land has been awarded to an applicant who did not apply for it as leased land, a lessee seeking to recover possession has the burden of proving that the improvements thereon are worth two hundred dollars and belong to him. Shelton *v.* Willis, 23 Tex. Civ. App. 547, 58 S. W. 176.

93. Patterson *v.* Knapp, (Tex. 1907) 103 S. W. 489, 102 S. W. 97 [*affirming* (Civ. App. 1907) 99 S. W. 125]; Glasgow *v.* Terrell, (Tex. 1907) 102 S. W. 98 (holding that Gen. Laws (1905), c. 103, § 5, giving such right, does not violate the constitution); Welhausen *v.* Terrell, 100 Tex. 150, 97 S. W. 79 (holding that petitioner had failed to complete his purchase of the land before the expiration of his lease, and thereby lost his preference right to purchase); Garza *v.* Terrell, 99 Tex. 506, 90 S. W. 1092; Ross *v.* Terrell, 99 Tex. 502, 90 S. W. 1093; West *v.* Terrell, 96 Tex. 548, 74 S. W. 903; Tolleson *v.* Rogan, 96 Tex. 424, 73 S. W. 520 [*followed* in Walker *v.* Marchbanks, 32 Tex. Civ. App. 303, 74 S. W. 929]; Patterson *v.* Crenshaw, (Tex. Civ. App. 1907) 105 S. W. 996; Fields *v.* Davis, (Tex. Civ. App. 1903) 74 S. W. 52; Mitchell *v.* Johnson, 32 Tex. Civ. App. 373, 74 S. W. 48.

Statute applies only to leases existing when it went into effect.— Trezevant *v.* Terrell, 100 Tex. 289, 99 S. W. 94, holding that the statute did not apply where the lease was taken out after it went into effect, although the application for the lease was made previous to that time. But the right of assignees of leases is not confined to those whose assignments were made before the statute took effect. Glasgow *v.* Terrell, 100 Tex. 581, 102 S. W. 98.

A notice not received by the commissioner until after the lease has expired gives the holder of the lease no prior right to purchase thereunder. Murphy *v.* Terrell, 100 Tex. 397, 100 S. W. 130.

What constitutes an "entire lease."— Where, after school lands were leased, part was sold to a third person with the consent of the lessee, who subsequently assigned his lease, the assignee was entitled to purchase, as the lease of the part not sold to the third person was an "entire lease" within the meaning of Gen. Laws (1905), c. 103, § 5, providing that an original lessee of school lands, or the assignee of an "entire lease," out of which no sale of one complement of land has been made under the act, may purchase out of his lease the quantity of land allowed to one purchaser. Garza *v.* Terrell, 99 Tex. 506, 90 S. W. 1092.

Under the act of 1901 leased lands in the absolute lease district were not subject to be sold even to the lessee or his assignee during the term of the lease unless the lease had been canceled. Martin *v.* Terrell, 97 Tex. 118, 76 S. W. 743 [*distinguishing* Tolleson *v.* Rogan, 96 Tex. 424, 73 S. W. 520].

Purchase by assignee under act of 1907.— Where an assignment of a lease of school land was executed, but not acknowledged, when the act of 1907 (Tex. Gen. Laws (1907), p. 491, c. 20, § 5), took effect, the assignee was not entitled to purchase under the act of 1905, and therefore, not having given his notice sixty days before the expiration of the lease, could not purchase under the act of 1907. Ross *v.* Terrell, (Tex. 1907) 105 S. W. 1116.

absolute lease district which are under lease are not subject to sale during the continuance of the lease,[94] to any one except the lessee or his assignee,[95] unless the lessee consents to the sale [96] or waives his rights under the lease.[97] On the expiration of a lease in the absolute lease district the land is subject to sale for a period of sixty days,[98] unless there are improvements on a section of the value of two hundred dollars or more, in which case action on an application to purchase by a person other than the maker of the improvements must be suspended for sixty days.[99] This merely allows a lessee on the expiration of his lease to apply at once for a new lease instead of waiting sixty days,[1] and does not prevent a sale to a third person who applied for the land before the lessee applied for a new lease;[2]

94. Ford *v.* Terrell, (Tex. 1908) 107 S. W. 40; Smith *v.* McLain, 96 Tex. 568, 74 S. W. 754; West *v.* Terrell, 96 Tex. 548, 74 S. W. 903; Tolleson *v.* Rogan, 96 Tex. 424, 73 S. W. 520; Blevins *v.* Terrell, 96 Tex. 411, 73 S. W. 515, 74 S. W. 528; Carothers *v.* Rogan, 96 Tex. 113, 70 S. W. 18; Reed *v.* Rogan, 94 Tex. 177, 59 S. W. 255; Bradford *v.* Brown, 37 Tex. Civ. App. 323, 84 S. W. 392; Pruitt *v.* Scrivner, (Tex. Civ. App. 1903) 77 S. W. 976.

Statute withholding leased lands from sale not in contravention of constitution.— Reed *v.* Rogan, 94 Tex. 177, 59 S. W. 255.

A void lease is no obstacle to a purchase of the land by another person. Kitchens *v.* Terrell, 96 Tex. 527, 74 S. W. 306; Thomson *v.* Lynn, 36 Tex. Civ. App. 79, 81 S. W. 330.

Where a lease had been canceled, and the unearned lease money returned, before the purchaser undertook to occupy the land, evidence that the lease ought not to have been canceled will not vary the effect of the fact that it was canceled. Borchers *v.* Mead, 17 Tex. Civ. App. 32, 43 S. W. 300.

Burden of proof.— One who seeks to purchase school land subject to lease has the burden of proving that the lease was canceled before he applied to purchase the land. Trevy *v.* Lowrie, 40 Tex. Civ. App. 321, 89 S. W. 981, 33 Tex. Civ. App. 606, 78 S. W. 18; Bradford *v.* Brown, 37 Tex. Civ. App. 323, 84 S. W. 392.

An award by the land commissioner of land which has been previously leased for a term which has not expired at the time of the award does not authorize the presumption, as against one claiming under the lease, that the lease had been forfeited before the award was made (Irwin *v.* Mayes, 31 Tex. Civ. App. 517, 73 S. W. 33; Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703); but where a junior applicant contests an award on the ground that at the time of the award the land was subject to a lease, the presumption is that the commissioner acted lawfully in awarding the land and the burden is on the junior applicant to show that the lease had not been canceled (Davis *v.* Tillar, 32 Tex. Civ. App. 383, 74 S. W. 921 [*distinguishing* Irwin *v.* Mayes, 31 Tex. Civ. App. 517, 73 S. W. 33; Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703], holding that proof of the issuance of the lease only is not enough).

Invalid sale to lessee.— Where the holder of a lease of school lands before the termination of the lease applied for the purchase of the lands, and the same were awarded to him, and the state, after discovering the invalidity of the sale because the holder was not an actual settler, took no action to avoid the lease or offer the lands for sale to others, as the state had the right to insist on the validity of the lease, a third person had no absolute right to purchase. Patterson *v.* Knapp, 100 Tex. 587, 102 S. W. 97, 103 S. W. 489 [*affirming* (Tex. Civ. App. 1906) 99 S. W. 125].

Gen. Laws (1901), c. 125, § 5, providing that all tracts of land lying partly inside and partly outside of an absolute lease district shall be considered as being wholly without the district does not apply to a large body of land comprising one hundred and fifty thousand acres, but to the sections and subdivisions of sections within that body. Raper *v.* Terrell, 100 Tex. 287, 99 S. W. 93.

95. Tolleson *v.* Rogan, 96 Tex. 424, 73 S. W. 520; Trevy *v.* Lowrie, 40 Tex. Civ. App. 321, 89 S. W. 981. See *supra*, note 93.

96. Smith *v.* McLain, 96 Tex. 568, 74 S. W. 754.

A consent to a sale to a particular person does not authorize a sale to any other person. Smith *v.* McLain, 96 Tex. 568, 74 S. W. 754.

Void sale.— Where the lessee of public school lands filed with the commissioner of the general land office a consent that the lands might be sold to a certain person, but such person's attempted purchase was void, the lease continued in force. Smith *v.* McLain, 96 Tex. 568, 74 S. W. 754.

97. Tolleson *v.* Rogan, 96 Tex. 424, 73 S. W. 520.

A waiver in favor of an ineligible purchaser does not authorize a sale of the land to any other person during the existence of the lease. Smith *v.* McLain, 96 Tex. 568, 74 S. W. 754; Trevy *v.* Lowrie, 40 Tex. Civ. App. 321, 89 S. W. 981.

A part-owner of a lease of state school lands cannot alone waive the lease, so as to authorize a purchase of the lands. Jones *v.* Wright, (Tex. Civ. App. 1904) 81 S. W. 569 [*reversed* on other grounds in 98 Tex. 457, 84 S. W. 1053].

98. Taylor *v.* Rose, 30 Tex. Civ. App. 471, 70 S. W. 1022.

99. Taylor *v.* Rose, 30 Tex. Civ. App. 471, 70 S. W. 1022.

1. Hazelwood *v.* Rogan, 95 Tex. 295, 67 S. W. 80.

2. Hazelwood *v.* Rogan, 95 Tex. 295, 67 S. W. 80.

and in case there are simultaneous applications by the maker of the improvements for a new lease and by a third person to purchase, the land must be awarded to the latter.[3]

(VI) *Purchase of Additional Lands.* A *bona fide* owner and actual resident of land has the right to purchase additional lands within a radius of five miles of his home place,[4] and it is not necessary that such owner shall have acquired the land on which he resides from the state.[5] The right to purchase additional lands extends only to persons engaged in agricultural or stock-raising pursuits,[6] and not to persons owning town lots.[7] In order to constitute a person a qualified purchaser of contiguous lands under the statute it is necessary that he should be the owner of his home or base survey,[8] but it is not necessary that he should have vested in him an indefeasible legal title.[9] Actual settlers[10] only are authorized to purchase additional school land,[11] and an award of additional land to one who

3. Taylor *v.* Rose, 30 Tex. Civ. App. 471, 70 S. W. 1022.

4. Nesting *v.* Terrell, 97 Tex. 18, 75 S. W. 485; Roddy *v.* White, 32 Tex. Civ. App. 422, 75 S. W. 358 [*following* Smith *v.* Rothe, (Tex. Civ. App. 1900) 55 S. W. 754]; Nowlin *v.* Hall, (Tex. Civ. App. 1902) 66 S. W. 116, 851, 67 S. W. 900; Faucett *v.* Sheppard, 24 Tex. Civ. App. 552, 60 S. W. 276; McKnight *v.* Clark, 24 Tex. Civ. App. 89, 58 S. W. 146; McGrew *v.* Wilson, (Tex. Civ. App. 1900) 57 S. W. 63; Smith *v.* Rothe, (Tex. Civ. App. 1900) 55 S. W. 754.

Statute giving right not in violation of constitution.— McGrew *v.* Wilson, (Tex. Civ. App. 1900) 57 S. W. 63.

Break in chain of title.— One who had been in the actual possession of land under deeds for many years, and had made valuable improvements, and paid all taxes thereon, is a "*bona fide* owner and resident upon" such land, notwithstanding a break in his chain of title. Smith *v.* Rothe, (Tex. Civ. App. 1900) 55 S. W. 754.

Matters material on question of good faith. — In trespass to try title, where defendant claims as a purchaser under the statute providing that any actual *bona fide* owner of and resident on lands contiguous to public lands, or within a radius of five miles thereof, may purchase such public lands, it is proper, in determining the good faith of defendant to consider the length of time he had owned and lived on his land, the improvements made, and taxes paid. Smith *v.* Rothe, (Tex. Civ. App. 1900) 55 S. W. 754.

5. Smith *v.* Rothe, (Tex. Civ. App. 1900) 55 S. W. 754.

6. Conn *v.* Terrell, 97 Tex. 578, 80 S. W. 608.

The right is not restricted to purchasers of agricultural sections, but the purchaser of a section classified as grazing land is entitled to purchase additional land. Trevey *v.* Lowrie, 33 Tex. Civ. App. 606, 78 S. W. 18. *Contra*, Terry *v.* Dale, 27 Tex. Civ. App. 1, 65 S. W. 51, 396.

7. Conn *v.* Terrell, 97 Tex. 578, 80 S. W. 608.

8. Bone *v.* Cowan, 37 Tex. Civ. App. 519, 84 S. W. 385.

A mere actual occupant of school land who is not a *bona fide* purchaser has no right to purchase additional land. Trevey *v.* Lowrie, 33 Tex. Civ. App. 606, 78 S. W. 18.

9. Bone *v.* Cowan, 37 Tex. Civ. App. 519, 84 S. W. 385, holding that a person is the "owner" of land, so as to be entitled under the statute to purchase contiguous public lands, where he has an oral contract to purchase it, under which he has taken possession and made improvements which are permanent and valuable relative to the value of the land.

10. An actual settler is one whose occupancy is actual rather than constructive. Schwarz *v.* McCall, 94 Tex. 10, 57 S. W. 31; Baker *v.* Millman, 77 Tex. 46, 13 S. W. 618; Mann *v.* Greer, 33 Tex. Civ. App. 517, 77 S. W. 34; Lewis *v.* Scharbauer, 33 Tex. Civ. App. 220, 76 S. W. 225.

11. Schwarz *v.* McCall, 94 Tex. 10, 57 S. W. 31; Mann *v.* Greer, 33 Tex. Civ. App. 517, 77 S. W. 34 (holding the evidence sufficient to sustain a finding that a purchaser was not an actual settler in good faith); Sterling *v.* Self, 30 Tex. Civ. App. 284, 70 S. W. 238; Nowlin *v.* Hall, (Tex. Civ. App. 1902) 66 S. W. 116, 851, 67 S. W. 900; Logan *v.* Curry, (Tex. Civ. App. 1901) 66 S. W. 81 [*reversed* on other grounds in 95 Tex. 664, 69 S. W. 129] (holding that a sale of a pastoral section to a settler on an adjoining agricultural section is void if the settlement on the agricultural section is not *bona fide*); Jones *v.* Bourbonnais, 25 Tex. Civ. App. 94, 60 S. W. 986.

Intent to make land one's home.— An actual settler on school land, who claims the right to purchase additional land, must not only have actually occupied and settled upon his land, but must intend to make it his home. Mahoney *v.* Tubbs, 34 Tex. Civ. App. 96, 77 S. W. 822 [*following* Willoughby *v.* Townsend, 93 Tex. 80, 53 S. W. 581]; Wyatt *v.* Lyons, 25 Tex. Civ. App. 88, 60 S. W. 575.

Right to question settlement.— Plaintiff, in trespass to try title to land which defendant made application to purchase as additional land to his home section, is not precluded from questioning defendant's actual settlement on the home section at the time of the application. Ford *v.* Brown, 33 Tex. Civ. App. 198, 75 S. W. 893.

One who marries the widow of a purchaser of school land, and thereafter resides thereon with her, is not thereby made eligible to pur-

is not an actual settler on his home section is ineffective.[12] Additional school lands may be purchased at the same time that the tract intended for the home place, upon which the purchaser has become an actual settler, is purchased.[13] Where a person applies to purchase two sections of school lands, claiming one as a home section and the other as additional land, his right to the latter section is dependent upon his right to the home section;[14] but where his right to purchase his home section as such is not contested, the commissioner has no power to deny his incidental right to purchase additional land subject to sale.[15]

(VII) *APPLICATION FOR PURCHASE.* The proposed purchaser must make application to purchase the land,[16] which must be filed in the land office through the mail, in an envelope addressed to the commissioner of the general land office at Austin.[17] When the land is to come on the market at some time subsequent to the application, the envelope must have indorsed thereon the description, name of the grantee, and date when the land is to be on the market,[18] and on receipt of the same it must be preserved by the commissioner without being opened until the day following the date indorsed thereon;[19] but it is not necessary that an application made after the land comes on the market shall bear such indorsement.[20] The application should describe the land which the applicant desires to purchase,[21] and one who seeks to purchase additional land should describe

chase additional school lands. Boyd *v.* Montgomery, 27 Tex. Civ. App. 206, 66 S. W. 243.

One who has been prevented by sickness from actually settling on his purchase cannot purchase additional land. Jones *v.* Bourbonnais, 25 Tex. Civ. App. 94, 60 S. W. 986.

Where the right to purchase additional lands is based upon a previous three years' residence on the original home section, all that is necessary to authorize the purchase is that the original section is occupied by the purchaser. He need not actually in person reside on it or make his home there, but such original section must be occupied either by himself or by someone for him. Thomson *v.* Hubbard, 22 Tex. Civ. App. 101, 53 S. W. 841.

12. Jones *v.* Wright, (Tex. Civ. App. 1906) 92 S. W. 1010 [*following* Lewis *v.* Scharbauer, 33 Tex. Civ. App. 220, 76 S. W. 225].

The burden of proof is upon the person claiming that the one to whom the award was made was not an actual settler, but such proof can be made by circumstantial evidence. Jones *v.* Wright, (Tex. Civ. App. 1906) 92 S. W. 1010.

Instructions.— In trespass to try title to certain school lands, an instruction that in determining whether defendant was an actual settler on the survey designated as his home section, the jury should look to all the facts and circumstances in evidence concerning his acts and conduct in relation to such settlement, if any, for a reasonable time before and after the date of his application to purchase additional lands, was proper. Jones *v.* Wright, (Tex. Civ. App. 1906) 92 S. W. 1010.

13. Nowlin *v.* Hall, (Tex. Civ. App. 1902) 67 S. W. 900, 66 S. W. 116, 851.

14. Sanford *v.* Terrell, (Tex. 1905) 87 S. W. 655; Fellers *v.* McFatter, (Tex. Civ. App. 1907) 101 S. W. 1065.

15. Murphy *v.* Terrell, (Tex. 1907) 100 S. W. 130.

16. Cordill *v.* Moore, 17 Tex. Civ. App. 217, 43 S. W. 298.

Form.— Where the form of an application for the purchase of school land is in compliance with the act of 1895, it is good under the act of 1897. Abilene Live-Stock Co. *v.* Guinn, (Tex. Civ. App. 1899) 51 S. W. 885 [*followed* in Faucett *v.* Sheppard, 24 Tex. Civ. App. 552, 60 S. W. 276].

17. Gen. Laws (1905), c. 103, § 3. See Flores *v.* Terrell, (Tex. 1906) 92 S. W. 32.

Under former statutes the applicant's application, oath, and obligation were filed in the office of the county clerk of the county where the land applied for, or a part thereof, was situated. Patterson *v.* Terrell, 96 Tex. 509, 74 S. W. 19; McGee *v.* Corbin, 96 Tex. 35, 70 S. W. 79 [*reversing* (Civ. App. 1902) 67 S. W. 1068]; Fellers *v.* McFatter (Tex. Civ. App. 1907) 101 S. W. 1065; Davis *v.* Burnett, 35 Tex. Civ. App. 30, 79 S. W. 105.

Presentation of application by agent under former law see Sweet *v.* Slough, (Tex. Civ. App. 1899) 51 S. W. 854, (Civ. App. 1899) 52 S. W. 1043.

18. Flores *v.* Terrell, (Tex. 1906) 92 S. W. 32.

19. Flores *v.* Terrell, (Tex. 1906) 92 S. W. 32.

What is meant by "the day following."— The statute providing that the envelope in which a purchaser makes his bid shall be preserved by the commissioner of the land office without being opened until the day following the date when the land comes on the market means the next day on which the land office is required to be opened, and not the next calendar day. Fessenden *v.* Terrell, (Tex. 1907) 98 S. W. 640, holding that where the next calendar day was a legal holiday it was proper to make the opening on the day following.

20. Flores *v.* Terrell, (Tex. 1906) 92 S. W. 32.

21. Lindsey *v.* Terrell, (Tex. 1907) 101 S. W. 1073, holding, however, that an application for the purchase of school lands which described the lands as one hundred and sixty

in his application the land on the ownership of which he bases his right to purchase.[22] An application to purchase as an actual settler should show which is the applicant's home section and that he is actually residing thereon at the time of his application.[23] The application must be accompanied by the affidavit of the applicant that he desires to purchase the land for a home,[24] and is not purchasing for another;[25] and the applicant must transmit to the state treasurer one fortieth of the aggregate purchase-money,[26] and send to the commissioner of the general land office his obligation binding him to pay to the state on the first of November of each year thereafter one fortieth of the aggregate purchase-price, with interest on the unpaid balance.[27] An application to purchase land for cash

acres in a designated section was sufficient to authorize the commissioner of school lands to make a sale where the state held only a quarter in the section, and it alone was on the market and had been advertised for sale by proper description, and that where the commissioner entertained such an application and gave the applicant an opportunity to give a more complete description of the premises, the applicant acquired a standing as an applicant for the purchase of school lands with the right to comply with the requirement of the commissioner to perfect his application, which brought him within the protection of the statute protecting the rights of third persons acquired after a forfeiture of a sale of school lands for non-payment of interest and prior to the reinstatement of the purchaser's claims.

Erroneous description.—A purchaser of public school lands, who describes the land he desires to purchase, in good faith, on his application of purchase, is entitled to the land, although the description proves erroneous. Short *v.* Seymour, (Tex. Civ. App. 1893) 22 S. W. 925.

22. Nesting *v.* Terrell, 97 Tex. 18, 75 S. W. 485, holding, however, that a purchaser of additional school lands who, in his application, has by mistake incorrectly described the land on which he bases his right to purchase, may have the application corrected at any time before the rights of third persons intervene.

23. Goethal *v.* Read, 35 Tex. Civ. App. 461, 81 S. W. 592 [*following* Mahoney *v.* Tubbs, 34 Tex. Civ. App. 96, 77 S. W. 822], holding that an application to purchase several sections of school land which had written below the description the words, "Settlement is on No. 4," was not sufficient.

24. Willoughby *v.* Townsend, 93 Tex. 80, 53 S. W. 581; Cordill *v.* Moore, 17 Tex. Civ. App. 217, 43 S. W. 298.

Affidavit held insufficient.— An affidavit which recited "that my home is upon aforesaid [tract], and that I am a *bona fide* settler on the same and head of a family" was insufficient. Willoughby *v.* Townsend, 93 Tex. 80, 53 S. W. 581 [*reversing* (Civ. App. 1899) 51 S. W. 335].

The affidavit was formerly required to show that the applicant had in good faith settled on the land. Willoughby *v.* Townsend, 93 Tex. 80, 53 S. W. 581; Cordill *v.* Moore, 17 Tex. Civ. App. 217, 43 S. W. 298.

25. Mahoney *v.* Tubbs, 34 Tex. Civ. App. 96, 77 S. W. 822.

The failure of the officer before whom the oath is taken to affix his seal of office thereto does not render such application junior to a subsequent application, when the seal is afterward affixed thereto, although after the filing of the second application. Watson *v.* White, 26 Tex. Civ. App. 442, 64 S. W. 826.

Contract for use of land for grazing.— It was not conclusive evidence of collusion that applicant purchased under an agreement with a third person that he would make the first payment, and pay interest and taxes for five years, for the use of the land during that time for grazing purposes, so far as it was not required by applicant. Wyatt *v.* Lyons, 25 Tex. Civ. App. 88, 60 S. W. 575.

26. Rawls *v.* Terrell, (Tex. 1907) 105 S. W. 488; Joyce *v.* Sisk, 26 Tex. Civ. App. 68, 62 S. W. 960; Coates *v.* Bush, 23 Tex. Civ. App. 139, 56 S. W. 617.

This does not apply to sales required to be for cash.— Buckley *v.* Terrell, (Tex. 1908) 109 S. W. 861.

A deposit made after the commissioner has rejected the application because of the lack of a deposit, without a new application, confers no rights on the applicant. Coates *v.* Bush, 23 Tex. Civ. App. 139, 56 S. W. 617.

Return of part of amount paid through mistake.— Where an applicant for the purchase of lands made the first payment thereon, as required by statute, but through some oversight or mistake of the treasurer or commissioner of the general land office, two dollars of such amount was returned to him, which he made every effort to again transmit when informed that it was necessary, his rights were not defeated by the mistake. Faucett *v.* Sheppard, 24 Tex. Civ. App. 552, 60 S. W. 276.

The commissioner is bound to announce the day on which the land is to be open to competitive bidding, and that on that day any one desiring to bid must have his application and accompanying documents on file and his first payment already paid into the treasury, and hence an award of lands to a purchaser who did not deposit the payment required with the treasurer until the day after the bids were open was illegal. Rawls *v.* Terrell, (Tex. 1907) 105 S. W. 488.

27. Joyce *v.* Sisk, 26 Tex. Civ. App. 68, 62 S. W. 960.

The application proper is only a part of the transaction and amounts to nothing un-

cannot be considered unless the cash payment is in the treasury.[28] An applicant for land which has not been classified as mineral is not required to make affidavit that there are not, to his knowledge, any minerals therein.[29] An application for more land than the applicant is entitled to purchase is invalid.[30] It has been held that an application to purchase school lands, filed before the lands have been placed on the market by the commissioner by listing the same with the county clerk,[31] or before a lease thereon has expired,[32] is premature, and confers no rights as against another applicant, whose application was made after the land became subject to sale and before the premature application was acted on.[33] But a premature application may be the basis of an award by the commissioner of the general land office, where no superior rights have been acquired prior to the making

less accompanied by an obligation for the unpaid balance of the purchase-money. Willoughby *v.* Long, 96 Tex. 194, 71 S. W. 545 [*reversing* (Civ. App. 1902) 69 S. W. 646].

Description of land in obligation.— The statute does not require that the obligation for the payment of the price of school land shall describe the land, but if the applicant undertakes to do so, and the obligation describes a tract different from that described in the application, the obligation is void. Hamilton *v.* Votaw, 31 Tex. Civ. App. 684, 73 S. W. 1091, holding, however, that a variance caused by a misstatement of the name of the grantee of the certificate was immaterial.

28. Tex. Laws (1907), p. 495, c. 20, § 6*e*. See Buckley *v.* Terrell, (Tex. 1908) 109 S. W. 861.

Where the purchase-money is deposited after the application such application may, it seems, be then considered unless some adverse right has intervened. Buckley *v.* Terrell, (Tex. 1908) 109 S. W. 861.

Where money deposited on previous rejected applications was in the treasury when a new application was acted upon, but at such time notice of the rejection of such previous applications had not been sent to the treasurer, the new application and an award thereon cannot be subsequently canceled on the ground that the purchase-money thereunder was not in the treasury. Buckley *v.* Terrell, (Tex. 1908) 109 S. W. 861.

29. Schendell *v.* Rogan, 94 Tex. 585, 63 S. W. 1001 [*followed* in Chappell *v.* Royan, (Tex. 1901) 63 S. W. 1006].

30. Goethal *v.* Read, 35 Tex. Civ. App. 461, 81 S. W. 592.

31. Willoughby *v.* Townsend, 93 Tex. 80, 53 S. W. 581 [*reversing* (Civ. App. 1899) 51 S. W. 335], holding that such an application is properly rejected.

An application made out before notice was received by the clerk but not sent to the commissioner of the general land office until after such receipt is not invalid as having been made too soon. Lester *v.* Elliott, 26 Tex. Civ. App. 429, 63 S. W. 916, holding further that where the county clerk made out the application for defendant to purchase public school land the day he received notice of its classification and appraisal, although prior thereto; afterward filling in the date and jurat, and mailing the application for defendant the following morning, but the clerk did nothing to prevent plaintiff from learning of the notice and making application to purchase, and it appeared that plaintiff's application probably reached the general land office in the same mail as defendant's, such facts did not show that the clerk's acts as agent for defendant gave him an undue advantage over plaintiff so as to invalidate defendant's application.

Right under premature application.— An application by an actual settler to purchase school lands, although premature and rejected, because made before the appraisement of the land was filed in the office of the county clerk, gives him a title against one who filed an application to purchase it as additional land to his home section, invalid because he was not an actual settler on his home land. Ford *v.* Brown, 33 Tex. Civ. App. 198, 75 S. W. 893.

32. Smith *v.* McLain, 96 Tex. 568, 74 S. W. 754; Trevy *v.* Lowrie, 40 Tex. Civ. App. 521, 89 S. W. 981; Jones *v.* Lohman, 36 Tex. Civ. App. 418, 81 S. W. 1002 [*following* Ford *v.* Brown, 96 Tex. 537, 74 S. W. 535]; Valentine *v.* Sweatt, 34 Tex. Civ. App. 135, 78 S. W. 385; Pruitt *v.* Scrivner, (Tex. Civ. App. 1903) 77 S. W. 976, although the lessee may be ineligible as a purchaser. See also Coates *v.* Bush, 23 Tex. Civ. App. 139, 56 S. W. 617, holding that an application to purchase leased lands will be denied where it does not show that under the statute the land is subject to sale notwithstanding the lease.

Affidavit made before expiration of lease.— The fact that the affidavit which is to accompany an application to purchase school lands is made an hour before a lease of the land expires and is available for purchase does not affect the validity of the application. McGee *v.* Corbin, 96 Tex. 35, 70 S. W. 79 [*reversing* (Civ. App. 1902) 67 S. W. 1068].

Entry before expiration of lease.— The fact that one applying to purchase additional land made an entry upon his home section before a lease thereof, made by the commissioner of the land office, had expired, and was therefore trespassing, is immaterial to the validity of his purchase, where, at the time of his application, the lease had expired, and he was rightfully in possession. McGee *v.* Corbin, 96 Tex. 35, 70 S. W. 79 [*reversing* (Civ. App. 1902) 67 S. W. 1068].

33. Jones *v.* Lohman, 36 Tex. Civ. App. 418, 81 S. W. 1002 [*following* Ford *v.* Brown,

of the award.[34] As between rival applicants the one whose application is first filed in the general land office has the better right,[35] and one who applies to purchase land for which another has previously applied has the burden of proving either that the prior applicant never completed his purchase or that he had in some manner forfeited his right before the subsequent application was made.[36] Where a person made a series of applications for the same lands in the names of different persons, allowing each application to lapse for want of payment within the ninety days, and thereafter immediately filing a new application, thus keeping the lands from market beyond the statutory time, and finally he made a new application before the expiration of the last ninety days, and a patent was issued thereon, a purchaser of this title was estopped as against an adverse claimant from setting up that the prior applications were fictitious, and left the land open for purchase upon the application for which the patent issued.[37] When the application proper, with the obligation and oath required by law, has been filed, and the first instalment of purchase-money paid, the right of the applicant is fixed, and there is a contract with the state.[38] An application to purchase state lands made on Sunday is not void or illegal.[39] Where an applicant for the purchase of state lands, in possession thereof, obeyed a judgment of ouster, and moved off, without waiting to be put off by an officer, such relinquishment of possession did not constitute an abandonment of the application.[40]

(VIII) *AWARD.* An award of school land by the commissioner is *prima facie* evidence that the land was on the market, and that all prerequisites to his power to make a valid sale had been met,[41] and while it remains uncanceled the award is

96 Tex. 537, 74 S. W. 535 (*approved* in Corrigan *v.* Fitzsimmons, (Tex. Civ. App. 1903) 76 S. W. 68 [*reversed* on other grounds in 97 Tex. 595, 80 S. W. 989])].

34. Williams *v.* Barnes, (Tex. Civ. App. 1906) 99 S. W. 127; Smith *v.* Zesch, 30 Tex. Civ. App. 444, 70 S. W. 775. See also Patterson *v.* Terrell, 96 Tex. 509, 74 S. W. 19.

35. Stephens *v.* Porter, 29 Tex. Civ. App. 556, 69 S. W. 423; Bell *v.* Williams, 29 Tex. Civ. App. 109, 66 S. W. 1119; Hamilton *v.* McAuley, 27 Tex. Civ. App. 256, 65 S. W. 205; Clack *v.* Hart, 26 Tex. Civ. App. 46, 62 S. W. 935; Faucett *v.* Sheppard, 24 Tex. Civ. App. 552, 60 S. W. 276. See also Perez *v.* Canales, 69 Tex. 674, 7 S. W. 507; Coody *v.* Harris, 36 Tex. Civ. App. 465, 81 S. W. 1233, 31 Tex. Civ. App. 169, 71 S. W. 607.

Amended application.— Where an application for an entire section is in effect rejected by the award of three quarters thereof to another person, an "amended application" to purchase the remaining one quarter dates from the time it is filed, and the right of the applicant is inferior to that of one who filed his application for such quarter before the "amended application," although after the original application. Clack *v.* Hart, 26 Tex. Civ. App. 46, 62 S. W. 935.

A fictitious application secures no preference, but such application will not vitiate a subsequent *bona fide* application by the same applicant before that made by another, or invalidate the patent based thereon. Martin *v.* Brown, 62 Tex. 467.

A person who makes a second application does not thereby abandon or waive his rights under his first application. Perry *v.* Rutherford, 39 Tex. Civ. App. 477, 87 S. W. 1054.

Mistake as to basis of right.— Where one is qualified to buy land and has complied with all the statutory requisites and the regulations of the land department in making his application his right is not impaired by the fact that in his first application he made a mistake in stating the ground which entitled him to purchase. Ratliff *v.* Terrell, 97 Tex. 522, 80 S. W. 600. See also Weckesser *v.* Lewis, 35 Tex. Civ. App. 18, 79 S. W. 355.

36. Boaz *v.* Powell, 96 Tex. 3, 69 S. W. 976.

37. Monroe Cattle Co. *v.* Becker, 147 U. S. 47, 13 S. Ct. 217, 37 L. ed. 72.

38. Willoughby *v.* Long, 96 Tex. 194, 71 S. W. 545 [*reversing* (Civ. App. 1902) 69 S. W. 646].

39. Stephens *v.* Porter, 29 Tex. Civ. App. 556, 69 S. W. 423 (holding that an application is not invalidated by the fact that it was filed in the general land office on a Sunday); Willoughby *v.* Townsend, 18 Tex. Civ. App. 724, 45 S. W. 861.

The fact that the affidavit was made on a Sunday does not invalidate the title acquired pursuant to the application. Willoughby *v.* Townsend, (Tex. Civ. App. 1899) 51 S. W. 335 [*reversed* on other grounds in 93 Tex. 80, 53 S. W. 581].

40. Clack *v.* Hart, 26 Tex. Civ. App. 46, 62 S. W. 935.

41. Corrigan *v.* Fitzsimmons, 97 Tex. 595, 80 S. W. 989 [*reversing* (Civ. App. 1903) 76 S. W. 68]; Hardman *v.* Crawford, 95 Tex. 193, 66 S. W. 206 [*affirming* (Civ. App. 1901) 63 S. W. 659; Jones *v.* Wright, (Tex. Civ. App. 1906) 92 S. W. 1010; Hood *v.* Pursley, 39 Tex. Civ. App. 475, 87 S. W. 870; Holt *v.* Cave, 38 Tex. Civ. App. 62, 85 S. W. 309; Stolley *v.* Lilwall, 38 Tex.

of itself sufficient to keep the land from being subject to a subsequent application.[42] One who seeks to overthrow the award has the burden of showing affirmatively the lack of power in the commissioner to make it; [43] but the commissioner's acceptance of an application to purchase land as an actual settler is not conclusive of such settlement, against a subsequent applicant.[44] Only the state can raise the issue of collusion after an award of school lands,[45] and the validity of an award will not be considered in an action by the person to whom the land was granted for damages against a mere trespasser who exhibits no title to the land.[46] No express authority is conferred upon the commissioner of the general land office to cancel an award of school lands upon the ground solely that it was illegally granted,[47] but if an unauthorized award is made it is merely void, and presents no obstacle to a purchase by another applicant,[48] on whom, however, rests the burden of proving the invalidity of the first award.[49] The commissioner has no power to award a part of a section upon an application for the whole section.[50] Where an application to purchase land is refused, it will be inferred that such refusal was proper, in the absence of evidence to show that the applicant had complied with all requirements necessary to have the land awarded to him; [51] but the refusal of the land commissioner to sell lands which are subject to sale to one who has the right to purchase and has complied with the law does not deprive the latter of the right to the land.[52]

(IX) *PRICE.* Where public school lands have been by the commissioner of the general land office regularly classified and valued at a certain amount per acre on a certain day, and that classification has been regularly entered of record in his office, he is not required to sell it at less than that price, although "the cor-

Civ. App. 48, 84 S. W. 689; Binion *v.* Harris, 32 Tex. Civ. App. 371, 74 S. W. 580; Landers *v.* Boliver, (Tex. Civ. App. 1903) 73 S. W. 1075; Bell *v.* Williams, 29 Tex. Civ. App. 109, 66 S. W. 1119; Reeves *v.* Smith, 23 Tex. Civ. App. 711, 58 S. W. 185. But *compare* Knippa *v.* Brown, (Tex. Civ. App. 1904) 82 S. W. 658.

42. Carothers *v.* Rogan, 96 Tex. 113, 70 S. W. 18; May *v.* Hollingsworth, 35 Tex. Civ. App. 665, 80 S. W. 841; Duncan *v.* State, 28 Tex. Civ. App. 447, 67 S. W. 903.

43. Hood *v.* Pursley, 39 Tex. Civ. App. 475, 87 S. W. 870; Holt *v.* Cave, 38 Tex. Civ. App. 62, 85 S. W. 309; Landers *v.* Boliver, (Tex. Civ. App. 1903) 73 S. W. 1075; McBane *v.* Angle, 29 Tex. Civ. App. 594, 69 S. W. 433; Davis *v.* McCauley, 28 Tex. Civ. App. 211, 66 S. W. 1124.

Proof that a lease had been previously executed for a period of time sufficient to embrace the award, without showing that at the date of the award the lease was not subject to forfeiture and had not been waived, is not sufficient. Jones *v.* Wright, 98 Tex. 457, 84 S. W. 1053; Hood *v.* Pursley, 39 Tex. Civ. App. 475, 87 S. W. 870; Davis *v.* Tillar, 32 Tex. Civ. App. 383, 74 S. W. 921.

Evidence not sufficient to overcome presumption of propriety.— The commissioner of the general land office having awarded land to one as detached land, the presumption that it was then detached is not overcome by evidence that it adjoined a section which three years after was public land, as the section may previously have been sold under some act, and afterward forfeited to the state. Shaver *v.* Tinsley, 16 Tex. Civ. App. 369, 40 S. W. 1042.

44. Franklin *v.* Kerlin, 32 Tex. Civ. App. 380, 74 S. W. 592 [*following* Borchers *v.* Mead, 17 Tex. Civ. App. 32, 43 S. W. 300; Hitson *v.* Glascock, 2 Tex. Civ. App. 617, 21 S. W. 710; Metzler *v.* Johnson, 1 Tex. Civ. App. 137, 20 S. W. 1116].

45. May *v.* Hollingsworth, 35 Tex. Civ. App. 665, 80 S. W. 841.

46. Forst *v.* Rothe, (Tex. Civ. App. 1902) 66 S. W. 575.

47. Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 [*reversing* (Civ. App. 1906) 91 S. W. 606], holding that on an issue as to the validity of a purchase of school lands, evidence that the commissioner of the general land office canceled the awards to the purchaser, and evidence of the indorsements on the file wrappers of his applications showing that they had been marked "canceled" was inadmissible.

48. Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 [*reversing* (Civ. App. 1906) 91 S. W. 606].

49. Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 [*reversing* (Civ. App. 1906) 91 S. W. 606], holding that the burden of proof cannot be shifted by the unauthorized action of the commissioner of the land office in canceling the first award, and awarding the land to another person.

50. Clack *v.* Hart, 26 Tex. Civ. App. 46, 62 S. W. 935, holding that where one applied for an entire section, an award of three quarters of a section to another amounted in law to a rejection of the application.

51. Forst *v.* Rothe, (Tex. Civ. App. 1902) 66 S. W. 575.

52. Watts *v.* Wheeler, 10 Tex. Civ. App. 117, 30 S. W. 297.

rected and revised list of all unsold school lands," which was on said day forwarded by him to the county clerk, shows it to be valued at a smaller amount per acre.[53] An application to purchase land at less than its appraised value confers no rights,[54] and an award of land at less than the appraised price has been held void.[55] But one to whom land was awarded has good title, although his application and the obligation first filed stated the price as less than the appraised price, where before the award was made an obligation for the proper amount was filed and the error in the application corrected.[56] A reduction in the valuation of land authorizes an award of the same to one who applied for it at the lower price before the reduction.[57] Where an application for school land is accepted by the commissioner of the general land office, and the land awarded to the applicant, the presumption is that it has been classified as applied for and appraised at the price offered.[58]

(x) *Settlement and Occupancy.*[59] The policy of the state in the disposition of its school lands is to sell to those only who will actually settle on them and occupy them as homes,[60] and where lands are awarded to one who is not an actual settler thereon, he must settle on his home tract within ninety days after the award,[61] and file in the land office proof of his settlement within thirty days after the expiration of such ninety days.[62] A purchaser of school land must also reside upon it as a home for three consecutive years next succeeding the date of his purchase,[63] and make proof of such residence and occupancy to the commissioner by affidavit corroborated by the affidavits of three disinterested and credible persons, to be certified by some officer authorized to administer oaths.[64] On the

53. Wilson *v.* Smith, (Tex. Civ. App. 1904) 82 S. W. 818.

54. Nard *v.* Baker, 27 Tex. Civ. App. 461, 66 S. W. 306; Bowerman *v.* Pope, 25 Tex. Civ. App. 79, 61 S. W. 330, 75 S. W. 1093.

55. Nard *v.* Baker, 27 Tex. Civ. App. 461, 66 S. W. 306.

56. Faucett *v.* Sheppard, 33 Tex. Civ. App. 64, 75 S. W. 538.

57. Threadgill *v.* Butler, 33 Tex. Civ. App. 347, 77 S. W. 43 [*following* Steward *v.* Wagley, (Tex. Civ. App. 1902) 68 S. W. 297 (*following* Hazelwood *v.* Rogan, 95 Tex. 295, 67 S. W. 80 [*overruling* in effect Gracey *v.* Hendrix, 93 Tex. 26, 51 S. W. 846 (*reversing* (Tex. Civ. App. 1899) 50 S. W. 137)])].

Reappraisement of land "on the market." — Where a person filed an application to purchase a certain tract of school land at less than the appraised price, and it was awarded to him, although improperly, the fact that the commissioner of the general land office a few days later approved a reappraisement at a lower price of all school lands in the county "which appeared on the market" did not constitute a reappraisement of the land so awarded. Bowerman *v.* Pope, 25 Tex. Civ. App. 79, 61 S. W. 330, 75 S. W. 1093.

58. Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 [*reversing* (Civ. App. 1906) 91 S. W. 606].

59. **Forfeiture for failure to reside on and improve land** see *infra*, III, C, 3, b, (XIII), (A).

60. Bourn *v.* Robinson, (Tex. Civ. App. 1908) 107 S. W. 873.

61. Lufkin Land, etc., Co. *v.* Terrell, 100 Tex. 406, 100 S. W. 134; Good *v.* Terrell, 100 Tex. 275, 98 S. W. 641.

Condition applicable to sale of timber lands. — Lufkin Land, etc., Co. *v.* Terrell, 100 Tex. 406, 100 S. W. 134.

Under the act of 1883 a purchaser had the right to sell after making his first payment without having settled on the land, and it was sufficient if his assignee settled within six months. State *v.* Palin, (Tex. Civ. App. 1894) 25 S. W. 820 [*following* Chancey *v.* State, 84 Tex. 529, 19 S. W. 706].

62. Jones *v.* Terrell, 100 Tex. 410, 100 S. W. 136, holding that under Gen. Laws (1905), c. 103, § 4, a sale was properly canceled where proof was not filed within such time.

Settlement after ninety days, although within one hundred and twenty days, insufficient.—An application for the purchase of lands must be canceled where the settlement was not made within ninety days after the award, although subsequently and within one hundred and twenty days after the award settlement was made and the required affidavit filed in the land office. Suares *v.* Terrell, (Tex. 1907) 99 S. W. 541.

One who purchases land as additional to his own private land is not required to make an affidavit of settlement. Evans *v.* Terrell, (Tex. 1907) 105 S. W. 490.

63. Logan *v.* Curry, 95 Tex. 664, 69 S. W. 129; Strickel *v.* Turberville, 28 Tex. Civ. App. 469, 67 S. W. 1058.

A purchaser of land as additional to his private land is required to make such settlement. Evans *v.* Terrell, (Tex. 1907) 105 S. W. 490.

Circumstances amounting to actual settlement see State *v.* Swenson, (Tex. Civ. App. 1894) 26 S. W. 234.

Circumstances not amounting to actual settlement see Swenson *v.* State, (Tex. Civ. App. 1894) 26 S. W. 237.

64. Logan *v.* Curry, 95 Tex. 664, 69 S. W. 129.

making of such proof it is the duty of the commissioner to issue a certificate of occupancy,[65] which is conclusive as to the question of settlement and occupancy,[66] except possibly as against the state,[67] and is not subject to collateral attack.[68] The commissioner cannot, after issuing a certificate, reverse his decision to the prejudice of the certificate holder because of an error on his part as to the sufficiency of the proof of occupancy;[69] but an applicant to purchase public lands, whose application is made before a prior applicant has made his proofs of occupancy and become entitled to a certificate, may litigate the question of such prior applicant's actual occupancy, although the latter's proofs have been accepted by the land commissioner.[70] A purchaser of "additional lands" is not required to settle on such land,[71] but his settlement on his home tract is sufficient.[72] It is, however, necessary, that an owner of patented land or his vendee who has applied to purchase other lands from the state should continuously reside on such patented land or some portion of the land applied for, for three years after the application to purchase the additional land is made, failing in which the additional lands applied for are forfeited.[73]

(xi) *Substitution of Purchaser.* A purchaser of public land may sell it at any time after the sale is effected,[74] and in such case the vendee must file his own obligation with the land commissioner, together with the transfer from the original

A copy of the original affidavit on file in the land office is admissible in evidence to establish compliance with the law in making proof of occupancy and filing the affidavit. McGrew *v.* Wilson, (Tex. Civ. App. 1900) 57 S. W. 63.

65. Logan *v.* Curry, 95 Tex. 664, 69 S. W. 129; Strickel *v.* Turberville, 28 Tex. Civ. App. 469, 67 S. W. 1058.

66. Logan *v.* Curry, 95 Tex. 664, 69 S. W. 129 [*reversing* (Civ. App. 1901) 66 S. W. 81, and *followed* in State *v.* Hughes, (Tex. Civ. App. 1904) 79 S. W. 608]; Williams *v.* Barnes, (Tex. Civ. App. 1908) 111 S. W. 432; Harper *v.* Dodd, 30 Tex. Civ. App. 287, 70 S. W. 223; Pardue *v.* White, 21 Tex. Civ. App. 121, 50 S. W. 591.

One applying for land after a certificate of occupancy has issued to another cannot controvert the fact of occupancy. Smith *v.* McClain, 39 Tex. Civ. App. 152, 87 S. W. 212 [*following* Logan *v.* Curry, 95 Tex. 664, 69 S. W. 129 (*reversing* (Civ. App. 1901) 66 S. W. 81)].

Showing forfeiture.— Where the commissioner has not declared a forfeiture by reason of an abandonment of a settlement, and a certificate has been issued to the settler, a subsequent applicant to purchase the land cannot show that the prior purchase was forfeited by reason of an abandonment. Lamkin *v.* Matsler, 32 Tex. Civ. App. 218, 73 S. W. 970.

Certificate issued after person's rights accrued.—As against one claiming public land under settlement and application to purchase, a certificate of occupancy issued by the commissioner of the general land office to others after his rights accrued, and after he commenced action against them for the land, is not conclusive. May *v.* Hollingsworth, 32 Tex. Civ. App. 245, 74 S. W. 592 [*following* Lamkin *v.* Matsler, 32 Tex. Civ. App. 218, 73 S. W. 970].

There is no merit in a contention that such certificate is inadmissible in evidence because it is *ex parte* and hearsay, and does not appear to be a certificate of facts contained in the records of the office of the commissioner. Strickel *v.* Turberville, 28 Tex. Civ. App. 469, 67 S. W. 1058 [*distinguishing* Hamilton *v.* McAuley, 27 Tex. Civ. App. 256, 65 S. W. 205]; Fisher *v.* Ullman, 3 Tex. Civ. App. 322, 22 S. W. 523.

67. See State *v.* Hughes, (Tex. Civ. App. 1904) 79 S. W. 608, where it was contended on behalf of the state that such certificate should not be held to cut off the right of the state to attack such a sale on the ground of fraud, and the court, while apparently considering that this might be true, deemed it unnecessary to decide the point for the reason that the facts set up in the petition of the state did not necessarily lead to the conclusion that fraud was committed in procuring the certificate.

68. Logan *v.* Curry, 95 Tex. 664, 69 S. W. 129 [*reversing* (Civ. App. 1901) 66 S. W. 81].

69. Smith *v.* McClain, 39 Tex. Civ. App. 152, 87 S. W. 212.

70. Forrester *v.* Berry, 35 Tex. Civ. App. 175, 79 S. W. 591 (where it was not made to appear that a certificate was issued); White *v.* Watson, 34 Tex. Civ. App. 169, 78 S. W. 237 (holding that the certificate of occupancy was not binding on such an applicant).

71. Spence *v.* Mitchell, 96 Tex. 43, 70 S. W. 73 [*affirming* (Civ. App. 1902) 67 S. W. 180]; Dabbs *v.* Rothe, 25 Tex. Civ. App. 201, 60 S. W. 811.

72. Dabbs *v.* Rothe, 25 Tex. Civ. App. 201, 60 S. W. 811; Watts *v.* Wheeler, 10 Tex. Civ. App. 117, 30 S. W. 297.

73. McKnight *v.* Clark, 24 Tex. Civ. App. 89, 58 S. W. 146, holding residence prior to the application ineffective to prevent forfeiture.

74. See *infra*, III, C, 3, b, (xv).

purchaser and also an affidavit, where three years' residence has not already been had on the land, stating that he desires to purchase the land for a home, and that he has settled thereon, in which case the obligation of the original purchaser is canceled and the vendee becomes a purchaser direct from the state.[75] The statute allowing a substitution of purchasers has in view the substitution of one actual settler for another actual settler;[76] but the process of substitution creates a new and original relation, so that the substituted purchaser, being an actual settler and having complied with the requirements of the statute, is entitled to stand as an original purchaser direct from the state.[77] The substituted purchaser acquires all the rights of the original purchaser,[78] and is not required to make the first payment as in the case of an original purchaser,[79] but is entitled to the benefit of the original cash payment made by his assignor.[80] The substitution of a purchaser renders immaterial any invalidity in the original or prior substituted sales.[81] Where a sale of state school land has been made to a purchaser who in good faith has actually settled thereon, intending it as a home, the right of such purchaser's transferee, who likewise becomes an actual settler in good faith intending to make it his home, is not forfeited by his failure to have his transaction recorded in the county where the land lies, as provided by the statute.[82]

(XII) *VALIDITY OF SALES.* The adoption of rules and regulations by the commissioner was not a condition precedent essential to the validity of a sale of school lands.[83] A sale of school lands is presumed to be regular,[84] and a person attacking the sale has the burden of overcoming this presumption by appropriate evidence showing a lack of power in the commissioner to make the award.[85] On

75. Dugat *v.* Means, (Tex. Civ. App. 1906) 91 S. W. 363; Perry *v.* Rutherford, 39 Tex. Civ. App. 477, 87 S. W. 1054; Smith *v.* Coble, 39 Tex. Civ. App. 243, 87 S. W. 170; Johnson *v.* Bibb, 32 Tex. Civ. App. 471, 75 S. W. 71. See also Lee *v.* Green, 24 Tex. Civ. App. 109, 58 S. W. 196, 847, holding that, although under the act of 1879, as amended by the act of 1881, there might be such a substitution, the title of a subsequent vendee was not forfeited by a failure to so proceed.

Facts not warranting substitution.— One cannot recover land as a substituted purchaser where he has done nothing to comply with the statute and has merely a quitclaim deed from the widow of the original purchaser, who had abandoned her husband and the land when he had lived on it only a year, shortly after which the husband sold it to another, who fully complied with the law as assignee of such original purchaser, and has since remained in possession. Dugat *v.* Means, (Tex. Civ. App. 1906) 91 S. W. 363.

Failure to make substitution does not forfeit vendee's title.— Lee *v.* Green, 24 Tex. Civ. App. 109, 58 S. W. 196, 847.

76. Spence *v.* Mitchell, 96 Tex. 43, 70 S. W. 73 [*affirming* (Tex. Civ. App. 1902) 67 S. W. 180, and *approved* in Reininger *v.* Pannell, (Tex. Civ. App. 1907) 101 S. W. 816] (holding that such a sale to one not an actual settler was void); Busk *v.* Lowrie, 86 Tex. 128, 23 S. W. 983; Dugat *v.* Means, (Tex. Civ. App. 1906) 91 S. W. 363.

Actual settlement on the land by the vendee for the remainder of the three years is necessary to give him any rights therein, and his settlement on an adjoining tract of school land then owned by him is insufficient. Hardman *v.* Crawford, 95 Tex. 193, 66 S. W. 206 [*affirming* (Civ. App. 1901) 63 S. W. 659].

77. Johnson *v.* Bibb, 32 Tex. Civ. App. 471, 75 S. W. 71 [*approved* in Reininger *v.* Pannell, (Tex. Civ. App. 1907) 101 S. W. 816].

78. Thomas *v.* Wolfe, 16 Tex. Civ. App. 22, 40 S. W. 182.

79. Johnson *v.* Bibb, 32 Tex. Civ. App. 471, 75 S. W. 71.

80. Reininger *v.* Pannell, (Tex. Civ. App. 1907) 101 S. W. 816.

81. Reininger *v.* Pannell, (Tex. Civ. App. 1907) 101 S. W. 816; Johnson *v.* Bibb, 32 Tex. Civ. App. 471, 75 S. W. 71. See also Thomas *v.* Wolfe, 16 Tex. Civ. App. 22, 40 S. W. 182.

82. Smith *v.* Coble, 39 Tex. Civ. App. 243, 87 S. W. 170, so holding on the ground that such defect is in the nature of an irregularity only.

83. West *v.* Terrell, 96 Tex. 548, 74 S. W. 903.

84. Smith *v.* Hughes, 39 Tex. Civ. App. 113, 86 S. W. 936.

85. Jones *v.* Wright, 98 Tex. 457, 84 S. W. 1053 [*reversing* (Civ. App. 1904) 81 S. W. 569], holding that where the state land commissioner was authorized by the law in force at the time of defendant's purchase to sell leased state land with the consent of the lessee, evidence that the land in question was subject to an existing lease when defendant purchased it, in the absence of proof that defendant's possession had been disturbed, except by plaintiff, was insufficient to show the invalidity of the sale to defendant); Smith *v.* Hughes, 39 Tex. Civ. App. 113, 86 S. W. 936.

an issue as to the validity of a sale of school land, a purchaser, when he has shown the award to him, should be permitted to show that he continued to pay interest and reside on the land as required by law.[86] Where lands not in fact isolated and detached sections were sold as such, the sale was invalid,[87] and could not be sustained on the ground that the purchaser was qualified to purchase as an actual settler, where his application was not placed upon that ground.[88]

(XIII) *FORFEITURE* — (A) *For Failure to Reside on and Improve.* A purchaser who fails to reside on and improve the land purchased, forfeits the land [89] and all payments made thereon,[90] and the land becomes subject to resale [91] without any action on the part of the commissioner of the general land office,[92] or any

86. Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 [*reversing* (Civ. App. 1906) 91 S. W. 606].

87. Burnam *v.* Terrell, 97 Tex. 309, 78 S. W. 500, holding further that the sale of two sections of public land as isolated when they are in fact connected by a third section is not rendered valid by the subsequent invalid sale of the connecting section.

The determination of the commissioner of the general land office as to whether sections are isolated is a ministerial, not a judicial, act, and is not conclusive on the matter. Burnam *v.* Terrell, 97 Tex. 309, 78 S. W. 500.

88. Burnam *v.* Terrell, 97 Tex. 309, 78 S. W. 500.

89. Gaddis *v.* Terrell, (Tex. 1908) 110 S. W. 429; Adams *v.* Terrell, (Tex. 1908) 107 S. W. 537; Slaughter *v.* Terrell, 100 Tex. 600, 102 S. W. 399; Andrus *v.* Davis, 99 Tex. 303, 89 S. W. 772 (holding that where plaintiff purchased four sections of school land under a statute requiring three years' residence thereon, but during the time left the land for eight months, during which she attended school, only returning to the land on one occasion for a period of one or two days, she thereby forfeited the land so purchased, although on her final return from school she again took up her residence on the home section); State *v.* Opperman, 74 Tex. 136, 11 S. W. 1076; Williams *v.* Keith, (Tex. Civ. App. 1908) 111 S. W. 1056, 112 S. W. 948; Overfelt *v.* Vinson, (Tex. Civ. App. 1907) 103 S. W. 1189; Witcher *v.* Wiles, 33 Tex. Civ. App. 69, 75 S. W. 889; Hardman *v.* Crawford, (Tex. Civ. App. 1901) 63 S. W. 659, 64 S. W. 938 [*affirmed* in 95 Tex. 193, 66 S. W. 206]; O'Keefe *v.* McPherson, 25 Tex. Civ. App. 313, 61 S. W. 534; Paffrath *v.* State, 2 Tex. Civ. App. 137, 21 S. W. 159. See also Edwards *v.* Terrell, 100 Tex. 26, 93 S. W. 426; Nowlin *v.* Hall, (Tex. Civ. App. 1903) 77 S. W. 419 [*affirmed* in 97 Tex. 441, 79 S. W. 806]; Chesser *v.* Baughman, 22 Tex. Civ. App. 435, 55 S. W. 132.

The execution of a contract of sale which contemplates that the vendor, the purchaser from the state, shall continue to occupy the land for the statutory period and convey it afterward, is not an abandonment. Witcher *v.* Wiles, 33 Tex. Civ. App. 69, 75 S. W. 889.

In case of a sale by the original purchaser of lands purchased as additional to a purchase of a home section of school lands, the failure of the vendee to occupy and continue to reside on the land so purchased subjects the land to forfeiture to the state; but this rule does not apply to a sale of additional lands purchased from the state by one as the owner of lands other than school lands, but the purchaser may sell such land to one who is not an actual settler, and the original purchaser's residence for three years on his original land is enough, without residence by any one on the additional land. Roberson *v.* Sterrett, 96 Tex. 180, 71 S. W. 385, 73 S. W. 2 [*followed* in Nesting *v.* Terrell, 97 Tex. 18, 75 S. W. 485 (*followed* in Miller *v.* Hallford, 34 Tex. Civ. App. 243, 78 S. W. 239)].

A mere failure to make improvements does not operate a forfeiture. Carter *v.* Clifton, 44 Tex. Civ. App. 132, 134, 98 S. W. 209.

90. Andrus *v.* Davis, 99 Tex. 303, 89 S. W. 772; State *v.* Opperman, 74 Tex. 136, 11 S. W. 1076; Witcher *v.* Wiles, 33 Tex. Civ. App. 69, 75 S. W. 889; Hardman *v.* Crawford, (Tex. Civ. App. 1901) 63 S. W. 659, 64 S. W. 938 [*affirmed* in 95 Tex. 193, 66 S. W. 206]; O'Keefe *v.* McPherson, 25 Tex. Civ. App. 313, 61 S. W. 534.

91. Andrus *v.* Davis, 99 Tex. 303, 89 S. W. 772; Witcher *v.* Wiles, 33 Tex. Civ. App. 69, 75 S. W. 889; Hardman *v.* Crawford, (Tex. Civ. App. 1901) 63 S. W. 659, 64 S. W. 938 [*affirmed* in 95 Tex. 193, 66 S. W. 206]; O'Keefe *v.* McPherson, 25 Tex. Civ. App. 313, 61 S. W. 534.

Land not subject to sale until commissioner has listed it with county clerk.— O'Keefe *v.* McPherson, 25 Tex. Civ. App. 313, 61 S. W. 534 [*following* Willoughby *v.* Townsend, 93 Tex. 80, 53 S. W. 581].

92. Andrus *v.* Davis, 99 Tex. 303, 89 S. W. 772; Witcher *v.* Wiles, 33 Tex. Civ. App. 69, 75 S. W. 889. See also McKnight *v.* Clark, 24 Tex. Civ. App. 89, 58 S. W. 146.

There must be a declaration of forfeiture, for the provision of the statute that "all forfeitures for non-occupancy shall have the effect of placing the land upon the market without any action whatever on the part of the commissioner of the general land office refers merely to the effect of the forfeiture when declared. Adams *v.* Terrell, (Tex. 1908) 107 S. W. 537 [*followed* in Williams *v.* Keith, (Tex. Civ. App. 1908) 111 S. W. 1056, 112 S. W. 948]. Under Rev. St. (1895) § 4218-L a declaration of forfeiture was necessary. Bates *v.* Bratton, 96 Tex. 279, 72 S. W. 157 [*reversing* (Civ. App. 1902) 71 S. W. 38]. See also O'Keefe *v.* McPherson, 25 Tex. Civ. App. 313, 61 S. W. 534.

decree of forfeiture.[93] But the land is not forfeited by necessary and temporary absence therefrom of the purchaser, for not more than six months in any one year for the purpose of earning money to pay for the land,[94] or for the purpose of schooling his children,[95] nor does a purchaser forfeit the land by non-residence where he was compelled to temporarily yield his possession of the land from a well-grounded fear of death or serious bodily injury.[96] Abandonment of the land is a question of fact to be determined from all the circumstances in evidence;[97] and where the land was not in fact abandoned, the land commissioner has no authority to forfeit the sale on that ground.[98] In trespass to try title in which it is alleged that one of the parties has forfeited his rights under a purchase, by failure to reside on and improve the land, the burden of proof is on the party alleging the forfeiture.[99]

(B) *For Non-Payment of Interest* — (1) IN GENERAL. The state has power through a declaration of the land commissioner to forfeit a sale of its lands for the non-payment by the vendee of the interest on the purchase-money,[1] and upon

93. Anderson *v.* Waco State Bank, 86 Tex. 618, 28 S. W. 344; Atkeson *v.* Bilger, 4 Tex. Civ. App. 99, 23 S. W. 415.

94. Gaddis *v.* Terrell, (Tex. 1908) 110 S. W. 429; Singleton *v.* Wright, (Tex. Civ. App. 1899) 54 S. W. 249; Willoughby *v.* Townsend, 18 Tex. Civ. App. 724, 45 S. W. 861,

95. Singleton *v.* Wright, (Tex. Civ. App. 1899) 54 S. W. 249; Willoughby *v.* Townsend, 18 Tex. Civ. App. 724, 45 S. W. 861.

96. Carter *v.* Clifton, 44 Tex. Civ. App. 132, 98 S. W. 209; Jones *v.* Wright, (Tex. Civ. App. 1906) 92 S. W. 1010. See also Overfelt *v.* Vinson, (Tex. Civ. App. 1907) 103 S. W. 1189.

Temporary abandonment means, in this connection, such abandonment as continues no longer than the facts justifying the abandonment in the first instance exist. Jones *v.* Wright, (Tex. Civ. App. 1906) 92 S. W. 1010.

Reasonableness of fear.— The fear of death or serious bodily injury, which will excuse a purchaser of state school lands for abandoning the same within three years after the purchase, need not be such as would be given way to only by a man of ordinary prudence and courage. Jones *v.* Wright, (Tex. Civ. App. 1904) 81 S. W. 569 [*reversed* on other grounds in 98 Tex. 457, 84 S. W. 1053].

97. Witcher *v.* Wiles, 33 Tex. Civ. App. 69, 75 S. W. 889.

98. Bumpass *v.* McLendon, (Tex. Civ. App. 1907) 101 S. W. 491.

Setting aside forfeiture.—An unauthorized and inadvertent attempt of the commissioner of the general land office to forfeit land, and payments thereon, for an abandonment may be set aside by him where it appears that there was in fact no abandonment. Johnson *v.* Bibb, 32 Tex. Civ. App. 471, 75 S. W. 71.

99. Carter *v.* Clifton, 44 Tex. Civ. App. 132, 98 S. W. 209.

1. Lawless *v.* Wright, 39 Tex. Civ. App. 26, 86 S. W. 1039; Waggoner *v.* Flack, 21 Tex. Civ. App. 449, 52 S. W. 584, holding that the legislature has the power to authorize the commissioner of the land office to declare forfeiture for non-payment of interest, where the purchaser of school lands makes default in payment of interest, without reference to the law under which the rights of the purchaser accrued. See also Berrendo Stock Co. *v.* McCarty, (Tex. Civ. App. 1892) 20 S. W. 933.

Statute providing forfeiture constitutional. — The act of March 25, 1897, authorizing the commissioner of the general land office to declare school lands purchased from the state forfeited when the interest is not paid, is not in conflict with Const. (1876) art. 7, § 4, forbidding the legislature to grant relief to purchasers of school lands, nor is it unconstitutional as being retroactive or as impairing the obligation of contracts. Standifer *v.* Wilson, 93 Tex. 232, 54 S. W. 898; Fristoe *v.* Blum, 92 Tex. 76, 45 S. W. 998 [*reversing* (Civ. App. 1897) 42 S. W. 656].

Default before passage of act.— The act of March 25, 1897, authorizes the commissioner to forfeit for a failure to pay interest which had accrued before the passage of the act, as well as for that which might accrue thereafter. Waggoner *v.* Flack, 92 Tex. 633, 51 S. W. 330, holding further that this act did not repeal Laws (1895), p. 67, § 11, so as to prevent a forfeiture as provided in that section for interest remaining unpaid for the years 1894, 1895, and 1896. See also Fristoe *v.* Blum, 92 Tex. 76, 45 S. W. 998 [*reversing* (Civ. App. 1897) 42 S. W. 656]. But *compare* Capps *v.* Garvey, (Civ. App. 1897) 41 S. W. 379.

Statute not applicable to contract made before its enactment.— Cuba *v.* Island City Sav. Bank, (Tex. Civ. App. 1897) 41 S. W. 532 (although default occurred afterward); Capps *v.* Garvey, (Tex. Civ. App. 1897) 41 S. W. 379.

A provision in a contract to purchase school lands from the state that the contract shall be forfeited on failure of the purchaser to pay interest on the purchase-money is not enforceable unless such provision is authorized by law. Patterson *v.* O'Docherty, 4 Tex. Civ. App. 462, 23 S. W. 293.

Estoppel to declare forfeiture.— The failure of the commissioner of the land office to notify purchasers of land that their claims are subject to forfeiture because of non-pay-

declaration of the forfeiture the land is restored to the public domain.[2] Accordingly the statute makes it the duty of the commissioner, when interest due for lands sold remains unpaid on the first day of November of any year, to indorse on the obligation for such lands "Lands forfeited," [3] and to cause an entry to that effect to be made on the account kept with the purchaser,[4] and thereupon the lands are forfeited and become subject to resale without the necessity of reëntry, or judicial ascertainment.[5] No presumptions in aid of a forfeiture will be allowed as against one who has made payments on a contract with the state.[6]

(2) Rights of Former Owner. Where lands are forfeited for the non-payment of interest, the purchasers or their vendees may have their claims reinstated by paying the full amount of interest due on such claim up to the date of reinstatement, if the rights of third persons have not intervened.[7] No formal appli-

ment of interest does not estop the state to declare a forfeiture, notwithstanding a custom of the office to give the notice. Mound Oil Co. *v.* Terrell, 99 Tex. 625, 92 S. W. 451, so holding on the ground that no statute required the commissioner to give such notice. Neither does a statement by the commissioner of the land office that a purchaser of public lands was in good standing, made in reply to an inquiry having no reference to whether interest had been paid, estop the state to declare a forfeiture of land for non-payment of interest prior to that time. Mound Oil Co. *v.* Terrell, 99 Tex. 625, 92 S. W. 451.

2. Lawless *v.* Wright, 39 Tex. Civ. App. 26, 86 S. W. 1039.

3. Brightman *v.* Comanche County, 94 Tex. 599, 63 S. W. 857.

Where the obligation is in the state treasurer's office, where the law in force at the time of the sale required it to be filed, a resale of lands forfeited is valid, although the forfeiture is not indorsed on the obligation. Brightman *v.* Comanche County, 94 Tex. 599, 63 S. W. 857 [*reversing* (Civ. App. 1901) 62 S. W. 973].

The commissioner is not required to take action on the first day of November, but it is his duty if the interest remains unpaid on that day to declare the forfeiture at sometime thereafter. McKinley *v.* Keath, 24 Tex. Civ. App. 570, 59 S. W. 813.

Premature forfeiture.—A forfeiture declared on August 20, for non-payment of interest due March 1 of the same year, on a land contract, is premature. Scott *v.* Blackburn. (Tex. Civ. App. 1898) 47 S. W. 480.

A premature indorsement of forfeiture is ineffective, and is not validated by a failure to pay the interest within the time allowed. Island City Sav. Bank *v.* Dowlearn, 94 Tex. 383, 60 S. W. 754 [*reversing* (Civ. App. 1900) 59 S. W. 308].

It is not necessary that the vendee be alive to warrant exercise of the authority given to the commissioner of the general land office to declare school lands purchased from the state forfeited for non-payment of interest. McKinley *v.* Keath, 24 Tex. Civ. App. 570, 59 S. W. 813 [*following* Standifer *v.* Wilson, 93 Tex. 232, 54 S. W. 898; Fristoe *v.* Blum, 92 Tex. 76, 45 S. W. 998].

4. Brightman *v.* Comanche County, 94 Tex. 599, 63 S. W. 857.

5. Brightman *v.* Comanche County, 94 Tex. 599, 63 S. W. 857.

6. Scott *v.* Blackburn, (Tex. Civ. App. 1898) 47 S. W. 480, holding that in order to sustain a forfeiture for failure to pay amounts due by November 1 of any year, it is necessary to show for what year unpaid interest is due.

7. Mound Oil Co. *v.* Terrell, 99 Tex. 625, 92 S. W. 451; Anderson *v.* Neighbors, 94 Tex. 236, 59 S. W. 543; Lawless *v.* Wright, 39 Tex. Civ. App. 26, 86 S. W. 1039; Price *v.* Bates, 32 Tex. Civ. App. 374, 74 S. W. 608.

When rights of third person vested.—Where, after a forfeiture had been declared, a third person made an application for purchase of the land, accompanied by the proper payment, but by mistake a part of the payment was returned, and on discovery of the mistake the amount was repaid, the mistake did not affect the validity of the application and the applicant's rights vested at the time of the first application, so as to prevent a reinstatement of the claim of the original purchaser thereafter applied for. Mound Oil Co. *v.* Terrell, 99 Tex. 625, 92 S. W. 451.

When no rights acquired by third person.—Where an application for the purchase of forfeited land was accompanied by an obligation for an insufficient amount, and the original purchaser applied for reinstatement before the necessary amount had been paid, the reinstatement should have been granted, no rights having accrued under the application of the third person. Mound Oil Co. *v.* Terrell, 99 Tex. 625, 92 S. W. 451.

An application for a lease does not constitute an intervening right, where the purchaser's request for reinstatement is received before the lease is executed. Anderson *v.* Neighbors, 94 Tex. 236, 59 S. W. 543.

Where the lands have been resold to a third person the original purchaser is not entitled to reinstatement. Waggoner *v.* Flack, 21 Tex. Civ. App. 449, 52 S. W. 584.

When interest considered due.—Where by the terms of a contract for the sale of public lands, and by the statute in force at the time it was made, the interest thereon was payable on the first day of August in each year, the purchaser on redeeming subsequent to August 1, but prior to November, from a forfeiture of the lands for non-payment of interest, was not required to pay interest for the year last

cation is necessary, but it is sufficient for the purchaser to signify his wish to be reinstated and to resume his obligation to pay for the land.[8] Neither is it necessary that payment of the interest should be made at the time of the application for reinstatement, but the commissioner, upon receiving notice of the desire of the purchaser to be reinstated, should allow him a reasonable time to ascertain the amount due and make payment.[9] Any owner of land forfeited for non-payment of interest has also ninety days' prior right to purchase the land when it is again placed on the market, without the condition of settlement and occupancy, where it has been occupied for three years;[10] but this right of priority does not extend to a corporation which has acquired the rights of a purchaser of public lands.[11] Where more than a year elapsed after a sale of school land had been reinstated without any suit being brought to vacate the same, such sale could not thereafter be vacated at the instance of a subsequent applicant to purchase, on the ground that, at the time the sale was reinstated, the circumstances necessary to authorize such reinstatement did not exist.[12]

(c) *For Premature Transfer.* Under the present statute[13] a purchaser of school lands cannot transfer his land until he has actually settled thereon and filed his affidavit of such settlement in the general land office, and any attempt to transfer the land before these things are done operates as a forfeiture.[14]

(d) *Effect of Forfeiture.* Improvements placed on school land by a purchaser, which are of such a character as to become fixtures, pass to the state on legal forfeiture of the contract of purchase, together with the land of which they constitute a part,[15] and the forfeiture deprives the purchaser of any rights or equities which he had in the land by reason of improvements by him.[16] In an action to try title to school land, the fact that the land commissioner has forfeited the sale to the person under whom plaintiff claims is not conclusive against him, but he can show that the attempted forfeiture was unauthorized and of no effect.[17]

past, since it did not become due until November. Pardue *v.* White, 21 Tex. Civ. App. 121, 50 S. W. 591.

Mandamus is the proper remedy to compel the commissioner to reinstate a person as the purchaser of certain school lands. Hazelwood *v.* Rogan, 95 Tex. 295, 67 S. W. 80.

8. Anderson *v.* Neighbors, 94 Tex. 236, 59 S. W. 543.

Oral request.—After the reinstatement of a forfeited sale on the oral request of the purchaser, another claimant cannot complain that the request was not in writing. Pardue *v.* White, 21 Tex. Civ. App. 121, 50 S. W. 591.

9. Anderson *v.* Neighbors, 94 Tex. 236, 59 S. W. 543.

10. Mound Oil Co. *v.* Terrell, 99 Tex. 625, 92 S. W. 451; Clack *v.* Hart, 26 Tex. Civ. App. 46, 62 S. W. 935.

Where school lands have been sold by the settler after application to purchase, but before securing the patent, he has no prior right to purchase them as owner after they have been forfeited to the state for failure of the grantee to pay the interest due the state, as agreed in the deed. Settle *v.* Stephens, 18 Tex. Civ. App. 695, 45 S. W. 969.

Right limited to ninety days.— One seeking to repurchase forfeited land must make a cash payment of interest due at the time of forfeiture and one fortieth of the appraised value of the principal within ninety days after the land is again placed on the market and compliance with the statute thereafter would be of no effect. Cobb *v.* Webb, 26 Tex. Civ. App. 467, 64 S. W. 792, holding that no rights were acquired by a mere application to repurchase within the ninety days where payment was not made until after such time had expired, and that the commissioner had no authority to extend the time.

11. Mound Oil Co. *v.* Terrell, 99 Tex. 625, 92 S. W. 451.

12. Weyert *v.* Terrell, (Tex. 1907) 100 S. W. 133.

13. Gen. Laws (1905), c. 103, § 4.

14. Patton *v.* Terrell, (Tex. 1907) 105 S. W. 1115; Good *v.* Terrell, 100 Tex. 275, 98 S. W. 641.

A sale before the affidavit of settlement is actually on file in the land office works a forfeiture of the purchase. Brown *v.* Terrell, 100 Tex. 309, 99 S. W. 542 [*following* Good *v.* Terrell, 100 Tex. 275, 98 S. W. 641], holding that where a purchaser settled upon the tract and made affidavit of settlement which he mailed, addressed to the commissioner of the land office, but conveyed the land before the affidavit reached the commissioner, the land was forfeited.

Date of deed not conclusive as to date of transfer.— Patton *v.* Terrell, (Tex. 1907) 105 S. W. 1115.

15. Clark *v.* McKnight, 25 Tex. Civ. App. 60, 61 S. W. 349; Shelton *v.* Willis, 23 Tex. Civ. App. 547, 58 S. W. 176.

16. Simms *v.* Wright, (Tex. Civ. App. 1900) 56 S. W. 110.

17. Bumpass *v.* McLendon, (Tex. Civ. App. 1907) 101 S. W. 491.

(xiv) *Setting Aside Sales.* A patent for school lands may be set aside at the suit of the state for fraud in obtaining it,[18] and in such case the state is not required to refund the purchase-money.[19] The commissioner is not authorized to cancel a sale because of a mistake in the classification of the land;[20] but where he inadvertently sells land which is not subject to sale, it is proper for either himself or his successor in office, on discovery of the mistake, to rescind the sale.[21] A sale of public school lands made on proper affidavit and compliance with all legal requirements can be attacked only by the state,[22] or by persons asserting a claim to purchase or lease the land.[23]

(xv) *Effect of Sale — Title and Rights of Purchaser.* Upon compliance with the statute in reference to the purchase of lands, the right to the land passes to the purchaser and the land then becomes "appropriated," and is not subject to further sale by the state until legal divestiture of the title so acquired.[24] One who applies for the purchase of land not classified as mineral and to whom the land is awarded secures a right free from any claim of the state for minerals that may thereafter be found in the land.[25] The title of a purchaser of school land

18. State *v.* Burnett, (Tex. Civ. App. 1900) 59 S. W. 599.

One who advances money to a settler on school lands with which to make improvements and payments to the state, and who, on accepting a deed to such land in payment, surrenders no new consideration, but merely the promise to repay him, is not a purchaser for value, so as to be protected against the state's rights to set aside the patent for fraud of the settler in receiving it. State *v.* Burnett, (Tex. Civ. App. 1900) 59 S. W. 599.

Nature of fraud.— The fraud which will vitiate a patent issued by the proper authority of the state must be fraud practised on the state, or its duly constituted agents, and not on a claimant of the land. Hulett *v.* Platt, (Tex. Civ. App. 1908) 109 S. W. 207.

19. State *v.* Burnett, (Tex. Civ. App. 1900) 59 S. W. 599.

20. Harper *v.* Terrell, 96 Tex. 479, 73 S. W. 949.

21. Burnam *v.* Terrell, 97 Tex. 309, 78 S. W. 500; Moore *v.* Rogan, 96 Tex. 375, 73 S. W. 1, holding that when the commissioner of the general land office has inadvertently accepted an application for the purchase of land not authorized to be sold, he has a right to cancel an award made under the application.

22. Maney *v.* Eyres, 33 Tex. Civ. App. 497, 77 S. W. 428, 969; Hamilton *v.* Votaw, 31 Tex. Civ. App. 684, 73 S. W. 1091; Thomson *v.* Hubbard. (Tex. Civ. App. 1902) 69 S. W. 649, 70 S. W. 592. See also Strickel *v.* Turberville, 28 Tex. Civ. App. 469, 67 S. W. 1058.

A county attorney cannot intervene in a suit for school land and claim title in the state by forfeiture. Duncan *v.* State, 28 Tex. Civ. App. 447, 67 S. W. 903, holding that in such case a judgment for the state could not be allowed to stand.

An objection that the claim is subject to forfeiture by reason of a misdescription of the land in the original application can be raised by the state only. Gunnels *v.* Cartledge, 26 Tex. Civ. App. 623, 64 S. W. 806.

23. Murphy *v.* Terrell, (Tex. 1907) 100 S. W. 130, holding that a person claiming no interest in the home section of an original settler has no power to attack the validity of his claim thereto merely to resist his right to purchase additional lands as an incident to his settlement on and occupancy of such home section.

A purchaser from the state has the right to contest the title of a prior purchaser of the same land on the ground that such purchaser fraudulently acquired the land for the benefit of another. Thomson *v.* Hubbard, 22 Tex. Civ. App. 101, 53 S. W. 841.

A lessee from the state, seeking to recover land from a purchaser, cannot avail himself of the latter's false representations as to the quality of the land, under the statute providing that a purchase may be canceled by the state for fraud, the sale being valid as to the lessee until canceled. Nobles *v.* Magnolia Cattle Co., 69 Tex. 434, 9 S. W. 448.

An actual settler whose application to purchase has been rejected may, prior to the issuance of a certificate of three years' occupancy, contest the right of one not an actual settler to whom the land has been awarded, on the grounds that the latter was not in fact an actual settler, or had not remained such as required by law. Williams *v.* Barnes, (Tex. Civ. App. 1908) 111 S. W. 432.

Time to sue.— Gen. Laws (1905), c. 29, requiring one who desires to purchase school land theretofore purchased by another to sue to set aside the former purchase within one year of the award of the land, or else be barred, is applicable only where the state recognizes the validity of the purchase and not where there has been a forfeiture of the former purchase by the land commissioner and the land again sold. Slaughter *v.* Terrell, (Tex. 1907) 102 S. W. 399; Campbell *v.* Enochs, (Tex. Civ. App. 1908) 107 S. W. 878. See also Buchanan *v.* Barnsley, (Tex. Civ. App. 1908) 112 S. W. 118, holding that an award of land to a purchaser was a recognition by the state of the invalidity of a lease, and hence the limitation did not apply to such purchaser.

24. Canales *v.* Perez, 65 Tex. 291; Butler *v.* Daniel 21 Tex. Civ. App. 628, 54 S. W. 29.

25. Schendell *v.* Rogan, 94 Tex. 585, 63

is not subject to collateral attack on the ground that he purchased in collusion with another and hence was not a *bona fide* purchaser within the statute.[26] Where the state sells a whole survey by the acre, and it contains more than estimated, the purchase includes the whole tract and the state can only demand payment for the excess, and, in default of such payment, have the surplus set apart to it by a partition.[27] A purchaser of school lands who has acquired rights therein may sell and convey, or contract to sell the same, before he has made all payments and become entitled to a patent;[28] but a deed conveying unappropriated public school lands while the title remains in the state and before the grantor has acquired a valid claim thereto, in conformity with the law governing sales of such land, is void as against public policy.[29] When the purchaser of school land has completed his three years of occupancy, the land is subject to seizure and sale under execution,[30] or may be mortgaged.[31] And even before he has completed his three years' occupancy the purchaser may create a mortgage or other lien on the property,[32] although such lien cannot be enforced until the occupancy is completed and proof thereof made,[33] and is subject to be defeated by a sale by the purchaser before that time.[34] Prior to the completion of the three years' occupancy the rights of the purchaser are not subject to seizure and sale under any judicial process.[35]

(XVI) *DEATH OF PURCHASER.* In case of the death of a purchaser, his heirs or legal representatives are entitled to one year in which to make payment after the first day of November next after his death, and are absolved and exempt from the requirement of settlement and residence.[36]

(XVII) *REFUNDING OF MONEY PAID FOR LANDS NOT PATENTABLE.* Provision has been made by statute for refunding money paid in good faith into the state treasury for lands for which a patent cannot be legally issued, on approval of the claim by the governor and attorney-general.[37]

S. W. 1001 [*followed* in Chappell *v.* Rogan, (Tex. 1901) 63 S. W. 1006].

26. Logan *v.* Curry, 95 Tex. 664, 69 S. W. 129 [*reversing* (Civ. App. 1901) 66 S. W. 81].

27. Willoughby *v.* Long, 96 Tex. 194, 71 S. W. 545 [*reversing* (Civ. App. 1902) 69 S. W. 646], holding that even if the act of March 22, 1889, attempts to authorize the commissioner of the land office to set apart the excess, where a survey has been sold containing more than estimated, no right is obtained against the purchaser by one making application to purchase part of it; the excess not having been legally set apart, and the commissioner not having set it apart or attempted to set it apart.

28. Cunningham *v.* Terrell, (Tex. 1908) 111 S. W. 651; Chancey *v.* State, 84 Tex. 529, 19 S. W. 706; Taylor *v.* Burke, 66 Tex. 643, 1 S. W. 910; Wilson *v.* Hampton, 2 Tex. Unrep. Cas. 426; Gunnels *v.* Cartledge, 26 Tex. Civ. App. 623, 64 S. W. 806; State *v.* Palin, (Tex. Civ. App. 1894) 25 S. W. 820.

Forfeiture for premature transfer see *supra*, III, C, 3, b, (XIII), (C).

Substitution of purchaser see *supra*, III, C, 3, b, (XI).

The rules of law by which the rights of vendor and purchaser are adjusted in suits for purchase-money for failure of title in conveyance of private lands have no application to the public domain. Slaughter *v.* Cooper, (Tex. Civ. App. 1908) 107 S. W. 897.

29. Rayner Cattle Co. *v.* Bedford, 91 Tex. 642, 44 S. W. 410, 45 S. W. 554 [*following* Lamb *v.* James, 87 Tex. 490, 29 S. W. 647].

30. Martin *v.* Bryson, 31 Tex. Civ. App. 98, 71 S. W. 615 [*approved* in Logue *v.* Atkeson, 35 Tex. Civ. App. 303, 80 S. W. 137], although a patent has not been issued.

31. Logue *v.* Atkeson, 35 Tex. Civ. App. 303, 80 S. W. 137.

32. Bourn *v.* Robinson, (Tex. Civ. App. 1908) 107 S. W. 873; Bumpass *v.* McLendon, (Tex. Civ. App. 1907) 101 S. W. 491; Harwell *v.* Harbison, (Tex. Civ. App. 1906) 95 S. W. 30.

33. Bumpass *v.* McLendon, (Tex. Civ. App. 1907) 101 S. W. 491; Harwell *v.* Harbison, (Tex. Civ. App. 1906) 95 S. W. 30.

34. Bourn *v.* Robinson, (Tex. Civ. App. 1908) 107 S. W. 873. But *compare* Harwell *v.* Harbison, (Tex. Civ. App. 1906) 95 S. W. 30.

35. Bourn *v.* Robinson, (Tex. Civ. App. 1908) 107 S. W. 873.

36. Clark *v.* Terrell, 100 Tex. 277, 98 S. W. 642, holding that Rev. St. (1895) § 4218*l*, so providing, was not repealed by Gen. Laws (1905), c. 103.

37. See Walker *v.* Finley, 94 Tex. 145, 58 S. W. 941; De Poyster *v.* Baker, 89 Tex. 155, 34 S. W. 106.

Certificate not amounting to approval.— Where the governor and attorney-general issued a certificate to plaintiff that he had paid a certain sum into the state treasury on school land entered by a minor, but had not filed a transfer from the original

(XVIII) *SALE OF TIMBER.* The commissioner of the general land office is empowered to adopt such regulations for the sale of timber on public lands as may be deemed necessary,[38] and one who fails to comply with the rules adopted as to applications cannot claim to be a purchaser.[39]

(XIX) *DISPOSAL OF COUNTY SCHOOL LANDS.* The various counties of the state have received grants of land for school purposes,[40] and hold such land in trust for the public schools, with a restricted power of sale.[41] Such land is to be sold in the manner provided by the commissioners court of the county,[42] who may appoint agents to make sales on specified terms, convey the lands, receive

purchaser when such payment was made, but that he had in fact acquired all the right, title, and interest of such minor by a regular sale under guardianship proceedings, but that for failure to file his transcript he was not a purchaser within the meaning of the bill, and entitled to the refund, this did not amount to an approval entitling plaintiff to a warrant. Walker *v.* Finley, 94 Tex. 145, 58 S. W. 941.

38. Hornbeck *v.* Terrell, 38 Tex. Civ. App. 70, 85 S. W. 485.

39. Hornbeck *v.* Terrell, 38 Tex. Civ. App. 70, 85 S. W. 485, holding that where the commissioner adopted the rule of requiring applications for the purchase of timber to be in writing and on blanks furnished by him, a person who had knowledge of such rule and failed to comply therewith cannot claim to be a purchaser through letters and telegrams to the commissioner stating that he wished to purchase the timber on specified sections.

40. See Galveston County *v.* Tankersley, 39 Tex. 651 [*approved* in Worley *v.* State, 48 Tex. 1], holding that the title of a county to school lands, the patent to which it had received from the state before the adoption of the constitution of 1869, was not divested by art. 9, § 8, of that constitution, providing that the public lands heretofore given to counties shall be under the control of the legislature, and may be sold under such regulations as the legislature may prescribe, and that in such case the proceeds shall be added to the public school fund.

Validation of surveys.— Under Rev. St. art. 4269, providing that the surveys of all county school lands heretofore made, either on the ground or by protraction, returned into the general land office, and on which patents have issued, shall be valid, and the titles to the land included within the lines of the surveys as so returned shall be vested in the counties for which the same were made, a county acquires title of all the lands included in the lines of an office survey shown by the field-notes on file in the land office to include all lands between other surveys, although the distance of the courses as given in the field-notes does not include all such lands. Steward *v.* Coleman County, 95 Tex. 445, 67 S. W. 1016.

Effect of grant to Greer county.— Under the general laws of Texas granting a certain amount of land to each county of the state for educational purposes, patents were issued to Greer county, Texas, for certain lands in other parts of the state. But subsequently it was decided by the supreme court of the United States that the territory known as Greer county belonged to the United States and not to the state of Texas. U. S. *v.* Texas, 162 U. S. 1, 16 S. Ct. 725, 40 L. ed. 867. Thereupon, by act of congress, the same territory was organized as Greer county, Oklahoma. In a suit by the state to recover the land granted to Greer county, it was held that the legal title to the land was in the state, for Greer county, Oklahoma, being a corporation created by a different sovereignty from that which purported to create Greer county, Texas, was technically a different person, and a stranger to the gift to Greer county, Texas; and on the disappearance of that *de facto* county, the state took whatever title the county had. And the court further expressed the opinion that the title could not be charged with any trust in favor of schools in Greer county, Oklahoma. Greer County *v.* Texas, 197 U. S. 235, 25 S. Ct. 437, 49 L. ed. 736 [*affirming* 31 Tex. Civ. App. 223, 72 S. W. 104]. But a purchaser from Greer county was protected. Cameron *v.* State, 95 Tex. 545, 68 S. W. 508 [*reversing* (Civ. App. 1902) 67 S. W. 348].

41. Logan *v.* Stephens County, 98 Tex. 283, 83 S. W. 365 [*affirming* (Civ. App. 1904) 81 S. W. 109].

A sale which is virtually a donation and disposition of the lands of the county for purposes not authorized by law is void. Llano County *v.* Johnson, (Tex. Civ. App. 1895) 29 S. W. 56.

42. Logan *v.* Stephens County, 98 Tex. 283, 83 S. W. 365 [*affirming* (Civ. App. 1904) 81 S. W. 109]; Matagorda County *v.* Casey, (Tex Civ. App. 1908) 108 S. W. 476; Meerscheidt *v.* Gardner, (Tex. Civ. App. 1908) 107 S. W. 619; Waggoner *v.* Wise County, 17 Tex. Civ. App. 220, 43 S. W. 836. The commissioners' court has power to convey all or any part of the county school lands in such manner as that court might have provided. San Augustine County *v.* Madden, 39 Tex. Civ. App. 257, 87 S. W. 1056, holding that a deed signed and acknowledged by the county judge and three of the members of the commissioners' court, purporting to be made on behalf of the county, and having its seal and that of the district clerk attached to the certificate of acknowledgment, and purporting to convey the land for a cash consideration, is *prima facie* valid and operative to convey the county's title to the land,

the purchase-money, deposit the same to the credit of the school fund and the county treasurer, and make an annual report of their transactions pursuant to a written contract.[43] Public school lands of a county cannot be sold or conveyed except for money,[44] and the gross proceeds of sales are to be held by the county in trust for the benefit of the public schools therein.[45] Hence a grant in consideration of services in locating or subdividing the land [46] or a contract to pay one a commission as agent out of the price of the lands [47] is void. So also as a county may dispose of the fee in its school lands only by sale, and an attempt on its part to make such disposition by a boundary line agreement is binding neither on it nor on the other party to the agreement.[48] But a conditional sale of the county school lands may be valid.[49] An actual settler on county school lands has a prior right to purchase the same,[50] and in order to bar such right an offer to sell must

although the signatures of the makers are not attested by a seal.

The court cannot delegate its power to fix the manner of sale. Logan *v.* Stephens County, 98 Tex. 283, 83 S. W. 365 [*affirming* (Civ. App. 1904) 81 S. W. 109].

The fact that the land is under lease for a definite term does not destroy or impair the power of the commissioners' court to sell it. Meerscheidt *v.* Gardner, (Tex. Civ. App. 1908) 107 S. W. 619.

43. Matagorda County *v.* Casey, (Tex. Civ. App. 1908) 108 S. W. 476.

44. Pulliam *v.* Runnels County, 79 Tex. 363, 15 S. W. 277; Tomlinson *v.* Hopkins County, 57 Tex. 572; Cassin *v.* La Salle County, 1 Tex. Civ. App. 127, 21 S. W. 122 [*following* Tomlinson *v.* Hopkins County, 57 Tex. 572, and *followed* in San Augustine County *v.* Madden, 39 Tex. Civ. App. 257, 87 S. W. 1056]; Slaughter *v.* Mallet Land, etc., Co., 141 Fed. 282, 72 C. C. A. 430.

Note and vendor's lien.—A county board having sold certain school lands, taking a note for the price, secured by lien upon the land, has power to release vendee's liability on the note after default, and take in lieu thereof the note of another person secured by trust deed on the land, to whom vendee's interest had been conveyed, and who assumed the payment of his note. Waggoner *v.* Wise County, 17 Tex. Civ. App. 220, 43 S. W. 836.

45. Logan *v.* Stephens County, 98 Tex. 283, 83 S. W. 365 [*affirming* (Civ. App. 1904) 81 S. W. 109], and see cases cited *supra*, note preceding.

46. Dallas County *v.* Club Land, etc., Co., 95 Tex. 200, 66 S. W. 294 [*reversing* as to this point 26 Tex. Civ. App. 449, 64 S. W. 872]; Pulliam *v.* Runnels County, 79 Tex. 363, 15 S. W. 277; Cassin *v.* La Salle County, 1 Tex. Civ. App. 127, 21 S. W. 122. One who purchases school lands from another to whom the county conveyed them in consideration of his locating other school lands is bound by the record of the commissioners' court showing how his grantor acquired title from the county, and cannot rely upon recitals in the deed made by the county judge that the lands were sold for cash which had been duly received. Pulliam *v.* Runnels County, 79 Tex. 363, 15 S. W. 277.

47. Matagorda County *v.* Casey, (Tex. Civ. App. 1908) 108 S. W. 476; Slaughter *v.* Mallet Land, etc., Co., 141 Fed. 282, 72 C. C. A. 430.

Stipulation to pay compensation based on percentage of proceeds.—A stipulation in a contract with agents for the sale of county school lands agreeing to pay them "10 per cent. on the gross amount of the sales, to be paid as the purchase money comes in," is not an agreement to pay them out of the proceeds of the sales, and hence on its face an unauthorized diversion thereof, but is an undertaking to pay them out of proper funds an amount equal to ten per cent. Matagorda County *v.* Casey, (Tex. Civ. App. 1908) 108 S. W. 476.

48. Atascosa County *v.* Alderman, (Tex. Civ. App. 1905) 91 S. W. 846.

49. Slaughter *v.* Mallet Land, etc., Co., 141 Fed. 282, 72 C. C. A. 430.

50. Perego *v.* White, 77 Tex. 196, 13 S. W. 974 [*followed* in Ward *v.* Worsham, 78 Tex. 180, 14 S. W. 453]; Carrington *v.* Harris, (Tex. Civ. App. 1899) 50 S. W. 197; Clay County Land, etc., Co. *v.* Wood, 71 Tex. 460, 9 S. W. 340; Perkins *v.* Miller, 60 Tex. 61; Best *v.* Baker, 3 Tex. Civ. App. 551, 22 S. W. 1067, 24 S. W. 679; Baker *v.* Millman, 2 Tex. Civ. App. 342, 21 S. W. 297; Baker *v.* Burroughs, 2 Tex. Civ. App. 337, 21 S. W. 295.

A sale of county school land by the commissioners' court is not such a proceeding *in rem* as to bar the prior rights of an actual settler in respect to such land. Baker *v.* Millman, 2 Tex. Civ. App. 342, 21 S. W. 297; Baker *v.* Burroughs, 2 Tex. Civ. App. 337, 21 S. W. 295.

Future settlers protected.—The right of preëmption given to actual settlers on county school lands by Const. art. 7, § 6, which provides that they "shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed 160 acres," extends to future settlers as well as to those residing on the land at the time the constitution was adopted, and is not affected by a sale of the land by the county to another before the settler offered to buy it. Baker *v.* Dunning, 77 Tex. 28, 13 S. W. 617.

One who does not reside upon the land claimed is not an "actual settler," although he has fenced the entire tract, and cultivated several acres of it. Baker *v.* Millman, 77 Tex. 46, 13 S. W. 618.

be made to him by the county in good faith, and the offer rejected on his part.[51] The fact that a purchaser of school lands from the county was not an actual settler at the time he purchased is immaterial, if no one claiming a preference right to purchase disputes the validity of the sale.[52] Purchasers of county school lands who purchased in good faith and without notice of any defect in the consideration moving to the county from the original grantee acquire a good title to the land as against the county, notwithstanding the invalidity of the original conveyance from the county on account of the defective consideration.[53]

c. Leases of School Lands — (i) *In General.* The legislature has power to provide for the leasing of school lands,[54] and it has authorized the commissioner of public lands to lease land which is not in immediate demand for purposes of actual settlement.[55]

(ii) *Power of Commissioner.*[56] The adoption of rules and regulations by the commissioner[57] or the classification of lands[58] is not a condition precedent to

Settler not confined to the land which he has actually inclosed.— Baker *v.* Burroughs, 2 Tex. Civ. App. 337, 21 S. W. 295.

A married man who is in possession of county school land at the time of its sale, and who has no land elsewhere, is an actual settler, so as to be entitled to a prior right of purchase, and the fact that he had verbally agreed to transfer his right before a sale makes no difference. Best *v.* Baker, 3 Tex. Civ. App. 551, 22 S. W. 1067, 24 S. W. 679; Baker *v.* Millman, 2 Tex. Civ. App. 342, 21 S. W. 297.

Right not confined to settlers who have no other land.— Best *v.* Baker, 3 Tex. Civ. App. 551, 22 S. W. 1067, 24 S. W. 679; Baker *v.* Burroughs, 2 Tex. Civ. App. 337, 21 S. W. 295.

Where an actual settler has made a tender of the purchase-price to the county, he has an interest in the land which is capable of transfer. Wood *v.* Wesson, (Tex. Civ. App. 1893) 22 S. W. 1069.

Payment to quiet title.— Where the price of school fund land, previously settled upon, is fixed by the commissioners' court, and the same is sold for such price to a purchaser, together with other land of another classification and price, for a gross sum, without allowing the settler a chance to purchase the same, the money to be paid by the settler to the purchaser to quiet his title, is the price, with interest, fixed by the commissioners' court. Ward *v.* Worsham, 6 Tex. Civ. App. 22, 24 S. W. 843.

51. Carrington *v.* Harris, (Tex. Civ. App. 1899) 50 S. W. 197, holding that the fact that a settler knew when he moved on county land that it was for sale, and that he remained five years thereafter on the land without making the purchase, did not relieve the county from the duty of offering the land to him before selling it to another.

52. Cage *v.* Perry, (Tex. Civ. App. 1896) 38 S. W. 543 [*following* Perego *v.* White, 77 Tex. 196, 13 S. W. 974].

53. San Augustine County *v.* Madden, 39 Tex. Civ. App. 257, 87 S. W. 1056.

54. Fitzgerald *v.* State, (Tex. 1888) 9 S. W. 150; Smission *v.* State, 71 Tex. 222, 9 S. W. 112.

Constitutionality of statutes.— The act of 1887 postponing the sale of school "lands classified as grazing lands" subject to lease, and warranting the lessee quiet enjoyment, was not in violation of Const. art. 7, § 4, requiring school lands to be sold. Brown *v.* Shiner, 84 Tex. 505, 19 S. W. 686. Acts (1895), p. 63, authorizing the commissioner of the general land office to lease public lands, is not in conflict with Const. (1876) art. 14, § 6, providing that, on certain conditions, one hundred and sixty acres of public lands shall be donated to every head of a family without a homestead. Bain *v.* Simpson, 18 Tex. Civ. App. 429, 45 S. W. 395.

55. Sandford *v.* Terrell, (Tex. 1905) 87 S. W. 655; Sullivan *v.* Hall, 22 Tex. Civ. App. 440, 55 S. W. 579; Hall *v.* Rushing, 21 Tex. Civ. App. 631, 54 S. W. 30.

The acts creating the Memphis and El Paso reservation did not operate as an appropriation of the lands, but only as a mere withdrawal from location by others than those for whose benefit the reservation was created, and did not preclude the lease of unlocated portions thereof by the commissioner of the general land office. Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703.

Presumption.— Where the commissioner has leased land it is presumed that he has determined that the land is subject to lease and of a character which may be leased for the term granted. Sanford *v.* Terrell, (Tex. 1905) 87 S. W. 655.

Decision of commissioner conclusive.— Under the act of 1887, providing for the leasing of school lands by the commissioner if he is "satisfied that the lands applied for are not in immediate demand for purposes of actual settlement," his act is conclusive on the question whether there is such demand. Brown *v.* Shiner, 84 Tex. 505, 19 S. W. 686. See also Sanford *v.* Terrell, (Tex. 1905) 87 S. W. 655.

56. Power of commissioner to lease public lands other than school lands see Harrington *v.* Blankenship, (Tex. Civ. App. 1899) 52 S. W. 585.

57. West *v.* Terrell, 96 Tex. 548, 74 S. W. 903.

58. Brown *v.* Shiner, 84 Tex. 505, 19 S. W. 686. See also Neville *v.* State, 73 Tex. 629, 11 S. W. 868 [*followed* in Cunningham *v.*

the exercise by the commissioner of his power of leasing the same. It is discretionary with the commissioner to advertise leases or not as he deems best.[59] Any bid or offer to lease may be rejected by the commissioner prior to signing the lease contract, for fraud or collusion or other good and sufficient cause.[60] Although the state land board had no authority to increase the minimum price per acre prescribed by the statute relating to renting public school lands, yet it could make a regulation reserving the right to reject any or all bids, in order to secure fair competition; and when a bid was accordingly rejected, although it was for a statutory minimum price, the bidder had no rights under it.[61]

(III) *Execution, Etc., of Lease.* The statute requires the lease contract to be executed [62] and recorded [63] and one year's rent to be paid [64] before the lease takes effect, and until the statute has thus been complied with no leasehold or other right of possession passes to the proposed lessee.[65]

(IV) *Term of Lease.* Under the statute lands classified as agricultural can be leased only for a term of five years or less,[66] but this limitation extends only to lands which are actually classified as agricultural and not to all lands which are agricultural in fact.[67] The statute also prohibits the leasing of lands classified as pastoral for a longer term than ten years.[68] The day of the execution of a lease is to be excluded in computing the time of its operation.[69]

(V) *Renewal of Lease.* The commissioner is prohibited from renewing any lease before its expiration,[70] and he has no power to cancel or accept a surrender of

State, (Tex. 1889) 11 S. W. 871]; Sanford *v.* Terrell, (Tex. 1905) 87 S. W. 655.

59. West *v.* Terrell, 96 Tex. 548, 74 S. W. 903.

60. Anderson *v.* Neighbors, 94 Tex. 236, 59 S. W. 543.

61. Coleman *v.* Lord, 72 Tex. 288, 10 S. W. 91.

62. Watts *v.* Cotton, 26 Tex. Civ. App. 73, 62 S. W. 931.

63. Irwin *v.* Mayes, 31 Tex. Civ. App. 517, 73 S. W. 33 (holding that Acts (1897), p. 186, c. 129 (Rev. St. art. 4218*s*), which provided that unrecorded leases of school lands should be filed for record within three months after the act took effect, and, if not recorded within that time, the commissioner of the general land office should disregard such lease, recognized, and thus far validated, leases which were void for want of record under Acts (1895), p. 69, c. 47 (Rev. St. art. 4218*r*), which provided that such leases should not take effect until duly filed for record in the clerk's office of the proper county); Watts *v.* Cotton, 26 Tex. Civ. App. 73, 62 S. W. 931; Coates *v.* Bush, 23 Tex. Civ. App. 139, 56 S. W. 617.

The recording of an abstract of a lease of school land in the county in which the land is situated is a sufficient compliance with the statute to authorize the admission of a copy of the lease, in trespass to try title to the land, by the holder of such a lease. Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703.

The commissioner of the land office must disregard leases when not recorded, and award the land to any other applicant, accompanying his application with a certificate of the clerk that no lease of said land is of record. Irwin *v.* Mayes, 31 Tex. Civ. App. 517, 73 S. W. 33 (holding that the commissioner has no power to disregard an existing lease and award a new one to an applicant on any other evidence than the certificate provided for in the statute, which it is incumbent on the applicant to show); Coates *v.* Bush, 23 Tex. Civ. App. 139, 56 S. W. 617. A certificate stating that there was no lease then in force of such lands, of record in said county, did not comply with the statute. Irwin *v.* Mayes, 31 Tex. Civ. App. 517, 73 S. W. 33.

64. McDowell *v.* Terrell, 99 Tex. 107, 87 S. W. 668; Watts *v.* Cotton, 26 Tex. Civ. App. 73, 62 S. W. 931. See also *infra*, III, C, 3, c, (VIII).

65. Watts *v.* Cotton, 26 Tex. Civ. App. 73, 62 S. W. 931.

The application to lease is but a preliminary proposition on the part of the intending lessee, and contains none of the essentials of a lease. Watts *v.* Cotton, 26 Tex. Civ. App. 73, 62 S. W. 931.

66. Sanford *v.* Terrell, (Tex. 1905) 87 S. W. 655.

67. Sanford *v.* Terrell, (Tex. 1905) 87 S. W. 655.

68. Sanford *v.* Terrell, (Tex. 1905) 87 S. W. 655.

69. Patterson *v.* Terrell, 96 Tex. 509, 74 S. W. 19; Jones *v.* Lohman, 36 Tex. Civ. App. 418, 81 S. W. 1002 [*approving* Hazlewood *v.* Rogan, 95 Tex. 295, 67 S. W. 80].

A uniform construction acted upon by the commissioner in all cases, by which the day of the execution of the lease is included in computing the term, must be deemed to have been assented to by those accepting leases and to form part of such leases. McGee *v.* Corbin, 96 Tex. 35, 70 S. W. 79 [*reversing* (Civ. App. 1902) 67 S. W. 1068, and *followed* in McChristy *v.* Jackson, (Tex. Civ. App. 1902) 71 S. W. 569].

70. Martin *v.* Terrell, 97 Tex. 118, 76 S. W. 743.

a lease before its termination, where there had been no failure to pay the rentals due, and issue a new lease of the same land to the same lessee for a longer period.[71] But where a lessee applied for a new lease and his application was accepted before his old lease expired, but the first annual rent was paid and the new lease executed after the old lease expired, the new lease was valid.[72]

(VI) *TRANSFER OF LEASE.* Where the record does not show whether or not the commissioner of the general land office consented to the transfer of a lease of school lands, it will not be presumed that he did not consent, in order to base a forfeiture of the lease on such want of consent.[73]

(VII) *VALIDITY OF LEASE.* A lease is not void because it provides for forfeiture on non-payment of the yearly rental, and reserves the right to sell to actual settlers.[74] Where at the time a lease of public land was issued one survey applied for was not subject to lease, but after the impediment was removed the deputy district clerk, being shown by the lessee a letter from the commissioner of the land office, giving authority to insert in the lease the additional survey, inserted it, and the rentals on the additional survey were paid by the lessee, and the lease was treated by the land commissioner and the state treasurer as covering the additional survey, the ratification of the deputy district clerk's act cured any lack of authority on his part.[75]

(VIII) *RENT.* The statute requires the annual rent of school lands to be paid in advance,[76] and the commissioner of the general land office has no authority to receive less than a year's rent on the lease,[77] nor does the receipt by him of a less sum keep the lease in force.[78] Where a lease of school lands is of the sections by name, and for a sum in gross, it may be doubted whether a small deficiency of acreage in one of the sections would entitle the lessee to any abatement of the rent.[79]

71. Ketner *v.* Rogan, 95 Tex. 559, 68 S. W. 774 [*followed* in Fish Cattle Co. *v.* Terrell, 97 Tex. 490, 80 S. W. 73 (*distinguishing* West *v.* Terrell, 96 Tex. 548, 74 S. W. 903; McGill *v.* Sites, (Tex. Civ. App. 1907) 103 S. W. 695, and *recognized* in McDowell *v.* Terrell, 99 Tex. 107, 87 S. W. 668]; Blevins *v.* Terrell, 96 Tex. 411, 73 S. W. 515, (1903) 74 S. W. 528; Newland *v.* Slaughter, 30 Tex. Civ. App. 228, 70 S. W. 102. *Compare* Thompson *v.* Lynn, 36 Tex. Civ. App. 79, 81 S. W. 330, holding that where state school lands were leased for two years, and the lessee paid the rent for the first year, but at the commencement of the second year, and within sixty days after the rental for the second year became due, made application for another lease of the land for five years, depositing with such application one year's rental, to be applied on the five-year lease if granted, the year's rental deposited should be applied on the existing lease, so that the five-year lease applied for was void.

That the lessee made valuable improvements on part of the land covered by the substituted lease was no impediment to the purchase of the land by another on the expiration of the original lease; such improvements not bringing the case within any of the provisions of the statute concerning improvements by lessees. Ketner *v.* Rogan, 95 Tex. 559, 68 S. W. 774.

Ratification.— The action of the commissioner, after canceling a lease before its termination and without authority substituting another lease of the same land to the same lessee for a longer period, in recognizing and acting on such substituted lease after the expiration of the original term, and of the treasurer in receiving rent under it, did not amount to a ratification of the unauthorized lease by the state. Ketner *v.* Rogan, 95 Tex. 559, 68 S. W. 774.

72. McDowell *v.* Terrell, 99 Tex. 107, 87 S. W. 668 [*following* West *v.* Terrell, 96 Tex. 548, 74 S. W. 903; Hazelwood *v.* Rogan, 95 Tex. 295, 67 S. W. 80, and *distinguishing* Fish Cattle Co. *v.* Terrell, 97 Tex. 490, 80 S. W. 73], holding that a new lease for several sections was valid as to a section the lease of which expired before the new lease was made and the rental paid, although void as to other sections, the leases of which did not expire until afterward.

73. Scott *v.* Slaughter, 35 Tex. Civ. App. 524, 80 S. W. 643, holding further that where the commissioner of the general land office has not claimed a forfeiture of a lease of school lands on the ground of want of consent to a transfer thereof, the transferee cannot set up such want of consent to defeat his contract.

74. Fitzgerald *v.* State, (Tex. 1888) 9 S. W. 150.

75. McGill *v.* Sites, (Tex. Civ. App. 1907) 103 S. W. 695.

76. Sherrod *v.* Terrell, 97 Tex. 165, 76 S. W. 916.

77. Sherrod *v.* Terrell, 97 Tex. 165, 76 S. W. 916.

78. Sherrod *v.* Terrell, 97 Tex. 165, 76 S. W. 916.

79. People *v.* Terrell, (Tex. 1903) 76 S. W. 432.

A lessee who accepts a lease at a rental higher than the minimum rate fixed by statute, voluntarily agreed on, is bound by his contract.[80] It is not necessary for a lessee of school land to furnish a description thereof with the money when he pays the rent.[81] An action by the state to recover rent for the use of school lands leased is properly brought in the county where by the lease the rent is payable, although defendants are non-residents of that county.[82] One who goes into possession of public lands under a lease which is unauthorized and in contravention of the policy of the state is not estopped to set up its invalidity in an action thereon for rent.[83] One who enters into occupation under an attempted lease of public lands which cannot be lawfully leased cannot be held liable for use and occupation.[84]

(IX) *Rights of Lessee.* A lessee of school lands is entitled to possession thereof as against one showing no title other than possession.[85] Where the commissioner of the general land office erroneously treats a lease as void by accepting another person's application to purchase, a writ of mandamus will be granted to compel the lessee's recognition as such.[86]

(X) *Termination or Cancellation of Lease.* The commissioner has no power to cancel a lease [87] unless the land is sold as provided by law [88] or the lessee fails to pay the rental within the time allowed by statute.[89] If a lessee fails to pay the rent within such time the commissioner should cancel the lease;[90] but such a default does not *ipso facto* forfeit the lease,[91] and the lessee has the right to make the payment at any time before formal cancellation of the lease.[92] A lease of school lands can be canceled only by a declaration in writing under the commissioner's hand and seal,[93] which must be filed with the other papers relating to the lease.[94] But nevertheless where the right to cancel exists, the rights under a lease may be terminated by an informal cancellation, if all parties concerned agree

80. Cunningham *v.* State, (Tex. 1889) 11 S. W. 871 [*following* Smisson *v.* State, 71 Tex. 222, 9 S. W. 112].

81. People *v.* Terrell, (Tex. 1903) 76 S. W. 432.

82. Fitzgerald *v.* State, (Tex. 1888) 9 S. W. 150.

83. State *v.* Day Land, etc., Co., 71 Tex. 252, 9 S. W. 130.

84. Especially where the purpose of such occupation is forbidden by a statute which provides penalties for its violation. State *v.* Day Land, etc., Co., 71 Tex. 252, 9 S. W. 130.

85. Hall *v.* Rushing, 21 Tex. Civ. App. 631, 54 S. W. 30.

86. McDowell *v.* Terrell, 99 Tex. 107, 87 S. W. 668.

Parties.— In mandamus by a lessee of public lands to compel the commissioner of the general land office to reinstate relator upon the records as lessee, one to whom the commissioner has leased the lands in question after the cancellation of relator's lease, and whose lease is in good standing, is a necessary party. Nevell *v.* Terrell, 99 Tex. 355, 87 S. W. 659, 89 S. W. 971.

87. Martin *v.* Terrell, 97 Tex. 118, 76 S. W. 743; Watts *v.* Cotton, 26 Tex. Civ. App. 73, 62 S. W. 931.

88. Martin *v.* Terrell, 97 Tex. 118, 76 S. W. 743.

Sale of leased land see *supra*, III, C, 3, b, (v).

89. Martin *v.* Terrell, 97 Tex. 118, 76 S. W. 743.

90. People *v.* Terrell, (Tex. 1903) 76 S. W. 432.

The fact that the lessee applied for a new lease before the time for cancellation of the old lease had arrived did not affect the power of the commissioner, when the proper time came, to cancel and relet as authorized by the statute. West *v.* Terrell, 96 Tex. 548, 74 S. W. 903.

91. Anderson *v.* Terrell, 97 Tex. 74, 76 S. W. 432; Buchanan *v.* Barnsley, (Tex. Civ. App. 1908) 112 S. W. 118; Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703.

92. Anderson *v.* Terrell, 97 Tex. 74, 76 S. W. 432.

93. Willoughby *v.* Terrell, 99 Tex. 488, 90 S. W. 1091; Anderson *v.* Terrell, 97 Tex. 74, 76 S. W. 432; Bradford *v.* Brown, 37 Tex. Civ. App. 323, 84 S. W. 392; Trevey *v.* Lowrie, 33 Tex. Civ. App. 606, 78 S. W. 18; Stokes *v*, Riley, 29 Tex. Civ. App. 373, 68 S. W. 703.

The commissioner's certificate that pursuant to a release by the lessee he had canceled the lease as to a certain section is admissible in evidence in an action involving title to such section, since this does not constitute a cancellation of the lease, but a mere waiver as to the single section, authorizes the sale thereof. Trevey *v.* Lowrie, 33 Tex. Civ. App. 606, 78 S. W. 18.

94. Bradford *v.* Brown, 37 Tex. Civ. App. 323. 84 S. W. 392.

The cancellation of a lease cannot be shown by the deposition of the land commissioner, if objected to, but only by a copy of such declaration furnished as provided by law. Bradford *v.* Brown, 37 Tex. Civ. App. 323, 84 S. W. 392.

to or acquiesce in it.[95] Where the lessee of a whole section purchased half of the section, the other half remained subject to the lease, although the sale was canceled during the term of the lease and the land sold thereby restored to the public domain.[96] Where a lease is canceled for non-payment of rent the land becomes subject to purchase or lease, and a new lease cannot be made to the original lessee until all arrears are fully paid.[97] The commissioner of the general land office has no authority to reinstate a lease of public school lands which he has canceled for non-payment of rent.[98] Where a lessee of school lands purchases the land included in it before its termination, his obligations as purchaser are substituted for those of lessee, and the lands are taken out of the operation of the lease without any cancellation thereof;[99] and if the sale proves to be invalid he cannot be treated as a lessee from the time of the sale, although his payments exceeded the amount which would have been due under the lease.[1] Where constitutent leases of school lands were in good standing, and a consolidated lease of the land embraced in the several constituent leases provided for the payment of the same rentals as on the constituent leases, but such consolidated lease was void, payments made thereon should have been applied to the constituent leases, so as to keep them alive and in force, and the canceling of them by the commissioner of the general land office, on the execution of the consolidated lease, was void.[2] Under the statute providing that state land is on the market for sixty days after the expiration of a lease thereof, and that if not sold in that time the original lessee has the preference right for thirty days to again lease it, after the thirty-day period it is again on the market.[3]

(xi) *Leases of County School Lands.* A county may lease its school lands,[4] and a county commissioners' court has power in leasing such lands to contract that the lessee shall have a preference right to purchase should the county desire to sell.[5]

4. Washington.[6] The tide lands belong to the state,[7] which has full power to

95. West *v.* Terrell, 96 Tex. 548, 74 S. W. 903.

96. Ford *v.* Terrell, (Tex. 1908) 107 S. W. 40, where the court assumed without deciding that the effect of the cancellation of the sale was as stated.

97. Rhae *v.* Terrell, 100 Tex. 626, 103 S. W. 481 [*citing* Rev. St. (1895) art. 4218*v*]; Kitchens *v.* Terrell, 96 Tex. 527, 74 S. W. 306.

Rev. St. (1896) § 4218v, not applicable to forfeitures occurring before it went into effect.— Angle *v.* Terrell, 97 Tex. 509, 80 S. W. 231.

Gen. Laws (1887), c. 99, placed no restrictions upon a second lease of school lands by a lessee whose lease had been forfeited. Angle *v.* Terrell, 97 Tex. 509, 80 S. W. 231.

A tender of the rent upon the canceled lease, which is refused, does not effect a removal of the disqualification of the lessee under the statute. Kitchens *v.* Terrell, 96 Tex. 527, 74 S. W. 306.

This applies only to the original lessee, and so where, after forfeiture of a lease of school lands for failure to pay rent, the lease was canceled, subsequent leases made to the original lessee and her assignee, as tenants in common, were not void. Rhae *v.* Terrell, 100 100 Tex. 626, 103 S. W. 481.

98. Wilson *v.* Smith, (Tex. Civ. App. 1904) 82 S. W. 818.

99. Patterson *v.* Knapp, 100 Tex. 587, 102 S. W. 97, 103 S. W. 489 [*affirming* (Civ. App. 1906) 99 S. W. 125], holding that the fact that the land had not been awarded to the applicant until after notices were sent to the state treasurer did not affect the inference that the reason why the land commissioner did not cancel the lease for non-payment of rent due was because the lease had been superseded by the sale.

Burden of proof as to termination of lease. —Where, after the holder of a lease of school lands had applied to purchase, the lease was not canceled for failure to pay rent, the burden was on a subsequent applicant to purchase, claiming that the prior application was void, to show that the state's rights under the lease had been terminated. Patterson *v.* Knapp, 100 Tex. 587, 102 S. W. 97, 103 S. W. 489 [*affirming* (Civ. App. 1906) 99 S. W. 125].

1. Burnam *v.* Terrell, 97 Tex. 309, 78 S. W. 500.

2. Scott *v.* Slaughter, 35 Tex. Civ. App. 524, 80 S. W. 643.

3. Valentine *v.* Sweatt, 34 Tex. Civ. App. 135, 78 S. W. 385, construing Gen. Laws (1901), c. 125, § 5.

4. Falls County *v.* De Laney, 73 Tex. 463, 11 S. W. 492, holding that where a county has leased lands, or indicated its policy to lease and not to sell them, settlers have no right to occupy any part of them.

5. Slaughter *v.* Mallet Land, etc., Co., 141 Fed. 282, 72 C. C. A. 430, holding that such a contract is not void as contrary to public policy.

6. For matters of general interest see *supra,* III, B.

7. West Seattle *v.* West Seattle Land, etc.,

dispose of them, subject only to the restrictions imposed by the constitution of the state and of the United States.[8] Tide lands of the first class comprise tide lands within or in front of the limits of any incorporated city or town, or within two miles thereof on either side,[9] and all tide lands not included in this class are known as the second class.[10] Provision was made by statute for county boards of appraisers,[11] but they seem to have been superseded under later statutes providing for a state board of appraisers and for inspectors to appraise lands.[12] The statute authorizes the sale of tide lands of every description whether or not there are improvements thereon and whether or not there are abutting upland owners,[13] but lands held under lease from the state cannot be offered for sale except to the lessee.[14] A sale of land

Co., 38 Wash. 359, 80 Pac. 549 (unless disposed of since its admission to the Union); Eisenbach *v.* Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632 [*followed* in Sequim Bay Canning Co. *v.* Bugge, 49 Wash. 127, 94 Pac. 922].

The general legislation of congress in respect to public lands does not extend to such lands. Mann *v.* Tacoma Land Co., 153 U. S. 273, 14 S. Ct. 820, 38 L. ed. 714 [*followed* in Baer *v.* Moran Bros. Co., 153 U. S. 287, 14 S. Ct. 823, 38 L. ed. 718], holding that "Valentine script" cannot be located upon tide land in the state of Washington.

Prior grants by United States.— Under the provision of the constitution that the state disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States, unless the patents are impeached for fraud, the state can assert no title to patented tide lands, although lying below the line of ordinary high tide. Cogswell *v.* Forrest, 14 Wash. 1, 43 Pac. 1098 [*following* Scurry *v.* Jones, 4 Wash. 468, 30 Pac. 726].

8. Eisenbach *v.* Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632 [*followed* in Sequim Bay Canning Co. *v.* Bugge, 49 Wash. 127, 94 Pac. 922].

9. State *v.* Bridges, 24 Wash. 363, 64 Pac. 518.

Tide lands across a bay in front of a city and within two miles of the city limits, which extend to the center of such bay, are not first class lands but belong in the second class. State *v.* Bridges, 24 Wash. 363, 64 Pac. 518.

Land below low water mark.— The words "tide and shore lands" as used in the statute with reference to tide lands of the first class are not limited in meaning to the strip between high and low tide lines but refer to the lands between high tide line and the inner line of the harbor reserve. State *v.* Forrest, 11 Wash. 227, 39 Pac. 684.

10. State *v.* Bridges, 24 Wash. 363, 64 Pac. 518.

11. See State *v.* Forrest, 7 Wash. 54, 33 Pac. 1079; State *v.* Sharpstein, 4 Wash. 68, 29 Pac. 848.

Appeal from appraisal.— Under the statute providing that appeals may be taken from appraisals of tide lands by local boards to the board of state land commissioners, and from the board to the superior court of the county, there was no direct appeal to the superior court from appraisals by the county board of appraisers. Scott *v.* Forrest, 13 Wash. 166, 42 Pac. 519, holding also that under the provision authorizing appeals from the decision of the local and state boards in appraising tide lands, to be taken by the city attorney of the city wherein such lands were situated, such appeal might be prosecuted by the corporation counsel of a city when such was the title of its principal law officer.

12. Ballinger Annot. Codes & St. tit. 14, c. 5, arts. 1, 5. See, however, State *v.* Forrest, 7 Wash. 54, 33 Pac. 1079, holding that the sections of the act of March 26, 1890, providing for local boards of appraisers and defining their duties in relation to tide lands, were not repealed or affected by the provisions of the "act to provide for the creation of a state board of land commissioners for the management and disposition of the public lands of the state," etc., approved March 15, 1893.

13. State *v.* Forrest, 13 Wash. 268, 43 Pac. 51, construing Laws (1889–1890), p. 431.

The statute authorizing the excavation of water ways through public lands and the filling in of tide lands by private contract, and giving the contractor on the completion of the contract a lien on all tide lands which he may fill in and raise above high tide, subject to which lien all purchasers from the state shall take, does not contemplate that the state shall retain or possess tide lands until the completion of the contract of filling the same, but the state may sell lands not filled in. Hays *v.* Hill, 23 Wash. 730, 63 Pac. 576.

The statute directing the reservation of natural oyster beds did not require a suspension of sales of tide lands until oyster reserves had been defined and plats filled, and where the county appraisers had neglected to put on the tide land maps that certain land was an oyster reserve, the commissioner of public lands was warranted in presuming that such land was subject to sale. State *v.* Forrest, 8 Wash. 610, 36 Pac. 686, 1120.

14. State *v.* Callvert, 33 Wash. 380, 74 Pac. 573.

A lessee who waives the provision of the statute that lands under lease shall not be offered for sale or sold except to the lessee, and applies to the commissioner of public lands for the sale of his leased premises at public auction cannot, where the lands are struck off to a higher bidder than himself, come in afterward and secure a preference right of purchase by tendering the amount of the highest bid. State *v.* Bridges, 23 Wash. 82, 62 Pac. 449, holding that no such right

with the timber thereon is unauthorized where the timber exceeds one million feet per quarter section, but in such case the timber must be sold separately.[15] The statutes require the appraisal of improvements erected on tide lands of the second class, where the owner thereof is not holding adversely to the state, before the lands can be advertised for sale;[16] and in case of sale of tide lands having improvements thereon the lands should be divided with reference to such improvements, so that the purchaser can buy not only the land covered by the improvements, but also unoccupied and unimproved adjoining land necessary for the convenient use and enjoyment thereof.[17] But a person must pursue one of the methods prescribed by law to lawfully obtain the use of tide lands belonging to the state before he can be allowed to assert any right to the use of or interest in such lands.[18] A person lawfully in possession of school lands and having improvements thereon has a right, as against a subsequent purchaser, to retain possession until paid therefor.[19] It is the duty of one making a written application to the board of state land commissioners for a public sale of tide lands to fully state the facts, not only as to possession, but also as to improvements, whether or not such improvements are such as are contemplated by the statute.[20] Where an application for the purchase of tide lands, accompanied with proper proofs, has been made to the state land commissioner, but not filed by him because of defects in the accompanying plat, the application is subject to amendment, and when so amended should be considered as relating back to the time when it was first tendered.[21] The determination by the commissioner of public lands that the plat of survey presented with an application for purchase of tide lands is incorrect and indefinite is a matter which cannot be reviewed by the courts.[22] The board of state land commissioners is vested with exclusive jurisdiction to vacate tide land plats,[23] and such board may reconsider an order for the sale of tide lands at any time prior to the execution of the deed of conveyance to the purchaser,[24] without notice to one whose application to purchase the land has been previously granted,[25] and without further hearing or the introduction of additional evidence,[26] and where the order for the rejection of the application is regular on its face, the courts will not inquire into the motives which prompted it.[27] So also where affidavits alleging fraud in the sale of certain tide

could be claimed by reason of a provision in the lease "that the tide lands herein shall not be offered for sale except upon application of the lessee, who shall have preference right to re-lease or to purchase at the highest rate bid," since there was no authority of law for the insertion of such a clause in the lease.

15. State *v.* Callvert, 37 Wash. 124, 79 Pac. 791.

16. Sullivan *v.* Callvert, 27 Wash. 600, 68 Pac. 363.

A railroad built on tide lands is not an improvement for which the owner has the right to demand an appraisement on the sale of the land by the state to another. Lake Whatcom Logging Co. *v.* Callvert, 33 Wash. 126, 73 Pac. 1128.

17. Sullivan *v.* Callvert, 27 Wash. 600, 68 Pac. 363.

18. Samish Boom Co. *v.* Callvert, 27 Wash. 611, 68 Pac. 367, holding that a boom company which had filed its plat of the shore lines and contiguous land which it proposed to appropriate to its use, must either lease or purchase the state tide lands included in the plat, before it could assert any interest in the land so as to compel payment for the improvements placed thereon.

19. Brummett *v.* Campbell, 32 Wash. 358, 73 Pac. 403; Wilkes *v.* Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; Pearson *v.* Ashley, 5 Wash. 169, 31 Pac. 410; Wilkes *v.* Hunt, 4 Wash. 100, 29 Pac. 830. See also Hart Lumber Co. *v.* Rucker, 15 Wash. 456, 46 Pac. 728.

20. State *v.* Ross, 47 Wash. 210, 91 Pac. 762, holding that one who is without actual knowledge of the condition of the land as to possession or improvements is in no position to present a proper application, but he should first examine the property, and become fully advised as to the situation.

21. Johnson *v.* Woodworth, 18 Wash. 243, 51 Pac. 375.

22. State *v.* Forrest, 13 Wash. 268, 43 Pac. 51.

23. State *v.* Abraham, 48 Wash. 215, 93 Pac. 325, holding that Act March 16, 1903, c. 127 (St. (1903) p. 238), so providing, superseded Act March 14, 1903, c. 92 (St. (1903) p. 139).

24. State *v.* Ross, 44 Wash. 246, 87 Pac. 262; Polson *v.* Callvert, 38 Wash. 614, 80 Pac. 815.

25. Polson *v.* Callvert, 38 Wash. 614, 80 Pac. 815.

26. Polson *v.* Callvert, 38 Wash. 614, 80 Pac. 815.

27. Polson *v.* Callvert, 38 Wash. 614, 80 Pac. 815.

lands were presented to the board of public land commissioners, after the execution of a deed, but before its delivery, the board had power to suspend the delivery of the deed, and investigate the charges;[28] and a public sale of tide lands may be set aside for collusion between bidders.[29] But a deed from the state of tide lands cannot be collaterally attacked.[30] The owner of uplands[31] abutting or fronting on tide or shore lands of the first class has the prior right to purchase the same,[32] for sixty days following the filing of the final appraisal of such lands with the commissioner of public lands,[33] and if valuable improvements for commerce, trade, residence, or business have been made upon such tide or shore lands and were in actual use prior to March 26, 1890, the owner of the improvements has the exclusive right to purchase the land for the same period.[34] A preference right to purchase tide lands from the state will descend to the claimant's heirs and legal representatives,[35] or may be assigned so as to confer on the assignee all of the assignor's rights in the premises.[36] Contests over the prior right to purchase tide or shore lands are

28. State *v.* Ross, 44 Wash. 246, 87 Pac. 262.

29. State *v.* Ross, 47 Wash. 210, 91 Pac. 762, holding the evidence sufficient to show collusion.

30. Welsh *v.* Callvert, 34 Wash. 250, 75 Pac. 871, holding that where lands had been sold and conveyed by the state as second-class tide lands, a claim by a subsequent applicant to purchase a portion thereof as oyster lands that the deed did not include the lands applied for was a collateral attack on the deed.

31. Denny *v.* Northern Pac. R. Co., 19 Wash. 298, 53 Pac. 341, holding that the statute refers merely to upland owners and not to owners of tide lands.

32. Denny *v.* Northern Pac. R. Co., 19 Wash. 298, 53 Pac. 341.

Limitation of right.— A person who has purchased lots, partly upland and partly tide land, by reference to a plat thereof is estopped from claiming anything as an upland owner beyond the lines of the lots conveyed to him, although he may have erected improvements on the adjoining tide lands prior to the passage of the statute giving a preference right of purchase to improvers and upland owners. State *v.* Forrest, 12 Wash. 483, 41 Pac. 194.

A sale of upland lands on execution does not pass to a purchaser the preference right of purchasing adjoining tide lands until the period allowed for the redemption from the execution sale has expired, but until such time the right to purchase remains in the original owner or his grantees. Hays *v.* Merchants' Nat. Bank, 14 Wash. 192, 44 Pac. 137 [*explaining* Knipe *v.* Austin, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531; Hardy *v.* Herriott, 11 Wash. 460, 39 Pac. 958], 10 Wash. 573, 39 Pac. 98, holding that a judgment creditor who has purchased the abutting property at his own execution sale cannot, before expiration of the time allowed his debtor to redeem, contest the application of one who claims through mesne conveyances from the judgment debtor.

33. See McKenzie *v.* Woodin, 9 Wash. 414, 37 Pac. 663, as to time from which period ran under former statute.

34. Oliver *v.* Dupee, 16 Wash. 634, 48 Pac. 351, holding that the provision of the statute that tide lands shall be sold to the first applicant applies only to lands not occupied and improved. See also Tullis *v.* Tacoma Land Co., 19 Wash. 140, 52 Pac. 1017; Globe Mill Co. *v.* Bellingham Bay Imp. Co., 10 Wash. 458, 38 Pac. 1112, construing Laws (1889–1890), p. 435, § 11.

The statute gives the right of purchase only to him who makes the improvement for himself and not in subordination to or under any one else. Tullis *v.* Tacoma Land Co., 19 Wash. 140, 52 Pac. 1017.

The construction of two or three small shacks or buildings on tide lands and their use as temporary residences and for the storing of a small quantity of goods for a short time does not constitute such improvements used for "commerce, trade or business" as are contemplated by the statute. Barlow *v.* Gamwell, 12 Wash. 651, 42 Pac. 115.

The driving of piles from the mill of a sawmill company to deep water, to which it piles its logs were secured before being driven to the mill, is not such an improvement of tide lands as entitles the company to purchase the land occupied by the piles. Globe Mill Co. *v.* Bellingham Bay Imp. Co., 10 Wash. 458, 38 Pac. 1112.

One who owns only the machinery in a sawmill erected on tide lands leased by him, and has the use, under a verbal license, of neighboring tide lands for the purpose of piling lumber, is not an "improver" within the meaning of the statute, so as to obtain the right to preference in purchasing the tide lands held under such license. McKenzie *v.* Woodin, 9 Wash. 414, 37 Pac. 663.

The statute merely confers a privilege and does not bind the state to sell all portions of tide lands on which improvements have been made. State *v.* Forrest, 12 Wash. 483, 41 Pac. 194.

35. Hotchkin *v.* Bussell, 46 Wash. 7, 89 Pac. 183.

36. Hotchkin *v.* Bussell, 46 Wash. 7, 89 Pac. 183.

Preference right of abutting owner passes with a conveyance of upland.— Seattle, etc., R. Co. *v.* Carraher, 21 Wash. 491, 58 Pac. 570, holding that a subsequent conveyance by the grantor of the tide lands to another grantee passes no title thereto.

heard and determined by the board of state land commissioners,[37] from whose determination an appeal lies to the superior court of the county in which the lands are situated.[38] And the right of appeal to the superior court from the decision of the board of state land commissioners applies not only to cases in which the board determines the prior right of purchase between two or more applicants for tide lands, but also to cases in which there is but one applicant and the commissioners determine that the tract applied for is not subject to sale.[39] The board of state

37. See Denny *v.* Northern Pac. R. Co., 19 Wash. 298, 53 Pac. 341.

Formal pleadings not necessary.— The statute governing the trial of contests before the board of state land commissioners between adverse claimants of the right to purchase tide lands does not require nor contemplate the filing of former pleadings. Denny *v.* Northern Pac. R. Co., 19 Wash. 298, 53 Pac. 341, where the court refused to sustain an objection to the introduction of the record of a former suit based on the ground that it was inadmissible because not pleaded.

The objection that an applicant for the purchase of tide lands is not qualified is a matter lying between him and the state, and cannot be raised by one who was not entitled to contest the application. Hayes *v.* Merchants' Bank, 10 Wash. 573, 39 Pac. 98.

Limitation of jurisdiction of board.—As the commissioner of public lands is vested by law with the duty of determining what lands are subject to sale, the state board of land commissioners has no jurisdiction to pass upon the right of an applicant for the purchase of tide lands which he claims to have improved as an artificial oyster bed, when the hearing is not based upon a contest or upon an appeal, but is founded upon a protest of citizens claiming that the lands are natural oyster beds. State *v.* Forrest, 8 Wash. 610, 36 Pac. 686, 1120.

38. See McNaught-Collins Imp. Co. *v.* Atlantic, etc., Pile, etc., Co., 36 Wash. 669, 79 Pac. 484.

Jurisdiction of superior court wholly appellate.— Hotchkin *v.* Bussell, 46 Wash. 7, 89 Pac. 183.

Right to appeal.— A second applicant to purchase tide lands, who contests the validity of the first application before the board of land commissioners, is an "applicant," so as to entitle him to appeal from the decision of the board on the contest, since his application becomes the first if the contest is sustained. Oliver *v.* Dupee, 16 Wash. 634, 48 Pac. 351. An owner of tide lands who has lost his preference right to lease abutting harbor area by failing to apply in time cannot appeal from the state land commissioners' order for the sale of such right to another, where he was a stranger to the proceedings. McNaught-Collins Imp. Co. *v.* Atlantic, etc., Pile, etc., Co., 36 Wash. 669, 79 Pac. 484.

Time for taking appeal.— An appeal from an order of the board of land commissioners directing a sale or lease of shore lands must be taken within thirty days from the time when the order was made. McNaught-Collins Imp. Co. *v.* Atlantic, etc., Pile, etc., Co., 36 Wash. 669, 79 Pac. 484. See, under earlier statute, Union Wharf Co. *v.* Katz, 8 Wash. 389, 36 Pac. 276.

Notice of appeal.— An appeal from the board of state land commissioners will not be dismissed because the notice of appeal did not contain the substance of the decision, nor its correct date, and was not signed by appellant, but by his attorneys, and the appeal-bond also gave the wrong date of decision, and the sureties thereon did not justify. Tullis *v.* Tacoma Land Co., 19 Wash. 140, 52 Pac. 1017.

Service of the appeal notice must be made upon the attorney of record for the respondent, and the superior court can take no jurisdiction where admission of the service of the notice appears to have been made by an attorney for the respondent other than the attorney of record. Seattle, etc., R. Co. *v.* Simpson, 19 Wash. 628, 54 Pac. 29, holding further that as the court had no jurisdiction of the appeal, the appearance therein or consent of the respondent would not confer jurisdiction.

Record on appeal.— Where on an appeal from the decision of the state board of equalization of a right to purchase tide lands the secretary of that board voluntarily sent to the superior court what purported to be a record of the contest, attested by him, and no attempt was made to show incorrectness therein, it cannot be held that the record thus transmitted gave the superior court nothing of an official character to act upon, and that it therefore did not acquire jurisdiction. Hayes *v.* Merchants' Bank, 10 Wash. 573, 39 Pac. 98.

Limitation of appellate jurisdiction.— On appeal from the decision of the board of land commissioners involving the question of prior right of purchase of tide lands, the superior court has no power to decide, between an applicant to purchase land and such board of commissioners, whether the original application to purchase had been taken from the files of the land commissioner's office, and a forged one substituted in its stead. Squire *v.* Sidney, 37 Wash. 1, 79 Pac. 469.

On appeal from a dismissal by the superior court of an appeal from the board of state land commissioners, the proceedings before the board need not be embodied in a statement of facts or bill of exceptions, but are sufficiently presented by a certificate. Oliver *v.* Dupee, 16 Wash. 634, 48 Pac. 351.

39. Ilwaco *v.* Ilwaco R., etc., Co., 17 Wash. 652, 50 Pac. 572, holding that where the right to purchase a particular tract of tide lands has been tried before the board of state land commissioners upon an issue of fact, and decided adversely to the claimant, an appeal

land commissioners acts in an executive and discretionary manner in confirming a sale of the right to lease harbor area, and the denial of a resale is not appealable where the affidavit therefor does not charge that the interests of the state are injuriously affected by fraud or collusion.[40] The holder of tide lands by virtue of a regular lease from the state is entitled to the possession and control of such lands.[41] The commissioner of public lands has no authority to cancel a lease of tide lands for any cause except non-payment of rent,[42] but the service of a delinquency notice by mail is sufficient to authorize the forfeiture of a lease for this cause.[43] Any sale or lease of state lands made by mistake, or through misrepresentation, or not in accordance with law, is void.[44] In the note are set forth a number of decisions with reference to the land acquired by a purchase,[45] the forfeiture of contracts of purchase and extension of time for payment,[46] the cancellation of deeds and contracts covering tide lands established as streets,[47] the price to be paid for lands,[48] the rights of a purchaser as to the application of the proceeds of sale,[49] the compensa-

from their decision, and not mandamus, is the proper remedy.

40. McNaught-Collins Imp. Co. *v.* Atlantic, etc., Pile, etc., Co., 36 Wash. 669, 79 Pac. 484.

41. Sequim Bay Canning Co. *v.* Bugge, 49 Wash. 127, 94 Pac. 922, holding that a person going upon such lands and digging and removing clams without the lessee's consent is a trespasser.

State not a necessary party to suit to enjoin trespass on leased lands.— Sequim Bay Canning Co. *v.* Bugge, 49 Wash. 127, 94 Pac. 922.

42. State *v.* Callvert, 33 Wash. 380, 74 Pac. 573, holding that the commissioners' unauthorized cancellation of a lease is a mere nullity.

Mandamus is the proper remedy to compel the commissioner of public lands to accept rent due under a valid lease of tide lands which he has unlawfully canceled and refused to recognize. State *v.* Callvert, 33 Wash. 380, 74 Pac. 573.

43. State *v.* Ross, 42 Wash. 439, 85 Pac. 29, holding, however, that where such a notice attempted to be served on the lessee by mail was not received by her, but was returned to the state land commissioner, and the amount of rent due was tendered before the expiration of sixty days from the date of the service of a second notice, the commissioner had no power to cancel the lease.

44. State *v.* Ross, 44 Wash. 246, 87 Pac. 262.

45. A purchaser from the state of tide lands described as lying in front of, adjacent to, or abutting on a lot as surveyed and platted by the general governor, did not thereby acquire title to tide lands within the meandered calls of such lot, but only to lands in front of or abutting on or adjacent thereto. Shelton Logging Co. *v.* Gosser, 26 Wash. 126, 66 Pac. 151.

46. The statute providing that contracts issued by the state to purchasers of "school or other lands," which are delinquent in payment of interest two years from the date of the first payment and not extended by law, shall be forfeited by the commissioners, unless such interest shall be paid within six months from the date of the notice of delinquency, and that if such interest is paid the time for paying the principal shall be extended to Jan. 1, 1905, on a contract where one tenth of the price has been paid, includes all sorts of granted lands including tide lands. State *v.* Bridges, 19 Wash. 431, 53 Pac. 545.

47. Laws (1897), c. 27, directing the board of state land commissioners to cancel all deeds and contracts covering tide land lots which were legally established street projections and extensions, where such streets or extensions had not been duly vacated, and authorizing a refunding of the money paid on such contracts, did not apply to streets shown by a former plat which was vacated by a later plat ratified by the legislature prior to the sale of the lots affected thereby. Henry *v.* Seattle, 42 Wash. 420, 85 Pac. 24, holding that the owner of tide lands constituting a part of such a street was not estopped to deny the existence of the street because his grantors were permitted to purchase the lots by reason of having purchased lots in a part of the original plat not changed by the new plat, since there was no attempt to question the plats under which the lots were purchased.

48. The statute authorizing reappraisement by the state land commissioners of certain tide lands and providing that if the lands had been sold under a prior appraisement which was excessive the purchaser might complete the purchase at the reappraisal value, and that his former payment should be credited on it, did not authorize the commissioners, on reappraising the lands at a lower value, to require a purchaser in arrears to pay accrued interest as a condition of receiving the land at the reappraised value. Semon *v.* Callvert, 27 Wash. 679, 68 Pac. 350.

49. A purchaser of tide lands from the state, under an act which donated seventy-five per cent of moneys so received to the improvement of the harbor in which the land was situated, had no vested interest in such tide land fund, and acquired no contract right which would prevent a succeeding legislature from repealing the statute in reference to such use of the proceeds, as was subsequently done. Tacoma Land Co. *v.* Young, 18 Wash. 495, 52 Pac. 244.

tion of a land agent for appraising timber,[50] the power of the land commissioners to review the location of streets,[51] and the acquisition of state land by the United States.[52]

IV. COLONIAL OR PROPRIETARY GRANTS.

In the early history of the country the various colonies were either royal or proprietary. In royal provinces the crown retained the right of soil and claimed and exercised the right of granting lands,[53] while in the proprietary governments the right of soil was vested in the proprietors,[54] who had power to dispose of the soil as they might think proper.[55] Colonial and proprietary grants abounded in the early history of the country, but matters relating to the mode of making, requisites, and validity of such grants,[56] the records and evidence

50. A state land agent who appraised timber on land which would be timber land except for a rule of the land commission designating as prairie land all land the timber on which did not exceed a certain value was entitled to compensation as for appraising timber land where he was designedly kept in ignorance of the rule by the commission. Strobach *v.* State, 17 Wash. 123, 49 Pac. 225.

51. The state land commissioners have no authority to review the action of local boards of tide land appraisers in the location of streets upon tide lands, which acts have been subsequently confirmed by legislation. Seattle *v.* Forrest, 14 Wash. 423, 44 Pac. 883.

52. The statutes granting permission to the United States to purchase or condemn land of any individuals, bodies politic or corporate, in the state, do not authorize the acquisition of lands from the state. State *v.* Callvert, 33 Wash. 380, 74 Pac. 573 (construing Laws (1891), p. 31, Laws (1889–1890), p. 459), holding further that Laws (1901), p. 7, granting to the United States the right to purchase a ship canal over all lands and waters belonging to the state in King county, cannot be construed as an attempt to convey the title of lands held under lease from the state so as to annul such lease, since such a construction would render the act unconstitutional. A deed of tide lands from the state to the United States is invalid where such tide lands did not border upon upland held or reserved by the United States government for the purpose of maintaining fords, etc., as required by the act authorizing a deed from the state, and such a deed cannot abrogate the rights of a prior lessee to such tide lands. State *v.* Callvert, 33 Wash. 380, 74 Pac. 573.

53. Montgomery *v.* Doe, 13 Sm. & M. (Miss.) 161. See also *In re* Proprietary Claims, 10 Haz. Reg. (Pa.) 113.

54. Montgomery *v.* Doe, 13 Sm. & M. (Miss.) 161; Conn *v.* Penn, 6 Fed. Cas. No. 3,104, Pet. C. C. 496.

55. Conn *v.* Penn, 6 Fed. Cas. No. 3,104, Pet. C. C. 496. See also Hurst *v.* Durnell, 12 Fed. Cas. No. 6,927, 1 Wash. 262.

Right of proprietor to establish rules for issuing grants see Countz *v.* Geiger, 1 Call (Va.) 190; Picket *v.* Dowdall, 2 Wash. (Va.) 106.

56. See the following cases:

Kentucky.— Craig *v.* Preston, Litt. Sel. Cas. 138.

Maine.— Clancey *v.* Houdlette, 39 Me. 451; Machias *v.* Whitney, 16 Me. 343; Hill *v.* Dyer, 3 Me. 441.

Maryland.— Wilson *v.* Inloes, 6 Gill 121; Atty.-Gen. *v.* Snowden, 1 Harr. & J. 332; Norwood *v.* Atty.-Gen., 2 Harr & M. 201; Potter *v.* Purnell, 1 Harr & M. 208; Stone *v.* Boreman, 1 Harr. & M. 1.

Massachusetts.— Baker *v.* Fales, 16 Mass. 488; Kennebec Purchase *v.* Call, 1 Mass. 483.

Mississippi.— Warren County *v.* Catchings, (1908) 46 So. 709.

New Hampshire.— Bellows *v.* Copp, 20 N. H. 492; Atkinson *v.* Bemis, 11 N. H. 44; Cornish *v.* Kenrick, Smith 270.

New Jersey.— Jennings *v.* Burnham, 56 N. J. L. 289, 28 Atl. 1048; Estell *v.* Bricksburg Land, etc., Co., 35 N. J. L. 235; Arnold *v.* Mundy, 6 N. J. L. 1, 10 Am. Dec. 356.

New York.— People *v.* Trinity Church, 22 N. Y. 44; People *v.* Van Rensselaer, 9 N. Y. 291; Atkinson *v.* Bowman, 42 Hun 404; People *v.* Schermerhorn, 19 Barb. 540; People *v.* Clarke, 10 Barb. 120; People *v.* Livingston, 8 Barb. 253; Jackson *v.* Joy, 9 Johns. 102; Jackson *v.* Lepper, 3 Johns. 12; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633.

Pennsylvania.— Thomas *v.* Stigers, 39 Pa. St. 486; Troutman *v.* May, 33 Pa. St. 455; Stigers *v.* Thomas, 23 Pa. St. 367; Thomas *v.* Stigers, 5 Pa. St. 480; Cleavinger *v.* Reimar, 3 Watts & S. 486; Hubley *v.* Vanhorne, 7 Serg. & R. 185; White *v.* Kyle, 6 Serg. & R. 107; Graham *v.* Moore, 4 Serg. & R. 467; White *v.* Kyle, 5 Binn. 162; Elliott *v.* Bonnet, 3 Yeates 287; Todd *v.* Ockerman, 1 Yeates 295.

South Carolina.— Moore *v.* McClure, 2 Brev. 139.

Vermont.— Capen *v.* Sheldon, 78 Vt. 39, 61 Atl. 864; Johnson *v.* Bayley, 15 Vt. 595; Sumner *v.* Conant, 10 Vt. 9; Paine *v.* Smead, 1 D. Chipm. 56.

Virginia.— Hamilton *v.* Maze, 4 Call 196; Hite *v.* Fairfax, 4 Call 42; *In re* Loyal, etc., Co., 4 Call 21; Countz *v.* Geiger, 1 Call 190; Picket *v.* Dowdall, 2 Wash. 106.

United States.— Harcourt *v.* Gaillard, 12 Wheat. 523, 6 L. ed. 716; Craig *v.* Radford, 3 Wheat. 594, 4 L. ed. 467; Taylor *v.* Brown, 5 Cranch 234, 3 L. ed. 88; Baeder *v.* Jennings, 40 Fed. 199; Hurst *v.* Durnell, 12 Fed. Cas. No. 6,927, 1 Wash. 262.

See 41 Cent. Dig. tit. "Public Lands," §§ 603, 605, 609, 612, 613, 614, 617, 620.

thereof,[57] the forfeiture, vacation, and annulment of such grants or rights acquired thereunder,[58] and other matters connected with the acquisition of lands from the crown or from proprietors or colonial governments[59] have long since become of no practical importance. At the present time the only questions with reference to such grants which can have any live interests are those relating to their construction and effect, as to which it is deemed sufficient to state that the general rules governing these matters are practically the same as those relating to ordinary conveyances,[60] and grants by the United States or the various states,[61] and to refer in the note to a number of illustrative cases in which the construction or effect of colonial or proprietary grants has been passed upon.[62]

57. See the following cases:

Louisiana.— Murdock *v.* Gurley, 5 Rob. 467.

Maryland.— Carroll *v.* Norwood, 5 Harr. & J. 155; Mundell *v.* Clarklee, 3 Harr. & J. 462; Carroll *v.* Norwood, 4 Harr. & M. 287.

Massachusetts.— Boston *v.* Richardson, 105 Mass. 351; Pitts *v.* Temple, 2 Mass. 538.

New Jersey.— Jennings *v.* Burnham, 56 N. J. L. 289, 28 Atl. 1048.

New York.— Mackinnon *v.* Barnes, 66 Barb. 91; McKineron *v.* Bliss, 31 Barb. 180 [*affirmed* in 21 N. Y. 206].

Vermont.— Doe *v.* Lawrence, 1 D. Chipm. 103; Stedman *v.* Putney, N. Chipm. 11.

Virginia.— Darby *v.* Stringer, Jeff. 10.

United States.— Conn *v.* Penn, 6 Fed. Cas. No. 3,104, Pet. C. C. 496.

See 41 Cent. Dig. tit. "Public Lands," §§ 607, 622.

58. See the following cases:

Maryland.— Atty.-Gen. *v.* Snowden, 1 Harr. & J. 332; Dulany *v.* Jennings, 1 Harr. & M. 92; Seward *v.* Hicks, 1 Harr. & M. 22.

Massachusetts.— Cushing *v.* Hacket, 10 Mass. 164, 11 Mass. 202.

New Hampshire.—Bellows *v.* Copp, 20 N. H. 492.

New York.— People *v.* Trinity Church, 22 N. Y. 44; People *v.* Clarke, 10 Barb. 120; People *v.* Livingston, 8 Barb. 253.

Pennsylvania.— Lineweaver *v.* Crawford, 26 Pa. St. 417; Wilhelm *v.* Shoop, 6 Pa. St. 21; Burns *v.* Swift, 2 Serg. & R. 436; Mitchell *v.* Mitchell, 4 Binn. 180; Bell *v.* Levers, 4 Dall. 210, 1 L. ed. 804.

Virginia.— Norvell *v.* Camm, 2 Munf. 257; Hunter *v.* Fairfax, 1 Munf. 218; Hamilton *v.* Maze, 4 Call 196; *In re* Loyal, etc., Counties, 4 Call 21; Curry *v.* Burns, 2 Wash. 121; Picket *v.* Dowdall, 2 Wash. 106.

United States.— Paxton *v.* Griswold, 122 U. S. 441, 7 S. Ct. 1216, 30 L. ed. 1143.

See 41 Cent. Dig. tit. "Public Lands," §§ 608, 609, 618, 623.

59. **Jurisdiction of claims by surveys** see Hamilton *v.* Maze, 4 Call (Va.) 196.

Authority to decide dispute as to title see Smith *v.* Meacham, 1 D. Chipm. (Vt.) 424.

Use and disposal of lands by municipalities see Hadley *v.* Hadley Mfg. Co., 4 Gray (Mass.) 140; McConnell *v.* Lexington, 12 Wheat. (U. S.) 582, 6 L. ed. 735. See 41 Cent. Dig. tit. "Public Lands," § 619.

Leases of crown lands see Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 369; Vermont *v.* Society for Propagation, etc., 28 Fed. Cas. No. 16,919, 1 Paine 652. See 41 Cent. Dig. tit. "Public Lands," §§ 610, 611.

60. See Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 631. And see, generally, DEEDS, 13 Cyc. 600.

61. See, generally, *supra*, II, M, 9; III, B, 10.

62. See the following cases:

Alabama.— Hagan *v.* Campbell, 8 Port. 9, 33 Am. Dec. 267.

Connecticut.— Church *v.* Meeker, 34 Conn. 421; East Haven *v.* Heminway, 7 Conn. 186.

Maine.— Proctor *v.* Maine Cent. R. Co., 96 Me. 458, 52 Atl. 933; Clancey *v.* Houdlette, 39 Me. 451.

Maryland.— Howard *v.* Moale, 2 Harr. & J. 249; Tolson *v.* Lanham, 2 Harr. & J. 174; Garretson *v.* Cole, 2 Harr. & M. 459.

Massachusetts.— Litchfield *v.* Scituate, 136 Mass. 39.

Mississippi.— Vick *v.* Peck, 4 How. 407; Montgomery *v.* Ives, 13 Sm. & M. 161.

New Hampshire.—Bellows *v.* Copp, 20 N. H. 492; Woods *v.* Banks, 14 N. H. 101; Cilley *v.* Cayford, Smith 150.

New Jersey.— Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 631.

New York.— *In re* New York, 168 N. Y. 134, 51 N. E. 158; Hinckel *v.* Stevens, 165 N. Y. 171, 58 N. E. 879 [*reversing* 35 N. Y. App. Div. 5, 54 N. Y. Suppl. 457]; Lawrence *v.* Hempstead, 155 N. Y. 297, 49 N. E. 868 [*affirming* 31 N. Y. Suppl. 1129, 34 N. Y. Suppl. 1142]; East Hampton *v.* Vail, 151 N. Y. 463, 45 N. E. 1030 [*affirming* 71 Hun 94, 24 N. Y. Suppl. 583]; New York *v.* Hart, 95 N. Y. 443; North Hempstead *v.* Eldridge, 111 N. Y. App. Div. 789, 98 N. Y. Suppl. 157; Sandiford *v.* Hempstead, 97 N. Y. App. Div. 163, 90 N. Y. Suppl. 76 [*affirmed* in 180 N. Y. 554, 79 N. E. 1115]; Bair *v.* Campbell, 67 N. Y. App. Div. 104, 73 N. Y. Suppl. 617 [*affirmed* in 177 N. Y. 539, 69 N. E. 1120]; People *v.* Schermerhorn, 19 Barb. 540; People *v.* Livingston, 8 Barb. 253; Southold *v.* Parks, 41 Misc. 456, 84 N. Y. Suppl. 1078 [*affirmed* in 97 N. Y. App. Div. 636, 90 N. Y. Suppl. 1116 (*affirmed* in 183 N. Y. 513, 76 N. E. 1110)]; Van Gordon *v.* Jackson, 5 Johns. 440; Nicoll *v.* Huntington, 1 Johns. Ch. 166; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 369.

North Carolina.— Tolson *v.* Mainor, 85 N. C. 235.

Pennsylvania.— Ross *v.* Cutshall, 1 Binn. 399; Weiser *v.* Moody, 2 Yeates 127.

V. SPANISH, MEXICAN, AND FRENCH GRANTS.[63]

A. Land Grant Systems — 1. SPANISH SYSTEM. The object of Spain, as of all the European powers making settlements in America, was to derive strength and revenue from her colonies, and to accomplish this grants of lands to individuals became indispensable.[64] The immense territories held by Spain, affording an almost inexhaustible fund of lands claimed by the crown, could scarcely fail to produce large grants to favorites, as well as a regular system for inviting population into her colonies.[65] The viceroys in New Spain and Peru, who were also governors, possessed almost unlimited powers on this and other subjects; [66] and in distant provinces, or where the sea intervened, the right of giving title to lands was vested in their governors, with the advice of the king's fiscal ministers and of the lieutenant-general, where he might be stationed.[67] No public restraint appears to have been imposed on the exercise of this power; [68] but the officer and his conduct were of course under the supervision and control of the king and his ministers, and especially of his council of the Indies.[69] In 1735 this power was withdrawn from the provincial officers,[70] but was restored to them by the royal order October 15, 1754, which conferred the power in general terms without any limitation on the quantity or on the consideration which might move to the grant.[71] Among the earliest laws for the government of America is an order that the viceroys of Peru and Mexico "grant such rewards, favors and compensation as to them may seem fit." [72] And a subsequent order, after directing extensive dispositions of territory, adds,

Vermont.— Capen *v.* Sheldon, 78 Vt. 39, 61 Atl. 864; Sumner *v.* Conant, 10 Vt. 9.

Virginia.— Cline *v.* Catron, 22 Gratt. 378; Marshall *v.* Clark, 4 Call 268.

United States.— Morris *v.* U. S., 174 U. S. 196, 19 S. Ct. 649, 43 L. ed. 946; Lowndes *v.* Huntington, 153 U. S. 1, 14 S. Ct. 758, 38 L. ed. 615 [*affirming* 40 Fed. 625]; Pawlet *v.* Clark, 9 Cranch 292, 3 L. ed. 735; Fairfax *v.* Hunter, 7 Cranch 603, 3 L. ed. 453; Lodge *v.* Lee, 6 Cranch 237, 3 L. ed. 210; Conn *v.* Penn, 6 Fed. Cas. No. 3,104, Pet. C. C. 496; Hurst *v.* Durnell, 12 Fed. Cas. No. 6,927, 1 Wash. 262; Penn *v.* Groff, 19 Fed. Cas. No. 10,932, 1 Wash. 390; Penn *v.* Klyne, 19 Fed. Cas. No. 10,935, 4 Dall. 402, Pet. C. C. 497, 1 Wash. 207.

See 41 Cent. Dig. tit. "Public Lands," §§ 603, 604, 606, 606½, 609, 612, 615, 616, 621.

63. Chronological and historical note.— In order to have a clear understanding of the status of Spanish, Mexican, and French land grants it is necessary to bear in mind the dates at which certain portions of territory passed from one sovereignty to another, and the dates at which the various territorial acquisitions of the United States occurred, and hence it is deemed appropriate at this place to give the following chronological survey: In 1763 the French territory west of the Mississippi was ceded by France to Spain, and in the same year Florida was ceded by Spain to England. In 1783 Florida was receded by England to Spain. In 1785 West Florida was sold by Spain to France. In 1800 Louisiana was ceded by Spain to France and in 1803 France ceded Louisiana to the United States. In 1810 Mexico revolted against Spain. In 1810–1812 small sections of territory in Florida were seized by the United States; and in 1819 the United States purchased Florida from Spain. In 1821–1822 Mexican independence was consummated, and in 1824 the republic of Mexico was established. In 1836 Texas seceded from Mexico and established independence, and in 1845 Texas was admitted to the United States as a state. In 1846 the agreement between the United States and England as to the Northwest Boundary gave the Oregon territory to the United States. In 1848 Mexico ceded to the United States the California territory, including the state of California as now established, and also Utah, Arizona, New Mexico, and parts of Colorado and Wyoming. The Gadsden purchase from Mexico took place in 1853, and the United States purchased Alaska from Russia in 1867. Spain ceded to the United States the Philippine Islands, Porto Rico, and Guam in 1898, and some outlying islands of the Philippines in 1901.

64. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

65. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

66. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

67. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

68. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

69. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

70. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

71. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

72. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 453, 8 L. ed. 1001.

"all the remaining land may be reserved to us, clear of any incumbrance, for the purpose of being given as rewards, or disposed of according to our pleasure." [73] There was also a law to the effect that "it is our pleasure that services be remunerated where they shall have been performed, and in no other place or province of the Indies." [74] It would seem that these remunerations, if in land, would be made by the governor, when empowered to grant them, provided no other officer was designated.[75] By the Spanish law in force in 1788 lands were distributed to those intending to settle, and, after the settlers had lived and labored in their settlements for the space of four years, they were empowered to sell the lands, or dispose of them by will; but confirmation by the audiencia, or the governor, if recourse to the audiencia was impracticable, after the four years had elapsed, was required to complete the legal title.[76] A royal order was issued on January 4, 1813, which recited that the general cortes had decreed as follows: "Considering that the conversion of public lands into private property is one of the measures which the welfare of the people, as well as the advancement of agriculture and industry, most imperiously demands; and desiring, at the same time, that this class of lands should serve as an aid to the public necessities, a reward to the deserving defenders of the country, and a support to the citizens who are not proprietors, the general and extraordinary Cortes do decree: All the uncultivated or public lands, and those of the corporation of cities, with the timber thereon or without it, both in the peninsular and adjacent islands, as well as in the ultra marine provinces, except the commons necessary for the towns, shall be made private property. In whatever manner these lands be distributed, it shall be in full property." [77] This order was transmitted to the captain general of the Island of Cuba; but seems to have been repealed on August 22, 1814.[78] There was no limitation in the royal orders restricting the powers of the governors to a league square in grants.[79] The decree of the Spanish cortes of January, 1813, established a system of disposing of the crown land as follows: [80] After providing for the reduction of the public lands to private ownership in the way and with the qualifications stated,[81] the act declared that half of the vacant and crown lands of the monarchy should be reserved as a security for the payment of the national debt, and of those to whom the nation was indebted and who were inhabitants of villages to which the lands were adjacent,[82] and provision was made for the distribution of such lands to the public creditors belonging to such villages,[83] and also for distribution among the officers and soldiers of the army,[84] and it was then provided that the location of these tracts should be made by a board of magistrates of the villages to which the lands were adjacent,[85] and the proceedings were afterward to be sent to the provincial deputation for approval.[86] The law then provided for grants of the residue of the vacant or crown lands to every inhabitant of the villages who should ask for them for the purpose of culti-

73. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 454, 8 L. ed. 1001.

74. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 454, 8 L. ed. 1001.

75. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

76. Chaves *v.* U. S., 168 U. S. 177, 18 S. Ct. 72, 42 L. ed. 426.

An opinion expressed by a Spanish governor, in answer to a letter of the alcalde referring to him a matter of conflicting claims under grants of previous governors, was a mere *ex parte* opinion, not constituting a decision in a judicial proceeding, it appearing that the parties in interest had no notice thereof, and that the governor expressly disclaimed any authority to adjudicate or review the acts of his predecessors. Chaves *v.* U. S., 168 U. S. 177, 18 S. Ct. 72, 42 L. ed. 426.

77. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

78. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

79. U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001.

80. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

81. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

82. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

83. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

84. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

85. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

86. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 143.

vation and had no lands of his own.[87] The patents were to be made by a board of magistrates free of charge,[88] and the provincial delegation was to approve of them.[89] This law may be very properly referred to as the foundation and source of many titles to the public lands in the Mexican government, and also of titles in the province or territory of California, if any were derived under it during the authority of the Spanish government.[90] Grants under this law were to be made to the creditors, officers, and soldiers of the old government,[91] which were called rewards for patriotism and were not to be extended to individuals other than those who might serve or who had served in the war then existing,[92] or in quelling disturbances in some of the provinces beyond the sea.[93] Individuals who were not military men, who had served in their districts or had contributed in any other way in this war or in the disturbances in America, or who were injured or crippled or disabled in battle were included in the grants to be made.[94]

2. Mexican System — a. In General. The Mexican congress, after the country had thrown off the government of Spain and had erected a new and independent government in its place, representing the sovereign power of the nation, passed the law of 1824, providing for the grant and colonization of the public lands.[95] This law provided that the lands of the nation which were not the property of any individual, corporation, or town were the subject of the law and might be colonized;[96] and for this purpose the congress of the states should, with the least delay, enact laws and regulations for colonizing within their respective boundaries, conforming in all respects to the constitutive act, the general constitution, and the rules established by the law of 1824.[97] The law then prohibited the colonization of any land within twenty leagues bordering on any foreign nation,[98] or within ten leagues of the sea coast,[99] without the consent of the supreme government,[1] and further provided that in the distribution of the lands preference was to be given to Mexican citizens,[2] that no person should be allowed to obtain a grant of more than eleven leagues,[3] and that no person who might obtain a grant under the law should retain it if he resided out of the limits of the republic.[4] It was then further provided that the executive should proceed in conformity with the principles established by the law of 1824 to the colonization of the territories of the republic.[5] The supreme executive government, acting under the foregoing provision, on November 21, 1828, established regulations for the granting and colonization of the public lands in the territories, and among others, in California.[6] These regulations provided that the governors or political chiefs of the territories were authorized to grant vacant lands within their respective territories [7] to either Mexicans or foreigners,[8] who might petition for them with the object of cultivation or settle-

87. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
88. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
89. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
90. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
91. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
92. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
93. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
94. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
95. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
96. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
97. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
98. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
99. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
1. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
2. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
3. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
4. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
5. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
6. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.
7. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232. And see also in this connection U. S. *v.* Cambuston, 20 How. (U. S.) 59. 15 L. ed. 828.
8. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

ment,[9] and that such grants should be made according to the laws of the general congress of August 18, 1824, and under their qualifications.[10] The regulations then set out a series of preliminary proceedings, specially enjoined for the purpose of ascertaining the fitness of the petitioner to receive a grant, and also of ascertaining if the land asked for might be granted without prejudice to the public or individuals.[11] It was required that every person soliciting land should address to the governor a petition expressing his name, country, and religion, and describing as definitely as possible by means of a map the land asked for,[12] that the governor should proceed to obtain the necessary information, whether the petition contained the proper conditions required by the law of August 18, 1824, both as regarded the land and the petitioner, in order that the application might be at once attended to,[13] or if it be preferred, that the municipal authority might be consulted whether there was any objection to the making of the grant;[14] that this being done the governor would accede or not to such petition in conformity to the laws on the subject;[15] but that if the grant was made it must be in strict conformity with the laws on the subject,[16] and especially with reference to the law of 1824;[17] that the grants made to individuals or families should not be definitively valid without the previous consent of the departmental assembly;[18] and that the definitive grant asked for being made, a patent signed by the governor should be given to serve as a title to the party interested,[19] wherein it must be stated that the grant was made in exact conformity with the provisions of the law, in virtue of which possession should be given.[20] It was further provided that a record should be made of all petitions and grants in a book kept for that purpose with maps or plats of the land granted,[21] and a circumstantial report should be forwarded quarterly to the supreme government.[22] And there were many other stringent provisions and conditions imposed,[23] the system thus established furnishing the highest evidence of the extreme interest the Mexican government took in guarding against impositions and frauds by or upon the political chiefs in the execution of the law.[24] These were the only laws of the Mexican congress passed on the subject of granting the public lands with the exception of those relating to the missions and towns.[25] While the Mexican constitution of 1824 was in force,[26] and after the passage of the national colonization law of August 18, 1824, the states of the Mexican confederation possessed the property in the soil, and had alone the power, by direct agency, of appropriating lands to individuals,[27] but from and after the adoption

9. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232; U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

10. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

11. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

12. U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

13. U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

14. U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

15. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232; U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

16. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

17. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

18. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

19. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232; U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

20. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232; U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

21. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232; U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

22. U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

23. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232; U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

24. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

25. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 552, 17 L. ed. 232, where it is said: "No others have been produced on the argument, nor have our researches found any, nor were any others discovered by the public agents which were authorized by the Government to inquire particularly into the subject."

26. Camou *v.* U. S., 171 U. S. 277, 18 S. Ct. 855, 43 L. ed. 163 [*followed* in Perrin *v.* U. S., 171 U. S. 292, 18 S. Ct. 861, 43 L. ed. 169].

27. Republic *v.* Thorn, 3 Tex. 499.

The officials of New Mexico had no authority in 1825 to make grants of the public

of the constitution of 1836 no power to grant lands was vested in the separate states.[28]

b. Pueblo or Town Lands. By the laws of Mexico which prevailed in California at the date of the conquest, pueblos or towns, when once established and officially recognized, were entitled, for their benefit and the benefit of their inhabitants, to the use of lands, embracing the site of such pueblos or towns, and of adjoining lands within certain prescribed limits.[29] These laws provided for the assignment to the pueblos, for their use and the use of their inhabitants, of land not exceeding in extent four square leagues.[30] Such assignment was to be made by the public authorities of the government upon the original establishment of the pueblo,[31] or afterward upon the petition of its officers or inhabitants,[32] and the land was to be measured off in a square or prolonged form, according to the nature and condition of the country.[33] All lands within the general limits stated, which had previously become private property, or were required for public purposes, were reserved, and excepted from the assignment.[34] Until the lands were thus definitely assigned and measured off, the right or claim of the pueblo was an imperfect one.[35] It was a right which the government might refuse to recognize at all,[36]

domain, for even if they had previously exercised it, they were deprived of such power by the decree of Oct. 24, 1824, declaring New Mexico a territory of the federation, taken in connection with the colonization law of 1824 and the constitution of Oct. 24, 1824. Hayes *v.* U. S., 170 U. S. 637, 18 S. Ct. 735, 42 L. ed. 1174.

The Spanish law of March 4, 1813, looking to the disposition of crown lands and municipal domains, was not in force in the territory of New Mexico after the enactment of the colonization law of 1824. Hayes *v.* U. S., 170 U. S. 637, 18 S. Ct. 735, 42 L. ed. 1174.

28. U. S. *v.* Coe, 170 U. S. 681, 18 S. Ct. 745, 42 L. ed. 1195 [*recognized* in Camou *v.* U. S., 171 U. S. 277, 18 S. Ct. 855, 43 L. ed. 163].

29. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597]. See also Hale *v.* Akers, 69 Cal. 160, 10 Pac. 385; Cohas *v.* Raisin, 3 Cal. 443; San Francisco *v.* U. S., 21 Fed. Cas. No. 12,316, 4 Sawy. 553.

This right appears to have been common to the cities and towns of Spain from an early period in her history, and was recognized in the laws and ordinances for the settlement and government of her colonies in the American continent. Townsend *v.* Greeley, 5 Wall. (U. S.) 336, 18 L. ed. 547. And the same general system of laws for the establishment and government of pueblos, and the assignment to them of lands, that prevailed under Spain was continued in Mexico with but little variation after her separation from the mother country and the establishment of the republic. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

San Francisco was a Mexican pueblo before the military occupation of California by the United States army and was invested with title to the lands within its boundaries. Hart *v.* Burnett, 15 Cal. 530; Cohas *v.* Raisin, 3 Cal. 443; Grisar *v.* McDowell, 11 Fed. Cas. No. 5,832, 4 Sawy. 597 [*affirmed* in 6 Wall. 363, 18 L. ed. 863]; San Francisco *v.* U. S., 21 Fed. Cas. No. 12,316, 4 Sawy. 553.

Acceptance by city authorities of additional grant.— Where a large body of land, say six leagues, had been granted by the Spanish government to a city, as exidos, and the congress of Coahuila and Texas, assuming that the city had no title, granted it two leagues, a question of fact arose whether the city authorities had accepted the two leagues grant, in lieu of the claim for six leagues, but the title of the city to the six leagues could not have been prejudiced by any acts of the city authorities. Lewis *v.* San Antonio, 7 Tex. 288.

30. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

31. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

32. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

33. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597]; Tripp *v.* Spring, 24 Fed. Cas. No. 14,180, 5 Sawy. 209.

34. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

35. Bernal *v.* Lynch, 36 Cal. 135; Stevenson *v.* Bennett, 35 Cal. 424; Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597]; Montgomery *v.* Bevans, 17 Fed. Cas. No. 9,735, 1 Sawy. 653.

Under the Spanish government, on the organization of a town, four square leagues of land did not vest in it by mere operation of law; but it was necessary that the proper authorities should particularly designate the land to be acquired. U. S. *v.* Santa Fé, 165 U. S. 675, 17 S. Ct. 472, 41 L. ed. 874.

36. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

or might recognize in a qualified form;[37] it might be burdened with conditions,[38] or restricted to less limits than the four square leagues which was the usual quantity assigned.[39] Even after the assignment the interest acquired by the pueblo was far from being an absolute or indefeasible estate such as is known to the laws of the United States,[40] for the purposes to be accomplished by the creation of pueblos did not require their possession of the fee.[41] The interest amounted to a little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes.[42] And this limited right of possession and use was, in all particulars, subject to the control of the government of the country,[43] until the title passed to private persons.[44] Lands appurtenant to towns were a part of the public domain, subject to the authority and disposition of the Mexican national government, and the officers of a territory in which they were located had no authority to grant them to private individuals;[45] and under the Mexican colonization law of January 4, 1823, the ayuntamiento or general council of a town had no authority to make grants of land outside of the four square leagues to which the town may have been entitled, and especially not when the grant was disapproved by the provincial deputation to which it was referred.[46]

c. Settlements and Contracts Under Colonization Laws. An empresario grant under the Mexican colonization law of March 24, 1825, operated simply to designate a large tract of country within which the empresarios might establish a colony or colonies,[47] so that if a colony was established the colonists were to be supplied with land taken from this tract,[48] and the amount of lands to which the empresarios would be entitled upon the establishment of a colony was to be determined by the number of families introduced by them,[49] and was also to be taken from the large tract,[50] so that of necessity these premium lands, as they were

37. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

38. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

39. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

40. Monterey *v.* Jacks, 139 Cal. 542, 73 Pac. 436 [*affirmed* in 203 U. S. 360, 27 S. Ct. 67, 51 L. ed. 220]; Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597]; San Francisco *v.* U. S., 21 Fed. Cas. No. 12,316, 4 Sawy. 553; U. S. *v.* Hare, 26 Fed. Cas. No. 15,303, 4 Sawy. 653. See also U. S. *v.* Sandoval, 167 U. S. 278, 17 S. Ct. 868, 42 L. ed. 168.

41. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

42. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597]. See also Pueblo of Zia *v.* U. S., 168 U. S. 198, 18 S. Ct. 42, 42 L. ed. 434.

43. Monterey *v.* Jacks, 139 Cal. 542, 73 Pac. 436 [*affirmed* in 203 U. S. 360, 27 S. Ct. 67, 51 L. ed. 220]; U. S. *v.* Santa Fé, 165 U. S. 675, 17 S. Ct. 472, 41 L. ed. 874; Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597]; San Francisco *v.* U. S., 21 Fed. Cas. No. 12,316, 4 Sawy. 553. And see also U. S. *v.* Hare, 26 Fed. Cas. No. 15,303, 4 Sawy. 653.

Persons taking possession of any of the municipal lands thus reserved held them at the pleasure of the government. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863 [*affirming* 11 Fed. Cas. No. 5,832, 4 Sawy. 597].

44. San Francisco *v.* U. S., 21 Fed. Cas. No. 12,316, 4 Sawy. 553; U. S. *v.* Hare, 26 Fed. Cas. No. 15,303, 4 Sawy. 653.

45. Hayes *v.* U. S., 170 U. S. 637, 18 S. Ct. 735, 42 L. ed. 1174.

46. Cessna *v.* U. S., 169 U. S. 165, 18 S. Ct. 314, 42 L. ed. 702.

47. Interstate Land Co. *v.* Maxwell Land Grant Co., 139 U. S. 569, 11 S. Ct. 656, 35 L. ed. 278 [*affirming* 41 Fed. 275].

48. Interstate Land Co. *v.* Maxwell Land Grant Co., 139 U. S. 569, 11 S. Ct. 656, 35 L. ed. 278 [*affirming* 41 Fed. 275].

49. Interstate Land Co. *v.* Maxwell Land Co., 139 U. S. 569, 11 S. Ct. 656, 35 L. ed. 278 [*affirming* 41 Fed. 275]. See also Houston *v.* Robertson, 2 Tex. 1. But *compare* Houston *v.* Perry, 5 Tex. 462, holding that empresarios were entitled to premium lands for the number of colonists received and admitted as such prior to the closing of the land offices, regardless of by whom or at whose expense they were introduced into the country.

50. Interstate Land Co. *v.* Maxwell Land Grant Co., 139 U. S. 569, 11 S. Ct. 656, 35 L. ed. 278 [*affirming* 41 Fed. 275]. The empresario should select his premiums out of

called, must be a less quantity than the grant as described by its outboundaries,[51] and so the grant was not a present conveyance subject to defeasance,[52] but a contract to convey on performance of a condition precedent.[53] No formal act of the empresario admitting and recognizing a person as a colonist was necessary to the latter's right to colonization grant.[54] An emigrant to the state of Coahuila and Texas as a colonist and the head of a family in 1834, under the laws then in force, by virtue of his settlement and compliance with the law and survey, became entitled to three hundred and twenty acres of land as a preëmptor.[55] The Mexican colonization law of March 24, 1825, section 17, providing that the government might augment the quantity of land granted to a colonist in proportion to the family industry, did not refer only to colonists to whom there had already been a grant, but such additional land might be granted to the colonist in the first instance.[56] The absence from a Mexican grant in colonization of conditions requiring cultivation and inhabitancy, and the construction of a house within a year, did not affect the validity of the grant.[57] Occupation merely for stock raising was very unsatisfactory evidence of possession and cultivation of California land in the sense of the Mexican colonization laws, as such occupation of public lands, without any permission, was a matter of common right.[58] The decree of March 26, 1834, section 30, of the government of Coahuila and Texas, providing that "hereafter no colonization contract shall be made, and those heretofore made shall be strictly fulfilled, and in entire accordance with the law of the 24th of March, 1825," had reference only to the duties and obligations of the empresarios or contractors with the government, which were required to be strictly and fully performed, and did not refer to the conditions imposed by the law of 1825 on the colonists or settlers who received lands in accordance with its provisions.[59] The title of possession under the colonization laws was a final title.[60] The decrees of colonization of the state of Coahuila and Texas, No. 16 and No. 190, were repealed, the first in 1832, and the latter in 1834.[61] The Texas act of December 14, 1837, declared that all empresario contracts ceased on the day of the declaration of independence, and authorized suits against the president of the republic of Texas to settle the claims of empresarios.[62]

B. Recognition of Grants — 1. In General. It is a well-established principle of international law that the inhabitants of a country are protected in their property rights notwithstanding a transfer of sovereignty,[63] and where territory

the lands deeded to him for families who had not taken titles, commencing with the first title which was issued. Houston *v.* Perry, 2 Tex. 37.

51. Interstate Land Co. *v.* Maxwell Land Grant Co., 139 U. S. 569, 11 S. Ct. 656, 35 L. ed. 278 [*affirming* 41 Fed. 275].

52. Interstate Land Co. *v.* Maxwell Land Grant Co., 139 U. S. 569, 11 S. Ct. 656, 35 L. ed. 278 [*affirming* 41 Fed. 275].

53. Interstate Land Co. *v.* Maxwell Land Grant Co., 139 U. S. 569, 11 S. Ct. 656, 35 L. ed. 278 [*affirming* 41 Fed. 275].

54. Hatch *v.* Dunn, 11 Tex. 708, holding that therefore it was no objection to a title, not issued or applied for until after the expiration of the time limited by the contract for the admission of colonists, that there was no evidence that the grantee had been admitted prior to the expiration of the period for admission.

55. Spier *v.* Laman, 27 Tex. 205 [*following* Jennings *v.* De Cordova, 20 Tex. 508].

56. Groesbeck *v.* Golden, (Tex. 1887) 7 S. W. 362 [*overruling* Harlan *v.* Haynie, 9 Tex. 459].

57. U. S. *v.* Yorba, 1 Wall. (U. S.) 412, 17 L. ed. 635.

58. U. S. *v.* Teschmaker, 22 How. (U. S.) 392, 16 L. ed. 353.

59. Clay *v.* Clay, 26 Tex. 24.

60. Hancock *v.* McKinney, 7 Tex. 384. See also Edwards *v.* James, 7 Tex. 372.

61. Emmons *v.* Oldham, 12 Tex. 18.

62. Houston *v.* Perry, 2 Tex. 37, holding that such a suit might be maintained on contracts which expired before the declaration of independence.

The republic was not liable for losses subsequent to the declaration of independence. Houston *v.* Robertson, 2 Tex. 1.

63. Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692]; Rio Arriba Land, etc., Co. *v.* U. S., 167 U. S. 298, 17 S. Ct. 875, 42 L. ed. 175; Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673; Astiazaran *v.* Santa Rita Land, etc., Co., 148 U. S. 80, 13 S. Ct. 457, 37 L. ed. 376. See International Law, 22 Cyc. 1729 *et seq.*

Alaskan lands granted in fee simple by Russia prior to the treaty of cession did not

has been ceded to the United States prior grants of public lands by the ceding government have invariably been respected; [64] and the various treaties by which the United States has acquired, which were formerly belonging to other sovereignties, have usually contained provisions recognizing and confirming such grants.[65]

2. Mode of Fulfillment of Treaty Obligations. The mode in which private rights of property may be secured, and the obligations imposed upon the United States by treaties fulfilled, belongs to the political department of the government

pass to the United States. Callsen *v.* Hope, 75 Fed. 758.

The revolution of Texas did not impair a grant of land acquired under the old government, nor did the removal of the grantee to Mexico in 1836, and his adherence to the Mexican party, *ipso facto* vacate his title, without some formal declaration of forfeiture therefor. Musquis *v.* Blake, 24 Tex. 461. See also Airhart *v.* Massieu, 98 U. S. 491, 25 L. ed. 213.

Grants to municipalities.— The republic of Texas had authority either to ignore or to confirm Spanish or Mexican grants to municipalities within its borders. Victoria *v.* Victoria County, (Tex. Civ. App. 1906) 94 S. W. 368.

64. Wilson *v.* Smith, 5 Yerg. (Tenn.) 379; Hardy *v.* De Leon, 5 Tex. 211; McMicken *v.* U. S., 97 U. S. 204, 24 L. ed. 947. See Palmer *v.* U. S., 18 Fed. Cas. No. 10,697, Hoffm. Land Cas. 249 [*affirmed* in 24 How. 125, 16 L. ed. 609].

Conditional warrants of land by the former government have invariably been respected whenever there has appeared any *bona fide* attempt to perform the conditions or any plausible excuse for their non-performance. McMicken *v* U. S., 97 U. S. 204, 24 L. ed. 947.

The declaration in the project of the treaty between the United States and Mexico that no grants of land had been made by the latter subsequent to May 13, 1846, which declaration was stricken out by the senate, cannot bar the rights of persons claiming lands under grants made since that day, and before actual conquest. Palmer *v.* U. S., 18 Fed. Cas. No. 10,697, Hoffm. Land Cas. 249 [*affirmed* in 24 How. (U. S.) 125, 16 L. ed. 609].

Claimants under original grantees.— In case of a cession of territory by a foreign government to the United States, and of action taken by our government to protect the inhabitants in their rights of property in land, subsequent claimants under such inhabitants take in strict subordination to this action, and are not entitled to any notice of it. Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151.

Courts of law will not notice claims to lands within the state of New York under grants made by the French government in Canada prior to the treaty of 1763 between Great Britain and France, for those courts will look only to titles under patents from the state, or the former colonial government of the province of New York, and the colonial assembly in 1773 pronounced those Canadian claims to be wholly unfounded; and, at the best, they are merely equitable claims, and afford no evidence of a legal title that can be recognized by a court of law. Jackson *v.* Ingraham, 4 Johns. (N. Y.) 163.

Where a grant was annulled by the ceding sovereignty while the land remained under its jurisdiction, a deed from the grantee to an American citizen conveyed no title. Doe *v.* Braden, 16 How. (U. S.) 635, 14 L. ed. 1090.

65. *Alabama.*— Stewart *v.* Trenier, 49 Ala. 492.

California.— Ward *v.* Mulford, 32 Cal. 365; Minturn *v.* Brower, 24 Cal. 644; Reynolds *v.* West, 1 Cal. 322.

District of Columbia.— Smith *v.* Reynolds, 9 App. Cas. 261.

Florida.— Magee *v.* Doe, 9 Fla. 382.

Texas.— Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80; State *v.* Sais, 47 Tex. 307; Haynes *v.* State, (Civ. App 1905) 85 S. W. 1029; State *v.* Russell, 38 Tex. Civ. App. 13, 85 S. W. 288, 1167.

Washington.— Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 159.

United States.— Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692]; Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673; U. S. *v.* Moreno, 1 Wall. 400, 17 L. ed. 633; Les Bois *v.* Bramell, 4 How. 449, 11 L. ed. 1051; U. S. *v.* Breward, 16 Pet. 143, 10 L. ed. 916; U. S. *v.* Waterman, 14 Pet. 478, 10 L. ed. 550; U. S. *v.* Wiggins, 14 Pet. 334, 10 L. ed. 481; Mitchel *v.* U. S., 9 Pet. 711, 9 L. ed. 283; Delassus *v.* U. S., 9 Pet. 117, 9 L. ed. 71; U. S. *v.* Clarke, 8 Pet. 436, 8 L. ed. 1001; U S. *v.* Arredondo, 6 Pet. 691, 8 L. ed. 547; Hodge *v.* Palms, 117 Fed. 396, 54 C. C. A. 570.

See 41 Cent. Dig. tit. "Public Lands," § 624.

The protocol of the treaty of Guadalupe Hidalgo, stating that the suppression of the tenth article of the treaty was not intended to annul the Mexican grants in ceded territories, but that these should preserve the legal value which they possessed, etc., referred solely to titles existing in Texas at the time of the treaty, and not to titles to lands embraced in the treaty, and hence did not affect the provision of article 8 of the treaty that property of every kind belonging to Mexicans in the territory ceded should be inviolably respected. Haynes *v.* State, (Tex. Civ. App. 1905) 85 S. W. 1029); State *v.* Russell, 38 Tex. Civ. App. 13, 85 S. W. 288, 1167.

The property rights of pueblos were entitled to protection under the treaty, equally with those of individuals. U. S. *v.* Lucero, 1 N. M. 422; Tripp *v.* Spring, 24 Fed. Cas. No. 14,180, 5 Sawy. 209.

to provide,[66] and in the execution of its treaty obligations respecting the lands claimed under the laws of the ceding sovereignty, the United States may adopt such modes of procedure as it may deem expedient,[67] and may act through the ordinary tribunals for the administration of justice,[68] through special boards,[69] or by direct legislation with respect to particular claims.[70]

3. Construction of Treaty Provisions. The term "grant," as used in treaties, is understood to mean any warrant, concession, order, or permission to survey, possess, or settle, evinced by writing or parol, or presumed from possession;[71] and a treaty provision for the preservation of title under grants of the ceding government has been held to apply to equitable as well as legal,[72] and to inchoate or imperfect as well as complete or perfect titles,[73] for the principle in respect to incomplete titles is that if a claim was such as would have bound the conscience of the former sovereign to perfect the title, and furnish the evidence necessary to support and maintain it, the United States government, having acquired the territory, would take it charged with the duty of carrying out in good faith the obligation of the previous government existing at the time of the cession.[74] But a treaty recognition of titles does not change their character,[75] and, in order to the confirmation of a grant by the court of private land claims, it must appear, not only that the title was lawfully and regularly derived, but that if the grant were not complete and perfect, the claimant could, by right and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States.[76] Under the eighth article of the Florida treaty,

66. Grant *v.* Jaramillo, 6 N. M. 313, 28 Pac. 508; Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692]; Rio Arriba Land, etc., Co. *v.* U. S., 167 U. S. 298, 17 S. Ct. 875, 42 L. ed. 175; Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673; Astiazaran *v.* Santa Rita Land, etc., Co., 148 U. S. 80, 13 S. Ct. 457, 37 L. ed. 376.

Equitable rights claimed by an individual, by virtue of a treaty, in the territory ceded by one sovereignty to another cannot be adjudicated and established by the courts until the political department provides the remedy. Haynes *v.* State, (Tex. Civ. App. 1905) 85 S. W. 1029, holding that Tex. Sess. Laws (1901), p. 4, c. 4, authorized the adjudication of imperfect or equitable titles having their origin in a grant of the Mexican government.

67. Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863.

68. Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692]; Rio Arriba Land, etc., Co. *v.* U. S., 167 U. S. 298, 17 S. Ct. 875, 42 L. ed. 175; Astiazaran *v.* Santa Rita Land, etc., Co., 148 U. S. 80, 13 S. Ct. 457, 37 L. ed. 376; Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863.

69. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863.

70. Rio Arriba Land, etc., Co. *v.* U. S., 167 U. S. 298, 17 S. Ct. 875, 42 L. ed. 175; Astiazaran *v.* Santa Rita Land, etc., Co., 148 U. S. 80, 13 S. Ct. 457, 37 L. ed. 376; Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863. See also Barker *v.* Hervey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692].

71. Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137.

72. Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Haynes *v.* State, (Tex. Civ. App. 1905) 85 S. W. 1029; State *v.* Russell, 38 Tex Civ. App. 13, 85 S. W. 288; Rio Arriba Land, etc., Co. *v.* U. S., 167 U. S. 298, 17 S. Ct. 875, 42 L. ed. 175; Astiazaran *v.* Santa Rita Land, etc., Co., 148 U. S. 80, 13 S. Ct. 457, 37 L. ed. 376; U. S. *v.* Moreno, 1 Wall. (U. S.) 400, 17 L. ed. 633; Smith *v.* U. S., 10 Pet. (U. S.) 326, 9 L. ed. 442.

73. Ward *v.* Mulford, 32 Cal. 365; Teschemacher *v* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Reynolds *v.* West, 1 Cal. 322; Haynes *v.* State, (Tex. Civ. App. 1905) 85 S. W. 1029; Chouteau *v.* U. S., 9 Pet. (U. S.) 147, 9 L. ed. 82; Delassus *v.* U. S., 9 Pet. (U. S.) 117, 9 L. ed. 71. But see Jones *v.* Borden, 5 Tex. 410, holding that imperfect claims to land originating under a former government, which lie in contract not executed, depend on the will of the existing government.

An inchoate grant by Spain, previous to the treaty of Saint Ildefonso, imposed on the United States only a political obligation to validate it so far as it was binding in conscience. Doe *v.* Jones, 11 Ala. 63.

74. Hall *v.* Root, 19 Ala. 378.

75. Lobdell *v.* Clark, 4 La. Ann. 99, holding that the treaty ceding Louisiana to the United States did not change the character of a mere order of survey or requête and permission to settle, given by the French or Spanish sovereign, as conferring only an equitable right to demand a title, as the treaty imposed on the United States only a political obligation to perfect such titles as could not be enforced by a judicial tribunal.

76. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673. See also Glenn *v.* U. S.,

the United States were bound to the same extent that Spain was before the treaty to perfect the titles to lands granted conditionally.[77] The United States government discharges its full duty under the Gadsden treaty where it recognizes a grant as valid to the amount of land paid for.[78] The treaty of February 22, 1819, by which Florida was ceded to the United States, of its own force and without legislation on the subject, ratified and confirmed prior Spanish grants;[79] but the provision that all "grants" made by the Spanish authorities before January 24, 1818, "shall be confirmed" to the persons in possession, etc., applied only to that part of the ceded territory of Florida clearly lying within the bounds of Florida where Spain had a right to grant until the treaty of cession, and did not apply to lands which were claimed by the United States to be within the territory of Louisiana ceded by France to the United States.[80] Land in Missouri held under a French or Spanish concession and survey was not finally severed from the royal domain and converted into private property by the Louisiana treaty of cession, which provided that the inhabitants of the ceded territory were to be protected in their property.[81] Texas is not a Mexican territory within the meaning of the clause of the treaty of Gaudalupe Hidalgo, providing for the security of the claims of nonresident Mexicans to lands in the territories of Mexico.[82] Where, on a conquest of territory, a treaty provided that the former inhabitants who wished to adhere in allegiance to their vanquished sovereign might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not sold, became abandoned to the conqueror.[83]

4. Effect of Possession. Where a person settled on land before he had been placed in possession by the proper authority, or had received any evidence of his right to it, he acquired no title, legal or equitable, which could be recognized in a court of justice.[84] Long possession under an inchoate or imperfect Mexican grant may give the grantee an equitable title which should be respected and confirmed;[85]

13 How. (U. S.) 250, 14 L. ed. 133 [*affirming* 10 Fed. Cas. No. 5,481, Hempst. 394].

77. U. S. *v.* Waterman, 14 Pet. (U. S.) 478, 10 L. ed. 550.

78. Camou *v.* U. S., 171 U. S. 277, 18 S. Ct. 855, 43 L. ed. 163.

79. This treaty was executed both in the Spanish and English languages, and article 8 in the English document provided that the prior Spanish grants "shall be ratified and confirmed," while the language of the Spanish document was that the "grants shall remain ratified and confirmed," and it was held that, although the English words were properly words of contract, stipulating for some future legislation confirming the grant, they were not necessarily so, and might mean that the grant should be ratified and confirmed by virtue of the instrument itself, and therefore would be given this construction, in conformity with the Spanish document and the law of nations. U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 8 L. ed. 604. See also U. S. *v.* Wiggins, 14 Pet. (U. S.) 334, 10 L. ed. 481; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 597.

80. Garcia *v.* Lee, 12 Pet. (U. S.) 511, 9 L. ed. 1176.

81. Les Bois *v.* Brannell, 4 How. (U. S.) 449, 11 L. ed. 1051.

82. McKinney *v.* Saviego, 18 How. (U. S.) 235, 15 L. ed. 365.

83. U. S. *v.* Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627.

84. Jenkins *v.* Chambers, 9 Tex. 167, holding that even a survey, without a concession or order of survey, would not be a legal appropriation of the land, and a subsequent title, issued by the proper authority, is a title only from its date. See also McManus *v.* O'Sullivan, 48 Cal. 7.

The title of the Spanish government to alienate public lands in the Philippine Islands could not be divested by adverse occupancy alone, no matter over how long a period it might have extended. And the Spanish government, while recognizing the right of an occupant of alienable public lands to a deed upon proof of possession for a sufficient length of time, always required the occupant to make that proof to the proper officers, and obtain from them a deed, and until compliance with which requisite title to the land so occupied remained vested absolutely in the state. Valenton *v.* Murciano, 3 Philippine 537.

Possession for six or seven years before the treaty of Guadalupe Hidulgo is not sufficient to constitute a title which can be confirmed under the court of private land claims act, where a valid grant is not proved to have been made. Hays *v.* U. S., 175 U. S. 248, 20 S. Ct. 80, 44 L. ed. 150.

85. U. S. *v.* Pico, 27 Fed. Cas. No. 16,048, 1 Sawy. 347 (holding that, where the papers relating to a Mexican grant were produced from the archives and were regular in all respects, including the approval of the grant by the departmental assembly, but there was a doubt as to its validity, arising from the

but where no grant, either perfect or inchoate, was made, nor any promise given that a grant would be made, mere occupation by the petitioner pending his application for the land does not constitute a valid claim.[86] And possession of Mexican lands under a written permit from the Spanish government will not warrant the presumption of a grant thereof, no matter how long continued.[87] A void Spanish grant, accompanied by possession, and a survey of the land after the passage of the act of 1804, prohibiting such surveys, conferred no title whatever on the claimants, when considered in the courts of justice, unless their possession was sufficient to bring them within the act of 1829, and created no obligation on the United States to recognize their claim.[88] The possession of lands in the Philippine Islands which would, under the Public Land Act, raise a presumption of the performance of the conditions essential to a government grant and the receipt of such a grant, must have been a physical occupation of the land.[89] Possession since the date of the treaty of cession, no matter how notorious or exclusive, cannot be regarded as an element going to make up a perfect title under the ceding sovereignty.[90]

C. Grants Under Former Government — 1. Power to Make Grants — a. In General. In order for an alleged grant under a former government to be entitled to any recognition by the United States, the grant must have emanated from a public official having power to make the same,[91] and acting under the

fact that the grantee himself was acting governor, and made out the papers to himself, according to a petition presented to a previous governor and a provisional possession conferred long before, such provisional occupation, which lasted some sixteen years to the time of making the grant, was sufficient to entitle the claimant to a confirmation); U. S. *v.* Soto, 27 Fed. Cas. No. 16,357, Hoffm. Land Cas. 182 (holding that, where it appears that the governor intended to accede to the petition for a Mexican grant in California, and the land has been long occupied and enjoyed under the grant or promise to grant, and by everybody recognized as belonging to the grantee, the latter has an equitable title which the United States should respect).

The bare possession of land for a year before the conquest of California was not sufficient to establish an equity overcoming the settled rule of practice requiring record evidence in support of titles, having source in the Mexican government. Peralta *v.* U. S., 3 Wall. (U. S.) 434, 18 L. ed. 221.

86. Romero *v.* U. S., 20 Fed. Cas. No. 12,029, Hoffm. Land Cas. 219.

87. Nieto *v.* Carpenter, 21 Cal. 455.

88. Eslava *v.* Bolling, 22 Ala. 721.

89. Tiglao *v.* Insular Government, 7 Philippine 80.

90. Hays *v.* U. S., 175 U. S. 248, 20 S. Ct. 80, 44 L. ed. 150; Crespin *v.* U. S., 168 U. S. 208, 18 S. Ct. 53, 42 L. ed. 438.

91. Woodworth *v.* Fulton, 1 Cal. 295; Jones *v.* Garza, 11 Tex. 186; Sheldon *v.* Milmo, (Tex. Civ. App. 1894) 29 S. W. 832; Tuxon *v.* U. S., 171 U. S. 244, 18 S. Ct. 849, 43 L. ed. 151 [*following* Ely *v.* U. S., 171 U. S. 220, 18 S. Ct. 840, 43 L. ed. 142; Hayes *v.* U. S., 170 U. S. 637, 18 S. Ct. 735, 42 L. ed. 1174]; U. S. *v.* Coe, 170 U. S. 681, 18 S. Ct. 745, 42 L. ed. 1195; U. S. *v.* Moore, 12 How. (U. S.) 209, 13 L. ed. 958; Chouteau *v.* U. S., 9 Pet. 137, 9 L. ed. 78. See also Hubbard *v.* Barry, 21 Cal. 321; Haynes *v.* State, (Tex. Civ. App. 1905) 85 S. W. 1029; U. S. *v.* Delespine, 15 Pet. (U. S.) 319, 10 L. ed. 753.

Satisfaction of court.— In order to the confirmation of any claim, the court of private land claims must be satisfied not merely of the regularity in form of the proceedings, but also that the official body or person assuming to make the grant was vested with authority or that the exercise of power, if unwarranted, was subsequently lawfully ratified; and the same rule applies to the supreme court of the United States on appeal. Tuxon *v.* U. S., 171 U. S. 244, 18 S. Ct. 849, 43 L. ed. 151 [*following* Ely *v.* U. S., 171 U. S. 220, 18 S. Ct. 840, 43 L. ed. 142; Hayes *v.* U. S., 170 U. S. 637, 18 S. Ct. 735, 42 L. ed. 1174].

The departmental assembly of California, under the Mexican government, had no power to authorize the sale of any lands other than those of the department. It could not confer upon the governor any power over the domain of the nation; its authority on that subject being limited, by the colonization laws, to the approval or disapproval of grants made by the governor under those laws. Mora *v.* Foster, 17 Fed. Cas. No. 9,784, 3 Sawy. 469 [*affirmed* in 98 U. S. 425, 25 L. ed. 191].

The governor of Coahuila and Texas, under the decree of Feb. 24, 1805, did not, it seems, possess the power of complete alienation over the public domain; but his authority was limited to the incipient measures in the transfer of lands, and these were subject to the revision, and required the approval, of the intendant of the intendancy of San Luis Potosi. Paschal *v.* Perez, 7 Tex. 348.

Grant to son of officer.—A Mexican commissioner for extending titles to land had no authority to extend a title to his infant son, and one so extended was void. De Leon *v.* White, 9 Tex. 598, where the court was of the opinion that the principle would be the same if the son were of full age.

authority of the government which at the time owned the soil and exercised sovereignty over it,[92] and the grant must have been made for such purposes as were authorized by the laws of such government,[93] and the land must have been of the character which the officer had power to grant.[94]

b. Officers Empowered to Make Grants.[95] The king of Spain delegated to the governor of Louisiana, while it was a Spanish province, the right to concede or grant to individuals parts of the land belonging to the public domain;[96] but by a royal decree of October 22, 1798, the power to grant lands was taken from the governor of the province of Louisiana and restored to the intendant.[97] The Spanish

92. See the following cases as to the validity of grants under particular governments at particular times.

French grants.— U. S. *v.* Ducros, 15 How. (U. S.) 38, 14 L. ed. 591; U. S. *v.* Pillerin, 13 How. (U. S.) 9, 14 L. ed. 28; Montault *v.* U. S., 12 How. (U. S.) 47, 13 L. ed. 887; U. S. *v.* D'Auterive, 10 How. (U. S.) 609, 13 L. ed. 560.

Mexican grants.— Brown *v.* O'Connor, 1 Cal. 419; State *v.* Bustamente, 47 Tex. 320; Martin *v.* Weyman, 26 Tex. 460; Donaldson *v.* Dodd, 12 Tex. 381; Rivers *v.* Foote, 11 Tex. 662; U. S. *v.* Pena, 175 U. S. 500, 20 S. Ct. 165, 44 L. ed. 251; More *v.* Steinbach, 127 U. S. 70, 8 S. Ct. 1067, 32 L. ed. 51; Alexander *v.* Routet, 13 Wall. (U. S.) 386, 20 L. ed. 564; Stearns *v.* U. S., 6 Wall. (U. S.) 589, 18 L. ed. 843; U. S. *v.* Yorba, 1 Wall. (U. S.) 412, 17 L. ed. 635; U. S. *v.* Wilson, 1 Black (U. S.) 267, 17 L. ed. 142; U. S. *v.* Pico, 23 How. (U. S.) 321, 16 L. ed. 464 [*reversing* 19 Fed. Cas. No. 11,130, Hoffm. Land Cas. 279]; Palmer *v.* U. S., 18 Fed. Cas. No. 10,697, Hoffm. Land Cas. 249 [*affirmed* in 24 How. 125, 16 L. ed. 609].

Spanish grants.— Eslava *v.* Bolling, 22 Ala. 721; Doe *v.* Jones, 11 Ala. 63; Hallett *v.* Doe, 7 Ala. 882; Pollard *v.* Files, 3 Ala. 47; Pollard *v.* Kibbe, 9 Port. (Ala.) 712; Davis *v.* Concordia, 1 La. Ann. 288; Garcia *v.* Hatchell, 8 Mart. N. S. (La.) 398; U. S. *v.* Lynde, 131 U. S. appendix lxix; U. S. *v.* Perot, 98 U. S. 428, 25 L. ed. 251; U. S. *v.* Watkins, 97 U. S. 219, 24 L. ed. 952; Clark *v.* Braden, 16 How. (U. S.) 635, 14 L. ed. 1090; U. S. *v.* Power, 11 How. (U. S.) 570, 13 L. ed. 817; Robinson *v.* Minor, 10 How. (U. S.) 627, 13 L. ed. 568; La Roche *v.* Jones, 9 How. (U. S.) 155, 13 L. ed. 85; U. S. *v.* Reynes, 9 How. (U. S.) 127, 13 L. ed. 74; Pollard *v.* Filis, 2 How. (U. S.) 591, 11 L. ed. 391; U. S. *v.* Clarke, 16 Pet. (U. S.) 228, 10 L. ed. 946; U. S. *v.* Huertas, 8 Pet. (U. S.) 488, 8 L. ed. 1019; U. S. *v.* Fernandez, 10 Pet. (U. S.) 303, 9 L. ed. 434; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415; Henderson *v.* Poindexter, 12 Wheat. (U. S.) 530, 6 L. ed. 718.

The law of the Spanish cortes of January, 1813, cannot authorize grants of Mexican lands, made after the change of government, without some express recognition of that law by the Mexican congress, and there has been none. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

After the signing of the treaty of Guadalupe Hidalgo neither a prefect nor an alcalde had power to make a grant of lands on behalf of the Mexican government. U. S. *v.* Pena, 175 U. S. 500, 20 S. Ct. 165, 44 L. ed. 251.

Preëxisting rights of grantee not affected by unauthorized issuance of title.— The issuing, by the governor of Tamaulipas, after his power to do so had ceased, of a final title to lands, formerly within the state of Tamaulipas, but by the act of Dec. 19, 1836, declared part of the territory of Texas, took away no existing right of the grantee to the land, on which such unauthorized act was based. Haynes *v.* State, (Tex. 1907) 100 S. W. 912 [*reversing* (Civ. App. 1905) 85 S. W. 1029].

93. U. S. *v.* Vigil, 13 Wall. (U. S.) 449, 20 L. ed. 602, holding that a grant by a departmental assembly, under the former Mexican government, of a large tract of land in New Mexico, on nominal conditions as to occupancy, was void, under the established rule that, under the laws of Mexico governing land grants, the departmental assemblies could make grants only for the purposes of settlement and cultivation.

On a trial at law, it may be shown that a grant of land at Mobile, purporting to have been made by an officer of Spain while that government was in possession of the country, was unauthorized, and consequently void. Doe *v.* Jones, 11 Ala. 63.

94. Bouldin *v.* Phelps, 30 Fed. 547, holding that the governor of California had no authority under the despatch of 1838, issued by the Mexican government, to grant Mare Island, as it was not a "desert island, adjacent to the department."

95. **An historical account** as to what officer in Louisiana possessed the power to grant part of the king's domains is given in U. S. *v.* Moore, 12 How. (U. S.) 209, 217–219, 13 L. ed. 958.

Power of particular individuals holding office from time to time see Choppin *v.* Michel, 11 Rob. (La.) 233; Murdock *v.* Gurley, 5 Rob. (La.) 457; McGehee *v.* Dwyer, 22 Tex. 435; Hamilton *v.* Avery, 20 Tex. 612; Wheeler *v.* Moody, 9 Tex. 372; U. S. *v.* Moore, 12 How. (U. S.) 209, 13 L. ed. 958; Les Bois *v.* Bramell, 4 How. (U. S.) 449, 11 L. ed. 1051.

96. De Armas *v.* New Orleans, 5 La. 132.

Grant of land in West Florida.— The governor of Louisiana had authority over the governor of West Florida, and could grant lands in that province. Murdock *v.* Gurley, 5 Rob. (La.) 457.

97. Choppin *v.* Michel, 11 Rob. (La.) 233;

governor of Florida had authority to issue grants of land,[98] and the governor and departmental assembly of California had power to make grants of lands within the general limits of pueblos.[99] The commandants of posts in the Spanish colonies had power to make inchoate titles to lands within their jurisdiction,[1] and in Upper Louisiana the lieutenant-governor was also a subdelegate, and as such was empowered to make inchoate grants.[2] Two persons might be empowered to grant lands within the same territorial limits without an exclusive right in either, and the grant of either would be effectual to pass the title of the government and vest it in the grantee.[3] Under the Spanish government, previous to the Mexican revolution, the authority to grant land was vested in the intendant,[4] or in the military commandants and governors,[5] subject to confirmation by the intendant.[6] These offices were abrogated and superseded by the consummation of the independence of Mexico,[7] and the public domain became thereby vested in the supreme government[8] until the formation of the states and its transfer by the supreme government to them,[9] during which time authority to grant lands must have emanated from the general government.[10] The power of political chiefs of provinces to grant lands after Mexican independence commenced with the state colonization law of 1825,[11] and prior to that time the political chief of a province was not authorized to grant lands forming part of the public domain,[12] unless authority to do so was expressly delegated to him,[13] and all titles issued by such officers prior to that time and not confirmed by the subsequent colonization laws are null and void.[14] Where a concession of land, in sale, under the colonization law of 1825, to a person who was secretary of state at the time, was authenticated by the "first officer," instead of the secretary of state, the objection was not of a character to invalidate the title.[15] The Mexican decree of March 26, 1834, No. 272, repealing all former instructions inconsistent with it, and declaring that no further colonization contracts should be made, did not divest the governor of authority to complete the titles where there had been concessions already made under the law of 1825.[16] Where a grant of a particular tract was made under a mistake of fact, the officer's power to issue title to another tract was not affected.[17] The department assembly or territorial deputation of New Mexico in 1831 had no power or authority to make a grant of lands.[18] A prefect in California had no authority to grant lands.[19]

Murdock *v.* Greeley, 5 Rob. (La.) 457. See also De Armes *v.* New Orleans, 5 La. 132.

98. U. S. *v.* Acosta, 1 How. (U. S.) 24, 11 L. ed. 33.

99. Brown *v.* San Francisco, 16 Cal. 451.

1. U. S. *v.* Davenport, 15 How. (U. S.) 1, 14 L. ed. 575.

In 1796, Delassus, as commandant of the port of New Madrid, exercised the powers of subdelegate, and had authority under the instructions of the governor-general of Louisiana, to make conditional grants of land. Glenn *v.* U. S., 13 How. (U. S.) 250, 14 L. ed. 133 [*affirming* 10 Fed. Cas. No. 5,481, Hempst. 394].

2. Chouteau *v.* U. S., 9 Pet. (U. S.) 137, 9 L. ed. 78.

3. Howard *v.* Richeson, 13 Tex. 553.

4. Jones *v.* Muisbach, 26 Tex. 235; Sheldon *v.* Milmo, (Tex. Civ. App. 1894) 29 S. W. 832.

5. Jones *v.* Muisbach, 26 Tex. 235.

6. Jones *v.* Muisbach, 26 Tex. 235.

7. Jones *v.* Muisbach, 26 Tex. 235.

8. Jones *v.* Muisbach, 26 Tex. 235.

9. Jones *v.* Muisbach, 26 Tex. 235.

10. Jones *v.* Muisbach, 26 Tex. 235.

11. Jones *v.* Garza, 11 Tex. 186.

In 1847, previous to the treaty, the political head of the department had authority to make grants of land and transfers of title within the limits of the pueblo of San Francisco, the exercise of which could not be interfered with or defeated by any subsequent action of the pueblo or its officers. Leese *v.* Clarke, 18 Cal. 535.

12. Pino *v.* Hatch, 1 N. M. 125; Holliday *v.* Harvey, 39 Tex. 670; Yancey *v.* Norris, 27 Tex. 40; Jones *v.* Garza, 11 Tex. 186 [*approved* in Norton *v.* Mitchell, 13 Tex. 47];

13. Pino *v.* Hatch, 1 N. M. 125; Jones *v.* Muisbach, 26 Tex. 235.

14. Jones *v.* Garza, 11 Tex. 186 [*followed* in Yancey *v.* Norris, 27 Tex. 40].

15. Hancock *v.* McKinney, 7 Tex. 384.

16. Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

17. Howell *v.* Hanrick, (Tex. Civ. App. 1894) 24 S. W. 823.

18. Chavez *v.* U. S., 175 U. S. 552, 20 S. Ct. 201, 44 L. ed. 269.

19. De la Guerra *v.* Santa Barbara, 117 Cal. 528, 49 Pac. 733 (holding that a title to pueblo lands conveyed by a prefect was adverse to that of the pueblo); Crespin *v.* U. S., 168 U. S. 208, 18 S. Ct. 53, 42 L. ed. 438, (holding that therefore a grant made by such a prefect, which was not shown to have been

Under the Mexican system the alcalde was the chief executive officer of a pueblo, or town,[20] and as such had authority to make grants of pueblo lands,[21] subject to the authority lodged in the ayuntamiento, or municipal council,[22] and the still higher authority of the departmental governor and assembly.[23] A title was not invalidated by the fact that the land did not lie within the municipality of the alcalde who issued it, but it was sufficient if it "pertained" to his jurisdiction.[24] Under the Mexican colonization law of 1825, the alcalde had no power to make grants of the public lands,[25] except when specially empowered by the governor.[26] The principales of the towns in the Philippine Islands had no power to convey title to the public lands.[27] The military governors and officers of the United States army who occupied California before the organization of the state had no power to grant lands,[28] or confirm titles,[29] or to reserve from disposition any part of the pueblo lands or of the public property of the United States.[30] Neither did an American alcalde, during the war between the United States and Mexico, have any authority from either government to make grants of public lands.[31]

c. Presumption as to Authority. It is presumed that the officer by whom a grant was made possessed the power to make it and in so doing acted within his authority,[32] and the burden of proving the contrary is upon the party opposing

approved by the governor or other superior Mexican authority, was void, and the fact that similar grants may have been confirmed by congress, or have received the approval of the Mexican authorities, is not sufficient ground for recognizing such a grant as valid.

20. Cohas *v.* Raisin, 3 Cal. 443; Merryman *v.* Bourne, 9 Wall. (U. S.) 592, 19 L. ed. 683.

21. White *v.* Moses, 21 Cal. 34; Cohas *v.* Raisin, 3 Cal. 443; Reynolds *v.* West, 1 Cal. 322; Merryman *v.* Bourne, 9 Wall. (U. S.) 592, 19 L. ed. 683.

Where no organization of a colony by settlement had taken place, the land might be sold with the consent of the empresario of the grant; and the alcalde was a competent and proper person to complete the titles and put the purchaser in possession. Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902.

22. Merryman *v.* Bourne, 9 Wall. (U. S.) 592, 19 L. ed. 683. See also Redding *v.* White, 27 Cal. 282.

23. Merryman *v.* Bourne, 9 Wall. (U. S.) 592, 19 L. ed. 683.

The law of 1826 seems to contemplate that the first step toward obtaining a land grant should be a petition to the governor. The application was to be referred by him to the proper alcalde whose duty it was to make the appropriate decree in reference to the examining, measuring, and marking out of the land designated after citing the adjoining proprietors, if there should be any. These proceedings, if no opposition were interposed, were to be passed by the alcalde to the executive of the state, by whom the title of adjudication to ownership should be issued to the person interested, ordering that the alcalde of the town of his residence put him immediately in possession of the land granted. The proceedings before the governor were to be conducted officially and the executive was to proceed with the orders of the fiscal of the supreme court of the state. But whilst the more regular plan may have been to apply in the first place to the executive, it seems that in practice these applications were frequently made to the alcalde or to the ayuntamiento. State *v.* De Leon, 64 Tex. 553, holding that the fact that it was the custom to apply to an alcalde or to the ayuntamiento justifies a decision that a title to land would not be invalidated by the fact that the petition for such land was made in accordance with the custom, and not to the governor.

24. Martin *v.* Parker, 26 Tex. 253.

25. Howell *v.* Hanrick, 88 Tex. 383, 29 S. W. 762, 30 S. W. 856, 31 S. W. 611; Owen *v.* Presidio Min. Co., 61 Fed. 6, 9 C. C. A. 338.

26. Howell *v.* Hanrick, 88 Tex. 383, 29 S. W. 762, 30 S. W. 856, 31 S. W. 611, holding that, after an alcalde had made a valid grant of eleven leagues of land, in pursuance of authority conferred by a concession and order of the governor for that amount, any further grant made under such concession and order was void.

Execution of commission by regidor.— Where a commission to extend a title was directed to an alcalde, and was executed by the first regidor, this was sufficient; the first regidor filling the place of the alcalde, in the case of the decease, legal impediment, or vacancy of the office of the latter. Edwards *v.* James, 7 Tex. 372.

27. Evangelista *v.* Bascos, 5 Philippine 255 [*followed* in Tiglao *v.* Insular Government, 7 Philippine 80].

28. Woodworth *v.* Fulton, 1 Cal. 295; Mumford *v.* Wardwell, 6 Wall. (U. S.) 423, 18 L. ed. 756; U. S. *v.* Hare, 26 Fed. Cas. No. 15,303, 4 Sawy. 653.

29. Mumford *v.* Wardwell, 6 Wall. (U. S.) 423, 18 L. ed. 756.

30. U. S. *v.* Hare, 26 Fed. Cas. No. 15,303, 4 Sawy. 653.

31. Woodworth *v.* Fulton, 1 Cal. 295.

32. *California.*— De Castro *v.* Fellom, 135 Cal. 225, 67 Pac. 142; Brown *v.* San Francisco, 16 Cal. 451; Payne *v.* Treadwell, 16 Cal. 220; Hart *v.* Burnett, 15 Cal. 530; Den

the title claimed under the grant.[33] There is, however, no such presumption in favor of a grant of an officer who was without authority to make grants under the governmental system prevailing at the time.[34]

d. Grant Outside of Territorial Jurisdiction of Officer. The title to a colony grant issued in good faith, and within the limits in which the officer issuing it was accustomed to exercise his jurisdiction, and within the limits to which he might reasonably have concluded his authority extended, is not void on the ascertain-

v. Den, 6 Cal. 81; Cohas *v.* Raisin, 3 Cal. 443; Reynolds *v.* West, 1 Cal. 322.

Louisiana.— Devall *v.* Choppin, 15 La. 566; Landry *v.* Martin, 15 La. 1.

Mississippi.— Winn *v.* Cole, Walk. 119.

Philippines.— Campañia General de Tabacos de Filipinas *v.* Topiño, 4 Philippine 33.

Texas.— Sheldon *v.* Milmo, 90 Tex. 1, 36 S. W. 413; Dittmar *v.* Dignowitty, 78 Tex. 22, 14 S. W. 268 (holding that, where the governor of the province of Texas in 1818, granted to an individual land within the limits of a cession made about 1733 by the king of Spain to the city of San Antonio, it would be presumed that the cession did not deprive the Spanish government of power to confer title on individuals, and that the grant by the provincial governor was within his authority); Johns *v.* Schutz, 47 Tex. 578 [*followed* in Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356]; Martin *v.* Parker, 26 Tex. 253; Burleson *v.* McGehee, 15 Tex. 375; Ryan *v.* Jackson, 11 Tex. 391; Uhl *v.* Musquez, 1 Tex. Unrep. Cas. 650.

United States.— Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801; U. S. *v.* Peralta, 19 How. 343, 15 L. ed. 678; Strother *v.* Lucas, 12 Pet. 410, 9 L. ed. 1137; Delassus *v.* U. S., 9 Pet. 117, 9 L. ed. 71; Glenn *v.* U. S., 10 Fed. Cas. No. 5,481, Hempst. 395; U. S. *v.* Sherebeck, 27 Fed. Cas. No. 16,275, Hoffm. Land Cas. 11; Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

See 41 Cent. Dig. tit. "Public Lands," § 629.

A grant of public land made by a special commissioner whose want of authority has not been shown, and whose acts have not been repudiated by the government, conveys good title. Groesbeck *v.* Golden, (Tex. 1887) 7 S. W. 362.

Limitation as to grants in California by Mexican governor shortly before territory acquired by United States.— The rule that public acts of public officers shall, in absence of proof to the contrary, be presumed to have been done in the exercise of a legitimate authority, applies with but little force to grants of land made by the Mexican governor of California, within a few weeks before the territory passed from his hands, and during the heat and conflict of the struggle in which his power was overthrown, especially where the evidence that the formalities required by law were observed is imperfect and unsatisfactory, and rests wholly in parol, where it does not appear that any preliminary inquiries were made as to the point on which he is supposed to have exceeded his authority, and where his situation and the mode in which he exercised his authority in other cases about the same time suggests a suspicion of carelessness and recklessness in the exercise of his powers. U. S. *v.* Cambuston, 25 Fed. Cas. No. 14,713, 7 Sawy. 575.

Act contrary to royal order.— Where the act of an officer to pass the title to land is done contrary to the written order of the king, produced at the trial, without any explanation, it will be presumed that the power has not been exceeded, and that the act was done on the motives set out therein, and according to some orders known to the king and his officers, although not to his subjects, and courts ought to require very full proof that the officer transcended his powers before they so determine. Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137.

33. Reynolds *v.* West, 1 Cal. 322; Devall *v.* Choppin, 15 La. 566; Lantry *v.* Martin, 15 La. 1; Ryan *v.* Jackson, 11 Tex. 391; U. S. *v.* Peralta, 19 How. (U. S.) 343, 15 L. ed. 678; Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137.

Proof of a mere error of the officer, in extending a title to one in fact not legally entitled, but whom he supposed to be, does not show a want of authority of the officer which renders the title void. Hanrick *v.* Jackson, 55 Tex. 17.

34. Mitchell *v.* Furman, 180 U. S. 402, 21 S. Ct. 430, 45 L. ed. 596 (holding that authority of a Spanish officer to make a conveyance of the public domain cannot be presumed from the mere fact of the conveyance, in the absence of other evidence, where he had no authority *ex officio* to do so); Goode *v.* McQueen, 3 Tex. 241 (holding that as the authority to control lands within what was known as the "border and coast leagues" was retained by the government of Mexico, no presumption can arise in favor of a grant made by the executive of the state of Texas and Coahuila until it is first shown by proof that the power to make the grant had been conferred on him); Owen *v.* Presidio Min. Co., 61 Fed. 6, 9 C. C. A. 338 (holding that the fact of the making of a grant of land by an official of the state of Chihuahua raises no presumption that he had power to do so, if the grant was executed after the adoption of the colonization law of May 25, 1825); Bouldin *v.* Phelps, 30 Fed. 547 (holding that power in the governor of California, after the passage of the colonization law of 1824, to make a grant otherwise than on the terms and conditions thereby prescribed, will not be presumed from the fact that he made the grant). See also Ely *v.* U. S., 171 U. S. 220, 18 S. Ct. 840, 43 L. ed. 142.

ment of the fact, years afterward, that it was a short distance beyond his colonial limits.[35] Neither is it any objection to a title extended by the commissioner of a colony, acting in that instance by virtue of a special authority to extend the title in question, that the land granted was without the limits of his colony.[36] A grant purporting to convey land lying within the limits of a colony will be void, if the land in fact lies outside such limits, unless the officer extending the title, as well as the grantee, acted with reasonable ground to believe that the land was actually situated within the colony.[37]

2. Land Subject to Grant. All unappropriated territory in the provinces belonged to the sovereign.[38] The jurisdiction of officers of the ruling sovereignty extended only so far as to make grants of public lands,[39] and they could not grant land which was private property.[40] And it has been considered that if by a stretch of arbitrary power the preceding government has granted public places, such as roads and streets to private individuals, such grants may be declared void.[41] Under the treaty of 1783, by which Great Britain retroceded to Spain the Floridas, etc., and which stipulated that "British inhabitants, or others who may have been subjects of the king of Great Britain in the said provinces," might sell their estates, and remove their persons and effects without restraint, within a prescribed period, and the emigration of such persons must be within that period, unless the period should be prolonged by a royal order of Spain, if a person coming within either of these classes failed to dispose of his land, or obtain a confirmation of his right to enjoy it, as provided by the treaty and consequent royal orders, but left the country and resided abroad, his claim was forfeited to Spain, and might be regranted by Spanish authority during the period of its rightful dominion over the territory.[42] By the usages of the Spanish government, a double concession of land could be granted only in the rear of the front tract.[43] Under the Mexican system the large tracts of land appurtenant to the mission establishments were never vested in the church or any other corporation or individual by any grant of a legal title;[44] but the missionaries and Indians had an usufruct or occupancy of the land at the will of the sovereign,[45] and in 1833 and 1834 the Mexican government passed laws to secularize the missions,[46] subsequent to which time the public authorities granted these lands to individuals the same as other lands.[47]

3. Area Which Might Be Granted. Under the Mexican law of 1824 no more

35. Ledyard *v.* Brown, 27 Tex. 393. See also Sideck *v.* Duran, 67 Tex. 256, 3 S. W. 264.

36. McGehee *v.* Dwyer, 22 Tex. 435, so holding on the ground that the authority conferred was independent of his office.

37. Sheirburn *v.* Hunter, 21 Fed. Cas. No. 12,744, 3 Woods 281.

38. De Armas *v.* New Orleans, 5 La. 132, so holding as to Louisiana while under Spanish dominion.

39. Castillero *v.* U. S., 2 Black (U. S.) 17, 17 L. ed. 360.

40. Castillero *v.* U. S., 2 Black (U. S.) 17, 17 L. ed. 360.

41. New Orleans *v.* Metzinger, 3 Mart. (La.) 296.

42. Doe *v.* Eslava, 11 Ala. 1028.

43. Broussard *v.* Gonsoulin, 12 Rob. (La.) 1.

44. U. S. *v.* Cervantes, 18 How. (U. S.) 553, 15 L. ed. 484 [*affirming* 5 Fed. Cas. No. 2,560].

Grantable land within pueblo or mission.— Where land within the general limits of the pueblo of San Francisco and also within the limits of the old "mission" was granted to an individual by the governor and departmental assembly in 1839–1840, before the mission had been entirely secularized, it would seem to have been, at the date of the grant, exempt from the exercise of pueblo rights over it, and must be presumed to have been grantable just as any other land previously occupied by the mission establishment, but not exclusively dedicated to pious uses. Brown *v.* San Francisco, 16 Cal. 451.

45. U. S. *v.* Cervantes, 18 How. (U. S.) 553, 15 L. ed. 484 [*affirming* 5 Fed. Cas. No. 2,560].

46. U. S. *v.* Cervantes, 18 How. (U. S.) 553, 15 L. ed. 484 [*affirming* 5 Fed. Cas. No. 2,560]; U. S. *v.* Ritchie, 17 How. (U. S.) 525, 15 L. ed. 236.

47. See also Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692]; U. S. *v.* Cervantes, 18 How. (U. S.) 553, 15 L. ed. 484 [*affirming* 5 Fed. Cas. No. 2,560]; U. S. *v.* Ritchie, 17 How. (U. S.) 525, 15 L. ed. 236.

The governor of California had no power, on June 8, 1846, to make a valid sale and grant of the mission of San Gabriel in California. U. S. *v.* Workman, 1 Wall. (U. S.) 745, 17 L. ed. 705.

than eleven leagues of land were permitted to be united in one hand as property,[48] and where a person had a grant of one tract a subsequent grant of a different tract could be for only so much as would make the total eleven leagues.[49] The restriction was, however, after the full organization of the state government, recommendatory merely, and not binding on the states.[50] Under the Mexican colonization law of 1825 the executive had authority to make a grant of six leagues to a settler,[51] and to increase the quantity in proportion to the family, industry, and activity of the applicant,[52] as to which qualifications the executive was the judge,[53] and his decision was final unless fraud on the part of the grantee was shown.[54] Under the colonization laws of Tamaulipas of December 15, 1826, a grant of three leagues, or any quantity less than five leagues, could be made.[55] The power of the municipal authorities under the Mexican law to grant or lease pueblo lands was limited to the granting of house lots for building purposes, and lots two hundred varas square, called suertes, for cultivating or planting as gardens, vineyards, orchards, etc.[56] Governor Figueroa's regulations of secularization of August 9, 1834, limiting grants to individuals to four hundred varas square, did not apply to pueblo lands, or limit the granting power of the governor and departmental assembly.[57] The supreme court of Texas has said that it knows no law of the Indies, which prohibited the grant of more than four leagues of land to a town, as exidos.[58] Where a law provided for the payment of an officer's salary in land at a certain price per league, it was properly left to the commissioner to determine how much land the officer should receive.[59] Where a valid grant was made by the Mexican authorities, pursuant to a Mexican concession, for the full amount of land embraced therein, a subsequent grant under the same concession was absolutely void, and the land covered was subject to appropriation by subsequent settlers.[60]

4. Estate Which Might Be Granted. Under the Mexican law the ayuntamiento of a pueblo had no power to grant lands, within the limits of propios duly and formally assigned to the pueblo, so as to create a greater estate in them than a leasehold for five years.[61]

5. Persons to Whom Grants Might Be Made. Indians had a right to receive grants of land under the Mexican laws.[62] The earlier colonization laws of Mexico

48. The statute provided that it should not be permitted to unite in one hand as property more than one league of irrigable land, four leagues of farming land not irrigable, and six for stock raising. U. S. *v.* Hartnell, 22 How. (U. S.) 286, 16 L. ed. 340 [*affirming* 26 Fed. Cas. No. 15,317, Hoffm. Land Cas. 207].

49. U. S. *v.* Hartnell, 22 How. (U. S.) 286, 16 L. ed. 340 [*affirming* 26 Fed. Cas. No. 15,317, Hoffm. Land Cas. 207].

Abandonment of prior grant.— Where two grants, each for eleven leagues, were shown in the name of the same grantee, the failure to show that a testimonio issued of the first grant raises no presumption that it was abandoned before the second grant issued. Hanrick *v.* Dodd, 62 Tex. 75.

50. Chambers *v.* Fish, 22 Tex. 504.

51. Jenkins *v.* Chambers, 9 Tex. 167.

52. Jenkins *v.* Chambers, 9 Tex. 167.

53. Jenkins *v.* Chambers, 9 Tex. 167.

54. Jenkins *v.* Chambers, 9 Tex. 167.

55. State *v.* Sais, 60 Tex. 87.

56. Redding *v.* White, 27 Cal. 282, holding that the municipal authorities of a pueblo in 1847 had no power to grant or lease pueblo lands in such a quantity as four hundred acres.

57. Brown *v.* San Francisco, 16 Cal. 451.

58. Lewis *v.* San Antonio, 7 Tex. 288.

59. Chambers *v.* Fisk, 22 Tex. 504, holding that under the custom prevailing, to leave the particular details of the law to be determined and carried out by the executive, neither the law as to the compensation nor the commission to the officer who issued the grant was void.

60. Howell *v.* Hanrick, 88 Tex. 383, 29 S. W. 762, 30 S. W. 856, 31 S. W. 611 [*reversing* (Civ. App. 1894) 24 S. W. 823, and *followed* in Peaslee *v.* Walker, 34 Tex. Civ. App. 297, 78 S. W. 980]. But *compare* Maxey *v.* O'Connor, 23 Tex. 234, holding that where a grantee was entitled to a certain amount and received a grant of a portion thereof his title thereto was not affected by the fact that a subsequent grant to complete his complement was of such an amount that the aggregate exceeded the amount to which he was entitled.

61. U. S. *v.* Berreyesa, 24 Fed. Cas. No. 14,585, holding that therefore possession of lands in a pueblo, under a concession by an officer of the Mexican government having authority only to lease for five years, accompanied by efforts on the part of the occupant to obtain a grant, was not "under claim of ownership."

62. U. S. *v.* Sunol, 27 Fed. Cas. No. 16,421, Hoffm. Land. Cas. 110.

permitted land grants to both foreigners and citizens,[63] but later laws deprived foreigners of the right to acquire land.[64] To constitute a man applying for lands a "head of a family" in the sense used by the colonization laws, it was not necessary that he should have a wife or children, but if he had servants it was sufficient.[65] A woman who was the head of a family was entitled, under the colonization laws of Coahuila and Texas, and under the constitution of the republic of Mexico, to the grant of a league and labor of land.[66] The Mexican authorities held that under the colonization laws two single men constituted a family and were entitled to privileges as such, and such construction is respected by the American courts.[67] There was nothing in the Mexican colonization laws, nor is there any general principle of law, which forbade a colonist to employ an agent or attorney in obtaining his grant.[68] Where a person, formerly of another state, came to Texas in 1834 and acquired a residence, *animo manendi*, his wife and children were constructively there also, although they were actually still at their former home;[69] a person who moved into Texas, not being introduced as a colonist, nor connected with any colonial enterprise, and who had not conformed in any respect to the laws for the distribution of lands, was not entitled to the benefits conferred by the colonization laws.[70] Although the Mexican law did not prohibit a grant to an infant,[71] an unmarried colonist, under the age of twenty-one years, was not entitled to a headright grant of land under the colonization laws.[72] The governor [73] or commissioner of a colony [74] was the judge as to the capacity or qualifications of the applicant or colonist. A grant of land by an alcalde to a deceased person was void.[75] The Spanish regulations of June 25, 1880, did not prohibit grants of land not included

63. This was permitted by the law of 1824. U. S. *v.* Cambuston, 25 Fed. Cas. No. 14,713, 7 Sawy. 575.

Actual residence in the country, previous to the making of a colonial grant, was not necessary to the validity of the title. White *v.* Holliday, 11 Tex. 606.

The colonization laws of Tamaulipas of December 15, 1826, included foreigners as well as citizens, but with a preference to citizens. State *v.* Sais, 60 Tex. 87.

The resolutions of 1828 authorized issuance of titles to native as well as to foreign colonists residing in the Nacogdoches frontier, and the other territory to which the decrees extend. Cowan *v.* Williams, 49 Tex. 380.

64. U. S. *v.* Cambuston, 25 Fed. Cas. No. 14,713, 7 Sawy. 575, holding that the law of Mexico of 1824, which permitted and invited foreigners to settle on the vacant lands of the republic, was repealed by the law of December 29, 1836, which provided "that foreigners cannot acquire real estate in the republic, unless they have been naturalized and married to a Mexican woman, and have otherwise complied with the laws relating to such acquisition. The acquisitions of colonists will be subject to special laws of colonization," and even if it be assumed that the act of 1836 did not repeal the law of 1824, such repeal was effected by the twelfth article of the law of 1842, which provides that "foreigners cannot acquire royal or public lands, in all departments of the republic, without contracting for them with the government, which passes this right as representing the domain of the Mexican nation," and therefore, after the latter act, no unnaturalized foreigner had capacity to receive a grant of land without the express license of the supreme government.

The Mexican governors of California had no authority to remove the disabilities of foreigners in respect to holding lands under the laws of 1836 and 1842; and an attempt to make a grant to a foreigner by executing the necessary papers could not therefore operate as an enfranchisement, which would render the grant effectual. U. S. *v.* Cambuston, 25 Fed. Cas. No. 14,713, 7 Sawy. 575.

The term "Mexican," as used in the Mexican colonization laws, included both native and naturalized citizens. Ruis *v.* Chambers, 15 Tex. 586.

65. Hatch *v.* Dunn, 11 Tex. 708, holding that it made no difference whether those servants were Mexicans or Africans.

66. Edwards *v.* Beavers, 19 Tex. 506.

67. Hardiman *v.* Herbert, 11 Tex. 656.

68. White *v.* Holliday, 11 Tex. 606. See also Martin *v.* Parker, 26 Tex. 253.

69. Russell *v.* Randolph, 11 Tex. 460, holding that where the grantee, after the acquisition of a grant in 1835, returned to his former home after his family, and there died, his heirs were entitled to the grant, although he had represented to the authorities at the time of its acquisition that his family was with him.

70. Kennedy *v.* State, 11 Tex. 108.

71. Palmer *v.* Low, 98 U. S. 1, 25 L. ed. 60.

72. Lockhart *v.* Republic, 2 Tex. 127.

73. Ruis *v.* Chambers, 15 Tex. 586.

74. Howard *v.* Colquhoun, 28 Tex. 134, holding that a grant of a league of land by the commissioner to a colonist could not be impeached on the ground that the colonist was a single man and as such entitled to only a quarter of a league.

75. Montgomery *v.* Bevans, 17 Fed. Cas. No. 9,735, 1 Sawy. 653.

within the "legua comunal" of any pueblo in the Philippine Islands to persons not natives of the islands.[76]

6. Proceedings to Obtain Grant. The failure of a grantee in a Mexican land grant to comply, in presenting and prosecuting his petition for the grant, with the regulations of the Mexican laws governing such petitions does not defeat his title to the land, as against the United States.[77] If the Mexican government did not exact compliance with their regulations, but made a grant without it, the United States is bound by the grant, as Mexico would have been.[78] A variance as to the name of the petitioner is immaterial where he is clearly identified in the grant.[79] The fact that, in obtaining a grant, the grantees applied for and obtained more land than, as appears by their own representation in their petition for the grant, and the facts therein set forth, they were entitled to obtain, does not amount to fraud.[80] Where, from a tract of land known by a particular name, grants of two parcels had been made, and a petition for a grant of the surplus remaining was presented to the governor of the department of California, and to the description of the land solicited these words were added, "the extent of which is about five leagues, more or less," these words were not a limitation on the quantity solicited, but a mere conjectural estimate of the extent of the surplus.[81] A petition to a Mexican governor for a sobrante or surplus of land in California, which was not granted, is no foundation for an equitable claim against the United States;[82] and a requête by which application was made for land to the intendant of the province of Louisiana, in 1801, gives no right without an order of survey.[83]

7. Licenses or Provisional Grants and Orders of Survey. A license to occupy land temporarily, called a provisional grant, conveyed no title, either legal or equitable, to the land itself, and was revocable at the pleasure of the authorities.[84] It put the Mexican government under no obligation to grant or perfect the title;[85] but it was the practice of the government to consider a legal possession held under a so-called provisional grant of this character as entitling the occupant to some sort of priority when the land came finally to be disposed of, a priority resting in no legal obligation, but founded on the apparent justice awarding to one already in possession and who had probably made improvements on the land, a prior right to obtain the title in full ownership.[86] A mere license of this description gave such title as the United States is bound to respect.[87] No title

76. Tio-Quinchuan *v.* Lim, 7 Philippine 467.

77. Hornsby *v.* U. S., 10 Wall. (U. S.) 224, 19 L. ed. 900, failure to annex map or furnish governor with proper official information.

Unsigned petition.— A grant of land by an alcalde, made on the same paper and immediately following the grantee's petition, is valid, although the petition was not signed by the grantee. Reynolds *v.* West, 1 Cal. 322.

78. Hornsby *v.* U. S., 10 Wall. (U. S.) 224, 19 L. ed. 900.

79. Phelan *v.* Poyoreno, 74 Cal. 448, 13 Pac. 681, 16 Pac. 241, holding that, where in a petition for a Mexican grant, the petitioner, Juan Crispin Perez, was twice called "Juan Perez," but in the decree of the governor, in the titulo or patent, and in subsequent proceedings, he was called "Juan Crispin Perez," with such reference to the petition and preceding document that there could be no doubt as to his identity, the variance was immaterial.

80. Maxey *v.* O'Connor, 23 Tex. 234.

81. U. S. *v.* De Aguirre, 1 Wall. (U. S.) 311, 17 L. ed. 595 [*distinguishing* Yontz *v.* U. S., 23 How. (U. S.) 495, 16 L. ed. 472; U. S. *v.* Fossat, 20 How. (U. S.) 413, 15 L. ed. 944].

82. Miramontes *v.* U. S., 131 U. S. appendix, 17 L. ed. 603.

83. Hooter *v.* Tippet, 8 Mart. (La.) 637.

84. Mott *v.* De Reyes, 45 Cal. 379.

85. Mott *v.* De Reyes, 45 Cal. 379; U. S. *v.* Teschmaker, 22 How. (U. S.) 392, 16 L. ed. 353.

A mere permission to search for and take possession of land did not bind the Mexican government to make a title. U. S. *v.* Garcia, 22 How. (U. S.) 274, 16 L. ed. 338 [*adopting* opinion of Hoffman, J., in 9 Fed. Cas. No. 5,215, Hoffm. Land Cas. 157].

The practice of the Mexican government was to consider a long possession held under such provisional grant or license, as entitling the occupant to some sort of priority or right to purchase when the land came finally to be disposed of; but this priority did not rest on any legal obligation which the government was under to such occupant. Mott *v.* De Reyes, 45 Cal. 379.

86. Mott *v.* De Reyes, 45 Cal. 379.

87. U. S. *v.* McDonough, 98 U. S. 424, 25 L. ed. 167; De Haro *v.* U. S., 5 Wall. (U. S.)

passed from the French and Spanish sovereign by a mere order of survey or requête and permission to settle, but they gave only an equitable right to demand a title, and until a complete grant, the title remained in the sovereign.[88] An order of survey did, however, vest such a right as could only be defeated by the alienation of the grantee, or his voluntary abandonment, or by an entire failure to perform the conditions, or some act against the government which would justify a confiscation.[89]

8. Mode of Making, Requisites, and Validity of Grants — a. In General.[90] Concessions or grants under the former sovereignties were usually made in one of three ways: (1) Grants by specific boundaries, where of course the donee was entitled to the entire tract within the described monuments. (2) Concessions or grants by quantity, as of one or more leagues of land within a larger tract described by what were called out-boundaries, where the donee was entitled to the quantity specified and no more, to be located by the public authority, usually in a manner to include the improvements of the occupant, and with due respect to any descriptive recitals in the instrument. (3) Grants or concessions of a place or rancho by some particular name, either with or without specific boundaries, where the donee was entitled to the tract known by the name specified according to the boundaries, if boundaries were given, and if not, then according to the known extent and limits of the tract or rancho as shown by the proofs, including evidence of possession and the settlement and cultivation of the occupant.[91] To constitute a definitively

599, 18 L. ed. 681 [*affirming* 25 Fed. Cas. No. 14,939, Hoffm. Dec. 53] (holding further that on the death of the licensees no rights passed to their heirs); U. S. *v.* Power, 11 How. (U. S.) 570, 13 L. ed. 817 (holding that the district courts of the United States have no authority to act on evidence of naked possession, although continued for many years, of lands in West Florida, by mere verbal permission of the French and British authorities. See also U. S. *v.* Berreyesa, 24 Fed. Cas. No. 14,585; U. S. *v.* Brown, 24 Fed. Cas. No. 14,664, Hoffm. Dec. 16, Hoffman. Op. 74, holding that an equity based on a license by a Spanish officer to occupy provisionally can be enforced against the United States only by one presenting clear proofs that, on the faith of the promise, he occupied and settled the land, and a mere use of the land for pasturage, in common with others, is insufficient.

Long continued possession.— A claim to land in California, based on a permission to occupy, given by a priest of an adjoining mission, when the country was under the domination of Spain or Mexico, and also based on a long continued possession and occupation, could not be maintained against the governments of either of those countries, but was a mere tenancy at will, and did not create an equity entitled to confirmation. U. S. *v.* De Serrano, 5 Wall. (U. S.) 451, 18 L. ed. 494.

88. Doe *v.* Jones, 11 Ala. 63, holding that where, previous to the year 1800, the Spanish governor of Louisiana, on a petition praying the grant of a tract of land, directed the commandant at Mobile to put the petitioner in possession of the tract, and to forward the proceedings of survey, for the purpose of procuring the petitioner a title in due form, the concession of the governor was a mere gratuitous assent to the prayer of the petition, and gave nothing more than a permission to occupy; and that the fee remained in Spain until the survey was made in due form, the fact communicated to the governor, and the evidence of title furnished. Lobdell *v.* Clark, 4 La. Ann. 99; Gonsoulin *v.* Brashear, 5 Mart. N. S. (La.) 33; Smith *v.* Madison, 67 Mo. 694.

The legal title passed to the United States on the cession of the territory.— Smith *v.* Madison, 67 Mo. 694.

89. Winn *v.* Cole, Walk. (Miss.) 119.

90. **Particular grants or claims held valid** see Ely *v.* U. S., 171 U. S. 220, 18 S. Ct. 840, 43 L. ed. 142; Bissell *v.* Penrose, 8 How. (U. S.) 317, 12 L. ed. 1095; U. S. *v.* Low, 16 Pet. (U. S.) 162, 10 L. ed. 923; U. S. *v.* Chaires, 10 Pet. (U. S.) 308, 9 L. ed. 435; Soulard *v.* U. S., 10 Pet. (U. S.) 100, 9 L. ed. 361; Castro *v.* U. S., 5 Fed. Cas. No. 2,509, Hoffm. Land Cas. 72; U. S. *v.* Carrillo, 25 Fed. Cas. No. 14,737, Hoffm. Land Cas. 96; U. S. *v.* Greer, 26 Fed. Cas. No. 15,261, Hoffm. Land Cas. 72; U. S. *v.* Rodriguez, 27 Fed. Cas. No. 16,184, Hoffm. Land Cas. 82.

Particular grants or claims held invalid see U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232; U. S. *v.* Hensley, 1 Black (U. S.) 35, 17 L. ed. 29; U. S. *v.* Chana, 24 How. (U. S.) 131, 16 L. ed. 611 [*reversing* 25 Fed. Cas. No. 14,780, Hoffm. Land Cas. 155]; Palmer *v.* U. S., 24 How. (U. S.) 125, 16 L. ed. 609; Luco *v.* U. S., 23 How. (U. S.) 515, 16 L. ed. 545; U. S. *v.* Murphy, 23 How. (U. S.) 476, 16 L. ed. 470 [*reversing* 27 Fed. Cas. No. 15,841, Hoffm. Land Cas. 154]; U. S. *v.* Rose, 23 How. (U. S.) 262, 16 L. ed. 448 [*reversing* 27 Fed. Cas. No. 16,195, Hoffm. Land Cas. 197]; U. S. *v.* Bennitz, 23 How. (U. S.) 255, 16 L. ed. 454 [*reversing* 3 Fed. Cas. No. 1,327]; U. S. *v.* Bassett, 21 How. (U. S.) 412, 16 L. ed. 136 [*reversing* 24 Fed. Cas. No. 14,538, Hoffm. Land Cas. 112]; U. S. *v.* Nye, 21 How. (U. S.) 408, 16 L. ed. 135.

91. Trenier *v.* Stewart, 101 U. S. 797, 25 L. ed. 1021; Van Reynegan *v.* Bolton, 95 U. S.

valid or complete Mexican title to land in California, two things were necessary: (1) A concession by the governor; and (2) the approval by the territorial deputation, or, in the event of their refusal, by the supreme government.[92] Grants will not be upheld unless made in pursuance of the laws in force at the time,[93] and so a claimant who has not complied with the regulations requiring a petition to the governor and a formal grant and record thereof takes no legal title under a grant.[94] Where the proceedings for a land grant were regularly instituted and the grant properly made by the competent authority of the ruling sovereignty, the title should be recognized as valid.[95] In reviewing the questions arising out of Mexican laws relating to land titles, it is an exceedingly difficult matter to determine with anything like certainty what laws were in force in Mexico at any particular time prior to the occupation of the country by the American forces in 1846–1848.[96] To vest an applicant under the colonization regulations with title in fee, either absolute and perfect or conditional and imperfect, to public lands under a Mexican grant, substantial compliance with the preliminary requisites to a grant was essential;[97] and it was necessary that the grant should be evidenced by an act of the governor clearly and unequivocally conveying the land intended to be granted,[98] and that a public record in some form should be made of the grant.[99] The fact that a testimonio was not made out and delivered for two or three days after the original grant was issued did not invalidate an otherwise lawful

33, 24 L. ed. 351; Higuera *v.* U. S., 5 Wall. (U. S.) 827, 18 L. ed. 469. See also Hosmer *v.* Wallace, 97 U. S. 575, 24 L. ed. 1130.

92. U. S. *v.* Cervantes, 25 Fed. Cas. No. 14,768, Hoffm. Land Cas. 9 [*reversed* on other grounds in 16 How. (U. S.) 619, 14 L. ed. 1083].

93. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232. See also U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828, holding that a claim to a grant made in California cannot be confirmed where there is no evidence that any one of the preliminary steps made requisite by the act of the Mexican congress of 1824 and the regulations of 1828 to a grant of the public domain by the governors has been observed.

94. U. S. *v.* Bolton, 23 How. (U. S.) 341, 16 L. ed. 569. See also Ohm *v.* San Francisco, (Cal. 1890) 25 Pac. 155; Castillero *v.* U. S., 2 Black (U. S.) 17, 17 L. ed. 360; U. S. *v.* Teschmaker, 22 How. (U. S.) 392, 16 L. ed. 353 [*reversing* 23 Fed. Cas. No. 13,843, Hoffm. Land Cas. 28].

After the final confirmation of a Mexican grant it is no objection to its admission in evidence that there is no evidence that the grantee, previous to the issuance of the grant, ever presented a petition to the governor expressing his name, country, and religion, and the number of his family, or that the grant ever received the approval of the departmental assembly, or that the grant or any proceedings in reference to it were ever reported to the supreme government of Mexico. Soto *v.* Kroder, 19 Cal. 87.

95. See U. S. *v.* Green. 185 U. S. 256, 22 S. Ct. 640, 46 L. ed. 898, holding that a grant initiated by proceedings approved by the intendant *ad interim* of Sonora and Sinaloa, in which a sale was made in 1822, and the purchase-price thereupon paid into the public treasury, and completed by title issued by the commissary-general of Sonora in 1825, should be recognized as valid by the court of private land claims.

96. Whitney *v.* U. S., 181 U. S. 104, 21 S. Ct. 565, 45 L. ed. 771.

97. U. S. *v.* Elder, 177 U. S. 104, 20 S. Ct. 537, 44 L. ed. 690.

98. U. S. *v.* Elder, 177 U. S. 104, 20 S. Ct. 537, 44 L. ed. 690 (holding that a grant of the title to land by the governor of New Mexico was not made by an indorsement of a petition directing the prefect of the district to ascertain whether the land applied for had an owner, and to cause delivery of the land referred to, as this is reasonably interpreted to be a mere license to occupy the land for cultivation, or to give temporary possession pending further action in the matter); Chavez *v.* U. S., 175 U. S. 552, 20 S. Ct. 201, 44 L. ed. 269 (holding that the governor of New Mexico cannot be held to have made a grant of lands by reason of his being *ex officio* president of the territorial deputation at the time when that body attempted to make a grant of lands, although he was present and attested the action of the deputation); Peabody *v.* U. S., 175 U. S. 546, 20 S. Ct. 219, 44 L. ed. 267.

Ratification by the governor of a grant of lands which the departmental assembly had attempted to make is not shown by a letter, signed by him, in which he simply acknowledges the receipt of an official communication from an alcalde, reporting the execution of a decree of the deputation making the grant, and asking how much his fee should be, as to which the governor says he is ignorant, but advises him to ask the assessor, although the governor does not make any protest against the validity of the grant. Chavez *v.* U. S., 175 U. S. 552, 20 S. Ct. 201, 44 L. ed. 269.

99. U. S. *v.* Elder, 177 U. S. 104, 20 S. Ct. 537, 44 L. ed. 690. And see *infra* V, D, 1.

title.[1] Under the Mexican system ordinary grants and those for meritorious service were governed by the same principles and regulations.[2] The Mexican colonization law of 1824 and the regulations of 1828 were, after their adoption and prior to the cession to the United States, the only laws in force under which public lands in California could be granted to individuals or families,[3] and the governor of California had no power to make grants of public lands, except in the manner and on the terms and conditions expressed in that law and those regulations.[4] A government grant never in fact issued by the officer purporting to have issued it is absolutely void.[5] As neither the act of the Mexican congress of 1824, nor the regulations of 1828, prescribed any particular form of grant, and as there is no uniformity with respect to the conditions imposed on grantees, the absence of a condition of settlement within a limited time will not avoid a grant.[6] A grant may be made under a different authority from that recited therein, and may thus be valid, although the authority referred to may prohibit its being made.[7] A grant fraudulently obtained [8] or issued without authority of law is void.[9] But fraud is not to be presumed but must be proved.[10] And it has been held that where a grant is unquestionably genuine, it will not be invalidated by an accompanying titulo which is forged and fraudulent, where it appears that neither the parties before the court claiming under such grant, nor the original grantee, were implicated in such fraud.[11] Where a concession was for five leagues of land but in the power of attorney to select and obtain title and sell the land, and in the act of possession of two leagues it was recited as for eleven leagues, the discrepancy was immaterial and must be deemed a clerical error in the power of attorney and act of possession.[12] A patent issued by the Spanish government for lands in the Philippine Islands was not invalidated by a recital that the land was conveyed by virtue of the provisions of a royal decree which had previously been repealed.[13]

b. Necessity For Written Grant. The Spanish government recognized verbal as well as written grants, and when part of the public domain was separated from the rest by metes and bounds, and a settler put in possession, the title was valid.[14] A pueblo or Mexican town, once formed and officially recognized, became entitled under Mexican law to the use of certain lands for its benefit and the benefit of its inhabitants, and the lands were, on petition, set apart and assigned to it by the government, and no other evidence of title than such assignment was required, nor was any other given, but the title of the pueblo to the lands in such case was valid, without a deed or other writing formally transferring the title.[15]

1. Houston *v.* Blythe, 60 Tex. 506.

2. Teschemacher *v.* U. S., 23 Fed. Cas. No. 13,843, Hoffm. Land Cas. 28 [*reversed* on other grounds in 22 How. 392, 16 L. ed. 353].

3. Bouldin *v.* Phelps, 30 Fed. 547.

4. Bouldin *v.* Phelps, 30 Fed. 547, holding that a grant cannot be sustained, under the colonization law of 1824 and the regulations of 1828, when there is a question of its genuineness, because, among other reasons, it is not in the usual form of such grants; it is not attested by the secretary of state; it is not upon habilitated paper; it has none of the usual conditions of such grants; it is not recited therein that it was made in exact conformity with the provisions of the laws; there is no record of the grant, or any note thereof, in the records of the government; it has not received the approval of the departmental assembly, nor was it referred to the departmental assembly by the governor; and juridical possession of the land was not given. Den *v.* Hill, 7 Fed. Cas. No. 3,784; McAllister 480.

5. Hanrick *v.* Cavanaugh, 60 Tex. 1 [*distinguishing* Hanrick *v.* Jackson, 55 Tex. 17].

6. U. S. *v.* Larkin, 18 How. (U. S.) 557, 15 L. ed. 485. See also Johnston *v.* Smith, 21 Tex. 722 [*following* Blount *v.* Webster, 16 Tex. 616; Smith *v.* Power, 14 Tex. 146].

7. Brown *v.* San Francisco, 16 Cal. 451.

8. Burleson *v.* McGehee, 15 Tex. 375.

It will not be inferred that a grant was procured by fraud. De Castro *v.* Fellom, 135 Cal. 225, 67 Pac. 142.

9. Burleson *v.* U. S., 15 Tex. 375.

10. Burleson *v.* U. S., 15 Tex. 375.

11. U. S. *v.* Juares, 26 Fed. Cas. No. 15,500.

12. Fulton *v.* Duncan, 18 Tex. 34.

13. Catindig *v.* Catindig, 6 Philippine 517, 518, where it is said: "The fact that in the recitals of that deed a mistake was made in the matter of a date can not affect its validity."

14. Landry *v.* Martin, 15 La. 1; Sanchez *v.* Gonzales, 11 Mart. (La.) 207 [*distinguished* in LeBlanc *v.* Victor, 3 La. 44].

15. U. S. *v.* Pico, 5 Wall. (U. S.) 536, 18 L. ed. 695.

c. Intention to Make Grant. Orders or other proceedings will not be construed as grants unless it is apparent that the action of the officials was intended as a grant,[16] and whether or not a grant was intended may become a matter of construction.[17] An order from the Mexican governor, allowing a search for land, and a reference by the governor to the alcalde of a petition for a grant of the land selected, and a report that the land belonged to no private person, does not amount to a grant of a vested interest, even in equity.[18] The order of the governor of a province to the regidor, which authorized the survey of certain land, the placing of a certain person in possession, and the extension "in due form the proper proceedings which he has completed," in order that the grantee might take further proceedings to complete the title, and which required the person placed in possession "to present himself at the place of the intendant to obtain the title of confirmation in accordance with the resolution in the Royal Warrant of Cartorse," did not constitute a valid grant but was inchoate and incomplete.[19] An ordinance of the ayuntamiento of a pueblo to the effect that a title to lands be extended to a person, provided no other person showed a better right thereto, passed no title.[20] Under the Spanish system the intention to grant as private property was always indicated in clear and appropriate words, which severed the land at once from the royal domain and converted it into private property, and an alleged grant not showing this intention was ineffectual.[21]

d. Consideration. A grant by the Spanish governor of Florida, which recites that it is made in consideration of the surrender by the grantee of another grant previously made, and which surrender has been accepted by the governor, will be confirmed as being based on a sufficient consideration.[22] It was not necessary to the validity of a Mexican colonization grant to show "onerous conditions"; that is, that any consideration, either in money or service, was required or given.[23]

e. Form of Grant or Other Instrument. The official record of his official acts which the Mexican law required an alcalde to keep carried with it the presumption that his acts were in form such as were necessary to give full effect to what he was attempting to do.[24]

f. Use of Stamped Paper. The fact that a concession was not written on stamped paper is an objection going merely to the authenticity of the instrument, which may be supported by proof *aliunde*.[25]

g. Name of Grantee. It has been held that it cannot be predicated of a grant of land that it was "issued" or "made" until the name of the grantee was inserted

16. Castillero *v.* U. S., 2 Black (U. S.) 17, 17 L. ed. 360.

17. Castillero *v.* U. S., 2 Black (U. S.) 17, 17 L. ed. 360.

18. U. S. *v.* Garcia, 22 How. (U. S.) 274, 16 L. ed. 338 [*affirming* 9 Fed. Cas. No. 5,215, Hoffm. Land Cas. 157].

19. Upson *v.* Campbell, (Tex. Civ. App. 1907) 99 S. W. 1129 [*following* Pashcal *v.* Perez, 7 Tex. 348; Menard *v.* Massey, 8 How. (U. S.) 293, 12 L. ed. 1085].

20. Beach *v.* Gabriel, 29 Cal. 580.

21. U. S. *v.* Turner, 11 How. (U. S.) 663, 13 L. ed. 857 [*following* U. S. *v.* King, 7 How. (U. S.) 833, 12 L. ed. 934, and *followed* in U. S. *v.* Coxe, 17 How. (U. S.) 41, 15 L. ed. 76], holding that the contract between the Baron de Carondelet and the Marquis de Maison-Rouge conveyed to the latter no interest in the land. See also U. S. *v.* Philadelphia, 11 How. (U. S.) 609, 13 L. ed. 834.

22. U. S. *v.* Delespine, 15 Pet. (U. S.) 226, 10 L. ed. 719.

23. Scott *v.* Ward, 13 Cal. 458.

24. Palmer *v.* Low, 98 U. S. 1, 25 L. ed. 60, holding that when a grant appearing in that record was in the following form: "No. 39. Whereas, George Donner has presented a petition soliciting for a grant of a title to a lot of ground as therein described, therefore I, the undersigned alcalde, do hereby give, grant and convey unto the said George Donner, his heirs and assigns forever, lot number thirty-nine (39), one hundred *varas* square, in the vicinity of the Town of San Francisco, subject to all the rules and regulations governing in such cases. In testimony whereof, I have hereunto set my hand as alcalde, this nineteenth day of July, A. D. 1847. George Hyde, 1st Alcalde." the terms used were sufficient to pass a title in fee to the land, and that, in the absence of anything to the contrary, the instrument must be presumed to be sufficient in form to give full effect to the evident intention of the parties.

25. Chambers *v.* Fisk, 22 Tex. 504; Gon-

in it.[26] But it has also been held that the mere clerical omission of the name of the grantee, in a grant which otherwise is formal, and has been treated as complete and final by the parties interested, as well as by judicial officers and tribunals, affords no ground for declaring the grant invalid at the instance of a stranger, where looking at the grant in its entirety there can be no question for whom it was intended and to whom and in what right it should have been and was in fact made.[27] Nor will a mistake as to the name of the grantee in the protocol defeat the grant when the error is apparent and it is clear who is the real grantee.[28]

h. Description of Land. A Mexican grant, to be complete and perfect, must be of a specific parcel of land, and it must appear on the face of the instrument, or by the aid of its descriptive portions, not only that a specific parcel was intended to be granted, but it must be so described that such parcel can be identified with reasonable certainty; and if there is nothing in the grant or documents to which it refers by which to fix the lines of one of the sides of the tract intended to be granted, or to determine the particular quantity, the concession does not confer a perfect title.[29] Where a grant of land is indefinite as to its location, or is uncertain as to the place where the lands granted are intended to be surveyed, rendering it impossible to make a survey under the terms of the grant with certainty, the grant is void and will not be confirmed.[30] The grant of a certain specified quantity of land, known under a specific name, and the locality of which is perfectly well ascertained, is sufficiently definite.[31] The description of land granted is sufficient if the diseño, which is referred to and which accompanies the petition, indicates the boundaries with reasonable certainty.[32]

i. Combining or Division of Grants. There was nothing in the Mexican colonization laws of Texas, or in any general principle of law, which forbade the comprising in one final title the lands granted to two colonists.[33] And on the other hand it is no objection to an eleven league grant that it was divided, and titles issued to the land in several parcels.[34]

j. Signature and Execution of Grant. It is no objection to an alcalde's grant, in the commencement of which his official character is stated, that his official designation was not appended to his signature; it being in evidence that he was alcalde in fact.[35] A grant of land in Texas, issued before the Revolution and subsequently located within the colony of Austin and Williams with their consent, and certified by the secretary of the state of Coahuila and Texas, is valid, without the signature of the governor.[36] Where a person relied for his title on a paper

zales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.

26. Howard *v.* Colquhoun, 28 Tex. 134.

27. Sheppard *v.* Harrison, 54 Tex. 91.

28. Howell *v.* Hanrick, 88 Tex. 383, 29 S. W. 762, 30 S. W. 856, 31 S. W. 611.

29. Banks *v.* Moreno, 39 Cal. 233.

30. Denise *v.* Ruggles, 16 How. (U. S.) 242, 14 L. ed. 922; U. S. *v.* King, 3 How. (U. S.) 773, 11 L. ed. 824; U. S. *v.* Delespine, 15 Pet. (U. S.) 319, 10 L. ed. 753. See also Pinkerton *v.* Ledoux, 129 U. S. 346, 9 S. Ct. 399, 32 L. ed. 706.

Grants held void for uncertainty see Gwyn *v.* Calegaris, 139 Cal. 384, 73 Pac. 851; Ohm *v.* San Francisco, (Cal. 1890) 25 Pac. 155; Doe *v.* Latimer, 2 Fla. 71; Arivaca Land, etc., Co. *v.* U. S., 184 U. S. 649, 22 S. Ct. 525, 46 L. ed. 731; U. S. *v.* Boisdore, 11 How. (U. S.) 63, 13 L. ed. 605; Villalobos *v.* U. S., 10 How. (U. S.) 541, 13 L. ed. 531; U. S. *v.* Lawton, 5 How. (U. S.) 10, 12 L. ed. 27; U. S. *v.* Miranda, 16 Pet. (U. S.) 153, 10 L. ed. 920; O'Hara *v.* U. S., 15 Pet. (U. S.) 275, 10 L. ed. 737; De Villemont *v.* U. S., 7 Fed. Cas. No. 3,839, Hempst. 389 [*affirmed* in 13 How. 261, 14 L. ed. 138].

31. U. S. *v.* Vaca, 18 How. (U. S.) 556, 15 L. ed. 485.

Grants held sufficiently definite see Spaulding *v.* Bradley, 79 Cal. 449, 22 Pac. 47; Phelan *v.* Poyoreno, 74 Cal. 448, 13 Pac. 681, 16 Pac. 241; Holloway *v.* Galliac, 47 Cal. 474; U. S. *v.* Sutherland, 19 How. (U. S.) 363, 15 L. ed. 666; Feliz *v.* U. S., 8 Fed. Cas. No. 4,720, Hoffm. Land Cas. 69; Semple *v.* U. S., 21 Fed. Cas. No. 12,662, Hoffm. Land Cas. 37; U. S. *v.* Grimes, 26 Fed. Cas. No. 15,265, Hoffm. Land Cas. 137; Yount *v.* U. S., 30 Fed. Cas. No. 18,188, Hoffm. Land Cas. 43.

32. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,735, Hoffm. Land Cas. 84.

33. White *v.* Holliday, 11 Tex. 606.

34. McGehee *v.* Dwyer, 22 Tex. 435 [*following* Jenkins *v.* Chambers, 9 Tex. 167; Hancock *v.* McKinney, 7 Tex. 384].

35. Downer *v.* Smith, 24 Cal. 114.

36. Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902.

without the usual stamp, but purporting to be a Mexican colonial grant, and containing the following clause: "On this date, this petition was attached to the manuscript record to which it corresponds, and raised to the corresponding seal, which I seal for its continuance," followed by a rubric, but no name or date, it was held that the paper appeared to have been duly legalized.[37]

k. Delivery of Grant. The doctrine of delivery, as applied to private conveyances, has no application to grants made by the Mexican government, but the title under a grant from that government vested the moment the entry in the book of records received the stamp of the last act required completely to authenticate the instrument, and a delivery of a copy was unnecessary.[38] So also, under the Spanish system, while delivery of the thing granted was essential to the validity of the grant, it was not necessary that the evidence of title be delivered.[39]

l. Alteration of Grant. If a government grant is, by subsequent alterations, made to confer other rights than those conferred at its issue, it is absolutely void, and may be shown to be so by a subsequent grantee.[40] Where a Mexican grant, issued and delivered, was subsequently altered in the quantity granted by direction of the grantor, on the application of the grantee, and was then redelivered to the grantee, such redelivery was in legal effect a reëxecution of the grant.[41]

m. Modification of Grant. The power vested in an alcalde to grant lots implied the power to modify the grant with the consent of all the parties in interest while the proceedings were *in fieri* and so long as anything remained to be done by the granting power.[42]

n. Approval of Departmental Assembly. A Mexican grant of land in California was required to be made subject to the approval of the departmental assembly,[43] and unless such approval was obtained the title was not regarded as perfect and complete.[44] But a grant of lands by the governor, subject to the approval of the departmental assembly, vested an immediate equitable title in the grantee before the approval of the assembly was obtained;[45] and as it was the duty of the governor, and not of the grantee, to submit the grant to the departmental assembly for its approval,[46] the want of such approval did not divest the grantee of his equitable title,[47] or affect the validity of the grant,[48] or prevent

37. White *v.* Holliday, 11 Tex. 606.

38. Donner *v.* Palmer, 31 Cal. 500.

39. Lavergne *v.* Elkins, 17 La. 220.

40. Hanrick *v.* Cavanaugh, 60 Tex. 1 [*distinguishing* Hanrick *v.* Jackson, 55 Tex. 17].

41. De Malarin *v.* U. S., 1 Wall. (U. S.) 282, 17 L. ed. 594.

42. Lick *v.* Diaz, 37 Cal. 437, holding that where the grantees, under a grant executed by a Mexican alcalde, immediately afterward appeared before him and declined to accept the grant as made, desiring a modification, he might amend the grant by indorsing on the back of it the renunciation of one and the fact that the other person might have the entire lot, irrespective of whether or not the title had vested at the time of the first grant, and that such modification of the grant was not a transfer of title from one grantee to another, but an exercise of the granting power.

43. Taylor *v.* Escandon, 50 Cal. 428; Waterman *v.* Smith, 13 Cal. 373; U. S. *v.* Workman, 1 Wall. (U. S.) 745, 17 L. ed. 705.

The only effect of the approval was to make the grant binding on the Mexican government. Waterman *v.* Smith, 13 Cal. 373.

44. Hornsby *v.* U. S., 10 Wall. (U. S.) 224, 19 L. ed. 900; U. S. *v.* Workman, 1 Wall. (U. S.) 745, 17 L. ed. 705; Bouldin *v.* Phelps, 30 Fed. 547; Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,069, McAllister 151, holding that a Mexican grant of land in California, which had never received the approbation of the departmental assembly and had never been segregated from the public domain before the treaty of Guadalupe Hidalgo, was not a title on which to maintain ejectment, except against a trespasser.

Approval of departmental assembly cannot be presumed from delivery of grant.— Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,069, McAllister 151.

45. Hornsby *v.* U. S., 10 Wall. (U. S.) 224, 19 L. ed. 900; U. S. *v.* Cervantes, 18 How. (U. S.) 553, 15 L. ed. 484; U. S. *v.* Reading, 18 How. (U. S.) 1, 15 L. ed. 291.

46. Hornsby *v.* U. S., 10 Wall. (U. S.) 224, 19 L. ed. 900; U. S. *v.* Reading, 18 How. (U. S.) 1, 15 L. ed. 291 [*followed* in U. S. *v.* Cervantes, 18 How. 553, 15 L. ed. 484 (*affirming* 5 Fed. Cas. No. 2,560)].

47. Soto *v.* Kroder, 19 Cal. 87; U. S. *v.* Reading, 18 How. (U. S.) 1, 15 L. ed. 291.

48. U. S. *v.* Johnson, 1 Wall. (U. S.) 326, 17 L. ed. 597; Cervantes *v.* U. S., 5 Fed. Cas. No. 2,560 [*affirmed* in 18 How. 553, 15 L. ed. 484].

its confirmation,[49] unless the territorial archives show that the grant had been sent to the assembly, and by them rejected, and from them sent to the supreme government, and disapproved by it also.[50] Upon approval by the departmental assembly the grant became "definitively valid" and ceased to be defeasible, and the estate was no longer subject to be divested except by proceedings for breach of its other conditions.[51] Where the Mexican governor granted lands, but the departmental assembly held that the grant was of a larger amount than by law could be made, and therefore reduced it, the grant could be confirmed only to the limited amount.[52] Under the laws of Mexico, grants of land to native citizens for the purpose of foreign colonization might be made by the territorial governors without the approval of the departmental assembly.[53]

o. Consent of Executive. Under the colonization laws of Mexico, 1824–1828, the consent of the federal executive was essential to the validity of grants of lands within the "coast leagues" or "littoral leagues," consisting of lands within a certain distance of the coast,[54] or the "border leagues," consisting of lands within a certain distance of the boundary between the United States and Mexico,[55] and a grant made by the authorities of a state within those limits is absolutely void unless it is shown that it was made with the approbation of the supreme government.[56] The United States supreme court has held that these restrictions applied only to grants to empresarios who intended to introduce large colonies of foreigners and did not apply to grants to natives of Mexico,[57] but the supreme court

Grant under special orders.— Where a Mexican grant was not claimed under the colonization law of 1824, or the regulations of 1828, but by special orders issued to the governor by the Mexican government, the power thereby conferred could not be exercised by the governor without the concurrence of the assembly, and a grant by the governor alone was void. U. S. *v.* Osio, 23 How. (U. S.) 273, 16 L. ed. 457.

A grant under the authority of the despatch of 1838, issued by the government of Mexico to the governor of California, was void, if not made with the concurrence of the departmental assembly, as thereby required. Bouldin *v.* Phelps, 30 Fed. 547.

49. Waterman *v.* Smith, 13 Cal. 373; U. S. *v.* Castillero, 23 How. (U. S.) 464, 16 L. ed. 498; Bouldin *v.* Phelps, 30 Fed. 547; U. S. *v.* Larkin, 26 Fed. Cas. No. 15,563 [*affirmed* in 18 How. 557, 15 L. ed. 485, and *following* U. S. *v.* Frémont, 18 How. (U. S.) 30, 15 L. ed. 302]; U. S. *v.* Reading, 27 Fed. Cas. No. 16,127, Hoffm. Land. Cas. 18 [*affirmed* in 18 How. 1, 15 L. ed. 291], the conditions having been performed *cy pres*.

Such titles could be perfected only by proceedings under the act of congress of March 3, 1851.— Bouldin *v.* Phelps, 30 Fed. 547.

Disturbance of country as excuse for failing to obtain approval.— The failure of the grantee, in a grant from the governor of California in 1844 of a designated tract of land, subject to the approbation of the departmental assembly, to obtain the approbation of the assembly, was excusable on account of the disturbance by the war with the United States. Fremont *v.* U. S., 17 How. (U. S.) 542, 15 L. ed. 241.

50. U. S. *v.* Reading, 18 How. (U. S.) 1, 15 L. ed. 291.

51. Hornsby *v.* U. S., 10 Wall. (U. S.) 224, 19 L. ed. 980.

52. U. S. *v.* Hartnell, 22 How. (U. S.) 286, 16 L. ed. 340.

53. U. S. *v.* Cervantes, 18 How. (U. S.) 553, 15 L. ed. 484; De Arguello *v.* U. S., 18 How. (U. S.) 539, 15 L. ed. 478.

54. Wilcox *v.* Chambers, 26 Tex. 180; Smith *v.* Power, 23 Tex. 29; Smith *v.* Power, 14 Tex. 146; Goode *v.* McQueen, 3 Tex. 241; Foote *v.* Egery, 24 How. (U. S.) 267, 16 L. ed. 656; League *v.* Egery, 24 How. (U. S.) 264, 16 L. ed. 655.

The littoral leagues are measured from the contact of the main land with the main sea, where no bay intervenes, and with the latter when one intervenes, and from the mouths of rivers, whether these be in the heads or lower down in the bays. Hamilton *v.* Menifee, 11 Tex. 718.

55. Wood *v.* Welder, 42 Tex. 396; Yancey *v.* Norris, 27 Tex. 40; Smith *v.* Power, 23 Tex. 29; Blount *v.* Webster, 16 Tex. 616; Smith *v.* Power, 14 Tex. 146; Republic *v.* Thorn, 3 Tex. 499; Goode *v.* McQueen, 3 Tex. 241.

Perfecting inchoate grant.— The executive of the states of Coahuila and Texas, without the approbation of the president of the Mexican Union, had no authority under the laws to grant lands within the border leagues for the purpose of perfecting an inchoate claim to the same land previously acquired under the government of Spain. Edwards *v.* Davis, 3 Tex. 321.

56. Goode *v.* McQueen, 3 Tex. 241.

Assent must be alleged.— The approbation and consent of the supreme federal executive of Mexico must be specifically averred and proved, and cannot be proven unless alleged. Republic *v.* Thorn, 3 Tex. 499.

57. De Arguello *v.* U. S., 18 How. (U. S.) 539, 15 L. ed. 478 [*followed* in U. S. *v.* Cervantes, 18 How. 553, 15 L. ed. 484 (*affirming* 5 Fed. Cas. No. 2,560)].

of Texas holds the consent to have been necessary whether the concession was made to a native Mexican or to a foreigner.[58] It is sufficient to support a grant of land within such limits that the consent of the executive was actually obtained,[59] and it is not necessary that such consent should appear on the face of the title of a colonist.[60] A grant by the state of Coahuila and Texas, under article 32 of the law or decree of March 26, 1834, was valid without the consent of the federal executive, although the lands were within the littoral or border leagues.[61]

p. Approval of Governor or Intendente. Where the governor, in referring a petition for a grant to the alcalde, with directions to give possession, "designating limits, and doing what is proper," further directed that he then transmit the expediente to the governor's office, "so that if it be approved the proper testimonio may be ordered to be given to the petitioner," the action of the alcalde in delivering possession was of no effect until approved by the governor.[62] Where, on a petition for a grant of land with specified boundaries, the governor indorsed a recital beginning, "As he asks it according to law, and I understand that no injury results to any third party," etc., together with a direction to the alcalde to "proceed to give the possession, designating the limits, and doing what is proper," etc., this was a direction to designate the limits described in the petition, and gave the alcalde no authority to designate limits giving a much larger tract than that petitioned for.[63] The approval of an intendente was not necessary to a grant of public lands in Mexico in 1816.[64]

q. Consent of Empresario. The consent of the empresario to a grant within the limits of his colony was required only for his own protection, and was not necessary to the validity of a title.[65]

r. Payment. Where the claimant failed to make the required payment for the land he is not protected,[66] even though the required amount be tendered.[67] But a grant was not invalidated by a failure to pay the fee which the Mexican regulations directed the alcalde to collect for each grant of public lots.[68] Where the law provided that a certain class of settlers should receive a grant of land without paying any dues to the state, and the governor directed the land commissioner to issue a grant to one of that class, and to classify his land so as to show what the grantee must pay to the state, and the commissioner issued a grant, not classifying the land, but exempting the grantee from the payment of all dues, the grant was valid.[69] Where a concession in sale, under the twenty-fourth article of the Mexican state colonization law of 1825, conceded to the purchaser the terms of payment designated in the twenty-second article of the same law, this was no objection to the title.[70]

s. Location and Survey. A claim under a ceding sovereignty cannot be confirmed unless evidenced by a grant, concession, warrant, or order of survey for some tract of land therein described, so as to make it capable of some definite location consistently with its terms, made, granted, or issued before the change of sovereignty,[71] or by an order to survey any given quantity without any descrip-

58. Wilcox *v.* Chambers, 26 Tex. 180, where Bell, J., delivering the opinion of the court, stated this to be the established rule on the subject but said that were the question an original one he would feel bound to decide it otherwise.

59. Marsh *v.* Weir, 21 Tex. 97.

60. Marsh *v.* Weir, 21 Tex. 97; Hatch *v.* Dunn, 11 Tex. 708.

61. Johnston *v.* Smith, 21 Tex. 722 [*following* Blount *v.* Webster, 16 Tex. 616]; Smith *v.* Power, 14 Tex. 146, holding this to be the only recognized exception to the requirement of consent of the federal executive.

62. Bergere *v.* U. S., 168 U. S. 66, 18 S. Ct. 4, 42 L. ed. 383.

63. Bergere *v.* U. S., 168 U. S. 66, 18 S. Ct. 4, 42 L. ed. 383.

64. Sheldon *v.* Milmo, 90 Tex. 1, 36 S. W. 413.

65. McGehee *v.* Dwyer, 22 Tex. 435 [*followed* in Martin *v.* Parker, 26 Tex. 253].

66. Haynes *v.* State, (Tex. Civ. App. 1905) 85 S. W. 1029.

67. Haynes *v.* State, (Tex. Civ. App. 1905) 85 S. W. 1029.

68. Donner *v.* Palmer, 31 Cal. 500.

69. Swift *v.* Herrera, 9 Tex. 263.

70. Hancock *v.* McKinney, 7 Tex. 384.

71. Smith *v.* U. S., 10 Pet. (U. S.) 326, 9 L. ed. 442 [*followed* in Wherry *v.* U. S., 10 Pet. (U. S.) 338, 9 L. ed. 446].

tion or limitation as to the place which was located by a survey made by a proper officer before that time.[72] That is to say, descriptive grants under the former government are confirmed, although not surveyed before the change of sovereignty;[73] but where the grant is too indefinite to convey any specific land it is not confirmed unless a survey or location was made.[74] By the Spanish regulations, when a concession was made, the grantee was to have the survey made at his own expense, and a return thereof was to be made to the proper officer.[75] Where the grantee has actually settled and occupied the land, a survey may be presumed.[76] As to pueblo lands,[77] although in some instances under the Mexican laws an officer was appointed to mark off boundaries of the four square leagues to which new pueblos were entitled, and to designate the uses to which particular tracts should be applied, yet the right of the pueblos and their inhabitants to the use and enjoyment of the lands was not made dependent upon such measurement and designation.[78] Under the Florida treaty, surveys of land granted by the Spanish authorities might be made at any time before the exchange of flags.[79] A grant of land, made by the governor of Louisiana before the treaty of cession of 1803, but without a survey until 1811, and after the treaty, is not valid.[80] It is not fatal to a Mexican grant that the survey was made before the order directed to the surveyor by the alcalde was entered on the grant.[81] Under the Spanish system individuals could not locate their grants by mere private survey,[82] but the grants were an authority to the public surveyor or his deputy to make the survey as a public trust to prevent the public domain from being cut up at the pleasure of the grantees.[83] A warrant or order of survey could be executed by the surveyor-general of the province,[84] by any deputy appointed by him,[85] by the district surveyor,[86] by the commandant of a post,[87] or by a private person specially authorized by the governor-general or intendant.[88] A survey under the Spanish government

72. Smith *v.* U. S., 10 Pet. (U. S.) 326, 9 L. ed. 442 [*followed* in Wherry *v.* U. S., 10 Pet. (U. S.) 338, 9 L. ed. 446].

73. U. S. *v.* Arredondo, 13 Pet. (U. S.) 133, 10 L. ed. 93; Mackey *v.* U. S., 10 Pet. (U. S.) 340, 9 L. ed. 447, holding this to be true as to grants in Florida and Missouri.

74. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673; D'Auterieve *v.* U. S., 101 U. S. 700, 25 L. ed. 869; Maguire *v.* Tyler, 8 Wall. (U. S.) 650, 19 L. ed. 320; Fremont *v.* U. S., 17 How. (U. S.) 542, 15 L. ed. 241 [*reversing* 25 Fed. Cas. No. 15,164]; U. S. *v.* Lawton, 5 How. (U. S.) 10, 12 L. ed. 27; U. S. *v.* Miranda, 16 Pet. (U. S.) 153, 10 L. ed. 920; U. S. *v.* Delespine, 15 Pet. (U. S.) 319, 10 L. ed. 753; O'Hara *v.* U. S., 15 Pet. (U. S.) 275, 10 L. ed. 737; Muse *v.* Arlington Hotel Co., 68 Fed. 637; De Villemont *v.* U. S., 7 Fed. Cas. No. 3,839, Hempst. 389 [*affirmed* in 13 How. 261, 14 L. ed. 138, *approving* Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344, and *followed* in Glenn *v.* U. S., 10 Fed. Cas. No. 5,481, Hempst. 394 (*affirmed* in 13 How. 250, 14 L. ed. 133)]; Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

Non-interference with the rights of others was a condition attaching to all grants, implied when not expressed, and this of itself demanded an actual survey of the land. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

75. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

76. O'Hara *v.* U. S., 15 Pet. (U. S.) 275, 10 L. ed. 737. See also U. S. *v.* Vaca, 18 How. (U. S.) 556, 15 L. ed. 485, where the claimant before applying for the grant had been in possession under a license.

77. See, generally, *supra*, V, A, 2, b.

78. San Francisco *v.* U. S., 21 Fed. Cas. No. 12,316, 4 Sawy. 553.

79. U. S. *v.* Acosta, 1 How. (U. S.) 24, 11 L. ed. 33; U. S. *v.* Clarke, 16 Pet. (U. S.) 228, 10 L. ed. 946. See also U. S. *v.* De Morant, 123 U. S. 335, 8 S. Ct. 189, 31 L. ed. 171.

80. Smith *v.* U. S., 10 Pet. (U. S.) 326, 9 L. ed. 442 [*followed* in Wherry *v.* U. S., 10 Pet. (U. S.) 338, 9 L. ed. 446].

81. Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902.

82. Smith *v.* U. S., 10 Pet. (U. S.) 326, 9 L. ed. 442 [*followed* in Wherry *v.* U. S., 10 Pet. (U. S.) 338, 9 L. ed. 446]; Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

83. Smith *v.* U. S., 10 Pet. (U. S.) 326, 9 L. ed. 442 [*followed* in Wherry *v.* U. S., 10 Pet. (U. S.) 338, 9 L. ed. 446]; Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344. See also Hornsby *v.* U. S., 10 Wall. (U. S.) 224, 19 L. ed. 900.

84. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

85. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

86. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

87. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

88. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

meant the actual measurement of land, ascertaining the contents by running lines and angles, marking them, and fixing corners and boundaries;[89] and unless the survey made will enable the court to ascertain the specific boundaries of the land granted, the validity of the grant cannot be sustained.[90] In order to be effective the survey must be in conformity with the grant and correspond with the concession in regard to the district where the survey should be made, and show that the survey is for the land granted by the proper authority,[91] and a survey made at a different place from that mentioned in the grant is void.[92] But where a Spanish grant of lands in Florida was for the land mentioned in the petition or any other land that was vacant, it is no objection that the survey did not correspond with the particular location.[93] A colonization grant of land in Texas is not void because the surveyor returned an excess in his survey,[94] and if the excess is not so great as to show fraud the grantee will hold to the extent of his survey.[95] It is necessary to the validity of an entry of land under a Mexican grant that it be made with such certainty and precision that adjacent lands can be located without confusion of the boundaries.[96] A location made in Texas in 1835 should, on account of the condition of the country, be liberally construed.[97] The word "near," indicating proximity to another place, as used in a selection of lands under a grant from the Mexican government, would afford no guide for the direction of others in selecting their lands, so as not to include those embraced in the location, and consequently, having no identity or means by which it could be identified, the grant must be without force or effect.[98] Plots and certificates, on account of the official character of the surveyor-general, had the force and character of a disposition.[99] The lines fixed by a corrected survey, accompanying a grant, are obligatory on the United States and all claiming under them since the act of confirmation, and cannot be impeached or changed by any evidence tending to show that these lines were incorrectly located, either by mistake or fraud on the part of the Spanish government or its officers, prior to the date of the grant.[1] A survey of lands in Louisiana, made when it was a province of Spain, but not in full conformity with the requirements of the order authorizing it, and not subsequently confirmed by Spanish authorities, gave merely an inchoate title to the grantee.[2] A variation in a survey of two or three miles over what may subsequently be determined to be the exact line of the littoral and border leagues will not defeat titles acquired thereby, if, when issued, they were supposed to be in conformity to the line, and were not located in wanton disregard of the laws restricting titles in the territory embraced by the line.[3] In determining the extent

89. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344. See also U. S. *v.* Lawton, 5 How. (U. S.) 10, 12 L. ed. 27, holding that a Spanish grant of land will not be confirmed, although surveyed twice, where the first survey was fictitious, not being actually made on the ground, but only on paper, and the second survey was too imperfect to be effectual.

Any actual marking of the boundaries of a grant, so that the land can be identified with reasonable certainty, is sufficient to establish the grant; and it is not necessary that lines should have been actually defined and marked by a scientific surveyor. Johns *v.* Schutz, 47 Tex. 578.

Mere erection of a monument at a particular spot is not a survey or its equivalent. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

90. Ledoux *v.* Black, 5 La. Ann. 510.

91. U. S. *v.* Forbes, 15 Pet. (U. S.) 173, 10 L. ed. 701 [*following* U. S. *v.* Huertas, 9 Pet. (U. S.) 171, 9 L. ed. 90; U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001].

92. Villalobos *v.* U. S., 10 How. (U. S.) 541, 13 L. ed. 531; U. S. *v.* Hanson, 16 Pet. (U. S.) 196, 10 L. ed. 935.

93. U. S. *v.* Clarke, 16 Pet. (U. S.) 228, 10 L. ed. 946.

94. White *v.* Burnley, 20 How. (U. S.) 235, 15 L. ed. 886.

95. Elliot *v.* Mitchell, 28 Tex. 105.

96. Weir *v.* Van Bibber, 34 Tex. 226.

97. Elliot *v.* Mitchell, 28 Tex. 105.

98. Ruis *v.* Chambers, 15 Tex. 586.

99. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

1. Magee *v.* Doe, 22 Ala. 699.

A survey and map, made under the authority of the United States, is not admissible to change the survey of a Spanish grant made prior to Oct. 27, 1795. Martin *v.* King, 3 How. (Miss.) 125.

2. Arceneaux *v.* De Benoit, 21 La. Ann. 673.

3. Hamilton *v.* Menifee, 11 Tex. 718.

of a grant the field-notes and map of the surveyor should control rather than casual and ambiguous phrases in the letter of the surveyor to the governor accompanying them.[4] The establishment of the boundaries of a colony by its proper surveyor had no effect on rights acquired anterior to that time, and did not warrant those authorized to colonize to grant a colonist lands previously granted to another but afterward included within the survey.[5] The location of a valid grant, confirmed by the departmental assembly, could not in any way be affected by the circumstance that, without any notice to the grantee, his grant was treated as forfeited, and a part of the land embraced within the diseño of a tract granted to another.[6]

t. Extension of Title. No petition or order was necessary for an extension of title under a Mexican grant,[7] nor was it necessary that the grant should be attached to the testimonio, nor that the testimonio should be written on stamped paper.[8] In extending title the commissioner's designation of the colony by a name popularly used, although not the legal name, was sufficient;[9] and the extension will not be held void, long afterward, the government having meanwhile acquiesced in the commissioner's acts, because it was executed two days after the expiration of the time limited by the law for taking possession.[10] As the act of congress of Coahuila and Texas of March 26, 1834, creating a new system of disposing of the public lands and repealing the act of 1832, did not abrogate the grants and sales which had been made under the latter act, or abolish the office and functions of commissioners, an extension of title by a commissioner, after the act of 1834 took effect in pursuance of a concession previously made under the act of 1832, is valid.[11] The signature of a judge or alcalde acting in place of a notary, authenticated by two assisting witnesses, has all the force and effect of the signature and seal or rubric of a notary.[12] It has been held that according to the Spanish law assisting witnesses are not necessary to the validity of final titles extended by alcaldes and commissioners to make sales.[13] A certificate of title to a concession of land, passed on by the alcalde and commissioner, reciting that it was granted on a concession accompanied by a power of attorney to select and obtain title under the concession and the acts of possession thereunder, is *res judicata* of the facts that the power of attorney referred to the same land covered by the concession and that the grantees in the certificate were legally entitled to have the certificate issued to them.[14] Where a concession of land was for five leagues, and the power of attorney to select and obtain title to the land and other papers used in obtaining a certificate of title called for a concession to the same person of eleven leagues, or did not mention the number of leagues at all, a certificate of extension of title to two leagues conferred on the grantee therein *prima facie* title to the two leagues, notwithstanding such discrepancies.[15] Where title was extended by an officer authorized to extend titles to lands in Texas, prior to the revolution of 1836, the presumption which is always indulged in favor of the validity of the acts of officers of a former government warrants the conclusion that the officer acted in conformity with the law, and not in violation of it, whether he set forth in the title

4. U. S. *v.* D'Auterieve, 15 How. (U. S.) 14, 14 L. ed. 580.
5. Hamilton *v.* Menifee, 11 Tex. 718.
6. U. S. *v.* Larkin, 26 Fed. Cas. No. 15,562, Hoffm. Dec. 23.
7. Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.
8. Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.
9. Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.
10. Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.
11. Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.
12. Martin *v.* Parker, 26 Tex. 253.
13. Sheirburn *v.* Hunter, 21 Fed. Cas. No. 12,744, 3 Woods 281. See also Ruis *v.* Chambers, 15 Tex. 586, holding that, although a title of possession be not authenticated by the signature of two assisting witnesses, it is not *ipso jure* a nullity, but remains valid and effectual, provided the fact of its execution by the commissioner be established by competent and sufficient evidence. But *compare* Grimes *v.* Bastrop Corp., 26 Tex. 310, holding that a title executed by a commissioner, without either instrumental or assisting witnesses, was insufficiently authenticated.
14. Fulton *v.* Duncan, 18 Tex. 34.
15. Fulton *v.* Bayne, 18 Tex. 50.

the evidence upon which he acted or merely recited as a fact that a concession had been granted and authority given him by the governor to extend title.[16] Where there were two extensions of title purporting to be in satisfaction of the same concession, but apparently no testimonio ever issued on the first, and no possession was taken under it; and the second was the grant always claimed by the grantee, and was not questioned for thirty years, and it was stated to the land office commissioner by the grantee's agent that the first extension was a mistake, no objection to the second extension could be made on the ground that the first exhausted the officer's authority.[17]

u. Juridical Possession. Under the civil, as at the common, law, a formal tradition or livery of seizin of the property was necessary,[18] and after a Mexican grant had been issued and approved it was necessary to a complete investiture of the title that there should be an official delivery of juridical possession to the grantee by the magistrate of the vicinage,[19] until the doing of which the grantee took no title to any specific quantity.[20] This proceeding required the measurement and segregation from the public domain of the specific quantity granted,[21] and the boundaries of the quantity granted had to be established as a preliminary to the proceeding where there was any uncertainty in the description of the premises.[22] Measurement and segregation in such cases therefore preceded the final delivery of possession.[23] It has been held that any passing beyond the boundaries of the grant vitiated the whole proceeding.[24] This juridical possession could be delivered only by a judicial officer,[25] and it was necessary that such officer,[26] the attend-

16. Hanrick *v.* Jackson, 55 Tex. 17.

17. Hanrick *v.* Jackson, 55 Tex. 17.

18. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673; De Malarin *v.* U. S., 1 Wall. (U. S.) 282, 17 L. ed. 594. See also Lecompte *v.* U. S., 11 How. (U. S.) 115, 13 L. ed. 627; Muse *v.* Arlington Hotel Co., 68 Fed. 637.

19. Leese *v.* Clark, 18 Cal. 535; Waterman *v.* Smith, 13 Cal. 373; Van Reynegan *v.* Bolton, 95 U. S. 33, 24 L. ed. 351; Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,069, McAllister 151; U. S. *v.* Castro, 25 Fed. Cas. No. 14,754, 5 Sawy. 625. See also De Arguello *v.* Greer, 26 Cal. 615; Thornton *v.* Mahoney, 24 Cal. 569.

The fact that the order for juridical possession preceded the approval of the grant by the departmental assembly does not render the proceedings fatally defective. Dominguez *v.* Botiller, 74 Cal. 457, 16 Pac. 241.

What magistrate should act.— A concession made by the governor of the state of Coahuila and Texas, which directed the alcalde "of the respective or nearest municipality" to put the grantee in possession of the land which he might select, and to issue to him the title, was not directed exclusively to the alcalde of the very municipality, if the land should be within one, the term "nearest" contemplating the event of the land not being within any municipality; but it was directed to the alcalde of a municipality which might be embraced within either term, and either one of the two might act under the appointment, as might be found most convenient. Hancock *v.* McKinney, 7 Tex. 384.

20. Waterman *v.* Smith, 13 Cal. 373. See also Thornton *v.* Mahoney, 24 Cal. 569.

Under the colonization laws of Tamaulipas of Dec. 15, 1826, no formal act of possession was necessary to establish an inchoate right to a grant of any quantity less than five leagues. State *v.* Sais, 60 Tex. 87.

21. Leese *v.* Clark, 18 Cal. 535; U. S. *v.* Pico, 5 Wall. (U. S.) 536, 18 L. ed. 695; U. S. *v.* Castro, 25 Fed. Cas. No. 14,754, 5 Sawy. 625.

22. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673; Pinkerton *v.* Ledoux, 129 U. S. 346, 9 S. Ct. 399, 32 L. ed. 706 (holding that an instruction in ejectment that if, from the descriptions and words in the petition and act of juridical possession, the jury could not definitely locate the boundaries of the Mexican grant under which plaintiff claimed, they must find for defendant, was correct); Van Reynegan *v.* Bolton, 95 U. S. 33, 24 L. ed. 351; De Malarin *v.* U. S., 1 Wall. (U. S.) 282, 17 L. ed. 594.

When survey presumed.— Where title issued to a concession recited that the land had been surveyed by a scientific and approved surveyor, the commissioner appointed to put grantees of concessions in possession and complete their title, where the alcalde had failed to do so, had a right to presume, from reading the title, that a legal and sufficient survey had been made under order of the alcalde. Jenkins *v.* Chambers, 9 Tex. 167.

23. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673; De Malarin *v.* U. S., 1 Wall. (U. S.) 282, 17 L. ed. 594. See also Thornton *v.* Mahoney, 24 Cal. 569.

24. U. S. *v.* Castro, 25 Fed. Cas. No. 14,754, 5 Sawy. 625. See also Dodge *v.* Perez, 7 Fed. Cas. No. 3,953, 2 Sawy. 645. But *compare* Yount *v.* U. S., 30 Fed. Cas. No. 18,187, Hoffm. Dec. 36.

25. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673. See also Thornton *v.* Mahoney, 24 Cal. 569.

26. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673.

ing witnesses,[27] and the grantee should be upon the ground,[28] and that there should be some physical act on the part of the grantee accepting or taking possession of the grant.[29] It was also required that coterminous proprietors should be called on to give assent to the final act investing the grantee with title and possession.[30] Where land was surveyed for certain grantees in a regular manner, and the commissioner, although not observing all the usual forms, yet recited that he put the grantees in possession, performing all acts of true possession, the title in the grantees was complete.[31] This juridical possession constituted the investiture of title,[32] and preliminary defects in the grant and survey were thereby cured.[33] An inchoate Mexican title, followed by juridical possession, presents an equity which the United States is bound to respect;[34] and it has been held that a condition that the grantee should obtain juridical possession of the premises was a condition subsequent, the breach of which would not operate a forfeiture of his title.[35] Where lands were jointly denounced by two, and the title recited payment by both, properly describing the land and commanding the proper officer to put the grantees in possession, the putting of one in possession inured to the benefit of both.[36] The fact that an applicant for a Mexican grant was in possession when the lands were denounced was sufficient to dispense with juridical possession.[37]

v. Performance of Conditions.[38] Where a grant was made subject to conditions a compliance therewith was necessary to vest a complete legal title in the grantee,[39] and failure to comply therewith invalidated the grant,[40] and the government could grant the land anew.[41] Where the conditions were in the nature of conditions precedent, upon a performance of which title might be acquired, noncompliance worked a forfeiture of the grant and warranted a refusal to confirm the

27. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673.

28. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673.

29. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673.

30. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673.

31. White *v.* Holliday, 11 Tex. 606.

32. U. S. *v.* Pico, 5 Wall. (U. S.) 536, 18 L. ed. 695; Bouldin *v.* Phelps, 30 Fed. 547.

33. Spencer *v.* Lapsley, 20 How. (U. S.) 264, 15 L. ed. 902.

34. U. S. *v.* Enright, 25 Fed. Cas. No. 15,053, Hoffm. Land Cas. 239.

35. Cervantes *v.* U. S., 5 Fed. Cas. No. 2,560 [*affirmed* in 18 How. 553, 15 L. ed. 484].

36. Trevino *v.* Fernandez, 13 Tex. 630.

37. Haynes *v.* State, (Tex. Civ. App. 1905) 85 S. W. 1029.

38. **A condition against alienation** was in violation of the Mexican law, and even if it were not so, it would not invalidate a conveyance to an American citizen made after the occupation of the territory by the United States troops. Tremont *v.* U. S., 17 How. (U. S.) 542, 15 L. ed. 24.

39. Clarkson *v.* Hanks, 3 Cal. 47; Leese *v.* Clarke, 3 Cal. 17. See also Compañia General de Tabacos de Filipinas *v.* Topiño, 4 Philippine 33, 65, per McDonough, J.

Unauthorized conditions in grant of recognition.— Where a permission to occupy certain lands was granted by the governor of California under the crown of Spain, and after the death of the grantee his heirs made application to the Mexican government for a cession of the same lands, stating that the original grant was lost, whereon a decree was made by the governor declaring the heirs to be entitled thereto, and reciting that the governor had seen the original grant, the deed made in pursuance of such decree was not an original grant, but merely a grant of recognition, and any conditions therein, not included in the original grant, were unauthorized. Nieto *v.* Carpenter, 7 Cal. 527.

40. Doe *v.* Latimer, 2 Fla. 71; Interstate Land Co. *v.* Maxwell Land Grant Co., 139 U. S. 569, 11 S. Ct. 656, 35 L. ed. 278 [*affirming* 41 Fed. 275]; McMicken *v.* U. S., 97 U. S. 204, 24 L. ed. 947; U. S. *v.* de Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627; U. S. *v.* Moore, 12 How. (U. S.) 209, 13 L. ed. 958; O'Hara *v.* U. S., 15 Pet. (U. S.) 275, 10 L. ed. 737; U. S. *v.* Burgevin, 13 Pet. (U. S.) 85, 10 L. ed. 70; U. S. *v.* Kingsley, 12 Pet. (U. S.) 476, 9 L. ed. 1163; U. S. *v.* Mills, 12 Pet. (U. S.) 215, 9 L. ed. 1061; De Villemont *v.* U. S., 7 Fed. Cas. No. 3,839, Hempst. 389 [*affirmed* in 13 How. 261, 14 L. ed. 138, and *followed* in Glenn *v.* U. S., 10 Fed. Cas. No. 5,481, Hempst. 394 (*affirmed* in 13 How. 250, 14 L. ed. 133)]; Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

Civil law as strict as common law.— The civil law used in Spain and the province of Louisiana was as strict as the common law in exacting compliance with conditions in grants, and excluding parol proof to change, annul, or in any way affect such conditions. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

41. Boissier *v.* Metayer, 5 Mart. (La.) 678.

same,[42] leaving the land subject to the disposing power of the United States.[43] But where title was granted burdened with conditions subsequent, as of settlement and improvement, a failure to perform such conditions did not, where the delay was not so unreasonable as to justify a presumption of abandonment, forfeit the grant, but merely subjected the land to be denounced by another,[44] or authorized the government to institute proceedings to divest the title,[45] and if the government did not take such steps prior to the cession of the territory to the United States, the failure in the conditions cannot be inquired into in proceedings to establish the title under the grant against the United States.[46] The United States courts cannot attach any condition to a grant of absolute property in the whole quantity,[47] nor can a condition be implied from the consideration being in part the erection of a sawmill.[48] Persons locating grants on lands acquired under Mexican concessions cannot raise the question whether the conditions of the concessions were complied with.[49] As the Mexican government had power in the first instance to make a grant of land without conditions its action in subsequently waiving or removing conditions was equivalent to an original unconditional grant.[50] Where no time was limited for the performance of conditions, performance within a reasonable time was sufficient.[51] The owners of conditional grants in Florida, who were prevented from fulfilling the conditions by the circumstances of the Spanish nation, had time by the treaty to complete the conditions, which time began to run from the ratification of the treaty.[52] Conditional warrants of land by the former government have been invariably respected where there has been a *bona fide* attempt to perform the conditions;[53] and a partial performance may suffice where complete performance has been prevented by causes beyond the control of the grantee,[54]

42. Norris *v.* Moody, 84 Cal. 143, 24 Pac. 37; Buyck *v.* U. S., 15 Pet. (U. S.) 215, 10 L. ed. 715; U. S. *v.* Wiggins, 14 Pet. (U. S.) 334, 10 L. ed. 481; U. S. *v.* Drummond, 13 Pet. (U. S.) 84, 10 L. ed. 70; Glenn *v.* U. S., 10 Fed. Cas. No. 5,481, Hempst. 394 [*affirmed* in 13 How. 250, 14 L. ed. 133]; U. S. *v.* Cervantes, 25 Fed. Cas. No. 14,768, Hoffm. Land Cas. 9 [*reversed* on other grounds in 16 How. 619, 14 L. ed. 1083]; Vallejo *v.* U. S., 28 Fed. Cas. No. 16,818, Hoffm. Dec. 66. See also Doe *v.* Latimer, 2 Fla. 71.

43. McMicken *v.* U. S., 97 U. S. 204, 24 L. ed. 947.

44. U. S. *v.* Vaca, 18 How. (U. S.) 556, 15 L. ed. 485; Fremont *v.* U. S., 17 How. (U. S.) 542, 15 L. ed. 241 [*followed* in Pico *v.* U. S., 19 Fed. Cas. No. 11,127, 11,128, 11,129, Hoffm. Land Cas. 116, 142, 188; Armijo *v.* U. S., 1 Fed. Cas. No. 536, Hoffm. Land Cas. 248; Chabolla *v.* U. S., 5 Fed. Cas. No. 2,566, Hoffm. Land Cas. 130. See also Hancock *v.* McKinney, 7 Tex. 384; U. S. *v.* Soto, 27 Fed. Cas. No. 16,355, Hoffm. Land Cas. 8.

Such a grant conveyed a present and immediate interest.— Fremont *v.* U. S., 17 How. (U. S.) 542, 15 L. ed. 241.

Person denouncing land anew must prove facts showing forfeiture.— Hancock *v.* McKinney, 7 Tex. 384.

45. Campañia General de Tabacos de Filipinos *v.* Topiño, 4 Philippine 33, 36 (per Johnson, J.); Sideck *v.* Duran, 67 Tex. 256, 3 S. W. 264; Hornsby *v.* U. S., 10 Wall. (U. S.) 224, 19 L. ed. 900.

46. Hornsby *v.* U. S., 10 Wall. (U. S.) 224, 19 L. ed. 900.

47. U. S. *v.* Segui, 10 Pet. (U. S.) 306, 9 L. ed. 435.

It was exclusively for the governor to judge of the conditions to be imposed on his grant. U. S. *v.* Segui, 10 Pet. (U. S.) 306, 9 L. ed. 435.

48. U. S. *v.* Rodman, 15 Pet. (U. S.) 130, 10 L. ed. 685; U. S. *v.* Segui, 10 Pet. (U. S.) 306, 9 L. ed. 435.

49. Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

50. Cessna *v.* U. S., 169 U. S. 165, 18 S. Ct. 314, 42 L. ed. 702.

51. U. S. *v.* Sibbald, 10 Pet. (U. S.) 313, 9 L. ed. 437, holding that where, in a grant by the Spanish governor on condition precedent, no time was limited for the performance, a performance within a reasonable time after the ratification of the treaty with Spain was sufficient, under the eighth article of that treaty, allowing the owners of land so granted the same time within which to fulfil the conditions of their grants as was limited in the grant.

52. U. S. *v.* Kingsley, 12 Pet. (U. S.) 476, 9 L. ed. 1163 [*following* U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547].

53. McMicken *v.* U. S., 97 U. S. 204, 24 L. ed. 947.

54. Grimes *v.* U. S., 11 Fed. Cas. No. 5,828, Hoffm. Land Cas. 107; U. S. *v.* Reading, 27 Fed. Cas. No. 16,127, Hoffm. Land Cas. 18 [*affirmed* in 18 How. (U. S.) 1, 15 L. ed. 29]. Where the conditions of occupation and settlement in a Mexican land grant were complied with, the fact that owing to the hostility of the Indians the grantees were subsequently driven from their property cannot have the effect of prejudicing their claim. U. S. *v.* Reid, 27 Fed. Cas. No. 16,141, Hoffm. Land Cas. 129.

but confirmation may be refused unless there has been a reasonable effort to fulfil the conditions.[55] The grant may be confirmed notwithstanding the grantee's non-performance of conditions where good and sufficient reasons or excuse for such non-performance appears,[56] or where subsequent events render performance useless or impossible,[57] or discharged the condition;[58] but a grantee cannot be excused for non-performance of conditions where, at the time of obtaining the grant, he knew or must have known of the circumstances which prevented his performance,[59] nor where the danger set up as an excuse casts as much doubt on his sincerity in asking the grant as difficulty in the way of his performance.[60]

w. Construction of Grant. The general rule for the construction of written instruments, that the intention of the parties, as evidenced by the language used, governs, is applicable in the construction of land grants or concessions under former sovereignties,[61] and as it is proper to look at all the several parts and ceremonies

55. Facts not amounting to a sufficient compliance see U. S. *v.* de Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627; U. S. *v.* Boisdore, 11 How. (U. S.) 63, 13 L. ed. 605.

56. McMicken *v.* U. S., 97 U. S. 204, 24 L. ed. 947; U. S. *v.* Reading, 18 How. (U. S.) 1, 15 L. ed. 291 [*affirming* 27 Fed. Cas. No. 16,127, Hoffm. Land Cas. 18]; Fremont *v.* U. S., 17 How. (U. S.) 542, 15 L. ed. 241 [*followed in* Pico *v.* U. S., 19 Fed. Cas. Nos. 11,127, 11,128, 11,129, Hoffm. Land Cas. 116, 142, 188]; U. S. *v.* Drummond, 13 Pet. (U. S.) 84, 10 L. ed. 70; U. S. *v.* Kingsley, 12 Pet. (U. S.) 476, 9 L. ed. 1163; U. S. *v.* Mills, 12 Pet. (U. S.) 215, 9 L. ed. 1061; Cervantes *v.* U. S., 5 Fed. Cas. No. 2,560 [*affirmed* in 18 How. 553, 15 L. ed. 484].

Reasons sufficient to excuse non-performance.— Failure of or delay in performance, or complete performance of conditions may be excused where it was caused by the disturbed condition of the country (U. S. *v.* Vaco, 18 How. (U. S.) 556, 15 L. ed. 485; U. S. *v.* Galbraith, 25 Fed. Cas. No. 15,782, Hoffm. Dec. 20, Hoffm. Op. 77 [*reversed* on other grounds in 2 Black 394, 17 L. ed. 449]); the presence of hostile Indians (Fremont *v.* U. S., 17 How. (U. S.) 542, 15 L. ed. 241 [*reversing* 25 Fed. Cas. No. 15,164, Hoffm. Land Cas. 20, and *followed* in Pico *v.* U. S., 19 Fed. Cas. No. 11,127, 11,128, 11,129, Hoffm. Land Cas. 116, 142, 188]); the hostilities between Mexico and the United States (Semple *v.* U. S., 21 Fed. Cas. No. 12,662, Hoffm. Land Cas. 37); or civil strife and the tendencies of the uncivilized Indians (U. S. *v.* Larkin, 26 Fed. Cas. No. 15,563, Hoffm. Land Cas. 41 [*affirmed* in 18 How. 557, 15 L. ed. 485]; Nunez *v.* U. S., 18 Fed. Cas. No. 10,379, Hoffm. Land Cas. 191).

57. U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547, holding that where a Spanish grant on condition subsequent of settling two hundred owners on the land was rendered impossible or useless by the cession of the territory to the United States, the grant became absolute.

58. Wheeler *v.* Moody, 9 Tex. 372, holding that a condition subsequent in a grant of land, that the grantee should pay a certain sum, to be applied to the building of churches, was discharged by the change of government in 1836, when religion was emancipated from civil authority. See also Swift *v.* Herrera, 9 Tex. 263, where this principle was discussed and applied.

59. U. S. *v.* Noe, 23 How. (U. S.) 312, 16 L. ed. 462, holding that non-performance of a condition for improvement in a Mexican grant is not excused by the fact that the Indians were very dangerous, it appearing that they were no more dangerous after than at the time of the grant. De Vilemont *v.* U. S., 13 How. (U. S.) 261, 14 L. ed. 138 [*affirming* 7 Fed. Cas. No. 3,839, Hempst. 389, and *approved* in U. S. *v.* Reading, 27 Fed. Cas. No. 16,127, Hoffm. Land Cas. 18 (*affirmed* in 18 How. 1, 15 L. ed. 291)], holding that the fact that the grantee was commandant of a post and the Indians were hostile was not a sufficient excuse for not performing the condition of clearing and establishing annexed to the grant.

60. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

61. See the following cases:

Alabama.— Stewart *v.* Trenier, 49 Ala. 492.

California.— Noe *v.* Card, 14 Cal. 576 (holding a grant to be a gift and not a purchase, although it contained conditions that the grantee should build a house, conform to all municipal regulations, and pay all municipal fees); Ferris *v.* Coover, 10 Cal. 589 (holding the grant in question to be a conveyance of the land in full property, giving title *eo instante*).

Florida.— Richardson *v.* Sullivan, 38 Fla. 90, 20 So. 815.

Texas.— Victoria *v.* Victoria County, (Civ. App.) 94 S. W. 368, holding that a reservation of land in a Spanish grant for "municipal buildings" was a reservation for the benefit of the precinct or subdivision corresponding to the county, and not for the benefit of the central or capital municipality or town alone.

United States.— U. S. *v.* Pena, 175 U. S. 500, 20 S. Ct. 165, 44 L. ed. 251 (holding the grant in question to have been in severalty and not to the grantees in common); Trenier *v.* Stewart, 101 U. S. 797, 25 L. ed. 1021 (holding the concession in question to be a complete grant, vesting a perfect title in the grantee); U. S. *v.* Richard, 8 Pet.

necessary to complete the title, and to take them together as one act,[62] the petition and the grant should be construed together.[63] The rule that the American courts will defer to the political and judicial authorities of other governments in the administration and interpretation of their own laws applies to Mexican grants.[64] A Mexican grant to the successors ("herederos") of one who has willed the land to them inures to their benefit and vests the title in them.[65] A grant to two persons as "heirs" of a deceased settler, on whose immigration to and settlement in the country the grant was based, vested title in the grantees as trustees for the benefit of all heirs of the settler.[66] The recital in a Mexican grant that the grantee asked it for his personal benefit and that of his family cannot control the operative words of the grant, which point to him alone,[67] especially where, as a matter of fact, the petition made no mention of any family.[68] A title of possession issued to an attorney in fact of the original grantee vested the title in such grantee and not in the attorney.[69] A grant by the Spanish government of a certain tract of land for the use of the inhabitants of a district, on which to cut timber, inured to the benefit of future generations as well as the living grantees,[70] but one not an inhabitant of the district is without right under the concession.[71] The general rules for the construction of conveyances [72] and grants of the public lands of the United States [73] apply, with some modifications due to the nature of the instruments and the prevailing conditions, in determining the location and boundaries of and the land included within grants made under authority of a former sovereignty.[74] The intention governs when that can be clearly ascertained,[75] and so where the description contained in a grant and the circumstances of the case justify the belief that the intention was to grant all the land included within the boundaries named, then the words "*poco mas o menos*" (a little more or less) must be construed as

470, 8 L. ed. 1013 (holding a grant to be of the land and not merely of the timber thereon).

See 41 Cent. Dig. tit. "Public Lands," § 649.

62. Yontz *v.* U. S., 23 How. (U. S.) 495, 16 L. ed. 472; Landes *v.* Brant, 10 How. (U. S.) 348, 13 L. ed. 449.

All instruments referred to and embraced by the commissioners in the expediente form parts of the title, and may be referred to for the correction of errors and mistakes in other parts thereof, and its legal effect must be determined as a whole, and not from a single part. Sheppard *v.* Harrison, 54 Tex. 91.

63. Yontz *v.* U. S., 23 How. (U. S.) 495, 498, 16 L. ed. 472, where it is said: "This was necessarily so, as the concession was often a mere grant of the request, without other description than the petition contained."

64. Cavazos *v.* Trevino, 35 Tex. 133.

65. Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418.

66. Delk *v.* Punchard, 64 Tex. 360.

67. Berreyesa *v.* Schultz, 21 Cal. 513; Scott *v.* Ward, 13 Cal. 458.

68. Scott *v.* Ward, 13 Cal. 458.

69. Hanrick *v.* Barton, 16 Wall. (U. S.) 166, 21 L. ed. 350.

70. Richard *v.* Perrodin, 116 La. 440, 40 So. 789.

71. Richard *v.* Perrodin, 116 La. 440, 40 So. 789.

72. See, generally, DEEDS, 13 Cyc. 626 *et seq.*

73. See *supra*, II, M, 9.

74. See the following cases:

Alabama.— Magee *v.* Doe, 22 Ala. 699; Hallett *v.* Doe, 7 Ala. 882; Hagan *v.* Campbell, 8 Port. 9, 33 Am. Dec. 267.

California.— Cornwall *v.* Culver, 16 Cal. 423; McGarvey *v.* Little, 15 Cal. 27.

Illinois.— Kaskaskia *v.* McClure, 167 Ill. 23, 47 N. E. 72.

Louisiana.— Millaudon *v.* McDonough, 18 La. 102; Meaux *v.* Breaux, 10 Mart. 364.

United States.— Ainsa *v.* U. S., 184 U. S. 639, 22 S. Ct. 507, 46 L. ed. 727; U. S. *v.* McLaughlin, 127 U. S. 428, 8 S. Ct. 1177, 32 L. ed. 213; U. S. *v.* Maxwell Land-Grant Co., 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949, 122 U. S. 365, 7 S. Ct. 1271, 30 L. ed. 1211; U. S. *v.* Sutter, 2 Wall. 562, 17 L. ed. 881; U. S. *v.* Fossat, 20 How. 413, 15 L. ed. 944 [*reversing* 25 Fed. Cas. No. 15,137, Hoffm. Land Cas. 211]; U. S. *v.* Seton, 10 Pet. 309, 9 L. ed. 436; U. S. *v.* Huertas, 9 Pet. 171, 9 L. ed. 90; U. S. *v.* Cleveland, etc., Cattle Co., 33 Fed. 323; U. S. *v.* De Haro, 25 Fed. Cas. No. 14,940, Hoffm. Dec. 75; U. S. *v.* Soto, 27 Fed. Cas. No. 16,357, Hoffm. Land Cas. 182.

See 41 Cent. Dig. tit. "Public Lands," § 651.

75. U. S. *v.* Pacheco, 22 How. (U. S.) 225, 16 L. ed. 336 [*reversing* 27 Fed. Cas. No. 15,982, Hoffm. Land Cas. 150] (holding that where the map and the evidence in relation to it clearly showed an intention to give a piece two leagues square, the grant was properly confirmed to that extent, although the grant was of two square leagues); U. S. *v.* Bernal, 24 Fed. Cas. No. 14,578, 14,580, Hoffm. Dec. 56.

operative to pass to the grantee such fractional part of a league as may be found in excess of the quantity named in the grant.[76] But where there is no natural boundary or descriptive call for the termination of lines of a tract of land, and the quantity of land called for in the grant is one league, "more or less," the qualifying words must be rejected and the survey must include only a league.[77] Where there is a large discrepancy between the amount of land stated in the proceedings for its sale, and for which payment was made, and the quantity included within the outer boundaries of the survey, the quantity named, and which was intended to be sold, will govern in establishing title under the grant.[78] Where the territorial governor of California made an order that the petitioner should have a certain tract of land, without fixing the boundaries, and on the next day issued an order granting the land within certain fixed limits, the petitioner can claim under these orders only the land contained within the fixed limits.[79] Where the description contained in a petition and grant differs from that contained in the act of juridical possession, the former must prevail;[80] but where a judicial measurement and delivery of a tract of land according to fixed boundaries has been made by the Mexican authorities, and long acquiesced in, such boundaries will not be modified, although they include a considerable quantity in excess of the amount specified in the grant.[81] A Mexican colonial grant affords *prima facie* evidence that the land lay within the limits of the colony.[82] A map referred to in a Mexican grant for the purpose of identifying the land is to be construed as part of the grant;[83] but where a grant is of a certain quantity of land, to be taken in the form of a square and at the place delineated on the diseño, but no boundaries are named, the condition as to quantity and shape must control, as against any natural objects represented on the map.[84] Where a grant by a Mexican governor expresses no intention to limit the quantity of land embraced within the given boundaries, the extent of the grant within such boundaries is only limited by the power of the governor under the colonization law;[85] but under a grant of two square leagues "a little more or less," land greatly in excess of the amount stated cannot be confirmed to the claimant.[86] Where a Mexican grant of California lands described it by boundaries and then stated the area, with the usual reservation of the sobrante or surplus for the use of the nation, it was confirmed to the extent of the area specified, although that did not extend to the boundaries mentioned,[87] and a Mexican grant of "a little more or less than three leagues" has been held to carry but three leagues, to be taken from the larger tract named in the grant.[88] In determining the boundaries of a Mexican grant, the mention in the act of possession of the length of a certain line as fixing its point of termination is not to be regarded as conclusive merely because, at or near that distance from the starting point, a marked tree is found, which is not identified by any witness as the tree to which measurement was made.[89] A claimant of a Mexican land grant in California, where the land granted is designated by a particular name and by quantity, with-

76. U. S. *v.* Estudillo, 25 Fed. Cas. No. 15,058, Hoffm. Land Cas. 204.

77. U. S. *v.* Fossat, 20 How. (U. S.) 413, 15 L. ed. 944 [*reversing* 25 Fed. Cas. No. 15,137, Hoffm. Land Cas. 211]. See also Marsh *v.* U. S., 16 Fed. Cas. No. 9,120, Hoffm. Land Cas. 301.

78. Ely *v.* U. S., 171 U. S. 220, 18 S. Ct. 840, 43 L. ed. 142.

79. De Arguello *v.* U. S., 18 How. (U. S.) 539, 15 L. ed. 478. See also U. S. *v.* Walkinshaw, 28 Fed. Cas. No. 16,633.

80. Pinkerton *v.* Ledoux, 129 U. S. 346, 9 S. Ct. 399, 32 L. ed. 706.

81. U. S. *v.* Bernal, 24 Fed. Cas. No. 14,583, Hoffm. Land Cas. 139; Yount *v.* U. S., 30 Fed. Cas. No. 18,187, Hoffm. Dec. 36.

82. Hatch *v.* Dunn, 11 Tex. 708.

83. Ferris *v.* Coover, 10 Cal. 589.

84. Weber *v.* U. S., 29 Fed. Cas. No. 17,329, Hoffm. Dec. 8, Hoffm. Op. 66.

85. U. S. *v.* Pico, 5 Wall. (U. S.) 536, 18 L. ed. 695.

86. U. S. *v.* Castro, 25 Fed. Cas. No. 14,753, Hoffm. Op. 57, Hoffm. Dec. 97 (three and one-half leagues); U. S. *v.* Peralta, 27 Fed. Cas. No. 16,032, Hoffm. Op. 63, Hoffm. Dec. 6 (four or five leagues).

87. Gonzales *v.* U. S., 22 How. (U. S.) 161, 16 L. ed. 332.

88. Marsh *v.* U. S., 16 Fed. Cas. No. 9,120, Hoffm. Land Cas. 301.

89. U. S. *v.* White, 28 Fed. Cas. No. 16,681, Hoffm. Dec. 58.

out specification of boundaries, is entitled to the quantity specified within the limits of his settlement, if that amount is obtainable without encroachment upon the prior rights of adjoining proprietors.[90] If a Mexican grant solicited by the diseño describes the first line as being a designated parallel of latitude, and the same is delineated on the diseño with great accuracy by reference to natural monuments, and the grant refers to the diseño for the description of the lands, the line as established by such natural monuments must be taken as the true boundary, although, owing to the lack of facilities or skill for determining parallels of latitude, the said natural line does not in fact coincide with the parallel line.[91] In determining, in the case of a Mexican grant, the limits of the tract from the map, regard is to be had to the natural objects there laid down as bounding the tract, rather than to the distance of such objects from other natural objects as shown by the scale; [92] but the rule of construction which excludes from a conveyance an object named as a boundary is of very uncertain application, as to Mexican grants, where objects are frequently mentioned rather as landmarks to identify the tract than as boundaries to which it is to extend.[93] The true Mexican vara is slightly less than thirty-three American inches; but by use in California it is estimated at thirty-three inches, and in Texas at thirty-three and one-third inches.[94] Where on a petition for a sobrante lying between various ranchos, a grant was made by the governor of "three square leagues, a little more or less, as the respective diseño explains," and on the diseño a considerable tract was delineated, but a smaller space was inclosed in yellow lines, and marked, "What is solicited," this reference in the grant to the diseño did not necessarily indicate that it included only the space so marked, but the presumption rather was that three leagues was granted to be taken anywhere within the tract bounded by the ranchos named.[95] When a grant of land was of a specific quantity, within exterior limits embracing a much larger quantity, there was no obligation on the part of the Mexican government, nor is there any on the United States government, to allow the quantity to be selected in accordance with the wishes of the grantee, but the government discharges its duty when the right conferred by the grant to the quantity designated is attached to a specific and defined tract.[96] Where a given quantity of land is granted within certain specified boundaries, it is not to be presumed that there is any more land within the boundaries than was intended to be granted, and the government alone can raise this objection.[97] In locating an order of survey granted by the Spanish government in the post of Rapides, the limits of such post, never having been correctly defined by the Spanish government, must be taken as recognized *de facto* by the Spanish officers, and those of the late territory.[98] Where a grant calls for land on the east or west side of a watercourse, without specifying how much on each, it should be located in equal quantities on each side,[99] and a grant calling for objects on both sides of a bayou must be laid out so as to include each.[1] A decision made before the Texas revolution as to a controversy between empresarios, relating to the boundaries of their respective colonies and the lands within the littoral leagues, and acquiesced in by both empresarios, must be regarded as final.[2]

x. Effect and Conclusiveness of Grant. A valid grant of public lands by Mexican authorities in 1833, pursuant to a concession, vested title in the grantee,

90. Alviso *v.* U. S., 8 Wall. (U. S.) 337, 19 L. ed. 305.
91. U. S. *v.* Larkin, 26 Fed. Cas. No. 15,562, Hoffm. Dec. 23.
92. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,734, Hoffm. Dec. 63.
93. U. S. *v.* Bernal, 24 Fed. Cas. No. 14,578, 14,580, Hoffm. Dec. 56.
94. U. S. *v.* Perot, 98 U. S. 428, 25 L. ed. 251.
95. U. S. *v.* Carillo, 25 Fed. Cas. No. 14,736, Hoffm. Dec. 40.
96. U. S. *v.* Armijo, 5 Wall. (U. S.) 444, 18 L. ed. 492.
97. Ferris *v.* Coover, 10 Cal. 589, opinion of the court delivered by Field, J.
98. Baldwin *v.* Stafford, 10 Mart. (La.) 416.
99. Holstein *v.* Henderson, 12 Mart. (La.) 319.
1. Holstein *v.* Henderson, 12 Mart. (La.) 319.
2. Bissell *v.* Haynes, 9 Tex. 556.

in the absence of evidence that it was not accepted, or was abandoned after acceptance.[3] The effect of extension of final title to a land grant by the governor of Texas, and the placing of the grantee in possession being to vest the latter with title to the property, cannot be avoided by extraneous evidence;[4] and where a colonial title is issued by the proper officer with full knowledge of the facts before him, and is regular in its articles and genuine in its signature, it is conclusive, in the absence of actual fraud or the unwarrantable exercise of authority, as the act of the issuing officer was an exercise of judgment.[5] The issue of a grant to an applicant as a colonist precludes inquiry as to the fact of his formal admission as such, especially where the residence of the grantee had been within the colonial limits.[6] The original validity of a colonial grant on its face regularly issued to the head of a family cannot be impeached on the ground that the grantee had not brought his family to the country or become domiciled there so as to be entitled to the grant;[7] and where such a grant was to a man as the head of a family, the question whether he was the head of a family will not be examined by the court, in the absence of fraud.[8]

y. Confirmation or Ratification by Former Sovereignty. An alleged Spanish grant of lands in East Florida, which was not in itself a royal title, and was neither made nor confirmed by the lawful authorities of the king, was insufficient to constitute a perfect title, at the time of the cession of Florida to the United States, without further action of the Spanish government to perfect it.[9] It was the constant practice of the authorities intrusted with the granting of lands under the former government of Texas to perfect incipient or inchoate titles by a final act of confirmation;[10] and whether or not an alcalde was authorized to issue a title of possession to the widow of a grantee in a concession under the colonization laws, it was competent for the governor subsequently to ratify the action of the alcalde and confirm the title.[11] As the Spanish government never contested the grants by French officers before the Spaniards took possession of Louisiana, this conduct amounted to a tacit ratification thereof.[12] A confirmation by the ceding authority subsequent to the treaty by which it yielded up its right to the soil is wholly inoperative to affect the title of others, acquired after the original grant.[13]

9. Abandonment, Revocation, or Forfeiture of Grant. A claim which was abandoned prior to the treaty of cession is not entitled to confirmation;[14] and a grantee under a former sovereignty, who has failed for a number of years to take possession of the land or to do any act showing an intention to comply with the conditions of the grant, must be presumed to have abandoned the grant;[15] as must also one who, after taking possession for years and commencing compliance with the conditions, has left the property and remained away and made no effort to fulfil the conditions for many years.[16] But some interruption of possession under a Mexican grant during the war between the United States and Mexico is not fatal to the validity of the grant.[17] A statute confirming claims does not

3. Peaslee *v.* Walker, 34 Tex. Civ. App. 297, 78 S. W. 980.
4. Surghenor *v.* Taliaferro, (Tex. Civ. App. 1906) 98 S. W. 648.
5. Burleson *v.* McGehee, 15 Tex. 375.
6. Byrne *v.* Fagan, 16 Tex. 391.
7. Johnston *v.* Smith, 21 Tex. 722 [*followed* in Bowmer *v.* Hicks, 22 Tex. 155].
8. Hatch *v.* Dunn, 11 Tex. 708.
9. Mitchell *v.* Furman, 180 U. S. 402, 21 S. Ct. 430, 45 L. ed. 596, opinion of the court delivered by Fuller, C. J.
10. Word *v.* McKinney, 25 Tex. 258.
11. Word *v.* McKinney, 25 Tex. 258.
12. Devall *v.* Choppin, 15 La. 566.
13. Doe *v.* Jones, 11 Ala. 63.
14. U. S. *v.* Noe, 23 How. (U. S.) 312, 16 L. ed. 462.
15. Fuentes *v.* U. S., 22 How. (U. S.) 443, 16 L. ed. 376; Glenn *v.* U. S., 13 How. (U. S.) 250, 14 L. ed. 133 [*affirming* 10 Fed. Cas. No. 5,481]; U. S. *v.* Hughes, 13 How. (U. S.) 1, 14 L. ed. 25; U. S. *v.* Le Blanc, 12 How. (U. S.) 435, 13 L. ed. 1055; U. S. *v.* Simon, 12 How. (U. S.) 433, 13 L. ed. 1054; Muse *v.* Arlington Hotel Co., 68 Fed. 637 [*affirmed* in 168 U. S. 430, 18 S. Ct. 109, 42 L. ed. 531].
16. Sena *v.* U. S., 189 U. S. 233, 23 S. Ct. 596, 47 L. ed. 787; U. S. *v.* de Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627.
17. U. S. *v.* Pena, 175 U. S. 500, 20 S. Ct. 165, 44 L. ed. 251.

include claims previously abandoned.[18] A settler under Mexican law lost his title when he ceased to occupy with the intention of relinquishing his claim.[19] Where land granted to one person was subsequently granted to another because the governor was satisfied that the first grantee had abandoned his grant, the second grant is properly confirmed.[20] Where one who had purchased land, and had built a house thereon, obtained a grant from the government of adjoining land, his continued occupancy of the former tract extended to the latter, so as to rebut any presumption of abandonment of the grant.[21] The fact that a naturalized citizen of Mexico, the grantee of lands in California, espoused the cause and joined the troops of the United States in the Mexican war, is not evidence of an intention to abandon the property, and furnished no reason for a forfeiture of the grant.[22] One who has failed for many years to register his claim under the act of congress requiring persons claiming land under the former government to register their claims in the land office will be deemed to have abandoned it.[23] The burden of proof is on the party seeking to impeach the title to a grant on the ground of its abandonment,[24] and as strong proof of abandonment is required in the case of a claim based on cultivation and possession as in a case where a documentary title from the Spanish government is shown.[25] An actual entry or office found is not necessary to enable the United States government to take advantage of a condition broken in the case of a Spanish grant, and to resume possession of lands which have become forfeited;[26] but a legislative act directing the appropriation and possession of the land is sufficient to reunite it with the public domain.[27] While it has been asserted that the doctrine of abandonment has no application where the possessor has actual title by grant,[28] yet the surrender of the sole evidence of a conditional grant before fulfilment of the condition implies the abandonment of all rights under it.[29] In passing upon claims under Mexican grants in California the question is as to what right in the land the grantee acquired from the Mexican government, and the United States courts cannot inquire into any acts or omissions of the grantee since the Mexican authorities were displaced or pronounce a forfeiture for anything done or omitted by the grantee since that time.[30] The Mexican governor of California had no power to annul a grant by a purely *ex parte* proceeding,[31] and an alcalde had no authority to revoke a grant once made and delivered or mutilate its record.[32] Where land allotted to the original settlers by metes and bounds was surveyed by the Spanish surveyor, and the settlers were put in possession, a governor could not by a subsequent grant destroy the title,[33] and where part of a defeasible grant was regranted

18. Barada *v.* Blumenthal, 20 Mo. 162, so holding in respect to Act Cong. June 13, 1812.

Where the husband abandoned his possession, his abandonment was the abandonment of his wife, and neither he nor his wife had any claim on which the act of June 13, 1812, could operate. Byron *v.* Sarpy, 18 Mo. 455.

19. Sideck *v.* Duran, 67 Tex. 256, 3 S. W. 264.

Abandonment a question of fact.— Simpson *v.* McLemore, 8 Tex. 448.

20. Pacheco *v.* U. S., 18 Fed. Cas. No. 10,641, Hoffm. Land Cas. 113.

21. U. S. *v.* Rose, 27 Fed. Cas. No. 16,195, Hoffm. Land Cas. 197 [*reversed* on other grounds in 23 How. 262, 16 L. ed. 448].

22. U. S. *v.* Reading, 18 How. (U. S.) 1, 15 L. ed. 291.

23. Strother *v.* Lucas, 6 Pet. (U. S.) 763, 8 L. ed. 573, so holding in the case of one who slept on his claim from 1785 to 1818.

24. White *v.* Holliday, 11 Tex. 606.

25. Fine *v.* St. Louis Public Schools, 30 Mo. 166.

26. McMicken *v.* U. S., 97 U. S. 204, 24 L. ed. 947; Farnsworth *v.* Minnesota, etc., R. Co., 92 U. S. 49, 23 L. ed. 530; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551; U. S. *v.* de Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627.

27. U. S. *v.* de Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627 [*approved* in McMicken *v.* U. S., 97 U. S. 204, 24 L. ed. 947].

28. Ferris *v.* Coover, 10 Cal. 589.

29. Boissier *v.* Metayer, 5 Mart. (La.) 678.

30. Hornsby *v.* U. S., 10 Wall. (U. S.) 224, 19 L. ed. 900; U. S. *v.* Juares, 26 Fed. Cas. No. 15,500.

31. Mott *v.* De Reyes, 45 Cal. 379.

32. Montgomery *v.* Bevans, 17 Fed. Cas. No. 9,735, 1 Sawy. 653, holding that neither an attempted revocation nor a mutilation of the record by the alcalde could operate to divest a title already passed to the grantee.

33. Landry *v.* Martin, 15 La. 1.

by the officers of the king of Spain, the title of the grantee to what remained was not affected.[34] The Mexican colonization laws of 1832 and 1834 did not annul rights acquired under the former laws.[35] A report of the surveyor of the Spanish government, stating land to be vacant, and the allegation of that fact in a Spanish grant, did not amount to a confiscation or a revocation of a prior grant of the same land.[36] All favorable presumptions will be made against the forfeiture of a grant,[37] and the burden of proving the forfeiture of a land grant before the acquisition of the territory by the United States is upon the party alleging it.[38] A forfeiture for the non-payment of instalments for the purchase of lands acquired by the act of congress of Coahuila and Texas cannot be claimed by one without at least connecting himself with a government title.[39] Where a junior claimant by patent who relied on the forfeiture of a prior Mexican or Spanish title, under the constitution of the republic of Texas, neglected to allege the forfeiture in his petition, he could not claim the benefit of the same, although evidence of the facts constituting the forfeiture was admitted without objection.[40] A genuine California grant is not vitiated by a fraudulent attempt to alter it after the cession to the United States, as the title against the United States depends on the title against Mexico at the time of the cession.[41] Under the Mexican system a land grant to a colonist was forfeited and became vacant if the grantee abandoned the country without having alienated the land,[42] and in such case no proceeding in the nature of office found was necessary, but the abandonment *ipso facto* vacated the land and restored it to the mass of the public domain.[43]

10. Title and Rights of Grantees. A right under a former sovereignty to a specific quantity of land lying in an area of a larger extent constituted an equitable title and a property in the land;[44] and until the grantee's possession was restricted by a segregation and location of the quantity granted, he was entitled to possession of all the land within the general description of the grant as against third persons without title,[45] or persons claiming under the preëmption laws of the United States.[46] An incomplete title under a former government was a property interest in the land which, at least between private persons, could be transferred by mortgage or reached by judicial process;[47] but when not confirmed by the United States, such a grant could not prevail against a grant from the United States.[48] A complete

34. Lewis *v.* San Antonio, 7 Tex. 288.

35. Jenkins *v.* Chambers, 9 Tex. 167.

36. Winn *v.* Cole, Walk. (Miss.) 119.

37. Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.

38. Catron *v.* Laughlin, 11 N. M. 604, 72 Pac. 26.

39. Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.

40. Paul *v.* Perez, 7 Tex. 338.

41. U. S. *v.* West, 22 How. (U. S.) 315, 16 L. ed. 317 [*distinguished* in U. S. *v.* Galbraith, 2 Black (U. S.) 394, 17 L. ed. 449 (*reversing* 25 Fed. Cas. No. 15,182)].

42. Bowmer *v.* Hicks, 22 Tex. 155; Marsh *v.* Weir, 21 Tex. 97; Yates *v.* Iams, 10 Tex. 168; Horton *v.* Brown, 2 Tex. 78; Holliman *v.* Peebles, 1 Tex. 673.

A removal from one of the states of the Mexican Confederacy to another was not an abandonment of the country. Maxey *v.* O'Connor, 23 Tex. 234; Grassmeyer *v.* Beeson, 18 Tex. 753, 70 Am. Dec. 309.

The judgment of a competent tribunal conclusively established the fact of abandonment and consequent forfeiture, and it was no objection to the validity of the judgment that the grantee was not served with notice if he had gone beyond the reach of process, the proceeding being *in rem*, and acting directly upon the status of the property. Marsh *v.* Weir, 21 Tex. 97.

After alienation of a colonial grant by the grantee, who had in good faith occupied and cultivated the land, his abandonment of the country was not sufficient ground for annulling the grant. Summers *v.* Davis, 49 Tex. 541.

43. Bowmer *v.* Hicks, 22 Tex. 155; Horton *v.* Brown, 2 Tex. 78; Holliman *v.* Peebles, 1 Tex. 673.

44. Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151.

45. Thornton *v.* Mahoney, 24 Cal. 569; Hosmer *v.* Wallace, 97 U. S. 575, 24 L. ed. 1130.

Grantee might maintain ejectment before survey.— Cornwall *v.* Culver, 16 Cal. 423 [*followed* in Riley *v.* Hersch, 18 Cal. 198].

46. Van Reynegan *v.* Bolton, 95 U. S. 33, 24 L. ed. 351. See also Mahoney *v.* Van Winkle, 21 Cal. 552.

Right to enter lands claimed under Spanish, Mexican, or French grants see *supra*, II, C, 2, b, (IV).

47. Bryan *v.* Kennett, 113 U. S. 179, 5 S. Ct. 407, 28 L. ed. 908.

48. Fluker *v.* Doughty, 15 La. Ann. 673;

title under a former government might, however, be successfully asserted against a claimant under the United States,[49] unless the grantee had lost his rights by failure to comply with the statutory requirements for a recognition thereof.[50] As between claimants of the same grant under a former sovereignty the earlier grant would as a rule prevail,[51] but a complete grant would prevail against a provisional grant or order of survey of earlier date.[52] An alcalde grant of a laguna survey lot conveyed the absolute title, and no portion of the land so conveyed could be appropriated for a street without the award of proper compensation.[53] The original purchaser of a concession of land from one of the Mexican states had the power to alienate his concession at once before the lands were selected,[54] and on the extension of final title the fee vested in his grantee.[55] So a deed executed by a grantee before confirmation passed the interest gained by a subsequent confirmation and patent to him.[56] Under the Texas colonization law of 1823 a colonist had the right of alienation at any time after receiving the grant,[57] but later colonization laws restricted alienation by colonists for a certain period.[58]

Mullanphy *v.* Redman, 4 Mo. 226; Chavez *v.* Chavez de Sanchez, 7 N. M. 58, 32 Pac. 137; McCabe *v.* Worthington, 16 How. (U. S.) 86, 14 L. ed. 856 [*affirming* 16 Mo. 514]; U. S. *v.* King, 3 How. (U. S.) 773, 11 L. ed. 824.

Compensation for improvements.— In ejectment by one claiming under a patent issued by the United States, against a claimant under an unconfirmed Spanish grant, defendant cannot recover for the value of improvements made by him, and have a lien on the land therefore, under N. M. Comp. Laws, § 2581. Chavez *v.* Chavez de Sanchez, 7 N. M. 58, 32 Pac. 137.

49. Hall *v.* Root, 19 Ala. 378; Phelan *v.* Poyoreno, 74 Cal. 448, 13 Pac. 681, 16 Pac. 241; Jewell *v.* Porche, 2 La. Ann. 148. See also Morrison *v.* Whetstone, 5 La. Ann. 636.

The act of congress of Sept. 28, 1850, granting to the states all swamp and overflowed land within their limits, could not apply to or affect land owned under the Mexican law by the pueblo at San Francisco, and afterward by the city of San Francisco, as its successor. San Francisco *v.* LeRoy, 138 U. S. 656, 11 S. Ct. 364, 34 L. ed. 1096.

50. Hall *v.* Root, 19 Ala. 378.

51. Mott *v.* De Reyes, 45 Cal. 379; Reynolds *v.* West, 1 Cal. 322; Ledyard *v.* Brown, 27 Tex. 393; Howard *v.* Richeson, 13 Tex. 553, holding that in case of a conflict between grants made by two persons empowered to grant land within the same territorial limits, the elder grant will prevail.

Reference in elder grant to existing rights. — Where the date of a grant of land by the Mexican government to A was prior to that of a grant to S, but the rights of S were referred to in A's petition and in the grant to him, A's grant was subordinate to that of S. U. S. *v.* Armijo, 5 Wall. (U. S.) 444, 18 L. ed. 492.

52. Mott *v.* De Reyes, 45 Cal. 379; Fleitas *v.* New Orleans, 1 Mart. N. S. (La.) 430; Jones *v.* Menard, 1 Tex. 771.

A grant, supported by a requête specifying a definite quantity of land, is of a higher dignity than that resulting from bare possession, which can only give a pretense of right to the extent actually inclosed. Martin *v.* Turnbull, 12 Mart. (La.) 395.

53. Spaulding *v.* Bradley, 79 Cal. 449, 22 Pac. 47 [*following* Scott *v.* Dyer, 54 Cal. 430].

54. Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113; Surghenor *v.* Ranger, 133 Fed. 453, 66 C. C. A. 327, holding the instrument in question to be an act of sale and not merely an executory agreement to sell. See also Allen *v.* Parmalee, 142 Fed. 354, 73 C. C. A. 402.

55. Surghenor *v.* Taliaferro, (Tex. Civ. App. 1906) 98 S. W. 648; Hunnicutt *v.* Peyton, 102 U. S. 333, 26 L. ed. 113.

56. Walbridge *v.* Ellsworth, 44 Cal. 353 [*following* Stark *v.* Barrett, 15 Cal. 361]; Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108; Nixon *v.* Carco, 28 Miss. 414.

A confirmation by Act Cong. June 13, 1812, inured to the benefit of the last claimant where there had been several successive transfers, whether before or after the change of government. St. Louis *v.* Toney, 21 Mo. 243.

57. Thomas *v.* Moore, 46 Tex. 433; Portis *v.* Hill, 14 Tex. 69, 65 Am. Dec. 99; Emmons *v.* Oldham, 12 Tex. 18.

58. Brown *v.* Simpson, 67 Tex. 225, 2 S. W. 644; Manchaca *v.* Field, 62 Tex. 135; Grant *v.* Wallis, 60 Tex. 350; Hines *v.* Thorn, 57 Tex. 98; Cook *v.* Lindsay, 57 Tex. 67; Summers *v.* Davis, 49 Tex. 541; Thomas *v.* Moore, 46 Tex. 433; Clay *v.* Clay, 35 Tex. 509; Ledyard *v.* Brown, 27 Tex. 393; Williams *v.* Talbot, 27 Tex. 159; Clay *v.* Clay, 26 Tex. 24; Williams *v.* Chandler, 25 Tex. 4; Atkinson *v.* Bell, 18 Tex. 474; McKissick *v.* Colquhoun, 18 Tex. 148; Clay *v.* Cook, 16 Tex. 70; Harris *v.* Hardeman, 15 Tex. 466; Clay *v.* Holbert, 14 Tex. 189; Desmuke *v.* Griffin, 10 Tex. 113; Jenkins *v.* Chambers, 9 Tex. 167; Spillers *v.* Clapp, 3 Tex. 498; Robbins *v.* Robbins, 3 Tex. 496.

Those who acquired land by purchase under section 24 of the colonization law of 1825 could sell as soon as the grant was obtained. Martin *v.* Parker, 26 Tex. 253; Fulton *v.* Duncan, 18 Tex. 34; Clay *v.* Holbert, 14 Tex. 189; Ryan *v.* Jackson, 11 Tex. 391.

D. Record and Evidence of Grants or Claims — 1. Record. As a general rule in order to sustain a claim under a Mexican grant it must appear that a grant from the Mexican government had been deposited and recorded in the proper public office, among the public archives of the republic.[59] But where the genuineness of the grant is fully proved and long occupation by the grantee and those claiming under him is also shown, the court will not refuse confirmation because the expediente is not among the archives.[60] A complete expediente in a land title according to the laws and customs of Mexico consisted of a petition with a diseño or map annexed, an order of reference, a decree of concession, and a copy of the grant,[61] and the nature and effect of an expediente, when clearly ascertainable from contemporaneous and official construction, cannot be defeated by an entry in the Toma de Razon.[62] Where the petition for a grant of land was accompanied by a plan of the lands asked for, but neither the petition nor the patent stated the quantity, but the concession by the governor, and his orders to issue the patent limited the quantity to eleven square leagues, all the papers were included in the record evidence of the title, and made it sufficiently definite.[63] The Spanish word "titulo," used in recorded Mexican documents regarding land, does not indicate the measure of the right, interest, or estate of the party; it only means the cause in virtue of which anything is possessed, and the instrument by which the right is accredited; and hence it applies to a provisional license as well as to a permanent grant.[64] If the commissioner for extending titles to lands omitted to sign the protocol or recorded title, the validity of the title was not affected thereby, where a testimonio properly executed by the commissioner was issued to the interested party.[65] On loss of part of an original Mexican title, it was in accordance with the usual and correct practice for the commissioner who issued it to supply the loss by adopting the testimonio.[66] Where the officer who had executed the protocol, and who had issued the testimonio to the party interested, appeared before the county clerk, and acknowledged his signature to the certificate, authenticating the testimonio, this was held sufficient to authorize the recording of the testimonio.[67] Alcaldes' grants of lots in pueblos in California made while the

59. Berreyesa *v.* U. S., 154 U. S. 623, 14 S. Ct. 1179, 23 L. ed. 913 [*following* Peralta *v.* U. S., 3 Wall. (U. S.) 434, 18 L. ed. 221; U. S. *v.* Castro, 24 How. (U. S.) 346, 16 L. ed. 659 (*followed* in U. S. *v.* Knight, 1 Black (U. S.) 227, 488, 17 L. ed. 76, 80); U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828].

An expediente not placed among the records until 1855 is not archive testimony such as is indispensable to the confirmation of an alleged grant. U. S. *v.* Teschemacher, 28 Fed. Cas. No. 16,455, Hoffm. Dec. 84.

Jimeno's index of Mexican grants in California is an auxiliary official memorandum kept by him while secretary, but neither the enumeration of a grant in it nor the omission of a grant from it is conclusive as to the validity of that grant. U. S. *v.* West, 22 How. (U. S.) 315, 16 L. ed. 317.

Hartnell's index.— The fact that an expediente is found among those indexed by Hartnell in 1847–1848 is not evidence that it was made at the time of its date. U. S. *v.* Galbraithe, 2 Black. (U. S.) 394, 17 L. ed. 449.

Del Valee's list.— The omission of a concession from Secretary Del Valee's list of original documents on file is not conclusive against it, especially where it appears that the original was lost before the list was made. McGehee *v.* Dwyer, 22 Tex. 435.

60. U. S. *v.* Cazares, 25 Fed. Cas. No. 14,761, Hoffm. Land Cas. 90.

61. U. S. *v.* Knight, 1 Black (U. S.) 227, 488, 17 L. ed. 76, 80. A record containing the petition, with a diseño, an order of reference, an informe by the proper officer, a decree of concession, a titulo, the approval of the departmental assembly, the order for survey the juridical possession, with the report of the proper officer that such survey was made and possession given, presents every link essential to a chain of title under the Mexican law. Phelan *v.* Poyoreno, 74 Cal. 448, 13 Pac. 681, 16 Pac. 241.

Petition not sufficiently connected with grant.— A petition, appearing in an expediente, on behalf of four persons for thirty-two leagues, cannot be considered as having been preliminary to a grant of sixteen leagues to two of such persons. U. S. *v.* Teschemacher, 28 Fed. Cas. No. 16,455, Hoffm. Dec. 84.

62. Deharo *v.* U. S., 5 Wall. (U. S.) 599, 18 L. ed. 681.

63. U. S. *v.* Larkin, 18 How. (U. S.) 557, 15 L. ed. 485.

64. Deharo *v.* U. S., 5 Wall. (U. S.) 599, 18 L. ed. 681.

65. Titus *v.* Kimbro, 8 Tex. 210.

66. Chambers *v.* Fisk, 22 Tex. 504.

67. Edwards *v.* James, 7 Tex. 372.

Spanish or Mexican laws were in force, were required to be first entered in a book to be kept by the alcaldes for that purpose, and then to be signed and attested by the proper officer, and a copy or summary statement of the proceedings as contained in this book, also signed and attested by the proper officer, was then to be given to the grantee as evidence of his title.[68] A Spanish grant, found only in the register of complete grants of land made by the French and Spanish governors of Louisiana, in the archives of the register of the land office of New Orleans, will give a good title.[69] An act of congress exempting certain titles by French and Spanish grants from the necessity of being recorded applied only in favor of complete grants, and did not include an order of survey, although the land was actually inhabited and cultivated.[70] Under the various acts of congress relating to land titles in the territory between the Iberville, the Perdido, and the thirty-first degree of north latitude, a complete title from a former government, unrecorded, is not barred against the United States, although it is barred against any private claim derived from the United States.[71] Acts of congress have made provision for the filing of evidence of incomplete claims under former sovereignty, failing in which the claims are barred.[72] In Texas the protocol of a Mexican title is an archive which may be deposited in the general land office at any time, subject to all just implications arising from delay and the circumstances of its history;[73] but until the title is deposited in the land office or duly recorded in the proper county, *bona fide* purchasers not having notice thereof will be protected, although they claim under a junior Mexican grant.[74] It has been held that if the protocol of a Mexican grant is in the general land office, it is notice to subsequent locators, whether it was delineated on the map or not;[75] and the introduction of the testimonio, or a certified translated copy from the general land office of what purports to be the original, is *prima facie* evidence that the original was on file in the land office at

68. Donner *v.* Palmer, 31 Cal. 500, holding that whenever Book A, the official record of grants kept by the alcaldes of San Francisco after the acquisition of California by the United States, contains a full copy of the paper which was delivered to the grantee, with the genuine signature of the alcaldes appended, it is a substantial compliance with the Spanish regulations of 1789 in relation to such grants.

69. Lavergne *v.* Elkins, 17 La. 220.

70. Lobdell *v.* Clark, 4 La. Ann. 99, so holding in regard to Act Cong. March 2, 1805, amended by Act of Cong. March 3, 1807.

71. U. S. *v.* Power, 11 How. (U. S.) 570, 13 L. ed. 817.

72. Barry *v.* Gamble, 3 How. (U. S.) 32, 11 L. ed. 479, holding that under the acts of congress of 1805, 1806, and 1807, it was necessary to file the evidence of an incomplete French or Spanish claim, bearing date anterior to 1800, as well as of those of a subsequent date, in order to avoid the bar provided by those statutes.

Notice held insufficient.— Where, in a suit for the recovery of land, plaintiff offered in evidence a written request to the recorder of lands in and for the territory of Missouri to record all registered concessions found in certain books named, then in his office, but it did not appear that those under whom plaintiff claimed had any agency in giving the notice, or that any signer of the paper was interested in the lands in question, or that any of them represented those who were or claimed to be so interested, and the notice named no claimant and described no land, nor did it intimate that any one was in fact claiming under the concessions referred to, it was held that the paper was not such a notice of claim as was contemplated by act July 4, 1836, requiring notice of claims under grants by the former French and Spanish governments. Connoyer *v.* Schaeffer, 48 Mo. 164 [*affirmed* in 22 Wall. (U. S.) 254, 22 L. ed. 837].

Who may take advantage of omission.— The act of congress requiring those holding French and Spanish claims in that part of Louisiana east of the Mississippi and the island of Orleans to give notice and record the written evidence thereof under penalty of forfeiture can be taken advantage of only by persons having grants from the United States of the land in controversy. Murdock *v.* Gurley, 5 Rob. (La.) 467.

73. Airhart *v.* Massieu, 98 U. S. 491, 25 L. ed. 213.

74. Airhart *v.* Massieu, 98 U. S. 491, 25 L. ed. 213.

Unrecorded grant void only against persons acquiring title from sovereignty of soil without notice.— Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.

75. King *v.* Elson, 30 Tex. 246. But *compare* Uhl *v.* Musquez, 1 Tex. Unrep. Cas. 650, holding that the presence of an original grant as an archive in the office of the county clerk, even of the county where the land may be situated, is not notice, as the registration laws take no notice of the archive as part of the records provided for by them.

the time of the inception of a subsequent title under which plaintiff claims, and is sufficient evidence of notice to a subsequent patentee of a superior title.[76] In cases of title emanating from the government, where the patent or testimonio has not been recorded in the county where the land lies, a subsequent locator without notice will be protected, unless there were such notorious marks of a prior grant as would have put a prudent man on inquiry.[77] The want of registration of a grant under the Coahuila and Texas government in the county where the title was afterward filed is not sufficient of itself to postpone the grant to a subsequent location and survey;[78] and the objection that an original Mexican title was not filed in the general land office within the time fixed by the Texas resolution was not available to one whose title did not accrue until after the formerly acquired title had been filed.[79]

2. Evidence — a. Burden of Proof. It is well established that the burden of proof to sustain a claim of a land grant under a former sovereignty rests upon the claimant, for otherwise there would be danger of imposition upon the United States by means of forged or fabricated grants,[80] and in order to establish such a claim the record of the title must be shown,[81] or its absence accounted for to the satisfaction of the court.[82] It has also been held incumbent upon a grantee to establish his right to receive the grant,[83] and that one seeking to bring himself within the purview of a special statute relating to the confirmation of a class of land titles has the burden of proving himself entitled to its benefits.[84] Where the approval of the governor is necessary the burden of showing such approval rests upon the claimant.[85] Where a certified copy of a protocol of title is admissible without reference to its age, and without proof of its execution, it being a copy of an archive of the general land office, and the original being an official act, which proves itself, the burden of proof is on one alleging that the original was forged.[86]

b. Presumptions.[87] The presumption of validity attends every grant issued by persons authorized to make grants when there is nothing on its face impeaching its validity,[88] especially where it has been acquiesced in by the sovereignty for a long time.[89] So where the land might have been grantable at the time of the

76. Nicholson *v.* Horton, 23 Tex. 47.

77. Guilbeau *v.* Mays, 15 Tex. 410.

78. Musquis *v.* Blake, 24 Tex. 461.

79. Chambers *v.* Fisk, 22 Tex. 504.

80. U. S. *v.* Ortiz, 176 U. S. 422, 20 S. Ct. 466, 44 L. ed. 529; Faxon *v.* U. S., 171 U. S. 244, 18 S. Ct. 849, 43 L. ed. 151; Ely *v.* U. S., 171 U. S. 220, 18 S. Ct. 840, 43 L. ed. 142; Berreyesa *v.* U. S., 154 U. S. 623, 14 S. Ct. 1179, 23 L. ed. 913; Peralta *v.* U. S., 3 Wall. (U. S.) 434, 18 L. ed. 221; Pico *v.* U. S., 2 Wall. (U. S.) 279, 17 L. ed. 856; Romero *v.* U. S., 1 Wall. (U. S.) 721, 17 L. ed. 627; White *v.* U. S., 1 Wall. (U. S.) 660, 17 L. ed. 698; U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232; U. S. *v.* Neleigh, 1 Black (U. S.) 298, 17 L. ed. 144; U. S. *v.* Knight, 1 Black (U. S.) 227, 488, 17 L. ed. 76, 80; Palmer *v.* U. S., 24 How. (U. S.) 125, 16 L. ed. 609; Luco *v.* U. S., 23 How. (U. S.) 515, 16 L. ed. 545; U. S. *v.* Bolton, 23 How. (U. S.) 341, 16 L. ed. 569; Fuentes *v.* U. S., 22 How. (U. S.) 443, 16 L. ed. 376; U. S. *v.* Pico, 22 How. (U. S.) 406, 16 L. ed. 357; U. S. *v.* Teschmaker, 22 How. (U. S.) 392, 16 L. ed. 353; U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828.

The law casts primarily upon the applicant for confirmation the duty of tendering such proof as to the existence, regularity, and archive record of the grant, as well as his connection with it, such as possession, ownership, or other related incidents, of sufficient probative force to create a just inference as to the reality and validity of the grant, before the burden of proof, if at all, can be shifted from the claimant to the United States. U. S. *v.* Ortiz, 176 U. S. 422, 20 S. Ct. 466, 44 L. ed. 529.

81. U. S. *v.* Teschmaker, 22 How. (U. S.) 392, 16 L. ed. 353. See also U. S. *v.* Bolton, 23 How. (U. S.) 341, 16 L. ed. 569.

82. U. S. *v.* Teschmaker, 22 How. (U. S.) 392, 16 L. ed. 353.

83. U. S. *v.* Cambuston, 25 Fed. Cas. No. 14,713, 7 Sawy. 575 [*distinguishing* U. S. *v.* Reading, 18 How. (U. S.) 1, 15 L. ed. 291].

84. Garza *v.* State, 64 Tex. 670.

85. Bergere *v.* U. S., 168 U. S. 66, 18 S. Ct. 4, 42 L. ed. 383.

86. Howell *v.* Hanrick, 88 Tex. 383, 29 S. W. 762, 30 S. W. 856, 31 S. W. 611.

87. **Presumption against forfeiture** see *supra*, V, C, 9.

Presumption of authority of officer see *supra*, V, C, 1, c.

88. Payne *v.* Treadwell, 16 Cal. 220; Reynolds *v.* West, 1 Cal. 322; Goode *v.* McQueen, 3 Tex. 241; Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.

89. Texas-Mexican R. Co. *v.* Jarvis, 69 Tex.

grant it is presumed to have been so.[90] It may properly be presumed that any ministerial duty imposed on the Mexican officials of registering the making of the grant was duly performed, and that such record was in fact made,[91] and although the protocols ought properly to be attached to the final titles, in their absence they will be presumed to be in the proper archives.[92] No presumption will be indulged to uphold a grant apparently made in violation of the laws,[93] and the necessary consent of the federal executive of Mexico to a grant of land situated within the border leagues will not be presumed when not alleged.[94] The action of an alcalde in delivering possession of a much larger tract than that described in the petition is sufficient to prevent a presumption of an approval by the governor of such delivery, where the papers themselves bear no evidence of such approval, and there is no other proof thereof.[95] One false title paper in a California land case affords strong ground for believing that the others, although apparently genuine, are fabricated, when authenticated by the same witnesses in the same way;[96] and the fact that a note of the secretary, on the margin of a pretended Mexican grant, untruly declares that the grant has been recorded, is a serious objection to its validity.[97] The delivery of a concession authorizes a presumption that the payment required by law to be made at the time of the sale of public lands was made.[98] The presumption is in favor of the validity and regularity of a record,[99] and the truth of the recitals in the grant,[1] unless such recitals relate to matters which should, but do not, appear of record.[2] A recital in the grant of particular Mexican laws does not raise the presumption that the grant was made under authority of those laws only.[3] The delivery of the grant will be presumed to have taken place at the time of its execution;[4] but the mere fact that papers properly constituting part of the expediente, which should be found in the government archives, are found among papers once

527, 7 S. W. 210; Carazos *v.* Trevino, 35 Tex. 133.

90. Brown *v.* San Francisco, 16 Cal. 451.

91. U. S. *v.* Green, 185 U. S. 256, 22 S. Ct. 640, 46 L. ed. 898.

92. Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

93. Whitney *v.* U. S., 181 U. S. 104, 21 S. Ct. 565, 45 L. ed. 771, holding that no presumption that the supreme executive of the Mexican nation had delegated his power to the governor or political chief of a province or state can be indulged for the purpose of upholding a grant of land made by the governor in violation of the constitution or laws which had theretofore been adopted or passed, where there is nothing in the laws of the nation providing in terms or by inference for the general delegation of power by the supreme executive to make such grants, even if he himself had such power.

94. Yancey *v.* Norris, 27 Tex. 40.

95. Bergere *v.* U. S., 168 U. S. 66, 18 S. Ct. 4, 42 L. ed. 383, holding also that where, on the return of the alcalde certifying to the juridical delivery by him of certain lands, the paper below his signature and that of his witnesses was mutilated so that there appeared only the words "the boundaries by," and below this what was apparently the governor's signature with the first letter torn off, there was nothing on the face of the paper justifying a presumption of an approval by the governor of the alcalde's action.

96. U. S. *v.* Galbraith, 2 Black (U. S.) 394, 17 L. ed. 449 [*reversing* 25 Fed. Cas. No. 15,182, Hoffm. Dec. 20, Hoffm. Op. 77, and *distinguishing* U. S. *v.* West, 22 How. (U. S.) 315, 16 L. ed. 317].

97. U. S. *v.* Vallejo, 1 Black (U. S.) 541, 17 L. ed. 232.

98. Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801.

99. Rice *v.* Cunningham, 29 Cal. 492, holding that where a book of alcalde's grants contained an entry in the margin of a grant of the words "not taken," and cross lines of cancellation, the marginal entry and the lines of cancellation were part of the record itself, and not an alteration or mutilation of it, and the law presumed that they had been regularly and honestly entered, in the absence of proof to the contrary.

1. U. S. *v.* Sherebeck, 27 Fed. Cas. No. 16,275, Hoff. Dec. 11, holding that in a grant of pueblo lands by the prefect, a mention of the land grant as "within the demarkation" of the pueblo affords presumptive proof, in the absence of opposing evidence, that the land was so situated and that the officer acted within the limits of his authority.

2. Fuentes *v.* U. S., 22 How. (U. S.) 443, 16 L. ed. 376, holding that if no proof of the preliminaries required by the Mexican law and regulations is to be found in the archives, and it cannot be established by proof that it was registered there, it will not be presumed that they were complied with as preliminary to the grant because the governor recites in the grant that they had been observed.

3. Brown *v.* San Francisco, 16 Cal. 451.

4. Lick *v.* Diaz, 30 Cal. 65.

belonging to the alleged grantee, is not sufficient to justify a presumption that the papers were delivered to him by the governor and a further presumption that the governor approved the delivery of juridical possession made by the alcalde of tract of land much larger than that petitioned for.[5] The absence from the archives of the country of evidence supporting an alleged Mexican grant creates a strong presumption against the validity of such a grant;[6] but if the original testimonio of a Mexican grant is found in the hands of the person claiming a title, the presumption is that the protocol was duly deposited in the general land office.[7] A survey recited in the title is presumed to have been made by order of the alcalde who was authorized to put the grantee in possession.[8] In the absence of any proof to the contrary, a legal presumption arises that the colonization law of 1824 had been promulgated in the territory of New Mexico prior to the making of an alleged grant by the territorial authorities in 1825.[9] Under the Texas statute providing for confirmation of such title to land within a certain territory as "would have matured into a perfect title under the laws, usages and customs of the government under which it originated, had its sovereignty over the same not passed to and been vested in the republic of Texas, provided said title was originally founded in good faith," if the applicant had progressed as far prior to the revolution as the termination of the "instructive despatch" ordered to be passed to the executive of the state of Tamaulipas, and that despatch shows performance of the conditions required by the laws then in force, it will be presumed that the grant was to be issued;[10] but if the "instructive despatch" shows upon its face that the successive steps taken to complete the title were, so far as they had progressed, not in accordance with the laws then in force, no presumption can be indulged in that the grant would ever have been perfected even if there had been no change in the sovereignty.[11] A grant of land may, under proper circumstances, be presumed;[12] but it seems that there is no general rule as to when such presumption will arise but each case must rest upon its own circumstances.[13] Evidence that a person took the preliminary steps in obtaining a grant is not admissible to raise the presumption of a grant.[14] Continued possession for nearly fifty years, together with the partial destruction of the archives of the province, has been held to warrant a presumption of a written Spanish grant, if one were necessary;[15] but a Mexican grant will not be presumed from possession.[16]

5. Bergere *v.* U. S., 168 U. S. 66, 18 S. Ct. 4, 42 L. ed. 383.

6. Pico *v.* U. S., 2 Wall. (U. S.) 279, 17 L. ed. 856, holding that such presumption can be overcome, if at all, only by the clearest proof of the genuineness of the grant and of open and continued possession of the premises.

7. King *v.* Elson, 30 Tex. 246; Nicholson *v.* Horton, 23 Tex. 47; Byrne *v.* Fagan, 16 Tex. 391.

8. Jenkins *v.* Chambers, 9 Tex. 167.

9. Hayes *v.* U. S., 170 U. S. 637, 18 S. Ct. 735, 42 L. ed. 1174.

10. State *v.* De Leon, 64 Tex. 553.

11. State *v.* De Leon, 64 Tex. 553.

12. Grimes *v.* Bastrop, 26 Tex. 310.

The consent of the federal executive to a grant of land within the border leagues will not be presumed when the grant itself rests upon presumption. Yancey *v.* Norris, 27 Tex. 40.

13. Grimes *v.* Bastrop, 26 Tex. 310.

An instruction making the presumption rest upon a continuous claim of the land is erroneous. Grimes *v.* Bastrop, 26 Tex. 310.

14. Ballard *v.* Perry, 28 Tex. 347.

15. Landry *v.* Martin, 15 La. 1. See also U. S. *v.* Pendell, 185 U. S. 189, 193, 22 S. Ct. 624, 46 L. ed. 866.

Interruption of possession.— Where it was proved that the family of A, under whom defendant claimed, had been in the continued possession of the land in controversy, under claim of title, for more than half a century prior to 1813, when they were driven away by incursions of Indians, and it was further proved that defendant had been in possession of the land, with his deed recorded, for the last ten years, and the claim was plotted on the county map as early as 1838 or 1839, and was respected by the authorities and surveyors until 1847, when plaintiff made his location, and it was held that a grant to the A family would be presumed, and that the presumption was not repelled by the interruption of possession in 1813, and also that the fact that, nearly a century ago, the land was the subject of litigation between the A family and other individuals, corroborated the presumption. Herndon *v.* Casiano, 7 Tex. 322.

16. Chavez *v.* U. S., 175 U. S. 552, 20 S. Ct. 201, 44 L. ed. 269; Peabody *v.* U. S.,

c. Competency and Admissibility of Evidence.[17] The records of land grants which the Mexican law required to be kept are primary, not secondary, evidence of a grant;[18] and the protocol, or first original, of the application and concession of land by the government of Coahuila and Texas, produced from the public archives, is admissible, under instructions, for all legitimate purposes, when properly authenticated although the testimonio given to the party interested is admissible as an original.[19] It is no objection to the admissibility of a copy of the title in the land office that a part of the title is a testimonio,[20] and where a copy appears to be that of the original testimonio of application for and grant of a colonial contract, duly certified by the legal custodian of the protocol, and delivered to the empresarios as evidence of their right, it is admissible.[21] It is no ground for excluding the records of the concessions in a contest over a Texas title that all of the lands contained in the concessions are not in controversy.[22] A Mexican grant deposited in the land office subsequent to 1876 is admissible in evidence if conceded to be valid notwithstanding the fact that the Texas constitution adopted in that year forbids that any claim of title to land which issued prior to November, 1835, be deposited in the general land office or recorded or used as evidence, as to nullify it would be to impair the obligation of a contract and also to infringe the treaty of Guadalupe Hidalgo.[23] The instructions to the commissioner under the colonization law of Mexico that public instruments of possession be attested by two witnesses was intended to authenticate the act so that it would prove itself, and in the absence of witnesses the genuineness of the document may be proved according to the general principles of evidence;[24] and so also where there are no subscribing witnesses to a Mexican grant in colonization, the signature of the governor who executed the grant and of the secretary who attested it may be proved by one acquainted with their writing.[25] In a contest over a Texas colonial title, when the titles under which defendants claim purport to have been issued by the commissioner appointed to extend titles in a colony, a certified copy of the application for a colonization contract to the person who acted as commissioner in a colony in which the lands were situated is admissible,[26] as is also the government concession.[27] The treaty of 1848 between the United States and Mexico, as originally agreed to, the correspondence which preceded it, and the protocol annexed to it, are evidence against any title which has a later date than May 13, 1846.[28] Whether land was at a certain time within a Mexican grant does not depend on the last United States survey made, but the boundaries must be ascertained by the expediente of the grant issued by the Mexican government, aided,

175 U. S. 546, 20 S. Ct. 219, 44 L. ed. 267 (possession having been originally taken under a permission or license to use the land and there being nothing to show that the character of the possession was subsequently changed); Crespin *v.* U. S., 168 U. S. 208, 18 S. Ct. 53, 42 L. ed. 438.

17. Competency of evidence as to particular matters of little or no present importance see Cornwall *v.* Culver, 16 Cal. 423; Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80; Hubert *v.* Bartlett, 9 Tex. 97; Uhl *v.* Musquez, 1 Tex. Unrep. Cas. 650; U. S. *v.* Davenport, 15 How. (U. S.) 1, 14 L. ed. 575.

18. Donner *v.* Palmer, 31 Cal. 500; Palmer *v.* Low, 98 U. S. 1, 25 L. ed. 60.

19. Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778.

20. Edwards *v.* Roark, 19 Tex. 184, so holding on the ground that when the final title is issued, that, as well as all other papers evidencing the incipient stages of the title, becomes an archive in the office from which the title emanated and is properly transferred to the custody of the commissioner of the general land office.

21. Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

22. Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

23. Lerma *v.* Stevenson, 40 Fed. 356.

24. Clay *v.* Holbert, 14 Tex. 189.

25. U. S. *v.* Moreno, 1 Wall. (U. S.) 400, 17 L. ed. 633.

26. Texas-Mexican R. Co. *v.* Locke, 74 Tex. 376, 12 S. W. 80.

27. Texas-Mexican R. Co. *v.* Locke, 74 Tex. 376, 12 S. W. 80, holding that while the concessions authorizing a purchase of colonial lands from the Texas government did not give title to land, they did give the consent of the government to its purchase, and are properly introduced in evidence to establish such right, and to show what officer could give the final title.

28. Castillero *v.* U. S., 2 Black (U. S.) 17, 17 L. ed. 360.

if necessary, by parol evidence.[29] So a report of a surveyor-general to congress, as to the validity of a Mexican grant, is not evidence of title.[30] The fact that a French grant of lands in Louisiana was dated after the cession of the territory to Spain does not render the record of such grant inadmissible as an evidence of title, as it may be shown to have been ratified or recognized by Spain, or by France after again acquiring possession.[31] Parol evidence cannot be received to establish a title of which no trace is found in the public archives,[32] nor can the public records be contradicted by parol evidence.[33] But the testimonio of a Spanish title may be referred to to determine from its appearance whether a change appearing on the face of the protocol was made before or after the issuance of the title, or to show its verity where suspicion is cast upon it by reason of erasures or interlineations.[34] And it has been held that a Texas statute authorizing suits to ascertain the right to claims under grants from the Mexican government, and requiring that the petition shall be accompanied by "the titles and evidences of title," is complied with by the filing of secondary evidence of the grant in case the grant itself cannot be produced.[35] On an issue as to whether a protocol of title was forged, evidence that there were subsequent locations of the land by persons other than the grantee, and that patents were issued thereon, or that there were adverse claims to such land, is immaterial.[36]

d. Weight and Sufficiency of Evidence. In the case of a Mexican grant, a claim may be confirmed on evidence from the archives, supported by long-continued possession, although the original title or grant has been lost;[37] for if the expediente be genuine it affords far more satisfactory evidence of the issuance of the grant than the production of the title papers by the party interested.[38] So a certified copy of the protocol of a grant on deposit in the general land office is sufficient evidence to establish the title of the grantee and those claiming under him without accounting for the testimonio or showing that one was in fact issued.[39] In the absence of archive evidence of a grant, the fullest and most satisfactory proofs of possession and occupation during the existence of the former government, under a notorious and undisputed claim of title, and clear and indubitable evidence of the genuineness of the grant produced, will be required,[40] and where there is no archive evidence of a California grant, and its absence is unaccounted for, and there has been no such possession as raises an equity in behalf of the party, the claim must be rejected, even when there is very strong parol proof of a grant.[41] It has also been held that written documentary evidence, no matter

29. Foss *v.* Hinkell, 78 Cal. 158, 20 Pac. 393.

30. U. S. *v.* Cameron, 3 Ariz. 100, 21 Pac. 177.

31. Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646.

32. Palmer *v.* U. S., 24 How. (U. S.) 125, 16 L. ed. 609; U. S. *v.* Berreyesa, 24 Fed. Cas. No. 14,585.

33. Palmer *v.* U. S., 24 How. (U. S.) 125, 16 L. ed. 609; U. S. *v.* Payson, 27 Fed. Cas. No. 16,015, holding that the record of the act of possession, based on depositions containing statements upon which the alcalde acted, cannot be contradicted by parol evidence of aged, illiterate, and infirm witnesses as to their recollection of what was done or intended by the alcalde.

34. Hanrick *v.* Dodd, 62 Tex. 75.

35. State *v.* Cardinas, 47 Tex. 250.

36. Howell *v.* Hanrick, 88 Tex. 383, 29 S. W. 762, 30 S. W. 856, 31 S. W. 611.

37. U. S. *v.* Rodriguez, 27 Fed. Cas. No. 16,185, Hoffm. Land Cas. 170; U. S. *v.* Vallejo, 28 Fed. Cas. No. 16,606, Hoffm. Dec. 3, Hoffm. Op. 53.

38. U. S. *v.* Galbraith, 25 Fed. Cas. No. 15,182, Hoffm. Dec. 20, Hoffm. Op. 77 [*reversed* on other grounds in 2 Black 394, 17 L. ed. 449].

Incomplete expediente.— The existence of the expediente in the Mexican archives with unquestionably genuine signatures, the note and description of the grant in the continuation of Jimeno's Index by Hartnell & Halleck, the entry in the Toma de Razon, and the records in the journals of the departmental assembly are sufficient to prove, beyond all doubt, that the Mexican grant was made, although the expediente does not contain the customary borrador, or copy of the titulo, delivered to the party. U. S. *v.* Juares, 26 Fed. Cas. No. 15,500.

39. Sheppard *v.* Harrison, 54 Tex. 91.

40. U. S. *v.* Polack, 27 Fed. Cas. No. 16,061, Hoffm. Land Cas. 284, Hoffm. Op. 32.

41. Romero *v.* U. S., 1 Wall. (U. S.) 721, 17 L. ed. 627; White *v.* U. S., 1 Wall. (U. S.)

how formal and complete, or how well supported by the testimony of witnesses, if coming from private hands, is insufficient to establish a Mexican grant if there is nothing in the public records to show that such evidence ever existed.[42] The absence of contemporaneous documents evidencing an ancient Spanish grant may be explained by showing a reasonable probability that the documents may have been lost or destroyed;[43] but the supposition of a claimant that an alleged Spanish land grant once existed and has been lost by time or accident is no evidence of an actual grant.[44] An entry in the alcalde's book of grants substantially in compliance with the regulations, over the signature of the proper officer, is primary evidence of a grant,[45] as is also the certificate of the secretary of the Spanish governor of Florida.[46] A plat or return of survey made by the surveyor-general is only *prima facie* evidence of title.[47] A reference in a land grant to another grant as a boundary is inadequate as proof of the legal existence of the latter grant, or of any change of the character of the possession of the land referred to, when that was originally taken, not under a grant of title, but under a mere permission or license.[48] The fact that the political chief treated and acted on a concession as valid and genuine is evidence that the original was properly signed by the governor.[49] The absence of the signature of the governor in a copy of the concession is no evidence that it was wanting in the original.[50] Where the objection to a grant of land in California is that the grantee was a foreigner and therefore not entitled to hold land, testimony of conversations or admissions made for the purpose of avoiding jury duty, and during the Mexican war, relied upon to prove that fact, ought not to be received to outweigh the *prima facie* presumption arising from the expediente and definitive title that he was a citizen.[51] The statement in a grant of land by a Mexican governor that the grantee is a Mexican citizen by naturalization is conclusive evidence of the grantee's citizenship, so far as his right to hold the land is concerned.[52] Mere proof of pasturing cattle upon land is entitled to little weight as evidence of possession upon which to base a claim of title under an alleged Mexican grant.[53] When a Mexican grant is alleged to have been fraudulently altered, after it was issued, in the designation of the quantity granted, a record of juridical possession, delivered to the grantee soon after the execution of the grant, showing that the quantity of which possession was delivered was the larger quantity stated in the grant, is entitled to great consideration in determining the character of the alteration, particularly when there has been a long subsequent occupation of the premises.[54] The fact that the governor's signature to an alleged titulo, testimonio, and order for extension of time to comply with the conditions of the grant in question is in a style rarely, if

660, 17 L. ed. 698. See also U. S. *v.* Brown, 24 Fed. Cas. No. 14,664, Hoffm. Dec. 16, Hoffm. Op. 74.

42. Peralta *v.* U. S., 3 Wall. (U. S.) 434, 18 L. ed. 221.

43. As by showing that shortly after the time of the alleged grant the country was raided by hostile Indians, the inhabitants killed or driven away, and their houses burned. State *v.* Ortiz, 99 Tex. 475, 90 S. W. 1084 [*affirming* (Civ. App. 1905) 86 S. W. 45].

44. Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 23 S. Ct. 170, 47 L. ed. 266 [*affirming* 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333].

45. Donner *v.* Palmer, 31 Cal. 500.

46. U. S. *v.* Acosta, 1 How. (U. S.) 24, 11 L. ed. 33.

47. U. S. *v.* Breward, 16 Pet. (U. S.) 143, 10 L. ed. 916.

Evidence of inchoate grant only.— A plat of survey made by a deputy surveyor under the Spanish government, with his certificate that the survey was made by himself agreeably to the order of the surveyor-general of the two Floridas, is not evidence of a complete Spanish grant, but only of an inchoate grant within the discretion of congress, after the acquisition of title by the United States, and subject to be entirely rejected. Fluker *v.* Doughty, 15 La. Ann. 673.

48. Peabody *v.* U. S., 175 U. S. 546, 20 S. Ct. 219, 44 L. ed. 267.

49. McGehee *v.* Dwyer, 22 Tex. 435.

50. McGehee *v.* Dwyer, 22 Tex. 435.

51. Dalton *v.* U. S., 22 How. (U. S.) 436, 16 L. ed. 395.

52. U. S. *v.* Reading, 18 How. (U. S.) 1, 15 L. ed. 291.

53. Bergere *v.* U. S., 168 U. S. 66, 18 S. Ct. 4, 42 L. ed. 383.

54. De Malarin *v.* U. S., 1 Wall. (U. S.) 282, 17 L. ed. 594.

ever, used by him, and different from his signature affixed to similar documents on the same date, tends to show that such papers are forgeries.[55] Proof that four days after the date of an alleged Mexican grant of eleven leagues by a certain governor he granted another nine leagues to the same persons tend to show that the former grant is not genuine,[56] and discrepancies in the papers and records are strong evidence that a grant is not genuine.[57] The fact that after the date of an alleged grant the Mexican government made grants to third persons of portions of the same land, as vacant and unoccupied, is of some weight against the existence of the alleged grant.[58] Due location of a Mexican grant to the extent of the four sitios, which, by the laws in force at the time of the sale in the proceedings to obtain such grant, it could not exceed, is sufficiently established by evidence from which the court of private land claims is able to determine the true boundaries of the tract as so limited.[59] When the statutes and ordinances defining the duties and powers of an officer are indefinite in their terms, and it is shown that he exercised the same powers in other cases without question by the government, and the grants purporting to have been made by him were not challenged, such facts support a construction of the statutes and ordinances which would confer the power exercised.[60] The fact that in the final execution of a Mexican grant the purchasers were cautioned "to restrict and limit themselves to the land, holdings, metes and bounds particularly described in the hereinbefore inserted proceedings of survey," and to comply with the law as to monuments at their boundary termini, does not show that the act of juridical possession had already taken place.[61] The non-production of the grant will not affect the validity of the claim, where the loss of the grant is proved, and long and notorious occupation of the land established;[62] but to entitle a claim to confirmation where there has been no grant, clear evidence must be presented of a long-continued, notorious, and exclusive possession under claim of ownership of a tract of land of definite boundaries, and of the recognition of the proprietary and possessory rights of the claimant by his neighbors and by the authorities of the former government.[63] Where a will clearly shows upon its face that the testator was marshaling his assets, and mentioning all his property, and making specific disposition thereof, the fact that he omits therefrom any mention of a large tract of land subsequently claimed by his descendants under an alleged Mexican grant is entitled to weight, as showing that he did not himself suppose that he owned the land.[64] A number of illustrative cases turning on the sufficiency of the evidence to establish the particular alleged grants in question are referred to in the note.[65]

55. U. S. *v.* Roland, 27 Fed. Cas. No. 16,190 [*affirmed* in 7 Wall. 743, 19 L. ed. 184].

56. U. S. *v.* Roland, 27 Fed. Cas. No. 16,190 [*affirmed* in 7 Wall. (U. S.) 743, 19 L. ed. 184].

57. U. S. *v.* Roland, 27 Fed. Cas. No. 16,190 [*affirmed* in 7 Wall. 743, 19 L. ed. 184], holding that the facts that the journals of the departmental assembly show that that body was not in session at the date on which the testimonio states that the grant in question was approved by it, and that the titulo which purports to have been issued on the same day that the borrador was drawn is much more specific in the description of the land than the borrador, are strong evidence that the grant is not genuine.

58. Bergere *v.* U. S., 168 U. S. 66, 18 S. Ct. 4, 42 L. ed. 383.

59. U. S. *v.* Green, 185 U. S. 256, 22 S. Ct. 640, 46 L. ed. 898.

60. Ely *v.* U. S., 171 U. S. 220, 18 S. Ct. 840, 43 L. ed. 142.

61. Ainsa *v.* U. S., 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673.

62. U. S. *v.* Castro, 25 Fed. Cas. No. 14,752, Hoffm. Land Cas. 125.

63. U. S. *v.* Chaboya, 25 Fed. Cas. No. 14,769, 14,770, Hoffm. Dec. 107, Hoffm. Op. 59. See also Diaz *v.* U. S., 7 Fed. Cas. No. 3,878, Hoffm. Op. 32.

64. Bergere *v.* U. S., 168 U. S. 66, 18 S. Ct. 4, 42 L. ed. 383.

65. **Evidence sufficient to establish grant and warrant confirmation** see the following cases: State *v.* Ortiz, 99 Tex. 475, 90 S. W. 1084 [*affirming* (Civ. App. 1905) 86 S. W. 45]; Sheldon *v.* Milmo, 90 Tex. 1, 36 S. W. 413; State *v.* Bruni, 37 Tex. Civ. App. 2, 83 S. W. 209; U. S. *v.* Pendell, 185 U. S. 189, 193, 22 S. Ct. 624, 46 L. ed. 866; Ely *v.* U. S., 171 U. S. 220, 18 S. Ct. 840, 43 L. ed. 142; U. S. *v.* Chaves, 159 U. S. 452, 16 S. Ct. 57, 40 L. ed. 215; U. S. *v.* Olvera, 154 U. S. 538, 14 S. Ct. 1158, 17 L. ed. 637; U. S. *v.* De Morant, 123 U. S. 335, 8 S. Ct. 189, 31

E. Confirmation — 1. Necessity. While perfect titles to land made by the ceding sovereignty before the cession are intrinsically valid and need no sanction from the legislative or judicial departments of the United States,[66] the obli-

L. ed. 171; U. S. *v.* Vallejo, 1 Black (U. S.) 283, 17 L. ed. 143; U. S. *v.* Alviso, 23 How. (U. S.) 318, 16 L. ed. 456; U. S. *v.* De Haro, 22 How. (U. S.) 293, 16 L. ed. 343; Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646; Armijo *v.* U. S., 1 Fed. Cas. No. 536, Hoffm. Land Cas. 248 [*affirmed* in 5 Wall. 444, 18 L. ed. 492]; Brackett *v.* U. S. 3 Fed. Cas. No. 1,763, Hoffm. Land Cas. 85; De Zaldo *v.* U. S., 7 Fed. Cas. No. 3,872, Hoffm. Land Cas. 98; McKee *v.* U. S., 16 Fed. Cas. No. 8,850, Hoffm. Land Cas. 173; Mesa *v.* U. S., 17 Fed. Cas. No. 9,491, Hoffm. Land Cas. 66; Morehead *v.* U. S., 17 Fed. Cas. No. 9,792, Hoffm. Op. 404; U. S. *v.* Alvisu, 24 Fed. Cas. No. 14,436, Hoffm. Land Cas. 176; U. S. *v.* Amador, 24 Fed. Cas. No. 14,437, Hoffm. Land Cas. 76; U. S. *v.* Bale, 24 Fed. Cas. No. 14,504, Hoffm. Land Cas. 92; U. S. *v.* Boggs, 24 Fed. Cas. No. 14,618, Hoffm. Land Cas. 109; U. S. *v.* Castro, 25 Fed. Cas. No. 14,751, Hoffm. Land Cas. 105; U. S. *v.* Guerrero, 26 Fed. Cas. No. 15,269, Hoffm. Land Cas. 94; U. S. *v.* Horrell, 26 Fed. Cas. No. 15,391, Hoffm. Land Cas. 78; U. S. *v.* Larkin, 26 Fed. Cas. No. 15,564, Hoffm. Land Cas. 75; U. S. *v.* Leese, 26 Fed. Cas. No. 15,590, Hoffm. Land Cas. 124; U. S. *v.* Moraga, 26 Fed. Cas. No. 15,806, Hoffm. Land Cas. 103; U. S. *v.* Murphy, 27 Fed. Cas. No. 15,839, Hoffm. Land Cas. 77; U. S. *v.* Murphy, 27 Fed. Cas. No. 15,840, Hoffm. Land Cas. 81; U. S. *v.* Ortega, 27 Fed. Cas. No. 15,970, Hoffm. Land Cas. 135; U. S. *v.* Pacheco, 27 Fed. Cas. No. 15,981, Hoffm. Land Cas. 79; U. S. *v.* Page, 27 Fed. Cas. No. 15,987, Hoffm. Land Cas. 80; U. S. *v.* Palomares, 27 Fed. Cas. No. 15,990, Hoffm. Land Cas. 97; U. S. *v.* Payson, 27 Fed. Cas. No. 16,017, Hoffm. Land Cas. 138; U. S. *v.* Peralta, 27 Fed. Cas. No. 16,031, Hoffm. Land Cas. 89; U. S. *v.* Pico, 27 Fed. Cas. No. 16,046, Hoffm. Land Cas. 172; U. S. *v.* Pope, 27 Fed. Cas. No. 16,068, Hoffm. Land Cas. 141; U. S. *v.* Reid, 27 Fed. Cas. No. 16,140, Hoffm. Land Cas. 74; U. S. *v.* Reid, 27 Fed. Cas. No. 16,141, Hoffm. Land Cas. 129; U. S. *v.* Rodriguez, 27 Fed. Cas. No. 16,181; U. S. *v.* Sheldon, 27 Fed. Cas. No. 16,270, Hoffm. Land Cas. 17; U. S. *v.* Soto, 27 Fed. Cas. No. 16,356, Hoffm. Land Cas. 77; U. S. *v.* Stevenson, 27 Fed. Cas. No. 16,397, Hoffm. Land Cas. 156; U. S. *v.* Sunol, 27 Fed. Cas. No. 16,420, Hoffm. Land Cas. 74; U. S. *v.* Thomas, 28 Fed. Cas. No. 16,481, Hoffm. Land Cas. 82; U. S. *v.* Thomes, 28 Fed. Cas. No. 16,482, Hoffm. Land Cas. 83; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,488, Hoffm. Land Cas. 79; U. S. *v.* Weber, 28 Fed. Cas. No. 16,657, Hoffm. Land Cas. 126; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,735, Hoffm. Land Cas. 84; U. S. *v.* Yount, 28 Fed. Cas. No. 16,784, Hoffm. Land Cas. 49.

Evidence not sufficient to establish grant see the following cases: De la Guerra *v.* Santa Barbara, 117 Cal. 528, 49 Pac. 733; Davis *v.* California Powder Works, 84 Cal. 617, 24 Pac. 387; Vasquez *v.* Ewing, 42 Mo. 247; Garza *v.* State, 64 Tex. 670 (evidence not sufficient to show that Mexican title originated prior to independence of Texas); State *v.* Vela, 47 Tex. 325; Harlan *v.* Haynie, 9 Tex. 459; Howard *v.* Perry, 7 Tex. 259; Hays *v.* U. S., 175 U. S. 248, 20 S. Ct. 80, 44 L. ed. 150; Roland *v.* U. S., 7 Wall. (U. S.) 743, 19 L. ed. 184; Chaboya *v.* U. S., 2 Black (U. S.) 593, 17 L. ed. 357; U. S. *v.* Neleigh, 1 Black (U. S.) 298, 17 L. ed. 144; U. S. *v.* Knight, 1 Black (U. S.) 227, 17 L. ed. 76, 80; U. S. *v.* Pico, 23 How. (U. S.) 321, 16 L. ed. 464; U. S. *v.* Osio, 23 How. (U. S.) 273, 16 L. ed. 457 [*reversing* 27 Fed. Cas. No. 15,972, Hoffm. Land Cas. 100]; Fuentes *v.* U. S., 22 How. (U. S.) 443, 16 L. ed. 376; U. S. *v.* Vallejo, 22 How. (U. S.) 416, 16 L. ed. 259 [*reversing* 28 Fed. Cas. No. 16,819, Hoffm. Land Cas. 174]; U. S. *v.* Teschmaker, 22 How. (U. S.) 392, 16 L. ed. 353; U. S. *v.* Galbraith, 22 How. (U. S.) 89, 16 L. ed. 321; U. S. *v.* Nye, 21 How. (U. S.) 408, 16 L. ed. 135; U. S. *v.* Cambuston, 20 How. (U. S.) 59, 15 L. ed. 828 [*reversing* 25 Fed. Cas. No. 14,712, Hoffm. Land Cas. 86]; Arguello *v.* U. S., 18 How. (U. S.) 539, 15 L. ed. 478; Owen *v.* Presidio Min. Co., 61 Fed. 6, 9 C. C. A. 338; De Fitch *v.* U. S., 7 Fed. Cas. No. 3,741, Hoffm. Land Cas. 272; Larkin *v.* U. S., 14 Fed. Cas. No. 8,091, Hoffm. Land Cas. 313; Little *v.* U. S., 15 Fed. Cas. No. 8,396, Hoffm. Land Cas. 325; Panaud *v.* U. S., 18 Fed. Cas. No. 10,704, Hoffm. Dec. 18, Hoffm. Op. 469; Redman *v.* U. S., 20 Fed. Cas. No. 11,631, Hoffm. Land Cas. 305; U. S. *v.* Bernal, 24 Fed. Cas. No. 14,579, Hoffm. Dec. 47; U. S. *v.* Berreyesa, 24 Fed. Cas. No. 14,585, Hoffm. Land Cas. 99; U. S. *v.* Galindo, 25 Fed. Cas. No. 15,183; U. S. *v.* Peralta, 27 Fed. Cas. No. 16,029, Hoffm. Dec. 190 [*affirmed* in 3 Wall. 434, 18 L. ed. 221]; U. S. *v.* Pico, 27 Fed. Cas. No. 16,045, Hoffm. Land Cas. 172; U. S. *v.* Pico, 27 Fed. Cas. No. 16,047, Hoffm. Op. 412; U. S. *v.* White, 28 Fed. Cas. No. 16,673 [*affirmed* in 1 Wall. 660, 17 L. ed. 698, and *distinguishing* U. S. *v.* Alviso, 23 How. (U. S.) 318, 16 L. ed. 456; U. S. *v.* Noe, 23 How. (U. S.) 312, 16 L. ed. 462].

Evidence showing alleged grant to be fraudulent see Bouldin *v.* Phelps, 30 Fed. 547; Palmer *v.* U. S., 24 How. (U. S.) 125, 16 L. ed. 609; Sampeyreac *v.* U. S., 7 Pet. (U. S.) 222, 8 L. ed. 665; Luco *v.* U. S., 15 Fed. Cas. No. 8,594, Hoffm. Land Cas. 345 [*affirmed* in 23 How. 515, 16 L. ed. 545]; U. S. *v.* Limantour, 26 Fed. Cas. No. 15,601, Hoffm. Land Cas. 389.

Evidence not sufficient to prove fraud see U. S. *v.* Bernal, 24 Fed. Cas. No. 14,581, Hoffm. Land Cas. 50; U. S. *v.* Rico, 27 Fed. Cas. No. 16,161, Hoffm. Land Cas. 161.

66. Minturn *v.* Brower, 24 Cal. 644; Leese *v.* Clark, 20 Cal. 387; Nixon *v.* Houillon, 20 La. Ann. 515; Murdock *v.* Gurley, 5 Rob.

gation of the United States to respect the rights of private property in ceded territory is entirely consistent with the right of this government to provide reasonable means for determining the validity of all titles within the ceded territory,[67] to require persons having claims to lands to present them for recognition,[68] and have their genuineness and extent established by proceedings in a particular manner before they can be held valid,[69] and to decree that all claims which are not thus presented shall be considered abandoned.[70] An inchoate grant by the ceding sovereignty confers upon the grantee no right which an American court will recognize until it is confirmed,[71] and while the United States government has admitted its obligation to confirm such inchoate rights or concessions as have been granted or made in ceded territory prior to the cession,[72] it has maintained that the legal title remained in the United States until by some act of confirmation it was passed or relinquished to the claimant,[73] and has also maintained its right to prescribe the forms and manner of proceeding in order to obtain a confirmation, and its right to establish tribunals to investigate and pronounce upon the fairness and validity of such claims,[74] and such a concession can derive no aid from the laws of the United States until it has been recorded or passed upon in the manner established by law.[75]

2. Legislation Recognizing or Confirming Claims. Various statutes have been enacted from time to time providing for the recognition and confirmation of claims to land in ceded territory,[76] and it has been laid down that such statutes should

(La.) 457; Lavergne *v.* Elkins, 17 La. 220; Ainsa *v.* New Mexico, etc., R. Co., 175 U. S. 76, 20 S. Ct. 28, 44 L. ed. 78 [*reversing* (Ariz. 1894) 36 Pac. 213]; U. S. *v.* Wiggins, 14 Pet. (U. S.) 334, 10 L. ed. 481; Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646.

Complete grant may be asserted in ordinary courts of justice against adverse private claimant.—Ainsa *v.* New Mexico, etc., R. Co., 175 U. S. 76, 20 S. Ct. 28, 44 L. ed. 78 [*reversing* (Ariz. 1894) 36 Pac. 213].

67. Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692].

68. Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692].

69. Mitchell *v.* Furman, 180 U. S. 402, 21 S. Ct. 430, 45 L. ed. 596; Ainsa *v.* New Mexico, etc., R. Co., 175 U. S. 76, 20 S. Ct. 28, 44 L. ed. 78; Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926; Glenn *v.* U. S., 13 How. (U. S.) 250, 14 L. ed. 133; U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 8 L. ed. 1001. See also Hamilton *v.* Avery, 20 Tex. 612.

70. Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692].

71. Mims *v.* Higgins, 39 Ala. 9; Doe *v.* Jones, 11 Ala. 63; Leese *v.* Clark, 20 Cal. 387; Paschal *v.* Dangerfield 37 Tex. 273; Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926. See also Gardiner *v.* Miller, 47 Cal. 570.

Persons who obtained conveyances from a claimant while the claim was pending before the United States tribunals took whatever interest they acquired subject to the determination of the claim. U. S. *v.* Hare, 26 Fed. Cas. No. 15,303, 4 Sawy. 653.

72. De la Croix *v.* Chamberlain, 12 Wheat. (U. S.) 599, 6 L. ed. 741.

73. De la Croix *v.* Chamberlain, 12 Wheat. (U. S.) 599, 6 L. ed. 741. See also Apis *v.* U. S., 88 Fed. 931.

Titles to land not perfected at the time of the Texas revolution require the action of legislative authority to perfect them. McMullen *v.* Hodge, 5 Tex. 34.

74. De la Croix *v.* Chamberlain, 12 Wheat. (U. S.) 599, 6 L. ed. 741.

75. De la Croix *v.* Chamberlain, 12 Wheat. (U. S.) 599, 6 L. ed. 741, holding that a concession which has not been recorded or passed upon by the board of commissioners or register of the land office established by congress in the district in which the land lies cannot be given in evidence to support an action of ejectment in the United States courts.

76. See U. S. *v.* De Morant, 123 U. S. 335, 8 S. Ct. 189, 31 L. ed. 171, construing Act Cong. June 22, 1860.

The object of the various acts of congress, authorizing or requiring French and Spanish claims to be presented to officers of the United States for recognition and confirmation, was: First, to ascertain the quantity and description of the grants, and so distinguish the public from private domain; and, second, to confirm to the claimants imperfect titles, requiring further action by the public authorities. Lavergne *v.* Elkin, 17 La. 220.

Uncertainty.—A confirmation by act of congress of the decision of commissioners appointed to hear and decide on claims under grants of lands in favor of claims for land of which no quantity is given, no boundary stated, and for the ascertainment of which no rule is stated, is void for uncertainty, and cannot operate to vest title to any particular land in the claimants. Slidell *v.* Grandjean, 111 U. S. 412, 4 S. Ct. 475, 28 L. ed. 321.

be administered in a liberal spirit.[77] A confirmation by act of congress is as fully to all intents and purposes a grant as if it contained in terms a grant *de novo*,[78] equivalent to a patent and the best title out of government,[79] entitling one to hold against an adverse claimant without a patent,[80] unless the latter can show a prior title out of government;[81] but leaving the title as under the former government in contests between different claimants.[82] A confirmation by act of congress of part of a grant should be construed as a denial of the residue.[83] When congress confirms a land claim its action is to be treated as an adjudication and is not subject to review by the courts [84] or any other department of the government.[85] Where an act of congress confirming a title to land specifically reserves the rights of all adverse claimants, they are remitted to the state courts for litigation of their claims.[86] A statute for confirming land claims does not apply to claims which have been abandoned before its enactment,[87] and a statute removing the objection arising from want of title in the government which was in possession of the territory at the time of making the grants, if they were otherwise sustainable, does not aid claims which were invalid from intrinsic defects.[88] But a confirmation by congress of a conditional grant either admits or dispenses with the performance of the conditions.[89] When a person claiming land in ceded territory is obliged to

77. U. S. *v.* Moreno, 1 Wall. (U. S.) 400, 17 L. ed. 633.

78. Smith *v.* Reynolds, 9 App. Cas. (D. C.) 261; Langlois *v.* Crawford, 59 Mo. 456; Fenwick *v.* Gill, 38 Mo. 510; St. Louis *v.* Toney, 21 Mo. 243; Soulard *v.* Clark, 19 Mo. 570; U. S. *v.* Maxwell Land-Grant Co., 26 Fed. 118 [*affirmed* in 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949]. See also Thomas *v.* Phillips, 7 La. Ann. 546 (holding that a confirmation of title to land by act of congress is as valid and final as a confirmation by the register of the land office); Catron *v.* Laughlin, 11 N. M. 604, 72 Pac. 26.

When the confirmees of a Mexican land grant accept the provisions of an act of congress confirming the grant, the title to the confirmed grant, if void prior to the passage of such act of confirmation, becomes valid by virtue of the confirmatory statute. Pueblo County *v.* Central Colorado Imp. Co., 2 Colo. 628. See also Tameling *v.* U. S. Freehold Land, etc., Co., 2 Colo. 411.

A failure to make proof of title as required by Act Cong. May 26, 1824, did not defeat the title of one whose claim was confirmed by Act. Cong. June 13, 1812. St. Louis *v.* Toney, 21 Mo. 243; Soulard *v.* Clark, 19 Mo. 570.

79. Slack *v.* Orillion, 11 La. 587, 30 Am. Dec. 724; Boatner *v.* Walker, 11 La. 582, 30 Am. Dec. 723.

If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. Langdeau *v.* Hanes, 21 Wall. (U. S.) 521, 22 L. ed. 606.

If the claim be to quantity and not to a special tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated. Langdeau *v.* Hanes, 21 Wall. (U. S.) 521, 22 L. ed. 606. See also Mims *v.* Higgins, 39 Ala. 9; Doe *v.* Jones, 11 Ala. 63.

80. Slack *v.* Orillion, 11 La. 587, 30 Am. Dec. 724; Boatner *v.* Walker, 11 La. 582, 30 Am. Dec. 723.

81. Slack *v.* Orillion, 11 La. 587, 30 Am. Dec. 724; Boatner *v.* Walker, 11 La. 582, 30 Am. Dec. 723.

82. Kittridge *v.* Hebert, 9 La. Ann. 154; Broussard *v.* Gonsoulin, 12 Rob. (La.) 1; Murdock *v.* Gurley, 5 Rob. (La.) 467; De la Houssaye *v.* Saunders, 4 La. 443; Barry *v.* Gamble, 8 Mo. 88.

Confirmation against claim of United States.—An act of congress confirming the title of certain lands "against any claim on the part of the United States" does not affect the title to such lands as against a third person. New Orleans *v.* De Armas, 9 Pet. (U. S.) 224, 9 L. ed. 109.

83. U. S. *v.* Cleveland, etc., Cattle Co., 33 Fed. 323. See also U. S. *v.* King, 3 How. (U. S.) 773, 11 L. ed. 824.

84. Magee *v.* Doe, 22 Ala. 699; Dutillet *v.* Blanchard, 14 La. Ann. 97; Catron *v.* Laughlin, 11 N. M. 604, 72 Pac. 26; U. S. *v.* Maxwell Land-Grant Co., 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949, 122 U. S. 365, 7 S. Ct. 1271, 30 L. ed. 1211; Tameling *v.* U. S. Freehold, etc., Co., 93 U. S. 644, 23 L. ed. 998.

Examination as to scope of adjudication.—While the courts cannot go back to the original grant for the purpose of passing on its validity, they may do so to ascertain whether it purported to convey absolute title to the land, as a means of ascertaining the full scope of the adjudication by congress. Catron *v.* Laughlin, 11 N. M. 604, 72 Pac. 26.

85. Smith *v.* Reynolds, 9 App. Cas. (D. C.) 261.

86. Lavedan *v.* Trinchard, 35 La. Ann. 540.

87. Barada *v.* Blumenthal, 20 Mo. 162; Byron *v.* Sarpy, 18 Mo. 455.

88. McMicken *v.* U. S., 97 U. S. 204, 24 L. ed. 947.

89. Winn *v.* Cole, Walk. (Miss.) 119.

appeal to the political power of the United States government in order to perfect his title, or to obtain the evidence thereof, that government has the right to prescribe the terms or conditions on which such confirmation or recognition will be made,[90] provided such terms or conditions are not inconsistent with the performance of the duties and the faithful discharge of the obligations imposed upon it by the transfer of the ceded territory,[91] and a failure to comply with such conditions bars the claim.[92] A number of decisions under statutes recognizing and confirming land claims in various territorial acquisitions of the United States are referred to in the note.[93]

90. Eslava *v.* Bolling, 22 Ala. 721; Hall *v.* Root, 19 Ala. 378; Mitchell *v.* Furman, 180 U. S. 402, 21 S. Ct. 430, 45 L. ed. 596, holding that the conditions of ascertaining Spanish land claims in Florida imposed by the act of congress of March 23, 1828, confirming every claim that had been recommended for confirmation to the extent of a league square, and requiring a release of the residue to be filed within a certain period, were within the constitutional power of congress.

91. Hall *v.* Root, 19 Ala. 378.

92. Mitchell *v.* Furman, 180 U. S. 402, 21 S. Ct. 430, 45 L. ed. 596.

93. Claims in Florida purchase see Kennedy *v.* Doe, 7 Ala. 543; Keech *v.* Enriquez, 28 Fla. 597, 10 So. 91; Doe *v.* Roe, 13 Fla. 602; Higgins *v.* McMicken, 1 La. 53; U. S. *v.* De Morant, 123 U. S. 335, 8 S. Ct. 189, 31 L. ed. 171; Mobile *v.* Emanuel, 1 How. (U. S.) 95, 11 L. ed. 60; Mobile *v.* Hallett, 16 Pet. (U. S.) 261, 10 L. ed. 958; Pollard *v.* Kibbe, 14 Pet. (U. S.) 353, 10 L. ed. 490; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 8 L. ed. 547. See 41 Cent. Dig. tit. "Public Lands," § 667.

Claims in Louisiana purchase see Kennedy *v.* Doe, 26 Ala. 384; Eslava *v.* Bolling, 22 Ala. 721; Laforest *v.* Downing, 16 La. Ann. 301; Lafayette *v.* Blanc, 3 La. Ann. 59; Brooks *v.* Norris, 6 Rob. (La.) 175; Kenton *v.* Baroness of Pontalba, 1 Rob. (La.) 355; Swift *v.* Williams, 3 La. 234; Spencer *v.* Grimball, 6 Mart. N. S. (La.) 355; Baird *v.* St. Louis Hospital Assoc., 116 Mo. 419, 22 S. W. 726, (1893) 21 S. W. 11; Cummings *v.* Powell, 97 Mo. 524, 10 S. W. 819; Harvey *v.* Rusch, 67 Mo. 551; Vasquez *v.* Ewing, 42 Mo. 247; St. Louis Public Schools *v.* Fritz, 40 Mo. 372; Fine *v.* St. Louis Public Schools, 39 Mo. 59; Papin *v.* Ryan, 36 Mo. 406; Cabanné *v.* Walker, 31 Mo. 274; Papin *v.* Hines, 23 Mo. 274; Barada *v.* Blumenthal, 20 Mo. 162; Soulard *v.* Clark, 19 Mo. 570; Byron *v.* Sarpy, 18 Mo. 455; Gamache *v.* Piquignot, 17 Mo. 310 [*affirmed* in 16 How. (U. S.) 451, 14 L. ed. 1012]; Burgess *v.* Gray, 15 Mo. 220 [*affirmed* in 16 How. (U. S.) 48, 14 L. ed. 839]; Wright *v.* Rutgers, 14 Mo. 585; Ashley *v.* Turley, 13 Mo. 430; Montgomery *v.* Landusky, 9 Mo. 714; Trotter *v.* St. Louis Public Schools, 9 Mo. 69; Gurno *v.* Janis, 6 Mo. 330; Vasseur *v.* Benton, 1 Mo. 296; Baird *v.* St. Louis Hospital Assoc., 3 Mo. App. 435; U. S. *v.* Stockslager, 129 U. S. 470, 9 S. Ct. 382, 32 L. ed. 785; Bryan *v.* Kennett, 113 U. S. 179, 5 S. Ct. 407, 28 L. ed. 908; Slidell *v.* Grandjean, 111 U. S. 412, 4 S. Ct. 475, 28 L. ed. 321; Ryan *v.* Carter, 93 U. S. 78, 23 L. ed. 807; U. S. *v.* Lynde, 11 Wall. (U. S.) 632, 20 L. ed. 230; St. Louis Public Schools *v.* Walker, 9 Wall. (U. S.) 282, 19 L. ed. 576; Guitard *v.* Stoddard, 16 How. (U. S.) 494, 14 L. ed. 1030; Burgess *v.* Gray, 16 How. (U. S.) 48, 14 L. ed. 839; Blanc *v.* Lafayette, 11 How. (U. S.) 104, 13 L. ed. 623; U. S. *v.* D'Auterive, 10 How. (U. S.) 609, 13 L. ed. 560; U. S. *v.* Reynes, 9 How. (U. S.) 127, 13 L. ed. 74; Les Bois *v.* Bramell, 4 How. (U. S.) 449, 11 L. ed. 1051; Mackay *v.* Dillon, 4 How. (U. S.) 421, 11 L. ed. 1038; Pollard *v.* Files, 2 How. (U. S.) 591, 11 L. ed. 391; Chouteau *v.* Eckhart, 2 How. (U. S.) 344, 11 L. ed. 293; Stoddard *v.* Chambers, 2 How. (U. S.) 284, 11 L. ed. 269; Chouteau *v.* U. S., 9 Pet. (U. S.) 137, 9 L. ed. 78; Delassus *v.* U. S., 9 Pet. (U. S.) 117, 9 L. ed. 71. See 41 Cent. Dig. tit. "Public Lands," § 668.

Claims in cessions from Mexico see Santa Rita Land, etc., Co. *v.* Mercer, 4 Ariz. 104, 33 Pac. 944 [*following* Astiazaran *v.* Santa Rita Land, etc., Co., 148 U. S. 80, 13 S. Ct. 457, 37 L. ed. 376]; Bascomb *v.* Davis, 56 Cal. 152; Welch *v.* Sullivan, 8 Cal. 165; Pueblo County *v.* Central Colorado Imp. Co., 2 Colo. 628; Tameling *v.* U. S. Freehold Land, etc., Co, 2 Colo. 411; Smith *v.* Reynolds, 9 App. Cas. (D. C.) 261; Catron *v.* Laughlin, 11 N. M. 604, 72 Pac. 26; U. S. *v.* Maxwell Land-Grant Co., 122 U. S. 365, 7 S. Ct. 1271, 30 L. ed. 1211, 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949 [*affirming* 26 Fed. 118, 21 Fed. 19]; U. S. *v.* Moreno, 1 Wall. (U. S.) 400, 17 L. ed. 633; Montgomery *v.* Bevans, 17 Fed. Cas. No. 9,735, 1 Sawy. 653. See 41 Cent. Dig. tit. "Public Lands," § 669.

Claims to lands in Texas see Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1064; Cowan *v.* Williams, 49 Tex. 380; State *v.* Cardinas, 47 Tex. 250; Spier *v.* Laman, 27 Tex. 205; Rose *v.* Governor, 24 Tex. 496; Hamilton *v.* Avery, 20 Tex. 612; Kennedy *v.* State, 11 Tex. 108; Lewis *v.* San Antonio, 7 Tex. 288; Trimble *v.* Smithers, 1 Tex. 790; Williams *v.* League, (Tex. Civ. App. 1898) 44 S. W. 570; Davila *v.* Mumford, 24 How. (U. S.) 214, 16 L. ed. 619. See 41 Cent. Dig. tit. "Public Lands," § 670.

Van Ness ordinance and other legislation concerning lands in San Francisco see Baker *v.* Brickell, 87 Cal. 329, 25 Pac. 489, 1067 [*followed* in Wheelan *v.* Brickell, (Cal. 1894) 38 Pac. 85; Whelan *v.* Brickell, (Cal. 1893) 33 Pac. 396]; Davis *v.* Spring Valley Water Works, 57 Cal. 543; McManus *v.*

3. Proceedings in Land Office. Some of the statutes have provided for the presentation of land claims to the various land offices where they were duly passed upon by the officers and recorded.[94] Under a statute directing the surveyor-general to make inquiries in regard to such grants, and report to congress for its action, his functions were merely advisory,[95] and his report was no evidence of title or right to possession,[96] nor were his decisions binding on the courts [97] until confirmed by congress.[98] State courts have no power to correct errors in the decisions of the recorder of land titles, if there be any, where such power is expressly reserved to congress by the statute.[99]

4. Determination of Claims by Courts.[1] Without legislation the courts have no power to recognize or enforce titles under a former sovereignty; [2] but some statutes

O'Sullivan, 48 Cal. 7; Pickett *v.* Hastings, 47 Cal. 269; Dupond *v.* Barstow, 45 Cal. 446; Valentine *v.* Mahoney, 37 Cal. 389; Brooks *v.* Hyde, 37 Cal. 366; Satterlee *v.* Bliss, 36 Cal. 489; Davis *v.* Perley, 30 Cal. 630; Borel *v.* Rollins, 30 Cal. 408; People *v.* Davidson, 30 Cal. 379; Carleton *v.* Townsend, 28 Cal. 219; Seabury *v.* Arthur, 28 Cal. 142; Hubbard *v.* Barry, 21 Cal. 321; Wolf *v.* Baldwin, 19 Cal. 306; San Francisco Bd. of Education *v.* Fowler, 19 Cal. 11; Hubbard *v.* Sullivan, 18 Cal. 508; San Francisco *v.* Beideman, 17 Cal. 443; Payne *v.* Treadwell, 16 Cal. 220; Holladay *v.* Frisbie, 15 Cal. 630; Chapin *v.* Bourne, 8 Cal. 294; Clark *v.* San Francisco, 124 U. S. 659, 8 S. Ct. 659, 31 L. ed. 553; Carr *v.* U. S., 98 U. S. 433, 25 L. ed. 209; Field *v.* Seabury, 19 How. (U. S.) 323, 15 L. ed. 650, 655 [*reversing* 21 Fed. Cas. No. 12,575]; Merriman *v.* Bourne, 17 Fed. Cas. No. 9,480 [*affirmed* in 9 Wall. 592, 19 L. ed. 683].

94. See the following cases:

Alabama.— Hall *v.* Root, 19 Ala. 378; Mobile *v.* Farmer, 6 Ala. 738; Ryder *v.* Innerarity, 4 Stew. & P. 14; Lewis *v.* Goguette, 3 Stew. & P. 184.

California.— Johnson *v.* Van Dyke, 20 Cal. 225.

Louisiana.— Sandoz *v.* Ozenne, 13 La. Ann. 616; Terrell *v.* Chambers, 6 Rob. 243; Fletcher *v.* Cavalier, 4 La. 267; Higgins *v.* McMicken, 1 La. 53.

Missouri.— Williams *v.* Carpenter, 28 Mo. 453; Vasquez *v.* Ewing, 24 Mo. 31, 66 Am. Dec. 694; Hunter *v.* Hemphill, 6 Mo. 106.

New Mexico.— Chaves *v.* Whitney, 4 N. M. 178, 16 Pac. 608; Whitney *v.* McAfee, 3 N. M. 37, 1 Pac. 173.

United States.— Mobile Transp. Co. *v.* Mobile, 187 U. S. 479, 23 S. Ct. 170, 47 L. ed. 266 [*affirming* 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333]; Downs *v.* Hubbard, 123 U. S. 189, 8 S. Ct. 85, 31 L. ed. 114; Scull *v.* U. S., 98 U. S. 410, 25 L. ed. 164; Tate *v.* Carney, 24 How. 357, 16 L. ed. 693; Gamache *v.* Piquignot, 16 How. 451, 14 L. ed. 1012 [*affirming* 17 Mo. 310]; De la Croix *v.* Chamberlain, 12 Wheat. 599, 6 L. ed. 741; Leitensdorfer *v.* Campbell, 15 Fed. Cas. No. 8,225, 5 Dill. 419; Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344. See 41 Cent. Dig. tit. "Public Lands," § 672.

95. U. S. *v.* Ortiz, 176 U. S. 422, 20 S. Ct. 466, 44 L. ed. 529, holding that until action by congress had supervened on a recommendation for the confirmation of a private land claim made by the surveyor-general it was not only the right, but the duty, of his successor in office, on proper suggestion being made to him, to hear additional evidence, and transmit it for the consideration of congress.

96. Pinkerton *v.* Ledoux, 129 U. S. 346, 9 S. Ct. 399, 32 L. ed. 706.

97. Chaves *v.* Whitney, 4 N. M. 178, 16 Pac. 608 [*following* Tameling *v.* U. S. Freehold, etc., Co., 93 Fed. 644, 30 L. ed. 949, and *overruling* Whitney *v.* McAfee, 3 N. M. 37, 1 Pac. 173].

General rule as to conclusiveness of decisions of land officers see *supra*, II, L, 15, a

98. See *supra*, notes 96, 97.

99. Burgess *v.* Gray, 16 How. (U. S.) 48, 14 L. ed. 839.

1. Court of private land claims see *infra*, V, E, 6.

Appeal to courts from decision of commissioners see *infra*, V, E, 5.

2. Ainsa *v.* New Mexico, etc., R. Co., 4 Ariz. 236, 36 Pac. 213, 214; Leese *v.* Clarke, 3 Cal. 17; Hancock *v.* McKinney, 7 Tex. 384; Paschal *v.* Perez, 7 Tex. 348; Jones *v.* Borden, 5 Tex. 410; Burgess *v.* Gray, 16 How. (U. S.) 48, 14 L. ed. 839; Les Bois *v.* Bramell, 4 How. (U. S.) 449, 11 L. ed. 1051; Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344. See also Astiazaran *v.* Santa Rita Land, etc., Co., 148 U. S. 80, 13 S. Ct. 457, 37 L. ed. 376 [*affirming* 3 Ariz. 20, 20 Pac. 189] (holding that Acts Cong. July 22, 1854, c. 103, and July 15, 1870, c. 292, reserving to congress final action in the adjustment and confirmation of claims under grants from the Mexican government of land in New Mexico and Arizona upon the report and recommendation of the surveyor-general, preclude the ordinary courts of justice from entertaining suits to determine the validity of such grants pending the final action of congress upon such a report); U. S. *v.* Clamorgan, 101 U. S. 822, 25 L. ed. 836 (claim not within statute).

As between two claimants setting up distinct imperfect titles under the former government of the territory of Louisiana, the courts have no jurisdiction, the controversy being one within the domain of the political power alone. Magwire *v.* Tyler, 8 Wall. (U. S.) 650, 19 L. ed. 320.

The decisions of the Mexican political or judicial authorities, federal and state, for-

made provision for proceedings in the United States courts of the various districts for the settlement and confirmation of claims of land grants under former sovereignties.[3] Such a proceeding must have been brought within the time limited by the statute,[4] and the proceeding was commenced when the petition was filed.[5] Adverse claimants were required to be made parties.[6] It was not necessary to allege in express terms that petitioner's claim was protected by the treaty of cession,[7] or to annex a sworn copy of the government surveys to the petition;[8] but it was necessary that the petition should aver that the petitioner had the qualifications requisite to entitle him to claim the benefit of the statute.[9] The powers

merly in control of the territory of Texas, deciding contested land claims, will not be revised by the courts of the state. Bissell *v.* Haynes, 9 Tex. 556. See also Cavazos *v.* Trevino, 35 Tex. 133.

Equitable rights claimed by virtue of a treaty in the territory ceded cannot be adjudicated and established by the courts until the political department provides the remedy. State *v.* Russell, 38 Tex. Civ. App. 13, 85 S. W. 288, 1167.

Reliance on grant as color of title.— When defendant relies on a Mexican grant as the claim and color of title to defend his right to fence lands, otherwise public lands, the court will look into the grant to see what lands purport to be granted, although it will not examine as to the validity of the claim. U. S. *v.* Cameron, 3 Ariz. 100, 21 Pac. 177.

3. Johnson *v.* Van Dyke, 20 Cal. 235; Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450; Scull *v.* U. S., 98 U. S. 410, 25 L. ed. 164; U. S. *v.* Innerarity, 19 Wall. (U. S.) 595, 22 L. ed. 202; U. S. *v.* Davenport, 15 How. (U. S.) 1, 14 L. ed. 575; U. S. *v.* Porche, 12 How. (U. S.) 426, 13 L. ed. 1051; U. S. *v.* Moore, 12 How. (U. S.) 209, 13 L. ed. 958; Le Bois *v.* Bramell, 4 How. (U. S.) 449, 11 L. ed. 1051; U. S. *v.* Delespine, 15 Pet. (U. S.) 319, 10 L. ed. 753; U. S. *v.* Huertas, 8 Pet. (U. S.) 488, 8 L. ed. 1019; U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 8 L. ed. 604; Apis *v.* U. S., 88 Fed. 931.

Where there are conflicting claimants to land in California, to one of whom the United States must patent the land, so that it has no interest in the dispute, the two parties must litigate in the district court, under St. March 3, 1851, § 13. U. S. *v.* White, 23 How. (U. S.) 249, 16 L. ed. 560.

Particular grants confirmed by courts see U. S. *v.* Watkins, 97 U. S. 219, 24 L. ed. 952 (confirmation as to one half of claim); U. S. *v.* Arredondo, 13 Pet. (U. S.) 88, 10 L. ed. 71; U. S. *v.* Levy, 13 Pet. (U. S.) 81, 10 L. ed. 68; U. S. *v.* Gibson, 8 Pet. (U. S.) 494, 8 L. ed. 1021; U. S. *v.* Fatio, 8 Pet. (U. S.) 492, 8 L. ed. 1020; U. S. *v.* Hernandez, 8 Pet. (U. S.) 485, 8 L. ed. 1018; U. S. *v.* Younge, 8 Pet. (U. S.) 484, 8 L. ed. 1018; U. S. *v.* Levi, 8 Pet. (U. S.) 479, 8 L. ed. 1016; U. S. *v.* Fleming, 8 Pet. (U. S.) 478, 8 L. ed. 1016; U. S. *v.* Gomez, 8 Pet. (U. S.) 477, 8 L. ed. 1016; U. S. *v.* Huertas, 8 Pet. (U. S.) 475, 8 L. ed. 1015.

4. U. S. *v.* Porche, 12 How. (U. S.) 426, 13 L. ed. 1051 (holding that under Act Cong. 1824, c. 173, § 5, extended by Acts (1844), c. 95, to Louisiana, the courts of the United States have no jurisdiction of a petition filed after the lapse of the two years, although the respondent expressly waives any right of objection on that ground); Les Bois *v.* Bramell, 4 How. (U. S.) 449, 11 L. ed. 1051; U. S. *v.* Marvin, 3 How. (U. S.) 620, 11 L. ed. 753.

Taking advantage of prior petition.—A person who filed his petition in the district court, claiming land under the act of congress of June 22, 1860, in time, but afterward discovered that he had no title, could not, by a supplemental petition acknowledging his mistake and showing who the right owner was, make his petition inure to the benefit of the right owner, who had let pass the time for asserting title under the act. U. S. *v.* Innerarity, 19 Wall. (U. S.) 595, 22 L. ed. 202.

The Hot Springs Act of 1870, providing that all claims to any part of said reservation on which suits should not be brought within ninety days of the passage of the act should be forever barred, applied to a complete title under a Spanish grant as well as to claims under the United States statutes. Filhiol *v.* U. S., 28 Ct. Cl. 110.

5. U. S. *v.* Delespine, 15 Pet. (U. S.) 319, 10 L. ed. 753, holding that where a petition for the confirmation of a claim to lands in Florida, as presented, was defective, and the court allowed an amended petition to be filed, the original petition was the commencement of the proceeding, and the amendment allowed by the court should not be taken as the date when the claim was first preferred.

6. U. S. *v.* Roselius, 15 How. (U. S.) 31, 14 L. ed. 587; U. S. *v.* Moore, 12 How. (U. S.) 209, 13 L. ed. 958.

The decree passed on such petition must specify the amount and boundaries of the lands of adverse claimants. U. S. *v.* Moore, 12 How. (U. S.) 209, 13 L. ed. 958.

7. U. S. *v.* Huertas, 8 Pet. (U. S.) 488, 8 L. ed. 1019.

8. U. S. *v.* De Morant, 123 U. S. 335, 8 S. Ct. 189, 31 L. ed. 171.

9. Thus under Act Cong. (1824) c. 173, and Act (1844), c. 95, the petition must aver the residence of the grantee within the province of Louisiana, at the date of the grant, or on or before March 10, 1804. U. S. *v.* Castant, 12 How. (U. S.) 437, 13 L. ed. 1056 [*following* U. S. *v.* D'Auterive, 10 How. (U. S.) 609, 13 L. ed. 560; U. S. *v.* Reynes, 9 How. (U. S.) 127, 13 L. ed. 74].

of the courts were limited by the statutes and they could only confirm grants within the purview of such statutes.[10] A petition might be dismissed for want of prosecution.[11] Appeals to the supreme court of the United States were allowed.[12] In Texas the congress of the republic and the legislature of the state provided for suits to confirm titles under Mexican grants,[13] or to recover lands claimed by persons under alleged titles emanating from the Spanish or Mexican governments, where no valid evidence of such grants could be found.[14]

5. Determination of Claims by Commissioners. Some of the statutes provided for a board of commissioners to settle land claims under former sovereignties,[15] and required all such claims to be presented to the commissioners[16] within a specified time[17] in order that such claims might be investigated, and, if substantiated,

10. U. S. *v.* Dalcour, 203 U. S. 438, 27 S. Ct. 58, 51 L. ed. 248; U. S. *v.* Roselius, 15 How. (U. S.) 36, 14 L. ed. 590; U. S. *v.* Castant, 12 How. (U. S.) 437, 13 L. ed. 1056; U. S. *v.* Lawton, 5 How. (U. S.) 10, 12 L. ed. 27; Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344.

The district court had no jurisdiction to partition a claim among claimants under the act of congress of May 26, 1824. Putnam *v.* U. S., 20 Fed. Cas. No. 11,484, Hempst. 332 [*followed* in Bullitt *v.* U. S., 4 Fed. Cas. No. 2,128, Hempst. 333].

11. Valliere *v.* U. S., 28 Fed. Cas. No. 16,822, Hempst. 335.

12. Cambuston *v.* U. S., 95 U. S. 285, 24 L. ed. 448 (appeal not taken in time); Villabolos *v.* U. S., 6 How. (U. S.) 81, 12 L. ed. 352.

13. Texas Mexican R. Co. *v.* Jarvis, 69 Tex. 527, 7 S. W. 210; Villareal *v.* State, 47 Tex. 319; State *v.* Sais, 47 Tex. 307; Herndon *v.* Robertson, 15 Tex. 593.

What titles may be adjudicated.— Sp. Laws (1901), p. 4, c. 4, providing a method for the confirmation and for testing the validity of titles to lands embraced in grants emanating from the Spanish or Mexican governments, and having their origin at such time as to be within the treaty of Guadalupe Hidalgo, is not limited in its application to perfect legal titles, but authorizes the adjudication of imperfect or equitable titles having their origin in a grant of the Mexican government. State *v.* Russell, 38 Tex. Civ. App. 13, 85 S. W. 288.

14. Sullivan *v.* State, 41 Tex. Civ. App. 89, 95 S. W. 645, holding the petition in such an action by the state not subject to a general demurrer.

15. Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88; Rodriguez *v.* U. S., 1 Wall. (U. S.) 582, 17 L. ed. 689.

16. Harvey *v.* Barker, 126 Cal. 262, 58 Pac. 692; Taylor *v.* Escandon, 50 Cal. 428; Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450; Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926; Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88; De la Croix *v.* Chamberlain, 12 Wheat. (U. S.) 599, 6 L. ed. 741; Bouldin *v.* Phelps, 30 Fed. 547; Grisar *v.* McDowell, 11 Fed. Cas. No. 5,832, 4 Sawy. 597 [*affirmed* in 6 Wall. 363, 18 L. ed. 863].

Mission Indians claiming a right of permanent occupancy of land in California under a Mexican grant were within the provisions of the statute requiring every person claiming lands in California by virtue of any right or title derived from a Spanish or Mexican government to present the same to commissioners. Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692].

Complete as well as inchoate claims to land in California, under the former sovereignty, were required to be presented to the commissioners for confirmation under the act of 1851. Anzar *v.* Miller, 90 Cal. 342, 27 Pac. 299; Botiller *v.* Dominguez, 130 U. S. 238, 9 S. Ct. 525, 32 L. ed. 926; More *v.* Steinbach, 127 U. S. 70, 8 S. Ct. 1067, 32 L. ed. 51; Newhall *v.* Sanger, 92 U. S. 761, 23 L. ed. 769; Castillero *v.* U. S., 2 Black (U. S.) 17, 17 L. ed. 360; U. S. *v.* Fossatt, 21 How. (U. S.) 445, 16 L. ed. 185; Fremont *v.* U. S., 17 How. (U. S.) 542, 15 L. ed. 241. Earlier California cases (Merle *v.* Dixey, 31 Cal. 130; Steinbach *v.* Moore, 30 Cal. 498; Minturn *v.* Brower, 24 Cal. 644) asserting the view that titles perfect at the date of the cession need not be presented are necessarily overruled.

Necessity of presentation under Texas land law of 1837 see Jones *v.* Menard, 1 Tex. 771.

Claims proper for presentation.—Act Cong. March 3, 1851, c. 41 (9 St. 631), to ascertain and settle private land claims in California, was intended to segregate private from public land, and did not contemplate presentation of claims to anything but "land"; and hence, where a city filed a petition with the board of land commissioners for an adjudication of its claim to lands, founded upon a grant to its predecessor, it was not necessary to present therein its claim to water rights pertaining thereto, and its claim to the water rights of its predecessor was not adversely adjudicated by a decision that it was not entitled to all the land claimed. Los Angeles *v.* Los Angeles Farming, etc., Co., 152 Cal. 645, 93 Pac. 869, 1135.

17. Barker *v.* Harvey, 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963 [*affirming* 126 Cal. 262, 58 Pac. 692]; Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88.

Neglect to support claim by evidence.— Where a person claiming land by virtue of a right or title derived from the Mexican or Spanish governments presented his petition to the board of land commissioners, but neglected to support it by evidence within two years thereafter, such neglect did not bring

confirmed,[18] failing in which, claims were to be considered and treated as abandoned,[19] and the land was considered as part of the public domain.[20] The jurisdiction and powers of such commissioners and of the courts on appeal were fixed and limited by the terms of the statutes.[21] Such jurisdiction included every question of title or right, whether inchoate or complete, and whether resting in contract or evidenced by authentic act and judicial possession,[22] and extended not only to the adjudication of questions relating to the genuineness and authenticity of the grant and others of a similar character,[23] but also to all questions relating to its location and boundaries,[24] and did not terminate until the issue of a patent

the claim within the limitation prescribed by the act of March 3, 1851, section 13, which barred all claims not presented within two years. Swat *v.* U. S., 23 Fed. Cas. No. 13,680, Hoffm. Land Cas. 230.

Pueblo lands.— Section 14 of the act of congress of March 3, 1851, did not except pueblo lands from the provision of section 13, which made lands held by titles from the Mexican government on the cession of California a part of the public domain unless the grantee, within two years from the date of the act, presented his claim to the land commissioners for approval, etc. Stevenson *v.* Bennett, 35 Cal. 424. See also Lynch *v.* De Bernal, 9 Wall. (U. S.) 315, 19 L. ed. 714.

Confirmation to another person.— The acts of congress for the confirmation of Spanish titles in Missouri, being in the nature of statutes of limitation, if any one who was entitled to a part interest in a Spanish claim failed within the time limited to present his interests in the claim for confirmation, he could not afterward claim the benefit of a confirmation of the whole claim made to another. Guyol *v.* Chouteau, 19 Mo. 546.

The act of May 26, 1830, relating to Florida lands, contained no direct limitation as to the time in which claims might be presented. U. S. *v.* Delespline, 15 Pet. (U. S.) 319, 10 L. ed. 753.

18. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 18 L. ed. 863.

The object of the government, in creating the board of land commissioners, was to separate the public lands from those which constituted private property, and discharge its treaty obligations to protect private claims. Norton *v.* Meader, 18 Fed. Cas. No. 10,351, 4 Sawy. 603.

19. Harvey *v.* Barker, 126 Cal. 262, 58 Pac. 692 [*affirmed* in 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963]; De Toro *v.* Robinson, 91 Cal. 371, 27 Pac. 671; Rico *v.* Spence, 21 Cal. 504; Estrada *v.* Murphy, 19 Cal. 248; Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88; Houston *v.* San Francisco, 47 Fed. 337.

Such legislation is not subject to any constitutional objection so far as it applies to grants of an imperfect character, which require further action of the political department of government to render them perfect. Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88.

Intervention by claimant in default.— One whose claim under a grant has never been presented, and has been abandoned, has no right, under the act of 1851, section 13, to intervene in a proceeding to confirm a different grant, until after the determination of the proceeding by the confirmation of the claim. U. S. *v.* White, 28 Fed. Cas. No. 16,680, Hoffm. Dec. 25, Hoffm. Op. 475.

20. Harvey *v.* Barker, 126 Cal. 262, 58 Pac. 692 [*affirmed* in 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963]; Rico *v.* Spence, 21 Cal. 504; More *v.* Steinbach, 127 U. S. 70, 8 S. Ct. 1067, 32 L. ed. 51; Apis *v.* U. S., 88 Fed. 931; Bouldin *v.* Phelps, 30 Fed. 547.

21. Leese *v.* Clarke, 18 Cal. 535; Magwire *v.* Tyler, 40 Mo. 406; U. S. *v.* Dalcour, 203 U. S. 408, 27 S. Ct. 58, 51 L. ed. 248; U. S. *v.* De Morant, 123 U. S. 335, 8 S. Ct. 189, 31 L. ed. 171; Lynch *v.* De Barnal, 9 Wall. (U. S.) 315, 19 L. ed. 714 [*followed* in Chaboya *v.* Umbarger, 97 U. S. 280, 24 L. ed. 893]; Castillero *v.* U. S., 2 Black (U. S.) 17, 17 L. ed. 360; Pollard *v.* Kibbe, 14 Pet. (U. S.) 353, 10 L. ed. 490; Mora *v.* Foster, 17 Fed. Cas. No. 9,784, 3 Sawy. 469 [*affirmed* in 98 U. S. 425, 25 L. ed. 191].

Rights of grantees inter sese.— Where one of two persons to whom a grant was made has exhibited a deed from his co-grantee, and obtained a confirmation of his claim to the whole tract, the co-grantee, who has presented his separate claim for his half and who denies the execution of the deed, is entitled to a confirmation as against the United States, and the rights of the parties *inter sese* will be left to be determined by the ordinary tribunals. Thurn *v.* U. S., 23 Fed. Cas. No. 14,015, Hoffm. Land Cas. 298. See also Norton *v.* Meader, 18 Fed. Cas. No. 10,351, 4 Sawy. 603.

Under the Texas land law of 1837, the board of commissioners could not entertain claims for augmentations under the colonization law of 1825, as their jurisdiction was confined to claims for head-rights. Norton *v.* General Land Office Com'rs, 2 Tex. 357.

22. U. S. *v.* Fossatt, 21 How. (U. S.) 445, 16 L. ed. 185.

23. U. S. *v.* Billings, 2 Wall. (U. S.) 444, 17 L. ed. 848; U. S. *v.* Halleck, 1 Wall. (U. S.) 439, 17 L. ed. 664; U. S. *v.* Fossatt, 21 How. (U. S.) 445, 16 L. ed. 185.

24. Fossat *v.* U. S., 2 Wall. (U. S.) 649, 17 L. ed. 739; U. S. *v.* Billing, 2 Wall. (U. S.) 444, 17 L. ed. 848; U. S. *v.* Halleck, 1 Wall. (U. S.) 439, 17 L. ed. 664; U. S. *v.* Fossatt, 21 How. (U. S.) 445, 16 L. ed. 185; U. S. *v.* Fossat, 25 Fed. Cas. No. 15,137, 15,139, Hoffm. Land Cas. 211, 376.

Boundary of adjoining rancho.— Upon an

conformably to the decree.[25] The jurisdiction did not, however, extend to inquiring into matters of private right between different individuals.[26] It was sufficient to give the commissioners jurisdiction that the petition alleged that the claim was by virtue of a right or title derived from a former sovereignty,[27] and it was not necessary to allege that such claim was supported by a written grant or concession.[28] Where a claim had been assigned it could be presented and prosecuted in the name of the assignee [29] or the original grantee.[30] There was an appeal from the decision of the commissioners to the United States district court,[31] and such appeal opened the whole issue for consideration and the case was to be heard in the district court *de novo*.[32] When a final decision was rendered by the commissioners it was their

appeal from a decision of the board of land commissioners confirming a claim to a Mexican land grant, the objection that the boundary of an adjoining rancho was affected by the claim under consideration was not tenable; the controversy being between and concluding the United States and the claimants only. U. S. *v.* Sanchez, 27 Fed. Cas. No. 16,218, Hoffm. Land Cas. 133.

Construction of decree as to boundaries see Valentine *v.* Sloss, 103 Cal. 215, 37 Pac. 326, 410.

Where the boundaries of the land had been established before the authorities of the former sovereignty, or were otherwise clearly indicated, it was proper for the commissioners to declare them in their decrees. U. S. *v.* Sepulveda, 1 Wall. (U. S.) 104, 17 L. ed. 569.

25. U. S. *v.* Fossatt, 21 How. (U. S.) 445, 16 L. ed. 185.

26. U. S. *v.* Morillo, 1 Wall. (U. S.) 706, 17 L. ed. 626; U. S. *v.* Grimes, 2 Black (U. S.) 610, 17 L. ed. 352; Dana *v.* U. S., 6 Fed. Cas. No. 3,555, Hoffm. Land Cas. 87; Martin *v.* U. S., 16 Fed. Cas. No. 9,168, Hoffm. Land Cas. 146; U. S. *v.* Vallejo, 28 Fed. Cas. No. 16,606, Hoffm. Dec. 3, Hoffm. Op. 53.

27. Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88.

28. Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88, so holding on the ground that the right or title might rest in the general law of the land.

29. U. S. *v.* Grimes, 2 Black (U. S.) 610, 17 L. ed. 352, holding that this was the proper method where the whole claim was assigned. See also Thomas *v.* Turnley, 3 Rob. (La.) 206.

30. U. S. *v.* Grimes, 2 Black (U. S.) 610, 17 L. ed. 352 (holding that this was the proper method where the land had been divided among a number of vendees); U. S. *v.* Sutter, 21 How. (U. S.) 170, 16 L. ed. 119 [*following* U. S. *v.* Patterson, 15 How. (U. S.) 10, 14 L. ed. 578; U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 8 L. ed. 604].

A confirmation in the name of the original grantee of Mexican lands is binding on the United States and the assignees of the original grantee, and hence they cannot afterward petition for confirmation, but must assert their rights against him in the ordinary courts of the country. U. S. *v.* Covilland, 1 Black (U. S.) 339, 17 L. ed. 40.

Consolidation of cases.— The cases of an original grantee and his assignees petitioning for the same land should be consolidated. U. S. *v.* Grimes, 2 Black (U. S.) 610, 17 L. ed. 352.

A confirmation to the grantee or his legal representatives did not inure to the benefit of the person who presented the claim unless he proved himself to be the assignee or legal representative of the person in whose name the certificate issued. St. Louis Gas Light Co. *v.* Reiss, 33 Mo. 551. See also Connoyer *v.* Le Beaume, 45 Mo. 139. But the effect of such a confirmation was to confirm the title to an assignee. Carpenter *v.* Rannells, 45 Mo. 584.

A certificate of confirmation issued to the legal representatives of a grantee who had sold his claim before the certificate issued, did not operate to the benefit of the heirs of the grantee. Montgomery *v.* Landusky, 9 Mo. 714.

Pueblo lands.— The act of congress of March 3, 1851, section 14, providing that the claims for lots held under grants from any corporation or town to which lands had been granted for the establishment of a town by the Spanish or Mexican government, or for any city, town, or village lot, which city, town, or village existed on July 7, 1846, should be presented by the corporate authorities, intended that the corporate authority should present under one general claim, not only the interest of the city, town, or village which they represented, but also the separate interests of the individuals holding under them, and relieve the board from the necessity of considering separate claims depending on the same original title. Lynch *v.* De Bernal, 9 Wall. (U. S.) 315, 19 L. ed. 714, holding further that it was not necessary that a claim to a lot within the limits of a pueblo should be presented in the name of the corporate authorities where the title was not derived from the pueblo. See also Leese *v.* Clark, 18 Cal. 535.

The assignee of a portion of a claim is not absolutely estopped by a decree adverse to the title under which he holds, where he was not a party to the proceedings; but he cannot expect to change such decree without furnishing new evidence to show that it was erroneous. U. S. *v.* Grimes, 2 Black (U. S.) 610, 17 L. ed. 352.

31. See Dana *v.* U. S., 6 Fed. Cas. No. 3,555, Hoffm. Land Cas. 87; De Zaldo *v.* U. S., 7 Fed. Cas. No. 3,872, Hoffm. Land Cas. 98.

32. Le Roy *v.* Wright, 15 Fed. Cas. No. 8,273, 4 Sawy. 530, holding that the case should be heard upon papers and testimony

duty to prepare two certified transcripts of their proceedings and decision, and of the papers and evidence on which they were founded, one of which was filed with the clerk of the proper district court and the other transmitted to the attorney-general.[33] The filing of the transcript with the clerk operated as an appeal on behalf of the party against whom the decision was rendered, and such party was required to file within a specified time a notice that the appeal would be prosecuted, failing in which the appeal was to be regarded as dismissed,[34] and the decree of the commissioners took effect precisely as though no appeal had ever been taken.[35] An appeal also lay from the district court to the supreme court of the United States;[36] but objections not raised in the trial court could not be raised on appeal,[37] nor were matters as to which no appeal was taken open to consideration.[38] On affirming a decree confirming a land grant the supreme court might instruct the district court to amend such decree.[39] Where a cause was remanded for further proceedings, involving additional proofs, the United States was entitled to a reasonable time in which to close its testimony.[40] The proceedings of the commissioners

used before the board of commissioners and such other evidence as either party might produce.

Personal knowledge of judge.— Where, on appeal to the district court, the question is whether a tract of land is sufficiently described to be well defined and intelligible, and the judge has personal knowledge relative to it, he will weigh that personal knowledge in connection with the testimony of witnesses. U. S. *v.* Juares, 26 Fed. Cas. No. 15,500.

33. Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88.

34. Beard *v.* Federy, 3 Wall (U. S.) 478, 18 L. ed. 88; Yturbide *v.* U. S., 22 How. (U. S.) 290, 16 L. ed. 342 [*affirming* 30 Fed. Cas. No. 18,191, Hoffm. Land Cas. 273].

Change in mode of appeal.—Acts Cong. (1851) c. 41, §§ 8, 9, prescribing certain modes of procedure for bringing before the district courts of the United States in California a land claim already passed upon by the commissioners appointed to settle private land claims in California were repealed by the act of Aug. 31, 1852, section 12, which substituted a different mode of procedure, as stated in the text. U. S. *v.* Ritchie, 17 How. (U. S.) 525, 15 L. ed. 236.

Discretion of attorney-general as to prosecuting appeal.—After the decision of the commissioners on a Mexican land claim, the control of proceedings, whether to prosecute an appeal or to dismiss the same, rested exclusively with the attorney-general; and the propriety or legality of his action in any case was not the subject of review by any tribunal, and it could only be revoked by the appellate court on his own application. U. S. *v.* Flint, 25 Fed. Cas. No. 15,121, 4 Sawy. 42 [*affirmed* in 98 U. S. 61, 25 L. ed. 93].

When the attorney-general gave notice that he would not prosecute the appeal, such appeal was for all legal purposes in fact dismissed, and the decree of the board took effect as if no appeal had been taken, and an order or decree of the district court giving leave to the claimant to proceed on the decree of the board as on a final decree was a proper disposition of the case. Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88.

A dismissal of the appeal on the part of the United States, both parties having appealed, may be regarded as an assent by the government to the main facts upon which the claim rests. San Francisco *v.* U. S., 21 Fed. Cas. No. 12,316, 4 Sawy. 553.

35. Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88.

36. Fossat *v.* U. S., 2 Wall. (U. S.) 649, 17 L. ed. 739; U. S. *v.* Billing, 2 Wall. (U. S.) 444, 17 L. ed. 848. See also U. S. *v.* Larkin, 18 How. (U. S.) 557, 15 L. ed. 485.

The act of congress of July 1, 1864, "to expedite the settlement of titles to lands in the State of California," did not authorize appeals to the circuit court from all past decrees in land cases of the district court, but only from decrees of that court then appealable to the supreme court, but from which no appeal had been taken, and from decrees of the district court which might be subsequently rendered. Mesa *v.* U. S., 17 Fed. Cas. No. 9,492, 4 Sawy. 551.

37. U. S. *v.* Yorba, 1 Wall. (U. S.) 412, 17 L. ed. 635; U. S. *v.* Auguisola, 1 Wall. (U. S.) 352, 17 L. ed. 613; U. S. *v.* Larkin, 18 How. (U. S.) 557, 15 L. ed. 485. See also U. S. *v.* Johnson, 1 Wall. (U. S.) 326, 17 L. ed. 597.

38. De Malarin *v.* U. S., 1 Wall. (U. S.) 282, 17 L. ed. 594, holding that when the validity of a Mexican grant was affirmed by a decree of the district court, and an appeal was taken by the claimant seeking a modification of the decree as to the extent of land embraced by the grant, but no appeal from such decree was taken by the United States, the validity of the grant was not open to consideration on the appeal. See also Fossat *v.* U. S., 2 Wall. (U. S.) 649, 17 L. ed. 739.

39. U. S. *v.* De Morant, 124 U. S. 647, 8 S. Ct. 675, 31 L. ed. 565, where the supreme court instructed the district court to amend its decree by inserting therein a description of the lands confirmed, ascertaining by reference whether any of such lands have been sold, and, if so, declaring the mover entitled to scrip for other equivalent lands.

40. U. S. *v.* Fossat, 25 Fed. Cas. No. 15,138, Hoffm. Land Cas. 373.

were judicial in their character, and had the same effect as other judicial proceedings.[41] Where a decree of the commissioners confirming a claim had become final, it was conclusive [42] between the United States or those claiming under it and the claimant [43] and was not open to revision; [44] and the same was true of a final decree of the district court confirming the claim, unless appealed from.[45] But the confirmation determined nothing as to the equitable relations between the grantee and third persons.[46] The final decree took effect by relation as of the day when the petition was presented to the land commissioners and was to be considered as if entered on that day.[47] The final rejection of the claim restored the land to the mass of the public domain, without any further action by the land department.[48] In passing on the rights of the inhabitants of California to the property they claimed under grants from the Spanish and Mexican governments, the commissioners and the courts were to be governed by the stipulations of the treaty, the law of nations, the laws, usages, and customs of the former government, the principles of equity, and the decisions of the supreme court, so far as they were applicable;[49] and they were not required to conduct their investigations as if the rights

41. Boyle *v.* Hinds, 3 Fed. Cas. No. 1,759, 2 Sawy. 527.

Confirmation to an assignee of the grantee entitled the assignee to the patent for the land. Thomas *v.* Turnley, 3 Rob. (La.) 206. See also Hayner *v.* Stanley, 13 Fed. 217, 8 Sawy. 214.

42. Harvey *v.* Barker, 126 Cal. 262, 58 Pac. 692 [*affirmed* in 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963, and *following* Los Angeles Farming, etc., Co. *v.* Thompson, 117 Cal. 594, 49 Pac. 714], holding that the decision of the commissioners that certain land derived from the Mexican government was, at the time it was granted, vacant and subject to alienation, was final and conclusive against all Indian and other claimants.

43. Ohm *v.* San Francisco, 92 Cal. 437, 28 Pac. 580; Sanchez *v.* Gonzales, 11 Mart. (La.) 207; Carmichael *v.* Brisler, 8 Mart. (La.) 727; More *v.* Steinbach, 127 U. S. 70, 8 S. Ct. 1067, 32 L. ed. 51; Higuera *v.* U. S., 5 Wall. (U. S.) 827, 18 L. ed. 469; U. S. *v.* Flint, 25 Fed. Cas. No. 15,121, 4 Sawy. 42.

44. Semple *v.* Hagar, 27 Cal. 163; Boatner *v.* Ventress, 8 Mart. N. S. (La.) 644, 20 Am. Dec. 266; Magwire *v.* Tyler, 40 Mo. 406; U. S. *v.* Flint, 25 Fed. Cas. No. 15,121, 4 Sawy. 42 (holding that one who bought lands on the faith of such a decree was not liable to be disturbed in his possession on charges of fraud in prosecuting the claim, as the decree was conclusive that such fraud did not exist); U. S. *v.* Hare, 26 Fed. Cas. No. 15,303, 4 Sawy. 653.

The decision of the commissioners could not be collaterally attacked.— Umbarger *v.* Chaboya, 49 Cal. 525; Semple *v.* Hagar, 27 Cal. 163; Mott *v.* Smith, 16 Cal. 533; Rose *v.* Davis, 11 Cal. 133; Lynch *v.* De Bernal, 9 Wall. (U. S.) 315, 19 L. ed. 714; Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88; Mora *v.* Foster, 17 Fed. Cas. No. 9,784, 3 Sawy. 469 [*affirmed* in 98 U. S. 425, 25 L. ed. 191].

A claimant who acquiesced for fifteen years in a decree of confirmation could not subsequently have the estimate of quantity in the petition struck out and a new and larger one inserted. Williams *v.* U. S., 92 U. S. 457, 23 L. ed. 497.

Where two adverse claims to land were both confirmed by the commissioners, the question of superiority was left open for the courts. Berthold *v.* McDonald, 24 Mo. 126 [*affirmed* in 22 How. (U. S.) 334, 16 L. ed. 318].

The commissioner of the general land office cannot revise the decisions of the board of commissioners in the adjustment of land claims arising under Spanish grants, rendered pursuant to the act of congress of May 8, 1822. Boatner *v.* Scott, 1 Rob. (La.) 546.

45. Mahoney *v.* Van Winkle, 21 Cal. 552; Clark *v.* Lockwood, 21 Cal. 220; Higuera *v.* U. S., 5 Wall. (U. S.) 827, 18 L. ed. 469; U. S. *v.* Peralta, 99 Fed. 618.

Confirmee as holder of "bona fide claim" within meaning of the act of congress of July 1, 1864, see De Bernal *v.* Lynch, 36 Cal. 135.

46. Hardy *v.* Harbin, 11 Fed. Cas. No. 6,060, 4 Sawy. 536.

47. U. S. *v.* Hare, 26 Fed. Cas. No. 15,303, 4 Sawy. 653. See also Magwire *v.* Tyler, 40 Mo. 406.

Where a confirmation was made upon a claim not filed by the claimant, the patent could relate back only to the day of the judgment of confirmation. Magwire *v.* Tyler, 40 Mo. 406.

No relation back as against patent issued before confirmation, although after filing of claim.— St. Louis Public Schools *v.* Walker, 40 Mo. 383 [*affirmed* in 9 Wall. (U. S.) 282, 19 L. ed. 576].

48. Rush *v.* Casey, 39 Cal. 339, holding that the mere omission of the commissioners to notify the register and receiver that the claim had been rejected did not suspend the claim.

49. U. S. *v.* Rocha, 9 Wall. (U. S.) 639, 19 L. ed. 612; U. S. *v.* Auguisola, 1 Wall. (U. S.) 352, 17 L. ed. 613.

Opening case.— The equity powers enjoined on the commissioners conferred power to open a case for the purpose of hearing newly discovered evidence of the title of a claimant.

of the claimants to the land depended upon the nicest observance of every legal formality.[50] A confirmation was limited to the extent of the claim made, and the decree could not be used to maintain title to other land embraced within the boundaries of the grant;[51] but a decree of the district court confirming a claim could be amended in advance of the official survey, so as to give only the quantity of land granted.[52]

6. Court of Private Land Claims. In 1891 congress established a court called the court of private land claims, to hear and decide on private claims under Spanish and Mexican grants to lands in territory ceded to the United States by Mexico.[53] This court was a mere creature of statute with prescribed and limited powers,[54] and its jurisdiction did not extend to claims which had been theretofore lawfully acted upon and decided by congress or under its authority,[55] or to the determination of questions of right or title between individuals.[56] It had no general equity jurisdiction,[57] and the fact that congress had repeatedly confirmed similar grants could not operate to justify the court in the adjudication of a case not coming within the terms of the law of its creation.[58] The holder of a complete title under the former sovereignty had the right to present his title for confirmation, although he was not bound to do so;[59] but unless imperfect claims were presented to the court within the time limited by statute they were barred.[60] It was the intention of congress that before a decision by the court all those asserting claims in the land adverse to the United States, under the grant relied on, should be made parties and heard in support of its validity.[61] It must appear, in order to the confirmation of a grant by the court of private land claims, not only that the title was lawful and regularly derived, but that if the grant was not complete and perfect the claimant could, by right and not by grace, have demanded that it should be made perfect by the former government had the territory not been acquired by the United States,[62] and the court could not confirm a grant made upon

U. S. *v.* Rocha, 9 Wall. (U. S.) 639, 19 L. ed. 612.

50. U. S. *v.* Auguisola, 1 Wall. (U. S.) 253, 17 L. ed. 613.

51. Brown *v.* Brackett, 21 Wall. (U. S.) 387, 22 L. ed. 622 [*affirming* 45 Cal. 167].

52. U. S. *v.* Peralta, 27 Fed. Cas. No. 16,032, Hoffm. Dec. 6, Hoffm. Op. 63, so holding notwithstanding a stipulation that the claimant might proceed under the decree as under a final decree.

53. 26 U. S. St. at L. 854, c. 539 [U. S. Comp. St. (1901) p. 764].

54. Cessna *v.* U. S., 169 U. S. 165, 18 S. Ct. 314, 42 L. ed. 702; U. S. *v.* Sandoval, 167 U. S. 278, 17 S. Ct. 868, 42 L. ed. 168.

55. U. S. *v.* Baca, 184 U. S. 653, 22 S. Ct. 541, 46 L. ed. 733.

A claim for lands within the limits of a grant which had been confirmed by congress, and for which a patent had been issued to another person, was properly rejected by the court of private land claims. Real de Dolores del Oro *v.* U. S., 175 U. S. 71, 20 S. Ct. 17, 44 L. ed. 76.

Claim allowed in part by congress.—A claim for the remainder of the land included in an alleged Mexican land grant, and which has been allowed in part only by act of congress, is not within the jurisdiction of the court of private land claims, and cannot be allowed by it. Las Animas Land Grant Co. *v.* U. S., 179 U. S. 201, 21 S. Ct. 92, 45 L. ed. 153.

56. Ainsa *v.* New Mexico, etc., R. Co., 175 U. S. 76, 20 S. Ct. 28, 44 L. ed. 78 [*reversing* 4 Ariz. 236, 36 Pac. 213]; U. S. *v.* De la Paz Valdez de Conway, 175 U. S. 60, 509, 20 S. Ct. 13, 44 L. ed. 72, holding that lands previously confirmed by act of congress to Indian pueblos should be excepted from a decree of confirmation of a Spanish grant, even if the previous grant by congress to the pueblos may be void, as the effect of the confirmation is only to release all claim of title by the United States, and it is not incumbent upon the court of private land claims to determine the priority of right as between the claimant and another grantee.

57. Cessna *v.* U. S., 169 U. S. 165, 18 S. Ct. 314, 42 L. ed. 702.

58. Rio Arriba Land, etc., Co. *v.* U. S., 167 U. S. 298, 17 S. Ct. 875, 42 L. ed. 175.

59. Ainsa *v.* New Mexico, etc., R. Co., 175 U. S. 76, 20 S. Ct. 28, 44 L. ed. 78 [*reversing* 4 Ariz. 236, 36 Pac. 213].

60. Reloj Cattle Co. *v.* U. S., 184 U. S. 624, 22 S. Ct. 499, 46 L. ed. 721, holding that a preferential right of purchase of overplus land within a Mexican land grant, to which the owner of the lawful area was entitled under the Mexican law at the date of the treaty with Mexico, was an imperfect claim.

61. U. S. *v.* Green, 185 U. S. 256, 22 S. Ct. 640, 46 L. ed. 898.

62. U. S. *v.* Sandoval, 167 U. S. 278, 17 S. Ct. 868, 42 L. ed. 168; U. S. *v.* Santa Fé, 165 U. S. 675, 17 S. Ct. 472, 41 L. ed. 874; Ainsa *v.* U. S. 161 U. S. 208, 16 S. Ct. 544, 40 L. ed. 673.

any condition or requirement either precedent or subsequent unless it appeared that such condition or requirement had been performed within the time and in the manner stated in the grant.[63] Where the papers and other evidence failed to show the existence of any Mexican grant, perfect or imperfect, at the time of the acquisition of the country by the United States, the court of private claims was not entitled to confirm to the petitioner any land whatever.[64] The court could confirm a grant only to the extent of eleven square leagues or so much land as could lawfully be granted under the laws in force at the time of the grant.[65] Confirmation of a grant to persons claiming to derive title by conveyances and legal succession from the grantee might be made to the claimants alone, without making it more generally to the "assigns and legal representatives of the original grantee."[66] The decrees of the court confirming claims were defined by a survey under the direction of the land department, and title to an imperfect grant did not pass out of the United States until confirmation by the court of such survey.[67] Testimony lawfully and regularly received by the surveyor-general or the commissioner of the general land office upon any claim presented to them was admissible in evidence in the court of private land claims when the person who testified was dead.[68] If it appeared that the land decreed to the claimant or any part thereof had been granted by the United States to another person, the title of such person remained valid notwithstanding the confirmation,[69] but the court could render judgment in favor of the claimant against the United States for the value of such land.[70] This indemnity could not be adjudged when no such claim was made by the petition;[71] but although the statute contemplated that the names of the adverse claimants should be set forth in the original petition, that notice should be given them, and that the claim for a money judgment for the lands

63. Ainsa *v.* U. S., 184 U. S. 639, 22 S. Ct. 507, 46 L. ed. 727; Cessna *v.* U. S., 169 U. S. 165, 18 S. Ct. 314, 42 L. ed. 702, holding that cases in which there was no performance of the conditions of the grant must be considered as reserved by congress for other action on its part, and the court was not, under the statute, at liberty to treat anything as equivalent to performance.

64. Bergere *v.* U. S., 168 U. S. 66, 18 S. Ct. 4, 42 L. ed. 383.

65. Territory *v.* Bernalillo County Delinquent Tax List, 12 N. M. 169, 76 Pac. 316; U. S. *v.* Green, 185 U. S. 256, 22 S. Ct. 640, 46 L. ed. 898.

66. U. S. *v.* Chavez, 175 U. S. 509, 20 S. Ct. 159, 44 L. ed. 255.

67. Territory *v.* Bernalillo County Delinquent Tax List, 12 N. M. 169, 76 Pac. 316. See *infra*, V, E, 7.

68. U. S. *v.* Ortiz, 176 U. S. 422, 20 S. Ct. 466, 44 L. ed. 529, holding that the supplementary proceeding before a surveyor-general to whom additional testimony was presented in respect to a petition for the confirmation of a land claim which was recommended by his predecessor but had not yet been acted upon by congress, was within the provisions of the act of 1891, permitting the use in evidence of proceedings before such officer.

69. Richardson *v.* Ainsa, (Ariz. 1908) 95 Pac. 103.

This provision does not apply to the confirmation of grants in suits by the government against claimants, who do not voluntarily appear to obtain the benefits of the act, and where the court in a suit by the government against plaintiff and defendant confirmed a grant to plaintiff without excepting the lands of defendant, although by the pleadings its attention was called to the fact that titles had been issued to portions of the grant by the United States to defendant, plaintiff obtains title, and is entitled to quiet title as against defendant. Richardson *v.* Ainsa, (Ariz. 1908) 95 Pac. 103.

70. U. S. *v.* Martinez, 184 U. S. 441, 22 S. Ct. 422, 46 L. ed. 632.

Release of interest of government to person apparently having good title.—A personal judgment against the United States was authorized only when such lands had been sold or granted as public lands for a consideration which equitably belonged to the owner of the land, and not where the government had merely released its interest to one apparently holding a good title under a Spanish or Mexican grant which subsequently turned out to be invalid by reason of an older or better title. Real de Dolores del Oro *v.* U. S., 175 U. S. 71, 20 S. Ct. 17, 44 L. ed. 76.

Loss of right to money judgment by delay.—An unexplained delay of over six years after a land grant had been confirmed by the court of private land claims defeated the right to recover a money judgment against the United States for the value of lands within the grant disposed of and patented by the United States to third persons before the filing of the original petition. U. S. *v.* Martinez, 184 U. S. 441, 22 S. Ct. 422, 46 L. ed. 632.

71. Real de Dolores del Oro *v.* U. S., 175 U. S. 71, 20 S. Ct. 17, 44 L. ed. 76.

given to them should be incorporated therein, relief asked by a subsequent petition would not be refused solely on the ground that these things were not done if sufficient excuse for the omission were shown.[72] An appeal lay from the court of private land claims to the supreme court of the United States;[73] but the decision as to the sufficiency of the evidence of possession under a Spanish land grant would not be reviewed merely because the evidence was such that different inferences might be drawn therefrom.[74] The court of private land claims was to exist for a very limited time only, but its existence was extended from time to time until it finally ceased to exist on June 30, 1904.[75]

7. Location and Survey. The acts of congress generally required a survey of the land by officers of the United States land office as an essential step in the completion of title to lands claimed under grants from former sovereignties.[76] The survey should conform to the decree of confirmation,[77] and correspond with the concession,[78] and could not be extended to other lands because of a deficiency

72. U. S. *v.* Martinez, 184 U. S. 441, 22 S. Ct. 422, 46 L. ed. 632.

73. See U. S. *v.* Pendell, 185 U. S. 189, 22 S. Ct. 624, 46 L. ed. 866.

74. U. S. *v.* Pendell, 185 U. S. 189, 22 S. Ct. 624, 46 L. ed. 866.

75. 32 U. S. St. at L. 1144, c. 1007 [U. S. Comp. St. Suppl. (1907) p. 232].

76. Doe *v.* Eslava, 11 Ala. 1028; San Diego *v.* Allison, 46 Cal. 162; Chipley *v.* Farris, 45 Cal. 527; Treadway *v.* Semple, 28 Cal. 652; McGarrahan *v.* Maxwell, 28 Cal. 75; Stoneroad *v.* Stoneroad, 158 U. S. 240, 15 S. Ct. 822, 39 L. ed. 966; Snyder *v.* Sickles, 98 U. S. 203, 25 L. ed. 97; Fossat *v.* U. S., 2 Wall. (U. S.) 649, 17 L. ed. 739; Rodriguez *v.* U. S., 1 Wall. (U. S.) 582, 17 L. ed. 689; U. S. *v.* Pacheco, 22 How. (U. S.) 225, 16 L. ed. 336; Cousin *v.* Labatut, 19 How. (U. S.) 202, 15 L. ed. 601; Stanford *v.* Taylor, 18 How. (U. S.) 409, 15 L. ed. 453; West *v.* Cochran, 17 How. (U. S.) 403, 15 L. ed. 110.

It was the duty of the surveyor-general to cause all private claims which should be finally confirmed to be accurately surveyed and to furnish plats of the same. U. S. *v.* Fossat, 21 How. (U. S.) 445, 16 L. ed. 185.

Plat sustained as correct designation of property see U. S. *v.* De Haro, 154 U. S. 544, 14 S. Ct. 1161, 18 L. ed. 61 [*reversing* 25 Fed. Cas. No. 14,941, Hoffm. Dec. 77].

A private survey made by the claimant and presented with his petition for confirmation was not binding on the government. Boggs *v.* Merced Min. Co., 14 Cal. 279.

Under some statutes and in some cases a survey was not necessary see Hallett *v.* Doe, 7 Ala. 882; Funkhouser *v.* Langkopf, 26 Mo. 453; Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356, under Texas act of Feb. 4, 1858.

The grantee was required to pay the expense of so much of the survey as inured to his benefit. Central Colorado Imp. Co. *v.* Pueblo County, 95 U. S. 259, 24 L. ed. 495.

Under the Texas act of Aug. 15, 1870, authorizing suits to confirm titles under Mexican grants, and providing that the petition should show "the situation, boundaries and extent of the land," a survey prior to the commencement of the suit was necessary. State *v.* Sarnes, 47 Tex. 323.

77. Hale *v.* Akers, 69 Cal. 160, 10 Pac. 385; Fossat *v.* U. S., 2 Wall. (U. S.) 649, 17 L. ed. 739; U. S. *v.* Halleck, 1 Wall. (U. S.) 439, 17 L. ed. 664. See also U. S. *v.* De Haro, 25 Fed. Cas. No. 14,937, construction of decree.

Presumption of conformity.— When a decree of court confirming a Mexican grant fixes its exterior boundaries, the presumption is that the lines of the survey coincide with or at least do not extend beyond the exterior limits fixed by the decree. More *v.* Massini, 37 Cal. 432.

A survey made with regard to the points mentioned in the description, without regard to the direction of the lines, has been approved, the courses of the lines being regraded as having been made by mistake. U. S. *v.* Higuera, 26 Fed. Cas. No. 15,363.

Reasonable conformity to decree sufficient. — U. S. *v.* Armijo, 5 Wall. (U. S.) 444, 18 L. ed. 492 [*affirming* 24 Fed. Cas. No. 14,466]; Dehon *v.* De Bernal, 3 Wall. (U. S.) 774, 18 L. ed. 146, holding that when all the elements of location prescribed by a decree of the district court as to a Mexican grant, which has been confirmed, cannot possibly be complied with, and a survey conforms as much with the decree confirming the grant as it can well be made to do, the court will not disturb it at the instance of a third person.

High-water mark as boundary.— Where the decree confirming a claim described the tract as "embracing so much of the extreme upper portion of the peninsula, above ordinary high-water mark," etc., the shore line of the bay should be run on the line of ordinary high-water mark, crossing the mouths of all streams running into the bay, and not following the line of high water of any tidal stream or estuary forming an arm of the bay. Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974.

78. Wilcoxon *v.* Rogers, 16 La. 6; U. S. *v.* Arredondo, 13 Pet. (U. S.) 88, 10 L. ed. 71; U. S. *v.* Levy, 13 Pet. (U. S.) 81, 10 L. ed. 68; U. S. *v.* Larkin, 26 Fed. Cas. No. 15,562, Hoffm. Dec. 23; U. S. *v.* Pacheco, 27 Fed. Cas. No. 15,980, Hoffm. Dec. 62 (holding that the mere fact that the diseño of a neighboring rancho includes part of the land embraced in the claimants' diseño is no ground for excluding such land from the

in quantity.[79] A survey should not include land previously granted to another person, although the boundaries of the grant overlapped.[80] Where a grant was of a specified quantity within exterior limits embracing a larger quantity, the grantee might be allowed the privilege of directing the selection of the quantity granted,[81] subject to the restriction that the selection be made in one body and in a compact form,[82] and also in some instances to selections made by his previous residence and by sales or other dispositions by him of parcels of the general tract.[83] But allowing the grantee to select was a matter of favor and not of right, for the United States had the same right as the former sovereignty to designate where

claimants' survey, where the adjoining rancho has not yet been surveyed, and the owners thereof have not intervened to assert their alleged rights); U. S. *v.* Peralta, 27 Fed. Cas. No. 16,030, Hoffm. Dec. 212; Weber *v.* U. S., 29 Fed. Cas. No. 17,329, Hoffm. Dec. 8, Hoffm. Op. 66.

Boundaries should be located in accordance with testimony of attesting witnesses.— U. S. *v.* Graham, 26 Fed. Cas. No. 15,246, Hoffm. Dec. 67, Hoffm. Op. 60.

A junior grantee has no right to insist that his land shall be surveyed so as to overlap an older grant for which a patent has been issued by the United States where the land patented lies within the exterior boundaries of the senior grant as shown by the diseño thereof; and especially where the junior grantee, without such overlapping, will obtain the full quantity granted by the former government. U. S. *v.* Soto, 27 Fed. Cas. No. 16,354.

Discrepancy as to mark.— In view of the well-known looseness and inaccuracy with which business was transacted in California under the Mexican government, the fact that a decree of concession made by a Mexican governor referred to a certain tree as a live oak, when in fact the only tree reasonably answering the other calls of the description was a white oak, is not sufficient ground for overthrowing a survey based on such white oak, especially when there is other evidence identifying it as the one referred to in the act of possession. U. S. *v.* Enwright, 25 Fed. Cas. No. 15,054.

General recognition of boundary.— Where a grantee reserved to himself a given quantity of the lands granted and sold the excess, and the purchasers of the excess themselves laid off the quantity reserved, and in so doing extended the line beyond the limits of the grant to include a strip of which the grantee had long maintained possession, the ancient possession and cultivation of this strip, the general recognition of the boundary by the grantee's neighbors, and impliedly by the former government in granting the adjoining ranch according to such boundary, and the act of the purchasers of the excess in making the location, together with the fact that the United States did not complain thereof, were sufficient to warrant the court in confirming a survey which adopted the boundary in question. U. S. *v.* Narvaez, 27 Fed. Cas. No. 15,855.

Conformity to act of juridical possession.— The survey should conform to the measurements contained in the record of juridical possession, which, under the Mexican law, established the location. Graham *v.* U. S., 4 Wall. (U. S.) 259, 18 L. ed. 334.

When non-conformity not cause for setting aside.— Where on confirmation of a Mexican grant a survey is made of half a league from a larger quantity, as selected by the claimant, it will not be set aside upon the application of his grantee, because it did not conform to one of the calls of the grant, where the overplus has been surveyed into lots and settled and improved by parties claiming under the government. U. S. *v.* De Haro, 154 U. S. 544, 14 S. Ct. 1161, 18 L. ed. 61 [*reversing* 25 Fed. Cas. No. 14,941, Hoffm. Dec. 77].

Protection of existing rights.— Where a decree locating a grant rested on the idea of conforming as near as might be, and in a general way, to the supposed intention of the grantor, the court was not precluded from thereafter modifying in a slight degree the directions of the lines so as to obtain a location by which existing rights acquired in good faith might be protected. Weber *v.* U. S., 29 Fed. Cas. No. 17,328, Hoffm. Dec. 10.

79. U. S. *v.* Arredondo, 13 Pet. (U. S.) 133, 10 L. ed. 93; U. S. *v.* Rodriguez, 27 Fed. Cas. No. 16,183.

80. U. S. *v.* Armijo, 24 Fed. Cas. No. 14,466 [*affirmed* in 5 Wall. 444, 18 L. ed. 492].

81. U. S. *v.* Armijo, 5 Wall. (U. S.) 444, 18 L. ed. 492; U. S. *v.* Pacheco, 2 Wall. (U. S.) 587, 17 L. ed. 865; U. S. *v.* Fossatt, 21 How. (U. S.) 446, 16 L. ed. 186 [*followed* in U. S. *v.* Sutter, 27 Fed. Cas. No. 16,424, Hoffm. Dec. 27 (*reversed* on other grounds in 2 Wall. (U. S.) 562, 17 L. ed. 881)]; U. S. *v.* Covilland, 25 Fed. Cas. No. 14,879, Hoffm. Dec. 52 (where the survey was set aside because the claimant was not allowed an opportunity to make an election as to the land); U. S. *v.* Richardson, 27 Fed. Cas. No. 16,156, Hoffm. Dec. 69. See also U. S. *v.* De Haro, 154 U. S. 544, 14 S. Ct. 1161, 18 L. ed. 61.

82. See *infra*, notes 85, 86.

83. U. S. *v.* Pacheco, 2 Wall. (U. S.) 587, 17 L. ed. 865. See also U. S. *v.* Sutter, 27 Fed. Cas. No. 16,424, Hoffm. Dec. 27 [*reversed* on other grounds in 2 Wall. 562, 17 L. ed. 881].

Deeds as opposed to residence and improvement.— The mere execution by a grantee from the Mexican government of deeds of parts of the tract within the exterior boundaries does not show a location of the grant as including the land so conveyed, to be adopted in prefer-

such a grant should be located.[84] As a general rule the survey should locate the land in one body,[85] in a compact form,[86] so that the surplus left to the United States should be in one connected piece,[87] and in conformity to the lines of the public surveys,[88] although allowance was to be made for the character of the country,[89] and a large discretion was left to the surveyor.[90] If no particular limits were given in a grant, the land should be surveyed so as to interfere as little as possible with the rights of others.[91] An exclusion of a bay from the survey of a Mexican grant embraces not only the land covered by the navigable waters of the bay but all the land within its exterior lines, including an island almost covered with water at high tide.[92] A survey caused to be made by the owners of a grant under the Texas statute confirming land titles was void as to any excess over the grant,[93] and on the other hand the surveyor was not authorized to include less land than that embraced in the original grant.[94] The survey and location of a grant confirmed by the court were under the control of such court.[95] At first the district courts had no jurisdiction to supervise the action of the surveyor-general in surveying claims confirmed by the commissioners,[96] but such jurisdiction as to pending and future claims was given them by the act of 1860.[97] Where a decree of confirmation had been entered, and a survey under it had been made, on which a patent was about to issue, which survey was objected to as erroneous, it was the duty of the court to direct the survey to be returned to it, that it might hear and determine the questions of location and boundary which might be raised,[98] and when the court had ordered a survey into court for exam-

ence to an election of location shown by the previous erection of a house and corrals on another part of the tract, and by the cultivation of the adjacent land, and residence thereon for a number of years. U. S. *v.* Castro, 25 Fed. Cas. No. 14,750.

84. U. S. *v.* McLaughlin, 127 U. S. 428, 8 S. Ct. 1177, 32 L. ed. 213.

85. U. S. *v.* Armijo, 5 Wall. (U. S.) 444, 18 L. ed. 492; U. S. *v.* Pacheco, 2 Wall. (U. S.) 587, 17 L. ed. 865; U. S. *v.* Sutter, 2 Wall. (U. S.) 562, 17 L. ed. 881.

86. U. S. *v.* Armijo, 5 Wall. (U. S.) 444, 18 L. ed. 492; U. S. *v.* Pacheco, 2 Wall. (U. S.) 587, 17 L. ed. 865.

87. U. S. *v.* Vallejo, 1 Wall. (U. S.) 658, 17 L. ed. 674.

88. U. S. *v.* Sutter, 2 Wall. (U. S.) 562, 17 L. ed. 881. See also U. S. *v.* Alvisu, 24 Fed. Cas. No. 14,435 [*affirmed* in 8 Wall. 337, 19 L. ed. 305].

89. U. S. *v.* Armijo, 5 Wall. (U. S.) 444, 18 L. ed. 492; U. S. *v.* Sutter, 2 Wall. (U. S.) 562, 17 L. ed. 881, holding that a grant might be located in two parcels, where, from the character of the country, the entire quantity granted could not be located in one tract.

90. U. S. *v.* Vallejo, 1 Wall. (U. S.) 658, 17 L. ed. 674.

91. Holstein *v.* Henderson, 12 Mart. (La.) 319, holding that when a certain number of superficial arpents was granted on a part of a bayou, and from the manner in which the surrounding grants were surveyed, the quantity given could not be obtained unless by making such part of the watercourse the side line of the survey, it might be done.

92. De Guyer *v.* Banning, 167 U. S. 723, 17 S. Ct. 937, 42 L. ed. 340 [*affirming* 91 Cal. 400, 27 Pac. 761].

93. Sullivan *v.* State, 41 Tex. Civ. App. 89, 95 S. W. 645.

94. Corrigan *v.* State, 42 Tex. Civ. App. 171, 94 S. W. 95 [*affirmed* in (1906) 94 S. W. 101].

95. Fossat *v.* U. S., 2 Wall. (U. S.) 649, 17 L. ed. 739, so holding on the ground that they were proceedings in the execution of its decree.

96. U. S. *v.* Sepulveda, 1 Wall. (U. S.) 104, 17 L. ed. 569. See also Valentine *v.* Sloss, 103 Cal. 215, 37 Pac. 326, 328, 329, 410 [*following* U. S. *v.* Sepulveda, 1 Wall. (U. S.) 104, 17 L. ed. 569]; U. S. *v.* Hancock, 30 Fed. 851; U. S. *v.* San Jacinto Tin Co., 23 Fed. 279, 10 Sawy. 639. If the final confirmation of a Mexican grant was made by the board of United States land commissioners, and not by the district court, the district court had no jurisdiction, under the act of congress of June 14, 1860, to adjudicate on the survey, unless the survey had been returned into court, and remained pending there at the time of the act. Morris *v.* De Celis, 51 Cal. 55.

97. U. S. *v.* Sepulveda, 1 Wall. (U. S.) 104, 17 L. ed. 569; Bissell *v.* Henshaw, 3 Fed. Cas. No. 1,447, 1 Sawy. 553 [*affirmed* in 18 Wall. 255, 21 L. ed. 835]; Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

When case "pending" within meaning of act of 1860 see U. S. *v.* Murphy, 27 Fed. Cas. No. 15,837; U. S. *v.* Semple, 27 Fed. Cas. No. 16,250, Hoffm. Dec. 14.

Particular surveys approved or confirmed see U. S. *v.* Sutter, 2 Wall. (U. S.) 562, 17 L. ed. 881. U. S. *v.* Pico, 27 Fed. Cas. No. 16,044; U. S. *v.* Rodriguez, 27 Fed. Cas. No. 16,181*a*.

Survey modified see U. S. *v.* Sunol, 27 Fed. Cas. No. 16,419.

Survey rejected see U. S. *v.* Rodriguez, 27 Fed. Cas. No. 16,182.

98. U. S. *v.* Folsom, 25 Fed. Cas. No.

ination, its jurisdiction over such survey and any new survey directed by it continued until the survey of the claim was finally disposed of.[99] In a proceeding to correct a survey, the federal district court had no jurisdiction to review and reverse the final decree, whereby the genuineness and validity of the claim was established,[1] nor could it assume the invalidity of the original grant.[2] When the dividing line between two ranchos has been fixed in proceedings for the confirmation of one of them, to which the claimant of the other was a party, such line should not be disturbed on exceptions to the official survey of the latter rancho, when this would involve the issue of overlapping patents creating certain litigation, and a possible loss by the claimant of the former rancho of part of the land confirmed to him in such proceedings.[3] Proceedings to confirm surveys of Mexican grants by the federal district court were of a judicial nature, and in the nature of proceedings *in rem*, and the judgments therein are conclusive upon all parties thereto, and those who were required to make themselves parties.[4] The approval of the survey by the court established the fact that it was in conformity with the decree of confirmation,[5] or if the decree was for quantity only, that the survey was authorized by it,[6] and the survey was then conclusive as to the location of the land,[7] as against all floating grants not previously located.[8] The approval of a final survey of a Mexican grant by the United States courts was not equivalent to, and could not have the force of, a patent, unless such effect was expressly given to it by statute.[9] A special statute authorizing persons to "contest the correctness" of surveys gave the court no authority to vacate its decrees or to determine the correctness of the survey by any other rules or upon any other considerations than those by which it was governed in ordinary cases.[10] On an appeal from a decree of the district court, confirming the survey of a private land claim, the only question was whether the decree of the land commissioners con-

15,127, 7 Sawy. 602 [*explaining* U. S. *v.* Fossatt, 21 How. (U. S.) 445, 16 L. ed. 185].

Where the board of commissioners, in confirming a claim, were misled by the compass marks, or by any other accurate representation on the diseño, so that they described boundaries, which, when run upon the ground, were found to include a different tract from that described in the grant and delineated on the diseño, the error should be rectified by the court when the survey was submitted for approval. U. S. *v.* Folsom, 25 Fed. Cas. No. 15,125, Hoffm. Dec. 42.

Satisfactory showing of error.— Before the court will disturb or set aside a survey made by the surveyor-general, it must be satisfied that the decree of confirmation has been plainly departed from, or that some clear and obvious error has been committed. U. S. *v.* Bojorques, 24 Fed. Cas. No. 14,620, Hoffm. Dec. 2, Hoffm. Op. 55.

99. U. S. *v.* Castro, 25 Fed. Cas. No. 14,754, 5 Sawy. 625.

1. U. S. *v.* Rico, 27 Fed. Cas. No. 16,160, Hoffm. Dec. 48.

Removal of ambiguities in decree.— Where objections were filed to a survey had under a decree of the federal district court establishing the authenticity of a claim, it was the duty of the court to pass upon, and, if necessary, to remove by interpretation, any ambiguities or repugnancies which might exist in such decree. U. S. *v.* Hoppe, 26 Fed. Cas. No. 15,388, Hoffm. Dec. 4.

In a clear case of mistake in a decree of confirmation, whereby the claimants might be given more land than they are entitled to, or have claimed, it is the duty of the court, on objections to a survey, to lay hold of any ambiguity or discrepancies in the language of the decree which will enable it to restrict the claimant to the land actually granted, occupied, and claimed. U. S. *v.* De Haro, 25 Fed. Cas. No. 14,938.

2. U. S. *v.* Vallejo, 28 Fed. Cas. No. 16,605, Hoffm. Dec. 51.

3. U. S. *v.* De Rodriguez, 25 Fed. Cas. No. 14,950, 7 Sawy. 617.

4. Treadway *v.* Semple, 28 Cal. 652 (holding that where, after a decree confirming a survey, another decree was made confirming a survey of a prior grant covering the land, the confirmee under the first decree was bound by the second decree, he having been a party and having consented thereto); Bissell *v.* Henshaw, 3 Fed. Cas. No. 1,447, 1 Sawy. 553 [*affirmed* in 18 Wall. 255, 21 L. ed. 835].

5. Miller *v.* Dale, 92 U. S. 473, 23 L. ed. 735. See also Sanborn *v.* Vance, 69 Mich. 224, 37 N. W. 273.

Decree of confirmation held not final see Robertson *v.* Sewell, 87 Fed. 536, 31 C. C. A. 107.

6. Miller *v.* Dale, 92 U. S. 473, 23 L. ed. 735.

7. Miller *v.* Dale, 92 U. S. 473, 23 L. ed. 735. And see *infra*, note 37.

8. Miller *v.* Dale, 92 U. S. 473, 23 L. ed. 735.

9. Miller *v.* Dale, 44 Cal. 562.

10. U. S. *v.* Carpentier, 25 Fed. Cas. No. 14,728, Hoffm. Dec. 81.

firming the claim was fairly carried into effect by the survey and the decree of the district court.[11] On appeal the order of the court permitting an appearance and contest of the survey should be set forth in the record, and only those persons who by such order are made parties contestant will be heard on appeal.[12] Pending an appeal from an order confirming a survey of a grant of a specific quantity within a larger area, the grantee was entitled as against third persons without title to possession of all the land within the exterior boundaries.[13] Under the act of 1851 the commissioner of the general land office had jurisdiction to revise or set aside a survey made by the United States surveyor-general.[14] Where a survey appeared to be incorrect, it was proper to reject it and order a new one,[15] and while the survey proceedings remained *in fieri* in the land department, the courts could not enjoin the obliteration of an old survey or the making of a new one.[16] On a final determination in favor of the validity of a French or Spanish grant of lands in Louisiana the secretary of the interior had authority to set aside former surveys of the land made by the land department, and to cause a new survey of the grant to be made.[17] Previous notice of the making of the survey directed by a decree of confirmation was not necessary;[18] but under some statutes, after completion of the survey, notice of the fact was required to be published in the newspapers for a certain time,[19] and the plat was required to remain in the land office, open to inspee-

11. Higuera *v.* U. S., 5 Wall. (U. S.) 827, 18 L. ed. 469.

12. U. S. *v.* Estudillo, 1 Wall. (U. S.) 710, 17 L. ed. 702. An appeal to the supreme court of a case relating to surveys of Mexican grants in which the appellants appear on the record as the "United States," simply, no interveners being named, remains within the control of the attorney-general, and a dismissal of the case is not subject to be vacated on the application of parties whose names do not actually appear in the record as having an interest in the case. U. S. *v.* Estudillo, *supra*, holding this to be true, even though it is obvious that below there were some private owners contesting the case under cover of the government name, and some such were represented by the same counsel who professed to represent them in the supreme court.

The United States cannot object to the correctness of a boundary line in an approved survey, if it has not appealed from the decree approving the survey. Alviso *v.* U. S., 8 Wall. (U. S.) 337, 19 L. ed. 305.

13. Thornton *v.* Mahoney, 24 Cal. 569.

14. Bissell *v.* Henshaw, 3 Fed. Cas. No. 1,447, 1 Sawy. 553 [*affirmed* in 18 Wall. 255, 21 L. ed. 835]; St. Louis *v.* U. S., 9 Ct. Cl. 455. See also U. S. *v.* Flint, 25 Fed. Cas. No. 15,121, 4 Sawy. 42 [*affirmed* in 98 U. S. 61, 25 L. ed. 93].

Prior to the act of 1860, where the survey, made by the surveyor-general, of a confirmed claim did not conform to the decree of the board of commissioners, the remedy must be sought from the commissioner of the general land office before the patent issued. U. S. *v.* Sepulveda, 1 Wall. (U. S.) 104, 17 L. ed. 569.

Ordering further investigation.—A decision of the commissioner of the general land office ordering a further examination, on the ground that the return of a survey made by the surveyor-general of California represented the tract as containing more than the quantity sold and confirmed was a proper exercise of the duties of his office. U. S. *v.* Hendricks, 26 Fed. Cas. No. 15,347*a*, 2 Hayw. & H. 293 [*affirmed* in 23 How. 438, 16 L. ed. 576].

15. U. S. *v.* Castro, 25 Fed. Cas. No. 14,749.

16. New Orleans *v.* Paine, 51 Fed. 833, 2 C. C. A. 516 [*affirming* 49 Fed. 12, and *affirmed* in 147 U. S. 261, 13 S. Ct. 303, 37 L. ed. 162], holding that, where a surveyor, acting under special instructions based on an opinion of the secretary of the interior, surveyed an old French grant, and reported the same to the surveyor-general, and protests were filed against the survey, but the surveyor-general approved the same, and forwarded it, together with the protests and evidence, to the commissioner of the general land office, and the latter accepted the survey in part, but reserved the remainder for further consideration, meantime directing the surveyor-general to withhold the filing of the triplicate plats from the local land office, and the matter was then referred to the secretary of the interior, who held that the survey did not comply with the decision of his predecessor, and directed a new survey, the action of the surveyor-general and the commissioner did not exhaust the authority of the land department, but that the matter was still lawfully pending therein.

17. Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646.

18. Boggs *v.* Merced Min. Co., 14 Cal. 279.

19. Treadway *v.* Semple, 28 Cal. 652; McGarrahan *v.* Maxwell, 28 Cal. 75; Mahoney *v.* Van Winkle, 21 Cal. 552; Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

"Place of publication" of newspaper see Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

Notice held insufficient see Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

Under the act of congress of June 14, 1860, relating to public lands in California, the publication and approval by the surveyor-general of a plat and survey of a Mexican grant has the same effect as a patent, in the

tion for a designated period.[20] If no application was made within such time for a return of the survey into the district court for examination and adjudication, or if application was made and refused, the survey became final;[21] but if the survey was ordered into court it did not become final until it was approved, modified, or reformed by the decree of the court.[22] A person having no title could not question the correctness of the location of a confirmation made by the United States surveyor;[23] but where the original grantee of lands had parted with his entire interest, parties who had obtained derivative titles *pendente lite* from such original grantee were entitled to contest a survey, although the United States, the original grantee and the purchasers of two-thirds of the original grantee's interest, consented to its approval.[24] Individuals could object to the location of the grant only through the United States district attorney and in the name of the United States.[25] The United States could not object to the correctness of a boundary line in an approved survey if it had not appealed from the decree approving the survey.[26] Any objections to the survey were waived by accepting a patent for the land,[27] and the claimants of a grant were estopped to object that parts of the land, which they had sold and conveyed as part of their rancho, were not within its limits, for the purpose of completing their quantity by embracing in the survey lands not conveyed by them.[28] Where notice was given to all parties having or claiming to have any interest in the survey and location of the claim, to appear by a day designated and intervene for the protection of their interests, and on the day designated certain parties appeared and the default of all other parties was entered, the opening of such default with respect to any party subsequently applying for leave to appear and intervene was a matter resting in the discretion of the district court, and its action on the subject was not subject to revision on appeal.[29] The official survey of a land grant made after it had been confirmed by congress was binding upon the owner of the grant[30] and the United States,[31] and conclusive as against any collateral attack in the courts.[32] But under a statute relating to the location of pri-

absence of an application to have it returned into the district court for examination and adjudication. Southern Pac. R. Co. *v.* Garcia, 64 Cal. 515, 2 Pac. 397.

The certificate of the surveyor-general was only *prima facie* evidence of the fact of publication. Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

The determination of the commissioner upon receiving a survey transmitted to him as published, as to the regularity and sufficiency of the publication, is conclusive, unless reviewed and corrected on appeal by the secretary of the interior. Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

20. Treadway *v.* Semple, 28 Cal. 652; Mahoney *v.* Van Winkle, 21 Cal. 552.

21. Mahoney *v.* Van Winkle, 21 Cal. 552.

22. Mahoney *v.* Van Winkle, 21 Cal. 552.

23. Boyce *v.* Papin, 11 Mo. 16. See also McGill *v.* Somers, 15 Mo. 80.

Title must be shown.—A person other than the grantee who seeks to contest a location must show some title, legal or equitable, to some part of the land covered by the survey, before the court will disturb it at his instance or in his alleged interest. Dehon *v.* De Bernal, 3 Wall. (U. S.) 774, 18 L. ed. 146.

24. Bajorques *v.* U. S., 2 Fed. Cas. No. 761, Hoffm. Dec. 1, Hoffm. Op. 53.

25. U. S. *v.* Bidwell, 24 Fed. Cas. No. 14,592, Hoffm. Dec. 5, Hoffm. Op. 54; U. S. *v.* Carillo, 25 Fed. Cas. No. 14,736, Hoffm. Dec. 40; U. S. *v.* Folsom, 25 Fed. Cas. No. 15,127, 7 Sawy. 602.

26. Alviso *v.* U. S., 8 Wall. (U. S.) 337, 19 L. ed. 305 [*affirming* 24 Fed. Cas. No. 14,435, 14,436].

27. Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

28. U. S. *v.* Pacheco, 27 Fed. Cas. No. 15,980, Hoffm. Dec. 62.

29. U. S. *v.* Estudillo, 1 Wall. (U. S.) 710, 17 L. ed. 702.

30. Stoneroad *v.* Stoneroad, 158 U. S. 240, 15 S. Ct. 822, 39 L. ed. 966 [*reversing* 4 N. M. 59, 12 Pac. 736], although the owners had no notice thereof and some of them were minors and some under coverture at the time. See also Cutter *v.* Waddingham, 33 Mo. 269; U. S. *v.* Bidwell, 24 Fed. Cas. No. 14,592, Hoffm. Dec. 5, Hoffm. Op. 54, purchaser from claimant. *Compare* O'Flaherty *v.* Kellogg, 59 Mo. 485, holding that surveys made in accordance with confirmations by act of congress were *prima facie*, but not conclusively, correct.

31. Magee *v.* Doe, 22 Ala. 699, holding that where the location and survey of an incomplete Spanish grant, made under the provisions of the act of congress confirming it, recognizes and adopts one of the lines of another grant as one of its boundary lines, and the parties agree to such survey and location, the grantees and the United States are mutually bound and estopped by it from disputing that line.

32. Russell *v.* Maxwell Land-Grant Co.,

vate land grants, and providing that the surveyor-general of the district where the claim was located, on satisfactory proof, should issue to the claimant or his legal representative a certificate of location, his decision was not conclusive of the rights of the real owner.[33] Where a survey ordered by the land office was executed according to the order, it gave a *prima facie* title and the United States was bound by it until it was set aside at the general land office,[34] but the title derived its validity and vitality from the confirmatory act itself, and not from the subsequent location and survey.[35] Where the statute prescribed proceedings after the survey, by which it was to be made final, such survey was of no binding force until established in the mode prescribed;[36] but a survey duly returned and approved or confirmed fixed conclusively the boundaries and location of the land, as to the parties to the proceeding.[37] Limits established by the surveyor and commissioners of the United States could not, however, affect individual rights having a previous existence,[38] nor could a plat of survey, never returned to the proper office, bind third persons.[39] A survey and its approval by the surveyor-general did not conclude the government as to title, but until a patent issued the title was still in the government unless the claim has precise boundaries and has been confirmed by congress, which confirmation was equivalent to a patent.[40] The survey and location of a claim, after the death of the person to whom it had been confirmed did not defeat the confirmation, but was cumulative evidence of title inuring to the benefit of his heirs.[41] Where the decree of the board of commissioners, of the district court, or of the supreme court, locating a grant, was specific and plain, and it had long been accepted as finally and definitely locating the land, and large interests had been acquired on the faith of this finality, the location ought not to be disturbed, except in the case of manifest error, and on clear proof of the incorrectness of the location.[42] The confirmation by the commissioners appointed to ascertain the rights of persons, of a claim for a specified number of acres between certain boundaries, could not be reduced by errors committed by officers of the government, in

158 U. S. 253, 15 S. Ct. 827, 39 L. ed. 971 [*followed* in Colorado Fuel Co. *v.* Maxwell Land Grant Co., 22 Colo. 71, 43 Pac. 556]; Stoneroad *v.* Stoneroad, 158 U. S. 240, 15 S. Ct. 822, 39 L. ed. 966 [*reversing* 4 N. M. 59, 12 Pac. 736].

Under the act of 1807 where the claim was uncertain, and confirmation was accompanied with the condition that the land should be surveyed, such survey was to be made by the United States officers, and the location was conclusive on the claim and not a question for the investigation of the judiciary. Magwire *v.* Tyler, 30 Mo. 202, 25 Mo. 484 [*affirmed* in 1 Black (U. S.) 195, 17 L. ed. 131, and *following* West *v.* Cochran, 17 How. (U. S.) 403, 15 L. ed. 110].

33. Weeks *v.* Milwaukee, etc., R. Co., 78 Wis. 501, 47 N. W. 737.

34. Cousin *v.* Labatut, 19 How. (U. S.) 202, 15 L. ed. 601.

35. Chastang *v.* Armstrong, 20 Ala. 609.

36. Mahoney *v.* Van Winkler, 21 Cal. 552.

Survey of no value as evidence until confirmed.— McGarrahan *v.* Maxwell, 28 Cal. 75.

37. San Diego *v.* Allison, 46 Cal. 162 (holding that when a survey has been made and approved as required by law, the courts will not go behind it and look into the decree to ascertain what are the boundaries of the grant); McGarrahan *v.* Maxwell, 28 Cal. 75; De Arguello *v.* Greer, 26 Cal. 615; Kittridge *v.* Hebert, 9 La. Ann. 154; Gibson *v.* Chouteau, 39 Mo. 536; Carondelet *v.* St. Louis, 1 Black (U. S.) 179, 17 L. ed. 102.

Variance between survey and decree.— If the patent purports to convey the land described in the approved survey, the claimant has no title except to the land therein described, although the decree of confirmation comprises a greater area. Chipley *v.* Farris, 45 Cal. 527.

Survey of town common.—An approved United States survey of the common confirmed to the inhabitants of the town under the act of 1812, if accepted by the town, was binding on it as to the extent of the common confirmed, and its inhabitants were estopped to claim as a part of the common any land lying outside of such survey. Carondelet *v.* St. Louis, 29 Mo. 527 [*affirmed* in 1 Black (U. S.) 179, 17 L. ed. 102].

38. Baldwin *v.* Stafford, 10 Mart. (La.) 416. See also Gibson *v.* Chouteau, 39 Mo. 536.

39. Baldwin *v.* Stafford, 10 Mart. (La.) 416.

40. Metoyer *v.* Larenandière, 6 Rob. (La.) 139.

41. Baker *v.* Chastang, 18 Ala. 417.

42. U. S. *v.* Folsom, 25 Fed. Cas. No. 15,126, Hoffm. Dec. 44. See also U. S. *v.* De Haro, 25 Fed. Cas. No. 14,940, Hoffm. Dec. 75.

surveying and locating the claim.[43] Where a surveyor surveyed and platted a tract of twice the area which he was directed to survey, it was held that the error could be corrected by the courts even after the issue of a patent.[44] Error in the survey is not shown by a mere discrepancy between the quantity of land as surveyed and the quantity as claimed before the recorder, nor by the mere fact that there is a deficiency of land in a block to satisfy all the claims proved before the recorder;[45] neither does the fact that confirmations are represented by surveys to embrace the same land impeach the correctness of the surveys, but in case of such conflict the proper locations must be determined by the history of the claims.[46] A survey which was disapproved had no binding effect.[47] The survey of a claim, made by the surveyor-general after the final confirmation of the claim by the supreme court, on which a patent had issued, was not invalid because the mandate issued by such court, directing further proceedings to be had in the district court, was not filed in the latter court;[48] nor was the validity of a survey affected by the interest in the grant of the deputy surveyor who made it, where the survey had been subsequently approved by the proper officials.[49]

8. Patent. The issuance of a patent was the last step in a proceeding for the confirmation of a land grant;[50] and as a general rule a patent from the United States was necessary to pass the complete legal title to a claimant under a grant from a former sovereignty which was not complete at the time of the cession to the United States of the territory in which the land lies,[51] although under some statutes a patent was not necessary.[52] When the right of a claimant to specific land was

43. Fay *v.* Chambers, 4 La. Ann. 481; Latiolais *v.* Richard, 6 Mart. N. S. (La.) 213.

44. U. S. *v.* Maxwell Land Grant Co., 21 Fed. 19.

45. Joyal *v.* Rippey, 19 Mo. 660.

46. McGill *v.* Somers, 15 Mo. 80, holding that the right must be determined as a question of law in favor of the superior title; but if the titles are of the same age and description, and neither is impeached by the evidence, the party in possession cannot be disturbed.

47. Snyder *v.* Sickles, 98 U. S. 203, 25 L. ed. 97, disapproval by secretary of interior.

48. U. S. *v.* Vaca, 28 Fed. Cas. No. 16,604, Hoffm. Dec. 22.

49. Mott *v.* Smith, 16 Cal. 533.

50. Chipley *v.* Farris, 45 Cal. 527; U. S. *v.* Peralta, 99 Fed. 618.

Patent cannot be issued until after final confirmation.— McGarrahan *v.* New Idria Min. Co., 49 Cal. 331.

51. Mims *v.* Higgins, 39 Ala. 9; Anzar *v.* Miller, 90 Cal. 342, 27 Pac. 299 [*following* Gardiner *v.* Miller, 47 Cal. 570]; Chipley *v.* Farris, 45 Cal. 527 (holding that the claimant of a Mexican grant, whose title was not perfect, could acquire a perfect title only by patent, or a survey confirmed in accordance with the act of congress of June 14, 1860); Sandoz *v.* Ozenne, 13 La. Ann. 616; Smith *v.* Madison, 67 Mo. 694; Le Beau *v.* Armitage, 47 Mo. 138; U. S. *v.* Pacheco, 22 How. (U. S.) 225, 16 L. ed. 336; Bouldin *v.* Phelps, 30 Fed. 547. See 41 Cent. Dig. tit. "Public Lands," § 698. But *compare* Winn *v.* Cole, Walk. (Miss.) 119, holding that a Spanish order of survey, in Mississippi, confirmed by the United States, constituted a legal title, independent of the patent.

The segregation of a Mexican grant of land is to be considered complete on the rendition of the final judgment of the courts on the question of its location, without the issue of a patent. Mahony *v.* Van Winkle, 33 Cal. 448.

52. Levy *v.* Gause, 112 La. 789, 36 So. 684 (holding that where a grant was confirmed by act of congress and the land was surveyed in accordance with the statute and the survey was examined and approved by the surveyor-general, the title passed on confirmation of the survey and was not held in abeyance until the issue of the patent); Jopling *v.* Chachere, 107 La. 522, 32 So. 243 (holding that where the old board of commissions for the western district of the territory of Orleans, under the act of congress of 1807, confirmed a claim to land based on occupancy and settlement, followed by confirmation by congress, it operated as effectually as a grant or quitclaim from the government, and the ownership of the land was not held in abeyance until a patent issued); Dean *v.* Bittner, 77 Mo. 101 [*affirming* 7 Mo. App. 413, and *following* Langlois *v.* Crawford, 59 Mo. 456; Aubuchon *v.* Ames, 27 Mo. 89] (holding that under the terms of the act of congress of April 29, 1816, confirming certain land titles in Louisiana and Missouri, the legal title passed to the confirmee without the aid of a patent); Fenwick *v.* Gill, 38 Mo. 510 (holding that when an act of congress confirming land grants authorized the commissioner to issue patents, the patents were not absolutely necessary for the purpose of showing title); Snyder *v.* Sickles, 98 U. S. 203, 25 L. ed. 97.

To what cases statute applicable.— The act of congress of June 6, 1874, entitled "An Act to obviate the necessity of issuing patents for certain private land-claims in the State of Missouri, and for other purposes,"

established, the patent should issue as a matter of course;[53] but as such issuance was an official act the confirmee could not be regarded as in default because of delay therein.[54] It was, however, the duty of the land officers to see that the grant had been properly confirmed or the survey become final,[55] and they might withhold a patent where the statute did not appear to have been complied with.[56] So a patent issued while an appeal to the supreme court from the decree of the district court confirming the grant was pending was void.[57] Two patents could not issue on one grant.[58] The patent must conform to the act or decree of confirmation,[59] and the survey.[60] The patent was in the nature of a conveyance by way of quitclaim,[61] passing whatever interest the United States possessed in the prem-

applied only to cases where the party interested was by law entitled to a patent. Snyder *v.* Sickles, 98 U. S. 203, 25 L. ed. 97.

53. King *v.* Martin, 5 Mart. (La.) 197, holding that the passage of the act of congress of March 2, 1805, *eo instanti* gave the settlers within its purview a title to their lands, and their right to a patent depended on no contingency, but it was to issue as a matter of course on their showing themselves to be within the act.

Opposition to patent.—A bill in equity by certain heirs and in behalf of the other heirs of the original beneficiaries under a Mexican land grant to enjoin the commissioner of the general land office and the secretary of the interior from issuing a patent for the lands to a town, or, if a patent has been issued, for a decree declaring its invalidity, is demurrable for want of proper parties, the town and its inhabitants being necessary parties to the bill. Maese *v.* Hermann, 17 App. Cas. (D. C.) 52 [*affirmed* in 183 U. S. 572, 22 S. Ct. 91, 46 L. ed. 335], holding further that where such town has not been incorporated, a sufficient number of the proprietors claiming under the grant embracing the town as will fairly represent the common interests of all interested should be made parties defendant.

54. Shartzer *v.* Love, 40 Cal. 93.

55. Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

56. Mims *v.* Higgins, 39 Ala. 9.

Confirmation unfairly obtained.—The commissioner of the general land office might withhold a patent when satisfied that confirmation of a grant had been unfairly obtained from the commissioners, and might perhaps order a new survey when that for the basis of a patent varied from the boun aries in the original title. Boatner *v.* Scott, 1 Rob. (La.) 546.

57. McGarrahan *v.* New Idria Min. Co., 49 Cal. 331.

58. U. S. *v.* Grimes, 2 Black (U. S.) 610, 17 L. ed. 352 (holding that the government would not issue patents to both the original claimant and his vendee); U. S. *v.* Covilland, 1 Black (U. S.) 339, 17 L. ed. 40.

59. Doe *v.* Greit, 8 Ala. 930 (holding that if a patent issued under an act of congress describes the land by other metes and bounds than the act designates, it is void as to the excess which it professes to convey); United Land Assoc. *v.* Knight, 85 Cal. 448, 23 Pac. 267, 24 Pac. 818 (holding that the officer who issued a patent which covered land not included in the decree of confirmation, but included within the metes and bounds of the survey, could not by the issuance of such patent conclusively adjudicate on his power over such land, and the patent could not overcome evidence that the land was not within the decree).

60. U. S. *v.* Hancock, 30 Fed. 851, holding that in the absence of satisfactory proof of fraud in procuring the survey, or its approval, or the issue of the patent based upon it, where the decree of the board of land commissioners created by the act of congress of March 3, 1851, confirming a Mexican grant, was for a tract of land with designated boundaries, and not for a specific quantity, a patent based upon a survey following the boundaries of the decree was not void because it embraced a tract containing more than thirty thousand acres, or very nearly seven Mexican leagues, while the grant was for one square league and no more.

Including lands covered by prior patent.—Where a patent issued on a survey of a grant was returned by the grantee to the commissioner of the general land office, who ordered another survey, the patent issued on the last survey was not rendered invalid because it purported to convey lands covered by the prior patent as well as those not covered thereby. Adam *v.* Norris, 103 U. S. 591, 26 L. ed. 583.

Land included in two surveys.—A patent for lands under a confirmed grant and final survey, showing on its face that it includes lands embraced in a previously approved final survey of another confirmed grant, is not void as to that portion of the lands included in both surveys. Yates *v.* Smith, 40 Cal. 662.

Discrepancy between survey and decree of confirmation.—If a decree of confirmation of a Mexican grant does not accord in its description of the land with the approved survey, and the patent conveys the land as described in the survey, the claimant's title is confined to the land as therein described, even if the decree of confirmation is inserted in the patent. Chipley *v.* Farris, 45 Cal. 527.

61. Louis *v.* Giroir, 40 La. Ann. 710, 4 So. 878; Adam *v.* Norris, 103 U. S. 591, 26 L. ed. 583.

The patent is only evidence of the preëxisting title made perfect by the confirmation

ises;[62] but it was merely documentary evidence, having the dignity of a record, of the existence of the grantee's title or of such equities respecting the claim as to justify its recognition and confirmation, and was not to be viewed exclusively as vesting title anew.[63] A patent issued to a person and his "representatives" included representatives by contract as well as by operation of law, the question as to whom the patent should inure being left open for settlement by law.[64] A patent took effect when issued,[65] and delivery was not essential to its taking effect as a conveyance,[66] acceptance being presumed in the absence of an express dissent where no personal obligation was imposed.[67] But if a patent was issued without the required survey the grantee was not precluded from objecting to it because he had made application for it.[68] A patent established the title of the patentee to the land as of the date of the original grant,[69] but as the deed of the United States such patent took effect only from the date of the commencement of the proceedings for confirmation.[70] The patent was to be considered as if made at the time when title vested by the confirmation and survey, and, although the patentee died in the interim, yet the patent inured to the benefit of his heirs or assigns.[71] A state had no authority to provide by statute when patents issued by the United States for land granted under former sovereignties should take effect.[72] Patents issued on the confirmation of land grants should be construed like other grants from the government,[73] and a patent for lands granted within the limits of a pueblo should have the same operation and effect as any other United States patent regular upon its face, issued to confirm a claim under a Mexican grant.[74] The patent was not subject to collateral attack,[75] and individuals could resist the conclusiveness of the patent only by showing that it conflicted with prior rights vested in them.[76] Proceedings to vacate a patent might be instituted by the United States;[77] but equity would not cancel a patent issued on confirmation

and survey. Waterman *v.* Smith, 13 Cal. 373.

62. Leese *v.* Clark, 18 Cal. 535.

Title cannot be subsequently divested by United States.— Culliver *v.* Garic, 11 La. 90.

63. Langdeau *v.* Hanes, 21 Wall. (U. S.) 521, 22 L. ed. 606; Hardy *v.* Harbin, 11 Fed. Cas. No. 6,060, 4 Sawy. 536. See also Japling *v.* Chachere, 107 La. 522, 32 So. 243.

64. McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; Hogan *v.* Page, 2 Wall. (U. S.) 605, 17 L. ed. 854. See also Morrison *v.* Jackson, 92 U. S. 654, 23 L. ed. 517.

65. Chipley *v.* Farris, 45 Cal. 527.

66. Miller *v.* Ellis, 51 Cal. 73; Chipley *v.* Farris, 45 Cal. 527.

67. Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

68. Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369.

69. Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Mott *v.* Smith, 16 Cal. 533; Stark *v.* Barrett, 15 Cal. 361.

70. McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; Morrill *v.* Chapman, 35 Cal. 85; Leese *v.* Clark, 20 Cal. 387; Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108; Leese *v.* Clark, 18 Cal. 535; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Moore *v.* Wilkinson, 13 Cal. 478; Mitchell *v.* Handfield, 33 Mo. 431 [*followed* in Tyler *v.* Wells, 57 Mo. 472]. See also Magwire *v.* Tyler, 40 Mo. 406 (holding that a patent for lands issued by the United States on a claim confirmed by the commissioners appointed for that purpose related back to the date of the filing of the claim with the first board of commissioners acting under the acts of 1805 and 1807, but, if the claim was not so filed, the patent related back only to the judgment of confirmation); St. Louis Public Schools *v.* Walker, 40 Mo. 383 [*affirmed* in 9 Wall. (U. S.) 282, 19 L. ed. 576] (holding that a confirmation and survey of land under the act of congress of July 4, 1836, are equivalent to a patent, and, where the location and boundaries are defined, as between the government and the confirmee, relate back to the filing of the claim with the first board of commissioners, as the inception of the title).

71. Waterman *v.* Smith, 13 Cal. 373.

72. Miller *v.* Ellis, 51 Cal. 73.

73. Wright *v.* Seymour, 69 Cal. 122, 10 Pac. 323.

The several portions of the patent must be construed together in ascertaining the boundaries of the land granted. More *v.* Massini, 37 Cal. 432.

74. Leese *v.* Clark, 18 Cal. 535.

75. Valentine *v.* Sloss, 103 Cal. 215, 37 Pac. 326, 328, 329, 410; De Guyer *v.* Banning, 91 Cal. 400, 27 Pac. 761; People *v.* San Francisco, 75 Cal. 388, 17 Pac. 522; Chipley *v.* Farris, 45 Cal. 527; Hagar *v.* Lucas, 29 Cal. 309; Kimball *v.* Semple, 25 Cal. 440; Leese *v.* Clark, 18 Cal. 535; Moore *v.* Wilkinson, 13 Cal. 478, even for fraud.

76. Moore *v.* Wilkinson, 13 Cal. 478.

77. Leese *v.* Clark, 18 Cal. 535; San Pedro, etc., Co. *v.* U. S., 146 U. S. 120, 13 S. Ct. 94, 36 L. ed. 911 [*affirming* 4 N. M. 225, 17 Pac. 337], holding that where one claiming under

of a land grant except on specific averments of mistake or fraud, supported by clear and satisfactory proof.[78]

9. Evidence of Title. A certificate of confirmation issued by the recorder is *prima facie,* but not conclusive, evidence of all the facts necessary to a confirmation and of the confirmation itself,[79] and a final certificate of title issued by the register and receiver of the land office on confirmation of a claim by the commissioners has been held sufficient evidence of title as against one having no claim to land other than that of mere occupancy.[80] A certified copy of the opinion of the recorder, recommending a claim to congress for confirmation, is evidence that the claim is embraced within a statute confirming all claims so recommended.[81] A plat of survey certified by the surveyor-general of the Spanish province of Louisiana, and afterward recognized by the United States commissioners and registered in the land office, is legal evidence of title.[82] Proof of inhabitation, cultivation, or possession was sufficient to establish a title to land by virtue of a confirmation under the act of 1812.[83] A survey under one statute was admissible in evidence to show the description of the same claim confirmed under a prior statute.[84] A survey certified in the handwriting of a deputy surveyor and recognized in a patent certificate has been held admissible in evidence, although not shown to have been made under a previous order for a survey.[85] A certificate made by the register of a land office of the proper district, within the appropriate sphere of his duties, to enable a claimant of a Spanish grant to receive a patent, is admissible evidence on proof of its genuineness.[86] The tabular statement of the books of

an old Mexican grant had obtained a patent, which by a fraudulent extension of the survey was made to include valuable mineral lands, the United States had a direct pecuniary interest, which would enable it to maintain a suit to set aside the patent.

Junior grantees were remediless unless the government interfered.— Leese *v.* Clark, 18 Cal. 535.

Duty of United States to proceed for cancellation of patent.— Where a patent issued pursuant to an old Mexican grant was made according to a survey which was fraudulently extended so as to include a town where the inhabitants held possession by the indefinite and unrecorded titles of dwellers in Mexican villages, the United States, in view of the stipulation to respect existing rights contained in the treaty of cession, was under obligation to set aside the patent, even though the same expressly recited that it was not to affect the claims of third persons, for the government owed at least a moral obligation not to burden the equitable rights of the villagers by an apparently adverse legal title. San Pedro, etc., Co. *v.* U. S., 146 U. S. 120, 13 S. Ct. 94, 36 L. ed. 911 [*affirming* 4 N. M. 225, 17 Pac. 337].

Limitations.— A suit to set aside on the ground of fraud a patent issued to one claiming land in California under a Mexican grant could not be maintained by the United States after the lapse of nineteen years since the survey was made, fifteen since the patent was issued, and thirty-six since the passage of the act of congress of March 3, 1851. Such a suit was at least a sequel to the compulsory litigation forced upon claimants by that act and part of the same suit, and, as the government consented to appear therein as an equal litigant, and impliedly waived all rights peculiar to it as a sovereign, it could not subsequently assert rights which but for its sovereignty would be forever barred. U. S. *v.* Hancock, 30 Fed. 851.

78. U. S. *v.* Maxwell Land-Grant Co., 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949 [*affirming* 26 Fed. 118].

All the attending circumstances of each case should be weighed in order that no wrong be done to the citizen, although the government be the suitor against him. U. S. *v.* San Jacinto Tin Co., 23 Fed. 279, 10 Sawy. 639 [*affirmed* in 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747].

The fraud must be extrinsic and collateral to the matter determined, and not matter on which the decree was rendered. U. S. *v.* San Jacinto Tin Co., 23 Fed. 279, 10 Sawy. 639 [*affirmed* in 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747].

Showing insufficient to warrant cancellation see U. S. *v.* San Jacinto Tin Co., 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747 [*affirming* 23 Fed. 279, 10 Sawy. 639]; U. S. *v.* Maxwell Land-Grant Co., 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949 [*affirming* 26 Fed. 118].

79. Vasquez *v.* Ewing, 42 Mo. 247; Bompart *v.* Stumpff, 40 Mo. 446; Joyal *v.* Rippey, 19 Mo. 660; Soulard *v.* Allen, 18 Mo. 590; McGill *v.* Somers, 15 Mo. 80.

80. Richardson *v.* Hobart, 1 Stew. (Ala.) 500, 18 Am. Dec. 70.

81. Roussin *v.* Parks, 8 Mo. 528.

82. Litchworth *v.* Bartells, 4 Mart. N. S. (La.) 136.

83. Fine *v.* St. Louis Public Schools, 30 Mo. 166.

84. St. Louis *v.* Toney, 21 Mo. 243; Joyal *v.* Rippey, 19 Mo. 660.

85. Doe *v.* Eslava, 11 Ala. 1028.

86. Doe *v.* Eslava, 11 Ala. 1028.

the recorder of land titles, showing the confirmation of a lot, its size, etc., was admissible as evidence.[87] Evidence taken in confirmation proceedings is not admissible in subsequent proceedings.[88]

10. Recording Title. It has been held that titles which were held under claims reported for confirmation by commissioners, whose report had been approved by congress, need not be recorded.[89]

11. Effect of Confirmation; Title and Rights of Confirmee.[90] The confirmation of a land claim and the patent issued pursuant thereto, if a patent was required, gave the claimant good title [91] to the land included [92] and was conclusive [93] as to the existence, validity, and confirmation of the grant,[94] the extent, location, and

87. Biehler *v.* Coonce, 9 Mo. 347.

88. Cabanné *v.* Walker, 31 Mo. 274 (holding that the evidence taken before the board of commissioners organized under the act of congress of July 9, 1832, cannot be admitted in evidence in another suit, in proof of the inhabitation, cultivation, or possession necessary to show a confirmation under the act of June 13, 1812); Clark *v.* Hammerle, 27 Mo. 55 (holding that minutes of the depositions of witnesses taken in confirmation proceedings accompanying the record of the confirmation of the recorder of lands are not evidence of the facts stated in them except to prove such acts as may be proved by hearsay).

89. Tear *v.* Williams, 2 La. Ann. 868.

90. Title of grantee to minerals see Mines and Minerals, 27 Cyc. 543 note 6.

91. Easton *v.* Salisbury, 21 How. (U. S.) 426, 16 L. ed. 181 [*affirming* 23 Mo. 100]. A confirmation by an act of congress is a title on which the claimant can maintain a petitory action. Morrough *v.* Moss, 5 La. Ann. 601.

92. See Dent *v.* Bingham, 8 Mo. 579, holding that the confirmation of a claim of six thousand arpens of land will not entitle the confirmee to hold a larger quantity, as included by the metes and bounds fixed by a subsequent survey, especially if such survey interferes with the claim of another person, which has been confirmed.

Boundaries of land included within particular confirmations see the following cases: Hallett *v.* Doe, 7 Ala. 882; De Guyer *v.* Banning, 91 Cal. 400, 27 Pac. 761; De Guyer *v.* Banning, (Cal. 1890) 25 Pac. 252; United Land Assoc. *v.* Knight, 85 Cal. 448, 23 Pac. 267, 24 Pac. 818; New Orleans *v.* Casteres, 3 Mart. (La.) 673; St. Louis *v.* Toney, 21 Mo. 243; Ott *v.* Soulard, 9 Mo. 581; Moss *v.* Anderson, 7 Mo. 337; Catron *v.* Laughlin, 11 N. M. 604, 72 Pac. 26; U. S. *v.* Maxwell Land-Grant Co., 26 Fed. 118 [*affirmed* in 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949]; Grisar *v.* McDowell, 11 Fed. Cas. No. 5,832, 4 Sawy. 597 [*affirmed* in 6 Wall. (U. S.) 363, 18 L. ed. 863]; Tripp *v.* Spring, 24 Fed. Cas. No. 14,180, 5 Sawy. 209. See 41 Cent. Dig. tit. "Public Lands," § 717.

The court and jury will look beyond the confirmation by commissioners or congress of a claim emanating from the former governments and look to the primitive title to ascertain the extent and boundaries of the claim. Slack *v.* Orillion, 11 La. 587, 30 Am. Dec. 724 [*followed* in Millaudon *v.* McDonough, 18 La. 102].

Reference to plats.— Where plats on file in the commissioners' office correspond substantially with the description of land in the certificate of confirmation, it will be presumed that the confirmation was made in reference to them. Beatty *v.* Michon, 9 La. Ann. 102.

93. Moore *v.* Wilkinson, 13 Cal. 478 (holding that the survey and patent are conclusive in actions of ejectment); Higuera *v.* U. S., 5 Wall. (U. S.) 827, 18 L. ed. 469; U. S. *v.* Halleck, 1 Wall. (U. S.) 439, 17 L. ed. 664; Boyle *v.* Hinds, 3 Fed. Cas. No. 1,759, 2 Sawy. 527 (holding that the decree of confirmation and the patent are conclusive as to the rights of all parties to the proceeding and their privies).

Confirmation conclusive upon grantee and his assignees.— U. S. *v.* Covilland, 1 Black (U. S.) 339, 17 L. ed. 40.

Recitals of fact.— Both the officers of the government and the grantee, as well as those in privity with him, are bound by the recital of facts contained in the patent for a Mexican grant. McGarrahan *v.* New Idria Min. Co., 49 Cal. 331.

A confirmation in favor of the assignee of a grant is evidence against the government, and although not binding on the original grantee, or those claiming under him, is *prima facie* evidence against the rest of the world. Thomas *v.* Turnley, 3 Rob. (La.) 206.

94. Soto *v.* Kroder, 19 Cal. 87; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Mott *v.* Smith, 16 Cal. 533; Stark *v.* Barrett, 15 Cal. 361; Adam *v.* Norris, 103 U. S. 591, 26 L. ed. 583; U. S. *v.* Halleck, 1 Wall. (U. S.) 439, 17 L. ed. 664; Mora *v.* Nunez, 10 Fed. 634, 7 Sawy. 455; Hardy *v.* Harbin, 11 Fed. Cas. No. 6,060, 4 Sawy. 536. See also Sanders *v.* Whitesides, 10 Cal. 88.

Confirmation implied finding that grantee was competent to take grant.— Semple *v.* Hagar, 27 Cal. 163.

The confirmation of a land grant segregated the land, when surveyed, from the public domain, invested the confirmee with the legal title, and entitled him to a patent as soon as the requisite survey had been made. Carpentier *v.* Montgomery, 13 Wall. (U. S.) 480, 20 L. ed. 698.

Patent imports due publication of survey.— Cruz *v.* Martinez, 53 Cal. 239.

boundaries of the land,[95] and the right of the confirmee or patentee thereto,[96] as against the United States [97] and persons claiming under it [98] by subsequent title,[99] and all persons not claiming by superior titles such as would enable them to contest the action of the government respecting the property.[1] But a confirmation

95. Steinback *v.* Perkins, 58 Cal. 86; Chipley *v.* Farris, 45 Cal. 527; Moore *v.* Wilkinson, 13 Cal. 478; U. S. *v.* Halleck, 1 Wall. (U. S.) 439, 17 L. ed. 664; U. S. *v.* Peralta, 99 Fed. 618 (holding that after the land department had issued patents in conformity to a decree of court confirming the grant, and to a survey thereof approved and confirmed by the court, such court could not entertain a petition to compel the issuance of patents in accordance with a different survey); Mora *v.* Nunez, 10 Fed. 634, 7 Sawy. 455; Boyle *v.* Hinds, 3 Fed. Cas. No. 1,759, 2 Sawy. 527.

A reference at the close of the decree to the original title papers for a more particular description would not control the description given, but the documents to which reference was thus made could only be resorted to in order to explain any ambiguity in the language of the descriptions given. U. S. *v.* Halleck, 1 Wall. (U. S.) 439, 17 L. ed. 664.

An apparent error in a decree of confirmation arising out of the obscurity of the act of possession should not be allowed to control a clear and definite call for a line, as of a given course and direction. U. S. *v.* Enwright, 25 Fed. Cas. No. 15,054.

The decree may be read in connection with the patent to determine what lands were conveyed. People *v.* San Francisco, (Cal. 1887) 15 Pac. 747.

Estoppel.—A person claiming under a Mexican grant is not estopped from obtaining possession of the land, after the requisite survey and confirmation by the United States government, by his declaration before the survey that it was not within the original grant, and was public land. Love *v.* Shartzer, 31 Cal. 487. See also Carpentier *v.* Thirston, 24 Cal. 268; Mahoney *v.* Van Winkle, 21 Cal. 552. And so also where claimants of a Mexican grant had, prior to the issuance of a patent to them, published a notice that they had become the owners of the grant, specifying its boundaries and warning off trespassers, they were not estopped from claiming, under their patent, land outside of those boundaries. Moore *v.* Wilkinson, 13 Cal. 478. But the claimant is estopped to claim land not included in the survey on which the patent is based. Cassidy *v.* Carr, 48 Cal. 339.

96. Waterman *v.* Smith, 13 Cal. 373.

97. Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Mott *v.* Smith, 16 Cal. 533; Stark *v.* Barrett, 15 Cal. 361; Waterman *v.* Smith, 13 Cal. 373; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88; U. S. *v.* San Jacinto Tin Co., 23 Fed. 279, 10 Sawy. 639 [*affirmed* in 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747].

United States not estopped to impeach confirmed grant as against stranger to confirmation proceedings.— Bouldin *v.* Phelps, 30 Fed. 547.

98. Moore *v.* Wilkinson, 13 Cal. 478; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88. See also Norton *v.* Hyatt, 8 Cal. 539.

The patentee's legal title is superior to a location made in consequence of a mistake of the commissioner of the general land office. Magee *v.* Chadoin, 30 Tex. 644.

99. Stewart *v.* Trenier, 49 Ala. 492; Carr *v.* Quigley, (Cal. 1887) 16 Pac. 9; Morrill *v.* Chapman, 35 Cal. 85; Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108 (holding that a patent issued in confirmation of a Mexican grant is conclusive against persons claiming under the government by titles acquired subsequent to the time at which the land came under the control of the government); Leese *v.* Clark, 18 Cal. 535; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Mott *v.* Smith, 16 Cal. 533; Stark *v.* Barrett, 15 Cal. 361; Moore *v.* Wilkinson, 13 Cal. 478; Le Beau *v.* Armitage, 56 Mo. 191; Mitchell *v.* Handfield, 33 Mo. 431; Harrold *v.* Simonds, 9 Mo. 326; Glasgow *v.* Baker, 128 U. S. 560, 9 S. Ct. 154, 32 L. ed. 513; Doolan *v.* Carr, 125 U. S. 618, 8 S. Ct. 1228, 31 L. ed. 844; Mills *v.* Stoddard, 8 How. (U. S.) 345, 12 L. ed. 1107; Bissell *v.* Penrose, 8 How. (U. S.) 317, 12 L. ed. 1095; Hayner *v.* Stanley, 13 Fed. 217, 8 Sawy. 214; Tripp *v.* Spring, 24 Fed. Cas. No. 14,180, 5 Sawy. 209.

Sale by United States before boundaries of confirmed claim ascertained.— Where the boundaries of a confirmed claim are vague and uncertain, and to be fixed by the surveying department, or the confirmation but recognizes a preëxisting right, and before a survey and location the government sells land not necessarily within the tract confirmed, such sale will prevail. Lott *v.* Prudhomme, 3 Rob. (La.) 293; Slack *v.* Orillion, 11 La. 587, 30 Am. Dec. 724; Lefebvre *v.* Comeau, 11 La. 321. See also Lafayette *v.* Blanc, 3 La. Ann. 59.

1. Trenier *v.* Stewart, 55 Ala. 458 (grant made before confirmation but with a reservation in favor of prior conflicting claims); Harvey *v.* Barker, 126 Cal. 262, 58 Pac. 692 [*affirmed* in 181 U. S. 481, 21 S. Ct. 690, 45 L. ed. 963, and *overruling* Byrne *v.* Alas, 74 Cal. 628, 16 Pac. 523] (holding that the patent concluded all claims of mission or pueblo Indians to occupancy of the patented lands which were not presented to the commissioners for confirmation); Yount *v.* Howell, 14 Cal. 465; Boggs *v.* Merced Min. Co., 14 Cal. 279; Waterman *v.* Smith, 13 Cal. 373; Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974; More *v.*

and patent was merely a relinquishment of all claim on the part of the United States,[2] and hence was not conclusive as against third persons holding or claiming to hold superior titles.[3] So the confirmation of a claim which was inchoate at the time of the cession did not give the confirmee title as against persons holding under grants from the United States antedating the confirmation.[4] A claimant whose claim had been confirmed had a title superior to that of one having an inchoate or incomplete and unconfirmed claim to the land,[5] but a confirmation by the United States of an incomplete title cannot avail as against a complete title under

Steinback, 127 U. S. 70, 8 S. Ct. 1067, 32 L. ed. 51; Mora *v.* Nunez, 10 Fed. 634, 7 Sawy. 455.

A recital in a patent binds persons showing no title, and is good evidence against them. Boatner *v.* Ventress, 8 Mart. N. S. (La.) 644, 20 Am. Dec. 266; Herrick *v.* Boquillas Land, etc., Co., 200 U. S. 96, 26 S. Ct. 192, 50 L. ed. 388 [*affirming* 8 Ariz. 258, 71 Pac. 924, (Ariz. 1904) 76 Pac. 612, and *following* Knight *v.* United Land Assoc., 142 U. S. 161, 12 S. Ct. 258, 35 L. ed. 974], holding that a recital in a patent from the United States, based on a decree of the court of private land claims confirming a Mexican land grant to the original grantees, "their heirs, successors in interest, and assigns," that two persons named therein had acquired an undivided interest in the land was sufficient to establish a record title in the persons so named as against others holding merely by adverse possession. And so mere trespassers on patented land, although strangers to the proceedings of the former or present government, are conclusively bound by the recitals of the patent. Stark *v.* Barrett, 15 Cal. 361.

2. Kittridge *v.* Hebert, 9 La. Ann. 154; Broussard *v.* Gonsoulin, 12 Rob. (La.) 1; Murdock *v.* Gurley, 5 Rob. (La.) 467; De la Houssaye *v.* Saunders, 4 La. 443; Barry *v.* Gamble, 8 Mo. 88. See also Langlois *v.* Crawford, 59 Mo. 456. A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quitclaim from the government. Langdeau *v.* Hanes, 21 Wall. (U. S.) 521, 22 L. ed. 606.

3. Ohm *v.* San Francisco, 92 Cal. 437, 28 Pac. 580; Hale *v.* Akers, 69 Cal. 160, 10 Pac. 385; Moore *v.* Wilkinson, 13 Cal. 478; Waterman *v.* Smith, 13 Cal. 373; Rachal *v.* Irwin, 8 Mart. N. S. (La.) 331; Sanchez *v.* Gonzales, 11 Mart. (La.) 207; Carmichael *v.* Brisler, 8 Mart. (La.) 727; Montgomery *v.* Doe, 13 Sm. & M. (Miss.) 161; Winn *v.* Cole, Walk. (Miss.) 119.

The act of congress of March 3, 1851, § 15, providing that patents issued under such act should not affect the interest of third persons, applied only to those who held superior titles such as would enable them to resist successfully any action of the government disposing of the property and not to all persons other than the United States and the claimants. People *v.* San Francisco, 75 Cal. 388, 17 Pac. 522 (holding that one claiming certain California lands in opposition to a government survey and patent under title acquired since 1850, when the rights of the government attached thereto, was not a third person, within the meaning of the statute); Miller *v.* Dale, 44 Cal. 562; De Arguello *v.* Greer, 26 Cal. 615; Leese *v.* Clark, 18 Cal. 535, 20 Cal. 387; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Yount *v.* Howell, 14 Cal. 465; Boggs *v.* Merced Min. Co., 14 Cal. 279; Beard *v.* Federy, 3 Wall. (U. S.) 478, 18 L. ed. 88.

4. Hebert *v.* Woods, 12 La. Ann. 211; Fahey *v.* Anderson, 6 La. Ann. 681; State *v.* Ham, 19 Mo. 592; Barry *v.* Gamble, 8 Mo. 88; Ham *v.* Missouri, 18 How. (U. S.) 126, 15 L. ed. 334; Delauriere *v.* Emison, 15 How. (U. S.) 525, 14 L. ed. 800 [*affirming* 14 Mo. 37]; Menard *v.* Massey, 8 How. (U. S.) 293, 12 L. ed. 1085; Mezes *v.* Greer, 17 Fed. Cas. No. 9,520, McAllister, 401.

The act of congress of 1812, reserving vacant lands for schools, did not pass the legal title, and where a claim to such lands under a grant of a former sovereignty was confirmed the fee passed to the confirmee, and the reservation for the use of schools no longer applied to the property. Hammond *v.* St. Louis Public Schools, 8 Mo. 65.

5. *Alabama.*— Hall *v.* Doe, 19 Ala. 378.

California.— Rico *v.* Spence, 21 Cal. 504; Estrada *v.* Murphy, 19 Cal. 248.

Louisiana.— See Tucker *v.* Burris, 13 La. Ann. 614.

Missouri.— Guyol *v.* Chouteau, 19 Mo. 546, holding that a confirmation of a Spanish land title, to one of several persons claiming it adversely to each other, vests in him, as against the others, title to the land.

United States.— Singleton *v.* Touchard, 1 Black 342, 17 L. ed. 50. See also Robinson *v.* Minor, 10 How. 627, 13 L. ed. 568.

See 41 Cent. Dig. tit. "Public Lands," § 712.

Knowledge of adverse claim raises no equity. — Where plaintiff and defendant claimed the same tract under separate Mexican grants, and defendant, knowing plaintiff's claim, obtained confirmation of his own claim and a patent, no equity arose in plaintiff against defendant, who was not by his knowledge of plaintiff's claim affected with notice of any equitable rights of plaintiff. Rico *v.* Spence, 21 Cal. 504.

A confirmed claim, not surveyed and located, and with boundaries vague and uncertain, cannot interfere with other valid claims having a location, although such claims have not yet been confirmed and patented. Slack *v.* Orillon, 11 La. 587, 30 Am. Dec. 724.

the former sovereignty.[6] Where two persons claim the same land under confirmations of grants of former sovereignties and patents issued pursuant thereto, and one or both of the grants was complete at the time of the cession, the earlier confirmation or patent is not conclusive, but the court must look to the original source of title and to the character of the title as it existed under the former government;[7] but as between claimants of inchoate rights, which were of imperfect obligation on the United States at the time of the cession and have since been confirmed, the elder confirmee has the better title without reference to the date of the origin of the respective claims.[8] Where, however, two inchoate claims are confirmed by the same act of congress, or the confirmations otherwise balance each other, the better title under the former sovereignty will prevail,[9] although it has been held that a confirmation by act of congress and a patent constitutes a better legal title than a confirmation by the same act of congress without a patent.[10] If the claim of a pueblo to a tract of land in California under the laws of Mexico was confirmed, and the decree excepted from the confirmation such parcels of land within the limits of the pueblo as had, by grants from lawful authority, vested in and been confirmed to parties claiming thereunder, and such parcels as should thereafter, in proceedings then pending, be confirmed to such parties, the confirmation of such excepted parcels gave to the confirmees a title against claimants under the pueblo confirmation.[11] The confirmee of a Mexican grant, who has been decreed to be entitled to a certain amount within larger exterior limits, has, until official segregation is made, a right to the possession of the whole tract embraced within the exterior limits, and may maintain ejectment against persons in possession of any part of it;[12] but where such confirmee selects a location and quantity, uses, leases, sells, or mortgages it, and disclaims title to the remainder, the selection is obligatory on him, until the government overrules his selection and assigns him land elsewhere within the designated tract.[13] Where two persons have been granted a certain quantity of land within the exterior limits including the same land, the issuance of a patent to one grantee gives the other no ground of complaint, where there still remains sufficient land within his exterior limits to satisfy his grant.[14] When an incomplete grant from a former

6. White *v.* Wells, 5 Mart. (La.) 652; Nevitt *v.* Beaumont, 6 How. (Miss.) 237; Stark *v.* Mather, Walk. (Miss.) 181, 12 Am. Dec. 553. See also Seale *v.* Ford, 29 Cal. 104.

7. Hale *v.* Akers, 69 Cal. 160, 10 Pac. 385; Adam *v.* Norris, 103 U. S. 591, 26 L. ed. 583; Henshaw *v.* Bissell, 18 Wall. (U. S.) 255, 21 L. ed. 835 [*affirming* 3 Fed. Cas. No. 1,447, 1 Sawy. 553]. See also Harrison *v.* Ulrichs, 39 Fed. 654.

Title and rights of grantees under former sovereignty see *supra*, V, C, 10.

8. Doe *v.* Greit, 8 Ala. 930; Hallet *v.* Eslava, 3 Stew. & P. (Ala.) 105; Moore *v.* Pontalba, 13 La. 571; Charleville *v.* Chouteau, 18 Mo. 492; Swartz *v.* Page, 13 Mo. 603; Chouteau *v.* Eckert, 7 Mo. 16 [*affirmed* in 2 How. (U. S.) 344, 11 L. ed. 293]; Mackay *v.* Dillon, 7 Mo. 7 [*reversed* on other grounds in 4 How. (U. S.) 421, 11 L. ed. 1038]; Dent *v.* Emmeger, 14 Wall. (U. S.) 308, 20 L. ed. 838. See also Schultz *v.* Lindell, 40 Mo. 330; Le Beau *v.* Gaven, 37 Mo. 556; Hogan *v.* Page, 32 Mo. 68. But *compare* Hall *v.* Doe, 19 Ala. 378; Delahoussaye *v.* Saunders, 4 La. 443; Sterling *v.* Drew, 5 Mart. N. S. (La.) 203.

Confirmation of void grants.— Where plaintiff in ejectment claimed under a British grant from the governor of West Florida in 1772, and defendant under a grant from the Spanish government in 1795, and although both grants were void, both were submitted to the commissioners appointed under the act of congress to carry into effect the cession made by Georgia, and both confirmed by that commission, this confirmation did not relate back to the dates of their respective patents, so as to cut out the younger patent, but each patent took effect from the date of the articles of cession, and the rule that where parties are in equal right the condition of defendant is best, must be applied. Montgomery *v.* Doe, 13 Sm. & M. (Miss.) 161.

9. Hallet *v.* Eslava, 3 Stew. & P. (Ala.) 105; Broussard *v.* Gonsoulin, 12 Rob. (La.) 1; Baker *v.* Thomas, 4 La. 414; Gonsoulin *v.* Brashear, 5 Mart. N. S. (La.) 33.

10. Maguire *v.* Vice, 20 Mo. 429.

11. Umbarger *v.* Chaboya, 49 Cal. 525.

12. Mott *v.* De Reyes, 45 Cal. 379; Mahoney *v.* Van Winkle, 21 Cal. 552 [*affirmed* in 24 Cal. 268], although such persons claim to be preëmptors under the United States laws.

13. Mahoney *v.* Van Winkle, 21 Cal. 552.

None but the government can question the grantee's selection and location.— Mahoney *v.* Van Winkle, 21 Cal. 552.

14. Waterman *v.* Smith, 13 Cal. 373.

sovereignty is perfected either by act of congress or by patent, the United States, and not the previous government, must be regarded as the source of title.[15] While the confirmation and the issuance of the patent fixed the legal title in the grantee [16] they did not cut off the equitable rights of third persons in the land;[17] but on the other hand the confirmation might be made to inure to the benefit of the persons equitably entitled to the land,[18] and after a confirmation and the issuance of a patent to the grantees, his assignees might enforce their rights in the ordinary tribunals.[19] Under some statutes where a claim was confirmed but the government had already sold the land or a part thereof, or the land could not be located, the claimant was entitled to an equal extent of other public lands.[20] Where a colonist lost title to part of his grant, by a suit, because that part was outside the limits of the colony, and by subsequent acts of the legislature his grant was validated except as to the adverse rights of third persons theretofore acquired, and a certificate for other land was granted him in compensation for the land lost by

15. Hall *v.* Doe, 19 Ala. 378.

Whre there is a conflict between the certificate of confirmation by the United States of an inchoate Spanish grant and the orders of survey offered as evidence of the grant, the act of confirmation must prevail, and determine the nature and extent of the rights of the original claimant. Fluker *v.* Doughty, 15 La. Ann. 673.

In Texas it was held that where the legislature confirmed the equitable title of a colonist or settler, the confirmation related back to the inception of the equitable title, notwithstanding the act of confirmation might save the rights of the third persons. Howard *v.* Perry, 7 Tex. 259.

16. De Castro *v.* Fellom, 135 Cal. 225, 67 Pac. 142; Los Angeles *v.* Pomeroy, 125 Cal. 420, 58 Pac. 69; Sherman *v.* McCarthy, 57 Cal. 507 (holding that this was true, although the patent recited that the patentee was the administrator of the original grantee); De Armas *v.* New Orleans, 5 La. 132 (holding that the patent vested the grantee with all the title of the United States and the former government); Carpentier *v.* Montgomery, 13 Wall. (U. S.) 480, 20 L. ed. 698; Bouldin *v.* Phelps, 30 Fed. 547; Hayner *v.* Stanley, 13 Fed. 217, 8 Sawy. 214.

17. Stark *v.* Mather, Walk. (Miss.) 181, 12 Am. Dec. 553; Carpentier *v.* Montgomery, 13 Wall. (U. S.) 480, 20 L. ed. 698.

18. De Castro *v.* Fellom, 135 Cal. 225, 67 Pac. 142 (holding, however, that in the case at bar the patentee held free of any trust); Schmitt *v.* Giovanari, 43 Cal. 617; Salmon *v.* Symonds, 30 Cal. 301; Stark *v.* Mather, Walk. (Miss.) 181, 12 Am. Dec. 553; Landes *v.* Brant, 10 How. (U. S.) 348, 13 L. ed. 449; Santa Clara Min. Assoc. *v.* Quicksilver Min. Co., 17 Fed. 657, 8 Sawy. 330; U. S. *v.* Hare, 26 Fed. Cas. No. 15,303, 4 Sawy. 653.

Persons to whose benefit particular confirmations inured see the following cases:

Alabama.— Chastang *v.* Armstrong, 20 Ala. 609; Baker *v.* Chastang, 18 Ala. 417.

California.— McManus *v.* O'Sullivan, 48 Cal. 7; Schmitt *v.* Giovanari, 43 Cal. 617; O'Connell *v.* Dougherty, 32 Cal. 458; Leese *v.* Clark, 18 Cal. 535.

Louisiana.— Jewell *v.* Porche, 2 La. Ann. 148; Noulen *v.* Perkins, 3 Rob. 233; O'Brien *v.* Smith, 16 La. 94; Sacket *v.* Hooper, 3 La. 104.

Missouri.— Connoyer *v.* Washington University, 36 Mo. 481; Leitensdorfer *v.* Goebel, 31 Mo. 474; Papin *v.* Massey, 27 Mo. 445; Mercier *v.* Letcher, 22 Mo. 66; Hogan *v.* Page, 22 Mo. 55; Charleville *v.* Chouteau, 18 Mo. 492; Boone *v.* Moore, 14 Mo. 420; Landes *v.* Perkins, 12 Mo. 238.

United States.—Trenouth *v.* San Francisco, 100 U. S. 251, 25 L. ed. 626; Connoyer *v.* Schaeffer, 22 Wall. 254, 22 L. ed. 837; Bouldin *v.* Phelps, 30 Fed. 547; Hardy *v.* Harbin, 11 Fed. Cas. No. 6,059, 1 Sawy. 194 [*affirmed* in 154 U. S. 598, 14 S. Ct. 1172, 22 L. ed. 378].

See 41 Cent. Dig. tit. "Public Lands," § 716.

Equitable interests must be enforced by a proceeding in equity and not by an action of ejectment. Carpentier *v.* Montgomery, 13 Wall. (U. S.) 480, 20 L. ed. 698.

Right to relief in equity accrues when patent issues.— Hayner *v.* Stanley, 13 Fed. 217, 8 Sawy. 214.

19. U. S. *v.* Covilland, 1 Black (U. S.) 339, 17 L. ed. 40.

20. U. S. *v.* De Morant, 123 U. S. 335, 8 S. Ct. 189, 31 L. ed. 171; Les Bois *v.* Bramell, 4 How. (U. S.) 449, 11 L. ed. 1051; Soulard *v.* U. S., 10 Pet. (U. S.) 100, 9 L. ed. 361.

Lands donated to settlers thereon were "sold" within the meaning of the act of congress of June 22, 1860. U. S. *v.* Watkins, 97 U. S. 219, 24 L. ed. 952.

Lands sold by former sovereignty.— Where the French government of Louisiana made a complete and valid grant to certain lands therein, and the succeeding Spanish government made grants of land within the limits of this grant, both being prior to the cession of Louisiana to the United States, and the Spanish grants were confirmed by the United States, the French grantees were not entitled to indemnity for the land so diverted from them, for the liability of the United States to indemnify them extended only to the case of lands sold by itself. Bouligney *v.* U. S., 3 Fed. Cas. No. 1,696*a*.

said suit, the acceptance of such certificate did not forfeit his title to that part of the original grant which had been validated.[21]

12. Statutory Rights of Unsuccessful Claimants. The act of 1886 in reference to land titles in California [22] gave to *bona fide* purchasers for value [23] of lands from Mexican grantees [24] or their assigns, where the grants were subsequently rejected,[25] or the lands purchased were excluded from the final survey of the grant,[26] the right to purchase such lands from the United States at the minimum price established by law,[27] provided they had used, improved, and continued in the actual possession of the lands,[28] and no valid adverse right or title except that of the United States existed.[29] This right of purchase did not, however, extend to land containing mines of gold, silver, copper, or cinnabar,[30] and the statute contained other exceptions. This preferred right of purchase was assignable so as to transfer all the purchaser's rights, although the assignee took with notice of the final rejection of the original claim.[31] The decision of the land department with refer-

21. Griffith *v.* Sauls, 77 Tex. 630, 14 S. W. 230.

22. 14 U. S. St. at L. 220, c. 219, § 7.

23. Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392].

Purchase after rejection of claim and pending appeal therefrom.— The fact that a purchase was made from the Mexican grantees after the claim had been rejected by the board of land commissioners and by the district court, and while it was pending on appeal in the supreme court, did not, as matter of law, prevent the purchaser from being a *bona fide* purchaser within the meaning of the statute. Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392].

Constructive notice of purchaser.— The fact that a Mexican grant fixed a definite base line, and that the grant was only a quarter of a league wide, did not affect the grantee with notice that all lands lying more than that distance from the base line did not belong to the grant, so as to deprive him of the right to purchase such lands. Watriss *v.* Reed, 99 Cal. 134, 33 Pac. 775.

24. Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392].

The statute was not limited to lands of which there was an actual grant by the Mexican authorities, but included lands supposed to have been granted, although it turned out that no formal grant was ever made. Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392].

25. Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392].

A claimant who never presented his grant for confirmation, and who is not in privity with any party who did present the grant, is not within the statute. Dodge *v.* Perez, 7 Fed. Cas. No. 3,953, 2 Sawy. 645.

26. Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392].

The fact that the land in question was never a portion of the grant did not affect the right to purchase the same under the statute. Watriss *v.* Reed, 99 Cal. 134, 33 Pac. 775.

Grant of specific quantity within larger tract.— The statute applied to lands included within the exterior boundaries of a Mexican grant for a specific quantity within a larger tract described by outside boundaries, commonly known as a "float"; the land so purchased having fallen outside the tract as the specific quantity was afterward officially located and surveyed. Hays *v.* Steiger, 76 Cal. 555, 18 Pac. 670.

27. Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392]. The object of the statute was to withdraw such lands from the general operation of the preëmption laws and to give to the purchaser, to the exclusion of all other claimants, the right to obtain the title. Hosmer *v.* Wallace, 97 U. S. 575, 24 L. ed. 1130.

28. Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392].

An inclosure was not necessary in order to constitute actual possession under the statute. Watriss *v.* Reed, 99 Cal. 134, 33 Pac. 775.

29. Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392].

A person who settled on land within the exterior limits of a Mexican grant, a portion of which was occupied by a *bona fide* purchaser for value from the Mexican grantee, did not, if, upon the final survey of the grant, the land was excluded from the grant, become a *bona fide* preëmptor, as against the purchaser from the Mexican grantee, but such purchaser was entitled to enter the land of which he was in possession at the minimum price. Rutledge *v.* Murphy, 51 Cal. 388.

30. Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579, holding that the person claiming the right to purchase must show that the land contained no such mines.

31. Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392].

ence to the existence of the facts entitling a person to the benefit of this statute was conclusive and not open to review by the courts,[32] but the courts could review an erroneous application of the law to the undisputed facts.[33] Prior to this statute similar privileges had been extended by special statutes to purchasers under particular grants.[34] The act of 1832 in reference to land claims in Missouri [35] gave to holders under rejected land claims who were actual settlers and housekeepers on the land [36] or claimants who waived their grants before a decision thereon [37] the right to preëmpt lands, including their improvements, not exceeding the amount of their claims, and not exceeding in any case six hundred and forty acres.[38] The act of 1858, authorizing the issuance of certificates or scrip to holders of deferred land claims confirmed under the treaty of cession of Louisiana, which should be receivable in payment for land by the land department of the United States, inured to the benefit of a grantee who had previously located under such a claim, where such location failed or became ineffectual by reason of some prior grant or location.[39]

VI. DISPOSAL OF CANADIAN CROWN LANDS.

A. In General — 1. POWER TO GRANT. The crown may make a valid grant of land although it is out of possession.[40] But where a crown grant contains a condition that it should be void if not settled within a certain time, a breach of the condition must be established by an inquest of office found before the crown can make a second valid grant of the same land.[41] And so also, while a crown grant may be attacked by the crown for excess in quantity, in the absence of such proceedings the land included cannot be regranted to a stranger.[42]

32. Wormouth *v.* Gardner, 112 Cal. 506, 44 Pac. 806; Beley *v.* Naphtaly, 169 U. S. 353, 18 S. Ct. 354, 42 L. ed. 775 [*affirming* 73 Fed. 120, 19 C. C. A. 392]; Cox *v.* U. S., 9 Wall. (U. S.) 298, 19 L. ed. 579.

33. Wormouth *v.* Gardner, 112 Cal. 506, 44 Pac. 806.

34. Act of congress of March 3, 1863, see Sheehy *v.* True, 45 Cal. 236; Durfee *v.* Plaisted, 38 Cal. 80; Hutton *v.* Frisbie, 37 Cal. 475; Page *v.* Fowler, 28 Cal. 605; Page *v.* Hobbs, 27 Cal. 483; Hastings *v.* McGoogin, 27 Cal. 84.

Act of congress of Jan. 27, 1851, see Copley *v.* Dinkgrave, 27 La. Ann. 601.

35. 4 U. S. St. at L. 567, § 3.

36. O'Brien *v.* Perry, 1 Black (U. S.) 132, 17 L. ed. 114 [*affirming* 28 Mo. 500], holding the claimant to have been an actual settler.

37. Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100, both holding that actual settlement was not necessary to entitle a claimant to gain the right of preëmption by waiver of his claim before a decision thereon. O'Brien *v.* Perry, 1 Black (U. S.) 132, 17 L. ed. 114 [*affirming* 28 Mo. 500].

The recorder's certificate of such relinquishment was the evidence of the right to such preëmption. Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100.

38. O'Brien *v.* Perry, 1 Black (U. S.) 132, 17 L. ed. 114 [*affirming* 28 Mo. 500].

All land to which claims were presented was reserved from sale, until some disposition of such claim could be made; and where claims were presented to land, and the claim relinquished to the United States before any decision upon such claim, the reservation still continued; and a patent to such land was void, if granted to any person other than the claimant, who took under the relinquishment. Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100.

39. Hodge *v.* Palms, 117 Fed. 396, 54 C. C. A. 570.

40. Lakeview Min. Co. *v.* Moore, 36 Nova Scotia 333; Louisburg Land Co. *v.* Tutty, 16 Nova Scotia 401; Costen *v.* Chappell, 10 Nova Scotia 40. But *compare* Miller *v.* Lanty, 1 Nova Scotia 161. As occupation against the crown for any period less than the sixty years required by the Nullum Tempus Act is of no avail against the title and legal possession of the crown, there is nothing to prevent the crown or its grantee, where no information of intrusion has been filed, from making a peaceable entry and then holding possession by virtue of title. Emmerson *v.* Maddison, [1906] A. C. 569, 75 L. J. P. C. 109, 95 L. T. Rep. N. S. 508, 22 T. L. R. 748 [*affirming* 34 Can. Sup. Ct. 533 (*reversing* 36 N. Brunsw. 260), and *overruling* Murray *v.* Duff, 33 N. Brunsw. 351; Smith *v.* Morrow, 14 N. Brunsw. 200; Doe *v.* Vernon, 4 N. Brunsw. 351; Smyth *v.* McDonald, 5 Nova Scotia 274; Scott *v.* Henderson, 3 Nova Scotia 115 (*approved* in Lakeview Min. Co. *v.* Moore, 36 Nova Scotia 333)], holding that the act of 21 Jac. I, c. 14, only regulates procedure, its effect being that if an information of intrusion is filed and the crown has been out of possession for twenty years, defendant is allowed to retain possession until the crown has established its title.

41. Wheelock *v.* McKown, 1 Nova Scotia 41.

42. Davison *v.* Benjamin, 9 Nova Scotia 474.

2. Presumption of Grant. Under proper circumstances a grant may be presumed.[43]

3. Contracts For Sale of Government Lands. In government contracts for the sale of lands, time is of the essence of the contract.[44]

4. Actions on Contracts to Make Grants. The exchequer court of Canada has jurisdiction in respect of a claim arising out of a contract to grant a portion of the public domain in aid of a railroad, made under the authority of an act of parliament,[45] and such a claim may be prosecuted by a petition of right.[46]

5. Receipts For Payments. Receipts or certificates of deposits to the credit of the receiver-general on a purchase of certain land import a sale to the person from whom the money is expressed to have been received, although no purchaser is named.[47]

6. Performance of Conditions. Where a person purchases crown land subject to a condition to be performed within a given time, failing in which he is to forfeit all rights under the sale, he is not entitled to a patent until such condition is performed.[48]

7. Lien For Indebtedness to Crown. Under a statute providing that indebtedness of a patentee to the crown shall be entered by the registrar "in the proper register or other record book in his office" and thereafter the indebtedness shall remain a charge on the land until paid, an entry in the proper book is necessary to create the charge.[49]

B. Preëmptions and Homesteads — 1. Land Open to Settlement or Preemption. Only unreserved and unoccupied lands are within the preëmption laws of British Columbia;[50] and where crown land is reserved from settlement by the lieu-

43. Boutilier *v.* Knock, 6 Nova Scotia 77, holding that the circumstances appearing in the case at bar warranted such a presumption.

44. Ewing *v.* Good, 1 U. C. Q. B. O. S. 65.

45. Qu 'Appelle Long Lake, etc., R. Co. *v.* Rex, 7 Can. Exch. 105, 21 Can. L. T. Occ. Notes 283.

46. Qu 'Appelle Long Lake, etc., R. Co. *v.* Rex, 7 Can. Exch. 105, 21 Can. L. T. Occ. Notes 283 [*distinguishing* Clarke *v.* Reg., 1 Can. Exch. 182], holding that where the court has jurisdiction in respect of the subject-matter of a petition of right, the petition is not open to objection on the ground that a merely declaratory judgment or order is sought thereby.

47. Young *v.* Scobie, 10 U. C. Q. B. 372.

48. Peterson *v.* Reg., 2 Can. Exch. 67.

Waiver.— Where suppliant purchased from the crown a parcel of land, subject to the condition that unless he erected certain manufacturing works thereon within a given time he would forfeit all rights under the sale, and a portion of the purchase-money was paid down, and he failed to perform the condition within the required time, but sometime thereafter the crown, through a duly authorized officer, accepted and received the balance of the purchase-money from him, such officer stating, however, that the sale would not be complete until the condition upon which it was made was complied with, the acceptance of the balance of the purchase-money, under the circumstances, constituted a waiver of the condition in respect of the time within which it was to be performed, but not of the condition itself. Peterson *v.* Reg., 2 Can. Exch. 67.

49. Reg. *v.* Fawcett, 20 Can. L. T. Occ. Notes 287, 13 Manitoba 205, holding that a docket or note book in which the registrar kept a record of applications under the Real Property Act which had been received and examined by him was not to be considered "the proper register or record book" in which to make the necessary entries, but such entries should have been made in the abstract book kept under the Registry Act, as the patent had been registered under the old system of registration.

50. Hereron *v.* Christian, 4 Brit. Col. 246; Hoggan *v.* Esquimalt, etc., R. Co., 20 Can. Sup. Ct. 235 [*affirmed* in [1894] A. C. 429, 63 L. J. P. C. 97, 70 L. T. Rep. N. S. 888, 6 Reports 478].

Section 14 of the Land Act, as amended by the Land Amendment Act (1891), § 1, "That occupation in this Act required shall mean a continuous *bona fide* personal residence of the preëmptor or family on the land recorded by him," relates to section 13, which provides for cancellation of the record of a settler "if he shall cease to occupy such land," and does not govern the question of what lands are "unoccupied" for the purposes of preëmption by others. Hereron *v.* Christian, 4 Brit. Col. 246.

An act throwing certain lands open to actual settlers for agricultural purposes does not confer a right of preëmption to lands not within the general preëmption laws of the province, and hence does not apply to lands previously reserved for a town site. Hoggan *v.* Esquimalt, etc., R. Co., 20 Can. Sup. Ct. 235 [*affirmed* in [1894] A. C. 429, 63 L. J. P. C. 97, 70 L. T. Rep. N. S. 888, 6 Reports 478.

tenant-governor in council it does not again become open for settlement until cancellation of the reservation by the same authority.[51]

2. Persons Entitled to Free Grants For Homesteads. Under the Ontario statute,[52] free grants of lands for homesteads are authorized to be made only to men.[53]

3. Proceedings to Obtain Grant. A person acquires no homestead interest in land until he is entered or permitted to enter for the land in the proper books or records of the land department,[54] and no such interest is acquired by merely making the required application and affidavit and depositing the office fee with the land agent.[55]

4. Jurisdiction to Pass Upon Claims to Free Grants. The statute giving authority to the governor in council to adjudge upon claims to free grants of land under any order in council then in force applies to located lands on which improvements have been made, as well as other lands.[56]

5. Effect of Location Ticket. A location ticket is *prima facie* evidence of title and possession under the statute.[57]

6. Cancellation of Location Ticket. The crown has always the right to cancel a location ticket;[58] but the statutory power given to a commissioner of crown lands to annul a location ticket[59] is judicial, and before exercising such power proceedings must be had to establish the default of the occupant, under such ticket.[60] If, before the time allowed for the performance of the conditions of settlement, the location ticket is canceled through error, the commissioner can revoke such cancellation and put the party in his former position, and disallow a second location ticket granted in the interval by a local agent.[61]

7. Occupation, Residence, and Clearance. The clearing of an acre or more of land on a government lot, without residing thereon,[62] or the occupying of and dwelling upon such lot without a government permit,[63] is not an occupation within the meaning of the act for the encouragement of colonization, and does not therefore confer any of the privileges thereof. The occupation required by the British Columbia Land Act means a continuous *bona fide* residence of the preëmptor or of his family on the land recorded by him.[64] Under the terms of a sale from the crown in 1857, the grantee was obliged to perform all the obliga-

51. Nelson, etc., R. Co. *v.* Parker, 6 Brit. Col. 1.

52. Ont. Rev. St. (1877) c. 24; Ont. Rev. St. (1897) c. 29.

53. Rogers *v.* Lowthian, 27 Grant Ch. (U. C.) 559.

54. Farmer *v.* Livingstone, 8 Can. Sup. Ct. 140, 5 Can. Sup. Ct. 221.

55. Farmer *v.* Livingstone, 8 Can. Sup. Ct. 140, 5 Can. Sup. Ct. 221.

56. Simpson *v.* Grant, 5 Grant Ch. (U. C.) 267, construing St. 4 & 5 Vict. c. 100, § 3.

57. Rocheleau *v.* Lacharite, 1 Quebec Q. B. 536.

58. Kealy *v.* Regan, 23 Quebec Super. Ct. 305.

The right to cancel a location ticket is an absolute one, which can always be exercised by the commissioner of crown lands where the grounds exist. Rocheleau *v.* Lacharite, 1 Quebec Q. B. 536.

Waiver of right.— The registration by the commissioner of crown lands of a transfer of the settler's rights in the land is a waiver of the right of the crown to cancel the location ticket for default to perform settlement duties. Holland *v.* Ross, 19 Can. Sup. Ct. 566 [*reversing* 2 Montreal Q. B. 316].

59. **Power cannot be exercised by deputy or substitute of commissioner.**— Lavigne *v.* Dion, 2 Rev. Crit. 267, 4 Rev. Lég. 390.

60. Dion *v.* Lavigne, 4 Reg. Lég. 390.

Cancellation must be preceded by notice and publication.— Rocheleau *v.* Lacharite, 1 Quebec Q. B. 536; Dion *v.* Lavigne, 4 Rev. Lég. 390. But where a location of land made by a local agent is repudiated by the commissioner, this is not equivalent to the cancellation of a grant regularly made, but is merely the refusal of the commissioner to ratify the location ticket given by the agent; in such case notice is not necessary, and the refusal to ratify renders the location ticket void. Rocheleau *v.* Lacharite, 1 Quebec Q. B. 536.

61. Rocheleau *v.* Lacharite, 1 Quebec Q. B. 536.

62. Vigneau *v.* Pontbriant, 7 Rev. Lég. 703.

63. Vigneau *v.* Pontbriant, 7 Rev. Lég. 703.

A mere verbal authorization to occupy such lands, given by an agent of the crown lands department is not a permit under the statute. Vigneau *v.* Pontbriand, 7 Rev. Lég. 703.

64. See Hereron *v.* Christian, 4 Brit. Col. 246.

tions contained in ordinary location tickets, and without residence and clearance upon the lot the grantee could not become the incommutable owner or acquire letters patent.[65]

8. Rights of Locatee. Until the conditions are performed the standing timber on the land remains the property of the crown,[66] and a locatee is not entitled to sell or otherwise dispose of standing timber until he has obtained a grant or patent.[67] But as a location ticket is virtually a sale conveying ownership, the holder has a right to recover the value of timber cut by others upon the land, notwithstanding the condition that he should not cut the timber himself.[68] A settler who takes up a lot included in a timber license takes it subject to the rights of the timber licensee;[69] but has a right of joint possession from and after the date of his location ticket, with the right to begin clearing thereon provided he does so in good faith.[70] A person in possession of crown land before patent issued cannot dedicate any portion of the same;[71] but he may so far bind himself by his acts that when a patent issues the lands granted would be bound by any right or easement to which his sanction has been obtained.[72] The court will not decree a partition of unpatented lands among the heirs of a deceased locatee,[73] but in a suitable case it may give declaratory relief which will work practically the result of a partition subject to the crown being willing to act on the judgment of the court.[74] A person holding land under a license of occupation from the crown is entitled to a demand of possession before ejectment brought by a grantee of the crown in fee.[75]

9. Restrictions on Alienation. The Ontario Free Grants and Homesteads Act provides that "neither the locatee, nor any one claiming under him, shall have power to alienate (otherwise than by devise) or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the patent";[76] but this does not prevent an agreement being entered into before the issue of a patent for the grant of land after the issue thereof, and such an agree-

65. **Kealy** *v.* Regan, 23 Quebec Super. Ct. 305.

66. Stevenson *v.* Flanagan, 30 N. Brunsw. 275.

Prohibition against cutting timber.— The regulations of the governor prohibit an applicant for land from cutting any timber or lumber, except for clearing, until he has transmitted to the surveyor-general a certificate from the labor act commissioner that he has performed the necessary amount of labor, and if timber is cut by the applicant in violation of the statute and the regulations it may be seized by the crown officers. Stevenson *v.* Flanagan, 30 N. Brunsw. 275.

Ont. Rev. St. (1887) c. 25, providing that pine trees on land located or sold within the limits of the free grant territory shall be considered as reserved from the location and shall be the property of the crown, and that patents of such lands shall contain a reservation of all pine trees thereon, applies only to public lands specifically appropriated by the lieutenant-governor in council for free grants to actual settlers. Lakefield Lumber, etc., Co. *v.* Shairp, 19 Can. Sup. Ct. 657 [*affirming* 17 Ont. App. 322].

67. Stevenson *v.* Flanagan, 30 N. Brunsw. 275; Chapiewski *v.* Campbell, 29 Ont. 343, holding that a locatee of free grant lands who has, contrary to the statute, sold the pine trees on the land before the issue of the patent, is not, nor is any one claiming under him, after its issue, estopped from denying the validity of the sale.

68. Dinan *v.* Breakey, 7 Quebec 120.

69. Price *v.* Leblanc, 11 Quebec Super. Ct. 30.

70. Price *v.* Leblanc, 11 Quebec Super. Ct. 30.

Extent of right.— This right of clearing does not necessarily interfere with the licensee's right to cut timber anywhere on the lot, so long as the latter does not "interrupt" the settler's clearing operations, but the right of the licensee to cut could not be prevented by the locatee simply marking out, by blazing trees, a certain area which he intended to clear. Price *v.* Leblanc, 11 Quebec Super. Ct. 30.

The ownership of wood cut by the settler in the *bona fide* process of clearing the land for cultivation rests in him and not in the timber licensee. Price *v.* Leblanc, 11 Quebec Super. Ct. 30.

71. Rae *v.* Trim, 27 Grant Ch. (U. C.) 374.

72. Rae *v.* Trim, 27 Grant Ch. (U. C.) 374.

73. Abell *v.* Weir, 24 Grant Ch. (U. C.) 464; Jenkins *v.* Martin, 20 Grant Ch. (U. C.) 613.

74. Pride *v.* Rodger, 27 Ont. 320.

75. Doe *v.* Friesman, 5 U. C. Q. B. O. S. 661.

76. Ont. Rev. St. (1897) c. 29, § 19. See Reed *v.* Wilson, 23 Ont. 552.

ment may be enforced after the issue of the patent, where all the requisites of the statute have been complied with by the locatee.[77]

10. Abandonment of Preëmption. A preëmption is abandoned by absence from the province for ten years without at any time leaving an address with the land office so that the preëmptor could be notified of a survey by the government or of a demand for the money due in the event of a survey.[78]

11. Remedy of Defeated Preëmptor. Where a valid preëmption has been defeated by a grant to another, issued by mistake, and not by reason of any fraud on the part of the grantee, a petition of right against the crown is the appropriate, if not the only, remedy of the party aggrieved.[79]

C. Patents and Grants — 1. Form and Requisites. A grant from the crown must be under the great seal [80] and a matter of record,[81] and must, in order to pass any legal interest, name a grantee or grantees, properly described and capable of holding.[82]

2. Construction. Grants from the crown, either for a valuable consideration or of special favor, are to be construed in the same manner as deeds from subject to subject,[83] and recitals in a grant must be taken and construed together.[84] In case of doubt, a patent from the crown is generally to be construed most favorably for the crown,[85] but there are exceptions to this rule.[86] Ascertained objects fixed upon in the grant as marks of boundary control courses and distances,[87] and the quantity purporting to be granted.[88] But the expression of quantity is descriptive and may aid in finding the intent where the boundaries are doubtful.[89] When the course of a line is not expressed, protraction on the plan of the grant may be resorted to as an element for ascertaining the course;[90] but where the position of the natural boundaries described in a grant cannot be ascertained, and there is no proof of the original survey, the limits of the grant cannot be extended by implication beyond the courses and distances mentioned in it.[91] A grant giving as a boundary the bank or edge of a lake is intended to express the margin, and

Mortgage under Ont. Rev. St. (1877) c. 25, § 26, see Watson *v.* Lindsay, 27 Grant Ch. (U. C.) 253 [*affirmed* in 6 Ont. App. 609].

77. Meek *v.* Parsons, 31 Ont. 529 [*reversing* 31 Ont. 54].

78. Cartwright *v.* Rex, 1 West. L. Rep. 82, 103.

79. Cartwright *v.* Rex, 1 West. L. Rep. 82, 103.

80. Doe *v.* Ramsay, 9 U. C. Q. B. 105; Doe *v.* Wilkes, 4 U. C. Q. B. O. S. 142.

An exemplification under the great seal of a grant invalid in its inception will not have the effect of making such grant valid by relation from its commencement. Doe *v.* Wilkes, 4 U. C. Q. B. O. S. 142.

81. Doe *v.* Wilkes, 4 U. C. Q. B. O. S. 142. Under a statute by which a grant will become void unless registered within one year in the office of the secretary and register of records in the province the non-registry of a grant need not be found by inquest of office in order to enable the crown to regrant, at least to the original grantee or his assigns. Doe *v.* White, 3 N. Brunsw. 595.

82. Doe *v.* Ramsay, 9 U. C. Q. B. 105, holding that no legal estate passed by a grant "to the Mohawk Indians, and such others of the Six Nations as might wish to settle on the Grand River."

83. Clark *v.* Bonnycastle, 3 U. C. Q. B. O. S. 528.

Construction of particular patents or grants see Quiddy River Boom Co. *v.* Davidson, 25 N. Brunsw. 580; Doe *v.* Hill, 7 N. Brunsw. 587; Fowler *v.* Dowling, 3 N. Brunsw. 581 [*followed* in Parrett *v.* Scott, 15 N. Brunsw. 434]; Rex *v.* Wilson, 2 N. Brunsw. 1; Brady *v.* Sadler, 17 Ont. App. 365 [*reversing* 16 Ont. 49 (*reversing* 13 Ont. 692)]; Canada Permanent Loan, etc., Co. *v.* Taylor, 31 U. C. C. P. 41.

84. Doe *v.* White, 3 N. Brunsw. 595.

85. Hyatt *v.* Mills, 20 Ont. 351 [*reversed* on other grounds in 19 Ont. App. 329]; Clark *v.* Bonnycastle, 3 U. C. Q. B. O. S. 528.

86. Hyatt *v.* Mills, 20 Ont. 351 [*reversed* on other grounds in 19 Ont. App. 329]; Clark *v.* Bonnycastle, 3 U. C. Q. B. O. S. 528.

87. Hanson *v.* Mawheney, 13 N. Brunsw. 11 (holding that as a certain angle of an adjoining grant was capable of ascertainment, a reference thereto controlled); Whelpley *v.* Lyons, 4 N. Brunsw. 276; Davison *v.* Benjamin, 9 Nova Scotia 474; Archibald *v.* Morrison, 7 Nova Scotia 272.

88. Davison *v.* Benjamin, 9 Nova Scotia 474 (holding that this is true notwithstanding the fact that the number of acres included in that case would be enormously in excess of the number which the grants purported to give); Archibald *v.* Morrison, 7 Nova Scotia 272.

89. Brevier *v.* Govang, 9 N. Brunsw. 144; Doe *v.* Vernon, 4 N. Brunsw. 351.

90. Whelpley *v.* Lyons, 4 N. Brunsw. 276.

91. Twining *v.* Stevens, 5 Nova Scotia 366.

makes the water's edge the boundary,[92] and a grant bounded by the shore of a tide river does not convey any title to the land below high-water mark.[93] The grantee of a water lot, bounded on the shore, is entitled to take up to high-water mark; and that line of his grant changes with the gradual encroachment or retirement of the sea.[94] The marks of the original survey are to be sought for and adhered to in determining the boundaries of a grant,[95] and parol evidence is admissible to show the actual position and survey of lands included in grants of wilderness and woodlands.[96] But in order to correct an error in the descriptive part of a grant by parol evidence, the evidence must be such as to leave no doubt of the intention of the grantor.[97] Where a plan is attached to a grant and referred to in the usual terms it is to be considered as incorporated with the instrument and must be construed along with it.[98] If the bounds are clearly ascertained by the grant, they cannot be extended or limited by subsequent grants;[99] but if there is any uncertainty as to the lines of a grant, subsequent grants of the crown to other persons of adjoining lands in which the lines of the prior grant are described may be referred to, in order to show where the crown considered the lines of the prior grant to be.[1] The courses and distances of the exterior boundaries of a grant are rather adhered to than those of the interior division of the tract into lots, where both cannot be reconciled, and the dispute relates to the exterior boundary.[2] Where the crown, after discovering an error in running one of the lines of a grant, took no steps to rectify it, it may be presumed to have adopted it, and such line fixes the boundary between the grant and subsequent grants referring to the line as a boundary.[3] A grant to a corporation will inure to its benefit notwithstanding a mistake in the name as stated in the grant.[4] A grant of a certain lake, *eo nomine*, with all profits, hereditaments, etc., reserving to the crown all mines and minerals, conveys the soil of the lake.[5]

3. Effect. A patent of land from the crown is to be upheld rather than avoided,[6] and has the legal effect of giving the patentee an absolute title in possession.[7] When the crown has issued the letters patent in view of all the facts, the grant is conclusive, and equities behind the patent cannot be set up.[8] Neither can an objection that the crown was misled in making a grant be made by a third person in a collateral proceeding.[9] A grant from the crown is not conclusive

92. Niles *v.* Burke, 14 N. Brunsw. 237; Burke *v.* Niles, 13 N. Brunsw. 166.

93. Lock *v.* Cleveland, 6 N. Brunsw. 390, so holding, although the grant was of a tract of land situate on both sides of the river.

94. Esson *v.* Mayberry, 1 Nova Scotia 186. See also Smith *v.* Smith, 10 Nova Scotia 29.

95. Whelpley *v.* Lyons, 4 N. Brunsw. 276.

96. Davison *v.* Benjamin, 9 Nova Scotia 474.

97. Brennock *v.* Fraser, 2 Nova Scotia 178.

98. Archibald *v.* Morrison, 7 Nova Scotia 272. The true lines of a tract of land must be ascertained by the courses and distances specified in the grant and particularly delineated on the plan of survey annexed, when there is no ambiguity in the description, and no proof of any actual survey contemporaneous with the grant, varying from the courses and distances therein specified. Doe *v.* McAlpine, 4 N. Brunsw. 467.

99. Brevier *v.* Govang, 9 N. Brunsw. 144; Robinson *v.* Wilson, 5 N. Brunsw. 301; Doe *v.* Jones, 5 N. Brunsw. 155; Doe *v.* Vernon, 4 N. Brunsw. 351. See also Doe *v.* Hallett, 5 N. Brunsw. 359. But *compare* Aiton *v.* Demill, 14 N. Brunsw. 164.

1. Doe *v.* Jones, 5 N. Brunsw. 155; Doe *v.* Vernon, 4 N. Brunsw. 351.

2. Brevier *v.* Govang, 9 N. Brunsw. 144.

3. Gaudin *v.* McKilligan, 7 N. Brunsw. 392.

4. King's College *v.* McDonald, 3 Nova Scotia 106, where the grant was made to "The Governors, President and Fellows of King's College, at Windsor, in the Province of Nova Scotia," whereas the real name of the corporation was "The Governors of King's College, Nova Scotia."

5. Burke *v.* Niles, 13 N. Brunsw. 166.

6. Hyatt *v.* Mills, 20 Ont. 351 [*reversed* on other grounds in 19 Ont. App. 329].

7. Kilborn *v.* Forester, Draper (U. C.) 332.

A grant from the crown conveys seizin to the grantee, and his possession will *prima facie* be deemed to continue while the land remains unoccupied and unimproved. Doe *v.* Chace, 8 N. Brunsw. 501; Doe *v.* Craft, 3 N. Brunsw. 546.

So long as there is no other person in possession, claiming adversely to the grantee's title, the grant and title given under it carry the possession by construction of law to the owner of the fee. Doe *v.* Turnbull, 5 U. C. Q. B. 129.

8. Farmer *v.* Livingstone, 8 Can. Sup. Ct. 140.

9. Lakeview Min. Co. *v.* Moore, 36 Nova Scotia 333.

evidence as to the bounds of any grant referred to therein, further than such bounds affect the premises of the grant itself.[10] Where a free grant or patent was issued in favor of one who shortly afterward petitioned the governor in council, stating that the lands were granted to her by mistake and without her authority, whereupon an order in council was passed allowing her to surrender them the lands never passed out of the crown.[11]

D. Setting Aside Patents and Grants. A crown grant or patent should be set aside where issued through fraud or in error and improvidence,[12] but the courts have no jurisdiction to set aside a grant or patent of land made by the crown upon a deliberate view of all the circumstances of the case and in the absence of fraud or mistake.[13] Proceedings for the annulment or repeal of a patent are properly brought in the chancery [14] or superior [15] court by the attorney-general,[16] or by a private individual having an interest in the land.[17] Where plaintiff's case, if successful, would establish a claim on the part of defendants, other than

10. Doe *v.* Jones, 5 N. Brunsw. 155.

11. Moffatt *v.* Scratch, 12 Ont. App. 157 [*affirming* 8 Ont. 147].

12. Reg. *v.* Montminy, 29 Can. Sup. Ct. 484; Reg. *v.* Becher, 4 Can. Exch. 412; Atty.-Gen. *v.* McGowan, 37 Nova Scotia 35; Atty.-Gen. *v.* Contois, 25 Grant Ch. (U. C.) 346; Atty.-Gen. *v.* McNulty, 11 Grant Ch. (U. C.) 581 [*followed* in Atty.-Gen. *v.* McGowan, 24 Can. L. T. Occ. Notes 136]; Westbrooke *v.* Atty.-Gen., 11 Grant Ch. (U. C.) 330; Stevens *v.* Cook, 10 Grant Ch. (U. C.) 410; Atty.-Gen. *v.* Hill, 8 Grant Ch. (U. C.) 532; Atty.-Gen. *v.* McNulty, 8 Grant Ch. (U. C.) 324 (patent issued under a right of pre-emption obtained by fraudulent concealment of other existing claims to such right); Atty.-Gen. *v.* Garbutt, 5 Grant Ch. (U. C.) 383 (grant to wrong person through mistake); Doe *v.* Principal Ordnance Officers, 3 U. C. Q. B. 387; Sturton *v.* Lessard, 1 Quebec Super. Ct. 121.

The term "improvidence," as distinguished from error, applies to cases where the grant has been to the prejudice of the commonwealth or the general injury of the public, or where the rights of any individual in the thing granted are injuriously affected by the letters patent. Fonseca *v.* Atty.-Gen., 17 Can. Sup. Ct. 612.

Facts not showing error or improvidence see Fonseca *v.* Atty.-Gen., 17 Can. Sup. Ct. 612; Scane *v.* Hartrick, 7 Grant Ch. (U. C.) 161; McDiarmid *v.* McDiarmid, 9 Grant Ch. (U. C.) 144.

Circumstances showing error and mistake and warranting cancellation of patent see Proctor *v.* Grant, 9 Grant Ch. (U. C.) 26 [*reversed* on other grounds in 9 Grant Ch. (U. C.) 224]; Martyn *v.* Kennedy, 4 Grant Ch. (U. C.) 61; Saugeen *v.* Church, 6 Grant Ch. (U. C.) 538; Fricht *v.* Scheck, 10 Grant Ch. (U. C.) 254.

Error not sufficient to warrant setting aside patent see McIntyre *v.* Atty.-Gen., 14 Grant Ch. (U. C.) 86.

Even where a person is really entitled to a grant he may not, it seems, safely make misrepresentations or commit frauds in order to facilitate his obtaining it. Westbrooke *v.* Atty.-Gen., 11 Grant Ch. (U. C.) 330.

13. Kennedy *v.* Lawlor, 14 Grant Ch. (U. C.) 224; Simpson *v.* Grant, 5 Grant Ch. (U. C.) 26; Boulton *v.* Jeffrey, 1 Grant Err. & App. (U. C.) 111 [*followed* in Burnes *v.* Boomer, 10 Grant Ch. (U. C.) 532].

Finding of heir and devisee commission.— The court of chancery may, it seems, in a proper case, set aside a patent issued upon the finding of the heir and devisee commission. McDiarmid *v.* McDiarmid, 9 Grant Ch. (U. C.) 144. See also Brouse *v.* Cram, 14 Grant Ch. (U. C.) 677.

14. Atty.-Gen. *v.* Contois, 25 Grant Ch. (U. C.) 346. The court of chancery has jurisdiction, under 4 & 5 Vict. c. 100, § 29, to rescind a patent, although the grant may be voidable, or even void at law. Martin *v.* Kennedy, 2 Grant Ch. (U. C.) 80.

15. The power to annul letters patent belongs to the superior court only, and not to the commissioner of lands, who has no power to correct errors which have crept in, in the preparation of such letters, when there is no adverse contention. Reg. *v.* Adams, 31 Can. Sup. Ct. 220 [*reversing* 11 Quebec K. B. 56 (*reversing* 18 Quebec Super. Ct. 520)], holding that the legal way to proceed to have nullified the action of the commissioner in revoking letters patent in order to make a grant to another is by scire facias.

16. Atty.-Gen. *v.* Contois, 25 Grant Ch. (U. C.) 340.

17. See Stevens *v.* Cook, 10 Grant Ch. (U. C.) 410.

One who never acquired any interest in the land has no *locus standi* to attack a patent issued to another. Farmer *v.* Livingstone, 8 Can. Sup. Ct. 140, 5 Can. Sup. Ct. 221; Cosgrove *v.* Corbett, 14 Grant Ch. (U. C.) 617; Lawrence *v.* Pomeroy, 9 Grant Ch. (U. C.) 474.

A person whose application to purchase land is refused on the ground that the land has been granted to a railway company has no standing in court to obtain relief on the ground that such grant was illegally issued and is void. Hall *v.* Reg., 7 Brit. Col. 89 [*affirmed* in 7 Brit. Col. 480].

Possession of crown lands by a person who entered under an agreement with another to clear and improve for the latter, on stipulated terms, is not such possession as entitles

the attorney-general, upon the justice of the crown for compensation, the attorney-general is at any rate a proper party;[18] but the attorney-general is not a necessary party where the bill alleges that the patentee obtained his title by false representations to the crown, and shows a case in which the patentee would not be entitled to compensation if the patent were set aside and the land given to another.[19] Summons in matters of scire facias or actions to annul letters patent is made by writ issued in the usual manner, without affidavit of the petitioner, order of a judge, or fiat of the attorney-general.[20] It is not necessary that an action to annul letters patent should be preceded or accompanied by a tender or deposit of the dues paid to the crown in order to obtain the issue of the letters patent.[21] The information of the attorney-general for annulling letters patent is simply a statement of the claim with conclusions as in the declaration in an ordinary action.[22] A bill by a private individual must show that he has some interest in the land,[23] and that such interest arose before the patent was issued.[24] If upon the allegations of a bill to repeal a patent plaintiff is entitled to a decree for such repeal, although he may be entitled to nothing more, a demurrer to the jurisdiction of the court on the subject-matter of the bill will not lie.[25] Where a private individual files a bill to repeal a patent on the ground of error, the onus of proof is on him, although it may to some extent involve proof of a negative,[26] and in order to the repeal of a patent on the ground of mistake such evidence must be laid before the court as will convince the mind of the court to a reasonable degree of certainty that the patent was issued in mistake.[27] Where the crown sought to forfeit two grants for non-performance of conditions as to improvements, etc., but none of the evidence on which the crown relied went further back than fifty years, while the grants were ninety years old, the evidence was not sufficient to forfeit the grants.[28] Where a bill impeaching a patent as having been obtained wrongfully was filed against the patentee and his vendee, who had not paid all his purchase-money, and the patentee answered denying the equity claimed

the occupant to maintain a bill to set aside a patent to the person under whom he held possession, on grounds of fraud or error unconnected with his own interest. Cosgrove *v.* Corbett, 14 Grant Ch. (U. C.) 617.

Joinder.— Several persons claiming preëmption rights in distinct portions of the land covered by a patent cannot join in a bill to set aside the patent for fraud. Westbrooke *v.* Atty.-Gen., 11 Grant Ch. (U. C.) 264.

Loss of right to relief.— Where it is shown that the patentee of land was ignorant of a fact which might have been material to bring to the notice of the officers of the crown, and plaintiff had the opportunity, but failed to do so, and subsequently filed a bill impeaching the patent, as issued in error and improvidence, the court refused the relief prayed, and dismissed the bill with costs. Mahon *v.* McLean, 13 Grant Ch. (U. C.) 361.

Costs on dismissal.— Where a bill was filed to set aside a patent, on the ground that the same had been issued in ignorance of the opposing claim of plaintiff, upon the fraudulent misrepresentations of the patentee, and the concealment of the facts by him from the crown lands department, the court, although unable to afford the relief sought because plaintiff was not entitled to demand it, dismissed the bill without costs as against defendant who had thus dealt with the department. Lawrence *v.* Pomeroy, 9 Grant Ch. (U. C.) 474.

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18. Rees *v.* Atty.-Gen., 16 Grant Ch. (U. C.) 467.

19. Rees *v.* Atty.-Gen., 16 Grant Ch. (U. C.) 467.

20. Gouin *v.* McManamy, 28 Quebec Super. Ct. 216.

21. Reg. *v.* Montminy, 29 Can. Sup. Ct. 484.

22. Gouin *v.* McManamy, 28 Quebec Super. Ct. 216.

Want of authorization, by the attorney-general, of the attorneys signing the information for him is not a ground of exception. If necessary, the attorney-general may file a disavowal of the attorneys *ad litem*. Gouin *v.* McManamy, 28 Quebec Super. Ct. 216.

23. Cosgrove *v.* Corbett, 14 Grant Ch. (U. C.) 617, holding that a bill by a squatter to set aside a patent for fraud or error must allege the custom of the crown in favor of squatters, and such other facts as may show his interest.

24. Mutchmore *v.* Davis, 14 Grant Ch. (U. C.) 346, holding that this rule applies whether plaintiff's interest is under another patent for the same land or under a contract of purchase.

25. Rees *v.* Atty.-Gen., 16 Grant Ch. (U. C.) 467.

26. McIntyre *v.* Atty.-Gen., 14 Grant Ch. (U. C.) 86.

27. Atty.-Gen. *v.* Garbutt, 5 Grant Ch. (U. C.) 181.

28. Reg. *v.* Robin, 16 Nova Scotia 91.

but his vendee allowed the bill to be noted *pro confesso*, it was held that, plaintiff failing to establish his case against the patentee, the bill should be dismissed as against both defendants.[29]

E. Rights of Grantees — 1. In General. The purchaser from the government of a clergy reserve, upon which he has paid an instalment and obtained the usual receipt from the department, has a right to obtain possession against any one in occupation.[30] A purchaser holding a receipt for the purchase-money or an instalment thereof, and having actual possession, may, before receiving a patent, maintain trespass against all strangers, although not against the crown;[31] but a receipt for a payment without a license of occupation or a patent does not entitle the purchaser to maintain ejectment.[32] The patentee of the crown may maintain trespass without entry against a person in actual possession before and at the time of the issuing of the patent.[33] Although a patent contains a clause saving and reserving to the crown all white pine trees, a person claiming under the patentee can maintain trover for white pine trees cut by a trespasser.[34]

2. Exemptions. The exemption under the Ontario Free Grants and Homestead Act[35] extends to the land or any part thereof or interest therein, so long as it is held by the original location title, whether before or after patent;[36] but where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him *qua* locatee, and hence such mortgage is not exempt.[37]

F. Squatters. Ordinarily mere squatters on public lands acquire no rights;[38] but the Vancouver Island Settlers' Relief Act of 1904,[39] providing that settlers who had occupied or improved land within the railway belt with the *bona fide* intention of living thereon, might obtain crown grants in fee simple thereof, applied to squatters, who were therefore entitled to the benefit thereof.[40]

PUBLIC LAW. See Statutes.

PUBLIC LETTING. A contract to do certain work that is "open to all — notorious."[1] (See Contracts, 9 Cyc. 279; Counties, 11 Cyc. 479; Municipal Corporations, 28 Cyc. 1027.)

29. McDermott *v.* McDermott, 3 Ch. Chamb. (U. C.) 38.

30. Doe *v.* Westover, 1 Grant Err. & App. (U. C.) 465, holding this to be true even though the occupant may have subsequently obtained the receipt of the commissioner of crown lands, the crown, under such circumstances, being bound by the contract made by the department with the first purchaser.

31. Bruyea *v.* Rose, 19 Ont. 433; Nicholson *v.* Page, 27 U. C. Q. B. 505 (holding that where plaintiff held possession as purchaser under a receipt from the crown land agent, and before defendant entered he had paid up in full, and was entitled to the patent, which, however, did not issue until some time after, he was entitled to recover for trespass committed before as well as after the patent); Whiting *v.* Kernahan, 12 U. C. C. P. 57; Deedes *v.* Wallace, 8 U. C. C. P. 385; Glover *v.* Walker, 5 U. C. C. P. 478 [*followed* in Alexander *v.* Bird, 8 U. C. C. P. 539].

Actual possession is necessary, for the receipt confers no constructive possession. Henderson *v.* McLean, 8 U. C. C. P. 42.

32. Walker *v.* Rogers, 12 U. C. C. P. 327. *Compare* Doe *v.* Seymour, 9 U. C. Q. B. 47.

33. Greenlaw *v.* Fraser, 24 U. C. C. P. 230.

34. Casselman *v.* Hersey, 32 U. C. Q. B. 333, so holding on the ground that the soil belonged to plaintiff and he was entitled to the shade of the trees as against a stranger.

35. Ont. Rev. St. (1897) c. 29, § 25, subd. (2), providing that after the issuance of a patent and while the land or any part thereof or interest therein is owned by the locatee or his widow, heirs, or devisees, such land, part, or interest shall during twenty years next after the date of the location be exempt from attachment, levy under execution, or sale for the payment of debts.

36. Cann *v.* Knott, 19 Ont. 422 [*affirmed* in 20 Ont. 294].

37. Cann *v.* Knott, 19 Ont. 422 [*affirmed* in 20 Ont. 294].

38. See Jenkins *v.* Martin, 20 Grant Ch. (U. C.) 613; Pacaud *v.* Peltier, 16 L. C. Rep. 305.

Mere priority of possession of vacant crown land is not a sufficient title in ejectment against a person who has applied to the crown for a grant of the land and obtained an order for survey thereof. Doe *v.* McAlpine, 4 N. Brunsw. 467.

39. Brit. Col. St. (1903–1904) c. 54, p. 375.

40. Esquimalt, etc., R. Co. *v.* McGregor, 2 West. L. Rep. 530.

1. Eppes *v.* Mississippi, etc., R. Co., 35 Ala. 33, 61, where it is said: "To become notorious, it is necessary that fair and reasonable public notice be given. To render the letting 'open to all,' it is necessary that the public shall have the equal privilege of bid-

PUBLIC LIBRARY. A library to which the general public have free access.[2] (See Library, 25 Cyc. 592.)

PUBLIC LOTS. A term, as used in a town plat made by a county, wherein certain property was so marked, meaning land dedicated by the county to public uses.[3]

PUBLIC MEETING. See Assembly, 3 Cyc. 1110, and Cross-References Thereunder.

PUBLIC MINISTER. See Ambassadors and Consuls, 2 Cyc. 259.

PUBLIC MONEY or MONEYS. The meaning of the term in any particular case is governed by the context and the intent with which it is employed.[4] As used in the statutes of the United States, money of the government, received from the public revenues or intrusted to its officers charged with the duty of receiving, keeping, or disbursing the same wherever it may be.[5] (Public Money: In General, see Bridges, 5 Cyc. 1058; Counties, 11 Cyc. 502; District of Columbia, 14 Cyc. 535; Drains, 14 Cyc. 1028; Levees, 25 Cyc. 197; Municipal Corporations, 28 Cyc. 1533; Schools and School-Districts; States; Territories; Towns; United States. Depositary of, see Depositaries, 13 Cyc. 812. Disposition of — Highway Tax, see Streets and Highways; License-Tax, see Licenses, 25 Cyc. 631; Proceeds of Fines, Forfeitures, and Penalties, see Bastards, 5 Cyc. 675; Customs Duties, 12 Cyc. 1187; Fines, 19 Cyc. 559; Forfeitures, 19 Cyc. 1362; Internal Revenue, 22 Cyc. 1680; Penalties, 30 Cyc. 1342; Taxes in General, see Taxation. Duty of Officer as to Custody and Care of, see Officers, 29 Cyc. 1425. Liability of Bank in Paying Out, see Banks and Banking, 5 Cyc. 514. Payment or Other Disposition of, as Subject of Protection and Relief by Injunction, see Injunctions, 22 Cyc. 895. Perjury in Proof of Claim to, see Perjury, 30 Cyc. 1408. Postal Revenues, see Post-Office, 31 Cyc. 986. Use of in Aid of Public and Private Enterprises, see Agriculture, 2 Cyc. 73; Bridges, 5 Cyc. 1058; Canals, 6 Cyc. 271; Charities, 6 Cyc. 974; Colleges and Universities, 7 Cyc. 291; Counties, 11 Cyc. 518; Municipal Corporations, 28 Cyc. 1553; Railroads; Religious Societies; States; Telegraphs and Telephones; Toll-Roads; Towns; Waters.)

PUBLIC MORALS. (Public Morals: Contract Against, see Contracts, 9 Cyc. 516. Offense Against, see Adultery, 1 Cyc. 950; Bigamy, 5 Cyc. 687; Disorderly Houses, 14 Cyc. 479; Fornication, 19 Cyc. 1433; Incest, 22 Cyc. 42;

ding for the contracts, and becoming contractors for the work."

2. People *v.* Tax, etc., Com'rs, 11 Hun (N. Y.) 505, 508, where it is said: "The words 'public library' are not technical. They have acquired, by judicial decisions, no precise legal meaning. They are words of common use."

The term does not include a library owned by a corporation, the use of which is limited to the stockholders of the corporation, their immediate families, and their licensees, since the public, as such, has no interest in the library. Providence Athenæum *v.* Tripp, 9 R. I. 559, 561.

3. Rutherford *v.* Taylor, 38 Mo. 315, 317.

4. See Myers *v.* Kiowa County Com'rs, 60 Kan. 189, 192, 56 Pac. 11, where it was used as synonymous with "county funds."

Does not include funds of a private corporation as used in a treaty for the extradition of embezzlers of public funds. Blandford *v.* State, 10 Tex. App. 627, 638; *In re* Reiner, 122 Fed. 109, 110.

It may mean public moneys of the state, as contradistinguished from public revenues levied for local purposes by towns, cities, and villages under state authority, or moneys which, by a long course of legislation, as in the case of excise moneys, have been treated as standing in the same situation. People *v.* Murray, 149 N. Y. 367, 377, 44 N. E. 146, 32 L. R. A. 344.

Used in the constitution, prohibiting the giving of public money to any association or private undertaking, should be construed to include a license fee required to be paid by the owner of a dog to a humane society for its own use. Fox *v.* Mohawk, etc., Humane Soc., 165 N. Y. 517, 526, 59 N. E. 353, 80 Am. St. Rep. 767, 51 L. R. A. 681.

5. Branch *v.* U. S., 12 Ct. Cl. 281, 289, where it is said not to include the money of states, counties, cities, and towns, although, with reference to those governments and municipalities, such funds, in other connections, would be deemed public moneys. Nor does it include money in the hands of the marshals, clerks, and other officers of courts, held by them to await the judgment of the court in relation to the ownership thereof.

Includes the money appropriated for the payment of the Cherokee Indians upon their removal and cession of the lands. Minis *v.* U. S., 15 Pet. (U. S.) 423, 448, 10 L. ed. 791.

LEWDNESS, 25 Cyc. 209; MISCEGENATION, 27 Cyc. 798; PROSTITUTION, *ante*, p. 731. Regulation of, see CONSTITUTIONAL LAW, 8 Cyc. 870; MUNICIPAL CORPORATIONS, 28 Cyc. 710.)

PUBLIC NAVIGABLE WATERS. See NAVIGABLE WATERS, 29 Cyc. 285.

PUBLIC NECESSITY. With reference to legislative action, that urgent, immediate public need arising from existing conditions which in the judgment of the legislature justifies a disturbance of private rights which otherwise might be legally exempt from such interference.[6] (See NECESSITY, 29 Cyc. 379; and, generally, EMINENT DOMAIN, 15 Cyc. 629.)

PUBLIC NOTICE. See NOTICE, 29 Cyc. 1110.

PUBLIC NUISANCE. See NUISANCES, 29 Cyc. 1143.

PUBLIC OFFENSE. A breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights — a punishable violation of law;[7] an act committed in violation of a law commanding or forbidding it, and to which is annexed a fine;[8] an act committed or omitted in violation of a public law;[9] the doing that which a penal law forbids to be done, or omitting to do what it commands;[10] an act or omission forbidden by law, and to which is annexed, upon conviction, either of the following punishments: Death, imprisonment, fine, removal from office or disqualification to hold and enjoy any office of honor, trust or profit under this state;[11] any act which is denounced as unlawful and punishable by fine.[12] (See, generally, CRIMINAL LAW, 12 Cyc. 70.)

PUBLIC OFFICER. See OFFICERS, 29 Cyc. 1356, and Cross-References Thereunder.

PUBLIC OPINION. See PUBLIC SENTIMENT, *post*, p. 1253.

PUBLIC PEACE. That invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted;[13] that quiet, order, and freedom from agitation or disturbance which is guaranteed by the laws.[14] (Public Peace: Breach, see BREACH OF THE PEACE, 5 Cyc. 1032. Homicide Committed in Preserving, see HOMICIDE, 21 Cyc. 798. Municipal Regulation, see MUNICIPAL CORPORATIONS, 28 Cyc. 707. Offenses Against, see AFFRAY, 2 Cyc. 40; DISORDERLY CONDUCT, 14 Cyc. 466; DISORDERLY HOUSES, 14 Cyc. 479; DUELING, 14 Cyc. 1111; INSURRECTION, 22 Cyc. 1451; PRIZE-FIGHTING, *ante*, p. 395; RIOT; UNLAWFUL ASSEMBLY. Peace Officers, see JUSTICES OF THE PEACE, 24 Cyc. 383; SHERIFFS AND CONSTABLES.)

PUBLIC PLACE. A place openly and notoriously public, a place of common resort;[15] a place where all persons have a right to go[16] and be;[17] a place which is in point of fact public, as distinguished from private — a place that is visited by many persons, and usually accessible to the neighboring public;[18] every place which is for the time made public by the assemblage of people.[19] (Public Place:

6. *In re* Sheldon St. R. Co., 69 Conn. 623, 629, 38 Atl. 362.

With reference to public matters and legislative usage, "necessity" means great or urgent public convenience. Com. *v.* Gilligan, 195 Pa. St. 504, 510, 46 Atl. 124.

7. State *v.* Cantieny, 34 Minn. 1, 9, 24 N. W. 458.

8. Dyer *v.* Placer County, 90 Cal. 276, 278, 27 Pac. 197.

9. Ford *v.* State, 7 Ind. App. 567, 35 N. E. 34, 35.

10. State *v.* Cantieny, 34 Minn. 1, 9, 24 N. W. 458.

Used interchangeably with "crime" see West *v.* Territory, (Ariz. 1894) 36 Pac. 207, 208.

Does not include so called offenses against a municipal government. State *v.* Lee, 29 Minn. 445, 451, 13 N. W. 913.

11. State *v.* Cram, 20 S. D. 159, 105 N. W. 99.

12. Com. *v.* McCann, 123 Ky. 247, 256, 94 S. W. 645, 29 Ky. L. Rep. 707.

13. State *v.* Benedict, 11 Vt. 236, 239, 34 Am. Dec. 688.

14. Neuendorff *v.* Duryea, 6 Daly (N. Y.) 276, 280.

Causing a report to be spread that a certain person is dead, and having a church bell rung and tolled, is not a disturbance of the "public peace," within Vermont statutes. State *v.* Riggs, 22 Vt. 321, 323.

15. Cahoon *v.* Coe, 57 N. H. 556, 595.

16. State *v.* Sowers, 52 Ind. 311, 312.

17. State *v.* Welch, 88 Ind. 308, 310; State *v.* Waggoner, 52 Ind. 481, 482; Territory *v.* Lannon, 9 Mont. 1, 4, 22 Pac. 495.

18. Parker *v.* State, 26 Tex. 204, 207; Gomprecht *v.* State, 36 Tex. Cr. 434, 435, 37 S. W. 734.

19. Campbell *v.* State, 17 Ala. 369, 371.

Element in Offense of — Affray, see Affray, 2 Cyc. 43; Gaming or Keeping Gaming Table or House or Place, see Gaming, 20 Cyc. 890; Indecent Exposure, see Obscenity, 29 Cyc. 1316; Intoxication in Public Place, see Drunkards, 14 Cyc. 1092. Negligence as to Condition and Use of, see Negligence, 29 Cyc. 466. Of Posting Notice, see Notice, 29 Cyc. 1123. Use and Regulation of, see Municipal Corporations, 28 Cyc. 705.)

PUBLIC POLICE AND ECONOMY. The due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners.[20] (See Police, 31 Cyc. 900; Police Power, 31 Cyc. 902, and Cross-References Thereunder.)

Any place may be made public by a temporary assemblage. People *v.* Bixby, 67 Barb. (N. Y.) 221, 222.

Does not include either theaters or churches. Cavan *v.* Brooklyn, 5 N. Y. Suppl. 758, 760.

What are, and what are not, public places in contemplation of statutes prohibiting: Affray see Carwile *v.* State, 35 Ala. 392, 394; Taylor *v.* State, 22 Ala. 15, 16; State *v.* Weekly, 29 Ind. 206, 207; State *v.* Fritz, 133 N. C. 725, 728, 45 S. E. 957; Wilson *v.* State, 3 Heisk. (Tenn.) 278, 280. See also Affray, 2 Cyc. 43. Annoying person in public place see People *v.* St. Clair, 90 N. Y. App. Div. 239, 242, 86 N. Y. Suppl. 77. Cock-fighting see Finnem *v.* State, 115 Ala. 106, 108, 22 So. 593. Disturbing public assemblages see Young *v.* State, (Tex. Cr. App. 1898) 44 S. W. 507. See also Disturbance of Public Meetings, 14 Cyc. 539. Disturbing the peace see King *v.* Brown, 100 Tex. 109, 111, 94 S. W. 328. See also Breach of the Peace, 5 Cyc. 1023. Gaming see Lee *v.* State, 136 Ala. 31, 32, 33 So. 894; Nickols *v.* State, 111 Ala. 58, 60, 20 So. 564; Graham *v.* State, 105 Ala. 130, 132, 16 So. 934; Franklin *v.* State, 91 Ala. 23, 25, 8 So. 678; Dickey *v.* State, 68 Ala. 508, 509; Henderson *v.* State, 59 Ala. 89, 91; Smith *v.* State, 52 Ala. 384, 388; Smith *v.* State, 37 Ala. 472, 473; McDaniel *v.* State, 35 Ala. 390, 391; Sherrod *v.* State, 25 Ala. 78, 79; Burdine *v.* State, 25 Ala. 60, 63; Smith *v.* State, 23 Ala. 39, 41; Mills *v.* State, 20 Ala. 86, 88; Coleman *v.* State, 20 Ala. 51, 53; Bythwood *v.* State, 20 Ala. 47, 49; Flake *v.* State, 19 Ala. 551; Roquemore *v.* State, 19 Ala. 528, 531; Bush *v.* State, 18 Ala. 415, 416; Campbell *v.* State, 17 Ala. 369, 371; Coleman *v.* State, 13 Ala. 602, 603; Holtzclaw *v.* State, 26 Tex. 682; Parker *v.* State, 26 Tex. 204, 207; Wilcox *v.* State, 26 Tex. 145, 146; Wheelock *v.* State, 15 Tex. 257, 259; Rice *v.* State, 10 Tex. 545; Lafferty *v.* State, 41 Tex. Cr. 606, 56 S. W. 623; White *v.* State, 39 Tex. Cr. 269, 270, 45 S. W. 702, 46 S. W. 825; Crutcher *v.* State, 39 Tex. Cr. 233, 235, 45 S. W. 594; Goldstein *v.* State, (Tex. Cr. App. 1896) 35 S. W. 289, 290; Miller *v.* State, 35 Tex. Cr. 650, 651, 34 S. W. 959; Sisk *v.* State, 35 Tex. Cr. 462, 463, 34 S. W. 277; Williams *v.* State, (Tex. Cr. App. 1896) 34 S. W. 271; Grant *v.* State, 33 Tex. Cr. 527, 530, 27 S. W. 127; Gerrells *v.* State, (Tex. Cr. App. 1894) 26 S. W. 394; Borchers *v.* State, 31 Tex. Cr. 517, 518, 21 S. W. 192; Metzer *v.* State, 31 Tex. Cr. 11, 12, 19 S. W. 254; Weiss *v.* State, 16 Tex. App. 431, 432; Fossett *v.* State, 16 Tex. App. 375; Jackson *v.* State, 16 Tex. App. 373, 374; O'Brien *v.* State, 10 Tex. App. 544, 545; Neal *v.* Com., 22 Gratt. (Va.) 917, 918; Purcell *v.* Com., 14 Gratt. (Va.) 679, 682; Bishop *v.* Com., 13 Gratt. (Va.) 785, 787; Com. *v.* Feazle, 8 Gratt. (Va.) 585, 587; Com. *v.* Vandine, 6 Gratt. (Va.) 689, 690; Farmer *v.* Com., 8 Leigh (Va.) 741, 742; Windsor *v.* Com., 4 Leigh (Va.) 680, 681; Wortham *v.* Com., 5 Rand. (Va.) 669, 675; State *v.* Brast, 31 W. Va. 380, 382, 7 S. E. 11; *In re* Freestone, 1 H. & N. 93, 94, 2 Jur. N. S. 525, 25 L. J. M. C. 121, 4 Wkly. Rep. 567. See also Gaming, 20 Cyc. 890. Indecent exposure see Lorimer *v.* State, 76 Ind. 495, 496; Reg. *v.* Holmes, 3 C. & K. 360, 6 Cox C. C. 216, Dears. C. C. 207, 17 Jur. 562, 22 L. J. M. C. 122, 1 Wkly. Rep. 416, 20 Eng. L. & Eq. 597; Reg. *v.* Orchard, 3 Cox C. C. 248, 249, 20 Eng. L. & Eq. 598; Reg. *v.* Watson, 2 Cox C. C. 376, 20 Eng. L. & Eq. 599; *Ex p.* Ashley, 8 Can. Cr. Cas. 328, 331. See also Obscenity, 29 Cyc. 1316. Intoxication see State *v.* Moriarty, 74 Ind. 103, 105; State *v.* Waggoner, 52 Ind. 481, 482; State *v.* Sowers, 52 Ind. 311, 312; State *v.* Tincher, 21 Ind. App. 142, 51 N. E. 943, 944; State *v.* Stevens, 36 N. H. 59, 63; Bordeaux *v.* State, 31 Tex. Cr. 37, 39, 19 S. W. 603; Murchison *v.* State, 24 Tex. App. 8, 9, 5 S. W. 508. See also Drunkards, 14 Cyc. 1092. Notorious lewdness see Williams *v.* State, 64 Ind. 553, 555, 31 Am. Rep. 135. See also Lewdness, 25 Cyc. 209. Swearing see Reg. *v.* Bell, 25 Ont. 272, 273. See Profanity, *ante*, p. 578.

Posting notices.— What are and what are not public places under statutes requiring the posting of certain notices in public places. Wilson *v.* Bucknam, 71 Me. 545, 547; Carter *v.* Abshire, 48 Mo. 300, 302; Territory *v.* Lannon, 9 Mont. 1, 4, 22 Pac. 495; Hoitt *v.* Burnham, 61 N. H. 620, 623; Cahoon *v.* Coe, 57 N. H. 556, 573; Russell *v.* Dyer, 40 N. H. 173, 187; Scammon *v.* Scammon, 28 N. H. 419, 428; Tidd *v.* Smith, 3 N. H. 178, 179; Cummins *v.* Little, 16 N. J. Eq. 48, 53; Roach *v.* Eugene, 23 Oreg. 376, 381, 31 Pac. 825; Seabury *v.* Howland, 15 R. I. 446, 447, 8 Atl. 341; Goss *v.* Cardell, 53 Vt. 447, 450; Alger *v.* Curry, 40 Vt. 437, 448; Austin *v.* Soule, 36 Vt. 645, 649; Drake *v.* Mooney, 31 Vt. 617, 618, 76 Am. Dec. 145; Myrick *v.* Kahle, 120 Wis. 57, 61, 97 N. W. 506; Ramsay *v.* Hommell, 68 Wis. 12, 15, 31 N. W. 271.

20. Com. *v.* McHale, 97 Pa. St. 407, 408.

PUBLIC POLICY.[21] That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good; [22] the principle that no one can lawfully do that which has a tendency to be injurious to the public or against the public good; [23] the principles under which freedom of contract or private dealing is restricted by law for the good of the community; [24] the public good.[25] (Public Policy: Combination and Trust Against, see MONOPOLIES, 27 Cyc. 891. Consolidation of Corporations Engaged in Competing Business, see CORPORATIONS, 10 Cyc. 291. Contract Against — In General, see CONTRACTS, 9 Cyc. 481; Champertous Agreement, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 855; Effect on Rights of Parties to and Purchasers of Negotiable Instruments, see COMMERCIAL PAPER, 7 Cyc. 712; Limiting Liability of Carrier, see CARRIERS, 6 Cyc. 393. Disclosure of Confidential Communications, see WITNESSES. Divorce, see DIVORCE, 14 Cyc. 578. Garnishment of Salaries or Fees of Public Officers or Employees, see GARNISHMENT, 20 Cyc. 990.)

PUBLIC PONDS. In Maine, ponds containing more than ten acres; [26] in Massachusetts, bodies of water containing more than ten acres of land, which prior to the year 1647 had not been appropriated to private persons, but were used by the colonists in common for public use.[27] (See, generally, WATERS. See also POND, 31 Cyc. 911.)

PUBLIC PRINTING. That which is directly ordered by the legislature or performed for the agents of the government authorized to procure it to be done.[28] (Public Printing: Contracts in General, see COUNTIES, 11 Cyc. 470; MUNICIPAL CORPORATIONS, 28 Cyc. 642; NEWSPAPERS, 29 Cyc. 701; STATES. Designation of Official Newspaper, see NEWSPAPERS, 29 Cyc. 695. Impairment of Obligation of Contract by State, see CONSTITUTIONAL LAW, 8 Cyc. 936.)

PUBLIC PROPERTY. See PROPERTY, *ante*, p. 639.

PUBLIC PROSECUTOR. See PROSECUTING AND DISTRICT ATTORNEYS, *ante*, p. 687.

PUBLIC PURPOSES. GOVERNMENTAL PURPOSES,[29] *q. v.*[30] (Public Purposes:

21. **Equivalent to** "policy of the law." Billingsley *v.* Clelland, 41 W. Va. 234, 244, 23 S. E. 812.

22. Egerton *v.* Brownlow, 4 H. L. Cas. 1, 196, 18 Jur. 71, 23 L. J. Ch. 348, 10 Eng. Reprint 359 [*quoted* in Fearnley *v.* De Mainville, 5 Colo. App. 441, 39 Pac. 73, 75]. See also Wakefield *v.* Van Tassell, 202 Ill. 41, 47, 66 N. E. 830, 95 Am. St. Rep. 207, 65 L. R. A. 511; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 294, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497; Consumers' Oil Co. *v.* Nunnemaker, 142 Ind. 560, 564, 41 N. E. 1048, 51 Am. St. Rep. 193; Disbrow *v.* Cass County, 119 Iowa 538, 541, 93 N. W. 585; McNamara *v.* Gargett, 68 Mich. 454, 460, 36 N. W. 218, 13 Am. St. Rep. 355; Spead *v.* Tomlinson, 73 N. H. 46, 55, 59 Atl. 376, 68 L. R. A. 432; Dean *v.* Clark, 80 Hun (N. Y.) 80, 86, 30 N. Y. Suppl. 45; Union Cent. L. Ins. Co. *v.* Champlin, 11 Okla. 184, 188, 65 Pac. 836, 55 L. R. A. 109; Robson *v.* Hamilton, 41 Oreg. 239, 245, 69 Pac. 651.

23. Baltimore Humane Impartial Soc. *v.* Pierce, 100 Md. 520, 526, 60 Atl. 277, 70 L. R. A. 485.

24. Black L. Dict. [*quoted* in People's Bank *v.* Dalton, 2 Okla. 476, 480, 37 Pac. 807]; Wharton L. Dict. [*quoted* in Holt *v.* Thurman, 111 Ky. 84, 92, 63 S. W. 280, 23 Ky. L. Rep. 92, 98 Am. St. Rep. 399].

25. Maryland Trust Co. *v.* National Mechanics' Bank, 102 Md. 608, 632, 63 Atl. 70.

This term has been said to mean the law of the state, whether found in the constitution, statutes, or judicial records. People *v.* Hawkins, 157 N. Y. 1, 12, 51 N. E. 257, 68 Am. St. Rep. 736, 42 L. R. A. 490. See also Vidal *v.* Girard, 2 How. (U. S.) 127, 197, 11 L. ed. 205; Hartford F. Ins. Co. *v.* Chicago, etc., R. Co., 70 Fed. 201, 202, 17 C. C A. 62, 30 L. R. A. 193; Swann *v.* Swann, 21 Fed. 299, 301.

Establishment.— It has been said to be a policy which must be established either by law, by courts, or by general consent. Matter of Lampson, 33 N. Y. App. Div. 49, 52, 53 N. Y. Suppl. 531.

In the administration of the law by the court public policy is distinguished from what may be public policy in the view of the legislature see Enders *v.* Enders, 164 Pa. St. 266, 271, 30 Atl. 129, 44 Am. St. Rep. 598, 27 L. R. A. 56.

No extraterritorial effect.— Cleveland, etc., R. Co. *v.* Druien, 80 S. W. 778, 780, 26 Ky. L. Rep. 103, 66 L. R. A. 275.

26. Brastow *v.* Rockport Ice Co., 77 Me. 100, 103.

27. West Roxbury *v.* Stoddard, 7 Allen (Mass.) 158, 171.

28. Ellis *v.* State, 4 Ind. 1, 5.

29. Covington *v.* Com., 107 Ky. 680, 684, 39 S. W. 836, 19 Ky. L. Rep. 105; Frankfort *v.* Com., 82 S. W. 1008, 1009, 26 Ky. L. Rep. 957; Covington *v.* Kentucky, 173 U. S. 231, 237, 19 S. Ct. 383, 43 L. ed. 679.

30. See 20 Cyc. 1285.

This term is said to include: Borrowing money, by a municipal corporation, to aid a

Condemnation of Property For, see EMINENT DOMAIN, 15 Cyc. 578, 581. Dedication of Property For, see DEDICATION, 13 Cyc. 444. Taxation of Property For, see TAXATION.)

PUBLIC QUARTERS. Any suitable quarters provided by the government for the use of army officers while performing their duties.[31] (See, generally, ARMY AND NAVY, 3 Cyc. 830.)

PUBLIC RECITATION. A recitation before an indiscriminate audience.[32]

PUBLIC RECORD. See RECORDS.

PUBLIC REPRESENTATION. With reference to a dramatic composition, the representation, in dialogue and action, by persons who represent it as real, by performing or going through with the various parts or characters assigned to them severally, in public.[33] (See, generally, THEATERS AND SHOWS.)

PUBLIC REVENUE. The revenue of the government of the state or nation; sometimes, perhaps, that of a municipality.[34] (See CUSTOMS DUTIES, 12 Cyc. 1104; INTERNAL REVENUE, 22 Cyc. 1692; TAXATION. See also Cross-References under PUBLIC MONEY.)

PUBLIC ROAD. See STREETS AND HIGHWAYS.

PUBLIC SAFETY. (Public Safety: As Subject of Protection by Injunction, see INJUNCTIONS, 22 Cyc. 786. From Disease, see ADULTERATION, 1 Cyc. 939; FOOD, 19 Cyc. 1084; HEALTH, 21 Cyc. 382. From Explosion, see EXPLOSIVES, 19 Cyc. 1. From Operation of Railroad, see RAILROADS; STREET RAILROADS. Regulation of, see MUNICIPAL CORPORATIONS, 28 Cyc. 705.)

PUBLIC SALE. A sale in pursuance of a notice, by auction or public outcry.[35] (Public Sale: In General, see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1037. By Assignee For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 238. By Executor or Administrator, see EXECUTORS AND ADMINISTRATORS,

railroad company making its road as a way for public travel and transportation. Rogers *v.* Burlington, 3 Wall. (U. S.) 654, 663, 18 L. ed. 79. Building a railroad by a municipal corporation to be owned by it. Walker *v.* Cincinnati, 21 Ohio St. 14, 43, 8 Am. Rep. 24. Conversion of a private dwelling into a public boarding-house. Gannett *v.* Albree, 103 Mass. 372, 374. Erection by a municipal corporation of a railroad and machine shops. Jarrott *v.* Moberly, 13 Fed. Cas. No. 7,223, 5 Dill. 253, 255, 5 Reporter 583. Fire department. Louisville *v.* Com., 1 Duv. (Ky.) 295, 298, 85 Am. Dec. 624. Furnishing water by a municipal corporation to its inhabitants for domestic use. Stiles *v.* Newport, 76 Vt. 154, 168, 56 Atl. 662. Organization and government of irrigation districts. Turlock Irr. Dist. *v.* Williams, 76 Cal. 360, 370, 18 Pac. 379. Plank road which leads from, extends to, or passes through the limits of a municipal corporation. Larned *v.* Burlington, 4 Wall. (U. S.) 275, 276, 18 L. ed. 353; Mitchell *v.* Burlington, 4 Wall. (U. S.) 270, 274, 18 L. ed. 350. Sprinkling of city streets. Maydwell *v.* Louisville, 116 Ky. 885, 888, 76 S. W. 1091, 25 Ky. L. Rep. 1062, 105 Am. St. Rep. 245, 63 L. R. A. 655; Savage *v.* Salem, 23 Oreg. 381, 384, 31 Pac. 832, 37 Am. St. Rep. 688, 24 L. R. A. 787.

Is said not to include: Affording accommodations for business, commerce, or manufactories, so long as the property is to remain under private ownership and control, and no right of use or management is conferred upon the public. *In re* Eureka Warehouse, etc., Co., 96 N. Y. 42, 48. Bonds in aid of the establishment of manufactories or other enterprises. Weismer *v.* Douglas, 64 N. Y. 91, 101, 21 Am. Rep. 586; Citizens' Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 665, 22 L. ed. 455; Sutherland-Innes Co. *v.* Evart, 86 Fed. 597, 604, 30 C. C. A. 305. Construction of a railroad which is to be owned or controlled by individuals or a private corporation. People *v.* Salem, 20 Mich. 452, 458, 4 Am. Rep. 400; People *v.* Salem, 1 Mich. N. P. xxxvi, xl. Expenses of a committee to represent it at a convention of American municipalities. Waters *v.* Bonvouloir, 172 Mass. 286, 289, 52 N. E. 500. Land, houses, and water pipes occupied by a city with its waterworks where the city is authorized to and does make terms with particular classes of customers to supply them with water like a water company. Manchester *v.* Manchester Tp., 17 Q. B. 859, 869, 79 E. C. L. 859. Manufacturing plant owned by private citizens. Central Branch Union Pac. R. Co. *v.* Smith, 23 Kan. 745, 751; Kissell *v.* Columbus Grove, 11 Ohio Dec. (Reprint) 501, 505, 27 Cinc. L. Bul. 183; Commercial Nat. Bank *v.* Iola, 6 Fed. Cas. No. 3,061, 2 Dill. (U. S.) 353. Public parks. Louisville *v.* Com., 1 Duv. (Ky.) 295, 298, 85 Am. Dec. 624. Right of way for railroad purposes. Strahan *v.* Malvern, 77 Iowa 454, 459, 42 N. W. 369.

31. U. S. *v.* Dempsey, 104 Fed. 197, 198.

32. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, 5 Pa. L. J. 501, 4 Phila. (Pa.) 157.

33. Daly *v.* Palmer, 6 Fed. Cas. No. 3,552, 6 Blatchf. 256, 263, 36 How. Pr. (N. Y.) 206.

34. Black L. Dict.

35. Robins *v.* Bellas, 4 Watts (Pa.) 255, 258.

18 Cyc. 325. By Guardian, see GUARDIAN AND WARD, 21 Cyc. 134. By Receiver, see RECEIVERS. Contract Preventing Competition at, see CONTRACTS, 9 Cyc. 470. For Non-Payment of — Internal Revenue Taxes, see INTERNAL REVENUE, 22 Cyc. 1669; Taxes, see MUNICIPAL CORPORATIONS, 28 Cyc. 1721; SCHOOLS AND SCHOOL-DISTRICTS; TAXATION. In Admiralty, see ADMIRALTY, 1 Cyc. 894. In Bankruptcy, see BANKRUPTCY, 5 Cyc. 382. In Insolvency, see INSOLVENCY, 22 Cyc. 1302. In Partition, see PARTITION, 30 Cyc. 274. Of Impounded Animal, see ANIMALS, 2 Cyc. 449. Of Infant's Property, see INFANTS, 22 Cyc. 574. Of Insane Person's Property, see INSANE PERSONS, 22 Cyc. 1192. Of Life-Estate, see ESTATES, 16 Cyc. 638 note 39. Of School Land, see SCHOOLS AND SCHOOL-DISTRICTS. Of Trust Estate, see TRUSTS. Of Ward's Property, see GUARDIAN AND WARD, 21 Cyc. 134. On Attachment, see ATTACHMENT, 4 Cyc. 714. On Execution, see EXECUTIONS, 17 Cyc. 1233. On Execution in Action By or Against Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1080. On Foreclosure, see CHATTEL MORTGAGES, 7 Cyc. 107; MORTGAGES, 27 Cyc. 1680. To Enforce — Judgment or Decree in Actions to Avoid Fraudulent Conveyances, see FRAUDULENT CONVEYANCES, 20 Cyc. 823; Lien on Logs and Lumber, see LOGGING, 25 Cyc. 1600; Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 446; Municipal Assessment, see MUNICIPAL CORPORATIONS, 28 Cyc. 1244; Vendor's Lien, see VENDOR AND PURCHASER. Under Order of Court in General, see JUDICIAL SALES, 24 Cyc. 22. Under Proceedings by Creditors' Suit, see CREDITORS' SUITS, 12 Cyc. 55. See also PRIVATE SALE, *ante*, p. 387.)

PUBLIC SCHOOL. See SCHOOLS AND SCHOOL-DISTRICTS.

PUBLIC SCHOOL-HOUSES. Such as belong to the public; such as are designed for the schools established and conducted under the authority of the public;[36] those school-houses, which belong to our system of free schools, and are used for carrying out the purposes of that system.[37] (See, generally, SCHOOLS AND SCHOOL-DISTRICTS.)

PUBLIC SECURITY. A certificate or instrument issued by the proper officer, under the authority of law, evidencing a pecuniary indebtment or liability of the government to the holder.[38]

PUBLIC SENTIMENT. Another name for public opinion, or harmony of thought — *idem sentire*.[39]

PUBLIC SERVANT. See OFFICERS, 29 Cyc. 1356.

PUBLIC SERVICE CORPORATION. A term used in a state constitution to include all transportation and transmission companies, all gas, electric light, heat and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public.[40]

PUBLIC SEWER. A sewer open and available to the whole city and not limited to any particular part;[41] a sewer heretofore constructed or acquired

36. Gerke *v.* Purcell, 25 Ohio St. 229, 242.

37. People *v.* Ryan, 138 Ill. 263, 267, 27 N. E. 1095.

Such is the use of the term in state constitutions authorizing the legislature to exempt such property from taxation. People *v.* Ryan, 138 Ill. 263, 267, 27 N. E. 1095; Gerke *v.* Purcell, 25 Ohio St. 229, 242.

38. U. S. *v.* Irwin, 26 Fed. Cas. No. 15,445, 5 McLean 178, 184.

In the legislation of congress, and, in its popular acceptation, the term has a fixed and determinate meaning. U. S. *v.* Irwin, 26 Fed. Cas. No. 15,445, 5 McLean 178, 184.

"Public stocks and securities."— Under a statute providing that personal estate for the purposes of taxation includes among other property "money at interest, and other debts due the persons to be taxed more than they are indebted or pay interest for," and "public stocks and securities," the term "public stocks and securities" includes bonds issued by the commonwealth in aid of a railroad (Hall *v.* Middlesex County Com'rs, 10 Allen (Mass.) 100, 101, 102); but it does not include railroad bonds which are properly classified as debts due (Hale *v.* Hampshire County Com'rs, 137 Mass. 111, 114).

39. Jackson *v.* Phillips, 14 Allen (Mass.) 539, 565.

40. Townsend *v.* Norfolk, etc., R. Co., 105 Va. 22, 28, 52 S. E. 970, 115 Am. St. Rep. 842, 4 L. R. A. N. S. 87.

41. South Highland Land, etc., Co. *v.* Kansas City, 172 Mo. 523, 534, 72 S. W. 944.

under authority of an ordinance and paid for wholly out of the general revenue.[42]

PUBLIC SOCIETY. A society known in law, formed by the public authority of the state.[43]

PUBLIC SPORT. One held out and given to the public.[44]

PUBLIC SQUARE. In ordinary acceptation, the plat of ground devoted to public purposes, and not the territory of the streets adjoining the sides of the public square; [45] property of a public nature held for governmental or public purposes.[46] (See MUNICIPAL CORPORATIONS, 28 Cyc. 935. See also PARK, 29 Cyc. 1684.)

PUBLIC STATUTE. See STATUTES.

PUBLIC SWEARING. See PROFANITY, *ante*, p. 578.

PUBLIC TAXES. Those which are levied and taken out of the property of the person assessed, for some public or general use or purpose, in which he has no direct, immediate or pecuniary interest.[47] (See, generally, TAXATION.)

PUBLIC TRIAL. A trial held in public, in the presence of the public, or in a place accessible and open to the attendance of the public at large, or of persons who may properly be admitted.[48] (Public Trial: Right of Accused Thereto, see CRIMINAL LAW, 12 Cyc. 520.)

42. Prior *v.* Buehler, etc., Constr. Co., 170 Mo. 439, 443, 71 S. W. 205.

"If a sewer is available as a means of drainage to an area less than the whole city, especially if it is exclusively reserved for the drainage of an area less than the whole, even if it were physically possible to drain the whole into it, it is not a public sewer." South Highland Land, etc., Co. *v.* Kansas City, 172 Mo. 523, 535, 72 S. W. 944. See also Heman *v.* Allen, 156 Mo. 534, 542, 57 S. W. 559.

43. Barnes *v.* Falmouth First Parish, 6 Mass. 401, 414.

44. People *v.* Poole, 44 Misc. (N. Y.) 118, 119, 89 N. Y. Suppl. 773, where it is distinguished from a "private sport."

45. De Witt County *v.* Clinton, 194 Ill. 521, 524, 62 N. E. 780.

46. Lowe *v.* Howard County, 94 Ind. 553.

"The term . . . has acquired a legal meaning, and courts adopt that meaning in all cases where the term is not shown by the language with which it is associated to have a different signification." Lowe *v.* Howard County, 94 Ind. 553.

In reference to public squares in Pennsylvania it is said: "In this state there are few ancient towns in which squares, such as this, do not form part of the plan. They are generally located at the intersection of the streets; and are intended as sites for the erection of buildings for the use of the public; such as court houses, market houses, schoolhouses and churches; sometimes they are designed for ornaments; and at others they are intended for the promotion of the health of the inhabitants by admitting of air. The squares as well as the streets, and for the same reason, are placed under the superintendence of the local authorities, who have full power to regulate them, so as more effectually to answer the purposes to which they have been dedicated." Bloomsburg Land Imp. Co. *v.* Bloomsburg Borough, 215 Pa. St. 452, 456, 64 Atl. 602; Mahon *v.* Norton, 175 Pa. St. 279, 34 Atl. 660; Rung *v.* Shoneberger, 2 Watts (Pa.) 23, 25, 26 Am. Dec. 95; Bloomsburg Land, etc., Co. *v.* Bloomsburg, 31 Pa. Co. Ct. 609, 612.

When used in statutes, as also in its popular import, the term refers almost exclusively to grounds occupied by the court-house, and not by the county. Westfall *v.* Hunt, 8 Ind. 174, 177. See also State *v.* Eastman, 109 N. C. 785, 787, 13 S. E. 1019.

When used in a proper place on the map of a town designed for a county seat, it is evidence that the ground is set apart as a place for the erection of a court-house or other county buildings. Logansport *v.* Dunn, 8 Ind. 378, 382.

Where used on a plat, it is an unrestricted dedication to public use. Rhodes *v.* Brightwood, 145 Ind. 21, 23, 43 N. E. 942. See also Com. *v.* Rush, 14 Pa. St. 186, 189.

The uses and purposes of a public square or common are, in some respects, different from those of a public highway. Thus, a street or highway cannot be inclosed by the local authorities. But a public square or common in a town or city, where the dedication is general and without special limitation or use, may be inclosed, notwithstanding it has remained open many years, and be improved and ornamented for recreation and health. But the place must, for the purpose of the dedication, remain free and common to the use of all the public. Dillon Mun. Corp. [*quoted* in Guttery *v.* Glenn, 201 Ill. 275, 284, 66 N. E. 305].

47. Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 506, 510.

Distinguished from "local and private taxes" see Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 506, 510; Shoalwater *v.* Armstrong, 9 Humphr. (Tenn.) 217, 222; Morgan *v.* Cree, 46 Vt. 773, 786, 14 Am. Rep. 640.

As used in a statute providing that a settlement may be gained in any poor district by the payment of any public taxes, the term is not confined to said taxes, but a settlement may be gained by the payment of road taxes. Huston Tp. Poor Dist. *v.* Benezette Tp. Poor Dist., 135 Pa. St. 393, 398, 19 Atl. 1060.

48. Black L. Dict.

PUBLIC TRUST. A term which includes every agency in which the public, reposing special confidence in the particular persons, appoint them for the performance of some duty or service.[49] (See CHARITIES, 6 Cyc. 895; OFFICERS, 29 Cyc. 1361.)

PUBLIC TRUSTS. See CHARITIES, 6 Cyc. 895; PERPETUITIES, 30 Cyc. 1464; TRUSTS.

PUBLIC USE. A use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals;[50] public usefulness, utility, advantage; or what is productive of general benefit;[51] a use by or for the government, the general public or some portion of it.[52] (Public Use: Adverse Possession of Land Dedicated or Acquired For, see ADVERSE POSSESSION,

As used in a constitutional guarantee that every person accused of crime shall have the right to public trial, the term is used in opposition to secret. People *v.* Swafford, 65 Cal. 223, 224, 3 Pac. 809.

The meaning of the term, as used in a statute providing that a person accused of crime shall be entitled to a speedy and a public trial, depends upon the circumstances of each particular case. "In a time of political or local excitement, if the trial judge permitted the court room to be packed exclusively with men opposed to the defendant on trial, the trial would not be public in fairness to the defendant. Every seat and all the standing room might be occupied, but the character of the spectators present and the friendliness to the accused of those who failed to gain admittance, perhaps through the connivance of the court, are to be considered in deciding whether the rights of the defendant have been trampled upon. The exclusion of a dozen school girls or boys of no particular prediliction for the defendant on trial can work no harm to him. The statute is for his benefit, and such an expulsion does not harm or aid him. It is apparent therefore, that while the defendant is entitled to a public trial, good morals or the exigencies of the situation may make that a relative term without injury to the defendant and without infringement upon the sanctity of the rights granted to him; that such discretion is vested in the presiding judge, and the test is whether or not it has been abused." People *v.* Hall, 51 N. Y. App. Div. 57, 62, 64 N. Y. Suppl. 433.

49. Conley *v.* State, 46 Nebr. 187, 193, 64 N. W. 708; Matter of Wood, Hopk. (N. Y.) 7, 9.

The terms "office" and "public trust," as used in a state constitution, are nearly synonymous; at least the term "public trust" is included in the more comprehensive term "office." *Ex p.* Yale, 24 Cal. 241, 243, 85 Am. Dec. 62.

An attorney at law, etc.—An attorney is not a person holding an office of public trust, within the meaning of a state constitution providing that a single oath shall be taken by a public officer, and no other oath required. Cohen *v.* Wright, 22 Cal. 293, 307. Under a similar constitutional provision the term "public trust" includes registration commissioners of elections, together with the functions of any district registers, clerks, and inspectors. Atty.-Gen. *v.* Detroit, 58 Mich. 213, 217, 24 N. W. 887, 55 Am. Rep. 675. Under a constitution providing that neither the chancellor nor justices of the supreme court, nor any circuit judge, shall hold any other office or public trust, the term includes an attorney or counselor. Seymour *v.* Ellison, 2 Cow. (N. Y.) 13, 29.

The phrase "place of public trust, honor, or emolument" in a statute prohibiting polygamists from any place of public trust or emolument, etc., does not include the position of a juryman. People *v.* Hopt, 3 Utah 396, 400, 4 Pac. 250.

50. Gilmer *v.* Lime Point, 18 Cal. 229, 251; Matter of Whitestown, 24 Misc. (N. Y.) 150, 152, 53 N. Y. Suppl. 397; Shasta Power Co. *v.* Walker, 149 Fed. 568, 571.

51. Potlatch Lumber Co. *v.* Peterson, 12 Ida. 769, 88 Pac. 426, 431; Valley City Salt Co. *v.* Brown, 7 W. Va. 191, 196.

52. McQuillen *v.* Hatton, 42 Ohio St. 202, 204.

Not a use by or for particular individuals, or for the benefit of certain estates see Hildreth *v.* Montecito Creek Water Co., 139 Cal. 22, 29, 72 Pac. 395; Coster *v.* Tide Water Co., 18 N. J. Eq. 54, 68; McQuillen *v.* Hatton, 42 Ohio St. 202, 204.

"A public use, whether for all men or a class, is one not confined to privileged persons. The smallest street is public, for all have an equal right to travel on it; but a way used by thousands, which may be shut against a stranger, is private." Troutman *v.* De Boissiere Odd Fellows' Orphans' Home, etc., 66 Kan. 1, 13, 71 Pac. 286; Burd Orphan Asylum *v.* Upper Darby School Dist., 90 Pa. St. 21, 29.

As used in a contract whereby a water company agreed, among other things, to furnish water to the inhabitants of a town, "for the extinguishing of fires and other public and domestic uses and purposes," the term means such uses as benefit the inhabitants of the municipality at large, as distinguished from those that benefit the individuals of a class, such as street sprinkling and washing and the extinguishing of fires, and does not include mechanical and manufacturing purposes. Boonton *v.* Boonton Water Co., 69 N. J. Eq. 23, 32, 33, 61 Atl. 390.

As used in a statute authorizing a county to purchase and hold lands for public use, the term means "that actual use, occupation and possession of real estate, rendered necessary for the proper discharge of the administrative or other functions of the county,

1 Cyc. 1117. Condemnation of Property For, see EMINENT DOMAIN, 15 Cyc. 612. Dedication of Property, see COPYRIGHT, 9 Cyc. 927; DEDICATION, 13 Cyc. 444. Of Navigable Waters Other Than For Navigation, see NAVIGABLE WATERS, 29 Cyc. 330. Of Patent, see PATENTS, 30 Cyc. 869. Of Piers, Booms, and Wharves, see NAVIGABLE WATERS, 29 Cyc. 347. Prior Public Use and Invention as Bar to Patent, see PATENTS, 30 Cyc. 838.)

PUBLIC VEHICLE. See LICENSES, 25 Cyc. 616; MUNICIPAL CORPORATIONS, 28 Cyc. 731.

PUBLIC WAR. See WAR.

PUBLIC WAREHOUSE. See WAREHOUSEMEN.

PUBLIC WATERS. See WATERS.

PUBLIC WATER-SUPPLY. See MUNICIPAL CORPORATIONS, 28 Cyc. 615, 636; WATERS.

PUBLIC WAY. See MUNICIPAL CORPORATIONS, 28 Cyc. 832, 1340; PENT ROADS, 30 Cyc. 1379; PRIVATE ROADS, *ante*, p. 363; STREETS AND HIGHWAYS.

PUBLIC WELFARE. That which is a public necessity or for the convenience of the public.[53] (See Cross-References under PUBLIC SAFETY. See also MUNICIPAL CORPORATIONS, 28 Cyc. 705.)

PUBLIC WHARF. See WHARVES.

PUBLIC WORK. A work in which the state is interested;[54] every species and character of work done for the public, and for which the taxpaying citizens are liable;[55] work by or for the state and by or for a municipal corporation and contractors therewith.[56] (See PUBLIC WORKS.)

through its appropriate officers." James *v.* Wilder, 25 Minn. 305, 310; Williams *v.* Lash, 8 Minn. 496, 505.

Bonds issued by a city for the purpose of raising a fund to be loaned to private individuals to enable them to rebuild structures destroyed by fire are invalid, being for private uses, while the constitution authorizes the exercise of the taxing power only for public purposes. Lowell *v.* Boston, 111 Mass. 454, 470, 15 Am. Rep. 39; Feldman *v.* Charleston, 23 S. C. 57, 62, 55 Am. Rep. 6.

A building removed by a city and afterward fitted up as a school-house and engine-house is a building erected for public use within the meaning of a statute punishing the malicious burning of such building. Com. *v.* Horrigan, 2 Allen (Mass.) 159.

Taxation of a municipality for the construction of a subway, which shall be leased to a street car company and used for the carriage of such passengers as pay the regular fare, is a taxation for a public use. Prince *v.* Crocker, 166 Mass. 347, 361, 44 N. E. 446, 32 L. R. A. 610.

There may be a dedication of water in a fountain for a limited purpose, but there cannot be a dedication to a limited part of the public, and where a water tank was open for anybody's cattle to drink on market day from ten o'clock until five, or for anybody's horses traveling along the road, it was a public use and valid to such a limited extent. Hildreth *v.* Adamson, 8 C. B. N. S. 587, 594, 30 L. J. M. C. 204, 2 L. T. Rep. N. S. 359, 8 Wkly. Rep. 470, 98 E. C. L. 587.

The use of a safe made by one man for himself, and kept by him in his counting room or cellar, is a private and not a public use. Adams *v.* Edwards, 1 Fed. Cas. No. 53, Fish. Pat. Cas. 1, charge to jury.

"When a college or academy is incorporated wholly for the purposes of general education, and is so operated without any capital stock or purpose of profit, and tuition is charged only for its maintenance, then it is devoted to public use. It is private only in technical sense. Every donation not devoted to extension or improvement would naturally enable it to extend its beneficial use to the public with less charge until in time it may become free. Its operation all the time is for the public weal, without personal advantage or profit to the corporators, except as they share with the whole public in the general advantage by promotion of education and good morals." The property of such a college or academy is exempt from taxation under a statute exempting real and personal estates granted, sequestered, or used for public, pious, or charitable uses. Willard *v.* Pike, 59 Vt. 202, 216, 9 Atl. 907. See also Middlebury College *v.* Cheney, 1 Vt. 336, 351.

53. Shaver *v.* Starrett, 4 Ohio St. 494, 499.

Includes both public health and convenience. Sessions *v.* Brunkilton, 20 Ohio St. 349, 456.

54. Denver *v.* Rhodes, 9 Colo. 554, 562, 13 Pac. 729.

55. State *v.* Butler, 178 Mo. 272, 317, 77 S. W. 560.

56. McAvoy *v.* New York, 52 N. Y. App. Div. 485, 489, 65 N. Y. Suppl. 274.

This term is said to include: Contracts for the removal and disposition of city garbage. State *v.* Butler, 178 Mo. 272, 317, 77 S. W. 560. Free gravel road. Lane *v.* State, 14 Ind. App. 573, 43 N. E. 244, 245. Railroads. Opinion of Justices, 13 Fla. 699, 720; Gibson *v.* Mason, 5 Nev. 283, 308. Sewer-building and macadamizing of streets. Seibert *v.* Cavender, 3 Mo. App. 421, 426.

PUBLIC WORKS. All fixed works contracted for public use.[57] (Public Works: Appeal to Enforce Assessment For, see APPEAL AND ERROR, 2 Cyc. 553 note 7. Constitutional and Statutory Provisions as to, see MUNICIPAL CORPORATIONS, 28 Cyc. 1103. Constitutionality of Law Validating Assessments For, see CONSTITUTIONAL LAW, 8 Cyc. 765. Construction, Improvement, and Repair of — Bridges, see BRIDGES, 5 Cyc. 1054, 1078; Drains, see DRAINS, 14 Cyc. 1024; Highways, see STREETS AND HIGHWAYS; Levees, see LEVEES, 25 Cyc. 188. Delegation of Power to — Judiciary of Legislative Power to Determine Necessity of Improvement, see CONSTITUTIONAL LAW, 8 Cyc. 836; Levy Assessments For Benefits, see CONSTITUTIONAL LAW, 8 Cyc. 838. Department of, see MUNICIPAL CORPORATIONS, 28 Cyc. 482. Employment of Alien Laborers, see ALIENS, 2 Cyc. 123. Improvements — By Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 941; By States, see STATES; By United States, see UNITED STATES; Of Channels and Streams, see NAVIGABLE WATERS, 29 Cyc. 298. Indebtedness and Expenditures For, as Subject to Limitation, see MUNICIPAL CORPORATIONS, 28 Cyc. 969. In District of Columbia, see DISTRICT OF COLUMBIA, 14 Cyc. 534. Liability of City For — Negligence in Construction of, see MUNICIPAL CORPORATIONS, 28 Cyc. 1307; Negligent Acts or Omissions of Officers of Department of Public Works, see MUNICIPAL CORPORATIONS, 28 Cyc. 1269. Power of — City to Incur Indebtedness in Connection With, see MUNICIPAL CORPORATIONS, 28 Cyc. 1542; County to Issue Bonds For, see COUNTIES, 11 Cyc. 560. Use and Regulation of, see MUNICIPAL CORPORATIONS, 28 Cyc. 848.)

PUBLIC WORSHIP. The usual church services on the Sabbath, open freely to the public, and in which any one may join.[58] (Public Worship: Generally, see RELIGIOUS SOCIETIES. Constitutional Guaranty of Religious Liberty, see CONSTITUTIONAL LAW, 8 Cyc. 884. Disturbance of, see DISTURBANCE OF PUBLIC MEETINGS, 14 Cyc. 540.)

This term is said not to include: Public highway. McHugh *v.* Boston, 173 Mass. 408, 53 N. E. 905. Public lighting. Blank *v.* Kearny, 44 N. Y. App. Div. 592, 594, 61 N. Y. Suppl. 79 [*reversing* 28 Misc. 383, 59 N. Y. Suppl. 645].

Term said to be applicable to any constructive work of a public character and is not limited to fixed works. U. S. *v.* Ætna Indemnity Co., 40 Wash. 87, 93, 82 Pac. 171.

57. Century Dict. [*quoted* in Ellis *v.* Grand Rapids, 123 Mich. 567, 569, 82 N. W. 244; Winters *v.* Duluth, 82 Minn. 127, 130, 84 N. W. 788, where it is said to include "railways, docks, canals, waterworks, and roads"].

Seamen upon a government vessel, when engaged in removing obstructions to navigation in rivers and harbors, are employed upon "public works of the United States." U. S. *v.* Jefferson, 60 Fed. 736, 737.

58. Young Men's Christian Assoc. *v.* New York, 113 N. Y. 187, 190, 21 N. E. 86; People *v.* Neff, 34 N. Y. App. Div. 83, 86, 53 N. Y. Suppl. 1077.

It may mean the worship of God, conducted and observed under public authority; or it may mean worship in an open or public place, without privacy or concealment; or it may mean the performance of religious exercises under the provision for an equal right in the whole public to participate in its benefits; or it may be used in contradistinction to worship in the family or the closet. Atty.-Gen. *v.* Merrimack Mfg. Co., 14 Gray (Mass.) 586, 602, where it is said: "In this country, what is called public worship is commonly conducted by voluntary societies, constituted according to their own notions of ecclesiastical authority and ritual propriety, opening their places of worship, and admitting to their religious services such persons, and upon such terms, and subject to such regulations, as they may choose to designate and establish."

As applicable to a church of the Protestant Episcopal Church of the United States of North America, which accepts the doctrine of the inspiration of the Old and New Testaments and the divinity of Jesus Christ, this term means the assembling together of the members of that church in a congregation, together with others who may choose to come, for the purpose of worshiping God in accordance with the rules and regulations and religious forms of that organization. *In re* Walker, 200 Ill. 566, 573, 66 N. E. 144.

Building for public worship does not include: A building where it appears that the only religious services held therein are provided for the benefit of the occupants, and the public are expressly excluded from such services, except under pressing and peculiar circumstances. Colored Orphans' Ben. Assoc. *v.* New York, 104 N. Y. 581, 585, 12 N. E. 279. A parsonage or rectory belonging to a church. St. Peter's Church *v.* Scott County, 12 Minn. 395, 397; People *v.* O'Brien, 53 Hun (N. Y.) 580, 6 N. Y. Suppl. 862; People *v.* Collison, 6 N. Y. Suppl. 711; Gerke *v.* Purcell, 25 Ohio St. 229, 248. Property owned by a private person and occupied by a church building, which is not used for religious purposes. Black *v.* Brooklyn, 51 Hun (N. Y.) 581, 582, 4 N. Y. Suppl. 78.

PUBLIC WRITING. That which is made by a notary public in the presence of the parties who execute it, with the assistance of two witnesses.[59]

PUBLIC WRONG. A breach and violation of public rights and duties which affect the whole community, considered as a community;[60] a breach and violation of public rights and duties due to the whole community, considered as a community in its social, aggregate capacity.[61] (See CRIMINAL LAW, 12 Cyc. 70.)

PUBLISH. To make known;[62] to issue; to make known what before was private; to put into circulation;[63] to proclaim; to make known generally;[64] to send forth, as a book, newspaper, magazine, musical piece or other printed work, either for sale or for general distribution;[65] a word whose meaning depends upon the subject with which it is connected.[66] (See PUBLICATION, and Cross-References Thereunder; PUBLISHER; PUBLISHING, and Cross-References Thereunder.)

59. Salazar *v.* Longwill, 5 N. M. 548, 557, 25 Pac. 927.

60. Rhobidas *v.* Concord, 70 N. H. 90, 116, 47 Atl. 82, 85 Am. St. Rep. 604, 51 L. R. A. 381; Cullinan *v.* Burkhard, 41 Misc. (N. Y.) 321, 324, 84 N. Y. Suppl. 825 [*reversed* as to other matters in 93 N. Y. App. Div. 31, 86 N. Y. Suppl. 1003]; Huntington *v.* Attrill, 146 U. S. 657, 668, 13 S. Ct. 224, 36 L. ed. 1123.

61. Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 498, 3 L. R. A. 554.

Contempts of court are public wrongs.— *Ex p.* Hickey, 4 Sm. & M. (Miss.) 751, 783.

Distinguished from ordinary crimes and misdemeanors see *Ex p.* Hickey, 4 Sm. & M. (Miss.) 751, 783; Huntington *v.* Attrill, 146 U. S. 657, 668, 13 S. Ct. 224, 36 L. ed. 1123.

62. State *v.* Orange, 54 N. J. L. 111, 116, 22 Atl. 1004, 14 L. R. A. 62.

"Published" means made known to the public. In this sense the enrollment, in the English Patent Office, of a specification, is a publication of its contents. Plimpton *v.* Malcolmson, 3 Ch. D. 531, 557, 45 L. J. Ch. 505, 34 L. T. Rep. N. S. 340.

63. U. S. *v.* Williams, 3 Fed. 484, 486.

64. Watts *v.* Greenlee, 13 N. C. 115, 119.

65. Webster Dict. [*quoted* in McFarlane *v.* Hutton, [1899] 1 Ch. 884, 889, 68 L. J. Ch. 408, 80 L. T. Rep. N. S. 486, 47 Wkly. Rep. 507].

66. State *v.* Bass, 97 Me. 484, 489, 490, 54 Atl. 1113.

Applied to an advertising chart, with the insertion therein of a business card, the word "published" can have no fixed signification that the courts can apply to a contract but the meaning must be ascertained by the jury. Stoops *v.* Smith, 100 Mass. 63, 68, 97 Am. Dec. 76, 1 Am. Rep. 85.

Used with reference to a book, magazine, or newspaper, the common and universal, as well as technical meaning of the word is to issue, to send forth to the public for sale or general distribution. State *v.* Bass, 97 Me. 484, 490, 54 Atl. 1113.

As used in the copyright law, said to mean "publish in print." Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, 4 Phila. (Pa.) 157, 5 Pa. L. J. 501.

A dramatic composition is made public the moment it is represented or acted, and the ordinary meaning of "published" is "made public." Boucicault *v.* Chatterton, 5 Ch. D. 267, 279, 46 L. J. Ch. 305, 35 L. T. Rep. N. S. 745, 25 Wkly. Rep. 287.

A painting is published within the meaning of the copyright law, when publicly exhibited. Pierce, etc., Mfg. Co. *v.* Werckmeister, 72 Fed. 54, 58, 18 C. C. A. 431.

A libel may be published by delivering, selling, reading, or otherwise communicating it directly or indirectly to any person. State *v.* Bass, 97 Me. 484, 489, 54 Atl. 113. To publish a libel is to make it public. Sproul *v.* Pillsbury, 72 Me. 20, 21. "When it is communicated to some person, other than the plaintiff, who understands it, and not until then." Prescott *v.* Tousey, 50 N. Y. Super. Ct. 12, 14.

In slander "published" imports *ex vi termini,* an uttering of the words in the presence and hearing of others (Duel *v.* Agan, 1 Cope Rep. (N. Y.) 134); and is sufficient to convey the idea of giving publicity (Watts *v.* Greenlee, 13 N. C. 115, 118, the syllabus of the case to the contrary notwithstanding).

May be used in same sense as "printed."— Jackson *v.* Beatty, 68 Ark. 269, 373, 57 S. W. 799; Nebraska Land, etc., Inv. Co. *v.* McKinley-Lanning Loan, etc., Co., 32 Nebr. 410, 414, 72 N. W. 357.

Not synonymous with "printed."— A paper may be printed in one place and published in another. State *v.* Bass, 97 Me. 484, 490, 54 Atl. 1113; Hollis *v.* Hollis, 84 Me. 96, 97, 24 Atl. 581; Bragdon *v.* Hatch, 77 Me. 433, 434, 1 Atl. 140 [*criticized* in Nebraska Land, etc., Co. *v.* McKinley-Lanning Loan, etc., Co., 52 Nebr. 410, 414, 72 N. W. 357]; Blake *v.* Dennett, 49 Me. 102, 104.

A writing as well as a printing may be published. U. S. *v.* Loftis, 12 Fed. 671, 673, 8 Sawy. 194 [*overruled* (as to what constitutes a publication within the U. S. Rev. St. (1878) § 3893), in U. S. *v.* Gaylord, 17 Fed. 438, 443].

Duty to publish the laws, imposed by law on an official, includes the preparation of them for publication. Anderson *v.* Lewis, 6 Ida. 51, 55, 53 Pac. 163. Applied to laws, official rights, executive, legislative, and judicial proceedings, required by Ill. Const. Schedule, § 18, to be "published in no other than the English language," the term is not confined to publications in book or pamphlet form, but includes publications in newspapers. Chicago *v.* McCoy, 136 Ill. 344, 350, 26 N. E. 363, 11 L. R. A. 413.

PUBLISHER. One who makes a thing publicly known;[67] one who, by himself or his agent, makes a thing publicly known; one engaged in circulation of books, pamphlets, or other papers.[68] (See PUBLICATION; PUBLISH; PUBLISHING.)

PUBLISHING. Making known; divulging; proclaiming;[69] issuing; sending out; placing on sale;[70] putting forth; issuing to the public;[71] the act of offering a book to the public by sale or distribution.[72] (Publishing: In General, see NEWSPAPERS, 29 Cyc. 692. Advertisement — Of Auction Sale Not Sufficient Memorandum of Contract of Sale Made at, see FRAUDS, STATUTE OF, 20 Cyc. 254 note 63; Of Goods For Sale, see CONTRACTS, 9 Cyc. 278; Of Loss by Person Suing on Lost Instrument, see LOST INSTRUMENTS, 25 Cyc. 1614; Parol Evidence as to, see EVIDENCE, 17 Cyc. 522. Annual Report of Condition of Corporation, see CORPORATIONS, 10 Cyc. 866. Award of Arbitrators, see ARBITRATION AND AWARD, 3 Cyc. 670. Best and Secondary Evidence of Publication, see EVIDENCE, 17 Cyc. 496. Certificate, Affidavit, or Notice of Formation of Limited Partnership, see PARTNERSHIP, 30 Cyc. 754. Collateral Attack on Judgment Based on Defects in Service by Publication, see JUDGMENTS, 23 Cyc. 1076, 1084. Contracts For, see CONTRACTS, 9 Cyc. 280. Copyrighted Work, see COPYRIGHTS, 9 Cyc. 926. Counterfeit, see COUNTERFEITING, 11 Cyc. 308. Delinquent List, see TAXATION. Depositions After Return, see DEPOSITIONS, 13 Cyc. 967. Firm-Name, see PARTNERSHIP, 30 Cyc. 520. Forged Instrument, see FORGERY, 19 Cyc. 1388. Information Contained in Semiannual Directories and Weekly Bulletin Sheets as Constituting Violation of Injunctions, see INJUNCTIONS, 22 Cyc. 1016 note 20. Injunction Against Publication of Private Writings, see INJUNCTIONS, 22 Cyc. 899. Judgment on Service by Publication as Foundation For Execution, see EXECUTIONS, 17 Cyc. 931. Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 365. Marriage Banns, see MARRIAGE, 26 Cyc. 854. Means of Procuring Abortion, see ABORTION, 1 Cyc. 178. Municipal Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 359, 397, 398, 1694. Necessity and Sufficiency of Notice to Parties to Be Bound by Judgment In Rem, see JUDGMENTS, 23 Cyc. 1407. Notice — In General, see NOTICE, 29 Cyc. 1119; In Proceeding to Appoint Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 121; Of Appeal, see APPEAL AND ERROR, 2 Cyc. 871; Of Application For Discharge of Poor Debtor, see EXECUTIONS, 17 Cyc. 1551; Of Application For Liquor License, see INTOXICATING LIQUORS, 23 Cyc. 127; Of Assessment For Benefits From Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1148; Of Attachment. see ATTACHMENT, 4 Cyc. 815; Of Dissolution of Firm. see PARTNERSHIP, 30 Cyc. 671; Of Election, see ELECTIONS, 15 Cyc. 324; Of Election Under Local Option Law and of Result of Such Election, see INTOXICATING LIQUORS, 23 Cyc. 99, 103; Of Entry on Mortgaged Premises For Condition Broken, see MORTGAGES, 27 Cyc. 1441; Of Execution Sale, see EXECUTIONS, 17 Cyc. 1245; Of Foreclosure Sale. see MORTGAGES, 27 Cyc. 1471, 1689;

67. Sproul *v.* Pillsbury, 72 Me. 20, 21.

68. Bouvier L. Dict. [*quoted* in Le Roy *v.* Jamison, 15 Fed. Cas. No. 8,271, 3 Sawy. 369].

May be equivalent to proprietor (of newspaper). Stuart *v.* Cole, 42 Tex. Civ. App. 478, 482, 92 S. W. 1040; Palmer *v.* McCormick, 28 Fed. 541, 544. And may apply to manufacturers and distributers of books, pamphlets, etc. Zugalla *v.* International Mercantile Agency, 142 Fed. 927, 931, 74 C. C. A. 97.

"Printer" and "publisher" (of a paper) may be synonymous. People *v.* Thomas, 101 Cal. 571, 574, 36 Pac. 9; Sharp *v.* Daugney, 33 Cal. 505, 513; Kipp *v.* Cook, 46 Minn. 535, 537, 49 N. W. 257; Menard *v.* Crowe, 20 Minn. 448; Bunce *v.* Reed, 16 Barb. (N. Y.) 347, 350; Pennoyer *v.* Neff, 95 U. S. 714, 721, 24 L. ed. 565.

69. Burton *v.* Burton, 3 Greene (Iowa) 316, 318.

70. Standard Dict. [*quoted* in Mooney *v.* U. S. Industrial Pub. Co., 27 Ind. App. 407, 61 N. E. 607, 608].

71. Mooney *v.* U. S. Industrial Pub. Co., 27 Ind. App. 407, 61 N. E. 607, 608.

Principally engaged in publishing.— The principal and general purpose of one so engaged is the manufacturing and issuing from the press and putting upon the market for sale books and pamphlets as such, not the collecting and arranging and tabulating the contents of such books. Zugalla *v.* International Mercantile Agency, 142 Fed. 927, 931, 74 C. C. A. 97.

72. Webster Dict. [*quoted* in Mooney *v.* U. S. Industrial Pub. Co., 27 Ind. App. 407, 61 N. E. 607, 608].

Of Judicial Sale, see JUDICIAL SALES, 24 Cyc. 18; Of Proposed Public Improvement or Resolution, see MUNICIPAL CORPORATIONS, 28 Cyc. 983; Of Sale of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 731; Of Sale Under Power in Mortgage, see MORTGAGES, 27 Cyc. 1471; Of Taking Deposition, see DEPOSITIONS, 13 Cyc. 912; Of Tax-Sale, see TAXATION; To Redeem from Tax-Sale, see TAXATION. Obscene Publication, see OBSCENITY, 29 Cyc. 1318. Order Appointing Special Term of Court, see COURTS, 11 Cyc. 731. Ordinance or Resolution of County Board, see COUNTIES, 11 Cyc. 402. Ordinance, Resolution, or Order For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1007. Patentability of Invention Formerly Described in Printed Publication, see PATENTS, 30 Cyc. 830, 837. Proceedings For Sale of Land For Assessments For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1148. Process — In Actions Against Infants, see INFANTS, 22 Cyc. 679; In Actions in Justices' Courts, see JUSTICES OF THE PEACE, 24 Cyc. 524; In Garnishment, see GARNISHMENT, 20 Cyc. 1056; To Sustain Decree Pro Confesso, see EQUITY, 16 Cyc. 490. Proposed Constitutional Amendment, see CONSTITUTIONAL LAW, 8 Cyc. 723. Publication — Constituting Contempt of Court, see CONTEMPT, 9 Cyc. 20; Of Advertisement in Sunday Newspaper, Contract For Illegal, see NEWSPAPERS, 29 Cyc. 701; Of Certificate of Partnership, see PARTNERSHIP, 30 Cyc. 420; Of Citation or Notice in Proceedings For Sale of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 761; Of Facts as Constructive Notice Thereof, see NOTICE, 29 Cyc. 1116; Of List of Jurors Drawn to Constitute Panel, see JURIES, 24 Cyc. 222; Of Notice of Sale by Guardian Under Order of Court, see GUARDIAN AND WARD, 21 Cyc. 133. Right to — Control Publication of Literary Property, and Dedication Thereof to Public by Publication Thereof, see LITERARY PROPERTY, 25 Cyc. 1495; Defend After Judgment on Service by Publication, see JUDGMENTS, 23 Cyc. 915; Mandamus to Compel Publication of Laws, Records, and Official Statements, see MANDAMUS, 26 Cyc. 288. Schedules of Carrier's Charges, see CARRIERS, 6 Cyc. 492. Special Municipal Charter or Act, see MUNICIPAL CORPORATIONS, 28 Cyc. 155. Testimony in Equity Taken by Depositions, see EQUITY, 16 Cyc. 376. Time For Taking Judgment by Default Where Service Is by Publication, see JUDGMENTS, 23 Cyc. 756. Will, see WILLS. Writ of Attachment, see ATTACHMENT, 4 Cyc. 542. See also PUBLICATION, and Cross-References Thereunder; PUBLISH; PUBLISHER.)

PUDDINE. An arbitrary word symbol applied to a prepared food.[73] (See, generally, TRADE-MARKS AND TRADE-NAMES.)

PUDDING. Flour or meal mixed with a variety of ingredients, and usually sweetened.[74]

PUEBLO. A word which, in its original signification, means people or population;[75] answers generally to the English word "town"[76] and has the indefiniteness of that term;[77] and may designate a collection of individuals residing at a particular place, a settlement or a village, or may be applied to a regularly organized municipality.[78] In Spanish law, people; all the inhabitants of any country or place, without distinction; a town, township, or municipality.[79] (See PUEBLO INDIANS; and, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 55; TOWNS.)

PUEBLO INDIANS. A civilized race, dwelling in fixed communities, each having its own municipal government; pastoral, agricultural, not without the

73. Clotworthy *v.* Schepp, 42 Fed. 62.

74. Clotworthy *v.* Schepp, 42 Fed. 62, 63.

75. Trenouth *v.* San Francisco, 100 U. S. 251, 25 L. ed. 626.

76. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 372, 18 L. ed. 863 [*cited* in Trenouth *v.* San Francisco, 100 U. S. 251, 25 L. ed. 626].

77. Trenouth *v.* San Francisco, 100 U. S. 251, 25 L. ed. 626.

78. Grisar *v.* McDowell, 6 Wall. (U. S.) 363, 372, 18 L. ed. 863 [*cited* in Trenouth *v.* San Francisco, 100 U. S. 251, 25 L. ed. 626].

79. Black L. Dict.

Pueblos under the Mexican law were simply part of the political government of the country, and as political agencies the state succeeded to control over them upon the change of government. Whatever property they had, incidental to their existence as pueblos, was held as a municipal trust for the public use of the pueblos. As such agen-

art of manufacturing, peaceable, industrious, intelligent, honest, and virtuous.[80] (See INDIANS, 22 Cyc. 114 note 18; PUEBLO.)

PUERI SUNT DE SANGUINE PARENTUM, SED PATER ET MATER NON SUNT DE SANGUINE PUERORUM. A maxim meaning "Children are of the blood of their parents, but the father and mother are not of the blood of the children."[81]

PUFFER. (Puffer: In General, see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1045 note 40. Employment of Puffers to Enhance Price at — Auction Sales, see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1045; Judicial Sales, see JUDICIAL SALES, 23 Cyc. 28; Partition Sales, see PARTITION, 30 Cyc. 275 note 35.)

PUIS DARREIN CONTINUANCE. Since the last adjournment;[82] a pleading of facts occurring since the last stage of the suit, whatever that stage may be, provided it precedes the trial.[83] (Puis Darrein Continuance: Award as Bar to Further Maintenance of Action, see ARBITRATION AND AWARD, 3 Cyc. 729. Plea of — In General, see PLEADING, 31 Cyc. 493; In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 562; In Mandamus Proceeding, see MANDAMUS, 26 Cyc. 458; On Trial of Cause Anew on Appeals From Justices of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 731.)

PUISNE. Younger;[84] subordinate; associate;[85] later in time.[86]

PULL. As a noun, in slang, something in one's favor in a comparison or a contest; an advantage; means of influencing.[87] As a verb, to drag.[88]

PULLICAN. A horrid instrument formerly used for extracting teeth by main force.[89]

PULLUS. Latin for the young of any thing.[90]

PULP. See WOOD PULP.

PULSATORY CURRENT. Of electricity, one caused by sudden or instantaneous changes of intensity.[91]

PUNCTUATION. The division of a written or printed document into sentences by means of periods; and of sentences into smaller divisions by means of commas, semi-colons, colons, etc.[92] (Punctuation: Affecting Constitution — Of Contract,

cies, the state (California) was under no obligation to continue their existence. In the exercise of her sovereign power she could have abolished them altogether or have incorporated them into her own scheme of government as municipalities with such powers and restrictions as she might see fit to impose upon them. Monterey *v.* Jacks, 139 Cal. 542, 555, 73 Pac. 436.

80. See U. S. *v.* Lucero, 1 N. M. 422, 453 [*quoted* in U. S. *v.* Joseph, 94 U. S. 614, 616, 24 L. ed. 295].

Not tribal Indians within the contemplation of United States Indian laws see U. S. *v.* Varela, 1 N. M. 593, 597 [*affirmed* in 94 U. S. 614, 24 L. ed. 295]; U. S. *v.* Santistevan, 1 N. M. 583, 586 [*affirmed* in 94 U. S. 619 note]; U. S. *v.* Lucero, 1 N. M. 422, 425. See also INDIANS, 22 Cyc. 114 note 18.

81. Black L. Dict.

Applied in Ratcliff's Case, 3 Coke 37*a*, 40*b*, 76 Eng. Reprint 713.

82. 3 Blackstone Comm. 316 [*cited* in Black L. Dict.].

83. Waterbury *v.* McMillan, 46 Miss. 635, 640.

84. Black L. Dict.; Burrill L. Dict.

85. Black L. Dict.

"**The title** by which the justices and barons of the several common-law courts at Westminster are distinguished from the 'chief' justice and 'chief' baron." Black L. Dict.; Burrill L. Dict.

86. Burrill L. Dict., giving as examples: "A *puisne* incumbrance" (March *v.* Lee 3 Ch. Rep. 62, 21 Eng. Reprint 729); "a *puisne* incumbrancer" (Brace *v.* Marlborough, 2 P. Wms. 495, 24 Eng. Reprint 829); "a *puisne* judgment creditor."

87. Webster Int. Dict.

"**Possessed of a pull**" is a phrase without intelligible meaning, too doubtful to impute corruption. Percival *v.* State, 45 Nebr. 741, 746, 64 N. W. 221, 50 Am. St. Rep. 568 [*approved* in Rosewater *v.* State, 47 Nebr. 630, 635, 66 N. W. 640].

88. Des Allemands Lumber Co. *v.* Morgan City Timber Co., 117 La. 1, 7, 41 So. 332.

To pull timber means to drag it, from where it has been felled, to the water on which it is to be floated to the sawmill. Des Allemands Lumber Co. *v.* Morgan City Timber Co., 117 La. 1, 7, 41 So. 332.

89. *In re* Hunter, 60 N. C. 372, 373.

90. Anonymous, 1 Lev. 48.

91. Telephone Cases, 126 U. S. 1, 531, 8 S. Ct. 778, 31 L. ed. 863.

92. Black L. Dict.

Erroneous punctuation does not always vitiate indictment see BURGLARY, 6 Cyc. 199, 200 [*cited* in State *v.* Lovelace, 29 Nev. 43, 48, 83 Pac. 330].

No part of the English language see Holmes *v.* Phenix Ins. Co., 98 Fed. 240, 241, 39 C. C. A. 45, 47 L. R. A. 308.

As affecting construction.— "Punctuation marks may, in proper cases, be regarded as aids in arriving at the correct meaning of

see CONTRACTS, 9 Cyc. 586; Of Deed, see DEEDS, 13 Cyc. 605; Of Statute, see STATUTES; Of Will, see WILLS. Mistakes in, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 292. See also COMMA, 7 Cyc. 405.)

PUNISH. To impose a penalty upon; to afflict with pain or loss or suffer for a crime or fault; to inflict a penalty for (an offense) upon the offender;[93] to impose a penalty for the commission of a crime.[94] (See PUNISHABLE; PUNISHMENT, and Cross-References Thereunder.)

PUNISHABLE. Liable to punishment;[95] deserving of or liable to punishment,[96] which may be, not only which must be, punished.[97] (See PUNISH; PUNISHMENT, and Cross-References Thereunder.)

PUNISHMENT. Pain, suffering, or loss inflicted on a person because of a crime or offense;[98] the penalty for the transgression of the law;[99] a term frequently used as synonymous with "forfeiture,"[1] "liability,"[2] or "penalty."[3] (Punish-

statements in the statute, but in construing statutes, punctuation cannot be accorded a controlling influence. Courts do not hesitate to repunctuate, when it is necessary to arrive at the true meaning." Cook *v.* State, 110 Ala. 40, 46, 20 So. 360. "The law-maker may not punctuate correctly, and yet may clearly express his meaning. . . . Statutes in the course of legislative procedure are read to the General Assembly, and, as is said, they apprehend them by the ear, not by the eye, which alone can take cognizance of punctuation. . . . The punctuation is not their work; to it their attention is not directed. It is most often the work of the draftsman, and not infrequently of the clerk entrusted with the duty of copying, or of the printer in publishing. The ancients were unacquainted with it, and it varies now according to the tastes of scholars and of writers. Resort to it is never had in the construction of statutes, and it is of very doubtful use in the construction of writings between individuals. In 3 Dane Abr. 558, it is said: 'Stops are never inserted in statutes or deeds, but the courts of law in construing them must read them with such stops as will give effect to the whole.' The legislative intention, expressed in the clearest words, would often be defeated if the courts did not disregard the punctuation, and read their enactments as if they were properly pointed." Danzey *v.* State, 68 Ala. 296, 298. "Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it." Ewing *v.* Burnet, 11 Pet. (U. S.) 41, 54, 9 L. ed. 624.

"There is still much uncertainty and arbitrariness in punctuation." Century Dict. [*quoted* in Holmes *v.* Phenix Ins. Co., 98 Fed. 240, 241, 39 C. C. A. 45, 47 L. R. A. 308].

93. Webster Dict. [*quoted* in Bradley *v.* State, 111 Ga. 168, 172, 36 S. E. 630, 78 Am. St. Rep. 157, 50 L. R. A. 691].

94. Anderson L. Dict. [*quoted* in Bradley *v.* State, 111 Ga. 168, 172, 36 S. E. 630, 78 Am. St. Rep. 157, 50 L. R. A. 691].

95. Com. *v.* Pemberton, 118 Mass. 36, 42, holding also that the expression "punishable with imprisonment for life" is broad enough to include every crime for which on conviction the guilty party is liable to such imprisonment.

96. Webster Dict. [*quoted* in Hicks *v.* State, 150 Ind. 293, 297, 50 N. E. 27].

97. State *v.* Neuner, 49 Conn. 232, 233 [*quoted* in People *v.* Keating, 61 Hun (N. Y.) 260, 263, 16 N. Y. Suppl. 748, 10 N. Y. Crim. 48] (where it is said: "The meaning of the word 'punishable' is not 'must be punished,' but 'liable' to be so punished"); Smith *v.* Com., 100 Ky. 133, 136, 37 S. W. 586, 18 Ky. L. Rep. 652; State *v.* Mayberry, 48 Me. 218, 236; People *v.* Hughes, 137 N. Y. 29, 34, 32 N. E. 1105 (where the term is said to refer to the possible, not the actual, sentence); Benton *v.* Com., 89 Va. 570, 572, 16 S. E. 725; *In re* Mills, 135 U. S. 263, 266, 10 S. Ct. 762, 34 L. ed. 107; U. S. *v.* Watkinds, 6 Fed. 152, 160, 7 Sawy. 85 (where it is said: "The phrase 'is punishable' cannot be construed to mean more or less than 'may be punished,' or 'liable to be punished'"). *Compare*, however, Hicks *v.* State, 150 Ind. 293, 296, 297, 50 N. E. 27, where "punishable by imprisonment in the state's prison" is held to include all that class of felonies where imprisonment in the state's prison is the necessary part of the punishment prescribed in cases where such is the actual sentence, but not those where such punishment may be, but is not, accorded by the court or jury.

An offense may be punishable with either of two penalties.—Miller *v.* State, 58 Ga. 200, 203.

98. Webster Dict. [*quoted* in State *v.* Walbridge, 119 Mo. 383, 390, 24 S. W. 457, 41 Am. St. Rep. 663].

99. People *v.* Monroe County Ct. of Sessions, 19 N. Y. Suppl. 508, 510.

1. Featherstone *v.* People, 194 Ill. 325, 334, 62 N. E. 684.

2. Featherstone *v.* People, 194 Ill. 325, 334, 62 N. E. 684.

3. State *v.* Walbridge, 119 Mo. 383, 390, 24 S. W. 457, 41 Am. St. Rep. 663. See also Featherstone *v.* People, 194 Ill. 325, 334, 62 N. E. 684.

Punishment not corporeal is a fine, forfeiture, suspension, or deprivation of some political or civil right. State *v.* Walbridge, 119 Mo. 383, 390, 24 S. W. 457, 41 Am. St.

ment: In General, see CRIMINAL LAW, 12 Cyc. 953. Assessment, see CRIMINAL LAW, 12 Cyc. 593–594 text and notes 96–2; FINES, 19 Cyc. 547 text and notes 12–18. Competency of Juror as Depending on Personal Opinions and Conscientious Scruples as to Punishment Prescribed For Offense, see JURIES, 24 Cyc. 306. Constitutional Guaranty Against Imprisonment For Debt, see CONSTITUTIONAL LAW, 8 Cyc. 879. Corporal Punishment of — Pupil, see SCHOOLS AND SCHOOL-DISTRICTS; Servants, see MASTER AND SERVANT, 26 Cyc. 1022. Defined, see CRIMINAL LAW, 12 Cyc. 953. Effect of as to Forfeiture of Property, see INTERNAL REVENUE, 22 Cyc. 1691. Establishment and Regulation of Places of, see PRISONS, *ante*, p. 312; REFORMATORIES. *Ex Post Facto* Laws and Bills of Attainder, see CONSTITUTIONAL LAW, 8 Cyc. 1017. Extent of in Disbarment Proceedings, see ATTORNEY AND CLIENT, 4 Cyc. 916. Failure to Make Return, and For False, Evasive, or Defective Return to Writ of Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 320. Fine, see FINES, 19 Cyc. 543. For Common Offenses, see ADULTERY, 1 Cyc. 966; ARSON, 3 Cyc. 1010; ASSAULT AND BATTERY, 3 Cyc. 1063; BARRATRY, 5 Cyc. 620; BASTARDS, 5 Cyc. 670; BIGAMY, 5 Cyc. 704; BREACH OF THE PEACE, 5 Cyc. 1028; BRIBERY, 5 Cyc. 1048; BURGLARY, 6 Cyc. 257; CHAMPERTY AND MAINTENANCE, 6 Cyc. 887; COMMON SCOLD, 7 Cyc. 393; CONSPIRACY, 8 Cyc. 690; COUNTERFEITING, 11 Cyc. 323; CONTEMPT, 9 Cyc. 33; DISORDERLY CONDUCT, 14 Cyc. 478; DISORDERLY HOUSES, 14 Cyc. 514; DRUNKARDS, 14 Cyc. 1096; EMBEZZLEMENT, 15 Cyc. 537; EMBRACERY, 15 Cyc. 542; ESCAPE, 16 Cyc. 547; EXTORTION, 19 Cyc. 43; FALSE PRETENSES, 19 Cyc. 447; FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1118; FORGERY, 19 Cyc. 1429; FORNICATION, 19 Cyc. 1443; GAMING, 20 Cyc. 917; HOMICIDE, 21 Cyc. 1080, 1085; LARCENY, 25 Cyc. 158; LEWDNESS, 25 Cyc. 217; LIBEL AND SLANDER, 25 Cyc. 567; NUISANCES, 29 Cyc. 1278; MALICIOUS MISCHIEF, 25 Cyc. 1686; MAYHEM, 26 Cyc. 605; OBSTRUCTING JUSTICE, 29 Cyc. 1333; PERJURY, 30 Cyc. 1459; RAPE; RECEIVING STOLEN GOODS; ROBBERY; SEDUCTION. Forfeiture, see FORFEITURES, 19 Cyc. 1355. For Juvenile Offenses, see INFANTS, 22 Cyc. 622. For Military Offenses, see ARMY AND NAVY, 3 Cyc. 843. For Misconduct in Public Office, see JUSTICES OF THE PEACE, 24 Cyc. 432; MUNICIPAL CORPORATIONS, 28 Cyc. 478; OFFICERS, 29 Cyc. 1449. For Obstructing Highway, see STREETS AND HIGHWAYS. For Procuring False Affidavits Concerning Pension Claims, see PENSIONS, 30 Cyc. 1375. For Violation — Of Election Laws, see ELECTIONS, 15 Cyc. 442; Of Food Laws, see FOOD, 19 Cyc. 1097; Of Injunction, in General, see INJUNCTIONS, 22 Cyc. 1009; Of Injunction Against Infringement of Patents, see PATENTS, 30 Cyc. 1016; Of Injunction Against Liquor Nuisance, see INTOXICATING LIQUORS, 23 Cyc. 288; Of Laws Against Lotteries, see LOTTERIES, 25 Cyc. 1647; Of Laws Relating to Animals, see ANIMALS, 2 Cyc. 427; Of License Laws, see LICENSES, 25 Cyc. 635; Of Liquor Laws, see INTOXICATING LIQUORS, 23 Cyc. 172; Of Order or Subpœna in Supplementary Proceedings, see EXECUTIONS, 17 Cyc. 1480; Of Police Regulation, see MUNICIPAL CORPORATIONS, 28 Cyc. 692; Of Postal Laws, see POST-OFFICE, 31 Cyc. 1000; Of Writ of Mandamus, see MANDAMUS, 26 Cyc. 498. Imputation of Crime as Constituting Libel or Slander as Dependent on Character of, see LIBEL AND SLANDER, 25 Cyc. 273. Nature as Determining — Necessity of Prosecution by Indictment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 178; Whether or Not a Crime Is Infamous, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 184. Pardon, see PARDONS, 29 Cyc. 1558. Penalties, see PENALTIES, 30 Cyc. 1331.)

PUNITIVE DAMAGES. See PUNITORY DAMAGES; and, generally, DAMAGES, 13 Cyc. 105.

PUNITORY DAMAGES. A class of damages otherwise designated as "smart money," "speculative," "imaginary," "presumptive," "exemplary," "vindictive," and "punitive" damages;[4] such as may be awarded only when the wrong is shown to be malicious, and ought to be assessed by the jury in their

Rep. 663; Bouvier L. Dict. [*quoted* in State *v.* Grant, 79 Mo. 113, 129, 49 Am. Rep. 218].

4. Murphy *v.* Hobbs, 7 Colo. 541, 546, 6 Pac. 119, 49 Am. Rep. 366.

sound discretion, without bias or feeling according to the malignity shown, and in such reasonable sum as will tend to prevent future evils of like kind and degree;[5] as distinguished from actual damages, those given by way of punishment by example, when it is found that the acts of the defendant, tending to the injury of the plaintiff, are wilful, wanton or malicious.[6] (See Damages, 13 Cyc. 105, text and note 74 *et seq.*)

PUPIL. A youth or any person of either sex under the care of an instructor or tutor;[7] a youth or scholar of either sex under the care of an instructor or tutor.[8] (Pupil: In General, see Schools and School-Districts. College Student, see Colleges and Universities, 7 Cyc. 288. United States Naval Cadet, see Army and Navy, 3 Cyc. 836.)

PUPILLUS PATI POSSE NON INTELLIGITUR. A maxim meaning "A pupil or infant is not supposed to be able to suffer, that is, to do an act to his own prejudice."[9]

PUR AUTRE VIE. See Pour Autre Vie, 31 Cyc. 1031.

PUR CAUSE DE VICINAGE. By reason of vicinity.[10]

PURCHASE. A word with two significations — a popular but restricted one, and a legal but enlarged one.[11] As a noun, in its popular and more limited sense: acquisition by way of bargain and sale or other valuable consideration, the transmission of property from one person to another by their voluntary act and agreement, founded upon a valuable consideration;[12] the buying of real estate and of

5. Wimer *v.* Allbaugh, 78 Iowa 79, 82, 42 N. W. 587, 16 Am. St. Rep. 422.

6. See Grace *v.* McArthur, 76 Wis. 641, 654, 45 N. W. 518.

7. Century Dict. [*quoted* in Marshall County *v.* Burkey, 1 Ind. App. 565, 27 N. E. 1108, 1109].

Does not apply to insane persons in hospitals.— Marshall County *v.* Burkey, 1 Ind. App. 565, 27 N. E. 1108, 1109.

A word of much broader signification than "children," and substituted therefor in an ordinance, with intent that it should embrace classes of young persons receiving instruction at more advanced institutions of learning, who would not be aptly described as "children going to and from school." Northrop *v.* Richmond, 105 Va. 335, 338, 53 S. E. 962.

8. Webster Int. Dict. [*quoted* in Marshall County *v.* Burkey, 1 Ind. App. 565, 27 N. E. 1108, 1109].

9. Burrill L. Dict. [*quoted* in 2 Kent Comm. 245].

10. See Coke Litt. 122*a* [*quoted* in Thomas *v.* Marshfield, 13 Pick. (Mass.) 240, 249].

11. Enterprise *v.* Smith, 62 Kan. 815, 817, 62 Pac. 324.

Contrasted.— In the provision "no purchase shall be made of stock of any company which has not regularly paid dividends," etc., the word is not used in the broad sense of "acquire," but in the more popular sense which makes it the correlative of the word "sell," and does not include subscription to unissued stock. Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673, 683, 685, 53 Atl. 842. In common parlance the word "has a much more restricted meaning than in its legal or technical sense, according to the common law, when applied to the acquisition of an estate or interest in land." Priest *v.* Cummings, 20 Wend. (N. Y.) 338, 349.

Of personalty, as distinguished from realty. — "There is a technical meaning given in the law to the word 'purchase,' as applied to real estate, wider than its general signification; it is the acquisition of lands by other means than descent or inheritance. As applied to personalty, it is the acquisition of anything for a price, by the payment of money or its equivalent." Berger *v.* U. S. Steel Corp., 63 N. J. Eq. 809, 817, 53 Atl. 68.

By occupancy or reclaiming.— "Britton speaks of purchasing by occupancy. He says purchase may be made even by shutting up bees, fish, or other wild animals." Kinne *v.* Kinne, 45 How. Pr. (N. Y.) 61, 65.

Purchase for value see McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 491, 18 Am. Dec. 516, the following passage: "But it is said that the word 'purchase' has another meaning, and is understood in its popular sense to be the acquisition of property by one person from another for a valuable consideration; and it is contended that the term is to be taken in that limited sense as being the common acceptation of it. One answer to this may be, that the legislature has not indicated any intention to confine the signification of the word to such narrow limits; and being used without explanation, the rule is, that it is to be understood in the sense the law attaches to it. Besides, what reason is there for limiting it to purchases for value?"

Contract for purchase.— Within Tex. Rev. St. art. 4691, providing that property held under contract for the purchase thereof shall be taxed as of the holder, the word is not used in the broad sense of all manner of acquisition except inheritance. Taylor *v.* Robinson, 34 Fed. 678, 681.

12. Anderson L. Dict. [*quoted* in Cobb *v.* Webb, 26 Tex. Civ. App. 467, 470, 64 S. W. 792].

In its vulgar and confined acceptation it is "applied only to such acquisitions of lands as are obtained by way of bargain and sale for money, or some other valuable considera-

goods and chattels;[13] that which is obtained for a price in money or its equivalent;[14] acquisition for a valuable consideration;[15] bargain.[16] In its technical and larger sense, in case of land, the act of obtaining or acquiring title to lands and tenements by money, deed, gift or any means, except by descent;[17] the acquisition of land by any lawful act of the party, in contradistinction to acquisition by operation at law, including title by deed, by matter of record, and by devise;[18] a method of acquiring title vested in a man by his own act or agreement

tion." 2 Black Comm. 241 [*quoted* in Purcell *v.* Smidt, 21 Iowa 540, 546; Enterprise *v.* Smith, 62 Kan. 815, 817, 62 Pac. 324]. The word in its common sense means "no more than when a man gives money for anything." Martin *v.* Strachan, 1 Wils. K. B. 66, 2 Rev. Rep. 552 note.

In connection with bona fide purchaser "the term . . . is ambiguous; it may be understood as alluding to the time of the agreement to purchase, and not to the time of executing the deed." Dean *v.* Anderson, 34 N. J. Eq. 496, 504.

Applied to a play the word means acquisition from other or owner of right to use it upon payment of a stipulated royalty. Sanger *v.* French, 157 N. Y. 213, 221, 51 N. E. 979.

13. Purcell *v.* Smidt, 21 Iowa 540, 546.

Implies purchase in fee see Hurst *v.* Dippo, 1 Dall. (Pa.) 20, 21, 1 L. ed. 19.

"The very idea of purchase imports a sale." — Matter of White Plains Water Com'rs, 71 N. Y. App. Div. 544, 549, 76 N. Y. Suppl. 11 [*reversed* on other grounds in 176 N. Y. 239, 68 N. E. 348].

Distinguished from "discount" in banking see Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 206, 23 Am. Rep. 683.

May include liability either express or implied upon a book-account for goods sold and delivered. See A. H. Davenport Co. *v.* Addicks, 5 Pennew. (Del.) 4, 57 Atl. 532, 533.

14. Webster Dict. [*quoted* in Hamilton *v.* Gray, 67 Vt. 233, 237, 31 Atl. 315, 48 Am. St. Rep. 811].

In a power given by charter to a corporation to take by direct purchase or otherwise, the word "purchase" must be taken to have been used in its popular sense and not to include acquisition by will. Downing *v.* Marshall, 23 N. Y. 366, 388, 80 Am. Dec. 290.

15. See Farrington *v.* Wilson, 29 Wis. 382, 392, where it is said: "'As used in common parlance, not' in its 'technical sense, purchase' is the acquisition of lands 'for a valuable consideration.'"

As used in an act exempting from taxation "the property of all Indians who are not citizens, except lands held by them by purchase," purchase is construed in its ordinary sense — that is acquisition for value, and therefore lands held by gift from the original tribes, with the consent of and patent from the United States, are not held by purchase and are exempted. Farrington *v.* Wilson, 29 Wis. 383, 392.

In act of parliament (1871), § 7, empowering trades unions to purchase or take upon lease land not exceeding one acre, purchase does not mean "acquire otherwise than by descent or escheat" and so does not include acquisition by devise. *In re* Amos, [1891] 3 Ch. 159, 165, 60 L. J. Ch. 570, 65 L. T. Rep. N. S. 69, 39 Wkly. Rep. 550.

16. Webster L. Dict. [*quoted* in Halff *v.* O'Connor, 14 Tex. Civ. App. 191, 196, 37 S. W. 238].

17. Webster Dict. [*quoted* in Falley *v.* Gribling, 128 Ind. 110, 115, 26 N. E. 794, and *cited* in Hale *v.* Heaslip, 16 Iowa 451, 456].

Like definitions are: "Every other mode of acquiring property as distinguished from descent." Jones *v.* Minogue, 29 Ark. 637, 645. "The acquisition of real estate by any means whatever, except descent." Farrington *v.* Wilson, 29 Wis. 383, 392.

The term includes: Every lawful method of coming to an estate by the act of a party as opposed to act of law. Burt *v.* Merchants' Ins. Co., 106 Mass. 356, 364, 8 Am. Rep. 339. Every mode of acquiring land, except by descent. Stamm *v.* Bostwick, 122 N. Y. 48, 51, 25 N. E. 233, 9 L. R. A. 597. All modes of acquiring property, except by descent. McCartee *v.* Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 491, 18 Am. Dec. 516. All modes of acquisition, except that by descent. Hackett *v.* Emporium Borough School-Dist., 150 Pa. St. 220, 226, 24 Atl. 627. All lawful acquisition of real estate by any means whatever, except by descent. 2 Blackstone Comm. 241 [*quoted* in Purcell *v.* Smidt, 21 Iowa 540, 546; Watson *v.* Donnelly, 28 Barb. (N. Y.) 653, 658]; Bouvier L. Dict. [*quoted* in Purcell *v.* Smidt, 21 Iowa 540, 546; Hale *v.* Heaslip, 16 Iowa 451, 456; Porter *v.* Green, 4 Iowa 571, 575; Gere *v.* Cushing, 5 Bush (Ky.) 304, 306]. All titles except such as are acquired by descent or by mere operation of law. Hall *v.* Hall, 81 N. Y. 130, 134 [*cited* in Stamm *v.* Bostwick, 40 Hun (N. Y.) 35, 38 [*affirmed* in 122 N. Y. 48, 25 N. E. 233, 9 L. R. A. 597)]. Every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law. Bouvier L. Dict.; Blackstone Comm. [both *quoted* in Enterprise *v.* Smith, 62 Kan. 815, 817, 62 Pac. 324]; Burrill L. Dict. [*quoted* in Strough *v.* Wilder, 119 N. Y. 530, 535, 23 N. E. 1057, 7 L. R. A. 555]; Washburn Real Prop. § 1824 [*cited* in Falley *v.* Gribling, 128 Ind. 110, 115, 116, 26 N. E. 794; Roberts *v.* Shroyer, 68 Ind. 64, 68; Stamm *v.* Bostwick, 122 N. Y. 48, 51, 25 N. E. 233, 9 L. R. A. 597]. Every mode of coming to an estate, except by inheritance. Greer *v.* Blanchar, 40 Cal. 194, 197.

18. Anderson L. Dict. [*quoted* in Cobb *v.* Webb, 26 Tex. Civ. App. 467, 64 S. W. 792].

as distinguished from descent; [19] the acquisition of property by a party's own act as distinguished from acquisition by act of law; [20] an acquisition either from an ancestor or any other person by deed, will, or gift, and not as heir at law; [21] possession to which a man cometh not by title of descent.[22] As a verb, to buy, to obtain property by paying an equivalent in money; [23] to obtain or secure as one's own by paying or promising to pay a price; [24] to buy; [25] to bargain for.[26] The verb in its technical, broader sense, refers to all titles including those by devise acquired

As source of intestate's title see DESCENT AND DISTRIBUTION, 14 Cyc. 32, 33.

Distinguished from "descent" see DESCENT AND DISTRIBUTION, 14 Cyc. 14 note 1.

Includes taking by eminent domain see Burt *v.* Merchants' Ins. Co., 106 Mass. 356, 362–364, 8 Am. Rep. 339. *Compare*, however, Kohl *v.* U. S., 91 U. S. 367, 374, 23 L. ed. 449, where it is said: "It is true the words 'to purchase' might be construed as including the power to acquire by condemnation; for technically, purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical only as meaning acquisition by contract between the parties, without governmental interference."

Words of purchase are words designating a particular class, who are to take, not through or from an ancestor, but from the grantor or devisor. May *v.* Ritchie, 65 Ala. 602, 604.

The doctrine that a mortgage of real estate is a purchase, within the meaning of recording laws, can have no application in jurisdictions where mortgage conveys no title. Hitchcock *v.* Nixon, 16 Wash. 281, 288, 47 Pac. 412.

Time of purchase.— With reference to purchase, without notice, the time may be when the contract for the purchase is made. Moore *v.* Mayhow, 1 Ch. Cas. 34, 22 Eng. Reprint 680, Freem. 175, 22 Eng. Reprint 680.

19. See 2 Blackstone Comm. 201 [*quoted* in Allen *v.* Bland, 134 Ind. 78, 80, 33 N. E. 774].

20. Burrill L. Dict. [*quoted* in Kinne *v.* Kinne, 45 How. Pr. (N. Y.) 61, 65].

Borrowing may be purchase since a title rests in the borrower, when borrowing is a mode other than by the act of law. Kinne *v.* Kinne, 45 How. Pr. (N. Y.) 61, 65.

Distinguished from "barter" see Labaree *v.* Klosterman, 33 Nebr. 150, 167, 49 N. W. 1102.

Distinguished from "discount" in banking see Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 206, 23 Am. Rep. 683. In reference to transfer of negotiable paper a term correlative with discount see Niagara County Bank *v.* Baker, 15 Ohio St. 68, 74.

21. Priest *v.* Cummings, 20 Wend. (N. Y.) 338, 349.

Taking by purchase as heir.— To take by purchase under will by the description of the heirs male, one must be right heir as well as nearest heir male descendant, subject, however, to the intent of the testator. Newcoman *v.* Bethlem Hospital, 1 Ambl. 8, 10, 27 Eng. Reprint 5.

Title by purchase is "the title to real property acquired in any other manner than by descent," including title by gift or devise. Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, Deady 268, 278.

22. Young *v.* Kinnebrew, 36 Ala. 97, 103.

23. Webster Folio Dict. [*quoted* in Hoyt *v.* Van Alstyne, 15 Barb. (N. Y.) 568, 572].

24. Standard Dict. [*quoted* in Cheatham *v.* Bobbitt, 118 N. C. 343, 34 S. E. 13].

Hiring with option to purchase.— The authority of the master of a vessel to purchase necessary supplies, while in a foreign port, implies the power to hire such supplies with option to purchase. Negus *v.* Simpson, 99 Mass. 388, 392.

"Purchased" construed as meaning "bought or acquired by paying a price," when used in an allegation in a declaration that plaintiff purchased certain lands see Curtis *v.* Burdick, 48 Vt. 166, 171.

May imply payment of value see Grant Tp. *v.* Reno Tp., 114 Mich. 41, 44, 72 N. W. 18.

A misuse of the word is to speak of a champertous agreement to undertake a lawsuit, pay a certain sum in case of recovery, and nothing in case of failure, as to "purchase" the suit. Hamilton *v.* Gray, 67 Vt. 233, 237, 31 Atl. 315, 48 Am. Rep. 811.

25. Stamm *v.* Bostwick, 122 N. Y. 48, 51, 25 N. E. 233, 9 L. R. A. 597.

Implies taking full title see *In re* Hunter, 1 Edw. (N. Y.) 1, 6.

26. Webster Dict. [*quoted* in Halff *v.* O'Connor, 14 Tex. Civ. App. 191, 196, 37 S. W. 238].

To purchase negotiable paper means "to pay a sum certain for it, the standard for which is fixed by the agreement of the parties." Ridgway *v.* New Castle Nat. Bank, 12 Ky. L. Rep. 216, 221.

"Purchased" may import a transaction completed or still incomplete. State *v.* Ware, 71 N. J. L. 53, 55, 58 Atl. 595.

"Purchasing and holding are very different things, and the consequences of each are very different. . . . It may be asked . . . what would be the situation of land purchased, without a capacity of holding. The answer is, that a corporation has, from its nature, a right to purchase lands, though the charter contains no license to that purpose; and in this respect the statutes of mortmain have not altered the law, except in case of superstitious uses. But since those statutes, it is necessary, in order to enable a corporation to retain lands which it has purchased, to have a license for that purpose." Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313, 319.

otherwise than by descent.[27] (See Auctions and Auctioneers, 4 Cyc. 1037; Judicial Sales, 24 Cyc. 1; Sales; Vendor and Purchaser. See also Purchase-Money; Purchaser; Purchase Scale.)

PURCHASE-MONEY. In the law of contracts, the consideration or price paid, or agreed to be paid, in money, by the purchaser of property, especially of real estate; [28] the consideration [29] in whatever form it exists,[30] of land, money paid for the land, or the debt created by the purchase; [31] the money agreed to be paid by the purchaser for the property.[32] (Purchase-Money: Advance of, For Vendee, as Equitable Mortgage, see Mortgages, 27 Cyc. 979. Secured by Mortgage, see Purchase-Money Mortgage, and Cross-References Thereunder. Subject of Claim by Bona Fide Purchaser of Mortgaged Property, see Mortgages, 27 Cyc. 1187. See also Consideration, 8 Cyc. 586; Money, 27 Cyc. 817; Price, 31 Cyc. 1171; Purchase.)

PURCHASE-MONEY MORTGAGE. A mortgage given, concurrently with a conveyance of land, by the vendee to the vendor, on the same land, to secure the unpaid balance of the purchase-price.[33] (See Mortgages, 27 Cyc. 1060, 1149, 1180, 1196, 1405, 1554; Purchase-Money.)

PURCHASER. Popularly, one who acquires either real or personal property by buying it for a price in money; a buyer; vendee; [34] one who acquires property by

27. See Stamm *v.* Bostwick, 122 N. Y. 48, 53, 25 N. E. 233, 97 L. R. A. 597; Branagh *v.* Smith, 46 Fed. 517, 518, in each of which cases the word is construed as used in St. (1845) c. 115, as amended by St. (1874) c. 261, and St. (1875) c. 38, declaring land of which an alien has purchased or shall purchase a conveyance, descendible.

Whether the ceding of land by a state to the United States constitutes purchase by the United States, within the meaning of U. S. Const. art 1, § 8, clause 17, giving congress jurisdiction over places purchased by the consent of the legislature of the state see opinion of Evans, J., in U. S. *v.* Tucker, 122 Fed. 518, 520.

28. Burrill L. Dict.

29. Devin *v.* Himer, 29 Iowa 297, 299 [*quoted* in Devin *v.* Eagleson, 79 Iowa 269, 274, 44 N. W. 545].

30. See syllabus in Devin *v.* Himer, 29 Iowa 297 [*quoted* in Stem *v.* Nysonger, 69 Iowa 512, 514, 29 N. W. 433].

31. Eyster *v.* Hathaway, 50 Ill. 521, 525 (1864, reported late), 99 Am. Dec. 537 [*quoted* in Austin *v.* Underwood, 37 Ill. 438, 442, 87 Am. Dec. 254 (*quoted* in Kneen *v.* Halin, 6 Ida. 621, 624, 59 Pac. 14)].

Money borrowed to pay for land — not included see Eyster *v.* Hathaway, 50 Ill. 521, 525 (1864, reported late), 99 Am. Dec. 537 [*distinguished* in Austin *v.* Underwood, 37 Ill. 438, 442, 87 Am. Dec. 254]; Heuisler *v.* Nickum, 38 Md. 270, 279 (where it is said: "The terms 'purchase money,' do not include any money that may be borrowed to complete a purchase, but that which is stipulated to be paid by the purchaser to the vendor, as between them only it is purchase money; as between the purchaser and lender, it is borrowed money"). Held to include money actually paid over by a creditor of the purchaser to the vendor for land and secured by a mortgage or deed of trust from the purchaser to the lender. Austin *v.* Underwood, 37 Ill. 438, 442, 87 Am. Dec. 254 [*distinguishing* Eyster *v.* Hathaway, 50 Ill. 521, 525 (1864, reported late), 99 Am. Dec. 537, and *followed* in Kneen *v.* Halin, 6 Ida. 621, 624, 59 Pac. 14 (where the money was borrowed expressly for the purpose of making the purchase and it was so recited in the mortgage)]. Money loaned expressly for the purpose of making a purchase of personalty included. Houlehan *v.* Rassler, 73 Wis. 557, 560, 41 N. W. 720.

Execution on a judgment for conversion is not issued for purchase-money. Hoyt *v.* Van Alstyne, 15 Barb. (N. Y.) 568, 572.

Debt for lumber for house is not purchase-money of a homestead. Smith *v.* Lackor, 23 Minn. 454, 458.

As distinguished from a demand on the security given for the payment of the purchase-price, the word means the original demand for the property sold. Davis *v.* Peabody, 10 Barb. (N. Y.) 91, 93.

32. Hoyt *v.* Van Alstyne, 15 Barb. (N. Y.) 568, 572.

33. Black L. Dict.

34. Black L. Dict.

"In the construction of registry acts, the term 'purchaser' is usually taken in its technical legal sense. It means a complete purchaser, or, in other words, a purchaser clothed with the legal title." Steele *v.* Spencer, 1 Pet. (U. S.) 552, 559, 7 L. ed. 259 [*quoted* in Black L. Dict.].

"A lessee is a purchaser as truly as he who becomes grantee in fee." Hackett *v.* Emporium Borough School-Dist., 150 Pa. St. 220, 226, 24 Atl. 627.

Judgment creditor not included within the meaning of Penn. Act of March 18, 1775, concerning registry see Heister *v.* Fortner, 2 Binn. (Pa.) 40, 52, 4 Am. Dec. 417; Rodgers *v.* Gibson, 4 Yeates (Pa.) 111, 112.

A mortgagee is a purchaser within the meaning of statutes entitling purchasers to protection. Seevers *v.* Delashmutt, 11 Iowa 174, 77 Am. Dec. 139; Porter *v.* Green, 4 Iowa 571, 577; Halbert *v.* McCulloch, 3 Metc. (Ky.) 456, 458, 79 Am. Dec. 556; Snyder *v.* Hitt, 2 Dana (Ky.) 204; Lancaster *v.* Dolan,

sale, or for a consideration; a buyer;[35] the party to a sale who agrees to pay the price; the buyer;[36] one who acquires for a valuable consideration;[37] buyer;[38] every person who acquires land otherwise than by descent.[39] Of land, technically, one who acquires real property in any other mode than by descent;[40] a person who acquires an estate in lands by his own act or agreement; a person who takes or comes to an estate, in any other manner than by inheritance;[41] including those who acquire real property by any means except inheritance.[42] (See PURCHASE, and Cross-References Thereunder.)

1 Rawle (Pa.) 231, 244, 18 Am. Dec. 625; Wethrill's Appeal, 3 Grant (Pa.) 281, 285; Eason *v.* Garrison, 36 Tex. Civ. App. 574, 576, 82 S. W. 800 (as to chattel mortgage). See also New York Sav. Bank *v.* Frank, 45 N. Y. Super. Ct. 404, 411, where it appears that under 1 Rev. St. 756, § 37, the term included the assignee of a mortgage. *Contra*, Berry *v.* Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603, 612.

One with a mere equity is not a purchaser entitled to impeach a fraudulent conveyance. Gilpin *v.* Davis, 2 Bibb (Ky.) 416, 418, 5 Am. Dec. 622.

Does not include a devisee within the meaning of the act providing that any purchaser (among other classes of persons in interest) of lands of which decedent died seized may apply for appointment of commission to assign dower. *In re* Hopper, 6 N. J. Eq. 325, 326.

Trustees of a settlement not a purchaser within English Bankrutpcy Act (32 & 33 Vict. c. 71), § 91, see *Ex p.* Hillman, 10 Ch. D. 622, 625, 48 L. J. Bankr. 77, 40 L. T. Rep. N. S. 177, 27 Wkly. Rep. 567. See also *Ex p.* Neal, 14 Ch. D. 579, 582, 43 L. T. Rep. N. S. 264, 28 Wkly. Rep. 875, *arguendo*.

A pledgee of deeds for a loan is not thereby a purchaser of the property. Kerrison *v.* Dorrien, 9 Bing. 76, 1 L. J. C. P. 166, 2 Moore & S. 114, 23 E. C. L. 492.

A partitioner of lands previously held in common is a purchaser for value. Campau *v.* Barnard, 25 Mich. 381.

"An assignee for the benefit of creditors is not a purchaser within the meaning of the word which protects lien creditors or vendees for value." *In re* Goodwin Gas Stove, etc., Co.'s Assigned Estate, 166 Pa. St. 296, 299, 31 Atl. 91.

35. Burrill L. Dict.

A purchaser at a sheriff's sale is a purchaser within the meaning of registry acts. Atwood *v.* Bearss, 45 Mich. 469, 8 N. W. 55 [*criticizing* Millar *v.* Babcock, 25 Mich. 137, as saying that Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792, holds the contrary]; Kauffelt *v.* Bower, 7 Serg. & R. (Pa.) 64, 82, 10 Am. Dec. 428; Heister *v.* Fortner, 2 Binn. (Pa.) 40, 53, 4 Am. Dec. 417. But *compare* Millar *v.* Babcock, 25 Mich. 137 [*criticized* in Atwood *v.* Bearss, *supra*] (holding that an attaching creditor is not a purchaser before the sheriff's deed); Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792 (where it is said that attaching or judgment execution creditors who must stand on their own law or statutory rights independent of the Michigan registry statute are not purchasers within its meaning).

A petitioner for condemnation of land is not a purchaser or creditor within the purview of the registration statutes. Atlanta, etc., R. Co. *v.* Southern R. Co., 131 Fed. 657, 667, 66 C. C. A. 601.

Construed "bona fide purchaser" in a statute of limitation and liens as against purchasers and others, as in the statute of frauds, see Fowler *v.* McCartney, 27 Miss. 509, 515.

36. See Bouvier L. Dict., *sub verb.* "sale" [*quoted* in Eldridge *v.* Kuehl, 27 Iowa 160, 173].

At tax-sale: Under Mich. Rev. St. 97, § 14, the purchaser is the person who buys as distinguished from the original proprietor who is called the "owner" or "claimant." People *v.* Hammond, 1 Dougl. (Mich.) 276, 280. Before the deed is executed he is a lienholder rather than a grantee, which latter he becomes after execution of the deed. Brackett *v.* Gilmore, 15 Minn. 245, construing Gen. St. c. 11, § 151.

Purchaser of a note or bill.— The person who buys a promissory note or bill of exchange from the holder without his indorsement. Black L. Dict.

37. See Morris *v.* Daniels, 35 Ohio St. 406, 413.

As defined by a recording act (1 N. Y. Rev. St. 756, § 37) the term embraces "every person to whom any estate or interest on real estate shall be conveyed, for a valuable consideration, and also every assignee of a mortgage or lease, or other conditional estate." New York Sav. Bank *v.* Frank, 45 N. Y. Super. Ct. 404, 411.

"Purchaser for a valuable consideration" is one who has paid a fair value, or something approaching a fair value (Clark *v.* Troy, 20 Cal. 219, 223); not in a technical sense as referring to one who comes to an estate by his own act but in the popular sense denoting one who buys for money, buys fairly and of course for a fair price (Fullenwider *v.* Roberts, 20 N. C. 420 [*cited* in Collins *v.* Davis, 132 N. C. 106, 111, 43 S. E. 579; Worthy *v.* Caddell, 76 N. C. 82, 86]).

38. So defined as used in the English Bankruptcy Act of 1869 (32 & 33 Vict. c. 71), § 91, where it is held that "in this section the word 'purchaser' means a 'buyer' in the ordinary commercial sense, not a purchaser in the legal sense of the word." *Ex p.* Hillman, 10 Ch. D. 622. 625, 48 L. J. Bankr. 77, 40 L. T. Rep. N. S. 177, 27 Wkly. Rep. 567.

39. Morris *v.* Daniels, 35 Ohio St. 406, 413.

40. Black L. Dict.

41. Burrill L. Dict.

42. See State *v.* Glenn, 18 Nev. 34, 47, 1

PURCHASE SCALE. A term used in lumber trade and which has been held to mean the scale made at the time of the purchase, and not the scale made at the mill as the lumber was cut.[43]

PURE. Clear; simple; unmixed or unqualified;[44] free from all foreign substance; less strictly, free from any defiling or objectionable mixture;[45] free from mixture or contact with that which is deleterious, impairs, vitiates, or dilutes.[46] (See PURELY; PURE OBLIGATION; PURE PLEA.)

PURE FOOD LAWS. See ADULTERATION, 1 Cyc. 939; FOOD, 19 Cyc. 1085.

PURELY. A word sometimes construed as equivalent to wholly;[47] completely; entirely; unqualifiedly.[48] (See PURE.)

PURELY PUBLIC CHARITY. See CHARITIES, 6 Cyc. 898 text and note 3.

PURE OBLIGATION. One which is not suspended by any condition, whether it has been contracted without any condition, or when thus contracted, the condition has been accomplished.[49] (See OBLIGATION, 29 Cyc. 1308; PURE.)

PURE PLEA. In equity pleading, one which relies wholly on some matter outside those referred to in the bill; as a plea of a release on a settled account.[50] (See PLEA, 30 Cyc. 1643; PURE.)

PURGATORY. A state of suffering after this life, in which those souls are for a time detained who depart this life after their deadly sins have been remitted as to the stain and guilt, and as to the everlasting pain that was due to them; but who have on account of those sins still some debt of temporal punishment to pay; as also those souls which leave this world guilty only of venial sins.[51]

Pac. 186, where in construing a resolution empowering the president of a corporation to convey land to "purchasers" such authority was held in its broadest sense to include "the power to donate land, to execute a conveyance by gift, and all other modes of the personal acquisition of real property, except by descent or inheritance."

Heir as purchaser.—"In a legal sense every man is purchaser of an estate who does not take it by descent; and whenever a man gains a new estate he is said to take it by purchase; so a man may take as heir of another and yet be a purchaser; as if lands to be granted to A., remainder to the right heirs of B., the heir of B. takes by purchase and not by descent, because B. had nothing in him; for nothing can descend to a man from a father who had no estate in him." Martin *v.* Strachan, 1 Wils. K. B. 66, 72, 2 Rev. Rep. 552 note.

Under a marriage settlement, children born of the marriage are equally purchasers with the parents. Harvey *v.* Ashley, 3 Atk. 607, 610, 26 Eng. Reprint 1150.

Under 1 N. Y. Rev. St. 738, § 137, providing for the protection of purchasers against unacknowledged and unattested deeds, the word means "one who derives title by purchase from the grantor in the unacknowledged and unattested deed, or from one who himself is mediately or immediately a purchaser from such grantor." Strough *v.* Wilder, 119 N. Y. 530, 535, 23 N. E. 1057, 7 L. R. A. 555.

43 Hayes *v.* Cummings, 99 Mich. 206, 208, 58 N. W. 46.

44. Burrill L. Dict.

"Pure accident" is a phrase not applicable to a thing which happens so often as to become a well known fact and a matter of common knowledge. Nelson *v.* Narragansett Electric Lighting Co., 26 R. I. 258, 58 Atl. 802, 106 Am. St. Rep. 711, 67 L. R. A. 116.

45. People *v.* Henry J. Heinz Co., 90 N. Y. App. Div. 408, 411, 86 N. Y. Suppl. 141, where it is said: "The word 'pure' means not only free from all foreign substance but in its original sense 'pure' means 'free from any defiling or objectionable mixture.' We have in chemistry pure products, but in the various uses the chemical standard is modified to a great extent. For instance, we speak of pure water, meaning by that water that is not contaminated, not defiled, not vitiated, although it may have mineral salts in solution. It may have in solution any product not deleterious; yet, strictly speaking, the only water that can be said to be chemically pure is distilled water. Still, in the various legislative acts providing for pure water . . . it has never been contemplated that absolutely chemically pure, distilled water was to be procured."

46. People *v.* Henry J. Heinz Co., 90 N. Y. App. Div. 408, 412, 86 N. Y. Suppl. 141, so construing the word as used in New York Agricultural Law.

47. Episcopal Academy *v.* Philadelphia, 150 Pa. St. 565, 573, 25 Atl. 55 [*quoted* in Kentucky Female Orphan School *v.* Louisville, 100 Ky. 470, 478, 36 S. W. 921, 40 L. R. A. 119; Widows' and Orphans' Home O. F. *v.* Com., 103 S. W. 354, 356, 31 Ky. L. Rep. 775, 16 L. R. A. N. S. 829], defining the phrase "purely public charity."

48. Donohugh's Appeal, 86 Pa. St. 306, 314 [*quoted* in White *v.* Smith, 189 Pa. St. 222, 228, 42 Atl. 125, 126, 43 L. R. A. 498], construing the word as used in the phrase "purely public charity."

49. Black L. Dict.

50. Black L. Dict.

51. Catholic Belief (Lambert Am. ed.) 196 [*quoted* in Harrison *v.* Brophy, 59 Kan. 1, 3,

PURGE. To cleanse; to clear; to clear or relieve from some imputation.[52] (To Purge: Contempt, see CONTEMPT, 9 Cyc. 58. Contract of Usury, see USURY. Transaction of Fraud, see FRAUDULENT CONVEYANCES, 20 Cyc. 414.)

PURGERY. A room in which hogsheads full of sugar are placed in a standing or upright position for the purpose of being drained.[53]

PURLOIN. To commit larceny; to steal.[54] (See, generally, LARCENY, 25 Cyc. 1.)

PUROLINE. A burning fluid extensively used in illuminating sugar-houses and rice mills with safety; a gas generating fluid; a product of petroleum.[55]

PURPORT. As a noun, design or tendency, meaning, import;[56] of an instrument, the substance or general import of the instrument;[57] what appears on the face of the instrument itself;[58] the substance of an instrument as it appears on the face of it;[59] what would be the ordinary construction of a document, or any part of it, according to the customary mode of using language.[60] As a verb, to intend to show; to intend; to mean; to signify.[61] (Purport: Setting Out Purport of — Counterfeit or Matter Imitated or Altered, see COUNTERFEITING, 11 Cyc. 313; Defamatory Words in Complaint For Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 447; Instrument Forged, see FORGERY, 19 Cyc. 1397; Statute in Indictment or Information, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 335; Written Instrument in Pleadings, see PLEADING, 31 Cyc. 65; Written or Printed Matter in Indictment or Information, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 354.)

PURPOSE.[62] That which a person sets before himself as an object to be reached

4, 51 Pac. 883, 40 L. R. A. 721], adding: "In Purgatory these souls are purified and rendered fit to enter into Heaven, where nothing defiled enters."

Relief of souls in purgatory by human aid see Catholic Belief (Lambert Am. ed. 196) [*quoted* in Harrison *v.* Brophy, 59 Kan. 1, 3, 4, 51 Pac. 883, 40 L. R. A. 721].

52. Burrill L. Dict.

"A contempt is said to be purged, when the party relieves himself from the charge." Burrill L. Dict., *sub verb.* "Purge." Contempt purged by disavowal of intention to commit it see CONTEMPT, 9 Cyc. 26 text and note 37.

Disseizin may be purged by entry. Fox *v.* Widgery, 4 Me. 214, 218.

"Purging a tort is like the ratification of a wrongful act by a person who has power of himself to lawfully do the act. . . . The purging of the tort may take place after commencement of the action." Black L. Dict.

53. Meyer *v.* Queen Ins. Co., 41 La. Ann. 1000, 1004, 6 So. 899.

54. See McCann *v.* U. S., 2 Wyo. 274.

55. Socola *v.* Chess-Carley Co., 39 La. Ann. 344, 349, 1 So. 824, comparing the fluid with gasoline.

56. State *v.* Sherwood, 90 Iowa 550, 553, 58 N. W. 911, 48 Am. St. Rep. 461 [*quoted* in State *v.* Burling, 102 Iowa 681, 684, 72 N. W. 295], construing the verb, as used in an indictment for forgery but defining the noun.

57. 2 Gabbett Cr. L. 201 [*quoted* in Com. *v.* Wright, 1 Cush. (Mass.) 46, 65], where it is also said: "The purport of a message or communication may be, and indeed generally is, stated, without the use of the identical words in which it is conceived. It is equivalent to substance."

58. Rex *v.* Jones, Dougl. (3d ed.) 300, 302 [*quoted* in State *v.* Page, 19 Mo. 213, 217].

59. Gillchrist's Case, 2 Leach C. C. 753, 757 [*quoted* in State *v.* Page, 19 Mo. 213, 217].

60. Rex *v.* Hamilton, 2 Can. Cr. Cas. 390, 403.

Distinguished from "tenor" see State *v.* Atkins, 5 Blackf. (Ind.) 458; Com. *v.* Wright, 1 Cush. (Mass.) 46, 65; Black L. Dict., *sub verb.* "Purport." See also FORGERY, 19 Cyc. 1397, 1398.

61. Webster Dict. [*quoted* in Wapella *v.* Davis, 39 Ill. App. 592, 594].

"Purporting," in a statute prohibiting "notes, bills, checks and tickets, 'purporting' that money will be paid to the receiver, bearer and holder thereof," and in an indictment thereunder is a word of technical meaning. State *v.* Page, 19 Mo. 213, 216.

A deposition "purports to be signed by the justice" before whom it "purports to be taken" within Cr. Code, § 687, declaring a deposition so purporting admissible in evidence when it appears upon the face of the whole deposition that it was taken before and signed by a certain justice. But merely attaching to a former deposition a new one signed by the same magistrate and witness, but not in terms connected with the former one, nor showing that the magistrate signing it was the one before whom the latter was taken, does not cause it to purport to be so signed. Reg. *v.* Hamilton, 2 Can. Cr. Cas. 390, 409.

Where an instrument is to be set forth, the description that it purports a particular fact necessarily means that what is stated as the purport of the instrument appears on the face of the instrument itself. Rex *v.* Reading, Leach C. C. 672, 674 [*quoted* in State *v.* Page, 19 Mo. 213, 216].

62. **Derived** from the Latin "*propositum.*" Webster Dict. [*cited* in Loftin *v.* Watson, 32 Ark. 414, 420].

or accomplished; the end or aim to which the view is directed in any plan, measure, or exertion; intention, design; end; effect; consequence;[63] a definition of "intent."[64] (Purpose: Charitable, see CHARITIES, 6 Cyc. 906. Of Incorporation, see CORPORATIONS, 10 Cyc. 160. Of Voyage, as Limit of Liberty in Marine Insurance Policy, see MARINE INSURANCE, 26 Cyc. 633. See also DESIGN, 14 Cyc. 228; INTENT, 22 Cyc. 1454; INTENTION, 22 Cyc. 1456; OBJECT, 22 Cyc. 1306; PURPOSELY.)

PURPOSELY. Intentionally and designedly;[65] by purpose or design; intentionally; with premeditation;[66] designedly, intentionally, with a will;[67] intentionally or wilfully;[68] on purpose.[69] (See PURPOSE.)

PURPRESTURE.[70] A clandestine encroachment or appropriation of the land of another, or upon land or waters that should be common or public;[71] an encroach-

63. Homewood *v.* Wilmington, 5 Houst. (Del.) 123, 127. See also Loftin *v.* Watson, 32 Ark. 414, 420, where Webster's Dictionary is quoted as giving a definition the same except that it concludes "manner, or execution; end, or, the view itself; design; intention."

"Of purpose, on purpose, for the purpose, that is, with previous design" see Homewood *v.* Wilmington, 5 Houst. (Del.) 123, 127.

Of mortgage, distinguished from consideration.— "Purpose," as used in a statute requiring a mortgage to express the purpose for which it is given, means the effect which the instrument is intended to have upon the rights of the contracting parties and the status of the subject-matter, and is not the "consideration." Ford *v.* Burks, 37 Ark. 91, 94.

"Benevolent purposes," although a broader term than "charitable purposes," must be confined to the latter in the construction of a will, otherwise a trust for such purposes would be too vague to execute. James *v.* Allen, 3 Meriv. 17, 19, 17 Rev. Rep. 4, 36 Eng. Reprint 7.

"Purpose of profit" held not to include the purposes of a mutual benefit society, which, though individual members might gain or lose, would, as a society, have gained nothing when its affairs were wound up. Bear *v.* Bromley, 18 Q. B. 271, 276, 16 Jur. 450, 21 L. J. Q. B. 354, 7 R. & Can. Cas. 507, 11 Eng. L. & Eq. 414, 83 E. C. L. 271.

"For all purposes whatsoever" in a policy of maritime insurance, authorizing a ship to touch and stay at any ports for all purposes whatsoever, would be limited in meaning to the purposes of the voyage if they were previously ascertained — where they are not, and the adventure includes obtaining information in the Baltic as to ports of discharge along its shores in an unsettled state due to war, it includes staying in Baltic ports to obtain such information and is not limited by the subsequent clause permitting the ship to wait "off" such ports for information. Rucker *v.* Allnutt, 15 East 278, 284, 285, 13 Rev. Rep. 465.

"For the purposes of taxation."—In a statute requiring an assessor to perform all the duties required of those whose business it is to assess property for the purposes of taxation, the phrase is not designed to limit his duties to such as relate to taxation only, but to point out the kind of assessor referred to, i. e., an assessor for purposes of taxation. McClung *v.* St. Paul, 14 Minn. 420.

Contrasted with "accident" and "mischance" see Fahnestock *v.* State, 23 Ind. 231, 262.

64. See 22 Cyc. 1455 text and note 20.

65. Fahnestock *v.* State, 23 Ind. 231, 262 [*cited* in Eaton *v.* State, 162 Ind. 554, 556, 70 N. E. 814], so construing the word as used in a statute defining murder in the second degree.

Indictment for assault and battery "with intent" to murder fully expresses the meaning of "purposely" as used in the statutory definition of murder. Carder *v.* State, 17 Ind. 307, 308.

"Feloniously" held identical in effect when used in an indictment for assault and battery to describe an intended killing see Carder *v.* State, 17 Ind. 307, 308.

66. Webster Dict. [*quoted* in Whitman *v.* State, 17 Nebr. 224, 226, 22 N. W. 459].

Premeditation not necessarily implied see Fahnestock *v.* State, 23 Ind. 231, 262.

With "unlawfully" and "feloniously" the word imports only criminal intent and not the knowledge necessary to the crime of having in possession a forged instrument with intent to utter, under Nebr. Cr. Code, § 145. Newby *v.* State, 75 Nebr. 33, 36, 105 N. W. 1099.

67. See Reed *v.* State, 75 Nebr. 509, 516, 106 N. W. 649.

In a statute defining murder in the first degree the word was held to refer to an act done with the purpose and intent of doing that act see State *v.* Lindgrind, 33 Wash. 440, 443, 74 Pac. 565.

68. See Lang *v.* State, 84 Ala. 1, 5, 4 So. 193, 5 Am. St. Rep. 324, where it is said: "'Purposely killing' is intentional, willful."

69. State *v.* Dolan, 17 Wash. 499, 50 Pac. 472.

70. More properly called "pourpresture." Eden Injunct. c. 11 [*quoted* in Revell *v.* People, 177 Ill. 468, 480, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790]. See 31 Cyc. 1031.

Derived from the French *pourprendre*, to take away entirely. Burrill L. Dict.

71. Coke Litt. 277 [*quoted* in Delaware, etc., Canal Co. *v.* Lawrence, 2 Hun (N. Y.) 163, 180, 181 (*affirmed* in 56 N. Y. 612, and *quoted* in Moore *v.* Jackson, 2 Abb. N. Cas. (N. Y.) 211, 214); People *v.* Mould, 24 Misc.

ment upon lands, or rights and easements incident thereto, belonging to the public, and to which the public have a right of access or of enjoyment, and encroachment upon navigable streams;[72] a close or inclosure — that is, where one encroaches and makes that safe to himself which ought to be common to many;[73] inclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large;[74] the appropriation to exclusive private use, or the enclosure for such use, of that which belongs to the public;[75] any encroachment upon the sovereign, either in highways, rivers, or streets or harbors;[76] an invasion of the right of property in the soil, while the same remains in the king or the people;[77] any encroachment upon the king, either upon part of the demesne lands, or on the highways, rivers, harbors, or streets;[78] an encroachment upon the king, either upon part of his demesne lands, or upon rights and easements held by the crown of the public, such as upon highways, public rivers, forts, streets, squares, bridges, quays, and other public accommodations;[79] intrusion upon the king's demesne;[80] strictly, an encroachment upon a public right in lands or navigable streams that does not operate as an obstruction or injury to individual members of the public, but only to some right incident and peculiar to it in its aggregate capacity as such.[81] (Purpresture: As Constituting Public Nuisance in General, see NUISANCES, 29 Cyc. 1179. Encroachment on — Highway in General, see STREETS AND HIGHWAYS; Land Under Navigable Waters, see NAVIGABLE WATERS, 29 Cyc. 364; Navigable Waters, see NAVIGABLE WATERS, 29 Cyc. 307; Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 892. See also POURPRESTURE, 31 Cyc. 1031.)

PURSE. In the sense of prize or premium, ordinarily some valuable thing,

(N. Y.) 287, 289, 52 N. Y. Suppl. 1032]; Anderson L. Dict. [*quoted* in Hoey *v.* Gilroy, 14 N. Y. Suppl. 159, 161].

72. U. S. *v.* Debs, 64 Fed. 724, 740.

Upon tidal lands below high-water mark see San Francisco Sav. Union *v.* R. G. R. Petroleum, etc., Co., 144 Cal. 134, 135, 77 Pac. 823, 103 Am. St. Rep. 72, 66 L. R. A. 242; People *v.* Mould, 24 Misc. (N. Y.) 287, 289, 52 N. Y. Suppl. 1032; Shively *v.* Bowlby, 152 U. S. 1, 13, 14 S. Ct. 548, 38 L. ed. 331; Weber *v.* State Harbor Com'rs, 18 Wall. (U. S.) 57, 65, 21 L. ed. 798; Blundell *v.* Catterall, 5 B. & Ald. 268, 298, 305, 24 Rev. Rep. 353, 7 E. C. L. 152; Atty.-Gen. *v.* Richards, Anstr. 603, 614–616, 3 Rev. Rep. 63.

On the Great Lakes see Revell *v.* People, 177 Ill. 468, 479 *et seq.*, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790.

Upon navigable river see Grand Rapids *v.* Powers, 89 Mich. 94, 112, 50 N. W. 661, 28 Am. St. Rep. 276, 14 L. R. A. 498; Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462, 473; Union Depot St. R., etc., Co. *v.* Brunswick, 31 Minn. 297, 302, 17 N. W. 626, 47 Am. Rep. 789.

Compared with nuisance see People *v.* Park, etc., R. Co., 76 Cal. 156, 160, 161, 18 Pac. 141; Columbus *v.* Jaques, 30 Ga. 506, 512; People *v.* Vanderbilt, 26 N. Y. 287, 293, 25 How. Pr. 139; Timpson *v.* New York City, 5 N. Y. App. Div. 424, 430, 39 N. Y. Suppl. 248; Delaware, etc., Canal Co. *v.* Lawrence, 2 Hun (N. Y.) 163, 181 (where it is said to be *per se* a nuisance); Moore *v.* Jackson, 2 Abb. N. Cas. (N. Y.) 211, 213; U. S. *v.* Debs, 64 Fed. 724, 740.

73. Coke Inst. [*quoted* in Eden Injunct. c. 11 (*quoted* in Revell *v.* People, 177 Ill. 468, 480, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790); Story Eq. Jur. § 921 (*quoted* in Moore *v.* Jackson, 2 Abb. N. Cas. (N. Y.) 211, 213)]. See also Columbus *v.* Jaques, 30 Ga. 506, 512.

It exists where one incloses or makes several to himself that which ought to be common to many. People *v.* Park, etc., R. Co., 76 Cal. 156, 161, 18 Pac. 141.

74. Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 461, 473 [*quoted* in Grand Rapids *v.* Powers, 89 Mich. 93, 112, 50 N. W. 661, 28 Am. St. Rep. 276, 14 L. R. A. 498].

75. Lexington, etc., R. Co. *v.* Applegate, 8 Dana (Ky.) 289, 290, 33 Am. Dec. 47.

76. Sullivan *v.* Moreno, 19 Fla. 200, 228.

"May ripen into a title because the sovereign power might make a grant of the property in question." Timpson *v.* New York, 5 N. Y. App. Div. 424, 430, 39 N. Y. Suppl. 248.

77. People *v.* Vanderbilt, 26 N. Y. 287, 293, 25 How. Pr. 139 [*quoted* in Knickerbocker Ice Co. *v.* Shultz, 116 N. Y. 382, 389, 22 N. E. 564 (where the words "the king or" are omitted); Timpson *v.* New York, 5 N. Y. App. Div. 424, 430, 39 N. Y. Suppl. 248; The Idlewild, 64 Fed. 603, 605, 12 C. C. A. 328].

78. Eden Injunct. 11 [*quoted* in Revell *v.* People, 177 Ill. 468, 480, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790].

79. Coke Inst. [*quoted* in Story Eq. Jur. § 921 (*quoted* in Moore *v.* Jackson, 2 Abb. N. Cas. (N. Y.) 211, 213, 214)].

80. 4 Blackstone Comm. 167 [*quoted* in Scott *v.* Henderson, 3 Nova Scotia 115, 118 (*reversed* on other grounds in [1906] A. C. 569, 580, 75 L. J. P. C. 109, 95 L. T. Rep. N. S. 508, 22 T. L. R. 748)].

81. Wood Nuisances, § 80 [*quoted* in State *v.* Goodnight, 70 Tex. 682, 686, 11 S. W. 119].

offered by a person for the doing of something by others, into the strife for which he does not enter.[82]

PURSER. The person appointed by the master of a ship or vessel, whose duty it is to take care of the ship's books in which every thing on board is inserted, as well the names of mariners as the articles of merchandise shipped.[83] (Purser: In United States Navy, see ARMY AND NAVY, 3 Cyc. 834 note 60, 835 note 63.)

PURSUANT TO LAW. A phrase which, as used in United States Revised Statutes,[84] allowing compensation to witnesses who attend "pursuant to law" to be taxed as costs, has given rise to much conflict of opinion, ending in the conclusion that it includes witnesses who, though not subpœnaed, voluntarily testified.[85]

PURSUE. To follow a matter judicially, as a complaining party.[86] In Scotch law, to prosecute criminally.[87] (See PROSECUTE; PURSUANT TO LAW; PURSUER; PURSUIT.)

PURSUER. In Scotch law, plaintiff; a plaintiff; a prosecutor.[88] (See PLAINTIFF, 30 Cyc. 1636; PROSECUTOR; PURSUER.)

PURSUIT. The act of following or going after, especially, a following with haste either for sport or in hostility; chase; prosecution.[89] As used in the Oregon corporation statutes, a word which has been held, like the word "business," to be used with reference to any object consistent with the interests of society that may engage the attention of men and invite their co-operation.[90] (Pursuit: As Affecting Authority of Officer to Arrest Without a Warrant, see ARREST, 3 Cyc. 877. Of Adversary as Affecting Right of Self-Defense, see HOMICIDE, 21 Cyc. 825.)

PURVIEW.[91] The enacting part or body of an act in contradistinction to the other parts of it, such as a preamble, a saving clause, and a proviso;[92] the enacting part of a statute, in contradistinction to the preamble;[93] spirit.[94]

PUSHING. In railroad parlance, that method of locomotion where the engine follows the car.[95] (See FLYING SWITCH, 19 Cyc. 1081; KICK, 24 Cyc. 795.)

PUT. As a noun, a privilege to deliver or not to deliver grain or other commodity;[96] an offer to buy property left open a certain length of time for the

82. Harris *v.* White, 81 N. Y. 532, 539 [*quoted* in Morrison *v.* Bennett, 20 Mont. 560, 569, 52 Pac. 553, 40 L. R. A. 158; Black L. Dict.] (adding: "He has not a chance of gaining the thing offered; and if he abide by his offer, that he must lose it and give it over to some of those contending for it is reasonably certain"); Porter *v.* Day, 71 Wis. 296, 300, 37 N. W. 259.

"Purse, prize, or premium" distinguished from "bet or wager," "bet or stakes" see Harris *v.* White, 81 N. Y. 532, 538 [*quoted* in Hankins *v.* Ottinger, 115 Cal. 454, 458, 47 Pac. 254, 40 L. R. A. 76; Porter *v.* Day, 71 Wis. 296, 300, 37 N. W. 259].

83. Black L. Dict.

Falls within the term "mariner" as used in a bill of lading containing a clause which exempts the ship's owners from loss by "barratry of the master and mariners." Spinetti *v.* Atlas Steamship Co., 80 N. Y. 71, 79, 36 Am. Rep. 579 [*reversing* 14 Hun 100, 105].

84. U. S. Rev. St. (1878) § 848 [U. S. Comp. St. (1901) p. 654].

85. See Hanckett *v.* Humphrey, 93 Fed. 895, 896.

For fuller authority on the construction of the same section see COSTS, 11 Cyc. 116, 117 notes 1, 2, 3, U. S. cases there cited.

86. Black L. Dict.; Burrill L. Dict.

"To pursue a warrant or authority, in the old books, is to execute it or carry it out." Black L. Dict.

87. Burrill L. Dict.

88. Burrill L. Dict.

89. Webster Int. Dict.

90. See Maxwell *v.* Akin, 89 Fed. 178, 180.

91. **Derived** from law French *purveier* "to provide." Burrill L. Dict.

92. The San Pedro, 2 Wheat. (U. S.) 132, 138, 4 L. ed. 589.

Literally, "provided." "A word very commonly used in the old French statutes . . . Purview *est que*; it is provided that. Stat. Westm. 1, c. 1. Purview *est ensement*; it is provided likewise. *Id.* c. 2." Burrill L. Dict.

93. Payne *v.* Conner, 3 Bibb (Ky.) 180, 181 [*quoted* in State *v.* Ives, 167 Ind. 13, 78 N. E. 225, 226; State *v.* Reynolds, 108 Ind. 353, 358, 9 N. E. 287; Com. *v.* Watts, 2 S. W. 123, 8 Ky. L. Rep. 571], where it is added: "We think the provision of the act repealing all acts or parts of acts coming within its purview, should be understood as repealing all acts in relation to all cases which are provided for by the repealing act; and that the provisions of no act are thereby repealed in relation to cases not provided for by it."

94. See Fidelity, etc., Co. *v.* U. S., 187 U. S. 315, 321, 23 S. Ct. 120, 47 L. ed. 194, where "purview of the rule" is defined "spirit of the rule."

95. Mark *v.* St. Paul, etc., R. Co., 32 Minn. 208, 210, 20 N. W. 131.

96. Pixley *v.* Boynton, 79 Ill. 351, 353

acceptance of the other party, in consideration of a stated amount of money.[97] As a verb, generally, to lay, or place.[98] (Put: The Noun, see Gaming, 20 Cyc. 931 text and note 64; Option, 29 Cyc. 1502; Puts and Calls; Puts and Refusals. The Verb, see Lay, 25 Cyc. 168; Place, 30 Cyc. 1633; Put in Circulation; Put in Repair; Put in Suit; Put Into Effect; Put Into His Hands; Put on Interest; Put Out; Put Through; Putting Character in Issue; Putting in Fear; Put Upon.)

PUTAGIUM HÆREDITATEM NON ADIMIT. A maxim meaning "Incontinence does not take away an inheritance." [99]

PUTATIVE FATHER. In bastardy proceedings the sworn father.[1] (Putative Father: Resemblance to, see Bastards, 5 Cyc. 630.)

PUTATIVE MARRIAGE. A marriage which is in reality null, but which has been contracted in good faith by the two parties, or by one of them.[2] (See Putative Matrimony. As to to Informal and Invalid Marriages in General, see Marriage, 26 Cyc. 863.)

PUTATIVE MATRIMONY. A marriage which, being null on account of some dissolving impediment, is held notwithstanding for a true marriage, because of its having been contracted in good faith, by both or one of the spouses being ignorant of the impediment.[3] (See Putative Marriage. As to Informal and Invalid Marriages in General, see Marriage, 26 Cyc. 863.)

PUT IN CIRCULATION. An equivalent of "issue." [4] (See Put.)

PUT IN REPAIR. A phrase held to imply lack of repair on the part of its object.[5] (See Put; Repair.)

PUT IN SUIT. A term synonymous with "Prosecute," [6] *q. v.* (See Prosecute; Put.)

PUT INTO EFFECT. To give practical operation.[7] (See Effect, 14 Cyc. 1231; Put.)

PUT INTO HIS HANDS. A phrase which, when used in pleading, may be satisfied by the fact that the thing mentioned was offered to a person, made subject to his control, and his attention called to his duty with regard to it.[8] (See Put.)

PUT ON INTEREST. A phrase which has been held not to convey the idea of a purchase of stock.[9] (See, generally, Interest, 22 Cyc. 1459. See also Put.)

[*quoted* in Miller *v.* Bensley, 20 Ill. App. 528, 530; Lane *v.* Logan Grain Co., 105 Mo. App. 215, 220, 79 S. W. 722].

Among dealers in stock it is "a privilege . . . by which . . . [one] might deliver the stock . . . at any time within" a certain period "is called a 'put.'" Hopper *v.* Sage, 47 N. Y. Super. Ct. 77, 78.

97. Woods *v.* Bates, 126 Ill. App. 180, 186 [*affirmed* in 225 Ill. 126, 80 N. E. 84].

98. McCaffrey *v.* Woodin, 65 N. Y. 459, 469, 22 Am. Rep. 644, holding that a provision in a lease, giving as security for rent a lien on all personal property "put" on the premises, includes crops and hay, since when planted they were "put" there.

"**Putting off counterfeit money**" see Rex *v.* Hedges, 3 C. & P. 410, 14 E. C. L. 636.

"**Putting away**" apprentice see Rex *v.* Shipton, 8 B. & C. 88, 94, 15 E. C. L. 51; Reg. *v.* Wainfleet All Saints, 11 A. & E. 656, 39 E. C. L. 353.

99. Morgan Leg. Max.

1. State *v.* Nestaval, 72 Minn. 415, 416, 75 N. W. 725, adding: "Because he is supposed to be the father of the illegitimate child."

2. Matter of Hall, 61 N. Y. App. Div. 266, 272, 70 N. Y. Suppl. 406.

3. Smith *v.* Smith, 1 Tex. 621, 629, 46 Am. Dec. 121.

4. See Issue, 23 Cyc. 358 text and note 68.

5. See Thomas *v.* Kingsland, 108 N. Y. 616, 618, 14 N. E. 807, holding that a covenant by landlords to put and keep in repair a roof necessarily implies that the roof was out of repair to the knowledge of the landlords.

6. See Gwynne *v.* Burnell, 6 Bing. N. Cas. 453, 547, 37 E. C. L. 713, 7 Cl. & F. 572, 7 Eng. Reprint 1188, 1 Scott N. R. 711, West 342, 9 Eng. Reprint 522.

"**Putting in suit,** as applied to a bond, or any other legal instrument, signifies bringing an action upon it, or making it the subject of an action." Black L. Dict.

7. State *v.* Atlantic Coast Line R. Co., 48 Fla. 114, 127, 37 So. 652, holding that the phrase when used concerning a rate for transportation means to charge and receive that rate when the article to which it applies is transported, in other words, to give it practical operation.

8. Patten *v.* Sowles, 51 Vt. 388, 391, holding that where it was alleged that a writ was put into a sheriff's hands, whereas in fact it was proffered for service but he refused to serve it and did not take it into his hands, there was no variance.

9. See *In re* Nyce, 5 Watts & S. (Pa.) 254, 258, 259, 40 Am. Dec. 498, where it was held that a provision in a will that executors

PUT OUT. A term which with other like phrases "ejected," "expelled," and "removed" applied to the tenants of a dwelling house, may be said to be satisfied under some circumstances by proof that the house was destroyed and rendered uninhabitable during the absence of the tenant;[10] to open;[11] a term which has been so used of the process of making windows;[12] a definition of EVICTED,[13] *q. v.* (See EJECT, 14 Cyc. 1232; EVICTED, 16 Cyc. 820; EVICTION, 16 Cyc. 820; EXPEL, 18 Cyc. 1502; OUSTER, 29 Cyc. 1540; PUT.)

PUTS AND CALLS. A privilege to deliver or receive or not at the seller or buyer's option.[14] (See GAMING, 20 Cyc. 931–932 text and notes 64–69; OPTION, 29 Cyc. 1502; PUT.)

PUTS AND REFUSALS. In English law, time bargains, or contracts for the sale of supposed stock on a future day.[15] (See PUT; REFUSAL.)

PUT THROUGH. A phrase sometimes used instead of the word "prosecute."[16] (See PROSECUTE; PUT.)

PUTTING CHARACTER IN ISSUE. A technical expression which does not mean simply that the character may be affected, but that it is of particular importance in the suit itself;[17] a technical expression which does not signify merely that personal reputation is incidently involved in the consequences or results of the action, but that the action in its nature directly involves the question of character.[18] (See CHARACTER, 6 Cyc. 892; ISSUE, 23 Cyc. 368; PUT.)

PUTTING IN FEAR. A phrase which, as used to describe a means of robbery equivalent to violence, necessitates no great degree of terror or affright for personal safety, but that the robbery be attended with such threatenings by word, gesture or manner as in common experience are likely to create an apprehension of danger and induce one to part with his property for the safety of his person.[19] (See ROBBERY.)

PUT UPON. In practice, to rest upon; to submit to.[20] (See PUT.)

Q. B. An abbreviation of "Queen's Bench."[21]

Q. B. D. An abbreviation of "Queen's Bench Division."[22]

Q. C. An abbreviation of "Queen's Counsel."[23]

Q. C. F. An abbreviation of "*quare clausum fregit.*"[24]

"put the sum of £500 on interest, to be well secured," intended that the money should be secured by mortgage or judgment on realty, and said: "In common parlance, neither among agriculturists, traders, or dealers in stock, do the terms 'put out on interest' convey the idea of a purchase of bank or other corporation shares."

10. Perry *v.* Fitzhowe, 8 Q. B. 757, 779, 10 Jur. 799, 15 L. J. Q. B. 239, 55 E. C. L. 757.

11. Burrill L. Dict.

12. See Daniel *v.* North, 11 East 372, 375 [*cited* in Burrill L. Dict.].

13. See 16 Cyc. 820 text and note 84.

14. Wolcott *v.* Heath, 78 Ill. 433, 437. "The true idea of an 'option' is 'puts' and 'call.' A 'put' is defined . . . to be 'a privilege of delivering or not delivering'" the thing sold, and "a 'call' is 'a privilege of calling or not calling'" for the thing bought. According to evidence received in Pixley *v.* Boynton, 79 Ill. 351, 353 [*quoted* and adopted as a judicial definition in Pearce *v.* Foote, 113 Ill. 228, 234, 55 Am. Rep. 414 (*quoted* in Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 85, 97, 43 S. E. 774, 31 L. R. A. 529; Carroll *v.* Holmes, 24 Ill. App. 453, 456; Zeller *v.* Leiter, 114 N. Y. App. Div. 148, 152, 99 N. Y. Suppl. 624); Miles *v.* Andrews, 40 Ill. App. 155, 172]; Osgood *v.* Bauder, 75 Iowa 550, 556, 39 N. W. 887, 1 L. R. A. 655.

15. Black L. Dict.

16. See Crone *v.* Angell, 14 Mich. 340, 344, 345, where it was held that a statement imputing false swearing, with the addition, "I will put him through for it, if it costs me all I am worth," taken altogether was "well calculated to convey the idea of intended legal prosecution," and was therefore slanderous.

17. Porter *v.* Seiler, 23 Pa. St. 424, 430, 62 Am. Dec. 341 [*quoted* in Stark *v.* Knapp, 160 Mo. 529, 550, 61 S. W. 669; Dudley *v.* McCluer, 65 Mo. 241, 243, 27 Am. Rep. 273].

18. American F. Ins. Co. *v.* Hazen, 110 Pa. St. 530, 537, 1 Atl. 605.

19. Simmons *v.* State, 41 Fla. 316, 319, 25 So. 881.

20. Burrill L. Dict. "'Puts' himself 'upon' the country" see Burrill L. Dict. The form, "and of this he puts himself upon the country," at the conclusion of a common-law plea, means that the pleader desires to have the truth of the alleged facts tried by a jury. Bell *v.* Yates, 33 Barb. (N. Y.) 627, 629.

21. Black L. Dict.

22. Black L. Dict.

23. Black L. Dict.

24. Black L. Dict.

Q. E. N. An abbreviation of "*quare executionem non*," wherefore execution [should] not [be issued.] [25]

QR. The recognized abbreviation for "quarter" as applied to weights and measures.[26] (See, generally, WEIGHTS AND MEASURES.)

Q. S. An abbreviation for "Quarter Sessions." [27]

Q. T. An abbreviation of "*qui tam.*" [28]

QUACK GRASS. See FRAUD, 20 Cyc. 50 note 10.

QUACK MEDICINE. A remedy or specific whose composition is kept secret, and which is sold to be used by the purchasers without the advice of regular or licensed physicians.[29] (See MEDICINE, 27 Cyc. 466.)

QUADROON. The descendant of a mulatto, that is a person of equal mixture of European and negro blood, and a white.[30] (See COLORED PERSONS, 7 Cyc. 400; MULATTO, 28 Cyc. 51; NEGRO, 29 Cyc. 661.)

QUÆ AB HOSTIBUS CAPIUNTUR, STATIM CAPIENTIUM FIUNT. A maxim meaning "Things which are taken from enemies immediately become the property of the captors." [31]

QUÆ AB INITIO INUTILIS FUIT INSTITUTIO, EX POST FACTO CONVALESCERE NON POTEST. A maxim meaning "An institution void in the beginning cannot acquire validity from after-matter." [32]

QUÆ AB INITIO NON VALENT EX POST FACTO CONVALESCERE NON POSSUNT. A maxim meaning "Things invalid from the beginning can not be made valid by a subsequent act." [33]

QUÆ ACCESSORIUM LOCUM OBTINET EXTINGUUNTUR CUM PRINCIPIALES RES PEREMPTÆ FUERIT. A maxim meaning "Those things which hold the place of accessories are extinguished when the principal has been destroyed." [34]

QUÆ AD OMNES PERTINET OMNES DEBENT TRACTARE. A maxim meaning "Those things which pertain to all should be exercised by all." [35]

QUÆ AD UNUM FINEM LOQUUTA SUNT, NON DEBENT AD ALIUM DETORQUERI. A maxim meaning "Words spoken to one end, should not be perverted to another." [36]

QUÆ COHÆRENT PERSONÆ A PERSONA SEPARARI NEQUEUNT. A maxim meaning "Things which cohere to, or are closely connected with, the person, cannot be separated from the person." [37]

QUÆ COMMUNI LEGI DEROGANT STRICTE INTERPRETANTUR. A maxim meaning "Laws which derogate from the common law ought to be strictly construed." [38]

QUÆ CONTRA RATIONEM JURIS INTRODUCTA SUNT NON DEBENT TRAHI IN CONSEQUENTIAM. A maxim meaning "Things that are introduced against the rule of right ought not to be drawn into consequence." [39]

QUÆ CUM OMNIBUS SEMPER UNA ATQUE EADEM VOCE LOQUERENTUR LEGES INVENTÆ SUNT. A maxim meaning "Laws are so framed that they may always speak with one and the same voice to all; for the law is no respecter of persons." [40]

25. Black L. Dict.
26. Standard Dict. [*quoted* in Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204, 206].
27. Black L. Dict.
28. Black L. Dict.
29. Kohler Mfg. Co. *v.* Beeshore, 59 Fed. 572, 574, 8 C. C. A. 215.
30. See 28 Cyc. 51. *Compare* State *v.* Davis, 2 Bailey (S. C.) 558, 559.
31. Black L. Dict.
Applied in Goss *v.* Withers, 2 Burr. 683, 693, 2 Ld. Ken. 325.
32. Bouvier L. Dict. [*citing* Dig. 50, 17, 210].
33. Morgan Leg. Max. [*citing* Trayner Leg. Max.].
34. Morgan Leg. Max. [*citing* Broom Leg. Max.].
Applied in Phillips *v.* Eyre, L. R. 6 Q. B. 1, 28, 10 B. & S. 1004, 40 L. J. Q. B. 28, 22 L. T. Rep. N. S. 869.
35. Morgan Leg. Max. [*citing* Tayler L. Gloss.].
36. Peloubet Leg. Max. [*citing* Cromwell's Case, 4 Coke 12*b*, 14*a*, 76 Eng. Reprint 877].
37. Black L. Dict. [*citing* Jenkins Cent. 28, case 53].
38. Bouvier L. Dict. [*citing* Jenkins Cent. 221].
39. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
40. Morgan Leg. Max.

QUÆCUNQUE INTRA RATIONEM LEGIS INVENIUNTUR, INTRA LEGEM IPSAM ESSE JUDICANTUR. A maxim meaning "Whatever appears within the reason of the law, is considered within the law itself." [41]

QUÆCUNQUE LEX VULT FIERI NON VULT FRUSTRA FIERI. A maxim meaning "Whatever the law wishes done, it wishes not to be done in vain." [42]

QUÆDAM ETSI HONESTE ACCIPIANTUR INHONESTE TAMEN PETUNTUR. A maxim meaning "Things which can be honorably accepted may yet be things which can not honorably be asked." [43]

QUÆDAM IN MAJUS MALUM VITANDUM PERMITTET LEX QUE TAMEN NEQUAQUAM PROBET. A maxim meaning "The law sometimes allows things of which it does not approve to be done, in avoidance of greater evils." [44]

QUÆ DUBITATIONIS CAUSA TOLLENDÆ INSERUNTUR COMMUNEM LEGEM NON LÆDUNT. A maxim meaning "Whatever is inserted for the purpose of removing doubt does not affect the common law." [45]

QUÆ DUBITATIONIS TOLLENDÆ CAUSA CONTRACTIBUS INSERUNTUR, JUS COMMUNE NON LÆDUNT. A maxim meaning "Particular clauses inserted in agreements to avoid doubts and ambiguity do not prejudice the general law." [46]

QUÆ EX HOSTIBUS CAPIUNTUR JURE GENTIUM STATIM CAPIENTUM FIERI. A maxim meaning "Things taken from an enemy belong to the captors." [47]

QUÆ INCONTINENTI VEL CERTO FIUNT IN ESSE VIDENTUR. A maxim meaning "Things which are done directly and certainly appear already in existence." [48]

QUÆ IN CURIA ACTA SUNT RITE AGI PRÆSUMUNTUR. A maxim meaning "Whatever is done in court is presumed to be rightly done." [49]

QUÆ IN PARTES DIVIDI NEQUEUNT SOLIDA, A SINGULIS PRÆSTANTUR. A maxim meaning "Things which cannot be divided into parts are rendered entire by each severally." [50]

QUÆ INTER ALIOS ACTA SUNT NEMINI NOCERE DEBENT, SED PRODESSE POSSUNT. A maxim meaning "Transactions between strangers ought to hurt no man, but may benefit." [51]

QUÆ IN TESTAMENTO ITA SUNT SCRIPTA UT INTELLIGI NON POSSINT PERINDE SUNT AC SI SCRIPTA NON ESSENT. A maxim meaning "Things which are so written in a testament that they can not be understood are as if they were not written." [52]

QUÆ LEGI COMMUNI DEROGANT NON SUNT TRAHENDA IN EXEMPLUM. A maxim meaning "Things derogatory to the common law are not to be drawn into precedent." [53]

QUÆ LEGI COMMUNI DEROGANT STRICTE INTERPRETANTUR. A maxim meaning "Those things which derogate from the common law are to be construed strictly." [54]

QUÆLIBET CONCESSIO DOMINI REGIS CAPI DEBET STRICTE CONTRA DOMINUM REGEM, QUANDO POTEST INTELLIGI DUABUS VIIS. A maxim meaning "Every grant of our lord the king ought to be taken strictly against our lord the king, when it can be understood in two ways." [55]

41. Bouvier L. Dict. [*citing* 2 Coke Inst. 689].
42. Peloubet Leg. Max. [*citing* Halkerstone Leg. Max.].
43. Morgan Leg. Max.
44. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
45. Peloubet Leg. Max. [*citing* Coke Litt. 205*a*].
46. Black L. Dict. [*citing* Dig. 50, 17, 81].
47. Morgan Leg. Max. [*citing* Tayler L. Gloss.].
48. Morgan Leg. Max. [*citing* Coke Litt. 236].
49. Bouvier L. Dict. [*citing* Clerk *v.* Austin, 3 Bulstr. 36, 43, 81 Eng. Reprint 31].
50. Peloubet Leg. Max. [*citing* Bruerton's Case, 6 Coke 1*a*, 77 Eng. Reprint 255].
51. Black L. Dict. [*citing* Bruerton's Case, 6 Coke 1*a*, 1*b*, 77 Eng. Reprint 255].
52. Morgan Leg. Max. [*citing* Dig. 50, 17, 73, § 3].
53. Bouvier L. Dict. [*citing* Branch Princ.].
54. Bouvier L. Dict. [*citing* Jenkins Cent. 29].
55. Black L. Dict.
Applied in Harris' Case, 3 Leon. 242, 243, 74 Eng. Reprint 660.

QUÆLIBET CONCESSIO FORTISSIME CONTRA DONATOREM INTERPRETANDA EST. A maxim meaning "Every grant is to be most strongly interpreted against the grantor." [56]

QUÆLIBET JURISDICTIO CANCELLOS SUOS HABET. A maxim meaning "Every jurisdiction has its bounds." [57]

QUÆLIBET NARRATIO SUPER BREVI LOCARI DEBET IN COMITATU IN QUO BREVE EMANAVIT. A maxim meaning "Every count upon the writ ought to be laid in the county in which the writ arose." [58]

QUÆLIBET PARDONATIO DEBET CAPI SECUNDUM INTENTIONEM REGIS, ET NON AD DECEPTIONEM REGIS. A maxim meaning "Every pardon ought to be taken according to the intention of the king, and not to his deception." [59]

QUÆLIBET PŒNA CORPORALIS, QUAMVIS MINIMA, MAJOR EST QUALIBET PŒNA PECUNIARIA. A maxim meaning "Every corporal punishment, although the very least, is greater than any pecuniary punishment." [60]

QUÆ MALA SUNT INCHOATA IN PRINCIPIS VIX BONO PERAGUNTUR EXITU. A maxim meaning "Things bad in their commencement rarely achieve a good end." [61]

QUÆ NON FIERI DEBENT, FACTA VALENT. A maxim meaning "Things which ought not to be done are held valid when they have been done." [62]

QUÆ NON VALEANT SINGULA, JUNCTA JUVANT. A maxim meaning "Things which do not avail singly, avail when joined." [63]

QUÆ PRÆTER CONSUETUDINEM ET MOREM MAJORUM FIUNT, NEQUE PLACENT, NEQUE RECTA VIDENTUR. A maxim meaning "What is done contrary to the custom and usage of our ancestors, neither pleases nor appears right." [64]

QUÆ PROPTER NECESSITATEM RECEPTA SUNT, NON DEBENT IN ARGUMENTUM TRAHI. A maxim meaning "Things which are received on the ground of necessity should not be drawn into question." [65]

QUÆRAS DE DUBIIS, LEGEM BENE DISCERE SI VIS. A maxim meaning "Inquire into doubtful points if you wish to understand the law well." [66]

QUÆRE DE DUBIIS, QUIA PER RATIONES PERVENITUR AD LEGITIMAM RATIONEM. A maxim meaning "Inquire into doubtful points, because by reasoning we arrive at legal reason." [67]

QUÆRENS NIHIL CAPIAT PER BILLAM. Literally "Plaintiff shall take nothing by his bill." A form of judgment for defendant.[68]

QUÆRENS NON INVENIT PLEGIUM. Literally "Plaintiff did not find a pledge." A return formerly made by a sheriff to a writ requiring him to take security of the plaintiff to prosecute his claim.[69]

QUÆRERE DAT SAPERE QUÆ SUNT LEGITIMA VERE. A maxim meaning "To investigate is the way to know what things are really true." [70]

QUÆ RERUM NATURA PROHIBENTUR NULLA LEGE CONFIRMATA SUNT. A maxim meaning "Things which are prohibited by the nature of things are confirmed by no law." [71]

QUÆRITUR UT CRESCANT TOT MAGNA VOLUMINA LEGIS: IN PROMPTU CAUSA EST CRESCIT IN ORBE DOLUS. A maxim meaning "If it is questioned

56. Peloubet Leg. Max. [*citing* Coke Litt. 183*a*].
Applied in Calland *v.* Troward, 2 H. Bl. 324–333. See also Courtis *v.* Dennis, 7 Metc. (Mass.) 510, 516.
57. Bouvier L. Dict. [*citing* Jenkins Cent. 139].
58. Peloubet Leg. Max. [*citing* Wharton L. Lex.].
59. Morgan Leg. Max. [*citing* Walles *v.* Hanger, 3 Bulstr. 1, 14, 81 Eng. Reprint 1].
60. Black L. Dict. [*citing* 3 Inst. 220].
61. Morgan Leg. Max. [*citing* Vernon's Case, 4 Coke 1, 2*b*].
62. Black L. Dict. [*citing* Trayner Leg. Max.].
63. Peloubet Leg. Max. [*citing* 3 Bulstr. 132].
64. Bouvier L. Dict. [*citing* Corporations' Case, 4 Coke 78, 78*a*].
65. Peloubet Leg. Max. [*citing* Dig. 50, 17, 162].
66. Bouvier L. Dict. [*citing* Littleton Ten. § 443].
67. Black L. Dict. [*citing* Littleton Ten. § 377].
68. Black L. Dict. [*citing* Latch 133].
69. Black L. Dict. [*citing* Cowell].
70. Peloubet Leg. Max. [*citing* Littleton Ten. § 443].
71. Morgan Leg. Max. [*citing* Finch Ch. Prec. 74].

why law books multiply so rapidly, the answer is plain: it is because crime increases as the world advances." [72]

QUÆ SINGULA NON PROSUNT, JUNCTA JUVANT. A maxim meaning "Things which taken singly are of no avail afford help when taken together." [73]

QUÆSTIO FIT DE LEGIBUS, NON DE PERSONIS. A maxim meaning "A question may arise as to the laws, but not as to persons." [74]

QUÆ SUNT MINORIS CULPÆ SUNT MAJORIS IN FAMIÆ. A maxim meaning "Things which are of the lesser guilt are of the greater infamy." [75]

QUÆ SUNT TEMPORALIA AD AGENDUM SUNT PERPETUA AD EXCIPIENDUM. A maxim meaning "Things which afford a ground of action, if raised within a certain time, may be pleaded at any time, by way of exception." [76]

QUAKER. See RELIGIOUS SOCIETIES.

QUALIFICATION. A term which has a double meaning.[77] In one sense, fitness for; [78] endowment, or accomplishment that fits for an office; having the legal requisites, endowed with qualities fit or suitable for the purpose; [79] any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character, with success; [80] the endowment or acquirement which renders eligible to place or position; [81] that which qualifies a person to render him admissible to or acceptable for a place, an office or employment.[82] In another sense, the doing of some act as a condition of taking or holding office.[83] (Qualification: As Prerequisite to Exercise of Duties of Office in General, see OFFICERS, 29 Cyc. 1385. Averment in Caption of Indictment as to Grand Jurors, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 234. Averment in Indictment or Information For Perjury Showing Qualification of Officer Administering Oath, see PERJURY, 30 Cyc. 1430. Constitutionality of Provision Relating to, see CONSTITUTIONAL LAW, 8 Cyc. 1110; GAMING, 20 Cyc. 917 note 78. Disqualification — Of Judge Ground For Change of Venue, see CRIMINAL LAW, 12 Cyc. 245; To Vote, see PARLIAMENTARY LAW, 29 Cyc. 1689. For Admission to Practise — Law, see ATTORNEY AND CLIENT, 4 Cyc. 901; Medicine, see PHYSICIANS AND SURGEONS, 30 Cyc. 1548. For Naturalization, see ALIENS, 2 Cyc. 112. For Office or Officer in General, see OFFICERS, 29 Cyc. 1376. For Particular Office, Etc., or of Particular Officer, Etc.— In General, see ALIENS, 2 Cyc. 114; AMBASSADORS AND CONSULS, 2 Cyc. 262; ATTORNEY-GENERAL, 4 Cyc. 1025; BAIL, 5 Cyc. 22, 108; CLERKS OF COURTS, 7 Cyc. 201; DEPOSITARIES, 13 Cyc. 813; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 77, 93; GRAND JURIES, 20 Cyc. 1296, 1319; JUDGES, 23 Cyc. 510, 511, 607; JUSTICES OF THE PEACE, 24 Cyc. 411, 509;

72. Morgan Leg. Max. [*citing* Twyne's Case, 3 Coke 80*b*, 82*a*, 76 Eng. Reprint 809].

73. Black L. Dict. [*citing* Trayner Leg. Max.].

Applied in Strode *v.* Perryer, 1 Mod. 267, 268, 86 Eng. Reprint 871.

74. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

75. Peloubet Leg. Max. [*citing* Coke Litt. 6*b*].

Applied in Rex *v.* Johnson, 1 Barn. 123, 124.

76. Peloubet Leg. Max. [*citing* Trayner Leg. Max.].

Applied in Huntington *v.* Westerfield, 119 La. 615, 619, 44 So. 317.

77. Hyde *v.* State, 52 Miss. 665, 672, distinguishing eligibility for office from the act of qualifying for office after election or appointment thereto.

The word, in reference to an officer, has a double sense, meaning the status of the officer, while also often used to describe his act of taking an oath. People *v.* Crissey, 91 N. Y. 616, 636.

In reference to the acts of an official after his election to office means taking oath and giving bond. State *v.* Bemenderfer, 96 Ind. 374, 376; Steinback *v.* State, 38 Ind. 483, 488; State *v.* Neibling, 6 Ohio St. 40, 44.

78. People *v.* Palen, 74 Hun (N. Y.) 289, 292, 26 N. Y. Suppl. 225. See also Hyde *v.* State, 52 Miss. 665, 672.

The term relates to the fitness or capacity of a party for a particular pursuit or profession. Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 319, 18 L. ed. 356.

79. State *v.* Seay, 64 Mo. 89, 101, 27 Am. Rep. 206.

80. Webster Dict. [*quoted* in Cummings *v.* Missouri, 4 Wall. (U. S.) 277, 319, 18 L. ed. 356].

81. Hyde *v.* State, 52 Miss. 665, 672.

82. Century Dict. [*quoted* in People *v.* Palen, 74 Hun (N. Y.) 289, 293, 26 N. Y. Suppl. 225].

"**Qualification shares**" see CORPORATIONS, 10 Cyc. 851.

83. People *v.* Palen, 74 Hun (N. Y.) 289, 292, 26 N. Y. Suppl. 225.

NOTARIES, 29 Cyc. 1070; PROSECUTING AND DISTRICT ATTORNEYS, *ante*, p. 687; RECEIVERS; REGISTERS OF DEEDS; SHERIFFS AND CONSTABLES; UNITED STATES COMMISSIONERS; UNITED STATES MARSHALS; Appraiser of Land, see JUDICIAL SALES, 24 Cyc. 15; MORTGAGES, 27 Cyc. 1685; Assessor or Collector of Benefits or Taxes, see MUNICIPAL CORPORATIONS, 28 Cyc. 1166; TAXATION; Assignee For Benefit of Creditor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 227, 228; Assignee or Trustee in Insolvency, see INSOLVENCY, 22 Cyc. 1277, 1279; Attachment Officer, see ATTACHMENT, 4 Cyc. 674; Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 901; Bank Officer, see BANKS AND BANKING, 5 Cyc. 455; Commissioner or Viewer For Assessment of Compensation in Condemnation Proceedings, see EMINENT DOMAIN, 15 Cyc. 876, 886; Commissioner or Viewer in Highway Proceedings, see STREETS AND HIGHWAYS; Commissioner to Take Depositions, see DEPOSITIONS, 13 Cyc. 846, 914; County Officer, see COUNTIES, 11 Cyc. 381, 383, 419, 423; Election Officer, see ELECTIONS, 15 Cyc. 310; Expert Witness, see EVIDENCE, 17 Cyc. 36; Fence Viewer, see FENCES, 19 Cyc. 475 note 68; Grand Juror, see GRAND JURIES, 20 Cyc. 1296; Guardian, see GUARDIAN AND WARD, 21 Cyc. 20, 32; INSANE PERSONS, 22 Cyc. 1139; Guardian Ad Litem or Next Friend of Infant, see INFANTS, 22 Cyc. 645, 649; Highway Officer, see STREETS AND HIGHWAYS; Juror For Assessment of Compensation in Condemnation Proceedings, see EMINENT DOMAIN, 15 Cyc. 876; Juror in General, see JURIES, 24 Cyc. 187, 196, 210, 237, 244, 255, 267; Jury Commissioner or Like Officer, see JURIES, 24 Cyc. 210, 212 note 31; Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 411; Master or Commissioner in Chancery, see EQUITY, 16 Cyc. 431; Member of Labor Union, see LABOR UNIONS, 24 Cyc. 825; Municipal Officer, see MUNICIPAL CORPORATIONS, 28 Cyc. 412, 417; Officer in Administration of Insolvent's Estate, see INSOLVENCY, 22 Cyc. 1299; Officer Making Judicial Sale, see JUDICIAL SALES, 24 Cyc. 12; Officer to Summon Jurors, see JURIES, 24 Cyc. 225; Petitioner For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 975; Poor Officer, see PAUPERS, 30 Cyc. 1068; Prosecutor, see EXCHANGES, 17 Cyc. 856; Referee, see REFERENCES; State Officer or Agent, see STATES; Surety on Bond, see BONDS, 5 Cyc. 731; Survivor in Administration of Community Property, see HUSBAND AND WIFE, 21 Cyc. 1714 note 92; Town Officer, see TOWNS; United States Officer, see UNITED STATES; Voters, see COUNTIES, 11 Cyc. 526; ELECTIONS, 15 Cyc. 290, 295; Witness, see WITNESSES. Judicial Power to Determine, see CONSTITUTIONAL LAW, 8 Cyc. 845. Retrospective Operation of Constitutional Provisions Requiring Oath, see CONSTITUTIONAL LAW, 8 Cyc. 746. Right of Alien — To Hold Office, see Officers, 29 Cyc. 1377; To Vote, see ELECTIONS, 15 Cyc. 290. Right of Infant to Hold Office, see INFANTS, 22 Cyc. 515.)

QUALIFIED. ENTITLED,[84] *q. v.*, possessed of endowments or accomplishments, or intellectual capacity, or moral worth to discharge the duties of an office;[85] endowed with the qualifications fit or suitable for the purpose;[86] having performed the acts which one chosen is required to perform before he can enter into office.[87] (Qualified: Acceptance of Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 775. Approval, see APPEAL AND ERROR, 3 Cyc. 92 note 27. Assignment, see ASSIGNMENTS, 4 Cyc. 65. Elector, see ELECTIONS, 15 Cyc. 290. Estate, see ESTATES, 16 Cyc. 662. Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 77. Fee, see BASE FEE, 5 Cyc. 621. Indorsement, see COMMERCIAL PAPER, 7 Cyc. 806. Juror, see JURIES, 24 Cyc. 267. Payment, see PAYMENT, 30 Cyc. 1187. Pilot, see PILOTS, 30 Cyc. 1607. Privileged Communication, see LIBEL AND SLANDER, 25 Cyc. 385; WITNESSES. Title, see NAVIGABLE WATERS, 29 Cyc. 346. Voter, see ELECTIONS, 15 Cyc. 290. See also QUALIFICATION; QUALIFY.)

84. See 15 Cyc. 1055.
"Qualified person" see BANKRUPTCY, 5 Cyc. 297 note 58.

85. State *v.* Bemenderfer, 96 Ind. 374, 376; Steinback *v.* State, 38 Ind. 483, 488.

86. State *v.* Seay, 64 Mo. 89, 101, 27 Am. Rep. 206.

87. State *v.* Bemenderfer, 96 Ind. 374, 376. See also Bradley *v.* Clark, 133 Cal. 196, 201, 65 Pac. 395; *Ex p.* Smith, 8 S. C. 495.

QUALIFIED ACCEPTANCE. See COMMERCIAL PAPER, 7 Cyc. 775.

QUALIFIED ELECTOR. See ELECTIONS, 15 Cyc. 290.

QUALIFIED ESTATE. See ESTATES, 16 Cyc. 602.

QUALIFIED FEE. See BASE FEE, 5 Cyc. 621.

QUALIFIED INDORSEMENT. See COMMERCIAL PAPER, 7 Cyc. 806.

QUALIFIED PAYMENT. See PAYMENT, 30 Cyc. 1187.

QUALIFIED VOTER. See ELECTIONS, 15 Cyc. 290.

QUALIFY. To take the oath and give the bond required by law for an administrator, executor, public officer, or the like, before he may enter on the discharge of his duties;[88] to take an oath to discharge the duties of an office;[89] to make oath to any fact; to take the oath of office before entering upon its duties.[90] (See QUALIFICATION; QUALIFIED.)

QUALITAS QUÆ INESSE DEBET, FACILE PRÆSUMITUR. A maxim meaning "A quality which ought to form a part is easily presumed."[91]

QUALITY. The condition of being of such a sort as distinguished from others; special or temporary character, profession, occupation;[92] KIND,[93] *q. v.* (Quality: Of Goods Sold, see SALES. Of Land Sold, see MORTGAGES, 27 Cyc. 1137, 1556; VENDOR AND PURCHASER. Opinion Evidence as to, see EVIDENCE, 17 Cyc. 25, 104. See also CONTRACTS, 9 Cyc. 395.)

QUAM LEGEM EXTERI NOBIS POSUERE EANDEM ILLIS PONEMUS. A maxim meaning " The same law which foreign nations have shown to us we should show to them."[94]

QUAM LONGUM DEBET ESSE RATIONABILE TEMPUS NON DEFINITUR IN LEGE, SED PENDET EX DISCRETIONE JUSTICIARIORUM. A maxim meaning " How long ' reasonable time ' ought to be, is not defined by law, but depends upon the discretion of the judges."[95]

QUAM QUISQUE NOVIT ARTEM IN HOC SE EXERCEAT. A maxim meaning " Let every man employ himself in the pursuit in which he is the most proficient."[96]

QUAM RATIONABILIS DEBET ESSE FINIS, NON DEFINITUR; SED OMNIBUS CIRCUMSTANTIIS INSPECTIS, PENDET EX JUSTICIARIORUM DISCRETIONE. A maxim meaning "A reasonable determination is not defined; but is left to the discretion of the judges, from a view of all the circumstances."[97]

88. Abbott L. Dict. [*quoted* in Bradley *v.* Clark, 133 Cal. 196, 201, 65 Pac. 395; State *v.* Bemenderfer, 96 Ind. 374, 376].

89. Hale *v.* Salter, 25 La. Ann. 320, 324.

90. Century Dict. [*quoted* in People *v.* Palen, 74 Hun (N. Y.) 289, 292, 26 N. Y. Suppl. 225]. See also JUDGES, 23 Cyc. 512 note 54.

With reference to the acts which statutes and constitutions require of persons elected to office to perform before entering upon the discharge of the duties of their offices the term means taking the oath of office (Archer *v.* State, 74 Md. 443, 448, 22 Atl. 8, 28 Am. St. Rep. 261; People *v.* McKinney, 52 N. Y. 374, 380; Logan County *v.* Harvey, 6 Okla. 629, 636, 52 Pac. 402), or taking the oath or giving bond where a bond is required (State *v.* Albert, 55 Kan. 154, 159, 40 Pac. 286).

91. Bouvier L. Dict.

92. Webster Dict. [*quoted* in State *v.* Martin, 60 Ark. 343, 353, 30 S. W. 421, 28 L. R. A. 153].

The term is used in different senses.— In some cases it is employed to denote the grade, ingredients, or properties of an article, and in others to indicate generally the merit or excellence of an article as associated with or coming from a certain source. Dennison Mfg. Co. *v.* Thomas Mfg. Co., 94 Fed. 651, 657.

The proper and general meaning of the term as applied to a material subject is its property, its virtue, or particular power of producing certain effects. Heron *v.* Davis, 3 Bosw. (N. Y.) 336, 344.

As applied to descriptions of realty the term must be understood as embracing not only qualities essentially inherent in the land itself but also adventitious qualities — qualities extrinsically added, such as preparation for cultivation or any other material improvement made upon the land. Barnes *v.* Anderson, 21 Ark. 125, 126.

"Quality of the testimony" see Gilmore *v.* Seattle, etc., R. Co., 29 Wash. 150, 152, 69 Pac. 743, 744.

93. U. S. *v.* One Hundred and Thirty-Two Packages of Spirituous Liquors, 65 Fed. 980, 982.

"Grade" compared and distinguished in Whitehall Mfg. Co. *v.* Wise, 119 Pa. St. 484, 494, 13 Atl. 298.

94. Peloubet Leg. Max. [*citing* Tayler L. Gloss.].

95. Black L. Dict. [*citing* Coke Litt. 56].

96. Morgan Leg. Max.

97. Morgan Leg. Max. [*citing* Godfrey's Case, 11 Coke 42*a*, 44*a*, 77 Eng. Reprint 1199].

QUAMVIS ALIQUID PER SE NON SIT MALUM, TAMEN SI SIT MALI EXEMPLI NON EST FACIENDUM. A maxim meaning "Although in itself a thing may not be bad, yet if it holds out a bad example it is not to be done." [98]

QUAMVIS LEX GENERALITER LOQUITUR, RESTRINGENDA TAMEN EST, UT CESSANTE RATIONE ET IPSA CESSAT. A maxim meaning "Although the law speaks generally, it is to be restrained, since when the reason on which it is grounded fails, it fails." [99]

QUAMVIS QUIS PRO CONTUMACIA ET FUGA UTLAGETUR, NON PROPTER HOC CONVICTUS EST DE FACTO PRINCIPIALI. A maxim meaning "Though a person may be outlawed for contempt and flight, he is not, on that account, convicted of the principal fact." [1]

QUANDO ABEST PROVISIO PARTIS, ADEST PROVISIO LEGIS. A maxim meaning " When the provision of the party is wanting, the provision of the law is at hand." [2]

QUANDO ACCIDERINT. Literally " When they shall happen, or come to hand." In practice, the technical name of a judgment entered against an executor or administrator, where it is directed to be satisfied out of assets which may " afterwards come " to the hands of the defendant.[3] (See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1044; JUDGMENTS, 23 Cyc. 1509 note 95.)

QUANDO ALIQUID CONCEDITUR, CONCEDITUR ID SINE QUO ILLUD FIERI NON POSSIT. A maxim meaning " When anything is granted, that also is granted without which it cannot be of effect." [4]

QUANDO ALIQUID MANDATUR, MANDATUR ET OMNE PER QUOD PERVENITUR AD ILLUD. A maxim meaning " When anything is commanded, everything by which it can be accomplished is also commanded." [5]

QUANDO ALIQUID PER SE NON SIT MALUM, TAMEN SI SIT MALI EXEMPLI, NON EST FACIENDUM. A maxim meaning "When anything by itself is not evil, and yet may be an example for evil, it is not to be done." [6]

QUANDO ALIQUID PROHIBETUR EX DIRECTO, PROHIBETUR ET PER OBLIQUUM. A maxim meaning " When any thing is prohibited directly, it is prohibited also indirectly." [7]

QUANDO ALIQUID PROHIBETUR, PROHIBETUR ET OMNE PER QUOD DEVENITUR AD ILLUD. A maxim meaning " That which cannot be done directly shall not be done indirectly." [8]

QUANDO ALIQUIS ALIQUID CONCEDIT, CONCEDERE VIDETUR ET ID SINE QUO RES UTI NON POTEST. A maxim meaning "When a person grants a thing, he is supposed to grant that also without which the thing cannot be used." [9]

QUANDO CHARTA CONTINET GENERALEM CLAUSULAM, POSTEAQUE DESCENDIT AD VERBA SPECIALIA, QUÆ CLAUSULÆ GENERALI SUNT CONSENTANEA, INTERPRETANDA EST CHARTA SECUNDUM VERBA SPECIALIA. A maxim meaning "When a deed contains a general clause, and afterwards descends to special

98. Bouvier L. Dict. [*citing* 2 Inst. 564].

99. Peloubet Leg. Max. [*citing* 4 Inst. 330].

1. Morgan Leg. Max. [*citing* Tayler L. Gloss.].

2. Black L. Dict. [*citing* 6 Viner Abr. 49].

3. Burrill L. Dict.

4. Peloubet Leg. Max.

Applied in: Proprietors Charles River Bridge *v.* Proprietors Warren Bridge, 7 Pick. (Mass.) 344, 494; Sterricker *v.* Dickinson, 9 Barb. (N. Y.) 516, 518.

5. Black L. Dict. [*citing* Foliamb's Case, 5 Coke 115*b*, 116, 77 Eng. Reprint 235].

Applied in: Morgan's Estate, 20 Phila. (Pa.) 60; France's Estate, 17 Phila. (Pa.) 485; Davis' Estate, 13 Phila. (Pa.) 407, 408; France's Estate, 16 Wkly. Notes Cas. (Pa.) 350, 351; Miller *v.* Knox, 4 Bing. N. Cas. 574, 582, 6 Scott 1, 33 E. C. L. 865; Frost *v.* Oliver, 2 E. & B. 301, 306, 18 Jur. 166, 22 L. J. Q. B. 353, 20 Eng. L. & Eq. 114, 75 E. C. L. 301.

6. Bouvier L. Dict. [*citing* 2 Inst. 564].

7. Morgan Leg. Max. [*citing* Coke Litt. 223].

Applied in *In re* Macleay, L. R. 20 Eq. 186, 189, 44 L. J. Ch. 441, 32 L. T. Rep. N. S. 682, 23 Wkly. Rep. 718.

8. Black L. Dict. [*citing* Broom Leg. Max.].

Applied in: Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344, 494; Macdonald *v.* Crombie, 2 Ont. 243, 259.

9. Bouvier I. Dict. [*citing* 3 Kent Comm. 421].

Applied in: Elliot *v.* Shepherd, 25 Me. 371, 378; Nichols *v.* Luce, 24 Pick. (Mass.) 102, 104; Dillman *v.* Hoffman, 38 Wis. 559, 572; Pinnington *v.* Galland, 9 Exch. 1, 12, 22 L. J. Exch. 348, 20 Eng. L. Eq. 561.

words, which are consentaneous to the general clause, the deed is to be interpreted according to the special words."[10]

QUANDO DE UNA ET EADEM RE, DUO ONERABILES EXISTUNT, UNUS, PRO INSUFFICIENTA ALTERIUS, DE INTEGRO ONERABITUR. A maxim meaning "Where there are two persons liable for one and the same thing, one, for the other's default, will be charged for the whole."[11]

QUANDO DISPOSITIO REFERRI POTEST AD DUAS RES ITA QUOD SECUNDUM RELATIONEM UNAM VITIETUR ET SECUNDUM ALTERAM UTILIS SIT, TUM FACIENDA EST RELATIO AD ILLAM UT VALEAT DISPOSITIO. A maxim meaning "When a disposition may refer to two things, so that by the former it would be vitiated, and by the latter it would be preserved, then the relation is to be made to the latter, so that the disposition may be valid."[12]

QUANDO DIVERSI DESIDERANTUR ACTUS AD ALIQUEM STATUM PERFICIENDUM, PLUS RESPICIT LEX ACTUM ORIGINALEM. A maxim meaning "When different acts are required to the formation of an estate, the law chiefly regards the original act."[13]

QUANDO DUO JURA CONCURRUNT IN UNA PERSONA, ÆQUUM EST AC SI ESSENT IN DIVERSIS. A maxim meaning "When two rights concur in one person, it is the same as if they were in separate persons."[14]

QUANDO JUS DOMINI REGIS ET SUBDITI CONCURRUNT, JUS REGIS PRÆFERRI DEBET. A maxim meaning "Where the title of the king and the title of a subject concur, the king's title shall be preferred."[15]

QUANDO LEX ALIQUID ALICUI CONCEDIT, CONCEDERE VIDETUR ID SINE QUO RES IPSA ESSE NON POTEST. A maxim meaning "When the law grants anything to any one it is considered to grant that also without which the thing itself cannot exist."[16]

QUANDO LEX EST SPECIALIS RATIO AUTEM GENERALIS, GENERALITER LEX EST INTELLIGENDA. A maxim meaning "When the law is special, but its reason general, the law is to be understood generally."[17]

QUANDO LICET ID QUOD MAJUS, VIDETUR ET LICERE ID QUOD MINUS. A maxim meaning "When the greater is allowed, the less is to be understood as allowed also."[18]

QUANDO MULIER NOBILIS NUPSERIT IGNOBILI, DESINIT ESSE NOBILIS, NISI NOBILITAS NATIVA FUERIT. A maxim meaning "When a woman marries a man not noble, she ceases to be noble, unless noble by her own birth."[19]

QUANDO PLUS FIT QUAM FIERI DEBET, VIDETUR ETIAM ILLUD FIERI QUOD FACIENDUM EST. A maxim meaning "Where more is done than ought to be

10. Peloubet Leg. Max. [*citing* Altham's Case, 8 Coke 150*b*, 154*b*, 77 Eng. Reprint 701].

11. Morgan Leg. Max. [*citing* 2 Inst. 277].

12. Black L. Dict. [*citing* Curson's Case, 6 Coke 75*b*, 76*b*, 77 Eng. Reprint 369].

13. Bouvier L. Dict. [*citing* Lampet's Case, 10 Coke 46*b*, 49*a*, 77 Eng. Reprint 994].

14. Peloubet Leg. Max. [*citing* Acton's Case, 4 Coke 117*a*, 118*a*, 76 Eng. Reprint 1107].

Applied in: Kessinger *v.* Wilson, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220; Newall *v.* Wright, 3 Mass. 138, 142, 3 Am. Dec. 98; Sims *v.* Chew, 15 Serg. & R. (Pa.) 197–205.

15. Morgan Leg. Max. [*citing* Quick's Case, 9 Coke 129*a*, 129*b*, 77 Eng. Reprint 916; Broom Leg. Max.].

Quoted in: Middlesex County *v.* New Brunswick State Bank, 29 N. J. Eq. 268; Giles *v.* Grover, 9 Bing. 128, 136, 23 E. C. L. 515, 6 Bligh N. S. 277, 5 Eng. Reprint 598, 1 Cl. & F. 72, 6 Eng. Reprint 843, 2 Moore & S. 197; *Ex p.* Jones, 3 Deac. & C. 521, 540; Reg. *v.* Nova Scotia Bank, 11 Can. Sup. Ct. 1, 15.

16. Peloubet Leg. Max. [*citing* Franklin's Case, 5 Coke 46*b*, 47*a*, 77 Eng. Reprint 125].

Applied in: Matter of McDonald, 2 N. Y. Cr. 82, 97; Cox *v.* Hakes, 15 App. Cas. 506, 540, 17 Cox C. C. 158, 54 J. P. 820, 60 L. J. Q. B. 89, 63 L. T. Rep. N. S. 392, 39 Wkly. Rep. 145; Doyle *v.* Falconer, L. R. 1 P. C. 328, 340, 36 L. J. P. C. 34, 4 Moore P. C. N. S. 203, 15 Wkly. Rep. 366, 16 Eng. Reprint 293; Kielley *v.* Carson, 7 Jur. 137, 140, 4 Moore P. C. 63, 13 Eng. Reprint 225; Fenton *v.* Hampton, 11 Moore P. C. 347, 360, 6 Wkly. Rep. 341, 14 Eng. Reprint 727; Moriarity *v.* Kavanagh, 2 Newfoundland 591, 594.

17. Peloubet Leg. Max. [*citing* 2 Inst. 83].

18. Black L. Dict. [*citing* Sheppard Touchst. 429].

19. Morgan Leg. Max. [*citing* Acton's Case, 4 Coke 117*a*, 118*a*, 76 Eng. Reprint 1107].

done, that at least shall be considered as performed which should have been performed." [20]

QUANDO QUOD AGO NON VALET UT AGO, VALEAT QUANTUM VALERE POTEST. A maxim meaning "When that which I do does not have effect as I do it, let it have as much effect as it can." [21]

QUANDO RES NON VALET UT AGO, VALEAT QUANTUM VALERE POTEST. A maxim meaning "When a thing is of no force as I do it, it shall have effect as far as it can." [22]

QUANDO VERBA ET MENS CONGRUUNT, NON EST INTERPRETATIONI LOCUS. A maxim meaning "When the words and the mind agree, there is no place for interpretation." [23]

QUANDO VERBA STATUTI SUNT SPECIALA, RATIO AUTEM GENERALIS, GENERALITER STATUTUM EST INTELLIGENDUM. A maxim meaning "When the words of a statute are special, but the reason general, the statute is to be understood generally." [24]

QUANTI MINORIS. In Louisiana, an action for the reduction of the price in consequence of a defect in the thing sold.[25]

QUANTITY. That which answers the question, "How much?" The attribute of being so much, and not more or less; [26] that property of anything which may be increased or diminished; an indefinite extent of space; a partition or part.[27] (Quantity: Evidence as to, see EVIDENCE, 17 Cyc. 105, 228. Of Goods Sold, see FRAUDS, STATUTE OF, 20 Cyc. 238, 245; SALES. Of Land, see BOUNDARIES, 5 Cyc. 883; COVENANTS, 11 Cyc. 1049; MORTGAGES, 27 Cyc. 1137, 1556; VENDOR AND PURCHASER. Of Minerals Granted on Sale Reserving Lands, see MINES AND MINERALS, 27 Cyc. 681. Of Minerals Sold, see MINES AND MINERALS, 27 Cyc. 700. Of Mining Property, see MINES AND MINERALS, 27 Cyc. 678, 697. Of Work or Material, see MECHANICS' LIENS, 27 Cyc. 47, 412. Pleading, Amendment of, in Action —Arising Out of Contract, see PLEADING, 31 Cyc. 414; For Tort, see PLEADING, 31 Cyc. 416. See also CUSTOMS AND USAGES, 12 Cyc. 1085; FRAUD, 20 Cyc. 140; LARCENY, 25 Cyc. 102; QUALITY.)

QUANTO GRADU UNUSQUISQUE EORUM DISTAT STIRPITE, EODEM DISTAT INTER SE. A maxim meaning "In so far as each person is removed from the stock, in such degree are they related among themselves." [28]

QUANTO IN ARTE EST MELIOR, TANTO EST NEQUIOR. A maxim meaning

20. Black L. Dict. [*citing* Broom Leg. Max.; Wade's Case, 5 Coke 114*a*, 115*a*, 77 Eng. Reprint 232, 8 Coke 85*a*, 77 Eng. Reprint 603].

Applied in: Mowatt *v.* Londesborough, 4 E. & B. 1, 7, 18 Jur. 1094, 23 L. J. Q. B. 38, 28 Eng. L. & Eq. 119, 2 Wkly. Rep. 568, 82 E. C. L. 1; Scottish American Inv. Co. *v.* Elora, 6 Ont. App. 628, 635, 636.

21. Bouvier L. Dict.

Applied in Jackson *v.* Blodget, 16 Johns. (N. Y.) 172, 178.

22. Pelobuet Leg. Max.

Applied in: Thayer *v.* McGee, 20 Mich. 195, 207; Van Syckel's Estate, 9 Pa. Dist. 367, 368; Goodtitle *v.* Bailey, Cowp. 597, 600; Dighton *v.* Tomlinson, 10 Mod. 31, 34, 88 Eng. Reprint 612, 1 P. Wms. 149, 24 Eng. Reprint 335, Salk. 239, 91 Eng. Reprint 212.

23. Black L. Dict.

24. Morgan Leg. Max. [*citing* Beawfage's Case, 10 Coke 99*b*, 101*b*, 77 Eng. Reprint 1076].

25. Millaudon *v.* Soubercase, 3 Mart. N. S. (La.) 287, 288.

26. Webster Dict. [*quoted* in Texas, etc., R. Co. *v.* Cuteman, 4 Tex. App. Civ. Cas. § 1, 14 S. W. 1069, 1070].

27. Webster Dict. [*quoted* in Reg. *v.* Cunerty, 2 Can. Cr. Cas. 325, 326].

Its synonyms are "weight," "bulk," "measure," and "amount." Reg. *v.* Cunerty, 2 Can. Cr. Cas. 325, 326.

The term may include "weights" or "amounts," but neither of these terms are accurately synonymous with it. Sherman, etc., R. Co. *v.* Conly, (Tex. Civ. App. 1896) 37 S. W. 253, 254.

The term as used in a schedule relating to duties on imported fruit, and making an allowance for loss on decay which exceeds twenty-five per cent of the quantity, relates to the whole importation of fruit, and not to the quantity in each particular package damaged. Scattergood *v.* Tutton, 2 Fed. 28, 29.

Where articles alleged to have been stolen are of one kind, an allegation that a "quantity" of articles were stolen without stating any specific number is sufficient. Com. *v.* Butts, 124 Mass. 449, 452.

"Quantity guaranteed" see Bissel *v.* Campbell, 54 N. Y. 353, 357. See also EVIDENCE, 17 Cyc. 686.

28. Peloubet Leg. Max. [*citing* Tayler L. Gloss.].

"The more skillful the thief or the gambler is in his art, the more wicked he is." [29]

QUANTUM. Quantity, *q. v.*, amount.[30] (See Customs and Usages, 12 Cyc. 1101; Evidence, 16 Cyc. 1096 note 24.)

QUANTUM DAMNIFICATUS. Literally "How much damnified?" [31]

QUANTUM MERUIT. Literally "As much as he deserved." [32] In pleading, the common count in an action of assumpit for work and labor, founded on an implied assumpsit or promise on the part of the defendant to pay the plaintiff as much as he reasonably deserved to have for his labor.[33] (Quantum Meruit: Action of Debt on Implied Contract For Work or Labor, see Debt, Action of, 13 Cyc. 409 note 32. Joinder With Count — For Damages For Breach of Contract, see Joinder and Splitting of Actions, 23 Cyc. 408 note 89; On Special Contract For Same Services, see Joinder and Splitting of Actions, 23 Cyc. 407. Nature and Form of Remedy For Breach of Contract, see Contracts, 9 Cyc. 686. Recovery of Assessments and Special Taxes For Benefits From Public Improvements on, see Municipal Corporations, 28 Cyc. 1212. Recovery on Quantum Meruit For Services — In General, see Work and Labor; After Abandonment of Contract see Contracts, 9 Cyc. 690; After Declaring on Express Contract, see Contracts, 9 Cyc. 749; By City Officer Under Contract With City, see Municipal Corporations, 28 Cyc. 654; By Contractor With City, see Municipal Corporations, 28 Cyc. 685; Under Contract in General, see Contracts, 9 Cyc. 685; Under Contract Partially Illegal, see Contracts, 9 Cyc. 566; Under Contract Void For Champerty, see Champerty and Maintenance, 6 Cyc. 880. Rights and Liabilities on Partial Performance of Contract, see Contracts, 9 Cyc. 689. Value and Amount of Services of Attorney, see Attorney and Client, 4 Cyc. 994. See also Assumpsit, Action of, 4 Cyc. 317; Bridges, 5 Cyc. 1068; Contracts, 9 Cyc. 213; Corporations, 10 Cyc. 1034, 1117; Debt, Action of, 13 Cyc. 402; Factors and Brokers, 19 Cyc. 275 note 22; Infants, 22 Cyc. 617; Joinder and Splitting of Actions, 23 Cyc. 376, 406, 408 note 89; Master and Servant, 26 Cyc. 1000, 1044, 1055 note 65; Work and Labor.)

QUANTUM TENENS DOMINO EX HOMAGIO, TANTUM DOMINUS TENENTI EX DOMINIO DEBET PRÆTER SOLAM REVERENTIAM; MUTUA DEBET ESSE DOMINII ET HOMAGII FIDELITATIS CONNEXIO. A maxim meaning "As much as the tenant by his homage owes to his lord, so much is the lord, by his lordship, indebted to the tenant, except reverence alone; the tie of dominion and of homage ought to be mutual." [34]

QUANTUM VALEBANT. Literally "As much as they were worth." In pleading, the common count in an action of assumpsit for goods sold and delivered, founded on an implied assumpsit or promise, on the part of defendant, to pay plaintiff as much as the goods were reasonably worth.[35] (Quantum Valebant: Recovery of Value of Goods Sold, see Sales.)

QUARANTINE. As a noun, a period of time originally consisting of forty days, but now of variable length, during which a vessel from certain coasts or ports, said or supposed to be infected with certain diseases, is not allowed to

29. Morgan Leg. Max. [*citing* Riley Leg. Max.].

30. Webster Dict. [*quoted* in Connelly *v.* Western Union Tel. Co., 100 Va. 51, 63, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663].

31. Black L. Dict.

It is the name of an issue directed by a court of equity to be tried in a court of law, to ascertain the amount of compensation to be allowed for damage. Black L. Dict.

32. Burrill L. Dict.

33. Black L. Dict. See also Turner *v.* Fidelity Loan Concern, 2 Cal. App. 122, 129, 83 Pac. 62, 70; Swanson *v.* Ottumwa, 131 Iowa 540, 550, 106 N. W. 9, 5 L. R. A. N. S. 860; James *v.* Parson, 70 Kan. 156, 159, 78 Pac. 438; Cozad *v.* Elam, 115 Mo. App. 136, 139, 91 S. W. 434; Barney *v.* Lasbury, 76 Nebr. 701, 107 N. W. 989; Lucas *v.* County Recorder, 75 Nebr. 351, 358, 106 N. W. 217; Goose River Bank *v.* Willow Lake School Tp., 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605; Bills *v.* Polk, 4 Lea (Tenn.) 494; *Re* Page, 32 Beav. 487, 489, 9 Jur. N. S. 1116, 8 L. T. Rep. N. S. 231, 11 Wkly. Rep. 584, 55 Eng. Reprint 191.

34. Black L. Dict. [*citing* Coke Litt. 64].

35. Burrill L. Dict.

communicate with the shore, except under particular restrictions;[36] the term of forty days during which persons coming from foreign ports infected with the plague are not permitted to come ashore;[37] properly the space of forty days; appropriately, the term of forty days during which a ship arriving in port, and suspected of being infected with a malignant or contagious disease, is obliged to forbear all intercourse with the city or place; restraint of intercourse to which a ship may be subjected, on the presumption that she may be infected, either for forty days or for any other limited period.[38] As a verb, to keep persons, when suspected of having contracted or been exposed to an infectious disease, out of a community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community.[39] (Quarantine: In General, see COMMERCE, 7 Cyc. 469; CONSTITUTIONAL LAW, 8 Cyc. 868; HEALTH, 21 Cyc. 394; MUNICIPAL CORPORATIONS, 28 Cyc. 709; SHIPPING. Jurisdiction of Federal Court to Restrain Enforcement of Quarantine Regulations, see COURTS, 11 Cyc. 1016. Maintenance of Widow During Quarantine, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 375. Of Animal, see ANIMALS, 2 Cyc. 340. Of Widow, see CURTESY, 12 Cyc. 1012 note 61; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 375. Regulations of Vessels by State as an Interference With Commerce, see COMMERCE, 7 Cyc. 469. Violation of Quarantine Regulations by Vessel, see SHIPPING.)

QUARE CLAUSUM FREGIT. Literally "Wherefore he broke the close."[40] (See, generally, TRESPASS.[41])

QUARE IMPEDIT. See INTERPLEADER, 23 Cyc. 3.

QUARREL. As related to police, the exchange of angry utterances between two or more persons, and not the mere use in an ordinary tone of vituperative and threatening words by one to another who remains silent.[42] (See FIGHT, 19 Cyc. 527.)

QUARRY.[43] As a noun, the spot where rock is quarried;[44] an excavation or other place from which stone is taken by cutting, blasting or the like, usually

36. Burrill L. Dict. [*quoted* in Gibson *v.* The Steamer Madras, 5 Hawaii 109, 120].

37. Tomlin L. Dict. [*quoted* in Gibson *v.* The Steamer Madras, 5 Hawaii 109, 120].

38. Webster Dict. [*quoted* in Gibson *v.* The Steamer Madras, 5 Hawaii 109, 116].

City ordinances prohibiting the bringing in of second-hand clothing, blankets, etc., and offering them for sale, are invalid as quarantine regulations, except where the places from which such articles come are infected with contagious diseases, being unreasonable restraint of trade. Greensboro *v.* Ehrenreich, 80 Ala. 579, 582, 2 So. 725, 60 Am. Rep. 130; Kosciusko *v.* Slomberg, 68 Miss. 469, 471, 9 So. 297, 24 Am. St. Rep. 281, 12 L. R. A. 528.

39. Daniel *v.* Putnam County, 113 Ga. 570, 572, 38 S. E. 980, 54 L. R. A. 292.

40. Black L. Dict.

41. See also CEMETERIES, 6 Cyc. 721; CORPORATIONS, 10 Cyc. 1215; JUDGMENTS, 23 Cyc. 1335 note 34.

42. Carr *v.* Conyers, 84 Ga. 287, 289, 10 S. E. 630, 20 Am. St. Rep. 357, where it is said: "It seems to us that it takes two to make a quarrel; that a quarrel cannot be *ex parte*. Certainly so, unless the speaker utters his words in a loud and angry tone."

As used in an ordinance forbidding persons to quarrel, the term is very comprehensive and would include a difficulty in which the owner of a store engaged in an attempt to eject a person from his premises who refused to go when ordered, though the ancient law would have given him a right to use force. Metcalf *v.* People, 2 Colo. App. 262, 30 Pac. 39.

Within the meaning of an accident policy providing that if death occurs from assault provoked by quarreling no recovery can be had, the term cannot be held to mean every frivolous controversy which might, in some sense, be termed a "quarrel," although it was not a dispute or quarrel from which the insured might reasonably have expected anger to be provoked or injury to result. Accident Ins. Co. of North America *v.* Bennett, 90 Tenn. 256, 265, 16 S. W. 723, 25 Am. St. Rep. 685.

Quarreling see DISORDERLY CONDUCT, 14 Cyc. 468.

Quarrels see HOMICIDE, 21 Cyc. 915, 962.

43. **Said to be derived** from the French word "*quarriere*." Bell *v.* Wilson, L. R. 1 Ch. 303, 309, 12 Jur. N. S. 263, 35 L. J. Ch. 337, 14 L. T. Rep. N. S. 115, 14 Wkly. Rep. 493.

"**In the Latin** of the lower ages, *quadratarius* was a stonecutter *qui marmora quadrat*, and hence *quarriere*, the place where he *quadrates*, or cuts the stones in squares. Bell *v.* Wilson, L. R. 1 Ch. 303, 309, 12 Jur. N. S. 263, 35 L. J. Ch. 337, 14 L. T. Rep. N. S. 115, 14 Wkly. Rep. 493.

44. Shaw *v.* Wallace, 25 N. J. L. 453, 462; Hoysradt *v.* Delaware, etc., R. Co., 151 Fed. 321, 331.

distinguished from a mine from being widely open at the top and front; [45] the place where the stone is cut in squares; generally, a stone-pit; [46] a place, cavern or pit where stone is taken from the rock or ledge, or dug from the earth, for building or other purposes; a stone pit; [47] a stone mine.[48] As a verb, to cut, dig or take from as from a quarry.[49] (Quarry: Liabilities For Injuries to Fellow Workmen in, see MASTER AND SERVANT, 26 Cyc. 1117. Operation of Mines, Quarries, and Wells, see MINES AND MINERALS, 27 Cyc. 747. Rights to Quarried Stone on Mortgage Foreclosure Sale, see MORTGAGES, 27 Cyc. 1728.)

QUARTER.[50] The fourth part of a thing.[51] As applied to money, twenty-five cents.[52]

QUARTER CORNER. As used in government surveys means the corner on the section line midway between the section corners.[53]

QUARTERLY. Quarter-yearly; once in a quarter of a year.[54]

QUARTER SESSIONS. See COURT COMMISSIONERS, 11 Cyc. 629.

QUARTER SESSIONS OF THE PEACE. See COURT COMMISSIONERS, 11 Cyc. 631.

QUARTO DIE POST. Literally " On the fourth day after." [55] (See, generally, COMMERCIAL PAPER, 7 Cyc. 865)

QUARTZ. In gold mining all kinds of auriferous rock.[56] (See, generally, MINES AND MINERALS, 27 Cyc. 516.)

QUARTZ LODE. A fissure or seam in the country rock filled with quartz matter bearing gold or silver.[57] (See, generally, MINES AND MINERALS, 27 Cyc. 516.)

45. Ruttledge *v.* Kress, 17 Pa. Super. Ct. 490, 495.

46. Bell *v.* Wilson, L. R. 1 Ch. 303, 309, 12 Jur. N. S. 263, 35 L. J. Ch. 337, 14 L. T. Rep. N. S. 115, 14 Wkly. Rep. 493.

47. Webster Dict. [*quoted* in *In re* Kelso, 147 Cal. 609, 611, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. N. S. 683].

48. March Dict. [*quoted* in *In re* Kelso, 147 Cal. 609, 611, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. N. S. 683]. See also ESTATES, 16 Cyc. 625; FIXTURES, 19 Cyc. 1060; MASTER AND SERVANT, 26 Cyc. 1117; MINES AND MINERALS, 27 Cyc. 699, 747; MORTGAGES, 27 Cyc. 1248.

As defined by the lexicographers, it is similar to a mine, in the sense that the material removed, be it mere rock, or stone, or valuable marble, is removed because of its value for some other purposes, and in the sense that it is not removed for the purpose of improving the property from which it is taken. It is distinguished from a mine in the fact that it is usually open at the top and front (see Century and Standard Dictionaries), and, in the ordinary acceptation of the term, in the character of the material extracted, but these distinctions are not material here. *In re* Kelso, 147 Cal. 609, 610, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. N. S. 683.

Distinguished from "mine" see Rapalje & L. L. Dict. [*quoted* in Murray *v.* Allred, 100 Tenn. 100, 110, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249]; Webster Dict. [*quoted* in Marvel *v.* Merritt, 116 U. S. 11, 12, 6 S. Ct. 207, 29 L. ed. 550].

Working a quarry includes the doing of any work necessary to the proper and convenient use of the pit, such as the removal of earth, debris, water, ice, or snow. Miller *v.* Chester Slate Co., 129 Pa. St. 81, 93, 18 Atl. 565.

49. Ruttledge *v.* Kress, 17 Pa. Super. Ct. 490, 495.

50. **Sometimes abbreviated** "q^r" see *ante*, p. 1276.

51. Black L. Dict.

Synonymous with "fourth" see Campbell *v.* Bates, 143 Ala. 338, 343, 39 So. 144, although improperly spelled "quater."

In government surveys the term is used to designate a square piece of land, as the "southeast" or "northeast" quarter. McCartney *v.* Dennison, 101 Cal. 252, 253, 35 Pac. 766.

As used in a city ordinance providing that the license for running a barroom, drinking shop, etc., shall be paid each quarter, the term means a quarter of a year and is not indefinite or uncertain. *In re* Schneider, 11 Oreg. 288, 298, 8 Pac. 289.

"Quarters of corn" in a lease see St. Cross Hospital *v.* Walden, 6 T. R. 338, 343.

52. Sims *v.* State, 1 Ga. App. 776, 777, 57 S. E. 1029.

53. Rud *v.* Pope County, 66 Minn. 358, 359, 68 N. W. 1062, 69 N. W. 886.

54. Kirk *v.* Hartman, 63 Pa. St. 97, 106.

Quarterly court.— A system of courts in Kentucky possessing a limited original jurisdiction in civil cases and appealable jurisdiction from justices of the peace. Black L. Dict. See Hamilton *v.* Spalding, 76 S. W. 517, 518, 25 Ky. L. Rep. 847, as to time of holding.

55. Black L. Dict.

The allowance of the dies gratiæ or the quarto die post was the practice in the English courts, and was presumably, upon the adoption of the common law in this state, introduced as the proper and approved practice thereunder. Vollmer *v.* Avondale Marble Co., 10 Pa. Dist. 434.

56. Leckie *v.* Stuart, 34 Nova Scotia 140, 147.

57. Foote *v.* National Min. Co., 2 Mont. 402, 404.

QUASH.[58] To abate or make void;[59] to overthrow or annul;[60] to vacate by judicial action.[61] (To Quash: Arrest, see ARREST, 3 Cyc. 965. Attachment — Generally, see ATTACHMENT, 4 Cyc. 687 note 15, 769; For Rent, see LANDLORD AND TENANT, 24 Cyc. 1241; In Justices' Courts, see JUSTICES OF THE PEACE, 24 Cyc. 544. Bill of Exceptions, see APPEAL AND ERROR, 3 Cyc. 52. Cause, see APPEAL AND ERROR, 3 Cyc. 208 note 90. Certiorari, see CERTIORARI, 6 Cyc. 813. Execution[62] — Generally, see EXECUTIONS, 17 Cyc. 1115, 1135, 1152, 1176, 1516; For Enforcement of Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 442; In Action By or Against Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1078; Issued by Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 628. Garnishment, see GARNISHMENT, 20 Cyc. 1125; PARTNERSHIP, 30 Cyc. 579. Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 317. Indictment or Information, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 290, 412, 416, 426. Inquisition, see CORONERS, 9 Cyc. 991. Mandamus, see MANDAMUS, 26 Cyc. 493. Order — For Removal of Pauper, see PAUPERS, 30 Cyc. 1115; Of Reference, see REFERENCES. Pleading — Generally, see PLEADING, 31 Cyc. 615; In Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1161. Process and Service or Return or Proof Thereof, see PROCESS. Report of Referee, see REFERENCES. Requisition or Order in Replevin, see REPLEVIN. Restitution on Quashing Proceedings on Certiorari in Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1181. Return — Of Attachment, see ATTACHMENT, 4 Cyc. 621 note 34; Of Execution, see EXECUTIONS, 17 Cyc. 1376. Venire — Generally, see JURIES, 24 Cyc. 328; For Grand Jury, see GRAND JURIES, 20 Cyc. 1325. Writ of Certiorari — Generally, see CERTIORARI, 6 Cyc. 813; To Review Proceedings of Justices of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 778. Writ of Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 317. Writ of Mandamus and Return or Answer in Mandamus Proceedings, see MANDAMUS, 26 Cyc. 463. Writ of Prohibition, see PROHIBITION. Writ of Quo Warranto, see QUO WARRANTO. Writ of Restitution, see APPEAL AND ERROR, 3 Cyc. 468 note 84. Writ of Scire Facias to Revive Judgment, see JUDGMENTS, 23 Cyc. 1461.)

QUASHAL. See QUASH.

QUASHING. See QUASH.

QUASI. A Latin word, in frequent use in the civil law, signifying "as if almost." It marks the resemblance, and supposes a little difference between two objects.[63]

QUASI CONTRACT. (Quasi Contract: In General and Defined, see CONTRACTS, 9 Cyc. 243, 365 note 32. Effect of Custom to Create, see CUSTOMS AND USAGES, 12 Cyc. 1056. Effect of Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 282. Particular Kinds, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 364; CONTRIBUTION, 9 Cyc. 792; MONEY PAID, 27 Cyc. 832; MONEY RECEIVED, 27 Cyc. 847; WORK AND LABOR.)

58. Derived from the French "*quasser*" see Cunningham L. Dict. [*quoted* in Crawford *v.* Stewart, 38 Pa. St. 34, 36].

59. Century Dict.; Webster Dict. [both *quoted* in Holland *v.* Webster, 43 Fla. 85, 90, 29 So. 625]; Webster Dict. [*quoted* in Jones *v.* Wolfe, 42 Nebr. 272, 273, 60 N. W. 563].

60. Abbott L. Dict. [*quoted* in Hood *v.* French, 37 Fla. 117, 122, 19 So. 165; Hoback *v.* Com., 104 Va. 871, 875, 52 S. E. 575]; Webster Dict. [*quoted* in Jones *v.* Wolfe, 42 Nebr. 272, 273, 60 N. W. 563]; Bouvier L. Dict.; Century Dict.; Tomlin L. Dict.; Webster Dict. [all *quoted* in Holland *v.* Webster, 43 Fla. 85, 90, 29 So. 625]; Cunningham L. Dict. [*quoted* in Crawford *v.* Stewart, 38 Pa. St. 34, 36].

61. Abbott L. Dict. [*quoted* in Hood *v.* French, 37 Fla. 117, 122, 19 So. 165; Hoback *v.* Com., 104 Va. 871, 875, 52 S. E. 575].

Applied to writs of error or other writs, the term is predicated of some defect in the writ itself or in the form of the writ, which defect does not reach the merits of the case. Bosley *v.* Bruner, 24 Miss. 457, 462.

This remedy is defined, it seems, as only applicable to irregular, defective, or improper proceedings. Crawford *v.* Stewart, 38 Pa. St. 34, 36.

62. See also ADVERSE POSSESSION, 1 Cyc. 1019 note 1; BAIL, 5 Cyc. 139.

63. Bouvier L. Dict. [*quoted* in People *v.* Bradley, 60 Ill. 390, 402].

"Quasi adoptive" see ADOPTION OF CHILDREN, 1 Cyc. 936.

Quasi civil see BASTARDS, 5 Cyc. 644 note 11.

"Quasi jurisdictional facts" see Noble *v.* Union River Logging R. Co., 147 U. S. 165, 173, 13 S. Ct. 271, 37 L. ed. 123.

QUASI CORPORATION. See MUNICIPAL CORPORATIONS, 28 Cyc. 128.[64]

QUASI CRIME.[65] An offense not constituting a crime or misdemeanor at law, but which is in the nature of a crime;[66] one of class of offenses which have not been declared crimes, but are wrongs against the general or local public, which it is proper should be repressed or punished by forfeitures or penalties.[67] (See, generally, CRIMINAL LAW, 12 Cyc. 70; TORTS.)

QUASI DEPOSIT. In the law of bailment, a kind of implied or involuntary deposit, which takes place where a party comes lawfully to the possession of another person's property, by finding it.[68]

QUASI DERELICT. In admiralty law, a term applicable to a vessel when, though not abandoned, those on board of her are both physically and mentally incapable of doing anything for their own personal safety.[69] (See DERELICT, 13 Cyc. 1044, and Cross-References Thereunder.)

QUASI DWELLING-HOUSE. In reference to the crime of burglary, a term used to designate barns and other out-houses in proximity to the mansion-house.[70] (See BURGLARY, 6 Cyc. 186.)

QUASI EASEMENT. There are rights which are mentioned in the books as quasi easements.[71] (See, generally, EASEMENTS, 14 Cyc. 1134.)

QUASI ESTOPPEL. See ESTOPPEL, 16 Cyc. 682.

QUASI FEE. An estate gained by wrong.[72]

QUASI GUARDIAN. A person who without legal appointment or qualification, assumes the functions of a guardian by exercising control over the person, or estate, or both, of a minor.[73] (See GUARDIAN AND WARD, 21 Cyc. 20.)

QUASI INCAPACITY. See DOMICILE, 14 Cyc. 849.

64. See also COUNTIES, 11 Cyc. 341 note 5, 380; LEVEES, 25 Cyc. 195 note 39.

65. "Quasi criminal" see BASTARDS, 5 Cyc. 644 note 10; EVIDENCE, 16 Cyc. 1268.

"Quasi criminal action" see CONTINUANCES IN CIVIL CASES, 9 Cyc. 152 note 36.

"Quasi criminal proceedings" see HABEAS CORPUS, 21 Cyc. 292.

66. Pittsburgh, etc., R. Co. *v.* Ferrell, 39 Ind. App. 515, 78 N. E. 988, 995, 80 N. E. 425, dissenting opinion.

The term includes all offenses not crimes or misdemeanors, but that are in the nature of crimes — a class of offenses against the public which have not been declared crimes, but wrongs against the general or local public which it is proper should be repressed or punished by forfeitures and penalties (Wiggins *v.* Chicago, 68 Ill. 372, 375); the act of doing damage or evil involuntarily (Wharton L. Lex. [*quoted* in Wiggins *v.* Chicago, 68 Ill. 372, 375]).

The term embraces all qui tam actions and forfeitures imposed for the neglect or violation of a public duty, but would not embrace an indictable offense, whatever might be its grade. Wiggins *v.* Chicago, 68 Ill. 372, 375. See also People *v.* Bradley, 60 Ill. 390, 402.

An action to recover the price paid for intoxicating liquors sold in violation of a statute is a civil action and not quasi criminal in character. Woodward *v.* Squires, 39 Iowa 435, 438.

67. Bouvier L. Dict. [*quoted* in Pittsburgh, etc., R. Co. *v.* Ferrell, 39 Ind. App. 515, 78 N. E. 988, 995, 80 N. E. 425, dissenting opinion].

68. Black L. Dict.

69. Sturtevant *v.* Nicholaus, 23 Fed. Cas. No. 13,578, Newb. Adm. 449.

70. Quinn *v.* People, 71 N. Y. 561, 568, 27 Am. Rep. 87.

71. Parsons *v.* Johnson, 68 N. Y. 62, 65, 23 Am. Rep. 149, where it is said: "(1) Where there has been an easement proper with a dominant and servient tenement, and the ownership of such tenements has been unified. In such a case when the ownership is again severed by a conveyance of the dominant tenement, the way will not pass by the general word "appurtenances" merely, but there must be particular or general words indicating an intention to grant the way. (Fetters *v.* Humphreys, 19 N. J. Eq. 471; Barlow *v.* Rhodes, 1 Cromp. & M. 439, 448, 2 L. J. Exch. 91, 3 Tyrw. 280; Thomson *v.* Waterlow, L. R. 6 Eq. 36; Goddard on Eas. 72, 73.) (2) There are other quasi easements, as when the owner of land has constructed a way or drain over one portion of it for the benefit of another portion, and there has never been a separate ownership of a dominant and servient tenement. This class is again subdivided into those which are called continuous, as a drain or sewer which are used continuously without the intervention of man and those which are called non-continuous, as a right of way which can only be used by the intervention of man repeated at intervals when user is desired. (Fetters *v.* Humphreys, *supra*; Lampman *v.* Milks, 21 N. Y. 505; Polden *v.* Bastard, L. R. 1 Q. B. 156, 7 B. & S. 130, 35 L. J. Q. B. 92, 13 L. T. Rep. N. S. 441, 14 Wkly. Rep. 198; Goddard on Eas. 84.)"

72. Black L. Dict.

73. Woerner Am. L. Guard. (1897) p. 76 [*quoted* in Zeideman *v.* Molasky, 118 Mo. App. 106, 114, 94 S. W. 754, being the same as "guardian *de son tort*"].

QUASI INDIVIDUAL. A term used to designate a private corporation.[74] (See, generally, CORPORATIONS, 10 Cyc. 1 *et seq.*)

QUASI IN REM. A suit against the person in respect of the *res*.[75]

QUASI JUDICIAL. A term used to describe acts presumed to be the product of judgment based upon evidence either oral or visual or both.[76]

QUASI MUNICIPAL CORPORATION. See MUNICIPAL CORPORATIONS, 28 Cyc. 128.

QUASI NEGOTIABLE. See CORPORATIONS, 10 Cyc. 630.

QUASI NEGOTIABLE INSTRUMENT. See COMMERCIAL PAPER, 7 Cyc. 525 note 60.

QUASI OFFICE. A term used to describe the legal position of a nominated candidate for office until the time of the election.[77]

QUASI PARTNERSHIP. See MARRIAGE, 26 Cyc. 863 note 63.

QUASI PUBLIC CORPORATION. See MUNICIPAL CORPORATIONS, 28 Cyc. 128.[78]

QUATUOR PEDIBUS CURRIT. Literally "Runs upon four feet; runs upon all fours." A term used to denote an exact correspondence.[79] (See ALL-FOURS, 2 Cyc. 133.)

QUAY. A vacant space between the first row of buildings and the water's edge, and is used for the reception of goods and merchandise imported or to be exported; [80] a landing place; a place where vessels are loaded and unloaded; a wharf, usually constructed of stone, but sometimes of wood, iron, etc., along a line of coast or a river bank, or around a harbor or dock.[81] (See, generally, WHARVES.)

QUEEN'S BENCH. See COURT COMMISSIONERS, 11 Cyc. 631.

QUEMADMODUM AD QUÆSTIONEM FACTI NON RESPONDENT JUDICES, ITA AD QUÆSTIONEM JURIS NON RESPONDENT JURATORES. A maxim meaning "In the same manner that judges do not answer to questions of fact, so jurors do not answer to questions of law." [82]

QUEMQUE ÆQUUM EST QUÆSTUM ESSE CALLIDUM. A maxim meaning "It is fitting and proper that every one should be alive to his own advantage." [83]

QUEM SEQUUNTUR COMMODA EUNDEM ET INCOMMODO SEQUUNTUR. A maxim meaning "He who reaps the advantage, must also bear the disadvantage."[84]

QUENCHED. EXTINCT,[85] *q. v.*

74. State *v.* Haun, 7 Kan. App. 509, 54 Pac. 130, 133.

75. Hill *v.* Henry, 66 N. J. Eq. 150, 157, 57 Atl. 554.

76. People *v.* McWilliams, 185 N. Y. 92, 104, 77 N. E. 785, dissenting opinion. See also Mitchell *v.* Clay County, 69 Nebr. 779, 683, 96 N. W. 673, 98 N. W. 662; De Weese *v.* Smith, 97 Fed. 309, 317.

A distinction is made between such acts and those ministerial duties which can only be properly performed in one particular way. American Casualty Ins., etc., Co. *v.* Taylor, 60 Conn. 448, 459, 22 Atl. 494, 25 Am. St. Rep. 337; People *v.* McWilliams, 185 N. Y. 92, 104, 77 N. E. 785, dissenting opinion. See Kusel *v.* Chicago, 121 Ill. App. 469, 472, where it is held that an office to be quasi judicial must be invested with power to decide property rights. See also JUDGMENTS, 23 Cyc. 668 note 9.

"Quasi judicial acts" see ARBITRATION AND AWARD, 3 Cyc. 583.

Quasi judicial functions are those which lie midway between the judicial and ministerial ones. Bair *v.* Struck, 29 Mont. 45, 74 Pac. 69, 63 L. R. A. 481.

77. State *v.* Goff, 129 Wis. 668, 682, 109 N. W. 628.

78. See also CONTRACTS, 9 Cyc. 498, 543; CORPORATIONS, 10 Cyc. 609; DRAINS, 14 Cyc. 1058; MANDAMUS, 26 Cyc. 359; MECHANICS' LIENS, 27 Cyc. 26.

79. Burrill L. Dict.

80. Fleitas *v.* New Orleans, 51 La. Ann. 1, 21, 24 So. 623; New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 715, 9 L. ed. 573.

81. Century Dict. [*quoted* in St. Anna's Asylum *v.* New Orleans, 104 La. 392, 403, 29 So. 117].

"The term is well understood in all commercial countries, and whilst there may be differences of opinion as to its definition, there can be little, or none, in regard to the popular and commercial signification of it. It designates a space of ground appropriated to the public use, such as the convenience of commerce requires." Fleitas *v.* New Orleans, 51 La. Ann. 1, 21, 24 So. 623; New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 715, 9 L. ed. 573.

Abbreviated "Q. B." see *ante*, p. 1275.

82. Bouvier L. Dict. [*citing* Coke Litt. 295].

83. Morgan Leg. Max. [*citing* Riley Leg. Max.].

84. Peloubet Leg. Max. [*citing* Trayner Leg. Max.].

85. See 19 Cyc. 33.

QUERELA. An action preferred in any court of justice.[86] (See AUDITA QUERELA, 4 Cyc. 1058.)

QUERENS. See *ante*, note 86.

QUESTIO FIT DE LEGIBUS, NON DE PERSONIS. A maxim meaning "Let the question be, 'what is the law?' not 'who is the offender?'" [87]

QUESTION. Something in controversy, or which may be the subject of controversy;[88] a proposition.[89] (Question: Certified, see APPEAL AND ERROR, 2 Cyc. 740; CRIMINAL LAW, 12 Cyc. 824. Examination of — Adverse Party or Others Before Trial, see DISCOVERY, 14 Cyc. 339; Expert and Non-Expert Witness, see EVIDENCE, 17 Cyc. 242; Witness in General, see DEPOSITIONS, 13 Cyc. 925; WITNESSES. Interrogatories — In Admiralty, see ADMIRALTY, 1 Cyc. 885; In Bill in Equity, see EQUITY, 16 Cyc. 223; In Proceedings For Discovery of Assets of Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 217; To Garnishee, see GARNISHMENT, 20 Cyc. 1073; To Jury, see TRIAL; To Parties and Witnesses, in General, see DEPOSITIONS, 13 Cyc. 894; DISCOVERY, 14 Cyc. 352. Of Law or Fact, see CRIMINAL LAW, 12 Cyc. 589; TRIAL. Reserved, see APPEAL AND ERROR, 2 Cyc. 740; CRIMINAL LAW, 12 Cyc. 824.)

QUESTION CERTIFIED. See APPEAL AND ERROR, 2 Cyc. 740; CRIMINAL LAW, 12 Cyc. 824.

QUESTION OF LAW OR FACT. See CRIMINAL LAW, 12 Cyc. 589; TRIAL.[90]

QUESTION RESERVED OR CERTIFED. See APPEAL AND ERROR, 2 Cyc. 740; CRIMINAL LAW, 12 Cyc. 824.

QUI ABJURAT REGNUM AMITTIT REGNUM, SED NON REGEM; PATRIAM, SED NON PATREM PATRIÆ. A maxim meaning "He who abjures the realm leaves the realm, but not the king; the country, but not the father of the country." [91]

86. Black L. Dict.

The plaintiff was called "*querens*," or complainant, and his brief, complaint, or declaration was called "*querela*." Black L. Dict. [*citing* Jacob L. Dict.].

87. Morgan Leg. Max. [*citing* Riley Leg. Max.].

88. McFarlane *v.* Clark, 39 Mich. 44, 46, 33 Am. Rep. 346; Bouvier L. Dict. [*quoted* in Matter of Merow, 112 N. Y. App. Div. 562, 578, 99 N. Y. Suppl. 9].

89. Matter of Merow, 112 N. Y. App. Div. 562, 578, 99 N. Y. Suppl. 9, "something in controversy, or which may be the subject of controversy."

The word in legal definition does not necessarily mean an interrogative inquiry. Matter of Merow, 112 N. Y. App. Div. 562, 578, 99 N. Y. Suppl. 9.

Under the federal statute providing that when a judgment or decree is entered in a civil suit in a circuit court held by two judges, in the trial whereof any question has arisen upon which the opinions of the judges are opposed, the point, etc., shall be certified, should be construed to mean a question of law which must be capable of being presented in a single point. California Artificial Stone Paving Co. *v.* Molitor, 113 U. S. 609, 615, 5 S. Ct. 618, 28 L. ed. 1106.

In connection with other words.— "Question arising under the patent laws" see Carleton *v.* Bird, 94 Me. 182, 189, 47 Atl. 154. "Question of fraudulent intent" see Gere *v.* Murray, 6 Minn. 305, 317. "Questions of Constitutional law" see Answer to Questions by Senate, 37 Mo. 135, 137. "Questions to be tried" see Perkins *v.* Merchants' Lith. Co., 21 Misc. (N. Y.) 516, 518, 47 N. Y. Suppl. 712. "Title questioned by suit either prosecuted or threatened" see Kinports *v.* Rawson, 29 W. Va. 487, 497, 2 S. E. 85.

90. See also ABATEMENT AND REVIVAL, 1 Cyc. 22; ALTERATIONS OF INSTRUMENTS, 2 Cyc. 256; APPEAL AND ERROR, 2 Cyc. 699 note 48, 726 note 48, 745 note 64, 746 note 71, 754 note 3, 921 note 20, 3 Cyc. 345, 394; ARBITRATION AND AWARD, 3 Cyc. 641 note 48, 676 note 34, 732 note 75, 742 note 19; ASSIGNMENTS, 4 Cyc. 112; ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 208; ATTACHMENT, 4 Cyc. 420 note 31; BAIL, 5 Cyc. 61, 148; BIGAMY, 5 Cyc. 703; BONDS, 5 Cyc. 854; BREACH OF PROMISE TO MARRY, 5 Cyc. 1017; BRIBERY, 5 Cyc. 1047; BUILDERS AND ARCHITECTS, 6 Cyc. 49, 104; CARRIERS, 6 Cyc. 449; CHATTEL MORTGAGES, 6 Cyc. 1027 note 41, 1060 note 92, 1074 note 30, 1098 note 57, 7 Cyc. 67 note 73; CIVIL RIGHTS, 7 Cyc. 174, 176; CLERKS OF COURTS, 7 Cyc. 243 note 41; CLUBS, 7 Cyc. 263 note 37, 264, note 42; COLLEGES AND UNIVERSITIES, 7 Cyc. 290 note 42; COMMERCIAL PAPER, 7 Cyc. 544 note 90, 553 note 45, 622, 619 note 40, 703 note 59, 8 Cyc. 39, 134 note 37, 312; COMMON SCOLD, 8 Cyc. 893 note 4; CONFUSION OF GOODS, 8 Cyc. 577; CONSPIRACY, 8 Cyc. 643 note 70, 688, 691; CONTEMPT, 9 Cyc. 68; CONTRACTS, 9 Cyc. 292, 775; COPYRIGHT, 9 Cyc. 946; CORONERS, 9 Cyc. 984 note 30; CORPORATIONS, 10 Cyc. 205, 212, 217 note 17, 269, 270, 281 note 69, 350, 1056, 1061, 1077, 1207; COURTS, 11 Cyc. 940, 975 note 8; CUSTOMS AND USAGES, 12 Cyc. 1102; DEPOSITARIES, 13 Cyc. 811; DESCENT AND DISTRIBUTION, 14 Cyc. 184; FRAUD, 20 Cyc. 143; FRAUDS, STATUTE OF, 20 Cyc. 320; LOGGING, 25 Cyc. 1598.

91. Black L. Dict. [*citing* Calvin's Case, 7 Coke 1-*a*, 9-*b*, 77 Eng. Reprint 377].

QUI ACCUSAT INTEGRÆ FAMÆ SIT ET NON CRIMINOSUS. A maxim meaning "Let him who accuses be of clear fame, and not criminal." [92]

QUI ACQUIRIT SIBI ACQUIRIT HÆREDIBUS. A maxim meaning "He who acquires for himself acquires for his heirs." [93]

QUI ADIMIT MEDIUM, DIRIMIT FINEM. A maxim meaning "He who takes away the middle, destroys the end." [94]

QUIA EMPTORES. See ESTATES, 16 Cyc. 604; GROUND-RENTS, 20 Cyc. 1371.

QUI ALIENAS RES NEGLIGENTER PERDIT, AUT VI VEL DOLO MALO AUFERT, SUAS AMITTITO. A maxim meaning "Whosoever negligently ruins another man's property, or takes it away by force or fraud, let him lose an equivalent of his own." [95]

QUI ALIQUID STATUERIT, PARTE INAUDITA ALTERA, ÆQUUM LICET DIXERIT, HAUD ÆQUUM FECERIT. A maxim meaning "He who determines any matter without hearing both sides, though he may have decided right, has not done justice." [96]

QUI ALTERIUS JURE UTITUR, EODEM JURE UTI DEBET. A maxim meaning "He who uses the right of another ought to use the same right." [97]

QUI ALTERUM INCUSAT NE IN EODEM SALTEM GENERE SIT INCUSANDUS. A maxim meaning "Let him who accuses another be free from the offense of which he makes accusation." [98]

QUI ANIMO PECCANDI ALIQUID FACIT, VIDETUR PECCARE AB INITIO. A maxim meaning "He who does anything with the intention of transgressing, seems to have transgressed from the beginning." [99]

QUI APPROBAT NON REPROBAT. A maxim meaning "He who approbates does not reprobate." [1]

QUIA TIMET. Literally "Because he fears or apprehends." [2] (See AUDITA QUERELA, 4 Cyc. 1062; EQUITY, 16 Cyc. 102; HOMESTEADS, 21 Cyc. 558; INTERPLEADER, 23 Cyc. 18 note 65; QUIETING TITLE, *ante*, p. 1296.)

QUI BENE DISTINGUIT, BENE DOCET. A maxim meaning "He who distinguishes well, teaches well." [3]

QUI BENEFICIUM LEGIS EXTRAORDINEM QUÆRIT, PURAS MANUS AFFERTO. A maxim meaning "Whosover seeks the benefit of the law extraordinarily, let him lift up pure hands." [4]

QUI BENE INTERROGAT, BENE DOCET. A maxim meaning "He who questions well, teaches well." [5]

QUI BONIS VIRIS PAUPERIBUS DAT, LEGIBUS OPITULATUR; QUI MALIS ET INERTIBUS SEGETEM, MALORUM FOVET ET LEGUM OPPROBRIUM. A maxim meaning "He who assists good men in poverty, assists the laws; he who assists the wicked and the slothful, fosters the evil and derogates from the law." [6]

QUI CADIT A SYLLABA CADIT A TOTA CAUSA. A maxim meaning "He who fails in a syllable fails in his whole cause." [7]

QUI CAUSA DECEDIT, CAUSA CADIT. A maxim meaning "He who departs from his cause, falls from his cause." [8]

QUICK DESPATCH. See CUSTOMARY QUICK DESPATCH, 12 Cyc. 1026.

QUICKENING. See ABORTION, 1 Cyc. 172.

92. Peloubet Leg. Max. [*citing* 3 Inst. 26].
93. Bouvier L. Dict. [*citing* Trayner Leg. Max.].
94. Morgan Leg. Max. [*citing* Coke Litt. 161].
95. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
96. Black L. Dict. [*citing* Boswel's Case, 6 Coke 48*b*, 52*a*, 77 Eng. Reprint 326, 4 Blackstone Comm. 283].
97. Peloubet Leg. Max. [*citing* Broom Leg. Max.].
98. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
99. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
1. Black L. Dict.
2. Black L. Dict.
3. Bouvier L. Dict. [*citing* 2 Inst. 470].
4. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
5. Peloubet Leg. Max. [*citing* 3 Bulstr. 227].
6. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
7. Black L. Dict. [*citing* Bracton, fol. 211].
8. Peloubet Leg. Max. [*citing* Halkerstone Leg. Max.].

QUICKSAND. A fine-grained, loose sand, into which a ship sinks by her own weight as soon as the water retreats from her bottom.[9]

QUICK WITH CHILD. See ABORTION, 1 Cyc. 172 note 17.

QUI CONCEDIT ALIQUID, CONCEDERE VIDETUR ET ID SINE QUO CONCESSIO EST IRRITA, SINE QUO RES IPSA ESSE NON POTUIT. A maxim meaning "He who grants anything is considered as granting that without which his grant would be idle, without which the thing itself could not exist." [10]

QUI CONCEDIT ALIQUID CONCEDIT OMNE ID SINE QUO CONCESSIO EST IRRITA. A maxim meaning "He who grants anything grants everything without which the grant is fruitless." [11]

QUI CONFIRMAT NIHIL DAT. A maxim meaning "He who confirms does not give." [12]

QUI CONTEMNIT PRÆCEPTUM, CONTEMNIT PRÆCIPIENTEM. A maxim meaning "He who contemns the precept, contemns the person giving it." [13]

QUICQUID ACQUIRITUR SERVO, ACQUIRITUR DOMINO. A maxim meaning "Whatever is acquired by the servant, is acquired for the master." [14]

QUICQUID CONTRA BONOS MORES FACIT, JURE COMMUNI VETITUM. A maxim meaning "Whatever is done against good morals, is done against common law." [15]

QUICQUID DEMONSTRATÆ REI ADDITUR SATIS DEMONSTRATÆ FRUSTRA EST. A maxim meaning "Whatever is added to demonstrate anything already sufficiently demonstrated is surplusage." [16]

QUICQUID EST CONTRA NORMAM RECTI EST INJURIA. A maxim meaning "Whatever is against the rule of right is a wrong." [17]

QUICQUID IN EXCESSU ACTUM EST, LEGE PROHIBETUR. A maxim meaning "Whatever is done in excess is prohibited by law." [18]

QUICQUID JUDICIS AUCTORITATI SUBJICITUR, NOVITATI NON SUBJICITUR. A maxim meaning "Whatever is subject to the authority of a judge is not subject to innovation." [19]

QUICQUID PER SE MALUM EST, ID LEGES OMNIBUS VETANT. A maxim meaning "Whatever is bad in itself, that the laws forbid to all." [20]

QUICQUID PER SERVUM ACQUIRITUR, ID DOMINO ACQUIRITUR. A maxim meaning "Whatever is obtained by the servant, belongs to the master." [21]

QUICQUID PLANTATUR SOLO, SOLO CEDIT. A maxim meaning "Whatever is affixed to the soil belongs to the soil." [22]

9. Smyth Dict. Nautical Terms [*quoted* in The Sandringham, 10 Fed. 556, 562, 5 Hughes 316].

10. Bouvier L. Dict. [*citing* Liford's Case, 11 Coke 46*b*, 52*a*, 77 Eng. Reprint 1206; Jenkins Cent. 32].

Applied in: Taylor *v.* Griswold, 14 N. J. L. 222, 227, 27 Am. Dec. 33; Rex *v.* Westwood, 7 Bing. 1, 20, 20 E. C. L. 11, 4 Bligh N. S. 213, 5 Eng. Reprint 76, 2 Dow. & Cl. 21, 6 Eng. Reprint 637, 7 D. & R. 267.

11. Black L. Dict. [*citing* Jenkins Cent. 32, case 63].

12. Bouvier L. Dict. [*citing* 2 Bouvier Inst. 2069].

13. Morgan Leg. Max. [*citing* Shrewsbury's Case, 12 Coke 94, 97, 77 Eng. Reprint 1369].

14. Peloubet Leg. Max. [*citing* 15 Viner Abr. 327]. See also Beardsley *v.* Copeland, 8 N. Brunsw. 458, 468; Jones *v.* Linde British Refrigeration Co., 2 Ont. L. 428, 432.

15. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

16. Black L. Dict. [*citing* Dig. 33, 4, 1, 8; Broom Leg. Max.].

Applied in Le Cain *v.* Hosterman, 8 Nova Scotia 413, 436.

17. Peloubet Leg. Max. [*citing* Cable *v.* Rogers, 3 Bulstr. 311, 313, 81 Eng. Reprint 259].

18. Black L. Dict. [*citing* 2 Inst. 107].

19. Bouvier L. Dict. [*citing* 4 Inst. 66].

20. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

21. Morgan Leg. Max. [*citing* Tayler L. Gloss.].

22. Black L. Dict. [*citing* Broom Leg. Max.].

Applied in: Sudbury First Parish *v.* Jones, 8 Cush. (Mass.) 184, 189; State *v.* Marshall, 4 Mo. App. 29, 33; Montclair *v.* Amend, (N. J. Sup. 1908) 68 Atl. 1067, 1068; Price *v.* Weehawken Ferry Co., 31 N. J. Eq. 31, 34; Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311, 317; Bedlow *v.* New York Floating Dry Dock Co., 20 N. Y. St. 707, 719; *In re* De Falbe, [1901] 1 Ch. 523, 538; Elwes *v.* Brigg Gas Co., 33 Ch. Div. 562, 567, 55 L. J. Ch. 734, 55 L. T. Rep. N. S. 831, 35 Wkly. Rep. 192; Climie *v.* Wood, L. R. 3 Exch. 257, 262, 37 L. J. Exch. 158, 18 L. T. Rep. N. S. 609 [*affirmed* in L. R. 4 Exch. 328, 38 L. J. Exch. 223, 20 L. T. Rep. N. S. 1012]; Elliott *v.* Bishop, 10 Exch. 496, 512, 1 Jur.

QUICQUID RECIPITUR, RECIPITUR SECUNDUM MODUM RECIPIENTIS. A maxim meaning "Whatever is received is received according to the intention of the recipient." [23]

QUICQUID SOLVITUR, SOLVITUR SECUNDUM MODUM SOLVENTIS. A maxim meaning "Whatever is paid, is paid according to the intention of the payer." [24]

QUI CUM ALIO CONTRAHIT, VEL EST, VEL ESSE DEBET NON IGNARUS CONDITIONIS EJUS. A maxim meaning "He who contracts with another either is or ought to be not ignorant of his condition." [25]

QUI CUM ALITER TUERI SE NON POSSUNT DAMNI CULPAM DEDERINT, INNOXII SUNT. A maxim meaning "They are guiltless of homicide who cannot defend themselves otherwise than by homicide." [26]

QUI CUM EBRIO LITIGAT, ABSENTEM LÆDIT. A maxim meaning "He who disputes with a drunken man, offends a sober man behind his back." [27]

QUICUNQUE ALIQUID STATUERIT PARTE INAUDITA. A maxim meaning "No man should be condemned unheard." [28]

QUICUNQUE HABET JURISDICTIONEM ORDINARIUM, EST ILLIUS LOCI ORDINARIUS. A maxim meaning "Whoever has an ordinary jurisdiction, is ordinary of that place." [29]

QUI DAT FINEM, DAT MEDIA AD FINEM NECESSARIA. A maxim meaning "He who gives an end gives the means necessary to that end." [30]

QUI DAT PAUPERIBUS, DEO DAT. A maxim meaning "He gives to God who gives to the poor." [31]

QUIDCUNQUE JUSSU JUDICIS ALIQUID FECERIT, NON VIDETUR DOLO MALO FECISSE; QUIA PARERE NECESSE EST. A maxim meaning "Whoever does any thing by command of a judge, is not reckoned to have done it with an evil intent; because it is necessary to obey." [32]

QUI DESTRUIT MEDIUM, DESTRUIT FINEM. A maxim meaning "He who destroys the means destroys the end." [33]

QUID LEGES SINE MORIBUS VANÆ PROFICIUNT. A maxim meaning "Little can be expected from the penalties or restraints imposed by laws, if the moral sense of the people is wanting." [34]

QUI DOIT INHERITER AL PERE DOIT INHERITER AL FITZ. A maxim meaning "He who would have been heir to the father shall be heir to the son." [35]

N. S. 46, 24 L. J. Exch. 33, 3 Wkly. Rep. 160, 28 Eng. L. & Eq. 484; Hodgins *v.* Toronto, 19 Ont. App. 537, 548; Walton *v.* Jarvis, 14 U. C. Q. B. 640, 650. See also Campbell *v.* Roddy, 44 N. J. Eq. 244, 248, 14 Atl. 279, 6 Am. St. Rep. 889; North Hudson County R. Co. *v.* Booraem, 28 N. J. Eq. 450, 454; McRea *v.* Troy Cent. Nat. Bank, 66 N. Y. 489, 501; State *v.* Martin, 141 N. C. 832, 835, 53 S. E. 874, 875; Teaff *v.* Hewitt, 1 Ohio St. 511, 525, 29 Am. Dec. 634; St. Johnsbury, etc., R. Co. *v.* Willard, 61 Vt. 134, 137, 17 Atl. 38, 15 Am. St. Rep. 886, 21 L. R. A. 528; Lane *v.* Dixon, 3 C. B. 776, 791, 11 Jur. 89, 16 L. J. C. P. 129, 54 E. C. L. 776; Parsons *v.* Hind, 2 Can. L. J. N. S. 217; Waterous Engine Works Co. *v.* McCann, 21 Ont. App. 486, 497; Joseph Hall Mfg. Co. *v.* Hazlitt, 11 Ont. App. 749, 750; Thomas *v.* Inglis, 7 Ont. 588, 594; Phillips *v.* Grand River Farmers' Mut. F. Ins. Co., 46 U. C. Q. B. 334, 359; Pronguey *v.* Gurney, 37 U. C. Q. B. 347, 353.

23. Bouvier L. Dict. [*citing* Broom Leg. Max.; Halkerstone Leg. Max.].

24. Peloubet Leg. Max.

Applied in: Shortridge *v.* Pardee, 2 Mo. App. 363, 365; Waugh *v.* Wren, 9 Jur. N. S. 365, 366, 7 L. T. Rep. N. S. 612, 1 New Rep. 142, 11 Wkly. Rep. 244; Waters *v.* Ebrall, 2 Vern. Ch. 606, 607, 23 Eng. Reprint 996; Heyward *v.* Lomax, 1 Vern. Ch. 24, 33 Eng. Reprint 279. See also Ingraham *v.* Hall, 11 Serg. & R. (Pa.) 78, 83.

25. Black L. Dict. [*citing* Story Confl. Laws, § 76].

26. Peloubet Leg. Max. [*citing* Tayler L. Gloss.].

27. Morgan Leg. Max. [*citing* Riley Leg. Max.].

28. Morgan Leg. Max.

29. Peloubet Leg. Max. [*citing* Coke Litt. 344*a*].

30. Peloubet Leg. Max.

Applied in Lane *v.* Kingsberry, 11 Mo. 402, 408.

31. Morgan Leg. Max.

32. Morgan Leg. Max. [*citing* Marshalsea's Case, 10 Coke 68*b*, 70*b*, 77 Eng. Reprint 1027].

33. Bouvier L. Dict. [*citing* 11 Coke 51; Coke Litt. 161*a*; Sheppard Touchst. 342].

34. Morgan Leg. Max. [*citing* Grigg Leg. Max.].

35. Black L. Dict. [*citing* 2 Blackstone Comm. 223; Broom Leg. Max.].

QUI DOLO DESIERIT POSSIDERE, PRO POSSIDENTE DAMNATUR. A maxim meaning "He who has fraudulently dispossessed himself of a thing may be treated as if he still had possession." [36]

QUI DOLO POSSESSIT PRO POSSIDENTE, PRO POSSESSIONE DOLUS EST. A maxim meaning "He who holds possession of lands by craft, is crafty, not for himself, but for the true owner." [37]

QUIDQUID MULTIS PECCATUR INULTUM EST. A maxim meaning "The crime which is committed by a multitude passes unpunished." [38]

QUID SIT JUS, ET IN QUO CONSISTIT INJURIA, LEGIS EST DEFINIRE. A maxim meaning "What constitutes right, and what injury, it is the business of the law to declare." [39]

QUID TIBI FIERI NON VIS, ALTERI NE FECERIS. A maxim meaning "Do not to another what you would not wish he should do to you." [40]

QUID TURPI EX CAUSA PROMISSUM EST NON VALET. A maxim meaning "A promise arising out of immoral circumstances is invalid." [41]

QUIET. As an adjective, free from noise or sound; silent; still.[42] As a verb, to make or cause to be quiet; calm; appease; pacify; lull; allay; tranquilize.[43]

QUIETA NON MOVERE. A maxim meaning "Not to unsettle things which are established." [44]

QUIET ENJOYMENT. See COVENANTS, 11 Cyc. 1072, 1118, 1127 note 3; ESTOPPEL, 16 Cyc. 694.

Applied in Doe *v.* Vardill, 6 Bing. N. Cas. 385, 397, 2 Scott N. R. 828, 37 E. C. L. 678.

36. Peloubet Leg. Max.

Applied in: Nichols *v.* Michael, 23 N. Y. 264, 268, 80 Am. Dec. 259; Wilkinson *v.* Verity, L. R. 6 C. P. 206, 211, 40 L. J. C. P. 141, 24 L. T. Rep. N. S. 32, 19 Wkly. Rep. 604; Robertson *v.* Lovett, 11 Nova Scotia 250, 253 [*citing* Wilkinson *v.* Verity, L. R. 6 C. P. 206, 211, 40 L. J. C. P. 141, 24 L. T. Rep. N. S. 32, 19 Wkly. Rep. 604].

37. Morgan Leg. Max. [*citing* Inst. Paul, C. 22].

38. Peloubet Leg. Max. [*citing* Tayler L. Gloss.].

39. Black L. Dict. [*citing* Coke Litt. 158*b*].

40. Morgan Leg. Max. [*citing* Tayler L. Gloss.].

41. Bouvier L. Dict.

42. Century Dict.

Quiet house see State *v.* Austin Club, 89 Tex. 20, 25, 33 S. W. 113, 30 L. R. A. 500; State *v.* Drake, 86 Tex. 329, 335, 24 S. W. 790.

43. Century Dict.

Where a newspaper article stated that a person was arrested for drunkenness but that a ten dollar note "quieted" the affair, this, at most, was a statement that the charge subsided or the arrest was abandoned for the sum named. Stacy *v.* Portland Pub. Co., 68 Me. 279, 286.

44. Black L. Dict.

Applied in Green *v.* Hudson River R. Co., 28 Barb. (N. Y.) 9, 22.

QUIETING TITLE

By Ernest G. Chilton *

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CROSS-REFERENCES

For Matters Relating to:
Action:
Of Ejectment, see EJECTMENT, 15 Cyc. 1.
Of Trespass to Try Title, see TRESPASS TO TRY TITLE.
To Cancel Instrument:
In General, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 282.
Patent For Public Land, see PUBLIC LANDS, *ante*, p. 1054.
To Quiet:
Tax Title, see TAXATION.
Title of Claimant:
To Mining Claim, see MINES AND MINERALS, 27 Cyc. 652.
To Public Land, see PUBLIC LANDS, *ante*, p. 1065.
To Reform Instrument in General, see REFORMATION OF INSTRUMENTS.
To Remove Cloud on Title by Tax-Sale or Tax Deed, see TAXATION.
Effect of Right to Quiet Title on Remedy For Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 323.
Ejectment, see EJECTMENT, 15 Cyc. 1.
Equitable Jurisdiction in General, see EQUITY, 16 Cyc. 1.
Establishment of Title After Loss of Record, see RECORDS.

I. EQUITABLE JURISDICTION.

A. In General. To quiet title to realty,[1] or to remove an existing cloud,[2] or

1. *Arkansas.*— Walker *v.* Peay, 22 Ark. 103.
Florida.— Griffin *v.* Orman, 9 Fla. 22.
Iowa.— Pella *v.* Scholte, 21 Iowa 463.
Kentucky.— Hiatt *v.* Calloway, 7 B. Mon. 178.
Nebraska.— Stalnaker *v.* Morrison, 6 Nebr. 363.
United States.— Duncan *v.* Greenwalt, 10 800, 3 McCrary 378.
See 41 Cent. Dig. tit. "Quieting Title," § 1 *et seq.*

The question as to what court has jurisdiction of an action to quiet title must be determined by reference to the constitutional or statutory provisions creating the courts and conferring jurisdiction upon them. Fritts *v.* Camp, 94 Cal. 393, 29 Pac. 867 (holding that the district court has no jurisdiction where the lands lie in another county); Arnett *v.* Berg, 18 Colo. App. 341, 71 Pac. 636 (holding that a county court has jurisdiction to quiet title to premises not exceeding two thousand dollars in value); East Longmeadow First Cong. Soc. *v.* Metcalf, 193 Mass. 288, 79 N. E. 343; Russell *v.* Texas, etc., R. Co., 68 Tex. 646, 5 S. W. 686 (holding that the superior court has no jurisdiction where the lands lie in another county).

When all issues legal.— Under a statute providing that it shall be lawful for any person having both the legal title and possession of land to institute a suit in equity against any other person setting up claims thereto to quiet title, a proceeding for that purpose was properly brought in equity, although all issues in such action were legal. Chenault *v.* East Kentucky Timber, etc., Co., 119 Ky. 170, 83 S. W. 552, 26 Ky. L. Rep. 1078.

2. *Alabama.*— Marston *v.* Rowe, 39 Ala. 722.
Arkansas.— Shell *v.* Martin, 19 Ark. 139.
Georgia.— Dart *v.* Orme, 41 Ga. 376; Wynne *v.* Lumpkin, 35 Ga. 208.
Illinois.—Coel *v.* Glos, 232 Ill. 142, 83 N. E. 529.
Iowa.— Blair *v.* Hemphill, 111 Iowa 226, 82 N. W. 501; Standish *v.* Dow, 21 Iowa 363.
Michigan.— Cleland *v.* Casgrain, 92 Mich. 139, 52 N. W. 460.
Mississippi.— Forniquet *v.* Forstall, 34 Miss. 87. See also Banks *v.* Evans, 10 Sm. & M. 35, 48 Am. Dec. 734.
Nevada.— Low *v.* Staples, 2 Nev. 209.
New Hampshire.— Downing *v.* Wherrin, 19 N. H. 9, 49 Am. Dec. 139.
New Jersey.— Foley *v.* Kirk, 33 N. J. Eq. 170; Smith *v.* Smith, 30 N. J. Eq. 564; Cornish *v.* Bryan, 10 N. J. Eq. 146.
New York.— Schoener *v.* Lissauer, 107

to prevent a threatened cloud,[3] is an ancient and well-established head of equity jurisprudence. Likewise a statutory action to determine adverse claims to real estate is of equitable cognizance.[4]

B. Grounds — 1. In General. The broad grounds on which equity interferes to remove a cloud on title are the prevention of litigation, the protection of the true title and possession, and because it is the real interest of both parties, and promotive of right and justice, that the precise state of the title be known if, all are acting *bona fide*.[5]

2. Lack of Remedy at Law. The rule is that a court of equity has jurisdiction to quiet title or remove a cloud thereon where no remedy at law exists.[6] Simi-

N. Y. 111, 13 N. E. 741; Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21; Pettit *v.* Shepherd, 5 Paige 493, 28 Am. Dec. 437; Hamilton *v.* Cummings, 1 Johns. Ch. 517.

Pennsylvania.— Eckman *v.* Eckman, 55 Pa. St. 269.

Tennessee.— Almony *v.* Hicks, 3 Head 39.

Vermont.— Eldridge *v.* Smith, 34 Vt. 484.

United States.— Lamb *v.* Farrell, 21 Fed. 5 (holding further that statutes assuming to confer on equity jurisdiction to remove clouds from title, which do not confer a more extensive remedy than exists by virtue of the customary jurisdiction of chancery courts, may regulate the mode of proceeding and form of decree, but they are not necessary to the exercise of the jurisdiction); Loring *v.* Downer, 15 Fed. Cas. No. 8,513, McAllister 360.

See 41 Cent. Dig. tit. "Quieting Title," § 14 *et seq.*

The principle on which equity will lend its aid to remove a cloud on title is that one in the rightful possession of realty is entitled to the full, quiet, and peaceable possession of the same without present annoyance and harassment, or threatened molestation. Thompson *v.* Etowah Iron Co., 91 Ga. 538, 17 S. E. 663.

Equity will not allow a title to real estate, otherwise clear, to be clouded by a claim which cannot be enforced at law or in equity, and consequently will interfere in behalf of the holder of a legal title to remove a cloud on the same, or an impediment in the way of an effectual assertion of his rights at law. Holland *v.* Baltimore, 11 Md. 186, 69 Am. Dec. 195; Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138.

Where a cloud on title has existed so long as to render it questionable whether the title of defendant is not *prima facie* better than that of plaintiff, a court of equity will interpose to remove the same in behalf of the latter. Gibbons *v.* Duley, 7 Mackey (D. C.) 320.

A court of equity having jurisdiction of the parties has also jurisdiction to compel defendant to release and discharge an apparent cloud on title to land in another state. Remer *v.* Mackay, 35 Fed. 86.

Only forum.— A court of equity is the only forum qualified, under our system of jurisprudence, to afford relief where another person has obtained a deed for the possession of land, which it is against conscience for him to use or enforce, and which operates as a cloud on the title of the owner. Shell *v.* Martin, 19 Ark. 139.

Jurisdiction limited by statute.— The jurisdiction of a court of equity to remove a cloud from the title to real estate is restricted to the special cases and particular relief contemplated by the statute, and does not draw to it the powers incident to the exercise of general equity jurisdiction to take cognizance of the whole controversy in relation to title, right of possession, and rents, issues, and profits. Phelps *v.* Harris, 51 Miss. 789.

3. Oakley *v.* Williamsburgh, 6 Paige (N. Y.) 262; Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682; Briggs *v.* French, 4 Fed. Cas. No. 1,870, 1 Sumn. 504.

On the same principles governing in its intervention to remove a cloud on title, equity will interfere, in advance, by injunction, to prevent a cloud being cast on title. Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682.

To prevent defendant from proceeding in an illegal act from which a cloud on title will necessarily arise, a court of equity, in an otherwise proper case, will interfere. Oakley *v.* Williamsburgh, 6 Paige (N. Y.) 262.

4. Armitage *v.* Wickliffe, 12 B. Mon. (Ky.) 488; Mathews *v.* Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558; Book *v.* Justice Min. Co., 58 Fed. 827; Leggett *v.* Cole, 3 Fed. 332, 1 McCrary 515; Balmear *v.* Otis, 2 Fed. Cas. No. 819, 4 Dill. 558.

An action to quiet title does not lose its equitable nature because by statute its procedure has been somewhat modified and its scope enlarged so as to permit it to be pursued by plaintiff out of possession. Costello *v.* Mulheim, 9 Ariz. 422, 84 Pac. 906. See also *infra*, I, D, 2, b, (II); V.

5. Lehman *v.* Shook, 69 Ala. 486 [*quoting* 1 Story Eq. § 711-*a*]; Whitlock *v* Greacen, 48 N. J. Eq. 359, 21 Atl. 944; McArthur *v.* Griffith, 147 N. C. 545, 61 S. E. 519; Stellwagen *v.* Tucker 144 U. S. 548, 12 S. Ct. 724, 36 L. ed. 537; Sharon *v.* Tucker, 144 U. S. 533, 12 S. Ct. 720, 36 L. ed. 532.

Jurisdiction preventitive as well as remedial.— Sneathen *v.* Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326.

6. *Alabama.*—Armstrong *v.* Connor, 86 Ala. 350, 5 So. 451; Jones *v.* De Graffenreid, 60 Ala. 145.

Florida.— Conant *v.* Buesing, 23 Fla. 559, 2 So. 882.

Illinois.— Morrison *v.* Morrison, 140 Ill.

larly equity has the same jurisdiction where the legal remedy invokable would not afford adequate relief.[7]

3. Prevention of Multiplicity of Suits. A court of equity, on the sole ground of preventing multiplicity of suits, will entertain an action to quiet title where there are a number of persons interested in it, and a great many actions at law would be necessary to conclude the title.[8]

4. Prevention of Harassment by Repeated Assertion of Defeated Title. Equity will entertain a bill to quiet title by one who has successfully vindicated his title at law against another, where the latter continues to harass the former by continued assertion of his defeated title.[9] In those jurisdictions where an

560, 30 N. E. 768; Holden *v.* Holden, 24 Ill. App. 106.

Kentucky.— Louisville *v.* Gray, 1 Litt. 146.

Maryland.— Polk *v.* Rose, 25 Md. 153, 89 Am. Dec. 773.

Massachusetts.— Hall *v.* Whiston, 5 Allen 126.

Michigan.— Byles *v.* Rowe, 64 Mich. 522, 31 N. W. 463; Moran *v.* Palmer, 13 Mich. 367.

Minnesota.— Hamilton *v.* Batlin, 8 Minn. 403, 83 Am. Dec. 787.

Missouri.— Sneathen *v.* Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326.

Nebraska.— Smith *v.* Dean, 15 Nebr. 432, 19 N. W. 642.

New Jersey.— Besson *v.* Gribble, 39 N. J. Eq. 111.

New York.— Letson *v.* Letson, 81 N. Y. App. Div. 556, 80 N. Y. Suppl. 1032.

Oregon.— Johnson *v.* Tomlinson, 41 Oreg. 198, 68 Pac. 406; O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004.

Virginia.— Virginia Coal, etc., Co. *v.* Kelly, 93 Va. 332, 24 S. E. 1020.

West Virginia.— De Camp *v.* Carnahan, 26 W. Va. 839.

Wisconsin.—Grignon *v.* Black, 76 Wis. 674, 45 N. W. 122, 938.

United States.— Warren *v.* Oregon, etc., Realty Co., 156 Fed. 203; Wilmore Coal Co. *v.* Brown, 147 Fed. 931 [*affirmed* in 153 Fed. 143]; Preteca *v.* Maxwell Land Grant Co., 50 Fed. 674, 1 C. C. A. 607; Allen *v.* Halliday, 25 Fed. 688.

7. *Arkansas.*— Sale *v.* McLean, 29 Ark. 612.

Illinois.—Johnson *v.* McChesney, 33 Ill. App. 526.

Massachusetts.— Clouston *v.* Shearer, 99 Mass. 209.

Michigan.— Eaton *v.* Trowbridge, 38 Mich. 454.

Minnesota.— Hamilton *v.* Batlin, 8 Minn. 403, 83 Am. Dec. 787.

Missouri.—Harrington *v.* Utterback, 57 Mo. 519.

New Jersey.—Albro *v.* Dayton, 50 N. J. Eq. 574, 25 Atl. 937.

New York.— Center *v.* Weed, 63 Hun 560, 18 N. Y. Suppl. 554 [*affirmed* in 138 N. Y. 532, 34 N. E. 294]; Huntington *v.* Nicoll, 3 Johns. 566.

Tennessee.— Merriman *v.* Polk, 5 Heisk. 717; Almony *v.* Hicks, 3 Head 39.

Wisconsin.— Krueczinski *v.* Neuendorf, 99 Wis. 264, 74 N. W. 974.

United States.— Teall *v.* Slaven, 40 Fed. 774; Morton *v.* Root, 17 Fed. Cas. No. 9,866, 2 Dill. 312.

See 41 Cent. Dig. tit. "Quieting Title," § 5 *et seq.*

An action to cancel a forged deed as a cloud is maintainable by one out of possession against one in possession, since the only remedy available to him at law would be an action in the nature of ejectment to recover possession of the land, in which the court could not decree a delivery of the deed, nor cancel the record of the same. Hamilton *v.* Batlin, 8 Minn. 403, 83 Am. Dec. 787.

If there is no necessity for an action at law, because the possession is not held adversely, a bill to quiet title is maintainable by one not in possession. Low *v.* Staples, 2 Nev. 209.

8. Porter *v.* Reed, 123 Mo. 587, 27 S. W. 357; Patterson *v.* McCamant, 28 Mo. 210; Preteca *v.* Maxwell Land Grant Co., 50 Fed. 674, 1 C. C. A. 607. See also Ashurst *v.* McKenzie, 92 Ala. 484, 9 So. 262; Illinois Steel Co. *v.* Schroeder, 133 Wis. 561, 113 N. W. 51, 14 L. R. A. N. S. 239.

A court of equity may, without remitting the action to a court of law, proceed to quiet the title when a multiplicity of suits will be avoided thereby. Huntington *v.* Nicholl, 3 Johns. (N. Y.) 566, holding further that equity will retain jurisdiction for such purpose, although it may be necessary to establish the title by its decree.

9. Whitehouse *v.* Jones, 60 W. Va. 680, 55 S. E. 730. See also Stark *v.* Starrs, 6 Wall. (U. S.) 402, 18 L. ed. 925.

The equity asserted in such case had its origin in the prolonged litigation which the action of ejectment permitted. That action being founded on a fictitious devise between fictitious parties, a recovery therein constituted no bar to a second similar action, or to any number of similar actions for possession of the same premises. With slight changes in these fictions a new action might be instituted and conducted as though no previous action had ever been commenced. Thus a party in possession although successful in every instance, might be harassed, if not ruined, by continued litigation. To prevent such litigation after one or more trials, and to secure peace to the party in possession, the courts of equity interposed upon proper application and terminated the controversy. Stark *v.* Starrs, 6 Wall. (U. S.) 402, 18 L. ed. 925.

The institution of repeated ejectment suits, if the same are abandoned before trial, can-

action of ejectment is regarded as a mere possessory action, the rule is that equity will not interfere to prevent harassment by continued assertion of defeated title, unless plaintiff has vindicated his title in successive actions of ejectment;[10] but if the title is satisfactorily established, it is not material what number of trials have taken place, whether two or more.[11] However, in those jurisdictions where ejectment is regarded as a real action, one trial and judgment in ejectment is conclusive, and when a party defeated in ejectment keeps on denying its effect and disquieting his adversary in possession, equity has jurisdiction to quiet the latter's title.[12]

C. Subject-Matter. The subject-matter of equitable jurisdiction to quiet title or remove cloud is generally held to be confined to land,[13] including the surface of the ground and everything that is on it[14] and under it,[15] and not to extend to personal property.[16]

D. Matters Affecting Exercise — 1. In General. The jurisdiction in actions to quiet title or remove cloud does not rest on arbitrary rules; much depends on the facts of the particular case, and in the exercise of the jurisdiction the court is clothed with a large discretion.[17]

2. Adequacy of Legal Remedies — a. In General. When the estate or interest to be protected is equitable, the jurisdiction to quiet title or remove cloud should be exercised whether plaintiff is in or out of possession;[18] but when the estate or interest is legal in its nature, the exercise of the jurisdiction of equity to quiet a title or to remove a cloud therefrom depends upon the adequacy of legal remedies.[19] Thus for example a plaintiff out of possession holding the legal title will be left to his remedy by ejectment under ordinary circumstances;[20] but

not furnish a foundation for the maintenance of a bill of peace to restrain vexatious litigation. Patterson *v.* McCamant, 28 Mo. 210.

10. Ashurst *v.* McKenzie, 92 Ala. 484, 9 So. 262; Marks *v.* Main, 4 Mackey (D. C.) 559; Huntington *v.* Nicholl, 3 Johns. (N. Y.) 566; Marsh *v.* Reed, 10 Ohio 347.

11. Marmaduke *v.* Hannibal, etc., R. Co., 30 Mo. 545; Patterson *v.* McCamant, 28 Mo. 210; Huntington *v.* Nicoll, 3 Johns. (N. Y.) 566; Marsh *v.* Reed, 10 Ohio 347.

12. Whitehouse *v.* Jones, 60 W. Va. 680, 55 S. E. 730; Harmer *v.* Gwynne, 11 Fed. Cas. No. 6,075, 5 McLean 313.

13. Fudickar *v.* East Riverside Irr. Dist., 109 Cal. 29, 4 Pac. 1024; Townsend *v.* Driver, 5 Cal. App. 581, 90 Pac. 1071; Whitlock *v.* Greacen, 48 N. J. Eq. 359, 21 Atl. 944.

An incorporeal hereditament is not a proper subject of equitable jurisdiction to quiet title. Whitlock *v.* Greacen, 48 N. J. Eq. 359, 21 Atl. 944. But see Davidson *v.* Nicholson, 59 Ind. 411.

A license to take oysters from a bay is not real estate. Catchot *v.* Zeigler, (Misc. 1908) 45 So. 707.

One having a right to cut growing timber and easements in connection therewith can quiet his title. Gazos Creek Mill, etc., Lumber Co. *v.* Coburn, (Cal. 1908) 96 Pac. 359.

14. Whitlock *v.* Greacen, 48 N. J. Eq. 359, 21 Atl. 944.

15. Whitlock *v.* Greacen, 48 N. J. Eq. 359, 21 Atl. 944.

16. Fudickar *v.* East Riverside Irr. Dist., 109 Cal. 29, 4 Pac. 1024; Red Diamond Clothing Co. *v.* Steidmann, 120 Mo. App. 519, 97 S. W. 220; Whitlock *v.* Greacen, 48 N. J. Eq. 359, 21 Atl. 944. See also Key City Gaslight Co. *v.* Munsell, 19 Iowa 305; Gott *v.* Hoschna, 57 Mich. 413, 24 N. W. 123. *Contra*, Magnuson *v.* Clithero, 101 Wis. 551, 77 N. W. 882.

17. Lehman, etc., Co. *v.* Shook, 69 Ala. 486; Munson *v.* Munson, 28 Conn. 582, 73 Am. Dec. 693; Wing *v.* Sherrer, 77 Ill. 200; Fonda *v.* Sage, 48 N. Y. 173. See also Glazier *v.* Bailey, 47 Mass. 395.

18. Dull's Appeal, 113 Pa. St. 510, 6 Atl. 540. And see *infra*, III, A, 2, a, (II).

19. Dull's Appeal, 113 Pa. St. 510, 6 Atl. 540.

20. *Alabama.*— Teague *v.* Martin, 87 Ala. 500, 6 So. 362, 13 Am. St. Rep. 42; Curry *v.* Peebles, 83 Ala. 225, 3 So. 622; Pettus *v.* Glover, 68 Ala. 517; Smith *v.* Cockrell, 66 Ala. 64; Daniel *v.* Stewart, 55 Ala. 278.

Arkansas.— Miller *v.* Neiman, 27 Ark. 233.

Connecticut.— Munson *v.* Munson, 28 Conn. 582, 73 Am. Dec. 693.

Florida.— Haworth *v.* Norris, 28 Fla. 763, 10 So. 18; Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603.

Illinois.— Delaney *v.* O'Donnell, 234 Ill. 109, 84 N. E. 668; Lundy *v.* Lundy, 131 Ill. 138, 23 N. E. 337; Gould *v.* Sternburg, 105 Ill. 488; Gage *v.* Abbott, 99 Ill. 366.

Kentucky.— Moses *v.* Gatliff, (1889) 12 S. W. 139.

Maryland.— Polk *v.* Pendleton, 31 Md. 118.

Michigan.— Deer Lake Co. *v.* Michigan Land, etc., Co., 83 Mich. 11, 46 N. W. 1024; Barron *v.* Robbins, 22 Mich. 35.

Minnesota.— Byrne *v.* Hinds, 16 Minn. 521. But see Dahl *v.* Pross, 6 Minn. 89, holding that if the obligee under a bond for a deed be in possession, the obliger is not confined to his action of ejectment, even if this would

when he is in possession, and thus unable to obtain adequate relief, he may resort to equity for relief.[21]

b. When Title or Interest of Plaintiff Is Legal — (I) *In General.* The general rule, when the title or interest of plaintiff is legal in its nature, is that equity will not entertain jurisdiction where there is an adequate remedy at law.[22] But to deprive equity of jurisdiction to quiet title or remove a cloud, it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practicable and efficient to the ends of justice as the remedy in equity.[23]

(II) *Effect of Statutes on General Rule* — (A) *Enlarging Remedy at Law.* Although there are authorities to the contrary,[24] the rule, as to the effect

afford a full and complete remedy, but may sue to have the cloud removed.

Mississippi.— Woffolk *v.* Bailey, 57 Miss. 239.

Missouri.— Graves *v.* Ewart, 99 Mo. 13, 11 S. W. 971.

Nebraska.— Snowden *v.* Toyler, 21 Nebr. 199, 31 N. W. 661.

Oregon.— O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004.

Pennsylvania.— Dull's Appeal, 113 Pa. St. 510, 6 Atl. 540.

Tennessee.— Jones *v.* Snapp, 1 Tenn. Cas. 56.

Virginia.— Lange *v.* Jones, 5 Leigh 192.

West Virginia.— Clayton *v.* Barr, 34 W. Va. 290, 12 S. E. 704.

Wisconsin.— Gray *v.* Tyler, 40 Wis. 579; Lee *v.* Simpson, 29 Wis. 333; Jones *v.* Collins, 16 Wis. 594.

United States.— U. S. *v.* Wilson, 118 U. S. 86, 6 S. Ct. 991, 30 L. ed. 110.

See 41 Cent Dig. tit. "Quieting Title," § 8.

21. Dull's Appeal, 113 Pa. St. 510, 6 Atl. 540; North Carolina Min. Co. *v.* Westfeldt, 151 Fed. 290. See also *infra*, I, D, 2, c.

22. *Alabama.*— Patterson *v.* Simpson, 147 Ala. 550, 41 So. 842; Belcher *v.* Scruggs, 125 Ala. 336, 27 So. 839; Morgan *v.* Lehman, 92 Ala. 440, 9 So. 314; Grigg *v.* Swindal, 67 Ala. 187; Baines *v.* Barnes, 64 Ala. 375; Jones *v.* De Graffenreid, 60 Ala. 145; Camp *v.* Elston, 48 Ala. 81.

Arkansas.— Rowe *v.* Allison, (1908) 112 S. W. 395.

California.— Ritchie *v.* Dorland, 6 Cal. 33.

Connecticut.— Miles *v.* Strong, 62 Conn. 95, 25 Atl. 459; Munson *v.* Munson, 28 Conn. 582, 73 Am. Dec. 693; Wolcott *v.* Robbins, 26 Conn. 236.

District of Columbia.— Peck *v.* Haley, 21 App. Cas. 224; Mayse *v.* Gaddis, 2 App. Cas. 20.

Florida.— Haworth *v.* Norris, 28 Fla. 763, 10 So. 18.

Georgia.— Jones *v.* Georgia R. Co., 62 Ga. 718.

Illinois.— Hamilton *v.* Quimby, 46 Ill. 90; Alton M. & F. Ins. Co. *v.* Buckmaster, 13 Ill. 201.

Iowa.— Cody *v.* Wiltse, 130 Iowa 139, 106 N. W. 510; Roberts *v.* Taliaferro, 7 Iowa 110.

Kentucky.— Wood *v.* Asher Lumber Co., 39 S. W. 702, 19 Ky. L. Rep. 235.

Maryland.— McCoy *v.* Johnson, 70 Md. 490, 17 Atl. 387.

Massachusetts.— Boardman *v.* Jackson, 119 Mass. 161; Clouston *v.* Shearer, 99 Mass. 209.

Michigan.— Crosby *v.* Hutchinson, 126 Mich. 56, 85 N. W. 255; Rhode *v.* Hassler, 113 Mich. 56, 71 N. W. 461; Moran *v.* Palmer, 13 Mich. 367.

Mississippi.— Phelps *v.* Harris, 51 Miss. 789; Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412; Shotwell *v.* Lawson, 30 Miss. 27, 64 Am. Dec. 145.

New Jersey.— Steelman *v.* Blackman, (Ch. 1907) 65 Atl. 715; McClave *v.* McGregor, (Ch. 1906) 64 Atl. 1066; Sheppard *v.* Nixon, 43 N. J. Eq. 627, 13 Atl. 617; Baldwin *v.* Elizabeth, 42 N. J. Eq. 11, 6 Atl. 275; Smith *v.* Newark, 32 N. J. Eq. 1 [*affirmed* in 33 N. J. Eq. 545].

New York.— Bockes *v.* Lansing, 13 Hun 38 [*affirmed* in 74 N. Y. 437].

North Carolina.— Pearson *v.* Boyden, 86 N. C. 585; Busbee *v.* Lewis, 85 N. C. 332; Busbee *v.* Macy, 85 N. C. 329.

Ohio.— Mawhorter *v.* Armstrong, 16 Ohio 188.

Pennsylvania.— Edwards *v.* Brightly, (1888) 12 Atl. 91; Barclay's Appeal, 93 Pa. St. 50; Buck Mountain Coal Co. *v.* Conrad, 6 Phila. 111.

Rhode Island.— Taylor *v.* Staples, 8 R. I. 170, 5 Am. Rep. 556.

Virginia.— Lange *v.* Jones, 5 Leigh 192.

Wisconsin.— Mash *v.* Bloom, 130 Wis. 366, 110 N. W. 203, 268.

United States.— Metzgar *v.* McCoy, 105 Fed. 676; Adoue *v.* Strahan, 97 Fed. 691; Morrison *v.* Marker, 93 Fed. 692; Witters *v.* Sowles, 42 Fed. 701; Allen *v.* Halliday, 28 Fed. 261; Patrick *v.* Isenhart, 20 Fed. 339; Greenwalt *v.* Duncan, 16 Fed. 35, 5 McCrary 132.

See 41 Cent Dig. tit. "Quieting Title," § 6 *et seq.*

23. Preteca *v.* Maxwell Land Grant Co., 50 Fed. 674, 1 C. C. A. 607.

24. Fontaine *v.* Hudson, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515; Gans *v.* Drum, 24 Pa. Co. Ct. 481; Metzgar *v.* McCoy, 105 Fed. 676. See Lamb *v.* Farrell, 21 Fed. 5, where the court says that if a statute should be passed authorizing one in possession of land to bring a suit at law against one claiming it, to settle the title, the jurisdiction, if it did not cease as unwarranted, would at least become inoperative and obsolete.

of statutes providing a legal remedy where formerly the remedy was in equity by bill to quiet title, or remove cloud thereon, undoubtedly is that the antecedent jurisdiction of equity is not ousted by such statutes,[25] at least where the language used therein does not limit the remedy to the one therein provided.[26]

(B) *Enlarging Equitable Jurisdiction* — (1) IN GENERAL. If the effect of a statute enlarging equity jurisdiction in respect to actions to quiet or remove cloud on title is to deprive parties of the right to trial by jury, the statute will not be sustained; in other words, the remedy, thus given by statute, must yield to the remedy at law.[27]

(2) PARTICULAR STATUTES — (a) PERMITTING ACTION BY PARTY IN POSSESSION. Statutes have been enacted in many states providing, in substance, that an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest, and to quiet title.[28] These statutes operate on the old action to quiet title, which, under the common law, could not be maintained until the party in possession had been harassed by repeated actions at law, and they give an additional remedy in equity;[29] but since they give it only to the party in possession, they have no effect on the rule that the aid of equity cannot be invoked where an adequate remedy at law exists.[30]

25. *Alabama.*— Daniel *v.* Stewart, 55 Ala. 278.

Massachusetts.— See Hinchley *v.* Greany, 118 Mass. 595; Clouston *v.* Shearer, 99 Mass. 209.

Missouri.— Hudson *v.* Wright, 204 Mo. 412, 103 S. W. 8; Harrington *v.* Utterback, 57 Mo. 519.

New Jersey.— McGrath *v.* Norcross,, 71 N. J. Eq. 763, 65 Atl. 998.

New York.— Fisher *v.* Hepburn, 48 N. Y. 41; Burnham *v.* Onderdonk, 41 N. Y. 425; Boylston *v.* Wheeler, 2 Hun 622; Barnard *v.* Simms, 42 Barb. 304.

Pennsylvania.— Hutchinson *v.* Dennis, 217 Pa. St. 290, 66 Atl. 524.

West Virginia.— Whitehouse *v.* Jones, 60 W. Va. 680, 55 S. E. 730; Sansom *v.* Blankenship, 53 W. Va. 411, 44 S. E. 408; Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682.

United States.— Grand Rapids, etc., R. Co. *v.* Sparrow, 36 Fed. 210, 1 L. R. A. 480. See Brown *v.* French, 80 Fed. 166.

See 41 Cent Dig. tit. "Quieting Title," § 48 *et seq.*

26. Normant *v.* Eureka Co., 98 Ala. 181, 12 So. 454, 39 Am. St. Rep. 45.

27. Hughes *v.* Hannah, 39 Fla. 365, 22 So. 613; McCoy *v.* Johnson, 70 Md. 490, 17 Atl. 387; Tabor *v.* Cook, 15 Mich. 322.

28. See the statutes of the several states. And see the following cases:

Colorado.— Denny *v.* Ashley, 12 Colo. 165, 20 Pac. 331.

Kansas.— Eaton *v.* Giles, 5 Kan. 24; Watkins *v.* La Mar, (App. 1900) 69 Pac. 730.

Michigan.— Newark M. E. Church *v.* Clark, 41 Mich. 730, 3 N. W. 207.

Minnesota.— Steele *v.* Fish, 2 Minn. 153.

Montana.— Wolverton *v.* Nichols, 5 Mont. 89, 2 Pac. 308.

Nevada.— Blasdel *v.* Williams, 9 Nev. 161.

New Hampshire.— Walker *v.* Walker, 63 N. H. 321, 56 Am. Rep. 514.

New Jersey.—Albro *v.* Dayton, 50 N. J. Eq. 574, 25 Atl. 937.

Ohio.— Harvey *v.* Jones, 1 Disn. 65, 12 Ohio Dec. (Reprint) 490.

Oklahoma.— Christy *v.* Springs, 11 Okla. 710, 69 Pac. 864.

Oregon.— O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004.

Wisconsin.— Jones *v.* Collins, 16 Wis. 594.

See 41 Cent Dig. tit. "Quieting Title," § 56.

A director or manager of a corporation cannot acquire a hostile possession of its property, so as to prevent it from maintaining an action under Civ. Code (1877), § 255, which provides that an action may be brought by any person in possession by himself or his tenant of real property against any person who claims an estate therein adverse to him for the purpose of determining such adverse claim. Consolidated Plaster Co. *v.* Wild, 42 Colo. 202, 94 Pac. 285.

29. King *v.* Carpenter, 37 Mich. 363; O'Hara *v.* Parker, 27 Oreg. 156, 30 Pac. 1004; Clark *v.* Drake, 3 Chandl. (Wis.) 253, 3 Pinn. 228. See also Meighem *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441.

30. *Colorado.*—Stock-Growers' Bank *v.* Newton, 13 Colo. 245, 22 Pac. 444.

Montana.— Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 288, 70 Pac. 1114; Wolverton *v.* Nichols, 5 Mont. 89, 2 Pac. 308.

New Hampshire.— Walker *v.* Walker, 63 N. H. 321, 56 Am. Rep. 514.

New Jersey.— Albro *v.* Day, 50 N. J. Eq. 574, 25 Atl. 937.

Oregon.— O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004.

Wisconsin.— Page *v.* Kennan, 38 Wis. 320; Jones *v.* Collins, 16 Wis. 594.

(b) Permitting Action by Claimant to Vacant Lands. Another group of statutes permits the action to quiet title, or remove cloud thereon, to be brought by a person in possession, and also, if the land is wild or unoccupied, by a person not in possession.[31] These statutes, in extending equitable relief to claimants to unoccupied lands in no wise interfere with the general rule that equitable jurisdiction cannot be invoked where an adequate remedy at law exists; for, where lands were unoccupied, ejectment would not lie at common law.[32]

(c) Permitting Action by One Not in Possession. In several states equitable jurisdiction has been enlarged by statute so as to permit actions to quiet title, or remove cloud thereon, to be maintained even where plaintiff is not in possession.[33] If these statutes be regarded as giving an absolute right to the equitable remedy where an adequate remedy at law exists, the effect is to deprive the party in possession of the right to trial by jury,[34] and they are therefore unconstitutional.[35] Some of the decisions follow the statute, without raising or discussing the question of its effect upon the right of trial by jury, where, under the common law, the remedy would have been at law,[36] while others hold, where the question is squarely presented, that, although equitable in form, the action is not strictly equitable, and that, where there are legal issues, the parties demanding it may have such issues framed for a jury.[37]

(3) Effect of State Statutes in Federal Courts. As to the effect on the chancery jurisdiction of the federal courts, of statutes enlarging equitable jurisdiction in the various states, it is settled that the constitutional provision as to trial by jury,[38] and the statutory provision forbidding equity from entertaining jurisdiction where an adequate remedy at law exists,[39] are controlling. But the

United States.— Northern Pac. R. Co. *v.* Amacker, 49 Fed. 529, 1 C. C. A. 346; Chamberlain *v.* Marshall, 8 Fed. 398.

See 41 Cent. Dig. tit. "Quieting Title," § 48 *et seq.*

31. See the statutes of the several states. And see Gage *v.* Abbott, 99 Ill. 366; McGrath *v.* Norcross, (N. J. Ch. 1905) 61 Atl. 727; Moore *v.* Shofner, 40 Oreg. 488, 67 Pac. 511; Prentice *v.* Duluth Storage, etc., Co., 58 Fed. 437, 7 C. C. A. 293.

32. Lundy *v.* Lundy, 131 Ill. 138, 23 N. E. 337.

33. See the statutes of the several states. And see the following cases:

Alaska.— Seliner *v.* McKay, 2 Alaska 564.

California.— Angus *v.* Craven, 132 Cal. 691, 64 Pac. 1091.

Illinois.— Whitney *v.* Stevens, 97 Ill. 482.

Iowa.— Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238.

Michigan.— Fabor *v.* Cook, 15 Mich. 322.

Montana.— Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 288, 70 Pac. 1114.

Nebraska.— Lyon *v.* Gombert, 63 Nebr. 630, 88 N. W. 774.

Washington.— Vietzen *v.* Otis, 46 Wash. 402, 90 Pac. 264. *Compare* Povah *v.* Lee, 29 Wash. 108, 69 Pac. 639.

See 41 Cent. Dig. tit. "Quieting Title," § 55.

Where property not in possession of any one.— Under 2 Ballinger Annot. Codes & St. § 5521, providing that, where real property is not in the actual possession of any one, any person claiming title thereto can maintain a civil action against another claiming an adverse interest, where realty was not in the actual possession of any one, parties claiming title by virtue of a sheriff's deed could maintain an equitable action to try title or remove clouds against adverse claimants. Rohrer *v.* Snyder, 29 Wash. 199, 69 Pac. 748.

34. Newman *v.* Duane, 89 Cal. 597, 27 Pac. 66.

35. Tabor *v.* Cook, 15 Mich. 322.

36. Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238; Vietzen *v.* Otis, 46 Wash. 402, 90 Pac. 264; Brown *v.* Baldwin, 46 Wash. 106, 89 Pac. 483.

37. Seliner *v.* McKay, 2 Alaska 564; Angus *v.* Craven, 132 Cal. 691, 64 Pac. 1091; Newman *v.* Duane, 89 Cal. 597, 27 Pac. 66; Donahue *v.* Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283; People *v.* Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Curtis *v.* Sutter, 15 Cal. 259. See also Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 288, 70 Pac. 1114; Lyon *v.* Gombert, 63 Nebr. 630, 88 N. W. 774.

Plaintiff must resort to his action at law for possession.— While an action may be maintained, under the statute, for the removal of a cloud on title, by one not in possession, yet the jurisdiction of equity is exhausted when the cloud has been removed, and plaintiff must resort to his action at law for possession. Wofford *v.* Bailey, 57 Miss. 239.

38. Whitehead *v.* Shattuck, 138 U. S. 146, 11 S. Ct. 276, 34 L. ed. 873; McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670; Gordan *v.* Jackson, 72 Fed. 86. See also Union Pac. R. Co. *v.* Meier, 28 Fed. 9.

39. Wehrman *v.* Conklin, 155 U. S. 314,

constitution and statute are held to refer to the right to trial by jury as it existed at common law ;[40] and if a state statute enlarging equitable jurisdiction does not deprive a party of the right to trial by jury as it existed at common law, the statute may be followed by the federal courts; [41] otherwise not.[42]

c. Adequacy of Particular Remedies — (I) *EJECTMENT.*[43] The remedy by ejectment is generally regarded as plain, adequate, and complete, and a party will ordinarily be left to that remedy when it exists.[44] Thus, where the title is purely a legal one, and defendant is in possession, the remedy at law in the nature of an action of ejectment is regarded as plain, adequate, and complete.[45] It has been

15 S. Ct. 129, 39 L. ed. 167; Whitehead *v.* Shattuck, 138 U. S. 146, 11 S. Ct. 276, 34 L. ed. 873; Peck *v.* Ayers, etc., Tie Co., 116 Fed. 273, 53 C. C. A. 551; Morrison *v.* Marker, 93 Fed. 692; Taylor *v.* Clark, 89 Fed. 7; Gombert *v.* Lyon, 80 Fed. 305; Gordan *v.* Jackson, 72 Fed. 86; Frey *v.* Willoughby, 63 Fed. 865, 11 C. C. A. 463; Whitehead *v.* Entwhistle, 27 Fed. 778.

40. Gordan *v.* Jackson, 72 Fed. 86; Grand Rapids, etc., R. Co. *v.* Sparrow, 36 Fed. 210, 1 L. R. A. 480.

41. Southern Pine Co. *v.* Hall, 105 Fed. 84, 44 C. C. A. 363; Grand Rapids, etc., R. Co. *v.* Sparrow, 36 Fed. 210, 1 L. R. A. 480.

42. Gordan *v.* Jackson, 72 Fed. 86.

43. **Ejectment** generally see EJECTMENT, 15 Cyc. 1.

44. *Arkansas.*— Mathews *v.* Marks, 44 Ark. 436; Crane *v.* Randolph, 30 Ark. 579; Branch *v.* Mitchell, 24 Ark. 431.

Connecticut.— Cahill *v.* Cahill, 76 Conn. 542, 57 Atl. 284.

Florida.— Haworth *v.* Norris, 28 Fla. 763, 10 So. 18; Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603.

Illinois.— Burton *v.* Gleason, 56 Ill. 25.

Iowa.— Harrington *v.* Cubbage, 3 Greene 307.

Maryland.— Carswell *v.* Swindell, 102 Md. 636, 62 Atl. 956; Helden *v.* Hellen, 80 Md. 616, 31 Atl. 506, 45 Am. St. Rep. 371; Textor *v.* Shipley, 77 Md. 473, 26 Atl. 1019, 28 Atl. 1060; Carter *v.* Woolford, 71 Md. 283, 17 Atl. 1041.

Michigan.— Barron *v.* Robbins, 22 Mich. 35; Blackwood *v.* Van Vleet, 11 Mich. 252.

Missouri.— Odle *v.* Odle, 73 Mo. 289.

New Jersey.—Essex Nat. Bank *v.* Harrison, 57 N. J. Eq. 91, 40 Atl. 209; Albro *v.* Dayton, 50 N. J. Eq. 574, 25 Atl. 937; Sheppard *v.* Nixon, 43 N. J. Eq. 627, 13 Atl. 617.

Rhode Island.— McCudden *v.* Wheeler, etc., Mfg. Co., 23 R. I. 528, 51 Atl. 48.

Virginia.— Glenn *v.* West, 103 Va. 541, 49 S. E. 671; Louisville, etc., R. Co. *v.* Taylor, 93 Va. 226, 24 S. E. 1013.

West Virginia.— Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682.

Wisconsin.— Lee *v.* Simpson, 29 Wis. 333.

United States.— Frost *v.* Spitley, 121 U. S. 552, 7 S. Ct. 1129, 30 L. ed. 1010; U. S. *v.* Wilson, 118 U. S. 86, 6 S. Ct. 991, 30 L. ed. 110; Ashburn *v.* Graves, 149 Fed. 968, 79 C. C. A. 478; Sanders *v.* Riverside, 118 Fed. 720, 55 C. C. A. 240; McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670; Scott *v.* Little, 76 Fed. 563; Northern Pac. R. Co. *v.* Cannon, 46 Fed. 224; Whitehead *v.* Entwhistle, 27 Fed. 778.

See 41 Cent. Dig. tit. "Quieting Title," § 6 *et seq.*

Where the bill shows that the parties claim title from different sources and through different chains of conveyances, defendant being in possession, there is a plain and speedy mode of settling the question of title by an action at law in the nature of ejectment, and that fact is fatal to the jurisdiction of equity. Whitehead *v.* Entwhistle, 27 Fed. 778.

Where it appears that the parties are each in possession of part of the property claiming title to the whole, plaintiff might, by an action in the nature of ejectment, put the title asserted by defendant as an entirety to the test, and procure an adjudication settling the title to the whole tract, and not merely to that part of which he is in possession; and therefore the statutory action to quiet title will not lie. Albro *v.* Dayton, 50 N. J. Eq. 574, 25 Atl. 937.

Adverse party has constitutional right to trial by jury.— Where the title is purely a legal one and defendant is in possession, the remedy at law in plain, adequate, and complete, and an action of ejectment cannot be maintained under a guise of a bill in equity to quiet title or remove a cloud. In such case the adverse party has a constitutional right to trial by jury. Mathews *v.* Marks, 44 Ark. 436; McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670.

45. *Arkansas.*— Mathews *v.* Marks, 44 Ark. 436.

Florida.— Haworth *v.* Norris, 28 Fla. 763, 10 So. 18; Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603.

Illinois.— Burton *v.* Gleason, 56 Ill. 25.

Maryland.— Textor *v.* Shipley, 77 Md. 473, 26 Atl. 1019, 28 Atl. 1060.

Virginia.— Glenn *v.* West, 103 Va. 521, 49 S. E. 671.

West Virginia.— Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682.

Wisconsin.— Lee *v.* Simpson, 29 Wis. 333.

United States.— Frost *v.* Spitley, 121 U. S. 552, 7 S. Ct. 1129, 30 L. ed. 1010; Ashburn *v.* Graves, 149 Fed. 968, 79 C. C. A. 478; McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670; Northern Pac. R. Co. *v.* Cannon, 46 Fed. 224; Harland *v.* Bankers, etc., Tel. Co., 32 Fed. 305.

See 41 Cent. Dig. tit. "Quieting Title," § 6 *et seq.*

held, however, that a bill to cancel a forged instrument as a cloud on title should not be dismissed on the ground that there is an adequate remedy in the nature of an action of ejectment, since in such an action the court could not decree the delivery of the deed, nor cancel the same.[46]

(II) *Trespass to Try Title.*[47] Generally, where there is nothing to prevent an action at law in the nature of trespass to try title, this remedy is regarded as plain, adequate, and complete, and, in such case, a court of equity will decline to interfere.[48]

(III) *Writ of Entry.*[49] If plaintiff may resort to the remedy at law by a writ of entry, that remedy is regarded as plain, adequate, and complete, and equity will decline to interfere.[50]

(IV) *Defenses Available at Law.* The owner of land in possession may sue to quiet his title, notwithstanding he may have a defense in a court of law,[51] unless such defense is as practical and efficient as the remedy in equity.[52]

3. Pendency of Action at Law. The rule is that if there is already an action pending in a court of law wherein the parties can fairly present their respective titles and obtain an adjudication thereof,[53] and no special reason is shown for equitable interference,[54] a court of equity will decline to exercise jurisdiction to quiet title or remove cloud. But the court is not deprived of jurisdiction by the pendency of an action at law, where it is between other parties and only extends to a portion of the controversy.[55]

4. Previous Establishment of Title at Law. The general rule is that equitable jurisdiction to quiet or remove cloud on title will not be exercised where the parties are not numerous, unless it clearly appears that plaintiff has fully and fairly established his title in an action at law.[56] This rule, however, is held to be abro-

Compare Cahill *v.* Cahill, 76 Conn. 542, 57 Atl. 284.

46. Hamilton *v.* Batlin, 8 Minn. 403, 83 Am. Dec. 787.

47. Trespass to try title generally see Trespass to Try Title.

48. Barron *v.* Robbins, 22 Mich. 35. See also Cahill *v.* Cahill, 76 Conn. 542, 57 Atl. 284. And suits necessary to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having appearance of better right. Thompson *v.* Locke, 66 Tex. 383, 1 S. W. 112.

49. Writ of entry generally see Entry, Writ of, 15 Cyc. 1057.

50. Gamage *v.* Harris, 79 Me. 531, 11 Atl. 422; Russell *v.* Barstow, 144 Mass. 130, 10 N. E. 746; Pratt *v.* Pond, 5 Allen (Mass.) 59. See also Spofford *v.* Bangor, etc., R. Co., 66 Me. 51.

51. Kennedy *v.* Northup, 15 Ill. 148; Murphy *v.* Sampson. 42 Mo. App. 654; Scott *v.* Onderdonk, 14 N. Y. 9, 67 Am. Dec. 106; Sieman *v.* Austin, 33 Barb. (N. Y.) 9; Wood *v.* Fisk, 45 Oreg. 276, 77 Pac. 126, 738.

Illustrations.— While the fact that a certain conveyance of realty was fraudulent as to the grantor's creditors is available as a defense at law, since such defense cannot relieve the land from a fraudulent deed as a cloud on the title, defendant, in an action at law, was entitled to file a complaint in the nature of a cross bill to have such conveyance vacated on that ground. Wood *v.* Fisk, 45 Oreg. 276, 77 Pac. 128, 738. Where a party relies on extrinsic evidence to impeach the invalidity of the claim and instrument apparently beclouding his title in any action at law that might be brought against him, he is not compelled to take the hazard of the loss of the evidence, but may at once invoke the aid of a court of equity to quiet his title. Scott *v.* Underdonk, 14 N. Y. 9, 67 Am. Dec. 106.

52. Brooklyn *v.* Meserole, 26 Wend. (N. Y.) 132; Van Doren *v.* New York, 9 Paige (N. Y.) 388; Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 547; Rooney *v.* Soule, 45 Vt. 303. See also Wood *v.* Fisk, 45 Oreg. 276, 77 Pac. 128, 738.

53. Rosebrook *v.* Baker, 151 Ala. 180, 44 So. 198; Normant *v.* Eureka Co., 98 Ala. 182, 12 So. 154, 39 Am. St. Rep. 45; Huntington *v.* Allen, 44 Miss. 654; Andrews *v.* Emery, 24 Pa. Co. Ct. 210; Chamberlain *v.* Marshall, 8 Fed. 398. See also Stockton *v.* Williams, Walk. (Mich.) 120 [*affirmed* in 1 Dougl. 565].

54. Huntington *v.* Allen, 44 Miss. 654, opinion of the court by Simrall, J.

Where it is not alleged that either fraud, accident, or mistake has intervened to prevent plaintiff from establishing at law all the title which he claims, and each party claims a legal title, and a court of law is already possessed of the case, a bill in equity to quiet title will not be entertained. Moran *v.* Palmer, 13 Mich. 367.

55. Wilmore Coal Co. *v.* Brown, 147 Fed. 931 [*affirmed* in 153 Fed. 143].

56. *Kentucky.*— Scott *v.* Means, 80 Ky. 460.

Maryland.— Carswell *v.* Swindel, 102 Md. 636, 62 Atl. 976.

Ohio.— Lowe *v.* Lowry, 4 Ohio 77, 19 Am. Dec. 585.

gated by a statute providing that any person in possession of realty may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest.[57]

II. What Constitutes Cloud on Title Justifying Interference of Equity.

A. Existing Cloud — 1. In General. A cloud, such as equity will undertake to remove, is the semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded, and which it would be inequitable to enforce.[58]

United States.— Allen *v.* Halliday, 25 Fed. 688; St. Louis, etc., R. Co. *v.* Dewees, 23 Fed. 519; Harmer *v.* Gwynne, 11 Fed. Cas. No. 6,075, 5 McLean 313; Shepley *v.* Rangely, 21 Fed. Cas. No. 12,756, 2 Ware 242, 2 N. Y. Leg. Obs. 5.

England.— Tenham *v.* Herbert, 2 Atk. 483, 26 Eng. Reprint 692.

Compare Whitehouse *v.* Jones, 60 W. Va. 6, 80, 55 S. E. 730, where it is held that a distinction in this regard exists between an action to quiet title and one to remove a cloud thereon and that equity has jurisdiction to remove cloud for one in possession under the better title, although he has not vindicated it at law.

Sufficiency of establishment of title at law. — The decision of a commissioner of the land office denying a patent, on the ground that the land sought to be patented was made land, and as such belonged to a riparian proprietor and was not subject to warrant, was not a judicial determination of the legal title to the land sought to be patented as between the applicants for the patent and the county caveator, who claimed the made land by virtue of his title as a prior patentee of an island, to which he asserted the made land became attached by accretion. Carswell *v.* Swindell, 102 Md. 636, 62 Atl. 956.

57. Holland *v.* Challen, 110 U. S. 15, 3 S. Ct. 495, 28 L. ed. 52; Stark *v.* Starrs, 6 Wall. (U. S.) 402, 18 L. ed. 925; Clark *v.* Smith, 13 Pet. (U. S.) 195, 10 L. ed. 123.

Where no suit to enforce or contest the validity of the title is pending, the statute gives a party in peaceable possession, whose title is disputed, a right to come into chancery in advance of a determination of the title at law. American Dock, etc., Co. *v.* Public School Trustees, 37 N. J. Eq. 266.

58. Head *v.* Fordyce, 17 Cal. 149; Rigdon *v.* Shirk, 127 Ill. 411, 19 N. E. 698; Kesner *v.* Miesch, 107 Ill. App. 468 [*affirmed* in 204 Ill. 320, 68 N. E. 405]; McArthur *v.* Griffith, 147 N. C. 545, 61 S. E. 519. See also Shults *v.* Shults, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188.

Some color of title in defendant must, in order to constitute a cloud, be shown. Dunklin County *v.* Clark, 51 Mo. 60.

If the claim sought to be removed is valid, and enforceable either at law or in equity, it cannot be said to be a cloud. Griffiths *v.* Griffiths, 198 Ill. 632, 64 N. E. 1069; Rigdon *v.* Shirk, 127 Ill. 411, 19 N. E. 698.

Another title of a nature rendering it questionable whether it is not *prima facie* a better title than that of complainant constitutes a cloud on his title. Eaton *v.* Trowbridge, 38 Mich. 454.

A claim by the owner of cutting stone rights of the right to have tracks cut on the land, to be used for the shipment of his freight, is the claim of an easement in the land and a cloud on the title of its owner. Oman *v.* Bedford-Bowling Green Stone Co., 134 Fed. 64, 67 C. C. A. 190.

A claim by a vendor to collect unpaid purchase-money from lands sold and conveyed does not constitute a cloud on the title of a judgment creditor of the purchaser, who has obtained a decree that the purchaser holds his interest in the land as trustee for the satisfaction of his indebtedness to such creditor. Bennett *v.* Hotchkiss, 17 Minn. 89.

A right of way over land which is created by the owner of the title, and exists by his grant, cannot be considered a cloud on his title. Bresler *v.* Pitts, 58 Mich. 347, 25 N. W. 311.

When, after the conveyance of real estate, a commission of lunacy is taken out and executed against the grantor, by the finding in which it appeared that the grantor had been a lunatic without a lucid interval from a time anterior to the date of the conveyance, and such finding has been confirmed by the court, the circumstance casts such a cloud on the title of the purchaser that he may ask for equitable relief by a bill in the nature of a bill *quia timet.* Yauger *v.* Skinner, 14 N. J. Eq. 389.

Verbal claim or assertion of ownership.— Unless otherwise provided for by statute (Gambrell Lumber Co. *v.* Saratoga Lumber Co., 87 Miss. 773, 40 So. 485; Cook *v.* Friley, 61 Miss. 1, both cases holding that under the statute a suit may be brought to cancel and remove a cloud on a valid title whether the cloud would be cast by a recorded instrument or by mere assertion of an unknown but hostile claim), a mere verbal claim to, or assertion of ownership in, realty does not constitute a cloud on title (Waters *v.* Lewis, 106 Ga. 758, 32 S. E. 854; Parker *v.* Shannon, 121 Ill. 452, 13 N. E. 155; Newman *v.* Newman, (Tex. Civ. App. 1905) 86 S. W. 635; Devine *v.* Los Angeles, 202 U. S. 313, 26 S. Ct. 652, 50 L. ed. 1046). See Madison Ave. Baptist Church *v.* Madison Ave. Baptist Church, 26 How. Pr. (N. Y.) 72, holding that mere threats and designs against a grantee

2. Necessary Attributes — a. Must Be Apparently Valid. Equity will not interfere to remove a cloud on title where the invalidity of the instrument or claim complained of appears on its face;[59] where extrinsic facts must be proved for the purpose of establishing its validity;[60] or where the party claiming under it must, in order to recover thereon, necessarily offer evidence inevitably showing its invalidity and destroying its effect.[61] But whenever the instrument or claim of defendant appears to be valid on its face, but for some reason or matter that can only be shown by extrinsic evidence is in fact void,[62] and especially if such evidence be

in possession, accompanied by declarations of the invalidity of his deed, are not to be deemed a cloud on the title.

Instrument not entitled to record.— Since an interest or agreement may be valid between the parties and those having actual notice, although not entitled to be admitted to record, the owner of property whose title is clouded by the recording of an instrument may maintain a suit to have the record canceled, although the instrument was not entitled to go on the record. Walter *v.* Hartwig, 106 Ind. 123, 6 N. E. 5.

A statement claiming an equitable interest in certain land, and signed only by the claimant, does not, although recorded in the registry of deeds, constitute a cloud on the title of the owner. Leeds *v.* Wheeler, 157 Mass. 67, 31 N. E. 709.

Question of construction.— Where both parties are claiming under the same instrument, and the question is purely one of construction, no case is presented for the removal of a cloud on the title. Ecton *v.* Smith, 6 Ky. L. Rep. 224; Brown *v.* Austen, 35 Barb. (N. Y.) 341, 22 How. Pr. 394.

59. *Alabama.*— Tyson *v.* Brown, 64 Ala. 244.

Arkansas.— Beardsley *v.* Hill, 85 Ark. 4, 106 S. W. 1169.

California.— Lick *v.* Ray, 43 Cal. 83; Leach *v.* Day, 27 Cal. 643.

Florida.— Simmons *v.* Carlton, 44 Fla. 719, 33 So. 408; Reyes *v.* Middleton, 36 Fla. 99, 17 So. 937, 51 Am. St. Rep. 17, 29 L. R. A. 66; Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603.

Illinois.— Petty *v.* Beers, 224 Ill. 129, 79 N. E. 704 [*affirming* 127 Ill. App. 593]; Roby *v.* South Park Com'rs, 215 Ill. 200, 74 N. E. 125.

Maine.— Briggs *v.* Johnson, 71 Me. 235.

Minnesota.— Mogan *v.* Carter, 48 Minn. 501, 51 N. W. 614; Maloney *v.* Finnegan, 38 Minn. 70, 35 N. W. 723.

Missouri.— Clark *v.* Covenant Mut. L. Ins. Co., 52 Mo. 272.

New York.— Lehman *v.* Roberts, 86 N. Y. 232; Townsend *v.* New York, 77 N. Y. 542; Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21; Mellen *v.* Banning, 60 Hun 151, 14 N. Y. Suppl. 665 [*affirmed* in 19 N. Y. Suppl. 1001]; Wiggin *v.* New York, 9 Paige 16.

North Carolina.— McArthur *v.* Griffith, 147 N. C. 545, 61 S. E. 519.

Wisconsin.— Meloy *v.* Dougherty, 16 Wis. 269; Gamble *v.* Loop, 14 Wis. 465; Moore *v.* Cord, 14 Wis. 213.

United States.— Hannewinkle *v.* Georgetown, 15 Wall. 547, 21 L. ed. 231; Peirsoll *v.* Elliott, 6 Pet. 95, 8 L. ed. 332; Taylor *v.* Fisk, 94 Fed. 242.

See 41 Cent. Dig. tit. "Quieting Title," § 14 *et seq.*

Compare Stevens *v.* Ryerson, 6 N. J. Eq. 477 (holding that equity may decree the cancellation of an instrument, although it is a nullity, on the ground that its existence may be a cloud on the complainant's title, or subject him to litigation at a future period when the facts become involved in obscurity); Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865 (holding that a defendant who asserts a claim, even under an instrument void on its face, cannot be heard to say that it has not such a semblance of validity as to create a cloud on the title of the property which it professes to convey, which will prejudice the right of the real owner if it be not removed, and in such case the court has power, which it must exercise, not only to declare the instrument void, but to cancel it).

Special circumstances must be shown.— If the instrument against which relief is prayed for be void on its face, so that an action based thereon must fall by its own weight, then the title of the party plaintiff is not necessarily clouded thereby, and he ought, if he would maintain an action to have it removed, show some special circumstances which entitle him, in the view of a court of equity, to a decree for that purpose.

A tax deed purporting to convey one vigintillionth part of a lot is void upon its face and does not constitute a cloud on title, since the portion of the lot purporting to be conveyed is not susceptible of possession and has no practical existence. Petty *v.* Beers, 224 Ill. 129, 79 N. E. 704 [*affirming* 127 Ill. App. 593]. *Contra*, Stinson *v.* Connecticut Mut. L. Ins. Co., 174 Ill. 125, 51 N. E. 193, 66 Am. St. Rep. 262 [*affirming* 62 Ill. App. 319].

60. Lehman *v.* Roberts, 86 N. Y. 232; Mulligan *v.* Baring, 3 Daly (N. Y.) 75. But see Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21.

61. Simmons *v.* Carlton, 44 Fla. 719, 33 So. 408; Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603; Overing *v.* Foote, 43 N. Y. 290.

62. *Alabama.*— Greene *v.* Boaz, (1908) 47 So. 255.

Arkansas.— Lawrence *v.* Zimpleman, 37 Ark. 643.

California.— Lick *v.* Ray, 43 Cal. 83; Pixley *v.* Huggins, 15 Cal. 127.

Indiana.— Sanxay *v.* Hunger, 42 Ind. 44.

Iowa.— Cranston *v.* McQuiston, 127 Iowa 104, 102 N. W. 785.

Kansas.— Douglass *v.* Nuzum, 16 Kan. 515.

oral,[63] equity will entertain a bill to remove such claim or instrument as a cloud on title. And where the deed or other instrument sought to be set aside is a mere nullity, but, left in an uncanceled state, may be a cloud on title, it is immaterial whether it was originally invalid by reason of extrinsic facts,[64] or has become insufficient by reason of subsequent events not impeaching its original validity, but only destroying its future operation.[65]

b. Must Be Capable of Embarrassing Title. In order to maintain an action to remove a cloud on title, the instrument or claim complained of must not only be clearly invalid or inequitable, but must be such as may, either now or in the future, embarrass the real owner in controverting it;[66] and whenever the instrument or claim complained of is not one which, presently, or in the future, will embarrass plaintiff or endanger his title, equity will refuse to entertain the bill.[67]

3. Particular Instruments or Matters — a. Deeds — (i) *Void on Face* — (a) *In General.* It is always assumed, when a court of equity interferes, that the title of the party complaining is affected by a hostile title, apparently good, but really defective and inequitable by something not appearing on its face.[68] Hence the court never intervenes to cancel or remove, as a cloud on title, a deed void on its face;[69] and the same is true, although the invalidity does not appear on the

Michigan.— Casgrain *v.* Hammond, 134 Mich. 419, 96 N. W. 510, 104 Am. St. Rep. 610.

Missouri.— Mason *v.* Black, 87 Mo. 329; Perkins *v.* Baer, 95 Mo. App. 70, 68 S. W. 939; Tipton Bank *v.* Davidson, 40 Mo. App. 421; Judge *v.* Lackland, 3 Mo. App. 107.

New York.— Lehman *v.* Roberts, 86 N. Y. 232; Crooke *v.* Andrews, 40 N. Y. 547; Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21; Mutual L. Ins. Co. *v.* Holloday, 13 Abb. N. Cas. 16; Lewis *v.* Buffalo, 29 How. Pr. 335.

North Carolina.— McArthur *v.* Griffith, 147 N. C. 545, 61 S. E. 519.

Ohio.— Lowmiller *v.* Fouser, 52 Ohio St. 123, 39 N. E. 419.

United States.— Acord *v.* Western Pocahontas Corp., 156 Fed. 989; Schofield *v.* Ute Coal, etc., Co., 92 Fed. 269, 34 C. C. A. 334; Ormsby *v.* Ottman, 85 Fed. 492, 29 C. C. A. 295; Coulson *v.* Portland, 6 Fed. Cas. No. 3,275, Deady 481.

See 41 Cent. Dig. tit. "Quieting Title," § 14 *et seq.*

The character of the extrinsic proof to which the true owner must resort is immaterial. Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21.

63. *Indiana.*— Sanxay *v.* Hunger, 42 Ind. 44.

Kansas.— Douglass *v.* Nuzum, 16 Kan. 515.

Missouri.— Mason *v.* Black, 87 Mo. 329.

New York.— Crooke *v.* Andrews, 40 N. Y. 547.

North Carolina.— McArthur *v.* Griffith, 147 N. C. 545, 61 S. E. 519.

64. Forniquet *v.* Forstall, 34 Miss. 87; Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21.

65. Foley *v.* Kirk, 33 N. J. Eq. 170; Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21. See also Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 520. But see Hotchkiss *v.* Elting, 36 Barb. (N. Y.) 38.

66. Hartford *v.* Chipman, 21 Conn. 488; Thompson *v.* Etowah Iron Co., 91 Ga. 538, 17 S. E. 663; Ecton *v.* Smith, 6 Ky. L. Rep. 224; Phelps *v.* Harris, 101 U. S. 370, 25 L. ed. 855; Lamb *v.* Farrell, 21 Fed. 5; Chamberlain *v.* Marshall, 8 Fed. 398.

67. Hartford *v.* Chapman, 21 Conn. 488; Townsend *v.* New York, 77 N. Y. 542; Farnham *v.* Campbell, 34 N. Y. 480; Cox *v.* Clift, 2 N. Y. 118. See also Hardy *v.* Sanborn, 172 Mass. 405, 52 N. E. 517; Murray *v.* Hazell, 99 N. C. 168, 5 S. E. 428.

A bill in equity which states nothing but a naked pretense of title in respondent, and prays for relief against it on the ground of an apprehended injury, cannot be maintained. Torrent *v.* Muskegon Booming Co., 22 Mich. 354.

68. Rea *v.* Longstreet, 54 Ala. 291.

69. *Alabama.*— Patterson *v.* Simpson, 147 Ala. 550, 41 So. 842; Hendon *v.* Delvichio, 137 Ala. 594, 34 So. 830; Borst *v.* Simpson, 90 Ala. 373, 7 So. 814; Lockett *v.* Hurt, 57 Ala. 198; Rea *v.* Longstreet, 54 Ala. 291. See also Daniel *v.* Stewart, 55 Ala. 278.

Arkansas.— Beardsley *v.* Hill, 85 Ark. 4; 106 S. W. 1169.

Connecticut.— Alden *v.* Trubee, 44 Conn. 455.

District of Columbia.— Mayse *v.* Gaddis, 2 App. Cas. 20; Welden *v.* Stickney, 1 App. Cas. 343.

Florida.— Reyes *v.* Middleton, 36 Fla. 99, 17 So. 937, 51 Am. St. Rep. 17, 29 L. R. A. 66.

Georgia.— Thompson *v.* Etowah Iron Co., 91 Ga. 538, 17 S. E. 663.

Illinois.— Glos *v.* Furman, 164 Ill. 585, 45 N. E. 1019.

Michigan.— Purdy *v.* Law, 132 Mich. 622, 94 N. W. 182.

Minnesota.— Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261.

Missouri.— Hannibal, etc., R. Co. *v.* Nortoni, 154 Mo. 142, 55 S. W. 220; Johnson *v.* Cottingham Ironing Mach. Co., 8 Mo. App. 575. See also Mason *v.* Black, 87 Mo. 329.

face of the deed, if it necessarily appears in some of the links of title which one claiming under the deed would have to establish in order to give it force and effect.[70]

(B) *Executed by Stranger to Title.* A deed executed by a mere stranger to the title does not constitute a cloud thereon.[71]

(C) *Indefinite Description.* If a deed describes the land so indefinitely as to render it void on its face, it does not constitute a cloud which equity will remove.[72]

(II) *APPARENTLY VALID* — (A) *In General.* Where a deed is apparently valid, and its invalidity can be shown only by the introduction of extrinsic evidence, it is a cloud on title justifying the intervention of equity.[73]

Nebraska.— Wright *v.* Smith, 11 Nebr. 341, 7 N. W. 537; Best *v.* Grist, 1 Nebr. (Unoff.) 812, 95 N. W. 836.

New York.— Fonda *v.* Sage, 48 N. Y. 173; Levy *v.* Hart, 54 Barb. 248; Hotchkiss *v.* Elting, 36 Barb. 38.

North Carolina.— Busbee *v.* Macy, 85 N. C. 329.

Wisconsin.— Robertson *v.* Kinkhead, 26 Wis. 560; Head *v.* James, 13 Wis. 641.

United States.— Peirsoll *v.* Elliott, 6 Pet. 95, 8 L. ed. 332; Ashburn *v.* Graves, 149 Fed. 968, 79 C. C. A. 478.

See 41 Cent. Dig. tit. "Quieting Title," § 18 *et seq.*

But see Mount *v.* McCauley, 47 Oreg. 444, 83 Pac. 529; Almony *v.* Hicks, 3 Head (Tenn.) 39; Jones *v.* Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; Whitehouse *v.* Jones, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. N. S. 49.

No exception to the rule stated in the text is allowed because plaintiff is an infant in present need of money, and the lot is not now productive. Cohen *v.* Sharp, 44 Cal. 29.

70. Birmingham *v.* McCormack, (Ala. 1905) 40 So. 111; Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186; Fonda *v.* Sage, 48 N. Y. 173.

71. *Alabama.*— See Rea *v.* Longstreet, 54 Ala. 291.

California.—Bothin *v.* California Title Ins., etc., Co., 153 Cal. 718, 96 Pac. 500; Curtis *v.* Sutter, 15 Cal. 259; Pixley *v.* Huggins, 15 Cal. 133, where the court says that every deed from the same source through which plaintiff derives his title must, if valid on its face, have the effect of casting a cloud on title, and a conveyance not falling in the chain of title, as from one who never had any connection with the property, would not constitute a cloud on title.

District of Columbia.— Welden *v.* Stickney, 1 App. Cas. 343.

Missouri.— Hannibal, etc., R. Co. *v.* Nortoni, 154 Mo. 142, 55 S. W. 220.

New York.— See Ward *v.* Dewey, 16 N. Y. 519.

United States.— Ashburn *v.* Graves, 149 Fed. 968, 79 C. C. A. 478.

See 41 Cent. Dig. tit. "Quieting Title," § 18 *et seq.*

72. Busbee *v.* Macy, 85 N. C. 329; Head *v.* James, 13 Wis. 641.

Where it is apparent that the description of property conveyed by deeds is not sufficiently comprehensive to embrace a certain tract, there can be no cloud on the title of that tract growing out of such description, and consequently a bill to quiet title and remove a cloud, and to restrain the sale of the lands conveyed by the deeds, cannot be maintained. St. Louis Bridge Co. *v.* Curtis, 103 Ill. 410.

73. *Alabama.*— Lockett *v.* Hurt, 57 Ala. 198; Daniel *v.* Stewart, 55 Ala. 278; Barclay *v.* Plant, 50 Ala. 509; Lyon *v.* Hunt, 11 Ala. 295, 46 Am. Dec. 216.

Arkansas.— Talieferro *v.* Barnett, 37 Ark. 511.

California.—Pixley *v.* Huggins, 15 Cal. 127.

Connecticut.—Alden *v.* Trubee, 44 Conn. 455.

District of Columbia.—See Welden *v.* Stickney, 1 App. Cas. 343.

Georgia.— Watkins *v.* Nugen, 118 Ga. 375, 45 S. E. 260; Graham *v.* Hall, 68 Ga. 354.

Illinois.— Shaw *v.* Allen, 184 Ill. 77, 56 N. E. 403 [*affirming* 85 Ill. App. 23]; Crawford *v.* Chicago, etc., R. Co., 112 Ill. 314; Van Dorn *v.* Leeper, 95 Ill. 35; Brooks *v.* Kerns, 86 Ill. 547; Stout *v.* Cook, 37 Ill. 283.

Iowa.— Thomas *v.* Kennedy, 24 Iowa 397, 95 Am. Dec. 740.

Kentucky.— Murphy *v.* Metz, 77 S. W. 191, 25 Ky. L. Rep. 1124; Kant *v.* Hall, 23 S. W. 954, 15 Ky. L. Rep. 511.

Michigan.— Chaffee *v.* Detroit, 53 Mich. 573, 19 N. W. 191; Palmer *v.* Rich, 12 Mich. 414.

Minnesota.— Lake Superior Land Co. *v.* Emerson, 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679.

Missouri.— Jewett *v.* Boardman, 181 Mo. 647, 81 S. W. 186; Mason *v.* Black, 87 Mo. 329.

New York.— Mutual L. Ins. Co. *v.* Corey, 54 Hun 493, 7 N. Y. Suppl. 939 [*affirmed* in 135 N. Y. 326, 31 N. E. 1095]; Remington Paper Co. *v.* O'Dougherty, 16 Hun 594. See Chautauque County Bank *v.* White, 6 Barb. 589 [*reversed* in 6 N. Y. 23, 65 Am. Dec. 442]; City Real Estate Co. *v.* Clark, 36 Misc. 709, 74 N. Y. Suppl. 405.

North Carolina.— Busbee *v.* Macy, 85 N. C. 329.

Pennsylvania.— Eckman *v.* Eckman, 55 Pa. St. 269.

South Dakota.—Fitzgerald *v.* Miller, 7 S. D. 61, 63 N. W. 221.

Tennessee.— Anderson *v.* Talbot, 1 Heisk. 407; Carter *v.* Taylor, 3 Head 30; Whillock *v.*

(B) *Executed by One Privy to the Title.* A deed executed by one privy to the title,[74] even though unrecorded [75] or undelivered,[76] constitutes a cloud on title justifying the intervention of a court of equity.

(C) *Procured by Fraud.* A deed which, although valid on its face, was procured by fraud, constitutes a cloud on title which equity will cancel.[77]

Grisham, 3 Sneed 237; Johnson *v.* Cooper, 2 Yerg. 524, 24 Am. Dec. 502.

Texas.— Taylor *v.* Taul, (Civ. App. 1895) 31 S. W. 1085.

Virginia.— Virginia Coal, etc., Co. *v.* Kelly, 93 Va. 332, 24 S. E. 1020.

Wisconsin.— Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032.

United States.— Bunce *v.* Gallagher, 4 Fed. Cas. No. 2,133, 5 Blatchf. 481; Remer *v.* McKay, 54 Fed. 432.

See 41 Cent. Dig. tit. "Quieting Title," § 18 *et seq.*

A deed executed by a married woman, without being acknowledged by her in the manner prescribed by law, and without disclosing that she was married at the time of its execution, constitutes a cloud on title which equity will take cognizance of. Brooks *v.* Kearns, 86 Ill. 547; Galliano *v.* Lane, 2 Sandf. Ch. (N. Y.) 147.

Another test.— If a defect in a deed is such as to require legal acumen to discover it, whether it appears on the face of the deed or proceedings, or is to be proved *aliunde*, it constitutes a cloud on title which a court of equity will remove. Merchants' Bank *v.* Evans, 51 Mo. 335.

Deed valid to the extent of one undivided portion of the land.— If the deed sought to be canceled as a cloud on plaintiff's title is a valid and operative muniment of title in favor of defendant to the extent of one undivided portion of the land, although plaintiff may be the rightful owner of the other portion prayed for, the prayer for cancellation must be denied. Latham *v.* Inman, 88 Ga. 505, 15 S. E. 8.

Conditional limitation of wife's estate in deed to husband and wife.—A deed granted the land to husband and wife, their heirs and assigns, forever, with a clause that it was made to her on condition that if she should not continue to live with him, not having good cause for a divorce, the land should vest in fee in the husband. It was held that after the wife ceased to live with her husband, not having good ground for a divorce, the deed, so far as it related to the wife, constituted a cloud on his title that equity will cancel at his suit, notwithstanding he has obtained a decree of divorce from her for her desertion. Smith *v.* Smith, 23 Wis. 176, 99 Am. Dec. 153.

Repurchase of land by life-tenant at tax-sale, inuring to benefit of remainderman.— Where land is sold to the government for non-payment of direct taxes under the United States direct tax acts, which a tenant for life should have paid, his subsequent repurchase of the fee in his own name from the government is equivalent to a payment of the taxes, and the deed to himself is merely a cloud on the title of the remainderman, which a court of equity will remove. Chaplin *v.* U. S., 29 Ct. Cl. 231.

A deed by one who had only a contingent remainder, which afterward became extinct, cast a cloud upon the title to the land in controversy, and should be declared null and void. Dickerson *v.* Dickerson, 211 Mo. 483, 110 S. W. 700.

74. Brewton *v.* Smith, 28 Ga. 442; Goodloe *v.* Black, 54 S. W. 957, 21 Ky. L. Rep. 1286.

Recording of escow.—A deed executed by a grantor and placed in the hands of a stranger to be held by him until the grantee does a particular thing, and then to be delivered to him, and which by accident or mistake is placed on record without ever having been delivered to the grantee, is, as to such grantee, absolutely void, and is a cloud on the grantor's title which a court of equity will cancel. Stanley *v.* Valentine, 79 Ill. 544; Bales *v.* Roberts, 189 Mo. 49, 87 S. W. 914; Willis *v.* Sweet, 49 Wis. 505, 5 N. W. 895. See also ESCROWS, 16 Cyc. 584.

75. Goodloe *v.* Black, 54 S. W. 957, 21 Ky. L. Rep. 1286.

76. Brewton *v.* Smith, 28 Ga. 442.

77. *Alabama.*— Shiff *v.* Andress, (1906) 40 So. 824; Lehman *v.* Shook, 69 Ala. 486.

California.— De Leonis *v.* Hammel, 1 Cal. App. 390, 82 Pac. 349.

Illinois.— Kennedy *v.* Northup, 15 Ill. 148.

Indiana.— Sherrin *v.* Flinn, 155 Ind. 422, 58 N. E. 549; Detwiler *v.* Schultheis, 122 Ind. 155, 23 N. E. 709.

Maine.— Spear *v.* Spear, 97 Me. 498, 54 Atl. 1106.

Nebraska.—Reynolds *v.* Rickgauer, 75 Nebr. 163, 106 N. W. 175.

New York.— Lupton *v.* Cornell, 4 Johns. Ch. 263.

Tennessee.— Coleman *v.* Satterfield, 2 Head 259.

See 41 Cent. Dig. tit. "Quieting Title," § 19.

But see Thigpen *v.* Pitt, 54 N. C. 49.

If the estate of a grantee in a deed procured by fraud is postponed until the death of a given person, a bill in equity lies to set aside the deed as a cloud on title. Martin *v.* Graves, 5 Allen (Mass.) 601.

Circumstances not showing fraud.—A patentee of military boundary land conveyed the land to E and the deed was duly recorded. Forty years afterward C purchased and obtained a deed of the same from the heirs of the patentee, claiming that the deed to E was made before issuance of the patent. It was held that no such fraud could be predicated of the deed from the heirs as to give equity jurisdiction of a bill to cancel the same. Comstock *v.* Henneberry, 66 Ill. 212.

(D) *Based on Illegal Consideration.* If a deed, apparently valid on its face, is in reality based on an illegal consideration, it constitutes a cloud on title.[78]

(E) *Rescinded by Redelivery and Acts of Abandonment.* After a conveyance of land has been rescinded by redelivery of the deed to the grantor and unequivocal acts of abandonment on the part of the grantee, the deed constitutes a cloud on the grantor's title which equity will remove.[79]

(F) *Executed by Agent After Principal's Death.* A deed executed by an agent under a power not coupled with an interest, after the death of the principal, but antedated, constitutes a cloud on title which a court of equity will remove.[80]

(G) *Containing Conditions Precedent That Have Not Been Performed.* When an instrument in the form of a conveyance on condition precedent has been recorded by the grantee, who is asserting rights thereunder, although no estate ever vested in him because the condition was not performed, these facts resting on extrinsic evidence, equity will decree a cancellation at the instance of the grantor.[81] So too where the grantee in a deed containing a condition precedent has failed to comply with the terms of the grant, or has abandoned the estate, and the grantor is in possession, the latter may maintain a bill in equity to cancel the deed as a cloud on title.[82]

(H) *Including Lands by Mistake.* Equity will quiet title to that part of a tract of land included by a mistake in a conveyance regular on its face,[83] at least where complainant and his grantors have remained in possession ever since the conveyance was made.[84]

(III) *Not Capable of Being Used to Injure Owner.* Equity will not interfere where the purpose of the deed is clear and it cannot operate presently or in the future to the injury of the true owner.[85]

b. Letters Patent For Land. Although, where evidence *dehors* letters patent for land is required to show the invalidity thereof, the patent can be avoided only by a direct proceeding by the state to review the action of the commissioners of the land office, or by action in equity to vacate the patent, yet an individual may bring an action in equity to remove from his title a cloud consisting of a patent from the state.[86]

c. Mortgages. A mortgage which is invalid on its face,[87] or whose invalidity will appear from the proof which the mortgagee must reasonably make in order to establish it,[88] does not constitute a cloud on title justifying the intervention

78. Johnson *v.* Cooper, 2 Yerg. (Tenn.) 524, 24 Am. Dec. 502.

79. Huffman *v.* Huffman, 1 Lea (Tenn.) 491.

80. Saltmarsh *v.* Smith, 32 Ala. 404.

81. Adams *v.* Guyandotte Valley R. Co., (W. Va. 1908) 61 S. E. 341.

82. Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200.

83. Lavender *v.* Holmes, 23 Nebr. 345, 36 N. W. 516; Riggs *v.* Pope, 3 Tex. Civ. App. 179, 21 S. W. 1013; Smith *v.* O'Keefe, 43 W. Va. 172, 27 S. E. 353. But see Bevans *v.* Henry, 49 Ala. 123.

84. Smith *v.* Matthews, 81 Cal. 120, 22 Pac. 409.

85. Murray *v.* Hazell, 99 N. C. 168, 5 S. E. 428.

A devisee's conveyance of real estate before final settlement of the estate by deed reciting that the title conveyed is derived by will, and covenanting against encumbrancers except testator's lawful debts, being subject to the executor's right to dispose of the land for debts of the estate and administration charges, is no cloud on his rights to do so. Hardy *v.* Sanborn, 172 Mass. 405, 52 N. E. 517.

86. Boggs *v.* Merced Min. Co., 14 Cal. 279; Lally *v.* New York Cent., etc., R. Co., 123 N. Y. App. Div. 35, 107 N. Y. Suppl. 868.

N. Y. Code Civ. Proc. § 1957, empowering the attorney-general to bring actions to vacate or annul letters patent granted by the state, is not prohibitive of an action by an individual to remove, as a cloud on her title, a patent from the state. Lally *v.* New York Cent., etc., R. Co., 123 N. Y. App. Div. 35, 107 N. Y. Suppl. 868.

87. Benner *v.* Kendall, 21 Fla. 584; Dudley *v.* Third Order of St. Francis Cong., 65 Hun (N. Y.) 21, 19 N. Y. Suppl. 605 [*affirmed* in 138 N. Y. 451, 34 N. E. 281]; Cornish *v.* Frees, 74 Wis. 490, 43 N. W. 507.

88. Dudley *v.* Third Order of St. Francis Cong., 65 Hun (N. Y.) 21, 19 N. Y. Suppl. 605 [*affirmed* in 138 N. Y. 451, 34 N. E. 281].

Evidence not going to the validity of mortgage.— The right to have a mortgage canceled as a cloud on title will not be denied because the mortgage is not enforceable with-

of equity. But a mortgage, valid on its face, and requiring proof of extrinsic circumstances to show its invalidity, constitutes a cloud on title which equity will remove; [89] and this is so whether the mortgage was, in its inception, not a valid lien on the property covered by it,[90] or has since ceased to be a valid lien.[91] An action to quiet title against the holder of a mortgage, on the naked ground that the right to foreclose the mortgage is barred by limitations, is not maintainable,[92] unless the right to such an action is given by statute.[93] However, one seeking to quiet his title to realty may interpose the bar of the statute against a mortgagee defendant seeking to foreclose in such action his mortgage lien.[94]

d. Leases. Whenever proof of extrinsic facts is necessary to establish that an outstanding lease, regular on its face, was invalid at its inception,[95] or, although originally valid, has, by subsequent events, become *functus officio*,[96] it constitutes a cloud on title.

out resort to extrinsic evidence, where such evidence is required to supply a mere insufficiency, which does not go to the validity of the mortgage. Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21.

89. *Alabama.*— Interstate Bldg., etc., Assoc. *v.* Stocks, 124 Ala. 109, 27 So. 506; Richardson *v.* Stephens, 122 Ala. 301, 25 So. 39.

Minnesota.— New England Mut. L. Ins. Co. *v.* Capehart, 63 Minn. 120, 65 N. W. 258.

New York.— Swarthout *v.* Ranier, 143 N. Y. 499, 38 N. E. 726; Schoener *v.* Lissauer, 107 N. Y. 111, 13 N. E. 741; Ward *v.* Dewey, 16 N. Y. 519; Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21; Williams *v.* Ayrault, 31 Barb. 364; Smith *v.* Fellows, 41 N. Y. Super. Ct. 36; Hartson *v.* Davenport, 2 Barb. Ch. 77.

North Carolina.— Basket *v.* Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842; Byerly *v.* Humphrey, 95 N. C. 151.

Wisconsin.— Pritchard *v.* Lewis, 125 Wis. 604, 104 N. W. 989, 110 Am. St. Rep. 873, 1 L. R. A. N. S. 565; Burhop *v.* Milwaukee, 18 Wis. 431.

See 41 Cent. Dig. tit. "Quieting Title," § 23.

The character of the extrinsic evidence to which resorts must be had to establish the invalidity of the mortgage is immaterial. Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21.

90. McCauley *v.* Coe, 150 Ill. 311, 37 N. E. 232; Yeck *v.* Crum, 17 Ill. App. 43; Swarthout *v.* Ranier, 143 N. Y. 499, 38 N. E. 726; Clark *v.* Gibson, 10 Wkly. Notes Cas. (Pa.) 522. See also Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21.

Cloud rightfully existing.— Where a vendee, knowing of an adverse claim against his vendor, took a deed with covenant of title, and gave a mortgage not to be due until the vendor should procure a quitclaim deed from the adverse claimant, which was not done within the time stipulated, the mortgage was not a cloud on the vendee's title. Ryerson *v.* Willis, 8 Daly (N. Y.) 462 [*affirmed* in 81 N. Y. 277].

91. Kelly *v.* Martin, 107 Ala. 479, 18 So. 132; McCauley *v.* Coe, 150 Ill. 311, 37 N. E. 232; Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21; Levy *v.* Merrill, 14 Hun (N. Y.) 145; Carter *v.* Taylor, 3 Head (Tenn.) 30.

Although the statute provides that the payment of a mortgage divests the title passing by the mortgage, yet a mortgagor of land, in possession, who has fully paid the debt, may sue to have the payment established and the mortgage canceled as a cloud on his title. Kelly *v.* Martin, 107 Ala. 479, 13 So. 132, where the court says that the payment, resting in parol, the evidence of it may be readily lost by death, removal, or failure of recollection of witnesses, or other causes, while the mortgage outstanding contains in itself enduring evidence, *prima facie*, that the legal title has passed to the mortgagee, and still remains in him, and it is manifest therefore that the mortgagor is subjected to the danger of the loss of his estate, unless some remedy is afforded him of establishing the payment, and withdrawing from the mortagee the instrument of such possible loss with which he is armed.

Unrecorded mortgage.—A mortgage constitutes a cloud on title which equity will remove, where it is apparently valid on its face, but has ceased to be a valid lien on the lands covered by it, although such mortgage has never been recorded. Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Suppl. 21.

92. Gibson *v.* Johnson, 73 Kan. 261, 84 Pac. 982.

93. Mitchell *v.* Bickford, 192 Mass. 244, 78 N. E. 453.

94. Hogaboom *v.* Flower, 67 Kan. 41, 72 Pac. 547.

95. Townshend *v.* Williams, 50 N. Y. Super. Ct. 394; New York *v.* North Shore Staten Island Ferry Co., 55 How. Pr. (N. Y.) 154 [*affirmed* in 9 Hun 620]; New York *v.* Union Ferry Co., 55 How. Pr. (N. Y.) 138.

96. Pendill *v.* Union Min. Co., 64 Mich. 172, 31 N. W. 100; Nickerson *v.* Canton Marble Co., 35 N. Y. App. Div. 111, 54 N. Y. Suppl. 705; Mehaffey's Appeal, 4 Pennyp. (Pa.) 502.

Instances.—An outstanding lease constitutes a cloud on title, where, although originally valid, proof of extrinsic evidence must be introduced to show that it has become *functus officio* by reason of a violation of its conditions (Pendill *v.* Union Min. Co., 64 Mich. 172, 31 N. W. 100; Nickerson *v.* Canton Mar-

e. Mechanics' Liens. Equity will remove a cloud on the title caused by the record of a mechanic's lien which has become forfeited by the lien claimant's failure to institute foreclosure proceedings.[97]

f. Trusts — (i) *In General.* A paper recorded in a registry of deeds, giving notice that certain realty is claimed to be a trust, in favor of the signer and others, and that he will dispute any title which the holder of the present title will attempt to give, is not a cloud on his title.[98] But a devise to a husband in trust during his life, in conflict with his life-estate as tenant by curtesy, will be removed as a cloud on title, where the facts necessary to show the invalidity of the devise must be shown by extrinsic evidence.[99]

(ii) *Nominal Trusts.* Although the court will ordinarily refuse to decree a conveyance from a nominal trustee in cases where the legal estate is executed in the trustee by force of law,[1] yet when a nominal trust beclouds the title and embarrasses the rights of alienation, a conveyance will be decreed.[2]

g. Wills. Disposition of property by will which the testator may not own does not give a court of equity jurisdiction to cancel the alleged will before its probate as a cloud on the title of one averring himself to be the true owner.[3] But where a will devising land is executed under such conditions as to be irrevocable, a subsequent will, inconsistent therewith, may be adjudged void as a cloud on title at the suit of those claiming under the original devise.[4]

h. Claims of Dower. When the invalidity of a claim of dower in land does not appear upon record, but can only be shown by extrinsic evidence, a bill in equity to remove such claim as a cloud on title will lie.[5]

i. Contracts For Sale of Land — (i) *Unrecorded.* An unrecorded contract for the sale or exchange of lands is not a cloud on the title.[6]

(ii) *Recorded.* If a recorded executory contract for sale of land is void on its face,[7] or its invalidity will necessarily appear in the proceeding by one claiming

ble Co., 35 N. Y. App. Div. 111, 54 N. Y. Suppl. 705), or by reason of an abandonment of the lands leased in certain circumstances and according to the original intent and understanding of the parties (Mehaffey's Appeal, 4 Pennyp. (Pa.) 502).

Rights of lessee of vendee of lands terminating with latter's rights.—A vendee drew a draft for the amount of the purchase-money and placed it in the hands of a banker for collection, and the owner of the land placed his deed to the purchaser in the hands of the same banker, to be delivered on condition that if the draft was duly paid, and the purchaser agreed that if the draft was not duly paid he would relinquish all his rights to the land under the contract, and the draft was returned protested for non-payment. It was held that no title passed by the deed and the claim of the grantee to the land under the contract was extinguished, and all rights of those claiming under him ceased, and hence that a lease from him which stood on the record was a cloud on the title of the owner which would be removed by a court of equity. Skinner *v.* Baker, 79 Ill. 496.

97. Sheets *v.* Prosser, 16 N. D. 180, 112 N. W. 72.

98. Nickerson *v.* Loud, 115 Mass. 94, holding further that where a writing is a mere assertion which cannot under any circumstances be evidence against plaintiff or in favor of defendant, and that, whether recorded or unrecorded, it does not constitute a cloud on title against which equity will grant relief.

99. Coit *v.* Grey, 25 Hun (N. Y.) 444.

1. Ring *v.* McCoun, 10 N. Y. 268. See also Kay *v.* Scates, 37 Pa. St. 31, 78 Am. Dec. 399.

2. Kay *v.* Scates, 37 Pa. St. 31, 78 Am. Dec. 399.

Barren and repudiated trust.—A court will remove a cloud on title created by a barren and repudiated trust by ordering a conveyance. McGuire *v.* Nugent, 103 Mo. 161, 15 S. W. 551.

3. Adams *v.* Johnson, 129 Ga. 611, 59 S. E. 269.

4. Mutual L. Ins. Co. *v.* Holloday, 13 Abb. N. Cas. (N. Y.) 16.

5. Hallett *v.* Parker, 69 N. H. 134, 39 Atl. 583; Besson *v.* Gribble, 39 N. J. Eq. 111; Wood *v.* Seely, 32 N. Y. 105; Carpenter *v.* Carpenter, 40 Hun (N. Y.) 263.

Assignment of claim of dower.— In an action by the owners of a deceased husband's land against the assignee of a wife's dower interest, it appeared that no consideration passed for the assignment; that it was recorded, and appeared regular on its face; that complainants were in possession of the land affected by it, and could not establish their rights by any proceeding at law; and that it was a cloud on their title. It was held that equity had jurisdiction to enjoin the assignee from transferring his interest, and to compel the surrender and cancellation of the assignment. Lewis *v.* Parrott, 37 Wkly. Notes Cas. (Pa.) 330.

6. Howe *v.* Hutchinson, 105 Ill. 501.

7. Goodkind *v.* Bartlett, 153 Ill. 419, 38

under it and attempting its enforcement,[8] it constitutes no cloud on title; but where the contract is not void on its face, and its invalidity can only be shown by extrinsic evidence, it constitutes a cloud on title which equity has jurisdiction to remove.[9]

j. Sales — (i) *Judicial Sales* — (a) *Under Execution* — (1) In General. A bill in equity will lie to remove as a cloud on title a sale of land under execution, where the invalidity of the sale can be shown only by extrinsic proof;[10] but equity will not interfere to remove such a sale as a cloud on title when the complainant's title is not affected thereby, and he is not under the necessity of resorting to extrinsic proof to show its invalidity.[11]

(2) Of Exempt Property. The sale of a homestead under an execution forms a cloud on the title to the homestead which a court of equity will remove.[12]

N. E. 1045. See also Doll *v.* Ingram, 8 N. Y. St. 253.

8. Washburn *v.* Burnham, 63 N. Y. 132.

9. *Illinois.*— Kesner *v.* Miesch, 204 Ill. 320, 68 N. E. 405; Monson *v.* Jacques, 144 Ill. 651, 33 N. E. 757; Monson *v.* Kill, 144 Ill. 248, 33 N. E. 43; Lane *v.* Lesser, 135 Ill. 567, 26 N. E. 522; Sea *v.* Morehouse, 79 Ill. 216; Larmon *v.* Jordan, 56 Ill. 204; Sargent *v.* McGuire, 43 Ill. App. 582.

Indiana.— Germania Bldg., etc., Assoc. *v.* Marot, Wils. 541.

Kansas.— Westbrook *v.* Schmaus, 51 Kan. 558, 33 Pac. 306.

Minnesota.— Meyers *v.* Markham, 90 Minn. 230, 96 N. W. 335, 787.

Pennsylvania.— Ullom *v.* Hughes, 204 Pa. St. 305, 54 Atl. 23.

United States.— Beamer *v.* Werner, 159 Fed. 99, 86 C. C. A. 289; Quinton *v.* Neville, 152 Fed. 879, 81 C. C. A. 673.

See 41 Cent. Dig. tit. "Quieting Title," § 25.

Contract not entitled to record.— Where plaintiff purchased land without actual knowledge of the existence of a prior contract of sale to another purchaser, and without constructive knowledge of such contract, except the record thereof, although it was not entitled to record because of defects in its execution, plaintiff is entitled to cancellation of such contract as a cloud on his title. Warnick *v.* Latta, 44 Nebr. 807, 62 N. W. 1097.

A contract of sale of land, placed in escrow, having been recorded without consent of the parties, can be set aside as cloud on title, the vendee not being entitled to enforcement of it. Sugar *v.* Froehlich, 229 Ill. 397, 82 N. E. 414.

Where a bond for a deed is not void on its face, and its invalidity can be made to appear only by extrinsic evidence, it creates a cloud on title which equity will remove. Smith *v.* Van Campen, 40 Iowa 411. See also Dahl *v.* Pross, 6 Minn. 89.

10. *Florida.*— Pettit *v.* Coachman, 51 Fla. 521, 41 So. 401.

Illinois.— Culver *v.* Phelps, 130 Ill. 217, 22 N. E. 809; Van Dorn *v.* Leeper, 95 Ill. 35; Phillips *v.* Pitts, 78 Ill. 72.

Minnesota.— Butman *v.* James, 34 Minn. 547, 27 N. W. 66.

New York.— Lounsbury *v.* Purdy, 18 N. Y. 515; Travis *v.* Phelps, 86 Hun 593, 33 N. Y. Suppl. 744; Radcliff *v.* Rowley, 2 Barb. Ch. 23.

South Carolina.— Kittles *v.* Williams, 64 S. C. 229, 41 S. E. 975.

United States.— Remer *v.* Mackay, 35 Fed. 86.

See 41 Cent. Dig. tit. "Quieting Title," § 29.

Where a husband's estate by the curtesy is sold under execution, the wife cannot maintain an action to set aside such sale as a cloud on her title, until the husband's estate has been extinguished by his death or otherwise, as such estate of the husband is subject to execution. Lang *v.* Hitchcock, 99 Ill. 550.

A certificate of sale of land under execution will be removed as a cloud on title, where it is *prima facie* valid, and the injured party must furnish extrinsic proof to establish its invalidity. Woodworth *v.* Gorton, 46 Mich. 324, 9 N. W. 434; Tisdale *v.* Jones, 38 Barb. (N. Y.) 523.

Setting aside sale on reversing decree under which it was made.— Where land has been sold under execution issued under a decree in equity, the court may, on reversing the decree, set aside such sale as a cloud on title, if the bill is framed so as to justify such relief. Forman *v.* Stickney, 77 Ill. 575.

11. Schroeder *v.* Gurney, 73 N. Y. 430.

A sale of land under an execution against a stranger to the record title, who is not in possession, does not constitute a cloud on title. Payne *v.* Daviess County Sav. Assoc., 126 Mo. App. 593, 105 S. W. 15.

12. Riley *v.* Pehl, 23 Cal. 70; Conklin *v.* Foster, 57 Ill. 104; Green *v.* Marks, 25 Ill. 221; Gile *v.* Hallock, 33 Wis. 523.

Lands sold under judgment before patent issued.— The rule that equity will not interfere to remove a cloud on title where defendant's asserted interest in the land is void on the face of the records does not apply to a case where the land has been sold under judgment before a patent has issued therefor, contrary to the provision of the act of congress of May 20, 1862, section 4, which provides that no lands acquired under such act shall become liable to the satisfaction of any debt contracted prior to the issuing of a patent therefor, the records of the United States

(B) *In Foreclosure.* A sale under a decree in suit to foreclose a mortgage does not constitute a cloud on title where the foreclosure proceedings are void on their face;[13] but the rule is otherwise where the foreclosure proceedings are apparently valid on their face, and their invalidity can only be shown by resort to extrinsic evidence.[14]

(II) *Sale of Estate Lands by Administrator.* Where a sale of estate lands by an administrator is void and the conveyance discloses its invalidity, it casts no cloud on title of which equity will take cognizance.[15] Nor is a sale of land by an administrator without an order of the probate court,[16] or under an order which is void for want of jurisdiction,[17] such a cloud on title as will justify the interference of a court of equity.

k. Assessments — (I) *In General.* An assessment which is really invalid, but apparently authorized and regular, may be set aside as a cloud on title, if extrinsic proof must be made to show the invalidity of the assessment,[18] and such extrinsic proof in aid of the action affects the jurisdiction of the taxing authorities;[19] but the contrary rule obtains where the invalidity of the assessment appears on the face of the proceeding,[20] or where the defect will necessarily appear in any proceedings which the party claiming under the lien of the assessment must produce to establish his title.[21]

land office being foreign records, having for the purpose of such enactments no greater effect than mere extrinsic evidence, or evidence arising wholly in parcel. Gile *v.* Hallock, 33 Wis. 523.

13. Ward *v.* Dewey, 16 N. Y. 519; Cox *v.* Clift, 3 Barb. (N. Y.) 481 [*affirmed* in 2 N. Y. 118]; Morris *v.* McKnight, 1 N. D. 266, 47 N. W. 375; Moore *v.* Cord, 14 Wis. 213.

14. Hunt *v.* Acre, 28 Ala. 580; Matheson *v.* Thompson, 20 Fla. 790. See also Franklin Sav. Bank *v.* Taylor, 131 Ill. 376, 23 N. E. 397; Tucker *v.* Conwell, 67 Ill. 552.

Where the amount due on lands sold under foreclosure is paid to the purchaser before the period of redemption expires, and he refuses to execute the necessary certificate, an action to remove a cloud on the title created by the foreclosure is proper. Donnelly *v.* Simonton, 7 Minn. 167.

15. Mitchell *v.* Spence, 62 Ala. 450. See also Posey *v.* Conaway, 10 Ala. 811.

Deed prima facie evidence of regularity of prior proceeding.— Where an administrator's deed, although fraudulently executed, is, by virtue of the statute, *prima facie* evidence of the regularity of the proceedings prior to the sale, it creates a cloud on the title of an heir which he may have removed by proceedings in equity. Hoffman *v.* Wheelock, 62 Wis. 434, 22 N. W. 713, 716.

16. Florence *v.* Paschal, 50 Ala. 28.

17. Florence *v.* Paschal, 50 Ala. 28. See also Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603, holding that an administrator's deed, purporting to convey land sold by him under an order of court, which as to its power to make such order is a court of special and limited jurisdiction, is not, nor are such deed and order and other sale proceedings, a cloud on title, when the fact or facts essential to the court's jurisdiction to make the order do not appear on the order of proceedings on which it is based.

18. *Colorado.*— Dumars *v.* Denver, 16 Colo. App. 375, 65 Pac. 580.

Indiana.— See Killian *v.* Andrews, 130 Ind. 579, 30 N. E. 700.

Minnesota.— Armstrong *v.* St. Paul, 30 Minn. 299, 15 N. W. 174; Mayall *v.* St. Paul, 30 Minn. 294, 15 N. W. 170; Sewall *v.* St. Paul, 20 Minn. 511; Minnesota Linseed Oil Co. *v.* Palmer, 20 Minn. 468.

Missouri.— Bayha *v.* Taylor, 36 Mo. App. 427.

New Hampshire.— Perham *v.* Haverhill Fibre Co., 64 N. H. 2, 3 Atl. 312.

New York.— Monroe County *v.* Rochester, 154 N. Y. 570, 49 N. E. 139; Rumsey *v.* Buffalo, 97 N. Y. 114; Clark *v.* Dunkirk, 12 Hun 181 [*affirmed* in 75 N. Y. 612] (holding further that such an action may be maintained by the person upon whose realty an apparent lien has been created by the assessment, in behalf of himself and others in like situation who may come in and contribute); Lewis *v.* Buffalo, Sheld. 80. See also Marsh *v.* Brooklyn, 59 N. Y. 280.

Washington.— Kinsman *v.* Spokane, 20 Wash. 118, 54 Pac. 934, 72 Am. St. Rep. 24.

See 41 Cent. Dig. tit. "Quieting Title," § 26.

Overvaluation.— Under the revenue law of 1881, failure of property-owners claiming to be aggrieved by overvaluation of their property by the assessors to submit their case to the board of equalization does not deprive them of the right to maintain a suit to remove the cloud created by such overvaluation. Miller *v.* Pierce County, 28 Wash. 110, 68 Pac. 358.

19. Monroe County *v.* Rochester, 154 N. Y. 570, 49 N. E. 139. See also Conde *v.* Schenectady, 164 N. Y. 258, 58 N. E. 130.

20. Conde *v.* Schenectady, 164 N. Y. 258, 58 N. E. 130; Wells *v.* Buffalo, 80 N. Y. 253; Stuart *v.* Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Nichols *v.* Voorhies, 6 Hun (N. Y.) 307; Bouton *v.* Brooklyn, 15 Barb. (N. Y.) 375.

21. Dederer *v.* Voorhies, 81 N. Y. 153; Marsh *v.* Brooklyn, 59 N. Y. 280.

(II) *Sale Thereunder* — (A) *In General.* Equitable intervention to set aside an assessment sale is not authorized where the record is void on its face,[22] or where the defect relied on to render it valid would necessarily be exposed by the proof required from one claiming under it in proceedings to establish his claim.[23]

(B) *Certificate of.* The owner of land may not maintain an action in equity to cancel as a cloud on his title a certificate of sale, made under an assessment, when such certificate is void on its face,[24] or where it is defective for want of preliminary proceedings which the party claiming under it would be bound to show.[25] But where the certificate is made presumptive evidence that such proceedings were had, the action lies, if the certificate be in fact void for a defect in the proceeding.[26] So too the action lies if it is necessary to resort to extrinsic evidence to show that the certificate is inoperative and void.[27]

(C) *Lease Given on.* Where the statute makes a lease given on the sale of land for assessments presumptive evidence of the regularity of the sale and all proceedings prior thereto, such a lease, although in fact invalid for irregularity in the prior proceedings, is an apparent cloud on the title of the land which it purports to lease, and the owner may maintain a suit in equity to set it aside.[28]

l. Judgments or Decrees — (I) *In General.* An action in equity will lie to cancel an invalid judgment or decree which is an apparent cloud on the title to land.[29]

(II) *Must Be Apparently Valid on Its Face.* A judgment or decree, void on its face, carries its own condemnation with it, and it is not such a cloud on

22. Guest *v.* Brooklyn, 69 N. Y. 506.

23. Guest *v.* Brooklyn, 69 N. Y. 506.

24. Morrison *v.* St. Paul, 5 Minn. 108; Weller *v.* St. Paul, 5 Minn. 95; Allen *v.* Buffalo, 39 N. Y. 386.

25. Morrison *v.* St. Paul, 5 Minn. 108; Weller *v.* St. Paul, 5 Minn. 95; Allen *v.* Buffalo, 39 N. Y. 386.

26. Morrison *v.* St. Paul, 5 Minn. 108; Weller *v.* St. Paul, 5 Minn. 95; Allen *v.* Buffalo, 39 N. Y. 386.

27. Newell *v.* Wheeler, 48 N. Y. 486; Scott *v.* Onderdonk, 14 N. Y. 9, 67 Am. Dec. 106; Johnson *v.* Stevens, 13 How. Pr. (N. Y.) 132; Knowlton *v.* Rock County, 9 Wis. 410; Delaplane *v.* Madison, 9 Wis. 409; Dean *v.* Madison, 9 Wis. 402.

28. Masterson *v.* Hoyt, 55 Barb. (N. Y.) 520; Lennon *v.* New York, 5 Daly (N. Y.) 347 [*affirmed* in 55 N. Y. 361].

29. *California.*— Head *v.* Fordyce, 17 Cal. 149.

Illinois.— Smith *v.* Hickman, 68 Ill. 314; Campbell *v.* McCahan, 41 Ill. 45; Johnson *v.* Johnson, 30 Ill. 215.

Missouri.— Truesdail *v.* McCormick, 126 Mo. 39, 28 S. W. 885; Rodgers *v.* Appleton City First Nat. Bank, 82 Mo. App. 377.

Nebraska.—Smith *v.* Neufeld, 57 Nebr. 660, 78 N. W. 278; Corey *v.* Schuster, 44 Nebr. 269, 62 N. W. 470, holding further that it is not an essential prerequisite to the maintenance of an action by the owner of a homestead to remove clouds on his title, consisting of recorded judgments, that the judgment creditors were threatening execution on the homestead.

New York.— Brown *v.* Goodwin, 75 N. Y. 409; Bernstein *v.* Schoenfeld, 37 Misc. 610, 76 N. Y. Suppl. 140 [*affirmed* in 81 N. Y. App. Div. 171, 81 N. Y. Suppl. 11]; Blodget *v.* Blodget, 42 How. Pr. 19.

South Dakota.— Hale *v.* Grigsby, 12 S. D. 198, 80 N. W. 199.

Virginia.— Wicks *v.* Scull, 102 Va. 290, 46 S. E. 297.

West Virginia.—Ambler *v.* Leach, 15 W. Va. 677.

See 41 Cent. Dig. tit. "Quieting Title," § 27 *et seq.*

But see McLean *v.* Shaw, 125 N. C. 491, 34 S. E. 634.

A decree affecting land in a suit between strangers to the true title does not constitute a cloud on the title of the true owner. Haggart *v.* Chapman, etc., Land Co., 77 Ark. 527, 92 S. W. 792.

A bill brought by a third party holding an equitable title to the land conveyed to a creditor to secure a debt, and also claiming under an execution sale antedating a judgment obtained by the creditor on reconveying the land, seeking to have such judgment declared a nullity, and to enjoin the marshal from dispossessing him thereunder, will not be dismissed on demurrer. Alexander *v.* Scotland Mortg. Co., 47 Fed. 131.

A judgment against one who has previously made a general assignment for creditors, valid by state laws, recovered before an assignee in bankruptcy has procured the assignment to be set aside, is not a cloud on title of the assignee under the general assignment. Belden *v.* Smith, 3 Fed. Cas. No. 1,242, 16 Nat. Bankr. Reg. 302.

Decree virtually wiped out.—A decree setting aside a conveyance as made to defraud grantor's creditors may in a proper case be construed to leave the same in force as between the parties, and in such case, if the creditors were satisfied without a sale of the land, the decree is virtually wiped out, and thenceforward is no cloud on the title claimed under the deed. Rawson *v.* Fox, 65 Ill. 200.

title as to justify the interposition of a court of equity;[30] but the rule is otherwise where a judgment or decree is valid on its face, and its invalidity can only be shown by proof of extrinsic facts.[31]

m. Proceedings at Law — (i) *In General.* Where a valid objection appears on the face of the proceedings at law through which the adverse party can alone claim title to plaintiff's land, there is not in law such a cloud on the title as to force him to apply to a court of equity to set aside such proceedings;[32] but where the claim of the adverse party to the land is valid on the face of the proceeding sought to be set aside, and extrinsic facts are necessary to show their invalidity, a case is made out for the interference of equity.[33]

(ii) *Attachment Proceedings.* Where the parties seek to remove all liens and encumbrances, if any, created by proceedings in attachment, and so to quiet their title, equity has jurisdiction.[34] But an action to remove a cloud on title will not lie in favor of one claiming perfect title to lands against another attaching it as the property of a third person, since it does not constitute a cloud on title.[35]

n. Lis Pendens. An owner of real estate is entitled to maintain a suit to set aside a *lis pendens* as a cloud on his title,[36] and this without waiting for a termination of the suit in which the *lis pendens* was filed.[37]

B. Apprehended or Threatened Cloud — 1. In General. To authorize an action to prevent a cloud being cast on title, it must be made clear that there is a fixed determination on the part of defendant to create a cloud,[38] and it is not sufficient that the danger is merely speculative.[39]

30. Tyson *v.* Brown, 64 Ala. 244; Maloney *v.* Finnegan, 38 Minn. 70, 35 N. W. 723; Wicks *v.* Scull, 102 Va. 290, 46 S. E. 297.

The reason of the rule is that such a decree or judgment is not capable of being used as an instrument of vexatious litigation; and the lapse of time cannot injure the means of defense against it, if rights under it should be asserted. Tyson *v.* Brown, 64 Ala. 244.

31. Barton *v.* Gregg, 21 Minn. 299; Corey *v.* Schuster, 44 Nebr. 269, 62 N. W. 470.

32. Gamble *v.* St. Louis, 12 Mo. 617.

33. Gamble *v.* St. Louis, 12 Mo. 617.

Where a bill claiming title under a destroyed deed was dismissed for want of prosecution, and the proceedings appeared on record, it is a semblance of title appearing in a legal form which cannot be enforced either at law or in equity; and therefore constitutes a cloud on the owner's title. Shultz *v.* Shultz, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188.

Amended return to process.— The statutes prohibit the sheriff from executing process in a case in which he has an interest. Service of summons was made by a deputy sheriff, but the return was insufficient to confer jurisdiction of the person of defendant; the sheriff having become interested as a warrantor of the property in issue after his term of office had expired, amended the return so as to obviate the objection to the jurisdiction. It was held that the amendment operated as a cloud on defendant's title to the land, justifying the interference of a court of equity. O'Conner *v.* Wilson, 57 Ill. 226.

34. Martin *v.* Dryden, 6 Ill. 187.

Contract for conveyance.—A husband conveyed his farm to his wife and the two joined in a mortgage thereof, the wife thereafter executing to the husband a contract to reconvey on his paying the mortgage, and also giving him a right to hold possession during the time the mortgage was to run. Attachments against the husband were levied on the farm as his real estate, and the attachment debtor made assignments of his contract and quitclaimed the farm to his wife. Bankruptcy proceedings were instituted against him, resulting in an adjudication of bankruptcy. It was held that the husband could maintain a bill to quiet his title against the attachment. Grover *v.* Fox, 36 Mich. 453.

35. Wilson *v.* Kelly, 31 Hun (N. Y.) 75; Mulligan *v.* Baring, 3 Daly (N. Y.) 75; Heath *v.* Cleburne First Nat. Bank, (Tex. 1895) 32 S. W. 778.

An attachment sued out against a vendor after he has conveyed the land, the deed therefor having been recorded fifteen days after its delivery, creates no cloud on title. Maisch *v.* Hoffman, 42 N. J. Eq. 116, 7 Atl. 349.

36. King *v.* Branscheid, 32 Wash. 634, 73 Pac. 668.

37. King *v.* Branscheid, 32 Wash. 634, 73 Pac. 668.

38. Clark *v.* Davenport, 95 N. Y. 477; Sanders *v.* Yonkers, 63 N. Y. 489; Pettit *v.* Shepherd, 5 Paige (N. Y.) 493, 28 Am. Dec. 437. See also Fox *v.* Kountze, 58 Nebr. 439, 78 N. W. 712.

There is a threat to create a cloud which equity will interfere to prevent, whenever an instrument or claim exists which the holder might so utilize as to convert it into a cloud on title by action of his own, and he refuses to surrender it, and thus put an end to this power. King *v.* Townshend, 141 N. Y. 358, 36 N. E. 513.

39. Clark *v.* Davenport, 95 N. Y. 477; Sanders *v.* Yonkers, 63 N. Y. 489.

2. Levy — a. Under Execution. A court of equity will restrain a threatened levy of execution on realty which is not subject to levy, and thus prevent a cloud being cast on title.[40] So too equity will enjoin a creditor, who has consented to an assignment for the benefit of creditors, from levying on the assignee's realty.[41]

b. For Taxes. A court of equity has power to enjoin the taxing authorities from making an unlawful levy which will result in casting a cloud on title.[42]

3. Sale — a. In General. It is well settled that equity will interfere by injunction to prevent the wrongful sale of land where such sale will result in casting a cloud on the title of the real owner of the property,[43] although no title would in fact pass to the purchaser at the sale.[44]

b. By Conveyance Under Pretense of Right. Equity will interfere to prevent the giving of a conveyance of realty, under pretense of right, which will operate as a cloud on title.[45] But to constitute such a cloud on title as would warrant equity in restraining the giving of a deed, it must appear that the owner of the property in an action by the adverse party, founded on the deed, would have to offer evidence to defeat a recovery.[46] Thus where a deed has never been recorded because of its destruction or loss,[47] or because of defects in the acknowledgment which prevent its being recorded,[48] a sale by the grantor or his legal representative will be restrained at the instance of the grantee in whom title has vested. But where complainant is in possession and has a good record title,[49] where his rights depend upon

40. O'Hare *v.* Downing, 130 Mass. 16; Russell *v.* Deshon, 124 Mass. 342; Hinchly *v.* Greany, 118 Mass. 595; Clouston *v.* Shearer, 99 Mass. 209; Ketchin *v.* McCarley, 26 S. C. 1, 11 S. E. 1099, 4 Am. St. Rep. 674; Smith *v.* Zimmerman, 85 Wis. 542, 55 N. W. 956; Webb *v.* Hayner, 49 Fed. 605.

41. Chaffee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345.

42. Fox *v.* Kountze, 58 Nebr. 439, 78 N. W. 712.

43. *Alabama.*— Martin *v.* Hewitt, 44 Ala. 418; Downing *v.* Mann, 43 Ala. 266.

California.— Thompson *v.* Lynch, 29 Cal. 189; England *v.* Lewis, 25 Cal. 337; Pixley *v.* Huggins, 15 Cal. 127; Hickman *v.* O'Neal, 10 Cal. 292; Alverson *v.* Jones, 10 Cal. 9, 70 Am. Dec. 689; Guy *v.* Hermance, 5 Cal. 73, 63 Am. Rep. 85.

Florida.— Budd *v.* Long, 13 Fla. 288.

Indiana.— McCulluck *v.* Hollingsworth, 27 Ind. 115; Cupps *v.* Irwin, 2 Blackf. 112, 118 Am. Dec. 136.

Iowa.— Palo Alto Banking, etc., Co. *v.* Maher, 65 Iowa 74, 21 N. W. 187; Key City Gaslight Co. *v.* Munsell, 19 Iowa 305.

Louisiana.— Bach *v.* Goodrich, 9 Rob. 391.

Maine.— Gerry *v.* Stimson, 60 Me. 186.

Missouri.— Bonsor *v.* Madison County, 204 Mo. 84, 102 S. W. 494; Vogler *v.* Montgomery, 54 Mo. 577; McPike *v.* Pen, 51 Mo. 63; Tipton Bank *v.* Davidson, 40 Mo. App. 421.

Ohio.— Norton *v.* Beaver, 5 Ohio 178; U. S. Bank *v.* Schultz, 2 Ohio 471.

Washington.— Quimby *v.* Slipper, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899.

United States.— West Portland Homestead Assoc. *v.* Lownsdale, 17 Fed. 614, 9 Sawy. 112.

See 41 Cent. Dig. tit. "Quieting Title," § 35.

Where a cloud to be cast on title exists only on the supposition of an incorrect legal view being taken of facts which are latent, equity will not enjoin a sale of real estate on the ground of a threatened cloud on the title. Haeussler *v.* Thomas, 4 Mo. App. 463.

A sale of land, as the property of one from whom the owner in no way derives his or her title, presents no ground for equitable interference as a cloud thereon, as where a married woman seeks to enjoin a sale under judicial process against her husband of lands belonging exclusively to her separate estate. Rea *v.* Longstreet, 54 Ala. 291.

Sale giving no record title.— Where under the statute relative to the sale of the state's interest in the water line front in the city of San Francisco, the commissioners have, by express terms, no authority as to the land outside of the boundaries there specified, their sale of lands outside can give no record title, and so cannot be enjoined as casting a cloud on plaintiff's title. Kisling *v.* Johnson, 13 Cal. 56.

44. Vogler *v.* Montgomery, 54 Mo. 577; Quimby *v.* Slipper, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899.

45. Hare *v.* Carnall, 39 Ark. 196; Russ *v.* Crichton, 117 Cal. 695, 49 Pac. 1043; Shattuck *v.* Carson, 2 Cal. 588; Pettit *v.* Shepherd, 5 Paige (N. Y.) 493, 28 Am. Dec. 437.

46. Russ *v.* Crichton, 117 Cal. 695, 49 Pac. 1043.

47. Gerry *v.* Stimson, 60 Me. 186; Hawkins *v.* Clermont, 15 Mich. 511; Wynn *v.* Cory, 43 Mo. 301; Schaumberg *v.* Hepburn, 39 Mo. 125; Meyer *v.* Phillips, 97 N. Y. 485, 49 Am. Rep. 538; Sanders *v.* Yonkers, 63 N. Y. 489; New York, etc., R. Co. *v.* Morrisania, 7 Hun (N. Y.) 652; Mann *v.* Utica, 44 How. Pr. (N. Y.) 334; Brooklyn *v.* Meserole, 26 Wend. (N. Y.) 132.

48. Frank *v.* Peyton, 82 Ky. 150.

49. Wilcox *v.* Walker, 94 Mo. 88, 77 S. W. 115; Gatewood *v.* Leak, 99 N. C. 357, 6 S. E. 706; Carlin *v.* Hudson, 12 Tex. 202, 62 Am. Dec. 521.

the construction of recorded instruments,[50] where the party sought to be enjoined has apparent title to the property on which he resides,[51] or where purchasers buy at their peril,[52] the injunction is unnecessary. Likewise, where the filing of a *lis pendens* will protect complainant, no injunction will be granted against a threatened wrongful sale of land on the ground of preventing a cloud on title.[53]

c. Under Execution. Equity will enjoin an execution sale which, although ineffectual to pass title, would be sufficient to cast a cloud on the complainant's title,[54] the jurisdiction so to do being coextensive with the jurisdiction to set aside and order to be canceled a deed of the property.[55] But if the judgment on which an execution issues,[56] or the execution itself,[57] is void on its face, equity will not interfere to restrain a sale of realty levied on under the execution.

d. Under Void Decree. A sale of land under a decree void on its face will, it has been held, be enjoined when necessary to prevent a cloud on plaintiff's title.[58]

e. Under Void Municipal Assessment. Equity will intervene to prevent a cloud being cast on title by a sale and conveyance of lands for the payment of municipal taxes levied under a void assessment, by statute such conveyance being presumptive evidence of title.[59]

f. Of Land Purchased at Tax-Sale. An injunction to prevent, as a threatened cloud on title, the sale of land previously purchased at a tax-sale, on the ground that the tax-sale passed no title, will be refused, since such mischief has already been done by the first sale.[60]

50. Mariposa Co. *v.* Garrison, 26 How. Pr. (N. Y.) 448; Browning *v.* Lavender, 104 N. C. 69, 10 S. E. 77.

51. Powell *v.* Quinn, 49 Ga. 523.

52. Spence *v.* Cox, 64 Ga. 543; Jackson *v.* Rainey, 64 Ga. 311; Palmer *v.* Casperson, 17 N. J. Eq. 204.

53. San Francisco *v.* Beideman, 17 Cal. 443; Mathews *v.* Cody, 60 Ga. 355; Powell *v.* Quinn, 49 Ga. 523; Babcock *v.* Jones, 62 Hun (N. Y.) 565, 17 N. Y. Suppl. 67; Fitzgerald *v.* Deshler, 55 N. Y. Super. Ct. 91, 18 N. Y. St. 363; Spokane *v.* Amsterdamasch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088.

54. *Alabama.*— Martin *v.* Hewitt, 44 Ala. 418.

California.— Porter *v.* Pico, 55 Cal. 165; Englund *v.* Lewis, 25 Cal. 337; Pixley *v.* Huggins, 15 Cal. 127.

Florida.— Lewton *v.* Hower, 18 Fla. 872.

Iowa.— Key City Gaslight Co. *v.* Munsell, 19 Iowa 305.

Mississippi.— Irwin *v.* Lewis, 50 Miss. 363.

New Hampshire.— Tucker *v.* Kenniston, 47 N. H. 267, 93 Am. Dec. 425.

Ohio.— Norton *v.* Beaver, 5 Ohio 178.

Pennsylvania.— Houston's Appeal, 6 Wkly. Notes Cas. 162.

Wisconsin.—Goodell *v.* Blumer, 41 Wis. 436.

See 41 Cent. Dig. tit. "Quieting Title," § 35.

Contra.— Kuhn *v.* McNeil, 47 Mo. 389; Drake *v.* Jones, 27 Mo. 428; Witthaus *v.* Washington Sav. Bank, 18 Mo. App. 181.

An execution sale under a satisfied judgment will, in order to prevent a cloud on title, be enjoined by a court of equity. Cox *v.* Smith, 10 Oreg. 418.

Execution issued on judgment against holder of legal title, as trustee.—A bill to restrain a sale of land on the ground that it would cast a cloud on plaintiff's title will lie where it appears that defendant, having a judgment against P, levied an execution on real estate, the legal title to which is in P, as trustee for the use of plaintiff, a religious association and sole owner of the land, and that plaintiff's equitable title is not a matter of record, but depends upon matters resting largely with the association. South Presb. Church *v.* Hintze, 5 Mo. App. 578 [*affirmed* in 72 Mo. 363].

Judgment against complainant's tenant.—A bill to quiet the title of land, by a purchaser in possession under the decree of a court of competent jurisdiction, will lie to prevent the enforcement of a judgment against his tenant in an action of unlawful entry and detainer, in which he was not a party, although the person holding the judgment would be entitled to possession upon bringing a proper action to determine his right. Cope *v.* Payne, 111 Tenn. 128, 76 S. W. 820, 102 Am. St. Rep. 746.

55. Pixley *v.* Huggins, 15 Cal. 127.

56. Sanchez *v.* Carriaga, 31 Cal. 170; Kirk *v.* Duren, 45 S. C. 597, 23 S. E. 954.

Where it appears that the judgment debtor never had any real or apparent title to or interest in the land, an execution issued on a judgment against A, under which the sheriff levied and advertised for sale the land of B, does not tend to produce such a cloud on the title of B as to authorize a court of equity to enjoin the sale. Barnes *v.* Mayo, 19 Fla. 542.

57. Hanson *v.* Johnson, 20 Minn. 194. See also Sanchez *v.* Carriaga, 31 Cal. 170.

58. George *v.* Nowlan, 38 Oreg. 537, 64 Pac. 1; White *v.* Espey, 21 Oreg. 328, 28 Pac. 71.

59. McPike *v.* Pen, 51 Mo. 63; Leslie *v.* St. Louis, 47 Mo. 474; Scott *v.* Onderdonk, 14 N. Y. 9, 67 Am. Dec. 106; New York, etc., R. Co. *v.* Morrisania, 7 Hun (N. Y.) 652; Mann *v.* Utica, 44 How. Pr. (N. Y.) 334; Mitchell *v.* Milwaukee, 18 Wis. 92.

60. St. Louis *v.* Goode, 21 Mo. 216.

g. Under Mortgage — (i) *In General.* A sale under a mortgage of land not included therein cannot cast a cloud on the title of the owner, and will not therefore be restrained as a threatened cloud on title.[61]

(ii) *Deed Intended as a Mortgage.* A party who has by fraud obtained possession of land by a deed absolute on its face, but intended only as a mortgage, will be restrained from selling it.[62]

4. Making of Lease. Injunction will not lie to prevent one in possession of land under claim of title as against another claimant, who is in no way connected with him in estate, from executing a lease on the ground that it will be a cloud on such other claimant's title.[63] But if a lease made pursuant to a sale for an unpaid street assessment is by law evidence of the regularity of the sale, the making of such lease will be restrained in case of substantial irregularity.[64]

5. Proceedings at Law. It has been held that a court of equity may restrain proceedings at law which would tend to cast a cloud on the title to realty.[65]

III. Conditions Precedent to Maintenance of Action, and Defenses.

A. Conditions Precedent to Maintenance of Action — 1. Title or Interest of Plaintiff — a. Necessity. Of course an action to quiet title or remove a cloud thereon can be maintained only by a person having some title to, or interest in, the lands in controversy.[66]

61. Preiss *v.* Campbell, 59 Ala. 635.

62. Peeler *v.* Barringer, 60 N. C. 556.

63. Spofford *v.* Bangor, etc., R. Co., 66 Me. 51.

64. Scott *v.* Onderdonk, 14 N. Y. 9, 67 Am. Dec. 106.

65. Wood *v.* Seely, 32 N. Y. 105.

Proceedings to alter grade of street.— The owner of adjoining lands whose property would be seriously injured by the alteration of the grade of the street is entitled to an injunction to restrain illegal proceedings for that purpose as a threatened cloud on title. Oakley *v.* Williamsburgh, 6 Paige (N. Y.) 262.

Proceedings to sell state lands for benefit of school fund.—A suit by the commissioner of school lands, instituted for the direct benefit of the state, to raise revenue for school purposes by the sale of its lands will not be restrained at the instance of an adverse claimant to the land who alleges that it may be clouded by the suit. Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682, holding further that by the statute under which the suit sought to be enjoined was brought the adverse claimant can become a party, and if not he could still assert his title against any purchaser under the proceeding, or against the former owner if there were a redemption.

66. *Arkansas.*— Carpenter *v.* Smith, 76 Ark. 447, 88 S. W. 976.

California.— Williams *v.* San Pedro. 153 Cal. 44, 94 Pac. 234; San Francisco *v.* Ellis, 54 Cal. 72.

Connecticut.— Roberts *v.* Merwin, 80 Conn. 347, 68 Atl. 377.

Florida.— Benner *v.* Kendall, 21 Fla. 584; Stewart *v.* Stewart, 19 Fla. 846; Shalley *v.* Spillman, 19 Fla. 500.

Georgia.— Weyman *v.* Atlanta, 122 Ga. 539, 50 S. E. 492.

Illinois.— Coel *v.* Glos, 232 Ill. 142, 83 N. E. 529; Whipple *v.* Gibson, 158 Ill. 339, 41 N. E. 1017; Hutchinson *v.* Howe, 100 Ill. 11; West *v.* Schnebly, 54 Ill. 523; Hopkins *v.* Granger, 52 Ill. 504; Johnson *v.* McChesney, 33 Ill. App. 526.

Iowa.— Schlosser *v.* Cruickshank, 96 Iowa 414, 65 N. W. 344.

Maryland.— Crook *v.* Brown, 11 Md. 158.

Mississippi.— Hart *v.* Bloomfield, 66 Miss. 100, 5 So. 620; Kerr *v.* Freeman, 33 Miss. 292; McAffee *v.* Lynch, 26 Miss. 257.

Nebraska.— Hall *v.* Hooper, 47 Nebr. 111, 66 N. W. 33; Blodgett *v.* McMurtry, 39 Nebr. 210, 57 N. W. 985.

New York.— Wiechers *v.* McCormick, 122 N. Y. App. Div. 860, 107 N. Y. Suppl. 835; Purdy *v.* Collyer, 26 N. Y. App. Div. 338, 49 N. Y. Suppl. 665.

Oklahoma.— Lewis *v.* Clements, (1908) 95 Pac. 769.

Oregon.— Moore *v.* Halliday, 43 Oreg. 243, 72 Pac. 801, 99 Am. St. Rep. 724; Tichenor *v.* Knapp, 6 Oreg. 205.

Tennessee.— Hoyal *v.* Bryson, 6 Heisk. 139; Ross *v.* Young, 5 Sneed 627.

Texas.— Armstrong *v.* Wilson, (Civ. App. 1908) 109 S. W. 955.

West Virginia.— Wallace *v.* Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485; Stockton *v.* Craig, 56 W. Va. 464, 49 S. E. 386.

United States.— Stark *v.* Starr, 6 Wall. 402, 18 L. ed. 925; Bearden *v.* Benner, 120 Fed. 690; Guarantee Trust, etc., Co. *v.* Delta, etc., Co., 104 Fed. 5, 43 C. C. A. 396; Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606; Patrick *v.* Isenhart, 20 Fed. 339; Cross *v.* Sabin, 13 Fed. 308; Chamberlain *v.* Marshall, 8 Fed. 398; King *v.* French, 14 Fed. Cas. No. 7,793, 2 Sawy. 441.

See 41 Cent. Dig. tit. "Quieting Title," § 36.

Where defendants are not trespassers, plaintiff in an action to be quieted in his title to a tract of land must make out his title. Phelps *v.* Hughes, 1 La. Ann. 320.

b. Sufficiency — (I) *In General.* To maintain the action to quiet title, or remove a cloud thereon, plaintiff must have a good and valid title, legal [67] or equitable,[68] or, as held in a few jurisdictions, a legal and equitable title, connected with possession [69] to the lands in controversy.

(II) *Paramount Title.* The rule is that plaintiff must succeed only on the strength of his own title, and not on the weakness of his adversary.[70]

(III) *Title Founded on Possession.* It is well settled that one in posses-

67. *Illinois.*— Hemstreet *v.* Burdick, 90 Ill. 444; Emery *v.* Cochran, 82 Ill. 65.

Michigan.— Stockton *v.* Williams, 1 Dougl. 546.

Mississippi.— Jones *v.* Rogers, 85 Miss. 802, 38 So. 742; Williamson *v.* Louisville, etc., R. Co., (1889) 6 So. 205; Handy *v.* Noonan, 51 Miss. 166; Carlisle *v.* Tindall, 49 Miss. 229; Adam *v.* Harris, 47 Miss. 144.

Nebraska.— Tracy *v.* Grezaud, 3 Nebr. (Unoff.) 890, 93 N. W. 214.

New York.— Mitchell *v.* Einstein, 42 Misc. 358, 86 N. Y. Suppl. 759 [*reversed* on other grounds in 105 N. Y. App. Div. 413, 94 N. Y. Suppl. 210].

Ohio.— Nolan *v.* Urmston, 18 Ohio 273.

Tennessee.— Coal Creek Min., etc., Co. *v.* Ross, 12 Lea 1.

United States.— Frost *v.* Spitley, 121 U. S. 552, 7 S. Ct. 1129, 30 L. ed. 1010; Dewing *v.* Woods, 111 Fed. 575, 49 C. C. A. 443.

See 41 Cent. Dig. tit. "Quieting Title," § 37.

A trustee in a deed of trust is not vested with any legal title to the property covered by the deed, when he has no beneficiary interest in it, and hence cannot maintain a suit to quiet title against the holder of the legal title. Fields *v.* Cobbey, 22 Utah 415, 62 Pac. 1020.

68. *California.*—Hayford *v.* Wallace, (1896) 46 Pac. 293; Tuffree *v.* Polhemus, 108 Cal. 670, 41 Pac. 806.

Idaho.— Coleman *v.* Jaggers, 12 Ida. 125, 85 Pac. 894.

Illinois.— Coel *v.* Glos, 232 Ill. 142, 83 N. E. 529; Emery *v.* Cochran, 82 Ill. 65.

Indiana.— Stout *v.* Duncan, 87 Ind. 383.

Michigan.— Stockton *v.* Williams, 1 Dougl. 546.

Mississippi.— Jones *v.* Rogers, 85 Miss. 802, 38 So. 742; Williamson *v.* Louisville, etc., R. Co., (1889) 6 So. 205; Handy *v.* Noonan, 51 Miss. 166; Carlisle *v.* Tindall, 49 Miss. 229; Adams *v.* Harris, 47 Miss. 144.

Montana.— Van Vranken *v.* Granite County, 35 Mont. 427, 90 Pac. 164.

Nebraska.— Tracy *v.* Grezaud, 3 Nebr. (Unoff.) 890, 93 N. W. 214.

North Dakota.— Dalrymple *v.* Security L. & T. Co., 9 N. D. 306, 83 N. W. 245.

Oregon.— Holmes *v.* Wolfard, 47 Oreg. 93, 81 Pac. 819.

Tennessee.— Coal Creek Min., etc., Co. *v.* Ross, 12 Lea 1.

Washington.— Bloomingdale *v.* Weil, 29 Wash. 611, 70 Pac. 94.

United States.— Dodge *v.* Briggs, 27 Fed. 160.

See 41 Cent. Dig. tit. "Quieting Title," § 37.

Legal title prevails over equitable title.— An action to quiet title cannot be maintained by the owner of an equitable interest as against the holder of the legal title. McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; Tuffree *v.* Polhemus, 108 Cal. 676, 41 Pac. 806; Burris *v.* Adams, 96 Cal. 664, 31 Pac. 565; Harrigan *v.* Mowry, 84 Cal. 467, 22 Pac. 658, 24 Pac. 48; Castro *v.* Barry, 79 Cal. 443, 21 Pac. 946; Von Drachenfels *v.* Doolittle, 77 Cal. 295, 19 Pac. 518; Spotswood *v.* Spotswood, 4 Cal. App. 711, 89 Pac. 362.

One holding an equitable fee in land may maintain suit to quiet title as against the person having the record title. Casstevens *v.* Casstevens, 227 Ill. 547, 81 N. E. 709.

Persons holding a title bond from the owner of the legal title have an equitable title sufficient to support a suit to quiet their title and to recover the possession of the premises and the rents collected from a person claiming adversely to them. Norman *v.* Pugh, 75 Ark. 52, 86 S. W. 833.

69. *Kentucky.*— Floyd *v.* Louisville, etc., R. Co., 80 S. W. 204, 25 Ky. L. Rep. 2147; Burt, etc., Lumber Co. *v.* Bailey, 60 S. W. 485, 22 Ky. L. Rep. 1264; Smith *v.* Lewis, 55 S. W. 551, 21 Ky. L. Rep. 1400. See also Snow *v.* Morse, 37 S. W. 953, 18 Ky. L. Rep. 707; Brandenburg *v.* Louisville Tin, etc., Co., 36 S. W. 7, 18 Ky. L. Rep. 297.

Maryland.— Keys *v.* Forrest, 90 Md. 132, 45 Atl. 22.

Virginia.— Tax Title Co. *v.* Denoon, 107 Va. 201, 57 S. E. 586; Glenn *v.* West, 103 Va. 521, 49 S. E. 671.

West Virginia.— Hitchcox *v.* Morrison, 47 W. Va. 206, 34 S. E. 993.

United States.— Frost *v.* Spitley, 121 U. S. 552, 7 S. Ct. 1129, 30 L. ed. 1010; Orton *v.* Smith, 18 How. 263, 15 L. ed. 393; Chamberlain *v.* Marshall, 8 Fed. 398.

See 41 Cent. Dig. tit. "Quieting Title," §§ 37, 38.

70. *Arkansas.*— Mason *v.* Gates, 82 Ark. 294, 102 S. W. 190; Chapman, etc., Land Co. *v.* Bigelow, 77 Ark. 338, 92 S. W. 534; Lawrence *v.* Zimpleman, 37 Ark. 643.

California.— Di Nola *v.* Allison, 143 Cal. 106, 76 Pac. 976, 101 Am. St. Rep. 84, 65 L. R. A. 419.

Florida.— Houston *v.* McKinney, 54 Fla. 600, 45 So. 480; Levy *v.* Ladd, 35 Fla. 391, 17 So. 635.

Indiana.— Graham *v.* Lunsford, 149 Ind. 83, 48 N. E. 627; Wilson *v.* Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; Krotz *v.* A. R. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273.

sion of realty, without having legal or equitable title thereto, may not sue to quiet title or remove a cloud thereon;[71] but it is also equally well settled that where title is claimed by plaintiff in good faith, accompanied by actual and adverse possession of the property for the period prescribed by the statute of limitations, no more is required to support an action to quiet title,[72] even though such action is against the holder of the paper title barred,[73] who has not used his title to disturb

Iowa.— Hurley *v.* Osler, 44 Iowa 642.

Kentucky.— Nolen *v.* Carr, 82 S. W. 418, 26 Ky. L. Rep. 773.

Michigan.— Stockton *v.* Williams, 1 Dougl. 546.

Mississippi.— Ricks *v.* Baskett, 68 Miss. 250, 8 So. 514; Hart *v.* Bloomfield, 66 Miss. 100, 5 So. 620.

Nebraska.—Blodgett *v.* McMurtry, 39 Nebr. 210, 57 N. W. 985.

New York.— Townsend *v.* Brookhaven, 97 N. Y. App. Div. 316, 89 N. Y. Suppl. 982.

North Dakota.— Brown *v.* Comonow, (1908) 114 N. W. 728.

Texas.— Chinn *v.* Taylor, 64 Tex. 385.

See 41 Cent. Dig. tit. "Quieting Title," § 37.

Where there is a common source of title agreed to, or the evidence shows a reliance on a common source of title, the rule that plaintiff must recover on the strength of his own title is not applicable, and he need not go back of the common source of title in making his case, and irregularities in the conveyance prior to the common source are immaterial. Harrison Mach. Works *v.* Bowers, 200 Mo. 219, 98 S. W. 770.

71. *California.*— San Diego *v.* Allison, 46 Cal. 162.

Kansas.— Northrop *v.* Andrews, 39 Kan. 567, 18 Pac. 510.

Kentucky.— Louisville *v.* Gray, 1 Litt. 146.

North Dakota.— Jackson *v.* La Moure County, 1 N. D. 238, 46 N. W. 449.

Oregon.— Moore *v.* Halliday, 43 Oreg. 243, 72 Pac. 801, 99 Am. St. Rep. 724.

Tennessee.— State *v.* Cooper, (Ch. App. 1899) 53 S. W. 391.

See 41 Cent. Dig. tit. "Quieting Title," § 38.

But see Rhea *v.* Dick, 34 Ohio St. 420; Mayfield *v.* Musquez, 1 Tex. Unrep. Cas. 221.

72. *Alabama.*— Clemons *v.* Cox, 116 Ala. 567, 23 So. 79; Torrent Fire Ins. Co. *v.* Mobile, 101 Ala. 559, 14 So. 557; Marston *v.* Rose, 39 Ala. 722.

Arizona.— Pacheco *v.* Wilson, 2 Ariz. 411, 18 Pac. 597.

Arkansas.— Van Etten *v.* Daugherty, 83 Ark. 534, 103 S. W. 737.

California.— Batchelder *v.* Baker, 79 Cal. 266, 21 Pac. 754; Arrington *v.* Liscom, 34 Cal. 365, 94 Am. Dec. 722; Orack *v.* Powelson, 3 Cal. App. 282, 85 Pac. 129.

Illinois.— Bellefontaine Imp. Co. *v.* Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Walker *v.* Converse, 148 Ill. 622, 36 N. E. 202.

Iowa.— Severson *v.* Gremm, 124 Iowa 729, 100 N. W. 862; Oak Dale Independent Dist. *v.* Fagen, 94 Iowa 676, 63 N. W. 456; Boling *v.* Clark, 83 Iowa 481, 50 N. W. 57; Quinn *v.* Quinn, 76 Iowa 565, 41 N. W. 316.

Kentucky.— Vallandingham *v.* Taylor, 64 S. W. 725, 23 Ky. L. Rep. 1059.

Michigan.— Vier *v.* Detroit, 111 Mich. 646, 70 N. W. 139; Hardy *v.* Powell, 40 Mich. 413.

Minnesota.— Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 1060.

Missouri.— McRee *v.* Gardner, 131 Mo. 599, 33 S. W. 166. *Compare* Cashman *v.* Cashman, 123 Mo. 647, 27 S. W. 549, holding that one who has acquired title by adverse possession cannot maintain a suit to remove a cloud on the title; nothing having been recorded since his possession began, and it not being questioned but that the record shows title as it was before plaintiff acquired it by adverse possession.

Nebraska.— South Omaha *v.* Meehan, 71 Nebr. 230, 98 N. W. 691; Tourtelotte *v.* Pearce, 27 Nebr. 57, 42 N. W. 915; South Omaha *v.* Ford, 5 Nebr. (Unoff.) 310, 98 N. W. 665.

North Carolina.— Marshall *v.* Corbett, 137 N. C. 555, 50 S. E. 210.

Ohio.— Buchanan *v.* Roy, 2 Ohio St. 251.

Oregon.— Logus *v.* Hutson, 24 Oreg. 528, 34 Pac. 477; Parker *v.* Metzger, 12 Oreg. 407, 7 Pac. 518.

Tennessee.— Trafford *v.* Young, 3 Tenn. Ch. 496.

Texas.— Moody *v.* Holcomb, 26 Tex. 714; Smith *v.* Montes, 11 Tex. 24.

United States.— Wehrman *v.* Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. ed. 167; Four Hundred and Twenty Min. Co. *v.* Bullion Min. Co., 9 Fed. Cas. No. 4,989, 3 Sawy. 634.

See 41 Cent. Dig. tit. "Quieting Title," § 38; and ADVERSE POSSESSION, 1 Cyc. 1138.

Contra.— Contee *v.* Lyons, 19 D. C. 207.

Under a statute providing that occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession, evidence that plaintiff was in the actual possession and occupancy of the premises, at and for a long time before the commencement of an action to quiet title, is sufficient to enable him to maintain it as against one who claimed, but never had, title. McGovern *v.* Mowry, 91 Cal. 383, 27 Pac. 746.

A trespasser occupying government land cannot bring an action to quiet his possession, because the statute of limitations does not run against the government, and the possession of the trespasser can never ripen into a perfect title. Wood *v.* Missouri, etc., R. Co., 11 Kan. 323.

73. *Alabama.*— Clemmons *v.* Cox, 114 Ala. 350, 21 So. 426; Torrent Fire Engine Co. No. 5 *v.* Mobile, 101 Ala. 559, 14 So. 557.

plaintiff.[74] And it is held in some jurisdictions where the statutory action for determining adverse claims exists that one in possession,[75] and claiming title to the land,[76] has a sufficient estate therein to maintain such an action.

(iv) *Title Derived From Common Source.* It is sufficient for plaintiff to deraign his title from the grantor under whom both parties claim.[77]

(v) *Record or Paper Title.* The general rule is that when reliance is placed solely upon paper title, the chain thereof must be from the original patentee [78] or some grantor in possession.[79] The action may be based on a quitclaim deed from one in possession, where at the time of the giving the deed there was an existing statutory provision that such deed should be sufficient to convey all the estate which could lawfully be conveyed by a deed of bargain and sale; [80] upon an unrecorded deed, when such facts are shown as to have put any one who was dealing with the estate on notice; [81] or upon a defective deed which is the result of a mistake, against which the law would afford relief.[82]

(vi) *Extent of Interest.* If the interest of plaintiff is a title in fee, such interest may be quieted; if a less interest, the less interest may likewise be quieted.[83]

(vii) *Particular Estates or Interests* — (a) *Of Executors.* Although it has been held that where the will does not devise lands to be sold, or direct

Illinois.— Walker *v.* Converse, 148 Ill. 622, 36 N. E. 202.

Nebraska.— Tourtelotte *v.* Pearce, 27 Nebr. 57, 42 N. W. 915.

Oregon.— Parker *v.* Metzger, 12 Oreg. 407, 7 Pac. 518.

Texas.— Moody *v.* Holcomb, 26 Tex. 714.

United States.— Four Hundred and Twenty Min. Co. *v.* Bullion Min. Co., 9 Fed. Cas. No. 4,989, 3 Sawy. 634.

See 41 Cent. Dig. tit. "Quieting Title," § 38.

74. Moody *v.* Holcomb, 26 Tex. 714.

75. Child *v.* Morgan, 51 Minn. 116, 52 N. W. 1127; Knight *v.* Alexander, 38 Minn. 384, 37 N. W. 796, 8 Am. St. Rep. 675; Steele *v.* Fish, 2 Minn. 153; Bird *v.* Winner, 24 Wash. 269, 64 Pac. 178.

As against a trespasser or wrong-doer, possession of real estate is *prima facie* title, and sufficient to maintain an action to determine adverse claims. Wilder *v.* St. Paul, 12 Minn. 192.

One who has conveyed the legal title but wrongfully retains possession does not come within the meaning of the statute which provides an action by one in possession against any person who claims an estate adverse to him for the purpose of determining such adverse claim. Walker *v.* Pogue, 2 Colo. App. 149, 29 Pac. 1017.

76. Schroeder *v.* Gurney, 10 Hun (N. Y.) 413 [*affirmed* in 73 N. Y. 430]. See also Ford *v.* Belmont, 69 N. Y. 567.

Quiet occupation under claim of title entitles one to try the validity of an adverse claim under the statute. Powell *v.* Mayo, 24 N. J. Eq. 178.

77. English *v.* Otis, 125 Iowa 555, 101 N. W. 293; Brown *v.* Taber, 103 Iowa 1, 72 N. W. 416; Eli *v.* Gridley, 27 Iowa 376; Byers *v.* Rodabaugh, 17 Iowa 53; Kendrick *v.* Burchett, 87 S. W. 239, 28 Ky. L. Rep. 242; People's Bank *v.* West, 67 Miss. 729, 7 So. 513, 8 L. R. A. 727; Marshall *v.* Corbett, 137 N. C. 555, 50 S. E. 210.

78. Cartwright *v.* Hall, 88 Minn. 349, 93 N. W. 117; Marshall *v.* Corbett, 137 N. C. 555, 50 S. E. 210. But see South Chicago Brewing Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732, holding that in a suit to remove a cloud on title, complainant is not bound to show a perfect title from the government or as against the world, but is only required to show a title good as against the holder of the alleged cloud.

79. Hamilton *v.* Beaudreau, 78 Wis. 584, 47 N. W. 952.

80. *Ex p.* Connolley, 168 Mass. 201, 46 N. E. 618.

A quitclaim deed from another who is not shown to have been in possession when he made the deed does not suffice as a basis for a suit to quiet title. Hamilton *v.* Beaudreau, 78 Wis. 584, 47 N. W. 952.

Where, in a suit to remove a cloud, plaintiff claims under a quitclaim deed from persons never in possession, while defendant claims by warranty for value from persons under whom plaintiff claims, the fact that plaintiff secured his quitclaim deed immediately before the institution of the suit does not defeat his right to maintain it. McLeod *v.* Lloyd, 43 Oreg. 260, 71 Pac. 795, 74 Pac. 491.

Neither grantee nor grantor in possession. —A quitclaim deed implies an adverse title in the party who executes it and cannot be treated as passing anything more than a doubtful title to the releasee, who, as complainant, cannot maintain a bill to remove clouds on his title, especially when it is not shown that either he or the person from whom he claims was in possession of the land at the time the deed was executed. Kerr *v.* Freeman, 33 Miss. 292.

81. Findlay *v.* Hinde, 1 Pet. (U. S.) 241, 7 L. ed. 128.

82. Hays *v.* McCormick, 83 Iowa 89, 49 N. W. 69.

83. McKinnie *v.* Shaffer, 74 Cal. 614, 16 Pac. 509.

their sale, nor vest title in the executor, he has not such title or interest in the lands in his representative capacity as to entitle him to maintain a suit to quiet title,[84] yet the rule seems to be that an executor having, for the purpose of carrying out the provisions of the law, a possessory interest in the land, and no more, may maintain a bill to quiet title to the interest in and right to the land claimed by him in his representative capacity.[85]

(B) *Of Administrators.* Beyond the naked power to sell to pay debts, in the mode provided by statute, an administrator has no concern with the lands of his intestate,[86] and, having no interest, cannot, in the absence of express statutory authority,[87] maintain an action to remove a cloud on, or quiet the title to, the lands of which his intestate died seized.[88]

(C) *Of Vendors* — (1) CONTRACTING TO CONVEY. The fact that a vendor has contracted to convey land to another does not prevent his bringing an action to quiet title as against his vendee, who has abandoned the contract, as he is still the owner of the legal title, and has the right to protect it.[89]

(2) AFTER CONVEYANCE. One who has sold, and actually conveyed, land cannot, subsequent to such conveyance, maintain a bill to quiet title in himself,[90] unless in conveying the land he warranted the title,[91] and evidence is about

84. McCaa *v.* Russom, 52 Miss. 639.

85. Laverty *v.* Sexton, 41 Iowa 435; Quinton *v.* Neville, 152 Fed. 879, 81 C. C. A. 673. See also Hall *v.* Pierson, 63 Conn. 332, 28 Atl. 544, holding that the fact that the probate court had not determined the necessity of selling the realty to pay debts does not affect the executrix's right to sue in equity to remove a cloud from the title, but the deficiency of assets may be shown *aliunde*.

86. Shoemate *v.* Lockridge, 53 Ill. 503.

87. Wheeler *v.* Single, 62 Wis. 380, 22 N. W. 569.

88. Nashville, etc., R. Co. *v.* Proctor, (Ala. 1907) 44 So. 669; Robinson *v.* Joplin, 54 Ala. 70; Stark *v.* Brown, 101 Ill. 395; Ryan *v.* Duncan, 88 Ill. 144; Shoemate *v.* Lockridge, 53 Ill. 503; Gridley *v.* Watson, 53 Ill. 186; Cutter *v.* Thompson, 51 Ill. 390, 531; Phelps *v.* Funkhouser, 39 Ill. 401; Smith *v.* McConnell, 17 Ill. 135, 63 Am. Dec. 340; Jenkins *v.* Bacon, 30 Mich. 154; King *v.* Boyd, 4 Oreg. 326. But see Blake *v.* Blake, 53 Miss. 182 (where the court says that an administrator, in certain circumstances, may invoke the aid of equity to remove clouds from the title to his intestate's land, and holds that where the land in suit was never the property of the intestate, but the intestate purchasing and paying for it in his lifetime, procured the title to be made in the name of his infant son, the administrator of the intestate cannot invoke the aid of equity to remove clouds from the title); Paine *v.* First Div. St. Paul, etc., R. Co., 14 Minn 65 (where it was held that an administrator who does not show that he is in possession of realty belonging to his intestate or that he has obtained a license from the probate court to sell the same, as required by statute, cannot maintain an action to remove a cloud from the title thereto, although the court expressly declines to pass upon the question whether the personal representative, after the probate court had granted a license to sell land, might maintain an action to remove a cloud from the title.

Under the California statute authorizing actions to determine adverse claims it is held that an administrator has such an interest in the decedent's real estate as enable him to maintain such an action against another asserting a claim adverse to such interest. Pennie *v.* Hildreth, 81 Cal. 127, 22 Pac. 398; Curtis *v.* Sutter, 15 Cal. 259.

89. Snodgrass *v.* Parks, 79 Cal. 55, 21 Pac. 79; Coel *v.* Glos, 232 Ill. 142, 83 N. E. 529.

90. *Illinois.*— Johnson *v.* McChesney, 33 Ill. App. 526.

Iowa.— Page County *v.* Burlington, etc., R. Co., 40 Iowa 520; Adams County *v.* Burlington, etc., R. Co., 39 Iowa 507.

Maryland.—See Whiteford *v.* Yellott, 104 Md. 191, 64 Atl. 936.

Michigan.— Begole *v.* Hershey, 86 Mich. 130, 48 N. W. 790.

Minnesota.— Styer *v.* Sprague, 63 Minn. 414, 65 N. W. 659.

Wisconsin.— Pier *v.* Fond du Lac County, 53 Wis. 421, 10 N. W. 686.

See 41 Cent. Dig. tit. "Quieting Title," § 39.

Agreement to procure discharge of lien.—A grantor who has no longer any interest in the land cannot maintain an action to remove an apparent lien thereon as being a cloud on his title, on the ground that he agreed with his grantee that he would procure the lien to be discharged. Townsend *v.* Goelet, 11 Abb. Pr. (N. Y.) 187.

Whole interest not parted with.— In an action to remove a cloud on title, it appeared that plaintiff, since the commencement of the suit and before the hearing, conveyed the premises by warranty deed to a third person, the grantee retaining part of the consideration, to be paid on the clearing of the title. It was held that plaintiff had not parted with his whole interest in the subject-matter of the suit, and had sufficient interest therein to entitle him to relief. Sutliff *v.* Smith, 58 Kan. 559, 50 Pac. 455.

91. *Connecticut.*— Van Brundt *v.* Hart-

to be lost, or the vendee's inertia would result in the perfecting of an adverse title.[92]

(D) *Of Purchasers* — (1) RECEIVING DEFECTIVE CONVEYANCE. A purchaser for value to whom a defective conveyance has been made and who has a right to call for the legal title may maintain a bill to quiet his title as against a subsequent purchaser for value, with notice of the prior equitable right.[93] So the vendor in such a case may be restrained from reclaiming the land by reason of the defect by a bill in the nature of a bill to quiet title.[94]

(2) HOLDING EXECUTORY CONTRACT OF PURCHASE. In those jurisdictions where none but a legal title suffices, a vendee under an executory contract of sale cannot maintain a bill to quiet title;[95] but where an equitable title is sufficient, a vendee under such a contract, being considered as having the equitable estate, may maintain the action.[96]

(3) AT JUDICIAL SALE — (a) IN GENERAL. A person deducing his title to lands through a judicial sale may maintain an action to quiet title to such lands,[97] except where the proceedings which were the basis of such sale, and on which the validity of complainant's title depends, are, for jurisdictional defects,[98] or for fraud,[99] shown to be void; or where the sale was on a judgment, and it is shown that the debt on which the judgment was obtained had been fully paid before the commencement of the action.[1]

(b) FORECLOSURE SALE. A party in possession, under color of foreclosure, with-

ford, 21 Conn. 500; Hartford *v.* Chipman, 21 Conn. 488.

Illinois.— See Johnson *v.* McChesney, 33 Ill. App. 526. But *compare* Glos *v.* Goodrich, 175 Ill. 20, 51 N. E. 643, holding that a person who sold premises and delivered possession to his grantee cannot maintain a suit to remove a cloud thereon, even where he conveyed by warranty.

Kentucky.— See U. S. Bank *v.* Cochran, 9 Dana 395, holding that the fact that the purchasers at a judicial sale, to whom an equitable title passes, sold their estate, does not preclude them from maintaining a bill to perfect the title of the vendees, to whom they are responsible and who are before the court.

Tennessee.— Jones *v.* Nixon, 102 Tenn. 95, 50 S. W. 740.

Wisconsin.— Jackson Milling Co. *v.* Scott, 130 Wis. 267, 110 N. W. 184; Ely *v.* Wilcox, 26 Wis. 91.

United States.— Remer *v.* Mackay, 35 Fed. 86.

See 41 Cent. Dig. tit. "Quieting Title," § 39.

If the warrantor of a title executes at the request of the warrantee an instrument which may injure the title, the warrantor is not thereby made liable on his covenant of warranty, and hence cannot maintain a bill in equity to clear the title from such instrument, without allegation and proof that such warrantee has, on request, refused to move in the matter. Cobb *v.* Baker, 95 Me. 89, 49 Atl. 425.

Part of purchase-price not to be paid until removal of cloud on title.— One who conveyed land by warranty deed with full covenants, and delivered possession to the grantee under an agreement that part of the purchase-price should be deposited with a third person, and should not be paid to the grantor until a cloud on the title was removed, has sufficient interest to maintain a bill to remove the cloud. Styer *v.* Sprague, 63 Minn. 414, 65 N. W. 659.

92. Jackson *v.* Kittle, 34 W. Va. 207, 12 S. E. 484.

93. Doe *v.* Doe, 37 N. H. 268.

94. Shivers *v.* Simmons, 54 Miss. 520, 28 Am. Rep. 372; Isaacks *v.* Wright, (Tex. Civ. App. 1908) 110 S. W. 970.

95. Chase *v.* Cameron, 133 Cal. 231, 65 Pac. 460; Thomas *v.* White, 2 Ohio St. 540.

96. Coel *v.* Glos, 232 Ill. 142, 83 N. E. 529; O'Neill *v.* Wilcox, 115 Iowa 15, 87 N. W. 742; Lambert *v.* St. Louis, etc., R. Co., 212 Mo. 692, 111 S. W. 550. But see Bradley *v.* Bell, 142 Ala. 382, 38 So. 759, holding that one having an executory contract for the purchase of land who has not paid the purchase-money, so as to entitle him to go at once into a court of equity and demand a conveyance, cannot maintain the action.

97. *California.*— Horn *v.* Jones, 28 Cal. 194.

Colorado.— Stock-Growers' Bank *v.* Newton, 13 Colo. 245, 22 Pac. 444.

Indiana.— Saunders *v.* Muegge, 91 Ind. 214.

Wisconsin.— Siedschlag *v.* Griffin, 132 Wis. 106, 112 N. W. 18.

United States.— Prevost *v.* Healey, 19 Fed. Cas. No. 11,408, 7 Wkly. Notes Cas. 263.

See 41 Cent. Dig. tit. "Quieting Title," § 40.

After the expiration of the time for redemption a purchaser of lands at a sheriff's sale may sue to remove a cloud on the title thereof. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

98. West *v.* Schnebly, 54 Ill. 523; Griswold *v.* Fuller, 33 Mich. 268.

99. Boyd *v.* Thornton, 13 Sm. & M. (Miss.) 338; Sowles *v.* Rugg, 55 Fed. 163.

1. Burt *v.* Collins, 39 Fed. 538.

out proving his title, may maintain an action to quiet his title against strangers to the equity of redemption.[2] But where a mortgagor has no title to the land, and the purchaser at foreclosure sale takes with notice, an action by the latter to quiet title must fail,[3] irrespective of any question whether the rights of the owner's representatives are barred by the statute of limitations by virtue of their having discovered the fraud by which mortgagor secured the apparent title.[4]

(c) Partition Sale. Where a sale in partition has not been reported nor confirmed, and no deed has been delivered, a purchaser at such sale is not entitled to maintain an action to remove a cloud on the title to the lands purchased.[5]

(e) *Of Creditors* — (1) Judgment Creditors. One who has recovered judgment at law, and levied his execution on the only realty of defendant, is entitled to a bill in chancery to remove a cloud on the title of such real estate.[6]

(2) Estate Creditors. A creditor of an estate has no interest such as will enable him to maintain an action to quiet title to the estate lands,[7] except by leave of court, after refusal of the administrator to bring suit.[8]

(f) *Homestead Interest.* An action may be brought by the holder of a homestead interest to quiet title thereto.[9]

(g) *Leasehold Interest.* One in possession of lands under a lease may maintain suit to quiet title against another claiming possession under another lease.[10]

(h) *Estate in Remainder.* An estate in remainder is sufficient to support an action to quiet title.[11]

(i) *Right of Dower.* An inchoate right of dower is such an interest in land as will enable a wife to bring an action to remove a cloud thereon.[12]

(j) *Interest as Mortgagor.* In those jurisdictions where the legal title remains in the mortgagor, and legal title is regarded as sufficient for the maintenance of an action to quiet title, a mortgagor in possession may sue the mortgagee asserting legal title to the land.[13]

(k) *Interest as Mortgagee.* In those jurisdictions where a mortgage is regarded as passing the whole legal title to the estate pledged to the mortgagee, and legal title in plaintiff is regarded as sufficient for the maintenance of an action to quiet title, a mortgagee may maintain suit to quiet title preparatory to sale under the mortgage.[14] But the rule is otherwise in those jurisdictions where a mortgage is

2. Fleming *v.* Boulevard Highlands Imp. Co. 12 Colo. App. 187, 54 Pac. 859; Craft *v.* Merrill, 14 N. Y. 456.

One who forecloses a junior mortgage and acquires the legal title cannot assert a lien under a prior mortgage in an action to quiet title, based on the ownership acquired by such foreclosure. Farm, etc., Co. *v.* Meloy, 11 S. D. 7, 75 N. W. 207.

Purchaser left to remedy at law.—A purchased at sheriff's sale under a mortgage foreclosure certain property for twenty dollars, proved to be worth three thousand dollars, and producing a rental of fifty dollars per month. B was also a purchaser at the sheriff's sale of the same property under a foreclosure of a prior, but unregistered mortgage; A, being in possession, filed his bill to cancel the deed and remove the cloud on his title. It was held that plaintiff should be left to his remedy at law; that to entitle him to an effectual decree, it should appear that the contract was fair, just and reasonable, and founded on an adequate consideration. Dunlap *v.* Kelsey, 5 Cal. 181.

3. Randall *v.* Duff, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, 756.

4. Randall *v.* Duff, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, 756.

5. MacGregor *v.* Malarkey, 89 Ill. App. 435.

6. Ledyard *v.* Chapin, 6 Ind. 320.

7. Le Moyne *v.* Quimby, 70 Ill. 399.

Estate insolvent.— Equity will intervene to remove a cloud on the title to decedent's real estate, his estate having been represented insolvent, in favor of a creditor who has obtained judgment against the administrator, and to subject the land to the payment of his debts. Saltmarsh *v.* Smith, 32 Ala. 404.

8. Marshall *v.* Blass, 82 Mich. 518, 46 N. W. 947; 47 N. W. 516.

9. McKinnie *v.* Shaffer, 74 Cal. 614, 16 Pac. 509.

10. Elk Ford Oil, etc., Co. *v.* Jennings, 84 Fed. 839.

11. Aiken *v.* Suttle, 4 Lea (Tenn.) 103. See also Haley *v.* Goodheart, 58 N. J. Eq. 368, 44 Atl. 193.

12. Madigan *v.* Walsh, 22 Wis. 501.

An inchoate right of dower is an encumbrance on land within St. (1898) § 3186, authorizing the holder of an "encumbrance" to bring an action to test the validity of the claim of another to the land. Huntzicker *v.* Crocker, 135 Wis. 38, 115 N. W. 340.

13. Sheffield *v.* Day, 90 S. W. 545, 28 Ky. L. Rep. 754.

14. Love *v.* Bryson, 57 Ark. 589, 22 S. W. 341.

regarded as passing only the equitable title to the estate pledged, and equitable title in a plaintiff is not deemed sufficient to support the action to quiet title.[15]

(L) *Easement.* A statute providing for an action to determine the validity of adverse claims by one in possession of a freehold estate does not include a party in the enjoyment of an easement.[16]

2. Possession by Plaintiff — a. Necessity — (I) *When Title or Interest Legal* — (A) *General Rule.* The general rule is that, unless some other special grounds for equitable interposition are shown,[17] a holder of the legal title to lands must, in order to maintain an action to quiet title or remove cloud, be in possession of the land when the action is instituted.[18] But this rule applies only where

A mortgagee, after conveying the mortgaged estate with a warranty of title, may maintain a suit in equity to relieve the estate from a cloud affecting the rights under the mortgage, thus protecting the title conveyed and warranted. Indianapolis *v.* United Presb. Church Extension, 28 Ind. App. 319, 62 N. E. 715.

15. Fields *v.* Cobbey, 22 Utah 415, 62 Pac. 1020.

16. Minot *v.* Cotting, 179 Mass. 325, 60 N. E. 610.

17. Peeples *v.* Burns, 77 Ala. 290; Plant *v.* Barclay, 56 Ala. 561; Sale *v.* McLean, 29 Ark. 612; Toledo, etc., R. Co. *v.* St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715; Glos *v.* Randolph, 133 Ill. 197, 24 N. E. 426; Lundy *v.* Lundy, 131 Ill. 38, 23 N. E. 337; Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Lattin *v.* McCarty, 41 N. Y. 107; Letson *v.* Letson, 81 N. Y. App. Div. 556, 80 N. Y. Suppl. 1032.

Of what special equity must consist.— Such special equity, to be available, must consist of some obstacle or impediment which would prevent or embarrass complete redress in a court of law. Plant *v.* Barclay, 56 Ala. 561.

18. *Alabama.*— Johnson *v.* Johnson, 147 Ala. 543, 41 So. 522; Merritt *v.* Alabama Pyrites Co., 145 Ala. 252, 40 So. 1028; Drum *v.* Bryan, 145 Ala. 686, 40 So. 131; Lyon *v.* Arndt, 142 Ala. 486, 38 So. 242; Tarwater *v.* Going, 140 Ala. 273, 37 So. 330; Smith *v.* Gordon, 136 Ala. 495, 34 So. 838; Boddied *v.* Bush, 136 Ala. 560, 33 So. 826; Williams *v.* Lawrence, 123 Ala. 588, 26 So. 647; Brown *v.* Hunter, 121 Ala. 210, 25 So. 924; Thorington *v.* Montgomery, 82 Ala. 591, 2 So. 513; Peeples *v.* Burns, 77 Ala. 290; Tyson *v.* Brown, 64 Ala. 244; Baines *v.* Barnes, 64 Ala. 375; Arnett *v.* Bailey, 60 Ala. 435; Plant *v.* Barclay, 56 Ala. 561; McLean *v.* Presley, 56 Ala. 211; Daniel *v.* Stewart, 55 Ala. 278.

Arkansas.—St. Louis Refrigerator, etc., Co. *v.* Thornton, 74 Ark. 383, 86 S. W. 852; Burke *v.* St. Louis, etc., R. Co., (1889) 50 S. W. 275, 51 S. W. 458; Mathews *v.* Marks, 44 Ark. 436; Bryan *v.* Winburn, 43 Ark. 28; Lawrence *v.* Zimpleman, 37 Ark. 643; Apperson *v.* Ford, 23 Ark. 746.

Colorado.— Reynolds *v.* Campling, 23 Colo. 105, 46 Pac. 339; Phillipi *v.* Leet, 19 Colo. 246, 35 Pac. 540.

Connecticut.— Cahill *v.* Cahill, 76 Conn. 542, 57 Atl. 284.

Florida.— Ropes *v.* Jenerson, 45 Fla. 556, 34 So. 955, 110 Am. St. Rep. 79; Gamble *v.* Hamilton, 31 Fla. 401, 12 So. 229; Patton *v.* Crumpler, 29 Fla. 573, 11 So. 225; Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603.

Idaho.— Branca *v.* Ferrin, 10 Ida. 239, 77 Pac. 636.

Illinois.— Glos *v.* Kenealy, 220 Ill. 540, 77 N. E. 146; McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Glos *v.* Kemp, 192 Ill. 72, 61 N. E. 473; Adams *v.* Black, 183 Ill. 377, 55 N. E. 887; Glos *v.* Huey, 181 Ill. 149, 54 N. E. 905; Robertson *v.* Wheeler, 162 Ill. 566, 44 N. E. 870; Mitchell *v.* Shortt, 113 Ill. 251, 1 N. E. 909; Burton *v.* Gleason, 56 Ill. 25; Stout *v.* Cook, 41 Ill. 447; Smith *v.* McConnell, 17 Ill. 135, 63 Am. Dec. 340; Alton M. & F. Ins. Co. *v.* Buckmaster, 13 Ill. 201; Gunning *v.* Sorg, 113 Ill. App. 333 [*affirmed* in 214 Ill. 616, 73 N. E. 870]; Glos *v.* Dawson, 83 Ill. App. 197.

Kansas.—Pierce *v.* Thompson, 26 Kan. 714; Douglass *v.* Nuzum, 16 Kan. 515; Eaton *v.* Giles, 5 Kan. 24.

Kentucky.— Harris *v.* Smith, 2 Dana 10; Floyd *v.* Louisville, etc., R. Co., 80 S. W. 204, 25 Ky. L. Rep. 2147; Layne *v.* Ferguson, 68 S. W. 656, 24 Ky. L. Rep. 444.

Louisiana.— Patterson *v.* Landru, 112 La. 1069, 36 So. 857.

Maine.— Annis *v.* Butterfield, 99 Me. 181, 58 Atl. 898; Frost *v.* Walls, 93 Me. 405, 45 Atl. 287; Snow *v.* Russell, 93 Me. 362, 45 Atl. 305, 74 Am. St. Rep. 350.

Maryland.— Carswell *v.* Swindell, 102 Md. 636, 62 Atl. 956; Helden *v.* Hellen, 80 Md. 616, 31 Atl. 506, 45 Am. St. Rep. 371; Polk *v.* Pendleton, 31 Md. 118.

Michigan.— Hatch *v.* St. Joseph, 68 Mich. 220, 36 N. W. 36; Kilgannon *v.* Jenkinson, 51 Mich. 240, 16 N. W. 390; Barron *v.* Robbins, 22 Mich. 35; Stockton *v.* Williams, 1 Dougl. 546.

Minnesota.— Bausman *v.* Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661; Byrne *v.* Hinds, 16 Minn. 521; Murphy *v.* Hinds, 15 Minn. 182; Eastman *v.* Lamprey, 12 Minn. 153.

Missouri.— Davis *v.* Sloan, 95 Mo. 552, 5 S. W. 702; Thompson *v.* Newberry, 93 Mo. 18, 5 S. W. 34; Keane *v.* Kyne, 66 Mo. 216; Campbell *v.* Allen, 61 Mo. 581; Clark *v.* Covenant Mut. L. Ins. Co., 52 Mo. 272; McGrath *v.* Mitchell, 56 Mo. App. 626; Dyer *v.* Krackauer, 14 Mo. App. 39.

Montana.— Sklower *v.* Abbott, 19 Mont. 228, 47 Pac. 901.

the object of the bill is purely and solely to remove a cloud on title, and not where the primary relief sought is upon other and well-established equitable grounds,

Nevada.— Lake Bigler Road Co. *v.* Bedford, 3 Nev. 399.

New Jersey.— Bradley *v.* McPherson, (Ch. 1904) 58 Atl. 105; Meeker *v.* Warren, 66 N. J. Eq. 146, 57 Atl. 421; Palmer *v.* Sinnickson, 59 N. J. Eq. 530, 46 Atl. 517; Essex County Nat. Bank *v.* Harrison, 57 N. J. Eq. 91, 40 Atl. 209; Oberon Land Co. *v.* Dunn, 56 N. J. Eq. 749, 40 Atl. 121; Allaire *v.* Ketcham, 55 N. J. Eq. 168, 35 Atl. 900.

New York.— Moores *v.* Townshend, 102 N. Y. 387, 7 N. E. 401; Mitchell *v.* Einstein, 42 Misc. 358, 86 N. Y. Suppl. 759 [*reversed* on other grounds in 105 N. Y. App. Div. 413, 94 N. Y. Suppl. 210].

North Carolina.— Pearson *v.* Boyden, 86 N. C. 585.

North Dakota.—Schneller *v.* Plankinton, 12 N. D. 531, 98 N. W. 77.

Ohio.— Raymond *v.* Toledo, etc., R. Co., 57 Ohio St. 271, 48 N. E. 1093; Thomas *v.* White, 2 Ohio St. 540; Clark *v.* Hubbard, 8 Ohio 382; Harvey *v.* Jones, 1 Disn. 65, 12 Ohio Dec. (Reprint) 490; Jenkins *v.* Artz, 6 Ohio S. & C. Pl. Dec. 439, 7 Ohio N. P. 371.

Oklahoma.— Christy *v.* Springs, 11 Okla. 710, 69 Pac. 864.

Oregon.— Silver *v.* Lee, 38 Oreg. 508, 63 Pac. 882; Lovelady *v.* Burgess, 32 Oreg. 418, 52 Pac. 25; Coolidge *v.* Forward, 11 Oreg. 118, 2 Pac. 292.

Pennsylvania.— McAndrew *v.* McAndrew, 3 C. Pl. 174.

South Carolina.— Pollitzer *v.* Beinkempen, 76 S. C. 517, 57 S. E. 475.

Virginia.— Austin *v.* Minor, 107 Va. 101, 57 S. E. 609; Neff *v.* Ryman, 100 Va. 521, 42 S. E. 314; Smith *v.* Thomas, 99 Va. 86, 37 S. E. 784; Kane *v.* Virginia Coal, etc., Co., 97 Va. 329, 33 S. E. 627; Louisville, etc., R. Co. *v.* Taylor, 93 Va. 226, 24 S. E. 1013; Otey *v.* Stuart, 91 Va. 714, 22 S. E. 513.

West Virginia.— Poling *v.* Poling, 61 W. Va. 78, 55 S. E. 993; Whitehouse *v.* Jones, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. N. S. 49; Wallace *v.* Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485; Logan *v.* Ward, 58 W. Va. 366, 52 S. E. 398, 5 L. R. A. N. S. 156; Mills *v.* Henry Oil Co., 57 W. Va. 255, 50 S. E. 157; Sansom *v.* Blankenship, 53 W. Va. 411, 44 S. E. 408; Freer *v.* Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556; Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694; Smith *v.* O'Keefe, 43 W. Va. 172, 27 S. E. 353; Davis Settle, 43 W. Va. 17, 26 S. E. 557; Christian *v.* Vance, 41 W. Va. 754, 24 S. E. 596; Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682. But see De Camp *v.* Carnahan, 26 W. Va. 839, which would seem to hold the opposite doctrine, but which is practically overruled by Moore *v.* McNutt, *supra*.

Wisconsin.— Gunderson *v.* Cook, 33 Wis. 551; Grimmer *v.* Sumner, 21 Wis. 179; Stridde *v.* Saroni, 21 Wis. 173.

United States.— U. S. *v.* Wilson, 118 U. S. 86, 6 S. Ct. 991, 30 L. ed. 110; Johnston *v.* Corson Gold Min. Co., 157 Fed. 145, 84 C. C. A. 593; Acord *v.* Western Pocahontas Corp., 156 Fed. 989; Miller *v.* Ahrens, 150 Fed. 644; Ashburn *v.* Graves, 149 Fed. 968, 79 C. C. A. 478; Davis *v.* Hinckley, 141 Fed. 708; Cocke *v.* Copenhaver, 126 Fed. 145, 61 C. C. A. 211; Giberson *v.* Cook, 124 Fed. 986; Hanley *v.* Kansas, etc., Coal Co., 110 Fed. 62; McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670; Jackson *v.* Simmons, 98 Fed. 768, 39 C. C. A. 514; American Stave, etc., Co. *v.* Butler County, 93 Fed. 301; Morse *v.* South, 80 Fed. 206; Northern Pac. R. Co. *v.* Cannon, 46 Fed. 224; Harland *v.* Bankers', etc., Tel. Co., 33 Fed. 199, 32 Fed. 305; Patrick *v.* Isenhart, 20 Fed. 339; Chamberlain *v.* Marshall, 8 Fed. 398; Shepley *v.* Rangely, 21 Fed. Cas. No. 12,756, 2 Ware 246, 5 N. Y. Leg. Obs. 5.

See 41 Cent. Dig. tit. "Quieting Title," § 8.

The reason for the rule is that when the title is a purely legal one and defendant is in possession, the remedy at law is plain, adequate, and complete, and an action of ejectment cannot be maintained under the guise of a bill in equity. Tyson *v.* Brown, 64 Ala. 244; Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96; Alton M. & F. Ins. Co. *v.* Buckmaster, 13 Ill. 201.

Hardship of taking possession no excuse.— A bill which is defective as one to quiet title because the complainant is not in possession will not be sustained on the ground of the extensive land possessions of the complainant under a land grant, and the hardship of taking possession of all such land before bringing suit. Northern Pac. R. Co. *v.* Amacker, 49 Fed. 529, 1 C. C. A. 345.

Both parties out of possession.— Where a suit to quiet title presents, in effect, a suit by one out of possession (there being nothing, so far as appears, to prevent either from taking possession) to have a determination between them as to who is and who is not the heir at law of the former owner, equity will not take jurisdiction. Marks *v.* Main, 4 Mackay (D. C.) 559. But where neither party is in possession, and the person in possession claims through and by virtue of plaintiff's title, a bill to quiet title may be maintained. Heppenstall *v.* Leng, 217 Pa. St. 491, 66 Atl. 991, 12 L. R. A. N. S. 652.

An alleged necessity for an accounting does not confer jurisdiction and equity of an action to quiet title, where plaintiff is not in possession. Bearden *v.* Brenner, 120 Fed. 690; Hanley *v.* Kansas, etc., Coal Co., 110 Fed. 62.

Defendant's possession subordinate to plaintiff's legal title.— Where the facts stated in a bill show that the legal title claimed by plaintiff is not disputed by the claimant in possession, but that such defendant sets up some equity not affecting the legal right of possession, but which operates as a cloud

and the removal of the cloud is prayed for only as an incident to that relief.[19] Hence equity will entertain a bill to have canceled as a cloud on title an instrument, the execution of which is shown by proper averments to have been procured by fraud, notwithstanding the fact that plaintiff is out of possession.[20]

(B) *Exceptions* — (1) In Favor of Holder of Future Estate. An exception to the general rule is recognized in favor of the holder of a future estate, such as a remainderman, who, pending the possession of the life-tenant, can maintain an action to quiet his title.[21]

(2) Where No Adequate Remedy at Law Available. The general rule that a bill to quiet title or remove cloud can only be maintained when plaintiff is in possession is subject to the exception that, when plaintiff holds the legal title under such circumstances that there is no adequate remedy at law available, equity gives relief.[22]

(II) *When Title or Interest Equitable.* Where plaintiff's title or interest is an equitable one, possession by him is not necessary to equitable jurisdiction.[23]

on the legal title, then equity has jurisdiction, because an action at law would not afford an adequate remedy, and in such case the possession by defendant, in subordination to plaintiff's legal title, will not defeat the jurisdiction. Holden *v.* Holden, 24 Ill. App. 106.

19. Booth *v.* Wiley, 102 Ill. 84; Swick *v.* Rease, 62 W. Va. 557, 59 S. E. 510.

20. *Alabama.*— Shipman *v.* Furniss, 69 Ala. 555, 44 Am. Rep. 528.

Illinois.— Booth *v.* Wiley, 102 Ill. 84; Redmond *v.* Packenham, 66 Ill. 434.

Kentucky.— Packard *v.* Beaver Valley Land, etc., Co., 96 Ky. 249, 28 S. W. 779, 16 Ky. L. Rep. 451.

South Carolina.— Du Bose *v.* Kell, 76 S. C. 313, 56 S. E. 968.

United States.— U. S. *v.* Minor, 114 U. S. 233, 5 S. Ct. 836, 29 L. ed. 110.

See 41 Cent. Dig. tit. "Quieting Title," § 8.

Where a party has purchased realty at a sheriff's sale and obtained a sheriff's deed therefor, and the judgment debtor has sold the same to a third party, with a view of defrauding his creditors. A bill is entertained in these cases on the ground that it partakes of the nature of a creditor's bill. Lick *v.* Ray, 43 Cal. 83; Hager *v.* Shinder, 29 Cal. 47; Sands *v.* Hildreth, 14 Johns. (N. Y.) 493.

21. *Alabama.*— Worthingham *v.* Miller, 134 Ala. 420, 32 So. 748; Lansden *v.* Bone, 90 Ala. 446, 8 So. 65; Woodstock Iron Co. *v.* Fullenwider, 87 Ala. 584, 6 So. 197, 13 Am. St. Rep. 73.

Kentucky.— Alley *v.* Alley, 91 S. W. 291, 28 Ky. L. Rep. 1073.

Nebraska.— Perry First Nat. Bank *v.* Pilger, 78 Nebr. 168, 110 N. W. 704, 78 Nebr. 172, 111 N. W. 361.

Rhode Island.— Keyes *v.* Ketrick, 25 R. I. 468, 56 Atl. 770.

United States.— Frost *v.* Spitley, 121 U. S. 552, 7 S. Ct. 1129, 30 L. ed. 1010.

See 41 Cent. Dig. tit. "Quieting Title," § 8.

Contra.— Glenn *v.* West, 103 Va. 521, 49 S. E. 671.

22. *Illinois.*— Johnson *v.* McChesney, 33 Ill. App. 526; Holden *v.* Holden, 24 Ill. App. 106.

Kansas.— Grove *v.* Jennings, 46 Kan. 366, 26 Pac. 738.

Minnesota.— Hamilton *v.* Batlin, 8 Minn. 403, 83 Am. Dec. 787.

Missouri.— Sneathen *v.* Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326.

New York.— Letson *v.* Letson, 81 N. Y. App. Div. 556, 80 N. Y. Suppl. 1032.

West Virginia.— Swick *v.* Rease, 62 W. Va. 557, 59 S. E. 510; De Camp *v.* Carnahan, 26 W. Va. 839.

See 41 Cent. Dig. tit. "Quieting Title," § 10.

Where evidence aliunde is required to establish the invalidity of an instrument or claim apparently valid and constituting a cloud on title, an action to remove the cloud will lie at the instance of one holding the legal title, whether in possession or not. Davenport *v.* Stephens, 95 Wis. 456, 70 N. W. 661.

Where the possession is not held adversely, there is no necessity for an action at law, and a bill to quiet title may be maintained by one not in possession. Low *v.* Staples, 2 Nev. 209.

23. *Alabama.*— Freeman *v.* Brown, 96 Ala. 301, 11 So. 249; Echols *v.* Hubbard, 90 Ala. 309, 7 So. 817; Tyler *v.* Jewett, 82 Ala. 93, 2 So. 905.

Arkansas.— St. Louis Refrigerator, etc., Co. *v.* Thornton, 74 Ark. 383, 86 S. W. 852; Mathews *v.* Marks, 44 Ark. 436; Bryan *v.* Winburn, 43 Ark. 28; Lawrence *v.* Zimpleman, 37 Ark. 643.

Colorado.— Consolidated Plaster Co. *v.* Wild, 42 Colo. 202, 94 Pac. 285; Brown *v.* Wilson, 21 Colo. 309, 40 Pac. 688, 52 Am. St. Rep. 239.

Florida.— Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603.

Illinois.— Mitchell *v.* Shortt, 113 Ill. 251, 1 N. E. 909; Shays *v.* Whorton, 48 Ill. 100; See also Smith *v.* McConnell, 17 Ill. 135, 63 Am. Dec. 340.

Michigan.— King *v.* Carpenter, 37 Mich. 363.

(III) *STATUTES DISPENSING WITH* — (A) *In General.* In several states jurisdiction in equity has been enlarged so as to permit actions to quiet title, or remove cloud thereon, to be maintained even where plaintiff is not in possession.[24]

(B) *As to Vacant or Unoccupied Lands.* By provision of statute in many states necessity of possession by plaintiff is dispensed with when vacant or unoccupied lands form the subject-matter of the action.[25]

(IV) *WAIVER OF* — (A) *In General.* The objection that the complainant in a suit to quiet title is not in possession, if not taken by demurrer, plea, or answer, is deemed waived.[26]

(B) *By Filing Cross Bill.* A defendant who files a cross bill to quiet title thereby gives the court jurisdiction of the whole controversy, although plaintiff is not in possession.[27]

Missouri.— Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Graves *v.* Ewart, 99 Mo. 13, 11 S. W. 971; Mason *v.* Black, 87 Mo. 329.

Washington.— Carlson *v.* Curren, 48 Wash. 249, 93 Pac. 315.

Wisconsin.— Siedschlag *v.* Griffin, 132 Wis. 106, 112 N. W. 18.

United States.— Stellwagen *v.* Tucker, 144 U. S. 548, 12 S. Ct. 724, 36 L. ed. 537; Sharon *v.* Tucker, 144 U. S. 533, 12 S. Ct. 720, 36 L. ed. 532; Lamb *v.* Farrell, 21 Fed. 5.

See 41 Cent. Dig. tit. "Quieting Title," § 11.

Contra.— Herrington *v.* Williams, 31 Tex. 448.

Equitable title enforceable in a court of law. —A bill to quiet title will be dismissed where it discloses that plaintiff is out of possession, although he claims under an equitable title, but shows no other facts which render the legal remedy inadequate, since Rev. St. c. 527, § 1, provides for the bringing of an action of right to recover "any interest in lands." Harrington *v.* Cubbage, 3 Greene (Iowa) 307.

24. See the statutes of the several states. And see the following cases:

Alaska.— Seliner *v.* McKay, 2 Alaska 564.

Arizona.— Costello *v.* Muheim, 9 Ariz. 422, 84 Pac. 906.

California.— Reiner *v.* Schroeder, 146 Cal. 411, 80 Pac. 517; Casey *v.* Leggitt, 125 Cal. 664, 58 Pac. 264; Gillespie *v.* Gouly, 120 Cal. 515, 52 Pac. 816; Heney *v.* Pesoli, 109 Cal. 53, 61 Pac. 819; Donahue *v.* Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283; Hyde *v.* Redding, 74 Cal. 493, 16 Pac. 380; People *v.* Center, 66 Cal. 555, 5 Pac. 263, 6 Pac. 481; Thompson *v.* Lynch, 29 Cal. 189.

Iowa.— Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 258; Lewis *v.* Soule, 52 Iowa 11, 2 N. W. 400.

Mississippi.— Wofford *v.* Bailey, 57 Miss. 239; Carlisle *v.* Tindall, 49 Miss. 229.

Nebraska.— Lyon *v.* Gombert, 63 Nebr. 630, 88 N. W. 774; Ross *v.* McManigal, 61 Nebr. 90, 84 N. W. 610; Foree *v.* Stubbs, 41 Nebr. 271, 59 N. W. 798; Eayrs *v.* Nason, 54 Nebr. 143, 74 N. W. 408; State *v.* Sioux City, etc., R. Co., 7 Nebr. 357.

Washington.—White *v.* McSorley, 47 Wash. 18, 91 Pac. 243; Vietzen *v.* Otis, 46 Wash. 402, 90 Pac. 264; Brown *v.* Baldwin, 46 Wash. 106, 89 Pac. 483.

United States.—More *v.* Steinbach, 127 U. S. 70, 8 S. Ct. 1067, 32 L. ed. 51; Holland *v.* Challen, 110 U. S. 15, 3 S. Ct. 495, 28 L. ed. 52; Taylor *v.* Clark, 89 Fed. 7.

See 41 Cent. Dig. tit. "Quieting Title," § 8.

Such a statute is constitutional.— McGrath *v.* Norcross, (N. J. 1907) 65 Atl. 998 [*affirming* (Ch. 1905) 61 Atl. 727].

25. See the statutes of the several states. And see the following cases:

Arkansas.— St. Louis Refrigerator, etc., Co. *v.* Thornton, 74 Ark. 383, 86 S. W. 852; Mathews *v.* Marks, 44 Ark. 436.

Illinois.— Glos *v.* Kenealy, 220 Ill. 540, 77 N. E. 146; McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Adams *v.* Black, 183 Ill. 377, 55 N. E. 887; Glos *v.* Huey, 181 Ill. 149, 54 N. E. 905; Glos *v.* Goodrich, 175 Ill. 20, 51 N. E. 643; Robertson *v.* Wheeler, 162 Ill. 566, 44 N. E. 870; Oakley *v.* Hurlbut, 100 Ill. 204; Wing *v.* Sherrer, 77 Ill. 200.

Oregon.— Moore *v.* Shofner, 40 Oreg. 488, 67 Pac. 511; Thompson *v.* Woolf, 8 Oreg. 454.

Washington.— Spithill *v.* Jones, 3 Wash. 290, 28 Pac. 531.

United States.—Prentice *v.* Duluth Storage, etc., Co., 58 Fed. 437, 7 C. C. A. 293.

See 41 Cent. Dig. tit. "Quieting Title," §§ 8, 57.

Lands held unoccupied see Glos *v.* Ptacek, 226 Ill. 188, 80 N. E. 727.

26. Gage *v.* Schmidt, 104 Ill. 106; Stout *v.* Cook, 41 Ill. 447; State *v.* Blize, 37 Oreg. 404, 61 Pac. 735.

Answering without insisting on the objection.—A defendant who answers, without insisting on the objection that plaintiff was not in possession, and permits proofs to be taken, cannot raise objection at the final hearing, where it appears that at the time of the filing of the bill such defendant, whose title is a legal and not an equitable one, was trying his right to the land by ejectment. Stockton *v.* Williams, Walk. (Mich.) 120.

27. Goodrum *v.* Ayers, 56 Ark. 93, 19 S. W. 97; Baumann *v.* Franse, 37 Nebr. 807, 56 N. W. 395; Mollie *v.* Peters, 28 Nebr. 670, 44 N. W. 872; Gregory *v.* Lancaster County Bank, 16 Nebr. 411, 20 N. W. 286; Siedschlag *v.* Griffin, 132 Wis. 106, 112 N. W. 18; San-

(c) *By Stipulating For Trial Before Master.* A defendant in a suit to quiet title, who stipulates for the trial of the cause before a master, thereby waives the objection that a court of equity has no jurisdiction because plaintiff is not in possession.[28]

b. Sufficiency — (i) *In General.* Whenever possession is a condition precedent to the maintenance of the action, possession in fact, as distinguished from constructive possession simply by virtue of legal title, is contemplated.[29] Hence the rule is that one having the legal title, and in constructive possession only, cannot maintain the action.[30] To this rule, however, an exception is recognized in some jurisdictions, as where the lands forming the subject-matter of the action are vacant and unoccupied, in which case the constructive possession arising from legal ownership is regarded as sufficient to support the action.[31] It has been held also that constructive possession will support the statutory action to determine

ders *v.* Riverside, 118 Fed. 720, 55 C. C. A. 240.

28. Sanders *v.* Riverside, 118 Fed. 720, 55 C. C. A. 240.

29. *California.*— Lyle *v.* Rollins, 25 Cal. 437.

Illinois.— Adams *v.* Black, 183 Ill. 377, 55 N. E. 887; Glos *v.* Goodrich, 175 Ill. 20, 51 N. E. 643.

Kansas.— Eaton *v.* Giles, 5 Kan. 24.

Kentucky.— Dupoyster *v.* Turk, 110 S. W. 260, 33 Ky. L. Rep. 320; Brown *v.* Ward, 105 S. W. 964, 32 Ky. L. Rep. 261.

Michigan.— Watson *v.* Lion Brewing Co., 61 Mich. 595, 28 N. W. 726.

Minnesota.— Greene *v.* Dwyer, 33 Minn. 403, 23 N. W. 546; Byrne *v.* Hinds, 16 Minn. 521; Murphy *v.* Hinds, 15 Minn. 182; Eastman *v.* Lamprey, 12 Minn. 153.

Missouri.—Cantlin *v.* Holladay-Klotz Land, etc., Co., 151 Mo. 159, 52 S. W. 247; McRee *v.* Gardner, 131 Mo. 599, 33 S. W. 166; Colline Real Estate, etc., Assoc. *v.* Johnson, 120 Mo. 299, 25 S. W. 190; Von Phul *v.* Penn, 31 Mo. 333.

New Jersey.— Yard *v.* Ocean Beach Assoc., 49 N. J. Eq. 306, 24 Atl. 729; Sheppard *v.* Nixon, 43 N. J. Eq. 627, 13 Atl. 617.

New York.— Boylston *v.* Wheeler, 61 N. Y. 521; Churchill *v.* Onderdonk, 59 N. Y. 134; Cleveland *v.* Crawford, 7 Hun 616.

West Virginia.— Mackey *v.* Maxin, 63 W. Va. 14, 59 S. E. 742.

Wisconsin.—Stridde *v.* Saroni, 21 Wis. 173.

United States.— San Jose Land, etc., Co. *v.* San Jose Ranch Co., 189 U. S. 177, 23 S. Ct. 487, 47 L. ed. 765; Elliot *v.* Atlantic City, 149 Fed. 849.

See 41 Cent. Dig. tit. "Quieting Title," § 44.

To constitute actual possession of land, it is only necessary to put it to such use by exercising such dominion or acts of ownership over it as in its present state it is reasonably adapted to. Brand *v.* U. S. Car. Co., 128 Ala. 579, 30 So. 60. See also Rummel *v.* Butler County, 93 Fed. 304.

The holder of the legal title, in actual possession of the surface of land underlain by undeveloped minerals, no mines having been opened, has a sufficient possession to enable him to sue to remove a cloud on his title, consisting of a deed purporting to convey the underlying minerals. Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227.

Slight actual possession has been held sufficient to support an action to quiet title against a person who has no pretense of possession. Mecartney *v.* Morse, 137 Ill. 481, 24 N. E. 576, 26 N. E. 376; Hoffman *v.* Woods, 40 Kan. 382, 19 Pac. 805.

Slight acts of ownership.— Plaintiff is entitled to maintain an action to remove a cloud from his title to real estate, although the land is unfenced and unoccupied, and he has only performed slight acts of ownership at distant intervals by selling grass cut thereon (Taylor *v.* Rountree, 28 Wis. 391); but merely breaking down a fence, and walking across the land is not sufficient (Greene *v.* Dwyer, 33 Minn. 403, 23 N. W. 546).

Open, visible occupancy.— It is not necessary that one should actually live on the land, in order to maintain the actual possession necessary in a suit to quiet title (Maggs *v.* Morgan, 30 Wash. 604, 71 Pac. 188), and yet there must be an open, visible occupancy (Churchill *v.* Onderdonk, 59 N. Y. 134; Cleveland *v.* Crawford, 7 Hun (N. Y.) 616).

Possession must immediately precede action. — Under a statute requiring three years' actual possession to maintain an action to determine adverse claims, the possession so required must immediately precede the commencement of action. Boylston *v.* Wheeler, 61 N. Y. 521.

30. *California.*— Lyle *v.* Rollins, 25 Cal. 437.

Minnesota.— Murphy *v.* Hinds, 15 Minn. 182.

Missouri.—Cantlin *v.* Holladay-Klotz Land, etc., Co., 151 Mo. 159, 52 S. W. 247.

New York.— Boylston *v.* Wheeler, 61 N. Y. 521.

West Virginia.—Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694.

See also cases cited *supra*, note 29.

31. *Florida.*— Levy *v.* Ladd, 35 Fla. 391, 17 So. 635; Woodford *v.* Alexander, 35 Fla. 333, 17 So. 658; Winn *v.* Strickland, 34 Fla. 610, 16 So. 606; Graham *v.* Florida Land, etc., Co., 33 Fla. 356, 14 So. 796.

Kansas.— Hoffman *v.* Woods, 40 Kan. 382, 10 Pac. 805; Douglass *v.* Nuzum, 16 Kan. 515; O'Brien *v.* Creitz, 10 Kan. 202; Eaton *v.* Giles, 5 Kan. 24.

adverse claims, where the plain intent of the statute, by merely using the word "possession," is to dispense with actual possession.[32]

(II) *Possession of Agent.* In some jurisdictions possession of land by plaintiff's agent is, by statute, sufficiently the possession of plaintiff to sustain an action to quiet title;[33] and, independently of statute, it has been held that possession of a duly authorized agent, having charge of the land and engaged in keeping off trespassers, is sufficient to sustain an action to quiet title in favor of the owner of the legal title who is himself a non-resident.[34]

(III) *Possession of Tenant.* In some jurisdictions the possession of a tenant is, by statute, the possession of the landlord, and sufficient to enable the latter to maintain an action to quiet title.[35]

(IV) *Possession of Vendee Under Bond.* The possession of a vendee, under a bond for a deed, is a sufficient possession of the vendor to enable him to maintain a bill to quiet title.[36]

(V) *Possession Subject to Public Easement.* One in possession of land as the owner in fee, subject to the right of the public to use the same as a public street or highway, has such possession of the premises as entitles him to maintain an action to remove a cloud from the title thereto.[37]

(VI) *Peaceable Possession.* The possession sufficient to support the action is sometimes limited by statute to peaceable and undisputed possession,[38] whether

Maryland.— Baumgardner *v.* Fowler, 82 Md. 631, 34 Atl. 537.

New York.— Whitman *v.* New York, 85 N. Y. App. Div. 468, 83 N. Y. Suppl. 465.

Oklahoma.— Christy *v.* Springs, 11 Okla. 710, 69 Pac. 864.

United States.—Lamb *v.* Farrell, 21 Fed. 5.

Contra.— Jenkins *v.* Bacon, 30 Mich. 154.

32. Clason *v.* Stewart, 23 Misc. (N. Y.) 177, 51 N. Y. Suppl. 1100; Womble *v.* Pike, 17 Okla. 122, 87 Pac. 427.

33. Smith *v.* Cooper, 38 Kan. 446, 16 Pac. 958; Root *v.* Mead, 58 Mo. App. 477.

34. Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603. See also State *v.* Griftner, 61 Ohio St. 201, 55 N. E. 612.

35. Merchants' State Bank *v.* Porter, 20 Colo. 216, 37 Pac. 960; Blanchard *v.* Tyler, 12 Mich. 339, 86 Am. Dec. 57; Miller *v.* Ahrens, 150 Fed. 644; Bayerque *v.* Cohen, 2 Fed. Cas. No. 1,134, McAllister 113.

Person occupying position analogous to that of tenant.— One having a contract for the sale of certain property and put in possession thereof by the owner for the purpose of building occupies a position so analogous to that of a tenant as to enable the owner to maintain an action to cancel a deed and quiet title, under a statute authorizing such an action by one in possession by himself or his tenant. Bigelow *v.* Brewer, 29 Wash. 670, 70 Pac. 129.

Effect of payment of rent by a tenant to party claiming adversely.— The fact that a tenant may, without the knowledge or consent of his landlord, have paid rent to a party claiming adversely, does not take the case from the operation of a statute providing that the possession of the tenant is the possession of the landlord, and sufficient to support an action by the latter to quiet his title. Merchants' State Bank *v.* Porter, 20 Colo. 216, 37 Pac. 960.

36. Thomas *v.* White, 2 Ohio St. 540.

37. Glos *v.* Holmes, 228 Ill. 436, 81 N. E. 1064.

38. George E. Wood Lumber Co. *v.* Williams, (Ala. 1908) 47 So. 202 (holding that a showing of peaceable possession makes out a *prima facie* case); Rosebrook *v.* Baker, 151 Ala. 180, 44 So. 198; Johnson *v.* Johnson, 147 Ala. 543, 41 So. 522; Foy *v.* Barr, 145 Ala. 244, 39 So. 578; Ladd *v.* Powell, 144 Ala. 408, 39 So. 46; Brand *v.* U. S. Car Co., 128 Ala. 579, 30 So. 60; Bradley *v.* McPherson, (N. J. Ch. 1904) 58 Atl. 105.

"Peaceable possession" refers to the character of the possession, and so long as one's possession is so clear that no one is denying the fact of his actual or constructive possession it is peaceable, although some other person may be denying his right to possession. George E. Wood Lumber Co. *v.* Williams, (Ala. 1908) 47 So. 202.

The possession in defendant which will defeat an action to quiet title need not be technically adverse, so as to ripen into title in time; but may be merely a disputed or scrambling possession. Crabtree *v.* Alabama State Land Co., (Ala. 1908) 46 So. 450.

That the adverse claimant is a tenant in common with complainant does not qualify the peaceable possession of the latter under claim of title. Powell *v.* Mayo, 24 N. J. Eq. 178.

Although one gives a deed of trust on land as security, he still retains the possession within a statute, limiting the right to bring action to quiet title to one who is by himself or his tenant or other person in the actual and peaceable possession of the property. Charles A. Warren Co. *v.* All Person, etc., 153 Cal. 771, 96 Pac. 807.

Possession held not to be peaceable.— Where defendants asserted title to an easement in a watercourse across plaintiff's premises, and had gone on the premises without plaintiff's consent, to repair the stream

actual or constructive,[39] as distinguished from disputed or scrambling possession. Under such a statute it is held that plaintiff need only be in peaceable possession of the *locus in quo* as against defendant, without regard to the claims of third persons.[40]

(VII) *POSSESSION OF PART OF TRACT.* Actual possession by plaintiff of the particular tract is sufficient possession of the adjoining ground, held under the same title and used in connection therewith,[41] at least where no one is in actual adverse possession of such adjoining ground.[42]

(VIII) *POSSESSION MUST BE LAWFUL.* The possession that gives jurisdiction in actions to quiet title, whenever possession is a jurisdictional fact, must be such as was acquired in a legal manner,[43] and hence possession wrongfully

every year since 1879, and had destroyed a gate erected by plaintiff to lessen the flow of the water, equity has no jurisdiction, prior to the settlement of the question of defendant's rights at law, to quiet title to the easement, under an act conferring jurisdiction in case plaintiff is in peaceable possession of the property. De Hanne *v.* Bryant, 61 N. J. Eq. 141, 48 Atl. 220.

Possession held to be peaceable.— Possession of complainant is peaceable, where defendant setting up a claim of title has not interfered with plaintiff's possession by an act which is suable at law, and suit upon which will or may involve the title of defendant. Allaire *v.* Ketcham, 55 N. J. Eq. 168, 35 Atl. 900. The easement in a public square acquired by dedication is an interest falling within the protection afforded by Code (1896), §§ 809–813, giving the right to file a bill to settle title to any one in peaceable possession of lands, claiming to own the same. Oates *v.* Headland, (Ala. 1908) 45 So. 910. Under the statute authorizing a bill to quiet title by one in peaceable possession of lands, claiming to own the same, whose title thereto is disputed, acts of possession, done without dispute, under a belief and claim on the part of the complainant that she owned the premises, and showing an occupation and use of the property for all of the purposes for which its nature enabled it to be used, are a sufficient exhibition of the peaceable possession under claim of ownership required by statute. Blakeman *v.* Bourgeois, 59 N. J. Eq. 473, 45 Atl. 594.

39. George E. Wood Lumber Co. *v.* Williams, (Ala. 1908) 47 So. 202, holding that one having a legal estate in fee in the land has the "constructive" possession, unless there is an actual possession in someone else.

40. Bradley *v.* McPherson, (N. J. Ch. 1904) 58 Atl. 105.

41. Yard *v.* Ocean Beach Assoc., 49 N. J. Eq. 306, 24 Atl. 729; Elliott *v.* Atlantic City, 149 Fed. 849. See also Fitz Hugh *v.* Barnard, 12 Mich. 104.

Where one in possession of a tract of land purchases an adjoining tract, he will be presumed to have extended his possession over the part so acquired, and may maintain a bill to quiet title as to it. Cates *v.* Loftus, 4 T. B. Mon. (Ky.) 439.

Possession of detached parcel.— Where one has a patent to all unappropriated lands within a certain boundary, possession of certain detached parcels of unappropriated land, separated from the land in dispute by land all appropriated, is not such possession as will extend over all lands unappropriated when the patent issued, so as to enable him to maintain a suit to quiet title. Moses *v.* Gatliff, 12 S. W. 139, 11 Ky. L. Rep. 356.

42. Weaver *v.* Bates, 33 S. W. 1118, 17 Ky. L. Rep. 1218; Goldberg *v.* Taylor, 2 Utah 486; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873. See also Gentile *v.* Kennedy, 8 N. M. 347, 45 Pac. 879, holding that one having a deed and good title to a tract of land, and actual possession of part of it, has constructive possession of the remainder, enabling him to maintain a suit to quiet title thereto against one who, although having a deed giving him color of title thereto, being in possession of other lands included in his deed, has done nothing but irregular, occasional or equivocal acts to oust the true owner.

Adjoining lands susceptible of occupation for part of year only.— If one who has a paper title to a tract of salt marsh tide land, which is not susceptible of occupation except during three months in the year, and in which there is a dry knoll, has actual possession of the knoll, and there is no adverse possession to the remainder, he may resort to his title deeds to extend his possession to the remainder of the tract, so as to enable him to sue in equity to quiet his title. Coleman *v.* San Rafael Turnpike Co., 49 Cal. 517.

43. Campbell *v.* Davis, 85 Ala. 56, 4 So. 140; Hardin *v.* Jones, 86 Ill. 313; Trotter *v.* Stayton, 41 Oreg. 117, 68 Pac. 3; Tichenor *v.* Knapp, 6 Oreg. 205; Stark *v.* Starr, 6 Wall. (U. S.) 402, 18 L. ed. 925; Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606; King *v.* French, 14 Fed. Cas. No. 7,793, 2 Sawy. 441. *Compare* Reed *v.* Calderwood, 32 Cal. 109; Phillippi *v.* Leet, 19 Colo. 246, 35 Pac. 540, where the complainant committed a trespass and took the actual possession in this manner for the purpose of bringing an action to quiet title, and it was held that the possession so obtained sufficed for the purposes of the action.

The statute gives the right of action to any person in possession, irrespective of the mode by which he acquired possession. Reed *v.* Calderwood, 32 Cal. 109; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370.

Possession held to have been lawfully ac-

obtained,[44] whether by force [45] or fraud,[46] will not suffice. But it has been held immaterial that possession was taken for the purpose of instituting the suit, if it was not tortious or in violation of the prior possession of another.[47]

3. Adverse Claim or Interest of Defendant — a. Necessity. In order to maintain the statutory action to determine adverse claims to realty, there must be a showing that defendant asserts a claim which is adverse to plaintiff's title or possession.[48]

b. What Constitutes — (i) *In General.* Whenever the statute provides broadly for the determination of adverse claims to realty, it embraces any adverse claim or interest whatever asserted by a person out of possession.[49] The adverse

quired.— The complainant acquired title to lands in suit by conveyance from one who had purchased them under a decree for taxes. At the date of the conveyance defendant was in possession by a tenant. The complainant procured the tenant to yield possession to her without process. It was held that, as defendant's title had terminated by operation of law, the complainant's possession, necessary to enable her to maintain a bill to quiet title, was not wrongfully obtained. Lillie *v.* Snow, 118 Mich. 611, 77 N. W. 241.

Possession acquired by sharp practice.— Where a purchaser out of possession can resort to ejectment, but instead makes an agreement with a tenant in possession by which the latter takes a lease from him in order to proceed in chancery to prevent the jury from passing on the good faith of his purchase, such a possession acquired by sharp practice will not entitle him to maintain a bill to quiet title. Stetsen *v.* Cook, 39 Mich. 750.

44. Collier *v.* Carlisle, 133 Ala. 478, 31 So. 970; Campbell *v.* Davis, 85 Ala. 56, 4 So. 140; Turnley *v.* Hanna, 67 Ala. 101; Hardin *v.* Jones, 86 Ill. 313 (where it is said that equity will not lend its aid to protect a possession wrested by the complainant from another by fraud or violence, his wrongful act affording no foundation for equitable jurisdiction and relief); Comstock *v.* Henneberry, 66 Ill. 212 (where the court says that if the complainant is in the actual possession of the land at the time he exhibits his bill, but such possession was wrongfully obtained, he will not be allowed to take advantage of his own wrong, and will be considered in equity as out of possession, so far as the question of jurisdiction is concerned; and being out of possession he has a complete remedy at law, and a court of equity cannot entertain his bill); Daudt *v.* Keen, 124 Mo. 105, 27 S. W. 361.

45. Tomlinson *v.* Watkins, 77 Ala. 399; Turnley *v.* Hanna, 67 Ala. 101; Hughey *v.* Winborne, 44 Fla. 601, 33 So. 249; Delaney *v.* O'Donnell, 234 Ill. 109, 84 N. E. 668; Gage *v.* Hampton, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; Gould *v.* Sternburg, 105 Ill. 488; Hardin *v.* Jones, 86 Ill. 313; Comstock *v.* Henneberry, 66 Ill. 212; Crosby *v.* Hutchinson, 126 Mich. 56, 85 N. W. 255; Rubert *v.* Brayton, 82 Mich. 632, 46 N. W. 935.

46. Collier *v.* Carlisle, 133 Ala. 478, 31 So. 970; Hardin *v.* Jones, 86 Ill. 313.

Under Cal. Pr. Act, § 254, one who, by collusion with the tenant, acquires possession of the leased premises, has such a possession that he may maintain an action to quiet title to the same. Calderwood *v.* Brooks, 45 Cal. 519.

47. Kraus *v.* Congdon, 161 Fed. 18, 88 C. C. A. 182.

48. *California.*— Harrigan *v.* Mowry, 84 Cal. 456, 22 Pac. 658, 24 Pac. 48; Bulwer Consol. Min. Co. *v.* Standard Consol. Min. Co., 83 Cal. 589, 23 Pac. 1102.

Colorado.— Smith *v.* Schlink, 15 Colo. App. 325, 62 Pac. 1044.

Idaho.— Coleman *v.* Jaggers, 12 Ida. 125, 85 Pac. 894.

Indiana.— Dumont *v.* Dufore, 27 Ind. 263.

Massachusetts.— Gilman *v.* Gilman, 171 Mass. 46, 50 N. E. 452.

Michigan.— Stockton *v.* Williams, 1 Dougl. 546.

Minnesota.— Weide *v.* Gehl, 21 Minn. 449; Steele *v.* Fish, 2 Minn. 153.

New York.— Onderdonk *v.* Mott, 34 Barb. 106.

United States.— Parrish *v.* Ferris, 2 Black 606, 17 L. ed. 317.

See 41 Cent. Dig. tit. "Quieting Title," § 51.

49. Castro *v.* Barry, 79 Cal. 443, 21 Pac. 946; Goldberg *v.* Taylor, 2 Utah 486.

Instances.—An action lies in favor of one in possession against a purchaser of the land at execution sale who has served on plaintiff a notice to quit. Lovelady *v.* Burgess, 32 Oreg. 418, 52 Pac. 25. An attempt to sell land on execution against a third party, even though such claim would not be deemed a cloud on the title under the rule governing courts of equity, is regarded as an adverse claim. Wilhelm *v.* Woodcock, 11 Oreg. 518, 5 Pac. 202; Murphy *v.* Sears, 11 Oreg. 127, 4 Pac. 471. A purchaser at an execution sale of land, conveyed by the debtor to defraud creditors, may sue a vendee, with knowledge of the fraudulent intent, to quiet title, under the statute providing that an action may be brought by any person against another, who claims an estate or interest in land adverse to him, for the purpose of determining such claim. Judson *v.* Lyford, 84 Cal. 505, 24 Pac. 286. Where an exception sale is void, one acquiring title from the execution debtor after the sale can maintain a suit to quiet title on a complaint generally asserting title in himself and that defendant claims some interest in the lands adverse to him. Stumph *v.* Reger, 92 Ind. 286.

claim or interest contemplated is not, however, simply with reference to the possession, but it must be in the legal sense the assertion of an adverse claim or interest in the property.[50]

(II) *Must Be of Present Interest.* A claim is not adverse within the meaning of the statute unless it is of a present interest.[51] Accordingly the proceeding will not lie against a remainderman pending possession of the life-tenant,[52] or against one claiming a remainder contingent on the death of plaintiff without issue.[53]

(III) *Lien Claims.* Under a statute which provides for the determination of adverse estates and interests in land, mere liens are not within the purview of the statute;[54] but where the statute provides broadly for the determination of adverse claims to land, it is applicable to lien claims.[55]

B. Defenses — 1. Particular Defenses — a. Title in Defendant. Plaintiff's right to recover may be defeated by defendant's showing a paramount title in himself,[56] but not if plaintiff acquired his title subsequent to the commencement of the action.[57]

b. Want of Title in Plaintiff. The weakness of plaintiff's title is a good defense in an action to quiet title, whether defendant is in or out of possession,[58] unless both parties derive their title from a common source.[59]

c. Title in Third Person. When plaintiff is in the actual possession of the land in controversy, defendant cannot defeat the action by showing an outstanding paramount right or title in a third person,[60] at least where such outstanding title is not a valid and subsisting one.[61] Nor will the holder of a naked legal title to land, as against a plaintiff in possession thereof, be permitted to set up a counter-

It is unnecessary for plaintiff to wait until he has been disturbed in his possession by an action and judgment against him; it is sufficient if, while he is in possession, a party out of possession claims an adverse estate or interest. Curtis *v.* Sutter, 15 Cal. 259.

50. Smith *v.* Schlink, 15 Colo. App. 325, 62 Pac. 1044; Kimmel *v.* Shaffer, 219 Pa. St. 375, 68 Atl. 1017.

51. Collins *v.* Collins, 19 Ohio St. 468.

52. Onderdonk *v.* Mott, 34 Barb. (N. Y.) 106.

53. Collins *v.* Collins, 19 Ohio St. 468.

54. Turrell *v.* Warren, 25 Minn. 9; Brackett *v.* Gilmore, 15 Minn. 245; Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328.

55. Blair *v.* Hemphill, 111 Iowa 226, 82 N. W. 501; Holmes *v.* Chester, 26 N. J. Eq. 79; Raymond *v.* Post, 25 N. J. Eq. 447; Kothe *v.* Wilson, 45 N. Y. Suppl. 649. *Compare* Lembeck *v.* Jersey City, 30 N. J. Eq. 554 [*reversed* in 31 N. J. Eq. 255].

A judgment recovered against a grantor, after he had conveyed his land in fraud of his creditors, ceases to be a lien on such land when it is conveyed by the fraudulent grantee to a *bona fide* purchaser; and therefore a claim by the judgment creditor that his judgment is still enforceable against the land is not a claim adverse to such purchaser, within Code Civ. Proc. § 1638, authorizing a person in possession of land under a claim of title to sue "any other person to compel the determination of any claim adverse to that of the plaintiff." Kothe *v.* Wilson, 45 N. Y. Suppl. 649.

56. Harris *v.* Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58; People *v.* Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Downing *v.* Hass, 33 Colo. 344, 81 Pac. 33; Lindsley *v.* McGrath, 62 N. J. Eq. 478, 50 Atl. 236.

A tax deed is *prima facie* a complete defense, and it is error to find in favor of plaintiff where defendant claimed by virtue of a tax deed, and plaintiff did not attempt to prove that the tax-sale was irregular, or that the deed was invalid. Doren *v.* Lupton, 154 Ind. 396, 56 N. E. 849. See also Sebree *v.* Johnson's Committee, 99 S. W. 340, 30 Ky. L. Rep. 681.

57. Floyd *v.* Sellers, 7 Colo. App. 498, 44 Pac. 373.

58. Williams *v.* San Pedro, 153 Cal. 44, 94 Pac. 234; Putt *v.* Putt, 149 Ind. 30, 48 N. E. 356, 51 N. E. 337.

That plaintiff, in an action to quiet title, procured his title by fraud on his grantors, will not avail a defendant, a stranger to the transaction, whose conduct was not influenced thereby, and who makes no claim under or through the persons defrauded. Pence *v.* Long, 38 Ind. App. 63, 77 N. E. 961.

59. Garrett *v.* Lyle, 27 Ala. 586; Kellar *v.* Stanley, 86 Ky. 240, 5 S. W. 477, 9 Ky. L. Rep. 388; Harrison Mach. Works *v.* Bowers, 200 Mo. 219, 98 S. W. 770; Jackson *v.* Tatebo, 3 Wash. 456, 28 Pac. 916.

60. Brenner *v.* Bigelow, 8 Kan. 496; Wilder *v.* St. Paul, 12 Minn. 192. But see Harney *v.* Morton, 36 Miss. 411.

Title in the United States.— In an action to quiet title, brought by the vendee under a constable's deed made on execution sale, defendant in possession cannot set up an outstanding title in the United States. Wilson *v.* Madison, 55 Cal. 5.

61. Harney *v.* Morton, 36 Miss. 411.

vailing equity in a third person, with whom he is not in privity, and who, being also a party defendant to the action, by his default confesses plaintiff's title.[62] But a defendant in adverse possession may defeat the action by showing a title outstanding in a third person,[63] without connecting himself with that title.[64]

d. Defendant in Possession. Irrespective of his title, possession in defendant is a sufficient defense, where plaintiff shows no title in himself.[65] But possession in defendant, obtained by a forcible entry on the lands, will not defeat plaintiff's right of recovery.[66]

e. Adequate Remedy at Law Available. Generally when the title or interest of plaintiff is legal in its nature, it is a good defense that he has an adequate remedy at law.[67]

f. Existing Agreement by Plaintiff to Dispose of Interest in Lands. The right of plaintiff cannot be defeated by showing that he has entered into an agreement to dispose of the property, where such agreement in no wise affects plaintiff's title.[68] But where plaintiff contracts to sell land to defendant, the contract entitling defendant to possession, and subsequently contracts to sell the land to another party, defendant's contract is, in the absence of the second vendee as a party, a complete defense to an action to quiet title.[69]

g. Limitations.[70] Limitations may be invoked as a defense to the action,[71] except where plaintiff is in the actual possession of the land, claiming to be the owner thereof.[72] But the statute of limitations does not begin to run in favor of defendant, so that he may invoke its running for the prescribed period as a defense, until some assertion of right or title to the premises has been made by him,[73]

If the outstanding title be barred by the statute of limitations, it will not defeat plaintiff's recovery. Harney *v.* Morton, 36 Miss. 411.

62. McKinzie *v.* Perrill, 15 Ohio St. 162.

63. Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739.

64. Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739.

65. White *v.* McGilliard, 140 Cal. 654, 74 Pac. 298; Ford *v.* Belmont, 69 N. Y. 567; Ranch *v.* Werley, 152 Fed. 509. See also Sheaff *v.* Husted, 8 Kan. App. 271, 55 Pac. 507.

66. Slaughter *v.* Mallet Land, etc., Co., 141 Fed. 282, 72 C. C. A. 430.

67. See *supra*, I, D, 2. See also Ayres *v.* Bensley, 32 Cal. 620, holding, however, that an action of ejectment pending, in which defendant does not ask for affirmative relief, is not available as a defense.

68. State *v.* Coughran, 19 S. D. 271, 103 N. W. 31.

69. Birch *v.* Cooper, 136 Cal. 636, 69 Pac. 420.

70. Statutes of limitations generally see LIMITATIONS OF ACTIONS, 25 Cyc. 963 *et seq.*

71. Casserly *v.* Alameda County, 153 Cal. 170, 94 Pac. 765; Tiedemann *v.* Kroll, 144 Mich. 308, 107 N. W. 883; Haarstick *v.* Gabriel, 200 Mo. 237, 98 S. W. 760; Hobson *v.* Huxtable, 79 Nebr. 334, 112 N. W. 658; Pleasants *v.* Blodgett, 39 Nebr. 741, 58 N. W. 423, 42 Am. St. Rep. 624; Sage *v.* Winona, etc., R. Co., 58 Fed. 297, 7 C. C. A. 237; Moore *v.* Miller, 43 Fed. 347.

Although fraud is an incident of the cause of action, the running of a statute of limitations applicable to actions for relief against fraud is not invokable as a defense in a suit to quiet title or remove a cloud thereon. Stewart *v.* Thompson, 32 Cal. 260; Detwiler *v.* Schultheis, 122 Ind. 155, 23 N. E. 709; Wagner *v.* Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 15 L. R. A. 784, 28 Am. St. Rep. 56; Elder *v.* Richmond Gold, etc., Min. Co., 58 Fed. 536, 7 C. C. A. 354.

Statute limiting time of bringing the suit, but not the time of trial.— The statute authorizing the bringing at any time within two years thereafter of suits to quiet title, merely limits the time of bringing the suit, but not the time of trial, and actions begun within two years may be legally tried and determined even after two years have passed. Kenedy *v.* Jarvis, (Tex. 1886) 1 S. W. 191.

72. *California.*— Smith *v.* Matthews, 81 Cal. 120, 22 Pac. 409.

Iowa.— Peck *v.* Sexton, 41 Iowa 566.

Mississippi.— Cameron *v.* Lewis, 59 Miss. 134.

Nebraska.— Batty *v.* Hastings, 63 Nebr. 26, 88 N. W. 139.

Oregon.— Katz *v.* Obenchain, 48 Oreg. 352, 85 Pac. 617; Meier *v.* Kelly, 22 Oreg. 136, 29 Pac. 265.

United States.— See Sage *v.* Winona, etc., R. Co., 58 Fed. 297, 7 C. C. A. 237.

73. O'Neill *v.* Wilcox, 115 Iowa 15, 87 N. W. 742; Lyons *v.* Carr, 77 Nebr. 883, 110 N. W. 705; Pleasants *v.* Blodgett, 39 Nebr. 741, 58 N. W. 423, 42 Am. St. Rep. 624; Palmer *v.* Mizner, 2 Nebr. (Unoff.) 899, 90 N. W. 637.

From the time defendant takes possession of the land, the statute of limitations begins to run. Moore *v.* Miller, 43 Fed. 347.

Cancellation of deed intended as mortgage. — In a suit where no limitation would run against the plaintiff's right to have deeds al-

and until such assertion of right or title to the premises has been brought to the knowledge of plaintiff.[74]

h. Laches.[75] Excepting where plaintiff is in possession,[76] laches is available as a defense to the action.[77]

2. Partial Defenses. Defendant cannot wholly defeat plaintiff's action by showing that plaintiff is estopped as a tenant from disputing title and right of possession to a part only of the realty in controversy, plaintiff being entitled, in

leged to have been intended as a mortgage canceled and released until the mortgage debt was discharged, or the defendant refused to allow them to redeem the property, it was immaterial when plaintiffs learned that the instruments were absolute deeds. Openshaw *v.* Rickmeyer, (Tex. Civ. App. 1907) 102 S. W. 467.

74. Palmer *v.* Mizner, 2 Nebr. (Unoff.) 899, 90 N. W. 637.

The mere record of a deed, signed and acknowledged by the owner of real estate, but not delivered, but which is taken from his possession and filed without his knowledge or consent by the grantee, is not notice to such owner that the grantee asserts some right under the deed. Palmer *v.* Mizner, 2 Nebr. (Unoff.) 899, 90 N. W. 637.

75. **Laches** generally see Equity, 16 Cyc. 150.

76. *Alabama.*— Ogletree *v.* Rainer, (1907) 44 So. 565; Torrent Fire Engine Co. No. 5 *v.* Mobile, 101 Ala. 559, 14 So. 557.

California.— Barroilhet *v.* Anspacher, 68 Cal. 116, 8 Pac. 804.

Georgia.— Pierce *v.* Middle Georgia Land, etc., Co., 131 Ga. 99, 61 S. E. 1114.

Illinois.— Beck Lumber Co. *v.* Rupp, 188 Ill. 562, 59 N. E. 429, 80 Am. St. Rep. 190; Shaw *v.* Allen, 184 Ill. 77, 56 N. E. 403.

Washington.— See Miller *v.* Pierce County, 28 Wash. 110, 68 Pac. 358.

West Viriginia.— Smith *v.* Owens, 63 W. Va. 60, 59 S. E. 762; Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; State *v.* Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727.

United States.— See Sage *v.* Winona, etc., R. Co., 58 Fed. 297, 7 C. C. A. 237.

77. *Arkansas.*— Osceola Land Co. *v.* Henderson, 81 Ark. 432, 100 S. W. 896; Turner *v.* Burke, 81 Ark. 352, 99 S. W. 76.

California.— Castro *v.* Adams, 153 Cal. 382, 95 Pac. 1027; Casserly *v.* Alameda County, 153 Cal. 170, 94 Pac. 765.

District of Columbia.— Peck *v.* Haley, 21 App. Cas. 224.

Georgia.— Pierce *v.* Middle Georgia Land, etc., Co., 131 Ga. 99, 61 S. E. 1114.

Illinois.— Barton *v.* Mayers, 183 Ill. 360, 55 N. E. 834.

Iowa.— Woodward *v.* Barr, 128 Iowa 727, 105 N. W. 207; Young *v.* Snell, 115 Iowa 32, 87 N. W. 728; Holman *v.* Winterboer, 107 Iowa 270, 77 N. W. 1060; Withrow *v.* Lowden, 82 Iowa 717, 47 N. W. 895; Withrow *v.* Walker, 81 Iowa 651, 47 N. W. 893.

Kentucky.— Four Mile Land, etc., Co. *v.* Gibson, 49 S. W. 954, 20 Ky. L. Rep. 1670.

Nebraska.— Butler *v.* Peterson, 79 Nebr. 715, 116 N. W. 515.

Washington.— Kenney Presbyterian Home *v.* Kenney, 45 Wash. 106, 88 Pac. 108; Ferrell *v.* Lord, 43 Wash. 667, 86 Pac. 1060.

United States.— Sage *v.* Winona, etc., R. Co., 58 Fed. 297, 7 C. C. A. 237.

See 41 Cent. Dig. tit. "Quieting Title," § 47.

Plaintiff is not precluded by laches from maintaining a suit, unless by reason of his course defendant has been misled to his injury, or the property has, at defendant's risk and expense, been greatly enhanced in value, while plaintiff lay by awaiting the turn of events to assert his claim, or unless some other facts exist showing inequity in plaintiff's possession. Costello *v.* Mulheim, 9 Ariz. 422, 84 Pac. 906.

Laches will not be imputed to one from a mere failure to watch the record to guard against the recording of a forged or undelivered deed purporting to be a conveyance of his real estate. Palmer *v.* Mizner, 2 Nebr. (Unoff.) 899, 90 N. W. 637. See also Hodges *v.* Wheeler, 126 Ga. 848, 56 S. E. 76.

A grantee who enters suit within five months from the time of receiving his deed to quiet title as against a cloud prior to his deed is not guilty of laches. Bland *v.* Windsor, 187 Mo. 108, 86 S. W. 162.

Where a suit to quiet title is brought by the owner of the land within a year of learning of the cloud thereon, he is not guilty of laches. Gilbreath *v.* Dilday, 152 Ill. 207, 38 N. E. 572.

Until there is interference with the possession of land, no occasion arises for resort to legal remedies, and where land has remained wild until shortly before the commencement of the plaintiff's action, his claim is not stale. Penrose *v.* Doherty, 70 Ark. 256, 67 S. W. 398.

The fact that the heirs of a record owner of land had become widely scattered is not sufficient to excuse a delay of sixteen years in bringing a suit in equity to quiet title to the land, in the absence of any fraudulent concealment from them of their rights, and of any fiduciary relations between them and defendants in possession or any one under whom the latter claim, and where the land claimed has increased enormously in value during an adverse possession of seventy years, and everyone having actual knowledge concerning ancient transactions regarding the title is dead. Peck *v.* Haley, 21 App. Cas. (D. C.) 224.

Where one is vested with legal title to land, laches will not defeat a suit for it when the right is not yet barred by limitation. Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

such case, to a decree to quiet title to that portion of the property to which the estoppel does not apply.[78]

3. Inconsistent Defenses. Defendant cannot rely on a defense inconsistent with a title, which, by his answer, he sets up in himself.[79]

IV. Proceedings and Relief.

A. Venue.[80] The venue of the action is determined by the situation of the premises,[81] and not by the residence of the party.[82]

B. Process.[83] The process or notice should accurately describe the property and state in general terms the nature and extent of plaintiff's claim.[84] A suit to quiet title being *in rem*, and the court having jurisdiction of the subject-matter of the suit, jurisdiction of defendant may be acquired by any reasonable method of imparting notice provided by statute, such as publication,[85] or personal service outside of the state.[86]

C. Parties[87] **— 1. Fundamental Rules — a. All Parties in Interest Must Be Joined.** Following the practice with respect to parties in civil actions as a general rule all the parties in interest should be joined either as plaintiffs or defendants[88]

78. Brenner *v.* Bigelow, 8 Kan. 496.

79. Harney *v.* Morton, 36 Miss. 411.

80. Venue generally see Venue.

81. Miller *v.* Kern County Land Co., (Cal. 1902) 70 Pac. 183; Fritts *v.* Camp, 94 Cal. 393, 29 Pac. 867; Landrum *v.* Farmer, 7 Bush (Ky.) 46; Nugent *v.* Powell, 63 Miss. 99; Russell *v.* Texas, etc., R. Co., 68 Tex. 646, 5 S. W. 686.

Where a tract of land lies partly in one county and partly in another, the circuit court of one county has jurisdiction to try an action to quiet title involving the question of whether a judgment rendered by the circuit court of the other county for the conveyance of the land is absolutely void. Howe *v.* Anderson, (Ky. 1890) 14 S. W. 216.

The answer is not to be considered in determining whether the action is to quiet title to land within Cal. Const. art. 6, § 5, providing that such actions shall be commenced in the county where the land is situated; the provision referring solely to the time of the commencement of the action. Miller *v.* Kern County Land Co., 140 Cal. 132, 73 Pac. 836, (1902) 70 Pac. 183.

82. Nugent *v.* Powell, 63 Miss. 99. See also Fritts *v.* Camp, 94 Cal. 393, 29 Pac. 867.

Action transitory.— Ky. Rev. St. § 11, providing that any person holding both the legal title and possession of land may sue in equity in the county where the lands, or some part of them, may lie, any person setting up claims thereto, etc., does not authorize a suit to quiet title against mortgages executed by plaintiff himself, on the ground that they were procured by fraud, to be brought in by the county where the land lies, but the action is a transitory one, to be brought in the county of defendant's residence. Shouse *v.* Taylor, 115 Ky. 22, 72 S. W. 324, 24 Ky. L. Rep. 1842.

Where an action is brought in one of several counties in which the lands are situated to quiet title against several defendants, a disclaimer of the land situated in the county in which the suit is brought will not entitle a defendant who resides in another county, in which alone he alleges that he claims lands adversely to the plaintiff, to a change of the place of trial to the county of his residence. Pennie *v.* Vischer, 94 Cal. 323, 29 Pac. 711.

83. Process generally see Process.

84. Richards *v.* Moran, 137 Iowa 220, 114 N. W. 1035.

85. Ruppin *v.* McLachlan, 122 Iowa 343, 98 N. W. 153.

Failure to name heirs.—An action to quiet title will not lie to remove an uncertainty as to whether plaintiff is the only heir of a deceased person, when the proceeding is begun by publication, and is against the heirs of the deceased, without even naming them, since the judgment in such an action could not affect the title of any one. Cashman *v.* Cashman, 50 Mo. App. 663 [*affirmed* in 123 Mo. 647, 27 S. W. 549]. See also Hill *v.* Henry, 66 N. J. Eq. 150, 57 Atl. 554.

86. Bancroft *v.* Conant, 64 N. H. 151, 5 Atl. 836.

87. Parties generally see Parties, 30 Cyc. 1.

88. *Alabama.*— Bromberg *v.* Yukers, 108 Ala. 577, 19 So. 49.

Florida.— Gibson *v.* Tuttle, 53 Fla. 979, 43 So. 310.

Illinois.— Getzelman *v.* Blazier, 112 Ill. App. 648; Howell *v.* Foster, 25 Ill. App. 42 [*affirmed* in 122 Ill. 276, 13 N. E. 527].

Louisiana.— Willis *v.* Wasey, 42 La. Ann. 876, 8 So. 591, 879; Sigler *v.* Gauthier, 5 La. Ann. 138.

Michigan.—Watson *v.* Lion Brewing Co., 61 Mich. 595, 28 N. W. 726; Jenness *v.* Smith, 58 Mich. 280, 25 N. W. 191.

Minnesota.— Johnson *v.* Robinson, 20 Minn. 170.

West Virginia.— Hitchcox *v.* Hitchcox, 39 W. Va. 607, 20 S. E. 595.

Wisconsin.— Leinenkugel *v.* Kehl, 73 Wis. 238, 40 N. W. 683.

United States.— Goldsmith *v.* Gilliland, 24 Fed. 154, 10 Sawy. 606; Bunce *v.* Gallagher, 1 Fed. Cas. No. 2,133, 5 Blatchf. 481.

See 41 Cent. Dig. tit. "Quieting Title," § 64 *et seq.*

in the bill. And the rule is applicable whether the interests of such parties be equitable merely or legal.[89]

b. Interest Must Be Material and Subsisting. One should not be made a party who has no material, subsisting interest in the realty in controversy.[90]

c. Interest Must Be Such as May Be Affected by Decree. While it is not always necessary to join all who have an interest in the subject-matter of the suit, those who have an interest in the object to be obtained by the suit must be joined.[91]

2. Parties Plaintiff. The suit cannot be brought in the name of one party for the use and benefit of another;[92] it not only may,[93] but must,[94] be prosecuted in the name of the real party in interest.

3. Parties Defendant — a. Necessary — (i) *Persons Who Have Parted With Interest in Property.* Generally one who has parted with all his interest in the land in controversy is not a necessary party defendant.[95] It has been held, however, that in a suit to remove a cloud consisting of an alleged fraudulent conveyance, the parties executing such conveyance, against whom fraud is charged, are necessary and indispensable parties, especially where such conveyance contains the covenants of general warranty.[96]

(ii) *Common Grantors.* The grantor under whom both parties to the action claim is not a necessary party defendant.[97]

The United States is a necessary party to an action to remove a cloud from the title to lands, the right of recovery in which depends on the validity of a government grant of the lands, where two of the questions involved and necessary to a complete determination are as to whether the manner in which the certificate of sale was obtained did not render it void, and whether such conveyance did not work a forfeiture of the grantee's rights to the United States as his grantor. Green *v.* Niver, 43 S. C. 359, 21 S. E. 263.

Persons claiming other lands on whose title the same cloud rests need not be made parties to an action to remove a cloud. Sanborn *v.* Eads, 38 Minn. 211, 36 N. W. 338.

Patentee.— In an action to remove from the title to land a cloud consisting of a patent issued by the state, the patentee is a necessary party defendant. Lally *v.* New York Cent., etc., R. Co., 123 N. Y. App. Div. 35, 107 N. Y. Suppl. 868.

89. Bunce *v.* Gallagher, 4 Fed. Cas. No. 2,133, 5 Blatchf. 481.

90. *California.*— Leet *v.* Rider, 48 Cal. 623.

Florida.— Matheson *v.* Thompson, 20 Fla. 790.

Indiana.— Shedd *v.* Disney, 139 Ind. 240, 38 N. E. 594.

Iowa.— Cunningham *v.* Cunningham, 125 Iowa 681, 101 N. W. 470.

Minnesota.— Brackett *v.* Gilmore, 15 Minn. 245.

New Jersey.— Carpenter *v.* Hoboken, 33 N. J. Eq. 27.

United States.— Bunce *v.* Gallagher, 1 Fed. Cas. No. 2,133, 5 Blatchf. 481.

See 41 Cent. Dig. tit. "Quieting Title," § 64 *et seq.*

The wife of grantee in a deed alleged to constitute a cloud on title is neither a necessary nor a proper party defendant to a bill to remove the same, on the theory that, being the wife of grantee, she has an inchoate dower interest; for, if the deed is in fact no more than a cloud, no right of dower could arise therefrom against the true owner. Greene *v.* Boaz, (Ala. 1908) 47 So. 255.

In an action by a husband to remove a cloud from the title to his land, his wife is not a necessary party. Puritan Oil Co. *v.* Myers, 39 Ind. App. 695, 80 N. E. 851.

91. Flanders *v.* McClanahan, 24 Iowa 486; Bunce *v.* Gallagher, 1 Fed. Cas. No. 2,133, 5 Blatchf. 481.

92. Peck *v.* Sims, 120 Ind. 345, 22 N. E. 313. See Adverse Possession, 1 Cyc. 1138.

93. New Orleans Nat. Bank *v.* Raymond, 29 La. Ann. 355, 29 Am. Rep. 335.

94. Peck *v.* Sims, 120 Ind. 345, 22 N. E. 313.

95. *Florida.*— West Coast Lumber Co. *v.* Griffin, 54 Fla. 621, 45 So. 514.

Indiana.— Warbritton *v.* Demorett, 129 Ind. 346, 27 N. E. 730, 28 N. E. 613.

Iowa.— Cunningham *v.* Cunningham, 125 Iowa 681, 101 N. W. 470.

Michigan.— Hammontree *v.* Lott, 40 Mich. 190.

Wisconsin.— Krueczinski *v.* Neuendorf, 99 Wis. 264, 74 N. W. 974.

Predecessors in a pretended title need not be made parties defendant to a bill to compel the present holder to release it, where all had notice of the adverse equity. Crooks *v.* Whitford, 40 Mich. 599.

Cestui que trust.— In a suit to quiet title, by the grantee of a trustee against the trustee's heirs, a *cestui que trust* who does not desire to avoid the conveyance need not be joined as defendant. Gridley *v.* Wynant, 23 How. (U. S.) 500, 16 L. ed. 411.

96. Florida Land Rock Phosphate Co. *v.* Anderson, 50 Fla. 516, 39 So. 392.

97. Fremont Tp. Independent School Dist. No. 3 *v.* Gunn, 93 Iowa 44, 61 N. W. 417.

The heirs of the grantor under which both the parties to the action claim are not necessary parties defendant. Thomas *v.* Kennedy, 24 Iowa 397, 95 Am. Dec. 740.

(iii) *Grantor's Heirs in Suit by Grantee.* In a suit by a grantee to remove a cloud on his title cast by the conditions of his deed, the grantor's heirs are necessary parties defendant, in the absence of a personal representative of the deceased grantor.[98]

b. Proper — (i) *Persons Who Have Parted With Interest in Property, and Their Heirs.* Persons who have parted with their interest in the property,[99] and likewise their heirs,[1] are proper, although not necessary, parties defendant.

(ii) *Heirs at Law in Action Against Estate.* In an action against an estate to quiet title the heirs at law are proper parties defendant.[2]

4. Joinder of Plaintiffs — a. In General. Those persons whose interests are in harmony, and only those, should be joined as parties plaintiff.[3]

b. Tenants in Common. A tenant in common of realty may maintain an action to quiet title to his independent interest therein, without joining his cotenant as party plaintiff.[4]

c. Joint Tenants. Joint tenants may join in an action to quiet their joint title.[5]

d. Owners in Severalty. Parties claiming land in severalty under a common source of title may quiet their title as against an adverse claim equally affecting the lands of all.[6]

e. Husband and Wife. Husband and wife may join as plaintiffs, it has been held, if the land be owned solely by the wife, and evidence of such ownership will not vitiate a finding for plaintiffs jointly;[7] but the rule is otherwise if the legal title to the land is in the husband solely.[8] And a husband and wife, claiming to own different tracts of land separately, cannot join as plaintiffs in an action to quiet title of all the tracts.[9]

f. Heirs. Where one dies intestate, leaving no debts, and there is no administration on his estate, all the heirs of such decedent may jointly maintain an action to cancel a deed of their ancestor, upon the ground that it is illegal and void, and is a cloud upon their title.[10]

5. Joinder of Defendants. All persons claiming an interest in the land may be joined as defendants,[11] although each claims a separate parcel of the land, under a distinct right.[12] But defendants who do not, in every instance, claim interest

98. Weinreich *v.* Weinreich, 18 Mo. App. 364.

99. Larson *v.* Allen, 34 Wash. 113, 74 Pac. 1069.

One who has parted with his title, conveying with covenants of seizin and warranty, is a proper party defendant. Hartford *v.* Chipman, 21 Conn. 488.

1. Caress *v.* Foster, 62 Ind. 145.

2. Louvall *v.* Gridley, 70 Cal. 507, 11 Pac. 777.

3. Bunce *v.* Gallagher, 1 Fed. Cas. No. 2,133, 5 Blatchf. 481.

4. *Connecticut.*— Cornwell *v.* Lee, 14 Conn. 524.

District of Columbia.— Bates *v.* District of Columbia, 7 Mackey 76.

New York.— O'Donnell *v.* McIntyre, 37 Hun 615 [*affirmed* in 116 N. Y. 663, 22 N. E. 1134].

Washington.— Hannegan *v.* Roth, 12 Wash. 695, 44 Pac. 256.

Wisconsin.— Herron *v.* Knapp, etc., Co., 72 Wis. 553, 40 N. W. 149.

United States.— Goldsmith *v.* Gilliland, 24 Fed. 154, 10 Sawy. 606.

See 41 Cent. Dig. tit. "Quieting Title," § 65.

5. Cornwell *v.* Lee, 14 Conn. 524.

6. Gillespie *v.* Gouley, 152 Cal. 643, 93 Pac. 856; Prentice *v.* Duluth Storage, etc., Co., 58 Fed. 437, 7 C. C. A. 293.

7. Indiana, etc., R. Co. *v.* Burlington, 98 Ind. 294.

8. Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58.

9. Gardner *v.* Robertson, 208 Mo. 605, 106 S. W. 645.

10. Pierce *v.* Middle Georgia Land, etc., Co., 131 Ga. 99, 61 S. E. 1114.

11. Kincaid *v.* McGowan, 88 Ky. 91, 4 S. W. 802, 9 Ky. L. Rep. 987, 13 L. R. A. 289; Keens *v.* Gaslin, 24 Nebr. 310, 38 N. W. 797; Carlson *v.* Curren, 48 Wash. 249, 93 Pac. 315.

12. Kincaid *v.* McGowan, 88 Ky. 91, 4 S. W. 802, 9 Ky. L. Rep. 987, 13 L. R. A. 289; Carlson *v.* Curren, 48 Wash. 249, 93 Pac. 315; Ellis *v.* Northern Pac. R. Co., 77 Wis. 114, 45 N. W. 811; Stemmler *v.* McNeill, 102 Fed. 660. See also Hudson *v.* Wright, 204 Mo. 412, 103 S. W. 8.

Where the different claimants of separate parties all deny plaintiff's rights on the same grounds, and claim title from a common source, it is proper to join them as parties defendant. Fisher *v.* Hepburn, 48 N. Y. 41.

adverse to plaintiffs in the same tract of land, cannot be joined in an action to quiet title of all the tracts.[13]

6. Intervention. The general rule is that a stranger will not be permitted on his own application to become a party,[14] except on a proper showing that he is interested in the property in question.[15]

7. Objections as to Parties — a. In General. If the omission to make certain persons parties is vital to the relief asked, the objection may be made at the hearing, and if the objection is so made and the court proceeds to a decree without an order bringing such parties in, it will be reversed on this ground.[16]

b. Waiver. A defect of parties apparent on the face of the bill is, if not taken advantage of by answer or demurrer, deemed to be waived.[17]

D. Pleading[18] — 1. Bill, Complaint, or Petition — a. In General. The bill or complaint must of course contain sufficient allegations to show a cause of action.[19]

13. Gardner *v.* Robertson, 208 Mo. 605, 106 S. W. 645.

14. Ingle *v.* Jones, 43 Iowa 286.

15. Reynolds *v.* Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; Ackley *v.* Croucher, 203 Ill. 530, 68 N. E. 86; Hampson *v.* Fall, 64 Ind. 382; Switz *v.* Black, 45 Iowa 597.

Intervention by necessary party.— A claimant should upon his or her motion be admitted as a party to a bill to remove a cloud where it appears that he or she is a necessary party thereto. Getzelman *v.* Blazier, 112 Ill. App. 648.

Intervention by state.— In an action to quiet title to land in plaintiff's possession, a petition of intervention by the state asking relief against plaintiff should be dismissed if the state has no title, although plaintiff fails to show title, as plaintiff's possession is a sufficient defense against the petition of intervention. Rood *v.* Wallace, 109 Iowa 5, 79 N. W. 449.

16. Swan *v.* Clark, 36 Iowa 560.

17. Hudson *v.* Wright, 204 Mo. 412, 103 S. W. 8; Hannegan *v.* Roth, 12 Wash. 695, 44 Pac. 256; Bunce *v.* Gallagher, 4 Fed. Cas. No. 2,133, 5 Blatchf. 481.

18. Pleading generally see Pleading, 31 Cyc. 1. See Bill of Peace, 5 Cyc. 707.

19. *Arizona.*— Astiazaran *v.* Santa Rita Land, etc., Co., 3 Ariz. 20, 20 Pac. 189; Ely *v.* New Mexico, etc., R. Co., 2 Ariz. 420, 19 Pac. 6.

Indiana.— Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93.

Louisiana.— Michel *v.* Stream, 48 La. Ann. 341, 19 So. 215.

Mississippi.— Clark *v.* McNeill, (1908) 46 So. 536.

Nebraska.— Fritz *v.* Grosnicklaus, 20 Nebr. 413, 30 N. W. 411.

Texas.—Openshaw *v.* Rickmeyer, (Civ. App. 1907) 102 S. W. 467.

See '41 Cent. Dig. tit. "Quieting Title," § 69 *et seq.*

Bills held sufficient.— A bill describing certain lands, and alleging plaintiff's ownership and possession thereof, and that defendant claims or is reputed to claim some right, title, or interest therein, and asking that plaintiff's title be quieted, is sufficient. Bledsoe *v.* Price, 132 Ala. 621, 32 So. 325. A petition to quiet title alleged, in substance, that plaintiff and one L contemplated forming a partnership, and that, for the benefit of the firm, plaintiff purchased the real estate described, with his own means, but, to avoid any further expense in conveying the title to the new firm when formed, he caused the deed to be made so as to convey directly to it; that the partnership was never created and therefore did not take title; that defendants now claim title, the nature and extent of which is unknown to plaintiff, in and to said premises, by virtue of a partnership formed between said plaintiff and defendant and one G, but said partnership was formed long after the purchase of said lands by plaintiff; and that neither of the defendants has any title or interest in said lands. The petition was held to state a cause of action. Fritz *v.* Grosnicklaus, 20 Nebr. 413, 30 N. W. 411. Where plaintiff alleges that he is the equitable owner in fee simple of the land in suit and entitled to possession; that he and his grantors were in peaceable adverse possession from 1837 until six years before the beginning of the action, at which time defendant unlawfully took possession; and that he has since wrongfully kept plaintiff out of possession, to his damage, a cause of action is stated. Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93. A petition, in an action to quiet title, which alleges that plaintiff is the owner in fee and in possession of the real estate in controversy, describing it, and that the defendants claim some interest therein, which claim is entirely unfounded, and prays that title to said premises be quieted in plaintiff, and that defendants be barred, sufficiently complies with Code, § 4224, requiring that petitions in such actions must describe the property and set forth the nature and extent of plaintiff's estate therein, and that he is credibly informed and believes that defendant makes some claim adverse to the petitioner, and pray for the establishment of plaintiff's estate, etc. Richards *v.* Moran, 137 Iowa 220, 114 N. W. 1035. A bill which alleges that complainant is the absolute owner of certain lands, that defendants were in possession thereof as tenants of complainant under written leases and having no other right or title thereto, and that they conspired together

By statute it is sometimes provided that the pleadings should conform to those in an ordinary civil action.[20]

b. Particular Allegations — (i) *As to Title or Interest of Plaintiff*— (A) *Necessity* — (1) In General. It is well settled that the complaint, by appropriate allegations, must show title in plaintiff to the lands in controversy.[21]

to defraud complainant of such lands, and in pursuance of such conspiracy executed deeds to one another purporting to convey title to specific parts of such lands, which deeds they caused to be recorded, states a cause of action cognizable in a federal court of equity for the cancellation of such deeds as clouds upon complainant's title. Acord *v.* Western Pocahontas Corp., 156 Fed. 989. A complaint in a suit to quiet title, which stated that plaintiff was in possession of the land, set up his title, and asked to have the same quieted, was sufficient to give jurisdiction, as it did not affirmatively show that defendants were in possession. Earle Imp. Co. *v.* Chatfield, 81 Ark. 296, 99 S. W. 84. Under Burns Rev. St. Ind. (1901) § 1082, declaring that an action to quiet title may be brought by any person, either in or out of possession, against one who claims title to or interest in real property adverse to him, although defendant may not be in possession thereof, averments in a complaint that plaintiff is owner and in possession of the land, and that defendant claims an interest therein which is adverse and unfounded, are sufficient against demurrer for want of facts. Huntington *v.* Townsend, 29 Ind. App. 269, 63 N. E. 36.

Bills held not sufficient.— A complaint alleged that plaintiff's father purchased land in which they, as heirs, claim an undivided half interest; that at the date of such purchase the land was "vacant and unimproved, and the same is still vacant and unimproved"; that plaintiffs have not ceased to be owners of such interest, and have not been divested of possession; that defendant claims the whole of such property under designated deeds, based on a pretended tax-sale,— but contained no direct allegation that plaintiffs or their ancestor ever had actual possession, and no admission of such possession in defendant. The prayer was for a decree quieting plaintiffs "in the possession" of an undivided half, and prohibiting defendant from setting up ownership under his deeds. It was held that the complaint did not state a cause of action. Michel *v.* Stream, 48 La. Ann. 341, 19 So. 215. A bill to quiet title, which alleges that complainant has title to land as tenant in common as heir of a decedent, and that defendant claims title under a void conveyance from a third person, which conveyance casts a cloud on complainant's title, but which fails to show the facts as to the validity of the conveyance to defendant, and which fails to show the interest of any of the parties in the land or when decedent died, or how any of the parties is heir to him, is demurrable. Thames *v.* Duvic, 89 Miss. 9, 42 So. 667. A bill which attacks and seeks to set aside a decree rendered in another suit as a cloud on the title to complainant's land, which does not allege that the decree was obtained by fraud so as to give jurisdiction to a court of equity, or that complainant's title was equitable, or the lands were wild and uncultivated, or that he was in possession of them, shows no grounds for equitable relief. Ropes *v.* Goldman, 52 Fla. 630, 42 So. 322.

A bill under Ala. Code (1896), § 809, to quiet title to land, may be dismissed for failing to aver that there was no other suit pending regarding the same. Corona Coal, etc., Co. *v.* Swindle, (1907) 44 So. 549; Bolen *v.* Allen, 150 Ala. 201, 43 So. 202.

20. Spencer *v.* Merwin, 80 Conn. 330, 68 Atl. 370; Huff *v.* Laclede Land, etc., Co., 157 Mo. 65, 57 S. W. 715, holding, however, that this does not mean that the rules of pleading in ordinary cases shall be so closely observed as to defeat the main purpose of the action, but only that general civil procedure adjusted to the peculiar action be followed.

21. *Georgia.*— McMullen *v.* Cooper, 125 Ga. 435, 54 S. E. 97.

Illinois.— Glos *v.* Miller, 213 Ill. 22, 72 N. E. 714; Parke *v.* Brown, 12 Ill. App. 291.

Indiana.— Chapman *v.* Jones, 149 Ind. 434, 47 N. E. 1065; Stanley *v.* Holliday, 130 Ind. 464, 30 N. E. 634; Corbin Oil Co. *v.* Searles, 36 Ind. App. 215, 75 N. E. 293; Indiana Natural Gas, etc., Co. *v.* Sexton, 31 Ind. App. 575, 68 N. E. 692.

Iowa.— Brinton *v.* Seevers, 12 Iowa 389.

Kentucky.— Goff *v.* Lowe, 80 S. W. 219, 25 Ky. L. Rep. 2176.

Minnesota.— Wakefield *v.* Day, 41 Minn. 344, 43 N. W. 71.

Mississippi.— Jones *v.* Rogers, 85 Miss. 802, 38 So. 742; Pierce *v.* Hunter, 73 Miss. 754, 19 So. 660; Chiles *v.* Champenois, 69 Miss. 603, 13 So. 840; Harrill *v.* Robinson, 61 Miss. 153; Toulmin *v.* Heidelberg, 32 Miss. 268.

Nebraska.— Brewer *v.* Merrick County, 15 Nebr. 180, 18 N. W. 43.

New Jersey.— Fittichauer *v.* Metropolitan Fire Proofing Co., 70 N. J. Eq. 429, 61 Atl. 746.

West Virginia.— Harr *v.* Shaffer, 45 W. Va. 709, 31 S. E. 905.

Wisconsin.— Van Hessen *v.* Chippewa Valley Mercantile Co., 115 Wis. 443, 91 N. W. 1008.

See 41 Cent. Dig. tit. "Quieting Title," § 73.

Alleging title of common grantor.— If the complaint and answer each show that the parties to the action claim under a common grantor, it is not essential that the complaint should allege the title of the common grantor. Fudickar *v.* East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

(2) Allegation of Possession as Dispensing With. In one jurisdiction the rule seems to be that an allegation that plaintiff is in possession does away with the necessity of alleging title,[22] and in another jurisdiction the statute has so enlarged the equitable jurisdiction that an averment of title is not necessary, an averment of possession in the words of the statute being sufficient.[23]

(B) *Sufficiency* — (1) In General. The complaint must allege clearly and directly, and with certainty to a common intent, title in plaintiff.[24]

(2) Averring Ultimate Fact of Title. An averment of the ultimate fact of title to the land,[25] such as an averment that plaintiff is the owner,[26] or the owner in fee simple,[27] or the owner of a complete equitable title,[28] without setting out specifically the character of the title, is sufficient.

(3) Averring Facts Showing Title. If the facts stated in the complaint show title in plaintiff, a direct averment of title is unnecessary.[29] Nor is such a complaint insufficient by reason of the inclusion of unnecessary allegations concerning plaintiff's title.[30] But if it avers generally that plaintiff is seized in fee

That complainant's title has been successfully tried at law at least once must be averred in a bill against a single adverse claimant. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 645, 23 S. Ct. 440, 47 L. ed. 634; Boston, etc., Consol. Copper, etc., Min. Co. *v.* Chile Gold Min. Co., 188 U. S. 645, 23 S. Ct. 440, 47 L. ed. 634; Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632, 23 S. Ct. 434, 47 L. ed. 626.

22. Mayfield *v.* Musquez, 1 Tex. Unrep. Cas. 221.

23. Lusby *v.* Jones, 1 Ohio S. & C. Pl. Dec. 292, 31 Cinc. L. Bul. 70.

24. Corbin Oil Co. *v.* Searles, 36 Ind. App. 215, 75 N. E. 293.

25. Cooper *v.* Birch, 137 Cal. 472, 70 Pac. 291 (holding, however, that an averment that plaintiff is the owner of a right to purchase the land from defendant is of a conclusion of law, and is a mere argumentative averment which is not equivalent to an averment of the ultimate fact of title); Savage *v.* Savage, (Oreg. 1908) 94 Pac. 182. See also Curran *v.* Hagerman, (Nebr. 1902) 92 N. W. 1003, where the petition was sufficient in this respect.

26. *Alabama.*— Love *v.* Coker, 140 Ala. 249, 37 So. 92.

California.—Fudickar *v.* East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

Colorado.— Knight *v.* Boring, 38 Colo. 153, 87 Pac. 1078; Schlageter *v.* Gude, 30 Colo. 310, 70 Pac. 428.

Indiana.— Rennert *v.* Shirk, 163 Ind. 542, 72 N. E. 546; Jones *v.* Leeds, (App. 1908) 83 N. E. 526. See also Stanley *v.* Holliday, 130 Ind. 464, 30 N. E. 634.

Mississippi.— Cook *v.* Friley, 61 Miss. 1.

Nebraska.—Andersen *v.* Andersen, 69 Nebr. 565, 96 N. W. 276; Scarborough *v.* Myrick, 47 Nebr. 794, 66 N. W. 867.

New Mexico.— Marques *v.* Maxwell Land Grant Co., 12 N. M. 445, 78 Pac. 40.

United States.— Union Mill, etc., Co. *v.* Warren, 82 Fed. 519.

See 41 Cent. Dig. tit. "Quieting Title," § 73.

27. *California.*— Millett *v.* Lagomarsino, (1894) 38 Pac. 308; Mora *v.* Le Roy, 58 Cal. 8.

Florida.—West Coast Lumber Co. *v.* Griffin, 54 Fla. 621, 45 So. 514.

Indiana.— Indiana, etc., R. Co. *v.* Brittingham, 98 Ind. 294; Gabe *v.* Root, 93 Ind. 256; Erie Crawford Oil Co. *v.* Meeks, 40 Ind. App. 156, 81 N. E. 518.

Kansas.— Parker *v.* Conrad, 74 Kan. 111, 85 Pac. 810.

Minnesota.— Herrick *v.* Churchill, 35 Minn. 318, 29 N. W. 129.

Missouri.— Spore *v.* Ozark Land Co., 186 Mo. 656, 85 S. W. 556.

New York.— King *v.* Townshend, 78 Hun 380, 29 N. Y. Suppl. 181.

South Carolina.— Shute *v.* Shute, 79 S. C. 420, 60 S. E. 961.

Wisconsin.— Mitchell Iron, etc., Co. *v.* Flambeau Land Co., 120 Wis. 545, 98 N. W. 530.

Wyoming.— Durell *v.* Abbott, 6 Wyo. 265, 44 Pac. 647.

United States.— Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291, 9 S. Ct. 293, 32 L. ed. 688.

See 41 Cent. Dig. tit. "Quieting Title," § 73.

28. Stanley *v.* Holliday, 130 Ind. 464, 30 N. E. 634.

29. *California.*— Batchelder *v.* Baker, 79 Cal. 266, 21 Pac. 754.

Kansas.— Illingsworth *v.* Stanley, 40 Kan. 61, 19 Pac. 352.

Michigan.— Hanscom *v.* Hinman, 30 Mich. 419.

Minnesota.— Johnson *v.* Robinson, 20 Minn. 189.

Washington.— Port Townsend *v.* Lewis, 34 Wash. 413, 75 Pac. 982; Wagner *v.* Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784.

United States.— See Bayerque *v.* Cohen, 2 Fed. Cas. No. 1,134, McAllister 113.

See 41 Cent. Dig. tit. "Quieting Title," § 73.

30. Bledsoe *v.* Price, 132 Ala. 621, 32 So. 325; Strong *v.* Buffalo Land, etc., Co., 203 U. S. 582, 27 S. Ct. 780, 51 L. ed. 327 [*affirming* 91 Minn. 84, 97 N. W. 575].

simple, and then proceeds to set forth the facts which constitute his title, it is bad if the facts so stated do not show title in him.[31]

(4) Time of Ownership. The bill must allege that plaintiff was the owner of the land at the time of the filing of the bill.[32]

(II) *As to Possession by Plaintiff* — (A) *Necessity.* Except in those jurisdictions where possession, as a condition precedent to the maintenance of the action, has been dispensed with by statute,[33] a plaintiff, claiming a legal estate or interest, must affirmatively allege in his bill or complaint that he is in possession of the lands in controversy,[34] or that such lands are vacant and unoccupied,[35] or it must state facts sufficient to show that, although out of possession, plaintiff's remedies at law are inadequate.[36] But the bill need not allege possession in plain-

31. Gabe *v.* Root, 93 Ind. 256 (holding, however, that a complaint to quiet title alleging that plaintiff derived its title through "The Indianapolis Warm Air Company" is not demurrable, as such company under certain circumstances may hold land); Keepfer *v.* Force, 86 Ind. 81. See also Turner *v.* White, 73 Cal. 299, 14 Pac. 794.

32. Parke *v.* Brown, 12 Ill. App. 291.

33. McCaslin *v.* State, 99 Ind. 428; Rose *v.* Nees, 61 Ind. 484. See also Dueber *v.* Wolfe, 47 Wash. 634, 92 Pac. 455.

34. *Alabama.*— Birmingham *v.* McCormack, (1905) 40 So. 111; Love *v.* Coker, 140 Ala. 249, 37 So. 92; Thorington *v.* Montgomery, 82 Ala. 591, 2 So. 513.

Arizona.— Ely *v.* New Mexico, etc., R. Co., 2 Ariz. 420, 19 Pac. 6.

Arkansas.— Mathews *v.* Marks, 44 Ark. 436; Chaplin *v.* Holmes, 27 Ark. 414.

Florida.—Simmons *v.* Carlton, 44 Fla. 719, 33 So. 408; Clem *v.* Meserole, 44 Fla. 191, 32 So. 783; Watson *v.* Holliday, 37 Fla. 488, 19 So. 640; Patton *v.* Crumpler, 29 Fla. 573, 11 So. 225.

Illinois.— Delaney *v.* O'Donnell, 234 Ill. 109, 84 N. E. 668; Illinois Land, etc., Co. *v.* Speyer, 138 Ill. 137, 27 N. E. 931; Gage *v.* Curtis, 122 Ill. 520, 14 N. E. 30; Gage *v.* Griffin, 103 Ill. 41; Gage *v.* Abbott, 99 Ill. 366; Johnson *v.* McChesney, 33 Ill. App. 526; Parke *v.* Brown, 12 Ill. App. 291.

Kansas.— Entreken *v.* Howard, 16 Kan. 551; Douglass *v.* Nuzum, 16 Kan. 515.

Kentucky.— Corneilson *v.* Foushee, 101 Ky. 257, 40 S. W. 680, 19 Ky. L. Rep. 417; Smith *v.* White, 41 S. W. 436, 19 Ky. L. Rep. 802; Coppage *v.* Griffith, 40 S. W. 908, 19 Ky. L. Rep. 459; Gately *v.* Wilder, 14 S. W. 680, 12 Ky. L. Rep. 621; Smith *v.* Gatliff, 5 S. W. 558, 9 Ky. L. Rep. 553.

Maryland.— Livingston *v.* Hall, 73 Md. 386, 21 Atl. 49.

Missouri.— Charm Mfg. Co. *v.* Donovan, 14 Mo. App. 591.

New York.— Howarth *v.* Howarth, 67 N. Y. App. Div. 354, 73 N. Y. Suppl. 785; O'Donohue *v.* Smith, 57 Misc. 448, 109 N. Y. Suppl. 929.

Ohio.— Clark *v.* Hubbard, 8 Ohio 382; Howard *v.* Levering, 8 Ohio Cir. Ct. 614, 4 Ohio Cir. Dec. 236.

Oregon.— Zumwalt *v.* Madden, 23 Oreg. 185, 31 Pac. 400.

Wisconsin.— Shaffer *v.* Whelpley, 37 Wis. 334.

See 41 Cent. Dig. tit. "Quieting Title," § 74.

Where the prime object of a bill is to appoint a partition of land between the complainants and defendants as tenants in common, the fact that the bill also asked for a cancellation of certain conveyances between some of the cotenants as clouds on the title does not render it necessary that the bill should allege that the complainants are in possession, as it would have been had the removal of the cloud been the sole ground of equitable jurisdiction. Gore *v.* Dickinson, 98 Ala. 363, 11 So. 743, 39 Am. St. Rep. 67.

Rule in federal courts.— In federal courts, sitting in states where the local statutes have dispensed with possession by complainant as a prerequisite to maintaining the suit, a bill in equity to quiet title to land is demurrable, which fails to allege affirmatively that complainant is in possession (Boston, etc., Consol. Copper Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 645, 23 S. Ct. 440, 47 L. ed. 634; Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632, 23 S. Ct. 434, 47 L. ed. 626; Southern Pac. R. Co. *v.* Goodrich, 57 Fed. 879); or that both complainant and defendant are out of possession (Southern Pac. R. Co. *v.* Goodrich, *supra*).

Time of possession.— In an action to determine adverse claims to real property under Code, § 449, the complainant must show that plaintiff has been in actual possession of the lands or tenements for three years. Austin *v.* Goodrich, 49 N. Y. 266.

A complaint showing that defendants are in possession of the real estate in question does not state a cause of action. Guerard *v.* Jenkins, 80 S. C. 223, 61 S. E. 258. See also Stannard *v.* Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254.

35. Mathew *v.* Marks, 44 Ark. 436; Simmons *v.* Carlton, 44 Fla. 719, 33 So. 408; Clem *v.* Meserole, 44 Fla. 191, 32 So. 783; Watson *v.* Holliday, 37 Fla. 488, 19 So. 640; Graham *v.* Florida Land, etc., Co., 33 Fla. 356, 14 So. 796; Delaney *v.* O'Donnell, 234 Ill. 109, 84 N. E. 668; Illinois Land, etc., Co. *v.* Speyer, 138 Ill. 137, 27 N. E. 931; Gage *v.* Curtis, 122 Ill. 520, 14 N. E. 30; Gage *v.* Griffin, 103 Ill. 41; Gage *v.* Abbott, 99 Ill. 366; Johnson *v.* McChesney, 33 Ill. App. 526; Parke *v.* Brown, 12 Ill. App. 291.

36. Ely *v.* New Mexico, etc., R. Co., 2 Ariz.

tiff if it states facts sufficient to show that the estate or interest to be protected is equitable in its nature.[37]

(B) *Sufficiency.* The fact of possession in plaintiff must be clearly stated in the bill, and not left to inference merely.[38] A bill alleging that complainant was the owner of the land described, setting forth particularly the chain of title, and charging that defendant claimed an adverse interest or estate in the premises, which so affected complainant's title as to render a sale or other disposition of the property impossible, and disturbed complainant in its right of possession, etc., sufficiently showed that complainant was in actual possession of the premises.[39]

(III) *As to Establishment of Title at Law.* A bill averring that complainant's title has been fully adjudicated in his favor by a court of competent jurisdiction in suits brought against persons in like situation with defendant is, in that regard, sufficient.[40]

(IV) *As to Inadequacy of Remedy at Law.* Unless required by statute,[41] it is not necessary for the complainant to allege that he has no adequate remedy at law.[42]

(V) *As to Adverse Claim.* In a suit to remove a cloud on title, it must be shown in the bill that such a cloud exists before relief can be given against it,[43] and, in such a case, the bill must, in addition to specifying the writing or matter which constitutes the alleged cloud, state the facts which give it apparent validity, as well as those which show its invalidity.[44] The rule prevails in some jurisdic-

420, 19 Pac. 6; Chaplin *v.* Holmes, 27 Ark. 414. See also Johnson *v.* McChesney, 33 Ill. App. 526.

37. Ely *v.* New Mexico, etc., R. Co., 2 Ariz. 420, 19 Pac. 6; Mulock *v.* Wilson, 19 Colo. 296, 35 Pac. 532; Bryant *v.* Wood, 90 Ky. 530, 14 S. W. 498, 12 Ky. L. Rep. 454. See also Mathews *v.* Marks, 44 Ark. 436.

38. Shaffer *v.* Whelpley, 37 Wis. 334.

Sufficient averment.— An averment of possession in the words of the statute is sufficient. Lusby *v.* Jones, 1 Ohio S. & C. Pl. Dec. 292, 31 Cinc. L. Bul. 70. An averment that plaintiff is seized in fee simple is a sufficient allegation that he has possession of the land. District of Columbia *v.* Hufty, 13 App. Cas. (D. C.) 175; Andrus *v.* Wheeler, 18 Misc. (N. Y.) 646, 42 N. Y. Suppl. 525; Gage *v.* Kaufman, 133 U. S. 171, 10 S. Ct. 406, 33 L. ed. 725. An allegation that, since their purchase of the premises, complainants "have resided on the same, and are now in possession thereof," is a sufficient averment of possession. Liddell *v.* Carson, 122 Ala. 518, 26 So. 133. Where the bill alleges that plaintiff is in peaceable possession of the land, the presumption is that he is in the actual possession, which need not be alleged in so many words. Douglass *v.* Huhn, 24 Kan. 766; Cartwright *v.* McFadden, 24 Kan. 662. A complaint alleging that "plaintiff is now, and for more than fifteen years next prior to the date of this complaint has been, the owner in fee simple absolute, and in the actual, notorious and open possession," sufficiently alleges plaintiff's actual possession. Maggs *v.* Morgan, 30 Wash. 604, 71 Pac. 188. Under the act to quiet title (Revision, p. 1189), an allegation that complainant is the owner in fee of the land and in possession sufficiently states that he is "in peaceable possession, claiming to own" the land. Ludington *v.* Elizabeth, 32 N. J. Eq. 159.

Insufficient allegation.— An averment that plaintiff's grantor, when he executed the conveyance under which plaintiff claims, was seized and in possession of the premises, does not suffice as an averment of plaintiff's present possession. Shaffer *v.* Whelpley, 37 Wis. 334. An allegation in a bill to remove clouds from title, complainants claiming under an execution sale, that defendant in execution "'yielded up possession' of the lands 'after'" the sale, is insufficient to show to whom or when possession was yielded, or that the purchaser, or any one claiming under him, ever had actual possession. Jones *v.* Rogers, 85 Miss. 802, 38 So. 742. When it is necessary to allege actual possession of the land, an allegation that plaintiff "is legally in possession, and entitled to the possession" is not sufficient. Smith *v.* Gatliff, 5 S. W. 558, 9 Ky. L. Rep. 553.

An allegation that plaintiff's tenant is in possession of the premises is not a denial of plaintiff's possession, since the possession of a tenant is the possession of the landlord. King *v.* Townshend, 78 Hun (N. Y.) 380, 29 N. Y. Suppl. 181.

39. North Carolina Min. Co. *v.* Westfeldt, 151 Fed. 290.

40. Preteca *v.* Maxwell Land Grant Co., 50 Fed. 674, 1 C. C. A. 607.

41. Lockhart *v.* Leeds, 10 N. M. 568, 63 Pac. 48.

42. Bishop *v.* Waldron, 56 N. J. Eq. 484, 40 Atl. 447 [*affirmed* in 58 N. J. Eq. 583, 43 Atl. 1098].

43. Chaplin *v.* Holmes, 27 Ark. 414; Hibernia Sav., etc., Soc. *v.* Ordway, 38 Cal. 679; Jenks *v.* Hathaway, 48 Mich. 536, 12 N. W. 691; Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606.

44. *California.*— Hibernia Sav., etc., Soc. *v.* Ordway, 38 Cal. 679.

tions that the complaint must state facts showing the nature [45] and invalidity [46] of defendant's title or claim, while in other jurisdictions the view obtains that the complaint need not state,[47] at least specifically,[48] the nature and circumstances of defendant's claim, or to deny knowledge thereof,[49] and that in this regard the bill need only allege that defendant is asserting some claim adverse to plaintiff,[50] and

Connecticut.— Welles *v.* Rhodes, 59 Conn. 498, 22 Atl. 286.

Oregon.— McLeod *v.* Lloyd, 43 Oreg. 260, 71 Pac. 795, 74 Pac. 491; Teal *v.* Collins, 9 Oreg. 89.

Texas.— Carver *v.* Crockett First Nat. Bank, 18 Tex. Civ. App. 425, 45 S. W. 475.

United States.— Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606.

See 41 Cent. Dig. tit. "Quieting Title," § 72.

Sufficient compliance with rule.— Where in a suit to remove a cloud, it appears from an abstract of title made a part of the complaint, that the conveyances under which defendant claims were received and recorded by him after the deeds under which plaintiff claims, there is a sufficient compliance with the rule requiring the complainant to allege the facts constituting the invalidity of the instruments which cast a cloud on the title. McLeod *v.* Lloyd, 43 Oreg. 260, 71 Pac. 795, 74 Pac. 491.

Use of term "cloud" unnecessary.— If all the facts are alleged which constitute a cloud on the title, that will be regarded as sufficient, although the term "cloud" is not used in the bill. Jewett *v.* Boardman, 181 Mo. 647, 61 S. W. 186; Williams *v.* Ayrault, 31 Barb. (N. Y.) 364.

Charge of fraud.— It is not enough, in an action to remove a cloud on title, to charge in general terms that a deed constituting the alleged cloud was obtained by fraud and deceit, but the specific facts constituting such fraud and deceit must be set forth. Emery *v.* Cochran, 82 Ill. 65.

45. McDonald *v.* Early, 15 Nebr. 63, 17 N. W. 257; Lamb *v.* Boyd, 4 Ohio Cir. Ct. 499, 2 Ohio Cir. Dec. 672; Page *v.* Kennan, 38 Wis. 320; Wals *v.* Grosvenor, 31 Wis. 681.

The rule in Kansas.— The petition should show the nature of defendant's claim if known, and if not known should aver ignorance thereof and pray a discovery. Douglass *v.* Nuzum, 16 Kan. 515.

46. Hesser *v.* Miller, 77 Cal. 192, 19 Pac. 375 (holding, however, that when the complaint shows, by necessary implication, that defendant's claim is invalid as against plaintiff, it need not so allege in terms); McDonald *v.* Early, 15 Nebr. 63, 17 N. W. 257; Page *v.* Kennan, 38 Wis. 320; Wals *v.* Grosvenor, 31 Wis. 681.

Rule in Mississippi.— If the complainant has knowledge of the nature of the adverse claim, the facts demonstrating its invalidity must be set forth in the complaint, and general allegations of fraud and simulation are insufficient. Gambrell Lumber Co. *v.* Saratoga Lumber Co., 87 Miss. 773, 40 So. 485.

47. *Colorado.*— Mitchell *v.* Titus, 33 Colo. 385, 80 Pac. 1042; Amter *v.* Conlon, 22 Colo. 150, 43 Pac. 1002.

Indiana.— Stribling *v.* Brougher, 79 Ind. 328; Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 383; Lafayette *v.* Wabash R. Co., 28 Ind. 497, 63 N. E. 237.

Kentucky.— Campbell *v.* Disney, 93 Ky. 41, 18 S. W. 1027, 13 Ky. L. Rep. 919.

Michigan.— Holbrook *v.* Winsor, 23 Mich. 394.

New Jersey.— Bishop *v.* Waldron, 56 N. J. Eq. 484, 40 Atl. 447 [*affirmed* in 58 N. J. Eq. 583, 43 Atl. 1098]; Monighoff *v.* Sayre, 41 N. J. Eq. 113, 3 Atl. 397; Ludington *v.* Elizabeth, 32 N. J. Eq. 159; Southmayd *v.* Elizabeth, 29 N. J. Eq. 203 [*affirmed* in 29 N. J. Eq. 650].

Ohio.— Darlington *v.* Compton, 20 Ohio Cir. Ct. 242, 11 Ohio Cir. Dec. 97.

United States.— Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 28 L. ed. 733; Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606.

See 41 Cent. Dig. tit. "Quieting Title," § 72.

48. McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634; Boyd *v.* Olvey, 82 Ind. 294; Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 383; Marot *v.* Germania Bldg., etc., Assoc. No. 2, 54 Ind. 37; Indiana Natural Gas, etc., Co. *v.* Beales, (Ind. App. 1905) 74 N. E. 551; Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370; Smith *v.* Taylor, 34 Tex. 589. See also Lafayette Second Nat. Bank *v.* Corey, 94 Ind. 457; Campbell *v.* Disney, 93 Ky. 41, 18 S. W. 1027, 13 Ky. L. Rep. 919.

49. Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606.

50. *Colorado.*— Amter *v.* Conlon, 3 Colo. App. 185, 32 Pac. 721.

Indiana.— Weaver *v.* Apple, 147 Ind. 304, 46 N. E. 642; Wilson *v.* Wilson, 124 Ind. 472, 24 N. E. 974; McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634; Rausch *v.* Trustees United Brethren, 107 Ind. 1, 8 N. E. 25; Boyd *v.* Olvey, 82 Ind. 294; Carss *v.* Foster, 62 Ind. 145 (holding further that it is not necessary that the complaint should aver in the precise words of the statute that defendant claims "title to or interest in" the land. Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 383; Marot *v.* Germania Bldg., etc., Assoc. No. 2, 54 Ind. 37; Lafayette *v.* Wabash R. Co., 28 Ind. App. 497, 63 N. E. 237.

Kentucky.— Campbell *v.* Campbell, 64 S. W. 458, 23 Ky. L. Rep. 869.

New Jersey.— Southmayd *v.* Elizabeth, 29 N. J. Eq. 203 [*affirmed* in 29 N. J. Eq. 650].

Ohio.— Darlington *v.* Compton, 20 Ohio Cir. Ct. 242, 11 Ohio Cir. Dec. 97.

Oregon.— Savage *v.* Savage, (1908) 94 Pac. 182; Teal *v.* Collins, 9 Oreg. 89.

United States.— Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291, 9 S. Ct. 293, 32 L. ed. 688; Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 28 L. ed.

that it is wrongful,[51] and call upon defendant to set it forth in his answer,[52] and submit its validity to the judgment and determination of the court.[53]

(VI) *As to Residence of Parties.* It is the better practice to aver the residence of the parties, and it is sometimes necessary to do so in order to show jurisdiction;[54] but a bill which alleges that the premises in controversy are located in the county in which the suit is brought is sufficient, although the bill does not allege the residence of the parties.[55]

(VII) *Describing Land* — (A) *Necessity.* A bill to quiet title must contain a pertinent description of the land in controversy;[56] otherwise it is fatally defective.[57]

(B) *Sufficiency.* The description of the property, contained in the bill, must be definite and accurate.[58] But a description as definite as can be in the nature of things,[59] or which is sufficiently definite to identify the property,[60] suffices.

(VIII) *Offering to Do Equity* — (A) *Necessity.* Whenever the object of the action is the removal of a cloud on plaintiff's title, which is created by a contract or agreement executed by him, he must expressly offer in his bill to do equity by restoring or repaying whatever he may have received under the contract or agreement sought to be canceled.[61] Likewise plaintiff must offer in his bill to do equity by offering to reimburse defendant for taxes or other charges on the property

733; Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606.

See 41 Cent. Dig. tit. "Quieting Title," § 72.

If plaintiff does not aver that defendant asserts an adverse estate or interest in the lands, there is no basis for the action, nor does it call for a defense. Smith *v.* Schlink, 15 Colo. App. 325, 62 Pac. 1044.

Averment not sufficient.—An allegation that the defendant "is setting up claim to the land" does not show that the claim of defendant is adverse. Campbell *v.* Disney, 93 Ky. 41, 18 S. W. 1027, 13 Ky. L. Rep. 919; Brown *v.* Ward, 105 S. W. 964, 32 Ky. L. Rep. 261.

51. Marot *v.* Germania Bldg., etc., Assoc. No. 2, 54 Ind. 37; Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606.

52. Marot *v.* Germania Bldg., etc., Assoc. No. 2, 54 Ind. 37; Teal *v.* Collins, 9 Oreg. 89; Holland *v.* Challen, 110 U. S. 15, 3 S. Ct. 495, 28 L. ed. 52; Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606.

Demand in the prayer sufficient.— The prayer is a part of the bill, and the statutory demand upon defendant to set forth his title or interest may be included therein. Slosson *v.* McNulty, 125 Ala. 124, 29 So. 183, 82 Am. St. Rep. 222.

53. Holland *v.* Challen, 110 U. S. 15, 3 S. Ct. 495, 28 L. ed. 52; Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606.

54. City Loan, etc., Co. *v.* Poole, 149 Ala. 164, 43 So. 13.

55. City Loan, etc., Co. *v.* Poole, 149 Ala. 164, 43 So. 13.

56. Smith *v.* Morgan, 28 Tex. Civ. App. 245, 67 S. W. 919; Schultz *v.* Highland Gold Mines Co., 158 Fed. 337. See also Howard *v.* Levering, 8 Ohio Cir. Ct. 614, 4 Ohio Cir. Dec. 236.

57. Smith *v.* Morgan, 28 Tex. Civ. App. 245, 67 S. W. 919.

58. *Alabama.*— Ward *v.* Janney, 104 Ala. 122, 16 So. 73.

California.— Head *v.* Fordyce, 17 Cal. 149.

Indiana.— Carr *v.* Huntington Light, etc., Co., 33 Ind. App. 1, 70 N. E. 552; Jones *v.* Mount, 30 Ind. App. 59, 63 N. E. 798.

Ohio.— See Howard *v.* Levering, 8 Ohio Cir. Ct. 614, 4 Ohio Cir. Dec. 236.

Oregon.— Kadderly *v.* Frazier, 38 Oreg. 273, 63 Pac. 487.

Texas.— Smith *v.* Morgan, 28 Tex. Civ. App. 245, 67 S. W. 919.

See 41 Cent. Dig. tit. "Quieting Title," § 75.

Not sufficiently definite.—A complaint which describes the land as the west half of a certain quarter section, "except 10 acres around well number one," is demurrable because of indefiniteness of the description of the land. Jones *v.* Mount, 30 Ind. App. 59, 63 N. E. 798. The description of a lot as on the south side of a certain street, between two other streets named, giving the dimensions of its front and its depth, and as being next east of S's lot, is insufficient, because, although S's lot might now be ascertained by parol, and the lot in question located, S's possession and ownership will not necessarily continue, and the description should be certain enough to always identify the property. Inge *v.* DeMouy, 122 Ala. 169, 25 So. 228.

59. Goldsmith *v.* Gilliland, 22 Fed. 865, 10 Sawy. 606.

60. Redd *v.* Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195; Pitcher *v.* Dove, 99 Ind. 175; Bynum *v.* Stinson, 81 Miss. 25, 32 So. 910. See also Butler *v.* Grand Rapids, etc., R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84.

61. Interstate Bldg., etc., Assoc. *v.* Stocks, 124 Ala. 109, 27 So. 506; Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58; New England Mortg. Security Co. *v.* Powell, 97 Ala. 483, 12 So. 55; Hays *v.* Carr, 83 Ind. 275. *Compare* Mitchell *v.* Baldwin, (Ala. 1908) 45 So. 715, holding that a bill in equity to cancel a

paid by him.[62] But where the complaint alleges that no taxes were due upon which the land could be sold,[63] or where it does not appear on the face of the bill, either expressly or by implication of law or fact, that any taxes were due,[64] a bill to remove a cloud, created by a tax deed, need not offer to pay any taxes as a condition of relief. Nor is it necessary for the complainant in his bill to offer to do equity by satisfying any claim or encumbrance which defendant may have had on the lands.[65]

(B) *Sufficiency.* While better pleading demands a direct and unconditional offer to repay such sums as plaintiff must pay as a condition of relief,[66] yet an offer by plaintiff to pay defendant whatever sum may be due on account of the matters set forth in the bill is a substantial offer to do equity and is sufficient.[67]

c. Prayer For Relief — (I) *Necessity* — (A) *When Complaint States Facts Entitling Plaintiff to Relief, and There Is No Answer.* Where the complaint states facts which entitle plaintiff to a judgment quieting his title, the suit may be regarded as an action to quiet title, and if the complaint is answered, such relief may be granted, although the complaint contains no such prayer.[68]

(B) *When Service on Defendant Was Constructive Only.* If service on defendant was not personal, but by publication alone, the complaint must set out exactly the relief sought.[69]

(II) *Uniting Prayer For Possession With Prayer For Removal of Cloud.* It has been held that when an action to quiet title lies at the instance of one not in possession, a prayer to recover possession may be united with a prayer that the cloud on title be removed.[70]

(III) *Including Special Prayer For Cancellation of Defendant's Muniment of Title.* If upon the facts stated the bill has equity a special prayer for the cancellation of the muniment of title under which defendant claimed will not destroy such equity.[71]

d. Joinder of Causes of Action. A complaint attempting to quiet the title under separate deeds of different tracts of land, formerly owned by different owners, is bad on demurrer for misjoinder of causes of action.[72] But there is no misjoinder of causes of action in a complaint to determine adverse claims to several tracts of land not contiguous, if such adverse claims are the same.[73] Nor is a complaint to cancel an instrument as a cloud on title bad on demurrer for misjoinder of causes of action, because it names several reasons why such instrument is invalid.[74]

e. Multifariousness. A bill to quiet title is not rendered multifarious by the fact that plaintiff seeks to quiet the title to several different pieces of property,

deed, alleged to be void by reason of the grantor's insanity, and to remove a cloud created by it, contains equity, although it does not offer to restore the consideration, since the payment of adequate consideration for the land is defensive matter.

The purpose of the rule requiring the offer to be made in the bill is to test the good faith of complainant; to require that he purge himself as far as possible of the guilt of complicity in the unlawful transaction, by declaring his purpose and readiness to do complete equity by restoring, as far as in his power, the other party to his original status. New England Mortg. Security Co. *v.* Powell, 97 Ala. 483, 12 So. 55.

62. Gage *v.* Kaufman, 133 U. S. 471, 10 S. Ct. 406, 33 L. ed. 725.

63. Gage *v.* Kaufman, 133 U. S. 471, 10 S. Ct. 406, 33 L. ed. 725.

64. Clark *v.* Darlington, 7 S. D. 148, 63 N. W. 771, 58 Am. St. Rep. 835.

65. Inge *v.* Demouy, 122 Ala. 169, 25 So. 228.

66. New England Mortg. Security Co. *v.* Poyell, 97 Ala. 483, 12 So. 55.

67. New England Mortg. Security Co. *v.* Powell, 97 Ala. 483, 12 So. 55.

68. Stockton *v.* Lockwood, 82 Ind. 158; Hunter *v.* McCoy, 14 Ind. 528.

69. Lamb *v.* Boyd, 4 Ohio Cir. Ct. 499, 2 Ohio Cir. Dec. 672.

70. Lees *v.* Wetmore, 58 Iowa 170, 12 N. W. 238.

71. Bledsoe *v.* Price, 132 Ala. 621, 32 So. 325.

72. Turner *v.* Duchman, 23 Wis. 500, holding further that the fact that one of the defendants is alleged to have been a former owner of some of the parcels in each deed renders the complaint none the less demurrable for an improper joinder of causes of action. See also Slosson *v.* McNulty, 125 Ala. 124, 39 So. 183, 82 Am. St. Rep. 222.

73. Pennie *v.* Hildreth, 81 Cal. 127, 22 Pac. 298.

74. Day *v.* Schnider, 28 Oreg. 457, 43 Pac. 650. See Joinder, etc., of Actions, 23 Cyc. 411, 421.

where the adverse title is in the same party;[75] or for joining as defendants persons who claim title from different sources when all the titles put in issue were once in the same defendant.[76] Nor is a bill to quiet title rendered multifarious by reason of the prayer for the cancellation of the muniment of title under which defendant claims.[77]

f. Waiver and Cure of Defects — (I) *By Admissions in Answer.* The omission of a material fact in the complaint is cured by its admission or averment in the answer;[78] and the fact that there is a demurrer to the complaint reserved in the answer does not take the case out of the rule of express waiver.[79]

(II) *By Not Taking Timely Objection* — (A) *In General.* It is too late to object for the first time at the trial or hearing,[80] or on appeal,[81] that the complaint omits a material fact, where the objection should have been raised by demurrer or answer.

(B) *Allegation of Possession.* The necessity of alleging possession in plaintiff may be waived by failure, either by demurrer or answer, to raise an objection, on that ground, to the jurisdiction of the court.[82]

(III) *Aider by Proof.* Failure to allege a material fact is not error after judgment, where the proof establishes the existence of such fact.[83]

g. Demurrer or Exceptions Thereto — (I) *Grounds* — (A) *Want of Possession by Plaintiff.* Want of possession by plaintiff is a good ground of demurrer to a bill which fails to show who is in actual possession of the lands in controversy;[84] but want of possession is not a good ground of demurrer to a bill by a party out of possession, claiming title to the realty as remainderman, pending possession of the life-tenant.[85]

(B) *Want of Title in Plaintiff.* Where, in a suit to remove a cloud from title, in addition to alleged ownership in fee, the facts which constitute the title are also set out and such facts do not show title, a demurrer to the bill will lie.[86] Where complainant is seeking affirmative relief, based upon a patent to land, defendant may attack the validity of such patent by demurrer, on the ground that it is void on its face, without first showing that he has an interest in the land.[87]

(C) *Want of Proper Averments as to Cloud.* A bill in a suit to remove a cloud on title is demurrable for failure to allege the facts that show the apparent validity of the alleged cloud, and also the facts showing its actual invalidity.[88]

75. Mitchell *v.* Knott, (Colo. 1908) 95 Pac. 335.

76. Mitchell *v.* Knott, (Colo. 1908) 95 Pac. 335; Hammontree *v.* Lott, 40 Mich. 190.

77. Bledsoe *v.* Price, 132 Ala. 621, 32 So. 325.

78. Hess *v.* Adler, 67 Ark. 444, 55 S. W. 843; Davis *v.* Hare, 32 Ark. 386; Cohen *v.* Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711; Goodloe *v.* Black, 54 S. W. 957, 21 Ky. L. Rep. 1286; Girdner *v.* Girdner, 32 S. W. 266, 17 Ky. L. Rep. 657.

79. Davis *v.* Hare, 32 Ark. 386; Cohen *v.* Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711.

80. Monson *v.* Kill, 144 Ill. 248, 33 N. E. 43; Gage *v.* Schmidt, 104 Ill. 106; Monson *v.* Jacques, 44 Ill. App. 306 [*affirmed* in 144 Ill. 248, 651]; McClave *v.* Newark, 31 N. J. Eq. 472; Jones *v.* Collins, 16 Wis. 594.

After proofs taken it is too late to attack the bill as not alleging that defendant asserts a hostile title. Cleland *v.* Casgrain, 92 Mich. 139, 52 N. W. 460.

81. Pollock Min., etc., Co. *v.* Davenport, 31 Mont. 452, 78 Pac. 768. See Appeal and Error, 2 Cyc. 681 *et seq.*

82. Gage *v.* Schmidt, 104 Ill. 106; Mitchell *v.* McFarland, 47 Minn. 535, 50 N. W. 610; Hooper *v.* Henry, 31 Minn. 264, 17 N. W. 476; Snowden *v.* Tyler, 21 Nebr. 199, 31 N. W. 661; Jones *v.* Collins, 16 Wis. 594. See also Mosier *v.* Momsen, 13 Okla. 41, 74 Pac. 905.

The filing of a cross bill in a suit to quiet title, alleging possession in defendant, and praying that his own title be established and quieted, confers jurisdiction on a court of equity to determine the question of title as between the parties and grant relief to the one entitled to the same, although the fact that plaintiff was not in possession would have defeated jurisdiction upon the original bill. Sanders *v.* Riverside, 118 Fed. 720, 55 C. C. A. 240.

83. Tourtellotte *v.* Pearce, 27 Nebr. 57, 42 N. W. 915.

84. Union Pac. R. Co. *v.* Meier, 28 Fed. 9.

85. Worthington *v.* Miller, 134 Ala. 420, 32 So. 748.

86. West Coast Lumber Co. *v.* Griffin, 54 Fla. 621, 45 So. 514.

87. Lockhard *v.* Asher Lumber Co., 123 Fed. 480.

88. Chaplin *v.* Holmes, 27 Ark. 414; Teal *v.* Collins, 9 Oreg. 89.

(D) *Want of Necessary Parties.* A demurrer lies where a want of necessary parties is disclosed by the bill itself.[89]

(E) *Multifariousness.* In an action to quiet title, plaintiff's pleadings are not demurrable because they show that there are other persons holding outstanding titles, and that making them parties would result in a multifariousness of properties and parties, for it is no concern of defendant that there are other outstanding titles that might constitute a cloud.[90]

(F) *Defects in Form* — (1) IN GENERAL. A bill which shows complainant to be entitled to relief is not demurrable because it is imperfectly drawn.[91]

(2) PRAYER FOR RELIEF. A demurrer to the bill for want of sufficient facts will not reach a defect, if any exist, in the prayer for relief.[92]

(G) *Plaintiff's Equity Barred by Time.* Where the bill fails to show clearly when complainant acquired title, a special demurrer, on the ground that complainant's equity is barred by time, will be overruled.[93]

(II) *FORM OF* — (A) *In General.* It is improper practice, where the bill gives a history of plaintiff's claim, to demur to a part and answer to part thereof; but, as a whole, it either does or does not show title, and, as a whole, should be demurred to or answered.[94]

(B) *Necessity of Stating Grounds.* The objection that complainant is not alleged in the bill to be in possession of the realty in controversy, to be available on demurrer, should be especially pointed out in the demurrer according to the practice in chancery.[95]

(III) *DEMURRER TO PLEADING GOOD IN PART.* A demurrer to the entire bill should be overruled, if the bill shows a right to any relief.[96] Accordingly a bill will not be held bad on a general demurrer, if it is maintainable as to part of the lands described in the complaint.[97]

(IV) *WAIVER OF.* Where in a suit defendant tenders a peremptory exception that there is no cause of action because defendant was not in possession, and the exception is referred to the merits without prejudice, it is not waived by an answer in which it is expressly reserved.[98]

(V) *HEARING.* On demurrer to a bill involving a question of boundaries, or what lands were intended to be conveyed by a certain description, which might be more or less affected by oral evidence or circumstances difficult to set forth in detail in the bill, plaintiff is entitled to the benefit of all such extrinsic evidence as might be introduced in support of his theory on the question under the case made by the bill.[99]

2. PLEA — a. In General. Where the allegations of the plea, being taken as true, do not, so far as it purports to go, make a full and complete defense,[1] or where the necessary facts are to be gathered by inference alone,[2] it will not be sustained. It must be perfect in itself, so that if true, it will make an end of the case,[3] or of that part of the case to which it applies.[4]

b. To Whole Bill. If the plea undertakes to answer the whole bill, but extends only to a part thereof, it is bad.[5]

89. Howell *v.* Merrill, 30 Mich. 282.
90. Mitchell *v.* Knott, (Colo. 1908) 95 Pac. 335; Hammontree *v.* Lott, 40 Mich. 190.
91. Damouth *v.* Klock, 29 Mich. 289.
92. Stribling *v.* Brougher, 79 Ind. 328.
93. Union Pac. R. Co. *v.* Meier, 28 Fed. 9.
94. Catchot *v.* Ocean Springs, (Miss. 1903) 34 So. 145.
95. Gage *v.* Schmidt, 104 Ill. 106.
96. Snow *v.* Counselman, 136 Ill. 191, 26 N. E. 590; Quitman County *v.* Stritze, 69 Miss. 460, 13 So. 35; Boyle *v.* Brooklyn, 71 N. Y. 1.
97. Kelly *v.* Martin, 107 Ala. 479, 18 So. 132; Snow *v.* Counselman, 136 Ill. 191, 26 N. E. 590; Aldrich *v.* Boice, 56 Kan. 170, 42 Pac. 695; Quitman County *v.* Stritze, 69 Miss. 460, 13 So. 35; Northern Pac. R. Co. *v.* Roberts, 42 Fed. 734 [*affirmed* in 158 U. S. 1, 15 S. Ct. 756, 39 L. ed. 873].
98. Craig *v.* Lambert, 44 La. Ann. 885, 11 So. 464.
99. Howell *v.* Merrill, 30 Mich. 282.
1. Gage *v.* Smith, 142 Ill. 191, 31 N. E. 430.
2. Gage *v.* Smith, 142 Ill. 191, 31 N. E. 430.
3. Gage *v.* Smith, 142 Ill. 191, 31 N. E. 430.
4. Gage *v.* Smith, 142 Ill. 191, 31 N. E. 430.
5. Snow *v.* Counselman, 136 Ill. 191, 26 N. E. 590.

c. Partial Pleas. The plea may be to the whole bill or to some distinct portion thereof,[6] and if partial must definitely and exactly express to what part it extends.[7]

3. Answer — a. In General. The answer must of course state facts sufficient to constitute a defense.[8]

b. Denials — (i) *In General.* A denial of a material allegation of the bill or complaint,[9] such as title [10] or possession,[11] is sufficient to raise an issue. Defendant need not allege his own title.[12]

(ii) *Matters Not in Bill.* The general rule of equity pleading, that a defendant who claims protection as a *bona fide* purchaser without notice must deny such notice, although not distinctly alleged in the complaint, applies in actions to quiet title,[13] and the pleader must deny fully, in the most precise terms, every circumstance from which notice could be inferred.[14]

c. Admissions — (i) *In General.* A direct admission in the answer that plaintiff is in possession binds defendant, and the binding force of such admission is not avoided by a special averment that plaintiff obtained possession by fraud.[15]

(ii) *By Failure to Deny.* The fact of possession is susceptible of a direct denial, and if not so denied, it is admitted.[16]

(iii) *By Pleading General Issue.* If plaintiff alleges title by devise, and the answer contains only a general denial, the effect of the answer is to admit that plaintiff acquired such interest in the land as the devisor had at the time of his death.[17]

Rule applied.— Thus, where a bill seeks to remove a cloud on title, a plea to the entire bill, denying none of the allegations on which relief is sought, but which merely sets up that plaintiff is not entitled to relief, for the reason that he has not offered to refund the taxes paid by one under whom defendant claims, on the sale of the property for taxes, is bad. Snow *v.* Counselman, 136 Ill. 191, 26 N. E. 590.

6. Snow *v.* Counselman, 136 Ill. 191, 26 N. E. 590.

7. Snow *v.* Counselman, 136 Ill. 191, 26 N. E. 590.

8. Butterfield *v.* Graves, 138 Cal. 155, 71 Pac. 510 (holding, however, that an answer denying that plaintiff was at any time owner of any right, title, or interest in or to the premises, or any part thereof, and denying that defendants had no estate, right, title, or interest therein, and alleging that at the commencement of the action certain defendants owned, and still own, the legal title in fee to all the premises, is sufficient, although alleging that said defendants hold the legal title under certain trusts, which are not described, but with which it is alleged plaintiff is in no wise connected); Hackworth *v.* Layne, 56 S. W. 817, 22 Ky. L. Rep. 185.

9. *California.*— Peterson *v.* Plunkett, 4 Cal. App. 302, 88 Pac. 283; United Land Assoc. *v.* Pacific Imp. Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988 [*affirmed* in 208 U. S. 614, 28 S. Ct. 569, 52 L. ed. 645].

Idaho.— Bacon *v.* Rice, 14 Ida. 107, 93 Pac. 511.

Kansas.— Pierce *v.* Thompson, 26 Kan. 714.

Montana.— Sklower *v.* Abbott, 19 Mont. 228, 47 Pac. 901.

North Dakota.— Hebden *v.* Bina, (1908) 116 N. W. 85.

Compare Lambert *v.* Shumway, 36 Colo. 350, 85 Pac. 89.

See 41 Cent. Dig. tit. "Quieting Title," § 78.

10. Jellison *v.* Halloran, 40 Minn. 485, 42 N. W. 392; Soria *v.* Stowe, 66 Miss. 615, 6 So. 317; Peck *v.* Brown, 26 How. Pr. (N. Y.) 350, holding that in an action by a trustee an answer setting up facts showing that the purposes of the trust have been accomplished amounts to a denial of his title, and is sufficient.

11. Pierce *v.* Thompson, 26 Kan. 714; Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441; Sklower *v.* Abbott, 19 Mont. 228, 47 Pac. 901.

12. United Land Assoc. *v.* Pacific Imp. Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988 [*affirmed* in 208 U. S. 614, 28 S. Ct. 569, 52 L. ed. 645]; Peterson *v.* Plunkett, 4 Cal. App. 302, 88 Pac. 283; Hebden *v.* Bina, (N. D. 1908) 116 N. W. 85. *Compare* Lambert *v.* Shumway, 36 Colo. 350, 85 Pac. 89; Wall *v.* Magnes, 17 Colo. 476, 30 Pac. 56.

13. Dailey *v.* Kinsler, 35 Nebr. 835, 53 N. W. 973.

14. Dailey *v.* Kinsler, 35 Nebr. 835, 53 N. W. 973.

15. Reed *v.* Calderwood, 32 Cal. 109.

16. Watterson *v.* Ury, 5 Ohio Cir. Ct. 347, 3 Ohio Cir. Dec. 171 (holding further that an answer admitting plaintiff's possession, but averring that such possession is unlawful, is obnoxious to the objection that it is argumentative and is a plea of a legal conclusion); Slater *v.* Reed, 37 Oreg. 274, 60 Pac. 709 (holding that where the complaint in an action to quiet title alleges plaintiff's possession and right of possession, and defendant denies the right of possession, the actual possession of plaintiff is admitted). See also Collier *v.* Goessling, 160 Fed. 604, 87 C. C. A. 506.

17. Shirk *v.* Williamson, 50 Ark. 562, 9 S. W. 307.

d. Pleading Defenses — (I) *Particular Defenses* — (A) *Title or Ownership in Defendant* — (1) In General. If plaintiff makes an alleged ownership in land his sole basis of action to quiet title, an answer is not demurrable where it makes a specific denial of such ownership with positive, affirmative averments showing fee simple title in defendant, although it does not recite all the evidence by which such defense is to be established.[18]

(2) Equitable Title. Defendant, to avail himself of an equitable title as against plaintiff's legal title, should specifically plead it.[19]

(3) When Claim of Title in Separate Defenses Not Inconsistent. Allegations of tax title and the facts by which it was acquired, in one defense in an answer, are in no wise consistent with a claim of title antecedent to it, and do not qualify the allegation of such antecedent title in a previously stated separate defense.[20]

(B) *Adverse Possession.* An answer purporting to set up the defense, that defendant was in adverse possession of the lands when plaintiff took conveyance, is bad for failure to aver that defendant entered, believing in good faith that he had title.[21]

(C) *Adverse Claim.* It has been held that in statutory proceedings to determine adverse claims, defendant relying on an adverse claim in himself must, as a condition precedent to the right to try the issue of plaintiff's possession, plead the nature of his claim.[22]

(D) *Adequate Remedy at Law.* A defendant in an action to remove a cloud on title, in order to avail himself of the defense that an adequate remedy at law exists, must plead that defense in his answer.[23]

(II) *Partial Defenses.* An answer which confesses that the fee is in plaintiff may *pro tanto* defeat the action where, by appropriate and adequate averments, it sets forth that defendant holds a lien;[24] that is to say, it may at least secure a lien hold and provision in the decree, reserving, protecting, or enforc-

18. Male *v.* Brown, 11 S. D. 340, 77 N. W. 585.

An allegation in the answer that the land is the property of defendant, subject only to certain recited mortgages, and showing further the issue to him of a final receipt therefor by the United States land office, is a sufficient allegation of defendant's ownership. Grace *v.* Ballou, 4 S. D. 333, 56 N. W. 1075.

An answer in an action by a railroad company to remove a cloud on its title to a part of its road equipment and appurtenances, which alleges that the property was placed in the hands of a receiver and sold by order of court, that defendant became the purchaser at the receiver's sale, and that title vested in him by reason of the sale, is sufficient as against a demurrer. Harle *v.* Texas Southern R. Co., 39 Tex. Civ. App. 43, 86 S. W. 1048.

19. United Land Assoc. *v.* Pacific Imp. Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988 [*affirmed* in 208 U. S. 614, 28 S. Ct. 569, 52 L. ed. 645].

Answer held not to show equitable title.— An answer alleging that defendant claims under an agreement with plaintiff's mortgagor whereby defendant is to receive a conveyance of an undivided one half of the land on the payment of the purchase-price, and that an action pending between defendant and the mortgagor's personal representative, to which plaintiff is a party, to settle partnership accounts, and sell the land without alleging payment of the price, or any excuse for failure to pay it, or that, on settlement of the accounts, defendant will be entitled to any interest in the land, is demurrable. Pennie *v.* Hildreth, 81 Cal. 127, 22 Pac. 398.

20. Branham *v.* Bezanson, 33 Minn. 49, 21 N. W. 861.

21. Elliott *v.* Frakes, 90 Ind. 389.

Pleading such defense under code.— Where adverse possession under color of title is relied on in an action to quiet title, it is proper to plead the section of the code establishing the period of limitations, omitting all references to the explanatory sections. Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431.

22. Wall *v.* Maynes, 17 Colo. 476, 30 Pac. 56; Colburn *v.* Dortic, 18 Colo. App. 96, 70 Pac. 151.

Answer held to show claim to some extent adverse.— The answer in a suit to quiet title to an undivided three-fourths interest in the land shows a claim to some extent adverse to plaintiff's interest, and therefore should not be stricken out; plaintiff claiming a three-sixteenths interest through M, and defendant claiming a one-tenth interest through M, and it appearing from the pleadings that M originally owned not exceeding a one-fifth interest. Colburn *v.* Dortic, 18 Colo. App. 96, 70 Pac. 151.

23. Nickerson *v.* Canton Marble Co., 35 N. Y. App. Div. 111, 54 N. Y. Suppl. 705.

24. Manifold *v.* Jones, 117 Ind. 212, 20 N. E. 124.

ing his lien.[25] But this rule cannot apply where the answer confesses that the fee is in plaintiff, and does no more than show that a stranger to the action holds an outstanding lien.[26]

(III) *JOINDER OF DEFENSES.* The fact that defendant's right to relief arose after the complaint was filed does not support a claim of misjoinder of defenses, where there is no repugnance or inconsistency in the several grounds of defense, the new matter pleaded affects all the parties and no others, and the transaction out of which defendant's right to relief arose is connected with the subject-matter of the action.[27]

(IV) *CONSOLIDATION OF DEFENSES.* If certain defenses, repeated in separate denials of the answer, are, in substance specifications of sources of title, the court may properly order them consolidated, and hence commits no error in merely striking out the repetition of the denials.[28]

e. Pleading Counter-Claim — (I) *IN GENERAL.* Under the code provisions governing pleading, it is generally held that, in actions to quiet title or remove cloud, matter may be pleaded as a counter-claim if it constitutes a cause of action in favor of defendant against plaintiff, and is connected with the subject of plaintiff's action;[29] and even where such matter is set up in the answer and may be a complete defense to the cause of action alleged in the complaint, it may also be pleaded as a counter-claim.[30] Thus defendant may set up by way of counter-claim an equitable title in himself,[31] or that the deed under which plaintiff holds was fraudulently procured.[32]

(II) *FOR MONEY DEMAND.* In an action to quiet title, defendant cannot interpose a counter-claim for a mere money demand, and obtain a personal judgment therefor.[33]

f. Pleading Matters in Confession and Avoidance. It is proper, if not absolutely necessary, that defendant should specially plead all matters in confession and avoidance of the complaint.[34] It is held, however, in one jurisdiction at least, that no answer is necessary but a general denial, as under that answer all defenses, legal or equitable, partial or complete, may be shown.[35]

4. REPLICATION OR REPLY — a. Necessity — (I) *IN GENERAL.* Following the general rules of pleading to new matter, properly pleaded by way of defense[36]

25. Manifold *v.* Jones, 117 Ind. 212, 20 N. E. 124.

26. Manifold *v.* Jones, 117 Ind. 212, 20 N. E. 124.

27. Flint *v.* Dulany, 37 Kan. 332, 15 Pac. 208.

28. Dawson *v.* Orange, 78 Conn. 96, 61 Atl. 101.

29. Griffin *v.* Jorgenson, 22 Minn. 92; Moody *v.* Moody, 16 Hun (N. Y.) 189.

Pleading held not to contain counter-claim. —A complaint sought to quiet title to three parcels of real estate. Defendants filed a pleading setting up a tax lien on the undivided three fourths of three parcels of land, but not alleging that the same was the land or parcels described in the complaint. It was held that the pleading did not contain matter arising out of, or connected with, plaintiff's cause of action, nor would it tend to reduce plaintiff's claim or demand. Thompson *v.* Toohey, 71 Ind. 296.

30. Griffin *v.* Jorgenson, 22 Minn. 92.

31. Barnes *v.* Union School Tp., 91 Ind. 301.

A counter-claim setting up title in defendant is unnecessary, where the statute authorizes a defendant to answer, setting up any matter which, if proved, will establish his own title. Sloan *v.* Rose, 101 Wis. 523, 77 N. W. 895.

32. Griffin *v.* Jorgenson, 22 Minn. 92; Moody *v.* Moody, 16 Hun (N. Y.) 189.

33. Kane *v.* Borthwick, 50 Wash. 8, 96 Pac. 516.

34. Bunch *v.* Bunch, 26 Ind. 400.

35. Messick *v.* Midland R. Co., 128 Ind. 81, 27 N. E. 419.

Defendant is entitled to be heard, where his answer denies the material allegations of the complaint. Butterfield *v.* Graves, 138 Cal. 155, 71 Pac. 510.

Defendant may give in evidence title in himself under the general denial, and it follows that the allegation of such title in the answer does not constitute new matter. Leggatt *v.* Stewart, 5 Mont. 107, 2 Pac. 320; Meyendorf *v.* Frohner, 3 Mont. 282.

In an action by an administrator a general denial puts in issue plaintiff's ownership of the land, and the fact that he is administrator, and is not demurrable on the ground that it does not set up defendant's claim or disclaim. Pennie *v.* Hildreth, 81 Cal. 127, 22 Pac. 398.

36. Schlageter *v.* Gude, 30 Colo. 310, 70 Pac. 428; Irvine *v.* Irvine, 89 S. W. 193, 28 Ky. L. Rep. 262; School Dist. No. 73 *v.* Wra-

or counter-claim,[37] and not demurred to, plaintiff must respond by a reply; but matters put in issue by the complaint and the general denial thereof in the answer are not required to be denied by a reply.[38]

(II) *WAIVER OF.* Defendant, by his conduct, may waive a reply.[39]

b. Requisites. The reply must not depart from the cause of action stated in the complaint.[40]

c. Effect of Failure to File. If no replication to an answer containing new matter is filed, the answer is taken as true.[41]

5. DISCLAIMER — a. Necessity of, to Relieve From Liability. A defendant claiming no interest in the land which is the subject-matter of the action must, in order to save himself from liability for costs, appear and file an absolute and unqualified disclaimer.[42] And if defendant does not claim a part of the land, he should specify the part disclaimed, failing to do which he must be treated as claiming the whole.[43]

b. Constitutes Good Answer When Defendant Out of Possession. A disclaimer is a good answer when defendant is out of possession.[44]

c. When Answer Amounts to. Where the facts necessary to constitute a cause of action under the statute are the actual possession of the land by plaintiff, and some claim on the part of defendant, adverse to him, of an estate or interest in the land, an answer denying any interest thereunder other than a lien on the land amounts to a disclaimer.[45]

d. Effect. A disclaimer by a defendant operates as an estoppel, and between the parties and their privies is an absolute bar to any other assertion of the right renounced.[46]

6. CROSS BILL OR COMPLAINT — a. In General. Although it has been held that, where defendant relies on his own possession, and the relief demanded by him can

beck, 31 Minn. 77, 16 N. W. 493; State *v.* Bachelder, 5 Minn. 223, 80 Am. Dec. 410. See also Bailey *v.* Galpin, 40 Minn. 319, 41 N. W. 1054.

An averment in the answer of matter which, if true, would deprive the court of jurisdiction must, if not in conflict with any allegation in the complaint, be put in issue by a replication. Peacock *v.* Scott, 104 N. C. 154, 10 S. E. 456.

37. Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328.

38. Walker *v.* Sioux City, etc., Land Co., 66 Iowa 751, 24 N. W. 563.

39. Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 104, 44 Am. St. Rep. 511, 21 L. R. A. 328, holding further that where both parties at the trial treat new matter, pleaded as a counter-claim, as traversed and at issue, and evidence upon the same is put in without objection, and the court without objection proceeds to litigate and determine the subject-matter of the counter-claim, it will not be too late, after judgment, to raise the point that no reply was served.

40. Neve *v.* Allen, 55 Kan. 638, 41 Pac. 966, holding, however, that where defendants in an action to quiet title pleaded facts showing they were tenants in common as to a one-third interest, a reply admitting that they held the naked legal title to the extent of such interest, and that a deed was given therefor with their consent by one supposed by all parties to have authority as trustee to convey the land, did not constitute a departure.

41. Irvine *v.* Irvine, 89 S. W. 193, 28 Ky. L. Rep. 262; Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328.

42. Blodgett *v.* Dwight, 38 Mich. 596 (holding further that in a suit against a grantee in a quitclaim deed from a person of the same name as the true owner of the land, the grantee having good reason to suppose that his grantor was not the actual owner, his failing to disclaim, and answering, thereby unnecessarily causing costs, is not justified by his professing willingness to do justice and to settle for a small bonus); Davis *v.* Read, 65 N. Y. 566; Moore *v.* Wallace, 16 Okla. 114, 82 Pac. 825.

A denial "except as hereinafter stated" is not an absolute disclaimer such as is required. Moores *v.* Clackamas County, 40 Oreg. 536, 67 Pac. 662.

43. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821.

44. Miller *v.* Curry, 124 Ind. 48, 24 N. E. 219, 374.

Disclaimer must be accompanied by offer to release.— Under the provisions of the Kentucky statute, it is not enough for defendant to fully and fairly disclaim all title in his answer, unless such disclaimer is accompanied by an offer to release. Loftus *v.* Cates, 1 T. B. Mon. (Ky.) 97.

45. Brackett *v.* Gilmore, 15 Minn. 245.

46. Pixley *v.* Huggins, 15 Cal. 127; New American Oil, etc., Co. *v.* Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; Levy *v.* Hart, 54 Barb. (N. Y.) 248.

be had on the averments of his answer, a cross bill to quiet title is unnecessary,[47] and may be stricken out,[48] yet the right of defendant to file a cross bill, urging a superior title in himself, and to be fully heard,[49] especially where full relief cannot be given to defendant upon answer,[50] is generally recognized. But the cross bill can only be sustained in respect to matters germane to those of the original bill,[51] and hence will not lie to quiet a title distinct from that which plaintiff in his original bill prays to have quieted.[52]

b. Averments — (i) *In General.* The general rule is that a cross bill to quiet title must set up such facts as are required in an original bill for the same purpose.[53]

47. Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195; Wilson *v.* Madison, 55 Cal. 5; Bacon *v.* Rice, 14 Ida. 107, 93 Pac. 511. See also Winter *v.* McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; Shields *v.* Sorg, 129 Ill. App. 266 [*affirmed* in 233 Ill. 79, 84 N. E. 181].

48. Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195.

49. *Arkansas.*— Cook *v.* Ziff Colored Masonic Lodge No. 119, 80 Ark. 31, 96 S. W. 618.

California.— Stephenson *v.* Deuel, 125 Cal. 656, 58 Pac. 258.

Georgia.— Jones *v.* Thacker, 61 Ga. 329.

Idaho.— Bacon *v.* Rice, 14 Ida. 107, 93 Pac. 511.

Indiana.—Rausch *v.* Trustees United Brethren, 107 Ind. 1, 8 N. E. 25; Barnes *v.* Union School Tp., 91 Ind. 301.

Iowa.— Switz *v.* Black, 45 Iowa 597.

Kentucky.— Loughridge *v.* Cawood, 97 Ky. 533, 31 S. W. 125, 17 Ky. L. Rep. 364.

Michigan.—McKenzie *v.* A. P. Cook Co., 113 Mich. 452, 71 N. W. 868.

North Dakota.— Betts *v.* Signor, 7 N. D. 399, 75 N. W. 781.

United States.— Remer *v.* McKay, 38 Fed. 164; Chicago, etc., R. Co. *v.* Wasserman, 22 Fed. 872; Greenwalt *v.* Duncan, 16 Fed. 35, 5 McCrary 132.

See 41 Cent. Dig. tit. "Quieting Title," § 78 *et seq.*

Cross bill indispensably necessary.—A defendant seeking to enforce a specific lien in a suit to quiet title must do so by cross bill, and must set forth the grounds on which he relies for affirmative relief. Tucker *v.* McCoy, 3 Colo. 284.

Original bill not giving jurisdiction.—Where defendant in an action seeks to quiet title in himself, equity will retain jurisdiction, and proceed to final determination of the matters at issue between the parties, even though the complaint did not give such jurisdiction. Reichelt *v.* Perry, 15 S. D. 601, 91 N. W. 459.

50. Winter *v.* McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243. See also McGuire *v.* Van Buren County Cir. Judge, 69 Mich. 593, 37 N. W. 568.

51. Meyer *v.* Calera Land Co., 133 Ala. 554, 31 So. 938; Dinsmoor *v.* Rowse, 200 Ill. 555, 65 N. E. 1079; Gage *v.* Mayer, 117 Ill. 632, 7 N. E. 97; McGuire *v.* Van Buren County Cir. Judge, 69 Mich. 593, 37 N. W. 568.

No departure from the original case.— Where the original bill draws in question the existence or extent of defendant's claim to the property, a cross bill setting up defendant's mortgage, and asking to foreclose the same, does not involve a departure from the original case. Jenkins *v.* Jonas Schwab Co., 138 Ala. 664, 35 So. 649.

52. Meyer *v.* Calera Land Co., 133 Ala. 554, 31 So. 938; Naler *v.* Ballew, 81 Ark. 328, 99 S. W. 72; Worcester *v.* Kitts, (Cal. App. 1908) 96 Pac. 335; Gage *v.* Mayer, 117 Ill. 632, 7 N. E. 97.

53. Bacon *v.* Rice, 14 Ida. 107, 93 Pac. 511; Conger *v.* Miller, 104 Ind. 592, 4 N. E. 300. Allen *v.* Douglass, 29 Kan. 412; Summet *v.* City Realty, etc., Co., 208 Mo. 501, 106 S. W. 614.

Except that he need not show the grounds of equity to support the jurisdiction of the court, a party defendant seeking specific relief in an equitable action to quiet title must, in his cross bill, state the grounds upon which he relies for affirmative relief with the same strictness required of the complainant in the original bill. Tucker *v.* McCoy, 3 Colo. 284.

The cross bill must be good within itself, without aid from other pleadings in the cause. Conger *v.* Miller, 104 Ind. 592, 4 N. E. 300.

Cross bills held sufficient.— A cross complaint alleging, in substance, that the cross complainant is the owner of the realty described in the complaint, and that the complainants claim an interest therein adverse to him, which is unfounded and casts a cloud on his title, is sufficient. Johnson *v.* Taylor, 106 Ind. 89, 5 N. E. 732. A cross complainant alleged that defendant turned out to the sheriff a certain piece of land on execution; that the sheriff by mistake sold the land in controversy which also belonged to defendant; that defendant then sold the land turned out to the sheriff, the consideration being that the grantee redeem the land sold by the sheriff; that the grantee borrowed money with which to redeem the land and assigned the sheriff's certificate as security; that the loan was thereafter paid, but the grantee neglected to have the certificate reassigned, and a sheriff's deed was issued to the lender of the money, who subsequently gave plaintiff a quitclaim deed. It was held that the cross complaint stated facts sufficient to constitute a cause of action. Allen *v.* Adams, 150 Ind. 409, 50 N. E. 387. A counter-claim by way of cross complaint, alleging that defendant was the owner and in possession of the land, and that plaintiff, by virtue of the pretended deed, set forth in his complaint or "by some other paper writing, the character or nature

(II) *Title in Defendant.* The cross bill should contain adequate averments to show title in defendant.[54]

(III) *Possession in Defendant.* Possession in defendant need not be alleged.[55]

(IV) *Plaintiff's Claim Adverse.* Although it is not averred in express terms that plaintiff's claim of title is adverse to that of cross complainant, it is sufficient, on demurrer, if facts are alleged showing such to be the case.[56]

e. Effect on Cross Bill of Dismissal of Original Bill. The rule is that a dismissal of the original bill carries with it the cross bill,[57] unless the latter has some independent equity which springs from matters germane to those of the former, and can uphold the jurisdiction of the court.[58]

d. Waiver of Objection Regarding. Where a cross complaint is filed, praying that title be quieted in defendant, a plaintiff who does not attack it by demurrer or motion to strike out, but answers it and goes to trial on the merits, waives his right to object that such cross complaint is not a proper method of procedure in an action to quiet title.[59]

e. Answer to Cross Bill. Where an answer to a cross bill is required, and none is filed, it is proper to enter an order taking the cross bill as confessed.[60]

7. Amended or Supplemental Pleadings — a. Discretion of Court as to Allowance. The question as to the allowance or refusal of an amendment is ordinarily one for the court to determine in the exercise of its discretion; [61] and its ruling will not be reversed by the appellate court,[62] unless there appears to have been an abuse of discretion.[63]

b. Character of Amendments — (I) *In General.* So long as the subject of the action remains substantially the same, an amendment may be permitted to adapt the relief to the facts relied on for recovery.[64] But a new and different

of which is unknown" to him, claimed a title which was unfounded, and was a cloud on his, defendant's, title, and asking that the title thereto be quieted in him as against such plaintiff, is sufficient. Cooper *v.* Jackson, 71 Ind. 244. A cross complaint alleging that the property had been devised to defendant, and that plaintiff's claim was under a deed procured by undue influence, was not demurrable as not stating a cause of action. Curtis *v.* Burns, 27 Ind. App. 74, 60 N. E. 963.

Pleading denominated "counter-claim."— Where, in an action to quiet title, defendant's right constitutes the basis of a cross action for the same purpose, and her pleading contained all the essential elements of a cross complaint, the fact that such pleading is called a counter-claim does not determine its character or affect the rights of the litigants. McClanahan *v.* Williams, 136 Ind. 30, 35 N. E. 897.

54. Cook *v.* Ziff Colored Masonic Lodge No. 119, 80 Ark. 31, 96 S. W. 618; Greenwalt *v.* Duncan, 16 Fed. 35, 5 McCrary 132.

55. Greenwalt *v.* Duncan, 16 Fed. 35, 5 McCrary 132, where the court says that plaintiff is in court for the sole reason that he is in possession, and has therefore brought in defendant, who is out of possession, to answer to the demand made, and defendant being thus in court at plaintiff's instance, has a right by cross bill to be fully heard, and is not to be denied a full hearing because the sole basis, jurisdictionally, of plaintiff's bill is true.

56. Kitts *v.* Willson, 106 Ind. 147, 5 N. E. 400.

57. Jones *v.* Thacker, 61 Ga. 329; Harlan *v.* Porter, 50 Iowa 446.

When the matter set up in the cross bill is simply a matter of defense, it is disposed of by the dismissal of the original bill. Slason *v.* Wright, 14 Vt. 208. See also McGuire *v.* Van Buren County Cir. Judge, 69 Mich. 593, 37 N. W. 568.

58. Meyer *v.* Calera Land Co., 133 Ala. 554, 31 So. 938.

59. Johnson *v.* Taylor, 150 Cal. 201, 88 Pac. 903, 10 L. R. A. N. S. 818.

60. Messenger *v.* Peter, 129 Mich. 93, 88 N. W. 209.

61. McDuffee *v.* Sinnott, 119 Ill. 449, 10 N. E. 385; Wyland *v.* Mendel, 78 Iowa 739, 37 N. W. 160; Newman *v.* Buzard, 24 Wash. 225, 64 Pac. 139.

62. Riverside Land, etc., Co. *v.* Jensen, 73 Cal. 550, 15 Pac. 131; McDuffie *v.* Sinnott, 119 Ill. 449, 10 N. E. 385; Wyland *v.* Mendel, 78 Iowa 739, 37 N. W. 160.

63. Benson *v.* McNamee, 12 N. Y. St. 503.

64. Homan *v.* Hellman, 35 Nebr. 414, 53 N. W. 369 (holding further that it is not error to permit plaintiff, in an action to quiet title, to so amend his petition as to state a cause of action in ejectment, since the subject of the action remains substantially the same, and the amendment merely changes the form of the remedy); Baker *v.* Briggs, 99 Va. 360, 38 S. E. 277; Post *v.* Campbell, 110 Wis. 378, 85 N. W. 1032. See also Wyland *v.* Mendel, 78 Iowa 739, 37 N. W. 160, holding that after a disclaimer by defendants, one of whom is in possession of the land, plaintiff may file an amended petition asking a writ of possession.

cause of action cannot be substituted for the original by amendment, or be brought in by a new and separate count.[65]

(II) *Amendment as to Title or Interest.* If at the commencement of the action plaintiff had the equitable title, a supplemental complaint may be filed setting up that plaintiff has since acquired the legal title.[66]

(III) *Correcting Mistake in Description of Lands.* A mistake in the complaint in the description of the property may be corrected by amendment.[67]

c. At What Stage of Proceedings Allowable. So long as the nature or character of a proposed amendment to the complaint is unobjectionable, it is allowable after issue joined,[68] or at the trial or hearing [69] or after judgment,[70] or even after reversal on appeal.[71]

d. Waiver of Objections Regarding. Where the supplemental complaint is objectionable on the ground that the original complaint is wholly defective, such objection is waived by answer.[72]

8. Issues, Proof, and Variance — a. Issues — (I) *Of Law.* A denial that the realty in controversy is plaintiff's homestead, and that the sale thereof made under defendant's judgment, which is a pure money judgment, is void or a cloud on title, raises an issue of law, and not of fact.[73]

(II) *Fact* — (A) *Title of Plaintiff.* In an action to remove a cloud from title, the real controversy is as to that which creates the cloud, and not the title of plaintiff, unless the latter is put in issue by the pleadings.[74] But in the statutory action to determine adverse claims a general denial in the answer of all allegations of the complaint, "except that which is hereinafter admitted, specifically denied or qualified," puts in issue an allegation of title in plaintiff, the specific averment of the answer being that defendant is in actual possession of the premises, and is the owner thereof.[75]

(B) *Possession of Plaintiff* — (1) In General. A denial of plaintiff's possession raises a material issue.[76]

(2) At Commencement of Action. An issue as to plaintiff's possession of

65. Matthews *v.* Rund, 27 Ind. App. 641, 62 N. E. 90; Red Diamond Clothing Co. *v.* Steidemann, 120 Mo. App. 519, 97 S. W. 220.

66. Lowry *v.* Harris, 12 Minn. 255.

67. Frey *v.* Owens, 27 Nebr. 862, 44 N. W. 42.

Amendment not prejudicial.— An amendment of the complaint, by enlarging the description of the land claimed by plaintiff, cannot be objected to as prejudicial to a defendant who disclaims as to all the premises described in the amended complaint. Bulwer Consol. Min. Co. *v.* Standard Consol. Min. Co., 83 Cal. 613, 23 Pac. 109.

68. Freeman *v.* Brown, 96 Ala. 301, 11 So. 249.

69. South Chicago Brewing Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732; Gage *v.* Bissell, 119 Ill. 298, 10 N. E. 238; Kunze *v.* Solomon, 126 Mich. 290, 85 N. W. 739; Hart *v.* Potter, 80 Miss. 796, 31 So. 898; Newman *v.* Buzard, 24 Wash. 225, 64 Pac. 139.

70. Frey *v.* Owens, 27 Nebr. 862, 44 N. W. 42; Jones *v.* Herrick, 35 Wash. 434, 77 Pac. 798.

71. Adams County *v.* Burlington, etc., R. Co., 44 Iowa 335, holding that after a reversal in an action to quiet title which is remanded for further proceedings not inconsistent with the opinion of the court, the unsuccessful party may file an amended or additional pleading, upon his making such a showing of newly-discovered evidence as would entitle a party to demand a new trial in an action at law.

72. Lowry *v.* Harris, 12 Minn. 255, holding further that the objection must be taken by demurrer, or by objection to the supplemental complaint being filed.

73. Mitchell *v.* McCormick, 22 Mont. 249, 56 Pac. 216.

74. Hutchinson *v.* Howe, 100 Ill. 11.

75. Jellison *v.* Halloran, 40 Minn. 485, 42 N. W. 392.

Issue raised as to sufficiency of levy of attachment to affect plaintiff's title held.— Where in an action to remove a cloud on title, defendants claiming a lien by attachment, ask affirmative relief by cross complaint by reason of their attachment, and bring in grantees of plaintiff as parties, and an amendment to plaintiff's original petition contains averments as to the pretended levy of such attachment, and denies that any interest was acquired thereby, plaintiff's grantees in their answer to the cross petition denying the levy of attachment, the issue as to the sufficiency of the levy to affect the title of plaintiff's grantees is thereby raised. Anderson *v.* Moline Plow Co., 101 Iowa 747, 69 N. W. 1028, 63 Am. St. Rep. 424.

76. Meighen *v.* Strong, 6 Minn. 177, 80 Am. Dec. 441.

the land at the commencement of the action is immaterial, where the action is brought under a statute dispensing with the necessity of possession as a condition precedent to the maintenance of the action.[77]

(c) *Adverse Claim of Defendant.* Where the complaint alleges that defendant claims some estate or interest in the land adverse to plaintiff, but that his claim is without right, and that he has no right, title, or interest, therein, and the answer admits the former, and denies the latter, allegation, such answer raises a material issue of fact.[78]

(d) *Forgery and Fraud.* If it is alleged that defendant holds a deed to the property which is a fraud and a forgery, and a cloud on plaintiff's title, and, unless canceled, will operate as an irreparable injury to plaintiff, the only issues tendered to be considered on the trial are the questions as to forgery and fraud.[79] But where the answer alleges that a deed made by plaintiff's vendor was without consideration, and to hinder, delay, and defraud a certain creditor of vendor, which allegation is denied, no issue is raised as to whether the deed was made to delay or defraud the creditors of the vendor generally.[80]

b. Matters to Be Proved — (i) *Title in Plaintiff.* If the chain of title is specifically set forth in the bill, and not specifically denied, evidence thereof need not be produced.[81] Thus it has been held that where one defense filed to the complaint consisted solely of admissions and denials, and another consisted solely of assertion of title in defendant and his grantees, plaintiff is not required to prove his title or possession.[82] But plaintiff must, when his title is put in issue by the answer, prove by competent evidence the legal or equitable title in himself,[83]

77. Pearson *v.* Creed, 78 Cal. 144, 20 Pac. 302.

78. Tompkins *v.* Sprout, 55 Cal. 31. See also Elder *v.* Spinks, 53 Cal. 293.

79. Halk *v.* Stoddard, 67 S. C. 147, 45 S. E. 140.

80. Traverso *v.* Tate, 82 Cal. 170, 22 Pac. 1082.

81. Bennett *v.* Chaffe, 69 Miss. 279, 13 So. 731. See also Cassidy *v.* Woodward, 77 Iowa 354, 42 N. W. 319, holding that where both parties claim under the same person, and an abstract of title exhibited with the petition shows a regular chain of title from the government through such person to plaintiff, and, by the answer or oral evidence introduced without objection, it is either admitted or plainly shown that plaintiff holds by a regular chain of conveyances, and throughout the trial it is conceded that the conveyances were made as shown by the abstract of title, it is immaterial whether the deeds in plaintiff's chain of title are formally introduced in evidence or not.

Where both parties claim from the same common source, complainants in bill to remove cloud on title need not prove a grant. Patton *v.* Dixon, 105 Tenn. 97, 58 S. W. 299.

The admissions of an infant defendant in an answer cannot be taken against him, but plaintiff is required to prove title in himself with the same certainty and clearness as would be required of him if an answer had been filed denying positively the allegation of title (Holderby *v.* Hagan, 57 W. Va. 341, 50 S. E. 437), and *a fortiori* an admission in the answer of a co-defendant that title is in plaintiff cannot bind the infant, although the interest of himself and his co-defendant is joint. Holderby *v.* Hagan, *supra.*

Defendants who deny plaintiff's title not bound by default of co-defendant.— Plaintiff alleged in her bill that she had the equitable title to certain land by virtue of an unsealed instrument of conveyance given by her deceased husband to one of the defendants, and a similar instrument given by said defendant to her. She prayed that the other defendants, heirs of her husband, be required to convey to her the legal title. The grantee defendant made default, but the heirs answered, denying execution of the instruments. It was held that the complainant could not recover without proof of the execution of the instrument alleged to have been executed by her husband's grantee. Head *v.* Thurber, 142 Ill. 430, 32 N. E. 492.

82. Mitchell *v.* Knott, (Colo. 1908) 95 Pac. 335. See also Lambert *v.* Shumway, 36 Colo. 350, 85 Pac. 89.

83. *Arkansas.*— Memphis Land, etc., Co. *v.* Stotts, (1900) 56 S. W. 873.

California.— Redd *v.* Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132.

Illinois.— Ritchie *v.* Pease, 114 Ill. 353, 3 N. E. 897; Wing *v.* Sherrer, 77 Ill. 200.

Mississippi.— Chiles *v.* Champenois, 69 Miss. 603, 13 So. 840.

Nebraska.— McCauley *v.* Ohenstein, 44 Nebr. 89, 62 N. W. 232.

New Hampshire.— Parker *v.* Stevens, 59 N. H. 203.

West Virginia.— Holderby *v.* Hagan, 57 W. Va. 341, 50 S. E. 437.

Wisconsin.— Hamilton *v.* Beaudreau, 78 Wis. 584, 47 N. W. 952.

See 41 Cent. Dig. tit. "Quieting Title," § 85.

Issue of title immaterial.— When the statute under which the action is brought was

or at least that he has some interest in the land in controversy superior to that of defendant.[84]

(II) *Plaintiff in Possession, and Land Vacant and Unoccupied.* If possession is necessary to the maintenance of the action, plaintiff cannot prevail without proof of such possession, where the allegation of possession is denied in the answer.[85] Likewise in an action by one not in possession to quiet title to lands alleged to be vacant and unoccupied, such allegation, being material, must be proved in order to entitle plaintiff to recover.[86] But if defendant, in the ordinary statutory action to determine adverse claims, alleges title in himself, and demands affirmative relief against plaintiff, it is not necessary for plaintiff to prove the allegation that the land is vacant and unoccupied,[87] or that he is in possession,[88] as the case may be.

(III) *Recitals in Instrument Constituting Cloud Untrue.* Where plaintiff alleges that defendant makes an adverse claim of title under a certain deed which he offers in evidence, he is not bound to show that the recitals in the deed are untrue before he can recover.[89]

c. Evidence Admissible Under Pleadings — (I) *In General.* The parties are confined to matters contained in their pleadings, and therefore no evidence will be considered except that relating to matters alleged in the bill or answer.[90]

intended to enable the party to quiet his title by proof of an actual, peaceable possession, with claim of title, the fact that plaintiff's title in fee is alleged in the complaint and denied in the answer does not render it necessary for plaintiff to prove title in himself. Wilder *v.* St. Paul, 12 Minn. 192.

84. McCauley *v.* Ohenstein, 44 Nebr. 89, 62 N. W. 232.

85. Brooks *v.* Calderwood, 34 Cal. 563; Rutz *v.* Kehn, 143 Ill. 558, 29 N. E. 553.

Possession of part of lands.— In an action under the statute to determine an adverse claim to real property, brought by a party who claims to be in possession, it is unnecessary for him to prove that he is in possession of all the land described in the complaint. He may succeed as to a part of the land, and fail as to the remainder. Wellendorf *v.* Tesch, 77 Minn. 512, 80 N. W. 629.

86. Rutz *v.* Kehn, 143 Ill. 558, 29 N. E. 553; Glos *v.* Randolph, 133 Ill. 197, 24 N. E. 426; Conklin *v.* Hinds, 16 Minn. 457.

87. Kipp *v.* Hagman, 73 Minn. 5, 75 N. W. 746; Burke *v.* Lacock, 41 Minn. 250, 42 N. W. 1016; Hinman *v.* Henry, 31 Minn. 264, 17 N. W. 476.

88. Hooper *v.* Henry, 31 Minn. 264, 17 N. W. 476.

89. Douglass *v.* Huhn, 24 Kan. 766.

90. Pease *v.* Sanderson, 188 Ill. 597, 59 N. E. 425; Le Baron *v.* Shepherd, 21 Mich. 263; Strong *v.* Whybark, 204 Mo. 341, 102 S. W. 968, 12 L. R. A. N. S. 240; Sturtevant *v.* McDougall, 45 Wash. 532, 88 Pac. 1035.

Illustrations.— Where defendant denies, in his answer, plaintiff's title to the land sued for, he cannot show that he is plaintiff's tenant. Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93. Where the source of plaintiff's title is specifically set out, no other source can be proven. Pittsburg, etc., R. Co. *v.* O'Brien, 142 Ind. 218, 41 N. E. 528. Where the title of plaintiff as stated in his bill depends on the performance of a condition, and the proof shows that the condition was not performed according to its terms, plaintiff will not be entitled to the relief he seeks by showing an excuse for the non-performance of the condition; there being no allegation in the bill on which an issue is to be taken of the facts relied on to justify or excuse the non-performance of the condition. Le Baron *v.* Shepherd, 21 Mich. 263. Under an averment of ownership in fee, defendant will not be permitted to show on the trial that he has succeeded to an equitable title or interest. Stuart *v.* Lowry, 49 Minn. 91, 51 N. W. 662. But see Rogers *v.* Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20. Evidence as to the value of improvements made by defendant while in possession is not admissible, where no claim has been made for improvements. Doren *v.* Lupton, 154 Ind. 396, 56 N. E. 849.

Ownership during certain period.— An averment that plaintiff was the owner of the land from a day prior to the commencement of the action is sufficient to warrant proof of his ownership at any time within that period. Erwin *v.* Perego, 93 Fed. 608, 35 C. C. A. 482.

Either or both of titles pleaded.— Where plaintiff's petition alleges a record generally of title from the sovereignty of the soil, and in addition alleges title under several statutes of limitation, he is entitled to prove either or both of the titles pleaded. Alford *v.* Williams, 41 Tex. Civ. App. 436, 91 S. W. 636.

Letters assuming payment of mortgage.— Where defendant's answer in an action to quiet title set up an unpaid mortgage to it by plaintiff's vendor, letters from plaintiff to defendant, assuming payment of the mortgage, were admissible. Interstate Bldg., etc., Assoc. *v.* Agricola, 124 Ala. 474, 27 So. 247.

Matters not necessary to plead.— It is not necessary for plaintiff to plead deraignment of title, it being a matter of evidence purely, and hence in an action against an executor to quiet title plaintiff may put in evidence a

(II) *Under General Denial.* Defendant may, it has been held in some jurisdictions, under general denial, give in evidence all defenses, either legal or equitable.[91]

d. Variance Between Allegations and Proof — (I) *In General.* The averments and proofs should correspond.[92]

(II) *As to Title.* If the complaint alleges that complainant has title in fee and the proof shows an equitable title, the variance is fatal.[93] A defense, consisting merely of a denial of plaintiff's title and an assertion of title in defendant, is not established by proof that, while plaintiff is the owner of the legal title, defendant has an equity entitling him to a conveyance.[94]

(III) *As to Possession.* An averment of possession in plaintiff is sustained by proof of possession in plaintiff's tenant at the time of bringing suit; [95] but proof showing property to be vacant constitutes a fatal variance.[96]

former judgment against defendant's testator for possession of the land, without pleading it. Riverside Land, etc., Co. *v.* Jensen, 108 Cal. 146, 41 Pac. 40.

91. Gibbs *v.* Potter, 166 Ind. 471, 77 N. E. 942; Kaufman *v.* Preston, 158 Ind. 361, 63 N. E. 570; Hamilton *v.* Byram, 122 Ind. 283, 23 N. E. 795; Hogg *v.* Link, 90 Ind. 346; Graham *v.* Graham, 55 Ind. 23; Allen *v.* Indianapolis Oil Co., 27 Ind. App. 158, 60 N. E. 1003. See also *supra*, IV, D, 3, f, text and note 35.

Illustrations.— Defendant, under a general denial, may show that the deed under which plaintiff holds was intended as a mortgage. Hamilton *v.* Byram, 122 Ind. 283, 23 N. E. 795; Wakefield *v.* Day, 41 Minn. 344, 43 N. W. 71. Under the general denial defendants may show an outstanding title in a third person by proving the facts on which it is based, and invoking the legal or equitable principles applicable thereto. Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739. Where defendant's adverse interest is claimed under a lease containing a misdescription, proof of a mistake in the description is admissible by way of equitable defense, under a general denial. Allen *v.* Indianapolis Oil Co., 27 Ind. App. 158, 60 N. E. 1003. Where a petition is filed, alleging among other things ownership and possession by plaintiff, and the answer, without any denial to the allegations of plaintiff, only sets up a specific title, it is error to admit evidence of any other than the title pleaded; but where the answer contains, besides the plea of the specific title, a general denial of the allegations of the petition, it is not error to admit in evidence a voluntary conveyance from plaintiff, a sheriff's or a tax deed, or any other legal testimony tending to show that plaintiff is not the owner as alleged, whether specifically set up in the answer or not. Morrill *v.* Douglass, 14 Kan. 293. So too a general denial in a mortgage foreclosure suit in which defendant files a cross complaint to quiet title, is sufficient to admit proof of all the legitimate matters of defense to the cross complaint. Fitzpatrick *v.* Papa, 89 Ind. 17.

92. Glos *v.* Archer, 214 Ill. 74, 73 N. E. 382.

Material variance.— Where a bill to set aside a conveyance as a cloud on the equitable title of the complainant is framed upon the theory that the land was purchased by A alone, from a voluntary grantee, and the evidence shows that the purchase was by A, B, and C, but the conveyance made to A alone for convenience, to hold and convey as directed by the purchasers, the variance is fatal. O'Neal *v.* Boone, 82 Ill. 589.

No variance.— In a suit to quiet title a deed offered in evidence which describes the survey of the land by a different number from that used in the pleading, the land being otherwise identified with reasonable certainty, is admissible; there is no variance, the number of the survey being unnecessarily used. Berrendo Stock Co. *v.* Kaiser, 66 Tex. 352, 1 S. W. 257. In a bill seeking to have a cloud removed from certain land, it was alleged that the land was bought of A and B. It appeared in evidence that complainant only negotiated with A but was informed that B had an interest in the land as well, which was a fact; that A acted as agent of B; that B conveyed his interest to A, expecting the whole to be eventually conveyed to complainant. It was held that there was no variance between the allegations and the proofs. Walsh *v.* Wright, 101 Ill. 178.

93. Hersey *v.* Lambert, 50 Minn. 373, 52 N. W. 963. See also Stewart *v.* Lead Belt Land Co., 200 Mo. 281, 98 S. W. 767; Hebden *v.* Bina, (N. D. 1908) 116 N. W. 85.

Rule varied by statute.— Under a statute providing that an action to determine and quiet title to real estate may be brought by any one claiming an interest, whether in or out of possession, against one claiming an interest or estate adverse to him, it is held that, where the complaint alleges plaintiff to have title in fee, and the proof shows an equitable title, there is no variance precluding a recovery. Oliver *v.* Dougherty, 8 Ariz. 65, 68 Pac. 553; Van Vranken *v.* Granite County, 35 Mont. 427, 90 Pac. 164.

94. Robinson *v.* Muir, 151 Cal. 118, 90 Pac. 521.

95. Krebs *v.* Dodge, 9 Wis. 1.

96. Glos *v.* Archer, 214 Ill. 74, 73 N. E. 382, holding, further, that the variance is none the less fatal because either an allegation that the complainant is in possession of the property or that it is vacant and unoccupied is sufficient to give the court jurisdiction.

(iv) *As to Lands Being Vacant or Unoccupied.* An allegation that the land was vacant and unoccupied at the time of the filing of the bill is not sustained by proof that the land was vacant and unoccupied at a given time after the filing of the bill.[97]

(v) *Waiver of Objection Regarding.* A variance between an allegation and proof which might have been obviated on the trial by other evidence or amendment if it had been expressly objected to on that ground will be deemed waived, and will be disregarded.[98]

E. Evidence[99]— **1. Burden of Proof — a. On Plaintiff** — (i) *As to Title in Himself.* The burden is on plaintiff to establish that he himself has a perfect legal or equitable title,[1] without reference to and regardless of whether defendant's title be valid or invalid.[2] But on the principle that a status, once established, is presumed by law to remain until the contrary appears, plaintiff, after proof of title in himself, need not show that he has not parted with it.[3]

(ii) *As to Possession in Himself.* The burden rests with plaintiff of proving possession on his part,[4] and he is not relieved from the burden of proving it by the fact that the allegation of possession in the complaint is not denied by the answer.[5] But by proof of title in himself, plaintiff meets the burden of proving possession.[6]

(iii) *As to Adverse Claim.* Plaintiff must show a prejudicial assertion of claim by defendant,[7] and that in fact defendant has no claim on the property,[8] or any right to subject it or any part of it.[9]

b. On Defendant. Whenever plaintiff sufficiently proves his case, the burden of proof will be shifted to defendant;[10] and where defendant substantially asserts

97. Johnson *v.* Huling, 127 Ill. 14, 18 N. E. 786.

98. Smith *v.* Prall, 133 Ill. 308, 24 N. E. 521; Messerschmidt *v.* Baker, 22 Minn. 81.

99. Evidence generally see Evidence, 16 Cyc. 821 *et seq.*

1. *Alabama.*— Ogletree *v.* Rainer, (1907) 44 So. 565.

California.— Keller *v.* McGilliard, 5 Cal. App. 395, 90 Pac. 483.

Iowa.— Nordman *v.* Meyer, 118 Iowa 508, 92 N. W. 693.

Kentucky.— McHargue *v.* Parks, 104 S. W. 955, 32 Ky. L. Rep. 164; Robertson *v.* Sebastian, 99 S. W. 93, 30 Ky. L. Rep. 883.

Mississippi.— A. W. Stevens Lumber Co. *v.* Hughes, (1905) 38 So. 769.

North Dakota.— Youker *v.* Hobart, (1908) 115 N. W. 839.

Washington.— Shelton Logging Co. *v.* Gosser, 26 Wash. 126, 66 Pac. 151.

See 41 Cent. Dig. tit. "Quieting Title," § 89.

Where a patent or deed includes within its boundary lands which are excepted by the grant or deed from its operation, plaintiff in equity suing to remove a cloud from his title must show that the land he claims against defendant is not the land so excepted. Logan *v.* Ward, 58 W. Va. 366, 52 S. E. 398, 5 L. R. A. N. S. 156.

2. A. W. Stevens Lumber Co. *v.* Hughes, (Miss. 1905) 38 So. 769; Powell *v.* Mayo, 27 N. J. Eq. 440.

In the statutory action to quiet title, the complainant, being in peacable possession of the premises, is not required to establish his title until defendant has shown *prima facie* the adverse title or interest which he claims. Ward *v.* Tallman, 65 N. J. Eq. 310, 55 Atl. 225.

3. Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647.

4. Glos *v.* Kemp, 192 Ill. 72, 61 N. E. 473.

Whenever rightful possession on the part of plaintiff is a jurisdictional fact, the burden of proof is on him to show that he is in possession, and that such possession was rightfully acquired. Collier *v.* Carlisle, 133 Ala. 478, 31 So. 970.

5. Glos *v.* Kemp, 192 Ill. 72, 61 N. E. 473.

6. Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647.

7. Blasdel *v.* Williams, 9 Nev. 161; Davis *v.* Commonwealth Land, etc., Co., 141 Fed. 711.

If defendant has appeared and disclaimed all interest in the property, the burden of establishing the fact of his making a claim is thereby cast on plaintiff. Davis *v.* Read, 65 N. Y. 566.

8. *California.*— Head *v.* Fordyce, 17 Cal. 149.

District of Columbia.— Bradford *v.* District of Columbia, 7 Mackey 353.

Illinois.— Gage *v.* Bissell, 119 Ill. 298, 10 N. E. 238; Hyde *v.* Heath, 75 Ill. 381.

Michigan.— Salisbury *v.* Salisbury, 49 Mich. 306, 13 N. W. 602.

New York.— Brown *v.* Brown, 110 N. Y. App. Div. 913, 96 N. Y. Suppl. 1002.

9. Head *v.* Fordyce, 17 Cal. 149.

10. Parsons *v.* Weis, 144 Cal. 410, 77 Pac. 1007.

Mere proof of possession or title with possession is not sufficient to throw the burden of proof on defendant to produce his claim, but plaintiff must show a prejudicial assertion of claim by defendant before the latter

and relies upon a fact as an affirmative issue, he must establish the same.[11] So the burden of a particular issue may rest with defendant, even if plaintiff be required to prove his whole case.[12]

2. Presumptions — a. In General. In order to quiet title after a lapse of more than twenty years, presumptions will be made against the known facts of the case, and in favor of one in possession in good faith.[13]

b. As to Possession. Proof of title raises a presumption of right to possession.[14] Where plaintiff's possession of the premises is shown, its continuance for a requisite time will be inferred in the absence of evidence to the contrary.[15]

3. Admissibility — a. As to Title — (i) *Extrinsic Evidence.* Extrinsic evidence bearing on title may be given.[16]

(ii) *Documentary Evidence.* Under the general rules of evidence the evidence admissible to show title includes grants, conveyances, or deeds generally,[17]

can be called on to move. Blasdel *v.* Williams, 9 Nev. 161. But see Stackhouse *v.* Stotenbur, 22 N. Y. App. Div. 312, 47 N. Y. Suppl. 940.

11. *Arkansas.*—Osceola Land Co. *v.* Chicago Mill, etc., Co., 84 Ark. 1, 103 S. W. 609.

California.— Stoddart *v.* Burge, 53 Cal. 394; Crook *v.* Forsyth, 30 Cal. 662.

Indiana.— Fitzgerald *v.* Goff, 99 Ind. 28.

Michigan.— Hammontree *v.* Lott, 40 Mich. 190.

Minnesota.— Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739.

Missouri.— Burk *v.* Pence, 206 Mo. 315, 104 S. W. 23; Dixon *v.* Hunter, 204 Mo. 382, 102 S. W. 970.

Texas.— Laffare *v.* Knight, (Civ. App. 1907) 101 S. W. 1034.

See 41 Cent. Dig. tit. "Quieting Title," § 89.

Where defendant relies for his title on a constable's sale under execution on a judgment from a justice of the peace, he must show affirmatively that the justice had jurisdiction to render the judgment. Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647.

A defendant, relying on possession, actual or constructive, to oust the jurisdiction of the court, must establish it without requiring the court, on an application for the issue, to first sustain the validity of his title. Titus *v.* Bindley, 210 Pa. St. 121, 59 Atl. 694.

Heirship between defendant's ancestor and the patentee under which plaintiff claims.— A defendant in a suit to quiet title who claims title through an ancestor alleged to have been an heir of the patentee, under whom plaintiff claims, has the burden of proving heirship between his ancestor and the patentee. Coates *v.* Teabo, 44 Wash. 271, 87 Pac. 355.

12. Magness *v.* Arnold, 31 Ark. 103.

13. Riddlehoover *v.* Kinard, 1 Hill Eq. (S. C.) 376.

14. Flood *v.* Templeton, 152 Cal. 148, 92 Pac. 78, 13 L. R. A. N. S. 579.

A person having exclusive legal title is presumed to be in possession, when the contrary is not shown. Judge *v.* Lackland, 3 Mo. App. 107.

15. Stackhouse *v.* Stotenbur, 22 N. Y. App. Div. 312, 47 N. Y. Suppl. 940; North Carolina Min. Co. *v.* Westfeldt, 151 Fed. 290.

16. Keller *v.* Keller, 80 Wis. 318, 50 N. W. 173.

Erection and removal of buildings.— Elliot *v.* Atlantic City, 149 Fed. 849.

Common reputation.— In a suit to determine an adverse claim to real estate, wherein plaintiff claimed title by adverse possession, evidence by defendant to establish her ownership by common reputation, referring principally to discussions among her neighbors, is inadmissible. Cooper *v.* Blair, (Oreg. 1907) 92 Pac. 1074.

Assessment of premises.— In a suit to quiet title, based on plaintiff's title by prescription, it was proper to show the assessment of the premises, so that the court might determine whether plaintiff had paid the taxes required by statute to obtain title by prescription. Spotswood *v.* Spotswood, 4 Cal. App. 711, 89 Pac. 362. In an action to quiet title to lots, claimed by defendant city as a public park, evidence by the city to show how the property was assessed on the assessment roll of the city was properly excluded. Myers *v.* Oceanside, (Cal. App. 1907) 93 Pac. 686.

17. *Alabama.*— Southern R. Co. *v.* Hall, 145 Ala. 224, 41 So. 135 (holding, however, that a void tax deed is not competent evidence as color of title, in the absence of evidence of actual possession); Fleming *v.* Moore, 122 Ala. 399, 26 So. 174; Sheridan *v.* Schimpf, 120 Ala. 475, 24 So. 940.

California.— Nathan *v.* Dierssen, 146 Cal. 63, 79 Pac. 739; Branson *v.* Caruthers, 49 Cal. 374; Landers *v.* Bolton, 26 Cal. 393.

Nebraska.— Roggencamp *v.* Converse, 15 Nebr. 105, 17 N. W. 361.

North Carolina.— Midgett *v.* Midgett, 129 N. C. 21, 39 S. E. 722.

South Dakota.—Thomas *v.* Wilcox, 18 S. D. 625, 101 N. W. 1072; Weeks *v.* Cranmer, 17 S. D. 173, 95 N. W. 875, holding, however, that where defendant sets up title in himself, and it does not appear that both parties claim from a common source, evidence of a deed to plaintiff's grantor is inadmissible, without showing that the grantor in that deed deraigned his title from the government.

Washington.— Lohse *v.* Burch, 43 Wash. 156, 84 Pac. 722, holding, however, that where it was shown that the land had been patented to the heirs of the decedent, without naming them, a deed by the heirs executed sixteen years before the commencement of the action

and mortgages.[18] And so also judgments and other records may be admitted as tending to show title to the premises in question.[19]

b. As to Possession — (I) *Payment of Taxes.* Evidence that taxes on the land in controversy are paid by a person, in connection with evidence of actual possession, is admissible to show the character of his possession.[20]

(II) *Inclosure of Land.* The inclosing of uncultivated, although not wild, land, on three sides by a wire fence, and on the other side by a stone fence, is evidence of possession.[21]

(III) *Execution of Lease.* Possession in plaintiff may be shown by a lease whereby the person occupying the land holds under him.[22]

c. As to Adverse Claim. Defendant's answer in a former suit showing that he then claimed an interest in the same land, adverse to plaintiff, is admissible on the question whether he claimed such adverse interest at the commencement of the present action.[23]

4. Weight and Sufficiency — a. As to Possession. It may be stated generally that to support a bill to quiet title the evidence must show a possession so open, visible, notorious, and exclusive as to be calculated in its very nature to inform persons in the vicinity, and those seeing the property, that some person has appro-

was inadmissible in evidence without proof that they were the only heirs of the decedent, the recital of that fact in the deed being insufficient.

See 41 Cent. Dig. tit. "Quieting Title," § 9.

Deeds procured pendente lite.— Deeds procured by plaintiff to all the land in controversy *pendente lite* are admissible, where he had a tax title to the land when the action was commenced, and was in actual possession of a part of it. Ne-Ha-Sa-Ne Park Assoc. *v.* Lloyd, 25 Misc. (N. Y.) 207, 55 N. Y. Suppl. 108 [*affirmed* in 45 N. Y. App. Div. 631, 61 N. Y. Suppl. 1143].

A tax deed which appears upon the face thereof to have been altered in a material respect after its execution is not admissible in evidence to show title in the holder thereof. Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195.

Joint deed by defendant and plaintiff's grantor.— Defendant answered, claiming title to an undivided one third, under a deed from plaintiff's grantor, and alleging possession under the deed for twenty years. On the trial defendant offered in evidence a deed executed jointly by himself and plaintiff's grantor for a part of the property. It was held that the evidence was admissible as tending to show defendant's claim of title, and a recognition of it by plaintiff's grantor. Dumont *v.* Dufore, 27 Ind. 263.

Plat.—Where, in a bill to remove a cloud on title, complainant claimed title under a deed from a grantor holding under a deed not embracing the land in controversy, but attempted to show by reference to an old plat containing a memorandum that the land in controversy belonged to him, it was held that the plat with the memorandum was admissible in determining the boundaries and title, but did not in itself constitute title. Austin *v.* Minor, 107 Va. 101, 57 S. E. 609.

18. Sheridan *v.* Schimpf, 120 Ala. 475, 24 So. 940.

Assignments of mortgages on the property to plaintiff are not relevant to the issue of ownership. Harmon *v.* Goggins, 19 S. D. 34, 101 N. W. 1088.

19. Nemo *v.* Farrington, (Cal. App. 1908) 94 Pac. 874.

Judgment in former action.— In an action to quiet title, where defendants introducing a tax deed under which they claimed, a judgment in a former action by plaintiff against defendants in which the title was adjudged in plaintiff was properly admitted to show that defendants' claim under the tax deed had been adjudicated against them. Nemo *v.* Farrington, (Cal. App. 1908) 94 Pac. 874.

Records in mortgage foreclosure suits.— Nathan *v.* Dierssen, 146 Cal. 63, 79 Pac. 739; Stevens *v.* Overturf, 62 Ind. 331.

Record held inadmissible.— Where, in an action to quiet title to land which is a part of the public domain, plaintiff, neither in person nor by his predecessor in interest, ever filed a possessory claim on the land to which he seeks to quiet the title, and was never in possession thereof, it is error to admit the record of the foreclosure proceedings through which he claims title, when defendant is in possession. Branca *v.* Ferrin, 10 Ida. 239, 77 Pac. 636.

That a foreign corporation has not complied with local laws cannot be shown by the certificate of the clerk of the court see Foreign Corporations, 19 Cyc. 1320 note 30.

20. Southern R. Co. *v.* Hall, 145 Ala. 224, 41 So. 135; Blanchard *v.* Lowell, 177 Mass. 501, 59 N. E. 114.

21. Blanchard *v.* Lowell, 117 Mass. 501, 59 N. E. 114.

22. Craig *v.* Lambert, 44 La. Ann. 885, 11 So. 464, holding further that it is immaterial that defendant had no notice of the lease and that the lease was not recorded when he purchased, as he should have demanded possession from his vendor.

23. Miles *v.* Strong, 68 Conn. 273, 36 Atl. 55.

priated it and is using and occupying it as his own.[24] But it has been held that where the answer relies on an adverse right depending entirely on the location of the description, the proof of possession is not required to be as strong as where there is a defense distinctly set up and relied on.[25]

b. As to Title. To authorize a recovery, plaintiff must establish title in himself by a preponderance of evidence.[26] It is sufficient *prima facie* if complainant

24. Glos *v.* Archer, 214 Ill. 74, 73 N. E. 382.

Evidence of possession held sufficient.— Evidence that plaintiff, the legal owner of a large tract of land in a body which included a large quantity of large mountain land, paid the taxes thereon for many years, and occupied parts of it by tenants, shows sufficient possession to support the action. Davis *v.* Hinckley, 141 Fed. 708. Evidence of the exercise of acts of ownership over unimproved land, such as hauling gravel, sand, and dirt therefrom, sinking wells and making streets there, shows sufficient possession on the part of one claiming to be the owner in fee to maintain an action to quiet title thereto. Dayton *v.* Cooper Hydraulic Co., 10 Ohio S. & C. Pl. Dec. 192, 7 Ohio N. P. 495. Testimony of complainant that he is in peaceable possession and is the owner of the land, without more, is sufficient evidence of possession. Southern R. Co. *v.* Hall, 145 Ala. 224, 41 So. 135. Evidence that plaintiff, vested with the legal title to the lands in controversy, once went upon the land and directed another to put up a fence, which was done, although the fence was not a substantial one, sufficiently shows possession entitling him to maintain the suit. Bland *v.* Windsor, 187 Mo. 108, 86 S. W. 162. Where the agent of a landowner has completed the foreclosure of the land by closing with bars an opening in the fence, and putting on the land a notice that he held the land for sale as agent of the owner, these facts, in the absence of actual adverse holding, show possession sufficient to entitle the owner to maintain a bill to quiet his title. Gage *v.* Williams, 119 Ill. 563, 9 N. E. 193. Where plaintiff's grantor staked off land including that in dispute, caused it to be surveyed and graded, and streets to be laid out, had a map issued showing it to belong to him, and had a movable tramway put over a portion of it, and complainant, after taking it, kept it in constant repair, and made numerous extensive and plainly visible improvements, and was the only one except his grantees to exercise acts of ownership, plaintiff has such possession as will enable him to bring a bill to quiet title. Oberon Land Co. *v.* Dunn, 56 N. J. Eq. 749, 40 Atl. 121. See also Alexander *v.* Hill, 108 S. W. 225, 32 Ky. L. Rep. 1147; Brown *v.* Dunn, 135 Wis. 374, 115 N. W. 1097.

Evidence of possession held insufficient.— Where lots were vacant and unineloscd, evidence of a lease of them to a person living across an alley therefrom, with nothing done under the lease, was not sufficient to sustain an allegation of possession in a bill to remove a cloud on title, filed by the lessor. Glos *v.* Archer, 214 Ill. 74, 75 N. E. 382. Testimony of one that plaintiff placed the property in charge of his firm six days prior to the suit to rent and collect the rents for him, and that thereafter his firm paid plaintiff some money received from the rent is insufficient to support a finding that plaintiff was in possession. Reid *v* Robrecht, 102 Cal. 520, 36 Pac. 875. Evidence of mere payment of taxes, cutting timber, and protecting the land by driving off trespassers does not establish the actual possession of land necessary to support an action to quiet title. Cantlin *v.* Holladay-Klotz Land, etc., Co., 151 Mo. 159, 52 S. W. 247. Evidence showing the construction on a tract of land, by a claimant, of a structure of rough boards eight or ten feet square, with a flat roof, having no foundation, chimney, or windows, and a door with no lock, not intended for a dwelling, or for any other use so far as shown, and which was in fact never used, fails to establish such possession or occupation of the land as will support a suit to quiet title. Jackson *v.* Simmons, 98 Fed. 768, 39 C. C. A. 514. There is an entire absence of evidence of possession essential to support a suit to set aside deeds as a cloud on title, where the only evidence on the subject is that plaintiff's father had tenants on the land before his death, and plaintiff had leased the land to a tenant who did not take possession. Kane *v.* Virginia Coal, etc., Co., 97 Va. 329, 33 S. E. 627. Plaintiff cannot recover judgment when all the evidence he produces is the tax deed under which he claims title, since such deed does not prove, or tend to prove, actual possession of the premises in plaintiff. Douglass *v.* Bishop, 24 Kan. 749. See also Tinker *v.* Piper, 149 Mich. 335, 112 N. W. 913; Hebden *v.* Bina, (N. D. 1908) 116 N. W. 85.

25. Verplank *v.* Hall, 27 Mich. 79.

26. Salisbury *v.* Salisbury, 49 Mich. 306, 13 N. W. 602; Swiekard *v.* Swiekard, 48 Fed. 256.

One who relies on a lost deed to show title in himself must establish its original existence, its loss, and the material parts thereof, by clear and convincing evidence. Garland *v.* Foster County State Bank, 11 N. D. 374, 92 N. W. 452.

Proof of title with the strictness required in actions of ejectment is not necessary in actions to quiet title to realty. Glos *v.* Randolph, 138 Ill. 268, 27 N. E. 941.

Evidence held sufficient.—Where a deed from a patentee from the state was not produced in an action to quiet title, but the evidence tended to show that it had been lost, and that plaintiff and his grantor had claimed title since 1848, without any objection on the part of the patentee or his heirs, a finding that such lost deed covered the land in con-

makes out a title apparently good as against defendant.[27] Where an assault on a

troversy is proper. Combs *v.* Combs, 72 S. W. 8, 24 Ky. L. Rep. 1691. Where, in a suit to remove a cloud on title, it was shown that the complainant, claiming the premises under a deed, had exclusive possession, had paid taxes, built fences, made repairs, etc., there was sufficient evidence of title, in the absence of any countervailing proof, to entitle complainant to maintain the bill. Glos *v.* Gerrity, 190 Ill. 545, 60 N. E. 833. It is not necessary for plaintiff to establish a chain of title from the government, where the only claim asserted by defendant to the land is through tax proceedings against plaintiff's deceased husband; but, in such case, it is sufficient for plaintiff to introduce the deed to her husband, showing a record title in him, and to prove that at the time of the tax proceedings her husband was dead, so that the tax proceedings were void; that he died intestate, and that plaintiff was the next of kin surviving him. Gage *v.* Campbell, 191 Mo. 698, 91 S. W. 119. Where it appears that the land in controversy was given by a father to his son by way of advancement, but no deed was given, although the son was in possession and made improvements, a decree vesting the title in the son's heirs is just, especially where there is evidence that the son once had a deed to the land which was afterward destroyed. Fuqua *v.* Fuqua, 16 S. W. 353, 13 Ky. L. Rep. 130. Where a deed not properly acknowledged is introduced in the evidence to show title to land, but this evidence is supplemented by uncontradicted testimony to the effect that the party claiming under the deed has paid a valuable consideration for the land, such evidence is sufficient to establish the claim of the latter as against parties who had no rights in the land. Bowen *v.* Duffie, 66 Iowa 88, 23 N. W. 277. Where the bill alleged that complainant had conveyed the land to defendant, who had reconveyed it to complainant by an unrecorded deed that had been lost, and complainant swears that the lost deed was executed and delivered, and another witness testifies that defendant had admitted its execution, and defendant testifies that he did not execute the deed, a decree for complainant will not be reversed on appeal as unsupported by the evidence. Springfield Homestead Assoc. *v.* Roll, 137 Ill. 205, 27 N. E. 184, 31 Am. St. Rep. 358. Plaintiff claimed that the property in controversy had been purchased for her by defendants' father, the title being taken in his name as security. He had repeatedly declared it to be hers. The deed to him was recorded, without his knowledge, by one of the defendants. There was ample evidence of payment in full by plaintiff. There was some evidence to show illicit relations between defendants' father and plaintiff, and defendants testified that they, at the request of their father, had notified her to quit the premises, and that she said she would. It was held that plaintiff had established title in himself. Wilson *v.* Orr, (Mo. 1894) 27 S. W. 394. Where an allegation of the fee in plaintiff is not denied, but the evidence shows a conveyance by two of the defendants to plaintiffs, a decree to quiet title and awarding possession as against defendants will be sustained. Wyland *v.* Mendel, 78 Iowa 739, 37 N. W. 160. In an action to set aside an invalid deed as a cloud on title, oral testimony, not objected to, that complainant is the owner of the land, together with an introduction in evidence of the trustee's deed under which he claims title, and the trust deed pursuant to which such trustee's deed was given, is sufficient evidence of complainant's title. Glos *v.* Randolph, 138 Ill. 268, 27 N. E. 941. Where the undisputed evidence shows that plaintiff was in the actual possession of the premises, claiming to be the owner in fee by virtue of a certain deed and certain judicial proceedings, such possession and claim of ownership were sufficient evidence of the title to justify a recovery as against a defendant who failed to establish any title in himself. Weeks *v.* Cranmer, 18 S. D. 441, 101 N. W. 32. See also Dickson *v.* Sentell, 83 Ark. 385, 104 S. W. 148; McLean *v.* Baldwin, 150 Cal. 615, 89 Pac. 429; Hodnett *v.* Stewart, 131 Ga. 67, 61 S. E. 1124; Scherer *v.* Judson, 100 Mich. 539, 59 N. W. 234.

Evidence held insufficient.— Where the parties did not claim title from the same grantor, and plaintiff was not in possession, and failed to connect himself with the paramount title, and defendant was in actual possession, a judgment in favor of defendant is proper. Harmon *v.* Goggins, 19 S. D. 34, 101 N. W. 1088. In order to make out a title under a sheriff's deed under a sale upon execution against the heirs of A, the facts of his death and that defendants were his heirs must be shown, as well as the sheriff's authority to sell, and a failure so to do is fatal. Stevens *v.* Robertson, 3 T. B. Mon. (Ky.) 97. Where plaintiff conveys land to defendant in trust for herself, which defendant is to reconvey at the end of five years, the fact that at the expiration of that time plaintiff is in possession of the land does not authorize a finding that the legal title is in him. Harrigan *v.* Mowry, 84 Cal. 456, 22 Pac. 658, 24 Pac. 48. Where, at the time of the trial, plaintiff only owned an easement of a right of way over the land in controversy, the fee of which belonged to defendant's grantees, subject to such easement, a finding that the title to the land is in plaintiff is not sustained by the evidence. Galletly *v.* Bockius, 1 Cal. App. 724, 82 Pac. 1109. Evidence of a deed from a third person to complainant, in an action to remove a cloud on title, without proof as to possession or title, does not establish title. Glos *v.* Miller, 213 Ill. 22, 72 N. E. 714; Glos *v.* Hoey, 181 Ill. 149, 54 N. E. 905. See also Malliat *v.* Vogel, 125 Mich. 291, 84 N. W. 279; Overstreet *v.* Cantrell, (Miss. 1908) 46 So. 69; Dever *v.* Cornwell, 10 N. D. 123, 86 N. W. 227.

27. *Alabama.*—Kendrick *v.* Colyar, 143 Ala. 597, 42 So. 110, holding that defendant has the burden of showing his alleged claim or right.

record title is made by attempting to establish a title in a third person by secondary proof of a lost muniment of title, a high degree of proof is required.[28]

c. As to Adverse Claim. Plaintiff's proofs must clearly show that the claim set up by defendant is in fact in hostility to plaintiff's title.[29]

F. Trial or Hearing — 1. Scope of Inquiry and Power of Court. The question of title between the parties may be fully litigated and determined,[30] and a decree rendered assigning the title to the realty in controversy,[31] or any part of it,[32] to the party entitled thereto. But where defendant denies a jurisdictional fact. the rule is that the court will try in the first instance the issue of jurisdiction, and will not go into the question of the respective titles of the parties until the jurisdiction in question has been decided.[33] Where the statute permitting the action prescribes the extent to which the judgment or decree may go in adjusting the rights of the parties, the court is limited thereby.[34]

2. Questions For Court and Jury. The general rule applies in actions to quiet title that the questions of law are for the determination of the court,[35] and that questions of fact are for the determination of the jury, especially where the evidence

California.— McGorray *v.* Robinson, 135 Cal. 312, 67 Pac. 279.

Florida.— See Wilson *v.* Matheson, 17 Fla. 630.

Illinois.— Glos *v.* Randolph, 138 Ill. 268, 27 N. E. 941.

Michigan.— Rayner *v.* Lee, 20 Mich. 384.

Missouri.— Graton *v.* Holliday-Klotz Land, etc., Co., 189 Mo. 322, 87 S. W. 37.

Washington.—White *v.* McSorley, 47 Wash. 18, 91 Pac. 243.

See 41 Cent. Dig. tit. "Quieting Title," § 91.

Mere possession is not alone presumptive evidence of title as against an admitted prior title in fact. Perkins *v.* Morse, 30 Minn. 11, 13 N. W. 911, 14 N. W. 879.

Where one has introduced proper conveyances from an owner of realty without any apparent defect, showing a clear paper title in himself, he has made a case entitling him *prima facie* to a decree removing a cloud. Applegate *v.* Dow, 15 Oreg. 513, 16 Pac. 651.

28. Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739.

29. Hartman *v.* Reed, 50 Cal. 485.

30. Harris *v.* Smith, 2 Dana (Ky.) 10; Dolen *v.* Black, 48 Nebr. 688, 67 N. W. 760; Snowden *v.* Tyler, 21 Nebr. 199, 31 N. W. 661; Shelton Logging Co. *v.* Gosser, 26 Wash. 126, 66 Pac. 151; Hanley *v.* Beatty, 117 Fed. 59, 54 C. C. A. 445.

Claims of third persons.— Where two persons, claiming to be joint owners of accretions, agreed on a boundary between their property, in an action between their successors in interest to quiet their title, the claims of a third person not a party to the action to a portion of the accretions between those which belong to the parties was immaterial, since the judgment could not affect his right. Matthews *v.* French, 194 Mo. 553, 92 N. W. 634.

Abandonment or forfeiture of grant.— On a bill by a grantor in possession against a grantee in a deed containing a condition subsequent, which he has failed to comply with, to remove the deed as a cloud on title, the court may try the question whether there be an abandonment or forfeiture of the grant. Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200.

Collateral attack on proceedings in other courts.— In proceedings to quiet title to certain realty, the title to which was a right from an administrator's sale, the heirs of intestate sought to show the invalidity of the appointment of the *de facto* administrator who made the sale. It was held that the probate court, having jurisdiction to grant such administration, and having recognized the validity, and licensed such administrator to sell the estate and confirm the sale, this court would not inquire into the irregularity of the appointment in this collateral proceeding. Woods *v.* Monroe, 17 Mich. 238.

31. Dolen *v.* Black, 48 Nebr. 688, 67 N. W. 760.

32. Dolen *v.* Black, 48 Nebr. 688, 67 N. W. 760.

33. San Francisco *v.* Ellis, 54 Cal. 72; Fittichauer *v.* Metropolitan F. Proofing Co., 70 N. J. Eq. 509, 61 Atl. 746; McGrath *v.* Norcross, 70 N. J. Eq. 364, 61 Atl. 727; Blakeman *v.* Bourgeois, 59 N. J. Eq. 473, 45 Atl. 594. See also Sheppard *v.* Nixon, 43 N. J. Eq. 627, 13 Atl. 617.

Where plaintiff fails to establish his own title, it is unnecessary to inquire into the validity of defendant's title. San Francisco *v.* Ellis, 54 Cal. 72; Shelton Logging Co. *v.* Gosser, 26 Wash. 126, 66 Pac. 151.

Peaceable possession in complainant is a jurisdictional fact in a bill to quiet title to lands; and if defendant, in his answer to such a bill, deny that complainant is in peaceable possession of the premises in question, he is entitled to have the issue thereby raised tried in the chancery court before the granting of an issue to be sent to a court of law to try the question of title or no title. Beale *v.* Blake, 45 N. J. Eq. 668, 18 Atl. 300.

34. Powell *v.* Crow, 204 Mo. 481, 102 S. W. 1024.

35. Reagan *v.* Sheets, 130 Ind. 185, 29 N. E. 1065.

Instances.—Questions as to the construction of writings are for the determination of the

is conflicting.[36] Where there are both equitable issues and issues of fact the court should first determine the equitable issue, and then submit the issues of fact to a jury on proper instructions.[37]

3. INSTRUCTIONS TO JURY. When an issue as to title or possession is raised, it should be submitted to the jury, and refusal to do so, or to charge the jury as to the same, is error.[38] An instruction that, if the jury find plaintiff has no title to the premises, they may determine whether defendant has title to the whole or any portion thereof is proper.[39] So too where a record is admitted in reference to a claim that the land in dispute is the site of a highway, an allusion, in the instruction, to the record as describing a highway, not taken out of the common, but beginning at and running from it, is not error, such being the legal construction of the record.[40]

4. DISMISSAL AND NONSUIT — a. Grounds — (I) *FAILURE OF PLAINTIFF TO PROVE TITLE OR POSSESSION.* Failure to prove title,[41] or possession,[42] in the plaintiff is held to be ground for dismissal or nonsuit. It is error to sustain a motion to dismiss, where plaintiff's evidence shows that the title in him is complete and perfect.[43]

(II) *DISCLAIMER BY DEFENDANT.* If defendant disclaims any title or pretension thereto, the suit will be dismissed.[44]

(III) *SALE OF PROPERTY IN CONTROVERSY DURING TRIAL.* Where, after the commencement of the action, both parties convey all their interest in the lands in dispute to a stranger, the bill should be dismissed.[45] Where, however, the proceeds of the sale is deposited in court under a stipulation by which it is to be subject to the adjudication of the question as to who is entitled thereto, the bill should not be dismissed.[46]

(IV) *TIME OF MAKING MOTION.* A motion for dismissal for want of jurisdiction of the subject-matter may be made at any time before final judgment or decree.[47]

(V) *OPERATION AND EFFECT* — (A) *On Cross Complaint.* Where plaintiff is nonsuited after filing an answer to the cross complaint, defendant is entitled to have the issues made by the cross complaint and answer thereto tried and disposed of.[48]

(B) *Nonsuit of One Plaintiff as Affecting Co-Plaintiffs.* A nonsuit by a plaintiff who is not a necessary party to the suit does not affect the right of his co-plaintiff to have an adjudication.[49]

court. Reagan *v.* Sheets, 130 Ind. 185, 29 N. E. 1065; Zenor *v.* Johnson, 107 Ind. 69, 7 N. E. 751.

36. Messdick *v.* Midland R. Co., 128 Ind. 81, 29 N. E. 419.

37. Park *v.* Wilkinson, 21 Utah 279, 60 Pac. 945.

Right of trial of issues by jury see JURIES, 24 Cyc. 110 note 57, 119.

38. Midgett *v.* Midgett, 129 N. C. 21, 39 S. E. 722.

39. Hager *v.* Hager, 38 Barb. (N. Y.) 92.

40. Dawson *v.* Grange, 78 Conn. 96, 61 Atl. 101.

41. Morgan *v.* Jones, 52 Fla. 543, 42 So. 242; Pinney *v.* Russell, 52 Minn. 443, 54 N. W. 484; Benson *v.* Townsend, 4 Silv. Sup. (N. Y.) 254, 7 N. Y. Suppl. 162; Haynes *v.* Onderdonk, 2 Hun (N. Y.) 619.

42. Israel *v.* Collins, (Cal. 1893) 31 Pac. 1126; Gage *v.* Schmidt, 104 Ill. 106; Haynes *v.* Onderdonk, 2 Hun (N. Y.) 619; Benson *v.* Townsend, 4 Silv. Sup. (N. Y.) 254, 7 N. Y. Suppl. 162; Moore *v.* Shofner, 40 Oreg. 488, 67 Pac. 511.

43. Mille Lacs Lumber Co. *v.* Keith, 78 Minn. 350, 81 N. W. 13, 548.

44. Howard *v.* Davis, 6 Tex. 174.

Disclaimer as to part of land.— Where defendant disclaims as to part of the land, it is not error for the court to dismiss the action as to such land, instead of giving plaintiff judgment therefor, as such judgment would be merely formal, under Cal. Code Civ. Proc. § 739, which provides that if defendant in such action disclaims in his answer any interest or estate in the property, plaintiff cannot recover costs. Packer *v.* Doray, (Cal. 1893) 34 Pac. 628.

45. Oberon Land Co. *v.* Dunn, 60 N. J. Eq. 280, 47 Atl. 60.

46. Pence *v.* Sweeney, 3 Ida. 181, 28 Pac. 413.

47. Gage *v.* Schmidt, 104 Ill. 106, holding that the court may do so of its own motion.

48. Harris *v.* Smith, 2 Dana (Ky.) 10; Hanson *v.* Hanson, 78 Nebr. 584, 111 N. W. 368.

49. Russell *v.* Texas, etc., R. Co., 68 Tex. 646, 5 S. W. 686.

5. VERDICT AND FINDINGS — a. Verdict — (I) *SUFFICIENCY.* If a special verdict states such facts as sustain the substance of the issues, it is sufficient;[50] but if the cause has been submitted generally to the jury, and the jury returns a verdict which determines in favor of plaintiff only one of several material issues, the verdict will not sustain a judgment for plaintiff.[51]

(II) *DISREGARDING.* It is held that a statute authorizing an action to determine adverse claims does not change the jurisdiction of the court in an action to quiet title, but such jurisdiction remains purely equitable, justifying the court in treating the verdict of a jury in such case as advisory merely, and finding contrary thereto.[52]

b. Findings — (I) *NECESSITY OF CERTAIN FINDINGS* — (A) *As to Plaintiff's Title.* In an action to quiet title, there is no occasion for a finding as to any alleged title of plaintiff not set up in the complaint.[53]

(B) *As to Defendant's Title.* A finding in a suit to quiet title on the issues raised by denial of the allegations of the complaint, if adverse to plaintiff, is sufficient, without finding defendant's title.[54] So where the complaint alleges ownership in plaintiff, and the evidence is insufficient to establish such ownership, and the court finds as a conclusion of law that defendant is entitled to judgment, and that plaintiff is not the owner, an omission to find as to defendant's title is not error.[55] If defendant in his answer claims no interest in the lands in controversy, a finding that he has no interest therein is not necessary.[56]

(C) *That Land Vacant and Unoccupied.* In the ordinary statutory action to determine adverse claims, a finding that the land is vacant and unoccupied, as alleged in the complaint, is not necessary to support the judgment, where defendant in his answer sets up his own claim to the land for the determination of the court.[57]

(II) *SUFFICIENCY* — (A) *In General.* The findings must of course be sufficient to support the judgment.[58]

50. Puterbaugh *v.* Puterbaugh, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341.

Unauthorized findings, inserted in a special verdict, must be disregarded. Kitts *v.* Willson, 130 Ind. 492, 29 N. E. 401.

Possession as tenant.—In an action to quiet title, the statement of the special verdict that, relying on the contract of defendant's ancestor to convey certain land to him, and in pursuance thereof, and with the knowledge and consent of the deceased, plaintiff and wife entered into possession of the premises and had been in peaceable, uninterrupted, and exclusive possession thereof up to the death of the deceased, and to the present time, excluded the inference that plaintiff's possession was that of tenant of the deceased. Puterbaugh *v.* Puterbaugh, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341.

51. See *infra*, IV, F, 5, b, (II), (B).

52. Reichelt *v.* Perry, 15 S. D. 601, 91 N. W. 459.

53. United Land Assoc. *v.* Pacific Imp. Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988 [*affirmed* in 208 U. S. 614, 28 S. Ct. 569, 52 L. ed. 645].

54. United Land Assoc. *v.* Pacific Imp. Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988 [*affirmed* in 208 U. S. 614, 28 S. Ct. 569, 52 L. ed. 645].

55. San Jose Land, etc., Co. *v.* San Jose Ranch Co., 129 Cal. 673, 62 Pac. 269.

56. Batchelder *v.* Baker, 79 Cal. 266, 21 Pac. 754.

57. Mitchell *v.* McFarland, 47 Minn. 535, 50 N. W. 610 [*citing* and *reviewing* Hooper *v.* Henry, 31 Minn. 264, 17 N. W. 476].

58. Smith *v.* James, 131 Ind. 131, 30 N. E. 902.

Findings held insufficient.—In an action to quiet title by a purchaser at foreclosure sale, findings which show that the legal title did not pass to him unless he was a purchaser without notice of defective title in the mortgagor, and which, instead of showing want of notice, show merely that the mortgagee had no notice when he took the mortgage, are insufficient to support a judgment for plaintiff. Randall *v.* Duff, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, 756. Where the pleadings admit that the fee is held by plaintiff, a finding that an undivided half interest is owned by another, without finding the facts from which such legal conclusion is drawn, is insufficient to support a judgment against plaintiff for half the land. Traverso *v.* Tate, 82 Cal. 170, 22 Pac. 1082. In an action to quiet title by the grantee of a deed against a judgment creditor of the grantor, who had purchased the land at execution sale, a finding that the deed, made by a mother while ill, and in the expectation of an early death, to her daughter, was made with the intention on the grantor's part that it should not take effect except in case of her death, and, in such case, that it should operate in lieu of a will, and take effect after her death, will not support a defense that it was made

(B) *Must Cover Material Issues.* The findings should cover all the material issues;[59] but want of a finding on a particular issue is not cause for reversal, if the omission is in no wise prejudicial.[60]

(C) *Must Be Responsive to Issues.* The verdict or finding should be responsive to the issues.[61]

(D) *Need Recite Only Ultimate Facts.* Only the ultimate facts should be contained in the findings,[62] and it is improper to insert therein evidential facts.[63]

(E) *As to Ownership of Property.* A finding that plaintiff was [64] or was not [65] the owner of the realty in controversy is a finding of the fact in issue, and is sufficient without a finding of the facts respecting such ownership.

6. New Trial of Issues. If on the trial of an issue submitted, defendant claims a title substantially different from that set up in his answer, and objection is made, a new trial will be granted as a matter of course, if the verdict is in his favor.[66]

G. Judgment [67] or Decree [68] — 1. Nature. Although a decree quieting

to defraud creditors, although coupled with a finding that after the grantor's recovery it was placed on record for the purpose of defrauding creditors. Mowry *v.* Heney, 86 Cal. 471, 25 Pac. 17.

Findings held sufficient.— The complaint merely alleging that defendant claims to hold a judgment lien against the land, but that the claim is without any foundation or right, a finding that the judgment, although recorded, is not and never has been a lien on the land, is sufficient to sustain a judgment quieting plaintiff's title, without finding the reason why the judgment is not a lien, as that the land is plaintiff's homestead. Dam *v.* Zink, 112 Cal. 91, 44 Pac. 331. When a water right consisting of a continuous flow of water and the canal or pipe line through which it passes are owned by the same person, a finding that the canal or pipe line is realty is a sufficient finding that the water right being appurtenant thereto was realty, to quiet title to which an action would lie. Fudickar *v.* East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024. A finding of fact that realty sold on execution "had in all things been duly appraised according to law" sufficiently shows the appraisement of the rents and profits before sale, although the finding also recites that the "appraisement returned that the execution contains only an appraisement of the real estate." Lytton *v.* Baird, 141 Ind. 446, 40 N. E. 1063. An allegation that plaintiff was the owner and in possession of land was an allegation of ownership in fee simple, and hence a finding that the allegation was true was sufficient to support a decree in plaintiff's favor on the theory that his ownership was in fee simple. Meyer *v.* O'Rourke, 150 Cal. 177, 88 Pac. 706.

59. Traverso *v.* Tate, 82 Cal. 170, 22 Pac. 1082; Daly *v.* Sorocco, 80 Cal. 367, 22 Pac. 211; Hall *v.* Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497. See also Mowry *v.* Heney, 86 Cal. 471, 25 Pac. 17.

Immaterial issues.— Whenever the statute has so enlarged equitable jurisdiction as to permit the action by one out of possession, an issue as to the possession of plaintiff at the commencement is immaterial, and no finding need be made thereon. Pearson *v.* Creed, 78 Cal. 144, 20 Pac. 302.

60. Callahan *v.* James, (Cal. 1902) 71 Pac. 104; Daly *v.* Sorocco, 80 Cal. 367, 22 Pac. 211, holding further that as the right to maintain an action to quiet title is based wholly on the ownership and right to possession, a failure to find on certain other issues is not prejudicial.

61. Dem *v.* Zink, 112 Cal. 91, 44 Pac. 331; Mowry *v.* Heney, 86 Cal. 471, 25 Pac. 17; Tompkins *v.* Sprout, 55 Cal. 31 (holding, however, that, although the answer should set out the nature of defendant's claim, yet where no demurrer or objection was interposed, it cannot be objected on appeal that the finding is not within the issue).

Finding held to be within the issue.— Plaintiffs claimed title under a grant of one hundred and eighty acres of their grandfather. Defendants claimed the same land under a subsequent overlapping grant to their remote grantor. Plaintiffs also claimed under a still later grant of five thousand acres to their grandfather, overlapping both the earlier grants. Plaintiffs sued to have their title quieted as to the overlap between their five-thousand-acre grant and defendants' grant. It was held that a finding that plaintiffs were entitled to have their title quieted as to the one-hundred-and-eighty-acre grant was within the issue raised by the pleading. Still *v.* Armstrong, (Tenn. Ch. App. 1899) 60 S. W. 509.

That plaintiff claimed title in fee does not prevent the court from finding a right or ownership in the nature of an easement. Bashore *v.* Mooney, 4 Cal. App. 276, 87 Pac. 553.

62. Smith *v.* James, 131 Ind. 131, 30 N. E. 902; Fitchette *v.* Victoria Land Co., 93 Minn. 485, 101 N. W. 655.

63. Daly *v.* Sorocco, 80 Cal. 367, 22 Pac. 211; Smith *v.* James, 131 Ind. 131, 30 N. E. 902.

64. Chaffee-Miller Land Co. *v.* Barber, 12 N. D. 478, 97 N. W. 850.

65. Daly *v.* Sorocco, 80 Cal. 367, 22 Pac. 211; Naddy *v.* Dietze, 15 S. D. 26, 86 N. W. 753.

66. Powell *v.* Mayo, 26 N. J. Eq. 120.

67. **Judgment** generally see Judgments, 23 Cyc. 623.

68. Decree generally see Equity, 16 Cyc. 471.

title is not *in rem*, strictly speaking, it fixes and settles the title to realty, and to that extent partakes of the nature of a judgment *in rem*.[69]

2. Form and Requisites — a. In General. The decree must fix and settle the rights of the parties.[70]

b. Describing Lands. In a suit to quiet title, in order to give stability to a judgment for plaintiff the judgment and the corresponding findings should describe the land with such definiteness as to enable the parties to know from such description the precise limits or the location of the boundary lines thereof.[71] But the description is sufficient, if the land is capable of identification from such description by resorting to extraneous evidence.[72]

3. Judgment by Default — a. Not Entered of Course. Defendant's default for omitting to appear and plead cannot be entered of course, but defendant must move the court for it, showing by affidavit or otherwise on what proof the rule to appear and plead was entered.[73]

b. Validity. A judgment by default in an action to quiet title as against a non-resident is not unauthorized and void, where there was only constructive service of the summons on him by publication and defendant did not answer and appear in the action.[74]

4. Judgment on the Pleadings. If the denials in the answer are insufficient, or in effect amount to an admission of the averments of the complaint, a motion on that ground for judgment on the pleadings should be granted.[75] But plaintiff is not entitled to judgment on the pleadings where the answer denies his asserted title,[76] although it fails to set forth an adverse interest,[77] or a valid interest,[78] in the lands. Nor can plaintiff recover judgment on the pleadings for that portion of the lands not admitted to be in his possession, where the answer admits that he is in possession of a portion of the lands, and denies possession of the remainder.[79]

5. Judgment on Disclaimer. Where, in the ordinary statutory action to determine an adverse claim, defendant files a disclaimer, plaintiff is entitled to judgment that defendant has no interest in the land in question,[80] although the answer puts in issue material allegations of the complaint.[81]

69. Perkins *v.* Wakeham, 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67.

70. McDaniel *v.* Sloss Iron, etc., Co., (Ala. 1907) 44 So. 705; Blatchford *v.* Conover, 40 N. J. Eq. 205, 1 Atl. 16, 7 Atl. 354.

In an action to quiet title to land sold under various judgments, some of which had been partly satisfied from other property, a decree determining the relative interests of the judgment creditor, which did not show the value of such other property nor the amount for which sold, is erroneous. Tilley *v.* Bonney, 123 Cal. 118, 55 Pac. 798.

Form of judgment under N. Y. Code Civ. Proc. § 1645, in action to determine claim to real estate see Merritt *v.* Smith, 50 N. Y. App. Div. 349, 63 N. Y. Suppl. 1068 [*affirming* 27 Misc. 366, 58 N. Y. Suppl. 851].

71. Hill *v.* Barner, (Cal. App.) 96 Pac. 111.

72. Redd *v.* Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Kelly *v.* Howard, (Tex. Civ. App. 1906) 94 S. W. 379.

73. Rosevelt *v.* Giles, 7 Hill (N. Y.) 166.

When application for relief to be made.— A defendant upon whom the summons was served by publication, and not personally, and against whom judgment by default is entered, may apply to be relieved from it, and for leave to answer, under Gen. St. (1878) c. 66, § 125, within one year after notice of the entry of judgment. Lord *v.* Hawkins, 39 Minn. 73, 38 N. W. 689.

74. Perkins *v.* Wakeman, 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67, construing Cal. Code Civ. Proc. § 412.

75. McCroskey *v.* Mills, 32 Colo. 271, 75 Pac. 910, holding, however, that where an affirmative defense in defendant's answer, and also his cross complaint, set up title in him and constitute a complete defense to plaintiff's claim, the fact that defendant's denials are insufficient does not entitle plaintiff to judgment on the pleadings.

76. Wheeler *v.* Winnebago Paper Mills, 62 Minn. 429, 64 N. W. 920 [*overruling* Donohue *v.* Ladd, 31 Minn. 244, 17 N. W. 381]; Jellison *v.* Halloran, 40 Minn. 485, 42 N. W. 392; Larson *v.* Christianson, 14 N. D. 476, 106 N. W. 51. See also Stevens *v.* Overturf, 62 Ind. 331.

77. Wheeler *v.* Winnebago Paper Mills, 62 Minn. 429, 64 N. W. 920; Jellison *v.* Halloran, 40 Minn. 485, 42 N. W. 392.

78. Larson *v.* Christianson, 14 N. D. 476, 106 N. W. 51.

79. Espinosa *v.* Gregory, 40 Cal. 58.

80. Perkins *v.* Morse, 30 Minn. 11, 13 N. W. 911, 14 N. W. 876; Osburn *v.* Hinds County, 71 Miss. 19, 14 So. 457.

81. Perkins *v.* Morse, 30 Minn. 11, 13 N. W. 911, 14 N. W. 876.

6. Conditions Precedent to Relief. A party seeking to quiet his title to realty or remove a cloud thereon will, as a condition precedent to the relief, be compelled to do equity.[82]

82. *Alabama.*— Grider *v.* American Freehold Land Mortg. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58.

California.— Tripp *v.* Duane, 74 Cal. 85, 15 Pac. 439.

Illinois.— Martin *v.* Martin, 62 Ill. App. 378 [*reversed* on other grounds in 164 Ill. 640, 45 N. E. 1007, 56 Am. St. Rep. 219].

Indiana.— Hays *v.* Carr, 83 Ind. 275.

Iowa.— Nourse *v.* Collis, 119 Iowa 38, 98 N. W. 85.

Kansas.— Challiss *v.* Hekelnkaemper, 14 Kan. 474.

Nebraska.— Henry *v.* Henry, 73 Nebr. 746, 103 N. W. 441, 107 N. W. 189; Hall *v.* Hooper, 47 Nebr. 111, 66 N. W. 33; Brewer *v.* Merrick County, 15 Nebr. 180, 18 N. W. 43.

New York.— Williams *v.* Fitzhugh, 37 N. Y. 444.

Washington.— Littlejohn *v.* Miller, 5 Wash. 399, 31 Pac. 758.

Rule applied.— A party seeking relief from a cloud on a title created by a void mortgage may be compelled to do equity as a condition precedent to relief, although the holder of the mortgage could not enforce the same by foreclosure. Henry *v.* Henry, 73 Nebr. 746, 103 N. W. 441, 107 N. W. 789. See also Burns *v.* Hiatt, 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157; Hall *v.* Hooper, 47 Nebr. 111, 66 N. W. 33. Where a mortgage lien has been extinguished, and the mortgagor borrows money and agrees that the mortgage shall stand as security, which it might ostensibly do until discharged of record, he may not sue in equity to remove the mortgage as a cloud upon his title without first doing equity, by repaying the money received upon the faith of the supposed security. Krugmeier *v.* Hackett, 134 Wis. 57, 113 N. W. 1103. In an action by a vendor to cancel the contract of sale as a cloud on the title of the land sold, plaintiff must tender performance of the contract as a condition precedent to obtaining the relief sought. Kane *v.* Borthwick, 50 Wash. 8, 96 Pac. 516. But where a vendor is ready and willing to perform the contract of sale, and the vendee refuses to perform, on the ground of defects in the title, the vendor need not, in an action to cancel the contract as a cloud on the title, tender performance of the contract, where the objections to the title are technical and frivolous, and nothing could be accomplished by the making of a tender. Kane *v.* Borthwick, 50 Wash. 8, 96 Pac. 516. A vendee of a judgment debtor who has received a deed from such debtor but not paid the purchase-money, cannot sustain a bill to quiet his title, as against one who has bought the land under a judgment rendered subsequently to the vendee's contract, without first paying the purchase-money into court. Butler *v.* Brown, 5 Ohio St. 211. Although assessment of any rear parcel of the first one hundred and fifty feet back from a street may be enjoined until the front parcel or parcels have been exhausted, title to none of them can be quieted against the lien of the assessment until it is paid. Woodruff Place *v.* Raschig, 147 Ind. 517, 46 N. E. 390. To quiet one's title as against a purchaser, at a sale to enforce a drainage assessment, who, by reason of his purchase, was subrogated in part to the state's lien, one must tender the amount of the purchaser's lien. Reed *v.* Kalfsbeck, 147 Ind. 148, 45 N. E. 476. A bill to quiet title to an undivided interest in land will not lie, as against the grantee of one who has advanced money to acquire the property, and taken a deed in the nature of a mortgage as security for the lien, without payment or tender of the proportionate part of the money loaned. Tripp *v.* Duane, (Cal. 1887) 13 Pac. 860. Plaintiff executed a mortgage to secure certain bonds executed and delivered to him by a county to aid him in building a grist mill. It was held that an action would not lie to set aside such mortgage and remove it, as a cloud on title to plaintiff's land until he should pay the same, or restore the consideration which he received thereunder. Brewer *v.* Merrick County, 15 Nebr. 180, 18 N. W. 43. Where the commissioner, under an order to sell real estate to pay debts of an estate, becomes the purchaser at his own sale, the heirs in an action to quiet title in them will be required to refund to the commissioner's grantees his purchase-money with interest, before being entitled to a decree. Penn *v.* Rhoades, 100 S. W. 288, 30 Ky. L. Rep. 997.

Rule held not applicable.— Where plaintiff purchased mortgage property and attempted to pay the amount of the mortgage, with interest, but the mortgagee evaded him and procured title to himself under a foreclosure sale, in bad faith, for the purpose of defeating plaintiff's title, and canceled the mortgage of record, plaintiff, in an action to quiet title to land, is entitled to have the title decreed to be in him, without the payment of the amount of the mortgage; the maxim that he who comes into equity must do equity not being applicable. Nugent *v.* Stofella, (Ariz. 1906) 84 Pac. 910. The purchaser of the equity of redemption of real estate, which is encumbered by mortgage liens of different priorities, if he be in possession under such purchase, may maintain an action to quiet his title, against the holder of a junior mortgage, without having paid off the senior. Holten *v.* Lake County, 55 Ind. 194. Where defendant claims under a void guardian's deed and sets up no claim for repayment of the money paid, and it does not appear that he paid any for the land, a judgment quieting the title in plaintiff is not erroneous, although no offer of repayment is made. Ybarra *v.* Sylvany, (Cal. 1893) 31 Pac. 1114. Where a vendee of land voluntarily abandons his contract of purchase, and becomes the tenant of the vendor, the latter may maintain an action against

7. Nature and Extent of Relief Granted — a. Conformation to Pleadings as Well as Proof. The relief afforded by the decree must conform to the case made out by the pleadings as well as to the proofs.[83]

b. Relief as Affected by Prayer — (i) *In General.* The relief granted must conform to the prayer of the bill, and cannot extend beyond that prayed;[84] but the fact that plaintiff has prayed for relief in excess of that to which he is entitled forms no objection to awarding him such part thereof as is warranted by the pleadings and proof.[85]

(ii) *Prayer For General Relief.* Under the prayer for general relief any decree, warranted by the allegations of the bill, may be made,[86] if plaintiff's equities be clear on the facts.[87]

c. Relief to Plaintiff — (i) *In General.* As a general rule the relief to plaintiff must be confined to perfecting his title to the land in controversy.[88] Thus

the former to quiet his title and to cancel a mortgage given by the vendee to a third person, without first rescinding the contract, and delivering up the vendee's notes for the purchase-money. Snodgrass *v.* Parks, 79 Cal. 55, 21 Pac. 429. Payment of the debt for which a mechanic's lien was claimed will not be required as a condition to removing the cloud on title caused by the record of the lien which has become forfeited by failure to institute foreclosure proceedings on demand. Sheets *v.* Prosser, 16 N. D. 180, 112 N. W. 72. Payment or tender of all just taxes paid by a party is not necessary before suing to quiet title, when there was no assessment of the land on account of a failure to properly describe it in the assessment roll. State Finance Co. *v.* Halstenson, (N. D. 1908) 114 N. W. 724. Where plaintiffs gave a lessee an option to purchase, and the lessee gave defendant an option to purchase from him, pursuant to which defendant made a payment to the lessee, who turned it over to plaintiffs, they were not required to return it to defendant in order to maintain a suit against defendant to remove its claim as a cloud on the title. Merk *v.* Bowery Min. Co., 31 Mont. 298, 78 Pac. 519. Where, in a suit to quiet title, the holder of a mortgage barred by limitations is made defendant and asks for affirmative relief on the mortgage, the court may, on proper proof, declare such mortgage barred, without requiring the holder of the legal title of the mortgage premises to do equity by tendering payment of the amount due thereon. Peterson *v.* Ramsey, 78 Nebr. 235, 110 N. W. 728.

83. *Arkansas.*— Liston *v.* Chapman, etc., Land Co., 77 Ark. 116, 91 S. W. 27.

California.— Von Drachenfels *v.* Doolittle, 77 Cal. 295, 19 Pac. 518.

Michigan.— Moran *v.* Palmer, 13 Mich. 367.

Tennessee.— Wilcox *v.* Blackwell, 99 Tenn. 352, 41 S. W. 1061.

United States.— Burton *v.* LeRoy, 4 Fed. Cas. No. 2,217, 5 Sawy. 510.

See 41 Cent. Dig. tit. "Quieting Title," § 101.

Where the bill contains only statutory averments, relief cannot be granted on general principles of equity on the ground of a resulting trust in the land. Fowler *v.* Alabama Iron, etc., Co., (Ala. 1908) 45 So. 635.

84. Liston *v.* Chapman, etc., Land Co., 77 Ark. 116, 91 S. W. 27; Gage *v.* Curtis, 122 Ill. 520, 14 N. E. 30.

85. Reiner *v.* Schroeder, 146 Cal. 411, 80 Pac. 517; Bashore *v.* Mooney, 4 Cal. App. 276, 87 Pac. 553.

Although plaintiff claims the entire title, he may have judgment for an undivided half interest, the evidence showing it. Tabler *v.* Peverill, 4 Cal. App. 671, 88 Pac. 994.

86. De Leonis *v.* Hammel, 1 Cal. App. 390, 82 Pac. 349; Hoyal *v.* Bryson, 6 Heisk. (Tenn.) 139.

In an action to quiet title to a parcel of land as an entirety, a prayer for general relief will not authorize a partition of the land on the theory that plaintiffs are the owners of an undivided interest in the land under a different title than that set up in the petition. Stivers *v.* Gardner, 88 Iowa 307, 55 N. W. 516.

Foreclosure of interest by a nominal holder of the equity of redemption of mortgaged premises may be decreed under a general prayer for relief in a petition praying to have quieted plaintiff's title, acquired under prior foreclosure by adjudging the conveyance from the mortgagor to defendant fraudulent and void as to plaintiff. Merriman *v.* Hyde, 9 Nebr. 113, 2 N. W. 218.

Injunction.— A general prayer in a complaint in an action to quiet title is sufficient to support an injunction where the facts alleged warrant it. Los Angeles *v.* Los Angeles Farming, etc., Co., 152 Cal. 645, 93 Pac. 869.

87. Dodd *v.* Benthal, 4 Heisk. (Tenn.) 601. See also Paton *v.* Lancaster, 38 Iowa 494.

88. Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138.

Where a vendor and his vendee join in a suit to remove a cloud from the title, it is error to make a decree vesting and confirming title in the vendor instead of the vendee. Andrews *v.* Palmer, 9 Tex. 491.

Where neither party proves any right or title in or to the land, but title was quieted in plaintiff as to a part thereof, it was not error to deny plaintiff further relief. Smith *v.* Thomas, 120 Iowa 12, 94 N. W. 259.

Judgment adjudging one half of land to plaintiff and one half to an intervener.— Defendants in an action to quiet title, having shown no title to the land, are not prejudiced

in a suit to set aside an instrument as a cloud on title it is generally regarded as sufficient, the facts warranting it, to simply set the instrument aside,[89] and as erroneous to decree a conveyance by defendant to plaintiff of the title derived through such instrument.[90] And it has been held that a decree pronouncing that an instrument is fraudulent and void has the effect to remove any cloud resulting from its execution, without an express direction that it be set aside.[91]

(II) *Incidental Relief* — (A) *In General.* The relief authorized in a suit to quiet title is equitable, and consists in a judgment quieting title to the land in dispute, and includes such incidental relief as may be proper to make the main relief complete.[92]

(B) *Delivery of Possession of Property.* Incidental to a bill to quiet title the court cannot decree a delivery of the possession of the lands,[93] or require the defendant to convey them to complainant.[94]

(C) *Damages For Wrongfully Withholding Possession.* Damages for wrongfully withholding possession cannot be awarded to plaintiff as incidental relief.[95]

(D) *Taking Account of Mesne Rents and Profits.* The court may grant complete relief to plaintiff by taking an account of the mesne rents and profits.[96] But

by a judgment adjudging one half of the land to plaintiff, and one half to an intervener who claims under purchase from plaintiff after the commencement of the action, where plaintiff would otherwise be entitled to the whole of the land. Pearson *v.* Creed, 78 Cal. 144, 20 Pac. 302.

Plaintiff having title to only part of land claimed.— Under Acts (1892–1893), p. 42, authorizing any person in peaceable possession of land, claiming to own any part thereof, to quiet title thereto, when it appears that the title to only the part claimed by complainant is in him, the court should ascertain the facts, and decree accordingly. Friedman *v.* Shamblin, 117 Ala. 454, 23 So. 821.

Limiting effect of deed.— On a bill to set aside a certain deed as a cloud, if the circumstances under which defendant obtained the title are such that he holds the fee in trust for plaintiff, subject to a life-estate in himself, free from any trust, plaintiff is entitled to have the effect of the deed limited by decree. Fox *v.* Coon, 64 Miss. 465, 1 So. 629.

89. Conwell *v.* Watkins, 71 Ill. 488; Rucker *v.* Dooley, 49 Ill. 377, 99 Am. Dec. 614. But see Pier *v.* Fond du Lac, 38 Wis. 470.

90. Conwell *v.* Watkins, 71 Ill. 488; Rucker *v.* Dooley, 49 Ill. 377, 99 Am. Dec. 614.

Specific performance of agreement to convey.— The court cannot, in an action brought in the usual form to quiet title, decree a specific performance of an agreement of defendant to convey to plaintiff's testator. Killey *v.* Wilson, 33 Cal. 690.

Decreeing conveyance in fee and a reconveyance of life-estate.—A, for a valuable consideration, conveyed land to B in fee, but retained a life-interest in the premises conveyed. In an action by A against B to quiet the title, it was held that, it being questionable whether the statute of uses is in force in California, a formal conveyance in fee from A to B, and a reconveyance from B to A for the life of the latter, should be decreed. Chandler *v.* Chandler, 55 Cal. 267.

Aiding a defective execution of power coupled with a trust by directing conveyance.— Land was devised for the payment of a certain debt, and the executor was empowered by the will to sell it for that purpose, and the executor assumed and paid the debt, and afterward sold the land. It was held, on a bill in equity by the purchaser to perfect his title, that the heirs at law should be decreed to convey the land to the purchaser; he being admitted to the rights of the executor, who had discharged the debt. Ducker *v.* Stubbelfield, 9 B. Mon. (Ky.) 577.

Decreeing release of claim to mortgage.— Where a mortgage has been satisfied, on a bill by a mortgagor to remove it as a cloud on its title, the court will compel the mortgagee to execute a release of record all claim to the mortgage, as required by Code, art. 24, §§ 33–35. Brown *v.* Stewart, 56 Md. 421.

91. Gibbons *v.* Peralta, 21 Cal. 629.

92. Spencer *v.* Merwin, 80 Conn. 330, 68 Atl. 370.

93. Wofford *v.* Bailey, 57 Miss. 239; Vanderburg *v.* Williamson, 52 Miss. 233; Ezelle *v.* Parker, 41 Miss. 520; Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138. But see Wyland *v.* Mendel, 78 Iowa 739, 37 N. W. 160.

Rule varied by statute.— Under a statute authorizing an action to quiet title to be maintained by one out of possession, plaintiff may have judgment for a restitution and possession. Landregan *v.* Peppin, 94 Cal. 465, 29 Pac. 771; People *v.* Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481.

94. Casstevens *v.* Casstevens, 227 Ill. 547, 81 N. E. 709.

95. Steam Stone-Cutter Co. *v.* Jones, 13 Fed. 567, 21 Blatchf. 138.

96. *Alabama.*—Lockett *v.* Hurt, 57 Ala. 198.

California.— De Cazara *v.* Orena, 80 Cal. 132, 22 Pac. 74.

Illinois.— Haworth *v.* Taylor, 108 Ill. 275.

Iowa.— Buckley *v.* Early, 72 Iowa 289, 33 N. W. 769.

Mississippi.— McMahon *v.* Yazoo Delta

if no accounting is asked for in the pleadings, failure to order an accounting is not error.[97]

(E) *Lien For Taxes Paid.* Where plaintiff has paid taxes on the land in question, and judgment goes against him as having no title, he is entitled to a lien on the land for the amount of taxes so paid.[98]

d. Relief to Defendant — (I) *In General.* If defendant's title be found to be superior to that of plaintiff, he is entitled to a decree to that effect.[99]

(II) *Incidental Relief* — (A) *Damages.* Damages sustained by a defendant in an action to quiet title cannot be recovered unless pleaded in the answer.[1]

(B) *Reimbursement For Moneys Expended* — (1) For Improvements — (a) In General. A defendant who, in good faith, supposing that he had title, made lasting improvements on the lands in controversy, is entitled, upon a proper showing, to recover for the improvements so made by him upon the premises, on his title being declared void,[2] or to remove such improvements;[3] but the rule is otherwise where the improvements were made by him after the action was instituted.[4]

Lumber Co., (1908) 46 So. 57; Scottish-American Mortg. Co. *v.* Bunckley, 88 Miss. 641, 41 So. 502, 117 Am. St. Rep. 763 (holding, however, that where one of several cotenants conveyed his interest to another, and the latter was successful in a suit to set aside a certain mortgage as a cloud on his title, it was error to decree him the rent of the interest acquired from the other cotenant for a period prior to the time that complainant acquired such possession); Robinson *v.* Jones, 65 Miss. 520, 5 So. 102.

Tennessee.— Bains *v.* Perry, 1 Lea 37.

Texas.— Bryson *v.* Boyce, 41 Tex. Civ. App. 415, 92 S. W. 820.

See 41 Cent. Dig. tit. "Quieting Title," § 100.

But see Fitzhugh *v.* Barnard, 12 Mich. 104.

97. Clark *v.* Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; Blackburn *v.* Lewis, 45 Oreg. 422, 77 Pac. 746.

98. Steers *v.* Kinsey, 68 Ark. 360, 58 S. W. 1050.

99. *Alabama.*— Collier *v.* Alexander, 138 Ala. 245, 36 So. 367.

Illinois.— Shields *v.* Sorg, 129 Ill. App. 266 [*affirmed* in Sorg *v.* Crandall, 233 Ill. 79, 84 N. E. 181].

Iowa.— Kraft *v.* James, 64 Iowa 159, 19 N. W. 894.

New Jersey.— Blachford *v.* Conover, 40 N. J. Eq. 205, 1 Atl. 16, 7 Atl. 354.

United States.— Greenwalt *v.* Duncan, 16 Fed. 35, 5 McCrary 132.

See 41 Cent. Dig. tit. "Quieting Title," § 101.

Quieting title in defendant without cross bill.—As to whether the court can decree that the superior title to the land is in a defendant who files no cross complaint, but merely an answer consisting of denials of plaintiff's allegations, and containing none of the elements of a cross complaint, there is a conflict of authority, it having been held in some jurisdictions that the court is powerless so to do (Hungarian Hill Gravel Min. Co. *v.* Moses, 58 Cal. 168; Spradlin *v.* Patrick, 64 S. W. 840, 23 Ky. L. Rep. 1156); and in other jurisdictions that such a decree is proper, and in accordance with the purpose of a bill to quiet title (Collier *v.* Alexander, 138 Ala. 245, 36 So. 367; Miller *v.* Steele, 146 Mich. 123, 109 N. W. 37).

Where both parties claim from a common source and defendant proves that he has secured the title derived from that source, he is entitled on a cross bill to a decree that the superior title is in him. People's Bank *v.* West, 67 Miss. 729, 7 So. 513, 8 L. R. A. 727.

1. Harrington *v.* Foley, 108 Iowa 287, 79 N. W. 64.

2. *Iowa.*— Buckley *v.* Early, 72 Iowa 289, 33 N. W. 769; Clark *v.* Brown, 70 Iowa 139, 30 N. W. 46. But see Buck *v.* Holt, 74 Iowa 294, 37 N. W. 377, holding that where defendant's deed, in an action to quiet title, is declared invalid, he cannot, in that form of action, be awarded the value of any improvements made by him while in possession under his deed, but must wait until the question of title has been determined against him.

Mississippi.— Robinson *v.* Jones, 65 Miss. 520, 5 So. 102.

Nebraska.— Thompson *v.* Thompson, 53 Nebr. 490, 73 N. W. 943.

New York.— Thomas *v.* Evans, 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519.

Tennessee.— Bains *v.* Perry, 1 Lea 37.

See 41 Cent. Dig. tit. "Quieting Title," § 101.

But see Moody *v.* Arthur, 16 Kan. 419.

Time of petitioning for value of improvements.— A claimant of land, who is ousted from the possession thereof on an adverse determination of his claim, loses his right to petition for the value of improvements under the occupying claimant's act by failing to petition therefor before surrendering possession of the property, as such right is in the nature of a lien, which is lost by a surrender or loss of possession. Lindt *v.* Uihlein, 116 Iowa 48, 89 N. W. 214.

3. Green Bay Lumber Co. *v.* Ireland, 77 Iowa 636, 42 N. W. 461; Jonesville Perpetual Bldg., etc., Assoc. *v.* Beverley, 107 S. W. 770, 32 Ky. L. Rep. 1102.

4. Biffle *v.* Jackson, 71 Ark. 226, 72 S. W. 566. *Compare* Thompson *v.* Thompson, 53 Nebr. 490, 73 N. W. 943, holding that where, in an action to quiet title to lands and recover their rental value, it appeared that lasting and valuable improvements were

Nor does the rule apply to improvements so made upon the land where defendant acted in bad faith.[5]

(b) Amount of Recovery. The value of defendant's recovery is the amount the real estate increased in value by reason of the improvements,[6] less the value of the rents and profits during defendant's occupancy.[7]

(2) For Lien Paid Off — (a) In General. Where defendant has paid off a lien on the property, both valid and prior to plaintiff's claim, the latter will be granted relief only upon terms of paying to the former the amount of the lien.[8]

(b) Tax Lien. As a condition to granting relief the court will require plaintiff to reimburse defendant, with interest, for all taxes properly chargeable upon the land and paid by him;[9] but defendant is not entitled to have taxes paid by him refunded where he has not made a claim therefor in his pleadings,[10] and proved the amount of taxes paid by competent evidence.[11] It has been held, however, that a plaintiff who has offered to pay all taxes legally due, as a condition precedent to relief, is estopped to deny the right of the court to decree payment by him according to the offer;[12] and that where plaintiff alleges that he is able and willing to pay all legal taxes due on the land, it is error for the court not to take an account of such taxes and decree their payment as a condition of the relief prayed for.[13]

(3) Mortgage Debt. A court of equity will require a plaintiff, suing to have a mortgage canceled as a cloud on his title, to do equity by paying to defendant the amount of the mortgage debt, even where such debt is barred, or alleged to be barred, by the statute of limitations;[14] or where the mortgage is unenforceable because taken by a loan association doing business in defiance of the statute.[15] Likewise where the interest of the mortgagor escapes being bound by a decree in foreclosure, through a slip in the proceedings, and he subsequently comes into equity to be relieved of the cloud cast upon his interest by reason of such proceedings, he will be required to pay defendant his proportion of the mortgage debt.[16]

(4) Purchase-Price at Judicial Sale. A court of equity setting aside a judicial sale under a void execution, as a cloud on title, should decree that the purchase-money be refunded.[17]

8. Operation and Effect — a. In General. Where a decree is rendered on the

made by defendant during possession taken and held in good faith, and in making proof of the rental value the witnesses for plaintiff increased their estimate year by year, as they themselves stated, because of the increased improvements, which, meanwhile, had been made, it was proper, under all these circumstances, to allow defendant the fair value of such improvements, even though some of them were made after the suit was instituted.

5. Mickey *v.* Barton, 194 Ill. 446, 62 N. E. 802; Lindt *v.* Uihlein, 116 Iowa 48, 89 N. W. 214.

6. Lashbrook *v.* Eldridge, 55 Iowa 344, 7 N. W. 584; Gombert *v.* Lyon, 72 Nebr. 319, 100 N. W. 414 (holding further that the defendant's recovery is not the cost of making the improvements); Thompson *v.* Thompson, 53 Nebr. 490, 73 N. W. 943. See also Thomas *v.* Evans, 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519.

Defendant must prove value.— To entitle defendant to a decree for improvements made by him on the land, he must establish their value by competent evidence. Hunter *v.* Clayton, (Tex. Civ. App. 1896) 36 S. W. 326.

7. Lashbrook *v.* Eldridge, 55 Iowa 344, 7 N. W. 584

8. Tompkins *v.* Sprout, 55 Cal. 31.

9. Ames *v.* Sankey, 128 Ill. 523, 21 N. E. 579; Alexander *v.* Merrick, 121 Ill. 606, 13 N. E. 190; Phelps *v.* Harding, 87 Ill. 442.

10. American Emigrant Co. *v.* Fuller, 83 Iowa 599, 50 N. W. 48; Gwynn *v.* Turner, 18 Iowa 1.

A decree in defendant's favor for taxes paid by him is not warranted by his prayer for general equitable relief, where the only allegation in his answer as to the payment of taxes is made in support of his plea of the statute of limitations. American Emigrant Co. *v.* Fuller, 83 Iowa 599, 50 N. W. 48.

11. Hunter *v.* Clayton, (Tex. Civ. App. 1896) 36 S. W. 326.

12. Barke *v.* Early, 72 Iowa 273, 33 N. W. 677.

13. Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292.

14. Boyce *v.* Fisk, 110 Cal. 107, 42 Pac. 473; Brandt *v.* Thompson, 91 Cal. 458, 27 Pac. 763; De Cazara *v.* Orena, 80 Cal. 132, 22 Pac. 74; Booth *v.* Hoskins, 75 Cal. 271, 17 Pac. 225. See also Merriam *v.* Goodlett, 36 Nebr. 384, 54 N. W. 686.

15. New York Nat. Bldg. Assoc. *v.* Cannon, 99 Tenn. 344, 41 S. W. 1054.

16. Johnston *v.* San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129.

17. Herndon *v.* Rice, 21 Tex. 455.

merits by a court of competent jurisdiction, it precludes and bars subsequent litigation between the same parties or their privies on the same cause of action.[18]

b. Conclusiveness as to Issues Determined. A decree is conclusive between the parties and their privies not only as to the issues actually involved and determined, but also as to such issues as might have been raised upon the cause of action set up in the complaint.[19] But the decree is conclusive only as to the matters capable of being controverted at the time and as to conditions then existing, and cannot operate as an estoppel as to after-occurring facts not involved in the suit in which the decree was rendered.[20]

c. Transferring Defendant's Title to Plaintiff as Against Stranger to Suit. The effect of an ordinary decree to quiet title is only to preclude defendant, or any one claiming under him, from asserting against plaintiff, or his successors, any title to or interest in the real property affected,[21] and such a decree does not have the effect of transferring to plaintiff, as against a stranger to the suit, the title theretofore held by defendant.[22] But where the decree includes an order for defendant to convey to plaintiff whatever interest he may have in the realty involved, it of course affects a transfer of title as effectually as a voluntary conveyance.[23]

d. Destroying Liens. A decree quieting title destroys all liens not protected by proper provisions in the decree, if the lien-holders were made parties defendant;[24] but the decree does not bind a lien-holder not made a party defendant, since the action is *in rem* only so far that personal service of process is not required to give jurisdiction.[25]

9. Enforcement of — a. In General. When the decree declares the rights of the respective parties, the court may subsequently direct such process, or make such order, as may be necessary to carry the decree into execution.[26]

b. Mode. Where title has been quieted by decree against one in possession, a mandatory injunction is a proper remedy to enforce it.[27]

H. Appeal and Error. The general rules of appeal and error apply in determining by or against what parties error or appeal lies in actions to quiet title;[28] to the necessity and sufficiency of the presentation and reservation in the lower court of grounds of review;[29] to waiver of and estoppel to allege

18. Bedford-Bowling Green Stone Co. *v.* Oman, 134 Fed. 441.

19. Bedford-Bowling Green Stone Co. *v.* Oman, 134 Fed. 441. See also Judgments, 23 Cyc. 1336.

20. Bedford-Bowling Green Stone Co. *v.* Oman, 134 Fed. 441.

21. Hildreth *v.* James, 109 Cal. 299, 41 Pac. 1038; Marshall *v.* Shafter, 32 Cal. 176; Woolworth *v.* Root, 40 Fed. 723 [*affirmed* in 150 U. S. 401, 14 S. Ct. 136, 37 L. ed. 1123].

Possession of defendant after decree against him in suit to quiet title as adverse possession see Adverse Possession, 1 Cyc. 1055.

22. Lockwood *v.* Meade Land, etc., Co., 71 Kan. 739, 81 Pac. 496; Weed Sewing Mach. Co. *v.* Baker, 40 Fed. 56.

Grantee in unrecorded deed.— A tax-deed holder who, without notice of any other claim, has quieted title against persons appearing by the records to hold the patent title, is protected against a deed which was executed by defendants before the commencement of the action, but was not recorded until after the rendition of the judgment; the title and estate of the person holding such unrecorded deed being as to third persons without notice, wholly in the grantor, and the grantee being in privity with his grantor and equally bound by any decree affecting the title. Utley *v.* Fee, 33 Kan. 683, 7 Pac. 55.

23. Lockwood *v.* Meade Land, etc., Co., 71 Kan. 739, 81 Pac. 496. See also Kentucky Union Co. *v.* Cornett, 112 Ky. 677, 66 S. W. 728, 23 Ky. L. Rep. 1922; Woolworth *v.* Root, 40 Fed. 723 [*affirmed* in 150 U. S. 401, 14 S. Ct. 136, 37 L. ed. 1123].

24. Watkins *v.* Winings, 102 Ind. 330, 1 N. E. 638.

25. McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; Jasper County *v.* Sparham, 125 Iowa 464, 101 N. W. 134. See *supra*, IV, G, 3, b.

26. Smith *v.* Miller, 66 Tex. 74, 17 S. W. 399.

27. Whitaker *v.* McBride, 5 Nebr. (Unoff.) 411, 98 N. W. 877.

Mandatory injunction generally see Injunctions, 22 Cyc. 742.

28. See Appeal and Error, 2 Cyc. 626, 726. And see Norton *v.* Walsh, 94 Cal. 564, 29 Pac. 1109; Chase *v.* Christenson, 92 Iowa 405, 60 N. W. 640.

Change of state of facts pending appeal in action to quiet title see Appeal and Error, 3 Cyc. 409 note 7.

29. See Appeal and Error, 2 Cyc. 660. And see Giltrap *v.* Watters, 77 Iowa 149, 41

error;[30] to questions reviewable generally;[31] to non-reversal for harmless error with respect to pleadings;[32] to giving or refusal of instructions;[33] and to the validity, operation, and effect of findings and judgments.[34] It may also be stated that the general rules as to the disposition of the cause upon appeal and error govern in actions to quiet title, so far as they are applicable, having constantly in view the fact that each case rests upon and must be determined by the factors peculiar thereto.[35]

N. W. 600; Easthampton *v.* Bowman, 136 N. Y. 521, 32 N. E. 987.

30. See APPEAL AND ERROR, 3 Cyc. 242. And see Myrick *v.* Coursalle, 32 Minn. 153, 19 N. W. 736.

Estoppel to claim right to possession.— In an action brought by a vendor against his vendee who has abandoned the contract and become a tenant of the vendor, the vendee, having failed to allege the fact that he was tenant of the vendor, and therefore entitled to possession, cannot contend on appeal that for that reason a judgment in favor of the vendor is erroneous. Snodgrass *v.* Parks, 79 Cal. 55, 21 Pac. 429.

Estoppel to claim that complaint should have been dismissed as to certain defendants. —Where both the lessor and the lessee corporation are made parties defendant to an action under the statute for the determination of adverse claims to realty, and both appeared, and neither disclaimed, by their pleadings or in any manner on the trial, and no motion has been made at any time to dismiss the complaint, defendant cannot, on appeal, urge that there was nothing to show that the lessee company made a claim against plaintiff, and that therefore, as to it, the complaint should have been dismissed. Phillips *v.* Rome, etc., R. Co., 9 N. Y. Suppl. 799 [*affirmed* in 128 N. Y. 578, 28 N. E. 250].

Waiver of proof of possession.—Defendant's seeking by cross complaint to have his own title quieted to a portion of the land embraced in the complaint, and his failure to raise any question in the trial court as to plaintiff's failure to prove possession, is a waiver of such proof. Relender *v.* Riggs, 20 Colo. App. 423, 79 Pac. 328.

31. See APPEAL AND ERROR, 3 Cyc. 220. And see Hayden *v.* Ortkiss, 7 Ky. L. Rep. 359.

32. Ratliff *v.* Stretch, 117 Ind. 526, 20 N. E. 438; O'Donahue *v.* Creager, 117 Ind. 372, 20 N. E. 267.

33. Dickey *v.* Shirk, 128 Ind. 278, 27 N. E. 733.

For example, an instruction that, if land was owned individually by a partner in whose name title was taken, and he sold the same to his copartner, who took and retained possession, the latter's grantee might have his title quieted against the partner who took title and his wife, is harmless error, where the jury specially find that the land was partnership property. Dickey *v.* Shirk, 128 Ind. 278, 27 N. E. 733.

34. See APPEAL AND ERROR, 3 Cyc. 275. And see White *v.* McGilliard, 140 Cal. 654, 74 Pac. 298; McLennan *v.* McDonnell, 78 Cal. 273, 20 Pac. 566; Reynolds *v.* Campling, 23 Colo. 105, 46 Pac. 639.

Supplemental decree.— After an appeal by defendant from a decree quieting title in plaintiff on condition that he pay defendant a certain sum, the trial court has no jurisdiction to make a supplemental decree barring plaintiff of his interest because of his failure to pay the amount as ordered. Stillman *v.* Rosenberg, (Iowa 1899) 78 N. W. 913.

35. See APPEAL AND ERROR, 3 Cyc. 403 *et seq.* And see Tripp *v.* Duane, 74 Cal. 85, 15 Pac. 439.

Affirmance.— Where plaintiff shows a clear legal title and defendant's title is based on a partially executed parol contract of purchase with plaintiff's grantor, the evidence as to the existence of which being conflicting, a judgment for plaintiff will be affirmed. Barr *v.* Vermilya, 130 Ind. 512, 30 N. E. 698.

Reversal.— Where the bill alleges and the answer denies possession, if, on appeal from a decree for complainants, the evidence is not brought up, and the decree does not find the fact of possession, it must be reversed. Rutz *v.* Kehn, 143 Ill. 558, 29 N. E. 553.

Modification.—A complaint alleged that plaintiff was the owner and in possession of the property. The findings were that plaintiff was the owner, but that defendant was in possession, and judgment was rendered that plaintiff's title be quieted and that defendant be removed from possession. Under Code Civ. Proc. § 380, the action may be maintained by one not in possession. It was held that, although the judgment was in direct contradiction to the complaint, it would be modified on appeal so as to omit the part relating to possession, and would be thus affirmed without costs to either party. Bryan *v.* Tormey, (Cal. 1889) 21 Pac. 725. A decree for plaintiff, including a tract not claimed in the bill, will be modified by omitting it therefrom. Hess *v.* Adler, 67 Ark. 444, 55 S. W. 843.

Remand.— Where a complainant alleges ownership and possession by plaintiff, a judgment in his favor, based on proof that he is the owner, and that defendant had verbally dispossessed him will be reversed and the cause remanded, in order that the complaint may be amended so as to conform to the proof. Bryan *v.* Tormey, 84 Cal. 126, 24 Pac. 319. Where, after the answer of the statute of limitations, and denial of the incorporation and title of plaintiff, a supplemental answer denying plaintiff's possession, and setting up the statute of limitations, was filed, but not in accordance with Nebr. Code, § 149, allowing such answer for the purpose of setting up facts occurring after the former answer: after which a supplemental bill was filed, alleging that plaintiff was in possession at the time of

I. Costs [36] **— 1. Right — a. In General.** The rule of equity, that the allowance of costs is within the court's discretion,[37] applies in actions to quiet title, so that costs are awarded or refused according to the justice of each particular case.[38] This rule, however, has been abrogated in many jurisdictions by statutes giving costs, as of right, to the successful party.[39]

b. Where Each Party Successful in Part. Where plaintiff brought suit to remove a cloud on his title, consisting of a certain instrument, and defendant having equities by reason of which there is judgment that the property be sold, and any proceeds above plaintiff's claim be applied to defendant's claim, it has been held that costs should not be awarded to either party.[40]

c. Previous Demand For Quitclaim Deed as Condition Precedent. If it is a condition precedent to his right to costs that plaintiff shall have made demand of the holder of the adverse claim for a quitclaim deed before suit, and that it shall have been refused, no costs can be taxed against defendant from whom no demand has been made.[41]

d. On Disclaimer. In some jurisdictions costs, by express provision of the law, cannot be adjudged against a defendant who, by his answer, disclaims all title or interest adverse to plaintiff in the land forming the subject-matter of the suit,[42]

bringing the suit, but that defendant had since forcibly taken possession — the case being then treated as ejectment at law, by court and counsel, and there appearing to have been much uncertainty as to the course of proceeding, and the evidence being unsatisfactory, the case will be remanded for trial on the merits after amending the pleadings. Lancaster County Bank *v.* Gregory, 24 Nebr. 656, 39 N. W. 835.

36. Costs generally see Costs, 11 Cyc. 1 *et seq.*

37. See Costs, 11 Cyc. 32, 61. And see Dudley *v.* Facer, 8 Utah 403, 32 Pac. 668.

38. Converse *v.* Rankin, 115 Ill. 398, 4 N. E. 504.

Defendants asserting in good faith title apparently valid.— Where, in a bill to quiet title, by making proof of certain defects in a probate record, defendants asserted in good faith a title apparently valid as to them, costs will be awarded to them, notwithstanding a decree was made against them on the merits. Woods *v.* Monroe, 17 Mich. 238.

39. See the statutes of the several states. and see Bothwell *v.* Millikan, 104 Ind. 162, 2 N. E. 959, 3 N. E. 816; Dudley *v.* Facer, 8 Utah 403, 32 Pac. 668.

If defendant resist the relief sought in an action to quiet title, brought under the act of March 9, 1854, plaintiff is entitled to costs, as of right, in the event of his success in the action, by express provision of the act. Moore *v.* Boner, 7 Bush (Ky.) 26.

In an action to determine adverse claims the statute gives costs, as of course, to a successful defendant. Rugen *v.* Collins, 8 Hun (N. Y.) 384.

Defendant not shown to have violated plaintiff's rights.— W sued B to quiet title to land, in which it was held that W did not own the land, but had merely a right to pass over it. B then brought suit against W and S, to quiet title to the same land, in which S, having disclaimed title, judgment was rendered against him. It was held that the court properly refused to enter judgment for costs against W, as it was not shown that he had violated any of B's rights. Browning *v.* Wayland, 85 S. W. 211, 27 Ky. L. Rep. 438.

40. Jones *v.* Garrigues, 75 N. Y. App. Div. 539, 78 N. Y. Suppl. 400.

41. Hurni *v.* Sioux City Stockyards Co., (Iowa 1908) 114 N. W. 1074; Mock *v.* Chalstrom, 121 Iowa 411, 96 N. W. 909; Lawless *v.* Stamp, 108 Iowa 601, 79 N. W. 365.

Demand held sufficient.— Plaintiff showed that he had sent a letter to defendant, requesting him to execute the quitclaim deed inclosed. A draft payable to defendant for one dollar and twenty-five cents was inclosed. Defendant's agent received the letter, opened it as he was authorized to do, and answered it by demanding five dollars for the execution of the deed. Defendant was not advised of the contents of the letter until commencement of the suit, more than twenty days after the receipt of the letter. It was held that defendant was sufficiently requested to give a deed entitling plaintiff to recover the costs authorized by Code, § 4225, where, in an action to quiet title, defendant, disclaiming any interest, fails to execute a deed within twenty days. Shay *v.* Callanan, 124 Iowa 370, 100 N. W. 55.

42. Foote *v.* Brown, 78 Conn. 369, 62 Atl. 667; New American Oil, etc., Co. *v.* Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; Scobey *v.* Thompson, 10 Ind. App. 12, 37 N. E. 277.

A defendant who claims to be the owner of and entitled to possession of a portion of the land embraced in the complaint cannot avail himself of a statute providing that if defendant disclaims any interest or estate in the property, plaintiff shall not recover costs. Relenden *v.* Riggs, 20 Colo. App. 423, 79 Pac. 328.

Disclaimer and giving of release.— Where defendant disclaimed, but gave no release, he did not bring himself within the exception to St. (1898) § 3186, providing that if, in an action to quiet title, plaintiff shall substantiate his title, defendant shall be ad-

and in other jurisdictions, such a disclaimer, if true, entitles defendant to recover costs.[43]

e. On Default. A defendant who is alleged to be in possession and withholding the realty and who suffers judgment to be taken against him without answer, is not, in the absence of express provision of law to the contrary, entitled to recover costs.[44]

f. On Settlement Out of Court. Where, on a bill to quiet title, a feigned issue was awarded to try the legal title to the lands in dispute, and, after judgment for defendants, plaintiff and defendants settled the litigation by conveying their interest in the lands in dispute to a third party, each party should pay his own costs.[45]

2. Amount. A party defendant filing a disclaimer cannot recover costs against plaintiff in a sum exceeding the amount which was necessary to enable him to file such disclaimer.[46]

V. Statutory Proceedings to Compel Bringing of Action to Quiet Title.

A. In General. In several jurisdictions a statutory proceeding exists, the design of which is to enable a party in actual possession of land, claiming it as his own, to compel a party out of possession, who also claims to be the owner, to bring an action at law or in equity to settle the question of title between them.[47] The proceeding is purely statutory, and possesses none of the features of an equitable suit to quiet title;[48] nor is it intended as a substitute for the action of ejectment.[49]

B. Who May Maintain. Who may maintain the proceeding is entirely dependent upon the language of the statute.[50]

C. Conditions Precedent to Maintenance[51] **— 1. Possession by Petitioner**[52] **— a. Necessity.** In order to maintain the proceeding, the petitioner must, at the time of filing his petition, have possession of the realty in question.[53]

judged to release all claims and pay the costs, unless defendant shall disclaim and give a release, and hence was liable for costs. Durbin *v.* Knox, 132 Wis. 608, 112 N. W. 1094.

43. Summerville *v.* March, 142 Cal. 554, 76 Pac. 388, 100 Am. St. Rep. 145; Deacon *v.* Central Iowa Inv. Co., 95 Iowa 180, 63 N. W. 673; Ninde *v.* Oskaloosa, 55 Iowa 207, 2 N. W. 618, 7 N. W. 511.

Costs against cross complainant.—A defendant in a suit to quiet title, who filed a disclaimer, but was obliged to continue in the case because another defendant filed a cross complaint against him, was entitled to recover costs against the cross complainant. Summerville *v.* March, 142 Cal. 554, 76 Pac. 388, 100 Am. St. Rep. 145.

44. Ragan *v.* Haynes, 10 Ind. 348.

45. Oberon Land Co. *v.* Dunn, 60 N. J. Eq. 280, 47 Atl. 60.

46. Summerville *v.* March, 142 Cal. 554, 76 Pac. 388, 100 Am. St. Rep. 145.

47. Colline Real Estate, etc., Assoc. *v.* Johnson, 120 Mo. 299, 25 S. W. 190.

Statute held constitutional.— Me. Rev. St. c. 104, §§ 47, 48, enabling those in possession of real estate claiming freehold or an unexpired term of not less than ten years therein, to quiet their title against adverse claimants by petition requiring such claimants to bring suit within such time as the court may order, are not unconstitutional as being beyond the power of the legislature. Webster *v.* Tuttle, 83 Me. 271, 22 Atl. 167.

48. Daudt *v.* Keen, 124 Mo. 105, 27 S. W. 361.

49. Dyer *v.* Baumeister, 87 Mo. 134.

50. See the statutes of the several states.

Any person, artificial or natural, may maintain the proceeding. Proprietors Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42, 26 N. E. 239.

Any person in possession of land, claiming an estate of freehold, or a term of not less than ten years, may maintain a proceeding. Dyer *v.* Baumeister, 87 Mo. 134.

A non-resident of the state may maintain the proceeding. Root *v.* Mead, 58 Mo. App. 477, holding, however, that the court may subject him to terms, and may require him to enter his appearance to an action for the assertion of title by the respondent.

51. See also *supra*, III.

52. See also *supra*, III, A, 2.

53. Dyer *v.* Baumeister, 87 Mo. 134; Rutherford *v.* Ullman, 42 Mo. 216; Heppenstall *v.* Leng, 217 Pa. St. 491, 66 Atl. 991, 12 L. R. A. N. S. 652; Huntzinger *v.* Helfenstein, 10 Pa. Co. Ct. 576.

To quiet title to an easement, the petitioner must have possession and enjoyment of the easement, and not a mere title thereto. Bowditch *v.* Gardner, 113 Mass. 315. See also Boston Mfg. Co. *v.* Burgin, 114 Mass. 340.

b. Sufficiency — (i) *Must Be Actual.* The possession of the petitioner must be actual;[54] and therefore constructive possession, which follows what is termed the paper title, will not suffice.[55]

(ii) *Must Be Substantially Exclusive.* As between himself and the respondent, the possession of the petitioner must be substantially and practically exclusive.[56] Accordingly it is not sufficient that the petitioner has mere formal or nominal possession which he may abandon and then bring the action himself,[57] especially if obtained by an act of trespass, for the sole purpose of instituting the proceeding, so as to shift the burden of establishing title on respondent.[58] Nor is it sufficient that petitioner may be treated as a disseizor at the election of a respondent.[59]

2. Adverse Claim on Part of Respondent[60] **— a. Necessity.** To authorize the proceeding, it must appear that respondent is asserting some claim adverse to the petitioner's title.[61] The proceeding cannot be maintained when it appears that the respondent, after the filing of the petition, conveyed his interest in the real estate.[62] It is a prerequisite to the maintenance of the proceeding that the respondent is, at the time of the filing of the petition, making a claim to the premises adverse to the title or interest of petitioner.[63]

b. Nature — (i) *Must Be of Immediate Interest.* The claim made by respondent must be one which can be presently asserted.[64] Thus where the

54. Daudt *v.* Keen, 124 Mo. 105, 27 S. W. 361; Babe *v.* Phelps, 65 Mo. 27; Von Phul *v.* Penn, 31 Mo. 333.

55. Munroe *v.* Ward, 4 Allen (Mass.) 150.

56. Sharon First Baptist Church *v.* Harper, 191 Mass. 196, 77 N. E. 778; Orthodox Cong. Soc. *v.* Greenwich, 145 Mass. 112, 13 N. E. 380; Proprietors India Wharf *v.* Central Wharf, etc., Corp., 117 Mass. 504; Tompkins *v.* Wyman, 116 Mass. 558; Daudt *v.* Keen, 124 Mo. 105, 27 S. W. 361; Dyer *v.* Baumeister, 87 Mo. 134; Rutherford *v.* Ullman, 42 Mo. 216. See also Brown *v.* Matthews, 117 Mass. 506.

Possession held exclusive.— The petitioner claiming under a quitclaim deed made in 1870 by a corporation which had filled flats in 1867, which had previously been partially covered by water, offered evidence that down to the time of the deed the land remained vacant and unoccupied; that soon after the petitioner put some building stone on the premises, and a short time prior to the filing of the petition caused a fence to be put upon the lot and ordered a fence erected by some one else to be removed; that he had paid the taxes from the date of the deed to him. The evidence of the respondent who claimed under a quitclaim deed from a third person, given in 1871, was to the effect that he had fenced the land twice after his deed, and that his fences were removed before the petition was filed; and that the corporation of which he was president had filled the land at a small cost, for the purpose of facilitating the filling of other land. It was held that the evidence was sufficient to show exclusive possession on the part of the petitioner. Brown *v.* Matthews, 117 Mass. 506.

Possession held not exclusive.— A religious society occupying a building originally erected by a town on a portion of the town common, to be used as a town house and for religious worship, but to which the town still continued to have access for the purpose of ringing the bell at noon and tolling it when deaths occurred, has not such an exclusive possession as will entitle it to bring a petition against the town to compel it to bring an action to try its alleged title to the premises. Orthodox Cong. Soc. *v.* Greenwich, 145 Mass. 112, 13 N. E. 380. Evidence that petitioner had leased the premises to the city for one year, and that the city covenanted to deliver up the premises to the lessor at the end of the term, is insufficient to show the petitioner's possession was exclusive where respondent executed a lease of his interest in the premises to the city for the same term, and both leases were delivered to the city at the same time. Proprietors India Wharf *v.* Central Wharf, etc., Co., 117 Mass. 504.

Where there is a joint or mixed possession, the petition cannot be maintained. Smith *v.* Libby, 64 Atl. 612, 101 Me. 338; Orthodox Cong. Soc. *v.* Greenwich, 145 Mass. 112, 13 N. E. 380.

57. Proprietors India Wharf *v.* Central Wharf, etc., Co., 117 Mass. 504.

58. Daudt *v.* Keen, 124 Mo. 105, 27 S. W. 361; Dyer *v.* Baumeister, 87 Mo. 134.

59. Proprietors India Wharf *v.* Central Wharf, etc., Co., 117 Mass. 504, where the court assigns, as the reason of the rule, that any person asserting a title to the land may be treated as a disseizor at the election of the rightful owner; and to give such a construction to the statute would be to enable any wrongful claimant to throw upon the rightful owner the burden of establishing his title.

60. See also *supra*, III, A, 3.

61. Benoist *v.* Murrin, 47 Mo. 537.

62. Allen *v.* Foss, 102 Me. 163, 66 Atl. 379.

63. Huntzinger *v.* Helfenstein, 10 Pa. Co. Ct. 576.

64. Webb *v.* Donaldson, 60 Mo. 394; Cook *v.* Von Phul, 55 Mo. App. 487; Burt *v.* War-

adverse claim is merely of a remainder, and does not conflict with petitioner's possession or right of possession, the case is not within the purview of the statute.[65]

(II) *Must Be Capable of Being Immediately Tested at Law or in Equity.* The claim made by the respondent must be one enforceable by an appropriate remedy at law [66] or in equity.[67] But when defendant asserts an immediate and adverse interest in the property, capable of being tested at once by appropriate proceedings in the courts, the form of action in which such adverse interest is to be asserted is immaterial.[68]

c. Particular Claims — (I) *Claim Invalid on Face.* The fact that a claim is invalid on the face of the record does not prevent it from being such an adverse claim as authorizes the proceeding.[69]

(II) *Assigned Dower.* Although an unassigned dower interest is neither a title nor an estate, yet it is an adverse claim within the purview of the statute.[70]

(III) *Claim Under Mortgage.* A petition by one in possession of realty, claiming the fee, will not be sustained when the respondent's claim is merely under a mortgage of the premises.[71]

D. Defenses.[72] It is a good defense to the proceeding that respondent can bring no action at law or in equity to settle the title,[73] that he claims only a future interest in the realty adverse to the petitioner,[74] or that he has already brought suit to try his title in the United States court.[75] But it is no defense that the practical effect of ordering respondent to prosecute an action to settle his title is to curtail the time allowed by the statute of limitations within which he might bring such an action.[76] Nor is it a defense that respondent is a *feme covert*, and so under disability and incapable of suing alone, and that her husband might refuse to join in the appropriate action to vindicate the rights of his wife.[77]

E. Parties.[78] Tenants in common may be joined as respondents in a petition to compel them to try their titles to the land, although their alleged titles are several.[79]

F. Process.[80] Actual notice is required to give the court jurisdiction, notice by publication to a non-resident not being sufficient.[81]

G. Pleading [82] — **1. Petition — a. In General.** The foundation of the proceeding is the petition, which must contain averments of the facts necessary to give the court jurisdiction, and asking that respondent be summoned to show cause why he should not bring an action to try his title.[83]

b. Particular Averments — (I) *As to Title or Interest of Petitioner.* The petition need not allege ownership in the petitioner, it being necessary only to allege that he is in actual possession of the land, claiming either an estate of freehold or an unexpired term of not less than ten years.[84]

ren, 30 Mo. App. 332; Bredall *v.* Alexander, 8 Mo. App. 110.

65. Tisdale *v.* Brabrook, 102 Mass. 377; Webb *v.* Donaldson, 60 Mo. 394; Northcutt *v.* Eager, 51 Mo. App. 218.

66. Tisdale *v.* Brabrook, 102 Mass. 374; Webb *v.* Donaldson, 60 Mo. 394; Burt *v.* Warren, 30 Mo. App. 332; Bredell *v.* Alexander, 8 Mo. App. 110.

67. Burt *v.* Warren, 30 Mo. App. 332; Bredell *v.* Alexander, 8 Mo. App. 110.

68. Colline Real Estate, etc., Assoc. *v.* Johnson, 120 Mo. 299, 25 S. W. 190; Cook *v.* Von Phul, 55 Mo. App. 487; Bredell *v.* Alexander, 8 Mo. App. 110.

69. Colline Real Estate, etc., Assoc. *v.* Johnson, 120 Mo. 299, 25 S. W. 190.

70. Benoist *v.* Murrin, 47 Mo. 537.

71. Poor *v.* Lord, 84 Me. 98, 24 Atl. 583.

A petition will not lie on behalf of the assignee of an insolvent debtor to compel a prior mortgagee of the same debtor to bring an action to test the validity of the mortgage. Dewey *v.* Buckley, 1 Gray (Mass.) 416; Hill *v.* Andrews, 12 Cush. (Mass.) 185.

72. See *supra*, III, B.

73. Webb *v.* Donaldson, 60 Mo. 394.

74. Webb *v.* Donaldson, 60 Mo. 394.

75. Deware *v.* Wyatt, 50 Mo. 236.

76. Benoist *v.* Murrin, 47 Mo. 537.

77. Benoist *v.* Murrin, 47 Mo. 537.

78. Parties generally see Parties, 30 Cyc. 1. See also *supra*, IV, C.

79. Gurney *v.* Waldron, 137 Mass. 376.

80. Process generally see Process, *ante*, p. 412. See also *supra*, IV, B.

81. Grant *v.* King, 31 Mo. 312; Murphy *v.* De France, 23 Mo. App. 337.

82. Pleading generally see Pleading, 31 Cyc. 1. See also *supra*, IV, D.

83. Murphy *v.* De France, 23 Mo. App. 337.

84. Dyer *v.* Baumeister, 87 Mo. 134.

(II) *As to Adverse Claims.* As to adverse claim the petition need only allege that petitioner is credibly informed and believes that respondent makes some claim adverse to his title.[85]

(III) *Describing Property.* The petition should contain a description of the land sufficiently definite to apprise the respondent of the land to which the petition refers.[86]

2. Disclaimer. An answer disclaiming all title adverse to petitioner estops respondent from denying the title, and the court should not enter on the trial.[87]

H. Hearing[88] **— 1. Questions Considered.** The court should confine its inquiries to the questions whether petitioner is in possession of the property claiming an estate of freehold, or an unexpired term of not less than ten years,[89] and whether respondent is making some claim to the premises adverse to that of claimant.[90] If the petitioner has, in addition to the record title, possession, the question whether he has a better title or not does not arise in this proceeding, but in the action which respondent may be ordered to bring.[91]

2. Determination. Petitioner must establish to the satisfaction of the court that he is claiming title to the realty involved.[92] And a rule on respondent to bring an action of ejectment will not be made absolute where there is nothing to show that petitioner is in possession of the property but the averments of the petition, denied by the answer.[93]

I. Decree.[94] It is only when a respondent ordered to show cause why he should not bring an action to establish his title defaults in appearance,[95] or, having appeared, disobeys a decree to prosecute such action to final judgment,[96] that the court is authorized to enter a final judgment forever debarring respondent from claiming adverse title. Hence when the petitioner is forced by motion of court to take a nonsuit, and files the usual motion to set the same aside, the court errs in sustaining the motion and then entering a judgment forever debarring petitioner from claiming any rights adverse to respondent.[97]

J. Costs.[98] If one of the respondents files a disclaimer founded on a partition of the land between respondents subsequently to the filing of the petition, he will take costs only from the date of the answer.[99]

K. Review. Since the proceeding involves the title to realty, it comes within the reviewing power of the supreme court.[1]

85. Benoist *v.* Murrin, 47 Mo. 537.

86. Oliver *v.* Look, 77 Me. 585, 1 Atl. 833.

Description held sufficient.—A description in the petition of the land claimed by the petitioner as "the accretion made by the Missouri River to section 24, which would be upon an extension of the line of the congressional survey the southeast quarter of section 24 and the northeast quarter of section 25," etc., is sufficiently definite. Rees *v.* McDaniel, 115 Mo. 145, 21 S. W. 913.

87. Jordan *v.* Stevens, 55 Mo. 361.

88. See also *supra*, IV, F.

89. Colline Real Estate, etc., Assoc. *v.* Johnson, 120 Mo. 299, 25 S. W. 190.

Superior title.—As between a petitioner claiming title by disseizin, and a respondent claiming paper title, it is not necessary for the court to determine who has the superior title, but only to determine whether petitioner has shown such a title as, in its discretion, entitles him to have the validity of his title settled. Leary *v.* Duff, 137 Mass. 147.

90. Colline Real Estate, etc., Assoc. *v.* Johnson, 120 Mo. 299, 25 S. W. 190.

91. Blanchard *v.* Lowell, 177 Mass. 501, 59 N. E. 114.

92. Huntzinger *v.* Helfenstein, 10 Pa. Co. Ct. 576.

93. Huntzinger *v.* Helfenstein, 10 Pa. Co. Ct. 576.

94. See also *supra*, IV, G.

95. Yankee *v.* Johnson, 51 Mo. 234.

96. Silsbee *v.* Salem, 103 Mass. 144; Yankee *v.* Johnson, 51 Mo. 234.

The effect of a decree requiring respondent to bring an action to try his title is to bar him from any subsequent claim to the premises. Northcutt *v.* Eager, 132 Mo. 265, 73 S. W. 1125; Rees *v.* McDaniel, 115 Mo. 145, 21 S. W. 913.

97. Yankee *v.* Thompson, 51 Mo. 234, holding further that the form of the judgment in such proceeding should be the same as would be appropriate in suits brought in the usual way.

98. **Costs** generally see Costs, 11 Cyc. 1 *et seq.* And see *supra*, IV, I.

99. Gurney *v.* Waldron, 137 Mass. 376.

1. Northcutt *v.* Eager, 132 Mo. 265, 33 S. W. 1125.

A judgment that defendant bring suit within a certain time, or be forever barred, is a final judgment from which an appeal will lie. Bredell *v.* Alexander, 8 Mo. App. 110.

QUIETUS. In Rhode Island, the name of a process by which an administrator may be fully discharged by the probate court.[1]

QUI EVERTIT CAUSAM, EVERTIT CAUSATUM FUTURUM. A maxim meaning "He who overthrows the cause overthrows its future effects." [2]

QUI EXCUSAT, ACCUSAT. A maxim meaning "He who excuses, accuses." [3]

QUI EX DAMNATO COITU NASCUNTUR INTER LIBEROS NON COMPUTANTUR. A maxim meaning "Those who are born of an illicit union, should not be counted among children." [4]

QUI EX PARTE TESTAMENTI ALIQUID DONATUM ACCIPIT, UNIVERSO TESTAMENTO STABIT. A maxim meaning "He who takes anything by a part of a testament, should stand by the whole testament." [5]

QUI EXTRA CAUSAM DIVAGATUR CALUMNIANDO, PUNITUR. A maxim meaning "Whoever wanders outside of the records in his pleading to utter calumny, shall be punished therefor." [6]

QUI FACIT ID QUOD PLUS EST, FACIT ID QUOD MINUS EST, SED NON CONVERTITUR. A maxim meaning "He who does that which is more, does that which is less, but not vice versa." [7]

QUI FACIT PER ALIUM, FACIT PER SE. A maxim meaning "He who acts through another, acts by himself." [8]

1. White *v.* Ditson, 140 Mass. 351, 355, 4 N. E. 606, 54 Am. St. Rep. 473.
2. Black L. Dict. [*citing* Lampert's Case, 10 Coke 46*b*, 51*b*, 77 Eng. Reprint 994].
3. Morgan Leg. Max.
4. Peloubet Leg. Max. [*citing* Coke Litt. 8*a*].
5. Peloubet Leg. Max. [*citing* Halkerstone Leg. Max.].
6. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
7. Peloubet Leg. Max. [*citing* Bracton 207].
8. Morgan Leg. Max.

Applied in: Hardeman *v.* Williams, 150 Ala. 415, 418, 43 So. 726, 10 L. R. A. N. S. 653; St. Louis, etc., R. Co. *v.* Smith, 48 Ark. 317, 320, 3 S. W. 364; Fones *v.* Phillips, 39 Ark. 17, 33, 43 Am. Rep. 264; Webster *v.* Diamond, 36 Ark. 532, 544; Powers *v.* Swigart, 8 Ark. 363, 365; Robins *v.* Hope, 57 Cal. 493, 496; State *v.* Boylan, 79 Conn. 463, 468, 65 Atl. 595; Hearns *v.* Waterbury Hospital, 66 Conn. 98, 123, 33 Atl. 595, 31 L. R. A. 224; Malley *v.* Thalheimer, 44 Conn. 41, 43; Middletown Ferry Co. *v.* Middletown, 40 Conn. 65, 70; Jewett *v.* New Haven, 38 Conn. 368, 380, 9 Am. Rep. 382; Lincoln *v.* McClatchie, 36 Conn. 136, 142; State *v.* Grady, 34 Conn. 118, 130; Munson *v.* Munson, 30 Conn. 425, 436; State *v.* Corrigan, 24 Conn. 286, 288; Thames Steamboat Co. *v.* Housatonic R. Co., 24 Conn. 40, 53, 63 Am. Dec. 154; Linsley *v.* Brown, 13 Conn. 192, 195; Barkhamsted *v.* Parsons, 3 Conn. 1, 8; Chenowith *v.* Cameron, 4 Ida. 515, 516, 42 Pac. 503; Dunlap *v.* Pattison, 4 Ida. 473, 477, 42 Pac. 504, 95 Am. St. Rep. 140; Nonn *v.* Chicago City R. Co., 232 Ill. 378, 381, 83 N. E. 924, 122 Am. St. Rep. 114; Snyder *v.* Fidler, 125 Iowa 378, 382, 101 N. W. 130; Kansas Lumber Co. Ir. *v.* Kansas Cent. Bank, 34 Kan. 635, 638, 9 Pac. 751; Oliphant *v.* Atchison County Com'rs, 18 Kan. 386, 397; New York Home Ins. Co. *v.* Myers, 107 S. W. 719, 720, 32 Ky. L. Rep. 999; Zacharie's Succession, 119 La. 150, 156, 43 So. 988; Howe *v.* Shaw, 56 Me. 291, 293; Forsyth *v.* Day, 46 Me. 176, 191; Silverwood *v.* Latrobe, 68 Md. 620, 629, 13 Atl. 161; Potomac Steamboat Co. *v.* Harlan, etc., Co., 66 Md. 42, 50, 4 Atl. 903; Adams *v.* Cost, 62 Md. 264, 267, 50 Am. Rep. 211; McHenry *v.* Marr, 39 Md. 510, 527; Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 65, 17 Am. Rep. 540; Deford *v.* State, 30 Md. 179, 201; Com. *v.* White, 123 Mass. 430, 434, 25 Am. Rep. 116; Hilliard *v.* Richardson, 3 Gray (Mass.) 349, 361, 63 Am. Dec. 743; Livermore *v.* Bagley, 3 Mass. 487, 508; Ætna Live Stock F., etc., Ins. Co. *v.* Olmstead, 21 Mich. 246, 253, 4 Am. Rep. 483; Green *v.* Graves, 1 Dougl. (Mich.) 351; Slater *v.* Advance Thresher Co., 97 Minn. 305, 308, 107 N. W. 133, 5 L. R. A. N. S. 598; Rissler *v.* American Cent. Ins. Co., 150 Mo. 366, 376, 51 S. W. 755; State *v.* Armstrong, 106 Mo. 395, 416, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419; Lynch *v.* Donnell, 104 Mo. 519, 525, 15 S. W. 927; Hammerslough *v.* Cheatham, 84 Mo. 13, 19; Peck *v.* Ritchey, 66 Mo. 114, 119; Summer *v.* Saunders, 51 Mo. 89, 93; De Soto *v.* American Guaranty Fund Mut. F. Ins. Co., 102 Mo. App. 1, 5, 74 S. W. 1; Ephland *v.* Missouri Pac. R. Co., 71 Mo. App. 597, 607; McLachlin *v.* Barker, 64 Mo. App. 511, 526; A. H. Whitney Co. *v.* Burnham, 48 Mo. App. 340, 344; Mangan *v.* Foley, 33 Mo. App. 250, 254; Fischer *v.* Anslyn, 30 Mo. App. 316, 321; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 23, 10 Am. Rep. 205; Dock *v.* Elizabethtown Steam Mfg. Co., 34 N. J. L. 312, 316; Brokaw *v.* New Jersey R., etc., Co., 32 N. J. L. 328, 331, 90 Am. Dec. 659; Aycrigg *v.* New York, etc., R. Co., 30 N. J. L. 460, 462; Brown *v.* Ramsay, 29 N. J. L. 117, 118; Allen *v.* Bunting, 18 N. J. L. 299, 301; Ludlam *v.* Broderick, 15 N. J. L. 269, 271; Saddle River Tp. *v.* Colfax, 6 N. J. L. 115, 118; McCauley *v.* Wood, 2 N. J. L. 86; McElwaine's Case, 18 N. J. Eq. 499, 502; Black *v.* Shreve, 13 N. J. Eq. 455, 459; Terhune *v.* Colton, 12 N. J. Eq. 242, 243; Rockland Lake Trap

QUI FALSI IN UNO, FALSI IN OMNIBUS. See FALSUS IN UNO, FALSUS IN OMNIBUS.[9]

QUI FRAUDEM FIT FRUSTRA AGIT. A maxim meaning "He who commits fraud, acts in vain."[10]

QUI HABET JURISDICTIONEM ABSOLVENDI, HABET JURISDICTIONEM LIGANDI. A maxim meaning "He who has jurisdiction to loosen has jurisdiction to bind."[11]

QUI HÆRET IN LITERA, HÆRET IN CORTICE. A maxim meaning "He who considers merely the letter of an instrument, goes but skin deep into its meaning."[12]

Rock Co. *v.* Lehigh Valley R. Co., 115 N. Y. App. Div. 628, 631, 101 N. Y. Suppl. 222; Weyant *v.* New York, etc., R. Co., 3 Duer (N. Y.) 360, 362; People *v.* Woodman, 15 Daly (N. Y.) 136, 137, 3 N. Y. Suppl. 927; Andes F. Ins. Co. *v.* Loehr, 6 Daly (N. Y.) 105, 106; Downs *v.* McGlynn, 2 Hilt. (N. Y.) 14, 16; Hauser *v.* Metropolitan St. R. Co., 27 Misc. (N. Y.) 538, 639, 58 N. Y. Suppl. 286; Amato *v.* Sixth Ave. R. Co., 9 Misc. (N. Y.) 4, 6, 29 N. Y. Suppl. 51; Peters *v.* Stewart, 2 Misc. (N. Y.) 357, 358, 21 N. Y. Suppl. 993; *In re* Strong, 16 N. Y. Suppl. 104, 105, 2 Connoly Surr. 574; People *v.* New York Hospital, 3 Abb. N. Cas. (N. Y.) 229, 269; Hews *v.* Hollister, 7 N. Y. Leg. Obs. 11, 12; People *v.* Adams, 3 Den. (N. Y.) 190, 210, 45 Am. Dec. 468; Miller *v.* Manice, 6 Hill (N. Y.) 114, 120; Wixson *v.* People, 5 Park. Cr. (N. Y.) 119, 129; People *v.* Merrill, 2 Park. Cr. (N. Y.) 590, 598; Stewart *v.* Cary Lumber Co., 146 N. C. 47, 89, 59 S. E. 545; Jackson *v.* American Tel., etc., Co., 139 N. C. 347, 353, 51 S. E. 1015, 70 L. R. A. 738; James *v.* Russell, 92 N. C. 194, 198; Cleveland City R. Co. *v.* Conner, 74 Ohio St. 225, 230, 78 N. E. 376; Collier *v.* Bickley, 33 Ohio St. 523, 531; Wolsey *v.* Lake Shore, etc., R. Co., 33 Ohio St. 227, 235; Cox *v.* John, 32 Ohio St. 532, 539; Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162, 168, 2 Am. Rep. 382; Reeves *v.* State Bank, 8 Ohio St. 465, 482; Clark *v.* Fry, 8 Ohio St. 358, 378, 72 Am. Dec. 590; Cleveland, etc., R. Co. *v.* Keary, 3 Ohio St. 201, 219, 227; State *v.* Guglielmo, 46 Oreg. 250, 261, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466; Macdonald *v.* O'Reilly, 45 Oreg. 589, 593, 78 Pac. 753; Fisher *v.* Union County, 43 Oreg. 223, 231, 72 Pac. 797; Harnish *v.* Herr, 98 Pa. St. 6, 8; Campbell *v.* Galbreath, 1 Watts (Pa.) 70, 75; Yard *v.* Lea, 3 Yeates (Pa.) 335, 345; McHenry's Estate, 15 Pa. Dist. 302, 304; Baldwin *v.* Polti, (Tex. Civ. App. 1907) 101 S. W. 543, 544; Findeisen *v.* Metropole F. Ins. Co., 57 Vt. 520, 527; Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 745, 14 S. E. 163; Muse *v.* Stern, 82 Va. 33, 40, 3 Am. St. Rep. 77; Fairfax *v.* Lewis, 2 Rand. (Va.) 20, 41; Black Lick Lumber Co. *v.* Camp Constr. Co., 63 W. Va. 477, 479, 60 S. E. 409; Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 593, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798; Zulkee *v.* Wing, 20 Wis. 408, 409, 91 Am. Dec. 425; Beattie *v.* Gardner, 3 Fed. Cas. No. 1,195, 4 Nat. Bankr. Reg. 323, 337; Moore *v.* Young, 17 Fed. Cas. No. 9,782, 4 Biss. 128, 131; U. S. *v.* Thomasson, 28 Fed. Cas. No. 16,478, 4 Biss. 99, 102; Smith *v.* Hancock, [1894] 2 Ch. 377, 390, 58 J. P. 638, 63 L. J. Ch. 477, 70 L. T. Rep. N. S. 578, 7 Reports 200, 42 Wkly. Rep. 456; London, etc., R. *v.* Reeves, L. R. 1 C. P. 580, 582, 1 Harr. & R. 845, 12 Jur. N. S. 786, 35 L. J. M. C. 239, 14 L. T. Rep. N. S. 662, 14 Wkly. Rep. 967; Ashby *v.* Blackwell, Ambl. 503, 505, 27 Eng. Reprint 326, 2 Eden 299, 28 Eng. Reprint 913; Askew *v.* Macreth, 1 B. & P. N. R. 214, 223; Overton *v.* Freeman, 11 C. B. 867, 873, 16 Jur. 65, 21 L. J. C. P. 52, '73 E. C. L. 867; Mackersy *v.* Ramsays, 9 Cl. & F. 818, 850, 8 Eng. Reprint 628, 640; Stevenson *v.* Mortimer, Cowp. 805, 806; Nicols Case, 3 De G. & J. 387, 437, 5 Jur. N. S. 205, 28 L. J. Ch. 257, 14 L. T. Rep. N. S. 464, 7 Wkly. Rep. 217, 60 Eng. Ch. 301, 44 Eng. Reprint 1317; Lumley *v.* Gye, 2 E. & B. 216, 224, 17 Jur. 827, 22 L. J. Q. B. 463, 1 Wkly. Rep. 432, 75 E. C. L. 216, 20 Eng. L. & Eq. 168; Cuming *v.* Toms, 14 L. J. C. P. 54, 56, 1 Lutw. Reg. Cas. 151, 7 M. & G. 29, 8 Scott N. R. 827, 49 E. C. L. 29; Reg. *v.* Middlesex Justice, 20 L. J. M. C. 42, 43, 15 Jur. 907, 1 Eng. L. & Eq. 311; The Bermina, 56 L. J. P. D. & Adm. 17, 19; Reg. *v.* Middlesex Justices, 1 L. M. & P. 621, 625; Duncan *v.* Findlater, Macl. & R. 911, 919, 9 Eng. Reprint 339, 342; Gibson *v.* Brand, 4 M. & G. 179, 189, 4 Scott N. R. 844, 43 E. C. L. 100; Canterbury *v.* Atty.-Gen., 1 Phil. 306, 321, 19 Eng. Ch. 306, 41 Eng. Reprint 648; Parsons *v.* Miller, 2 Phillim. 194, 196; Thomas *v.* Pearse, 5 Price 578, 589; Gyse *v.* Ellis, Str. 228, 93 Eng. Reprint 488; Dalmer *v.* Barnard, 7 T. R. 248, 252; Mitchell *v.* Tarbutt, 5 T. R. 649, 651, 2 Rev. Rep. 684; The Maria, 1 W. Rob. 95, 109; Hatfield *v.* St. John Gas Light Co., 32 N. Brunsw. 100, 113; Ronne *v.* Montreal Ocean Steamship Co., 19 Nova Scotia 312, 329; Campbell *v.* General Min. Assoc., 7 Nova Scotia 415, 419; Canada Landed Credit Co. *v.* Thompson, 8 Ont. App. 696, 703; Saunders *v.* Toronto, 29 Ont. 273, 277; *In re* Simpson, 9 Ont. Pr. 358, 360.

9. See also Caldwell *v.* Kinsman, 2 Nova Scotia 398, 424.

10. Peloubet Leg. Max. [*citing* 2 Rolle 17].

11. Bouvier L. Dict. [*citing* Langdale's Case, 12 Coke 58, 60, 77 Eng. Reprint 1338].

12. Morgan Leg. Max. [*citing* Coke Litt. 283*c*; Broom Leg. Max.].

Applied in: State *v.* Smith, 40 Ark. 431, 433; Monson *v.* Hunt, 17 Conn. 566, 570; United Soc. *v.* New Haven Eagle Bank, 7 Conn. 456, 475; Clark *v.* Hoskins, 6 Conn. 106, 109; French *v.* Gray, 2 Conn. 92, 118; Henshaw *v.* Foster, 9 Pick. (Mass.) 312, 317; Sumner *v.* Williams, 8 Mass. 162, 183,

QUI IGNORAT QUANTUM SOLVERE DEBEAT, NON POTEST IMPROBUS VIDERE. A maxim meaning "He who does not know what he ought to pay, does not want probity in not paying." [13]

QUI IN ALTERIUS LOCUM SUCCEDANT, JUSTAM HABENT IGNORANTIÆ CAUSAM AN ID QUOD PETITUR DEBERETUR FIDI JUSSORES, NON MINUS QUAM HÆREDES, JUSTAM IGNORANTIAM POSSUNT ALLEGARE. A maxim meaning "They who succeed in the room of another, may properly allege ignorance whether that which is sought for from the estate be due." [14]

QUI INERTIBUS DAT, INDUSTRIOS NUDAT. A maxim meaning "He who gives to the indolent, defrauds the industrious." [15]

QUI IN JUS DOMINIUMVE ALTERIUS SUCCEDIT JURE EJUS UTI DEBET. A maxim meaning "He who succeeds to the right or property of another ought to use his right." [16]

QUI INSCIENTER LÆSIT, SCIENTER EMENDIT. A maxim meaning "He who hurts another ignorantly, knowingly amends." [17]

QUI IN UTERO EST, PRO JAM NATO HABETUR QUOTIES DE EJUS COMMODO QUÆRITUR. A maxim meaning "He who is in the womb is held as born, whenever it is questioned concerning his benefit." [18]

QUI JURE SUO UTITUR, NEMINI FACIT INJURIAM. A maxim meaning "He who uses his legal rights harms no one." [19]

QUI JURE SUO UTITUR, NON POTEST DICI FRAUDEM COMMITTERE. A maxim meaning "He who uses his own right cannot be said to commit a fraud." [20]

QUI JUSSU JUDICIS ALIQUOD FECERIT NON VIDETUR DOLO MALO FECISSE, QUIA PARERE NECESSE EST. A maxim meaning "Where a person does an act by

5 Am. Dec. 83; Smith *v.* Barstow, 2 Dougl. (Mich.) 155, 166; Taylor *v.* Taylor, 10 Minn. 107; Watervliet Turnpike Co. *v.* McKean, 6 Hill (N. Y.) 616, 620 [both *citing* Dwarris St. 690]; State *v.* Lindell R. Co., 151 Mo. 162, 177, 52 S. W. 248; Chouteau *v.* Rowse, 90 Mo. 191, 195, 2 S. W. 209; Connor *v.* Chicago, etc., R. Co., 59 Mo. 285, 293; Fleming *v.* Graham, 34 Mo. App. 160, 168; Angle *v.* Lantz, 53 N. J. L. 578, 580, 22 Atl. 49; Waters *v.* Quimby, 27 N. J. L. 296, 303; Crane *v.* Alling, 14 N. J. L. 593, 596; Riggs *v.* Palmer, 115 N. Y. 506, 510, 22 N. E. 188, 12 Am. St. Rep. 819, 5 L. R. A. 340; McGaffin *v.* Cohoes, 74 N. Y. 387, 389, 30 Am. Rep. 307; Tracy *v.* Troy, etc., R. Co., 38 N. Y. 433, 437, 98 Am. Dec. 54; Clark *v.* Rumsey, 59 N. Y. App. Div. 435, 438, 69 N. Y. Suppl. 102; Richardson *v.* Herron, 39 Hun (N. Y.) 537, 542; Leavitt *v.* Fisher, 4 Duer (N. Y.) 1, 23; Langdon *v.* Astor, 3 Duer (N. Y.) 477, 601; People *v.* Campbell, 18 Abb. Pr. (N. Y.) 1, 2; *In re* Applicants for License, 143 N. C. 1, 21, 55 S. E. 635, 10 L. R. A. N. S. 288; Webster *v.* State, 43 Ohio St. 696, 701, 4 N. E. 566; Wolf *v.* Powner, 30 Ohio St. 472, 476; State *v.* Howe, 25 Ohio St. 588, 595, 18 Am. Rep. 321; Slater *v.* Cave, 3 Ohio St. 80, 82; Teaff *v.* Hewitt, 1 Ohio St. 511, 543, 59 Am. Dec. 634; Deginther's Appeal, 83 Pa. St. 337; Moers *v.* Reading, 21 Pa. St. 188, 200; Robins *v.* Beck, 2 Pennyp. (Pa.) 125, 127; Nicholas's Estate, 8 Pa. Dist. 725, 726; Sterling's Estate, 7 Pa. Co. Ct. 223, 226; *In re* North Chester Election Dist., 3 Pa. Co. Ct. 247, 249; Moore *v.* Risden, 5 Pa. L. J. 429, 430; Sterling's Estate, 19 Phila. (Pa.) 189; Philadelphia *v.* Lukens, 3 Phila. (Pa.) 333, 334; Toner's Estate, 5 Wkly. Notes Cas. (Pa.) 387, 388; Charleston *v.* Lunenburgh, 23 Vt. 525, 531; Orndoff *v.* Turman, 2 Leigh (Va.) 200, 226, 21 Am. Dec. 608; Joannes *v.* Millerd, 90 Wis. 68, 71, 62 N. W. 916; Rider *v.* Ashland County, 87 Wis. 160, 164, 58 N. W. 236; Kimball *v.* Rosendale, 42 Wis. 407, 416, 24 Am. Rep. 421; Tincher *v.* Arnold, 147 Fed. 665, 673, 77 C. C. A. 649, 7 L. R. A. N. S. 471; The Harmony, 11 Fed. Cas. No. 6,081, 1 Gall. 123, 127; Mendenhall *v.* Carter, 17 Fed. Cas. No. 9,426, 7 Nat. Bankr. Reg. 320, 328; Butler *v.* Wearing, 17 Q. B. D. 182, 186, 3 Morr. Bankr. Cas. 5; *Ex p.* Pillers, 17 Ch. D. 653, 667, 50 L. J. Ch. 691, 44 L. T. Rep. N. S. 691, 29 Wkly. Rep. 575; Drury *v.* Drury, 5 Bro. Ch. 570, 1 Ch. Rep. 49, 21 Eng. Reprint 504; Drury *v.* Drury, 2 Eden 39, 55, 28 Eng. Reprint 810; Provincial Ins. Co. *v.* Worts, 9 Ont. App. 56, 87; *Re* Erly, 2 Ont. App. 617, 624; Doe *v.* Lindsay, Draper (U. C.) 123, 135.

13. Black L. Dict. [*citing* Dig. 50, 17, 99].

14. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

15. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

16. Bouvier L. Dict. [*citing* Broom Leg. Max.].

17. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

18. Peloubet Leg. Max. [*citing* Wharton L. Lex.].

19. Bouvier L. Dict.

Applied in: Lawler *v.* Baring Boom Co., 56 Me. 443, 448; Carson *v.* Western R. Co., 8 Gray (Mass.) 423, 424; American Press Assoc. *v.* Daily Story Pub. Co., 120 Fed. 766, 770, 57 C. C. A. 70, 66 L. R. A. 444.

20. Peloubet Leg. Max. [*citing* Trayner Leg. Max.].

command of one exercising judicial authority, the law will not suppose that he acted from any wrongful or improper motive, because it was his bounden duty to obey." [21]

QUI JUSTA NEGANT, OMNIA DAT. A maxim meaning "He who refuses his adversary what is just, grants him everything else." [22]

QUI LIBENTER ET SÆPE, ET PARVULA, DE RE JURAMENTO SE OBSTRINGIT, PERJURIO PROXIMUS EST. A maxim meaning "He who willingly and often, and concerning a small matter, binds himself by an oath, is nearest to perjury." [23]

QUILIBET POTEST RENUNCIARE JURI PRO SE INDUCTO. A maxim meaning "Any one may renounce a right introduced for his own benefit." [24]

QUI MALE AGIT, ODIT LUCEM. A maxim meaning "He who acts badly, hates the light." [25]

QUI MANDAT IPSE FECISSI VIDETUR. A maxim meaning "He who commands (a thing to be done) is held to have done it himself." [26]

QUI MELIUS PROBAT MELIUS HABET. A maxim meaning "He who proves most recovers most." [27]

QUI MOLITUR INSIDIAS IN PATRIAM ID FACIT QUOD INSANUS NAUTA PERFORANS NAVEM IN QUA VEHITUR. A maxim meaning "He who betrays his country is like the insane sailor who bores a hole in the ship which carries him." [28]

QUI NASCITUR SINE LEGITIMO MATRIMONIO, MATREM SEQUITUR. A maxim meaning "He who is born out of lawful matrimony follows the condition of the mother." [29]

QUI NON CADUNT IN CONSTANTEM VIRUM VANI TIMORES SUNT ÆSTIMANDI. A maxim meaning "Those fears are to be esteemed vain which do not affect a brave man." [30]

QUI NON HABET, ILLE NON DAT. A maxim meaning "He who has not, gives not." [31]

21. Black L. Dict. [*citing* Marshalsea's Case, 10 Coke 68*b*, 76*a*, 77 Eng. Reprint 1027; Broom Leg. Max.].
Applied in: Slocum *v.* Wheeler, 1 Conn. 429, 450; Van Slyke *v.* Trempealeau County Mut. F. Ins. Co., 39 Wis. 390, 394, 20 Am. Rep. 63; Philips *v.* Bury, Show 35, 49, 1 Eng. Reprint 24.

22. Morgan Leg. Max. [*citing* Riley Leg. Max.].

23. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

24. Bouvier L. Dict.
Applied in: Walker *v.* Walker, 7 Ark. 542, 557; Marlborough *v.* Sisson, 23 Conn. 401, 412; Ormsbee *v.* Davis, 16 Conn. 567, 574; Reading *v.* Weston, 7 Conn. 409, 414; Newton *v.* Danbury, 3 Conn. 553, 559; Artz *v.* Grove, 21 Md. 456, 470; Com. *v.* Dailey, 12 Cush. (Mass.) 80, 83; Miles *v.* Boyden, 3 Pick. (Mass.) 213, 218; Long *v.* Billings, 9 Mass. 479, 482; People *v.* Johr, 22 Mich. 461, 466; Wildbahn *v.* Robidoux, 11 Mo. 659, 661; Van Idour *v.* Nelson, 60 Mo. App. 523, 527; Edwards *v.* State, 45 N. J. L. 419, 427; Ford *v.* Potts, 6 N. J. Eq. 388, 393; Baker *v.* Braman, 6 Hill (N. Y.) 47, 48, 40 Am. Dec. 387; Graham *v.* Davis, 4 Ohio St. 362, 376, 62 Am. Dec. 285; Henniss *v.* Page, 3 Whart. (Pa.) 275, 278; Downing *v.* Kintzing, 2 Serg. & R. (Pa.) 326, 345 (dissenting opinion); Hildeburn's Estate, 16 Pa. Co. Ct. 39, 44; Whitney's Estate, 3 Pa. Co. Ct. 498, 511, 18 Phila. 211; Bourguignon's Estate, 20 Phila. (Pa.) 143, 145; Singerly's Estate, 14 Phila. (Pa.) 313, 316; Toner's Estate, 12 Phila. (Pa.) 91, 93; Portsmouth Ins. Co. *v.* Reynolds, 32 Gratt. (Va.) 613, 629; Crenshaw *v.* Clark, 5 Leigh (Va.) 65, 68; Chinn *v.* Heale, 1 Munf. (Va.) 63, 72; Wilson *v.* McIntosh, [1894] A. C. 129, 133, 63 L. J. P. C. 49, 70 L. T. Rep. N. S. 536, 6 Reports 429; All Souls' Oxford *v.* Costar, 3 B. & P. 635, 643; Graham *v.* Ingleby, 5 D. & L. 737, 740, 1 Exch. 651; Rowbotham *v.* Wilson, 8 E. & B. 123, 151, 3 Jur. N. S. 1297, 27 L. J. Q. B. 61, 5 Wkly. Rep. 820, 92 E. C. L. 123; Bovill *v.* Wood, 2 M. & S. 23, 25, 1 Rose 155; Prince of Wales Coal Co. *v.* Osman, 22 N. Brunsw. 115, 122; Jamieson *v.* London, etc., Loan, etc., Co., 26 Ont. App. 116, 127; Thurlow Tp. *v.* Sidney Tp., 29 Grant Ch. (U. C.) 497, 499; Pardee *v.* Lloyd, 26 Grant Ch. (U. C.) 374, 375; Newman *v.* Church-Wardens, 1 Newfoundl. 310, 311. See also Langdon *v.* Astor, 3 Duer (N. Y.) 477, 582; Ellis *v.* Craig, 7 Johns. Ch. (N. Y.) 7, 10; Passmore *v.* Western Union Tel. Co., 9 Phila. (Pa.) 90, 92.

25. Bouvier L. Dict. [*citing* Mackalley's Case, 9 Coke 65*b*, 66*a*, 77 Eng. Reprint 828].

26. Bouvier L. Dict. [*citing* Story Bailm. § 147].
Applied in Ish *v.* Crane, 13 Ohio St. 574, 584.

27. Black L. Dict. [*citing* 9 Viner Abr. 235].

28. Black L. Dict. [*citing* 3 Inst. 36].

29. Bouvier L. Dict.

30. Morgan Leg. Max. [*citing* Calvin's Case, 7 Coke 1, 27*a*].

31. Black L. Dict. [*citing* Sheppard Touchst. 243].

QUI NON HABET IN ÆRE, LUAT IN CORPORE. A maxim meaning "He who has nothing in his purse must suffer in person." [32]

QUI NON HABET POTESTATEM ALIENANDI HABET NECESSITATEM RETINENDI. A maxim meaning "He who has not the power of alienating is obliged to retain." [33]

QUI NON IMPROBAT, APPROBAT. A maxim meaning "He who does not disapprove, approves." [34]

QUI NON LIBERE VERITATEM PRONUNCIAT PRODITOR EST VERITATIS. A maxim meaning "He who does not freely declare the truth, is a betrayer of the truth." [35]

QUI NON LUAT IN CRUMEN LUAT IN CORPORE. A maxim meaning "Who can not suffer in the purse, let him suffer in the body." [36]

QUI NON NEGAT FATETUR. A maxim meaning "He who does not deny, admits." [37]

QUI NON OBSTAT QUOD OBSTARE POTEST, FACERE VIDETUR. A maxim meaning "He who does not prevent what he can, seems to commit the thing." [38]

QUI NON PECCAVIT, PŒNAM NON FERET. A maxim meaning "He who hath not transgressed, shall not suffer punishment." [39]

QUI NON POTEST DONARE NON POTEST CONFITERI. A maxim meaning "He who is not able to give is not able to confirm." [40]

QUI NON PROHIBET CUM PROHIBERE POSSIT, JUBET. A maxim meaning "He who does not forbid when he can forbid, commands." [41]

QUI NON PROHIBET QUOD PROHIBERE POTEST, ASSENTIRE VIDETUR. A maxim meaning "He who does not forbid what he can forbid, appears to assent." [42]

QUI NON PROPULSAT INJURIAM QUANDO POTEST, INFERT. A maxim meaning "He who does not repel an injury when he can, induces it." [43]

QUI NON VETAT CUM DEBEAT ET POSSIT, JUBET. A maxim meaning "He who does not forbid a thing when it is in his power to forbid it, is regarded as directing it." [44]

QUINTERONES. In the Spanish and French West Indes, the issue of a white person and a quarterone.[45] (See COLORED PERSONS, 7 Cyc. 400; MULATTO, 28 Cyc. 51; NEGRO, 29 Cyc. 661; QUADROON, *ante*, p. 1276.)

QUI OBSTRUIT ADITUM, DESTRUIT COMMODUM. A maxim meaning "He who obstructs an entrance destroys a conveniency." [46]

QUI OMNE DICIT, NIHIL EXCLUDIT. A maxim meaning "He who says all excludes nothing." [47]

QUI ORDINE ULTERIORA ADMITTIT, PRÆCEDENTIA AFFIRMAT. A maxim meaning "He who admits posterior things in order, affirms preceding things." [48]

Applied in: Morrill *v.* Noyes, 56 Me. 458, 465, 96 Am. Dec. 486; Collins' Appeal, 3 Pennyp. (Pa.) 333, 345, 15 Wkly. Notes Cas. 5.

32. Peloubet Leg. Max. [*citing* 2 Inst. 173].

33. Black L. Dict. [*citing* Hobart 336].

34. Bouvier L. Dict. [*citing* 3 Inst. 27].

35. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

36. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

37. Black L. Dict. [*citing* Trayner Leg. Max.].

38. Bouvier L. Dict. [*citing* 2 Inst. 146].

39. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

40. Peloubet Leg. Max. [*citing* 1 Pothier Ev. 804].

41. Bouvier L. Dict. [*citing* 1 Blackstone Comm. 430].

Applied in: Rotch *v.* Miles, 2 Conn. 638, 648; Bulkley *v.* Derby Fishing Co., 2 Conn. 252, 256, 7 Am. Dec. 271.

42. Morgan Leg. Max. [*citing* 2 Inst. 350*a*].

Applied in: Norfolk, etc., R. Co. *v.* Perdue, 40 W. Va. 442, 453, 21 S. E. 755; Beattie *v.* Gardner, 3 Fed. Cas. No. 1,195, 4 Ben. 497, 4 Nat. Bankr. Reg. 323; Mowrey *v.* Indianapolis, etc., R. Co., 17 Fed. Cas. No. 9,891, 4 Biss. 78, 89; Whelan *v.* Reg., 28 U. C. Q. B. 2, 73.

43. Black L. Dict. [*citing* Jenkins Cent. 271].

44. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

45. Daniel *v.* Guy, 19 Ark. 121, 131.

46. Bouvier L. Dict. [*citing* Coke Litt. 161].

47. Peloubet Leg. Max. [*citing* 2 Inst. 81].

48. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

QUI PARCIT NOCENTIBUS INNOCENTES PUNIT. A maxim meaning "He who spares the guilty punishes the innocent." [49]

QUI PECCAT EBRIUS, LUAT SOBRIUS. A maxim meaning "He who offends drunk must be punished when sober." [50]

QUI PER ALIUM FACIT PER SEIPSUM FACERE VIDETUR. A maxim meaning "He who does a thing by an agent is considered as doing it himself." [51]

QUI PER FRAUDEM AGIT FRUSTRA AGIT. A maxim meaning "What a man does fraudulently he does in vain." [52]

QUI PERICULUM AMAT, IN EO PERIBIT. A maxim meaning "He who loves danger, will perish by it." [53]

QUI POTEST ET DEBET VETARE, JUBET. A maxim meaning "He who can and ought to forbid a thing (if he do not forbid it) directs it." [54]

QUI PRIMUM PECCAT ILLE FACIT RIXAM. A maxim meaning "He who first offends causes the strife." [55]

QUI PRIOR EST TEMPORE, POTIOR EST JURE. A maxim meaning "He who is prior in time is stronger in right." [56]

49. Black L. Dict. [*citing* Jenkins Cent. 133].

50. Bouvier L. Dict. [*citing* Broom Leg. Max.].

51. Black L. Dict. [*citing* Coke Litt. 258; Broom Leg. Max.].

Applied in: Shaw *v.* Bradley, 59 Mich. 199, 205, 26 N. W. 331; Brown's Accounting, 16 Abb. Pr. N. S. (N. Y.) 457, 465.

52. Black L. Dict. [*citing* 2 Rolle 17].

53. Morgan Leg. Max. [*citing* Wharton Leg. Max.].

54. Black L. Dict. [*citing* 2 Kent Comm. 483 note].

Applied in: Trapnall *v.* Burton, 24 Ark. 371, 400; New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 274, 283; Matthews *v.* Light, 32 Me. 305, 309; Sumner *v.* Seaton, 47 N. J. Eq. 103, 111, 19 Atl. 884; Kirchner *v.* Miller, 39 N. J. Eq. 355, 359; Epley *v.* Witherow, 7 Watts (Pa) 163, 168.

55. Peloubet Leg. Max. [*citing* Godbolt].

56. Bouvier L. Dict.

Applied in: Oats *v.* Halls, 28 Ark. 244, 251; Whiting *v.* Beebe, 12 Ark. 421, 575; Trowbridge *v.* Means, 5 Ark. 135, 138, 39 Am. Dec. 368; Nicks *v.* Rector, 4 Ark. 251, 281; Salter *v.* Baker, 54 Cal. 140, 143; Logan *v.* Driscoll, 19 Cal. 623, 626, 81 Am. Dec. 90; Curtiss *v.* Smith, 35 Conn. 156, 160; Williams *v.* Elting-Woolen Co., 33 Conn. 353, 356; Vansands *v.* Middlesex County Bank, 26 Conn. 144, 154; Carter *v.* Champion, 8 Conn. 549, 559, 21 Am. Dec. 695; Salmon *v.* Bennett, 1 Conn. 525, 556*n*, 7 Am. Dec. 237; Hayford *v.* Cunningham, 72 Me. 128, 132; May *v.* Buckhamon River Lumber Co., 70 Md. 448, 450, 17 Atl. 274; Cole *v.* Flitcraft, 47 Md. 312, 317; Schwarz *v.* Stein, 29 Md. 112, 118; Whipple *v.* Robbins, 97 Mass. 107, 108, 93 Am. Dec. 64; Wood *v.* Cushing, 6 Metc. (Mass.) 448, 459; American Tel., etc., Co. *v.* St. Louis, etc., R. Co., 202 Mo. 656, 678, 101 S. W. 576; State Sav. Assoc. *v.* Kellogg, 63 Mo. 540, 543; Pritchard *v.* Toole, 53 Mo. 356, 360; St. Louis *v.* O'Neil Lumber Co., 42 Mo. App. 586, 598; State *v.* Netherton, 26 Mo. App. 414, 427; Minor *v.* Rogers Coal Co., 25 Mo. App. 78, 81; Terney *v.* Wilson, 45 N. J. L. 282, 288; Lehigh Zinc, etc., Co. *v.* Trotter, 42 N. J. Eq. 678, 682, 9 Atl. 691; Butterfield *v.* Orie, 36 N. J. Eq. 482, 483; Barker *v.* Miller, 32 N. Y. App. Div. 364, 369, 53 N. Y. Suppl. 283; Arnold *v.* Morris, 7 Daly (N. Y.) 498, 504; Kaylor *v.* O'Connor, 1 E. D. Smith (N. Y.) 672, 675; Fuller *v.* Claflin, 14 N. Y. Suppl. 92, 93; Piper *v.* Hoard, 11 N. Y. St. 375, 379; Phillips *v.* O'Connor, 1 N. Y. City Ct. 372, 373; Bevans *v.* Pierce, 1 N. Y. City Ct. 259, 261; Diossy *v.* Heuberer, 1 N. Y. City Ct. 13, 15; Hertell *v.* Bogert, 9 Paige (N. Y.) 52, 60; Skeel *v.* Spraker, 8 Paige (N. Y.) 182, 188; James *v.* Hubbard, 1 Paige (N. Y.) 228, 234; Covell *v.* Tradesman's Bank, 1 Paige (N. Y.) 131, 135; Poillon *v.* Martin, 1 Sandf. Ch. (N. Y.) 569, 578; Loan Assoc. *v.* Merritt, 112 N. C. 243, 245, 17 S. E. 296; Campbell *v.* Sidwell, 61 Ohio St. 179, 190, 57 N. E. 609; Wilson *v.* Hicks, 40 Ohio St. 418, 427; Shorten *v.* Drake, 38 Ohio St. 76, 86; Hume *v.* Dixon, 37 Ohio St. 66, 69, 71; Hastings' Case, 10 Watts (Pa.) 303, 305; Bellas *v.* McCarty, 10 Watts (Pa.) 13, 26; Gratz *v.* Gratz, 4 Rawle (Pa.) 411, 434; Frazer *v.* Hallowell, 1 Binn. (Pa.) 126, 131; Ewing's Appeal, 1 Chest. Co. Rep. (Pa.) 34, 36; Buffalo City Bank *v.* Easton Boat, etc., Co., 42 Wkly. Notes Cas. (Pa.) 409, 412; White *v.* Dougherty, Mart. & Y. (Tenn.) 309, 321, 17 Am. Dec. 802; Anderson *v.* Ammonett, 9 Lea (Tenn.) 1. The doctrine is applied in this case but the maxim is not quoted in terms. Pinson *v.* Ivey, 1 Yerg. (Tenn.) 296, 331; Hillman *v.* Moore, 3 Tenn. Ch. 454, 460; Glenn *v.* Doyle, 3 Tenn. Ch. 324; Wells *v.* Stratton, 1 Tenn. Ch. 328; Downer *v.* South Royalton Bank, 39 Vt. 25, 30; Wasserman *v.* Metzger, 105 Va. 744, 781, 782, 54 S. E. 893, 905, 7 L. R. A. N. S. 1019; Briscoe *v.* Ashby, 24 Gratt. (Va.) 454, 476, 481; McClanachan *v.* Siter, 2 Gratt. (Va.) 280, 302; State *v.* Melton, 62 W. Va. 253, 262, 57 S. E. 729; Fowler *v.* Lewis, 36 W. Va. 112, 164, 14 S. E. 447; Tingle *v.* Fisher, 20 W. Va. 497, 510; Orient Ins. Co. *v.* Sloan, 70 Wis. 611, 615, 36 N. W. 388; Ohlson *v.* Pierce, 55 Wis. 205, 212, 12 N. W. 429; Smith *v.* Ford, 48 Wis. 115, 157, 2 N. W. 134, 4 N. W. 462; Hall *v.* Hinckley, 32 Wis. 362, 370; Wood *v.* Lake, 13 Wis. 84, 94; Wallace *v.* McConnell, 13 Pet. (U. S.)

QUI PRIUS JUS SUUM INSINUAVERIT PRÆFERETUR. A maxim meaning "He is preferred whose right has just been recorded." [57]

QUI PRO ME ALIQUID FACIT, MIHI FECISSE VIDETUR. A maxim meaning " He who does any benefit for me (to another) is considered as doing it to me." [58]

QUI PROVIDET SIBI PROVIDET HÆREDIBUS. A maxim meaning "He who provides for himself provides for his heirs." [59]

QUI RATIONEM IN OMNIBUS QUÆRUNT RATIONEM SUBVERTUNT. A maxim meaning "They who seek a reason for everything, subvert reason." [60]

QUIRT. A rawhide whip plated with two thongs of buffalo hide.[61]

QUI SCIT SE DECIPI, NON DECIPIATUR. A maxim meaning "He who knows that he is deceived, is not deceived." [62]

QUI SEMEL ACTIONEM RENUNCIAVERIT AMPLIUS REPETERE NON POTEST. A maxim meaning "He who has once relinquished his action cannot bring it again." [63]

QUI SEMEL MALUS, SEMPER PRÆSUMITUR ESSE MALUS IN EODEM GENERE. A maxim meaning "He who is once bad is presumed to be always so in the same degree." [64]

QUI SENTIT COMMODUM, SENTIRE DEBET ET ONUS. A maxim meaning "He who feels the advantage, ought also to feel the burden." [65]

136, 151, 10 L. ed. 95; Bedford *v.* Hunt, 3 Fed. Cas. No. 1,217, 1 Mason 302, 304, 1 Robb. Pat. Cas. 148; Lloyds Banking Co. *v.* Jones, 29 Ch. D. 221, 228, 54 L. J. Ch. 931, 52 L. T. Rep. N. S. 469, 33 Wkly. Rep. 781; Keate *v.* Phillips, 18 Ch. D. 560, 569, 675, 50 L. J. Ch. 664, 44 L. T. Rep. N. S. 731, 29 Wkly. Rep. 710; Cave *v.* Cave, 15 Ch. D. 639, 647, 49 L. J. Ch. 505, 42 L. T. Rep. N. S. 730, 28 Wkly. Rep. 793; Hunter *v.* Walters, L. R. 11 Eq. 292, 310, 24 L. T. Rep. N. S. 276 [*affirmed* in L. R. 7 Ch. 75, 41 L. J. Ch. 175, 25 L. T. Rep. N. S. 765, 20 Wkly. Rep. 218]; Roberts *v.* Croft, 24 Beav. 223, 224, 231, 53 Eng. Reprint 243 [*affirmed* in 2 De G. & J. 1, 3 Jur. N. S. 1069, 27 L. J. Ch. 220, 6 Wkly. Rep. 144, 59 Eng. Ch. 1, 44 Eng. Reprint 887]; Belchier *v.* Renforth, 5 Bro. P. C. 292, 296, 2 Eng. Reprint 686; Phillips *v.* Phillips, 4 De G. F. & J. 208, 215, 8 Jur. N. S. 145, 31 L. J. Ch. 321, 5 L. T. Rep. N. S. 655, 10 Wkly. Rep. 236, 65 Eng. Ch. 162, 45 Eng. Reprint 1164; Keech *v.* Hall, Dougl. (3d ed.) 21, 23; Rice *v.* Rice, 2 Drew. 73, 77, 85, 2 Eq. Rep. 341, 23 L. J. Ch. 289, 4 Wkly. Rep. 139, 61 Eng. Reprint 646; Belcher *v.* Butler, 1 Eden 523, 527, 28 Eng. Reprint 789; Parker *v.* Carter, 4 Hare 400, 410, 30 Eng. Ch. 400, 67 Eng. Reprint 704; Foster *v.* Blackstone, 1 Myl. & K. 297, 303, 2 L. J. Ch. 84, 7 Eng. Ch. 297, 39 Eng. Reprint 694; Frere *v.* Moore, 8 Price 475, 489, 22 Rev. Rep. 759; Roberts *v.* Roberts, 3 P. Wms. 66, 75, 24 Eng. Reprint 971, 975; Dearle *v.* Hall, 3 Russ. 1, 20, 27 Rev. Rep. 1, 3 Eng. Ch. 1, 38 Eng. Reprint 475; White *v.* Wakefield, 7 Sim. 401, 410, 8 Eng. Ch. 401, 58 Eng. Reprint 891; Thomas *v.* Butler, 1 Vent. 217, 218, 86 Eng. Reprint 146; Fox *v.* Crane, 2 Vern. Ch. 304, 305, 23 Eng. Reprint 797; Mackreth *v.* Symmons, 15 Ves. Jr. 329, 354, 10 Rev. Rep. 85, 33 Eng. Reprint 778; Sturgis *v.* Bishop of London, 5 Wkly. Rep. 499; Kirk *v.* Kirkland, 7 Brit. Col. 12, 18; King *v.* Keith, 1 N. Brunsw. 538, 548; Moffatt *v.* Scratch, 12 Ont. App. 157, 180; Toronto Bank *v.* Hall, 6 Ont. 653, 664; Scott *v.* Benedict, 5 Ont. 1, 26; Merchant's Bank *v.* Morrison, 19 Grant Ch. (U. C.) 1, 32.

57. Morgan Leg. Max. [*citing* Trayner Leg. Max.].

58. Bouvier L. Dict. [*citing* 2 Inst. 501].

59. Black L. Dict.

60. Peloubet Leg. Max. [*citing* Cromwel's Case, 2 Coke 69*b*, 75*a*, 76 Eng. Reprint 574].

61. Webster Dict. [*quoted* in Miller *v.* Meche, 111 La. 143, 146, 35 So. 491].

62. Morgan Leg. Max. [*citing* Tayler L. Gloss.].

63. Black L. Dict. [*citing* Beecher's Case, 8 Coke 58*a*, 59*b*, 77 Eng. Reprint 559].

64. Bouvier L. Dict. [*citing* Best Ev. 345].

65. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

Applied in: Dowdy *v.* Blake, 50 Ark. 205, 212, 6 S. W. 897, 7 Am. St. Rep. 88; Stalcup *v.* Greenwood Dist., 44 Ark. 31, 33; Warren *v.* Chambers, 25 Ark. 120, 123, 91 Am. Dec. 538, 4 Am. Rep. 23; United Soc. *v.* Eagle Bank, 7 Conn. 456, 474; Middletown Bank *v.* Magill, 5 Conn. 28, 61; Franklin County *v.* White Water Valley Canal Co., 2 Ind. 162, 163; Wolff *v.* Baltimore, 49 Md. 446, 449; Gough *v.* Manning, 26 Md. 347, 367; Tilghman *v.* Steuart, 4 Harr. & J. (Md.) 156, 170; Poage *v.* Wabash, etc., R. Co., 24 Mo. App. 199, 207; Ward *v.* Bodeman, 1 Mo. App. 272, 280; Ashuelot R. Co. *v.* Elliott, 57 N. H. 397, 438, 445; Clark *v.* Elizabeth, 37 N. J. L. 120, 125; *In re* Trenton Water Power Co., 20 N. J. L. 659, 664; New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25, 68; Whitehead *v.* Gray, 12 N. J. L. 36, 38; Vandyke *v.* Chandler, 10 N. J. L. 49, 54; Spinning *v.* Spinning, 43 N. J. Eq. 215, 247, 10 Atl. 270; Cooper *v.* Louanstein, 37 N. J. Eq. 284, 305; Yawger *v.* Yawger, 37 N. J. Eq. 216, 218; Danly *v.* Cummins, 31 N. J. Eq. 208, 209; Holcombe *v.* Holcombe, 27 N. J. Eq. 473, 474; Starbuck *v.* Starbuck, 62 N. Y. App. Div. 437, 454, 71 N. Y. Suppl. 104; Atlantic Dock Co.

QUI SENTIT ONUS, SENTIRE DEBET ET COMMODUM. A maxim meaning "He who bears the burden ought also to derive the benefit." [66]

QUIS ERIT INNOCENS, SI CLAM VEL PALAM ACCUSARE SUFFICIAT? A maxim meaning "If mere accusation, secret or open, could convict, who would go free?" [67]

QUI SERIUS SOLVIT, MINUS SOLVIT. A maxim meaning "He who pays too late, pays less." [68]

QUI SINE DOLO MALO AD JUDICIUM PROVOCAT, NON VIDETUR MORAM FACERE. A maxim meaning "He who without fraud expediates a hearing, can not be accused of delay." [69]

QUISQUE MANERE SUAM FORTUNAM DEBET. A maxim meaning "Every one is bound to live within his means." [70]

QUISQUE UTITUR JURE AUCTORIS. A maxim meaning "He who exercises a derived right, exercises it as the right of his principal." [71]

QUISQUIS EST QUI VELIT JURISCONSULTUS HABERI, CONTINUET STUDIUM, VELIT A QUOCUNQUE DOCERI. A maxim meaning "Whoever wishes to be held a jurisconsult, let him continually study, and desire to be taught by everybody." [72]

QUISQUIS PRÆSUMITUR BONUS; ET SEMPER IN DUBIIS PRO REO RESPONDENDUM. A maxim meaning "Every one is presumed to be good; and in doubtful cases, the resolution should always be for the accused." [73]

QUISQUIS SUA FACTA SCIRE ET PRESUMITUR ET DEBET. A maxim meaning "Every one is presumed to speak best in his own cause." [74]

QUI STATUAT ALIQUID PARTE INAUDITA, ALTERA ÆQUUM LICET STATUERIT, HAUD ÆQUUSOLET. A maxim meaning "He who determines any thing while one party remains unheard, even though he may determine justly, is not a just judge." [75]

QUI SUSPICIONEM PECCATI INDUCIT, PECCAT. A maxim meaning "He offends who occasions the suspicion of an offense." [76]

v. Leavitt, 50 Barb. (N. Y.) 135, 140; Astor *v.* L'Amoreux, 4 Sandf. (N. Y.) 524, 537; Paine *v.* Bonney, 4 E. D. Smith (N. Y.) 734, 751, 6 Abb. Pr. 99; Puitt *v.* Gaston County Com'rs, 94 N. C. 709, 717, 55 Am. Rep. 638; Black *v.* Kuhlman, 30 Ohio St. 196, 199; Hartwell *v.* Smith, 15 Ohio St. 200, 204; Wheeler, etc., Mfg. Co. *v.* Aughey, 144 Pa. St. 398, 407, 22 Atl. 667, 27 Am. St. Rep. 638; Lycoming F. Ins. Co. *v.* Woodworth, 83 Pa. St. 223, 227; McCaraher *v.* Com., 5 Watts & S. (Pa.) 21, 27, 39 Am. Dec. 506; Duff *v.* Bayard, 4 Watts & S. (Pa.) 240, 249, 39 Am. Dec. 73; Davis' Estate, 5 Whart. (Pa.) 530, 540, 34 Am. Dec. 574; Guardians of Poor *v.* Greene, 5 Binn. (Pa.) 554, 563; Hawk *v.* Harman, 5 Binn. (Pa.) 43, 50; Lyon *v.* McManus, 4 Binn. (Pa.) 167, 173; Cumming's Estate, 1 Pa. Dist. 485, 491; Neill's Estate, 3 Pa. Co. Ct. 197, 201, 18 Phila. 163; Pfeifer *v.* Sheboygan, etc., R. Co., 18 Wis. 155, 157, 86 Am. Dec. 751; Central Trust Co. *v.* Charlotte, etc., R. Co., 65 Fed. 257, 261; The Missouri, 17 Fed. Cas. No. 9,654; Pickersgill *v.* Rodger, 5 Ch. D. 163, 173; Dryden *v.* Putney, 1 Ex. D. 223, 231, 34 L. T. Rep. N. S. 69; Northumberland *v.* Aylesford, Ambl. 540, 543, 27 Eng. Reprint 347; Burnett *v.* Lynch, 6 B. & C. 589, 607, 8 D. & R. 368, 4 L. J. K. B. O. S. 274, 29 Rev. Rep. 343, 11 E. C. L. 597; Deering *v.* Winchelsea, 2 B. & P. 270, 274, 1 Cox Ch. 318, 1 Rev. Rep. 41, 29 Eng. Reprint 1148; Matter of Worcester Corn Exch. Co., 3 De G. M. & G. 180, 17 Jur. 721, 22 L. J. Ch. 593, 1 Wkly. Rep. 171, 52 Eng. Ch. 141, 43 Eng. Reprint 71, 19 Eng. L. & Eq. 627; Priestley *v.* Foulds, 2 M. & G. 175, 193, 2 R. & Can. Cas. 422, 2 Scott N. R. 265, 40 E. C. L. 549, 558; Sutherland-Innes Co. *v.* Romney Tp., 30 Can. Sup. Ct. 495, 515; Gardner *v.* Klœpfer, 15 Can. Sup. Ct. 390, 397; *Ex p.* Gorman, 34 N. Brunsw. 397, 410.

66. Bouvier L. Dict. [*citing* Broom Leg. Max.].

Applied in: Pennington *v.* Todd, 47 N. J. Eq. 569, 573, 21 Atl. 297, 24 Am. St. Rep. 419, 11 L. R. A. 589; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 630, 9 L. ed. 773, 938; Courtenay *v.* Wright, 2 Giffard 337, 351, 6 Jur. N. S. 1283, 30 L. J. Ch. 131, 3 L. T. Rep. N. S. 433, 9 Wkly. Rep. 153, 66 Eng. Reprint 141; Gardner *v.* Klœpfer, 15 Can. Sup. Ct. 390, 397.

67. Morgan Leg. Max. [*citing* Riley Leg. Max.].

68. Munday *v.* Rahway, 43 N. J. L. 338, 345.

69. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

70. Morgan Leg. Max. [*citing* Riley Leg. Max.].

71. Peloubet Leg. Max. [*citing* Trayner Leg. Max.].

72. Bouvier L. Dict.

73. Morgan Leg. Max.

74. Morgan Leg. Max. [*citing* Trayner Leg. Max.].

75. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

Applied in Bell *v.* Moffot, 18 N. Brunsw. 151, 156.

76. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

QUI SUUM RECIPIT LICET, A NON DEBITORE, NON TENETUR RESTITUERE. A maxim meaning "He who receives his due, although not from his debtor, is not held liable in restitution." [77]

QUIT. In a general sense, to leave off or desist.[78] As used in deeds, to sell or release.[79]

QUI TACET CONSENTIRE VIDETUR. A maxim meaning "He who is silent appears to consent." [80]

QUI TACET NON UTIQUE FATEUR, SED TAMEN VERUM EST EUM NON NEGARE. A maxim meaning "He who is silent does not indeed confess, but yet it is true that he does not deny." [81]

QUI TAM ACTION. Literally "Who as well—." An action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution; [82] an action brought under a statute which gives a certain penalty, to be recovered by action by any person who will sue for the same, and then gives part of the penalty when recovered to such person, and part to the king, poor of the parish, etc.[83] (Qui tam Action: Competency of Juror in Trial of, see JURIES, 24 Cyc. 272 note 20. Enforcement of Judgment Recovered in One State in Another State, see JUDGMENTS, 23 Cyc. 1561 note 38. For Infringement of Copyright, see COPYRIGHT, 9 Cyc. 966 note 3. Nature of Action, see APPEAL AND ERROR, 2 Cyc. 542; CIVIL SUIT, 7 Cyc. 179 note 5. Power of Attorney-General to Attend to Prosecution of, see ATTORNEY-GENERAL, 4 Cyc. 1031 note 48. Right to Take Depositions in, see DEPOSITIONS, 13 Cyc. 844 note 47. To Recover Penalties, see PENALTIES, 30 Cyc. 1346. See also FINES, 19 Cyc. 562 note 95.)

QUI TARDIUS SOLVIT, MINUS SOLVIT. A maxim meaning "He who pays more tardily [than he ought] pays less [than he ought]." [84]

QUITCLAIM or **QUITCLAIM DEED.** As a noun, a release or acquittance given to one man by another, in respect of any action that he has or might have against

77. Peloubet Leg. Max. [*citing* Trayner Leg. Max.].

78. Ryan *v.* State, 5 Ind. App. 396, 31 N. E. 1127, 1128.

Under a statute providing that tenancy for three months or longer may be terminated by a ten days' notice in writing to quit a notice requiring defendant "to leave" instead of "to quit" is sufficient the terms being synonymous. Douglass *v.* Anderson, 32 Kan. 350, 351, 4 Pac. 257.

79. Gordon *v.* Haywood, 2 N. H. 402, 404.

80. Peloubet Leg. Max. [*citing* Jenkins Cent. 32].

Applied in: Trapnall *v.* Burton, 24 Ark. 371, 400; New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 274, 283; Matthews *v.* Light, 32 Me. 305, 309; Day *v.* Caton, 119 Mass. 513, 515, 20 Am. Rep. 347; Sumner *v.* Seaton, 47 N. J. Eq. 103, 111, 19 Atl. 884; McKee *v.* People, 36 N. Y. 113, 1 Transcr. App. 1, 5, 3 Abb. Pr. N. S. 216, 24 How. Pr. 230; Armsby *v.* People, 2 Thomps. & C. (N. Y.) 157, 165; Hill *v.* Atlantic, etc., R. Co., 143 N. C. 539, 557, 55 S. E. 854, 9 L. R. A. N. S. 606; James *v.* Russell, 92 N. C. 194, 198; Hoff's Estate, 7 Pa. Dist. 93, 95; Epley *v.* Witherow, 7 Watts (Pa.) 163, 168; Norfolk, etc., R. Co. *v.* Perdue, 40 W. Va. 442, 453, 21 S. E. 755; Beattie *v.* Gardner, 3 Fed. Cas. No. 1,195, 4 Ben. 479, 495, 4 Nat. Bankr. Reg. 323; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478, 493; Simpson *v.* Smyth, 1 Grant Err. & App. (U. C.) 172, 206. See also Jones *v.* State, 2 Ga. App. 433, 435, 58 S. E. 559; Kirchner *v.* Miller, 39 N. J. Eq. 355, 359; Cowen *v.* Paddock, 17 N. Y. Suppl. 387, 391; La Ban *v.* Vanderbilt, 3 Redf. Surr. (N. Y.) 384, 395; Griffith *v.* Zipperwick, 28 Ohio St. 388, 408; Reichart *v.* Castator, 5 Binn. (Pa.) 109, 112, 6 Am. Dec. 402; State *v.* Sudduth, 74 S. C. 498, 500, 54 S. E. 1013; Fry *v.* Stowers, 92 Va. 13, 18, 22 S. E. 500; Hinton *v.* Wells, 45 Wis. 268, 273; Clarke *v.* Parker, 19 Ves. Jr. 1, 11, 12 Rev. Rep. 124, 34 Eng. Reprint 419.

81. Bouvier L. Dict. [*citing* Dig. 50, 17, 142].

82. Black L. Dict. [*quoted* in State *v.* Warner, 197 Mo. 650, 663, 94 S. W. 962].

So called because the plaintiff states that he sues as well for the state as for himself. Black L. Dict. [*quoted* in State *v.* Warner, 197 Mo. 650, 663, 94 S. W. 962].

83. Espinasse Pen. St. [*quoted* in *In re* Barker, 56 Vt. 14, 21]. See also Grover *v.* Morris, 73 N. Y. 473, 478.

The action against overseer of the roads for neglect of duty must be a *qui tam* action. Harris *v.* Moore, 1 N. J. L. 44.

84. Black L. Dict. [*citing* Jenkins Cent. 58].

him; also acquitting or giving up one's claim of title.[85] As a verb, to release a claim to by deed without covenants of warranty against adverse and paramount titles.[86] (Quitclaim or Quitclaim Deed: Affecting Right to Claim Compensation For Improvements in Ejectment, see EJECTMENT, 15 Cyc. 226. As Violation of Laws Against Champerty and Maintenance, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 879. Bona Fide Purchasers Under, see VENDOR AND PURCHASER. Conveyance of Covenant by, see COVENANTS, 11 Cyc. 1099. Deed by Mortgagee as Transfer of Debt or Obligation Secured, see MORTGAGES, 27 Cyc. 1292. Effect of — As Color of Title, see ADVERSE POSSESSION, 1 Cyc. 1095; Executed After Majority on Deed Executed During Infancy, see INFANTS, 22 Cyc. 556. Estate and Interest Conveyed by, see DEEDS, 13 Cyc. 652. Liability of Grantee in For Fraudulent Representations, see FRAUDS, 20 Cyc. 60. Mode of Conveying Land, see DEEDS, 13 Cyc. 525. Operation by Way of Estoppel, see ESTOPPEL, 16 Cyc. 688. Title — To Mortgaged Property Conveyed by, see MORTGAGES, 27 Cyc. 1292; Under Quitclaim Deed to Support Action of Ejectment, see EJECTMENT, 15 Cyc. 41. To Mortgaged Property From Mortgagee as Assignment of Mortgage, see MORTGAGES, 27 Cyc. 1292. Validity of Deed Executed by Tribal Council, see INDIANS, 22 Cyc. 130 note 84.)

QUITCLAIM DEED. See QUITCLAIM.

QUI TEMPUS PRÆTERMITTIT, CAUSUM PERDIT. A maxim meaning "He who is dilatory, loses his own cause." [87]

QUI TIMENT, CAVENT ET VITANT. A maxim meaning "They who fear, take care and avoid." [88]

QUI TOTUM DICIT NIHIL EXCIPIT. A maxim meaning "He who says all excepts nothing." [89]

QUIT RENT. A yearly rent by the payment of which the tenant goes quit and free of all other services.[90]

QUITTANCE. An abbreviation of "acquittance;" a release.[91]

QUI VI RAPUIT, FUR IMPROBIOR ESSE VIDETUR. A maxim meaning "He who robs by violence, is the greater thief." [92]

QUIVIS PRÆSUMITUR BONUS, DONEC PROBETUR CONTRARIUM. A maxim meaning "Every man is presumed innocent, until it is proved to the contrary." [93]

QUI VULT DECIPI, DECIPIATUR. A maxim meaning "Let him who wishes to be deceived, be deceived." [94]

QUOCUMQUE MODO VELIT; QUOCUMQUE MODO POSSIT. A maxim meaning "In any way he wishes; in any way he can." [95]

QUOD AB INITIO NON VALET IN TRACTU TEMPORIS NON CONVALESCET. A maxim meaning "That which is not valid at the beginning, improves not by lapse of time." [96]

85. Black L. Dict. [*citing* Cowell L. Dict.; Termes de la Ley].

86. Bannard *v.* Duncan, 79 Nebr. 189, 112 N. W. 353, 355.

A contract to "quitclaim and convey" a parcel of land means to "convey by quitclaim deed." Brame *v.* Towne, 56 Minn. 126, 128, 57 N. W. 454.

Effect of use of word.—Although the word "quitclaim" is actually used, in a deed, if the deed nevertheless purports to convey the land itself, and not the mere right or title of the grantor, and if the grantee paid the purchase-money without notice of any claim by a third person, he will be protected against the unregistered deed of the latter. Dycus *v.* Hart, 2 Tex. Civ. App. 354, 357, 21 S. W. 299. See also Garrett *v.* Christopher, 74 Tex. 453, 454, 12 S. W. 67, 15 Am. St. Rep. 850, where it was said: "From this language we think it quite clear that the parties intended to convey the land itself."

The term is of equivalent meaning with the term "release." Hill *v.* Dyer, 3 Me. 441, 445.

87. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

88. Peloubet Leg. Max. [*citing* Wentworth Off. Ex. 162].

89. Black L. Dict.

90. Burrill L. Dict.

In some of the United States, a fee farm rent is so termed. Burrill L. Dict. [*citing* 1 Hilliard Real Prop. 239].

91. Black L. Dict.

92. Morgan Leg. Max.

93. Peloubet Leg. Max. [*citing* Trayrer Leg. Max.].

94. Bouvier L. Dict. [*citing* Broom Leg. Max. 782 note].

95. Black L. Dict.

Applied in Clason *v.* Bailey, 14 Johns. (N. Y.) 484, 492.

96. Peloubet Leg. Max. [*citing* Coke Litt. 35*a*].

QUOD AD JUS NATURALE ATTINET OMNES HOMINES ÆQUALES SUNT. A maxim meaning "All men are equal as far as the natural law is concerned." [97]

QUOD ÆDIFICATUR IN AREA LEGATA CEDIT LEGATO. A maxim meaning "Whatever is built upon land given by will passes with the gift of the land." [98]

QUOD ALIAS BONUM ET JUSTUM EST, SI PER VIM VEL FRAUDEM PETATUR, MALUM ET INJUSTUM EFFICITUR. A maxim meaning "What otherwise is good and just, if it be sought by force and fraud, becomes bad and unjust." [99]

QUOD ALIAS NON FUIT LICITUM NECESSITAS LICITUM FACIT. A maxim meaning "What otherwise was not lawful, necessity makes lawful." [1]

QUOD A QUOQUE PŒNÆ NOMINE EXACTUM EST ID EIDEM RESTITUERE NEMO COGITUR. A maxim meaning "That which has been exacted as a penalty, no one is obliged to restore." [2]

QUOD ATTINET AD JUS CIVILE, SERVI PRO NULLIS HABENTUR, NON TAMEN ET JURE NATURALI, QUIA, QUOD AD JUS NATURALE ATTINET, OMNES HOMINES ÆQUALI SUNT. A maxim meaning "So far as the civil law is concerned, slaves are not reckoned as persons, but not so by natural law, for, so far as regards natural law, all men are equal." [3]

QUOD BILLA CASSETUR. Literally "That the bill be quashed." [4]

QUOD CIVILE JUS NON IDEM CONTINUO GENTIUM; QUOD AUTEM GENTIUM IDEM CIVILE ESSE DEBET. A maxim meaning "All civil law is not the law of nations; but all law of nations is civil law." [5]

QUOD COMPUTET. Literally "That he account." Judgment *quod computet* is a preliminary or interlocutory judgment given in the action of account-render (also in the case of creditors' bills against an executor or administrator,) directing that accounts be taken before a master or auditor.[6]

QUOD CONSCIENTIA VULT UBI, LEX DEFICIT, ÆQUITAS COGIT. A maxim meaning "What conscience wishes, the law being deficient, equity prescribes." [7]

QUOD CONSTAT CLARE NON DEBET VEREFICARI. A maxim meaning "What appears clearly, need not be proved." [8]

QUOD CONSTAT CURIÆ OPERE TESTIUM NON INDIGET. A maxim meaning "What appears to the court needs not the help of witnesses." [9]

QUOD CONTRA JURIS RATIONEM RECEPTUM EST, NON EST PRODUCENDUM AD CONSEQUENTIAS. A maxim meaning "What has been admitted against the reason of the law, ought not to be drawn into precedents." [10]

QUOD CONTRA LEGEM FIT PRO INFECTO HABETUR. A maxim meaning "That which is done against law is regarded as not done at all." [11]

QUOD CUM. In pleading, "for that whereas." A form of introducing matter of inducement in certain actions, as assumpsit and case.[12]

QUODCUMQUE EST LUCRI COMMUNE. A maxim meaning "A windfall is the common property of all the finders." [13]

Applied in: Holyoke *v.* Haskins, 5 Pick. (Mass.) 20, 27, 16 Am. Dec. 372; Boyd *v.* Stubbs, 7 Watts (Pa.) 29, 32; Reg. *v.* Chilverscoton, 8 T. R. 178, 181; Dawe *v.* Broom, 1 Newfoundl. 382, 395.

97. Black L. Dict. [*citing* Dig. 50, 17, 32].

98. Bouvier L. Dict. [*citing* Broom Leg. Max.].

99. Peloubet Leg. Max. [*citing* Fermor's Case, 3 Coke 77*a*, 78*a*, 76 Eng. Reprint 800].

Applied in Fox *v.* Hills, 1 Conn. 295, 302.

1. Peloubet Leg. Max. [*citing* Fleta, 5, 23, 14].

2. Peloubet Leg. Max. [*citing* Dig. 50, 17, 46].

3. Black L. Dict. [*citing* Dig. 50, 17, 32].

4. It is the common-law form of a judgment sustaining a plea in abatement, where the proceeding is by bill, i. e. by a capias instead of by original writ. Black L. Dict.

5. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

6. Black L. Dict.

7. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

8. Peloubet Lex. Max. [*citing* Thornicroft *v.* Barns, 10 Mod. 149, 150, 88 Eng. Reprint 669].

9. Bouvier L. Dict. [*citing* 2 Inst. 662].

10. Bouvier L. Dict. [*citing* Dig. 50, 17, 141].

11. Black L. Dict. [*citing* French's Case, 4 Coke 31*a*, 76 Eng. Reprint 960].

Applied in Evans *v.* Harrison, Wilm. 130, 144.

12. Bouvier L. Dict. [*quoted* in Spiker *v.* Bohrer, 37 W. Va. 258, 260, 16 S. E. 575].

13. Morgan Leg. Max. [*citing* Riley Leg. Max.].

QUODCUNQUE ALIQUIS OB TUTELAM CORPORIS SUI FECERIT JURE ID FECISSE VIDETUR. A maxim meaning "Whatever one does in defence of his person, that he is considered to have done legally." [14]

QUOD DATUM EST ECCLESIÆ, DATUM EST DEO. A maxim meaning "What is given to the church is given to God." [15]

QUOD DECET, NON QUOD LICET, LAUS EST. A maxim meaning "To do what is just, not what the law allows, is true excellence." [16]

QUOD DEFERTUR NON AUFERTUR. A maxim meaning "Omittance is no quittance; that which is deferred is not relinquished." [17]

QUOD DEMONSTRANDI CAUSA ADDITUR REI SATIS DEMONSTRATÆ, FRUSTRA FIT. A maxim meaning "What is added to a thing sufficiently palpable, for the purpose of demonstration, is vain." [18]

QUOD DUBIA INTERPRETATIO LIBERTATIS EST SECUNDUM LIBERTATEM RESPONDENDUM ERIT. A maxim meaning "What is a doubtful interpretation of liberty ought to be answered according to the greatest liberty." [19]

QUOD DUBITAS, NE FECERIS. A maxim meaning "Where you doubt, do nothing." [20]

QUOD ENIM SEMEL AUT BIS EXISTIT, PRÆTEREUNT LEGISLATORES. A maxim meaning "That which never happens but once or twice, legislators pass by." [21]

QUOD EST EX NECESSITATE NUNQUAM INTRODUCITUR, NISI QUANDO NECESSARIUM. A maxim meaning "That which is of necessity is never introduced, unless when necessary." [22]

QUOD EST INCONVENIENS, AUT CONTRA RATIONEM NON PERMISSUM EST IN LEGE. A maxim meaning "What is inconvenient or contrary to reason, is not allowed in law." [23]

QUOD EST NECESSARIUM EST LICITUM. A maxim meaning "What is necessary is lawful." [24]

QUOD EST VIOLENTUM NON EST DURABILE. A maxim meaning "That which is violent is not durable." [25]

QUOD FACTUM EST, CUM IN OBSCURO SIT, EX AFFECTIONE CUJUSQUE CAPIT INTERPRETATIONEM. A maxim meaning "When there is doubt about an act, it may be interpreted from the known feelings of the actor." [26]

QUOD FATO CONTINGIT CUIVIS DILIGENTISSIMO POSSIT CONTINGERE. A maxim meaning "Accidents may happen to the most wary and cautious." [27]

QUOD FIERI DEBET FACILE PRÆSUMITUR. A maxim meaning "That is easily presumed which ought to be done." [28]

QUOD FIERI DEBET INFECTUM VALET. A maxim meaning "What ought to be done avails, even though it is not done." [29]

QUOD FIERI DEBUIT PRO FACTO CENSATUR. A maxim meaning "What ought to have been done is reckoned as done." [30]

QUOD FIERI NON DEBET, FACTUM VALET. A maxim meaning "That which ought not to be done, when done, is valid." [31]

14. Bouvier L. Dict. [*citing* 2 Inst. 590].
15. Black L. Dict. [*citing* 2 Inst. 2].
16. Morgan Leg. Max.
17. Morgan Leg. Max. [*citing* Riley Leg. Max.].
18. Bouvier L. Dict. [*citing* Legat's Case, 10 Coke 109*a*, 113*a*, 77 Eng. Reprint 1093].
19. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
20. Peloubet Leg. Max. [*citing* 1 Hale Pl. Cr. 300].
21. Bouvier L. Dict. [*citing* Dig. 1, 3, 17].
22. Black L. Dict. [*citing* Sheffeild's Case, 2 Rolle 501, 502, 81 Eng. Reprint 943].
23. Bouvier L. Dict. [*citing* Coke Litt. 178].
Applied in: Guilford *v.* Oxford, 9 Conn. 321, 327; Mitchell *v.* Rodney, 2 Bro. P. C. 423, 430, 1 Eng. Reprint 1039.
24. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
25. Morgan Leg. Max. [*citing* Grigg Leg. Max.].
26. Peloubet Leg. Max.
27. Morgan Leg. Max. [*citing* Tayler L. Gloss.].
28. Bouvier L. Dict. [*citing* Halkerstone Leg. Max.; Broom Leg. Max.].
29. Morgan Leg. Max. [*citing* Trayner Leg. Max.].
30. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
31. Black L. Dict. [*citing* Broom Leg. Max.].

QUOD FIERI VETATUR EX DIRECTO VETATUR ETIAM AB OBLIQUO. A maxim meaning "What is forbidden to be done directly is forbidden also indirectly." [32]

QUOD FRAUDE FACTUM EST IN ALIOS INFECTUM ESTO CONTRA FRAUDATOREM VALET. A maxim meaning "What is done in fraud, although null and void as to all others, is valid against the defrauders." [33]

QUOD HODIE EXEMPLIS TUEMUR, EXEMPLA ERIT. A maxim meaning "What to-day we respect as examples, in the future will be regarded as precedents." [34]

QUOD INCONSULTO FECIMUS, CONSULTIUS REVOCEMUS. A maxim meaning "What is done without counsel, we revoke upon consideration." [35]

QUOD INITIO NON VALET, TRACTU TEMPORIS NON CONVALESCET. A maxim meaning "That which is unlawful in the beginning will acquire no validity by lapse of time." [36]

QUOD IN JURE SCRIPTO "JUS" APPELLATUR, ID IN LEGE ANGLIÆ "RECTUM" ESSE DICITUR. A maxim meaning "What in the civil law is called 'jus,' in the law of England is said to be 'rectum,' (right)." [37]

QUOD IN MAJORE NON VALET, NEC VALET IN MINORE. A maxim meaning "That which avails not in the greater, avails not in the less." [38]

QUOD IN MINORI VALET, VALEBIT IN MAJORI; ET QUOD IN MAJORI NON VALET, NEC VALEBIT IN MINORI. A maxim meaning "What avails in the less, will avail in the greater; and what will not avail in the greater, will not avail in the less." [39]

QUOD IN SE MALUM UBICUNQUE FACTUM FUERIT NULLA JURIS POSITIVI RATIONE VALEBIT. A maxim meaning "That which is bad when done can never be valid by positive law." [40]

QUOD IN UNO SIMILIUM VALET VALEBIT IN ALTERO. A maxim meaning "That which is effectual in one of two like things shall be effectual in the other." [41]

QUOD IPSIS, QUI CONTRAXERUNT, OBSTAT, ET SUCCESSORIBUS EORUM OBSTABIT. A maxim meaning "That which bars those who have contracted will bar their successors also." [42]

QUOD JURIS IN TOTO IDEM IN PARTE. A maxim meaning "That which is law as regards the whole is also law as to the part." [43]

QUOD JUSSU ALTERIUS SOLVITUR PRO EO EST QUASI IPSI SOLUTUM ESSET. A maxim meaning "That which is paid by the order of another is the same as though it were paid to himself." [44]

QUOD LEGE TUUM EST AMPLIUS ESSE TUUM NON POTEST. A maxim meaning "What is yours by law can not be more yours." [45]

QUOD LEGIS CONSTRUCTIO NON FACIT INJURIAM. A maxim meaning "That the construction of law worketh no injury." [46]

Applied in Srimati Uma Deyi *v.* Gokoolanund das Mahapatra, L. R. 5 Indian App. 40, 53.

32. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

33. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

34. Morgan Leg. Max. [*citing* Tayler L. Gloss.].

35. Peloubet Leg. Max. [*citing* Jenkins Cent.].

36. Tayler L. Gloss.

Applied in: Gorham *v.* Wing, 10 Mich. 486, 496; Steers *v.* Lashley, 1 Esp. 166, 167.

37. Black L. Dict. [*citing* Coke Litt. 260; Fleta, 1, 6*c*, 1, § 1].

38. Peloubet Leg. Max. [*citing* Tayler L. Gloss.].

39. Bouvier L. Dict. [*citing* Coke Litt. 260].

40. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

41. Black L. Dict. [*citing* Coke Litt. 191*a*].

42. Bouvier L. Dict. [*citing* Dig. 50, 17, 103].

43. Morgan Leg. Max. [*citing* Trayner Leg. Max.].

44. Black L. Dict. [*citing* Dig. 50, 17, 180].

45. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

46. Tayler L. Gloss.

Applied in: Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454, 465, 44 Am. Dec. 556; Jackson *v.* Van Hoesen, 4 Cow. (N. Y.) 325, 329, which was an action of *quare clausum fregit.*

QUOD MEUM EST, SINE FACTO SIVE DEFECTU MEO AMITTI SEU IN ALIUM TRANSFERRI NON POTEST. A maxim meaning "That which is mine cannot be lost or transferred to another without mine own act or default." [47]

QUOD MEUM EST SINE ME AUFERRI NON POTEST. A maxim meaning "What is mine cannot be taken away without my consent." [48]

QUOD MINUS EST IN OBLIGATIONEM VIDETUR DEDUCTUM. A maxim meaning "That which is the less is held to be imported into the contract." [49]

QUOD NATURALIS RATIO INTER OMNES HOMINES CONSTITUIT, VOCATUR JUS GENTIUM. A maxim meaning "That which natural reason has established among all men, is called the law of nations." [50]

QUOD NATURALITER INESSE DEBET PRÆSUMITUR. A maxim meaning "That is presumed which ought naturally to exist." [51]

QUOD NECESSARIE INTELLIGITUR ID NON DEEST. A maxim meaning "What is necessarily understood is not wanting." [52]

QUOD NECESSITAS COGIT, DEFENDIT. A maxim meaning "What necessity compels, it justifies." [53]

QUOD NON APPARET NON EST. A maxim meaning "That which does not appear, does not exist." [54]

QUOD NON HABET PRINCIPIUM NON HABET FINEM. A maxim meaning "What has no beginning has no end." [55]

QUOD NON LEGITUR NON CREDITUR. A maxim meaning "What is not read is not believed." [56]

QUOD NON VALET IN PRINCIPALI, IN ACCESSORIO SEU CONSEQUENTI NON VALEBIT; ET QUOD NON VALET IN MAGIS PROPINQUO NON VALEBIT IN MAGIS REMOTO. A maxim meaning "That which is not good against the principal will not be good as to accessories or consequences; and that which is not of force in regard to things near it will not be of force in regard to things remote from it." [57]

QUOD NOSTRUM EST, SINE FACTO SIVE DEFECTU NOSTRO, AMITTI SEU IN ALIUM TRANSFERRI NON POTEST. A maxim meaning "That which is ours cannot be lost or transferred to another without our own act, or our own fault." [58]

QUOD NULLIUS ESSE POTEST, ID UT ALICUJUS FIERET NULLA OBLIGATIO VALET EFFICERE. A maxim meaning "No agreement can avail to make that the property of any one, which cannot be acquired as property." [59]

QUOD NULLIUS EST, EST DOMINI REGIS. A maxim meaning "That which belongs to nobody belongs to our lord the king." [60]

QUOD NULLIUS EST ID RATIONE NATURALI OCCUPANTI CONCEDITUR. A maxim meaning "What belongs to nobody is given to the occupant by natural right." [61]

47. Bouvier L. Dict. [*citing* Fraunces' Case, 8 Coke 89*b*, 92*a*, 77 Eng. Reprint 609; Broom Leg. Max.].

48. Peloubet Leg. Max. [*citing* Jenkins Cent. 251].

49. Black L. Dict. [*citing* 1 Story Cont. 481].

50. Bouvier L. Dict. [*citing* Dig. 1, 1, 9; Inst. 1, 2, 1; 1 Blackstone Comm. 43].

51. Morgan Leg. Max. [*citing* Trayner Leg. Max.].

52. Peloubet Leg. Max. [*citing* Egerton *v.* Morgan, 1 Bulstr. 69, 71, 80 Eng. Reprint 770].

53. Peloubet Leg. Max. [*citing* 1 Hale Pl. Cr. 54].

Applied in Conway *v.* Reg., 1 Cox C. C. 210, 215.

54. Peloubet. Leg. Max. [*citing* 2 Inst. 479].

Applied in: Wendell *v.* Pennsylvania R. Co., 57 N. J. L. 467, 469, 31 Atl. 720; Convery *v.* Conger, 53 N. J. L. 468, 480, 24 Atl. 549 (dissenting opinion); State *v.* Paterson, 36 N. J. L. 159, 163; Osborn *v.* Allen, 26 N. J. L. 388, 397; New Brunswick Steamboat, etc., Co. *v.* Tiers, 24 N. J. L. 697, 715, 64 Am. Dec. 394; Tindall *v.* McIntyre, 24 N. J. L. 147; Snyder *v.* Hummel, 2 N. J. L. 82, 83; Banta *v.* School Dist. No. 3, 39 N. J. Eq. 123, 124; Thum's Estate, 18 Pa. Co. Ct. 615, 619; Maynard's Case, 1 Walk. (Pa.) 472, 500.

55. Bouvier L. Dict. [*citing* Broom Leg. Max.].

56. Morgan Leg. Max. [*citing* 4 Inst. 304].

57. Black L. Dict. [*citing* Stafford's Case, 8 Coke 73*a*, 78*a*, 77 Eng. Reprint 586].

58. Peloubet Leg. Max. [*citing* Fraunces' Case, 8 Coke 89*b*, 92*a*, 77 Eng. Reprint 609]. Also found in the following form: "*Quod nostrum est, sine defectu vel facto nostro admitti non debet.*" Mattoon *v.* Fitzgerald, 1 Skin. 125, 129, 90 Eng. Reprint 58.

59. Peloubet Leg. Max. [*citing* Dig. 50, 17, 182].

60. Bouvier L. Dict. [*citing* Broom Leg. Max.].

61. Morgan Leg. Max. [*citing* Dig. 41, 1, 3].

QUOD NULLO INTERNO VITIO LABORAT ET OBJECTO IMPEDIMENTO CESSAT, REMOTO IMPEDIMENTO PER SE EMERGIT. A maxim meaning "That which, laboring under no internal fault, is overcome by obstacles, emerges of itself, the obstacle being removed." [62]

QUOD NULLUM EST, NULLUM PRODUCIT EFFECTUM. A maxim meaning "That which is null produces no effect." [63]

QUOD OMNES TANGIT AB OMNIBUS DEBET SUPPORTARI. A maxim meaning "That which touches or concerns all ought to be supported by all." [64]

QUOD PARTES REPLACITENT. Literally "That the parties do replead." The form of judgment on award of a repleader.[65]

QUOD PARTITIO FIAT. Literally "That partition be made." The name of the judgment in a suit for partition, directing that a partition be effected.[66] (See JUDGMENTS, 23 Cyc. 671 note 28; PARTITION, 30 Cyc. 249.)

QUOD PENDET, NON EST PRO EO, QUASI SIT. A maxim meaning "What is in suspense is considered as not existing, during the suspense." [67]

QUOD PER ME NON POSSUM, NEC PER ALIUM. A maxim meaning "What I cannot do in person, I cannot do through the agency of another." [68]

QUOD PERMITTAT PROSTERNDRE. A writ commanding the defendant to permit the plaintiff to abate the nuisance complained of, and unless he so permits, to summon him to appear in court and show cause why he will not.[69] (See NUISANCES, 29 Cyc. 1214.)

QUOD PER RECORDUM PROBATUM NON DEBET ESSE NEGATUM. A maxim meaning "What is proved by record ought not to be denied." [70]

QUOD POPULUS POSTREMUM JUSSIT, ID JUS RATUM ESTO. A maxim meaning "What the people have last enacted, let that be the established law." [71]

QUOD PRIMUM EST INTENTIONE ULTIMUM EST IN OPERATIONE. A maxim meaning "That which is first in intention is last in operation." [72]

QUOD PRINCIPI PLACUIT LEGIS HABET VIGOREM. A maxim meaning "That which has pleased the prince has the force of law. The emperor's pleasure has the force of law." [73]

QUOD PRIUS EST VERIUS EST; ET QUOD PRIUS EST TEMPORE POTIUS EST JURE. A maxim meaning "What is first is true; and what is first in time is best in law." [74]

QUOD PRO MINORE LICITUM EST, ET PRO MAJORE LICITUM EST. A maxim meaning "What is lawful in the less is lawful in the greater." [75]

62. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
Applied in Bartlett *v.* Williams, 1 Pick. (Mass.) 288, 292.

63. Black L. Dict. [*citing* Trayner Leg. Max.].

64. Black L. Dict. [*citing* How. St. Tr. 878, 1087].

65. Black L. Dict. [*citing* Staple *v.* Hayden, 2 Salk. 579].

66. Black L. Dict.
It is the first decree in a partition suit and is interlocutory. Gudgell *v.* Mead, 8 Mo. 54, 55, 4 Am. Dec. 120; Marquam *v.* Ross, 47 Oreg. 374, 379, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1; Mitchell *v.* Harris, 4 Pa. L. J. 231, 233; Wistar's Appeal, 15 Wkly. Notes Cas. (Pa.) 376, 377.

67. Peloubet Leg. Max. [*citing* Dig. 50, 17, 169].

68. Bouvier L. Dict. [*citing* Murrel *v.* Smith, 4 Coke 24*b*, 76 Eng. Reprint 928; Case of Monopolies, 11 Coke 84*b*, 87*a*].

69. Blackstone Comm. [*quoted* in Conhocton Stone Road *v.* Buffalo, etc., R. Co., 51 N. Y. 573, 579, 10 Am. Rep. 559]. See also Powell *v.* Bentley, etc., Furniture Co., 34 W. Va. 804, 808, 12 S. E. 1085, 12 L. R. A. 53.
Does not merely give damages, as a satisfaction for past injury, but also strikes at the root of the evil, by removing the cause of the mischief itself. Miller *v.* Truehart, 4 Leigh (Va.) 569, 577.

70. Morgan Leg. Max. [*citing* Wharton Leg. Max.].

71. Black L. Dict. [*citing* 1 Blackstone Comm. 89].

72. Morgan Leg. Max. [*citing* Bacon Leg. Max.].

73. Black L. Dict. [*citing* Dig. 1, 4, 1; Inst. 1, 2, 6]. "It (the common law) has proved to be a system replete with vigorous and healthy principles, eminently conducive to the growth of civil liberty; and it is in no instance disgraced by such a slavish political maxim as that with which the Institutes of Justinian are introduced." Kent Comm. [*quoted* in Clark *v.* Allaman, 71 Kan. 206, 216, 80 Pac. 571, 70 L. R. A. 971].

74. Peloubet Leg. Max. [*citing* Coke Litt. 347*a*].

75. Bouvier L. Dict. [*citing* Griesley's Case, 8 Coke 38*a*, 41*b*, 77 Eng. Reprint 530].

QUOD PROSTRAVIT. Literally "That he do abate." The name of a judgment upon an indictment for a nuisance, that the defendant abate such nuisance.[76]

QUOD PURE DEBETUR PRÆSENTI DIE DEBETUR. A maxim meaning "That which is due unconditionally is due now." [77]

QUODQUE DISSOLVITUR EODEM MODO QUO LIGATUR. A maxim meaning "In the same manner that a thing is bound, in the same manner it is unbound." [78]

QUOD QUIS EX CULPA SUA DAMNUM SENTIT, NON INTELLIGITUR DAMNUM SENTIRE. A maxim meaning "He who suffers a damage by his own fault, is not considered as suffering damage." [79]

QUOD QUISQUIS NORIT IN HOC SE EXERCEAT. A maxim meaning "Let every one employ himself in what he knows." [80]

QUOD QUIS SCIENS INDEBITUM DEDIT HAC MENTE, UT POSTEA REPETERET, REPETERE NON POTEST. A maxim meaning "What one has paid knowing it not to be due, with the intention of recovering it back, he cannot recover back." [81]

QUOD RECUPERET. Literally "That he recover." The ordinary form of judgments for the plaintiff in actions at law.[82] (See JUDGMENTS, 23 Cyc. 670, 1459.)

QUOD REMEDIO DESTITUITOR IPSA SE VALET, SI CULPA ABSIT. A maxim meaning "That which is without remedy avails of itself, if there be no fault in the party seeking to enforce it." [83]

QUOD REX CONTRA LEGES JUBET PRO INJUSSA REPUTABITUR. A maxim meaning "What the king orders contrary to law is to be considered as not compulsory." [84]

QUOD SEMEL AUT BIS EXISTIT PRÆTEREUNT LEGISLATORES. A maxim meaning "Legislators pass over what happens (only) once or twice." [85]

QUOD SEMEL MEUM EST AMPLIUS MEUM ESSE NON POTEST. A maxim meaning "That which is once my own can not be any more fully my own." [86]

QUOD SEMEL PLACUIT IN ELECTIONE, AMPLIUS DISPLICERE NON POTEST. A maxim meaning "Where choice is once made it cannot be disapproved any longer." [87]

QUOD SOLO INÆDIFICATUR SOLO CEDIT. A maxim meaning "Whatever is built on the soil is an accessory of the soil." [88]

QUOD STATIM LIQUIDARE POTEST PRO JAM LIQUIDO HABETUR. A maxim meaning "That which can be immediately liquidated is held as already liquidated." [89]

QUOD STATUENDUM EST SEMEL DIU DELIBERANDUM EST. A maxim meaning "Time must be taken for deliberation, when we have to determine once for all." [90]

QUOD SUB CERTA FORMA CONCESSUM VEL RESERVATUM EST, NON TRAHITUR AD VALOREM VEL COMPENSATIONEM. A maxim meaning "That which is granted or reserved under a certain form, is not to be drawn into a valuation or compensation." [91]

76. Black L. Dict.
77. Black L. Dict. [*citing* Trayner Leg. Max.].
78. Black L. Dict. [*citing* 2 Rolle 39].
79. Peloubet Leg. Max. [*citing* Dig. 50, 17, 203].
80. Black L. Dict. [*citing* Priddle's Case, 11 Coke 8*b*, 10*b*, 77 Eng. Reprint 1155].
81. Bouvier L. Dict. [*citing* Dig. 2, 6, 50].
82. Black L. Dict. [*citing* 1 Archbold Pr. K. B. 225; 1 Burrill Pr. 246].
83. Morgan Leg. Max. [*citing* Broom Leg. Max.].
84. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].
85. Bouvier L. Dict. [*citing* Broom Leg. Max.].
86. Morgan Leg. Max. [*citing* Broom Leg. Max.].
87. Peloubet Leg. Max. [*citing* Coke Litt. 146*a*].
Applied in Ward *v.* Day, 2 New Rep. 444, 446.
88. Bouvier L. Dict.
Applied in Washburn *v.* Sproat, 16 Mass. 449.
89. Morgan Leg. Max. [*citing* Trayner Leg. Max.].
90. Morgan Leg. Max. [*citing* Riley Leg. Max.].
91. Peloubet Leg. Max. [*citing* Bacon Leg. Max.].

QUOD SUBINTELLIGITUR NON DEEST. A maxim meaning "What is understood is not wanting." [92]

QUOD TACITE INTELLIGITUR DEESSE NON VIDETUR. A maxim meaning "What is tacitly understood is not considered to be wanting." [93]

QUOD TALEM ELIGI FACIAT QUI MELIUS ET SCIAT ET VELIT, ET POSSIT OFFICIO ILLIO INTENDERE. A maxim meaning "That person should be chosen who best understands, and is willing and able to perform the duty of the office." [94]

QUOD TIBI FIERI NON VIS ALTERI NON FECERIS. A maxim meaning "Do not that to another which you would not wish done to yourself." [95]

QUOD VANUM ET INUTILE EST, LEX NON REQUIRIT. A maxim meaning "The law requires not what is vain and useless." [96]

QUOD VERO NATURALIS RATIO INTER OMNES HOMINES CONSTITUIT, ID APUD OMNES PERÆQUE CUSTODITUR QUOD SEMPER ÆQUUM AC BONUM EST. A maxim meaning "That which natural reason hath established among men is always the same and always just and true." [97]

QUOD VIDE. Literally "Which see." A direction to the reader to look to another part of the book, or to another book, there named, for further information.[98]

QUOD VOS JUS COGIT ID VOLUNTATE IMPETRET. A maxim meaning "Do as of your own free will, and gracefully, those things which the law compels you to do." [99]

QUO LIBELLI IN CELEBERRIMIS LOCIS PROPONUNTUR, HUIC NE PERIRE QUIDEM TACITE CONCEDITUR. A maxim meaning "The criminal who is arraigned in public can not be condemned in private." [1]

QUOMODO QUID CONSTITUITUR EODEM MODO DISSOLVITUR. A maxim meaning "In whatever manner a thing is constituted, in the same manner it is dissolved." [2]

QUORUM. Such a number of an assembly as is competent to transact its business.[3] (Quorum: In General, see PARLIAMENTARY LAW, 29 Cyc. 1688. At Meetings — Of Bank Directors, see BANKS AND BANKING, 5 Cyc. 466, 574 note 32; Of Congress, see UNITED STATES; Of County Board, see COUNTIES, 11 Cyc. 392; Of Directors of Corporation, see CORPORATIONS, 10 Cyc. 354, 362, 776, 782, 819, 1244; Of Jury Commissioners, see GRAND JURIES, 20 Cyc. 1309 note 90; Of Members and Stock-Holders of Corporation, see CORPORATIONS, 10 Cyc. 329; Of Municipal Council, see MUNICIPAL CORPORATIONS, 28 Cyc. 330; Of Religious Society, see RELIGIOUS SOCIETIES; Of School-District and District Board, see SCHOOLS AND SCHOOL-DISTRICTS; Of State Legislatures, see STATES. Of Judges Necessary to Adjudication, see APPEAL AND ERROR, 3 Cyc. 391 note 20; COURTS, 11 Cyc. 758.)

QUORUM PRÆTEXTU NEC AUGET NEC MINUIT SENTENTIAM, SED TANTUM CONFIRMAT PRÆMISSA. A maxim meaning "'Quorum prætextu' neither increases nor diminishes the meaning, but only confirms that which went before." [4]

QUOTA. A proportional part or share; the proportional part of a demand or liability, falling upon each of those who are collectively responsible for the whole.[5] (See BOUNTIES, 5 Cyc. 985.)

QUOTATION. The production to a court or judge of the exact language of a

92. Bouvier L. Dict. [*citing* Cole *v.* Rawlinson, 2 Ld. Raym. 831, 832].

93. Black L. Dict. [*citing* Brown's Case, 4 Coke 21*a*, 22*a*, 76 Eng. Reprint 911].

94. Peloubet Leg. Max. [*citing* Tayler L. Gloss.].

95. Morgan Leg. Max. See also Miller *v.* Taylor, 4 Burr. 2303, 2343.

96. Black L. Dict. [*citing* Coke Litt. 319].

97. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

98. Black L. Dict.

99. Morgan Leg. Max. [*citing* Riley Leg. Max.].

1. Morgan Leg. Max.

2. Peloubet Leg. Max. [*citing* Jenkins Cent. 74].

3. Roberts Rules of Order [*quoted* in Lyons *v.* Woods, 5 N. M. 327, 348, 21 Pac. 346, dissenting opinion].

4. Bouvier L. Dict. [*citing* Plowden Comm. 52].

5. Black L. Dict.

As used in a statute providing that any person duly enlisted and mustered into the military service of the United States as a part of the "quota" of any city or town, under any call of the President during the late civil war and who has continued in such service for a time not less than one year

statute, precedent, or other authority, in support of an argument or proposition advanced; the transcription of part of a literary composition into another book or writing; a statement of the market price of one or more commodities; or the price specified to a correspondent.[6] (Quotation: From Copyrighted Work as Constituting Infringement, see COPYRIGHT, 9 Cyc. 942. Of Market Price as Evidence of Value, see EVIDENCE, 16 Cyc. 1143. Of Price and Transaction on Stock Exchange, see EXCHANGES, 17 Cyc. 869. Repetition of Libel or Slander Originated by Others, see LIBEL AND SLANDER, 25 Cyc. 370.)

QUOTE. To name as the price of an article;[7] to name as the price of stocks, produce, etc.;[8] to name the current price of;[9] to give the current market price of;[10] to state as the price of merchandise.[11] (See QUOTATION.)

QUOTIENS IDEM SERMO DUAS SENTENTIAS EXPRIMIT, EA POTISSIMUM EXCIPIATUR, QUÆ REI GERENDÆ APTIOR EST. A maxim meaning "Whenever the same words express two meanings, that is to be taken which is the better fitted for carrying out the proposed end."[12]

QUOTIENT VERDICT. A verdict where each juror marks down an amount, then, the amounts thus marked down being added together, that sum is divided by the number of jurors, and the result rendered as their verdict.[13] (See CRIMINAL LAW, 12 Cyc. 679.)

QUOTIES ÆQUITATE DESIDERII NATURALIS RATIO, AUT DUBITATIO JURIS MORATUR, JUSTIS DECRETIS RES TEMPORANDA EST. A maxim meaning "Let occasional decrees regulate equity; lest a lawful desire, or a natural reason, or a doubt of law, delay it."[14]

QUOTIES DUBIA INTERPRETATIO LIBERTATIS EST, SECUNDUM LIBERTATEM RESPONDENDUM ERIT. A maxim meaning "Whenever the interpretation of liberty is doubtful, the answer should be on the side of liberty."[15]

QUOTIES DUPLICI JURE DEFERTUR ALICUI SUCCESSIO, REPUDIATO NOVO JURE, QUOD ANTE DEFERTUR SUPERERIT VETUS. A maxim meaning "As often as a succession comes to a man by a double right, the new right is laid in abeyance, and the old right by which he first succeeds, survives."[16]

QUOTIES IN STIPULATIONIBUS AMBIGUA ORATIO EST, COMMODISSIMUM EST ID ACCIPI QUO RES DE QUA AGITUR IN TUTO SIT. A maxim meaning "Whenever an ambiguity appears in a written instrument, it is most conveniently construed so that the subject matter shall be preserved."[17]

QUOTIES IN VERBIS NULLA EST AMBIGUITAS, IBI NULLA EXPOSITIO CONTRA VERBA EXPRESSA FIENDA EST. A maxim meaning "When there is no ambiguity in the words, then no exposition contrary to the words is to be made."[18]

and has not been proved guilty of wilful desertion, and has received an honorable discharge, shall be deemed to have acquired a settlement in such city or town, the term was not used in any legal or technical sense, but according to its natural sense and import to designate the portion or share of the common burden which from the beginning belonged to each place. Bridgewater *v.* Plymouth, 97 Mass. 382, 388. See also Milford *v.* Uxbridge, 130 Mass. 107, 108; Taber *v.* Erie County, 14 N. Y. Suppl. 211, 214.

6. Black L. Dict.

7. Imperial Dict. [*quoted* in Johnston *v.* Rogers, 30 Ont. 150, 156].

8. Century Dict. [*quoted* in Johnston *v.* Rogers, 30 Ont. 150, 156].

9. Century Dict.; Imperial Dict.; Webster Dict. [*quoted* in Johnston *v.* Rogers, 30 Ont. 150, 156].

10. Standard Dict. [*quoted* in Johnston *v.* Rogers, 30 Ont. 150, 156].

11. Worcester Dict. [*quoted* in Johnston *v.* Rogers, 30 Ont. 150, 156].

There is little or no difference between any of these definitions. Johnston *v.* Rogers, 30 Ont. 150, 156.

12. Peloubet Leg. Max. [*citing* Dig. 50, 17, 67].

13. Hamilton *v.* Owego Water Works, 22 N. Y. App. Div. 573, 576, 48 N. Y. Suppl. 106. See also Moses *v.* Central Park, etc., R. Co., 3 Misc. (N. Y.) 322, 23 N. Y. Suppl. 23.

14. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

15. Black L. Dict. [*citing* Dig. 50, 17, 20].

16. Morgan Leg. Max.

17. Morgan Leg. Max. [*citing* Dig. 41, 80, 50, 16, 219].

18. Bouvier L. Dict. [*citing* Broom Leg. Max.; Coke Litt. 147].

Applied in: Summer *v.* Williams, 8 Mass. 16, 202, 5 Am. Dec. 83; Cole *v.* Winnipiseogee Lake Cotton, etc., Co., 54 N. H. 242, 278; Bassett *v.* Wells 56 Misc. (N. Y.) 81, 85, 106 N. Y. Suppl. 1068; Clark *v.* Wethey, 19

QUOTIES LEGE ALIQUID UNUM VEL ALTERUM INTRODUCTUM EST, BONA OCCASIO EST CÆTERA QUÆ TENDUNT AD EANDEM UTILITATEM VEL INTERPRETATIONE, VEL CERTE JURISDICTIONE SUPPLERI. A maxim meaning "Whenever it is expedient that the law be opened, in order that new incidents or terms be introduced into it, then it is also expedient that at the same time every other incident or term appropriate be supplied, either by interpretation or by jurisdiction." [19]

QUOTING LIST. The names of persons to whom a dealer quotes prices with the expectation of doing business with them.[20]

QUO TUTELA REDIT EO HÆREDITAS PERVENIT, NISI CUM FŒMINÆ HÆREDES INTERCEDUNT. A maxim meaning "An inheritance comes in the way in which guardianship goes, unless female heirs intervene." [21]

Wend. (N. Y.) 320, 323; Lawler *v.* Burt, 7 Ohio St. 340, 350; Sheetz's Estate, 6 Pa. Dist. Ct. 367, 370; Serrill's Estate, 15 Wkly. Notes Cas. (Pa.) 470, 471; Com. *v.* Western Land Imp. Co., 30 Wkly. Notes Cas. (Pa.) 154, 155; Smith *v.* Jersey, 3 Bligh 290, 344, 347, 7 Price 379, 4 Eng. Reprint 610; Spencer *v.* All Souls College, Wilm. 163, 166; Briggs *v.* McBride, 19 N. Brunsw. 202, 210; Hickey *v.* Stover, 11 Ont. 106, 112.

19. Morgan Leg. Max. [*citing* Halkerstone Max.].

20. Torsch *v.* Dell, 88 Md. 459, 462, 41 Atl. 903.

21. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

QUO WARRANTO

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CROSS-REFERENCES

For Matters Relating to:
Corporations, see CORPORATIONS, 10 Cyc. 1.
Election Contests, see ELECTIONS, 15 Cyc. 393.
Franchises, see FRANCHISES, 19 Cyc. 1451.
Injunctions, see INJUNCTIONS, 22 Cyc. 724.
Mandamus, see MANDAMUS, 26 Cyc. 125.
Officers, see OFFICERS, 29 Cyc. 1356.
Prohibition, see PROHIBITION, *ante,* p. 596.
Scire Facias, see SCIRE FACIAS.

I. INTRODUCTORY STATEMENT.

Quo warranto in its broadest sense is a proceeding to determine the right to the use or exercise of a franchise or office and to oust the holder from its enjoyment, if his claim be not well founded, or if he has forfeited his right to enjoy the privilege.[1] The term is used variously to describe proceedings under the common-law writ,[2] or under the information in the nature of the writ,[3] or in the United States to describe similar remedies prescribed by statute.[4]

II. NATURE, ORIGIN, AND SCOPE OF REMEDY.

A. The Common-Law Writ — 1. DEFINITION AND NATURE. The common-law writ of quo warranto was in the nature of a writ of right for the king, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to determine the right; and lay also in the case of non-user or long neglect of a franchise, or misuser or abuse of it; being a writ commanding defendant to show by what warrant he exercised such franchise,

1. See Moody *v.* Lowrimore, 74 Ark. 421, 86 S. W. 400; Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.
2. See *infra,* II, A.
3. See *infra,* II, B.
4. See *infra,* II, C.

never having had any grant of it, or having forfeited it by neglect or abuse.[5] The procedure under the writ was civil, and not criminal,[6] the writ being prosecuted by the king's attorney-general at the suit of the king without any relation whatever, to try the mere civil right to some public office, franchise, or liberty of, or belonging to the crown, which was claimed or exercised by some person in opposition to, and in violation of, the prerogative right of the sovereign; and in case of judgment for defendant he was allowed the franchise, but when the king had judgment it was that the franchise be seized into the hands of the king.[7]

2. Origin and Historical Development. Little is known of the origin of this remedy, its history being obscured in antiquity. It was used at least as early as Richard I, during whose reign it appeared apparently for the first time in the courts,[8] and it first appeared upon the English statute books in the statute 6 Edward I, known as the Statute of Gloucester.[9] The writ has been obsolete in England for centuries, having been abandoned probably because of the length of its process, and of the nature of the judgment which was conclusive even against the crown. An information in the nature of a quo warranto was substituted.[10]

B. Information in the Nature of Quo Warranto — 1. Origin. The exact time when the ancient writ [11] came into disuse, or when the more important proceeding in the nature of quo warranto was introduced, is uncertain.[12] Infor-

5. 3 Blackstone Comm. 262 [*cited* in State *v.* Ashley, 1 Ark. 279, 304; Territory *v.* Hauxhurst, 3 Dak. 205, 14 N. W. 432; State *v.* St. Louis Perpetual Mar., etc., Ins. Co., 8 Mo. 330; People *v.* Pease, 30 Barb. (N. Y.) 588, 591; State *v.* Allen, (Tenn. Ch. App. 1900) 57 S. W. 182, 190]; Jacob L. Dict. [*quoted* in Territory *v.* Ashenfelter, 4 N. M. 85, 90, 12 Pac. 879].

Other definitions are: "The most appropriate remedy for the King, by which he may at pleasure require any subject exercising a public franchise or authority which he cannot legally exercise without some grant or authority from the crown, to show by what warrant or authority he exercises it, and thereupon demand and have a judicial trial and determination of the legal right of the defendant to exercise such office or franchise." State *v.* Evans, 3 Ark. 585, 588, 36 Am. Dec. 468.

"A writ of right for the king, against him who usurps or claims any franchises or liberties, to say by what authority he claims them." Comyns Dig. [*quoted* in State *v.* Meek, 129 Mo. 431, 436, 31 S. W. 913, and *cited* in Ames *v.* Kansas, 111 U. S. 449, 460, 4 S. Ct. 437, 28 L. ed. 482].

"A prerogative writ, to be applied for on behalf of the crown as a matter of right, as against one who had usurped franchises or liberties, and for the purpose of enquiring by what right he claimed to do so." Buckman *v.* State, 34 Fla. 48, 56, 15 So. 697, 24 L. R. A. 806.

"A writ by which the government began its action to recover an office or franchise from the person or corporation in possession of it. It merely commanded the sheriff to summon the defendant to appear and show cause by what warrant he claimed the office. And it was a writ of right — a civil remedy to try the mere right to the office or franchise where the person in possession never had a right to it." State *v.* Wright, 10 Heisk. (Tenn.) 237, 243.

6. *Arkansas.*— Moody *v.* Lowrimore, 74 Ark. 421, 86 S. W. 400; State *v.* Ashley, 1 Ark. 279.

Illinois.— Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495.

Massachusetts.—Atty.-Gen. *v.* Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455.

North Carolina.— State *v.* Hardie, 23 N. C. 42.

United States.— Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

England.— Rex *v.* Marsden, 3 Burr. 1812, W. Bl. 579.

See 41 Cent. Dig. tit. "Quo Warranto," § 1 *et seq.*

7. State *v.* Ashley, 1 Ark. 279.

8. State *v.* Stewart, 6 Houst. (Del.) 359; Darley *v.* Reg., 12 Cl. & F. 520, 8 Eng. Reprint 1513, where it is said that the earliest record of the writ is to be found in the ninth year of the reign of Richard I, against the incumbent of a church, calling on him to show quo warranto he held the church.

9. See High Extraord. Leg. Rem. (3d ed.) 544 *et seq.*

10. *Florida.*— State *v.* Gleason, 12 Fla. 190.

Illinois.— People *v.* Healy, 230 Ill. 280, 82 N. E. 599.

Massachusetts.— Atty.-Gen. *v.* Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455.

Missouri.— State *v.* St. Louis Perpetual Mar., etc., Ins. Co., 8 Mo. 330.

New Mexico.— Territory *v.* Ashenfelter, 4 N. M. 85, 12 Pac. 879 [*quoting* 5 Jac. L. Dict. 373].

Tennessee.— State *v.* Wright, 10 Heisk. 237.

United States.— Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

England.— Rex *v.* Marsden, 3 Burr. 1812, W. Bl. 579.

See 41 Cent. Dig. tit. "Quo Warranto," § 1 *et seq.*

11. See *supra*, II, A.

12. State *v.* Ashley, 1 Ark. 279; Territory

mations as the basis, or institution of a criminal prosecution, are said to have existed coeval with the common law itself, but as a mode of investigating and determining civil rights between private parties, they seem to owe their origin and existence to the statute of 9 Anne, chapter 20, which expressly authorized the proceeding in all cases of intrusion into, or usurpation of, corporate offices in corporate places.[13] The proceeding by information in the nature of quo warranto was designed principally to punish offenders who were guilty of usurping the prerogative rights of the crown, yet, upon conviction or disclaimer, the right of the crown being thereby established, there was, besides the fine or imprisonment, a judgment of ouster against defendant, or that the franchise be seized into the king's hands, thus affording incidentally, a civil remedy for the king.[14]

2. Nature — a. Civil or Criminal. Information in the nature of quo warranto differed from the writ of quo warranto[15] in that originally it was essentially a criminal method of prosecution;[16] but long before the American Revolution it lost its character as a criminal proceeding in everything except form and was applied to the mere process of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal merely;[17] and such has always been its character in many states of the Union.[18] In some states, however, it has been held criminal in form to the extent that matters of jurisdiction[19] and pleading[20] are governed by the rules applicable to criminal and not civil proceedings.

v. Ashenfelter, 4 N. M. 85, 12 Pac. 879; Rex *v.* Marsden, 3 Burr. 1812, W. Bl. 579 (holding that the writ of quo warranto probably dropped with the judge in eyre because the quo warranto was to be determined in eyre under statute 18 Edward I).

13. State *v.* Ashley, 1 Ark. 279 (holding that there is no precedent of an information in the nature of a quo warranto having been filed or allowed at the instance or on the relation of any private person previous to the statute of 9 Anne); People *v.* Healy, 230 Ill. 280, 82 N. E. 599.

Informations in civil cases generally see Informations in Civil Cases, 22 Cyc. 716.

Informations in criminal cases generally see Indictments and Informations, 22 Cyc. 186 *et seq.*

14. State *v.* Ashley, 1 Ark. 279; Rex *v.* Marsden, 3 Burr. 1812, W. Bl. 579.

15. See *supra*, II, A.

16. *Arkansas.*— Moody *v.* Lowrimore, 74 Ark 421, 86 S. W. 400; State *v.* Ashley, 1 Ark. 279.

Illinois.— People *v.* Healy, 230 Ill. 280, 82 N. E. 599.

Massachusetts.—Atty.-Gen. *v.* Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455.

New York.— People *v.* Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243.

North Carolina.— State *v.* Hardie, 23 N. C. 42.

United States.— Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

England.— Rex *v.* Jones, 8 Mod. 201, 88 Eng. Reprint 146; Rex *v.* Bennett, Str. 101, 93 Eng. Reprint 412.

See 41 Cent. Dig. tit. "Quo Warranto," § 28.

17. *New Jersey.*— Atty.-Gen. *v.* Delaware, etc., R. Co., 38 N. J. L. 282.

North Carolina.— State *v.* Hardie, 23 N. C. 42.

Pennsylvania.— Com. *v.* Browne, 1 Serg. & R. 382.

Texas.— State *v.* De Gress, 53 Tex. 387.

United States.— Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

England.— Rex *v.* Francis, 2 T. R. 484.

See 41 Cent. Dig. tit. "Quo Warranto," § 28.

18. *Indiana.*— Robertson *v.* State, 109 Ind. 79, 10 N. E. 582, 643; Reynolds *v.* State, 61 Ind. 392; State Bank *v.* State, 1 Blackf. 267.

Massachusetts.— Atty.-Gen. *v.* Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455.

Missouri.— State *v.* Taylor, 208 Mo. 442, 106 S. W. 1023; State *v.* Lawrence, 38 Mo. 535; State *v.* Stewart, 32 Mo. 379; State *v.* Lingo, 26 Mo. 496.

New Jersey.— Atty.-Gen. *v.* Delaware, etc., R. Co., 38 N. J. L. 282.

New York.— People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* Richardson, 4 Cow. 97; People *v.* Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243.

North Carolina.— State *v.* Hardie, 23 N. C. 42.

Pennsylvania.— Com *v.* Browne, 1 Serg. & R. 382.

Texas.— State *v.* De Gress, 53 Tex. 387.

Vermont.— State *v.* Smith, 48 Vt. 266.

United States.—Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

See 41 Cent. Dig. tit. "Quo Warranto," § 28.

19. State *v.* Ashley, 1 Ark. 279; Painter *v.* U. S., 6 Indian Terr. 505, 98 S. W. 352; State *v.* West Wisconsin R. Co., 34 Wis. 197; Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

20. Hay *v.* People, 59 Ill. 94; Wight *v.* People, 15 Ill. 417; People *v.* Mississippi, etc., R. Co., 13 Ill. 66; Donnelly *v.* People, 11 Ill. 552, 52 Am. Dec. 459; State *v.* Roe, 26

b. Legal or Equitable. Quo warranto proceedings are not of an equitable but of a legal nature.[21]

3. Exclusiveness of Remedy. In the absence of statutory provision to the contrary,[22] quo warranto proceedings are held to be the only proper remedy in cases in which they are available. Thus they are held to be the exclusive method of questioning the legality of the organization or a change in the territory of a quasi-public corporation, such as a school-district,[23] or a drainage district,[24] or of determining the right to hold and exercise a judicial or other public office,[25] or to enforce the forfeiture of a corporate franchise,[26] to attack the validity of the organization of a corporation,[27] or to try title to an office therein;[28] and when the remedy by quo warranto is available, it is held that there is no concurrent remedy in equity unless by virtue of statutory provision.[29]

4. Synonymity of Terms. In American practice the terms "quo warranto" and "information in the nature of a quo warranto" are used as synonymous and convertible terms, the object and end of each being the same,[30] the constitutional provisions[31] in several of the states providing for the issuance of writs of quo warranto

N. J. L. 215; People *v.* Jones, 18 Wend. (N. Y.) 601; Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

21. State *v.* Alt, 26 Mo. App. 673; People *v.* Albany, etc., R. Co., 57 N. Y. 161; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

22. See *infra*, II, C, D.

23. Aldermen *v.* District No. 5, School Directors, 91 Ill. 179; People *v.* Newberry, 87 Ill. 41; Renwick *v.* Hall, 84 Ill. 162; Trumbo *v.* People, 75 Ill. 561.

24. Blake *v.* People, 109 Ill. 504.

25. *Alabama.*— Lee *v.* State, 49 Ala. 43.

California.— Hull *v.* Shasta County Super. Ct., 63 Cal. 174.

Indiana.—Parsons *v.* Durand, 150 Ind. 203, 49 N. E. 1047.

Nevada.— State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128.

New York.— Nichols *v.* MacLean, 101 N. Y. 526, 5 N. E. 347, 54 Am. St. Rep. 730; Palmer *v.* Foley, 36 N. Y. Super. Ct. 14, 45 How. Pr. 110; New York *v.* Conover, 5 Abb. Pr. 171; People *v.* Stevens, 5 Hill 616.

Pennsylvania.— Gilroy's Appeal, 100 Pa. St. 5.

Texas.— Grant *v.* Chambers, 34 Tex. 573.

Wisconsin.—State *v.* Raisler, 133 Wis. 672, 114 N. W. 118.

England.—Reg. *v.* Chester, 5 E. & B. 531, 25 L. J. Q. B. 61, 4 Wkly. Rep. 14, 85 E. C. L. 531.

Canada.— Chaplin *v.* Woodstock Public School Bd., 16 Ont. 728.

See 41 Cent. Dig. tit. "Quo Warranto," § 6.

26. *Georgia.*— State *v.* Savannah, R. M. Charlt. 250.

Illinois.— Citizens Horse R. Co. *v.* Belleville, 47 Ill. App. 388; Williams *v.* State Bank, 6 Ill. 667.

Indiana.— Little *v.* Danville, etc., Plank-Road Co., 18 Ind. 86.

Massachusetts.— Atty.-Gen. *v.* Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227.

Nebraska.— Clark *v.* Interstate Independent Tel. Co., (1904) 101 N. W. 977.

Pennsylvania.— Irvine *v.* Lumberman's Bank, 2 Watts & S. 190.

Virginia.— Pixley *v.* Roanoke Nav. Co., 75 Va. 320.

See 41 Cent. Dig. tit. "Quo Warranto," § 6.

27. Osborn *v.* People, 103 Ill. 224.

28. Hartt *v.* Harvey, 13 Abb. Pr. (N. Y.) 332, 21 How. Pr. 382; Eliason *v.* Coleman, 86 N. C. 235; Com. *v.* Jones, 1 Leg. Rec. (Pa.) 293; Com. *v.* Schoener, 1 Leg. Chron. (Pa.) 177.

29. *Illinois.*— Burgess *v.* Davis, 138 Ill. 578, 28 N. E. 817; Moore *v.* Hoisington, 31 Ill. 243.

Massachusetts.— Atty.-Gen. *v.* Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227.

New Jersey.— Owen *v.* Whitaker, 20 N. J. Eq. 122.

Ohio.— Hullman *v.* Honcomp, 5 Ohio St. 237.

Canada.— Atty.-Gen. *v.* Miller, 2 N. Brunsw. Eq. 28.

See 41 Cent. Dig. tit. "Quo Warranto," § 6.

30. *Colorado.*— People *v.* Keeling, 4 Colo. 129.

Florida.— State *v.* Anderson, 26 Fla. 240, 8 So. 1; State *v.* Gleason, 12 Fla. 190.

Massachusetts.— Atty.-Gen. *v.* Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455.

Minnesota.— State *v.* Tracey, 48 Minn. 497, 51 N. W. 613.

New Jersey.— Owen *v.* Whittaker, 20 N. J. Eq. 122.

New York.— Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. 371.

Wisconsin.— State *v.* Baker, 38 Wis. 71; State *v.* West Wisconsin R. Co., 34 Wis. 197; State *v.* Messmore, 14 Wis. 115; Atty.-Gen. *v.* Barstow, 4 Wis. 567; Atty.-Gen. *v.* Blossom, 1 Wis. 317.

Canada.— Atty.-Gen. *v.* Miller, 2 N. Brunsw. Eq. 28.

In Missouri the terms were formerly used synonymously (State *v.* Merry, 3 Mo. 278); but in later cases in that state a distinction between the terms seems to be recognized (State *v.* Stone, 25 Mo. 555; State *v.* St. Louis Perpetual Mar., etc., Ins. Co., 8 Mo. 330).

31. See *infra*, II, C.

being construed as authorizing proceedings by information in the nature of quo warranto.[32]

C. Statutory and Constitutional Provisions in the United States. In a majority of the states the remedy has been the subject of statutory enactment.[33] The general effect of this legislation is to relieve the old civil remedy of the burden of a criminal form of procedure with which it had become encumbered, and to restore it to its original character [34] as a civil action for the enforcement of a civil right,[35] and it is almost universally held in the United States that, regardless of the precise form of the action, proceedings by quo warranto or by information in the nature thereof, or statutory remedies substituted therefor, are civil and not criminal.[36] But even where a statutory proceeding or civil action is substituted it is held that only the forms of the older remedies are abolished, the substance remaining the same.[37]

D. Effect of Existence of Another Adequate Remedy — 1. General Rule. As a general rule quo warranto will not lie if another adequate remedy exists at law or in equity.[38] This rule must, however, be understood to be appli-

32. State *v.* Leatherman, 38 Ark. 81; People *v.* Boughton, 5 Colo. 487; People *v.* Keeling, 4 Colo. 129; State *v.* Anderson, 26 Fla. 240, 8 So. 1; State *v.* Gleason, 12 Fla. 190; State *v.* West Wisconsin R. Co., 34 Wis. 197.

33. See the statutes of the several states; and the cases cited *infra*, notes 35–37.

34. See *supra*, II, A, 1.

35. Central, etc., Road Co. *v.* People, 5 Colo. 40; State *v.* Port Gibson Bank, 4 Sm. & M. (Miss.) 439 (holding that what doubts might formerly have been indulged respecting the nature of this proceeding, especially when a fine constituted a part of the final judgment against a corporation, under our statute it is used for the sole purpose of determining a civil right and ousting a wrongful possession of a franchise and is therefore exclusively a civil proceeding); State *v.* McDaniel, 22 Ohio St. 354; Foster *v.* Kansas, 112 U. S. 201, 5 S. Ct. 8, 28 L. ed. 629; Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482.

36. *Alabama.*— State *v.* Price, 50 Ala. 568.

Florida.— State *v.* Gleason, 12 Fla. 190.

Illinois.— People *v.* Bruennemer, 168 Ill. 482, 48 N. E. 43; People *v.* Boyd, 132 Ill. 60, 23 N. E. 342; Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495.

Indiana.— Robertson *v.* State, 109 Ind. 79, 10 N. E. 582, 643; Reynolds *v.* State, 61 Ind. 392.

Massachusetts.—Atty.-Gen. *v.* Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455.

Mississippi.— Rodney Commercial Bank *v.* State, 4 Sm. & M. 439.

Missouri.— State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

New Hampshire.— Meehan *v.* Bachelder, 73 N. H. 113, 59 Atl. 620.

New Jersey.— Atty.-Gen. *v.* Delaware, etc., R. Co., 38 N. J. L. 282.

North Carolina.— Giles *v.* Hardie, 23 N. C. 42.

See 41 Cent. Dig. tit. "Quo Warranto," § 2 *et seq.*; and *supra*, II, B, 2, a.

37. *Dakota.*— Territory *v.* Hauxhurst, 3 Dak. 205, 14 N. W. 432, holding that, although by Code Civ. Proc. c. 26, § 531, the form of proceeding by quo warranto is abolished, the jurisdiction and power of the courts, the position of defendant, the rules of evidence, and the presumptions of law and fact are not affected; and that all the remedies formerly attainable by writ of quo warranto, and proceedings by information in the nature of quo warranto, may be obtained by a civil action.

Mississippi.— Newsom *v.* Cocke, 44 Miss. 352, 7 Am. Rep. 686, holding that the statute regulating informations in the nature of a quo warranto not only preserves the only remedy, but renders it more expeditious and convenient, and declares it to be the appropriate proceeding to try the right to any office, civil or military, in this state.

New York.—People *v.* Broadway R. Co., 126 N. Y. 29, 26 N. E. 961; People *v.* Hall, 80 N. Y. 117; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Pease, 30 Barb. 588 [*affirmed* in 27 N. Y. 45, 84 Am. Dec. 242].

North Dakota.— Wishek *v.* Becker, 10 N. D. 63, 84 N. W. 590.

Pennsylvania.— Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Com. *v.* Burrell, 7 Pa. St. 34.

Tennessee.— State *v.* Wright, 10 Heisk. 237.

Texas.— State *v.* De Gress, 53 Tex. 387.

Vermont.— State *v.* Boston, etc., R. Co., 25 Vt. 433.

See 41 Cent. Dig. tit. "Quo Warranto," § 3 *et seq.*

38. *Illinois.*— People *v.* Cooper, 139 Ill. 461, 487, 29 N. E. 872; People *v.* Whitcomb, 55 Ill. 172.

Kansas.— State *v.* Wilson, 30 Kan. 661, 2 Pac. 828.

Massachusetts.— Malone *v.* New York, etc., R. Co., (1908) 83 N. E. 408.

Nebraska.— State *v.* Scott, 70 Nebr. 681, 97 N. W. 1021.

New York.— People *v.* Hillsdale, etc., Turnpike Road, 2 Johns. 190.

Ohio.— State *v.* Toledo R., etc., Co., 23 Ohio Cir. Ct. 603.

Pennsylvania.— Town Council's Appeal, (1888) 15 Atl. 730; Com. *v.* Allegheny Bridge Co., 20 Pa. St. 185.

cable merely to cases wherein the redress of the relator's private injury is the main object, and not to affect proceedings brought by the state or its officers. The state has the right, by virtue of its sovereignty, to inquire into the authority by which any one assumes to exercise the functions of a public office or a franchise. That the relator, or other individuals aggrieved, can seek their remedy in another manner, is no bar to proceedings by the state.[39] The right reserved by the legislature to repeal a charter which it has granted does not impair the right to proceed by quo warranto in case the legislature does not exercise its power,[40] and it is no bar to quo warranto against a corporation for misusing its franchise that the acts constituting such misuser have rendered its officers criminally liable.[41]

2. Where the Other Remedy Is Provided by Statute. In the absence of a constitutional prohibition, the legislature has power to provide other remedies and thereby to supersede that by quo warranto, and an intention so to do, if clearly manifested, will be given effect, and the courts will recognize the statutory remedy as exclusive.[42] Unless, however, the contrary intention clearly appears, the statutory remedy will be considered cumulative.[43]

Canada.— *In re* Hammond, 24 U. C. Q. B. 56.

See 41 Cent. Dig. tit. "Quo Warranto," § 4.

Recovery of real estate.—Quo warranto will not lie to recover real estate (State *v.* Shields, 56 Ind. 521), except where the real estate has escheated to the state (State *v.* Meyer, 63 Ind. 333; State *v.* Shields, *supra; In re* West, 64 Pa. St. 186).

39. *Alabama.*— Capital City Water Co. *v.* State, 105 Ala. 406, 18 So. 62, 29 L. R. A. 743.

Illinois.— Snowball *v.* People, 147 Ill. 260, 35 N. E. 538 [*affirming* 43 Ill. App. 241].

Michigan.— Atty.-Gen. *v.* Booth, 143 Mich. 89, 106 N. W. 868.

Minnesota.— State *v.* St. Paul, etc., R. Co., 35 Minn. 222, 28 N. W. 245.

New York.— People *v.* Hillsdale, etc., Turnpike Road, 23 Wend. 254; People *v.* Bristol, etc.. Turnpike Road, 23 Wend. 222; People *v.* Thompson, 21 Wend. 235 [*reversed* on other grounds in 23 Wend. 537].

Ohio.— State *v.* Toledo R., etc., Co., 23 Ohio Cir. Ct. 603.

Pennsylvania.— Com. *v.* Potter County Water Co., 212 Pa. St. 463, 61 Atl. 1099; Birmingham, etc., Turnpike Road *v.* Com., 1 Pennyp. 458; Com. *v.* Towanda Water Works, 23 Wkly. Notes Cas. 420.

See 41 Cent. Dig. tit. "Quo Warranto," § 4.

40. Grand Gulf R., etc., Co. *v.* State, 10 Sm. & M. (Miss.) 428.

41. State *v.* Delmar Jockey Club, (Mo. 1905) 92 S. W. 185; State *v.* Capital City Dairy Co., 62 Ohio St. 350, 57 N. E. 62, where the offense was a violation of the pure food laws.

42. *Alabama.*— Louisville, etc., R. Co. *v.* State, (1907) 45 So. 296; State *v.* Ensley, 142 Ala. 661, 38 So. 802; State *v.* Southern Bldg., etc., Assoc., 132 Ala. 50, 31 So. 375; State *v.* Elliott, 117 Ala. 172, 23 So. 43; Parks *v.* State, 100 Ala. 634, 13 So. 756; State *v.* Gardner, 43 Ala. 234.

Colorado.— Atchison, etc., R. Co. *v.* People, 5 Colo. 60; Central, etc., Road Co. *v.* People, 5 Colo. 39.

Missouri.— State *v.* Atchison, etc., R. Co., 176 Mo. 687, 75 S. W. 776.

New York.— People *v.* Hall, 80 N. Y. 117; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* Pease, 30 Barb. 588 [*affirmed* in 27 N. Y. 45, 84 Am. Dec. 242]; People *v.* Collins, 34 How. Pr. 336.

Ohio.— State *v.* McLain, 58 Ohio St. 313, 50 N. E. 907; State *v.* Funk, 16 Ohio Cir. Ct. 155, 8 Ohio Cir. Dec. 782.

South Carolina.— State *v.* Evans, 33 S. C. 612, 12 S. E. 816; Alexander *v.* McKenzie, 2 S. C. 81.

Wisconsin.— State *v.* West Wisconsin R. Co., 34 Wis. 197; State *v.* Messmore, 14 Wis. 115; State *v.* Foote, 11 Wis. 14, 78 Am. Dec. 689.

England.— Reg. *v.* Morton, [1892] 1 Q. B. 39, 56 J. P. 105, 61 L. J. Q. B. 39, 65 L. T. Rep. N. S. 611, 40 Wkly. Rep. 109.

See 41 Cent. Dig. tit. "Quo Warranto," § 2 *et seq.*

In Arkansas, although the writ and information are abolished as original proceedings, it is held that the supreme court retains its power to proceed by quo warranto in aid of its appellate jurisdiction. Louisiana, etc., R. Co. *v.* State, 75 Ark. 435, 88 S. W. 559.

43. *Colorado.*—People *v.* Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444, holding that the great weight of authority, as well as the better reason, supports the proposition that, unless the legislative intent to take away the jurisdiction by quo warranto is expressed so clearly as to be practically beyond a reasonable doubt, it will be regarded as undisturbed.

Illinois.— Lincoln Park Chapter No. 177, R. A. M. *v.* Swatek, 105 Ill. App. 604.

Maryland.— Hamilton *v.* Annapolis, etc., R. Co., 1 Md. Ch. 76.

New Jersey.— Owen *v.* Whitaker, 20 N. J. Eq. 122.

Pennsylvania.— Centre, etc., Turnpike Road Co. *v.* McConaby, 16 Serg. & R. 140.

South Dakota.— Wright *v.* Lee, 4 S. D. 237, 55 N. W. 931, holding also that Comp. Laws, §§ 5345, 5346, providing that the remedies heretofore reached by writ of quo warranto, and proceedings by information in the nature

3. Trial of Title to Office — a. In General. Upon the question whether, where a special proceeding for contesting elections is provided by statute, or where the determination of the validity thereof or of the title to office is vested in a specified officer or court, the remedy by quo warranto is thereby excluded, the cases are in direct conflict. Some hold that the statutory proceeding is exclusive;[44] but, by the weight of authority, the statutory remedy is held to be cumulative and not exclusive, in the absence of express provision to the contrary in the statute,[45] and although it be held that quo warranto is superseded by statutory proceedings for contesting elections, the courts will entertain quo warranto in

of quo warranto, might be obtained by civil action, as provided in those sections, being intended merely to give an additional remedy, were not repealed by the adoption of the state constitution (art. 5, § 14), giving the courts jurisdiction to issue writs of quo warranto.

Texas.— State *v.* Southern Pac. R. Co., 24 Tex. 80, holding that on adoption of the common law the state adopted the remedy of quo warranto against corporations, and the act of 1857 providing for special proceedings against railroad companies does not prevent the district attorney from filing a quo warranto for the forfeiture of a railroad charter, but only refers to the venue of certain proceedings against railroad companies.

See 41 Cent. Dig. tit. "Quo Warranto," § 3 *et seq.*

In Virginia it is held that the writ of quo warranto is a common-law writ never abolished by statute and still exists in that state. Bland, etc., County Judge Case, 33 Gratt. (Va.) 443; Royall *v.* Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335.

In Tennessee neither the writ nor information in the nature of quo warranto were ever in force. State *v.* Standard Oil Co., (Tenn. 1908) 110 S. W. 565; Atty.-Gen. *v.* Leaf, 9 Humphr. (Tenn.) 753; State *v.* Turk, Mart. & Y. (Tenn.) 287; Boring *v.* Griffith, 1 Heisk. (Tenn.) 456; Hyde *v.* Trewhitt, 7 Coldw. (Tenn.) 59. But see State *v.* Wright, 10 Heisk. (Tenn.) 237, in which the language of the court would seem to indicate that the proceeding by information was used in that state. The proceedings in this case were, however, brought under Code, § 3409 *et seq.*, and it is to these sections that the court undoubtedly referred.

44. *Arkansas.*— Baxter *v.* Brooks, 29 Ark. 173; State *v.* Baxter, 28 Ark. 129.

Georgia.— Cutts *v.* Scandrett, 108 Ga. 620, 34 S. E. 186.

Kentucky.— Steele *v.* Meade, 98 Ky. 614, 33 S. W. 944, 17 Ky. L. Rep. 1158; Batman *v.* Megowan, 1 Metc. 533.

Maine.— Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325.

Massachusetts.— Peabody *v.* Boston School Committee, 115 Mass. 383.

Michigan.— People *v.* Every, 38 Mich. 405.

Minnesota.— State *v.* Moriarity, 82 Minn. 68, 84 N. W. 495.

Nevada.— Garrard *v.* Gallagher, 11 Nev. 382.

North Carolina.— O'Hara *v.* Powell, 80 N. C. 103.

Ohio.— Dalton *v.* State, 43 Ohio St. 652, 3 N. E. 685; State *v.* Marlow, 15 Ohio St. 114.

Pennsylvania.— Com. *v.* Leech, 44 Pa. St. 332; Hulseman *v.* Rems, 41 Pa. St. 396; Com. *v.* Baxter, 35 Pa. St. 263; Com. *v.* Garrigues, 28 Pa. St. 9, 70 Am. Dec. 103; Glazier *v.* Merringer, 12 Lanc. Bar 61.

South Carolina.— State *v.* Bowen, 8 S. C. 400; State *v.* Wadkins, 1 Rich. 42.

Tennessee.— State *v.* Gossett, 9 Lea 644; Hyde *v.* Trewhitt, 7 Coldw. 59.

See 41 Cent. Dig. tit. "Quo Warranto," § 4 *et seq.*

45. *Alabama.*— State *v.* Gardner, 43 Ala. 234; Wammack *v.* Holloway, 2 Ala. 31.

California.— People *v.* Holden, 28 Cal. 123.

Colorado.— People *v.* Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444.

Illinois.— Snowball *v.* People, 147 Ill. 260, 35 N. E. 538 [*affirming* 43 Ill. App. 241]; Stephens *v.* People, 89 Ill. 337; Simons *v.* People, 119 Ill. 617, 9 N. E. 220 [*reversing* 18 Ill. App. 588]; Garms *v.* People, 108 Ill. App. 631; People *v.* Bird, 20 Ill. App. 568.

Indiana.— State *v.* Shay, 101 Ind. 36; State *v.* Gallagher, 81 Ind. 558; State *v.* Adams, 65 Ind. 393.

Iowa.— Haverstock *v.* Aylesworth, 113 Iowa 378, 85 N. W. 634; State *v.* Funck, 17 Iowa 365.

Kansas.— Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

Mississippi.— Harrison *v.* Greaves, 59 Miss. 453; Hyde *v.* State, 52 Miss. 665.

Missouri.— State *v.* Francis, 88 Mo. 557; State *v.* Fitzgerald, 44 Mo. 425.

Nebraska.— State *v.* Frantz, 55 Nebr. 167, 75 N. W. 546; State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602; State *v.* Frazier, 28 Nebr. 438, 44 N. W. 471; Kane *v.* People, 4 Nebr. 509.

New Jersey.— State *v.* Passaic County, 25 N. J. L. 354.

New York.— People *v.* Hall, 80 N. Y. 117; People *v.* Cook, 8 N. Y. 67, 59 Am. Dec. 451; People *v.* Seaman, 5 Den. 409; *Ex p.* Heath, 3 Hill 42; People *v.* Van Slyck, 4 Cow. 297.

Oregon.— State *v.* McKinnon, 8 Oreg. 493.

Texas.— Gray *v.* State, 92 Tex. 396, 29 S. W. 217; McAllen *v.* Rhodes, 65 Tex. 348; Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

Wisconsin.— State *v.* Messmore, 14 Wis. 115; Atty.-Gen. *v.* Barstow, 4 Wis. 567.

See 41 Cent. Dig. tit. "Quo Warranto," § 4 *et seq.*

those instances where the statutory remedy is inapplicable or insufficient.[46] The use of quo warranto to inquire into the validity of an election to public office is not limited by statutory provisions for canvassing ballots and declaring the result of an election.[47]

b. Legislative Bodies Empowered to Decide Qualification of Members. Upon the question whether, where the charter of a municipality gives the common council power to determine the qualifications and election of its members, the existence of such power and the action of such body prevent the courts from examining the question by quo warranto, there is also a direct conflict of authority, some cases holding that the courts may nevertheless entertain quo warranto proceedings,[48] and that the decision of the council does not bind the state, although it is conclusive on the contestants,[49] while others hold that quo warranto by the state will not lie under these circumstances.[50] Similarly, where the constitution provides that the legislature shall be the sole judge of the qualifications of its members, the judicial department is held to be prohibited from proceeding by quo warranto to try title to a seat in the legislature.[51]

III. PROPRIETY AND GROUNDS OF REMEDY IN PARTICULAR CASES.

A. Determination of Private Rights. Where an action is grounded on an alleged usurpation or misuser of a franchise or privilege, it must be made to appear that the franchise or privilege is of a public nature; the whole community must be affected in order that the remedy may be appropriate, for a state will not interfere by quo warranto to determine mere private rights in which the public has no interest.[52]

46. *Alabama.*— State *v.* Elliot, 117 Ala. 172, 23 So. 124.

Georgia.— Hathcock *v.* McGouirk, 119 Ga. 973, 47 S. E. 563.

Illinois.— Rafferty *v.* McGowan, 136 Ill. 620, 27 N. E. 194.

Indiana.— Gass *v.* State, 34 Ind. 425.

Ohio.— State *v.* Goodale, 7 Ohio Dec. (Reprint) 707, 4 Cinc. L. Bul. 1065.

Pennsylvania.— *In re* Murphy, 8 Pa. Dist. 445, 22 Pa. Co. Ct. 29.

See 41 Cent. Dig. tit. "Quo Warranto," § 4.

47. State *v.* Kearn, 17 R. I. 391, 22 Atl. 322, 1018.

48. *Florida.*— State *v.* Anderson, 26 Fla. 240, 8 So. 1.

Georgia.— Hardin *v.* Colquitt, 63 Ga. 588.

Indiana.— State *v.* Shay, 101 Ind. 36; State *v.* Adams, 65 Ind. 393.

Iowa.— State *v.* Funck, 17 Iowa 365.

Minnesota.— State *v.* Gates, 35 Minn. 385, 28 N. W. 927; State *v.* Dowlan, 33 Minn. 536, 24 N. W. 188.

Missouri.— State *v.* Fitzgerald, 44 Mo. 425.

New Jersey.— State *v.* Camden, 47 N. J. L. 64, 54 Am. Rep. 117.

New York.— People *v.* Hall, 80 N. Y. 117.

Wisconsin.— State *v.* Kempf, 69 Wis. 470, 34 N. W. 226, 2 Am. St. Rep. 753.

See 41 Cent. Dig. tit. "Quo Warranto," § 4.

49. Latham *v.* People, 95 Ill. App. 528; People *v.* Hall, 80 N. Y. 117.

50. *California.*— People *v.* Metzker, 47 Cal. 524.

Colorado.— Darrow *v.* People, 8 Colo. 417, 8 Pac. 661.

Kansas.— State *v.* Tomlinson, 20 Kan. 692.

Ohio.— State *v.* Berry, 47 Ohio St. 232, 24 N. E. 266. But see State *v.* O'Brien, 47 Ohio St. 464, 25 N. E. 121, holding that, although a provision that the city council shall be the judge of the election of its own members is held to exclude quo warranto in ordinary cases of contest, yet the writ will lie against a person assuming to represent a ward that has no legal existence, or claiming office by virtue of an election held without lawful authority or where there is no office or vacancy to be filled.

Pennsylvania.— Com. *v.* Henzey, 81* Pa. St. 101 [*affirming* 9 Phila. 490]; Com. *v.* Leech, 44 Pa. St. 332; Com. *v.* Barger, 20 Leg. Int. 101.

Texas.— Seay *v.* Hunt, 55 Tex. 545.

See 41 Cent. Dig. tit. "Quo Warranto," § 4.

51. State *v.* Tomlinson, 20 Kan. 692.

Validity of election of governor.— The same rule was applied in a case where the legislature was empowered to determine the validity of an election to the office of governor of the state. State *v.* Baxter, 28 Ark. 129.

But the power to impeach executive officers, vested in the legislature, does not affect the jurisdiction of the supreme court to try the respondent's right to the office of lieutenant-governor, such right to an office being a proper matter of judicial cognizance, and impeachment not being a remedy equivalent to nor intended to take the place of quo warranto. State *v.* Gleason, 12 Fla. 190.

52. *Arkansas.*— Ramsey *v.* Carhart, 27 Ark. 12.

B. Trial of Title to Public Office — 1. Propriety of Remedy — a. In General. In the absence of statutory provisions to the contrary,[53] quo warranto is the proper proceeding for the trial of title to office, claimed by different persons.[54] The remedy thus afforded to a claimant not in possession is the basis

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929.

Illinois.— People *v.* Cooper, 139 Ill. 461, 29 N. E. 872; Swarth *v.* People, 109 Ill. 621; People *v.* Ridgley, 21 Ill. 65; People *v.* Wild Cat Special Drain. Dist., 31 Ill. App. 219.

Indiana.— State *v.* Hare, 121 Ind. 308, 23 N. E. 145.

Iowa.— State *v.* Higby Co., 130 Iowa 69, 106 N. W. 382, 114 Am. St. Rep. 409.

Michigan.— Atty.-Gen. *v.* Geerlings, 55 Mich. 562, 22 N. W. 89.

Missouri.— State *v.* Atchison, etc., R. Co., 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761, holding that the imposition of a reconsignment charge by railroad companies having switch tracks within a city, whereby a certain charge is made for the delivery of each car of grain from the track upon which it is originally placed to that designated by the consignee, is a matter of private concern between the railroad companies and the consignees, and not a matter of public interest; hence quo warranto will not lie to prevent the companies from making such charge.

Utah.— Cupit *v.* Park City Bank, 20 Utah 292, 58 Pac. 839.

England.— Rex *v.* Ogden, 10 B. & C. 230, 21 E. C. L. 104; Darley *v.* Reg., 12 Cl. & F. 520, 8 Eng. Reprint 1513.

See 41 Cent. Dig. tit. "Quo Warranto," § 8.

Under a statute providing that any person whose private right or interest has been injured or has been put in hazard by the exercise by any private corporation of a franchise or privilege not conferred by law shall have leave to file an information in the nature of a quo warranto against such corporation, it has been held that an information pursuant to that statute should be allowed to be filed where it appeared that the petitioner was injured in his business and prevented from obtaining credit, by reason of proceedings taken by the respondent corporation, in excess of its lawful powers, in procuring sellers of goods of the kind used by petitioner to refuse credit to him. Hartnett *v.* Plumbers' Supply Assoc., 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194. But see Haupt *v.* Rogers, 170 Mass. 71, 48 N. E. 1080.

A dram-shop license is a public franchise for the forfeiture of which quo warranto will lie. Martens *v.* People, 186 Ill. 314, 57 N. E. 871 [*affirming* 85 Ill. App. 66]; Matthews *v.* People, 159 Ill. 399, 42 N. E. 864 [*reversing* 53 Ill. App. 305]; Swarth *v.* People, 109 Ill. 621; Handy *v.* People, 29 Ill. App. 99. But see Hargett *v.* Bell, 134 N. C. 394, 46 S. E. 749, holding that such a license is neither a franchise nor an office within the meaning of the North Carolina code sections relating to quo warranto.

For franchises held to be public see People *v.* Thompson, 21 Wend. (N. Y.) 235 (right to maintain a toll bridge); Morris *v.* State, 62 Tex. 728 (right to operate a ferry).

53. See *supra*, II, C.

54. *Alabama.*— *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559; State *v.* Paul, 5 Stew. & P. 40.

California.— People *v.* Scannell, 7 Cal. 432; People *v.* Olds, 3 Cal. 167, 58 Am. Dec. 398.

Connecticut.— Harrison *v.* Simonds, 44 Conn. 318; Duane *v.* McDonald, 41 Conn. 517.

Georgia.— Bonner *v.* State, 7 Ga. 473.

Illinois.— Delahanty *v.* Warner, 75 Ill. 185, 20 Am. Rep. 237; People *v.* Matteson, 17 Ill. 167; People *v.* Forquer, 1 Ill. 104; Garms *v.* People, 108 Ill. App. 631.

Indiana.— Parsons *v.* Durand, 150 Ind. 203, 49 N. E. 1047.

Iowa.— State *v.* Minton, 49 Iowa 591; Desmond *v.* McCarthy, 17 Iowa 525.

Kentucky.— Taylor *v.* Com., 3 J. J. Marsh. 401.

Louisiana.— Peters *v.* Bell, 51 La. Ann. 1621, 26 So. 442; State *v.* Gastinel, 18 La. Ann. 517; Terry *v.* Stauffer, 17 La. Ann. 360.

Massachusetts.— Com. *v.* Fowler, 10 Mass. 290.

Mississippi.— Moore *v.* Caldwell, Freem. 222.

Missouri.— State *v.* Thompson, 36 Mo. 70; St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355; *Ex p.* Bellows, 1 Mo. 115.

New Hampshire.— Meehan *v.* Bachelder, 73 N. H. 113, 59 Atl. 620.

New Jersey.— Stokes *v.* Camden County, 35 N. J. L. 217.

New York.— People *v.* New York, 3 Johns. Cas. 79.

North Carolina.— Ellison *v.* Raleigh, 89 N. C. 125; Davis *v.* Moss, 81 N. C. 303; Saunders *v.* Gatling, 81 N. C. 298; Swain *v.* McRae, 80 N. C. 111; Sneed *v.* Bullock, 77 N. C. 282; Brown *v.* Turner, 70 N. C. 93; *Ex p.* Daughtry, 28 N. C. 155.

Ohio.— State *v.* Conser, 24 Ohio Cir. Ct. 270.

Pennsylvania.— Updegraff *v.* Crans, 47 Pa. St. 103; Com. *v.* Perkins, 7 Pa. St. 42; Hagner *v.* Heyberger, 7 Watts & S. 104, 42 Am. Dec. 220; Com. *v.* Philadelphia County Com'rs, 6 Whart. 476; Com. *v.* Phillips, 1 Del. Co. 41; Jones *v.* Gilroy, 13 Lanc. Bar 207.

South Carolina.— State *v.* Deliesseline, 1 McCord 52.

Texas.— State *v.* Owens, 63 Tex. 261; *Ex p.* Colin De Bland, Dall. 406.

Virginia.—Kilpatrick *v.* Smith, 77 Va. 347.

See 41 Cent. Dig. tit. "Quo Warranto," § 13.

Notice of removal need not be given before proceeding by quo warranto to oust the respondent from office. Atty.-Gen. *v.* Parsell, 99 Mich. 381, 58 N. W. 335. But see Burke *v.* Jenkins, 148 N. C. 25, 61 S. E. 608.

of the statutory election contest which exists in many states, and is in some cases concurrent with the statutory proceedings, and in others exclusive.[55] Although the proceeding is in the name of the state, the action is personal as to the parties claiming the office, the issue between them being the right to the office.[56] The claimant who appears as relator must show that he is eligible, duly elected, or appointed and qualified in order to maintain the proceeding and oust the respondent who is in possession of the office.[57] In this respect the proceedings differ from quo warranto by the state merely to oust the possessor, wherein the respondent's right to hold depends entirely on the strength of his own title and the relator's title is not involved.[58] As a means of trying title to an office, a proceeding by quo warranto offers an advantage over the statutory contest, in that the latter does not preclude separate inquiry by the state while the former is conclusive upon all the parties interested, the state as well as the contestants.[59]

b. Nature of Office. To justify the employment of quo warranto to try title to office it is essential that the office be such as the law deems of a public nature,[60]

55. Murphy's Contested Election, 8 Pa. Dist. 445, 22 Pa. Co. Ct. 29; Gray *v.* State, 92 Tex. 396, 49 S. W. 217.

As to cumulative or exclusive nature of statutory proceedings see *supra*, II, D, 2.

As to statutory election contests see ELECTIONS, 15 Cyc. 394 *et seq.*

56. State *v.* Broatch, 68 Nebr. 687, 94 N. W. 1016, 110 Am. St. Rep. 477.

57. *Alabama.*— Nolen *v.* State, 118 Ala. 154, 24 So. 251.

Florida.— State *v.* Saxon, 25 Fla. 792, 6 So. 858.

Indiana.— Benham *v.* Bradt, (1908) 84 N. E. 1084.

Kansas.—State *v.* Hamilton County, 39 Kan. 85, 19 Pac. 2; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

Mississippi.— Lindsey *v.* Atty.-Gen., 33 Miss. 508.

New Jersey.— Manahan *v.* Watts, 64 N. J. L. 465, 45 Atl. 813. See also Hoagland *v.* Labaw, 32 N. J. L. 269.

Ohio.— State *v.* Johnson, 28 Ohio Cir. Ct. 793.

Taking oath as condition precedent.— If a certificate of election has been issued to one person who has taken the oath of office, it is not necessary for another who claims the office to take or offer to take the oath as a condition precedent to the maintenance of quo warranto proceedings to determine the title to the office. People *v.* Miller, 16 Mich. 56; People *v.* Vail, 20 Wend. (N. Y.) 12; Little *v.* State, 75 Tex. 616, 12 S. W. 965. *Compare* Carlson *v.* People, 118 Ill. App. 592.

That the claimant cannot write is such a disqualification as precludes his recovery of the office of township clerk. Reg. *v.* Ryan, 6 U. C. Q. B. 296.

If the incumbent prevents his successor from qualifying by unlawfully detaining his certificate and commission, he will not be allowed to set up his right to hold over as a defense to quo warranto proceedings and thereby reap a benefit from his own wrong. State *v.* Steers, 44 Mo. 223.

An interest in the office must be shown as distinguished from a mere interest in the duties thereof, in order that the claimant may succeed. State *v.* Dudley, 161 Ind. 431, 68 N. E. 899.

58. Relender *v.* State, 149 Ind. 283, 49 N. E. 30. See also *infra*, IV, D, 2, c.

59. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55.

60. State *v.* North, 42 Conn. 79; Reg. *v.* Mousley, 8 Q. B. 946, 11 Jur. 56, 16 L. J. Q. B. 89, 55 E. C. L. 946; Reg. *v.* Auchinbeck, L. R. 28 Ir. 404; Rex *v.* Hanley, 3 A. & E. 463 note, 30 E. C. L. 232; *Ex p.* Smith, 8 L. T. Rep. N. S. 458, 11 Wkly. Rep. 754; Reg. *v.* Wells, 43 Wkly. Rep. 576.

Quo warranto has been held proper to try title to the office of chief of police or assistant (Ptacek *v.* People, 194 Ill. 125, 62 N. E. 530; Ellis *v.* Lennon, 86 Mich. 468, 49 N. W. 308; State *v.* Hall, 111 N. C. 369, 16 S. E. 420), city physician (Com. *v.* Swasey, 133 Mass. 538), city policeman (Johnson *v.* State, 132 Ala. 43, 31 So. 493. *Contra*, Atty.-Gen. *v.* Cain, 84 Mich. 223, 47 N. W. 484), clerk of a county court (Reg. *v.* Owen, 15 Q. B. 476, 14 Jur. 953, 19 L. J. Q. B. 490, 69 E. C. L. 476), clerk of a poor board (Reg. *v.* St. Martins in the Fields, 17 Q. B. 149, 15 Jur. 800, 20 L. J. Q. B. 423, 79 E. C. L. 149), collector of a school-district (Hamlin *v.* Dingman, 41 How. Pr. (N. Y.) 132 [*reversed* on other grounds in 5 Lans. 61]), commissioner of a drainage district (Smith *v.* People, 140 Ill. 355, 29 N. E. 676 [*affirming* 39 Ill. App. 238]), counsel of a borough (Reg. *v.* Ireland, L. R. 3 Q. B. 130, 9 B. & S. 19, 37 L. J. Q. B. 373, 17 L. T. Rep. N. S. 466, 16 Wkly. Rep. 358), constable (Reg. *v.* Booth, 12 Q. B. 884, 13 Jur. 6, 18 L. J. M. C. 25, 64 E. C. L. 882), coroner (Reg. *v.* Grimshaw, 10 Q. B. 747, 16 L. J. Q. B. 385, 59 E. C. L. 747), county treasurer (Darley *v.* Reg., 12 Cl. & F. 520, 8 Eng. Reprint 1513), director or trustee of a public school (State *v.* Kitchens, 148 Ala. 385, 41 So. 871; Ellis *v.* Greaves, 82 Miss. 36, 34 So. 81; Com. *v.* McMillin, 3 Pa. Co. Ct. 548; Reg. *v.* Nagle, 24 Ont. 507), district clerk (State *v.* Dunlap, 5 Mart. (La.) 271; Williams *v.* State, 69 Tex. 368, 6 S. W. 845), jail-keeper or inspector (Bownes *v.* Meehan, 45 N. J. L. 189; Com. *v.* Douglass, 1 Binn (Pa.) 77), judge of a state

and it must be an office as distinguished from a mere employment,[61] and the tenure must be certain. The writ will not lie to try title to a public employment held at the will of the officer or body having the power of appointment.[62] A state cannot question by quo warranto the title to the office of elector of president and vice-president of the United States.[63]

c. Existence of Office. Quo warranto will not lie to try title to an office not shown to have a legal existence,[64] and so in proceedings by quo warranto against one who claims to be an officer, the legal existence of the office may be denied, and to that end the constitutionalty of a law creating the office attacked,[65] or the legality of the organization of the town or other municipality in which the office is claimed may be controverted,[66] or it may be shown that the office claimed and exercised has been abolished.[67] If the occupant of an office claims it by virtue of an appointment to fill a vacancy, and such vacancy did not legally exist, quo

court (Caldwell *v.* Bell, 6 Ark. 227; Com. *v.* Hawkes, 123 Mass. 525; *In re* Hartt, 161 N. Y. 507, 55 N. E. 1058; Atty.-Gen. *v.* Heaton, 77 N. C. 18; State *v.* Davies, 12 Ohio Cir. Ct. 218, 5 Ohio Cir. Dec. 525; Coyle *v.* Com., 104 Pa. St. 117; Clark *v.* Com., 29 Pa. St. 129; U. S. *v.* Lockwood, 1 Pinn. (Wis.) 359), justice of the peace (Rex. *v.* ——, 2 Chitt. 368, 18 E. C. L. 681), municipal assessor (*In re* McPherson, 17 U. C. Q. B. 99), member of a municipal council (Henry *v.* Camden, 42 N. J. L. 335; Lewis *v.* Oliver, 4 Abb. Pr. (N. Y.) 121; Com. *v.* Brunner, 6 Pa. Co. Ct. 323; *In re* Cassel, 14 Montg. Co. Rep. (Pa.) 101), officer in the state militia (State *v.* Utter, 14 N. J. L. 84; People *v.* Sampson, 25 Barb. (N. Y.) 254; Com. *v.* Small, 26 Pa. St. 31; State *v.* Brown, 5 R. I. 1), president of a municipal council (State *v.* Anderson, 45 Ohio St. 196, 12 N. E. 656), president of a state senate (State *v.* Rogers, 56 N. J. L. 480, 28 Atl. 726, 29 Atl. 173, 23 L. R. A. 354), pilot (People *v.* Woodbury, 14 Cal. 43; Atty.-Gen. *v.* Miller, 2 N. Brunsw. Eq. 28. *Compare* State *v.* Jones, 16 Fla. 306), recorder (Rex *v.* Colchester, 2 T. R. 259, 1 Rev. Rep. 480), street and paving commissioner (Rex *v.* Beedle, 3 A. & E. 467, 30 E. C. L. 224; Rex *v.* Bedford Level, 6 East 356, 2 Smith K. B. 535), township trustee (State *v.* Conser, 24 Ohio Cir. Ct. 270), or vestryman or clerk (Reg. *v.* Burrows, [1892] 1 Q. B. 399, 61 L. J. Q. B. 88, 66 L. T. Rep. N. S. 25, 40 Wkly. Rep. 207; Reg. *v.* Soutter, [1891] 1 Q. B. 57, 55 J. P. 229, 60 L. J. Q. B. 71, 63 L. T. Rep. N. S. 279, 39 Wkly. Rep. 8).

Value of office immaterial.— The right to a public office may be tried by quo warranto without regard to its value; the amount involved in the proceedings is immaterial and no proof need be made of the salary attached to the office. Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

61. *Michigan.*—People *v.* Langdon, 40 Mich. 673, where respondent was a mere clerk in a public office.

Missouri.— State *v.* Gray, 91 Mo. App. 438, where respondent was engineer for a city hall.

North Carolina.— Eliason *v.* Coleman, 86 N. C. 235, where respondent was chief engineer of a railroad.

Ohio.— State *v.* McGonagle, 26 Ohio Cir. Ct. 685, where respondent was superintendent of a county home.

Pennsylvania.— Com. *v.* Frank, 4 Pa. Co. Ct. 618 (where respondent was teacher in a public school); Phillips *v.* Com., 98 Pa. St. 394 [*reversing* 1 Del. Co. 41] (where the respondent was professor in an incorporated university).

England.— Darley *v.* Reg., 12 Cl. & F. 520, 8 Eng. Reprint 1513.

See 41 Cent. Dig. tit. "Quo Warranto." § 11.

Distinction between office and employment see OFFICERS, 29 Cyc. 1366.

62. People *v.* Ridgley, 21 Ill. 65 (holding that a mere employment by appointment or otherwise to serve a public or private corporation determinable at the will of the employer or appointing power is not an office so that the right to the possession can be tested by quo warranto, and the fact that a person is employed by the state to act in a fiduciary capacity and is vested with much discretion does not make him an officer or confer upon him a franchise, so that his right to act can be questioned by quo warranto proceedings against him); State *v.* Champlin, 2 Bailey (S. C.) 220; Reg. *v.* Carroll, L. R. 22 Ir. 400; Darley *v.* Reg., 12 Cl. & F. 520, 8 Eng. Reprint 1513; Reg. *v.* Fox, 8 E. & B. 939, 4 Jur. N. S. 410, 27 L. J. Q. B. 151, 6 Wkly. Rep. 282, 92 E. C. L. 939; Reg. *v.* Bayly, 2 Ir. R. 335; Bradley *v.* Sylvester, 25 L. T. Rep. N. S. 459; Reg. *v.* Simpson, 19 Wkly. Rep. 73.

63. State *v.* Bowen, 8 S. C. 400.

64. Hedrick *v.* People, 221 Ill. 374, 77 N. E. 441.

65. Hinze *v.* People, 92 Ill. 406; People *v.* Riordan, 73 Mich. 508, 41 N. W. 482; State *v.* Scott, 17 Mo. 521. But see State *v.* Moores, 52 Nebr. 634, 72 N. W. 1056, holding that if the argument of unconstitutionality applies to the law under which the relator claims as well as that on which the respondent bases his title, the question cannot be raised.

66. State *v.* Parker, 25 Minn. 215; State *v.* Rose, 84 Mo. 198; State *v.* McReynolds, 61 Mo. 203; State *v.* Coffee, 59 Mo. 59; Harness *v.* State, 76 Tex. 566, 13 S. W. 535.

67. Worthley *v.* Steen, 43 N. J. L. 542.

warranto lies to remove him; [68] and where there was no office when an appointment was made, the appointee has thereby no title, although such office be afterward created and quo warranto will lie to oust him.[69]

d. Possession and User. In order to maintain a proceeding by quo warranto to try the right to public office, it must appear that the respondent is in actual possession of the office.[70] Hence, although defendant was once an unlawful incumbent of the office, he cannot be ousted therefrom if at the time of filing the information he was not exercising or claiming title to the office.[71] It is sufficient user of an office to warrant an information that the respondent claimed the office by appointment, and took the oath required, whereby he obligated himself to discharge the duties of the office.[72]

2. Grounds For Employment of Remedy — a. In General. The title to an office, the existence of which is not disputed, may be questioned or contested in quo warranto proceedings on any legal or equitable grounds which show the incumbent disqualified or not entitled to exercise the powers he claims. Thus it may be shown that the respondent is a mere usurper, having intruded into the office without color of title,[73] or that his supposed title is worthless because of illegality in the election or appointment whereby he claims the office; [74] and in the absence of limitations upon its common-law jurisdiction, the court may investigate the entire matter of the conduct, validity, and result of a popular election.[75] If the respondent was regularly elected but lacks a statutory qualification,[76] or failed

68. Marshall *v.* Illinois State Reformatory, 103 Ill. App. 65 [*affirmed* in 201 Ill. 9, 66 N. E. 314]; State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206; *In re* Hart, 161 N. Y. 507, 55 N. E. 1058; People *v.* Neubrand, 32 N. Y. App. Div. 49, 52 N. Y. Suppl. 280.

69. Com. *v.* Fowler, 10 Mass. 290.

70. Com. *v.* McMullin, 3 Pa. Co. Ct. 548; Reg. *v.* Tidy, [1892] 2 Q. B. 179, 56 J. P. 650, 61 L. J. Q. B. 791, 67 L. T. Rep. N. S. 319, 41 Wkly. Rep. 128; Reg. *v.* Pepper, 7 A. & E. 745, 7 L. J. Q. B. 92, 3 N. & P. 154, 34 E. C. L. 391; Rex. *v.* Ponsonby, 2 Bro. P. C. 311, 1 Eng. Reprint 965, 1 Ld. Ken. 1, 1 Ves. Jun. 1, 30 Eng. Reprint 201; Reg. *v.* Armstrong, 2 Jur. N. S. 211, 25 L. J. Q. B. 238; Reg. *v.* Jones, 28 L. T. Rep. N. S. 270; Rex *v.* Whitwell, 5 T. R. 85, 2 Rev. Rep. 545. But see State *v.* Graham, 13 Kan. 136, holding that mere want of actual possession will not defeat an action brought by the state for forfeiture of office for neglecting to perform the duties of such office, if the respondent was legally entitled to possession at the commencement of the action.

Possession by the respondent is conclusively admitted by a claimant, by the latter instituting quo warranto proceedings. Hubbell *v.* Armijo, (N. M. 1906) 85 Pac. 477; Hubbell *v.* Abbott, (N. M. 1906) 85 Pac. 476; Territory *v.* Dame, (N. M. 1906) 85 Pac. 473.

71. Holmes *v.* Sikes, 113 Ga. 580, 38 S. E. 978. See also State *v.* North, 42 Conn. 79, where it was held that where two school-districts are consolidated, and electors of one district refuse to recognize the consolidation and proceed to elect officers of their original district, such officers are not liable to proceedings by quo warranto for a usurpation, as they do not claim office under the consolidation, and were regularly elected for the district which they assume to represent.

72. People *v.* Callaghan, 83 Ill. 128; Rex *v.* Tate, 4 East 337; Rex *v.* Harwood, 2 East 177.

73. *California.*— Buckner *v.* Veuve, 63 Cal. 304.

Florida.— MacDonald *v.* Rehrer, 22 Fla. 198.

Illinois.— Deemar *v.* Boyne, 103 Ill. App. 464.

Kansas.— Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

New York.— People *v.* Ferris, 76 N. Y. 326.

Virginia.— Watkins *v.* Venable, 99 Va. 440, 39 S. E. 147.

See 41 Cent. Dig. tit. "Quo Warranto," § 14.

74. People *v.* Tisdale, 1 Dougl. (Mich.) 59; State *v.* Frazier, 98 Mo. 426, 11 S. W. 973; People *v.* Van Slyck, 4 Cow. (N. Y.) 297.

75. *Alabama.*— Echols *v.* State, 56 Ala. 131.

Mississippi.— Moore *v.* Caldwell, Freem. 222.

Nevada.— State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573.

New Hampshire.—Osgood *v.* Jones, 60 N. H. 543.

New Jersey.—State *v.* Passaic County Clerk, 25 N. J. L. 354.

North Carolina.— Davis *v.* Moss, 81 N. C. 303; Saunders *v.* Gatling, 81 N. C. 298.

See 41 Cent. Dig. tit. "Quo Warranto," § 13.

In Pennsylvania it has been held that the return by the election officers that a certain candidate has received a majority of the votes for a township office cannot be inquired into by quo warranto. Com. *v.* Baxter, 35 Pa. St. 263.

76. Greenwood *v.* Murphy, 131 Ill. 604, 23 N. E. 421; State *v.* Collister, 27 Ohio Cir.

to qualify by filing the bond and taking the oath required, he may be ousted by quo warranto,[77] and the same is true if he assumes to exercise the office after the expiration of the term for which he was elected or appointed.[78]

b. Misconduct of Officer. Quo warranto may be employed to oust an incumbent of an office because of misconduct therein, if such misconduct operates as or is a cause of a forfeiture of the office;[79] but if the title of the respondent is not questioned, quo warranto cannot be used as a means of restraining a public officer from doing any particular act, the right of doing which is claimed by virtue of such office, and which constitutes an integral part of the rights and powers incident thereto.[80]

3. Proceedings by Incumbent. An incumbent of an office cannot proceed by quo warranto against an adverse claimant who neither usurps nor unlawfully holds or executes such office,[81] even though steps are taken which threaten to disturb the incumbent in the enjoyment of his term.[82]

C. Trial of Right to Corporate Franchise or Office — 1. Municipal Corporations — a. Trial of Legal Existence. Quo warranto is the proper and in the absence of statute the exclusive [83] proceeding to determine the question of the legal existence or validity of the organization of a municipal corporation, such as a city or village,[84] a township,[85] or a school-district; [86] and in such proceedings it may be shown that the incorporation is void because of fraud in securing the charter or in the organization of the municipality.[87] But a writ of quo warranto will not be

Ct. 529, where it was held sufficient ground for quo warranto that defendant was not a citizen of the United States, although otherwise legally elected and qualified.

77. State *v.* Bernoudy, 36 Mo. 279; Respublica *v.* Wray, 2 Yeates (Pa.) 429.

78. Burgess *v.* Davis, 138 Ill. 578, 28 N. E. 817; Holden *v.* People, 90 Ill. 434; Walsh *v.* Com., 1 Lack. Leg. Rec. (Pa.) 283.

79. State *v.* Allen, 5 Kan. 213; Bradford *v.* Territory, 2 Okla. 228, 37 Pac. 1061; Com. *v.* McWilliams, 11 Pa. St. 61; Com. *v.* Shepp, 10 Phila. (Pa.) 518; Royall *v.* Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335.

Conviction in a criminal prosecution is not a prerequisite, although the act charged as ground for removal is also a crime. Royall *v.* Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335.

Incompatible offices.— Quo warranto lies to oust a person from an office which he has forfeited by accepting another office incompatible therewith. Rex *v.* Day, 9 B. & C. 702, 7 L. J. K. O. S. 308, 4 M. & R. 541, 17 E. C. L. 314 (holding also that the relator must show a legal appointment to the second office); Rex *v.* Lawrence, 2 Chit. 371, 18 E. C. L. 683; Rex *v.* Bond, 6 D. & R. 333, 16 E. C. L. 261.

80. *Arkansas.*— State *v.* Evans, 3 Ark. 585, 36 Am. Dec. 468, holding that where a special judge was commissioned to try a certain class of cases the writ will not lie to inquire into his authority to try any one or more particular cases.

Georgia.— Locklear *v.* Harris, 108 Ga. 809, 34 S. E. 183.

Illinois.— People *v.* Whitcomb, 55 Ill. 172.

Nebraska.— State *v.* Scott, 70 Nebr. 681, 97 N. W. 1021.

Pennsylvania.— Com. *v.* Becker, 5 Lack. Jur. 115.

Texas.— State *v.* Smith, 55 Tex. 447.

England.— Reg. *v.* Durham County Justices, 2 L. T. Rep. N. S. 372.

See 41 Cent. Dig. tit. "Quo Warranto," § 15 *et seq.*

Compare State *v.* State University, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378.

A mere threatened abuse of their powers by city officers does not amount to ground for quo warranto, where the statute authorizes the remedy against a person who usurps, intrudes into, or unlawfully holds or exercises a public office. State *v.* Ensley, 142 Ala. 661, 38 So. 802.

81. Roberson *v.* Bayonne, 58 N. J. L. 325, 33 Atl. 734; Haines *v.* Camden County, 47 N. J. L. 454, 1 Atl. 515; State *v.* Smith, 55 Tex. 447.

82. Bradshaw *v.* Camden, 39 N. J. L. 416.

83. **Exclusiveness of remedy** see *supra*, II, B, 3.

84. Mullikin *v.* Bloomington, 72 Ind. 161; State *v.* Clark, 75 Nebr. 620, 106 N. W. 971; Brennan *v.* Weatherford, 53 Tex. 330, 37 Am. Rep. 758; Merritt *v.* State, 42 Tex. Civ. App. 495, 94 S. W. 372.

The constitutionality of a law incorporating a city may be inquired into in such proceedings, brought to ascertain the power of the city council to act under the law. State *v.* Osborn, 24 Nev. 187, 51 Pac. 837.

85. People *v.* Stratton, 33 Colo. 464, 81 Pac. 245; Territory *v.* Armstrong, 6 Dak. 226, 50 N. W. 832.

86. State *v.* Carbondale Independent School Dist., 29 Iowa 264; Roeser *v.* Gartland, 75 Mich. 143, 42 N. W. 687; Askew *v.* Manning, 38 U. C. Q. B. 345.

A township board of education has been held not subject to proceedings by quo warranto. State *v.* Riley Tp. Bd. of Education, 7 Ohio Cir. Ct. 152, 3 Ohio Cir. Dec. 703.

87. State *v.* Ford County, 12 Kan. 441; State *v.* Uridil, 37 Nebr. 371, 55 N. W. 1072.

allowed to attack the incorporation of a municipality where its organization was had through the judicial action of a court of record, from whose decision an appeal or writ of error lies.[88]

b. Ouster From Franchise. If a public corporation usurps or exercises powers not conferred upon it by law, quo warranto is the appropriate remedy to oust it from the exercise thereof.[89] But the only question before the court in such proceedings is whether the corporation has in fact the power which it assumes; if it be admitted that it has, the irregular or improper exercise of the power is no ground for proceedings by quo warranto,[90] nor will quo warranto lie against a municipal corporation to enforce the exercise of a corporate power, the remedy being inapplicable because the judgment would be forfeiture.[91]

2. Private Corporations — a. Trial of Legal Existence and Ouster From Franchise. In the exercise of the right of the state to supervise and control private corporations, proceedings by quo warranto may be employed to test the legality of a corporation,[92] or to oust it from exercising particular franchises or powers,[93] or to compel it to desist from acts which violate its charter and the rights

88. People *v.* Waite, 213 Ill. 421, 72 N. E. 1087; People *v.* Mineral Marsh Drainage Dist., 193 Ill. 428, 62 N. E. 225; State *v.* Fleming, 158 Mo. 558, 59 S. W. 118; Keyser *v.* Bremen, 16 Mo. 88; Com. *v.* Kennedy, 5 Lack. Leg. N. (Pa.) 323.

If the action of the court is ministerial only as it has been held to be where the judge calls an election to vote upon the question of incorporating a town and enters an order declaring the same incorporated, upon the result being certified by the election officers, it does not preclude inquiry by quo warranto as to the validity of the incorporation. West End *v.* State, 138 Ala. 295, 36 So. 423.

Where the result of an election to locate a county-seat has been declared by the board of supervisors as provided by statute, the result so declared cannot be contested by quo warranto. Leigh *v.* State, 69 Ala. 261; People *v.* Grand County, 6 Colo. 202.

Effect of existence of another adequate remedy generally see *supra*, II, D.

89. *Alabama.*— State *v.* Wilburn, (1905) 39 So. 816; Uniontown *v.* State, 145 Ala. 471, 39 So. 814.

Illinois.— People *v.* Quincy Bd. of Education, 101 Ill. 308, 40 Am. Rep. 196.

Kansas.— State *v.* Leavenworth, 36 Kan. 314, 13 Pac. 591; State *v.* Topeka, 31 Kan. 452, 2 Pac. 593, 30 Kan. 653, 2 Pac. 587.

Michigan.—Atlee *v.* Wexford County, 94 Mich. 562, 54 N. W. 380; Owosso Fractional School Dist. No. 1 *v.* Owosso School Inspectors, 27 Mich. 3.

Missouri.— State *v.* Fleming, 147 Mo. 1, 44 S. W. 758.

North Dakota.— See State *v.* McLean County, 11 N. D. 356, 92 N. W. 385.

Ohio.— State *v.* Bingham, 14 Ohio Cir. Ct. 245, 7 Ohio Cir. Dec. 522.

See 41 Cent. Dig. tit. "Quo Warranto," § 9.

90. Johnston *v.* Savidge, 11 Ida. 204, 81 Pac. 616; State *v.* Lyons, 31 Iowa 432; State *v.* Newark, 57 Ohio St. 430, 49 N. E. 407.

The validity of an ordinance or contract within the scope of the powers of the municipality cannot be questioned by quo warranto. People *v.* Springfield, 61 Ill. App. 86; State *v.* Nebraska Tel. Co., 127 Iowa 194, 103 N. W. 120.

Sale of real estate.— Where a statute authorized the sale of real estate belonging to a county by the county board of supervisors, a sale to a member of the board cannot be attacked by quo warranto, although the sale is possibly void on grounds of public policy. McDonald *v.* Alcona County, 91 Mich. 459, 51 N. W. 1114.

Acts by officer other than the one authorized.— Where the mayor of a city claimed to exercise a power granted to the council, the latter having delegated the same to a committee, quo warranto could not be maintained against the city. Com. *v.* Pittsburgh, 14 Pa. St. 177.

91. Atty.-Gen. *v.* Salem, 103 Mass. 138.

92. *Colorado.*— Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673.

Indiana.— Lawrence County *v.* Hall, 70 Ind. 469.

New Jersey.— Miller *v.* American Tobacco Co., 56 N. J. Eq. 847, 42 Atl. 1117; Stockton *v.* American Tobacco Co., 55 N. J. Eq. 352, 36 Atl. 971 [*affirmed* in 56 N. J. Eq. 847, 42 Atl. 1117]; West Jersey R. Co. *v.* Cape May, etc., R. Co., 34 N. J. Eq. 164.

New York.— People *v.* Clark, 70 N. Y. 518.

Tennessee.— State *v.* Merchants' Ins., etc., Co., 8 Humphr. 235.

See 41 Cent. Dig. tit. "Quo Warranto," § 17.

A corporation is a person within the meaning of statutes relating to quo warranto proceedings. State *v.* Des Moines City R. Co., (Iowa 1906) 109 N. W. 867; State *v.* Seattle Gas, etc., Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114; State *v.* Milwaukee Independent Tel. Co., 133 Wis. 588, 114 N. W. 108, 315; State *v.* Milwaukee, etc., R. Co., 116 Wis. 142, 92 N. W. 546; State *v.* Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

93. *Indiana.*— State *v.* Portland Natural Gas Co., 153 Ind. 483, 53 N. E. 1089, 74 Am. St. Rep. 314, 53 L. R. A. 413.

of its stock-holders,[94] or which create a public nuisance.[95] In order to support the proceedings there must be actual user or possession of the rights or franchises, and a mere claim by an association of persons to exercise corporate rights, privileges, or franchises, is insufficient;[96] nor can the organization of a corporation be attacked as illegal on the ground that its members do not intend in good faith to carry out the declared objects of its organization, but intend to use the corporation as a means of accomplishing some ulterior purpose.[97] The state may contest the claim of a corporation to use state lands, since the right to the use of such property can only be derived from the state;[98] but if a corporation takes and uses for a private purpose the land of a private person, it cannot be ousted from possession of the land by quo warranto.[99] A foreign corporation is subject to proceedings by quo warranto, to try its right to carry on its corporate business in the state;[1] but a state cannot, by quo warranto, inquire whether a foreign *de facto* corporation has a legal existence, that question being determinable only by the state under whose laws the corporation claims to be organized.[2]

b. Trial of Title to Office. Quo warranto is the proper remedy to try title to office in a private corporation.[3] Thus quo warranto proceedings may be brought

Kansas.— State *v.* State University, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378.

Maine.— Reed *v.* Cumberland, etc., Corp., 65 Me. 132.

Michigan.—Atty.-Gen. *v.* Detroit Suburban R. Co., 96 Mich. 65, 55 N. W. 562.

New York.— People *v.* Geneva College, 5 Wend. 211; People *v.* Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243.

Ohio.— State *v.* Capital City Dairy Co., 62 Ohio St. 350, 57 N. E. 62; State *v.* Cincinnati, etc., R. Co., 47 Ohio St. 130, 23 N. E. 928 (holding also that where a railroad company fixes a rate for carrying oil in tank cars substantially lower than the rate for transporting it in barrels in carload lots, it is exercising "a franchise, privilege or right in contravention of law," within the meaning of the prevailing statute authorizing quo warranto proceedings against corporations); State *v.* Toledo R., etc., Co., 23 Ohio Cir. Ct. 603; State *v.* Dayton Traction Co., 18 Ohio Cir. Ct. 490, 10 Ohio Cir. Dec. 212. But see State *v.* Toledo, 23 Ohio Cir. Ct. 327.

Wisconsin.— State *v.* Milwaukee, etc., R. Co., 116 Wis. 142, 92 N. W. 546; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

See 41 Cent. Dig. tit. "Quo Warranto," § 18 *et seq.*

As to what constitutes a franchise see FRANCHISES, 19 Cyc. 1451 *et seq.*

Immunity from taxation is not a corporate franchise, or right and privilege of a corporation within the meaning of the Texas statute relating to quo warranto. International, etc., R. Co. *v.* State, 75 Tex. 356, 12 S. W. 685.

Use of streets.— The right conferred by a city ordinance upon a public service corporation to lay gas-pipe in the streets is not a franchise, but a local easement, resting only on contract or license, and quo warranto will not lie against a gas company on the ground that it has forfeited the right to use the streets by violating certain conditions of the grant (People *v.* Detroit Mut. Gaslight Co., 38 Mich. 154); but where the statute extends the remedy to privileges and licenses as well as franchises, quo warranto may be had against a corporation for misuser of the license to maintain telephone wires in city streets (People *v.* Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245).

The validity of a contract between corporations may be investigated by quo warranto, and if it be found to be in excess of the legitimate power of either, such corporation may be ousted from acting thereunder. Com. *v.* Delaware, etc., Canal Co., 43 Pa. St. 295.

Where competing corporations consolidate under a statute, quo warranto will lie to determine the constitutionality of the statute. People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244.

94. State *v.* Ohio, etc., R. Co., 6 Ohio Cir. Ct. 412, 3 Ohio Cir. Dec. 516.

95. Atty.-Gen. *v.* Jamaica Pond Aqueduct Corp., 133 Mass. 361.

96. Mylrea *v.* Superior, etc., R. Co., (Wis. 1896) 67 N. W. 1138.

97. State *v.* Kingan, 51 Ind. 142; State *v.* Martin, 51 Kan. 462, 33 Pac. 9.

98. State *v.* Pittsburg, etc., R. Co., 53 Ohio St. 189, 41 N. E. 205.

99. State *v.* Pittsburg, etc., R. Co., 53 Ohio St. 239, 33 N. E. 1051.

1. Atty.-Gen. *v.* A. Booth, etc., Co., 143 Mich. 89, 106 N. W. 868; State *v.* Fidelity, etc., Ins. Co., 39 Minn. 538, 41 N. W. 108; State *v.* Fidelity, etc., Ins. Co., 49 Ohio St. 440, 31 N. E. 658, 34 Am. St. Rep. 573, 16 L. R. A. 611; State *v.* Western Union Mut. L. Ins. Co., 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129. See also FOREIGN CORPORATIONS, 19 Cyc. 1288.

2. Hudson *v.* Green Hill Seminary Corp., 113 Ill. 618.

3. *Illinois.*— Garmire *v.* American Min. Co., 93 Ill. App. 331; Hayes *v.* Morgan, 81 Ill. App. 665.

Indiana.— Covington, etc., Plank-Road Co. *v.* Moore, 3 Ind. 510, where it was held that an information will lie to determine the right to exercise the duties of an office in a private corporation, since the public is interested,

against bank directors,[4] trustees of religious societies,[5] of cemetery associations,[6] or of benevolent societies,[7] and against officers of railroad and other commercial corporations.[8] But an election of corporate officers is not subject to attack at the instance of a person who participated in the election with knowledge that it was illegal.[9] The office must be one recognized as such by law, and not a mere employment.[10] The inquiry may extend to the legality of the election and proceedings under which the respondent claims title,[11] but not to the validity of the charter of the corporation.[12]

c. Forfeiture of Charter. Quo warranto is the proper remedy to enforce a forfeiture of the charter and franchises of a corporation, for misuser or non-user,[13]

having a right to see that no one not lawfully entitled so to do holds office in a corporation which is the creation of the sovereign power and can do nothing save under its authority.

Michigan.—Atty.-Gen. *v.* Looker, 111 Mich. 498, 69 N. W. 929.

New Jersey.— Hankins *v.* Newell, (Sup. 1907) 66 Atl. 929; Barna *v.* Kirczow, 71 N. J. Eq. 196, 63 Atl. 611; Owen *v.* Whitaker, 20 N. J. Eq. 122.

New York.— People *v.* Kip, 4 Cow. 382 note; People *v.* Tibbets, 4 Cow. 358.

Pennsylvania.— Com. *v.* Jankovic, 216 Pa. St. 615, 65 Atl. 1099; Com. *v.* Lent, 32 Pa. Co. Ct. 388.

United States.— Gunton *v.* Ingle, 11 Fed. Cas. No. 5,870, 4 Cranch C. C. 438.

See 41 Cent. Dig. tit. "Quo Warranto," § 21.

In Canada it is held that quo warranto will not lie for usurpation of office in a private corporation, the rights of the crown or the public being in no way affected. *Ex p.* Gilbert, 15 N. Brunsw. 29; Reg. *v.* Hespeler, 11 U. C. Q. B. 222.

4. State *v.* Ashley, 1 Ark. 513; Smith *v.* State Bank, 18 Ind. 327; State *v.* Buchanan, Wright (Ohio) 233.

5. *Delaware.*— State *v.* Stewart, 6 Houst. 359.

Illinois.— Nelson *v.* Benson, 69 Ill. 27.

Ohio.— Gallipolis Tp. First Presby. Soc. *v.* Smithers, 12 Ohio St. 248; Trinity Church *v.* Wardens, etc., 3 Ohio Dec. (Reprint) 524.

Pennsylvania.— Nolde's Appeal, (1888) 15 Atl. 777 [*affirming* 4 Lanc. L. Rev. 347]; Com. *v.* Graham, 64 Pa. St. 339.

Wisconsin.—Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84.

See 41 Cent. Dig. tit. "Quo Warranto," § 21.

6. Hullman *v.* Honcomp, 5 Ohio St. 237.

7. Davidson *v.* State, 20 Fla. 784.

8. State *v.* Ohio, etc., R. Co., 6 Ohio Cir. Ct. 412, 3 Ohio Cir. Dec. 516. See also cases cited *supra*, note 3.

9. People *v.* Moore, 73 Ill. 132; Com. *v.* McCutchen, 2 Pars. Eq. Cas. (Pa.) 205; Rex *v.* Trevenen, 2 B. & Ald. 339, 20 Rev. Rep. 461.

A mistaken opinion as to the legality of corporate action held by one who participated therein with knowledge of all material facts does not amount to lack of knowledge of the illegality of such action. People *v.* Moore, 73 Ill. 132.

10. Com. *v.* Dearborn, 15 Mass. 125; People *v.* Hills, 1 Lans. (N. Y.) 202.

Distinction between office and employment see OFFICERS, 29 Cyc. 1366.

11. Covington, etc., Plank-Road Co. *v.* Moore, 3 Ind. 510.

12. Com. *v.* Yetter, 190 Pa. St. 488, 43 Atl. 226; Com. *v.* Morris, 1 Phila. (Pa.) 411; Reg. *v.* Taylor, 11 A. & E. 949, 3 P. & D. 652, 39 E. C. L. 499; Reg. *v.* Jones, 8 L. T. Rep. N. S. 503. *Compare* Reg. *v.* Lloyd, 2 L. T. Rep. N. S. 232.

13. *Arkansas.*— Darnell *v.* State, 48 Ark. 321, 3 S. W. 365; State *v.* Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109.

Illinois.— People *v.* Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245; Baker *v.* Backus, 32 Ill. 79.

Iowa.— State *v.* Des Moines City R. Co., (1906) 109 N. W. 867.

Kansas.— State *v.* Pipher, 28 Kan. 127; Territory *v.* Reyburn, McCahon 134.

Maryland.— Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1.

Massachusetts.— Malone *v.* New York, etc., R. Co., (1908) 83 N. E. 408.

Mississippi.— Bayless *v.* Orne, Freem. 161.

Missouri.— State *v.* Hannibal, etc., Gravel Road Co., 37 Mo. App. 496.

New York.— People *v.* Erie R. Co., 36 How. Pr. 129; People *v.* Hudson Bank, 6 Cow. 217; People *v.* Niagara Bank, 6 Cow. 196.

Pennsylvania.—Freeman *v.* Stine, 13 Phila. 28; Lejee *v.* Continental Pass. R. Co., 10 Phila. 362.

Virginia.— Com. *v.* James River Co., 2 Va. Cas. 190.

See 41 Cent. Dig. tit. "Quo Warranto," § 20.

Under the Michigan statute respecting quo warranto it is held that corporations will be punished for nothing but violations of the laws and policy of the state. People *v.* Detroit Mut. Gaslight Co., 38 Mich. 154.

Municipal sanction of misuser.— In proceedings by the state to forfeit the charter of a water company, for furnishing impure water by means of a connection between its mains and a mill pond into which the sewers of the town emptied, from which pond the company drew water when its supply from other sources became insufficient, it is no defense that the connection with the pond was maintained pursuant to an agreement with the borough. Com. *v.* Potter County Water Co., 212 Pa. St. 463, 61 Atl. 1099.

and also to wind up an illegally organized corporation;[14] but although a corporation is ousted of the right to exercise its franchises, it will not be divested of its property, unless the property was acquired by usurpation of the proprietary rights of the state.[15] If, however, the corporation's ownership of its property is limited to the time of its existence, its charter providing that thereafter the property shall be the property of a city, quo warranto to enforce such forfeiture may be sustained.[16] In some states the ground of the action determines what remedy shall be used, scire facias being the only remedy to punish, by forfeiture, an abuse of corporate power, and quo warranto the exclusive proceeding where the cause of forfeiture is a defect in the organization.[17]

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

A. Jurisdiction and Venue — 1. IN GENERAL. To ascertain what courts may take jurisdiction of proceedings by quo warranto, reference must be had to the organic law and statutes of the state, the common law being of little value on this point.[18]

2. NISI PRIUS COURTS. A court of superior, original, common-law jurisdiction is usually the proper tribunal to which to present an information in the nature of a quo warranto.[19] This is true whether the power is conferred upon such courts expressly, or whether the constitution and statutes merely vest therein general common-law powers.[20] The jurisdiction of such courts extends, on the one hand,

14. Albert *v.* State, 65 Ind. 413.

15. State *v.* Pittsburgh, etc., R. Co., 50 Ohio St. 339, 33 N. E. 1051.

16. State *v.* Washington Steam Fire Co., 76 Miss. 449, 24 So. 877.

17. Regents of University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Com. *v.* U. S. Bank, 2 Ashm. (Pa.) 349.

In Vermont, by statute, proceedings to forfeit a corporate charter should be by scire facias. Green *v.* St. Albans Trust Co., 57 Vt. 340.

18. Lindsey *v.* Atty.-Gen., 33 Miss. 508 (where it is said that the nature and extent of rights, and the remedies to protect these rights, are ascertained from the common law, but the tribunal before which the particular right is to be vindicated is ascertained from the constitution and laws of our own government; and that the writ of quo warranto will be granted by the common-law courts of the state); State *v.* Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

The courts of the Indian Territory have only common-law jurisdiction to grant writs of quo warranto. Painter *v.* U. S., 6 Indian Terr. 505, 98 S. W. 352.

The court, not the judge, hears proceedings on quo warranto, both in vacation and term-time, where the statute provides that the court shall be always open for the trial of such cases. Newman *v.* State, (Ala. 1905) 39 So. 648. See also JUDGES, 23 Cyc. 536.

Acts done out of term.— Anything done by a judge of a district court in a proceeding in the nature of quo warranto, so far at least as it is treated as a civil cause which will be valid if done in term-time, is not invalid because done outside of a regular term of such court. Territory *v.* Armijo, (N. M. 1907) 89 Pac. 267, 275.

Power of judge out of court see JUDGES, 23 Cyc. 554.

Law or trial term.— An information in the nature of a quo warranto should be filed at the law term, not at the trial term; and if wrongly filed, may be transferred. State *v.* Portland, etc., R. Co., 58 N. H. 113.

19. State *v.* Stewart, 6 Houst. (Del.) 359; Enterprise *v.* State, 29 Fla. 128, 10 So. 740; State *v.* Lingo, 26 Mo. 496. And see, generally, COURTS, 11 Cyc. 765 *et seq.*

20. *Delaware.*—State *v.* Hancock, 2 Pennew. 252, 45 Atl. 851.

Florida.— Buckman *v.* State, 34 Fla. 48, 15 So. 697, 24 L. R. A. 806.

Idaho.— Toncray *v.* Budge, 14 Ida. 621, 95 Pac. 26; Lindsay *v.* People, 1 Ida. 438.

Illinois.— Snowball *v.* People, 147 Ill. 260, 35 N. E. 538 [*affirming* 43 Ill. App. 241].

Indiana.— State *v.* Kankakee Valley Draining Co., 42 Ind. 353; Gass *v.* State, 34 Ind. 425.

Missouri.— State *v.* Lobsinger, 7 Mo. App. 106.

New Mexico.— Territory *v.* Ashenfelter, 4 N. M. 85, 12 Pac. 879.

North Dakota.— State *v.* McLean County, 11 N. D. 356, 92 N. W. 385.

Texas.— McAllen *v.* Rhodes, 65 Tex. 348.

Washington.— State *v.* Morris, 14 Wash. 262, 44 Pac. 266.

Wisconsin.— State *v.* Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

See 41 Cent. Dig. tit. "Quo Warranto," § 29.

General power over corporations.— Under an act giving a court superintending authority over all civil corporations, it may take jurisdiction of an information in the nature of a quo warranto against a city council to test its power to pass an ordinance imposing a tax on bonds. State *v.* Charleston, 1 Mill (S. C.) 36.

Upon the repeal of a statute abolishing writs of quo warranto, the common-law rem-

and is restricted on the other hand, to the political division for which they are established.[21] Inferior courts, and those of limited jurisdiction, such as city courts, do not usually have jurisdiction of quo warranto proceedings,[22] although it may be conferred upon them by constitutional provisions or statutes.[23]

3. Appellate Courts. It is usual for courts of appellate jurisdiction to be given original jurisdiction of quo warranto proceedings for certain purposes;[24] but, although an appellate court may have jurisdiction concurrent with that of circuit courts, it will not ordinarily exercise the same unless some good reason is shown why the application should not be made to the circuit court.[25]

4. Venue — a. In General. The place where quo warranto proceedings should be instituted is generally governed by statutes, which vary in the different states.[26] A state court of last resort has jurisdiction throughout the state, and

edy is revived, and district courts under their common-law jurisdiction may hear proceedings on such writs. State *v.* Otis, 58 Minn. 275, 59 N. W. 1015.

21. State *v.* Green, 1 Pennew. (Del.) 63, 39 Atl. 590 (holding that a county court cannot issue a writ against one wrongfully holding an office in another county); Hathcock *v.* McGouirk, 119 Ga. 973, 47 S. E. 563 (holding that a county court may entertain a quo warranto proceeding to try title to the office of sheriff of the county); State *v.* Bowen, 8 S. C. 400 (holding that this principle prevents state courts from taking jurisdiction over proceedings to determine title to federal offices).

Jurisdiction over foreign corporations.—For the same reason a state cannot forfeit the charter of a foreign corporation (Hudson *v.* Green Hill Seminary Corp., 113 Ill. 618); nor can the courts of one state inquire into the regularity of the election of an officer of a foreign corporation, although an office is kept within the state, and most of the directors are residents thereof (Com. *v.* Leisenring, 15 Phila. (Pa.) 215).

In Pennsylvania, under the act of June 14, 1836, giving courts of common pleas jurisdiction by quo warranto over the subject-matter of forfeiture by a corporation of its franchise for non-user of misuser of corporate rights, the court of one county has jurisdiction in such proceeding against a corporation organized and doing business in another county, provided the corporation appears in court. Com. *v.* Order of Solon, 166 Pa. St. 33, 30 Atl. 930. In the same state, by the act of April 7, 1870 (Pamphl. Laws 57), the common pleas court of Dauphin county is given jurisdiction throughout the state for the purpose of hearing and determining all suits, claims, and demands whatever, at law or in equity, in which the commonwealth may be party plaintiff, etc.; and it was held that thereby such court has power to issue a writ of quo warranto, in which the commonwealth is the real plaintiff, against a railway corporation having neither its place of business, nor exercising or claiming any powers, privileges, or franchises in said county, for the purpose of inquiring into its authority for exercising the franchise and liberties of a corporation within the commonwealth. Com. *v.* Pennsylvania, etc., R. Co., 16 Phila. (Pa.) 596, 14 Wkly. Notes Cas. 60. See also the following cases in regard to the jurisdiction of the common pleas court in quo warranto proceedings: Com. *v.* Haeseler, 161 Pa. St. 92, 38 Atl. 1014; Com. *v.* Towanda Water-Works, (Pa. 1888) 15 Atl. 440; Cleaver *v.* Com., 34 Pa. St. 283; Field *v.* Com., 32 Pa. St. 478; Lieb *v.* Com., 9 Watts (Pa.) 200; Com. *v.* Kempsmith, 13 Pa. Co. Ct. 667; Com. *v.* Brunner, 6 Pa. Co. Ct. 323, 3 Del. Co. 551; Com. *v.* Frank, 4 Pa. Co. Ct. 618; Com. *v.* McCutchen, 2 Pars. Eq. Cas. (Pa.) 205.

22. People *v.* King, 1 Cal. 345; People *v.* Gillespie, 1 Cal. 342. And see, generally, Courts, 11 Cyc. 771 *et seq.*

23. Lee *v.* State, 49 Ala. 43; People *v.* Bingham, 82 Cal. 238, 22 Pac. 1039; Delage *v.* Germain, 12 Quebec 149.

24. See the constitutions of the several states. And see State *v.* Claggett, 73 Mo. 388; Courts, 11 Cyc. 801 *et seq.*

Jurisdiction of informations in the nature of quo warranto is held to be conferred on the supreme court by a constitutional provision that such court may issue writs of quo warranto. State *v.* Leatherman, 38 Ark. 81; State *v.* Anderson, 26 Fla. 240, 8 So. 1; State *v.* Equitable Loan, etc., Assoc., 142 Mo. 325, 41 So. 916; State *v.* Elliott, 13 Utah 200, 44 Pac. 248.

The jurisdiction to superintend municipal elections by means of quo warranto is not ousted by a statute which vests in township commissioners full power and authority to approve or set aside certain elections. The election itself may be inquired into in proceedings against such commissioners. Com. *v.* McCloskey, 2 Rawle (Pa.) 369.

In Arkansas the jurisdiction of the supreme court to issue quo warranto and information as original proceedings has been abolished, and the court has jurisdiction to issue the same only in aid of its appellate jurisdiction. Louisiana, etc., R. Co. *v.* State, 75 Ark. 435, 88 S. W. 559.

25. State *v.* Branch, 28 Mo. App. 131.

26. See the statutes of the different states; and, generally, Venue.

In Alabama it is no objection to the jurisdiction of the court to try title to the office of solicitor of the county that he is not a resident of the county. It is enough that the office is within the territorial jurisdiction of the court. Lee *v.* State, 49 Ala. 43.

may issue a writ to a defendant anywhere within its boundaries, and he must appear in the county where the court sits, regardless of the county of his domicile.[27]

b. Change of Venue. A change of venue will, in some states, be allowed in quo warranto proceedings brought for the protection of the rights of a private person as in ordinary civil cases.[28] Statutes relating to change of venue in criminal cases do not apply to quo warranto.[29]

B. Preliminary Questions and Proceedings — 1. Time to Sue — a. In General. Quo warranto proceedings may in some cases be barred by the statute of limitations,[30] or by laches.[31] The objection that the proceedings are begun too late may in some cases be made on presenting a petition for leave to file an information,[32]

In Indiana proceedings by quo warranto to try title to office should be brought in the county where defendant resides. Robertson *v.* State, 109 Ind. 79, 10 N. E. 582, 643.

In Massachusetts an information may be filed in any county of the state, but must be made returnable to the county where respondent resides. Com. *v.* Smead, 11 Mass. 74.

In Mississippi, the code, section 3521, relating to the venue of quo warranto proceedings, does not provide for a case where several corporations domiciled in different counties are to be joined in one action for violation of the act against trusts brought in a county where three of the defendant corporations were domiciled; but it was held that the circuit court of such county had no jurisdiction, by reason of the joinder of corporations not domiciled in that county, which were not subject to proceedings for forfeiture of their charter except in the county of their domicile. State *v.* Mississippi Cotton Oil Co., 79 Miss. 203, 30 So. 609.

In New York, under Code Civ. Proc. § 1948, the attorney-general may designate the county in which the trial shall be had. People *v.* Platt, 46 Hun 394. See also People *v.* Cook, 6 How. Pr. 448.

In Ohio, where relator prosecutes the proceeding in his private right, it may be brought in the county in which defendant resides or may be summoned, as in civil actions generally. State *v.* Thompson, 34 Ohio St. 365.

If the charge is that defendants have usurped corporate powers, they may be ousted by the court of the county where they reside (Com. *v.* Morris, 1 Phila. (Pa.) 411); or where the office of the pretended corporation or of its president is located (State *v.* Buckland, 5 Ohio St. 216).

Proceedings based on illegal combination.— Quo warranto proceedings, brought by the attorney-general under the provisions of the Valentine Anti-Trust Act (Bates Annot. St. §§ 4427-1 to 4427-12) and of Rev. St. § 6762, to oust certain domestic corporations from their corporate franchises on the ground that they have entered into an illegal agreement or conspiracy in restraint of trade, may be brought in any county in which any one of such corporations is situated or has a place of business, and process may issue thence to any other county where any other of the defendant corporations may be situated. For purposes of prosecution, an illegal combination between corporations in restraint of trade exists in each and every county where its constituent members exist and act; hence, the contention is erroneous that quo warranto proceedings based upon such illegal combination must be brought in a county where the combination does business as a separate entity. State *v.* King Bridge Co., 28 Ohio Cir. Ct. 147.

27. State *v.* Frazier, 28 Nebr. 438, 44 N. W. 471, holding that the case is not altered by a statute relating to the county in which actions must be brought, which provides that actions "must be brought in the county in which the defendant, or some of the defendants, reside or may be summoned."

If, however, the court sits in various counties, including that of defendant's residence, the writ must be returnable in the latter county, although application therefor may be made anywhere in the state. *In re* Mt. Pleasant Bank, 5 Ohio 249.

In Vermont an order to show cause cannot be made returnable to the general term of the supreme court, as that is not a term appointed by law to be held at any prescribed time and place; and a cause is not in the supreme court until it has been entered at a fixed county term of the court, and cannot go to the general term except by order of court made at such fixed term. State *v.* Smith, 48 Vt. 14.

28. People *v.* Shaw, 13 Ill. 581; Clerk *v.* Reg., 9 H. L. Cas. 184, 31 L. J. Q. B. 175, 5 L. T. Rep. N. S. 66, 11 Eng. Reprint 699, holding that venue may be changed on the ground that the trial of the issue can be more conveniently had in the county of the substituted venue See also People *v.* Cicott, 15 Mich. 326, holding that Comp. Laws, § 5300, which authorizes an issue in quo warranto cases to be sent to such county as the court may direct, does not refer to issues arising on questions as to the office itself, but only on the question of damages for the detention of the office.

If the supreme court has specified a county for the trial of an issue of fact, the general law touching change of venue does not apply. State *v.* Townsley, 56 Mo. 107.

29. Ensminger *v.* People, 47 Ill. 384, 95 Am. Dec. 495.

30. See *infra*, IV, B, 1, b.

31. See *infra*, IV, B, 1, c.

32. Com. *v.* New York, etc., R. Co., 10 Pa. Co. Ct. 129.

or if not made at that time, such objection may be raised subsequently by plea or answer.[33]

b. Limitations.[34] A plea of the statute of limitations is not available against the state,[35] in the absence of an express or implied provision to the contrary;[36] but a statute barring civil actions, not otherwise provided for, after a lapse of five years, applies to quo warranto proceedings brought to enforce private rights.[37]

c. Laches[38] **and Estoppel.**[39] Some lack of harmony among the authorities has resulted from the application of the doctrines of laches and estoppel to quo warranto proceedings. This is partly due to a breaking down of the old rule that the court's discretionary power over quo warranto is limited to the question of granting leave to file the information,[40] there being a recent tendency to exercise a like discretion throughout the proceedings and in the final disposition thereof.[41] Upon the application for leave to file an information, the court may properly consider the lapse of time since the cause of complaint occurred, in connection with all the circumstances, although the law does not fix a period within which the information shall be brought.[42] The court will lay down no universal rule in such cases, but will decide whether the delay has been unreasonable or not from the circumstances of each case.[43]

33. People *v.* Schnepp, 179 Ill. 305, 53 N. E. 632; People *v.* Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366.

34. See, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 963.

35. People *v.* Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366; McPhail *v.* People, 160 Ill. 77, 43 N. E. 382, 52 Am. St. Rep. 306 [*affirming* 56 Ill. App. 289]; Catlett *v.* People, 151 Ill. 16, 37 N. E. 855.

36. State *v.* Buckley, 60 Ohio St. 273, 54 N. E. 272 [*affirming* 17 Ohio Cir. Ct. 86, 9 Ohio Cir. Dec. 341]; State *v.* Pittsburgh, etc., R. Co., 50 Ohio St. 239, 33 N. E. 1051; State *v.* Beecher, 16 Ohio 358; State *v.* Bingham, 14 Ohio Cir. Ct. 245, 7 Ohio Cir. Dec. 522.

In Ohio a corporation may be ousted from exercising an unwarrantable power if the user has not continued for twenty years (State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145); but not if the user has continued for that length of time (State *v.* Miami Exporting Co., 11 Ohio 126).

A statute limiting prosecution by information on any penal law does not apply to an information in the nature of a quo warranto. Com. *v.* Birchett, 2 Va. Cas. 51.

English statutes of limitation see Reg. *v.* Harris, 11 A. & E. 518, 8 Dowl. P. C. 499, 4 Jur. 459, 9 L. J. Q. B. 114, 3 P. & D. 266, 39 E. C. L. 284; Rex *v.* Stokes, 2 M. & S. 71.

37. People *v.* Boyd, 132 Ill. 60, 23 N. E. 342 [*affirming* 30 Ill. App. 608].

38. See, generally, EQUITY, 16 Cyc. 150 *et seq.*

39. See, generally, ESTOPPEL, 16 Cyc. 722 *et seq.*, 784 *et seq.*

40. State *v.* Brown, 5 R. I. 1. See also *infra*, IV, B, 3, a, (I), (B).

41. State *v.* Mansfield, 99 Mo. App. 146, 72 S. W. 471.

42. Soule *v.* People, 205 Ill. 618, 69 N. E. 22; McPhail *v.* People, 160 Ill. 77, 43 N. E. 382, 52 Am. St. Rep. 306 [*affirming* 56 Ill. App. 289]; State *v.* Gordon, 87 Ind. 171; State *v.* Westport, 116 Mo. 582, 22 S. W. 888; State *v.* Mansfield, 99 Mo. App. 146, 72 S. W. 471; Com. *v.* Bala, etc., Turnpike Co., 155 Pa. St. 47, 25 Atl. 1105. But see People *v.* Gary, 196 Ill. 310, 63 N. E. 749 (holding that laches is no defense to a proceeding by the people to test the legality of the organization of a public corporation); Place *v.* People, 192 Ill. 160, 61 N. E. 354 [*affirming* 87 Ill. App. 527] (holding that relator's laches is not pleadable as an estoppel, equivalent to justification, where respondent is required by the state to show that he is an officer *de jure*); Com. *v.* Allen, 128 Mass. 308 (proceeding to oust usurper from office); State *v.* Pawtuxet Turnpike Co., 8 R. I. 521, 94 Am. Dec. 123 (holding that a proceeding by the attorney-general is not barred by lapse of time, in the absence of statutory provisions).

43. *Illinois.*— People *v.* Hanker, 197 Ill. 409, 64 N. E. 253, holding that an application by a private relator is properly refused where, for more than twenty years, he has acquiesced in the exercise of municipal functions by the village whose organization it is sought to declare illegal.

Iowa.— State *v.* Alexander, 129 Iowa 538, 105 N. W. 1021, where fourteen months' delay after the organization of a school-district before bringing quo warranto proceedings to question the legality thereof was held not to be an unreasonable delay.

Michigan.—Atty.-Gen. *v.* Lowrey, 131 Mich. 639, 92 N. W. 289; People *v.* Oakland County Bank, 1 Dougl. 282.

Missouri.— State *v.* Small, 131 Mo. App. 470, 109 S. W. 1079, where it appeared that an order incorporating a village was made in 1897, but no attempt to organize a municipal government was made until 1902, and until 1905 taxes were not levied against farm lands included within the limits of the village as incorporated, that as soon as the village authorities undertook to treat the

d. Proceedings to Try Title to Public Office. Proceedings to try title to a public office cannot be brought before the term of office commences,[44] nor after the term has expired, or when it is so nearly expired that the inquiry would be of no effect;[45] but an action commenced during the term of office may be prosecuted to final judgment after the expiration of the term, for the recovery of damages or costs which plaintiff has sustained or incurred by the wrongful assumption of authority.[46] Where, however, no substantial benefit would inure to plaintiff, the proceeding will not, as a general rule, be continued after the term has expired, merely to try the abstract title to the office.[47] An officer elected or appointed under a statute conferring a franchise on a city cannot be ousted, nor can his official acts be attacked, on the ground of the invalidity of the statute, if proceedings against the city itself to prevent its exercise of the franchise are barred by a statute of limitations.[48]

2. Consent of State Officers. The right to file an information in the nature of a quo warranto belongs to the state, and the institution of the action is a matter within the discretion of the attorney-general;[49] and the attorney-general or other authorized state officer must institute quo warranto proceedings for the redress of injuries to the public right. Statutes abrogating the common-law rule have

farm lands as part of the village and subject them to municipal burdens, the owners of the land brought quo warranto against the persons assuming to act as officers of the village to determine its existence, and it was held that the owners were not guilty of laches precluding them from maintaining their suit.

England.— Rex *v.* Brooks, 8 B. & C. 321, 6 L. J. K. B. O. S. 322, 2 M. & R. 389, 15 E. C. L. 163 (where a party had been sworn into, and had exercised a corporate office for more than six years, and the court, in the exercise of its discretion, and without deciding whether he was protected by 32 Geo. III, c 58, refused to grant a quo warranto information against him, on the ground of his not having been sworn in before the proper officer); Rex *v.* Peacock, 4 T. R. 684 (where the court refused to grant an information to impeach a derivative title where the person claiming the original title had been in the undisturbed possession of his office for six years); Rex *v.* Dicken, 4 T. R. 282 (where the court refused an information against a person who had been in the peaceable possession of his franchise for six years).

Canada.— *In re* Moore, 14 U. C. Q. B. 365, holding that directors of a company, whose election was illegal, but who have served for more than eight months before complaint is made, will not be disturbed.

See 41 Cent. Dig. tit. "Quo Warranto," § 31.

44. Sublett *v.* Bedwell, 47 Miss. 266, 12 Am. Rep. 338. *Compare* People *v.* Vail, 20 Wend. (N. Y.) 12.

It must appear that respondent has already assumed the office, which implies that his term has begun. Osgood *v.* Jones, 60 N. H. 282; People *v.* McCullough, 11 Abb. Pr. N. S. (N. Y.) 129; *In re* Lackawanna Tp. Sup'rs, 1 Lack. Leg. Rec. (Pa.) 433. See also *supra*, III, B, 1, c.

45. People *v.* Sweeting, 2 Johns. (N. Y.) 184; Com. *v.* Smith, 45 Pa. St. 59. And see *infra* IV, B, 3, a, (I), (B).

Exception to rule.— If it is necessary to convict the former occupant of an office so as to invalidate certain acts of a public nature whereby other persons may claim continuing rights, an information may be filed after the expiration of the term of office. Burton *v.* Patton, 47 N. C. 124, 62 Am. Dec. 194.

46. *Michigan.*— People *v.* Hartwell, 12 Mich. 508, 86 Am. Dec. 70.

Missouri.— Hunter *v.* Chandler, 45 Mo. 452.

Nebraska.— Dean *v.* Miller, 56 Nebr. 301, 76 N. W. 555, where the final decision was delayed by an appeal to the supreme court, pending which the term of office expired.

New York.— People *v.* Seaman, 5 Den. 409; People *v.* Loomis, 8 Wend. 396, 24 Am. Dec. 33.

Wisconsin.— State *v.* Pierce, 35 Wis. 93.

See 41 Cent. Dig. tit. "Quo Warranto," § 67.

Compare Com. *v.* Swasey, 133 Mass. 538.

47. State *v.* Porter, 58 Iowa 19, 11 N. W. 715; Hurd *v.* Beck, (Kan. 1896) 45 Pac. 92; State *v.* Taylor, 12 Ohio St. 130; State *v.* Jacobs, 17 Ohio 143.

48. State *v.* Bingham, 14 Ohio Cir. Ct. 245, 7 Ohio Cir. Dec. 522.

49. Robinson *v.* Jones, 14 Fla. 256; Goddard *v.* Smithett, 3 Gray (Mass.) 116 (holding that a private individual has no common-law right to apply, without the intervention of the attorney-general, for leave to file an information); State *v.* Taylor, 208 Mo. 442, 106 S. W. 1023 (holding that the power to determine whether or not a quo warranto proceeding shall be instituted is vested in the attorney-general or prosecuting attorneys by Rev. St. (1899) § 4457 (Annot. St. (1906) p. 2442), providing that, in case any person usurps any office, the attorney-general or prosecuting attorneys "shall" exhibit an information in the nature of a quo warranto, and the officers have discretion whether to proceed or not; the word "shall" not being mandatory).

not usually affected it so far as it concerns proceedings essentially public in purpose.[50] A refusal by the attorney-general to prosecute in such cases does not give a private person the right to proceed, nor can the state officer be compelled to bring quo warranto proceedings.[51] Under statutes which authorize the attorney-general or state's attorney to petition for a writ of quo warranto at the instance of private persons, if private rights are involved, the consent of the state officer is essential, and the writ cannot otherwise be issued for the redress of the private injury.[52] Provision has been made by statute in several states for quo warranto proceedings to redress private injuries, whereby an applicant may obtain the writ upon showing an interest distinct from that of the public, such as a right in himself to an office. In such cases the consent of state officers is not required, and it need not be alleged that the attorney-general has refused to act.[53]

3. Leave of Court — a. Necessity For Leave — (i) *Information on Private Relation* — (A) *Rule Stated.* By the statute of Anne informations upon the relation of a private citizen were required to be brought by leave of court, the leave being granted, however, as a matter of course.[54] Similarly, in modern practice, the writ upon the relation of a private citizen is not, as a general rule, a writ of right,[55] nor is leave now granted as a matter of course, a petition to file

50. People *v.* Grand River Bridge Co., 13 Colo. 11, 21 Pac. 898, 16 Am. St. Rep. 182; People *v.* Healy, 230 Ill. 280, 82 N. E. 599 (holding that the arbitrary discretion possessed by the attorney-general at common law to determine as to the institution of quo warranto proceedings still exist where the proceedings are brought by the people and involve no individual grievance of the relator); Haupt *v* Rogers, 170 Mass. 71, 48 N. E. 1080.

51. People *v.* Grand River Bridge Co., 13 Colo. 11, 21 Pac. 898, 16 Am. St. Rep. 182 (holding that even though the statute provides in general terms that, upon refusal of the district attorney to bring the action, a private party may bring the same upon his own relation in the name of the people, yet in order to maintain the action, the private relator must have a special interest; if he have none other than that of all citizens, the refusal of the state officer is conclusive upon him); Thompson *v.* Watson, 48 Ohio St. 552, 31 N. E. 742.

52. Porter *v.* People, 182 Ill. 516, 55 N. E. 349; State *v.* Cook, 39 Oreg. 377, 65 Pac. 89 (holding that where a statute provides that an action may be maintained on relation of a private person for certain purposes, but that it must be commenced and prosecuted by the prosecuting attorney, a complaint is not sufficient which was filed by a private person by his own attorney, nor is it aided by the subsequent appearance and approval of the prosecuting attorney); Com. *v.* Burrell, 7 Pa. St. 34.

Discretion of officer.— Where an individual seeks relief of a private nature under Hurd Rev. St. (1905) c. 112, § 1, providing that, when a person unlawfully holds an office in a corporation created by the state, the attorney-general or state's attorney, either of his own accord or at the instance of an individual, may petition the court for leave to file an information in the nature of a quo warranto, the only discretion vested in the prosecuting officer is to determine whether the documents presented to him are in proper legal form, and whether evidence is presented sufficient to establish the person's *prima facie* right to the relief. People *v.* Healy, 230 Ill. 280, 82 N. E. 599.

The officer's mere consent to the use of his name by a private relator is not enough; the law requires that he exercise his discretion, and allow the application only if in his opinion his official duty requires it, and that a case can be made out. People *v.* North Chicago R. Co., 88 Ill. 537 (construing Rev. St. (1874) c. 112, § 1); People *v.* Atty.-Gen., 41 Mich. 728, 3 N. W. 205; People *v.* Atty.-Gen., 22 Barb. (N. Y.) 114, 13 How. Pr. 179.

When consent obtained.— It is sufficient if the consent of the attorney-general be obtained at any time before trial. State *v.* Withers, 121 N. C. 376, 28 S. E. 522. But see State *v.* Cook, 39 Oreg. 377, 65 Pac. 89.

How consent shown.— Where by statute the consent of the county attorney is required to warrant an action by a claimant for office, if the county attorney joins in the action as one of the attorneys for the claimant, his consent is sufficiently shown. Duffy *v.* State, 60 Nebr. 812, 84 N. W. 264.

53. Barnum *v.* Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304; State *v.* Orvis, 20 Wis. 235. See also *infra*, IV, C, 1, a.

If the officer refuses to prosecute, a private individual may have the writ upon showing that he applied to the prosecuting attorney to file an information and that such attorney has refused or neglected to file the same. State *v.* Frazier, 28 Nebr. 438, 44 N. W. 471.

The attorney-general is required to proceed in some cases if security for costs is given as prescribed by statute. State *v.* Withers, 121 N. C. 376, 28 S. E. 522.

54. State *v.* Kent, 96 Minn. 255, 104 N. W. 948, 1 L. R. A. N. S. 826.

55. Stone *v.* Wetmore, 44 Ga. 495; State *v.* Dowlan, 33 Minn. 536, 24 N. W. 188; State

a writ in the nature of quo warranto being addressed to the discretion of the court.[56]

(B) *Exercise and Extent of Discretion of Court.*[57] The discretion which the court must exercise is not an arbitrary personal discretion of the judge, but a sound judicial discretion according to law, the exercise of which is reviewable,[58] and which extends as a general rule only to the question whether or not the information should be allowed to be filed, for, after having permitted the filing, the discretionary powers of the court are exhausted and issues of fact and law presented must then be tried and determined in like manner as in other suits.[59] It has been held, however, that when the writ was improvidently issued and the case made by the pleadings is such that leave to file would have been refused in the first instance had the court been fully cognizant of the nature and grounds of the proceeding, the court may decline to proceed to judgment.[60] In the exercise of its discretion, the court may regulate the scope of the inquiry upon the application for leave and thereon may hear either the petition alone or affidavits on both sides so as to determine not merely whether there is a probable ground for the proceeding but also whether there is a preponderance of evidence in support of the allegations of the petition.[61] The writ may be denied on the ground of public policy or in consideration of general justice, all the circumstances being considered and the question determined from the standpoint of public interest,[62]

v. Stewart, 32 Mo. 379; Com. *v.* Cluley, 56 Pa. St. 270, 94 Am. Dec. 75.

56. *Colorado.*— People *v.* Keeling, 4 Colo. 129.

Idaho.— Toncray *v.* Budge, 14 Ida. 621, 95 Pac. 26.

Illinois.— People *v.* Waite, 70 Ill. 25.

Michigan.— People *v.* Tisdale, 1 Dougl. 59.

Missouri.— State *v.* Rose, 84 Mo. 198; State *v.* Lawrence, 38 Mo. 535.

New Jersey.— Tillyer *v.* Minderman, 70 N. J. L. 512, 57 Atl. 329; Miller *v.* Seymour, 67 N. J. L. 482, 51 Atl. 719.

New York.— People *v.* Sweeting, 2 Johns. 184.

Pennsylvania.— Com. *v.* Arrison, 15 Serg. & R. 127, 16 Am. Dec. 531; Com. *v.* McCutchen, 2 Pars. Eq. Cas. 205; Com. *v.* Daily, 3 Wkly. Notes Cas. 133.

South Carolina.— State *v.* Lehre, 7 Rich. 234; State *v.* Schnierle, 5 Rich. 299.

Vermont.— State *v.* Smith, 48 Vt. 266.

United States.— Gunton *v.* Ingle, 11 Fed. Cas. No. 5,870, 4 Cranch C. C. 438.

England.— Rex *v.* Parry, 6 A. & E. 810, 2 N. & P. 414, 33 E. C. L. 424; Rex *v.* Trevenen, 2 B. & Ald. 479, 21 Rev. Rep. 364; Reg. *v.* Cousins, 42 L. J. Q. B. 124, 28 L. T. Rep. N. S. 116; Rex *v.* Peacock, 4 T. R. 684.

See 41 Cent. Dig. tit. "Quo Warranto," § 7.

In Alabama, it is not necessary for a relator to obtain permission of court before prosecuting a proceeding in the nature of a quo warranto for the dissolution of a corporation. Newman *v.* State, (1905) 39 So. 648; Capital City Water Co. *v.* State, 105 Ala. 406, 18 So. 62, 29 L. R. A. 743.

57. As to the discretion of the attorney-general in instituting proceedings see *supra*, IV, B, 2.

58. *Illinois.*— People *v.* Arcola Drainage Com'rs, 123 Ill. App. 604.

Minnesota.— State *v.* School Dist. No. 108, 85 Minn. 230, 88 N. W. 751.

Missouri.— State *v.* McClain, 187 Mo. 409, 86 S. W. 135.

Pennsylvania.— Phillips *v.* Com., 1 Del. Co. 13, 11 Lanc. Bar 195.

Virginia.— Watkins *v.* Venable, 99 Va. 440, 39 S. E. 147.

See 41 Cent. Dig. tit. "Quo Warranto," § 7.

In the absence of a clear abuse of discretion the refusal of the court to grant leave to file a writ will not be disturbed. People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244; Watkins *v.* Venable, 99 Va. 440, 39 S. E. 147. See also Com. *v.* Davis, 109 Pa. St. 128, 2 C. Pl. 166.

59. People *v.* Golden Rule, 114 Ill. 34, 28 N. E. 383; Place *v.* People, 83 Ill. App. 84; State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121; State *v.* Brown, 5 R. I. 1.

60. People *v.* Wild Cat Special Drainage Dist., 31 Ill. App. 219; People *v.* Hamilton, 24 Ill. App. 609; Gilroy *v.* Com., 105 Pa. St. 484; Com. *v.* Cluley, 56 Pa. St. 270, 94 Am. Dec. 75.

Proceeding dismissed where there is no real dispute.— Although in a proper case quo warranto would be available to determine who has the power of appointment to an office, yet a proceeding for that sole purpose will be dismissed where the relator and respondent have no real dispute, and the occupant will remain in office whatever may be the decision. State *v.* McCullough, 20 Nev. 154, 18 Pac. 756. But see Rex *v.* Marshall, 2 Chit. 370, 18 E. C. L. 683, holding that it is no objection that the proceeding is friendly in order that the respondent may disclaim title to the office.

61. People *v.* Mineral Marsh Drainage Dist., 193 Ill. 428, 62 N. E. 225.

62. *Illinois.*— People *v.* Lake St. El. R. Co., 54 Ill. App. 348; People *v.* Boyd, 30 Ill. App. 608.

Minnesota.— State *v.* McDonald, 101 Minn. 349, 112 N. W. 278.

and thus the court may deny an application for leave to file an information, although the facts are such that if the proceeding was entertained judgment would have to be given against the respondent.[63] In a proceeding brought for the benefit of the relator primarily, the court's discretion is much greater than where purely public interests are involved,[64] and in any event the writ will not be granted upon the relation of a claimant to an office, unless he shows himself clearly entitled to it, or at least that there is strong ground for questioning the respondent's title.[65] The court may deny an application for a quo warranto, if the facts show such conduct on the part of the applicants as precludes them from making the inquiry,[66] or if the harm will be done before relief can be granted, as where the term of office is so short that it will expire before the question could be decided,[67]

Missouri.— State *v.* Lindell R. Co., 151 Mo. 162, 52 S. W. 248.

New Hampshire.— Cate *v.* Furber, 56 N. H. 224.

New York.— *In re* Equity Gas-Light Co., 10 N. Y. Suppl. 801, where leave was refused to bring an action to vacate the charter of a gas company on the ground of non-user, where it appeared that the company had made a large outlay upon the strength of a dismissal of a former action for the same purpose, and no new facts were alleged why the charter should be annulled which did not exist at the time of the former action.

North Dakota.— State *v.* Nohle, 16 N. D. 168, 112 N. W. 141; State *v.* McLean County, 11 N. D. 356, 92 N. W. 385, where the court refused leave to file an information against two counties for usurpation of franchise in extending their powers over territory not within their limits, under authority of an unconstitutional law, it appearing, among other things, that governmental functions had been exercised over the territory for ten years, taxes levied, public improvements made, etc., and that the state had received its share of the taxes and had otherwise acquiesced in the existing conditions.

Ohio.— State *v.* Taylor, 50 Ohio St. 120, 38 N. E. 24 (where leave was denied a private person who moved to file an information against the secretary of state to oust him from acting as supervisor of elections under a statute alleged by the relator to be unconstitutional); Ohio Turnpike Co. *v.* Waechter, 25 Ohio Cir. Ct. 605.

Pennsylvania.— Com. *v.* Jones, 12 Pa. St. 365.

Texas.— State *v.* Hoff, 88 Tex. 297, 31 S. W. 290.

Vermont.— State *v.* McNaughton, 56 Vt. 736; State *v.* Fisher, 28 Vt. 714, where the writ was refused upon an application to oust a justice of the peace because he was also acting as postmaster, where no one claimed the office of justice.

England.— Rex *v.* Bond, 2 T. R. 767.

See 41 Cent. Dig. tit. "Quo Warranto," § 7.

Where the result would not be affected, the court, in the exercise of its discretion, will refuse leave to file a writ of quo warranto to question the regularity of a municipal election. Reg. *v.* Cousins, 42 L. J. Q. B. 124, 28 L. T. Rep. N. S. 116.

When granting leave would be useless.— The court will refuse leave where the occupant of an office seeks to contest the legality of his dismissal from the office and it appears that if reinstated he might and would be legally dismissed again immediately. *Ex p.* Richards, 3 Q. B. D. 368, 47 L. J. Q. B. 498, 88 L. T. Rep. N. S. 684.

Where a relator has twice obtained a ruling for informations binding upon the respondent to show why he exercised the office of mayor of a borough, the court may in the exercise of its discretion refuse leave to allow the same relator on an application against the succeeding mayor to raise the same questions as to the title of the former mayor to exercise the office. Rex *v.* Langhorn, 2 N. M. 618, 28 E. C. L. 584. See also Rex *v.* Orde, 8 A. & E. 420 note, 35 E. C. L. 661.

63. State *v.* Hoff, 88 Tex. 297, 31 S. W. 290; Rex *v.* Parry, 6 A. & E. 810, 2 N. & P. 414, 33 E. C. L. 424.

Motive of relator.— Under circumstances tending to throw suspicion on the motives of the relator, the court will not grant the application where the consequences would be to dissolve a corporation. Rex *v.* Trevenen, 2 B. & Ald. 479, 21 Rev. Rep. 364. But see Rex *v.* Wakelin, 1 B. & Ad. 50, 8 L. J. K. B. O. S. 366, 20 E. C. L. 393, holding that it was no objection that the person applying was in low and indigent circumstances and that there were strong grounds of suspicion that he was not applying on his own account or at his own expense but in collusion with a stranger. The court, however, required security for costs.

64. People *v.* Mineral Marsh Drainage Dist., 193 Ill. 428, 62 N. E. 225; State *v.* Tolan, 33 N. J. L. 195; Reg. *v.* Ryan, 6 U. C. Q. B. 296, where the court refused a quo warranto to place the applicant in the office of township clerk, because in his application he showed that he could not write.

65. Lynch *v.* Martin, 6 Houst. (Del.) 487; Com. *v.* Jordan, 4 L. T. N. S. (Pa.) 54.

66. Dorsey *v.* Ansley, 72 Ga. 460; Pomeroy *v.* Kelton, 78 Vt. 230, 62 Atl. 56.

67. Com. *v.* Athearn, 3 Mass. 285; State *v.* Mead, 56 Vt. 353. See also State *v.* Brown, 60 Ohio St. 499, 54 N. E. 467. *Compare* People *v.* Tibbets, 4 Cow. (N. Y.) 358.

In Alabama, a claimant of a disputed office appears to be entitled to a writ of quo war-

nor will leave be granted to file a writ where the office is determined before the commencement of the proceeding.[68]

(II) *Ex-Officio Information.* The common-law writ was a writ of right of the king,[69] the attorney-general *ex officio* filing an information in the nature of a quo warranto and having the writ issued without application or leave of court,[70] and generally, in the United States proceedings instituted by the attorney-general *ex officio* may be brought as of right without leave of court.[71]

b. Application For Leave and Proceedings Thereon.[72] The first step in a proceeding for a writ of quo warranto is generally an application for leave to file the information.[73] The application should be in statutory form, if any such form is prescribed,[74] and if not so prescribed, the procedure conformable to common-law usage will be followed.[75] Usually a written petition is presented, which should show facts entitling the applicant to institute the proceedings.[76] If the petition

ranto if a *prima facie* case is made by affidavit; and the exercise of discretion as to filing an information is limited to cases where the term of office will expire before the information can be decided, or where the relator is not a claimant of the office. State *v.* Burnett, 2 Ala. 140.

68. Matter of Harris, 6 A. & E. 475, 33 E. C. L. 259, 6 L. J. Q. B. 161, 1 N. & P. 576, 36 E. C. L. 680. But see Rex *v.* New Nadnor, 2 Ld. Ken. 498.

69. See *supra*, II, A.

70. State *v.* Gleason, 12 Fla. 190; State *v.* Kent, 96 Minn. 255, 104 N. W. 948, 1 L. R. A. N. S. 826; Meehan *v.* Bachelder, 73 N. H. 113, 59 Atl. 620; Rex *v.* Trevenen, 2 B. & Ald. 479, 21 Rev. Rep. 364; Rex *v.* Philipps, 3 Burr. 1565.

71. *Florida.*— State *v.* Bryan, 50 Fla. 293, 39 So. 929; State *v.* Gleason, 12 Fla. 190.

Massachusetts.— Com. *v.* Allen, 128 Mass. 308.

Minnesota.— State *v.* Kent, 96 Minn. 255, 104 N. W. 948, 1 L. R. A. N. S. 826.

Missouri.— State *v.* McClain, 187 Mo. 409, 96 S. W. 135; State *v.* Rose, 84 Mo. 198; State *v.* Buskirk, 43 Mo. 111; State *v.* Lawrence, 38 Mo. 535; State *v.* Stewart, 32 Mo. 379; State *v.* Stone, 25 Mo. 555; State *v.* St. Louis Perpetual Mar., etc., Ins. Co., 8 Mo. 330.

New Jersey.— Miller *v.* Seymour, 67 N. J. L. 482, 51 Atl. 719; Atty.-Gen. *v.* Delaware, etc., R. Co., 38 N. J. L. 282.

Pennsylvania.— Com. *v.* Dillon, 81* Pa. St. 41; Com. *v.* Daily, 3 Wkly. Notes Cas. 133.

Rhode Island.— State *v.* Brown, 5 R. I. 1.

Washington.— Mills *v.* State, 2 Wash. 566, 27 Pac. 560.

See 41 Cent. Dig. tit. "Quo Warranto," § 34.

In Missouri proceedings by writ of quo warranto and by information are recognized and the distinctions between them to some extent are preserved. The writ may issue as of right on demand of the proper officer as at common law but leave of court must be obtained to commence proceedings by information. State *v.* St. Louis Perpetual Mar., etc., Ins. Co., 8 Mo. 330.

In New Jersey the granting of leave to the attorney-general is discretionary with the court, where it is sought to file an information to test the title to the office of town treasurer. Clark *v.* Searing, 70 N. J. L. 517, 57 Atl. 331.

72. Leave granted by judge out of court see Judges, 23 Cyc. 554.

73. State *v.* McLean County, 11 N. D. 356, 92 N. W. 385; U. S. *v.* Lockwood, 1 Pinn. (Wis.) 359. But see Com. *v.* De Turk, 6 Pa. Co. Ct. 94.

A judgment of ouster will not be reversed for failure to obtain leave to file the information. Dickson *v.* People, 17 Ill. 191.

Waiver.— After defendant has appeared and pleaded to the merits in a proceeding involving public interests, prosecuted by the state's attorney, he will not be heard to object that the information was filed without leave of court. Bishop *v.* People, 200 Ill. 33, 65 N. E. 421.

74. State *v.* Elliott, 117 Ala. 172, 23 So. 43.

In South Carolina proceedings in the nature of quo warranto must be in the form of an action commenced by complaint. State *v.* Evans, 33 S. C. 612, 12 S. E. 816.

75. State *v.* Merry, 3 Mo. 278; Reg. *v.* Nagle, 24 Ont. 507.

76. Whelchel *v.* State, 76 Ga. 644; Vrooman *v.* Michie, 69 Mich. 42, 36 N. W. 749.

In Illinois, in applying for leave to file an information in the nature of a quo warranto, a petition ready for filing when signed, together with an affidavit by a person familiar with the facts, containing a full statement thereof drawn so that perjury may be assigned thereon if materially false, should be addressed to the court and presented to the prosecuting officer, who, if he signs the petition, should present it with the affidavit for the consideration of the court. People *v.* Healy, 230 Ill. 280, 82 N. E. 599.

In New York an application for leave to sue and annul the charter of a corporation must be upon the written application of the attorney-general stating that in his opinion the action can and ought to be maintained. His consent to the use of his name by the applicant is insufficient. Matter of Central Stamping Co., 79 Hun 369, 29 N. Y. Suppl. 449. In such a proceeding the application must point out the particular unlawful acts of the corporation. *In re* Atty.-Gen., 81 Hun 541, 30 N. Y. Suppl. 1093.

In Texas, although the statute contemplates that the petition for leave to file and the information shall be separate, yet as the pro-

is by the attorney-general, it is not required to be verified or accompanied by affidavits, but if by a private person, it must be under oath, or accompanied by affidavits as to all material facts.[77] On application by a private relator for leave to bring quo warranto proceedings, no notice to defendant is necessary.[78] The court will not readily grant leave to file a quo warranto to determine the right to a public office after statutory election contest proceedings have been dismissed.[79] The matter of granting leave to a private relator to bring an action in the nature of quo warranto is merely a preliminary question addressed to the discretion of the court or judge, and when it is decided that the relator has sufficient interest, the ruling is not to be reviewed on motion to set aside or dismiss.[80] Nor is an order granting leave to bring quo warranto subject to collateral attack;[81] but if the court grants leave to file an information, it may reconsider the matter and vacate the order at any time during the term, if convinced that leave should not have been granted.[82] An order granting leave to sue to annul a charter should specify the grounds on which the action is to be brought.[83]

ceeding is expressly declared to be a civil one, the liberal rules of code pleading are to be applied, and it is sufficient if the petition for leave to file be included in and made a part of the information. East Dallas *v.* State, 73 Tex. 370, 11 S. W. 1030.

77. Com. *v.* Philadelphia, etc., R. Co., 3 Leg. Gaz. (Pa.) 371; Com. *v.* Jones, 1 Leg. Rec. (Pa.) 292; Com. *v.* Bank of America, 10 Phila. (Pa.) 156; U. S. *v.* Lockwood, 1 Pinn. (Wis.) 359. See also *infra*, IV, D, 5.

Affidavit by state's attorney.— An application of the state's attorney for leave to file an information against a corporation may be accompanied by his affidavit as to his opinion of the constitutionality of a law under which defendant is acting, and as to the motives for the institution of the proceedings. People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244.

Sufficiency of affidavit.— All material facts should be stated in the applicant's affidavit; and where such are withheld, the rule should be discharged with costs to defendant. *Ex p.* Gilbert, 14 N. Brunsw. 231. An affidavit in support of a petition for leave to file an information in the nature of a quo warranto to test the right of a person to an office, which avers that the board of directors of a corporation consists of ten persons, that the by-laws provide that a majority shall constitute a quorum, that upon the resignation of the treasurer five members of the board (naming them) held a meeting and attempted to elect a treasurer, and that as a result thereof a certain person claims to have been elected treasurer, is sufficient. People *v.* Healy, 230 Ill. 280, 82 N. E. 599. Upon an application for a quo warranto information, suggesting that the defendants were elected contrary to the provisions of a particular charter, the affidavit must state that the charter was accepted, or that the usage had been in conformity to the charter; and the court, after determining that the affidavit was bad for omitting so to state, refused leave to amend it. Rex *v.* Barzey, 4 M. & S. 253, 16 Rev. Rep. 453. The affidavit in support of the motion must state at whose instance the application is made. It is not enough for a party to depose that, if the court grants the information, it is his intention to become really and *bona fide* the relator. Reg. *v.* Hedges, 11 A. & E. 163, 9 Dowl. P. C. 493, 5 Jur. 290, 10 L. J. Q. B. 6, Wils. P. C. 63, 39 E. C. L. 109. Affidavits in support of a quo warranto should state any usage there may be which differs from what might be held to be the construction of the charter of the incorporation of the borough. Rex *v.* Headley, 7 B. & C. 496, 6 L. J. K. B. O. S. 53, 1 M. & R. 345, 14 E. C. L. 225. The relator is bound by the day on which, in his affidavit (although founded on information and belief), the election is alleged to have taken place; and if that day is mistaken defendant is not bound to show a regular election on another day. Rex *v.* Rolfe, 1 N. & M. 773. An affidavit should show that the relator is a properly qualified person. Reg. *v.* Thirlwin, 10 Jur. N. S. 206, 33 L. J. Q. B. 171, 9 L. T. Rep. N. S. 731, 12 Wkly. Rep. 384. Strict proof of all material facts must be made. Indefinite or equivocal averments in the affidavit render it insufficient. Reg *v.* Calloway, 3 Manitoba 297.

Effect of defective affidavit.— A defective affidavit, worthless because not sworn to before a proper officer, nullifies the writ itself. Lavoie *v.* Jeffrey, 16 Quebec Super. Ct. 363.

The court will receive the affidavit of a person estopped from being a relator, if the motion is made by a relator properly qualified, although the complete ground of the application appears only from the affidavit of the party estopped. Rex *v.* Brame, 4 A. & E. 664, 31 E. C. L. 295.

78. State *v.* Des Moines City R. Co., 135 Iowa 694, 109 N. W. 867.

79. Reg. *v.* Calloway, 3 Manitoba 297.

80. State *v.* Des Moines City R. Co., 135 Iowa 694, 109 N. W. 867.

81. State *v.* Alexander, 129 Iowa 538, 105 N. W. 1021.

82. People *v.* Lake St. El. R. Co., 54 Ill. App. 348. see also *supra*, IV, B, 3, (I), (B).

83. Matter of Atty.-Gen., 81 Hun (N. Y.) 541, 30 N. Y. Suppl. 1093.

c. Rule to Show Cause — (i) *In General.* Upon application duly presented, showing proper ground and reason, the court will grant an order or rule upon defendant to show cause why the information should not be filed.[84] Such an order is granted as of course, without notice, and does not determine any question of legal right either as to subject-matter or procedure.[85] A private person may serve a rule to show cause why an information should not be filed, and proof of the service may be made by affidavit showing the essential facts.[86]

(ii) *Necessity For Rule.* On application by a private person for leave to file an information, defendant is entitled to be heard on the question of filing,[87] and the granting of a rule to show cause is an essential preliminary step.[88]

(iii) *Return of Rule and Proceedings Thereon.* A rule to show cause may be made returnable at such time as the court shall fix, its discretion governing the question unless otherwise provided by statute.[89] Respondent may answer the petition, and file counter affidavits to support his allegations.[90] Upon the hearing, the court may discharge the rule and dismiss the petition if its allegations are insufficient, or if defendant has answered the same satisfactorily;[91] but if the facts relied upon in the answer are disputed, or if new and doubtful questions of law are involved, requiring time for the determination thereof, the rule for the

84. People *v.* McFall, 124 Ill. 642, 17 N. E. 63 [*affirming* 26 Ill. App. 319]; State *v.* Smith, 48 Vt. 14.

By whom applied for.— In Ohio the rule must be applied for by the prosecuting attorney of the proper county on behalf of the state. *In re* Mt. Pleasant Bank, 5 Ohio 249. In South Carolina an application for a rule to show cause why an information should not be filed must be in the name of the attorney-general. State *v.* Schnierle, 5 Rich. (S. C.) 299.

Sufficiency of rule.— Where a rule *nisi* was obtained on the ground of an undue removal of one person from, and of an undue election of defendant to, the office of town clerk of a borough, and the rule did not mention, and the affidavit did not distinctly disclose, the objection that the removal and election had taken place at a meeting without due notice that such was the business of the meeting, it was held that the objection of the want of such notice could not be taken in support of the rule. Reg. *v.* Thomas, 8 A. & E. 183, 2 Jur. 347, 7 L. J. Q. B. 141, 3 N. & P. 288, 35 E. C. L. 543. It is not sufficient to state in the rule that defendant was not entitled to be appointed, and that relator was. Reg. *v.* Edye, 12 Q. B. 936, 13 Jur. 8, 18 L. J. Q. B. 6, 64 E. C. L. 936.

Good faith of applicant.— The rule will be denied if it appears that the relator is not acting in good faith to test the title to the office attacked. Miller *v.* Seymour, 67 N. J. L. 482, 51 Atl. 719.

85. State *v.* Smith, 48 Vt. 14.

86. U. S. *v.* Lockwood, 1 Pinn. (Wis.) 386.

87. Miller *v.* Seymour, 67 N. J. L. 482, 51 Atl. 719.

Notice of an application by a private relator need not be given to the attorney-general. Day *v.* Lyons, 70 N. J. L. 114, 56 Atl. 153.

88. State *v.* Hancock, 2 Pennew. (Del.) 231, 45 Atl. 850; Lynch *v.* Martin, 6 Houst. (Del.) 487; Miller *v.* Seymour, 67 N. J. L. 482, 51 Atl. 719; *In re* Mt. Pleasant Bank, 5 Ohio 249. But see Lindsey *v.* Atty.-Gen., 33 Miss. 508.

A rule is unnecessary if the subject-matter is a small annual office, although in proceedings against corporations, or involving important offices, such a rule is required. Casterline *v.* Gummersall, 24 N. J. L. 529.

Discretion of court.— The court may issue such a rule upon an application by the attorney-general, although by a statute applicable in such a case the court is authorized to order the information to be filed without such rule on any previous notice, the choice of methods of procedure being within the discretion of the court. People *v.* Golden Rule, 114 Ill. 34, 28 N. E. 383; People *v.* Moore, 73 Ill. 132.

In Pennsylvania the omission of such a rule, although notice was given, has been held sufficient ground for a motion to quash the writ (Com. *v.* Jones, 12 Pa. St. 365); but in later cases this position appears to have been abandoned, the court holding that if defendant had sufficient opportunity to be heard before being compelled to answer, the omission to proceed by way of a rule to show cause was immaterial (Murphy *v.* Farmers' Bank, 20 Pa. St. 415; Com. *v.* Jackson, 16 Pa. Co. Ct. 561).

89. State *v.* McDiarmid, 26 Ark. 480.

90. Lynch *v.* Martin, 6 Houst. (Del.) 487; People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244; People *v.* McFall, 124 Ill. 642, 17 N. E. 63 [*affirming* 26 Ill. App. 319]; Atty.-Gen. *v.* Chicago, etc., R. Co., 112 Ill. 520.

91. Lynch *v.* Martin, 6 Houst. (Del.) 487; State *v.* Bruggemann, 53 N. J. L. 122, 20 Atl. 730; Rex *v.* Hughes, 7 B. & C. 708, 6 L. J. K. B. O. S. 190, 1 M. & R. 625, 31 Rev. Rep. 288, 14 E. C. L. 319, where the rule was dismissed with costs, where the affidavits in support suppressed several material facts.

If no grounds are set out for annulling a charter, a rule *nisi* should be discharged. *Re* Howe, 2 Can. L. T. 95; *In re* Bower, 14 Nova Scotia 349.

information to be filed should be made absolute.[92] Where a party who is elected to an office is disqualified and another claims the office as having the only legal votes, the party so elected cannot, by merely resigning his office, deprive the other party of his right to the advantage which a judgment of ouster upon a quo warranto will give him.[93]

4. Process For Appearance. When leave is granted to file an information in the nature of a quo warranto, and the same is filed, process should be issued against defendant requiring his appearance and answer. At common law the first process was a venire facias or subpœna, and if defendant failed to appear in response thereto, a distringas or attachment was next issued.[94] The modern practice varies with the statutes. Where the common-law practice prevails, the rule is that the court can acquire jurisdiction to render judgment only by service of a writ under the seal of the court, in the name of the people, or by voluntary appearance.[95] Where a civil action under the code is substituted for quo warranto, the nature of the process is the same as in other civil actions.[96] If the statute fixes a time for pleading in quo warranto, the court will quash a writ issued contrary to such provision.[97] A rule upon defendant to appear and plead within a time fixed is not regular, in the absence of statute, and confers no jurisdiction over defendant;[98] but in some states the statutes authorize the entry of a rule to appear and plead, and provide for the method of service thereof.[99] In the absence of statute the

92. Atty.-Gen. *v.* Chicago, etc., R. Co., 112 Ill. 520.

93. Reg. *v.* Blizard, L. R. 2 Q. B. 55, 7 B. & S. 922, 36 L. J. Q. B. 18, 15 L. T. Rep. N. S. 242, 15 Wkly. Rep. 105; Rex *v.* Warlow, 2 M. & S. 75, 14 Rev. Rep. 592. See also Reg. *v.* Newcombe, 15 Wkly. Rep. 108.

94. People *v.* Richardson, 4 Cow. (N. Y.) 97 and note; Com. *v.* Sprenger, 5 Binn. (Pa.) 353; State *v.* Hunton, 28 Vt. 594.

95. Lavalle *v.* People, 68 Ill. 252; Hambleton *v.* People, 44 Ill. 458; Lindsey *v.* Atty.-Gen., 33 Miss. 508, where it is suggested that the proper practice in Mississippi is to file the information by leave of court and issue a subpœna to respondent, serving with the same a rule *nisi*, specifying the objections to respondent's title.

96. State *v.* Messmore, 14 Wis. 115.

Rules relating to process in civil suits.— Quo warranto proceedings are not generally held to be governed by rules of practice relating to civil suits, such as a provision that all original process shall be returnable on the first day of the term next after its issuance (Territory *v.* Ashenfelter, 4 N. M. 85, 12 Pac. 879); but the summons may be made returnable forthwith, or at a short day within the same term (Lindsey *v.* Atty.-Gen., 33 Miss. 508: State *v.* Buchanan, Wright (Ohio) 233). A statute prescribing that the first process in personal actions shall be a summons does not apply to an information in the nature of quo warranto, and the rules for the mode and time of pleading, appearing, etc., contained in such a statute, do not affect the court's discretion in entering such rules therefor as the justice of the case requires. Atty.-Gen. *v.* Delaware, etc., R. Co., 38 N. J. L. 282.

In Virginia, by Code (1904), § 3024, writs of quo warranto may be made returnable to the next term of court. This is held to mean the next regular term, and a writ cannot be returned to a special term. Stultz *v.* Pratt, 103 Va. 536, 49 S. E. 654.

Service by publication upon non-residents in a proceeding in the circuit court cannot be made where the statute provides that such court has jurisdiction of quo warranto only within the county in which defendant resides. State *v.* Smith, 6 Ohio Cir. Ct. 410, 3 Ohio Cir. Dec. 515.

97. State *v.* Robinson, 9 Ohio Dec. (Reprint) 249, 11 Cinc. L. Bul. 294.

Time of service of process.— If a writ is not served a sufficient time before the return-day, the objection is waived by pleading to the merits. Com. *v.* Helms, 26 Wkly. Notes Cas. (Pa.) 358. That a writ was not served in time is ground for a motion to set aside the service, but not to quash the writ. Com. *v.* Getz, 4 Pa. Dist. 391.

98. People *v.* Richardson, 4 Cow. (N. Y.) 97 and note; People *v.* Richardson, 3 Cow. (N. Y.) 357.

99. People *v.* De Mill, 15 Mich. 161; People *v.* Pratt, 14 Mich. 333; Anderson *v.* Myers, (N. J. 1907) 67 Atl. 1036, holding that since a quo warranto proceeding is an inquisition which the sovereignty by its courts institutes to ascertain whether its prerogative rights have been invaded, a statute providing for the service of a copy of the information and the rule to plead is valid. and service on a non-resident defendant either personally or by mail is sufficient.

In New York, under an act relating to fraudulent bankruptcies by corporations, it was held that the provisions therein for compelling appearance without process extended to quo warranto against a corporation, so that the court might rule defendant to appear and plead at once. People *v.* Tibbets, 4 Cow. 384.

In Vermont it seems to be proper to enter a rule upon respondent to appear and plead, and in case he does not do so voluntarily,

manner of notifying defendant to appear and the length of notice is within the discretion of the court.[1]

5. ABATEMENT.[2] Proceedings by quo warranto may be abated by the court when it appears that the public interest is not involved, whether the fact is disclosed by the pleadings or in any other manner.[3] It is ground for abatement that the officer filing the information was without authority to do so, but an objection based thereon must be made seasonably or it will be deemed to be waived.[4] Whether the pending of another action abates a quo warranto proceeding is governed by the rules applicable to abatement of civil actions in general.[5] The expiration of the term of office involved, after information filed, does not work a dismissal of a writ of error upon a judgment of ouster.[6]

C. Parties — 1. PLAINTIFFS, PETITIONERS, AND RELATORS — a. In General. The nature of proceedings by quo warranto at common law was such that the sovereign was necessarily plaintiff.[7] And the general rule still is that quo warranto proceedings must be carried on in the name of the state or the people.[8] In a few states, however, statutory proceedings in the nature of quo warranto may be brought in the name of the attorney-general, or of some other designated public officer;[9] and in some states, under statute, a private individual who claims an

then process will issue to compel his appearance. State *v.* Smith, 48 Vt. 266.

1. Reed *v.* Cumberland, etc., Canal Corp., 65 Me. 53.

2. See, generally, ABATEMENT AND REVIVAL, 1 Cyc. 10.

3. People *v.* Wild Cat Special Drainage Dist., 31 Ill. App. 219.

4. State *v.* McSpaden, 137 Mo. 628, 39 S. W. 81.

5. See State *v.* Kreider, 21 La. Ann. 482; and cases cited *infra*, this note.

Illustrations.— It is not ground for staying or abating proceedings by quo warranto brought by the state that a claimant in contesting the election of the respondent (State *v.* Buckland, 23 Kan. 259), nor that the corporation defendant, which admits it has forfeited its charter, is plaintiff in other pending suits (People *v.* Northern R. Co., 53 Barb. (N. Y.) 98 [*affirmed* in 42 N. Y. 217]); nor that voluntary proceedings are pending for the dissolution of the corporation on the ground of insolvency, the quo warranto being based solely on non-user of franchises (People *v.* Seneca Lake Grape, etc., Co., 126 N. Y. 631, 27 N. E. 410); and an action for injunction by an occupant of an office against his successors to prevent the latter from taking possession, if dismissed before the trial of a subsequent quo warranto after possession taken, does not abate the latter action (Snow *v.* Hudson, 56 Kan. 378, 43 Pac. 260).

6. Albright *v.* Territory, (N. M. 1905) 79 Pac. 719.

7. See *supra*, II, A.

8. *Florida.*— State *v.* Gleason, 12 Fla. 190.

Illinois.— Chesshire *v.* People, 116 Ill. 493, 6 N. E. 486; People *v.* Mississippi, etc., R. Co., 13 Ill. 66.

Iowa.— Scott *v.* Clark, 1 Iowa 70.

Kansas.— Bartlett *v.* State, 13 Kan. 99.

Kentucky.— Com. *v.* Lexington, etc., Road Co., 6 B. Mon. 397.

Louisiana.— State *v.* Dranguet, 23 La. Ann. 784.

New York.— People *v.* Hinsdale, 43 Misc. 182, 88 N. Y. Suppl. 206.

Ohio.— State *v.* Sullivan, 15 Ohio Cir. Ct. 477, 8 Ohio Cir. Dec. 346.

South Carolina.— State *v.* Stickley, 80 S. C. 64, 61 S. E. 211.

South Dakota.— State *v.* Union Ins. Co., 7 S. D. 51, 63 N. W. 232.

Wisconsin.— State *v.* Mott, 111 Wis. 19, 86 N. W. 569.

United States.— Wallace *v.* Anderson, 5 Wheat. 291, 5 L. ed. 91.

See 41 Cent. Dig. tit. "Quo Warranto," § 39.

The United States as plaintiff.—A proceeding to test the right of a person to exercise the office of judge of the supreme court of a territory must be brought in the name of the United States, and if the territory appears as plaintiff, the error is fatal on demurrer (Nebraska Territory *v.* Lockwood, 3 Wall. 236, 18 L. ed. 47); but the people of the territory may maintain quo warranto in their own name for the removal of a county officer (People *v.* Curtis, 1 Ida. 753).

9. See the statutes of the several states; and the following cases:

Massachusetts.— Malone *v.* New York, etc., R. Co., (1908) 83 N. E. 408.

Michigan.— Taggart *v.* James, 73 Mich. 234, 41 N. W. 262.

Mississippi.— State *v.* Morgan, 80 Miss. 372, 31 So. 789; Lindsey *v.* Atty.-Gen., 33 Miss. 508.

New Jersey.— Tillyer *v.* Mindermann, 70 N. J. L. 512, 57 Atl. 329.

North Carolina.— Houston *v.* Neuse River Nav. Co., 53 N. C. 476; Giles *v.* Hardie, 23 N. C. 42.

See 41 Cent. Dig. tit. "Quo Warranto," § 40.

The naming of a private person as relator in a suit brought by the attorney-general is not objectionable on the ground that the attorney-general lent his name for the benefit of a private relator. Atty.-Gen. *v.* Booth, 143 Mich. 89, 106 N. W. 868.

office may bring an action in his own name to recover the office from the occupant,[10] or may appear as plaintiff in a proceeding to redress private injuries suffered as a result of usurpation of franchises by private corporations or by reason of any interference with rights to private offices.[11]

b. Public Officers. The attorney-general is as a general rule the proper officer *ex officio* to bring action in the nature of quo warranto for the state upon his own information without naming any other person as relator,[12] and although a statute exists conferring upon any elector of a county the right to contest the election of any person declared elected, the attorney-general may, nevertheless, bring suit on behalf of the people to test the right of an incumbent of an office to hold the same.[13] In some states, county attorneys, or local prosecuting attorneys, are empowered to act on behalf of the state in quo warranto,[14] in which case the county attorney of the county in which the wrong is committed is the proper officer to file an information.[15] Whether the attorney-general can act in a matter falling within the scope of the county attorney's duties depends upon the construction of the statute.[16] The attorney-general or other state officer authorized to act

10. See the statutes of the several states; and the following cases:

Indiana.— Reynolds *v.* State, 61 Ind. 392.

Kansas.— Brown *v.* Jeffries, 42 Kan. 605, 22 Pac. 578.

Kentucky.— Tillman *v.* Otter, 93 Ky. 600, 20 S. W. 1036, 14 Ky. L. Rep. 586, 29 L. R. A. 110; King *v.* Kahne, 87 S. W. 807, 27 Ky. L. Rep. 1080.

Michigan.— Vrooman *v.* Michie, 69 Mich. 42, 36 N. W. 749.

Texas.— McAllen *v.* Rhodes, 65 Tex. 348.

Utah.— Preshaw *v.* Dee, 6 Utah 360, 23 Pac. 763.

See 41 Cent. Dig. tit. "Quo Warranto," § 41 *et seq.*

11. Haupt *v.* Rogers, 170 Mass. 71, 48 N. E. 1080; Atty.-Gen. *v.* Drohan, 169 Mass. 534, 48 N. E. 279, 61 Am. St. Rep. 301. See also Olathe *v.* Missouri, etc., R. Co., (Kan. 1908) 96 Pac. 42.

12. *Arkansas.*— Caldwell *v.* Bell, 6 Ark. 227.

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929.

Massachusetts.— Com. *v.* Fowler, 10 Mass. 290.

Minnesota.— Territory *v.* Smith, 3 Minn. 240, 74 Am. Dec. 749.

Ohio.— State *v.* Anderson, 45 Ohio St. 196, 12 N. E. 656; State *v.* Thompson, 34 Ohio St. 365.

Texas.— State *v.* Southern Pac. R. Co., 24 Tex. 80.

See 41 Cent. Dig. tit. "Quo Warranto," § 40.

In Maryland the state attorney has no authority to file an information against one in possession of an office. Hawkins *v.* State, 81 Md. 306, 32 Atl. 278.

13. People *v.* Holden, 28 Cal. 123.

14. See the statutes of the several states; and the following cases:

Dakota.— Territory *v.* Armstrong, 6 Dak. 226, 50 N. W. 832.

Michigan.— Pound *v.* Oren, 119 Mich. 528, 78 N. W. 541.

Missouri.— State *v.* McMillan, 108 Mo. 153, 18 S. W. 784; State *v.* Bellflower, 129 Mo. App. 138, 108 S. W. 117.

Ohio.— State *v.* Buckland, 5 Ohio St. 216.

Pennsylvania.— Gilroy *v.* Com., 105 Pa. St. 484; Com. *v.* Allen, 15 Pa. Co. Ct. 257; Com. *v.* De Turk, 6 Pa. Co. Ct. 94.

Texas.— Morris *v.* State, 62 Tex. 728.

Washington.— State *v.* Seattle Gas, etc., Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

See 41 Cent. Dig. tit. "Quo Warranto," § 40.

Where the constitution empowers the attorney-general to proceed against private corporations exercising powers not conferred by law, a statute is unconstitutional and void which attempts to authorize district and county attorneys to bring such proceedings. State *v.* International, etc., R. Co., 89 Tex. 562, 35 S. W. 1067.

Attorney appointed in absence of district attorney.— If the district attorney is duly authorized to file an information for a quo warranto, an attorney appointed by the court during the absence of the district attorney has like authority. Fowler *v.* State, 68 Tex. 30, 3 S. W. 255.

15. Pound *v.* Oren, 119 Mich. 528, 78 N. W. 541; State *v.* Seattle Gas, etc., Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

The authority of a district attorney is confined to the territory for which he is appointed, and he cannot maintain proceedings elsewhere. State *v.* Shearman, 51 Kan. 686, 35 Pac. 455.

A change of venue of an action begun in the proper county does not terminate the right of the attorney of that county to prosecute the same. Eel River R. Co. *v.* State, 155 Ind. 433, 57 N. E. 388.

On appeal from the trial court, the county attorney of one county within the appellate district may conduct the case, although it was commenced in another county. State *v.* Kelly, 2 Kan. App. 178, 43 Pac. 299.

16. See Com. *v.* Commercial Bank, 28 Pa. St. 391 (holding that the prevailing statute conferring on district attorneys the power to institute quo warranto proceedings did not take away the authority of the attorney-general); State *v.* Seattle Gas, etc., Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114 (where it was held that the attorney-general could not act).

on its behalf, may direct and control the proceedings on an information in the nature of quo warranto.[17]

c. Private Persons. Before the statute of 9 Anne, chapter 20, the information in the nature of quo warranto could be filed only upon the application of the attorney-general. That statute permitted the filing of the information upon leave of court being obtained at the instance of any private person desiring to sue or prosecute, and it required such person to appear as relator in the proceedings.[18] Similarly the statutes in many of the states permit proceedings in the nature of quo warranto to be brought at the suggestion of persons whose private interests are involved.[19] In these cases the attorney-general or other public officer must nominally bring the proceedings; but if he refuses to do so, or to permit his name to be used, the person interested may proceed independently on his own relation.[20] Whether the statute expressly so provides or not, it is essential that a private person who applies for a quo warranto shall show his interest in the subject-matter of the prosecution,[21] and whether such an interest exists is a question for the court

17. Tuscaloosa Scientific, etc., Assoc. *v.* State, 58 Ala. 54; State *v.* Bryan, 50 Fla. 293, 39 So. 929; State *v.* Douglas County Road Co., 10 Oreg. 198; Atty.-Gen. *v.* Barstow, 4 Wis. 567.

A stipulation not signed by the attorney-general will be disregarded. People *v.* Molitor, 23 Mich. 341; People *v.* Pratt, 15 Mich. 184.

18. State *v.* Ashley, 1 Ark. 279; State *v.* Gleason, 12 Fla. 190; Haupt *v.* Rogers, 170 Mass. 71, 48 N. E. 1080; Atty.-Gen. *v.* Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455; Osgood *v.* Jones, 60 N. H. 543.

19. See the statutes of the several states; and the following cases:

Georgia.— Whitehurst *v.* Jones, 117 Ga. 803, 45 S. E. 49; Crovatt *v.* Mason, 101 Ga. 246, 28 S. E. 891; Davis *v.* Dawson, 90 Ga. 817, 17 S. E. 110.

Indiana.— State *v.* Reardon, 161 Ind. 249, 68 N. E. 169.

Missouri.— State *v.* Boal, 46 Mo. 528.

Pennsylvania.— Com. *v.* Stevenson, 200 Pa. St. 509, 50 Atl. 91; Com. *v.* Campbell, 3 Just. L. Rep. 20, 12 Luz. L. Reg. 149.

West Virginia.— State *v.* Matthews, 44 W. Va. 372, 29 S. E. 994.

See 41 Cent. Dig. tit. "Quo Warranto," § 41 *et seq.*

In Canada an information on behalf of a private person should be exhibited in the name of the master of the crown office; but a rule in such case to show cause why the attorney-general should not file the information, although incorrect, may be amended. Reg. *v.* Lindsay, 18 U. C. Q. B. 51. The English rule of practice requiring the relator to file an affidavit that the motion for the writ was made at his instance is not in force in Canada. *In re* Spence, 5 Nova Scotia 333.

20. State *v.* Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; Camman *v.* Bridgewater Copper Min. Co., 12 N. J. L. 84; Ney *v.* Whitley, 26 R. I. 464, 59 Atl. 400; State *v.* Leischer, 117 Wis. 475, 94 N. W. 299. See also Respublica *v.* Griffiths, 2 Dall. (Pa.) 112, 1 L. ed. 311, holding that if the court grants leave to a private person to file an information against one holding a public office, and the proceedings are required to be in the name of the attorney-general, that official must allow his name to be used, *pro forma*, by the prosecutor; but he is not obliged to file or prosecute the information himself.

21. *Idaho.*— Toncray *v.* Bridge, 14 Ida. 621, 95 Pac. 26.

Indiana.— See Scott *v.* State, 151 Ind. 556, 52 N. E. 163.

Kansas.— Hudson *v.* Conklin, (1908) 93 Pac. 585.

Pennsylvania.— Com. *v.* Hough, 8 Pa. Dist. 685, 22 Pa. Co. Ct. 440; Com. *v.* Hargest, 2 Dauph. Co. Rep. 409.

Washington.— State *v.* Point Roberts Reef Fish Co., 42 Wash. 409, 85 Pac. 22.

Wisconsin.— State *v.* Samuelson, 131 Wis. 499, 111 N. W. 712.

See 41 Cent. Dig. tit. "Quo Warranto," § 41 *et seq.*

Private persons held to have sufficient interest.— One of the board of directors of a corporation, who have possession of its property, has a special interest in the corporation, such as warrants the state's attorney in presenting a petition for leave to file an information against the other directors. Place *v.* People, 83 Ill. App. 84. A superintendent of the water system of a city has a sufficient interest in the right of persons appointed to the office of trustees of the waterworks, to maintain an action of quo warranto to determine such right. State *v.* Barker, 116 Iowa 96, 89 N. W. 204. A justice of the peace is a person interested sufficiently to bring quo warranto against an alderman who exercises the functions of a justice of the peace throughout the county. Com. *v.* Brunner, 6 Pa. Co. Ct. 323, 3 Del. Co. 551. The chief burgess of a borough has a sufficient interest to make him a competent relator in quo warranto against a councilman. Com. *v.* Shepp, 10 Phila. (Pa.) 518. The owner of agricultural lands illegally included within the boundaries of a city or village in which he is not a voter may maintain quo warranto to determine the validity of such inclusion. State *v.* Mote, 48 Nebr. 683, 67 N. W. 810; State *v.* Dimond, 44 Nebr. 154, 62 N. W. 498. An owner of rated property in a town, although not entitled to vote, has sufficient interest to

to decide upon the application for the writ.[22] In a proceeding against a person acting as mayor, it has been held a sufficient interest that the relator is a freeholder, resident, and elector of a city,[23] or that the relator is merely a citizen.[24] If a writ is asked for before the time has arrived when the relator is entitled to assume the duties of his office, it will be refused, as, until then, he has no interest within the meaning of the statute.[25]

d. Purpose of Proceedings as Determining Who May Prosecute — (I) *In General.* The purpose of the quo warranto proceedings often determines who may apply for the writ. The general rule is that where the remedy is sought for a public wrong, proceedings should be instituted by and upon the relation of the attorney-general; but where the primary purpose is to redress a private injury, the person aggrieved may appear as relator in the information.[26] In a number of cases the rule has been broadly stated that the writ of quo warranto does not lie at the suit of a private person,[27] but this rule must be taken to be limited to proceedings of the character under consideration by the court at the time of stating it.[28]

(II) *Trial of Title to Public Office.* As to whether a private citizen without any special interest may institute quo warranto proceedings to try title to public office, the authorities in the different states are not in accord, nor do the authorities in the same state all agree. This conflict is due in part to the different wordings of the statutes in the different states, and in part to a doubt as to the extent to which the common law remains in force. So in some cases it has been held that any citizen may obtain a writ of quo warranto against the occupant of a public office,[29] while other cases hold that, in addition to that interest which

be a relator in quo warranto proceedings against one exercising the office of town commissioner. Reg. *v.* Briggs, 11 L. T. Rep. N. S. 372.

Private persons held not to have sufficient interest.— A police constable who has been discharged for cause by the mayor of a city has no absolute right to be restored to his position, nor has he any interest in the office of mayor so as to entitle him to a writ of quo warranto against the mayor, although the latter has not taken the constitutional oath. Com. *v.* McCarter, 98 Pa. St. 607. Members of a voluntary church society cannot obtain a writ of quo warranto to try the right of office of a minister appointed by another portion of the society which has organized as a corporation. Com. *v.* Murray, 11 Serg. & R. (Pa.) 73, 14 Am. Dec. 614. The mayor of a city has not such an interest in the office of city councilman as to entitle him to maintain quo warranto to oust an alleged usurper of such office; such usurpation affects the public equally with the mayor, and the remedy is by proceedings on the part of the state. Mills *v.* State, 2 Wash. 566, 27 Pac. 560. That a candidate for office who received the highest number of votes has disqualified himself from holding it by contracting to farm or sell it does not confer any interest in the office upon the defeated candidate so as to permit him to bring quo warranto. State *v.* Matthews, 44 W. Va. 372, 29 S. E. 994.

In England an inhabitant of a borough may be a relator upon an application against a town councilor, although he iss not a burgess. Reg. *v.* Quayle, 11 A. & E. 508, 5 Jur. 368, 10 L. J. Q. B. 99, 4 P. & D. 442, 39 E. C. L. 279.

22. State *v.* Mason, 14 La. Ann. 505; Deaver *v.* State, 27 Tex. Civ. App. 453, 66 S. W. 256.

23. People *v.* Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444; State *v.* Barker, 116 Iowa 96, 89 N. W. 204, 93 Am. St. Rep. 222, 57 L. R. A. 244.

24. Crovatt *v.* Mason, 101 Ga. 246, 28 S. E. 891; State *v.* Kohnke, 109 La. 838, 33 So. 793.

25. Scott *v.* State, 151 Ind. 556, 52 N. E. 163.

26. Com. *v.* Dillon, 81* Pa. St. 41; Com. *v.* Hough, 8 Pa. Dist. 685, 22 Pa. Co. Ct. 440.

27. *Kentucky.*— Com. *v.* Lexington, etc., Turnpike Road Co., 6 B. Mon. 397.

Ohio.— State *v.* Moffit, 5 Ohio 358.

Pennsylvania.— Com. *v.* Brosnahan, 1 Leg. Rec. 59; Com. *v.* Philadelphia, etc., R. Co., 10 Wkly. Notes Cas. 400.

South Carolina.— State *v.* Delieselline, 1 McCord 52; Cleary *v.* Delieselline, 1 McCord 35.

Texas.— Wright *v.* Allen, 2 Tex. 158.

Wisconsin.— U. S. *v.* Lockwood, 1 Pinn. 359.

See 41 Cent. Dig. tit. "Quo Warranto," § 41.

28. See cases cited *supra*, IV, C, 1, c; *infra*, IV, C, 1, d, (II), (III).

29. Davis *v.* Dawson, 90 Ga. 817, 17 S. E. 110; Churchill *v.* Walker, 68 Ga. 681; State *v.* Kohnke, 109 La. 838, 33 So. 793 [*overruling* Voisin *v.* Leche, 23 La. Ann. 25; State *v.* Mason, 14 La. Ann. 505]; State *v.* Gastinel, 20 La. Ann. 114; Hann *v.* Bedell, 67 N. J. L. 148, 50 Atl. 364; State *v.* Hammer, 42 N. J. L. 435; State *v.* Hall, 111 N. C. 369,

every citizen has, a special interest in the particular office must be shown.[30] It is very generally held, however, that a defeated candidate to the office has an interest sufficient to warrant him in bringing quo warranto proceedings to try the title of the incumbent; [31] but a defeated candidate not entitled to the office in any event has not a sufficient interest,[32] and a private person cannot prosecute an information against a judge, unless the proceeding is directed by the attorney-general or other authorized official.[33]

(III) *Testing Corporate Organization, Powers, or Election* — (A) *Municipal Corporations.* In proceedings against a municipal corporation, to test the validity of its organization, or to arrest a usurpation of corporate powers, a private citizen cannot, as a general rule, file the information; [34] but it has been held that if the suit is in fact conducted by the proper officer, it is no objection that a private person is named as relator,[35] and that a proceeding wherein the state's attorney appears as relator is none the less public in nature because individuals interested have employed counsel at their own expense to assist in prosecuting the suit.[36]

(B) *Private Corporations.* A writ of quo warranto to forfeit the charter of a private corporation,[37] or to oust it from the exercise of franchises not conferred

16 S. E. 420; People *v.* Hilliard, 72 N. C. 169. But see Moore *v.* Seymour, 69 N. J. L. 606, 55 Atl. 91, holding that the right conferred upon a private citizen to question the title of an occupant of public office does not allow an attack on the legal existence of the office.

A relator who participated in an irregular election will not be heard to question the title of officers elected thereat (Reg. *v.* Lofthouse, L. R. 1 Q. B. 433, 7 B. & S. 447, 12 Jur. N. S. 619, 35 L. J. Q. B. 145, 14 L. T. Rep. N. S. 359, 14 Wkly. Rep. 649; Reg. *v.* Greene, 2 Q. B. 460, 2 G. & D. 24, 6 Jur. 777, 42 E. C. L. 760; Rex *v.* Parkyn, 1 B. & Ad. 690, 9 L. J. K. B. O. S. 104, 20 E. C. L. 652; Rex *v.* Trevenen, 2 B. & Ald. 339, 20 Rev. Rep. 461; Rex *v.* Slythe, 6 B. & C. 240, 9 D. & R. 226, 5 L. J. M. C. O. S. 41, 30 Rev. Rep. 312, 13 E. C. L. 119); but the mere fact that the relator subsequently coöperated with the respondent in corporation business will not disqualify him (Rex *v.* Benney, 1 B. & Ad. 684, 9 L. J. K. B. O. S. 104, 20 E. C. L. 649; Rex *v.* Morris, 3 East 213, 4 East 17; Rex *v.* Clarke, 1 East 38, 5 Rev. Rep. 505); and an application made on the affidavits of several persons, of whom all but one have consented to the election proposed to be impeached, may be granted on the affidavit of that one, if he avows himself to be the relator (Rex *v.* Symmons, 4 T. R. 223).

30. State *v.* Stein, 13 Nebr. 529, 14 N. W. 481; Meehan *v.* Bachelder, 73 N. H. 113, 59 Atl. 620; Osgood *v.* Jones, 60 N. H. 543; Demarest *v.* Wickham, 63 N. Y. 320; State *v.* Taylor, 50 Ohio St. 120, 38 N. E. 24.

In Pennsylvania it has been held that a private citizen, although without any special interest, may bring quo warranto proceedings to try title to a public office (see Com. *v.* Meeser, 44 Pa. St. 341; Com. *v.* Keilly, 4 Phila. 329); but the weight of authority and more recent decisions in that state are to the contrary (Com. *v.* Cluley, 56 Pa. St. 270, 94 Am. Dec. 75; Com. *v.* Burrell, 7 Pa. St. 34; Com. *v.* Horn, 10 Phila. 164, 1 Wkly. Notes Cas. 27; Com. *v.* Wisler, 11 Wkly. Notes Cas. 513).

31. *Georgia.*—Davis *v.* Dawson, 90 Ga. 817, 17 S. E. 110; Hardin *v.* Colquitt, 63 Ga. 588.

Indiana.— Yonkey *v.* State, 27 Ind. 236.

New York.— People *v.* Ryder, 12 N. Y. 433; People *v.* De Bevoise, 27 Hun 596.

Ohio.— State *v.* Taylor, 50 Ohio St. 120, 38 N. E. 24; State *v.* Chandler, 2 Ohio Dec. (Reprint) 164, 1 West. L. Month. 602.

Pennsylvania.— Com. *v.* Bumm, 10 Phila. 162.

Texas.— McAllen *v.* Rhodes, 65 Tex. 348; State *v.* Owens, 63 Tex. 261. But see Banton *v.* Wilson, 4 Tex. 400.

See 41 Cent. Dig. tit. "Quo Warranto," § 41.

32. State *v.* Bieler, 87 Ind. 320; Andrews *v.* State, 69 Miss. 740, 13 So. 853; Harrison *v.* Greaves, 59 Miss. 453; Miller *v.* English, 21 N. J. L. 317. But see Londoner *v.* People, 15 Colo. 557, 26 Pac. 135.

33. State *v.* Moffitt, 5 Ohio 358; Coyle *v.* Com., 104 Pa. St. 117; State *v.* McConnell, 3 Lea (Tenn.) 332.

34. *Alabama.*— State *v.* Cahaba, 30 Ala. 66.

Florida.— Robinson *v.* Jones, 14 Fla. 256.

Illinois.— Chicago *v.* People, 80 Ill. 496.

Kansas.— Miller *v.* Palermo, 12 Kan. 14.

Minnesota.— State *v.* Tracy, 48 Minn. 497, 51 N. W. 613.

New Jersey.— Steelman *v.* Vickers, 51 N. J. L. 180, 17 Atl. 153, 14 Am. St. Rep. 675.

See 41 Cent. Dig. tit. "Quo Warranto," § 41.

But see State *v.* Jenkins, 25 Mo. App. 484.

35. People *v.* Burns, 212 Ill. 227, 72 N. E. 374.

36. McGahan *v.* People, 191 Ill. 493, 61 N. E. 418.

37. *Illinois.*— People *v.* Golden Rule, 114 Ill. 34, 28 N. E. 383.

Massachusetts.— Rice *v.* Commonwealth Nat. Bank, 126 Mass. 300.

New Jersey.— Terhune *v.* Potts, 47 N. J. L.

by its charter, or other abuses of its legal powers,[38] should be filed by the attorney-general, *ex officio*, or other appropriate officer, on behalf of the state. In some jurisdictions, however, a private person may appear as relator in an information presented in the name of the attorney-general;[39] and it is sometimes held that a private person, interested in a corporation, may have a writ to inquire into an election of officers or members of the corporation, and the name of the state may be used without application to the attorney-general.[40] One having no interest in the corporation cannot as a general rule have the writ,[41] nor will it be allowed to a person who does not clearly show an injury to his private interest;[42] and if other remedies might be available, such as a statutory remedy provided for judgment creditors, the fact that they are not applicable to the circumstances must be shown or the writ will not be issued.[43]

2. Defendants or Respondents — a. Proceedings Relating to Corporations — (i) *To Test Legal Existence or Forfeit Charter.* An information which questions the existence of a corporation on the ground that it was never legally organized should be brought against the individuals who claim the right to exercise the corporate franchise, and not against the corporation itself,[44] for by

218; State *v.* Patterson, etc., Turnpike Co., 21 N. J. L. 9.

Ohio.— *In re* Mt. Pleasant Bank, 5 Ohio 249.

Pennsylvania.— Com. *v.* Philadelphia, etc., R. Co., 20 Pa. St. 518; Com. *v.* Jones, 1 Leg. Rec. 293.

England.— Rex *v.* Ogden, 10 B. & C. 230, 21 E. C. L. 104.

See 41 Cent. Dig. tit. "Quo Warranto," § 41.

38. State *v.* Smith, 32 Ind. 213; Kenney *v.* Consumers' Gas Co., 142 Mass. 417, 8 N. E. 138; Goddard *v.* Smithett, 3 Gray (Mass.) 116; Wagner *v.* Christ Church Parish Episcopal Church, 9 Rich. Eq. (S. C.) 155; Queen Ins. Co. *v.* State, (Tex. Civ. App. 1893) 22 S. W. 1048.

39. Tuscaloosa Scientific, etc., Assoc. *v.* State, 58 Ala. 54; State *v.* Charleston, 1 Mill (S. C.) 36.

Estoppel of a relator does not estop the state in a proceeding by the state for usurpation of franchise. People *v.* Burns, 212 Ill. 227, 72 N. E. 374; State *v.* Sharp, 27 Minn. 38, 6 N. W. 408; People *v.* Buffalo Stone, etc., Co., 131 N. Y. 140, 29 N. E. 947, 15 L. R. A. 240; State *v.* Harris, 52 Vt. 216. See also People *v.* Lowden, (Cal. 1885) 8 Pac. 66.

40. Com. *v.* Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50; South, etc., R. Co. *v.* Com., 104 Va. 314, 51 S. E. 824; State *v.* Horan, 22 Wash. 197, 60 Pac. 135.

41. Com. *v.* Dillon, 81* Pa. St. 41; Com. *v.* Philadelphia, etc., R. Co., 20 Pa. St. 518; Com. *v.* Farmers' Bank, 2 Grant (Pa.) 392.

In Alabama any person who gives the required security for costs may institute proceedings by quo warranto to annul the charter of a corporation. State *v.* U. S. Endowment, etc., Co., 140 Ala. 610, 37 So. 442, 103 Am. St. Rep. 60.

42. Hastings *v.* Amherst, etc., R. Co., 9 Cush. (Mass.) 596.

43. People *v.* Wayland Wood Mfg. Co., 33 Mich. 413.

44. *Alabama.*— State *v.* Webb, 97 Ala. 111, 12 So. 377, 38 Am. St. Rep. 151.

California.— People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92.

Colorado.— People *v.* Stratton, 33 Colo. 464, 81 Pac. 245.

Dakota.— Territory *v.* Armstrong, 6 Dak. 226, 50 N. W. 832.

Illinois.— People *v.* Bruennemer, 168 Ill. 482, 48 N. E. 43; North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462; People *v.* Spring Valley, 129 Ill. 169, 21 N. E. 843.

Indiana.— Mud Creek Draining Co. *v.* State, 43 Ind. 236.

Iowa.— State *v.* Dallas Centre Independent School Dist., 44 Iowa 227.

Michigan.— People *v.* Gladwin County, 41 Mich. 647, 2 N. W. 904.

Mississippi.— State *v.* Commercial Bank, 33 Miss. 474; Commercial Bank *v.* State, 6 Sm. & M. 599.

Missouri.— State *v.* McClain, 187 Mo. 409, 86 S. W. 135; State *v.* Fleming, 147 Mo. 1, 44 S. W. 758; State *v.* Small, 131 Mo. App. 470, 109 S. W. 1079.

Nebraska.— State *v.* Lincoln St. R. Co., (1907) 114 N. W. 422; State *v.* Uridil, 37 Nebr. 371, 55 N. W. 1072.

New York.— People *v.* James, 5 N. Y. App. Div. 412, 39 N. Y. Suppl. 313; People *v.* Rensselaer, etc., R. Co., 15 Wend. 113, 30 Am. Dec. 33; People *v.* Richardson, 4 Cow. 97.

Ohio.— State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; State *v.* American Eclectic Medical College, 6 Ohio Dec. (Reprint) 844, 8 Am. L. Rec. 422.

Texas.— Ewing *v.* State, 81 Tex. 172, 16 S. W. 872.

Washington.— State *v.* South Park, 34 Wash. 162, 75 Pac. 636, 101 Am. St. Rep. 998; Ferguson *v.* Snohomish, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795.

England.— Rex *v.* Carmarthen, 2 Burr. 869, W. Bl. 187; Le Roy *v.* Cusacke, 2 Rolle 113, 81 Eng. Reprint 694.

See 41 Cent. Dig. tit. "Quo Warranto," § 44.

In Kansas the action may be brought against the corporation itself, and it is not

suing the corporation itself, its corporate existence is admitted, and plaintiff cannot then be heard to say that there is no such corporation.[45] The rule is often relaxed, however, in the case of municipal or quasi-public corporations and writs allowed to be issued against them directly.[46] If the ground of complaint is that a corporation, legally organized, has ceased to exist, or has so acted as to incur a forfeiture of its corporate franchise, the corporation itself is the proper defendant,[47] and the same rule applies where a corporation usurps powers or franchises beyond those given it by its charter.[48]

(II) *To Forfeit Assigned Franchises.* An action to forfeit franchises which have been illegally assigned by one corporation to another must be brought against the assignee company;[49] but although a receiver of a corporation, appointed by the federal court, is an assignee of its property, he is neither a necessary nor a proper party to quo warranto by the state to forfeit the charter.[50]

b. Trial of Title to Public Office. The person who claims and exercises a public office is the only proper defendant to an information to test the right to such office.[51] A proceeding against one acting as mayor of a city may be against the officer, describing him as such, for usurping a franchise, or against him as an individual, charging the usurpation of the office.[52] The corporate officers or corporate body who have appointed the respondent to his office have no interest, and are not proper parties to proceedings to oust him.[53]

3. Joinder — a. Of Plaintiffs.[54] While several persons claiming different offices cannot ordinarily join in one proceeding,[55] such joinder is proper where the rights of different persons to separate corporate offices depend on the same votes at the same election.[56] In some states the statutes require that the informant or person interested must join with the state as plaintiff.[57] In an information by

necessary that the officers be made parties. Deng *v.* Lamb, (1908) 95 Pac. 592; Gardner *v.* State, (1908) 95 Pac. 588; State *v.* Inner Belt R. Co., 74 Kan. 413, 87 Pac. 696.

45. People *v.* Spring Valley, 129 Ill. 169, 21 N. E. 843; State *v.* Commercial Bank, 33 Miss. 474; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33.

46. *California.*— People *v.* Montecito Water Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. Rep. 172.

Connecticut.— State *v.* North, 42 Conn. 79.

Minnesota.— State *v.* Tracy, 48 Minn. 497, 51 N. W. 613.

New Jersey.— State *v.* Atlantic Highlands, 50 N. J. L. 457, 14 Atl. 560.

Vermont.— State *v.* Bradford, 32 Vt. 50.

See 41 Cent Dig. tit. "Quo Warranto," § 44.

47. *Arkansas.*— Smith *v.* State, 21 Ark. 294.

Illinois.— People *v.* Spring Valley, 129 Ill. 169, 21 N. E. 843.

Nebraska.— State *v.* Atchison, etc., R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. Rep. 164.

New Hampshire.— State *v.* Barron, 57 N. H. 498.

Ohio.— State *v.* Taylor, 25 Ohio St. 279; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; State *v.* Robinson, 9 Ohio Dec. (Reprint) 383, 12 Cinc. L. Bul. 269.

Pennsylvania.— Com. *v.* Morris, 1 Phila. 411.

Virginia.— Com. *v.* James River Co., 2 Va. Cas. 190.

See 41 Cent. Dig. tit. "Quo Warranto," § 44.

48. State *v.* Somerby, 42 Minn. 55, 43 N. W. 689; State *v.* Fleming, 158 Mo. 558, 59 S. W. 118.

49. People *v.* New York Cent. Underground R. Co., 21 N. Y. Suppl. 373, holding also that if the right of the assignee is attacked on the ground that it has no right to the franchises because the assignor company, at the time of the assignment, had forfeited its charter and ceased to exist, such assignor is a proper, although not a necessary, party to the proceedings, in order that the fact of its death may be judicially ascertained. But see Com. *v.* Tenth Massachusetts Turnpike Corp., 5 Cush. (Mass.) 509.

50. City Water Co. *v.* State, 88 Tex. 600, 32 S. W. 1033.

51. State *v.* Kohnke, 109 La. 838, 33 So. 793; Com. *v.* Masonic Home, 6 Pa. Dist. 732, 20 Pa. Co. Ct. 465.

52. State *v.* Coffee, 59 Mo. 59.

53. State *v.* Hall, 111 N. C. 369, 16 S. E. 420.

54. Joinder of plaintiffs in actions generally see Parties, 30 Cyc. 105.

55. People *v.* De Mill, 15 Mich. 164, 93 Am. Dec. 179; Com. *v.* Martin, 3 Lanc. L. Rev. (Pa.) 177.

56. People *v.* Stoddard, 34 Colo. 200, 86 Pac. 251; Com. *v.* Stevens, 168 Pa. St. 582, 32 Atl. 111.

Three persons who have been elected aldermen for a ward entitled to that number may proceed in one action against three others who have usurped their offices. People *v.* Cohn, 7 Utah 252, 26 Pac. 928.

57. See the statutes of the several states. And see State *v.* Kitchens, 148 Ala. 385, 41

the attorney-general against a corporation, private persons cannot join for the purpose of trying their rights to offices in the corporation.[58]

b. Of Defendants.[59] No joinder of defendants is proper which unites separate causes of action against several defendants.[60] Thus, if the defendants claim title to different offices by distinct titles, they are improperly joined.[61] But several members of a town council may be named as respondents in one proceeding when the information avers that they were all illegally elected at the same election, in that fraudulent ballots were cast for them,[62] and two school directors elected when a district is entitled to but one may be made defendants in quo warranto, but neither the district, its inhabitants, nor other directors should be joined.[63] A lessee of part of a railroad company's road may properly be joined with the company in an action to vacate its charter.[64] In a proceeding to declare void a pretended municipal corporation, it is not proper to join the corporation with the individuals who are exercising the corporate offices,[65] nor need the inhabitants of the corporation be joined as parties.[66] The various illegal acts of different county officers, although in pursuance of one object, cannot be made the subject-matter of a single suit, as there is nothing in common among such acts, so far as the usurpation of powers is concerned.[67]

4. Intervention.[68] Intervention of parties in interest is generally allowed in quo warranto as in other proceedings.[69]

D. Pleading[70]**—1. In General.** Quo warranto is now ordinarily regarded as a civil and not a criminal remedy,[71] and the pleadings in such an action are governed in general by the rules applicable to pleadings in ordinary civil actions.[72] If, however, the action is considered to be a criminal proceeding, as was the common-law

So. 871 (where the joinder was held sufficiently shown by the recital "your petitioner and relator, the State of Alabama, on the relation of H. respectfully represents," etc.); West End *v.* State, 138 Ala. 295, 36 So. 423; Territory *v.* Hauxhurst, 3 Dak. 205, 14 N. W. 432; Territory *v.* Smith, 3 Minn. 240, 74 Am. Dec. 749; People *v.* Walker, 23 Barb. (N. Y.) 304.

58. Gibbs *v.* Somers Point, 49 N. J. L. 515, 10 Atl. 377.

59. **Joinder of defendants** in actions generally see PARTIES, 30 Cyc. 120.

60. State *v.* Riley Tp. Bd. of Education, 7 Ohio Cir. Ct. 152, 3 Ohio Cir. Dec. 703.

61. Preshaw *v.* Dee, 6 Utah 360, 23 Pac. 763; Rex *v.* Warlow, 2 M. & S. 75, 14 Rev. Rep. 592.

A misjoinder not apparent on the face of the complaint may be taken advantage of by answer. Preshaw *v.* Dee, 6 Utah 360, 23 Pac. 763. See also People *v.* Long, 32 Colo. 486, 77 Pac. 251.

62. State *v.* Kearn, 17 R. I. 391, 22 Atl. 322, 1018. See also Rex *v.* Foster, 1 Burr. 573.

63. State *v.* Simpkins, 77 Iowa 676, 42 N. W. 516.

64. People *v.* Albany, etc., R. Co., 77 N. Y. 232 [*reversing* 15 Hun 126].

65. People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92.

66. West End *v.* State, 138 Ala. 295, 36 So. 423.

67. McDonald *v.* Alcona County, 91 Mich. 459, 51 N. W. 1114.

68. **Intervention** generally see PLEADING, 31 Cyc. 512.

69. People *v.* Albany, etc., R. Co., 77 N. Y. 232 [*reversing* 15 Hun 126]; Atty.-Gen. *v.* Simonton, 78 N. C. 57. But see Com. *v.* Dillon, *81 Pa. St. 41.

In Idaho it is held that the right of intervention given by statute exists only in actions which are purely civil in their character, and that the statutory proceeding in the nature of quo warranto, being quasi-criminal in character, the right to intervene therein does not exist. People *v.* Green, 1 Ida. 235.

Change of relator.—After the rule has been made absolute the court will change a relator on motion if by reason of necessary absence from the jurisdiction he is unable to enter into the bond required by the prevailing statute. Reg. *v.* Quayle, 11 A. & E. 508, 5 Jur. 368, 10 L. J. Q. B. 99, 4 P. & D. 442, 39 E. C. L. 279.

If the relator and respondent employ the same attorney, the court will change the attorney for the prosecution, although there is no collusion between the parties and the attorney intended to proceed *bona fide* to obtain the judgment of the court. Reg. *v.* Alderson, 11 A. & E. 3, 3 P. & D. 2, 39 E. C. L. 28.

70. See, generally, PLEADING, 31 Cyc. 1.

71. See *supra*, II, B, 2, a.

72. People *v.* Heidelberg Garden Co., 233 Ill. 290, 84 N. E. 230 [*affirming* 124 Ill. App. 331]; People *v.* Central Union Tel. Co., 232 Ill. 260, 83 N. E. 829; Independent Medical College *v.* People, 182 Ill. 274, 55 N. E. 345; Distilling, etc., Co. *v.* People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200; State *v.* Beechner, 160 Mo. 78, 60 S. W. 1110; State *v.* Steers, 44 Mo. 223; People *v.* Clark, 4 Cow. (N. Y.) 95.

information, the rules of criminal pleading, so far as they are pertinent, will be enforced, and the same degree of certainty will be required in a quo warranto information as in an indictment.[73]

2. INFORMATION, PETITION, OR COMPLAINT — a. In General. To ascertain the sufficiency of an information, reference should first be had to the local statute, as in some instances these contain provisions relating to the form or contents of pleadings in quo warranto,[74] and although, under a practice code, a complaint is to be used, such complaint is the same in effect as the common-law information in the nature of quo warranto, and its sufficiency is determinable by common-law rules.[75] In a case which may be presented only by a state officer, or with his consent, the information should be exhibited by him,[76] and should show on its face that it is presented upon his authority.[77] If leave of court is essential, it may be sufficiently shown by proceedings of record without an allegation thereof in the information.[78] Such facts should be alleged as will make out a *prima facie* case for relief, within the scope of the remedy by quo warranto as defined by the statutes; [79] and the facts should be alleged in a traversable form, statements which are mere conclusions of law being insufficient.[80] It is only necessary to set forth in general terms

73. Lavalle *v.* People, 68 Ill. 252; Hay *v.* People, 59 Ill. 94; People *v.* Mississippi, etc., R. Co., 13 Ill. 66; Donnelly *v.* People, 11 Ill. 552, 52 Am. Dec. 459; People *v.* Kingston, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551, all so holding before the practice was changed by statute. See also People *v.* Miller, 15 Mich. 354.

74. See State *v.* Gleason, 12 Fla. 190; Wight *v.* People, 15 Ill. 417; Donnelly *v.* People, 11 Ill. 552, 52 Am. Dec. 459; State *v.* Cook, 39 Oreg. 377, 65 Pac. 89; State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

75. Territory *v.* Virginia Road Co., 2 Mont. 96.

In Alabama, where a complaint is the first pleading in civil actions, an action in the nature of quo warranto may be based on an information, which takes the place of a complaint. West End *v.* State, 138 Ala. 295, 36 So. 423.

76. Eaton *v.* State, 7 Blatchf. (Ind.) 65; State *v.* Taylor, 208 Mo. 442, 106 S. W. 1023.

Filing by request.— If the information is in fact filed by the attorney-general, it will not be quashed because it sets out an order of the house of representatives directing that such proceedings be taken, and recites that it is filed pursuant to such order; it is none the less filed by the attorney-general *ex officio* (Com. *v.* Fowler, 10 Mass. 290); and if the information filed on behalf of the state by the attorney-general is stated to be "at the request of" a private individual, such statement may be rejected as surplusage (State *v.* Charleston, 1 Mill (S. C.) 36).

77. State *v.* Taylor, 208 Mo. 442, 106 S. W. 1023; State *v.* Davis, 64 Nebr. 499, 90 N. W. 232 (where it is held, however, that an allegation that the information is presented by the attorney-general on the relation of an individual named satisfactorily shows official action); Harpham *v.* State, 63 Nebr. 396, 88 N. W. 489 (holding that if filed by a private citizen without showing authorization by the prosecuting attorney, the information will be fatally defective unless it alleges that relator has applied to the prosecuting attorney, who refused or neglected to comply with the request to file the same).

Title of officer.— In a proceeding by quo warranto to test the right to an office, an information filed by the district attorney, beginning: "Your informant Wm. P. Davis, prosecuting attorney, of the county of," etc., is sufficiently accurate; the use of the prefix "prosecuting" instead of "district" attorney is but a technical error and does not vitiate. Davis *v.* Best, 2 Iowa 96. So also it is no objection to an information that the full title of the "solicitor of the state" is not given, and that the term "solicitor" only is used. But if it were an objection, it would be formal only, and could not avail defendant on a demurrer to his plea. Giles *v.* Hardie, 23 N. C. 42.

78. Giles *v.* Hardie, 23 N. C. 42.

79. People *v.* Ridgley, 21 Ill. 65, holding that the information should allege that defendant holds and executes some office or franchise, describing it, so that it may be seen whether the case is within the statute or not.

Excluding other remedies.— If the case made is one to which another remedy would ordinarily apply, the information must be so drawn as to show that such other remedy has been exhausted or that it is inapplicable. Keeney *v.* Consumers' Gas Co., 142 Mass. 417, 8 N. E. 138.

Usurpation of franchise.— Where defendant's predecessors were granted a legislative franchise to maintain a dam of a specified height in a stream, and defendant raised the dam beyond the height specified, resulting in damage to upper riparian proprietors, a complaint in the nature of quo warranto to oust defendant from such franchise, as authorized by statute, alleging such facts, states a cause of action to oust defendant from the rights and privileges he was exercising in excess of those lawfully granted. State *v.* Norcross, 132 Wis. 534, 112 N. W. 40, 122 Am. St. Rep. 998.

80. Connor *v.* McLaurin, 77 Miss. 373, 27 So. 594; Atty-Gen. *v.* Fox, 72 N. J. L. 6, 60

the rights and privileges alleged to be usurped,[81] and the wrongful act or omission complained of may likewise be stated generally by alleging the ultimate fact.[82] An information in the nature of a quo warranto is not demurrable because it does not follow the petition, but enlarges it, provided it does not go outside of the substantial subject-matter of the petition or of the order allowing the information to be filed.[83] Where several matters are included in the information, a prayer for relief need not be added to each paragraph, as a prayer at the end of the information will be taken distributively.[84] Relevant facts well pleaded stand confessed on the record if not traversed by the opposite party.[85]

b. In Proceedings Relating to Municipal Corporations. In a proceeding to restrain a usurpation of franchise by a municipal corporation, a complaint charging that defendant is exercising the franchise without being incorporated, or without lawful authority, states facts sufficient to constitute a cause of action.[86] An information by a private citizen which assails the legality of the organization of a city must set forth the facts showing wherein the organization is contrary to law;[87]

Atl. 60; Van Riper *v.* Parsons, 40 N. J. L. 1, holding that an allegation that a certain law in point of fact will apply to but a single city, and is therefore local and unconstitutional, is insufficient, as the facts should be set forth.

81. People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64. See also People *v.* Heidelberg Garden Co., 233 Ill. 290, 84 N. E. 230 [*affirming* 124 Ill. App. 331].

82. *California.*— People *v.* Reclamation Dist. No. 136, 121 Cal. 522, 53 Pac. 1085, as that the pretended corporation is exercising corporate franchises without lawful authority.

Florida.— Simonton *v.* State, 44 Fla. 289, 31 So. 821, as that respondent has usurped the public office referred to, and enjoys and performs the functions thereof without warrant of law.

Illinois.— See People *v.* Heidelberg Garden Co., 233 Ill. 290, 84 N. E. 230 [*affirming* 124 Ill. App. 331].

Indiana.— Eel River R. Co. *v.* State, 155 Ind. 433, 57 N. E. 388, holding that it is not necessary to include allegations that the acts are prohibited by statute, or that public injury has resulted therefrom.

Ohio.— State *v.* Toledo R., etc., Co., 23 Ohio Cir. Ct. 603.

See 41 Cent. Dig. tit. "Quo Warranto," § 49.

In Alabama, under Code (1896), § 3428, quo warranto is a civil action, and the complaint must aver the act or omission complained of concisely and clearly, and if faulty in that respect it is demurrable. State *v.* Matthews, (1907) 45 So. 307.

Negativing exception.— It may be necessary to allege facts to negative an exception made by the law, which the court would otherwise presume to be applicable to the case, and which would render lawful the acts complained of. Bishop *v.* State, 149 Ind. 223, 48 N. E. 1038, 63 Am. St. Rep. 270, 39 L. R. A. 278.

Specific allegations as controlling general allegations.— If the complaint, besides making general allegations which, standing alone, would be sufficient, specifies the particular facts claimed to show usurpation or other illegality, and these do not amount to a cause of action, the entire pleading is bad. People *v.* Los Angeles, 133 Cal. 338, 65 Pac. 749; People *v.* Goodrich, 180 N. Y. 522, 72 N. E. 1148 [*affirming* 92 N. Y. App. Div. 445, 87 N. Y. Suppl. 114].

83. Welchel *v.* State, 76 Ga. 644.

84. State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405.

85. Hepler *v.* People, 226 Ill. 275, 80 N. E. 759; Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405.

86. People *v.* Riverside, 66 Cal. 288, 5 Pac. 350; Enterprise *v.* State, 29 Fla. 128, 10 So. 740. See also People *v.* Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085, holding that in a proceeding in quo warranto prosecuted by the state to exclude a reclamation district and the persons claiming to constitute it from all corporate rights, it is sufficient to allege the ultimate fact that defendants are exercising the franchise without authority of law, and the complaint is not defective in not alleging specifically the acts constituting the usurpation.

But where an independent school-district encroached on other districts, a quo warranto petition to vacate the same on that ground, failing to show how or to what extent the interference existed, whether it was not assented to by a majority of the inhabitants of the district encroached upon, and that relators or others would be inconvenienced by reason thereof, is insufficient. State *v.* Buchanan, 37 Tex. Civ. App. 325, 83 S. W. 723.

87. State *v.* Tipton, 109 Ind. 73, 9 N. E. 704, where the proceeding was based on the ground that a census was not taken as required, and that a majority of the votes cast were not in favor of the incorporation of the town, and it was held that the information should contain an allegation to that effect, it being insufficient to state that a majority of the legal voters did not vote in favor, etc.; that if the report of the election officials was false or incorrect, such fact should be alleged, and also that the officials did not do their duty and make a suitable record as required by law, since in the absence of such allega-

and it should appear from the information that relator did not vote in favor of the organization or otherwise concur in the proceedings, else the information will be bad on demurrer.[88] If the object of the information is to restrain the unlawful exercise of powers by a municipality whose existence is admitted, the fact of the incorporation of defendant should be stated so as to show its legality and powers.[89] A drainage district organized through the action of a quasi-judicial body, and so not subject to quo warranto, except on the ground of fraud, may yet be attacked by quo warranto if the information shows that a fact essential to be found was not considered or passed upon in the organization of the district.[90]

c. In Proceedings Relating to Public Office. An information to try defendant's right to an office should show that the office legally exists and is of a public nature,[91] and is within the jurisdiction of the court.[92] If the occupant of the office has no title, but is a mere usurper, it is sufficient to allege generally that defendant is in possession without lawful authority,[93] or that he has usurped the

tions the record of the officials would be presumed to be correct, and would be conclusive as to the facts it purports to state.

88. State *v.* Tipton, 109 Ind. 73, 9 N. E. 704.

89. State *v.* Anderson, 26 Fla. 240, 8 So. 1, holding, however, that the fact of incorporation under a general law therefor was shown by alleging that the town "is a municipal corporation, duly incorporated under the laws of the State of Florida, and pursuant to the statutes of the State of Florida in that behalf and was such municipal incorporation" on the specified date when the illegal act was done.

90. People *v.* McDonald, 208 Ill. 638, 70 N. E. 646.

91. Hedrick *v.* People, 221 Ill. 374, 77 N. E. 441, where, in a proceeding to try title to the office of "Chief Sanitary Inspector" of a city, an information which alleged merely that the office was created by a certain ordinance which authorized the commissioner of health to appoint a "medical sanitary inspector" and "such other employees as may be necessary," not specifying a "chief sanitary inspector," was held not sufficient to show the existence of the office.

Nature of office to try title to which quo warranto lies see *supra*, III, B, 1, b.

If the office exists by virtue of a private law, the information must set up the existence of such law by proper averments. Minck *v.* People, 6 Ill. App. 127.

That the office existed at the date charged as the commencement of the usurpation need not be alleged if the information states that the office was created by the municipal board, and is now existing, and that defendant is exercising its functions without warrant of law. Beverly *v.* Hattiesburg, 83 Miss. 621, 36 So. 74.

Within scope of statute.— Such allegations must be made as will bring the case within the provisions of the statute defining the scope of quo warranto against public officers. Stultz *v.* State, 65 Ind. 492.

The value of an office, on inquiry into the holder's right thereto, may be alleged as is the value of any tangible thing, without giving the details making up the aggregate. Little *v.* State, 75 Tex. 616, 12 S. W. 965.

Information not demurrable, although indefinite.—An information may be sufficient to withstand a demurrer, although the facts are stated in such general and indefinite terms that a motion to make more specific and certain would be granted. Barrett *v.* State, 112 Ind. 322, 13 N. E. 677; Jones *v.* State, 112 Ind. 193, 13 N. E. 416; People *v.* Nolan, 10 Abb. N. Cas. (N. Y.) 471, 63 How. Pr. 271 (holding that the complaint need not state the specific facts in support of a general allegation that the relator was elected to the office by the greatest number of votes; but if it appears that defendant is ignorant of the facts on which the claim is founded, a bill of particulars will be ordered); State *v.* Kearn, 17 R. I. 391, 32 Atl. 322, 1018 (where an information was held sufficient on demurrer, which averred that a large number of ballots were fraudulent cast, all being for respondents, without stating that enough illegal ballots were cast to affect the result).

92. Little *v.* State, 75 Tex. 616, 12 S. W. 965.

93. *Alabama.*— Jackson *v.* State, 143 Ala. 145, 42 So. 61; Lee *v.* State, 49 Ala. 43.

California.— People *v.* Woodbury, 14 Cal. 43.

Florida.— Simonton *v.* State, 44 Fla. 289, 31 So. 821.

Indiana.— State *v.* Peele, 121 Ind. 495, 22 N. E. 654, holding that the general assembly having no power to elect the chief of a bureau, an election by it is void; and an information by a relator, an appointee of the governor, which alleges that there is a vacancy in the office, that defendant usurped the office and illegally holds possession of it; that the governor appointed the relator, who is eligible and entitled to the office, is sufficient, and a demurrer thereto should be overruled.

Kansas.— State *v.* Nelson, (1908) 96 Pac. 662.

Michigan.— Taggart *v.* James, 73 Mich. 234, 41 N. W. 262, holding that an information which charges that the respondent holds, uses, and exercises the office of superintendent of the poor, and has done so for six months last past, without any legal election, appointment, warrant, or authority whatsoever, and has usurped, intruded into, and exer-

office.[94] An information filed at the instance of a private person to oust the incumbent and obtain possession of an office must state facts showing that the claimant is entitled to the office;[95] and, in addition to setting out relator's title, should specify the objections to defendant's title;[96] and if the objection is based upon illegal votes, or an illegal count, must set forth explicitly such illegality or error, general allegations being insufficient.[97] In the statement of a claim that defendant's term

cised the said office, and still does so usurp, intrude into, and unlawfully exercises the same, sufficiently charges intrusion into and usurpation of the office to sustain the suit.

New Jersey.— State *v.* Riordan, (Sup. 1908) 69 Atl. 494.

See 41 Cent. Dig. tit. "Quo Warranto," § 51.

94. Frost *v.* State, (Ala. 1907) 45 So. 203; Thompson *v.* Moran, 44 Mich. 602, 7 N. W. 180; People *v.* Miller, 15 Mich. 354; People *v.* Goodrich, 92 N. Y. App. Div. 445, 87 N. Y. Suppl. 114 [*affirmed* in 180 N. Y. 522, 72 N. E. 1148] (holding, however, that although general allegations in quo warranto that defendants have usurped and unlawfully held office are sufficient, standing alone, to state a cause of action, where the complaint further states the specific facts constituting the alleged unlawful holding, and these are insufficient to state a cause of action, the entire pleading is insufficient); Com. *v.* Young, 2 Pearson (Pa.) 163. But see Lavalle *v.* People, 68 Ill. 252 (where an information was held too general and indefinite which charged that defendant was unlawfully executing the duties and exercising the powers of supervision of the village of C, and that he had so executed the duties and exercised the powers of supervision and had enjoyed the emoluments thereof, but did not charge that he had intruded into or usurped the office, nor specify in what way he unlawfully executed the duties and exercised the powers of the office); State *v.* Messmore, 14 Wis. 115 (holding that the complaint should state the facts constituting the usurpation).

95. *Florida.*— State *v.* Kennerly, 26 Fla. 608, 8 So. 310.

Indiana.— State *v.* Bell, 169 Ind. 61, 82 N. E. 69, 13 L. R. A. N. S. 1013; State *v.* Hyde, 121 Ind. 20, 22 N. E. 644; State *v.* Long, 91 Ind. 351; Reynolds *v.* State, 61 Ind. 392.

Missouri.— State *v.* Boal, 46 Mo. 528.

Nebraska.— State *v.* Hamilton, 29 Nebr. 198, 45 N. W. 279; State *v.* Stein, 13 Nebr. 529, 14 N. W. 481.

Ohio.— State *v.* Johnson, 28 Ohio Cir. Ct. 793.

See 41 Cent. Dig. tit. "Quo Warranto," § 51.

Oath or bond.— If the law requires a person elected to office to take an oath or file a bond, before entering upon the discharge of his duties, an information in quo warranto is fatally defective if it fails specifically to allege compliance with such requirements. Carlson *v.* People, 118 Ill. App. 592; State *v.* Wheatley, 160 Ind. 183, 66 N. E. 684.

Residence.— If a candidate for office is required to be a resident of the district for which he is elected, an information does not state a cause of action unless it alleges that the relator was a resident of the district as prescribed by law. State *v.* Cook, 39 Oreg. 377, 65 Pac. 89. See also State *v.* Hœflinger, 35 Wis. 393.

Title of relator.— Where the respondent's right to hold the office depends upon the validity of the relator's election to the office, under a provision that the officer shall hold until his successor is elected and duly qualified, it is the relator's title which is in issue, and he must show a legal title and a compliance with all the requirements of law necessary to entitle him to the office *de jure*, and an allegation that the relator had "a majority of all the votes as it appears by the returns of" the election officers is insufficient, not being equivalent to an unqualified allegation that he has a majority of all the votes. State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657.

That relator was a citizen of the county and entitled to the office of county treasurer is sufficient as against a general demurrer as to the relator's qualifications, and the information is good if it states that the relator received a majority of the ballots of the qualified voters, without specifying facts constituting their qualifications. Fowler *v.* State, 68 Tex. 30, 3 S. W. 255.

That relator was duly elected has been held a sufficient allegation of his title to the office. People *v.* Miles, 2 Mich. 348; State *v.* Sherman, 42 Mo. 210; People *v.* McIntyre, 10 Mont. 166, 25 Pac. 100.

96. State *v.* Price, 50 Ala. 568.

97. State *v.* Lewis, 51 Conn. 113; Collins *v.* Huff, 63 Ga. 207; Davis *v.* State, 75 Tex. 420, 12 S. W. 957; State *v.* Zuehlke, 133 Wis. 677, 114 N. W. 120; State *v.* Raisler, 133 Wis. 672, 114 N. W. 118. But see State *v.* Palmer, 24 Wis. 63, holding that it was not necessary in quo warranto where the complaint alleged that a certain number of illegal votes had been cast for defendant, for the complaint also to state the names of the alleged illegal voters.

If the court orders relator to file a bill of particulars setting forth specified facts regarding the alleged illegal votes, and such order is complied with, defendant cannot demand another order for a further bill of particulars of other facts. People *v.* Teague, 106 N. C. 576, 11 S. E. 665.

Want of legal notice of an election under which defendant claims an office may be alleged in general terms. The information need not aver want of knowledge on the part of the electors. If they had such knowledge so as to render harmless the lack of legal notice, it is a matter of defense for respondent to estab-

expired and that relator was duly elected to succeed him, the information must show clearly when the term commenced and the length thereof.[98] A petition to oust the incumbent of an office, when presented on behalf of the state by the attorney-general, need not set forth the name of a claimant to the office, as this is necessary only where the claimant's rights are to be passed upon by the court;[99] nor need it show that relator is entitled to the office,[1] but the interest of relator in the suit should appear.[2] A petition to oust the possessor of an office on the ground that he is not qualified should specify wherein he is disqualified,[3] and if an office-holder for any cause has incurred a forfeiture of his office, the facts should be so stated in the information as to show as a legal consequence that defendant's right to the office has terminated.[4]

d. In Proceedings Relating to Corporate Franchise, or Office — (i) *OUSTER AND FORFEITURE OF FRANCHISE.* An information to determine the right of a corporation to a franchise claimed to be illegally exercised is sufficient if it sets forth the franchise and calls upon defendant to show by what authority the franchise is exercised;[5] but a petition which attempts to specify the ground on which it is based should not be equivocal, but should show whether a usurpation or a forfeiture is claimed,[6] and if based on a usurpation, the information should not be open to the construction that it admits the incorporation of defendant.[7] In a proceeding to oust a corporation *de facto*, its existence as such being admitted or charged, the defects in the proceedings for its organization must be set out distinctly,[8] and to forfeit a charter because of misuser of the corporate franchise or powers, the complaint or information should allege clearly and dis-

lish. State *v.* Carroll, (R. I. 1892) 24 Atl. 106.

98. State *v.* Bell, 116 Ind. 1, 18 N. E. 263; People *v.* Carrique, 2 Hill (N. Y.) 93, holding that, as the removal of an officer appointed by the governor and senate can only be effected through the direct action upon an express recommendation of removal by the governor, an allegation that the governor, by and with the consent of the senate, appointed another in the place of such officer, is not equivalent to an averment of his having been removed.

99. People *v.* Ryder, 12 N. Y. 433; State *v.* Heinmiller, 38 Ohio St. 101.

1. People *v.* Bingham, 82 Cal. 238, 22 Pac. 1039. But see People *v.* Murray, 70 N. Y. 521 [*reversing* 8 Hun 577].

Where the relator in such an action joins with the state as plaintiff, and the complaint states a good cause of action in favor of the state, a demurrer on the ground that it does not show the other plaintiff entitled to the office is bad. State *v.* Palmer, 24 Wis. 63.

2. People *v.* Ryder, 12 N. Y. 433; State *v.* Vann, 118 N. C. 3, 23 S. E. 952.

3. *Ex p.* Bellows, 1 Mo. 115; *In re* Wood, 26 U. C. Q. B. 513.

4. State *v.* Hixon, 27 Ark. 398; People *v.* Shorb, 100 Cal. 537, 35 Pac. 163, 38 Am. St. Rep. 310; Com. *v.* De Turk, 6 Pa. Co. Ct. 94, holding, however, that where the ground of alleged disqualification appears by the information, it is not necessary that it should be stated, in terms, that the offices are incompatible.

5. People *v.* Central Union Tel. Co., 232 Ill. 260, 83 N. E. 829; State *v.* Missouri Pac. R. Co., 206 Mo. 28, 103 S. W. 936; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; Com. *v.* Commercial Bank, 28 Pa. St. 383; Com. *v.* Steelton Mut. Relief Assoc., 7 Del. Co. (Pa.) 430.

Interest of relator.— Under a statute allowing a person having an interest to bring quo warranto against a corporation, the interest of the relator must be shown by allegations of fact, and not merely stated as a conclusion. State *v.* Ireland, 130 Ind. 77, 29 N. E. 396.

Jurisdiction.—An information against persons acting as a corporation must allege that they have so acted within the state, else the court will have no jurisdiction of the alleged offense. State *v.* Kingan, 51 Ind. 142.

6. Louisville, etc., R. Co. *v.* State, (Ala. 1907) 45 So. 296; People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92. See also People *v.* Ravenswood, etc., Turnpike, etc., Co., 20 Barb. (N. Y.) 518, holding that where a complaint alleged that the corporation had omitted to perform specified acts essential to its existence as a corporation, and that since it had acted as a corporation it had violated its charter, the complaint was good, containing but one subject-matter, namely, the right of the corporation to continue to exercise certain franchises.

7. People *v.* Volcano Canyon Toll-Road Co., 100 Cal. 87, 34 Pac. 522, holding, however, that an averment that "for more than six months last past the defendant has had no franchise," is not an admission of the existence of such franchise prior to the period mentioned.

8. People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92; State *v.* Bethlehem, etc., Gravel Road Co., 32 Ind. 357.

tinctly the illegal acts constituting such misuser.[9] Similarly, specific facts should be clearly stated if a forfeiture is asked on account of non-user of franchises or omission of a statutory duty such as the making of reports,[10] and it should be alleged when and where the corporation was incorporated.[11]

(II) *Ouster From Corporate Office.* An information for usurping an office in a private corporation should show that the usurpation is of a corporate office, and that the offense is of a nature which concerns the public.[12] Unless the corporation is one whereof the court will take judicial notice, its organization must be shown by alleging compliance with all the requisite forms of law.[13]

3. Plea or Answer — a. In General. Under the common-law practice the defense to a quo warranto information is by plea, and not in the form of an answer,[14] only one plea being allowed to be filed as of right; [15] but very generally throughout the United States informations of quo warranto may be met by answer in like manner as complaints in other actions.[16] Matter of inducement is not traversable, and as to it the plea should be silent.[17] A defendant charged with exercising powers and franchises without authority of law must either disclaim or justify,[18] and to show title, so as to justify, a complete right on defendant's part must be disclosed; [19] but individuals charged with claiming and using the franchise of being a body corporate need not in their plea deny the claim, a denial of the user of the franchise being sufficient.[20] Upon an information attacking the organization of an

9. *Alabama.*— Louisville, etc., R. Co. *v.* State, (1907) 45 So. 296.

California.— People *v.* San Francisco Public Stock Exch., (1893) 33 Pac. 785; People *v.* Dashaway Assoc., 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117; People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92.

Mississippi.— Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602.

Missouri.— State *v.* Talbot, 123 Mo. 69, 27 S. W. 366.

New York.— People *v.* Milk Exch., 133 N. Y. 565, 30 N. E. 850.

North Carolina.— Atty.-Gen. *v.* Petersburg, etc., R. Co., 28 N. C. 456.

Texas.— State *v.* Southern Pac. R. Co., 24 Tex. 80.

See 41 Cent. Dig. tit. "Quo Warranto," § 52.

Wilful violation.—An information which seeks to forfeit the franchises of defendant must aver that the non-compliance with its charter was wilful on the part of the corporation. State *v.* Columbia, etc., Turnpike Co., 2 Sneed (Tenn.) 254.

Many causes of forfeiture, if not contradictory, may be alleged as grounds in one information (State *v.* Milwaukee, etc., R. Co., 45 Wis. 579); but if several contradictory illegal acts are charged in one paragraph of a complaint against a corporation, the paragraph is bad (State *v.* Foulkes, 94 Ind. 493).

10. People *v.* New York City Cent. Underground R. Co., 21 N. Y. Suppl. 373; State *v.* Southern Pac. R. Co., 24 Tex. 80.

11. Crawfordsville, etc., Turnpike Co. *v.* Fletcher, 104 Ind. 97, 2 N. E. 243; Covington, etc., Plank-Road Co. *v.* Van Sickle, 18 Ind. 244; Danville, etc., Plank-Road Co. *v.* State, 16 Ind. 456.

Averment as to corporate existence.— In quo warranto to dissolve a corporation, the organization of defendant under the laws of the state cannot be presumed, but must be distinctly alleged. State *v.* Citizens' Gas, etc., Min. Co., 151 Ind. 505, 51 N. E. 1067.

12. Gunton *v.* Ingle, 11 Fed. Cas. No. 5,870, 4 Cranch C. C. 438. See also People *v.* Paisley, 81 Ill. App. 52.

In a contest for offices in a church corporation it is sufficient to allege that the claimants were duly elected, qualified, and acting trustees, and that defendants had wrongfully usurped the authority of trustees and taken charge of the property and excluded the claimants therefrom. Creek *v.* State, 77 Ind. 180; St. Stephen Church Cases, 11 N. Y. Suppl. 671, 25 Abb. N. Cas. 253.

13. People *v.* De Mill, 15 Mich. 164, 93 Am. Dec. 179.

14. People *v.* Percells, 8 Ill. 59.

A petition for leave to file an information does not require an answer or plea; if an answer be filed, it is of no more effect than a simple oral statement of the grounds of defense. People *v.* Mineral Marsh Drainage Dist., 193 Ill. 428, 62 N. E. 225.

15. People *v.* Jones, 18 Wend. (N. Y.) 601.

16. See cases cited *infra*, notes 17–23.

17. People *v.* Gary, 196 Ill. 310, 63 N. E. 749.

18. Holden *v.* People, 90 Ill. 434; Illinois Midland R. Co. *v.* People, 84 Ill. 426.

19. Ham *v.* State, (Ala. 1908) 47 So. 126; Jackson *v.* State, 143 Ala. 145, 43 So. 61; Enterprise *v.* State, 29 Fla. 128, 10 So. 740; People *v.* Heidelberg Garden Co., 233 Ill. 290, 84 N. E. 230 [*affirming* 124 Ill. App. 331] (holding, however, that it is not proper for a plea to anticipate a matter which should come from the other side); People *v.* Central Union Tel. Co., 232 Ill. 260, 83 N. E. 829; Clark *v.* People, 15 Ill. 213; Com. *v.* Cross Cut R. Co., 53 Pa. St. 62.

20. People *v.* Thompson, 16 Wend. (N. Y.) 655.

alleged municipal corporation, the plea must set out all facts necessary to show a legal incorporation.[21] An information in quo warranto is sufficiently answered by a plea which sets out all material facts relative to the questions properly raised by the information;[22] but a plea is insufficient if it contains nothing upon which a material issue can be formed, and in such case judgment may be rendered on the record, without any evidence being introduced.[23]

b. In Proceedings Relating to Public Office. Upon an information to oust the occupant of an office defendant may disclaim holding the office;[24] but if he does not he must justify by setting out in his plea all the facts necessary to establish a lawful right to the office.[25] The plea should show expressly that defendant had

21. West End *v.* State, 138 Ala. 295, 36 So. 423; People *v.* Burns, 212 Ill. 227, 72 N. E. 374; Soule *v.* People, 205 Ill. 618, 69 N. E. 22; Mason *v.* People, 185 Ill. 302, 56 N. E. 1069.

A plea setting up an estoppel must show that the events alleged to constitute the estoppel occurred before the filing of the information, or it will be demurrable. Hallock Tp. Dist. No. 7 *v.* People, 75 Ill. App. 539.

22. People *v.* Gary, 196 Ill. 310, 63 N. E. 749; State *v.* Cincinnati, 23 Ohio St. 445, holding that where the information charges defendant with usurping certain franchises by acting through other parties, the only issue is as to the authority of defendant, and that there is no issue involving the authority of the other parties, not derivable from defendant, but exercised by them in their own right.

23. Whelchel *v.* State, 76 Ga. 644; People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64; People *v.* Northern R. Co., 42 N. Y. 217; Com. *v.* Shepp, 10 Phila. (Pa.) 518.

A specific denial of each and every allegation contained in the information, except such as are specifically admitted by the plea, is a good denial. People *v.* Reid, 11 Colo. 138, 17 Pac. 302. But see West End *v.* State, 138 Ala. 295, 36 So. 423.

24. People *v.* Crawford, 28 Mich. 88; Com. *v.* Shepp, 10 Phila. (Pa.) 518.

25. *Alabama.*— Newman *v.* State, (1905) 39 So. 648.

Colorado.— People *v.* Horan, 34 Colo. 304, 86 Pac. 252, holding that a quo warranto proceeding cannot be converted into a statutory election contest, and that it is not a proper defense for respondent to allege defects in relator's title, as he might do in the statutory contest, but that he must show the facts as to his own title.

Florida.— Buckman *v.* State, 34 Fla. 48, 15 So. 697, 24 L. R. A. 806; State *v.* Anderson, 26 Fla. 240, 8 So. 1; State *v.* Gleason, 12 Fla. 190.

Illinois.— Massey *v.* People, 201 Ill. 409, 66 N. E. 392; McPhail *v.* People, 160 Ill. 77, 43 N. E. 382, 52 Am. St. Rep. 306; Catlett *v.* People, 151 Ill. 16, 37 N. E. 855 (where the corporate existence of an alleged village was attacked, and the plea was that the place was duly incorporated as a town, and that its name was thereafter changed from "town" to "village"; and the plea was held demurrable for failing to allege a legal change of incorporation from town to village); Crook *v.* People, 106 Ill. 237 (holding, however, that mere technical objections to the plea will be disregarded); Clark *v.* People, 15 Ill. 213.

Michigan.— People *v.* Crawford, 28 Mich. 88; People *v.* Van Clews, 1 Mich. 362, 53 Am. Dec. 69.

Nebraska.— State *v.* Tillma, 32 Nebr. 789, 49 N. W. 806.

New Jersey.— Davis *v.* Davis, 57 N. J. L. 203, 31 Atl. 218.

Canada.— Burroughs *v.* Barron, 30 L. C. Jur. 80, holding, however, that where defendant fails to set up the whole ground of his title and plaintiff does not demur the court may look at plaintiff's declaration to discover defendant's title.

See 41 Cent. Dig. tit. "Quo Warranto," § 54.

Not guilty, or non usurpavit, is not a good plea. State *v.* Saxon, 25 Fla. 342, 5 So. 801; Atty.-Gen. *v.* Foote, 11 Wis. 14, 78 Am. Dec. 689.

That the respondent was duly elected is a proper allegation, and if accompanied by other averments showing the time and place of election, that it was held pursuant to the authority of the charter and of the provisions of an act of the legislature, copies whereof are annexed, the plea will be held sufficient (Com. *v.* Gill, 3 Whart. (Pa.) 228); but alone, an allegation of due election is not enough (State *v.* Day, 14 Fla. 9. See also State *v.* Saxon, 25 Fla. 792, 6 So. 858).

That the election was held on the day required is a proper allegation, but its omission is not fatal if the plea names the day on which the election was to be held, avers the giving of notice as required by law, and that defendant was duly elected, as in such case it will be presumed the election was held at the time specified in the notice. People *v.* Gary, 196 Ill. 310, 63 N. E. 749.

An election contest decided in defendant's favor may be set out to show his title, and allegations of the various steps in such proceedings and of the result thereof constitute a good plea. Massey *v.* People, 201 Ill. 409, 66 N. E. 392; State *v.* Shay, 101 Ind. 36. See also Scales *v.* Faulkner, 118 Ga. 152, 44 S. E. 987.

If good title is shown by the plea, it is not objectionable because it neither denies nor confesses and avoids the material allegations of the information. People *v.* Keechler, 194 Ill. 235, 62 N. E. 525.

Defendant may set up several titles to the

all the qualifications necessary to the enjoyment of the office and in case a continued usurpation is alleged should set out the continuance as well as the original existence of such qualifications;[26] and it should appear that defendant accepted the office, and qualified by taking the proper oath and filing bond, or otherwise complied with the law's requirements.[27] A plea may be bad for duplicity,[28] or because it contains a negative pregnant,[29] or because of any other of the grounds upon which pleas at common law may be attacked.[30] While it is no answer to an information by the state to allege that relator is not entitled to the office,[31] or that the claimant is estopped to question defendant's title, by reason of an agreement between them to abide by the result of another suit involving their respective claims,[32] yet in proceedings begun by the claimant of the office, to enforce his private right, a plea is good which shows that the claimant's title is invalid.[33]

c. In Proceedings Relating to Corporate Franchise and Office. To a quo warranto charging an illegal exercise of corporate franchises, the plea should as a general rule be either of justification or a disclaimer,[34] and the plea of justification must contain allegations of all such facts as are necessary to show authority for the use of the franchises.[35] Where the complaint sets out facts establishing the ille-

office. People *v.* Stratton, 28 Cal. 382; State *v.* McDaniel, 22 Ohio St. 354.

26. People *v.* Owers, 29 Colo. 535, 69 Pac. 515; State *v.* Beecher, 15 Ohio 723.

The words of a statute prescribing the qualifications need not be adopted; the essential thing is to set up the facts. State *v.* Jones, 16 Fla. 306.

Averments of citizenship or of other qualifications are unnecessary if the plea shows that defendant has been formally declared elected. Atty.-Gen. *v.* McIvor, 58 Mich. 516, 25 N. W. 499.

27. State *v.* Phillips, 30 Fla. 579, 11 So. 922; Massey *v.* People, 201 Ill. 409, 66 N. E. 392 (holding, however, that it is unnecessary to allege the date when defendant was notified by the city clerk of his election, so that it might appear whether he took the oath of office within ten days thereafter as required by law, this being matter for replication which need not be anticipated by plea); People *v.* Gary, 196 Ill. 310, 63 N. E. 749; Simons *v.* People, 18 Ill. App. 588 (holding that the plea must show that the oath taken was the identical oath required by the constitution); State *v.* McCann, 88 Mo. 386; People *v.* McCallum, 1 Nebr. 182.

28. State *v.* Steer, 44 Mo. 233.

29. State *v.* Anderson, 26 Fla. 240, 8 So. 1; Com. *v.* Shepp, 10 Phila. (Pa.) 518; State *v.* McGarry, 21 Wis. 496.

30. Atty.-Gen. *v.* Parsell, 99 Mich. 381, 58 N. W. 335 (holding respondent's allegations of a malicious conspiracy on the part of the governor and others to oust him from his office to be impertinent and scandalous); Davis *v.* Davis, 57 N. J. L. 80, 30 Atl. 184 (where the plea merely denied a legal conclusion).

31. People *v.* Abbott, 16 Cal. 358; Lake *v.* State, 18 Fla. 501; Massey *v.* People, 201 Ill. 409, 66 N. E. 392; Clark *v.* People, 15 Ill. 213; Davis *v.* Davis, 57 N. J. L. 80, 30 Atl. 184; Edelstein *v.* Fraser, 56 N. J. L. 3, 28 Atl. 434.

32. State *v.* Bernoudy, 36 Mo. 279.

33. Vrooman *v.* Michie, 69 Mich. 42, 36 N. W. 749; People *v.* Hartwell, 12 Mich. 508, 86 Am. Dec. 70; Manahan *v.* Watts, 64 N. J. L. 465, 45 Atl. 813; Davis *v.* Davis, 57 N. J. L. 80, 30 Atl. 184.

Conclusion of plea.— On an information charging respondent with intruding into a public office, averring that an election to fill the office was held; that relator received a certain number of votes, and respondent a certain less number; and that relator was thereby elected, a plea that no election was held for the office and that no votes were cast for that purpose should conclude to the country and not with a verification. People *v.* Hartwell, 12 Mich. 508, 86 Am. Dec. 70.

34. Distilling, etc., Co. *v.* People, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200, where a plea was held demurrable which expressly admitted many of the allegations of the information, expressly denied the rest, and contained numerous affirmative allegations.

A disclaimer and plea of not guilty may be joined in one plea. State *v.* Brown, 34 Miss. 688.

That defendants are directors of the corporation, if stated by a plea, is an admission that they are also corporators, unless the latter fact is expressly denied. State *v.* Sherman, 22 Ohio St. 411.

35. State *v.* Brown, 33 Miss. 500; Com. *v.* Central Pass. R. Co., 52 Pa. St. 506.

A special charter contained in several acts of the legislature is properly recited in the answer. State *v.* Mississippi, etc., R. Co., 20 Ark. 495.

Conditions precedent to corporate existence, such as payment for a specified portion of the capital stock, must be complied with, and the plea must show such compliance, but it is unnecessary to plead performance of conditions subsequent. State *v.* Hancock, 2 Pennew. (Del.) 252, 45 Atl. 851.

Merger of corporations.— Where defendants seek to justify their use of corporate franchises by relying on the legality of a merger of other corporations into the one now claimed to exist, the plea must show that the original corporations were legally organized,

gality of the alleged corporation, such allegations must be specifically denied by the answer;[36] and such an answer by the individuals composing the corporation is good without any disclaimer or justification by the corporation itself.[37] In proceedings to forfeit defendant's charter for violation of a law against combinations, it may be pleaded that such law is unconstitutional.[38] A corporation charged with exercising certain powers without authority of law makes a *prima facie* defense by pleading its charter, by which the powers claimed were conferred *in præsenti*.[39] A plea which attempts to justify respondent's right to hold an office in a private corporation must set out his title specially, and show when and how he obtained the office.[40] If he relies on a right to hold over after the expiration of his term, the fact that at no time has any one been chosen to succeed him must be averred.[41]

4. Replication, Reply, and Subsequent Pleadings. It is proper for the information to charge a usurpation generally, and if defendant pleads in justification, to state in a replication causes of forfeiture or other matter in avoidance of the plea.[42] Thus in proceedings to test title to office, a plea showing defendant's election may be met with a replication that certain of the votes counted for him were void, and that without such votes defendant did not receive enough votes to entitle him to the office.[43] Where the question is as to the legality of the organization of a municipal corporation, the replication may properly impeach a record of the incorporation set up in the plea, and a denial of any jurisdictional fact

and so existed at the time of the merger, that they had the power to consolidate, and that the merger was by authority of the stockholders, in the manner prescribed by law. State *v.* Hancock, 2 Pennew. (Del.) 252, 45 Atl. 851.

The manner of election of defendants to corporate offices need not be averred, where their plea states that they are officers of the corporation, and the contest is as to the existence of such corporation. State *v.* Hancock, 2 Pennew. (Del.) 252, 45 Atl. 851.

36. People *v.* Lowden, (Cal. 1885) 8 Pac. 66, holding that a denial of legal conclusions is insufficient.

37. People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92.

38. State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363, holding that such a plea is an admission of the violation of the law, although there is a general denial of all allegations not admitted to be true.

39. Atty.-Gen. *v.* Michigan State Bank, 2 Dougl. (Mich.) 359, 43 Am. Dec. 455, holding further that additional allegations tending to show either a continued existence of the corporation down to the filing of the information, or that the state was estopped from insisting upon a forfeiture for causes which arose prior to a certain period, are surplusage.

40. Place *v.* People, 192 Ill. 160, 61 N. E. 354 [*affirming* 87 Ill. App. 527]; State *v.* Conklin, 34 Wis. 21.

Non-existence of the office may be pleaded by the occupant. McCall *v.* Webb, 125 N. C. 243, 34 S. E. 430.

41. People *v.* Phillips, 1 Den. (N. Y.) 388; Com. *v.* Gill, 3 Whart. (Pa.) 228.

42. *Illinois.*— People *v.* Kankakee R. Imp. Co., 103 Ill. 491.

Michigan.— Atty.-Gen. *v.* May, 97 Mich. 568, 56 N. W. 1035.

New Hampshire.— State *v.* Olcott, 6 N. H. 74.

New York.— People *v.* Niagara Bank, 6 Cow. 196.

Ohio.— State *v.* Pennsylvania, etc., Canal Co., 23 Ohio St. 121.

See 41 Cent. Dig. tit. "Quo Warranto," § 56.

But see State *v.* Messmore, 14 Wis. 115, where in a proceeding to remove a circuit judge it was held that the only pleadings allowable were a complaint and answer, and not a replication.

Several distinct causes of forfeiture may be set up in one replication without rendering the same bad for duplicity, as the single ultimate fact aimed at is a violation of corporate duty, relied on as ground of forfeiture of the charter. People *v.* Plymouth Plank Road Co., 31 Mich. 178; People *v.* Manhattan Co., 9 Wend. (N. Y.) 351.

The replication may admit the correctness of the averments of the plea except as to the one material fact, thus narrowing the issue to that point (Atty.-Gen. *v.* May, 97 Mich. 568, 56 N. W. 1035); but an information which admits the lawful incorporation of defendant cannot be followed by a replication attacking its validity, and such a replication would be demurrable as a departure from the information (Noel *v.* Aron, (Miss. 1891) 8 So. 647. See also State *v.* Weatherby, 45 Mo. 17).

Matters not presented on the application for leave to file the information are not properly set forth in a replication, and if inserted will be stricken out on motion. People *v.* Bristol, etc., Turnpike Road, 23 Wend. (N. Y.) 222.

43. Chicago *v.* People, 80 Ill. 496 (where, however, such a plea was held defective for failing to show that the result of the election was affected by the illegal votes); Atty.-Gen. *v.* May, 97 Mich. 568, 56 N. W. 1035.

tenders a material issue.[44] New matter, set up in a replication in confession and avoidance of a plea, is taken as confessed if not denied, hence it is sometimes necessary for defendant to file a rejoinder to protect his rights,[45] which may be a traverse of the replication,[46] or which may confess and avoid it.[47]

5. Signature and Verification.[48] An information filed by a public officer should have his official signature affixed;[49] but if the information was filed with the actual consent and in the name of such officer, and he appears to conduct the proceedings, the want of his signature will not sustain a motion to quash.[50] In accordance with the rule applicable to ordinary civil actions, neither an information in the nature of a quo warranto nor a plea thereto need be verified, unless a statute so requires;[51] but in some states statutes have been passed requiring the pleadings to be verified.[52]

6. Exhibits.[53] Although the information in an action of quo warranto may refer to written documents as the basis of its allegations, a failure to attach copies thereof is not ground for demurrer.[54] The information is not a pleading founded on a written instrument within the meaning of a statute requiring a copy of the instrument to be filed in such cases.[55]

7. Amendments to Pleadings.[56] The pleadings in quo warranto are subject to amendment, as in ordinary civil actions,[57] statutes relating to amendments in

44. People *v.* Gary, 196 Ill. 310, 63 N. E. 749.

45. State *v.* Taylor, 25 Ohio St. 279.

46. Com. *v.* Atlantic, etc., R. Co., 53 Pa. St. 9.

47. Swart *v.* Chippewa Cir. Judge, 119 Mich. 598, 78 N. W. 662; People *v.* Niagara Bank, 6 Cow. (N. Y.) 196, where the information charged usurpation of banking privileges by the respondent corporation, the plea set forth the act of incorporation and the organization of the bank thereunder, the replication was that the bank had become insolvent by the fraud and mismanagement of some of its officers, and had stopped payment and discontinued banking operations for several years, and the rejoinder was held sufficient which admitted the allegations of the replication, but averred that the bank had resumed payment on a certain date and had continued it ever since.

48. Signature and verification of pleadings generally see Pleading, 31 Cyc. 524 *et seq.*

49. Davis *v.* Best, 2 Iowa 96 (holding also that no other verification is necessary); State *v.* Taylor, 208 Mo. 442, 106 S. W. 1023; State *v.* Stevens, 29 Oreg. 464, 44 Pac. 898. But see State *v.* Campbell, 120 Mo. 396, 25 S. W. 392, holding that an information in quo warranto against a public officer is not so far criminal as to require signature by the prosecuting attorney.

50. Kane *v.* People, 4 Nebr. 509.

51. Jackson *v.* State, 143 Ala. 145, 42 So. 61; Atty.-Gen. *v.* McIvor, 58 Mich. 516, 25 N. W. 499. But see Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106, holding that relations or information in quo warranto should be verified, although this is not necessary by the terms of the statute, it having been the practice under similar statutes.

A quo warranto by the state, prosecuted by the attorney for the state, need not be verified. Davis *v.* Best, 2 Iowa 96; State *v.* Sullivan, 15 Ohio Cir. Ct. 477, 8 Ohio Cir. Dec. 346. See also Mathews *v.* State, 82 Tex. 577, 18 S. W. 711; Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106.

52. See the statutes of the several states; and the cases cited *infra*, this note.

An answer is sufficiently verified as required by statute when supported by an affidavit of all the defendants that all the statements therein were true so far as came within their own knowledge, and so far as derived from the information of others they believed them to be true. Whitehurst *v.* Jones, 117 Ga. 803, 45 S. E. 49. But see Harris *v.* Pounds, 66 Ga. 123, holding that a petition for quo warranto to test title to office should be supported by affidavits, which should be positive as to the facts showing the petitioner's title, although the allegations of usurpation by defendant may be made upon information and belief.

53. As to filing exhibits in actions generally see Pleading, 31 Cyc. 556 *et seq.*

54. Harris *v.* Pounds, 66 Ga. 123.

Matters contained in an exhibit may override averments in an amendment to the petition for quo warranto, as where the constitution of a benevolent society is made a part of the petition, and the amendment contains allegations as to the purposes for which the society was organized which differ from the purposes set forth in the constitution. State *v.* Nichols, 78 Iowa 747, 41 N. W. 4.

55. Yonkey *v.* State, 27 Ind. 236.

56. Amendment of pleadings generally see Pleading, 31 Cyc. 359 *et seq.*

57. *Florida.*— State *v.* Gleason, 12 Fla. 190.

Illinois.— McDonald *v.* People, 214 Ill. 83, 73 N. E. 444; Hinze *v.* People, 92 Ill. 406; Handy *v.* People, 29 Ill. App. 99.

Mississippi.— Kelly *v.* State, 79 Miss. 168, 30 So. 49, holding that it is proper to permit defendant, after the close of relator's proof of his title to the office involved, to amend his pleadings and to introduce evidence to show that certain votes for relator were cast by persons who were not qualified voters.

civil suits being generally held applicable to quo warranto.[58] Amendments may be as to form,[59] or as to substance;[60] but it is not permissible to set up, in an amendment, grounds essentially different from those alleged in the original information.[61] Matters of defense arising after defendant has made answer may be set up in a supplemental answer, or by plea *puis darrein continuance*.[62]

8. Demurrer.[63] The legal sufficiency of pleadings in quo warranto may be questioned by demurrer, the effect being in substance the same as in ordinary common-law actions.[64] Thus a demurrer is an admission of all facts well pleaded and of their legal effect;[65] and if an information would be sufficient, if uncontro-

Missouri.— State *v.* Job, 205 Mo. 1, 103 S. W. 493.

Pennsylvania.— Com. *v.* Gill, 3 Whart. 228.

Texas.— Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106.

England.— Rex *v.* Philips, 1 Burr. 292, 1 Ld. Ken. 331.

See 41 Cent. Dig. tit. "Quo Warranto," § 58.

Grounds for refusing leave to amend.— The same grounds that would induce the court to refuse leave to file an information may be good reason for refusing leave to amend, as where an information was filed by a private relator to try title to a public office which he claimed, and a demurrer was sustained thereto, and before leave to amend was given, the legislature terminated the relator's title. Van Riper *v.* Parsons, 40 N. J. L. 123, 29 Am. Rep. 210.

Adding verification by amendment.— If the original information is not verified, the court may permit the filing of an amended information, properly verified. Little *v.* State, 75 Tex. 616, 12 S. W. 965.

58. West End *v.* State, 138 Ala. 295, 36 So. 423; Davis *v.* State, 75 Tex. 420, 12 S. W. 957; State *v.* Baker, 38 Wis. 71.

59. State *v.* Baker, 38 Wis. 71, where the pleading filed by the attorney-general was not signed by him nor was it in the form of an information, and leave was given to change the form of the pleading and to sign the same.

60. Atty.-Gen. *v.* Page, 38 Mich. 286 (where failure to set forth clearly in a replication that the petition was defective was allowed to be remedied by amendment); Com. *v.* Swank, 79 Pa. St. 154 (where relator set out in the original petition the foundation of his title to the disputed office and an amendment was allowed averring his right to perform the duties and receive the fees of an office united therewith by statute); Com. *v.* West, 5 Pa. Co. Ct. 219 (where an averment that the occupant of the office of district attorney had not been admitted to practice in "some" county was amended by changing "some" to "any"); Gunton *v.* Ingle, 11 Fed. Cas. No. 5,870, 4 Cranch C. C. 438 (where it was held proper to allow an amendment of the information so as to show the fact that the offices alleged to be usurped were public offices).

The original information is not abandoned by filing an amendment, or a supplemental information, although the original was on relation and the other is not. Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106.

61. Davis *v.* State, 75 Tex. 420, 12 S. W. 957; Hunnicutt *v.* State, 75 Tex. 233, 12 S. W. 106.

62. U. S. *v.* Avery, 24 Fed. Cas. No. 14,481, Deady 204.

63. **Demurrer** generally see Pleading, 31 Cyc. 269 *et seq.*

64. State *v.* Saxon, 25 Fla. 342, 5 So. 801 (holding also that a motion to strike out is not a proper substitute for a demurrer); People *v.* Cooper, 139 Ill. 461 29 N. E. 872; State *v.* McGarry, 21 Wis. 496 (holding that a denial of matter of record upon information and belief is insufficient and the objection may be taken by general demurrer).

A demurrer searches the record, and if addressed to a plea, may be carried back to reach a defect in the information. Enterprise *v.* State, 29 Fla. 128, 10 So. 740; People *v.* Whitcomb, 55 Ill. 172; People *v.* Mississippi, etc., R. Co., 13 Ill. 66; Elam *v.* State, 75 Ind. 518.

That a defective copy of the information was served on defendant is not ground for demurrer where he was not misled thereby, and when, being in court otherwise, the service of the copy was not essential. People *v.* Miller, 15 Mich. 354.

Preference on calendar.— The argument of a demurrer will not be given a preference on the calendar, although the office sought is an annual one. Com. *v.* Sparks, 6 Whart. (Pa.) 416.

Issue on demurrer.— The only question in issue is the legal incorporation of defendant, on a joinder in demurrer to a plea of due incorporation. Atty.-Gen. *v.* McArthur, 38 Mich. 204.

Separate counts in the information must be considered independently of each other when a demurrer is interposed. People *v.* McDonald, 208 Ill. 638, 70 N. E. 646.

If defendant fails to stand by his demurrer when it is overruled, he can, on appeal, urge objections only which go to the cause of action. State *v.* Meek, 129 Mo. 431, 31 S. W. 913.

An information is not demurrable because the petition upon which leave was granted was not filed in the clerk's office before the information was filed. McDonald *v.* Alcona County, 91 Mich. 459, 51 N. W. 1114.

65. *Florida.*— Atty.-Gen. *v.* Connors, 27 Fla. 329, 9 So. 7.

Illinois.— People *v.* Heidelberg Garden Co., 233 Ill. 290, 84 N. E. 230 [*affirming* 124 Ill.

verted, to entitle plaintiff to the relief sought, upon overruling a demurrer thereto, judgment may be entered against defendant.[66] A demurrer filed may not be withdrawn and a plea presented as matter of right,[67] but time to plead will be allowed on overruling a demurrer interposed in good faith without intent to delay.[68] If a demurrer to a plea is sustained, judgment of ouster should be given,[69] and if overruled, and no leave is asked to traverse the plea or amend the information, final judgment is properly rendered for defendant.[70] If an information or plea is insufficient in any respect which might be cured by amendment, but the objection is not made by demurrer or otherwise, the defect will be deemed waived, and cannot be urged after trial and verdict.[71]

9. Motion to Quash or Dismiss. A motion to quash the writ may be made before pleading to the information,[72] and an information filed by a person having no right or authority to do so will be dismissed.[73] Such defects, however, as may be cured by amendment do not afford sufficient ground for sustaining the motion,[74]

App. 331]; People *v.* Gary, 196 Ill. 310, 63 N. E. 749. But see People *v.* Cooper, 139 Ill. 461, 29 N. E. 872, holding that facts not properly alleged in the information, because their rightful place is in the replication, are not admitted by a demurrer thereto.

Michigan.— People *v.* Michigan Sanitarium, etc., Assoc., 151 Mich. 452, 115 N. W. 423.

Missouri.— State *v.* Delmar Jockey Club, (1905) 92 S. W. 185.

New Jersey.—Edelstein *v.* Fraser, 56 N. J. L. 3, 28 Atl. 434.

Pennsylvania.— Com. *v.* Walter, 86 Pa. St. 15; Com. *v.* Primrose, 2 Watts & S. 407.

United States.— Boyd *v.* Nebraska, 143 U. S. 125, 12 S. Ct. 375, 36 L. ed. 103 [*reversing* 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602], holding that an information to oust respondent because he is not a citizen is sufficiently answered by showing that while respondent was a minor, his father completed his naturalization; and a demurrer to the answer admits the facts and the conclusion follows that respondent is a citizen.

See 41 Cent. Dig. tit. "Quo Warranto," § 57.

66. State *v.* Herndon, 23 Fla. 287, 2 So. 4. **Although a demurrer is sustained** as to the averments of the relator's right, this does not affect the judgment which ought to be rendered if the information sufficiently shows a usupation by defendant. State *v.* Price, 50 Ala. 568.

67. Bownes *v.* Meehan, 45 N. J. L. 189; Com. *v.* Walter, 86 Pa. St. 15 (where leave to answer over was refused it appearing that defendant could not be benefited by the leave sought); State *v.* Dousman, 28 Wis. 541 (where leave to answer over was refused, it appearing that the demurrer was filed merely as a means of delay and that there was danger that the term of office might expire before trial could be had).

68. Atty.-Gen. *v.* May, 97 Mich. 568, 56 N. W. 1035. **On overruling a special demurrer** for alleged defect of form, the judgment should be that respondent answer over, and a judgment of ouster should not be rendered. Com. *v.* Young, 2 Pearson (Pa.) 163.

69. State *v.* Herndon, 23 Fla. 287, 2 So. 4.

70. People *v.* Canty, 55 Ill. 33. **In a contest for office,** a demurrer to a plea that relator was not a qualified elector at the time of his election admits that fact and that therefore he was ineligible to office, and should be overruled (Andrews *v.* State, 69 Miss. 740, 13 So. 853); and where the plea was that an equal number of votes were cast for respondent and relator, and that on proceedings by lot before a deputy sheriff, under the statute, the respondent was chosen, and a demurrer, on the ground that only the sheriff in person had a right to cast the lot, having been overruled, the relator was not permitted to reply that votes cast for respondent were invalid (People *v.* Sutherland, 41 Mich. 177, 1 N. W. 927).

71. Bishop *v.* People, 200 Ill. 33, 65 N. E. 421. **Omission of the venue in an information** against a corporation for violation of its charter is cured by verdict. State Bank *v.* State, 1 Blackf. (Ind.) 267; State *v.* Meek, 129 Mo. 431, 31 S. W. 913; Com. *v.* McWilliams, 11 Pa. St. 61.

72. Capital City Water Co. *v.* State, 105 Ala. 406, 18 So. 62, 29 L. R. A. 743; Commercial Bank *v.* McCaa, 8 Sm. & M. (Miss.) 720 (holding, however, that a motion to quash is only regular when the defect appears on the face of the proceedings); Com. *v.* Dillon, 81* Pa. St. 41 (holding that the court will consider not only the legal questions involved, but also questions of the justice and propriety of the proceedings); Com. *v.* Graham, 64 Pa. St. 339; Com. *v.* De Turk, 6 Pa. Co. Ct. 94. But see Rex *v.* Edgar, 4 Burr. 2297. **Pleadings cannot be adjudged insufficient in point of law** upon a motion to quash or dismiss, a demurrer being the proper means of raising such a question. People *v.* Woodbury, 14 Cal. 43; Hathcock *v.* McGouirk, 119 Ga. 973, 47 S. E. 563; State *v.* McGarry, 21 Wis. 496.

73. Scott *v.* Clark, 1 Iowa 70 (where a writ of quo warranto, obtained by a private person without any statutory authority, was quashed by the court of its own motion upon learning the facts); State *v.* Seattle Gas, etc., Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

74. People *v.* Knight, 13 Mich. 230 (where

and if any count of the information is good and no sufficient answer is made, a dismissal will not be allowed.[75] After judgment for respondent on a demurrer, plaintiff cannot discontinue the suit without the consent of respondent,[76] nor can private persons who have appeared as relators withdraw from the proceeding as a matter of right.[77] If, however, a private relator disqualifies himself for the office which he sought to recover the action may be dismissed as for an abandonment by plaintiff.[78] A defendant is not entitled to a dismissal of an information charging him with usurpation merely because he files a renunciation of the office; judgment should be entered prohibiting him from interfering with the office.[79]

E. Evidence — 1. Burden of Proof.[80] In quo warranto by the state to test the right of the occupant to hold an office, the burden is, as a general rule, upon respondent to show a good legal title to the office by proof of all facts essential thereto, and not upon the state to prove that respondent has not a good title;[81] but with respect to those proceedings partaking more or less of the nature of quo warranto, brought by private relators to try title or recover possession of offices, public or corporate, the general rule is that relator must show good title in himself before he can inquire into the title of respondent.[82] Where the right to a corporate franchise is attacked, respondent must prove the existence of the franchise,[83] and

a person was named as relator without his authority, and the court directed an amendment by striking out the relator's name and denied a motion to dismiss the information); Com. *v.* Graham, 64 Pa. St. 339; Com. *v.* Commercial Bank, 28 Pa. St. 383; Com. *v.* Steelton Mut. Relief Assoc., 7 Del. Co. (Pa.) 430; Com. *v.* Bumm, 10 Phila. (Pa.) 340.

75. Grey *v.* Newark Plank Road Co., 65 N. J. L. 603, 48 Atl. 557.

76. Com. *v.* O'Donnell, Brightly (Pa.) 111.

77. Mathews *v.* State, 82 Tex. 577, 18 S. W. 711.

78. State *v.* Boyd, 34 Nebr. 435, 51 N. W. 964.

79. Atty.-Gen. *v.* Johnson, 63 N. H. 622, 7 Atl. 381.

80. Burden of proof generally see Evidence, 16 Cyc. 926.

81. *Alabama.*— State *v.* Foster, 130 Ala. 154, 30 So. 477.

Arkansas.— State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460; State *v.* Ashley, 1 Ark. 513.

Colorado.— Frisch *v.* Ard, 34 Colo. 66, 81 Pac. 247; People *v.* Stratton, 33 Colo. 464, 81 Pac. 245; People *v.* Owers, 29 Colo. 535, 69 Pac. 515.

Connecticut.— State *v.* Lashar, 71 Conn. 540, 42 Atl. 636, 44 L. R. A. 197.

Florida.— State *v.* Saxon, 25 Fla. 342, 5 So. 801.

Illinois.— Garms *v.* People, 108 Ill. App. 631; Latham *v.* People, 95 Ill. App. 528; Gorman *v.* People, 78 Ill. App. 385.

Michigan.— People *v.* Crawford, 28 Mich. 88; People *v.* Mayworm, 5 Mich. 146.

Nebraska.— State *v.* Davis, 64 Nebr. 499, 90 N. W. 232.

New York.— People *v.* Perley, 80 N. Y. 624; People *v.* Bartlett, 6 Wend. 422.

Pennsylvania.— Com. *v.* Hargest, 2 Dauph. Co. Rep. 409; Com. *v.* Lentz, 9 Northam. Co. Rep. 75; Com. *v.* Filer, 13 Pittsb. Leg. J. N. S. 286.

Tennessee.— State *v.* Allen, (Ch. App. 1900) 57 S. W. 182.

Utah.— State *v.* Beardsley, 13 Utah 502, 45 Pac. 569; People *v.* Jack, 4 Utah 438, 449, 11 Pac. 213; People *v.* Clayton, 4 Utah 421, 11 Pac. 206.

Wisconsin.— State *v.* Norton, 46 Wis. 332, 1 N. W. 22.

See 41 Cent. Dig. tit. "Quo Warranto," § 63.

But see State *v.* Trimkle, 70 Kan. 396, 78 Pac. 854, holding that where quo warranto is directed against a county attorney to remove him from office on account of his failure to prosecute violators of law, it is presumed that such officer acted in good faith, and the burden is on the state to show otherwise by a preponderance of evidence.

Possession of the office is not of itself evidence of a right thereto. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

Facts set out in a replication, if put in issue by a rejoinder, are required to be established by evidence produced by the state. State *v.* McDiarmid, 27 Ark. 176.

82. *Minnesota.*— State *v.* Oftedal, 72 Minn. 498, 75 N. W. 692.

Missouri.— State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

Nebraska.— State *v.* Davis, 64 Nebr. 499, 90 N. W. 232; State *v.* Moores, 52 Nebr. 634, 72 N. W. 1056.

New York.— People *v.* Perley, 80 N. Y. 624; People *v.* Lacoste, 37 N. Y. 192.

Ohio.— State *v.* Hay, Wright 96.

Pennsylvania.— Com. *v.* Filer, 13 Pittsb. Leg. J. N. S. 286.

Vermont.— State *v.* Hunton, 28 Vt. 594.

See 41 Cent. Dig. tit. "Quo Warranto," § 63.

But see State *v.* Saxon, 25 Fla. 342, 5 So. 801.

That plaintiff has the better title is not enough to warrant a judgment ousting the occupant and inducting plaintiff, but the latter must show not only the better title, but one which is of itself legally good. State *v.* Wheatley, 160 Ind. 183, 66 N. E. 684.

83. State *v.* Sharp, 27 Minn. 38, 6 N. W. 408.

the right to exercise it,[84] as well as facts showing compliance with all conditions precedent to the complete organization of the corporate body.[85] Where, however, the proceedings are based upon an abandonment or forfeiture of a franchise to which respondent had title, it has been held that the state must prove the facts charged as causing the forfeiture.[86]

2. Admissibility. The rules governing the admissibility of evidence in civil actions generally [87] apply to quo warranto proceedings,[88] and so parol evidence is inadmissible to show the appointment of an officer whose appointment is required by statute to be in writing.[89] In an action to try title to office ballots cast at the election are admissible in evidence;[90] and where the title to office of court clerk, under an appointment from a judge of the court, is attacked, a judgment in an action in which such justice was ousted from office is admissible in evidence as against the claimant.[91] In quo warranto proceedings to determine the validity of the incorporation of a village, evidence is admissible to show that the territory sought to be incorporated had not, at the time the petition for incorporation was filed, the requisite population.[92] As the forfeiture of a charter can be had only on public grounds it is proper for the court to consider testimony tending to show that one of the corporators procured the institution of the proceedings in bad faith and for private purposes.[93]

3. Weight and Sufficiency. In quo warranto proceedings questions as to the weight and sufficiency of evidence are governed by the rules relating to civil actions generally.[94] In an action to try title to office, the certificate of election is only *prima facie* evidence;[95] and in an action by the people to vacate a corporate

84. People *v.* Volcano Canyon Toll Road Co., 100 Cal. 87, 34 Pac. 522; Lyons, etc., Toll Road Co. *v.* People, 29 Colo. 434, 68 Pac. 275; Chicago City R. Co. *v.* People, 73 Ill. 541; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

85. McGahan *v.* People, 191 Ill. 493, 61 N. E. 418 (where in quo warranto to test the legality of the incorporation of a village, it was held that respondents must prove that the territory organized contained the required number of inhabitants); People *v.* Bruennemer, 168 Ill. 482, 48 N. E. 43; State *v.* Hogan, 163 Mo. 43, 63 S. W. 378.

Acts of directors in reincorporating, pursuant to statutory provisions, to perfect incomplete organizations, will be presumed to have been authorized by the members of the body, without proof of such authorization where it appears that thereafter the body acted as a corporation. State *v.* Steele, 37 Minn. 428, 34 N. W. 903.

86. State *v.* Haskell, 14 Nev. 209.

87. See Evidence, 16 Cyc. 821.

88. Ewing *v.* State, 81 Tex. 172, 16 S. W. 872, holding that in a proceeding in quo warranto to oust a mayor and councilmen of a city upon the ground that it was not legally incorporated in that it included territory not actually covered by the village from which it was incorporated, where the cause was tried before the court it was not error to admit in evidence a map showing the surface within the limits of the pretended corporation when it was admitted to be correct except as to portions designed to represent the area actually covered by the city.

That the statute creating the office is unconstitutional may be proved under a complaint which merely alleges that defendant unlawfully intrudes into and usurps the office. State *v.* Stevens, 20 Oreg. 464, 44 Pac. 898.

Where the issue is the legality of the election, evidence may be given of conversations and transactions previous to the election, if they were connected with, and might have an influence on it, although no previous notice thereof has been given. Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

89. State *v.* Meder, 22 Nev. 264, 38 Pac. 668.

90. State *v.* Shay, 101 Ind. 36, holding that the ballots actually cast may be shown in evidence and also the indorsement made by the inspector of elections upon a bag containing the ballots.

The certificate of commissioners appointed to recount ballots cast at the election for a township trustee is competent evidence in quo warranto proceedings to test the title to the office. State *v.* Shay, 101 Ind. 36.

91. People *v.* Anthony, 6 Hun (N. Y.) 142.

92. Poor *v.* People, 142 Ill. 309, 31 N. E. 676; Kamp *v.* People, 141 Ill. 9, 30 N. E. 680, 33 Am. St. Rep. 270.

93. State *v.* Wood, 13 Mo. App. 139.

94. See, generally, Evidence, 17 Cyc. 753.

Evidence held sufficient to show a user of the office in a proceeding to oust defendant from the office of county school commissioner see State *v.* Meek, 129 Mo. 431, 31 S. W. 913. To justify the application for a writ of quo warranto to test the right of a member of a city common council to a seat in that body see Com. *v.* Meeser, 44 Pa. St. 341.

95. Magee *v.* Calaveras County, 10 Cal. 376; State *v.* Shay, 101 Ind. 36; Com. *v.* Reno, 25 Pa. Co. Ct. 442.

charter, the certificate of an official inspector that defendant has performed a particular duty according to the statute is not conclusive of that fact.[96]

F. Trial — 1. Scope of Inquiry and Powers of Court — a. Trial of Right to Corporate Franchise. In an action against an individual for exercising unlawfully an office in a municipality, not only the question of the legal existence of the office, but that of the corporation itself, may be tried and decided;[97] but if a proceeding to oust defendant from exercising corporate franchises is adjudged against defendant, the court has no power to determine that there has never been a *de facto* corporation, or that its acts under color of its supposed charter are void.[98] Where a state sues to oust a foreign corporation, the action of the proper officials in refusing respondent's application for a license to transact business in the state, will not be reviewed.[99] The constitutionality of a statute may be properly decided in a proceeding to test an alleged corporate franchise granted under such statute.[1]

b. Trial of Title to Public Office. In quo warranto as to one's authority to exercise an office, the court may determine whether defendant has the qualifications expressly required by the constitution or statute,[2] and if illegality in his election is charged, the validity of the election may be examined in all respects concerning the office involved, and the ballots may be inspected and counted.[3] If a forfeiture is claimed by reason of facts arising subsequent to a valid election, the court may inquire thereinto and give judgment according to its findings, although misconduct is charged which constitutes a criminal offense of which defendant has not been convicted.[4] In adjudging the right to hold public office, the court considers only the title, and there is no adjudication of official rights;[5] and, conversely, if the purpose is to determine the right of an officer to exercise a particular function, the legality of his election is not subject to inquiry.[6] Where respondent's

96. People *v.* Waterford, etc., Turnpike Co., 3 Abb. Dec. (N. Y.) 580, 2 Keyes 327.

97. State *v.* Coffee, 59 Mo. 59; People *v.* Carpenter, 24 N. Y. 86.

Incidental questions arising with the main question of corporate existence may likewise be passed upon. McDonald *v.* People, 214 Ill. 83, 73 N. E. 444 (where a finding by commissioners for the organization of a drainage district, that lands affected were all in one township, was held not conclusive); Ewing *v.* State, 81 Tex. 172, 16 S. W. 872 (holding that boundaries of a city, organized under a general law, may be inquired into in a proceeding to oust respondent from acting as mayor of the alleged city). But see People *v.* Waite, 213 Ill. 421, 72 N. E. 1087, holding that judicial action in connection with the organization of municipal corporations is not a proper subject of inquiry in quo warranto.

98. Society Perun *v.* Cleveland, 43 Ohio St. 481, 3 N. E. 357.

The intention of corporators, in good faith to carry out the purposes of the organization, cannot be examined in quo warranto. State *v.* Beck, 81 Ind. 500.

99. State *v.* Kansas Natural Gas Co., 71 Kan. 785, 81 Pac. 506.

Annulling contracts of foreign corporation. — Contracts of a foreign corporation, made within the state, cannot be annulled in quo warranto to oust defendant from exercising its franchise in the state. State *v.* American Book Co., 65 Kan. 847, 69 Pac. 563.

1. Atty.-Gen. *v.* Perkins, 73 Mich. 303, 41 N. W. 426.

2. People *v.* Woodbury, 14 Cal. 43; Brady *v.* Howe, 50 Miss. 607; Royall *v.* Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335.

3. *Colorado.*— People *v.* Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444.

Indiana.— State *v.* Shay, 101 Ind. 36.

New York.—People *v.* McCausland, 54 How. Pr. 151.

North Carolina.— Baxter *v.* Ellis, 111 N. C. 124, 15 S. E. 938, 17 L. R. A. 382.

Texas.— State *v.* Owens, 63 Tex. 261.

Wisconsin.— State *v.* Meilike, 81 Wis. 574, 51 N. W. 875; State *v.* Pierpont, 29 Wis. 608; State *v.* Tierney, 23 Wis. 430; Atty.-Gen. *v.* Barstow, 4 Wis. 567; Atty.-Gen. *v.* Ely, 4 Wis. 420.

See 41 Cent. Dig. tit. "Quo Warranto," § 68.

In Missouri ballots cannot be inspected in quo warranto proceedings, nor can the qualifications of electors be inquired into, the statutory method of contesting elections being exclusive. State *v.* Francis, 88 Mo. 557; State *v.* Mason, 77 Mo. 189; State *v.* Vail, 53 Mo. 97.

4. State *v.* Trinkle, 70 Kan. 396, 78 Pac. 854; Com. *v.* Walter, 83 Pa. St. 105, 24 Am. Rep. 154; Com. *v.* Allen, 70 Pa. St. 465. But see State *v.* Lingo, 26 Mo. 496.

5. State *v.* Broatch, 68 Nebr. 687, 94 N. W. 1016, 110 Am. St. Rep. 477. See also State *v.* Tunstall, 145 Ala. 477, 40 So. 135.

6. Com. *v.* Kempsmith, 13 Pa. Co. Ct. 667.

Inquiry limited to matters charged.— Where the affidavits offered in support of an application for quo warranto touched only the matter of the election of respondent to office, the court could not consider whether he was holding illegally because of being a

title rests on an appointment, the court will not go back of the power of appointment to inquire into the title of the appointing officer,[7] nor into his reasons and motives for making the appointment.[8] Matters which are merely collateral will not be investigated.[9]

2. Mode of Trial.[10] Issues of fact in quo warranto are properly submitted to a jury for trial,[11] and in original proceedings in the supreme court, a reference may be had to the circuit court of the county where the controversy arose, for the trial of specified issues.[12] On the trial before a jury, the right to open and close lies with the party who has the burden of proof.[13] Instructions to the jury should be given in accordance with the rules governing instructions in ordinary actions.[14]

G. New Trial.[15] A new trial may be granted in quo warranto proceedings, upon the same grounds and on the same showing as in civil actions generally.[16] A new trial will not be granted where it appears at the time of the motion that the term of the office which is being litigated has expired,[17] and, if a new trial is sought on the ground of newly discovered evidence, it must be shown that the newly discovered evidence is of such a character as to seriously affect the result.[18] A new trial will not be granted on the ground that the verdict is against the evidence, unless the impropriety of the verdict is clearly shown.[19]

H. Judgment and Enforcement Thereof — 1. Propriety and Validity. The judgment in quo warranto will be determined by the purpose of the proceedings and the issues and proof. A judgment of ouster from the franchise or office involved is proper when it is made to appear that defendant's use or occupancy is illegal.[20]

contractor with the town and thereby disqualified under the prevailing statute. Reg. *v.* Kirk, 24 Nova Scotia 168.

7. State *v.* Horton, 19 Nev. 199, 8 Pac. 171.

The jurisdiction of the appointing body may be examined in proceedings to oust the appointee. State *v.* McClymon, 7 Ohio Dec. (Reprint) 109, 1 Cinc. L. Bul. 116.

8. State *v.* Adams, 2 Stew. (Ala.) 231.

9. State *v.* Gleason, 12 Fla. 190.

A statute collaterally involved cannot be attacked as unconstitutional. People *v.* Nelson, 133 Ill. 565, 27 N. E. 217; People *v.* Whitcomb, 55 Ill. 172.

10. **Constitutional right to trial by jury** in quo warranto proceeding see Juries, 24 Cyc. 129.

11. Latham *v.* People, 95 Ill. App. 528; State *v.* Allen, 5 Kan. 213; Merritt *v.* State, 42 Tex. Civ. App. 495, 94 S. W. 372; State *v.* McDonald, 108 Wis. 8, 84 N. W. 171, 81 Am. St. Rep. 878.

If the facts are conceded, there is nothing for a jury to try, and judgment should be given on the pleadings. State *v.* Wilson, 121 N. C. 425, 28 S. E. 554.

A special verdict may be had as to particular material facts. Washington, etc., Turnpike Road *v.* State, 19 Md. 239; State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

12. People *v.* Plymouth Plank Road Co., 32 Mich. 248; People *v.* Koppelkom, 16 Mich. 61; People *v.* Cicott, 15 Mich. 326. But see People *v.* Sackett, 15 Mich. 315, where the supreme court refused to frame special issues to be tried by a jury on a claim for damages in quo warranto proceedings as the prevailing statute had established another form of proceeding.

13. Atty.-Gen. *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; People *v.* Platt, 117 N. Y. 159, 22 N. E. 937 [*affirming* 50 Hun 454, 3 N. Y. Suppl. 367].

14. Elston, etc., Gravel Road Co. *v.* People, 96 Ill. 584.

Instructions in actions generally see Trial.

15. See, generally, New Trial, 29 Cyc. 707.

16. People *v.* Plymouth Plank Road Co., 32 Mich. 248 (holding that the motion for a new trial should be made at the same term that the report of the trial is filed, where there is ample time to make it before the close of the term); People *v.* Sackett, 14 Mich. 243 (holding that the practice not being provided for either by statute or rule of court is governed by that of the common law); Rex *v.* Francis, 2 T. R. 484.

17. State *v.* Tudor, 5 Day (Conn.) 329, 5 Am. Dec. 162.

18. People *v.* Sackett, 14 Mich. 320.

19. People *v.* Sackett, 14 Mich. 243, holding also that where an issue has been sent to the circuit court for trial by jury, on motion for new trial in the supreme court, the evidence therein should not only be incorporated in the report, but the judge should also express his opinion thereon for the guidance of this court; and the parties should have an opportunity of appearing before the judge, for the purpose of settling the report, which should be as full, for the purpose of enabling the parties to raise the legal questions, as would be necessary in a bill of exceptions.

20. Reed *v.* Cumberland, etc., Canal Corp., 65 Me. 132; State *v.* Atchison, etc., R. Co., 38 Nebr. 437, 57 N. W. 20; Hammer *v.* State, 44 N. J. L. 667.

Ouster is the proper judgment against the occupant of an office who is disqualified, although there is no opposing claimant (Peo-

The state is entitled to such a judgment against defendants who default and fail to appear or answer, without making proof of the facts set out in the information,[21] but if defendants appear and plead, issues of fact or law must be taken and a trial thereof had, before the court will be authorized to enter judgment.[22] A judgment will not be vitiated by including in it recitals of matters not in issue, as such recitals may be rejected as surplusage.[23]

2. Scope and Extent of Relief. In proceedings against corporations, the court may enter judgment of ouster as to the corporate franchise, or merely as to particular powers;[24] and if the corporation is dissolved, the court may order incidentally that the officers shall no longer exercise the functions of their offices.[25] On judgment of ouster from an office, a fine may be imposed upon defendant;[26] but unless the usurpation was wilful and without color of right, the amount will be nominal, merely, or the fine will be omitted altogether.[27] When granting relief against one exercising a public office, the court will go no further under its common-law powers than to oust the wrongful possessor of the office and will not give possession thereof to the relator or any other person;[28] but it is very generally provided by statute that in addition to a judgment of ouster of the holder of the

ple *v.* Howlett, 94 Mich. 165, 53 N. W. 1100); or although the usurpation charged is not continued to the time of trial (Hammer *v.* State, 44 N. J. L. 667; Rex *v.* Williams, W. Bl. 93); or where a foreign corporation alleges by a supplemental answer that it has withdrawn from the state, and tenders the cost of the proceedings (State *v.* New York Mut. L. Ins. Co., (Kan. 1898) 51 Pac. 881).

21. Place *v.* People, 83 Ill. App. 84 (where a demurrer to defendant's plea was sustained, and he declined to plead further, whereupon judgment was entered); People *v.* Robertson, 27 Mich. 116; State *v.* McCann, 88 Mo. 386; State *v.* Kearn, 17 R. I. 391, 22 Atl. 322, 1018.

In California proof must be made to sustain a judgment in case of default. Searcy *v.* Grow, 15 Cal. 117. See also People *v.* Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92.

If relator asks to be installed in the office, evidence in support of his claim will be required. Atty.-Gen. *v.* Barstow, 4 Wis. 567.

The petition must set out all the material facts in order to justify a judgment by default. State *v.* American Eclectic Medical College, 6 Ohio Dec. (Reprint) 844, 8 Am. L. Rec. 422.

The New Jersey statute relating to the service of summons on corporations in personal actions, and to judgment by default in such cases, does not apply to quo warranto proceedings to oust a corporation from the exercise of its franchise. Atty.-Gen. *v.* Delaware, etc., R. Co., 38 N. J. L. 282.

22. Paul *v.* People, 82 Ill. 82; State *v.* Brown, 34 Miss. 688 (holding that, although a disclaimer is filed, if a plea of not guilty is filed also, the state must prove the charges denied by such plea before it is entitled to judgment); Com. *v.* Sparks, 6 Whart. (Pa.) 416.

23. Schaefer *v.* People, 20 Ill. App. 605.

24. State *v.* Portland Natural Gas, etc., Co., 153 Ind. 483, 53 N. E. 1089, 74 Am. St. Rep. 314, 53 L. R. A. 413; State *v.* Old Town Bridge Corp., 85 Me. 17, 26 Atl. 947; Malone *v.* New York, etc., R. Co., (Mass. 1908) 83 N. E. 408; People *v.* Rensselaer Ins. Co., 38 Barb. (N. Y.) 323, holding that a judgment that the alleged company has no legal existence should extend to the receiver of such company, to prohibit his future action and institution of suits as receiver, but not to interfere with pending suits.

25. State *v.* Bradford, 32 Vt. 50.

26. Davis *v.* Davis, 57 N. J. L. 203, 31 Atl. 218.

27. *Michigan.*— Atty.-Gen. *v.* James, 74 Mich. 733, 42 N. W. 167.

Missouri.— State *v.* Bernoudy, 36 Mo. 279; State *v.* McAdoo, 36 Mo. 452.

New Jersey.—Bownes *v.* Meehan, 45 N. J. L. 189.

New York.— St. Stephen Church Cases, 11 N. Y. Suppl. 671, 25 Abb. N. Cas. 253.

Rhode Island.— State *v.* Kearn, 17 R. I. 391, 22 Atl. 322, 1018; State *v.* Brown, 5 R. I. 1.

See 41 Cent. Dig. tit. "Quo Warranto," § 71.

28. *Colorado.*— People *v.* Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444.

Maryland.— Harwood *v.* Marshall, 9 Md. 83.

Massachusetts.— *In re* Strong, 20 Pick. 484.

Michigan.— People *v.* Connor, 13 Mich. 238.

New Mexico.—Albright *v.* Territory, 13 N. M. 64, 79 Pac. 719.

Ohio.— Gano *v.* State, 10 Ohio St. 237.

Pennsylvania.— Respublica *v.* Wray, 3 Dall. 490, 1 L. ed. 692.

Rhode Island.— State *v.* Lane, 16 R. I. 620, 18 Atl. 1035.

See 41 Cent. Dig. tit. "Quo Warranto," § 71.

The delivery of books pertaining to the office, by the ousted occupant to the relator, is not a matter that can lawfully be adjudged in quo warranto. Albright *v.* Territory, 13 N. M. 64, 79 Pac. 719. But see People *v.* Livingston, 80 N. Y. 66.

office, relator may be installed upon a clear showing that he is entitled to the office,[29] and the statutes sometimes allow a judgment to be rendered for damages against respondent for loss of fees or salary to relator by reason of being deprived of the office.[30] A judgment awarding an office to the claimant may include its franchises, privileges, and emoluments.[31]

3. Effect and Enforcement. The legal effect of a judgment of ouster against a person in possession of an office is to determine that he is not entitled to the office and to oust him at once, so that any subsequent acts as such officer will be invalid;[32] but ouster of the occupant does not of itself adjudge the right to the office to the claimant.[33] A judgment against defendant because his term has expired will not prevent his continuing to act until a successor is qualified, as provided by statute,[34] and an adjudication of the right of a claimant to an office for a specified time does not determine the right of a successor to the office holding by appointment from the same authority for a different term.[35] A writ of mandamus may be issued as final process in the nature of an execution, to enforce a judgment in quo warranto as to plaintiff's right to office.[36]

I. Review of Proceedings[37]**—1. In General.** The practice in reviewing judgments in quo warranto proceedings is governed by the rules of the common law in all respects not regulated by statute.[38] A review of the judgment may be

29. See the statutes of the several states. And see the following cases:

California.— People *v.* Bauvard, 27 Cal. 470.

Colorado.— People *v.* Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444.

Florida.— State *v.* Herndon, 23 Fla. 287, 2 So. 4.

Kansas.— State *v.* Cobb, 2 Kan. 32.

New York.— People *v.* Tobey, 153 N. Y. 381, 47 N. E. 800.

Texas.— McAllen *v.* Rhodes, 65 Tex. 348; State *v.* Owens, 63 Tex. 261.

See 41 Cent. Dig. tit. "Quo Warranto," § 71.

30. See the statutes of the several states. And see the following cases:

Kansas.— Rule *v.* Fait, 38 Kan. 765, 18 Pac. 160.

Michigan.— People *v.* Sackett, 15 Mich. 315.

New York.— People *v.* Nolan, 101 N. Y. 539, 5 N. E. 446. But see People *v.* Snedeker, 3 Abb. Pr. 233.

North Carolina.— McCall *v.* Webb, 126 N. C. 760, 36 S. E. 174, holding that, although the statute allows a recovery of fees and emoluments received by defendant during his unlawful occupancy of the office, plaintiff by omitting to ask for a reference to ascertain the same, is not precluded from proceeding by a proper action to recover them.

Ohio.— Palmer *v.* Darby, 4 Ohio S. & C. Pl. Dec. 48, 2 Ohio N. P. 401, holding that under a statute allowing a recovery of damages for usurpation of office, no recovery can be had for attorney's fees and expenses of the action.

Wisconsin.— State *v.* Pierce, 35 Wis. 93.

See 41 Cent. Dig. tit. "Quo Warranto," § 71.

31. Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

32. State *v.* Johnson, 40 Ga. 164.

It is a contempt of court for an officer to continue to exercise an office after a judgment in quo warranto that he was guilty of usurpation thereof and that another person was entitled thereto. State *v.* Cahill, 131 Iowa 286, 108 N. W. 453. But see State *v.* Johnson, 40 Ga. 164.

33. Allen *v.* Patterson, 85 Ill. App. 256; Taylor *v.* Com., 3 J. J. Marsh. (Ky.) 401. But see Welch *v.* Cook, 7 How. Pr. (N. Y.) 282, holding that on rendition of a judgment of ouster, the person entitled thereto becomes invested with the office the moment he qualifies.

If relator has qualified before judgment of ouster against the occupant, the judgment places him in immediate possession of the office, and process to effect that result is unnecessary. State *v.* Wilson, 121 N. C. 480, 28 S. E. 554.

34. State *v.* Smith, 17 R. I. 415, 22 Atl. 1020.

35. State *v.* Broatch, 68 Nebr. 687, 94 N. W. 1016, 110 Am. St. Rep. 477.

36. Com. *v.* Masonic Home, 6 Pa. Dist. 732, 20 Pa. Co. Ct. 465, holding also that a decree for such writ cannot be affirmed on appeal where the original judgment in quo warranto on which it was based has been reversed since the appeal from the decree was taken. See also Mandamus, 26 Cyc. 353 *et seq.*

37. See, generally, Appeal and Error, 2 Cyc. 474.

38. People *v.* Sackett, 14 Mich. 243; Reg. *v.* Seale, 5 E. & B. 1, 1 Jur. N. S. 593, 24 L. J. Q. B. 221, 3 Wkly. Rep. 414, 85 E. C. L. 1.

A plea in abatement of an appeal by relator on the ground that since the appeal was taken by defendant he had made no claim to the office and relator had been put in possession of the same, was overruled where it appeared that relator had recovered the office by procuring the summary removal of defendant. State *v.* Pinkerman, 63 Conn. 176, 28 Atl. 110, 22 L. R. A. 653.

obtained by appeal or writ of error;[39] but, although a technical error may have occurred in the proceedings, the judgment will not be disturbed if on the whole case the court concludes that such error was immaterial or not prejudicial to the appellant.[40] Under a statute specifying the time within which an appeal shall be taken, the appeal must be taken within the prescribed time, or the appellate court will have no jurisdiction.[41] The death of a defendant who has appealed from a judgment ousting him from office because of misconduct operates to abate the appeal and there can be no substitution of the successor in office.[42]

2. Who May Appeal. Either defendant or relator may appeal from a judgment in a quo warranto proceeding to try title to office;[43] but a person not holding or claiming the office cannot appeal,[44] and if the action be to dissolve a corporation a private relator cannot appeal from a judgment in favor of the corporation.[45]

3. Effect of Appeal on Judgment — Appeal-Bond. In the absence of any statutory provision to the contrary, a judgment of ouster is not suspended or annulled by an appeal therefrom;[46] but in some states it is provided by statute that proceedings upon the judgment shall be stayed pending an appeal upon the filing of a bond.[47] An appeal-bond need not be given by the state.[48]

4. Presentation and Reservation of Grounds For Review.[49] A transcript of the record of the trial court must be filed upon appeal,[50] including a bill of excep-

If the attorney-general has granted his fiat for a writ of error to issue, the court will not interfere, the fiat being conclusive. Reg. *v.* Clarke, 7 Wkly. Rep. 601.

39. Pollock *v.* People, 1 Colo. 83; Watkins *v.* Venable, 99 Va. 440, 39 S. E. 147.

In Canada there is no appeal to the supreme court in quo warranto, from a decision of the court of queen's bench for Lower Canada, appeal side. Walsh *v.* Heffernan, 14 Can. Sup. Ct. 738.

Whether the position involved is an office will not be inquired into on appeal, unless the question was considered on the trial. Ptacek *v.* People, 194 Ill. 125, 62 N. E. 530.

That the relator has not the necessary interest to bring the proceeding may be first urged on a motion to dismiss an appeal. State *v.* Vann, 118 N. C. 3, 23 S. E. 932.

If the information does not state a cause of action, the objection may be raised by motion for a rehearing of the appeal. State *v.* Moores, 58 Nebr. 285, 78 N. W. 529.

40. *Alabama.*— Montgomery *v.* State, 107 Ala. 372, 18 So. 157.

California.— People *v.* Campbell, 138 Cal. 11, 70 Pac. 918.

Illinois.— People *v.* Cooper, 139 Ill. 461, 29 N. E. 872; People *v.* McFall, 124 Ill. 642, 17 N. E. 63 [*affirming* 26 Ill. App. 319].

Michigan.— People *v.* Every, 38 Mich. 405.

Missouri.— State *v.* Mansfield, 99 Mo. App. 146, 72 S. W. 471; State *v.* Fasse, (App. 1903) 71 S. W. 745.

See 41 Cent. Dig. tit. "Quo Warranto," § 73.

41. State *v.* Baine, 131 Ala. 176, 31 So. 18; International, etc., R. Co. *v.* State, 75 Tex. 356, 12 S. W. 685; Fontaine *v.* State, 69 Tex. 510, 6 S. W. 816.

42. State *v.* Gower, 73 Nebr. 304, 102 N. W. 674.

43. People *v.* Bruennemer, 168 Ill. 482, 48 N. E. 43.

From an ex parte order refusing a writ the proposed defendant cannot appeal. Watkins *v.* Venable, 99 Va. 440, 39 S. E. 147.

44. State *v.* Mount, 21 La. Ann. 177.

An officer holding over until his successor qualifies has no such interest in the suit of the contestants for the office as to give him a right of appeal. Guilbeau *v.* Détiège, 32 La. Ann. 909.

45. State *v.* Douglas County Road Co., 10 Oreg. 198.

46. People *v.* Stephenson, 98 Mich. 218, 57 N. W. 115; Welch *v.* Cook, 7 How. Pr. (N. Y.) 282; State *v.* Wilson, 121 N. C. 480, 28 S. E. 554; Olmstead *v.* Distilling, etc., Co., 73 Fed. 44.

Supersedeas or stay of proceedings upon appeal see, generally, Appeal and Error, 2 Cyc. 885 *et seq.*

47. See the statutes of the several states. And see People *v.* Campbell, 138 Cal. 11, 70 Pac. 918; Pollock *v.* People, 1 Colo. 83 (holding that where a bond is prescribed but its conditions are not indicated, the court may allow an appeal without the execution of a bond, although in its discretion terms relating to the subject-matter of the controversy might be prescribed); Simonton *v.* State, 43 Fla. 351, 32 So. 809; State *v.* Knight, 82 Wis. 151, 50 N. W. 1012, 51 N. W. 1137.

Necessity for bonds on appeal generally see Appeal and Error, 2 Cyc. 818 *et seq.*

48. State *v.* Broach, (Tex. Civ. App. 1896) 35 S. W. 86.

49. **Requisites and proceedings for transfer of cause upon appeal** generally see Appeal and Error, 2 Cyc. 789 *et seq.*

50. People *v.* Robertson, 27 Mich. 116; State *v.* Alt, 26 Mo. App. 673.

The time for filing the transcript of record may be limited by a rule of court to a period less than that prescribed by statute as the limit in all appeals. White *v.* Rowlett, 12 Tex. Civ. App. 378, 34 S. W. 151.

If the record is defective in that it is ambiguous as to the date set for appearance and as to the date of default, a judgment based

tions showing the evidence and the rulings of the court, so that the appellate court may be properly advised of all material facts,[51] and matters not shown by the bill of exceptions or records will not be considered by the appellate court.[52]

J. Costs and Security Therefor.[53] In England, under the statute of Anne and subsequent acts passed thereon, costs have generally been allowed to the successful party upon a judgment of ouster from office,[54] and this practice is followed in many of the states;[55] but a state prosecutor appearing as relator is not liable for costs,[56] and if an officer disclaims or resigns upon application for the writ the costs will not, as a general rule, be assessed against him.[57] A private relator must file a bond for costs if required by statute;[58] but no bond need be furnished by a state officer who actually brings and conducts the suit.[59]

thereon will be reversed. Planters', etc., Bank *v.* State, 12 Ala. 657.

51. Western, etc., R. Co. *v.* State, 69 Ga. 524; People *v.* Beaver Drainage Dist. No. 3, 235 Ill. 278, 85 N. E. 215; Cooley *v.* Ashley, 43 Mich. 458, 5 N. W. 659; People *v.* Sackett, 14 Mich. 243.

An agreed statement of facts may be submitted if consented to by the attorney-general, where he appeared in the action, but cannot be considered without his consent. People *v.* Moliter, 23 Mich. 341; People *v.* Pratt, 15 Mich. 184.

52. People *v.* Campbell, 138 Cal. 11, 70 Pac. 918; State *v.* Stevens, 29 Oreg. 464, 44 Pac. 898.

53. See, generally, COSTS, 11 Cyc. 1.

54. Reg. *v.* Greene, 4 Q. B. 646, 6 Jur. 896, 11 L. J. Q. B. 281, 45 E. C. L. 646; Rex *v.* Amery, 1 Anstr. 178, 1 Rev. Rep. 533, 2 Bro. P. C. 336, 2 T. R. 515, 1 T. R. 575, 1 Eng. Reprint 981; Lloyd *v.* Reg., 2 B. & S. 656, 31 L. J. Q. B. 209, 6 L. T. Rep. N. S. 610, 10 Wkly. Rep. 625, 110 E. C. L. 656; Rex *v.* Lewis, 2 Burr. 780, 2 Ld. Ken. 497; Reg. *v.* Dudley, 4 Jur. 915; Ballard *v.* Halliwell, 65 L. J. Q. B. 332; Rex *v.* Downes, 1 T. R. 453. But see Rex *v.* McKay, 5 B. & C. 640, 8 D. & R. 393, 11 E. C. L. 619; Reg. *v.* Morgan, 26 L. T. Rep. N. S. 790.

55. See the statutes of the several states. And see the following cases:

Alabama.— Jackson *v.* State, 143 Ala. 145, 42 So. 61.

Arkansas.— *Ex p.* Ashley, 3 Ark. 63.

California.— People *v.* Campbell, 138 Cal. 11, 70 Pac. 918, holding that costs were properly charged against a party who intervened in quo warranto proceedings wherein judgment was finally given for relator.

Illinois.— People *v.* Pike, 197 Ill. 449, 64 N. E. 393.

Iowa.—Hull *v.* Eby, 123 Iowa 257, 98 N. W. 774.

New York.— People *v.* Clute, 52 N. Y. 576 (where relator was held to be entitled to costs against defendant who was ousted from the office in controversy, although the judgment also determined that relator was not the lawful holder of the office); People *v.* Ballou, 12 Wend. 277 (where directors of a corporation against which judgment of ouster was pronounced were held individually liable for costs).

Texas.— Hussey *v.* Heim, 17 Tex. Civ. App. 153, 42 S. W. 859, holding that the successful party should recover costs of his adversary, as quo warranto to try title to office is a civil action, being prosecuted by the claimant against the occupant, through private counsel, and the district attorney taking no part therein except to sign the information.

Vermont.— State *v.* Bradford, 32 Vt. 50.

See 41 Cent. Dig. tit. "Quo Warranto," § 74.

Double costs should not be allowed in quo warranto. People *v.* Adams, 9 Wend. (N. Y.) 464. See also People *v.* Flagg, 25 Barb. (N. Y.) 652.

If there is no relator in the proceedings, it has been held that the occupant of an office, although ousted should not be ordered to pay costs. Com. *v.* Woelper, 3 Serg. & R. (Pa.) 52; *Ex p.* Shick, 1 Leg. Gaz. (Pa.) 62.

On discharge of a rule to show cause why a writ should not issue, costs should not be allowed defendant (Com. *v.* Athearn, 3 Mass. 285), unless the statute so provides (People *v.* Mineral Marsh Drainage Dist., 193 Ill. 428, 62 N. E. 225).

56. Houston *v.* Neuse River Nav. Co., 53 N. C. 476.

57. State *v.* Bradford, 32 Vt. 50; Reg. *v.* Moreton, 4 Q. B. 146, 3 G. & D. 400, 7 Jur. 85, 12 L. J. Q. B. 123, 45 E. C. L. 146; Rex *v.* Holt, 2 Chit. 366, 18 E. C. L. 680; Reg. *v.* May, 15 Jur. 129, 20 L. J. Q. B. 268, 2 L. M. & P. 144; Reg. *v.* Earnshaw, 22 L. J. Q. B. 174; Reg. *v.* Newcombe, 15 Wkly. Rep. 108. But see Reg. *v.* Hartley, 3 E. & B. 143, 18 Jur. 623, 2 Wkly. Rep. 159, 77 E. C. L. 143.

58. Lee *v.* State, 49 Ala. 43; Taylor *v.* State, 31 Ala. 383.

New security is not required after an amendment whereby the name of the informant is inserted as plaintiff, when security was given on filing the information. West End *v.* State, 138 Ala. 295, 36 So. 423.

Where the relator is very poor, and there is strong ground of suspicion that he is applying not on his own account or at his own expense, but in collusion with a stranger, the court will require security for costs (Rex *v.* Wakelin, 1 B. & Ad. 50, 8 L. J. K. B. O. S. 366, 20 E. C. L. 393); but the court will not stay proceedings until the prosecutor gives security for costs on the ground that the relator is in insolvent circumstances, where it appears that he is an incorporator and no fraud is suggested (Rex *v.* Wynne, 2 M. & S. 346, 15 Rev. Rep. 273).

59. Simonton *v.* State, 44 Fla. 289, 31 So.

QUUM DE LUCRO DUORUM QUÆRATUR, MELIOR EST CAUSA POSSIDENTIS. A maxim meaning "When the question is as to the gain of two persons, the title of the party in possession is the better one." [1]

QUUM DUÆ INTER SE REPUGNANTIA REPERIANTUR IN TESTAMENTO, ULTIMA RATÆ EST. A maxim meaning "Where there are two repugnant clauses in a will, the last clause shall prevail." [2]

QUUM IN TESTAMENTO AMBIGUE AUT ETIAM PERPERAM SCRIPTUM EST, BENIGNE INTERPRETARI ET SECUNDUM ID QUOD CREDIBLE EST COGITATUM, CREDENDUM EST. A maxim meaning "When in a will an ambiguous or even an erroneous expression occurs, it should be construed liberally and in accordance with what is thought the probable meaning of the testator." [3]

QUUM PRINCIPALIS CAUSA NON CONSISTIT NE EA QUIDEM QUÆ SEQUUNTUR LOCUM HABENT. A maxim meaning "When the principal cause does not hold its ground, neither do the accessories find place." [4]

QUUM QUOD AGO NON VALET UT AGO, VALEAT QUANTUM VALERE POTEST. A maxim meaning "When what I do is of no force as to the purpose for which I do it, let it be of force to as great a degree as it can." [5]

Q. V. An abbreviation of "*quod vide*," used to refer a reader to the word, chapter, etc., the name of which it immediately follows. [6]

R. In the signatures of royal persons, an abbreviation for "*rex*" (king) or "*regina*" (queen.) [7] Also, in signatures of land, an abbreviation for "range." [8]

RACE. A tribe people or nation, belonging or supposed to belong to the same stock or lineage. [9] (Race: As Affecting Status, see ALIENS, 2 Cyc. 81; CITIZENS, 7 Cyc. 132; CIVIL RIGHTS, 7 Cyc. 158; INDIANS, 22 Cyc. 109. As Subject of Discrimination — Constitutional Prohibition, see CONSTITUTIONAL LAW, 8 Cyc. 1048, 1073; Criminal Proceedings, see CIVIL RIGHTS, 7 Cyc. 177. As Subject of Evidence — Opinion Evidence, Based on Physical Condition, see EVIDENCE, 17 Cyc. 87 note 61; Relevancy of Evidence of Negro Descent, see EVIDENCE, 16 Cyc. 1133 notes 33, 34; Reputation as to, see EVIDENCE, 16 Cyc. 1133. As Subject of Slander by Imputation of Negro Blood in White Person, see LIBEL AND SLANDER, 25 Cyc. 225. Of Parties, as Affecting Marriage or Right to Marry, see MARRIAGE, 26 Cyc. 846; MISCEGENATION, 27 Cyc. 798. Of Witness as Affecting Credibility, see WITNESSES. Whether Involved in Definition of Term "Citizen," see CITIZENS, 7 Cyc. 135.)

RACE FIELD. A term held to include a field with race tracks upon it occasionally used for racing, though not often, and only with the owner's permission, at a time when horses are being run there for purposes of training only, and bets are being made on their running. [10] (See RACING.)

RACE MEETING. A term which as used in a statute prohibiting such meetings within certain periods of time has been held broad enough to embrace all persons, corporations, companies, and associations, whether the same that have held races previously within the inhibited time or different ones. [11] (See RACING.)

RACEWAY. A technical term in hydraulics, meaning, an artificial canal dug in the earth, leading from the dam of a stream to the machinery which it draws,

821 (holding also that where the attorney-general instituted proceedings in his own name, to oust respondent from a public office, and to try the right of a claimant thereof, the claimant is not required to give bond for costs); State *v.* Sullivan, 15 Ohio Cir. Ct. 477, 8 Ohio Dec. 346.

1. Black L. Dict. [*citing* Dig. 50, 17, 126, 2].

2. Morgan Leg. Max. [*citing* Tayler L. Gloss.].

3. Bouvier L. Dict. [*citing* Dig. 34, 5, 24; Broom Leg. Max.].

4. Bouvier L. Dict. [*citing* Dig. 50, 17, 129, 1; Broom Leg. Max.; 1 Pothier Obl. 413].

5. Black L. Dict. [*citing* 1 Vent. 216].

6. Black L. Dict.

7. Black L. Dict.

8. Kile *v.* Yellowhead, 80 Ill. 208, 210; Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164, 167, 32 N. W. 315 (where the abbreviation is said to be almost universally used in Iowa and generally understood in this sense); Hunt *v.* Smith, 9 Kan. 137, 153.

9. Black L. Dict.

10. Com. *v.* Wilson, 9 Leigh (Va.) 648, 649, so holding within the meaning of a statute to prohibit unlawful gaming.

11. State *v.* Roby, 142 Ind. 168, 193, 41 N. E. 145, 51 Am. St. Rep. 174, 33 L. R. A. 213.

and also to a similar watercourse leading from the bottom of a water wheel.[12] (Raceway: As Property Passing by Deed of Mill, see MILLS, 27 Cyc. 512 note 29. See also WATERS.)

RACING. Of horses, held to be a game, within all the mischiefs that render gaming unlawful.[13] (Racing: As Gaming, see GAMING, 20 Cyc. 884. As Subject of Contract, see GAMING, 20 Cyc. 926. Lien of Trainer of Race-Horse Where Racing Illegal, see ANIMALS, 2 Cyc. 316 note 98. On Fair Grounds, see AGRICULTURE, 2 Cyc. 73 note 64. On Highways — In General, see STREETS AND HIGHWAYS; As Disorderly Conduct, see DISORDERLY CONDUCT, 14 Cyc. 471. See also RACE FIELD; RACE MEETINGS.)

RACK-RENT. A rent of the full value of the tenement, or near it.[14]

RADIUS. A straight line drawn from the center of a circle to any point of the circumference;[15] a right line drawn or extending from the center of a circle to its periphery.[16]

RAFFLE. As a noun, a game of chance, or lottery, in which several persons deposit the value of a thing in consideration of the chance of gaining it;[17] a game of perfect chance in which every participant is equal with every other, in the proportion of his risk and prospect of gain; in which the prize is a common fund, or that which is purchased by a common fund; and wherein each is an equal actor in developing the chances in proportion to his risk, whether the chances be developed with dice or some other instrument being immaterial; wherein the successful party takes the whole prize and all the rest lose; and having no keeper, dealer or exhibitor.[18] As a verb, to cast dice for a prize for which each person

12. Wilder *v.* De Cou, 26 Minn. 10, 15, 18, 1 N. W. 48.

13. Ellis *v.* Beale, 18 Me. 337, 339, 36 Am. Dec. 726.

Compared with "trotting" see Ellis *v.* Beale, 18 Me. 337, 339, 36 Am. Dec. 726 (holding that there is no distinction between horse-trotting and horse-racing as regards the objectionable side); Van Valkenburgh *v.* Torrey, 7 Cow. (N. Y.) 252, 255 ("trotting" horses distinguished from "horse racing").

14. 2 Blackstone Comm. 43 [*quoted* in Black L. Dict.].

"Rack-rent" by statute is defined to be "rent which is not less than two-thirds of the full annual value of the premises out of which the rent arises, and the full annual value shall be taken to be the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the premises if the tenant undertook to pay all usual tenants' rates and taxes, and tithe commutation and rent-charge (if any), and if the landlord undertook to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the premises in a state to command such rent." Truman *v.* Kerslake, [1894] 2 Q. B. 774, 777, 58 J. P. 766, 63 L. J. M. C. 222, 10 Reports 489, 43 Wkly. Rep. 111.

15. State *v.* Berard, 40 La. Ann. 172, 174, 3 So. 463.

16. Cook *v.* Johnson, 47 Conn. 175, 177, 36 Am. Rep. 64.

From what point measured.— Under an agreement not to practice dentistry "within a radius of ten miles from Litchfield," it was held that the radius should be measured from the center of Litchfield village where the restricted business had been located and not from the edge of the township. Cook *v* Johnson, 47 Conn. 175, 177, 36 Am. Rep. 64. Under an act prohibiting private markets "within a 'radius' of six squares from a public market," it was held that the radius was not to be measured from the center of the public market but "from the nearest point on the external line of the space occupied by the public market to the circumference, drawn from that centre," so that no private market be allowed within that circumference. State *v.* Berard, 40 La. Ann. 172, 174, 3 So. 463 [*cited* in State *v.* Barthe, 41 La. Ann. 46, 49, 6 So. 531].

Its length is half the diameter, or the space between center and circumference. State *v.* Berard, 40 La. Ann. 172, 174, 3 So. 463.

17. Webster Dict. [*quoted* in State *v.* Kennon, 21 Mo. 262, 264], adding: "The successful thrower of the dice takes or sweeps the whole."

As lottery, and as distinguished therefrom see LOTTERIES, 25 Cyc. 1639.

Example of raffle as distinguished from gaming.— "Where one owning real or personal property of a certain value — say worth $100 — sells 10 chances to 10 parties at $10 each, and the party drawing the capital prizes takes the article." Dalton *v.* State, (Tex. Cr. App. 1903) 74 S. W. 25, 27.

Turkey raffle characterized as a banking or table game and not a raffle see Dalton *v.* State, (Tex. Cr. App. 1903) 74 S. W. 25, 28.

18. See Stearnes *v.* State, 21 Tex. 692, 699 [*quoted* in Risein *v.* State, 44 Tex. Cr. 413, 415, 71 S. W. 974; Prendergast *v.* State, 41 Tex. Cr. 358, 364, 57 S. W. 850; Long *v.* State, 22 Tex. App. 194, 196, 2 S. W. 541. 58 Am. Rep. 633], defining a raffle as permitted by Code, art. 406, when the property raffled for does not exceed five hundred dollars; adding: "The element of one against the many, the keeper against the betters, does not exist."

concerned in the game lays down a stake or hazards a part of the value.[19] (See, generally, GAMING, 20 Cyc. 873; LOTTERIES, 25 Cyc. 1631.)

RAFT. As a noun, a term which may comprehend a structure made by lashing together two pieces of plank, or a floating structure of timber of great value and extent;[20] and which may include a number of logs, thrown loosely into a stream and suffered to float in a body;[21] a frame or float made by laying pieces of timber across each other.[22] As a verb, to transport on a raft or in the form of a raft; to make into a raft.[23] (Raft: As Subject to — Admiralty Jurisdiction, see ADMIRALTY, 1 Cyc. 823 note 16; Maritime Lien, see MARITIME LIENS, 26 Cyc. 755. Floatage of, as Test of Navigability, see LOGGING, 25 Cyc. 1566–1568 text and notes 4–20; NAVIGABLE WATERS, 29 Cyc. 292–293, text and notes 14, 15. Police Power of States to Regulate, see COMMERCE, 7 Cyc. 465. Rafting Logs, see LOGGING, 25 Cyc. 1566.)

RAFTAGE. See LOGGING, 25 Cyc. 1547. See also RAFT.

RAGE. A kind of passion, distinguished from mere ANGER, *q. v.*, as a higher and more demonstrative and uncontrollable type of the existence of the latter.[24]

RAGS. An old torn piece, small or large, of any woven fabric which has subserved one purpose and goes into the market as second-hand material.[25] By custom, in the junk trade, all articles used as material in the manufacture of paper.[26] (Rags: Kept on Premises, as Affecting Insurance, see FIRE INSURANCE, 19 Cyc. 739 note 29.)

RAIL CAR. A railroad car.[27] (Rail Car: In General, see BOX-CAR, 5 Cyc. 955; CAR, 6 Cyc. 650; FREIGHT-CAR, 20 Cyc. 848; HAND-CAR, 21 Cyc. 359. In Relation to the Business of Carrier, see CARRIERS, 6 Cyc. 372, 429, 432, 440, 562, 584, 595, 643, 651, 656. See also RAILROADS.)

RAILING. A word which as used in a statute providing for the safety of highways seems to imply a barrier of sufficient strength to prevent travelers under ordinary circumstances from going off a bridge or embankment.[28]

RAILROAD. See RAILROADS.

RAILROAD BRIDGE. A viaduct constructed for the exclusive use of railroad transportation.[29] (See RAILROADS; and, generally BRIDGES, 5 Cyc. 1049.)

19. Webster Dict. [*quoted* in State *v.* Kennon, 21 Mo. 262, 263, 264].

20. State *v.* Gilmanton, 14 N. H. 467, 479.

21. Deddrick *v.* Wood, 15 Pa. St. 9, 13, holding that actual ligaments are not essential to a "raft" as such.

22. Walker Dict. [*quoted* in Deddrick *v.* Wood, 15 Pa. St. 9, 13].

23. Webster Int. Dict.

Example see Penobscot Lumbering Assoc. *v.* Bussell, 92 Me. 256, 258, 42 Atl. 408, where it is said: "That cause of action is stated to be: I. Neglect to seasonably raft out logs, and neglect to raft them out separately from the logs of others. . . . II. Neglect to raft the logs of different marks belonging to several owners separately. . . . A special finding, however, limited the damages to failure 'to exercise reasonable diligence in rafting and delivering' logs. The words 'rafting and delivering,' however, taken in connection with the statements in the declaration, plainly enough mean rafting, or rafting out; nothing more; nothing less. They are used in the conjunctive and as having the same significance and meaning. . . . The charter of . . . the Penobscot Boom Corporation . . . imposes the duty 'to raft all lumber in said booms securely and faithfully, with suitable warps and wedges for rafting.'"

"**Rafting**" **includes** "**sorting**" since "the act of sorting is a necessary part of the work of rafting." But sorting by ownership is sufficient, and sorting by kind is not demanded of a boom corporation under a charter duty of rafting the lumber that comes into its boom. Proprietors Machias Boom *v.* Sullivan, 85 Me. 343, 346, 27 Atl. 189.

24. Eanes *v.* State, 10 Tex. App. 421, 447.

25. Train-Smith Co. *v.* U. S., 140 Fed. 113, 115.

As used in the Tariff Act of July 24, 1897, c. 11, § 2, Free List, par. 648, does not include selected pieces of bagging all of high grade, or measurable dimensions, and serviceable for use in patching cotton bales (U. S. *v.* Davies, 160 Fed. 456, 457, 87 C. C. A. 672); but does include coarse pieces of jute bagging with ragged edges in the condition in which they have been torn from cotton bales for covering which they were originally used (Train-Smith Co. *v.* U. S., 140 Fed. 113, 115).

26. See Mooney *v.* Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 277.

27. See State *v.* Green, 15 Mont. 424, 426, 39 Pac. 322, holding that the term, as used in a Montana statute concerning burglary, includes a box car, the latter being a railroad car.

28. Munson *v.* Derby, 37 Conn. 298, 310, 9 Am. Rep. 332, referring to Rev. St. tit. 31, c. 1, § 8.

29. Diebold *v.* Kentucky Traction Co., 117

RAILROAD CAR. See CAR, 6 Cyc. 350; RAIL CAR and Cross-References Thereunder.

RAILROAD COMMISSION. A state instrumentality, having the power, and obliged, as a duty, to regulate the rates on railroads of the state.[30] (See RAILROADS.)

RAILROAD COMPANY. See RAILROADS, 33 Cyc. 1; and, generally, CORPORATIONS, 10 Cyc. 1.

RAILROAD CORPORATION. See RAILROADS; and, generally, CORPORATIONS, 10 Cyc. 1.

RAILROAD CROSSING. See RAILWAY CROSSING.

RAILROAD EMPLOYEE. See RAILWAY EMPLOYEE.

RAILROAD FERRY. A means of connecting railroad tracks, or two railroads.[31] (Railroad Ferry: Generally, see FERRIES, 19 Cyc. 491; RAILROADS. Franchise Over Location of Regular Ferry, see FERRIES, 19 Cyc. 501, 502, text and notes 89, 90.)

RAILROAD LIABILITY POLICY. See EMPLOYERS' LIABILITY INSURANCE, 15 Cyc. 1036 note 5.

RAILROAD LINE. A regular line of vehicles for public use operated between distant points, or between different cities.[32] (See RAILROADS; STREET RAILROADS.)

RAILROAD POOL. See POOL, 31 Cyc. 911. See also MONOPOLIES, 27 Cyc. 901.

RAILROAD PROPERTY. The property which is essential to a railroad company to enable it to discharge its functions and duties as a common carrier by rail.[33] (See RAILROADS; and, generally, PROPERTY, *ante*, p. 639.)

RAILROAD PURPOSES. Purposes incident to the proper construction, maintenance, and management of the railroad, or to its use by the corporation as a carrier of goods and passengers.[34] (Railroad Purposes: For Which Land May Be Taken, see EMINENT DOMAIN, 15 Cyc. 587. For Which Property May Be Used, as Affecting Taxation, see TAXATION. See, generally, RAILROADS.)

Ky. 146, 154, 77 S. W. 674, 25 Ky. L. Rep. 1275, 111 Am. St. Rep. 230, 63 L. R. A. 637; Louisville, etc., R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175, 178.

30. Southern Pac. Co. *v.* Railroad Com'rs, 78 Fed. 236, 252.

31. New York *v.* New England Transfer Co., 18 Fed. Cas. No. 10,197, 14 Blatchf. 159, 168.

It is a substitute for a railroad bridge and is a part of a railroad route for the transportation of the cars which are used upon a railroad track, and the burden which they bear, and is not for the accommodation of any persons except those who happen to be for the time being, railroad passengers. New York *v.* New England Transfer Co., 18 Fed. Cas. No. 10,197, 14 Blatchf. 159, 168.

Distinguished from a "'general, unlimited' ferry." Fitch *v.* New Haven, etc., R. Co., 30 Conn. 38, 40; New York *v.* New England Transfer Co., 18 Fed. Cas. No. 10,197, 14 Blatchf. 159, 168.

32. Com. *v.* Walton, 104 S. W. 323, 31 Ky. L. Rep. 916, where it is said that such is the ordinary meaning of the term, also of "stage line" and "automobile line," and the terms do not include hacks, stages, and automobiles which merely operate from point to point in one city for the transportation of the public.

33. Northern Pac. R. Co. *v.* Walker, 47 Fed. 681, 685. See also *In re* Erie R. Co., 65 N. J. L. 608, 611, 48 Atl. 601; McHenry *v.* Alford, 168 U. S. 651, 665, 18 S. Ct. 242, 42 L. ed. 614.

Includes road-bed, right of way, tracks, stations, rolling-stock, etc. Northern Pac. R. Co. *v.* Walker, 47 Fed. 681, 685.

Does not include: Lands owned and held for sale, or other disposition, for profit, and in no way connected with the use or operation of the railroad. McHenry *v.* Alford, 168 U. S. 651, 665, 18 S. Ct. 242, 42 L. ed. 614; Northern Pac. R. Co. *v.* Walker, 47 Fed. 681, 685); a steamboat though used in connection with the railroad (Illinois Cent. R. Co. *v.* Irvin, 72 Ill. 452, 455); warehouses erected by private individuals upon lands leased by the railroad company along and on the company's right of way and intended for the private benefit of the lessees (Gilkerson *v.* Brown, 61 Ill. 486, 488).

A statute providing for the taxation of railroad track and rolling stock includes all property owned or used by the railroad company, in the operation of its road, which may come within the term "railroad property." Pittsburgh, etc., R. Co., *v.* Backus, 154 U. S. 421, 430, 14 S. Ct. 1114, 38 L. ed. 1031.

34. See United New Jersey R., etc., Co. *v.* Jersey City, 55 N. J. L. 129, 132, 26 Atl. 135 [*quoted* in Delaware, etc., R. Co. *v.* Newark, 60 N. J. L. 60, 37 Atl. 629], holding that purposes other than those so described are not railroad purposes within provisions for exemption from taxation.

Actual use or purpose, and not ownership, is the test of exemption. See Delaware, etc., R. Co. *v.* Newark, 60 N. J. L. 60, 63, 37 Atl. 629.

Includes depot and storage purposes, as used in the exemption clause in N. J. St. March 30, 1868, conveying certain lands to railroad and canal companies. Pennsylvania R. Co. *v.* Jersey City, 49 N. J. L. 540, 544, 9 Atl. 782, 60 Am. Rep. 648.