2.00

4 3.00

Rare could not
be found

LAW OF EXECUTIONS.

VOL. I.

A TREATISE

ON THE

LAW OF EXECUTIONS

IN CIVIL CASES,

AND OF

PROCEEDINGS IN AID AND RESTRAINT THEREOF.

BY

ABRAHAM CLARK FREEMAN,

AUTHOR OF A TREATISE ON THE LAW OF JUDGMENTS, AND ALSO OF A TREATISE ON THE LAW OF COTENANCY AND PARTITION.

Executio est fructus et finis legis.

VOL. I.

SECOND EDITION.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1888.

PREFACE TO THE SECOND EDITION.

A LITTLE more than twelve years have elapsed since the publication of the first edition of my treatise on the Law of Executions. During that time our various courts, state and national, have been busy, and their labors have resulted in the addition of many decisions to those previously existing upon this topic. Hence the necessity of a second edition of my treatise, containing references to these more recent adjudications and statements of the legal principles which they reaffirm or establish. I have, however, deemed it best not to confine myself to the mere addition of new cases. On the contrary, I have re-examined the whole subject, and have added whatever came within my research, regardless of the date of decision. The scope of the work has also been enlarged by including within it writs and proceedings issued or taken for the purpose of enforcing decrees in chancery, and this has involved the consideration of chancery sales and the various steps required to procure their vacation or confirmation, and to compel the payment of the purchaser's bid. This has occasioned a necessity for inserting two new chapters, and renumbering others in the latter part of the work. The first of the new chapters is inserted as number xx., and is devoted to the reporting, confirming, and vacating of chancery sales. Chapter xx. of the former edition is now number xxi. The second new chapter is numbered xxii., and in it are treated proceedings to collect the amount bid, whether at execution or chancery

sales, or the amount of the deficiency when it has been ascertained by a resale. From this point the chapters follow the same order as in the first edition, but are numbered respectively from xxiii. to xxxiv. instead of from xxi. to xxxii.

With respect to the law of executions, it has been found that the questions requiring most frequent consideration by the courts are, What property is subject to execution? and what exemptions may be allowed? Special attention has therefore been given to the subjects of garnishment, of conditions and restraints designed to withdraw property from execution, and of the various statutory exemptions. Considerably more than three thousand cases have been added to the table of citations, and the text has been augmented to a corresponding extent.

A. C. FREEMAN.

San Francisco, October 1, 1888.

PREFACE TO THE FIRST EDITION.

The prejudice against the increase of law books is unquestionably great. So well is this fact understood, that an author is expected to introduce his book by an attempt to justify its existence. I can offer this apology for the production of each of my prior works: that it treated of subjects of prime importance and frequent recurrence, not recently nor extensively considered by any other writer. I long hoped that the same apology might be urged in favor of this book; and that any asperities which might be aroused by observing defects in its execution would be mollified by the remembrance that it was the only effort which had been made to collect, arrange, and interpret a mass of authorities so vast that their numbers bore unquestionable evidence of the difficulty and importance of the subject with which they were connected.

When this book was about half completed, I was deprived of a portion of my coveted apology by the publication of a work on the same topic. My first impulse was to discontinue my own labors. But a work on Executions was so clearly a sequel to my work on Judgments; my thought and research in the preparation of the latter were so evidently of a character to fit me for the prosecution of the former; and, beyond all, I was so thoroughly interested in my theme,—that I determined to proceed. The result of this determination is now before the reader. If, after a patient examination of my work, he can truly say that there was no need of its publication, and that it

will prove of no material aid to the bench and bar of my country, then both myself and my publishers will deserve his commiseration as much as we shall merit his censure.

This work, though not formally subdivided in that manner, consists of three parts. The first treats of executions against the property of the defendant; the second, of executions against the person of the defendant; and the third, of executions to recover specific property, to the possession of which the plaintiff has been adjudged to be entitled. Part i. comprises all that is usually understood by the word "execution," and occupies more than nine tenths of the entire book. I have endeavored to consider the several questions in the order in which they are likely to arise. My first eight chapters are occupied by matters usually presenting themselves for consideration before the writ is delivered to the sheriff. They treat of the issue and form of original executions; of *alias* and *pluries* writs; of writs of *venditioni exponas;* of amending and quashing writs; of proceedings to obtain executions on dormant judgments; and of the consequences flowing from various errors and irregularities in these several writs and proceedings. When a writ is delivered to an officer, he ought first to ascertain whether it is one which he may lawfully execute; and if so, within what time and limits, and under whose direction, he should proceed. My ninth chapter is devoted to inquiries which must be made by the officer in ascertaining these matters. Naturally, the next inquiry is for property on which to enforce the writ. Chapters x. to xv., therefore, treat of real and personal property subject to execution; of property bound by execution liens; and of personal property and homestead exemptions. Supposing that the information contained in these chapters will enable the officer to learn with what property he may properly interfere, I have next sought to show how such property may be taken in execu-

tion and forced to produce the satisfaction of the writ. Hence my sixteenth, seventeenth, and eighteenth chapters are devoted to levies upon real and personal property, and to proceedings where such property is claimed adversely to the defendant. After the levy come the proceedings preparatory to the sale; the sale itself, and the various measures looking to its confirmation or vacation; the redemption, if any be made, and if not, then the deed and the various questions looking to the ascertainment of the purchaser's rights and of the means by which they may be enforced. These questions and proceedings occupy chapters xix. to xxiii. Returns on executions, their effect and admissibility as evidence, and the circumstances in which they may be quashed or amended, are the subjects embraced in chapter xxiv. Chapters xxv. and xxvi. treat of proceedings by *elegit* as they were formerly pursued in England, and of proceedings by extent as they are now authorized in most of the New England states. Here terminate the proceedings ordinarily taken under executions against property; but as they do not uniformly prove effective, we have yet to consider what further steps may be taken to compel the satisfaction of the plaintiff's demand. Hence the necessity for chapters xxvii. and xxviii., upon proceedings at law and in equity, supplemental to or in aid of execution. To these I have added a brief chapter upon equitable proceedings restraining executions. Chapter xxx. treats of the satisfaction of executions and the distribution of their proceeds. Chapters xxxi. and xxxii. comprise parts ii. and iii. of the book. Their contents have already been indicated. It will be observed that I have not collected in any single chapter the rules governing the liabilities of officers and others for wrongful acts done while engaged in the service of executions; nor have I separately treated of actions to enforce those liabilities. Neither of these subjects has, however, been overlooked. Each has been considered in

many different portions of the book, in connection with other subjects from which I deemed it inseparable.

Recently, American text-books have been unfavorably criticised in England, because of their numerous, and apparently inconsiderate, citation of cases. It were better, in the opinion of our critic, for an author to confine his attention and that of his readers to those cases which, from being carefully considered by courts of acknowledged erudition, probity, and ability, really deserve the name of *authorities*, than to cite indiscriminately everything which has been honored by the immortality of a publication in a law report. This opinion is so plausible that it has met the concurrence of several law periodicals in this country. But it must be remembered that we have many supreme courts, each making and publishing decisions which are regarded as *law* within the jurisdictions in which they are pronounced. The result of this is not one system of law, but many systems. A text-book is expected to go into every part of our Union. It must be the companion and assistant of practitioners under all these various systems. This it cannot be unless it is competent to refer each to the cases on which he may rely with the greatest degree of confidence at the place where he happens to be discharging the duties of his profession. A decision made by the highest court of the youngest or most obscure of our states or territories may be treated with indifference, or even with contempt, in England, or Massachusetts, or New York. It may, in fact, richly deserve such treatment. It is, nevertheless, the law in the jurisdiction in which it was pronounced. To the practitioners and to all other persons within that jurisdiction, it is paramount in importance to the decisions of all other legal tribunals, however wise or venerable they may be. Hence no text-writer can properly ignore it. Whatever he may think of it himself, he must not forget that, in one state at least, it must be treated as a correct exposition of the law.

This book will be found to contain nearly fourteen thousand citations, embracing references to over ten thousand different cases. These large numbers prove that my theme is one which has compelled the attention of courts with extraordinary frequency, and entitled itself to the distinction of a treatise devoted to its exclusive consideration. The materials for this treatise are so numerous and so various that their arrangement has given me far greater trouble than any similar task which I have heretofore undertaken. Whether the result proves gratifying or otherwise, the reader may feel assured that I have spared neither time nor labor in the attempt to do justice both to him and to myself.

A. C. F.

SACRAMENTO, CAL., August 1, 1876.

TABLE OF CONTENTS.

CHAPTER I.

DEFINITIONS AND CLASSIFICATIONS.

Object, classification, and definition of executions — Executions for possession of real and personal property — Executions against chattels — Writs in aid of executions — Writs to enforce decrees.....§§ 1-9

CHAPTER II.

ISSUING THE ORIGINAL EXECUTION.

The courts that may issue it — The judgments on which it may issue — For and against whom and by whom issued — Time for issuing — Suspension of right to issue — Issuing writs of attachment — Sequestration, assistance, and other writs to enforce decrees — Practice to be pursued in obtaining writs of assistance.....§§ 10–37 e

CHAPTER III.

THE FORM OF THE ORIGINAL EXECUTION.

Essential parts — Consequences of variances, omissions, and alterations — Forms of execution and other writs to enforce decrees.....§§ 38–47 a

CHAPTER IV.

ISSUING ALIAS AND PLURIES WRITS.

Classification — The return and proceedings under former writs — On judgments satisfied by mistake — Where former writ was void — Where a sale has conveyed no title — Form of — Notice to Obtain.....§§ 48–56

CHAPTER V.

THE WRIT OF VENDITIONI EXPONAS.

Definition — Object — May have *fieri facias* clause — Effect of sale under — Collateral attack — To whom directed.....§§ 57–62

CHAPTER VI.

AMENDING WRITS OF EXECUTION.

Extent of the power to amend, and instances in which it will be exercised — Time — Persons against whom amendments may be made — Effect of amendments.....§§ 63–72

CHAPTER VII.

QUASHING WRITS OF EXECUTION.

What may be quashed — Notice of motion for — Who may apply for — Time — Grounds — Consequence of.....§§ 73–80

CHAPTER VIII.

PROCEEDINGS TO OBTAIN EXECUTION ON DORMANT JUDGMENTS.

First, by *scire facias* — Object of this writ — In what actions it may issue — When necessary — Form of writ — Service of — Time for issue — Irregularities — Judgments on *scire facias* — *Alias* writs of — Second, by motion.....§§ 81–97

CHAPTER IX.

INQUIRIES CONCERNING THE DUTIES AND LIABILITIES OF OFFICERS ON RECEIVING WRITS.

Indorsing time of receipt — Ascertaining whether the writ is valid, and whether he may safely execute it — Competency of the officer to execute the writ — Termination of officer's authority — When he must act — Who may control the writ.....§§ 98–108

CHAPTER X.

PERSONAL PROPERTY SUBJECT TO LEVY AND SALE.

Classification — Conflict of Laws — Tangible property — Money — Choses in action — Crops — Fixtures — The defendant's actual interest only — Equitable and leasehold estates — Interests of mortgagors and mortgagees, pawners and pawnees, bailors and bailees, co-tenants and copartners — Inchoate estates — Estates in reversion or remainder — Property held under conditional purchase — Property subject to execution in equity — Defendant whose property cannot be seized — Property in custody of law — Property conveyed or mortgaged to hinder, delay, or defraud creditors — Absence of change of possession as evidence of fraud in transfers.....§§ 109–158

CHAPTER XI.

PERSONAL PROPERTY SUBJECT TO GARNISHMENT.

Object of garnishment — Garnishment of property not subject to execution or fraudulently transferred — Possession necessary to render persons liable as garnishee — Bailee of choses in action — Debts subject to garnishment.....§§ 159-171

CHAPTER XII.

REAL PROPERTY SUBJECT TO EXECUTION.

Lands subject to execution at common law — Uncertain, contingent, and undivided interests — General rule — Naked legal title — Title without possession — Possession without title — Interest held under the United States — Various estates and interests — Equitable titles — Devises and trusts to withdraw property from execution .....§§ 172-194

CHAPTER XIII.

THE LIEN OF EXECUTIONS.

General nature of the lien, and its difference from other liens — Property subject to — Commencement of — Duration — Dormancy — Loss of — Effect of bankrupt act upon.....§§ 195-207

CHAPTER XIV.

OF PROPERTY EXEMPT FROM EXECUTION.

Statutes of exemption — How construed — Extra-territorial effect of — Claim — Waiving and forfeiting benefits of — Consequences of disregarding — Debts against which exemption may be enforced — Sale and encumbrance of exempt property — Constitutionality of exemption laws — Persons entitled to exemption — Various classes of exempt property.....§§ 208-238

CHAPTER XV.

HOMESTEAD EXEMPTIONS.

Who entitled to — How selected — What titles may be held by — Uses of homestead for business and other purposes — Homestead appurtenances — Amount of — Abandonment and forfeiture — Liabilities against which homesteads are not exempt — Produce and proceeds of homesteads — Claims for moneys fraudulently invested in — Judgments for torts, or in favor of state or United States — Sale of to satisfy liens.....§§ 239-250

CHAPTER XVI.

OF LEVIES UPON PERSONAL PROPERTY.

Which writ to be first levied — Diligence required — What amount should be seized — Whose property may be taken — Levy on property of which defendant is a part owner — Of indemnity — Acts required to make and maintain a levy — Restoring possession to defendant — Receiptors — Inventory — Levy under second writ — Effect of levy — Levy accomplished by unlawful act — Releasing and vacating — Liability for — Necessity of.....§§ 251–274

CHAPTER XVII.

REMEDIES OF OFFICERS WHERE THE TITLE TO PERSONALTY IS DISPUTED.

Methods of protection from claim of strangers to the writ — Right to indemnity — Summoning a jury — Trial of right of property — Bills of interpleader.....§§ 275–278

CHAPTER XVIII.

OF LEVIES UPON REAL ESTATE.

Not to be made where there is personalty — How made — Statutory provisions respecting — Describing the property — Effect of....§§ 279–282

CHAPTER XIX.

PROCEEDINGS FROM THE LEVY TO AND INCLUDING THE SALE.

General synopsis of the officer's duties — Appraisement — Notice of sale — Time of sale — Adjournments — Place of sale — By whom and to whom sale may be made — Selling in parcels — Fraudulent combinations and devices — Memorandum of sale — Payment of bids — — Resales — Liability for wrongful sales, and for neglecting to sell.....§§ 283–304

CHAPTER XX.

REPORTING, CONFIRMING, AND VACATING CHANCERY SALES.

Necessity for confirmation — The report of the sale and proceedings thereon — Opening the biddings — Grounds for refusing confirmation and vacating sales — Effect of the confirmation.....§§ 304 a–304 l

CHAPTER XXI.

VACATING AND CONFIRMING EXECUTION SALES — ISSUE AND TRANSFER OF CERTIFICATES OF PURCHASE.

Who may move to vacate sale — Notice of motion and time within which it must be given — Suits to vacate sales — Grounds for — Inade-

quacy of price — Confirming sales — Issue of certificates of sale, and the assignment thereof.....§§ 305–313

CHAPTER XXII.

PROCEEDINGS TO COLLECT THE AMOUNT BID.

Power of chancery over bidders — Order against purchaser to pay his bid — Proceedings for resale — Proceedings to compel payment of loss resulting from resale — Action at law for amount of bid, or for deficiency.....§§ 313 a–313 h

CHAPTER XXIII.

REDEMPTION FROM EXECUTION SALE

Depends on statute — Waiver of defects in making — Retroactive statutes — By whom may be made — Evidence of right to redeem — Amount to be paid — Effect of — Bill in equity — Title of purchaser pending right of defendant to redeem.....§§ 314–323

CHAPTER XXIV.

THE DEED.

Necessity for — Authority to make — How compelled — By whom, to whom, and when to be made — Forms, recitals, variances — Description — Acknowledgment — Second deed — Effect by relation — Contradicting.....§§ 324–334

CHAPTER XXV.

THE PURCHASER'S TITLE, RIGHTS, AND REMEDIES.

Obtains defendant's title and no other — Secret vices and equities — Irregularities in the proceedings — Reversal of judgment — Right to rents and profits — Remedies for waste and to recover possession — Defenses which can be asserted against the purchaser — Remedy for failure of title — Purchaser's right to subrogation, or to hold land until repaid the amount of his bid.....§§ 335–352 a

CHAPTER XXVI.

OF RETURNING EXECUTIONS.

When and by whom to be made — Form of various returns — Amendments — Quashing — Construing — When returns are admissible as evidence — How compelled — Liability for false return and for neglecting to return.....§§ 353–369

CHAPTER XXVII.

PROCEEDINGS UNDER ELEGITS.

History — What to be taken — Proceedings — Effect of.....§§ 370–371

CHAPTER XXVIII.

EXTENDING EXECUTIONS UNDER THE STATUTES OF THE NEW ENGLAND STATES.

Strict construction of statutes — What may be extended — Appraisers, their oaths of office, appointment, duty, and proceedings — When extent must be by metes and bounds — Extent for too much — Delivery of seisin — Officer's return — Recording — Contradicting and amending the return — Redemption from — Effect of.. ...§§ 372–391

CHAPTER XXIX.

PROCEEDINGS AT LAW SUPPLEMENTAL TO OR IN AID OF EXECUTION.

Definition, object, nature, and classification — On what judgments — In what courts and by and against whom may be prosecuted — Witnesses and their examination — Proceedings to obtain from a defendant the discovery of his assets — Arrest of defendant — Grounds for discharge of defendant without examination — Second examination — Proceedings against third persons — Receivers — Property which may be reached — Power to enforce obedience to orders — Garnishee's right to pay officer holding the writ.....§§ 392–423

CHAPTER XXX.

PROCEEDINGS IN EQUITY IN AID OF EXECUTION AND TO REACH EQUITABLE ASSETS.

Object — Property subject to — On what judgments — Necessity for exhausting legal remedies — Parties plaintiff and defendant — The lien of creditors' bills.....§§ 424–434

CHAPTER XXXI.

ENJOINING PROCEEDINGS UNDER EXECUTION.

No injunction where there is an adequate remedy at law — Nor on account of errors or irregularities — Enjoining sale of property not belonging to the defendant — Injunction to prevent dispossession of one person under writ against another — Preventing the clouding of titles and the sale of exempt property — Compelling resort to a particular fund — Injunctions in aid of proceedings in bankruptcy..§§ 435–441

CHAPTER XXXII.

SATISFACTION OF EXECUTIONS AND DISTRIBUTION OF THEIR PROCEEDS.

Payment, how and to whom made — Keeping the writ alive after payment — Satisfaction by proceedings under execution — Remedy where officer is in doubt about distribution of proceeds — General rules of distribution — Liability of officers for proceeds, and actions to enforce such liability.....§§ 442–450

CHAPTER XXXIII.

EXECUTIONS AGAINST THE PERSON.

History — Cases in which it may issue — Form — Irregularities — Amending and Quashing — Privilege from arrest — How executed — Effect of arrest — Discharge from custody — Escapes and liability therefor — Rearrest under.....§§ 451–467

CHAPTER XXXIV.

EXECUTIONS FOR THE POSSESSION OF REAL AND PERSONAL PROPERTY.

Writs for possession of personalty — Taking possession without a writ — Issuing writs for the possession of real estate — Form of — Compelling and controlling execution of — How executed — Who may be dispossessed — Restitution — Proceedings where defendants wrongfully retake possession.....§§ 468–477

LAW OF EXECUTIONS.

CHAPTER I.

DEFINITIONS AND CLASSIFICATIONS.

§ 1. General object and definition of executions.
§ 2. General classification of executions.
§ 3. In real actions.
§ 4. In actions for possession of personalty.
§ 5. Against the person
§ 6. Against lands.
§ 7. Against chattels.
§ 8. Writs in aid of execution.
§ 8 a. Writs to enforce decrees.
§ 9. Classification of executions as treated in this work.

§ 1. General Object and Definition of Executions. — Theoretically, a judgment is the end of the law. It permanently settles disputed issues of fact, and applies to the facts, as thus settled, established principles of law. It declares the respective obligations of the litigants in regard to the matters which they have chosen to submit to the decision of the court.

Practically, a judgment may be as far from the end as it is from the beginning of the law. The declaration of a right or the permanent and unalterable establishment of an obligation can of itself have no practical force, except as it operates on the private or the public conscience; and unfortunately, people who have engaged in a long and perhaps bitter litigation are likely

to emerge with consciences so dulled toward each other that they will respond to nothing less than the practical forcing power of the law. Even where this state of mind has not been produced, the losing party, through his inability to discharge the established obligation, may make it indispensable to call in aid the final process of the law. Every step taken from the issue of this process is liable to be attended with legal embarrassments of the most perplexing nature, and to lead to litigation more persistent and more complicated than that upon which the process was based. The writ which authorizes the sheriff or other officer either to enforce a judgment at law or to endeavor to produce a satisfaction thereof, is called an execution.[1] Every writ which authorizes an officer to carry into effect a judgment is an execution.[2] But a writ of execution is not necessarily based upon a judgment. It may be employed to enforce other obligations, which by statute have, in this respect, been made equivalent to judgments. A familiar instance of this existed in the English law, in the case of certain obligations by matter of record. Each of these obligations was "a writing obligatory, acknowledged before a judge or other officer having authority for that purpose, and enrolled in a court of record; and of this there are two sorts,

[1] "*Execution, executio*, signifieth in law the obtaining of actual possession of anything acquired by judgment of law or by a fine executory levied, whether it be by the sheriff or by the entry of the party." Co. Lit. 154 d. "Execution is the act of carrying into effect the final judgment of a court or other jurisdiction. The writ which authorizes the officer to so carry into effect such judgment is also called an execution." Bouvier's Law Dict., tit. Execution; "Execution, in a practical sense, is the formal method prescribed by law, whereby the party entitled to the benefit of a judgment, or of an obligation equivalent to judgment, may obtain that benefit." Bingham on Judgments and Executions, 101.

[2] Pierson *v.* Hammond, 22 Tex. 585; United States *v.* Nourse, 9 Pet. 28. Darby *v.* Carson, 9 Ohio, 149.

viz., recognizances or statutes. The first of these securities is the recognizance at common law, which is no more than an obligation on record, and may be acknowledged before the several judges out of term and in any part of England, and may be entered on record as well out as in term."[1] The statutes referred to are statute merchant and statute staple.[2] There are a number of instances in the United States where, by statute, an execution may be issued without being preceded by a judgment.

But the term "execution" will not in this work be used in its most comprehensive sense. It will be employed in its most usual sense, — a sense in which it denotes a writ issued to enforce a judgment or order of a court of law, or a final decree of a court of equity.

§ 2. **General Classification of Executions on Judgments.** — As an execution is issued to make a judgment productive, it must be of such a nature as to produce all the relief warranted by the judgment, and no more. In other words, an execution is necessarily of the same nature as the judgment on which it is based. This judgment is either for the recovery of some specific thing, or for some specified sum of money, or both for

[1] Bac. Abr., tit. Execution, B, 1.

[2] "A statute merchant is a bond of record, acknowledged before one of the clerks of the statute merchant and mayor of the city of London, or two merchants of the said city, for that purpose assigned, or before the mayor or warden of the towns, or other discreet men for that purpose assigned. This recognizance is to be entered on a roll, which must be double, one part to remain with the mayor and the other with the clerk, who shall write with his own hand a bill obligatory, to which a seal of the king for that purpose appointed shall be affixed, together with the seal of the debtor." "The statute staple is a bond of record, acknowledged before the mayor of the staple in the presence of all or one of the constables. To this end, says the statute, there shall be a seal ordained, which shall be affixed to all obligations made on such recognizances acknowledged in the staple." Bac. Abr., tit. Execution, B, 1.

the recovery of some specific thing and some specified sum of money, or for the recovery of some thing, and in case it cannot be had, for the recovery of a sum of money. Executions may therefore be divided into four classes:—

1. Those which authorize the officer to deliver to the plaintiff some specific thing.

2. Those which authorize the officer to proceed to do something by which it is hoped a sum of money may be produced.

3. Those which authorize the officer to do both these things, as where an execution in ejectment commands that plaintiff be placed in possession of the premises, and that the officer levy on sufficient property to produce a satisfaction of the damages accrued to plaintiff by the withholding of the property.

4. Those which command the officer to take and deliver to plaintiff certain personal property, and in case it cannot be found, to levy on other property sufficient to satisfy plaintiff for the value of the property of which no return can be had.

§ 3. **Executions in Real Actions.** — The executions referred to in the preceding section, as of the first class, represent those cases in which nothing belonging to the defendant is taken away from him. They command the plaintiff to be put in possession of something that belongs to him, and which, therefore, the defendant has no right to retain. The property of which possession is to be given to the plaintiff is either real or personal. If it be real property, the execution must conform to the nature of the judgment, and be appropriate to the interest which the plaintiff has recovered. In a real action in which the seisin or possession of lands was

recovered, the writ of *habere facias seisinam*, or writ of seisin of a freehold, issued. This "is a judicial writ issuing out of the record of the judgment, and directed to the sheriff of the county where the land lies, commanding him *quod habere faciat* to the demandant *seisinam suam de messuagio*," etc.[1]

If, in ejectment, only a chattel interest or term of years be awarded to plaintiff, the judgment must be made available by a *habere facias possessionem*, or writ of possession of a chattel interest.[2]

§ 4. **In Actions for Possession of Personalty.** — "Upon a replevin the writ of execution is the writ *de returno habendo;* and if the distress be eloigned, the defendant shall have a *capias in withernam:* but on the plaintiff's tendering the damages and submitting to a fine, the process *in withernam* shall be stayed. In detinue, after judgment, the plaintiff shall have a *distringas* to compel the defendant to deliver the goods by repeated distresses of his chattels; or else a *scire facias* against any third person in whose hands they may happen to be to show cause why they should not be delivered; and if the defendant still continues obstinate, then (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods and the plaintiff's damages; which (being either so assessed or by the verdict in case of an issue) shall be levied on the person or goods of the defendant. So that, after all, in replevin and detinue (the only actions for recovering the specific possession of personal chattels), if the wrong-doer be very perverse, he cannot be compelled to a restitution

[1] Com. Dig., tit. Execution, A, 2; 3 Bla. Com. 413.
[2] Com. Dig., tit. Execution, A, 5; 3 Bla Com. 413.

of the identical thing taken or detained; but he still has his election to deliver the goods or their value, — an imperfection in the law that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not always amesnable to the magistrate." [1]

§ 5. **Execution against the Person.** — When the judgment is not for any specific thing, but simply that the plaintiff recover a certain sum of money, satisfaction is sought, either by seizing the person of the debtor and imprisoning him until he pays the debt, or by seizing upon his property, and either turning it over to the plaintiff, or selling so much as may be necessary at public auction and applying the proceeds to the discharge of the execution. When the judgment was in favor of the king for a fine, the writ which authorized the seizure of the defendant's person was called a *capias pro fine*. A *capias utlagatum* issued on a judgment of outlawry being returned by the sheriff upon the *exigent*.[2]

A *capias ad satisfaciendum* is the writ of execution which on a judgment at the suit of a common person authorizes the seizure and imprisonment of the defendant. By the common law, this writ issued only in actions *vi et armis;*[3] but it was allowed in other actions by a variety of statutes.[4]

[1] 3 Bla. Com. 413.

[2] See Bouvier's Dict., tit. Capias; Com. Dig., tit. Execution, B, 1.

[3] Com. Dig., tit. Execution, C, 1.

[4] Tidd's Prac. 994. "Personal execution for payment of death was introduced after execution against land, and long after execution against movables. Nor will this appear singular when we consider that the debtor's person cannot, like his land or movables, be converted into money for the payment of debt. And with regard to a vassal in particular, his person cannot regularly be withdrawn from the service he owes his superior. This would not have been tolerated while the feudal law was in vigor, and came to be indulged in the decline of the law, when land was improved and personal services were less valued than pecuniary casualties." Kame's Law Tracts, 354.

§ 6. **Execution against Lands.** — "By the common law, execution never was against the lands or tenements of the party at the suit of a common person, except in the case of an heir."[1] "By *levari facias* the sheriff might levy on the goods and chattels of the defendant, and might also take the emblements, rents, and present profits of his lands, but not the land itself."[2] This writ was at law usually issued only on judgments in favor of the crown. It was also employed as a writ of execution against the goods and chattels of a clerk. When issued against a clerk, it was directed to the bishop of the diocese, and after reciting that the defendant had no lay fee nor goods and chattels on which a levy could be made, it commanded the bishop to cause execution to be made of the goods and chattels of the defendant in his diocese.[3] When issued against a clerk, this writ was styled a *levari facias de bonis ecclesiasticis*. A *sequestari facias* could be issued instead of a *levari facias de bonis ecclesiasticis*, and accom-

[1] Com. Dig., tit. Execution, C, 2; Bingham on Judgments and Executions, 108.

[2] Com. Dig., tit. Execution, C, 3; 3 Bouv. Inst., sec. 3400; Bingham on Judgments and Executions, 113; 3 Bla. Com. 417. The writ of *levari facias* is to a limited extent employed in the United States. In Indiana it accomplished the objects usually sought by a *venditioni exponas*. Doe r. Cunningham, 6 Blackf. 430. In Delaware it is used to enforce judgments under the mechanics' lien laws, and to sell unproductive or unimproved real estate. Laws of Del., ed. of 1874, pp. 670, 678. In Pennsylvania it issues to enforce charges against lands, such as mortgages, mechanics' liens, and municipal charges. Brightly's Purdon's Digest, 483, 484, 653, 654, 1089; Hart r. Homiller, 23 Pa. St. 39; Pentland r. Kelly, 6 Watts & S. 483. This radical difference between the common law and the American writ of *levari facias* will be observed; namely, that the former authorized the taking of chattels and the products and profits of real estate, while the latter is not directed against chattels nor against the rents nor profits of lands, but to authorize the sale of the land itself. In Pennsylvania and Delaware, if the rents and profits of lands for seven years be adjudged sufficient to pay the debt, "the lands are extended by the writ of *liberari facias* and possession given to the creditor." 3 Bouv. Inst., sec. 3394; Laws of Del., ed. of 1874, p. 682; Brightly's Purdon's Digest, 648, 663–668.

[3] Bouvier's Dict., tit. Levari Facias; 3 Bla. Com. 418.

plished the same purpose.[1] The statute of 13 Edw. I., c. 18 (otherwise known as the statute of Westminster 2, c. 18), provided that when a debt was recovered or acknowledged in the king's court, or damages awarded, the plaintiff might, at his election, have a writ commanding the sheriff to deliver to him the chattels of the debtor and one half of his lands, to be retained until the debt is satisfied. The writ of execution issued at the election of the plaintiff, in pursuance of this statute, is called an *elegit*.[2] The *extendi facias*, or extent, is a writ of execution by virtue of which the goods, lands, and person of the defendant may at once be seized. Under the *elegit*, a moiety only of the lands of defendant was appropriated to the satisfaction of the writ, and this appropriation was but temporary. The plaintiff thereby became a tenant by *elegit*, and so continued until by the profits of the lands, or otherwise, a satisfaction of the judgment was produced, when his estate terminated, and the defendant again became seised of the whole. Under an *extendi facias*, or extent, "the sheriff is to cause the lands to be appraised to their full extended value before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied."[3]

[1] Bingham on Judgments and Executions, 114.

[2] Porter's Lessee *v.* Cocke, Peck, 30; Bingham on Judgments and Executions, 108; Com. Dig., tit. Executions, C, 14; 3 Bla. Com. 418.

[3] 3 Bla. Com. 420. "Land, when left free to commerce by the dissolution of the feudal fetters, was of course subject to execution for payment of debt. This was early introduced with relation to the king. For from Magna Charta it appears to have been the king's privilege, failing goods and chattels, to take possession of the land till the debt was paid. And from the same chapter it appears that the like privilege is bestowed upon a cautioner, in order to draw payment of what sums he is obliged to advance from the principal debtor. By the statute of merchants the same privilege is given to merchants; and by 13 Edw. I., c. 18, the privilege is communicated to creditors in general, but with the following remarkable limitation, that they are allowed to possess the half

§ 7. **Execution against Chattels Personal.** — It will be seen from the preceding section that all the forms of execution authorizing a levy on lands or on the profits of land also authorized a seizure of the goods and chattels of the defendant. Where neither lands nor their profits were sought to be subjected to the satisfaction of the judgment, a writ of *fieri facias* was issued. Under this writ the sheriff was authorized to seize and sell every chattel thing belonging to the defendant and not exempt from execution.[1] An important difference existed in the methods by which real and personal property were appropriated toward the satisfaction of executions. Care was taken that the defendant's realty should not be sacrificed through a forced sale. Under the *elegit* the title remained in the defendant, while the actual profits of a moiety were applied to the payment of the debt. Under the *extendi facias* the lands of the debtor were first appraised, and then set off to the creditor at their appraised value. Whichever writ the plaintiff elected to take out, the defendant might rest assured that no more of his real estate could be taken than, in the judgment of a disinterested jury of his neighbors, was equivalent in value to the amount of the debt. In regard to personal property, no such solicitude was ever manifested. The law authorized it to be seized and sold at public auction for whatever it might chance to bring. This favoritism toward real estate has in the major portion of the United States ceased to exist; but in some of the states the policy of appraising lands and then setting them off to the credi-

only of the land. By this time it was settled that the military vassal's power of aliening reached the half only of his freehold, and it was thought incongruous to take from the debtor by force of execution what he himself could not dispose of, even for the most valuable consideration." Kame's Law Tracts, 339.

[1] Bingham on Judgments and Executions, 111.

do are of such a nature that another may do them for him, the court usually authorizes its master, commissioner, or other officer to execute the decree for and as the act of the defendant. This authorization is sanctioned by statute in most of the states. The national courts, however, have not been vested with such statutory authority, and must enforce their decrees in some mode warranted by their own rules of proceeding or by the practice of the English court of chancery.[1] Whether any special statute has been adopted on the subject or not, the various courts of equity in the United States have power to enforce their decrees by the same writs and proceedings as were allowable in the courts of like jurisdiction in England immediately preceding our separation from that country.[2]

When the coercive powers of the court of chancery were sought to be invoked, the first step of the complainant was to procure the issuing and service of a writ of execution. This was a mandate under the great seal, commanding the defendant to do the acts required of him by the decree.[3] This writ is now obsolete. Instead of procuring its issuance, the complainant now obtains a copy of the decree and serves it upon the defendant, who thereupon becomes bound to comply therewith. Under the English practice the decree must state the time after its service within which the act must be done, and the copy served must bear an indorsement notifying the defendant that if he neglects to obey the decree by the time therein designated, he will be liable to arrest under a writ of attach-

[1] Pomeroy's Eq. Jur., sec. 1317; Ingersoll's Barton's Suit in Equity, 153.

[2] White *v.* Geraerdt, 1 Edw. Ch. 336; Jones *v.* Boston Mill Corp., 4 Pick. 507; 16 Am. Dec. 358.

[3] Lubé's Eq. Pl. 174; Daniell's Ch. Pr., 4th Am. ed., 1043.

ment "issued out of the high court of chancery, or by the sergeant at-arms attending the same court," and will also be liable to have his estate sequestered for the purpose of compelling his obedience.[1] After the copy of the decree has been duly served, and the time limited for compliance therewith has expired without such compliance, the complainant is entitled to a writ of attachment. This writ is directed to the sheriff or some other competent officer of the jurisdiction in which the defendant is likely to be found, requiring him to attach the body of such defendant and have him before the court at a time designated, to answer for an alleged contempt.[2] Under this writ the defendant may be arrested and lodged in prison, and suffered to remain there until he has purged himself of his contempt by obedience to the decree.[3] Arrest and imprisonment, including close confinement and putting in irons, seem down to the end of the reign of Charles I. to have constituted the sole means of compelling obedience to a decree.[4] These means might prove inefficient because the defendant was already in prison, or could not be found or apprehended, or, upon being arrested and imprisoned, preferred remaining in custody to obeying the decree. If the defendant was already in prison, a writ of *habeas corpus cum causus*[5] could be obtained, whereby the keeper of the prison was commanded to bring the prisoner into court. If the defendant cannot be found,

[1] Daniell's Ch. Pr., 4th Am. ed., 1043.

[2] Daniell's Ch. Pr., 4th Am. ed., 1046, 463; Lubé's Eq. Pl. 174; Ingersoll's Barton's Suit in Equity, 152. If the defendant was a corporation, and therefore incapable of being arrested, its action was coerced by a *distringas*. This writ was directed to the sheriff, and commanded him to make distress of the lands, tenements, goods, and chattels of the defendant within his bailiwick.

[3] Daniell's Ch. Pr., 4th Am. ed., 1047, 1032.

[4] Spence's Ch. Jur. 391.

[5] Elvard *v.* Warren, Ch. R. 151.

a return of *non est inventus* is made. Upon this return, when the defendant cannot be found, or upon showing that he is in prison, obstinate and disobedient, where he has been found, a writ or commission of sequestration may issue.[1] This writ is directed to certain persons therein named (usually four), and empowers them to enter upon the real estate of the disobedient person, "and to receive, sequestrate, and take the rents and profits thereof, and also his personal estate, and keep the same under sequestration in their hands until he shall have performed the act required and cleared his contempt."[2] If the sequestrators ascertain and return that the defendant is a beneficed clerk, without lay property, a writ of *sequestrari facias de bonis ecclesiasticis* may issue. This is directed to the bishop of the diocese, and under it the defendant's benefice may be sequestered.[3] If it becomes necessary or advisable for the sequestrators to sell personal effects seized by them, such sale will be authorized by the court on proper application therefor.[4] If the decree required the delivery of the possession of lands, a mandatory injunction was sometimes issued, commanding such delivery, where defendant remained obstinate in prison, and if this were disobeyed, a commission issued to justices of the peace to put the complainant into possession.[5] If, when a commission issued to sequestrators, or others, under which it was necessary for them to take possession of real property, they were unable to

[1] Ross *v.* Colville, 3 Call, 382; Spence's Ch. Jur. 391; Lubé's Eq. Pl. 176.

[2] Daniell's Ch. Pr., 4th Am. ed., 1050, 1051; Tatham *v.* Parker, 1 Smale & G. 513; Seton's Forms of Decrees, Judgments, and Orders, 4th ed., 1577.

[3] Daniell's Ch. Pr., 4th Am. ed., 1051.

[4] Daniell's Ch. Pr., 4th Am. ed., 1054; Seton's Forms of Decrees, Judgments, and Orders, 4th ed., 1582.

[5] Spence's Ch. Jur. 392; Lubé's Eq. Pl. 177.

otherwise obtain possession, a writ of assistance issued in their aid.[1] Where the surrender of the possession of lands to a complainant or other person was ordered or decreed, this writ also issued.[2] This writ is now obsolete under the English practice. It was issued to put a party in possession, upon service of a copy of the decree, and without the prosecution of any proceedings for contempt. It is directed to the sheriff of the county wherein the lands lie, and commands him to put plaintiff into possession pursuant to the decree.[3] In England the functions of a writ of assistance are now performed by the writ of possession.[4] Where a decree is for the payment of money, statutes and rules of court have been enacted or adopted, both in England and in this country, giving authority to issue the writs appropriate for the enforcement of a like judgment at law. Under these statutes satisfaction of a decree may be sought by an *elegit*, a *fieri facias*, or a *capias ad satisfaciendum*, in any case where such writ would be proper had the recovery been at law instead of in equity.[5] In England, if, upon return of an *elegit* or *fieri facias*, it appears that defendant is a beneficed clerk, without lay property subject to the writ, the plaintiff may have "one or more writs of *fieri facias de bonis ecclesiasticis*," [6] whereby the sheriff is authorized to levy the damages and costs out of the defendant's

[1] Daniell's Ch. Pr. 1056; Spence's Ch. Jur. 392; Seton's Forms of Decrees, Judgments, and Orders, 4th ed., 1562; Pelham *v.* Newcastle, 3 Swab. 289, note.

[2] Ludlow *v.* Johnson, Hopk. Ch. 231; Kershaw *v.* Thompson, 4 Johns. Ch. 231.

[3] Daniell's Ch. Pr. 1062.

[4] Seton's Forms of Decrees, Judgments, and Orders, 4th ed., 1563.

[5] Daniell's Ch. Pr., 4th Am. ed., 1042; Brockway *v.* Copp, 2 Paige, 580; Bryson *v.* Petty, 1 Bland, 183; Shackleford *v.* Apperson, 6 Gratt. 453; Seton's Forms of Decrees, Judgments, and Orders, 4th ed., 1555, 1560, 1561.

[6] Daniell's Ch. Pr. 1065.

ecclesiastical goods. Final process to enforce decrees is provided for by the eighth and ninth rules of practice for the courts of equity of the United States. Under these rules an execution on a decree for the payment of money may be in the form used in actions of *assumpsit* at common law. Other decrees are enforced by attachment and sequestration.[1]

§ 9. **Classification of the Subject.** — We have now described the principal writs of execution employed at law or in equity, or introduced by statutes. Most of the terms which we have attempted to define have ceased to have any place in the jurisprudence of the greater portion of the United States. Bentham reproached the legal procedure of his time by the following assertion, — an assertion no doubt well supported in fact: "In the sciences we always go on simplifying the processes of our predecessors; in jurisprudence we al-

[1] These rules, 8 and 9, are as follows: —

Rule 8. Final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution, in the form used in the circuit court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

Rule 9. When any decree or order is for the delivery of possession upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

ways go on rendering them more complicated. The arts are perfected by producing greater effects with more easy means; jurisprudence is deteriorated by multiplying means and diminishing effects."[1]

The American law of executions is comparatively free from this and similar reproaches. When a judgment is for the recovery of money, we do not in most of the states resort to one form of execution to reach real estate and another form to reach personal property. But by one writ the sheriff is commanded to levy upon the personal property of the defendant, and if sufficient personal property cannot be found, then upon the real estate. In cases where the statute so authorizes, the writ may contain a clause directing the seizing and imprisonment of the defendant.

In the following pages we shall not undertake to treat separately of each of the several writs of execution heretofore named, but shall classify and consider our subject as follows: Part 1 will treat of executions, writs, and proceedings whose object is to obtain the satisfaction of a judgment or decree out of the defendant's estate, real and personal, or to compel obedience to a decree in other respects than the payment of a sum of money; part 2, of executions against the person of defendant; and part 3, of executions to recover specific property adjudged to belong to the plaintiff. In each of these parts we shall endeavor as far as possible to dispose of various questions in the order in which they naturally present themselves in the execution of the writ.

[1] Bentham's Judicial Evidence, by Dumont, ed. of 1825, p. 5.

CHAPTER II.

ISSUING THE ORIGINAL EXECUTION.

FIRST. — OF THE COURTS THAT MAY ISSUE IT.

§ 10. General rule.
§ 11. Of American courts.
§ 12. Courts ceasing to exist.
§ 13. Removal of record from one court to another.
§ 14. On transcripts from other courts.
§ 15. Effect of issue from wrong court.

SECOND. — OF THE JUDGMENTS ON WHICH IT MAY ISSUE.

§ 16. General rule as to judgments.
§ 17. Orders and rules of court.
§ 18. Lost or mutilated judgment records.
§ 19. Satisfied or merged judgments.
§ 20. Void judgments.

THIRD. — FOR AND AGAINST WHOM, AND BY WHOM ISSUED.

§ 21. Who may sue out, and how he may compel issuance of.
§ 22. Against whom may issue.
§ 23. By whom issued.

FOURTH. — TIME FOR ISSUING.

§ 24. The earliest time for issuing.
§ 25. Consequence of premature issuing.
§ 26. Consequence of issuing before expiration of stay by agreement.
§ 27. The latest time for issuing.
§ 27 a. Issuing on motion, instead of resorting to *scire facias*.
§ 28. The latest time for issuing, how computed.
§ 29. Validity of executions on dormant judgments.
§ 30. Validity of executions on dormant judgments as between the parties.

FIFTH. — SUSPENSION OF THE RIGHT TO ISSUE EXECUTION.

§ 31. By issue of another writ.
§ 32. By stay of execution.
§ 33. Issue contrary to stay.
§ 34. By stay laws, constitutionality of.
§ 35. By death of sole plaintiff or defendant.
§ 36. By death of one of several plaintiffs or defendants.
§ 37. Abatement of writ by death.
§ 37 a. Issuing execution to enforce decrees.

§ 37 b. Issuing attachment to enforce decrees.
§ 37 c. Issuing writ of sequestration.
§ 37 d. Writs of assistance, for and against whom may be issued.
§ 37 e. Writs of assistance, proceedings to obtain.

§ 10. Of the Courts that may Issue—General Rule. —Probably the very first question to be answered in regard to the proposed issuing of an execution is this: Does the court wherein the judgment has been entered have authority to enforce its judgments by the aid of this writ? And here it may be remarked that a judgment at law, disconnected from the right to issue execution, would be so idle and worthless a record that we can scarcely conceive that its creation would be encouraged or its existence tolerated. A tribunal invested with the power to call litigants before it, and to adjudge that one of them recover of the others certain specific property or a certain compensation in money, and yet without any authority to make its decision effective, would be the arena of such solemn trifling that nothing but the most positive declaration made by the law creating such court could convince us of its legal existence. It may be assumed, as a general proposition, that every judicial tribunal having jurisdiction to pronounce judgment has authority to award execution. Exceptions to this rule must rest upon some clear and positive statutory limitation. "If a court is competent to pronounce judgment, it must be equally competent to issue execution to obtain its satisfaction. A court without the means of executing its judgments and decrees would be an anomaly in jurisprudence, not deserving the name of a judicial tribunal. It would be idle to adjudicate what could not be executed, and the power to pronounce necessarily implies the power of executing."[1] But there

[1] United States *v.* Drennan, Hemp. 325.

were, nevertheless, judicial tribunals which did not possess authority to issue writs of execution against the property of the defendant. The most important of these tribunals was the court of chancery. This court did not, however, undertake to pronounce a formal judgment directing that one party should recover of another. It did not assume to deal with the legal rights of the parties. It undertook to decide what was due from one party to the other, not according to law, but according to conscience. It then attempted to coerce the party adjudged to be in the wrong into acting as became a conscientious man. Its decrees, unless for land, operated solely *in personam*,[1] and were enforced solely by means of process for contempt, under which a disobedient party could be imprisoned until he became obedient. If he could not be seized, or if, being seized and imprisoned, he still refused to comply with the decree, the court could issue a writ of sequestration under which commissioners named in the writ sequestered "the personal property of the defendant, and the rents and profits of his real estate, and kept him from the enjoyment of them till he had cleared his contempt." The English courts of chancery, by the statute 1 and 2 Vict., c. 110, sec. 18, are authorized to issue executions in certain cases.[2] In order that a decree in chan-

[1] Daniell's Ch. Pr., 4th Am. ed., 1031; Noonan *v.* Lee, 2 Black, 499; Orchard *v.* Hughes, 1 Wall. 73.

[2] This statute enacts "that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the lord chancellor or of the court of review in matters of bankruptcy, and all orders of the lord chancellor in matters of lunacy whereby any sum of money or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys or costs, charges or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law, with respect to matters depending in the same courts, shall and may be exercised by courts of equity

cery may, by virtue of the provisions of this statute, be enforced by execution against the defendant's property, it must contain the substantial elements of a judgment at common law. It must be strictly for the payment of a sum of money from one person to another.[1] The rule thus introduced into the English law is in substantial conformity with the practice adopted in the different states,[2] and also by the federal courts.[3] In some instances, decrees direct the sale of certain property, and make the defendant responsible for the deficiency remaining after the proceeds of the sale have been applied to the payment of the plaintiff's demand. In such cases the amount to be paid by defendant is uncertain and contingent; and therefore no execution can issue against him until the sale has been completed and the deficiency ascertained.[4] The right of courts of

with respect to matters therein depending, and by the lord chancellor in the court of review in matters of bankruptcy, and by the lord chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses, are by such orders or rules respectively directed to be paid." Executions on decrees under this act must issue out of the chancery and not out of the common-law courts. In re Stanford, 4 Scott N. R. 23; 3 Man. & G. 407; 6 Jur. 38.

[1] Garner *v.* Briggs, 4 Jur., N. S., 230; 6 Week. Rep. 378; Earl of Mansfield *v.* Ogle, 4 De Gex & J. 38; Shaw *v.* Neale, 20 Beav. 157, 174; 1 Jur., N. S., 666; 6 H. L. Cas. 541; 4 Jur., N. S., 695; Chadwick *v.* Holt, 8 De Gex M. & G. 584; 2 Jur., N. S., 918.

[2] Battle *v.* Bering, 7 Yerg. 529; Van Ness *v.* Cantine, 4 Paige, 55; Bryson *v.* Petty, 1 Bland, 183; Brockway *v.* Copp, 2 Paige, 578; Patrick *v.* Warner, 4 Paige, 397; Hall *v.* Dana, 2 Aiken, 381; Otis *v.* Forman, 1 Barb. Ch. 33; Wallen *v.* Williams, 7 Cranch, 602; Colman *v.* Cocke, 6 Rand. 618; McNair *v.* Ragland, 2 Dev. Eq. 42; 22 Am. Dec. 728; Coombs *v.* Jordan, 3 Bland, 321; 22 Am. Dec. 236; Bouslough *v.* Bouslough, 68 Pa. St. 495; Gen. Stats. Ky., ed. 1873, p. 419, art. 4, sec. 1.

[3] By eighth equity rule of the United States courts, "final process to execute a decree may, if the decree be solely for the payment of money, be by writ of execution, in the form used by the circuit courts in suits at common law, in actions of *assumpsit*." Desty's Fed. Proc. 276. An additional rule, numbered 92, and made in 1864, provided for decree and execution for balance due after sale in foreclosure suits. Desty's Fed. Proc. 310.

[4] Bank of Rochester *v.* Emerson, 10 Paige, 115; Cobb *v.* Thornton, 8 How. Pr. 66.

law to issue executions may, we think, be successfully upheld in all cases where the power is not clearly withheld by statute. The authority of courts of chancery to issue writs of execution similar in form and effect to those employed at law, is, as we have already seen, dependent upon statutes of comparatively recent date; but these courts, as we have shown in the preceding chapter, have for a long period issued writs, the ultimate object of which was to compel obedience to their decrees, and all of which were in effect, as one of them was by name, a writ of execution. There are other courts which have jurisdiction to bring litigants before them, and to determine what is due from one to the other; and which yet do not profess to enter a direct judgment that one party shall recover from the other. The most common of these are the probate or surrogate courts. The decisions of these courts are *res judicata;* they permanently establish the liability of the parties. But the discharge of the liability thus established cannot be compelled by execution, unless the statute has so provided.[1]

§ 11. **Of the Laws Governing American Courts.** — The authority of the several courts of each state to issue executions is conferred by the several statutes, where statutory regulation has been attempted; and, in the absence of such regulations, by the rules of the common law. The federal judiciary, on the other hand, is entirely beyond the control of state laws. The courts of the United States issue executions under the authority and control of the laws enacted by Congress, of the rules adopted by the courts themselves, and of the provisions of the common law and chancery

[1] Stiles *v.* Smith, 5 Paige, 135.

practice, as adopted or modified by the United States statutes or by the rules of court.[1]

§ 12. **Loss of Power to Issue Execution.** — If the existence of a tribunal competent to pronounce judgment necessarily implies the existence in that tribunal of the power to award execution, it would seem to follow, as the negative of this proposition, that the destruction of the tribunal would necessarily carry with it the destruction of the power. When a court has ceased to exist by the repeal of the act by which it was created, it no longer has any authority to issue executions.[2]

§ 13. **Removal of Record to Another Court.** — Ordinarily, the court where the judgment is entered must issue execution.[3] This court may, however, continue in existence with its general power unimpaired, and yet its power to issue execution may, in a particular case, be suspended or destroyed. The most familiar illustration of this is in the case of an appeal to some higher tribunal. Here, although the appellate court may have affirmed the judgment, the court of original jurisdiction

[1] Wayman *v.* Southard, 10 Wheat. 1; Toland *v.* Sprague, 12 Pet. 300; Boyle *v.* Zacharie, 6 Pet. 648; Gwin *v.* Breedlove, 2 How. 29; The Steamer St. Lawrence, 1 Black, 522; Robinson *v.* Campbell, 3 Wheat. 222; Noonan *v.* Lee, 2 Black, 509; McFarlin *v.* Gwin, 3 How. 720; Griffin *v.* Thompson, 2 How. 344. For law regulating executions from United States courts in common-law cases, see Desty's Fed. Proc., sec. 916; 17 U. S. Stats. 197; on judgments for duties, Desty's Fed. Proc., sec. 962; 13 U. S. Stats. 494; on judgments for the use of the United States, Desty, sec. 986; 1 U. S. Stats. 515; on judgments for fines in penal or criminal causes, Desty, sec. 1041; 17 U. S. Stats. 198; in admiralty, see Admiralty Rule 21; Desty, p. 320; in equity, see Equity Rules 8 and 92, Desty, pp. 276, 310; *ante*, § 8 a, note.

[2] Lee *v.* Newkirk, 18 Ill. 550; Newkirk *v.* Chapron, 17 Ill. 346; Harris *v.* Cornell, 80 Ill. 54.

[3] Com. Dig., tit. Executions, I; Bac. Abr., tit. Executions, E; Bingham on Judgments and Executions, 181.

may have no power to issue execution. According to the common-law rule, whenever upon the prosecution of an appeal the *original* record was removed into another court, that court alone was competent to issue execution. In other words, unless some statute has interposed to modify or destroy the common-law rule, the court having custody of the original record must issue the execution.[1] In the United States, the common-law rules in regard to appeals, including the rules providing for the means of enforcing the judgments of appellate courts, have been very generally displaced or modified by statutory provisions. We must, therefore, refer our readers to the different state statutes for further information concerning the respective powers of courts of original and courts of appellate jurisdiction to issue executions on judgments, after an appeal has been prosecuted to final judgment.

§ 14. **Executions on Transcripts from Other Courts.** — It is not unusual for statutes to be enacted authorizing the filing with the county clerk of transcripts of judgments rendered and entered by justices of the peace, and providing that executions may issue on such transcripts in the same manner, and by the same person or officer, as though the judgment were rendered in the court wherein the transcript is filed.[2] This does not transform the original judgment into a judgment of the higher court, except for the purpose of issuing and controlling execution.[3] In New York an execution on

[1] Tidd's Prac. 994; Altman *v.* Johnson, 2 Mich. N. P. 42; Allen *v.* Belcher, 3 Gilm. 596; Cowperthwaite *v.* Owens, 3 Term Rep. 657; Herbert *v.* Alcocke, 1 Lev. 134; Pringle *v.* Lansdale, 3 McCord, 289; Vicars *v.* Haydon, Cowp. 843; Com. Dig., tit. Executions, I, 1.

[2] Ginochio *v.* Figari, 2 Abb. Pr. 185; 4 E. D. Smith, 227.

[3] People *v.* Doe, 31 Cal. 220; Martin *v.* Mayor of New York, 11 Abb. Pr. 295; 20 How. Pr. 86.

such a transcript of judgment may be issued by the plaintiff or his attorney, as in other cases.[1] The filing of the transcript does not prolong the life of the original judgment. The time at which the right to execution will expire must be computed from the rendition of the judgment, and not from the filing of the transcript.[2] When the county clerk issues execution to enforce the judgment of a justice of the peace, his authority to do so rests upon the filing of the transcript, and upon the existence of such other facts as the statute has prescribed. Unless it can be shown that the law was substantially complied with, the act of the clerk is regarded as without authority, and therefore as void.[3] A true copy of the judgment, followed by a certificate in the following form: "I certify that the foregoing contains an entry made on my docket," and signed by the justice of the peace, is a sufficient transcript.[4] Where the transcript is regular, and a sale has been made thereunder, the justice will not, in a collateral proceeding, be allowed to show that an execution as set out in the transcript is not a true copy of the original.[5] So there are statutes authorizing transcripts of judgments to be sent to other counties, sometimes for the purpose of making such judgments liens in the counties to which the transcripts are sent, and sometimes to authorize the issue of execution in such

[1] McDonald *v.* O'Flynn, 2 Daly, 42. The case of Brush *v.* Lee, 18 Abb. Pr. 398, holding that such an execution must be issued by the clerk, was reversed by the court of appeals. See 36 N. Y. 49; 1 Trans. App. 66; 3 Abb. Pr., N. S., 204; 34 How. Pr. 283.

[2] Kerns *v.* Graves, 26 Cal. 156.

[3] Carr *v.* Youse, 39 Mo. 346; 90 Am. Dec. 470; Ruby *v.* Hann, 39 Mo. 489; Linderman *v.* Edson, 25 Mo. 105; Coonce *v.* Munday, 3 Mo. 374; Burk *v.* Flournay, 4 Mo. 116; Wineland *v.* Coonce, 5 Mo. 296; 32 Am. Dec. 320.

[4] Franse *v.* Owens, 25 Mo. 329.

[5] Crowley *v.* Wallace, 12 Mo. 143.

county. Where the latter is the object, the authority to issue execution depends on compliance with the provisions of the statute, and if issued in the absence of such compliance, the execution is void.[1] Where the former object is the only one at which the statute aims, the power to issue execution is confined to the proper officers of the county wherein the judgment was rendered. An issuing by the clerk of the county in which the transcript is filed is void.[2] In many instances, the court wherein judgment is pronounced is authorized to issue its execution, in certain contingencies, to other counties. Here the general power to issue the writ is conferred by the judgment. A mistake in determining whether the proper contingency exists is an error, which may be corrected by some appropriate proceeding, such as by motion to quash or recall the writ, but cannot render the writ void.[3]

Under a statute authorizing the clerk of the circuit court to issue execution upon certified transcripts of judgments of justices of the peace, upon receiving an affidavit on behalf of plaintiff showing that the judgment was unpaid in whole or in part, and stating the amount due, an execution was issued without such affidavit, and being followed by a sale, the question was, whether such sale was invalid. In the opinion of the court the issuing of the writ under the circumstances was a mere irregularity; and the defendant

[1] Colville *v.* Neal, 2 Swan, 89; Morgan *v.* Hannah, 11 Humph. 122; Eason *v.* Cummins, 11 Humph. 210.

[2] Seaton *v.* Hamilton, 10 Iowa, 394; Furman *v.* Dewell, 35 Iowa, 170; Shattuck *v.* Cox, 97 Ind. 242.

[3] Earle *v.* Thomas, 14 Tex. 583; Sanders *v.* Russell, 2 T. B. Mon. 139; 15 Am. Dec. 148; Cox *v.* Nelson, 1 T. B. Mon. 84; 15 Am. Dec. 89; Sydnor *v.* Roberts, 13 Tex. 598; 65 Am. Dec. 84; McConnell *v.* Brown, 5 T. B. Mon. 479; Young *v.* Smith, 10 B. Mon. 296; Commonwealth *v.* O'Cull, 7 J. J. Marsh. 149; 23 Am. Dec. 393.

having waived the irregularity by his inaction, the sale was pronounced valid.[1] Where by statute authority was given to levy a justice's execution in a county other than that in which it issued, on procuring a certificate from a justice of the latter county that he knew the handwriting of the justice issuing the execution, a levy upon a writ issued without such certificate was adjudged to be wholly void.[2] When authority is given to the clerk of a circuit court to issue execution to any other county in which the judgment has been docketed, the docketing of the judgment in such other county has been held by the supreme court of Wisconsin to be a prerequisite to the issue of the writ to such county. It is even said that the fact of such docketing must be recited in the writ, on the ground that the writ must on its face disclose the authority for issuing it, and that failing to state such docketing, it discloses no authority whatsoever.[3] By the statutes of Michigan, an execution may be issued by a justice of the peace at the expiration of five days from the rendition of his judgment; and whenever an execution may issue, an affidavit may be made, and a transcript of the judgment and proceedings filed in the circuit court. A transcript filed before the expiration of the five days is unauthorized by the statute, and no valid execution can issue thereon.[4]

§ 15. **Executions Issued out of Wrong Court.** — Executions issued by one court to enforce the judgments of another court, when there was no authority

[1] Mavity v. Eastridge, 67 Ind. 211.
[2] Street v. McClerkin, 77 Ala. 580.
[3] Kentzler v. C. M. & St. P. R'y Co., 47 Mo. 641.
[4] O'Brien v. O'Brien, 42 Mich. 15; Vroman v. Thompson, 42 Mich. 145.

so to do, have been regarded as absolute nullities.[1] In New York, an execution issued out of the supreme court on a judgment in the court of common pleas. A sale was made under this writ, and thereafter, to aid the title based on this sale, the common pleas ordered the writ to be amended so as to make it an execution of the court of common pleas. The writ and the sale thereunder were, nevertheless, treated as void when brought in question in an action of ejectment based thereon.[2]

[1] Field *v.* Paulding, 3 Abb. Pr. 139; 1 Hilt. 187; Shattuck *v.* Cox, 97 Ind. 242.

[2] Clarke *v.* Miller, 18 Barb. 270. The following is from the opinion of the court in this case: "The rule is a familiar one, that judgments must be executed in those courts in which they are rendered. I do not see upon what principle the supreme court could assume to execute this judgment recovered in the common pleas. The supreme court possessed no power to award a *fieri facias* upon that judgment, and every execution that is issued by the attorney is regarded in law as awarded by the court out of which it issues just as much as if the award was made upon the record. It strikes me as a strange proceeding for the supreme court to award an execution to the sheriff, commanding him to collect a judgment of the county court; and I entertain no doubt but such an execution is absolutely void. But what is more strange still, after the sheriff has executed it, and sold the lands of the defendant, and given a deed to the purchaser, the county court assume to say, We will interfere with the process of the supreme court, because that court has undertaken to execute our judgment; and so by an order the county court change, I suppose, an execution of the supreme court, which has been fully executed and returned, into a process of the county court, and declare in effect that the child is theirs, although they had no hand in begetting it. The rule is a familiar one that every court can amend its own process. It is said to be a power incidental to every court. It is no more than assuming the power to correct its own proceedings; but I am not aware of any power in the county court to amend the process of the supreme court. This process, being void, is not amendable. In Simson *v.* Gurney, 1 Petersdorf's Abr. 595, where a *fieri facias* was issued upon a judgment in the common pleas, returnable in the king's bench, but the writ was *tested* in the name of the chief justice of the common pleas, the court allowed the writ to be amended by making it returnable in the common pleas; placing their decision upon the express grounds that as the writ was *tested* in the name of the chief justice of the common pleas, there was something to amend by. The reason why void process cannot be amended is, there is nothing to amend by." But see Matthews *v.* Thompson, 3 Ohio, 272.

§ 16. **On What Judgments.**—Conceding that the court has general authority to issue executions, and that nothing has occurred to suspend such authority, it is now necessary to inquire whether the judgment is one in reference to which this power of the court can properly be invoked; or in other words, on what judgments may executions issue? The general answer to this question is, that the judgment, though it need not contain a formal award of execution,[1] must be final,[2] and must in form be sufficient to enable a court by inspection to determine what has been awarded, from whom the award is to be recovered, and to whom it is due.[3] Because it does not sufficiently indicate for whom the recovery is to be made, no execution can issue on a judgment in favor of "the legatees of P. J.,"[4] nor in favor of "the officers of the circuit court of M."[5] But this rule does not apply to a judgment in

[1] Little *v.* Cook, 1 Aik. 363; 15 Am. Dec. 698.

[2] Truett *v.* Legg, 32 Md. 150; 4 Wait's Prac. 2.

[3] As to form of judgments, see Freeman on Judgments, sec. 46–55. If the judgment is final and is sufficient in form, an execution may issue, irrespective of the character of the judgment. Thompson *v.* Perryman, 45 Ala. 619; Orrok *v.* Orrok, 1 Mass. 341; French *v.* French, 4 Mass. 587; Howard *v.* Howard, 15 Mass. 196; Reynolds *v.* Lowry, 6 Pa. St. 465; Bank of Chester *v.* Ralston, 7 Pa. St. 482. No execution can issue on a judgment condemning lands and awarding a sum to be paid therefor. The plaintiff may not wish to take the land at the price awarded. If he does not so wish, there is nothing compulsory in the nature of the judgment. Chicago & M. R. R. Co. *v.* Bull, 20 Ill. 218; Cook *v.* Commissioners, 61 Ill. 115. In saying that, as a general rule, an execution may issue on any final judgment, we must be understood as assuming that the judgment is not void. A void judgment is in legal contemplation no judgment. Freeman on Judgments, sec. 117. An execution issued on a void judgment and an execution issued without any judgment are alike invalid, for neither has any legal foundation on which to rest. Albee *v.* Ward, 8 Mass. 79; Nabours *v.* Cocke, 24 Miss. 44; Fithian v. Monks, 43 Mo. 502; Gelston *v.* Thompson, 29 Md. 595; Mulvey *v.* Carpenter, 8 Chic. L. N. 171; Roberts v. Stowers, 7 Bush, 295; Morris *v.* Hogle, 37 Ill. 150; Johnson v. Baker, 38 Ill. 98; Chase *v.* Dana, 44 Ill. 262.

[4] Joseph *v.* Joseph, 5 Ala. 280.

[5] Patterson *v.* The Officers, 11 Ala. 742.

favor of C., "for the use of the officers of the court"; for here the plaintiff is distinctly specified, and the other words may be rejected as surplusage.[1] The judgment must also warrant the kind of execution issued. Hence no execution *in personam* can issue on a judgment *in rem*.[2] But if the judgment be *in personam*, and also authorize the sale of certain property for its satisfaction, the plaintiff is not compelled to avail himself of this property, but may take out an ordinary execution, and levy upon other property belonging to the defendant.[3]

§ 17. **Executions on Orders and Rules of Court.** — While at common law it was a well-settled rule "that in all cases a judgment shall precede execution,"[4] yet this rule is now subject to many statutory innovations. In England, as we have seen,[5] the same statute which enabled courts of chancery to issue execution on final decrees authorized rules of courts of law and orders in chancery to be enforced by execution. Under this statute these orders and rules are given the effect of judgments. Executions may therefore be issued thereon without first applying to the court for permission.[6] In one respect, these rules and orders are more favored than final judgments and decrees; for when

[1] McElhaney *v.* Flynn, 23 Ala. 820. If the amount of the judgment is not certain when entered, as if judgment be for the penalty in a bond to be released on payment of a smaller sum, execution can only be for such smaller sum (Sprague *v.* Seymour, 15 Johns. 474), and cannot issue till the judgment has been made certain by ascertaining that sum. Fitzhugh *v.* Blake, 2 Cranch C. C. 37; Rusk *v.* Sackett, 28 Wis. 400.

[2] Chapman *v.* Lemon, 11 How. Pr. 239.

[3] Bennett *v.* Morehouse, 42 N. Y. 191.

[4] Washington *v.* Ewing, Mart. & Y. 47.

[5] See § 10.

[6] Wallis *v.* Sheffield, 7 Dowl. P. C. 793; 3 Jur. 1002, Exch.; Harrison *v.* Hampson, 5 Dowl. & L. 484; 4 Com. B. 745; 17 L. J. Com. P. 147

more than a year and a day have elapsed since their entry, no *scire facias* nor special leave is necessary to authorize the issuing of execution.[1] But the order or rule on which the execution is based must be unconditional,[2] and made after notice to the party to be charged.[3] So in the United States, under statutes similar to the English statute just referred to, executions may be issued upon unconditional orders of court for the payment of money.[4]

By this means the purchaser under a decree in chancery is sometimes brought before the court by motion in the original suit, and compelled to pay his bid.[5]

In some of the states, when an action has been finally determined, and fees due to the court officials or some of them remain unpaid, the clerk of the court has power to issue execution for the collection of such unpaid fees. In such cases the order of the court taxing the costs, or the mere cost bill properly verified or authenticated, where such order is not required, stands in the place of the judgment, at least so far as to warrant and support such execution.[6]

§ 18. Executions on a Lost or Destroyed Record. —A judgment is the sentence of the law pronounced

[1] In re Spooner, 11 Q. B. 130; 17 L. J., N. S., Q. B. 68.

[2] Gibbs *v.* Flight, 13 Com. B. 803; 17 Jur. 1034; 22 L. J. Com. P. 1056.

[3] Rickards *v.* Patterson, 8 Mees. & W. 313; 10 L. J. Ex. 272; 5 Jur. 894.

[4] Cal. Code Civ. Proc., sec. 1007; Ark. Dig., ed. of 1858, p. 499, sec. 1; Code of Iowa, sec. 3026.

[5] Atkinson *v.* Richardson, 18 Wis. 246; Blackmore *v.* Barker, 2 Swan, 342.

[6] Clerk's Office *v.* Allen, 7 Jones, 156; Sheppard *v.* Bland, 87 N. C. 163. In California an execution may issue for costs on appeal without any order or judgment fixing their amount. Section 1034 of the Code of Civil Procedure is as follows: "Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must within thirty days after the *remittitur* is filed with the clerk below deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereupon he may have an execution therefor as upon a judgment."

favor of C., "for the use of the officers of the court"; for here the plaintiff is distinctly specified, and the other words may be rejected as surplusage.[1] The judgment must also warrant the kind of execution issued. Hence no execution *in personam* can issue on a judgment *in rem*.[2] But if the judgment be *in personam*, and also authorize the sale of certain property for its satisfaction, the plaintiff is not compelled to avail himself of this property, but may take out an ordinary execution, and levy upon other property belonging to the defendant.[3]

§ 17. **Executions on Orders and Rules of Court.** — While at common law it was a well-settled rule "that in all cases a judgment shall precede execution,"[4] yet this rule is now subject to many statutory innovations. In England, as we have seen,[5] the same statute which enabled courts of chancery to issue execution on final decrees authorized rules of courts of law and orders in chancery to be enforced by execution. Under this statute these orders and rules are given the effect of judgments. Executions may therefore be issued thereon without first applying to the court for permission.[6] In one respect, these rules and orders are more favored than final judgments and decrees; for when

[1] McElhaney *v.* Flynn, 23 Ala. 820. If the amount of the judgment is not certain when entered, as if judgment be for the penalty in a bond to be released on payment of a smaller sum, execution can only be for such smaller sum (Sprague *v.* Seymour, 15 Johns. 474), and cannot issue till the judgment has been made certain by ascertaining that sum. Fitzhugh *v.* Blake, 2 Cranch C. C. 37; Rusk *v.* Sackett, 28 Wis. 400.

[2] Chapman *v.* Lemon, 11 How. Pr. 239.

[3] Bennett *v.* Morehouse, 42 N. Y. 191.

[4] Washington *v.* Ewing, Mart. & Y. 47.

[5] See § 10.

[6] Wallis *v.* Sheffield, 7 Dowl. P. C. 793; 3 Jur. 1002, Exch.; Harrison *v.* Hampson, 5 Dowl. & L. 484; 4 Com. B. 745; 17 L. J. Com. P. 147

more than a year and a day have elapsed since their entry, no *scire facias* nor special leave is necessary to authorize the issuing of execution.[1] But the order or rule on which the execution is based must be unconditional,[2] and made after notice to the party to be charged.[3] So in the United States, under statutes similar to the English statute just referred to, executions may be issued upon unconditional orders of court for the payment of money.[4]

By this means the purchaser under a decree in chancery is sometimes brought before the court by motion in the original suit, and compelled to pay his bid.[5]

In some of the states, when an action has been finally determined, and fees due to the court officials or some of them remain unpaid, the clerk of the court has power to issue execution for the collection of such unpaid fees. In such cases the order of the court taxing the costs, or the mere cost bill properly verified or authenticated, where such order is not required, stands in the place of the judgment, at least so far as to warrant and support such execution.[6]

§ 18. Executions on a Lost or Destroyed Record. —A judgment is the sentence of the law pronounced

[1] In re Spooner, 11 Q. B. 136; 17 L. J., N. S., Q. B. 68.

[2] Gibbs *v.* Flight, 13 Com. B. 803; 17 Jur. 1034; 22 L. J. Com. P. 1056.

[3] Rickards *v.* Patterson, 8 Mees. & W. 313; 10 L. J. Ex. 272; 5 Jur. 894.

[4] Cal. Code Civ. Proc., sec. 1007; Ark. Dig., ed. of 1858, p. 499, sec. 1; Code of Iowa, sec. 3026.

[5] Atkinson *v.* Richardson, 18 Wis. 246; Blackmore *v.* Barker, 2 Swan, 342.

[6] Clerk's Office *v.* Allen, 7 Jones, 156; Sheppard *v.* Bland, 87 N. C. 163. In California an execution may issue for costs on appeal without any order or judgment fixing their amount. Section 1034 of the Code of Civil Procedure is as follows: "Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must within thirty days after the *remittitur* is filed with the clerk below deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereupon he may have an execution therefor as upon a judgment."

by the court. The judgment necessarily precedes its entry. The entry or record is not the judgment, but merely the best evidence of the fact that the judgment exists. As a judgment may exist preceding the record evidence of its existence, so it may continue in full force after this evidence has been lost or destroyed. Hence the destruction or mutilation of the record by no means divests the court nor the proper officers thereof of authority to issue execution.[1]

§ 19. Execution on a Merged or Satisfied Judgment.—When a judgment or decree has, by payment or otherwise, lost its original force, the case presented is very different from that where the mere evidence has been lost. When satisfied, the judgment has fully accomplished its mission, and the preponderance of authority is in favor of disregarding as absolutely void all proceedings taken subsequently to the satisfaction. The satisfaction of a judgment, as a matter of course, must terminate the period when execution can properly issue; it must equally follow, as a matter of course, that the subsequent issue of execution can, as to the plaintiff and all persons acting in concert with him and having notice of the satisfaction, afford no justification for issuing the writ, nor for any act done under its authority.[2] Whoever sues out an execution on a judgment which he knows to be paid is liable for all damages which he may occasion the defendant thereby; nor is it essential to the maintenance of the action that the wrongful issue of the execution be shown to have

[1] Strain *v.* Murphy, 49 Mo. 340; Faust *v.* Echols, 4 Cold. 400; Fleece *v.* Goodrum, 1 Duvall, 306; Cheesewright *v.* Franks, 7 Dowl. 471; Fischer *v.* Sievers, 6 Chic. L. N. 11.

[2] McGuinty *v.* Herrick, 5 Wend. 240; Weston *v.* Clark, 37 Mo. 573; Myers v. Cochran, 29 Ind. 256; Ruckman *v.* Cowell, 1 N. Y. 505; Keeling *v.* Heard, 3 Head, 592; Hoffman *v.* Strohecker, 7 Watts, 86; 32 Am. Dec. 740.

been the result of actual malice.[1] In England it must be shown that the writ issued without probable cause.[2] A plaintiff is also liable to defendant if he persist in acting under an execution after tender of satisfaction has been made to and refused by the sheriff.[3] As the statutes of the several states generally, and we believe universally, provide for the entry of satisfaction on the record or upon the judgment docket, and thus afford defendants ample means of giving public notice that an apparent obligation, evidenced by the public records, has been canceled, we have before expressed,[4] and must still express, our dissatisfaction with the rule of law which permits an execution issued upon a judgment apparently in force to be treated as void. Nevertheless, so large a number of cases may be cited to show that even an innocent purchaser at an execution sale must lose his title by parol proof of the prior satisfaction of the judgment, that we must look to the legislature rather than to the judiciary for means of escape from the hardship of this rule.[5] The reasoning by

[1] Brown *v.* Feeter, 7 Wend. 301; Glover *v.* Horton, 7 Blackf. 295.

[2] Roret *v.* Lewis, 5 Dowl. & L. 371.

[3] Tiffany *v.* St. John, 5 Lans. 153; Masson *v.* Sudan, 2 Johns. Ch. 172.

[4] Freeman on Judgments, § 480.

[5] Durette *v.* Briggs, 47 Mo. 361; Wood *v.* Colvin, 2 Hill, 567; 38 Am. Dec. 598; King *v.* Goodwin, 16 Mass. 63; Shelly *v.* Lash, 16 Minn. 498; Swan *v.* Saddlemire, 8 Wend. 676; Lewis *v.* Palmer, 8 Wend. 368; State *v.* Salyers, 19 Ind. 436; Neilson *v.* Neilson, 5 Barb. 569; Carpenter *v.* Stillwell, 11 N. Y. 61; Laval *v.* Rowley, 17 Ind. 36; Hunter *v.* Stevenson, 1 Hill (S. C.), 415; Knight *v.* Applegate, 3 T. B. Mon. 335; Murrell *v.* Roberts, 11 Ired. 424; 53 Am. Dec. 419; McClure *v.* Logan, 59 Mo. 234; Carnes *v.* Platt, 59 N. Y. 411; Frost *v.* Yonkers Savings Bank, 70 N. Y. 560; 26 Am. Rep. 627; Wells *v.* Chandler, 2 Fed. Rep. 273; Drefahl *v.* Tuttle, 42 Iowa, 177. This last case shows that at least between the parties to the writ no estoppel can arise to preclude the defendant from successfully resisting an action to recover the property sold under the writ, from the fact that he was aware of its issuance, made no effort to have it vacated, and even procured one postponement of the sale with the intent of obtaining funds with which to satisfy the writ. In this case both parties were fully cognizant of the facts, though each was probably mistaken with

which this rule of law has been best defended was thus stated in the New York court of appeals: "The judgment was the sole foundation of the sheriff's power to sell and convey the premises; and if the judgment was paid when he undertook to sell and convey, his power was at an end, and all his acts were without authority and void. The purchaser under a power is chargeable with notice, if the power does not exist, and purchases at his peril."[1] The supreme court of Missouri quite recently, with less logic but equal emphasis, announced as its conclusion on this subject that "when an execution has performed its office by extracting full satisfaction from a portion of the debtor's property, it cannot have sufficient life and vigor to deprive him of the residue, and transfer the title from him to another."[2] On the other hand, it is insisted that an execution regular on its face, based upon a judgment equally regular and apparently in full force, must be regarded as a regular execution; that while a regular execution may be voidable, it cannot be void; that it must operate as a sufficient justification to officers intrusted with its execution;[3] and finally, that it cannot be the means of ensnaring innocent purchasers when nothing exists to warn them that the foundation on which it apparently rests has in fact been swept away.[4] But the

respect to the law. The judgment had been paid by one of several defendants who was a surety of the others; and they all believed that the judgment might be kept in force for the purpose of enabling him to compel repayment from his co-defendants.

[1] Craft *v.* Merrill, 14 N. Y. 456.

[2] Durette *v.* Briggs, 47 Mo. 361.

[3] Mason *v.* Vance, 1 Sneed, 178; 60 Am. Dec. 144; Lewis *v.* Palmer, 6 Wend. 367.

[4] Luddington *v.* Peck, 2 Conn. 700; Boren *v.* McGehee, 6 Port. 432; 31 Am. Dec. 695; Jackson *v.* Caldwell, 1 Cow. 622; Van Campen *v.* Snyder, 3 How. (Miss.) 66; 32 Am. Dec. 311; Hoffman *v.* Strohecker, 7 Watts, 86; 32 Am. Dec. 740; Doe *v.* Ingersoll, 11 Smedes & M. 249; 49 Am. Dec. 57; Morton *v.*

authorities sustaining this view concede that when the purchaser has notice, the execution and sale are void. When a judgment has been sued upon, and the suit has resulted in a second judgment against the defendant based upon the first, it is impossible to state, under the present condition of the authorities, whether the first is merged into and extinguished by the second, or whether both must be regarded as in force until one is satisfied by payment. We see no reason why the second judgment should not be regarded as a full merger and satisfaction of the first, and to this view we think the authorities slightly preponderate.[1] But upon the common-law theory that no merger can take place except where the original debt is replaced by a debt of a higher nature, it has frequently been denied that one judgment can merge into another.[2] This last view has for a long period and on many occasions received the approval of the courts of the state of New York. In that state it is certain that the first judgment may, notwithstanding the second, be enforced by execution;[3] and this is also the rule in Alabama and Texas, at least

Academies, 8 Smedes & M. 773; Banks v. Evans, 10 Smedes & M. 35; 48 Am. Dec. 734.

[1] Chitty *v.* Glenn, 3 T. B. Mon. 425; Whiting *v.* Beebee, 7 Eng. 549; Freeman on Judgments, secs. 215, 216. In several cases a statutory judgment arising by force of the law on the forfeiture of bonds has been held to be a full discharge of the original judgment. Witherspoon *v.* Spring, 3 How. (Miss.) 60; 32 Am. Dec. 310; King *v.* Terry, 6 How. (Miss.) 513; Brown *v.* Clark, 4 How. (Miss.) 4; Bank of U. S. *v.* Patton, 5 How. (Miss.) 200; 35 Am. Dec. 428; Wright *v.* Yell, 13 Ark. 503; 58 Am. Dec. 336; Hanna *v.* Guy, 3 Bush, 91; Cook *v.* Armstrong, 25 Miss. 63; Neale v. Jeter, 25 Ark. 98; Black v. Nettle, 25 Ark. 606; Lipscomb *v.* Grace, 26 Ark. 234; Commonwealth *v.* Merrigan, 8 Bush, 132; Joyce *v.* Farquhar, 1 A. K. Marsh. 20.

[2] Weeks *v.* Pearson, 5 N. H. 324; Griswold *v.* Hill, 2 Paine, 492.

[3] Jackson *v.* Shaffer, 11 Johns. 513; Mumford *v.* Stocker, 1 Cow. 178; Doty *v.* Russell, 5 Wend. 129; Andrews *v.* Smith, 9 Wend. 53; Bates *v.* Lyons, 7 Paige, 86; Howard *v.* Sheldon, 11 Paige, 558; Millard *v.* Whitaker, 5 Hill, 408; Small *v.* Wheaton, 2 Abb. Pr. 316; 4 E. D. Smith, 427; Smith v. Anderson, 18 Md. 520.

in regard to statutory judgments on forthcoming and delivery bonds.[1]

Where from any cause a judgment is by the record, or by the return of execution shown to be satisfied, it would certainly be very irregular to issue execution, although the entry of satisfaction was made through mistake. In such cases, if sufficient cause exists for vacating the apparent satisfaction, application should first be made to the court for such vacation, and for leave to issue execution before any further steps are taken toward the enforcement of the judgment.[2] But it must be admitted that due respect for this rule has not been uniformly enforced. Thus where plaintiff executed a satisfaction piece, and delivered it to a third person with authority to file it on compliance with certain conditions, and it was filed without such compliance, the court held that the plaintiff was entitled to issue execution without asking for leave of the court, and while the satisfaction remained in apparent force.[3] The pendency of an action upon a judgment has no effect upon the right to issue execution thereon.[4]

§ 20. **Executions on Void Judgments or Orders.** —It is not sufficient that the judgment on which execution issues appears to be final, and is perfect in form. It must at least be so far valid as to be impregnable to collateral assault. "A void judgment is in legal effect no judgment. By it no rights are divested.

[1] Patton v. Hamner, 33 Ala. 307; Cole *v.* Robertson, 6 Tex. 356; 55 Am. Dec. 784.

[2] Foot *v.* Dillaye, 65 Barb. 521; Ackerman *v.* Ackerman, 14 Abb. Pr. 229; Snipes *v.* Beezley, 5 Or. 420.

[3] Anderson *v.* Nicholas, 5 Robt. 634.

[4] Cushing *v.* Arnold, 9 Met. 23; Moor *v.* Towle, 38 Me. 133; Freeman on Judgments, sec. 440.

From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress."[1] An execution issued by a clerk without the authority of any judgment whatever, like that issued on a void judgment, has no validity.[2]

§ 21. **Who may Sue out, and how He may Compel its Issuance.**—As the judgment is the property of the plaintiff, he alone, while the property remains his, is entitled to exercise dominion over it. As a writ of execution is the only means by which the property can be made productive, the owner of the property is necessarily the person entitled to call for the writ; to withhold the writ from him is in effect to withhold from him the beneficial enjoyment of his property; and to allow another to call for or to control the writ is to turn the dominion of property over to one who has no right thereto. Of course, ownership over judgments, like ownership over all other kinds of property, may be exercised in person or by duly constituted agents. But as the plaintiff is the only person entitled to the fruits of the judgment, no execution can properly issue

[1] Freeman on Judgments, sec. 117, citing Campbell *v.* McCahan, 41 Ill. 45; Roberts *v.* Stowers, 7 Bush, 295; Huls *v.* Buntin, 47 Ill. 397; Sherrill *v.* Goodrum, 3 Humph. 430; Andrews *v.* State, 2 Sneed, 550; Hollingsworth *v.* Bagley, 35 Tex. 345; Morton *v.* Root, 2 Dill. 312; Com. Bank *v.* Martin, 9 Smedes & M. 613; Hargis v. Morse, 7 Kan. 417. See also Cornell *v.* Barnes, 7 Hill, 35; Dawson *v.* Wells, 3 Ind. 398; Meyer *v.* Mintonye, 106 Ill. 414.

[2] Criswell *v.* Ragsdale, 18 Tex. 443.

except at his instance or that of his attorney or agent.[1] Where a deputy clerk issued execution without authority from the plaintiff, and afterwards became the purchaser at a sale thereunder, it was held that he could take no benefit from his purchase, although no actual fraud entered into the transaction; but that a grantee from such clerk for value and without notice of the irregularity could not be disturbed in his title.[2]

An execution may be issued by the clerk of the court without the authority or knowledge of the plaintiff. In that event the plaintiff, on becoming aware of such issuance, may ratify it, and upon such ratification the writ seems to become and remain as efficient and unobjectionable as though originally issued by authority.[3] Doubtless the ratification may be inferred from very slight circumstances, when the knowledge of the existence of the writ is brought home to plaintiff. Nevertheless, it may happen without any fault or neglect on the part of the plaintiff, that the writ is issued and executed without his knowledge and to his prejudice. In such case, either he or the purchaser at the execution sale must suffer a loss; and so far as the question has been considered, it has been held, and perhaps wisely, that the loss, if any, falls on him, and that the

[1] State *v.* Wilkins, 21 Ind. 217; Watt *v.* Alvord, 25 Ind. 535; Wills *v.* Chandler, 2 Fed. Rep. 273; Newkirk *v.* Chapron, 17 Ill. 345; Osgood *v.* Brown, Freem. Ch. 292; Wickliff *v.* Robinson, 18 Ill. 145; Ex parte Hampton, 2 G. Greene, 137; Nunemacher *v.* Ingle, 20 Ind. 135; Brush *v.* Lee, 36 N. Y. 49; McDonald *v.* O'Flynn, 2 Daly, 42.

[2] Lewis *v.* Phillips, 17 Ind. 108; 79 Am. Dec. 467. Where after death of plaintiff execution was taken out in his name by persons not appearing to have any authority to do so, the court seemed inclined to the opinion that it was void. Bellinger *v.* Ford, 14 Barb. 251. An execution issued by a clerk, without authority, may be quashed or enjoined. Shakleford *v.* Apperson, 6 Gratt. 451.

[3] Clarkson *v.* White, 4 J. J. Marsh. 529; 20 Am. Dec. 229; Lerch *v.* Gallup, 67 Cal. 595.

purchaser, if he acted in good faith, takes title although the sale was without plaintiff's knowledge, and realized a sum less than the value of the property, and insufficient to satisfy the writ.[1] This is upon the ground that the purchaser is not bound to look behind the judgment and writ, and may safely presume that the acts of the officers, apparently within the scope of their powers and duties, were not unauthorized. Until the contrary is shown, an execution will be presumed to have issued at the instance of the plaintiff.[2] An execution may be issued by a different attorney from the one employed when judgment was entered,[3] though no formal substitution be made. The plaintiff may control his own execution free from the interference of his attorney and of the officers of the court.[4] When the plaintiff has ceased to have any interest in the judgment, by reason of his having it assigned to another, his right to control process also ceases. Whether the law recognizes the assignment as a legal or only as an equitable transfer, it nevertheless allows the assignee to control the execution.[5] A stranger may acquire an equitable right to the benefit of the execution, or to the property upon which it is levied, and such equitable right may, in most cases, give him authority to sue out and conduct the process, or to object to its regularity or validity; but he cannot do so by proceedings in the case in his own name, upon or against the process, for the purpose of enforcing or abrogating the same: he

[1] Sowles *v.* Harvey, 20 Ind. 217; 83 Am. Dec. 315; Splahn *v.* Gillespie, 48 Ind. 410; Johnston *v.* Murray, 112 Ind. 154.

[2] Niantic Bank *v.* Dennis, 37 Ill. 381.

[3] Cook *v.* Dickerson, 1 Duer, 679; Thorp *v.* Fowler, 5 Cow. 446; Tipping *v.* Johnson, 2 Bos. & P. 357.

[4] Reddick *v.* Cloud, 2 Gilm. 670; Morgan *v.* People, 59 Ill. 58.

[5] Corriell *v.* Doolittle, 2 G. Greene, 385.

must do it in the name of a legal party to the process, or one who can be made so. And this authority, so derived, to use the name of a party to the process of a court of law, will be so far recognized by such court as to preclude the intervention of such party for the purpose of defeating it. But a court of law cannot tolerate the intromission of equitable claimants into or against its process as if they were legal parties thereto; which would break in upon its forms and modes of administering justice, and present for its adjudication collateral, and indeed irrelevant, questions arising out of the derivation of their interests; for equitable claimants can acquire no better or other right to prosecute or defend the process under or against which they claim than that of the parties from whom they derive their interest."[1] The right to have an execution may be denied to the plaintiff by the officer whose duty it is to issue it. In such case, the plaintiff seems to have his choice between these remedies: he may sue for the damages occasioned by the denial of his right;[2] or he may, by motion or by *mandamus*, compel the issuing of the writ.[3] In California, however, when the judgment is for money only, the plaintiff cannot proceed by *mandamus*, because the remedies by motion and by action against the clerk are both adequate.[4]

§ 22. **Persons against Whom Execution may Issue.**—"The power and authority of our courts extend over every class of persons and every species of prop-

[1] Wallop's Adm'r *v.* Scarburgh, 5 Gratt. 4; Haden *v.* Walker, 5 Ala. 88; Fisk *v.* Lamoreaux, 48 Mo. 523; Weir *v.* Pennington, 6 Eng. 745.

[2] Gaylor *v.* Hunt, 23 Ohio St. 255.

[3] Terhume *v.* Barcalow, 6 Halst. 38; Laird *v.* Abrahams, 3 Green (N. J.), 22; People *v.* Yale, 22 Barb. 502; Stafford *v.* Union Bank, 17 How. 275. See Jones *v.* McMahan, 30 Tex. 726.

[4] Goodwin *v.* Glazer, 10 Cal. 333; Fulton *v.* Hanna, 40 Cal. 278.

erty situate within the territorial limits in which those courts are authorized to act, and subject to the same sovereignty which organized the courts, and invested them with judicial functions. Every subject is, therefore, liable to be made a party litigant, and to be bound by the result of the litigation. Those disabilities arising from infancy, from coverture, or from mental infirmities, which render parties incapable of being bound by their contracts, do not have the effect of exempting any person from the control of the courts."[1] It would be a contradiction of terms to say that all persons may be bound by judgments, and then to declare that some persons are exempt from having executions issued against them. The decisions in regard to the persons who may be parties to judgments are not perfectly harmonious; but wherever, under the law as understood in any particular state, a person, or class of persons, may be made parties litigant, and bound by judgments against them, it must follow, in the absence of statutes to the contrary, that the same persons may, by writs of execution, be made to satisfy such judgments. In other words, when a judgment is valid against the defendant, an execution based upon it must, unless expressly forbidden by statute, be equally valid. Execution may therefore issue against a lunatic,[2] and also against a married woman.[3] There are, however, some familiar instances in which the only effect of a judgment is to establish the existence of a

[1] Freeman on Judgments, sec. 142. As to judgments against married women, lunaties, infants, and deceased persons, see Freeman on Judgments, secs. 142–153.

[2] Ex parte Leighton, 14 Mass. 207; Thatcher *v.* Dinsmore, 5 Mass. 299.

[3] Moncrief *v.* Ward, 16 Abb. Pr. 354, note; Baldwin *v.* Kimmel, 16 Abb. Pr. 353; 1 Robt. 109; Charles *v.* Lowenstein, 26 How. Pr. 29; Fox *v.* Hatch, 14 Vt. 340; 39 Am. Dec. 226.

liability against the defendant; and in which the plaintiff cannot issue execution, but must obtain satisfaction in some other manner provided by law. Thus, a judgment against a county, or a municipal corporation, is ordinarily no more than the mere establishment of a valid claim, which it is the duty of the proper officers to provide means of payment, out of the revenues of the defendant. It is error to award or issue execution on such a judgment.[1] This rule is not of universal

[1] Emerie *v.* Gilman, 10 Cal. 404; 70 Am. Dec. 742; Kimmundy *v.* Mahan, 72 Ill. 462; Wilson *v.* Commissioners, 7 Watts & S. 197; Board of Supervisors *v.* Edmonds, 76 Ill. 544; Knox County *v.* Arms, 22 Ill. 175; King *v.* McDrew, 31 Ill. 418; Gilman *v.* Contra Costa County, 8 Cal. 52; 68 Am. Dec. 290; Sharp *v.* Contra Costa County, 34 Cal. 290; City of Chicago *v.* Hasley, 25 Ill. 595. In this last case a judgment for damages had been recovered against the city of Chicago, and execution issued thereon. A motion to quash the writ having been made and refused, an appeal was taken to the supreme court, where the action of the subordinate court was reversed. Breese, J., in pronouncing the opinion of the court, said: "There can be no doubt that the property of a private corporation may be seized and sold under a *fi. fa.* for the payment of its debts, as in the case of an individual, such corporation being bound to provide for its just debts, whether payment is made by a forced sale of its property for that purpose, or with money from its safe.

"The nature, objects, and liabilities of political, municipal, or public corporations, we think, stand on different grounds. These corporations signify a community, and are clothed with very extensive civil authority and political power. All municipal corporations are both public and political bodies. They are the embodiment of so much political power as may be adjudged necessary, by the legislature granting the charter, for the proper government of the people within the limits of the city or town incorporated, and for the due and efficient administration of their local affairs. For these purposes, the authorities can raise revenue by taxation, make public improvements, and defray the expenses thereof by taxation, exercise certain judicial powers, and generally act within their limited spheres, as any other political body, restrained only by the charters creating them, — beyond them, they cannot go. This power of taxation is plenary, and furnishes ordinarily the only means such corporations possess by which to pay their debts. They cannot be said to possess property liable to execution, in the sense an individual owns property so subject, for they have the control of the corporate property only for corporate purposes, and to be used and disposed of to promote such purposes, and such only. Levying on and selling such property, and removing it, would work the most serious injury in any city. Many of our cities, Chicago especially, have costly water-works, indispensable to the lives and health of the citizens. These works are as much the property of the city as any other it

application. In Wisconsin, an execution may, in certain contingencies, issue against a county.[1] Judgments against an executor or administrator, on a cause of action accrued against the deceased, are often very similar in their legal effect to a judgment against a county. This is so when they merely establish the existence of a valid claim against the estate, which must be paid in the course of administration. Such a judgment cannot ordinarily be enforced by execution.[2] On the other hand, there are judgments making administrators or executors personally responsible; and also judgments which, under the law of the state, or by leave of the surrogate, are to be enforced at once, without waiting for due course of administration. On such judgments a writ of execution may issue. But no execution can be properly issued against any person unless a judgment has been pronounced against him. Where the writ is against one defendant only, and is not supported by a judgment against him, it is un-

may control, and in appellee's view, liable to be seized and sold on execution, to the great discomfort and probable ruin of the inhabitants. Fire-engines are also indispensable; they, too, can be seized and sold, and a great city exposed to the ravages of fire, and all this to enable one or more creditors of the city to obtain the fruits of judgments against the city, which, by another process, not producing any of these destructive inconveniences, they could fully obtain. The money raised by taxation could also be levied upon, and the whole business of the city be broken up and deranged, — its offices and office furniture, its jails, hospitals, and other public buildings, taken from the corporate authorities and sold to strangers, who would have a right to the exclusive possession of them if not redeemed. In the absence of an express statute authorizing a proceeding fraught with such consequences, we must hold that a *fi. fa.* cannot issue against the city of Chicago."

[1] Savage *v.* Supervisors of Crawford County, 10 Wis. 49.

[2] Bull *v.* Harris, 31 Ill. 487; Home *v.* Spivey, 44 Ga. 616. But an execution in which the word "executor" or "administrator" is added to the defendant's name, without anything further to indicate that it is against the defendant in his representative capacity, may be treated as against him personally, and levied upon his property. Tinsley *v.* Lee, 51 Ga. 482.

doubtedly void.[1] So where a writ issues against several, some one of whom is not embraced in the judgment, it has been held to be void *in toto*.[2] We are inclined to doubt the correctness of these decisions, and to believe that the addition of unauthorized names is a variance for which the writ ought to be quashed; but that, if permitted to stand, it must be treated as binding on the persons properly named therein. By virtue of statutes, writs of execution may be authorized against persons not nominally parties to the original judgment. A familiar instance of this is the statute which, on return of *nulla bona*, to an execution against a corporation, authorizes its stockholders to be brought before the court on motion, and an order to be thereupon made for the issuing of execution against them for their proportion of the debt.[3]

§ 23. **By Whom Issued.** — The awarding of an execution is a judicial act. "To award is to adjudge, to give anything by judicial sentence."[4] "To award an execution is a judicial act, and not a ministerial one; no such power is given the clerk by law. In England, when he issues the execution it is by order of the court; here it is by virtue of the judgment, which, it is determined, awards the execution."[5] The award of execution need not be mentioned in the judgment; for it is by law the necessary consequence of the judgment. The award of execution, or in other words, the granting of judgment, being a judicial act, the judge is not personally

[1] Terrail *v.* Tinney, 20 La. Ann. 444.

[2] Fleming *v.* Dayton, 8 Ired. 453; Blanchard *v.* Blanchard, 3 Ired. 105; 38 Am. Dec. 710; Pennoyer *v.* Brace, 1 Ld. Raym. 244.

[3] Marks *v.* Hardy, 86 Mo. 232; Paxon *v.* Talmage, 87 Mo. 13.

[4] Johnson *v.* Ball, 1 Yerg. 292; 24 Am. Dec. 751.

[5] Daley *v.* Perry, 9 Yerg. 444.

liable for errors committed by him in its performance. But as the issuing of execution is a mere ministerial act, the officer is liable for unlawfully performing it. Hence in Massachusetts, a justice of the peace, who, in defiance of the statute, issued execution within twenty-four hours after entering judgment, was held responsible in an action of trespass.[1] Another result, following from the rule that the issue of execution is to be regarded as a ministerial act, is that the officer having authority to issue the writ need not do it in person, but may delegate his authority to another. It is not indispensable to the regularity of an execution that it should be issued by the clerk or a duly qualified deputy. If the clerk thinks proper, he can engage the services of an assistant to write for him; and if the execution is made out and subscribed with his name, by his direction, and under his supervision, or if made and subscribed with his name, and afterwards adopted by him, it would, in point of law, be as much his act as if the labor had been performed with his own hand."[2] The same ruling has been made in the case of an execution issued out of a justice's court.[3] But it seems to us that a general authority to issue execution cannot be delegated, except where the law authorizes the appointment of a deputy, and such appointment has been made; and that the cases referred to go no further than to sustain executions made so directly under the eye and control of the officer that they must be treated as his acts. Executions are usually issued by the clerk when the

[1] Briggs *v.* Wardwell, 10 Mass. 356. An officer issuing execution while a stay bond is in force is liable as a trespasser. Milliken *v.* Brown, 10 Serg. & R. 188.

[2] McMahan *v.* Colclough, 2 Ala. 70.

[3] Kyle *v.* Evans, 3 Ala. 482; 37 Am. Dec. 705.

court has one, and by the judge or justice when the court has no clerk. In New York they may be issued by the plaintiff or his attorney.[1] Being a mere ministerial act, the clerk is not disqualified from the issuing of an execution because he is attorney for one of the parties.[2] He is not relieved from the duty of issuing the writ by the judgment being uncertain in its terms and difficult to execute.[3] An execution issued by a person having no authority so to do conferred on him by law, nor by delegation from some competent official, is conceded to be void.[4] This rule applies to executions which appear to be issued by the proper officer, but which in fact are forgeries.[5]

§ 24. **Earliest Time for Issuing.**—Having treated of the courts from which, and the judgments and decrees on which, and the persons for and against whom, execution may issue, we come next to the consideration of the time during which such issuing may properly be made. In treating this subject, we shall direct attention, first, to the earliest period at which an execution may properly issue, and the consequences of its issuance before that period; and second, to the latest period at which an execution may properly issue, and the consequences of its issuance after the expiration of that period. As an execution is authorized for the purpose of making effectual the judgment or order of the court, it must, of course, follow that the plaintiff may have it issued as soon as the time comes when he

[1] Code of N. Y., sec. 289.

[2] Blount *v.* Wells, 55 Ga. 282.

[3] Levy *v.* Blount, 15 La. Ann. 573; 77 Am. Dec. 198.

[4] Seaton *v.* Hamilton, 10 Iowa, 394; Perry *v.* Whipple, 38 Vt. 278; Furman Dewell, 35 Iowa, 170.

[5] Silvan *v.* Coffee, 20 Tex. 4; 70 Am. Dec. 371.

is entitled to the satisfaction of his judgment or decree, and this is generally immediately upon its entry, unless process is stayed by some order or rule of court.[1] It must also follow that there is no authority for an execution until there is a judgment to be enforced. If there be no judgment, a writ issued in anticipation of such judgment is void, and continues invalid though the judgment be subsequently rendered and entered.[2] If, however, a judgment is rendered, a writ of execution may issue before its formal entry.[3] If a writ so issued were assailed and sought to be vacated or otherwise avoided, it would generally be rescued from peril by a *nunc pro tunc* entry of the judgment upon which it was based. In Illinois, it appears that an execution issued upon a judgment by confession in advance of the actual entry of such judgment is unauthorized and void, although every act had been done and every fact existed, making it the unquestionable duty of the clerk to enter the judgment.[4] These cases seem to us very questionable. We think the confession having been made in due form, and everything done which the statute exacted, judgment thereupon was pronounced by the law, and was therefore legally in existence, though not formally recorded by the clerk. His failure to enter it was the neglect of a mere ministerial duty; and where the failure to enter a judgment arises from such neglect, it is generally regarded as sufficiently in existence to support a writ. Doubtless there is generally no authority for the issuing of an execution prior to the

[1] Seton's Forms of Decrees, Judgments, and Orders, 4th ed., 1561.
[2] Hathaway *v.* Howell, 6 Thomp. & C. 453; 4 Hun, 470.
[3] Graham *v.* Lynn, 4 B. Mon. 17; 39 Am. Dec. 493.
[4] Ling *v.* King, 91 Ill. 571; Cummins *v.* Holmes, 109 Ill. 15.

rendition of the judgment.[1] But to this rule there are exceptions, arising in cases where the entry of judgment is a mere ministerial act, as where, upon the verdict of a jury, a justice of the peace is required by law to enter judgment in conformity therewith. In such cases, the rendition of the verdict is substantially the rendition of the judgment.[2] By the common law, as soon as final judgment was signed, and before its entry of record, execution might issue, "provided there was no writ of error depending, or agreement to the contrary."[3] So in New Jersey, "the established practice is that the plaintiff may issue his execution immediately after the entry of judgment *nisi*, if he thinks proper to do so, at the risk, however, of having it rendered a nullity, by the rule to show cause being allowed absolutely, and without directing the entry of final judgment for the protection of plaintiff."[4] In California, execution may issue before the judgment roll is made up.[5] But it seems that the common-law practice never prevailed in New York; and that the practice adopted in its stead required the judgment roll to be filed with the clerk before issuing execution.[6]

[1] Parker *v.* Frambes, 1 Pen. 156; Lofton *v.* Champion, 1 Pen. 157; Lee *v.* Steelman, 1 Pen. 319; Rector *v.* Gale, Hardin, 78. In Missouri, execution cannot regularly issue until the motion for a new trial has been denied. Stephens *v.* Brown, 56 Mo. 23.

[2] Freeman on Judgments, 2d ed., sec. 53 a; Lynch *v.* Kelly, 41 Cal. 232; Felton *v.* Mulliner, 2 Johns. 181; Overall *v.* Pero, 7 Mich. 317; Gaines *v.* Betts, 2 Doug. (Mich.) 98.

[3] Tidd's Pr. 994. But a writ tested before the time of signing judgment is irregular. Peacock *v.* Day, 3 Dowl. P. C. 291; Englehart *v.* Dunbar, 2 Dowl. P. C. 202.

[4] Erie R. Co. *v.* Ackerson, 33 N. J. L. 33.

[5] Sharp *v.* Lumley, 34 Cal. 614.

[6] Barrie *v.* Dana, 20 Johns. 309; Chicester *v.* Cande, 3 Cow. 563; 15 Am. Dec. 238; Marvin *v.* Herrick, 5 Wend. 109; Clute *v.* Clute, 4 Denio, 243; Townshend *v.* Wesson, 4 Duer, 342; Macomber *v.* Mayor of N. Y., 17 Abb. Pr. 35; Morris *v.* Patchin, 24 N. Y. 398; 82 Am. Dec. 311.

The docketing of judgments is required for the purpose of imparting notice to third persons of the existence of the judgment lien. It is in no wise essential to the existence of the judgment;[1] nor is it in general regarded as a condition precedent to the issue of execution[2] in any case where the same is issued by the court wherein judgment was rendered. The period at which execution may first issue has been the subject of such varied statutory regulation in the different states that it cannot be fully treated, except by furnishing extracts from each of those statutes. And

[1] Freeman on Judgments, sec. 343.

[2] Hastings *v.* Cunningham, 39 Cal. 144; Mollison *v.* Eaton, 16 Minn. 426; 10 Am. Rep. 150; Youngs *v.* Morrison, 10 Paige, 325; Corey *v.* Cornelius, 1 Barb. Ch. 583; Clark *v.* Dakin, 2 Barb. Ch. 36. The 287th section of the New York Code of Procedure provides that execution may issue "to the sheriff of any county where judgment is docketed." This language might, with equal force, be construed as limitation or an extension of the previous authority of the court to issue execution. It may be argued, on the one hand, that this provision was designed solely to extend the authority of local courts, and to enable them to issue writs not only within the limits of their own jurisdiction, but also to other counties in which the judgment had been docketed, and this we think the more reasonable construction. But Mr. Wait construes the provision as a limitation, for he says: "An execution cannot regularly issue on a judgment for the payment of money before such judgment has been docketed." 4 Wait's Pr. 6. The cases cited by him hardly support his assertion. In the case of Stephens *v.* Browning, 1 Code Rep. 123, a judgment had been recovered in New York City, and execution against the real and personal property of the defendant had issued to Oswego County, before any transcript had been docketed in the last-named county. The court held that the execution was authorized as to the personal and unauthorized as the real estate, and permitted it to be amended so as to run against personalty only. In Stouttenburgh *v.* Vandenburgh, 7 How. Pr. 229, a judgment was entered in Columbia County and a transcript sent to Greene County. The execution was received in Greene County one day before the transcript. It was held that the execution became operative in the hands of the sheriff from the time the judgment was actually docketed in Greene County. But the court was inclined to hold that in all cases before execution can be issued to any county, judgment should be docketed. In De Agreda *v.* Mantel, 1 Abb. Pr. 135, as in the case just cited, the necessity of docketing the judgment to authorize execution in the county where it was entered was not involved; but the court expressed its doubt on the subject.

wherever a matter is so much under the control of diverse statutes, we think it better to turn the practitioners of each state over to the consideration of their own statutory compilations than to attempt the recompilation and republication of these statutes as a part of this treatise. We may say, however, in regard to the general policy of these statutes, that many of them authorize execution immediately after the *entry* of judgment;[1] and that the others, which postpone the right to execution to a later date, generally have provisions under which, in cases of emergency, immediate execution may be obtained upon applying to the court therefor.[2]

§ 25. **The Consequences of the Premature Issuing** of an execution are next to be considered. An execution issued in Massachusetts, in violation of the statute directing that "no execution shall be issued within twenty-four hours after the entry of the judgment," was adjudged to be void, and the title derived there-

[1] De Witt *v.* Smith, 3 How. Pr, 280; Carpenter *v.* Vanscoten, 20 Ind. 52; People *v.* Bay Co., 14 Mich. 169; Sharp *v.* Lumley, 34 Cal. 614.

[2] Formerly in New York execution could not issue until thirty days after entry of judgment. Commercial Bank *v.* Ives, 2 Hill, 355; Stone *v.* Green, 3 Hill, 469; Van Valkenburgh *v.* Harris, 3 Denio, 162; Bell *v.* Bell, 1 How. Pr. 71. In Pennsylvania, not until ten days. Bobyshall *v.* Openheimer, 4 Wash. C. C. 388. Not until four days in Georgia. Harris *v.* Wetmore, 5 Ga. 64. Ten days in Kentucky. Gen. Stats. Ky., ed. of 1873, p. 417, sec. 4. In Florida, the same as in Kentucky. Bush's Dig. of Fla. 324, sec. 3. In Alabama, as soon after adjournment of court as possible. Sec. 3838 of Code. In Iowa, may issue on Sunday, when plaintiff would otherwise lose his debt. Sec. 3028, Iowa Code. In Massachusetts, execution cannot be taken out until twenty-four hours after entry of judgment. Penniman *v.* Cole, 8 Met. 501. In Missouri, the execution ought not to issue before the determination of the motion for a new trial. Stephens *v.* Brown, 56 Mo. 23. In order to keep the lien of an attachment alive and effectual, it has been held that when judgment is reversed execution ought to issue thereon within a reasonable time, and that a delay of more than a year is unreasonable. Speelman *v.* Chaffee, 5 Col. 247.

from was disregarded.[1] In the same state, a justice of the peace who issued execution within less than twenty-four hours after the rendition of judgment was held liable therefor in an action of trespass.[2] But a very decided preponderance of the authorities is against the first decision above referred to, and in favor of the proposition that the premature issuing of an execution is an irregularity merely. The execution is erroneous, but, like an erroneous judgment, it must be respected, and may be enforced, until it is vacated in some manner prescribed by law.[3] No one but the defendent can complain of it; and even he cannot do so in any collateral proceeding.[4] Under an act of Congress providing that "until the expiration of ten days execution shall not issue," certain executions were collaterally objected to, on the ground that they were issued within ten days, but the court said: "If irregular, the court from which they issued ought to have been moved to set them aside; they were not void, because the marshal could have justified under them, and if voidable, the proper means of destroying their efficacy have not been pursued."[5] When substantially the same question arose in Missouri, Judge Ryland, speaking for the supreme court, said: "The time of doing the deed only is relied on as rendering it void. I am satisfied,

[1] Penniman *v.* Cole, 8 Met. 496.

[2] Briggs *v.* Wardwell, 10 Mass. 356.

[3] Dawson *v.* Daniel, 2 Flip. 305; Rosenfeld *v.* Palmer, 5 Daly, 318; Scribner *v.* Whitcher, 9 N. H. 63; 23 Am. Dec. 708; Miller *v.* O'Bannon, 4 Lea, 398; Stanley *v.* Nelson, 4 Humph. 483; Carpenter *v.* Mechanics' Bank, 1 Lea, 202; Wilkinson's Appeal, 65 Pa. St. 190.

[4] Stewart *v.* Stocker, 13 Serg. & R. 199; 15 Am. Dec. 589; Lowber & Wilmer's Appeal, 8 Watts & S. 389; 42 Am. Dec. 302; Wilkinson's Appeal, 65 Pa. St. 190; Lynch *v.* Kelly, 41 Cal. 232; Allen *v.* Portland Stage Co., 8 Me. 209.

[5] Blaine *v.* Ship Charles Carter, 4 Cranch, 333.

from reason and authority both, that the time is not so much of the substance of the power and act as to render the act void."[1] So in New York, against the objection that an execution had, contrary to the statute, issued within thirty days after the rendition of judgment, the court of appeals held that "until set aside, although issued without the defendant's consent, the process was valid, and no one could take advantage of such irregularity but the *defendant* in the execution."[2] Where the practice requires the filing of the judgment roll to precede the issuing of execution, an execution is not void because issued before such filing; and where the issue and filing are on the same day, the court will not make any inquiry in reference to fractions of the day, but will, as between the parties, permit the writ to stand in force.[3] But an execution properly issued will obtain precedence over another issued on the same day, if the judgment roll authorizing the latter is not filed until after the former is issued. In this case, the court will notice a fraction of a day.[4] An execution sent to the sheriff, and received by him previous to the filing of the record, is not prematurely issued, if the sheriff be directed to indorse it as received of a subsequent day, and on that day the record be signed and filed.[5]

§ 26. **Executions Issued Contrary to Agreement** between the parties are subject to the same rules as other premature executions. In North Carolina, the

[1] Carson *v.* Walker, 16 Mo. 85.

[2] Bacon *v.* Cropsey, 7 N. Y. 199.

[3] Jones *v.* Porter, 6 How. Pr. 286; Clute *v.* Clute, 4 Denio, 241; Clute *v.* Clute, 3 Denio, 263; Small *v.* McChesney, 3 Cow. 19

[4] Marvin *v.* Herrick, 5 Wend. 169.

[5] Walters *v.* Sykes, 22 Wend. 566.

parties, by consent, had a memorandum made upon the record, "no *fi. fa.* to issue until October, or until ordered." The plaintiff issued execution in contravention of this agreement. This execution was afterwards collaterally questioned, when the court held that "it was not void, but was a sufficient justification to the sheriff in proceeding under it as if no such memorandum had been made."[1] There is no doubt, however, that courts will, on proper application, enforce all agreements made by the parties for the stay of execution, whether entered on the record or not. "I have known, if a judgment be given and there is an agreement between the parties not to take out execution till next term, and they do it before, that the court has set all aside."[2] In New York, where judgment had been entered by confession, the court afterward set aside the execution, being convinced, by affidavits filed on behalf of the defendant, that the plaintiff induced the confession by agreeing to stay execution for three years.[3] But an agreement procured by misrepresentations, or upon conditions which were not complied with, may be disregarded by the plaintiff, who may at once issue execution. The court will not, in such a case, interfere in behalf of the defendant.[4]

§ 27. **Latest Time for Issuing.** — By the common law, a plaintiff who had obtained a judgment in a personal action was compelled to attempt to execute it within a year and a day. If he failed to do so, the right to execution upon *that* judgment was forever

[1] Cody *v.* Quinn, 6 Ired. 193; 44 Am. Dec. 75; Shelton *v.* Fels, Phill. (N. C.) 178.

[2] Twisden, J., in Veal *v.* Warner, 1 Mod. 20.

[3] Merritt *v.* Baker, 11 How. Pr. 456.

[4] Holmes *v.* Delabourdine, 1 Browne, 132.

gone. The judgment remained a mere evidence of indebtedness, upon which an action could be brought. In such action, it was incumbent on the defendant to show by what means, if any, the judgment had been satisfied. The rule was otherwise in real actions. There the demandant after a year might take out *scire facias* to revive his judgment. By statute of Westminster 2, 13 Edw. I., c. 45, *scire facias* was given to the plaintiff to revive his judgment in a personal action. But after this statute, as before, the time within which an execution could issue on the original judgment was limited to a year and a day. In the greater portion of the United States the common-law rule has been displaced by statutes. These statutes have generally fixed the time within which the original execution can issue at a much longer period than that fixed by the common law.[1] The requirement of the law, by which plaintiff, after delaying for a year and a day the issuing of his original execution, is compelled to sue out a *scire facias* and obtain a judgment thereon before he can have execution, is intended for the protection of the defendant. He need not seek this protection. He may, by consent, authorize the entry of a judgment of revivor, without putting the plaintiff to his *scire facias;*[2] or he may, by agreement

[1] In Connecticut and Louisiana executions may issue at any time during the life of the parties. Denison *v.* Williams, 4 Conn. 404; Harper *v.* Terry, 16 La. Ann. 216. In Alabama, within ten years. Perkins *v.* B. I. & C. Co., 77 Ala. 403. In Iowa, at any time before the judgment is barred by the statute of limitations. Sec. 3025 of Code. In Illinois, within seven years. Hind's Stats. of Ill. 622, sec. 6; Stribling *v.* Prettyman, 57 Ill. 371; but see Chase *v.* Frost, 60 Ill. 143. In Florida, within five years. Bush's Dig. of Fla. 516, sec. 228. In Arkansas, Indiana, and Minnesota, within ten years. Hanly *v.* Caneal, 14 Ark. 524; Plough *v.* Reeves, 33 Ind. 181; Plough *v.* Williams, 33 Ind. 182; Davidson *v.* Gaston, 16 Minn. 230. In West Virginia, within two years. Gardner *v.* Landcraft, 6 W. Va. 36.

[2] Harmer *v.* Johnson, 14 Mees. & W. 336; 3 Dowl. & L. 38; 9 Jur. 669; 14 L. J. Ex. 292.

with the plaintiff, waive his right to object to the issuing of execution after a year and a day. There is no reason why such an agreement should not be enforced. An execution issued within the time agreed upon is regular; and the want of *scire facias* cannot be urged against it by any person nor for any purpose.[1]

§ 27 a. Executions Issued on Motion without Scire Facias.—In many of the states the remedy by *scire facias* is no longer employed; but after the lapse of a time designated in the statute, an execution can issue only upon order of the court, granted on motion, on proof that the judgment remains unsatisfied. In California, certain judgments may be enforced at any time, while upon others, no execution can issue after five years. Section 685 of the Code of Civil Procedure of that state reads as follows: "In all cases other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion or by judgment for that purpose, founded upon supplemental pleadings." Under this section, the question arises whether a judgment directing the sale of property, but not imposing a personal liability on any one, is a judgment "other than for the recovery of money." The question has not yet been authoritatively determined, but we think it must surely be answered in the negative. This section, in our opinion, divides judgments into two great classes: 1. Those the object or result of which is the recovery of money; and 2. Those the object or result

[1] Cooper *v.* Norton, 16 L. J. Q. B. 364; Howell *v.* Stratton, 2 Smith, 65; Morgan *v.* Burgess, 1 Dowl., N. S., 850; Morris *v.* Jones, 3 Dowl. & R. 603; 2 Barn. & C. 242.

of which is to recover something other than money. In the first class, execution cannot issue after five years. The object of an action to obtain the sale of property is to compel the payment of a debt or charge. The plaintiff's claim can at any time be satisfied by the payment of money. He is not entitled to recover possession of any specific property or thing; but only to obtain or recover money. It is true that in seeking compulsory payment he may be confined to certain designated property, but still the thing sought and granted is none the less the recovery of money, and nothing but money, and the judgment resulting is therefore one for the recovery of money. The views we have expressed seem in harmony with those avowed by Professor Pomeroy, at section 112 of his work on equity jurisprudence. In treating of equitable remedies, he names as the seventh, "remedies of pecuniary compensation, or those in which the relief consists in the award of a sum of money"; and describing these remedies of pecuniary compensation, he says: "These remedies, whose final object is the recovery of money, are of three distinct species, which differ considerably in their external form and incidents, but agree in their substance, in the intrinsic nature of the final relief." He then mentions as one of these species the case "in which the relief is not a general pecuniary judgment, but is a decree of money to be obtained and paid out of some particular fund or funds." He admits that, on the first view, a judgment of this class may appear to be something more than a mere money judgment; but adds that "a closer view shows that the real remedy, the final object of the proceeding, is the pecuniary recovery. Among the familiar examples of this species is the suit to foreclose a mortgage of land, common

throughout the United States, by the sale of the mortgaged premises."

In the other states in which the right to issue execution after a certain time is granted by statute, it generally depends not upon the character of the judgment, but upon the fact of its remaining unsatisfied.[1] This fact must be shown to the court, and usually the defendant is entitled to notice of the application for the writ, and may resist if he can show any cause therefor. Whether a writ issued without leave, where leave for its issuing should have first been obtained in the mode designated in these statutes, is void or voidable only, is a question still involved in doubt and conflicting judicial opinion. On the one hand, it is insisted that as the statute declares that the writ shall not issue unless it is shown to the court that the judgment remains unsatisfied, the authorization of such issuing is a judicial act, there is no more foundation on which to rest the writ than if no original judgment had been entered;[2] on the other, the existence of the original judgment is regarded as sufficient to support the writ, and the absence of the order granting leave is treated as a mere irregularity justifying the vacating of the writ, but not destroying or limiting its force while it remains unvacated.[3] If an execution issues at a time when both the time within which execution could originally issue and within which the judgment could be revived have both elapsed, it is obviously void because there can then be no circumstance in which it could be directed to issue.[4]

[1] Reeves *v.* Plough, 46 Ind. 350.

[2] Rollins *v.* McIntyre, 87 Mo. 496; State *v.* McArthur, 5 Kan. 280; Halsey *v.* Van Vliet, 27 Kan. 474.

[3] Sandlin *v.* Anderson, 76 Ala. 403; Mariner *v.* Coon, 16 Wis. 490; Martin *v.* Prather, 82 Ind. 535; Lawrence *v.* Grambling, 13 S. C. 120; Bank of Genesee *v.* Spencer, 18 N. Y. 154; Winebrenner *v.* Johnson, 7 Abb. Pr., N. S., 205.

[4] George *v.* Middough, 62 Mo. 519; Lyon *v.* Russ, 84 N. C. 588.

Sometimes there is an apparent conflict between different parts of a state statute relating to this subject, one part giving the right to issue execution without imposing any limit of time, and another part limiting the time within which an action could be brought on a judgment, and thereby implying that after such time it is *functus officio*. In New York, it is said that the limitation of the remedy by action does not imply any limitation of the remedy by execution, and therefore that an execution may properly issue to enforce a judgment, all actions on which are barred by the statute of limitations.[1] This position seems logically sound. Nevertheless, we believe it at variance with the general current of authority.[2] The majority of the cases treat the statute of limitations as a practical extinguishment of the judgment; and in one case it has been held that the issuing of an execution after the statute of limitations once became operative cannot be sustained, even by showing that the defendant has made a new promise under which an action on the judgment could be successfully prosecuted.[3]

§ 28. **In Computing the Year and a Day at Common Law**, the time in which, by writ of error or by agreement, the execution was stayed, was excluded,[4] and so was the time during which the failure to take out execution was occasioned by the act or fault of

[1] Kincaid *v.* Richardson, 25 Hun, 237; 9 Abb. N. C. 315; Waltermere *v.* Westover, 14 N. Y. 17.

[2] Jerome *v.* Williams, 13 Mich. 521; People *v.* Wayne, 37 Mich. 287; McDonald *v.* Dickson, 85 N. C. 248; McGraw *v.* Reason, 3 Lea, 485.

[3] Cannon *v.* Laman, 7 Lea, 513.

[4] 1 Bac. Abr., tit. Execution, H; Bellasis *v.* Hanford, Cro. Jac. 364; Booth *v.* Booth, 6 Mod. 288; Cromwell *v.* Andrews, Yel. 7; Layton *v.* Garnon, 5 Coke, 88; Watkins *v.* Haydon, 3 W. Black. 762; Hiscocks *v.* Kemp, 3 Ad. & E. 676.

the defendant.[1] In the United States the authorities are divided upon the question whether the time in which execution may issue is extended either by a stay of proceedings, or by any other act of the defendant. In North Carolina the common-law practice prevails, and the defendant cannot complain of a delay occasioned by his agreement. If he procures a stay, the execution may issue within a year and a day after such stay expires.[2] The same rule applies in Kentucky where any definite stay has been agreed upon,[3] or when any judgment or decree is suspended in its operation until some further day after its entry.[4] The rule has also been frequently applied in the United States where the delay was occasioned by an injunction.[5] In Texas a statute purported to suspend the right to execution, but it was finally declared to be unconstitutional and void. But many judgment creditors had, before this decision was reached, respected the law, and neglected to take out execution. In fact, it was impossible to obtain execution, because no clerk of any court would issue it. When the question subsequently arose whether the time during which this law was supposed to be valid should be computed against the plaintiff in determining whether his judgment had become dormant, the supreme court said: "He was not bound to disregard this law at his peril, though it was

[1] Mitchel *v.* Cue, 2 Burr. 660; Bosworth *v.* Phillips, 2 W. Black. 784; Bland *v.* Darley, 3 Term Rep. 530.

[2] Wood *v.* Bagley, 12 Ired. 87.

[3] Nicholson *v.* Hansley, Litt. Sel. Cas. 300; Pollard *v.* Pollard, 4 T. B. Mon. 360.

[4] Long *v.* Morton, 2 A. K. Marsh. 40.

[5] Gibbes *v.* Mitchell, 2 Bay, 120; United States *v.* Hanford, 19 Johns. 173; Nolan *v.* Seekright, 6 Munf. 185; Smith *v.* Charlton, 7 Gratt. 447; Eppes *v.* Randolph, 2 Call, 186; Hutsonpiller *v.* Stover, 12 Gratt. 582; Pennock *v.* Hart, 8 Serg. & R. 376.

afterward held to be unconstitutional, and it is insisted that until so held none lost their rights by observing it as a rule of action. It is within the knowledge of all that, until the decision in the case of Jones *v.* McMahan, parties could not procure executions,—the clerks would not issue them; and we presume that such a construction will not now be put upon the law as would have compelled every judgment creditor in the state to resort to a *mandamus* against the clerk, or lose his right to an execution on his judgment."[1] But in California, the time during which a stay of execution is in force, though granted by the court, is computed as part of the five years within which execution may issue.[2] In the same state, although no personal execution can issue in a foreclosure suit until the property has been sold and the deficiency ascertained, the time in which this deficiency is being ascertained is computed, and plaintiff can have no execution after five years from the entry of the original decree.[3] In New York we understand it to be held that "the provision of the code limiting the time within which execution may issue, as of course to five years, applies only to a case where the right to issue has continued during that time."[4] Hence if a judgment be reversed by the supreme court, and subsequently affirmed by the court of appeals, the intermediate time must be excluded in computing the time within which execution may issue.[5]

[1] Phillips *v.* Lesser, 32 Tex. 750, followed in Sessums *v.* Botts, 34 Tex. 335; Cravans *v.* Wilson, 35 Tex. 52.

[2] Solomon *v.* Maguire, 29 Cal. 236.

[3] Bowers *v.* Crary, 30 Cal. 623; Stout *v.* Macy, 22 Cal. 649; *contra*, Cupfer *v.* Frank, 65 How. Pr. 396.

[4] Underwood *v.* Green, 10 Alb. L. J. 346; see Lytle *v.* Cincinnati Mfg. Co., 4 Ohio, 459; Welsh *v.* Childs, 17 Ohio St. 319.

[5] Underwood *v.* Green, 56 N. Y. 247.

§ 29. **Validity of Executions on Dormant Judgments.**—The consequences of issuing an execution after a year and a day are the same as the consequences of a premature issue. The writ is voidable, but not void. The defendant may take proceedings to have it set aside. If *he* chooses to interpose no objection to the irregularity, others cannot do so for him. Even he cannot attack it collaterally; and a levy and sale made under it are sufficient to transfer his title.[1] The decisions made under the English statute requiring the original execution to issue within a year and a day seem to be equally applicable to cases where executions have issued at too late a day under American statutes. Still there are American courts which have declared executions issued in the absence of an order of court void. These decisions are, however, in the main based on a misconception of the rules generally applied at common law to executions issued on dormant judgments in the absence of their revivor by *scire facias*.[2] The statutes of Wisconsin and New York provide that, after a period of time therein specified, execution shall

[1] Ripley *v.* Arledge, 94 N. C. 467; Brevard *v.* Jones, 50 Ala. 221; Morgan *v.* Evans, 72 Ill. 586; 12 Am. Rep. 154; Pierce *v.* Alsop, 3 Barb. Ch. 184; Mitchell *v.* Evans, 5 How. (Miss.) 548; 37 Am. Dec. 169; Brown *v.* Long, 1 Ired. 190; 36 Am. Dec. 43; Ingram *v.* Belk, 2 Strob. 208; 47 Am. Dec. 591; Mosely *v.* Edwards, 2 Fla. 440; Overton *v.* Perkins, Mart. & Y. 367; Simmons *v.* Wood, 6 Yerg. 521; Jackson *v.* Bartlett, 8 Johns. 364; Willard *v.* Whipple, 40 Vt. 219; Beale *v.* Botetourt, 10 Gratt. 281; Doe *v.* Harter, 1 Cart. 431; Oxley *v.* Mizle, 3 Murph. 250; Weaver *v.* Cryer, 1 Dev. 337; Portis *v.* Parker, 22 Tex. 707; Andrews *v.* Richardson, 21 Tex. 287; Hancock *v.* Metz, 15 Tex. 205; Sydnor *v.* Roberts, 13 Tex. 598; 65 Am. Dec. 84; Boggess *v.* Howard, 40 Tex. 153; Vastine *v.* Fury, 2 Serg. & R. 426; Reynolds *v.* Corp, 3 Caines, 271; Patrick *v.* Johnson, 3 Lev. 403; Woodcock *v.* Bennet, 1 Cow. 711; 13 Am. Dec. 568; Ontario Bank *v.* Hallett, 8 Cow. 192; Howard *v.* Pitt, 1 Salk. 261; Dawson *v.* Shepherd, 4 Dev. 497; Delisle *v.* Dewitt, 18 U. C. Q. B. 155; Harris *v.* Cornell, 7 Chic. L. N. 345; Richards *v.* Allen, 3 E. D. Smith, 399; Elliott *v.* Knott, 14 Md. 121; State *v.* Morgan, 7 Ired. 387; 47 Am. Dec. 329; Hill *v.* Newman, 67 Tex. 265.

[2] See § 28 a.

issue only upon motion, and by leave of the court. In both states, executions issued without leave of the court have been sustained.[1] The reasoning on which

[1] Selsby *v.* Redlon, 19 Wis. 17; Jones *v.* Davis, 22 Wis. 421, and 24 Wis. 229. The following is the full opinion of the supreme court of Wisconsin on this subject, given in Mariner *v.* Coon, 16 Wis. 468: "The question presented by this case is, whether an execution issued upon a dormant judgment, without leave of court, is void, or only voidable. If void, no sale can be made under it, and the purchaser acquires no title. But if voidable, the sale may be valid, notwithstanding the omission to obtain leave. We are of opinion that such an execution is merely voidable, and therefore that no advantage can be taken of the irregularity, except in a direct proceeding to set it aside.

"The rule at common law is well known. If the plaintiff failed to take out execution within a year and a day, extended, in many of the states, by statute, to two years from the time the judgment became final, it could not be regularly issued thereafter without reviving the judgment by *scire facias*. The rule was founded upon a presumption that the judgment had been satisfied, which drove the plaintiff to a new proceeding to show that it had not; and yet it was invariably held that an execution taken out after that time, and without *scire facias* or judgment of revivor, was not null, but simply irregular. The defendant might, if he desired, interpose and set it aside upon motion; but if he neglected to do so, it was considered an implied admission that the judgment was still in full force. He might waive the irregularity, and thus avoid the expense of a *scire facias*. See Irwin's Lessee *v.* Dundas, 4 How. 79; and Doe *v.* Harter, 2 Cart. 252, and the cases cited.

"But the code (sections 192 and 193 of the original act, now sections 1 and 2 of chapter 134, Revised Statutes) prescribes a different practice, and it is upon thist hat the counsel for the defendants chiefly relies. When the execution in controversy was issued, the period was fixed at two years from the entry of judgment. It is now enlarged to five. (Laws 1861, chap. 140.) After that period has elapsed, it is provided that 'an execution can be issued only by the leave of the court, upon motion,' etc. This language is said to take away all power, except it be acquired in the manner prescribed, and to render every process issued in contravention of it void for want of jurisdiction. Were we to suppose the legislature to be speaking with reference to the question of power, then there is nothing in their language inconsistent with the position of counsel, and we might adopt his views. But we are not at liberty to act upon this supposition. Upon looking to the previous state of the law, and to other provisions of the act, we see, very clearly, that it was a matter of practice with which the legislature were dealing, a question as to the *form* of proceeding which should thenceforth be pursued, and not one which necessarily affected the jurisdiction in case the new practice was not complied with. By section 331 of the original act (section 1, chapter 160, Revised Statutes), the writ of *scire facias* is virtually abolished. The remedies heretofore obtainable in that form may be obtained by civil action under the provisions of the code. But by the particular provision of section 2, chapter 134, above referred to, the remedy by

all these decisions, whether made under English or American statues, rests, is this: the judgment, notwithstanding the lapse of the year and a day, or other time designated, is, unless actually satisfied, still in force. From the lapse of time, the presumption may be indulged that a satisfaction has taken place, or that some reason exists for the non-issuance of execution. To give the defendant an opportunity of showing cause against the execution, the plaintiff is required to bring him before the court by *scire facias* or by motion, and thus give him an occasion to show whether the judgment has been satisfied. But as the *power* to issue execution still exists, its issuance without the *scire facias* or motion is merely the erroneous exercise of a

motion to revive a judgment which has become dormant by lapse of time is substituted. Hence the peculiar significance of the word 'only,' upon which the counsel insists so strongly to show a want of jurisdiction. The execution shall be issued *only* upon motion; otherwise the plaintiff might resort to the remedy by civil action. It appears, therefore, that the consequences of a departure from the practice prescribed by statute are the same as they were at common law. It is a simple irregularity, which the execution debtor may waive, and which it seems he did do in this case." The view here taken by the Wisconsin court is supported by the following opinion of the New York court of appeals: "There was always a time after which a party who had recovered a judgment was not at liberty to sue out execution without an application to the court. Formerly, the time was a year and a day; and the form of obtaining an award of execution, when one had not been issued in time, was by *scire facias quare executionem non.* Afterward, it was extended by the Revised Statutes to two years. 2 R. S. 363, sec. 1. By the code it was further extended, as we have seen, to five years, and the mode of obtaining leave was an application to the court on motion. Under the former practice it was well settled that the execution, if issued too late, was not void. Woodcock *v.* Bennet, 1 Cow. 711; 13 Am. Dec. 568. It was liable to be set aside on motion, but such motion, like all others, must be made promptly; and if it appeared that the defendant had consented to the execution being issued, or if there were any circumstances which in fairness and equity precluded him from availing himself of the irregularity, the motion would not prevail. Morris *v.* Jones, 2 Barn. & C. 232. There is no reason why the same practice should not obtain under the code." Bank of Genesee *v.* Spencer, 18 N. Y. 154; followed in Winebrener *v.* Johnson, 7 Abb. Pr., N. S., 205; Union Bank of Troy *v.* Sargent, 35 How. Pr. 87; 53 Barb. 422.

conceded power, and must, like all other errors, be corrected by some appropriate proceeding; and if not so corrected, must be respected as fully as though free from error. But there are statutes under which the time to issue execution is limited absolutely, and no provision is made for revivor, nor for any means by which further execution can be obtained on *that* judgment. Under such statutes, we infer that, at the expiration of the statutory period, *the power* to issue execution must also expire, and therefore that a subsequent execution is void.[1] The statute of limitations may have interposed a bar to the judgment, and have destroyed its vitality. If, in such a case, execution should issue without any order of court, we think, with Mr. Justice Breese, of the supreme court of Illinois, that "it would be absurd to give a *fieri facias* more vitality than the judgment on which it issued."[2]

§ 30. Validity of Executions on Dormant Judgments, as between the Parties.—The authorities cited in the preceding section show that the purchaser under an execution based upon a dormant judgment will be protected. It remains to us to consider the effect of such execution between the parties. In the case of Blanchenay *v.* Burt, in the court of queen's bench, the action was for false imprisonment. The defendant justified the imprisonment under a *ca. sa.*, issued in a suit of Burt *v.* Blanchenay; and the replication showed the *ca. sa.* to have been issued after a year and a day, without any revivor by *scire facias* or otherwise. The defend-

[1] White *v.* Clark, 8 Cal. 513; Kerns *v.* Graves, 26 Cal. 156; Bates *v.* James, 3 Duer, 45; Givens *v.* Campbell, 29 Iowa, 79.

[2] Scammon *v.* Swartwout, 35 Ill. 344. But see § 28 a.

ant was held to be protected by his writ.[1] The only redress which the defendant has, when execution has improperly issued on a dormant judgment, is by motion to quash such execution. The defendant, if he does not make such motion in a reasonable time, by his delay assents to the irregularity. "The plaintiff is put to a *scire facias*, that the defendant may have an opportunity of showing that the debt is paid, and, as it is intended for his benefit, he may dispense with the writ, either by express agreement, or by conduct which amounts to a waiver, and this, in fact, is frequently done when the defendant is aware that the debt is not paid or otherwise satisfied. When an irregularity has occurred, it is the duty of the opposite party to take advantage of the defect at the earliest opportunity; otherwise, in consequence of his own laches, he will be decreed to have waived every advantage arising from it. It would be unjust that the defendant should lie by, with a knowledge of an error, and by this means delay his adversary, and expose him to unnecessary trouble and expense. Courts are desirous, or should

[1] 4 Q. B. 707; 3 Gale & D. 613; 7 Jur. 575; 12 L. J. Q. B. 291. In this case, Lord Denham, C. J., delivered the judgment of the court. After having shortly stated the pleadings, and in particular the objection raised by the replication, that the *ca. sa.* was absolutely void, having issued on a judgment more than a year old without a *sci. fa.*, his lordship said: "The plaintiff argues that it is absolutely void for this fault, relying on the language of this court in Mortimer *v.* Piggott, 2 Dowl. P. C. 615, in which it was so decided. That case, however, did not require the doctrine now called in question; and is actually reported in 4 Ad. & E. 363, note *d*, without its being laid down. We are now required to reconsider it, and are satisfied that it is in that respect erroneous. The defect amounts to an irregularity, of which the opposite party might take advantage by writ of error; or, on application to the court, the writ of *ca. sa.* might be set aside; but it is not a mere nullity." See also Reynolds *v.* Corp, 3 Caines, 271; Martin *v.* Ridge, Barnes, 271; Woodcock *v.* Bennet, 1 Cow. 737; 13 Am. Dec. 568; Jackson *v.* De Lancy, 13 Johns. 550, 7 Am. Dec. 403; Doe *v.* Dutton, 2 Cart. 312; 52 Am. Dec. 510; Boggess *v.* Howard, 40 Tex. 153.

be, of enforcing fair dealing, and preventing trick and chicanery, which are the disgrace of the law. Hence the rule is, that the party must seize the earliest opportunity of suggesting the error, otherwise it is considered as waived."[1] While we believe it to follow, from the latest and best considered cases, that an execution issued after a year and a day is, until set aside, valid between the parties to the writ, yet there are not wanting several American decisions maintaining that such writ is so far a nullity that the plaintiff who sued it out can neither justify under it nor acquire title through it.[2]

§ 31. **By the Issue or Levy of Another Writ.**—By the common law, the various remedies to enforce the collection of judgments were regarded as cumulative. The mere fact that a *ca. sa.* had issued was no bar to a *fi. fa.*, nor was the issuing of the latter any bar to the issuing of the former. The plaintiff took out as many writs of different kinds as he thought best, he being answerable for any abuse he might make of his process.[3] "A *fieri facias* and a *capias ad satisfaciendum* may issue, at the same time, against the goods and person of a defendant. So a party, having sued out one writ of execution, may, before it is executed, abandon that writ, and sue out another of a *different* sort; or he may have several writs of the *same* sort running at the same time, in order to take the defendant, or his goods, in different counties."[4] But while executions of

[1] Bailey *v.* Wagoner, 17 Serg. & R. 327.

[2] Waite *v.* Dolby, 8 Humph. 408; Hoskins *v.* Helm, 4 Litt. 309; 14 Am. Dec. 133; Weaver *v.* Cryer, 1 Dev. 338.

[3] Primrose *v.* Gibson, 2 Dowl. & R. 193; 16 Eng. Com. L. 78; Pontius *v.* Nesbit, 40 Pa. St. 309; Commonwealth *v.* Lelar, 13 Pa. St. 22; Davies *v.* Scott, 2 Miles, 52; Allison *v.* Rheam, 3 Serg. & R. 142; 8 Am. Dec. 644; McNair *v.* Ragland, 2 Dev. Eq. 42; 22 Am. Dec. 728.

[4] Tidd's Pr. 995; McNair *v.* Ragland, 2 Dev. Eq. 42; Hammond *v.* Mather, 3 Cow. 456; Code of Ala., sec. 2843.

different sorts may issue contemporaneously, and while the prior issue of one is no obstacle to issuing the other, it is equally clear that they cannot be contemporaneously executed.[1] If one execution is levied on the defendant's property, and under another his person is seized, both cannot stand. In Pennsylvania, the plaintiff, under such circumstances, is allowed to elect which he will abandon.[2] If, under the English practice, the *fieri facias* is levied on any property, though entirely insufficient to satisfy the execution, the *ca. sa.* cannot be served until after the *fi. fa.* is returned.[3] "Taking the defendant in execution, like a levy upon sufficient goods, operates as a suspension of the judgment for the time being. But if there be two or more defendants, the taking of one of them in execution does not suspend the plaintiff's right to take the others."[4] Whenever the judgment is suspended, the right to sue out execution must also be suspended. This suspension is not, we think, so absolute as to entirely destroy the *power* to issue execution. A *fi. fa.* issued while the defendant is in custody under a *ca. sa.*, though erroneous, is not void.[5] The taking out of an *elegit* authorized

[1] Miller *v.* Parnell, 6 Taunt. 370; 2 Marsh. 78; 1 Eng. Com. L. 658; Hodgkinson *v.* Walley, 2 Tyrw. 174; Cutter *v.* Colver, 3 Cow. 30; McGehe *v.* Handley, 5 How. (Miss.) 629.

[2] Young *v.* Taylor, 2 Binn. 218; Grant *v.* Potts, 2 Miles, 164.

[3] Hodgkinson *v.* Walley, 1 Tyrw. 174; 2 Cromp. & J. 86; 1 Dowl. P. C. 298.

[4] Freeman on Judgments, sec. 477, citing Fassett *v.* Tallmadge, 15 Abb. Pr. 205; Bank of Beloit *v.* Beale, 7 Bosw. 611; Penn *v.* Remsen, 24 How. Pr. 503. See also Sharpe *v.* Speckenagle, 3 Serg. & R. 465; Bowrell *v.* Zigler, 19 Ohio, 366; Rockhill *v.* Hanna, 15 How. 196; Rogers *v.* Marshall, 4 Leigh, 432.

[5] Tayloe *v.* Thompson, 5 Pet. 369; Jeanes *v.* Wilkins, 1 Ves. Sr. 195. In the case last cited, Lord Chancellor Hardwicke said: "To avoid the sale and title of the defendant, it must be proved that the *fi. fa.* was void, and conveyed no authority to the sheriff, for it might be irregular; and yet, if sufficient to indemnify the sheriff so that he might justify in an action of *trespass*, he might convey a good title, notwithstanding the writ might be afterward set aside. It is said that, by law, during the existence of the *capias* and the person in custody

the seizing of a moiety of the defendant's lands, to be held until the profits of such moiety should pay the debt. The law presumed that this payment would in time be accomplished, and therefore regarded the extending of any lands under an *elegit*, however trivial their value, as a satisfaction of the judgment, and therefore as a bar to the right to take out any further execution. It was, at an early day, sometimes contended that the mere suing out of an *elegit* precluded the plaintiff from afterward having any other writ. But it was afterward well settled that when, "under this writ, execution can only be had of goods, because there are *no* lands, and such goods are insufficient to satisfy the debt (*nihil*) being returned as to the lands, a *ca. sa.* or other writ may then be had after the *elegit*, for such *elegit* is, in this case, no more in effect than a *fieri facias*." [1]

§ 32. Stay of Execution. — After the commencement, and before the termination, of the period provided by law for the issuing of execution, the plaintiff

a *fi. fa.* ought not to be taken out, and certainly it ought not; although, if the defendant dies, the plaintiff may have a new execution, as upon the statute 21 Jac. I.; yet while that continues, resort cannot be to any other execution; and the court, without putting the party to his *audita querela*, would (as I apprehend) set it aside on motion. But yet that *fi. fa.* was not void, and the sheriff might justify taking this leasehold by that writ; and so may the purchaser under the sheriff, who gains a title; otherwise it would be very hard, if it should be at the peril of purchaser under a *fi. fa.*, whether the proceedings were regular or not; and the law is the same, although the *fi. fa.* issued in a different county from that wherein the body was taken into custody." But these views have been repudiated in the case of Kennedy *v.* Dunclee, 1 Gray, 70, where it is held that a *fi. fa.*, issued while defendant is in custody, is in legal effect issued on a satisfied judgment, and that no title can be divested thereby, whether the purchaser has notice or not. This last case is but a reaffirmance of the doctrines of the prior case of King *v.* Goodwin, 16 Mass. 63.

[1] Bingham on Judgments and Executions, 176; Foster *v.* Jackson, Hob. 58; Crawley *v.* Lidgeat, Cro. Jac. 338; Lancaster *v.* Fideler, 2 Ld. Raym. 1451; Knowles *v.* Palmer, Cro. Eliz. 160; Beacon *v.* Peck, 1 Strange, 226.

may be prevented from immediately reaping the fruits of his judgment, by a stay of execution. This stay may either be granted by order of the court, or may be created by compliance with the provisions of some statute under which the plaintiff is allowed to prosecute proceedings for the reversal of the judgment, or by which he may temporarily arrest its enforcement by giving adequate security for its final payment. Each court has such general control of its process as enables it to act for the prevention of all abuse thereof.[1] Hence it may, to prevent the annoyance which might be occasioned by the attempted execution of a void judgment, either stay or arrest the process;[2] and may, where it is clear that the judgment ought not to be further enforced, order a perpetual stay of execution.[3] When an appellate court has affirmed a judgment and remitted the case to the subordinate court, the latter has no right to stay execution.[4] The power of courts to temporarily stay the issuing of execution is exercised in an almost infinite variety of circumstances, in order that the ends of justice may be accomplished. In many cases this power operates almost as a substitute for proceedings in equity, and enables the defendant to prevent any inequitable use of the judgment or writ.[5] Like

[1] Robinson *v.* Yon, 8 Fla. 350; Sawin *v.* Mt. Vernon Bank, 2 R. I. 382; Robinson *v.* Chesseldine, 4 Seam. 332.

[2] Sanchez *v.* Carriaga, 31 Cal. 170; Ketchum *v.* Crippen, 37 Cal. 223; Murdock *v.* De Vries, 37 Cal. 527; Logan *v.* Hillegass, 16 Cal. 200.

[3] Keeler *v.* King, 1 Barb. 390; Rutland *v.* Pippin, 7 Ala. 469; Lansing *v.* Orcott, 16 Johns. 4; Welsh *v.* Tittsworth, 22 How. Pr. 475; Baker *v.* Taylor, 1 Cow. 165; Palmer *v.* Hutchins, 1 Cow. 42; Davis *v.* Tiffany, 1 Hill, 643; Harrison *v.* Soles, 6 Pa. St. 393; Marsh *v.* Haywood, 6 Humph. 210; Smith *v.* Page, 15 Johns. 395; Monroe *v.* Upton, 50 N. Y. 593; Cornell *v.* Dakin, 38 N. Y. 253.

[4] Marysville *v.* Buchanan, 3 Cal. 212; Dibrell *v.* Eastland, 3 Yerg. 507.

[5] Barnes *v.* Carmach, 1 Barb. 390; Steere *v.* Stafford, 12 R. I. 131; Knox *v.* Hexter, 10 Jones & S. 496; Comm. *v.* Magee, 8 Pa. St. 240; 49 Am. Dec. 509.

most other discretionary powers, it is liable to abuse. It is the general practice of the losing party to ask and for the court to grant a stay of execution for some designated period after the entry of judgment, for no other reason than that he is not yet ready to comply with the judgment, or perhaps in view of proceedings by appeal or for a new trial. These stays generally result in a delay, and sometimes in the defeat of justice; and the courts ought to be very cautious in granting them, except in cases where the ultimate satisfaction of the judgment by the defendant is assured. The power, however, to grant such stays of execution is everywhere conceded, and it could not be limited by the enactment of any unvarying rule without encountering evils of greater magnitude than those sought to be suppressed. The exercise of this power will sometimes be reviewed by the appellate courts,[1] but never "unless capriciously exercised or abused."[2] In some of the states, stay laws are in force, under which defendants, on giving security, may delay the issuing of execution. These laws, and the proceedings necessary to secure the benefits thereof, are so purely the result of diverse local legislation that we shall not undertake to treat of them in this work. A party moving for a new trial, or prosecuting an appeal from a judgment, ordinarily finds it necessary to obtain a stay of execution. Neither of these proceedings results in such stay,[3] until the undertaking or other security required

[1] Livermore *v.* Hodgkins, 54 Cal. 637.

[2] Granger *v.* Craig, 85 N. Y. 619.

[3] Thomas *v.* Nicklas, 58 Ia. 49; Eakle *v.* Smith, 24 Md. 339; Kelbee *v.* Myrick, 12 Fla. 416; Ex parte Floyd, 40 Ala. 116; Castro *v.* Illies, 22 Tex. 479; 73 Am. Dec. 277; Tucker *v.* State, 11 Md. 322; Branigan *v.* Rose, 3 Gilm. 123; Johnston *v.* Goldsboro, 3 Gilm. 499; People *v.* Loucks, 28 Cal. 68.

by statute has been given;[1] but in New York it seems a stay may be granted without security, when it appears that appellant is amply able to respond to any judgment that may be given.[2] At common law no undertaking nor other security was required. A writ of error[3] or a *certiorari*,[4] from the time of its allowance, operated as a *supersedeas*, and avoided all proceedings thereafter taken, though consummated before any notice was given of the allowance of the writ. At the present time the rule is otherwise, both in England[5] and in the United States.[6] No order will be made staying execution until security has been given to indemnify the party whose writ is thus suspended, for the injury which may be occasioned thereby, unless perhaps in peculiar cases in which the court thinks proper to stay proceedings by virtue of its common-law powers.[7] The circumstances in which execution of the judgment may be stayed pending appellate proceedings are designated in various statutes, differing in their details, but resembling in their general outlines. A bond for the

[1] Fulton *v.* Hanna, 40 Cal. 278; Ela *v.* Welch, 9 Wis. 35.

[2] Polhamus *v.* Moser, 7 Robt. 443. In this state, the courts in exercise of their common-law powers may stay executions pending appeals, though no bonds have been given. Granger *v.* Craig, 85 N. Y. 619; Quinlan *v.* Russell, 48 N. Y. Sup. Ct. 537.

[3] Cleghorn *v.* Desanges, Gow. 66; Jacques *v.* Nixon, 1 Term Rep. 279; Capron *v.* Archer, 1 Burr. 340; Perkins *v.* Wollastin, Salk. 322; Thorpe *v.* Beer, 2 Barn. & Ald. 373; Hawkins *v.* Jones, 5 Taunt. 204.

[4] Gardiner *v.* Murray, 4 Yeates, 560; Kingsland *v.* Gould, 1 Halst. 161; Mairs *v.* Sparks, 2 South. 513; Case *v.* Shepherd, 2 Johns. Cas. 27; Mayor of Macon *v.* Shaw, 14 Ga. 162.

[5] Bicknell *v.* Longstaff, 6 Term Rep. 455; Attenbury *v.* Smith, 2 Dowl. & R. 85; Smith *v.* Howard, 2 Dowl. & R. 85; Abraham *v.* Pugh, 5 Barn. & Ald. 903; Smith *v.* Shepherd, 5 Term Rep. 9.

[6] Stockton *v.* Bishop, 2 How. 74; Pratt *v.* Stage Co., 26 Iowa, 241; Jackson *v.* Schauber, 7 Cow. 417; Bonnell *v.* Neely, 43 Ill. 288; Jones *v.* M. & A. R. R. Co., 5 How. (Miss.) 407.

[7] Granger *v.* Craig, 85 N. Y. 619; Quinlan *v.* Russell, 48 N. Y. Sup. Ct. 537.

payment of costs is generally made indispensable to the appeal, and in some contingencies it operates to stay the proceedings. When, however, the judgment is for the payment of money or for the delivery or sale of property, or for any relief, the further withholding of which might occasion its loss or otherwise seriously prejudice the prevailing party, a further bond is generally exacted in some sum designated by statute or fixed by a rule or order of court.[1] In order to obtain the *supersedeas* it is well settled that the law must be strictly conformed to and every act designated in the statute must be performed within the time, and substantially in the manner specified in the statute.[2] The *supersedeas* arising from the allowance of a writ of error or of a *certiorari* may operate to prevent the issue of an execution or the service of an execution already issued. In either event, it is merely suspensive in its effect, and cannot operate retroactively to avoid or annul proceedings previously taken.[3] It did not abate a writ which had already been partly executed. Hence, where a levy had already been made, it was the duty of the officer to proceed to sell the property.[4] In the United States, this rule of the common law has

[1] Telegraph Co. *v.* Eyser, 19 Wall. 419; Orchard *v.* Hughes, 1 Wall. 73; Ringgold's Case, 1 Bland, 5; Fitzgerald *v.* Beebe, 7 Ark. 310; 46 Am. Dec. 285; Desty's Fed. Proc., p. 672. Sometimes no bond is exacted where the appeal is by the people, or by an officer who has given an official bond: People *v.* Clingan, 5 Cal. 389; Trapnall *v.* Brownlee, 8 Ark. 207.

[2] Kitchen *v.* Randolph, 93 U. S. 86; Erie City Bank *v.* Compton, 27 Pa. St. 195; The Roanoke, 3 Blatchf. 390; Penn. R. R. Co. *v.* Commonwealth, 39 Pa. St. 403; Sage *v.* C. R. R., 93 U. S. 412; Tucker *v.* State, 11 Md. 322.

[3] Runyon *v.* Bennett, 4 Dana, 598; 29 Am. Dec. 431; Board of Comm'rs *v.* Gorman, 19 Wall. 661.

[4] Charter *v.* Peeter, Cro. Eliz. 597; Meriton *v.* Stevens, Willis, 271; Blanchard *v.* Myers, 9 Johns. 65; Kinnie *v.* Whitford, 17 Johns. 34; Patchin *v.* The Mayor, 13 Wend. 664; Payfer *v.* Bissell, 3 Hill, 239; Mayor of Macon *v.* Shaw, 14 Ga. 162;

been very generally supplanted by statutory provisions, by virtue of which a sufficient undertaking on appeal, while it does not usually destroy existing levies or liens, suspends all further proceedings until the final disposition of the appeal.[1] A stay in favor of one of the defendants does not suspend the right to issue execution against the others.[2] A motion to vacate a judgment, or to quash an execution, does not stay proceedings.[3] Where a stay is desired, pending the hearing of the motion, an order of the court to that effect should be obtained. A *supersedeas* should be granted by the court having at the time the custody of the record.[4]

§ 33. **Execution Issued Pending a Stay.** — An execution issued pending a stay thereof granted by the court or by a statute is of course irregular, and may be quashed on motion. But it may happen that for want of such motion the execution is never arrested, and property is seized and sold thereunder. In such case, as in all other cases of irregular execution, the authorities are conflicting, some asserting that the writ, having erroneously issued, remains in force till the error is corrected,[5] and others maintaining that the court for

[1] Delafield *v.* Sandford, 3 Cow. 473; North Western Co. *v.* Landes, 6 Minn. 564. In Alabama, the proceeding for a *supersedeas* is by petition. Shearer *v.* Boyd, 10 Ala. 281; Spence *v.* Walker, 7 Ala. 568; Powell *v.* Washington, 15 Ala. 803.

[2] Sheetz *v.* Huber, 31 Leg. Int. 28; 6 Leg. Gaz. 68.

[3] Spang *v.* Commonwealth, and Commonwealth *v.* Freedley, 12 Pa. St. 358; Bryan *v.* Berry, 8 Cal. 130.

[4] Payne *v.* Thompson, 48 Ala. 535.

[5] Swigart *v.* Harber, 4 Scam. 364; 39 Am. Dec. 418; Sheetz *v.* Huber, 6 Leg. Gaz. 68; 31 Leg. Int. 28; Oakes *v.* Williams, 107 Ill. 154; Shirk *v.* M. & N. C. G. R'y Co., 110 Ill. 661. Perhaps a sheriff or constable may lawfully refuse to enforce a writ issued in contravention of a stay of proceedings. Palmer *v.* Galbreath, 74 Ind. 84.

the time being having no *power* to issue the execution, the writ is void.[1] In New York the stay of execution resulting from an appeal bond does not terminate when the judgment of the appellate court is orally pronounced and entered on the minutes. To supersede the stay, there must be a formal judgment entered by the clerk. An execution issued before the entry of this formal judgment, though irregular, will not be vacated except upon prompt application; and if not vacated will be treated as valid.[2]

§ 34. **The Constitutionality of Stay Laws.** — It is well known that a distinction has been made by judges and by writers upon constitutional law between laws impairing the obligation of contracts and laws regulating the remedies by which those contracts may be enforced. By this distinction the former laws have been avoided and the latter upheld. There is so intimate a connection between a right and the means by which it may be enforced that the justness of this distinction may well be doubted; for substantially we destroy a right when we destroy the legal methods of enforcing it, and we abridge or enlarge the right when we abridge or enlarge those methods. The right to judgment ought necessarily to be inseparable from the right to speedy execution; and hence all laws professing to postpone or suspend the right to execution, whether in regard to pre-existing judgments or in regard to judgments on pre-existing contracts, ought not to be enforced when their manifest tendency is to diminish the plaintiff's opportunities for reaping the fruits of

[1] Milliken *v.* Brown, 10 Serg. & R. 188.

[2] Bowman *v.* Tallman, 28 How. Pr. 483; 3 Robt. 633; 2 Robt. 632; Lentilhon *v.* Mayor, 1 Code R., N. S., 111.

his judgment. It is, however, quite certain that some alteration may be made in the laws allowing execution, by which the time for their issue may be somewhat postponed, and the chances of the plaintiff's obtaining satisfaction somewhat diminished. No sufficiently exact test can be made by which to determine precisely what laws are prohibited and what upheld. The most that can be said is, that no change in the remedy will be enforced where it amounts to a substantial denial of the right. "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which in the form of remedy impair the right. But it is manifest that the obligation of the contract and the rights of a party under it may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it."[1]

Laws regulating judgments and judgment liens, together with the time and manner of their enforcement by execution, are said to affect the remedy merely,[2] and are therefore sometimes given a retrospective operation. This, however, is true only of those statutory changes in which the prime object does not appear to be to delay the judgment creditor, or to compel him to

[1] Bronson *v.* Kinzie, 1 How. 317.

[2] Bank of United States *v.* Longworth, 1 McLean, 35.

accept an inadequate satisfaction of his debt. In times of great financial embarrassment, the legislatures of several of the states have attempted to protect judgment and other debtors from a sacrifice of their property at forced sale, and have enacted laws, some of which provided that no execution should be issued nor enforced within certain periods; and others declared that such execution could issue only when plaintiff was willing to accept payment in bank notes, or other depreciated currency. These statutes, though prompted by motives of the most humane character, and perhaps even sustainable on grounds of public policy, were liable to the most unanswerable constitutional objections. They either, for months or years, took from the creditor *all* remedy, or coerced him into accepting something different from and less valuable than that contemplated by his original contract. They have therefore been almost uniformly declared to possess no validity, on the ground that in their operation they necessarily impaired the obligation of contracts.[1] Nor can one cred-

[1] Dormire *v.* Cogly, 8 Blackf. 177; Strong *v.* Daniel, 5 Ind. 348; Gentry *v.* Baily, 1 Mo. 164; 13 Am. Dec. 484; Brown *v.* Ward, 1 Mo. 209; Bumgardner *v.* Circuit Court, 4 Mo. 50; Lapsley *v.* Brashears, 4 Litt. 47; Hudspeth *v.* Davis, 41 Ala. 389; Pool *v.* Young, 7 T. B. Mon. 588; Miller *v.* Gibson, 63 N. C. 635; Ex parte Pollard and Woods, 40 Ala. 77; Stevens *v.* Andrews, 31 Mo. 205; Jacobs *v.* Smallwood, 63 N. C. 112; Taylor *v.* Stearns, 18 Gratt. 244; Garlington *v.* Priest, 13 Fla. 559; Crittenden *v.* Jones, 1 Car. Law Rep. 385; 6 Am. Dec. 531; State *v.* Carew, 13 Rich. 506; 91 Am. Dec. 245; Jones *v.* McMahan, 30 Tex. 720; Coffman *v.* Bank of Kentucky, 40 Miss. 30; 90 Am. Dec. 311; Grayson *v.* Lilly, 7 T. B. Mon. 10; Stephenson *v.* Barnett, 7 T. B. Mon. 50. "Does an act to suspend execution impair the obligation of contracts made before it? What the obligation of a contract is may be discerned by considering what it is that makes the obligation. The contract alone has not any legal obligation, and why? Because there is no law to enforce it. The contract is made by the parties, and if sanctioned by law, it promises to enforce performance should the party decline performance himself. The law is the source of the obligation, and the extent of the obligation is defined by the law in use at the time the contract is made. If this law direct a specific execution, and a subsequent act declare that there shall not be a specific execution, the obliga-

itor be compelled to stay execution because others are willing to do so. Hence, an act authorizing a court to stay execution upon the written assent of more than two thirds of the defendant's creditors is unconstitutional.[1] During the late Civil War, statutes were enacted in several states for the purpose of staying execution against volunteers in the service of the United States. As the tendency of these statutes was to encourage enlistments, and thereby to aid in

tion of the contract is lessened and impaired. If the law in being at the date of the contract give an equivalent in money, and a subsequent law say the equivalent should not be in money, such act would impair the obligation of the contract. If the law in being at the date of the contract give immediate execution on the rendition of the judgment, a subsequent act, declaring that the execution should not issue for two years, would lessen or impair the contract equally as much in principle as if it suspended execution forever; in which latter case, the legal obligation of the contract would be wholly extinguished. The legislature may alter remedies; but they must not, so far as regards antecedent contracts, be rendered less efficacious or more dilatory than those ordained by the law in being when the contract was made, if such alteration be the direct and special object of the legislature, apparent in an act made for the purpose. Though possibly, if such alteration were the consequence of a general law, and merely incidental to it, which law had not the alteration for its object, it might not be subject to the imputation of constitutional repugnance. The legislature may regulate contracts of all sorts, but the regulation must be before, not after, the time when the contracts are made." (Townsend *v.* Townsend, 1 Peck, 13; 14 Am. Dec. 722.) In treating a similar question, in Blair *v.* Williams, 4 Litt. 46, the court of appeals in Kentucky said: "Does, then, the act of assembly in question impair that obligation? By the law as it stood at the date of the contract, the defendants were allowed to replevy the debt but for three months only, and the money, if not then paid, was required to be made of their estate, without further delay; but, by the act in question, they are allowed to replevy the debt for two years, or enter into a recognizance for the payment of the money within that time. And surely it cannot require argument to prove that the latter act impairs the obligation imposed by the former law. Indeed, the avowed object of the act in question was to relieve the debtor from the obligation he was under to pay his debt in the time prescribed by the former law, and give him further time of payment; and according to any sense of the word, the act in question must impair the obligation imposed by the former law, and is therefore unconstitutional and void, as it relates to the contract between the parties in this case, as well as to all contracts made previous to the passage of the act."

[1] Bunn *v.* Gorgas, 41 Pa. St. 441

the preservation of the national government, it was perfectly natural that the courts should seek, if possible, to sustain them. These statutes were generally upheld,[1] except where they were held to authorize an indefinite stay of execution,[2] or where the defendants had agreed to waive the right to such stay.[3] There can be no doubt of the validity of stay laws when applied to proceedings upon contracts made after their passage. In such cases, the stay law does not impair the obligation of the contract; but is rather to be regarded as part of the considerations and conditions upon which the contract was made, and as becoming a part of the contract itself.[4]

§ 35. Death of Sole Plaintiff or Defendant. — The time within which execution may ordinarily be sued out may be affected by the death, either of a sole plaintiff or of a sole defendant. Upon the happening of either of these events, the right to issue process is suspended, and so remains until the judgment can be revived by *scire facias*, or until the proper representatives of the deceased can, in some appropriate manner, be brought before the court, and made parties to the record.[5] The remedy by *scire facias* has fallen into disuse in many of the states, and its place has been

[1] McCormick *v.* Rusch, 15 Iowa, 127; 83 Am. Dec. 401; Breitenbach *v.* Bush, 44 Pa. St. 313; 84 Am. Dec. 442; Coxe's Ex'r *v.* Martin, 44 Pa. St. 322; Johnson *v.* Duncan, 3 Mart. (La.) 530; 6 Am. Dec. 675.

[2] Hasbrouck *v.* Shipman, 16 Wis. 296; Clark *v.* Martin, 3 Grant Cas. 393; 49 Pa. St. 299.

[3] Billmeyer *v.* Evans, 40 Pa. St. 324; Lewis *v.* Lewis, 47 Pa. St. 127.

[4] Barry *v.* Iseman, 14 Rich. 129; Wardlaw *v.* Buzzard, 15 Rich. 158; 94 Am. Dec. 148; Burns *v.* Crawford, 34 Mo. 330; Donnell *v.* Stephens, 35 Mo. 441.

[5] Hubert *v.* Williams, Walk. Ch. 175; Wilson *v.* Kirkland, Walk. Ch. 155; Davis *v.* Helm, 3 Smedes & M. 17; McMahon *v.* Glasscock, 5 Yerg. 304; Miller *v.* Doan, 19 Mo. 650; Swearingen *v.* Eberius, 7 Mo. 421; 38 Am. Dec. 463.

taken by some remedy provided by statute. Thus in Indiana, when the defendant dies subsequent to judgment, the right to take out execution seems to be suspended thereby, until one year after the granting of letters of administration on his estate. His heirs may then be summoned to show cause why the judgment should not be enforced against his estate in their hands. They may appear in response to the summons, and issues may be made up and tried. If the issues are determined in favor of the creditor, a judgment is entered directing that the money be made out of the assets in the hands of the administrator, and, if they prove insufficient, then out of the lands of the decedent.[1] If the judgment is not an ordinary money judgment, but one directing the sale of lands, the death of the defendant does not render necessary any proceedings by way of revivor. This is because the judgment operates *in rem*, and binds all persons acquiring any interest in the property from or under the defendants.[2] The statutory proceeding to revive a judgment against a decedent must not be confounded with the proceeding to obtain execution on a judgment dormant through lapse of time, for an execution issued as the result of the last-named proceeding will be entirely abortive in its effect against the heirs of the decedent.[3] In Illinois, if the defendant die after judgment, execution may issue against his lands and tenements, after three months' notice in writing has been given to his executor or administrator of the existence of the judgment;

[1] Faulkner *v.* Larrabee, 76 Ind. 154; Graves *v.* Skeels, 6 Ind. 107. Similar proceedings are required in some of the other states. Wallace *v.* Swinton, 64 N. Y. 195; Eaton *v.* Young, 41 Wis. 507.

[2] Kellogg *v.* Tont, 65 Ind. 151; Hays *v.* Thomas, 56 N. Y. 521; Harrison *v.* Simons, 3 Edw. Ch. 394.

[3] Wallace *v.* Swinton, 64 N. Y. 195; Faulkner *v.* Larrabee, 76 Ind. 154.

but if there be no executor or administrator, the judgment must first be revived by *scire facias*.[1] But it must be remembered that, under the English practice, the teste of the execution and the actual date of its issuing were often different. Upon the entry of judgment in any part of the term, or during vacation, an execution could issue tested the first day of the term. The execution was treated as if actually issued on the day of its teste; and the death of the plaintiff or defendant, subsequently to the teste, had no other effect beyond what it would have had if occurring subsequently to the actual issuing of the writ.[2] When the term at which judgment was entered had entirely passed, the right to teste executions as of that term ended. Hence, if defendant died subsequently to the lapse of the term, or if dying during the term no execution was sued out against him until the succeeding term, a revivor of the judgment by *scire facias* became necessary to entitle plaintiff to sue out execution.[3] If, however, the teste of the writ where it is issued under the English practice, or the actual date of its issue where the fiction of the English law is not enforced, be subsequent to the death of a sole plaintiff, in whose name it issues, then there can be no doubt that the writ is irregular. By the

[1] Coran *v.* Pettinger, 92 Ill. 241.

[2] Cleve *v.* Veer, Cro. Car. 459; Bragner *v.* Langmead, 7 Term Rep. 20, explaining and modifying Heapy *v.* Parris, 6 Term Rep. 368; Collingsworth *v.* Horn, 4 Stew. & P. 240; 24 Am. Dec. 753; Center *v.* Bellinghurst, 1 Cow. 34; Fox *v.* Lamar, 2 Brev. 417; Robinson *v.* Tongue, 3 P. Wms. 398; Preston *v.* Surgoine, Peck, 81; Battle *v.* Bering, 7 Yerg. 531; 27 Am. Dec. 526; Waghorne *v.* Langmead, 1 Bos. & P. 571; Nichols *v.* Chapman, 9 Wend. 452; Hay *v.* Fowler, 1 How. Pr. 127; Black *v.* Planters' Bank, 4 Humph. 367; Day *v.* Rice, 19 Wend. 644; Den *v.* Hillman, 2 Halst. 180; Davis *v.* Helm, 3 Smedes & M. 34; Montgomery *v.* Reulhafer, 85 Tenn. 668.

[3] Cooper *v.* May, 1 Harr. 18; Dibble *v.* Taylor, 2 Speers, 308; 42 Am. Dec. 368; Davis *v.* Oswalt, 18 Ark. 414; 68 Am. Dec. 182; Collingsworth *v.* Horn, 4 Stew. & P. 237; 24 Am. Dec. 753.

common law, however, the court still has power to award execution upon the revival of the judgment by *scire facias*. The power of the court seems to be as ample, and to be properly invoked in the same manner, as when judgment becomes dormant for want of execution within a year and a day. If an execution issued without *scire facias* is not void in the latter case, it ought, upon principles equally applicable to both, to be upheld in the former case. This view has been accepted by some judicial tribunals, and has led to the declaration that an execution in the name of a deceased plaintiff, though voidable, is not void.[1] But, on the other hand, it has been maintained that, by the death of the plaintiff, the judgment also dies, subject, however, to resurrection by *scire facias*, and that until so resurrected "its life is suspended, and the authority which it gave to issue execution for the time being withdrawn, and the judgment stands as if it never had been rendered."[2] In Wisconsin, by statute, execution after the death of plaintiff may issue in the same manner and with the same effect as though he were still living;[3] and in some other states the death of a sole plaintiff does not render a *scire facias* necessary.[4] The

[1] Day *v.* Sharp, 4 Whart. 341; 34 Am. Dec. 509; Mairty *v.* Eastridge, 67 Ind. 211; Hughes *v.* Wilkinson, 37 Miss. 491; Darlington *v.* Speakman, 9 Watts & S. 182.

[2] Stewart *v.* Nuckolls, 15 Ala. 231; 50 Am. Dec. 127; Graham *v.* Chandler, 15 Ala. 345; Brown *v.* Parker, 15 Ill. 309; Pickett *v.* Hartsock, 15 Ill. 279; Laflin *v.* Herrington, 16 Ill. 302; Meyer *v.* Mintonye, 106 Ill. 414; Morgan *v.* Taylor, 38 N. J. L. 317.

[3] Holmes *v.* McIndoe, 20 Wis. 667.

[4] In Kentucky, as soon as an administrator or executor of deceased plaintiff is appointed, the clerk may issue execution, making indorsement showing the change in the parties. Morgan *v.* Winn, 17 B. Mon. 244; Venable *v.* Smith, 1 Duvall, 195. In New York, "prior to 1866, if a plaintiff died after judgment in his favor and before execution issued, no execution issued upon the application of his personal representatives, and the remedy was not by execution, but

issuing of executions against sole defendants, bearing date after their death, has also given rise to diverse decisions; but upon this point the authorities are much more unevenly divided than upon that arising where execution has issued after the death of a sole plaintiff. Some of the authorities deny that the death of the defendant is an extinguishment of the *power* to issue execution; and affirm that a writ thereafter issued, without revivor of the judgment, though voidable, is not void.[1] These authorities, while sustainable on principle, are borne down by the weight of opposing authority.[2]

§ 36. Issue after Death of One of Several Plaintiffs or Defendants. — We shall next consider the effect of

by an action in the nature of *scire facias*, under section 428 of the code. See Ireland *v.* Litchfield, 22 How. Pr. 178; 8 Bosw. 634; Jay *v.* Martin, 2 Duer, 654; Wheeler *v.* Dakin, 12 How. Pr. 537; Bellinger *v.* Ford, 21 Barb. 311; Thurston *v.* King, 1 Abb. Pr. 126; Nims *v.* Sabine, 44 How. Pr. 252. But since the amendment of section 283 of the code in 1866, the personal representatives of a deceased judgment creditor have all the rights and remedies by execution which the creditor had while living." 4 Wait's Pr. 7 f. See also Code of Ala., sec. 2834; Hurd's Ill. Dig. 626, sec. 37; Iowa Code, sec. 3130; Wagner's Stat. Mo. 791; Gaston *v.* White, 46 Mo. 486; Fowler *v.* Burdett, 20 Tex. 34; Thompson *v.* Ross, 26 Miss. 198; Landes *v.* Perkins, 12 Mo. 238; Rooks *v.* Williams, 13 La. Ann. 374; Trail *v.* Snouffer, 6 Md. 308; Darlington *v.* Speakman, 9 Watts & S. 182.

[1] Drake *v.* Collins, 5 How. (Miss.) 256; Shelton *v.* Hamilton, 23 Miss. 497; 57 Am. Dec. 149; Hodge *v.* Mitchell, 27 Miss. 564; 61 Am. Dec. 524; Hughes *v.* Wilkinson, 37 Miss. 491; Wight *v.* Wallbaum, 39 Ill. 554; Elliott *v.* Knott, 14 Md. 121; 74 Am. Dec. 519; Butler *v.* Haynes, 3 N. H. 21; Speer *v.* Sample, 4 Watts, 367; Harrington *v.* O'Reilly, 9 Smedes & M. 216; 48 Am. Dec. 704.

[2] Massie's Heirs *v.* Long, 2 Ohio, 288; 15 Am. Dec. 547; Samuel *v.* Zachery, 4 Ired. 377; Cartney *v.* Reed, 5 Ohio, 221; Houston *v.* Childers, 24 La. Ann. 472; Beach *v.* Dennis, 47 Ala. 262; Lucas *v.* Price, 4 Ala. 679; Collier *v.* Windham, 27 Ala. 291; 62 Am. Dec. 767; Whittock's Adm'r *v.* Whittock's Creditors, 25 Ala. 543; Gwynn *v.* Latimer, 4 Yerg. 22; Erwin's Lessee *v.* Dundas, 4 How. 58; Mitchell *v.* St. Maxent, 4 Wall. 237; Whitehead *v.* Cummins, 2 Cart. 58; State *v.* Michaels, 8 Blackf. 436; Hildreth *v.* Thompson, 16 Mass. 191; Pickett *v.* Hartsock, 15 Ill. 279; Wallace *v.* Swinton, 64 N. Y. 188; Meyer *v.* Hearst, 75 Ala. 390; Smith *v.* Reed, 52 Cal. 345; Cunningham *v.* Burk, 45 Ark. 267; Williams *v.* Weaver, 94 N. C. 134.

the death of one of several defendants, or of one of several plaintiffs, after judgment, and before the date at which the execution is issued or tested. Where counsel insisted that "where there are two or more judgment creditors, and before execution issues one of them dies, the survivors are put to their *scire facias* before they can have execution upon their judgment," the court replied that "no authority has been produced in support of this principle, but, on the contrary, the course of the books shows that the proper mode of proceeding in such case would be to take out the execution conformed to the judgment, in the name of all the creditors, without regarding the death of any one." Probably, however, in a case like the present, on suggestion made to the court of the death of one of the creditors in a judgment, where the interest survived after judgment and before the issuing of an execution, the execution would be ordered to issue in the name of the survivor only.[1] A judgment recovered in favor of two or more persons would, on the death of one or more, become vested in the survivor or survivors,[2] who would be entitled to issue execution or to maintain an action on the judgment. The death of part of the plaintiffs introduces no new parties to the record, and therefore creates no necessity for a revivor by *scire facias*. The general rule in regard to revivor is, that it is indispensable whenever a new party is to be charged or benefited by the judgment. "Where any new person is either to be better or worse by the execution, there must be a *scire facias*, because he is a stranger, to make him

[1] Hamilton v. Lyman, 9 Mass. 18; Bowdoin v. Jordan, 9 Mass. 160; Cushman v. Carpenter, 8 Cush. 388; Withers v. Harris, Ld. Raym. 808; Howell v. Eldridge, 21 Wend. 678.

[2] Freeman on Cotenancy and Partition, sec. 362.

party to the judgment, as in case of executor and administrator; otherwise where the execution is neither to charge nor benefit any new party, as is this case, where there is a survivorship; for there is no reason why death should make the condition of the survivors better than before."[1]

When one of several judgment defendants dies, satisfaction may be sought solely by seizing the persons or levying on the personal estate of the survivors, in which cases no *scire facias* is needful to authorize the issue of execution.[2] But it is otherwise if the heir of the deceased is to be pursued.[3] In order that the execution may conform to the judgment, it issues against all the defendants, although it, for all practical purposes, amounts to no more than an execution against the survivors. Under the common-law system of procedure, a certain kind of writs issued against the persons of the defendants, another kind against the personal estate of defendants, and still another kind was necessary to authorize satisfaction to be made out of their real estate. The two former, being personal in their nature, could issue after the death of one of the defendants without any revivor. But with the latter the rule was otherwise. If an *elegit* issued, it

[1] Pennoir *v.* Brace, 1 Salk. 319; S. C., Penoyer *v.* Brace, Ld. Raym. 244; Mitchell *v.* Smith, 1 Litt. 243; Johnston *v.* Lynch, 3 Bibb, 337.

[2] Day *v.* Rice, 19 Wend. 644; Cheatham *v.* Brien, 3 Head, 553; Carahan *v.* Brown, 6 Blackf. 93; Johnston *v.* Lynch, 3 Bibb, 334; Wade *v.* Natt, 41 Miss. 248; Howell *v.* Eldridge, 21 Wend. 678; Thompson *v.* Bondurant, 15 Ala. 346; 50 Am. Dec. 136; Payne *v.* Payne, 8 B. Mon. 392; Martin *v.* Branch Bank, 15 Ala. 587; 50 Am. Dec. 147; Hildreth *v.* Thompson, 16 Mass. 193, note; Dickinson *v.* Bowers, 7 Baxt. 307; Fabel *v.* Boykin, 55 Ala. 383; Reed *v.* Garfield, 15 Ill. App. 290; Holt *v.* Lynch, 18 W. Va. 567.

[3] Thus in Pennoir *v.* Brace, 1 Salk. 319, "Holt, C. J., held that a *capias* or *fi. fa.*, being in the personalty, might survive, and might be sued against the survivors without a *scire facias;* otherwise of an *elegit,* for there the heir is to be contributory." Blanks *v.* Rector, 24 Ark. 496; 89 Am. Dec. 780.

must have been against both the defendants, to be executed on the lands of both. Each defendant had the right to insist that one half of the land of his co-defendant be extended, in order that the burden might be lighter on him. "But if one defendant died before execution issued, the lands descended and the title vested in the heir. He had the right to show cause (as he had never had a day in court) why the judgment was not a charge on his land, and therefore a notice or *scire facias* must issue to him before his lands could be taken in execution. The lands of the surviving defendant being chargeable jointly with the lands of the deceased defendant, and he having the right to insist that this charge should be equally divided between them, the plaintiff in execution could not extend his land without a *sci. fa.* If, therefore, the goods of the survivor were not sufficient to satisfy the debt, the plaintiff could not proceed by his writ of *elegit;* neither against the heir of the deceased defendant, because he was entitled to have a day in court; or against the surviving defendant, because he had the right to show that the land, descended to the heir of his co-defendant, was jointly liable, with his own, to pay and satisfy the charge. Hence arose the necessity of a *sci. fa.* against the surviving defendant, before his lands could be taken in execution."[1] In the United States, the *elegit* has fallen into disuse, even in those states where it was once employed.

An execution against two or more defendants may be levied upon the real as well as upon the personal estate of either; and there is no provision of law under which a defendant can compel an execution to be levied

[1] Martin v. Branch Bank, 15 Ala. 594; 50 Am. Dec. 147.

on the real estate of his co-defendant as well as upon his own. But in some cases the difference between the manner in which real estate is subjected to execution under our statutes from that under which it was so subjected under the English statute has been overlooked; and it has therefore been held that an execution cannot be levied on the real estate of the surviving defendant until there has been a *scire facias* against the heirs of the deceased co-defendant; and that if so levied, the levy and sale are unauthorized and void.[1] But we think that the reasoning of Judge Dargan, in pronouncing the opinion of the supreme court of Alabama, sufficiently demonstrates that these cases ought not to be followed. He said: "Under our statutes, judgments are joint and several, and executions may be levied on the lands of one of the defendants alone without any levy on the lands of the other, as at the common law they could be levied on the goods of one alone, notwithstanding the other had goods liable to execution. The decisions, therefore, of the English courts, under their statute, ought not to be adopted here, as ours is entirely different in its legal consequences, and places lands on the same footing with personal property in reference to the payment of judgments; that is, they may be absolutely sold under the same process, and a perfect title passed to the purchaser; and the land of one may be sold, though no levy is made on that of the other. It thus being the right of plaintiff to sell the land of one, without reference to the other, as at common law he could sell the goods of one without making any levy on the goods of the other, I cannot myself see any reason for a *sci.*

[1] Woodcock *v.* Bennet. 1 Cow. 738; 13 Am. Dec. 568; Erwin's Lessee *v.* Dundas, 4 How. 77; Banks *v.* Rector, 24 Ark. 496.

fa. against a surviving defendant, for it would answer no purpose, and would not benefit him. The question here raised has never before been made in this court, and we feel bound to decide it upon our own statutes; and we believe that a just construction of them warrants us in saying that the lands of a survivor may be sold under execution issued after the death of a co-defendant, without a *scire facias*."[1]

§ 37. **Abatement of Writ by Death of a Party.** — We have already stated that the death of a plaintiff, or of a defendant, subsequently to the teste of an execution, had no other effect than if such death had occurred subsequently to the actual issuing of the writ. We shall now consider whether the death of a plaintiff or defendant had any effect on an execution previously issued, and if so, in what cases and to what extent. The common-law rule, in the event of the death of a plaintiff, as thus expressed and explained in an early case, is sustained by all the authorities: "There is a difference betwixt a judicial writ after judgment, to do execution, and a writ original; for the writ judicial, to make execution, shall not abate, nor is abatable, by the death of him who sues it; as it is the common course of a *capias ad satisfaciendum*, or a *fieri facias*, upon judgment issueth, the sheriff shall execute it, although the party who sued it died before the return of the writ; and although the death be before or after execution, if it be after the teste of the writ, it is well enough; as where a *capias ad satisfaciendum* is sued, and the party taken, before or after the death of him who sued it, and before the day of return; or if a *fieri*

[1] Martin *v.* Branch Bank, 15 Ala. 594; 50 Am. Dec. 147; Hardin *v.* McCause, 53 Mo. 255; Wade *v.* Watt, 41 Miss. 248.

facias be awarded, and the money levied by the sheriff, and the plaintiff dies before the return day of the writ, yet the executor, or his administrator, shall have the benefit, and is to have the money; and it is no return to say that the plaintiff is dead; and therefore that he did not execute it."[1] When a writ is once sued out against the personal property of the defendant, the sheriff need not, and in fact cannot, take any notice of the subsequent death of the defendant. From its teste at common law, and from its delivery to the officer under statutes where the common-law fiction of relation to the day of teste has been abolished, the writ is deemed to be in process of execution; and when its execution is commenced during the life of defendant, either in fact or in contemplation of law, it must proceed. The officer may therefore seize the chattels of the defendant, though they have come into the possession of his executor or administrator.[2] With respect to the real estate of the defendant, the rule, according to a decided preponderance of the authorities, is the

[1] Massie's Heirs *v.* Long, 2 Ohio, 287; 15 Am. Dec. 547; Wing *v.* Hussey, 71 Me. 186; Becker *v.* Becker, 47 Barb. 498; Fox *v.* Lamar, 2 Brev. 417; Cleve *v.* Veer, Cro. Car. 459; Ellis *v.* Griffith, 16 Mees. & W. 106; 4 Dowl. & L. 279; 10 Jur. 1014; 16 L. J. Ex. 66; Gregory *v.* Chadwell, 3 Cold. 390; Clerk *v.* Withers, 6 Mod. 290; 11 Mod. 35; Brayner *v.* Langmead, 7 Term Rep. 20; Neil *v.* Gaul, 1 Cold. 396; Murray *v.* Buchanan, 7 Blackf. 549; Clere *v.* Withers, Ld. Raym. 1073; Thoroughgood's Case, Noy, 73; Commonwealth *v.* Whitney, 10 Pick. 434; Buckner *v.* Terrill, Litt. Sel. Cas. 29; 12 Am. Dec. 269; Gaston *v.* White, 46 Mo. 486; Bigelow *v.* Renker, 25 Ohio St. 542. But in Kentucky, the writ abates unless levied or replevied in plaintiff's lifetime. Wagnon *v.* McCoy, 2 Bibb, 198; Huey *v.* Ridden, 3 Dana, 488; Bristow *v.* Payton's Adm'r, 2 T. B. Mon. 91; 15 Am. Dec. 134.

[2] Parker *v.* Mosse, Cro. Eliz. 181; Parsons *v.* Gill, Ld. Raym. 695; Eaton *v.* Southby, Willes, 131; Waghorne *v.* Langmead, 1 Bos. & P. 571; Huey *v.* Redden, 3 Dana, 488; Grosvenor *v.* Gold, 9 Mass. 214; Needham's Case, 12 Mod. 5; Thompson *v.* Ross, 26 Miss. 200; Odes *v.* Woodward, Ld. Raym. 850; Dodge *v.* Mack, 22 Ill. 95; Logsdon *v.* Spivey, 54 Ill. 104; Craig *v.* Fox, 16 Ohio, 563; Arnold *v.* Fuller, 1 Ohio, 458.

same as that applicable to his personal estate. An *elegit* bearing teste in the defendant's lifetime may, after his death, be extended on his real estate, and the same is true of any other writ, so tested, which may be employed to make real estate answerable for the defendant's debt.[1] In Kentucky, the death of a defendant at any time before sale abates the execution both as to real and to personal estate; but this result was not attained in that state through any peculiar interpretation of the common law. It was owing to a construction given a local statute.[2] In New York, it has been held that the real estate of the defendant cannot be sold under an execution tested before, but issued after, his death.[3] As this decision is not supported by any local statute, it must be conceded to be contrary to a strong and overpowering current of authorities. But when execution has in fact issued, and the sheriff has taken steps for its enforcement, it is settled, even in New York, that the death of the defendant cannot arrest the process.[4] In Texas, executions seem to abate on the death of the defendant, whether levied or not, and to be thereafter regarded as absolutely void.[5]

[1] Tidd's Pr. 1034; Sprott *v.* Reid, 3 G. Greene, 492; 56 Am. Dec. 549; Doe *v.* Heath, 7 Blackf. 156; Erwin's Lessee *v.* Dundas, 4 How. 76; Bleecker *v.* Bond, 4 Wash. C. C. 6; Doe *v.* Hayes, 4 Ind. 117; Hanson *v.* Barnes, 3 Gill & J. 359; 22 Am. Dec. 322; Jones *v.* Jones, 1 Bland, 443; 18 Am. Dec. 327; Mundy *v.* Bryan, 18 Mo. 29; Dew *v.* Hillman, 2 Halst. 180; Aycock *v.* Harrison, 65 N. C. 8; Hurt *v.* Nave, 49 Ala. 459; Davis *v.* Moore, 103 Ill. 445; Barber *v.* Peay, 31 Ark. 392; Jones *v.* Bay, 50 Ala. 579; Lewis *v.* Coombs, 60 Mo. 44.

[2] Huston *v.* Duncan, 1 Bush, 205; Holeman *v.* Holeman, 2 Bush, 514; Wagnon *v.* McCoy, 2 Bibb, 198; Bristow *v.* Payton, 2 T. B. Mon. 91; 15 Am. Dec. 134.

[3] Stymets *v.* Brooks, 10 Wend. 210. See also Overton *v.* Perkins, 10 Yerg. 328; and Rutherford *v.* Reed, 6 Humph. 423.

[4] Wood *v.* Morehouse, 45 N. Y. 373.

[5] Conkrite *v.* Hart, 10 Tex. 140; Chandler *v.* Burdett, 20 Tex. 42; McMiller *v.* Butler, 20 Tex. 402; but the authority of these cases is somewhat shaken in

§ 37 a. Issuing Executions on Decrees. — Where a decree is for the payment of a sum of money, it may now, under the authority of various English and American statutes, be enforced by the same writs of execution as though the recovery had been at law instead of in equity.[1] The issuing of these writs may generally be obtained by demanding them of the proper officer as soon as the creditor has become entitled to immediate compliance with the decree. In cases not provided for by these statutes, resort must be had to other modes of enforcing satisfaction. Since the writ of execution has become obsolete, it is incumbent on the prevailing party to have inserted in his decree, or in some supplemental decree, a clause designating the time, or the time after the service of such decree, within which the act required by it to be done must be performed. A copy of this decree must then be procured and served upon the defendant, and in England, a memorandum must be indorsed thereon to the following effect: "If you, the within-named A B, neglect to obey this decree by the time therein limited, you will be liable to be arrested,

Webb v. Mallard, 27 Tex. 20. In Taylor v. Snow, 47 Tex. 462, 26 Am. Rep. 311, it was determined that a sale could not be collaterally avoided on the ground that the defendant died before the rendition of the judgment as well as before the issue of the execution.

[1] Daniell's Ch. Pr., 4th Am. ed., 1042, and notes. In Florida, the authority to issue execution on a decree is founded on rule 7 of the rules of circuit courts in suits in equity, which is as follows: "Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution in the form used in the circuit courts in suits at common law." For some reason, which the court failed to disclose, and which we can neither conceive nor imagine, this rule was held to authorize the issuing of but one execution, and, in the event of the issue and return of an execution, to leave the clerk without power to issue any *alias* or subsequent writ. White v. Staley's Ex'rs, 21 Fla. 396. A *venditioni exponas* may issue when the sheriff has seized goods which remain unsold for want of bidders. If he has gone out of office he may be compelled to proceed to sale by the writ of *distringas nuper vice-comitem*. Seton's Forms of Decrees, Judgments, and Orders, 4th ed., 1561.

under a writ of attachment issued out of the high court of chancery, or by the sergeant-at-arms attending the same court; and also be liable to have your estate sequestered, for the purpose of compelling you to obey the same decree."[1] If the time for performance is fixed by the decree, the service of the copy must be made before such time, or an order must be obtained and served enlarging the time or fixing a new period for such performance. The service of the copy of the decree must be personal, unless the court authorizes the adoption of some other mode. When the party has absconded, or cannot be found, or keeps his door locked, the court will order substituted service upon his solicitor.

§ 37 b. Issue of Attachment to Enforce Decrees. — In England, the writ of attachment was formerly issued by the clerk, upon his being satisfied by affidavit of the due service of the copy of decree, and that it had not been obeyed within the time designated;[2] but we believe it is now generally the practice, both in that country and in the United States, not to issue this writ except upon leave or order of the court; and that this order is not issued until the party alleged to be in contempt has had notice of the application therefor, and an opportunity to show cause why he should not be proceeded against as one guilty of a contempt.[3] After the attachment issued, the defendant was arrested thereunder and lodged in prison if he could be found,

[1] Daniell's Ch. Pr., 4th Am. ed., 1043; Seton's Forms of Decrees, Judgments, and Orders, 4th ed., 1555, 1560.

[2] Daniell's Ch. Pr., 4th Am. ed., 1046.

[3] Seton's Forms of Decrees, Judgments, and Orders, 4th ed., 1567; Gates v. McDaniel, 3 Port. 256; Androscoggin R. R. v. Androscoggin R. R., 40 Me. 291; Ex parte Langdon, 25 Vt. 680; Ex parte Petrie, 38 Ill. 498; Wightman v. Wightman, 45 Ill. 167.

and this imprisonment, where it was possible to arrest the defendant, seems to have been a prerequisite to further proceedings against him.[1] The plaintiff may, if he choose, leave the contumacious defendant in prison until he purges himself of his contempt by performing the act required of him and paying the costs of the contempt.

§ 37 c. **Issue of Writ of Sequestration.**—It may happen that the defendant cannot be found and arrested, or being found and put in prison, remains there without obeying the decree. In this event, a further remedy of the complainant is by the writ of sequestration.[2] When it appears that the defendant is out of the jurisdiction of the court, this writ may issue without first proceeding to sue out an attachment.[3] Formerly on the return of *non est inventus* to the writ of attachment, the plaintiff might have "an order for the sergeant-at-arms, and such other process as he was formerly entitled to, upon a return *non est inventus*, made by the commissioners named in a commission of rebellion, issued for the non-performance of a decree or order."[4] The writ of sequestration issues in England upon motion, as of course, when it appears that the defendant against whom the attachment issued cannot be found within the jurisdiction of the court, or being found, is imprisoned and neglects to obey the decree.

[1] Kinsey *v.* Yardley, Dick. 265; Daniell's Ch. Pr., 4th Am. ed., 1047.

[2] Ross *v.* Colville, 3 Call, 382; 8th Equity Rule of United States Courts; Roberts *v.* Patton, 18 Mo. 481.

[3] Re East of England Bank, 10 Jur., N. S., 1093; 3 Drew. & S. 284. Writ of sequestration may now issue in England after service of a copy of the decree. Seton's Forms of Decree, etc., 4th ed., 1576; Sprunt *v.* Pugh, 7 Ch. Dec. 507; Sykes *v.* Dyson, 9 Eq. 228.

[4] Daniell's Ch. Pr., 4th Am. ed., 1048; Hook *v.* Ross, 1 Hen. & M. 320.

It may issue against an infant,[1] and because of the non-performance of every conceivable kind of decree. Hence it may issue where defendant refuses to produce deeds,[2] or to deliver property to a receiver,[3] or to perform a personal duty.[4] In Maryland, the plaintiff seems by statute to be entitled to this writ without resorting to an attachment, or even serving any copy of the decree, or making any demand for its performance.[5] In Pennsylvania, a writ of sequestration is "the execution process, where judgment has been obtained against corporations, except counties and townships, or others of like public municipal character." It is demandable of right, and may therefore issue without notice.[6] The writ of sequestration was irregular if issued at any time after the death of the defendant, and was liable to be vacated.[7] Where there is any change of parties after judgment, leave must be obtained for the issue of any writ of sequestration.[8] The sequestration is a personal proceeding, and after the death of the party in default it cannot be revived against his heir unless the decree is for the land, or for the performance of a covenant in which the heir is bound; but it may be revived against the defendant's personal representative if the decree is for a mere personal demand.[9] In order to make the writ of sequestration effective, it may be necessary to apply to the court from time to time for further author-

[1] Anonymous, 2 Ch. Cas. 163.

[2] Trig *v.* Trig, Dick. 325.

[3] People *v.* Rogers, 3 Paige, 103.

[4] Guavers *v.* Fountaine, 2 Freem. 99.

[5] Keighler *v.* Ward, 8 Md. 254.

[6] Reid *v.* N. W. R'y Co., 32 Pa. St. 257

[7] Chick *v.* Smith, 8 Dowl. P. C. 337; 4 Jur. 86.

[8] Seton's Forms of Decrees, etc., 4th ed., 1578; Coulston *v.* Gardiner, 2 Ch. Cas. 43; Burdett *v.* Rockley, 1 Vern. 58, 118.

[9] Daniell's Ch. Pr., 4th Am. ed., 1059, 1033; Wharam *v.* Broughton, 1 Ves. 182.

ity. Thus while the sequestrators may not, by virtue of the writ alone, sell any property,[1] they may be authorized to sell personal estate by the court upon motion, and after notice to the defendant.[2]

§ 37 d. **Writs of Assistance, for and against Whom may Issue.** — If the decree directs the possession of property to be surrendered or given to any person, he is entitled, without first pursuing proceedings by the ordinary process of contempt, "upon due service of the decree or order, to an order for a writ of assistance, directed to the sheriff of the county where the property lies, commanding him to put the plaintiff into the possession of the premises in question, pursuant to the decree or order. A demand for possession is not now necessary."[3] A writ of assistance may issue in aid of any person other than the complainant, who has become entitled to the possession of the premises, under or by virtue of the decree, or of proceedings taken for its enforcement. It may therefore issue on behalf of the sequestrators,[4] or of receivers, to put them in possession of the defendant's realty.[5] Its chief employment in the United States is to place in possession persons who have purchased real property at foreclosure or other equity sales. Although such purchasers have a remedy by an action at law to recover such possession, the court of equity under whose proceedings they have acquired their title interposes in their behalf, and re-

[1] Shaw *v.* Wright, 3 Ves. 22.

[2] Mitchell *v.* Draper, 9 Ves. 208; Cowper *v.* Taylor, 16 Sim. 314; Cadell *v.* Smith, 3 Swan, 306.

[3] Daniell's Ch. Pr., 4th Am. ed., 1062. This writ is said to be superseded by the writ of possession. Seton's Forms of Decrees, etc., 4th ed., 1562.

[4] Daniell's Ch. Pr., 4th Am. ed., 1056.

[5] Sharp *v.* Carter, 3 P. Wms. 379, note; Cazet de la Borde *v.* Othon, 23 Week. Rep. 110.

lieves them, in proper cases, from the expense, delay, and annoyance of an independent action in another forum.[1] When the purchaser was already a party to the suit, there has never been any doubt that this writ would issue in his name and for his benefit.[2] When, however, the purchaser was not a party to the suit, it has been claimed that he was not entitled to this writ, and that he could not otherwise obtain its aid than by procuring one of the parties to make the application therefor in his behalf.[3] The decisions to this effect are mere *dicta*, and are based on false premises, to wit, on the supposition that as such purchaser was not a party to the suit, it would be incongruous and irregular to permit him to take any proceeding therein in his own name. But a purchaser at an equity sale, from the moment of the striking off the property to him as the successful bidder, has always been treated as a party, and no court of equity has hesitated to treat him as such, either when as a moving party he sought to obtain the confirmation of the sale, or when as a respondent he was called before the court for the purpose of compelling his compliance with the terms of the sale.[4] He is, therefore, substantially a party to the suit from the date of his purchase, and the court will issue its writ of assistance in his behalf unless some good reason is shown for withholding it.[5] The writ has been issued in favor

[1] Terrell *v.* Allison, 21 Wall. 289; Beatty *v.* De Forest, 27 N. J. Eq. 482; Diggle *v.* Boulden, 48 Wis. 477; Commonwealth *v.* Dieffenbach, 3 Grant Cas. 365; Brown *v.* Marzyck, 19 Fla. 840; Voigtlander *v.* Brotze, 59 Tex. 286.

[2] See cases last cited; Dorsey *v.* Campbell, 1 Bland Ch. 363.

[3] Wilson *v.* Polk, 13 Smedes & M. 131; 51 Am. Dec. 151; Langley *v.* Voll, 54 Cal. 436.

[4] Redus *v.* Hayden, 43 Miss. 636; Clarkson *v.* Reed, 15 Gratt. 295.

[5] Jones *v.* Hooper, 50 Miss. 510; overruling on this point Wilson *v.* Polk, 13 Smedes & M. 131; 51 Am. Dec. 151; Wilbor *v.* Danolds, 59 N. Y. 657; Knight *v.* Houghtaling, 94 N. C. 408; Schenck *v.* Conover, 13 N. J. Eq. 220; 78 Am. Dec. 95.

of the purchaser's assignee to whom the conveyance was made,[1] and also in behalf of one to whom the purchaser granted the property after conveyance.[2] With respect to the parties against whom this writ will be ordered to issue, it must be remembered that it is in effect a writ for the complete execution of a decree, and therefore that it cannot issue against any one who has the right to resist or question such decree. If the person sought to be removed was not a party to the suit, and was in possession prior to its institution, either claiming adversely to the parties[3] or holding a right of possession derived from some of them,[4] and which has not terminated, then the writ will not issue to dispossess him, and the purchaser will be required to resort to some independent suit or action to vindicate his claim to the possession. The rule as to the parties against whom a writ of assistance may be directed and enforced is doubtless the same as the rule designating the persons who may be lawfully dispossessed by an officer executing a writ of possession,[5] to wit, the parties to the suit, and all persons receiving possession from or under them *pendente lite*, by their consent or connivance, and also mere intruders into possession after the commencement of the suit.[6] If, however, the statute requires a notice of the pendency of an action to be filed and recorded to operate as constructive notice of such action, a purchaser *pendente lite*, in the absence of such notice and

[1] Ekings *v.* Murray, 29 N. J. Eq. 388.

[2] N. Y. L. I. & T. Co. *v.* Rand, 8 How. Pr. 35, 352.

[3] Gelpcke *v.* Milwaukee R. R., 11 Wis. 454; Howard *v.* R. R. Co., 101 U. S. 837; Frelinghuysen *v.* Calden, 4 Paige, 204; Brush *v.* Fowler, 36 Ill. 53; 85 Am. Dec. 382.

[4] Thomas *v.* De Baum, 14 N. J. Eq. 37; Gilcrest *v.* Mitchell, 37 Ill. 300.

[5] For such rule, see *post*, § 475.

[6] Hooper *v.* Younge, 69 Ala. 484; Burton *v.* Lies, 21 Cal. 87; Brown *v.* Marzyck, 19 Fla. 840; Knight *v.* Houghtaling, 94 N. C. 408.

without actual notice of the pendency of the suit, is not bound by the final decree, and cannot be subjected to a writ of assistance based thereon.[1] And generally, a writ of assistance will be directed only in a clear case, and when the respondent cannot possibly have any rights which were not subjected to the decree.[2] If, for instance, he sets up and appears to claim in good faith a right to the possession derived from and under the purchaser,[3] or from the defendant prior to the commencement of the suit,[4] the validity and effect of his claim will very rarely, and perhaps never, be tried upon application for this writ, but he will be left in possession. The writ has been denied when the purchaser had delayed for a long period of time to apply for it,[5] and also when the respondent had not intruded into the possession until some time after the purchaser had received his deed.[6] In the first case, the court presumed that the respondent might have acquired from the purchaser some right to the possession; and in the last case, the court, while admitting its duty to place a purchaser in possession by removing parties unlawfully withholding the property at the execution of the deed, did not conceive that this duty was so continuous as to require it to protect the purchaser from subsequent intrusion.

§ 37 e. The Practice to be Pursued to Obtain a Writ of Assistance is not uniform in the several states.

[1] Harlan *v.* Rackerby, 24 Cal. 561.

[2] Blauvelt *v.* Smith, 22 N. J. Eq. 31; Thompson *v.* Campbell, 57 Ala. 183; Enos *v.* Cook, 65 Cal. 175.

[3] Langley *v.* Voll, 54 Cal. 435; Barton *v.* Beatty, 28 N. J. Eq. 412; Mayor of San Jose *v.* Fulton, 45 Cal. 316.

[4] Thompson *v.* Smith, 1 Dill. 458; Van Hook *v.* Throckmorton, 8 Paige, 33; Henderson *v.* McTucker, 45 Cal. 647.

[5] Hooper *v.* Yonge, 69 Ala. 484.

[6] Betts *v.* Birdsall, 11 Abb. Pr. 222; 19 How. Pr. 491.

It is not necessary in any of the states that the decree contain any clause to the effect that such writ shall issue in favor of the purchaser, or that the parties shall surrender possession upon a sale and conveyance being made.[1] This clause, when inserted in a decree, is, like the award of execution in a judgment, superfluous. The rights of the purchaser result from the facts that there has been a valid decree, a sale thereunder, and the execution of a conveyance pursuant to such sale; and he is therefore entitled to be put into possession of the property. Formerly the practice was as follows: 1. Obtain an order on the defendant to deliver possession; 2. Serve such order on him, together with a demand for possession; 3. Have an attachment issued for disobeying the order, which attachment need not be served; 4. Make an affidavit showing these various steps which had been taken, on which, as a matter of course, an injunction issued against the tenant to deliver possession; 5. Serve such injunction, and make an affidavit of such service, and that the delivery of possession was refused; 6. Move, *ex parte* and without notice, and upon the motion supported by such affidavits the writ issued of course.[2] Manifestly, several of these steps may be omitted without imperiling the rights of any of the parties, and they are therefore not now required. The acts now required of the purchaser in most of the states are: 1. Exhibit his deed to and demand possession of the parties against whom he wishes to proceed; 2. Move the court to issue the writ, and upon the hearing of the motion establish

[1] Horn *v.* Volcano Water Co., 18 Cal. 141; Montgomery *v.* Middlemiss, 21 Cal. 103; 81 Am. Dec. 146; Dove *v.* Dove, Dick. 617; 1 Bro. 375; Kershaw *v.* Thompson, 4 Johns. Ch. 614.

[2] Kershaw *v.* Thompson, 4 Johns. Ch. 614.

such exhibit and demand, and that such parties remain in possession.[1] Thereupon the writ will be ordered unless good cause is shown against its issuance. The exhibition of the deed may be rendered unnecessary by the conduct of the respondent, as where he announces his intention of withholding possession, notwithstanding such deed, and in defiance thereof.[2]

The authorities differ with respect to the necessity of giving notice of the application for the writ. Some of them treat it as an ordinary writ of execution, like a *habere facias possessionem*, which may issue without notice, because the judgment has conclusively established that the plaintiff is entitled thereto.[3] But there is this difference between an ordinary writ of possession and a writ of assistance in behalf of a purchaser: the former is sanctioned by the original judgment or decree, and is not dependent on any facts or proceedings subsequent thereto; while the latter is not proper unless there has been a valid sale and conveyance to the person claiming to be a purchaser, nor unless the persons in possession have refused after demand to surrender such possession.[4] It is therefore proper, and we should think necessary, that notice of the application for the writ should be given to the persons to be affected thereby.[5] In Wisconsin, by a rule adopted by the supreme court for the government of the circuit court, it was the duty of the clerk of the latter court to issue this writ when it was shown to him by affidavit that possession had been

[1] Montgomery *v.* Middlemiss, 21 Cal. 103; 81 Am. Dec. 146.

[2] Knight *v.* Houghtaling, 94 N. C. 408.

[3] Harney *v.* Morton, 39 Miss. 508; N. Y. L. I. & T. Co. v. Rand, 8 How. Pr. 35, 352.

[4] Howard *v.* Bond, 42 Mich. 131; Griswold *v.* Simmons, 50 Miss. 123.

[5] Blauvelt *v.* Smith, 22 N. J. Eq. 31; Jones *v.* Hooper, 50 Miss. 510; Hooper *v.* Yonge, 49 Ala. 484.

demanded and refused. He acted independently of any order of the court of which he was clerk, and he was not exonerated from acting when a proper affidavit was filed with him by an order of the court or judge, directing him to withhold any action.[1] This rule was held to be inapplicable when the person proceeded against was not a defendant in the suit. As against such person, it was necessary to obtain an order of court.[2] It is true that a writ of assistance improperly issued may be vacated on motion; and if already executed, the parties may be restored to their possession,[3] and the wrongs resulting from its improvident issuing may thereby be mitigated if not averted. Nevertheless, in so serious a matter as invading or destroying the possession of a freehold, we think it far better that the parties in possession have notice of the application for the writ, and be then given an opportunity to urge any defense which remains open to them, notwithstanding the decree and sale.

[1] Attorney-General *v.* Lum, 2 Wis. 507.
[2] Goit *v.* Dickerman, 20 Wis. 630.
[3] Skinner *v.* Beatty, 16 Cal. 156; Chamberlain *v.* Choles, 35 N. Y. 477.

CHAPTER III.

THE FORM OF THE ORIGINAL EXECUTION.

§ 38. Essential parts of the writ.
§ 39. Omission of the style of the writ.
§ 40. To whom directed.
§ 41. Words commanding levy.
§ 42. The description of the judgment.
§ 43. Consequence of variance between execution and the judgment.
§ 44. Designating the return day.
§ 45. Clause of attestation.
§ 46. The seal.
§ 47. Alteration subsequent to issue of writ.
§ 47 a. Forms of executions on decrees.

§ 38. The Essential Parts of the Writ.—In the preceding chapter we have seen that, before an original execution can properly issue, there must be,—1. A court competent to issue the writ; 2. A judgment, decree, or order which the law authorizes to be put in execution by aid of the writ; 3. A demand for the writ, made to the proper officer by the proper person, against a defendant whose property is subject to execution; 4. The time allowed for issuing the writ must have commenced, and must be still unexpired; and 5. Nothing must have occurred to suspend or postpone the right to execution. When inquiries in regard to these five prerequisites have all been answered in the affirmative, the right to an execution must be conceded. The next inquiries are in regard to the writ itself,—what must its contents be, and in what form and order shall they be set forth.[1] In most of the states, pro-

[1] For forms of writs at common law and in equity, see the note at the end of this chapter.

vision is made by statute for the form and contents of executions. It has been held that where the statute provides a form, that form must be strictly followed, especially by justices of the peace.[1] But we apprehend that this decision was made under a misconception of the true purposes of such statutes, and that it cannot be regarded as a correct interpretation of the law. The object of these statutes is to enumerate the substantial elements of the writ, rather than to command adherence to a prescribed form. A writ of execution is simply an authorization proceeding from and directed to some competent authority, by which the former requires the latter to do some act. To accomplish its purpose, it must necessarily state with certainty the act to be done. Whenever a writ shows the authority whence it proceeded, and is directed to an officer competent to execute it, giving directions sufficient, if followed, to result in the proper execution of the judgment, we apprehend that it will be almost uniformly upheld; and that, instead of requiring unusual strictness from justices of the peace, the writs of those officers will be granted unusual indulgence.[2] Hence, when by statute an *alias* execution issued by a justice is required to have appended to it a copy of the return made on the former writ, the failure to append such return is a mere irregularity rendering the execution voidable, but not void.[3] So the failure of a justice to insert the name of the county, township, or city in the

[1] Streeter *v.* Frank, 4 Chand. 93.

[2] Burdick *v.* Shigley, 30 Iowa, 63; Cooley *v.* Brayton, 16 Iowa, 10; Dean *v.* Goddard, 13 Iowa, 292; 81 Am. Dec. 433; McMahan *v.* Colclough, 2 Ala. 68; Chase *v.* Plymouth, 20 Vt. 469; 50 Am. Dec. 52; Morrison *v.* Austin, 14 Wis. 601. A *fieri facias* in debt upon a judgment in *assumpsit* is not void. Elmsley *v.* McKenzie, 9 U. C. Q. B. 559.

[3] Culbertson *v.* Milhollin, 22 Ind. 362; 85 Am. Dec. 428.

blanks intended for such names is a mere clerical irregularity in the writ, which "as against a stranger to it, resisting the claim of a purchaser under it, is curable by parol evidence.[1] Where, as in Tennessee, a justice of the peace of one county is authorized to issue execution on a judgment rendered by a justice of another county, upon receiving a certain certificate from the clerk of the latter county, it has been held that if the execution as issued shows that the certificate of the clerk was substantially defective, the writ is void, on the ground that it is issued under a new and special jurisdiction, which "must be strictly pursued to make valid the proceedings under it."[2] The form of execution most usually adopted contains the following particulars: 1. It purports to issue in the name of some sovereign power; in England, the name of the reigning monarch is used; in the United States, the name is the state of ——, or the people of the state of ——; 2. It is addressed to the sheriff, or to some other officer competent to execute it; 3. It commands the officer to do some act; 4. It shows the purpose for which the act is to be done, or in other words, the judgment of which satisfaction is sought; 5. It usually directs a time and place in which and to which a return must be made; 6. It closes with a clause of attestation. We shall now separately consider each of these particulars for the purpose of ascertaining the consequence of variances or omissions therein.

§ 39. It has always been the custom in England to issue the writ in the name of the reigning sovereign,

[1] Elliott v. Hart, 45 Mich. 234.

[2] Moore v. Lynch, 4 Baxt. 287; Apperson v. Smith, 5 Sneed, 371; Eason v. Cummins, 11 Humph. 210.

and in the greater portion of the United States in the name of the state or of the people of the state. This portion of the writ is purely formal, and we are unable to see that its omission ought to prejudice any one, provided it appeared from the whole writ that it was issued by virtue of some competent authority. This authority is the court or an officer of such court to whom is delegated the power to exercise the authority of issuing writs, as the act of the court, for the enforcement of its judgments. Whether the omission of the style of the writ might on prompt application furnish a sufficient ground for quashing the execution has never, so far as we can ascertain, been determined; but it surely would not impair the efficacy of the writ when offered in evidence to support a sale of real property made while such writ remained in force.[1] Doubtless the law is otherwise in Illinois. The courts of that state are inclined to regard every statutory direction with respect to the form and contents of an execution as essential and mandatory. Hence if the writ does not run in the name of the people of the state, it will then be held void.[2]

[1] Hibbert *v.* Smith, 50 Cal. 511; 56 Am. Dec. 726. In this case the writ was for a sum remaining unpaid after a foreclosure sale. The formal parts of it were as follows: "State of California, county of Alameda, ss.: Whereas, a a judgment and decree of sale was rendered in the district court of the third judicial district," etc. It then recited the foreclosure sale, the fact that the sheriff had reported a deficiency, and then proceeded as follows: "These are therefore to command you, as heretofore you have been commanded, that of the goods and chattels, if sufficient; if not, then of the lands and tenements of the said William W. Chipman, you levy and cause to be made," etc. The writ was excluded from evidence by the trial court. This was determined to be error by the supreme court, which in so doing said: "The execution offered by defendants, although irregular and defective in form, was amendable, and not void."

[2] Sudwell *v.* Schumacher, 99 Ill. 433. The general views of the court upon this question were expressed as follows: While there is some conflict of authority upon this subject, yet it is believed that the weight of authority

§ 40. To Whom Directed.—"By the ancient law of the land, all writs (except to some few particular jurisdictions) are directed to the sheriff of the county where the cause of suit arose; and cannot be directed to any other person, unless it be in special cases where there is good cause of exception against the sheriff,[1] and there the writ shall be directed to the coroner, who then standeth in the place of the sheriff; as where it is alleged that the sheriff is of kin to any party in the writ, or where the sheriff is himself a party to the suit, whether plaintiff or defendant; also in some cases where

establishes the proposition that where the law expressly directs that process shall be in a specified form, and issue in a particular manner, such a provision is mandatory, and a failure on the part of the official whose duty it is to issue it to comply with the law in that respect will render such process void. On the other hand, it is well settled that there are many merely formal defects which do not have that effect. To illustrate, where the statute or constitution expressly requires that process shall issue under the seal of the court, and be tested in the name of and signed by the clerk, the failure to comply with either of these requirements would, as it is believed, according to the weight of authority, render the process void. The legislature or the people, through the constitution, have the unquestionable right to say of what process shall consist; and when they have declared that it shall be of a specified form, by implication all other forms are prohibited. If such laws are merely directory, then writs are as valid without their observation as with it, and every clerk would be at liberty to issue process in whatever form might suit his fancy. If one of these requirements may be omitted, all may, on the same principle. Under such a system, one clerk might conclude that the ceremony of attaching a seal was idle and useless; another might think the writ would be sufficient with a seal, and that the addition of the name of the clerk would therefore be superfluous; another might think all these requirements of the law are but idle ceremonies, and for them substitute something altogether different. Under such a system of things, how could the defendant, in the process, know what was valid and binding upon him and what was not, and when to obey and when not? And how could the officer into whose hands it was delivered for execution know whether he would be protected in serving it or not? And what would become of the almost numberless questions discussed by the courts and legal authors, founded upon the supposed distinction between void and voidable process, if there are no essential requirements by which the one can be distinguished from the other?

[1] Walter v. Denison, 24 Vt. 551; Penn v. Isherwood, 5 Gill, 206.

the sheriff maketh default of serving process."[1] When the writ issues to the coroner, it need not disclose the reason why it is not issued to the sheriff.[2] A sale made by a sheriff under a writ issued upon a judgment in favor of himself is void.[3]

§ 41. **Words Commanding Levy.**—In Indiana an execution recited the rendition of the judgment, and added "by levy and sale of the goods" of the judgment defendant, "and make due return thereof within six months from date." It did not contain any other words of command or direction. The supreme court of the state held that this writ did not justify the officer to whom it was directed and delivered in levying on the property of the defendant.[4] It may be that under the law it is the duty of the sheriff to levy on one kind of property in preference to another, and that the writ ought to command him accordingly. Thus in New York, under a certain class of judgments, the statute required the execution to direct the sheriff to satisfy it, first, out of attached personalty; second, out of any other personalty which could be found; and third, out of attached real property. A writ which "commanded the sheriff to collect the judgment out of the attached personal property of the judgment debtor, and if that was insufficient, out of his attached real property," was ad-

[1] Bingham on Judgments and Executions, 222. In Texas process issues to a constable when the sheriff is disqualified. McClane *v.* Rogers, 42 Tex. 214.

[2] Bastard *v.* Trutch, 5 Nott & McC. 109; 4 Dowl. P. C. 6; 3 Ad. & E. 451; 1 Har. & W. 321; see Moss *v.* Thompson, 17 Mo. 405. A writ directed to the coroner because of a vacancy in the sheriff's office may be turned over to the new sheriff after his appointment. Carr *v.* Youse, 39 Mo. 346; 90 Am. Dec. 470. A writ directed to the constable of —— seems to have been regarded as invalid in Hall *v.* Moor, Addis. 376.

[3] Collais *v.* McLeod, 8 Ired. 221; 49 Am. Dec. 376; Elston *v.* Bret, Moore, 547; Rowlet's Case, Dyer, 188 a; Chambers *v.* Thomas, 1 Litt. 268.

[4] Gaskill *v.* Aldrich, 41 Ind. 338.

judged void.[1] No reason was given for the decision other than that the statute was peremptory in its requirement, and obviously intended that the defendant's personalty, whether attached or not, should first be appropriated under the writ before any resort could be had to his realty. This reason appears to be far from conclusive. The statute in question does not seem to be more peremptory than any of the other statutory provisions requiring or directing certain things to be done in and about the issuing and enforcing of writs; and by an almost unanimous judicial concurrence most of these other provisions are treated as directory merely, —as being provisions in the interest of the defendant, and upon which he may insist by obtaining the vacation of any writ or proceeding not in substantial conformity therewith, and which he may and does waive by remaining inactive and permitting his property to be taken and sold thereunder without any protest. Hence we think the better rule upon this subject is, that the omission in an execution to direct the order in which different classes of property should be seized, or even a misdirection in this regard, is a mere amendable defect and whether corrected or not cannot make the writ void.[2]

§ 42. **Describing the Judgment.**—In regard to the particulars considered in the last three sections, very little litigation has arisen. We now come to the fourth and most important particular,—one in regard to which omissions and variances are most likely to occur, and which, therefore, is most likely to furnish

[1] Place *v.* Riley, 98 N. Y. 1.

[2] Wright *v.* Young, 6 Or. 87; Clinkscales *v.* Hall, 15 S. C. 602; West *v.* Krebaum, 88 Ill. 263.

frequent occasion for judicial determination. In this part of the execution the same precision must be attained as is necessary in the entry of a judgment. It should show for and against whom the execution issues; the amount or amounts to be taken from the latter for the benefit of the former; and also the date at which and the court wherein the judgment was rendered. No execution can be proper in form, unless, with reference to these particulars, it exactly pursues the judgment.[1] Hence, an execution against a man *in his private capacity* cannot properly issue on a judgment against him *as administrator;* and a sale thereunder has been held to pass no title. A judgment in favor of one as administrator or executor may support an execution issued in his favor without mentioning his representative capacity, when the notes on which the judgment was entered were made to him in such capacity, because in that event the title to the property and judgment is vested in him personally, and all proceedings thereon may properly be conducted in his name.[2] It is no objection to an execution that it issues in favor of plaintiff as administrator, without saying of whom.[3] The omission of plaintiff's name from the body of the writ does not make it a nullity, where the indorsement shows who were the parties to the suit.[4] So in regard to the number of the plaintiffs, the execution should agree with the judgment, and not on any account specify more nor less names than are to be found in the judg-

[1] Reese *v.* Burt's Adm'r, 39 Ga. 565; Hightower *v.* Handlin, 27 Ark. 20; Jennings *v.* Pray, 8 Yerg. 84; Kneib *v.* Graves, 72 Pa. St. 104; Bain *v.* Chrisman, 27 Mo. 293; Wilson *v.* Reuter, 29 Iowa, 176.

[2] Moughton *v.* Brown, 68 Ga. 207.

[3] Saffold *v.* Banks, 69 Ga. 289.

[4] McGuire *v.* Galligan, 53 Mich. 453.

ment entry.[1] It is indispensable that the execution should show upon whose property it is to be levied. If it does not, it is worthless, and cannot support title derived through a sale thereunder.[2] The execution must, on its face, appear to be against *all* the defendants, notwithstanding from death, bankruptcy, or some other cause no levy can be made on the property of some.[3] The execution ought also to state the name of each defendant as it is set forth in the judgment. If the name be incorrectly stated in the judgment, there is not, until the judgment is amended, any authority for execution against defendant in his true name.[4] An execution in the name of William Barnes, guardian, is not supported by a judgment in the name of Charity, Penelope, and Sarah Newsom, by their guardian, William Barnes.[5] It is indispensable that the amount to be collected should be specified in the writ; otherwise

[1] Tanner *v.* Grant, 10 Bush, 362; Horne *v.* Spivey, 44 Ga. 616; Palmer *v.* Palmer, 2 Conn. 462; Wilson *v.* McGee, 2 A. K. Marsh. 600; Beazley *v.* Dunn, 8 Rich. 345.

[2] Douglas *v.* Whiting, 28 Ill. 362.

[3] Linn *v.* Hamilton, 34 N. J. L. 305; Saunders *v.* Gallaher, 2 Humph. 445; Farmers' and Mechanics' National Bank *v.* Crane, 15 Abb. Pr., N. S., 434; Clarke *v.* Clement, 6 Term Rep. 525; Raynes *v.* Jones, 9 Mees. & W. 104; 1 Dowl., N. S., 373; 6 Jur. 133; Johnston *v.* Lynch, 3 Bibb, 334; Erwin *v.* Dundas, 4 How. 58; Brinton *v.* Gerry, 7 Ill. App. 238; Sheetz *v.* Wynkoop, 74 Pa. St. 198; Conn *v.* Pender, 1 Smedes & M. 386; Shaffer *v.* Watkins, 7 Watts & S. 219; Cumberland Coal Co. *v.* Jeffries, 26 Md. 526; Mortland *v.* Himes, 8 Pa. St. 265; Lee *v.* Crossna, 6 Humph. 281. The writ should also issue in the names of all the plaintiffs, though one be dead. Stewart *v.* Cunningham, 22 Ala. 626. Omitting the name of a defendant from an *alias* writ is fatal to the continuance of its lien against him. Brem *v.* Jamieson, 70 N. C. 567. Where execution is stayed as against one defendant, because he is a soldier, it may be enforced against the others. Sheetz *v.* Winkoop, 74 Pa. St. 198.

[4] Farnham *v.* Hildreth, 32 Barb. 277; Bank of United States *v.* McKenney, 3 Cranch C. C. 173. But the insertion of a middle initial in the execution when there is none in the judgment is immaterial. McMahon *v.* Colclough, 2 Ala. 68.

[5] Newsom *v.* Newsom, 4 Ired. 381.

the officer has no authority to collect anything, nor to make any levy or sale.[1] The amount, when given, should not vary from the judgment. An execution varying from the judgment is irregular, although the amount for which it issues is *less* than that authorized by the judgment.[2] It has been held that a variance between the true date of the judgment and that set forth in the execution renders the latter a nullity;[3] but we shall hereafter show that this is not sustained by authority. In Massachusetts, an execution issued by a justice of the peace, and signed by him in his official capacity, recited that the judgment was recovered before him as "trial justice," when there was no such officer known to the law. The court held this execution to be void, because "it purports to be on a judgment recovered before a tribunal which then had no existence."[4] In Maryland, when the judgment was the result of proceedings by attachment and was for the seizure and sale of certain property, but the execution issued was as if the judgment had been a general judgment *in personam*, the writ was adjudged to be void, because the court regarded the case as one not of a misdescribed judgment, but of the issuing of a writ which there was no judgment to support.[5]

§ 43. **Consequences of Variance between the Writ and Judgment.**—The decisions in regard to the consequences of issuing an execution in which the judgment on which it is based is misdescribed in one or more

[1] Maxwell *v.* King, 3 Yerg. 460; Wright *v.* Nostrand, 15 Jones & S. 441.

[2] Webber *v.* Hutchins, 8 Mees. & W. 319; 1 Dowl., N. S., 95; King *v.* Birch, 2 Gale & D. 513; Cobbold *v.* Chilver, 4 Scott N. R. 678; 1 Dowl., N. S., 726; 4 Man. & G. 162; 6 Jur. 346.

[3] Cutler *v.* Walsworth, 7 Conn. 6; Rider *v.* Alexander, 1 D. Chip. 267.

[4] Palmer *v.* Crosby, 11 Gray, 46.

[5] Deakins *v.* Rex, 60 Md. 593.

particulars are not entirely in harmony with one another. This is particularly the case when the error in the writ has not been corrected in any manner, and the officer has proceeded to make a levy and sale. Here it must follow that the error must be overlooked, or the purchaser must be made to severely suffer for that for which he is not justly blamable. There are loose remarks in the early reports, to the effect that an irregular execution is void, while an erroneous execution is merely voidable. No test is there or elsewhere prescribed by which to determine one from the other. Courts have often, without any want of logical acumen, arrived at the conclusion that an execution issued contrary to established rules of practice, or in a form different from that prescribed by those rules, is not regularly issued, and therefore must be deemed "an irregular execution"; and they have therefore, not unfrequently, under the authority of the loose remarks just referred to, held such executions to be void. There can be no just distinction made between an irregular and an erroneous execution, for an erroneous execution is necessarily irregular, and an irregular execution is necessarily erroneous. There is a just distinction between executions issued without authority, and executions issued under an authority which is erroneously pursued; but these two classes of executions cannot be accurately designated as irregular and erroneous. The former class is void; the latter may, with equal propriety, be termed either irregular or erroneous. When an execution can properly issue, a mistake made by the officer, in performing the duty of issuing it, is necessarily a mere error or irregularity. It is, however, necessary that an execution should have a judgment to support

it; and that it should appear from the execution what judgment is intended to be enforced. The reason why the description of the judgment is inserted in the writ is, that the officer may know what he is to enforce, and that the writ may, by inspection, be connected with the authority for its issuance. When a sale has been made by a sheriff, we apprehend that the purchaser need show, in support of his title, nothing except a judgment, an execution thereon, and a sale and conveyance under such execution. When the execution is offered in evidence, it may vary from the judgment in some respects, and correspond with it in others. The question, then, before the court is, Did *this execution* issue on *this judgment?* If, from the whole writ, taken in connection with other facts, the court feels assured that the execution offered in evidence was intended, issued, and enforced as an execution upon the judgment shown to the court, then we apprehend that the writ ought to be received and respected.[1] When an execution is not in proper form, or when it misrecites the judgment, as no one but the defendant can be injured, no one but he ought to be allowed to complain;[2] and his complaints ought not to be heard when, by his apathy, he has allowed the rights of third persons to attach themselves to the execution, or even when he has allowed plaintiff to be

[1] Hunt *v.* Loucks, 38 Cal. 372; 99 Am. Dec. 464; Miles *v.* Knott, 12 Gill & J. 442; McCollum *v.* Hubbert, 13 Ala. 282; 48 Am. Dec. 56; Doe *v.* Gildart, 4 How. (Miss.) 267; Barker *v.* Planters' Bank, 5 How. (Miss.) 566; Keeler *v.* Neal, 2 Watts, 424; Durham *v.* Heaton, 28 Ill. 264; 81 Am. Dec. 275; Graham *v.* Price, 3 A. K. Marsh. 522; 13 Am. Dec. 199; Jackson *v.* Streeter, 5 Cow. 529; Healy *v.* Preston, 14 How. Pr. 20; Jackson *v.* Walker, 4 Wend. 462; Jackson *v.* Anderson, 4 Wend. 474; Sprott *v.* Reid, 3 G. Greene, 489; 56 Am. Dec. 549; Jackson *v.* Davis, 18 Johns. 7; Corbin *v.* Pearce, 81 Ill. 461; Hall *v.* Clagett, 63 Md. 57; Davis *v.* Kline, 76 Mo. 310; Jones *v.* Dove, 7 Or. 467.

[2] Swiggart *v.* Harder, 4 Scam. 364; 39 Am. Dec. 418; Harlan *v.* Harlan, 14 Lea, 107; Chapman *v.* Dyett, 11 Wend. 31; 25 Am. Dec. 598; Mitchell *v.* Toole, 63 Ga. 95; 60 Am. Rep. 502.

placed in a worse situation than though prompt complaint had been made. Where sufficient appeared on the face of the execution to connect it with the judgment, courts have frequently disregarded variances in the names of the parties,[1] in the date,[2] or in the amount of the judgment.[3]

[1] Barnes *v.* Hayes, 1 Swan, 304; Blake *v.* Blanchard, 48 Me. 297; Lee *v.* Crossna, 6 Humph. 281; Hayes *v.* Bernard, 38 Ill. 297; Couch *v.* Atkinson, 32 Ala. 633; Morse *v.* Dewey, 3 N. H. 535; Thornton *v.* Lane, 11 Ga. 459; Lewis *v.* Avery, 8 Vt. 289; 30 Am. Dec. 469; Holmes *v.* McIndoe, 20 Wis. 657.

[2] Perkins *v.* Spaulding, 2 Gibbs, 157; Stewart *v.* Severance, 43 Mo. 322; 97 Am. Dec. 392; Bank of Whitehall *v.* Pettis, 13 Vt. 395; 37 Am. Dec. 600; Brown *v.* Betts, 13 Wend. 30; Liebig *v.* Rawson, 1 Scam. 272; 29 Am. Dec. 354; Hull *v.* Blaisdell, 1 Scam. 332; Swift *v.* Agnes, 33 Wis. 228; Alexander *v.* Miller, 18 Tex. 893; 70 Am. Dec. 314; Mollison *v.* Eaton, 16 Minn. 426; Millis *v.* Lombard, 32 Minn. 259; Nims *v.* Spurr, 138 Mass. 209; Dailey *v.* State, 56 Miss. 475; Davis *v.* Kline, 76 Mo. 310; Franklin *v.* Merida, 50 Cal. 289.

[3] Harris *v.* Alcock, 10 Gill & J. 226; 32 Am. Dec. 158; Marshall *v.* Green, 1 S. W. Rep. 602 (Ky.); Perry *v.* Whipple, 38 Vt. 278, where the variance was twenty-five cents; Sanders *v.* Ky. Ins. Co., 4 Bibb, 471, where the variance was one cent; Doe *v.* Rue, 4 Blackf. 263; 29 Am. Dec. 368, where execution for $25.06 issued on judgment for $24.34; Trotter *v.* Nelson, 1 Swan, 7, where execution for $319.06 issued on judgment for $328.18; Cunningham *v.* Felker, 26 Iowa, 117, where, on judgment for $201 debt and $7.15 costs, execution issued for $201.50 debt and $8.40 costs; Jackson *v.* Pratt, 10 Johns. 381; Peck *v.* Tiffany, 2 N. Y. 451; Peet *v.* Cowenhaven, 14 Abb. Pr. 56, where execution was for $100 more than due on judgment; Brace *v.* Shaw, 16 B. Mon. 43, where execution omitted interest given by the judgment; Avery *v.* Bowman, 40 N. H. 453; 77 Am. Dec. 728; Jackson *v.* Walker, 4 Wend. 462; Becker *v.* Quigg, 54 Ill. 390; Jackson *v.* Page, 4 Wend. 588; Parmlee *v.* Hitchcock, 12 Wend. 96, where it was held to be the duty of the sheriff to execute a writ for $186.71, though the judgment whereon the writ issued was for $133.59; Miles *v.* Knott, 12 Gill & J. 442, where the judgment was for $235.83¼, and the writ for $295.83¼; Durham *v.* Heaton, 28 Ill. 264, where execution for $4,113.56 issued on judgment for $3,441.41; Dickens *v.* Crane, 33 Kan. 344, where the judgment was for $102.12 and $73.20 costs, and the writ for 1.02 12 and costs 7.3,20; Warder *v.* Millard, 8 Lea, 581, where on a judgment for five hundred and thirty-four dollars, a writ issued for five and thirty-four dollars; Williams *v.* Ball, 62 Tex. 610; 36 Am. Rep. 730, where execution, issued for $13.37 on a judgment for $12.50. The case in which the largest variance in amount has occurred, so far as we know, is that of Hunt *v.* Loucks, 38 Cal. 372; 99 Am. Dec. 464. This case was an action of ejectment, in which the execution was offered in evidence as part of the plaintiff's claim of title. We give the following extracts from the opinion of the court, delivered by Judge Sanderson: "The

In Delaware, a judgment was recovered for four hundred dollars payable in three annual installments. An

ground of the first objection was, that the execution called for $695 more than the face of the judgment. Was it for that reason *void*, and therefore the sale also? We think it was only *voidable*, and therefore the sale *valid*.

"It cannot be denied that to sustain a title founded upon a sheriff's sale, a judgment must be produced; an execution, which the judge can affirm, was issued upon the judgment produced, and a deed which was given in pursuance of the execution and the sale under it. Unless it appear that the judgment, execution, and deed are links of the same chain, the title will fail. But a question of variance between them must not be confounded with the question of their validity. The two propositions are quite separate and distinct. The former is a question of *identity* only; the latter assumes or concedes the identity, and goes only to the validity of the suspected instrument. If the execution differs so materially from the judgment that the judge cannot affirm that the former was issued upon the latter, his conclusion is, not that the execution is *void*, but that it was not issued upon the judgment which has been exhibited with it. The conditions upon which the two questions arise are not only different, but the question of void or voidable does not arise until the question of variance has been considered.

"That this execution was issued upon the judgment which was exhibited with it does not admit of a rational doubt. The recitals in the execution correspond with the judgment in every particular, except as to the amount; the court, the date, the parties, the general character of the judgment, are all correctly stated in the execution; and it is not pretended that there is, or was, any other judgment of the same court, of the same date, between the same parties, and of the same general character upon which the execution could have been issued. Such being the case, there is no rational ground for saying that the judgment and execution are not parts of the same judicial proceedings; and we do not understand counsel as disputing this proposition, but as conceding it, and insisting only that the execution is *void*, because it calls for too much money.

"That, as a general rule, an execution must follow the judgment, and conform to it, and that if it varies materially from it, it will be set aside, or quashed, or amended, as the case may be, upon the motion of the parties to it, who are prejudiced by the error, is undoubtedly true, as appears by the cases cited by counsel. But that, and nothing more, being shown, we have made but little progress in the present case. The question is not as to what the court would have done with this execution if the defendants in the judgment had moved to set it aside, to quash, or amend it, as they might have done. If such was the question, it could be readily answered. The court would not have set it aside, but would have allowed it to be amended so as to conform to the judgment; that is to say, it would have quashed it only as to the excess. Stevenson *v.* Castle, 1 Chit. 349; King *v.* Harrison, 15 East, 615; Morrys *v.* Leake, 8 Term Rep. 416, note a; McCollum *v.* Hubbert, 13 Ala. 282; 48 Am. Dec. 56. But quite a different question is here presented,—one which rests upon entirely different conditions, and involves altogether different principles. It is as to what ought to be done

execution on this judgment, issued for the whole, when a part only was due, and was levied on the property of the

with such an execution when it comes before the court collaterally as evidence of title in an action which is not even between the parties to the execution, but between entire strangers to it, and where it is not pretended that the execution was ever, at any time, even after the sale, set aside upon the application of the parties who alone were injured by the error." His honor next proceeded to consider various instances of void and voidable executions, and the method by which the latter could be avoided. He also referred to various cases involving variances between judgments and executions, and closed as follows: "We regard the foregoing cases as establishing, beyond a rational doubt, the proposition that an execution which is amendable is not void, and that an execution which merely calls for too much money is amendable. It is true that the difference between the judgments and executions were not so great as in the present case, but no reference was made in any of them to the maxim, *De minimis non curat lex*, nor has that maxim, for obvious reasons, any application to questions of this character; it goes only to the question whether the amount *in dispute* is too trifling to attract the eye of the court, and in no respect illustrates or controls a question of void or voidable process. To allow the amount of the excess — as much or little — to affect such a question is not only to invoke a principle wholly irrelevant to it, but to proclaim that, in relation to a most important matter, there is no settled rule; that if there is any variance at all, that circumstance does not establish the character of the execution as void or voidable, but its character must depend upon the varying notions of judges as to what is or is not a trifle, which is to say, that the validity of judicial process is not to depend upon established rules of law, but upon judicial discretion; or in other words, the purchaser is not to be told, in round terms which he can understand, that the execution is or is not void, and that he will or will not get a title if he buys, but that if he buys he must take the chances, and wait until his title comes, as it surely will, before the judicial eye, for inspection, when he will be fully informed as to what, *in his case*, is a trifle or is not, and that accordingly he has or has not got a title. If it be the policy of the law to uphold judicial sales, we know of no way by which that policy can be more effectually defeated than by the adoption of such a rule of decision. We say *adoption*, because we are certain that no such rule yet exists. The cases to which we have referred make no mention of such a rule; they all proceed upon the theory that, in respect to mere variances between the judgment and the execution, the latter is amendable, and is, therefore, not void, but voidable only.

"That executions which are merely voidable cannot be attacked collaterally admits of no debate, where, as in this state, the common law controls the question. A collateral attack can no more be made upon an erroneous execution than upon an erroneous judgment. Like an erroneous judgment, an erroneous execution is valid until set aside upon a direct proceeding brought for that purpose; and until set aside, all acts which have been done under it are also valid. In a collateral action, it cannot be brought in question, even by a party to it, much less, as in this case, by a stranger to it. Even directly

defendant. This writ was claimed to be void, but the court, after argument, admitted it, saying: "The distinction is between void and voidable process; between such as is merely irregular and such as is absolutely void. Process issued on a judgment payable by installments, after any of them, but before all of them, are due, and commanding the sheriff to levy the whole debt, would be merely irregular, and it would not be competent for any one collaterally to question it, and much less the sheriff who executes it; but it is even doubtful whether the writ is irregular."[1] There must, however, in each case, be sufficient to convince the court that the judgment offered in evidence and that attempted to be recited in the execution are one and the same. Hence, where the judgment offered in evidence was rendered in a different year, and for a different amount from that recited in the execution, and no proof was offered to show that but one judgment had been rendered between the parties, the variance was regarded as fatal.[2] A similar result followed where there was a variance

it cannot be attacked by a stranger, for it does not lie in the mouth of A to say by it B has been made to pay too much money, and that therefore all proceedings under it are null and void. That is a question which concerns B only, and if he is content, A cannot complain. Nor if B, who is bound to know of the variance between the judgment and the execution, does not interpose by motion for its correction, ought he to be allowed to question the title of a purchaser under it,—it may be years afterward? He has a remedy, by motion to amend, or by action to recover the excess of the levy from the plaintiff in the execution, and the clerk also; besides, with full knowledge of all defects, he has allowed the sheriff, acting as his agent in the matter, to sell, and the purchaser to buy, without opening his lips, and in all fairness and justice to the latter, he must keep them closed forever" But in Hastings *v.* Johnson, 1 Nev. 613, and Collais *v.* McLeod, 8 Ired. 221, 49 Am. Dec. 376, executions materially in excess of the judgments on which they issued were adjudged to be void.

[1] State *v.* Platt, 5 Harr. (Del.) 429.

[2] Harmon *v.* Larned, 58 Ill. 167.

is the names of the parties and in the amount of the judgment.[1]

In North Carolina it has been held that a *fieri facias* for an amount in excess of that warranted by the judgment is void.[2] In Georgia the rule that the execution must conform to the judgment on which it was based is very inflexible,[3] at least when sought to be applied to proceedings to vacate or avoid a levy. Thus where, on a judgment against the "Water Lot Company of the city of Columbus," a *fieri facias* issued against the Water Lot Company, a motion to dissolve the levy was granted.[4] The decisions in this state are doubtless due to the peculiar and stringent language of its code. Section 3636 declares that "all executions must follow the judgment from which they issued, and describe the parties as described in such judgment"; and section 3495 is as follows: "A *fieri facias* may be amended so as to conform to the judgment from which it issued, and also at the time of its return; but if such *fieri facias* be levied at the time of the amendment, such levy must fall; still the amended *fieri facias* may be re-executed." Under the influence of these sections, it has been held that when a judgment is against a partnership, an execution against such partnership, and also against its individual members, must be quashed, and

[1] Crittenden *v.* Leitensdorfer, 35 Mo. 239. In this case the judgment recited in the execution was in favor of Robert Campbell, surviving partner of William and Robert Campbell, against Eugene Leitensdorfer, Jacob Haughton, Antoine Vien, Aaron Bowers, and Euphrosine Leitensdorfer, for $7,660.76. The judgment offered in evidence was in favor of William and Robert Campbell against Eugene Leitensdorfer and Jacob Haughton, for $7,676.

[2] Coltraine *v.* McCaine, 3 Dev. 308; 24 Am. Dec. 256; Walker *v.* Marshall, 7 Ired. 1; 45 Am. Dec. 502.

[3] Bradley *v.* Sadler, 57 Ga. 191; Maury *v.* Shepperd, 57 Ga. 68.

[4] Bradford *v.* Water Lot Co., 58 Ga. 280.

the levy thereunder annulled.[1] Where a variance exists between an execution and a judgment offered in support of it, the safer course is to show by some proof *aliunde* that the former was in fact issued to enforce the latter. In Texas, when an execution against P. B. Clements and a judgment against J. P. Clements were put in evidence without any testimony to connect them, the court refused to assume that these two names were intended to designate the same person, and therefore held that the judgment, execution, and a sale thereunder were not, in the absence of such evidence, sufficient to divest the title of J. P. Clements.[2] In this case the judgment was one establishing a lien, and directing the sale of certain specifically described lands for its satisfaction. The execution conformed to the judgment in date, in amount, in the names of plaintiff, and in the description of the lands to be sold; and therefore nothing less than highly developed judicial blindness could have failed, in the absence of other evidence, to see that the execution in question issued upon the judgment offered to support it. Doubtless parol evidence may properly be received to show or explain a mistake made in issuing an execution, and to establish the fact that it was made upon a judgment from which it varies in some particulars.[3] The chief object in describing the judgment in the writ is to refer the officer and others to the authority under which he acts, and to advise him what must be done to produce full satisfaction. The question, as we have already intimated, is one of identity merely; and if from the records, or from any other competent evidence, the

[1] Clayton *v.* May, 68 Ga. 27.

[2] Battle *v.* Guedry, 58 Tex. 111.

[3] Jennings *v.* Carter, 2 Wend. 446; 20 Am. Dec. 635.

court is convinced that the writ was intended to be issued upon a valid judgment produced in evidence, it is not void, though it misnames the judgment creditor,[1] or omits part of the name of a corporation plaintiff,[2] or transposes the names of plaintiff and defendant.[3]

§ 44. Designating the Return Day.—The period within which the execution is to be returned differs in the different states, being regulated by local statutes. At common law, the time for the return was designated in the writ, and this practice still obtains in most, but not in all, of the states. It has sometimes been held that an error in the return day, or in other words, the designation in the writ of a return day at a time different from that designated by law, was fatal.[4] But this view is entirely without the support of reason, and is now opposed by a decisive majority of the reported adjudications upon this subject.[5] In fact, there is no

[1] Harlan *v.* Harlan, 14 Lea, 107.

[2] Miller *v.* Willis, 15 Neb. 13.

[3] McIntyre *v.* Sanford, 9 Daly, 21.

[4] Fifield *v.* Richardson, 34 Vt. 410; Ex parte Hatch, 2 Aik. 28; Bond *v.* Wilder, 16 Vt. 393; Ticksut *v.* Cilley, 3 Vt. 415; Jameson *v.* Paddock, 14 Vt. 491; West *v.* Hughes, 1 Har. & J. 6; 2 Am. Dec. 539, in which case no return day was named; Harris *v.* West, 25 Miss. 156. This last case is irreconcilable with the later case of Brown *v.* Thomas, 26 Miss. 335. This rule was applied in New York to executions issued by justices of the peace and made returnable in less than ninety days, on the ground that "it is well settled that inferior and limited jurisdictions must be confined strictly to pursue the authority given them." Toof *v.* Bently, 5 Wend. 276; Farr *v.* Smith, 9 Wend. 338; 24 Am. Dec. 162.

[5] Brown *v.* Hunt, 31 Ala. 146; Chambers *v.* Stone, 9 Ala. 260; Wofford *v.* Robinson, 7 Ala. 489; Stephens *v.* Dennison, 1 Or. 19; Wilson *v.* Huston, 4 Bibb, 332; Cramer *v.* Van Alstyne, 9 Johns. 386; How *v.* Kane, 2 Chand. 233; 54 Am. Dec. 152; Campbell *v.* Cumming, 2 Burr. 1187; Stone *v.* Martin, 2 Denio, 185, where the return day fell on Sunday; Williams *v.* Rogers, 5 Johns. 166, overruling Drake *v.* Miller, Col. Cas. 85; Milburn *v.* State, 11 Mo. 188; 47 Am. Dec. 148; Brown *v.* Thomas, 26 Miss. 335, where no time was fixed for the return; Williams *v.* Hogeboom, 8 Paige, 469. In this last case Chancellor Walworth said: "As every court of record of general jurisdiction

mere matter of form from which a departure could be of less detriment to the parties. The provision for a return day is beneficial mainly, if not solely, to the plaintiff, because it fixes a time when he may expect to obtain the fruits of his judgment, by compelling the sheriff to have the writ satisfied, if satisfaction can be had. The defendant has no interest in the return day, for the writ, as soon as sued out, may and ought to be levied, whether it be returnable in ten days or in six months. And whether the time for the return day be material to defendant or immaterial, he ought not to be precluded from waiving his rights; and if he does waive them, either in express terms or by silent acquiescence, the waiver ought to be irrevocable. An execution issued January 7, 1842, was by mistake made returnable on the first Monday in July, 1841. A motion against the sheriff and his sureties was made for not returning the execution according to law, which motion he resisted, on the ground that the writ was returnable on an impossible day. The court said: "There is no question the clerk committed a mistake both in the year and the Monday of the month, in stating the time for the return, but this did not affect

must judge of the regularity of its own proceedings, if the mistake in the return day of this execution did not render the process actually void, the remedy of the defendant, if he has any, is by application to set aside the execution for the irregularity. And it now appears to be fully settled in this state, as well as in England, that a mistake in the return day of an execution issuing out of a court of record of general jurisdiction is not void; but it is only voidable upon an application to set the same aside for irregularity. See Atkinson *v.* Newton, 2 Bos. & P. 336; Reddell *v.* Pateman, 1 Gale's Exc. Rep. 104. I am satisfied, therefore, that a neglect to make an execution returnable at the end of sixty days from the receipt thereof by the sheriff renders it irregular merely; and that the execution is not void, so as to make the attorney issuing it, and the party in whose favor it is issued, trespassers; without the necessity of an application to the court, to set aside the execution for the irregularity; and where the irregularity may be cured by such court by amendment."

the sheriff, or make it less his duty to make the money and return the process according to law."[1] An execution returnable in a less time than allowed by law is valid, and may be executed after the time named in the writ.[2] A writ returnable at a more distant date than sanctioned by statute may be enforced within the time in which it might properly have been made returnable.[3] The omission of any part or of the whole of the clause designating a time or place for the return of the writ is an amendable defect, which though not amended does not vitiate the writ on a collateral attack.[4]

§ 45. **Clause of Attestation.** — The execution closed with a clause of attestation, as "Witness, Edward Lord Ellenborough, at Westminster, the —— day of ——, in the —— year of our reign." In the English court of king's bench a writ of *fieri facias* need only be sealed; "but in the common pleas, all executions are required to be signed by the prothonotary, and must be so signed before they are sealed."[5] Defects in the clause of attestation, unless we may except the seal and signature, are regarded as defects in matters of form, and therefore as not affecting the validity of the writ.[6] In Georgia, a writ was erroneously dated, so that the person in whose name it was tested was not the judge at the date of the teste. This writ was held not to be

[1] Samples *v.* Walker, 9 Ala. 726.

[2] Estes *v.* Long, 71 Mo. 605.

[3] Youngblood *v.* Cunningham, 38 Ark. 571.

[4] Benedict & B. M. Co. *v.* Thayer, 20 Hun, 547; Walker *v.* Isaacs, 36 Hun, 233; Douglass *v.* Haberstro, 88 N. Y. 618.

[5] Tidd's Prac. 999; Bingham on Judgments and Executions, 190. In New York, an execution need not contain any teste nor direction to return. Carpenter *v.* Simmons, 1 Robt. 360; 28 How. Pr. 12; Douglass *v.* Haberstro, 88 N. Y. 618.

[6] A writ tested on a wrong day is a nullity in New Brunswick. Power *v.* Johnson, 2 Kerr, 43.

void, and the sheriff was not permitted to avail himself of the irregularity as an excuse for not serving the writ.[1] At the common law, a judgment was deemed to be entered on the first day of the term. The execution might bear teste any time after the supposed entry of the judgment. "Every writ of execution, in the case of a common person, must bear teste in term time; for being the process of the court in which judgment is given, they have no authority for awarding it at any other time. When judgment is entered up in vacation, it relates in point of form to the first day of the preceding term, and execution may be sued out on it by a writ tested as of the preceding term; for the plaintiff having run through the whole course of a judicial proceeding, and his cause being ripe for execution, it would be unreasonable to oblige him to wait till the ensuing term, by which he might be disappointed of the effect of his judgment."[2] In the United States, the theory of the common law, that the execution is issued by the court and is a judicial act, does not, as a general rule, prevail. With us it is a ministerial act, to be performed by the clerk of the court; and which may be performed out of term time as well as within term time. We are therefore under no necessity of giving our writs a fictitious date. We have also very generally abolished the common-law fiction that a judgment is entered at the commencement of the term. In most of the states, the proper date for the writ is that at which it was in fact taken out.[3] If the date is stated according to the year of the commonwealth, the year of Christ may be omitted.[4] Neither the misdating of

[1] Jordan *v.* Porterfield, 19 Ga. 139; 63 Am. Dec. 301.
[2] Bingham on Judgments and Executions, sec. 187.
[3] Mollison *v.* Eaton, 16 Minn. 426.
[4] Craig *v.* Johnson, Hard. 520.

a writ[1] nor the entire omission of a date[2] invalidates it. So the entire clause of attestation may be omitted without rendering the writ void.[3] With respect to the signature of the clerk on the writ, the authorities are meager and inharmonious. In North Carolina it was assumed that a justice's execution not signed by him is void.[4] In Ohio, an execution signed by and in the name of a deputy clerk, without signing the name of his principal, is unobjectionable.[5] In Illinois, the signature of the clerk issuing the execution is indispensable to its validity;[6] while in Arkansas the omission of such signature, and the signing in its stead of the name of another person, as, for instance, the name of the plaintiff, is a mere amendable defect, which does not justify the sheriff levying under the writ from proceeding to make a sale and return in due time.[7]

§ 46. **The Seal.**—The effect of the failure to affix the seal of the court to an execution is a subject upon which the authorities are too evenly divided to warrant us in expressing a very decided opinion. The question has been much more frequently determined than discussed by the courts. The conclusions on either side have been announced with a curtness and dogmatism that disdained argument and explanation, and cared neither to deal with logic nor delve for precedents. On the one side, the theory seems to be that before the seal is affixed there can be no writ;

[1] Norris *v.* Sullivan, 47 Conn. 474, where a writ issued July 29th was dated June 10th.

[2] Usry *v.* Saulsbury, 62 Ga. 179.

[3] People *v.* Van Hoesen, 62 How. Pr. 76; Douglass *v.* Haberstro, 88 N. Y. 611.

[4] Huggins *v.* Ketchum, 4 Dev. & B. 414.

[5] Chapin *v.* Allison, 15 Ohio, 566.

[6] Hernandez *v.* Drake, 81 Ill. 34.

[7] Jett *v.* Shinn, 47 Ark. 373.

that without the seal there can be no legal command to execute the judgment of the court; that an officer, acting in the absence of the seal, acts in the absence of the writ, and that, so acting, whatever he does is unjustifiable and void.[1] On the other side, it is assumed that the omission of the seal is the omission of a matter of form rather than of substance; that it can be corrected by amendment, on application to the court; and that, being an amendable error, it cannot utterly avoid the writ. This view seems to us entitled to favorable consideration, and to be constantly gaining ground. Of all the different parts of the writ, this is most purely a mere matter of form, and its omission the least likely to prejudice either of the parties, or to mislead the officer in executing the writ. Without it there is certainly enough to indicate the judgment to be enforced, and that the command for its enforcement proceeds from competent authority, and a writ indicating this, and in fact issued by the clerk of the court, ought to be treated as valid, at least until objected to by some proceeding to set it aside.[2] When, after the lapse of a long period, a writ is offered in evidence, a very slight and indistinct impression will be presumed to have been made by a seal.[3]

[1] Insurance Co. *v.* Hallock, 6 Wall. 556; Boal *v.* King, 6 Ohio, 11; Swett *v.* Patrick, 2 Fairf. 177; Hutchins *v.* Edson, 1 N. H. 139; Shackleford *v.* McRea, 3 Hawks, 226; Seawell *v.* Bank of Cape Fear, 3 Dev. 279; 22 Am. Dec. 722; Taylor *v.* Taylor, 83 N. C. 116; Roseman *v.* Miller, 84 Ill. 297.

[2] Rose *v.* Ingram, 98 Ind. 276; Hunter *v.* Burnsville T. Co., 56 Ind. 213; Bridewell *v.* Mooney, 25 Ark. 524; Taylor *v.* Courtnay, 15 Neb. 190; Dever *v.* Akin, 40 Ga. 429; Corwith *v.* Bank of Illinois, 18 Wis. 560; 86 Am. Dec. 793; Sabin *v.* Austin, 19 Wis. 421; People *v.* Dunning, 1 Wend. 16; Dominick *v.* Eacker, 3 Barb. 17; Arnold *v.* Nye, 23 Mich. 286; Sawyer *v.* Baker, 3 Greenl. 29; Purcell *v.* McFarland, 1 Ired. 34; 35 Am. Dec. 734.

[3] Heighway *v.* Pendleton, 15 Ohio, 755.

§ 47. **A Material Alteration** in a writ, made by plaintiff after its issue, without leave of the court, will, no doubt, make the writ void as against the plaintiff and all others having notice of the unauthorized alteration.[1] The alteration of an original into an *alias* writ is said to make it void;[2] but this rule will not be allowed to so operate as to destroy the protection due to a sheriff or constable to whom the writ was delivered for execution.[3] If an execution shows that certain words have been erased and others inserted in their place, and the evidence fails to disclose the time at which such erasures and insertions were made, the presumption against fraud is applicable, and the court will proceed on the assumption that the apparent alteration was innocently made, prior to the issuing of the writ.[4]

§ 47 a. **Forms of Executions on Decrees.** — Writs issued in chancery for the purpose of enforcing its decrees were in the name of the reigning monarch if in England, and of the President of the United States, if in this country, and were directed to the person or persons who were therein commanded to do some act, either in the performance of the decree on their part, or looking towards the coercion of others to its performance. If the writ was an injunction or a writ of execution, it was directed to the defendants. If it was an attachment, it was directed to the sheriff. If it was a writ of sequestration, it was directed to the persons who had been chosen as sequestrators. In either

[1] Trigg *v.* Ross, 35 Mo. 165; People *v.* Lamborn, 1 Scam. 123; White *v.* Jones, 38 Ill. 159.

[2] Johnson *v.* Winslow, Kerr, 53.

[3] Faris *v.* State, 3 Ohio St. 159.

[4] First Nat. Bank *v.* Franklin, 20 Kan. 264.

case, it enjoined the person or persons to whom it was directed to perform and fulfill the matters and things which had been decreed to be done, or else to do certain acts which might produce the satisfaction of the decree, either through seizing, fining, or imprisoning the defendant, or taking possession of his property and appropriating the proceeds or income thereof. At the present time, decrees for the payment of specific sums of money are enforced by writs of *fieri facias* having the same effect, and we presume substantially in the same form, as writs of like character issued upon judgments at law. If the decree commanded the sale of specific property, as where it foreclosed a mortgage or other lien, or authorized the sale of property over which the court had assumed jurisdiction, and of which it had taken possession by its receiver or other officer, we are unable to discover that any other authority was, by the English chancery practice, required to warrant the action of the officer or other person authorized to make the sale than such decree itself. In California, however, it has been held that the entry of a decree of foreclosure will not alone authorize the sheriff to make sale of the property as therein directed; that his action must be based on something equivalent to an execution; and that this something may consist either of a formal order of sale issued by the clerk, or of a copy of the decree certified by him.[1]

The following is the form of *fieri facias* given in Bingham on Judgments and Executions: —

George the Third, etc.

To the Sheriff of Greeting: We command you, that of the goods and chattels of C D, in your bailiwick, you cause to be made £ which A B, lately in our court before us at Westminster, recovered against him for his

[1] Heyman *v.* Babcock, 30 Cal. 367. See also Farmers' & M. Bank *v.* Luther, 14 Wis. 96; Rhonemus *v.* Corwin, 9 Ohio St. 366.

damages which he had sustained, as well on occasion of the not performing certain promises and undertakings, then lately made by the said C D to the said A B, as for his costs and charges by him about his suit in that behalf expended; whereof the said C D is convicted, as appears to us of record; and have that money before us, at Westminster, on next after to render to said A B for his damages aforesaid; and have there then this writ. Witness Edward, Lord Ellenborough, at Westminster, the day of in the year of our reign.

If the judgment were in favor of two or more plaintiffs, and against two or more defendants, and one of the plaintiffs and one of the defendants had died since its rendition, then the foregoing form, after the direction to the sheriff, might read as follows: "We command you, that of the goods and chattels of G H and J K, in your bailiwick, you cause to be made £ , which A B, C D, and E F, in the lifetime of E F, now deceased, and whom the said A B and C D have survived, lately in our court before us at Westminster, recovered against them, the said G H and J K, and one L M, in his lifetime, now deceased, and whom the said G H and J K have survived, for their damages which they had sustained, as well on occasion of the not performing certain promises and undertakings, then lately made by the said G H, J K, and L M, to the said A B, C D, and E F, as for their costs and charges by them about this suit in that behalf expended, whereby said G H, J K, and L M are convicted" (proceeding from this point in the same as in the first form).

If a sole plaintiff had died, a *fieri facias* in favor of his executor or administrator, read as shown in the first form down to and including the clause, "appears to us of record," after which was inserted the following: "And whereupon it is considered in our said court before us that E F, executor of the last will and testament of said A B, deceased (or administrator of all and singular the goods, chattels, and credits, which were of said A B, deceased, at the time of his death, who died intestate), have execution against the said C D for the damages aforesaid, according to the force, form, and effect of said recovery by the default of said C D, as also appears to us of record."

If a sole defendant had died, the form after the words "C D" was varied so as to read, "deceased, at the time of his death, in the hands of E F, executor," etc. (or administrator, etc.), to be administered, in your bailiwick, you cause to be made £ which A B, lately in our court, etc., etc. And whereupon it is considered in our said court, before us at Westminster aforesaid, that the said A B have his execution against the said E F, as executor (or administrator), as aforesaid, of the damages aforesaid, of the goods and chattels which were of the said C D at the time of his death, in the hands of said E F, as executor (or administrator), as aforesaid, to be administered according to the form and effect of said recovery; and have that money, etc. (as in the first form).

In California, where an execution may be directed against the lands as well as the chattels of the defendant, it may be in the following form (see Code Civ. Proc. of Cal., sec. 682): —

The People of the State of California.

To the Sheriff of the County of Greeting: Whereas, on the day of 18—, A B, plaintiff, recovered judgment in the superior court of the

county of in said state, against C D, defendant, for $ and $ costs of suit, and the judgment roll is on file in said county; and whereas the sum of $ is now actually due on such judgment, —

Now, therefore, you are required to satisfy said judgment, with interest, out of the personal property of the said C D, or if sufficient personal property of said C D cannot be found, then out of the real property to him belonging, on the day when said judgment was docketed, or at any time thereafter, and make return of this writ within days after your receipt thereof.

Witness my hand and the seal of said court this day of A. D. 18—.

[SEAL OF COURT.] E F, Clerk of said Court,
By C D, Deputy.

The next two forms are those in use in the circuit and district courts of the United States for the district of California.

United States of America.

The President of the United States of America, to the Marshal of the District of California, Greeting: You are hereby commanded that of the goods and chattels of in your district, you cause to be made the sum of dollars to satisfy a lately rendered in the circuit court of the United States, for the district of California, against for the damages which had sustained as well by reason of as for the costs and charges in and about that suit expended, whereof the said convicted as appears of record. And if sufficient goods and chattels of the said cannot be found within your district, that then you cause the amount of the said to be made of the real estate, lands, and tenements whereof the said seised on the said day of A. D. 18—, or at any time afterwards, in whose hands soever the same may be, and have you that money, together with this writ, with your doings thereon, before the judges of said circuit court, at the court-house thereof, in the city and county of San Francisco, district of California, on the day of A. D. 18—, to satisfy the so rendered as aforesaid.

Witness the honorable Morrison R. Waite, chief justice of the supreme court of the United States of America, this day of in the year of our Lord one thousand eight hundred and and of our Independence the

Attest my hand and the seal of said circuit court the day and year last above written. Clerk,
By Deputy Clerk.

District of California, ss.

The President of the United States of America, to the Marshal of the District of California, Greeting: Whereas, a was filed in the district court of the United States for the district of California, on the day of in the year of our Lord one thousand eight hundred and by and such proceedings were thereupon had, that by the judgment and decree of said court in the said cause entered on the day of 18—, the said required to pay to the said the sum of besides costs in this suit to be taxed, and execution was ordered therefor; and whereas, the said costs have been duly taxed at the sum of as by the records and files of said court fully appear, —

Now, therefore, we command you, that of the goods and chattels of the said in your district, and in default of goods and chattels of then of the lands and tenements in your district of which seised, on the day you shall receive this writ, or at any time afterwards, you cause to be made the sum of and further, that you have those moneys in said court, at the court-house in the city of San Francisco, on or before the day of A. D. 18—, to render to the said in satisfaction of said judgment and decree; and that you duly return to the said court what you shall do in the premises, together with this writ.

Witness the honorable Ogden Hoffman, judge of the said court, at the city of San Francisco, in the district of California, this day of in the year of our Lord one thousand eight hundred and eighty- and of our Independence the one hundred

Clerk.

Writ of Execution in Chancery.

George the Third, by the grace of God, of Great Britain, France and Ireland King, Defender of the Faith, and so forth, to A B and C D. Greeting: —

Whereas, by certain final judgment or decree, lately made before us in our court of chancery, in a certain cause there depending, wherein E F is complainant, and you, the said A B and C D, are defendants: It is ordered and decreed that (here insert the things ordered to be done in the decree), as by said decree duly enrolled, and remaining as of record, in our said court of chancery, doth and may fully appear, —

Therefore, we strictly enjoin and command you, the said A B and C D, that you do severally pay, perform, fulfill, and execute all and every the moneys, matters, and things specified in the said final judgment or decree, in all things so far as the same any way relates to or concerns you respectively, according to the true meaning and import of the said decree, and of these presents, and hereof fail not, at your peril. Witness ourselves at Westminster the day of and in the year of our reign.

Writ of Attachment in Chancery.

George the Third, etc.

To the Sheriff of Greeting: We command you to attach A B so as to have him before us in our court of chancery, wheresoever the said court shall then be, there to answer to us, as well touching a contempt which he, as is alleged, hath committed against us, as also such other matters as shall then be laid to his charge; and further, to abide such order as our said court shall make in his behalf; and hereof fail not, and bring this writ with you.

Witness ourselves at Westminster, the day of in the year of our reign.

Distringas against a Corporation.

George the Third, etc.

To the Sheriff of the County of Greeting: We command you that you make a distress upon the lands and tenements, goods and chattels, of (here name the corporation), within your bailiwick, so as neither the said nor any other person or persons for them, may lay his or their hands thereon until our court of chancery shall make other order the contrary; and in the mean time you are to answer to us for the said goods and chattels, rents and profits

of the said lands, so that the said may be compelled to appear before us in our said court of chancery, wheresoever it then shall be, there to answer to us as well touching a contempt which they, it is alleged, have committed against us, as also such other matters as shall be then and there laid to their charge; and further to perform and abide such order as our said court shall make in this behalf; and herein fail not, and bring this writ with you.

Witness, etc., etc.

Writ of Sequestration.

George the Third, etc.

To A B, C D, E F, etc.: Whereas, etc. (here the occasion of the issuing of the writ was recited, showing the suit and the act which defendant had failed to perform, etc.).

Know ye, therefore, that we, in consideration of your prudence and fidelity, have given, and by these presents do give to you, any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever, of the said I J, and to take, collect, receive, and sequester into your hands, not only the rents and profits of the said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estate whatsoever; and therefore, we command you, any three or two of you, that you do, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estate of the said I J; and that you do collect, take, and get into your hands, not only all the rents and profits of all his real estate, but also all his goods, chattels, and personal estate, and keep the same under sequestration, in your hands, until the said I J shall fully answer the complainant's bill and clear his contempts, and our said court make other orders to the contrary.

Witness ourself at Westminster, the day of in the year of our reign.

CHAPTER IV.

ISSUING ALIAS AND PLURIES WRITS.

§ 48. Classification of cases in which may issue.
§ 49. The former writ ought to be returned.
§ 50. The levy under the former writ must be disposed of.
§ 51. May issue after year and a day without *scire facias*.
§ 52. When may issue without return of former writ.
§ 53. Issued, when judgment was satisfied, fraudulently or by mistake.
§ 54. After sale under void writ, or where defendant had no title.
§ 55. Form of, and consequence of errors in.
§ 56. Notice to obtain.

§ 48. Classification of Cases in Which an Alias Writ may Issue.—The plaintiff is not limited to his original or first writ of execution, but may call to his aid such further writs as may be necessary to enable him to obtain a full satisfaction of his demand. The second writ is usually called an *alias*, and writs issued subsequently to the *alias* are *plurics* writs. An *alias* or *plurics* may usually be issued as of course, without leave of the court, but there are circumstances in which it is first necessary to obtain such leave. An *alias* or *plurics* writ is proper,—1. When the preceding writ has been returned unsatisfied in whole or in part; 2. When the preceding writ has not been returned, and a sufficient reason exists for the issuing of another writ without requiring a return of the former; 3. Where a former writ has been returned satisfied, when no satisfaction has in fact been made. In the first case the writ may issue as of course; but in the last two cases there is usually a necessity for obtaining an order of court.

§ 49. Necessary that Former Writ shall be Returned.—It is obvious that to allow plaintiff succes-

sive writs of execution to the same county, without requiring him to give any account of his proceedings under former writs, would be likely to lead to great confusion and abuse in the execution of process. As between different kinds of writs, it is clear that plaintiff may at the common law sue out one kind without returning another. Hence a plaintiff having taken a *fieri facias* may issue a *ca. sa.*, even where an attempted levy has been made under the former, but abandoned because the property had been previously seized under other process, or is from any other cause no longer liable to seizure.[1] But if the levy be consummated, there must be a return of the *fieri facias* before the *ca. sa.* can issue, although the levy was abandoned or proved unproductive.[2] In some of the United States the plaintiff is by statute allowed at his own cost to take out a second execution without returning the first.[3] But where no statute has interposed to change the rule of the common law, it is clear, in this country as well as in England, that no execution can regularly issue if any attempt has been made to execute a former writ to which no return has been made.[4] The rule proba-

[1] Dicas *v.* Warner, 3 Moore & S. 814; 10 Bing. 341; Steele *v.* Murray, 1 Blackf. 179; Edmond *v.* Ross, 9 Price, 5.

[2] Hudson *v.* Dangerfield, 2 La. 66; 20 Am. Dec. 297; Miller *v.* Parnell, 6 Taunt. 370; 2 Marsh. 78; Dennis *v.* Wells, Cro. Eliz. 344; Lawes *v.* Codrington, 1 Dowl. P. C. 30; Turner *v.* Walker, 2 Gill & J. 377; 22 Am. Dec. 329; Wilson *v.* Kingston, 2 Chit. 203; Scott *v.* Hill, 2 Murph. 143; Arnold *v.* Fuller, 1 Ohio, 458; Purdon *v.* Purdon, 2 Miles, 173.

[3] Webb *v.* Bumpass, 9 Port. 201; 33 Am. Dec. 310; Fryer *v.* Dennis, 3 Ala. 254; Hopkins *v.* Land, 4 Ala. 427; Windrum *v.* Parker, 2 Leigh, 361.

[4] Allen *v.* Johnson, 4 J. J. Marsh. 235; Gist *v.* Wilson, 2 Watts, 30; Cupston *v.* Field, 3 Wend. 382; Marshall *v.* Moore, 36 Ill. 321; Babcock *v.* McCamant, 53 Ill. 215; Dorland *v.* Dorland, 5 Cow. 417; Ledyard *v.* Buckle, 5 Hill, 571; Corning *v.* Burdick, 4 McLean, 133; McMurrich *v.* Thompson, 1 U. C. P. R. 258; Cairns *v.* Smith, 8 Johns. 337; Chapman *v.* Bowlby, 8 Mees. & W. 248; 1 Dowl., N. S., 83; Coppendale *v.* Debonaire, Barnes, 213; but see Green *v.* Elgie, 3 Barn. & Adol. 437; Franklin *v.* Hodgkinson, 3 Dowl. & L. 554; 10 Jur. 249; 15 L. J. Q. B. 132; Chapman *v.* Dyett, 11 Wend. 31; 25 Am. Dec. 598.

bly goes further when the second writ is of the same nature as the first, and prohibits the issuing without leave of the court of any *alias* or *pluries* execution while the former writ is unreturned, no matter whether a levy has been made or not;[1] and to support this prohibition, it has been maintained that, after the issuing of execution, a presumption arises and continues till rebutted by the officer's return that the judgment has been satisfied by levy on sufficient goods.[2] An *alias* may properly issue after the return of the original writ, though such return was made before the return day.[3] The right to an execution continues, notwithstanding the loss or destruction of the record.[4] Hence such loss or destruction constitutes no valid objection to the issuing of an *alias* writ.[5] The issuing of a second writ before the return of the first is a mere irregularity. The writ is not void.[6] If the plaintiff purchases thereunder, the sale may be vacated, unless the defendant has in some mode waived the irregularity.[7] Such waiver is implied when, having notice of the existence of both writs, he permits a sale of realty to be made under the second writ, allows the time for redemption to expire, and surrenders possession before attempting to urge the objection that there were two writs in exist-

[1] Waters *v.* Caton, 1 Har. & McH. 407; Corning *v.* Burdick, 4 McLean, 133; Oviat *v.* Vyner, Salk. 318; Cutler *v.* Colver, 3 Cow. 30. But in McNair *v.* Ragland, 2 Dev. Eq. 42; 22 Am. Dec. 728, it is said that a plaintiff may sue out as many writs of execution as he pleases. *Alias* writs of execution may issue in Minnesota, notwithstanding the statute of that state providing for the renewal of executions. Walter *v.* Greenwood, 29 Minn. 87.

[2] Bishop *v.* Spruance, 4 Harr. (Del.) 114.

[3] Pennington *v.* Yell, 11 Ark. 212; 52 Am. Dec. 262.

[4] Faust *v.* Echols, 4 Coll. 397.

[5] Childress *v.* Marks, 2 Baxt. 12.

[6] Atwood *v.* Bears, 45 Mich. 469; Mace *v.* Dutton, 2 Ind. 309; 52 Am. Dec. 510; State *v.* Page, 1 Spears, 408; 40 Am. Dec. 608.

[7] Merritt *v.* Grover, 57 Iowa, 493.

ence at the same time.[1] In Georgia it seems that an *alias* cannot ordinarily issue, and that even when the original writ has been lost or destroyed the proper mode of proceeding is to establish a copy of such original. If, however, an *alias* is in such case improperly awarded, the proceedings thereunder are treated as valid.[2] Where the statute has provided for certain proceedings to renew executions, a defendant who being duly notified of such proceeding fails to make the objection that there is a prior writ which has never been returned is precluded from urging such objection thereafter.[3]

§ 50. **There must be No Outstanding Levy.** — If a writ has been issued and its execution commenced, it must first be completed before a new writ can issue.[4] This rule applies equally whether the old writ has been returned or not. A levy upon personal property is, to the extent of the levy, a satisfaction of the judgment. Therefore if the return shows that property has been levied under the writ, and has not been released nor sold, it cannot be known to what extent the writ is satisfied, nor for what amount the *alias* should issue. The proper proceeding in such case is to issue a writ of *venditioni exponas*, by which the property seized may be sold.[5] After a levy is made the plaintiff has no right to wantonly abandon it; and if he does so, and procures the issuing of an *alias* writ, or if, under any circumstances,

[1] Merritt *v.* Grover, 61 Iowa, 99. Section 3025 of the code of that state declares that "but one execution shall be in existence at the same time."

[2] Rushin *v.* Shields, 11 Ga. 636; 56 Am. Dec. 436; Kellogg *v.* Buckler, 17 Ga. 187.

[3] Bull *v.* Rowe, 13 S. C. 355.

[4] Downard *v.* Crenshaw, 49 Iowa, 296.

[5] Babcock *v.* McCamant, 53 Ill. 214; Freeman *v.* Brown, 7 T. B. Mon. 262.

an *alias* issues while a levy under a prior writ remains undisposed of, such *alias* may be quashed.[1] The issuing of an *alias* instead of a *venditioni exponas* is an irregularity rather than a nullity; and long delay on the part of the defendant will estop him from urging such irregularity.[2]

§ 51. May Issue after Year and a Day without Scire Facias. — The provisions of the common law, that execution may issue within a year and a day after judgment, and provisions of a like nature in the statutes of the various states of these United States, have no application to *alias* and *pluries* writs. In some of the states the time within which these writs may be sued out is limited by statute.[3] But in the absence of statutory regulation to the contrary, if an original execution is issued within the time prescribed by law, and is thereafter returned unsatisfied, it is no longer necessary as between the original parties to revive the judgment by *scire facias*. An *alias* writ may issue at any time subsequent to such return, and while the judgment remains in force.[3] It has even been held that this rule could be invoked when the original writ, though issued by

[1] Trapnall *v.* Richardson, 13 Ark. 543; 58 Am. Dec. 338; McIver *v.* Ballard, 96 Ind. 76.

[2] Kerr *v.* Commissioners, 8 Biss. 276.

[3] Jordan *v.* Petty, 5 Fla. 326; Dowsman *v.* Potter, 1 Mo. 518; Pierce *v.* Crane, 4 How. Pr. 257; McSmith *v.* Van Densen, 9 How. Pr. 245; Lindell *v.* Benton, 6 Mo. 361; Clemens *v.* Brown, 9 Mo. 718; Flanagan *v.* Tinen, 53 Barb. 587; Mitchell *v.* Chestnut, 31 Md. 521; Thorp *v.* Fowler, 5 Cow. 446; Craig *v.* Johnson, Hardin, 520; Lampsett *v.* Whitney, 2 Scam. 441; Payne *v.* Payne's Ex'rs, 8 B. Mon. 391; Jewett *v.* Hooglan l, 30 Ala. 716; Bank of Mississippi *v.* Catlett, 5 How. (Miss.) 175; Abby *v.* Com. Bank of New Orleans, 31 Miss. 434. So *alias* writs may issue after the death of defendant, without prosecuting any proceedings by *scire facias*, where the original had issued and been levied in his lifetime: Collingsworth *v.* Horn, 4 Stew. & P. 237; 24 Am. Dec. 753; Clark *v.* Kirksey, 54 Ala. 219.

the clerk, was never in the sheriff's hands.[1] The soundness of this decision may well be doubted. The reason of the law requiring plaintiff to revive his judgment by *scire facias* after a year and a day has passed without the issuing of a writ was, that it seems improbable that plaintiff would remain so long inactive unless the judgment had been paid. He is therefore not allowed to proceed without giving defendant notice. The mere taking of the writ from the clerk's office shows a degree of inaction scarcely less than that shown where the writ is not called for at all.[2]

§ 52. **When may Issue without Return of Former Writ.** — The issuing of an *alias* writ is no doubt always within the power of the court, while the judgment continues in force. This power will be exercised, under the discretion of the court, in a great variety of cases. It may often happen that the execution has not been returned, and through some accident cannot be. In all such cases the court may, no doubt, on a proper showing, allow an *alias* or *pluries* to issue, without requiring the return of the former writ.[3]

§ 53. **On Judgment Satisfied by Fraud or Mistake.** — A mistake may occur in issuing a writ by which the amount directed to be collected may be less than that to which plaintiff is entitled under his judgment. In such an event, the plaintiff is not without remedy. The court will not harass the defendant with the trouble and expense of two writs without imposing on plaintiff

[1] Nicholson *v.* Housley, Litt. Sel. Cas. 301.

[2] Kelley *v.* Vincent, 8 Ohio St. 415; deciding that "suing out execution" requires actual or constructive delivery of the writ to the sheriff.

[3] In Georgia, where an original execution was returned, and then lost, it was held that the *alias* ought not to have issued without an order of court. Watson *v.* Halsted, 9 Ga. 275.

such terms as may be requisite to indemnify the former from all loss arising from the negligence or mistake of the latter. But if, after notice of the mistake, the defendant persists in his refusal to pay the balance due, a new writ will be ordered.[1] But where an execution issued for the proper sum, and by the plaintiff's directions a levy was made for a smaller amount, it was held that no further writ should issue. "An execution," said the court, "is an entire thing. If a plaintiff in a judgment issues an execution, and directs an amount less than the whole sum to which he is entitled to be levied, he cannot subsequently issue another execution for the balance. It cannot be permitted that a defendant should be harassed by repeated executions."[2] If a motion is made to vacate an entry of satisfaction, because made by an attorney without authority, the supreme court will not review the action of the subordinate court, if there was a conflict of evidence.[3]

§ 54. **After Sale under Void Writ, or where Defendant had No Title.** — An execution may be returned satisfied, and yet it may turn out that no actual satisfaction has taken place. This may happen, — 1. When the writ or the levy is void, and therefore does not transfer the title to the property seized and sold under it; 2. When the entry of satisfaction was made, either wrongfully or by mistake; and 3. When the property sold was purchased by the plaintiff, but did not belong to the defendant, and plaintiff has therefore been compelled to account for it to the true owner.

[1] Hunt *v.* Passmore, 2 Dowl. P. C. 414; Langdon *v.* Langdon, 1 Root, 454; People *v.* Judges of Chatauque, 1 Wend. 73. See also Moore *v.* Edwards, 1 Bail. 23; Sims *v.* Campbell, 1 McCord's Ch. 53; 16 Am. Dec. 595.

[2] People *v.* Onondaga C. P., 3 Wend. 331.

[3] Fuller *v.* Baker, 48 Cal. 632.

In the first class of cases, the void writ is, in legal effect, no writ; and when the defendant has not lost, nor the plaintiff acquired, anything by the writ, it is not to be disputed that a new writ may and ought to issue.[1] In cases of the second class, the propriety of ordering a second writ is also indisputable. "Every court has control over its process, and of entries upon its records; and whenever process is irregularly issued, or the entry of the satisfaction of a judgment is improperly made, the court has power to inquire into the subject, and to cause the former to be set aside and the latter to be vacated. It is believed to be the uniform practice to do so on *motion*. This, it is true, is a summary mode of procedure, and important rights and interests and difficult questions may be involved which are summarily tried by the court without the intervention of a jury, but these objections have not been regarded as sufficient to prevent courts from exercising their jurisdiction in this manner."[2] In Kentucky, an agent of the plaintiff, through mistake, indorsed a credit on an execution. Some time afterward, the plaintiff sued out another writ, disregarding this indorsement. A motion having been made to quash this last writ, the court of appeals said: "We do not understand that a receipt indorsed upon execu-

[1] Hughes *v.* Streeter, 24 Ill. 647; 76 Am. Dec. 777; Field *v.* Paulding, 3 Abb. Pr. 139; 1 Hill, 187; citing Suydam *v.* Holden, decided by N. Y. court of appeals in Oct. 1853, and not reported; Freeman on Judgments, sec. 478, citing Stoyel *v.* Cady, 4 Day, 225; Arnold *v.* Fuller, 1 Ohio, 466; Townsend *v.* Smith, 20 Tex. 465; 70 Am. Dec. 400; Tate *v.* Anderson, 9 Mass. 92; Gooch *v.* Atkins, 14 Mass. 379; Ladd *v.* Blunt, 4 Mass. 402; Watson *v.* Reissig, 24 Ill. 281; 76 Am. Dec. 746.

[2] Wilson *v.* Stillwell, 14 Ohio St. 467; see also Laughlin *v.* Fairbanks, 8 Mo. 367. In both these cases, satisfaction had been acknowledged by persons who were not entitled to the fruits of the judgments. McMichael *v.* Branch Bank, 14 Ala. 496; Aycock *v.* Harrison, 63 N. C. 145; Anderson *v.* Nicholas, 4 Robt. 630.

tion, by an agent, so necessarily precludes the plaintiff from taking out another execution, as that he will have to cause the receipt to be erased by order of the court before he can legally obtain another. It no doubt will be much the most prudent for clerks to refuse a new execution, under such circumstances, without an order of court. But if a second execution does go, and it turns out that plaintiff was entitled to it, we do not think the issuing of it should be treated as irregular, and subject the proceedings under it to be quashed."[1] But no doubt the better opinion is, that when a judgment appears to be satisfied of record, this satisfaction ought to be vacated before anything further is done under the judgment.[2] Where property is levied on, but returned unsold for want of title, the supposed satisfaction presumed to arise from the levy is shown to have been no satisfaction whatever. Therefore another writ may issue.[3] The statute 22 Henry VIII., c. 5, gave a remedy to the creditor to whom the debtor's land had been delivered, under an *elegit*, when the tenant by *elegit* was thereafter evicted without any fault on his part.

It has been held in New York that this statute became a part of the common law of that state, because it was a part of the general law of England when the colony was settled under the charter of the Duke of York; and further, that when the *elegit* was abolished in that state, the equitable principles of the statute of Henry VIII. remained in force, and were so far applicable to sales under execution as to entitle

[1] Frankfort Bank *v.* Markley, 1 Dana, 373.

[2] Poor *v.* Deaver, 1 Ired. 391; Hughes *v.* Streeter, 24 Ill. 647; 76 Am. Dec. 777; Snead *v.* Rhodes, 2 Dev. & B. 386; Rikeman *v.* Kohn, 48 Ga. 183.

[3] Pedler *v.* Hollinshead, 9 Serg. & R. 277; Coleman *v.* Mansfield, 1 Miles, 56.

plaintiff to equitable relief on the failure of title to property purchased by him under execution against defendant.[1] The provisions of the statute of Henry VIII. were re-enacted in the territory comprising the present states of Massachusetts, Maine, and New Hampshire. In those states, it is clear that, when plaintiff wholly loses the lands taken by him under an extent or sold under execution on account of the invalidity of defendant's title, or of the proceedings under the writ, he may, by *scire facias*, obtain a new execution for the whole debt;[2] and when it turns out that defendant had a *less* estate than that extended, the plaintiff may obtain execution to compensate him for the difference between the value of the estate extended and the estate obtained.[3] But it must in all cases be clear that the plaintiff has lost the benefit of his purchase.[4] But there frequently arise cases to which no statute like that of Henry VIII. can be applied, either because no such statute is in force in the state, or because the property sold is not of the kind contemplated by the statute. "In such a case, if the plaintiff be the purchaser, a satisfaction is produced without any resulting benefit to the plaintiff, or any detriment to the defendant. The question then arises, Is this satisfaction irrevocable, or

[1] Bank of Utica *v.* Mersereau, 3 Barb. Ch. 586; 49 Am. Dec. 189.

[2] Perry *v.* Perry, 2 Gray, 326; Dewing *v.* Durant, 10 Met. 29; Barker *v.* Wendell, 12 N. H. 119; Green *v.* Bailey, 3 N. H. 33; Pillsbury *v.* Smyth, 25 Me. 427; Dennis *v.* Arnold, 12 Met. 449; Stewart *v.* Allen, 5 Me. 103; Ware *v.* Pike, 12 Me. 303. See R. S. of Me. 1871, p. 573, sec. 18; Grosvenor *v.* Chesley, 48 Me. 369; Soule *v.* Buck, 55 Me. 30; Gen. Stat. of Mass. 1860, p. 519, sec. 22; Kendrick *v.* Wentworth, 14 Mass. 57; Wilson *v.* Green, 19 Pick. 433, where the rule was applied to personal property; Dennis *v.* Sayles, 11 Met. 233; Gen. Stat. Vt. 1863, p. 368, secs. 43–52; Pratt *v.* Jones, 25 Vt. 303; Baxter *v.* Shaw, 28 Vt. 569; Royce *v.* Strong, 11 Vt. 248; Bell *v.* Roberts, 13 Vt. 582; Hyde *v.* Taylor, 19 Vt. 599; Briggs *v.* Green, 33 Vt. 565.

[3] Coos Bank *v.* Brooks, 2 N. H. 148; Soule *v.* Buck, 55 Me. 30.

[4] Batchelder *v.* Wasson, 8 N. H. 121.

may the plaintiff have it vacated, and procure a new execution? Upon this question, the authorities are quite evenly divided, and are clearly irreconcilable. On the one hand, it is insisted that, as the maxim *caveat emptor* applies to all purchasers at sheriffs' sales, the purchaser takes all risks; and therefore, that he cannot have the sale, and the satisfaction thereby produced, vacated on account of the failure of defendant's title. On the contrary, it is claimed that 'the doctrine of *caveat emptor* has its legitimate effect in precluding any idea of warranty by the defendant in execution, or by the sheriff'; and therefore, that it interposes no obstacle to prevent the plaintiff from obtaining that relief to which, upon principles of natural justice, he seems entitled."[1] In South Carolina, a motion was made to set aside an entry of satisfaction and to permit the issuing of another writ, on the ground that the goods from the sale of which the apparent satisfaction had resulted were not the property of the defendant, and their value had been recovered by their owner in actions of trespass against the plaintiff and the sheriff. The motion was denied because in such a case "the plaintiff levies and sells at his own risk and with notice that the sales will be applied in satisfaction of his execution, though he may be made responsible for damages, if he has tortiously sold the property of another person as the property of the defendant."[2] In North Carolina, the statute

[1] Freeman on Judgments, sec. 478. In Piper *v.* Elwood, 4 Denio, 165, plaintiff was allowed to recover in an action on a judgment which had been satisfied, on proving that the satisfaction was produced by a sale of property which defendant had recovered because it was exempt from execution. In Tennessee, the revival of judgment where it was satisfied by sale of property not belonging to defendant is provided for by statute. Edde *v.* Cowan, 1 Sneed, 290; Swaggerty *v.* Smith, 1 Heisk. 403.

[2] Jones *v.* Burr, 5 Strob. 147; 53 Am. Dec. 699.

provides that a purchaser at execution sale who has been deprived of the property purchased or been compelled to pay damages to the real owner, in consequence of a defect in the defendant's title, may recover from the defendant in an action on the case, the amount paid for such property, with interest. The remedy given by this statute has been held to be exclusive, and the sale, to the amount realized from it, an irrevocable satisfaction of the judgment.[1] In Ohio and Pennsylvania, no relief can be had at law where the property sold is lost to plaintiff because of defects in the defendant's title.[2] In the first-named state, manifestly, a doubt has arisen with respect to the propriety of the early decisions on the subject, and the rule maintained in such decisions has been limited rather than extended. Thus where a mortgagee who recovered judgment at law on some of the notes, secured by his mortgage, and sold real property, the title to which he failed to obtain on account of a prior conveyance made by the mortgagor, of which he was ignorant, commenced subsequently a suit to foreclose the equity of redemption, it was held that the amount bid at the execution sale did not in equity constitute a satisfaction, and could not be asserted by the mortgagor as such.[3] The court, however, declined to consider the question whether on a bill filed by the plaintiff to vacate the apparent satisfaction, it would act or not, and restricted itself to determining that it would not at the instance of the mortgagor extend him any aid. In Minnesota, it is clear that relief may be obtained in equity by a plaintiff when the title

[1] Halcombe *v.* Loudermilk, 3 Jones, 491; Wall *v.* Fairley, 77 N. C. 105.
[2] Vattier *v.* Lytle's Ex'r, 6 Ohio, 482; Freeman *v.* Caldwell, 10 Watts, 10.
[3] Hollister *v.* Dillon, 4 Ohio St. 198.

to lands purchased by him on execution fails without his being guilty of any neglect in making his purchase, as where he relied upon an abstract of title, which omitted a previous conveyance made by defendant.[1] Like relief was extended in the same state where the plaintiff bid upon certain lots under the belief that they were the same lots levied upon under an attachment issued in the case, when in fact the sheriff had, through a mistake on his part, levied upon other lots which were subject to liens paramount to plaintiff's judgment.[2] Generally, where the relief is allowed at all, it can be procured without resort to equity, as by permitting the sheriff to correct his return so as to show that no satisfaction was realized, or by ordering the apparent satisfaction vacated on motion or by *scire facias* and directing an *alias* writ to issue,[3] and in some states relief can be had either by motion in the original case, or by a suit in equity to revive and reinstate the judgment.[4] The statute in Iowa provides that an execution sale may be set aside "where the judgment on which execution issued was not a lien" on the property sold. If, however, the judgment was a lien on the property, the plaintiff purchasing is without redress, though the property is ultimately lost to him by reason of paramount liens.[5]

[1] First Nat. Bank *v.* Rogers, 22 Minn. 224.

[2] Lay *v.* Shaubhut, 6 Minn. 182; 80 Am. Dec. 446; Shaubhut *v.* Hilton, 7 Minn. 506.

[3] Magwire *v.* Marks, 28 Mo. 193; 75 Am. Dec. 121; Whiting *v.* Bradley, 2 N. H. 99; Adams *v.* Parmeter, 5 Cow. 280; Richardson *v.* McDougall, 19 Wend. 89; Townsend *v.* Smith, 20 Tex. 465; 70 Am. Dec. 400; Andrews *v.* Richardson, 21 Tex. 287; Ritter *v.* Henshaw, 7 Iowa, 98; Tudor *v.* Taylor, 26 Vt. 144; Cowles *v.* Bacon, 21 Conn. 451; 56 Am. Dec. 371; Chambers *v.* Cochran, 18 Iowa, 159.

[4] Cross *v.* Zane, 47 Cal. 602; Scherr *v.* Himmelman, 53 Cal. 312.

[5] Holtzinger *v.* Edwards, 51 Iowa, 383.

§ 55. **Form of Alias.** — An *alias* writ should contain all the particulars embraced in an original writ; and in addition, should show the issue of the former writ, the amount realized thereon, and the sum remaining due, and for which the officer is to levy.[1] As the *alias* cannot properly issue before the return of the original, it ought not to be *tested* before such return. Mere errors in issuing an *alias* or *pluries* writ, whether in regard to its form or to the time and manner of its issue, while they may make it voidable, do not render it void.[2] These errors may, however, constitute grounds for vacating the writ. Thus in Vermont, where a judgment had been satisfied in part, but an *alias* execution issued thereon, as if no partial satisfaction existed, the writ and the levy thereof made upon real property were set aside.[3] A second execution will not be quashed on the sole ground that it does not purport to be an *alias*.[4]

§ 56. **Notice of Motion for.** — Where the original execution has been returned unsatisfied, wholly or in part, an *alias* may issue without any notice to the defendant.[5] In Massachusetts, it seems to be the usual practice, before issuing an *alias* on a judgment for alimony, to give defendant notice, that he may have an opportunity of showing that payment has been made;[6]

[1] Chapman *v.* Bowlby, 8 Mees. & W. 249; Lee *v.* Neilson, 3 U. C. Law J. 72; Oviat *v.* Vyner, Salk. 318; Smith *v.* Jones, 2 All. 176; Watson *v.* Halsted, 9 Ga. 275; Bingham on Judgments and Executions, 260; Scott *v.* Allen, 1 Tex. 508; Maupin *v.* Emmons, 47 Mo. 304; Fairbanks *v.* Devereaux, 48 Vt. 550.

[2] Rammel *v.* Watson, 2 Vroom, 281; Rushin *v.* Shields, 11 Ga. 636; 56 Am. Dec. 436; State *v.* Page, 1 Spears, 408; 40 Am. Dec. 608; Bryant *v.* Johnson, 24 Me. 307; Mace *v.* Dutton, 2 Ind. 309; 52 Am. Dec. 510.

[3] Fairbanks *v.* Devereaux, 48 Vt. 550.

[4] Bushong *v.* Taylor, 82 Mo. 671.

[5] Johnson *v.* Huntington, 13 Conn. 50.

[6] Newcomb *v.* Newcomb, 12 Gray, 28.

but the court may, in its discretion, issue an *alias* without such notice.[1] When the application for an *alias* is made without returning the original, as where the latter is alleged to be lost, notice should be given to the defendant.[2]

[1] Chase *v.* Chase, 105 Mass. 385.

[2] Douw *v.* Burt, 1 Wend. 89. In Georgia, notice of motion to issue an *alias* when the original has been lost is not necessary. Lowry *v.* Richards, 62 Ga. 370. Sometimes the renewal of executions is authorized by statute. Where this is the case, there seems to be no necessity for the return of original and the issue of *alias* writs. Any memorandum or indorsement made on the writ by the proper officer, indicating that he intends that it shall continue in force, may be treated as a renewal, and as authorizing the officer to proceed, either to make new levies, or to dispose of those already made. Wickham *v.* Miller, 12 Johns. 320; Chapman *v.* Fuller, 7 Barb. 70; Preston *v.* Leavitt, 6 Wend. 663; Wilson *v.* Gale, 4 Wend. 633. In Connecticut, the practice has always prevailed of renewing executions by erasing the original date and inserting a subsequent one. Roberts *v.* Church, 17 Conn. 142. This practice is irregular in Vermont, but a writ so altered is not void. Sawyer *v.* Doane, 19 Vt. 598. In Illinois, and in most of the other states, the renewal of an execution is not sanctioned by statute, and is therefore legally impossible. Calhoun County *v.* Birch, 27 Ill. 440. In South Carolina, an execution may be renewed by the service of summons on defendant, his heirs or administrators, to show cause why it shall not be renewed. The defendant may by his written consent authorize such renewal without any summons or proceedings. Carrier *v.* Thompson, 11 S. C. 79.

CHAPTER V.

THE WRIT OF VENDITIONI EXPONAS.

§ 57. Definition and object.
§ 58. Gives no authority.
§ 59. May issue with a *fieri facias* clause.
§ 60. Effect of sale under.
§ 61. Collateral attack.
§ 62. To whom directed.

§ 57. Definition of Object. — The *venditioni exponas* is sometimes spoken of as a branch of the writ of *fieri facias*.[1] It is issued when an original, *alias*, or *pluries* writ of *fieri facias* is returned with an indorsement, showing that the officer has levied on property, and has the same in his hands unsold. In all such cases, the plaintiff may wish to compel a sale of the property levied, in order that he may have it applied to the satisfaction of his debt, and may, in case it does not produce a complete satisfaction, have execution for the sum remaining unpaid. Without this writ, the plaintiff's remedy against the officer would be inadequate; with the aid of the writ, such remedy is complete. The officer is bound to return the writ of *fieri facias* by the return day thereof, and is liable to suit if he does not return it, either executed or with a sufficient excuse for not executing it. In case he returns that he has made a levy, and gives sufficient excuse for not having sold the property levied, then the plaintiff may, by procuring a writ of *venditioni exponas*, compel him to proceed with the sale. This writ is, therefore, properly

[1] Hughes *v.* Rees, 7 Dowl P. C. 56; 4 Mees. & W. 468; 1 H. & H. 347.

defined as the writ which *compels* an officer to proceed with the sale of property levied upon under a *fieri facias*.[1]

§ 58. **Gave the Officer No Authority.**—The *venditioni exponas* was so frequently issued as to create the impression that it was a writ of *authorization* as well as of compulsion, and was necessary to enable the officer to proceed with the sale. Such was not the fact; it gave the officer no authority not previously possessed by him.[2] Notwithstanding the return of the *fieri facias*, he could sell the property levied on as well without as with a *venditioni exponas*. If he was willing to proceed, the issue of this writ was a clear superfluity.[3] Where a levy had been made, and thereafter a *supersedeas* issued, it was held that the levy, having been commenced, gave the officer a special property which the *supersedeas* did not affect, and that he could, therefore, by a *venditioni exponas*, be compelled to proceed with the sale.[4] If the property mentioned in the *venditioni exponas* was sold without satisfying the judgment, the proper remedy was to procure an *alias fieri facias* for the balance due.[5] From the well-established proposition that

[1] Cameron *v.* Reynolds, Cowp. 406; Welch *v.* Sullivan, 8 Cal. 165; Holmes *v.* McIndoe, 20 Wis. 657; Bellingall *v.* Duncan, 3 Gilm. 477; Lockridge *v.* Baldwin, 20 Tex. 308; 70 Am. Dec. 385; Frisch *v.* Miller, 5 Pa. St. 310.

[2] Manahan *v.* Sammon, 3 Md. 463; Buehler *v.* Rogers, 68 Pa. St. 9; Young *v.* Smith, 23 Tex. 598; 76 Am. Dec. 81; Smith *v.* Spencer, 3 Ired. 256; Cummins *v.* Webb, 4 Pike, 229; Borden *v.* Tillman, 39 Tex. 262; Hastings *v.* Bryant, 115 Ill. 75.

[3] Ritchie *v.* Higginbotham, 26 Kan. 645; Ayre *v.* Aden, Cro. Jac. 73; Irvin *v.* Pickett, 3 Bibb, 343; Clerk *v.* Withers, Ld. Raym. 1073; Colyer *v.* Higgins, 1 Duvall, 7; Keith *v.* Wilson, 3 Met. (Ky.) 204.

[4] Charter *v.* Peeter, Cro. Eliz. 597; Milton *v.* Edrington, 1 Dyer, 98 b; Overton *v.* Perkins, Mart. & Y. 367.

[5] Den on dem. of Smith *v.* Fore, 10 Ired. 37; 51 Am. Dec. 376; Chambers *v.* Dollar, 29 U. C. Q. B. 599.

a *venditioni exponas* confers no authority upon an officer, and is, in its effect, confined to inciting or compelling him to pursue an authority otherwise possessed, it follows that in determining the validity of an execution sale, the *venditioni exponas* may be disregarded, for it can neither detract from a sale otherwise valid, nor give force to a sale otherwise void. The power of the officer depends solely on the prior writ and the proceedings thereunder.[1] Hence, if acting under this writ an officer sells property in a case where no *fieri facias* had issued,[2] or where the property sold had not been levied upon,[3] or where the judgment had been satisfied or merged into another judgment,[4] such sale is clearly void; for in neither of these instances is there any power to subject the property to a compulsory sale. At the common law, this writ issued only to compel a sale of personal property, for the very obvious reason that the policy of that law did not permit the divesting of the title to real property by an execution sale. In this country a different policy prevails,—one under which the sale of realty under execution is regarded with but little less favor than that of personal estate. Whenever under the local statutes, a levy upon real estate is sanctioned, and when made constitutes a continuing lien notwithstanding the return of the execution, the property so levied upon may after the return day of the writ be sold under a *venditioni exponas*.[5] The

[1] Frink *v.* Roe, 70 Cal. 296.

[2] Hurst *v.* Liford, 11 Heisk. 622.

[3] Borden *v.* McRae, 46 Tex. 396; Wood *v.* Augustine, 61 Mo. 46.

[4] Wright *v.* Yell, 13 Ark. 503; 58 Am. Dec. 336.

[5] Borden *v.* Tillman, 39 Tex. 262; Lockridge *v.* Baldwin, 20 Tex. 303; 70 Am. Dec. 385; Borden *v.* McRae, 46 Tex. 396. It has, however, been denied that a *venditioni exponas* can give power to sell lands after the return day: Rogers *v.* Cawood, 1 Swan, 143; 55 Am. Dec. 729.

doubtful question is, whether lands may be sold after the return day of the execution in the absence of this writ. In the case of personal estate, it is conceded that the officer levying the writ obtains a right of possession and a special property in the goods seized, which continue after the return day, and authorize him to sell as effectually as if the original writ remained in full force. But a levy upon real estate gives no special property, and no right of possession to the officer making the levy, and hence it has been inferred that after the return day of the writ under which the levy was made, he occupies no official or other relation toward such property, and has no power to dispose of it, and thereby make effectual the lien created by the levy. Where this view prevails, an exception exists to the general rule that a *venditioni exponas* confers no authority, and it is then necessary after the return day of an execution that this writ issue to empower the officer to sell real estate levied upon but not sold, and a sale without such writ is void.[1] In our judgment, the special property and the right of possession vested in an officer upon the levy of a writ upon personal property are not the foundation of his authority to sell, but are mere incidents of that authority designed to make its exercise effectual. His authority is derived from the judgment, the writ and its levy. That this authority may be pursued the more effectually, the officer is vested with a special property and right of possession, for otherwise the chattels seized might be taken out of his possession with impunity, and their application to the

[1] Hester *v.* Duprey, 46 Tex. 627; Mitchell *v.* Ireland, 54 Tex. 306; Barden *v.* McKinnie, 4 Hawks, 279; 15 Am. Dec. 519; Porter *v.* Neelan, 4 Yeates, 108; Smith *v.* Mundy, 18 Ala. 185; 52 Am. Dec. 221; Sheppard *v.* Rhea, 49 Ala. 125; and see *post*, § 106.

satisfaction of the writ delayed or wholly avoided. The authority to sell real estate may, on the other hand, be prudently and effectively exercised without divesting the owner of possession, or conferring any special property on the levying officer. It can neither be hidden, nor seized and removed beyond his bailiwick; and the recording of the levy may give notice to all intending purchasers or encumbrancers and prevent the creation of any new rights or interests not subordinate to the levy. By the levy, a lien is created whose duration is not limited to the return day of the writ, and from this it must necessarily follow that the officer has authority, notwithstanding the passing of such return day, to make his levy productive by a sale of the realty levied upon; and this authority is not dependent on the issuing of a *venditioni exponas*, for this writ does nothing more than to compel the performance of a pre-existing duty.[1]

§ 59. **May have Fieri Facias Clause.**— The *venditioni exponas* could be issued with a *fieri facias* clause. It then united the powers of the two writs, compelling the sale of the property under levy, and authorizing the seizure and sale of such other property as might be necessary to satisfy the judgment. But if the *fieri facias* clause was not inserted, its omission could not be treated as a clerical error, to be thereafter cured by amendment. A levy and sale, where there is no *fieri facias* clause, are therefore entirely unauthorized and absolutely void.[2]

[1] Rose *v.* Ingram, 98 Ind. 276; Knox *v.* Randall, 24 Minn. 479; Johnson *v.* Bemis, 7 Neb. 224; Frink *v.* Roe, 70 Cal. 296; Cox *v.* Joiner, 4 Bibb, 94; Stein *v.* Chambless, 18 Iowa, 474; Butterfield *v.* Walsh, 21 Iowa, 101; Phillips *v.* Dana, 3 Scam. 557; Moreland *v.* Bowling, 3 Gill, 500; Remington *v.* Linthicum, 14 Pet. 84; Bussey *v.* Tuck, 47 Md. 171; see *post*, § 106.

[2] Maupin *v.* Emmons, 47 Mo. 304; Quinn *v.* Wiswall, 7 Ala. 645; Zug *v.* Laughlin, 23 Ind. 170; Lee *v.* Howes, 30 U. C. Q. B. 292.

The property must be sold under the *venditioni* before seizure can be made under the *fieri facias* clause.[1]

§ 60. **The Effect of a Sale under a Venditioni Exponas** is the same as though the sale had been made under the original writ before the return day. The purchaser can obtain no better nor greater title than would have passed under the original writ;[2] but on the other hand, the lien of the original writ, and of the levy thereunder, continue under the *venditioni exponas*, and confer as ample a title as could have been transferred under and by virtue of such original liens.[3]

§ 61. **Collateral Attack.** — A *venditioni exponas* is as little liable to collateral attack, and as much subject to amendments, as the original writ. Thus where it was issued under the seal of the court, but without the clerk's signature, this omission was regarded as a clerical error, proper for amendment, but not destroying the validity of the writ.[4] So where the writ omitted some of the articles which were sold under it, it was amended after forty years to sustain the sale, it appearing that all the articles were levied on under the *fieri facias*.[5] In such a case, there is no need of an amendment; for as the officer has authority to sell without *any venditioni exponas*, he cannot be said to have less authority because of informalities in the writ, whether of form or substance.[6]

[1] Canaday *v.* Nuttall, 2 Ired. Eq. 265; Dan *v.* Nichols, 63 N. C. 107.

[2] Badham *v.* Cox, 11 Ired. 456.

[3] Yarborough *v.* State Bank, 2 Dev. 23; Zug *v.* Laughlin, 23 Ind. 170; Doe *v.* Hayes, 4 Ind. 117; Taylor *v.* Mumford, 3 Humph. 66; Hicks *v.* Ellis, 65 Mo. 177.

[4] McCormack *v.* Merson, 1 Serg. & R. 92.

[5] De Haas *v.* Bunn, 2 Pa. St. 335; 44 Am. Dec. 201. See also Chambers *v.* Dollar, 29 U. C. Q. B. 599.

[6] See § 58.

§ 62. **To Whom Directed.** — This writ is usually directed to the officer who made the levy, whether he continues in office or not. It may, however, be directed to and executed by his successor in office, if the levy be upon real estate;[1] but the authorities make a distinction between cases where the *venditioni* is issued for the sale of personal property, and where it is issued for the sale of land. In cases of the former class, the *venditioni* must go to the officer who made the seizure; for by the seizure he acquired a special property in the chattels, and a right to their possession.[2] If the courts will but consistently apply the well-established rule that a *venditioni exponas* is not a writ of authorization, but of compulsion merely, that the object of its issue is not to create an authority, but to arouse to action one already existing, then the question whether it shall issue to the sheriff in office, or to his predecessor, by whom the levy was made, is of insignificant import. The important question is, What acts may a sheriff or other officer, lawfully and effectually do, after the expiration of his term of office? — for such acts may, we think, be done without as well as with the writ of *venditioni exponas*. The general rule is, that when an officer enters upon the execution of the writ, and at all events when he has proceeded so far as to make a valid levy thereunder, he may, notwithstanding the expiration of his official term, complete the execution of the process, and do every act necessary to completely appropriate to the satisfaction of the writ the property so levied upon, including, in the event of

[1] Bellingall *v.* Duncan, 3 Gilm. 477; Sumner *v.* Moore, 2 McLean, 59; Holmes *v.* McIndoe, 20 Wis. 657; Tarkington *v.* Alexander, 2 Dev. & B. 87.

[2] Bussey *v.* Clark, 47 Md. 171; Clark *v.* Sawyer, 48 Cal. 133; Purl *v.* Duval, 6 Har. & J. 69; 9 Am. Dec. 490.

a sale, the execution of such muniments of title as may be required to divest the title of the judgment debtor and vest it in the purchaser, at the execution sale. For all these purposes, he may be considered as if still in office. The authority of his deputies is continued, unless revoked by him, and they may perform acts and execute writings in his name, with like effect as if he remained in office.[1] If the levy was upon personal estate, there was never any question that the sale might, and indeed must, be made by the officer who levied the writ, though in the mean time he had ceased to hold the office.[2] "It seems to be a well-settled rule of law, a rule of the common law, recognized and confirmed by statute, that when an executive officer has begun a service, or commenced the performance of a duty, and thereby incurred a responsiblity, he has the authority, and indeed is bound, to go on and complete it, although his general authority, as such officer, is superseded by his removal, or his derivative authority terminated by the determination of the office of his principal. His authority attaches by the commencement of the service, and will be superseded only when it is completed, whether it be a longer or a shorter time."[3] The levy of an execution upon real estate does not, as in the case of its levy upon personal property, vest in the officer any special property, or right of pos-

[1] Tyree *v.* Wilson, 9 Gratt. 59; 58 Am. Dec. 213; Lofland *v.* Ewing, 5 Litt. 42; 15 Am. Dec. 41; Jackson *v.* Collins, 3 Cow. 89; Ballard *v.* Thomas, 19 Gratt. 24; Tuttle *v.* Jackson, 6 Wend. 219; Mills *v.* Tukey, 22 Cal. 373; 83 Am. Dec. 74.

[2] Clerk *v.* Withers, 1 Salk. 322; 6 Mod. 290; Doe *v.* Donston, 1 Barn. & Ald. 230; Sauvinet *v.* Maxwell, 26 La. Ann. 280; People *v.* Boring, 8 Cal. 406; State *v.* Roberts, 7 Halst. 114; 21 Am. Dec. 62; Newman *v.* Beckwith, 61 N. Y. 205; Clark *v.* Pratt, 55 Me. 546; Tukey *v.* Smith, 18 Me. 125; 36 Am. Dec. 704.

[3] Lawrence *v.* Rice, 12 Met. 533.

session; hence it has been decided that on the termination of his official term, he could no longer sell such real estate,[1] though if the sale had taken place during such term, we believe no doubt has ever been expressed that he could, after the expiration of the term, make his return upon the writ, or execute any conveyance or other evidence of title, based upon the sale,[2] or receive from the judgment debtor, or other person entitled to redeem, the moneys required to make a valid redemption from such sale.[3] The better opinion is, that if a levy be made upon real estate, the officer levying the writ may, after the expiration of his term, complete the execution of the writ by a sale and conveyance; but that his powers in this respect are concurrent with those of his successor in office, and therefore, that the *venditioni exponas* may properly be issued to and executed by either.[4]

[1] Leshey *v.* Gardner, 3 Watts & S. 314; 38 Am. Dec. 764; Bank of Tennessee *v.* Beatty, 3 Sneed, 305; 65 Am. Dec. 58.

[2] Welsh *v.* Joy, 13 Pick. 477; Allen *v.* Trimble, 4 Bibb, 21; 7 Am. Dec. 726; *post*, § 327.

[3] Elkin *v.* People, 3 Scam. 207; 36 Am. Dec. 541; Robertson *v.* Dennis, 20 Ill. 315.

[4] Clark *v.* Sawyer, 48 Cal. 133; Lofland *v.* Ewing, 5 Litt. 42; 15 Am. Dec. 41; Purl *v.* Duval, 5 Har. & J. 69; 9 Am. Dec. 490; Jackson *v.* Collins, 3 Cow. 89; Bellingall *v.* Duncan, 3 Gilm. 480; Holmes *v.* McIndoe, 20 Wis. 689; Sumner *v.* Moore, 2 McLean, 59; Fowble *v.* Rayberg, 4 Ohio, 56; Kane *v.* McCoun, 55 Mo. 181.

CHAPTER VI.

AMENDING WRITS OF EXECUTION.

§ 63. Power liberally exercised.
§ 64. Power extends to all matters of form.
§ 65. Amending direction to the officer.
§ 66. Amending omission in words of command.
§ 67. Amending to conform execution to judgment.
§ 68. Amending error in designating the return day.
§ 69. Amending the clause of attestation.
§ 70. Amending by affixing seal.
§ 71. Time within which amendment may be made.
§ 71 a. The effect of amendments.
§ 72. Persons against whom amendments may be made.

§ 63. Power of is Liberally Exercised. — The power of courts to amend executions was, until a comparatively recent date, either doubted altogether, or affirmed with great hesitation. Thus Mr. Bingham, in his work on judgments and executions, says nothing upon this subject, except the following: "But it seems a judicial writ may, in some instances, be amended by the roll, on leave from the court."[1] No subsequent author, in his treatment of this topic, can hope to excel Mr. Bingham in brevity, caution, and uncertainty. But the power to amend executions, and the limits within which it would be exercised, were much better established and understood in Mr. Bingham's time than his cautious sentence and his single citation of authority indicate. At the present day, the power to amend executions so as to correct clerical misprisions is universally conceded, and frequently invoked. "Indeed, it is very difficult to prescribe limits to this

[1] Bingham on Judgments and Executions, 186.

salutary power possessed by the courts, of permitting amendments in their process, whether *mesne* or *final*. It is a power exercised for the promotion of justice, with no parsimonious hand; yet where its allowance would be destructive of the rights of innocent third persons, the court will scan well the grounds on which its action is sought."[1] "When we advert to the doctrine of amendments, and the cases which have been decided on that subject, it will be perceived that the object of the whole system is to provide a remedy for casual omissions, or negligence of different officers of the court; in a word, to enable the party to do that which the law and the facts in the case would have authorized or did require the officers to have done. The decisions on this subject are so numerous, and amendments so common, and I may almost say unlimited, that the difficulty is in selecting such cases as seem most directly to apply to the subject before us."[2]

§ 64. **Amendments for Matters of Form.**—When we come to examine the different decisions in reference to amending executions, we find them so various and comprehensive as to fully justify the remarks quoted in the preceding section. These decisions, though not perfectly harmonious, are as nearly so as, from our previous knowledge of judicial doubts and dissensions, we could expect to find them. In the chapter on the form of an original execution, we have stated that every execution usually embraces six different parts. We

[1] Cawthorn *v.* Knight, 11 Ala. 582; McCollum *v.* Hubbert, 13 Ala. 284; 48 Am. Dec. 56; Meyer *v.* Ring, 1 H. Black, 541; Simon *v.* Gurney, 5 Taunt. 605; Atkinson *v.* Newton, 2 Bos. & P. 336; Deloach *v.* State Bank, 27 Ala. 444. Amendments may be made in matters of form, but not of substance. Blanks *v.* Rector, 24 Ark. 496; 88 Am. Dec. 780.

[2] Bordeaux *v.* Treasurers, 4 McCord, 144.

think that each of these parts may be amended, at any time, where the amendment proper to be made can be ascertained, either from reference to the record, or to the existing law prescribing the form and contents of the writ. Hence, if the writ issues in the name of the territory of C., instead of in the name of the state,[1] or in the case of an execution against the person of the defendant misnames the town in which the county jail is situated,[2] these are amendable defects which do not destroy the efficiency of the writ.

§ 65. Amending the Direction to the Officer. — Where a writ is directed to an improper officer, but executed by the proper officer, the error in the direction does not vitiate the writ, and may be cured by amendments.[3] Where such an error had been commited, the court said: "This is a judicial writ, and the erroneous direction is a mere misprision of our own clerk. Judicial writs are more absolutely under the control of the court than original writs. Let the amendment be made."[4] Where the error is in directing the writ to the sheriff of one county, when it is intended to be delivered to the sheriff of another county, there is some doubt whether it can be amended so as to support proceedings taken in the latter county. In Illinois, it has been held that this is not a proper case for an amendment, and that, as the sheriff acted in the absence of any writ directed to him, a levy and sale made by him are incurably void.[5]

[1] Carnahan *v.* Pell, 4 Col. 190.

[2] Avery *v.* Lewis, 10 Vt. 332; 33 Am. Dec. 203.

[3] Rollins *v.* Rich, 27 Me. 557; Walden *v.* Davison, 15 Wend. 578; 25 Am. Dec. 602; Hearsey *v.* Bradbury, 9 Mass. 95; Wood *v.* Ross, 11 Mass. 277.

[4] Campbell *v.* Stiles, 9 Mass. 217. See Atkinson *v.* Gatcher, 23 Ark. 101; Simcoke *v.* Frederick, 1 Ind. 54; Cook *v.* Morrell, 31 Me. 120.

[5] Bybee *v.* Ashby, 2 Gilm. 151; 43 Am. Dec. 47.

§ 66. **Amending Omission of Words of Command.** — Where the law authorized executions to be levied on lands and tenements as well as on goods and chattels, a writ issued, commanding a levy on goods and chattels, but omitting the words "lands and tenements." Under this writ, lands were sold and a conveyance made in pursuance of the sale. About fifteen years afterward, this writ and deed, having been offered in evidence, were objected to for this defect, whereupon the court held as follows: "By an act of the legislature, real estate, *quoad hoc*, is put on the same footing with personal, and a plaintiff has the same right to have his judgment levied as well of the one as the other. An execution is the process which the law gives to enforce a judgment, and ought to pursue the law. It is a remedy which a plaintiff has a right to ask of the court, and which the court is bound to extend to him to the utmost extent of the law. The omission, therefore, of the words 'lands and tenements,' etc., in the execution in the case of Williams *v.* Robertson, is clearly a clerical mistake: considering it, therefore, as the act of the court, and not of the party, I should be disposed to think, if it were necessary, that the court would — even at this day — entertain a motion to amend it, so as to render it consistent with, and make it as efficient as, the law itself." [1]

§ 67. **Amendments to Conform Executions to the Judgments** on which they were entered have been of very frequent occurrence. By such amendments, a variance in the name of the plaintiff,[2] or of the defendant,[3]

[1] Toomer *v.* Purkey, 1 Cons. Ct. R. 324; 12 Am. Dec. 634; Treasurers *v.* Bordeaux, 3 McCord, 142.

[2] Bank of Kentucky *v.* Lacy, 1 T. B. Mon. 7; Mackie *v.* Smith, 4 Taunt. 322.

[3] Brown *v.* Hammond, Barnes, 10; Vogt *v.* Ticknor, 48 N. H. 242; Gross *v.* Mims, 63 Ga. 563.

or in the date,[1] or amount[2] of the judgment, may be corrected; or the name of a party may be entirely stricken out when its insertion was not warranted by the judgment;[3] or a name improperly omitted may be inserted.[4] The style of the writ may also be amended so as to agree with the form prescribed by statute.[5]

§ 68. Amending Errors in Regard to the Return Day.—Where the law designates the return day, the omission to designate it in the writ is, according to the majority of the authorities, a mere clerical misprision of no serious consequence. Whether the return day be improperly designated or altogether omitted, the writ need not be quashed, but may be amended so as to make it to be what it should have been in the first instance.[6]

[1] Chase *v.* Gilman, 15 Me. 66; Hagerstown Bank *v.* Weckler, 52 Md. 30; Woolworth *v.* Taylor, 62 How. Pr. 90.

[2] Stevenson *v.* Castle, 1 Chit. 349; Laroche *v.* Wasbrough, 2 Term Rep. 737; Doe *v.* Rue, 4 Blackf. 263; 29 Am. Dec. 368; McCall *v.* Trevor, 4 Blackf. 496; Hutchens *v.* Doe, 3 Ind. 528; Black *v.* Wistar, 4 Dall. 267; Saunders *v.* Smith, 3 Kelly, 121; Sheppard *v.* Malloy, 12 Ala. 561; Holmes *v.* Williams, 3 Caines, 98; Waggoner *v.* Dubois, 19 Ohio, 104; Bissell *v.* Kip, 5 Johns. 100; Wright *v.* Wright, 6 Me. 415; Paine *v.* Spratley, 5 Kan. 525; King *v.* Harrison, 15 East, 615; Murphy *v.* Lewis, Hemp. 17; Robb *v.* Halsey, 11 Smedes & M. 140; Smith *v.* Keen, 26 Me. 411; Hunt *v.* Loucks, 38 Cal. 376; 99 Am. Dec. 464; Spence *v.* Rutledge, 11 Ala. 557; Williams *v.* Waring, 5 Tyrw. 1128; Cromp. M. & R. 354; Bicknell *v.* Witherell, 1 Q. B. 914; Hinton *v.* Roach, 95 N. C. 106.

[3] Goodman *v.* Walker, 38 Ala. 142; Deloach *v.* State Bank, 27 Ala. 437; Green *v.* Cole, 13 Ired. 425; Andress *v.* Roberts, 18 Ala. 387; Thompson *v.* Bondurant, 15 Ala. 346; 50 Am. Dec. 136; Cawthorn *v.* Knight, 11 Ala. 579.

[4] Shaffer *v.* Watkins, 7 Watts & S. 219; Morse *v.* Dewey, 3 N. H. 535; Porter *v.* Goodman, 1 Cow. 413.

[5] Thompson *v.* Bickford, 19 Minn. 17; Hanna *v.* Russell, 12 Minn. 80.

[6] Furtade *v.* Miller, Barnes, 213; Kidd *v.* Crowell, 17 Ala. 647; Reubel *v.* Preston, 5 East, 291; Walker *v.* Hawkey, 1 Marsh. 399; Harrell *v.* Martin, 4 Ala. 650; Harris *v.* West, 25 Miss. 156; Saunders *v.* Smith, 3 Kelly, 121; Cramer *v.* Van Alstyne, 9 Johns. 386; Shoemaker *v.* Knorr, 1 Dall. 197; Berthon *v.* Keeley, 4 Yeates, 205; Goode *v.* Miller, 78 Ky. 235; Perkins *v.* Woodfolk, 8 Baxt. 480.

§ 69. **The Clause of Attestation** may also be amended.[1] Thus an execution tested after the defendant's death may be amended so as to bear teste of the first day of the term;[2] or if tested out of term, may be amended so as to be tested in term time.[3] So if the court, place, or time at which the writ is to be returned is improperly stated, the writ may be amended.[4] And in case the clause of attestation be entirely omitted, it may be inserted as an amendment to the original writ.[5] So if the writ be attested in the name of the wrong person as chief justice, it may be amended by striking out such name and inserting the proper one.[6] The signature of the clerk may be added as an amendment.[7]

§ 70. **Amendment by Affixing Seal.**—There are authorities of a very high character[8] affirming that the affixing of the seal of the court is essential to the validity of the original writ. Where this view is sus-

[1] Haines *v.* McCormack, 5 Ark. 663; People *v.* Montgomery C. P., 18 Wend. 633; Newnham *v.* Law, 5 Term Rep. 577; Englehart *v.* Dunbar, 2 Dowl. P. C. 202; Rex *v.* Sheriff, 1 Marsh. 344; Jackson *v.* Bowling, 10 Ark. 578; Ripley *v.* Warren, 2 Pick. 592.

[2] Center *v.* Billinghurst, 1 Cow. 33; Lune *v.* Beltznoover, Taney, 110.

[3] Jones *v.* Cook, 1 Cow. 313; Meyer *v.* Ring, 1 H. Black. 541; Berthon *v.* Keeley, 4 Yeates, 205; Baker *v.* Smith, 4 Yeates, 185; Shoemaker *v.* Knorr, 1 Dall. 197.

[4] Van Dusen *v.* Brower, 6 Cow. 50; Inman *v.* Griswold, 1 Cow. 199; Atkinson *v.* Newton, 2 Bos. & P. 336; Hart *v.* Weston, 5 Burr. 2588; Stone *v.* Martin, 2 Denio, 185; Hall *v.* Ayer, 9 Abb. Pr. 220; Hunt *v.* Kendrick, 2 W. Black. 836; Simon *v.* Gurney, 5 Taunt. 605; 1 Marsh. 237; Boyd *v.* Vanderkemp, 1 Barb. Ch. 273; Forward *v.* Marsh, 18 Ala. 645; Harrison *v.* Agricultural Bank, 2 Smedes & M. 307.

[5] McIntyre *v.* Rowan, 3 Johns. 144.

[6] Ross *v.* Luther, 4 Cow. 158; 15 Am. Dec. 341; Brown *v.* Aplin, 1 Cow. 203; United States *v.* Hanford, 19 Johns. 173; Henry *v.* Henry, 1 How. Pr. 167; Spooner *v.* Frost, 1 How. Pr. 192; Nash *v.* Brophy, 13 Met. 476.

[7] Whiting *v.* Beebe, 12 Ark. 421.

[8] See § 46.

tained, a motion to amend by affixing the seal would be unavailing, for no amendment could operate to the extent of giving life to a writ which theretofore was dead in law. But where this view is not maintained, the seal of the court, having been omitted at the issuing of the writ, may afterward be affixed as an amendment.[1]

§ 71. **The Time within Which an Execution** may be amended has no limit. A sale of property may have been made under execution, and for years may have been confirmed by the silent acquiescence of all the parties in interest. After time has thus elapsed, the execution may for the first time be made subject to objection for some amendable informality. In such a case, the court, irrespective of the lapse of time, will either disregard the informality or order the execution to be amended.

§ 71 a. **The Effect of Amending an Execution** is generally to give the writ the same operation as if originally issued in due form.[2] Unless this were the case, the amendment would accomplish no useful purpose. If an officer is sued for not executing a writ or

[1] Sawyer *v.* Baker, 3 Greenl. 29; Bridewell *v.* Mooney, 25 Ark. 524; Dominick *v.* Eacker, 3 Barb. 17; Arnold *v.* Nye, 23 Mich. 286; Corwith *v.* State Bank of Illinois, 18 Wis. 560; 86 Am. Dec. 793; Purcell *v.* McFarland, 1 Ired. 34; 35 Am. Dec. 734; Clark *v.* Hellen, 1 Ired. 421.

[2] Cluggage *v.* Duncan, 1 Serg. & R. 111; Morse *v.* Dewey, 3 N. H. 535; Abels *v.* Westervelt, 24 How. Pr. 284; Bordeaux *v.* Treasurers, 3 McCord, 142; Toomer *v.* Purkey, 1 Cons. Rep. 323; 12 Am. Dec. 634; Porter *v.* Goodman, 1 Cow. 413; McCormack *v.* Melton, 1 Ad. & E. 331; Thorpe *v.* Hook, 1 Dowl. P. C. 501; Sickler *v.* Overton, 3 Pa. St. 325; Jackson *v.* Anderson, 4 Wend. 474; Den *v.* Leeony, 1 Coxe (N. J.), 111; Hunt *v.* Kendrick, 2 W. Black. 836; Mackie *v.* Smith, 4 Taunt. 322; Saunders *v.* Smith, 3 Ga. 121; Phelps *v.* Ball, 1 Johns. Cas. 31; Coleman's Cases, 66; Cherry *v.* Woolard, 1 Ired. 438; Suydam *v.* McCoon, Coleman's Cases, 59; Lewis *v.* Lindley, 28 Ill. 147; Durham *v.* Heaton, 28 Ill. 264; 81 Am. Dec. 275.

for negligence in its execution, it may be amended pending that action or during the trial.[1] If a sale has taken place, the writ may be amended, and as amended may ever thereafter be offered in support of such sale.[2] If the action is for false imprisonment, the defendant may have the *ca. sa.* under which he acted amended to conform to the judgment on which it issued, and then justify under the writ as amended.[3] The same action may be taken and the same result accomplished where the defendant is sued for trespass in levying the writ.[4] In many instances the amendment of an execution may properly be described as having no effect whatsoever. When the amendment is to cure a clerical error or defect obvious from the record, or in other words, where the record discloses the error and supplies the *data* for its correction, no formal amendment is necessary, and the writ will in all collateral proceedings be treated as amended.[5] It is true, there are some cases treating the amendment of an execution as a matter within the discretion of the court, to be granted or refused according to its notions of justice.[6] If this view were correct, then we do not understand how a writ can be treated as amended in advance of an order authorizing its amendment, for prior to that time it cannot be known how the discretion will be exercised. But

[1] Hargrave *v.* Penrod, Breese, 401; 12 Am. Dec. 201.

[2] Lewis *v.* Lindley, 28 Ill. 147; Durham *v.* Heaton, 28 Ill. 264; 81 Am. Dec. 275; Jackson *v.* Anderson, 4 Wend. 474.

[3] Holmes *v.* Williams, 3 Caines, 98.

[4] Porter *v.* Goodman, 1 Cow. 413.

[5] Den *v.* Lecony, 1 Coxe (N. J.), 111; Morse *v.* Dewey, 3 N. H. 535; Sheppard *v.* Bland, 87 N. C. 163; Griswold *v.* Connolly, 1 Woods, 193; Corthell *v.* Egery, 74 Me. 41; Cluggage *v.* Duncan, 1 Serg. & R. 111; Portis *v.* Parker, 8 Tex. 23; 58 Am. Dec. 95; Hunt *v.* Loucks, 38 Cal. 372; 99 Am. Dec. 464; Corwith *v.* State Bank, 18 Wis. 560; 86 Am. Dec. 793; Durham *v.* Heaton, 28 Ill. 264; 81 Am. Dec. 275; Wright *v.* Nostrand, 94 N. Y. 31, and other cases cited in § 72.

[6] Hayford *v.* Everett, 68 Me. 505.

where the amendment is proper, we conceive that its allowance is not a matter of discretion. There being a valid judgment and a writ obviously issued upon it, though tainted by some mere clerical omission or defect, it is the duty of the court to give due effect to such judgment and writ, and all proceedings based thereon, at least until some direct motion or proceeding is taken to quash the writ or proceedings for irregularity, and even then the better practice is to amend the writ and purge it of the irregularity rather than to destroy it, and annul the proceedings taken for its enforcement.[1]

§ 72. **Persons against Whom Amendments may be Made.** — In quite a number of cases the general declaration is made that an amendment of a writ will not be made when it will prejudice the interests of third persons.[2] On examining these cases, it will generally be found that the third persons against whom the court refused to authorize an amendment were not in a situation entitling them to any partiality from the court. They were, in most cases, either the assignees in bankruptcy of the defendant, or his personal representatives, the assignment on the one hand and the defendant's decease on the other having taken place subsequently to the issue of the writ sought to be amended. Neither the assignees nor representatives were purchasers for value, nor in any respect the holders of any special

[1] See § 78; Cheney *v.* Beall, 69 Ga. 533; but in this state the code provides that the amendment of an execution avoids a previous levy thereunder. Beasley *v.* Boudon, 58 Ga. 154; Jones *v.* Parker, 60 Ga. 500.

[2] Brooks *v.* Hodson, 7 Man. & G. 529; 8 Scott N. R. 223; Hunt *v.* Pasman, 4 Maule & S. 329; Phillips *v.* Tanner, 6 Bing. 237; 3 Moore & P. 562; Levitt *v.* Kibblewhite, 6 Taunt. 483; Webber *v.* Hutchins, 8 Mees. & W. 319; Johnson *v.* Dobell, 1 Moore & P. 28; Cape Fear Bank *v.* Williamson, 2 Ired. 147; Ohio Life Ins. Co. *v.* Urbana Ins. Co., 13 Ohio, 220.

equities; and being the mere successors of the defendant's interests, we cannot understand why they were in condition to resist anything to which his resistance, if made prior to the assignment or decease, would have been unavailing. But conceding the rule to be too well established by authority to be overthrown by argument, we conceive that it must be given a very restricted application, and must be confined to those instances where a motion to quash the writ is promptly made, and where no one but the plaintiff can be injured by refusing the amendment. There are two classes of third persons whose interests may be affected by a proposed amendment, namely, those who have derived title from the defendant, and are therefore interested in avoiding the writ; and secondly, those who have made purchases, and are deraigning title by aid of the writ, and therefore interested in maintaining its validity. The latter class will no doubt be protected by amending the writ, if it be amendable. In fact, it seems, so far as their interests are involved, superfluous to order an amendment; for where an amendment is proper, it will, in collateral proceedings, be treated as if actually made.[1] In determining whether an amendment should be allowed against the objection of third persons, an inquiry must be made whether such persons had any actual or constructive notice of the facts upon which the claim to the amendment is based. If, by inspect-

[1] Den *v.* Leeony, Coxe, 111; Stephens *v.* White, 2 Wash. (Va.) 203; Williams *v.* Brown, 28 Iowa, 247; Hunt *v.* Loucks, 38 Cal. 372; 99 Am. Dec. 464; Cooley *v.* Brayton, 16 Iowa, 10; Corwith *v.* State Bank of Illinois, 18 Wis. 560; 86 Am. Dec. 793; Durham *v.* Heaton, 28 Ill. 264; 81 Am. Dec. 275; Morrell *v.* Cook, 31 Me. 120; Doe *v.* Giddart, 4 How. (Miss.) 267; Toomer *v.* Purkey, 1 Const. Ct. 324; 12 Am. Dec. 634; Hubbell *v.* Fogartie, 1 Hill (S. C.), 167; Giles *v.* Pratt, 1 Hill (S. C.), 239; 26 Am. Dec. 170; Owen *v.* Simpson, 3 Watts, 87; Morse *v.* Dewey, 3 N. H. 535; Savin *v.* Austin, 19 Wis. 421.

ing the whole record in the case, they could have ascertained that the proposed amendment would be authorized, they must be regarded as charged with constructive notice, and as holding their interest in subordination to the right of amendment.[1] "The subsequent purchaser or creditor being chargeable with constructive notice of what is contained on the record, —if he has there sufficient to show him that all the requisitions of the statute have probably been complied with, and he will, notwithstanding, attempt to procure a title, under the debtor,—he should stand chargeable with notice of all facts the existence of which is indicated and rendered probable by what is stated in the record, and the existence of which can be satisfactorily shown to the court. And in such cases amendments should be allowed, notwithstanding the intervening interests of such purchaser or creditor."[2]

[1] Fairfield *v.* Paine, 23 Me. 498; Rollins *v.* Rich, 27 Me. 557.
[2] Whittier *v.* Varney, 10 N. H. 301.

CHAPTER VII.

QUASHING WRITS OF EXECUTION.

§ 73. Void or voidable writs may be.
§ 73 a. Classification of grounds for vacating.
§ 74. Notice for motion.
§ 75. Who may apply for, and to what court.
§ 76. Time within which motion for should be made.
§ 77. Grounds for quashing for errors in issuing.
§ 78. Quashing for errors in form.
§ 79. In Georgia, by affidavit of illegality.
§ 80. Consequences of quashing.

§ 73. Void or Voidable Executions may be Quashed. —Whenever an execution has been improperly issued, the most speedy and convenient, and in most cases the only, remedy of him against whom it runs, is by motion to quash or set it aside. Executions which are liable to be thus vacated are divided into two great classes, namely, void and voidable. A void writ is one which can have no force whatever, unless perhaps as a justification to an officer having no notice of its invalidity; while a voidable writ is one which, though erroneous, is valid until vacated by some proper proceeding. It is true that these definitions may be of no material assistance in enabling the practitioner to determine whether a particular writ belongs to the one class or to the other; for they state rather the result of the writ when adjudged to belong to one of these classes than the *indicia* by which it may be properly classified. Nor, in view of the many conflicting decisions, is it possible to state these *indicia* with any degree of confidence. An execution from a court having no authority to issue executions, or from a court no longer in

existence, or upon a void judgment, or a judgment never rendered, would undoubtedly be void. The same may be affirmed of executions issued by some one having *no* authority to issue executions. Executions on satisfied judgments; or against a defendant whose property cannot be taken in execution; or for or against a sole plaintiff or defendant who died prior to the teste of the writ, when there has been no revivor, — are, according to a preponderance of the authorities, void. Various errors in issuing the writ, as at an improper time, or in an improper form, may be urged as grounds for declaring it void, and will be received with different degrees of attention in different courts. The decisions upon these subjects have been considered in the second and third chapters of this work. When a writ is void, it can derive no validity from the defendant's inaction. He is not compelled to move to have it vacated. He may disregard it altogether, and may, at any time, successfully resist any claims based upon it. It may, however, be employed to cloud his title, or to subject him to various annoyances. The better course for him is to have it quashed. And that courts will vacate void process, and also process based on void judgments, and thereby relieve the defendant from annoyance, there can be no doubt.[1]

§ 73 a. Classification of Grounds for Vacating. — An execution may be quashed, — 1. When no writ could properly issue at the time of the issuance of the writ in question; and 2. When, though a writ of execution could properly issue, the one sought to be vacated was issued without authority, or by some person not authorized to issue it, or is irregular in form,

[1] Mabry *v.* State, 9 Yerg. 208; Avery *v.* Babcock, 35 Ill. 175.

or not warranted by the judgment on which it is based. The motion to quash is, in no sense, a revisory or appellate proceeding directed against the judgment. An irregular or erroneous judgment will, as long as it remains in force, support an execution. Hence an execution will not be vacated because the judgment was erroneous or irregular, nor will such error or irregularity, antecedent to the judgment, be considered by the court on motion to quash the execution.[1] Nor is a motion to quash the execution the proper mode of revising or controlling the acts of the officer who is seeking to enforce it. If he levies upon property not subject to execution, this does not make the writ irregular. The remedy in such case is by some proceeding against the officer to recover the property improperly seized. His unlawful act furnishes no ground for vacating the writ.[2]

§ 74. **Notice of Motion for.**—Whenever the defendant seeks to have a writ against him quashed, he should apply to the court on motion, giving his adversary notice of the intended application, and of the grounds upon which it is based. The party whose writ is sought to be vacated, and any purchaser deraigning title therefrom, are entitled to this notice, and any action against them in its absence is erroneous. This is particularly the case where the existence of the irregularity complained of cannot be determined from an inspection of the record.[3] The notice should be served

[1] Schultze *v.* State, 43 Md. 295; Galena & S. W. R. R. *v.* Ennor, 9 Ill. App. 159; Hall *v.* Claggett, 63 Md. 57; Boyle *v.* Robinson, 7 Har. & J. 200; Stephens *v.* Wilson, 14 B. Mon. 88.

[2] Hasty *v.* Simpson, 84 N. C. 590.

[3] Dazey *v.* Orr, 1 Scam. 535; Iron *v.* Callard, 1 A. K. Marsh. 423; Bentley *v.* Cummins, 8 Ark. 490; Osburn *v.* Cloud, 21 Iowa, 238; Eckstein *v.* Calderwood, 34 Cal. 658; Linn *v.* Hamilton, 34 N. J. L. 305; Payne *v.* Payne's Ex'r, 8

personally on the parties interested. After judgment has been recovered, the authority and duty of the plaintiff's attorney generally cease. Service of notice of motion to quash should therefore be served upon the plaintiff, and not upon his attorney in the case, unless it appears that such attorney is still retained by plaintiff, and has authority to represent him on the hearing of the motion.[1]

§ 75. Who may Apply for, and to What Court. —The general rule that none but the parties to a suit will be allowed to interfere with its management is equally applicable to the writ of execution which may be issued at the termination of the action. None but the parties to the writ, who are liable to be injured by it, can complain of irregularities with which it may be infected. Hence no stranger to the action can obtain an order quashing the execution.[2] Application to quash a writ must always be presented to the court whence it issued. One court will not entertain a motion to set aside the process of another court.[3]

§ 76. The Time within Which a Motion to Quash an execution may be made appears to have no limit. The motion may be made and granted after the writ

B. Mon. 391; Mann *v.* Nichols, 1 Smedes & M. 257; State Bank *v.* Marsh, 10 Ark. 129; McKissack *v.* Davis, 18 Ala. 315; Irons *v.* McQuewen, 27 Pa. St. 196; 67 Am. Dec. 456; Lyster *v.* Brewer, 13 Iowa, 461; McKinney *v.* Jones, 7 Tex. 598; 58 Am. Dec. 83.

[1] Duncan *v.* Brown, 15 S. C. 414.

[2] Bonnell *v.* Neely, 43 Ill. 288; Fiske *v.* Lamoreux, 48 Mo. 523; Gouverneur *v.* Warner, 2 Sand. 624; Oakley *v.* Becker, 2 Cow. 454; Howland *v.* Ralph, 3 Johns. 20; Frink *v.* Morrison, 13 Abb. Pr. 80; Perrin *v.* Bowes, 5 U. C. L. J., O. S., 138; Wallop *v.* Scarburgh, 5 Gratt. 1.

[3] Pettus *v.* Elgin, 11 Mo. 411; McDonald *v.* Tillman, 17 Mo. 603; Nelson *v.* Brown, 23 Mo. 13; Mellier *v.* Bartlett, 89 Mo. 134.

has been returned fully executed,[1] except in Texas, where such motion appears not to be entertained after the return day, and the actual return of the writ.[2] But while courts have the *power* to quash executions at any time, they are not disposed to exercise this power in behalf of the negligent. They require motions in ordinary cases to be made and prosecuted with diligence; and where the error complained of consists in a mere irregularity, any considerable delay on the part of the applicant will be treated as a waiver of the irregularity, and an irrevocable renunciation of his right to quash the writ.[3]

§ 77. **Grounds for Quashing.**—We have already endeavored to show the time and circumstances in which executions may properly issue;[4] and have at the same time attempted to show the consequences of any irregularity in such issuing when the writ was, by the parties, permitted to stand. In case, however, that the party against whom the writ runs seeks to avail himself of its erroneous issuance, he may do so by a motion to quash; and such motion, at least when promptly made, will ordinarily be granted. Hence a motion to quash will prevail when the judgment on which it issued was satisfied,[5] or the writ was issued by the clerk without

[1] Pinckney *v.* Hegeman, 53 N. Y. 31; Page *v.* Coleman, 9 Port. 275; Isaacs *v.* The Judge, 5 Stew. & P. 408.

[2] Meader Co. *v.* Aringdale, 58 Tex. 447.

[3] Henderson *v.* Henderson, 66 Ala. 556; Bristow *v.* Payton, 2 T. B. Mon. 91; 15 Am. Dec. 134; Fream *v.* Garrett, 24 Hun, 161; Bowman *v.* Talman, 2 Robt. 633; Hapgood *v.* Goddard, 26 Vt. 401; McKinney *v.* Scott, 1 Bibb, 155; Murphrey *v.* Wood, 2 Jones, 63; De Crano *v.* Musselman, 27 Leg. Int. 358; Berry *v.* Perry, 81 Ala. 103.

[4] See chapter II.

[5] McHenry *v.* Watkins, 12 Ill. 233; Russell *v.* Hugunin, 1 Scam. 562; 33 Am. Dec. 423; Adams *v.* Smallwood, 8 Jones, 258; Barnes *v.* Robinson, 4 Yerg. 186; Smock *v.* Dade, 5 Rand. 639; 16 Am. Dec. 780.

the direction of the proper authority,[1] or before the time for issuing had arrived,[2] or after a year and a day without reviving the judgment,[3] or when, in the absence of such revivor, the writ was tested after the death of a sole plaintiff,[4] or of a sole defendant,[5] or after the marriage of a female, she being sole plaintiff,[6] or when issued after the defendant had, in bankruptcy proceedings, been discharged from all further liability under the judgment;[7] but not when defendant had merely tendered the plaintiff the amount of the judgment, without bringing the money into court.[8] An execution may also be quashed because it states a different rate of interest from that stated in the judgment,[9] or is against defendant personally when it ought to be against him as surviving trustee,[10] or is against two defendants for amounts for which they are severally liable, or is issued by a person acting as clerk without

[1] Shackleford *v.* Apperson, 6 Gratt. 451.

[2] Allen *v.* Portland Stage Company, 8 Greenl. 207; Bartlett *v.* Stinton, L. R. 1 C. P. 483; 3 L. J. Com. P., N. S., 238; Blashfield *v.* Smith, 27 Hun, 114.

[3] Bacon *v.* Red, 27 Miss. 469; Bolton *v.* Landsdown, 21 Mo. 399; Azcarati *v.* Fitzsimmons, 3 Wash. C. C. 134; Lytle *v.* Cinn. Manf. Co., 4 Ohio, 459; Reynolds *v.* Corp, 3 Caines, 270; Blayer *v.* Baldwin, 2 Wils. 82; Sympson *v.* Gray, Barnes, 197; Noe *v.* Conyers, 6 J. J. Marsh. 514; Goodtitle *v.* Badtitle, 9 Dowl. P. C. 1009; Moore *v.* Bell, 13 Ala. 469; Trail *v.* Snouffer, 6 Md. 308.

[4] Wingate *v.* Gibson, 1 Murph. 492; Harwood *v.* Murphy, 1 Green (N. J.), 193.

[5] Bentley *v.* Cummings, 4 Eng. 487; Davis *v.* Helm, 3 Smedes & M. 17; Harrington *v.* O'Reily, 9 Smedes & M. 216; 48 Am. Dec. 704. A *fieri facias* issued at two o'clock P. M. was set aside on showing that the defendant died at eleven o'clock A. M. of the same day. Chick *v.* Smith, 8 Dowl. P. C. 337; 4 Jur. 86.

[6] Johnson *v.* Parmlee, 17 Johns. 271.

[7] Linn *v.* Hamilton, 34 N. J. L. 305; Davis *v.* Shapley, 1 Barn. & Adol. 54; Barrow *v.* Poile, 1 Barn. & Adol. 629; Humphreys *v.* Knight, 6 Bing. 572; Alcott *v.* Avery, 1 Barb. Ch. 347; Milhous *v.* Aicardi, 51 Ala. 594.

[8] Shumaker *v.* Nichols, 6 Gratt. 592.

[9] Fowlkes *v.* Poppenheimer, 4 Lea, 422.

[10] Alger *v.* Conger, 17 Hun, 45.

any authority to so act,[1] or because it does not name the person whose property is to be seized.[2]

§ 78. **Quashing for Errors in Form.** — The quashing of executions which were authorized to be issued at the time when they were sued out, but which are not in proper form, is a question upon which the practice of the courts is variant. For substantial irregularities in the form of the writ, such as are of so serious a character as to be incurable by amendment, there can be no doubt of the propriety of setting aside the whole writ. But what irregularities are substantial in this sense, and to this extent, is something about which the courts do not usually agree, as we have shown in the chapter on the form of original executions. The vast majority of writs liable to objection for matters of form are capable of being set right by comparison with the judgment. The informality is usually a clerical misprision for which the parties are not justly blamable, and which is not so culpable that it ought to be followed by any severe penalty. In all probability, it has not injured the complainant; and if capable of inflicting such injury, its power to do so may be destroyed by an amendment making it conform to the judgment. Numerous cases may, no doubt, be found in the reports, in which, for harmless informalities or variances, writs have been quashed. The decisions, however, show a tendency, strong at the first and still increasing, to correct rather than to destroy; to respond to a motion to quash by refusing such motion, and ordering the writ to be so amended as to free it

[1] Taney *v.* Woodmansee, 23 W. Va. 709.
[2] Haynes *v.* Richardson, 61 Ga. 390.

from all objection,[1] whenever this can be done by reference to the record. There are cases which seem to affirm the general proposition that an execution will be quashed for a variance between it and the judgment.[2] In Kentucky, when an execution was issued for too small an amount, it was said that the proper remedy of the plaintiff was by motion to quash.[3] No doubt there are other reported cases, in which the proposition that an execution may be quashed because for either too large or too small[4] an amount finds encouragement. But the preponderance of authority, both English and American, negatives this proposition, and establishes the rule that for variance in amount an execution may be corrected by the record, but will not be entirely set aside.[5] In Texas, an error in the style of the writ has been spoken of as a possible ground for quashing, but no positive opinion was required or given.[6] In Kentucky, an execution in detinue may be quashed when it is for the value of the property, instead of being for the return or for the value in case a return cannot be had.[7] Executions have also been

[1] Newnham *v.* Law, 5 Term Rep. 577; Shaw *v.* Maxwell, 6 Term Rep. 450; Mouys *v.* Leake, 8 Term Rep. 416, note *a;* Stevenson *v.* Castle, 1 Chitty, 349; Saunders *v.* Ky. Ins. Co., 4 Bibb, 471; Mitchell *v.* Chesnut, 31 Md. 521; Goodman *v.* Walker, 38 Ala. 142; Deloach *v.* State Bank, 27 Ala. 437; Thompson *v.* Bondurant, 15 Ala. 346; 50 Am. Dec. 136; Shepard *v.* Malloy, 12 Ala. 561.

[2] Noe *v.* Lawless, 6 J. J. Marsh. 514; Reese *v.* Burts, 39 Ga. 565; Newman *v.* Willitts, 60 Ill. 519.

[3] Brown *v.* Julian, 5 J. J. Marsh. 312.

[4] Cobbold *v.* Childer, 4 Scott N. R. 678; 4 Man. & G. 62; 1 Dowl., N. S., 726; Webber *v.* Hutchins, 8 Mees. & W. 319; 1 Dowl., N. S., 95.

[5] Mouys *v.* Leake, 8 Term Rep. 416, note *a;* King *v.* Harrison, 15 East, 615; Murphy *v.* Lewis, Hemp. 17; Todd *v.* McClanahan's Heirs, 1 J. J. Marsh. 356; Knight *v.* Applegate's Heirs, 3 T. B. Mon. 338; Commonwealth *v.* Hamilton, 4 T. B. Mon. 133; Sheppard *v.* Malloy, 12 Ala, 561; Hunt *v.* Loucks, 38 Cal. 376; 99 Am. Dec. 464; Hollingsworth *v.* Floyd, 2 Har. & G. 87; Tilby *v.* Best, 16 East, 163; Boyd *v.* Boyle, 36 Kan. 512.

[6] Portis *v.* Packer, 8 Tex. 23; 58 Am. Dec. 95.

[7] Boyd *v.* Williams, 5 J. J. Marsh. 56.

quashed for varying from the judgment in being against a party not named in the judgment,[1] or in incorrectly stating the name of the plaintiff.[2] An erroneous taxation of costs, or an erroneous indorsement on an execution, furnishes no ground for quashing the writ. The former error may be corrected on motion to retax costs,[3] and the latter by quashing the indorsement.[4] An execution not subscribed by the plaintiff nor by his attorney, where the law requires it to be subscribed by one or the other, may be quashed.[5]

§ 79. **In Georgia, by Affidavit of Illegality.**—The judiciary act of the state of Georgia of the year 1799 makes provisions, "in all cases where execution issued illegally," by which plaintiff may make affidavit of such illegality, and thereby procure a suspension of the proceedings until the alleged illegality can be determined by the court. This act was construed to provide a remedy where there was anything illegal, either in issuing the execution, or in subsequent proceedings under it.[6] This was a forced interpretation, by which the word "issued" was given an effect equivalent to the words "issued, or is proceeding." The statute has since been amended in such a manner than it no longer requires judicial aid to extend its provisions.[7] As the law now stands, the defendant whose property or person has been taken under execution may make an affidavit stating the illegality, and deliver the same to

[1] Morrel *v.* Barner, 4 Litt. 10; Treadwell *v.* Herndon, 41 Miss. 38; Grayham *v.* Roberds, 7 Ala. 719; Bridges *v.* Caldwell, 2 A. K. Marsh. 195.

[2] Jennings *v.* Pray, 8 Yerg. 85; Smith *v.* Knight, 11 Ala. 618.

[3] Walton *v.* Brashears, 4 Bibb, 18.

[4] McGowan *v.* Hoy, 2 Dana, 347.

[5] Bonesteel *v.* Orvis, 23 Wis. 506; 99 Am. Dec. 201.

[6] Robinson *v.* Banks, 17 Ga. 211.

[7] Code of Georgia, secs. 3614–3621, revised by Irwin.

the officer, together with security for the forthcoming of the property levied upon. The proceedings are then stayed, and the officer must return the execution and bond and affidavit to court. If the facts stated in the affidavit are controverted, a jury is called upon to determine such controversy. The proceeding by illegality cannot reach any proceedings prior to the judgment,[1] unless the court did not acquire jurisdiction of the defendant.[2] The affidavit must contain all the grounds of illegality of which the defendant intends to complain. No amendment will be allowed,[3] except for the purpose of inserting such new grounds as the defendant by his oath shows were not within his knowledge when the original affidavit was made.[4] The affidavit must be made by the party upon whose person or property the writ is being executed, or by his agent or attorney. It cannot be made by a co-defendant, in his own name, when neither he nor his property has been molested by the writ.[5] The grounds upon which the defendant can prevail, when his objections are directed to the *issuing* of the writ, seem to be none other than would be sufficient in other states under an ordinary motion to quash the writ. Thus an affidavit of illegality cannot be sustained because of an immaterial variance,[6] nor because the writ was signed by the deputy clerk and without affixing seal of the court.[7] But the affidavit of illegality reaches one error not to

[1] Mangham *v.* Reed, 11 Ga. 137; Emory *v.* Smith, 51 Ga. 323; Mayor *v.* Trustees, 7 Ga. 204; Swinny *v.* Watkins, 22 Ga. 570.

[2] Parker *v.* Jennings, 26 Ga. 140; Brown *v.* Gill, 49 Ga. 549.

[3] Hurst *v.* Mason, 2 Kelly, 367.

[4] Higgs *v.* Huson, 8 Ga. 317.

[5] Van Dyke *v.* Besser, 34 Ga. 268.

[6] Mitchell *v.* Printup, 19 Ga. 579.

[7] Dever *v.* Akin, 40 Ga. 429.

be remedied by a motion to quash; namely, an error committed by the officer in the execution of the writ.[1]

§ 80. The Consequences of an Order Quashing a writ may be considered, first, with reference to the plaintiff and his attorneys; and second, with respect to the officers who have acted under the authority of the writ, and to strangers who have in good faith made purchases and paid money at sales had thereunder. If an unconditional order is given quashing an execution, the plaintiff and his attorney are left in no better a position than if the writ had never issued. If they or either of them have become the purchasers of property thereunder, an essential muniment of their title is obliterated, and the purchase necessarily falls for want of support. If they have seized upon property, or taken the defendant in execution, their act can no longer be justified, and they may be pursued as trespassers.[2] With respect to officers, we believe the rule is of universal operation that they may justify under a writ regular on its face, and that the quashing of a writ will not operate retrospectively so as to make them trespassers for acts previously done under its authority. When sales have been made under execution to *bona fide* purchasers, the duty as well as the inclination of the court is to protect them, and a motion to quash the execution for any mere error or irregu-

[1] Robinson *v.* Banks, 17 Ga. 211; Force *v.* Dahlonega T. & L. Co., 22 Ga. 86.

[2] Freeman on Judgments, sec. 104 b; Turner *v.* Felgate, 1 Lev. 95; Parsons *v.* Loyd, 3 Wils. 341; 2 W. Black. 845; Chapman *v.* Dyett, 11 Wend. 31; 25 Am. Dec. 598; Kerr *v.* Mount, 28 N. Y. 659; Hayden *v.* Shed, 11 Mass. 500; Codrington *v.* Lloyd, 8 Ad. & E. 449; 3 Nev. & P. 442; 1 W. W. & H. 358; 2 Jur. 593; Barker *v.* Braham, 3 Wils. 368; Young *v.* Bircher, 31 Mo. 136; 77 Am. Dec. 638; Sanders *v.* Ruddle, 2 T. B. Mon. 139; 15 Am. Dec. 148.

larity will be denied.[1] But even should the motion be granted, its operation seems not to extend to sales made to such purchasers; and for the purpose of supporting such sale, the quashed writ retains its original vitality.[2]

[1] Bryan *v.* Berry, 8 Cal. 130; Day *v.* Graham, 1 Gilm. 435.

[2] Doe *v.* Snyder, 3 How. (Miss.) 66; 32 Am. Dec. 311; Cox *v.* Nelson, 1 T. B. Mon. 94; 15 Am. Dec. 89; Adamson *v.* Cummins, 5 Eng. 545; Chambers *v.* Stone, 9 Ala. 261.

CHAPTER VIII.

PROCEEDINGS TO OBTAIN EXECUTION ON DORMANT JUDGMENTS.

FIRST. — BY SCIRE FACIAS.

§ 81. Object and definition of the writ.
§ 82. In what actions it may issue.
§ 83. When necessary.
§ 84. Change in the parties other than by death.
§ 85. Change in parties occasioned by death.
§ 86. Parties plaintiff.
§ 87. Parties defendant.
§ 88. Form of the writ, and amendments thereto.
§ 89. Service of the writ.
§ 90. Proceedings on return of the writ; defenses received.
§ 91. Time in which the writ must be sued out.
§ 92. Irregular writs.
§ 92 a. Judgment upon.
§ 93. Second *scire facias*.
§ 94. Form of execution on *scire facias*.

SECOND. — BY MOTION.

§ 95. Motion and notice as a substitute for *scire facias*.
§ 96. On death of one of the parties.
§ 97. On judgment dormant by lapse of time.

§ 81. Object and Definition. — Before a judgment is either satisfied by payment or barred by lapse of time, it may become temporarily inoperative so far as the right to issue execution is concerned, and so continue until something is done by which such right is revived. In this condition it is usually called a dormant judgment. This dormancy in judgments was, at the common law, usually created either by a change in the parties plaintiff or defendant, or by the lapse of time without the issuing of execution. "Where any new person (that is, one not originally party to the judgment) is to be charged or benefited by the execution,

or where more than a year and a day have elapsed since the signing of judgment, and that delay has not been caused by the party chargeable, new measures become necessary before execution can be proceeded in."[1] There were also cases in which execution was to be issued in certain contingencies only, and in which it became necessary to establish the existence of the contingency before the writ could be regularly sued out. So the judgment might have been satisfied, through fraud or mistake, or by an extent upon property not belonging to the defendant, and it might therefore be necessary to set aside the apparent satisfaction and to obtain leave to issue further execution. When from any cause it became necessary to apply to a court for a revivor of the right to issue execution, the remedy of the plaintiff was by *scire facias*. According to Mr. Bingham's definition, "a *scire facias* is a judicial writ, founded on some matter of record, and having for its object the prevention of undue surprise by interposing itself as a warning between judgment and execution, — whenever any new party is to be charged or benefited by such execution; whenever such execution is contingent, after judgment on the existence of certain circumstances, to be first proved by the party charging; and lastly, whenever execution has been delayed beyond a year and a day after judgment signed, that delay not arising from the party charged."[2] But perhaps a better definition of *scire facias*, as the term will be used in this chapter, is this:

[1] Bingham on Judgments and Executions, 118; Foster on Scire Facias, 6.

[2] Bingham on Judgments and Executions, 122. It was formerly held that an *elegit* might issue after a year and a day. Seymour *v.* Grenville, Carth. 283. But this decision has since been overruled. Putland *v.* Newman, 6 Maule & S. 179; Rutland *v.* Newman, 2 Chit. 384; Brown *v.* C. & O. Canal Co., 4 Hughes, 584.

It is a writ issued out of the court wherein a judgment has been entered[1] or to which the record has been removed, reciting such judgment, suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reason, if any there be, why such execution should not issue.[2] "The writ, therefore, presents the plaintiff's whole case, and constitutes the declaration to which the defendant must plead."[3] "A *scire facias* to revive a judgment is not an original but a judicial writ, founded on some matter of record, to enforce execution of it; and, properly speaking, is only the continuation of an action,—a step leading to the execution of a judgment already obtained, and enforcing the original demand for which the action was brought. It creates nothing anew, but may be said to reanimate that which before had existence, but whose vital powers and faculties are, as it were, suspended, and without its salutary influence would be lost."[4] A *scire facias* is sometimes and for some purposes spoken of as an

[1] A *scire facias*, being founded on some record, must be issued out of the court where that record is. Hence a *scire facias* to obtain execution on a judgment must issue out of and be returnable to the court where the record of such judgment is, and whence the execution must issue if the plaintiff in the *scire facias* prevails. Walker *v.* Wells, 17 Ga. 547; 63 Am. Dec. 252; Grimke *v.* Mayrant, 2 Brev. 202; Osgood *v.* Thurston, 23 Pick. 110; Tindall *v.* Carson, 1 Harr. (N. J.) 94; Barron *v.* Pagles, 6 Ala. 422; Carlton *v.* Young, 1 Aiken, 332; Wilson *v.* Tierman, 3 Mo. 577; Vallance *v.* Sawyer, 4 Greenl. 62; Treasurer *v.* Erwin, Brayt. 218; 2 Sellon's Practice, 198; Foster on Scire Facias, 19; Dougherty's Estate, 9 Watts & S. 189; 42 Am. Dec. 396; Perkins *v.* Hume, 10 Tex. 50; State *v.* Brown, 41 Me. 535; State *v.* Kinne, 39 N. H. 129; Gibson *v.* Davis, 22 Vt. 374.

[2] Bingham on Judgments and Executions, 123, 124.

[3] Bouv. Dict., tit. Scire Facias, 5; Hicks *v.* State, 3 Pike, 313; Blake *v.* Dodemead, 2 Strange, 776; Ogden *v.* Smith, 14 Ala. 428; Jackson *v.* Tanner, 18 Wend. 526.

[4] Brown *v.* Harley, 2 Fla. 164; 2 Sellon's Practice, 188.

action.[1] But the object sought and the result accomplished by a *scire facias* to revive a judgment both show, beyond all doubt, that it is not a new action, but merely a continuation of an old one.[2] No cause of action beyond the old judgment can be asserted. No grounds of defense anterior to the old judgment can be brought forward. No relief beyond that embraced in the old judgment can be obtained; and finally, the judgment entered upon the *scire facias* is simply "that the plaintiff have execution for the judgment mentioned in the said *scire facias*, and his costs."[3] In Pennsylvania, the practice in *scire facias*, and the judgment therein, are different from what they are under common-law forms of procedure, and accomplish results very similar to those brought about by an action on a judgment.[4]

§ 82. **In What Actions may be Sued out.** — By the common law, a plaintiff who failed to take out execution in a personal action within a year and a day had

[1] Fenner *v.* Evans, 1 Term Rep. 267; Winter *v.* Kretchman, 2 Term Rep. 46; Farrell *v.* Gleeson, 11 Cl. & F. 702; Bilbo *v.* Allen, 4 Heisk. 31; Swancy *v.* Scott, 9 Humph. 340; State Bank *v.* Vance, 9 Yerg. 471; Howard *v.* Randall, 58 Vt. 564.

[2] Dickey *v.* Craig, 5 Paige, 283; Dickinson *v.* Allison, 10 Ga. 557; Reynolds *v.* Rogers, 5 Ohio, 169; Potter *v.* Titcomb, 13 Me. 36; Treasurers *v.* Foster, 7 Vt. 52; Wolf *v.* Pounsford, 4 Ham. 397; Comstock *v.* Holbrook, 16 Gray, 111; Ingram *v.* Belk, 2 Strob. 207; Wright *v.* Nutt, 1 Term Rep. 388; Phillips *v.* Brown, 6 Term Rep. 283; Denegre *v.* Haun, 13 Iowa, 240; 81 Am. Dec. 480; Fitzhugh *v.* Blake, 2 Cranch C. C. 37; Hopkins *v.* Howard, 12 Tex. 7; Foster on Scire Facias, 11, 18; Cocks *v.* Brewer, 11 Mees. & W. 56; 2 Dowl., N. S., 759; Adams *v.* Rowe, 11 Me. 89; 25 Am. Dec. 266; Carter *v.* Carringer, 3 Yerg. 411; 24 Am. Dec. 585.

[3] Vredenberg *v.* Snyder, 6 Iowa, 39; Woolston *v.* Gale, 4 Halst. 32; Camp *v.* Gainer, 8 Tex. 372; Tindall *v.* Carson, 1 Har. & J. 94; Murray *v.* Baker, 5 B. Mon. 172; Walton *v.* Vanderhoof, Penn. 73; Hanly *v.* Adams, 15 Ark. 232.

[4] Custer *v.* Detterer, 3 Watts & S. 28; Collingwood *v.* Carson, 2 Watts & S. 220; Shaefer *v.* Child, 7 Watts, 84; Maus *v.* Maus, 5 Watts, 315; Fries *v.* Watson, 5 Serg. & R. 220.

no means of obtaining execution upon *that judgment.* The right to execution, when once lost through his delay, could not be restored. His only remedy was to commence an action on his judgment, and thereby procure a new judgment. The necessity of bringing a new action was obviated by the statute Westminister 2, c. 45, by which a *scire facias* was given in all personal actions.[1] Independently of statute, the right to a *scire facias* to obtain execution of a judgment in a real action was accorded by the common law. And this remark is equally true of actions of ejectment and actions of a mixed nature, in all of which *scire facias* was authorized and required to obtain execution after a year and a day.[2] It is said that there are some actions in which execution may be taken out after a year and a day without a *scire facias.* "It is well settled that it does not apply to judgments entered by confession under a warrant of attorney, but only to *actions*, and judgment thereon by default, confession, or on demurrer, under the statute of 8 and 9 William III, c. 11, sec. 8."[3] In Kentucky, it has been held that where a decree is for the payment of a sum certain, and may therefore be enforced by execution, it may be revived by *scire facias.*[4] But in other states the opinion prevails that as a *scire facias* is a purely legal proceeding, it cannot be employed in a case in

[1] This statute is in force in Florida. Union Bank *v.* Powell, 3 Fla. 175; 52 Am. Dec. 367. By the code of Georgia, a *scire facias* may be issued by the clerk of the court in vacation, on the oral demand of plaintiff. Hill *v.* Neal, 52 Ga. 92.

[2] 2 Sellon's Practice, 189; Hess *v.* Sims, 1 Yerg. 143; Withers *v.* Harris, 2 Ld. Raym. 806; 1 Salk. 258; 7 Mod. 64; Proprietors *v.* Davis, 1 Greenl. 369; Proctor *v.* Johnson, 2 Salk. 600; Foster on Scire Facias 2–6.

[3] Jones *v.* Dilworth, 63 Pa. St. 447; Longstreth *v.* Gray, 1 Watts, 60; Skidmore *v.* Bradford, 4 Pa. St. 296.

[4] Logan *v.* Cloyd, 1 A. K. Marsh. 201.

equity, unless authorized by statute,[1] nor to revive a decree of a probate court.[2] In suits for divorce, the wife is often awarded alimony not payable in one gross sum; but at stated and frequently recurring periods, and the question has arisen whether the payment of such sums may be enforced by *scire facias* as well as by attachment for contempt. In such a case, it seems clear that execution cannot issue as a matter of course, for it may be that some contingency has arisen under which the wife has no longer any right to exact alimony, or it may have been paid as directed in the decree. Some notice ought to be given the party claimed to be in default before any writ is issued against his person or property. The proceeding by *scire facias* is well adapted to giving the requisite notice, and there seems to be no doubt that it is an appropriate and perhaps the exclusive proceeding in such cases.[3] This remark is also true with respect to judgments at law, by which sums of money are recovered payable in installments.[4] It is, however, in all cases where resort is had to this remedy, necessary to show that there is a judgment or order establishing the plaintiff's right to a fixed definite sum of money, the amount of which can be ascertained by inspecting the record and making the computations justified thereby. If parol or other evidence not found in the record must first be heard to enable the court to determine the amount of plaintiff's recovery, the remedy by *scire facias* cannot be sustained.[5]

[1] Curtis *v.* Haun, 14 Ohio, 185; Jeffreys *v.* Yarborough, 1 Dev. Eq. 506.
[2] Kirby *v.* Anders, 26 Ala. 466; Hurst *v.* Williamson, 42 Ala. 296.
[3] Morton *v.* Morton, 4 Cush. 518.
[4] Collins *v.* Collins, 2 Burr. 820; Willoughby *v.* Swinton, 6 East, 550.
[5] Chesnut *v.* Chesnut, 77 Ill. 346.

§ 83. **When Necessary.**—We have already shown that *scire facias* issued in three cases: 1. To revive an ordinary judgment between the parties; 2. To obtain execution where a new party was to be charged or benefited; and 3. To obtain execution on a contingent judgment upon the happening of the contingency. In this chapter we shall treat only of the first and second classes of cases. In the chapters on issuing original and *alias* writs, we have already considered in what instances it is necessary to sue out a *scire facias* between the original parties to the judgment; and have found that, as to original writs, the *scire facias* was necessary after a lapse of a year and a day, except where the delay had been occasioned by the defendant;[1] while if the original issued within a year and a day, and was returned, the right to issue *alias* writs could be continued to any distance of time during the life of the judgment.[2] Within a year and a day, it often became necessary to obtain execution by *scire facias*, even as between the original parties. The judgment might be satisfied through fraud or mistake, or by a sale to plaintiff of property to which defendant had no title. In these and other cases, where the plaintiff's right to execution *seemed* to be extinguished, but in which he had, in fact, obtained no satisfaction,

[1] See §§ 27, 28; also 2 Sellon's Practice, 189; Foster on Scire Facias, 8–10, 66–97; Tidd's Pr. 1104.

[2] See § 51; also 2 Sellon's Practice, 189; Tidd's Pr. 1104; Reed *v.* Williams, 3 A. K. Marsh. 521; Dodge *v.* Casey, 1 Miles, 13; Clemens *v.* Brown, 9 Mo. 718; Blayer *v.* Baldwin, 2 Wils. 83; Seymour *v.* Greenvill, Carth. 283; Thorp *v.* Fowler, 5 Cow. 446; Downsman *v.* Potter, 1 Mo. 518; Craig *v.* Johnson, Hardin, 520; Cook *v.* Batthurst, 2 Show. 235; Aires *v.* Hardress, 1 Strange, 100; Scull *v.* Godbolt, 4 Ala. 326; Bank of Mississippi *v.* Catlett, 5 How. (Miss.) 175; Lindell *v.* Benton, 6 Mo. 361; Jewett *v.* Hoogland, 30 Ala. 716; Abbey *v.* Comm. Bank, 31 Miss. 434; Foster on Scire Facias, 84; Messick *v.* Russel, 3 Harr. 13; Jordan *v.* Petty, 5 Fla. 326; Bracken *v.* Wood, 12 Ark. 605; Kellogg *v.* Buckler, 17 Ga. 187; Strawbridge *v.* Mann, 17 Ga. 454.

or but a partial satisfaction, he could, by *scire facias*, bring the defendant before the court, vacate the entry upon the record, or make it conform to the facts, and obtain execution.[1] In Texas, a *scire facias* may become necessary, or at least advisable, before the judgment has become so dormant that execution cannot issue thereon. By the statute of that state, an execution may issue at any time within ten years after the issuing of the last preceding execution; but the lien of the judgment becomes inoperative unless execution issues "within one year from the first day when it might issue." The lien after becoming inoperative may be revived by *scire facias*, though the judgment is not dormant in the sense that no execution can issue upon it.[2]

§ 84. When the Parties have been Changed without Death of Either. —The changes in the parties to a judgment which, at the common law, rendered a *scire facias* essential, usually occurred through the death either of a plaintiff or of a defendant, and sometimes, but more rarely, by the introduction of a new party by other means than by the death of either of the original parties. The latter class of cases was created chiefly, if not exclusively, by either marriage or bankruptcy. If a *feme sole* recovered judgment, "and she, before execution taken out, marries, the husband and wife must sue out a *scire facias* and get judgment thereon *quod habeant executionem;* and if, after such judgment, but before execution, the wife dies, the husband alone may have a *scire facias* and go on to execution."[3] By the

[1] See §§ 53, 54; also Arnold *v.* Fuller, 1 Ham. 458; Steward *v.* Allen, 5 Greenl. 103; Wilson *v.* Green, 19 Pick. 433; Foster on Scire Facias, 47–57; Dewing *v.* Durant, 10 Gray, 29; Keith *v.* Proctor, 8 Baxt. 189.

[2] Masterson *v.* Cundiff, 58 Tex. 472.

[3] 2 Sellon's Practice 194; Bingham on Judgments and Executions, 138; Johnson *v.* Parmlee, 17 Johns. 271; Woodyer *v.* Freshman, 1 Salk. 116.

scire facias the judgment becomes the property of the husband. "So, *vice versa*, if judgment be recovered against a *feme sole*, and she marries, a *scire facias* must be sued out against the husband and wife, and judgment had against them; and if the wife then dies, a new *scire facias* may issue against the husband only, and he will be chargeable, though he was not liable upon the first judgment."[1] "In cases of bankruptcy, a *scire facias* is necessary before proceeding to execution, inasmuch as a new party (the assignees) are benefited by the execution, and ought therefore to show that they have due authority to assume that benefit."[2]

§ 85. **Change in the Parties by Death.** — Whether the death of a plaintiff or of a defendant renders a *scire facias* necessary is to be determined by ascertaining whether, through such death, a new party is charged or benefited by the judgment. Whenever a sole plaintiff or a sole defendant dies, it is obvious that the judgment cannot be enforced without affecting some new party. Here, then, it is clear that a *scire facias* is necessary. Upon the death of one of several co-plaintiffs or co-defendants in a personal action, the doctrine of survivorship applies. The judgment, on the death of one of the plaintiffs, may be executed for the benefit of the survivors, in which case, as no new party is benefited, no *scire facias* need be prosecuted. On the death of one of the defendants in a personal action, satisfaction may be sought of the survivors; in which case a revivor would be useless. If satisfaction be sought from the property of the deceased defendant, a new party is

[1] 2 Sellon's Practice, 194; Miles's Case, 1 Mod. 179; Obrian *v.* Ramm, Carth. 30; 3 Mod. 186.

[2] Bingham on Judgments and Executions, 141; 2 Sellon's Practice, 195.

necessarily interested, and must first be proceeded against by *scire facias*. But in all actions pertaining to the possession or title of real estate, the death of one of several plaintiffs, or of one of several defendants, introduces some new party in interest, and renders a *scire facias* indispensable.[1] With respect to the persons who must be proceeded against by *scire facias*, after the death of a defendant, the law must be consulted to ascertain whose interests may be affected by the execution. If the law is such that the property sought to be reached descends to the heirs alone, the personal representatives need not be made parties; and if, on the other hand, it descends to the personal representatives alone, the heirs need not be made parties. The question has arisen whether on the death of one of several defendants, against whom judgment has been rendered on a joint contract, any *scire facias* can issue against the representatives of the decedent. Against the issuing of such writ it has been urged that on the death of one of several parties to a joint contract his executor or administrator is discharged from all liability, and only the survivors remain answerable to proceedings for its enforcement;[2] on the other hand, it has been held that, in such a case, the plaintiff might have a *scire facias* framed on the special matter, and proceed against the survivor and the personal representatives of the deceased, if personalty were sought to be seized, or against the survivor and the heirs and terre-tenants of the decedent,

[1] Foster on Scire Facias, 175–177; Withers *v.* Harris, 7 Mod. 68; Sir William Herbert's Case, 3 Coke, 14; Lampton *v.* Collingwood, 4 Mod. 315; Wright *v.* Maddock, 8 Q. B. 122; Dibble *v.* Taylor, 2 Speers, 308; 42 Am. Dec. 368.

[2] Stoner *v.* Stroman, 9 Watts & S. 85; Howe *v.* Gilbert, 2 Bail. 306.

if real estate was to be subjected to a judgment lien.[1] In Pennsylvania, a *scire facias* may not be prosecuted against a surviving defendant and the representatives of a decedant, to charge the personal estate of the latter,[2] though where a judgment is a lien, it may by *scire facias* be enforced against the real estate of the survivor upon which such lien had attached.[3]

§ 86. **Parties Plaintiff.** — As the *scire facias* must pursue the judgment, it follows that all the plaintiffs, while all are living, must join in the writ. Except in the case of the death, marriage, or bankruptcy of the plaintiff, a *scire facias* must, by the common law, be prosecuted in the name of the plaintiff;[4] but by statute this right has sometimes been given to the assignee, or equitable owner of the judgment.[5] When a sole plaintiff dies, the *scire facias* must be prosecuted by the person who represents the deceased. If the judgment be in a personal action, the *scire facias* should be by the executor or administrator; if in a real action, or an action for the possession of realty, it should be by the heir. "In a mixed action, it is said, if the lands to be recovered be fee-simple, the heir and the executor shall join in the *scire facias,* and the heir have execution as to the lands, and the executor execution as to the damages."[6]

[1] Union Bank *v.* Heirs of Powell, 3 Fla. 175; 32 Am. Dec. 367; Henderson *v.* Van Hook, 24 Tex. 358; Austin *v.* Reynolds, 13 Tex. 544; Underhill *v.* Devereaux, 2 Saund. 72; note to Tretheny *v.* Ackland, 2 Saund. 67; Huey *v.* Redden, 3 Dana, 458.

[2] Stoner *v.* Stroman, 9 Watts & S. 85.

[3] Commonwealth *v.* Mateer, 16 Serg. & R. 416.

[4] McKinney *v.* Mehaffey, 7 Watts & S. 276.

[5] Murphy *v.* Cochran, 1 Hill, 339; Clark *v.* Digges, 5 Gill, 118.

[6] Foster on Scire Facias, 189.

§ 87. **Parties Defendant.** — In determining who must be parties defendant in a writ of *scire facias*, we may consider the question, first, with reference to the original defendants in the suit; and second, with reference to new persons who are to be affected by the proposed revivor. A *scire facias* should conform to the judgment, and must therefore be joint when the judgment is joint. Where there is a judgment against two or more defendants, it may be revived against one alone if he consents thereto; for as he is the sole person injured by such revivor, he is the sole person who can object, and even his objection should be interposed before the judgment on the *scire facias* is entered against him.[1] In an early English case, one of two judgment debtors having died, a *scire facias* was prosecuted against the survivor alone, correctly describing the original judgment, and suggesting the death of the other defendant. This *scire facias* was sustained, because it was said that the court could not know but that the plaintiff intended to take out a *fieri facias* and levy it on the personal estate of the survivor, which he could lawfully do; but, at the same time, the court stated that the plaintiff could not be allowed to take out and execute an *elegit* on such revived judgment.[2] But at the present day, the rule seems to almost universally prevail, that where there is a joint judgment against two or more, there must, unless the non-joinder is waived, be a joint *scire facias*. The judgment must be revived against all the defendants, when all are still living; and when one has died, his representatives must be made parties in his stead. The plaintiff can neither proceed against the

[1] Edwards's Appeal, 66 Pa. St. 89.
[2] Edsar *v.* Smart, T. Raym. 56.

survivors without joining the representatives of the deceased, nor against the representatives of the deceased without joining the survivors.[1] And it is said that a discontinuance as to any of the necessary parties to a *scire facias* operates as a discontinuance as to all.[2] Strangers to the original judgment may be affected by its revivor against the original defendant; and this may happen whenever he sells or encumbers the lands upon which the judgment is a lien. Whether those who have thus acquired interests under the defendant must be joined with him in the *scire facias* is a disputed question, upon which the authorities are somewhat meager. In Maryland it seems that, although the defendant be living, the judgment cannot be revived against him so as to affect his grantees unless they are

[1] Foster on Scire Facias, 20; Swainsbury *v.* Pringle, 10 Barn. & C. 751; Grenell *v.* Sharp, 4 Whart. 344; McAfee *v.* Patterson, 2 Smedes & M. 172; Fowler *v.* Rickerby, 9 Dowl. P. C. 682; Murray *v.* Baker, 5 B. Mon. 172; Gray *v.* McDowell, 5 T. B. Mon. 501; Holder *v.* Commonwealth, 3 A. K. Marsh. 407; Panton *v.* Hall, Salk. 598; Rex *v.* Chapman, 3 Anstr. 811; Henderson *v.* Vanhook, 24 Tex. 358; Austin *v.* Reynolds, 13 Tex. 544; Mitchell *v.* Smith, 1 Litt. 243; Coleman *v.* Edwards, 2 Bibb, 595; Williams *v.* Fowler, 3 T. B. Mon. 316; Bolinger *v.* Fowler, 14 Ark. 27; Greer *v.* State Bank, 5 Eng. 456; 2 Saund. 51, note 4, to case of Tretheny *v.* Ackland; but in Alabama plaintiff may discontinue as against either defendant; Hanson *v.* Jacks, 22 Ala. 549; and in Arkansas and Iowa may proceed against a survivor without joining the representatives of a deceased defendant. Vredenberg *v.* Snyder, 6 Iowa, 39; Finn *v.* Crabtree, 7 Eng. 597. But when a *scire facias* recites the judgment properly, and calls on all the defendants to show cause, and when part are summoned it appears that the others are insolvent, or dead, or out of the state, or have nothing, it has been held that judgment might be entered against those summoned; and "that the award of execution is not necessarily to pursue the form of the *scire facias*, but may be accommodated to what shall be judicially ascertained to be the law fit for enforcing the judgment; and also, that if it appear of record that one of the defendants to the judgment cannot be summoned and need not be summoned, for that he has not the ability to be contributory to the payment of the judgment, the execution for the whole may rightfully issue against the other." Binford *v.* Alston, 4 Dev. 355.

[2] Morton's Ex'rs *v.* Croghan's Terre-tenants, 20 Johns. 106; McAfee *v.* Patterson, 2 Smedes & M. 172.

made parties.[1] But in Pennsylvania and in New York an opposite view has been taken, one showing that it is only "in the case of the death of the original defendant that the ter-tenants are to be made parties, and not where the original defendant is living."[2] This view, we think, is sustained by the books of practice. In none of these works do we find any reference to any case in which the successors in interest of a living defendant need be summoned as terre-tenants. On the contrary, it seems always to be assumed that the only instances in which it can be necessary to summon others than the original defendants are where new persons have become interested, either through the death, marriage, or bankruptcy of the defendant.

Upon the death of a defendant, leaving a judgment which is not a lien on any real estate, no one but his personal representative need be a party to the *scire facias*. But where the judgment is for the possession, or affects the title, or is a lien on real estate, the rule is different; and it becomes necessary to warn all persons whose interests in the real estate are liable to be prejudiced by a revivor. In New York and Mississippi, it is said to be improper to join the heirs with the personal representatives of the deceased.[3] But in other states the heirs, personal representatives, and terre-tenants of the deceased may all be joined in one *scire facias*.[4] In ejectment, where the judgment is for

[1] Doub *v.* Barnes, 4 Gill, 11, explaining Murphy *v.* Cord, 12 Gill & J. 182. See also Lusk *v.* Davidson, 3 Pen. & W. 229.

[2] Young *v.* Taylor, 2 Binn. 228; Jackson *v.* Shaffer, 11 Johns. 513; Righter *v.* Rittenhouse, 3 Rawle, 278.

[3] Lee *v.* McClosky, 44 How. Pr. 60; Barnes *v.* McLemore, 12 Smedes & M. 316.

[4] Calloway *v.* Enbank, 4 J. J. Marsh. 286; Reynolds *v.* Henderson, 2 Gilm. 110; Rowland *v.* Harbaugh, 5 Watts, 365; Graves *v.* Skeels, 6 Ind. 107.

the possession of lands and for damages, both the heirs and representatives of the deceased are necessary parties to its revivor;[1] but where the judgment is for possession alone, the personal representatives need not be warned, if under the law prevailing in the jurisdiction where the lands lie, such representatives are not entitled to be in possession thereof.[2] If the judgment be for money, it is primarily chargeable against the executor, and no revivor ought to be entered against the heirs until after a return of *nihil* as to the executor.[3] Persons entering an tenants of the defendant in ejectment after the entry of the judgment are said to be unnecessary parties to a *scire facias*, because their holding is in subordination to the defendant, and they may properly be dispossessed under a *habere facias* against him.[4] In Alabama, if there are two executors of the deceased defendant, one of whom is beyond the jurisdiction of the court, he may be omitted from the *scire facias*.[5] Where a defendant is imprisoned for life upon a conviction for felony, and is by the law civilly dead, he cannot be a party to a *scire facias*. It ought to be directed to his heirs or representatives; and if directed to and served upon him personally, is entirely inoperative.[6] None but those who are made parties to the *scire facias* are affected by the judgment of revivor.[7] One about to prosecute a *scire facias* to revive a judg-

[1] Mitchell *v.* Smith, 1 Litt. 243.

[2] Thompson *v.* Dougherty, 3 J. J. Marsh. 564; Waldon *v.* Craig, 14 Pet. 147.

[3] Panton *v.* Hall, Carth. 107; Alston *v.* Munford, 1 Brock. 266; Brown *v.* Webb, 1 Watts, 411; Bingham on Judgments and Executions, 131; Roland *v.* Harbaugh, 5 Watts, 365.

[4] Lunsford *v.* Turner, 5 J. J. Marsh. 104; Von Puhl *v.* Rucker, 6 Iowa, 187.

[5] Hanson *v.* Jacks, 22 Ala. 549.

[6] Troup *v.* Wood, 4 Johns. Ch. 228.

[7] Campbell *v.* Rawdon, 19 Barb. 494.

ment lien against the successors in interest of a deceased defendant, in determining who are to be made parties, must be governed by the same principles which would be applicable to the foreclosure of a mortgage or other lien. He must bring in all persons holding title under the defendant, but subordinate to the lien; but he need not and cannot proceed against persons whose claims are adverse to the defendant's title, or paramount to the lien.[1] "It is the usual way to join the heir and terre-tenants in the writ of *scire facias;* but it is said that if it be returned that the heir has no lands, the writ may proceed against the tenants of the lands without him, and it may be against the tenants of the lands generally, without naming them, or against them by name, but the former is the usual form; for if the plaintiff undertakes to name them, he must name them all, and if he do not, those who are named may plead in abatement. It seems, however, to be the better opinion that the terre-tenants alone are not to be charged until the heir be summoned, or it be returned that there is no heir, or that the heir hath not any lands to be charged.[2]

§ 88. **Form of the Writ.**—The writ of *scire facias* answered the double purpose of a writ and of a declaration.[3] Its form, therefore, necessarily varied to correspond to the various contingencies in which it might issue. It was directed to the sheriff, and recited: 1.

[1] Morton *v.* Croghan, 20 Johns. 106; Lusk *v.* Davidson, 3 Pen. & W. 229; Polk *v.* Pendleton, 31 Md. 118; Janett *v.* Tomlinson, 3 Watts & S. 114.

[2] Foster on Scire Facias, 100.

[3] Foster on Scire Facias, 349; Blake *v.* Dodemead, 2 Strange, 775; Bank of Scotland *v.* Fenwick, 1 Ex. 796; Nunn *v.* Claxton, 3 Ex. 715; State *v.* Robinson, 8 Yerg. 370; Farris *v.* People, 58 Ill. 26; Calhoun *v.* Adams, 43 Ark. 238; Lasselle *v.* Godfrey, 1 Blackf. 298; McNeigh *v.* Old Dom. Bank, 76 Va. 267.

The recovery of a judgment, showing the court, amount, and parties; 2. The change, if any, in the parties to the judgment, stating what new parties had become interested; 3. That, notwithstanding the judgment, execution still remains to be done; 4. That plaintiff demands that he be provided with a proper remedy; 5. It commanded the officer to make known to the defendant, or other person designated in the writ, that he should be before the court, at a date specified, to show cause why plaintiff ought not to have execution of the judgment. No petition or complaint is necessary to obtain a *scire facias;* or perhaps it would be more correct to say that the *scire facias* is a complaint as well as a writ. It is therefore essential that it state all the facts necessary to authorize the relief sought,[1] and if it fails to do this, it may be demurred to,[2] or in some states may be quashed upon motion.[3] The failure to demur or to move to quash only admits the facts stated, and if they are not such as will warrant the judgment given, it may be reversed on appeal or by writ of error, as may other judgments by default based upon complaints which are radically defective.[4] With respect to designating heirs and terre-tenants, it has been said that they ought to be named in the writ,[5] or at least that it is preferable that they be so named. But there seems to be no doubt that this is unnecessary.[6] Instead of specifically naming the heirs and terre-ten-

[1] Huey *v.* Redden, 3 Dana, 488; McVickar *v.* Ludlow, 2 Ohio, 246; Hicks *v.* State, 3 Ark. 313.

[2] Prather *v.* Manro, 11 Gill, 231; Graham *v.* Smith, 1 Blackf. 413.

[3] Evans *v.* Freeland, 3 Munf. 119.

[4] Waller *v.* Huff, 9 Tex. 530; Wray *v.* Williams, 2 Yerg. 301.

[5] Chahoon *v.* Hollenbach, 16 Serg. & R. 425; 16 Am. Dec. 587.

[6] Seawell *v.* Williams, 5 Hayw. (N. C.) 280; Williams *v.* Fowler, 3 T. B. Mon. 316; Hughes *v.* Wilkinson, 28 Miss. 600.

ants, the writ may and generally does command the sheriff as follows: "That by honest and lawful men of your bailiwick, you make known to the heirs of the said C D, and also to the tenants of all the lands and tenements in your bailiwick, of which said C D, or any person in trust for him, was or were seised on the —— day of ——, on which day the judgment aforesaid was given, or at any time after.[1] The judgment must be stated in the writ with as much particularity as would be required in a complaint, though we apprehend that neither in a complaint nor in a *scire facias* would an immaterial variance be fatal, if from what is set forth it is clearly apparent what judgment is sought to be revived by the proceeding.[2] If the judgment stated is such that some further action was necessary after its entry to make it final and effective, such additional action should be shown by the writ.[3] If the judgment on which execution is sought is in ejectment, the writ must state the term recovered by such judgment, for otherwise it cannot be known that such term has not expired, and with it the plaintiff's right to execution.[4] If any facts are disclosed by the writ from which the satisfaction of the judgment is inferable, then such probable satisfaction must be negatived. Thus if it appears that a *ca. sa.* has been issued, and the defendant arrested thereon, such facts must be disclosed as would establish plaintiff's right to execution, notwithstanding such taking of the person of the defendant in execution.[5] So

[1] For forms of writs of *scire facias*, see Tidd's Forms, 305–335; Foster on Scire Facias, 379–388; Tillinghast's Forms, 39–58.

[2] Wolf *v.* Pounsford, 4 Ohio, 397; Ward *v.* Prather, 1 J. J. Marsh. 4; Barron *v.* Tait, 19 Ala. 78.

[3] Evans *v.* Freeland, 3 Munf. 119.

[4] Griffith *v.* Wilson, 1 J. J. Marsh. 209.

[5] Dozier *v.* Gore, 1 Litt. 163.

if property has been levied upon and sold, but has been lost to the plaintiff by reason of some paramount title or lien, that fact should be stated.[1]

It ought to appear from the writ that it is necessary to entitle the plaintiff to execution. If he is not entitled to execution because the judgment has become dormant from lapse of time, that fact ought to be suggested. Hence a *scire facias* is defective if it fails to state the date of the judgment, because, in the absence of such statement, it does not appear but that plaintiff may have execution without proceeding by *scire facias*.[2] It is not, however, essential or usual to state that no execution issued within a year and a day. This fact, as well as the fact that the judgment remains in force, seems to be sufficiently suggested by the averment, "that although judgment aforesaid, in form aforesaid, is given, execution nevertheless, for the debt and damages aforesaid, remains to be made to him," the plaintiff.[3] Where an executor or administrator is sought to be brought before the court by *scire facias*, it must show the facts making him answerable to the writ, and hence it must suggest the death of the judgment defendant, and the appointment of such executor or administrator.[4] Where still other facts are required to establish the plaintiff's right to execution, they must be stated. Therefore, a *scire facias* against the administrator of one of several co-defendants is demurrable, unless it shows cause for proceeding against such administrator in the absence of the other defendants.[5] If the object of the

[1] Baxter *v.* Shaw, 28 Vt. 569.
[2] Hough *v.* Norton, 9 Ohio, 45.
[3] Albin *v.* People, 46 Ill. 372; Weaver *v.* Reese, 6 Ohio, 418.
[4] Walker *v.* Hood, 5 Blackf. 266.
[5] Graham *v.* Smith, 1 Blackf. 414.

proceeding is to make an administrator answerable personally, the *scire facias* must aver that he has converted or wasted the goods of his intestate which came to his hands "to be administered upon, to the value of said debt and costs, with intent that the execution aforesaid should not be made," and must notify him to appear to show cause why plaintiff should not have "execution against him of the debt, etc., to be levied out of his own proper goods, chattels, lands, and tenements."[1] When heirs are proceeded against to subject to execution lands descended to them, it appears to be unnecessary to describe such lands in the *scire facias*,[2] though the practice of so describing them has been commended as the better one.[3] Regarded as a pleading, the writ of *scire facias* as sanctioned by the approved precedents is essentially defective, in not designating the heirs or terre-tenants who are in effect made parties defendant, and in not describing the lands against which the execution, when issued, will operate. This defect is generally supplied by the return to the writ. From the writ and return together, it must always appear who were proceeded against as heirs and terre-tenants, and with respect to what lands they were summoned to appear. The writ need not negative the various matters which, if existing, would constitute a defense, because it is the business of the defendant to plead these if he wishes to make them available.[4] A *scire facias*

[1] Wray *v.* Williams, 2 Yerg. 301. For *scire facias* to enforce payment of sum awarded as owelty in partition, see Davis *v.* Norris, 8 Pa. St. 122.

[2] Commercial Bank *v.* Kendall, 13 Smedes & M. 278; Union Bank *v.* Meigs, 5 Ham. 312. But in Tennessee, before a *scire facias* can issue against heirs, it must be suggested to the court that certain real estate has descended to them, etc. Hillman *v.* Hickerson, 3 Head, 573; Frierson *v.* Harris, 5 Cold. 146.

[3] Union Bank *v.* Meigs, 5 Ohio, 312.

[4] Rogers *v.* Denham, 2 Gratt. 200.

seems to be subject to amendment to the same extent as an original execution.[1]

§ 89. **Serving the Writ.**—"Although the intent of the *scire facias* is to give the party against whom execution is about to issue notice or warning thereof, yet by the general practice it is wholly defeated, for the defendant may be summoned or not as the party thinks fit; and indeed, the usual way is to revive the judgment without giving the party any notice."[2] "On the return day of the writ the sheriff either returns '*scire feci*,' that is, that he has warned the party, or '*nihil*,' that is, that the party has nothing by which he can warn him. Where the sheriff returns '*nihil*,' the party must sue out a second or *alias* writ of *scire facias*, and if the sheriff returns *nihil* also to the second writ, and the party do not appear, there shall be judgment against him."[3] In other words, two returns *nihil* are equivalent to one return of *scire feci*,[4] with this exception, that when a

[1] Thompson *v.* Dougherty, 3 J. J. Marsh. 564; Arrison *v.* Commonwealth, 1 Watts, 374; Rainey *v.* Commonwealth, 10 Watts, 343; Holland *v.* Phillips, 2 Perry & D. 336; 10 Ad. & E. 149; Foster on Scire Facias, 375; Buxom *v.* Hoskins, 6 Mod. 264; Rex *v.* Ayre, 1 Strange, 43; Rex *v.* Aires, 10 Mod. 259, note; Thorpe *v.* Hook, 1 Dowl. P. C. 501; Klos *v.* Dodd, 4 Dowl. P. C. 67; Baker *v.* Neaver, 1 Cromp. & M. 112; 3 Tyrw. 233; Webb *v.* Taylor, 1 Dowl. & L. 676; Anthony *v.* Humphries, 4 Eng. 176; Bryant *v.* Smith, 7 Cold. 113.

[2] 2 Sellon's Practice, 197; Bingham on Judgments and Executions, 126.

[3] Bingham on Judgments and Executions, 124.

[4] Cox *v.* McFerron, Breese, 10; Kearns *v.* State, 5 Blackf. 334; Barrow *v.* Bailey, 5 Fla. 9; Barratt *v.* Cleydon, Dyer, 168; Ratcliffe's Case, Dyer, 172; Cumming *v.* Eden, 1 Cow. 70; 2 Wm. Saund. 72 *s*, note to Underhill *v.* Devereaux; Chambers *v.* Carson, 2 Whart. 9; Warden *v.* Tainter, 4 Watts, 274; Compher *v.* Anawalt, 2 Watts, 490; Bromley *v.* Littleton, Yelv. 113; Barcock *v.* Thompson, Styles, 281, 288; Sans *v.* People, 3 Gilm. 327; Andrews *v.* Harper, 8 Mod. 227; Randal *v.* Wale, Cro. Jac. 59; Besimer *v.* People, 15 Ill. 440; Dunlevy *v.* Ross, Wright, 287; Woodford *v.* Bromfield, 1 Murph. 187; Choat *v.* People, 19 Ill. 63; Kearns *v.* State, 3 Blackf. 334; Cox *v.* McFerron, Breese, 10. But under more recent rules and decisions, a judgment will not be entered on two *nihils* unless efforts have been made to summon the defendants. Sabine *v.* Field, 1 Cromp. & M. 466; Foster on Scire Facias, 355.

judgment is revived without any actual notice, the defendants may, either on motion or by *audita querela*, be relieved if the revivor was improper.[1] While this constructive service is permitted, yet with respect to what it does require the law seems to be quite exacting. If the writ is served by a sheriff to whom it was not directed,[2] or the service is by giving a copy to a member of the defendant's family, the service is a nullity.[3] So if there are two or more persons to be proceeded against, the service of the writ upon one of them will not justify any judgment against the others.[4] But the constructive service of *scire facias* by two returns of *nihil*, or not found, operates against those defendants only whose names are stated in the writ. To a *scire facias* against the heirs and terre-tenants, "the sheriff returns either that there are none, or that he has warned them to appear; in the latter case, if the writ be general against the terre-tenants, without naming them, the sheriff should return that he has warned certain persons, describing them, being tenants of *all* the lands in his bailiwick, or certain persons tenants of certain lands, and that there are no others."[5] The methods of warning the defendants in *scire facias* have been modified by statutes in many of the states where the writ is still employed.[6] Unless the service of the writ is made in

[1] Anonymous, Salk. 93; Ludlow *v.* Lennard, 2 Ld. Raym. 1295; Wharton *v.* Richardson, 2 Strange, 1075; Randal *v.* Wale, Cro. Jac. 59; Wicket *v.* Cremer, 1 Ld. Raym. 439; Salk. 264; 12 Mod. 240; Holt *v.* Frank, 1 Maule & S. 199; Foster on Scire Facias, 357; Barrow *v.* Bailey, 5 Fla. 9.

[2] Kennedy *v.* People, 15 Ill. 418.

[3] McCombs *v.* Feeter, 1 Wend. 19.

[4] Breckenridge *v.* Miller, 1 How. (Miss.) 273.

[5] 2 Wm. Saund. 72 r; Cumming *v.* Eden, 1 Cow. 70.

[6] Calloway *v.* Eubank, 4 J. J. Marsh. 280; Combs *v.* Young, 4 Yerg. 218; 26 Am. Dec. 225; Crutchfield *v.* Stewart, 10 Yerg. 237; Rice *v.* Talmadge, 20 Vt. 378; Comstock *v.* Holbrook, 16 Gray, 111.

some of the methods authorized by law, the judgment of revivor is inoperative.[1]

§ 90. **Proceedings on Return of the Writ — Defenses Which may be Made.** — If the party summoned makes no appearance, judgment will be entered against him. "So where a *scire facias* is sued out on a joint judgment against two, if it be returned that one was summoned, and he makes default, and that the other has nothing, the plaintiff may have execution for the whole against him who was summoned and made default. So if it be returned that one of them is dead, and the other was summoned, and he makes default."[2] If the defendant appears, the plaintiff may declare against him. The so-called declaration is, however, nothing more than a recital setting forth a copy of the writ, and praying for execution thereon.[3] The defendant may plead either in bar or in abatement.[4] "Thus to a *scire facias* on a judgment, the defendant may plead *nul tiel record*, or payment, or a release, or that the debt and damages were levied *fieri facias*, or that his lands were extended for them upon an *elegit*, or his person taken in execution on a *capias ad satisfaciendum*. So a terre-tenant may plead in bar to a *scire facias* anything which shows his lands not liable to execution, or non-joinder of other terre-tenants. A defendant may plead to a *scire facias* anything which has been done under the original judgment which exonerates him from liability."[5] With respect to the judgment

[1] Simmons *v.* Wood, 6 Yerg. 518; People *v.* The Judges, 1 Wend. 19.

[2] Bingham on Judgments and Executions, 125.

[3] See Tidd's Forms, adapted to state of New York, 342; People *v.* Society for Propagating the Gospel, 1 Paine, 652.

[4] Alice *v.* Gale, 10 Mod. 112; Rex *v.* Hare, 1 Strange, 146.

[5] Foster on Scire Facias, 353; Phillipson *v.* Tempest, 1 Dowl. & L. 209; Giles *v.* Hutt, 5 Dowl. & L. 387; 1 Ex. 704; Mounteney *v.* Andrews, Cliff.

itself, manifestly the same defenses are admissible as in an action upon a judgment, and none other. If the judgment was by confession, it may be shown to have been entered by a clerk who was not authorized to receive or enter it.[1] Any circumstances may be proved which tend to show that the judgment is void,[2] as that the court never obtained jurisdiction of the person of the defendant.[3] But error or irregularity in the proceedings anterior to the judgment cannot be urged by the defendants on *scire facias*.[4]

"The principles of estoppel, attached to final adjudications, are as operative and conclusive in proceedings in *scire facias* as in any other cases. No defense can be made which existed anterior to the judgment,"[5] nor

675; 4 Leon. 194; Glascock *v.* Morgan, 1 Lev. 92; Scott *v.* Peacock, 1 Salk. 271; Holmes *v.* Newlands, 5 Ball & B. 370; Jefferson *v.* Morton, 2 Wms. Saund. 6; Clerk *v.* Withers, Ld. Raym. 1075. The pendency of a writ of error is said not to bar a *scire facias* to make an executor a party to the judgment. Snook *v.* Mattock, 6 Nev. & M. 783; 5 Ad. & E. 239; 2 Har. & W. 188.

[1] Phelps *v.* Hawkins, 6 Mo. 197.

[2] Ulrich *v.* Voneida, 1 Pa. 245; Griswold *v.* Stewart, 4 Cow. 457.

[3] Clinton Bank *v.* Hart, 19 Ohio St. 372.

[4] Anthony *v.* Humphries, 9 Ark. 176; Barber *v.* Chandler, 17 Pa. St. 48; 55 Am. Dec. 503; Langston *v.* Abbey, 43 Miss. 164; McAfee *v.* Patterson, 2 Smedes & M. 595; Betancourt *v.* Eberlin, 71 Ala. 461.

[5] Freeman on Judgments, sec. 445; Bowen *v.* Bonner, 45 Miss. 10; Allen *v.* Andrews, Cro. Eliz. 283; Cook *v.* Jones, Cowp. 727; Proctor *v.* Johnson, 2 Salk. 600; Camp *v.* Baker, 40 Ga. 148; Koon *v.* Ivey, 8 Rich. 37; McFarland *v.* Irwin, 8 Johns. 77; Davidson *v.* Thornton, 7 Pa. St. 128; Alden *v.* Bogart, 2 Grant Cas. 400; West *v.* Sutton, 1 Salk. 2; Ld. Raym. 853; Bradford *v.* Bradford, 5 Conn. 127; Heller *v.* Jones, 4 Binn. 61; Sigourney *v.* Stockwell, 4 Met. 518; United States *v.* Thompson, Gilp. 614; Hubbard *v.* Manning, Kirby, 256; Cardesa *v.* Humes, 5 Serg. & R. 65; Watkins *v.* State, 7 Miss. 334; Dickson *v.* Wilkinson, 3 How. 57; Miller *v.* Shackelford, 16 Ala. 95; Mathews *v.* Mosby, 13 Smedes & M. 422; Person *v.* Valentine, 13 Smedes & M. 551; Duncan *v.* Hargove, 22 Ala. 150; Smith *v.* Eaton, 36 Me. 298; 58 Am. Dec. 746; Ferebee *v.* Doxey, 6 Ired. 448; Thomas *v.* Williams, 3 Dowl. P. C. 655; Baylis *v.* Hayward, 5 Nev. & M. 613; 4 Ad. & E. 256. One who fails to plead his infancy in the original action cannot plead it against the *scire facias* Kemp *v.* Cook, 6 Md. 305. The same rule applies to a defendant who neglected to plead his discharge in insolvency. Moore *v.* Garretson, 6 Md. 444.

which is so inconsistent with the judgment that the maintenance of the defense implies or establishes the falsity of the facts upon which the judgment rests.[1] The principle of *res judicata* is, however, on *scire facias*, as in other cases, confined to the parties to the suit, and their privies in person or in estate.[2] Of course the defendants may show that the judgment has been satisfied, or that from some cause occurring since the rendition of the judgment the plaintiff is no longer entitled to execution.[3] A terre-tenant cannot successfully defend a *scire facais* on the ground that he purchased the lands sought to be charged without having any actual notice of the judgment.[4] There are cases which declare, in general terms, that terre-tenants and other strangers to the judgment may falsify it for fraud or irregularity in its rendition.[5] But we apprehend that the doctrine of these decisions must be confined to such strangers as were prejudiced by the judgment when it was entered. For if the defendant was properly before the court so as to give it jurisdiction, he could not attack the judgment collaterally for fraud and irregularity, and certainly he could not, after judgment, transmit to others a right which he did not possess, or which he had forfeited through his own want of diligence.[6] But where the original judgment

[1] Smith *v.* Eaton, 36 Me. 298; 58 Am. Dec. 746; Pollard *v.* Eckford, 50 Miss. 631; Dowling *v.* McGregor, 91 Pa. St. 410; May *v.* State Bank, 2 Rob. (Va.) 56; 40 Am. Dec. 726; Koon *v.* Ivey, 8 Rich. 37.

[2] Griswold *v.* Stewart, 4 Cow. 459. In Massachusetts, a judgment by default against a person summoned as a trustee is not final, and he may, on *scire facias*, show that he was not, in fact, chargeable. Brown *v.* Neale, 3 Allen, 74; 80 Am. Dec. 53.

[3] Brown *v.* Morangue, 108 Pa. St. 69; Seymour *v.* Hubert, 83 Pa. St. 346.

[4] Ridge *v.* Prather, 1 Blackf. 401.

[5] Proctor *v.* Johnson, 1 Ld. Raym. 669; 2 Salk. 600; Ulrich *v.* Voneida, 1 Penr. & W. 250; Griswold *v.* Stewart, 4 Cow. 458

[6] Heller *v.* Jones, 4 Binn. 61.

was procured or suffered with the view of prejudicing third persons, they may be allowed to avoid it on *scire facias;*[1] for "whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, he may escape from the injury thus attempted, by showing, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained."[2]

§ 91. **Time in Which the Writ must be Sued out.** — In England, a *scire facias* cannot be sued out to revive a judgment, except within twenty years, unless in the mean time some payment thereon has been made, or some written acknowledgment of the continuing force of the judgment has been given, in which cases the *scire facias* must be sued out within twenty years after the last payment or acknowledgment.[3] If the judgment be less than seven years old, the writ issues of course; but after that period, and before the judgment is ten years old, "a side bar or treasury rule must be obtained. If the judgment be between ten and fifteen years of age, a *scire facias* is not allowed without a motion in term, or a judge's order in vacation. If between fifteen and twenty years old, there must first be a rule to show cause." In the United States, the statutes of limitation applicable to proceedings on *scire facias* prescribe different terms in the different states.[4]

[1] Phillipson *v.* Earl of Egremont, 6 Q. B. 587; 14 L. J. Q. B. 25; Bosanquet *v.* Graham, 6 Q. B. 601, note; Dodgson *v.* Scott, 2 Ex. 457; 6 Dowl. & L. 27; 17 L. J. Ex. 321.

[2] Freeman on Judgments, sec. 336.

[3] Foster on Scire Facias, 14, 29.

[4] Mulliken *v.* Duvall, 7 Gill & J. 355; Clark *v.* Sexton, 23 Wend. 477; Langham *v.* Grigsby, 9 Tex. 493; Furst *v.* Overdeer, 3 Watts & S. 470; Green's Appeal, 6 Watts & S. 327; Code of Ala., sec. 2833; Lansing *v.* Lyons, 9 Johns. 84; Bank of New York *v.* Eden, 17 Johns. 105.

§ 92. **An Irregular or Erroneous Scire Facias**, like an irregular or erroneous execution, is voidable but not void. If the irregularity is not taken advantage of in some appropriate method, the judgment of revivor is valid. It cannot be collaterally assailed, and will support title derived from an execution issued by its authority.[1]

§ 92 a. **The Judgment Rendered upon Scire Facias** must be consonant with the relief sought. This relief is nothing more than that plaintiff be allowed the means necessary to make a pre-existing judgment effectual and productive. No new recovery can be had, and if a judgment is entered up in the nature of an original judgment, or to the effect that plaintiff recover a certain sum of money or a designated parcel of real or personal property, it is void.[2] The "entry should be that the plaintiff have execution for the judgment mentioned in the *scire facias*, and for costs."[3] The effect of a proceeding by *scire facias* in Pennsylvania has been thus described by the supreme court of that state: "A *scire facias* to revive a judgment *post annum et diem* is but a continuation of the original action, and the execution thereon is an execution in the former judgment. The judgment on the *scire facias* is not a new judgment giving vitality only from that time, but it is the revival of the original judgment, giving, or rather continuing, the vitality of the original judgment with all its incidents, from the time of its rendition. This is clear on authority. Thus in Bouvier's Law Dictionary, p. 380,

[1] Jackson *v.* Robins, 16 Johns. 537; Jackson *v.* Delancy, 13 Johns. 537; 7 Am. Dec. 503; Jackson *v.* Bartlett, 8 Johns. 365.

[2] Lavell *v.* McCurdy, 77 Va. 763; Camp *v.* Gainer, 8 Tex. 372; Bullock *v.* Ballew, 9 Tex. 498.

[3] Vredenberg *v.* Snyder, 6 Iowa, 39; Denegre *v.* Haun, 13 Iowa, 240.

he says, citing 1 Term Rep. 388, and 2 Saund. 72, that a *scire facias* is a judicial writ, founded on some record, and requiring defendant to show cause why the plaintiff should not have advantage of such record. When brought to revive a judgment after a year and a day, it is but the continuation of the original action. Thus in 4 Harr. (Del.) 397, and 3 Pet. 300, it is ruled that a *scire facias* to renew a judgment is only a continuation of the former suit, and not an original proceeding. It would be easy to multiply authorities, if a fact so plain and familiar needed their aid. In England the judgment on the *scire facias* is, that the original judgment be revived. Here the amount of the debt is ascertained, and judgment given for the sum due; and this unfortunate departure from precedents has given rise to the erroneous notion in the minds of some members of the profession, that the judgment on the *scire facias* is a new and distinct judgment, and not, as it really is, nothing more than the revival of the original judgment, the sum being ascertained for which execution may issue. If we pay any regard to precedent, the execution ought always to be issued on the original judgment, and not, as is sometimes ignorantly done, on the judgment on the *scire facias*, — an irregularity which ought never to have been tolerated by the courts."[1]

§ 93. **Second Scire Facias.** — If the plaintiff who sues out a *scire facias* to revive a judgment does not proceed upon it within a year and a day, it is a *discontinuance* of it, and the plaintiff must commence by *scire facias de novo*. So if he does not sue out execution on a judgment on *scire facias* within a year, he must revive it again.[2]

[1] Irwin *v.* Nixon's Heirs, 11 Pa. St. 419; 51 Am. Dec. 559.

[2] Vanderheyden *v.* Gardenier, 9 Johns. 79; Foster on Scire Facias, 27.

§ 94. **Form of Execution.** — When the judgment has been revived by *scire facias*, the form of the execution must be changed to correspond to the changed state of the record. It should show the judgment on the *scire facias* as well as the original judgment. The *fieri facias* should refer to and profess to be founded on the judgment in the suit by *scire facias;* and this is true whether the *scire facias* was necessary or "entirely supererogatory."[1]

§ 95. **Motion and Notice as a Substitute for Scire Facias.** — It is obvious that the objects sought and accomplished by the writ of *scire facias*, in reference to the revivor of dormant judgments, could be as readily obtained by a mere motion and order in the original suit. Practically, a writ of *scire facias* is nothing beyond a notice to parties in interest that the applicant will, at a stated time, apply for a writ of execution, which notice is accompanied by a statement of the grounds upon which the application will be based. A notice prepared and signed by the plaintiff or his attorney, and served by copy on the defendants in the suit, if living, or on their representatives, if dead, would accomplish every useful purpose accomplished by a writ; while the order of the court, made after hearing the motion specified in the notice, would afford relief as adequate as could be granted by a judgment on *scire facias*. Proceedings by *scire facias* to revive dormant judgments are gradually becoming obsolete, though the writ is still employed in about one half of the states of this Union. In those states where this writ is not in use, the relief which it formerly afforded is obtained on motion.

[1] Richardson *v.* McDougall, 19 Wend. 80; Davis *v.* Morton, 1 Bing. 133.

§ 96. **On Death of One of the Parties.** — When a sole plaintiff has died after final judgment, the administrator, or other person authorized to represent the deceased, may apply to the court, show the death of the deceased and the appointment of the applicant, and procure an order entitling him to sue out and control the execution; or, in some states, the executor or administrator may obtain execution on presenting his letters testamentary or of administration to the clerk of the court. So on the death of defendant, his representatives may on motion be brought before the court to show cause why execution ought not to issue; and in some states, where the judgment is for the recovery of real or personal property, or for the enforcement of a lien thereon, execution may issue notwithstanding the death of defendant, and without leave of the court. The provisions in the different states on this subject are so diverse, that we shall not attempt to make any detailed statement of them.

§ 97. **Execution on Judgment Dormant by Lapse of Time.** — When a judgment has become dormant from lapse of time, a motion may be made to the court for leave to issue execution. Usually, no pleadings are required. A notice of the motion, describing the judgment with sufficient certainty to inform the defendant and other persons interested of what execution is demanded, is all that is required to authorize the court to act.[1] In some states, the notice must be accompanied by an affidavit,[2] while in others not even a notice of the motion need be given.[3] The defendant

[1] Simpson *v.* Wilson, 16 Ind. 428; Venden *v.* Coleman, 23 Ind. 49; Plough *v.* Reeves, 33 Ind. 181; Plough *v.* Williams, 33 Ind. 182.

[2] Turner *v.* Keller, 38 Mo. 332.

[3] Bryan *v.* Stidger, 17 Cal. 270.

cannot resist the application by urging any matter existing anterior to the judgment. The execution must issue unless the judgment has been satisfied, or ceased to be in force through lapse of time, or the defendant has by some means been released from his liability.[1] It is no answer that the defendant has judgments or other counterclaims against the plaintiff.[2] The plaintiff must show, to the satisfaction of the court, that the judgment has not been paid, and that he is still entitled to have it enforced.[3] In New York, where the facts on which the right to execution is based are disputed, the refusal of the court to order the writ to issue will not be reviewed on appeal; but the plaintiff will be turned over to his remedy by action on the judgment.[4] The application must be made during the lives of the parties,[5] after the judgment has become dormant,[6] and before it has become barred by the statute of limitations.[7] In New York, if an original execution is issued within five years, an *alias* writ may issue at any time thereafter without leave of the court. This is clear under provisions of section 284 of the Code of Procedure, as amended in 1858. Before this amendment, this section provided that "after the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court." The courts were very evenly divided upon the effect of this language. On the one side, it was contended that the common-law rule was still in force, allowing an *alias* to issue at any

[1] [illegible] v. Watkins, 13 How. Pr. 178; 3 Abb. Pr. 243.
[2] Betts v. Carr, 26 N. Y. 383.
[3] Reeves v. Plough, 46 Ind. 350.
[4] Bowman v. Strauss, 52 N. Y. 404.
[5] [illegible] v. Litchfield, 22 How. Pr. 178; 8 Bosw. 674.
[6] Wilgus v. Bloodgood, 33 How. Pr. 289; Field v. Paulding, 3 Abb. Pr. 139; 1 Hilt. 187.
[7] Kennedy v. Mills, 4 Abb. Pr. 132.

time, if an original writ issued within the time specified by law;[1] on the other side, it was insisted that the terms of the statute embraced *alias* as well as original writs, and therefore that *no* execution could regularly issue, after five years, without leave of the court.[2] This last view met the concurrence of the supreme court of Missouri when construing a similar statute, in a case in which, in referring to the common-law rule, the court said: "Certainly we ought not to adopt this worn-out rule in the construction of a new statute, which, after extending the year to five years, prohibits the issuing of execution after that period, unless by leave upon motion after notice to the adverse party. We cannot, and ought not, in this manner, partially repeal the statute, by declaring that the prohibition does not apply to a case like the present, where an execution has been sued out within five years, although more than five years have since elapsed without any proceeding upon the judgment."[3]

[1] Pierce *v.* Crane, 4 How. Pr. 257; McSmith *v.* Van Duzen, 9 How. Pr. 245; Kress *v.* Ellis, 14 How. Pr. 392; Redmond *v.* Wheeler, 2 Abb. Pr. 117.

[2] Currie *v.* Noyes, 1 Code R., N. S., 198; Swift *v.* Flanagan, 12 How. Pr. 438; Sacia *v.* Nestle, 13 How. Pr. 572.

[3] Bolton *v.* Lansdown, 21 Mo. 402.

CHAPTER IX.

INQUIRIES CONCERNING THE DUTIES AND LIABILITIES OF OFFICERS ON RECEIVING WRITS OF EXECUTION.

§ 98. First duty of officer on receipt of the writ.
§ 99. Inquiries by officer into validity of the writ.
§ 99 a. Inquiries concerning competency of officer to execute the writ.
§ 100. How far officer must inquire into the jurisdiction of the court.
§ 101. The officer need not look behind the writ.
§ 102. Whether the officer's knowledge of void nature of writ is material.
§ 103. Officer must execute voidable process; otherwise, if it be void.
§ 104. Officer must see that the writ is enforceable in his county.
§ 105. Suspension or satisfaction of writ in officer's hands.
§ 106. When the authority of the officer terminates.
§ 107. When the writ must be executed.
§ 108. Who may control the writ.

§ 98. The First Duty of Officer on Receipt of Writ. —So far, our inquiries have been in regard to the form and issue of execution against the property of defendants. We will now assume that the plaintiff has procured an execution to be issued. For the purpose of our future investigations, it will, in general, be immaterial to ascertain whether the writ is an original or an *alias;* whether it was sued out on the original judgment before the same became dormant, or after such judgment had been dormant and was duly revived by *scire facias*, or by some similar proceeding sanctioned by statute. The two officers who have most to do with writs of execution are the clerks by whom such writs are issued, and the sheriffs or constables by whom they are enforced. The preceding chapters of this work have been mainly employed in the consideration of matters falling within the duties of the clerks; the remaining chapters will be very

largely occupied by questions connected with the duties of sheriffs and constables. After the plaintiff procures his execution, his next step will be to place it in the hands of the proper officer for service. This officer is usually required, on receiving the writ, to indorse thereon the precise time at which it came into his hands. This requirement is useful because it furnishes *data* by which to determine the priority of conflicting writs, and preserves evidence by which to ascertain the exact period when the officer's rights and responsibilities[1] began. The negligence of the sheriff in this respect has no effect whatever upon the validity of the writ, nor of any subsequent proceedings taken in the enforcement thereof, for the date of delivery may be ascertained by any competent evidence.[2] If, on the other hand, the officer does indorse upon the writ a date as that of its reception, a question may arise as to whether the date so indorsed is correct. In Pennsylvania this question seems not to be an open one, for in that state the indorsement is conclusive.[3] We are not able to conceive any adequate reason for this conclusion, and none is attempted to be given by the court. The object of the requirement is to preserve some memorandum from which the date of the reception of different writs may be indicated and their respective priorities determined. But the ultimate result sought was to give priority to the writ first in the officer's hands; and this result would be defeated

[1] Williams *v.* Lowndes, 1 Hall, 579.

[2] Hale's Appeal, 44 Pa. St. 439; Johnson *v.* McLane, 7 Blackf. 501; 43 Am. Dec. 102; Hester *v.* Keith, 1 Ala. 316; Fletcher *v.* Pratt, 4 Vt. 182; Ulrich *v.* Dreyer, 2 Watts, 303; De Witt *v.* Dunn, 15 Tex. 106; Hanson *v.* Barnes's Lessee, 3 Gill & J. 359; 22 Am. Dec. 322.

[3] Porson's Appeal, 78 Pa. St. 145.

if a mere mistake of the officer in entering the date is to prevail over the actual facts of the case.

§ 99. **Inquiries to be Made by Officer before Executing Writ.** — Before making any attempt to execute the writ, a prudent officer will stop to make such inquiries as are necessary to satisfy him whether it is one which he is authorized by law to enforce; whether it will protect him while acting in obedience to its commands, or will leave him as a trespasser without any legal justification. He may, if he sees proper so to do, after ascertaining that the writ is one under which he can justify, proceed further, and inquire whether it is one which he is bound to execute. We shall devote this chapter to inquiries likely to be made after the issue of the writ, and before any active steps are taken for its enforcement.

§ 99 a. **Inquiries respecting the Competency of the Officer to Serve the Writ.** — Before undertaking to proceed under a writ, an officer ought always to ascertain whether he is competent to execute it. This inquiry may generally be answered from an inspection of the writ. It may be directed to a different officer from the one to whom it is delivered, in which case we apprehend that it would not justify proceedings taken by the latter.[1] If the sheriff is by any reason disqualified to serve an execution, it ought to be directed to the coroner. But an error in omitting to so direct it will not require the sheriff to receive and execute it. Even though the sheriff has no interest in the writ or judgment, as where he is a party in a representative capacity, as administrator of a deceased person, he may

[1] Plant *v.* Anderson, 16 Fed. Rep. 914; Blance *v.* Mize, 72 Ga. 96.

decline to serve the writ, and cannot be proceeded against by motion for a failure to return such writ.[1] With respect to a writ which an officer is disqualified to serve, he must be regarded as holding no official capacity. He has no competency to act; and though he attempt to act, what he does is in contemplation of law no action whatever.[2] If he has no authority to act, he can delegate no such authority to another, and hence his deputy cannot act for him nor in his name in any case in which he is disqualified.[3] The disqualification of the officer need not appear from the face of the writ. It does not depend upon his being nominally a party to the writ. He is, in most of the states, forbidden from executing any writ in which he is interested. Hence, if he has become the assignee of the judgment, or if the judgment is being enforced for his indemnity or benefit, he is disqualified to act, and his attempted action is a nullity.[4] There may, perhaps, be instances in which an officer may be affected by the result of a suit without losing his competency to serve process therein. Thus in New Hampshire, it has been decided that a sheriff was not incompetent to serve process because the maintenance of the action might make him answerable to defendant for the amount of the recovery, though it was conceded that he would be incompetent if he were the real plaintiff or the real defendant for whose benefit the action was

[1] Johnson *v.* McLaughlin, 9 Ala. 551.

[2] Knott *v.* Jarboe, 1 Met. (Ky.) 504; Mills *v.* Young, 23 Wend. 314; Riner *v.* Stacy, 8 Humph. 228; May *v.* Walters, 2 McCord, 470; Singletary *v.* Carter, 1 Bail. 467; 21 Am. Dec. 480.

[3] Stewart *v.* Magness, 2 Cold. 310; 88 Am. Dec. 598; Fairfield *v.* Hall, 8 Vt. 68; Chambers *v.* Thomas, 3 A. K. Marsh. 536.

[4] Carpenter *v.* Stilwell, 11 N. Y. 61; Barker *v.* Remick, 43 N. H. 238; Samuel *v.* Commonwealth, 6 T. B. Mon. 173

prosecuted or defended.[1] If the officer is an inhabitant of a municipal corporation, and under the existing law his property may be seized under a writ against such corporation, he is incompetent to serve a writ for or against it.[2] A deputy sheriff is incompetent to execute a writ to which he is the real party in interest.[3] In some of the states the sheriff and his deputies are regarded as one officer, and where any of them are disqualified all seem to be. Hence it has been held that neither the sheriff nor any of his deputies could execute a writ to which another deputy was a nominal or real party.[4] This is a mistaken view. There is but one office, it is true, but the only incumbent of that office is the principal. If the principal is disqualified, the deputies must be, because what they do is in law not their act but his. If a deputy, on the other hand, is disqualified, this renders him incompetent to act, and his principal cannot depute to him authority to levy the writ. But his incompetency does not affect the principal, for the latter derives no authority from his subordinate. Therefore a sheriff may execute process for or against any of his deputies.[5]

§ 100. **Inquiries regarding the Jurisdiction of the Court.**— While sheriffs, and other officers acting in a similar capacity, are protected to a very great extent, they, like other persons, are bound to know the law. They must know the general jurisdiction of the courts whose process they are called to enforce; for if a writ

[1] Barker *v.* Remick, 43 N. H. 235.

[2] State *v.* Walpole, 15 N. H. 26; Barker *v.* Remick, 43 N. H. 258; Fairfield *v.* Hall, 8 Vt. 68; Town of Essex *v.* Prentiss, 6 Vt. 47.

[3] Chambers *v.* Thomas, 1 Litt. 268; Samuel *v.* Commonwealth, 6 T. B. Mon. 173.

[4] Dame *v.* Gilmore, 51 Me. 544.

[5] Ford *v.* Dyer, 26 Miss. 243.

is placed in their hands which the court had no authority under any circumstances to issue,[1] or if the court had authority to issue similar writs, but it appears, from this particular writ, that the subject-matter of the action was one over which the court had no jurisdiction, then the writ is absolutely void, and cannot justify any one in obeying its commands.[2] The officer must examine the writ, and when it appears therefrom that the judgment was void, either for want of jurisdiction over the subject-matter of the suit or over the parties thereto, he must, if he would protect himself from liability, refuse to proceed under the writ.[3] There are

[1] Shergold *v.* Holloway, 2 Strange, 1002; Brown *v.* Compton, 8 Term Rep. 424; Allen *v.* Greenlee, 2 Dev. 370; Howard *v.* Clark, 43 Mo. 344; Batchelder *v.* Currier, 45 N. H. 460.

[2] Hull *v.* Blaisdell, 1 Scam. 332; Gurney *v.* Tafts, 37 Me. 130; 58 Am. Dec. 777; Wise *v.* Withers, 3 Cranch, 331; Pearce *v.* Atwood, 13 Mass. 324; Brown *v.* Compton, 8 Term Rep. 424; Stevens *v.* Wilkins, 6 Pa. St. 260; Fisher *v.* McGirr, 1 Gray, 45; 61 Am. Dec. 361; Howard *v.* Clark, 43 Mo. 344; Entick *v.* Carrington, 2 Wils. 275; Groome *v.* Forrester, 5 Maule & S. 314.

[3] Baldwin *v.* Hamilton, 3 Wis. 747; Garratt *v.* Morely, 1 Q. B. 18; Campbell *v.* Webb, 11 Md. 482; Grumon *v.* Raymond, 1 Conn. 48; 6 Am. Dec. 200; Howard *v.* Gossett, 10 Q. B. 359; Tobin *v.* Addison, 2 Strob. 3. In the case of Dynes *v.* Hoover, 20 How. 80, the action was brought against a ministerial officer for executing the sentence of a court-martial. It appeared, however, that the court had jurisdiction, and the officer was therefore held not liable. The court undertook, however, to state the general rules governing ministerial officers, and in doing so, said: "That where a court has no jurisdiction over the subject-matter it tries, and assumes it, or where an inferior court has jurisdiction over the subject-matter, *but is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered coram non judice*, that trespass for false imprisonment is the proper remedy, where the liberty of the citizen has been restrained by process of the court, or by the execution of its judgment. Such is the law in either case, in respect to the court which acts without having jurisdiction over the subject-matter; or which, having jurisdiction, disregards the rules of proceeding enjoined by the law for its exercise, so as to render the case *coram non judice*. Cole's Case, John. W. 171; Dawson *v.* Gill, 1 East, 64; Smith *v.* Beucher, Hardin, 71; Martin *v.* Marshall, Hob. 68; Weaver *v.* Clifford, 2 Bulst. 64; 2 Wils. 385. In both cases, the law is, that an officer executing the process of a court which has acted without jurisdiction over the subject-matter becomes a trespasser, it being better for the peace of society, and its interests of every kind, that

certain circumstances with respect to the form and issuing of the writ to which he must also give attention. Thus where the writ disclosed on its face the reasons for its premature issuing, and they were insufficient in law, the officer was held not to be justified in enforcing it.[1] While we do not concur in the result reached in this instance, we concede that there may be cases in which executions constitute no justification to the officers acting under them, because of a want of power to issue them, or because their form and substance are not such as to confer any authority upon the persons to whom they are delivered for service. The cases here referred to can only be those in which the writs are void upon their face. We have endeavored in the preceding chapters to show when writs are so void. The decisions upon the subject are not harmonious, and the officer must, for his protection, inform himself respecting the law of his own state. A writ issued out of a court which never had authority to issue it, or whose authority had terminated, or upon a judgment which it had in no circumstances any power to enter, or issued by some officer who had no authority to issue it,[2] is unquestionably void. Beyond this, little or nothing can be affirmed without meeting with dissent in one or

the responsibility of determining whether the court has or has not jurisdiction should be upon the officer, than that a void writ should be executed. This court, so far back as the year 1806, said, in the case of Wise *v.* Withers, 3 Cranch, 331, p. 337 of that case: 'It follows, from this opinion, that a court-martial has no jurisdiction over a justice of the peace as a militiaman; he could never be legally enrolled; and *it is a principle* that a decision of such a tribunal, in a case *clearly without its jurisdiction*, cannot protect the officer who executes it. The *court and the officers are all trespassers.*' 2 Brown, 124; 10 Cranch, 69; Mark's Rep. 118; 8 Term Rep. 424; 4 Mass. 234." An officer cannot justify under a writ which is not valid in form. Taylor *v.* Morrison, 7 Chic. L. N. 376.

[1] Clark *v.* Bond, 7 Baxt. 288.

[2] Chalker *v.* Ives, 55 Pa. St. 81; Hilbish *v.* Hower, 58 Pa. St. 93.

more of the states.[1] A writ issued under a supposed statute, which is in law no statute whatever because unconstitutional, is void, and will not protect an officer.[2] The same result follows where the tribunal whose sentence or judgment is the basis of the writ is not authorized by law,[3] or being authorized by law, has no jurisdiction over the subject-matter in the particular case, as where a state court issues process *in rem* to enforce a maritime lien,[4] or a justices' court enters judgment for a sum in excess of its jurisdiction.[5] The general expression of many of the cases is that the process must "be fair on its face" to warrant the officer in implicitly relying upon it for protection. By this expression we do not understand them to intend that there must be no irregularity in its features, and no roughness or discoloration in its complexion; for imperfections so slight in character as these the court may compel the parties to overlook, and where the parties may be required to abide by the process, it always justifies an officer in whatever he may do by its command.

With respect to process proceeding from a court of limited jurisdiction, the inquiries which the officer called upon to enforce it must pursue are not substantially variant from the inquiries required in other cases. He must, at his peril, know what is the jurisdiction of the court,—what judgments it may lawfully enter, and what writs it may grant for their enforcement. If the

[1] See chapters II. and III. for essential matters respecting the issuing and form of writs of execution.

[2] Fisher *v.* McGirr, 1 Gray, 45; 61 Am. Dec. 387; Ely *v.* Thompson, 3 A. K. Marsh. 70.

[3] Milligan *v.* Hovey, 3 Biss. 13.

[4] Campbell *v.* Sherman, 35 Wis. 103.

[5] Rosen *v.* Fischel, 44 Conn. 371; Gates *v.* Neimeyer, 54 Iowa, 110; Patzak *v.* Von Gerichten, 10 Mo. App. 424.

writ issued appears upon its face to have issued in a proper case and by a competent officer, he may safely yield obedience thereto.[1]

§ 101. **Officer need not Look behind the Writ.** — The sheriff may limit his inquiries to an inspection of the writ. If the writ is issued by the proper officer, in due form, and appears to proceed from a court competent to exercise jurisdiction over the subject-matter of the suit, to grant the relief granted and enforce it by the writ issued, and there is nothing on the face of the writ showing a want of jurisdiction over the person of the defendant, or showing the writ to be clearly illegal from some other cause, the officer may safely proceed. That from some cause, not shown in the writ, the judgment or writ was irregular or void, will be of no consequence to him.[2] He can justify upon producing the

[1] Billings *v.* Russell, 23 Pa. St. 189; 62 Am. Dec. 330; Gott *v.* Mitchell, 7 Blackf. 270; Savacool *v.* Boughton, 5 Wend. 170; 21 Am. Dec. 181, and note.

[2] Sprague *v.* Birchard, 1 Wis. 457; 60 Am. Dec. 393; Warner *v.* Shed, 10 Johns. 138; Rue *v.* Perry, 63 Barb. 40; Gray *v.* Kimball, 42 Me. 299; Earl *v.* Camp, 16 Wend. 562; Billings *v.* Russell, 23 Pa. St. 189; 62 Am. Dec. 330; Mason *v.* Vance, 1 Sneed, 178; 60 Am. Dec. 144; Hill *v.* Bateman, 2 Strange, 710; State *v.* Crow, 6 Eng. 642; McDonald *v.* Wilkie, 13 Ill. 22; 54 Am. Dec. 423; Andrews *v.* Morris, 1 Ad. & E., N. S., 4; McLean *v.* Cook, 23 Wis. 364; Clark *v.* May, 2 Gray, 410; Donahue *v.* Shed, 8 Met. 326; Hargett *v.* Blackshear, Tayl. (N. C.) 107; Harmon *v.* Gould, Wright (Ohio), 709; Churchill *v.* Churchill, 12 Vt. 661; Higdon *v.* Conway, 12 Mo. 295; Taylor *v.* Alexander, 6 Ham. 145; Cady *v.* Quinn, 6 Ired. 191; Howard *v.* Clark, 43 Mo. 344; Brown *v.* Henderson, 1 Mo. 134; Smith *v.* Miles, 1 Hemp. 34; Whitney *v.* Jenkinson, 3 Wis. 407; Twitchell *v.* Shaw, 10 Cush. 48; 57 Am. Dec. 80; Allen *v.* Corlew, 10 Kan. 70; Crockett *v.* Latimer, 1 Humph. 273; Carter *v.* Purrington, 2 Allen, 226; Young *v.* Wise, 7 Wis. 128; State *v.* Giles, 10 Wis. 101; Bogert *v.* Phelps, 14 Wis. 88; Milburn *v.* Gilman, 11 Mo. 64; Johnson *v.* Fox, 51 Ga. 270; Woods *v.* Davis, 34 N. H. 328; Keniston *v.* Little, 10 Fost. 318; 64 Am. Dec. 297; Blanchard *v.* Goss, 2 N. H. 491; Ortman *v.* Greenman, 4 Mich. 291; McElhaney *v.* Flynn, 23 Ala. 819; Averett *v.* Thompson, 15 Ala. 678; Cogburn *v.* Spence, 15 Ala. 549; 50 Am. Dec. 140; Dixon *v.* Watkins, 4 Eng. 139; Bickerstaff *v.* Doub, 19 Cal. 109; 79 Am. Dec. 204; Watson *v.* Watson, 9 Conn. 141; 23 Am. Dec. 324; Carter *v.* Clark, 28 Conn. 512; Neth *v.* Crofut, 30 Conn.

writ. It is therefore immaterial to him that the judgment does not correspond to the writ, or that there never was any such judgment in existence.[1]

The case of Savacool *v.* Boughton, 5 Wend. 170, 21

580; Barnes *v.* Barber, 1 Gilm. 401; Parker *v.* Smith, 1 Gilm. 411; Hunt *v.* Ballew, 9 B. Mon. 390; Hoskins *v.* Helm, 4 Litt. 310; 14 Am. Dec. 133; Clay *v.* Caperton, 1 T. B. Mon. 10; 15 Am. Dec. 77; Percefull *v.* Commonwealth, 3 B. Mon. 347; Chase *v.* Fish, 16 Me. 132; Carle *v.* Delesdernier, 13 Me. 263; 29 Am. Dec. 508; State *v.* McNally, 34 Me. 210; 56 Am. Dec. 650; Wilton M. Co. *v.* Butler, 34 Me. 431; Robinson *v.* Barrows, 48 Me. 186; Deal *v.* Harris, 8 Md. 40; 63 Am. Dec. 686; Wilmarth *v.* Burt, 7 Met. 257; Chase *v.* Ingalls, 97 Mass. 524; Bergin *v.* Hayward, 102 Mass. 414; Clark *v.* Norton, 6 Minn. 412; Woodruff *v.* Barrett, 3 Green, 40; Rammel *v.* Watson, 31 N. J. L. 281; Mangold *v.* Thorpe, 33 N. J. L. 134; French *v.* Willett, 4 Bosw. 649; Cornell *v.* Barnes, 7 Hill, 35; Noble *v.* Halliday, 1 N. Y. 330; Hutchinson *v.* Brand, 9 N. Y. 208; Chegaray *v.* Jenkins, 5 N. Y. 381; Rosenfield *v.* Palmer, 9 Alb. L. J. 191; State *v.* Morgan, 3 Ired. 186; 38 Am. Dec. 714; State *v.* Ferguson, 67 N. C. 219; McHugh *v.* Pundt, 1 Bail. 441; Brown *v.* Wood, 1 Bail. 457; Miller *v.* Grice, 1 Rich. 147; Traylor *v.* McKeown, 12 Rich. 251; Faris *v.* State, 3 Ohio St. 159; Fox *v.* Wood, 1 Rawle, 143; Paul *v.* Vankirk, 6 Binn. 123; Swires *v.* Brotherline, 41 Pa. St. 135; 80 Am. Dec. 601; Atkinson *v.* Micheaux, 1 Humph. 312; Stevenson *v.* McLean, 5 Humph. 332; 42 Am. Dec. 434; Barnes *v.* Hayes, 1 Swan, 304; Fall Creek Coal Co. *v.* Smith, 71 Pa. St. 230; Earle *v.* Thomas, 14 Tex. 583; Hill *v.* Wait, 5 Vt. 124; Gage *v.* Barnes, 11 Vt. 195; Pierson *v.* Gale, 8 Vt. 509; 30 Am. Dec. 487; Brown *v.* Mason, 40 Vt. 157; Loomis *v.* Wheeler, 21 Wis. 271; Miller *v.* Brown, 3 Mo. 127; 23 Am. Dec. 693; Elsemore *v.* Longfellow, 76 Me. 128; Erskine *v.* Hohnbach, 14 Wall. 613; Coleman *v.* McAnulty, 16 Mo. 173; 57 Am. Dec. 229; Orr *v.* Box, 22 Minn. 485; Yeager *v.* Carpenter, 8 Leigh, 454; 31 Am. Dec. 665; Barr *v.* Royles, 96 Pa. St. 31. Hence the officer is protected though the writ runs against a deceased person. Bragg *v.* Thompson, 19 S. C. 572.

[1] Turner *v.* Felgate, Lev. 95; Britton *v.* Cole, 12 Mod. 178; Jones *v.* Williams, 8 Mees. & W. 349; Camp *v.* Moseley, 2 Fla. 171; Barker *v.* Braham, 3 Wils. 376; Cotes *v.* Michill, 3 Lev. 20; Moravia *v.* Sloper, Willes, 30; Gott *v.* Mitchell, 7 Blackf. 270; Burton *v.* Sweaney, 4 Mo. 1; Andrews *v.* Morris, 1 Ad. & E., N. S., 4; Etheridge *v.* Edwards, 1 Swan, 426; Davis *v.* Cooper, 6 Mo. 148; Kleissendorff *v.* Fore, 3 B. Mon. 473; Traylor *v.* McKeown, 12 Rich. 251; Jackson *v.* Hobson, 5 Ill. 411; Keys *v.* Grannis, 3 Nev. 548. Therefore, if an execution purports to be issued on a judgment of the county court, when in fact it is upon a transcript of a judgment of an inferior court, and is invalid because not issued in the manner provided for executions upon such transcripts, the officer cannot be held responsible as a trespasser, there being nothing to warn him that he was not acting under a judgment of the county court. Hill *v.* Haynes, 9 Alb. L. J. 276; 54 N. Y. 153. *Contra*, that officer must produce judgment, Hamilton *v.* Decker, 2 South. 813.

Am. Dec. 181, is a leading case on this subject, when the process issues out of a court of limited jurisdiction. In this case, Judge Marcy, after reviewing the English and American authorities then existing, concluded as follows: "In my judgment, the same principle which gives protection to a ministerial officer, who executes the process of a court of *general jurisdiction*, should protect him when he executes the process of a court of *limited jurisdiction*, if the *subject-matter* of the suit is within that jurisdiction, and nothing appears on the face of the process to show that the *person* was not also within it. The following propositions, I am disposed to believe, will be found to be well sustained by reason and authority: That where an inferior court has not jurisdiction of the subject-matter, or, having it, has not jurisdiction of the person of the defendants, all its proceedings are absolutely void; neither the members of the court nor the plaintiff (if he procured or assented to the proceedings) can derive any protection from them when prosecuted by a party aggrieved thereby. If a mere ministerial officer executes any process, upon the face of which it appears that the court had not jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it. If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the *person* or place, the officer who executes process issued in such suit is no trespasser, unless the want of jurisdiction appears by such process."[1] Nor is a ministerial officer compelled to make investigations to as-

[1] Followed in Coon *v.* Congdon, 12 Wend. 496; Parker *v.* Walrod, 16 Wend. 514; 30 Am. Dec. 124; Chegaray *v.* Jenkins, 1 Seld. 376; Cornell *v.* Barnes, 7 Hill, 35; Sheldon *v.* Vanbuskirk, 2 N. Y. 477.

certain whether the magistrate or other officer issuing the process is an officer *de jure*, or an officer *de facto* merely. "The principle is well settled that the acts of officers *de facto* are as valid and effectual when they concern the public, or the rights of third persons, as though they were officers *de jure*."[1] Officers are also protected where, though the court had jurisdiction, the writ is void as between the parties thereto on account of something not appearing on the face thereof. The sheriff, therefore, need not make any inquiries to ascertain whether the judgment has been satisfied. He may safely assume that the plaintiff would not ask for, nor the clerk or magistrate issue, a writ to enforce a paid judgment.[2] The rule that an officer may justify under a writ valid on its face is one of protection merely. If he seeks to maintain an action, he cannot rely upon the process alone, but must support it by a valid judgment.[3] So there are cases in which the process alone may not be a protection. Thus an officer may levy upon property in the possession of a stranger to the writ, who derived title from the defendant in execution prior to the issuance or levy of the writ. The officer may retain the property if he can show that the transfer was actually or constructively fraudulent, and that he is in position to attack it on that ground. He is not in position to maintain such attack unless the plaintiff in execution, whom he represents, is a creditor by judgment, or a creditor having a lien on the property. That the plaintiff is such creditor is

[1] Wilcox *v.* Smith, 5 Wend. 231; 21 Am. Dec. 213; Thulemeyer *v.* Jones, 37 Tex. 560; Laver *v.* McGlachlin, 28 Wis. 364.

[2] Mason *v.* Vance, 1 Sneed, 178; 60 Am. Dec. 144; Luddington *v.* Peck, 2 Conn. 700; Lewis *v.* Palmer, 6 Wend. 367.

[3] Dunlap *v.* Hunting, 2 Denio, 643; 43 Am. Dec. 763; Earl *v.* Camp, 16 Wend. 562; Horton *v.* Hendershot, 1 Hill, 118.

not established by the execution alone. The officer, to make his justification complete, must establish it in some other mode. If he relies upon the execution, he must support it by a valid judgment,[1] or by some other competent evidence, of the existence of a debt of such a character as to afford a justification for the seizure and detention of the property.[2] This, however, is scarcely an exception to the rule that an officer is protected by a writ regular on its face, for the writ does not purport to confer immunity for any acts not authorized by it. It does not expressly sanction the seizure of any property other than the defendant's, and if the officer undertakes to subject other property to the writ, he must first, at his peril, satisfy himself of the existence of all the circumstances essential to justify his action.

§ 102. Whether the Officer's Knowledge of Irregularities is Material. — The authorities cited in the preceding section abundantly sustain the proposition that the officer may limit his inquiries to an inspection of the face of the writ; and that he is not to be held responsible for anything of which the writ gives him notice, and of which he has no actual knowledge. But in some instances, the officer's knowledge may have placed him in possession of the very facts which render the writ void between the parties thereto. Does this knowledge become a material fact in determining whether he is responsible for acting in obedi-

[1] State *v.* Rucker, 19 Mo. App. 587; Thatcher *v.* Maack, 7 Ill. App. 635; Bean *v.* Loftus, 48 Wis. 371; 4 N. W. Rep. 334.

[2] Sexey *v.* Adkinson, 34 Cal. 346; 91 Am. Dec. 698; Damon *v.* Bryant, 2 Pick. 412; Manlock *v.* White, 20 Cal. 600; Rinchey *v.* Stryker, 28 N. Y. 52; 84 Am. Dec. 324; Howard *v.* Manderfield, 31 Minn. 337; 17 N. W. Rep 946; Bogert *v.* Phelps, 14 Wis. 89.

ence to the writ? To this question the highest courts in some of the states have given a response in the negative. To go beyond the process would, in the opinion of the courts of New York, "lead to a new and troublesome issue, which would tend greatly to weaken the reasonable protection to ministerial officers. Their duties, at best, are sufficiently embarrassing and responsible; to require them to act or not at their peril, as they may be supposed to know or not the technical regularity of the party or magistrate, seems to me an innovation upon previous cases, and against the reasons and policy of the rule. The experience of the officer will soon enable him to determine whether the process is in regular form or not, or he can readily obtain the necessary advice; but he must be presumed to be wiser than the magistrate, if even a knowledge of the proceedings would enable him to decide correctly if they happen to be erroneous."[1] In a later case in the same state a warrant was issued by the inspectors of elections, and was executed by an officer who knew that these inspectors were without jurisdiction. The court, in holding the officer justifiable, said: "Although the inspectors had no jurisdiction of the subject-matter, yet, as the warrant was regular upon its face, it was a sufficient authority for the arrest. The knowledge of the officer that the inspectors had no jurisdiction is not important. He must be governed and is protected by the process, and cannot be affected by anything he has heard or learned out of it."[2] It has also been decided that an officer is justified in serving an execution, al-

[1] Webber *v.* Gay, 24 Wend. 484.

[2] People *v.* Warren, 5 Hill, 440; to same effect, Gott *v.* Mitchell, 7 Blackf. 270; Watson *v.* Watson, 9 Conn. 240; 23 Am. Dec. 324; Tierney *v.* Frazier, 57 Tex. 437; Rainey *v.* State, 20 Tex. App. 455; see also State *v.* Weed, 1 Fost. 262; 53 Am. Dec. 188.

though he knew that the defendant had been released in proceedings in bankruptcy from the judgment on which the execution issued.[1] The rule that protects officers from all jurisdictional and other infirmities not disclosed upon the face of the process, and not otherwise brought home to their knowledge, seems to us sufficiently comprehensive. All mere errors and irregularities in the process, such as are not of so serious a character as to render it void as between the parties thereto, ought not to be noticed by the sheriff; for as long as the parties acquiesce, certainly he ought not to be liable for executing the writ. But there is a class of cases in which the process, on account of some infirmity in the judgment or in the writ, has no validity. Not only the plaintiff but also innocent purchasers are precluded from acquiring any benefit therefrom. But as ministerial officers are constantly called on to execute process, and are therefore frequently exposed to the hazard of being left without protection for their acts done in good faith, the law has wisely interposed in their behalf, in order that their position should not be intolerable. This indisposition has not been such as in all cases to thrust a shield between them and the persons whom they have injured in their attempts to execute void writs. It is clear that if the writ gives notice of the matters rendering it void, the officer is responsible; for while it is reasonable to protect officers against secret vices in the proceedings, it is unreasonable that they should be encouraged in the perpetration of a legal wrong of which they have been notified. But suppose that, though the writ is in due form, the officer has outside of the writ been informed of a state

[1] Whitworth *v.* Clifton, 1 Moody & R. 531; Tarlton *v.* Fisher, 2 Doug. 671.

of facts which, if set forth in the writ, would make him answerable as a trespasser for its attempted execution, is it any greater hardship to require him to know the legal consequence of these facts than it is to make a similar requirement when his knowledge had been obtained from an inspection of the writ? If he is competent to determine the question in the one case, he is equally so in the other. If the judgment set forth in the writ was not in truth rendered, or was rendered in a case where there was an absence of jurisdiction either over the subject-matter or over the parties; or if from any other cause the proceeding about to be taken by the officer is void as between the parties, and can therefore result in nothing but outrage and wrong perpetrated under the forms of law, — why should he be encouraged to proceed? If he is ignorant, he may properly be awarded the protection we accord to the innocent in the pursuit of a path mistaken for that of duty. But if he knows of these destroying vices, he has no duty to proceed. In proceeding, he is the willful and conscious instrument of legal oppression, voluntarily choosing to seize the person or property of the defendant in professed obedience to a mandate which he knows to be destitute of legal sanction; and he ought to be held answerable as a trespasser as rigorously as any party to the suit, or any other voluntary participant in the wrong.[1]

§ 103. Officer must Execute Voidable Process — Otherwise if it be Void. — When an officer has decided that the execution delivered to him for service

[1] Sprague *v.* Birchard, 1 Wis. 457; 60 Am. Dec. 393; McDonald *v.* Wilkie, 13 Ill. 22; 54 Am. Dec. 423; Batchelder *v.* Currier, 45 N. H. 460; Watson *v.* Bodell, 14 Mees. & W. 57; Grace *v.* Mitchell, 11 Am. Rep. 613; 31 Wis. 533; Leachman *v.* Dougherty, 81 Ill. 324.

will justify him in acts done in obedience thereto, he may next, if he chooses to do so, consider whether he will be justified in refusing to execute it. There are many *dicta* in which the general assertion is made, that a ministerial officer *must* execute all process regular on its face, and appearing to emanate from a court of competent jurisdiction. This statement is by no means true. A writ may be voidable to the extent that it may be set aside on motion, and yet the parties may choose not to make such motion; or if the motion be made, the irregularity may be such that the court will amend but not quash the writ. Whenever the writ is amendable, or is such that, by the failure of the proper party to move for its vacation, it may be lawfully executed, and may, by a sale thereunder, transfer the title of the defendant, the sheriff is bound to execute it, and to take no notice of the irregularity, and is as liable to the plaintiff for any neglect or misconduct in its execution as though it were in all respects regular.[1] But where the writ, though regular on its face, is in fact void between the parties, the officer is not compelled to execute it. "The cases recognize and affirm a distinction between process

[1] Bissell *v.* Kip, 5 Johns. 89; Cable *v.* Cooper, 15 Johns. 152; Martin *v.* Hall, 70 Ala. 421; Milburn *v.* State, 11 Mo. 188; 47 Am. Dec. 148; Reams *v.* McNail, 9 Humph. 542; Jones *v.* Cook, 1 Cow. 309, where the writ was tested out of term; People *v.* Dunning, 1 Wend. 16, where the writ had no seal; Walden *v.* Davison, 16 Wend. 575, the writ being directed to wrong officer; Ontario Bank *v.* Hallett, 8 Cow. 192, where writ issued after a year and a day; Parmlee *v.* Hitchcock, 12 Wend. 96, the writ varying from the judgment; Bacon *v.* Cropsey, 7 N. Y. 195, where the writ issued prematurely; Samples *v.* Walker, 9 Ala. 276, where wrong return day was designated; Griswold *v.* Chandler, 22 Tex. 637, where officer attempted to excuse himself on the ground that the summons was not properly served; Chase *v.* Plymouth, 20 Vt. 469; 50 Am. Dec. 52; Stoddard *v.* Tarbell, 20 Vt. 321; Ex parte Cummins, 4 Pike, 103; Cody *v.* Quinn, 6 Ired. 191; 44 Am. Dec. 75; Arnold *v.* Commonwealth, 8 B. Mon. 109; Jordan *v.* Porterfield, 19 Ga. 139; 63 Am. Dec. 301; Roth *v.* Duvall, 1 Idaho, 167.

which is void and that which is voidable merely, and it is repeatedly stated that when the process is void, the sheriff is not bound to execute it, nor liable for any neglect, partial or total. But otherwise if the process is voidable only; because if the defendant in execution does not seek to avoid the process, and where the court might, if applied to, allow an amendment, the sheriff cannot avail himself of the defects in the process."[1]

§ 104. Must See that the Writ is Enforceable in his County.—The execution may be regular, and in all respects valid where it was issued, and yet not authorize its service by the officer to whom it is delivered. By the rules of the common law, the writs of each court were only capable of enforcement within the territorial limits of its jurisdiction.[2] In most of the United States, statutes have been enacted allowing courts of general jurisdiction to issue writs of execution to any county within the state. But this privilege is not generally accorded to courts of limited jurisdiction. It is, therefore, still necessary for the officer to see, in the service of writs from these latter courts, that he does not act beyond the limits of their authority. So when intrusted with the execution of a writ of his own county, the officer must remember that his authority under the writ is confined to the county. He has no legal power to levy on lands or property outside of

[1] Ginochio *v.* Orser, 1 Abb. Pr. 434. See; as to the right of ministerial officers to refuse to serve void process, and their exemption from all liability for neglect in such service, Stevenson *v.* McLean, 5 Humph. 332; 43 Am. Dec. 434; Albee *v.* Ward, 8 Mass. 79; Ezra *v.* Manlove, 7 Blackf. 389; Jones *v.* Cook, 1 Cow. 309; Earl *v.* Camp, 16 Wend. 562; Cornell *v.* Barnes, 7 Hill, 35; McDuffie *v.* Beddoe, 7 Hill, 578; Anonymous, 1 Vent. 259; Squibbs *v.* Hale, 2 Mod. 29; Hill *v.* Wait, 5 Vt. 124.

[2] Chiles *v.* Hoy, 6 T. B. Mon. 47; People *v.* Van Eps, 4 Wend. 387.

the county.[1] This is true, although a tract of land belonging to the defendant is situated partly in one county and partly in another.[2] The acts of an officer outside of his county or bailiwick seem to be regarded as void.

§ 105. **Satisfaction or Suspension of the Writ.** — An execution, valid when placed in the officer's hands, may thereafter cease to justify the officer in its further enforcement. He is, however, authorized to proceed until he has knowledge that it has been satisfied or suspended.[3] If a *supersedeas* issues, the sheriff need not question its propriety, except so far as to ascertain that the court had jurisdiction to grant it.[4] The allowance of a writ of error operates as a *supersedeas*.[5] After notice of such allowance, or of any other *supersedeas*, an officer who proceeds with the execution of the writ is a trespasser.[6]

§ 106. **When the Writ Ceases to be in Force by Expiration of Time.** — Conceding that the execution placed in the officer's hands is valid, and that it has not been satisfied nor stayed by an order of court, the officer will next inquire how long it will continue in force, so as to protect him in its attempted enforcement. Of course it is the duty of the officer to proceed to execute the writ without waiting for the latest period;

[1] Kinter *v.* Jenks, 43 Pa. St. 445; Dinkgrave *v.* Sloan, 13 La. Ann. 393; Runk *v.* St. John, 29 Barb. 585.

[2] Finley *v.* R. R. Co., 2 Rich. 567.

[3] Johnson *v.* Fox, 51 Ga. 270; Bryan *v.* Hubbs, 69 N. C. 428.

[4] Williams *v.* Stewart, 12 Smedes & M. 533.

[5] Perkins *v.* Woolaston, 1 Salk. 322; Meagher *v.* Vandyck, 2 Bos. & P. 370; Braithwaite *v.* Brown, 1 Chit. 238.

[6] Belshaw *v.* Marshall, 4 Barn. & Adol. 336; Bleasdale *v.* Darby, 9 Price, 606; O'Donnell *v.* Mullin, 27 Pa. St. 199; 77 Am. Dec. 458; Morrison *v.* Wright, 7 Port. 67; Bryan *v.* Hubbs, 69 N. C. 428.

but it may happen that its execution is hindered by circumstances not attributable to any want of official diligence. Hence the frequent necessity of acting under the writ at the latest period authorized by law. The first act to be done by the officer is that of levying upon the property of the defendant when the execution is against his goods, and of seizing his person when the writ authorizes such seizure. These are initial acts done for the purpose of producing a satistion of the writ, but not likely to accomplish their object unless succeeded on one hand by the retention and sale of the goods, and on the other by the imprisonment of defendant. By the levy on property the officer has entered upon the execution of his writ, and has, if the levy be on personalty, acquired a special property in the goods seized. By the principles of the common law, the special property thus acquired was not divested by the return of the writ. The officer could, without waiting for a *venditioni exponas*, proceed to sell the property by virtue of the authority conferred by the original writ.[1] Wherever some statute does not provide otherwise, an officer who has entered upon the execution of the writ before the return day thereof, by a seizure of or levy upon property, may, after the return day, and after the actual return, continue to hold the property, and may prosecute such further proceedings as may be necessary to convert such property, whether it be real or personal, into money, for the purpose of satisfying the judgment.[2] The power of an

[1] See § 58.

[2] Phillips *v.* Dana, 3 Scam. 551; State *v.* Roberts, 1 Hawks, 349; 21 Am. Dec. 62; Cox *v.* Joiner, 4 Bibb, 94; Lester's Case, 4 Humph. 383; Logsdon *v.* Spivey, 54 Ill. 104; Savings Institution *v.* Chinn, 7 Bush, 539; Heywood *v.* Hildreth, 9 Mass. 393; Smith *v.* Spencer, 3 Ired. 256; Blair *v.* Compton, 33 Mich. 414; Barrett *v.* McKenzie, 24 Minn. 20; Kane *v.* McCown, 55 Mo. 181; Remington

officer to make a sale after the return day of his writ was justified on the ground that by the levy of the writ he acquired a special property and right of possession in the chattels seized, and that in this special property was included the right independently of the continuing force of the writ to sell the goods in furtherance of the object for which they were seized, to wit, the satisfaction of the judgment. This justification was sufficient at the common law, under which nothing but chattels were subject to sale under execution. Very generally in America, real property may also be sold under execution. Notice of the sale is ordinarily required to be given for a considerable period of time, and unless the officer may make his sale after the return day, many levies must inevitably remain unproductive. It has nevertheless been held in several of the states that because the officer acquired no special property nor right of possession in lands levied upon, he was without power to sell them after the return day of the writ.[1] To so hold was practically to make the writ inoperative against real estate for weeks prior to the return day; for of what avail is a levy when no sufficient notice can be given of a sale? — and yet it is conceded that a levy may be made upon property, real as well as personal, up to the moment when the writ is required to be returned.

v. Linthicum, 14 Pet. 84; Wheaton *v.* Sexton, 4 Wheat. 503; Barnard *v.* Stevens, 2 Aiken, 429; 16 Am. Dec. 733; Doe d. Lander *v.* Stone, 1 Hawks, 329; Stewart *v.* Severance, 43 Mo. 322; 97 Am. Dec. 392; Taylor *v.* Gaskins, 1 Dev. 295; Wright *v.* Howell, 35 Iowa, 288; Gaither *v.* Martin, 3 Md. 146; Pettingill *v.* Moss, 3 Minn. 223; 74 Am. Dec. 747; Wood *v.* Colvin, 5 Hill, 230; Moreland *v.* Bowling, 3 Gill, 500; Devoe *v.* Elliott, 2 Caines, 213; Bank of Missouri *v.* Bray, 37 Mo. 194; see *ante*, § 58.

[1] Overton *v.* Perkins, 10 Yerg. 328; Rogers *v.* Cawood, 1 Swan, 142; 55 Am. Dec. 729; Borden *v.* McKinnie, 4 Hawks, 279; Seawell *v.* Bank of Cape Fear, 3 Dev. 279; 22 Am. Dec. 722; Morgan *v.* Ramsey, 15 Ala. 190; Smith *v.* Mundy, 18 Ala. 182; 52 Am. Dec. 221; Sheppard *v.* Rhea, 49 Ala. 125; see *ante*, § 58.

We apprehend that the reason given for the rule at common law was not the true one,—that the special property and the right of possession were not the basis of the officer's authority, but mere incidents of it. The authority was conferred by the writ, which commanded him to make the money of the goods and chattels of the defendant. This authority could not be pursued except by seizing the property and retaining it till sold, and the possession of the property until a sale could be made could not be secured to the officer except by conceding to him a special property and right of possession sufficient to enable him to vindicate his rights against all attempted invasions thereof. When real property was authorized to be levied on and sold, it was not essential to the effectual exercise of the power that the officer should seize the property, but it was essential that by some act, equivalent to a levy, he should consecrate the realty to the satisfaction of his writ, so that no act of the defendant, nor of any one claiming under him, could deprive the plaintiff of the right, in the mode provided by law, of appropriating such realty to the extinction of the judgment debt. It was also essential that the lien or right created by the levy should not become abortive from the mere inability of the officer to make a sale in consonance with the requirements of the statute prior to the return day of the writ. Hence the better opinion is, that the levy upon real property before the return day vests in the officer a power of sale without which the levy would be an idle act, and that such power may be pursued after such return day as effectively as before.[1] A few

[1] See 3 Minn. 223; 5 Hill, 230; 4 Bibb, 94; 3 Scam. 551; 14 Pet. 84; 4 Wheat. 503; 37 Mo. 194; and 35 Iowa, 288, cited above. Also Mooney *v.* Mass. 22 Iowa, 380; Reddick *v.* Cloud, 2 Gilm. 670; Bellingall *v.* Duncan, 3 Gilm. 477; Tillotson *v.* Doe, 5 Blackf. 590; Butterfield *v.* Walsh, 21 Iowa, 97;

of the states have thought proper to limit this power by statutes forbidding its exercise after the return day. In these states a sale made in defiance of such statutes is undeniably void.[1] The rule allowing the officer to make a sale after the return day of the writ, of property then levied upon by him, is justified on the ground that title, when transferred by a sheriff's sale, relates back to the seizure or levy of the property sold; and on the further ground that otherwise the previous levy, which was authorized when made, might become a vain and purposeless act. But, except for the purpose of justifying the detention and sale of the property previously levied upon, an execution after the return day thereof is *functus officio*.[2] The officer attempting to further execute it is entirely without justification, and is liable for his acts precisely as he would be if he had no writ in his possession. A purchaser at an execution sale, where the levy and sale were made after the return day of the writ, acquires no title whatever.[3] An arrest under a *ca. sa.* after the return day is a trespass,[4] and so is a levy under a *fieri facias*.[5] An officer

89 Am. Dec. 557; Stein *v.* Chambless, 18 Iowa, 474; 87 Am. Dec. 411; Irwin *v.* Picket, 3 Bibb, 343; Lowry *v.* Reed, 89 Ind. 442; Rose *v.* Ingram, 98 Ind. 276; Knox *v.* Randall, 24 Minn. 479; Johnson *v.* Bemis, 7 Neb. 224.

[1] Lehr *v.* Rogers, 3 Smedes & M. 468; Kane *v.* Preston, 24 Miss. 133; Dale *v.* Metcalf, 9 Pa. St. 108; Cash *v.* Tozer, 1 Watts & S. 519.

[2] Cook *v.* Wood, 1 Harr. (N. J.) 254; Hathaway *v.* Howell, 9 Alb. L. J. 261; 54 N. Y. 97; Finn *v.* Commonwealth, 6 Pa. St. 460; Lofland *v.* Jefferson, 4 Harr. (Del.) 303; Castleman *v.* Griffith, Ky. Pr. Decis. 348; Carnahan *v.* People, 2 Ill. App. 630.

[3] Bank of Missouri *v.* Bray, 37 Mo. 191; Jefferson *v.* Curry, 71 Mo. 85; Wack *v.* Stevenson, 54 Mo. 481; McDonald *v.* Gronefeld, 45 Mo. 28; Kemble *v.* Harris, 36 N. J. L. 526; McElevee *v.* Sutton, 2 Bail. 361; Love *v.* Gates, 2 Ired. 14; Gaines *v.* Clark, 1 Bibb, 609; Lehr *v.* Doe, 3 Smedes & M. 468; Ross *v.* McEartan, 1 Brev. 507; Vail *v.* Lewis, 4 Johns. 450; 4 Am. Dec. 300; Collins *v.* Waggoner, Breese, 186; Rangeley *v.* Goodwin, 18 N. H. 217; Frellsen *v.* Anderson, 14 La. Ann. 65; West *v.* Shockley, 4 Harr. (Del.) 287.

[4] Stoyel *v.* Lawrence, 3 Day, 1.

[5] Vail *v.* Lewis, 4 Johns. 450; 4 Am. Dec. 300.

receiving money after the return day does not act in his official capacity, but merely as the agent of the defendant. Such payment does not make the officer's sureties responsible, nor does it satisfy the judgment unless accepted by plaintiff.[1] An execution continues in force to and including the return day thereof; and a valid levy may be made on the return day as well as on any other.[2] When, under the law, the writ is returnable to court, a question has arisen whether it continues in force after the adjournment of the court on the return day. In England,[3] it was held that at the adjournment of the court the writ became *functus officio;* and in America some decisions have been made on authority of this English case, and therefore in harmony with it;[4] but the English case was long since overruled in that country, and the law declared to be that the writ may be executed at any time during the return day.[5] A *levari facias de bonis ecclesiasticis* differs from other writs of execution in the time it may be enforced. It is a continuing writ. A levy may be made under it from time to time after it is returnable, until satisfaction is produced. A rule may be had against the bishop from time to time, to know what he has levied. If, however, the writ is actually returned, the bishop's authority to act is thereby terminated.[6]

[1] Farmers' Bank *v.* Reid, 3 Ala. 299; Rudd *v.* Johnson, 5 Litt. 19; Edward *v.* Ingraham, 31 Miss. 272; Haralson *v.* Ingraham, 10 Smedes & M. 581; Barton *v.* Lockhart, Stew. & P. 109; Bobo *v.* Thompson, 3 Stew. & P. 385; Harris *v.* Ellis, 30 Tex. 4; 94 Am. Dec. 296; Planters' Bank *v.* Scott, 5 How. (Miss.) 246; Grandstaff *v.* Ridgeley, 30 Gratt. 1.

[2] Wolley *v.* Mosely, Cro. Eliz. 761; Harvey *v.* Broad, Salk. 626; Gaines *v.* Clark, 1 Bibb, 609; Valentine *v.* Cooley, 1 Humph. 38.

[3] Perkins *v.* Woolaston, 6 Mod. 130; Salk. 321.

[4] Prescott *v.* Wright, 6 Mass. 20; Blaisdell *v.* Sheafe, 5 N. H. 201.

[5] Maud *v.* Barnard, 2 Burr. 812.

[6] Marsh *v.* Fawcett, 2 H. Black. 582; 3 Wms. Abr. 468.

§ 107. Diligence with Which the Officer should Proceed. — Having satisfied himself that it is his duty to execute the writ, the officer may next inquire when and how he must proceed. The writ will expire on its return day, and ought certainly to be executed by that time, if possible. But the officer has no right to delay its execution for any period of time. If the plaintiff points out property belonging to the defendant, and requests its seizure, the sheriff should comply, though the writ has just come to his hands. If he refuses to levy, an action may be sustained against him for such refusal, without waiting for the return of the writ, provided that the plaintiff can show that he has been injured by the delay.[1] The degree of diligence which an officer must display in the execution of a writ cannot be stated with desirable precision: 1. Because the courts are not exactly agreed in the rules which they have announced on the subject; and 2. Because of the inherent and unavoidable difficulty of finding and expressing any general principle which is fit to govern a class of cases, each member of which is necessarily affected by peculiar circumstances tending to distinguish it from every other member.[2] In Lindsay's Executors *v.* Armfield,[3] it is said that "the law declares it to be the duty of the sheriff to execute all process which comes to his hands with the utmost expedition, or as soon after it comes to his hands as the nature of the case will admit." In another case the court said: "A sheriff is bound to use all reasonable endeavors to execute process"; and further, that he should

[1] Shannon *v.* Commonwealth, 8 Serg. & R. 444; Farquhar *v.* Dallas, 20 Tex. 200.

[2] Whitsell *v.* Slater, 23 Ala. 626.

[3] 3 Hawks, 553; 14 Am. Dec. 603.

make all needful inquiries, and not rely "on vague information obtained from casual inquiries."[1] While it is doubtless prudent for the plaintiff to point out to the officer property subject to levy, his not doing so does not exonerate the officer from making a levy if practicable. It is his duty to make diligence search and inquiry for property, and failing to do so, he is answerable for any loss which may be incurred.[2] Nor must he content himself with mere formal inquiry. If sued for his failure to realize the judgment debt, he cannot successfully defend by proving the existence of a general report that the defendant was insolvent,[3] nor by showing that he was informed by the debtor and his wife that the property in their possession belonged to her.[4] So it was held that a marshal was bound to serve a subpœna in chancery "as soon as he reasonably could."[5] "The sheriff's liability rests on his breach of official duty. As he is bound to perform his duty, so he is responsible to every one who may be injured by his failure to discharge it. In respect to the execution of process, these official duties are well defined by law. The law is reasonable in this, as in all other things. It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties. It sanctions no negligence; but it requires no impossibilities, and imposes no unconscionable exactions. When process of attachment or execution comes to the hands of the sheriff, he must obey the exigency

[1] Hinman *v.* Borden, 10 Wend. 368; 25 Am. Dec. 568.

[2] Green *v.* Lowell, 3 Greenl. 373; Hargrave *v.* Penrod, Breese, 401; Albany City Bank *v.* Dorr, Walk. Ch. 318.

[3] Parks *v.* Alexander, 7 Ired. 412.

[4] Robertson *v.* Beavers, 3 Port. 385.

[5] Kennedy *v.* Brent, 6 Cranch, 187. A delay of eight days has been determined to be negligent. Hearn *v.* Parker, 7 Jones, 150.

of the writ. He must in such cases execute the writ with all reasonable celerity. Whenever he can make the money on execution, or secure the debt on attachment, he must do it. But he is not held to the duty of starting, on the instant after receiving a writ, to execute it, without regard to anything else than its instant execution. Reasonable diligence is all that is required of him in such instances. But this reasonable diligence depends upon the particular facts in connection with the duty. If, for example, a sheriff has execution against A, and he has no special instructions to execute it at once, and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligations to execute it instantaneously as if he were so instructed, and there were circumstances of urgency."[1] In order to sustain an action against an officer for not levying a writ, "it is necessary for the plaintiff to establish by proof that an execution in his favor was received by the sheriff in time to make the money; and that while in his hands he was required to make a levy by virtue of it, at a time when it was in his power to do so; and further, that he failed to make such levy."[2]

The mere failure to make a levy, though property could have been found subject to such levy, will not invariably make the officer liable. The court will consider what were his other duties at the time, for his diligence must be viewed in the light of all attendant circumstances. If he has a large number of prior writs in his hands, and is also pressed by numerous other

[1] Whitney v. Butterfield, 13 Cal. 338; 73 Am. Dec. 584. See also Janier v. Vandever, 3 Harr. (Del.) 29; Roe v. Gemmill, 1 Houst. 9.

[2] Lyendecker v. Martin, 38 Tex. 289. Failing to levy an execution, when in his power to do so, makes the officer responsible. O'Bannon v. Saunders, 24 Gratt. 138.

official duties, a delay of fourteen days may not establish want of diligence.[1] In some of the recent cases it has been held proper to instruct the jury that the sheriff was exonerated if he exercised "skill and diligence such as a reasonable man would exercise in the performance of like duties under the same circumstances."[2] This subject received very careful attention in the supreme court of Wisconsin in considering two appeals taken in the case of Elmore *v.* Hill.[3] The general rule was there formulated as follows: "The result of the adjudications on the subject seems to be, that on receipt of the execution, in the absence of specific instructions, the officer must proceed with reasonable celerity to seize the property of the debtor, if he knows, or by reasonable effort can ascertain, that such debtor has property in his bailiwick liable to seizure or execution. The officer must do this as soon after the process comes to his hands as the nature of the case will admit. If he fails to execute the process within an apparently reasonable time, the burden is on him to show, by averment and proof, that his delay was not in fact unreasonable. Failing this, he must respond in damages to the party injured by his negligence." In this case it appeared that in the afternoon of April 25, 1876, the execution was delivered to the sheriff. It was against a thrashing-machine company then doing business within a mile and a half of the sheriff's office. In the evening of the same day the under-sheriff called on the secretary of the company, advised him of the execution, and asked him whether he was ready to satisfy it. The secretary

[1] State *v.* Blanch, 70 Ind. 204.

[2] Crosby *v.* Hungerford, 59 Iowa, 712; 12 N. W. Rep. 582; State *v.* Leland, 82 Mo. 260.

[3] 46 Wis. 618 and 51 Wis. 365; 1 N. W. Rep. 235 and 8 N. W. Rep. 240.

replied that the board would have a meeting the next morning and make some arrangement about paying the debt. Nothing further was done by the sheriff. On the 29th of the same month the company made an assignment. It being admitted that the defendant in execution had property known to the sheriff upon which a levy could have been made, the court had no hesitation in declaring as a matter of law that these facts constituted want of diligence on the part of that officer, and rendered him answerable to the plaintiff, even assuming that no directions were given to proceed at once. To the sheriff's plea that he was required to be in attendance upon the circuit court at that time, the court responded that he was authorized by law to appoint as many deputies as he saw fit, that the object of this authorization was to secure the speedy service of process; and that if his constant personal attendance upon the court was really necessary, then he ought to have sent a deputy to levy the execution.

§ 108. **Who may Control the Writ.** — The inquiry how the writ is to be executed cannot be answered in detail in this chapter. The best general answer to this inquiry is that given by Bacon in his Abridgment, namely, "that there cannot be a surer rule to go by than a strict observance of what is enjoined by the writ."[1] The writ directs the money to be made out of the personal property of the defendant. The first inquiry, therefore, will be with a view of ascertaining whether the defendant has any such property subject to execution; if so, the next inquiry is, How can a valid levy be made on such property? So if the de-

[1] Bac. Abr., tit. Sheriff, N, 1.

fendant has no personal property subject to execution, the officer should inquire for real estate, and if any be found, should ascertain whether it be subject to execution, and if so, should proceed to levy thereon. And whether the levy be upon real or personal estate, many inquiries must be made to ascertain how the levy is to be made productive of satisfaction. The various steps in the enforcement of the writ, and the inquiries necessarily preceding these steps, will be considered in subsequent chapters. One inquiry will be answered here, — who is entitled to control the writ. The officer should always bear in mind that the writ is intended for the benefit of the plaintiff, who alone is interested in its enforcement.[1] The interests and wishes of the plaintiff should at all times be respected. He has no right to insist upon a fraudulent nor oppressive use of the writ;[2] nor in any respect to compel the officer to exercise a severity which would seem to be actuated by malice toward the defendant as much as by the desire to obtain satisfaction of his judgment. But all directions of the plaintiff not savoring of fraud, nor undue rigor and oppression, must be obeyed, or the officer will be held liable for injurious consequences flowing from his disobedience.[3] The plaintiff may direct that the property of one of the defendants be levied upon, instead of levying on the property of all the defendants;[4] or he may authorize the officer to take a course

[1] Reddick *v.* Cloud's Adm'rs, 7 Ill. 670; Morgan *v.* People, 59 Ill. 58.

[2] McDonald *v.* Neilson, 2 Cow. 139; 14 Am. Dec. 431.

[3] Tucker *v.* Bradley, 15 Conn. 46; Rogers *v.* McDearmid, 7 N. H. 506; Richardson *v.* Bartley, 2 B. Mon. 328; Patton *v.* Hamner, 28 Ala. 618; Poston *v.* Southern, 7 B. Mon. 289; Walworth *v.* Readsboro, 24 Vt. 252; Shyrock *v.* Jones, 22 Pa. St. 303; Isler *v.* Colgrove, 75 N. C. 334; State *v.* Pilsbury, 35 La. Ann. 408.

[4] Root *v.* Wagner, 30 N. Y. 9; 86 Am. Dec. 348; Godfrey *v.* Gibbons, 22 Wend. 569.

outside the ordinary method of collection, by receiving notes, in payment or giving credit at the sale;[1] or he may order the officer to suspend the writ, either temporarily or permanently;[2] and the latter is liable for making a sale after the plaintiff has directed him not to do so.[3] The plaintiff's attorney has, by virtue of his general employment in the case, power to direct and control the execution,[4] though he cannot satisfy the writ except upon payment to him of the *full amount* thereof in *money*,[5] unless the plaintiff has given him special authority to compromise the debt or accept satisfaction in something not a legal tender. The burden of proving such special authority is upon the party claiming under it; for it will never be presumed.[6] In England it seems that the retainer of the attorney ceases at judgment;[7] but that if an attorney is retained to conduct proceedings under execution, he has authority to make a compromise.[8] The authority of the plaintiff's attorney may be revoked at any time; and after knowledge of such revocation, the officer is

[1] Armstrong *v.* Garrow, 6 Cow. 465; Gorham *v.* Gale, 6 Cow. 467, note *a*.

[2] Jackson *v.* Anderson, 4 Wend. 474.

[3] Morgan *v.* People, 59 Ill. 60.

[4] Gorham *v.* Gale, 7 Cow. 739; 17 Am. Dec. 549; Walters *v.* Sykes, 22 Wend. 568; State *v.* Boyd, 63 Ind. 428.

[5] Freeman on Judgments, sec. 463; Wright *v.* Daily, 26 Tex. 730; Garthwaite *v.* Wentz, 19 La. Ann. 196; Lewis *v.* Gamage, 1 Pick. 347; Smock *v.* Dade, 5 Rand. 639; 16 Am. Dec. 780; McCarver *v.* Nealey, 1 Iowa, 360; Lewis *v.* Woodruff, 15 How. Pr. 539; Benedict *v.* Smith, 10 Paine, 126; Beers *v.* Hendrickson, 45 N. Y. 665; Jackson *v.* Bartlett, 8 Johns. 361; Trumbull *v.* Nicholson, 27 Ill. 149; Wilkinson *v.* Holloway, 7 Leigh, 277; Wakeman *v.* Jones, 1 Cart. 517; Chapman *v.* Cowles, 41 Ala. 103; 91 Am. Dec. 508; Jones *v.* Ransom, 3 Ind. 327; Abbe *v.* Rood, 6 McLean, 107; Jewett *v.* Wadleigh, 32 Me. 110; Vail *v.* Conant, 15 Vt. 314.

[6] Portis *v.* Ennis, 27 Tex. 574.

[7] Lovegood *v.* White, L. R. 6 C. P. 440; Butler *v.* Knight, L. R. 2 Ex. 109; 36 L. J. Ex. 86; 15 Week. Rep. 497; 15 L. T., N. S., 621.

[8] Butler *v.* Knight, L. R. 2 Ex. 109; 36 L. J. Ex. 86; 15 Week. Rep. 497; 15 L. T., N. S., 621.

not justified in pursuing the instructions of the attorney. An assignment of the judgment also operates as a revocation of the attorney's authority. If the officer has notice of such assignment, and that the assignee has employed another attorney, he must recognize the changed condition of affairs, and obey the instructions of the latter.[1]

[1] Robinson *v.* Brennan, 90 N. Y. 208.

CHAPTER X.

PERSONAL PROPERTY SUBJECT TO EXECUTION BY LEVY AND SALE.

§ 109. Introduction — Classification of subject.
§ 109 a. Law of the *situs* controls.

KINDS OF PERSONAL PROPERTY SUBJECT TO EXECUTION.

§ 110. Generally all tangible property.
§ 111. Money.
§ 112. Choses in action.
§ 113. Crops not harvested, and other products of the soil.
§ 114. Fixtures.

OF THE INTERESTS IN PERSONALTY SUBJECT TO EXECUTION.

§ 115. Only the real as contradistinguished from the apparent interests of the defendant.
§ 116. Equitable estates.
§ 117. Estates of mortgagors.
§ 118. Estates of mortgagees.
§ 119. Leasehold interests in real and personal property.
§ 120. Interests of pawnors and of pawnees.
§ 121. Interests of bailees.
§ 122. Estates in remainder.
§ 123. Inchoate interests.
§ 124. Property held under conditional sale.
§ 125. Interests of co-tenants and partners.
§ 125 a. Property subject to execution in equity.

DEFENDANTS WHOSE PROPERTY CANNOT BE SEIZED.

§ 126. Counties and municipalities.
§ 126 a. Property of *quasi* public corporations.
§ 127. Married women under judgments against their husbands.
§ 128. Married women under judgments against themselves.

PROPERTY NOT SUBJECT TO EXECUTION, BECAUSE IN CUSTODY OF THE LAW.

§ 129. Property in the hands of receivers and assignees.
§ 130. Money in the hands of sheriffs, constables, clerks, and justices.
§ 130 a. Property taken from prisoner on his arrest.
§ 131. Property in the hands of administrators, executors, and guardians.
§ 132. Money in the hands of federal, state, and county officers.
§ 133. Money in the hands of officers of municipalities.
§ 134. Money in the hands of attorneys.
§ 135. Goods levied upon.

PROPERTY CONVEYED OR MORTGAGED TO HINDER, DELAY, OR DEFRAUD CREDITORS.

§ 136. General rule.
§ 137. Creditors who may avoid a fraudulent transfer.
§ 137 a. Creditors, who are, within meaning of law against fraudulent transfers.
§ 138. Property which may be taken from fraudulent grantee.
§ 139. Origin of the law against fraudulent tranfers.
§ 140. Grantees whose interests are not prejudiced by showing fraud in transfer.
§ 141. Good faith of the holder of the property.
§ 142. Voluntary conveyances.
§ 143. Conveyances to the use of grantor.
§ 144. Conditional conveyances.
§ 145. Mortgages.
§ 146. Assignments for benefit of creditors.

ABSENCE OF CHANGE OF POSSESSION AS EVIDENCE OF FRAUD IN TRANSFER.

§ 147. Rule of the English cases.
§ 148. Cases in the majority of the United States.
§ 149. States where continuance of grantor in possession is *per se* fraudulent.
§ 150. Recapitulation of authorities.
§ 151. Absolute transfers not requiring change of possession.
§ 152. Transfers to secure payment of indebtedness.
§ 152 a. In conditional sales.
§ 153. Character and situation of property as dispensing with necessity for change of possession.
§ 154. When the change of possession must be made.
§ 155. What is a sufficient change.
§ 156. How long the change must continue.
§ 157. Property sold, but never delivered.
§ 158. Goods purchased through fraud.

§ 109. Introduction — Classification of Subject. — In following the instructions contained in the writ, the officer will first seek to discover personal property[1] belonging to the defendant or defendants, and

[1] Cape Sable Company's Case, 3 Bland, 640; Daniel *v.* Justice, Dud. (Ga). 2; Coe *v.* Wickham, 33 Conn. 389; Neilson *v.* Neilson, 5 Barb. 565; Simpson *v.* Hiatt, 13 Ired. 470; Hassell *v.* Southern Bank, 2 Head, 381; Thatcher *v.* Powell, 6 Wheat. 118. But in Illinois it is the duty of the officer first to levy upon real estate. Pitts *v.* Magie, 24 Ill. 610; Farrell *v.* McKee, 36 Ill. 225. A levy may be made on the lands of the judgment debtor, although he has personal property by his consent. Smith *v.* Randall, 6 Cal. 47; 65 Am. Dec. 475; Springer *v.* Johnson, 3 Harr. (Del.) 515. Or where he did not produce personal property for levy. Graves *v.* Merwin, 19 Conn. 96; Sloan *v.* Stanly, 11 Ired.

subject it to execution and forced sale. In the proceedings to discover property, the officer must, of course, exercise diligence, and proceed with such wisdom and perception as would characterize the efforts of a man of ordinary intelligence in transacting his private business. In reference to this part of the officer's business, we can make no suggestions likely to be of any practical assistance. But when property is discovered, it is essential that the officer should know whether it is such as he is authorized to seize under his writ. Hence this chapter shall be devoted to answering the inquiry, What personal property may be seized under execution? Before proceeding to answer this question in detail, we must stop to remark that while a *fieri facias* authorizes the officer to levy only upon "property *subject to execution*," yet this does not, in the first instance, require him to consider the question of *exemption* from execution where the exemption does not arise from the *nature* of the property. For we shall hereafter see that the privilege accorded by law to certain persons to hold a specified amount or character of property, as exempt from forced sale, is in most states a *personal* privilege, of which the officer need take no notice until the defendant claims the benefit of the law,

627. "Against a debtor refractory or negligent, the proper legal remedy is to lay hold of his effects for paying his creditors. This is the method prescribed by the Roman law, with the following limitation, that the movables, as of less importance, must be sold first. But the Roman law was defective in one particular, that the creditor was disappointed if no buyer was found. The defect is supplied by a rescript of the emperor, appointing that, failing a purchaser, the goods shall be adjudged to the creditor by a reasonable extent. Among other remarkable innovations of the feudal law, one is, that land was withdrawn from commerce, and could not be attached for payment of debt. Neither could the vassal be attached personally, because he was bound personally to the superior for service. The movables, therefore, which were always the chief subject of execution, came now to be the only subject." Kames's Law Tracts, 338.

and specifies what property he wishes to retain.[2] Our inquiry, therefore, in this chapter is, What property may the sheriff levy upon where the benefit of exemption is not claimed as a personal privilege? We shall treat, — 1. Of the *kinds* of personal property subject to execution; 2. Of the *estates* therein which are so subject; 3. Of defendants whose property cannot be seized; 4. Of property withdrawn from execution because in custody of the law; 5. Of property transferred or mortgaged with intent to hinder, delay, or defraud creditors; 6. Of the want of change of possession as evidence of fraud in the transfer of property; 7. Of property which has been sold, but never delivered to the purchaser; and 8. Of property acquired by fraud. The principles announced in treating of the third, fourth, and fifth subdivisions are as applicable to real as to personal property. If property is not *subject to execution*, a levy thereon and a sale thereof, based on such levy, are utterly void.[3] But if the exemption of the property is a mere personal privilege, available to defendant when he may choose to claim it, a sale under execution by his express or implied assent is valid.

§ 109 a. **Law of the Situs Controls.** — The question whether property is subject to execution is one which must be determined by the laws of the state in which it happens to be. The owner of property may send it into another state, or it may always have been in one state while he resided in another, and in either case the question may arise as to whether the right to sub-

[2] See § 211.

[3] Barbour *v.* Breckenridge, 4 Bibb, 548; Jeffries *v.* Sherburn, 21 Ind. 112; Griffin *v.* Spencer, 6 Hill, 525; Bigelow *v.* Finch, 11 Barb. 498; Gooch *v.* Atkins, 14 Mass. 378.

ject this property to execution is regulated and controlled by the law of his domicile, or by that of the state in which the property is found. This question arises most frequently in cases where the owner in the state of his domicile has made some conveyance or transfer of the property valid there, and which would there remove the property from the reach of his execution creditors, but which is inoperative against such creditors by the laws of the state in which the property is situate, for want of change of possession or from some other cause known to the laws of the state. In all such cases, the law of the state in which the property is controls, irrespective of the question of the domicile of the parties. If the property is seized and sold in such state, pursuant to the laws thereof, and by proceedings sufficient in form to vest title in the purchaser there, such title must be respected in every other state in which it may be drawn in question, though by the laws of the latter state the property was not subject to execution as the property of the defendant in execution at the time it was seized and sold.[1]

KINDS OF PERSONAL PROPERTY SUBJECT TO EXECUTION.

§ 110. Generally all Tangible Property is Subject to Levy. — "The general rule of law is, that all chattels, the property of the debtor, may be taken in execution."[2] Perhaps it would be more accurate to say that all kinds of personal property of the debtor, which can at law be by him made the subject of a voluntary transfer of title, can, by execution, be made the subject of

[1] Green v. Van Buskirk, 5 Wall. 307; Hervey v. R. I. Locomotive Works, 93 U. S. 664.

[2] Turner v. Fendall, 1 Cranch, 134; Crocker on Sheriffs, sec. 451.

an involuntary transfer. It is sometimes said that nothing can be seized by the officer which cannot be sold.[1] But this is not strictly true. The object of the levy is to obtain satisfaction; and this object is usually, but not universally, consummated by a sale of the property seized. The officer cannot lawfully seize anything which could not be made to contribute to the satisfaction of the judgment. But if a thing can, without sale, be applied upon the writ, it may be taken. "It appears to us to comport with good policy, as well as justice, to subject everything of a tangible nature, excepting such things as the humanity of the law preserves to the debtor, and mere choses in action, to the satisfaction of the debtor's debts."[2] A copyright is "an incorporeal right, secured by statute to the author; and, being intangible, is not subject to seizure and sale at common law."[3] "There would certainly be great difficulty in assenting to the proposition that patent and copy rights, held under the laws of the United States, are subject to seizure and sale on execution. Not to repeat what is said on this subject in 14 How. 531, it may be added that these incorporeal rights do not exist in any particular state or district,—that they are co-extensive with the United States. There is nothing in any act of Congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of states and districts. That an execution out of the court of common pleas for the county of Bristol, in the state of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island or New

[1] Knox *v.* Porter, 18 Mo. 243; Watson on Sheriffs, 178.
[2] Handy *v.* Dobbin, 12 Johns. 220; Twinam *v.* Swart, 4 Lans. 264.
[3] Stephens *v.* Cady, 14 How. 531.

York, will hardly be pretended. That by the levy of such an execution the entire right could be divided, and so much of it as might be exercised in the county of Bristol sold, would be a position subject to much difficulty."[1] Whether unpublished manuscripts are subject to execution is a question which seems to have been determined in but one case. In that case a set of abstract books containing, we presume, memoranda compiled from the public records, and so arranged as to facilitate the examination of titles to real estate, was made the subject of an action of replevin, and the question of their liability to execution was assumed by the court to be involved. The court held that the proprietor of such a manuscript had a right either to publish it or to withhold it from publication; that this right was a personal one, of which he could not be divested otherwise than by his own act; that the value of the books depended on the information contained therein, and not on the books themselves; that "no law can compel a man to publish what he does not choose to publish"; that "it would be very absurd to hold that books could be seized and sold under execution, which after the sale the purchaser could not use"; and finally, that the books were not subject to seizure and sale under execution.[2] The reasoning of this decision does not seem irresistible.

In a set of abstract books, or in any other manuscripts, we see nothing intangible, nothing which makes it difficult or improper to subject them to

[1] Stevens *v.* Gladding, 17 How. 451. See Cooper *v.* Gunn, 4 B. Mon. 594, assuming that copyright *is not* subject to execution; and Woodworth *v.* Curtis, 2 Wood. & M. 530, assuming that it *is* subject. Banker *v.* Caldwell, 3 Minn. 94, cited by Mr. Herman as showing that copyrights and manuscripts are subject to execution, is not an authority on either side of the question.

[2] Dart *v.* Woodhouse, 40 Mich. 399; 29 Am. Rep. 544.

execution. Confessedly they are property, and as such may be valuable to their compiler or owner, and doubtless he may by his voluntary transfer divest himself of title, and vest it in another. His transfer may not divest him of the information contained in them, and certainly will not impair the skill required in their compilation or use. The fact that he does not and cannot transfer his information and skill constitutes no ground for denying his ability to transfer so much as is transferable. In a state whose statutes in general terms declare all property subject to execution, we can perceive no reason for holding abstract books or other valuable writings not subject to execution. If the court meant by saying that it would be "absurd to hold that books could be seized and sold under execution, which the purchaser could not use," that nothing can be sold which a purchaser cannot comprehend or skillfully manage, then a book might be reserved from execution sale because written in a language which none of the bidders understood, or a musical instrument, because, like Hamlet's flute, they were not competent to play upon it. That the interests held by inventors and authors, under grants of letters patent or copyright, are not directly subject to execution sale, is owing to their intangible nature, and the fact that they cannot be said to be located in any particular place, so as to be subject to seizure and sale. The manuscript, however, is not intangible. If it should be sold under execution, there would be no more difficulty in defining, recognizing, and preserving the rights and interests of the purchaser than if his purchase had been made at a voluntary sale. Though not subject to seizure, patent rights are subject to execution. In

England they pass to assignees in bankruptcy for the benefit of creditors.[1] In the United States they may be reached by proceedings either in chancery or supplemental to execution, whereby the defendant may be compelled to transfer by a proper writing all his right, title, and interest in the patent right to a receiver appointed to sell the same, and apply the proceeds to the satisfaction of the judgment.[2] If the patentee of an invention constructs, though not for sale, one or more of the machines or implements covered by his letters patent, it being a tangible thing, is subject to seizure, and consequently to sale under execution. The purchaser's rights are not limited to the mere materials purchased, but include the right to use the machine as fully as if such machine had been voluntarily sold by the patentee.[3]

Seats in stock-boards in large cities have become, in some instances, of great value, and though in the nature of personal privileges, their transfer from one person to another has generally been respected, if made in compliance with the rules or by-laws of the association. They have been spoken of by the courts as property; and it has been said that on bankruptcy they would pass to the assignee, subject to the rules of the stock-board.[4] If this be true, they must be subject to execution in some mode, perhaps by creditor's bill, or by proceedings supplemental to execution, in which a receiver could be appointed, and a transfer to

[1] Hesse *v.* Stevenson, 3 Bos. & P. 577; Nias *v.* Adamson, 3 Barn. & Ald. 225; Coles *v.* Barrow, 4 Taunt. 754.

[2] Pacific Bank *v.* Robinson, 57 Cal. 520; 44 Am. Rep. 120; Barnes *v.* Morgan, 3 Hun, 703; Stephens *v.* Cady, 14 How. 531; Ager *v.* Murray, 105 U. S. 126.

[3] Willer *v.* Kent, 15 Fed. Rep. 217.

[4] Hyde *v.* Woods, 94 U. S. 525.

him compelled. In the only case considering the question which we have been able to discover, it was held that they were not liable to seizure and sale under execution.[1] A personal lien existing in favor of any person, and not liable to voluntary transfer, can never be subjected to a writ of execution.[2] An agreement that the plaintiff will not seek to satisfy his judgment except by levy on specified property is valid, and may be enforced against him.[3]

§ 111. **Money.**—It was at one time insisted that money was not subject to seizure upon execution, because it could not be sold.[4] But this reason did not long prevail; and it is doubtful whether it ever prevailed at all. For while money may not—or, more properly speaking, need not—be sold, in order to apply it to the execution, yet this furnishes no sensible reason why it should not be taken and credited on the writ. The rule is now well established that "money, whether in specie or in bank notes (which are treated *civiliter*, as money), if in the possession of the defendant, or capable of being identified as his property, may be taken in execution."[5] In England, the decisions on

[1] Pancoast *v.* Gowen, 93 Pa. St. 66.

[2] Holly *v.* Huggeford, 8 Pick. 73; 19 Am. Dec. 303; Kittredge *v.* Sumner, 11 Pick. 50; Legg *v.* Evans, 6 Mees. & W. 36; 8 Dowl. P. C. 177; 4 Jur. 197. See also § 112.

[3] Whitney *v.* Haverhill Ins. Co., 9 Allen, 35.

[4] Thus in Armistead *v.* Philpot, Doug. 231, "Lord Mansfield said he believed there were old cases where it had been held that the sheriff could not take *money* in execution, even though found in the defendant's *escritoir*, and that a quaint reason was given for it, viz., that money could not be *sold*."

[5] Crane *v.* Freese, 1 Harr. (N. J.) 307; Turner *v.* Fendall, 1 Cranch, 134; State *v.* Taylor, 56 Mo. 495; Spencer *v.* Blaisdell, 4 N. H. 198; 17 Am. Dec. 412; Handy *v.* Dobbin, 12 Johns. 220; The King *v.* Webb, 2 Show. 166; Reno *v.* Wilson, 1 Hemp. 91; Russell *v.* Lawton, 14 Wis. 202; 80 Am. Dec. 769; Dolby *v.* Mullins, 3 Humph. 437; 39 Am. Dec. 180; Green *v.* Palmer, 15 Cal. 411; 76 Am. Dec. 492; Taylor's Appeal, 1 Pa. St. 390; Harding *v.* Stevenson, 6

this subject are infrequent, meager, and contradictory. The cases of Armistead *v.* Philpot, Doug. 231, and of The King *v.* Webb, 2 Show. 161, are clearly in harmony with the American decisions. Some later cases, however, are understood as establishing a different rule.[1] These cases, we think, will, on examination, be found to go no further than to establish that money in the hands of a sheriff, or in other words, *in custodia legis*, cannot be levied upon under either execution or attachment,—a position which is perfectly agreeable to that of the American courts.[2] In no case can money be lawfully seized by the officer when it is not in the possession and control of the defendant. Thus where money is deposited in bank, it becomes the property of the bank, and cannot be seized by the sheriff as the money of the judgment debtor.[3]

§ 112. **Choses in Action.**—By the common law, choses in action were not subject to seizure and sale under execution. This common-law rule still prevails, except where it has been changed by statute;[4] but in

Har. & J. 264; Brooks *v.* Thompson, 1 Root, 216; Doyle *v.* Sleeper, 1 Dana, 531; Prentiss *v.* Bliss, 4 Vt. 513; 24 Am. Dec. 631; Holmes *v.* Nuncaster, 12 Johns. 395; Summers *v.* Caldwell, 2 Nott & McC. 341; Means *v.* Vance, 1 Bailey, 39; Noble *v.* Kelly, 40 N. Y. 415.

[1] Fieldhouse *v.* Croft, 4 East, 510; Knight *v.* Cridden, 9 East, 48; Willows *v.* Ball, 2 Bos. & P. 376.

[2] By section 12, chapter 110, of statutes of 1 and 2 Victoria, the sheriff may seize, under a *fieri facias*, any money, bank notes, checks, bills of exchange, promissory notes, bonds, specialties, or other securities for moneys. See Wood *v.* Wood, 3 Gale & D. 532.

[3] Carroll *v.* Cone, 40 Barb. 220; McMillan *v.* Richards, 9 Cal. 365; 70 Am. Dec. 655; Moorman *v.* Quick, 20 Ind. 67; Scott *v.* Smith, 2 Kan. 458.

[4] Williams *v.* Reynolds, 7 Ind. 622; Taylor *v.* Gillean, 23 Tex. 508; Watkins *v.* Dorsett, 1 Bland, 530; Grogan *v.* Cooke, 2 Ball & B. 233; Totten *v.* McManus, 5 Ind. 407; Price *v.* Brady, 21 Tex. 614; Stewart *v.* English, 6 Ind. 176; Smith *v.* K. & P. R. R. Co., 45 Me. 547; McGehee *v.* Cherry, 6 Ga. 550; Ellison *v.* Tuttle, 25 Tex. 283; Harding *v.* Stevenson, 6 Har. & J. 264; Denton *v.* Livingston, 9 Johns. 96; 6 Am. Dec. 264; McClelland *v.* Hubbard, 2 Blackf.

most states provisions have been made by statute, under which many choses in action may be reached by garnishment, and thereby made to contribute to the satisfaction of executions. In some of the states, choses in action may be levied upon and sold in the same manner as other personal estate.[1] These statutes will not, however, be construed as authorizing an involuntary transfer of that which the judgment debtor could not transfer voluntarily. Thus the vendor's lien held by one who has sold real estate is not subject to voluntary transfer,[2] though the indebtedness secured by such lien may be assigned. Hence, while such indebtedness can be sold under execution as a chose in action, such sale cannot entitle the purchaser to the benefit of the lien.[3] But it seems, at least in California, that all kinds of choses in action may be levied

361; McFerran *v.* Jones, 2 Litt. 222; Johnson *v.* Crawford, 6 Blackf. 377; Moore *v.* Pillow, 3 Humph. 488; Humble *v.* Mitchell, 11 Ad. & E. 205; Nash *v.* Nash, 2 Ma. & D. 133; Ransom *v.* Miner, 3 Sand. 692; Ingalls *v.* Lord, 1 Cow. 240; Field *v.* Lawson, 5 Pike, 376; Greenwood *v.* Spiller, 2 Scam. 504; People *v.* Auditors, 5 Mich. 223; Rhoads *v.* Megonigal, 2 Pa. St. 39; Pool *v.* Glover, 2 Ired. 129.

[1] By section 688, California Code of Civil Procedure, "all goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment." A similar statute existed in Louisiana. Sec. 647 of Code of Practice. Hence in that state a promissory note may be levied upon and sold. State *v.* Judge, 20 La. Ann. 884; Nugent *v.* McCaffrey, 33 La. Ann. 271; Brown *v.* Anderson, 4 Martin, N. S., 416; Wilson *v.* Munday, 5 La. 483; Flouker *v.* Ballard, 2 La. Ann. 338; Stockton *v.* Stanbrough, 3 La. Ann. 390. Choses in action are also subject to levy and sale in Iowa (section 3046 of the code), and in Indiana (Bay *v.* Saulspaugh, 74 Ind. 397).

[2] Baum *v.* Grigsby, 21 Cal. 172; 81 Am. Dec. 153; Lewis *v.* Covillaud, 21 Cal. 178; Williams *v.* Young, 21 Cal. 227. The same rule applies to mechanics' liens. Lovett *v.* Brown, 40 N. H. 511.

[3] Ross *v.* Heintzen, 36 Cal. 313.

upon and sold,[1] except contingent and complicated contracts, of which the true amount and value cannot be ascertained. When personal property is held adversely to its owner, his interest therein is a mere chose in action, and cannot be reached by execution,[2] unless by virtue of the provisions of some statute. But there are many choses in action, which, from their intangible character, seem to be incapable of being made the subjects of direct levy and sale. Of this character are all debts and credits not evidenced by writing, or by something capable of being seized and taken into possession, or in some manner made to bear witness to a change in their ownership. A chose in action evidenced by a book-account is also of this character. The book-account is not so intimately connected with the demands charged therein, that the seizure of the book is equivalent to the seizure of the demands. There is no means by which these demands can be transferred by a direct levy and sale.[3] They must be reached by garnishment, trustee process, or proceedings supplemental to or in aid of execution.[4] A judgment may be subjected to execution as a credit or chose in action in most of the states in which choses in action may be subjected to execution. The mode of levying upon a judgment, and of applying it toward the satisfaction of the writ, is a matter of some difficulty. That it is property is everywhere conceded. But though it is evidenced by some writing or matter

[1] Davis *v.* Mitchell, 34 Cal. 87; Adams *v.* Hackett, 7 Cal. 187.

[2] Commonwealth *v.* Abell, 6 J. J. Marsh. 476; Thomas *v.* Thomas, 2 A. K. Marsh. 430; Wier *v.* Davis, 4 Ala. 442; Carlos *v.* Ansley, 8 Ala. 900; Horton *v.* Smith, 8 Ala. 73; 43 Am. Dec. 628.

[3] Clark *v.* Warren, 7 Lans. 180; Brower *v.* Smith, 17 Wis. 410.

[4] Brisco *v.* Askey, 12 Ind. 666; Chandler *v.* Keaton, 17 Ind. 215; Chandler *v.* Davis, 17 Ind. 262; Lake Erie R. R. Co. *v.* Eckley, 13 Ind. 67.

of record, such writing or record is not the judgment, but only evidence thereof. It would be impossible to seize the judgment, for it is intangible, and improper to seize the evidence of it, for that should remain in the custody of some public officer. In this dilemma, the major portion of the courts considering the question have concluded that a judgment cannot be levied upon and sold, but can be reached only by garnishment.[1] In Louisiana, a judgment may be reached by garnishment,[2] or seized and sold under execution;[3] while in Oregon it is not a subject of garnishment,[4] but whether of levy and sale the decisions do not state. The objection urged in this state against permitting the garnishment of a judgment is, that to render the garnishment effective, it may be necessary to proceed to judgment against the garnishee, and that there will then be two judgments against him in favor of different persons, based upon the same debt.

§ 113. **Crops, whether Growing or Standing in the Field**, ready to be harvested, are, when produced by annual cultivation, no part of the realty. They are, therefore, liable to voluntary transfer as chattels.[5] It

[1] McBride *v.* Fallon, 65 Cal. 301; Wilson *v.* Matheson, 17 Fla. 630; Osborn *v.* Cloud, 23 Iowa, 104; 92 Am. Dec. 413. The rule has been changed in Iowa by section 3046 of the code.

[2] Hanna *v.* Bry, 5 La. Ann. 651; 52 Am. Dec. 606; Righter *v.* Slidell, 9 La. Ann. 602.

[3] Safford *v.* Maxwell, 23 La. Ann. 345.

[4] Despain *v.* Crow, 14 Or. 404; Norton *v.* Winter, 1 Or. 47.

[5] Harris *v.* Frink, 49 N. Y. 24; 10 Am. Rep. 318; Graff *v.* Fitch, 56 Ill. 373; 11 Am. Rep. 85; Whipple *v.* Foot, 2 Johns. 418; 3 Am. Dec. 442; Craddock *v.* Riddlesbarger, 2 Dana, 205; Mattock *v.* Fry, 15 Ind. 483; Evans *v.* Roberts, 5 Barn. & C. 829; Pourrier *v.* Raymond, 1 Hann. 512; Parker *v.* Staniland, 11 East, 362; Austin *v.* Sawyer, 9 Cow. 39; Jones *v.* Flint, 10 Ad. & E. 753; Poulter *v.* Killingbeck, 1 Bos. & P. 398; Austin *v.* Sawyer, 9 Cow. 39; Mumford *v.* Whitney, 15 Wend. 387; 30 Am. Dec. 60; Westbrook *v.* Eager, 1 Harr. (N. J.) 81; Purner *v.* Piercy, 40 Md. 212. It is immaterial whether the growing

is equally well settled that they may be seized and sold under execution.[1] "Various growing vegetables, termed in law emblements, and properly speaking the profits of *sown* land, but extended in law not only to growing crops of corn, but to roots planted, and other annual artificial profit, are deemed personal property, and pass as such to the executor or administrator of the occupier, if he die before he has actually cut, reaped, or gathered the same. All vegetable productions are so classed when they are raised annually by labor and manure, which are considerations of a personal nature. At common law, *fructus industriales*, as growing corn and other annual produce, which would go to the executor upon death, may be taken in execution."[2] "We have no doubt that corn, or any other product of the soil raised annually by labor and cultivation, is personal estate. It is, therefore, liable to be seized on execution, and may be sold as other personal estate."[3] A growing crop, raised annually by labor and cultivation, is, as respects an execution against the owner, a mere chattel, and subject as such to be taken and sold. A purchaser, on such sale, acquires the rights and inter-

crop be such as can be severed, like corn or wheat, or such as must be dug out of the ground, as turnips or potatoes. Dunne *v.* Ferguson, Hayes, 542; Sainsbury *v.* Matthews, 4 Mees. & W. 343; Warick *v.* Bruce, 2 Maule & S. 205. Some of the English decisions, however, deny that crops are personal property, and affirm that they cannot be transferred except as real estate. Emmerson *v.* Heelis, 2 Taunt. 38; Earl of Falmouth *v.* Thomas, 1 Cromp. & M. 89; 3 Tyrw. 963.

[1] Northern *v.* State, 1 Ind. 113; Hartwell *v.* Bissell, 17 Johns. 128; Coombs *v.* Jordan, 3 Bland, 312; 22 Am. Dec. 236; Cassilly *v.* Rhodes, 12 Ohio, 88; Parham *v.* Thompson, 2 J. J. Marsh. 159; Peacock *v.* Purvis, 2 Brod. & B. 362; Bloom *v.* Welsh, 3 Dutch. 178; Crine *v.* Tifts, 65 Ga. 644; Thompson *v.* Craigmyle, 4 B. Mon. 391; 41 Am. Dec. 240; Preston *v.* Ryan, 45 Mich. 174; *contra:* Norris *v.* Watson, 22 N. H. 364; 55 Am. Dec. 160.

[2] Smith *v.* Tritt, 1 Dev. & B. 241; 28 Am. Dec. 565; Poole's Case, 1 Salk. 368; Scorell *v.* Boxall, 1 Younge & J. 398; Shannon *v.* Jones, 12 Ired. 206.

[3] Penhallow *v.* Dwight, 7 Mass. 35; 5 Am. Dec. 21.

ests of the defendant in execution to the crop, with the right of ingress, egress, and regress, for the purpose of gathering and carrying it away.[1] When a product of the soil is claimed not to be subject to seizure and sale under a *fieri facias*, the claim must be determined by ascertaining whether such product is real or personal estate; and this last question is, in turn, to be settled by inquiring whether the product is chiefly the result of roots permanently attached to the soil, or of the labor and skill of the defendant in sowing and cultivating the soil.

The decisions holding certain crops to be personal estate, and therefore subject to execution, have generally embraced nothing beyond those crops which, being sown or planted, are capable of reaching perfection within one year. But we think a crop which could not reach perfection in less than two or three years would also be personal property, if its growth can be regarded as chiefly attributable to the skill and labor of the owner. We think, too, that the purpose for which the product is cultivated may be taken into consideration in determining its character as real or personal estate. Thus fruit-trees, planted in an orchard to permanently enhance the value of the real estate, ought to be regarded in a very different light from trees growing in a nursery for the purposes of sale, and which the owner treats as merchandise, to be

[1] Sheppard *v.* Philbrick, 2 Denio, 175; Stewart *v.* Doughty, 9 Johns. 108. At an early date, in Alabama, an execution could not be levied on a growing or ungathered crop. Adams *v.* Tanner, 5 Ala. 740; Evans *v.* Lamar, 21 Ala. 333. At a later period the common-law rule prevailed. McKenzie *v.* Lampley, 31 Ala. 526. At present, growing and ungathered crops are exempt from execution. Rev. Code Ala., sec. 2879. Statutes have also been enacted in Kentucky, Michigan, and Tennessee, providing when crops may be taken in execution.

sold to whomsoever may apply.[1] But the general rule undoubtedly is, that "growing trees, fruit, or grass, the natural produce of the earth, and not annual productions raised by the manurance and industry of man, are parcel of the land itself, and not chattels."[2] "Annual productions of fruits of the earth, as clover, timothy, spontaneous grasses, apples, pears, peaches, cherries, etc., are considered as incidents to the land in which they are nourished, and are therefore not personal."[3] Fruit on trees cannot be levied upon.[4] Of course, the rule is otherwise where fruit, grass, or any other natural product of the earth has been severed therefrom, and thereby converted into personalty. The fact that a crop is produced by perennial roots is by no means conclusive that it is to be ranked as real estate. The true test is, whether the crop is produced chiefly by the manurance and industry of the owner. Thus hop roots are perennial, and, unlike potatoes, are regarded as real estate; but the crop grown from such roots, being almost entirely dependent for its value on manurance and industry, is personal estate.[5] Hops growing and maturing on the vines may therefore be levied upon and sold under execution.[6] It seems to be well settled that some kinds of property, which under ordinary circumstances would be regarded as real

[1] Miller *v.* Baker, 1 Met. 27; Whitmarsh *v.* Walker, 1 Met. 313.

[2] Green *v.* Armstrong, 1 Denio, 556; Teal *v.* Auty, 2 Brod. & B. 99; Slocum *v.* Seymour, 36 N. J. L. 138; Crosby *v.* Wadsworth, 6 East, 602; Rodwell *v.* Phillips, 9 Mees. & W. 501; Putney *v.* Day, 6 N. H. 430; 25 Am. Dec. 470; Olmstead *v.* Niles, 7 N. H. 522; Bank of Lansingburg *v.* Crary, 1 Barb. 542; Adams *v.* Smith, Breese, 221.

[3] Craddock *v.* Riddlesbarger, 2 Dana, 206.

[4] Roe *v.* Gemmell, 1 Houst. 9.

[5] Latham *v.* Atwood, Cro. Car. 515; Anonymous Case, Freem. Ch. 210; Fisher *v.* Forbes, referred to 9 Vin. Abr. 373, pl. 82. See also Evans *v.* Roberts, 5 Barn. & C. 829; Graves *v.* Weld, 5 Barn. & Adol. 105.

[6] Frank *v.* Harrington, 36 Barb. 415.

estate, may, under peculiar circumstances, acquire or retain the character of personal estate. Thus a building or fence placed on lands by a tenant may, by agreement between him and his landlord, retain its character of personalty.[1] So the owner of land may, by a transfer in writing, sell the trees thereon, and thus separate them from the realty. Or grass or trees may belong to a tenant according to the terms of his lease. In such case, they are personal property, and liable to be seized and sold under an execution against the tenant.[2] It seems to be conceded that where lands are leased to a professional gardener or nurseryman, for the purpose of carrying on his trade, the shrubs, trees, and flowers which he may plant and have growing on such lands are regarded as *trade fixtures*. They are, therefore, during the continuance of his term, to be treated as personal property.[3] In Louisiana, a growing crop is regarded as part of the realty when it belongs to the owner of the land; but when the property of a lessee, it is mere chattel, and is subject to execution as such.[4] Where a mortgage is given upon real estate it does not affect the right of the mortgagor to deal with the crops growing thereon as personal property. He may transfer or encumber them either voluntarily or involuntarily. If they are seized upon execution, the rights of the seizing creditor

[1] Sheldon *v.* Edwards, 35 N. Y. 279; Ford *v.* Cobb, 20 N. Y. 344; Smith *v.* Benson, 1 Hill, 176.

[2] Smith *v.* Jenks, 1 Denio, 580, affirmed as Jenks *v.* Smith, 1 N. Y. 90; Winternute *v.* Light, 46 Barb. 278. One who, under a timber lease, has the right to cut and remove timber, has a mere chattel interest, which is subject to sale as personalty. Caldwell *v.* Fifield, 4 Zab. 161.

[3] Penton *v.* Robart, 2 East, 91; Wyndham *v.* Way, 4 Taunt. 316; Maples *v.* Millon, 31 Conn. 598; Miller *v.* Baker, 1 Met. 27. For essay on growing crops, see 7 Chic. L. N. 391.

[4] Porche *v.* Bodin, 28 La. Ann. 761; Pickens *v.* Webster, 31 La. Ann. 870.

become paramount to those of the mortgagee. If the latter, upon showing that the mortgagor is insolvent, obtains a receiver of the rents and profits, the appointment of such receiver cannot operate retroactively so as to vest in him a right to crops previously attached. In such cases the rights of the receiver seem not to relate to the date of the mortgage, but to be such only as were vested in the mortgagor at the time of the appointment.[1]

While growing crops are generally subject to execution as personal estate, it may happen that the interest of the defendant therein at the time of the levy is not such as to warrant a levy thereon. Thus in Indiana, where lands are held by husband and wife as tenants by the entireties, and he is without power to sell or encumber them, the crops raised thereon are held not to be subject to execution against him.[2]

Where crops have been raised by one person on the land of another, under a lease or contract by which he and the owner of the land share in such crops, there is some doubt concerning the nature of the interests of the parties, and therefore some difficulty in determining when and against whom they are subject to execution. They are in some instances subject to execution against the land-owner only, in other instances against the cropper only, and in still other instances against both the land-owner and the cropper. In by far the greater number of cases the contract or leasing is such that both parties at all times have an interest in the crops prior to their division as tenants in common thereof;[3]

[1] Favorite *v.* Deardoff, 84 Ind. 555; Rider *v.* Vrooman, 12 Hun, 299.

[2] Patton *v.* Rankin, 68 Ind. 245; 34 Am. Rep. 254.

[3] Freeman on Cotenancy and Partition, sec. 100; Foote *v.* Colvin, 3 Johns. 210; 3 Am. Dec. 478; De Mott *v.* Hagerman, 8 Cow. 220; 18 Am. Dec. 443; Putnam *v.* Wise, 1 Hill, 234; 37 Am. Dec. 309; Wentworth *v.* Portsmouth R.

and where this is so, the interest of each is necessarily subject to an execution against him. The question is one of intention, to be determined from the whole contract. If the contract shows that it was the intention of the parties to divide the specific products of the premises, the intention would seem to be manifest that each should at all times prior to the division have a title to his moiety of such products. If, on the other hand, the lease or contract contains words importing a present demise and a reservation of a portion of the crop as rent, the parties seem to stand toward each other in the relation of debtor and creditor, the debt being payable in produce; and the tenant is the sole owner of such produce until the part due the landlord is segregated and paid to him.[1] Where this is the case, the crops are subject to an execution against the tenant, but to none against the landlord.[2] The leasing or contract, taken as a whole, may, in substance, provide that the cropper give his services in consideration of receiving a portion of the crop. In this event he is regarded as having possession of the land merely for the purposes of cultivating and harvesting his crop; the obligation of the landlord to him is in the nature of a debt merely, and he has no title to any part of the crop until its segregation and payment to him. His interest

R., 55 N. H. 546; Guest *v.* Opdyke, 31 N. J. L. 552; Cooper *v.* McGrew, 8 Or. 327; Esdon *v.* Colburn, 28 Vt. 631; 67 Am. Dec. 730; Bernal *v.* Hovious, 17 Cal. 541; 79 Am. Dec. 147; Delany *v.* Root, 99 Mass. 546; Johnson *v.* Hoffman, 53 Mo. 204; Lowe *v.* Miller, 3 Gratt. 205; 46 Am. Dec. 188; Thompson *v.* Mawhinny, 17 Ala. 362; 52 Am. Dec. 176; Schell *v.* Simon, 66 Cal. 264.

[1] Deaver *v.* Rice, 4 Dev. & B. 431; 34 Am. Dec. 383; Woodruff *v.* Adams, 5 Blackf. 317; 35 Am. Dec. 122; Harrison *v.* Ricks, 71 N. C. 7; Walls *v.* Preston, 25 Cal. 59; Dixon *v.* Niccolls, 39 Ill. 372; 89 Am. Dec. 312; Sargent *v.* Courrier, 66 Ill. 245; 6 Am. Rep. 524; Front *v.* Hardin, 56 Ind. 165; Townsend *v.* Isenberger, 45 Iowa, 670; Warner *v.* Abbey, 112 Mass. 355; Darling *v.* Kelly, 113 Mass. 29; Dockham *v.* Parker, 8 Greenl. 137; 23 Am. Dec. 547.

[2] Waltson *v.* Bryan, 64 N. C. 764.

is not subject to execution.[1] The owner of the land may always, by apt words in his contract or lease, provide that the title to all the crops raised shall remain in him until the tenant's or cropper's part shall be segregated and delivered to him; and where such words are employed, no one other than the land-owner has any interest in the crops subject to seizure and sale under execution.[2] The parties may also make their relation that of partners, in which event their property will be subject to execution as other partnership property.[3]

§ 114. **Fixtures.**—It was formerly thought that fixtures[4] were not liable to be taken in execution. But it is now well settled that they are subject to be made to contribute to the payment of the debts of their owner.[5] The chief difficulty is in deciding what is a fixture. The tests for making a correct decision cannot be fully stated otherwise than by writing a treatise on the subject of fixtures. It may be, however, remarked here, that the intent of the parties, or, more

[1] Brazier *v.* Ansley, 11 Ired. 12; 51 Am. Dec. 408; Jeter *v.* Penn, 28 La. Ann. 230; 26 Am. Rep. 98; McNeely *v.* Hart, 10 Ired. 63; 51 Am. Dec. 377; State *v.* Burwell, 63 Mc. 661; Porter *v.* Chandler, 27 Minn. 301; 38 Am. Rep. 293.

[2] Wentworth *v.* Miller, 53 Cal. 9; Pender *v.* Rhea, 32 Ark. 435; Esdon *v.* Colburn, 28 Vt. 631; Moulton *v.* Robinson, 27 N. H. 550; Kelley *v.* Weston, 20 Me. 232; Howell *v.* Foster, 65 Cal. 169.

[3] Reynolds *v.* Pool, 84 N. C. 37; 37 Am. Rep. 607, note; McCrary *v.* Slaughter, 58 Ala. 230; Christian *v.* Crocker, 25 Ark. 327; Donnell *v.* Harske, 67 Mo. 170; Holenfield *v.* White, 52 Ga. 567; Musser *v.* Brink, 68 Mo. 242.

[4] We use the term "fixture" according to the definition given in Amos and Ferard on Fixtures, "as denoting those personal chattels which have been annexed to the land, and which *may* be afterwards severed and removed by the party who has annexed them, or his personal representative, against the will of the owner of the freehold." See Hallen *v.* Runder, 1 Cromp. M. & R. 276; 3 Tyrw. 959.

[5] Amos and Ferard on Fixtures, 321; Brown on Fixtures, sec. 193; Poole's Case, 1 Salk. 368; Pitt *v.* Shew, 4 Barn. & Ald. 207; Lemar *v.* Miles, 4 Watts, 330; Doty *v.* Gorham, 5 Pick. 487; 16 Am. Dec. 417; Ombony *v.* Jones, 19 N. Y. 234.

properly speaking, the agreement between the owner of the soil and the person who has attached the thing thereto, is of vital importance in determining whether such thing has become a part of real estate. For it seems to be well settled that a house or other structure, which is not of such a character that it must necessarily be real estate, but which under ordinary circumstances would be so deemed, may, by agreement between the owner of the freehold and the builder of the house or structure, retain the character of a chattel, and be subject to removal and sale as such.[1] Even where erected under such circumstances that the land-owner might retain it, he may waive his rights and authorize its removal; and when he does so it becomes the personal property of the tenant or other person thus authorized to remove it, and is subject to levy under an execution against him.[2] Improvements erected on public lands are regarded as private property for most purposes, and as such may be levied upon and sold.[3] The right to so levy and sell is manifestly subordinate to the power of the government to manage and dispose of such lands. The title of the purchaser cannot, therefore, prevail against the United States, nor against its patentee if the improvements were so attached as to have become a part of the realty. It may also be mentioned that the re-

[1] Curtis *v.* Riddle, 7 Allen, 187; Wells *v.* Bannister, 5 Mass. 514; Fairburn *v.* Eastwood, 6 Mees. & W. 679; Aldrich *v.* Parsons, 6 N. H. 555; Osgood *v.* Howard, 6 Greenl. 452; 20 Am. Dec. 322; Curtis *v.* Hoyt, 19 Conn. 166; Russell *v.* Richards, 1 Fairf. 429; 25 Am. Dec. 254; Dame *v.* Dame, 38 N. H. 429; 75 Am. Dec. 195; Wall *v.* Hinds, 4 Gray, 273; 64 Am. Dec. 64; Hunt *v.* Bay State Iron Co., 97 Mass. 283; Crippen *v.* Morrison, 13 Mich. 37; Ford *v.* Cobb, 20 N. Y. 344; Haven *v.* Emory, 33 N. H. 66; Merritt *v.* Judd, 14 Cal. 70; Teaff *v.* Hewitt, 1 Ohio St. 534; 59 Am. Dec. 634.

[2] Foster *v.* Mabe, 4 Ala. 402; Jewett *v.* Partridge, 12 Me. 243; 28 Am. Dec. 173.

[3] Switzer *v.* Skiles, 3 Gilm. 529; 44 Am. Dec. 723; Turney *v.* Saunders, 4 Scam. 527; French *v.* Carr, 2 Gilm. 664.

lation to the ownership of the soil of the person attaching the thing claimed to be a fixture is a very material fact in determining whether such thing can be seized and sold under a *fieri facias* against him. If, at the time of such attaching, he was the owner of the freehold, it must be a very clear case, indeed, that will warrant a levy on the property so attached. For many things which, if placed on the soil by a stranger to the title, would be clearly regarded as personal property, will, if placed there in the same manner by the owner, be regarded as a part of the freehold.[1] But some things which were fastened to the realty have been held to be subject to execution as personalty on a writ against the owner of the freehold. This is particularly the case with machinery used for manufacturing, when it can be disconnected without any material injury, and when it was attached only for the purpose of keeping it firm and steady, and enabling its use to be more beneficial.[2] But even in such a case it seems that the intent of the owner in attaching the machinery must be considered;

[1] Amos and Ferard on Fixtures, 323; Winn *v.* Ingleby, 5 Barn. & Ald. 625; 1 Dowl. & R. 247; Place *v.* Fagg, 4 Man. & R. 277; Stewart *v.* Lambe, 1 Ball & B. 506; 4 Moore, 281; Snedeker *v.* Warring, 12 N. Y. 170; Minsall *v.* Lloyd, 2 Mees. & W. 450; Murphy & Hurlston, 125; 1 Jur. 336; Mackintosh *v.* Trotter, 3 Mees. & W. 184; Voorhis *v.* Freeman, 2 Watts & S. 116; 37 Am. Dec. 490; Brown on Fixtures, sec. 172–177 a; Corless *v.* Van Sagen, 29 Me. 115; Winslow *v.* Merchants' Insurance Co., 4 Met. 306; 38 Am. Dec. 368; Trull *v.* Fuller, 28 Me. 545; Morgan *v.* Arthurs, 3 Watts, 140; Oves *v.* Oglesby, 7 Watts, 106; Union Bank *v.* Emerson, 15 Mass. 159; Bishop *v.* Bishop, 11 N. Y. 123; 62 Am. Dec. 68.

[2] Tobias *v.* Francis, 3 Vt. 425; 23 Am. Dec. 217; Sturgis *v.* Warren, 11 Vt. 435; Swift *v.* Thompson, 9 Conn. 63; 21 Am. Dec. 718; Bartlett *v.* Wood, 32 Vt. 372; Fullam *v.* Stearns, 30 Vt. 443; Hill *v.* Wentworth, 28 Vt. 428; Gale *v.* Ward, 14 Mass. 352; 7 Am. Dec. 223; Cresson *v.* Stout, 17 Johns. 116; 8 Am. Dec. 373; Farrar *v.* Chauffette, 5 Denio, 527; Vanderpool *v.* Allen, 10 Barb. 157; Murdock *v.* Gifford, 18 N. Y. 28; Freeland *v.* Southworth, 24 Wend. 191. See Hutchinson *v.* Kay, 23 Beav. 413; Haley *v.* Hammersly, 3 De Gex, F. & J. 587; 7 Jur., N. S., 765; 30 L. J. Ch. 771; 9 Week. Rep. 562; 4 L. T., N. S., 269. See note to Pierce *v.* George, 11 Am. Rep. 314.

and if it appears that he attached the property to the realty with a view that it should remain there permanently, it must be treated as real estate.[1] This intention is to be "inferred from the *nature* of the article affixed, the *relation* and *situation* of *the party* making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made."[2]

The circumstances in which fixtures were attached to the soil may be such as to show clearly that no permanent annexation was intended. If so, they remain personal property. Thus where the contractors by whom a railroad was built laid down side tracks, fastened to the main track by frogs, and used in transporting gravel, and left such tracks in place on the request of the president of the road, as a matter of accom-

[1] Potter *v.* Cromwell, 40 N. Y. 287; 100 Am. Dec. 485; McKim *v.* Mason, 3 Md. Ch. 186; Pierce *v.* George, 11 Am. Rep. 310; 108 Mass. 78; Voorhees *v.* McGinnis, 48 N. Y. 478; Richardson *v.* Copeland, 6 Gray, 536; 66 Am. Dec. 424; Teaff *v.* Hewitt, 1 Ohio St. 530; 59 Am. Dec. 634; Stockwell *v.* Campbell, 12 Am. Rep. 393; 39 Conn. 362; Alvord C. M. Co. *v.* Gleason, 36 Conn. 86; Capen *v.* Peckham, 35 Conn. 88.

[2] Teaff *v.* Hewett, 1 Ohio St. 530; 59 Am. Dec. 634. The rolling stock of a railroad must, in Illinois, be sold as real estate. Palmer *v.* Forbes, 23 Ill. 301; Hunt *v.* Bullock, 23 Ill. 320; Titus *v.* Mabee, 25 Ill. 257. In New York and Ohio it may be sold as personal property. Beardslee *v.* Ontario Bank, 31 Barb. 619; Stevens *v.* B. & N. R. R. Co., 31 Barb. 590; Bement *v.* P. & M. R. R. Co., 47 Barb. 104; Randall *v.* Elwell, 11 Am. Rep. 47; 52 N. Y. 522; Hoyle *v.* P. & M. Co., 54 N. Y. 314; 13 Am. Rep. 595; Coe *v.* R. R. Co., 10 Ohio St. 372; 75 Am. Dec. 518. In New Hampshire it may be sold as personalty when not in use. Boston, C. & M. R. R. *v.* Gilmore, 37 N. H. 410; 72 Am. Dec. 336. In several cases the rolling stock of railroads has been regarded as fixtures, so as to pass to a mortgagee of the realty. Pennock *v.* Coe, 23 How. 117; Strickland *v.* Parker, 54 Me. 263; Minnesota Co. *v.* St. Paul Co., 2 Wall. 644; Phillips *v.* Winslow, 18 B. Mon. 431; 68 Am. Dec. 729. Where a railroad company constructed a bridge, being a part of its road, and built with stone piers and abutments, and subsequently abandoned the road, it was held that the piers and abutments did not pass to the owner of the land. Wagner *v.* C. & T. R. R. Co., 10 Am. Rep. 770; 22 Ohio St. 563; Corwin *v.* Cowan, 12 Ohio St. 629; Northern C. R. W. Co. *v.* Canton Co., 30 Md. 347.

modation, on his assurance that the materials would thereafter be delivered to them free of expense, such tracks were held to be subject to execution as the personal property of the contractors, on the ground that they "were laid entirely for temporary and not permanent purposes," were not designed for use in any particular locality, and were "a part of the means used in constructing a road, but are not a part of the structure, and because" it might as well be contended that the scaffolding, ladders, and appliances, used in constructing, which a mechanic temporarily leaves about a newly finished house, become the property of the householder, so as to pass as fixtures upon his conveyance of the real estate.[1] Even with the tests here prescribed, it must be very difficult for an officer or creditor to determine what may be seized as personal estate. In fact, the judges, with all their opportunity for mature deliberation, and all their skill in precision and exactness of expression, have not yet been able to make the law of fixtures harmonious or well understood. It would, therefore, be marvelous if the ministerial officers of the court, acting in the haste of pressing emergencies, did not often err in attempting to conform to this law. Even the term "fixtures" is popularly employed with diverse significations,—sometimes to designate a chattel so attached to the realty that it cannot be removed, and sometimes to designate a chattel so attached that it can be removed. But in the vast majority of cases in which the law of fixtures is involved, the alleged fixture has been affixed by the lessee. To determine whether a chattel affixed by the lessee can be seized on execution, we have only to as-

[1] Fifield *v.* Me. C. R. R., 62 Me. 81.

certain whether the lessee can lawfully remove it. For whatever rights and interests the lessee has are subject to execution against him. The law of fixtures has been gradually modified in favor of lessees, in order that trade and manufactures might be encouraged. "Things set up by a lessee during his tenancy for the purposes of his trade" remain personal property.[1] Tenants occupying property for the purposes of agriculture were less favored than occupants for the purposes of trade.[2] The tendency of the more recent decisions is in favor of putting agricultural and other tenants upon an equality, in this respect, with tenants for the purposes of trade; and of determining the character of alleged fixtures by considering their nature, and the nature and intent of their annexation,[3] and the injury which would be done to the freehold by their removal, rather than by considering the business in aid of which they have been annexed.[4] Domestic and ornamental fixtures, being such as are erected or affixed by the tenant for his convenience or that of his family, or for the purpose of gratifying a taste for the beautiful, retain their character of personal property, unless their removal would occasion some material injury to the freehold. Among the domestic and ornamental fixtures which so retain their character as personalty are "all fixtures put up as furniture, such as hangings, tapestry, beds fastened to

[1] Hill on Fixtures, sec. 17; Pillow *v.* Love, 5 Hayw. 109; Lamar *v.* Miles, 4 Watts, 330; Raymond *v.* White, 7 Cow. 319; Heermance *v.* Vernoy, 6 Johns. 5; Reynolds *v.* Shuler, 5 Cow. 323.

[2] Elwes *v.* Mawe, 3 East, 38.

[3] Meigs's Appeal, 1 Am. Rep. 372; 62 Pa. St. 28.

[4] Dubois *v.* Kelly, 10 Barb. 496; Van Ness *v.* Packard, 2 Pet. 137; Harkness *v.* Sears, 26 Ala. 493; 62 Am. Dec. 742; Whitney *v.* Brastow, 4 Pick. 310; Holmes *v.* Tremper, 20 Johns. 29; 11 Am. Dec. 338; Rex *v.* Otley, 1 Barn. & Adol. 161; Wood *v.* Hewett, 8 Q. B. 913; 10 Jur. 390; 15 L. J. Q. B. 247; Mant *v.* Collins, 10 Jur. 390; 15 L. J. Q. B. 248.

the ceiling, blinds, chimney-glasses, chimney-pieces, clock-cases, coffee-mills, looking-glasses, pier-glasses, pictures, shelves, cabinets, chimney backs, cupboards, desks and drawers, frames, gas-pipes, grates, iron chests and iron ovens, iron safes, jacks, lamps, pumps, ranges, sinks, turret-clocks, wainscots fixed by screws, window-sashes not being bedded into frames but merely fastened by laths and nailed across frames and curtains."[1]

It must be remembered that the tenant's right to his fixtures may be forfeited by his failure to remove them while he is entitled to do so. When he ceases to be a tenant, he ceases, in the absence of any agreement preserving his rights, to have any interest in the fixtures, except when his lease was, without his fault, terminated by the happening of some uncertain contingency. Ordinarily, he must remove the fixtures during *his term*. The period within which he may make the removal may be prematurely terminated by the forfeiture of his lease; or it may be prolonged by the extension of his lease, or by stipulation with his landlord. But where no special stipulations to the contrary have been made, and the term is for a certain and definite period, a lessee may remove his fixtures while he is still entitled to regard

[1] Crocker on Sheriffs, sec. 461; Amos and Ferard on Fixtures, 64–93; Hill on Fixtures, secs. 29–39; 2 Smith's Lead. Cas. 242. See also, as to domestic and ornamental fixtures: for window-sashes, Rex *v.* Hedges, 1 Leach C. C. 201; 2 East P. C. 590, note; for pumps, McCracken *v.* Hall, 7 Ind. 30; Grymes *v.* Boweren, 4 Moore & P. 143; 6 Bing. 437; for cornices, Avery *v.* Cheslin, 5 Nev. & M. 372; 3 Ad. & E. 75; 1 Har. & W. 283; for chimney-pieces, Leach *v.* Thomas, 7 Car. & P. 328; Bishop *v.* Elliott, 11 Ex. 113; 24 L. J. Ex. 229; for show-case and drawers, Cross *v.* Marston, 17 Vt. 533; 44 Am. Dec. 353; gas-fixtures and setting-stools, Lawrence *v.* Kemp, 1 Duer, 363; Vaughen *v.* Haldeman, 33 Pa. St. 522; 75 Am. Dec. 622; chimney-pieces, wainscots, and beds fastened to ceiling, Ex parte Quincy, 1 Atk. 477; hangings and looking-glasses, Beck *v.* Rebow, 1 P. Wms. 94; stoves and grates fixed into the chimney, and a cupboard standing on the ground supported by holdfasts, King *v.* St. Dustans, 4 Barn. & C. 686; book-case screwed to the wall, Birch *v.* Dawson, 2 Ad. & E. 37.

himself as a tenant, and he cannot remove them afterwards.[1] By his failure to exercise his privilege of removal within the time prescribed by law, his fixtures become a portion of the real property of the landlord, and of course are no longer subject to execution against their original owner.

OF THE ESTATES AND INTERESTS IN PERSONAL PROPERTY SUBJECT TO EXECUTION.

§ 115. The Real and not the Apparent Interest of the Debtor may be Taken. — In treating of the lien of judgments, we have, in another work, said: "Whenever a lien attaches to any parcel of property, it becomes a charge on the precise interest which the judgment debtor has, and no other. The apparent interest of the debtor can neither extend nor restrict the operation of the lien, so that it shall encumber any greater or less interest than the debtor in fact possesses."[2] This is equally true of the lien of an execution, and of the interest acquired by the officer by reason of his levy. A transfer may be actually or constructively fraudulent, and may on that account be void as against creditors, while it is valid against the transferrer; or it may, in

[1] Weeton *v.* Woodcock, 7 Mees. & W. 14; Dudley *v.* Warde, Amb. 113; Roffey *v.* Henderson, 17 Q. B. 573; 16 Jur. 84; 21 L. J. Q. B. 49; Davis *v.* Moss, 38 Pa. St. 246; Leader *v.* Homewood, 5 Com. B., N. S., 546; 4 Jur., N. S., 1062; 27 L. J. C. P. 316; Heap *v.* Barton, 12 Com. B. 274; 16 Jur. 891; 21 L. J. C. P. 153; Storer *v.* Hunter, 3 Barn. & C. 368; Lee *v.* Risdon, 7 Taunt. 188; Overton *v.* Williston, 31 Pa. St. 155; Lyde *v.* Russell, 1 Barn. & Adol. 394; White *v.* Arndt, 1 Whart. 91; State *v.* Elliott, 11 N. H. 540; Whipley *v.* Dewey, 8 Cal. 36; Merrit *v.* Judd, 14 Cal. 59; Fitzherbert *v.* Shaw, 1 H. Black. 258; King *v.* Wilcomb, 7 Barb. 263; Amos and Ferard on Fixtures, 94, and following. The opining of Lord Kenyon in Penton *v.* Hobart, 2 East, 88, that the lessee could lawfully remove his fixtures *while he remained in possession*, has, as will be seen from examining the above authorities, ceased to be regarded as law.

[2] Freeman on Judgments, secs. 356, 357; Walton *v.* Hargroves, 42 Miss. 18; 97 Am. Dec. 429.

some states, be void as against creditors for want of delivery. In these cases, it is evident that an execution may reach and transfer a greater interest than that held by the defendant. With these exceptions, it is believed that no interest is subject to execution beyond what the defendant actually owns, although his apparent may be much greater than his real ownership.[1] Hence, where a debtor is garnished, he must be released on showing that, before the service of the writ, his creditor had assigned the debt,[2] or that, by agreement, the debt was to be paid to the creditor's creditor.[3] It is not essential that the debtor should be notified of the assignment prior to the levy.[4] A draft takes precedence over a subsequent attachment, though not presented until after the writ is levied.[5] On the other hand, it is equally well settled that the real interest of a defendant is subject to execution, though he may not appear to have any interest; or, more properly speaking, though the evidence of his title may be concealed. Hence, in order to subject real estate to execution, it is not necessary to show that the defendant's evidence of title is on record. It is wholly immaterial whether the interest of the defendant appears from the records or not.[6] What is here said about the real interest of the defendant being subject to execution, rather than the

[1] Whitworth *v.* Gaugain, 13 L. J., N. S., Ch. 288; 3 Hare, 416.

[2] Adams *v.* Robinson, 1 Pick. 461; Weed *v.* Jewett, 2 Met. 608; 37 Am. Dec. 115; Littlefield *v.* Smith, 17 Me. 327; King *v.* Murphy, 1 Stewt. 228. See § 170.

[3] Lovely *v.* Caldwell, 4 Ala. 684; Black *v.* Paul, 10 Mo. 103; 45 Am. Dec. 353.

[4] Pellman *v.* Hart, 1 Pa. St. 263.

[5] Nesmith *v.* Drum, 8 Watts & S. 9; 42 Am. Dec. 260.

[6] Vance *v.* McNairy, 3 Yerg. 171; 24 Am. Dec. 553; Ready *v.* Bragg, 1 Head, 511; Shields *v.* Mitchell, 10 Yerg. 1; Lathrop *v.* Brown, 23 Iowa, 40; Niantic Bank *v.* Dennis, 37 Ill. 381; Ritcher *v.* Selin, 8 Serg. & R. 425.

apparent interest, meets with an apparent exception through the operation of the laws for the registration of instruments affecting the title to real estate. Under those laws, a purchaser in good faith, who records his conveyance, is entitled to precedence over a prior conveyance or encumbrance of which he had no notice, actual or constructive. A purchaser at execution sale may also be a purchaser in good faith, and may therefore obtain a greater or better title than the defendant in fact held.[1] This is because of the effect of the registry laws, and not because any greater interest than that held by defendant was subject to execution; for until the moment when the purchaser in good faith pays his money, notice may be given of the prior unregistered conveyance or encumbrance, and the levy and sale thus made ineffective as against it.

§ 116. **Equitable Interests.**—By the common law, an equitable interest in personal property could not be seized and sold under a writ of *fieri facias*. Hence, wherever the common-law rule has not been changed by statute, the sheriff is not authorized to seize and sell any chattels, unless the defendant in execution has the legal as well as the equitable title thereto.[2] "It was a principle of the common law, steadily maintained, that an equitable interest in chattels could not be sold under execution. A sheriff must actually seize the property on a *fieri facias* before he can sell."[3] "I do

[1] See *post*, § 336.

[2] Boyce *v.* Smith, 16 Mo. 317; McLeary *v.* Snider, 1 West. L. M. 270; McNairy *v.* Eastland, 10 Yerg. 310; Lyster *v.* Dolland, 1 Ves. Jr. 431; 3 Bro. C. C. 478; Wilson *v.* Carver, 4 Hayw. 90; Badlam *v.* Tucker, 1 Pick. 399; 11 Am. Dec. 202; Benton *v.* Pope, 5 Humph. 392; Dargan *v.* Richardson, Dudley (S. C.), 62; Martin *v.* Jewell, 37 Md. 530; Brown *v.* Wood, 6 Rich. Eq. 155; Rose *v.* Bynum, 10 Mo. 466; 49 Am. Dec. 170; Wylie *v.* White, 10 Rich. Eq. 291; Scott *v.* Harder, 1 Yerg. 3; 24 Am. Dec. 427; Roads *v.* Symmes, 1 Ohio, 281; 13 Am. Dec. 621.

[3] Yeldell *v.* Barnes, 15 Mo. 434.

not know of any case in which a court of equity has considered an execution at law as binding an equitable right. The idea is altogether inadmissible."[1] When an assignment is made to certain persons, for the purpose of enabling them to sell the property assigned, and with the proceeds to pay the assignor's liabilities, and reserving to the assignor such property as may remain after the debts have all been paid, he has no interest subject to execution.[2] In Missouri it has been held that one who was the owner of an equitable interest in stocks, and who also had the right to retain possession for a definite period of time, had an interest in such stocks subject to execution.[3] In some of the states the common-law rule has been abrogated, and has been substituted by statutory provisions subjecting equitable as well as legal interests to execution and forced sale at law.[4] The common-law rule was sustained by the theory that at law only legal interests could be recognized and enforced. It was not founded on any tenderness for equitable titles, but rather upon a desire to ignore them altogether. By proceedings in equity, equitable interests could always be made to contribute to the satisfaction of a judgment against the owner.[5] If such interests are to be subjected to forced

[1] Hendricks *v.* Robinson, 2 Johns. Ch. 312.

[2] Sprinkle *v.* Martin, 66 N. C. 55; McKeithan *v.* Walker, 66 N. C. 95; Wilkes *v.* Ferris, 5 Johns. 345; 4 Am. Dec. 364; Scott *v.* Scholay, 8 East, 467; Biscoe *v.* Royston, 15 Ark. 508; Pope *v.* Boyd, 22 Ark. 535; Brown *v.* Graves, 4 Hawks, 342; Metcalf *v.* Scholey, 2 Bos. & P. 461; Williamson *v.* Clark, 2 Miles, 153.

[3] Foster *v.* Potter, 37 Mo. 525.

[4] Middletown Savings Bank *v.* Jarvis, 33 Conn. 372; Eastland *v.* Jordan, 3 Bibb, 186; Samuel *v.* Salter, 3 Met. (Ky.) 259.

[5] Pendleton *v.* Perkins, 49 Mo. 565; Edmonston *v.* Hyde, 1 Paige, 637; Tarbell *v.* Griggs, 3 Paige, 207; 23 Am. Dec. 790; Hadden *v.* Spader, 20 Johns. 554; Williams *v.* Hubbard, Watkins' Ch. 28; Bigelow *v.* Congregational Society, 11 Vt. 283.

sale, it is better to allow them to be taken under *fieri facias* than to compel the creditor to resort to a separate suit; for the suit, after subjecting both parties to delay and expense, without any compensatory advantages, does precisely what might long before have been done under a *fieri facias*.

§ 117. Mortgagor's Interest.—The equity of redemption held by a mortgagor of chattels is clearly an equitable interest, and according to the rules stated in the preceding section, would not be subject to execution. But in many of the United States the courts have proceeded upon the theory that, except as between the mortgagor and the mortgagee, the former, while by the terms of the mortgage he is entitled to retain possession for a definite time, must be treated as the real owner of the property mortgaged. They have therefore held that the mortgagor's interest in the chattels, while he has the right to retain possession, may be sold under execution.[1] "A mortgagor of chattels has an interest in the mortgaged property until it has been barred or foreclosed, which may be seized, taken, and disposed of by his creditors. But this is such an interest that it must be taken and treated as subservient to the

[1] Hunter *v.* Hunter, Walk. 194; McWhorter *v.* Huling, 3 Dana, 349; Randall *v.* Cook, 17 Wend. 53; Redman *v.* Hendricks, 1 Sand. 32; Waters *v.* Stewart, 1 Caines Cas. 47; Hobart *v.* Frisbie, 5 Conn. 592; McGregor *v.* Hall, 3 Stew. & P. 397; Purnell *v.* Hogan, 5 Stew. & P. 192; Ford *v.* Philpot, 5 Har. & J. 312; Fugate *v.* Clarkson, 2 B. Mon. 41; 36 Am. Dec. 589; Merritt *v.* Niles, 25 Ill. 283; Collins *v.* Gibson, 5 Vt. 243; Garro *v.* Thompson, 7 Watts, 416; Schrader *v.* Wolfin, 21 Ind. 238; Wright *v.* Henderson, 12 Tex. 43; Van Ness *v.* Hyatt, 13 Pet. 294; Bailey *v.* Burton, 8 Wend. 339, 348; Hall *v.* Sampson, 35 N. Y. 274; 91 Am. Dec. 56; Anthony *v.* Shaw, 7 R. I. 275; Mercer *v.* Tinsley, 14 B. Mon. 274; Mattison *v.* Bancus, 1 N. Y. 295; Wootton *v.* Wheeler, 22 Tex. 338; Saxton *v.* Williams, 15 Wis. 292; O'Neal *v.* Wilson, 21 Ala. 288; Moore *v.* Murdock, 26 Cal. 527; Raysor *v.* Reed, 55 Tex. 256; Lyman *v.* Rowe, 66 How. Pr. 481.

paramount interest of the mortgagee. The latter has a vested right to require that the property be converted into a satisfaction of his demand; and subject to this right, the creditor of the mortgagor may attach or seize the property. He cannot, however, deprive the mortgagee of the possession of his security if he has such possession, nor can he assume control and dispose of the property regardless of the prior right of the mortgagee."[1] If the officer levies upon the *entire* property mortgaged, instead of upon the interest of the mortgagor therein, and assumes to control and dispose of the property absolutely, the writ in some of the states furnishes no justification for his action.[2] But in other states, if the defendant is in possession of the property, and entitled to remain in possession for some definite period, the sheriff may lawfully seize and sell the property without taking any notice of the mortgagee's interest.[3] It seems to us, however, that the general rule that an officer who, having notice of defendant's special interest, assumes to sell a greater interest in chattels than belongs to defendant in execution is liable for conversion,[4] ought to operate in favor of mortgagees.[5] But when the mortgagor has no right to retain possession of the property except by the permission of the mortgagee, he certainly has little claim to be regarded as

[1] Cotton *v.* Marsh, 3 Wis. 241; Cotton *v.* Watkins, 6 Wis. 629.

[2] Frisbie *v.* Langworthy, 11 Wis. 375; McConeghy *v.* McCaw, 31 Ala. 451; Fox *v.* Cronan, 47 N. J. L. 493; 54 Am. Rep. 190.

[3] Hall *v.* Carnley, 11 N. Y. 501; 17 N. Y. 202; Goulet *v.* Asseler, 22 N. Y. 225; Manning *v.* Monaghan, 28 N. Y. 585; Fairbanks *v.* Phelps, 22 Pick. 535; Hamill *v.* Gillespie, 45 N. Y. 556.

[4] Dean *v.* Whittaker, 1 Car. & P. 347; Wheeler *v.* McFarland, 10 Wend. 318.

[5] An officer who under an execution against a co-tenant assumes to sell the entire chattels is guilty of a conversion. Freeman on Cotenancy and Partition, secs. 214, 310.

the owner thereof. As he has no right to the possession, it is difficult to understand how his creditors can obtain such right by virtue of process against him. His interest in such case is a mere equity; and even the American courts do not regard it as subject to execution, except when rendered so by the provisions of some statute. Hence, if the mortgagee is entitled to the possession of the property, the officer has no right to seize it, although it is found in the possession of the mortgagor, such possession being permissive merely, and not a matter of right.[1] If the mortgage stipulates that the mortgagor may retain possession, with a condition that if any of the property be levied upon it shall be lawful for the mortgagee to take immediate possession, an action may be maintained by the mortgagee against an officer who has seized and carried away the property under process against the mortgagor.[2] When the mortgage is made to secure a debt already due,[3] or when, having been made to secure a debt to become due in a specified time, default is thereafter made in the payment, the mortgagor has no right to retain possession, and no interest subject to execution.[4] It must be

[1] Spriggs *v.* Camp. 2 Spears, 181; Yeldell *v.* Barnes, 15 Mo. 443; King *v.* Bailey, 8 Mo. 332; Mattison *v.* Baucus, 1 N. Y. 295; Perkins *v.* Mayfield, 5 Port. 182; Palmer *v.* Forbes, 23 Ill. 301; Eggleston *v.* Mundy, 4 Mich. 295; Farrell *v.* Hildreth, 38 Barb. 178; Holbrook *v.* Baker, 5 Greenl. 265; 17 Am. Dec. 236; Campbell *v.* Leonard, 11 Iowa, 489; Paul *v.* Hayford, 22 Me. 234; Marsh *v.* Lawrence, 4 Cow. 467; Galen *v.* Brown, 22 N. Y. 37; Tannahil *v.* Tuttle, 3 Mich. 104; 61 Am. Dec. 480.

[2] Welch *v.* Whittemore, 25 Me. 86.

[3] Baltes *v.* Ripp, 1 Abb. Dec. 78; 3 Keyes, 210.

[4] Thompson *v.* Thornton, 21 Ala. 808; Baxter *v.* Gilbert, 12 Abb. Pr. 97; Stewart *v.* Slater, 6 Duer, 83; Champlin *v.* Johnson, 39 Barb. 606; Ford *v.* Williams, 13 N. Y. 577; 67 Am. Dec. 83; Tannahil *v.* Tuttle, 3 Mich. 104; 61 Am. Dec. 480; Porter *v.* Parmly, 34 N. Y. 398; 43 How. Pr. 445; Peckinbaugh *v.* Quillin, 12 Neb. 586; Howland *v.* Willett, 3 Sand. 607; Mercer *v.* Tinsley, 14 B. Mon. 272; Farmers' Bank *v.* Cowan, 2 Keyes, 217; Bacon *v.* Kimmell, 14 Mich. 201. But it is now understood that the statute in Michigan

admitted that the American law determining whether an execution can be levied upon mortgaged chattels is unsettled, and that different persons are likely to disagree as to the result of the reported cases. Mr. Hilliard says: "The weight of authority would seem to be against the right of taking mortgaged property in execution."[1] Mr. Sumner, in his note to Lyster *v.* Dolland, 1 Ves. Jr. 431, shows that, "except as against the mortgagee, the mortgagor is regarded as the real owner of the property mortgaged, and in the United States the rule has very extensively prevailed that an equity of redemption was veindible as real property on an execution at law"; and by his citations shows a decided majority of the cases to be in favor of the practice of seizing equities of redemption under *fieri facias*. But while there are a few cases in which an equity of redemption in chattels is stated, without qualification, to be subject to execution,[2] and while cases somewhat more numerous than those just alluded to maintain the broad proposition that an equity of redemption in chattels is never subject to execution,[3] we think the result of a considerable majority of the American decisions is this: that a mere equity of redemption is not of itself subject to execution; but when such equity is joined with the right to remain for a definite time in posses-

authorizes the levy upon goods in the mortgagor's possession at any time before the mortgage is actually foreclosed. Cary *v.* Hewitt, 26 Mich. 228. The same rule prevails in Rhode Island. Arnold *v.* Chapman, 13 R. I. 586.

[1] 2 Hilliard on Mortgages, 2d ed., 428.

[2] Doughten *v.* Gray, 2 Stock. 323.

[3] Badlam *v.* Tucker, 1 Pick. 399; 11 Am. Dec. 202; Rose *v.* Bevan, 10 Md. 466; 69 Am. Dec. 170; Haven *v.* Low, 2 N. H. 13; 9 Am. Dec. 25; Myers *v.* Amey, 21 Md. 302; Lyon *v.* Coburn, 1 Cush. 278; Whitesides *v.* Williams, 2 Dev. & B. Eq. 153; Lamb *v.* Johnson, 10 Cush. 126; Hawkins *v.* May, 12 Ala. 673; Thornhill *v.* Gilmer, 4 Smedes & M. 163; Harbison *v.* Harrell, 19 Ala. 753; Commercial Bank *v.* Waters, 10 Smedes & M. 559.

sion of the property mortgaged, the mortgagor has an interest which may be seized and sold under an execution at law.

With respect to the authority of an officer to invade the rightful possession of the mortgagee, for the purpose of levying on the mortgagor's equity of redemption, where he yet retains such equity, the courts are not entirely in harmony. On the one hand, it is insisted that in those states where such equity is subject to execution, the mortgage is accepted with a tacit agreement that it may be so subjected, and that such steps may be taken as are necessary thereto, and that these necessarily include the right to seize the property even while in the possession of the mortgagee, and to retain such possession so as to be enabled to have the property present at the sale;[1] and the case is likened to that of an execution against one of several partners, in which it is generally conceded that the officer may seize the property and sell the partner's interest therein, though the title conveyed is nothing beyond what may remain after the settlement of the affairs of the partnership. Where the law requires property to be present at the time of the sale, it seems to be necessary to concede either that the levying officer may take it from the possession of the mortgagee, or else that while in such possession it is not subject to levy and sale unless by his permission. On the other hand, it is urged that the mortgagee, being in possession and entitled to the possession as against the mortgagor, no creditor of the latter can acquire any right which his debtor has not; that no right of possession can be acquired by levying a writ against one who is without such right; and

[1] Hackleman *v.* Goodman, 75 Ind. 204; Loutham *v.* Miller, 85 Ind. 161; Sparks *v.* Compton, 70 Ind. 393.

finally, that it would very seriously impair the rights of the mortgagee, if the property could be taken from his hands, for an indefinite period, in order to subject to execution an equity of redemption which might be of no value whatsoever. In some of the states an escape from the dilemma is affected by holding that a levy and sale may be made, in such circumstances, without taking possession of the mortgaged property.[1] The better rule, however, as we have already indicated, is, that the mortgagor has no interest subject to levy, unless he has, in addition to his mere equity of redemption, the right to remain in possession of the property for some ascertainable, definite length of time.

The right to seize mortgaged chattels under execution or attachment, and the mode in which it may be pursued, have been regulated by statute in many of the states. Thus sections 2968 and 2969 of the Civil Code of California declare that "personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor. Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee."[2] In the absence of the payment or deposit of the mortgage debt, the seizure of the property under execution is without justification;[3] and in any suit for seizing such property, the measure of damages under the above sections is not the value of the property taken, but the entire amount

[1] Fox v. Cronan, 47 N. J. L. 493; 54 Am. Rep. 190; Srodes v. Caven, 3 Watts, 258; Welch v. Bell, 32 Pa. St. 12; Chicago Lumber Co. v. Fisher, 18 Neb. 334.

[2] Berson v. Nunan, 63 Cal. 550.

[3] Meherin v. Oaks, 67 Cal. 59.

of the mortgage debt, whether in excess of the value of the property or not.[1] In several other states, and in some of the territories, statutes have been enacted similar to that of California in respect to requiring the creditor levying a writ of attachment or execution on mortgaged chattels to pay or tender to the mortgagee the amount of the debt, or to deposit the amount thereof, payable to his order, with some officer designated in the act;[2] while in some of the statutes providing for this payment or deposit, the creditor may be excused from such payment, if instead of seizing the property he levies on the mere equity of redemption in the mode designated by the statute,[3] in which case the sale does not affect the mortgagee's rights, and the moneys realized must be applied to the satisfaction of the judgment and costs. When the creditor pays the mortgage debt before making the levy, the proceeds of the sale are first applied to its repayment, and the residue only is credited on the writ. Other statutes provide generally for levies on equities of redemption, without first exacting payment of the mortgage debt.[4] In Florida, however, the purchaser of the mortgaged chattels under execution must give security for their delivery to the proper officer when required to satisfy any decree of foreclosure. So in Kentucky,

[1] Wood *v.* Franks, 56 Cal. 217; Rider *v.* Edgar, 54 Cal. 127.

[2] Comp. Laws Arizona, ed. 1877, p. 615, sec. 5; Laws of Colorado, 1879, p. 87, secs. 17, 18; Rev. Code Dakota, 1877, secs. 1753–1755; Rev. Laws Idaho, 1875, p. 662, secs. 5, 6; Rev. Stats. Me., 1871, c. 81, secs. 41–44; Mont. Stats., 1881, p. 4, sec. 5; Comp. Laws Nev., 1873, sec. 294; Gen. Laws N. H., 1878, c. 224, secs. 17, 18.

[3] Comp. Laws Arizona, ed. 1877, p. 615, sec. 5.

[4] Code Ala., 1876, sec. 3209; Gen. Stats. Conn., 1875, p. 461, sec. 32; Digest Laws Fla., 1881, p. 522, c. 102, secs. 8–10; Code Ga., 1882, sec. 1967, 1968; Comp. Laws Mich., 1871, sec. 6097; Gen. Stats. Minn., 1878, c. 66, sec. 309; Gen. Stats. R. I., 1872, c. 197, secs. 4–8; Rev. Stats. Tex., 1879, art. 2296; Rev. Laws Vt., 1880, secs. 1180–1185; Code Wash. Terr., 1881, sec. 1990.

the purchaser of mortgaged personalty must, before he can acquire a right to its possession, obligate himself, with a good surety, not to remove it out of the county, and to preserve it, and have it forthcoming when required to satisfy the mortgage.[1] In Maine, New Hampshire, and Massachusetts, the attaching officer need not pay the mortgage debt until after a demand has been made therefor, accompanied by a statment of the amount remaining unpaid,[2] and certain penalties are prescribed for making a false statement of such amount.

§ 118. **Mortgagee's Interests.**—In many of the states, a mortgage is no more than a mere lien, having, before foreclosure, no effect on the title except to make it stand as security for the payment of the mortgagor's debt. In such a case, it would be clear, upon principle, and in the absence of all authority, that the mortgagee had no estate in the property mortgaged subject to execution, though a levy on the note or other indebtedness secured by the mortgage, in states where choses in action are subject to execution, would operate to transfer the indebtedness, and as an incident thereto, the mortgage lien. But under the common-law system, while the mortgage, technically speaking, vested the legal title in the mortgagee, yet for all practical purposes, he was regarded merely as a lien-holder. His interest was not liable to be taken in execution during the continuance of the mortgagor's equity of redemption; for all the purposes of execu-

[1] Gen. Stats. Ky., 1881, p. 435, secs. 1, 2.

[2] Rev. Stats. Me., 1871, c. 81, secs. 41–44; Pub. Stats. Mass., 1882, c. 161, secs. 74–84; Gen. Laws N. H., 1878, c. 224, secs. 17, 18, and c. 236, secs. 3–5.

tions it was treated merely as a chose in action.[1] But when the property becomes that of the mortgagee by reason of its forfeiture under the mortgage, it is liable to execution under a writ against him.[2]

§ 119. Leasehold Interests in Real or Personal Property. — A term of years in real estate was always, by the common law, regarded as a chattel. It was transferred as personal and not as real estate. In this respect there was no difference between voluntary and involuntary transfers. Hence a leasehold interest in lands, for whatever term of years it may continue, must, unless some statute directs otherwise, be levied upon and sold as personal property.[3] One who has hired personal property for a term has an interest therein, subject to seizure and sale under execution. The purchaser at such sale acquires the right to retain and use the property to the end of the term.[4] But

[1] Chapman *v.* Hunt, 2 Beasl. 370; Doughten *v.* Gray, 2 Stock. Ch. 323; Jackson *v.* Willard, 4 Johns. 42; Brown *v.* Bates, 54 Me. 520; 92 Am. Dec. 613; Eaton *v.* Whiting, 3 Pick. 484; Thornton *v.* Wood, 42 Me. 282; Huntington *v.* Smith, 4 Conn. 235; Marsh *v.* Austin, 1 Allen, 235; Glass *v.* Ellison, 9 N. H. 69; Trapnall *v.* State Bank, 18 Ark. 53; Prout *v.* Root, 116 Mass. 410; Knowles *v.* Herbert, 11 Or. 54, 240.

[2] Ferguson *v.* Lee, 9 Wend. 258; Phillips *v.* Hawkins, 1 Fla. 262.

[3] Williams *v.* Downing, 18 Pa. St. 60; Barr *v.* Doe, 6 Blackf. 334; 38 Am. Dec. 145; Buhl *v.* Kenyon, 11 Mich. 249; Sparrow *v.* Earl of Bristol, 1 Marsh. 10; Dalzell *v.* Lynch, 4 Watts & S. 255; Bigelow *v.* Finch, 17 Barb. 394; Doe *v.* Smith, 1 Moody & R. 137; Chapman *v.* Gray, 15 Mass. 439; Shelton *v.* Codman, 3 Cush. 318; Thomas *v.* Blackmore, 5 Yerg. 113; Glenn *v.* Peters, Bush. 457; 59 Am. Dec. 563. A lease for ninety-nine years is subject to execution as a chattel interest (Bisbee *v.* Hall, 3 Ohio, 449), though it contains a stipulation that it shall be renewable forever (Reynolds *v.* Commissioners, 5 Ohio, 204). But under the laws of Ohio, it is now settled that permanent leaseholds are to be considered as real estate. McLean *v.* Rockey, 3 McLean, 235; Northern Bank of Kentucky *v.* Roosa, 13 Ohio, 334; Loring *v.* Melendy, 11 Ohio, 355. In Connecticut, an estate for 999 years, though not a freehold, must be sold as real estate. Munn *v.* Carrington, 2 Root, 15.

[4] Van Antwerp *v.* Newman, 2 Cow. 543; 15 Am. Dec. 340; Gordon *v.* Harper, 7 Term Rep. 11; Ward *v.* Macauley, 4 Term Rep. 489; Manning's Case,

the terms of the hiring may be such as to amount to a mere license to use, and may, therefore, preclude any transfer of interest, whether voluntary or compulsory. Thus where a wagon was hired with the provision that it should be used only "for the baker business," and should not be sold or loaned, it was held that the legal effect of this hiring was to confer on the beneficiary a mere personal license, not subject to execution.[1] In Minnesota, certain sheep were lent to W. to keep for three years. W. was entitled to the increase, and was to deliver annually to the owner of the sheep a certain amount of wool. At the end of the term, W. was to return the same number of sheep as were lent to him. Within less than a year after the commencement of his term, the sheep were seized under process against W., whereupon it was held that he had no interest in the sheep subject to execution.[2] The grounds of this decision are very imperfectly stated in the opinion of the court. Taking the opinion, together with the *syllabus* of the reporter, we are inclined to believe that the court regarded the transaction as a *personal* bailment, induced by special confidence reposed in W., and conferring upon him certain rights and interests, which, for their continuance, were to depend upon the continued exercise of his skill and labor in managing the property.

§ 120. **Property Pawned or Pledged.** — A pawn or pledge, unlike a mere lien, "gives an actual though qualified property in the thing pawned to the creditor"; but, unlike a mortgage, it does not divest the

8 Coke, 191; Dean *v.* Whittaker, 1 Car. & P. 347; Houston *v.* Simpson, 1 Jones, 513; Duffield *v.* Spottiswoode, 3 Car. & P. 435; Allen *v.* Russell, 19 Tex. 487.

[1] Reinmiller *v.* Skidmore, 7 Lans. 161.

[2] Williams *v.* McGrade, 13 Minn. 174.

debtor of the legal title to his property.[1] There remains in the debtor a legal interest such as the law will recognize. The only obstacle to the sale of pledged property under execution against the pledgor is that the pledgee being entitled to the possession, the officer has no right to seize upon the property in violation of the rights of the pledgee. Hence, at common law, pledged property could not be taken under execution, against the pledgor without first divesting the pledgee's right of possession by paying or tendering to him the amount of his debt.[2] Upon the voluntary surrender of the property to the officer by the pledgee, it may doubtless be sold under execution.[3] In the United States, there are several decisions holding the interest of a pledgor to be subject to levy and sale, independently of statutes declaring it to be so.[4] The rights of the pledgee were preserved by requiring the property to be returned to his possession after the sale. In some of the states the right to seize pledged property under a writ against the pledgor is given by statute. The rights of the pledgee are protected under some of these statutes, by requiring the judgment creditor to pay the amount due before

[1] Turner on Contract of Pawn, 29; Castelyon *v.* Lansing, 2 Caines Cas. 200; Barrow *v.* Paxton, 5 Johns. 258; 4 Am. Dec. 354; Brown *v.* Bement, 8 Johns. 97; McLean *v.* Walker, 10 Johns. 471.

[2] Legg *v.* Evans, 6 Mees. & W. 36; 9 L. J., N. S., Ex. 102; Rogers *v.* Kennay, 15 L. J., N. S., Q. B. 381; Story on Bailments, sec. 353; Viner's Abr., tit. Pawn, citing Waller *v.* Hanger, 3 Bulst. 17; Cogs *v.* Bernard, 3 Holt, 528; Scott *v.* Scholly, 8 East, 467; Badlam *v.* Tucker, 1 Pick. 389; 11 Am. Dec. 202; Moore *v.* Hitchcock, 4 Wend. 292; Pomeroy *v.* Smith, 17 Pick. 85; Stief *v.* Hart, 1 N. Y. 28. In Pennsylvania, the officer may sell, though he cannot seize, pledged goods. Strodes *v.* Caven, 3 Watts, 258; Baugh *v.* Kirkpatrick, 54 Pa. St. 84; 93 Am. Dec. 675.

[3] Mower *v.* Stickney, 5 Minn. 397.

[4] Bakewell *v.* Ellsworth, 6 Hill, 484; Stief *v.* Hart, 1 N. Y. 20; Williams *v.* Gallick, 11 Or. 337; McConegy *v.* McCaw, 31 Ala. 447; Mech. B. & L. A. *v.* Conover, 14 N. J. Eq. 219.

taking the property from the pledgee;[1] under others, this payment need not be made except from the proceeds of the sale.[2] In Indiana and Louisiana the right to seize and sell does not seem to depend on any prior payment of the amount due.[3] In several other states the right to levy and sell is conferred by statutes, subject to the rights of the pledgor, but without stating whether the property may be taken from the possession of the pledgee without first paying the sum due him.[4] In New York, Pennsylvania, Texas, and Wisconsin, the pledge may be levied on and sold, but without disturbing the possession of the pledgee.[5] In Vermont the levying officer may seize the property, and then demand of the pledgee a written statement of the amount due under oath, and the creditor may pay the same within a designated time, and thereupon become subrogated to the rights of the pledgee.[6] The pledgee may levy on the pledged property under a writ in his favor against the pledgor. The effect of such a levy upon the pledgee's lien is in doubt, some of the authorities intimating that it is a waiver thereof, and others insisting that it is not.[7] Whether the interest of a pledgee is subject to levy and sale is a question which

[1] Laws Col., 1879, p. 82, secs. 17, 18; Rev. Stats. Me., 1871, c. 81, secs. 41, 44; Pub. Stats. Mass., 1882, c. 161, secs. 74–78.

[2] Code Ga., 1873, sec. 2144.

[3] Rev. Stats. Ind., 1876, p. 207, sec. 436; Civil Code La., art. 3157; Homer v. Dennis, 31 La. Ann. 389.

[4] Comp. Laws Mich., 1871, sec. 6097; Gen. Stats. Minn., 1878, c. 66, sec. 309; Gen. Laws N. H., 1878, c. 224, secs. 17, 18.

[5] 4 Rev. Stats., 1882; sec. 1412, Code Civ. Proc.; Reichenbach v. McKean, 95 Pa. St. 432; Rev. Stats. Tex., 1879, art. 2296; Rev. Stats. Wis., 1878, c. 130, sec. 2988.

[6] Rev. Laws Vt., 1880, secs. 1180–1185.

[7] Jones on Pledges, secs. 599–601; Arendale v. Morgan, 5 Sneed, 703; Sickles v. Richardson, 23 Hun, 559; Legg v. Willard, 17 Pick. 140; 28 Am. Dec. 282.

has received very little consideration. As he has a beneficial interest accompanied by a rightful possession, there seems to be no reason for denying to his creditor the power to reach such interest under execution.[1] With respect to subjecting to execution the interest of the pledgor by garnishment or trustee process served upon the pledgee, the rule is, in the absence of statutory regulation, the same as in the case of direct levy and sale. The right to garnish such property is denied, on the ground that no property can be reached by this proceeding except that which is subject to execution.[2] It is clear that some remedy ought to exist to reach the interests of pledgors without impairing the rights of pledgees; and also that the remedy which will best accomplish these two objects is by garnishment. Statutes have therefore been enacted in many of the states extending that remedy so as to reach the interest of pledgors in property while in the possession of pledgees.[3]

§ 121. Estates of Bailees.—The mere fact that property is in the possession of a bailee interposes no obstacle to its seizure under an execution against its owner.[4] When the contract of bailment is such as to give the bailee some beneficial interest in the property, the case is different. An officer, acting under an

[1] Turner on Contract of Pawn, 189; Saul *v.* Kruger, 9 How. Pr. 569. "It seems to have been formerly thought that goods pledged could not be taken in execution at all for the debt of the pawnee." Turner, p. 189, citing Com Dig., tit. Mortgage, A; Moses *v.* Conham, Owen, 124.

[2] Whitney *v.* Dean, 5 N. H. 249; Howard *v.* Card, 6 Greenl. 353; Kergin *v.* Dawson, 1 Gilm. 86; Patterson *v.* Harland, 12 Ark. 158.

[3] See c. 515, Civil Code of Cal.; Treadwell *v.* Davis, 34 Cal. 601; 94 Am. Dec. 770; Rev. Stats. Me., 1871, c. 86, secs. 50, 51; Comp. Laws Mich., 1871, c. 202, sec. 6472; Aldrich *v.* Woodcock, 10 N. H. 99; Hughes *v.* Corey, 20 Iowa, 399; Carty *v.* Fenstemaker, 14 Ohio St. 457; Blake *v.* Hatch, 25 Vt. 555.

[4] Thomas *v.* Thomas, 2 A. K. Marsh. 430; Beale *v.* Digges, 6 Gratt. 582.

execution, cannot, by his levy, obtain nor transfer any greater interest in the property than was possessed by the defendant at the time of the levy. Hence, if a bailee has, as against the owner, the right to retain possession of the property for a specified time, he has the same right as against an officer proceeding under a writ against the owner. The officer cannot, in such a case, lawfully seize the property.[1] He can only subject it to execution where some statute has provided him with the means of reaching property of which he is not authorized to take possession.

§ 122. **Estates in Reversion or Remainder.**—The difficulty suggested in the preceding section, of levying an execution on the goods of a bailor while the bailee has the right to continue in possession, is also to be met in all cases where an execution is sought to be levied on an estate in reversion or remainder in chattels. In such a case the owner of the estate in possession need not surrender the property to the sheriff; and it seems to be conceded that, on common-law principles, the officer cannot sell property of which he cannot take possession. Hence it has been held that an estate in reversion or remainder cannot be sold under execution at law.[2] But in North Carolina a sale under execution of an estate in reversion or remainder was sustained, the owner of the estate in possession having produced the property, and had it present at the sale.[3] An estate in remainder in chat-

[1] Hartford *v.* Jackson, 11 N. H. 145.

[2] Allen *v.* Scurry, 1 Yerg. 36; 24 Am. Dec. 436; note to Stringfellow *v.* Brownsoppe, Dyer, 67 b; Sale *v.* Saunders, 24 Miss. 38; 57 Am. Dec. 157; Goode *v.* Longmire, 35 Ala. 668; Smith *v.* Niles, 20 Vt. 315; 49 Am. Dec. 782.

[3] Blanton *v.* Morrow, 7 Ired. Eq. 47; 53 Am. Dec. 391; Knight *v.* Leak, 2 Dev. & B. 133.

tels is now liable to attachment under the statutes of Tennessee.[1]

§ 123. **Inchoate Interests.**—There may be certain inchoate interests in property which do not become settled nor perfect until the lapse of a certain time or the performance of certain conditions. Thus the owner of a flock of sheep may give them into the custody of some other person, on an agreement by which, in consideration of care bestowed, such person becomes entitled to all or some portion of the wool to be grown on such sheep. In such case, it has been held that the owner continued to be the owner of the sheep and of the wool until shearing time, or until a full performance of the conditions of the agreement; and therefore, that the other person had no interest in the wool, prior to shearing time, which was subject to execution.[2] Similar principles apply to the owner of lands and a cropper thereon, when the former is to have one half of the crop "in the half-bushel." In this and similar cases, it is considered that the title belongs to him who has raised the crop, "until it is thrashed, measured, and one part set off to the landlord"; until this division is made, the landlord's part is not subject to execution.[3] So where A was to cut down trees and haul the logs to a certain place for market, and B, the owner of the land, was to sell the logs, and after deducting stumpage and advances made for supplies, was to pay A the balance, it was held that A had no interest in the logs subject to execution.[4] If a land-

[1] Lockwood *v.* Nye, 2 Swan, 515; 58 Am. Dec. 73.

[2] Hasbrouck *v.* Bouton, 60 Barb. 413; 41 How. Pr. 208.

[3] Williams *v.* Smith, 7 Ind. 559; Gordon *v.* Armstrong, 5 Ired. 409; Deaver *v.* Rice, 4 Dev. & B. 431; 34 Am. Dec. 383.

[4] Pelton *v.* Temple, 1 Hann. (N. B.) 275. See Provis *v.* Cheves, 9 R. I. 53; 98 Am. Dec. 367. But in cases like those referred to in the above section,

owner stocks his farm and puts it in charge of a tenant, under an agreement that the tenant shall have one half of the growth of the stock and one half of the wool produced by the sheep, the latter, prior to the expiration of his lease, has a mere inchoate interest, which is not subject to execution.[1] If, however, one obtains the ownership of property with a right to its possession, his title is not to be regarded as inchoate merely because he has not paid for it. Thus where a contract was entered into, by the terms of which the owners of a stone quarry permitted certain contractors to quarry and remove stone for two outlet locks in the Pennsylvania canal, the quantity to be ascertained by measurement when in the locks, and to be paid for as soon as payments were made to contractors on the canal, it was held that as soon as the stone was quarried, though it remained at the mouth of the quarry, it was subject to execution against the contractors, on the ground that the land-owner had trusted to their personal responsibility.[2]

§ 124. **Conditional Sales.** — In Martin *v.* Mathiot,[3] property was delivered into possession of a person under an agreement that the title was not to pass until he made payment of a sum stipulated as the purchase price. This transaction was regarded by the court as fraudulent as against the creditors of the person in possession; and they were therefore allowed to seize the

it may be that the defendant has a special interest subject to execution. See Weaver *v.* Darby, 42 Barb. 411, where D. was to cut, hew, and raft certain timber to be sold by B., and D was to have ten and one half cents per cubic foot for the timber sold.

[1] Smith *v.* Mosch, 26 Vt. 233.

[2] Watts *v.* Tibbals, 6 Pa. St. 447.

[3] 14 Serg. & R. 214; 16 Am. Dec. 491. See Haak *v.* Linderman, 64 Pa. St. 499; 3 Am. Rep. 612; Ketchum *v.* Watson, 24 Ill. 592.

property under execution. It was said that, by encouraging such transactions, people would be enabled to obtain a fictitious credit, by being invested with the apparent ownership of the property of others; and that creditors would necessarily be defrauded. In a subsequent case of a conditional sale in the same state, where there was no open, visible change of possession, it was held that as nothing had been done to deceive creditors, they could not seize upon the property as that of the vendee.[1] With the exception of the case first referred to, conditional sales have been everywhere upheld. The fact that possession is delivered under the contract of sale does not enlarge the rights of the vendee; nor does it authorize his creditors to regard the sale as absolute. Until the purchase-money is paid, or the other conditions of the contract are performed, the title remains with the vendor, if he so stipulated in his contract. The vendee is powerless to transfer a title which he does not possess, although the purchaser from him is ignorant of the true condition of the title.[2] The vendee has no interest subject to execution.[3] So goods

[1] Lehigh Co. *v.* Field, 8 Watts & S. 232.

[2] Kohler *v.* Hayes, 41 Cal. 455; Ash *v.* Putnam, 1 Hill, 302; Bailey *v.* Harris, 8 Iowa, 331; 74 Am. Dec. 312; Sargent *v.* Metcalf, 5 Gray, 306; 66 Am. Dec. 368; Whitwell *v.* Vincent, 4 Pick. 449; 16 Am. Dec. 35; Baker *v.* Hall, 15 Iowa, 279; Dunbar *v.* Rawles, 28 Ind. 225; 92 Am. Dec. 311; Ballard *v.* Burgett, 40 N. Y. 314; Lane *v.* Borland, 14 Me. 77; 31 Am. Dec. 33; Lucy *v.* Bundy, 9 N. H. 298; 32 Am. Dec. 359; Burbank *v.* Crooker, 7 Gray, 158; 66 Am. Dec. 470; Ketchum *v.* Brennan, 53 Miss. 596; Mount *v.* Harris, 1 Smedes & M. 185; 40 Am. Dec. 89; note to Palmer *v.* Howard, 1 Am. St. Rep. 63; Rose *v.* Story, 1 Pa. St. 190; 44 Am. Dec. 121; Crocker *v.* Gullifer, 44 Me. 491; 69 Am. Dec. 118; Hirschorn *v.* Canney, 98 Mass. 150; Cole *v.* Berry, 42 N. J. L. 308.

[3] Sage *v.* Sleutz, 23 Ohio St. 1; Gambling *v.* Read, Meigs, 281; Buckmaster *v.* Smith, 22 Vt. 203; Woodbury *v.* Long, 8 Pick. 543; 19 Am. Dec. 345; Bigelow *v.* Huntley, 8 Vt. 151; Herring *v.* Hoppock, 3 Duer, 20; 15 N. Y. 409; Cardinal *v.* Edwards, 5 Nev. 36; Hart *v.* Carpenter, 24 Conn. 427; Strong *v.* Taylor, 2 Hill, 326; Harkness *v.* Russell, 118 U. S. 663; Bradshaw *v.* Warner,

may be delivered to an agent for sale, under an agreement that those not sold may be returned. In such case, the agent has no interest in the unsold goods subject to execution.[1] It seems to make no difference that the vendee has been intrusted with the apparent ownership of the property with power to dispose of it in the ordinary course of business. Where R. furnished G. with a stock of ready-made clothing, with which to go in business in G.'s name, the property to remain R.'s, and G. was to purchase of no other person but R., was to do a cash business only, and to remit the proceeds to R. after taking out his salary and expenses, it was held that the goods were not subject to execution against G.[2] This rule is also applicable to a consignment of property to a dealer to be by him sold and the proceeds remitted to the consignor, the property to remain the consignor's till paid for.[3] But this principle in regard to conditional sales will not be allowed to support mere devices, resorted to for the purpose of avoiding creditors. Hence where liquors were sold to a bar-keeper, to be by him retailed in the course of his business, with an agreement that the portion not sold should continue the property of the wholesaler, the court regarded the transaction as an absolute sale, and

54 Ind. 58; Blanchard *v.* Child, 7 Gray, 157; Armington *v.* Houston, 38 Vt. 448; 91 Am. Dec. 366; Rowan *v.* State Bank, 45 Vt. 160; Reeves *v.* Harris, 1 Bail. 563; Baylor *v.* Smithers, 1 Litt. 105; Hussey *v.* Thornton, 4 Mass. 405; 3 Am. Dec. 224; Marston *v.* Baldwin, 17 Mass. 606; Clark *v.* Wells, 12 Am. Rep. 187; 45 Vt. 4; Buckmaster *v.* Smith, 22 Vt. 203; Barrow *v.* Coles, 3 Camp. 92; Barrett *v.* Pritchard, 2 Pick. 512; 13 Am. Dec. 449; Wilder *v.* Stafford, 30 Vt. 399; Reed *v.* Upton, 10 Pick. 522; 20 Am. Dec. 545; McFarland *v.* Farmer, 42 N. H. 386; Lucas *v.* Birdsey, 41 Conn. 357. For law in force in Iowa, see Pittsburgh L. & C. Works *v.* State Bank, 8 Chic. L. N. 41; Moseley *v.* Shattuck, 43 Iowa, 540.

[1] Merrill *v.* Rinker, Bald. 528; Benz *v.* Geissell, 24 Minn. 169.

[2] Robinson *v.* Chapline, 9 Iowa, 90.

[3] Cole *v.* Mann, 62 N. Y. 1.

the agreement as colorable only.[1] If this decision can be harmonized with the prevailing authorities on the subject, it must be upon the ground that the peculiar character of the property and the circumstances of the particular case indicated that the transaction was not in good faith, but was a mere device resorted to for the purpose of defrauding creditors.

Where the memorandum of a sale was as follows: "Brighton, July 7, 1873, John McDonald bought of D. McKinney and Son one roan mare for $300. Paid $50. The mare to be paid for August 1st; if not, to be returned to D. McKinney and Son," — it was held that this was not a conditional sale, and that the title therefore vested in the purchaser on the delivery of the property to him.[2] A few cases, while conceding that as between the original parties a conditional sale does not transfer the title until compliance with the condition, hold that a purchaser from the vendee in possession, in good faith and for value, acquires a perfect title freed from the condition.[3] These cases have, except in the state of Kentucky, been overruled. Transactions have very

[1] Ludden *v.* Hazen, 31 Barb. 650; Bonesteel *v.* Flack, 41 Barb. 435; 27 How. Pr. 210.

[2] McKinney *v.* Bradlee, 118 Mass. 321.

[3] Vaughn *v.* Hopson, 10 Bush, 337; Wait *v.* Green, 36 N. Y. 556; Smith *v.* Lynes, 5 N. Y. 41. But these, and earlier New York cases in harmony with them, are either explained away, or overruled by Ballard *v.* Burgett, 40 N. Y. 314; Austin *v.* Dye, 46 N. Y. 500; Maynard *v.* Anderson, 54 N. Y. 641. In the opinion of the court in Vaughn *v.* Hopson, 10 Bush, 337, it is said that "numerous authorities might be cited sustaining what we conceive to be the true doctrine on this subject, holding that where there is a conditional sale of chattels, with an actual delivery of possession to the vendee, a purchaser from the latter, in good faith, and without notice of the condition, acquires a perfect title." Whence these authorities might be cited we cannot imagine, and nothing less than imagination can supply them. There was not, when that decison was rendered, a single unoverruled case in harmony with it, except in the states of Illinois and Pennsylvania. Murch *v.* Wright, 46 Ill. 487; 95 Am. Dec. 455; Schweitzer *v.* Tracy, 76 Ill. 345; Stadtfield *v.* Huntsman, 92 Pa. St. 53; 37 Am. Rep. 661.

frequently been put in the form of conditional sales, when the real relations of the parties were those of mortgagors and mortgagees. The advantages of chattel mortgages have thus been secured, even when security of that character was forbidden with respect to the class of property in controversy. Recently the courts have been inclined to scrutinize these transactions more closely, and to refuse to be bound by the name and form given them by the parties, if satisfied from the whole transaction that it was not a conditional sale. With respect to the construction of contracts claimed to be conditional sales, the supreme court of the United States has very wisely said: "The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provision it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought. The form of the instrument is of little account."[1] The contract here in question was between two corporations, one of which was a builder of cars and the other the owner and operator of a railway. It recited that the former had constructed certain cars to be used on the railway of the latter for hire, and that the former loaned the latter the said cars for hire on such railway for the period of four months, and not elsewhere; that the railway company had executed to the manufacturing company three certain notes, which were to be collected at maturity, and their proceeds held as security for the return of the cars when demanded; that the railway company had the privilege of purchasing the cars at any time

[1] Heryford v. Davis, 102 U. S. 243.

on paying a price fixed by the contract; that until such payment it should have no right, title, or interest in the cars, except to use them, and no power to dispose of, mortgage, or pledge them; that the cars were to be redelivered to the manufacturing company when demanded, in default of the payment of said fixed sum, with interest; that on default in the payment of any of said notes, the manufacturing company might take possession of all said cars, and retain all payments made on any of such notes, and would sell said cars and return to the railway company any surplus remaining out of the net proceeds of the sale, over and above the amount due on the unpaid notes; and finally, that on payment of all of the notes, the manufacturing company would convey the cars to the railway company. This contract was construed not to be a conditional sale, but an attempt to obtain or reserve a lien in a form forbidden by the laws of the state; and the property was held to be subject to execution against the railway company. The grounds of this decision were, that no price for the hire was mentioned or alluded to; that the manufacturing company took notes for the full price of the cars, and exacted security for their payment, and would thereby realize the price of the cars before the four months had elapsed; no part of the money was to be returned to the railway company in any contingency, and in the event of the cars being taken from the railway company and sold, it was entitled to such portion of the proceeds of the sale as remained after paying the demands of the manufacturing company. "In view of these provisions," said the court, "we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, the ownership of the cars

should pass at once to the railroad company in consideration of their becoming debtors for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. The railroad company was not accorded an option to buy or not. They were bound to pay the price, either by paying these notes or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale. This giving the property as a security for the payment of a debt is the very essence of a mortgage, which has no existence in a case of conditional sale."

The case of Palmer and Rey *v.* Howard[1] was very similar in its features. The plaintiffs delivered to one St. Clair an agreement reciting that he had borrowed and received of them certain articles in good order; that if the price named should be paid, the property to belong to the borrower, otherwise to remain the property of Palmer and Rey; that the borrower would keep the property in good order; pay the price as per memorandum; keep the property insured for the benefit of Palmer and Rey; that it should not be removed from certain designated premises; and that if the borrower failed to meet any of the payments, Palmer and Rey might take the property, sell it, and render the borrower all surplus after paying "the price agreed upon and the expenses of removal and sale." The court was of opinion that it was clear from the whole agreement that the plaintiffs had sold the property to St. Clair, who, on his part, had made an absolute engagement to pay therefor, and had acquired a right

[1] 72 Cal. 293; 1 Am. St. Rep. 60, and note.

to such part of the net proceeds of the sale as might remain after paying any installments in the payment of which he had made default; and that the manifest scope and purpose of the contract could not be defeated by the statement therein made that the property "remains the property of Palmer and Rey."[1]

§ 125. Interests of Co-tenants and Partners.— There can be no doubt that an undivided interest in real or personal property, unless held by tenancy by entireties, is subject to execution the same as a like estate in severalty. Some difficulty may be experienced in determining how the interest is to be seized and sold. In the case of co-tenants,[2] it is clear that the officer's levy should, except in the case of severable chattels, purport to be upon the defendant's moiety only. The officer may, however, take exclusive possession of the chattel, retain possession until the sale, and deliver it to the purchaser.[3] It is universally conceded that, except where some statutory provision to the contrary has been enacted, the interest of a partner is

[1] Other cases holding that the real nature of the transaction must be considered, and cannot be destroyed by the name given it by the parties, are Hervey *v.* R. I. L. Works, 93 U. S. 664; Murch *v.* Wright, 46 Ill. 488; 95 Am. Dec. 455; Hart *v.* B. & S. Mfg. Co., 7 Fed. Rep. 543; Greer *v.* Church, 13 Bush, 430.

[2] Newton *v.* Howe, 9 Am. Rep. 616; 29 Wis. 531; Freeman on Cotenancy and Partition, sec. 252.

[3] Freeman on Cotenancy and Partition, sec. 214; Waldman *v.* Broder, 10 Cal. 378; Treon *v.* Emerick, 6 Ohio, 391; Thomas *v.* Turvey, 1 Har. & G. 435; McElderry *v.* Flanagan, 1 Har. & G. 308; Walsh *v.* Adams, 3 Denio, 125; Bernal *v.* Hovious, 17 Cal. 541; 79 Am. Dec. 147; Whitney *v.* Ladd, 10 Vt. 165; Kilby *v.* Haggin, 3 J. J. Marsh. 215; Durant *v.* Cabbage, 2 Hill (S. C.), 311; Caldwell *v.* Auger, 4 Minn. 217; 77 Am. Dec. 515; Waddell *v.* Cook, 2 Hill, 48; 37 Am. Dec. 372; Reed *v.* Shepardson, 2 Vt. 120; 19 Am. Dec. 697; Phillips *v.* Cook, 24 Wend. 389; Welch *v.* Clark, 12 Vt. 686; 38 Am. Dec. 368; Reed *v.* Howard, 2 Met. 40; Islay *v.* Stewart, 4 Dev. & B. 160; Hayden *v.* Binney, 7 Gray, 416; Veach *v.* Adams, 51 Cal. 611; Heald *v.* Sargeant, 15 Vt. 506; 40 Am. Dec. 694.

liable to execution for his individual debts.[1] In New York, the interest of a special or limited partner is a mere chose in action, and is not subject to execution.[2] In Georgia, the interest of a copartner may, by statute, be reached only by garnishment.[3] In Iowa, the manner of levying upon the interest of a partner has also been provided for by statute.[4] Confessedly, a sale under an execution against one partner does not divest the title of the partnership in the property. It transfers only such interest as may remain in the judgment debtor upon the settlement and adjustment of the affairs of the partnership. As the rights of the partnership are paramount, it would seem that they would preclude the officer serving the writ from taking the property into his exclusive possession, even for the purposes of levy and sale; and this view has been maintained with great force in several decisions pronounced in the supreme court of New Hampshire.[5] The authorities elsewhere are almost unanimous in affirming that the officer may, in levying on the interest of a partner, assume exclusive possession of the chattels of the firm, and retain it until the sale.[6]

[1] Parsons on Partnership, 352; Knox *v.* Summers, 4 Yeates, 477; Watson *v.* Gabby, 18 B. Mon. 658; Haskins *v.* Everett, 4 Sneed, 531; Wilson *v.* Conine, 2 Johns. 280; Walsh *v.* Adams, 3 Denio, 125; Jones *v.* Stratton, 32 Ill. 202; Nixon *v.* Nash, 12 Ohio St. 647; 80 Am. Dec. 390; Knerr *v.* Hoffman, 65 Pa. St. 126; Scrugham *v.* Carter, 12 Wend. 131; Shaw *v.* McDonald, 21 Ga. 395; Chapman *v.* Koops, 3 Bos. & P. 289; Holmes *v.* Mentze, 4 Ad. & E. 131; Douglas *v.* Winslow, 20 Me. 90; Dow *v.* Sayward, 12 N. H. 271; Moody *v.* Payne, 2 Johns. Ch. 548; Burgess *v.* Atkins, 5 Blackf. 337; Jones *v.* Thompson, 12 Cal. 191.

[2] Harris *v.* Murray, 28 N. Y. 574; 86 Am. Dec. 268.

[3] Willis *v.* Henderson, 43 Ga. 325; Anderson *v.* Chenney, 51 Ga. 372.

[4] Richards *v.* Haines, 30 Iowa, 574; Code of Iowa, sec. 3291.

[5] Gibson *v.* Stevens, 7 N. H. 352; Garvin *v.* Paul, 47 N. H. 158; Morrison *v.* Blodgett, 8 N. H. 238; 29 Am. Dec. 653, and note; Treadwell *v.* Brown, 43 N. H. 290.

[6] Clark *v.* Cushing, 52 Cal. 617; Saunders *v.* Bartlett, 12 Heisk. 317; Branch *v.* Wiseman, 51 Ind. 3; De Forest *v.* Miller, 42 Tex. 34; Atkins *v.* Saxton, 77

It is also undoubted that the interest subject to execution is, at least in equity, in no respect greater than that held by the defendant; that it is subject to the paramount claims against the partnership, and is, in fact, nothing beyond the right to demand an accounting, and to share in the surplus that may remain after all the partnership obligations have been discharged.[1]

Whether the levy can be upon any specific part of the goods of the firm, and whether by the sale the purchaser acquires any interest in the property sold, beyond the right to call for an accounting, are questions upon which the authorities are not agreed. The earlier cases were determined when partnerships were regarded as mere co-tenancies. Hence those cases, and such modern cases as have been controlled by them, place sales under execution for the separate debt of a copartner very much on the same ground as a sale for the separate debt of a co-tenant. Therefore, according to this view, an officer can, under such an execution, levy upon a part as well as upon the whole of the

N. Y. 195; Harker *v.* Johnson, 66 Me. 21; Parker *v.* Wright, 66 Me. 392; United States *v.* Williams, 4 McLean, 236; Bachurst *v.* Clinkard, 1 Show. 173; Mayhew *v.* Herrick, 7 Com. B. 229; Newhall *v.* Buckingham, 14 Ill. 405; Parker *v.* Pistor, 3 Bos. & P. 288; Pope *v.* Haman, Comb. 217; Heydon *v.* Heydon, Salk. 392; White *v.* Jones, 38 Ill. 159; Johnson *v.* Evans, 7 Man. & G. 240; Davis *v.* White, 1 Houst. 228; Andrews *v.* Keith, 34 Ala. 722; Smith *v.* Orser, 42 N. Y. 132.

[1] Eighth N. B. *v.* Fitch, 49 N. Y. 539; Clagett *v.* Kilbourne, 1 Black, 346; Lyndon *v.* Gorham, 1 Gall. 367; Chandler *v.* Lincoln, 52 Ill. 74; Deal *v.* Bogue, 20 Pa. St. 228; 57 Am. Dec. 702; Bowman *v.* O'Reilly, 31 Miss. 261; Atwood *v.* Impson, 20 N. J. Eq. 150; Dutton *v.* Morrison, 17 Ves. 193; 1 Rose, 213; Garbett *v.* Veale, 5 Q. B. 408; 8 Jur. 335; Dru. & M. 458; Robinson *v.* Tevis, 38 Cal. 611; Skipp *v.* Harwood, 2 Swans. 586; In matter of Wait, 1 Jacob & W. 605; Filley *v.* Phelps, 18 Conn. 294; Taylor *v.* Fields, 4 Ves. 396; Hankey *v.* Garratt, 1 Ves. Jr. 239; Price *v.* Hunt, 11 Ired. 42; Marston *v.* Dewberry, 21 La. Ann. 518; Knox *v.* Schepler, 2 Hill (S. C.), 595; Jarvis *v.* Hyer, 4 Dev. 367; Barber *v.* Bank, 9 Conn. 407; United States *v.* Hack, 8 Pet. 271; Pierce *v.* Jackson, 6 Mass. 242.

chattels of a firm;[1] and can, by his sale, transfer a moiety of the legal title, together with the right to take and hold possession against the other partners,[2] leaving them without any other means of enforcing the rights of the partnership than by proceedings in chancery. But the courts have gradually progressed toward a realization of the true nature of partnerships, and have therefore come to understand that they are materially different from co-tenancies. A copartner has no right to any specific chattel belonging to the firm, nor has he any right, as against the firm, to take or hold exclusive possession of any such chattel. The real ownership of all the chattels is vested in the firm; the interest of each partner is merely a right to share in the proceeds of those chattels after all the partnership obligations have been satisfied. Upon what principle can the purchaser at an execution sale be sustained in the exercise of rights to which the defendant was never entitled? Clearly, upon no principle whatever. The precedents made at an early day, when the law of partnership was imperfectly understood, are losing their force as authorities. Their place is being supplied by a line of decisions, destined to grow in favor and number, declaring that the creditor of an individual partner cannot sell any specific article, but only the partner's interest in the whole of the partnership assets,[3] and that the purchaser does not acquire

[1] Wiles *v.* Maddox, 26 Mo. 77; Fogg *v.* Laury, 68 Me. 78; 28 Am. Rep. 19.

[2] Walsh *v.* Adams, 3 Denio, 125; Berry *v.* Kelly, 4 Robt. 106; Phillips *v.* Cook, 24 Wend. 389; Haskins *v.* Everett, 4 Sneed, 531.

[3] Thomas *v.* Lusk, 13 La. Ann. 277; Vandike *v.* Rosskam, 67 Pa. St. 330; Atwood *v.* Meredith, 37 Miss. 635; Whigham's Appeal, 63 Pa. St. 194; Pittman *v.* Robicheau, 14 La. Ann. 108; Serrine *v.* Briggs, 31 Mich. 443; Haynes *v.* Knowles, 36 Mich. 407; Levy *v.* Cowan, 27 La. Ann. 556; Doner *v.* Stauffer, 1 Pen. & W. 198; 21 Am. Dec. 370; Richard *v.* Allen, 117 Pa. St. 199. In the last-named case the goods of a partnership were levied upon and sold under two

the right to hold possession of the property purchased, as against the other members of the firm, but only an

several writs against the two members thereof individually, and subsequently under another writ against the partnership. The plaintiffs claimed under the first levy and the defendants under the second. In disposing of the case the court said: "We may admit, for the purposes of this case, however doubtful the proposition, that a constable may levy an execution which he holds against an individual member of a firm on his interest in the goods and assets of the partnership; yet, even with this admission, the case in hand is by no means determined in favor of the plaintiffs in error. The constable's levies were necessarily confined to the property of the individuals against whom they were issued, *qua* individuals, and his seizure of the goods of the firm was a trespass, and legally void. A partnership is a distinct entity, and the joint effects belong to it, and not to the several partners: Doner *v.* Stauffer, 1 Pen. & W. 198. It follows that the levies on the goods of the firm of Sargent and Holt, for the several debts of the individual members of that firm, created no lien upon those goods, and were, in fact, as nugatory as though levied upon the property of a stranger. Admittedly, had the sale been on but one of the writs, the purchaser would have taken no right in the firm assets, but only the right to compel an account with the continuing partner, and such also is the purport of the first section of the act of the 8th of April, 1873. If, however, a levy on the interest of a single partner would have created no lien on the goods in controversy, we cannot see how a levy on the individual interests of both could alter the legal aspect of affairs, for in either case those interests were several, and the firm rights remained unaffected. The action of the constable did not deprive the partnership of the control of its own goods; the several partners still continued to be agents of the firm, and it would not be proper to say that a sale by both or either of them, as such, would not have passed a good title to a purchaser of those goods regardless of the levies. But the sheriff's levy, made by virtue of an execution issued on a judgment against the partnership, was a lien on the goods themselves, and his sale was not the disposition of a mere right in the firm, but of the property itself, and therefore vested in his vendee the absolute ownership thereof, leaving to the constable's vendees the right to have so much of the proceeds of the sale as remained after the satisfaction of the sheriff's writ. Had there been no levy by the sheriff on the property in question until after the sale to the plaintiffs, their case would have been different; in that event, the interest of both parties having been disposed of, there would thereafter have been no partnership in existence, hence no firm goods on which to levy. Doner *v.* Stauffer, *supra*. The equities of partnership creditors depend on the equities of the partners, and as long as a partner continues to have an interest in the partnership, so long do the equities of the firm creditors continue; but when the rights of all the partners have been disposed of, either by judicial or private sale, neither partnership nor partnership rights remain; and consequently they, the creditors, have no longer anything to which they can look for a satisfaction of their claims, except individual responsibility. But as a levy on the right of a partner neither divests that right nor dissolves the partnership, clearly the power

interest in the proceeds after the business of the firm shall have been settled.[1]

Though the right of the officer to seize the property of a partnership under an execution against one of its members is conceded, it must be exercised "as far as possible in harmony with the rights of the other partners, and not in hostility to them. His power to take and deliver possession of the *corpus* of the property is merely incidental to the right to reach the interest of the debtor, and is to be exercised only as a means to that end. Consequently, if he exceeds that limit, and undertakes to interfere with the rights of the other partners to a greater extent than is necessary to reach the interest of the debtor partner, and dispose of it, as, when instead of selling the interest of the debtor partner he undertakes to sell the entire property, though his act is nugatory, such interference renders him liable as a trespasser *ab initio*."[2]

§ 125 a. Property Subject to Execution in Equity. —Under statutes now in force in England and in the

of the firm to dispose of its own goods is not thereby affected, and as a consequence the equities of the firm creditors remain. That the judgment was confessed by the firm subsequently to the levies by the constable, even though the debt for which it was given was contracted after those levies, is not of material consequence; it was, nevertheless, a debt of the firm, for the payment of which the goods might have been assigned, or converted into cash; and as the levies by the constable created no lien, the property was entirely free for seizure on the execution against the partnership."

[1] Deal *v.* Bogue, 20 Pa. St. 228; 57 Am. Dec. 702; Reinheimer *v.* Hemingway, 35 Pa. St. 432; Crane *v.* French, 1 Wend. 311; Gibson *v.* Stevens, 7 N. H. 352; Garvin *v.* Paul, 47 N. H. 158; Clagett *v.* Kilbourne, 1 Black, 346; Sutcliffe *v.* Dohrman, 18 Ohio, 181; 51 Am. Dec. 450; Sitler *v.* Walker, Freeman Ch. 77; Bevan *v.* Allee, 3 Harr. (Del.) 80; Parsons on Partnership, 352; 3 Southern L. R. 250–273. In Alabama, it seems that the purchaser is entitled to be in possession jointly with the partners, but not to their exclusion. Andrews *v.* Keith, 34 Ala. 722.

[2] Atkins *v.* Saxton, 77 N. Y. 199; Neary *v.* Cahill, 20 Ill. 214; Waddell *v.* Cook, 2 Hill, 47; 37 Am. Dec. 372.

United States, writs of *fieri facias* may be issued to enforce decrees directing the payment of specific sums of money. These writs may unquestionably be levied upon any property which would be subject to levy under like writs issued upon judgments at law. Courts of law formerly took no notice of mere equitable estates and interests, and hence they were generally not subject to execution at law. These estates and interests were, however, always regarded in equity. In fact, a large portion of its jurisdiction was devoted to their consideration and maintenance, and for most purposes they were, in its tribunals, not less potent than though united with the legal title. Will such estates and interests be ignored, when proceeding under a *fieri facias* issued upon a decree in chancery, in those states where they are not subject to execution at law? We have discovered no case considering this question. Unless the statute conferring the power to use this writ in enforcing decrees expressly restricts its use to cases where it might be employed at law, we think that it ought to be adjudged to authorize the seizure and sale of property of which the debtor has the equitable title, and which would be subject to execution at law if he were also vested with the legal title.

In many instances, specific property is directed to be sold by the decree. In these cases, the officer conducting the sale, and intending purchasers thereat, need only consider the directions of the decree, if jurisdiction has been obtained over all the parties interested in the property ordered to be sold. Whatsoever has been decreed to be sold, and no more, is subject to sale.

According to the practice of the court of chancery prior to the introduction of any statutory innovations,

no property was subject to execution in equity, in the sense in which those terms were understood at law. It is true that sequestrators were authorized to take possession of certain property of the defendant. A commission or writ of sequestration was said not to be a writ of execution, but a mere process to punish a contempt of court.[1] While it nominally issued to punish contempts, it was an efficient means of enforcing decrees, and therefore answered the purposes of writs of execution.[2] The issue of the writ did not create any lien on any property, nor give the sequestrators any precedence over any *bona fide* lessee, purchaser, or encumbrancer thereof, whose title accrued at any time prior to their taking possession.[3] Prior encumbrances were respected if made in good faith;[4] but transfers and encumbrances made for the purpose of rendering the sequestration abortive, to one having notice of this purpose, were disregarded.[5] With respect to lands, it is quite certain that the sequestrators acquired no title, and hence could make no sale.[6] They were, however, by their writ authorized to take possession of the defendant's lands, tenements, goods, and chattels, and to receive the rents and profits thereof. When these rents and profits were payable in kind, or when the sequestrators received the natural produce of the lands seized, an order of court might be

[1] Brune v. Robinson, 7 I. R. Eq. 188.

[2] Reddingfield v. Zouch, 2 Freem. 168; Hide v. Petit, 2 Freem. 125; 1 Ch. Cas. 91.

[3] Vicars v. Colclough, 5 Brown Parl. C. 31; Ex parte Nelson, L. R. 14 Ch. D. 41; 49 L. J. Bankruptcy, 44; 42 L. T. 389; 28 Week. Rep. 554.

[4] Burne v. Robinson, 7 I. R. Eq. 188; Tatham v. Parker, 1 Smale & G. 506; 17 Jur. 929; 22 L. J. Ch. 203.

[5] Ward v. Booth, L. R. 14 Eq. 195; 41 L. J. Ch. 729; 27 L. T., N. S., 364; 20 Week. Rep. 880; Coulston v. Gardiner, 3 Swans. 279, note.

[6] Coats v. Elliott, 23 Tex. 606; Shaw v. Wright, 4 Ves. 22; Sutton v. Stone, 1 Dick. 107; Foster v. Townshend, 2 Abb. N. C. 29; 68 N. Y. 203.

obtained for the sale of such chattels,[1] and perhaps other personal property of a party in contempt for the non-payment of money might be ordered sold.[2] All property of a tangible character, of which the sequestrators could obtain possession without suit, was subject to sequestration, and they might open boxes and rooms which were locked to obtain possession of the goods therein.[3] Property seized by them thereby became in the custody of the law, and any interference with their possession not authorized by the court was punished as a contempt.[4] If the property seized was claimed by a stranger to the writ, it was necessary for him to come before the court and present his claim; and if convinced of its validity, the court would order the restoration of the property, and sometimes award damages for its detention.[5] Where moneys were due for rents of lands of the defendant, subject to the sequestration, they might be ordered paid to the sequestrators.[6] Where funds or moneys are under the control of the court, which the defendant is entitled to receive, they may be subjected to the sequestration by obtaining an order of the court for their payment to the sequestrators.[7] The pay of a public officer, for which the government is entitled to any services, is, on principles of public policy, not subject to seques-

[1] Shaw *v.* Wright, 3 Ves. 22.

[2] Cavil *v.* Smith, 3 Brown Ch. 362; In re Rush, L. R. 10 Eq. 442; 18 Week. Rep. 417; 22 L. T., N. S., 116; Cowper *v.* Taylor, 16 Sim. 314.

[3] Pelham *v.* Newcastle, 3 Swans. 290, note; White *v.* Geraedt, 1 Edw. Ch. 336.

[4] Angel *v.* Smith, 9 Ves. 336; Copeland *v.* Mape, 2 Ball & B. 387.

[5] Francklyn *v.* Colhoun, 3 Swans. 310; Pelham *v.* Newcastle, 3 Swans. 290, note.

[6] Wilson *v.* Metcalfe, 8 L. J. Ch. 331; 1 Beav. 263.

[7] Claydon *v.* Finch, L. R. 15 Eq. 266; Conn *v.* Garland, L. R. 9 Ch. 101; 22 Week. Rep. 175; Slade *v.* Hulme, L. R. 18 Ch. D. 653; 50 L. J. Ch. 729; 45 L. T., N. S., 276; 30 Week. Rep. 28.

tration.[1] Pensions granted for past services may be secured to the sequestrators by obtaining an injunction restraining the defendant from receiving them.[2] Choses in action have sometimes been spoken of by the courts as subjects of sequestration;[3] but they are so to a very limited extent. If the person from whom they are owing is a party to the suit, or otherwise before the court, or if he voluntarily appears and assents thereto, an order may be made directing him to pay to the sequestrators the amount due from him to the defendant. In all other cases no such order will be entered, and the chose in action cannot be subjected to the sequestration.[4]

DEFENDANTS WHOSE PROPERTY CANNOT BE LEVIED AND SOLD.

§ 126. Property of a County or of a Municipal Corporation. — We have shown, in a preceding section,[5] that it was, under ordinary circumstances, erroneous to award an execution against a county or a municipal corporation. Where this rule of law prevails, it is clear that no property of a county or a city is subject to seizure under execution; for, in contemplation of law, there can be no valid execution. Thus in California a suit was regularly prosecuted against a parcel of land for delinquent taxes thereon, and a judgment *in rem* obtained. A sale having been made under this judg-

[1] McCarthy *v.* Goold, 1 Ball & B. 389; Fenton *v.* Lowther, 1 Cox, 315; Spooner *v.* Payne, 1 De Gex, M. & G. 388.

[2] McCarthy *v.* Goold, 1 Ball & B. 389; Willcock *v.* Terrell, 3 Ex. D. 323; Dent *v.* Dent, L. R. 1 P. & D. 366.

[3] Wilson *v.* Metcalfe, 1 Beav 263; 8 L. J. Ch. 331; Grew *v.* Breed, 12 Met. 363; White *v.* Geraedt, 1 Edw Ch. 336.

[4] Crispin *v.* Cumano, L. R. 1 P. & D. 622; Johnson *v.* Cleppendale, 2 Sim. 55; McCarthy *v.* Goold, 1 Ball & B. 389.

[5] City of Bloomington *v.* Brokaw, 77 Ill. 194; City of Morrison *v.* Hinkson, 87 Ill. 587. See § 22.

ment, the purchaser applied to be let into possession of the property. He was resisted, on the ground that the land belonged to a city, and was used by it as a public cemetery. The court held the tax suit unauthorized, and the judgment therein *coram non judice;* and that the sale was, therefore, void.[1] The question whether or not a parcel of property belonging to a municipal or other public corporation is subject to execution must be determined by ascertaining the uses and purposes for which such property is held. Such a corporation is generally either a part of the government or an instrumentality through which some portion of the functions of government are exercised. It may acquire and use property for the purposes of public schools, hospitals, prisons, courts, and for divers other uses in which the public is concerned, its welfare promoted, and the functions of government discharged. When held for such purposes, the property does not partake of the character of private ownership, and is clearly not subject to execution.[2] It would be intolerable that these instrumentalities should be seized and the functions of government either suspended or destroyed. Nor would a mere change in the form of the property subject it to execution. Hence there cannot be any garnishment of moneys due a municipality for insurance upon a school-house which has been destroyed by fire.[3] Blocks of land used by a city for wharf and levee purposes, and upon which charges are made by the city for wharfage, are not subject to execution; for the providing of such wharves and the collecting of

[1] People *v.* Doe G. 1034, 36 Cal. 220.

[2] State *v.* Tiedeman, 69 Mo. 306; 33 Am. Rep. 498; Gooch *v.* Gregory, 65 N. C. 142; Virden *v.* Fishback, 9 Ill. App. 82; Lyon *v.* Elizabeth, 43 N. J. L. 158; City of Davenport *v.* P. M. & F. I. Co., 17 Iowa, 276.

[3] Fleishel *v.* Hightower, 62 Ga. 324

tolls thereon are matters of governmental regulation.[1] Nor is it necessary to exempt the property of a city that it be then in actual public use, if it has formerly been so used, for it will be presumed to be intended for such use until the contrary is shown.[2] "Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation."[3] And this rule has been held to extend to judgments obtained under the mechanics' lien law, for work done and materials furnished toward the erection of a public school-house.[4] This immunity from execution extends to all the public revenues of a city, whether derived from taxes or other sources; for to permit their seizure would necessarily suspend the governmental functions of the city almost as effectually as the repeal of its charter.[5] Nor do such revenues become subject to seizure, because deposited in a private bank or other depository.[6] This is manifestly so, because it is the purpose of the funds, and not their situation, which withdraws them from execution. Pueblo lands held by towns and cities

[1] Klein *v.* New Orleans, 99 U. S. 149.

[2] Curry *v.* Savannah, 64 Ga. 290; 37 Am. Rep. 74; 21 Alb. L. J. 34.

[3] Meriwether *v.* Garrett, 102 U. S. 501.

[4] Brinckerhoff *v.* Board of Education, 6 Abb. Pr., N. S., 428; 37 How. Pr. 499; 2 Daly, 443; Loring *v.* Small, 50 Iowa, 571; 32 Am. Rep. 136; Chadwick *v.* Colfax, 51 Iowa, 70; Dillon on Municipal Corporations, sec. 577.

[5] Brown *v.* Gates, 15 W. Va. 131; Edgerton *v.* Municipality, 1 La. Ann. 435; Municipality *v.* Hart, 6 La. Ann. 570; N. O. & C. R. R. *v.* Municipality, 7 La. Ann. 148; Police Jury *v.* Michel, 4 La. Ann. 84; City of Chicago *v.* Halsey, 25 Ill. 595.

[6] Peterkin *v.* New Orleans, 2 Woods, 101.

under the Mexican laws, in trust for their inhabitants, are not subject to execution against such towns and cities, because they have no beneficial interest therein.[1] In some of the states, certain property belonging to cities has been decided to be subject to execution, on the ground that it was not held or used for governmental purposes, and that its seizure would not suspend or impair the exercise of the governmental functions delegated to such cities.[2] Thus in California lands were held subject to execution which were granted to a city by the state, with a proviso that the city should "pay into the state treasury, within twenty days after their receipt twenty-five per cent of all moneys arising from the sale or other disposition of the property."[3]

§ 126 a. **The Property of Certain Quasi Public Corporations** is held by them for the purposes of private gain, and has, so far as its ownership is concerned, all the advantages of private property; but such corporations are generally created and given especial privileges, with a view to the advantages which may accrue to the public. The public is, therefore, regarded as having an interest in the continued performance of the corporate duties; and any alienation, whether voluntary or involuntary, of the franchises of the corporation, or of the property necessary to the

[1] Hart *v.* Burnett, 15 Cal. 530; Townsend *v.* Greely, 5 Wall. 326.

[2] City of New Orleans *v.* H. M. I. Co., 23 La. Ann. 61; City of New Orleans *v.* Morris, 3 Woods, 103.

[3] Smith *v.* Morse, 2 Cal. 524; Holladay *v.* Frisbie, 15 Cal. 530; Wheeler *v.* Miller, 16 Cal. 124. See also Darlington *v.* Mayor of N. Y., 31 N. Y. 164; Lyell *v.* Supervisors of St. Clair Co., 3 McLean, 580. It is said that the apparatus and funds of the metropolitan fire department of New York and Brooklyn are subject to execution in satisfaction of judgments against the department. Clarissy *v.* Metropolitan Fire Department, 7 Abb. Pr., N. S., 352; 1 Sweeny, 224. In Alabama the creditor of a municipal corporation may garnish moneys in the hands of a city marshal. Smoot *v.* Hart, 33 Ala. 69.

exercise of such franchises, is looked upon with disfavor, and in some of the states has been peremptorily forbidden. Hence, if a corporation is authorized to construct and maintain a turnpike or canal, and to collect tolls thereon, neither the turnpike, nor canal, nor the toll-houses, or other property indispensable to the maintenance of such road or canal, can be sold under execution.[1] "Most people acquainted at all with corporate action understand that corporations other than municipal, which are purely public, naturally divide into public and private corporations; that is, into those that are agencies of the public directly affecting it, and those which affect it indirectly, by adding to its prosperity in developing its natural resources, or in improving its mental and moral qualities; of the former, are corporations for the building of bridges, turnpike roads, canals, and the like. The public is directly interested in the results to be produced by such corporations in the facilities afforded to travel, and the movements of trade and commerce. It is well settled that this use is not to be disturbed by the seizure of any part of their property essential to their active operations, by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking to accommodate the public."[2] It was therefore held that a corporation for introducing water into a town for the use of its inhabitants was a public corporation, and that its lands and buildings necessary to the enjoyment of its franchises were not subject to execution nor to a mechanic's lien.[3] The same rule applies to railroad cor-

[1] Ammant v. N. A. & P. T. Co., 13 Serg. & R. 210; 15 Am. Dec. 593; Susquehanna C. Co. v. Bonham, 9 Watts & S. 27; 42 Am. Dec. 315.

[2] Foster v. Fowler, 60 Pa. St. 30.

[3] Ibid.

porations. "As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale; and this on the ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by its own act than can a creditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate franchises shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration."[1] Such was the law of Pennsylvania, until the statute of 1870 authorized the levy of execution upon the franchises and property of corporations.[2] In the other states the courts have conceded that franchises were not subject to execution unless made so by statute; but they have hesitated to declare that the exemption of franchises drew with it that of all other property essential to their enjoyment. That the involuntary sale of such property might render the franchise unproductive of the public good, and to some extent thwart the public will and impair the public

[1] Plymouth R. R. v. Colwell, 39 Pa. St. 337; 80 Am. Dec. 526; see also Richardson v. Sibley, 11 Allen, 700; 87 Am. Dec. 65.

[2] Philadelphia & B. C. R. R. Co.'s Appeal, 70 Pa. St. 355.

welfare, has always been conceded. On the other hand, the evil of withdrawing a vast and constantly increasing amount of the wealth of the country from the reach of creditors has been regarded as so real and serious, that the courts have not given it their countenance or support; and at the present day the property of corporations other than municipal, though essential to the enjoyment of the corporate franchises, is almost universally treated as subject to execution.[1] "The idea that property, either real or personal, may become a mere incident to a franchise, so that the franchise and property shall constitute an entire thing, is not found in any of the books of the common law, so far as we are aware. The right to a ferry is such a franchise, and the boats required for the transportation of passengers and their property are entirely indispensable for the discharge of the public duties of the owner; yet we have found no instance in which it has been claimed that such boats were exempt from seizure for the owner's debts."[2]

§ 127. **Property of Married Women for Debts of Husband.** — Under the provisions of the common law, the giving of a woman in marriage, unless restricted by antenuptial agreements, operated as a gift of all her personal estate, then actually or constructively in her possession, and of all personal estate which might thereafter, during coverture, be acquired by her, and reduced into her possession or that of her husband.

[1] State *v.* Rives, 5 Ired. 306; Arthur *v.* C. & R. R. Bank, 9 Smedes & M. 431; 48 Am. Dec. 719; Coe *v.* C. P. & I. R. R., 10 Ohio St. 372; 75 Am. Dec. 518; Coe *v.* Peacock, 14 Ohio St. 187; R. R. Co. *v.* James, 6 Wall. 750; Stewart *v.* Jones, 40 Mo. 140; Ludlow *v.* C. L. R. R., 1 Flip. 25.

[2] B. C. & M. R. R. *v.* Gilmore, 37 N. H. 410; 72 Am. Dec. 336; Lathrop *v.* Middleton, 23 Cal. 257; 83 Am. Dec. 312.

And her chattels were deemed, in law, to be in her possession, for the purpose of transferring title to the husband, by mere force of his marital rights, in all cases where such chattels were not held adversely to her. It was of no consequence that they were held by her agent or bailee, or by any other person for her benefit. Where the rules of the common law still prevail, it is evident that what might, according to justice, or according to the popular acceptation of the term, be called the wife's chattels, are, in contemplation of the law, chattels in which she has no interest, over which she can exercise no control, and for the interference with which she has no legal cause for complaint. They are the property of her husband as absolutely as though possessed by him anteriorly to his marriage.[1] They are not to be thought of as her property; but may be seized and sold under execution against him, and applied to the payment of his debts.[2] Choses in action were not regarded as being in the possession either of the husband or the wife. The husband may, by collection, reduce them to his possession and make the proceeds his personal estate. If he does not do so during coverture, they survive to the wife, and do not pass to his

[1] As to the vesting of wife's chattels in the husband by virtue of marriage, see Bishop on Married Women, secs. 64, 52; Clapp *v.* Stoughton, 10 Pick. 463; Sheriff *v.* Buckner, 1 Litt. 126; Gwynn *v.* Hamilton, 29 Ala. 233; Martin *v.* Pougue, 4 B. Mon. 524; Washburn *v.* Hale, 10 Pick. 429; Carleton *v.* Lovejoy, 54 Me. 445; Jordan *v.* Jordan, 52 Me. 320; Hopper *v.* McWhorter, 18 Ala. 529; Bell *v.* Bell, 1 Kelly, 637; Byrd *v.* Ward, 4 McCord, 228; Cram *v.* Dudley, 28 N. H. 537; Pope *v.* Tucker, 23 Ga. 484; Hill *v.* Wynn, 4 W. Va. 453; Ewing *v.* Handley, 4 Litt. 346; 14 Am. Dec. 140; Miller *v.* Bingham, 1 Ired. Eq. 423; 36 Am. Dec. 58; Daniel *v.* Daniel, 2 Rich. Eq. 115; 44 Am. Dec. 244; Burleigh *v.* Coffin, 22 N. H. 118; 53 Am. Dec. 236. The possession of the wife can never become adverse to the husband, though he has abandoned her and lived in adultery with another. Bell *v.* Bell's Adm'r, 37 Ala. 536; 79 Am. Dec. 73.

[2] Cunningham *v.* Gray, 20 Mo. 170; Apple *v.* Ganong, 47 Miss. 189; Tally *v.* Thompson, 20 Mo. 277; Barbee *v.* Wimer, 27 Mo. 140; Pawley *v.* Vogel, 42 Mo. 291.

administrator.[1] But in some of the states it has been held that the husband's creditors may reach the wife's choses in action before he reduces them to possession.[2] The view, however, which is best sustained by reason and by authority is, that to entitle the husband to the benefit of the wife's choses in action, he must at least make some attempt to appropriate them to his own use, or, by means of suit, to convert them into things in possession; that, in the absence of such attempt, the choses continue to be the property of the wife; that no person but the husband is entitled to exercise his right of depriving her of such property; that a writ against the husband cannot reach the property, because it is not his, and cannot reach the right of reducing the property into possession, because that is a personal privilege, and cannot be transferred.[3] "The common law of England identifies the wife so entirely with the husband as scarcely to tolerate their separate existence

[1] Bishop on Married Women, sec. 65; Chappelle *v.* Olney, 1 Saw. 401.

[2] Wheeler *v.* Bowen, 20 Pick. 563; Holbrook *v.* Waters, 19 Pick. 354; State *v.* Krebs, 6 Har. & J. 31; Peacock *v.* Pembroke, 4 Md. 280; Strong *v.* Smith, 1 Met. 476; Alexander *v.* Crittenden, 4 Allen, 354; Doll *v.* Geiger, 2 Gratt. 98; Vance *v.* McLaughlin, 8 Gratt. 289; Hockaday *v.* Sallee, 26 Mo. 219; Johnson *v.* Fleetwood, 1 Harr. (Del.) 442; Babb *v.* Elliott, 4 Harr. (Del.) 466; Bryan *v.* Rooks, 25 Ga. 622; 71 Am. Dec. 191.

[3] Marston *v.* Carter, 12 N. H. 159; Poor *v.* Hazleton, 15 N. H. 564; Wheeler *v.* Moore, 13 N. H. 478; Smithurst *v.* Thurston, Brightly, 127; Skinner's Appeal, 5 Pa. St. 262; Denison *v.* Nigh, 2 Watts, 90; Robinson *v.* Woelpper, 1 Whart. 179; 29 Am. Dec. 44; Ryan *v.* Bull, 3 Strob. Eq. 86; Durr *v.* Bowyer, 2 McCord Ch. 374; Perryclear *v.* Jacobs, 2 Hill Ch. 509; Short *v.* Moore, 10 Vt. 446; Probate Court *v.* Niles, 32 Vt. 775; Arrington *v.* Screws, 9 Ired. 42; 49 Am. Dec. 408; Godbold *v.* Bass, 12 Rich. 202; Pressly *v.* McDonald, 1 Rich. 27; Bennett *v.* Dillingham, 2 Dana, 437; Kilby *v.* Haggin, 3 J. J. Marsh. 208; Sayre *v.* Flournoy, 3 Kelly, 541; Flory *v.* Becker, 2 Pa. St. 470; 45 Am. Dec. 610; Scrutton *v.* Pattillo, L. R. 19 Eq. 369; 12 Moak, 803; Proctor *v.* Ferebee, 1 Ired. Eq. 143; 36 Am. Dec. 34; Kaufman *v.* Crawford, 9 Watts & S. 131; 42 Am. Dec. 323; Wedgery *v.* Tepper, L. R. 5 Ch. D. 516; 22 Moak, 261; Slocum *v.* Breedlove, 8 La. 143; 28 Am. Dec. 135; Miller *v.* Miller, 1 J. J. Marsh. 169; 19 Am. Dec. 59; Scott *v.* Hicks, 2 Sneed, 192; 62 Am. Dec. 458.

while they live together. She cannot acquire personal property by a direct conveyance to herself. Her interest is, by act of law, almost in every instance transferred to her husband. But this rule does not apply to personal estate to which a female is entitled before marriage, and which has not been reduced to possession. This remains her property, and does not vest in the husband by the marriage. The marital right does not extend to the property while a chose in action, but enables the husband to reduce it to possession, and thereby acquire it. The property becomes his, not upon the marriage, but upon the fact of his obtaining possession. The property does not become his, nor is it subject to the liabilities which attach to that which is his, until it shall be reduced to possession. Till then his creditors have no claim to it."[1]

Mere manual possession alone is not sufficient. It must be a reduction to possession with intent to assert the husband's martial right. Hence, where he intends the property to remain his wife's, his intent is not frustrated by his becoming its custodian,[2] nor by holding it as trustee,[3] or as executor.[4] There must be a union of act and intent. Therefore the intent without the act is as ineffective as the act without the intent.[5] A wife's chose in action is reduced to the possession of her husband, and its proceeds become his property, when he receives payment thereof with intent to appropriate

[1] Gallego *v.* Gallego, 2 Brock. 286; Harris *v.* Taylor, 3 Sneed, 536; 67 Am. Dec. 376.

[2] Hind's Estate, 5 Whart. 138; 34 Am. Dec. 545; Holmes *v.* Holmes, 28 Vt. 675; McDowell *v.* Potter, 8 Pa. St. 192; Barber *v.* Slade, 30 Vt. 191; 73 Am. Dec. 299.

[3] Jackson *v.* McAliley, 1 Spears Eq. 303; 40 Am. Dec. 620; Resor *v.* Resor, 9 Ind. 347; State *v.* Reigart, 1 Gill, 1; 39 Am. Dec. 628.

[4] Walker *v.* Walker, 25 Mo. 357; Page *v.* Sessions, 4 How. 122.

[5] Brown *v.* Bokee, 53 Md. 155.

the proceeds to his own use,[1] or accepts in its stead a bond payable to himself,[2] or executes a transfer thereof, or recovers judgment thereon, in his own name.[3] With respect to the effect of a transfer for value, made by a husband of his wife's chose in action not otherwise reduced to his possession, the authorities disagree, some asserting that it operates to vest in the assignee an indefeasible title,[4] and others contending that the assignee obtains nothing beyond what the assignor held, viz., the right to reduce the chose into possession, and that if such right is not exercised during the husband's life, the chose survives to the wife.[5] The recovery of judgment on a wife's chose in action, where the husband instead of suing alone merely joins with her as a party plaintiff, does not vest it in him.[6] Concerning post-nuptial choses in action, there exists the same divergence of judicial opinion as in other cases. So far as the earnings of the wife is concerned, they doubtless belong to the husband, unless he has done something to estop himself from claiming them.[7] Human beings, less heartless and more discriminating than the common law, may, however, recognize the services and kind offices of a married woman, and express

[1] Thomas *v.* Chicago, 55 Ill. 103; Lowery *v.* Craig, 30 Miss. 19; Plummer *v.* Jarman, 44 Md. 632.

[2] Stewart's Appeal, 3 Watts & S. 476.

[3] Alexander *v.* Crittenden, 4 Allen, 312; Probate Court *v.* Niles, 32 Vt. 775.

[4] Siter's Case, 4 Rawle, 468; Tritt *v.* Colwell, 31 Pa. St. 228; Needles *v.* Needles, 7 Ohio St. 432; 70 Am. Dec. 85; Tuttle *v.* Fowler, 22 Conn. 58; Ware *v.* Ware, 28 Gratt. 670; Manion's Adm'r *v.* Titsworth, 18 B. Mon. 582; Smith *v.* Atwood, 14 Ga. 402.

[5] State *v.* Robertson, 5 Harr. (Del.) 201; George *v.* Goldsby, 23 Ala. 326; Bryan *v.* Spruill, 4 Jones Eq. 27; O'Connor *v.* Harris, 81 N. C. 279.

[6] McDowl *v.* Charles, 6 Johns. Ch. 132; Pierson *v.* Smith, 9 Ohio St. 554; 75 Am. Dec. 486; Perry *v.* Wheelock, 49 Vt. 63; Pike *v.* Collins, 33 Me. 38.

[7] Prescott *v.* Brown, 29 Me. 305; 39 Am. Dec. 623; Norcross *v.* Rodgers, 30 Vt. 588; 73 Am. Dec. 323.

such recognition in the form of a chose in action payable to her, or such chose may be taken in her name in payment of portions of her separate estate sold by her. Doubtless there are courts which regard such chose, in either case, as the absolute property of the husband, and consequently as subject to execution against him.[1] On the other hand, choses in action taken in the name of a wife, of which she is the meritorious cause, and possibly those taken in her name with the assent of her husband, of which she is not the meritorious cause, have been treated as of the same effect as her antenuptial choses.[2] Where creditors of the husband find it necessary to ask the aid of equity to enable them to reach choses in action, and appropriate them to the satisfaction of the husband's debts, it is very clear that the relief sought will not be granted unless adequate provision first be made for the support of the wife and her children.[3] It will be seen that the exemption of the wife's choses in action from execution or attachment against her husband will only be maintained when the circumstances are such that they must still be regarded as her property. The reason why a sheriff may, ordinarily, under a writ against a married man, seize the personal property which belonged to the wife at her marriage, is not because the wife's

[1] Stevens *v.* Beals, 10 Cush. 291; 57 Am. Dec. 108; Commonwealth *v.* Manley, 12 Pick. 173; Krebs *v.* O'Grady, 23 Ala. 726; 58 Am. Dec. 312; Peacock *v.* Pembroke, 4 Md. 280.

[2] Dickinson *v.* Davis, 43 N. H. 647; 80 Am. Dec. 202; Barber *v.* Slade, 30 Vt. 191; 73 Am. Dec. 299; Boozer *v.* Addison, 2 Rich. Eq. 273; 46 Am. Dec. 43, and note; Reed *v.* Blaisdell, 16 N. H. 194; 41 Am. Dec. 722.

[3] Browning *v.* Headley, 2 Rob. (Va.) 340; 40 Am. Dec. 755; Wiles *v.* Wiles, 3 Md. 1; 56 Am. Dec. 733; Daniel *v.* Daniel, 2 Rich. Eq. 115; 44 Am. Dec. 244; Wilks *v.* Fitzpatrick, 1 Humph. 54; 34 Am. Dec. 618; Duvall *v.* Farmers' Bank, 4 Gill & J. 282; 23 Am. Dec. 558; Oswald *v.* Hoover, 43 Md. 368; Van Duzer *v.* Van Duzer, 6 Paige, 366; 31 Am. Dec. 257; Napier *v.* Howard, 3 Kelly, 192; Hays *v.* Blanks, 7 B. Mon. 347; Bowling *v.* Bowling, 6 B. Mon. 31.

property is liable to be taken in satisfaction of judgments against her husband, but because the property seized upon belongs, in contemplation of law, to the defendant in execution. But property which, notwithstanding the marriage, is recognized by law as constituting the separate estate of the wife is no more liable to be taken on an execution against her husband than it is to be taken under a writ against some other person. Whatever interest in the property the law concedes to the wife, it will protect from her husband's creditors;[1] and in some of the states, statutes have been enacted which, without changing the wife's legal title to personal estate owned by her before marriage or afterwards acquired, have exempted such property from execution against the husband.[2] In other states, the wife is required to file for record an inventory of her separate personal estate. If she omits to do this, it may be taken in execution to satisfy her husband's debts.[3]

§ 128. **Property of Wife under Execution against Herself.** — Married women are not usually regarded as exempt from the jurisdiction of the courts. Judgments against them, until vacated in some proper proceedings, are generally binding to all intents and purposes, and are capable of being enforced in the same

[1] Unger *v.* Price, 9 Md. 552; Logan *v.* McGill, 8 Md. 461; Barnard *v.* Mix, 35 Conn. 223; Knapp *v.* Smith, 27 N. Y. 277; Buckley *v.* Wells, 33 N. Y. 518; Gage *v.* Dauchy, 34 N. Y. 293; Johnson *v.* Chapman, 35 Conn. 550; Jones *v.* Ætna Ins. Co., 14 Conn. 501; Selden *v.* Merchants' Bank, 69 Pa. St. 424; Van Etten *v.* Currier, 3 Keyes, 329; Kluender *v.* Lynch, 4 Keyes, 361; Hale *v.* Coe, 49 Mo. 181; Saunders *v.* Carrott, 33 Ala. 454.

[2] Harvey *v.* Wickham, 23 Mo. 112; White *v.* Dorris, 35 Mo. 181; Pawley *v.* Vogel, 42 Mo. 291; Hale *v.* Coe, 49 Mo. 181; Furrow *v.* Chapin, 13 Kan. 107.

[3] Williams *v.* Brown, 28 Iowa, 247; Presnall *v.* Herbert, 34 Iowa, 539; Stuart *v.* Bishop, 33 Iowa, 554.

manner as judgments similar in other respects. Hence, when a personal judgment for money is entered against a married woman, either alone or in conjunction with other defendants, it is commonly conceded that execution may be issued, under which the sheriff may seize and sell her separate property.[1] In at least one case it has been held that when a woman marries her debt becomes the debt of her husband; that he alone is responsible for its payment; and that in no case, during the coverture, can execution issue against her separate estate, whether for a debt contracted before or after her marriage.[2]

PROPERTY IN THE CUSTODY OF THE LAW.

§ 129. Property in the Hands of Receivers and Assignees. — It is very clear that all property in custody of the law is not subject to any seizure or interference by officers acting under writs of execution;[3] but some difficulty may be experienced in determining when property is so within the custody of the law as to be shielded by this rule. When a court of equity has acted by taking property into its possession by the appointment of a receiver, such property, whether real or personal, is clearly *in custodia legis*. The whole purpose of the suit might be defeated if an officer could wrest the property from the agent of the court, and sell it by virtue of a writ against one of the contending parties. Such property is not subject to execution.[4]

[1] Smith v. Taylor, 11 Ga. 20; Schafroth v. Ambs, 46 Mo. 114; Rountree v. Thomas, 32 Tex. 286; Musgrave v. Musgrave, 54 Ill. 186; Van Metre v. Wolf, 27 Iowa, 341; Merrill v. St. Louis, 83 Mo. 244.

[2] Haygood v. Harris, 10 Ala. 291.

[3] Hackley's Ex'r v. Swigert, 5 B. Mon. 86; 41 Am. Dec. 256.

[4] Gouverneur v. Warner, 2 Sand. 624; Wiswall v. Sampson, 14 How. 52; Martin v. Davis, 21 Iowa, 535; Field v. Jones, 11 Ga. 413; Nelson v. Connor, 6 Rob. (La). 339; County of Yuba v. Adams & Co., 7 Cal. 35; Glenn v. Gill,

No officer has any right to levy on it without permission of the court. Proceeding without such permission, he may be brought before the court, punished for contempt, and obliged to relinquish his levy.[1] Property has been held to be in custody of law where a receiver had been appointed but had declined to act.[2] The effect of the appointment of a receiver, in a suit brought by one partner against another for the dissolution of the partnership and the settlement of its affairs, has been considered in a series of cases in California arising out of the somewhat notorious failure of Adams and Company. The conclusion there reached was, that until the dissolution of the partnership is decreed and the *pro rata* distribution of its assets ordered among the creditors, they are, notwithstanding the appointment of a receiver, at liberty to pursue their remedies at law, and entitled to retain any liens resulting from their diligence in such pursuit.[3] The reasons given in support of these decisions were, that the suit was one to which the creditors were not parties, and over which they had no control; that they might settle or adjust the case between themselves, or the plaintiff might dismiss it at any time; that until the dissolution was decreed, it could not be known that the firm business would be terminated and its affairs settled by the court; and that it would be unwise to deny the creditors the right to pursue the partnership because one of its members

2 Md. 1; Taylor *v.* Gillian, 23 Tex. 508; Robinson *v.* A. & G. R. R. Co., 66 Pa. St. 160; Bentley *v.* Shrieve, 4 Md. Ch. 412; Farmers' Bank *v.* Beaston, 7 Gill & J. 421; 28 Am. Dec. 260; Langdon *v.* Lockett, 6 Ala. 727; 41 Am. Dec. 78; Jackson *v.* Lahee, 114 Ill. 287.

[1] Russell *v.* East Anglican R. W. Co., 3 Macn. & G. 104; Coe *v.* C. P. & I. R. R. Co., 10 Ohio St. 403; 75 Am. Dec. 518; High on Receivers, sec. 163.

[2] Skinner *v.* Maxwall, 68 N. C. 400.

[3] Adams *v.* Hackett, 7 Cal. 187; Adams *v.* Woods, 8 Cal. 152; 68 Am. Dec. 313; Adams *v.* Woods, 9 Cal. 19.

had obtained the appointment of a receiver in a suit which he might dismiss or delay at pleasure. This reasoning is not without force; but we think it more appropriate when presented to the court in opposition to the appointment of the receiver, or in support of a motion for leave to proceed, notwithstanding such appointment;[1] for generally courts of equity will not permit a party who has defied their authority, by seizing under execution property in their possession, to excuse himself on the ground that the order appointing the receiver was irregularly or improvidently made.[2] An assignee, appointed in proceedings at law for the benefit of insolvent debtors, seems to stand in the same position as a receiver. He is an officer of the court, and moneys and effects in his hands are in the custody of the law. They cannot be reached by garnishment,[3] unless a dividend has been declared, and the assignee has been directed to pay it over to the respective creditors.[4] One to whom a debtor has made a voluntary assignment of his assets for the benefit of creditors is liable to be garnished. If he has in his hands assets more than sufficient to discharge the claims of the creditors assenting to the assignment, a dissenting creditor may reach the surplus by garnishment.[5]

§ 130. Moneys Collected by Sheriffs, Constables, Clerks, and Justices. — The authorities are very nearly unanimous in sustaining the proposition that when a

[1] See Jackson v. Lahee, 114 Ill. 287; Waring v. Robinson, Hoff. Ch. 524.

[2] Russell v. East Anglican R. Co., 3 Macn. & G. 104.

[3] Colby v. Coates, 6 Cush. 558.

[4] Thayer v. Tyler, 5 Allen, 94; Jones v. Gorham, 2 Mass. 375; Decoster v. Livermore, 4 Mass. 101.

[5] Leeds v. Sayward, 6 N. H. 83; Viall v. Bliss, 9 Pick. 13; Ward v. Lamson, 6 Pick. 358; Brewer v. Pitkin, 11 Pick. 298; Copeland v. Weld, 8 Me. 411; Jewett v. Barnard, 6 Me. 381; Todd v. Bucknam, 11 Me. 41.

sheriff or constable has collected money on execution, it can neither be levied upon nor garnished by the same or another officer, under a writ against the judgment creditor.[1] Various reasons have been given in support of this rule. In some of the cases, the judges were satisfied to rest their judgment on the general statement that such moneys were in custody of law. In other cases, it was urged that money collected on execution does not thereby become the property of the plaintiff in the writ; that in theory of law, it is to be brought into court, and by the order of the court paid

[1] Marvin *v.* Hawley, 9 Mo. 378; 43 Am. Dec. 547; Keating *v.* Spink, 3 Ohio St. 124; 62 Am. Dec. 244; Jones *v.* Jones, 1 Bland, 445; 18 Am. Dec. 327; Turner *v.* Fendall, 1 Cranch, 117; Wood *v.* Wood, 14 Ad. & E., N. S., 397; 3 Gale & D. 532; 7 Jur. 325; 12 L. J. Q. B. 111; State *v.* Wilson, 56 Mo. 492; Ex parte Fearle and Lewis, 13 Mo. 467; 53 Am. Dec. 155; Winton *v.* State, 4 Ind. 321; Thompson *v.* Brown, 17 Pick. 462; Dubois *v.* Dubois, 6 Cow. 494; State *v.* Lea, 8 Ired. 94; Harding *v.* Stevenson, 6 Har. & J. 264; Staples *v.* Staples, 4 Greenl. 532; Knight *v.* Criddle, 9 East, 48; Muscott *v.* Woodworth, 14 How. Pr. 477; Baker *v.* Kenworthy, 41 N. Y. 215; Reddick *v.* Smith, 3 Seam. 451; Padfield *v.* Brine, 3 Brod. & B. 294; Collinbridge *v.* Paxton, 11 Com. B. 683; State *v.* Taylor, 56 Mo. 492; 21 Am. Rep. 561; Dawson *v.* Holcomb, 1 Ham. 275; 13 Am. Dec. 618; Willis *v.* Pitkin, 1 Root, 47; Reno *v.* Wilson, Hemp. 91; Prentiss *v.* Bliss, 4 Vt. 513; 24 Am. Dec. 631; First *v.* Miller, 4 Bibb, 311; Gray *v.* Maxwell, 50 Ga. 108; Campbell *v.* Hasbrook, 24 Ill. 213; Stevenson *v.* Douglas, Bert. 281. In the foregoing cases, attempts were made to *levy* upon money in the officer's hands. The following cases show that the same principles apply to attempted garnishments: Clymer *v.* Willis, 3 Cal. 363; 58 Am. Dec. 414; Burrell *v.* Letson, 1 Strob. 230; Hill *v.* Lacrosse & M. R. R. Co., 14 Wis. 293; 80 Am. Dec. 783; Lightner *v.* Steinagel, 33 Ill. 516; 85 Am. Dec. 292; Wilder *v.* Bailey, 3 Mass. 289; Pollard *v.* Ross, 5 Mass. 19; Robinson *v.* Howard, 7 Cush. 257; Morris *v.* Penniman, 14 Gray, 220; 74 Am. Dec. 675; Farmers' Bank *v.* Beaston, 7 Gill & J. 421; 28 Am. Dec. 226; Jones *v.* Jones, 1 Bland, 443; 18 Am. Dec. 337; Overton *v.* Hill, 1 Murph. 47; Blair *v.* Cantey, 2 Spears, 34; 42 Am. Dec. 360; Zanesler *v.* Magee, 2 Ala. 253; Drane *v.* McGavock, 7 Humph. 152; Marvin *v.* Hawley, 9 Mo. 382; 43 Am. Dec. 547. But Conant *v.* Bickell, 1 D. Chip. 50; Hurlburt *v.* Hicks, 17 Vt. 193; 44 Am. Dec. 329; Lovejoy *v.* Lee, 35 Vt. 430; Crane *v.* Freese, 1 Har. (N. J.) 305; Woodbridge *v.* Morse, 5 N. H. 519; Dolby *v.* Mullins, 3 Humph. 437; 39 Am. Dec. 180; and Hill *v.* Beach, 1 Beasl. 31, — differing from the majority of the authorities, hold that money in the sheriff's hands may be garnished under writ against the judgment creditor.

over to the person entitled thereto; that the officer, upon the receipt of such money, does not thereby become the debtor of the plaintiff; and finally, that it is not until the money is paid over to the plaintiff that it becomes his property, and subject to execution against him. It has also been suggested, as a matter of public policy, that the officers of the law, in the discharge of their duties, should be protected from the hindrance and embarrassment consequent from holding money and other property in their official custody, liable to levy and seizure in other suits. Money in the hands of a sheriff or constable, belonging to the defendant, being the surplus or residue remaining in possession of the officer after he has satisfied the writ, has sometimes been regarded as in custody of the law, and therefore as not subject to execution.[1] But in a considerable preponderance of the cases a different view has been taken. The execution having been fully satisfied, the officer ceases to hold the money by virtue of the writ. As to the ascertained surplus, he is said to be liable to the defendant, as for money had and received. Such surplus can, therefore, while in the officer's hands, be reached by the defendant's creditors.[2] In Connecticut, where the writ, instead of

[1] Fieldhouse *v.* Croft, 4 East, 506; Fretz *v.* Heller, 2 Watts & S. 397; Harrison *v.* Paynter, 6 Mees. & W. 387; Willows *v.* Ball, 2 Bos. & P. N. R. 376; Crossen *v.* McAllister, 2 Pa. L. J. 199; Bentley *v.* Clegg, 2 Pa. L. J. 62; Oriental Bank *v.* Grant, 1 Wyatt & W. 16.

[2] Pierce *v.* Carlton, 12 Ill. 358; 54 Am. Dec. 405; Lightner *v.* Steinagel, 33 Ill. 516; 85 Am. Dec. 292; Orr *v.* McBride, 2 Car. Law Rep. 257; Davidson *v.* Clayland, 1 Har. & J. 546; Jacquett's Adm'r *v.* Palmer, 2 Harr. (Del.) 144; King *v.* Moore, 6 Ala. 160; 41 Am. Dec. 44; Hearn *v.* Crutcher, 4 Yerg. 461; Dickson *v.* Palmer, 2 Rich. Eq. 407; Tucker *v.* Atkinson, 1 Humph. 300; 34 Am. Dec. 650; Watson *v.* Todd, 5 Mass. 271; Hill *v.* Beach, 1 Beasl. 31; Lovejoy *v.* Lee, 35 Vt. 430; Wheeler *v.* Smith, 11 Barb. 345; Hamilton *v.* Ward, 1 Tex. 356; Walton *v.* Compton, 28 Tex. 569; Lynch *v.* Hanahan, 9 Rich. 186; Payne *v.* Billingham, 10 Iowa, 360.

commanding the officer to have the money in court, directed him to cause the money to be levied, "and paid and satisfied to plaintiff," the court held that the officer was thereby made the mere agent of the plaintiff, and as such, that he could be garnished for moneys collected for plaintiff under the writ.[1] Money paid into court in satisfaction of a judgment, whether paid to the clerk of the court,[2] or to a judge, or justice of the peace,[3] is *in custodia legis*, and exempt alike from levy or garnishment. Money paid to the clerk of a court in a partition suit was held to be liable to attachment, after the court had ordered it to be paid over to the parties entitled thereto.[4] Money paid to a sheriff, to effect the redemption of property sold under execution, is protected from seizure, being in custody of the law until it is accepted by the holder of the certificate of purchase.[5] One of the reasons for denying the right to attach property in custody of the law is that otherwise a conflict must arise between different officers seeking in the performance of their duties to seize the same property. This reason does not exist when two writs are in the hands of the same officer. It has, therefore, sometimes been held that a sheriff having moneys in his hands due a judgment creditor might

[1] New Haven Saw-mill Co. *v.* Fowler, 28 Conn. 103.

[2] Ross *v.* Clark, 1 Dall. 354; Sibert *v.* Humphries, 4 Ind. 481; Daley *v.* Cunningham, 3 La. Ann. 55; Farmers' Bank *v.* Beaston, 7 Gill & J. 421; 28 Am. Dec. 226; Overton *v.* Hill, 1 Murph. 47; Alston *v.* Clay, Hayw. (N. C.) 171; Hunt *v.* Stevens, 3 Ired. 365; Drane *v.* McGavock, 7 Humph. 132; Murrell *v.* Johnson, 3 Hill (S. C.), 12; Bowden *v.* Schatzell, Bail. Eq. 360; 23 Am. Dec. 170.

[3] Corlyn *v.* Bollman, 4 Watts & S. 342; Hooks *v.* York, 4 Ind. 636. It is otherwise in Alabama. Clark *v.* Boggs, 6 Ala. 809; 41 Am. Dec. 85.

[4] Gaither *v.* Ballew, 4 Jones, 488.

[5] Davis *v.* Seymour, 16 Minn. 210; Lightner *v.* Steinagel, 33 Ill. 513; 85 Am. Dec. 292.

retain such moneys under a writ coming to his hands against such creditor.[1]

§ 130 a. **Property Taken from a Prisoner upon his Arrest**, by a sheriff, policeman, or other officer charged with that duty, is not, while in the hands of such officer, subject to levy, nor can it be reached by garnishment or trustee process.[2] This exemption is not strictly on the ground that the property is in custody of the law, for the charge under which the arrest was made may not relate to the property taken from the prisoner, and under no circumstances could it affect the title thereto. But "we should fear that any other construction would lead to a gross abuse of criminal process. Such process might be used to search the person, or otherwise, under cover of lawful authority, to get possession of the property of a debtor, in order to place it in the hands of the officer, and thus make it attachable by trustee process."[3]

§ 131. **Moneys and other Chattels in the Possession** of administrators,[4] executors,[5] or guardians,[6] in their official capacity, are almost universally conceded to be

[1] Ex parte Fearle and Lewis, 13 Mo. 467; 53 Am. Dec. 155; Dolby *v.* Mullins, 3 Humph. 437; 39 Am. Dec. 180.

[2] Robinson *v.* Howard, 7 Cush. 257; Morris *v.* Penniman, 14 Gray, 220; 74 Am. Dec. 675.

[3] 7 Cush. 259.

[4] Curling *v.* Hyde, 10 Mo. 374; Colby *v.* Coates, 6 Cush. 558; Hancock *v.* Titus, 39 Miss. 224; Selfridge's Appeal, 9 Watts & S. 55; Thayer *v.* Thayer, 5 Allen, 94; Waite *v.* Osborn, 11 Me. 185; Suggs *v.* Sapp, 20 Ga. 100; Marvel *v.* Houston, 2 Harr. (Del.) 349; Thorn *v.* Woodruff, 5 Pike, 55; Welch *v.* Gurley, 2 Hayw. (N. C.) 334; Hartle *v.* Long, 5 Pa. St. 491; Stout *v.* La Follette, 64 Ind. 365.

[5] Barnes *v.* Treat, 7 Mass. 271; Piquet *v.* Swan, 4 Mass. 443; Young *v.* Young, 2 Hill (S. C.), 425; Beckwith *v.* Baxter, 3 N. H. 67.

[6] Cassatt *v.* Grout, 4 Met. 486; Hanson *v.* Butler, 48 Me. 81; Godbold *v.* Bass, 12 Rich. 202; Davis *v.* Drew, 6 N. H. 399; 25 Am. Dec. 467.

in custody of the law, and therefore are neither subject to levy under execution, nor to any process of garnishment. "No person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind."[1] In most instances where decisions have been made holding that moneys in the hands of administrators, executors, or guardians could not be reached under process against the creditor, legatee, or ward who might become entitled to such moneys on a final settlement of accounts, the courts have professed to exempt such money, both because it was *in custodia legis*, and because it could not properly be said to belong to the defendant in execution until an order of the court had been entered finally establishing his right thereto, and directing that it should be paid over to him in pursuance of such order. We give the following extracts from the opinions of the supreme courts of Connecticut and Pennsylvania, showing the reasons influencing those courts when attempts were made to garnish legacies in the hands of executors before a final settlement of the estate: "An executor cannot be considered as the debtor of a legatee. The claim is against the testator or his estate; and the executor is merely the representative of the deceased. There cannot be a debt due from the executor within the meaning of the statute. Nor can a person, like an executor, deriving his authority from the law, and bound to perform it according to the rules prescribed by law, be considered as a trustee, agent, attorney, or factor within the statute; and this for the best of reasons. In the common case of agents, trustees, and factors, the creditor can easily place himself in the shoes of the absconding debtor,

[1] Brooks *v.* Cook, 8 Mass. 246.

and prosecute his claim without inconvenience to the garnishee. But such would not be the case with an executor. It would not only embarrass and delay the settlement of estates, but would often draw them from courts of probate, where they ought to be settled, before the courts of common law, which have no power to settle his accounts. Such an interference might produce much inconvenience, and prevent the executor from executing his office as the law directs."[1] "An executor or administrator is, to a certain extent, an officer of the law, clothed with a trust to be performed under prescribed regulations. It would tend to distract and embarrass these officers if—in addition to the ordinary duties which the law imposes, of themselves often multiplied, arduous, and responsible—they were drawn into conflicts created by interposition of creditors of legatees, and compelled to withhold payment of legacies without suit; to suspend indefinitely the settlement of estates; to attend, perhaps, to numerous rival attachments; to answer interrogatories on oath, and to be put to trouble and expense for the benefit of third persons no way connected with the estate nor within the duties of their trust."[2]

When the share of a creditor, heir, legatee, ward, or other person entitled to moneys in the hands of an administrator, executor, or guardian has been settled by the court and ordered to be paid, it is no longer regarded as in custody of the law. The right to it has become fixed, absolute, and capable of enforcement by action at law. It may, therefore, be garnished.[3] In

[1] Winchell *v.* Allen, 1 Conn. 385.

[2] Shewell *v.* Keen, 2 Whart. 339; 30 Am. Dec. 266.

[3] Richards *v.* Griggs, 16 Mo. 416; 57 Am. Dec. 240; Adams *v.* Barrett, 2 N. H. 374; Estate of Nerac, 35 Cal. 392; 95 Am. Dec. 111; Fitchett *v.* Dolbee, 3 Harr. (Del.) 267; Parks *v.* Cushman, 9 Vt. 320; McCreary *v.* Topper, 10 Pa. St. 419; Bank of Chester *v.* Ralston, 7 Pa. St. 482.

some of the states the right to garnish moneys in the hands of executors and administrators has been conferred by statute.[1] It has also, in a few instances, and contrary to a long line of authorities, been affirmed to exist in the absence of special statutory provisions. Thus in Alabama and Indiana, an unascertained distributive share in an estate can be bound by garnishment while in the hands of the executor.[2] In New Hampshire, an administrator of a solvent estate can be held as the trustee of a person having a claim against such estate, though such claim has never been presented to such administrator for allowance.[3] In Massachusetts, an executor or administrator may now be summoned and charged as the trustee of an heir, legatee, or creditor of the deceased, before distribution of the estate, and before it can be known what there will be to distribute.[4] In Georgia, an administrator may be summoned as a garnishee when more than a year has elapsed since his appointment.[5] In Pennsylvania, a legacy, and also a distributive share in an estate, may be reached by garnishment before the settlement of the estate.[6]

What we have said in this section has been in reference to attempts to reach the interests of heirs, creditors, or legatees in property in the hands of executors or administrators under writs against such heirs, creditors,

[1] Holman *v.* Fisher, 49 Miss. 472.

[2] Terry *v.* Lindsay, 3 Stew. & P. 317; Stratton *v.* Ham, 8 Ind. 84; 65 Am. Dec. 754; Tillinghast *v.* Johnson, 5 Ala. 514; Moore *v.* Stainton, 22 Ala. 834; Jackson *v.* Shipman, 28 Ala. 488.

[3] Quigg *v.* Kittredge, 18 N. H. 137.

[4] Wheeler *v.* Bowen, 20 Pick. 563; Holbrook *v.* Waters, 19 Pick. 354; Boston Bank *v.* Minot, 3 Met. 507; Cady *v.* Comey, 10 Met. 459; Hoar *v.* Marshall, 2 Gray, 251.

[5] Selman *v.* Millikin, 28 Ga. 366.

[6] Lorenz *v.* King, 38 Pa. St. 93; Sinnicker *v.* Painter, 32 Pa. St. 384; Gochenaur *v.* Hostetter, 18 Pa. St. 414; Baldy *v.* Brady, 15 Pa. St. 103.

or legatees. But there may be judgments against executors or administrators in their official capacity, or it may happen that a judgment entered in the lifetime of the defendant remains unsatisfied at his death. In either case, satisfaction may be sought out of the assets of the deceased. The administration of these assets is now chiefly confided to the surrogate and probate courts; and judgments, except where they are liens on specific property of the deceased, are generally satisfied in the due course of administration, and not by levy and sale under execution. Neither the common law nor any of the statutes regulating the settlement of the estates of deceased persons will permit an execution against an administrator or executor, personally, to be levied on property held by him in his official capacity.[1] On the other hand, while an executor or administrator may, by misconduct in wasting or appropriating the assets of the estate, become personally responsible to the creditors, an execution against him in his official capacity does not, in the absence of such misconduct, justify any interference with his private property.[2] Where the statute has not restricted the right to issue an execution and to satisfy it out of the assets of an estate, it may, as a general rule, be levied upon the same property as if the judgment debtor were still surviving.[3] Hence it may be satisfied out of property conveyed to hinder, delay, or defraud the judg-

[1] Farr *v.* Newman, 4 Term Rep. 621; McLeod *v.* Drummond, 17 Ves. 168; Quick *v.* Staines, 1 Bos. & P. 295; Satterwaite *v.* Carson, 3 Ired. 459; Lessing *v.* Vertrees, 32 Mo. 431; overruling Lecompte *v.* Sergeant, 7 Mo. 351, and Thomas *v.* Relfe, 9 Mo. 377.

[2] In Averett *v.* Thompson, 15 Ala. 678, it is held that an execution against A as administrator of B, but commanding the officer to levy on the goods of A, authorizes a levy on the goods of the latter.

[3] Clark *v.* May, 11 Mass. 233; Beall *v.* Osbourn, 30 Md. 8.

ment creditor;[1] or out of lands devised, and by the devisees conveyed to third persons;[2] or out of lands partitioned among the heirs.[3] The assets of the deceased may be taken, whether inventoried[4] by the administrator, or not.[5] In Virginia, a legacy delivered to a legatee, with the assent of the executor or administrator, is thereby placed beyond the reach of an execution against the assets of the estate.[6] This rule, though once maintained in Mississippi,[7] was soon afterward abandoned.[8]

§ 132. **Moneys and Property in the Hands of Federal, State, or County Officers** are also exempt from execution or garnishment against a defendant to whom they may be due. In the case of Buchanan *v.* Alexander, 4 How. 20, attachments issued against certain seamen, and were laid on moneys due them as wages, and in the hands of the purser of the frigate Constitution. He, by order of the Secretary of the Navy, disregarded the attachments, and paid over the money to the seamen. Judgment having been entered against the purser, an appeal was taken to the supreme court of the United States, where a reversal was obtained, and the following opinion given: "The important question is, whether money in the hands of the

[1] Drinkwater *v.* Drinkwater, 4 Mass. 353; Clark *v.* Hardiman, 2 Leigh, 377; Chamberlayne *v.* Temple, 2 Rand. 395; 14 Am. Dec. 786.

[2] Gore *v.* Brazier, 3 Mass. 523; 3 Am. Dec. 182; Bigelow *v.* Jones, 4 Mass. 512; Wyman *v.* Brigden, 4 Mass. 150.

[3] Norwell *v.* Bragdon, 14 Me. 320.

[4] Weeks *v.* Gibbs, 4 Mass. 74.

[5] Prescott *v.* Tarbell, 1 Mass. 204.

[6] Burnley *v.* Lambert, 1 Wash. (Va.) 308; Randolph *v.* Randolph, 6 Rand. 194; Dunn *v.* Amey, 1 Leigh, 472; Sampson *v.* Bryce, 5 Munf. 175.

[7] Turner *v.* Chambers, 10 Smedes & M. 308; 48 Am. Dec. 751.

[8] Smith *v.* State, 13 Smedes & M. 140; Vanhouten *v.* Reilly, 6 Smedes & M. 440.

purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service. The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated, by state process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much money of the United States as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seaman." Goods being imported into the United States are, "from the moment of their arrival in port, in legal contemplation, in custody of the United States." "Now, an attachment of such goods by a state officer presupposes a right to take the possession and custody of those goods, and to make such possession and custody exclusive. If the officer attaches on mesne process, he has a right to hold the possession to answer the exigency of that process. If he attaches upon an execution, he

is bound to sell or may sell the goods within a limited period, and thus virtually displace the custody of the United States. The act of Congress recognizes no such authority, and admits of no such exercise of right." "In short, the United States, having a lien on the goods for the payment of the duties accruing thereon, and being entitled to a virtual custody of them from the time of their arrival in port until the duties are paid or secured, any attachment by a state officer is an interference with such lien and right of custody; and being repugnant to the laws of the United States, is void."[1] The same reasoning applies to property in bonded warehouses of the United States, upon which moneys are due for internal revenue taxes. It is in custody of the law, and can neither be reached by direct seizure nor by garnishment.[2] Proceedings by way of garnishment against either a state or the United States are manifestly inadmissible, on other grounds. Thus the only mode in which a garnishment can be made effective is by the entry of judgment for the debt garnished. But the United States and each state thereof is a sovereign, and not subject to be called before its courts, except in cases where it has expressly assented to their assuming jurisdiction. Nor will either of these sovereigns permit their immunity from the process of their courts to be evaded "by ignoring the state in their suits, and proceeding directly against the officer having the custody of the moneys sought to be reached." Hence, for want of power to enter judgment, a garnishment against a state or against the United States is necessarily in-

[1] Harris *v.* Denme, 3 Pet. 304.

[2] May *v.* Hoaglan, 9 Bush, 191; Fisher *v.* Dandistal, 9 Fed. Rep. 145; McCullough *v.* Large, 20 Fed. Rep. 309.

effectual.[1] Another very serious objection to the garnishment of a state or county or of the United States, or of any officer of either, is its probable interference with the administration of the government. It is not consistent with the state's "interests, nor the proper administration of public affairs, that her officers shall be arrested in their public duties and required to answer before the courts for funds or securities committed to their custody for a specific purpose, under authority of public law. The treasurer of state is one of the most important officers of the commonwealth, with grave, arduous, and difficult duties to perform. It is impossible to foresee the mischiefs and embarrassments that will ensue, if, in addition to these duties, he is to be involved in the conflict of creditors, to answer innumerable rival attachments, employ counsel, answer interrogatories, and otherwise consume time and attention which should be devoted exclusively to public interests."[2] When an attempt is made to garnish the salary of any public officer, the further objection exists that his continuance in the service of the public may be dependent on his being able to regularly draw such salary and devote it to the maintenance of himself and family, and that the interest of the public is paramount in importance to that of the creditors. For these various reasons it has uniformly been held that money in the hands of state[3] or county officials,[4] whether for the pur-

[1] Tracy *v.* Hornbuckle, 8 Bush, 336; Tunstall *v.* Worthington, Hemp. 662; Rollo *v.* Andes Ins. Co., 23 Gratt. 511; 14 Am. Rep. 147.

[2] Rollo *v.* Andes Ins. Co., 23 Gratt. 509; 14 Am. Rep. 147.

[3] Divine *v.* Harvie, 7 T. B. Mon. 439; 18 Am. Dec. 194; Bank of Tennessee *v.* Dibrell, 3 Sneed, 379; Wild *v.* Ferguson, 23 La. Ann. 752; Stillman *v.* Isham, 11 Conn. 124; McMeekin *v.* State, 4 Eng. 553; Train *v.* Herrick, 4 Gray, 534; Swepson *v.* Turner, 76 N. C. 115.

[4] Gilman *v.* Contra Costa County, 8 Cal. 52; 68 Am. Dec. 290; Garnishees *v.* Root, 8 Md. 95; Wallace *v.* Lawyer, 54 Ind. 501; 23 Am. Rep. 661; *contra:*

pose of paying salary due an officer or employee, or of satisfying any other claim, is not subject to execution nor garnishment. The doctrine is also applicable to money in the hands of school directors, or of their treasurer, and due to teachers for services performed in the public schools.[1]

§ 133. **Money Held by Officers of Municipal Corporations** has, in Connecticut,[2] Iowa,[3] Kentucky,[4] Rhode Island,[5] New Hampshire,[6] Ohio,[7] been held subject to garnishment under writs against the persons to whom such money was due. In the three last-named states, the statute authorized the garnishment of *any corporation* possessed of any money of the debtor. These terms were considered to be so comprehensive as to embrace municipal as well as other corporations. In the two other states named, no stress was, in the decisions, laid upon any special or peculiar statutory provisions. But, upon principle, there is

Adams *v.* Tyler, 121 Mass. 380; Geer *v.* Chapel, 11 Gray, 18; Ward *v.* Hartford Co., 12 Conn. 409; Chealy *v.* Brewer, 7 Mass. 259. In this last case the court said: "A public officer, who has money in his hands to satisfy a demand, but which is upon him merely as a public officer, cannot for that cause be adjudged a trustee. A contrary decision would be mischievous, as will appear from this single cause: that it would suspend, during the pendency of an action, a possibility of settling the accounts of the officer, and, it may be added, that it would unreasonably compel him to attend courts in every county of the commonwealth."

[1] Buckley *v.* Eckert, 3 Pa. St. 368; 45 Am. Dec. 650; Mullison *v.* Fisk, 43 Ill. 112; Ross *v.* Allen, 10 N. H. 96; Bivens *v.* Harper, 59 Ill. 21; Allen *v.* Russell, 78 Ky. 105.

[2] Bray *v.* Wallingford, 20 Conn. 416.

[3] Wales *v.* City of Muscatine, 4 Iowa, 302. But the statute has now taken away the right to garnish a municipal corporation in this state. Clapp *v.* Walker, 25 Iowa, 315.

[4] Redman *v.* Muzelman, 12 Bush, 354; 23 Am. Rep. 724.

[5] Wilson *v.* Lewis, 10 R. I. 285.

[6] Whidden *v.* Drake, 5 N. H. 13.

[7] City of Newark *v.* Funk, 15 Ohio St. 462, under statute authorizing garnishment of bodies politic.

no reason why the rule applicable to a state or county official, or to a treasurer of a board of school directors, should not also be applied to officers of towns and cities. They are all mere custodians of public moneys, with their duties and responsibilities created and prescribed by the laws creating their respective offices, and prescribing the duties thereof. "As municipal corporations are parts of the state government, exercising delegated political powers for public purposes, the rule which prevents an attachment from being levied upon a claim of one state officer upon funds in the hands of another, applicable to its payment, must apply with equal force to a case like the present. If an argument against the right to attach, based upon inconvenience, can have an influence in any case, it surely should do so where the officers of a large city are, necessarily, very numerous."[1] Where an attempt was made to attach money due from a city to a police officer for his services, the supreme court of Alabama said: "But does not public policy protect the wages of a police officer from attachment? Money due from a government or state is thus guarded for the benefit of the public. The law says the state must be permitted to select its own officers, from any condition or position in society, and cannot be made subject to the power of individual creditors to drive their selection from service when they choose; nor can the creditor be permitted

[1] Holt *v.* Experience, 26 Ga. 113; McLellan *v.* Young, 54 Ga. 399; 21 Am. Rep. 276; Moore *v.* Mayor, 8 Heisk. 850; Memphis *v.* Laski, 9 Heisk. 511; 24 Am. Rep. 327; Bulfham *v.* City of Racine, 26 Me. 449; Mayor of Baltimore *v.* Root, 8 Md. 102; 63 Am. Dec. 692; Hawthorn *v.* City of St. Louis, 47 Am. Dec. 141; 11 Mo. 59; Fortune *v.* City of St. Louis, 23 Mo. 239; Merwin *v.* Chicago, 45 Ill. 193; 92 Am. Dec. 204; Triebel *v.* Colburn, 64 Ill. 376; McDougal *v.* Hennepin Co., 4 Minn. 184; Bradley *v.* Cooper, 6 Vt. 121; Burnham *v.* City of Fond du Lac, 15 Wis. 193; 82 Am. Dec. 668; City of Erie *v.* Knapp, 29 Pa. St. 173. See Fellows *v.* Duncan, 13 Met. 332.

to paralyze the energy, or in any way to cripple the efficiency, of a state's officer by taking from him the means afforded by the state, which gives bread and clothing to himself and family. The government of a city is a part of the state government. It is the exercise of a portion of the state sovereignty, and should, in like manner, be upheld by the same public policy."[1]

§ 134. **An Attorney at Law is**, for some purposes, a public officer. As such officer, he is so far under the control of the court that it may, in some instances, compel him to perform gratuitous services; and may, in all cases, require him to discharge the duties of his office faithfully, honestly, and without any breach of professional decorum. But when an attorney collects moneys for his client, even by means of a suit, such money is never treated as being in custody of the law, but rather as money collected by an agent for the benefit of his principal. It is, to the same extent as money in the hands of any other agent, liable to execution.[2]

§ 135. **By the Levy upon the Goods of a Defendant** by virtue of an execution or attachment, the officer acquires a special property therein, entitling him to their possession and control. They are thereby placed in the custody of the law. Another officer, acting under another writ of attachment, has no right to interfere

[1] Mayor of Mobile *v.* Rowland, 26 Ala. 501; Clark *v.* School Commissioners, 36 Ala. 621.

[2] Riley *v.* Hirst, 2 Pa. St. 316; Staples *v.* Staples, 4 Greenl. 532; Mann *v.* Buford, 3 Ala. 312; 37 Am. Dec. 691; Tucker *v.* Butts, 6 Ga. 589; Coburn *v.* Ansart, 3 Mass. 319; Thayer *v.* Sherman, 12 Mass. 441; Woodbridge *v.* Morse, 5 N. H. 519; Carr *v.* Benedict, 48 Ga. 431; White *v.* Bird, 29 La. Ann. 188; 96 Am. Dec. 393.

with them. As he cannot reduce them into his possession, he can, according to the preponderance of the authorities, make no valid levy;[1] but in one case it was said that he could levy, though he could not remove.[2] Even if the goods are taken from the officer under a writ of replevin and delivered over to a third person, they still remain *in custodia legis*, to the extent that they cannot be levied upon under process against the original defendant.[3] But the officer who has levied upon property may hold the same to answer for subsequent writs which come into his hands while the first levy remains in force. The mere receipt of the subsequent writ operates as a constructive levy upon all property actually or constructively in his possession under a prior writ.[4] A levy by one deputy operates as a constructive levy on the same property under a subsequent execution delivered to another deputy of the same sheriff. And this is true, although, before the receipt of the second writ, the property was removed to another state, and remained there until after the return day of such writ.[5] But an unauthorized levy

[1] Winegardner *v.* Hafer, 15 Pa. St. 144; Buckey *v.* Snouffer, 10 Md. 149; 69 Am. Dec. 129; Van Loan *v.* Kline, 10 Johns. 129; Dubois *v.* Harcout, 20 Wend. 41; Moore *v.* Withenburg, 13 La. Ann. 22; Lewis *v.* Buck, 7 Minn. 104; 82 Am. Dec. 73; Hartwell *v.* Bissell, 17 Johns. 128; Rogers *v.* Darnaby, 4 B. Mon. 241; Taylor *v.* Carryl, 20 How. 583; Hamilton *v.* Reedy, 3 McCord, 38; Hagan *v.* Lucas, 10 Pet. 400; The Oliver Jordan, 2 Curt. 414; Peck *v.* Jenness, 7 How. 612; Jones S. & P. Co. *v.* Case, 26 Kan. 299; 40 Am. Rep. 310; Jones S. & P. Co. *v.* Hentig, 29 Kan. 75.

[2] Benson *v.* Berry, 55 Barb. 620.

[3] Acker *v.* White, 25 Wend. 614; Rhines *v.* Phelps, 3 Gilm. 455; Selleck *v.* Phelps, 11 Wis. 380; Hagan *v.* Lucas, 10 Pet. 400; Ward *v.* Whitney, 13 Phila. 7; Bates County National Bank *v.* Owen, 79 Mo. 429; Pipher *v.* Fordyce, 88 Ind. 436.

[4] Van Winkle *v.* Udall, 1 Hill, 559; Cresson *v.* Stout, 17 Johns. 116; 8 Am. Dec. 373; Birdseye *v.* Ray, 4 Hill, 160; Collins *v.* Yewens, 10 Ad. & E. 570; Bank of Lansingburgh *v.* Crary, 1 Barb. 542.

[5] Russell *v.* Gibbs, 5 Cow. 390.

does not put property in custody of law. Hence property seized by an officer contrary to plaintiff's instructions was held to be liable to seizure under another writ.[1] Generally a court cannot bring before it, or subject to its jurisdiction, except in proceedings *in rem*, the titles or interests of any persons other than the parties to the suit and those acquiring from or under them. It would seem that in an action between A and B, nothing could be brought into the custody of the law which did not belong to A or B. It is true that an officer seizing property under process acts as the agent of the court out of which the process issued, and his possession becomes the possession of the court. But he is generally regarded as the agent of the court only while he does what the process lawfully commands him to do; and his seizure of something which he had no right to seize ought not to be regarded as the act of the court, for the court ought not to be presumed to intend that its agent should act wrongfully. The courts of each state or nation are, however, unwilling that the courts of any other sovereignty should exercise any authority which might impair the jurisdiction of the former by taking property out of the possession of their officers; and they will not permit the courts of another jurisdiction to determine whether such possession was taken rightfully or not. If an officer acting under a writ of execution or attachment, issued out of a court of the United States, seizes the property of a stranger to the writ, he is confessedly guilty of an act for which his writ affords no justification, and he may be sued in a state court for the tort committed by him.[2] But the property thus wrongfully seized is,

[1] Sherry v. Schuyler, 2 Hill, 204.

[2] Buck v. Colbath, 7 Minn. 310; 82 Am. Dec. 91, affirmed 3 Wall. 343.

by the national courts, nevertheless treated as in their custody, and they will not permit it to be taken by an officer of a state court under any writ whatsoever. If the true owner wishes to secure its return to him, he must resort to the court in whose custody it is, and vindicate his claim by some ancillary proceeding there taken.[1]

§ 136. Property Conveyed in Fraud of Creditors — General Rule. — The struggle between fraud and justice seems to be as old as time, and bids fair to prove as endless as eternity. Fraud has always sought to interpose itself as a shield to save the debtor from the execution of the law. The law has retaliated by putting its mark of condemnation upon fraud in every distinguishable form; and fraud, to escape the just judgment of the law, has concealed its identity by every conceivable disguise, and pursued by artifice and ambuscade the struggle in which open contest was sure defeat. Whoever goes out with an execution to seek the fruits of his judgment is too apt to find that fraud has forestalled him. It then becomes his business to pursue those fruits, wherever fraud has taken them; to wrest them from the possession of his adversary, wherever they may be found; and to prepare himself to show that the refuge whence he has wrested them is still the refuge of fraud. In many instances the aid of equity is invoked. But generally this is unnecessary; for a transfer made to hinder, delay, or defraud creditors, while as between the parties it conveys the title, has as against a creditor proceeding under execution

[1] Beckett *v.* Sheriff, 21 Fed. Rep. 32; Covell *v.* Heyman, 111 U. S. 176; Freeman *v.* Howe, 24 How. 450; Krippendorf *v.* Hyde, 110 U. S. 276; Lewis *v.* Buck, 7 Minn. 104; 82 Am. Dec. 73; United States *v.* Dantzler, 3 Woods, 719.

no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity, — not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all.[1] A creditor having a judgment may, if he thinks it advisable, ask the aid of equity, but he cannot be compelled to do so. His judgment is an effective lien against real estate fraudulently conveyed, and he may rely upon it as such in all contests not involving the rights of *bona fide* purchasers or encumbrancers, who have acted upon the apparent title and without any actual or implied notice of the fraud.[2] If other creditors proceed in equity to have the conveyance adjudged fraudulent, and a receiver of the property appointed and a sale made by him, such sale is subordinate to any pre-existing

[1] Bergen *v.* Snedeker, 8 Abb. N. C. 58; O'Brien *v.* Browning, 49 How. Pr. 113; Warden *v.* Browning, 12 Hun, 499; High *v.* Nelms, 14 Ala. 350; 48 Am. Dec. 103; Johnson *v.* Harvey, 2 Penr. & W. 82; 21 Am. Dec. 426; Stewart *v.* McMinn, 5 Watts & S. 100; 39 Am. Dec. 115; Scully *v.* Keans, 14 La. Ann. 436; Gleises *v.* McHatton, 14 La. Ann. 560; Hall *v.* Sands, 52 Me. 355; Gormerly *v.* Chapman, 51 Ga. 425; Pratt *v.* Wheeler, 6 Gray, 520; Austin *v.* Bell, 20 Johns. 442; 11 Am. Dec. 297; Lowry *v.* Orr, 1 Gilm. 70; Gooch's Case, 5 Coke, 60; Jacoby's Appeal, 67 Pa. St. 434; Hoffman's Appeal, 44 Pa. St. 95; Eastman *v.* Schettler, 13 Wis. 324; Pepper *v.* Carter, 11 Mo. 540; Barr *v.* Hatch, 3 Ohio, 527; Russell *v.* Dyer, 33 N. H. 186; Duvall *v.* Waters, 1 Bland, 569; 18 Am. Dec. 350; Middleton *v.* Sinclair, 5 Cranch C. C. 409; Lawrence *v.* Lippencott, 1 Halst. 473; Croft *v.* Arthur, 3 Desaus. Eq. 223; Shears *v.* Rogers, 3 Barn. & Adol. 363; Allen *v.* Berry, 50 Mo. 90; Ryland *v.* Callison, 54 Mo. 513; Staples *v.* Bradley, 23 Conn. 167; 60 Am. Dec. 630; Fowler *v.* Trebein, 16 Ohio St. 493; 91 Am. Dec. 95; Manhattan Co. *v.* Evertson, 6 Paige, 457; Foley *v.* Bitter, 34 Md. 646; Shur *v.* Statler, 1 West. L. Mo. 317. But Focum *v.* Bullit, 17 Am. Dec. 184, Payne *v.* Graham, 23 La. Ann. 771, and Collins *v.* Shaffer, 20 La. Ann. 41, seem to oppose the general rule

[2] See §§ 140, 141.

judgment liens, and the holders of such liens cannot be compelled to relinquish them nor to accept any distribution of the proceeds which ignores their priorities.[1] If the vendor of a sale fraudulent as against creditors were to die, the vendee might at the common law be charged as his executor *de son tort*, "and this, too, although there was a rightful executor or administrator";[2] and if the vendee were to die also, his executor or administrator could also be proceeded against as executor *de son tort*.[3] And what is true of fraudulent transfers is equally true of fraudulent mortgages, liens, judgments, executions, and all similar devices for hindering, delaying, or defrauding creditors. Property held under and by virtue of a fraudulent lien, execution, or transfer is subject to execution precisely as if such transfer had not been made and such lien had not been given.[4] That such lien is pursued to judg-

[1] Chautauque Co. Bank *v.* Risley, 19 N. Y. 369; 75 Am. Dec. 347; Sanders *v.* Wagonseller, 19 Pa. St. 252.

[2] Babcock *v.* Booth, 2 Hill, 181; 38 Am. Dec. 578; Osborne *v.* Moss, 7 Johns. 161; 5 Am. Dec. 252; Ashby *v.* Child, Style, 384; Tucker *v.* Williams, Dud. 329; 31 Am. Dec. 561.

[3] McMorine *v.* Storey, 4 Dev. & B. 189; 34 Am. Dec. 374.

[4] Robinson *v.* Holt, 39 N. H. 557; 75 Am. Dec. 233; Fischel *v.* Keer, 45 N. J. L. 507; Switzer *v.* Skiles, 3 Gilm. 529; 44 Am. Dec. 723. As to mortgages, see Angier *v.* Ash, 6 Fost. 99; Brown *v.* Snell, 46 Me. 490. In the case of Booth *v.* Bunce, 33 N. Y. 139, 88 Am. Dec. 372, members of an embarrassed corporation formed a new corporation, to which they transferred all the assets of the old one. This transaction was declared void as against the creditors of the old corporation, and they were allowed to levy upon the property as though no transfer had been made, the court quoting, with approval, the following language from another decision: "Deeds, obligations, contracts, judgments, and even corporate bodies, may be instruments through which parties may obtain the most unrighteous advantages. All such devices and instruments have been resorted to to cover up fraud; but whenever the law is invoked, all such instruments are declared nullities; they are a perfect dead letter; the law looks upon them as if they had never been executed. They can never be justified nor sanctified by any new shape or cover, by forms or recitals, by covenants or sanctions, which the ingenuity, or skill, or genuis of the rogue may devise."

ment, and the judgment is in turn followed by execution and sale, is immaterial as against a creditor who is not a party to such judgment, for the lien, judgment, and sale taken in the aggregate amount only to a fraudulent conveyance. Hence, if a fraudulent mortgage be given and foreclosed, a creditor not a party to the foreclosure may proceed to sell under his execution with like effect as if no mortgage had been executed and no decree of foreclosure entered.[1] No distinction can be made between a transfer or lien, partly honest and partly in fraud of creditors. If any portion of its purpose is to hinder, delay, or defraud creditors, the law denounces it as void, not with respect to such purpose merely, but wholly and unconditionally. "The unlawful design of the parties cannot be confined to one particular parcel of property. Entire honesty and good faith is necessary to render it valid; and whenever it indisputably appears that one object was to defraud creditors to any extent, the entire instrument is, in judgment of law, void."[2] A debtor in failing circumstances may seek to avoid his creditors by purchasing property, and having the title taken in the name of some friend or relative. This, being a device to hinder, delay, or defraud creditors, may be thwarted; or, more properly speaking, the property thus conveyed may be made to contribute to

[1] Beeler *v.* Bullitt, 3 A. K. Marsh. 280; 13 Am. Dec. 161.

[2] Russell *v.* Winne, 37 N. Y. 591; 4 Abb. Pr., N. S., 384; 97 Am. Dec. 755; Collins *v.* Blantern, 2 Wils. 151; Maleverer *v.* Redshaw, 1 Mod. 35; Norton *v.* Simmes, Hob. 12 c; Grover *v.* Wakeman, 11 Wend. 194; 25 Am. Dec. 624; Mackie *v.* Cairns, Hopk. Ch. 373; 5 Cow. 547; 15 Am. Dec. 477; Hyslop *v.* Clark, 14 Johns. 464; McKenty *v.* Gladwin, 15 Cal. 227; Fermor's Case, 3 Coke, 78; Woolon *v.* Hawes, 10 Conn. 50; Wimbush *v.* Talbois, Plow. 54; Scales *v.* Scott, 13 Cal. 77; Tickner *v.* Wishall, 9 Ala. 305; Burke *v.* Murphy, 27 Miss. 167; Mead *v.* Combs, 19 N. J. Eq. 112; Hall *v.* Heydon, 41 Ala. 242; Coolidge *v.* Melvin, 42 N. H. 510; Johnson *v.* Murchison, 1 Winst. 292; Hawes *v.* Mooney, 39 Conn. 37.

the payment of the debts of its real owner. This object cannot, however, be accomplished at law. The aid of equity must be sought. Where a debtor has fraudulently conveyed his property, it may be taken on execution against him, because, in favor of his creditors, he is still considered as the owner of the legal as well as of the equitable title. But when he has fraudulently bought property, and had the title taken in the name of another, the circumstances are different, though the object is the same. If the transfer were treated as void, the title would remain in the person of whom the purchase was made; and this would be of no advantage to the creditors. The transfer must therefore be treated as valid, and as transmitting the legal title to the person named in the deed. This legal title cannot be reached by the levy of an execution against the debtor, because he has never owned it. The creditors must therefore resort to equity,[1] except in a few states, where statutes have been enacted to enable them to reach it at law.[2]

§ 137. What Creditors may Levy on Property Fraudulently Conveyed.—To authorize a plaintiff to

[1] Belford *v.* Crane, 16 N. J. Eq. 265; 84 Am. Dec. 155; Williams *v.* Council, 4 Jones, 206; Howe *v.* Bishop, 3 Met. 28; Dockray *v.* Mason, 48 Me. 178; Low *v.* Marco, 53 Me. 45; Hamilton *v.* Cone, 99 Mass. 478; Webster *v.* Folsom, 58 Me. 230; Parris *v.* Thompson, 1 Jones, 57; Jimmerson *v.* Duncan, 3 Jones, 237; Trask *v.* Green, 9 Mich. 358; Smith *v.* Hinson, 4 Heisk. 250; Garfield *v.* Hatmaker, 15 N. Y. 476, reaffirming Brewster *v.* Power, 10 Paige, 562, and overruling Wait *v.* Day, 4 Denio, 439; Worth *v.* York, 13 Ired. 206; Page *v.* Goodman, 8 Ired. Eq. 16; Davis *v.* McKinney, 5 Ala. 719; Gray *v.* Farris, 7 Yerg. 155; Dewey *v.* Long, 25 Vt. 564; Garret *v.* Rhame, 9 Rich. 407; 67 Am. Dec. 557.

[2] Tevis *v.* Doe, 3 Ind. 129; Pennington *v.* Clifton, 11 Ind. 162; Clark *v.* Chamberlain, 13 Allen, 257; Dunnica *v.* Coy, 24 Mo. 167; 69 Am. Dec. 420; Rankin *v.* Harper, 23 Mo. 579; Eddy *v.* Baldwin, 23 Mo. 588; Thomas *v.* Walker, 6 Humph. 93; Cecil Bank *v.* Snively, 23 Md. 253; Kimmel *v.* McRight, 2 Pa. St. 38; Howe *v.* Wayman, 12 Mo. 169; 49 Am. Dec. 126.

seize property which has been transferred with a view of defrauding or delaying creditors, it is not necessary for him to show that the transfer was made to avoid the payment of his particular debt. If an intent existed to defraud any single creditor, the transfer is void as against all creditors. A transfer made for the purpose of hindering, delaying, or defrauding existing creditors is void as against subsequent creditors.[1] It would seem that the only persons entitled to treat a conveyance as fraudulent and void should be those against whom it might have operated as a fraud at the time it was made, or whom the grantor at that time had a design to defraud. It seems, however, to be settled by the decided preponderance of the authorities that a conveyance made with the intent to defraud creditors may be disregarded and treated as void by subsequent as well as by antecedent creditors.[2] This rule must, we think, be qualified so as to exclude from its protection all those subsequent creditors whose debts were contracted with notice of the precedent transfer, and whom it therefore could by no possibility defraud.[3] Fraudulent conveyances may be divided into two classes: 1. Those made with intent to de-

[1] Wyman v. Brown, 50 Me. 139; Clark v. French, 23 Me. 221; 39 Am. Dec. 618; Barling v. Bishopp, 29 Beav. 417; Vertner v. Humphreys, 14 Smedes & M. 130; Hey v. Niswanger, 1 McCord Ch. 518; Carpenter v. Roe, 10 N. Y. 227; Madden v. Day, 1 Bail. 337; Parish v. Murphree, 13 How. 92; Beach v. White, Walk. Ch. 495; Hurdt v. Courtenay, 4 Met. (Ky.) 139; Lowry v. Fisher, 2 Bush, 70; 92 Am. Dec. 754; Ridgeway v. Underwood, 4 Wash. C. C. 129; Doyle v. Sleeper, 1 Dana, 531.

[2] Hutchinson v. Kelly, 1 Rob. (Va.) 123; 39 Am. Dec. 250; Nicholas v. Ward, 1 Head, 323; 73 Am. Dec. 177. But in Maine, on the other hand, a creditor cannot treat his debtor's conveyance as void unless every part of the debt on which the execution issued accrued prior to the making of such conveyance. Usher v. Hazeltine, 5 Greenl. 471; 17 Am. Dec. 253; Miller v. Miller, 23 Me. 22; 39 Am. Dec. 597.

[3] Lehmberg v. Biberstein, 51 Tex. 457; Lewis v. Castleman, 27 Tex. 407; Monroe v. Smith, 79 Pa. St. 459; Snyder v. Christ, 39 Pa. St. 499.

fraud creditors; and 2. Those made without any evil intent, but deemed fraudulent because their operation may result in withdrawing property from the reach of creditors. Of this latter class are voluntary conveyances made under the impulse of friendship or affection, and without any design to injure any one. The law deals more leniently with them, and does not permit them to be avoided by persons upon whom they could inflict no injury. A voluntary conveyance made *bona fide* is valid against subsequent creditors. They cannot complain because their debtor, prior to the debt, chose to give his property away. If the grantor was free from debts when his conveyance was made, but it can be shown that he intended to become indebted to another, and defraud him by means of such conveyance, then it is void as against creditors.[1]

§ 137 a. Who are Creditors in Favor of Whom a Transfer may be Held Fraudulent.—The term "creditors" as employed in the statutes and decisions concerning fraudulent and voluntary conveyances is not used in any narrow or technical signification, but includes all persons whose interests might be defrauded by the transfer. Wherever there exists a right or obligation for the invasion or disregard of which a judgment may be entered, a transfer made with the view of rendering such judgment ineffectual is doubtless fraudulent, and therefore void as against the

[1] Littleton *v.* Littleton, 1 Dev. & B. 327; Ridgeway *v.* Underwood, 4 Wash. C. C. 129; Stileman *v.* Ashdown, 2 Atk. 481; Barling *v.* Bishopp, 29 Beav. 417; Howe *v.* Ward, 4 Me. 195; Black *v.* Nease, 37 Pa. St. 433; Graham *v.* O'Keefe, 16 Irish Ch. 1; Tarbach *v.* Marbury, 2 Vern. 509; New Haven St. Co. *v.* Vanderbilt, 16 Conn. 420; Cook *v.* Johnson, 1 Beasl. 51; 72 Am. Dec. 381; National Bank *v.* Sprague, 20 N. J. Eq. 13; Murphy *v.* Abraham, 15 Irish Eq., N. S., 371; Miller *v.* Wilson, 15 Ohio, 108; Lyman *v.* Cessford, 15 Iowa, 229; Bogard *v.* Gardley, 4 Smedes & M. 302; Williams *v.* Banks, 11 Md. 198.

interest sought to be defrauded. Thus if one has committed any tort for which he may be answerable in damages, the person entitled to recover such damages is a creditor, and as such, in proceeding to obtain satisfaction of a judgment for such damages, may treat as void any transfer made with a view of hindering or delaying him in his attempt to realize such satisfaction.[1] Hence a transfer to prevent the satisfaction of a judgment which might be recovered against the grantor for a slander uttered by him,[2] or for seduction or breach of promise of marriage,[3] or for alimony, or other moneys to which a wife is entitled from her husband,[4] may be regarded as fraudulent and void. Sometimes it has been held that one having a claim for a tort is not entitled to protection as a creditor, unless he has commenced an action for the damages occasioned to him thereby.[5] This question has not been very carefully considered, but, upon principle, there seems to be no reason for attaching any importance to the pendency of the action, except that the known pendency of an action might render it more probable that the transfer was fraudulent, and intended to avoid a claim which

[1] Barling *v.* Bishopp, 29 Beav. 417; Fox *v.* Hills, 1 Conn. 295; Westmoreland *v.* Powell, 59 Ga. 256; Bongard *v.* Bloch, 81 Ill. 186; 25 Am. Rep. 276; Weir *v.* Day, 57 Iowa, 87; Cooke *v.* Cooke, 43 Md. 522; Hoffman *v.* Junk, 51 Wis. 613; Harris *v.* Harris, 23 Gratt. 737; Patrick *v.* Ford, 5 Sneed, 532, note.

[2] Walradt *v.* Brown, 1 Gilm. 397; 41 Am. Dec. 190; Lillard *v.* McGee, 4 Bibb, 165; Farnsworth *v.* Bell, 5 Sneed, 531.

[3] Lowry *v.* Pinson, 2 Bail. 324; 23 Am. Dec. 140; Smith *v.* Culbertson, 9 Rich. 106; Hoffman *v.* Junk, 51 Wis. 613; Greer *v.* Wright, 6 Gratt. 154; 52 Am. Dec. 111.

[4] Feigley *v.* Feigley, 7 Md. 537; 61 Am. Dec. 375; Sanborn *v.* Lang, 41 Md. 107; Taylor *v.* Wild, 8 Beav. 159; Draper *v.* Draper, 68 Ill. 17; Chase *v.* Chase, 105 Mass. 385; Bonslough *v.* Bonslough, 68 Pa. St. 495; Livermore *v.* Boutelle, 11 Gray, 217; 71 Am. Dec. 708; Boils *v.* Boils, 1 Cold. 284.

[5] Hill *v.* Bowman, 35 Mich. 191, in which case the opinion is upon this subject a mere *dictum*.

the parties had reason to believe would be prosecuted to judgment. But a plaintiff is no more a creditor after commencing an action than before. His cause of complaint, whatever it may be, must exist anterior to the commencement of his action, and is of precisely the same character after such commencement as before. If any change takes place in the cause of action, it cannot be prior to its merger in the judgment. Nor does the mere pendency of the action create any lien upon any property. The better opinion, therefore, is, that one having a claim for a tort is a creditor before the commencement of an action thereon as well as after, and as such creditor is upon recovering judgment entitled to avoid a fraudulent transfer antedating the commencing of his action.[1] If a judgment is based on a contract, the judgment creditor's right to be treated as a creditor relates back to the date of the execution of the original contract. Hence he may treat as void any fraudulent transfer executed subsequent to the contract on which the judgment was based. The transfer cannot be supported by showing that when it was made the judgment creditor's debt had not become due,[2] or that his claim was contingent, and it could not then have been known that any cause of action against him would ever result from the contract. Therefore if a bond be given, a fraudulent transfer made subsequently but before breach of its condition may be avoided as well as if executed after such breach.[3] The same rule

[1] Corder *v.* Williams, 40 Iowa, 582; Shean *v.* Shay, 42 Ind. 375; 13 Am. Rep. 366.

[2] Howe *v.* Ward, 4 Me. 195; Cook *v.* Johnson, 12 N. J. Eq. 51; 72 Am. Dec. 381.

[3] Thompson *v.* Thompson, 19 Me. 244; 36 Am. Dec. 751; Stone *v.* Myers, 9 Minn. 303; 86 Am. Dec. 104; Carlisle *v.* Rich, 8 N. H. 44; Anderson *v.* Anderson, 64 Ala. 403; 38 Am. Rep. 797; Soden *v.* Soden, 34 N. J. Eq. 115.

prevails where the liability of the fraudulent grantor at the date of the grant was contingent,[1] as where he was a surety, guarantor, or indorser, and it was not known that he would ever be called upon to pay the debt.[2] The liability of a grantor under his covenant of warranty does not differ in principle from other contingent liabilities, and a fraudulent conveyance made at any time after such covenant ought to be regarded as void as against a judgment thereon.[3] If debts exist when a fraudulent conveyance is made, a change in their form, or in the persons to whom they are due, is immaterial. Subsequent creditors from whom means were obtained to pay off the antecedent creditors are entitled to treat the conveyance as void.[4]

§ 138. What kinds of Property may be taken from Fraudulent Grantee.— The kinds of property which may be levied upon as that of the fraudulent grantor embrace everything which could have been subjected to execution in his hands if no conveyance had been made. In other words, the laws against fraudulent conveyances are applicable to every species of property which the grantor's creditors could have lawfully had appropriated to the payment of their demands.[5] But it is evident that creditors cannot be defrauded, hindered,

[1] Bibb *v.* Freeman, 59 Ala. 612; Post *v.* Stiger, 29 N. J. Eq. 554.

[2] Jackson *v.* Seward, 5 Cow. 67; Cramer *v.* Reford, 17 N. J. Eq. 367; 90 Am. Dec. 594; McLaughlin *v.* Bank, 7 How. 220; Bay *v.* Cook, 31 Ill. 336; Gibson *v.* Love, 4 Fla. 217; Crane *v.* Sickles, 15 Vt. 252; Curd *v.* Miller's Ex'r, 7 Gratt. 185.

[3] Rhodes *v.* Green, 36 Ind. 7; Gannard *v.* Eslara, 20 Ala. 741; *contra*, Bridgford *v.* Riddell, 55 Ill. 261.

[4] Paulk *v.* Cooke, 39 Conn. 566; Barhydt *v.* Perry, 57 Iowa, 416; Mills *v.* Morris, Hoff. Ch. 419; Savage *v.* Murphy, 34 N. Y. 508; 90 Am. Dec. 733; McElwee *v.* Sutton, 2 Bail. 128.

[5] Bump on Fraudulent Conveyances, 263, 264; Bank *v.* Ballard, 12 Rich. 259; Garrison *v.* Monaghan, 33 Pa. St. 232.

nor delayed by the transfer of property which, neither at law nor in equity, can be made to contribute to the satisfaction of their debts.[1] Hence it is almost universally conceded that property which is by statute exempt from execution cannot be reached by creditors on the ground that it has been fraudulently transferred.[2] The transfer is effectual between the parties, and neither will be permitted to evade its force by showing that it was without consideration and intended to defraud creditors. If the fraudulent grantee of a homestead should reconvey the property to the grantor, it must be regarded as a new acquisition, and subject to execution to the same extent as if the first conveyance had not been intended to defraud creditors.[3]

§ 139. Origin of the Law against Fraudulent Transfers.—Whether the result of fraudulent transfers, as stated in the three preceding sections, was fully recognized at common law, may, perhaps, admit of some doubt. At all events, Parliament saw proper not to rest entirely upon common-law rules, but to enact several statutes,[4] all designed to prevent persons from taking advantage of their own frauds. It is claimed that these statutes were but declaratory of the common law, and that every wrong to which they have been applied was susceptible of equally successful treatment

[1] Winebrinner *v.* Weisinger, 3 T. B. Mon. 33; Dearman *v.* Dearman, 4 Ala. 521; Planters' Bank *v.* Henderson, 4 Humph. 75.

[2] Bond *v.* Seymour, 1 Chand. 40; Smith *v.* Allen, 39 Miss. 469; Legro *v.* Lord, 10 Me. 161; Lisby *v.* Perry, 6 Bush, 515; Vaughan *v.* Thompson, 17 Ill. 78; Pike *v.* Miles, 23 Wis. 164; 99 Am. Dec. 148; Wood *v.* Chambers, 20 Tex. 247; 70 Am. Dec. 382; Foster *v.* McGregor, 11 Vt. 595; 34 Am. Dec. 713; Cox *v.* Shropshire, 25 Tex. 113; Bean *v.* Smith, 2 Mason, 252; *post*, § 218; Crummen *v.* Bennet, 68 N. C. 494; Dortch *v.* Benton, 98 N. C. 190.

[3] Butler *v.* Nelson, 72 Iowa, 732.

[4] Stat. 50 Edw. III., c. 6; 3 Hen. VII., c. 4; 13 Eliz., c. 5; 27 Eliz., c. 4.

without their aid.[1] At all events, it seems not to be necessary, at the present day, to show that an alleged fraudulent device falls within the provisions of either of these statutes; and we may, therefore, assume that every transfer, pledge, or lien made with intent to delay, hinder, or defraud creditors is, as against such creditors, void, whether it assumes some one of the forms designated by these statutes, or takes some shape hitherto unknown and undescribed.[2] It becomes, therefore, of the highest importance that persons seeking to harvest the fruits of their judgments should be enabled to determine whether property, formerly belonging to the defendant, but transferred by him to another, may still be taken and appropriated to the payment of his debts, on the ground that the transfer was void as against creditors. The subject of fraudulent liens and transfers is of such importance, and has given rise to so many reported adjudications, that it cannot be treated with desirable fullness within the limits of this work. And fortunately, such treatment is not now necessary, because of the research and ability already devoted to it in the notes to Twyne's Case in 1 Smith's Leading Cases; in the notes to Sexton *v.* Wheaton, Salmon *v.* Bennett, Thomas *v.* Jenks, and

[1] Cadogan *v.* Kennett, Cowp. 432; Clark *v.* Douglas, 62 Pa. St. 408; Barton *v.* Vanheythuysen, 11 Hare, 132; Clements *v.* Moore, 6 Wall. 312; Peck *v.* Land, 2 Kelly, 10; 46 Am. Dec. 368; Hudnal *v.* Wilder, 4 McCord, 294; 17 Am. Dec. 444.

[2] "Whenever the statute is ineffective, either through a change of custom or the introduction of a new kind of property, or the concocting of some new device, there the common law intervenes with its pure and elevated principles of morality and justice, and enforces the dictates of common honesty and common sense. In other words, the common law supplements the statute, to the end that justice may be done and every species of fraud suppressed." Bump on Fraudulent Conveyances, 59; Blackman *v.* Wheaton, 13 Minn. 326; Fox *v.* Hills, 1 Conn. 295; State *v.* Fife, 2 Bail. 337; Lillard *v.* McGee, 4 Bibb, 165; Taylor *v.* Heriot, 4 Desaus. 227.

Grover *v.* Wakeman, 1 American Leading Cases; in Kerr on Fraud and Mistake, with American notes by Mr. O. F. Bump; and finally, in a more elaborate form, in Mr. Bump's excellent treatise on fraudulent conveyances. The subject is, however, so intimately connected with the law of executions, that we must give it some further consideration. We shall endeavor to show, in the briefest manner possible, — 1. Who are the persons from whose hands the property cannot be taken under execution against the fraudulent vendor; 2. The most important classes of cases in which transactions are regarded as fraudulent, *prima facie* or *per se*, owing to the nature of the transfer, and independent of any evidence showing the actual intent; and 3. When and where the retention of possession by the vendor is conclusive proof of fraud.

§ 140. **Persons whose Rights cannot be Affected by Showing that Transfer was Fraudulent.** — The general statement that transfers or liens made to hinder, delay, or defraud creditors are void against the persons sought to be so prejudiced or defrauded, must always be understood with this qualification, that the rule is not to be applied against persons who have obtained interests in the property in good faith, and for a valuable consideration.[1] The law does not interpose in favor of creditors as against persons who are innocent of all participation in the fraud; who have not assisted it by act, design, or neglect; who have had neither notice nor knowledge of its existence; and have parted with valuable consideration upon their faith in the

[1] A purchaser from a fraudulent vendee, in good faith and for value, will hold the property against a creditor who had issued an execution, but had not levied it when such purchase was made. Young *v.* Lathrop, 12 Am. Rep. 603; 67 N. C. 63.

transfer, which, in the end, may be shown to have been fraudulent. It is not sufficient that the person in whose hands the property is found can show that he has acquired it for a valuable consideration, or that he has acquired it in good faith. He must surrender the property to the creditors, unless he can show that his acquisition is sustained both by good faith and by a valuable consideration. "An inquiry into the good faith of the grantee is only necessary when there is a valuable consideration for the transfer. The mere acceptance of a transfer, without a valuable consideration, is of itself sufficient evidence of a participation in the debtor's fraudulent intent."[1] If no valuable consideration existed, the transaction is *per se* fraudulent as against creditors whom it would hinder or delay if permitted to stand. No evidence of the intent of the parties can be received. The inference of the law is irresistible. But the consideration paid, though valuable, may have been inadequate. The inadequacy of the consideration does not necessarily avoid the transfer. It is, however, a material fact, to be considered by the jury as a badge of fraud; and may operate to avoid the transfer when, either alone or in connection with other facts, it produces the conviction that the transfer was not made in good faith.[2]

[1] Bump on Fraudulent Conveyances, 229; Taylor *v.* Jones, 2 Atk. 600; Strong *v.* Strong, 18 Beav. 498; Goldsmith *v.* Russell, 5 De Gex, M. & G. 547; Belt *v.* Ragnet, 27 Tex. 471; Newman *v.* Cordell, 43 Barb. 448; Peck *v.* Carmichael, 9 Yerg. 325; Gamble *v.* Johnson, 9 Mo. 605; Swartz *v.* Hazlett, 8 Cal. 118; Wise *v.* Moore, 31 Ga. 148; Lee *v.* Figg, 37 Cal. 328; 99 Am. Dec. 271; Hicks *v.* Stone, 13 Minn. 434; Clark *v.* Chamberlain, 13 Allen, 257.

[2] Moncil *v.* Scherrick, 54 Ill. 269; Kane *v.* Weighley, 22 Pa. St. 179; Trimble *v.* Ratcliff, 9 B. Mon. 511; Robinson *v.* Robards, 15 Mo. 459; Lee *v.* Hunter, 1 Paige, 519; Barrow *v.* Bailey, 5 Fla. 9; Seamans *v.* White, 8 Ala. 656; Kuykendall *v.* McDonald, 15 Mo. 416; 57 Am. Dec. 212; Arnold *v.* Bell, 1 Hayw. (N. C.) 396; Bryant *v.* Kelton, 1 Tex. 415; Penhall *v.* Elwin, 1 Smale & G. 258.

§ 141. Good Faith of the Holder of Property Transferred in Fraud. — The mere payment of a valuable and sufficient consideration is by no means conclusive in favor of the holder of property which has been fraudulently transferred. On the contrary, if it be shown that the holder did not acquire the property in good faith, it is immaterial whether he paid full value or no value.[1] That the transaction was to hinder, delay, or defraud creditors is sufficient to annul it, unless the person into whose hands the property has come is guiltless of all complicity in the fraudulent intent, and is ignorant of its existence. The acquisition of the property, though for full value, is not in good faith when the purchaser participated in the grantor's fraudulent intent, nor when, without participating in such intent, he had notice of its existence. The cases in which actual knowledge can be proved are not likely to be frequent; for people engaged in the prosecution of fraudulent schemes seek to conceal all direct evidences of their purposes and intentions, and true relations to the business in hand. But notice may be inferred where actual knowledge cannot be established. The purchase will be regarded as *mala fide* where, at any time prior to the payment of the purchase-money,[2] the purchaser had "knowledge of

[1] Worsdley *v.* De Mattos, 1 Burr. 474; Bott *v.* Smith, 21 Beav. 516; Harman *v.* Richards, 10 Hare, 81; Thompson *v.* Webster, 4 Drew. 628; 7 Jur., N. S., 531; Lloyd *v.* Attwood, 3 De Gex & J. 655; Fraser *v.* Thompson, 4 De Gex & J. 659; Carlett *v.* Radcliffe, 14 Moore P. C. C. 121; Holmes *v.* Penney, 3 Kay & J. 99; Harrison *v.* Kramer, 3 Clarke, 543; Wood *v.* Chambers, 20 Tex. 247; 70 Am. Dec. 382; Stein *v.* Hermann, 23 Wis. 132; Pulliam *v.* Newberry, 41 Ala. 168; Harrison *v.* Jaquess, 29 Ind. 208; Sayre *v.* Fredericks, 16 N. J. Eq. 205; Robinson *v.* Holt, 39 N. H. 557; 75 Am. Dec. 233; Zerbe *v.* Miller, 16 Pa. St. 488; Pettus *v.* Smith, 4 Rich. Eq. 197; Brown *v.* Force, 7 B. Mon. 357; 46 Am. Dec. 519.

[2] Parkinson *v.* Hanna, 7 Blackf. 400; Story *v.* Windsor, 2 Atk. 630; Hardingham *v.* Nicholls, 3 Atk. 304.

facts sufficient to excite the suspicions of a prudent man, and put him on inquiry,[1] or to lead a person of ordinary perception to infer fraud."[2] It is sufficient to charge the purchaser with notice, that by ordinary diligence he might have known, or that he had reason to know or believe, what was the intent of the transfer.[3] The notice to the vendee which renders his purchase *mala fide* must be in regard to the *intent* to hinder, delay, or defraud. His knowledge of the financial embarrassment or insolvency of the vendor is not sufficient;[4] for every man, regardless of his solvency, has the right to sell and transfer his property at any time before it is made subject to writs issued by his creditors. As has already been intimated, the claim to protection as a *bona fide* purchaser can only be supported by showing that a conveyance of the title was received and payment made in full prior to receiving notice of the equity against which the claim is made. It is not sufficient that the money was secured to be paid prior to receiving such notice,[5] though there

[1] Green *v.* Tantum, 19 N. J. Eq. 105; 21 N. J. Eq. 364; Atwood *v.* Impson, 20 N. J. Eq. 150; Jackson *v.* Mather, 7 Cow. 301; Mills *v.* Howeth, 19 Tex. 257; 70 Am. Dec. 331; Smith *v.* Henry, 2 Bail. 118.

[2] Wright *v.* Brandis, 1 Ind. 336.

[3] Humphries *v.* Freeman, 22 Tex. 45; Farmers' Bank *v.* Douglass, 11 Smedes & M. 469; Foster *v.* Grigsby, 1 Bush, 86; Garahy *v.* Bayley, 25 Tex. Sup. 294. But there are authorities which seem to require that the vendee should participate in the *intent*, or his purchase will be deemed in good faith. Seavy *v.* Dearborn, 19 N. H. 351; Brown *v.* Force, 7 B. Mon. 357; 46 Am. Dec. 519; Sterling *v.* Ripley, 3 Chand. 166.

[4] Atwood *v.* Impson, 20 N. J. Eq. 150; Sisson *v.* Roath, 30 Conn. 15; Bunyard *v.* Seabrook, 1 Fost. & F. 321; Hughes *v.* Monty, 24 Iowa, 499; Loeschigk *v.* Bridge, 42 N. Y. 421; Merchants' N. B. *v.* Northrop, 22 N. J. Eq. 58; Beals *v.* Guernsey, 8 Johns. 446; 5 Am. Dec. 348; Lyon *v.* Rood, 12 Vt. 233. *Contra*, Reinheimer *v.* Hemingway, 35 Pa. St. 432.

[5] Dugan *v.* Vattier, 3 Blackf. 245; 25 Am. Dec. 105; Nantz *v.* McPherson, 7 T. B. Mon. 597; 18 Am. Dec. 216; Gallion *v.* McCaslin, 1 Blackf. 91; 12 Am. Dec. 205; Jewett *v.* Palmer, 7 Johns. Ch. 65; 11 Am. Dec. 401; Jackson

seems to be a growing tendency to protect a purchaser *pro tanto*, who in good faith paid a portion of the purchase-money before receiving notice.[1] With respect to what will deprive a purchaser of the right to be protected as a purchaser without notice, the general rule is, that he is chargeable not only with the facts of which he has knowledge, but also with notice of such other facts as would have been disclosed to him had he acted in a prudent and reasonable manner. "If he has knowledge of such facts as would lead any honest man using ordinary caution to make further inquiries, and does not make, but on the contrary avoids making, such obvious inquiries, he must be taken to have notice of these facts, which, if he had used such ordinary diligence, he would readily have ascertained."[2] "Whatever will put a purchaser upon inquiry and lead to knowledge is notice. He is bound to make inquiries where there is anything that would lead a prudent man to make it, and he is therefore presumed to have known all that inquiry would have revealed to him.[3]

§ 142. **Voluntary Conveyances.** — Transfers which are regarded as fraudulent *per se*, or *prima facie*, will be considered in the following order: 1. Absolute conveyances; 2. Mortgages and trust deeds, purporting to be made to secure existing indebtedness; 3. Assignments for the benefit of creditors. Of conveyances, we

v. McChesney, 7 Cow. 360; 17 Am. Dec. 521; Union Canal Co. *v.* Young, 1 Whart. 410; 30 Am. Dec. 212; Blanchard *v.* Tyler, 12 Mich. 339; 86 Am. Dec. 57; Lewis *v.* Phillips, 17 Ind. 108; 79 Am. Dec. 457.

[1] Fessler's Appeal, 75 Pa. St. 483; Kitteridge *v.* Chapman, 36 Iowa, 348; Hardin *v.* Harrington, 11 Bush, 367; Haughwout *v.* Murphy, 21 N. J. Eq. 118; Digby *v.* Jones, 67 Mo. 104.

[2] Converse *v.* Blumrich, 14 Mich. 109; 90 Am. Dec. 230.

[3] Gibson *v.* Winslow, 46 Pa. St. 380; 84 Am. Dec. 552; Litchfield's Appeal, 28 Conn. 127; 73 Am. Dec. 662; Lumbard *v.* Abbey, 73 Ill. 178; Morrison *v.* Kelly, 22 Ill. 610; 74 Am. Dec. 169; Chicago R. R. *v.* Kennedy, 70 Ill. 362.

shall first treat of those which are voluntary. Where it can be shown that the intent with which any conveyance was made was to hinder, delay, or defraud creditors, there can be no doubt that it is void as against them. With respect to voluntary conveyances, the intent with which they were made may be inferred from the situation of the grantor at the time. "The law presumes that every man intends the necessary consequences of his act, and if the act necessarily delays, hinders, or defrauds his creditors, then the law presumes that it is done with fraudulent intent."[1] On the other hand, it is equally well settled that every man is entitled to dispose of his own property as he thinks best, provided that neither the intent nor the result of the act of disposition is to hinder, delay, or defraud his creditors. A man free from debt may make a valid gift of his property, — one which subsequent creditors cannot successfully assail otherwise than by showing that the gift was made with a view of becoming indebted, and of defrauding them.[2] Nor is the mere

[1] Bump on Fraudulent Conveyances, p. 282, citing Potter *v.* McDowell, 31 Mo. 62; O'Connor *v.* Bernard, 2 Jones, 654; Freeman *v.* Pope, L. R. 5 Ch. 358; 39 L. J. Ch. 689; Norton *v.* Norton, 5 Cush. 524; Smith *v.* Cherrill, L. R. 4 Eq. 390; 50 L. J. Ch. 738; French *v.* French, 6 De Gex, M. & G. 95; 25 L. J. Ch. 612; Strong *v.* Strong, 18 Beav. 498; Freeman *v.* Burnham, 36 Conn. 469; Corlett *v.* Radcliffe, 14 Moore P. C. C. 121; Reese River M. Co. *v.* Atwell, L. R. 7 Eq. 347; Van Wyck *v.* Seward, 18 Wend. 375; Thompson *v.* Webster, 7 Jur., N. S., 531.

[2] Sexton *v.* Wheaton, 8 Wheat. 229; Russel *v.* Hammond, 1 Atk. 14; Walker *v.* Burrows, 1 Atk. 94; Townshend *v.* Windham, 2 Ves. 1; Stephens *v.* Olive, 2 Brown Ch. 91; Lush *v.* Williamson, 5 Ves. 384; Glaister *v.* Hewer, 8 Ves. 199; Battersbee *v.* Farrington, 1 Swanst. 106; Faringer *v.* Ramsay, 4 Md. Ch. 33; Bonny *v.* Griffith, 1 Hayes, 115; Benton *v.* Jones, 8 Conn. 186; Sweeney *v.* Damron, 47 Ill. 450; Winebrinner *v.* Weisinger, 3 T. B. Mon. 32; Baker *v.* Welch, 4 Mo. 484; Charlton *v.* Gardner, 11 Leigh, 281; Haskell *v.* Bakewell, 10 B. Mon. 206; Phillips *v.* Wooster, 35 N. Y. 412; 3 Abb. Pr., N. S., 475; Roberts *v.* Gibson, 6 Har. & J. 116; Creed *v.* Lancaster Bank, 1 Ohio St. 1; Thomson *v.* Dougherty, 12 Serg. & R. 448; Martin *v.* Olliver, 9 Humph. 561; 49 Am. Dec. 717; Dick *v.* Hamilton, Deady, 322.

fact of the donor's existing indebtedness conclusive against the gift. Existing creditors cannot avoid the gift, either at law or in equity, if, at the time it was made, their claims were amply secured;[1] nor if, when in favor of a member of donor's family, the pecuniary circumstances of the donor, at the time of making the gift, were such that the withdrawal of the property from his assets did not hazard the rights of his creditors, nor materially diminish their prospects of payment.[2] Upon this last point the authorities are not unanimous. The minority contends that a gift is void as to existing creditors, irrespective of its amount and of the circumstances and intention of the donor.[3] But when a voluntary transfer is made by an insolvent debtor,[4] or by a debtor in such financial circumstances that the gift tends materially to hinder, delay, or de-

[1] Manders *v.* Manders, 4 I. R. Eq. 434; Pell *v.* Tredwell, 5 Wend. 661; Stephens *v.* Olive, 2 Brown Ch. 90; Johnson *v.* Zane, 11 Gratt. 552; Hester *v.* Wilkinson, 6 Humph. 215; 44 Am. Dec. 303.

[2] Kipp *v.* Hanna, 2 Bland, 26; Bonny *v.* Griffith, Hayes, 115; Babcock *v.* Echler, 24 N. Y. 623; Taylor *v.* Eubanks, 3 A. K. Marsh. 239; Jackson *v.* Tunno, 3 Desaus. 1; Bracket *v.* Waite, 4 Vt. 389; Smith *v.* Lowell, 6 N. H. 67; Thompson *v.* Webster, 7 Jur., N. S., 531; 4 Drew. 628; Clements *v.* Eccles, 11 I. R. Eq. 229; Dodd *v.* McGraw, 3 Eng. 84; 46 Am. Dec. 301; Williams *v.* Banks, 11 Md. 198; Salmon *v.* Bennett, 1 Conn. 525; 7 Am. Dec. 237; Abbe *v.* Newton, 19 Conn. 20; Posten *v.* Posten, 4 Whart. 27.

[3] Reade *v.* Livingston, 3 Johns. Ch. 481; 8 Am. Dec. 520; Moore *v.* Spence, 6 Ala. 506; Foote *v.* Cobb, 18 Ala. 586; O'Daniel *v.* Crawford, 4 Dev. 197; Kissam *v.* Edmondson, 1 Ired. Eq. 180; Bogard *v.* Gardley, 4 Smedes & M. 302; Choteau *v.* Jones, 11 Ill. 318; 50 Am. Dec. 460

[4] Annin *v.* Annin, 24 N. J. Eq. 184; Phelps *v.* Morrison, 24 N. J. Eq. 195; Caswell *v.* Hill, 47 N. H. 407; Morgan *v.* McLelland, 3 Dev. 82; Wellington *v.* Fuller, 38 Me. 61; Reppy *v.* Reppy, 46 Mo. 571; Stickney *v.* Borman, 2 Pa. St. 67; Shontz *v.* Brown, 27 Pa. St. 123; Raymond *v.* Cook, 31 Tex. 373; Dulany *v.* Green, 4 Harr. (Del.) 285; Walcott *v.* Almy, 6 McLean, 23; Craig *v.* Gamble, 5 Fla. 430; Doughty *v.* King, 2 Stock. 396; Barnard *v.* Ford, L. R. 4 Ch. 247; Burpee *v.* Bunn, 22 Cal. 194; Sargent *v.* Chubbuck, 19 Iowa, 37; Harvey *v.* Steptoe, 17 Gratt. 289; Catchings *v.* Manlove, 39 Miss. 655; Welcome *v.* Batchelder, 23 Me. 85.

fraud his creditors,[1] it is clearly void as against them. In such case, the inference of law is irresistible, and cannot be overcome by any evidence in regard to the debtor's actual intent.[2]

Considered with respect to existing creditors, there appears to be no doubt that the law presumes, *prima facie*, that a voluntary conveyance is fraudulent and void.[3] Many of the authorities go further, and declare this presumption to be conclusive.[4] The duty of a husband or father to provide for his wife or children is one, however, which is scarcely inferior to his duty to apply his property to the satisfaction of his creditors. There are many cases in which a gift or settlement is made upon a child, wife, or other relative, which does not operate as a fraud upon the creditors of the donor, though he is at the time somewhat indebted. Therefore, "the better doctrine seems to us to be that there is, as applicable to voluntary conveyances made on a meritorious consideration, as of blood and affection, no absolute presumption of fraud which entirely disregards the intent and purpose of the conveyance, if the grantor happened to be indebted at the time it was made, but that such conveyance under such circumstances affords

[1] Holmes *v.* Penney, 3 Kay & J. 90; Jones *v.* Slubey, 6 Har. & J. 372; Parkman *v.* Welch, 19 Pick. 231; Potter *v.* McDowell, 31 Mo. 62; Wilson *v.* Buchanan, 7 Gratt. 334; Worthington *v.* Bullett, 6 Md. 172; Crossley *v.* Elworthy, L. R. 12 Eq. 158; Townsend *v.* Westacott, 2 Beav. 340; Skarf *v.* Soulby, 1 Macn. & G. 364.

[2] Phelps *v.* Curts, 8 Chic. L. N. 208; Churchill *v.* Wells, 7 Cold. 370.

[3] Nicholas *v.* Ward, 1 Head, 323; 73 Am. Dec. 177; Welcker *v.* Price, 2 Lea, 667; Cheatham *v.* Hess, 2 Tenn. Ch. 764; Hutchinson *v.* Kelly, 1 Rob. (Va.) 123; 39 Am. Dec. 250.

[4] Cook *v.* Johnson, 1 Beasl. Ch. 51; 72 Am. Dec. 381; Belford *v.* Crane, 16 N. J. Eq. 272; 85 Am. Dec. 155; Miller *v.* Thompson, 3 Port. 196; Spencer *v.* Colwin, 30 Ala. 355; Crawford *v.* Kirksey, 55 Ala. 282; 28 Am. Rep. 704; Lockhard *v.* Beckley, 10 W. Va. 87; Huggins *v.* Perrine, 30 Ala. 396; 68 Am. Dec. 131.

only *prima facie* or presumptive evidence of fraud, which may be rebutted and controlled."[1] To rebut the presumption, the financial circumstances of the grantor at the time of the grant may be shown, and if it appears that he was then abundantly able to pay all liabilities existing against him, that the property donated was an inconsiderable portion of his estate, and that after the donation he remained able to satisfy all his creditors, then, unless there are other circumstances indicating an intent to defraud, the presumption must be regarded as overcome.[2] Subsequent creditors can attack a voluntary conveyance only upon the ground that it was made with a fraudulent intent.[3] "The law now appears to be well settled that a man may, for the sole purpose of protecting his family against the casualties and accidents of trade, settle his property for their benefit, and that such settlement will be upheld against his subsequent creditors, unless it shall appear that the property was so situated that the community could have been easily misled as to the title of the true owner. The very object of such settlement by a man engaged in commerce is to prefer his family to those who may thereafter become his creditors, and it may be safely admitted that the design was to protect the property against the debts thus contracted; for otherwise the conveyance would be simply an idle cere-

[1] Lerow *v.* Wilmarth, 9 Allen, 386; Holden *v.* Burnham, 63 N. Y. 74; see note to Jenkins *v.* Clement, 14 Am. Dec. 705.

[2] Gridley *v.* Watson, 53 Ill. 193; Pratt *v.* Curtis, 2 Low. 87; Stewart *v.* Rogers, 25 Iowa, 375; 95 Am. Dec. 794; Winchester *v.* Charter, 97 Mass. 140; Miller *v.* Pierce, 6 Watts & S. 101; French *v.* Holmes, 67 Me. 186.

[3] Inhabitants of Pelham *v.* Aldrich, 8 Gray, 515; 69 Am. Dec. 266; Bangor *v.* Warren, 34 Me. 324; 56 Am. Dec. 657; Hester *v.* Wilkinson, 6 Humph. 215; 44 Am. Dec. 303; Cosby *v.* Ross's Adm'r, 3 J. J. Marsh. 290; 20 Am. Dec. 140; Lancaster *v.* Dolan, 1 Rawle, 231; 18 Am. Dec. 625; Smith *v.* Vodges, 92 U. S. 183.

mony. The right to make the settlement carries with it the right to the beneficiaries to hold and enjoy the property against the claims of the donor, or against those who may assert a title through him. The conveyance, when executed according to the forms and ceremonies of the law, and made a matter of record, is notice to the world not to trust the donor longer upon the faith of the property conveyed; and while it may have the effect of impairing his credit, it cannot be regarded as a fraud upon those who have ample opportunity to learn his true condition."[1] On the other hand, if a voluntary conveyance is made with intent to defraud subsequent creditors, it is void as against them. "It is perfectly well settled that if there be any design of fraud or collusion, or any intent to deceive third persons, in making a voluntary conveyance, although the grantor be not then indebted, the transfer will be voidable by subsequent creditors;[2] and the design to defraud may be inferred from the fact that the grantor, when he made the deed, was upon the eve of entering into business requiring more means than he then possessed, and in the course of which he must necessarily contract debts."[3]

§ 143. **A Conveyance to the Use of the Grantor** is by the statute of 3 Henry VII., c. 4, void as against creditors. The purposes for which such a deed is made and the actual intention of the parties are immaterial. Nor does it make any difference that the grantor was solvent or entirly free from debt when he

[1] Bullitt *v.* Taylor, 34 Miss. 708; 69 Am. Dec. 412.

[2] Winchester *v.* Charter, 12 Allen, 610; Elliott *v.* Horn, 10 Ala. 348; 44 Am. Dec. 488.

[3] Beeckman *v.* Montgomery, 1 McCarter, 106; 80 Am. Dec. 229; Ridgeway *v.* Underwood, 4 Wash. C. C. 137.

made the transfer. "In all the refinements of uses and trusts, in the midst of multiplied distinctions between legal and equitable interests which have abounded in the progress of Anglican jurisprudence, this principle has never been doubted, and the mockery of a transfer by a debtor of his property, to be held for the use of the debtor, has never been allowed to defeat the rights or remedies of creditors."[1] Hence "it has been considered as settled long since that if an absolute deed is given with intent to secure a debt, such deed would be void as it respects *bona fide* creditors, as it does not disclose the real nature of the transaction. It places the parties in a false position as it respects the public. It holds out the grantee as the real owner, when in fact the grantor is, or may be, the owner. It tends to lull the creditors of both parties into false security, and to conceal from them the real condition of their debtors."[2] "Honesty and fair dealing require that the truth of the transaction should concur with its appearances; that the whole truth should be developed, and that the transaction should not wear the aspect of a simple sale or preference, and yet in fact be merely a disguise or color, by means of which the debtor is enabled to enjoy a secret interest in and control over the goods and their proceeds, of which other creditors are not informed by the proceeding itself."[3]

[1] Bump on Fraudulent Conveyances, 239. For application of the law against conveyances containing reservations for the benefit or advantage of grantor, see Mackie *v.* Cairns, Hopk. 373; Wilson *v.* Cheshire, 1 McCord Ch. 223; Brown *v.* Donald, 1 Hill Ch. 297; Jackson *v.* Parker, 9 Cow. 73; Van Wyck *v.* Seward, 18 Wend. 375; Lukins *v.* Aird, 6 Wall. 78; Smith *v.* Smith, 11 N. H. 460; Barbank *v.* Hammond, 3 Sum. 429; Curtis *v.* Leavitt, 15 N. Y. 9; Sturdivant *v.* Davis, 9 Ired. 365; Ladd *v.* Wiggin, 35 N. H. 421; 69 Am. Dec. 551.

[2] North *v.* Belden, 13 Conn. 376; 35 Am. Dec. 83.

[3] McCulloch *v.* Henderson, 7 Watts, 431; 32 Am. Dec. 778; Winkley *v.* Hill, 9 N. H. 31; 31 Am. Dec. 215.

§ 144. **Conditional Conveyances.**—A transfer is not *bona fide*, when made by an insolvent debtor unless it is unconditional. The contract of sale must be absolute. If the debtor retains the right to revoke the contract, the sale is fraudulent *per se*;[1] and a like result follows a stipulation that the vendee may, before the payment of the purchase price, return the property and annul the sale.[2] A transfer, of which part of the consideration is that the grantee shall thereafter support the debtor or his family, is regarded as an effort to preserve a right or interest in property, and keep it beyond the reach of the grantor's creditors. If the grantor, immediately after making such a conveyance, is unable to pay his debts, the transfer is void;[3] but it is otherwise when, notwithstanding the conveyance, the grantor retains property sufficient to satisfy his creditors.[4] And it is said that the deed may

[1] West *v.* Snodgrass, 17 Ala. 449; Tarback *v.* Marbury, 2 Vern. 510; Bethel *v.* Stanhope, Cro. Eliz. 810; Peacock *v.* Monk, 1 Ves. Sr. 12; Anonymous, Dyer, 295 a; Jenkyn *v.* Vaughan, 3 Drew. 419.

[2] Shannon *v.* Commonwealth, 8 Serg. & R. 444; West *v.* Snodgrass, 17 Ala. 549. As to the effect of an agreement that debtor may repurchase, see Towne *v.* Hoit, 14 N. H. 61; Albee *v.* Webster, 16 N. H. 362; Newsom *v.* Roles, 1 Ired. 179; Glenn *v.* Randall, 2 Md. Ch. 220; Barr *v.* Hatch, 3 Ohio, 527.

[3] Church *v.* Chapin, 35 Vt. 223; Bott *v.* Smith, 21 Beav. 511; Henderson *v.* Downing, 24 Miss. 106; Sidensparker *v.* Sidensparker, 52 Me. 481; 83 Am. Dec. 527; Gunn *v.* Butler, 18 Pick. 248; Morrison *v.* Morrison, 49 N. H. 69; Robinson *v.* Robards, 15 Mo. 459; Geiger *v.* Welsh, 1 Rawle, 349; Rollins *v.* Moores, 25 Me. 192; Hunt *v.* Knox, 34 Miss. 655; Robinson *v.* Stewart, 10 N. Y. 189; Miner *v.* Warner, 2 Grant Cas. 448; Jones *v.* Spear, 21 Vt. 426; Stokes *v.* Jones, 18 Ala. 734; Hawkins *v.* Moffitt 10 B. Mon. 81; McLean *v.* Button, 18 Barb. 450; Graves *v.* Blondell, 70 Me. 194; Egery *v.* Johnson, 70 Me. 261; Johnston *v.* Harvy, 2 Penr. & W. 82; 21 Am. Dec. 426; McClurg *v.* Lecky, 3 Penr. & W. 91.

[4] Barker *v.* Osborne, 71 Me. 71; Usher *v.* Hazeltine, 5 Greenl. 471; 17 Am. Dec. 253; Hapgood *v.* Fisher, 34 Me. 407; 56 Am. Dec. 663; Drum *v.* Painter, 27 Pa. St. 148; Buchanan *v.* Clark, 28 Vt. 799; Mills *v.* Mills, 3 Head, 705; Johnson *v.* Zane, 11 Gratt. 552; Eaton *v.* Perry, 29 Mo. 96; Barrow *v.* Bailey, 5 Fla. 9; Mahoney *v.* Hunter, 30 Ind. 246; Tibbals *v.* Jacobs, 31 Conn. 428; Johnson *v.* Johnson, 3 Met. 63.

always be supported by showing that the vendee paid the full value of the property. For in such a case, it appears that the agreement to support the grantor is not made in consideration of property to which his creditors are entitled.[1] A sale made by an insolvent on a long credit indicates an intent to withdraw his assets from the reach of his creditors; and has often been regarded as sufficient evidence of fraud to avoid the sale.[2]

§ 145. **Mortgages.**—Mortgages, under which the debtor retains possession of the property, with the power to sell the same, are generally treated as fraudulent and void as against creditors.[3] Such an instrument affords no security to the mortgagee, and if valid, could have no other effect than to give the mortgagee preference over other creditors. A deed of trust to creditors, or to some one for their benefit, in which the debtor reserves the power to sell the property until default is made in the payment of the debts, is also void.[4] But in some of the states, mortgages on stocks of goods in stores, containing a stipulation that the

[1] Slater *v.* Dudley, 18 Pick. 373; Albee *v.* Webster, 16 N. H. 362; see also Oriental Bank *v.* Haskins, 3 Met. 332; 37 Am. Dec. 140.

[2] Borland *v.* Walker, 7 Ala. 269, where the notes were due in from seven to ten years; Pope *v.* Andrews, 1 Smedes & M. Ch. 135, where the notes were due in nine, ten, and eleven years; Kepner *v.* Burkhart, 5 Pa. St. 478, where the notes were due in six years; Grannis *v.* Smith, 3 Humph. 179, where the notes were due in from five to ten years.

[3] Collins *v.* Myers, 16 Ohio, 547; Harman *v.* Abbey, 7 Ohio St. 218; Griswold *v.* Sheldon, 4 N. Y. 580; Armstrong *v.* Tuttle, 34 Mo. 432; King *v.* Kenan, 38 Ala. 63; Constantine *v.* Tweives, 29 Ala. 607; Addington *v.* Etheredge, 12 Gratt. 436; Bishop *v.* Warner, 19 Conn. 460; Ranlett *v.* Blodgett, 17 N. H. 298; Place *v.* Langworthy, 13 Wis. 629; 80 Am. Dec. 758; Freeman *v.* Rawson, 5 Ohio St. 1; Gardner *v.* McEwan, 19 N. Y. 123; Barnet *v.* Fergus, 51 Ill. 352; Read *v.* Wilson, 22 Ill. 377; 74 Am. Dec. 159.

[4] Brooks *v.* Wimer, 20 Mo. 503; Walter *v.* Wimer, 24 Mo. 63; Chopard *v.* Bayard, 4 Minn. 533.

mortgagors may continue their business, retailing the goods mortgaged, and replacing them with other goods of like value, have been upheld.[1] Where a chattel mortgage, by its terms, permits the mortgagor to remain in possession of the property, and to sell portions thereof and retain the proceeds of such sales, it is in New York fraudulent and void as a matter of law.[2] But there seems to be no objection in that state to permitting the mortgagor to remain in possession and make sales, if he agrees to apply the proceeds of such sales to the satisfaction of the mortgage debt.[3] In such a case, the mortgage is not fraudulent *per se;* the retention of possession is merely evidence of fraud *prima facie*. If, under such an agreement, the mortgagors make sales, it is as the agents of and as the act of the mortgagees, and every sale satisfies the mortgage *pro tanto*, whether the money ever reaches the mortgagees or not.[4] If the mortgagor is, by agreement of the parties, permitted to retain any portion of the proceeds of sales made by him, either for his own use, or for the support or benefit of his family, or any member thereof, the mortgage is doubtless fraudulent and void as a matter of law.[5] The fact that a mortgage embraced much more property than was necessary to amply secure the mortgagee has been held to be a circumstance tending to show that it was made to hinder, delay, or defraud

[1] Hickman *v.* Perrin, 6 Cold. 135; Jones *v.* Huggeford, 3 Met. 515; Briggs *v.* Parkman, 2 Met. 258; 37 Am. Dec. 89; Goggins *v.* Gilmore, 47 Me. 9; 74 Am. Dec. 472; Hughes *v.* Corey, 20 Iowa, 399; Gay *v.* Bidwell, 7 Mich. 519.

[2] Edgell *v.* Hart, 9 N. Y. 213; 59 Am. Dec. 532; Marston *v.* Vulter, 18 Bosw. 131; 12 Abb. Pr. 144; Miltnacht *v.* Kelly, 3 Keyes, 408; 3 Abb. App. 302; 5 Abb. Pr. 445; Russell *v.* Winne, 37 N. Y. 595; 4 Abb. Pr., N. S., 388; Simmons *v.* Jenkins, 76 N. Y. 483.

[3] Ford *v.* Williams, 13 N. Y. 577; 67 Am. Dec. 83.

[4] Conkling *v.* Shelley, 23 N. Y. 360; 84 Am. Dec. 348.

[5] Place *v.* Langworthy, 13 Wis. 629; 80 Am. Dec. 758; Blakesler *v.* Rossman, 43 Wis. 123; Fish *v.* Harshaw, 45 Wis. 668.

the creditors of the mortgagor.[1] But, on the other hand, it is claimed that the creditors are not prejudiced by such a mortgage, because they may release the property by paying the mortgage debt, or may sell the property subject to the lien.[2] A mortgage may be made for the purpose of hindering, delaying, or defrauding creditors, in which case it is void as against them. If made for a sum in excess of the debt intended to be secured, it is fraudulent and void.[3] But if the intent is to secure future advances to be made, as well as an existing debt, the mortgage is not fraudulent, though the fact that it is partly for future advances is not stated therein.[4]

§ 146. **Assignments for Benefit of Creditors.**—It seems to be unanimously conceded that an assignment to a trustee for the benefit of creditors, whether general or partial, is, in the absence of statutory prohibition, valid.[5] It operates to withdraw the property from the

[1] Bailey *v.* Burton, 8 Wend. 339; Mitchell *v.* Beal, 8 Yerg. 134; 29 Am. Dec. 108; Bennett *v.* Union Bank, 5 Humph. 612; Hawkins *v.* Allston, 4 Ired. Eq. 137; Adams *v.* Wheeler, 10 Pick. 199; Ford *v.* Williams, 13 N. Y. 577; 67 Am. Dec. 83; Davis *v.* Ransom, 18 Ill. 396.

[2] Downs *v.* Kissam, 10 How. 12; Bank of Georgia *v.* Higginbottom, 9 Pet. 48.

[3] Dwier *v.* M'Laughlin, 2 Wend. 600; Bailey *v.* Burton, 8 Wend. 339.

[4] Tully *v.* Harloe, 35 Cal. 302; 95 Am. Dec. 102.

[5] Brashear *v.* West, 7 Pet. 609; Kettlewell *v.* Stewart, 8 Gill, 473; Phippen *v.* Durham, 8 Gratt. 464; De Forest *v.* Bacon, 2 Conn. 633; Niolon *v.* Douglass, 2 Hill Ch. 443; 30 Am. Dec. 368; Moore *v.* Collings, 3 Dev. 126; Pearson *v.* Rockhill, 4 B. Mon. 296; Hindman *v.* Dill, 11 Ala. 689; Hall *v.* Denison, 17 Vt. 311; Nightingale *v.* Harris, 6 R. I. 328; Dana *v.* Bank of United States, 5 Watts & S. 224; De Ruyter *v.* St. Peter's Church, 3 N. Y. 238; London *v.* Parsley, 7 Jones, 319. An assignment of all the assignor's property, for the equal benefit of his creditors, is unquestionably valid, and if executed more than six months before proceedings in bankruptcy are instituted against the assignor, it cannot be assailed by the assignee in bankruptcy, nor to any extent impaired by proceedings under the bankrupt act. Mayer *v.* Hellman, 8 Chic. L. N. 177. Such an assignment is not fraudulent against creditors, nor does it give any creditor a preference over another. It does not in any respect accomplish purposes in hostility with those which the bankrupt act is designed to promote. It will, in all probability, be permitted to stand, though made

reach of all liens and processes taking effect subsequently to the execution of the transfer. In other words, although such a transfer necessarily tends to hinder and delay creditors, by depriving them of the right to take the debtor's property in execution, and apply its proceeds to the payment of their debts, yet, as the creditor had the right to directly turn over his property to his creditors, in satisfaction of their demands, he is allowed to accomplish the same result through the intervention of a trustee. To deny the right to hinder creditors, in a certain sense, would be to deny the right to make an assignment for the benefit of creditors, for such assignment, if given any operation, must necessarily prevent some of the creditors from reaching under execution or attachment property which they could have reached but for such assignment. And the assignor may have foreseen and intended this result. He may have desired to prevent the sacrifice of his assets, which must inevitably attend their immediate seizure and sale under execution. To this extent he has the right to hinder his creditors, and the assignment is not rendered void thereby, provided the hindrance is only such as results from turning over the property in good faith, to be applied to the satisfaction of his debts.[1] If, however,

within less than six months prior to the commencement of proceedings in bankruptcy. Sedgwick *v.* Place, 1 Nat. Bank. Reg. 204; Langley *v.* Perry, 2 Nat. Bank. Reg. 596; In re Kintzing, 3 Nat. Bank. Reg. 217; Farrin *v.* Crawford, 2 Nat. Bank. Reg. 602; In re Wells, 1 Nat. Bank. Reg. 171; In re Marter, 12 Nat. Bank. Reg. 185. *Contra:* Globe Ins. Co. *v.* Cleveland Ins. Co. 8 Chic. L. N. 258; 13 Alb. L. J. 305; In re Burt, 1 Dill. 439; In re Goldschmidt, 3 Nat. Bank. Reg. 165; 3 Ben. 379; In re Langley, 1 Nat. Bank. Reg. 559; In re Smith, 3 Nat. Bank. Reg. 377; 4 Ben. 1; Spicer *v.* Ward, 3 Nat. Bank. Reg. 512.

[1] Baldwin *v.* Peet, 22 Tex. 708; 75 Am. Dec. 806; Hempstead *v.* Johnson, 18 Ark. 123; 65 Am. Dec. 458; Hoffman *v.* Machall, 5 Ohio St. 124; 64 Am. Dec. 637; Houston R. R. *v.* Winter, 44 Tex. 609; Bailey *v.* Mills, 27 Tex. 437; Pike *v.* Bacon, 21 Me. 280; 38 Am. Dec. 259.

the hindering of creditors was the object rather than the incident of the assignment; if the assignment was resorted to as a mere device to gain time or to coerce the creditors, or some of them, into making some settlement of their claims, to which the assignor was not legally entitled,—it would doubtless be void.[1]

In the absence of any statutory inhibition, a debtor may prefer any one or more of his creditors, either by making payment of his liabilities to them, or by turning over property to them to be held as security, or to be applied at once at an agreed value, or by means of a sale, to the extinction of the debt. In many of the states statutes have been enacted forbidding preferences in assignments for the benefit of creditors; but in the absence of such statutes, the preferring of any creditor or class of creditors, if free from any fraudulent intent, does not render the assignment fraudulent nor void.[2] The fact that some of the creditors are preferred to others will doubtless cause an assignment to be viewed with suspicion; and may, when combined with other suspicious circumstances, produce the conviction that it was intended to defraud the other creditors. Of course, if any actual design to defraud taints the assignment, it is void. There

[1] Knight *v.* Packer, 1 Beasl. Ch. 214; 72 Am. Dec. 388; Kimball *v.* Thompson, 4 Cush. 441; 50 Am. Dec. 799.

[2] Note to Crawford *v.* Taylor, 26 Am. Dec. 584; Sommerville *v.* Horton, 4 Yerg. 541; 26 Am. Dec. 242; Buffum *v.* Green, 5 N. H. 71; 20 Am. Dec. 562; Wilkes *v.* Ferris, 5 Johns. 335; 4 Am. Dec. 361; Mackie *v.* Cairns, 5 Cow. 547; 15 Am. Dec. 477; Murray *v.* Judson, 9 N. Y. 73; 59 Am. Dec. 516; Knykendall *v.* McDonald, 15 Mo. 416; 57 Am. Dec. 212; Arthur *v.* C. & R. Bank, 9 Smedes & M. 394; 48 Am. Dec. 719; Skipwith *v.* Cunningham, 8 Leigh, 271; 31 Am. Dec. 642; Grover *v.* Wakeman, 11 Wend. 187; 25 Am. Dec. 624; Hempstead *v.* Johnson, 18 Ark. 123; 65 Am. Dec. 458; Nye *v.* Van Husan, 6 Mich. 329; 74 Am. Dec. 690; *contra:* Malcolm *v.* Hall, 9 Gill, 177; 48 Am. Dec. 688; Denny *v.* Dana, 2 Cush. 160; 48 Am. Dec. 655; Johnson *v.* McGrew, 11 Iowa, 151; 77 Am. Dec. 137.

are several things which, when connected with an assignment, are well-established badges of fraud, and some of which render the assignment fraudulent *per se*. The most prominent of these will now be mentioned. An assignment will not be allowed to withdraw property from the reach of the creditors, that it may, to any extent, be secured for the benefit of the assignor. He must part with all interest in the property, except his right to such surplus as may remain after satisfying the demands of his creditors. Hence, when it appears that the debtor has reserved some portion of the property, or some interest therein, for his own benefit; or that he stipulates for some benefit or advantage for himself or for his family, to be reserved out of the proceeds,—it is evident that he thereby seeks to withdraw something of value from the reach of his creditors, and the assignment is fraudulent *per se*.[1] Nor is it necessary that this reservation appear on the face of the assignment. As the intent to reserve some benefit to the assignor is very often present, many devices have been resorted to for the purpose of accomplishing it. But in whatever guise it may be concealed, it will, when discovered, avoid the assignment. As the as-

[1] Pike *v.* Bacon, 21 Me. 280; 38 Am. Dec. 259; Niolon *v.* Douglas, 2 Hill Ch. 443; 30 Am. Dec. 368; Beek *v.* Burdett, 1 Paige, 305; 19 Am. Dec. 436; Green *v.* Trammel, 3 Md. 11; McAllister *v.* Marshall, 6 Binn. 338; 6 Am. Dec. 458; Harris *v.* Sumner, 2 Pick. 129; Bradbury's Estate, 1 Ashm. 212; Green *v.* Branch Bank, 33 Ala. 643; Goodrich *v.* Downs, 6 Hill, 438; Anderson *v.* Fuller, 1 McMull. Eq. 27; 36 Am. Dec. 290; Faunce *v.* Lesley, 6 Pa. St. 121; Shaffer *v.* Watkins, 7 Watts & S. 219; Austin *v.* Johnson, 7 Humph. 191; Quarles *v.* Kerr, 14 Gratt. 48. In the following cases the assignment was held void for providing for support of grantor's family: Richards *v.* Hazzard, 1 Stew. & P. 139; Johnston *v.* Harvy, 2 Pen. & W. 82; 21 Am. Dec. 426; Henderson *v.* Downing, 24 Miss. 117. In Mead *v.* Phillips, 1 Sand. Ch. 83, the debtor reserved money to pay expenses of suits; in Harney *v.* Peck, 4 Smedes & M. 229, he reserved possession; in McClurg *v.* Lecky, 3 Pen. & W. 83, 23 Am. Dec. 64, he was to be employed by the assignees, at such price as he should judge proper; and in each case the assignment was held void.

signee is chosen by the assignor, they are usually personal friends, and entirely in accord with respect to any scheme which may aid the assignor at the expense of his creditors. The assignor may therefore usually rely upon the assignee to carry out any anterior understanding or agreement without inserting it in the assignment, nor giving it any other written authenticity. But it may be proved and avoided by any competent evidence.[1] The existence of a fraudulent agreement may be inferred, in the absence of direct proof of its terms, from the conduct of the parties. Thus where it was shown that the assignor was permitted to remain in the possession of the property assigned, and to receive benefit therefrom, the supreme court of Texas said: "Unquestionably, the deed is to be received in the light of surrounding circumstances, in order to arrive at the real intention of the parties. Unquestionably, the assignor, remaining in possession of the goods to dispose of them as agent for the trustee, must be deemed, *prima facie* at least, to have conducted himself in his dealing with them in accordance with the understanding between himself and his principal. The latter was bound to take notice of the manner in which he conducted himself in his employment. What the agent did, the principal must be presumed to have assented to; and it is not unreasonable to suppose that parties had contemplated in advance a line of conduct which they are shown to have pursued. Although the employment of the debtor by the trustee is not forbidden by law, yet 'if he be permitted, as their agent, to use and control the assigned effects in a manner wholly inconsistent with the purposes of the

[1] Pettibone v. Stevens, 15 Conn. 19; 38 Am. Dec. 57.

trust, and as his own, it will be evidence that the assignment was not made in good faith.' Burrill on Assignments, 174; Smith *v.* Scavitts, 10 Ala. 92, 105. The fair and natural inference deducible from the evidence is, that the dealing of the parties with the goods after the assignment was consonant with their intention and private understanding at the time of making it; and that it was intended not only to secure the preferred creditors, and those who had incurred liability as sureties of the assignor, but also to secure to the assignor himself certain benefits out of the property assigned, to the hindrance of other creditors in the enforcement of their rights. That such a purpose will render the deed fraudulent and void as to the deferred creditors, does not admit of question."[1] It must, however, be admitted that there are cases inconsistent with this general rule, and which have supported reservations for the advantage of the assignor. The rule itself is not denied. The exceptional cases have been occasioned by reservations of trifling value, or of so meritorious a nature that the court strained the law in their favor.[2] The assignment must be unconditional, and must place the property beyond the control of the debtor. Hence an assignment to a trustee, personally, for his life, or till his resignation,[3] or with a power of revocation,[4] or with the right to

[1] Linn *v.* Wright, 18 Tex. 317; 70 Am. Dec. 285.

[2] Canal Bank *v.* Cox, 6 Greenl. 395; Skipwith *v.* Cunningham, 8 Leigh, 271; 31 Am. Dec. 642; Kevan *v.* Branch, 1 Gratt. 275. The cases of Murray *v.* Riggs, 15 Johns. 271, and Austin *v.* Bell, 20 Johns. 442, 11 Am. Dec. 297, sustaining reservations for the support of the debtor's family, are inconsistent with later cases in the same state.

[3] Smith *v.* Hurst, 10 Hare, 30; 22 L. J. Ch. 289; 17 Jur. 30.

[4] Riggs *v.* Murray, 2 Johns. Ch. 565; Cannon *v.* Peebles, 4 Ired. 204; 2 Ired. 449; Hyslop *v.* Clark, 14 Johns. 458.

make loans on the security of the property assigned,[1] is void; for in each case the debtor attempts to withdraw the property, for a time, from his creditors, with the privilege of resuming in the future his rights of ownership. In one instance, an assignment, with the stipulation that the assignees should hold the property for twenty-five days, during which the debtor had the privilege of paying the creditors, and putting an end to the assignment, was held to be void;[2] but in another instance, under a similar assignment, the stipulation in favor of the assignor was held to be a mere circumstance for the consideration of the jury in determining whether there was any intent to delay or defraud creditors.[3] "Every assignment is absolutely void if it does not appoint and declare the uses for which the property is to be held, and to which it is to be applied. A provision that the uses shall be subsequently declared will not do. They must accompany the instrument, and appear on its face, in order to rebut the conclusive presumption of a fraudulent intent, which would otherwise arise."[4] To permit the assignor to declare subsequently the uses for which the property is to be held, or to direct what preferences should be given, would in effect allow him to retain a control over the property as valuable to him as though he retained an interest for his own benefit or that of

[1] Sheppards *v.* Turpin, 3 Gratt. 373.

[2] Whallon *v.* Scott, 10 Watts, 237.

[3] Hafner *v.* Irwin, 1 Ired. 490.

[4] Bump on Fraudulent Conveyances, 382; Grover *v.* Wakeman, 11 Wend. 187; 25 Am. Dec. 624; Harvey *v.* Mix, 21 Conn. 406; Burbank *v.* Hammond, 3 Sum. 429. Hence the assignor cannot retain the right to designate the order in which his creditors shall be paid. If any preferences are intended, they must be stated and regulated in the assignment. Sheldon *v.* Dodge, 4 Denio, 221; Brainerd *v.* Dunning, 30 N. Y. 214; Strong *v.* Skinner, 4 Barb. 559; Smith *v.* Howard, 20 How. Pr. 127.

his family. With this power he could easily coerce his creditors into executing releases or granting other valuable privileges. Nor can a power of this character be conceded to the assignee. Where an assignment classified the creditors of the assignor, and designated the order in which they should be paid, but gave the assignee authority from time to time, and whenever it shall be for the mutual interest of the several parties beneficially interested to depart from the order of payment hereinbefore appointed and directed, by settling in full or in part, by compromises or otherwise, any of the debts or liabilities specified in the schedule hereto annexed, it was declared void on its face, because there was apparent therefrom a "design to hinder and delay creditors in the collection of their debts, and because" such a provision, if tolerated, would enable a debtor to set his creditors at defiance, and compel them to bid against each other for his favors, and would be virtually vesting him with powers which no one would suppose he could in terms reserve to himself in the deed of assignment.[1]

The assignment need not fix the time within which the trust thereby created must be executed. But if a time is specified, it must be reasonable,—not so short as to compel a sacrifice of the property, and not so long as to indicate an intent to unreasonably and unnecessarily postpone the payment of the debts. Anything unreasonable in either respect is a badge of fraud, and may avoid the assignment.[2] An assignment

[1] Gazzam *v.* Poyntz, 4 Ala. 374; 37 Am. Dec. 745; Barnham *v.* Hempstead, 7 Paige, 568.

[2] Carlton *v.* Baldwin, 22 Tex. 724; Robins *v.* Embry, 1 Smedes & M. Ch. 207; Shearer *v.* Lautzerheizer, 6 Watts, 543; Sheppards *v.* Turpin, 3 Gratt. 373; Shearer *v.* Loftin, 26 Ala. 703; Vaughan *v.* Evans, 1 Hill Ch. 414; Replier *v.* Orrich, 7 Ohio, part 2, p. 246; Knight *v.* Packer, 1 Beasl. 214; Far-

authorizing the trustees to sell on credit is fraudulent *per se* in some states,[1] fraudulent *prima facie* in others,[2] and *prima facie* valid in others.[3] A difference of opinion exists respecting the signification of certain phrases frequently employed in assignments, as where the assignee is directed to sell the property "upon such terms and conditions as in his judgment may appear best and most for the interest of the parties concerned." Perhaps the better opinion is, that these words do not authorize a sale upon credit, because it must have been intended that the discretion conferred should be exercised within legal limits, and that they no more sanction a sale upon credit than they do any other illegal mode of disposing of property; such, for instance, as a sale by lottery or raffle.[4]

So a marked diversity of opinion exists in regard to the validity of assignments which stipulate that the proceeds shall be divided among those creditors only who shall execute a release of all demands against the

quharson *v.* McDonald, 2 Heisk. 404; Hafner *v.* Irwin, 1 Ired. 490; Hardy *v.* Simpson, 13 Ired. 138; Rundlett *v.* Dole, 10 N. H. 458; Bennett *v.* Union Bank, 5 Humph. 612; Adlum *v.* Yard, 1 Rawle, 163; 18 Am. Dec. 608; Mitchell *v.* Beal, 8 Yerg. 134; 29 Am. Dec. 108; Ward *v.* Trotter, 3 T. B. Mon. 1; Johnson *v.* Thweatt, 18 Ala. 745.

[1] Barney *v.* Griffin, 2 N. Y. 366; Nicholson *v.* Leavitt, 6 N. Y. 510; 57 Am. Dec. 499; Dunham *v.* Waterman, 17 N. Y. 17; 72 Am. Dec. 406; Bowen *v.* Parkhurst, 24 Ill. 261; Keep *v.* Sanderson, 12 Wis. 363; 2 Wis. 42; 60 Am. Dec. 494; Porter *v.* Williams, 9 N. Y. 142; 59 Am. Dec. 519; Truitt *v.* Caldwell, 3 Minn. 364; 74 Am. Dec. 764; Inloes *v.* Am. Ex. Bank, 11 Md. 173; 69 Am. Dec. 190; Jones *v.* Syer, 52 Md. 216; 36 Am. Rep. 366.

[2] Billings *v.* Billings, 2 Cal. 113; 56 Am. Dec. 319.

[3] Grimill *v.* Adams, 11 Humph. 285; Shackelford *v.* Bank of Mobile, 22 Ala. 238; Abercrombie *v.* Bradford, 16 Ala. 560; Hoffman *v.* Mackall, 5 Ohio St. 124; 64 Am. Dec. 637; Conkling *v.* Coorod, 6 Ohio St. 611; Baldwin *v.* Peet, 22 Tex. 712; 75 Am. Dec. 806; Berry *v.* Hayden, 7 Iowa, 472.

[4] Kellogg *v.* Slawson, 11 N. Y. 302; Nye *v.* Van Husan, 6 Mich. 329; 74 Am. Dec. 690; Booth *v.* McNair, 14 Mich. 22; Whipple *v.* Pope, 33 Ill. 336. *Contra:* Hutchinson *v.* Lord, 1 Wis. 286; 60 Am. Dec. 381; Sumner *v.* Hicks, 2 Black, 532.

assignor. This stipulation is clearly a reservation in favor of the debtor, as it provides for his exoneration from legal liability. It is an attempted coercion of the creditors; and is not a full and unconditional relinquishment of the property for their benefit. If allowed to stand, it must necessarily enable debtors to compel creditors to compromise their claims, because it withdraws property from the reach of execution, and says to the creditors, You shall not obtain relief, except on such terms as the debtor has proposed. By a majority of the authorities, such assignments are declared to be fraudulent *per se*;[1] but by quite a respectable minority, they are asserted to be good and valid, if not otherwise objectionable.[2] The known character and circumstances of the assignee may be such as to clearly disqualify him from performing the duties of his trust. If so, his selection indicates an intent adverse to the interests of the creditors, and is, at least, *prima facie*

[1] Hyslop *v.* Clarke, 14 Johns. 458; Wakeman *v.* Grover, 4 Paige, 23; Spaulding *v.* Strong, 32 Barb. 235; Hafner *v.* Irwin, 1 Ired. 490; Robins *v.* Embry, 1 Smedes & M. Ch. 208; Woolsey *v.* Urner, Wright, 606; Swearingen *v.* Slicer, 5 Mo. 241; Brown *v.* Knox, 6 Mo. 302; Ingraham *v.* Wheeler, 6 Conn. 277; Howell *v.* Edgar, 3 Scam. 417; Ramsdell *v.* Sigerson, 2 Gilm. 78; Malcom *v.* Hodges, 8 Md. 418; Albert *v.* Winn, 7 Gill, 446; Bridges *v.* Hindes, 16 Md. 104; The Watchman, Ware, 232; Pearson *v.* Crosby, 23 Me. 261; Vose *v.* Holcomb, 31 Me. 407; Hurd *v.* Silsby, 10 N. H. 108; 34 Am. Dec. 142; Atkinson *v.* Jordan, 5 Ohio, 295; 24 Am. Dec. 281; Conkling *v.* Carson, 11 Ill. 503; Graves *v.* Roy, 13 La. 454; 33 Am. Dec. 568; Miller *v.* Conklin, 17 Ga. 430; Henderson *v.* Bliss, 8 Ind. 100; Butler *v.* Jaffray, 12 Ind. 504; Gimell *v.* Adams, 11 Humph. 283; Wilde *v.* Rawlins, 1 Head, 34; Wilson's Accounts, 4 Pa. St. 430; 45 Am. Dec. 701.

[2] Todd *v.* Bucknam, 11 Me. 41; Borden *v.* Sumner, 4 Pick. 265; 16 Am. Dec. 338; Nostrand *v.* Atwood, 19 Pick. 281; Halsey *v.* Whitney, 4 Mason, 406; Lippincott *v.* Barker, 2 Binn. 174; 4 Am. Dec. 433; Livingston *v.* Bell, 3 Watts, 198; Bayne *v.* Wylie, 10 Watts, 309; Skipwith *v.* Cunningham, 8 Leigh, 271; 31 Am. Dec. 642; Nicolon *v.* Douglas, 2 Hill Ch. 443; 30 Am. Dec. 368; Le Prince *v.* Guillemot, 1 Rich. Eq. 187; Brashear *v.* West, 7 Pet. 608; Pearpoint *v.* Graham, 4 Wash. C. C. 232; Lea's Appeal, 9 Pa. St. 504; Hall *v.* Denison, 17 Vt. 310; Spencer *v.* Jackson, 2 R. I. 35; Gordon *v.* Cannon, 18 Gratt. 387.

evidence of fraud. Among the well-established disqualifications of assignees are "non-residence,[1] blindness,[2] want of learning,[3] conflicting interests,[4] and insolvency."[5]

§ 147. Necessity of Change of Possession Accompanying Transfer of Title.—In many of the states a sheriff may levy upon personal property under an execution against a vendor thereof, if he finds such property in the possession of such vendor, unless there has first been an open and notorious delivery to the vendee, and after such delivery and notoriety, the property has, in good faith, been returned to the custody of the vendor. The statute of 13 Elizabeth, c. 5, declared that every feoffment, grant, alienation, conveyance of any lands, tenements, hereditaments, goods, and chattels, and every bond, suit, judgment, and execution made to delay, hinder, or defraud creditors, shall, as against the person delayed or defrauded, be utterly void. This statute does not purport to modify the rules nor the effect of evidence; nor does it declare that, from the existence of any particular fact, an intent to hinder, delay, or defraud creditors shall be conclusively presumed. But in the forty-fourth year of the reign of Elizabeth, an information against Twyne, for making and publishing a fraudulent gift of goods, was heard in the star-chamber. One Pierce, being possessed of goods and chattels, made in secret

[1] Cram *v.* Mitchell, 1 Sand. Ch. 251; Cox *v.* Platt, 32 Barb. 126; 19 How. Pr. 121.

[2] Cram *v.* Mitchell, 1 Sand. Ch. 251.

[3] Cram *v.* Mitchell, 1 Sand. Ch. 251; Guerin *v.* Hunt, 6 Minn. 375.

[4] Hays *v.* Doane, 3 Stock. 84.

[5] Angell *v.* Rosenburg, 12 Mich. 241; Browning *v.* Hart, 6 Barb. 91; Reed *v.* Emery, 8 Paige, 417; 35 Am. Dec. 720; Connah *v.* Sedgwick, 1 Barb. 211; Currie *v.* Hart, 3 Sand. Ch. 356.

a general deed of gift of all his goods and chattels to Twyne, in consideration of the release of antecedent indebtedness. Pierce, however, continued in possession, treating the property in all respects as though it were his own. C., another creditor of Pierce, took out a *fieri facias*, and was proceeding to levy, when he and the sheriff were forcibly resisted by Twyne, who claimed the goods under his gift from Pierce, "and whether this gift, or the whole matter, was fraudulent and of no effect, by the said act of 13 Elizabeth, or not, was the question. And it was resolved by Sir Thomas Egerton, lord-keeper of the great seal, and by the chief justices Popham and Anderson, and the whole court of star-chamber, that this gift was fraudulent within the statute of 13 Elizabeth. And in this case divers points were resolved:—

"1. That this gift had the signs and marks of fraud, because the gift is general, without exception, of his apparel, or anything of necessity; for it is commonly said, *quod dolosus versatur in generalibus.*

"2. He continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

"3. It was made in secret, *et dona clandestina sunt semper suspiciosa.*

"4. It was made pending the writ.

"5. Here was a trust between the parties; for the donor possessed all, and used them as his proper goods, and fraud is always appareled and clad with a trust, and trust is the cover of fraud.

"6. The deed contains that the gift was made honestly, truly, and *bona fide; et clausulæ inconsuet semper inducunt suspicionem.*

"Secondly, it was resolved that, notwithstanding here was a true debt to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Elizabeth, by which it was provided that said act shall not extend to any estate or interest in the lands, etc., goods, or chattels, made on good consideration, and *bona fide;* for no gift shall be deemed to be *bona fide* within said proviso which is accompanied with any trust. As, if a man be indebted to five several persons, in several sums of twenty pounds, and hath goods of the value of twenty pounds, and makes a gift of all the goods to one of them, in satisfaction of the debt, but there is a trust between them, that the donee shall deal favorably with him in regard to his poor estate, either to permit the donor, or some other for him or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called *bona fide* within said proviso; for the proviso saith, on a good consideration and *bona fide;* so a good consideration does not suffice if it be not also *bona fide.* And therefore, reader, when any gift shall be to you, in satisfaction of a debt, by one who is indebted to others also: first, let it be made in a public manner and before the neighbors, and not in private, for secrecy is a mark of fraud; second, let the goods and chattels be appraised, by good people, to the very value, and take a gift in particular in satisfaction of your debt; third, immediately after the gift, take possession of them, for continuation of possession in the donor is a sign of trust." [1]

In this case, the continuance of the vendor's possession was certainly one of the most material of the

[1] Twyne's Case, 3 Coke, 80; 1 Smith's Lead. Cas. 1.

grounds upon which the court reached the conclusion that the sale was fraudulent, and therefore void as against other creditors. It does not, however, appear clearly that this ground alone could have produced the same conviction as when aided by the other grounds. Possession was here characterized as a sign of fraud; but it was not asserted to be an indubitable sign. Whether justifiably or not, Twyne's Case came to be regarded as authority for the doctrine, that, when an absolute sale has been made, the continuance of the vendor in possession of the goods sold is fraudulent *per se*, rendering the sale void as to creditors, and the property liable to seizure and sale under execution against the vendor. This doctrine received the support of some subsequent English adjudications;[1] but in that country, it was afterward clearly displaced by the other doctrine, that "the question of fraud or no fraud is one for the consideration of the jury"; that the continuance of the vendor in possession of the property sold is to be treated as a very material fact in such consideration, but not as requiring a verdict of fraud where the jury is satisfied that the transaction was *bona fide*, and without any intent to hinder, delay, or defraud.[2] But by the act of 17 and 18 Victoria, c. 36, "for preventing frauds upon creditors by secret bills of

[1] Edwards *v.* Harben, 2 Term Rep. 587; Reed *v.* Blades, 5 Taunt. 212; Paget *v.* Perchard, 1 Esp. 205; Wordall *v.* Smith, 1 Camp. 332; Shears *v.* Rogers, 3 Barn. & Adol. 363.

[2] Martindale *v.* Booth, 3 Barn. & Adol. 498; Carr *v.* Burdiss, 5 Tyrw. 316; 1 Cromp. M. & R. 782; Latimer *v.* Batson, 4 Barn. & C. 652; 7 Dowl. & R. 105; Kidd *v.* Rawlinson, 2 Bos. & P. 59; 3 Esp. 52; Pennell *v.* Dawson, 18 Com. B. 355; Hale *v.* Met. S. O. Co., 28 L. J. Ch. 777; 7 Week. Rep. 316; 4 Drew. 492; Watkins *v.* Birch, 4 Taunt. 823; Cole *v.* Davies, 1 Ld. Raym. 724; Macdona *v.* Swiney, 8 Irish Ch. L. Rep. 73; Storer *v.* Hunter, 3 Barn. & C. 368; 5 Dowl. & R. 240; Eastwood *v.* Browne, Russ. & M. 312; Hunter *v.* Corbett, 7 U. C. Q. B. 75.

sale of personal chattels," every bill of sale of chattels, whether absolute or conditional, whether subject to or free from trusts, must be filed with a public officer, named in the act, within twenty-one days after the making or giving of such bill of sale, or it will, in favor of creditors, be regarded as void as to all chattels still in possession of the vendor.

§ 148. **Rule as to Change of Possession in Majority of the United States.**—Mr. Parsons, in his work on contracts, says: "There seems now to be a tendency to consider the question of fraud as a question of fact, in relation to which the circumstance of possession is of great weight, though not absolutely conclusive. The question is thus taken from the court, who should infer it from a single fact, and is left to the jury, who may consider all the facts, and determine how far the fact of possession is explained and made consistent with an honest purpose";[1] and he further states, in his footnote, that "although few questions in the law present a greater conflict of authorities than this, we believe that reason, analogy, and the current of a *modern* authority, both English and American, support the principle laid down in the text." While these remarks are substantially correct, the current of the American authority tends in the direction indicated with less force than Mr. Parsons seems to realize. In fact, the current of these authorities, like that of some of our own mightiest rivers, so frequently shifts from one side to the other, and is so obscured by the turbid matter through which it flows, and of which it is a part, that its course can hardly be descried by the most careful observer; and when ascertained, must constantly be

[1] 1 Parsons on Contracts, 4th ed., 442.

verified by new observations. If the American decisions on this subject were to be ranged in opposing lines, it would be found that neither side far outnumbered the other; while probably a majority of the jurists of whom Americans have felt most proud would be found to have indorsed the opinions which are now regarded as deviating from the current of authority. The law as stated by Mr. Parsons in the above quotation prevails in Alabama,[1] Arkansas,[2] and Georgia.[3] In Indiana a different rule was at first laid down in reference to mortgages;[4] but was soon after modified,[5] and was next followed by a case involving the effect of possession retained by a vendor after an absolute sale. We are not sure that we understand the legal principles upheld by this last decision, but we believe that the court intended to hold that fraud was a question of fact for the jury, notwithstanding the want of a change of possession.[6] The matter is now set at rest by a statute, under which a sale, not accompanied by a change of possession, is presumed to be fraudulent, "until it shall be made to appear that the same was made in good faith."[7] In Maine,[8] Massachusetts,[9]

[1] Mayer *v.* Clark, 40 Ala. 259; Upson *v.* Raiford, 29 Ala. 195; Mullard *v.* Hall, 24 Ala. 220; Noble *v.* Coleman, 16 Ala. 77.

[2] Cocke *v.* Chapman, 2 Eng. 197; 44 Am. Dec. 536; Field *v.* Strong, 2 Eng. 269; George *v.* Norris, 23 Ark. 128.

[3] Fleming *v.* Townsend, 6 Ga. 103; 50 Am. Dec. 318; Ector *v.* Townsend, 29 Ga. 443; Collins *v.* Taggart, 51 Ga. 357.

[4] Jordan *v.* Turner, 3 Blackf. 309.

[5] Watson *v.* Williams, 4 Blackf. 26; 28 Am. Dec. 36.

[6] Foley *v.* Knight, 4 Blackf. 420.

[7] Kane *v.* Drake, 27 Ind. 32.

[8] Reed *v.* Jewett, 5 Greenl. 96; Ulmer *v.* Hills, 8 Greenl. 326; Cutter *v.* Copeland, 18 Me. 127; Clark *v.* French, 23 Me. 221; 39 Am. Dec. 618.

[9] Brooks *v.* Powers, 15 Mass. 244; 8 Am. Dec. 99; Mardin *v.* Babcock, 2 Met. 99; Adams *v.* Wheeler, 10 Pick. 199; Matrick *v.* Linfield, 21 Pick. 325; Ingalls *v.* Herrick, 108 Mass. 351; 11 Am. Rep. 360; Briggs *v.* Parkman, 2 Met. 258; 37 Am. Dec. 89.

Michigan,[1] and Mississippi,[2] the rule mentioned by Mr. Parsons is in force. Such is also the case in New Jersey,[3] the case of Chumar *v.* Wood, 1 Halst. 155, which established a contrary doctrine, having been overruled. In Nebraska, the vendee, notwithstanding his want of possession, may, under section 70, chapter 43, of the Revised Statutes, be permitted to show that the sale was made in good faith, and without intent to defraud creditors.[4] New York formerly gave her adherence to the rule of the earlier English cases, maintaining that possession by the vendor, in ordinary circumstances, after an absolute sale, gave rise to an indisputable presumption of fraud; but under the influence of statutory provisions, she now regards such possession as *prima facie* evidence of fraud, liable to rebuttal.[5] North Carolina[6] and Ohio[7] have always maintained the rule finally reached in New York. Tennessee at first denied,[8] but subsequently adopted, the same rule.[9] In Hudnal *v.* Wilder, 4 McCord, 306; 17 Am. Dec. 744, the court said: "A vendor continuing in possession is regarded, as to creditors or subsequent purchasers, as the owner, against the most solemn, unconditional deed to a *bona fide* purchaser not

[1] Jackson *v.* Dean, 1 Doug. 517; Oliver *v.* Eaton, 3 Mich. 114; Moliter *v.* Robinson, 40 Mich. 200.

[2] Comstock *v.* Rayford, 12 Smedes & M. 369.

[3] Sherron *v.* Humphreys, 2 Green, 217; Runnyon *v.* Goshon, 1 Beasl. 86; Miller *v.* Pancoast, 29 N. J. L. 250.

[4] Pyle *v.* Warren, 2 Neb. 241; Robinson *v.* Uhl, 6 Neb. 328.

[5] Bissell *v.* Hopkins, 3 Cow. 166; 15 Am. Dec. 259; Thompson *v.* Blanchard, 4 N. Y. 303; Griswold *v.* Sheldon, 4 N. Y. 580.

[6] Howell *v.* Elliott, 1 Dev. 76; Rea *v.* Alexander, 5 Ired. 644.

[7] Rogers *v.* Dare, Wright, 136; Burbridge *v.* Seely, Wright, 359.

[8] Ragan *v.* Kennedy, Over. 91.

[9] Callen *v.* Thompson, 3 Yerg. 475; 24 Am. Dec. 587; Maney *v.* Killough, 7 Yerg. 440; Wiley *v.* Lashlee, 8 Humph. 717; Richmond *v.* Crudup, Meigs, 581; 33 Am. Dec. 164; Shaddon *v.* Knott, 2 Swan, 58; 58 Am. Dec. 63.

in possession. These are the settled rules of the common law, to which the common sense of the community yields a ready assent, from the obvious tendency to fraud to which a contrary doctrine would lead." Notwithstanding this emphatic language, other cases in the same state fully establish that the possession of a vendor after the sale is no more than *prima facie* evidence of fraud,[1] except when the sale was made in consideration of a prior indebtedness, in which case it is conclusive evidence,[2] unless the retention of possession is under a contract of hiring made in good faith between the vender and vendee.[3] Texas,[4] Wisconsin,[5] and Virginia[6] also support the rule that possession is never conclusive evidence of fraud; though in the last-named state the contrary doctrine was frequently and uniformly upheld for nearly, if not fully, half a century.[7] In Kansas[8] and in Oregon,[9] statutes have been enacted under which sales of personal property, if not accom-

[1] Blake *v.* Jones, 1 Bail. Eq. 141; 21 Am. Dec. 530; Kid *v.* Mitchell, 1 Nott & McC. 234; 9 Am. Dec. 702; Terry *v.* Belcher, 1 Bail. 568; Cox *v.* McBee, 1 Speers, 19; Beck *v.* Massey, 11 Rich. 14; Smith *v.* Henry, 2 Bail. 118.

[2] Smith *v.* Henry, 1 Hill (S. C.), 16; Maples *v.* Maples, Rice Eq. 300; Anderson *v.* Fuller, 1 McMull. Eq. 27; 26 Am. Dec. 290.

[3] Pringle *v.* Rhame, 10 Rich. 72; 67 Am. Dec. 569.

[4] Bryan *v.* Kelton, 1 Tex. 415; Morgan *v.* The Republic, 2 Tex. 279; Mills *v.* Walton, 19 Tex. 271; Van Hook *v.* Walton, 28 Tex. 59; Thornton *v.* Tandy, 39 Tex. 544.

[5] Smith *v.* Welch, 10 Wis. 91; Grant *v.* Lewis, 14 Wis. 487; 80 Am. Dec. 785; Livingston *v.* Littell, 15 Wis. 221; Bullis *v.* Borden, 21 Wis. 136.

[6] Davis *v.* Turner, 4 Gratt. 422; Forkner *v.* Stuart, 6 Gratt. 197.

[7] Clayborn *v.* Hill, 1 Wash. (Va.) 177; 1 Am. Dec. 462; Alexander *v.* Deneal, 2 Munf. 341; Robertson *v.* Ewell, 3 Munf. 1; Glasscock *v.* Batton, 6 Rand. 78; Tavener *v.* Robinson, 2 Rob. (Va.) 280; Thomas *v.* Sosser, 5 Munf. 28; Fitzhugh *v.* Anderson, 2 Hen. & M. 289; Williamson *v.* Farley, Gilmer, 15; Land *v.* Jeffries, 5 Rand. 211; Burchard *v.* Wright, 11 Leigh, 463; Mason *v.* Bond, 9 Leigh, 181; 33 Am. Dec. 243.

[8] Wolfley *v.* Rising, 8 Kan. 391.

[9] Moore *v.* Floyd, Laws and Decisions of Oregon, 1872, p. 320; McCully *v.* Swackhamer, 6 Or. 438.

panied by actual and continued change of possession, are deemed void against purchasers or creditors without notice, until shown to have been made in good faith, and for a sufficient consideration. Before the passage of this statute, a different rule prevailed in the last-named state.[1] Rhode Island seems to have adopted a rule similar to that embraced in the statutes of Kansas and Oregon. The adoption, however, was judicial instead of legislative, the supreme court of the state having accepted as law the views expressed in Parsons on Contracts.[2]

§ 149. **States wherein Want of Change of Possession is per Se Fraudulent.** — We shall now notice the decisions of the American courts which are opposed to the doctrines mentioned in the preceding section. Hamilton *v.* Russell,[3] determined in the supreme court of the United States, is a leading case. Mr. Chief Justice Marshall delivered the opinion of the court, as follows: "On the 4th of January, 1800, Robert Hamilton made to Thomas Hamilton an absolute bill of sale for a slave in the bill mentioned, which, on the 14th of April, 1801, was acknowledged and recorded in the court of the county in which he resided. The slave continued in possession of the vendor; and some short time after the bill of sale was recorded, an execution on a judgment obtained against the vendor was levied on the slave, and on some other personal property, also in the possession of the vendor. In July, 1801, Thomas Hamilton, the *vendee*, brought trespass against the defendant Russell, by whose execution and by whose

[1] Monroe *v.* Hussey, 1 Or. 188; 75 Am. Dec. 552.
[2] Anthony *v.* Wheatons, 7 R. I. 490.
[3] 1 Cranch, 309.

direction the property had been seized; and at the trial, the counsel for the defendant moved the court to instruct the jury that if the slave George remained in the possession of the vendor by the consent and permission of the vendee, and if by such consent and permission the vendor continued to exercise acts of ownership over him, the vendee could not under such circumstances protect such slave from the execution of the defendant. The court gave the instruction required, to which a bill of exceptions was taken. The act of assembly which governs the case appears, as far as respects fraudulent conveyances, to be intended to be co-extensive with the acts of 13 and 27 Elizabeth, and those acts are considered as only declaratory of the principles of the common law. The decisions of the English judges, therefore, apply to this case.

"In some cases a sale of a chattel, unaccompanied by the delivery of possession, appears to have been considered as an evidence or a badge of fraud, to be submitted to the jury, under direction of the court; and not as constituting in itself, in point of law, an actual fraud which rendered the transaction as to creditors entirely void. Modern decisions have taken this question up upon principle, and have determined that an unconditional sale, where the possession does not accompany and follow the deed, is, with respect to creditors, on the sound construction of the statute of Elizabeth, a fraud, and should be so determined by the court. The distinction they have taken is between a deed purporting on its face to be absolute, so that the separation of the possession from the title is incompatible with the deed itself, and a deed made upon condition which does not entitle the vendor to the

immediate possession. The case of Edwards *v.* Harbin, Executor of Tempest Mercer, 2 Term Rep. 587, turns on this distinction, and is a very strong case.

"William Tempest Mercer, on the 27th of March, 1786, offered to the defendant, Harbin, a bill of sale of sundry chattels as security for a debt due by Mercer to Harbin. This Harbin refused to take, unless he should be permitted, at the expiration of fourteen days, if the debt should remain unpaid, to take possession of the goods, and sell them in satisfaction of the debt, the surplus money to be returned to Mercer. To this Mercer agreed, and a bill of sale, purporting on the face of it to be absolute, was executed, and a corkscrew delivered in the name of the whole. Mercer died within fourteen days, and immediately after their expiration, Harbin took possession of the goods specified in the bill of sale, and sold them. A suit was then brought against him by Edwards, who was also a creditor of Mercer, charging Harbin as executor in his own wrong; and the question was, whether this bill of sale was fraudulent and void, as being on its face absolute, and being unaccompanied by the delivery of possession. It was determined to be fraudulent; and in that case, it is said that all the judges of England had been consulted on a motion for a new trial in the case of Bamford *v.* Baron, and were unanimously of opinion that 'unless possession accompanies and follows the deed, it is fraudulent and void'; that is, unless the possession remain with the person shown by the deed to be entitled to it, such deed is void as to creditors within the statutes. This principle is said by Judge Buller to have been long settled, and never to have been seriously questioned. He states it to have been

established by Lord Coke, in 2 Bulstrode, so far as to declare that an absolute conveyance or gift of a lease for years, unattended with possession, was fraudulent. 'But if the deed or conveyance be conditional, then the vendor's continuing in possession does not avoid it, because, by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition.' 'And that case,' continues Judge Buller, 'makes the distinction between deeds or bills of sale which are to take place immediately and those which are to take place at some future time. For in the latter case, the possession continuing with the vendor till such future time, or till that condition be performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed. That case has been universally followed by all the cases since.' 'This,' continues the judge, 'has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance, *per se*, as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that if there is nothing but the absolute conveyance, without the possession, that in point of law is fraudulent.'

"This court is of the same opinion. We think the intent of the statute is best promoted by that construction; and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest while his property is protected from creditors, will be most effectually prevented by declaring that an absolute bill of sale is itself a fraud, unless possession accompanies and follows the deed." The principles thus announced

and adopted have been reaffirmed in many cases in the federal courts.[1] The general rule, that an absolute sale not accompanied and followed by possession by the vendee of the chattels sold is *per se* fraudulent, now prevails in several of the states. In some of them it is subject to the exception stated in Hamilton *v.* Russell, in favor of conditional sales, but in others this exception is not recognized. In another section we shall refer to conditional sales. In the present section we shall proceed to show in what states the rule of Hamilton *v.* Russell is accepted and enforced in connection with absolute sales. In California all doubts were avoided by clearly incorporating this rule in the statute.[2] In Connecticut, possession by the vendor has always been regarded as conclusive evidence of fraud.[3] In Delaware the statute provides that in a bill of sale of chattels, the title shall not pass except as against the vendor, unless possession be delivered to the vendee "as soon as conveniently may be" after the sale. Under this act sales without a change of possession are, as against creditors, void.[4] In Florida and Illinois the courts have coincided with the views expressed in Hamilton *v.* Russell.[5] In Iowa a creditor

[1] Travers *v.* Ramsay, 3 Cranch C. C. 354; Moore *v.* Ringgold, 3 Cranch C. C. 434; Hamilton *v.* Franklin, 4 Cranch C. C. 729; Meeker *v.* Wilson, 1 Gall. 419; Phettiplace *v.* Sayles, 4 Mason, 312; D'Wolf *v.* Harris, 4 Mason, 515; Merrill *v.* Dawson, Hemp. 563; Comly *v.* Fisher, Taney, 216; Allen *v.* Massey, 2 Abb. 60. But see Warner *v.* Norton, 20 How. 448.

[2] Whitney *v.* Stark, 8 Cal. 514; 68 Am. Dec. 360; Hodgkins *v.* Hook, 23 Cal. 581; Chenery *v.* Palmer, 6 Cal. 119; 65 Am. Dec. 493; Stevens *v.* Irwin, 15 Cal. 503; 76 Am. Dec. 500.

[3] Patten *v.* Smith, 5 Conn. 196; Swift *v.* Thompson, 9 Conn. 63; 21 Am. Dec. 718; Webster *v.* Peck, 31 Conn. 495; Gaylor *v.* Harding, 37 Conn. 508; Hatstat *v.* Blakeslee, 41 Conn. 301; Calkins *v.* Lockwood, 17 Conn. 154; 42 Am. Dec. 729; Crouch *v.* Carrier, 16 Conn. 505; 41 Am. Dec. 156.

[4] Bowman *v.* Herring, 4 Harr. (Del.) 458.

[5] Gibson *v.* Love, 4 Fla. 217; Sanders *v.* Pepoon, 4 Fla. 465; Thornton *v.* Davenport, 1 Scam. 296; 19 Am. Dec. 358; Rhines *v.* Phelps, 3 Gilm. 455;

may take on execution property still in possession of the vendor, unless he has actual notice of the sale, or constructive notice given by recording the bill of sale as required by statute.[1] The decisions made in Kentucky are so cited by Mr. Parsons, in his work on contracts, as to indicate that they were conflicting, and that a considerable portion of them supported the doctrine that the retention of a chattel by the vendor, after its absolute sale, is only evidence of fraud. Upon examination, the decisions in that state will be found to affirm, in the most unequivocal terms, that an absolute sale of personal property, unless followed by the delivery of possession to the vendee, is *per se* fraudulent and void, and cannot be aided by proof showing that the transaction was in fact in good faith and of the most meritorious nature.[2] Nor can this rule be dispensed with because the vendor and vendee live in the same house,[3] nor because the execution creditor's debt accrued subsequently to the sale.[4] But where the sale is not absolute, and the title and right of possession are not to be divested, except on the performance of subsequent acts, the retention of possession by the vendor is not *per se* fraudulent, because

Thompson *v.* Yeck, 21 Ill. 73; Dexter *v.* Parkins, 22 Ill. 143; Ketchum *v.* Watson, 24 Ill. 591; Corgan *v.* Frew, 39 Ill. 31; 89 Am. Dec. 286; Allen *v.* Carr, 85 Ill. 389; Ticknor *v.* McClelland, 84 Ill. 74.

[1] Miller *v.* Bryan, 3 Clarke, 58; Courtright *v.* Leonard, 11 Iowa, 32; Day *v.* Griffith, 15 Iowa, 104; Prather *v.* Parker, 24 Iowa, 26.

[2] Baylor *v.* Smither's Heirs, 1 Litt. 105; Goldsbury *v.* May, 1 Litt. 256; Daniel *v.* Holand, 4 J. J. Marsh. 18; Brunnel *v.* Stockton, 3 Dana, 134; Anthony *v.* Wade, 1 Bush, 110; Miles *v.* Edelen, 1 Duvall, 270; Allen *v.* Johnson, 4 J. J. Marsh. 235; Dale *v.* Arnold, 2 Bibb, 605; Stevens *v.* Barnett, 7 Dana, 257; Humiley *v.* Webb, 3 J. J. Marsh. 643; 20 Am. Dec. 189; Waller *v.* Todd, 3 Dana, 503; 28 Am. Dec. 91.

[3] Waller *v.* Cralle, 8 B. Mon. 11.

[4] Woodrow *v.* Davis, 2 B. Mon. 298.

not inconsistent with the contract.[1] In Wash *v.* Medley, 1 Dana, 269, a deed of slaves was made by one member of a family to another, but was succeeded by no visible change in possession. The court held this not fraudulent *per se*, because the family lived together. In this respect this decision is in effect overruled by the subsequent cases of Waller *v.* Cralle, 8 B. Mon. 11, and Jarvis *v.* Davis, 14 B. Mon. 529, 61 Am. Dec. 166. In Louisiana the retention of possession by the vendor is conclusive evidence of fraud, and the goods may be taken under execution against him.[2] The same rules which we have stated as prevailing in Iowa are equally applicable to sales of chattels in Maryland.[3] Missouri, at an early day, was on this subject in full accord with the decisions of the federal judiciary.[4] Subsequently this state by statute adopted a different rule;[5] but still later, by chapter 107, section 10, of statutes of 1866, the legislature declared all sales of personal property void as to creditors, unless possession was taken within a reasonable time. The statute of Nevada and the decisions made under it are in consonance with the statute and decisions in California.[6] "In New Hampshire the principle appears to be nearly the same as in the federal courts, though declared in a form somewhat different; in fact, instead of the *rule* of the federal

[1] Baylor *v.* Smither's Heirs, 1 Litt. 105; Hundley *v.* Webb, 3 J. J. Marsh. 643; 20 Am. Dec. 189.

[2] Garritson *v.* Creditors, 7 La. 551; Jorda *v.* Lewis, 1 La. Ann. 59; Zacharie *v.* Rich, 14 La. Ann. 433; Lassiter *v.* Bussy, 14 La. Ann. 699; Civil Code, secs. 1916, 1917.

[3] Bruce *v.* Smith, 3 Har. & J. 499; Hambleton *v.* Hayward, 4 Har. & J. 443; Hudson *v.* Warner, 2 Har. & G. 416.

[4] Rocheblave *v.* Potter, 1 Mo. 561; 14 Am. Dec. 305; Wallace *v.* Foster, 2 Mo. 231; Sibley *v.* Hood, 3 Mo. 390.

[5] State *v.* Evans, 39 Mo. 150.

[6] Doack *v.* Brubaker, 1 Nev. 218; Lawrence *v.* Burnham, 4 Nev. 361.

courts being established, the *principle* and *reason* on which the rule is based are used as guides."[1]

Hence, while the courts of this state have hesitated to declare that the retention of possession by the vendor is conclusive evidence of fraud, they have at the same time held it conclusive evidence of a secret trust unless explained. What explanation might suffice to overcome the presumptive evidence of fraud, they have nowhere clearly indicated. It appears, however, that proof of the actual good faith of the transaction will not accomplish this purpose, "but a satisfactory reason must be shown for allowing the vendor to retain the possession of the goods, else it will be presumed that it was intended he should have the use of them. What would be a sufficient explanation of the possession, as a general principle, has not been determined in this state."[2] The early cases in New York have, through the construction given to a subsequent statute, ceased to control the law of that state; but they will be alluded to here for the purpose of showing the interpretation they gave to the statute of 13 Elizabeth while it was still in force. In the case of Sturtevant *v.* Ballard,[3] decided in 1812, Kent, chief justice, delivered the opinion of the court, saying: "The facts lie in a narrow compass. *Mecker*, on the 2d of *August*, 1810, obtained a judgment against *Holt*. On the 29th of *August*, *Holt* sold his goods and chattels (being a quantity of blacksmith's tools) to the plaintiffs, partly for

[1] Smith's Lead. Cas. 63. See Haven *v.* Low, 2 N. H. 13; 9 Am. Dec. 25; Coburn *v.* Pickering, 3 N. H. 415; 14 Am. Dec. 375; Trask *v.* Bowers, 4 N. H. 309; Clark *v.* Morse, 10 N. H. 239; Kendall *v.* Fitts, 2 Fost. 1; Paul *v.* Crooker, 8 N. H. 288; Parker *v.* Patton, 4 N. H. 176.

[2] Putnam *v.* Osgood, 52 N. H. 148; Coolidge *v.* Melvin, 42 N. H. 510; French *v.* Hall, 9 N. H. 137; 32 Am. Dec. 34.

[3] 9 Johns. 337; 6 Am. Dec. 281.

cash and partly to satisfy a debt due to them. The articles were specified in a bill of sale, and the bill contained an agreement that *Holt* was to retain the use and occupation of the goods for the term of three months. Just before the expiration of the term, and while the goods continued in the possession of *Holt*, they were seized by the defendant, as sheriff, by virtue of an execution issued on the judgment in favor of *Mecker*. The question arising upon this case is, whether the sale to the plaintiffs under the above circumstances was valid in law as against the judgment creditor.

"As between the parties to it, a sale of chattels unaccompanied by possession may be valid. It may even be valid as against a creditor who was knowing and assenting to the sale. It was so ruled in Steele *v.* Brown and Pary, 1 Taunt. 381; but this is not such a case. Here was a judgment creditor affected by the sale.

"The statute of 13 Elizabeth, and which has been re-enacted with us (Sess. 10, c. 44, sec. 2), makes void all grants and alienations of goods and chattels made with intent to delay, hinder, and defraud creditors. This statute, as it has frequently been observed by the *English* judges, was declaratory of the common law; and the true principles of law in relation to such sales are to be found in a series of judicial decisions, both before and since the statute of *Elizabeth;* the great point is, whether the fact of permitting the vendor to retain possession of the goods did not render this sale fraudulent in law, notwithstanding such permission was inserted in the deed as a condition of the contract. If there had been no such insertion, but the sale had been absolute on the face of it, and possession had not im-

mediately accompanied and followed the sale, it would have been fraudulent as against creditors; and the fraud in such case would have been an inference or conclusion of law, which the court would have been bound to pronounce. This is a well-settled principle in the *English* courts. It is to be met with in a variety of cases, and especially in that of Edwards *v.* Harben, 2 Term Rep. 587; and it has been recognized and adopted by some of the most respectable tribunals in this country. But it by no means follows that such a sale, with such an agreement attached to it and appearing on the face of the deed, is necessarily valid. There must be some sufficient motive, and of which the court is to judge, for the non-delivery of the goods, or the law will still presume the sale to have been made with a view to 'delay, hinder, or defraud creditors.' Delivery of possession is so much of the essence of a sale of chattels that an agreement to permit the vendor to keep possession is an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation. This was a voluntary sale made by the debtor soon after the judgment against him, and made to a creditor, partly for cash and partly to satisfy an old debt; and why was the sale made three months before possession was to be delivered, if it was not to defeat the intermediate execution of the judgment creditor? There is no assignable reason appearing for the arrangement, and the time of delivery might have been postponed for three years as well as for three months. The instances in which a sale of chattels, unaccompanied with delivery, has been held valid, are all founded upon special reasons, which have no application to this case.

"The general principle involved in this discussion is extremely important to the commercial interests of the community, and to confidence and integrity in dealing. The law, in every period of its history, has spoken a uniform language, and has always looked with great jealousy upon a sale or appropriation of goods without parting with the possession, because it forms so easy and so fruitful a source of deception. Lord *Kenyon* said he lamented that it was ever decided that the possession and apparent ownership of personal property might be in one person, and the title in another, and he thought it would have been better for the public if the possession of such property (except in the case of factors) were to carry the title. The value of the principle, and its necessity, were perceived and felt as early as the age of *Glanville;* for he observed, when speaking of pledges, that 'when a thing is agreed to be placed in pledge, by a debtor to a creditor, *and delivery does not follow*, it becomes a question what shall be done for the creditor in that case, *since the same thing may be pledged to other creditors, both before and after.* And it is to be observed that the court will not regard such private arrangements, nor intermeddle therewith, or *sustain a suit thereon.*' This was acknowledging the mischief, and admitting the remedy, under the same enlightened view of public policy and private interest which some of the decisions of Lord *Mansfield* announce at the period of the full growth and maturity of the commercial system. There is also a case in the *Book of Assises*, f. 101, pl. 72, 22 Edw. III., which is much to the present purpose. An action of trespass was brought, for wrongfully taking some castle, and the jury found that the defendant had received from the

bailiff the beasts, on an execution which had issued for him against one B, and that the beasts belonged to B at the time of the judgment, and that he afterwards, by deed, gave them to the plaintiff, to delay the execution; and the jury, being required by the court to say *who took the profits of the same beasts in the mean time*, they answered that the *donor did*. Then *Thorpe*, J., declared: 'I conceive the gift to be of no value, and I hold that he to whom such gift was made was only keeper of the beasts to the use of the other, because there was fraud, etc., *for otherwise a man could never have execution of chattels.*'

"We may, therefore, safely conclude that a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases and for special reasons, to be shown to and approved of by the court, fraudulent and void as against creditors. This is clearly not one of those cases, and the defendant is therefore entitled to judgment."

The doctrines thus announced in the case of Sturtevant *v.* Ballard were reaffirmed on several subsequent occasions in the same state; and there is no doubt that its courts were fully committed to the rules of decision set forth in Edwards *v.* Harben and Hamilton *v.* Russell.[1] In Pennsylvania[2] and in Ver-

[1] See Jennings *v.* Carter, 2 Wend. 446; 20 Am. Dec. 635; Diver *v.* McLaughlin, 2 Wend. 596; 20 Am. Dec. 655; Archer *v.* Hubbell, 4 Wend. 514; Doane *v.* Eddy, 16 Wend. 522; Stevens *v.* Fisher, 19 Wend. 181.

[2] Cunningham *v.* Neville, 10 Serg. & R. 201; Clow *v.* Woods, 5 Serg. & R. 275; 9 Am. Dec. 346; Brady *v.* Haines, 18 Pa. St. 113; Born *v.* Shaw, 29 Pa. St. 288; 72 Am. Dec. 633; Milne *v.* Henry, 40 Pa. St. 352; Dewart *v.* Clement, 48 Pa. St. 413; Davis *v.* Bigler, 1 Am. Rep. 393; 62 Pa. St. 242; Dick *v.* Lindsay, 2 Grant Cas. 431; Gorman *v.* Cooper, 29 Leg. Int. 372; Streeper *v.* Eckart, 2 Whart. 302; 30 Am. Dec. 258; Forsyth *v.* Matthews, 14 Pa. 100; 53 Am. Dec. 522.

mont,[1] the rule that the retention of possession by the vendor after an absolute sale leads to a legal and conclusive presumption of fraud has always been sustained.

§ 150. Recapitulation of Authorities in Reference to Effect of Want of Change of Possession.—From a recapitulation of the authorities cited in the last two sections, it will be seen that in the states of Alabama, Arkansas, Georgia, Indiana, Kansas, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin, the question of fraud or no fraud is clearly one for the decision of the jury. Of these states, Indiana, Kansas, Nebraska, New York, Oregon, and Wisconsin have settled the question by statute. But in saying that the question of fraud or no fraud is one for the jury, we must not be understood as implying that the jury are at liberty to disregard the fact that the vendor retains possession after his sale. If the sale be absolute in terms, or is such that the continuing possession of the vendor seems to be inconsistent with the alleged transfer of title, then such possession is everywhere regarded as a badge of fraud. This badge is not a mere suspicious circumstance: it is *prima facie* evidence. Standing alone, it is conclusive against the vendee. He cannot prevail against a subsequent purchaser, nor against a creditor of the vendor, until he has rebutted the presumption of fraud arising from his want of possession. The *onus* of proof is upon him. He must show clearly, to the satisfaction

[1] Moore *v.* Kelley, 5 Vt. 34; 26 Am. Dec. 283; Farnsworth *v.* Shepard, 6 Vt. 521; Hart *v.* F. & M. Bank, 33 Vt. 252; Sleeper *v.* Pollard, 28 Vt. 700; 67 Am. Dec. 741; Batchelder *v.* Carter, 2 Vt. 168; 19 Am. Dec. 707.

of the jury, that his purchase was made in good faith, and without any intention to delay or defraud creditors. What evidence, on the part of the vendee, may operate to repel the presumption arising from his want of possession cannot be stated with any degree of certainty. As the question is one of fact, evidence sufficient to convince one jury of the good faith of the transaction might produce no such effect on the minds of another jury. But if the vendee does not produce some evidence tending to explain why he did not assume possession, and to show the good faith of his alleged purchase, the presumption against him becomes conclusive.[1] The court, in such case, should instruct the jury to find in favor of the creditor of the vendor, and should set aside its verdict, and grant a new trial, in case it disregards such instruction. In New Hampshire, while the general rule seems to prevail that possession by the vendor is not conclusive against the vendee, yet such strong proof is required to rebut the presumption arising from such possession, that, in its practical effect, the law of that state approaches more nearly to the law of Hamilton *v.* Russell than to the opposite line of decisions. In the federal courts, and in the courts of California, Connecticut, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maryland, Missouri, Nevada, Pennsylvania, and Vermont, the possession, continuing in the vendor, is, under

[1] Ball *v.* Loomis, 29 N. Y. 412; Mauldin *v.* Mitchell, 14 Ala. 814; Bank of Mobile *v.* Borland, 5 Ala. 539; Beers *v.* Dawson, 8 Ga. 556; Peck *v.* Land, 2 Kelly, 1; 46 Am. Dec. 368; Kane *v.* Drake, 29 Ind. 30; Nutter *v.* Harris, 9 Ind. 88; Keller *v.* Blanchard, 19 La. Ann. 53; Knykendall *v.* McDonald, 15 Mo. 416; 57 Am. Dec. 212; Hartman *v.* Vogel, 40 Mo. 570; Kendall *v.* Fitts, 2 Fost. 1; Grubbs *v.* Greer, 5 Cold. 160; McQuinnay *v.* Hitchcock, 8 Tex. 33; Curd *v.* Miller, 7 Gratt. 185; Brooks *v.* Powers, 15 Mass. 244; 8 Am. Dec. 99; Ulmer *v.* Hills, 8 Greenl. 326; Young *v.* Pate, 4 Yerg. 164; Fleming *v.* Townsend, 6 Ga. 103; 50 Am. Dec. 318.

ordinary circumstances, treated as fraudulent *per se.* For the guidance of judgment creditors in the states last named, we shall endeavor to show, — 1. In what cases a change of possession may be omitted; 2. What constitutes a sufficient change of possession, where such change cannot with safety be omitted; 3. When the change must commence; and 4. How long it must continue.

§ 151. **Absolute Transfers, in Which No Change of Possession need be Made.** — The cases in which the interests of a vendee are not placed in jeopardy by his failure to assume possession of the chattels purchased may be divided into three classes. In the first class are the cases in which the necessity for a change of possession is removed by the *nature of the transfer.* The second class embraces cases in which the change of possession may be dispensed with, owing to the *character of the property.* While in the third class are those cases in which the nature of the transfer and the character of the property would both, in ordinary circumstances, require a change of possession; but something in the *situation of the property,* at the time of the sale, renders a change in its possession unnecessary or impossible. The cases of the first class may again be subdivided into absolute transfers, and transfers which are not so absolute in their nature that the continued possession of the vendor is inconsistent with the terms and purposes of the transfer. In the states in which the retention of possession by the vendor produces a conclusive presumption of fraud, perhaps the only well-established exceptions, in cases of absolute sales, arising from the *nature of the transfer,* are in cases of

marriage settlements,[1] and cases where the property of a defendant is sold under an execution or other legal process against him. "The notoriety of a public sale, which, by giving notice to the public that the title has passed out of the former owner, and thereby prevents him from obtaining a delusive credit, from the apparent ownership of property which belongs to another, creates a distinction between public and private sales, where there is no change of possession, as to the rights of creditors."[2] "Retention of possession by the former owner of a chattel sold at sheriff's sale is not an index of fraud, because the sale is not the act of the person retaining, but of the law; and because a judicial sale, being conducted by the sworn officer of the court, shall be deemed fair till it is proved otherwise. It may, like a judgment, be shown to be collusive and fraudulent in fact; but the presumption of the law is favorable to it in the first instance. A chattel thus purchased, then, may safely be left in the possession of the former owner on any contract of bailment that the law allows in any other case."[3] It seems to be almost universally conceded that when a stranger to the writ purchases and pays for property at an execution sale, the fact that he does not choose to remove it from the control of the defendant neither renders the sale fraudulent *per se*, nor, unless connected with other circumstances of a suspicious character, creates any presumption against its good faith.[4] But when the plaintiff in execution

[1] Larkin *v.* McMullin, 49 Pa. St. 29; Charlton *v.* Gardner, 11 Leigh, 281; Cadogan *v.* Kennett, Cowp. 432; Arundell *v.* Phipps, 10 Ves. 139.

[2] Simerson *v.* Bank, 12 Ala. 213.

[3] Myers *v.* Harvey, 2 Pen. & W. 481; 23 Am. Dec. 60; Bisbing *v.* Third Nat. Bank, 93 Pa. St. 79; 39 Am. Rep. 726.

[4] Kid *v.* Rawlinson, 2 Bos. & P. 59; 3 Esp. 52; Abney *v.* Kingsland, 10 Ala. 355; 44 Am. Dec. 491; Latimer *v.* Batson, 7 Dowl. & R. 106; Anderson *v.*

becomes the purchaser, some of the American cases have considered that the necessity for a change of possession is as imperative as though the sale were voluntary;[1] but in England the question has been determined otherwise.[2] We apprehend that there can be no well-founded distinction between a purchase by the plaintiff and a purchase by a stranger to the execution, unless the circumstances of the sale, taken in connection with the continued possession of the defendant, produce the conviction that the writ was employed in bad faith, for the purpose of withdrawing the property from the reach of other creditors, without affecting the defendant's beneficial interest therein.

There is some doubt as to the true grounds upon which the exception in favor of sales under execution rests. Some contend that the notoriety of the sale furnishes a sufficient protection from fraud, and gives ample notice of the change of title. Others insist that the exception is justified by the fact that the sale is involuntary, and is made by the officers of the law. If

Brooks, 11 Ala. 953; Stone *v.* Waggoner, 3 Eng. 204; Perry *v.* Foster, 3 Harr. (Del.) 293; Pennington *v.* Chandler, 5 Harr. (Del.) 394; Greathouse *v.* Brown, 5 T. B. Mon. 280; 17 Am. Dec. 67; Miles *v.* Edelen, 1 Duvall, 270; Walter *v.* Gernant, 13 Pa. St. 515; 53 Am. Dec. 491; Dick *v.* Lindsay, 2 Grant Cas. 431; Poole *v.* Mitchell, 1 Hill (S. C.), 404; Guignard *v.* Aldrich, 10 Rich. Eq. 253; Coleman *v.* Bank of Hamburg, 2 Strob. Eq. 285; 49 Am. Dec. 671; Boardman *v.* Keeler, 1 Aik. 158; 15 Am. Dec. 670; Dick *v.* Cooper, 24 Pa. St. 217; 64 Am. Dec. 652; Canett *v.* Rhame, 9 Rich. 407; 67 Am. Dec. 557; McMichael *v.* McDermott, 17 Pa. St. 353; 55 Am. Dec. 560. The principle also extends to sales under distress for rent. Water *v.* McClellan, 4 Dall. 208. In New York, a purchase by a stranger to the execution was deemed fraudulent, where for more than a year he allowed the defendant to retain possession and deal with the goods as his own. Dickenson *v.* Cook, 17 Johns. 332. But where there is no apparent intent to defraud creditors, the purchaser may, in that state, leave the goods with the defendant. McIntstry *v.* Tanner, 9 Johns. 135.

[1] Williams *v.* Kelsey, 6 Ga. 365; Farrington *v.* Caswell, 15 Johns. 430; Gardenier *v.* Tubbs, 21 Wend. 169. But see Floyd *v.* Goodwin, 8 Yerg. 484; 29 Am. Dec. 132.

[2] Watkins *v.* Birch, 4 Taunt. 823.

the notoriety of the sale furnishes a sufficient reason for this exception, then it would seem that the rule ought to extend to other sales attended with equal publicity. Where debtors make assignments of personal property for the benefit of their creditors, and the assignees thereafter, in pursuance of public notice, sell the property at auction, the purchasers may, according to a decided preponderance of the authorities, safely allow the goods to remain with the assignors.[1] But in Vermont the authority of these cases is denied,[2] and the exception which we are discussing is confined to purchases at sales made under legal process. Hence, where a constable sold property by consent of the defendant, not having legal process in his hands, the supreme court, by Redfield, J., said: "It is at present a well-settled principle of the law of this state that sales of personal chattels, unaccompanied by any visible, substantial change of possession, are inoperative as against the creditors of the vendor. The case of sheriff's sales has been considered an exception from the operation of this rule. It is not now necessary, and could not be useful, to go into the reasons of the exception. The cases upon that subject have followed in the track of Kid *v.* Rawlinson, 2 Bos. & P. 59. The principal reasons there urged in favor of the determination are, that the publicity and character of the sale rebut all inference of fraud. For myself, I think this exception rests more upon the fact that it is a transfer of title by operation of law than upon its notoriety. It is the former rather than the latter

[1] Leonard *v.* Baker, 1 Maule & S. 251; Woodham *v.* Baldock, 3 T. B. Moore, 11; 8 Taunt. 676; Wyatt *v.* Stewart, 34 Ala. 716; Montgomery *v.* Kirksey, 26 Ala. 172; Garland *v.* Chambers, 11 Smedes & M. 337; 49 Am. Dec. 63; Ewing *v.* Cargill, 13 Smedes & M. 79; Jezeph *v.* Ingram, 1 T. B. Moore, 189

[2] Rogers *v.* Vail, 16 Vt. 327.

which distinguishes it from sales by contract of the parties; for if all public sales were to form exceptions to this very salutary rule, it would doubtless cease to have any beneficial operation. Sheriffs' sales, and all sales made by officers of the law, must be held *prima facie* good to transfer the title of the debtor. Now, no law and no practice requires such officer to make any delivery of the property. When he appears to have proceeded as sheriff or other officer, and the sale is *in invitum*, it will be recognized as an exception to the rule. But where he really proceeds by consent of the parties, and in making the sale acts as the agent of the parties, and not as the minister of the law, his proceedings cannot be allowed any greater force than those of any other auctioneer."[1] The fact that sales by auction furnish no exception to the general rule[2] strongly confirms the theory announced by Judge Redfield, and stated in the preceding quotation. "An execution sale may be resorted to for the purpose of hindering, delaying, or defrauding the creditors of the defendant, and when shown to have been resorted to for this purpose, it will be treated as void. The retention of possession by the defendant after such a sale is not in harmony with his changed relation to the property, and has therefore been properly regarded as a suspicious circumstance,—one indicating that the sale may have been made in the interest of the defendant, without desiring to deprive him of any beneficial interest in the property, but rather to assure him of the continuous enjoyment of such interest by withdrawing it beyond the reach of

[1] Kelly v. Hart, 14 Vt. 53; Laughlin v. Ferguson, 6 Dana, 118; Stephens v. Barnett, 7 Dana, 257.

[2] Rankin v. Holloway, 3 Smedes & M. 614; Batchelder v. Carter, 2 Vt. 168; 19 Am. Dec. 707.

more hostile creditors. If in such a case the plaintiff in execution was the purchaser, he must, to maintain his title, show that his judgment was an honest and fair one."[1] The retention of possession by the debtor may undoubtedly be considered, in connection with other circumstances, as tending to show that the sale was fraudulent, and therefore void.[2]

§ 152. Transfers of Title, Made to Secure the Payment of Indebtedness, are, in some of the states, treated differently from ordinary bills of sale. The reason of this difference has been thus explained: "There is evidently an essential difference between the effect of a possession retained by the maker of an absolute bill of sale, and the possession retained by the maker of a mortgage. The object of one is to pass an absolute right of property, and the object of the other is to give a security defeasible upon a particular contingency. The possession in the former case is utterly incompatible with the deed; whereas, in the latter case, there exists no such incompatibility. Whilst, therefore, the possession in the former case may be correctly said to form conclusive and introversible evidence of fraudulent intent, and render the deed *per se* fraudulent, such cannot be admitted to be the effect of the possession in the latter case."[3] This line of reasoning has been frequently followed in other states, and mortgages of personal property sustained, though the possession remained with the mortgagor; and although, perhaps, in some cases, the retention of possession by

[1] Floyd *v.* Goodwin, 8 Yerg. 481; 29 Am. Dec. 130.

[2] Stovall *v.* F. & M. Bank, 8 Smedes & M. 305; 47 Am. Dec. 85.

[3] McGowan *v.* Hoy, 5 Litt. 243; Bucklin *v.* Thompson, 1 J. J. Marsh. 223; Snyder *v.* Hitt, 2 Dana, 294; Clayborn *v.* Hill, 1 Wash. (Va.) 177; 1 Am. Dec. 452; Haven *v.* Low, 2 N. H. 13; 9 Am. Dec. 25; Thornton *v.* Davenport, 1 Scam. 296; 29 Am. Dec. 358; Bampas *v.* Dobson, 7 Humph. 310; 46 Am. Dec. 81.

the mortgagor may be deemed suspicious, yet it will always be regarded in a more favorable light than in the case of an absolute bill of sale ;[1] and this is generally true after as well as before default is made in payment of the debt secured.[2] But in Indiana the mortgagor's continuance in possession after condition broken was held to be *prima facie* evidence of fraud.[3] A conveyance made to trustees, for the benefit of creditors, has also been treated in the same manner as a mortgage, for the object of the transaction is to enable the trustees to appropriate the property to the satisfaction of the debts; and it is not inconsistent with this object that the assignor should continue in possession until arrangements for the final disposition of the property can be consummated.[4] But certainly the temptation to fraudulent mortgages is as great as to fraudulent sales. There is, therefore, great propriety in guarding against such mortgages, and preventing the mortgagor from gaining credit by his apparent ownership of property in which he has little or no beneficial title. In many of the states chattel mortgages are required to be recorded, before the necessity for a change of possession can be removed;[5] while in some others, the

[1] United States *v.* Hooe, 3 Cranch, 73; Magee *v.* Carpenter, 4 Ala. 469; Planters' & M. Bank *v.* Willis, 5 Ala. 770; Dearing *v.* Watkins, 16 Ala. 20; De Wolf *v.* Harris, 4 Mason, 515; Ash *v.* Savage, 5 N. H. 545; Barker *v.* Hall, 13 N. H. 298; Rose *v.* Burgess, 10 Leigh, 186; Martin *v.* Ogden, 41 Ark. 186; Sperry *v.* Etheredge, 63 Iowa, 543; Wilson *v.* Sullivan, 58 N. H. 260.

[2] Head *v.* Ward, 1 J. J. Marsh. 280.

[3] Hankins *v.* Ingols, 4 Blackf. 35.

[4] Ravisies *v.* Alston, 5 Ala. 297; Vernon *v.* Morton, 8 Dana, 247; Christopher *v.* Covington, 2 B. Mon. 357; Hempstead *v.* Johnson, 18 Ark. 123; 65 Am. Dec. 458; Wilson *v.* Russell, 13 Md. 495; 71 Am. Dec. 645.

[5] Griswold *v.* Sheldon, 4 N. Y. 598; Call *v.* Gray, 37 N. H. 428; 75 Am. Dec. 141; Bevans *v.* Bolton, 31 Mo. 437; Rich *v.* Roberts, 50 Me. 395; Langworthy *v.* Little, 12 Cush. 109; Henderson *v.* Morgan, 26 Ill. 431; Weed *v.* Standley, 12 Fla. 166; Rood *v.* Welch, 28 Conn. 157; Matlock *v.* Straughn, 21 Ind. 128; Kuhn *v.* Graves, 9 Iowa, 393; Robinson *v.* Elliott, 7 Chic. L. N. 193.

presumption arising from the continued possession of the mortgagor is precisely the same as in the case of an absolute bill of sale.[1]

§ 152 a. Conditional Sales have also been held not to be of a character which necessarily require a change of possession to relieve them from the imputation of fraud. "If the deed or bill of sale show that an absolute and immediate title has passed, the possession, which is its natural consequence, must follow and accompany it. But if the contract evince only a conditional sale, and the absolute title has not been changed, it is not necessary that there should be a change of possession. But the condition must be in the title, and not simply in the contract; that is, the title must depend on condition; and this must appear in the deed or bill of sale; and the condition must, when it shall so appear, be such as the court may consider reasonable and legal. For the law does not declare that in conditional sales the retention of the possession by the vendor may not be fraudulent; but that, as a general rule, it is not necessarily so. It will, however, be so considered unless the condition be consistent with the

[1] Case *v.* Winship, 4 Blackf. 425; 30 Am. Dec. 664; Rood *v.* Welch, 28 Conn. 157; Ryall *v.* Rolle, 1 Wils. 260; Welch *v.* Beeker, 1 Pen. & W. 57; Jenkins *v.* Eichelberger, 4 Watts, 121; 28 Am. Dec. 691; Clow *v.* Woods, 5 Serg. & R. 275; 9 Am. Dec. 346; Trovillo *v.* Shingles, 10 Watts, 438; Weeks *v.* Wead, 2 Aik. 64; Tobias *v.* Francis, 3 Vt. 425; 23 Am. Dec. 217; Woodward *v.* Gates, 9 Vt. 358. With respect to mortgages deemed fraudulent because they permit the mortgagor to remain in possession and to sell the mortgaged chattels, see *ante*, § 145; Lund *v.* Fletcher, 39 Ark. 325; 43 Am. Rep. 270; Jacobs *v.* Erwin, 9 Or. 52; Texas Bank *v.* Lorenberg, 63 Tex. 506; Lister *v.* Simpson, 38 N. J. Eq. 438; Rome Bank *v.* Haselton, 15 Lea, 216; Gauss *v.* Doyle, 46 Ark. 122; Bullene *v.* Barrett, 87 Mo. 185; Wineburgh *v.* Schaer, 2 Wash. 328; Joseph *v.* Lewis, 58 Miss. 843; Meyer *v.* Evans, 66 Iowa, 179. Mortgage made for a greater sum than is owing to the mortgagee, for the purpose of protecting the property from creditors, is fraudulent and void. Mitchell *v.* Sawyer, 115 Ill. 650.

reason and policy of the rule itself, which defines fraud in law."[1]

§ 153. Character and Situation of Property as Dispensing with Necessity for Change of Possession. — The exceptions to the rule requiring a change of possession to accompany an absolute sale to free it from the imputation of fraud, arising from the *character* and *situation* of the property, will be considered together. They both rest on the same ground, namely, the absurdity of requiring that which is impossible or highly impracticable;[2] and they are both limited by the requirement that such a change of possession as is practicable must not be omitted. Where property, from its character, is such that possession cannot be taken at the time of the sale, the want of a notorious change of possession is not inconsistent with the transaction, and does not render the sale void. Thus if a man sells his growing crop, it must necessarily be left standing in the same field till ready for harvesting. The vendor is not obliged, because he sold his crop, to quit possession of his farm. Growing crops, therefore, form an exception to the rule that there must be a change of possession to render the sale valid,[3] although raised by a tenant, and he continues to reside on the land, with his vendee, after the sale.[4] "The acts that will con-

[1] Hundley *v.* Webb, 3 J. J. Marsh. 644; 20 Am. Dec. 189; Barrow *v.* Paxton, 5 Johns. 258; 4 Am. Dec. 354.

[2] Choses in action, in some states, form an exception to this statement. Their delivery is, in many instances, possible; but its absence has been held not to render the sale fraudulent. Hall *v.* Redding, 13 Cal. 214; Livingston *v.* Littell, 15 Wis. 218. But Woodbridge *v.* Perkins, 3 Day, 364, Currier *v.* Hart, 2 Sand. Ch. 353, and Mead *v.* Phillips, 1 Sand. Ch. 83, sustain a contrary doctrine.

[3] Davis *v.* McFarlane, 37 Cal. 638; Bellows *v.* Wells, 36 Vt. 600; Robbins *v.* Oldham, 1 Duvall, 28; Herron *v.* Fry, 2 Pen. & W. 263.

[4] Vischer *v.* Webster, 13 Cal. 58; Bernal *v.* Hovious, 17 Cal. 541; 79 Am. Dec. 147.

stitute a delivery will vary in the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case. The same acts are not necessary to make a good delivery of a ponderous article, like a block of granite or a stack of hay, as would be required in case of an article of small bulk, as a parcel of bullion. It might properly be required that there should be a manual delivery of a single sack of grain at the moment of its sale; but upon the sale of two thousand sacks, this could not be done without incurring great and unnecessary expense, and departing from the usual course of business." [1]

Hence, where lumber is in piles,[2] or hay in a field,[3] and the purchaser does all that the nature of the property will permit toward at once reducing it to his possession, he will be allowed a reasonable time to remove it, and make the change visible and notorious. But although the property is not capable of manual delivery, the purchaser must not omit to do what he can toward giving notice of his acquisition. The owner of a kiln of unburnt bricks, one hundred and thirty feet long, thirty feet wide, and fifteen feet high, gave a bill of sale thereof, and made a formal delivery. He then continued in possession of the kiln, as was necessary to attend to burning it. He employed the men and bought the wood. The vendee visited the kiln five times while burning, but informed no one of his claim. It was held that the sale was void as against a creditor attaching the property subsequently to the burning of

[1] Lay v. Neville, 25 Cal. 552.

[2] Haynes v. Hunsicker, 26 Pa. St. 58; Morse v. Powers, 17 N. H. 286.

[3] Chaffin v. Doub, 14 Cal. 384; Pacheco v. Hunsacker, 14 Cal. 120; Conway v. Edwards, 6 Nev. 190.

the kiln, and while the bricks were yet too hot to handle.[1] The delivery of a house may be made, symbolically, by giving the vendee the key.[2] When we come to consider the exception arising from the situation of the property, we find that it usually rests on necessity, and that, in general, even a symbolical delivery is not sufficient where an actual delivery is practicable.[3] But where a vessel or other property is at sea,[4] or where property is in custody of an officer of the law,[5] or where logs are floating in a river,[6] a sym-

[1] Woods *v.* Bugbey, 29 Cal. 466.

[2] Vining *v.* Galbreath, 39 Me. 496.

[3] Cunningham *v.* Neville, 10 Serg. & R. 201.

[4] Badlam *v.* Tucker, 1 Pick. 389; 11 Am. Dec. 202; Gardner *v.* Howland, 2 Pick. 599; Dawes *v.* Cope, 4 Binn. 258; Ludwig *v.* Fuller, 17 Me. 166; Lampriere *v.* Pasley, 2 Term Rep. 485; Thuret *v.* Jenkins, 7 Mart. 318; 12 Am. Dec. 508.

[5] Klinch *v.* Kelly, 63 Barb. 622.

[6] Leonard *v.* Davis, 1 Black, 476; Boynton *v.* Veazie, 24 Me. 286; Sanborn *v.* Kittredge, 20 Vt. 632; 50 Am. Dec. 58. In the case of McMarlan *v.* English, 74 Pa. St. 296, it was held that in the case of the sale of the furniture of a large hotel, it was enough for the vendee to assume the direction and control of the property in such an open and notorious manner as usually accompanies an honest transaction. In Straus *v.* Minzesheimer, 78 Ill. 492, the vendor of a large quantity of cigars brought the vendee to the factory, and said to him, "Here are your cigars." He handed to him several boxes, and the vendee paid for the whole, employed the cigar-makers in charge of the factory to stamp them in accordance with the laws of the United States, which require stamping before removal. This was held to be as complete a delivery as the vendor could make, and therefore sufficient. In Morgan *v.* Miller, 62 Cal. 492, the cattle sold were running at large with those of another person, and the vendor had them driven up into a corral, and said to the vendee, "Here are your cows that you bought." The vendee then requested a person to take charge of the cattle for her, which he undertook to do. This was held to be a sufficient delivery. In Schmidt *v.* Nunan, 63 Cal. 371, the vendor sold a quantity of hay on his ranch, to be delivered at a landing on the river. He delivered it there, and it was put on board a schooner chartered by the vendee, when it was attached by the creditors of the vendor. It was held to have been delivered to the vendee, and not liable to attachment. In Tognini *v.* Kyle, 17 Nev. 209; 45 Am. Rep. 442, the vendors executed to the vendees a bill of sale of twelve thousand bushels of charcoal in pits on the vendors' land. The vendees sent a person a few days afterwards to the pits, who marked them with their names. This person remained in charge a few days, and then

bolical delivery will suffice; or if that be impossible, the sale will be valid without it.

In such cases, however, the vendor must not be permitted to continue in the apparent ownership of the property longer than its situation and condition render necessary. So where cattle were roaming at large over the plains, upon a certain range, it was held that the vendee should have a reasonable time after the sale to prepare for a *rodeo*, and to give proper notices thereof, in order to separate the cattle purchased from other stock, and have them properly marked and

requested a neighbor to look after the pits, which he did. This was held to be a sufficient delivery.

In Vermont it is held that logs in a stream, or piled on its banks, especially if partly frozen into the ice, are of such a cumbrous character, and so situated, as to pass, as against creditors, by a bill of sale, without further delivery. Sanborn *v.* Kittredge, 20 Vt. 632; 50 Am. Dec. 58; Hutchins *v.* Gilchrist, 23 Vt. 82; Birge *v.* Edgerton, 28 Vt. 291; Fitch *v.* Burke, 38 Vt. 683; Sterling *v.* Baldwin, 42 Vt. 306; Ross *v.* Draper, 55 Vt. 404; 45 Am. Rep. 621; Kingsley *v.* White, 57 Vt. 565. Ross, J., in delivering the opinion of the court in the case last cited, said: "To hold that such property comes within the operation of the ordinary rule would practically preclude any sale of it which would be valid against attachment by the creditors of the vendor. But in Cobb *v.* Haskell, 14 Me. 303, 31 Am. Dec. 56, where the vendor of lumber lying in different piles in a mill-yard brought the vendee in sight of it, and said, "There is the lumber," and told him to take it away and make the best of it, and the vendee went away and left it as it was, and exercised no ownership over it for two months, it was held not to have been delivered, as against attaching creditors of the vendor.

If a vessel is abroad at the time of its sale, it will be sufficient if it be delivered within a reasonable time after its arrival. Thuret *v.* Jenkins, 7 Mart. (La.) 318; 12 Am. Dec. 508. But a boat upon the water will not pass, as against a subsequent purchaser, by an oral sale without delivery. Veazie *v.* Somerby, 5 Allen, 280.

The delivery of warehouse receipts for bulky articles stored in the warehouse is a sufficient delivery of such articles. Usage has made the possession of these documents equivalent to the possession of the property itself. Horr *v.* Barker, 8 Cal. 609; Benton *v.* Curyea, 40 Ill. 320; Cool *v.* Phillips, 66 Ill. 217; Broadwell *v.* Howard, 77 Ill. 305; National Bank *v.* Walbridge, 19 Ohio St. 419; Gibson *v.* Stevens, 8 How. 384. And the delivery of the keys of a warehouse in which bulky articles are stored is a sufficient delivery of the articles themselves. Niagara Co. National Bank *v.* Lord, 33 Hun, 557.

branded.[1] Property, when sold, may be in the possession of a third person, as bailee for the vendor. If the bailment be such as to give the bailee the right to hold the property for a definite time, the delivery of possession to the vendee must be omitted from necessity. But even if the bailment be for no definite time, it is sufficient that the bailee be notified of the sale;[2] and if he be at a distance, it is probable that the parties will be allowed necessary time in which to convey him the information.[3] S. sold certain horses on the eighteenth day of October to W., which were then on a mountain range belonging to D., and were being there cared for by him for S., and S., in anticipation of the sale, directed D. to get up the horses for W., and at the time of the sale told W. of the direction thus given D., and D., on November 12th, wrote to W. to come for the horses, as they had been gotten up for him, and W. answered that he wanted D. to keep them for him during the winter. This D. did, and the horses remained in his possession until the ensuing spring, when they were attached as the property of S. They were held not liable to such attachment, in an opinion in which the court said: "When property is so situated that the buyer is entitled to and can rightfully take possession of it at his pleasure, he is considered

[1] Walden *v.* Murdock, 23 Cal. 540; 83 Am. Dec. 135.

[2] Moore *v.* Kelly, 5 Vt. 34; 26 Am. Dec. 283; Burge *v.* Cone, 6 Allen, 412; Barney *v.* Brown, 2 Vt. 374; 19 Am. Dec. 270; Breckenridge *v.* Anderson, 3 J. J. Marsh. 710; Carter *v.* Willard, 19 Pick. 1; Harding *v.* Jones, 4 Vt. 462; Pierce *v.* Chapman, 8 Vt. 339; Kroesen *v.* Steevens, 5 Leigh, 434; Frye *v.* Shepler, 7 Pa. St. 91; Roberts *v.* Guernsey, 3 Grant Cas. 237; How *v.* Taylor, 52 Mo. 592; Butt *v.* Caldwell, 4 Bibb, 458; Lynde *v.* Melvin, 11 Vt. 683; 34 Am. Dec. 717; Morgan *v.* Miller, 62 Cal. 492; Hildreth *v.* Fitts, 53 Vt. 684; Stone *v.* Taft, 58 N. H. 445; Wing *v.* Peabody, 57 Vt. 19; Campbell *v.* Hamilton, 63 Iowa, 293; Linton *v.* Butz, 7 Pa. St. 89; 47 Am. Dec. 501; Potter *v.* Washburn, 13 Vt. 558; 37 Am. Dec. 615.

[3] Ricker *v.* Cross, 5 N. H. 570.

as having actually received it as the statute requires. Accordingly, it has been held, if the vendor of goods in the care and keeping of a third person directs him to deliver them to the vendee, and the party holding the goods, on notice and application of the vendee, assents to retain the goods for him, it is a delivery sufficient to transfer the title and to satisfy the statute. Means v. Williamson, 37 Me. 556. By delivering the bill of sale to the plaintiff, and giving direction to his agent to get the horses together and keep them for the plaintiff, to whom they had been sold, Sotcher transferred them to the plaintiff; and when the agent, in obedience to the direction which he had received, collected them together in his pasture for the plaintiff, and wrote to him that they were ready for him, and to come and take them, and the plaintiff employed the agent to take charge of them and winter them for him, this was an actual delivery of the property, so far as the nature and condition of the property admitted of it."[1] In Vermont, logs on the lands of another than the owner, and not in the visible possession of any one, may be transferred without any perceptible change of possession.[2] So property in a warehouse, on storage, if ascertained and separated from other property, and formally delivered to the vendee, may be left by him in the same place.[3] Where twelve thousand bushels of charcoal in pits were sold, and the purchaser a few days after the sale sent a person to the pits, and caused them to be severally marked with the purchaser's name, and the person so sent remained in charge for a fort-

[1] Williams v. Lerch, 56 Cal. 334.

[2] Merritt v. Miller, 13 Vt. 416; Sanborn v. Kittredge, 20 Vt. 622; 50 Am. Dec. 58; Hutchins v. Gilchrist, 23 Vt. 82; Kingsley v. White, 57 Vt. 565.

[3] Cartwright v. Phœnix, 7 Cal. 281.

night, when he left, requesting a neighbor to look after the property, it was held that there had been a sufficient change of possession.[1] The sale by one of several joint owners also furnishes an exception to the rule that there must be a change of possession. If the co-tenant selling is in the sole possession, he ought to give possession to his vendee; but if the other co-tenants are in possession, the vendor has no right to take it from them. He may, therefore, from necessity, make a valid sale without placing the property in the custody of his vendee.[2] Property exempt from or not subject to execution cannot enable its owner to obtain a delusive credit, nor can its secret sale by him operate as a fraud on his creditors, since they have, under no circumstances, a right to seize it against his will. They can take no advantage of the fact that its sale was not accompanied nor followed by a corresponding change of possession.[3] So, because he cannot possibly be defrauded by it, a creditor will not be permitted to attack a sale, for want of a change of possession, when he knew of such sale at the time it was made, and derived a benefit from it,[4] or where, having like knowledge, he thereafter became a creditor of the vendor.[5]

§ 154. When the Change of Possession must Commence. — In many of the decisions under the statute of Elizabeth, it is said that possession must *accompany*

[1] Toginini *v.* Kyle, 17 Nev. 209; 45 Am. Rep. 442.

[2] Freeman on Cotenancy and Partition, secs. 167, 219; Brown *v.* Coleman, 24 Ill. 630; Beaumont *v.* Crane, 14 Mass. 400; Cushing *v.* Breed, 14 Allen, 380; 92 Am. Dec. 777; Criley *v.* Vasel, 52 Mo. 445.

[3] Patten *v.* Smith, 4 Conn. 450; 10 Am. Dec. 166; Foster *v.* McGregor, 11 Vt. 595; 34 Am. Dec. 713; Anthony *v.* Wade, 1 Bush, 110; Morton *v.* Ragan, 5 Bush, 334; Derby *v.* Weyrich, 8 Neb. 174; 30 Am. Rep. 827; Jewett *v.* Guyer, 38 Vt. 218; George *v.* Bassett, 54 Vt. 217.

[4] Parsons *v.* Hatch, 63 N. H. 343.

[5] Van Meter *v.* Estill, 78 Ky. 456.

the deed. In some of the state statutes, the requirement is that the possession be *immediate;* under others, it must be taken within a *reasonable* time. The construction given these different statutes is substantially identical. When the sale is made the vendee must proceed to take possession of the property as soon as practicable, exercising the same degree of diligence that usually is employed by vendees of property of a similar character and in a similar situation. If he does this, his possession *accompanies* the sale within the meaning of the decisions.[1] "By an immediate delivery is not meant a delivery *instanter;* but the character of the property sold, its situation, and all the circumstances must be taken into consideration in determining whether there was a delivery within a reasonable time, so as to meet the requirement of the statute; and this will often be a question of fact for the jury."[2] Hence, if a sale of a stock of goods twenty miles distant be made at nine o'clock in the evening, possession thereof taken pursuant to such sale at four o'clock the next morning is immediate, within the meaning of the statute.[3] Generally the failure to take possession in pursuance of a sale, either immediately or within a reasonable time after such sale, is held to make such sale either conclusively or *prima facie* fraudulent. The sale having been thus tainted with fraud, the question arises whether this taint may be removed by a possession subsequently taken.

The better rule, we think, is, that when the taking of

[1] Ingraham v. Wheeler, 6 Conn. 277; Meade v. Smith, 16 Conn. 347; Wilt v. Franklin, 1 Binn. 521; 2 Am. Dec. 474; State v. King, 44 Mo. 238.

[2] Stephens v. Gorham, 5 Cal. 227; Carpenter v. Clark, 2 Nev. 246.

[3] Kleinschmidt v. McAndrews, 117 U. S. 282.

possession has been so deferred that the sale must be denounced for constructive fraud, its character is irretrievably determined, and possession afterwards taken gives no life or validity to that which was before null and void.[1] Doubtless, however, the weight of the authorities is against the rule as we have stated it. They maintain that a sale is never, because of a want of a change of possession, void as against creditors generally, but only against those who have either reduced their debts to judgments, or have in some manner obtained liens for the enforcement thereof. If, when the judgments are rendered, or the attachment or other liens obtained, the sale has been consummated by taking possession, it must, according to these authorities, be treated as valid, though such possession did not accompany the sale.[2] These authorities seem to ignore the chief object sought by the statutes and decisions requiring the change of possession to accompany the sale. That object was to suppress fraud by preventing vendors from obtaining a false and delusive credit by remaining in apparent ownership of property in which they had ceased to have any interest. The most equitable rule upon the subject is that enacted in section 3440 of the present Civil Code of California, as follows: "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port,

[1] Gibson v. Love, 4 Fla. 217; Carpenter v. Mayer, 5 Watts, 483; Hackett v. Manlove, 14 Cal. 85; Chenery v. Palmer, 6 Cal. 119; 65 Am. Dec. 493; Edmondson v. Hyde, 2 Saw. 209; 7 Nat. Bank. Reg. 4; In re Morrill, 2 Saw. 359; 8 Nat. Bank. Reg. 120; Franklin v. Cumersell, 9 Mo. App. 89; Watson v. Rodgers, 53 Cal. 401.

[2] Kendall v. Sampson, 12 Vt. 515; Read v. Wilson, 22 Ill. 377; 74 Am. Dec. 159; Calkins v. Lockwood, 16 Conn. 276; 41 Am. Dec. 143; Blake v. Graves, 18 Iowa, 312; Clute v. Steel, 6 Nev. 355; Cruikshanks v. Cogswell, 26 Ill. 366; Gilbert v. Decker, 53 Conn. 401; Sydnor v. Gee, 4 Leigh, 535; Hall v. Gaylor, 37 Conn. 550.

and every lien thereon, other than a mortgage when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer." But even in those states where the want of an immediate delivery cannot be supplied by a subsequent one, there is an inclination to avoid a rigid application of the rule. Hence where furniture was purchased, and the vendee took no possession until after two or three weeks, during which he was hunting for a suitable house to live in, the court refused to award the property to a creditor of the vendor whose judgment and levy were eight or nine months subsequent to the sale.[1]

§ 155. **What is a Sufficient Change of Possession.** —The response to this question, so far as it can be expressed in general terms, is that the change of possession must be open, visible, actual, and substantial, so that persons in the habit of seeing the property will infer that a change of ownership has taken place.[2] "In no case that we are aware of has the supreme

[1] Smith *v.* Storm, 17 Pa. St. 360. See also McVicker *v.* May, 3 Pa. St. 224; 45 Am. Dec. 637.

[2] Rockwood *v.* Collamer, 14 Vt. 141; Kirtland *v.* Snow, 20 Conn. 23; Hoofsmith *v.* Cope, 6 Whart. 53; Cadbury *v.* Nolen, 5 Pa. St. 320; Cook *v.* Mann, 6 Col. 21.

court laid down a rule requiring less than that the purchaser must have that possession which places him in the relation to the property which owners usually are to the like kind of property."[1] "The change necessary is only one which the creditors, upon reasonable inquiry, can ascertain, — such a change of the possession, or such a divesting of the possession of the vendor, as any man knowing the facts, which could be ascertained upon reasonable inquiry, would be bound to know and understand was the result of a change of ownership, — such a one as he could not reasonably misapprehend."[2] "The vendee must take the actual possession, and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed to the purchaser. This must be determined by the vendee using the usual marks and *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property."[3] "It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the same manner, and accompanied with such plain and unmistakable acts of possession, control, and ownership, as a prudent *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property."[4] "The possession of the vendee must be open and unequivocal, carrying with it the usual marks

[1] Woods v. Bugbey, 29 Cal. 472.

[2] Stephenson v. Clark, 20 Vt. 627; Burrows v. Stebbins, 26 Vt. 659.

[3] Claflin v. Rosenberg, 42 Mo. 449; 43 Mo. 593; 97 Am. Dec. 336; Lesem v. Herriford, 44 Mo. 323; Allen v. Massey, 2 Abb. 60.

[4] Lay v. Neville, 25 Cal. 552.

and indications of ownership by the vendee. It must be such as to give evidence to the world of the claim of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous, — not taken to be surrendered back, — not formal, but substantial."[1] "There must be such change in the apparent custody of the property as to put one dealing with the vendor with respect to it upon inquiry, or such at least as might suggest a change of ownership."[2] It is not sufficient that the vendee assume control of the property in such a manner that the vendor cannot legally interfere with it, if the transaction is "wanting in the publicity, openness, or notoriety which would tend to warn other members of the community, or advertise the claim of the vendee."[3] The marking of goods is not equivalent to a change of possession.[4] "Purchasers must learn and understand that if they purchase property, and without a legal excuse permit the possession to remain in fact or apparently and visibly the same, or if changed for a brief period, to be in fact or apparently and visibly restored, and thereafter in fact or apparently and visibly continued as before the sale, they hazard its loss by attachment for the debts of the vendor, as still, to the view of the world and in the eye of the law, as it looks to the rights of creditors and the prevention of fraud, his property."[5] "The purpose of the statute is, that there shall be such a change of possession as will give

[1] Stevens v. Irwin, 15 Cal. 506; 76 Am. Dec. 500; Engles v. Marshall, 19 Cal. 320; Calhoon v. Marshall, 25 Cal. 197.

[2] Heathal v. Myles, 53 Cal. 623.

[3] Ibid.

[4] Stewart v. Nelson, 78 Mo. 522.

[5] Norton v. Doolittle, 32 Conn. 311.

to parties dealing with the seller or buyer notice of the transaction. It is such transfer of dominion over the property as to impart notice to persons dealing with reference to the property that the title has been transferred, or such possession as will put such persons in possession of such facts as will lead to inquiry as to the ownership. It is sometimes said that the possession must be such as to be notice to the world. This does not mean notice to the public generally, but to those who propose to purchase the property or deal with reference to it."[1] Merely changing the name of the store in which a stock of goods is kept is not a sufficient change of possession.[2] In Merrill *v.* Hurlburt, 63 Cal. 494, the property sold was a quantity of loose hay stored in a barn owned by the vendor. The vendee examined the hay at the time of the sale, and there was a verbal delivery. The vendee also placed a man in charge of the property, but the barn continued in the possession and under the control of the vendor. A portion of the hay was subsequently removed, but the part in controversy remained in the barn until it was attached by a creditor of the vendor, about three months after the sale. The trial court found that there was not an immediate delivery, and an actual and continued change of possession, and the supreme court held that the finding was justified by the evidence.

The possession of the vendee must be exclusive, and not in common with the vendor.[3] "There must be a *bona fide* substantial change of possession. It is a mere

[1] Deere *v.* Needles, 65 Iowa, 105.

[2] Klee *v.* Reitzenberger, 23 W. Va. 749.

[3] Braun *v.* Kelly, 43 Pa. St. 104; 82 Am. Dec. 554; 3 Grant Cas. 144; Stadtler *v.* Wood, 24 Tex. 622; Kendall *v.* Sampson, 12 Vt. 515; Wooten *v.* Clark, 23 Miss. 75.

mockery to put in another person to keep possession jointly with the former owner."[1] If the possession of the vendor and vendee after the sale "is mixed or concurrent, it is insufficient to indicate an open and complete transfer of the possession."[2]

[1] Babb v. Clemson, 10 Serg. & R. 428; 13 Am. Dec. 684; Wordall v. Smith, 1 Camp. 333.

[2] Worman v. Kramer, 73 Pa. St. 386; Sumner v. Dalton, 58 N. H. 295; Allen v. Massey, 17 Wall. 351; Plaisted v. Holmes, 58 N. H. 293. In Hull v. Sigsworth, 48 Conn. 258, 40 Am. Rep. 167, the vendee employed by the vendor on the latter's farm agreed to buy him a horse, and apply his wages in payment. Two years afterwards the vendor sold and delivered the horse to the vendee, taking his receipt in full of wages earned in payment. The vendee continued in the vendor's employment on the farm, keeping the horse in the vendor's stable, taking care of it, breaking it, and shoeing it, paying the vendor for the feed. It was held that there was not a sufficient change of possession as against the creditors of the vendor. But see Webster v. Anderson, 42 Mich. 554, 36 Am. Rep. 452, where it was agreed between a farmer and his laborer that the latter should accept certain hogs in payment for his services. The hogs were pointed out, but were to remain in the pasture with other hogs until an opportunity should be found for selling them. It was held that this was a sufficient transfer of the possession to constitute a delivery under the circumstances. Cooley, J., in delivering the opinion of the court, said: "It was all the delivery that could well have been made under the circumstances, without requiring Anderson to remove the hogs from the farm where he was employed to some other place where they would have been less in his possession than where they were; and for this there could have been no sufficient reason." In Roberts v. Radcliff, 35 Kan. 502, a lawyer and real estate agent bought a stock of millinery goods in a distant city, and returned home on the same day, without moving the goods, changing the sign on the store, or giving any notice to the public that there had been a change of proprietorship, but leaving to manage the new business the same persons who had been in charge before the sale. And it was held that there was sufficient evidence to justify the jury in finding the sale fraudulent as against the creditors of the vendors. So in Wolf v. Kahn, 62 Miss. 814, where the business after the conveyance was carried on just as before the sale, and there was nothing to indicate that the former clerk had become the owner, and the former owner a clerk, but so far as the public could know from appearances, the vendor was still the owner of the business, and the fact of the sale was known to two persons only besides the parties to it, the sign over the store remaining the same, and the license of the former owner remaining posted up in the store as before the sale, it was held that there was not sufficient evidence of a change of possession as against the vendor's creditors. But in Ware v. Hirsch, 19 Ill. App. 274, where certain creditors of a debtor in failing circumstances bought out his store and goods, and put one of their number in pos-

It may be that the vendor and vendee are occupants of the same premises, and even members of the same family. If such be the case, it will require great care to give a transfer from one to the other that notoriety

sion thereof, who opened a new set of books, took down the debtor's sign, employed the former clerks, and paid the rent, etc., it was held that there was sufficient evidence of a change of possession to satisfy the requirements of the Illinois statute. In Wilson *v.* Hill, 17 Nev. 401, the mortgagor of 324 cords of wood lying on the roadside went with the mortgagee to the place, and said to him: "There is the wood. I deliver it to you as security for the money loaned." The wood was not marked, nor was any one put in charge of it, but the mortgagee went occasionally to see that no one interfered with it. It was held that there was not a sufficient change of possession as against creditors. In Betz *v.* Conner, 7 Daly, 550, the purchaser at execution sale left the property after the sale in the same premises, where it was used by the execution debtor as it had been used by him before the sale, and over which he exercised the same control as before, except that after the sale he acted as agent of the purchaser; and it was held that the change of possession was constructive only, and not actual, and that the sale was therefore presumptively fraudulent as to the creditors of the former owner. In McCarthy *v.* McDermott, 10 Daly, 450, the vendor, after the execution and delivery of a bill of sale of the furniture of a boarding-house, went with the purchaser to the house, who stated to him that he took possession of the property, and at the same time delivered to the vendor's wife a writing constituting her a bailee of the property; but there was no change in the apparent ownership, and nothing to disclose the fact that the title had been transferred. It was held that the sale was void as against creditors, and that it was error to submit the question of change of possession to the jury. In Bentz *v.* Rockey, 69 Pa. St. 71, the vendor was the lessee of a tannery, and after the sale the vendee paid the rent for the remainder of the year, but the vendor remained on the premises as before, and worked out and sold the stock, paying the money received therefor to the vendee. It was held that there was not sufficient change of possession to make the sale valid as against creditors. But in Crawford *v.* Davis, 99 Pa. St. 576, the vendor was an aged and infirm man residing on a farm under a parol lease, his son residing with him. By reason of infirmity and poverty the father was unable to carry on the farm, and he therefore sold all the property on the farm to his son, in consideration of the vendee's agreeing to support his father and mother and pay the rent. The son after the sale took charge of the farm, bought and put additional stock on it, used the whole of it, paid the rent, supported his father until he died, and continued to support his mother, hired and paid labor to work the farm, and lived upon it. It was held that the trial court erred in holding that the evidence of change of possession was not sufficient as against creditors of the vendor, and the supreme court decided that the case ought to have been left to the jury to decide, under the circumstances, whether the sale was in good faith or merely colorable.

which will warn others of the change of ownership. In some instances, as where the transfer was from a parent to his minor child, it has been held that the possession subsequently held by the former must be deemed the possession of the latter; and the transfer was therefore sustained, although no notorious or other apparent change of possession followed the transfer.[1] While the enforcement of the rule requiring a change of possession to accompany a transfer may occasion some hardship when the transaction is between relatives or others occupying the same premises, yet it ought to be remembered that it is between persons thus related or situated that a fraudulent or simulated transfer is most likely to be conceived and attempted to be made effective against creditors. Such a transfer is properly viewed with suspicion, and will be sustained only where the evidence shows that "the vendee assumed such control of the property as to reasonably indicate a change of ownership."[2] If the change of possession is not sufficient to indicate the change of ownership, the transfer is invalid as against creditors, though the vendor and vendee live in the same house[3] and are members of the same family.[4] G., the owner of certain horses and cattle, sold them to P. on Saturday. On Sunday and Monday ensuing, the

[1] Howard *v.* Williams, 1 Bail. 575; 21 Am. Dec. 483; Dodd *v.* McCraw, 8 Ark. 83; 46 Am. Dec. 301.

[2] Crawford *v.* Davis, 90 Pa. St. 579; McClure *v.* Forney, 107 Pa. St. 414.

[3] Hull *v.* Sigsworth, 48 Conn. 258; 40 Am. Rep. 167; Lawrence *v.* Burnham, 4 Nev. 364; 97 Am. Dec. 540. In this case, vendor and vendee lived in different rooms of the same house. They held common possession of a barn, in which the vendor had grain. After selling this grain, the vendor continued to have a key to the barn, and to go in and out at pleasure. The grain remained in the same bin as before the sale. It was held that there was no sufficient delivery.

[4] Stiles *v.* Shumway, 16 Vt. 435; Jarvis *v.* Davis, 14 B. Mon. 529; 61 Am. Dec. 166.

stock was collected together. On Tuesday P., with G. and family, started with the property *en route* for a distant part of the state, G. riding one of the horses he had sold, and his family accompanying him in a wagon drawn by another horse embraced in the same sale. When they had proceeded thirty miles on their journey the stock was attached as the property of G. It was held that these facts were such that the jury ought to have found the sale fraudulent, and its verdict in favor of the vendee was vacated, and a new trial granted.[1] The vendee must not leave his vendor in possession of the property as his agent,[2] nor as his warehouseman.[3] If the vendee was, before the sale, in possession as agent, he must in some way make known to the public the change of ownership.[4] Where a purchase is made of a store or other place of business, it is not necessary that the vendor's employees be excluded from the place. If the vendee takes possession by exercising all the rights of a proprietor, and by so conducting himself toward the business as to create, in his favor, all the marks of ownership usually existing in favor of a proprietor of similar business establishments, he may safely re-employ the same clerks and other assistants which were formerly in the service of his vendor.[5] Nor is the vendor absolutely excluded from the service of the vendee. The vendor's continued connection with the business must always be a suspicious circumstance. But if the vendee takes posses-

[1] Regli *v.* McClure, 47 Cal. 612.

[2] Fitzgerald *v.* Gorham, 4 Cal. 289; 60 Am. Dec. 616; Bacon *v.* Scannell, 9 Cal. 271. But see England *v.* Com. Ins. Co., 16 La. Ann. 5.

[3] Stewart *v.* Scannell, 8 Cal. 80.

[4] Comley *v.* Fisher, Taney, 121.

[5] Ford *v.* Chalmers, 28 Cal. 13; Parker *v.* Kendrick, 29 Vt. 391; Hall *v.* Parsons, 15 Vt. 358.

sion as the owner, and by his acts clearly shows to the world that he has become the proprietor, his engaging the vendor in the capacity of a clerk or as an employee does not render the sale *per se* fraudulent. The relation which the vendor and vendee in such cases assume toward the business must be such as to clearly indicate to observers of ordinary sagacity that the former is there as the *servant*, and the latter as the *master*.[1] "What, then, constitutes such a change of possession as the law requires, in order to prevent the sale being declared fraudulent? Undoubtedly the vendor must deliver to the vendee the possession of the property in order to consummate the sale, and render it valid as against creditors. The delivery must be actual, and such as the nature of the property or thing sold, and the circumstances of the sale, will reasonably admit, and such as the vendor is capable of making. A mere symbolical or constructive delivery, where an actual or real one is reasonably practicable, is of no avail. There must be an actual separation of the property from the possession of the vendor at the time of the sale, or within a reasonable time afterward, according to the nature of the property. But is it essential to such separation that the property shall be removed from the vendor, or the vendor from the property, so that there shall be an actual and visible separation between them, measurable by space or distance? Must the vendor absolutely cease to have any connection or contact with

[1] Godchaux *v.* Mulford, 26 Cal. 317; 85 Am. Dec. 178; Warner *v.* Carlton, 22 Ill. 415; Dunlap *v.* Bournonville, 26 Pa. St. 72; Rothgerber *v.* Gough, 52 Ill. 456; Hugus *v.* Robinson, 24 Pa. St. 9; Becks *v.* Lyon, 21 Conn. 604; Billingsley *v.* White, 59 Pa. St. 464; State *v.* Schulein, 45 Mo. 521; McKibbin *v.* Martin, 64 Pa. St. 352; 3 Am. Rep. 588; Wilson *v.* Lott, 5 Fla. 305; Talcox *v.* Wilcox, 9 Conn. 134; Ware *v.* Husch, 19 Ill. App. 274; O'Gara *v.* Lowry, 5 Mont. 427; Zeigler *v.* Handrick, 106 Pa. St. 87.

the property after its delivery, not as owner, but as the agent or servant of the vendee, on pain of having the sale declared fraudulent? To hold this would be going beyond the established doctrine of our own decisions, and the reason and requirements of the law. Separation of the property from the possession of the vendor implies nothing more than a change of the vendor's relation to it as owner, and consists in the surrender and transfer of his power and control over it to the vendee. But in order to prevent fraud, the law requires that this shall be done by such appropriate and significant acts as — if done in good faith — shall clearly show the vendor's intention to part with the possession of the property and transfer it to the vendee. And these acts must be so open and manifest as to make the change of possession apparent and visible. If there are such palpable tokens and proofs of the vendor's surrender of his dominion over the property as owner, and of the transfer of his possession to the vendee, the sale will not be declared fraudulent in law, although the vendor may act as the agent or servant of the vendee in the management and disposal of the property, provided that his acts are professedly and apparently done, not as owner, but as the agent or servant of the vendee, and are so understood by those with whom he deals. If the change of possession is otherwise sufficiently shown, the mere fact of such agency is not, and never has been held to be, such a badge of fraud, or evidence of retained possession, as to render the sale invalid."[1]

Separating a lot of sacks of grain from a larger quantity in the vendor's corral or barn-yard, and marking them with the initial letter of the vendee's name,

[1] Billingsley v. White, 59 Pa. St. 467.

and piling them up on another part of the same corral, is not a sufficient delivery, where the vendor continues to have possession of the corral.[1] Where a team has been for some time driven by the same person, it is not a sufficient change of possession to make a formal delivery, discharge and re-employ the driver, and then keep the team in the same place and about the same work as before.[2]

§ 156. **How Long the Change of Possession must Continue.** — A Pennsylvania court once said: "It is not the law that if a man *bona fide* sells cattle which are removed, and afterward they find their way back to his possession, the sale is *per se* fraudulent."[3] This is certainly a very clear misstatement of the law. It is perfectly well settled that the possession which must accompany a sale must be substantial,—not taken to be surrendered; and must continue for a period sufficient to give a notoriety to the sale, among those who are familiar with the property. If the possession be not retained by the vendee till it accomplishes this purpose, the sale is treated as though no change of possession had ever been made.[4] Thus where S. sold his stock of goods to W., who took possession, and removed the property to his own store, but within less than two weeks allowed S. to resume possession, professedly as an employee, and to commence retailing

[1] Vance *v.* Boynton, 8 Cal. 554.

[2] Hurlburd *v.* Bogardus, 10 Cal. 518; Gray *v.* Corey, 48 Cal. 208. See Doak *v.* Brubaker, 1 Nev. 218; Sharon *v.* Shaw, 2 Nev. 290; 90 Am. Dec. 546.

[3] Jordan *v.* Brackenridge, 3 Pa. St. 442.

[4] Whitney *v.* Stark, 8 Cal. 514; 68 Am. Dec. 360; McBride *v.* McClelland, 6 Watts & S. 94; Young *v.* McClure, 2 Watts & S. 147; Streeper *v.* Eckart, 2 Whart. 302; 30 Am. Dec. 258; Van Pelt *v.* Lettler, 10 Cal. 391; Goldsbury *v.* May, 1 Litt. 256; Breckenridge *v.* Anderson, 3 J. J. Marsh. 710; Norton *v.* Doolittle, 32 Conn. 405.

the goods, the sale was declared fraudulent.[1] It makes no difference that the property was delivered back to the vendor for purposes of manufacture,[2] nor that it might pay for its keeping,[3] nor that an agent of the vendee allowed it to return without asking his consent,[4] nor that after one week it was hired on an unexpected urgency in business,[5] nor that, after fourteen days' possession, it was sold at auction, and then suffered to return to its former owner.[6] On the other hand, it is equally certain that the vendee's possession need not be perpetual. The buyer may employ the former owner to take charge of the goods, and to care for and sell them for him. If he does this in good faith, and after taking such possession, and exercising such control and dominion over the property, as to show the public and those dealing with the vendor that there has been a real change in the ownership, he will not be subjected to the penalty of a forfeiture of his property because he has seen fit, or has been compelled, to leave the goods in charge of the former owner.[7] The time during which the vendee must keep the property from the possession of his vendor must necessarily differ in different circumstances. If the vendee's use of the property was very frequent, open, and public, the change of possession would acquire sufficient notoriety in a short time; while if, though under his control, it was rarely seen by the public, a much longer time would be neces-

[1] Weil *v.* Paul, 22 Cal. 492.

[2] Carter *v.* Watkins, 14 Conn. 240.

[3] Osborne *v.* Tuller, 14 Conn. 529.

[4] Morris *v.* Hyde, 8 Vt. 352; 30 Am. Dec. 475.

[5] Webster *v.* Peck, 31 Conn. 495.

[6] Rogers *v.* Vail, 16 Vt. 327.

[7] Stevens *v.* Irwin, 15 Cal. 503; 76 Am. Dec. 500; Clark *v.* Morse, 10 N. H. 236; Powell *v.* Stickney, 88 Ind. 310; Ewing *v.* Merkley, 3 Utah, 406.

sary. A mortgagee who, after default, takes possession and forecloses his mortgage may afterward loan the property to the mortgagor.[1] After seven months' possession by the vendee, during which the vendor occasionally used the property, it may safely be permitted to return to the custody of the vendor.[2] A son, in February, sold a piano to his mother, with whom he was residing. He then left the county, expecting to remain away permanently. In July he returned and lived with the mother as before. The piano was seized by his creditors; but the court declared the change of possession sufficient.[3] A possession for two months,[4] for five weeks,[5] from the "fore part of January" to the 12th of February,[6] have each been declared sufficient to free the sale from the character of fraudulent *per se*.

§ 157. **Property Sold, but never Delivered.**—Let it be borne in mind that we have heretofore been treating of the retention of possession by the vendor, with reference to its effect as evidence of fraud. The delivery of possession, actual or constructive, is, however, in some of the states, even where its absence is not regarded as fraudulent *per se*, necessary to complete the sale, so that the property cannot be levied upon by the creditors of the vendor. In other words, while a sale as between vendor and vendee may be complete with-

[1] Funk *v.* Staats, 24 Ill. 632.

[2] Farnsworth *v.* Shepard, 6 Vt. 521; Dewey *v.* Thrall, 13 Vt. 281.

[3] Graham *v.* McCreary, 40 Pa. St. 515; 80 Am. Dec. 591.

[4] French *v.* Hall, 9 N. H. 137; 22 Am. Dec. 341.

[5] Brady *v.* Harris, 18 Pa. St. 113.

[6] Sutton *v.* Shearer, 1 Grant Cas. 207. For different cases determining the time after which a return of possession was or was not held fraudulent, see Cunningham *v.* Hamilton, 25 Ill. 228; Wright *v.* Grover, 27 Ill. 426; Mills *v.* Warner, 19 Vt. 609; 47 Am. Dec. 711; Miller *v.* Garman, 28 Leg. Int. 405; Look *v.* Comstock, 15 Wend. 244.

out delivery, it is not so as between the vendee and a creditor of or a purchaser from the vendor. In such a case, the property may be awarded to the creditor of the vendor, or to a subsequent purchaser from him, not because the sale was fraudulent *per se*, but because, as against such creditor or purchaser, it had not yet been consummated. The law upon this subject is well stated in the following opinion of the supreme court of Maine, given in a case wherein a wife claimed certain cattle as the vendee of her husband: "The rule of law is well established, that in order to pass the title to personal property by a sale, as against subsequently attaching creditors of the vendor without notice, there must be a delivery, actual, constructive, or symbolical. (Cobb *v.* Haskell, 14 Me. 303; 31 Am. Dec. 56.)

"What amounts to proof of delivery has been much discussed by courts and jurists, and where so much depends upon the subject-matter of the sale, its situation and condition, the usual course of trade, and all other attendant circumstances, together with the subsequent acts of the parties, as showing their intention at the time of the sale, it will be found exceedingly difficult, if not absolutely impracticable, to lay down a general rule applicable to all cases.

"Though this is undoubtedly true, yet it is proper to observe, in general terms, that, to constitute proof of a delivery, there must be such evidence arising from the conduct of the parties as shows a relinquishment of ownership and possession of the property by the vendor, and an assumption of these by the vendee. This is the case:—

"1. Actually, when there has been a formal tradition of the property to the vendee; or,

"2. Constructively, when the property, not being present or accessible, as a ship at sea, the vendor gives the vendee a grand bill of sale, under which he takes possession upon her arrival in port; or if the property is difficult of access, as logs in a stream, or incapable of manual tradition, as blocks of stone, when the vendor approaches in view of it with the vendee, and proclaims a delivery to him; or when a part of the goods are delivered for the whole; or if the goods are in the custody of a third party, where the parties to the sale give such party notice of the transfer; or,

"3. Symbolically, when the vendor gives the vendee the key to the warehouse in which the goods are stored, or an order on the wharfinger or warehouse-keeper who has them in charge, or a bill of landing duly indorsed.

"Though the assignment and delivery to the vendee, by the vendor, of a bill of lading, invoice, or other documentary evidence of his title to the goods, has been held good as a symbolical delivery, the delivery of a bill of parcels or bill of sale by the vendor to the vendee has been held insufficient, as these depend solely upon the vendor for their authenticity, and may be multiplied indefinitely; such memoranda are not, technically considered, documentary evidence of the vendor's title.

"Thus in Lanfear *v.* Sumner, 17 Mass. 117, 9 Am. Dec. 119, a merchant in Philadelphia made out and receipted a bill of sale of a number of chests of tea, supposed to be on their passage from China to Boston, though they were then in the custom-house in Boston, and before the agent of the vendee demanded possession of them they were attached by the creditor of the

vendor. The court sustained the action, on the ground that the goods not being at sea, there was no delivery, actual or symbolical, before the attachment.

"So in Carter *v.* Willard, 19 Pick. 9, the only evidence of delivery was the giving of a bill of sale of the goods by the vendor to the vendee, and the court held that that was not sufficient. So, also, in Burge *v.* Cone, 6 Allen, 413, the same question arose, with the same result. The doctrine of delivery rests upon the ground that the vendee should have the entire control of the property, and that there should be some notoriety attending the act of sale; and hence, proof of delivery will not be dispensed with on account of the peculiar situation or relation of the parties with respect to the property at the time of the sale, nor will these constitute sufficient evidence of delivery.

"Accordingly, it has been held to be no proof of delivery that the vendor and vendee reside in the same house (Trovers *v.* Ramsy, 3 Cranch, 354); not even if they are brothers (Hoffner *v.* Clark, 5 Whart. 445); or son-in-law and father-in-law (Stulwagon *v.* Jeffries, 44 Pa. St. 407); nor if the vendor resides with the vendee (Halle *v.* Cralle, 8 B. Mon. 11); nor when the the vendor's agent remains in possession with the vendor (Medell *v.* Smith, 8 Cowp. 333); nor though the parties are partners with respect to the property sold (Shurtliff *v.* Willard, 18 Pick. 201).

"It is clear from these cases that there is the same necessity for a delivery when the parties to the sale are husband and wife that there is in other cases. For this purpose, the wife sustains the same relation to the husband as any other person; and though, in respect to personal property owned by the wife in her own right,

she stands upon the same footing that the husband does to his, we are not aware that the authorities have gone so far as to dispense with the necessary formalities to be observed in acquiring property in her favor.

"In this case there was no actual delivery. John McKee, the vendor, and husband of the plaintiff, held the same possession after as before the sale of the cattle. There was no change of possession by the act of sale. The plaintiff had no possession, either of the cattle or the farm on which they were kept. She resided on the farm simply because her husband did. Nor was there any constructive or symbolical delivery, unless the delivery of the bill of sale constituted one; and that, as we have seen, is not sufficient, there being nothing to prevent an actual delivery by a transfer of the manual possession of the property to the vendee."[1]

It would seem from the foregoing case, and from others in which similar language is employed, that while proceeding upon different grounds they reach the same practical result as those cases which declare the want of delivery and continued change of possession to render the sale *per se* fraudulent. That the cases are not designed to have a practical identity of result is obvious from the fact that the courts which have been the foremost to maintain that the retention of possession by the vendor does not avoid the sale, as

[1] McKee *v.* Garcelon, 60 Me. 165; 11 Am. Rep. 200. See also Ober *v.* Matthews, 24 La. Ann. 90; Burge *v.* Cone, 6 Allen, 112; Carter *v.* Willard, 19 Pick. 1; Packard *v.* Wood, 4 Gray, 307; Hoofsmith *v.* Cope, 6 Whart. 53; Langfear *v.* Sumner, 17 Mass. 112; 9 Am. Dec. 119; Mount Hope Iron Co. *v.* Buffington, 103 Mass. 62; Morgan *v.* Taylor, 32 Tex. 363; Fairfield Bridge Co. *v.* Nye, 60 Me. 374; note *d* to sec. 675 of Benjamin on Sales, Am. ed.; Ricker *v.* Cross, 5 N. H. 572; 22 Am. Dec. 480; Hilliard on Sales, c. 8, sec. 23; Shumway *v.* Rutter, 7 Pick. 55; 19 Am. Dec. 340; 1 Parsons on Contracts, 4th ed., 442. But from the doctrine of these cases, a vigorous and well-considered dissent was expressed in Meade *v.* Smith, 16 Conn. 347.

fraudulent *per se*, have also been the foremost to declare that, as against creditors of the vendor, the title to personal property does not pass without delivery. It is difficult, and perhaps impossible, to state the exact difference between the two classes of cases, the first of which is represented by Hamilton *v.* Russell, cited in section 149, and the second by McKee *v.* Garcelon, from which we have just quoted. The difference is, nevertheless, material. That it cannot be satisfactorily stated is not owing to its want of magnitude and importance, but rather to the fact that the cases of the second class, while not diametrically opposed to one another, cannot all be brought to the same line; and hence, as a class, we cannot say how near they approach the line of decisions following the lead of Hamilton *v.* Russell. So far as we understand and can state it, the distinction is this: the cases of the first class demand that an absolute sale shall be accompanied and followed by an open, visible change of possession, such as will notify persons seeing or dealing with the property of its change of ownership. This visible change of possession will ordinarily be dispensed with only upon grounds of necessity; and having once taken place, it must continue until by its continuance the sale acquires such notoriety and such appearance of good faith as induces a conviction of its reality and fairness, and warns the community that the property can no longer be treated as that of the vendor. Wanting this visible and continuous change of possession, the sale is declared to be fraudulent and of no effect as against creditors of the vendor. The cases of the second class demand that there shall be a delivery accompanying or following the sale. But the delivery which

they exact seems in most cases to be nothing more than some formal act, indicating that the vendor relinquishes and the vendee assumes possession. The delivery may therefore be without that notoriety which gives notice to the world of the transmission of the title;[1] and having once been perfected, the property may be returned to the control of the vendor without affecting the sale, except by inducing a presumption against its fairness. But when wanting in a delivery, "actual, constructive, or symbolical," the sale is declared as against creditors not to have taken place, and they may seize the property and apply it to the satisfaction of their claims against the vendor.

§ 158. **When Property is Purchased Fraudulently** and by misrepresentation, without paying the purchase price, the vendor is entitled to rescind the sale and reclaim possession of the goods. As against the claims of the vendor, the vendee has no interest subject to execution. The property, if levied upon, may be recovered from the officer in the same manner as if it were still in the hands of the fraudulent vendee.[2]

[1] Ingalls *v.* Herrick, 108 Mass. 351; 11 Am. Rep. 360; Shumway *v.* Rutter, 8 Pick. 443; 19 Am. Dec. 340; Legg *v.* Willard, 17 Pick. 140; 28 Am. Dec. 282; Hardy *v.* Potter, 10 Gray, 89; Phelps *v.* Cutler, 4 Gray, 137; Truxworth *v.* Moore, 9 Pick. 347; Bullard *v.* Wait, 16 Gray, 55; Ropes *v.* Lane, 9 Allen, 502; Drake on Attachments, sec. 245 a; Hatch *v.* Bayley, 12 Cush. 27.

[2] Van Cleef *v.* Fleet, 15 Johns. 147; Covell *v.* Hitchcock, 23 Wend. 611; Durell *v.* Halley, 1 Paige, 492; Cary *v.* Hotailing, 1 Hill, 311; 37 Am. Dec. 323; Lupin *v.* Marie, 2 Paige, 169; Ash *v.* Putnam, 1 Hill, 302; Acker *v.* Campbell, 23 Wend. 372; Hitchcock *v.* Covill, 20 Wend. 167; Farley *v.* Lincoln, 12 Am. Rep. 182; 51 N. H. 577; Load *v.* Green, 15 Mees. & W. 216; Bristol *v.* Wilsmore, 1 Barn. & C. 514.

CHAPTER XI.

PERSONAL PROPERTY SUBJECT TO GARNISHMENT.

§ 159. Object of garnishment proceedings.
§ 159 a. Garnishment of property not subject to execution.
§ 159 b. Garnishment of property fraudulently transferred.
§ 160. Possession necessary to render garnishee liable.
§ 160 a. Garnishment of property in possession of servant or agent.
§ 161. Bailee of choses in action.

OF THE DEBTS SUBJECT TO GARNISHMENT.

§ 162. Must be debts at law.
§ 162 a. Garnishment of rights which defendant has option of enforcing.
§ 163. Debt must be payable in coin.
§ 164. Debt must not be contingent.
§ 164 a. Garnishment of claims against insurance companies.
§ 165. Need not be due.
§ 166. Debts in suit or in judgment.
§ 167. Claims in tort, or for unliquidated damages.
§ 168. Debts due by negotiable note.
§ 169. Debts due from two or more persons.
§ 169 a. Debts due from two or more jointly, or jointly and severally.
§ 170. Debts assigned.
§ 171. Asserting garnishment as a defense.

§ 159. **The Object of Garnishment Proceedings** is generally to reach assets of the defendant which are not susceptible of direct seizure by the attaching officer, either because the nature of the property makes such seizure impossible, or because the property is in the possession of the person on whom the garnishment is served, and he has some rights or interests therein which make it improper for the officer to deprive him of such possession. The service of a garnishment is not, in most states, a mode of proceeding which may safely be resorted to in preference to a direct seizure of the property, where such seizure is possible. Generally, if the property is capable of manual delivery,

it must be seized by the attaching officer, though found in the possession of a stranger to the writ, if such possession can be taken from him without any invasion of his rights.[1] A levy upon chattels capable of manual delivery, by garnishment of the person in whose possession they are, is ineffective.[2] A dwelling-house belonging to a tenant of the land upon which it is standing has been held to be capable of manual delivery, and therefore not attachable, except by taking it into the possession of the officer.[3]

§ 159 a. Property not Subject to Excution, whether Subject to Garnishment.—Garnishment, except where its scope has been enlarged by statute, is generally regarded as a proceeding at law,[4] and can therefore affect no rights and interests not recognized at law. This proceeding is designed mainly to reach the legal assets of the defendant in the hands of third persons, or to intercept legal credits owing to the defendant, and compel their payment to the plaintiff. Choses in action, though not subject to execution at law, are proper subjects of garnishment. But property capable of manual delivery is rarely subject to garnishment, if for any of the causes detailed in the two preceding chapters it is not subject to execution. And whether capable of manual delivery or not, it may fall within the class of property exempt by statute from attachment

[1] Civ. Code Ala., ed. 1876, sec. 3268; Comp. Laws Ariz., ed. 1877, sec. 2561; Gantt's Dig. Ark., sec. 399; Code Civ. Proc. Cal., sec. 542; Code Civ. Proc. Col., sec. 98; Code Civ. Proc. Dak., secs. 201, 208; Rev. Code Del., c. 104, sec. 2.

[2] Johnson *v.* Gorham, 6 Cal. 195; 65 Am. Dec. 501.

[3] Coleman *v.* Collier, 11 Pac. C. L. J. 567.

[4] Thomas *v.* Hopper, 5 Ala. 442; Price *v.* Masterson, 35 Ala. 483; Lackland *v.* Garesche, 56 Mo. 267.

or execution. If such is the case, it is not subject to garnishment, for garnishment is merely a means provided by statute for reaching property which is subject to execution. If the debt sought to be reached represents money obtained or due to the defendant as a pension, the garnishee is not liable because of the exemption of such pension money from execution.[1] A like result follows where the debt consists of wages due to the defendant and exempt by statute;[2] and generally, it is the duty of one who is garnished for debts or property exempt from execution to urge such exemption, or at least to give the defendant an opportunity of so doing. If, however, the creditor succeeds in collecting by garnishment wages of the debtor which by law are exempt from execution, the latter, unless he has waived such exemption, may proceed against the former as a wrong-doer, and recover the amount improperly collected.[3] Property situate beyond the territorial limits of a state is not subject to direct seizure by the officers of such state, because their authority, and that of the courts whom they represent, is confined within those limits. This is true although such property may be in the possession or control of a person who is within the state. "Notwithstanding the general language of our statute upon the subject of garnishment, that 'any creditor shall be entitled to proceed by garnishment in the circuit court of the proper county, against any person (except a municipal corporation) who shall be indebted to or have any property whatever, real or personal, in his possession or under his control belong-

[1] Haywood *v.* Clerk, 50 Vt. 612.

[2] Bliss *v.* Smith, 78 Ill. 359; Hoffman *v.* Fitzwilliam, 81 Ill. 521; Chicago etc. *v.* Ryland, 84 Ill. 375; Welker *v.* Hintze, 16 Ill. App. 326.

[3] Albrecht *v.* Treitschke, 17 Neb. 205.

ing to such creditor's debtor, in the cases, upon the conditions, and in the manner prescribed in this chapter,' we feel constrained to hold that the personal property or real estate in his possession or under his control must be limited to personal property or real estate within this state, and that in the absence of any fraud or connivance on the part of the garnishee to aid in defrauding his creditors, personal property or real estate which is lawfully in the possession or under the control of the garnishee outside of this state is not the subject of garnishment under our statute; that personal chattels outside of the state, which if within the state could be seized by attachment or execution, were not intended to be covered by the statute, is, we think, evident."[1]

So property held by any person as the custodian of the law, or as a disburser of public moneys, or merely in an official capacity, is no more subject to garnishment than it is to direct levy under execution.[2] So where property capable of manual delivery cannot be subjected to ordinary levy and sale, because it is in the hands of a person other than its owner, and such other person is entitled to remain in such possession for some definite period, it cannot, unless made so by statute, be reached by garnishment or trustee process. Hence a pledgee or a mortgagee in possession cannot be summoned and charged as the trustee of the pledgor

[1] Bates *v.* C. M. & St. P. R'y, 60 Wis. 296; 50 Am. Rep. 369.

[2] Rundle *v.* Sheetz, 1 Miles, 330; Corbyn *v.* Ballman, 4 Watts & S. 342; Buckley *v.* Echert, 3 Pa. St. 368; Clark *v.* Boggs, 6 Ala. 809; 41 Am. Dec. 85; Spaulding *v.* ——, 1 Root, 551; Thorn *v.* Woodruff, 5 Ark. 55; Fowler *v.* McClelland, 5 Ark. 188; Stillman *v.* Isham, 11 Conn. 124; McMeekin *v.* State, 9 Ark. 553; Winchell *v.* Allen, 1 Conn. 385; Ward *v.* Hartford Co., 12 Conn. 404; Lyons *v.* Houston, 2 Harr. (Del.) 349; Rollo *v.* Andes Ins. Co., 7 Chic. L. N. 63.

or mortgagor.[1] This is the rule sustained by a considerable majority of the authorities arising under laws in which the garnishment of pledgees and mortgagees is not clearly authorized by some statutory provision. But the propriety of subjecting the interests of pledgors and mortgagors to execution has been very generally conceded. While the mortgagee or pledgee is in possession, and entitled to so continue, it is evident that no direct seizure can be made. The most convenient method of reaching the property and subjecting it to execution is by garnishment. This method is now very generally authorized by statute to reach pledged or mortgaged property, and is in very common use.[2] In some of the states it may be shown that the mortgage is fraudulent as against creditors, and the mortgagee compelled to account for the full value of the property.[3] A mortgagee cannot be held as the trustee or garnishee, except when he is in the actual possession of the property.[4] The rights of garnishment must be exercised in subordination to the rights of the mortgagee or pledgee. Generally the mortgagee cannot be deprived of the possession without he is first

[1] Drake on Attachment, secs. 538, 540; Hudson *v.* Hunt, 5 N. H. 538; Patterson *v.* Harland, 12 Ark. 158; Badlam *v.* Tucker, 1 Pick. 389; 11 Am. Dec. 202; Central Bank *v.* Prentice, 18 Pick. 396; Whitney *v.* Dean, 5 N. H. 249; Howard *v.* Carl, 6 Me. 353; Callender *v.* Furbish, 46 Me. 226; Kergin *v.* Dawson, 1 Gilm. 86; Rhoads *v.* Megonigal, 2 Pa. St. 39.

[2] Aldrich *v.* Woodcock, 10 N. H. 99; Boardman *v.* Cushing, 12 N. H. 105; Chapman *v.* Gale, 32 N. H. 421; Hughes *v.* Corey, 20 Iowa, 399; Carty *v.* Fenstemaker, 14 Ohio St. 457; Blake *v.* Hatch, 25 Vt. 555; Treadwell *v.* Davis, 34 Cal. 601; 94 Am. Dec. 770; Edwards *v.* Beugnot, 7 Cal. 162; Becker *v.* Dunham, 27 Minn. 32; Burnham *v.* Doolittle, 14 Neb. 214; Davis *v.* Wilson, 52 Iowa, 157; Williams *v.* Gallick, 3 Pac. Rep. 469.

[3] Brainard *v.* Van Kuran, 22 Iowa, 261. The same rule was applied to a vendee under a fraudulent sale. Morris *v.* House, 32 Tex. 492.

[4] Pierce *v.* Henrie, 35 Me. 57; Central Bank *v.* Prentice, 18 Pick. 396; Wood *v.* Estes, 35 Me. 145; Callender *v.* Furbish, 46 Me. 226.

offered payment of the mortgage debt.[1] In some states pledged property may be taken and offered for sale at public auction. If it can be sold for more than the debt secured, the debt is paid, and the balance applied to the payment of the judgment. If, however, no bid can be obtained sufficient to discharge the claim of the pledgee, the property is returned to him.[2]

§ 159 b. Garnishment where Fraudulent Transfers have been Made.—As has been heretofore shown, a transfer made to defraud creditors may generally be treated by them as absolutely void, and the property transferred may be levied upon and sold in the same manner and with the same effect as though such transfer had not been attempted. A fraudulent transfer is equally unavailing against a garnishment. Hence where one is garnished, and has goods in his possession acquired from the execution defendant under a mortgage, if it be shown that the mortgage debt was created under and in pursuance of a conspiracy entered into between such defendant and the garnishee for the purpose of defrauding the creditors of the former, then the latter is answerable to the judgment creditor for such goods.[3] So where corn was purchased of J., but the purchaser was afterwards told that it belonged to J.'s son, to whom a note was given for part of the purchase price, and the purchaser, being garnished under an execution against the father, nevertheless paid the note to the son, it was held that the purchaser was answerable on the garnishment on proof being made that the note

[1] Cotton *v.* Marsh, 3 Wis. 221; Frisbee *v.* Langworthy, 11 Wis. 375; Cotton *v.* Watkins, 6 Wis. 629; Selleck *v.* Phelps, 11 Wis. 380.

[2] Hills *v.* Smith, 8 Fost. 369; Torbett *v.* Hayden, 11 Iowa, 435; Briggs *v.* Walker, 1 Fost. 72. See Stief *v.* Hart, 1 N. Y. 20.

[3] Cowles *v.* Coe, 21 Conn. 220.

was taken in the name of the son to defraud the creditors of the father.[1] In Maine, where B. held a ship as collateral security for a loan, under a conveyance absolute in form made by K., and they subsequently, in anticipation of an attachment, agreed that B. should not execute any defeasance, and that the conveyance should be treated as absolute, but had a secret understanding that B. would reconvey on payment of the original sum due, it was decided that B. might be charged as trustee, and further, that having claimed the ship absolutely, and not as security, his claim should be regarded as fraudulent, and he held for the full value of the ship, regardless of his loan.[2] If an assignment be made for the benefit of creditors which is void because not in compliance with the statute of the state regulating such assignments, or because it is actually or constructively fraudulent, the property or its proceeds may be garnished while in the hands of the assignee,[3] or of his vendee who has agreed to pay but has not actually paid therefor.[4] It is not the taking of a fraudulent transfer, but the reception of property, which makes the garnishee answerable. Hence he may exonerate himself by showing that the property of which he received a fraudulent mortgage or bill of sale never came into his possession, or having come into his possession, was returned to the defendant before the garnishment was served, or being an animal, has died, and is therefore not subject to execution.[5] In Arkansas, money was given by a husband to his wife,

[1] Kesler *v.* St. John, 22 Iowa, 565.
[2] Thompson *v.* Pennell, 67 Me. 159.
[3] Kimball *v.* Evans, 58 Vt. 655.
[4] Dixon *v.* Hill, 5 Mich. 404.
[5] Gutterson *v.* Morse, 58 N. H. 529.

who deposited it in her name in a bank, where it was sought to be garnished under a writ against the husband. The court, however, held that by the deposit the bank became a creditor of the wife; and that the question whether the act of the husband in giving the money to the wife was fraudulent or not could not be tried otherwise than under a bill in equity, setting up the husband's insolvency and fraudulent purpose in paying the money to his wife, and praying that the money be adjudged to belong to the husband, and directed to be paid to his creditors.[1]

§ 160. The Possession Necessary to Charge the Garnishee.—In order to charge a person as trustee or garnishee on account of property capable of manual delivery, he must be in the actual, as contradistinguished from the constructive, possession of the property.[2] If he is not in the actual possession of the property, he must, at least, have both the right and the power to take immediate possession, before he can be garnished.[3] "The garnishee must not only have actual possession of the defendant's effects, but there must be, except in cases of fraudulent disposition of property, privity between him and the defendant, both of contract, express or implied, and of interest, by which the defendant would have a right of action or an equitable claim against the garnishee to recover the property for his own use, either at the present or some future

[1] Himstedt *v.* German Bank, 46 Ark. 537.

[2] Andrews *v.* Ludlow, 5 Pick. 28; Willard *v.* Sheafe, 4 Mass. 235; Grant *v.* Shaw, 16 Mass. 341; 8 Am. Dec. 142; Burrell *v.* Letson, 1 Strob. 239; Drake on Attachment, secs. 482–484.

[3] Lane *v.* Nowell, 15 Me. 86; Morse *v.* Holt, 22 Me. 180; Glenn *v.* B. & S. Glass Co., 7 Md. 287; Childs *v.* Digly, 24 Pa. St. 23; Ward *v.* Lamson, 6 Pick. 358.

time. The want of privity, either of contract or of interest, will generally prevent the garnishee's being charged. Property may be in the garnishee's hands, in which the defendant has an interest, but which the garnishee may be under no legal obligation to deliver to him; and as the plaintiff can exercise no greater control over the property, in such case, than the defendant could, the garnishee cannot be charged. There may, too, be property in the garnishee's hands, the legal title to which is in the defendant, and for which the defendant might maintain an action against the garnishee, and yet the latter not be liable as garnishee. Such, for instance, as held in New Hampshire, is the case of a party who has taken the goods of another by trespass, and who cannot, in respect thereof, be held as garnishee of the owner, though the legal title is in the latter, and he might maintain an action for the trespass. Such, too, is the case of one in whom the legal title of goods is vested, but has no interest of his own in them."[1] In conformity with these principles, it must be held that property which happens to be in the possession of a person, either without his consent[2] or without his knowledge,[3] does not render him liable to be held as

[1] Drake on Attachment, sec. 485. For illustrations of the doctrines here stated, see same work, secs. 486–491, inclusive; and also Skowhegan Bank *v.* Farrar, 46 Me. 293; Dispatch Line *v.* Bellamy M. Co., 12 N. H. 205; 37 Am. Dec. 203; Simpson *v.* Harry, 1 Dears. & B. 202; Miller *v.* Richardson, 1 Mo. 310; Jones *v.* Ætna Ins. Co., 14 Conn. 501; White *v.* Jenkins, 16 Mass. 62; Bridgden *v.* Gill, 16 Mass. 522; Wright *v.* Foord, 5 N. H. 178; Pickering *v.* Wendall, 20 N. H. 222; Hess *v.* Shorb, 7 Pa. St. 231; Newer *v.* Fallon, 18 Mo. 277; Barnard *v.* Graves, 16 Pick. 41; Bean *v.* Bean, 33 N. H. 279; Briggs *v.* Block, 18 Mo. 281; Huntley *v.* Stone, 4 Wis. 91; Field *v.* Crawford, 6 Gray, 116; Eichelberger *v.* Murdock, 10 Md. 373; 69 Am. Dec. 140; Town *v.* Griffith, 17 N. H. 165; Folsom *v.* Haskell, 11 Cush. 470. For exceptions to the rule, see Jackson *v.* U. S. Bank, 10 Pa. St. 61.

[2] Staniels *v.* Raymond, 4 Cush. 314.

[3] Bingham *v.* Lamping, 26 Pa. St. 340; 67 Am. Dec. 418.

a trustee or garnishee. In a few cases, it has been decided that a person could be charged as trustee for property in his possession, in which he had no interest, which he had no right to detain, and upon which a direct levy and seizure could be made.[1] On the other hand, it is said that even a special deposit of money should be levied upon and taken into the officer's possession, instead of summoning the person in whose possession it is as a garnishee.[2] In some cases where the possession of the garnishee is sufficient to charge him, special circumstances may entitle him to relief. For instance, he may be a common carrier who has issued a bill of lading or carrier's receipt. If so, he cannot be charged as garnishee while such bill or receipt is outstanding; for he cannot know to whom it is his duty to deliver the property.[3] So process may be served upon him when the property is in the possession of one of his servants at some distant point. In this event, he is not chargeable, unless the service is made "at such a time and under such circumstances that he, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee." It would be the height of injustice to hold a railroad company liable as garnishees for goods which their servants and employees have delivered to consignees entitled to receive them, having no notice, at the time of making such delivery, that any garnishee process had been served, and before a reasonable time had elapsed after the service upon a distant

[1] Brown *v.* Davis, 18 Vt. 211; Loyless *v.* Hodges, 44 Ga. 647.

[2] Wood *v.* Edgar, 13 Mo. 451.

[3] Walker *v.* G. H. & M. R. R. Co., 49 Mich. 446; see Bingham *v.* Lamping, 26 Pa. St. 340; 67 Am. Dec. 418; Wood *v.* Half, 44 Tex. 633.

officer of the corporation within which notice could have been given to stop such delivery."[1]

§ 160 a. **The Garnishment of Property in the Possession of a Servant or Agent** has occasioned considerable judicial discussion and dissention. Where possession is held by a servant or agent, the property is, in contemplation of law, in the possession of the principal, and it may, and generally must, be levied upon in the same manner as like property belonging to the principal and held by him without the aid of any servant or agent. Where the property is capable of manual delivery, and may therefore be taken into the possession of the officer, the service of a notice of garnishment on a servant or agent of the defendant will, we apprehend, be universally conceded to be an idle ceremony. But moneys are frequently collected by mere servants or agents, and remain in their possession under such circumstances that they must be regarded as mere custodians of such moneys, rather than as debtors of their principals. Familiar instances of this are treasurers of corporations, ticket sellers, and station-agents in the service of transportation companies, and collectors of tolls upon toll-roads. With respect to these and similar cases, it has been held that the possession of the agent was the possession of the principal; that the relation of debtor and creditor did not exist between them; that garnishment must be directed against a third person; that such agent is not a third person, within the meaning of the rule, and therefore that moneys collected and held by him cannot be reached by garnishment, under a

[1] Bates v. C. M. & St. P. R. R., 60 Wis. 296; 50 Am. Rep. 369; Spooner v. Rowland, 4 Allen, 485.

writ against his principal.[1] The reasoning of these cases seems quite faultless, but the conclusion reached is very unsatisfactory. It would place moneys, while in the hands of servants and agents, except when so situated that it could be seen and seized by the officer, beyond the reach of process against their principals, and would enable the latter to defy their creditors, notwithstanding the existence of ample funds for their satisfaction. The majority of the courts have, therefore, not yielded to reasoning leading to a result so unjust and so at variance with a practical, commonsense view of this question, and have determined that an agent or servant of the defendant, on being served with a garnishment against the latter, becomes bound to retain any moneys in their hands belonging to such defendant, and to hold it subject to such garnishment.[2]

§ 161. **Bailee of Choses in Action.**—A chose in action can only be reached by proceedings against the payor thereof. It may happen that a promissory note is deposited with some third person, for the purpose of collection, or as collateral security, or merely for safekeeping. This person is not on that account liable to be summoned and charged as a garnishee or trustee.[3]

[1] Fowler *v.* Pittsburgh R'y, 35 Pa. St. 22; Hall *v.* Filter Mfg. Co., 10 Phila. 370; Pettingill *v.* Androscoggin, 51 Me. 370.

[2] Littleton Bank *v.* P. & O. R. R. Co., 58 N. H. 104; Gregg *v.* F. & M. Bank, 89 Me. 251; Mann *v.* Buford, 3 Ala. 312; 37 Am. Dec. 691; Maxwell *v.* McGee, 12 Cush. 137; Central P. R. R. Co. *v.* Sammons, 27 Ala. 380; Ballston Spa Bank *v.* Marine Bank, 18 Wis. 490; Everdell *v.* S. & F. du Lac R. R. 41 Wis. 395; First Nat. Bank of Davenport *v.* D. & St. P. R. R., 45 Iowa, 120.

[3] Grosvenor *v.* F. & M. Bank, 13 Conn. 104; Hall *v.* Page, 4 Ga. 428; 48 Am. Dec. 235; Clark *v.* Viles, 32 Me. 32; Rundlet *v.* Jordan, 3 Me. 47; Skowhegan Bank *v.* Farrar, 46 Me. 293; Raiguel *v.* McConnell, 25 Pa. St. 362; Deacon *v.* Oliver, 14 How. 610; Moore *v.* Pillow, 3 Humph. 448; Fitch *v.* Waite, 5 Conn. 117; Fuller *v.* Jewett, 37 Vt. 473; Lane *v.* Felt, 7 Gray, 491; Scofield *v.* White, 29 Vt. 339; Amee *v.* Jackson, 35 Vt. 173; Smith *v.* Wiley,

In some of the states the decisions upon this subject seem to be grounded upon this principle: that a chose in action cannot be taken and held under execution, and therefore that a bailee thereof cannot be compelled to surrender it under proceedings in garnishment, because it would be idle to compel the delivery to the court or officer of that which could not be seized or held under the writ.[1] In several states, however, certain choses in action are liable to seizure and sale under execution; while in other states, choses in action, if delivered to the officer, or to the receiver, could be collected by suit against the payor thereof. It is evident that the reason assigned for not requiring the bailee of choses in action to deliver them to an officer acting by garnishment, or in proceedings supplemental to execution, has no application to some of the states, and it would be logical to infer that where the reason does not exist the rule would not be enforced. Nevertheless, we have met with no case in which the bailee

41 Vt. 19; Ellison v. Tuttle, 25 Tex. 283; Tirrell v. Canada, 25 Tex. 455; Levisohn v. Waganer, 76 Ala. 412; Tingley v. Dolby, 13 Neb. 371; Lochrane v. Solomon, 38 Ga. 290. In Hancock v. Colyer, 99 Mass. 187, the garnishees answered that, at the time of the service of the writ upon them, they had in their hands a check for a large sum of money, payable to their order, and received by them under special instructions from the judgment debtor to accept it in satisfaction of a judgment in his favor against a third person. After such service they presented the check, received the proceeds, and paid them over to the defendant in execution. The court said: "The check of a third party, payable to the order of the supposed trustee, is not attachable by trustee process. It is not money, goods, effects, or credits, in the sense of the statute. It may never be paid. The liability of the trustee to the principal defendant is therefore contingent." To the same effect, Knight v. Bowley, 117 Mass. 551.

[1] Maine F. & M. Ins. Co. v. Weeks, 7 Mass. 468; Perry v. Coates, 9 Mass. 537; Dickenson v. Strong, 4 Pick. 57; Andrews v. Ludlow, 5 Pick. 28; Lupton v. Cutter, 8 Pick. 298; Gore v. Clisby, 8 Pick. 555; Guild v. Holbrook, 11 Mass. 101; Hopkins v. Ray, 1 Met. 79; McMeacham v. McCorbitt, 2 Met. 352; Sargeant v. Leland, 2 Vt. 277; Hitchcock v. Edgerton, 8 Vt. 202; Smith v. K. & P. R. R. Co., 45 Me. 547; Price v. Braly, 21 Tex. 614.

of a chose in action has been held chargeable, except by virtue of express statutory provisions.[1]

§ 162. **Reaches Legal Debts only.** — Garnishment, whether made under an attachment or under an execution, is a legal, and not an equitable, proceeding. The court can take no notice of debts due by the garnishee to the defendant, unless these debts could have been enforced by the defendant against the garnishee in an action at law. Whenever statutes have authorized the garnishment of debts, they have uniformly been limited in their application to legal debts.[2] Hence, if a judgment is entered in favor of A, for the use of B, it cannot be garnished by the creditors of the latter. "While our statute in regard to garnishment is comprehensive in its provisions, we do not think equitable claims can be subjected to the process. The terms employed are 'indebted,' or 'hath any effects or estate' in his charge, enumerating 'lands, tenements, goods, chattels, moneys, choses in action, credits, and effects.' The 'effects or estate,' spoken of in the charge or custody of the garnishee, must belong to the defendant in attachment, or judgment debtor, and the choses in action or credits must be due or owing to him, and evidently must be of a legal, and not equitable, character."[3] An assignment having been made to trustees for the benefit

[1] Thus in New Hampshire, a bailee of choses in action can now be held as a trustee. Fling *v.* Goodall, 40 N. H. 208. But it was otherwise until the passage of the present statute. Stone *v.* Dean, 5 N. H. 502; Fletcher *v.* Fletcher, 7 N. H. 452; 28 Am. Dec. 359; Howland *v.* Spencer, 14 N. H. 530.

[2] Harrell *v.* Whitman, 19 Ala. 135; Roby *v.* Labuzan, 21 Ala. 60; 56 Am. Dec. 237; Golden *v.* Pierson, 42 Ala. 370; Grain *v.* Aldrich, 38 Cal. 520; Hoyt *v.* Swift, 13 Vt. 129; 37 Am. Dec. 586; May *v.* Baker, 15 Ill. 89; Lowry *v.* Wright, 15 Ill. 95; Patton *v.* Smith, 7 Ired. 438; Gillis *v.* McKay, 4 Dev. 172.

[3] Webster *v.* Steele, 75 Ill. 544; Netler *v.* Chicago Bank, 12 Ill. App. 607; Perry *v.* Barnard, 7 R. I. 15.

of creditors, in trust to convert the property into money, and, after paying the expenses of the trust, to distribute the remaining proceeds *pro rata* among the creditors of the assignor, an attempt by garnishment was made to reach in the hands of the trustees the interest of one of the creditors of the assignor in the funds which would ultimately be due him as his *pro rata* of such funds. The trustees, however, had not completed their duties by disposing of all the property. It was therefore held that the right of the creditors was not a legal right or interest in the funds then in the possession of the trustees, but at most the right to compel in equity the execution of the trust; and hence, that it was not subject to garnishment.[1] In West Virginia, "where the garnishee owes a debt to the defendant in execution, or has an estate of his in his hands, and the character of his liability is such that it might be enforced in a common-law suit by an action of debt, detinue, or some other appropriate personal action," then the garnishee may be proceeded against by process of garnishment. "But when the liability of the garnishee is such that it can *only* be enforced in a court of equity, the garnishee process is entirely unsuited to enforce it"; and the judgment creditor is by statute au horized to bring suit in equity in the name of the sheriff.[2] The rule subjecting none but legal debts to garnishment is applicable in states where law and equity jurisdictions are blended in practice and administered by the same courts. "It is well settled that the word 'debt,' as used in the law of garnishment, includes only legal debts, — causes of action upon which the defendant, under the common-law practice, can maintain an

[1] Mass. Nat. Bank v. Bullock, 120 Mass. 86.

[2] Swann v. Summers, 19 W. Va. 125.

action of debt, or *indebitatus assumpsit*, and not mere equity claims."[1]

§ 162 a. **Rights Which the Judgment Debtor has the Option of Enforcing or not** are not subject to garnishment. This rule has been invoked and applied where the defendant in execution had paid usurious interest, which the judgment creditor in effect sought to recover by garnishment. The defense of usury is generally regarded as a personal privilege, and the payment of usurious interest voluntarily made is treated as a valid appropriation of the moneys by the payee, at least until the payor elects to disaffirm the payment, and treat the usurious interest as moneys held for his use and benefit. Until the payor has made his election to treat the payment as void, and reclaim the moneys paid, he has no cause of action against the payee. The debtor of the payor cannot compel him to make such election, and there can therefore be no perfect cause of action against the payee to be a proper subject for garnishment.[2] The same principles lead to the denial of the right to garnish a stockholder in a corporation who has not paid in full the amount subscribed by him to its corporate stock, where his duty to complete such payment is by law dependent upon an assessment or call therefor being made by the corporation. No cause of action exists against him in the absence of such call or assessment, and garnishment is a proceeding which can neither compel the requisite action by the corporation nor make its absence immaterial.[3]

[1] Hassie *v.* G. I. W. U. C., 35 Cal. 385; Cook *v.* Walthall, 20 Ala. 334; Lundie *v.* Bradford, 26 Ala. 512; Self *v.* Kirkland, 24 Ala. 275; Nesbitt *v.* McClanahan, 30 Ala. 68; Victor *v.* H. F. Ins. Co., 33 Iowa, 210.

[2] Eslett *v.* Rodes, 1 B. Mon. 316; Graham *v.* Moore, 7 B. Mon. 53; Boardman *v.* Roe, 13 Mass. 104; Barker *v.* Esty, 19 Vt. 131; Ransom *v.* Hays, 39 Mo. 445.

[3] McKelvey *v.* Crockett, 18 Nev. 238; Brown *v.* Union Ins. Co., 3 La. Ann. 177; Bingham *v.* Rushing, 5 Ala. 405.

§ 163. **Must be Payable in Money.**—It is essential that the obligation existing against the garnishee in favor of the defendant should be payable in money.[1] Therefore, a demand payable in "store accounts,"[2] or "notes,"[3] or "saddlery,"[4] or "castings and iron,"[5] or in work or labor,[6] or in board,[7] or "in groceries and provisions to live upon, as called for,"[8] cannot be reached by garnishment. In all these cases it is obvious that the court cannot compel the garnishee to pay a certain sum of money into court, for that would be to compel him to change a contract for the delivery of specific property or the performance of specified services into a contract to pay money; nor can the court enter a judgment payable in services or in property other than money. In response to a garnishment, the garnishee answered that he had purchased of the judgment debtor a tract of land, and had given him four several written contracts to make four annual payments of four bales of lint cotton, each weighing five hundred pounds. In discharging the garnishee, the court said: "Garnishment is a proceeding of purely statutory creation unknown to the common law, and while we are inclined to construe it favorably as highly remedial and beneficial, we have no power to originate machinery or process by which to adapt it to conditions which its statutory provisions are not broad enough to cover.

[1] Weil *v.* Taylor, 43 Mo. 581; McMinn *v.* Hall, 2 Over. 328; Jennings *v.* Summers, 7 How. (Miss.) 453; Bartlett *v.* Wood, 32 Vt. 372; Briggs *v.* Beach, 18 Vt. 115.

[2] Smith *v.* Chapman, 6 Port. 365; Deaver *v.* Keith, 5 Ired. 374.

[3] Munn *v.* Parker, 1 Ala. 421; Willard *v.* Butler, 14 Pick. 550.

[4] Blair *v.* Rhodes, 5 Ala. 618.

[5] Nesbitt *v.* Ware, 30 Ala. 68.

[6] Wrigley *v.* Geyer, 4 Mass. 101; *contra*, Louderman *v.* Wilson, 2 Har. & J. 379.

[7] Aldrich *v.* Brooks, 5 Fost. 241; Peebles *v.* Meeds, 96 Pa. St. 150.

[8] Smith *v.* Davis, 1 Wis. 447; 60 Am. Dec. 390.

The court having power only to render an unconditional money judgment against the garnishee, or to condemn personal chattels in his hands, it early became a question what description of debt or liability would authorize a personal money judgment against the garnishee. It was settled that only such debts as would maintain debt or *indebitatus assumpsit*, if sued on by the defendant, could be the subject of such condemnation and personal judgment.[1] If the sum due or to become due from the garnishee may be paid by him in his negotiable promissory notes, he cannot be held, because the creditor has no power "to interfere with this contract, and to compel the other party to pay it in money, instead of giving the note."[2] Where, however, the proceeding by garnishment or trustee process can reach not merely debts, but also effects of the defendant, it may be that the garnishee can be compelled to surrender any specific article to which the defendant is entitled from him.[3] In Iowa, where a garnishee had given his note for five hundred dollars, payable "in merchandise or trade at his store, as the same might be demanded," it was said that a judgment should have been entered against him for the amount of the note, "to be discharged in goods or merchandise at a fair value, to be placed at the disposal of the sheriff."[4]

§ 164. **Contingent Debts.**—Debts which are due contingently, and which therefore, may never become

[1] Jones *v.* Crews, 64 Ala. 371.

[2] Fuller *v.* O'Brien, 121 Mass. 422.

[3] Comstock *v.* Farnum, 2 Mass. 96; Clark *v.* King, 2 Mass. 524.

[4] Stadler *v.* Parmlee, 14 Iowa, 175. For form of judgment against garnishee when he owes a debt payable in specified bonds, see King *v.* Hyatt, 41 Pa. St. 229.

due, are not subject to garnishment.[1] In Vermont, a note was given, payable when the payee or his heirs should clear off certain encumbrances then existing on a specified tract of land. Trustee process was served on the maker of the note. The supreme court, in determining whether he could be charged under such process, said: "The note set forth in the disclosure is payable on a condition. This was a condition *precedent*, and the note was payable upon a contingency. It was not a debt *in præsenti*, to be discharged *in futuro*. Its becoming a debt rested in contingency. Until the condition was performed, no indebtedness existed; and no right of action would ever accrue on the note, in favor of the payee, against the maker. It is well settled in England, under the process of foreign attachment, that no *lien* can be acquired upon a debt the very existence of which is dependent upon a contingency, for the very satisfactory reason that it is no debt. The same principle has been and must be applied to the trustee process given by statute in many of the states."[2] To assist a better understanding of the rule,

[1] McCormick *v.* Kehoe, 7 N. Y. Leg. Obs. 184; Haven *v.* Wentworth, 2 N. H. 93; Burke *v.* Whitcomb, 13 Vt. 421; Tucker *v.* Clisby, 12 Pick. 22; Roberts *v.* Drinkhard, 3 Met. (Ky.) 309; Wentworth *v.* Whittemore, 1 Mass. 471; Taber *v.* Nye, 12 Pick. 105; Russell *v.* Clingan, 33 Miss. 535; Harris *v.* Aiken, 3 Pick. 1; Sayward *v.* Drew, 6 Me. 263; Frothingham *v.* Haley, 3 Mass. 68; Kettle *v.* Harvey, 21 Vt. 301; Bishop *v.* Young, 17 Wis. 46; Bates *v.* N. O. J. & G. N. R. R. Co., 4 Abb. Pr. 72; 13 How. Pr. 516; Baltimore & O. R. R. Co. *v.* Gallahue, 14 Gratt. 563; Davis *v.* Ham, 3 Mass. 33; Wood *v.* Partridge, 11 Mass. 488; Clement *v.* Clement, 19 N. H. 460; Shearer *v.* Handy, 22 Pick. 417; Maduel *v.* Mousseaux, 29 La. Ann. 228.

[2] Burke *v.* Whitcomb, 13 Vt. 423. For cases discussing and determining the question what demands are contingent, see Cutter *v.* Perkins, 47 Me. 557, Williams *v.* Marston, 3 Pick. 65; Guild *v.* Holbrook, 11 Pick. 101; Rich *v.* Waters, 22 Pick. 563; Woodard *v.* Herbert, 24 Me. 358; Ingalls *v.* Dennett, 6 Me. 79; Thorndike *v.* De Wolf, 6 Pick. 120; Downer *v.* Curtis, 25 Vt. 650; Dwinel *v.* Stone, 30 Me. 384; Wilson *v.* Wood, 31 Me. 123; Willard *v.* Sheafe, 4 Mass. 235; Grant *v.* Shaw, 16 Mass. 341.

we shall refer to some of the cases in which its application has been sought. A school-teacher having been employed to teach for the winter term, under a contract providing that he should "recover no part of his earnings until the term of school should have been fully completed," the school district was garnished as his creditor after he had taught about two months, but before the term was completed, and the court determined that such garnishment was unavailing, because the teacher might never complete the term, and if so, he would never become entitled to any compensation.[1] So where a builder had entered into a written contract to perform certain work within a time designated and according to certain plans and specifications, and had stipulated to pay three dollars for each day the job should remain unfinished after the day designated for its completion, it was held that a garnishment before the completion of the work was ineffectual, because it could not be known whether the work would ever be completed, nor, if completed, what amount must be deducted from the contract price for delay in such completion.[2] A farm was sold, the purchaser agreeing to cultivate the land, and to deliver "to the grantee stipulated portions of the crops raised thereon" for several years thereafter. Being sued for damages for not delivering crops as stipulated, he urged in his defense that he had been garnished by a creditor of his vendor. The garnishment was decided to be inoperative, because at the time of its service the debt or liability sought to be reached depended on a contingency.[3] A conductor of a street railway company was entitled to $6.75 for

[1] Norton v. Soule, 75 Me. 365.
[2] Hopson v. Dinan, 48 Mich. 612.
[3] Reinhart v. Hardesty, 17 Nev. 141

wages, but he owed the company $4.57 for money received, and had in his possession tickets intrusted to him to sell of the value of $5. By his contract with the company he was required to account to it for these tickets, either by paying therefor in money or by allowing their value in reduction of the amount due him for wages. It was held that the company could not be held as garnishee, because "whether it owed anything depended upon the contingency or condition that the conductor should return the tickets in his hands."[1] If a contract is made whereby the promisor agrees to pay the promisee certain sums at stated periods during the life of the latter, sums which have become due absolutely may be garnished; but it is otherwise as to sums not so due, because their becoming due is dependent on the contingency of the continuance of the life of the promisee.[2] If the amount to which a contractor on a railroad is entitled for work done under his contract is or may be subject to forfeiture for divers causes specified in such contract, it cannot be garnished.[3] Rents unless due absolutely and unconditionally are not subject to garnishment, because their coming due is dependent on the continuance between the parties of the relation of landlord and tenant with respect to the property leased.[4] A mail subcontractor agreed with the principal contractor to carry the mails for seventy-five dollars per quarter, provided he should fulfill all the requirements, conditions, and stipulations contained in a contract with the postmaster-

[1] Fellows v. Smith, 131 Mass. 362.

[2] Sabin v. Cooper, 15 Gray, 532; Sayard v. Drew, 6 Mo. 263.

[3] Baltimore etc. R. R. v. Gallahue's Adm'r, 14 Gratt. 563; Strauss v. R. R. Co., 7 W. Va. 368.

[4] Thorp v. Preston, 42 Mich. 511; *contra*, Rowell v. Felker, 54 Vt. 526.

general. Payment was not to be made to the subcontractor until the principal received his pay from the government, nor unless evidence of the service should be received by the department. The moneys to become due the subcontractor were sought to be garnished, though they had not been paid to the principal, nor had any evidence been furnished the department of the rendition of the service. The court said: "It is contingent whether the required evidence of service will ever be furnished the department, and if not furnished, there is nothing due the trustee or the defendant. The claim of the defendant against the trustee is contingent. It is not absolutely due, but the trustee is not to be charged where his liability rests upon a contingency."[1] On the other hand, if there is no contingency with respect to the liability, the debt, it is said, may be garnished, although some further act must be done to fix its amount or value, provided the act is one to the performance of which the judgment debtor is entitled.[2] So if the debt is absolute, it may be garnished, although the debtor has the right to elect the mode in which it may be paid, as where he having purchased personal property has the

[1] Larrabee *v.* Walker, 71 Me. 441. See also Early *v.* Redwood City, 57 Cal. 193.

[2] Ware *v.* Gowen, 65 Me. 534. In this case the defendant had performed work in the construction of a railroad, under a contract which entitled him to payment upon the estimate and certificate of an engineer named in such contract. The court said: "Was the pay for the work due absolutely, and not on any contingency at the time of the service of the writ?" We think by the true construction of the contract it was. The work had been performed. There was nothing further for the contractor to do to be entitled to pay. It only remained for the engineer to measure the work and make his estimate in order to fix the amount to be paid. If the engineer should neglect or unreasonably refuse to make an estimate and certificate of the work, it would not deprive the contractor of his right to pay, but he might bring his suit, and prove the amount of the work in some other way.

right either to return the property or to pay a stipulated price therefor within a prescribed period.[1] A debt is not to be regarded as contingent merely because the mode of book-keeping used by the parties is such that the apparent indebtedness shown by such books is liable to be changed by subsequent investigations, which may show that some of the charges made did not in fact represent existing liabilities against the party charged.[2]

In Michigan, the statute relating to garnishment now provides that the garnishee shall "be liable on any contingent right or claim against him in favor of the principal defendant." In construing this statute, the supreme court of that state excludes all contingencies "depending on the will and ability of the debtor to earn the money." Hence if after a building contract has been entered into a garnishment is served, it can reach nothing beyond moneys then actually due. If a different construction were adopted, a garnishment could be served as soon as the contract was made, and the builder thereby deprived of all credit, and therefore of all means of performing his contract. No advances or payments could be made on the work, because of their prior appropriation by the garnishment; and both parties would be forced to abandon the contract. "No doubt the employer has a claim in such a case that the builder shall perform his contract; but the contingency on which the money is payable is one dependent on the subsequent earning of the money. It is therefore a contingency depending on the will and ability of the debtor to earn money,—a will which it may generally be assumed will not be exerted where

[1] Smith v. Cahoon, 37 Me. 281.

[2] Wagon Co. v. Peterson, 27 W. Va. 339.

earning is not to be followed by enjoyment. If there is a contingent claim here, so there is when a laborer hires out for a year, to be paid at the end of the year; and his creditor may garnish as soon as the hiring takes place. It would be a safe assumption that very little labor would be done under the hiring after the claim was garnished."[1] The demand, though contingent when the garnishee is summoned, may be transformed into an absolute, unconditional indebtedness before the time for the entry of judgment. It has sometimes been held that this transformation cannot render him chargeable, because his liability must exist at the service of the writ.[2] In other cases it has been adjudged that he is chargeable for all debts due and certain at the time of the answer or disclosure, though contingent when the writ was served.[3]

§ 164 a. **Claims against Insurance Companies** for losses against which they have issued policies form a prominent class of debts not subject to garnishment, because subject to contingencies. Indeed, it has been held, and so far as we know without dissent, that claims for loss of property destroyed by fire cannot, until their adjustment, be garnished, because they are mere claims for unliquidated damages.[4] In most cases of insurance against loss by fire, the insurer reserves the right, instead of paying the amount of such loss, of repairing or rebuilding the property injured or destroyed. Until he has made his election not to rebuild or repair, it cannot be known that any sum of money will ever be-

[1] Webber *v.* Bolte, 51 Mich. 115.

[2] Williams *v.* A. & K. R. R. Co., 36 Me. 201; 8 Am. Dec. 742; Mace *v.* Heald, 36 Me. 136.

[3] Franklin F. Ins. Co. *v.* West, 8 Watts & S. 350.

[4] Bucklin *v.* Powell, 60 N. H. 119; McKren *v.* Turner, 45 N. H. 203.

come due from him under his policy, and he therefore cannot be garnished.[1] Where a policy of life insurance has issued, the insurer cannot be garnished during the existence of the life of the assured, because it is not certain when nor whether any sum will ever become due on the policy.[2] In the case of the insurance of property against loss by fire or other causes, the policy generally prescribes sundry acts to be performed by the assured after the loss and before he becomes entitled to payment therefor, such as giving due notice, making proofs of the amount of the loss, furnishing the certificate of a magistrate that he believes the loss was suffered without any fraud of the assured, etc. Until these various conditions have been fulfilled, the liability of the insurer is contingent, and he cannot be garnished.[3]

§ 165. **Debts not Due.**—The earlier authorities inclined toward the view that a garnishment could reach only those debts which had fallen due, and which, therefore, constituted a perfect present cause of action against the garnishee.[4] But it is now a very generally recognized rule of law, that a debt existing in favor of the garnishee, not due at the service of the writ, but which is sure to become due at a future period, may be reached both under execution and attachment.[5] This

[1] Martz *v.* Detroit Ins. Co., 28 Mich. 201; Godfrey *v.* McComber, 128 Mass. 188.

[2] Day *v.* N. E. L. Ins. Co., 111 Pa. St. 507; 56 Am. Rep. 297.

[3] Gies *v.* Bechtner, 12 Minn. 279; Katz *v.* Sorsby, 34 La. Ann. 588.

[4] Dalton *v.* Solly, Cro. Eliz. 184; Childress *v.* Dickins, 8 Yerg. 113; McMinn *v.* Hall, 2 Tenn. 328. In Rundle *v.* Scheetz, 2 Miles, 330, salary not due was held exempt from attachment, and in Cany *v.* Day, 2 Miles, 412, a like decision was made in reference to an annuity.

[5] Branch Bank *v.* Poe, 1 Ala. 396; Cottrell *v.* Varnum, 5 Ala. 229; Fulweiler *v.* Hughes, 17 Pa. 440; Dunnegan *v.* Byers, 17 Ark. 492; Glanton *v.* Griggs, 5 Ga. 424; Peace *v.* Jones, 3 Murph. 256; Steuart *v.* West, 1 Har. & J. 536;

rule has no application to future contingent liabilities;[1] nor to any case where the liability of the defendant to the garnishee depends upon the performance by the latter of some condition precedent, or upon his full compliance with the terms of some unperformed agreement or contract.[2] The debt itself must be in existence at the time of the service of the writ, free from any contingency; and it may so exist though the time stipulated for its payment be very remote. Hence if one is under a contract to serve another, and has performed the greater portion of his contract, leaving something yet to be done before he is entitled to any compensation, as there is nothing due to him absolutely, there can be no garnishment.[3] If, on the other hand, the person performing services is entitled to compensation, free from any contingency, though the time for payment has not arrived, there is an absolute debt, and consequently a proper subject for garnishment. If some services for which one is entitled to compensation have been performed, and other services for which he will become entitled to compensation on performance remain to be performed, the former are and the latter are not proper subjects of garnishment, though all are provided for in the same contract.[4] Whether the liability of a lessee for rents to accrue is a perfect debt,

Pursell *v.* Pappenheimer, 11 Ind. 327; Sheriff *v.* Buckner, 1 Litt. 127; Sayward *v.* Drew, 6 Me. 263; Willard *v.* Sheafe, 4 Mass. 235; Walker *v.* Gibbs, 2 Dall. 211; Fay *v.* Smith, 25 Vt. 610; Clapp *v.* Hancock Bank, 1 Allen, 394; Nichols *v.* Scofield, 2 R. I. 123.

[1] See § 164.

[2] Robinson *v.* Hall, 3 Met. 301; Daily *v.* Jordan, 2 Cush. 390; Wyman *v.* Hinchborn, 6 Cush. 264; Baltimore & O. R. R. *v.* Gallahue, 14 Gratt. 563; Baltimore & O. R. R. *v.* McCullough, 12 Gratt. 595; Ross *v.* McKinny, 2 Rawle, 227; Kettle *v.* Harvey, 21 Vt. 301; Russell *v.* Clingan, 33 Miss. 535.

[3] Webber *v.* Bolte, 51 Mich. 113; Thomas *v.* Gibbons, 61 Iowa, 50.

[4] B. & M. R. R. Co. *v.* Thompson, 31 Kan. 180; 47 Am. Rep. 497.

within the meaning of the statutes respecting garnishment, is a doubtful question. On the one hand, it is said that the lessor may convey the property to a third person, or the lease may be surrendered, or the lessee may be ousted, and upon the happening of these or other possible contingencies may be exonerated from any further liability on his lease, and therefore, that any attempted garnishment must prove ineffective under the rule inhibiting the garnishment of contingent debts.[1] On the other hand, it has been decided that rent to accrue for future occupation may be garnished, and that the contingency of a suspension or destruction of the lease from some cause is not one of the contingencies relieving the lessee from liability as garnishee.[2] The court intimated that if any contingency should subsequently occur, under which the lessee ought no longer to be held answerable, "he must avail himself of it, in such manner as the law will permit"; but what "such manner" shall be was not foreshadowed. If a contract is entered into with a municipal corporation to build a sewer, to be completed on a day named, and to be paid for a certain sum per lineal foot, a garnishment at any time prior to the completion of the work is not permitted, because the contract is entire, and not apportionable, and prior to its complete performance there is no existing debt.[3] So under a contract to deliver a certain quantity of logs in a designated boom, for an agreed price per thousand feet, there is no debt, and therefore no subject for garnishment, until the logs are delivered as agreed.[4] If a contract of sale is entered into, by the

[1] Vogel *v.* Preston, 42 Mich. 511.
[2] Rowell *v.* Felker, 54 Vt. 529.
[3] Coburn *v.* City of Hartford, 38 Conn. 290.
[4] Wheeler *v.* Day, 23 Minn. 545.

terms of which no credit is to be given, and the delivery and payment are to be concurrent, no debt exists from the purchaser to the seller. If, in such a case, "the delivery and payment were to be simultaneous, and the goods were delivered in the expectation that the price would be immediately paid, the refusal to make payment would be such a failure on the part of the buyer to perform the contract as to entitle the seller to put an end to it and reclaim the goods." Unless the seller consents to give credit, or to treat the sale as valid and subsisting, notwithstanding the want of payment, there is no debt due him which can be garnished.[1] Although debts not due may be subjected to garnishment, the garnishee will not be compelled to make payment of the obligation against him until it has fully matured. The entry of the judgment against him will be delayed till the debt becomes due;[2] or if such delay be not made in entering the judgment, execution thereon will be stayed, as the justice of the case may require.[3]

§ 166. **Debts in Suit or in Judgment.**—At an early day it was determined in the states of Massachusetts[4] and New Hampshire[5] that a debtor could not be garnished during the pendency of an action against him for the recovery of a debt. This position has been abandoned in both of these states;[6] and it seems now to be very generally, and perhaps universally, conceded that the mere pendency of a suit for the collection of a debt will not place it beyond the

[1] Paul v. Reed, 52 N. H. 136.
[2] Wilson v. Albright, 2 G. Greene, 125.
[3] Anderson v. Wanzer, 5 How. (Miss.) 587; 37 Am. Dec. 170.
[4] Gridley v. Harraden, 14 Mass. 496.
[5] Burnham v. Folsom, 5 N. H. 566.
[6] Thorndike v. De Wolf, 6 Pick. 120; Foster v. Dudley, 10 Fost. 463.

reach of garnishment process.[1] But there may arrive certain stages of the suit at which the defendant is in many of the states no longer liable to garnishment. The general rule upon this subject seems to be this: that as long as the proceedings are in such a condition that the defendant, by a plea in abatement or otherwise, can bring before the court the fact that the debt in suit is attached by a creditor of the plaintiff, and can thus shield himself from the liability to make payment both to the plaintiff and to the plaintiff's creditor, so long the defendant may be summoned and held as a garnishee.[2] But when this stage has been passed, the liability of the debt to garnishment is, in most of the states, terminated. Hence a debt in suit cannot be attached after a verdict,[3] nor after a default,[4] nor after an award made therefor by a referee.[5] It may happen that the suit is pending in one court, and that the writ under which the garnishment is sought to be made has issued from another court. In such a case, there is strong reason for denying the right of garnishment, because its allowance might permit one tribunal to interfere with the proceedings of another.[6] This is

[1] Crabb *v.* Jones, 2 Miles, 130; Smith *v.* Barker, 10 Me. 458; McCarty *v.* Emer, 2 Dall. 277; Sweeney *v.* Allen, 1 Pa. St. 380; Jones *v.* N. Y. R. R. Co., 1 Grant Cas. 457; Foster *v.* Jones, 15 Mass. 185; Locke *v.* Tippets, 7 Mass. 149; Hitt *v.* Lacy, 3 Ala. 104; 36 Am. Dec. 440; Huff *v.* Mills, 7 Yerg. 42; Lieber *v.* St. Louis, 36 Mo. 382; McDonald *v.* Karney, 8 Kan. 20.

[2] Wadsworth *v.* Clark, 14 Vt. 139; Foster *v.* Dudley, 10 Fost. 463; Thorndike *v.* De Wolf, 6 Pick. 120; Trombly *v.* Clark, 13 Vt. 118.

[3] Eunson *v.* Healey, 2 Mass. 32; Thayer *v.* Pratt, 47 N. H. 470.

[4] Howell *v.* Freeman, 3 Mass. 121; Kidd *v.* Shepherd, 4 Mass. 238; McCaffrey *v.* Moore, 18 Pick. 492.

[5] Holt *v.* Kirby, 39 Me. 164; Strout *v.* Clements, 22 Me. 292; Caila *v.* Elgood, 2 Dowl. & R. 193; Coppell *v.* Smith, 4 Term Rep. 312.

[6] Bingham *v.* Smith, 5 Ala. 651. See this principle urged against the garnishment of judgments in Young *v.* Young, 2 Hill (S. C.), 426, and in Burrell *v.* Letson, 2 Spears, 378. In Michigan, a debt upon which an action has been brought before one justice of the peace cannot be garnished under process issued by another justice. Custer *v.* White, 49 Mich. 262.

particularly the case where the two courts act under and by virtue of entirely distinct authorities. Hence it has been determined that a debt in suit in one of the federal courts cannot be garnished under a writ issuing out of a state court,[1] nor can a debt in suit in one state, but subsequently garnished in another state.[2] The garnishment of debts is authorized upon the theory that the garnishee owes something to the defendant, which, after the service of garnishment, may be lawfully withheld from the defendant, and appropriated to the payment of the defendant's creditors. But when the debt has merged into a judgment, the defendant has no right to delay its payment; nor has he any means, aside from payment, of preventing his property from being taken and sold under execution for the satisfaction of the judgment. Therefore it has been held, in a majority of the states, that a debt due by judgment cannot be reached by garnishment.[3] In other states the language of the statutes is so broad as to embrace debts of every kind and nature; and in these states it has been determined that a judgment debtor may be held as garnishee,[4] even if the execution

[1] Wallace *v.* McConnell, 13 Pet. 151; Wood *v.* Lake, 13 Wis. 84; Greenwood *v.* Rector, Hemp. 708.

[2] Whipple *v.* Robbins, 97 Mass. 107; American Bank *v.* Rollins, 99 Mass. 313.

[3] Norton *v.* Winter, 1 Or. 47; 62 Am. Dec. 297; Black *v.* Black, 32 N. J. Eq. 75; Burnham *v.* Folsom, 5 N. H. 566; Sharp *v.* Clark, 2 Mass. 91; Prescott *v.* Parker, 4 Mass. 170; Franklin *v.* Ward, 3 Mason, 136; Shinn *v.* Zimerman, 3 Zab. 150; 55 Am. Dec. 260; Sir John Parrott's Case, Cro. Eliz. 63; Kerry *v.* Bower, Cro. Eliz. 186; Norton *v.* Winter, 1 Or. 47; 62 Am. Dec. 297; Esty *v.* Flanders, 16 N. H. 218; Clodfellow *v.* Cox, 1 Sneed, 330; 60 Am. Dec. 157; Trowbridge *v.* Means, 5 Ark. 135; 39 Am. Dec. 368; Tunstall *v.* Means, 5 Ark. 700. In Massachusetts a judgment may now be reached by garnishment, if it remains unpaid for one year after its entry. Sabin *v.* Cooper, 15 Gray, 552.

[4] Jones *v.* N. Y. & E. R. R. Co., 1 Grant Cas. 457; Skipper *v.* Foster, 29 Ala. 330; 65 Am. Dec. 405; O'Brien *v.* Liddell, 10 Smedes & M. 371; Minard *v.* Lawler, 26 Ill. 301; Gray *v.* Henby, 1 Smedes & M. 598; Belcher *v.* Grubb,

has been levied upon his property.[1] His remedy, in such circumstances, would, no doubt, be by an application to the court in which the judgment was rendered, showing that it has been attached, and asking for a stay of proceedings until the attachment suit can be settled. If, however, the garnishment is under process from a court of a different jurisdiction from that in which the judgment sought to be garnished was entered, there seems to be no doubt that the garnishment cannot be permitted. To permit it would probably occasion an unseemly conflict between independent judicial tribunals, in which the one would seek to enforce its judgment, and the other to seize upon such judgment, and in effect transfer it to a stranger to the original action.[2]

§ 167. **Claims for Tort or for Unliquidated Damages.**—The fact that the person summoned as garnishee is liable to the defendant in an action of tort does not render him chargeable under the garnishment.[3] If a person obtains possession of goods by the commission of a trespass, he cannot be charged as the trustee of the person against whom the wrong was committed.[4] The rule is the same where the person summoned as a garnishee is liable for a wrongful con-

4 Harr. (Del.) 461; Halbert *v.* Stinson, 6 Blackf. 398; Gager *v.* Watson, 11 Conn. 168; Sweeney *v.* Allen, 1 Pa. St. 380; Fithian *v.* N. Y. & E. R. R. Co., 31 Pa. St. 114; Ochiltree *v.* M. I. &. N. R'y, 49 Iowa, 150.

[1] Belcher *v.* Grubb, 5 Harr. (Del.) 461.

[2] Sievers *v.* W. S. W. Co., 43 Mich. 275; Noyes *v.* Fisher, 48 Mich. 273; Henry *v.* Gold P. M. Co., 15 Fed. Rep. 649; Young *v.* Young, 2 Hill (S. C.), 426.

[3] Getchell *v.* Chase, 37 N. H. 106; Foster *v.* Dudley, 10 Fost. 464; Rundlett *v.* Jordan, 3 Greenl. 48; Ten Broeck *v.* Sloo, 13 How. Pr. 28; 2 Abb. Pr. 234; Davenport *v.* Ludlow, 4 How. Pr. 337; 3 Code Rep. 66; Hudson *v.* Plets, 11 Paige, 180; 3 N. Y. Leg. Obs. 120; Hill *v.* Bowman, 35 Mich. 191.

[4] Despatch Line *v.* Bellamy M. Co., 12 N. H. 205.

version[1] of property, or for a breach of official duty.[2] "Garnishees are required to answer as to indebtedness, and as to assets or property in hand, not as to the torts they may have committed against the defendant in the suit." Hence there can be no garnishment of a liability arising from such false representations as would sustain an action for deceit.[3] If an officer wrongfully levies upon property, and sells it under execution, but no payment is made to him pursuant to such sale, he is not liable for money had and received, but either for a wrongful levy, or for negligence in not collecting the purchase price. In either event, there is not such an "indebtedness, right, or credit" as is "liable to be seized or taken under attachment."[4] If a railroad corporation, in the construction of its road, enters upon and takes certain lands for railway purposes, without any agreement with their owner, the claim of the latter is "for unliquidated damages for a tortious act, such a claim has never been held to come within the attachment laws."[5] A person wronged may be in a condition to waive the wrong and to recover in *assumpsit.* The right to make this waiver belongs only to the injured party. Until it has been made, the wrong-doer must be regarded as a tort-feasor, and not as a debtor, and cannot be charged as a garnishee.[6] Where a claim is based upon a tort, its character is not changed by any proceedings anterior to the entry of judgment, so as to become subject to garnishment. It is therefore immaterial that an

[1] Paul *v.* Paul, 10 N. H. 117.

[2] Hemmenway *v.* Pratt, 23 Vt. 332; Lomerson *v.* Huffman, 1 Dutch. 625.

[3] Bates *v.* Forsyth, 69 Ga. 365.

[4] Lomerson *v.* Huffman, 1 Dutch. 632.

[5] Selheimer *v.* Elder, 98 Pa. St. 154.

[6] Lewis *v.* Dubose & Co., 29 Ala. 219.

action has been commenced in which the default of the defendant has been entered, and the right to recover damages thereby conceded, for "the office of a default is not to change in the least the nature of the demand in suit, but merely to dispense with the necessity of certain proof."[1] Nor does the verdict of a jury or the report of a referee in an action for tort change the nature of the liability.[2] It merely ascertains the amount of the damages. Thus where a city was garnished after a verdict against it in an action for tort, the court said: "The original cause of action did not render the city liable as a trustee, because it is a cause of action arising from tort. The verdict on it did not convert it into a debt; no action of debt would lie on it. It could not constitute a debt till judgment should be rendered upon it; and when judgment was rendered upon it, it was too late for the city to plead it, or otherwise bring it to the notice of the court. The city owed the principal nothing when the trustee writ was served."[3] It is also well settled that a claim for unliquidated damages, whether for torts committed, or for breaches of contracts, or for any other cause, cannot make the person against whom the claim exists liable as a garnishee.[4] Hence there can be no garnishment of a liability arising out of a bond given to pay the damages which might result from a wrongful attachment.[5] This rule also applies when a lease is made, and the covenants therein are afterward violated in sundry respects, entitling the lessee to dam-

[1] Holcomb *v.* Town of Winchester, 52 Conn. 448; 57 Am. Rep. 608.

[2] Cranch *v.* Gridley, 6 Hill, 250; Kellogg *v.* Schuyler, 2 Denio, 73.

[3] Thayer *v.* Southwick, 8 Gray, 229; Detroit Post *v.* Reilly, 46 Mich. 459.

[4] Hugg *v.* Booth, 2 Ired. 282; Deaver *v.* Keith, 5 Ired. 374; Ransom *v.* Hayes, 49 Mo. 445; Rand *v.* White Mountains R. R., 40 N. H. 79.

[5] Peet *v.* McDaniel, 27 La. Ann. 455.

ages.[1] A garnishee cannot be charged for any sum received by him from the defendant for usurious interest.[2] This is not because the claim rests in tort, or is for unliquidated damages, but rather by reason of the legal principle that the right to recover such interest is a personal privilege, depending for its existence on the election of the party who made the usurious payment. No very precise definition of a liquidated claim can be given; and if given, different minds may be unable to agree whether a particular state of facts shows a liquidated claim within the meaning of a definition of conceded correctness. Thus while a claim for loss against which an insurance company has agreed to indemnify the owner of property destroyed by fire is undoubtedly subject to garnishment as soon as it is adjusted,[3] the courts cannot agree regarding the *status* of such claim prior to its adjustment. Senator Maison, in Butts *v.* Collins, said: "But what are uncertain, unliquidated damages?[4] They are such as rest in opinion only, and must be ascertained by a jury, their verdict being regulated by the peculiar circumstances of each particular case; they are damages which cannot be ascertained by computation or calculation,—as, for instance, damages for not using a farm in a workmanlike manner; for not building a house in a good and sufficient manner; on warranty

[1] Eastman *v.* Thayer, 60 N. H. 575.

[2] Boardman *v.* Roe, 13 Mass. 104; Graham *v.* Moore, 7 B. Mon. 53; Barker *v.* Esty, 19 Vt. 131; Fish *v.* Field, 19 Vt. 141.

[3] Boyle *v.* Franklin Fire Ins. Co., 7 Watts & S. 76; Franklin Fire Ins. Co. *v.* West, 8 Watts & S. 350; Gove *v.* Varrell, 58 N. H. 78. While the insurance company retains the right to replace or rebuild the property destroyed, instead of paying its value, the claim for insurance cannot be garnished, for it is not due in money, and may never become so due. Martz *v.* D. F. & M. Ins. Co., 28 Mich. 291.

[4] 13 Wend. 156.

in the sale of a horse; for not skillfully amputating a limb; for carelessly upsetting a stage by which a bone is broken; for unskillfully working raw materials into a fabric; and other cases of like character, where the amount to be settled rests in the discretion, judgment, or opinion of the jury." This definition was quoted and approved in the case of McKean *v.* Turner, 45 N. H. 204,—a case in which an insurance company was summoned as a trustee. In this case, the court determined that the company could not be held, because the amount of the claim against it was "a matter of opinion and judgment, to be determined, not by any fixed pecuniary standard, but by an opinion formed from all the circumstances of the case, including location, state of repairs, the quality of the building, machinery, and fixtures, the prices of such property in the neighborhood, and generally, all the circumstances which bear on the question of value."[1] But perhaps the better opinion is, that a claim against an insurance company for loss occasioned by the destruction of property is no more an unliquidated claim than is a debt due for goods sold and delivered, to be paid for according to their market value.[2] A liability may be exempt from garnishment, though not founded in tort, nor for the recovery of damages, if it is unliquidated, and the parties have the right to have it liquidated by a proceeding in chancery before either becomes liable at law to the other. Thus it is a familiar principle of law that while the business of a partnership remains unsettled, neither of the partners can recover of the other in an action at law the balance which he claims

[1] See Meacham *v.* McCorbitt, 2 Met. 352.

[2] Knox *v.* Protection Ins. Co., 9 Conn. 430; 25 Am. Dec. 33; Girard F. & M. Ins. Co. *v.* Field, 45 Pa. St. 129; 3 Grant Cas. 329.

would be due him upon such settlement. It follows that the creditors of one of the partners have no rights superior to their debtor, and that as he must await an accounting before he can assert any claim by action at law, so must they await such accounting before they can proceed by garnishment.[1]

§ 168. **Debt Due by Negotiable Note.** — A garnishee is not, by means of the garnishment, to be placed in a worse situation than before, nor is his contract to be varied or made more perilous. He is not thereby to be made answerable to some person, when he owes another. One who has executed a negotiable note can rarely know to whom he may be liable to make payment. When summoned as garnishee, he can only answer that he was indebted to the defendant, but that he does not know whether his obligation is now due to the defendant or has been transferred to another. While the present ownership of the note remains unknown, it is obvious that no judgment can be entered against the garnishee without exposing him to a double accountability: 1. Upon the judgment; and 2. Upon the note, if it shall prove to have been transferred. Hence it must follow that negotiable paper ought never to be subject to garnishment, except when its present ownership can be shown to be in the defendant, and it is overdue; or except where it can, as soon as judgment is given against the garnishee, be deposited in court, or with the garnishee, or in some manner deprived of its negotiable character.[2] Thus it was said at an early day in New Hampshire, that "it has always been

[1] Burnham *v.* Hopkinson, 17 N. H. 259; Driscoll *v.* Hoyt, 11 Gray, 404; Sheedy *v.* Second Nat. Bank, 62 Mo. 17.

[2] Clough *v.* Buck, 6 Neb. 343; King *v.* Vance, 46 Ind. 246; Huot *v.* Ely, 17 Fla. 775.

considered as settled in this state that a trustee who has given a negotiable note to the principal cannot be charged as a trustee on account of such note. The reason of this rule is founded upon the negotiable quality of the paper. If the trustee could be charged in such a case, then it might happen that either a *bona fide* purchaser of the note must lose the amount of it, or the maker, without any fault on his part, be compelled to pay it twice. To avoid such a dilemma, the rule was established."[1] But since this decision was pronounced, the law of the state has been changed by statute, making negotiable paper subject to garnishment, and protecting the maker from the claim of any indorsee whose title was acquired subsequently to the service of the trustee process.[2] In Vermont it was decided, upon principle, that the maker of a negotiable note could not be held, unless it could be shown that the note had not been transferred, and that it could be prevented from continuing its negotiable character.[3] The legislature then made *all* negotiable paper subject to garnishment, unless notice of its assignment had been given to the maker.[4] In Pennsylvania, it seems in the first instance to have been decided that negotiable notes could not be reached by garnishment.[5] Subsequently, the courts held that such notes were liable; that the judgment against the garnishee could not prejudice an assignee without notice; and that the

[1] Stone *v.* Dean, 5 N. H. 503.

[2] Amoskeag M. Co. *v.* Gibbs, 8 Fost. 316.

[3] Hutchins *v.* Evans, 13 Vt. 541; Hinsdale *v.* Safford, 11 Vt. 309.

[4] Kimball *v.* Gay, 16 Vt. 131; Chase *v.* Haughton, 16 Vt. 594; Barney *v.* Douglass, 19 Vt. 38; Peck *v.* Walton, 25 Vt. 33; Emerson *v.* Partridge, 27 Vt. 8; 62 Am. Dec. 617; Williams *v.* Shepherd, 33 Vt. 164; Seward *v.* Garlin, 33 Vt. 583.

[5] Ludlow *v.* Bingham, 4 Dall. 47.

garnishee, for his protection, could require the notes to be placed in the custody of the court.[1] In South Carolina,[2] Louisiana,[3] and Texas,[4] the maker of negotiable notes can be charged as a garnishee only when it can be shown that they are still in the possession of the defendant. In Indiana,[5] Michigan,[6] Minnesota,[7] and Wisconsin[8] the rule is in substantial conformity with that adopted in the states last named. In Iowa the statute provides that "the garnishee shall not be made liable on a debt due by negotiable or assignable paper, unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon, after he may have satisfied the judgment.[9] In California, the maker of a negotiable note,[10] or of a negotiable certificate of deposit,[11] cannot be garnished before its maturity so as to impair the rights of a subsequent *bona fide* holder. In Georgia,[12] Kentucky,[13]

[1] Kieffer *v.* Ekler, 18 Pa. St. 388; Hill *v.* Kroft, 29 Pa. St. 186.

[2] Gaffney *v.* Bradford, 2 Bail. 441; McBride *v.* Floyd, 2 Bail. 209.

[3] Sheetz *v.* Culver, 14 La. 449; 32 Am. Dec. 593; Kimball *v.* Plant, 14 La. 511; Erwin *v.* C. & R. R. Bank, 3 La. Ann. 186; Ross *v.* Savoy, 5 La. Ann. 162; Harris *v.* Bank of Mobile, 5 La. Ann. 538; Denham *v.* Pogue, 20 La. Ann. 195.

[4] Inglehart *v.* Moore, 21 Tex. 501; Price *v.* Brady, 21 Tex. 614; Bassett *v.* Garthwaite, 22 Tex. 230; 73 Am. Dec. 257; Kapp *v.* Teel, 33 Tex. 81; Wybrants *v.* Rice, 3 Tex. 458.

[5] Smith *v.* Blatchford, 2 Ind. 184; 52 Am. Dec. 504; Junction R. R. Co. *v.* Cleneay, 13 Ind. 161; Stetson *v.* Cleneay, 14 Ind. 453; Cadwalader *v.* Hartley, 17 Ind. 520; Cleneay *v.* J. R. R. Co. 26 Ind. 375.

Littlefield *v.* Hodge, 6 Mich. 326.

[7] Hubbard *v.* Williams, 1 Minn. 54; 55 Am. Dec. 66.

[8] Carson *v.* Allen, 2 Chand. 123; Davis *v.* Pawlette, 3 Wis. 300; 62 Am. Dec. 690; Mason *v.* Noonan, 7 Wis. 609.

[9] Hughes *v.* Monty, 24 Iowa, 499; Wilson *v.* Albright, 2 G. Greene, 125; County Comm'rs *v.* Fox, 1 Morris, 48; Yocum *v.* White, 36 Iowa, 288

[10] Gregory *v.* Higgins, 10 Cal. 339.

[11] McMillan *v.* Richards, 9 Cal. 365; 70 Am. Dec. 655.

[12] Burton *v.* Wynne, 55 Ga. 615; Mims *v.* West, 38 Ga. 18, explaining King *v.* Carhart, 18 Ga. 650.

[13] Greer *v.* Powell, 1 Bush, 489.

Massachusetts,[1] and Mississippi,[2] the maker of negotiable paper is protected from the possibility of loss by garnishment.

In Maryland, the maker of negotiable notes was garnished. They, it clearly appeared, were transferred before their maturity; but the evidence was conflicting with respect to the question whether such transfer was before or after the garnishment. The garnishee asked for an instruction to the jury, to the effect that if the transfer was made prior to the maturity of the notes to an indorsee, *bona fide*, for value, of which transfer the garnishee had no notice, then that the verdict must be in his favor. This instruction was refused, and on account of such refusal the judgment against the garnishee was reversed. "The difficulty of subjecting credits of that kind to the process of garnishment is to be found, not only in the nature and character of negotiable paper, but also in placing the garnishee in a worse condition than he otherwise would be, and subjecting him to the danger of having to pay the same debt twice over; for if a judgment of condemnation be recovered against him, its payment would not serve as a defense against a suit upon the note by a *bona fide* indorsee for value, who received it before maturity without notice of the attachment. The rights of the indorsee could be in no manner affected by the attachment proceeding, to which he is not a party, and which as to him is *res inter alios*. On the other hand, if it could be maintained that in such case the judgment of condemnation and its payment by the garnishee will protect him against the claim of the

[1] Eunsen *v.* Healy, 2 Mass. 32; Perry *v.* Coates, 8 Mass. 537; Wood *v.* Bodwell, 16 Pick. 268; Maine F. Ins. Co. *v.* Weeks, 7 Mass. 438.

[2] McNeil *v.* Roache, 49 Miss. 436.

indorsee, which would be contrary to sound principles, such a doctrine would destroy the negotiability of all promissory notes, and interfere injudiciously with the daily business and transactions of men dealing with commercial paper."[1] In Ohio, all debts, whether evidenced by negotiable instruments or not, are by statute declared to be subject to garnishment. The construction given to this statute, however, does not impair the negotiability of such debts. "No judgment charging the garnishee can be rendered in any case of debt not due until after it becomes due, and not then as to negotiable paper, if it appears that the garnishee is liable to a *bona fide* holder." The garnishee is entitled to a day in court. The garnishment entitles the judgment creditor, upon the maturity of the debt, to bring an action against the garnishee. This action the garnishee may successfully defend by showing that, before its maturity, the negotiable debt was transferred to an indorsee, *bona fide*, for value, and without notice of the garnishment;[2] and it is not material whether the garnishee had notice of the transfer or not at the time of garnishment.[3] The result of the decisions in Connecticut and North Carolina is substantially identical with that of the decisions in Ohio; viz., the right of garnishment does not affect the negotiability of the debt, nor impair the rights of a *bona fide* holder thereof before maturity; and in the last-named state the garnishee has the right to insist upon the production and surrender of the note before judgment against him as

[1] Cruett *v.* Jenkins, 53 Md. 223, explaining and overruling Stewart *v.* West, 1 Har. & J. 536, and Somerville *v.* Brown, 5 Gill, 339, and Brown *v.* Somerville, 8 Md. 444.

[2] Secor *v.* White, 39 Ohio St. 218.

[3] Knisely *v.* Evans, 34 Ohio St. 158.

garnishee, or may require indemnity as in case of a lost note.[1]

In Alabama, the question has been carefully considered in a case wherein it appeared that the transfer of negotiable paper had been made after the garnishment of the maker but before the maturity of the note. The court said: "A judgment cannot and ought not to be rendered against a garnishee unless it will shield him from any demand of the judgment debtor, or those claiming under him. The judgment cannot protect him against a right and title which is independent of and paramount to that of the judgment debtor,—a right and title which the law enables the debtor to confer in pursuance of a well-defined public policy, in opposition to its own maxims, in reference to any and all other species of property. The very nature, import, and obligation of negotiable paper is not to pay to a particular person, but to pay whoever may be its *bona fide* holder at maturity, and to pay him absolutely and at all events. In its structure and form, and the character of its obligation, it is essentially distinguishable from a promise to pay a particular person a particular sum, which is so hemmed and circumscribed that it cannot pass without putting to inquiry all who touch and deal with it. The principle is therefore well settled, that if a garnishment will reach negotiable paper before the rendition of judgment against the garnishees, it must be affirmatively shown that the note had become due, and was still the property of the payee or of the holder, as whose property the garnishment is intended to condemn it."[2] Nor does it seem to be es-

[1] Shuler *v.* Bryson, 65 N. C. 201; Myers *v.* Beeman, 9 Ired. 116; Ormond *v.* Moye, 11 Ired. 564; Enos *v.* Tuttle, 3 Conn. 27; Culver *v.* Parish, 21 Conn. 408.

[2] Mayberry *v.* Morris, 62 Ala. 118; Mills *v.* Stewart, 12 Ala. 90.

sential that the transfer of negotiable paper be in all respects a complete legal transfer, in the technical sense, to entitle the holder to protection against garnishment. M. made his negotiable note in favor of S., who indorsed it in blank, and delivered it to a national bank as collateral security for a loan. While the note remained in the bank, O. & C. purchased it of S., who gave them an order on the bank therefor. The bank, having been paid the amount of its debt, made no claim to the note, but declined to deliver it, because of a garnishment served prior to the sale of the note to O. & C., but of which they had no notice at the time of such sale. It was insisted that O. & C. were not entitled to protection as *bona fide* indorsees or holders of the note, because it had not been delivered to them. The court held that as the note was indorsed in blank, and was therefore transferable by delivery, a direction given to the bank to deliver it to the purchasers was sufficient as a constructive delivery.[1] So in South Carolina the depositing of negotiable bills in the mails was adjudged to be a sufficient delivery thereof to give the persons to whom they were mailed precedence over an attachment levied after such mailing, but before the notes reached their destination.[2]

A note is not negotiable unless payable in money. Hence the maker of a note payable in bank notes or current bills may be held as a garnishee.[3] If the maker of negotiable paper is summoned as a garnishee, he must make the defense that the note is transferable,

[1] Howe *v.* Ould, 28 Gratt. 1.

[2] Mitchell *v.* Byrne, 6 Rich. 171; see also Lysaght *v.* Bryant, 67 Eng. Com. L. 46.

[3] Platt *v.* State Bank, 17 Wis. 222; Ford *v.* Mitchell, 15 Wis. 304; Kirkpatrick *v.* McCullough, 3 Humph. 171; 39 Am. Dec. 158; Whiteman *v.* Childress, 6 Humph. 303; Fay *v.* Rosseau, 3 McLean, 106; Irvine *v.* Lowny, 14 Pet. 293.

and that he does not know who the owner is, or who he may be, when payment becomes due. If he neglects to avail himself of this defense, and permits judgment to be entered against him, he cannot, on that account, resist an action brought against him by the assignee of the note.[1] In Tennessee it was held that a debt due by a negotiable note may be attached.[2] The practical result of this decision has been obviated by subsequent decisions, declaring that if the garnishee answers that he executed a negotiable note to the defendant, but does not know who now holds the note, nor to whom the debt is now owing, no judgment can be entered against him.[3] In Missouri, debts due by negotiable notes may be attached.[4] The garnishee may, however, "protect himself by compelling the attachment debtor to produce the note in controversy, or show a sale and transfer, if one has been had."[5] In New Jersey, negotiable debts are subject to garnishment, both before and after their maturity. If the debt is claimed by an attaching creditor and by an indorsee, *bona fide*, before maturity, the debtor may compel these adverse claimants to interplead, and to determine to which he is answerable. Up to the present time, the courts of that state seem to have been successful in avoiding the necessity of determining

[1] Shuler *v.* Bryson, 65 N. C. 201; Myers *v.* Beeman, 9 Ired. 116; Ormond *v.* Moye, 11 Ired. 564.

[2] Huff *v.* Mills, 7 Yerg. 42.

[3] Turner *v.* Armstrong, 9 Yerg. 412; Moore *v.* Greene, 4 Humph. 299; Daniel *v.* Rawlings, 6 Humph. 403. See also Yarborough *v.* Thompson, 3 Smedes & M. 291; Thompson *v.* Shelby, 3 Smedes & M. 296.

[4] Quarles *v.* Porter, 12 Mo. 76; Colcord *v.* Daggett, 18 Mo. 557; Scott *v.* Hill, 3 Mo. 88; 22 Am. Dec. 462; St. Louis Ins. Co. *v.* Cohen, 9 Mo. 421; Dickey *v.* Fox, 24 Mo. 217; Walden *v.* Valiant, 15 Mo. 409; Funkhouser *v.* How, 24 Mo. 44.

[5] Murphy *v.* Wilson, 45 Mo. 427.

which of these adverse claimants is entitled to preference.[1] The law respecting the garnishment of negotiable paper has been thus stated in a recent case by the court of appeals of New York: "It is generally the law in this country, under statutes like those which existed in this state, that a debt evidenced by a negotiable security can be attached, and the following rules may be deduced from the adjudged cases. While the negotiable security is held by the attachment debtor, it may be attached by the service of an attachment upon the maker, provided the negotiable security is past due. If the security be not past due at the time the attachment served, but remains in the hands of the attachment debtor until it becomes due, then the attachment is effectual. Where a debt evidenced by a negotiable security is thus attached, the attachment is effectual against everybody except a *bona fide* taker of the security after the attachment. The care and purpose of the courts in such cases is to protect the maker of the security against double payment, and when that can be accomplished the attachment can be made effective. If the security is not due, there must be proof that it was in the hands of the attachment debtor when the attachment was served, and in the absence of proof, that will not be presumed; in other words, it must be shown that it was in such a condition as to be liable to attachment. It has generally been understood to be the law in this state that a debt evidenced by a negotiable security, whether due or not, so long as it is in the hands of the attachment debtor, can be attached by serving the attachment on the maker of the security. The attachment may be defeated by a subsequent

[1] Briant *v.* Reed, 14 N. J. Eq. 271.

transfer of the security to a *bona fide* taker for value, who is in a position to enforce it against the maker. But before the debt can be enforced against the maker under the attachment, the sheriff must obtain possession of the security, so that upon the trial he can surrender it to the maker, or he must show that it has already got into the hands of the maker, or that for some other reason it could not be enforced against the maker by any other person."[1] In this case it appeared that a railroad corporation, having a deposit with the bank, drew its check therefor payable to the order of R., as its assistant treasurer. The check was certified by the bank to be good, delivered by it to R., and charged against the railroad company. Three days later the bank was garnished under an attachment against the company. After being by the bank informed of this garnishment, R. opened an individual account with the bank, upon which he deposited the check in question, it having remained in his possession, and the property of the railway company. The proceeds of the check were subsequently drawn out of the bank by R., and applied to the payment of other liabilities of the railway company. As the bank had reason to believe, at the time it received the deposit in the name of R., that the check deposited was the property of the railway company, it was held to be liable for the amount thereof to the attaching creditor. If money is deposited in a savings bank, and a pass-book issued to the depositor, and such book is transferable by indorsement, it is nevertheless not to be regarded as a negotiable instrument for all purposes. The bank may

[1] Bills v. N. P. Bank of N. Y., 98 N. Y. 349.

be garnished under an execution or attachment against the depositor.[1]

§ 169. **Debts Due from Two or More Persons, or to Two or More Persons.**—The debt sought to be subjected to execution may be owing from two or more persons. In that event, all the debtors ought to be summoned as garnishees; for although the debt is due from them severally, and either of them is liable to an action therefor without joining the others, yet if one be omitted from the garnishment, he may, if he sees proper, pay the debt to the creditor, and thus defeat the garnishment. The plaintiff who undertakes to reach a debt by garnishment or by proceedings supplemental to execution, ought to be entitled to enforce the debt against the person from whom it is owing, in the same manner and under the same circumstances as it could, but for the garnishment, have been enforced by the original creditor. If the debt was due from two or more persons jointly, the original creditor could enforce it only by an action against all the debtors; but if it was due from two or more, jointly and severally, then it could be enforced against all or against one, as the creditor might choose to proceed. These principles, though usually applied to proceedings by garnishment, have not been universally recognized as applicable to those proceedings. With respect to proceedings against joint debtors, it is very generally conceded that all must be summoned.[2] In Massachusetts, the non-joinder of a

[1] Nichols *v.* Schofield, 2 R. I. 123; Witte *v.* Vincent, 43 Cal. 325. See State *v.* Judge Co. Ct., 11 Wis. 50, Beck *v.* Cole, 16 Wis. 95, and Smith *v.* Picket, 7 Ga. 104, 50 Am. Dec. 383, for discussion of effect of instruments made negotiable by agreement.

[2] Rix *v.* Elliott, 1 N. H. 184; Hudson *v.* Hunt, 5 N. H. 538; Jewett *v.* Bacon, 6 Mass. 60; Atkins *v.* Prescott, 10 N. H. 120; Ladd *v.* Baker, 6 Fost.

co-debtor must be objected to by a plea in abatement;[1] but this rule seems not to be applied to proceedings by garnishment in most of the other states. If the debt is due from a partnership composed of resident and non-resident members, it may be garnished in Massachusetts and Vermont by summoning the resident members,[2] except where it was contracted in a foreign land by a member of the firm there residing, and carrying on business in behalf of the firm.[3] This exception was made because it would be impossible for the resident members to be constantly informed with regard to indebtedness alleged to have been created by their copartners in the foreign country.

The liability of partners, unless modified by statute, is unquestionably joint, and not joint and several. The creditors of the partnership have no right to proceed against any of the partners severally by action. Neither have the creditors of a creditor of a partnership the right to proceed by garnishment against one only of the partners as if the debt were his individual debt. Hence if garnishment be sued out in two different actions, one against A and the other against A and B as partners, and the object be to reach a debt due from the firm, the latter garnishment must be awarded precedence over the former, though subsequently served.[4] If the garnishment is directed against one person, and he answers that he person-

76; Pettes *v.* Spalding, 21 Vt. 66; Nash *v.* Brophy, 13 Met. 476; Wilson *v.* Albright, 2 G. Greene, 125; Warren *v.* Perkins, 8 Cush. 518; Hoskins *v.* Johnson, 24 Ga. 625; Elliott *v.* Smith, 2 Cranch C. C. 543; Fairchild *v.* Lampson, 37 Vt. 407.

[1] Hoyt *v.* Robinson, 10 Gray, 371; Sabin *v.* Cooper, 15 Gray, 532.

[2] Parker *v.* Danforth, 16 Mass. 299; Peck *v.* Barnum, 24 Vt. 75.

[3] Kidder *v.* Packard, 13 Mass. 80.

[4] Hoskins *v.* Johnson, 24 Ga. 628.

ally owes the judgment debtor nothing, but admits the liability of himself and another as members of a firm, he is generally entitled to be discharged.[1] If the garnishment is directed against the firm, there may be circumstances which will authorize the court to dispense with the service of process on some of its members, as where it is impossible so to do because of his being beyond the jurisdiction of the court. Thus where garnishment was directed to only one member of a firm, the court said: "Had the partner been included in the writ, whether service was on him or not, the firm would have been holden; but the trustee would not have been permitted to disclose till he could have informed his partner of the pendency of the trustee process. If the partner had not paid the claim to the principal debtor, then he could not do it after such notice, except in his own wrong, and the trustee might well disclose as to the liability of the firm. Here no claim is made against the firm, and the trustee is in no manner liable."[2]

Where a debt is due from two or more, jointly and severally, the creditor may unquestionably sue all of the debtors jointly, or each of them separately. If a creditor of the creditor seeks to levy upon and enforce the same liability, he ought to be entitled to the like option of treating the debt as either joint or several, and therefore be privileged, in his discretion, to garnish either all or any of those debtors. It has nevertheless been held that he must summon all the debtors.[3]

[1] Wellover *v.* Soule, 30 Mich. 481; Hirth *v.* Pfeifle, 42 Mich. 31; Warner *v.* Perkins, 8 Cush. 518; Pettes *v.* Spalding, 21 Vt. 66; Atkins *v.* Prescott, 10 N. H. 120.

[2] Atkins *v.* Prescott, 10 N. H. 123.

[3] Treadwell *v.* Brown, 41 N. H. 12; Barker *v.* Garland, 22 N. H. 103. For exception to this rule in this state, see Ladd *v.* Baker, 6 Fost. 76.

But the decisions to this effect must, upon principle, be regarded as unsound. A person jointly and severally liable with others may be jointly or severally sued. His obligation is, therefore, not changed, nor in any respect made more onerous, by charging him jointly or severally as a garnishee. Hence, where, by statute, partners could be severally sued on partnership obligations, it was determined that either of them could be garnished for a debt due from the firm.[1] Whenever a cause of action of a personal nature accrues to two or more persons, whether as joint tenants, copartners, tenants in common, or partners, it cannot, against the objection of the defendant, be asserted otherwise than by an action in which all the co-owners are joined.[2] In other words, a single demand cannot, without the assent of the person from whom it is owing, be split into a separate demand in favor of each of the obligees. If this cannot be done in favor of the obligees, it would seem to be too clear for argument that it cannot be done in favor of a person whose rights are derived solely from one of the obligees. Upon what legal principle can it be affirmed that the creditor's creditor can, by garnishment, acquire a right or a remedy to which the creditor never was entitled, and which he was incompetent to transfer by any voluntary act? The garnishment might well be allowed to subrogate the creditor's creditor to all the rights and remedies of the creditor. This would entitle him to take the place of one of the original obligees, and, in connection with the co-obligees, to assert the entire demand against the obligor. But why should the debtor be subjected to two recoveries, — one by the creditor whose credit has

[1] Travis *v.* Tartt, 8 Ala. 574; Speak *v.* Kinsey, 17 Tex. 301.

[2] Freeman on Cotenancy and Partition, c. 15.

not been garnished, and the other by judgment in the garnishment proceedings? Furthermore, how can the respective moieties of the creditors be ascertained and fixed, in a proceeding to which one of them is not a party? But it must be conceded that, in a majority of the cases in which this question has been involved, it has been determined in opposition to principles which appear to us as axiomatic. Thus in Maine,[1] Massachusetts,[2] and Missouri,[3] it has been held that a person can be held as garnishee upon an obligation due to the defendant and a person not a party to the suit; that the debt will be severed and judgment given for such part as the defendant would be entitled to receive upon the collection and division of the whole debt. In New Hampshire, the rule is clearly in accordance with what we deem the true principle, and protects the garnishee from the splitting of demands against him.[4] With respect to debts due to a partnership, the majority of the decisions deny the liability of the garnishee, except in an action to which all the partners are parties defendant.[5] These decisions do not proceed upon the principles for which we have here contended, but on the more questionable ground that, until the final adjustment of the partnership business, it cannot be known whether the partner, as whose creditor the

[1] Whitney *v.* Monroe, 19 Me. 42; 36 Am. Dec. 733.

[2] Thorndike *v.* De Wolf, 6 Pick. 120. It may be that this case is overruled in Hawes *v.* Waltham, 18 Pick. 451, the statement of facts not being sufficiently clear, in the last-named case, to enable us to determine its precise import.

[3] Miller *v.* Richardson, 1 Mo. 310.

[4] French *v.* Rogers, 16 N. H. 177; Hanson *v.* Davis, 19 N. H. 133.

[5] Winston *v.* Ewing, 1 Ala. 129; Johnson *v.* King, 6 Humph. 233; Branch *v.* Adam, 51 Ga. 113; Towne *v.* Leach, 32 Vt. 747; Fish *v.* Herrick, 6 Mass. 271; Mobley *v.* Lonbat, 7 How. (Miss.) 318; Uphan *v.* Naylor, 9 Mass. 490; Smith *v.* McMicken, 3 La. Ann. 319; Church *v.* Knox, 2 Conn. 514; Lyndon *v.* Gorham, 1 Gall. 367; Kingsley *v.* Missouri F. Ins. Co., 14 Mo. 467; Bulfinch *v.* Winchenback, 3 Allen, 161; Williams *v.* Gage, 49 Miss. 777.

garnishee is summoned, is entitled to any portion of the debt. In Maryland,[1] Pennsylvania,[2] and South Carolina[3] the interest of a partner in a debt due to the firm can be reached by garnishment.

§ 169 a. Debts Due to the Judgment Debtors, Jointly or Severally. — One of the consequences of a judgment against two or more persons is that the property of all or either may be levied upon and sold for the purpose of satisfying the judgment. Satisfaction need not be sought exclusively out of joint property, nor exclusively out of separate property; but both joint and separate property may doubtless be seized at the same time and sold under the execution. We see no reason why this principle should not extend to proceedings by garnishment, and the creditor be permitted to garnish debts due to all of the debtors, or to any one of them, or to two or more of them, at the same time.[4] In Michigan, however, the rule is otherwise. In that state, under a judgment against several, none but those who jointly owe them all can be garnished;[5] nor under a judgment against one person can two or more persons be united in one garnishment, where their liability to him is several.[6] No other reason is given for these remarkable decisions than "that garnishment proceedings are purely statutory, and cannot be extended by construction." If one of several judgment debtors

[1] Wallace *v.* Patterson, 2 Har. & McH. 463.

[2] McCarty *v.* Emlen, 2 Dall. 277; 2 Yeates, 190.

[3] Schatzill *v.* Bolton, 2 McCord, 478; 13 Am. Dec. 748; Chatzel *v.* Bolton, 3 McCord, 33.

[4] Thompson *v.* Taylor, 13 Me. 420; Caignett *v.* Gilband, 2 Yeates, 35; Stone *v.* Dean, 5 N. H. 502; Parker *v.* Guillow, 10 N. H. 103; Locket *v.* Child, 11 Ala. 640.

[5] Ford *v.* Detroit Dry D. Co., 59 Mich. 358.

[6] Ball *v.* Young, 52 Mich. 476.

happens to be indebted to the others, he cannot be garnished on account of such debt, because he is not a third person, within the meaning of the statutes authorizing third persons to be garnished. The denial of the right to garnish him might, with equal propriety, be sustained on the ground that such garnishment is a vain act. The only result which could follow from its allowance would be a judgment against such debtor for the amount of the debt due from him to his co-judgment debtors. But the plaintiff has already a judgment against him; and with like diligence may make one judgment as efficient as two, because the the second judgment would not entitle the judgment creditor to seize any property not equally open to levy under the first.

§ 170. **Assignment of the Debt Preceding the Garnishment.**—Neither the law of garnishment, nor that applicable to proceedings supplemental to execution, will be permitted to interfere with the right of a creditor to assign any debt which may be due to him.[1] The general rule with respect to an execution or judgment lien, or the lien acquired by the levy of an execution or attachment, is, that such lien attaches to the real rather than the apparent interest of the defendant, and is therefore subject to alienations or encumbrances made by him, whether known to the judgment creditor, or not. This rule is applicable to proceedings by garnishment. The lien acquired thereby is subordinate to any prior assignment made by the defendant. All that the law requires for the complete protection of the

[1] Cairo & St. L. R. R. *v.* Kellenberg, 82 Ill. 295. In Sandridge *v.* Graves, 1 Pat. & H. 101, it was held that an assignment of prior date to a garnishment would be treated as paramount, though there was no proof of its delivery.

assignee is, that the transfer to him shall have been made in good faith, and without any intent to hinder, delay, or defraud creditors,[1] and that he shall not be guilty of such laches as result in the debtor's paying the debt, without notice of the assignment, either to the original creditor or to the creditor's creditor proceeding by garnishment.[2] The assignee of a non-negotiable demand, wishing to protect it from garnishment under a writ against his assignor, must give the debtor notice of the assignment. In the absence of such notice, the debtor must necessarily answer that he owes the original creditor, and judgment must be entered against him for the amount of the debt. After his liability has become thus fixed, owing to the laches of the assignee in not giving notice of the assignment, the latter must, upon principles of natural justice, be held to be estopped from asserting his assignment.[3] The assignment need not be absolute. It may be made for the purpose of securing a debt due from the assignor to the assignee; and if so, the garnishment can affect nothing beyond the surplus which may remain after the payment of the debt thus secured.[4] By the common law, the assignment of choses in action was not recognized, though the assignee was generally permitted to make the assignment productive by conducting an action in the name of the assignor. But even under the systems of jurisprudence, in which an

[1] The assignment must be made in good faith, or it will be disregarded. Giddings *v.* Coleman, 12 N. H. 153; Hooper *v.* Hills, 9 Pick. 435; King *v.* Gorham, 4 Me. 492.

[2] Drake on Attachment, sec. 602.

[3] Walters *v.* Insurance Co., 1 Iowa, 404; 63 Am. Dec. 451; McCord *v.* Beatty, 12 Iowa, 299; Tudor *v.* Perkins, 3 Day, 364; Dodd *v.* Brott, 1 Minn. 270; 66 Am. Dec. 541.

[4] Freetown *v.* Fish, 123 Mass. 355.

assignment is not recognized at law, it is enforced against a garnishment.[1] In other words, whether an assignment is recognized at law or not, a garnishment is subordinate to all pre-existing equitable assignments. It is not essential that the assignment should be perfect at law. It is sufficient if it is a good, equitable assignment.[2] It may be made by parol,[3] or by mere agreement between the debtor and creditor, that the debt shall be paid to some third person.[4] No doubt an order made by the creditor, directing the debtor to pay the debt to some third person, is, after its acceptance, a good and sufficient assignment of the amount therein directed to be paid.[5] And though this has sometimes been doubted,[6] the majority of the authorities show that its acceptance is not essential to enable such an order to withdraw funds from the reach of the creditors of the drawer.[7] As a general rule, it seems to be conceded that an assignment is operative, even before notice is given to the garnishee;[8] and that if

[1] Norton *v.* P. Ins. Co., 111 Mass. 532.

[2] Matheson *v.* Rutledge, 12 Rich. 41; Byar *v.* Griffin, 31 Miss. 603; Smith *v.* Sterritt, 24 Mo. 261; Drake on Attachment, c. 31; Burrows *v.* Glover, 106 Mass. 324; Dressor *v.* McCord, 96 Ill. 389; Insurance Co. of Pennsylvania *v.* Phœnix Ins. Co., 71 Pa. St. 31; Claflin *v.* Kimball, 52 Vt. 6.

[3] Norton *v.* P. Ins. Co., 111 Mass. 532; Littlefield *v.* Smith, 17 Me. 327; Porter *v.* Bullard, 26 Me. 448.

[4] Black *v.* Paul, 10 Mo. 103; 45 Am. Dec. 353.

[5] Dibble *v.* Gaston, R. M. Charlt. 444; Brazier *v.* Chappell, 2 Brev. 107; Legro *v.* Staples, 16 Me. 252; Lamkin *v.* Phillips, 9 Port. 98; Hoadley *v.* Caywood, 40 Ind. 239; Colt *v.* Ives, 31 Conn. 25; Adams *v.* Robinson, 1 Pick. 461; Davis *v.* Taylor, 4 Mart., N. S., 134.

[6] Sands *v.* Matthews, 27 Ala. 399.

[7] Nesmoth *v.* Dunn, 8 Watts & S. 9; United States *v.* Vaughan, 3 Binn. 394; Pellman *v.* Hart, 1 Pa. St. 263.

[8] Wakefield *v.* Martin, 3 Mass. 558; Smith *v.* Clark, 9 Iowa, 241; Walling *v.* Miller, 15 Cal. 38; McCubbins *v.* Atchison, 12 Kan. 166; Smith *v.* Sterritt, 24 Mo. 262; Smith *v.* Blatchford, 2 Ind. 184. This rule has been denied in several states. Judah *v.* Judd, 5 Day, 534; Woodbridge *v.* Perkins, 3 Day, 364; Hunt *v.* Forbes, 60 Miss. 745; Robertson *v.* Baker, 10 Lea, 300.

he receives such notice, even after the service of the writ upon him, he not only may, but he must, if he still has an opportunity to do so, present the fact of the assignment as a defense to the garnishment proceedings.[1] While there is no doubt than an order or draft for the whole of a debt or fund, whether accepted or not, takes precedence over a subsequent garnishment,[2] a more difficult question arises when the order or draft is for a part only of such debt or fund. A party entitled to a debt has no right to make a partial assignment thereof, and such assignment, if attempted, is inoperative until the debtor assents thereto. Hence, it has been held that such an order or draft, until accepted by the debtor, leaves the entire debt subject to garnishment.[3] If, however, under the laws of the state, the check or draft imposes a duty on the person or corporation on which it is drawn, to make payment thereof, it, though for a part only of the debt or fund, and not accepted, operates as an assignment *pro tanto*, and must be respected in preference to a subsequent garnishment.[4] "An assignment of a chose in action need not be by any particular form of words or particular form of instrument. Any binding appropriation of it to a particular use, by any writing whatever, is an assign-

[1] Kimbrough *v.* Davis, 34 Ala. 583; Adams *v.* Filer, 7 Wis. 306; 73 Am. Dec. 410; Greentree *v.* Rosenstock, 34 N. Y. Sup. Ct. 505; Crayton *v.* Clark, 11 Ala. 787; Foster *v.* White, 9 Port. 221; Ray *v.* Baucus, 43 Barb. 310; Gibson *v.* Haggarty, 15 Abb. Pr. 406; Large *v.* Moore, 17 Iowa, 258; Funkhouser *v.* How, 24 Mo. 44; Leahey *v.* Dugdale, 41 Mo. 517; Oldham *v.* Ledbetter, 1 How. (Miss.) 43; 26 Am. Dec. 690; Lyman *v.* Cartwright, E. D. Smith, 117; Page *v.* Thompson, 43 N. H. 373.

[2] Robbins *v.* Bacon, 3 Greenl. 315; Bank of Commerce *v.* Bogy, 44 Mo. 13; 100 Am. Dec. 247.

[3] Gibson *v.* Cooke, 20 Pick. 15; 32 Am. Dec. 194; Mandeville *v.* Welch, 5 Wheat. 277.

[4] Bank of America *v.* Indiana Banking Co., 114 Ill. 483; Union National Bank *v.* Oceana County Bank, 80 Ill. 212; 22 Am. Rep. 185.

ment, or, what is the same, a transfer of the ownership. And where it appears that a debt due from a trustee to the defendant has been equitably assigned, the court will take cognizance of the assignment, and protect the rights of the assignee. For, as the defendant has parted with his interest in the debt, and can no longer maintain an action for it against the trustee for his own benefit, and as the plaintiff can acquire no greater interest in the debt than the defendant had at the time of the service of the trustee process, it results that the trustee cannot be charged for that which he has equitably ceased to owe the defendant and owes to another person."[1]

If after notice of an assignment the debtor pays the debt either to the original creditor or to the creditor's creditor, proceeding by garnishment, such payment constitutes no defense to a subsequent action brought by the assignee. Even if the debtor should plead the assignment as a defense to the garnishment, and such plea, on the trial thereof, should be determined against the debtor, this determination is not binding upon the assignee; and the assignee may, notwithstanding judgment against the debtor and the enforcement thereof, assert his rights as assignee in an action by him against the debtor.[2] Generally, it is no objection to an assignment that the debt is not due when assigned, but the debt may be attempted to be assigned before it can be known that it will ever become due. Impecunious debtors find it necessary to anticipate their future earnings and to obtain advances on account thereof. If they should make an assign-

[1] Conway *v.* Cutting, 51 N. H. 407.

[2] McKnight *v.* Kinsely, 25 Ind. 336; 87 Am. Dec. 364; Gates *v.* Kerby, 13 Mo. 157; Myers *v.* Beeman, 9 Ired. 116; Ormond *v.* Moye, 11 Ired. 564.

ment for the mere purpose of preventing the proceeds of such earnings from reaching their creditors, such assignment would undoubtedly prove abortive, as against such creditors, by virtue of the laws making void all transfers made with a view of hindering, delaying, or defrauding the creditors of the transferrer. If not subject to attack and demolition on this latter ground, the next question to arise will be whether the earnings or other moneys to become due had at the time of their transfer such an existence in the eye of the law as to be proper subjects of assignment. The general rule upon the subject of the assignment of moneys to become due for personal services is, that if the assignor be at the time employed, or under a valid contract of employment, he may assign the wages to become due him, and that such assignment is paramount to any subsequent garnishment.[1] It does not appear to be necessary that the contract of employment be for any specific time. Hence an assignment by one who was employed by the day was upheld.[2] The fact that a workman is employed by the piece is not material.[3] So one who has contracted to construct a building may assign moneys to become due him on the completion of his contract.[4] But an assignment of moneys to be earned under a contract not yet secured,[5]

[1] Lannan *v.* Smith, 7 Gray, 150; Boylen *v.* Leonard, 2 Allen, 407; Darling *v.* Andrews, 9 Allen, 106; Webb *v.* Jewett, 2 Met. 608; White *v.* Richardson, 12 N. H. 93; Hall *v.* Buffalo, 1 Keyes, 199; Tiernay *v.* McGarity, 14 R. I. 231; Johnson *v.* Pace, 78 Ill. 143; Augur *v.* N. Y. B. & P. Co., 39 Conn. 26; Field *v.* Mayor of N. Y., 6 N. Y. 179; 57 Am. Dec. 435, and note; Devlin *v.* Mayor etc. of N. Y., 50 How. Pr. 1; 63 N. Y. 15.

[2] Garland *v.* Hamilton, 51 N. H. 413.

[3] Hartley *v.* Tapley, 2 Gray, 565; Kane *v.* Clough, 36 Mich. 436; 24 Am. Rep. 599.

[4] Hawley *v.* Bristol, 39 Conn. 26.

[5] Mulhall *v.* Quin, 1 Gray, 105.

or under such employment as the assignor might thereafter obtain,[1] or for services to be rendered beyond his present term of employment, when he was then serving under a contract or election for a time specified,[2] are all void as being attempted transfers of mere possibilities not coupled with any interest. The incumbent of a public office may assign his claim for past services. With respect to services to be performed, or salary to be earned in future, the rule is probably different, "it being contrary to the public policy of the law that a stipend to one man for future services should be transferred to another who could not perform them." "Unquestionably any salary paid for the performance of a public duty ought not to be perverted to other uses than those for which it is intended."[3] It must, however, be admitted that these principles have not been universally applied;[4] but a further consideration of them is hardly germane to our subject, because salaries due to public officials, whether assigned or not, are, upon principles of public policy, not subject to execution. When the garnishment and the transfer of a debt occur on the same day, and there is doubt with respect to which was prior in point of time, the burden of proof has been adjudged to rest upon the assignee to establish that his assignment was anterior to the garnishment.[5] In some of the states, a person claiming to be an assignee may be brought before the

[1] Jermyn *v.* Moffatt, 75 Pa. 401.

[2] Fagan *v.* Lubby, 133 Mass. 543.

[3] Billings *v.* O'Brien, 14 Abb. Pr., N. S., 247; Arbuckle *v.* Cowtan, 3 Bos. & P. 328.

[4] Brackett *v.* Blake, 8 Met. 335; 41 Am. Dec. 442; State Bank *v.* Hastings, 15 Wis. 75; Thurston *v.* Fairman, 9 Hun, 585; People *v.* Dayton, 50 How. Pr. 143.

[5] Beigman *v.* Sells, 39 Ark. 97.

court in the garnishment proceedings,[1] and the question whether the assignment is valid or fraudulent there litigated and determined.[2]

§ 171. **Asserting Garnishment as a Defense.**—A garnishee may at the same time be pursued both by his creditor and by his creditor's creditor. This question then occurs: In what manner and by what means may the garnishee prevent the pursuit by both parties from being successful? or in other words, how shall he avoid the necessity of the double payment of a single debt? Manifestly the garnishment may, in some manner, be brought to the attention of the court, and when so brought to its attention, must be given some effect, otherwise a garnishment could always be annulled by a subsequent action for the garnished debt. That the garnishment does not constitute proper matter for a plea in bar is obvious, for the cause of action yet exists.[3] If a person is first garnished by his creditor's creditor, and is afterward sued by the creditor, there are a number of exceedingly respectable authorities which insist that the garnishment may be asserted by a plea in abatement to the suit brought by the creditor.[4] Upon this theory, the cause of action

[1] Cadwalader *v.* Hartley, 17 Ind. 520; Born *v.* Staaden, 24 Ill. 320. The assignee's right cannot be determined unless he is made a party. Simpson *v.* Tippin, 5 Stew. & P. 208.

[2] Daggett *v.* St. L. M. F. Ins. Co., 19 Mo. 201; Lee *v.* Tabor, 8 Mo. 322; Keep *v.* Sanderson, 2 Wis. 42; 60 Am. Dec. 404; 12 Wis. 352; Prentiss *v.* Danaker, 20 Wis. 311; Inglehart *v.* Moore, 21 Tex. 501.

[3] Clise *v.* Freborn, 27 Iowa, 280; Near *v.* Mitchell, 23 Mich. 382.

[4] Brook *v.* Smith, 1 Salk. 280; Embree *v.* Hanna, 5 Johns. 101; Brown *v.* Somerville, 8 Md. 444; Haselton *v.* Monroe, 18 N. H. 598; Phila. Sav. Inst. *v.* Smethurst, 2 Miles, 439; Fitzgerald *v.* Caldwell, 1 Yeates, 274; Irvine *v.* Lumberman's Bank, 2 Watts & S. 190; Cheongo *v.* Jones, 3 Wash. 359; Wallace *v.* McConnell, 13 Pet. 136; Mattingly *v.* Boyd, 20 How. 128; Clise *v.* Freborn, 27 Iowa, 280; Near *v.* Mitchell, 23 Mich. 382.

which existed anterior to the garnishment is treated as thereby suspended until the determination of the action in which the garnishment issued; and any action commenced after such garnishement is abated, or in other words, thrown out of court, leaving the plaintiff no other remedy than to wait until the termination of the suit in which the garnishment was issued, and then to recommence his action. The result of this suspension of plaintiff's cause of action may be very disastrous to him. To illustrate: Let us suppose that A is indebted B, and that C in an action against B garnishes this debt. It may be that B does not owe C, and will ultimately recover judgment against him for costs; or even when B does owe C, the debt may be satisfied out of a levy made on other property, and without enforcing the garnishment. But if, pending this litigation between B and C, B can take no proceedings against A, the latter may in the mean time become insolvent, or perhaps be relieved from liability through the operation of the statute of limitations. This wrong to B can be avoided only by permitting him to commence and maintain his action against A, and to take such proceedings therein as will enable him to secure his debt. We therefore yield our assent to those authorities which insist that a preceding garnishment never constitutes a sufficient cause for the abatement of a suit.[1] In states whence these authorities proceed, the remedy of the garnishee is either by a motion for the continuance of the suit

[1] Winthrop *v.* Carlton, 8 Mass. 456; Carrol *v.* McDonogh, 10 Mart. 609; Morton *v.* Webb, 7 Vt. 123; Spicer *v.* Spicer, 23 Vt. 678; Jones *v.* Wood, 30 Vt. 268; Crawford *v.* Slade, 9 Ala. 887; 44 Am. Dec. 463; Smith *v.* Hatchford, 2 Ind. 184; 52 Am. Dec. 504; Hicks *v.* Gleason, 20 Vt. 139; McFadden *v.* O'Donnell, 18 Cal. 160; McKeon *v.* McDermott, 22 Cal. 667; 83 Am. Dec. 86.

brought against him by his creditor, or by asking that the judgment in such suit shall be stayed until he is released from liability arising in consequence of the garnishment. If the garnishment is made after instead of before the commencement of the suit, it may, in those states where the validity of a garnishment so made is conceded, be brought to the attention of the court, and a stay of proceedings obtained until the release or settlement of the proceedings by garnishment.[1] In cases where the debtor has no other means of escape from a twofold enforcement of the liability against him, he may procure an injunction.[2] The garnishment may have resulted in a judgment against the garnishee, in which case the effect of such judgment prior to its satisfaction, upon an action brought against him by his original creditor, remains to be considered. In England, such a judgment seems to be regarded as a satisfaction or merger of the original debt, and therefore as a complete bar to all further action against the garnishee,[3] and a like effect has been sometimes conceded to it in the United States.[4] But the judgment in garnishment does not in fact produce any satisfaction until it has been paid, or property has been levied upon sufficient to produce its payment in whole or in part. The debtor whose demand was garnished is not entitled to any credit for the amount thereof upon the debt due from him to the garnishing creditor, and may, notwithstanding the garnishment

[1] Marden *v.* Wheelock, 1 Mont. 49; Drew *v.* Towle, 7 Fost. 412; Wadleigh *v.* Pilsbury, 14 N. H. 373. But see Waldheim *v.* Bender, 36 How. Pr. 181.

[2] Preston *v.* Harris, 24 Miss. 247.

[3] McDaniels *v.* Hughes, 3 East, 367; Savage's Case, 1 Salk. 291.

[4] Matthews *v.* Houghton, 11 Me. 377; McAllister *v.* Brooks, 22 Me. 80; 38 Am. Dec. 282; Coburn *v.* Currens, 1 Bush, 242; King *v.* Vance, 46 Ind. 246.

judgment, be compelled to pay the whole debt. Therefore he ought not to be bound absolutely by the garnishment judgment against his debtor; nor should the latter be allowed to plead it in bar unless he has satisfied it absolutely or conditionally, either in whole or in part.[1]

[1] Meriam v. Rundlett, 13 Pick. 511; Brannon v. Noble, 8 Ga. 549; Farmer v. Simpson, 6 Tex. 303; Cook v. Field, 3 Ala. 53; 36 Am. Dec. 436.

CHAPTER XII.

REAL PROPERTY SUBJECT TO EXECUTION.

FIRST. — OF REAL ESTATE HELD BY LEGAL TITLES.

§ 172. Lands were not subject to execution at common law.
§ 172 a. Uncertain and contingent estates.
§ 172 b. Co-tenant's interest.
§ 173. Naked legal titles.
§ 174. Title without possession.
§ 175. Possession without title.
§ 176. Interests acquired from the government.
§ 177. Estates at will.
§ 178. Estates in remainder or reversion.
§ 179. Franchises.
§ 180. Effect of sale of franchise.
§ 181. Interest of a vendor before conveyance.
§ 182. Interest of defendant in execution before conveyance and after sale.
§ 183. Interest of heir or devisee before final distribution.
§ 184. Interest of mortgagee before foreclosure.
§ 185. Interest of a dowress before assignment.
§ 186. Interest of husband as tenant by courtesy or by entirety.

SECOND. — OF EQUITABLE TITLES TO REAL ESTATE.

§ 187. Trust estates at common law, and under statute 29 Charles II.
§ 188. Trust estates under American statutes.
§ 189. Resulting trusts.
§ 189 a. Devises and trusts to withdraw property from execution.
§ 190. Mortgagor's equity of redemption.
§ 191. Equity of redemption, where execution is for mortgage debt.
§ 192. Equity of redemption under deeds intended as mortgages.
§ 193. Interest of purchaser at execution sale before conveyance.
§ 194. Interest of purchaser at voluntary sale before conveyance.

§ 172. **Lands were not, by the Common Law** of England, subject to execution for the debt of any private citizen. "This rule was considered as a fair and necessary result from the nature of the feudal tenures, according to which all the lands in that country were held. In the case of the king, however, an execution

always issued against the lands as well as the goods of a public debtor, because the debtor was considered as being not only bound in person, but as a feudatory, who held mediately or immediately from the king; and therefore, holding what he had from the king, he was from thence to satisfy what he owed the king."[1] "By an English statute passed in the year 1285, Westminster 2, chapter 18, lands were partially subjected to be taken in execution under an *elegit*, and held until the debt should be levied upon a reasonable price or extent."[2] Under the influence of the English statutes, and of the various statutes upon the subject in force in this country, as a general rule all legal estates in land may be sold under execution or extended under an *elegit*. "All lands of the defendant are liable to be extended, whether he hath an estate in fee, in tail, for life, or for years; but copyhold lands, or a lease of copyhold lands, are not extendible on an *elegit* as part of the realty. But lands held in ancient demesne may be extended and delivered over on an *elegit*."[3] A rent-charge may be taken in execution as real estate,[4] though a rent-seek cannot.[5] It is not clear whether an advowson could be extended under an *elegit* or not.[6] A life estate was, no doubt, subject to execution at common law, and also under the statutes of nearly all of the

[1] Jones v. Jones, 1 Bland, 443; 18 Am. Dec. 327.

[2] Duvall v. Waters, 1 Bland, 569; 18 Am. Dec. 350; Coombs v. Jordan, 3 Bland, 284; 22 Am. Dec. 236; Drayton v. Marshall, Rice Eq. 373; 33 Am. Dec. 84; Bank of Utica v. Mersereau, 3 Barb. Ch. 528; 49 Am. Dec. 189.

[3] Watson on Sheriffs, 208.

[4] Dougall v. Turnbull, 10 Q. B. 121; Hurst v. Lithgrow, 2 Yeates, 25; 1 Am. Dec. 326; Wooton v. Shirt, Cro. Eliz. 742; Watson on Sheriffs, 208; People v. Haskins, 7 Wend. 463. But this case seems to be overruled by Payn v. Beal, 4 Denio, 405; Huntington v. Forkson, 6 Hill, 149.

[5] Dougall v. Turnbull, 8 U. C. Q. B. 622; Walsal v. Heath, Cro. Eliz. 656.

[6] Robinson v. Tonge, 3 P. Wms. 401; Watson on Sheriffs, 208.

United States;[1] but a different rule formerly prevailed in Pennsylvania.[2] Leasehold estates are also unquestionably subject to execution, though there may be some question whether they should be levied upon as real or as personal property. In Pennsylvania, a lease of land is, for the purposes of execution sale, treated as an estate in the land and as properly levied upon as such.[3] Where the statute provides for a mode of levying on or selling "chattels real," a lease of lands for a term of years, with the right to dig for and remove coal during the term of the lease, and to construct all necessary buildings, must be levied on and sold as a chattel real. "Chattels real are interests annexed to or concerning the realty, as a lease for years of the land; and the duration of the term of the lease is immaterial, provided it be fixed and determinate, and there be a reversion or remainder in fee to some other person."[4] In the absence of any special statute upon the subject, we think the weight of authority in favor of the proposition that a leasehold interest in lands must be levied upon and sold as an estate in personal property.[5] Lands devoted to the use of the public are not subject to execution. This rule applies to all lands used by the state, or by any county or city thereof for specific public uses; as for state houses, streets, public

[1] Westervelt *v.* People, 20 Wend. 416; Fitzhugh *v.* Hellen, 3 Har. & J. 206; Poyer *v.* Waller, 2 B. Mon. 91; Mendenhall *v.* Randon, 3 Stew. & P. 251; Hitchcock *v.* Hotchkiss, 1 Conn. 470.

[2] Howell *v.* Woolfort, 2 Dall. 75; Near *v.* Watts, 8 Watts, 319; Snavely *v.* Wagner, 3 Pa. St. 275; 45 Am. Dec. 640; Eyrick *v.* Hetrick, 13 Pa. St. 488; Commonwealth *v.* Allen, 30 Pa. St. 49.

[3] Titusville N. I. Works' Appeal, 77 Pa. St. 103; Sowers *v.* Vie, 14 Pa. St. 99.

[4] Hyatt *v.* Vincennes Bank, 113 U. S. 408.

[5] Barr *v.* Doe, 6 Blackf. 335; 38 Am. Dec. 146; Coombs *v.* Jordan, 3 Bland, 284; 22 Am. Dec. 236; Buhl *v.* Kenyon, 11 Mich. 249.

squares, charity hospitals, and the like.[1] Churches, though devoted to public uses, are private property, liable to be seized and sold to pay the debts of their owners.[2] At common law, neither a church-yard, nor the glebe of a parsonage or vicarage, could be extended under an *elegit*. They were regarded as solemnly consecrated to God and religion.[3] A sentiment of reverence toward the graves of companions and ancestors would certainly go far toward impelling the courts in this country to hold that a church-yard, used as a cemetery, is not subject to execution.[4]

§ 172 a. **Uncertain and Contingent Estates** may be divided into two classes: 1. Those of which the debtor is seised or in which he has some interest at the present time, but of which his seisin or interest is liable to be divested upon the happening of some future event; and 2. Those in which the debtor has no present seisin or interest, but to which he may become entitled upon some future, uncertain contingency. In the cases of the first class, his interest, if a legal one, is subject to execution. Hence, if the defendant is seised of an estate defeasible upon the contingency of his dying without issue living at the time of his decease, he has a present estate "liable to be taken in execution and held by the creditor until the happening of the contingency."[5] Upon the same principle, if an executor or trustee becomes a purchaser at a sale, which the heir or *cestui que trust* may elect to avoid, he has, in

[1] State *v.* Finlay, 33 La. Ann. 113; Leonard *v.* Reynolds, 14 N. Y. Sup. Ct. 73.

[2] Presbyterians *v.* Colt, 2 Grant Cas. 75.

[3] Watson on Sheriffs, 208; Arbuckle *v.* Cowtan, 3 Bos. & P. 327.

[4] Brown *v.* Lutheran Church, 23 Pa. St. 500.

[5] Phillips *v.* Rogers, 12 Met. 405.

the absence of such election, an estate subject to execution.[1] So one who purchases lands from a state, under a contract which provides for certain stated payments, upon the making of which he will become entitled to a patent, and upon default in any of which he forfeits all rights under his contract, has a vendible interest in such lands prior to their forfeiture, and one which is subject to execution.[2] The estate acquired under the levy of an execution in this and similar cases is, of course, no better or more certain estate than that held by the judgment debtor, and remains liable to be defeated by the same contingency to which it was subject before the execution sale.[3] It is equally clear that in cases of the second class, there is no estate or interest subject to execution. A judgment debtor having a right to enter for condition broken,[4] or to disaffirm a conveyance made by him while a minor,[5] is not seised of any present estate. Whether he will in future become seised of an estate is dependent upon his volition, —upon the exercise of a mere personal privilege, and this privilege does not pass by an execution sale. This rule applies, though the breach of condition giving the judgment debtor a right of re-entry has taken place. Where it was claimed that the levy might be regarded as an entry, and as therefore revesting the estate in the defendant, the court said: "It would be altogether illogical to hold that the entry by the sheriff, for the purpose of making the levy, would serve as a substitute for entry by the grantor or his heirs. This

[1] Thornton *v.* Willis, 65 Ga. 184.
[2] McWilliams *v.* Withington, 7 Saw. 205; 7 Fed. Rep. 326.
[3] Thomas *v.* Record, 47 Me. 500; 74 Am. Dec. 500.
[4] Bangor *v.* Warren, 34 Me. 324; 56 Am. Dec. 657.
[5] Kendall *v.* Lawrence, 22 Pick. 540.

would be to say that there was no estate for the sheriff to seize, and that still, by setting about making the seizure, the officer might bring the estate into existence. As well could we put fruit on a tree by going with a basket to gather it."[1] A conveyance of land may be procured by fraud, on account of which the grantor may have the right to proceed in equity to annul the conveyance. This right is very generally held to be a personal right, not capable of voluntary transfer,[2] and we are therefore at a loss to understand how it can be the subject of involuntary transfer, through the medium of an execution sale, even in those states where equitable interests are subject to execution. Lands so conveyed have nevertheless been held subject to execution in Missouri, upon the ground that the statute of that state subjects to execution "all interests in land, whether legal or equitable."[3] A conveyance of certain lands was made to trustees for the benefit of the creditors of a railroad company. An execution was subsequently taken out against the company, under which the lands were sold. But they were held not subject to such execution and sale, because the company had no legal title to the land, nor any equitable title, but a mere right to file a bill in equity to compel the trustees to execute the trust.[4]

§ 172 b. **The Interest of a Co-tenant** is always liable, by a suit in partition, to be changed from a moiety of the whole lands of the co-tenancy to an estate in severalty in some specific part thereof, or to be entirely

[1] Edmondson v. Leach, 56 Ga. 461.

[2] Crocker v. Bellangee, 6 Wis. 645; 70 Am. Dec. 489; M. & M. R. R. v. M. & W. R. R., 20 Wis. 183; Pomeroy's Eq. Jur., sec. 1275.

[3] Street v. Goss, 62 Mo. 226.

[4] Thomas v. Eckard, 88 Ill. 593.

divested by a partition sale. These contingencies do not make his estate any the less subject to execution. The officer has no right to levy upon the interest of the co-tenant in any specific part of the parcel levied upon. "In the case of an involuntary transfer of property, the interest of the person whose estate is to be divested by compulsion ought to be carefully considered and jealously guarded. If an officer may lawfully levy on a specific parcel and subject it to forced sale, he may thereby sacrifice the property of the defendant; for few persons would be found willing to bid for that which, when purchased, consisted of a mere contingent interest, —an interest which the other co-tenants are not bound to notice, and which might finally be lost upon a partition of the common property. Hence, the rule, supported by a decided preponderance of the authorities, is, that a levy and sale of the debtor's interest in a specific part of the lands cannot be sustained."[1] If, however, a levy is made upon the interest of a co-tenant in an entire parcel of land, it will be sustained, although the same parties are also co-tenants of other parcels of land, all of which might have been united in one suit for partition. For the purposes of sale and conveyance, whether voluntary or involuntary, each distinct parcel of land is treated as forming the basis of an independent co-tenancy.[2]

§ 173. **Naked Legal Title.**—While, as a general rule, all legal estates in land are subject to execution, the rule is not applied to the detriment of persons for

[1] Freeman on Cotenancy and Partition, sec. 216. In Ohio the rule seems to be different. Treon *v.* Emerick, 6 Ohio, 399.

[2] Butler *v.* Roys, 25 Mich. 53; 12 Am. Rep. 218; Aycock *v.* Kimbrough, 61 Tex. 543. Real estate continues subject to execution during the pendency of proceedings for partition. Brown *v.* Renfro, 63 Tex. 600.

whose benefit the legal estate may be held. It is only when the holder of the legal title has some beneficial interest that it can be sold under execution. If he is a mere trustee, or if, for any reason, he holds the bare legal title for the benefit of another, an execution and sale against him transfers no interest whatever.[1] But if the trustee holds for the legal benefit of himself and others, he has a beneficial interest subject to execution. The legal title "always may be bound to the extent of the beneficial interest covered by it."[2] The rule respecting the exemption from execution against the trustee of lands held in trust for another is not restricted to formal declarations of trust. It applies to all cases where, though the legal title is in the judgment debtor, he has no beneficial interest in the land. This may exist in trusts arising from operation of law, as well as in those formally declared in some declaration or conveyance.[3] Where the grantee in a deed receives it for the purpose of immediately conveying the property to another, and does so convey it,—the two deeds being really parts of one and the same transaction,—he has never had anything beyond a mere instantaneous seisin, and his interest, like that of the holder of the naked legal title, is not subject to execution.[4] So where the vendor and vendee agree upon a sale and purchase of land, and that, simultaneously with

[1] Bostick *v.* Keizer, 4 J. J. Marsh. 597; 20 Am. Dec. 237; Elliott *v.* Armstrong, 2 Blackf. 198; Baker *v.* Copenbarger, 15 Ill. 103; 58 Am. Dec. 600; Campfield *v.* Johnson, 1 Halst. Ch. 245; Mallory *v.* Clark, 9 Abb. Pr. 358; 20 How. Pr. 418; Manly *v.* Hunt, 1 Ohio, 257; Hunt *v.* Townshend, 31 Md. 336; Houston *v.* Nowland, 7 Gill & J. 480; Smith *v.* McCann, 24 How. 398; Hancock *v.* Titus, 39 Miss. 224.

[2] Drysdale's Appeal, 15 Pa. St. 457.

[3] Thomas *v.* Kennedy, 24 Iowa, 398; Lounsburg *v.* Purdy, 11 Barb. 490.

[4] Chickering *v.* Lovejoy, 13 Mass. 51; Haynes *v.* Jones, 5 Met. 292; Webster *v.* Campbell, 1 Allen, 313; Harrison *v.* Andrews, 18 Kan. 535.

the execution of the conveyance, a mortgage shall be executed for the purchase price or some part thereof, the two instruments, when so executed, are regarded as one, and there is no intervening period between the conveyance and the mortgage in which an execution, lien or levy can attach and obtain precedence over the mortgage.[1]

§ 174. Lands in Adverse Possession.—It was for some time held, in Kentucky, that a sale under execution, of lands held adversely to the defendant, was void; or in other words, that an involuntary, like a voluntary, transfer of real estate could not be made while the owner was disseised.[2] A different rule soon afterward obtained in that state.[3] So far as we have been able to ascertain, lands may, in every part of the United States, be taken in execution, notwithstanding a holding thereof adversely to the defendant, if he still retains a right of entry.[4] This seems to be contrary to the rule established under the English statutes in regard to extending lands under an *elegit*.[5] A claim of title without merit and without possession is not subject to execution. A sale against such claimant transfers no interest and creates no estoppel. If he should chance afterward to take possession, he cannot be ejected under the sheriff's deed.[6]

[1] Scott *v.* Warren, 21 Ga. 408.

[2] McConnell *v.* Brown, 5 T. B. Mon. 479; Shepherd *v.* McIntyre, 4 J. J. Marsh. 111; Griffith *v.* Huston, 7 J. J. Marsh. 385.

[3] Frizzle *v.* Veach, 1 Dana, 211; Blanchard *v.* Taylor, 7 B. Mon. 649.

[4] Jarett *v.* Tomlinson, 3 Watts & S. 114; Woodman *v.* Bodfish, 25 Me. 317; Jackson *v.* Varick, 7 Cow. 238; Kelly *v.* Morgan, 3 Yerg. 441; Nickles *v.* Haskins, 15 Ala. 619; 50 Am. Dec. 154; McGill *v.* Doe, 9 Ind. 306; High *v.* Nelms, 14 Ala. 350.

[5] Watson on Sheriffs, 208.

[6] Hagaman *v.* Jackson, 1 Wend. 502.

§ 175. **Possession without Title.**—The mere possession, without title, is, no doubt, one of the least valuable interests or estates which can be held in lands. It is, nevertheless, a legal estate, recognized and protected at law as against all persons save the true owner of the right to possession. It is *prima facie* evidence of title. It is subject to execution; and its sale, under process against the possessor, gives the purchaser all the rights accruing from the possession of the defendant,[1] together with the right to enter and enjoy the possession to the same extent as it could have been lawfully enjoyed by the defendant in execution if no sale had been made.[2] From this proposition there is some dissent. Thus in Tennessee a mere right of occupancy is not subject to execution.[3] So in Alabama, Missouri, and Tennessee, an occupant of public lands has no interest which can be sold under execution.[4] The majority of the decisions in regard to occupants of public lands is the other way. Mere possessory interests on public lands may, in most of the states, be sold under execution, except where their sale would interfere with the laws of the United States in regard

[1] The purchaser at execution sale may take the same benefit from the statute of limitations that the defendant in execution could have taken. Scheetz v. Fitzwater, 5 Pa. St. 126; Overfield v. Christie, 7 Serg. & R. 173.

[2] Emerson v. Sansome, 41 Cal. 552; Thomas v. Bowman, 29 Ill. 426; 30 Ill. 94; Murray v. Emmons, 19 N. H. 483; Kellogg v. Kellogg, 6 Barb. 116; Jackson v. Town, 4 Cow. 599; 15 Am. Dec. 405; Talbot v. Chamberlin, 3 Paige, 219; Jackson v. Parker, 9 Cow. 93; Dickinson v. Smith, 25 Barb. 102; Gray v. Tappan, Wright, 117; Miner v. Wallace, 10 Ohio, 403; Turney v. Saunders, 4 Scam. 527; French v. Carr, 2 Gilm. 664; Scott v. Douglass, 7 Ohio, 228; Dean v. Pyncheon, 3 Chand. 9; Bunker v. Rand, 19 Wis. 253; 88 Am. Dec. 684; Swift v. Agnes, 33 Wis. 228

[3] Dougherty v. Marcuse, 3 Head, 323; Crutsinger v. Catron, 10 Humph. 24.

[4] Rhea v. Hughes, 1 Ala. 219; 34 Am. Dec. 772; Hatfield v. Wallace, 7 Mo. 112; Brown v. Massey, 3 Humph. 470. But in Alabama possession is *prima facie* subject to execution. McCaskle v. Amarine, 12 Ala. 17.

to the disposal of those lands. Hence the owner of a mining claim on public lands in California has an interest liable to sale under a writ against him.[1] While mere possession without title is generally subject to execution, it must be remembered that possession may be held by virtue of some title which is not subject to execution. In such case, the exemption of the title usually carries with it the exemption of the possession.

§ 176. Interests in Government Lands. — Improvements situate upon the public lands are generally deemed subject to execution.[2] The erection of improvements is one of the acts necessary to show the good faith of one who is attempting to acquire title under the homestead and pre-emption laws; and their continuance on the property is not only conducive to his comfort, but practically indispensable to his residence upon the property for the length of time requisite to his substantial compliance with these laws. The right to seize, sell, and remove his improvements must impede, and perhaps finally prevent, his compliance with the law. Where such result is likely to follow, we doubt the propriety of the decisions holding such improvements subject to execution. We have said, in the preceding section, that a possessory interest in public lands is generally subject to execution sale, unless such sale would interfere with the laws for the disposal of such lands. If the possessor has acquired a right of pre-emption, the policy of these laws will not permit

[1] McKeon v. Bisbee, 9 Cal. 137; State v. Moore, 12 Cal. 56; Hughes v. Devlin, 23 Cal. 501.

[2] Switzer v. Skiles, 3 Gilm. 529; 44 Am. Dec. 723. Such improvements are exempted by statute in Arkansas. Healy v. Connor, 40 Ark. 552.

of its transfer by sale under execution.[1] Where lands have been purchased of the United States, and payment therefor made, it is well settled that the purchaser acquires thereby an inchoate legal title. The patent, when issued, takes effect, by relation, as of the day when the payment was made. The interest of the purchaser may be levied upon and sold before the patent issues.[2] The same is true of the interest of the owner of a Spanish grant, after its presentation to the commissioners. The patent, when issued, relates back to the presentation of the petition for confirmation.[3] But in Georgia, a grant from the state which did not become perfect until certain fees was paid was held not to be subject to execution;[4] a like decision was made in Indiana, in reference to school lands purchased from the state, and which the state had agreed to convey on payment of the residue of the purchase price.

§ 177. **Copyhold Estates,[5] and all Other Tenancies at Will** or by sufferance, are not subject to execution.[6]

[1] Bray *v.* Ragsdale, 53 Mo. 170; Moore *v.* Besse, 43 Cal. 511; Cravens *v.* Moore, 61 Mo. 178. Lester *v.* White, 44 Ill. 461, appears to intimate a contrary opinion, and refers to Turney *v.* Saunders, 4 Scam. 537, and French *v.* Carr, 2 Gilm. 664. These last two cases, however, affirm no more than that the interest and improvements of an occupant on public lands are subject to execution, provided that title derived from the government is not affected.

[2] Carroll *v.* Safford, 3 How. 441; Levi *v.* Thompson, 4 How. 17; Goodlet *v.* Smithson, 5 Port. 245; 30 Am. Dec. 561; Land *v.* Hopkins, 7 Ala. 115; Levi *v.* Thompson, Morris, 235; Cavender *v.* Smith, 5 Iowa, 157; Jackson *v.* Spink, 59 Ill. 404; Thomas *v.* Marshall, Hardin, 19; Martin *v.* Nash, 31 Miss. 324; Hamblen *v.* Hamblen, 33 Miss. 453; 69 Am. Dec. 358; Lindsey *v.* Henderson, 27 Miss. 502; Jackson *v.* Williams, 10 Ohio, 69; Heflly *v.* Hall, 5 Humph. 581; Lee *v.* Crossna, 6 Humph. 281.

[3] Landes *v.* Perkins, 12 Mo. 254; Landes *v.* Brant, 10 How. 348; Stark *v.* Bennett, 15 Cal. 361; Walbridge *v.* Ellsworth, 44 Cal. 354.

[4] Garlick *v.* Robinson, 12 Ga. 340.

[5] Watson on Sheriffs, 208.

[6] Wildy *v.* Bonney, 26 Miss. 35; Waggoner *v.* Speck, 3 Ohio, 292; Colvin *v.* Baker, 2 Barb. 206; Bigelow *v.* Finch, 11 Barb. 498; 17 Barb. 394.

The reason of this rule is apparent. An occupant by the permission and at the will of the owner has no estate which he can transfer by a voluntary conveyance, and no possession which can be regarded as independent of or adverse to that of the owner. Hence, he has no interest in the title, nor in the possession, susceptible of transfer by execution.

§ 178. **Remainders and Reversions.**—A vested remainder is clearly and indisputably subject to execution at law against the remainderman.[1] The same is true of an interest in reversion after an estate for life or for years.[2] A reversioner or remainderman, though not entitled to the present possession of the lands, is nevertheless regarded as the owner of an estate in possession. The possession of the tenant entitled to present possession is regarded as the possession of the reversioner or remainderman. Hence an estate in remainder or reversion may be transferred by voluntary conveyance, or by extent under *elegit*, or by sale under execution. If lands be devised to A for life, "and at her death to be equally divided between her children," each of her children takes a vested remainder in the land, which, during the life of the mother, is subject to execution, because the words of the devise show an intent that each of the children shall enjoy a several interest.[3] But if the devise had been made to

[1] Wiley *v.* Bridgman, 1 Head, 68; Humphreys *v.* Humphreys, 1 Yeates, 427; Harrison *v.* Maxwell, 2 Nott & McC. 347; 10 Am. Dec. 611; Doe *v.* Hazen, 3 Allen, 87; Lockwood *v.* Nye, 2 Swan, 515; 58 Am. Dec. 73; Atkins *v.* Beans, 14 Mass. 404; Den *v.* Hillman, 2 Halst. 180; Williams *v.* Avery, 14 Mass. 20; Kelly *v.* Morgan, 3 Yerg. 347; Brown *v.* Gale, 5 N. H. 416.

[2] Morrell *v.* Roberts, 11 Ired. 424; Penniman *v.* Hollis, 13 Mass. 429; Burton *v.* Smith, 13 Pet. 464; Watson on Sheriffs, 208; Bishop of Bristol's Case, 2 Leon. 113.

[3] Davis *v.* Goforth, 1 Lea, 31.

a fluctuating class of persons, so that it would have been uncertain whether the judgment debtor would be a member of the class at the termination of the life estate, the question would be more difficult and doubtful.[1] "A contingent remainder, conditional limitation, or executory devise, where the person is certain, is transmissible by descent. But such interests are not assignable at law, for the reason that in every conveyance there must be a grantor, a grantee, and a thing granted,—that is, an estate, and such contingent interests do not amount to an estate, but are mere 'possibilities coupled with an interest.' It is held in the old cases that such contingent interests cannot be devised, as a devise is a species of conveyance, but by the latter cases they have been held to be devisable upon a wording of the statute of devises, a devise being in effect a mere substitution of some person to take in place of the heir. Such contigent interests not being assignable at law, it follows, as a matter of course, that they cannot be sold under execution."[2] Under the statute of Missouri declaring that the term "real estate" "shall include all estates and interests in land, and that all real estate whereof a defendant shall be seised, either in law or equity, shall be subject to seizure and sale under execution," contingent as well as vested remainders are subject to execution.[3] So in New York it seems to be now settled that contingent future interests are subject to execution.[4]

[1] Watson *v.* Dodd, 68 N. C. 530; Penn *v.* Spencer, 17 Gratt, 85; 91 Am. Dec. 375; Payn *v.* Beal, 4 Denio, 405; Jackson *v.* Middleton, 52 Barb. 9.

[2] Scott *v.* Scholey, 8 East, 467.

[3] White *v.* McPheeters, 75 Mo. 292.

[4] Sheridan *v.* House, 4 Keyes, 569; Moore *v.* Littel, 41 N. Y. 66; 40 Barb. 488; Woodgate *v.* Fleet, 44 N. Y. 1. Those who may chance to compare the above section with section 354 of the first edition of my work on judgments will see that I have abandoned the views there expressed.

§ 179. **Franchises.**—A "franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *fieri facias*."[1] Thus where a turnpike was levied upon and sold, the court, in determining that the levy ought to be set aside, said: "It has been decided that every kind of interest in land, legal or equitable, is subject to execution in this state. But it does not appear that the turnpike company had any estate of any kind in the land over which the road runs. They were permitted to enter upon the land and make a road under certain regulations, and when the road was finished and approved by the governor, to take certain tolls. But there is nothing in the incorporating act which authorizes the company to transfer their right to other persons; and such transfer would certainly be inconsistent with the whole design and object of the law. The defendants had no tangible interest,—nothing which could be delivered by the sheriff to a purchaser under the execution. There was no rent or profit of any kind issuing out of land,—nothing but a right to receive toll for horses, carriages, etc., passing over the land."[2] A grant was made to a railroad company, their successors and assigns, of the right of way over the lands of the grantor, "for the purpose of running, erecting, and es-

[1] Gue *v.* Tide Water Canal Co., 24 How. 263; Stewart *v.* Jones, 40 Mo. 140; Munroe *v.* Thomas, 5 Cal. 470; Winchester and Lexington Turnpike Co. *v.* Vimont, 5 B. Mon. 1; Arthur *v.* C. & R. Bank, 9 Smedes & M. 431; 48 Am. Dec. 719; Thomas *v.* Armstrong, 7 Cal. 286; Ludlow *v.* Hurd, 6 Am. Law. Reg. 493; Hatcher *v.* T. W. & W. R. R. Co., 62 Ill. 477; Ammant *v.* The President etc., 13 Serg. & R. 210; 15 Am. Dec. 593; Seymour *v.* Mil. & Chil. Turnpike Co., 10 Ohio, 476; Western Pennsylvania R. R. *v.* Johnston, 59 Pa. St. 294.

[2] Ammant *v.* The President etc., 13 Serg. & R. 212; 15 Am. Dec. 593; Leedom *v.* Plymouth R. W. Co., 5 Watts & S. 265; Wood *v.* Truckee Turnpike Co., 24 Cal. 474; Ludlow *v.* Hurd, 6 Am. Law Reg. 493.

tablishing thereon a railroad, with the requisite number of tracks." The company entered upon the construction of its road, but, becoming financially embarrassed, finally ceased all attempts to complete the necessary work. Judgment was recovered by some of the contractors, under which executions were issued and levied upon "the right of way to the railroad, so far as the right of way has been obtained, and all appurtenances belonging to said railroad company." Subsequently a sale was made by the sheriff, of the property so levied upon, and in due time a deed therefor issued. The validity and effect of this sale and conveyance being subsequently questioned, the supreme court of the United States adjudged them to be void, because "no fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law or separate from the franchise to make and own and run a railroad," and because what the corporation "acquired was merely an easement in the land to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor."[1]

While franchises have been held not to be subject to execution, for the avowed reason that they are intangible, and cannot be delivered by the sheriff to the purchaser, it seems to be doubtful whether this is the true —or at all events, whether it is the only—ground upon which such exemption rests. If this were the only ground, the franchise could not operate for the protection of tangible property capable of delivery by the officer. But it is contended that the exemption of a franchise extends to all property essentially necessary

[1] East Ala. R'y Co. v. Doe, 114 U. S. 350.

to its enjoyment, whether tangible or intangible.[1] This position is sustainable only upon the theory that the franchise is granted for the furtherance of certain objects which the granting power considers so important that it will neither tolerate private interference with the franchise, nor with other property, without which the objects sought could not be accomplished. This theory, though ultimately supplemented by express statutory enactments, was very boldly declared in Pennsylvania, in the following language: "As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale; and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a creditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation, in respect to its capital, is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate

[1] The Susquehanna Canal Company v. Bonham, 9 Watts & S. 28; 42 Am. Dec. 315, in which case the house occupied by the collector of tolls on a canal was held to be not subject to sale under *fieri facias*. Gue v. Tide Water Canal Co., 24 How. 263, in which the sale of a house and lot, a wharf, and sundry canal locks was enjoined. Plymouth R. R. Co. v. Colwell, 39 Pa. St. 337; Youngman v. R. R. Co., 65 Pa. St. 278; but by act of April 7, 1870, the franchises and property of corporations may be sold on execution; Philadelphia & B. C. R. R. Co.'s Appeal, 70 Pa. St. 355.

functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration. And that remedy is consistent with corporate existence, whilst a power to alien, or liability to levy and sale under execution, would hang the existence of the corporation on the caprices of the managers or on the mercy of its creditors. For the corporation would cease to exist for the purposes of its institution when its means of subsistence were gone. It might still have a name to live, but it could only be a life in name. A railroad company could scarcely accomplish the end of its being after the ground on which its rails rest had been sold to a stranger."[1] Carry this opinion to its logical conclusion, and all property held by a corporation and necessary to enable it to discharge its duties to the public, or to effectuate the objects of its incorporation, must be adjudged not subject to execution. A railroad company can no more discharge its public duties without locomotives and passenger and freight cars than it can without a franchise, a track, or a depot; and yet the existence of these great corporations, with all the property, real and personal, essential, or at least highly beneficial, to their successful operation, entirely exempt from execution at law, would be insufferable. So comprehensive an exemption will not now be sustained. So far as any general rule can be formulated upon the subject, it is this: that property of a corporation is not subject to execution which is not subject to voluntary transfer by the corporation. The mere right or franchise to be a corporation is never, in the absence of special statutory authority, subject to sale, whether voluntary or under

[1] Plymouth R. R. Co. v. Colwell, 39 Pa. St. 337; 80 Am. Dec. 528.

execution.[1] So the franchise to build a railroad is so inseparably connected with the purposes of a railway corporation as also to be exempt from execution.

With respect to the property of a railway, or other corporation employed by it in its business, a distinction has been made between the road and structures immediately connected therewith and appliances afterwards obtained for the purpose of operating the road. The interest or right of way in the land required for the construction of the road, the timber and iron of the track, and the depots, and structures for the supply of water, and the like, are said to be a part of the realty; and "the road is not regarded as so constructed and prepared for use until such things are affixed. But when the road is thus constructed and ready for use, other things are requisite for that use,—locomotives, cars, and other articles and materials, some of which are consumed in the use, and the supply has to be from time to time renewed. Now, we think there is a manifest distinction between the road, as constructed for use, and the various things employed in that use, and the latter cannot with propriety be regarded as constituting a part of the real estate, but are the personal property of the corporation. We have no hesitation in coming to the conclusion that what we have described as the personal property of the corporation, employed in the use of its road and franchise, is liable for the payment of its debts. We think the line can be clearly drawn between the interest in real estate,

[1] Commonwealth v. Smith, 10 Allen, 448; 87 Am. Dec. 672; Hall v. Sullivan R. R., 21 Law Rep. 138; Pierce v. Emery, 32 N. H. 484; 2 Redf. R'y Cas. 631; Richards v. Merrimack Co., 44 N. H. 127; Kennebec R. R. v. Portland R. R., 59 Me. 9; Clarke v. Omaha R. R., 4 Neb. 458; 19 Am. R'y Rep. 423; State v. Consolidated Coal Co., 46 Md. 1.

and the franchise connected therewith, and the movable things connected with the franchise. The distinction appears to us to be as plain as that between a farm and the implements and stock which the proper use of the farm necessarily requires. There are instances which may be put still more analogous. Take, for example, a ferry franchise. It is connected with real estate; it is itself an incorporeal hereditament, and therefore real estate. The use of this franchise requires boats and other movable appliances. But these, when employed in the use of the ferry franchise, do not thereby become a part of the real estate; they are the personal property of the owner of the ferry franchise, or, it may be, of some person to whom the ferry franchise has been demised for a term of years."[1] These views respecting the separability of the personal property of a corporation from its franchises have met with general acquiescence. Such personal property will not be regarded as a part of the real estate or franchise of the corporation so as to withdraw it from execution, though its use, or the use of other property of like character, is required for the successful operation of the road.[2] An execution based upon a decree of foreclosure stands upon a somewhat different footing from an ordinary execution at law. So far as the principles of public policy are concerned, there can be no difference. The results to the public would not be less disastrous in the one case than in the other. But great public improvements are rarely constructed without resort being made to the borrowing of money in some form; and this money

[1] Coe *v.* Columbus, P. & I. R. R., 10 Ohio St. 372; 75 Am. Dec. 522.

[2] Pierce *v.* Emery, 32 N. H. 484; Sangamon & M. R'y Co. *v.* Morgan County, 14 Ill. 163; 56 Am. Dec. 497; Boston, C. & M. R. R. *v.* Gilmore, 37 N. H. 410; 72 Am. Dec. 336.

is generally secured by mortgage or trust deed, either of which form of security would be greatly impaired in efficiency and value if disconnected from the right to sell the franchises of the corporation and all the property incidental thereto. The right to mortgage the franchises of the corporation is generally conferred by statute. Where this is so, there can be no question of the propriety of a decree ordering their sale, and no doubt that the sale, if regularly made, will transfer the title to all the property mortgaged. In some of the states, independently of statutory authority, a railway corporation is held to have power to mortgage its road, and to include in such mortgage the franchise or right to construct and maintain such road.[1]

In North Carolina the property of a corporation may be seized and sold under execution, though by such sale the corporation will be deprived of the means of enjoying its franchise;[2] and the decisions in Mississippi and Missouri tend strongly toward the same conclusion.[3] But, conceding that the property of a corporation necessary to the exercise of its franchise is exempt from execution, this exemption cannot continue after the exercise of the franchise has been abandoned. Hence if a railroad company has ceased to use a portion of its road for public purposes, and is proceeding to take up and carry away the rails, the portion so abandoned is subject to levy under execu-

[1] Bardstown & L. R. R. v. Metcalfe, 4 Met. (Ky.) 199; 81 Am. Dec. 541. The contrary doctrine is better supported by the authorities. Richardson v. Sibley, 11 Allen, 65; 87 Am. Dec. 700; Tippecanoe Co. v. Lafayette R. R. Co., 50 Ind. 97; Ehrman v. Insurance Co., 35 Ohio St. 341.

[2] State v. Rives, 5 Ired. 306.

[3] Arthur v. C. & M. Bank, 9 Smedes & M. 431; 48 Am. Dec. 719; Stewart v. Jones, 40 Mo. 140. See Railroad Co. v. James, 6 Wall. 750; Coe v. C. P. & I. R. R. Co., 10 Ohio St. 372; 25 Am. Dec. 518; Covington Co. v. Shepard, 21 How. 112.

tion.[1] In most of the states statutes have been enacted under which franchises and all property connected therewith may be made available in satisfaction of judgments recovered against their owners. We shall make no attempt here toward compiling these statutes, nor presenting the decisions which have been made thereunder, but shall turn the reader for further information to the statutory compilations of his own particular state. Before doing so, however, we stop to remark that the general principle seems to prevail, that as these statutes are in derogation of the common law, their provisions must be strictly followed in order to impart validity to any attempted sale or sequestration.[2]

§ 180. The Effect of the Sale of Franchise and Property of a Corporation. — As the power to transfer a franchise under execution depends upon statutory provisions enacted in the state wherein the transfer is made, so the effect of the transfer is necessarily dependent upon the same provisions. In this country, franchises of any considerable importance are usually exercised by corporations. In many cases it seems difficult to separate the franchise from the corporate powers and privileges in connection with which it has been enjoyed. And yet it seems to be settled that the sale of the franchise and property of a corporation has no operation to destroy the corporate existence, nor to transfer the general powers nor obligations of the corporation. The few decisions which have been made in regard to the effect of the compulsory sale of

[1] Benedict *v.* Heineberg, 43 Vt. 231.

[2] James *v.* Plank Road Co., 8 Mich. 91; Ammant *v.* The President etc., 13 Serg. & R. 210; 15 Am. Dec. 593.

franchises, so far as we are aware, have arisen out of sales made under mortgages given by railroad corporations. In Eldridge *v.* Smith,[1] Chief Justice Poland, determining the effect of such a sale, said: "When a railroad company mortgages its road and appurtenances as a security for debt, and also its franchise, it is not to be understood as conveying its corporate existence or its general corporate powers, but only the franchise necessary to make the conveyance productive and beneficial to the grantees, to maintain and support, manage and operate, the railroad, and receive the tolls and profits thereof for their own benefit." In the case of Atkinson *v.* Marietta and Cincinnati Railroad Company, as reorganized,[2] the company sought to appropriate certain lands to its use for a railroad tract. It was resisted on the ground, among others, that it had no such corporate existence, under the laws of the state, as authorized it to exercise the right of eminent domain. The company showed that the railroad corporation, as originally organized, had mortgaged its property and franchises; that a sale had been made under such mortgage, and also under the provisions of a special act of the legislature; that this act undertook to confer on the purchasers all the rights and powers embraced in the charter of the original corporation; and that the present company had reorganized under the provisions of this special act. On the other side, it was insisted that this act was repugnant to the constitution of the state, which prohibited the passage of "*special acts* conferring corporate powers." The counsel for the company, to avoid the force of this objection, contended that the act, instead

[1] 34 Vt. 490. [2] 15 Ohio St. 21.

of conferring corporate powers, simply declared "the effect of a sale of the road and franchises under the decree." In discussing this point, the court said: "To enable us to see clearly what the act has attempted to accomplish, and what it must have effectually accomplished, to invest the defendant with the capacities and powers of the old charter, it may be well to consider what would have been their position if this act had not been passed. They were mortgage creditors of the old company, having a decree for the sale of its road. If, without this act, they had become the purchasers of the property, they would also have been invested with the franchise of maintaining, operating, and making profit from the use of the road, according to the grant made to that company. But neither their mortgage nor decree gave them any right to or lien upon the corporate existence of the Marietta and Cincinnati company; nor could any sale under the decree have divested the stockholders of that company of this franchise, or have invested the purchasers with a corporate existence. The capacity to have perpetual succession under a special name and in an artificial form, to take and grant property, contract obligations, and sue and be sued by its corporate name as an individual, were franchises belonging to the individual stockholders of that company, inalienable in the hands of the artificial being thus created, and without any power 'to transfer its own existence into another body; nor could it enable natural persons to act in its name, save as its agents, or as members of the corporation acting in conformity to the modes required or allowed by its charter.' Although it may be divested of its property, together with the franchise of operating and

making profit from the use of the road, its corporate existence survives the wreck, and endures until the state sees fit to terminate it by a proper proceeding. It is hardly necessary to add that a delegation of the power of eminent domain to a corporation, as a means to carry into effect the grant of its franchises, cannot be made the subject of either grant or sale."[1] Where the purchasers, under a mortgage sale, of the property and franchises of a railroad corporation, are authorized, by statute, "to organize anew, and be invested with all the rights and powers of the old company in the management of the road and business," and they do so organize, the reorganized corporation is not liable for any of the debts of the old corporation.[2]

§ 181. **The Interest of a Vendor** who has not yet conveyed the title to his vendee may be sought to be made available under a writ against him, either when he has given possession and received full payment for the property, and has, therefore, no beneficial interest therein, or when, though under a binding contract to sell and convey, full payment has not been made, and he yet retains the legal title as security for the payment of his purchase-money. In either case, it is quite clear that if the property is subject to execution at all, the title acquired by the purchaser at the execution sale with notice of the prior contract of sale must be subordinate thereto; but it may be insisted that as there remains a legal estate in the vendor, it passes by the execution sale, leaving the vendee to assert his rights by some equitable proceeding. The prevailing opinion,

[1] Atkinson v. M. & C. R. R. Co., 15 Ohio St. 35.

[2] Vilas v. M. & P. R. W. Co., 17 Wis. 497; Smith v. C. & N. W. R. R. Co., 18 Wis. 17; Stewart's Appeal, 72 Pa. St. 291

however, is, that where the vendor retains no beneficial interest, the property is not subject to execution against him, and a purchaser with notice, actual or constructive, does not even obtain the legal title, or at least, that he may be defeated on his bringing an action at law, although the vendee interposes no equitable defense.[1] A like result follows where, though the purchase price has not been fully paid, the vendor, before the levy of the execution against him, has transferred the notes given him for the unpaid purchase-money.[2] If the vendor has received partial payment, and retains the title as security for the balance, the case seems, on principle, to be essentially different. For, in that event, he has both the legal title and a beneficial interest therein. According to the better opinion, his interest may be taken in execution, subject to the rights of the vendee, under the contract of sale.[3] The rule in Mississippi and North Carolina is otherwise.[4] A contract for the sale of real estate, followed by a partial payment, has, in those states, the effect of entirely withdrawing the property from the reach of an execution at law, whether against the vendee or against the vendor. A judgment creditor of the vendor has only two modes open to him: "either to have sequestered the debt by summons in garnishment; or to have brought a bill in chancery, and asked that the equity of the vendor upon the land, as security for the debt due him, might be applied to the satisfaction of the judgment."[5]

[1] Cutting v. Pike, 21 N. H. 347; Paramore v. Persons, 57 Ga. 473.

[2] Catlin v. Bennett, 47 Tex. 165; Neal v. Murphy, 60 Ga. 388.

[3] Riley v. Million, 4 J. J. Marsh. 395; Patterson's Estate, 25 Pa. St. 71; Hardee v. McMichael, 68 Ga. 678; Bell v. McDuffie, 71 Ga. 264; Doak v. Runyan, 33 Mich. 75.

[4] Money v. Dorsey, 7 Smedes & M. 15; Tally v. Reid, 72 N. C. 336; Folger v. Bowles, 72 N. C. 303.

[5] Taylor v. Lowenstein, 50 Miss. 278; Chisholm v. Andrews, 57 Miss. 636.

182. The Interest of Defendant after a Sale under Execution.—The owner of real estate which has been sold or extended under execution has, in many of the United States, the right to redeem the same from such sale within the time and upon the terms prescribed by statute. He has, pending the time for the redemption, the possession of the property, and a beneficial as well as legal estate therein. His estate is subject to his voluntary disposition, and we perceive no reason why it ought not to be susceptible of levy and sale under execution against him. That it is so subject is now affirmed by a preponderance of the authorities,[1] but is denied in at least one state,[2] on the ground that to permit it to be sold under a second writ would frustrate the humane objects of the statute in giving the debtor a time in which he may rescue his property from the sacrifice likely to attend an absolute, involuntary sale. While the statute was doubtless designed to operate beneficially to the debtor, it was not intended to do so at the expense of his other creditors, and they are not to be deprived of an opportunity to satisfy their demands merely because the property has been sold subject to redemption, and probably for a sum representing but a small part of its value. Perhaps the chief value to the judgment debtor of his right to redeem is, that it coerces the judgment creditor into bidding a fair price for the property, lest it should be redeemed by the defendant or his assignee, and the creditor's purchase thereby defeated, without his judgment being satisfied or the full value of the

[1] Curtis v. Millard, 14 Iowa, 128; 81 Am. Dec. 462; Herndon v. Pickard, 5 Lea, 702.

[2] Russell v. Fabyan, 34 N. H. 218; Barnes v. Cavanagh, 53 Iowa, 29; Merry v. Bostwick, 13 Ill. 398; 54 Am. Dec. 434; Watson v. Reissig, 24 Ill. 281; 76 Am. Dec. 746; Bowman v. People, 82 Ill. 246; 25 Am. Rep. 316.

land realized. This right would be very seriously imperiled, and the debtor needlessly vexed and exposed to ruinous costs, if the creditor could make successive levies and sales of the same land under the same judgment. The creditor might purchase the land at a wholly inadequate price, and then, under another execution issued for the same debt, levy on the same land, and greatly embarrass the debtor in his attempts to exercise his right of redemption. In the absence of any statutory provision on the subject, the courts whose attention has been directed to this question have therefore determined that a sale of land under a judgment withdraws it from any further levy and sale under the same judgment pending the time allowed for redemption, unless in the mean time the debtor should acquire some additional title.[1] In England, when an extent has been perfected under an *elegit*, the defendant retains no interest which can be extended under a subsequent *elegit*.[2] If lands be sold for a sum not sufficient to satisfy the judgment, and are thereafter redeemed by the defendant, they may be resold to pay the balance due on the same judgment.[3]

§ 183. **Heirs and Devisees.**—Upon the death of a person seised of lands, his estate passes, by operation of law, to his heirs or devisees. It is true that such estate is liable to administration, and may be made answerable for the debts of the deceased, if his personal property should prove inadequate to their satisfaction. The title, however, passes to the heirs or devisees, subject to a lien in favor of the creditors. Each of the

[1] Hardin *v.* White, 63 Iowa, 633; Peebles *v.* Pate, 90 N. C. 348.
[2] Carter *v.* Hughes, 27 L. J. Ex. 225; 2 Hurl. & N. 714.
[3] Wood *v.* Colvin, 5 Hill, 228; Titus *v.* Lewis, 3 Barb. 70.

heirs has, therefore, a legal estate, subject to be alienated or devised by him, and also subject to execution against him, as other beneficial legal estates are. The purchaser, whether at a voluntary or a compulsory sale, acquires the estate of the heir, subject to the rights of the creditors.[1] In Georgia and Louisiana it has been held that when the heirs are entitled to several parcels of land, a specific parcel cannot, before partition, be sold on execution against a single heir. The reason urged in support of this decision is, that such a sale is an attempt to interfere with the right of the other heirs to partition.[2] Later cases in Georgia show the inclination of the court to question, and if necessary to deny, the soundness of the earlier decisions. Referring to the case of Clarke *v.* Harker, just cited, and the reasons there given, Judge Bleckley, in delivering the opinion of the court in Wilkinson *v.* Chew,[3] remarked: "I doubt whether those reasons are not open to grave criticism. Distribution in kind is but partition; and if each distributee can sell privately as much or as little of his undivided interest as he chooses, it is difficult to see why it may not be levied upon and sold by the

[1] Proctor *v.* Newhall, 17 Mass. 81; Douglass *v.* Massie, 16 Ohio, 271; Block *v.* Steel, 1 Bail. 307; Vanzyckle *v.* Richardson, 13 Ill. 171; Dearmond *v.* Courtney, 12 La. Ann. 251; Noble *v.* Ventes, 3 Rob. (La.) 153; Mayo *v.* Stroud, 12 Rob. (La.) 105. If judgment is entered against an heiress, in consequence of a warranty made by her ancestor, for a certain sum, "to the extent of her interest in the estate of her father," execution cannot be levied upon her property pending the settlement of the estate, for, prior to such settlement, it cannot be known what is the extent of her interest in the estate of her father. In other words, such judgment is indefinite and meaningless, and not until given precision by the final settlement of the estate is it the proper basis for an execution or levy. Morgan *v.* Labanne, 32 La. Ann. 1300.

[2] Clarke *v.* Harker, 48 Ga. 596; Mayo *v.* Stroud, 12 Rob. (La.) 105. See Freeman on Cotenancy and Partition, secs. 199-208; also sec. 216. Butler *v.* Royes, 12 Am. Rep. 218; 25 Mich. 53.

[3] 54 Ga. 602; see also Du Bose *v.* Cleghorn, 65 Ga. 302.

sheriff. The purchaser, in either case, would simply occupy the place, *quoad hoc*, of the distributee or tenant in common. Upon principle as well as authority, subjection to levy and sale should rest on two questions only: Is there a vested interest? and is it so definite as to be susceptible of description in terms of legal certainty? What equities may arise afterwards between co-tenants or co-distributees may be left to the general resources of remedial jurisprudence." An executory devise is, even while the first devisee in fee is still living, an existing interest, and not a bare possibility. "It is entirely certain that such an interest may be transferred by assignment, even at law, and consequently that it may be sold by execution.[1] The personal property of a decedent does not, like his real estate, vest immediately upon his death in his heir at law. It goes to the administrator or executor; and whether the title vests in the executor or the heir, the possession of the property passes into the custody of the executor as an officer of the law, and while it remains in the custody of the law, the property is not subject to execution against the heirs, nor can the amount bequeathed to a legatee be garnished.[2] The operation of the will of a decedent may be such as to convert his real estate, or some part of it, into personalty, as where he directs his executors to sell such real estate, and to divide the proceeds among his heirs or to pay specific legacies. In such cases, neither an heir nor a legatee has any interest in the realty subject to execution at law.[3] Their creditors may, however,

[1] Humphreys *v.* Humphreys, 1 Yeates, 427; De Haas *v.* Bunn, 2 Pa. St. 335; 44 Am. Dec. 201.

[2] See *ante*, § 131; Stout *v.* La Follette, 64 Ind. 369.

[3] Hess *v.* Shorb, 7 Pa. St. 231; Baker *v.* Copenbarger, 15 Ill. 103; 58 Am. Dec. 600.

generally reach such interests by resorting to proceeding in equity.[1]

§ 184. **The Interest of a Mortgagee** is a legal interest. He is invested with full legal title. But this title is vested in him only for security, and can be of no advantage, except when held by the owner of the mortgage debt. It would be useless to permit the sale of the mortgagee's legal title under execution, if he were still to remain the holder of the indebtedness, The indebtness, being a mere chose in action, was not subject to execution. Hence, at common law, the interest of the mortgagee, both in regard to the indebtedness and to the real estate, was not subject to execution. "Until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action. It is but an incident attached to the debt; it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. There is no way to render a mortgage vendible but by allowing the debt to go with it; and this would be repugnant to all rule, for it is well understood that a chose in action is not the subject of sale on execution. When the mortgagee has taken possession of the land, the rents and profits may, perhaps, then become the subject of computation and sale. Until then, the attempt would be useless."[2] The mortgagee's

[1] Daniels *v.* Eldridge, 125 Mass. 356; Lang *v.* Brown, 21 Ala. 179; 56 Am. Dec. 244; Sparhawk *v.* Cloon, 125 Mass. 263.

[2] Jackson *v.* Willard, 4 Johns. 43; Brown *v.* Bates, 55 Me. 520; 92 Am. Dec. 613; Trapnall *v.* State Bank, 18 Ark. 53; Rickert *v.* Maderia, 1 Rawle, 329; Coombs *v.* Warren, 34 Me. 89; Randall *v.* Farnham, 36 Me. 86; State *v.* Lawson, 1 Eng. 269; Huntington *v.* Smith, 4 Conn. 235; Cooper *v.* Martin, 1 Dana, 23; Portland Bank *v* Hall, 13 Mass. 207; Blanchard *v.* Colburn, 16

interest cannot be sold under an execution against him and the mortgagor jointly, any more than it can under a writ against him alone.[1] The rule exempting the interest of a mortgagee from execution as real estate is not confined to mere formal mortgages; but applies in all cases where the true relation of the parties is that of mortgagor and mortgagee, though their apparent relation is that of grantor and grantee. Thus a conveyance absolute in its terms may be proved to have been made for the purpose of securing the payment of a debt due from the grantor to the grantee. If so, the interest of the latter, as to persons having notice of the purpose of the deed, is that of a mere mortgagee, and is not subject to execution.[2]

§ 185. **A Dowress** did not, at common law, have any estate in the lands until assignment of her dower was made.[3] Previous to her assignment, her interest is a mere chose in action,—nothing but a right, by appropriate proceedings, to compel the assignment to be made. Wherever the interest of the dowress remains subject to common-law rules, and free from statutory innovations, it is clear, upon principle, that it cannot be levied upon under execution.[4] A different

Mass. 345; Eaton *v.* Whiting, 3 Pick. 484; Smith *v.* People's Bank, 24 Me. 185; Morris *v.* Mowatt, 2 Paige, 586; 22 Am. Dec. 661; Moore *v.* Mayor of N. Y., 8 N. Y. 110; 59 Am. Dec. 473.

[1] Buck *v.* Sanders, 1 Dana, 188.

[2] Harman *v.* May, 40 Ark. 146; Clark *v.* Watson, 141 Mass. 248.

[3] Freeman on Cotenancy and Partition, secs. 108, 121.

[4] Pennington *v.* Yell, 6 Eng. 212; 52 Am. Dec. 262; Newman *v.* Willetts, 48 Ill. 534; Blain *v.* Harrison, 11 Ill. 384; Hoots *v.* Graham, 23 Ill. 81; Nason *v.* Allen, 5 Greenl. 479; Gooch *v.* Atkins, 14 Mass. 378; Waller *v.* Mardens, 29 Mo. 25; Torry *v.* Minor, 1 Smedes & M. Ch. 489; Tompkins *v.* Fonda, 4 Paige, 448; Ritchie *v.* Putnam, 13 Wend. 524; Graham *v.* Moore, 5 Harr. (Del.) 318; Wallis *v.* Doe, 2 Smedes & M. 220; Ligon *v.* Spencer, 58 Miss. 37; Hayden *v.* Weser, 1 Mackey, 457.

rule prevails in Georgia and Pennsylvania, whenever the dowress, though no assignment be made, is in possession of the lands of her deceased husband.[1] In some of the states, a widow has, upon the death of her husband, a different interest from that held by a dowress at common law, — an interest giving her a right of possession, and making her substantially a tenant in common with the children or other heirs of the deceased.[2] In such states, we should think that, upon principle, her interest would be subject to execution, unless exempted by statute.

§ 186. **Husband's Interest in Wife's Lands, and in Tenancies by Entireties.** — At common law, the husband was, by virtue of the marital relation, seised of a freehold estate in all the real property of his wife, whether her title existed at the date of the marriage or accrued afterward. The husband's estate, created by virtue of the marriage alone, continued only during the joint lives of the husband and wife; but by the birth of living issue of the marriage, the husband became tenant by courtesy, and entitled to an estate for his life, though his wife should die before him. The life estate of which the husband was seised, whether by virtue of the marriage or as tenant by curtesy, was his property as absolutely as though it had been conveyed to him prior to the marriage. It was not the property of the wife; for by virtue of the marriage in in the one case, and the birth of living issue in the other, the law took the estate from her, and gave it to her husband. He could dispose of either estate in any

[1] Pitts *v.* Hendrix, 6 Ga. 452; Thomas *v.* Simpson, 3 Pa. St. 60.

[2] Stedman *v.* Fortune, 5 Conn. 462; Stokes *v.* McAllister, 2 Mo. 163; C. & A. Turnpike *v.* Jarrett, 4 Ind. 215; Wooster *v.* Iron Co., 38 Conn. 256; Crocker *v.* Fox, 1 Root, 323.

manner he thought proper. His creditors were entitled to treat it as assets, the same as other estates for life. Wherever the common law on this subject still prevails, the husband's estate in the lands of his wife, whether existing by marital right or as tenant by curtesy, is subject to execution.[1] Hence, when a widow who has had her dower assigned to her again marries, her second husband acquires an estate in the lands held in dower, which is subject to execution.[2] Nor is it necessary that the estate of the wife should be one entitling her to the possession of the property. It is sufficient that it may give her a right of possession at some time during the coverture. Hence, if she is seised of a vested remainder, to take effect at the death of the tenant for life, her husband has an estate therein subject to execution.[3] But in some of the states, all the husband's interest in the property of his wife is, by statute, exempt from execution.[4] Lands may be held by the husband and wife as tenants by entireties,[5] in which case each has a right of survivorship, incapable of being defeated by any act, omission, or default of

[1] Canby *v.* Porter, 12 Ohio, 79; Schneider *v.* Stahr, 20 Mo. 269; Harvey *v.* Wickham, 23 Mo. 112; Burd *v.* Dansdale, 2 Binn. 80; Schermerhorn *v.* Miller, 2 Cow. 439; Murray *v.* Fishback, 5 B. Mon. 412; Montgomery *v.* Tate, 12 Ind. 615; Butterfield *v.* Beall, 3 Ind. 203; Neil *v.* Johnson, 11 Ala. 615; Cheek *v.* Waldrum, 25 Ala. 152; Pringle *v.* Allen, 1 Hill Ch. 135; Barber *v.* Root, 10 Mass. 260; Roberts *v.* Whitney, 16 Mass. 186; Litchfield *v.* Cudworth, 15 Pick. 23; Shortall *v.* Hinckley, 31 Ill. 219; Gillis *v.* Brown, 5 Cow. 388; Mitchell *v.* Sevier, 9 Humph. 146; Metropolitan Bank *v.* Hitz, 1 Mackey, 111; Matter of Winne, 1 Lans. 514; Wickes *v.* Clarke, 8 Paige, 172. In Pennsylvania the rule is otherwise, and the husband's life estate in the lands of his wife is not subject to execution. Snavely *v.* Wagner, 3 Pa. St. 275; 45 Am. Dec. 640; Gordan *v.* Ingraham, 1 Grant Cas. 156; Kurtz *v.* Long, 30 Pa. St. 502.

[2] McComb *v.* Sawyer, 12 N. H. 396.

[3] Brown *v.* Gale, 5 N. H. 416.

[4] Junction R. R. Co. *v.* Harris, 9 Ind. 184; White *v.* Dorris, 35 Mo. 181.

[5] For description of this tenancy, see Freeman on Cotenancy and Partition, secs. 63–76.

the other. But if the husband has, by common law, certain estates and rights in real property, belonging wholly to his wife, can he have estates and rights of less dignity and value in real property belonging partly to her and partly to himself? The answer given by a majority of the authorities on the subject is, that though the lands be held by entireties, the husband has during the joint lives of the spouses, the right to the possession and enjoyment of the property as fully as if the title thereto were vested exclusively in his wife. It follows, as a result from this, that this life estate is subject both to voluntary and to involuntary transfer.[1] This opinion has not received universal concurrence,[2] and whether correct or incorrect, upon common-law principles, is entirely inapplicable in those states where the marital rights of husbands have been modified or destroyed by statute, and the realty of wives exempted from levy and sale under executions against their husbands.[3]

§ 187. **Trust Estates were not**, at common law, regarded as assets,[4] nor were they subject to debts due to private persons, and it is doubtful whether they were liable to crown debts. "But by the statute 13 Elizabeth, c. 4, it is enacted that if any person who is

[1] Freeman on Cotenancy and Partition, secs. 73, 74; Ames v. Norman, 4 Sneed, 692; Stoebler v. Knerr, 5 Watts, 181; French v. Mehan, 56 Pa. St. 289; McCurdy v. Canning, 64 Pa. St. 41; Bennett v. Child, 19 Wis. 362; Litchfield v. Cudworth, 15 Pick. 23.

[2] Jackson v. McConnell, 19 Wend. 178; Thomas v. De Baum, 1 McCarter Ch. 40; Chandler v. Cheney, 37 Ind. 408; Vinton v. Beamer, 55 Mich. 559.

[3] McCurdy v. Canning, 64 Pa. St. 41; Chandler v. Cheney, 37 Ind. 408. In the last-named state it has also been determined that crops raised by the husband on lands held by himself and wife in entireties are not subject to execution. Patton v. Rankin, 68 Ind. 245.

[4] Bennett v. Box, 1 Ch. Cas. 12.

an accountant, or indebted to the crown, shall purchase any lands in the name of other persons, to his own use, all such lands shall be taken for the satisfaction of the debts due by such persons to the crown."[1] To enable private creditors to obtain satisfaction of their debts by extending lands held in trust, the statute of 29 Charles II., c. 3, enacted "that it shall and may be lawful for every sheriff, or other officer to whom any writ or precept shall be directed, upon any judgment, statute, or recognizance, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, etc., as any other person or persons shall be seised or possessed in trust for him against whom execution is so sued, like as the sheriff, or other officer, might or ought to have done if said party, against whom the execution shall be so sued, had been seised of such lands, tenements, etc., of such estate as they be seised of in trust for him at the time of the said execution sued, which lands, tenements, etc., by force and virtue of such execution, shall accordingly be held and enjoyed, freed, and discharged from all encumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; and if any *cestui que trust* shall die leaving a trust in fee-simple to descend to his heir, then, and in every such case, such trust shall be deemed and taken, and is hereby declared to be, assets by descent; and the heir shall be liable to and chargeable with the obligation of his ancestors, for and by reason of such assets, as fully and amply as he might or ought to have been if the estate in law had descended to him in possession in like manner as the trust descended."

[1] 1 Greenl. Cruise, 412.

The tendency of the decisions has been such as to restrict the operation of this statute to the estates therein clearly and expressly designated. It by no means follows that, in states which have adopted this or a similar statute, all equitable estates are subject to execution. On the contrary, it will be found that the equitable interests coming within the statutes are comparatively rare. In King *v.* Ballett,[1] the statute was held not to extend to estates for years. In other cases it has been held that the interest of a *cestui que trust* is not within the statute, where others are also beneficiaries under the trust.[2] "The words of the statute are 'seised or possessed in trust for him against whom execution is sued, like as the sheriff might do if that person were seised.' This statute made a change in the common law, and—up to a certain extent at least—made a trust the subject of inquiry and cognizance in a legal proceeding. We think the trust that is to be thus treated must be a clear and simple trust for the benefit of the debtor, the object of the statute appearing to us to be to remove the technical objection arising from the interest in land being vested in another person, where it is so vested for the benefit of the debtor."[3] The operation of this and similar statutes seems to be confined to cases where a *cestui que trust*, by virtue of a conveyance or devise, is entitled to the full and exclusive benefit and enjoyment of an estate the legal title to which is vested in another.

§ 188. Trust Estates—English Statutes Adopted in America.—The statute of 29 Charles II., referred

[1] 2 Vern. 248.

[2] Harris *v.* Pugh, 4 Bing. 335; Doe *v.* Greenhill, 4 Barn. & Ald. 684; Lynch *v.* Utica Ins. Co., 18 Wend. 236; Harrison *v.* Battle, 1 Dev. Eq. 537.

[3] Doe *v.* Greenhill, 4 Barn. & Ald. 690.

to in the preceding section, did not extend to the provinces. In some of the United States it has never been adopted, and the rule in regard to taking trust estates under execution remains as at common law.[1] This statute was, however, re-enacted, in substance or in form, in many of the states; and where so enacted its effect was confined, as under the English decisions, to clear and unmixed trusts. In Alabama perfect equities are subject to execution;[2] and it has been said by the supreme court of that state that "the perfect equity which the statute subjects to levy and sale under execution at law is of one class only,—that of a vendee who has paid the purchase-money"; and that the "statute subjects to levy and sale an equity of redemption, a perfect equity,—the defendant having paid the purchase-money,—a legal title, or a vested legal interest in possession, reversion, or remainder, whether it is an entire estate or held in common with others."[3] Hence, where a conveyance is made to a trustee with power to sell the property conveyed on default being made in the payment of a specified debt, and where the law grants to the debtor the privilege of redeeming from a sale made under such trust, he nevertheless has not, after such sale, that perfect equity which is subject to execution. In Arkansas the statute declares subject to execution all real estate whereof the defendant or any person for his use was seised in law or equity on the day of the rendition of the judgment, or at any time thereafter. The object of the original enactment of this statute was to subject to execution lands pur-

[1] Russell v. Lewis, 2 Pick. 508; Merrill v. Brown, 12 Pick. 216.

[2] Code Ala., sec. 2871; see Wilson v. Beard, 19 Ala. 629; Doe v. McKinney, 5 Ala. 719.

[3] Shaw v. Lindsey, 60 Ala. 344; Smith's Ex'r v. Cockrell, 66 Ala. 64.

chased from the United States for which full payment had been made, but to which no patent had issued. The interpretation of the statute has therefore been such as to confine it to perfect or simple equities,— those in which the interests of the beneficiary were so clear that no sacrifice of his estate was likely to follow from subjecting it to execution. Hence, if he makes a deed of trust to secure the payment of certain debts therein specified, the equitable rights retained by him are not subject to execution.[1] In Delaware and Georgia, perfect or passive equities, as where lands have been purchased and complete payment made, so that the purchaser is entitled to a conveyance, are subject to execution.[2] In Kentucky the estates embraced within the statute of 29 Charles are liable to execution,[3] but no others.[4] Trust estates are not liable in Michigan,[5] nor in New Jersey.[6] Mere trusts, pure and simple, are subject to execution in Mississippi;[7] but imperfect and complicated trusts are not.[8] This remark seems to be equally applicable to Missouri.[9]

[1] Pettit v. Johnson, 15 Ark. 55; Biscoe v. Royston, 18 Ark. 508; Pope's Heirs v. Boyd, 22 Ark. 538.

[2] McMullen v. Lank, 4 Houst. 648; Pitts v. Bullard, 3 Kelly, 5; 46 Am. Dec. 405.

[3] Blanchard v. Taylor, 7 B. Mon. 645; Eastland v. Jordan, 3 Bibb, 186; Jones v. Langhorn, 3 Bibb, 453; Anderson v. Briscoe, 14 Bush, 344.

[4] Allen v. Saunders, 2 Bibb, 94; Ormsby v. Tarascon, 3 Litt. 412; January v. Bradford, 4 Bibb, 566; Tyree v. Williams, 3 Bibb, 365; 6 Am. Dec. 663.

[5] Gorham v. Wing, 10 Mich. 486; Trask v. Green, 9 Mich. 358.

[6] Hogan v. Jacques, 19 N. J. Eq. 123; 97 Am. Dec. 644; Vancleve v. Groves, 3 Green Ch. 330.

[7] Presley v. Rodgers, 24 Miss. 520; Boarman v. Catlett, 13 Smedes & M. 149.

[8] Hopkins v. Carey, 23 Miss. 54.

[9] McIlvaine v. Smith, 42 Mo. 45; 97 Am. Dec. 295; Brant v. Robertson, 16 Mo. 129; Broadwell v. Yantis, 10 Mo. 403; Anthony v. Rogers, 17 Mo. 394; Wagner's Stats. 605; Gen. Stats., ed. of 1865, c. 160, sec. 6; Morgan v. Bouse, 53 Mo. 219.

In New York "the Revised Statutes provide that lands, tenements, and real estate holden by any one in trust or for the use of another shall be liable to debts, judgments and decrees, executions and attachments, against the person to whose use they are holden, in the cases and in the manner prescribed in the first chapter of the second part of the Revised Statutes."[1] In North Carolina, South Carolina, Tennessee, and Virginia, the decisions are in substantial harmony with those made under the statute of 29 Charles II.[2] Lands are not there subject to execution against a *cestui que trust*, unless the trustee could convey him the entire legal title without committing a breach of trust.[3] The condition of the title must be such that the purchaser at execution sale can be treated as having acquired the entire title, both legal and equitable. If the sale would leave any outstanding equity in any other person, then the property is not subject to execution.[4] The debtor must be in such a condition that the conveyance of the legal title would be decreed to him were he to sue for it.[5] "The statute of uses never executes the use while there is anything for the trustee to do necessary to

[1] 4 Wait's Practice, 37 d; see Wright *v.* Douglass, 3 Barb. 574; Brewster *v.* Power, 10 Paige, 567; Garfield *v.* Hatmaker, 15 N. Y. 475; Mallory *v.* Clark, 29 How. Pr. 418; 9 Abb. Pr. 358; Lynch *v.* Utica Ins. Co., 18 Wend. 236; Bogert *v.* Perry, 17 Johns. 351; 8 Am. Dec. 411; Kellogg *v.* Wood, 4 Paige, 578; Jackson *v.* Bateman, 2 Wend. 570; Guthrie *v.* Gardner, 19 Wend. 414; Foote *v.* Colvin, 3 Johns. 216; 3 Am. Dec. 478.

[2] Gillis *v.* McKay, 4 Dev. 172; Harrison *v.* Battle, 1 Dev. Eq. 537; Mooro *v.* McDuffy, 3 Hawks, 578; Brown *v.* Graves, 4 Hawks, 342; Melton *v.* Davidson, 6 Ired. Eq. 194; Thompson *v.* Ford, 7 Ired. 418; Freeman *v.* Perry, 2 Dev. Eq. 243; Burgin *v.* Burgin, 1 Ired. 160; Shute *v.* Harder, 1 Yerg. 1; 24 Am. Dec. 427; Hurt *v.* Reeves, 5 Hayw. (N. C.) 50; Smith *v.* Gray, 1 Humph. 491; White *v.* Kavanagh, 8 Rich. 377; Claytor *v.* Anthony, 6 Rand. 285; Coutts *v.* Walker, 2 Leigh, 280.

[3] Battle *v.* Petway, 5 Ired. 576; 44 Am. Dec. 59.

[4] Tally *v.* Reid, 72 N. C. 336.

[5] Love *v.* Smathers, 82 N. C. 369; Davis *v.* Inscoe, 84 N. C. 403.

the accomplishment of the trust created by the deed. It applies only in cases where there is nothing to be done by the trustee, as where an estate is given to one and his heirs simply in trust for another. In such case the title passes through the trustee directly to the *cestui que trust*, the latter becoming the legal owner by virtue of this transmission caused by the statute. But where the trustee is charged with the performance of some duty in connection with the property, which cannot be performed except by authority of the legal estate vested in him, the statute has no application, because if it did, it would defeat the very purpose intended by the execution of the deed."[1] A testator devised lands to D. and B., in trust for the use and benefit of the testator's son and daughter, with directions to divide such lands equally between the son and daughter, to be used by each respectively during his or her natural life, and after the death of either, to divide his or her share equally among his or her children. The executors made the division of the lands between the son and daughter, who respectively went into the possession of the parts assigned to them. After this the part allotted to the son was sold under execution against him. But the court was clear that no title passed by the sale: 1. Because the debtor was entitled to a portion only of the land, and hence could not compel a conveyance of the legal title to him; and 2. Because it was necessary that the executors should retain the title to enable them to perform the duty enjoined on them of dividing the son's share among his children upon his death.[2]

In Ohio, equities are not subject to execution unless

[1] Bristow v. McCall, 16 S. C. 548.

[2] Bristow v. McCall, 16 S. C. 548; see also Bunch v. Hardy, 3 Lea, 543.

accompanied by possession, and even then it is not clear whether the equity is transferred, or only the possessory interest.[1] In California, Connecticut, Indiana, Iowa, Kansas, Maryland, New Hampshire, Nevada, and Pennsylvania, equitable estates are subject to execution much more extensively than under the statute of 29 Charles II. In fact, in most of these states all beneficial estates are liable to be taken in execution, irrespective of the question whether they are legal or equitable.[2]

§ 189. **Resulting Trust.** — When the consideration for a conveyance is paid by one man, but the deed is taken in the name of another, the parties being strangers to each other, a resulting or presumptive trust at once arises in favor of the one by whom the consideration was furnished, entitling him to hold the other as his trustee. Some difference of opinion has been manifested whether the beneficiary under such a trust has, under the act of 29 Charles II. and similar statutes, an estate subject to execution. The object of taking the conveyance in the name of a person other than the one by whom its consideration was paid may be innocent; but it is more frequently for the purpose of concealing the real ownership of the property from creditors, who,

[1] Roads *v.* Symmes, 1 Ohio, 281; 13 Am. Dec. 621; Douglass *v.* Houston, 6 Ohio, 156; Scott *v.* Douglass, 7 Ohio, 227; Miner *v.* Wallace, 10 Ohio, 403; Haynes *v.* Baker, 5 Ohio St. 255.

[2] Davenport *v.* Lacon, 17 Conn. 273; State Bank *v.* Macy, 4 Ind. 362; Pennington *v.* Clifton, 11 Ind. 162; Hutchins *v.* Hanna, 8 Ind. 533; Crosby *v.* Elkader Lodge, 16 Iowa, 399; Harrison *v.* Kramer, 3 Iowa, 543; Kiser *v.* Sawyer, 4 Kan. 503; Miller *v.* Allison, 8 Gill & J. 35; McMechen *v.* Marman, 8 Gill & J. 57; Hopkins *v.* Stump, 2 Har. & J. 301; Reynolds *v.* Crawford, 7 Har. & J. 52; Pritchard *v.* Brown, 4 N. H. 397; 17 Am. Dec. 431; Upham *v.* Varney, 15 N. H. 462; Garro *v.* Thompson, 7 Watts, 416; Dake *v.* Brown, 68 Pa. St. 223; Kennedy *v.* Nunan, 52 Cal. 326.

upon knowing the truth, would at once institute measures looking towards the compulsory satisfaction of their demands. In either event, the majority of the authorities inclines to the view that the estate may be taken in execution the same as though the trust was expressed in the conveyance.[1] This majority is opposed by a minority very nearly its equal in number and importance.[2]

§ 189 a. Trusts and Devises to Withdraw Property from Execution. — We now approach a subject of great importance, and one in respect to which the authorities are not in entire harmony. The efforts of the owner of property to withdraw it from execution against him, while he retains some beneficial interest therein for himself or his family, would undoubtedly be met and counteracted by the statutes and decisions denouncing all conveyances and devises the design or operation of which is to hinder, delay, or defraud creditors. Each debtor is under both a moral and a legal obligation to pay his debts, and he cannot be permitted to evade such obligation by creating any trust for the benefit of himself or his family. But while a parent is under no

[1] Pritchard *v.* Brown, 4 N. H. 397; 17 Am. Dec. 431; Tevis *v.* Doe, 3 Ind. 129; Bobb *v.* Woodward, 50 Mo. 95; Foote *v.* Colvin, 3 Johns. 216; Guthrie *v.* Gardner, 19 Wend. 414; Wait *v.* Day, 4 Denio, 439; Ontario Bank *v.* Root, 3 Paige, 478. But it is otherwise under the present statutes of New York. Garfield *v.* Hatmaker, 15 N. Y. 475. In Maine, property bought by husband in name of wife may be taken in execution, the statute raising resulting trust in his favor. Low *v.* Marco, 53 Me. 45; Thomas *v.* Walker, 6 Humph. 93; Evans *v.* Wilder, 5 Mo. 313; Rankin *v.* Harper, 23 Mo. 579; Dunnica *v.* Cox, 24 Mo. 167; 69 Am. Dec. 420; Herrington *v.* Herrington, 27 Mo. 560; Dewey *v.* Long, 25 Vt. 564. But in Missouri and Vermont the interest acquired by the purchaser seems to be the equity only, and not the legal title.

[2] Harrison *v.* Hollis, 2 Nott & McC. 578; Bauskett *v.* Holsonback, 2 Rich. 624; Jimmerson *v.* Duncau, 3 Jones, 537; Mitchell *v.* Robertson, 15 Ala. 412; Wilson *v.* Beard, 19 Ala. 629; Gentry *v.* Harper, 2 Jones Eq. 177; Growing *v.* Rich, 1 Ired. 553; Maynard *v.* Hoskins, 9 Mich. 485, by statute.

obligation to pay either the present or future debts of his child, he ought to feel a solicitude for its future welfare, and a desire to guard it against future penury. The greater the incapacity or improvidence of the child, and the consequent probability of its becoming subject to obligations which it is unable to meet by its own efforts, the greater ought to be the solicitude and forethought of the parent in making some provision for its maintenance and comfort which will elude or withstand the efforts of its creditors, whether such efforts are confined to ordinary proceedings under execution, or are aided by such powers of chancery as can be invoked by a creditor's bill.

Where statutes have not been enacted subjecting all equitable estates to execution, property may be withdrawn from execution at law by making it the subject of some active trust; but in that event it may be reached by a creditor's bill. The question we propose to consider is, What, if anything, will place property beyond the reach of the creditors of the beneficiary, whether proceeding at law or in equity? A direct devise or conveyance, with a provision forbidding alienation by the devisee or grantee, or declaring that the property shall not be subject to execution, cannot withdraw the property from execution, for the prohibition does not operate to divest the debtor's estate and vest it in another, and while he retains the whole beneficial estate, it must carry with it the power to dispose of the property by transfer, whether voluntary or involuntary.[1] On the other hand, it is now clear that the property may be withdrawn from creditors by so limiting its possession and enjoyment that the estate or interest of

[1] Bridge v. Ward, 35 Wis. 687; Blackstone Bank v. Davis, 21 Pick. 142; 32 Am. Dec. 241.

the beneficiary or grantee will terminate on his becoming insolvent or bankrupt, or on an attempt being made to seize the estate for the benefit of his creditors.[1] Thus where an annuity was given to the testator's nephew during his natural life, to be paid to him only and upon his receipt, and expressing an intent that the annuity should not be alienated, and if alienated, that it should immediately cease and determine, and the nephew was adjudged a bankrupt, and his assignees in bankruptcy sought to recover the annuity, it was held that there could be no recovery, because by the alienation consequent upon the adjudication of bankruptcy the annuity had ceased.[2] A testator devised certain real estate to trustees, with power to dispose of the same, and after paying certain charges out of the proceeds, to invest the residue, and of the income to be raised out of such investments one moiety was to be paid to his son and the other to his daughter; and the testator directed "that in case his son should, at any time or times, make any assignment, mortgage, or charge of or upon, or in any manner dispose of, by way of anticipation, the said interest, dividends, or accumulations, or any part thereof, or attempt or agree so to do, or commit any act whereby the same or any part thereof could or might, if the absolute property thereof were vested in him, be forfeited unto or become vested in any person or persons, then in any of such cases the said trustees should henceforth pay and apply the said interest, dividends, and accumulations for the maintenance and support of his said son, and any wife or child or children he might have, and for the education of such issue, or any of them as his trustees for the time

[1] Joel v. Mills, 3 Kay & J. 458; Rochford v. Hackman, 9 Hare, 475.

[2] Dommatt v. Bedford, 3 Ves. Jr. 149.

being should, in their discretion, think fit." The son became a bankrupt. Whereupon a bill was filed by his assignee in bankruptcy for a decree to compel the trustees to pay them the moiety to which the son would have been entitled had the fiat in bankruptcy not issued against him. But the prayer of the bill was denied, on the ground that, after the commission of the act of bankruptcy, the son retained no interest in the property.[1]

A will, wherein the testatrix devised her estate to trustees for the benefit of her sons, "contained a provision that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person, then the trust expressed in said will concerning so much thereof as would so vest, should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust fund was to be paid to the wife and children, or wife and child, as the case might be, of such son; and in default of any objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund."[2] This provision was sustained as against the claims of the assignee in bankruptcy of one of the sons. If property is conveyed or devised to trustees, who are vested with a discretion, in case they see fit, to apply the income or proceeds for the benefit or support of the beneficiary, he has no interest which can be reached by creditor's

[1] Godden v. Crowhurst, 10 Sim. 643.

[2] Nichols v. Eaton, 91 U. S. 718.

bill. As he had no power to compel the trustees to act for his benefit, his assignee or creditors can have none.[1] It must therefore be conceded that property may be withdrawn from the reach of the creditors of the beneficiary by limiting his estate so that it will be terminated by his alienation voluntarily or involuntarily, or by vesting it in trustees who have a discretion to apply it for his benefit, or not. The vice of each of these methods is that it involves the beneficiary and his creditors in common ruin; for while it thwarts the efforts of the creditors, it leaves the intended beneficiary either without any estate or dependent on the caprice of the trustees. Hence efforts have been made to devise other trusts under which the beneficiary may retain some absolute rights, notwithstanding his subsequent bankruptcy. These efforts have generally proved futile in England, but have met with encouraging success in the United States, as will more fully appear from a reference to the leading cases upon the subject. In the case of Brandon *v.* Robinson,[2] it appeared that Stephen Goom had devised and bequeathed his estate to trustees to sell, and to divide or otherwise apply the produce to the use of all his children living at his decease, in equal proportions, and he directed with reference to the eventual interest of his son Thomas that it should be laid out in public funds or securities, and that the dividends should be by the trustees, from time to time, paid to the son on his proper order and receipt, "subscribed with his own proper hand, to the intent that the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived

[1] Twopenny *v.* Peyton, 10 Sim. 487; Leavitt *v.* Beirne, 21 Conn. 1; Hall *v.* Williams, 120 Mass. 344.

[2] 18 Ves. Jr. 429.

payment or payments," and that, upon his decease, the principal of his share with all accrued dividends should be applied by the trustees to the benefit of such persons as, in course of administration, would be entitled to his personal estate. After the death of the testator the son became a bankrupt, and the surviving assignee, under the commission in bankruptcy, applied for the execution of the trust by the taking of an account and the payment to him of the son's interest. The Lord Chancellor Eldon sustained the bill of the assignee, saying: "There is no doubt that property may be given to a man until he shall become a bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents of a life estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. A like decision resulted from an annuity which trustees were directed to pay to the testator's son for life, the testator having declared with respect to such annuity that it was intended for the personal maintenance and support of the son during the whole of his life, and that it should not on any account be subject 'to the debts, engagements, charges, or encumbrances of him, my said son.'"[1] The case of Snowden *v.* Dales[2] is an extreme one. An assignment was made to trustees of two mortgage sums aggregating two thousand pounds. Of this sum they were directed to hold eight hundred pounds in trust during the life of J. D. H., "or during such part thereof as the trustees should think proper, and at their will and

[1] Graves *v.* Dolphin, 1 Sim. 66. [2] 6 Sim. 525.

pleasure, but not otherwise, or at such other time or times, and in such sum or sums, portion or portions, as they should judge proper and expedient, to allow and pay the interest of the eight hundred pounds into the proper hands of the said J. D. H., or otherwise if they should think fit, in procuring for him diet, lodging, wearing apparel, and other necessaries; but so that he should not have any right, title, claim, or demand in or to such interest, other than the trustees should, in their or his absolute and uncontrolled power, discretion, and inclination, think proper, expedient, and so that no creditor of his should or might have any lien or claim thereon in any case, or the same be, in any way, subject or liable to his debts, dispositions, or engagements." The will further provided that in the event of the death of J. D. H., leaving a widow, the trustees should pay the interest to her, and after the decease of him or his widow, the eight hundred pounds, and all accumulations thereof, should be held in trust for the benefit of his children. It was held, as there was no provision made for the disposition of the fund to some other person than J. D. H. during his lifetime, that his interest therein vested in his assignee in bankruptcy.[1]

In several of the United States the English decisions upon this subject have been followed without hesitation. Thus in Smith *v.* Moore,[2] funds devised to T. H. S., in trust for W. G. S., "not subject to any debts he may have contracted, but for his comfort and support; and should he depart this life before receiving the same," then to be equally divided with testator's other children, were held to be subject to a bill filed

[1] See also Younghusband *v.* Gisborne, 1 Coll. C. C. 400; Page *v.* Way, 3 Beav. 20.

[2] 37 Ala. 327.

by the creditors of the beneficiary. A like decision was pronounced in Georgia, where a devise had been made to a trustee of property, to be managed and controlled by him for the use and benefit of testator's son, who was restricted "in his expenses to the income arising from said property," and it was further provided in the will "that said property shall not be liable for the debts or contracts of testator's said son, except when made and entered into by the written consent of the trustee."[1] The states of California, North Carolina,[2] South Carolina,[3] Rhode Island,[4] and perhaps Missouri,[5] are also committed to the English rule that a debtor cannot retain any beneficial interest beyond the reach of a creditor's bill. Unless it is limited over to some other beneficiary, the voluntary and involuntary disposition of it cannot be inhibited. Until recently, the supreme court of the United States entertained like views. Mr. Justice Swayne, delivering the opinion of that court in Nichols *v.* Levy,[6] thus tersely and lucidly expressed them: "It is a settled rule of law that the beneficial interest of the *cestui qui trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary, and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by

[1] Gray *v.* Obear, 54 Ga. 231.

[2] Kennedy *v.* Nunan, 52 Cal. 326; Mebane *v.* Mebane, 4 Ired. Eq. 181; 44 Am. Dec. 102; Pace *v.* Pace, 73 N. C. 119.

[3] Heath *v.* Bishop, 4 Rich. Eq. 46; 55 Am. Dec. 654.

[4] Tillinghast *v.* Bradford, 5 R. I. 205.

[5] McIlvaine *v.* Smith, 42 Mo. 45; 97 Am. Dec. 295.

[6] 5 Wall. 441.

his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go."

But the views thus expressed were unnecessary to the decision of the case then before the court, and were not entertained by that great tribunal, when at a later day, and doubtless upon more mature consideration, it came to decide the case of Nicholls *v.* Eaton.[1] In that case, too, the opinion of the court upon this point was a *dictum*, — but a *dictum* so forcibly expressed as to leave no doubt of the final dissent of that court from the decisions of the English courts upon this subject, and its adherence to the more liberal rules first pronounced by various state courts in different parts of the Union. Mr. Justice Miller delivered the opinion, in the course of which he said: "But while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts, upon the extremest doctrine of the English chancery court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a *necessary* incident to a life estate in real property, or that the rents and profits of real property, and the interest and dividends of personal property, may not be enjoyed by an individual, without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English chancery court has ingrafted upon the common law for the benefit of creditors, and

[1] 91 U. S. 725, followed in Hyde *v.* Woods, 94 U. S. 523.

is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity, to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court. If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the states of this Union, as expressed both by their statutes and the decisions of their courts, has not been carried so far in that direction. It is believed that every state in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts; in short, is not by law liable to the payment of his debts. This exemption varies in its extent and nature in the different states. In some it extends only to the merest implements of household necessity; in others it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many it embraces the homestead in which the

family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled, policy in all the states. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by state laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held that as to contracts made thereafter the exemptions were valid. This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law to his case, as he knows, when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country, all wills or other instruments creating such trust estates are recorded in public offices, where they may be inspected by every one; and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life estate, or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows that in creating a debt with such person he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded

when the object of the testator is carried out by excluding him from any benefit of such devise. Nor do we see any reason, in the recognized nature and tenure of property, and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so, is not readily perceived."

It remains for us to call attention to the American cases announcing and sustaining the rule to which the supreme court of the United States has yielded its weighty assent, as shown in the foregoing quotation. In the pioneer case upon this tropic, a father directed his executors to purchase a tract of land, and to hold the same in trust for his son, and to permit the son to have the rents, issues, and profits thereof, but that the same should not be liable to any debts contracted or which might be contracted by the son, at whose death the land should vest in his heirs, but if he should die without heirs, then in the heirs of the testator. The executors purchased a tract of land, and took a conveyance to themselves, subject to the trusts specified in the will. Afterward the life estate of the son was levied upon and sold. A conveyance was made pursuant to the sale, and the purchaser sought, in an action of ejectment, to recover possession of the property. His

right of recovery was denied, on the broad ground that "a man may, undoubtedly, so dispose of his land as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust estate, explicitly designating the uses, and defining the power of the trustees. Nor is such a provision contrary to law or any act of assembly. Creditors cannot complain because they are bound to know the foundation upon which they extend their credit."[1] The principle of this case has been very frequently applied by the courts of the same state, Pennsylvania; but it appears to be essential, to bring a devise or bequest within the protection of the rule there maintained, that the testator in his will either prohibit the alienation or taking in execution of the beneficial interest,[2] or vest the trustees with a mere discretion to pay or to withhold the fund or its proceeds as they may deem proper.[3] In Kentucky, a testator devised his estate to trustees, the greater portion to be held for the benefit of his grandchildren, but the trustees were to pay to his son Robert, during the latter's life, the sum of twenty-five dollars per month for his support. An attempt, made by creditor's bill, to reach Robert's life estate proved futile, because the court construed the trust as giving Robert no absolute, assignable interest, but merely as imposing upon the trustees the duty of

[1] Fisher v. Taylor, 2 Rawle, 33. This case has been repeatedly reaffirmed. Vaux v. Parke, 7 Watts & S. 25; Shankland's Appeal, 47 Pa. St. 113; Overman's Appeal, 88 Pa. St. 276; Thackara v. Mintzer, 100 Pa. St. 151.

[2] Girard Life Ins. Co. v. Chambers, 46 Pa. St. 485; 86 Am. Dec. 513.

[3] Keyser v. Mitchell, 67 Pa. St. 473. A man's friends may raise a fund and place it in his control for the purpose of engaging in business, to enable him to support his family, and if he accepts such funds and makes a profit thereon, they are not subject to execution against him. Holdship v. Patterson, 7 Watts, 547.

using the amount designated for his support, and because the principles of equity "do not subject the father's property to the debts of the son, nor give to the creditors of the son any right to complain that the father has not left or placed his property within their reach."[1] In Connecticut, a testator devised and bequeathed his estate to his sons and daughter, but inserted in the will the following condition: "All and every of the property given to my daughter is for the exclusive benefit of her and her children, free from the debts and control of her husband; and to secure the same to their unimpaired enjoyment, I hereby give the same to my sons, George P. Beirne and Oliver Beirne, with full authority to apply the property as to them shall seem best, for their exclusive benefit, during the life of my said daughter, and after her decease, to divide the same equally among her children." A bill was filed in chancery to compel the payment of a promissory note executed by the daughter out of moneys held by the sons as trustees under the will. The bill was dismissed, the majority of the court maintaining the right of a parent to place funds in the hands of trustees to be used for the benefit of a child, and not subject to alienation, whether voluntary or compulsory.[2]

[1] Pope's Ex'rs *v.* Elliott, 8 B. Mon. 56.

[2] Leavitt *v.* Beirne, 21 Conn. 1; Easterly *v.* Keney, 36 Conn. 18. The clause in the will here involved was as follows: "I give and devise to my friend, Henry Keney, a three-fifths part of the brick house and lot next adjoining St. John's Hotel, to him and his heirs forever, in trust, however, for my nephew, Albert W. Goodwin of Wethersfield; and I do hereby order and direct said trustee to pay said Albert W., and this devise is for the purpose of securing to said Albert W. the rents, use, and benefits of said devise, exclusive of all other persons. Said trustee is hereby directed to pay to said Albert W., or to his written order, made annually, the rents, profits, and issues of said building hereby devised, and this devise is not to inure in any

In Virginia, lands were devised to a trustee for the benefit of "Henrietta F. Handley, then the wife of Alexander W. Handley, and her family. The trustee was directed so to use and conduct the farm or plantation as to be most advantageous to the interests and support of said Henrietta F. and her children during the lifetime of said Henrietta." On a suit in equity being instituted to reach the interest of the wife and apply it to the satisfaction of her creditors, it was held that it was competent for the testatrix to provide a fund for the support of her daughter and the latter's children, and the fund not being shown to be in excess of what was needed for such support, the bill must be dismissed.[1] In the same state, one Platoff Zane, on becoming possessed by inheritance of a vast estate, contracted in a little over a year liabilities exceeding fifty thousand dollars, and his friends, foreseeing that his extravagances and business incapacity would soon reduce him and his family to want, prevailed upon him to execute a deed of trust. By this deed all his property was conveyed to trustees, with ample powers to take possession thereof and to sell and dispose of the same, and out of the proceeds to pay all existing creditors of the grantor and the expenses of the trust. After these debts and expenses should be paid, the residue of the property was to be employed in purchasing a residence

manner for the use and benefit of any creditors of said Albert W., but is hereby intended to be for the only use and benefit of said Albert W., and for such use and purpose only as he shall annually appoint." An execution was levied on the lands devised, and the levy was held inoperative. The court, however, was of the opinion that the beneficiary had a vested interest in the moneys in the hands of the trustee, and that such moneys were subject to attachment. The courts of this state have, therefore, proceeded no further than to hold that where the trustees are vested with a discretion to pay or withhold the moneys, they will not control such discretion in the interest of creditors.

[1] Nickell *v.* Handly, 10 Gratt. 336.

for Zane and his wife, and in making investments in bank stocks and other good securities. The income derived from the stocks and securities was to be applied to the support of Zane and wife during their lives and the life of the survivor, and at the death of the survivor was to go to their descendants and heirs. A bill in chancery was filed by a creditor, whose debt accrued subsequently to the date of the deed, whereby he sought to assail the deed as fraudulent, and to compel the trustees to pay such debt out of the trust property. The court determined that the deed, because it provided for all the existing debts of the grantor, could not be justly regarded as fraudulent, in the absence of any actual or express fraudulent intent on the part of the grantor, and that the interest reserved by the deed to the grantor, being merely a right to support and maintenance during life, was not subject to creditor's bill.[1] A testator devised certain real estate upon the following trusts: "To keep said lands and tenements well rented; to make reasonable repairs upon the same; to pay promptly all taxes and assessments thereon; to keep the buildings thereon reasonably insured against damages by fire; to pay over all remaining rents and income in cash into the hands of my said daughter, Juliet, in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said Juliet. At the death of the said Juliet, said trust estate shall cease and be determined, and the said lands shall vest in the heirs of the body of the said Juliet, and in default of such heirs, shall descend to the heirs of my body then living, according to the laws of Illinois then in force regulating descents." After the will

[1] Johnston *v.* Zane, 11 Gratt. 552.

had been probated, and moneys had come into the hands of the trustees, to which the daughter, Juliet, was entitled, such funds were attempted to be attached by her creditors. The court conceded that upon an absolute conveyance or gift there could not be annexed conditions and limitations which would "defeat or annul the legal consequences of the estate transferred," but added: "But while this unquestionably is true, it does not necessarily follow that a father may not, by will or otherwise, make such reasonable disposition of his property, when not required to meet any duty or obligation of his own, as will effectually secure to his child a competent support for life; and the most appropriate, if not the only, way of accomplishing such an object is through the medium of a trust. Yet a trust, however carefully guarded otherwise, would, in many cases, fall far short of the object of its creation, if the father in such case has no power to provide against the schemes of designing persons, as well as the improvidence of the child itself. If the beneficiary may anticipate the income, or absolutely sell or otherwise dispose of the equitable interest, it is evident the whole object of the settler is liable to be defeated. If, on the other hand, the author of the trust may say, as was done in this case, the net accumulations of the fund shall be paid only into the hands of the beneficiary, then it is clear the object of the trust can never be wholly defeated. Whatever the reverses of fortune may be, the child is provided for, and is effectually placed beyond the reach of unprincipled schemers and sharpers."[1] In Tennessee and New York the question has been

[1] Steib v. Whitehead, 111 Ill. 249. Like reasoning prevailed in Wallace v. Campbell, 53 Tex. 229; White v. White, 30 Vt. 338; Arwine v. Carroll, 4 Halst. Ch. 620.

settled by statutes, which, in substance, exclude from proceedings in equity to reach beneficial interests all cases where the trust has been created by, or the fund held in trust has proceeded from, some person other than the debtor,[1] with the limitation in the last-named state which enables a creditor to reach any portion of a trust fund "beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created."[2] It is no objection to the validity of a devise under these statutes that the beneficiary is also one of the trustees of the fund, if there are other trustees competent to act, and the income of the fund cannot be applied to the use of the beneficiary without the concurrence of the other trustees.[3]

A wife devised and bequeathed her property to a trustee, to hold for the sole use and support of her husband, with power to sell or exchange the property and to reinvest the proceeds. The trustee was required to exact the written receipt or assent of the husband in every instance in which he paid moneys to him or sold or exchanged property, and was directed to convey any part of the testator's estate "to such associations, person, or persons as her husband might designate by written authority." The interest of the husband was

[1] Hooberry *v.* Harding, 3 Tenn. Ch. 677; Campbell *v.* Foster, 35 N. Y. 366; Bramhill *v.* Ferris, 14 N. Y. 41; 67 Am. Dec. 113.

[2] Williams *v.* Thorn, 70 N. Y. 270; Sillick *v.* Mason, 2 Barb. Ch. 79; Graff *v.* Bonnett, 31 N. Y. 9; 88 Am. Dec. 236. In Hallett *v.* Thompson, 5 Paige, 583, Chancellor Walworth showed an inclination to follow the English chancery decisions, and to hold that "an attempt to give to the legatee an absolute and uncontrollable interest in personal estate, and at the same time to prevent its being subject to the usual incidents of such an absolute right to property, so far as the rights of creditors are concerned," must be thwarted in a court of chancery. See also Clute *v.* Bool, 8 Paige, 82; Degraw *v.* Clason, 11 Paige, 136.

[3] Wetmore *v.* Truslow, 51 N. Y. 338.

adjudged to be clearly subject to a bill filed by his creditors, for the following reasons: "No other person is named in the will as a *cestui que trust*, either during the life of the husband or after his death; no accumulation of income is provided for or contemplated; nor is any disposition made of the remainder after his death in case of his not exercising the power conferred on him; and no restrictions whatever are imposed by the will or committed to the discretion of the trustee as to the amount of principal or income that the husband may receive, or the uses to which he may apply them."[1]

§ 190. **Mortgagor's Estate.**—A mortgage at common law operated as a conveyance of the legal title, and left the mortgagor, whether he continued in possession or not, the owner of a mere equity. The legal title of the mortgagee was defeasible, and upon payment of the mortgage debt was extinguished; or, more properly speaking, the conveyance embraced within the terms of the mortgage became null and void upon the satisfaction of the debt due the mortgagee. But during the continuance of the mortgage, it is clear, upon common-law principles, that the mortgagor, as he was possessed of a mere equity, had no estate subject to execution. Nor was the statute of 29 Charles II., authorizing the interests of certain classes of *cestuis que trust* to be taken under an *elegit* at all applicable to mortgagors. In fact, it is clear that that statute could not reach any case in which the holder of the legal title had any beneficial interest therein. It operated only in those cases where the *cestui que trust* had the whole beneficial interest, with

[1] Sparhawk v. Coon, 140 Mass. 267.

the right to insist upon an immediate conveyance to him of the legal estate. As neither the common law nor this statute extended to equities of redemption, it was clear that upon legal principles a mortgagor's estate was not subject to execution. These legal principles were acquiesced in in England, and in some portions of the United States.[1] But in equity the mortgage was treated according to the real intention of the parties. It was held to be a mere security for the payment of money, and all the rights of the mortgagor were carefully protected. By the usual terms of mortgages, the mortgagor was to continue in the possession and in the enjoyment of his lands until after default was made in the payment of the debt. He was not allowed to commit waste, nor otherwise to depreciate the value of the mortgagee's security; but in other respects he was regarded as the owner of the property. His equity of redemption could be aliened, entailed, mortgaged, and devised. In the United States, the fact that the mortgagor was, for so many purposes, entitled to all the advantages of unconditional ownership has had its influence in determining his legal *status*. Except as between himself and his mortgagee, he came to be regarded, even in law, as the owner of the property. Hence, in the vast majority of the states, his equity of redemption, or in other words, all his rights under the mortgage, may, at law, be taken and sold or extended under an execution

[1] Van Ness *v.* Hyatt, 13 Pet. 294; Combs *v.* Young, 4 Yerg. 218; 26 Am. Dec. 225; Cantzon *v.* Dorr, 27 Miss. 246; Boarman *v.* Catlett, 13 Smedes & M. 149; Thornhill *v.* Gilmer, 4 Smedes & M. 153; Henry *v.* Fullerton, 13 Smedes & M. 631; Marlow *v.* Johnson, 31 Miss. 128; Allison *v.* Gregory, 1 Murph. 333; Hill *v.* Smith, 2 McLean, 446; Watson on Sheriffs, 209; Plunket *v.* Penson, 2 Atk. 290; Scott *v.* Scholey, 8 East, 467, 486; Lyster *v.* Dollard, 1 Ves. Jr. 431; 4 Bro. C. C. 478.

against him.[1] In Mississippi, where the common-law rule is still in force, a mortgagor's interest may be sold under execution when the mortgage was given to secure a contingent liability, and reserved the right to continue in possession;[2] also when the mortgage debt has been paid, but satisfaction has not been entered.[3] In New Jersey the mortgagor has no estate subject to execution after the mortgagee has entered for condition broken.[4] The rule is otherwise in New York, and the mortgagor's equity of redemption may be levied upon until after it has been foreclosed.[5]

§ 191. **The Sale of the Mortgagor's Equity of Redemption,** under a judgment at law for the mortgage debt, has always been regarded with disfavor. In some states it has been forbidden by statute,[6] and,

[1] Bernstein *v.* Humes, 60 Ala. 582; 31 Am. Rep. 52; Kelly *v.* Longshore, 78 Ala. 203; Baker *v.* Clepper, 26 Tex. 629; 84 Am. Dec. 591; De la Vega *v.* League, 64 Tex. 205; Kelly *v.* Burnham, 9 N. H. 20; Camp *v.* Coxe, 1 Dev. & B. 52; Crooker *v.* Frazier, 52 Me. 405; Wootton *v.* Wheeler, 22 Tex. 338; Punderson *v.* Brown, 1 Day, 93; 2 Am. Dec. 53; Franklin *v.* Gorham, 2 Day, 142; 2 Am. Dec. 86; Harwell *v.* Fitts, 20 Ga. 723; Commissioners *v.* Hart, 1 Brev. 492; Allyn *v.* Burbank, 9 Conn. 151; Fitch *v.* Pinckard, 4 Scam. 69; State *v.* Laval, 4 McCord, 336; Halsey *v.* Martin, 34 Cal. 81; Finley *v.* Thayer, 42 Ill. 350; Foster *v.* Potter, 37 Mo. 525; Watson *v.* Gregory, 6 Blackf. 113; Dougherty *v.* Linthicum, 8 Dana, 198; McIsaacs *v.* Hobbs, 8 Dana, 268; Cushing *v.* Hurd, 4 Pick. 253; 16 Am. Dec. 335; Reed *v.* Bigelow, 5 Pick. 280; Washburn *v.* Goodwin, 17 Pick. 137; Johnson *v.* Stevens, 7 Cush. 431; Waters *v.* Stewart, 1 Caines Cas. 47; Phelps *v.* Butler, 2 Ohio, 224; Farmers' Bank *v.* Commercial Bank, 10 Ohio, 71; Asay *v.* Hoover, 5 Pa. St. 35; 45 Am. Dec. 713; Tiffany *v.* Kent, 2 Gratt. 231; Phyfe *v.* Riley, 15 Wend. 248; Taylor *v.* Cornelius, 60 Pa. St. 187; Stewart *v.* Crosby, 50 Me. 130; Trimm *v.* Marsh, 54 N. Y. 599; 13 Am. Rep. 623; Heimberger *v.* Boyd, 18 Ind. 420; Beers *v.* Bottsford, 13 Conn. 146; Dunbar *v.* Starkey, 19 N. H. 160; Livermore *v.* Boutelle, 11 Gray, 217; 71 Am. Dec. 708; Hulett *v.* Soullard, 26 Vt. 295; Capen *v.* Doty, 13 Allen, 262; Cowles *v.* Dickinson, 140 Mass. 373; Byrd *v.* Clarke, 52 Miss. 623.

[2] Huntington *v.* Cotton, 31 Miss. 253.

[3] Wolfe *v.* Dowell, 13 Smedes & M. 103.

[4] Ketchum *v.* Johnson, 3 Green Ch. 370.

[5] Trimm *v.* Marsh, 3 Lans. 509.

[6] Gale *v.* Hammond, 45 Mich. 107; Preston *v.* Ryan, 45 Mich. 174; Linville *v.* Bell, 47 Ind. 547.

when made, has been declared void.[1] Independent of statutory considerations, it has generally been declared inoperative; or if allowed any effect, has been so restricted and confined as to prevent its operation from working injustice to the mortgagor.[2] It seems to be conceded that the mortgagee may sue at law for his debt. By so doing, he elects to pursue other property than that mortgaged to him. He will not be allowed to sell the equity of redemption, and at the same time to retain his title under the mortgage. His attempt to do so is always regarded as oppressive. "The true and only remedy for all this mischief is to prevent such sales; and I think I shall be inclined, if the case should arise hereafter, to prohibit the *mortgagee from proceeding at law to sell the equity of redemption.* He ought, in every case, to be put to his election to proceed directly on the mortgage, or else to seek *other property*, or the person of the debtor, to obtain satisfaction for his debt. I see no other way to prevent a sacrifice of the interest of the mortgagor; and it is manifestly equitable that the mortgagee be compelled to deal with his security, so as not to work injustice."[3] The courts are by no means unanimous in their judgments respecting the effect of the sale of mortgaged premises under a judgment at law for the mortgage

[1] Delaplaine *v.* Hitchcock, 6 Hill, 14.

[2] Greenwich Bank *v.* Loomis, 2 Sandf. Ch. 70; Atkins *v.* Sawyer, 1 Pick. 351; 11 Am. Dec. 188; Camp *v.* Coxe, 1 Dev. & B. 52; Simpson *v.* Simpson, 93 N. C. 373; Deaver *v.* Parker, 2 Ired. Eq. 40; Washburn *v.* Goodwin, 17 Pick. 137; Trimm *v.* Marsh, 3 Lans. 509; Waller *v.* Tate, 4 B. Mon. 529; Powell *v.* Williams, 14 Ala. 476; 48 Am. Dec. 105; Barker *v.* Ball, 37 Ala. 358; Baldwin *v.* Jenkins, 23 Miss. 206; Bronston *v.* Robinson, 4 B. Mon. 142; Goring *v.* Shreve, 7 Dana, 64; Bonnell *v.* Henry, 13 How. Pr. 142; Loomis *v.* Stuyvesant, 10 Paige, 490; Thompson *v.* Parker, 2 Jones Eq. 475; Buck *v.* Sherman, 2 Doug. (Miss.) 176; Thornton *v.* Pigg, 24 Mo. 249.

[3] Tice *v.* Annin, 2 Johns. Ch. 130.

debt. If the levy and sale are to be regarded as operating only upon the equity of redemption, to sustain and enforce them would create great confusion and injustice. In that event, the sale would be subject to the very claim or debt for the satisfaction of which it is made, and the right of redemption might sell for a sum sufficient to pay the debt while the mortgage would remain in apparent force. If the interest of the mortgagee be regarded as a mere lien, he may, unless prohibited by statute, waive it. His recovering judgment at law for the mortgage debt, and levying upon and selling the mortgaged premises, may with great propriety be construed as an irrevocable election to waive the lien. Where this construction prevails, a sale of such premises may properly be allowed, by giving it effect as a transfer of the interest both of the mortgagor and the mortgagee.[1] A mortgagee may levy upon and sell the mortgaged premises upon an execution for a debt distinct from that secured by the mortgage.[2] A mortgage may be made to secure two or more negotiable notes. In this event, the indorsee of any of these notes may bring an action at law thereon against the mortgagor, and may sell his equity of redemption in satisfaction of the judgment.[3] If, however, the mortgagee assigns the mortgage to the indorsee of the note, he becomes substituted to the disability of the mortgagee, and cannot sell the equity

[1] Coggswell *v.* Warren, 1 Curt. 223; Porter *v.* King, 1 Greenl. 297; Crooker *v.* Frazier, 52 Me. 405; Forsyth *v.* Rowell, 59 Me. 131; Youse *v.* McCreary, 2 Blackf. 243; Foslick *v.* Risk, 15 Ohio, 84; 45 Am. Dec. 562; Hollister *v.* Dillon, 4 Ohio St. 197; Fitman *v.* Corwin, 17 Ohio St. 118; Pierce *v.* Potter, 7 Watts, 475.

[2] Cushing *v.* Hurd, 4 Pick. 253; 16 Am. Dec. 335.

[3] Crane *v.* March, 4 Pick. 131; 16 Am. Dec. 329; Andrews *v.* Fiske, 101 Mass. 422.

of redemption under a judgment at law for a part of the mortgage debt.[1] A mortgagee may, in Massachusetts, sell, under a judgment for his debt, the mortgagor's equity of redemption in a second or junior mortgage.[2] In Oregon, the levy upon and sale of the mortgaged premises under a judgment at law for the mortgaged debt are not void.[3] Whether such sale is voidable by some motion or preceding taken in the interest of the mortgagor was not determined.

§ 192. **Interest of Grantor and Grantee of a Deed Intended as a Mortgage.**—There are various conveyances which, though not mortgages in form, are nevertheless designed to accomplish the same purpose. The question arises, whether the grantor in such a conveyance retains an interest subject to execution, in those states where, though equitable titles are exempt, the interests of mortgagors are liable to execution. In Ohio and Alabama it has been held that the grantor in a deed of trust has no estate vendible under an execution at law.[4] So in Ohio and Georgia, if a deed absolute on its face is given and accepted as a mortgage, the grantor's interest cannot be levied upon at law.[5] But the more reasonable rule under such circumstances is, that the creditors of the parties are entitled to treat their relation as that of mortgagor and mortgagee; and therefore that they may levy an execution against the former, and not against the latter.[6]

[1] Washburn *v.* Goodwin, 17 Pick. 137.

[2] Johnson *v.* Stevens, 7 Cush. 431.

[3] Matthews *v.* Eddy, 4 Or. 225.

[4] Morris *v.* Way, 16 Ohio, 469; Thompson *v.* Thornton, 21 Ala. 808; Like *v.* Mitchell, 2 Yerg. 400.

[5] Baird *v.* Kirtland, 8 Ohio, 21; Loring *v.* Mellendy, 11 Ohio, 355; Phimzy *v.* Clark, 62 Ga. 623; Groves *v.* Williams, 69 Ga. 614.

[6] Fredericks *v.* Corcoran, 109 Pa. St. 413; Clark *v.* Watson, 141 Mass. 248; Newhall *v.* Burt, 7 Pick. 156; Second Ward Bank *v.* Upmann, 12 Wis. 499.

§ 193. **A Purchaser at an Execution Sale** "obtains an inchoate right, which may be perfected into a perfect title, without any further act than the execution of a deed, in pursuance of a sale already made. It is not a mere right to have a certain sum charged upon the property satisfied out of it. The sum before charged upon the land has already been satisfied by the sale to the extent of the amount bid by the purchaser. The purchaser has already bought the land and paid for it. The sale is simply a conditional one, which may be defeated by the payment of a certain sum, by certain designated parties, within a certain limited time. If not paid within the time, the right to a conveyance becomes absolute, without any further sale, or other act to be performed by anybody. The purchaser acquires an equitable estate in the lands, conditioned, it is true, but which may become absolute by simple lapse of time, without the performance of the only condition which can defeat the purchase. The legal title remains in the judgment debtor, with the further right in him, and his creditors having subsequent liens to defeat the operation of a sale already made during a period of six months; after which, the equitable estate acquired by the purchaser becomes absolute and indefeasible, and the mere dry, naked, legal title remains in the judgment debtor, with authority in the sheriff to divest it, by executing a deed to the purchaser."[1] Because, by a sale under execution, the purchaser acquires even before the expiration of the time for redemption, an inchoate, inceptive title to the lands sold, and because the sheriff's deed, when made, takes effect by relation as of the day of the sale, the purchaser's title has, in California, New York, and

[1] Page v. Rogers, 31 Cal. 301.

Pennsylvania, been held to be subject to execution.[1] So it is said that the estate of a tenant by *elegit* is subject to execution in England.[2] But in Maine, Ohio, and New Jersey, one who derives title under an execution has no interest subject to levy until the time for redemption has expired, although, in the first-named state, he has by law a perfect legal title, and not a mere equity, — this legal title being defeasible on payment of the sum required to make redemption.[3]

§ 194. **The Interest Held under a Contract** to purchase, with an agreement for a conveyance when the terms of the sale have been complied with, is, of course, a mere equity, and upon common-law principles is not subject to execution. Prior to the statute of 29 Charles II., it would have been immaterial to inquire whether the vendee had fully complied with the terms of his agreement, and become entitled to a conveyance, or not; for as long as the legal title remained in the vendor, there was no interest in the vendee subject to execution. Under the construction given to this and to similar statutes, the vendee who had made full payment, and was entitled to an immediate conveyance, was regarded as a *cestui que trust*, for whom and to whose use the vendor was seized. Hence the interest of such vendee was held to be liable to levy and sale at law.[4] The same rule has been maintained

[1] Page *v.* Rogers, 31 Cal. 301; Wright *v.* Douglas, 2 N. Y. 373; Slater's Appeal, 29 Pa. St. 169; Morrison *v.* Wurtz, 7 Watts, 437; Whiting *v.* Butler, 29 Mich. 129.

[2] Watson on Sheriffs, 208.

[3] Den *v.* Steelman, 5 Halst. 193; Gonell *v.* Kelsey, 40 Ohio St. 117; Kidder *v.* Orcutt, 40 Me. 589.

[4] Morgan *v.* Bouse, 53 Mo. 219; Thompson *v.* Wheatley, 5 Smedes & M. 499; Moody *v.* Farr, 6 Smedes & M. 100; Frost *v.* Reynolds, 4 Ired. Eq. 494; Pitts *v.* Bullard, 3 Kelly, 5; 43 Am. Dec. 405; Neef *v.* Seely, 49 Mo. 209; Phillips *v.* Davis, 69 N. C. 117.

where the purchase-money, though tendered by the vendee, had been refused by the vendor.[1] But in some of the states the vendee's interest has been held to be exempt from execution until the conveyance was made to him. This was so for a long time in Alabama,[2] and until the adoption of the code now in force in that state. In Indiana, the interest of the vendee is not subject to direct levy and sale until, by conveyance, he has become vested with legal title;[3] but it may be reached by certain statutory proceedings in aid of the execution.[4] In cases where a contract of sale has been made, and only a portion of the purchase-money has been paid, the vendee has an interest which will be recognized and amply protected in equity. He is not, however, such a *cestui que trust* as is referred to in the statute of 29 Charles II., nor in similar statutes. He has no right to call for an immediate conveyance. He is not entitled to the legal estate; nor is it certain that he will ever be so entitled. The vendor has still a beneficial interest in the legal estate. It is true that the vendee's estate or interest may be of great value, and that it ought, as a matter of public policy and of common honesty, to be available as assets for the benefit of his creditors. But it is clear that the case is not one of a simple, unmixed trust, and therefore that the vendee's interest cannot be taken in execution, by virtue of the common law, nor of the statutes heretofore referred to.[5] The interest of the vendee may be

[1] Anthony *v.* Rogers, 17 Mo. 394.

[2] Hogan *v.* Smith, 16 Ala. 600; Collins *v.* Robinson, 33 Ala. 91; Fawcett *v.* Kinney, 33 Ala. 261.

[3] Modisett *v.* Johnson, 2 Blackf. 431; Gentry *v.* Allison, 20 Ind. 481.

[4] Figg *v.* Snook, 9 Ind. 202.

[5] Bogert *v.* Perry, 17 Johns. 351; 8 Am. Dec. 411; Goodwin *v.* Anderson, 5 Smedes & M. 730; Ledbetter *v.* Anderson, Phill. Eq. 323; Harrow *v.* James, 7 Smedes & M. 111; Brunson *v.* Grant, 48 Ga. 394; Ellis *v.* Ward, 7 Smedes &

transferred voluntarily. Hence it has been held that a sale thereof under execution, made at his request, is valid.[1] In several of the states the interest of a vendee, after part payment has been made, is by statute subject to execution. The purchaser at the sheriff's sale becomes entitled to all the benefits of the contract of sale on complying with all its conditions.[2] We have already shown that the mere possession of lands is *prima facie* evidence of a legal estate, and is subject to execution.[3] It may be shown, however, that such possession, instead of being held by virtue of some legal title, is held by the sufferance and at the will of the owner, or by virtue of a contract of purchase, or of some purely equitable title. When such a showing is made, the presumption arising from the defendant's possession is rebutted; and we think, as a necessary consequence of such rebuttal, the interest of the defendant ought to be declared not subject to execution. Such has uniformly been the case when the defendant's possession has been shown to be permissive or by mere tenancy at will. But some contrariety of opinion has been expressed in cases where the possession was held in connection with and by virtue of a contract to purchase, or of some other equitable title. The majority of

M. 651; Frost *v.* Reynolds, 4 Ired. Eq. 494; Delafield *v.* Anderson, 7 Smedes & M. 630; Badlam *v.* Cox, 11 Ired. 456; Moore *v.* Simpson, 3 Met. (Ky.) 349; Hinsdale *v.* Thornton, 75 N. C. 381. In Ohio an interest held under a bond for title, without possession, is not subject to execution. Haynes *v.* Baker, 5 Ohio St. 253.

[1] Moore *v.* Simpson, 3 Met. (Ky.) 349.

[2] Nickles *v.* Haskins, 15 Ala. 619; 50 Am. Dec. 154; Fish *v.* Fowlie, 58 Cal. 373; Estes *v.* Ivey, 53 Ga. 52; Young *v.* Mitchell, 33 Ark. 222; Rosenfeld *v.* Chaila, 12 Neb. 25; Brant *v.* Robertson, 16 Mo. 129; Lumley *v.* Robinson, 26 Mo. 361; Stevens *v.* Legrow, 19 Me. 95; Jameson *v.* Head, 14 Me. 34; Woods *v.* Scott, 14 Vt. 518; Houston *v.* Jordan, 35 Mo. 520; Russell's Appeal, 15 Pa. St. 319; Vierheller's Appeal, 24 Pa. St. 105; 62 Am. Dec. 365.

[3] See § 175.

the cases have, we believe, affirmed that the interest of the vendee, before full payment, is not subject to execution, though he is found in possession of the property.[1] In New York and in Ohio a different result was announced;[2] but in neither of these states did the courts venture to express an opinion whether, by the execution sale, the purchaser acquired anything beyond the mere possession. Since the early decisions in New York were pronounced, a statute has been enacted, under which means are provided for reaching the interests of vendees in possession under contracts of purchase; but the sale of such interests, under an ordinary levy and sale, is forbidden and made void.[3]

[1] Ellis *v.* Ward, 7 Smedes & M. 651; Frost *v.* Reynolds, 4 Ired. Eq. 494; Badlam *v.* Cox, 11 Ired. 456.

[2] Jackson *v.* Scott, 18 Johns. 94; Jackson *v.* Parker, 9 Cow. 73.

[3] Boughton *v.* Bank of Orleans, 2 Barb. Ch. 458; Griffin *v.* Spencer, 6 Hill, 525; Sage *v.* Cartwright, 9 N. Y. 49.

CHAPTER XIII.

THE LIEN OF EXECUTIONS.

§ 195. General nature and effect of the lien.
§ 196. Differences between execution and other liens.
§ 197. Property subject to execution liens.
§ 198. Territorial extent of the lien.
§ 199. At common law, commences at the teste of the writ.
§ 200. By statute, commences with the delivery of the writ for execution.
§ 201. By statute, commences with the levy of the writ.
§ 202. Duration of execution liens.
§ 203. Liens under writs of equal date or teste.
§ 204. Liens under writs from the courts of the United States.
§ 205. Judgment lien not continued by execution.
§ 206. Lien is dormant while the writ is not being executed in good faith.
§ 207. Lien not to be lost during the life of the writ, except by some act or fault of the plaintiff.

§ 195. General Nature and Effect of the Lien. — In all that has heretofore been said regarding the property subject to execution, we have assumed that the property spoken of at the time the officer sought to make his levy belonged to the defendant. There are many instances, however, in which property may lawfully be taken in execution after the defendant's interest therein has ceased. These instances arise in all cases where the property is subject to some lien by which it is bound for the express purpose that it may be made available to the satisfaction of the execution. Hence it becomes the duty of an officer, on receipt of an execution, to inquire, not merely in reference to the property at present owned by the defendant, but also in regard to all other property of the defendant liable to the execution. Thus the judgment may be a lien on real estate belonging to the defendant at its rendition,

and since alienated by him; or property, real or personal, may have been attached at the institution of the suit, and may therefore be liable to be taken in execution, though it has since been sold by the defendant. The subjects of attachments and of judgment liens do not come within the scope of this work. Our readers must look elsewhere for information concerning these two important themes.[1] In many of the states a lien arises from the execution itself. This lien, being within the scope of our work, must be treated here. The lien of an execution, like other liens, does not of itself transfer title. It does not change the right of property, and vest it at once in the plaintiff in execution nor in the officer charged with the execution of the writ. It confers, however, the right to levy on the property to the exclusion of all transfers and liens made by the defendant subsequent to commencement of the execution lien. When the levy and sale are made, the title relates back to the inception of the lien, and thus takes precedence over all transfers and encumbrances made subsequently to such inception. It has been held that an execution lien does not, prior to levy, create a vested right; and therefore that property subject to such lien may by act of the legislature be exempted from execution.[2] It is certain that the owner of property bound by an execution lien may convey or transfer the legal title, subject, however, to its being subsequently divested by a seizure and sale while in the hands of his vendee.[3] While the sheriff may seize property in

[1] See Drake on Attachment; Freeman on Judgments, c. 14.

[2] Norton v. McCall, 66 N. C. 159; Ladd v. Adams, 66 N. C. 164.

[3] Smallcomb v. Cross, 1 Ld. Raym. 252; Hotchkiss v. McVickar, 12 Johns. 406; Folsom v. Chesley, 2 N. H. 432; Churchill v. Warren, 2 N. H. 298; Bates v. Moore, 2 Bail. 614; Jones v. Judkins, 4 Dev. & B. 454; Payne v. Drewe, 4 East, 523; Samuel v. Duke, 3 Mees. & W. 622; 6 Dowl. P. C. 536; 1 H. & H. 127.

the hands of such vendee, and sell it for the purpose of satisfying the lien, he has not, prior to seizure, any special property in the goods, and therefore cannot sustain an action of trover against one who converts them.[1] Whether the lien of an execution be regarded as taking effect from its teste or from its delivery to the sheriff, the result of the lien, after it is conceded to have become operative, is the same. It authorizes the officer to seize and sell the goods wherever they may be found, although since its inception they may have been sold to a purchaser without notice,[2] or their owner may have died.[3] A wagon was by the owner placed in the possession of a mechanic for the purpose of making repairs thereon; and having made such repairs, he was, under the statutes of the state, entitled to a lien upon the property therefor. It was shown, however, that prior to the placing of the wagon in possession of the mechanic, a writ of *fieri facias* against the owner had been delivered to a constable for service, of which fact the mechanic was ignorant until after he made the repairs. It was held that the mechanics' lien could not displace that of the execution, and that the officer was entitled to recover possession of the wagon.[4] So where mortgages existed against

[1] Hathaway *v.* Howell, 54 N. Y. 97; Hotchkiss *v.* McVickar, 12 Johns. 403; Paysinger *v.* Shumpard, 1 Bail. 237.

[2] Marshall *v.* Cunningham, 13 Ill. 20; Lindley *v.* Kelley, 42 Ind. 294; Million *v.* Riley, 1 Dana, 359; 25 Am. Dec. 140; Newell *v.* Sibley, 1 South. 381; Barnes *v.* Hayes, 1 Swan, 304; Evans *v.* Barnes, 2 Swan, 292; Duncan *v.* McCumber, 10 Watts, 212.

[3] Becker *v.* Becker, 47 Barb. 497; Dodge *v.* Mack, 22 Ill. 93; Den *v.* Hillman, 2 Halst. 180; Parkes *v.* Mosse, Cro. Eliz. 181; Waghorne *v.* Langmead, 1 Bos. & P. 571; Preston *v.* Surgoine, Peck, 72; Black *v.* Planters' Bank, 4 Humph. 367; Harvey *v.* Berry, 1 Baxt. 252; Trevillian *v.* Guerrant, 31 Gratt. 525. In Kentucky, though no sale can be made after defendant's death, the lien continues, and may be enforced in equity. Burge *v.* Brown, 5 Bush, 535; 96 Am. Dec. 369.

[4] McCrisaken *v.* Osweiler, 70 Ind. 131.

a railroad, under which proceedings were taken resulting in the appointment of a receiver, but it appeared that prior to such proceedings sundry creditors had placed execution in the hands of proper officers, the court determined that these execution creditors were entitled to funds arising from the income of the road in preference to the receiver.[1] In the absence of a statutory provision giving it some greater effect, an execution lien, like that of a judgment, attaches to the real rather than the apparent interest of the defendant. If the title held by him is subject to equities of third persons, the execution lien is also subordinate to such equities.[2] "The fountain cannot rise higher than its source." In all attempts to acquire rights under the execution, the title of the defendant must be regarded as the source beyond which it will be impossible to proceed. If his title is impaired by equities or liens which are susceptible of assertion against him, they will be equally susceptible of assertion against the execution lien; and the lien may be destroyed, or more correctly speaking, may be proved never to have existed, by evidence of some pre-existing conveyance, of which the judgment creditor had no actual or constructive notice when his lien was supposed to have attached.

§ 196. **Differences between Execution and Other Liens.**—There are some very important differences between the operation of a lien by execution and that of a lien by judgment or mortgage. A judgment or mortgage lien cannot be displaced by a sale made under any junior lien. The purchaser at the sale

[1] Gilbert *v.* Washington City V. M. & G. S. R. R., 33 Gratt. 645.
[2] McAdow *v.* Black, 4 Mont. 475.

under the junior lien acquires a title which may be divested by a subsequent sale under an elder lien. With sales made under execution, the rule is different. If a sheriff has two or more writs in his hands, it is his duty to apply the proceeds to the writ having the elder lien. He may, however, levy and sell under the junior writ. If he does so, the purchaser acquires title to the property sold, free from the lien of all the other writs.[1] In such an event, the plaintiff under whose junior writ the levy and sale were made is not entitled to the proceeds of the sale. On the contrary, it is the duty of the sheriff to apply these proceeds to the several writs that may be in his hands, according to their priority as liens.[2] A sale, when made by the officer, is not for the benefit of the particular writ under which it is made, but for the benefit of all writs in his hands, according to their respective priorities. The purchaser at the sale need not concern himself about the priorities of the writs nor the distribution of the proceeds. The officer, on the other hand, must be attentive to these matters. For though he may have sold under a junior writ, if he pays the money to the plaintiff therein, he may afterward be compelled to pay it on the writ properly entitled thereto.[3] A judgment

[1] Jones *v.* Judkins, 4 Dev. & B. 454; 34 Am. Dec. 392; Lambert *v.* Paulding, 18 Johns. 311; Rogers *v.* Dickey, 1 Gilm. 636; 41 Am. Dec. 204; Marsh *v.* Lawrence, 4 Cow. 461; Rowe *v.* Richardson, 5 Barb. 385; Isler *v.* Moore, 67 N. C. 74; Woodley *v.* Gilliam, 67 N. C. 237; Samuel *v.* Duke, 3 Mees. & W. 622; 6 Dowl. P. C. 536; 1 H. & H. 127. This rule is in Alabama limited to sales of personal property. Lancaster *v.* Jordan, 78 Ala. 197.

[2] Hanauer *v.* Casey, 26 Ark. 352.

[3] Jones *v.* Judkins, 4 Dev. & B. 454; Green *v.* Johnson, 2 Hawks, 309; Jones *v.* Atherton, 7 Taunt. 56; Drewe *v.* Laimson, 11 Ad. & E. 537; Sawle *v.* Paynter, 1 Dowl. & R. 307; Furman *v.* Christie, 3 Rich. 1; Rogers *v.* Dickey, 1 Gilm. 636; Kirk *v.* Vonberg, 34 Ill. 440; Huger *v.* Dawson, 3 Rich. 328; Peck *v.* Tiffany, 2 N. Y. 451; Marshall *v.* McLean, 3 G. Greene, 363; Million *v.*

lien is paramount to the liens of all younger judgments, whether entered in the same or in different courts. But an execution lien does not necessarily take precedence over the liens of junior executions. There may be several writs in force against the same defendant at the same time. Some of these may be in the hands of a United States marshal, others in the hands of the sheriff of the county, and others in the hands of a constable. Now, if these several writs were to enforce judgments which were liens on real estate, the elder judgment lien would prove paramount, irrespective of the teste, delivery, or levy of the respective writs. But if there are no liens, except such as arise from the writs, the rule is different. The officer who succeeds in making the first levy thereby obtains priority for his writ, and secures it the right to be first paid out of the proceeds of the sale.[1]

§ 197. **In Determining What Property is Subject to Execution Liens,** we have only to consider the purpose in aid of which such liens have been created by law. This purpose was to prevent the defendant from alienating such property as the plaintiff was entitled to take in satisfaction of his writ. Therefore, as a general rule, all property subject to execution is subject to an execution lien. On the other hand, it must be true

Commonwealth, 1 B. Mon. 311; Russell *v.* Gibbs, 5 Cow. 390; Rowe *v.* Richardson, 5 Barb. 385; Kennon *v.* Ficklin, 6 B. Mon. 415; Smallcomb *v.* Cross, 1 Ld. Raym. 251. *Contra*, Smallcorn *v.* Lond, Comb. 428.

[1] Moore *v.* Fitz, 15 Ind. 43; McCall *v.* Trevor, 4 Blackf. 496; Jones *v.* Davis, 2 Ala. 730; Ray *v.* Harcourt, 19 Wend. 495; Irwin *v.* Sloan, 2 Dev. 349; Arberry *v.* Nolaud, 2 J. J. Marsh. 421; Field *v.* Millburn, 9 Mo. 492; McClelland *v.* Slinghuff, 7 Watts & S. 134; Dubois *v.* Harcourt, 20 Wend. 41; Wylie *v.* Hyde, 13 Johns. 249; Kring *v.* Green, 10 Mo. 195; Peck *v.* Robinson, 3 Head, 438; Miller *v.* Commonwealth, 1 B. Mon. 311; Pritchard *v.* Toole, 53 Mo. 356; Lash *v.* Gibson, 1 Murph. 266; Tilford *v.* Burnham, 7 Dana, 109.

that no property not subject to execution can be subject to execution lien, for it would be idle to declare the existence of a lien, and at the same time maintain that no proceedings can be had for its enforcement. Exempt property may therefore be sold or exchanged while writs against the owner are in the officer's hands, without imperiling the title of the vendee.[1] If the owner should, however, decline to claim his exemption where the law makes it his duty so to do, we presume that this waiver of his rights would impress the property with the legal characteristics of property subject to execution, at least so far as to entitle the holders of several writs to share in the proceeds according to the respective priorities of such writs.

In a state where growing crops are liable to be seized and sold, they are bound by the execution lien;[2] while in states where they cannot be levied upon till gathered, they are not before gathering subject to such lien.[3] Money passes rapidly from hand to hand, and is incapable of identification. It must necessarily on this account, and also as a matter of public policy, be exempted from the operation of execution liens.[4] Though we have met with no authorities on the subject, we think that all property which on principles of public policy and the necessities of commerce is exempted from the law of *lis pendens*[5] is also exempt from the lien of executions. In Virginia and West Virginia all personal property, including choses in action, owned by the debtor from the delivery of the writ to the

[1] Gotman *v.* Smith, 17 Ind. 152; Paxton *v.* Freeman, 6 J. J. Marsh. 234; 22 Am. Dec. 74.

[2] Lindley *v.* Kelley, 42 Ind. 294.

[3] Evans *v.* Lamar, 21 Ala. 333; Adams *v.* Tanner, 5 Ala. 740.

[4] Doyle *v.* Sleeper, 1 Dana, 531.

[5] For property not bound by *lis pendens*, see Freeman on Judgment, sec. 194.

officer to the return day thereof, is by statute subject to execution liens.[1] Property manufactured for sale,[2] and the interest of a partner in the assets of a firm,[3] are subject to execution liens; but the execution against the partner is subordinate as a lien to subsequent executions against the partnership.[4] The lien attaches to property acquired by the defendant at any time while the writ is in force.[6] Hence if a horse of the defendant is exchanged for another while the writ is in force, both become subject to the lien, and may be taken and sold.[6]

§ 198. **The Territorial Extent of Execution Liens** varies in different states. In South Carolina it is coextensive with the boundaries of the state.[7] The object of the lien is to bind the property which can be seized under the writ. Hence the usual rule is, that property situate within the territory in which the writ may be executed is bound, while property outside of that territory is not bound.[8] Writs are commonly to be executed in the county where they are issued, and their lien is ordinarily confined to the same county.[9] But where a writ may be sent to another county for execution, no doubt it would create a lien

[1] Puryear *v.* Taylor, 12 Gratt. 401; Huling *v.* Cahill, 9 W. Va. 531.

[2] Sawyer *v.* Ware, 36 Ala. 675.

[3] Wiles *v.* Maddox, 26 Mo. 77.

[4] Crane *v.* French, 1 Wend. 311; Dunham *v.* Murdock, 2 Wend. 553; Fenton *v.* Folger, 21 Wend. 676.

[5] Lea *v.* Hopkins, 7 Pa. St. 492; Shafner *v.* Gilmore, 3 Watts & S. 438; Ruttan *v.* Levisconte, 16 U. C. Q. B. 495.

[6] Groomes *v.* Dixon, 5 Strob. 149; Orchard *v.* Williamson, 6 J. J. Marsh. 561; 22 Am. Dec. 102.

[7] Woodward *v.* Hill, 3 McCord, 241.

[8] Hardy *v.* Jasper, 3 Dev. 158; Gott *v.* Williams, 29 Mo. 461; Roth *v.* Wells, 29 N. Y. 471.

[9] Claggett *v.* Force, 1 Dana, 428; Pond *v.* Griffin, 1 Ala. 678.

on the debtor's property therein from the time it was delivered to the officer for service. In some of the states the successful suitor in the appellate court may have execution issued upon its judgment to any county in the state. Very serious inconvenience and apparent injustice may arise from the enforcement of a rule maintaining the lien of an execution so issued as effective of any date prior to its delivery to an officer of the county for execution. For while it may be practicable for an intending purchaser to ascertain in the office of the sheriff of his county whether there are any writs there against the vendor, such inquiry cannot reasonably extend to the capital in a remote part of the state. These hardships, though urged in the supreme court of North Carolina, were not so potent as to preclude it from maintaining the lien of its execution from the teste of the writ.[1] If property, when bound by an execution lien, is removed to another county or state, and is afterward returned, it is still subject to the lien;[2] or if the removal be to another county, the lien may be made available by taking out an execution to that county.[3]

§ 199. **Lien at Common Law Dated from the Teste of the Writ.**—At common law a *fieri facias* was a lien upon the personal property of the defendant from its teste.[4] This teste might be the first day of the term, and hence long anterior to the issue of the writ and to

[1] Rhyne *v.* McKee, 73 N. C. 259.

[2] Hood *v.* Winsatt, 1 B. Mon. 211; McMahan *v.* Green, 12 Ala. 71; Claggett *v.* Force, 1 Dana, 428; Newcombe *v.* Leavitt, 22 Ala. 631; Lambert *v.* Paulding, 18 Johns. 311.

[3] Forman *v.* Proctor, 9 B. Mon. 125; Hill *v.* Slaughter, 7 Ala. 632.

[4] Palmer *v.* Clarke, 2 Dev. 354; 21 Am. Dec. 340; Hanson *v.* Barnes's Lessee, 3 Gill & J. 359; 22 Am. Dec. 322; Jones *v.* Jones, 1 Bland, 443; 18 Am. Dec. 327.

the actual rendition of the judgment. Alienations and encumbrances, made in perfect good faith were therefore liable to be defeated by executions actually issued long subsequent thereto.[1] The hardships visited upon purchasers and encumbrancers were to some extent obviated by statute 29 Charles. II., c. 3. This statute was never adopted in some parts of the United States. The common-law rule, under which the goods of the defendant are bound from the teste of execution against him, still prevails in North Carolina[2] and Tennessee.[3] In the last-named state, it seems to be established, after much doubt and discussion, that the rule will not be applied against *bona fide* purchasers without notice prior to the actual rendition of the judgment.[4] Executions issued out of justices' courts also form exceptions to the general rule, and are not liens till levied.[5] Trust estates were not subject to execution at common law. The construction of the statute under which they were in England made liable to execution is such that they are not bound by the writ until actually levied upon.[6] The assets of a copartnership are first liable to the partnership debts. Until these debts are satisfied, neither the individual partners nor their creditors have

[1] Anonymous, Cro. Eliz. 174; Baskerville *v.* Brocket, Cro. Jac. 451; Bingham on Judgments and Executions, 190; Payne *v.* Drewe, 4 East, 538.

[2] Green *v.* Johnson, 2 Hawks, 309; 11 Am. Dec. 763; State *v.* Ferrell, 63 N. C. 640; Gilkey *v.* Dickerson, 3 Hawks, 293; Stamps *v.* Irvine, 2 Hawks, 232; Beckerdite *v.* Arnold, 3 Hawks, 296.

[3] Coffe *v.* Wray, 8 Yerg. 464; Peck *v.* Robinson, 3 Head, 438; Johnson *v.* Ball, 1 Yerg. 291; 24 Am. Dec. 451; Cox *v.* Hodge, 1 Swan, 371; Battle *v.* Bering, 7 Yerg. 529; 27 Am. Dec. 526; Union Bank *v.* McClung, 9 Humph. 91; Daley *v.* Perry, 9 Yerg. 442; Anderson *v.* Taylor, 1 Tenn. Ch. 436. With respect to lands there is no execution lien in this state. They are bound only by the judgment lien or by a levy of the writ. Anderson *v.* Taylor, 6 Lea, 382.

[4] Berry *v.* Clements, 9 Humph. 312.

[5] Parker *v.* Swan, 1 Humph. 80; Farquhar *v.* Toney, 5 Humph. 502.

[6] Morisey *v.* Hill, 9 Ired. 66; Hall *v.* Harris, 3 Ired. Eq. 289; Williamson *v.* James, 10 Ired. 162.

any right to participate in the assets. Hence an assignment to pay partnership debts has in North Carolina been held to take precedence over an execution against one of the partners, tested prior to the assignment.[1]

§ 200. Statutes Making the Lien Commence at the Delivery of the Writ.—To alleviate the hardship and injustice of the common law, "it is enacted by the 29 of Car. II., c. 3, sec. 16, that no *fieri facias* or other writ shall bind the property or goods, but from the time such writ shall be *delivered* to the sheriff to be executed, who, on his receipt of it, shall indorse the day of his receipting the same; that is, that if, after the writ is so delivered, the defendant makes an assignment of his goods (except in market overt), the sheriff may anywhere take them in execution."[2] This statute was adopted very generally on this side of the Atlantic; and while it is steadily giving way before statutory provisions, under which the lien of executions is entirely abolished, it is still substantially the law in about one half of the states.[3] The require-

[1] Watt *v.* Johnson, 4 Jones, 190; Harris *v.* Phillips, 4 S. W. Rep. 196.

[2] Bingham on Judgments and Executions, 190; Hutchinson *v.* Johnson, 1 Term Rep. 729.

[3] In re Paine, 17 Nat. Bank Reg. 37; Whitehead *v.* Woodruff, 11 Bush, 209; Durbin *v.* Haines, 99 Ind. 463; Perkins *v.* Brierfield I. & C. Co., 77 Ala. 403; Davis *v.* Oswalt, 18 Ark. 414; Hananer *v.* Casey, 26 Ark. 352; Lawrence *v.* McIntyre, 83 Ill. 399; McMahan *v.* Green, 12 Ala. 71; Layton *v.* Steel, 3 Harr. (Del.) 512; Taylor *v.* Horsey, 5 Harr. (Del.) 131; People *v.* Bradley, 17 Ill. 485; Garner *v.* Willis, Breese, 370; Leach *v.* Pine, 41 Ill. 65; Kennon *v.* Ficklin, 6 B. Mon. 414; Cones *v.* Wilson, 14 Ind. 465; Vandibur *v.* Love, 10 Ind. 54; Tabb *v.* Harris, 4 Bibb, 29; Million *v.* Riley, 1 Dana, 359; 25 Am. Dec. 149; Duffy *v.* Tounsend, 9 Mart. (La.) 585; Arnott *v.* Nicholls, 1 Har. & J. 473; Selby *v.* Magruder, 6 Har. & J. 454; Giese *v.* Thomas, 7 Har. & J. 459; Furlong *v.* Edwards, 3 Md. 99; Brown *v.* Burrus, 8 Mo. 26; Gott *v.* Williams, 29 Mo. 461. But the rule in Missouri is now different. Wagner's Stats., p. 607; Newell *v.* Sibley, 1 South. 381; Beals *v.* Guernsey, 8 Johns. 446; 5 Am. Dec.

ment of the statute that the sheriff shall indorse on the writ the time at which it is received was designed to furnish evidence by which to determine precisely when the lien attached. If the sheriff omits the performance of this portion of his duty, the plaintiff's rights are so far prejudiced that he may be compelled to furnish other evidence by which to prove the time at which his lien commenced. If he succeeds in making such proof, the absence of the indorsement becomes immaterial.[1] Leaving a writ at the sheriff's office, or at his usual place of business, is equivalent to delivering it to him personally.[2] The lien commences at once, though the writ is received out of office hours.[3] In New York and Virginia, subsequent purchasers and encumbrancers, in good faith and without notice, are protected from the lien of executions not levied.[4] In most of the states the rule that the writ first delivered for execution shall become a lien from that date, and shall be entitled to satisfaction over subsequent writs first levied, is confined to writs in the hands of the same officer; as between writs

348; Camp *v.* Chamberlain, 5 Denio, 198; Hale *v.* Sweet, 40 N. Y. 98; Lambert *v.* Paulding, 18 Johns. 311; Beals *v.* Allen, 18 Johns. 363; 9 Am. Dec. 221; Hodge *v.* Adee, 2 Lans. 314; Cresson *v.* Stout, 17 Johns. 116; 8 Am. Dec. 373; Lewis *v.* Smith, 2 Serg. & R. 157; Cowden *v.* Brady, 8 Serg. & R. 505; Childs *v.* Dilworth, 44 Pa. St. 123; Puryear *v.* Taylor, 12 Gratt. 401; Lynch *v.* Hanahan, 9 Rich. 186.

[1] McMahan *v.* Green, 12 Ala. 71; Hester *v.* Keith, 1 Ala. 316; Johnson *v.* McLane, 7 Blackf. 501; Hale's Appeal, 44 Pa. St. 438.

[2] Mifflin *v.* Will, 2 Yeates, 177.

[3] France *v.* Hamilton, 26 How. Pr. 180.

[4] Ray *v.* Birdseye, 5 Denio, 619; Thompsen *v.* Van Vetchen, 5 Abb. Pr. 458; Butler *v.* Maynard, 11 Wend. 548; Hendricks *v.* Robinson, 2 Johns. Ch. 283; Williams *v.* Shelly, 37 N. Y. 375; Charron *v.* Boswell, 18 Gratt. 216. An execution lien, though not consummated by levy, will in New York prevail over a mortgage to secure a pre-existing debt, and also over a general assignment for the benefit of creditors. Warner *v.* Paine, 3 Barb. Ch. 630; Slade *v.* Van Vetchen, 11 Paige, 21; Ray *v.* Birdseye, 5 Denio, 619.

in the hands of different officers, the one first levied obtains priority.[1]

§ 201. Commences in Some States at the Levy. — As the plaintiff, when he has taken out his execution, is authorized thereby to seize upon all the personal property of the defendant liable to forced sale, there seems but little necessity of allowing him any lien on the defendant's goods, otherwise than such as may be acquired by an actual seizure thereof. If he really designs to execute his writ, he ought to proceed with diligence. Personal property is constantly being subjected to the necessities of commerce. It changes owners with great rapidity in the course of lawful and meritorious business relations. It ought not to be unnecessarily tied up in the hands of any owner. It is true that statutes can be enacted, which, like those in New York, protect purchasers and encumbrancers in good faith without notice.[2] But without such statutes, transfers made to defraud creditors are void; and thus, without giving any lien to executions, the law avoids the only transfers against which its powers ought to be directed. If an execution is a lien, except as against transfers in good faith, then plaintiffs, in directing levies, and officers acting, whether with or without directions, are constantly placed in the most embarrassing circumstances, as they are required to determine, at their peril, whether an alleged transfer was made in good or in bad faith. In several of the states executions no longer create liens, statutes having been

[1] McCall *v.* Trevor, 4 Blackf. 496; Moore *v.* Fitz, 15 Ind. 43; Commonwealth *v.* Stratton, 7 J. J. Marsh. 90; Kelly *v.* Haggin, 3 J. J. Marsh. 212; Million *v.* Commonwealth, 1 B. Mon. 310.

[2] Weisenfeld *v.* McLean, 96 N. C. 248.

enacted under which the lien does not commence until the levy of the writ.[1]

§ 202. **With Respect to the Duration of an Execution** lien, the laws and decisions in the various states are by no means harmonious. In Virginia it outlives the execution, and retains its vitality till the judgment on which the writ was issued is satisfied, or is barred by the statute of limitations, or is otherwise extinguished.[2] In Missouri the lien is continued by statute until a sale of property taken in execution can be made.[3] But as the object of the lien is to prevent the transfer of property liable to be taken under the writ, the general rule is, that the lien continues while the writ remains in force, so that the property may be taken and sold under it, and no longer.[4] If a levy is made under an execution, the officer thereby obtains a special property in the goods levied upon. He may retain possession, and make a sale after the return day of the writ. Such sale is usually made under a *venditioni exponas*, though the issuing of that writ is not indispensable, and in fact, seems to be unnecessary, except where the officer refuses to proceed. A sale made under a *venditioni exponas* relates back to the delivery or teste of the original execution.[5] Hence a sale after the lapse of two years, during which plaintiff constantly

[1] Johnson *v.* Gorham, 6 Cal. 195; Bagley *v.* Ward, 37 Cal. 121; Reeves *v.* Sebern, 16 Iowa, 234; 85 Am. Dec. 513; Wagner's Statutes of Missouri, p. 607; Tullis *v.* Brawley, 3 Minn. 277; sec. 421, Code of Ohio; Moercein *v.* Burton, 17 Tex. 206; McMahan *v.* Hall, 36 Tex. 59; Russell *v.* Lawton, 14 Wis. 202; Knox *v.* Webster, 18 Wis. 406; 86 Am. Dec. 779; Wilson's Appeal, 90 Pa. St. 370; Albrecht *v.* Long, 25 Minn. 163.

[2] Charron *v.* Boswell, 18 Gratt. 216.

[3] Wood *v.* Messerly, 46 Mo. 255.

[4] Carr *v.* Glasscock, 3 Gratt. 343; Humphreys *v.* Hitt, 6 Gratt. 509; 52 Am. Dec. 133.

[5] Taylor *v.* Mumford, 3 Humph. 66.

kept writs of *venditioni exponas* in the officer's hands, was held to be valid, and to entitle the plaintiff to the same rights as though it had been made during the life of the original writ.[1] But when sales are made under this writ the lien of the execution has merged into the lien of the levy; for in the absence of a levy there can be no sale under a *venditioni exponas*. The question, therefore, when a valid levy has been made under the writ, is not with respect to the duration of the execution lien, but to the continuance or duration of the lien effected or consummated by the levy. If no levy has been effected under a writ, and the return day has passed, so that no levy can be made thereunder, the writ is *functus officio*. The lien was conceded only that the writ might be more surely and effectually executed. But when the writ is legally dead, and can never be executed, it would seem that its lien must also die with it. Nor do we know of any reason why it should be conceded a resurrection and second life. A new or *alias* execution may be procured, with its attendant lien, and thereunder a levy may be made upon the property of the defendant; but we think the better rule, in the absence of any statutory regulation of the subject, is that the *alias* must be treated as a new proceeding having no lien of its own antedating its teste or delivery, and no power to revive or continue the lien of anterior, defunct writs. The power of an *alias* to effect such a continuance seems to be affirmed by several North Carolina cases;[2] but we know not how to reconcile these cases with a more recent one in the same state.[3] Alabama has been far

[1] Locke *v.* Coleman, 4 T. B. Mon. 316.

[2] Allen *v.* Plummer, 63 N. C. 307; McLean *v.* Upchurch, 2 Murph. 353; Gilky *v.* Dickerson, 2 Hawks, 341; Harding *v.* Spivey, 8 Ired. 63; Brasfield *v.* Whitaker, 4 Hawks, 309; Yarborough *v.* State Bank, 2 Dev. 23.

[3] Ross *v.* Alexander, 65 N. C. 577.

more fertile in decisions upon this topic than any other state. When the question first arose in that state, the court denied the continuing existence of the lien of a writ which had been returned into court with the indorsement that no goods of the defendant could be found.[1] But at a later date, the interpretation of the statute of this state permitted the return of an execution to court, without impairing its lien, provided an *alias* issued before another term elapsed.[2] "If, however, the execution of a junior judgment creditor was levied, and before a sale under it the senior judgment creditor had execution issued and placed in the hands of the sheriff, the lien revived, and would prevail over that of the junior judgment creditor."[3] A later statute was construed as making the loss of the lien occasioned by permitting a term to pass after the return of the original writ, and before the issuing of an *alias*, peremptory and irrevocable.[4]

But in the majority of the states in which the question has been adjudicated, the lien of an execution, except as to property levied upon and retained in custody, ceases with the return day of the writ. An *alias* writ becomes a lien from its teste or delivery, just as an original writ would in the same state. It has no lien anterior to such teste or delivery; nor can it perpetuate or renew the lien of a prior writ.[5] The effect on an

[1] McBroom *v.* Rives, 1 Stew. 72; Cary *v.* Gregg, 3 Stew. 433; Dargan *v.* Waring, 11 Ala. 988; 46 Am. Dec. 234.

[2] Wood *v.* Gary, 5 Ala. 43; Johnson *v.* Williams, 8 Ala. 529.

[3] Toney *v.* Wilson, 51 Ala. 500; Collingsworth *v.* Horn, 4 Stew. & P. 237; 24 Am. Dec. 753; Parker *v.* Coffey, 52 Ala. 32.

[4] Toney *v.* Wilson, 51 Ala. 501; Perkins *v.* Brierfield I. & C. Co., 77 Ala. 403; Carlisle *v.* May, 75 Ala. 502.

[5] Kregelo *v.* Adams, 9 Biss. 343; 3 Fed. Rep. 628; Sturgis's Appeal, 86 Pa. St. 413; Brown *v.* The Sheriff, 1 Mo. 154; Garner *v.* Willis, Breese, 368; Watrous *v.* Lathrop, 4 Sand. 700; Union Bank *v.* McClung, 9 Humph. 91; Maul *v.* Scott, 2 Cranch C. C. 367; Ross *v.* Alexander, 65 N. C. 577.

execution lien of an injunction temporarily arresting the execution of the writ is not well settled. On one side it is contended that if an officer has two writs, and the elder is enjoined, it is his duty to proceed under the younger; and that, as a necessary consequence, the elder must lose its lien,[1] unless the injunction is dissolved before the sale is made under the junior writ.[2] On the other side, it is said that "when the operative energy of an execution has been suspended by an injunction, a sale under a junior execution does not affect the lien acquired by such elder execution, but the property in the hands of any person remains liable to levy when the injunction is removed."[3] Still other cases make the effect of the injunction dependent on security being given when it issues, holding that if the defendant is indemnified from loss by an appropriate bond, his lien is thereby destroyed; while in the absence of such bond, that the lien continues, and will become effective whenever the removal of the injunction affords an opportunity to enforce the execution.[4]

§ 203. **Liens under Writs of Equal Priority.**— Writs delivered to the same officer at the same time are equal as liens,[5] and are entitled to share the proceeds of the sale equally, until the smaller is satisfied. In South Carolina and Nebraska, writs delivered on the same day are considered as if delivered at the same time.[6] In the last-named state, the statute declares

[1] Mitchell *v.* Anderson, 1 Hill (S. C.), 69; 26 Am. Dec. 158.

[2] Duchett *v.* Dalrymple, 1 Rich. 143.

[3] Lynn *v.* Gridley, Walker (Miss.), 548; 12 Am. Dec. 591.

[4] Conway *v.* Jett, 3 Yerg. 481; 24 Am. Dec. 590.

[5] Farquharson *v.* Ruger, 1 Cow. 215.

[6] Bachman *v.* Sulzbacker, 5 S. C. 58; Ex parte Stagg, 1 Nott & McC. 405. See also sec. 424, Ohio Code of Procedure.

that in such cases if sufficient moneys are not made to satisfy all the writs, "the amount made shall be distributed to the several creditors in proportion to their respective demands."[1] Where two judgments or two executions have no priority over each other as liens, priority may be gained by activity and diligence. He who first begins to execute his writ upon the property of the defendant obtains the right to seek satisfaction out of such property as he has seized, to the exclusion of creditors less diligent than he, but otherwise equally meritorious.[2] If a clerk delivers several executions to the sheriff, one after another in immediate succession, this is not such "a difference in the time of delivery as to give one a preference over the other." If he however indorses on them dates indicating that some of them were delivered to him one minute before the others, he is bound by such indorsement, and will not be permitted to show that the deliveries were simultaneous.[3]

§ 204. **Liens of Executions from Federal Courts.** —The various states have no power to enact laws regulating, in any respect, the procedure of the courts of the United States, nor prescribing or limiting the lien of any execution issuing from those courts. The United States government has the exclusive authority to enact and to interpret laws regulating the process of its courts. Such process is entirely free from the do-

[1] State *v.* Hunger, 17 Neb. 16.

[2] Smith *v.* Lind, 29 Ill. 24; Adams *v.* Dyer, 8 Johns. 247; 5 Am. Dec. 344; Michaels *v.* Boyd, 1 Cart. 259; Burney *v.* Boyett, 1 How. (Miss.) 39; Reeves *v.* Johnson, 7 Halst. 33; Rockhill *v.* Hanna, 15 How. 189; Waterman *v.* Haskin, 11 Johns. 228; Ulrich *v.* Dreyer, 2 Watts, 303; Shirley *v.* Brown, 80 Mo. 244.

[3] State *v.* Cisney, 95 Ind. 265.

minion of state laws, except so far as such laws have been adopted by Congress or by the different federal courts.[1] The act regulating the procedure of the courts of the United States provides that "the party recovering a judgment in any common-law cause, in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."[2] It results, from this section, that whether executions from the federal courts shall be treated as liens from their teste, from their delivery, or from their levy, must be determined from inspection of such laws of the state wherein the writ is issued as were in force at the passage of the section quoted, or have since been adopted by the courts in virtue of the powers conferred by that section. Cases of conflict frequently arise between writs issued by federal courts and delivered to the United States marshal, and writs issued by state courts and placed in the hands of officers of the state. Under such circumstances, the writ which is first levied thereby obtains precedence, and becomes entitled to

[1] Wayman *v.* Southard, 10 Wheat. 1; Bank of United States *v.* Halstead, 10 Wheat. 51; Boyle *v.* Zachario, 6 Pet. 648; Beers *v.* Haughton, 9 Pet. 331; Ross *v.* Duval, 13 Pet. 45; United States *v.* Knight, 14 Pet. 301; Amis *v.* Smith, 16 Pet. 303; Massingill *v.* Downs, 7 How. 760; Corwin *v.* Benham, 2 Ohio St. 36; Carroll *v.* Watkins, 1 Abb. 474; Cropsey *v.* Randall, 2 Blatchf. 341; Ward *v.* Chamberlain, 2 Black, 430; Freeman on Judgments, sec. 403.

[2] Desty's Federal Procedure, sec. 916.

satisfaction out of the proceeds of the property seized.[1] The rule seems to be universally recognized, that when two different tribunals have the concurrent right to seize upon property, that tribunal whose officers first accomplish a seizure obtains an exclusive jurisdiction over the property seized, which the other tribunal will not attempt to disturb.[2]

§ 205. The Lien of an Execution does not Continue the Lien of a Judgment. — Lands, while bound by a judgment, are nevertheless so far the subjects of subsequent conveyance and encumbrance that such conveyance or encumbrance can only be destroyed by a sale of the property under the judgment made during the life of its lien. In many instances sales have been made by judgment debtors during the life of the judgment liens. Subsequently, and while the liens were still in force, executions have been taken out and levied, but no sales were made until after the time designated by law for the termination of the judgment lien. In Missouri it was held that the lien of the execution continued that of the judgment; and therefore, that the execution sale divested all titles and liens acquired from the debtor subsequently to the judgment.[3] In all the other states, so far as we are aware,

[1] Pullian *v.* Osborne, 17 How. 471; Brown *v.* Clarke, 4 How. 4; Williams *v.* Benedict, 8 How. 107; Logan *v.* Lucas, 59 Ill. 237; Hagan *v.* Lucas, 10 Pet. 400; Munson *v.* Harroun, 34 Ill. 422; Schaller *v.* Wickersham, 7 Cold. 376; Ruggles *v.* Simonton, 3 Biss. 325; Leopold *v.* Godfrey, 11 Biss. 158.

[2] Fox *v.* Hempfield R. R. Co., 2 Abb. 151; Riggs *v.* Johnson, 6 Wall. 197; Crane *v.* McCoy, 1 Bond, 422; Moore *v.* Withenburg, 13 La. Ann. 22; Johnson *v.* Bishop, 1 Woolw. 324; Bill *v.* N. A. Co., 2 Biss. 390; Bell *v.* Loan & T. Co., 1 Biss. 260; Chapin *v.* James, 7 Chic. L. N. 33; U. T. Co. *v.* R. R. Co., 7 Chic. L. N. 33; Taylor *v.* Carryl, 20 How. 583; Peck *v.* Jenness, 7 How. 612; Smith *v.* McIver, 9 Wheat. 532; Freeman *v.* Howe, 24 How. 450; Buck *v.* Colbath, 3 Wall. 334.

[3] Bank of Missouri *v.* Wells, 12 Mo. 361.

the decisions made upon this subject are in conflict with that made in Missouri, and affirm that a sale made after the expiration of a judgment lien is to be treated as though such lien had never existed.[1]

§ 206. **No Lien while the Writ is not Being Executed in Good Faith.**—By the statute of 13 Elizabeth, c. 5, executions taken out with intent to hinder, delay, or defraud creditors, or others, are, as against the persons sought to be hindered, delayed, or defrauded, utterly void.[2] The operation of this statute upon the lien of executions has been the subject of very frequent judicial decisions, and of occasional judicial dissension. According to a very considerable preponderance of the authorities, no actual intent to hinder, delay, or defraud any one need be shown. An execution and its lien may be avoided by such conduct on the part of the plaintiff as shows an improper use of his writ, though the motives influencing such conduct, instead of being fraudulent, were grounded in kindness and charity toward the defendant, and free from the slightest design to injure others. The only proper use of an execution is to enforce the collection of a debt, and to enforce it with a considerable degree of diligence. To employ it for other objects is inconsistent with its nature, and such a perversion from its legitimate pur-

[1] Tenney *v.* Hemenway, 53 Ill. 98; Gridley *v.* Watson, 53 Ill. 186; Trapnall *v.* Richardson, 8 Eng. 543; Rogers *v.* Druppel, 46 Cal. 654; Bagley *v.* Ward, 37 Cal. 121; Isaac *v.* Swift, 10 Cal. 81; Dickenson *v.* Collins, 1 Swan, 516; Roe *v.* Swart, 5 Cow. 294; Little *v.* Harvey, 9 Wend. 158; Tufts *v.* Tufts, 18 Wend. 621; Graff *v.* Kipp, 1 Edw. Ch. 619; Pettit *v.* Sheppard, 5 Paige, 493; Rupert *v.* Dantzler, 12 Smedes & M. 697; Beirne *v.* Mower, 13 Smedes & M. 427; Davis *v.* Ehrman, 20 Pa. St. 258; Birdwell *v.* Cain, 1 Cold. 302; Sheppard *v.* Bailleul, 3 Tex. 26; Conwell *v.* Watkins, 71 Ill. 488; Pierce *v.* Fuller, 36 Hun, 179.

[2] Smith's Leading Cases, 82; Bradley *v.* Wyndham, 1 Wils. 44; Snyder *v.* Hunkleman, 3 Pen. & W. 487; Matthews *v.* Warne, 6 Halst. 295; Williamson *v.* Johnston, 7 Halst. 86.

poses as brings upon it the penalty prescribed by the statute of Elizabeth. The plaintiff in execution may desire to allow the defendant time in which to make payment, and yet may wish to save himself from all hazard arising from his delay to enforce the collection of his judgment. He is likely, therefore, to take out execution with a view of binding defendant's property, but with no intent to make any immediate levy or sale. In other words, he seeks to convert an execution into a mere mortgage. This the law does not tolerate. Whenever it can be shown that the object of the writ was merely to obtain better security for the debt, it is fraudulent as against subsequent purchasers or encumbrancers, and outranked by subsequent executions.[1] This rule can be invoked only in favor of some person who could be delayed or defrauded by the writ. "It is clear that mere delay on the plaintiff's part, in executing his judgment, will not affect his lien, as against the defendant in execution, his personal representative or heirs, who presumptively cannot be prejudiced by it. The principle upon which such a lien is lost by mere suspension is that of delay by the plaintiff for the purpose of favoring the defendant in execution at the expense of other creditors, whose diligence may be thus paralyzed and rendered of no avail. It is, therefore, justly confined to junior creditors, mortgagees, or vendees who acquire intervening rights during the time the execution may be stayed by order of plaintiff."[2] An assignee for the benefit of creditors, not being a *bona fide* purchaser for value, is in no better

[1] Davidson *v.* Waldron, 31 Ill. 121; Corliss *v.* Stanbridge, 5 Rawle, 286; Freeburger's Appeal, 40 Pa. St. 244; Weir *v.* Hale, 3 Watts & S. 285; Smith's Appeal, 2 Pa. St. 331; Price *v.* Shipps, 16 Barb. 585.

[2] Keel *v.* Larkin, 72 Ala. 493.

condition than his assignor to assail an execution lien on the ground of laches in enforcing the writ.[1] But in order to avoid a writ, as being issued for the purpose of security only, it must be shown that the plaintiff gave some direction to stay the execution of the writ, or did some other act from which it may be inferred that he did not intend to compel a sale.[2] The delivery of a writ to an officer, with directions not to levy, is equivalent to no delivery, and can create no lien.[3] A direction not to levy or not to sell, unless compelled to do so by younger executions, is conclusive that the writ is being used as a mere security, or to prevent other creditors from attempting to seize the same property. Viewed in either light, it is an unjustifiable use of the writ, and until countermanded by a direction to proceed, operates as an entire suspension of the lien of the writ, whether a levy has been made or not.[4] "We believe the doctrine to be, as the object of an execution is to obtain satisfaction of the judgment on which it issues, on its delivery to the proper officer, it gives to the creditor a priority, because the law imposes the duty upon the officer to execute it without delay. Any act of the creditor, therefore, diverting the execution from this purpose, renders it inoperative against other creditors, and clothes them with priority. A delivery of such a writ to a sheriff, instructing him at the same time to do nothing under it, is really

[1] Griffin *v.* Wallace, 66 Ind. 410.

[2] Brown's Appeal, 26 Pa. St. 490; Brown *v.* Berry, 55 Barb. 620.

[3] Cook *v.* Wood, 1 Har. & J. 254.

[4] Moore *v.* Fitz, 15 Ind. 43; Kimball *v.* Munger, 2 Hill, 364; Foster *v.* Smith, 13 U. C. Q. B. 243; Crane *v.* Clark, Hil. T. 1828, N. B.; Hamilton *v.* Bryson, 1 Har. 618; Hunt *v.* Hooper, 1 Dowl. & L. 626; 12 Mees. & W. 664; 8 Jur. 203; 13 L. J. Ex. 183; Pringle *v.* Isaac, 11 Price, 445; Dunderdale *v.* Sauvestre, 13 Abb. Pr. 116; Flick *v.* Troxsell, 7 Watts & S. 65; McClure *v.* Ege, 7 Watts, 74.

no delivery, and confers no rights upon the creditor. If a plaintiff in execution instructs the sheriff to make no levy until he gives him further orders, or until another day, it follows, if, in the mean time, an execution comes to the hands of an officer, with instructions to proceed, and he actually does proceed and make a levy, taking the property into his possession, this second execution is, and should be deemed, first in order; and the same is the rule if the direction is, not to proceed to a levy unless urged by junior executions."[1] In other words, it is not the mere issuing or delivery of the writ which creates a lien; but an issuing and delivery for the purpose of execution.[2]

The execution of a writ for the purpose of making or keeping it effective as a lien cannot stop with a mere levy upon the property. If the officer is instructed by the plaintiff not to sell till further orders, the lien of the execution and levy becomes subordinate to that of any subsequent writ placed in the officer's hands for service.[3] It is also subordinate to any subsequent mortgage executed by defendant during a period when the writ is being held up or suspended.[4] But it is by no means essential, in order to postpone the lien of an execution, that the plaintiff's purposes should be made known by so unmistakable a direction as that just referred to. The lien of an execution is designed to assist the plaintiff while he is seeking to enforce his writ. If at any time he is shown not to be seeking such enforcement, then, during such time, he is with-

[1] Gilmore *v.* Davis, 84 Ill. 489; Landis *v.* Evans, 113 Pa. St. 334; Howes *v.* Cameron, 23 Fed. Rep. 324.

[2] Smith *v.* Erwin, 77 N. Y. 471.

[3] Ala. Gold L. Ins. Co. *v.* McCreary, 65 Ala. 127.

[4] Burnham *v.* Martin, 54 Ala. 189.

out any execution lien, and is liable to lose the benefit of his writ through the sale or encumbrance of the defendant's property, or by the operation of a junior writ. He cannot avoid this result by showing that his intentions were meritorious, or that he knew of no other creditors. Whenever, by the plaintiff's orders, or by agreement between him and the defendant, the execution of the writ is suspended, by directions not to levy, or, after levy, by directions not to sell, whether such directions are permanent in their nature, or designed to operate only until further orders are given, then, according to a decided preponderance of the authorities, the lien is also suspended, and the execution becomes dormant.[1] There may probably be some delay in the service of the writ, caused by the plaintiff's directions, which will not impair its lien, provided it clearly appears that there was no intent to employ the writ as a mere security. On the day a writ issued, the plaintiff's attorney "told the sheriff's deputy not to go to defendant's house until the next day, as the house was torn up," and on the following morning informed the sheriff that the ladies were clearing up things in the house, and suggested that that officer might wait and go up in the afternoon. The court decided that the lien was not thereby lost nor sus-

[1] Ross *v.* Weber, 26 Ill. 221; Truit *v.* Ludwig, 25 Pa. St. 145; Kellogg *v.* Griffin, 17 Johns. 274; Ball *v.* Shell, 21 Wend. 222; Bailey *v.* Burming, 1 Lev. 174; Kemplund *v.* Macauley, Peake, 66; Eberle *v.* Mayer, 1 Rawle, 366; Hickman *v.* Caldwell, 4 Rawle, 376; Berry *v.* Smith, 3 Wash. C. C. 60; Kauffelt's Appeal, 9 Watts, 334; Commonwealth *v.* Stremback, 3 Rawle, 341; 24 Am. Dec. 351; Porter *v.* Cocke, Peck, 30; Lowry *v.* Coulter, 9 Pa. St. 349; Wood *v.* Gary, 5 Ala. 43; Branch Bank *v.* Boughton, 15 Ala. 127; Wise *v.* Darby, 9 Mo. 131; Albertson *v.* Goldby, 28 Ala. 711; Knower *v.* Barnard, 5 Hill, 377; Hickok *v.* Coates, 2 Wend. 419; 20 Am. Dec. 362; Rew *v.* Barber, 3 Cow. 272; Lovich *v.* Crowder, 8 Barn. & C. 132; 2 Moody & R. 84; Slocomb *v.* Blackburn, 18 Ark. 309; Mickie *v.* Planters' Bank, 4 How. (Miss.) 130.

pended, because "it cannot be doubted that what was thus said and suggested by the plaintiff in the execution was prompted by a desire to accommodate the family of the defendant in the execution, and cannot be fairly construed as evidence of a design on his part to merely obtain a lien by virtue of his execution, and hold the same as security."[1] The plaintiff in the writ and the officer intrusted with its execution must necessarily be permitted to exercise a reasonable discretion in carrying it into effect. The plaintiff is not compelled to proceed at once to a sale, when by so doing he would defeat rather than promote the objects of the writ, or would unnecessarily and unreasonably impoverish the defendant. Hence a reasonable adjournment of the sale does not render the writ dormant, provided it may still be executed before the return day.[2] So where hides were levied upon in the autumn while tanning in a vat, and were, on that account, not in a fit condition to be sold until the next spring, it was held that the plaintiff did not waive the priority of his writ by directing that the sale be postponed till they were in condition to be sold.[3] An execution, when delivered to an officer, is presumed to have been delivered for service.[4] This presumption may, as we have shown, be rebutted by proving that the delivery was accompanied by directions staying the execution of the writ. In many instances the existence of such directions cannot be established by direct proof, and yet the manner in which the officer has conducted him-

[1] Landis *v.* Evans, 113 Pa. St. 335.

[2] Lantz *v.* Worthington, 4 Pa. St. 153; Dancy *v.* Hubbs, 71 N. C. 424; Logan *v.* Dougherty, 70 N. C. 558; Childs *v.* Dilworth, 44 Pa. St. 123.

[3] Power *v.* Van Buren, 7 Cow. 560.

[4] Johnson *v.* Crocker, 4 Allen, 94.

self, and the lenity with which the plaintiff has viewed such conduct, indicate that the directions must have been given, or that by some means the officer and the plaintiff must have come to a mutual understanding to delay the execution of the writ.

No doubt many cases may arise in which, from all the circumstances, the jury will be warranted in inferring directions for delay, though no direct proof can be produced. An execution cannot become dormant without some fault on the part of the plaintiff. He is certainly not liable for the ordinary neglect of the officers with whom he intrusts his process.[1] And there are many cases in which the broad declaration is made that the plaintiff is not to be deprived of the benefit of his lien by his mere acquiescence in the delay of the officer, but only by his direction to stay the writ.[2] As the plaintiff is obliged to seek the assistance of officers of the law, who are not always the agents whom he would prefer if allowed his choice, and as they may be guilty of laches in which he may have no complicity, there is a manifest propriety in exempting him from the evil consequences of their inattention and neglect in ordinary circumstances. But he is not without means of compelling them to act with reasonable promptness. His neglect for a long period to employ those means is certainly either evidence of his complicity in the delay, or of gross laches in the discharge of his own business. While the property of the defendant remains in his possession, the lien of the execution is a secret lien, and as such it ought not to be favored in law. The

[1] Leach *v.* Williams, 8 Ala. 759.

[2] McCoy *v.* Reed, 5 Watts, 300; Snipes *v.* Sheriff, 1 Bay, 295; Russell *v.* Gibbs, 5 Cow. 390; Benjamin *v.* Smith, 12 Wend. 404; Doty *v.* Turner, 8 Johns. 20; Herkimer Bank *v.* Brown, 6 Hill, 232; Thomas *v.* Van Vetchen, 5 Abb. Pr. 458.

property is liable to be sold by the defendant to purchasers for value, and without notice of the lien. The hardship of exposing such purchasers to liens during a diligent execution of the writ can hardly be justified. By what terms, then, can we adequately condemn the rule of law which, as against them, permits the indefinite continuance of the lien through the laches or acquiescence of plaintiffs? To the credit of the judiciary, let it be said that the rule that the mere acquiescence of the plaintiff in delay cannot render the lien dormant, has not been applied in extreme cases. In Ohio, a stallion, levied upon September 11, 1857, was left in possession of the defendant, who sold it November 3, 1858. The execution was held to be dormant as against this purchaser, because, as it was in the power of plaintiffs to have compelled a sale, they were guilty of laches in not doing so.[1] Similar principles were announced in Kentucky, where a sale of lands was delayed in one case for seventeen months,[2] and in another for three years;[3] and also in New York, where a cow was sold after an execution had lain for thirteen months in the sheriff's office without a levy.[4] From the rules stated in this section concerning the effect of a direction to stay executions, the courts of Delaware, New Jersey, and South Carolina dissent. In the first-named state, the plaintiff may safely instruct the sheriff not to proceed unless compelled by other judgment creditors;[5] in the second-named state,

[1] Acton *v.* Knowles, 14 Ohio St. 18.

[2] Owens *v.* Patterson, 6 B. Mon. 489; 44 Am. Dec. 780.

[3] Deposit Bank *v.* Berry, 2 Bush, 236.

[4] Bliss *v.* Ball, 9 Johns. 132. See Snyder *v.* Beam, 1 Browne, 366; Wood *v.* Keller, 2 Miles, 81.

[5] Janvier *v.* Sutton, 3 Harr. (Del.) 37; Hickman *v.* Hickman, 3 Harr. (Del.) 484.

he may direct the officer not to sell till further orders;[1] while in the last-named state, a writ "lodged to bind" has precedence over a subsequent writ "lodged to levy and sell."[2] A stay of execution, made by the court, does not affect the execution lien.[3] After a levy has been made, the property may be left in the possession of the defendant, under an agreement that it shall be forthcoming at the day of sale. When and in what circumstances this may operate as a postponement of the writ, in favor of subsequent purchasers or of junior writs, will be considered in the chapter on the levy of executions. Granting the defendant indulgence, or issuing a writ without intent to execute it, does not impart to plaintiff's claim a permanently fraudulent character. The writ may be returned and an *alias* issued on the same judgment. If so, the lien of the latter is not impaired by the laches in executing the former.[4] Even with respect to the original writ, it seems, that if the plaintiff after staying or suspending its execution directs the officer to proceed, the lien will be revived, and made paramount to all writs received by the officer after such direction to proceed.[5]

§ 207. **Not Destroyed during the Life of the Writ, Except by Fault of Plaintiff.** — Except where lost by abandonment of the levy, or by the fault of the plaintiff in staying the execution of the writ, or in making some use of it actually or constructively fraudulent, the lien of an execution seems not to be lost, except by

[1] Cumberland Bank *v.* Hann, 4 Harr. (N. J.) 166.

[2] Greenwood *v.* Naylor, 1 McCord, 414.

[3] Bain *v.* Lyle, 68 Pa. St. 60.

[4] Huber *v.* Schnell, 1 Browne, 16; Arrington *v.* Sledge, 2 Dev. 359; Roberts *v.* Oldham, 63 N. C. 297.

[5] Freeburger's Appeal, 40 Pa. St. 244.

some matter which is sufficient to deprive the writ of all further vitality. No act of the defendant can, as a general rule, defeat or impair the lien.[1] Hence, as has been heretofore stated, the lien is not lost by his removing the property to another county.[2] The execution itself is dependent on the judgment, and must be destroyed or suspended by whatever destroys or suspends the judgment. The lien of the writ is therefore destroyed by the reversal or satisfaction of the judgment. The temporary satisfaction of the judgment operates as a temporary suspension of the lien. The revival of the judgment, while it might revive the lien, could not do so to the prejudice of intermediate purchasers or encumbrancers. Taking the defendant in execution is for the time being a satisfaction of the judgment, and therefore, must necessarily suspend the execution lien.[3] A forthcoming bond is in some states considered as a satisfaction of the writ, and hence as a suspension of the execution lien.[4] A similar effect is produced by replevying an execution, "for by replevying the debt the execution becomes satisfied, and it would be preposterous to suppose that a lien, created for the purpose of discharging an execution, could continue to exist after the execution itself is satisfied."[5] But in other states a forthcoming bond,[6] or a bond given to stay execu-

[1] Couchman *v.* Maupin, 78 Ky. 33.

[2] Mitchell *v.* Ashby, 78 Ky. 254; see also Phegley *v.* Steamboat, 33 Mo. 461; 84 Am. Dec. 57.

[3] Rockhill *v.* Hanna, 15 How. 189; Snead *v.* McCoull, 12 How. 407.

[4] Brown *v.* Clark, 4 How. 4; King *v.* Terry, 6 How. (Miss.) 513; Witherspoon *v.* Spring, 3 How. (Miss.) 60; Bank of United States *v.* Patton, 5 How. (Miss.) 200; Parker *v.* Dean, 45 Miss. 408; Malone *v.* Abbott, 3 Humph. 532.

[5] Harrison *v.* Wilson, 2 A. K. Marsh. 547.

[6] Campbell *v.* Spruce, 4 Ala. 543; Doremus *v.* Walker, 8 Ala. 194; 43 Am. Dec. 634; Babcock *v.* Williams, 9 Ala. 150; Branch Bank *v.* McCollum, 20 Ala. 280.

tion,[1] does not satisfy the writ, and hence it does not destroy the lien. If property is taken from the officer in a replevin suit, bond being given for its return if the suit results in his favor, neither the bond nor the temporary loss of possession destroys the execution lien. If the suit terminates in his favor, the officer must retake the property, and sell it under his writ.[2] If there are two or more executions in an officer's hands under which a levy has been made, and the officer requires a bond of indemnity, which the holder of the senior writ refuses to give, and the holder of the junior writ gives, the latter, by a statute of Alabama, obtains precedence over the holder of the elder writ.[3] In Pennsylvania, while an officer held property under three writs, a bond of indemnity was required. It was given by the holder of the junior writ, and refused by the others. The officer thereafter proceeded to sell the property under *all the writs*. It was held that the senior writs had not lost their priority, and must first be satisfied, because there was no statute giving precedence to the giver of the bond of indemnity, and because, while the officer might have abandoned his levies under the senior writs, he had not done so.[4] But if, on the refusal of the holder of a writ to give a bond of indemnity, the officer surrenders possession of the property to the claimant, the lien of the execution ceases to operate. Upon the subsequent giving of the bond, the officer may again take the property to satisfy

[1] Branch Bank *v.* Curry, 13 Ala. 304; Brush *v.* Sequin, 24 Ill. 254; Lantz *v.* Worthington, 4 Pa. St. 153; 45 Am. Dec. 682; Sedgwick's Appeal, 7 Watts & S. 260; Hastings *v.* Quigley, 4 Pa. L. J. 220.

[2] Ferguson *v.* Williams, 3 B. Mon. 304; 39 Am. Dec. 466.

[3] Pickard *v.* Peters, 3 Ala. 493.

[4] Girard Bank *v.* P. & N. R. R. Co., 2 Miles, 447.

the writ; but he cannot do so to the prejudice of rights acquired while the claimant was in possession.[1]

In some of the states the right of an officer to demand indemnity is denied. In such states the refusal to give a bond of indemnity does not affect the rights of the plaintiff to the fruits of the execution, and therefore cannot impair its lien.[2] The better rule seems to be, that if, after a levy upon property a claim is made thereto by a stranger to the writ, in consequence of which the sheriff demands a bond of indemnity before proceeding further, and some of the plaintiffs give such bond and others do not, the latter are estopped from claiming the proceeds of the sale of the property by their refusal to indemnify the officer from the consequences of retaining such property and making the sale.[3] An execution lien extends to property conveyed by the defendant for the purpose of hindering or defrauding his creditors, and may be made productive by a sale of the property under the writ, and without seeking the aid of chancery. Other creditors of the same defendant may prefer to obtain the aid of equity, and before proceeding at law, may seek by a creditor's bill to remove or have declared void the fraudulent obstruction which the debtor has placed in their way. By so doing, they cannot destroy or obtain any precedence over a pre-existing execution lien. That lien is perfect at law. "A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable; and whenever there is a direct rule of law governing the case in all its circumstances, the

[1] Otey *v.* Moore, 17 Ala. 280; 52 Am. Dec. 173; Cotten *v.* Thompson, 25 Ala. 671.

[2] Adair *v.* McDaniel, 1 Bail. 158; 19 Am. Dec. 664.

[3] Smith *v.* Osgood, 46 N. H. 178; Burnett *v.* Handley, 8 Ala. 685; *post*, § 275.

court is as much bound by it as would be a court of law, if the controversy were there pending. The court comes as an auxiliary to give effect to and render more available legal liens, not to displace them, nor to subvert the order of priority which the law has established."[1] If, on the other hand, the holder of the senior lien files his bill to remove fraudulent obstructions, such lien is not lost by the delay required for the successful prosecution of his suit.[2] The suspension or delay of plaintiff's proceedings resulting from an order of court not obtained at his instance does not destroy his lien. When such suspensive order terminates or is vacated, he may proceed, and in so proceeding, is entitled to the benefit of the lien existing in his favor when his progress was arrested by such order. Otherwise he would be deprived of a valuable right, and without means of legal redress. And the general rule is, that the plaintiff, while guilty of no fault or neglect on his part, will not be deprived of his lien "without at least having a full remedy against the sheriff, or some other officer, on his official bond."[3] It is well settled that an execution lien cannot be displaced by subsequent proceedings under statutes relating to bankrupts. The rights of the assignee of a bankrupt debtor are always subordinate to all judgment[4] and execution liens to which the bankrupt's estate was subject when the petition in bankruptcy was filed. Such liens can be avoided

[1] Matthews *v.* Mobile M. Ins. Co., 75 Ala. 90.

[2] Shepherd *v.* Woodfolk, 10 Lea, 593.

[3] Kightlinger's Appeal, 101 Pa. St. 546.

[4] Witt *v.* Hereth, 8 Chic. L. N. 40; 13 Nat. Bank. Reg. 106, 6 Biss. 474; Webster *v.* Woolbridge, 3 Dill. 74; In re Weeks, 4 Nat. Bank. Reg. 364; Meeks *v.* Whatley, 10 Nat. Bank. Reg. 501; Haworth *v.* Travis, 13 Nat. Bank. Reg. 145; In re Hambright, 2 Nat. Bank. Reg. 502; Reed *v.* Bullington, 11 Nat. Bank. Reg. 408; Phillips *v.* Bowdoin, 14 Nat. Bank. Reg. 43; Winship *v.* Phillips, 14 Nat. Bank. Reg. 50.

only by showing that they were obtained in pursuance of a purpose to avoid or delay the operation of such statutes; and this purpose will not be inferred merely from the fact that the debtor did not defend the action, or that he was known to be in an insolvent condition.[1]

Note. — Concerning the Right to Prosecute Liens after Proceedings in Bankruptcy have been Instituted. — It must be remembered it does not necessarily follow, because property is charged with a valid lien, that such lien can be made productive by proceedings in the state courts. The respective authority of the state and federal courts, in the enforcement of such liens, has been the subject of a vast amount of judicial dissension, and has occasioned the most irreconcilable decisions and the most distressing doubts. On the one side, the claim is made that the federal courts proceeding in bankruptcy have exclusive jurisdiction over all the estate of the bankrupt, and all liens thereon; that the holder of the lien must in all cases present his claim against the bankrupt to the tribunal having charge of the bankruptcy proceedings; and either have his lien satisfied out of the proceeds of the estate when realized in that tribunal, or else seek permission to proceed in the state courts. In re Bridgeman, 2 Nat. Bank. Reg. 312; In re Bigelow, 1 Nat. Bank.

[1] Mays *v.* Fritton, 20 Wall. 414; 11 Nat. Bank. Reg. 229; Wilson *v.* City Bank of St. Paul, 17 Wall. 473; 6 Chic. L. N. 149; 9 Nat. Bank. Reg. 97; 1 Am. L. T., N. S., 1; In re Weamer, 8 Nat. Bank. Reg. 527; Haworth *v.* Travis, 13 Nat. Bank. Reg. 145; In re Fuller, 4 Nat. Bank. Reg. 29; In re Smith, 1 Nat. Bank. Reg. 599; In re McGilton, 7 Nat. Bank. Reg. 294; Whithed *v.* Pilsbury, 13 Nat. Bank. Reg. 249; Swope *v.* Arnold, 5 Nat. Bank. Reg. 148; Goddard *v.* Weaver, 6 Nat. Bank. Reg. 440; Bernstein's Case, 2 Ben. 44; Wilson *v.* Childs, and Anshutz *v.* Campbell, 8 Nat. Bank. Reg. 527; In re Black, 2 Nat. Bank. Reg. 171; In re Kerr, 2 Nat. Bank. Reg. 388; Marshall *v.* Knox, 8 Nat. Bank. Reg. 97; Appleton *v.* Bowles, 9 Nat. Bank. Reg. 354; Smith's Case, 2 Ben. 432; 1 Nat. Bank. Reg. 599; Reeser *v.* Johnson, 76 Pa. St. 313; 10 Nat. Bank. Reg. 467; Fehley *v.* Barr, 66 Pa. St. 196; Chadwick *v.* Carson, 78 Ala. 116; In re Weeks, 4 Nat. Bank. Reg. 116. See also Matter of Campbell, 7 Am. Law Reg., N. S., 100; Campbell's Case, 1 Abb. 188; In re Burns, 7 Am. Law Reg. 105; Ex parte Donaldson, 7 Am. Law Reg. 213; Scott's Case, 1 Abb. 336; Sharman *v.* Howett, 40 Ga. 257; 2 Am. Rep. 576; In re Hufnagel, 12 Nat. Bank. Reg. 554; In re Hughes and Son, 11 Nat. Bank. Reg. 452; Appleton *v.* Bowles, 6 Chic. L. N. 192. The same rule prevailed under preceding bankrupt acts, except that it applied to attachment as well as to execution liens. Ingraham *v.* Phillips, 1 Day, 117; Franklin Bank *v.* Batchelder, 23 Me. 60; Davenport *v.* Tilton, 10 Met. 320; Kittredge *v.* Warren, 14 N. H. 509; Kittredge *v.* Emerson, 15 N. H. 277; Buffum *v.* Seaver, 16 N. H. 160; Vreeland *v.* Bruen, 1 Zab. 214; Wells *v.* Brander, 18 Miss. 348; Downer *v.* Brackett, 21 Vt. 599; Rowell's Case, 21 Vt. 620. The rights of the holder of an execution lien were denied in In re Tills and May, 11 Nat. Bank. Reg. 214.

Reg. 632; In re Bowie, 1 Nat. Bank. Reg. 628; Blum *v.* Ellis, 8 Chic. L. N. 163; 13 Nat. Bank. Reg. 345; In re Ruehle, 2 Nat. Bank. Reg. 577; In re Frizelle, 5 Nat. Bank. Reg. 122; In re Cook and Gleason, 3 Biss. 116; In re Vogel, 2 Nat. Bank. Reg. 427; Stuart *v.* Hines, 6 Nat. Bank. Reg. 416; In re Hufnagel, 12 Nat. Bank. Reg. 556; In re Whipple, 13 Nat. Bank. Reg. 373; In re Brinkman, 7 Nat. Bank. Reg. 421; Davis *v.* Anderson, 6 Nat. Bank. Reg. 145. In some instances, proceedings for the enforcement of liens, carried on in the state courts, though in the absence of any special inhibition of the courts of bankruptcy, have been declared void. Phelps *v.* Sellick, 8 Nat. Bank. Reg. 390; Stemmons *v.* Burford, 39 Tex. 352; Davis *v.* Anderson, 6 Nat. Bank. Reg. 145. But certainly the state courts are not so entirely without jurisdiction as to render their proceedings absolutely void. If a tribunal has no jurisdiction over a subject-matter, it is impossible, even by the consent of the parties in interest, to confer any validity on the judgments or orders of such tribunal. Freeman on Judgments, sec. 120. But if the assignee of a bankrupt submits his rights in regard to the enforcement of a lien, or the distribution of the proceeds of a sale to a state court, he is bound by its decision. Mays *v.* Fritton, 11 Nat. Bank. Reg. 229; 20 Wall. 414; Augustine *v.* McFarland, 13 Nat. Bank. Reg. 7; Scott *v.* Kelley, 12 Nat. Bank. Reg. 96. Where a sale has been made under proceedings in a state court to enforce a lien, and the property brings its value, the bankruptcy court will generally refuse to interfere, for the reason that no advantage could accrue to the creditors of the bankrupt from such interference. In re Hufnagel, 12 Nat. Bank. Reg. 556; In re Iron Mountain Co., 4 Nat. Bank. Reg. 645; In re Fuller, 4 Bank. Reg. (quarto) 29; 1 Saw. 423; In re Bowie, 1 Nat. Bank. Reg. 628; In re Lambert, 2 Nat. Bank. Reg. 426; Lee *v.* German Association, 3 Nat. Bank. Reg. 218. The right of the tribunal having jurisdiction of the bankrupt's estate to compel the claimants of liens to adjudicate their claims before it is not seriously questioned. Hence such claimants have frequently been enjoined from proceeding further in the state courts. Kerosene Oil Co., 3 Nat. Bank. Reg. 125; 3 Ben. 35; 6 Blatchf. 521; In re Mallory, 6 Nat. Bank. Reg. 22; Jones *v.* Leach, 1 Nat. Bank. Reg. 595; In re Shuey, 6 Chic. L. N. 248; Witt *v.* Hereth, 8 Chic. L. N. 41; 13 Nat. Bank. Reg. 106; In re Lady Bryan Mining Co., 6 Nat. Bank. Reg. 252; Samson *v.* Clark, 6 Nat. Bank. Reg. 403; In re Hufnagel, 12 Nat. Bank. Reg. 556; In re Whipple, 13 Nat. Bank. Reg. 373. And sales made without permission have either been vacated, or the claimants who proceeded have been held responsible for the value of the property sold, regardless of the price realized. Davis *v.* Anderson, 6 Nat. Bank. Reg. 145; In re Rosenberg, 3 Nat. Bank. Reg. 130; Smith *v.* Kehr, 7 Nat. Bank. Reg. 97.

But supposing that the lien-holder chooses to rely upon his lien, and the bankrupt court does not enjoin him from proceeding, nor in any other manner bring him before it, and undertake to adjudicate upon his rights. May he, in such circumstances, lawfully proceed in the state courts until the bankruptcy courts command him to desist? The cases which were first cited in this note insist that all the debts due from the bankrupt must be proved against his estate, and that the holders of liens cannot make them productive except by proceedings either in the bankruptcy court, or having the express sanction of that court. The pretensions of these cases must be very materially abated, if not

altogether denied. It is now settled that if an execution has been issued and levied, the officer making the levy may, notwithstanding the subsequent bankruptcy of the defendant, proceed to sell the property, and that the bankruptcy courts will not, in ordinary circumstances, interfere with his possession, nor enjoin his proceedings. The rights of the assignee are limited to the proceeds of the sale remaining in the hands of the officer after the plaintiff in execution has been satisfied. In re Weamer, 8 Nat. Bank. Reg. 527; Marshall *v.* Knox, 8 Nat. Bank. Reg. 97; 16 Wall. 551; In re Bernstein, 1 Nat. Bank. Reg. 199; 2 Ben. 44; Allen *v.* Montgomery, 48 Miss. 101; Thompson *v.* Moses, 43 Ga. 383; Jones *v.* Leach, 1 Nat. Bank. Reg. 595; Maris *v.* Duron, 1 Brewst. 428; In re Wilbur, 3 Nat. Bank. Reg. 276; 1 Ben. 527. It is also too well established to admit of doubt that if property has been attached on mesne process more than four months prior to the commencement of the proceedings in bankruptcy, the state court may make the attachment lien productive by ordering a sale of the property. Doe *v.* Childress, 21 Wall. 642; Stoddard *v.* Locke, 43 Vt. 574; Daggett *v.* Cook, 37 Conn. 341; Hatch *v.* Seely, 13 Nat. Bank. Reg. 380; Bates *v.* Tappan, 99 Mass. 376; 3 Nat. Bank. Reg. 647; Leighton *v.* Kelsey, 57 Me. 85; 4 Nat. Bank. Reg. 471; Batchelder *v.* Putnam, 13 Nat. Bank. Reg. 404; Brandon M. Co. *v.* Frazer, 13 Nat. Bank. Reg. 365; Rowe *v.* Page, 13 Nat. Bank. Reg. 366; Bowman *v.* Harding, 56 Me. 559; 4 Nat. Bank. Reg. 20; Gibson *v.* Green, 45 Miss. 218. In Pennsylvania the state courts are considered competent to enforce liens by action. Keller *v.* Denmead, 68 Pa. St. 449; Biddle's Appeal, 68 Pa. St. 13; 9 Nat. Bank. Reg. 144. In Iowa, actions may be brought to foreclose mortgages if the assignee takes no steps to redeem, and the mortgagor has not, by the presentation of his claim, submitted his lien to the jurisdiction of the court of bankruptcy. McKay *v.* Funk, 37 Iowa, 661; 13 Nat. Bank. Reg. 334; Brown *v.* Gibbons, 37 Iowa, 654; 13 Nat. Bank. Reg. 407. See also Reed *v.* Bullington, 11 Nat. Bank. Reg. 408; Wicks *v.* Perkins, 13 Nat. Bank. Reg. 280. There are some other cases which, we think, warrant the lien-holder in proceeding till arrested by the direct action of the bankruptcy court. In re Davis, 8 Nat. Bank. Reg. 167; 1 Saw. 230; Davis *v.* R. R. Co., 13 Nat. Bank. Reg. 258; Myer *v.* C. L. P. & P. W., 8 Chic. L. N. 197; Baum *v.* Stern, 1 Rich., N. S., 415; Lenihan *v.* Haman, 6 Chic. L. N. 63; In re Donaldson, 1 Nat. Bank. Reg. 181; 1 L. T. B. 5; 7 Am. Law Reg. 213. But it is said that though a judgment is conceded to be a valid lien on real estate, no sale can be made under such judgment unless a levy was made before the commencement of the proceedings in bankruptcy. Jones *v.* Leach, 1 Nat. Bank. Reg. 595; Pennington *v.* Sale, 1 Nat. Bank. Reg. 572; Turner *v.* The Skylark, 6 Chic. L. N. 239; Davis *v.* Anderson, 6 Nat. Bank Reg. 145.

We are unable to discover any provision of the bankrupt law depriving the holder of a judgment lien from making the same productive by process issued out of the state court, and confined to the subject of the lien. The right to sell under a judgment lien has been upheld in Pennsylvania. Reeser *v.* Johnson, 10 Nat. Bank. Reg. 467; 76 Pa. St. 313; Fehley *v.* Barr, 66 Pa. St. 196. Of similar import, as we understand them, are the decisions under the bankrupt act of 1841. Russell *v.* Cheatham, 8 Smedes & M. 703; Talbert *v.* Melton, 9 Smedes & M. 27; Savage *v.* Best, 3 How. 118; Peck *v.* Jenness, 7 How. 612. The

supreme court of the United States has always exhibited a tendency to modify the pretensions of the subordinate courts, when they were seeking to unduly extend the operation of the bankrupt law. The recent decision in the case of Eyster *v.* Gaff, reported in 8 Chic. L. N. 117, shows that a mortgagor who has procured a decree of foreclosure may proceed to sell the property after the mortgagee has been declared a bankrupt. In this case it was shown that a suit to foreclose the mortgage had been instituted in 1868. In May, 1870, the mortgagee filed his petition in bankruptcy. Thereafter, in July of the same year, a decree of foreclosure was entered, the assignee not having been made a party to the suit. A sale was made under this decree. The purchaser, in due time, brought his action to recover possession of the property, and was resisted on the ground that the decree and sale were void. The decree and sale were sustained. Justice Miller, delivering the opinion of the court, said: "It is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceeding in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court, in the case before us, had acquired jurisdiction of the parties, and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending. It was the *duty* of that court to proceed to a decree, as between the parties before it, until, by some proper pleadings in the suit, it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain that if, at any stage of the proceedings, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention and received none. In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. The opinion seems to have been quite prevalent in many quarters, at one time, that the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act, not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction; and that other courts can proceed no further in suits of which they had, at that time, full cognizance. And it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property, or of contracts, into the bankrupt court, by the service of a rule to show cause and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such

contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts. These propositions are supported by the following cases, decided in this court: Smith *v.* Mason, 14 Wall. 419; Marshall *v.* Knox, 16 Wall. 501; Mays *v.* Fritton, 20 Wall. 414; Doe *v.* Childress, 21 Wall. 642. See also Bishop *v.* Johnson, Woolw. 324."

CHAPTER XIV.

OF PROPERTY EXEMPT FROM EXECUTION.

FIRST. — GENERAL PRINCIPLES APPLICABLE TO THE EXEMPTION LAWS.

§ 208. Exemption laws are liberally construed.
§ 209. Exemption laws have no extraterritorial force.
§ 210. Exemption laws, to what extent in force in the federal courts.
§ 211. Whether the benefit of the exemption must be claimed by the defendant.
§ 212. Claiming the right of exemption.
§ 212 a. Claiming the right of selection.
§ 213. Claiming the benefit of appraisement and exemption.
§ 214. Waiver of exemption rights.
§ 214 a. Forfeiture of exemption rights.
§ 215. Consequences of officers disregarding claim for exemption.
§ 215 a. Actions when debtor's claim for exemption is denied.
§ 215 b. Measure of damages and the right to set off.
§ 216. Agreements to waive benefit of exemption laws.
§ 217. Against what debts the exemption laws prevail.
§ 218. Sale and encumbrance of exempt property by its owner.
§ 219. Constitutionality of exemption laws as against prior debts.

SECOND. — OF THE PERSONS ENTITLED TO EXEMPTION.

§ 220. Exemption laws apply to all inhabitants.
§ 221. Co-tenants and copartners.
§ 222. Heads of families.
§ 223. Householders.
§ 224. Teamsters and agriculturists.
§ 225. Persons exercising two or more trades.

THIRD. — OF VARIOUS CLASSES OF EXEMPT PROPERTY.

§ 226. Tools, what exempt as.
§ 226 a. Implements and utensils, what exempt as.
§ 227. Teams, what exempt as.
§ 228. Wagons, what exempt as.
§ 229. Horses, what exempt as.
§ 230. Cows, what exempt as.
§ 231. Household furniture, what exempt as.
§ 232. Wearing apparel, what exempt as.
§ 233. Provisions for family use and feed for stock.
§ 234. Wages and earnings of the defendant.
§ 234 a. Pensions.
§ 235. Proceeds of exempt property.

§ 236. Property exempt because essential to the use of other exempt property.
§ 236 a. Exemption of food, provisions, etc.
§ 236 b. Exemption of stock in trade.
§ 236 c. Exemptions not confined to specific articles.
§ 237. Miscellaneous exemptions.
§ 238. Continuance of exemption after death of the owner.

FIRST. — GENERAL PRINCIPLES APPLICABLE TO EXEMPTION LAWS.

§ 208. Exemption Laws should be Liberally Construed. — Under the common law and the early English statutes, the obligation of the debtor to discharge his liabilities was deemed to be paramount to every consideration of benevolence and humanity. If unable to satisfy his obligations, he was placed within control of his creditors so absolutely that not only his property, but also his person, could be taken and held under execution. The law was as cruel as Shylock. Like him, it listened to no appeals for mercy, but insisted upon the satisfaction of the exact terms of the bond. True, it stopped short of the direct taking of human life, and the direct drawing of human blood; but it never hesitated to deprive the debtor of all liberty of person, and to impair his health and spirits, and shorten his life, by confinement within the narrow limits and foul atmosphere of its ill-kept prisons. It was scarcely less cruel to his family. For while it allowed them a scanty supply of wearing apparel, it left them no home, no tools or implements of husbandry, no food, and no means of obtaining a subsistence. It punished the debtor for not paying his debts, and by so doing it deprived him of all means of payment. If the creditor happened to be either a sensible or a merciful man, he would not avail himself of the means of torture which the law placed in his hands; but if he

were otherwise, the condition of the debtor was scarcely less unfortunate than that of any convicted felon. In some respects it was less fortunate. For the latter, by accepting the definite punishment awarded to him, might, in other than capital cases, regain his liberty; while the imprisonment of the former, unless the aid of friends or the accidental acquisition of fortune enabled him to make payment of the debt, might terminate only with his life. The laws under which, through motives of humanity toward the debtor and his family, a considerable portion of his property is now exempt from execution are chiefly, if not exclusively, the result of statutes enacted in the various states of the American Union. These statutes differ greatly from one another in the enumeration of property exempted, though they are all animated by the same spirit, and intended to accomplish the same humane purposes. The practitioner must necessarily study the subject of exemptions mainly by the aid of the statutes of his own state. The most that can be accomplished in a text-book is to call attention to those principles which are of general application, and to give such interpretation, as can be found in the reports, of the various terms and phases contained in the different statutes. It is of primary importance that the practitioner should understand the spirit in which the statute of his state will be received and construed by its courts. While it is true that lands were not subject to execution at the common law, their exemption was dictated by other considerations than those of benevolence to the debtor and his family. That there should be property which in its nature was generally subject to execution, but which was exempt for certain

persons or in certain cases, to mitigate the misfortunes of debtors, was unknown to the common law. Statutes of exemption, whether referring to real or personal property, may therefore properly be characterized as in derogation of the common law;[1] and if there were a universal rule that statutes in derogation of the common law must be strictly construed, then such a construction of statutes of exemption would be unavoidable. This construction has in fact been proclaimed in some instances.[2] Where this rule prevails, no property can be successfully claimed as exempt which does not clearly appear to be embraced within the specification contained in the statute. But in most of the states it does not prevail, nor can it be permitted to prevail anywhere without forgetting that the "quality of mercy is not strained." We can hardly conceive the propriety of strictly construing a statute of mercy or benevolence. Unless its validity can be wholly denied because of the want of legislative power to enact it, it should be given full effect by interpreting it in the spirit in which it was conceived and adopted, and with a view of accomplishing all its manifest objects. It is true that exemption laws are occasionally perverted from their laudable purposes. They sometimes enable debtors in comfortable circumstaces to bid defiance to creditors more improvished than themselves. They sometimes assist scoundrels to consummate the most cruel frauds. But in the vast majority of cases their operation is highly meritorious. They often assure to the family the shel-

[1] Garaty v. Du Bose, 5 S. C. 500; Briant v. Lyons, 29 La. Ann. 65; Todd v. Gordy, 28 La. Ann. 666.

[2] Guillory v. Deville, 21 La. Ann. 686; Crilly v. Sheriff, 25 La. Ann. 219; Grimes v. Bryne, 2 Minn. 105; Temple v. Scott, 3 Minn. 419; Rue v. Alter, 5 Denio, 119; Ward v. Huhn, 16 Minn. 159.

ter of a home, the means of obtaining a livelihood, and the earnings of its natural head and protector. They mitigate the harshness of the cruel and grasping creditor, and give to the most unfortunate of debtors a place of refuge and a gleam of hope. Because of their meritorious purposes and their remedial character, the courts have generally treated them with the utmost consideration, and have been inclined to extend rather than to restrict their operation. Hence the rule is well supported, and is constantly growing in favor, that exemption laws, being remedial, beneficial, and humane in their character, must be liberally construed.[1] Wherever this rule prevails, and it does not clearly appear whether certain property is or is not embraced within the exempting statute, the debtor will generally be allowed the benefit of the doubt, and suffered to retain the property. Doubtless the courts will always distinguish between enacting and construing, and not undertake to supply omissions made by the legislature. This will not bind them to a literal interpretation, nor prevent them from realizing objects clearly within the

[1] Allman *v.* Gann, 29 Ala. 240; Favers *v.* Glass, 22 Ala. 621; 58 Am. Dec. 272; Sallee *v.* Waters, 17 Ala. 482; Noland *v.* Wickham, 9 Ala. 169; Wassell *v.* Tunnah, 25 Ark. 101; Montague *v.* Richardson, 24 Conn. 346; 63 Am. Dec. 173; Good *v.* Fogg, 61 Ill. 449; Deere *v.* Chapman, 25 Ill. 610; Bevan *v.* Hayden, 13 Iowa, 122; Kenyon *v.* Baker, 16 Mich. 373; King *v.* Moore, 10 Mich. 535; Wade *v.* Jones, 20 Mo. 75; Megehe *v.* Draper, 21 Mo. 510; Carpenter *v.* Herrington, 25 Wend. 370; 37 Am. Dec. 239; Stewart *v.* Brown, 37 N. Y. 350; Alvord *v.* Lent, 23 Mich. 369; Ford *v.* Johnson, 34 Barb. 364; Becker *v.* Becker, 47 Barb. 497; Tillotson *v.* Wolcott, 48 N. Y. 188; Buxton *v.* Dearborn, 46 N. H. 44; Richardson *v.* Duncan, 2 Heisk. 220; Webb *v.* Brandon, 4 Heisk. 285; Hawthorne *v.* Smith, 3 Nev. 182; Cobbs *v.* Coleman, 14 Tex. 594; Anderson *v.* McKay, 30 Tex. 190; Rogers *v.* Ferguson, 32 Tex. 534; Gilman *v.* Williams, 7 Wis. 329; Connaughton *v.* Sands, 32 Wis. 387; Kuntz *v.* Kinney, 33 Wis. 510; Webster *v.* Orne, 45 Vt. 40; In re Jones, 2 Dill. 343; Stewart *v.* Brown, 37 N. Y. 350; Shaw *v.* Davis, 55 Barb. 389; Vogler *v.* Montgomery, 54 Mo. 577; Carrington *v.* Herrin, 4 Bush, 624; Puett *v.* Beard, 86 Ind. 172; 44 Am. Rep. 298; Butner *v.* Bowser, 104 Ind. 255.

purpose of the act, though not literally within its terms. Thus though a statute exempted a yoke of oxen, or a cow, or team of horses, the courts will not construe these terms so literally as to deny the exemption of a steer, heifer, or unbroken colt, of which the debtor has become possessed in his efforts to obtain a yoke of oxen, a cow, or a horse, as the case may be;[1] for the purpose to exempt these under the circumstances is sufficiently manifest, though the literal words of exemption are not co-extensive with the signification given to them.

§ 209. **Exemption Laws are Part of the Lex Fori.** — The operation of exemption laws is restricted to the state in which they are enacted. They do not constitute a part of the contract between the debtor and creditor, to the extent that the former may invoke them wherever he may choose to go. Hence if a man to whom a debt was due for personal services in Pennsylvania should remove to another state, in which such a debt was subject to execution, he could not protect it from garnishment by showing its exemption in the state where it was earned and whence he had removed.[2] So a resident of one state, having property in another, cannot hold it as exempt by virtue of the exemption laws of the state of his domicile.[3] Statutes of exemp-

[1] Mallory *v.* Berry, 16 Kan. 293. Perhaps in some instances, in the interests of impecunious humanity, the judges have gone beyond the bounds where interpretation ends and legislation begins. The cases tending in this direction, and cited and somewhat humorously commented upon in a note to Rockwell *v.* Hubbell's Adm'rs, 45 Am. Dec. 253.

[2] Morgan *v.* Neville, 74 Pa. St. 52.

[3] Boykin *v.* Edwards, 21 Ala. 261. The case of Pierce *v.* C. & N. W. R. R. Co., 36 Wis. 283, 2 Cent. L. J. 377, may somewhat conflict with the views expressed in this section. That case is, however, very severely criticised (see 2 Cent. L. J. 374, 378, 447), and so far as it gives countenance to the theory

tion are regarded as relating to or affecting the remedy, as constituting part of the *lex fori* only. When an action is brought in a state, its exemption laws must be accepted as an unavoidable incident of the remedy conceded by its courts. The contract may have been made in another state, where the exemption laws are either more illiberal to the debtor, or deny him all exemption as against this particular cause of action. This immunity from exemption laws does not attend the contract; and when sought to be enforced in another state, satisfaction of the judgment thereon obtained cannot be had in violation of the exemption laws of the latter state.[1] Statutes of exemption being generally conceded to be a part of the *lex fori*, the question arises whether they do not necessarily extend to the protection of all persons who are sued or pursued within the state, unless their provisions are explicitly, or by necessary implication restricted to residents or to some other designated class of persons. With natural partiality toward their fellow-citizens, the courts of some of the states have construed their exemption laws as operative only in behalf of residents. Thus where the defendant had absconded from the state, the court said: "In case a debtor abscond from the state with the purpose of avoiding the service of process and all responsibility to its laws, and of placing himself permanently beyond their reach and influence, he must be regarded as vol-

that a contract may be enforced according to the *lex loci* rather than the *lex fori*, the case is utterly indefensible. Newell *v.* Haydon, 8 Iowa, 140; Woodbridge *v.* Wright, 3 Conn. 523; Atwater *v.* Townsend, 4 Conn. 47; Toomer *v.* Dickerson, 37 Ga. 428; Coffin *v.* Coffin, 16 Pick. 323; Wood *v.* Malin, 5 Halst. 208; Whittemore *v.* Adams, 2 Cow. 626; White *v.* Canfield, 7 Johns. 117; 5 Am. Dec. 249; Smith *v.* Atwood, 3 McLean, 545; Hinkley *v.* Marcau, 3 Mason, 88; Haskill *v.* Andros, 4 Vt. 609; 24 Am. Dec. 645.

[1] Helfenstein *v.* Cave, 3 Iowa, 287.

untarily abandoning all claim to participate in any of the personal benefits and privileges conferred by such laws upon those remaining subject to their jurisdiction. In the language of Woodward, J., in Yelverton *v.* Burton, 26 Pa. St. 351, 'if he will not come within our jurisdiction to answer to his liabilities, let him not come to appropriate our bounties.' It cannot, therefore, be presumed that the legislature intended to extend the benefits of the exemption laws to this class of persons."[1] States are not accustomed to give exemptions from the laws for the collection of debts for the benefit of persons resident in other jurisdictions. The exemptions are personal privileges, dependent on personal or family circumstances; and if one who possesses them removes to a foreign state, whereby he would acquire under its laws privileges more or less liberal, not possessed by our own people, he thereby abandons those he possessed before, so far as they were local in their nature. And if exemption privileges are not necessarily local, they are certainly in their reasons. They are conferred on grounds of state policy, to add to the comfort and encourage the industry of the people; and every state will make such regulations on the subject as its own people will deem wisest and best.[2] In other states the application of exemption laws to non-residents, whether temporarily within the state or absent therefrom, is denied by statute.[3] In one of these states it has been held that where the defendant resided within the state, and was entitled

[1] Orr *v.* Box, 22 Minn. 485.

[2] McHugh *v.* Curtis, 48 Mich. 262; Lisenbee *v.* Holt, 1 Sneed, 42; Hawkins *v.* Pearce, 11 Humph. 44; Finley *v.* Sly, 44 Ind. 266; Yelverton *v.* Burton, 26 Pa. St. 351.

[3] Graw *v.* Manning, 54 Iowa, 719; Allen *v.* Manasse, 4 Ala. 554.

to exemption at the time he claimed it, such demand consummated his right, and his subsequent removal from the state was immaterial.[1] That the object of the legislature in enacting exemption laws was solely to benefit or protect the citizens of the state will, if regarded as a question of fact, admit of no serious controversy, for the view of the average legislator is rarely sufficiently comprehensive to embrace the citizens of a sister state or of foreign nations. It is equally beyond controversy that this limited object is not apparent in many of the statutes, and exists only as the result of judicial interpolation. This interpolation will not be made in several of the states, and the reasons for not making it have been thus forcibly stated: "Whatever remedy our laws give to enforce the performance of a contract will equally avail the citizen or the foreigner; and they equally must be subject to any restraints which the law imposes upon them. Our inhabitants can have no greater rights in enforcing a claim against a foreigner than an alien can have in enforcing a similar claim against one of our own citizens. Whoever submits himself or his property to our jurisdiction must yield to all the requirements which are made of our citizens in relation to the collecting of debts, or maintaining suits; and is clearly entitled to all the benefits, exemptions, and privileges to which other debtors or suitors belonging to our own state are subject or entitled. If the one can hold a cow, suitable wearing apparel, and necessary household furniture, without having the same taken from him by execution, so can the other. Nothing short of the express language of a statute would justify us in saying that a person

[1] McCrary *v.* Chase, 71 Ala. 540.

may, by virtue of an execution, be stripped of his wearing apparel, his necessary household furniture, and his only cow, merely because he resides under another government, when a person residing here would not be subject to the same inconvenience and distress."[1] "The statute makes no discrimination between temporary and permanent residents, nor does it purport to confine its privileges to residents at all. It exempts certain articles of the debtor and his family. And we think it would be entirely inconsistent with the beneficent intentions of the statute as well as with the dignity of a sovereign state, to say that the temporary sojourner, or even the stranger within our gates, was not entitled to its protection."[2] The courts will interfere to protect their citizens in their rights of exemption, when sought to be evaded by recourse to proceedings in other states. The wages of an employee may be exempt by the laws of the state in which he lives and in which they are earned; but his creditor, to avoid such exemption, may commence an action against him in another state in which they are not exempt, and seek to levy upon them under attachment or execution. If the creditor is a citizen of the state in which the debtor lives, the courts of such state will protect the debtor's right of exemption by enjoining the creditor from proceeding in the other state.[3] As the court has jurisdiction over both parties, there is no doubt of its power to prevent

[1] Haskill *v.* Andross, 4 Vt. 609; 24 Am. Dec. 645.

[2] Lowe *v.* Stringham, 14 Wis. 225; Hill *v.* Loomis, 6 N. H. 263; Mineral Point R. R. Co. *v.* Barron, 83 Ill. 365; Wright *v.* C. B. & Q. R. R., 19 Neb. 175; Menzie *v.* Kelly, 8 Ill. App. 259; Mo. P. R'y. *v.* Maltby, 34 Kan. 125; Kansas C., St. J. & C. B. R'y *v.* Gough, 35 Kan. 1; Sproul *v.* McCoy, 26 Ohio St. 577.

[3] Snook *v.* Snetzer, 25 Ohio St. 516; Keyser *v.* Rice, 47 Md. 203; Teayer *v.* Landsley, 69 Iowa, 725; Mumper *v.* Wilson, 72 Iowa, 163.

the creditor from proceeding, if the case presented against him is a proper one in which to exercise such power. Upon this subject the authorities seem to uniformly affirm that courts of equity will, if necessary, compel persons within their jurisdiction to obey and respect the laws of the state, and will not suffer them to evade those laws, and thereby obtain preferences, to the injury of the debtor or of other creditors.[1] This rule has been extended in Iowa to protect from execution in Nebraska a team which had been taken to the latter state by a resident of Iowa, for a temporary purpose. "Residents of one state, in the prosecution of their ordinary business, often find it necessary to take exempted property, for temporary use, in earning support for their families, into adjoining states. It would be unjust, oppressive, and absurd to permit creditors to follow such persons and seize their property, exempt from their debts, the moment they had passed the boundary line of the state."[2]

§ 210. **Exemption from Executions from Federal Courts.**—A party recovering judgment in any common-law cause in any circuit or district court of the United States, according to the present statutory provisions governing this matter, "shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like cause by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may from time to time, by general rules, adopt such state laws

[1] See authorities last cited, and McIntosh *v.* Ogilvie, 4 Term Rep. 193.

[2] Mumper *v.* Wilson, 72 Iowa, 163.

as may hereafter be in force in such state in relation to remedies upon judgments as aforesaid, by execution or otherwise."[1] It follows from this provision, that property exempt from process issued out of a state court may not be exempt from process issued out of a court of the United States. The state exemption laws cannot be enforced against creditors having judgments in the federal courts, except where those laws have been adopted by virtue of the statute quoted above, or of general rules prescribed by the federal courts in the exercise of authority conferred by that statute.[2] To determine what property may be successfully claimed as exempt as against a writ issued from a district or circuit court of the United States, we must first examine the exemption laws in force in the state wherein such court was held at the date of the passage of the statute just referred to, and must next ascertain what subsequent state statutes have been adopted by the court issuing the writ.[3] As against proceedings under the late bankrupt act of the United States, the following exemptions prevailed: "The necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value in any case the sum of five hundred dollars; and also the wearing apparel of such bankrupt,

[1] Desty's Federal Procedure, sec. 916; 17 U. S. Stats. 197.

[2] Rogers *v.* McKenzie, 1 Heisk. 514; United States Bank *v.* Halstead, 10 Wheat. 51; Lawrence *v.* Wickware, 4 McLean, 96.

[3] With respect to the final process of the federal courts and its freedom from state control, see Wayman *v.* Southard, 10 Wheat. 1; Boyle *v.* Zacharie, 6 Pet. 648; Beers *v.* Haughton, 9 Pet. 431; Ross *v.* Duval, 13 Pet. 45; United States *v.* Knight, 14 Pet. 301; Amis *v.* Smith, 16 Pet. 303; Massingall *v.* Downs, 7 How. 760.

and that of his wife and children; and the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States; and such other property as now is or hereafter shall be exempted from attachment, or seizure, or levy in execution by the laws of the United States, and such other property not included in the foregoing exemptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1871."[1]

This portion of the statute, so far as it adopted the state exemption laws, was objected to as unconstitutional, because it is not uniform in its operation. This objection was never sustained.[2] But by an amendment, enacted in 1873, it was provided that the exemptions "shall be the amount allowed by the constitution and law of each state respectively, as existing in the year 1871; and that such exemptions be valid against debts contracted before the adoption and passage of such state constitutions and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."[3] This amendment was an attempted adoption of

[1] See section 14 of act of 1867; sec. 5045, R. S. U. S.

[2] In re Beckerford, 1 Dill. 45; 2 Nat. Bank. Reg. 203; In re Wylie, 5 L. T. B. 330; In re Deckert, 10 Nat. Bank. Reg. 1; Am. L. T., N. S., 336; 9 Alb. L. J. 330; 6 Chic. L. N. 310.

[3] 17 U. S. Stat. 577.

state laws which had been, or were likely to be, declared invalid by the state tribunals, because they impaired the obligation of contracts. It was frequently attacked on the ground that it did not, like the former law, adopt the state statutes; but, in effect, prescribed a direct law upon the subject; that the law so prescribed could not be uniform in its operation, and was therefore not authorized by the constitution when it granted congress the power to enact bankrupt laws which should be uniform in their operation. The constitutionality of the amendment was frequently sustained.[1] But the more recent decisions supported a different conclusion, and indicated that the amendment will ultimately be declared unconstitutional.[2] The title to the property exempted by the bankrupt act did not vest in the assignee, but remained in the bankrupt.[3] The bankrupt was entitled to the state exemption, in addition to the amount specified in the act.[4] The amount of property to be retained by the bankrupt by virtue of the state exemption laws could not exceed that allowed in the year 1871;[5] under the laws of the state or territory[6] in which he had his domicile at the time the proceedings in bankruptcy were instituted.[7] The

[1] In re Jordan, 8 Nat. Bank. Reg. 180; In re Kean and White, 8 Nat. Bank. Reg. 367; In re W. A. Jordan, 10 Nat. Bank. Reg. 427; In re Owens, 12 Nat. Bank. Reg. 518; In re J. W. Smith, 8 Nat. Bank. Reg. 401; 6 Chic. L. N. 33.

[2] In re Deckert, 10 Nat. Bank. Reg. 1; Am. L. T., N. S., 236; 9 Alb. L. J. 330; Chic. L. N. 310; In re Kerr and Roach, 9 Nat. Bank. Reg. 566; In re Duerson, 13 Nat. Bank. Reg. 183; In re Dillard, 9 Nat. Bank. Reg. 8; 6 L. T. B. 490.

[3] In re Lambert, 2 Nat. Bank. Reg. 426; In re Hester, 5 Nat. Bank. Reg. 285; Rix *v.* Capitol Bank, 2 Dill. 367.

[4] In re Ruth, 1 Nat. Bank. Reg. 154; 7 Am. Law Reg. 157; In re Cobb, 1 Nat. Bank. Reg. 414; 1 L. T. B. 59; In re Hezekiah, 11 Nat. Bank. Reg. 573; 2 Dill. 551.

[5] In re Askew, 3 Nat. Bank. Reg. 575.

[6] In re McKercher and Pettigrew, 8 Nat. Bank. Reg. 409.

[7] In re Stevens, 5 Nat. Bank. Reg. 298; 2 Biss. 373.

property set aside to the bankrupt as exempt remained subject to all valid liens, other than those attachment liens which are dissolved by virtue of the proceedings in bankruptcy.[1] To be entitled to an exemption as a householder or head of a family, it was not indispensable that the bankrupt should have either a wife or children. It was sufficient that he kept house, and had persons living with him, and dependent upon him for support.[2] Nor could the bankrupt's right of exemption be diminished on account of his having a wife who owned a house or other separate property.[3] Exemption was frequently allowed to the bankrupt from the property of a partnership of which he was a member;[4] but probably this cannot be permitted, as against the rights of the creditors of the firm, unless expressly sanctioned by the state laws.[5] Most of the exemptions allowed by the bankrupt act, independent of the state exemptions, are so specifically stated in the act as to be free from doubt, and from the need of judicial interpretation. The only questions liable to controversy are: 1.

[1] In re Perdue, 1 Nat. Bank. Reg. 183; 2 West. Jur. 279; In re Whitehead, 2 Nat. Bank. Reg. 599; In re Brown, 3 Nat. Bank. Reg. 250; 2 L. T. B. 122; 1 Chic. L. N. 409; Fehley *v.* Barr, 66 Pa. St. 196; In re Hutto, 3 Nat. Bank. Reg. 781; 1 L. T. B. 226; 3 L. T. B. 179; In re Coons, 5 Chic. L. N. 515; Haworth *v.* Travis, 13 Nat. Bank. Reg. 145.

[2] In re Taylor, 3 Nat. Bank. Reg. 158; In re Ruth, 1 Nat. Bank. Reg. 154; In re Cobb, 1 Nat. Bank. Reg. 414; 1 L. T. B. 59.

[3] In re Cobb, 1 Nat. Bank. Reg. 414; 1 L. T. B. 59; In re Tonne, 13 Nat. Bank. Rep. 171.

[4] In re Rupp, 4 Nat. Bank. Reg. 95; 2 L. T. B. 123; In re Young, 3 Nat. Bank. Reg. 440; McKercher and Pettigrew, 8 Nat. Bank. Reg. 409; In re Richardson & Co. 11 Nat. Bank. Reg. 114; 7 Chic. L. N. 62; In re Ralph, 4 Nat. Bank. Reg. 95; 2 L. T. B. 123; Stewart *v.* Brown, 37 N. Y. 350.

[5] In re Price, 6 Nat. Bank. Rep. 400; In re Handlin & Verny, 12 Nat. Bank. Reg. 49; 2 Cent. L. J. 264; Burns *v.* Harris, 67 N. C. 140; In re Blodgett & Sanford, 10 Nat. Bank. Reg. 145; In re Steuart and Newton, 13 Nat. Bank. Reg. 295; In re Hafer, 1 Nat. Bank. Reg. 547; Anonymous, 1 Bank. Reg. (quarto) 187; Pond *v.* Kimball, 101 Mass. 105; Guptil *v.* McFee, 9 Kan. 30.

What may be held as "necessary household and kitchen furniture"; and 2. What are the "other articles and necessaries of the bankrupt" which the assignee may "designate and set apart." As the amount to be set apart is not to exceed five hundred dollars in value, there is little danger that the assignee can, without exceeding this limitation, set aside an unnecessary amount of household and kitchen furniture for the use of an ordinary family. The terms "other articles and necessaries" do not embrace articles of mere luxury, ornament, fancy, taste, or convenience; but only those things which are of immediate use, and needful to the debtor or his family in almost the same degree as is wearing apparel or household furniture.[1]

§ 211. **Whether the Officer must take Notice of Defendant's Rights before They are Claimed.** — Perhaps the very first question in reference to the exemption law which an officer will desire to have answered is, whether it is his business to inquire whether particular property is exempt; or may he proceed to levy on any property within his reach, and hold it until claimed by the defendant? Different responses are made to this question in different states. In many of them, all property is considered as *prima facie* subject to levy, and the officer may safely proceed until the defendant claims the benefit of the exemption laws. Under this view of the law, the exemption is a mere

[1] See In re Cobb, 1 Nat. Bank. Reg. 414; 1 L. T. B. 59; In re Graham, 2 Miss. 449; In re Ludlow, 1 N. Y. Leg. Obs. 322; In re Thiell, 4 Miss. 241; In re Comstock, 1 N. Y. Leg. Obs. 326; In re Williams, 4 Law Rep. 155; In re Thornton, 2 Nat. Bank. Reg. 189; 8 Am. Law Reg. 42. Money may be allowed to the bankrupt as a necessary. In re Thornton, 2 Nat. Bank. Reg. 189; 8 Am. Law Reg. 42; In re Lawson, 2 Nat. Bank. Reg. 54; In re Hay, 7 Nat. Bank. Reg. 344; In re Grant, 1 Story, 312; In re Daniel Welch, 5 Nat. Bank. Reg. 348; 5 Ben. 230.

personal privilege, to which the defendant must make some claim before it will be conceded, and before he can recover damages because it has not been recognized.[1] And if the defendant chooses not to assert his privilege, the officer has no sufficient excuse for not levying on the property.[2] "Construing together all the statutory provisions bearing upon the seizure and sale of property upon execution, the inference is obvious that all the property of execution defendants in this state is considered as *prima facie* subject to execution, and that it is the duty of the officer holding an execution to proceed until some claim for exemption is lawfully interposed."[3] Whether the rule thus broadly stated will, in any of the states, be applied in all circumstances admits of doubt. It is unquestionably true, in some of the states, that a debtor who does not within some reasonable time claim his exemption irrevocally waives it, and that therefore neither he nor his vendee can recover the property from a purchaser thereof, under execution.[4] But the debtor may claim the exemption within a reasonable time, and then the question will arise whether the sheriff has been justified in proceeding until the claim is interposed. If the debtor knew of the levy, and made no objections to it, his temporary acquiescence might estop him from treating the officer as a wrong-doer. But suppose the debtor is ignorant of the levy, and therefore makes no

[1] Howland *v.* Fuller, 8 Minn. 50; Tullis *v.* Orthwein, 5 Minn. 377; Borland *v.* O'Neal, 22 Cal. 504; Twinam *v.* Swart, 4 Lans. 263; Dains *v.* Prosser, 32 Barb. 291; Baker *v.* Brintnall, 52 Barb. 188; State *v.* Melogue, 9 Ind. 196. But even in New York it is said that an officer cannot justify taking all the property of which he knew part to be exempt. Frost *v.* Mott, 34 N. Y. 253.

[2] Gresham *v.* Walker, 10 Ala. 370.

[3] Terrell *v.* State, 66 Ind. 575; Boesker *v.* Pickett, 81 Ind. 554; State *v.* Boulden, 57 Md. 314; Oliver *v.* White, 18 S. C. 235.

[4] Barton *v.* Brown, 68 Cal. 11.

claim. Meanwhile the officer enters the debtor's house, takes up his carpets and removes his furniture, or perhaps seizes and drives away the family cow. We doubt whether this would be justified in any state. The better rule perhaps is, that the officer should make a formal seizure, such as will give the judgment creditor the benefit of the property, if the debtor should elect to claim his exemption, and should, on the other hand, do as little damage to the debtor as possible until he has knowledge of the levy and an opportunity to assert his rights. But it is not universally true that the defendant must claim his exemption. In Iowa, an action of replevin was maintained against the sheriff, although it was not contended that any claim for exemption had ever been interposed otherwise than by the suit.[1] In Minnesota, if the property is such that the officer can know that it is exempt, he has no right to levy upon it all. "Where a separate and distinct article of property is taken, which is expressly exempt by statute, and the party holding or directing the service of the writ knows before or at the time of such service that the property seized is exempt, there is no reason for claiming that the liability of the attaching party does not occur at the time of the levy, nor that a demand and refusal is necessary in order to make the party levying liable as a wrong-doer. In such circumstances, the wrong is committed at the instant of seizing the property, and the cause of action then accrues. A demand could not be necessary to in-

[1] Parsons *v.* Thomas, 62 Iowa, 319. The date of the taking of the property does not appear in the report. It may be that the decision was controlled by section 3072 of the code as amended in 1882, by the terms of which the defendant does not waive his exemption, unless he fails to claim it after being notified so to do. Ellsworth *v.* Savre, 67 Iowa, 450.

form the creditor of the rights of the debtor, for the statute fixes those, and a demand could be only an idle ceremony. The statute makes the exemption absolute, and not dependent upon selection or demand by the debtor."[1]

In North Carolina, it is said that the officer may levy on any property, unless he knows it to be exempt.[2] In Tennessee, it is presumed, until the contrary is shown, that the debtor did not waive his rights. The officer, where property is clearly exempt, can justify a levy only by showing the consent of the defendant thereto.[3] In Wisconsin and Massachusetts, officers are required to know the exemption laws, and interfere at their peril when property is clearly exempt.[4] So in Ohio, the officer must take notice that there are certain articles which are necessarily exempt.[5] In Michigan, where property is unconditionally exempt, the officer must not take it, and where it is exempt up to a certain value, he must have an appraisement made.[6] In Illinois and Missouri, an officer about to levy must inform the defendant of his rights, and give him an opportunity to select the property which he will claim as exempt;[7] and a delivery bond obtained from defendant without first notifying him of his rights is invalid.[8] In Tennessee and Texas, the exemption

[1] Lynd *v.* Picket, 7 Minn. 184; 82 Am. Dec. 81.

[2] Henson *v.* Edwards, 10 Ired. 43.

[3] State *v.* Haggard, 1 Humph. 390.

[4] Gilman *v.* Williams, 7 Wis. 329; 34 Am. Dec. 714; Maxwell *v.* Reed, 7 Wis. 582; Woods *v.* Keyes, 14 Allen, 236; 92 Am. Dec. 766.

[5] Frost *v.* Shaw, 3 Ohio St. 270.

[6] Elliott *v.* Whitmore, 5 Mich. 532; Wyckoff *v.* Wyllis, 8 Mich. 48.

[7] People *v.* Palmer, 46 Ill. 398; 95 Am. Dec. 418; State *v.* Romer, 44 Mo. 99; Bingham *v.* Maxey, 15 Ill. 200; State *v.* Barada, 57 Mo. 562; Foote *v.* People, 12 Ill. App. 94; Shear *v.* Reynolds, 90 Ill. 238.

[8] Robards *v.* Samuel, 17 Mo. 555.

for the heads of families, being created for the benefit of the whole family, is an absolute right which need not be claimed and cannot be waived.[1] In Mississippi, the officer, in a case of doubt, may summon three disinterested citizens to decide. Failing to do this, he is responsible as a trespasser if the property levied on can be shown to be exempt.[2] Wherever the rule of law prevails that all property is *prima facie* liable to execution, it necessarily follows that in all legal controversies involving a claim to exemption, the *onus* of proof is on the claimant. He must show affirmatively every fact necessary to support his claim.[3]

§ 212. **Claiming Benefit of Exemption.**—In those states where the exemption laws are considered as conferring a mere personal privilege, which must be claimed by the defendant, the first inquiry necessarily is, How, when, and by whom must the claim be made? As the privilege is personal, the claim must be made by the defendant, or by some one acting for him by authority, express or implied.[4] The general language employed in some of the cases is to the effect that the defendant must make the claim in person,—that it cannot be made by an agent. But we apprehend that the true rule must be this: that no one has a right to interfere officiously on behalf of the defendant; and that even an agent in custody of the property has not, by

[1] Ross *v.* Lister, 14 Tex. 469; Denny *v.* White, 2 Cold. 283; 88 Am. Dec. 596.

[2] Perry *v.* Lewis, 49 Miss. 443.

[3] Calhoun *v.* Knight, 10 Cal. 393; Briggs *v.* McCullough, 36 Cal. 542; Dowling *v.* Clark, 3 Allen, 570; Davenport *v.* Alston, 14 Ga. 271; Corp *v.* Griswold, 27 Iowa, 379; Van Sickler *v.* Jacobs, 14 Johns. 434; Griffin *v.* Sutherland, 14 Barb. 456; Dains *v.* Prosser, 32 Barb. 290; Tuttle *v.* Buck, 41 Barb. 417; Line's Appeal, 2 Grant Cas. 197; Swan *v.* Stephens, 99 Mass. 7.

[4] Mickels *v.* Tousley, 1 Cow. 114; Smith *v.* Hill, 22 Barb. 656; Earl *v.* Camp, 16 Wend. 562; Wygart *v.* Smith, 2 Lans. 185.

virtue of his general authority as agent or bailee, any power to make the claim. When, however, the defendant has resolved to claim his exemption, we can see no objection to his doing so by means of an attorney or agent, acting in his name and in pursuance of his instructions. Nor do we perceive any reason why his agents, whether such agency is evidenced by an expressed delegation of his authority, or implied from their relationship to him, or from their being put in charge of the property, may not, in his absence, and therefore without his knowledge, interpose a claim in his behalf. Otherwise the debtor's family are, in his absence, helpless as against a threatened seizure of their household effects, provisions, and wearing apparel, and must remain naked and unfed, unless relieved by charity, until the debtor can be communicated with, and has thereupon announced his election that they should not be thus despoiled. But what if he does not thus elect? Husbands there have been, and may again be, who are inattentive to their wives and children, or who willfully inflict upon them misery and want. The family of such a man, more than of any other, is within the spirit and the necessities of exemption laws; and it is a strange and perverse interpretation of these laws which denies their benefit, even temporarily, to a family whose head is for the moment absent from them, or who, though not absent, is indifferent to their fate. A statute of Ohio declared "that it shall be lawful for any resident of Ohio, being the head of a family, and not the owner of a homestead, to hold exempt from levy and sale personal property to be selected by such person, his agent or attorney, at any time before sale, not exceeding five hundred dollars in value, in addition to

the amount of chattel property now by law exempted." An action was brought under this statute by a wife, her husband joining, to recover damages sustained by the refusal of a constable to set off property as exempt from execution on her demand. Why the demand was not made by the husband, and the action prosecuted solely in his name, does not appear. The court construed the statute as made to protect the family, and therefore saw no reason why the wife "may not make the demand for the benefit of herself and children, as she is their natural guardian for nurture of her children."[1] By the statutes of Iowa, "when a debtor absconds and leaves his family, such property shall be exempt in the hands of the wife and children, or either of them."[2] His wife has, therefore, on his absconding, the right to claim the exempt property, and where he has several articles, some only of which can be retained as exempt, she is authorized, in her discretion, to select which shall be so retained.[3]

In Pennsylvania numerous decisions have been made, under which it is clearly settled that in the absence of the defendant a claim for the benefit of exemption and appraisement may be made by his wife, or by any other adult member of his family, or by any other person placed by him in the charge of the property.[4] There is not, unless prescribed by statute, any set form in which to claim an exemption.[5] It may be

[1] Regan *v.* Zeeb, 28 Ohio St. 487.

[2] Code Iowa, sec. 3078.

[3] Malvin *v.* Christoph, 54 Iowa, 562.

[4] Miller *v.* McCarthy, 28 Leg. Int. 221; Taylor *v.* Worrell, 4 Leg. Gaz. 401; Meitzler *v.* Helfrinch, 5 Leg. Gaz. 173; 30 Leg. Int. 216; Waugh *v.* Burket, 3 Grant Cas. 319; Wilson *v.* McElroy, 32 Pa. St. 82; McCarthy's Appeal, 68 Pa. St. 217; Meitzler's Appeal, 73 Pa. St. 368.

[5] Diehl *v.* Holben, 39 Pa. St. 213; Keller *v.* Bricker, 64 Pa. St. 379; Bassett *v.* Inman, 8 Cal. 270.

written or unwritten.[1] It is sufficient if it gives the officer to understand that the property upon which he has levied, or is about to levy, is exempt from execution, and that the defendant desires to avail himself of the exemption. Regarding the time within which the right to exemption must be claimed, there is some difference of opinion. The rule most generally recognized is, that the claim will, under ordinary circumstances, not be too late if made at any time previous to the sale.[2] But in Pennsylvania it must be interposed more promptly. In that state, a defendant having knowledge of a levy upon his property must not by his inaction suffer the plaintiff to incur trouble and expense in preparing for a sale under the writ. After the property has been advertised for sale, the claim for exemption is in that state generally treated as irrevocably waived,[3] except in cases where the debtor had no knowledge of the levy. He cannot be treated as in default, and his rights cut off, when he has no no-

[1] McCluskey *v.* McNeely, 3 Gilm. 578; Simpson *v.* Simpson, 30 Ala. 225; Bowman *v.* Smiley, 31 Pa. St. 225; 72 Am. Dec. 738; Gamble *v.* Reynolds, 42 Ala. 236. In the last-named state, if any moneys or choses in action are garnished which the defendant desires to claim as exempt, he must file a verified claim in the court whence the writ issued, showing specifically what other personal property he has, and its value, and where situated. Code Ala., sec. 2842; McBrayer *v.* Dillard, 49 Ala. 174; Todd *v.* McCravey's Adm'rs, 77 Ala. 468.

[2] Bray *v.* Laird, 44 Ala. 295; Pyett *v.* Rhea, 6 Heisk. 136; Pate *v.* Swann, 7 Blackf. 500; McGee *v.* Anderson, 1 B. Mon. 189; 36 Am. Dec. 570; Chesney *v.* Francisco, 12 Neb. 626; Shepherd *v.* Murrill, 90 N. C. 208; Rice *v.* Nolan, 33 Kan. 28. It has been held that the right may be successfully claimed after the commencement of the sale. State *v.* Emerson, 74 Mo. 607.

[3] Dieffenderfer *v.* Fisher, 3 Grant Cas. 30; Bair *v.* Steinman, 52 Pa. St. 423; Bowyer's Appeal, 21 Pa. St. 210; Kensel *v.* Kern, 4 Phila. 86; Neff's Appeal, 21 Pa. St. 247; Yost *v.* Heffner, 69 Pa. St. 68; Commonwealth *v.* Boyd, 56 Pa. St. 402. As to property garnished, see Landis *v.* Lyon, 71 Pa. St. 473; Zimmerman *v.* Briner, 50 Pa. St. 535. In the case of real estate, the claim should be made before the inquisition. Miller's Appeal, 16 Pa. St. 300; Grant's Appeal, 20 Pa. St. 141; Yardley *v.* Holby, 1 T. & H. Pr. 1089.

tice of their peril.[1] In Iowa the rule formerly prevailed that a debtor, if present at the time of the levy, must then assert his exemption rights. His voluntary surrender of the property to the officer was irretrievable.[2] "We are of opinion," said the court, "the debtor cannot stand by and know the levy is about to be made, and afterward claim the exemption. He must, at the time, in some manner, indicate to the officer his purpose to claim the property as exempt."[3] The code of that state has changed the pre-existing law upon this subject. It declares that "any person entitled to any of the exemptions mentioned in this section does not waive his rights thereto by failing to designate or select such exempt property, or by failing to object to a levy thereon, unless failing or refusing to do so, when required to make such designation or selection by the officers about to levy."[4] "Under this statute, the mere silence of the defendant at the time of the levy, and for two weeks thereafter, cannot estop him from asserting his right of exemption."[5] Where property is seized under attachment, and by the rules of procedure in force a judgment may be entered directing the sale of the property, the debtor's rights are determined by such judgment, and he cannot afterward claim his exemption. The rule applicable to such a case has been thus stated and explained: "The property which it is sought to have released is not held by defendant under execution, but by virtue of an order of sale duly issued in an attachment proceeding

[1] Howard B. & L. A. *v.* P. & R. R. R., 102 Pa. St. 220.

[2] Richards *v.* Haines, 30 Iowa, 576.

[3] Angell *v.* Johnson, 51 Iowa, 626; 33 Am. Rep. 152; Moffitt *v.* Adams, 60 Iowa, 44.

[4] Code Iowa, sec. 3072.

[5] Ellsworth *v.* Savre, 67 Iowa, 450.

from a court of competent jurisdiction. It is in custody of the law, and under the solemn judgment of a court, and so long as that judgment stands unreversed, it is entitled to our respect in all collateral proceedings. When the property was seized in attachment, if the relator claimed and desired to hold it as exempt, he should have brought the matter to the attention of the court in whose custody it was, and thus have obtained its release; or if he preferred so to do, he could at any time before final judgment against him have replevied it from the officer in whose possession it was."[1]

Where the officer has several writs in his hands against the same defendant at the same time, one demand for exemption is probably sufficient; but as to successive writs, the rule is different, and a claim for exemption must be made against each writ.[2] Whenever the law prescribes a method by which the claim for exemption shall be made, a compliance with the method is indispensable to the preservation and assertion of the right.[3] Occasional cases must necessarily arise in which a claim for exemption is not interposed because of the ignorance of the defendant that his rights are in jeopardy. This may happen from sickness or temporary absence, and also from other causes sufficient in their nature to fully exonerate the defendant from the charge of laches or of willful inattention.

[1] State *v.* Krumpus, 13 Neb. 321; State *v.* Manley, 15 Ind. 8; Perkins *v.* Bragg, 29 Ind. 507. For rule in Pennsylvania, see Bettenger's Appeal, 76 Pa. St. 105; Howard B. & L. A. *v.* P. & R. R. R., 102 Pa. St. 220; Cornman's Appeal, 90 Pa. St. 254.

[2] Strouse *v.* Becker, 38 Pa. St. 190; 80 Am. Dec. 474; Betchel's Appeal, 2 Grant Cas. 375; Dodson's Appeal, 25 Pa. St. 232.

[3] Crow *v.* Whitworth, 20 Ga. 38; Gavitt *v.* Doub, 23 Cal. 79; Gresham *v.* Walker, 10 Ala. 370; Collins *v.* Boyd, 56 Pa. St. 402.

The question very naturally arises whether, in such circumstances, his right of exemption is lost. The decisions on the subject are not sufficiently numerous to warrant any positive answer to this question. In Alabama it is settled that the right of exemption, unless claimed, is lost, although the defendant never knew that his property had been levied upon.[1] In California, an action was sustained for selling exempt property, the debtor having been absent on account of sickness at the time of the levy and sale, and having thereby been prevented from claiming the exemption. But in this case it was shown that the plaintiff in execution was aware of the rights of the debtor, he having claimed and procured the release of the same property when taken under a previous writ issued to enforce the same judgment.[2]

§ 212 a. Claiming the Right of Selection.—The debtor may have more of a particular kind of property than is exempt from execution. In this event, he has the right to select which he will claim.[3] The law will not permit the levying officer to make the selection, for if it did, he would doubtless substantially impair the debtor's right of exemption by leaving him the least valuable of the exempt articles.[4] The right to select need not be claimed in any prescribed form. It is sufficient that the debtor shows a preference for the

[1] Bell *v.* Davis, 42 Ala. 460.

[2] Haswell *v.* Parsons, 15 Cal. 266; 76 Am. Dec. 480.

[3] State *v.* Haggard, 1 Humph. 390; Finnin *v.* Maloy, 33 N. Y. Sup. Ct. 382; Elliott *v.* Flanigan, 37 Pa. St. 425; Austin *v.* Swank, 9 Ind. 109; Lockwood *v.* Younglove, 27 Barb. 505; Fuller *v.* Sparks, 39 Tex. 136; Bingham *v.* Maxcy, 15 Ill. 290; Pyett *v.* Rhea, 6 Heisk. 136. But the officer is not liable for selling all where the debtor does not demand the right to select what is exempt. Nash *v.* Farrington, 4 Allen, 157; Clapp *v.* Thomas, 5 Allen, 158.

[4] Parker *v.* Haley, 69 Iowa, 325; Bayne *v.* Patterson, 40 Mich. 658.

property taken, and urges the hardship of the officer's seizing it, rather than the other property then present which the debtor states to be less valuable or useful to him.[1] The right of selection must be so exercised as not to work a fraud upon the creditor by permitting the debtor to select as exempt that which has been levied upon, and at the same time conceal or dispose of other property which might have been levied upon had the right of selection been promptly exercised. If the defendant has a greater number of chattels of any kind than is exempt from execution, and removes or conceals any of them to avoid a levy thereon, this is conceded to be an irrevocable election to claim as exempt the property so removed or concealed, and he will not be permitted to afterward claim in its stead property levied upon. But some of the authorities insist that as long as the defendant does no affirmative act to keep property out of the officer's way, he may select as exempt the property levied upon, without tendering for levy the other chattels in his possession of the same class as those levied upon.[2] The better rule, as we conceive, when there are several articles, out of which the debtor has the right to select a certain number as exempt, is that he must, on being informed of the levy, or within a reasonable time thereafter point out to the officer not only those which he selects as exempt, but also those which remain, and tender the latter to the officer, or at least give him an opportunity to levy thereon.[3] In adopting this rule, the supreme court of California said: "We should not

[1] Clark *v.* Bond, 7 Baxt. 288.

[2] Ross *v.* Hannah, 18 Ala. 125; Bray *v.* Laird, 44 Ala. 296.

[3] Fuller *v.* Sparks, 39 Tex. 136; Smothers *v.* Holly, 47 Ill. 331; Bonnell *v.* Bowman, 53 Ill. 460.

lose sight of the beneficent objects of the exemption laws, or do or say aught to abridge the rights secured thereby. On the other hand, the wise provisions of these laws should not be used as a means for unjustly shielding property not exempt from the claims of creditors. It is quite proper to give the debtor a reasonable time within which to make his selection of that which he will claim, but if he does not do so at the time a levy is made, the opportunities and temptations to dispose of the property not levied upon, or place it beyond the pale of the law, and then claim as exempt that which has been taken in execution, becomes great, and, if yielded to, may result in a fraud upon creditors. If the exemption is claimed at the time of the levy, there being other property of the same kind not claimed, it is reasonable to suppose the officer holding an execution will levy upon that not claimed, and his opportunity to do so shall not be abridged by reason of the claims of exemption being asserted at a later date. We hold, therefore, where, as in this case, the debtor has more property of a particular kind liable to seizure than is exempt from execution, and a writ is levied upon a portion only thereof, leaving as much as is by law exempt, and thereafter the debtor for the first time claims as exempt the property levied upon, or a portion thereof, and leaving in the hands of the officer a less quantity than is necessary to satisfy the writ, then, and in that case, the debtor, to make good his claim of exemption, must offer to surrender to the officer the other property in his hands of the same general kind subject to execution, or so much thereof as may be necessary to satisfy the writ; and failing to do so, he is not entitled to recover against the officer."[1] If the

[1] Keybers *v.* McComber, 67 Cal. 395.

property on which an officer has levied is unquestionably exempt, the debtor not having other chattels of the same kind so as to present the necessity of his electing as between two or more which he will claim as exempt, his right to exemption cannot be denied because of his not tendering for levy other chattels of a different class not exempt from execution.[1] The defendant is always entitled to a reasonable time in which to determine what property he will claim as exempt.[2] With respect to what is a reasonable time, the rule is more strict than in the case of a mere claim for exemption. When the right of the debtor to an exemption has not been denied, and the only question is whether he will select as exempt the property which has been seized rather than that which has been left in his possession, he must exercise reasonable diligence.

In California, a debtor, having more horses than by law were exempt, suffered a levy on part of them to be made, and possession of the property to be retained for four months, when he claimed the right to select those levied upon as exempt. It was held that his right of selection had been lost by his unreasonable delay in exercising it.[3] The selection "must be done so promptly as not to mislead the officer into the belief that the owner acquiesces in the selection which has been made."[4] It has been said that "this selection should

[1] Amend *v.* Murphy, 69 Ill. 337.

[2] Elliott *v.* Flanigan, 37 Pa. St. 425; Austin *v.* Swank, 9 Ind. 109; Pyett *v.* Rhea, 6 Heisk. 136.

[3] Borland *v.* O'Neal, 22 Cal. 504.

[4] Savage *v.* Davis, 134 Mass. 401. In Illinois, the officer may notify the defendant that he holds an execution against him, and will at a time and place designated levy the same. If the defendant neglects to be present for the purpose of making a selection of property to withhold from the levy, he loses the "right to come in, on a day subsequent to the levy, and make a selection of the property he desired to claim." Wright *v.* Deyoe, 86 Ill. 490.

be made by the debtor at the time of the levy, if he be present; but if not present, he should make the selection and notify the officer within a reasonable time thereafter, and before the sale."[1] To require an immediate selection is perhaps too harsh, as it may coerce the debtor into acting while he is surprised and disconcerted by the seizure, and has not reflected sufficiently to exercise a wise forethought. But if he does not make his selection then, he must certainly do so without needless delay, after having notice of the levy.[2] If, on being notified by the officer to appear at a designated time and make his selection, the debtor declines the opportunity, he waives his right to select.[3] An officer about to levy a writ found the defendant in the possession of three horses, upon one of which a levy was made. The defendant claimed it as exempt, but refused to make any selection between it and the other two, on the ground that the title in them was in one Allen, and whether defendant had any interest in them could be ascertained only on a settlement between him and Allen. Trover was subsequently brought for the horse. At the trial, it was proved that defendant owned the three horses, but it did not appear that his

[1] Frost *v.* Shaw, 3 Ohio St. 274; Cook *v.* Scott, 6 Ill. 342.

[2] Zeilke *v.* Morgan, 50 Wis. 560.

[3] Butt *v.* Green, 29 Ohio St. 607. In a case where the debtor had two cows, one of which was exempt, and he delayed for some five or six days to make a selection, the following instruction to the jury was approved: "The plaintiff had the right of election as to which cow should be exempt under the statute. If he failed to elect in a reasonable time, the officer would have the right to make an election for him, and he would be bound by the officer's election. It is a question for the jury to determine whether the plaintiff exercised his right of election within a reasonable time under all the circumstances of the case; that if he did not so elect within a reasonable time, and they should find that the officer in good faith made an election for him, then the plaintiff would be bound by such selection." The jury returned a verdict for the defendant. Savage *v.* Davis, 134 Mass. 403.

ownership had not been dependent on his settlement with Allen, nor that he had sought to mislead the officer. The claim of the horse levied upon was adjudged to be a sufficient selection of it as exempt. The fact that he did not acknowledge the ownership of the others was, under the circumstances, immaterial.[1] The right of selection may be claimed orally as well as in writing.[2] The form of the demand is immaterial. It will be construed with great liberality, and will be adjudged sufficient if its terms are such that an officer of ordinary intelligence would understand therefrom which of the chattels upon which a levy has been made or threatened the debtor prefers to retain as exempt.[3] If the chattels possessed by the debtor do not exceed the exemption allowed him by law; there is no occasion for any selection.

§ 213. **Claiming the Benefit of Appraisement Laws.** —Some of the state statutes, instead of designating specific articles, exempt property not to exceed a specified value. When this is the case, the property to be retained by the debtor is usually ascertained by an appraisement made by his request. The officer, when the claim for exemption and appraisement is made, is required to summon three disinterested and competent persons, who, after being duly sworn, perform the duty of appraisers. In Indiana the claimant must furnish the officer with an inventory of his property, verified by oath,[4] and demand that the amount

[1] Plimpton *v.* Sprague, 47 Vt. 467.

[2] McCluskey *v.* McNeily, 8 Ill. 582; Simpson *v.* Simpson, 30 Ala. 225; Finnin *v.* Malloy, 33 N. Y. Sup. Ct. 390.

[3] See cases last cited.

[4] Mark *v.* State, 15 Ind. 99.

exempt be set off to him.[1] In Pennsylvania, no particular form of claim is required. Thus in deciding whether a claim made by one Holben was in due form, the court of the last-named state said: "The testimony was, that Holben 'warned the defendant not to sell,—that he claimed this under the three-hundred-dollar law,—that he claimed it for his family.' The court held this a sufficient demand. We think it was. The statute does not prescribe the form of the demand; and it would be very adverse to the spirit of the statute to hold a debtor to any technical accuracy in stating his demand. A demand or notice there must be; but any words which are sufficient to apprise the officer that the statutory exemption is the thing claimed is sufficient."[2] If several writs are in the officer's hands at the same time, one demand is sufficient as against all.[3] But a demand against one writ does not operate against subsequent writs.[4] The fact that an appraisement has been demanded, and a set-off made in pursuance thereof, does not prevent a levy on the same property under a subsequent writ, unless the benefit of appraisement is demanded against that writ also.[5] An appraisement may be vacated by the court, if manifestly too low,[6] or if not publicly conducted.[7] In Michigan, an officer levying upon property, part of which is exempt, must have an inventory and appraisement of the whole made, and then allow the debtor to select

[1] Graham *v.* Crockett, 18 Ind. 119.

[2] Diehl *v.* Holben, 39 Pa. St. 216; Keller *v.* Bricker, 64 Pa. St. 379.

[3] Betcher's Appeal, 2 Grant Cas. 375.

[4] McAfoose's Appeal, 32 Pa. St. 276; Dodson's Appeal, 25 Pa. St. 232; Line's Appeal, 2 Grant Cas. 197.

[5] Finley *v.* Sly, 44 Ind. 266.

[6] Sleeper *v.* Nicholson, 1 Phila. 348; Fisher *v.* Hughes, 9 Pittsb. L. J. 50.

[7] Haddy *v.* Sproule, 18 Leg. Int. 141.

which he will retain;[1] but the defendant is not entitled to have the inventory and appraisement embrace property situate out of the county in which the levy is made.[2] A claim made to an officer, and not allowed by him, may be allowed by his successor in office.[3] By the setting off of property to a debtor as exempt, it is released from the execution lien.[4]

§ 214. **Waiver of Exemption Rights.**—In some instances, the claim for exemption may be disallowed, because of some prior act or neglect of the claimant. The consideration of this topic is necessarily involved in the two preceding sections. The claim must be made in the manner and within the time required by the law of the state as expressed in its statutes or in the decisions of its courts. In Iowa, as we have seen, the rule formerly prevailed that the voluntary surrender of the property to the levying officer without then interposing any claim or objection, was an irrevocable waiver of his claim.[5] If such surrender was made by the debtor with a knowledge of his rights, and was accompanied by such words or acts as indicated his intention to renounce the benefit of the law, it would probably afford sufficient reason for holding him estopped from subsequently pressing his claim,[6] especially if it appeared that the judgment creditor had incurred serious expense in keeping the property, or in advertising or preparing it for sale, or had been other-

[1] Comp. Laws, Mich., ed. 1871, secs. 6102, 6103; Elliott *v.* Whitmore, 5 Mich. 532; Wyckoff *v.* Wyllis, 8 Mich. 48.

[2] Alvord *v.* Lent, 23 Mich. 369.

[3] Seibert *v.* Kreibel, 5 Leg. Gaz. 189.

[4] Hall *v.* Hough, 24 Ind. 273.

[5] Richards *v.* Haines, 30 Iowa, 574.

[6] Fogg *v.* Littlefield, 68 Me. 52.

wise substantially damnified by the debtor's conduct. But it has been held that the license to take exempt property could be revoked, and the property reclaimed, at any time prior to the sale.[1] At all events, it seems that the rule to be gathered from the majority of the reported cases on the subject is, that the mere surrender of property to an officer, or the execution of a bond for its surrender to him, does not estop the debtor from subsequently claiming such of the property as may be exempt.[2] Nor can the debtor's rights be prejudiced by the execution of a delivery bond under protest.[3] Nor is a protest essential. The giving of a delivery bond seems not to estop the defendant from claiming his exemption at any time prior to the sale.[4] The delivery of property by a garnishee to an officer to be sold is no waiver of exemption, for the obvious reason that the garnishee, from his want of interest in the property, has no authority to waive anything.[5] If the defendant claims his exemption, and does all the law exacts of him to prevent a sale, there is no ground to impute a waiver to him. Being satisfied that the officer will persist in the sale, he may become the latter's bailee until the sale, and may then bid in the property himself, or procure others to do so, without impairing his right to proceed against the officer by any appropriate action to recover the value of the goods sold, or damages resulting from their seizure and sale.[6] An agreement by a debtor to turn certain exempt

[1] Jordan *v.* Autrey, 10 Ala. 276; Wallis *v.* Truesdell, 6 Pick. 455.

[2] Eltzroth *v.* Webster, 15 Ind. 21; 77 Am. Dec. 78; Perry *v.* Hensley, 14 B. Mon. 474; 61 Am. Dec. 164; Jordan *v.* Autrey, 10 Ala. 276.

[3] Atkinson *v.* Gatcher, 23 Ark. 101; Servanti *v.* Lusk, 43 Cal. 238.

[4] Desmond *v.* State, 15 Neb. 438; Daniels *v.* Hamilton, 52 Ala. 15.

[5] Fanning *v.* Nat. Bank, 76 Ill. 53.

[6] Parham *v.* McMurry, 32 Ark. 261.

property over to his creditors to secure the payment of their debt, or over to a third person to sell for the benefit of creditors, does not justify them in levying an execution thereon, nor preclude him from claiming his exemption rights if they do; for his agreement does not contemplate the forced sale of the property under execution.[1]

§ 214 a. **Forfeiture of Exemption Rights.**— Though the debtor has done nothing indicating any willingness to waive his exemption rights, it may be insisted that he has in some manner forfeited such rights. If exempt goods be so mixed with others that they can no longer be identified, the right of exemption is lost. The claimant must always be able to point out the property claimed.[2] The exempt and non-exempt property having been inextricably blended, the exemption must necessarily be denied as to the whole. Else the creditor is compelled to suffer and the debtor permitted to profit by the act or neglect of the latter. The fact that the debtor has mortgaged,[3] or is about to sell,[4] property, is no waiver of forfeiture of his right to claim its exemption from execution. But the cases in which a forfeiture of exemption rights is claimed with the

[1] Washburn *v.* Goodheart, 88 Ill. 229; Haswell *v.* Parsons, 15 Cal. 266; 76 Am. Dec. 480.

[2] Smith *v.* Turnley, 44 Ga. 243; Roth *v.* Wells, 29 N. Y. 471.

[3] Collett *v.* Jones, 2 B. Mon. 19; 36 Am. Dec. 586; Vaughan *v.* Thompson, 17 Ill. 78; Hill *v.* Johnson, 29 Pa. St. 362; Patten *v.* Smith, 4 Conn. 450; 10 Am. Dec. 166.

[4] Shaw *v.* Davis, 55 Barb. 389; Duvall *v.* Rollins, 68 N. C. 220. In the last-named case the debtor sold the property, but the vendee rescinded the sale. Where a debtor, having two yokes of oxen, sold one yoke conditionally, the other was held exempt. Wilkinson *v.* Wait, 44 Vt. 508; 8 Am. Rep. 391. But sending goods to auction-room was held to be a waiver of exemption rights in Kennedy *v.* Haselton, 4 Chand. 19.

greatest plausibility are those in which he has been guilty of some act of bad faith towards his creditors. In Pennsylvania a debtor who conceals his property, or otherwise attempts to delay or prevent the execution of the writ, forfeits the benefit of the exemption law.[1] This rule does not seem to have its foundation in any provision of the statutes of that state. It resulted from the belief of the judges that these statutes were designed for the exclusive benefit of *honest* debtors, — for those only who would not seek to avoid the operation of the writs directed against them. If, however, we concede that the dishonest are not worthy of the benefits of the exemption laws, it still seems that we should not, as judges, enforce our peculiar ideas until they had met the expressed approval of the legislature. Judges ought not to pronounce sentence where the law has provided no penalty. Besides, it must be remembered that one of the chief objects of these laws is to protect and provide for the debtor's family, and that this object would be partially subverted by making the benefit of the law depend upon the character of the debtor. Hence the position taken by the courts of Pennsylvania has been vigorously, and we think successfully, assailed, as will appear from the following quotation, extracted from an opinion of the highest court in Mississippi: "This exemption is granted without any reference to the merit or demerit of the debtor. It is founded upon a policy that has no relation to the character or conduct of the parties claiming the benefit of it. It is the interest of the state that no citizen should be stripped of the implements neces-

[1] Strouse *v.* Becker, 38 Pa. St. 190; 80 Am. Dec. 474; Carl *v.* Smith, 28 Leg. Int. 366; Emerson *v.* Smith, 51 Pa. St. 90; 88 Am. Dec. 566. See Brackett *v.* Watkins, 21 Wend. 68.

sary to enable him to carry on his usual employment, and that families should not be made paupers or beggars, or deprived of shelter and reasonable comforts, in consequence of the follies, the vices, or the crimes of their head. The right to enjoy the benefit of the exemption does not in any manner depend upon the question whether the party is solvent or insolvent; whether he possesses other slaves or other property, or not; or whether he has or has not made a fraudulent disposition of other property, with intent to hinder and delay his creditors. The statute makes no such exceptions, and it is not for the court to ingraft them upon it."[1] In Missouri a suit for levying upon exempt property was resisted, on the ground that, at the time of the levy, the debtor had other property, which he concealed, to avoid its being levied upon. The court said: "If the defendant in the execution, who claims the property to be exempt, has concealed, or hid, or placed beyond the immediate reach of the officers of justice his property, and this fact be known to the plaintiffs in execution, let them ferret out the hidden property and take steps to reach it, and subject it to the process of the law. The burden should be on their shoulders. They have no right to destroy the obvious intention of the statute in favor of the helpless and needy, when they can so easily reach the hidden or concealed property."[2] The debtor's claim for exemption cannot be successfully resisted on the ground that he has committed perjury in swearing to a false schedule,[3] or has made a fraudulent mortgage, and has property in another county which has not been levied upon,[4] or has other property which he fraudu-

[1] Moseley *v.* Anderson, 40 Miss. 49; Duvall *v.* Rollins, 71 N. C. 218.
[2] Megehe *v.* Draper, 21 Mo. 510; 64 Am. Dec. 245.
[3] Over *v.* Shannon, 91 Ind. 99.
[4] Baldwin *v.* Talbot, 43 Mich. 11.

lently conceals for the purpose of hindering, delaying, and defrauding his creditors.[1] Nor does an attempt by the debtor to prevent a levy by disclaiming all interest in the property and falsely representing it to belong to a third person forfeit, or estop him from enforcing, his exemption rights.[2] The reason for this rule has been thus stated: "The conduct and statements of a party never operate as an estoppel in favor of another party where the latter is not influenced thereby in his subsequent action, and to his prejudice. The fact that respondent disclaimed any ownership of the property in himself, at the time of the levy, had no influence whatever on the officer who made it, for he made it notwithstanding the disclaimer, and afterwards sold the property. The failure of respondent to interpose his claim of exemption as to such property at the time of the levy could not work an estoppel against his making the claim subsequently, for it is neither found nor shown that the officer did, or omitted to do, anything by reason of such act of omission of respondent, or that plaintiff in the execution was in any way prejudiced thereby.[3] If a debtor conveys his property to delay or defraud creditors, he cannot sustain an action for it as exempt, because he has parted with the title, and cannot urge his own fraudulent design for the purpose of defeating his deed.[4] If, however, the conveyance should be vacated for fraud, the exemption rights would revive.

§ 215. **Consequences of Officers Disregarding Claim for Exemption.**—The claim for exemption, when made in due form and in due time, may be dis-

[1] Elder *v.* Williams, 16 Nev. 416.
[2] Wallis *v.* Truesdell, 6 Pick. 455; Farrell *v.* Higley, Hill & D. 87.
[3] McAbe *v.* Thompson, 27 Minn. 134.
[4] Mandlove *v.* Burton, 1 Cart. 39.

regarded by the officer, who may proceed to sell the property as if such claim had not been made. When he does so, the question arises, What are the consequences with respect to the claimant, the officer, and the purchaser at the execution sale? The consequence to the claimant is, that he must vindicate his rights by some appropriate form of action, either common-law or statutory. We have the authority of one case to the effect that he may resist the threatened invasion of his rights to the extent of opposing the officer by force.[1] We apprehend that this is a mistaken view. Its maintenance would make each claimant the judge of the merits of his own claim, and would lead to violence, and even to the loss of life. If this sort of warfare is lawful, we should expect the history of each county to consist largely of the annals of petty battles between the debtor and his friends on the one side, and the officer with the creditor and his friends on the other, and which of the contestants should be deemed riotous criminals, and which applauded as brave defenders of the law, would depend upon the ultimate determination of those numerous issues of law and fact which attends all litigation regarding exemption rights. The consequences to the officer do not, in our judgment, include the right of the claimant to challenge him to physical combat. But he must submit to legal combat of great variety and seriousness, as we shall show in the next section; and the creditor may generally be joined with him, and compelled to share in the results. When the sale has taken place, the vital question to the purchaser is, whether, notwithstanding the sale of the exempt property under execution, the claimant may disregard

[1] State *v.* Johnson, 12 Ala 840; 46 Am. Dec. 283.

the sale and recover the property from the purchaser. As to property exempt under the homestead laws, it is perfectly clear that an execution sale against the objections and in defiance of the rights of the claimant conveys no title whatever;[1] and it seems to be equally well settled that this rule is applicable to other exempt property.[2]

§ 215 a. Actions brought when the Debtor's Claim for Exemption is Denied are either for the recovery of the specific property claimed, or for damages for its conversion or detention. Property seized by an officer acting under a writ from a court of competent jurisdiction is certainly thereby placed in the custody of the law, if his act can be justified by the terms of the writ. Though commanded to seize the property of the defendant, he may take that of a stranger to the writ, and though directed to levy upon that which is subject to execution, he may, in defiance of the debtor's protestations, seize that which is exempt from execution. In either case the question arises, Has the act forbidden by law placed the property in the custody of the law? If it has, then it is certain that the property cannot be reclaimed by an independent action, and replevin therefor does not lie. So far as exempt property is involved, the question has received a statutory answer in many of the states, by the terms of which an affidavit is exacted from the plaintiff, to the

[1] Morris *v.* Ward, 5 Kan. 239; Wing *v.* Hayden, 10 Bush, 276; Beecker *v.* Baldy, 7 Mich. 488; Vogler *v.* Montgomery, 54 Mo. 577; Wiggins *v.* Chance, 54 Ill. 175; Hamblin *v.* Warnecke, 31 Tex. 91; Abbott *v.* Cromartie, 72 N. C. 292; 21 Am. Rep. 457; Kendall *v.* Clark, 10 Cal. 17; 20 Am. Dec. 691; Myers *v.* Ford, 22 Wis. 139.

[2] Paxton *v.* Freeman, 6 J. J. Marsh. 234; 22 Am. Dec. 74; Johnson *v.* Babcock, 8 Allen, 583; Williams *v.* Miller, 16 Conn. 144; Twinan *v.* Swart, 4 Lans. 263.

effect that the property has not been "seized under an execution or an attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure."[1] If exempt property is seized, it may, under these statutes, be recovered by replevin.[2] That in many instances there can be no other adequate remedy is beyond doubt. Cheap, worn, and even dilapidated articles of wearing apparel, and of household furniture, are to the debtor and his family of value wellnigh inestimable, while the amount which he can be awarded for their conversion will rarely more than repay the expenses of the litigation. Nevertheless, if the law be that these chattels cannot be recovered in specie of the officer, it must be tolerated and respected until modified by appropriate legislation. That such was the law in the absence of such legislation was affirmed by the earlier American decisions.[3] Most of the later cases take an opposite view, though the courts were acting under the common law, or under statutes which merely sanctioned the action of replevin when goods were unlawfully detained.[4] The action of trover seems to have been

[1] Code Civ. Proc. Cal., sec. 510; Stats. Mich., ed. 1878, p. 726; Seney's Civ. Code Ohio, sec. 175; Thompson and Steger's Stats. Tenn., sec. 3376; Code N. Y., secs. 206, 207; Rev. Stats. Ind. 1876, p. 89, sec. 133; 2 Dassler's Stats. Kan., p. 676, sec. 3405; Rev. Stats. S. C., ed. 1873, p. 618, sec. 230; Rev. Stats. Wis., ed. 1878, sec. 2718.

[2] Wilson *v.* Stripe, 4 G. Greene, 551; Douch *v.* Rahmer, 61 Ind. 64; Maxon *v.* Perrott, 17 Mich. 332; 97 Am. Dec. 191; Elliott *v.* Whitmore, 5 Mich. 532; Samuel *v.* Agnew, 80 Ill. 556; Cooley *v.* Davis, 34 Iowa, 128; Chapin *v.* Hoel, 11 Ill. App. 309; Carlson *v.* Small, 32 Minn. 492.

[3] Kellogg *v.* Churchill, 2 N. H. 412; 9 Am. Dec. 105; Gist *v.* Cole, 2 Nott & McC. 456; 10 Am. Dec. 616; Spring *v.* Bourland, 11 Ark. 658; 54 Am. Dec. 243.

[4] Mosely *v.* Anderson, 40 Miss. 49; Ross *v.* Hawthorne, 55 Miss. 551; Frazier *v.* Dyas, 10 Neb. 115; 35 Am. Rep. 446; Wilson *v.* McQueen, 1 Head, 17; Harris *v.* Austill, 2 Baxt. 148.

very rarely resorted to against officers for wrongfully taking and selling exempt chattels,[1] and we have been unable to discover any case discussing its appropriateness as a remedy for the wrong. It certainly is an appropriate form of action, for by disregarding the claim of exemption, the officer is guilty of "a conversion, respecting which he may be regarded as a tort-feasor from the beginning."[2] There is little doubt that, except in Vermont,[3] a person denied his exemption rights may successfully prosecute an action of the case for the injury done him.[4]

The one question, however, upon which all the authorities agree is, that the abuse of process of which an officer is guilty when he denies the debtor's exemption rights makes him a trespasser *ab initio*, and that the debtor may properly seek redress in an action of trespass;[5] but it is said that the officer is not liable in this form of action if there was any serious doubt whether the property was exempt,[6] nor if the benefit of exemption or selection was not claimed.[7] In a state like Pennsylvania, where no specific property is exempt, and where on demand it is the duty of the

[1] McCoy *v.* Dail, 6 Baxt. 137; Wolfenbarger *v.* Standifer, 3 Sneed, 661.

[2] McCoy *v.* Brennan, 61 Mich. 362.

[3] Dow *v.* Smith, 7 Vt. 465; 29 Am. Dec. 202.

[4] Van Dresor *v.* King, 34 Pa. St. 201; 75 Am. Dec. 643; Spencer *v.* Brighton, 49 Me. 326; Perry *v.* Lewis, 49 Miss. 443.

[5] Bean *v.* Hubbard, 4 Cush. 85; Dow *v.* Smith, 7 Vt. 465; 29 Am. Dec. 202; Leavitt *v.* Metcalf, 2 Vt. 342; 19 Am. Dec. 718; Bonnell *v.* Dunn, 28 N. J. L. 153; Cornelia *v.* Ellis, 11 Ill. 585; Wymond *v.* Amsbury, 2 Col. 213; Stephens *v.* Lawson, 7 Blackf. 275; Atkinson *v.* Gatcher, 23 Ark. 101; Hall *v.* Penney, 11 Wend. 44; 25 Am. Dec. 601; State *v.* Johnson, 12 Ala. 840; 46 Am. Dec. 283; Freeman *v.* Smith, 30 Pa. St. 264; Wilson *v.* Ellis, 28 Pa. St. 238; Van Dresor *v.* King, 34 Pa. St. 201; 75 Am. Dec. 643; State *v.* Moore, 19 Mo. 369; 56 Am. Dec. 563; State *v.* Farmer, 21 Mo. 160.

[6] Trovillo *v.* Shingles, 10 Watts, 438.

[7] State *v.* Morgan, 3 Ired. 186; 38 Am. Dec. 714; Frost *v.* Shaw, 3 Ohio St. 270.

officer to allow an exemption of a specified value, the sole remedy of the claimant is against the officer for damages.[1] If the judgment creditor directs the levy or sale, he is liable to an action equally with the officer.[2] The sureties on the official bond of the officer are also answerable for his trespass in seizing and selling exempt property.[3] In all actions against officers, it is of course necessary to aver and prove all the facts entitling the party to the exemption, and showing that the officer has knowingly disregarded the claimant's rights.[4] The burden of proof is upon the debtor to show that he belongs to the class of persons who by the statute are entitled to exemption, and that the chattels for the taking of which he sues are such as were exempt. In other words, he is not aided by any presumption, and must offer evidence tending to prove every fact essential to his recovery.[5] In some of the states an officer who refuses to allow a defendant his exemption rights is liable to criminal prosecution, which, if sustained, will result in his being convicted and punished as for a misdemeanor.[6]

§ 215 b. Measure of Damages and Right to Set-off. —When the action is in replevin, the plaintiff may, in

[1] Marks's Appeal, 34 Pa. St. 36; 75 Am. Dec. 631; Hatch *v.* Bartle, 45 Pa. St. 166; 84 Am. Dec. 484; Hammer *v.* Freese, 19 Pa. St. 255; Bonsall *v.* Comly, 44 Pa. St. 442.

[2] Elder *v.* Frevert, 5 West Coast Rep. 52; Spencer *v.* Brighton, 49 Me. 326; Atkinson *v.* Gatcher, 23 Ark. 101; Frazier *v.* Syas, 10 Neb. 115; 35 Am. Rep. 446.

[3] State *v.* Moore, 19 Mo. 369; 61 Am. Dec. 563; State *v.* Carroll, 9 Mo. App. 275; State *v.* Kenan, 94 N. C. 296; Commonwealth *v.* Stockton, 5 B. Mon. 192.

[4] Wolfenbarger *v.* Standifer, 3 Sneed, 659; Pollard *v.* Thomason, 5 Humph. 56; Figueira *v.* Pyatt, 88 Ill. 402.

[5] Alabama Conference *v.* Vaughn, 54 Ala. 443; McMasters *v.* Alsop, 85 Ill. 157; Brown *v.* Davis, 9 Hun, 43; Calhoun *v.* Knight, 10 Cal. 393.

[6] State *v.* Carr, 71 N. C. 106.

addition to the property or its value, recover interest thereon from the time of the wrongful taking to the trial,[1] or, instead of interest, he may recover the value of the use of the property for the same period.[2] Where the action is in trespass or trover, the damages would ordinarily also be the current market value of the property, with interest. But the taking of exempt property may very properly give rise to a claim for exemplary damages. In Michigan it has been held that the jury are not at liberty, "after estimating the actual damages, to go further and give a further sum, limited only by their discretion, by way of punishment and example." But the court further said: "In some cases the damages are incapable of pecuniary estimation; and the court performs its duty in submitting all the facts to the jury, and leaving them to estimate the plaintiff's damages as best they may under all the circumstances. In other cases there may be a partial estimate of damages by a money standard, but the invasion of plaintiff's rights has been accompanied by circumstances of peculiar aggravation, which are calculated to vex and annoy the plaintiff, and cause him to suffer much beyond what he would suffer from the pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. But in all cases it is to be distinctly borne in mind that compensation to the plaintiff is the purpose in view, and any instruction which is calculated

[1] Twinan *v.* Swart, 4 Lans. 263; Spencer *v.* Brighton, 49 Me. 326.

[2] Elder *v.* Frevert, 18 Nev. 446; Allen *v.* Fox, 51 N. Y. 562; 10 Am. Rep. 641; Crabtree *v.* Clapham, 67 Me. 326; Robbins's Adm'r *v.* Walter, 2 Tex. 130; Darby *v.* Cassaway, 2 Har. & J. 413; Butler *v.* Nehring, 15 Ill. 488.

to lead them to suppose that besides compensating the plaintiff they may punish the defendant is erroneous."[1] In Minnesota a jury were instructed that if they should find that the defendants, knowing the property to be exempt, willfully and maliciously attached the same for the purpose of harassing and oppressing the plaintiff, then they would not be limited to the value of the property and interest thereon, but they might award such damages to the plaintiff as they should deem him entitled to under the circumstances. The instruction was approved. As against the objection that there was no evidence of such aggravating circumstances as justified the instruction, the court replied that if the defendants knew the property to be exempt, that was "an aggravating circumstance of the strongest character"; that to such seizure "it is impossible to ascribe any other than a malicious motive. It was a gross outrage upon the rights of plaintiff, which the law does not tolerate, and justly allows damages by way of punishment and example."[2] The effect on a jury of the instruction approved in Minnesota, and an instruction such as that admitted to be proper in Michigan, would be substantially identical, for each would permit the embodiment in the verdict of damages other than pecuniary, to wit, the damages arising from the aggravating circumstance of having one's exempt chattels taken by one who knew them to be exempt.

In Alabama, "exemplary or vindictive damages, as they are indifferently termed, may also be recovered, if the trespass is committed with a bad motive, with

[1] Stetson *v.* Gibbs, 53 Mich. 280.

[2] Lynd *v.* Picket, 7 Minn. 184; 82 Am. Dec. 79.

an intent to harass or oppress or injure; and the fact that it is wantonly, recklessly, or knowingly committed, is a circumstance indicative of malice, and proper matter for the consideration of the jury." But in that state it is the duty of an officer to proceed to levy if indemnified by the plaintiff in the writ, though he may know the property is not subject to execution. He therefore is not guilty of malice or oppression in proceeding to levy on exempt property after being directed so to do by plaintiff and indemnified for proceeding; and it is immaterial that he believed or knew the property to be exempt. "If after indemnity he should proceed to a levy, or to execution of the process, rudely, insultingly, or in an aggravated manner, indicative of malice, or of an intent to harass or oppress or injure, he would be answerable for vindictive damages. A bad, malicious intent, in the commission of a trespass, is always proper matter for the consideration of a jury; for a man acting tortiously, with such an intent, ought, in justice, to be dealt with more harshly than a man who acts ignorantly, without such intent. But when a public officer is in the line of duty, acting in obedience to process, which he cannot with safety refuse to execute, whatever may be his information or knowledge of facts, which, if proved in the course of a judicial investigation, will subject him to liability as a trespasser, it would savor of harshness and oppression, if his liability was increased by the addition of vindictive damages, because of such knowledge or information. Acting in good faith, under instructions and indemnity from the party controlling the process, who is in pursuit of his supposed legal rights, if there are no circumstances of aggravation, no facts indicative of a bad motive, nothing more than

information that the property is not subject to the process, the value of the property taken, with interest to the time of the trial, is the only reparation he can be required to make; this is full compensation to the owner, and all he can in good conscience demand."[1] In some of the states the exemption rights of debtors are protected by statutes allowing the damages to be trebled. Where such statutes are in force the debtor has his election to sue for the penalty thus allowed him, or to proceed by an ordinary action of trespass.[2] If, in an action by a debtor to recover damages for violating his exemption rights, the plaintiff seeks to assert as an offset the judgment against the debtor, or any other debt, such offset must be denied. Otherwise the exemption laws would be futile, for the creditor would always wrongfully take the exempt property, and then pay the damages by pleading his judgment, or some other debt, as an offset.[3]

§ 216. **Agreements to Waive the Benefit of the Exemption Laws** have been the subjects of judicial discussion and decision in several of the states. By these agreements debtors, at the time of incurring a liability, contract with their debtors that they will not, as against any execution issued to enforce a discharge of the liability, claim anything as exempt. It is quite possible that such an agreement, if made by a single man,—one who had no one but himself to suffer for his improvidence,—would be generally sustained. In Pennsylvania it would be enforced against the

[1] Alley *v.* Daniel, 75 Ala. 408.

[2] Amend *v.* Murphy, 69 Ill. 337; Wymond *v.* Amsbury, 2 Col. 213; Shear *v.* Reynolds, 90 Ill. 238.

[3] See § 235; Mulliken *v.* Winter, 2 Duv. 256; 87 Am. Dec. 495.

debtor, whether the head of a family or not;[1] but it does not deprive him of the right to claim exemption as against other liabilities.[2]

The reasons for the rule as laid down in Pennsylvania are thus stated in one of the leading cases on this topic: "When at the time of contracting the debt he (the debtor) agrees to waive the benefit of the exemption,—and this forms the ground of the credit given him,—the injustice of permitting him to violate his contract, and thus to defraud his creditor, is too palpable to need illustration, or to require the aid of precedents to discountenance it. Notwithstanding the benevolent provisions of the statute in favor of unfortunate and thoughtless debtors, it was far from the intention of the legislature to deprive the free citizens of the state of the right, upon due deliberation, to make their own contracts in their own way in regard to securing the payment of debts honestly due. Creditors are still recognized as having some rights; and it is not the intention of the legislature to destroy them by impairing the obligation of contracts. It frequently happens that the creditor is more in need of public sympathy than the debtor. When a poor man is unjustly kept out of money due to him, the distress arising from the want of it is often greater than that caused to the other party by its collection. If the suffering was but equal, it is plain that one man should not suffer for the follies or misfortunes of another; every one should bear his own burden. The statute which exempts debtors from the operation of this principle did not take

[1] Bowman *v.* Smiley, 31 Pa. St. 223; 72 Am. Dec. 738; Smiley *v.* Bowman, 3 Grant Cas. 132; Case *v.* Dunmore, 23 Pa. St. 93; Shelley's Appeal, 36 Pa. St. 373; see Dow *v.* Cheney, 103 Mass. 181.

[2] Thomas's Appeal, 69 Pa. St. 120.

away from them the right to waive the privilege thus conferred whenever their consciences or their necessities prompted the waiver."[1] The constitution of Alabama, in section 1 of article 10, declares that "the personal property of any resident of this state, to the value of one thousand dollars, to be selected by such resident, shall be exempted from sale on execution or other process of any court issued for the collection of any debt contracted since the thirteenth day of July, 1868." By section 7 of the same article, "the right of exemptions hereinbefore secured may be waived by an instrument in writing; and when such waiver relates to realty, the instrument must be signed by both the husband and wife, and attested by one witness." The operation of this provision in the fundamental law of the state is necessarily to authorize a waiver of all chattel exemptions to be made in writing.[2] A waiver of all exemptions signed by the husband alone, though invalid as against the homestead, is valid as against all chattel exemptions.[3] "The intention to make such waiver must be clearly expressed." A written expression is essential; hence a verbal mortgage against exempt property is not enforceable.[4] Under the statutes of Kansas, "a tenant may waive in writing the benefit of the exemption laws of the state for all debts contracted for rents."[5] The courts of Pennsylvania, which we believe are the only ones which have sanctioned prospective waivers of exemption rights, unless compelled to do so by statutory or constitutional provision, have repented of their

[1] Case *v.* Dunmore, 23 Pa. St. 94; Adams *v.* Bachert, 83 Pa. St. 524; White Deer Overseer's Appeal, 95 Pa. St. 191; Spitley *v.* Frost, 5 McCrary, 49.

[2] Brown v. Leitch, 60 Ala. 314; 31 Am. Rep. 42.

[3] Neely *v.* Henry, 63 Ala. 261; Wagnon *v.* Keenan, 67 Ala. 519.

[4] Knox *v.* Wilson, 77 Ala. 309.

[5] Horsington *v.* Huff, 24 Kan. 379.

folly. A statute of that state passed in 1845 declared that "the wages of any laborers, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer." A laborer executed a note containing a waiver of all exemption laws in force in the state. In refusing to enforce such waiver, the supreme court of the state said: "If it were *res integra;* if with the experience and observation we have had we were now for the first time to pass upon the question whether debtors could waive their rights under the act of 1849, or widows theirs under the act of 14th of April, 1851,—we would be very likely to deny it altogether, and stick to the statutes as they are written. And here we have a new case. We have never decided that a debtor may repeal the proviso of the act of 1845, and public policy pleads strongly against such a decision. If we make it, we bring on the litigation which has sprung out of our decision upon the act of 1849,—the inconveniences to employers before adverted to, and the temptation to weak debtors to beggar their families in behalf of sharp and grasping creditors. We will not, therefore, strain the proviso to fit it to our construction of the exemption statutes, but will leave it to its natural operation as it is expressed. The legislature having said that justices shall not attach wages, we will say they shall not, though a particular debtor has said they may. It is to be observed that the garnishee has rights in the premises, and he is under the act of assembly, but is not a party to the agreement which his laborer makes with a creditor. Why should he be annoyed and subjected to costs, his work hindered, and his hands deprived of their daily bread, by an agree-

ment between others to which he was not a party, and of which he had no notice? Why should such an agreement be made a rule of law to garnishees, instead of a statute which they knew of when they made their business arrangements and employed their laborers, and which they had a right to expect would be administered as it is written?"[1]

In the other states, where no statutory or constitutional provision has been enacted or adopted, authorizing agreements waiving the right to claim the exemption of property from execution, such agreements are treated as against public policy, and are declared void. The reasons for thus treating them are well and conclusively stated by Denio, J., in an opinion pronounced in the New York court of appeals. He said: "The statutes which allow a debtor, being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of policy and humanity, which would be frustrated if an agreement like that contained in these notes, entered into in connection with the principal contract, could be sustained. A few words contained in any note or obligation would operate to change the law between those parties, and so far disappoint the intentions of the legislature. If effect shall be given to such provisions, it is likely that they will generally be inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. Every honest man who contracts a debt expects to pay it, and believes he will be able to do so without having his property sold

[1] Firmstone *v.* Mack, 49 Pa. St. 387; 88 Am. Dec. 507.

under execution. No one worthy to be trusted would, therefore, be apt to object to a clause subjecting all his property to levy on execution in case of non-payment. It was against the consequences of this over-confidence, and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the legislature has undertaken to interpose. When a man's last cow is taken on an execution on a judgment rendered upon one of these notes, it is no answer to say that it was done pursuant to his consent, freely given, when he contracted the debt. The law was designed to protect him against his own improvidence in giving such consent. The statutes contain many examples of legislation based on the same motives. The laws against usury, and those which forbid imprisonment for debt, and those which allow a redemption after the sale of land on execution, are of this class. So of the principle originally introduced by courts of equity, and which has been long established in all courts, to the effect that if one convey land as security for a debt, and agree that his deed shall become absolute if payment is not made by the day, he shall be entitled to redeem on paying the debt and interest; and so also of executory contracts without consideration to make gifts, and the like. In these cases, the law seeks to mitigate the consequences of men's thoughtlessness and improvidence; and it does not, I think, allow its policy to be evaded by any language which may be inserted in the contract. It is not always equally careful to shield persons from those acts which, instead of being promissory in their character and prospective in their operation, take effect immediately. One may turn out his

last cow on execution, or may release an equity of redemption, and he will be bound by the act. In thus discriminating, the law takes notice of the readiness with which sanguine and incautious men will make improvident contracts which look to the future for their consummation, when, if the results were to be presently realized, they would not enter into them at all. If, with the consequences immediately before them, they will do the act, they will not generally be allowed to retract; it being supposed, in such cases, that valid reasons for the transaction may have existed, and that, at all events, the party was not under the illusion which distance of time creates. Ordinarily, men are held to their executory as well as their executed contracts; but in a few exceptional cases, where the temptation is great, or the consequences peculiarly inconvenient, parties are not allowed to make valid prospective agreements. The present is, in my opinion, one of those cases."[1] So the court of appeals of Kentucky, in a recent decision, said: "Executory agreements are generally enforced, and as much obligatory on parties as if in fact executed; but there are exceptions to this general rule. No one in this state is entitled to the benefit of the exemption laws but a housekeeper with a family; and the legislature certainly intended by the enactment of such laws to provide more for the dependent family of the debtor than for the debtor himself. Every honest man has a desire to fulfill all his obligations, and such are always willing to comply with the demands of a creditor, by giving to the latter any assurance he may exact as evidence of his intention to pay his debt. The law in its

[1] Knettle *v.* Newcomb, 22 N. Y. 249; 78 Am. Dec. 186.

wisdom for the poor and needy has said that certain property shall not be liable for debt, not so much to relieve the debtor as to protect his family against such improvident acts as reduce the family to want. Such is the policy of the law; and this contract was made not only in diregard of this policy, but to annul the law itself, so far as it affected the debt sought to be recovered. If such a contract is upheld, the exemption law of the state would be a blank upon the statute-book, and deprive the destitute of all claim they have to its beneficent provisions."[1] "Such contracts contravene the policy of the law, and hence are inoperative and void. The owner may, if he chooses, sell or otherwise dispose of any property he may have, however much his family may need; but the law will not aid him in that regard, nor permit him to contract, in advance, his creditor may use the process of the courts to deprive his family of its benefit and use, when an exemption has been created in their favor. Laws enacted from considerations of public concern, and to subserve the general welfare, cannot be abrogated by mere private agreement."[2]

§ 217. **The Liabilities against Which the Benefit** of an exemption law may be claimed are to be discovered, first, by the inspection of the statute, and next, by considering whether the statute is liable to any constitutional objection. In several of the states, the

[1] Moxley *v.* Ragan, 10 Bush, 156; 13 Am. Law Reg., N. S., 743; 19 Am. Rep. 61; Crawford *v.* Lockwood, 9 How. Pr. 547; Maxwell *v.* Reed, 7 Wis. 582; Levicks *v.* Walker, 15 La. Ann. 245; 9 Am. Law Reg. 112; Curtis *v.* O'Brien, 20 Iowa, 376; 89 Am. Dec. 543; Harper *v.* Leal, 10 How. Pr. 282.

[2] Recht *v.* Kelly, 82 Ill. 147; 25 Am. Rep. 301; Carter *v.* Carter, 20 Fla. 558; 51 Am. Rep. 618; Phelps *v.* Phelps, 72 Ill. 545; 22 Am. Rep. 149; Branch *v.* Tomlinson, 77 N. C. 8; Van Wickle *v.* Laudry, 29 Wis. 388; Denny *v.* White, 2 Cold. 283; 88 Am. Dec. 596.

privilege of exemption can be asserted only against judgments founded in contract, and not against judgments founded in tort.[1] Hence in these states there is no chattel exemption against a judgment in ejectment for damages for the unlawful withholding of real estate, nor can parol evidence be received to show, in opposition to the record, that the judgment was of the class against which the exemption was allowable.[2] If the judgment against the husband is for damages occasioned by the tort of his wife, his liability is regarded as founded on tort, and not in the contract of marriage, and he is not entitled to any exemption.[3] A judgment for the amount of a statutory penalty, as where a recovery is had for the penalty given by statute against a mortgagee for failure to acknowledge on the record the satisfaction of his mortgage, is not founded on contract, and therefore not subject to chattel exemptions.[4] Costs are but an incident to the judgment, and so far as exemptions are concerned, must be treated as of the same nature as the judgment. Hence if the plaintiff recovers, the costs are included in and become a part of his judgment, and the exemption does not prevail against him.[5] The rule is the same where, in an action for an alleged tort, the plaintiff fails, and the defendant recovers judgment for his

[1] Kenyon *v.* Gould, 61 Pa. St. 292; Commonwealth *v.* Dougherty, 28 Leg. Int. 14; Lane *v.* Baker, 2 Grant Cas. 424; State *v.* Mclogue, 9 Ind. 196; Lauck's Appeal, 24 Pa. St. 426; Massie *v.* Enyart, 33 Ark. 688. This rule was applied to homestead exemptions in Robinson *v.* Wiley, 15 N. Y. 489; Cook *v.* Newman, 8 How. Pr. 523; Lathrop *v.* Singer, 36 Barb. 396; Davis *v.* Henson, 29 Ga. 345. It is doubtful whether costs are to be regarded as a demand growing out of contract. In re John Owens, 7 Chic. L. N. 371.

[2] Smith *v.* Wood, 83 Ind. 522.

[3] McCabe *v.* Berge, 89 Ind. 225.

[4] Williams *v.* Bowden, 69 Ala. 433.

[5] Massie *v.* Enyart, 33 Ark. 688; State *v.* McIntosh, 100 Ind. 439; Church *v.* Hay, 93 Ind. 323.

costs.[1] In other states the privilege of exemption is available against an execution founded on a judgment for tort, or on a judgment against a defendant in a criminal prosecution, as against an execution for a contract liability.[2] In Arkansas the action for use and occupation "is in all respects of the nature of *assumpsit* at common law on an implied promise, and is an action *ex contractu*, and not *ex delicto*." The judgment recovered in such action is subject to all exemption privileges.[3] In Kansas the personal property of the debtor is not exempt as against the claim of a clerk, mechanic, laborer, or servant, for wages;[4] while in Minnesota it was determined that the legislature was prohibited from making a like exception in the exemption statute, under a constitution commanding that a certain portion of the property of the debtor be exempt from *all* debts.[5]

It has been held that the state cannot be affected by exemption laws, unless the intention to so affect it is declared by the statute in express terms,[6] and this ruling is certainly sustained by a rule whose existence and propriety was always affirmed by the common law, to wit, "that in the construction of statutes declaring or affecting rights and interests, general words do not include the state, or affect its rights, unless it be specially named, or it be clear, by necessary implication, that the state was intended to be included."[7] The

[1] Russell *v.* Cleary, 105 Ind. 502.

[2] This rule was applied for the purpose of exempting homesteads, in Loomis *v.* Gerson, 62 Ill. 11; Conroy *v.* Sullivan, 44 Ill. 451; Smith *v.* Ormans, 17 Wis. 395; Dellinger *v.* Twend, 66 N. C. 206.

[3] St. L., I. M. & S. R'y Co. *v.* Hart, 38 Ark. 112.

[4] Reed *v.* Umbarger, 11 Kan. 206; McBride *v.* Reitz, 19 Kan. 123.

[5] Tuttle *v.* Strout, 7 Minn. 465; 82 Am. Dec. 108.

[6] Commonwealth *v.* Cook, 8 Bush, 220; 8 Am. Rep. 456.

[7] Cole *v.* White County, 32 Ark. 51.

weight of the decisions, however, at the present time is, that as the object of these laws is to secure to the poorest and most numerous class of the community the means of support, the state is within the policy of its own legislation upon this subject-matter, and is therefore bound by these laws, and cannot enforce its claims against the exemptions therein granted,[1] except upon the same cause of action, against which a claim of exemption would be unavailing, if the judgment were in favor of a private person.[2] It is now settled that the right to exemption exists against judgments in favor of the United States. After referring to the various statutes upon the subject of writs of execution from the national courts, the supreme court announced the following conclusion: "It is further to be observed that no distinction is made in any of these statutes on the subject between executions on judgments in favor of private parties, and on those in favor of the United States. And as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that the exemption from levy and sale, under executions of one class, apply equally to all, including those on judgments recovered by the United States."[3] Property is generally, and we believe universally,[4] subject to an execution for the purchase price thereof.[5] A judgment for the conver-

[1] Gladney *v.* Deavors, 11 Ga. 79; State *v.* Williford, 36 Ark. 155; 38 Am. Rep. 34; State *v.* Pitts, 51 Mo. 133; Conroy *v.* Sullivan, 44 Ill. 451; Loomis *v.* Gerson, 52 Ill. 13; Commonwealth *v.* Lay, 12 Bush, 283.

[2] Vincent *v.* State, 74 Ala. 274.

[3] Fink *v.* O'Neil, 106 U. S. 279.

[4] Friedman *v.* Sullivan, 2 S. W. Rep. 785; Behymer *v.* Cook, 5 Col. 395; Rodgers *v.* Brackett, 34 Me. 279.

[5] For application of this rule to homestead cases, see Montgomery *v.* Tutt, 11 Cal. 190; Skinner *v.* Beatty, 16 Cal. 156; McGhee *v.* Way, 46 Ga. 282; Kitchell *v.* Burgwin, 21 Ill. 40; Phelps *v.* Connover, 25 Ill. 309; Barnes *v.*

sion of goods is not, it is said, within the benefit of this rule.[1] It has been held that the judgment must be in favor of the vendor, and therefore that the transferee of a note given for purchase-money has no immunity from the claim for exemption.[2] So if the vendee transfers the property, it is no longer subject to levy under a judgment against the vendee for purchase-money.[3] A judgment is not for the purchase-money, unless it is against the purchaser,[4] and is based upon the contract made between the vendor and the vendee. Hence one who has become a surety for the purchaser, and has been compelled to pay the purchase price, cannot, on recovering against the purchaser, seize property exempt from execution.[5] The contract of the purchaser's surety is not a contract for the payment of purchase-money within the meaning of the statutes of exemption.[6] The judgment must be exclusively for purchase-money. If other items of indebtedness are included, the right to take exempt property is waived.[7] "The principle to be deduced from the cases is, that when a creditor has two classes of claims against his debtor, by uniting them in one suit, and obtaining judgment, he reduces that in which his rights are superior to a level with that in which they are inferior.[8] Where wages are exempt, except in a suit for neces-

Gay, 7 Iowa, 26; Pratt *v.* Topeka Bank, 12 Kan. 570; Stevens *v.* Stevens, 10 Allen, 146; 87 Am. Dec. 630; Buckingham *v.* Nelson, 42 Miss. 417; Ulrich's Appeal, 48 Pa. St. 489; Fehley *v.* Barr, 66 Pa. St. 196; Burford *v.* Rosenfield, 37 Tex. 42; Perrin *v.* Serjeant, 33 Vt. 184.

[1] Hoyt *v.* Van Alstyne, 15 Barb. 568.

[2] Shepard *v.* Cross, 33 Mich. 96.

[3] Haworth *v.* Franklin, 74 Mo. 106.

[4] Buckingham *v.* Nelson, 42 Miss. 417.

[5] Harley *v.* Davis, 16 Minn. 487.

[6] Davis *v.* Peabody, 10 Barb. 91; Smith *v.* Slade, 57 Barb. 637.

[7] Hickox *v.* Fay, 36 Barb. 9.

[8] Holmes *v.* Farris, 63 Me. 318.

saries, they are exempt in an action on a judgment for necessaries. By the judgment in the first action, the old debt is merged or extinguished. The nature of the security is changed. An action on such judgment "is not for necessaries furnished within the meaning of the statute."[1] A judgment for the purchase price of one article seems, in New York, to authorize the taking of other exempt property.[2] Under an execution for the purchase price of a homestead, the debtor's crop raised thereon, if otherwise exempt, is not subject to execution.[3] In some of the states a homestead is not exempt from an execution based on a debt which accrued prior to its purchase[4] or occupancy.[5]

§ 218. Exempt Property may be Sold or Pledged. — The power of the owner of exempt property, unless limited by statute, to sell or encumber is undoubted.[6] The right of exemption is a privilege, but not a restraint. In fact, the owner's power to dispose of exempt property is more absolute than it is over other kinds of property. This is because of the freedom of exempt property from involuntary liens. Not being subject to execution, the owner may sell it, pledge it, or give it away, notwithstanding the existence of judgment or execution liens, and without reference to the rights of his general creditors.[7] In some of the states

[1] Brown *v.* West, 73 Me. 23.

[2] Cole *v.* Stevens, 9 Barb. 676; Snyder *v.* Davis, 47 How. Pr. 147; 1 Hun, 350; Craft *v.* Curtiss, 25 How. Pr. 163; *contra*, Hickox *v.* Fay, 36 Barb. 9.

[3] Johnson *v.* Holmes, 49 Ga. 365.

[4] Laing *v.* Cunningham, 17 Iowa, 510; Tucker *v.* Drake, 11 Allen, 145; Brainard *v.* Van Kuran, 22 Iowa, 261. See § 249.

[5] Hale *v.* Heaslip, 16 Iowa, 451; Hyatt *v.* Spearman, 29 Iowa, 510; Delevan *v.* Pratt, 19 Iowa, 429.

[6] Jones *v.* Scots, 10 Kan. 33; Bevan *v.* Hayden, 13 Iowa, 127.

[7] Pool *v.* Reid, 15 Ala. 826; Godman *v.* Smith, 17 Ind. 152; Vandibur *v.* Love, 10 Ind. 54; Finley *v.* Sly, 44 Ind. 266; Paxton *v.* Freeman, 6 J. J.

this rule is not applicable to homesteads. In these states, judgment liens were held to apply to homestead, so that the alienee of a homestead estate held it subject to sale under judgments against his grantor.[1] But except under statutes clearly indicating that such is to be the case, there is no reason why homesteads should form an exception to the general rule that exempt property may be transferred free of all judgments and executions which were not enforceable against the property in the hands of the vendor.[2] Some limitations in the power of a debtor to dispose of his exempt property have been imposed by statute. Thus in Ohio a married man is prohibited from selling, disposing of, or in any manner parting with any personal property exempt from sale under execution, without first obtaining the consent of his wife. Should he violate this statute, his wife may, in her own name, prosecute to final judgment a civil action for the recovery of the property or the value in money.[3] In Indiana, after real property has been selected as exempt, and has been appraised, and set apart to the debtor, it can no longer be sold by him except by a deed in which his wife unites with him, acknowledged in due form of law.[4] Owing to some ambiguity in

Marsh. 234; 22 Am. Dec. 74; Jones *v.* Scott, 10 Kan. 33; Cook *v.* Baine, 37 Ala. 350; Denny *v.* White, 2 Cold. 283; 88 Am. Dec. 597; Smith *v.* Allen, 39 Miss. 469; Moseley *v.* Anderson, 40 Miss. 49; Buckley *v.* Wheeler, 52 Mich. 1; Frost *v.* Shaw, 3 Ohio St. 270; Vaughan *v.* Thompson, 17 Ill. 78; *ante*, § 197; Kulage *v.* Schueler, 7 Mo. App. 250; Barnard *v.* Brown, 112 Ind. 53.

[1] Hoyt *v.* Howe, 3 Wis. 752; Folsom *v.* Carli, 5 Minn. 335; 80 Am. Dec 429; Tillotson *v.* Millard, 7 Minn. 513; 82 Am. Dec. 112; Smith *v.* Brackett, 36 Barb. 571.

[2] Monroe *v.* May, 9 Kan. 475; Freeman on Judgments, sec. 355; Morris *v.* Ward, 5 Kan. 247; Lamb *v.* Shays, 14 Iowa, 567; Wiggins *v.* Chance, 45 Ill. 175.

[3] Slanker *v.* Beardsley, 9 Ohio St. 589.

[4] Sullivan *v.* Winslow, 22 Ind. 153.

exemption statutes, whereby they purported to exempt certain chattels from forced sale under execution, it has often been insisted that a mortgage thereof is invalid because it cannot be enforced otherwise than by a forced sale. The courts have, with substantial uniformity, denied the claim, and held that the mortgage was valid, and that its foreclosure was not one of the forced sales against which the statute provided. To this extent there may be a valid prospective waiver of exemption rights.[1] Under the statute of Ohio, referred to above, a mortgage of exempt property in which the wife does not assent cannot be enforced against her, because it is within the meaning of that statute a disposing of and parting with property.[2] A mortgage or pledge of exempt property is not an unconditional or general waiver of the mortgagor's exemption rights therein. The waiver entitles the mortgagee or pledgee to subject the property to the satisfaction of his claim, in like manner and with the same effect as if it were not exempt;[3] but with respect to other creditors, the property is exempt to the same extent as before the mortgage was given.[4]

§ 219. **The Constitutionality of Exemption Laws,** when sought to be applied to debts contracted prior to their passage, has been frequently discussed. Chief Justice Taney considered the question incidentally in Bronson *v.* Kinzie,[5] saying: "Undoubtedly, a state may regulate at pleasure the modes of proceeding in its

[1] Patterson *v.* Taylor, 15 Fla. 336; Love *v.* Blair, 72 Ind. 281; Cronan *v.* Honor, 10 Heisk. 533.

[2] Colwell *v.* Carper, 15 Ohio St. 279.

[3] Jones *v.* Scott, 10 Kan. 33; Frost *v.* Shaw, 3 Ohio St. 270.

[4] Collett *v.* Jones, 2 B. Mon. 19; 36 Am. Dec. 586.

[5] 1 How. 315.

courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional." Long prior to the decision of Bronson *v.* Kinzie, it had become well settled that it was within the power of the state legislatures to abolish imprisonment for debt, and to make the abolition applicable to prior as well as to future liabilities.[1] The language of that decision unquestionably led to the conclusion that exemption laws pertained to the remedy merely, and unless so unreasonable as to render unavoidable the inference that they were enacted with the view of impairing the obligation of pre-existing contracts, they were sus-

[1] Sturgis *v.* Crowninshield, 4 Wheat. 200; Beers *v.* Haughton, 9 Pet. 359; Woodfin *v.* Hooper, 4 Humph. 13; Fisher *v.* Lacky, 6 Blackf. 373; Newton *v.* Tibbatts, 2 Eng. 150.

tained and enforced even against such contracts,[1] unless we may regard the decisions in Missouri, upon the statute exempting the property of wives from executions against their husbands, as an exception to the general current of the authorities.[2] But the statutes in regard to homesteads attempted to withdraw property of considerable value from the reach of executions, and occasioned the constitutionality of exemption laws to be discussed anew. It would seem that the principles applicable to the exemption of personal property would apply with equal force to real estate. If a state, without impairing the obligation of contracts, may exempt certain personal property upon which the creditor had a right to rely for payment at the creation of the contract, why may it not also exempt certain real estate? It is true that implements of husbandry and the tools of mechanics, with other means of obtaining livelihood, are almost indispensable to the debtor; but not less so than a place in which to shelter his family. And after all, the question is not one of hardship or of necessity. It is whether the value of the contract made anterior to the passage of the law is impaired by enforcing the law. Whatever the courts may ultimately determine, it will always require a great deal of sophistry to make it seem that an obligation which could be wholly or partly enforced but for the operation of some law is

[1] Hardeman *v.* Downer, 39 Ga. 425; Morse *v.* Goold, 11 N. Y. 281; 62 Am. Dec. 103; overruling Danks *v.* Quackenbush, 1 N. Y. 129, and Quackenbush *v.* Danks, 1 Denio, 128; Rockwell *v.* Hubbell, 2 Doug. (Mich.) 197; Cusic *v.* Douglas, 3 Kan. 123; 87 Am. Dec. 458; Schneider *v.* Heidelberger, 45 Ala. 126; Gray *v.* Munroe, 1 McLean, 528; Evans *v.* Montgomery, 4 Watts & S. 218; Grimes *v.* Bryne, 2 Minn. 89; Stevenson *v.* Osborne, 41 Miss. 119; Mede *v.* Hand, 5 Am. Law Reg., N. S., 82; Bigelow *v.* Pritchard, 21 Pick. 169; Van Hoffman *v.* City of Quincy, 4 Wall. 535; In re John Owens, 7 Chic. L. N. 397.

[2] Cunningham *v.* Gray, 20 Mo. 170; Tally *v.* Thompson, 20 Mo. 277; Harvey *v.* Wickham, 23 Mo. 112; Hockaday *v.* Sallee, 26 Mo. 219.

not impaired by that law. When the constitutionality of homestead laws purporting to be applicable to antecedent debts was first discussed, it was sustained,[1] because it was correctly thought to be upheld by the language of Chief Justice Taney, in Bronson *v.* Kinzie. But later decisions show that state laws or constitutions enlarging homestead exemptions, or creating such exemptions where none before existed, are unconstitutional in so far as they apply to liabilities created before their passage.[2]

These decisions, it is true, are not directly applicable to other exemptions; but the principles upon which they are based are so applicable. Exemptions of inconsiderable value may possibly be allowed a retroactive operation. But we think the course of recent adjudications is such as to confirm the following prediction made by Judge Dillon, in the American Law Register for December, 1865: "On examining anew the decisions of the United States supreme court on the subject of the obligation of contracts, from the earliest down to the latest, we are persuaded that that tribunal will deny the validity of exemption laws as to antecedent obligations."[3] The question has been re-examined by that tribunal, in a case involving the validity of a homestead exemption. The constitution of North Carolina, which took effect April 24, 1868, exempted per-

[1] Hardeman *v.* Downer, 39 Ga. 425; Cusic *v.* Douglas, 3 Kan. 123; Mede *v.* Hand, 5 Am. Law Reg., N. S., 82.

[2] Gunn *v.* Barry, 15 Wall. 610; 5 Leg. Gaz. 193; The Homestead Cases, 22 Gratt. 266; 12 Am. Rep. 507; Grant *v.* Casby, 51 Ga. 450; Cochran *v.* Darcy, 6 Chic. L. N. 230; Jones *v.* Brandon, 48 Ga. 593; Lessley *v.* Phipps, 18 Am. Law Reg., N. S., 236; 49 Miss. 790; Martin *v.* Hughes, 67 N. C. 293; Kibbey *v.* Jones, 7 Bush, 243. But a homestead law not increasing former exemption is valid. Garrett *v.* Cheshire, 66 N. C. 396; 12 Am. Rep. 547; Hill *v.* Kessler, 63 N. C. 437.

[3] Note to Mede *v.* Hand, 5 Am. Law Reg., N. S., 93.

sonal property of the value of five hundred dollars, and the homestead and its appurtenances not exceeding one thousand dollars in value. Before that time, the exemptions allowed in that state were "certain enumerated articles of inconsiderable value, and such other property as the freeholders appointed for that purpose might deem necessary for the comfort and support of the debtor's family, not exceeding in value fifty dollars." After the adoption of the constitution, judgment was recovered upon a pre-existing debt, and the question was, whether it might be satisfied out of the debtor's homestead; and the question was answered in the affirmative. The conclusions announced by the court were that to impair is "to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power, to weaken, to enfeeble; to deteriorate"; that by the constitution a contract is not to be impaired at all; that the impairment "thus denounced must be material"; and that "the remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void."[1] In Mississippi, anterior to the rendition of a judgment the statute exempted one horse or mule. Subsequently this exemption was increased to two horses or mules. In refusing to give this statute a retrospective operation, the court said: "It may now be considered as firmly settled here and elsewhere, that any law which materially increases the amount of property withdrawn from liability to the owner's debts impairs

[1] Edwards *v.* Kearzey, 96 U. S. 595.

the obligation of existing contracts, and is therefore, as to them, unconstitutional. Is an extension of the exemption from one horse to two a material increase in the amount exempted? To a man of wealth it seems inconsiderable; and yet, as to this species of property, it doubles the exemption. To a large class of our population, embracing those most injured as well as those most benefited by exemption laws, the difference between one horse and two is quite material. It is the small farmers and laborers who are most interested in the exemption of two horses rather than one. It is the small trader who will be most injured if the increase is applied to his existing claims. If our present homestead exemption of eighty acres of land should be increased to a hundred and sixty acres, the increase would undoubtedly be considered material. But to the homeless and landless, who comprise so large a portion of our population, and all of whose wealth consists usually of household furniture and one or more head of cattle or horses, a law which doubles the exemption in this species of property is as important as one which doubles the number of acres to a land-holder. These people trade and traffic among themselves, and are creditors as well as debtors. Such a creditor may as well complain of a law which, acting retrospectively, doubles the personal exemption, as the banker or wholesale merchant of one which doubles the homestead."[1] Some of the states have incorporated in their constitutions a specific enumeration of property which shall be exempt from execution. There can be no doubt that the exemptions there expressed cannot be restricted.

[1] Johnson *v.* Fletcher, 54 Miss. 629; 28 Am. Rep. 388. To the same effect are Lessley *v.* Phipps, 49 Miss. 790; Carlton *v.* Watts, 82 N. C. 212.

Whether they can be extended is more questionable. In the only state in which the question seems to have arisen, the decision has been that they cannot.[1]

SECOND. — OF THE PERSONS ENTITLED TO CLAIM THE BENEFIT OF EXEMPTION LAWS.

§ 220. Exemption Laws Apply to All Inhabitants. — Having considered the general principles applicable to the exemption laws, we are now about to treat more particularly of the *persons* and *property* to which these laws apply. In considering the persons entitled to the benefit of these laws, we shall first speak of statutes in which no particular persons are designated; and secondly, of statutes in which exemption is given to a specified class of persons. Unless the statute shows a contrary intent, all *inhabitants* of the state are entitled to the protection afforded by its provisions. Hence a resident alien is, in this respect, as much favored as a citizen.[2] With respect to non-residents who may happen to be temporarily in a state where their property is seized under execution, the courts have been unable to agree. On the one side, it is insisted that the exemption laws are designed solely for the benefit of the poor people resident in the state where they are enacted;[3] and on the other side, it is maintained, with at least equal force, that unless the statute is by its terms restricted to permanent residents, the courts have no authority to make such restriction.[4]

[1] Duncan *v.* Barnet, 11 S. C. 333.

[2] People *v.* McClay, 2 Neb. 7; Cobbs *v.* Coleman, 14 Tex. 594.

[3] Lisenbee *v.* Holt, 1 Sneed, 42; Hawkins *v.* Pearce, 11 Humph. 44; Finley *v.* Sly, 44 Ind. 266; Munds *v.* Cassidey, 98 N. C. 558.

[4] Hill *v.* Lockis, 6 N. H. 263; Lowe *v.* Stringham, 14 Wis. 222; Abercrombie *v.* Alderson, 9 Ala. 981; Haskill *v.* Andros, 4 Vt. 609; 24 Am. Dec. 645. See *ante*, § 209.

§ 221. **Co-tenants and Copartners.**—It often happens that property designated as exempt by statute belongs to two or more persons, either as co-tenants or copartners. The question then arises whether this property must be treated as exempt to the same extent as if held in severalty. The answers to this question are irreconcilable, and the opposing opinions are both supported by very respectable authorities. On the one hand, it has been insisted that the terms of the exemption statutes are such as to indicate that the legislature proposed to deal only with estates in severalty; that there would be great difficulty, and even impropriety, in setting apart to one co-tenant or copartner, to hold as exempt for his sole benefit, property to which he had no claim to any separate possession or enjoyment; and finally, as a result of these and other considerations, that the operation of the exemption laws must be confined to estates in severalty.[1] But, on the other hand, while the right of a partner to the benefit of exemption has been denied, where its allowance was against the consent of his copartners and to the prejudice of the interests of the partnership,[2] yet where these obstacles did not interpose, co-tenants and copartners have been placed on the same footing in a majority of the states, and both have been given the full benefit of the exemption laws. This position, even where the words of the statute do not clearly indicate an intent to deal with undivided interests, is made tenable by the general rule that these statutes must be liberally construed, so as to promote the policy on which they are based, and accomplish

[1] Bonsal *v.* Comly, 44 Pa. St. 442; Pond *v.* Kimball, 101 Mass. 105; Guptil *v.* McFee, 9 Kan. 30.

[2] Till's Case, 3 Neb. 261; Burns *v.* Harris, 67 N. C. 140.

the purposes to which they are directed. Prominent among these purposes is the protection of the poor, by allowing them the implements of their trade, and the other means essential to enable them to gain a livelihood. And where a man is supporting his family by the aid of a team or of tools, or of provisions which he would be entitled to retain if owned by him in severalty, it seems to be a clear perversion of the spirit of the exemption laws to deprive him of a moiety of the property because he is unable to own the whole. Hence, as a general rule, a part interest is, in most of the states, as much exempt from execution as though it were an interest in severalty; and this is true, whether it be held in copartnership or co-tenancy, and whether the execution be for the debt of one owner, or for the debt of all the owners.[1] Where an execution is against two or more persons, each is entitled to the benefit of the statute of exemptions to the same extent, as though the writ were against him as a sole defendant;[2] but where a writ was against a husband and wife, it was held that after he had been allowed the benefit of exemption to the extent of his property, she might also claim exemption as to her property, provided that the allowance to both did not, in the aggregate, exceed in value the amount allowed to the husband by law.[3] That the property of a co-tenant may be exempt from execution ought not to admit of doubt. If the circumstances are such as would entitle him to exempt the whole chattel were he the

[1] Stewart *v.* Brown, 37 N. Y. 350; 93 Am. Dec. 579; Gilman *v.* Williams, 7 Wis. 329; 76 Am. Dec. 219; Burns *v.* Harris, 67 N. C. 140; Gaylord *v.* Imhoff, 1 Cin. Rep. 404; Howard *v.* Jones, 50 Ala. 67, referred to in 13 Am. Law Reg. 457; Radcliff *v.* Wood, 25 Barb. 52; State *v.* Kenan, 94 N. C. 296.

[2] Spade *v.* Bruner, 72 Pa. St. 57; 29 Leg. Int. 350.

[3] Crane *v.* Waggoner, 33 Ind. 83.

owner thereof, they must upon principle be potent to exempt his moiety. The object of the exemption laws was not to exempt estates in severalty merely, but to make some provision for the better maintenance of persons in humble circumstances. If such a person owns but half of a cow or a horse, that half is as much within the letter and the spirit of the exemption laws as the whole would be.[1] Nor is it true that the exemption of this half is any less consistent with the nature of the estate and the rights of the other cotenant than would be its sale under execution. With respect to partnership property, other considerations intervene, and more doubt exists both upon principle and authority. Some of the courts still maintain the right of exemption.[2] "That the several members of a partnership come within the language of the statute and constitution there should be no question, and that they by becoming members of a firm do not place themselves beyond the pale of the reason of the law would seem clear. The same reason which exists for protecting an individual engaged in carrying on business would seem to apply with equal force to each and every member of the firm. The whole object of the law is to prevent a person being stripped of all means of carrying on his business, and in this respect no distinction can exist between those who are members of a firm and those who are not."[3] In Wisconsin, an exemption will be allowed to one partner if his copartners

[1] Newton *v.* Howe, 29 Wis. 531; 9 Am. Rep. 616; Servanti *v.* Lusk, 43 Cal. 238; Rutledge *v.* Rutledge, 8 Baxt. 33.

[2] Blanchard *v.* Paschall, 68 Ga. 32; 45 Am. Rep. 474; Evans *v.* Bryan, 95 N. C. 174; 59 Am. Rep. 233.

[3] Skinner *v.* Shannon, 44 Mich. 86; 38 Am. Rep. 232; Chipman *v.* Kelley, 60 Mich. 438; McCoy *v.* Brennan, 61 Mich. 362.

assent thereto.[1] This is the middle ground between two opposing lines of decision, and, as is usually the case, is less defensible, when logically considered, than either of the extremes between which it lies. For surely the right of exemption was not intended to be dependent on the will of some third person; to exist with respect to some partners, and not to exist with respect to others, as might suit the caprice of the partner whose interests were not involved at all. But the tendency of the recent decisions to deny altogether the right of exemption out of partnership assets is unquestionable, and we think irresistible.[2] Some of them proceed upon the peculiar language of the statute granting the exemption, as where it seems to contemplate that the exemption must be claimed by the head of a family, or that the property shall be selected by some individual, to be by him held and enjoyed in severalty. We apprehend that the true grounds are, that partnership assets are generally acquired and held for purposes of trade and commerce; that neither partner has any specific interest in the firm assets, but only the right to have the business settled and his share paid to him out of what remains; and that each partner has the right to insist on the application of all the assets, in case of necessity, to the satisfaction of the firm debts.

[1] O'Gorman *v.* Fink, 57 Wis. 649; 46 Am. Rep. 50; Russell *v.* Lennon, 39 Wis. 570; 20 Am. Rep. 60.

[2] Gaylord *v.* Imhoff, 26 Ohio St. 317; 20 Am. Rep. 762; State *v.* Spencer, 64 Mo. 355; 27 Am. Rep. 244; White *v.* Heffner, 30 La., pt. 2, p. 1280; In re Handlin, 3 Dill. 290; Gill *v.* Lattimore, 9 Lea, 381; Wise *v.* Frey, 7 Neb. 134; 29 Am. Rep. 380; Baker *v.* Sheehan, 29 Minn. 235; Spiro *v.* Paxton, 3 Lea, 75; 31 Am. Rep. 630; State *v.* Bowden, 18 Fla. 17; Short *v.* McGruder, 22 Fed. Rep. 46; Giovanni *v.* First N. B., 55 Ala. 805; 28 Am. Rep. 723; Love *v.* Blair, 72 Ind. 281.

§ 222. **Head of a Family.** — In many of the states, homestead and other exemptions are allowed to the "heads of families"; and the courts have frequently been required to discuss and decide the question, Who is entitled to the benefit of this exemption? In the dictionaries, a family is defined as being "the collective body of persons who live in one house, and under one head or manager; a household, including parents, children, and servants, and, as the case may be, lodgers or boarders."[1] But it is evident, from the decisions, that the word "family" has, in the exemption statutes, a signification somewhat different from that attributed to it in the dictionaries. In the first place, it is by no means essential that persons, to constitute a family, should reside in the same house. Thus a man who has either a wife or a child dependent on him for support is the head of a family,[2] although he does not reside under the same roof with them.[3] This rule would probably not be applied where the separation of the members of the family is permanent in its character; nor where the head of the family resides in one state, and the other members of the family in another state.[4] A husband would not cease to be the head of a family while his wife and children were temporarily absent from the state.[5] But if he does not live with his wife for a number of years, and has no children, he is not the head of a family.[6] In the second place, it is quite pos-

[1] Webster's Dictionary; Parsons *v.* Livingston, 11 Iowa, 104; Zimmerman *v.* Franke, 34 Kan. 654; Arnold *v.* Waltz, 53 Iowa, 707; 36 Am. Rep. 248.

[2] Barney *v.* Leeds, 51 N. H. 253; Cox *v.* Stafford, 14 How. Pr. 519.

[3] Seaton *v.* Marshall, 6 Bush, 429; 99 Am. Dec. 683; Robinson's Case, 3 Abb. Pr. 466; Sallee *v.* Waters, 17 Ala. 482.

[4] Allen *v.* Manassee, 4 Ala. 554; Abercrombie *v.* Alderson, 9 Ala. 981; Boykin *v.* Edwards, 21 Ala. 261; Keiffer *v.* Barney, 31 Ala. 192.

[5] State *v.* Finn, 8 Mo. App. 261.

[6] Linton *v.* Crosby, 56 Iowa, 386; 41 Am. Rep. 107.

sible for several persons to reside together in the same house, under one head or manager, without constituting a family within the meaning of the exemption statutes. This may happen where a man, having no wife nor children, lives in a house with his servants or other employees. Thus, where an unmarried man employed his brother and his brother's wife to live with him and take care of his house, he was held not, on that account, to be the head of a family. In this case, the court said: "The head of a family primarily is the husband or father. One may be such head, however, without being either. Thus the mother may become such on the death of the husband. So a son having mother and brother and sisters, or either, depending upon him for support, and living in a household which he controls, might be such head. And thus we might state many cases where the party claiming the exemption would be legally entitled to it, and still not be the husband or father. And yet in each case he must, for the purposes of this inquiry, stand in the place of the father. He must be the master in law of the family. In the case before us, the married brother and his wife in no proper sense belong to the family of the plaintiff. He had no control over them, except such as resulted purely and exclusively from contract. He had no right to exact obedience from them, or to direct their movements, except so far as their agreement bound them to take care of the house."[1] Where two or more persons are residing together, one of whom owes the duty of support and protection to the others; and they, on their part, are dependent on him and owe him the duty of obedience, and these correlative duties

[1] Whalen *v.* Cadman, 11 Iowa, 226.

arise out of the *status* of the parties, and not out of a contract between them, other than the contract of marriage, there is undoubtedly a family. Hence a husband and wife, if living together as such, though without children, servants, or other dependents, constitute a family.[1] If the persons living in the same house owe these duties to one another because of some contract relation, as where one is master and the others servants or employees, they do not constitute a family.[2]

But it is by no means necessary that the relation of husband and wife, or parent and child, should exist in every case to constitute a family. One who has living with him, and dependent on him for support, his mother, or brother, or sisters, is the head of a family, and as such entitled to the benefit of the exemption laws.[3] That a son is the head of a family when his mother is living with him and dependent on him for support is unquestionable, for he owes her this duty. But in many instances persons live in the same house, looking to its master for support and protection, which he affords to them, though under no legal obligation to do so. In Georgia such a person is not the head of a family within the meaning of the homestead laws. In that state, the applicant for a homestead, to which only a head of a family was entitled, alleged that "he was the head of a family consisting of his sister, a widow about thirty-eight years old, and her three children.

[1] Kitchell *v.* Burgwin, 21 Ill. 45; Cox *v.* Stafford, 14 How. Pr. 519; Brown *v.* Brown, 68 Mo. 388.

[2] Whaley *v.* Whaley, 50 Mo. 577; Whithead *v.* Nickleson, 48 Tex. 530; Calhoun *v.* McLendon, 42 Ga. 405; Calhoun *v.* Williams, 32 Gratt. 18; 34 Am. Rep. 759.

[3] Parsons *v.* Livingston, 11 Iowa, 104; 77 Am. Dec. 135; Wade *v.* Jones, 20 Mo. 75; 61 Am. Dec. 584; McMurray *v.* Shuck, 6 Bush, 111; 99 Am. Dec. 662; Marsh *v.* Lazenby, 41 Ga. 153; Connaughton *v.* Sands, 32 Wis. 387.

aged seventeen, fifteen, and seven years old, respectively, who are indigent, and mainly dependent on petitioner for support." A demurrer to the petition was sustained, on the following grounds: "The applicant was under no legal obligation to support the persons whom he claimed to be his family, and therefore he was not entitled to a homestead as the head of a family. If the applicant could obtain a homestead as the head of a family of persons whom he was not legally bound to support, then he might enjoy it for his own benefit exclusively, and refuse with impunity to support those for whose benefit he claimed to have obtained it."[1] But this is an isolated case, and deserves so to remain. It is not essential that the head of a family be under a legal obligation to support its dependent members. The ties of consanguinity may be sufficient to cause him to assume the obligation, where the law does not require him to do so. Hence, if he takes charge of the children of a deceased brother or sister, providing for them a home, and standing, by his voluntary act, in the relation of parent toward them, he and they constitute a family.[2] Where the persons residing together under one roof are relatives, recognizing one person as the head or master of the house, the tendency of the recent decisions is to treat him as the head of a family, though such persons are not minors nor dependent on him for support. "The relations existing between such persons must be of a permanent and domestic character, not abiding together temporarily as strangers. There need not, of necessity, be dependence or obligation growing out of the

[1] Dendy *v.* Gamble, 64 Ga. 528.

[2] Arnold *v.* Waltz, 53 Iowa, 706; 36 Am. Rep. 248.

relation."[1] Widowers and widows have been held to be heads of families, when the persons residing with them were not dependent upon them, and did not owe any duty to them other than that resulting from a contract of employment. Thus in Nebraska a widower who was residing on his homestead with a married son, the son's wife, and the wife and children of another married son, then absent at the mines, was adjudged to be entitled to retain such homestead as the head of a family; but this was on the ground that as the homestead existed while its owner was a married man, "neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law."[2] In other states, where a family has existed consisting of a husband and wife, and after his death she continued to maintain a family establishment consisting of herself and servants, she has been held to be the head of a family.[3] These decisions may be regarded as forced from the courts by the manifest injustice and even cruelty of depriving a wife of the protection of the exemption laws, because death has robbed her of the protection and support of her husband. Nevertheless, these circumstances of hardship do not change the signification of the word "family." Servants do not constitute a part of a family. Therefore, their employment by a widow does not make her the head of a family.[4] If the law were otherwise, a widow of suffi-

[1] Tyson *v.* Reynolds, 52 Iowa, 431; Duncan *v.* Frank, 8 Mo. App. 286.

[2] Dorrington *v.* Myers, 11 Neb. 389.

[3] Collier *v.* Latimer, 8 Baxt. 420; 35 Am. Rep. 711; Race *v.* Oldridge, 90 Ill. 250; 32 Am. Rep. 27.

[4] Murdock *v.* Dalby, 13 Mo. App. 41; Kidd *v.* Lester, 46 Ga. 231.

cient pecuniary ability to hire and support servants would be entitled to exemption rights as the head of a family, and would lose those rights when the decadence of her fortune made it impossible longer to incur such an expenditure. As between husband and wife, he must ordinarily be regarded as the head of the family. But if the wife becomes in fact the head of the family, she is entitled to exemption privileges belonging to that position. The reasons for her separation from her husband will not be considered. Whether he abandons her against her wish, or they separate by mutual consent, is immaterial. The material facts in respect to her right to be treated as the head of a family are that she is living separate and apart from her husband, having the charge of her minor children or others dependent on her for support, who are living with her in the family relation, and looking to her as their head. If these facts exist, she is the head of a family.[1] One who is the head of a family does not cease to be so by living in a house controlled by some other person. Hence when a widow and her children go to live with her father, she does not lose the benefit of her exemption as the "head of a family."[2] One who becomes the head of a family after the issue and before the levy of an execution is in Alabama entitled to avail himself of the exemption law.[3] Upon the decease of the husband, the widow, who thereby becomes charged with the care and maintenance of the children, succeeds him as the head of the family. The exemption laws were designed for the benefit of the family, rather

[1] Nash *v.* Norment, 5 Mo. App. 545; State *v.* Slater, 22 Mo. 464; Kenley *v.* Hudleson, 99 Ill. 500; 39 Am. Rep. 31; People *v.* Stitt, 7 Brad. App. 298; Parlet *v.* Stewart, 50 Miss. 717; Fish *v.* Street, 27 Kan. 270.

[2] Bachman *v.* Crawford, 3 Humph. 213; 39 Am. Dec. 163.

[3] Watson *v.* Simpson, 5 Ala. 233.

more than for the benefit of its head. On his death, property before held by him as exempt from execution retains its exempt character in favor of his widow, who succeeds to his exemption rights as a householder or head of the family.[1]

§ 223. **Householders.**—The term "householder" is very nearly synonymous with the phrase "head of a family." According to Webster, the lexicographer, a householder is "the master or chief of a family; one who keeps house with his family."[2] To entitle a person to exemption as a householder, it is by no means essential that he should be living with his family, nor that they should be occupying a house. Thus in New York, one Murray absconded to avoid his creditors. His family had commenced to move from their former residence to the house of his wife's father. While *en route*, their only cow was seized under execution. The plaintiff in execution claimed that, under the circumstances, Murray was not a householder at the time of the levy of the writ; but the court said: "Murray had gone to Ohio, leaving his wife and children living together as a family. They were his *household* and he was their *householder*. To say that a family while in act of removal, and on the highway, may be deprived of their bed and their cow, on execution, because they did not for the time inhabit a dwelling-house, would be a perversion of the statute. So long as they remain together *as a family*, without being broken up and incorporated into other families, the privilege remains. It was designed as a protection for poor and destitute families; and the forlorn and houseless condition of this

[1] Becker *v.* Becker, 47 Barb. 497.
[2] Bowne *v.* Witt, 19 Wend. 475.

family, in the absence of the husband and father, gave them a peculiar claim to the benefit of the statute."[1] It may be that in some states, one who packs up his goods, intending to remove to another state, loses his right to exemption as a householder.[2] But it is quite certain that one who is removing from one part of a state to another part,[3] or who temporarily ceases keeping house, and therefore stores his goods,[4] or who, on account of domestic or other difficulty, temporarily abandons his family,[5] is still entitled to exemption as a householder. The keeping, occupying, and controlling a house may perhaps sometimes entitle a person to be treated as a householder when the other facts do not warrant it. This is unquestionably true in Indiana. A widower is a householder in that state if he keeps house, though his children are grown and have left him without any dependents, nor any household other than his employees or servants.[6] Nor is a bachelor there denied the privileges of a householder if he keeps house with servants, though he has no dependents nor relatives residing with him.[7] While mere housekeeping, or the maintenance and management of a household of servants or employees, may possibly entitle one to the title and privileges of a householder, it is quite clear that the absence of housekeeping will not necessarily deprive one of the title of householder. It may be

[1] Woodward *v.* Murray, 18 Johns. 400. The absconding of the husband does not forfeit the right of the family to exemption. Bonnell *v.* Dunn, 5 Dutch. 435.

[2] Anthony *v.* Wade, 1 Bush, 110.

[3] Mark *v.* State, 15 Ind. 98; Davis *v.* Allen, 11 Ala. 164; Pool *v.* Reid, 15 Ala. 826; O'Donnell *v.* Segar, 25 Mich. 367.

[4] Griffin *v.* Sutherland, 14 Wend. 456.

[5] Carrington *v.* Herrin, 4 Bush, 624; Norman *v.* Bellman, 16 Ind. 156.

[6] Bunnell *v.* Hay, 73 Ind. 452.

[7] Kelley *v.* McFadden, 80 Ind. 536.

that some householders are not heads of families, but all heads of families are householders. If one is the head of a family, to whose support he contributes, he is a householder, though he has no house of his own, and lodges and boards in the house of another person whom he pays therefor.[1] A married woman who continues to provide for the children of a prior marriage may claim exemption as a householder.[2] So also may a father, with whom reside as one family his indigent daughter and her children.[3] To constitute a householder, it is not necessary that the relation of husband and wife or of parent and child should exist. A man living with his sister, they jointly contributing to their support, is a householder;[4] and so is a man who rents a house, hires servants, and keeps boarders.[5] The bad character of a defendant cannot deprive him of his exemption rights. Hence if a prostitute "really had a family which she was bound to provide for, the fact of her improper mode of living would not deprive her of a right to which she was otherwise entitled."[6] The same rule prevails in the case of an unmarried man and woman, and their children living with them as a family. The family exists in fact, if not in law; and there is at least a moral obligation on the part of the man to care for his illegitimate issue.[7]

[1] Lowry *v.* McAllister, 86 Ind. 543; Astley *v.* Capron, 89 Ind. 167. This rule probably does not prevail where the head of the family has come from another state, and occupies a room here at the sufferance of another, as a mere visitor or guest. In such case he is neither a resident nor the head of a family. Veile *v.* Koch, 27 Ill. 129.

[2] Brigham *v.* Bush, 33 Barb. 596.

[3] Blockwell *v.* Broughton, 56 Ga. 390.

[4] Graham *v.* Crockett, 18 Ind. 119.

[5] Hutchinson *v.* Chamberlain, 11 N. Y. Leg. Obs. 248; Van Veehten *v.* Hall, 14 How. Pr. 436.

[6] Bowman *v.* Quackenboss, 3 Code R. 17.

[7] Bell *v.* Keach, 80 Ky. 42.

§ 224. **Teamster — Agriculturist.** — "In common speech, a teamster is one who drives a team; but in the sense of the statute, every one who drives a team is not necessarily a teamster, nor is he necessarily not a teamster unless he drives a team continually. In the sense of the statute, one is a teamster who is engaged, with his own team or teams, in the business of teaming, — that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business of teaming habitually, and for the purpose of making a living by that business. If a carpenter, or other mechanic, who occupies his time in labor at his trade, purchases a team or teams, and also carries on the business of teaming by the employment of others, he does not thereby become a teamster in the sense of the statute. So of the miner, farmer, doctor, and minister."[1] A teamster may, if his capital or credit is sufficient, own several teams, and may employ others to attend to the manual labor. He need not personally drive either of the teams. It is sufficient that his business is that of teaming. If he "owns more than one team, that is, if he owns more than two horses or mules, and their necessary harness and equipments, and more than one wagon, it is his right and privilege under the law to select and designate two animals and their harness, etc., and one wagon, suitable for use therewith, or with two animals, as his exempt property, and when so selected and pointed out, the law will recognize and protect them as his exempt

[1] Brusie *v.* Griffith, 34 Cal. 302; 91 Am. Dec. 695. Contracting to do work which will require the team to be used outside of the state does not affect the teamster's right of exemption. Whicher *v.* Long, 11 Iowa, 48.

property, provided they were actually in use by such teamster in his business of teaming, by which he earned his living at the time of the levy by an officer; and such selection may be made without regard to the value or quality of the property selected."[1] Under the statute of California, it is essential that the person claiming exemption as a teamster "habitually earn his living by the use of his team."[2] Therefore the fact that the claimant is engaged in another business, as where he is a dealer in coal, and uses his team in hauling coal to his place of business and in delivering it to customers, is fatal to his claim.[3] If, however, he is engaged in no other business, he does not lose his right to exemption as a teamster or hackman, by turning his horses temporarily out at pasture and sending his hack to the shop for repairs.[4] Some exemptions are allowed by statute only to persons engaged in agriculture, or "in the science of agriculture." An agriculturist is a husbandman; one engaged in the tillage of the ground, the raising, managing, and fattening of live-stock, or the management of a dairy. The question most difficult of solution is not with respect to the character, but to the amount of business required to constitute an agriculturist. If a man is engaged in another business, and merely cultivates a small tract of land adjacent to his dwelling, it seems clear that he is not engaged in agriculture.[5] On the other hand, where it appeared that the claimant farmed about forty-five acres of land, raising buckwheat, potatoes, corn, oats, and some wheat, he was held to be one "engaged in the science of agriculture, though he lived at another place, at which he kept

[1] Elder *v.* Williams, 16 Nev. 420.
[2] Code Civ. Proc., sec. 690.
[3] Dove *v.* Nunan, 62 Cal. 400.
[4] Forsyth *v.* Bower, 54 Cal. 639.
[5] Simons *v.* Lovell, 7 Heisk. 510.

a boarding-house, and sometimes worked as a tailor. The views of the court were as follows: "A person is 'actually engaged in the science of agriculture' when he derives the support of himself and family, in whole or in part, from the tillage and cultivation of fields. He must cultivate something more than a garden, though it may be much less than a farm. If the area cultivated can be called a field, it is agriculture, as well in contemplation of law as in the etymology of the word. And if this condition be fulfilled, the uniting of any other business, not inconsistent with the pursuit of agriculture, does not take away the protection of the act. The keeping a tavern and boarding-house, and the working at his trade as a tailor, in the intervals of the seasons for farming, did not divest Lewis of the benefits which the statute was intended to secure to him. The act extends its protection over the property of the agriculturist during the winter, when he is obliged to suspend his labors in the field, as effectually as in the summer, while actively engaged in rearing or harvesting crops."[1] One who is a farmer is entitled to exemption as such, though he owns no farm and has none leased, if he has not abandoned the business of farming.[2]

§ 225. **A Person may Exercise Two Trades**; as, when he obtains his livelihood from a farm, and also from a workshop. In this case the question arising is, whether he shall be allowed exemption as a farmer or as a mechanic, or as both. In Michigan the question is answered by a statute allowing exemption in the business in which the debtor is *principally* engaged.[3]

[1] Springer *v.* Lewis, 22 Pa. St. 193.

[2] Hickman *v.* Cruise, 72 Iowa, 528.

[3] Morrill *v.* Seymour, 3 Mich. 64; Kenyon *v.* Baker, 16 Mich. 373; 97 Am. Dec. 158.

He is deemed to be principally engaged in that business to which he devotes the most time, although it may yield less profit than some of his other occupations.[1] Where the statute is not so specific as that of Michigan, it has been held that the debtor cannot, by multiplying his employments, "claim cumulatively several exemptions, created by statute for several distinct employments. Thus one person cannot claim the exemption of his library and office furniture as a professional man, and at the same time have exempted to him tools and implements for the purpose of carrying on his trade or business as a mechanic or miner. The mere fact, however, that a debtor carries on two or more trades or professions at the same time does not deprive him of all exemptions. If he has two separate pursuits, the exempted articles must belong to him in his main or principal business. In other words, to the business in which he is principally engaged."[2] In another case it was said that the debtor has the right to elect under which trade he will claim.[3] An agriculturist may employ a portion of his time in some other business without losing his right of exemption as an agriculturist.[4] If a man is engaged in the business of editing and publishing a newspaper, carrying on a job printing-office, also in the loan, land, and insurance business, and is also a justice of the peace, he is entitled to hold as exempt his printing-press and type used in printing his newspaper if that is his principal business.[5] In many states exemptions are allowed

[1] Smalley *v.* Masten, 8 Mich. 529; 77 Am. Dec. 467.

[2] Jenkins *v.* McNall, 27 Kan. 532; 41 Am. Rep. 422; Bevitt *v.* Crandall, 19 Wis. 531.

[3] Lockwood *v.* Younglove, 27 Barb. 505.

[4] Springer *v.* Lewis, 22 Pa. St. 191.

[5] Bliss *v.* Vedder, 34 Kan. 57; 55 Am. Rep. 237.

to all persons, or to all heads of families, and additional exemptions are provided for persons filling certain trades. In such cases, while a man cannot claim exemption for more than one trade or calling, he may have the exemption provided for heads of families, and also the exemption allowed to persons of his calling.[1] The rule that one engaged in distinct and diverse callings cannot cumulate exemptions on account thereof meets with general concurrence. But if the different callings are of the same nature, as where they both require the use of mechanical tools, the application of the rule has been frequently denied.[2] Thus in Massachusetts, where it was claimed that a man could not have allowed him, as exempt, stock in trade as a painter, and also as a carriage-maker, the court denied the claim, saying: "There is no settled rule of division or distinction between different trades in this country, and changes are in constant progress by which the divisions of labor and trade are multiplying, especially in large towns where business is prosecuted on a large scale. The business of house-building, for example, is divided into a great number of separate trades; and if the distinction contended for here were to be adopted, the tools of a joiner used in making windows would not be exempted if he was also engaged in making stairs, and possessed tools adapted to that business. This view of the statute was taken in Pierce *v.* Gray, 7 Gray, 67, where it was held that one whose general business was the ice business, and whose tools of trade in that business were exempt, might also hold as exempt his tools for farming or gardening."[3] Indeed, the

[1] Harrison *v.* Martin, 7 Mo. 286.

[2] Stewart *v.* Welton, 32 Mich. 56.

[3] Eager *v.* Taylor, 9 Allen, 156. See also Patten *v.* Smith, 4 Conn. 455.

case of Pierce *v.* Gray, here referred to, seems to be wholly irreconcilable with the rule. But in that case the principal business of the defendant was the ice business. The only articles held to be exempt which were not used in that business were a shovel, pickax, and a dung-fork with which defendant was accustomed to work in the summer time in and about his garden and stable. Without adverting to the debtor's dual occupation, if merely attending to his stable and garden can be called an occupation, the court said: "In the country farming or gardening is or ought to be part of every man's business; and the soundest policy, as well as the language of the statute, forbids the taking of any of the tools so necessary to all good husbandry."[1]

THIRD. — OF VARIOUS CLASSES OF EXEMPT PROPERTY.

§ 226. **Tools.** — In most of the states, tools are exempt from execution when owned by the defendant, and used by him in earning his livelihood. By some of the statutes, the exemption is confined to the tools of mechanics, while in others it is extended to every debtor in whose trade or occupation tools are necessary. The object of these statutes is to save to the debtor the means of earning his support. Hence the debtor cannot claim as exempt tools not necessary to *his* trade;[2] nor is he entitled to his exemption after having abandoned his trade;[3] nor where he has never exercised the trade for which the tools claimed are designed.[4] Thus where one's business was that of a hotel-keeper,

[1] Pierce *v.* Gray, 7 Gray, 67.

[2] Grimes *v.* Bryne, 2 Minn. 104.

[3] Davis *v.* Wood, 7 Mo. 162; Atwood *v.* De Forest, 19 Conn. 518; Norris *v.* Hoitt, 18 N. H. 196; Willis *v.* Morris, 66 Tex. 633; 59 Am. Rep. 634.

[4] Atwood *v.* De Forest, 19 Conn. 513.

he is not entitled to hold as exempt a grain-drill which he had been in the habit of hiring to contractors and others who were putting in wheat.[1] One who has abandoned a trade or calling is no longer entitled to the exemptions attaching thereto. A cessation is not necessarily, and perhaps not ordinarily, an abandonment. With respect to tools, the statute does not require that the claimant should habitually earn his living with them.[2] He may engage in other business not amounting to any abandonment of his trade. If he is a member of a manufacturing firm, he does not lose his right to claim his tools as exempt by traveling in the interest of the firm.[3] So if he fails in business, makes an assignment for the benefit of creditors, and is, in consequence thereof, idle and without employment, he cannot on that account, so long as he engages in no other business, be properly regarded as having abandoned the trade in which he was engaged at the time of such assignment.[4] His enlistment as a volunteer soldier in time of war, placing his tools with a friend for safe-keeping, is not an abandonment of his trade.[5] "The distinction between withdrawing from the pursuit of a particular trade or occupation with a determination never to resume it, and a temporary diversion from its prosecution, while engaged in conducting some other business or enterprise not intended to be of permanent or durable continuance, is clear and definite. To secure himself the privileges and benefits intended to be conferred by the provisions of the statute,

[1] Reed *v.* Cooper, 30 Kan. 574.
[2] Perkins *v.* Wisner, 9 Iowa, 320.
[3] Willis *v.* Morris, 66 Tex. 633; 59 Am. Rep. 634.
[4] Caswell *v.* Keith, 12 Gray, 351; Harris *v.* Haynes, 30 Mich. 140
[5] Abrams *v.* Pender, Busb. 260.

an artisan is not required to ply his trade without a possible intermission or the occurrence of any interruption in its pursuit. If, for instance, owing to the usual stagnation of business, he cannot for a season find remunerative employment in carrying it on, or if from personal infirmity or other intervening impediment it becomes necessary or expedient that he should resort temporarily to some other department of industry to obtain means of supporting himself and his family, he cannot, as long as he entertains an intention to return as soon as circumstances will permit to occupation and employment in his trade, be said to have given up or abandoned it. The tools and implements requisite to carry it on in the usual and ordinary manner in which such business is conducted, are in the mean time still things of necessity to him within the meaning of the law."[1] The defendant cannot, as a general rule, claim more tools than are necessary for his own personal use. Hence if a man engages in manufactures in which it is necessary that he should own a large amount of tools to be used by his employees, these are not usually regarded as exempt.[2] So where a man owns tools, and not being a mechanic employs another to use them, whether in a factory or not, they are not exempt.[3] But the fact that a mechanic employs an apprentice or assistant does not necessarily make him a manufacturer, nor does it necessarily follow that the tools used by the assistant are subject to execution; for the tools used by the principal and assistant may not, in the aggregate, exceed the number ordinarily required in carrying on

[1] Caswell *v.* Keith, 12 Gray, 351.

[2] Richie *v.* McCauley, 4 Pa. St. 472; Smith *v.* Gibbs, 6 Gray, 298; Atwood *v.* De Forest; 19 Conn. 513; Seeley *v.* Gwillim, 40 Conn. 106.

[3] Abercrombie *v.* Alderson, 9 Ala. 981.

the trade. Thus in Massachusetts, where a jeweler carrying on his trade with the aid of an apprentice, and that portion of the tools used by the latter was levied upon, the court held them to be exempt, saying: "The exemption is not limited merely to the tools used by the tradesman *with his own hands*, but comprises such, in *character* and *amount*, as are necessary to enable him to prosecute his appropriate business in a convenient and usual manner; and the only rule by which it can be restricted is that of good sense and discretion, in reference to the circumstances of each particular case. It would be too narrow a construction of a humane and beneficial statute to deny to tradesmen —whose occupation can hardly be prosecuted at all, much less to any profitable end, without the aid of assistants, as journeymen and apprentices — the necessary means of their employment."[1]

In interpreting a statute exempting "such tools as may be necessary for upholding life," the supreme court of Vermont employed the following language: "The word 'tools,' in this statute, has long been held to extend to such farming tools as are used by hand, and to include hoes, axes, pitchforks, shovels, spades, scythes, snaths, cradles, dung-forks, and other tools of that character. But it is not to include machinery, or implements used by oxen and horses, as carts, plows, harrows, mowers and reapers, etc. We think this is the sound and reasonable construction of the statute. And we see no reason why one who carries on farming to any extent should not have an adze, broad-ax, augers, and such simple mechanical tools exempt from

[1] Howard *v.* Williams, 2 Pick. 83; Willis *v.* Morris, 66 Tex. 633; 59 Am. Rep. 634. The tools of a master workman are exempt. Parkerson *v.* Wightman, 4 Strob. 363.

attachment as are indispensable for repairing farming implements, and which he procures for his own use, and which he in fact uses as much as a mechanic. He is or may be compelled to perform such mechanical work, in order to get along with his ordinary farming operations, and if so, he must have the tools, and should hold them exempt from execution."[1] The supreme court of New Hampshire said that: "The word 'tools,' as used in these statutes, is presumed to embrace such implements of husbandry, or of manual labor, as are usually employed in and are appropriate to the business of the several trades or classes of the laboring community, and according to the wants of their respective employments or professions."[2] The word "tool" is usually understood as designating something of a simple nature, and comparatively free from complication. Hence though a machine may possibly be so simple in its construction and operation as to be exempt as a "tool,"[3] this is very rarely the case. In the vast majority of cases where the question has arisen for decision, machines have been held subject to execution.[4] Where the statute exempted "the proper tools and implements of a farmer," the court held that the statute

[1] Garrett *v.* Patchin, 29 Vt. 248; 70 Am. Dec. 414.

[2] Wilkinson *v.* Alley, 45 N. H. 551. "Working tools" include, in addition to the tools in ordinary use by a mechanic, such other contrivances as the defendant may have adopted to facilitate or diminish his labor. Healy *v.* Bateman, 2 R. I. 454; 60 Am. Dec. 94. The tools, implements, and fixtures of a milliner are exempt. Woods *v.* Keyes, 14 Allen, 236; 92 Am. Dec. 766.

[3] Daniels *v.* Hayward, 5 Allen, 43; 78 Am. Dec. 731.

[4] Henry *v.* Sheldon, 35 Vt. 427; 82 Am. Dec. 644; Kilburn *v.* Deming, 3 Vt. 404; 21 Am. Dec. 543; Richie *v.* McCauley, 4 Pa. St. 471; Atwood *v.* De Forest, 19 Conn. 518; Seeley *v.* Gwillim, 40 Conn. 106; Kilburn *v.* Demming, 2 Vt. 404; 21 Am. Dec. 543; Batchelder *v.* Shapleigh, 10 Me. 135; 25 Am. Dec. 213; Knox *v.* Chadbourne, 28 Me. 160; 48 Am. Dec. 487. A weaver's loom was held to be a tool in McDowell *v.* Shotwell, 2 Whart. 26. A gin and grist-mill are not exempt as tools. Cullers *v.* James, 66 Tex. 494.

applied only to the ordinary and usual implements of husbandry, and therefore that it did not exempt thrashing machines.[1] In some instances printing-presses and type used by a practical printer have been held to be tools of his trade;[2] in others a different conclusion has been sustained.[3] In New York it has been held that a watch may, in some instances, be exempt as a working tool or as necessary household furniture.[4] The chair and foot-rest used by a barber have been decided to be exempt as tools of his trade;[5] but it is held otherwise in regard to the horse of a farmer[6] and the library of a lawyer.[7]

The question frequently arises whether, under a statute exempting mechanical tools, or the tools of a mechanic, the instruments of a professional man are protected from execution. In New York surgical instruments have been exempted as tools.[8] In Michigan, in construing a statute exempting "mechanical tools," and determining whether it applied to the tools of a dentist, the supreme court said: "A dentist in one sense is a professional man, but in another sense his calling is mainly mechanical, and the tools which he employs are used in mechanical operations. Indeed,

[1] Meyer *v.* Meyer, 23 Iowa, 359; 92 Am. Dec. 432; Ford *v.* Johnson, 34 Barb. 364.

[2] Patten *v.* Smith, 4 Conn. 450; 10 Am. Dec. 166; Sallee *v.* Waters, 17 Ala. 482; Prather *v.* Bobo, 15 La. Ann. 524.

[3] Spooner *v.* Fletcher, 3 Vt. 133; 21 Am. Dec. 599; Frantz *v.* Dobson, 64 Miss. 631; 60 Am. Rep. 68; Danforth *v.* Woodward, 10 Pick. 423; 20 Am. Dec. 531; Buckingham *v.* Billings, 13 Mass. 82.

[4] Bitting *v.* Vandenburgh, 17 How. Pr. 80. See also Rothschild *v.* Boelter, 18 Minn. 361.

[5] Allen *v.* Thompson, 45 Vt. 472.

[6] Wallace *v.* Collins, 5 Ark. 41; 39 Am. Dec. 359; *contra*, as to doctor's horse and buggy, Richards *v.* Hubbard, 59 N. H. 158; 47 Am. Rep. 188.

[7] Lenoir *v.* Weeks, 20 Ga. 596.

[8] Robinson's Case, 3 Abb. Pr. 466.

dentistry was formerly purely mechanical, and instruction in it scarcely went beyond manual dexterity in the use of tools; and a knowledge of the human system generally, and of the diseases which might affect the teeth, and render an operation important, was by no means considered necessary. The operations of the dentist are still for the most part mechanical, and so far as tools are employed, they are purely so; and we could not exclude these tools from the exemption which the statute makes without confining the construction of the statute within limits not justified by the words employed."[1] But in Mississippi, where a statute provided for the exemption of the "tools of a mechanic necessary for carrying on his trade," the court gave the following as its interpretation of the statute: "A dentist cannot be properly denominated a 'mechanic.' It is true that the practice of his art requires the use of instruments for manual operation, and that much of it consists in manual operation; but it also involves a knowledge of the physiology of the teeth, which cannot be acquired but by a proper course of study; and this is taught by learned treatises upon the subject, and as a distinct, though limited, department of the medical art, in institutions established for the purpose. It requires both science and skill; and if such persons could be included in the denomination of 'mechanics,' because their pursuit required the use of mechanical instruments and skill in manual operation, the same reason would include general surgeons under the same denomination; because the practice of their profession depends in a great degree upon similar instruments and operative skill. Nor could such a pursuit properly be said to be

[1] Maxon *v.* Perrott, 17 Mich. 332; 97 Am. Dec. 191. The instruments of a dentist are exempt in Louisiana. Duperron *v.* Communy, 6 La. Ann. 789.

a 'trade.' That term is defined to denote 'the business or occupation which a person has learned, and which he carries on for procuring subsistence or for profit, — particularly a mechanical employment, distinguished from the liberal arts and learned professions, and from agriculture.' It is manifest that a pursuit requiring a correct knowledge of the anatomy and physiology of a part of the human body, as well as mechanical skill in the use of the necessary instruments, could not be properly denominated a *trade*."[1]

A photographer has been held not to be a mechanic, and therefore not entitled to the exemptions of a mechanic. "The photographer is an artist, not an artisan, who takes impressions or likenesses of things and persons on prepared plates or surfaces. He is no more a mechanic than the painter who, by means of his pigments, covers his canvas with the glaring images of natural objects. And his tent, bins, camera-stand, camera-box, head-rest, bath-holder, etc., are no more tools, within the meaning of the exemption laws, than the tent, stool, easel, hand-rest, brushes, pigment-box, and paints, glaze, etc., of the painter. The exemption was not intended to extend to these artists, and their tools of trade."[2] The building in which a photographer carries on his business, though personal property, is not a "tool," or "instrument."[3]

§ 226 a. **Implements, Utensils, etc.**—In some of the statutes of exemptions words are used nearly synony-

[1] Whitcomb *v.* Reid, 31 Miss. 567; 66 Am. Dec. 579. A person engaged in the business of a merchant is not entitled to exemption of a wagon as a tool for carrying on his business. Gibson *v.* Gibbs, 9 Gray, 62; Wilson *v.* Elliott, 7 Gray, 69.

[2] Story *v.* Walker, 11 Lea, 517; 47 Am. Rep. 305.

[3] Holden *v.* Stranahan, 48 Iowa, 70.

mous with the word "tools," and yet apparently of a more extensive signification. Thus in some statutes "farming utensils or implements of husbandry," the tools or implements of a mechanic or artisan, are exempted;[1] in others the exemption is of "the proper tools and implements of a farmer," or "the proper tools, instruments, or books of the debtor, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor,"[2] or "necessary tools and implements of any, mechanic miner, or other person, used and kept for the purpose of carrying on his trade or business."[3] So far as we are aware, none of the courts have undertaken to define the word "implements" as used in these statutes. The lexicographers define it as "whatever may supply a want; especially an instrument or utensil as supplying a requisite to an end; as the implements of trade, of husbandry, or of war"; and a utensil they declare to be "that which is used; an instrument, an implement; especially an instrument or vessel used in a kitchen, or in domestic and farming business." By the courts these words are accorded a broad signification, and exempt many things which are not tools. Thus statutes exempting implements or utensils have been adjudged to exempt a printing-press, type, and other articles used in publishing a newspaper,[4] a piano used by a music teacher, and upon which she relied for support,[5] a mower suitable for use by a farmer,[6] a lamp and show-cases used by a mechanic,[7] articles used by the owner in making

[1] Code Civ. Proc. Cal., sec. 690; Elder *v.* Williams, 16 Nev. 421.

[2] Code Iowa, sec. 3072.

[3] Bliss *v.* Vedder, 34 Kan. 59; 55 Am. Rep. 237.

[4] Bliss *v.* Vedder, 34 Kan. 59; 55 Am. Rep. 237; Sallee *v.* Waters, 17 Ala. 482; Green *v.* Raymond, 58 Tex. 80; 44 Am. Rep. 601.

[5] Amend *v.* Murphy, 69 Ill. 337.

[6] Humphreys *v.* Taylor, 45 Wis. 251; 30 Am. Rep. 738.

[7] Bequillard *v.* Bartlett, 19 Kan. 385; 27 Am. Rep. 120.

cheese-vats, cheese-presses, curd-knives, cheese-hoops, and hoisting apparatus,[1] a clock, stove, screen, pitcher, and table cover of a milliner, necessary for carrying on her business,[2] a sewing-machine,[3] various kinds of musical instruments.[4] In fact, there seems to be no limitation of the things which may be held exempt as implements, save that of necessity. If they are necessary in the debtor's trade or calling, they are exempt, though they are not mere tools, but are complicated and expensive machinery. Thrashing machines have repeatedly been adjudged not exempt, but solely because the evidence showed that the particular machine in controversy was chiefly used in working or thrashing for others than the owner. In the most recent decision on this topic the court said: "In our opinion, the legislature meant by the words, 'the farming utensils or implements of husbandry of the judgment debtor,' such utensils or implements as are needed and used by the farmer in conducting his own farming operations; and it was not intended that all farming machinery which a farmer may own should be exempt, because, while he uses it chiefly by renting it out, or in doing work on others' farms for hire, he still uses it to a small extent on his own land. To hold otherwise would enable the farmer who cultivates forty acres to invest a large amount of money in expensive implements, and to hold them free and clear of his creditors, though they were used but for a day on his own land, and for all the balance of the year were rented or hired out to others. A reasonable construction should be given to the statute, and not one which would

[1] Fish *v.* Street, 27 Kan. 270.

[2] Woods *v.* Keyes, 14 Allen, 236; 92 Am. Dec. 765.

[3] Rayner *v.* Whicher, 6 Allen, 294.

[4] Baker *v.* Willis, 123 Mass. 195; 25 Am. Rep. 61; Goddard *v.* Chaffee, 2 Allen, 395; 79 Am. Dec. 796.

pervert its benevolent design, and enable gross frauds to be perpetrated under color of law."[1]

§ 227. **A Team**, according to the definition given by Webster, is "two or more horses, oxen, or other beasts, harnessed together to the same vehicle, for drawing." This definition does not, in all respects, coincide with that which has been given to the word in the various decisions made by the courts in interpreting the different exemption statutes. In the first place, we know of no instance in which the debtor has successfully claimed more than *two* beasts as his exempt team. In the second place, it is quite certain, under these decisions, that one beast may constitute *a team*, and may be exempt from execution, where it is used by the defendant for the same purposes for which he would use a team of two beasts, if he were so fortunate as to possess that number.[2] So where the law exempts a "yoke of oxen," the judges will exempt a single ox or bull, if he is broken to harness, or otherwise employed to assist the defendant for the purposes for which a yoke of oxen would be used.[3] Nor need he be broken, if purchased for the purpose of being broken and used as a part of a team. Manifestly, if the debtor is to be allowed a team, the law will not insist on his purchasing it already broken, but will allow him to proceed in the manner which will most accord with his impoverished circumstances, to wit: by procuring unbroken animals and converting them into a useful team as rapidly as prac-

[1] In re Baldwin, 71 Cal. 78; Meyer *v.* Meyer, 23 Iowa, 359; 92 Am. Dec. 432.

[2] Wilcox *v.* Hawley, 31 N. Y. 648; Harthouse *v.* Rikers, 1 Duer, 606; Lockwood *v.* Younglove, 27 Barb. 505; Finnin *v.* Malloy, 33 N. Y. Sup. Ct. 382; Hoyt *v.* Van Alstyne, 15 Barb. 568.

[3] Wolfenbarger *v.* Standifer, 3 Sneed, 659; Bowzey *v.* Newbegin, 48 Me. 410.

ticable.[1] It is evident that the judges have looked to the *object* rather than at the *wording* of the statutes; and seeing that the legislature intended to protect the poor debtor in the use of a team, the judges have thought that the like intent must have existed where he had only half a team. The exemption of "a span of horses" has been held not to protect a four-months'-old colt, which, with its mother, constituted the debtor's only horses.[2] Two calves less than a year old have been exempted as a "yoke of steers";[3] and an ass has been exempted under a statute allowing the defendant "a horse, mule, or yoke of oxen."[4] In New York it is clear that the word "team" is not confined to the beasts harnessed together. It embraces the harness and vehicle with which the beasts are commonly used, and without which they would be of comparatively little value to the debtor.[5] A team cannot be held as exempt, unless the claimant shows that he is one of the persons for whom the exemption is provided by statute.[6] He must also show that the property claimed is used by him as a team, or has been procured for the purpose of being so used.[7] Hence where a physician claimed two horses as exempt, the exemption was denied as to one of the horses, because it was not used by him as a

[1] Mallory *v.* Berry, 16 Kan. 293; Berg *v.* Baldwin, 31 Minn. 541. In Vermont a colt bought when suckling, and intended for use for team-work when of sufficient age, was held to be subject to attachment when about two years old, and after it had been used to a limited extent, harnessed to a shed, for the purpose of drawing wood and water. Sullivan *v.* Davis, 50 Vt. 649.

[2] Ames *v.* Martin, 6 Wis. 361; 70 Am. Dec 468.

[3] Mundell *v.* Hammond, 40 Vt. 641.

[4] Richardson *v.* Duncan, 2 Heisk. 220.

[5] Harthouse *v.* Rikers, 1 Duer, 606; Eastman *v.* Caswell, 8 How. Pr. 75; Van Buren *v.* Loper, 29 Barb. 388; Dains *v.* Prosser, 32 Barb. 290; Hutchins *v.* Chamberlain, 11 N. Y. Leg. Obs. 248; *contra*, Morse *v.* Keyes, 6 How. Pr. 18.

[6] Calhoun *v.* Knight, 10 Cal. 393.

[7] O'Donnell *v.* Segar, 25 Mich. 367.

part of his team.[1] But where a man is about to change his occupation, and with that end in view purchases a team, and it is attached before he has any opportunity to make any use of it, he is nevertheless entitled to hold it as exempt.[2] Where a man shows that he uses his team in his business, it is regarded as necessary, and is to be treated as exempt, although he may have other property of great value, and may, in fact, be able to live without the aid of a team.[3]

Some of the statutes exempt a team "kept and used for team-work"; and this keeping and using would be clearly essential whether expressly mentioned in the statute or not. When there is some evidence tending to show this use, the question is one of fact to be submitted to the jury. "Team-work" means work done by a team as a substantial part of a man's business, as in farming, staging, express carrying, drawing of freight, peddling, the transportation of material used or dealt in as a business. This is clearly distinguishable from what is circumstantial to one's business, as a matter of convenience in getting to and from it, or as a means of going from place to place to solicit patronage, or to settle or make collections, or to see persons for business purposes. It is plainly distinguishable from family use and convenience, pleasure, exercise, or recreation. None of these uses of a horse are suggested by the expression "kept and used for team-work."[4] It is not essential that the animals claimed as a team be in use as such at the time of the levy. To

[1] Corp *v.* Griswold, 27 Iowa, 379.

[2] Bevan *v.* Hayden, 13 Iowa, 122.

[3] Smith *v.* Slade, 57 Barb. 637; Wheeler *v.* Cropsey, 5 How. Pr. 288; Wilcox *v.* Hawley, 31 N. Y. 658.

[4] Hickok *v.* Thayer, 49 Vt. 375.

exact a constant use of them would impose a burden on the debtor as difficult to bear as a denial of his claim for exemption. "It has never been understood that an actual user of the animal for team-work at the time its exemption from attachment was claimed was necessary; such a construction would defeat the evident purpose of the statute. Future intended use is as controlling upon the question of exemption as any past use. 'Kept and used' signifies that the animal must be kept for team-work, and must be in actual use, or must be kept with the honest intention and purpose of the owner, within a reasonable time thereafter, to use him for team-work, as occasion may require, to enable him, with the aid of the animal, to procure a livelihood."[1] The statute of Illinois exempts "one yoke of oxen, or two horses in lieu thereof, used by the debtor in obtaining the support of his family." This was construed as exempting horses not used by the debtor personally, but driven by another person in hauling for sundry persons for compensation, the debtor receiving one half of the moneys earned thereby. The words "used by the debtor in obtaining the support of his family" are general, and restricted to no particular mode of use. They are answered when the team is hired to others for compensation, which compensation goes into the general fund to support the family, as well as where the debtor himself goes with the team as its driver, and adds the earnings to his labor or to that of the team. A team kept for pleasure merely is not within either the letter or the spirit of the statute. The team must be kept and used in good faith to contribute to the means of support of the

[1] Rowell *v.* Powell, 53 Vt. 304.

family, but when it is thus kept and used, we do not consider it important by whom it is taken care of and used. In this matter, as in very many others, the act of the agent or servant is to be regarded as the act of the principal or master. The use is his use, whether by his own hands or by those of another.[1]

§ 228. **The "Term 'Wagon'** is intended to mean a common vehicle for the transportation of goods, wares, and merchandise of all descriptions. A hackney-coach, used for the conveyance of passengers, is a different article, and does not come within the equity or literal meaning of the act."[2] We doubt whether this decision, in so far as it excludes a hackney-coach from exemption, will be followed in other states. The tendency of the courts is toward an extremely liberal construction of the exemption laws. Hence all four-wheeled vehicles, whether used to transport persons or things, are usually held to be exempt as wagons.[3] In Kansas the court thought the word "wagon" was sufficiently comprehensive in its ordinary signification to include a buggy; but held that the exemption statute of that state showed an intention to qualify the term so as to exclude buggies.[4] The exemption of a buggy as a wagon was at first denied,[5] but afterwards conceded,[6] in Minnesota. In Texas a dray is exempt as a wagon,[7] and in Wisconsin a hearse is held to be within the

[1] Washburn *v.* Goodheart, 88 Ill. 231.

[2] Quigley *v.* Gorham, 5 Cal. 418; 63 Am. Dec. 139.

[3] Rogers *v.* Ferguson, 32 Tex. 533; Nichols *v.* Claiborne, 39 Tex. 363, in which carriages and buggies were held exempt.

[4] Gordon *v.* Shields, 7 Kan. 320.

[5] Dingman *v.* Raymond, 27 Minn. 507.

[6] Allen *v.* Coates, 29 Minn. 46.

[7] Cone *v.* Lewis, 64 Tex. 331; 53 Am. Rep. 767.

same exemption.[1] In Alabama it was held that the exemption of "carts" included wagons;[2] and in Tennessee, that the exemption of "a two-horse wagon" included a wagon which in fact had always been drawn by oxen, but which it was possible to use as a two-horse wagon.[3]

§ 229. **The Exemption of "a Horse"** has been held to imply that the animal must be a work-horse. The object of the law is to provide the debtor with the means of carrying on his vocation. Hence a stallion used solely for the purpose of propagation is not exempt from execution;[4] but it would be otherwise if he were kept exclusively or chiefly as a work-horse.[5] In order to entitle a claimant to retain his horse, it is not essential that the animal should have been broken to harness, or that it should have been used in the manner in which other people commonly employ their horses. It is sufficient that the horse does work or drudgery for the defendant or his family. The method in which he is made to do this is immaterial.[6] Though the statute exempts "horses," the courts have held that the term includes "colts" where the debtor has not the number of horses allowed him by law.[7] "The usefulness and service of a mule are identical with that of a horse, at least so far as the exemption is concerned; and as, in common parlance, the mule is hardly distinguishable from the horse, we are of the opinion that

[1] Spikes *v.* Burgess, 65 Wis. 428.
[2] Favers *v.* Glass, 22 Ala. 621.
[3] Webb *v.* Brandon, 4 Heisk. 285.
[4] Robert *v.* Adams, 38 Cal. 383; 99 Am. Dec. 413.
[5] Allman *v.* Gann, 29 Ala. 240; McCue *v.* Tunstead, 65 Cal. 506.
[6] Noland *v.* Wickham, 9 Ala. 169; 44 Am. Dec. 435.
[7] Kennedy *v.* Bradbury, 55 Me. 107; 92 Am. Dec. 572.

the word 'horses,' as used in the statute, includes mules also."[1]

§ 230. **Under the Statutes Exempting Cows** from execution, the only question which, so far as we are aware, has arisen for decision is, whether a heifer is, for the purposes of exemption, to be regarded as a cow. The answer has been that "a heifer is a young cow, and as such exempt from attachment, if the debtor has no other."[2] It is also insisted that when the law exempts a thing, it impliedly authorizes the debtor to obtain that thing on the most advantageous terms within his reach. Therefore it is claimed that the exemption of a cow implies that the debtor may procure one by buying and raising a heifer. In Vermont, the exemption of the debtor's only cow has been held to include the exemption of butter made from her milk,[3] because the legislature could not have intended that the debtor should keep the cow for the sake of giving the creditor the profits of her keeping. Where every head of a family is by statute allowed as exempt two cows, the right to such exemption is absolute, and cannot be defeated by showing that they were not necessary to the support of the debtor or his family.[4]

§ 231. **Household Furniture.**—A trunk and cabinet-box having been claimed as exempt as houshold

[1] Allison *v.* Brookshire, 38 Tex. 202.

[2] Johnson *v.* Babcock, 8 Allen, 583; Pomeroy *v.* Trimpler, 8 Allen, 403; 85 Am. Dec. 714; Freeman *v.* Carpenter, 10 Vt. 433; 33 Am. Dec. 210; Dow *v.* Smith, 7 Vt. 465; 29 Am. Dec. 202. In these cases, the heifer in controversy was between one and two years of age. A yearling heifer held not to be exempt under a statute exempting two cows and a calf. Mitchell *v.* Joyce, 69 Iowa, 122.

[3] Leavitt *v.* Metcalf, 2 Vt. 342; 19 Am. Dec. 718.

[4] Nuzman *v.* Schooley, 36 Kan. 178.

furniture, the court, in giving its reasons for denying the claim, said: "The expression 'household furniture' must be understood to mean those vessels, utensils, or goods which, not becoming fixtures, are designed in their manufacture originally and chiefly for use in the family as instruments of the household, and for conducting and managing household affairs. Neither of these articles would seem to hold such a place in the domestic economy. The trunk, though often perhaps made to some extent to take the place of the chest of drawers, the bureau, or the wardrobe, is nevertheless in its construction designed for and adapted to the use of the traveler as such rather than the householder. By the cabinet-box we understand an article designed, in its material and workmanship, rather for ornament than use, and, so far as designed for use, intended for keeping jewelry and other small articles of value; thus ministering to the taste of the owner rather than the necessities or convenience of the household."[1] A piano is not an article of household furniture; its primary and principal use is as a musical instrument.[2] Where, however, the articles claimed as exempt are conceded to be household furniture, a liberal allowance will be made. Under ordinary circumstances, it will be incumbent on the plaintiff in execution to show that the furniture of the defendant is excessive in quantity, and far beyond what is needed for immediate use in the family.[3] No beds can be taken where the family consists of five persons, and has provided itself with six beds.[4] But if

[1] Towns *v.* Pratt, 33 N. H. 345; 66 Am. Dec. 726.

[2] Tanner *v.* Billings, 18 Wis. 163; 86 Am. Dec. 755; Dunlap *v.* Edgerton, 30 Vt. 224.

[3] Heath *v.* Keyes, 35 Wis. 668.

[4] Haswell *v.* Parsons, 15 Cal. 266; 76 Am. Dec. 480; Deckerman *v.* Van Tyne, 4 Sand. 724.

the furniture on hand is designed for the purpose of keeping a boarding or lodging house, it may, so far as it is in excess of family necessities, be taken in execution.[1] The fact that furniture is in temporary disuse does not prevent its being exempt from execution.[2] "The exemption is not necessarily restricted to such furniture as is in constant use; nor is it, as before suggested, restricted to the use of the debtor himself. Reasonable provision may be made, according to circumstances, for wife and children, for domestics, for dependent relatives who may be residing with and constitute a part of the family, and for visitors."[3] In many of the states the statute, instead of exempting all the household furniture of the debtor, exempts only necessary household furniture. But the word "necessary" is always given a liberal construction. It is never treated as synonymous with "indispensable." It embraces all those articles which enable the family to live conveniently and decently, according to the custom of the country in which they reside. "We think the word 'necessary' was not intended to denote those articles of furniture only which are indispensable to the bare subsistence of the persons for whose benefit the law was designed,—the debtor and his family. According to such a limited construction, it would exclude many things which universal usage and the common understanding of that word in reference to this subject have pronounced to be necessary articles of household furniture; and would, indeed, protect merely those rude contrivances which are used only in a savage state. The word was obviously used in a

[1] Weed *v.* Dayton, 40 Conn. 296; 13 Am. Law Reg. 603.
[2] Ibid.
[3] Ibid.

larger sense; it was intended to embrace those things which are requisite in order to enable the debtor not merely to live, but to live in a convenient and comfortable manner."[1] Nevertheless, it cannot be extended by taking into consideration the debtor's present or past station in life, and the mode of living to which he and his family have been accustomed. Articles which are unusually valuable, so as properly to be regarded as ornaments, cannot be exempt under a statute exempting "household furniture necessary for supporting life." "The law intends that the debtor, when withholding money from his creditor for furniture, shall supply each class of his necessities, and secure his comfort and convenience by expending money in a reasonably economical manner, looking solely to utility."[2] Though the exemption purports to be of "all household and kitchen furniture," it must be restricted to such furniture as the debtor has for the use of himself and family, and cannot include that which he may have and use in conducting a hotel or restaurant, beyond what is used by his family;[3] nor, on the other hand, can he be deprived of the household furniture appropriate for the use of his family, because he is the keeper of a boarding-house.[4] In some of the states the household furniture to which a debtor is entitled as exempt is by statute limited by value only. Where this is the case,

[1] Montague *v.* Richardson, 24 Conn. 338; 63 Am. Dec. 173; Davlin *v.* Stone, 4 Cush. 359. It has been held that a watch may sometimes be exempt as necessary household furniture. Wilson *v.* Ellis, 1 Denio, 462; Leavitt *v.* Metcalf, 2 Vt. 342; 19 Am. Dec. 718.

[2] Hitchcock *v.* Holmes, 43 Conn. 528. The articles of which exemption was denied in this case consisted of lace curtains of the value of $160, hanging over curtains of cloth, a pier-glass with base valued at $125, a clock of the value of $50.

[3] Heidenheimer *v.* Blumenkron, 56 Tex. 308.

[4] Vanderhorst *v.* Bacon, 38 Mich. 669; 31 Am. Rep. 338.

the furniture exempt "may be pictures hung upon the walls, or other furniture, or mere ornaments, or bedroom furniture for visitors only, or bedroom furniture, table-ware, etc., for paying guests, boarders, etc." "The word 'furniture' is a comprehensive term, embracing about everything with which a house or anything else can be furnished. It evidently means everything with which the residence of the debtor is furnished."[1]

§ 232. **Wearing Apparel** was exempt from execution at common law. The exemption, however, was very limited in its character, and was probably confined to the garments in which the debtor was clad.[2] If he had two coats, it was safe for the officer to seize one. In fact, it is quite doubtful whether the exemption was not dependent upon the apparel being found on the debtor's person. However this may be, it has been held in New York that no officer has the right to deprive a defendant of the means of preventing his person from being exposed to the inclemency of the weather and the observation of the populace; and therefore, that though the debtor is in bed, and not using his wearing apparel, yet that it cannot be attached.[3] The common law has in most of the states, so far as concerns this exemption, been supplanted by statutes under which it is certain that the debtor need not always keep his clothes on to insure their protection from the rapacity of his creditor. Some of these statutes exempt all wearing apparel; others exempt only such as is necessary. Under the first class of

[1] Rasure *v.* Hart, 18 Kan. 344; 26 Am. Rep. 772.

[2] Cooke *v.* Gibbs, 3 Mass. 193; Sunbolf *v.* Alford, 3 Mees. & W. 248; Wolff *v.* Summers, 2 Camp. 631; Bowne *v.* Witt, 19 Wend. 475.

[3] Bumpus *v.* Maynard, 38 Barb. 626.

statutes, a lace shawl, being wearing apparel, is exempt, irrespective of its cost, if it was bought *bona fide* for use, and not with a view of acquiring property which should be beyond the reach of creditors.[1] Wearing apparel consists of "garments worn to protect the person from exposure, and not articles used for ornament merely." It does not include trinkets nor jewelry.[2] Cloth and trimmings purchased, and about to be used for the purpose of being made into clothing, are exempt as wearing apparel.[3] In those states where the exemption is confined by statute to *necessary* wearing apparel, the word "necessary" "is not to be understood in its most rigid sense, implying something indispensable, but as equivalent to convenient and comfortable. It would therefore include such articles of dress or clothing as might properly be considered among the necessaries, in contradistinction to the luxuries, of life. Whether an article attached is a necessary or a luxury may, under some circumstances, be a question for the jury, depending upon the situation of the debtor and the character and uses, and perhaps the cost, of the article."[4] "The wearing apparel 'necessary for immediate use' must be such an amount of clothing as is necessary to meet the varying climate and the customary habits and ordinary necessities of the mass of the people. The clothing worn by the individual while about his daily toil might be all that was necessary for the time, but be wholly insufficient when the labor ceased; and the clothing suitable and proper for days of labor might

[1] Frazier *v.* Barnum, 19 N. J. Eq. 316; 97 Am. Dec. 666.

[2] Frazier *v.* Barnum, 19 N. J. Eq. 316; 97 Am. Dec. 666; Towns *v.* Pratt, 33 N. H. 345; 66 Am. Dec. 726. Hence a watch is not wearing apparel. Smith *v.* Rogers, 16 Ga. 479.

[3] Richardson *v.* Buswell, 10 Met. 506; 43 Am. Dec. 450.

[4] Towns *v.* Pratt, 33 N. H. 349; 66 Am. Dec. 726.

not be such as the common sentiment of the community would deem necessary for use on days set apart for religious assembling and worship."[1] Wearing apparel, as these words are used in the statutes, consists of clothing or garments. A watch is an article for which exemption has been claimed under various provisions of the statutes of exemption; thus it has been held to be exempt as necessary household furniture,[2] as a working tool,[3] and as wearing apparel.[4] We think the better rule is that it is not exempt in either capacity.[5]

§ 233. **Provisions for Family Use, or for Feed for Stock.**—Articles purchased and kept for sale cannot be exempted as provisions provided for family use, though the family had been supplied from them before the levy.[6] Corn on hand may be exempted as provisions, if it was kept with a view of being converted into food for the family.[7] It has been held that corn standing ungathered in the field is not exempt.[8] But this is contrary to the weight of the authorities. The only test is to inquire whether the articles claimed as exempt were provided and intended as provisions to support the family. If they were so provided, and are adapted to the purpose for which the debtor intends them, they are exempt, though they may exist in the

[1] Peverly *v.* Sayles, 10 N. H. 356.

[2] Leavitt *v.* Metcalf, 2 Vt. 342; 19 Am. Dec. 718.

[3] Bitting *v.* Vandenburgh, 17 How. Pr. 80.

[4] Stewart *v.* McClung, 12 Or. 431; 53 Am. Rep. 374.

[5] Rothschild *v.* Boelter, 18 Minn. 362; Gooch *v.* Gooch, 33 Me. 535; Sawyer *v.* Sawyer's Heirs, 28 Vt. 251.

[6] Nash *v.* Farrington, 4 Allen, 157; Robinett *v.* Doyle, 2 West. L. M. 585. It seems that property bought to sell is never exempt. Guptil *v.* McGee, 9 Kan. 30; O'Donnell *v.* Segar, 25 Mich. 367.

[7] Atkinson *v.* Gatcher, 23 Ark. 101.

[8] Donahue *v.* Steele, 2 West. L. J. 402.

form of vegetables yet to be dug from the soil, or of corn yet to be severed from the stalk.[1] Starting vegetables to market, to sell or exchange them for other necessaries of life, is not a forfeiture of the right to hold them as exempt.[2]

Where the statute exempts necessary food for stock, what is necessary must be determined upon all the circumstances of the case. During the season for pasturing, no feed may be exempt, if the stock is such that it should be kept by pasturing. Ordinarily, necessary food for stock is such an amount as will keep it until proper food may be realized from the productions of the ensuing crop-producing season.[3] Food for stock is not allowed to a defendant unless he owns stock,[4] or unless he has the means with which he intends to buy it.[5]

§ 234. **Exemption of Wages, Earnings, etc.**—In most of the states the exemption laws have been amended at a comparatively recent period with a view of exempting some portion of the earnings of persons who do not carry on business on their own account, but merely as employees of others.[6] The rapid multiplication of great manufacturing, transportation, and other corporations, with the army of employees in the service of each, has attracted attention to the multitude

[1] Mulligan *v.* Newton, 16 Gray, 211; Carpenter *v.* Herrington, 25 Wend. 370; 37 Am. Dec. 239.

[2] Shaw *v.* Davis, 55 Barb. 389.

[3] Farrell *v.* Higley, Hill & D. 87.

[4] King *v.* Moore, 10 Mich. 538. In Vermont the exemption of forage is understood to extend to a quantity sufficient to keep all the stock named in the statute as exempt, whether the debtor owns that amount of stock or not. Kimball *v.* Woodruff, 55 Vt. 229.

[5] Cowan *v.* Main, 24 Wis. 569.

[6] Davis *v.* Meredith, 48 Mo. 263. See statutes on this subject collected in note 91 Am. Dec. 411.

of men, many of whom are householders, who have no tools or implements of their own to be exempted, and whose only means of support consists of the moneys due them from their employers at stated times for services rendered. The garnishment of these moneys left them and their families without any means of support. Hence the enactment of divers statutes withdrawing such moneys, to a limited extent, from execution and attachment. The debt thus withdrawn is variously described as "wages, salaries, or compensation of laborers and employees for personal services,"[1] "time wages of all laborers and mechanics,"[2] "earnings of judgment debtor for his personal services,"[3] "debt which has accured by reason of personal services of the debtor,"[4] "fifty per cent of the wages for labor or service of any person residing within the state,"[5] "money due for personal labor or services,"[6] "daily, weekly, or monthly wages of all journeymen, mechanics, and day laborers,"[7] "wages and services,"[8] "wages,"[9] "earnings of a judgment debtor for his personal services or those of his family,"[10] "wages or hire of any laborer or

[1] Code Ala., 1876, sec. 2823.

[2] Ark. Dig., 1884, sec. 3422.

[3] Cal. Code Civ. Proc., sec. 690, subd. 8; Code N. C., 1885, vol. 1, sec. 493; Code Civ. Proc. Col., sec. 226; Gen. Laws Idaho, 1881, secs. 439, 440; Dassler's Comp. Laws Kan., 1885, secs. 4719, 4303; Rev. Stats. Mont., 1879, sec. 310; Gen. Laws Nev., 1885, sec. 3267; Code Civ. Proc. N. Y., 1886, sec. 2463; Gen. Laws Or., 1872, sec. 310; Code Civ. Pro. S. C., sec. 317.

[4] Pub. Stats. Conn., 1882, c. 59, p. 150. As to wages of minors, see Pub. Acts Conn., 1883, c. 55, p. 254.

[5] Rev. Code Del., 1882, as amended; Stats. 1874–75, c. 111, pp. 684, 685.

[6] McClellan's Dig. Fla., 1881, c. 104, sec. 23, p. 534.

[7] Code Ga., 1882, sec. 3554.

[8] Starr and Center's Ann. Stat. Ill., vol. 2, c, 62, par. 14.

[9] Rev. Stats. Ind., 1881, secs. 958, 959; Gen. Stats. Ky., 1883, c. 38, art. 13, sec. 8; Rev. Stats. Mo., 1879, secs. 416, 2519.

[10] McClain's Ann. Stats. Iowa, 1880, sec. 3074; Rev. Stats. Me., 1883, tit. 9, c. 86, sec. 55, subd. 6; Rev. Stats. Ohio, 1883, sec. 5430.

employee not actually due at the date of the attachment,"[1] "money or credits which are due for the wages of the personal labor or services of defendant, or of his wife or minor children,"[2] "wages of any laboring man or woman, or of his or her minor children,"[3] "wages of every laborer and mechanic,"[4] "wages of laborers, mechanics, and clerks,"[5] "wages of any laborer, or the salary of any person, in private or public employment,"[6] "salary or wages,"[7] "wages of mechanic or other laboring man,"[8] "current wages for personal services,"[9] "wages or compensation,"[10] and "earnings of all married persons having families dependent on them for support."[11]

The amount of wages or earnings exempted varies in the different states. In some it must not exceed twenty-five dollars per month, in others it is for a designated number of days preceding the garnishment;[12] in others the time is unlimited. In some of the states a necessity for the exemption must be shown;[13] while in others it need not. One of the questions most frequently recurring under these statutes is what is meant by the terms "wages" or "earnings." Where the defendant is work-

[1] Rev. Code, Md., 1878, art. 67, sec. 53.

[2] Pub. Stats. Mass., 1882, p. 1054, secs. 29, 30; Gen. Laws N. H., 1878, c. 249, sec. 40; Howell's Ann. Stats. Mich., 1882, secs. 8032, 8096, 7091.

[3] Minn. Stats., 1878, c. 66, sec. 310.

[4] Rev. Code Miss., 1880, c. 45, sec. 1244.

[5] Comp. Stats. Neb., 1885, sec. 531; Wright *v.* C. B. & Q. R. R., 19 Neb. 175.

[6] Brightly's Purdon's Dig. Pa., vol. 1, p. 746, sec. 40, and p. 1000, sec. 120.

[7] Pub. Stats. R. I., 1882, c. 209, sec. 10–13.

[8] Milliken and Ventrees's Code Tenn., 1884, sec. 2931.

[9] Rev. Stats. Tex., 1879, arts. 2335, 2337.

[10] Rev. Laws Vt., 1880, sec. 1075.

[11] Laws Wis., 1883, c. 141.

[12] Haynes *v.* Hussey, 72 Me. 448; Cal. Code Civ. Proc., sec., 690 subd. 8; sec. 531, Code Neb.

[13] Zimmerman *v.* Franke, 34 Kan. 650.

ing for a salary, or where the money or debt sought to be subjected to execution is the result of the defendant's personal labor unassisted by any other person or thing, there can be no doubt that he is entitled to the exemption, unless such exemption is conceded only to a particular class of persons to which the claimant does not belong. Thus if the exemption is of earnings of the debtor for his personal services, a professional man, as a physician or school-teacher, is entitled to the exemption.[1] If, on the other hand, the exemption is given to laborers or mechanics, the claimant must show that he belongs to the class exempted. Whether a claimant is a laborer or mechanic may frequently admit of doubt. In Georgia it was held that overseers,[2] and shipping and receiving clerks,[3] and forwarding clerks,[4] and teachers,[5] were laborers. The correctness of these decisions was subsequently doubted, and the court refused a claim for exemption made by one who was the boss or director of an entire department of an extensive factory, authorized to employ and discharge hands, and who had under his supervision 150 men.[6] Moneys due for services as commissioner in a partition suit,[7] or for salary as president of a railway company,[8] are not exempt as the wages of laborers or employees. Whether the amount due is for wages or personal services may also be questionable. The claimant may have used his

[1] McCoy *v.* Cornell, 40 Iowa, 457; Miller *v.* Hooper, 19 Hun, 394.

[2] Caraker *v.* Matthews, 25 Ga. 571; Russell *v.* Arnold, 25 Ga. 625.

[3] Butler *v.* Clark, 46 Ga. 466.

[4] Claghorn *v.* Saussy, 51 Ga. 576.

[5] Hightower *v.* Slaton, 54 Ga. 108; 21 Am. Rep. 273. Teachers are not regarded as laborers in Pennsylvania. Schwacke *v.* Langton, 12 Phila. 402.

[6] Kile *v.* Montgomery, 73 Ga. 343.

[7] State *v.* Cobb, 4 Lea, 481; South & N. A. R. R. Co. *v.* Falkner, 49 Ala. 115.

[8] South & N. A. R. R. Co. *v.* Falkner, 49 Ala. 115.

capital or that of others, or may have employed assistants, or labored with the aid of his team. In either case, the moneys realized are not solely the fruits of his personal labor. In Pennsylvania, the "wages of laborers" were exempt from attachment. One Chave contracted to grade and excavate a street. In performing his contract he employed two carts, two or three horses, "and enough of hands, with himself, to keep these in exercise." The supreme court of the state, being required to decide whether moneys due under this contract were wages, within the meaning of the statutes, gave its opinion as follows: "The act was, doubtless, intended to protect and secure to the laborer what was earned by his own hands. 'Muzzle not the ox which treadeth out the corn.' It was not designed to protect the contracts of those who speculate upon or make profit out of the labor of others. The term 'labor,' to be sure, is of very extensive signification. The merchant labors, for there is mental as well as manual or corporeal labor; the farmer labors, the professional man labors, and judges labor, as every member of this court can testify. But it is this very capability of enlarged extension which produces the necessity to circumscribe and limit the word as used in the statute, in order to accomplish what we believe must have been the intent of the legislature. That is, to secure to the manual laborer, by profession and occupation, the fruits of his own work for the subsistence of himself and family. If it is extended to the contractor who employs others, we would by that construction prevent the actual laborer, who earned the money, from attaching it to secure the wages of his labor, and his reward. We believe that, by confining

the exemption from attachment to the actual reward or wages earned by the hands and labor of the individual himself, and his family under his direction, we best accomplish the beneficial design of the legislature."[1] But the doctrines of this case were certainly modified, and to a great extent overruled, in the subsequent case of Pennsylvania Coal Co. *v.* Costello.[2] Kennedy was a miner by profession. He contracted to mine coal at a fixed rate per ton, and in executing his contract employed a common laborer to assist him. A sum of money due from the coal company to Kennedy under this contract was garnished by Costello. This sum was shown to represent the wages or profits due to Kennedy after paying his laborer. It was therefore held to be exempt. "The labor of the miners is as truly labor as that of the subordinate whom they employ, and their earnings as truly wages as are his. If the proviso would protect his earnings from seizure, it must be held to protect the earnings of the miners. Any other construction would embarass a large and productive branch of industry, which doubtless has adjusted itself in the best form for both employer and employee, and would also discriminate unfairly against the most meritorious class of laborers."[3] In Wisconsin, a judgment debtor was employed by merchants to inspect flour, and was paid a specified price for each barrel. He inspected daily himself, passing upon every sample, and employed a deputy, a book-keeper, and a laborer. His net income was about two thousand five hundred dollars per annum, and was held to be his

[1] Heebner *v.* Chave, 5 Pa. St. 115. See also Smith *v.* Brooke, 49 Pa. St. 147.

[2] 33 Pa. St. 241.

[3] Pennsylvania Coal Co. *v.* Costello, 33 Pa. St. 241.

earnings within the meaning of the exemption statute.[1] In another case in the same state, the word "earnings" was held to protect all that the debtor made by the assistance of his team and other exempt property.[2] Where one is employed to superintend work being done under a contract, for which he is paid, as a commission for his services, a certain percentage of the total cost of the work, the amount to become due him is exempt from execution as earnings or wages.[3] But moneys due from boarders, to the keeper of a boarding-house, who rents the house, furnishes the necessary furniture and provisions, employs the servants, and renders them personal assistance, are not exempt as earnings for personal services.[4]

In Nebraska one section of the code declared that no property should be exempt from execution for laborers' wages, while another section, subsequently adopted, provided for the exemption from execution of the wages of mechanics, clerks, and laborers, while in the hands of their employers; and then the courts were confronted with a question which the legislature had overlooked, to wit: In an action to recover wages due the plaintiff as a laborer, may he subject to execution wages due the defendant, also a laborer? In this instance the court was able to solve the question by giving precedence to the section exempting laborers' wages, on the ground that, being enacted after the other section, it was the later expression of the legisla-

[1] Brown *v.* Hebard, 20 Wis. 326; 91 Am. Dec. 408.

[2] Kuntz *v.* Kinney, 33 Wis. 510.

[3] Moore *v.* Heaney, 14 Md. 558; Howell *v.* McDowell, 1 Atl. Rep. 474. Moneys due a subcontractor, who has furnished no capital, are exempt as earnings. Banks *v.* Rodenbach, 54 Iowa, 695.

[4] Shelly *v.* Smith, 59 Iowa, 455.

tive will.[1] In the same state it has been held that the exemption may be claimed at any time prior to the actual payment of the money by the garnishee; that though judgment has been entered against him, if he was at the time not aware that the debt attached was exempt, either he or the judgment debtor may thereafter call the attention of the court to the exemption, and thereby rescue the debt from execution.[2]

§ 234 a. **Pensions.**—Section 4747 of the Revised Statutes of the United States declares that "no sums of money due or to become due to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension-office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." Relying upon the last clause, some of the state courts held that the object of the statute was to wholly protect the pension moneys from execution, and therefore exempted such moneys from seizure after their receipt by the pensioner.[3] Later decisions hold that the statute is fully satisfied by protecting the moneys from levy or garnishment until they actually reach the pensioner. After that they and their proceeds are subject to execution.[4]

§ 235. **Proceeds of Exempt Property.** — Property which the statute designates as exempt may be ex-

[1] Snyder *v.* Brune, 22 Neb. 189.

[2] Union P. R'y *v.* Smersh, 22 Neb. 751.

[3] Folschow *v.* Werner, 51 Wis. 85; Eckert *v.* McKee, 9 Bush, 355. This last case is overruled in Robion *v.* Walker, 82 Ky. 60; 56 Am. Rep. 878.

[4] Webb *v.* Holt, 57 Iowa, 712; Jardain *v.* F. S. F. Ass'n, 44 N. J. L. 377; Cranz *v.* White, 27 Kan. 319; 41 Am. Rep. 408; Robion *v.* Walker, 82 Ky. 60; 56 Am. Rep. 878; Payne *v.* Gibson, 5 Lea, 173.

changed for or converted into property not exempt. This may be done either by the act of the debtor, or without his act and against his consent. Where a debtor voluntarily parts with the ownership of exempt property, and acquires in lieu thereof property not exempt, he no doubt waives his right to the benefit of the exemption law; or, more properly speaking, any article which the statute has failed to include in the list of exempt property cannot be placed in such list by proving that it has been obtained by the voluntary sale or exchange of exempt property.[1] Debts due,[2] or moneys[3] realized from a voluntary sale of exempt property, are subject to execution. An exception to this rule exists in Georgia, as the result of a very peculiar feature in the exemption laws of that state. There it appears that on taking the requisite proceedings, the debtor may have certain property segregated and set apart to him as exempt. This property need not remain in specie to retain its exemption. The debtor may use it for any proper purpose, may exchange it for other property, may sell it and make purchases with the proceeds, may increase it by the ordinary process of growth or reproduction, and whatever may be obtained in lieu of it, or added to it as growth, increase, or profits, is exempt.[4] The original amount set apart as exempt may therefore be augmented by the frugality and business capacity of the

[1] Harris *v.* Fassett, 56 Iowa, 264; Lloyd *v.* Durham, 1 Winst. 228; Connell *v.* Fisk, 54 Vt. 381; Wygant *v.* Smith, 2 Lans. 185; Friedlander *v.* Mahoney, 31 Iowa, 311; Pool *v.* Reid, 15 Ala. 826.

[2] Scott *v.* Brigham, 27 Vt. 561; Edson *v.* Trask, 22 Vt. 18.

[3] Charles *v.* Oatman, 4 Pa. L. J. 239; Knabb *v.* Drake, 23 Pa. St. 489; 62 Am. Dec. 352.

[4] Morris *v.* Tennant, 56 Ga. 577; Wade *v.* Weslow, 62 Ga. 562; Johnson *v.* Franklin, 63 Ga. 378; Dodd *v.* Thompson, 63 Ga. 393; Kupferman *v.* Buckholts, 73 Ga. 778.

defendant to an unlimited extent. The property set apart as exempt is like a trust estate, and neither the original nor anything proceeding therefrom, is subject to execution. In Wisconsin the statute in express terms permits a debtor to sell and convey his homestead without subjecting it to the demands of his creditors. The proceeds of such sale retain their exempt character, while the debtor in good faith intends with them to procure another homestead.[1] Where the exemption law, instead of specifying certain property, exempts property to the extent of one thousand dollars, or of some other specified value, the fact that the debtor exchanges his property, or sells it and buys other property, does not prejudice his claim for exemption;[2] for, under such a law, all property is equally exempt, the only test being that of value. In Iowa if the owner of a homestead exchanges or sells it, and procures another with the proceeds, the right of exemption attaches to the new homestead.[3] But as a general rule, we think that it must be held, in the absence of any statutory provision to the contrary, that the voluntary sale of a homestead by the husband and wife is a complete extinguishment of the homestead right, and that the proceeds of the sale, until invested in other exempt property, are subject to execution. In many instances, the homestead is of greater value than the law will protect from execution. In such a case, it must happen, when a creditor seeks satisfaction out of the homestead, either that the property be partitioned, and the debtor's part set off to him, and the balance

[1] Watkins *v.* Blatschinski, 40 Wis. 347.

[2] Brewer *v.* Granger, 45 Ala. 580.

[3] Pearson *v.* Minturn, 18 Iowa, 36; Furman *v.* Dewell, 35 Iowa, 170; Sargent *v.* Chubbuck, 19 Iowa, 37; Marshall *v.* Ruddock, 28 Iowa, 487.

sold, or that the whole be sold, and the proceeds paid to the debtor to the extent of his exemption rights, and the balance applied to the satisfaction of the debt. When the homestead is thus converted into money by acts over which the defendant has no control, the proceeds belonging to the debtor continue to be exempt from execution, either for some period designated by statute, or until he has for an unreasonable time failed to invest them in another homestead.[1] So where a debtor owns a horse of a greater value than is exempted by statute, he must, on the sale of the horse under execution, be allowed out of the proceeds the amount of the exemption; and these proceeds cannot be seized under execution.[2] The officer making a levy may refuse to allow the defendant his exemption rights, and render it necessary for the latter to resort to an action at law. In such an event, the cause of action, and also any judgment that may be rendered thereon, are exempt from execution.[3] To hold otherwise would be to destroy the efficacy of the exemption laws. For by disregarding defendant's rights, and compelling him to resort to legal proceedings, it would always be possible to compel defendant to convert exempt property into property subject to execution. Therefore if a judgment is a part of the debtor's exempt property, or is the result of the unlawful taking of such property, it is not subject to be set off against a judgment held by

[1] Walsh *v.* Horine, 36 Ill. 238; Mitchell *v.* Milhoan, 11 Kan. 628; Dearing *v.* Thomas, 25 Ga. 223; Keyes *v.* Rines, 37 Vt. 260; 86 Am. Dec. 707; Maxey *v.* Loyal, 38 Ga. 531; Morgan *v.* Stearns, 41 Vt. 398; Fogg *v.* Fogg, 40 N. H. 282; 77 Am. Dec. 715; Pittsfield Bank *v.* Hawk, 4 Allen, 347.

[2] Moultrie *v.* Elrod, 23 Ga. 393.

[3] Andrews *v.* Rowan, 28 How. Pr. 126; Collett *v.* Jones, 7 B. Mon. 586; Tillotson *v.* Wolcott, 48 N. Y. 188; Keyes *v.* Rines, 37 Vt. 260; 86 Am. Dec. 707; Stebbins *v.* Peeler, 29 Vt. 289; Wilson *v.* McElroy, 32 Pa. St. 82.

the defendant in execution.[1] Where property is destroyed by fire, and the owners are in consequence entitled to indemnity from an insurance company, an instance may be afforded of the voluntary exchange of exempt for non-exempt property. In California it seems to have been held that money due from an insurance company for indemnity for loss of the homestead residence by fire, retains the character of the premises destroyed, and is not subject to execution.[2] But in New Hampshire different views are entertained.[3]

§ 236. **Property Exempt because Essential to the Use of Exempt Property.**—In some of the states, where exemption statutes are interpreted with extreme liberality toward the claimant, various articles have been held to be exempt, not because they were specified in the statute, but because they were indispensable to the convenient and ordinary use of other articles of whose exemption there was no doubt. In New York, harness and vehicles have been exempted as part of a "team"; but this was because the court understood the word "team" to embrace the harness and vehicle, as well as the horses of which the team was composed. Hence the New York decision cannot fairly be cited as authority for the proposition that the exemption of a *thing* includes all other things necessary to its use. But in Texas, the exemption of "a horse" has been held to include his saddle and bridle, and also the rope with which he was led or fastened. In these cases the court said: "A horse was not reserved because he

[1] Curlee *v.* Thomas, 74 N. C. 51; Myers *v.* Forsythe, 10 Bush, 394; Butner *v.* Bowser, 104 Ind. 255; *contra*, Knabb *v.* Drake, 23 Pa. St. 489; 62 Am. Dec. 352.

[2] Houghton *v.* Lee, 50 Cal. 101; Cooney *v.* Cooney, 65 Barb. 524.

[3] Wooster *v.* Page, 54 N. H. 125; 20 Am. Rep. 128.

was a horse, but because of his useful qualities, and his almost indispensable services; but what would be the benefit of a horse without shoes, or without saddle and bridle, or without gears, if employed for purposes of agriculture? It cannot be presumed that the legislature intended that a debtor should be reduced to the most primitive usage of riding without saddle or bridle; yet this may often be the only alternative, if such appendages be held not exempt from execution. It would seem that by fair construction the grants in the statute must include, not only the subject itself, but everything absolutely essential to its beneficial enjoyment."[1]

§ 236 a. **Exemptions of Food, Provisions, etc.,** are generally allowed. With respect to the amount which will be regarded as exempt as necessary for family use there seem to be no decisions. Where an allowance is made for feed for live-stock, it will be construed as limited to the amount necessary to maintain them until they can be fatted and killed for their flesh, when that is the object for which they are kept, or until the next food-producing season when the stock is permanently kept.[2] Food cannot be exempted for stock which the defendant does not possess and has no present purpose of obtaining.[3] The provisions need not be in the form or condition required for immediate use. Corn not yet ground into meal,[4] and

[1] Cobbs *v.* Coleman, 14 Tex. 599; Dearborn *v.* Phillips, 21 Tex. 449.

[2] Farrell *v.* Higley, Hill & D. 87; Hall *v.* Penny, 11 Wend. 44; 25 Am. Dec. 601.

[3] Cowan *v.* Main, 24 Wis. 569; King *v.* Moore, 10 Mich. 538.

[4] Atkinson *v.* Gatcher, 23 Ark. 106. But it has been held that the exemption of flour does not include wheat. Salsbury *v.* Parsons, 36 Hun, 12.

potatoes not dug,[1] may be exempt as provisions. The exemption of provisions for family use does not include food prepared by the keeper of a restaurant for his customers,[2] nor groceries constituting part of the debtor's stock in trade.[3]

§ 236 b. Stock in Trade.—Statutes exempting "the tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and in addition thereto, stock in trade not exceeding" a designated amount in value, have generally been held not to apply to merchants, or to stock bought to be resold as merchandise.[4] Stock in trade, as the terms are here used, signifies,—1. The raw materials upon which the debtor works with his tools and implements; and 2. The articles manufactured or in process of manufacture out of such raw materials with his tools and implements, and kept or intended for sale.[5] These manufactured articles are exempt as part of the debtor's stock in trade, because if they were not, his entire exemption of stock in trade would be practically destroyed, for it would be idle to exempt the raw material and permit it to be seized when greatly enhanced in value by the debtor's labor. But in Wisconsin a statute exempting "the tools and implements or stock in trade of any mechanic, miner, or other person, used or kept for

[1] Carpenter *v.* Herrington, 25 Wend. 370; 37 Am. Dec. 239. Whether vegetables which had just began to grow, and were not sufficiently matured to be used for food were exempt, was a question upon which the judges disagreed in King *v.* Moore, 10 Mich. 538.

[2] Coffey *v.* Wilson, 65 Iowa, 270.

[3] State *v.* Connor, 73 Mo. 572.

[4] Grimes *v.* Bryne, 2 Minn. 89; Guptil *v.* McFee, 9 Kan. 30.

[5] In re Jones, 2 Dill. 343; Bequillard *v.* Bartlett, 19 Kan. 382; 21 Am. Rep. 120; Stewart *v.* Welton, 32 Mich. 56; Hutchinson *v.* Roe, 44 Mich. 389.

the purpose of carrying on his trade or business, not exceeding two hundred dollars in value," was very properly held to apply to merchants.[1] When a designated amount of his stock in trade has been set apart to the debtor as exempt, his creditors have no further interest in it, "and it may be sold or used in such way as to serve the necessities of the owner without doing wrong to any one." He need not re-embark in the same or any other business with it. He may "sell it, or keep it until a way opens for its profitable use." He does not forfeit his exemption by a purpose not to re-engage in business, or to sell the property set aside to him.[2]

§ 236 c. **Exemptions not Confined to Specific Articles.**—Sometimes exemptions are granted of a certain amount in value of personal property, without any limitation respecting its character, or the debtor is permitted to take other property in place of that specifically exempted.[3] In either case, every conceivable chattel may be exempt, provided it does not in itself, or in connection with other property selected or set apart to the debtor, exceed in value the amount of the exemption. Hence the debtor, when he is by statute allowed as exempt personal property not exceeding a designated value, may hold free from levy under execution fees due him as a justice of the peace,[4] or choses in action,[5] or moneys deposited in bank.[6] If the debtor is assigned the full amount of his exemption, he is en-

[1] Wicker *v.* Comstock, 52 Wis. 316.

[2] Rosenthal *v.* Scott, 41 Mich. 632.

[3] State *v.* Farmer, 21 Mo. 160; Mahan *v.* Scruggs, 29 Mo. 282.

[4] Dane *v.* Loomis, 51 Ala. 487.

[5] Chilcote *v.* Conley, 36 Ohio St. 545; Frost *v.* Naylor, 68 N. C. 325; Probst *v.* Scott, 31 Ark. 652; Strouse's Ex'r *v.* Becker, 44 Pa. St. 206.

[6] Fanning *v.* First N. B., 76 Ill. 53.

titled to further assignments whenever he can show that the property has been taken from him without his fault, or has been consumed in maintaining himself or family, or has deteriorated in value without fault on his part, or has been applied by him to the payment of debts.[1]

§ 237. **Miscellaneous Matters.**—In New York, a physician having books of his profession of small value was allowed to retain them as exempt, on the ground that they constituted part of his family library.[2] The exemption of cloth manufactured on a farm was, in Kentucky, held to protect carpets so manufactured.[3] In Wisconsin, the exemption of stock in trade is confined to stock in some lawful trade or business. It cannot be invoked by the keeper of an unlicensed saloon.[4] Where the statute exempts an "insurance on the life of a debtor; a policy agreeing to pay him a certain sum of money at the end of a stipulated period, if he should so long live, and if he should not so live, then that the sum should be paid at his death to his heirs, is a policy of life insurance within the meaning of the statute."[5] A ferry-boat is not exempt from execution because it is on a mail route, and is used, among other purposes, to convey the United States mail across the stream.[6] In Texas the statute exempts the "books belonging to the trade or profession of any citizen. The professional library of a lawyer

[1] Weis *v.* Levy, 69 Ala. 211.

[2] Robinson's Case, 3 Abb. Pr. 466.

[3] Sims *v.* Reed, 12 B. Mon. 53.

[4] Harrod *v.* Hamer, 32 Wis. 159.

[5] Briggs *v.* McCullough, 36 Cal. 542.

[6] Lathrop *v.* Middleton, 23 Cal. 257; 83 Am. Dec. 112; Parker *v.* Porter, 6 La. 169.

may, therefore, in that state, after his death, be set aside for the benefit of his widow and children, as exempt property.[1] In Missouri the ninth section of the act respecting executions exempts certain property when owned by the head of a family; and the eleventh subdivision of that section gives all lawyers the "privilege of selecting such books as may be necessary to their profession in place of other property herein allowed, at their option." Under this statute a lawyer is not entitled to an exemption of his library regardless of its value, but only to the privilege of selecting books in place of other exempt property, so that the amount of his exemption including such books shall not exceed in value the exemption accorded to other heads of families.[2] Under a statute exempting tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, a farmer is entitled to an exemption of seed wheat, because it is unquestionably necessary to the carrying on of his business.[3] The benefit of the exemption laws may be claimed against a garnishment,[4] and is not lost to the defendant by the neglect of the garnishee to claim it for him.[5] In North Carolina a communion service consisting of "a silver pitcher, two silver plates, and two silver goblets, with the box in which they were kept, used in the public worship of a church," were levied upon, under a judgment in favor of the pastor,

[1] Fowler *v.* Gilmore, 30 Tex. 432.
[2] Brown *v.* Hoffmeister, 71 Mo. 411.
[3] Stilson *v.* Gibbs, 46 Mich. 215.
[4] Fanning *v.* First Nat. Bank, 76 Ill. 53.
[5] Jones *v.* Tracy, 75 Pa. St. 417.

for arrears of his salary. The supreme court intimated that they might be held exempt under the constitutional guaranty of the right of all citizens "to worship Almighty God according to the dictates of their own consciences," but preferred to place its decision on the less questionable ground that the judgment debtor was a mere trustee, having no beneficial interest in the property, and therefore no estate therein subject to execution.[1]

A statute was enacted declaring that "the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor liable for his debts." In interpreting this law, it was held to exempt from execution, based upon a debt created subsequently to its passage, the estate of a husband as tenant by curtesy in his wife's lands, whether such estate vested before or after the taking effect of the enactment.[2]

§ 238. **Exemption Continues after Death of Owner in Favor of his Family.**—The decisions frequently refer to the fact that the policy of the exemption law embraces the protection of the debtor's family even more than of himself. This policy would be very inadequately pursued if it did not continue after the decease of the debtor. His wife, if she survives him, then becomes the householder or head of the family; and she and her children, being thus deprived of their

[1] Lord *v.* Hardie, 82 N. C. 241.

[2] Hitz *v.* National Met. Bank, 111 U. S. 722; White *v.* Hildreth, 32 Vt. 265; Rugh *v.* Ottenheimer, 6 Or. 231.

chief protection and support, are more than ever before in need of all the rights and privileges guaranteed by the exemptions laws. Generally, and perhaps universally, the necessities of the now dependent family have been recognized, and as far as possible provided for by laws, under which the exempt property is preserved from the grasp of creditors, and set aside for the use of the family.[1] These laws are usually incorporated into that portion of the statute regulating the settlement and distribution of the estates of deceased persons, and are generally interpreted and carried into effect by the probate and surrogate courts.

[1] Williams *v.* Hall, 33 Tex. 212; Fowler *v.* Gilmore, 30 Tex. 433; Wally *v.* Wally, 41 Miss. 657; Mason *v.* O'Brien, 42 Miss. 420; Brown *v.* Brown, 33 Miss. 39; Harden *v.* Osborne, 43 Miss. 532.

CHAPTER XV.

HOMESTEAD EXEMPTIONS.

§ 239. Of the homestead exemption, and inquiries in relation thereto.
§ 240. Who entitled to select a homestead.
§ 241. How the homestead right may be acquired.
§ 242. Of the title necessary to sustain a homestead claim.
§ 243. Where claimant has only a moiety of the title.
§ 244. Using the homestead for business and rental purposes.
§ 245. The homestead appurtenances.
§ 246. The amount of property which may be held.
§ 247. Claiming two or more distinct parcels.
§ 247 a. Produce and proceeds of homestead.
§ 248. Abandonment and forfeiture.
§ 249. Liabilities against which homesteads are not exempt.
§ 249 a. Claims for moneys fraudulently invested in.
§ 249 b. Exemption against judgments for torts.
§ 249 c. Exemption against judgments in favor of state or the United States.
§ 249 d. Sale of homesteads to satisfy judgment liens.
§ 249 e. Attachment liens.
§ 249 f. Vendor's lien against homestead.
§ 249 g. Mechanic's lien against homestead.
§ 249 h. Miscellaneous debts against which homestead is not exempt.
§ 250. Lands acquired under the homestead laws of the United States.

§ 239. Of the Homestead Exemption, and Inquiries in Relation thereto.—In nearly all the states of the Union, the dwelling of the debtor, with its appurtenances, when occupied by himself and family as their homestead, is exempt from execution. In most of the states, the homestead is so far held by a title different from that of the claimant's other real estate, that it cannot be alienated nor encumbered without the concurrence of himself and his wife; that upon his death it does not become liable to administration as does his other estate; that it either vests in the wife as sur-

vivor of a kind of joint tenancy,[1] or continues to be held as a homestead for the use of the widow or children, or both. Of the various incidents attending a homestead estate we shall here undertake to treat of but one, namely, its exemption from execution. We shall pursue only those inquiries which we feel confident must be pursued by plaintiffs when desirous of knowing whether certain real estate may be made available under execution. In a few of the states, homestead claimants must notify the officer charged with the execution of the writ that they claim the exemption. Otherwise, they irrevocably waive their rights.[2] Thus in Arkansas, it is said that with respect to interposing claims for exemption, lands and chattels stand on the same footing; that the debtor must claim his exemptions, and see to it that a *supersedeas* issues; that if the officers neglect or refuse to do their duties, a remedy exists either by *mandamus* or appeal; and that a failure to prosecute the remedy is a waiver of the right.[3] The reverse of this is the usual rule. The homestead right having been acquired in the manner designated by the statutes of the particular state, all persons must take notice of it. It need not be claimed.[4] As a general rule, it cannot be waived except by a declaration in writing executed by both husband and wife in the manner prescribed by statute. Hence, if an officer sees proper to levy upon a homestead, the claimants

[1] For the consideration of the subject of the homestead as a joint tenancy, see Chapter III. of Freeman on Cotenancy and Partition.

[2] Rector *v.* Rector, 3 Neb. 171; Livermore *v.* Boutelle, 11 Gray, 217; Belt *v.* Davis, 42 Ala. 461; Wright *v.* Grabfelder, 74 Ala. 460.

[3] Chambers *v.* Perry, 47 Ark. 403. See Irwin *v.* Taylor, 48 Ark. 225, with respect to interposing claim of homestead against attachment proceedings.

[4] Vogler *v.* Montgomery, 54 Mo. 584; Barney *v.* Leeds, 51 N. H. 293; Lambert *v.* Kinnery, 74 N. C. 350; Goldman *v.* Clark, 1 Nev. 611.

need not object. They may regard his acts as destitute of all legal authority. They may permit him to make a sale and execute a deed to the purchaser. For all these proceedings have no effect on their title,[1] beyond that of casting a cloud over it. In Iowa, where the defendant owned a large tract of land occupied by him as a homestead, and a part thereof, not including the dwelling in which he resided and the appurtenant buildings, was sold under execution, without first platting and setting apart a homestead, it was held that the sale was voidable only, and not void; that it might be set aside in a direct proceeding between the parties; that the defendant might disregard the irregularity and let the sale stand, and therefore that the sale "cannot be collaterally called in question."[2]

The grounds of this decision are not sufficiently disclosed by the court to bring them within our comprehension. The defendant was left in possession of the dwelling-house and its appurtenances, and it may be that the court regarded his silent acquiescence as equivalent to his acceptance of the part left him as his homestead. Whether the same conclusion could have been reached had the whole premises been sold, leaving the debtor no homestead whatsoever, is doubtful.

[1] Dye *v.* Mann, 10 Mich. 291; Allen *v.* Bay, 9 Iowa, 509; Hefenstein *v.* Cave, 6 Iowa, 374; Hubbell *v.* Canady, 58 Ill. 425; Vanzant *v.* Vanzant, 23 Ill. 536; Williams *v.* Swetland, 10 Iowa, 51; Bartholomew *v.* West, 2 Dill. 290; Ferguson *v.* Kumler, 25 Minn. 183; Barney *v.* Leeds, 51 N. H. 253; Doyle *v.* Coburn, 6 Allen, 73; Beecher *v.* Baldy, 7 Mich. 488; Abbott *v.* Cromartie, 72 N. C. 292; 21 Am. Rep. 457; Wing *v.* Hayden, 10 Bush, 276; Ring *v.* Burt, 17 Mich. 465; Wiggins *v.* Chance, 54 Ill. 175; Pardee *v.* Lindley, 31 Ill. 174; 83 Am. Dec. 219; Haskins *v.* Litchfield, 31 Ill. 137; Moore *v.* Titman, 33 Ill. 358; Cummings *v.* Long, 16 Iowa, 41; 85 Am. Dec. 502; Morris *v.* Ward, 5 Kan. 239; Myers *v.* Ford, 22 Wis. 139; Myers *v.* Ham, 20 S. C. 522. This latter case seems in conflict with the prior case of Oliver *v.* White, 18 S. C. 235.

[2] Martin *v.* Knapp, 57 Iowa, 340.

There is a substantial difference between the sale under execution of a tract all of which is homestead, and the sale of a larger tract of which the homestead is a part. In the latter case, the sale may be construed as having for its subject that part of or interest in the land which is in excess of the homestead. That view has been taken in Missouri, where the court, on ejectment being brought against a purchaser, declared the sale not to be void, appointed commissioners to admeasure the homestead, and gave judgment only for the part assigned by them to the plaintiff.[1] In several other states such sales are not treated as void, but merely as being subject to the defendant's homestead rights, and therefore as creating between the purchaser and the defendant in execution the relation of tenants in common.[2] A preponderance of the authorities, however, pronounces void a sale under execution of the homestead, though the lands sold exceed in quantity or value the amount which can be retained as exempt.[3] Two very conclusive reasons support this conclusion. They are, first, that a sale prior to the separation of the exempt from the non-exempt lands would render it impossible for intending purchasers to ascertain either the quantity or location of the lands sold, and would therefore inevitably lead to a sale at an inadequate price; and second, a sale of the whole premises would probably embarrass the debtor in the exercise of his

[1] Crisp *v.* Crisp, 86 Mo. 630.

[2] Letchford *v.* Cary, 52 Miss. 791; Swan *v.* Stephens, 99 Mass. 7; Silloway *v.* Brown, 12 Allen, 32.

[3] Ferguson *v.* Kumler, 25 Minn. 183; 25 Minn. 156; Kipp *v.* Bullard, 30 Minn. 84; Kerr *v.* S. P. Comm'rs, 8 Biss. 276; Mebane *v.* Layton, 89 N. C. 396; Fogg *v.* Fogg, 40 N. H. 282; 77 Am. Dec. 715; Hartwell *v.* McDonald, 69 Ill. 293; McCracken *v.* Adler, 98 N. C. 400; McCanless *v.* Flinchum, 98 N. C. 358.

statutory right of redemption. "That right could not be exercised without paying the entire sum bid, although a portion, and in some instances perhaps a greater portion, of such sum may have been bid on account of the exempt land."[1] In every case of a proposed levy upon real estate, the parties interested in making the levy should, without waiting for any claim on the part of the defendant, first satisfy themselves that the property is not exempt as a homestead. In determining this question, they must make some, and perhaps all, of the following inquiries: 1. Is the defendant a person on whose behalf, or on behalf of whose family, a homestead exemption can be acquired? 2. Have the measures necessary for acquiring such exemption been taken with reference to the realty on which the levy is about to be made? 3. Is the defendant's title or estate such as can be held as a homestead under the statute? 4. Is the *use* to which the property is put such as wholly or partly destroys its character of a homestead? 5. Does the property exceed in area or value the limit prescribed by statute? 6. Is the parcel upon which a levy is desired so distant or distinct from the family residence that it cannot in law be deemed a part of the homestead? 7. Has there been any abandonment of the homestead rights? 8. Conceding that a valid homestead claim exists, is the liability upon which the writ issued one against which this claim can be asserted?

§ 240. Who Entitled to Claim a Homestead. — There are states in which an unmarried man having no family dependent on him for support, is entitled to the

[1] Mohan *v.* Smith, 30 Minn. 259.

full benefit of the homestead exemption.[1] There are other states in which such a man is not entitled to the same exemption as a married man; but is, nevertheless, entitled to a homestead exemption of less value. But the chief object of the homestead laws is to shelter the family. In the majority of the states, the claimant must be the head, or one of the heads, of a family.[2] The head of a family is generally a husband or father. This is not, however, an invariable rule. A wife may, in most states, claim the benefit of the homstead laws. But a person may be the head of a family, within the meaning of the exemption statutes, without being married, and without being a parent.[3] Thus a man who has living with him his mother, or sister, or other persons dependent on him for support, is entitled to a homestead exemption.[4] A woman supporting her illegitimate child is more within the need, and as much entitled to the benefit, of the homestead laws as though she had been a wedded mother.[5] We know not why any other woman who supports a dependent relative should not be entitled to a homestead, just as her brother would be if he were performing the same meritorious act. But the courts have illogically and ungallantly determined otherwise.[6] If the family consists of a

[1] Greenwood *v.* Maddox, 27 Ark. 648; Myers *v.* Ford, 22 Wis. 139.

[2] Folsom *v.* Carli, 5 Minn. 333; 80 Am. Dec. 429; Revalk *v.* Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Tillotson *v.* Millard, 7 Minn. 520; Gee *v.* Moore, 14 Cal. 472; Bowman *v.* Norton, 16 Cal. 213; Davenport *v.* Alston, 14 Ga. 271; Kitchell *v.* Burgwin, 21 Ill. 40; Morrison *v.* McDaniel, 30 Miss. 217; Sears *v.* Hanks, 14 Ohio St. 298; 84 Am. Dec. 378; Griffin *v.* Sunderland, 14 Barb. 456. An alien resident is entitled to a homestead. McKenzie *v.* Murphy, 24 Ark. 155.

[3] See § 222.

[4] Parsons *v.* Livingston, 11 Iowa, 104; 77 Am. Dec. 135.

[5] Ellis *v.* White, 47 Cal. 73.

[6] Woodworth *v.* Comstock, 10 Allen, 425; Lathrop *v.* Loan Ass'n, 45 Ga. 483.

parent and his or her children, the latter must, if adults, be unable to support themselves, through some infirmity other than indolence. "Adults, male, or if unmarried, female, who have robust health, and all usual faculties, lie under the necessity of supporting themselves, unless they find others willing to support them who can do so, without making such service a foundation for exempting their property from liability for the payment of their just debts."[1] As the fact that a person is unmarried is not conclusive against his or her claim, so the fact that he or she is married is not conclusive in favor of the claim. One may be the head of a family without being married, and one may be married without being the head of a family. A man living in one state, with a family residing in another state, is not entitled to the benefit of a homestead exemption as the head of a family in the former state. The property claimed must first be made the home of the family.[2] But a married woman, having her niece living with her, may make a valid homestead claim, though her husband resides elsewhere.[3] It would probably be otherwise if it were shown that he also had a homestead; for the law does not allow one to each of the spouses.[4] In some instances persons have been allowed to retain homesteads after ceasing to be heads of families; as where the wife and children have either died, or have permanently abandoned their home, leaving it in the possession of the husband.[5] We doubt the

[1] Décuir *v.* Benker, 33 La. Ann. 320.

[2] Cary *v.* Tice, 6 Cal. 625; Benedict *v.* Bunnell, 7 Cal. 245; Meyer *v.* Claus, 15 Tex. 516; Keillin *v.* Berney, 31 Ala. 192; Farlin *v.* Snook, 26 Kan. 397.

[3] Gambette *v.* Brock, 41 Cal. 78.

[4] Dwinell *v.* Edwards, 23 Ohio St. 603.

[5] Doyle *v.* Coburn, 6 Allen, 71; Silloway *v.* Brown, 12 Allen, 30; Barney *v.* Leeds, 51 N. H. 253; Bipus *v.* Deer, 106 Ind. 135.

soundness of these decisions. When the family ceases, we think the right to exemption as a married person, or as a householder or head of the family, must also terminate.[1] The fact that husband and wife are only temporarily in the state, and intend to migrate as soon as they can make a certain amount of money, does not disqualify them from claiming a homestead.[2] An alien domiciled in Arkansas was held to be there entitled to the benefit of the homestead exemption, although the statute did not profess to extend such benefits to any persons except "free white citizens of the state, male or female."[3] Domicile in a state is essential to a successful claim to a homestead exemption under the laws of some of the states,[4] and removal from the state operates as an abandonment of a homestead previously existing.[5] Where the defendant is entitled to a homestead exemption as the head of a family, he must possess that *status* at the time of the levy. If the levy is proper when made, the judgment creditor thereby acquires a special lien which cannot be divested by the defendant subsequently becoming the head of a family.[6]

§ 241. How the Homestead Exemption may be Created.—The first thing to be done to impress the homestead exemption on property is to make it a *home.* The law does not exempt future homesteads. It throws its protection around only that which is already consecrated by being the residence of the claimant as the

[1] Revalk *v.* Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Cooper *v.* Cooper, 24 Ohio St. 488; 7 Chic. L. N. 217; Gee *v.* Moore, 14 Cal. 472.

[2] Dawley *v.* Ayres, 23 Cal. 108.

[3] McKenzie *v.* Murphy, 24 Ark. 155.

[4] Alston *v.* Ulman, 39 Tex. 157.

[5] Baker *v.* Leggett, 98 N. C. 304; Finley *v.* Saunders, 98 N. C. 462.

[6] Pender *v.* Lancaster, 14 S. C. 25; 33 Am. Rep. 720; Selders *v.* Lane, 40 Ohio St. 345.

home of himself and his family. The declaration which the claimant may be required to file and record does not create a homestead. It is merely legal notice that one already exists, and that the claimant desires that it shall not be longer subject to forced sale under execution. The homestead exemption cannot exist upon property upon which the claimant and his family have never resided.[1] The fact that there is a homestead must precede the declaration of its existence. The declaration is not only false: it is also invalid if it precedes this fact. Where the law requires a declaration to be filed, the filing is of no consequence, unless it can be shown that the premises were then occupied as a homestead. It is not sufficient that they had been so occupied before, or that they are so occupied after, the filing.[2] In New Hampshire, buildings having been completed for the purposes of occupation as a home, the owner commenced to move in. While he was moving, and after part of his furniture was in the house, an attachment was levied. But it was held that the homestead character had been impressed on the property, and took precedence over the attachment.[3] So in Iowa, where a debtor removed to D. to

[1] Kaster *v.* McWilliams, 41 Ala. 302; Cook *v.* McChristian, 4 Cal. 23; Moss *v.* Warner, 10 Cal. 296; Holden *v.* Pinney, 6 Cal. 234; Benedict *v.* Bunnell, 7 Cal. 245; Tourville *v.* Pierson, 39 Ill. 446; Charless *v.* Lamberson, 1 Iowa, 435; Christy *v.* Dyer, 14 Iowa, 438; 81 Am. Dec. 493; Cole *v.* Gill, 14 Iowa, 527; Elston *v.* Robinson, 23 Iowa, 208; Brown *v.* Martin, 4 Bush, 47; Dyson *v.* Sheley, 11 Mich. 527; Coolidge *v.* Wells, 20 Mich. 79; Campbell *v.* Adair, 45 Miss. 170; Kresin *v.* Mall, 15 Minn. 116; Hoitt *v.* Webb, 36 N. H. 158; True *v.* Estate of Morrill, 28 Vt. 672; Morgan *v.* Stearns, 41 Vt. 398; Davis *v.* Andrews, 30 Vt. 678; Philleo *v.* Smalley, 23 Tex. 498; Franklin *v.* Coffee, 18 Tex. 413; 70 Am. Dec. 292; Russ *v.* Henry, 58 Vt. 388; Williams *v.* Borris, 31 Ark. 468; Tillotson *v.* Millard, 7 Minn. 513; 82 Am. Dec. 112.

[2] Gregg *v.* Bostwick, 33 Cal. 227; 91 Am. Dec. 637; Mann *v.* Rogers, 35 Cal. 316; Prescott *v.* Prescott, 45 Cal. 58; Lee *v.* Miller, 11 Allen, 47.

[3] Fogg *v.* Fogg, 40 N. H. 282; 77 Am. Dec. 715.

occupy premises purchased by him, but being obliged to wait for the completion of repairs, put his goods in the house and boarded his family till the repairs could be completed, it was adjudged that the property became a homestead when the goods were put therein.[1] In Texas it seems that preparation to improve, accompanied by an intention to reside on the premises as a home, might be sufficient to create a homestead exemption.[2] The fact that the debtor was at the time of the levy building a house on the lot levied upon, with the intent to use and occupy it as his homestead, will not entitle him to its exemption.[3] In Wisconsin, on the other hand, the purchase of land with intent to occupy it as a homestead, evidenced by overt acts in fitting it up for that purpose, followed within a reasonable time by its actual occupancy as a homestead, exempts it from the time of its purchase.[4] The reasons for this decision were thus stated by the court; "The acquisition of a completed homestead is seldom instantaneous. Generally, it requires years of industry and economic living. The purpose necessarily precedes the inception of the work, and that is followed by successive steps until completion is attained. The land must be acquired, the location of the dwelling-house designated, the cellar dug, the materials procured, the foundations laid, the superstructure erected, and then all fitted for a dwelling-house, before actual occupancy with the family can take place. These successive steps in the acquisition of a completed homestead, made in good faith, come within the spirit of the statute, and are each entitled to the protection afforded by it."

[1] Neal *v.* Coe, 35 Iowa, 407.
[2] Franklin *v.* Coffee, 18 Tex. 413; 70 Am. Dec. 292.
[3] Patrick v. Baxter, 42 Ark. 175.
[4] Scofield *v.* Hopkins, 61 Wis. 370.

Residing on part of the premises will not enable the claimant to impress other parts with the homestead characteristics or exemption.[1] A tract of land was devised by a father to his son. About five acres were enclosed, and had thereon a dwelling in which the son resided. The balance had been leased by the father for farming purposes, and was being cultivated by the lessee, who resided thereon. The son filed a declaration, claiming the whole tract as his homestead; but such declaration was declared inoperative except as to the five acres.[2] "It is impossible," said the court, "to conceive of land constituting part of a 'homestead' (as the term is commonly employed) of a family residing in a certain dwelling-house, which is not used at all by those living in the dwelling-house, and the right to use or occupy which is in no manner annexed to or connected with the occupancy of the house, but which, to the contrary, is used and possessed by the occupants of another dwelling-house, — who alone have the right to use and possess the land, — and is part of the 'home' of those residing in that house."

But one homestead can be acquired or in existence at the same time. No man can hold two homesteads. Nor can any one occupy such a relation to two or more residences or places that he may elect which he will claim as his homestead. Before either place can be successfully claimed as exempt, it must have become *the* homestead of the debtor.[3] In a majority of the states the fact that premises are occupied as a homestead is all that is necessary to render them exempt

[1] Casselman *v.* Packard, 16 Wis. 114; 82 Am. Dec. 710.

[2] Estate of Crowey, 71 Cal. 300.

[3] Saharas *v.* Fenlon, 5 Kan. 592; Wright *v.* Dunning, 46 Ill. 371; Tourville *v.* Pierson, 39 Ill. 446.

from execution. But in the other states a declaration of homestead must be made and filed for record, or some other kind of record notice must be given, showing the world that the occupants intend to insist upon their exemption right.[1]

§ 242. Of the Title Necessary to Sustain a Homestead Claim.—The legislators who enact homestead laws are, no doubt, chiefly intent upon protecting the debtor and his family, regardless of the title by which the homestead is held. Such as it is, the family is entitled to retain it. Whether it be an estate in fee-simple, free from encumbrances, or an estate of less dignity and value, or a mere possessory interest, as long as the debtor can occupy it as a home, the creditor should not be allowed to take it under his execution.[2] The object of the homestead law is to protect *the possession.* It applies as well to possession held under an equitable as under a legal title.[3] Whether the debtor holds in fee-

[1] The states and territories in which no formal declaration or selection of homestead is essential are Arizona, Arkansas, Connecticut, Dakota, Florida, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Montana, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, South Carolino, Tennessee, Texas, Utah, Vermont, Wyoming, and Wisconsin. But in Alabama, California, Colorada, Georgia, Idaho, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nevada, New Jersey, New York, Virginia, Washington Territory, and West Virginia the homestead must be selected, and a declaration or other notice of such selection placed on record.

[2] Brooks *v.* Hyde, 37 Cal. 373; McClurkin *v.* McClurkin, 46 Ill. 331; Deere *v.* Chapman, 25 Ill. 610; 79 Am. Dec. 350; Conklin *v.* Foster, 57 Ill. 104; Norris *v.* Moulton, 34 N. H. 392; Colwell *v.* Carper, 15 Ohio St. 279; Pelan *v.* De Berard, 13 Iowa, 53; Johnson *v.* Richardson, 33 Miss. 462; Poe *v.* Hardie, 65 N. C. 447; Tyffe *v.* Beers, 18 Iowa, 4; *contra*, Pezzaler *v.* Campbell, 46 Ala. 35, holding that the claimant must be the *owner.*

[3] Bartholomew *v.* West, 2 Dill. 291; Morgan *v.* Stearns, 41 Vt. 398; Cheatham *v.* Jones, 68 N. C. 153; Doane *v.* Doane, 46 Vt. 485; Blue *v.* Blue, 38 Ill. 18; 87 Am. Dec. 267; Allen *v.* Hawley, 66 Ill. 168; Orr *v.* Shraft, 22 Mich. 260; McKee *v.* Wilcox, 11 Mich. 358; 83 Am. Dec. 743; Tomlin *v.* Hilyard, 43 Ill. 300; 92 Am. Dec. 118; Farrant *v.* Swain, 1 L. & Eq. Reporter, 9; McCabe *v.* Mazzuchelli, 13 Wis. 481; Dreutzer *v.* Bell, 11 Wis. 114; *contra*, Thurston *v.* Maddox, 6 Allen, 427; Robinett *v.* Doyle, 2 West. L. M. 585.

simple absolute, for life, or for a term of years,[1] the reason for applying the exemption exists with equal force. The possession of land held under a contract to purchase may be subjected to a homestead claim.[2] If so claimed, the husband cannot dispose of it without the assent of the wife, and if he refuse to complete his purchase, she should be permitted to do so for the protection of her interest.[3] Title acquired after filing a declaration of homestead is also protected from forced sale, and seems to become an inseparable part of the homestead estate. In California a declaration of homestead was filed by one in possession, the fee being in a stranger. Afterward, prior to the sale under execution, but subsequently to the docketing of a judgment against him, the claimant became the owner of the fee. The purchaser at the sheriff's sale brought an action to recover possession. In determining that this action could not be sustained, the court justified the decision by the following train of reasoning: "At the time the judgment was docketed and became a lien, the premises constituted the homestead of the defendant, as to everybody except the owner of the land. There is no question made as to its being a homestead, if a party

[1] Platto *v.* Cady, 12 Wis. 461; 78 Am. Dec. 752.

[2] McManus *v.* Campbell, 37 Tex. 267; Allen *v.* Hawley, 66 Ill. 164.

[3] McKee *v.* Wilcox, 11 Mich. 358; 83 Am. Dec. 743. But see Farmer *v.* Simpson, 6 Tex. 310. In some of the states, a husband cannot claim as exempt, as a homestead, lands of his wife in his occupation. Davis *v.* Dodds, 20 Ohio St. 473; Holman *v.* Martin, 12 Ind. 553; Herschfeldt *v.* George, 6 Mich. 457. But where a husband has an estate in his wife's land, by virtue of the marriage, entitling him to possession for life, or otherwise, we see no reason why it should not be deemed his homestead when so occupied and dedicated. Tourville *v.* Pierson, 39 Ill. 446; Boyd *v.* Cudderback, 31 Ill. 113; Dreutzer *v.* Bell, 14 Wis. 114; Orr *v.* Shraft, 22 Mich. 260; Newton *v.* Clarke, 4 W. L. Gaz. 109. When the claimant's estate in the land terminates, he cannot hold the *buildings* as a homestead. Brown *v.* Keller, 32 Ill. 152; 83 Am. Dec. 258. In other words, there can be no homestead estate in a mere structure when the owner has not even a possessory interest in the soil.

having a naked possession only, the title being in a stranger, can acquire a homestead right in the land so possessed. The statute does not specify the kind of title a party shall have in order to enable him to secure a homestead. It says nothing about title. The homestead right given by the statute is impressed on the land to the extent of the interest of the claimant in it,—not on the title merely. The actual homestead, as against everybody who has not a better title, becomes impressed with the legal homestead right by taking the proceedings prescribed by the statute. The estate or interest of the occupant, be it more or less, thereby becomes exempt from forced sales on execution, and can only be affected by voluntary conveyances or relinquishment in the mode prescribed. The land, in this instance, as to everybody having no superior title, became the homestead of the defendant, for all the purposes of protection against forced sales and voluntary conveyances in any other than the statutory mode, as effectually as if the defendant had held the title in fee-simple. There was nothing which the sheriff was authorized to sell under execution. The fact that the defendant, after the attaching of the homestead right, acquired the true title from a stranger, does not affect the question. This did not vitiate the homestead right which had attached to the land, and given an independent estate not subject to execution. The title so acquired cannot be considered as a thing separate and apart from the land subject to sale and conveyance, in the hands of the homestead claimant, so as thereby to affect the homestead right. By filing the declaration, the party indicates his intention to make the land his homestead; and if he afterwards acquires an outstanding title, it

attaches itself to the homestead already acquired, and perfects the homestead right. If it were otherwise, a homestead could not be secured which would be safe against forced sales, unless there was at the time a perfect title in fee-simple in the party who seeks the homestead right. In case of a title in any respect imperfect, the claimant could not perfect his title to his homestead, except at the risk of losing it altogether, through the intervention of a creditor, and by the very means adopted to render it more secure; and under such a construction of the statute it would not be available to the greater portion of the class in this state who need it most."[1] In truth, the question is not one of title, but of use. Are the premises the debtor's homestead as a matter of fact? If so, such estate as he has in them is exempt from execution.[2] If, on the other hand, the estate is not consistent with the occupation of the land by the debtor as his home, it is not exempt. He may have an estate in reversion or remainder. This, however valuable, gives him no right to the possession, and therefore no right to occupy the premises as his home. The homestead right, if any exists, is in the holder of the estate in possession. Hence a reversioner or remainderman, because his estate is incompatible with the existence of a homestead in fact, cannot secure its exemption from forced sale by claiming it as a homestead.[3]

[1] Spencer *v.* Geissman, 37 Cal. 99; 99 Am. Dec. 248. Though a claim of homestead may protect a possessory title *from execution* against the occupant, it can interpose no obstacle to the recovery of the property by the true owner in an action therefor. Mann *v.* Rogers, 35 Cal. 316; Calderwood *v.* Tevis, 23 Cal. 335; McClurkin *v.* McClurkin, 46 Ill. 327.

[2] King *v.* Sturges, 56 Miss. 606; Hogan *v.* Manners, 23 Kan. 531.

[3] Murchison *v.* Plyler, 87 N. C. 79; Estate of Crowey, 71 Cal. 300.

§ 243. **Whether Homestead Rights can Attach to an Undivided Interest** in lands, in the absence of an express provision of the statute to that effect, is a question on which the judges have not agreed. On the one hand, it has been thought that the provisions of the homestead law contemplated that the interest to which they should be applied should be susceptible of an enjoyment in severalty. When the value of the land claimed exceeds in amount the limit of the homestead right, the statute provides means by which the homestead may be segregated; and that, as segregated, it may be set off to the judgment debtor. No such segregation could take place when the interest of the claimant was in a moiety only, for in that case there is no place which he can lawfully take into his exclusive possession. For these reasons, the claim of a co-tenant to a homestead has been denied in many of the cases in which it has been questioned.[1] In California, the doctrine that a homestead could not be acquired in undivided property was frequently enforced, and was applied in some extreme cases. In one instance, the lands attempted to be dedicated as a homestead belonged to the husband and wife and their child, as tenants in common. The court could see no distinction between this case and one in which the co-tenants were entire strangers to one another.[2] In another instance, the homestead had been acquired under a conveyance purporting to convey the same in severalty, and was

[1] West *v.* Ward, 26 Wis. 580; Wolf *v.* Fleischacker, 5 Cal. 244; 63 Am. Dec. 121; Elias *v.* Verdugo, 27 Cal. 418; Reynolds *v.* Pixley, 6 Cal. 167; Kellersberger *v.* Copp, 6 Cal. 165; Bishop *v.* Hubbard, 23 Cal. 517; 83 Am. Dec. 132; Ward *v.* Huhn, 16 Minn. 161; Thurston *v.* Maddocks, 6 Allen, 429; Kingsley *v.* Kingsley, 39 Cal. 665; Cameto *v.* Dupuy, 47 Cal. 79; Henderson *v.* Hay, 26 La. Ann. 156.

[2] Giblin *v.* Jordan. 6 Cal. 417.

acquired and held under the claim and belief, on the part of the occupant, that he was the sole owner. The court could not understand that these facts authorized any exception to the general rule.[1] And where, when acquired, the homestead was held in severalty, the conveyance of an undivided interest, because it turned the homestead into a co-tenancy, was deemed an abandonment of the homestead.[2] On the other hand, in several of the states, a homestead claim upon an undivided interest has been sustained, and all distinction in this respect, between estates in severalty and estates in co-tenancy, denied.[3] In California, the state in which the claim of a co-tenant to exemption was first denied, the legislature so changed the statute that a part owner can hold, as a homestead, lands of which he is in the exclusive possession.[4] But we see no sufficient reason, even in the absence of statutes directly bearing upon the subject, for holding that a general homestead act does not apply to lands held in co-tenancy. The fact that a homestead claim might savor of such an assumption of an exclusive right as is inconsistent with the rights of the other co-tenant, and that the maintenance of such claim might interfere with proceedings for partition, form no very satisfactory reason for denying the exemption. If the rights of the other co-tenant are threatened or endangered, he alone should be permitted to call for protection and redress. The law will

[1] Seaton *v.* Son, 32 Cal. 483.

[2] Kellersberger *v.* Copp, 6 Cal. 565.

[3] Horn *v.* Tufts, 38 N. H. 483; Thorn *v.* Thorn, 14 Iowa, 53; 81 Am. Dec. 451; Tarrent *v.* Swain, 15 Kan. 146; 2 Cent. L. J. 754; McElroy *v.* Bixby, 36 Vt. 254; 84 Am. Dec. 684; Greenwood *v.* Maddox, 27 Ark. 660; Robinson *v.* McDonald, 11 Tex. 385; 62 Am. Dec. 480; Williams *v.* Wethered, 37 Tex. 131; Smith *v.* Deschaumes, 37 Tex. 429; Bartholomew *v.* West, 2 Dill. 293.

[4] Statute 1868, p. 116; Higgins *v.* Higgins, 46 Cal. 259. See sec. 1238, California Civil Code.

not sanction any use of the homestead in prejudice of his rights. But as long as *his* interests are respected, or so nearly respected that *he* feels no inclination to complain, why should some person having no interest in the co-tenancy be allowed to avail himself of the law of co-tenancy for his own and not for a co-tenant's gain? The homestead laws have an object perfectly well understood, and in the promotion of which courts may well employ the most liberal and humane rules of interpretation. This object is to assure to the unfortunate debtor, and his equally unfortunate but more helpless family, the shelter and the influence of HOME. A co-tenant may lawfully occupy every parcel of the lands of the co-tenancy. He may employ them, not merely for cultivation, or for other means of making profits, but may also build houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may of right occupy and enjoy the premises with him. Upon the land of which he is but a part owner, he may, and in fact he frequently does, obtain all the advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity because the other co-tenants are entitled to equal advantages in the same home. That he has not the whole is a very unsatisfactory and a very inhumane reason for depriving him of that which he has. We have remarked with pleasure the acquiescence in these views evident in the more recent decisions. In no instance, so far as we are aware, in which the question has been presented within the last fifteen years, have the court, unless bound by some previous adjudication in the same state, declared an undivided interest in lands beyond

the protection of the homestead laws.[1] We exclude from this assertion partnership lands. By partnership lands we mean lands which, in addition to standing in the names of two or more persons who happen to be partners, have been so acquired and held that, at least in equity, they have the incidents of partnership property, and must, when necessary in the liquidation of partnership debts or accounts, be treated as personalty. Such lands are subject to the joint obligations of their owners, and each has the right to insist on their application, in case of necessity, to the satisfaction of the firm debts; and finally, neither partner has any certain definite interest therein, but only a share in such surplus as may remain after the payment of the partnership obligations. If either partner were permitted to dedicate any portion of these lands as a homestead, he could thus indirectly withdraw from the firm a portion of its capital in defiance of the partnership articles, and often to the great prejudice of his co-partners and the creditors of the firm. Therefore whatever may be his rights as against his individual creditors, we think it must ultimately be conceded that neither partner can successfully claim as a homestead any part of the firm realty, as against his co-partners, nor to the prejudice of the creditors of the firm.[2]

[1] Clements *v.* Lacy, 51 Tex. 162; Brown *v.* McLennan, 60 Tex. 43; Hewett *v.* Rankin, 41 Iowa, 35; In re Swearinger, 5 Saw. 52; 17 Nat. Bank. Reg. 134; McGrath *v.* Sinclair, 55 Miss. 89; Sherrid *v.* Southwick, 43 Mich. 515; Kaser *v.* Haas, 27 Minn. 406; Lozo *v.* Southerland, 38 Mich. 168; Ward *v.* Mayfield, 41 Ark. 94; Danforth *v.* Beathe, 43 Vt. 138; McGune *v.* Van Pelt, 55 Ala. 344; Snedecor *v.* Freeman, 71 Ala. 140.

[2] In re Smith, 2 Hughes, 307; C. & S. Bank *v.* Corbett, 5 Saw. 543; Terry *v.* Berry, 13 Nev. 514; Smith *v.* Chenault, 48 Tex. 455; Drake *v.* Moore, 66 Iowa, 58; Hoyt *v.* Hoyt, 69 Iowa, 174; Trowbridge *v.* Cross, 117 Ill. 109.

§ 244. The Use of the Homestead for Business and Rental Purposes. — The actual home of the debtor — the place where he and his family reside — must be conceded to be exempt wherever homestead laws prevail, and the claimant has complied with their requirements.[1] Premises claimed as exempt, and undisputably occupied by the debtor and his family as their home, may also be occupied for other purposes. These questions then arise: Does the occupation for other purposes make the premises any less a homestead? Does it forfeit the homestead claim, either in whole or in part? In Rhodes *v.* McCormick, 4 Iowa, 368, 68 Am. Dec. 663, part of a building was occupied by the claimant's family. Those parts not necessary for the family were occupied for other than homestead purposes. The court determined that the homestead character and exemption must be confined to the rooms used by the family; that part of the building was homestead and part was not.[2] This decision has not, so far as we are aware, ever been overruled.[3] In fact, it has quite recently been recognized as a controlling authority.[4] It is, however, opposed by so many adverse adjudications in other parts of the Union that its force as authority must be limited to the state wherein it was made. Nothing is more common than to use the homestead for business purposes. Spare rooms may be rented

[1] Tumlinson *v.* Swinney, 22 Ark. 400; 76 Am. Dec. 432; Cook *v.* McChristian, 4 Cal. 23; Taylor *v.* Hargous, 4 Cal. 268; 60 Am. Dec. 606; McDonald *v.* Badger, 23 Cal. 393.

[2] Rhodes *v.* McCormick, 4 Iowa, 368; 68 Am. Dec. 663.

[3] In Wright *v.* Ditzler, 54 Iowa, 626, Rhodes *v.* McCormick, 68 Am. Dec. 663, is referred to as a case wherein the referees reported that the parts of the house declared not to be exempt were originally designed for a business house, and the case was therefore held not to forbid the use as a store of part of a building intended originally for family use.

[4] Mayfield *v.* Maasden, 59 Iowa, 517.

to lodgers. The claimants may carry on the business of keeping a hotel or lodging-house. They may live upstairs and have storerooms underneath rented out to tenants. In all these cases the fact that part of the building was used for business purposes has never, except in Iowa, been regarded as a waiver of the homestead exemption as to the part so used.[1] In Wisconsin the claimant lived in the fourth story of his building, and rented the three lower stories to tenants. The entire building was adjudged exempt.[2] In Kansas a building designed both for a brewery and for a family residence was also regarded as entirely exempt.[3] In Iowa, a single building claimed as a homestead, and occupied partly as a residence and partly for business purposes, will undoubtedly be divided, if possible, so as to assign to the debtor the rooms and parts occupied as his home, and to permit the sale of the residue under execution.[4] So far as we have observed, this course has not been pursued in other states. Generally the courts have considered all the uses and purposes for which the building has been constructed and used. If, upon the whole, it appeared that the chief use or purpose of the building was that of a homestead, they have not condemned the whole nor any part to forced sale because some of the rooms or parts have been rented out or used for business purposes;[5] and if, on the

[1] Orr *v.* Shraft, 22 Mich. 260; Gregg *v.* Bostwick, 33 Cal. 220; 91 Am. Dec. 637; Moore *v.* Whitis, 30 Tex. 440. For exemption of hotels and lodging-houses, see Goldman *v.* Clark, 1 Nev. 607; Mercier *v.* Chace, 11 Allen, 194; Lazell *v.* Lazell, 8 Allen, 575; Ackley *v.* Chamberlain, 16 Cal. 181; 76 Am. Dec. 516.

[2] Phelps *v.* Rooney, 9 Wis. 70; 76 Am. Dec. 244.

[3] In re Tertelling, 2 Dill. 339; Klenk *v.* Knoble, 37 Ark. 298.

[4] Mayfield *v.* Maasden, 59 Iowa, 517.

[5] Klenk *v.* Knoble, 37 Ark. 298; Hogan *v.* Manners, 23 Kan. 551; 33 Am. Rep. 199.

other hand, the primary use of the building is for business purposes, they have held it subject to execution, though occupied by the debtor and his family as their home. The use of a residence for hotel purposes will not forfeit the debtor's claim to hold it exempt as his homestead;[1] and the use of a hotel for residence purposes will not enable the owner to maintain a claim for its exemption as his homestead.[2]

In the cases to which we have referred, the property claimed as a homestead, though in part used for other purposes, did not contain dwellings or places of business distinct and separate from the building occupied by the family. The premises claimed as a homestead may contain two or more buildings, or they may have one dwelling occupied by the family, and one or more distinct structures rented out to tenants for stores, offices, or other purposes. In some of the states it is immaterial how many structures are on the homestead lot, or to what uses it is put, provided always that it, or some part of it, is occupied as a homestead, and that, with all its improvements, it does not exceed in value the limit prescribed by statute.[3] In other states, buildings distinct from the family residence, and rented out, are not exempt as part of the homestead.[4] In Michigan, a double house, showing by its structure that it was originally intended for two families, and in fact occupied one half by the claimant, and the other half by his tenant, was held to be a homestead only so

[1] Harriman *v.* Queen Ins. Co., 49 Wis. 84.

[2] Laughlin *v.* Wright, 63 Cal. 116.

[3] Kirtland *v.* Davis, 43 Ga. 318; Hubbell *v.* Canady, 58 Ill. 425; Kelley *v.* Baker, 10 Minn. 154; Hancock *v.* Morgan, 17 Tex. 582; Umland *v.* Holcombe, 26 Minn. 286; Stevens *v.* Hollingsworth, 74 Ill. 203; Smith *v.* Stewart, 13 Nev. 65.

[4] Casselman *v.* Packard, 16 Wis. 115; 82 Am. Dec. 710; Hoitt *v.* Webb, 36 N. H. 158; Kurz *v.* Brusch, 13 Iowa, 371; 81 Am. Dec. 435.

far as occupied by its owner.[1] The sole object of the homestead laws is the securing to the families of unfortunate debtors the shelter of their homes, and to give them assurance that this much is beyond the reach of the law. The policy of these laws does not go beyond this. It does not embrace the withdrawal from execution of property not needed nor used by the family as a part of the home. If these laws are to be interpreted with reference to the well-known purpose of their enactment, we think they must, except where they are clearly of a different purport, be confined in their operation to that portion of the premises claimed which constitutes the claimant's home, and so as not to embrace buildings separated from the family residence and rented out to tenants.[2] If the premises are not used as a home at all, as where they are used solely as a mill, a shop, or an office, no part of them is exempt as a homestead, because no part is a homestead in fact.[3] If there are several distinct tenements, whether united into one structure or not, one tenement may be used as the home of the debtor, while the others may be used for rental or business purposes. In such cases the former is clearly exempt, because it is the homestead in fact, and the latter are as certainly not exempt, for they are no more a part of the homestead in fact than if they were situate in remote parts of the same town.[4] But the premises, when dedicated

[1] Dyson *v.* Sheley, 11 Mich. 527.

[2] Johnson *v.* Moser, 66 Iowa, 536.

[3] Crow *v.* Whitworth, 20 Ga. 38; Greeley *v.* Scott, 2 Woods, 657; True *v.* Morrill, 28 Vt. 672; Stanley *v.* Greenwood, 24 Tex. 224; 76 Am. Dec. 106.

[4] Kaster *v.* McWilliams, 41 Ala. 302; McConnaughly *v.* Baxter, 55 Ala. 379; Wade *v.* Wade, 9 Baxt. 612; Schoffen *v.* Landauer, 60 Wis. 337; Tiernan *v.* Creditors, 62 Cal. 286; Ashton *v.* Ingle, 20 Kan. 670; 27 Am. Rep. 197; Geney *v.* Maynard, 44 Mich. 578.

as a homestead, may be in the exclusive occupancy of the family. If so, the homestead estate at once attaches to the whole property. In this estate, the wife is, under many of the statutes, a joint tenant with her husband, or is at least so interested in the preservation of the whole of the premises as a homestead, that they cannot be alienated, devised, nor encumbered without her assent. She has no power to prevent her husband from erecting other dwellings, or making other improvements, nor from renting the new erections to tenants. If the new erections and their occupancy by tenants have the effect of contracting the homestead estate so that it shall not embrace the lands on which they stand, then the estate of the wife is impaired and partially terminated without her assent. Hence it has been held that the erection and renting of a house on lands previously dedicated as a homestead cannot occasion any decrease in the limits of the exempt premises.[1]

§ 245. **The Homestead Appurtenances.** — The homestead is not limited to the dwelling-house. "The word 'homestead' is used in its ordinary or popular sense,—or in other words, its legal sense is also its popular sense. It represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including out-buildings of every kind necessary or convenient for family use, and lands used for the purposes thereof." [2] It includes barns, stables, smoke-houses, and no doubt all other out-buildings

[1] Hancock *v.* Morgan, 17 Tex. 582. For a discussion of the character and uses of the premises which may successfully be claimed as a homestead, see Greeley *v.* Scott, 2 Cent. L. J. 361, and note thereto.

[2] Gregg *v.* Bostwick, 33 Cal. 227; 91 Am. Dec. 637; Moore *v.* Whitis, 30 Tex. 440.

erected for family use.[1] The claimant may exercise some trade or profession requiring him to keep a shop or office. This shop or office may be erected on the homestead premises, and if so erected, seems to be regarded as appurtenant to the homestead, and as exempt from execution.[2] In Nevada, a livery stable erected on a portion of the homestead lot was adjudged to be exempt as a part of the homestead.[3] In Wisconsin, laths, lumber, shingles, and other material procured for the purpose of repairing the homestead dwelling, and actually deposited upon the homestead premises, are exempt from execution.[4] A lot lying adjacent to that on which the dwelling-house of the debtor is situate, and used by him and his family as an approach to the dwelling-house lot, and for various domestic purposes, may be exempt as part of the homestead.[5] In Florida, a mill adjacent to the residence of the mill-owner may be a part of his homestead.[6] But generally, neither a mill nor any other business structure can be exempt as appurtenant to a homestead.[7]

§ 246. **The Amount of Property Which may be Held as a Homestead** is prescribed by the statutes

[1] Aekley *v.* Chamberlain, 16 Cal. 181; 76 Am. Dec. 516; Kurz *v.* Brusch, 13 Iowa, 371; 81 Am. Dec. 435; Reinback *v.* Walter, 27 Ill. 393; Greeley *v.* Scott, 2 Cent. L. J. 361; Wright *v.* Ditzler, 54 Iowa, 620.

[2] Pryor *v.* Stone, 19 Tex. 371; 70 Am. Dec. 341; Stanley *v.* Greenwood, 24 Tex. 224; 76 Am. Dec. 106; Stevens *v.* Hollingsworth, 7 Chic. L. N. 198; West River Bank *v.* Gale, 42 Vt. 27.

[3] Clark *v.* Shannon, 1 Nev. 568.

[4] Krueger *v.* Pierce, 37 Wis. 269; Scofield *v.* Hopkins, 61 Wis. 370; In Georgia, the produce, rents, and profits of a homestead are also exempt. But this exemption does not include the rent of a house disconnected from the homestead. Huff *v.* Bournell, 48 Ga. 338.

[5] Englebrecht *v.* Shade, 47 Cal. 627; Arto *v.* Maydole, 54 Tex. 244.

[6] Greeley *v.* Scott, 2 Woods, 657.

[7] Mouriquand *v.* Hart, 22 Kan. 594; 31 Am. Rep. 200.

of each state in which the homestead exemption is known. The limit is sometimes kept within a specified area, and sometimes within a specified value. In villages and cities the area is usually small; in the country it is necessarily extended so as to embrace lands enough to make at least a small farm. The more usual course is to leave the area indefinite, but to limit the value. Where this course is pursued, the premises, though of little value when dedicated as a homestead, may by fluctuation in prices, or by subsequent improvement, pass beyond the statutory limit. In this event the excess becomes liable to execution.[1] The whole premises may be sold, and the debtor, after paying to the defendant the amount of the exemption prescribed by statute, may apply the balance of the proceeds to the satisfaction of his writ; or the premises, if susceptible of such a partition, may be so divided as to allow the defendent to retain a homestead equal in value to the limit fixed by statute, and to permit the creditor to levy on the residue.[2]

§ 247. **In Several of the States, Two Distinct Parcels of Land** may be held as one homestead. In these states the test of use is applied. Whenever it appears that both tracts, taken as an aggregate, are employed for homestead purposes, and do not exceed in value the amount prescribed by statute, they are both exempt.[3] In speaking of distinct parcels of land,

[1] Stubblefield *v.* Graves, 50 Ill. 103; Gregg *v.* Bostwick, 33 Cal. 227; 91 Am. Dec. 637.

[2] Morgan *v.* Stearns, 41 Vt. 398; McDonald *v.* Crandall, 43 Ill. 231; 92 Am. Dec. 112; Hume *v.* Gossett, 43 Ill. 297; Fogg *v.* Fogg, 40 N. H. 282; 77 Am. Dec. 715; Pittsfield Bank *v.* Howk, 4 Allen, 347; Maxey *v.* Loyal, 38 Ga. 531.

[3] Pryor *v.* Stone, 17 Tex. 371; 70 Am. Dec. 341; Ragland *v.* Rogers, 34 Tex. 617; Martin *v.* Hughes, 67 N. C. 293; Mayho *v.* Cotton, 69 N. C. 289;

we do not mean lands divided by imaginary lines, nor by streets, highways, or watercourses; we mean tracts or lots separated from each other by the lands of other proprietors.[1] Thus in New Hampshire, a tract of land a mile distant from the tract on which the claimant resided, and which he used as a pasture for his cows, was adjudged to be a part of the homestead.[2] But where the same person claims two parcels as exempt, however near they may be to each other, he must show clearly that the tract on which he does not personally reside is used as a part of the homestead.[3] In the majority of the states where the question is not controlled by statute, the lands claimed as a homestead must be contiguous. They must not be separated by the lands of another proprietor.[4] Lands on opposite sides of a street or other public highway must be regarded as contiguous.[5] They are only severed by a mere easement. The lands in the road belong to the adjacent owners. In Kansas the rule is otherwise. The streets there belong to the state. Hence lands separated by a street have between them the lands of another proprietor, and cannot be held as

Melton *v.* Andrews, 45 Ala. 454; Reynolds *v.* Hull, 36 Iowa, 394; Iken *v.* Olenick, 42 Tex. 195; Bothell *v.* Sweet, 6 Atl. Rep. 646; Perkins *v.* Quigly, 62 Mo. 498.

[1] Thus in Arkansas, where the statute provides for the exemption of "one town or city lot, being the residence of a householder or the head of a family," it was held that the claimant was not restricted to one lot according to a city map, but might hold two or more lots embraced in a common inclosure, and all used as a single lot for homestead purposes. Wassell *v.* Tunnah, 25 Ark. 101.

[2] Buxton *v.* Dearborn, 46 N. H. 43.

[3] Methery *v.* Walker, 17 Tex. 593.

[4] Hornby *v.* Sikes, 56 Wis. 382; Walters *v.* People, 18 Ill. 184; 65 Am. Dec. 730; Adams *v.* Jenkins, 16 Gray, 146; Bunker *v.* Locke, 15 Wis. 635; True *v.* Morrill, 28 Vt. 672; Kreslin *v.* Mau, 15 Minn. 116; Randal *v.* Elder, 12 Kan. 257; Mills *v.* Grant, 36 Vt. 269.

[5] Bunker *v.* Locke, 15 Wis. 635; West River Bank *v.* Gale, 42 Vt. 27

one homestead.[1] In Illinois and Minnesota a homestead can consist of but one tract or lot of land.[2] Land divided by imaginary lines, but in fact contained within a single inclosure, constitutes but one tract, within the meaning of this rule.[3] In California, the supreme court, in attempting to describe a statutory homestead, said: "It represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including out-buildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country, it may include a garden or farm. If situated in a city or town, it may include one or more lots, or one or more blocks. In either case it is unlimited by extent merely. It need not be in a compact body; on the contrary, it may be intersected by highways, streets, or alleys."[4]

§ 247 a. Produce and Proceeds of Homestead. — The exemption of homesteads in property used for agriculture is of but little benefit to the claimant, if it does not include the crops produced thereon. His occupation of the homestead in such cases is for the purpose of realizing therefrom something to support himself and family, rather than to employ it as a mere place wherein to shelter him and them from the winter's cold or the summer's heat. As well might the exemption of a debtor's only cow be held not to protect from execution the milk given by her, or the butter

[1] Randal *v.* Elder, 12 Kan. 257.

[2] Kreslin *v.* Mau, 15 Minn. 116; Walters *v.* People, 18 Ill. 194; 21 Ill. 178; 65 Am. Dec. 730.

[3] Thornton *v.* Boyden, 31 Ill. 200.

[4] Gregg *v.* Bostwick, 33 Cal. 227; 91 Am. Dec. 637; Estate of Delaney, 37 Cal. 179.

manufactured out of it, as the exemption of a rural homestead be held not to entitle the claimant to retain from forced sale any of the crops raised by him thereon. The decisions upon this subject, though strangely infrequent, preponderate toward the views here expressed, and hold such crops to be embraced within the exemption.[1] If the homestead or any part of it is converted into money or other personalty without the assent of the claimants, this involuntary conversion does not imperil their right of exemption. Hence if the improvements thereon are insured against loss by fire, the moneys falling due by reason of their loss from the peril insured against cannot be garnished.[2] The same rule applies to moneys awarded for a right of way over the homestead,[3] and to a claim for damages resulting from the destruction of improvements on the homestead through negligence whereby they were destroyed by fire.[4] In the absence of a statute protecting from execution the proceeds of the voluntary sale of a homestead, they are doubtless not exempt.[5] In some of the states, however, if a debtor sells his homestead, and retains the proceeds for the purpose of procuring another, they continue exempt during the continuance of such purpose.[6]

§ 248. **Abandonment of the Homestead.** — In some of the states the abandonment of a homestead, like its selection, must be by some instrument executed

[1] Alexander *v.* Holt, 59 Tex. 205; Marshall *v.* Cook, 46 Ga. 301; *contra*, Horgan *v.* Amick, 62 Cal. 401.

[2] Houghton *v.* Lee, 50 Cal. 101; Cooney *v.* Cooney, 65 Barb. 524; Cameron *v.* Fay, 55 Tex. 58.

[3] Kaiser *v.* Seaton, 62 Iowa, 463.

[4] Mudge *v.* Lanning, 68 Iowa, 641.

[5] *Ante*, § 235.

[6] Huskins *v.* Hanlon, 72 Iowa, 37; Binzel *v.* Grogan, 67 Wis. 147.

as designated by statute, and filed for record. In others, the abandonment need not be attested by any written declaration, but may be inferred from the acts of the claimants. In many of the states the wife need not be consulted with respect to the abandonment of the homestead. The husband, as the head of the family, has the right to determine its place of residence, and may therefore abandon the homestead without the concurrence of his wife.[1] Even where this is the law, the desertion by a husband of his family, leaving them in the occupancy of the homestead, is not an abandonment. The presumption is that he "continues a wanderer, without a home, until he returns to his duty and his family."[2] Abandonment generally requires a union of act and intent. Possibly there may be acts sufficient to constitute an abandonment, where there is no intent to abandon; but there can be no intent to abandon which is adequate to work an abandonment in advance of some act toward carrying the intent into execution.[3] Removal from the homestead, coupled with an intention not to return, operates at once as an abandonment thereof;[4] and declarations made by the claimant at or before such removal are admissible to show the intent with which it was made.[5] Where the wife has an interest in the homestead, and a right to

[1] Brown *v.* Coon, 36 Ill. 243; 85 Am. Dec. 402; Titman *v.* Moore, 43 Ill. 169; Hand *v.* Winn, 52 Miss. 784.

[2] Moore *v.* Dunning, 29 Ill. 130; 81 Am. Dec. 301; Cary *v.* Tice, 6 Cal. 625; White *v.* Clark, 36 Ill. 285; Blandy *v.* Asher, 72 Mo. 35; Locke *v.* Rowell, 47 N. H. 46.

[3] Dunn *v.* Tozer, 10 Cal. 167; Dawley *v.* Ayers, 23 Cal. 108; Cross *v.* Everts, 28 Tex. 523.

[4] Fyffe *v.* Beers, 18 Iowa, 4; 85 Am. Dec. 577; Dunton *v.* Woodbury, 24 Iowa, 76; Cline *v.* Upton, 56 Tex. 319.

[5] Brennan *v.* Wallace, 25 Cal. 108; Wright *v.* Dunning, 46 Ill. 271; 92 Am. Dec. 257; McMillan *v.* Warner, 38 Tex. 410; Jarvais *v.* Moe, 38 Wis. 440; Anderson *v.* Kent, 14 Kan. 207; Holliman *v.* Smith, 39 Tex. 357.

insist on its continuance, it is difficult to say what acts will be sufficient, as against her, to establish the abandonment of her homestead. She is obliged by law to accompany her husband. She cannot refuse to leave her home and accompany him to a new domicile of his selection, without violating her marital obligations, parting with the company of her children, and giving sufficient cause for an action of divorce on the ground of desertion. Hence her removal, after a sale of the homestead by the husband alone, has been said not to present a case of abandonment, but to be the very contingency against which the statute was designed to protect her.[1] Under such a statute it is evident that no acts can amount to an abandonment, unless done by the concurrence of both husband and wife.[2] The acts relied upon most frequently as evidence of abandonment are, either the acquisition of a new homestead, or the mere departure from the old homestead without acquiring a new one. Whether an abandonment has taken place is a question of fact, to be determined by a jury, or by a court acting instead of a jury.[3] In most of the states, leaving the old homestead and acquiring a new one is regarded as conclusive evidence of abandonment of the former, because the claimants cannot, at the same time, have two separate homes.[4] Where, however, no new homestead has been secured, but the claimants have absented themselves from the

[1] Taylor *v.* Hargous, 4 Cal. 268; 60 Am. Dec. 606; Dorsey *v.* McFarland, 7 Cal. 342. See Wood *v.* Lord, 51 N. H. 448.

[2] Estate of Tompkins, 12 Cal. 114.

[3] Brennan *v.* Wallace, 25 Cal. 110.

[4] Thoms *v.* Thoms, 45 Miss. 263; Horn *v.* Tufts, 39 N. H. 478; Titman *v.* Moore, 43 Ill. 170; Wood *v.* Lord, 51 N. H. 448; Buck *v.* Conlogue, 49 Ill. 394; Trawick *v.* Harris, 8 Tex. 312; Howe *v.* Adams, 28 Vt. 544; Taylor *v.* Boulware, 17 Tex. 74; 67 Am. Dec. 642; Atchison *v.* Wheeler, 20 Kan. 625; Donaldson *v.* Lamprey, 29 Minn. 18.

old one, it becomes necessary to ascertain whether their absence was designed to be permanent or temporary. For nothing else in the law of abandonment is so clearly settled as that the claimants may, for purposes of health, pleasure, business, safety, or for any cause they may deem sufficient, temporarily remove from their homestead without forfeiting their homestead rights.[1] The fact that the claimants had removed from their homestead has, in a few cases, been adjudged to give rise to the presumption that their removal was intended to be permanent, and to throw upon them the *onus* of showing that they intended to return.[2] But the opinion sustained by the greater number of the reported cases is, that when a new homestead has not been acquired, the absence from the old one, unless for a considerable period, does not even create a presumption of its abandonment.[3] So it is affirmed, by some cases, that removal to another state is *prima facie* evidence of abandonment.[4] This proposition is also denied.[5] In Massachusetts it is held that the removal from a homestead cannot operate as its abandonment

[1] Taylor *v.* Hargous, 4 Cal. 268; 60 Am. Dec. 606; Moss *v.* Warner, 10 Cal. 296; Dulanty *v.* Pinchon, 6 Allen, 510; Drury *v.* Batchelder, 11 Gray, 214; Stewart *v.* Brand, 23 Iowa, 478; Fyffe *v.* Beers, 18 Iowa, 4; 85 Am. Dec. 577; Guiod *v.* Guiod, 14 Cal. 506; 76 Am. Dec. 440; Dearing *v.* Thomas, 25 Ga. 223; Tumlinson *v.* Swinney, 22 Ark. 400; 76 Am. Dec. 432; Davis *v.* Kelley, 14 Iowa, 523; Herrick *v.* Graves, 16 Wis. 153; Campbell *v.* Adair, 45 Miss. 170; Carrington *v.* Herrin, 4 Bush, 624; Wetz *v.* Beard, 12 Ohio St. 431; Austin *v.* Stanley, 46 N. H. 51; Boyle *v.* Shulman, 59 Ala. 566; Lehman *v.* Bryan, Ala. 67 558; Thomas *v.* Williams, 50 Tex. 269; Hixon *v.* George, 18 Kan. 253; Lindsay *v.* Murphy, 76 Va. 428; Griffin *v.* Sheley, 55 Iowa, 513; Phipps *v.* Heton, 12 Bush, 375.

[2] Titman *v.* Moore, 43 Ill. 170; Harper *v.* Forbes, 15 Cal. 202.

[3] Mills *v.* Vos Buskirk, 32 Tex. 360; Campbell *v.* Adair, 45 Miss. 170; Rix *v.* Capitol Bank, 2 Dill. 369; Ives *v.* Mills, 37 Ill. 73; 87 Am. Dec. 238.

[4] Orman *v.* Orman, 26 Iowa, 361.

[5] Rix *v.* Capitol Bank, 2 Dill. 369; Ives *v.* Mills, 37 Ill. 73; 87 Am. Dec. 238.

until a new one is acquired.[1] In Texas, in order to establish the abandonment of a homestead, it is not absolutely essential to show that a new one has been obtained and dedicated;[2] but if this fact is not shown, its absence can be supplied only by evidence of the most clear and unmistakable character, and entirely inconsistent with the theory that the claimants had any intention of returning.[3] Mere absence for several years, or for an indefinite period, is not enough, in this state, to warrant a jury in inferring an abandonment of the homestead.[4] The question in each case is: Did the parties intend, at the time of their removal, or during their subsequent absence, to permanently relinquish their home? In order to determine this question, their declarations and conduct may be proved.[5] Frequently, however, the chief testimony before the court relates to the residence of the claimants away from their home. From the purpose, character, and duration of this residence, the court infers whether the intent of the parties was to remain from their homestead permanently, or only temporarily. The mere renting of the homestead for a year[6] does not show an intent to abandon. In Cabeen *v.* Mulligan, 37 Ill. 230, 87 Am. Dec. 247, removing to another state and residing there two years was held to be an abandonment, regardless of what the claimant might testify regarding his intent to return. In Dutton *v.* Woodbury, 24 Iowa, 74, an absence of three

[1] Woodbury *v.* Luddy, 14 Allen, 1; 92 Am. Dec. 238.

[2] Shepherd *v.* Cassiday, 20 Tex. 24; 70 Am. Dec. 372; McMillan *v.* Warner, 38 Tex. 414; Woolfork *v.* Rickets, 41 Tex. 358.

[3] Goulhenant *v.* Cockrell, 20 Tex. 96; Cross *v.* Evarts, 28 Tex. 524.

[4] McMillan *v.* Warner, 38 Tex. 410; Mills *v.* Vos Buskirk, 32 Tex. 360.

[5] Brennan *v.* Wallace, 25 Cal. 110.

[6] Locke *v.* Rowell, 47 N. H. 46.

years, attempts to sell, and expressions of a desire not to return, were adjudged to be sufficient evidence of an abandonment. Very similar circumstances were, in another state, thought to show a desire to sell, rather than an intent to abandon.[1] In Vermont, an abandonment was presumed from a leasing for five years, living in another house, and endeavoring to sell.[2] In Wisconsin it was presumed merely from renting property and going into town to live, the removal not being shown to be for any temporary purpose.[3]

The following facts and circumstances have been held sufficient to justify the finding of abandonment of homestead by the claimant, to wit: Moving from the homestead to town with his family, intending to reside there and practice law, if successful, otherwise to return;[4] removing with his family to another county, residing there for several years, repeatedly exercising the right of suffrage there, and offering to sell the homestead;[5] leaving the state by the claimant in 1875, who was followed by his wife in 1876, though she left part of the household furniture at the homestead;[6] leaving the homestead by the claimant, and going to another state, while his wife went to live with her father in another county, while the claimant's mother remained on the homestead and rented it to a tenant with whom she boarded;[7] surrendering the homestead to the mortgagee under a lease renewable annually until

[1] Dunn *v.* Tozer, 10 Cal. 167.
[2] Davis *v.* Andrews, 30 Vt. 678. See also Cahill *v.* Wilson, 62 Ill. 137.
[3] Phelan's Estate, 16 Wis. 76.
[4] Kimball *v.* Wilson, 59 Iowa, 638.
[5] Cotton *v.* Hamil, 58 Iowa, 594.
[6] Leonard *v.* Ingraham, 58 Iowa, 406.
[7] Roach *v.* Hacker, 2 Lea, 633.

the mortgage debt should be paid.[1] The question of abandonment must necessarily be decided upon the facts of each particular case. The intention of the claimants must be determined from their declarations made at the time of the removal or afterward, as well as from the declarations they may make under oath when attempting to sustain their claim. It is always difficult to state general rules which will be of any considerable utility in assisting the determination of issues of fact. With respect to the issue of fact arising when an abandonment is affirmed on one side and denied on the other, the difficulty of framing any general rule is insurmountable. This is because the decisions in the various states are too dissimilar in their results to warrant the inference that the principles of law governing this question have yet attained anything like a general recognition and acquiescence.[2] The abandonment of the homestead by a husband cannot prejudice the claim of his wife, where she retains possession.[3]

[1] Benson *v.* Dow, 65 Ill. 146.

[2] For the decisions regarding the effect of absence from a homestead as evidence of abandonment, see Wiggins *v.* Chance, 54 Ill. 175; Walters *v.* People, 21 Ill. 178; Cipperly *v.* Rhodes, 53 Ill. 346; Fergus *v.* Woodworth, 44 Ill. 377; Ives *v.* Mills, 37 Ill. 73; 87 Am. Dec. 238; Brinkerhoff *v.* Everett, 38 Ill. 263; McMillan *v.* Warner, 38 Tex. 410; Gouhenant *v.* Cockrell, 20 Tex. 96; Pitman *v.* Moore, 43 Ill. 170; Vasey *v.* Trustees, 59 Ill. 188; Locke *v.* Rowell, 47 N. H. 46; Wood *v.* Lord, 51 N. H. 448; Moss *v.* Warner, 10 Cal. 296; Harper *v.* Forbes, 15 Cal. 202; Brennan *v.* Wallace, 25 Cal. 110; Dulanty *v.* Pinchon, 6 Allen, 510; Campbell *v.* Adair, 45 Miss. 170; Brettum *v.* Fox, 100 Mass. 234; Cox *v.* Shropshire, 25 Tex. 113; Dorsey *v.* McFarland, 7 Cal. 342; Dearing *v.* Thomas, 25 Ga. 223; Wright *v.* Dunning, 46 Ill. 271; 92 Am. Dec. 257; Gaines *v.* Casey, 10 Bush, 92.

[3] White *v.* Clark, 36 Ill. 285; Moore *v.* Dunning, 29 Ill. 130; 81 Am. Dec. 301. As long as the other members of the family continue in the occupancy of the homestead, no abandonment can be presumed from the absence of the husband. Locke *v.* Rowell, 47 N. H. 46. Hence under the statute of Michigan protecting homesteads, "when owned and occupied by any resident of the state," the homestead of an absconding debtor cannot be seized by his creditors while his family continue to reside upon it. In re Charles C. Pratt, 1 Cent.

The fraudulent act or conveyance of a husband does not—at least as against the wife—defeat the homestead estate. If a deed of the homestead premises is set aside as fraudulent, the homestead character reattaches to the property, and binds it as fully as though the deed had never been made.[1] In Texas, a wife who leaves the state, not intending to return, or who, for three or four years before her husband's death, deserts and abandons him, is not entitled to her homestead rights after his death.[2] In California, the fact that a wife abandons her husband and commits adultery does not destroy her interest in the homestead.[3] The waiver or abandonment of the homestead exemption, as against specified claims, cannot be taken advantage of by the holders of other claims. Except as against the claims specified, the homestead rights continue unabated.[4]

§ 249. Liabilities against Which the Homestead Exemption may be Asserted—Antecedent Debts.—We think it must now be conceded that a home-

L. J. 290. As the homestead is designed chiefly for the benefit of the wife, and as in many states she has an estate in the homestead premises very similar to that of a joint tenant, it is obvious that her rights ought not to be capable of being put in peril by the act of her husband, to which she gave no assent. Hence her rights are not destroyed by *his* waiver (Allen *v.* Hawley, 66 Ill. 164), nor by her compulsory absence. Mix *v.* King, 66 Ill. 145. If she joins in a conveyance, influenced by duress, it may be set aside. Helm *v.* Helm, 11 Kan. 19.

[1] Hugunin *v.* Dewey, 20 Iowa, 368; Castle *v.* Palmer, 6 Allen, 401; In re Detert, 7 Chic. L. N. 130; 14 Am. Law Reg., N. S., 166; Cox *v.* Wilder, 2 Dill. 45; Vogler *v.* Montgomery, 13 Am. Law Reg., N. S., 244; 54 Mo. 577; McFarland *v.* Goodman, 13 Am. Law Reg., N. S., 697; In re Poleman, 19 Int. Rev. Rec. 94; Sears *v.* Hanks, 14 Ohio St. 296; 84 Am. Dec. 378; Wood *v.* Chambers, 20 Tex. 247; Winn *v.* Meacham, 50 Miss. 34; Currie *v.* Sutherland, 54 N. H. 475; Eckhardt *v.* Schlecht, 29 Tex. 129; Crummen *v.* Bennel, 68 N. C. 494; Dreutzer *v.* Bell, 11 Wis. 114. *Contra*, Piper *v.* Johnson, 12 Minn. 60.

[2] Travick *v.* Harris, 8 Tex. 312; Earle *v.* Earle, 9 Tex. 630.

[3] Lies *v.* De Diblar, 12 Cal. 330.

[4] In re Poleman, 6 Chic. L. N. 181.

stead law cannot be asserted against liabilities in existence at the time of its passage.[1] Such a law withdraws so material a portion of the debtor's property from the reach of his creditors that, if enforced against prior liabilities, it must necessarily "impair the obligation of contracts," as that term is used in the constitution of the United States. In considering liabilities arising subsequently to the homestead law, we shall treat, — 1. Of simple liabilities; 2. Of liabilities secured by lien on the homestead property. Simple liabilities may be divided into two classes: 1. Those which were created before the property was impressed with the homestead character; 2. Those which are created after the property assumes such character. As a general rule, executions founded upon simple liabilities, whether arising before or after the creation of the homestead, cannot be levied upon it. But as to antecedent liabilities, this rule is by no means universal. The holders of these liabilities may have permitted them to be contracted because the debtor was seised of valuable property apparently subject to execution; and it may be regarded as an act of bad faith on his part to withdraw a substantial part of his assets from execution by dedicating them as a homestead. Hence in several of the states the statutes in regard to homestead exemptions have not shielded the claimant from certain pre-existing debts.[2] While the object of these statutes was doubtless to prevent the debtor from obtaining

[1] See *ante*, § 219; Gunn *v.* Barry, 15 Wall. 610; 5 Leg. Gaz. 193; The Homestead Cases, 22 Gratt. 266; 12 Am. Rep. 507; Milne *v.* Schmidt, 12 La. Ann. 553; Jones *v.* Brandon, 48 Ga. 593; Edwards *v.* Keazey, 96 U. S. 595; 17 Alb. L. J. 346.

[2] Delevan *v.* Pratt, 19 Iowa, 429; Hyatt *v.* Spearman, 20 Iowa, 510; Stevens *v.* Stevens, 10 Allen, 146; 87 Am. Dec. 630; Clark *v.* Potter, 13 Gray, 21; Rice *v.* Southgate, 16 Gray, 143; Lawton *v.* Bruce, 39 Me. 484.

delusive credit from the possession and apparent ownership of property, and then withdrawing such property from the grasp of his debtors by interposing a homestead claim, yet the language of some of them indicates either a very indistinct view of the wrong to be remedied, or else a lamentable want of skill in prescribing the remedy; for instead of subjecting the homestead to debts contracted prior to its being impressed with the homestead character, they subject it to debts contracted prior to its purchase, or prior to the recording of the deed therefor.[1] It is immaterial that the debt was contracted in another state.[2] So where a debt was in existence prior to the homestead, and was thereafter outlawed by operation of the statute of limitations, and was subsequently renewed, it was still considered as having an existence anterior to that of the homestead, and as being a debt for which the homestead was liable to be sold.[3] The construction of these statutes has, however, to some extent been controlled by the idea that their object was merely to prevent the debtor from withdrawing from execution lands upon which his creditors probably and rightfully relied for the satisfaction of their debts. Hence it has been held that lands

[1] Code Iowa, sec. 1992; Gen. Stats. Ky., 1873, p. 434, sec. 16; Gen. Stats. Vt. (App. 1870), c. 68, sec. 7; 1 Wagner's Stats. Mo. 698, sec. 7: Farra *v.* Quigley, 57 Mo. 284; West River Bank *v.* Gale, 42 Vt. 27; Lamb *v.* Mason, 45 Vt. 500; Shindler *v.* Givens, 63 Mo. 494; Lincoln *v.* Rowe, 64 Mo. 138.

[2] Laing *v.* Cunningham, 17 Iowa, 510; Brainard *v.* Van Kuran, 22 Iowa, 264.

[3] Sloan *v.* Waugh, 18 Iowa, 224; Pryor *v.* Smith, 4 Bush, 379; Mills *v.* Spaulding, 50 Me. 57. The renewal of an old debt by giving another note, security, or other evidence of indebtedness, whether of a higher nature or not, does not extinguish the original debt. Hence where the homestead could have been sold under a judgment for it, such sale may take place under a judgment given on the renewed note or other evidence of indebtedness. Kibbey *v.* Jones, 7 Bush, 243; Ladd *v.* Dudley, 45 N. H. 61; McLaughlin *v.* Bank of Potomac, 7 How. 228; Lowry *v.* Fisher, 2 Bush, 70; 92 Am. Dec. 475; Weymouth *v.* Sanborn, 43 N. H. 171; 80 Am. Dec. 144; Reed *v.* Defebaugh, 24 Pa. St. 495.

acquired by descent[1] or gift,[2] or purchased with the proceeds of a prior homestead,[3] may be held as exempt, regardless of antecedent debts. The fact that a debtor is insolvent or in failing circumstances will not, unless the statute declares otherwise, prevent him from dedicating as a homestead real estate previously owned by him, nor even from purchasing real property with his personal assets and exempting it as a homestead.[4]

§ 249 a. Claims for Moneys Fraudulently Invested in the Homestead.— While a claim or declaration of homestead can rarely be avoided because a fraud upon the creditors of the claimant, yet there may sometimes be debts against which the exemption will not be allowed, because its allowance will perpetrate a fraud. In an early California case, a sale of personal property by an insolvent, for the purpose of raising moneys to discharge liens existing on the seller's homestead, was adjudged to be fraudulent and void because of its direct tendency to delay and defraud his creditors.[5] But in this case the right to hold the homestead as exempt was not involved. It is true, the court said: "It would seem to be only fair that the homestead should remain answerable for the debts charged upon it, and not, after becoming a source of credit, be relieved intentionally by the disposition of all the other prop-

[1] Jewell *v.* Clark, 78 Ky. 398.

[2] Holcomb *v.* Hood, 1 S. W. Rep. 401 (Ky.).

[3] Pearson *v.* Minturn, 18 Iowa, 36; Farra *v.* Quigley, 57 Mo. 284; Benham *v.* Chamberlain, 39 Iowa, 358; Sargent *v.* Chubbuck, 19 Iowa, 37.

[4] Randall *v.* Buffington, 10 Cal. 491; Hawthorne *v.* Smith, 3 Nev. 182; 93 Am. Dec. 397; Culver *v.* Rogers, 28 Cal. 520; Cipperly *v.* Rhodes, 53 Ill. 346; In re Henkel, 2 Saw. 305; North *v.* Shearn, 15 Tex. 174; Edmondson *v.* Meacham, 50 Miss. 35. *Contra*, Riddell *v.* Shirley, 5 Cal. 488; Pratt *v.* Burr, 5 Biss. 86; Burnside *v.* Terry, 51 Ga. 190.

[5] Riddell *v.* Shirley, 5 Cal. 488.

erty of the debtor, leaving nothing for the satisfaction of the other creditors"; but it does not appear that the court would have subjected the homestead itself to execution because the debtor had sold his personal assets to discharge liens existing thereon. Where land belonged to two copartners, who, on becoming insolvent, in order to hinder and delay their creditors, divided it, and one of them then filed a declaration of homestead on the part assigned to him in the division, the firm creditors were permitted to levy upon and sell the homestead for the firm debts. But this was on the ground that the land, while held by the partnership, could not be dedicated as a homestead, and the jury had found that the object of the conveyance was fraudulent. It was the *conveyance* that was disregarded as fraudulent. Such being the case, there was no estate in the debtor upon which the declaration of homestead could operate.[1] If moneys are fraudulently taken or procured, and then employed to discharge a valid lien existing on the homestead, persons equitably entitled to such moneys may obtain relief by proper suit in chancery, wherein the moneys so fraudulently taken and paid may be decreed to be a lien on the homestead; or in other words, the lien fraudulently discharged may be revived and enforced for the benefit of the complainants, who would otherwise be defrauded for the benefit of the claimant. Neither he nor his wife has any just cause of complaint against such a decree, for it merely wrests from them the fruits of the fraud, and "neither ever had, or ever could have, any *right* founded on the fraudulent appropriation of the funds of other parties."[2]

[1] Bishop *v.* Hubbard, 23 Cal. 514; 83 Am. Dec. 132.

[2] Shinn *v.* Macpherson, 58 Cal. 596; Red Jacket Tribe *v.* Gibson, 70 Cal. 128.

§ 249 b. Exemption against Judgments for Torts.— With respect to the liabilities arising after the creation of the homestead, and founded upon contract, it is clear that they are not enforceable against the homestead. In relation to the liabilities arising from torts, the laws of the different states are not uniform. In New York it has *once* been determined that a homestead cannot be sold under a judgment for a tort,[1] but it has *twice* been determined that it can be so sold.[2] In Georgia it is clear that the homestead exemption cannot prevail against judgments founded upon torts;[3] and the statutes of some of the other states limit the homestead exemption to debts arising out of contracts.[4] In the majority of the states, however, the homestead exemption prevails against liabilities founded upon torts as well as against those founded upon contracts.[5]

§ 249 c. Exemption against Judgments in Favor of the State or the United States. — The application of the maxim, that the sovereign is not bound by any statute, unless expressly named therein, to the homestead laws, would very generally result in their being held unavailing against a writ in favor of the state or of the United States. So far as the burdens of taxation are concerned, doubtless homesteads must bear their share. With respect to judgments in civil actions in favor of a state, there have been decisions holding that the maxim above referred to is applicable, and therefore

[1] Cook *v.* Newman, 8 How. Pr. 523.

[2] Schouton *v.* Kilmer, 8 How. Pr. 527; Lathrop *v.* Singer, 39 Barb. 396.

[3] Davis *v.* Heuson, 29 Ga. 345.

[4] Kenyon *v.* Gould, 61 Pa. St. 292; Meredith *v.* Holmes, 68 Ala. 190; Lane *v.* Baker, 2 Grant Cas. 424; State *v.* Melogue, 9 Ind. 196.

[5] Conroy *v.* Sullivan, 44 Ill. 451; Smith *v.* Omans, 17 Wis. 395; Dellinger *v.* Tweed, 66 N. C. 206; Gill *v.* Edwards, 87 N. C. 76; In re Radway, 3 Hughes, 609.

that the exemption cannot be allowed, in the absence of words in the statute showing an intent to bind the state.[1] The object of these statutes is to protect those in humble circumstances from becoming houseless and homeless, and thereby saved from being a burden on the state. To the general policy which the state prescribes for its citizens upon this subject it may well be deemed to assent, when its own interests are involved. Hence the almost unanimous concurrence of the authorities in declaring that the homestead exemption may be urged against a state or the United States with like effect as against a private citizen.[2]

§ 249 d. Sale of Homesteads to Satisfy Judgment Liens.—The lien of a judgment and of an execution is almost universally regarded as arising from the right to sell property thereunder. And hence, where the right of sale cannot be asserted, the existence of the lien must be denied.[3] It would follow, as a logical result, from the application of this general principle, that a judgment rendered after the creation and before the abandonment of a homestead cannot be a lien thereon; and as a result of this last proposition, it must follow that a homestead may be sold or mortgaged, and that the title of the vendee or mortgagee will be paramount to that of a prior judgment creditor. If the property was a homestead, and as such exempt from execution, the exemption right is not lost by the transfer of the property to a third person. It cannot

[1] Brooks *v.* State, 54 Ga. 36; Commonwealth *v.* Cook, 8 Bush, 220; 8 Am. Rep. 456; overruled, Commonwealth *v.* Lay, 12 Bush, 283; 23 Am. Rep. 718;

[2] Salentine *v.* Fink, 8 Biss. 503; Fink *v.* O'Neil, 106 U. S. 272; Commonwealth *v.* Lay, 12 Bush, 283; 23 Am. Rep. 718; Hume *v.* Gossett, 43 Ill. 297; Loomis *v.* Gerson, 62 Ill. 12; State *v.* Pitts, 51 Mo. 133; Gladney *v.* Deavors, 11 Ga. 89.

[3] Freeman on Judgments, secs. 339, 340, 355.

be sold in his hands under a judgment against his vendor.[1] In some of the states, a different view of the homestead law has been sustained. Under this view, the homestead exemption is a mere personal right of the claimant, by virtue of which the property is for the time being withdrawn from forced sale. The lien of a judgment is deemed to attach to the property notwithstanding this right, and to remain in abeyance only so long as the right continues capable of assertion by the defendant. Hence when the defendant sells the property, and thereby parts with his rights to insist upon its exemption, it at once becomes liable to sale under a judgment lien existing against him.[2] In two of the states[3] where this view was sustained by the courts, the legislature, aware of the inconveniences likely to result from its maintenance, enacted statutes under which homesteads are not liable to judgment liens, and may therefore, as in other states, be sold or encumbered by the owner, irrespective of liens existing against him arising from judgments rendered after the premises became his homestead. Except in the states of Ohio, Louisiana, Texas, Alabama, and Mississippi,[4]

[1] Holland *v.* Kreider, 86 Mo. 59; Ackley *v.* Chamberlain, 16 Cal. 181; 76 Am. Dec. 516; Bowman *v.* Norton, 16 Cal. 214; Marriner *v.* Smith, 27 Cal. 649; Deffeliz *v.* Pico, 46 Cal. 289; Englebrecht *v.* Shale, 47 Cal. 627; Green *v.* Marks, 25 Ill. 221; Hume *v.* Gossett, 43 Ill. 297; Bonnell *v.* Smith, 53 Ill. 377; Coe *v.* Smith, 47 Ill. 225; McDougall *v.* Crandall, 43 Ill. 231; Lamb *v.* Shays, 14 Iowa, 567; Parker *v.* Dean, 45 Miss. 409; Bliss *v.* Clark, 39 Ill. 590; 89 Am. Dec. 330; Fishback *v.* Lane, 36 Ill. 437.

[2] Hoyt *v.* Howe, 3 Wis. 753; 62 Am. Dec. 705; Whitworth *v.* Lyons, 39 Miss. 467; Allen *v.* Cook, 26 Barb. 374; Smith *v.* Brackett, 36 N. Y. 571; Folsom *v.* Carli, 5 Minn. 333; 80 Am. Dec. 429; Trustees *v.* Schell, 17 Wis. 308; Tillotson *v.* Millard, 7 Minn. 513; 82 Am. Dec. 112.

[3] The states referred to are Minnesota and Wisconsin. Seamans *v.* Carter, 15 Wis. 548; 82 Am. Dec. 696; Dopp *v.* Albee, 17 Wis. 590.

[4] Wildemuth *v.* Kœnig, 41 Ohio St. 180; Jones *v.* Hart, 62 Miss. 13; Faqua *v.* Chaffe, 26 La. Ann. 148; Stone *v.* Darnell, 20 Tex. 11; McManus *v.* Campbell, 28 Tex. 267; Trotter *v.* Dobbs, 38 Miss. 198, holding that property is

the establishment of a homestead can in no wise impair any judgment lien previously existing. In such a case, while the property may be dedicated as a homestead, the right of the claimant must always exist in subservience to the anterior lien.[1] In some of the states the premises occupied as a homestead may all be embraced in the declaration or claim of homestead, though their value is far in excess of the amount which the statute permits to be retained as exempt. In the event of this levy of an execution on such premises, certain proceedings designated in the statute may be taken for the purpose of setting aside to the debtor the amount to which he is entitled, and subjecting the balance to execution. In such a case, what is the effect of judgment liens? Do they attach so as to entitle their holders to claim the proceeds of the homestead in excess of the amount which the debtor may retain? It has been said that in such circumstances "there is no lien of the judgment until the levy of an execution."[2] From this conclusion we dissent. A judgment lien attaches to all the real property of the defendant not exempt from execution. That part of the property claimed as a homestead in excess of the amount which the debtor may retain as exempt, is at all times subject to execution and to

exempt if it is a homestead at the date of the sale. The homestead cannot defeat prior mortgages. Rix *v.* McHenry, 7 Cal. 89; Roupe *v.* Carradine, 20 La. Ann. 244; Ely *v.* Eastwood, 26 Ill. 107; Smith *v.* Marc, 26 Ill. 150. Nor trust deeds. Chipman *v.* McKinney, 41 Tex. 76.

[1] Liebetran *v.* Goodsell, 26 Minn. 417; Elston *v.* Robinson, 23 Iowa, 208; McCormick *v.* Wilcox, 25 Ill. 274; Howard *v.* Wilbur, 5 Allen, 219; Tuttle *v.* Howe, 14 Minn. 145; 100 Am. Dec. 205; Hale *v.* Heaslip, 16 Iowa, 457; McKeithan *v.* Terry, 64 N. C. 25; Seamans *v.* Carter, 15 Wis. 548; 82 Am. Dec. 696; Sluder *v.* Rogers, 64 N. C. 289; Dopp *v.* Albee, 17 Wis. 590; Trustees *v.* Schell, 17 Wis. 308.

[2] Barrett *v.* Sims, 59 Cal. 619.

forced sale, and there is therefore no reason why creditors may not with respect thereto obtain the benefits both of judgment and attachment liens.[1]

§ 249 e. Attachment Liens against Homesteads. — Whether the dedication of a homestead can impair a pre-existing attachment lien is a question upon which the courts are divided. In California and Nevada, the lien of the attachment may be destroyed by the subsequent dedication of the premises as a homestead at any time before the judgment is docketed, so as to become a lien.[2] These decisions are founded upon a consideration of the homestead statutes of those states, leaving out of view the provisions of the code respecting attachments. It is true that the Civil Code of California, in enumerating the judgments under which the homestead may be sold, does not specify any judgments except those "obtained before the declaration of homestead was filed for record, and which constitute liens on the premises."[3] But the Code of Civil Procedure declares that plaintiff "may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered."[4] Such attachment is directed to be of all property of "defendant within the county, not exempt from execution."[5] "If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached."[6] These provisions clearly make it the duty

[1] Moriarty *v.* Galt, 112 Ill. 378; Eldridge *v.* Pierce, 90 Ill. 474.

[2] Wilson *v.* Madison, 58 Cal. 1; McCracken *v.* Harris, 54 Cal. 81; Sullivan *v.* Hendrickson, 54 Cal. 258; Hawthorne *v.* Smith, 3 Nev. 182; 93 Am. Dec. 397.

[3] Civ. Code Cal., sec. 1241.

[4] Code Civ. Proc. Cal., sec. 537.

[5] Code Civ. Proc. Cal., sec. 540.

[6] Code Civ. Proc. Cal., sec. 550.

of the officer to levy the writ on all property not then exempt from execution, and afterwards, in the event of plaintiff's recovering judgment, to sell all the property attached, if necessary to produce a satisfaction of such judgment. We think, therefore, that, construing all the statutes together, it clearly appears that these decisions are wrong, and that when an attachment is properly levied on lands not then exempt from attachment and execution, a lien is created which no subsequently arising exemption can supplant; and in so thinking, we are sustained by a decided preponderance of the adjudications upon this subject.[1] The property dedicated as a homestead may be of greater value than the amount allowed for a homestead exemption. In this event the statute points out the mode of proceeding to subject the excess to execution, and the mode so designated seems to exclude every other.[2] Though the point seems never to have been decided, we apprehend that an attachment levied on a homestead would initiate a lien and give the attaching creditor precedence with respect to that part of the homestead in excess of the amount allowed by law.

§ 249 f. **Vendor's Liens against Homesteads.** — We believe the rule prevails everywhere, without exception, that the right of the holder of exempt property, whether real or personal, to claim the benefit of exemption, always exists in subordination to the right of his vendor to enforce the payment of any sum remaining due for the purchase price. The rule that a homestead may be sold to enforce the payment of a vendor's

[1] Avery *v.* Stephens, 48 Mich. 246; Watkins *v.* Overby, 83 N. C. 165; Kelley *v.* Dill, 23 Minn. 435; Robinson *v.* Wilson, 15 Kan. 595; Bullene *v.* Hiatt, 12 Kan. 98.

[2] Barrett *v.* Sims, 59 Cal. 615; 62 Cal. 440.

lien is undoubted.[1] The limits within which this rule must be confined are disputed. Strictly speaking, a vendor's lien must be regarded as a lien existing for the purpose of securing the debt due from a *vendee* to a *vendor*. But there are many instances in which a person other than the vendor has been so connected with the purchase of homestead property that, according to equity and good conscience, he ought to be subrogated to the lien of the vendor. These instances arise whenever any one pays the purchase price, or some valid existing security therefor, for the benefit and at the instance of the occupants of the homestead. But many of the decisions show a tendency to disregard the strong equities of these persons, and to deny them that relief which would be extended to vendors. Whenever these decisions prevail, a third person furnishing money with which to buy a homestead for another, or to relieve another's homestead from a vendor's or other paramount lien, is without any redress against the homestead. He must seek satisfaction out of other property.[2] In some of the states, a more just rule prevails,—one under which a

[1] Stone *v.* Darnell, 20 Tex. 12; Barnes *v.* Gray, 7 Iowa, 26; Montgomery *v.* Tutt, 11 Cal. 191; Phelps *v.* Conover, 25 Ill. 309; Buckingham *v.* Nelson, 42 Miss. 417; Williams *v.* Young, 17 Cal. 403; Succession of Foulks, 12 La. Ann. 537; McHendry *v.* Reilly, 13 Cal. 75; Perrin *v.* Serjeant, 33 Vt. 84; Woolfork *v.* Rickets, 41 Tex. 358; Hopper *v.* Parkinson, 5 Nev. 233; Tunstall *v.* Jones, 25 Ark. 272; Cole *v.* Gill, 14 Iowa, 527; Andrews *v.* Alcorn, 13 Kan. 351; Joplin *v.* Fleming, 38 Tex. 526; Miller *v.* Marckle, 27 Ill. 405; New E. Co. *v.* Merriam, 2 Allen, 390; Ulrich's Appeal, 48 Pa. St. 489; Fehley *v.* Barr, 66 Pa. St. 196; Stevens *v.* Stevens, 10 Allen, 146; 87 Am. Dec. 630; McCreery *v.* Fortson, 35 Tex. 641; Burford *v.* Rosenfield, 37 Tex. 42; Chambliss *v.* Phelps, 39 Ga. 386; Christy *v.* Dyer, 14 Iowa, 438; 81 Am. Dec. 493; Toms *v.* Fite, 93 N. C. 274.

[2] Winslow *v.* Noble, 101 Ill. 194; Burnap *v.* Cook, 16 Iowa, 149; Lear *v.* Heffner, 28 La. Ann. 829; Malone *v.* Kaufman, 38 Tex. 454; Wynn *v.* Flannegan, 25 Tex. 778; Skaggs *v.* Nelson, 25 Miss. 88; Notte's Appeal, 45 Pa. St. 361; Stansell *v.* Roberts, 13 Ohio, 148.

person paying the purchase-money at the instance of the homestead claimant may enforce its repayment by proceeding against the homestead premises.[1] Under these decisions the form or mode of paying the purchase-money seems immaterial. The question is, whether the party seeking to subject the homestead to his debt has in effect discharged the obligation of the homestead claimant to first pay for the premises before holding them as exempt. Hence the following persons have been adjudged to be entitled to enforce their claim against the household: a vendor who had received in payment notes of a third person indorsed to him by the vendee and claimant;[2] one who advances money to pay for the homestead, or to discharge a valid lien thereon,[3] except when the moneys were advanced on the mere personal security of the vendee, and without any reference to the use which he was to make of them. A person in possession of property claimed as a homestead may purchase a title thereto different from that under which he has before held. A vendor's lien for money agreed to be paid for this title may be enforced. The wife may, however, defeat its enforcement, by showing that the new title was not paramount to that under which the property was held before its acquisition.[4] The questions relating to vendor's lien, or the right of the plaintiff to be subrogated to a vendor's lien, need not concern the officer in the

[1] Carr *v.* Caldwell, 10 Cal. 384; 70 Cal. 740; Pratt *v.* Toledo Bank, 12 Kan. 570; Austin *v.* Underwood, 37 Ill. 438; 87 Am. Dec. 254; McGee *v.* McGee, 51 Ill. 500; 99 Am. Dec. 571. See Eyster *v.* Hatheway, 50 Ill. 521; 99 Am. Dec. 537; Kelly *v.* Stephens, 39 Ga. 466; Griffin *v.* Trentlin, 48 Ga. 148; Allen *v.* Hawley, 66 Ill. 170.

[2] Whitaker *v.* Elliott, 73 N. C. 186; Lane *v.* Collier, 46 Ga. 58.

[3] Lassen *v.* Vance, 8 Cal. 271; 68 Am. Dec. 322; Nichols *v.* Overacker, 16 Kan. 54; Hamrick *v.* People's Bank, 54 Ga. 502; Griffin *v.* Trentlen, 48 Ga. 148.

[4] Cassell *v.* Ross, 33 Ill. 244; 85 Am. Dec. 270.

execution of the writ. If the judgment is a simple money judgment, containing no directions showing on what property it may be levied, the homestead is exempt, unless the judgment is secured by a pre-existing attachment, the continued effect of which is conceded by the laws of the state. If the plaintiff claims a lien he can only enforce it by some appropriate proceeding in equity, resulting in a decree recognizing the lien, and directing it to be satisfied by the sale of specified property. An order of sale pursuant to such a decree will justify the officer in selling the property therein described, and will preclude the defendant from disputing the validity of such sale. But in the absence of such a decree, the officer cannot take into consideration the question whether indebtedness, out of which the judgment arose was in any way connected with the purchase price of the property claimed as a homestead.[1] The decree under which the officer acts may purport to direct a sale of the homestead premises; but the effect of the sale, when made, may be doubtful, because of the failure to make the wife a party to the suit, and thereby obtain in advance of the sale an adjudication upon her interests. This happens when a mortgage, executed by her husband, in which she did not join, is foreclosed against him alone. Such a mortgage may be enforced when given for the purchase-money. But what will be the effect of a decree for its enforcement to which the wife is not a party? In some instances a sale thereunder has been held to entitle the purchaser to possession of the property sold, as against the wife, upon proof that the mortgage

[1] Tunstall *v.* Jones, 25 Ark. 272; Pinchain *v.* Collard, 13 Tex. 333; Williams *v.* Young, 17 Cal. 403. *Contra*, Durham *v.* Young, 72 N. C. 357.

was given for the purchase-money.[1] If the wife, under the statutes of the state, has any estate or interest in the homestead, we very much doubt the efficiency of a sale under a judgment to which she was not a party, to divest her interest or to entitle the purchaser to dispossess her of her home.

§ 249 g. Mechanics' Liens against the Homestead. —Almost universally the statutes in relation to homesteads do not exempt them from sale under judgments foreclosing mechanics' liens.[2] When the inception of such a lien antedates the dedication of the premises as a homestead, there can be no doubt of the propriety of this rule, both because it is inequitable for the claimants to receive, without compensation, labor and materials, and use them in constructing improvements to be held as exempt, and because a homestead claim or declaration is generally subordinate to all pre-existing liens. But if the homestead precedes the inception of the mechanics' lien, and the statute of the state forbids the encumbering or abandoning of the homestead without the assent of the wife, there is grave doubt of the right to assert a mechanic's lien against the homestead, unless it is based upon some contract to which the wife has given her assent in the mode in which she is permitted to encumber her homestead. If the statute denies the exemption, as against the liens of mechanics and laborers, this will not permit the enforcement against the homestead of the lien of one who furnishes materials which are used in erecting improvements thereon.[3]

[1] Skinner *v.* Beatty, 16 Cal. 156; Amphlett *v.* Hibbard, 29 Mich. 298.

[2] Allen *v.* Harley, 3 S. C. 412; Merchant *v.* Perez, 11 Tex. 20; Stevenson *v.* Marony, 29 Ill. 534; Hawthorne *v.* Smith, 3 Nev. 186; 93 Am. Dec. 397; Stone *v.* Darrell, 20 Tex. 14; Thompson on Homesteads and Exemptions, secs. 372, 373; Tuttle *v.* Howe, 14 Minn. 145.

[3] Richards *v.* Shear, 70 Cal. 187.

§ 249 h. **Miscellaneous Debts against Which Homesteads are not Exempt.**—In Georgia, the homestead exemption is subordinate to the lien allowed by statute to "factors, merchants, landlords, dealers in fertilizers, and all other persons furnishing supplies, money, farming utensils, or other articles necessary to make crops."[1] In New Hampshire, under a statute providing that the homestead exemption shall not extend to "any claim for labor less than one hundred dollars," it was held that this exception "would not ordinarily be understood to embrace the services of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad and other contractors, but would be confined to claims arising out of services where physical toil was the main ingredient, although directed and made more valuable by mechanical skill."[2] In Minnesota, the portion of the homestead act "which excepts, from the exemption provided, debts or liabilities for wages due to clerks, laborers, or mechanics," was held to be void, because in direct conflict with the bill of rights of that state.[3]

§ 250. **By the Homestead Act of the United States,** the provision is made that "no lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."[4] Property acquired under this act is exempt from execution for a debt created before the issuing of the patent, but afterward reduced to a judgment against the patentee. As they are not subject to sale under

[1] Tift *v.* Newsom, 44 Ga. 600; Davis *v.* Meyers, 41 Ga. 95.
[2] Weymouth *v.* Sanborn, 43 N. H. 171; 80 Am. Dec. 144.
[3] Tuttle *v.* Strout, 7 Minn. 465; 82 Am. Dec. 108.
[4] Smith *v.* Steele, 13 Neb. 1.

execution, it is not possible for the judgment to create any lien on the lands acquired under the act. Hence the patentee may, notwithstanding such judgment, transfer the lands, and a sale under the judgment will not affect the title of the vendee of the patentee.[1] Under this act, the homestead claimant may, before the expiration of the five years he is required to reside on the lands, obtain a patent by making payment to the government. In this event, his title, though having its inception under the homestead act, is consummated by the payment of money instead of by continuous residence for the period prescribed by the act. The supreme court of Oregon has, nevertheless, decided that the patent, though procured by payment, is not the less obtained and issued under the homestead act, and that it vests a title in the patentee which cannot be made to contribute to the payment of his pre-existing debts.[2]

[1] Miller *v.* Little, 47 Cal. 348. [2] Clark *v.* Bayley, 2 Cent. L. J. 299.